

STATE OF NORTH CAROLINA
COUNTY OF WAKE

THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA)
)
)
)
v.)
)
)
NICOLAS OLIVARES PINEDA)

CASE # 11-CRS-203626; 11-CRS203627;
11-CRS-203631; 11-CRS-203632;
11-CRS-203633; 11-CRS-203634;
11-CRS-203635; 11-CRS-203636;
11-CRS-203637; 14-CRS-196

MOTION FOR APPROPRIATE RELIEF

NOW COMES THE MOVANT, NICOLAS OLIVARES PINEDA, and moves this Court to grant him appropriate relief from his conviction of one count of conspiracy to traffic heroin, pursuant to N.C.G.S. §90-95(I); fourteen (14) counts of trafficking twenty-eight (28) grams or more of heroin, pursuant to N.C.G.S. §90-95(h)(4); and, four counts of trafficking fourteen (14) grams or more of heroin, pursuant to N.C.G.S. §90-95(h)(4). In support thereof, the Movant shows the following:

INTRODUCTION AND PROCEDURAL HISTORY

1. Nicolas Pineda, movant, was tried and convicted in Wake County Superior Court during the May 19, 2014 session before Hon. Henry W. Hight Jr. Movant was indicted in 11 CRS 203626, which charged Movant with trafficking in heroin by possessing, transporting and selling 54.2 grams of heroin on November 3, 2010; 11 CRS 203627 with trafficking in heroin by possessing, transporting and selling 130.7 grams of heroin on February 14, 2011; 11 CRS 203631 with trafficking in heroin by possessing, transporting and selling 26.2 grams of heroin on November 23, 2010; 11 CRS 203632 with trafficking in heroin by possessing, transporting and selling 51.0 grams of heroin on December 21, 2010; 11 CRS 203633 with trafficking in heroin by possessing, transporting and selling 62.3 grams of heroin on February 4, 2011; 11 CRS 203634

with trafficking in heroin by delivery of 62.3 grams of heroin on February 4, 2011; 11 CRS 203635 with trafficking in heroin by delivery of 54.2 grams of heroin on November 3, 2010; 11 CRS 203636 with trafficking in heroin by delivery of 51.0 grams of heroin by delivery on December 21, 2010; 11 CRS 203637 with trafficking in heroin by delivery of 26.2 grams of heroin by delivery on November 23, 2010; 14 CRS 196 with conspiring to commit the felony of trafficking by sale of 28 grams or more of heroin from November 3, 2010 through February 14, 2011.

2. Movant was convicted of nineteen (19) counts and sentenced with a prior record level of II. (R pp. 118-124) Consecutive sentences were entered as follows: In 11 CRS 203626, 225 months to 279 months and fined \$500,000 (possession); 11 CRS 203626, 225 months to 279 months and fined \$500,000 (transportation); 11 CRS 203626, 225 months to 279 months and fined \$500,000 (sale). 11 CRS 203625, 225 months to 279 months and fined \$500,000 (delivery). In 11 CRS 203631, 90 months to 117 months and fined \$100,000 (possession); 11 CRS 203631, 90 months to 117 months and fined \$100,000 (transportation); 11 CRS 203631, 90 months to 117 months and fined \$100,000 (sale). In 11 CRS 203637, 90 months to 117 months and fined \$100,000 (delivery). In 11 CRS 203632, 225 months to 279 months and fined \$500,000 (possession); 11 CRS 203632, 225 months to 279 months and fined \$500,000 (transportation); 11 CRS 203632, 225 months to 279 months and fined \$500,000 (sale). In 11 CRS 203636, 225 months to 279 months and fined \$500,000 (delivery). In 14 CRS 196, 225 months to 279 months and fined \$500,000 (Conspiracy). In 11 CRS 203633, 225 months to 279 months and fined \$500,000 (possession); 11 CRS 203633, 225 months to 279 months and fined \$500,000 (transportation); 11 CRS 203633, 225 months to 279 months and fined \$500,000 (sale). In 11 CRS 203634, 225 months to 279 months and fined \$500,000 (delivery). In 11 CRS 203627, 225

months to 279 months and fined \$500,000 (possession); 11 CRS 203627, 225 months to 279 months and fined \$500,000 (transportation). Movant gave notice of appeal in open court at the time of entry of the judgment and commitment.

3. Movant perfected his appeal to the North Carolina Court of Appeals that remanded to the trial court for resentencing on one of two claims raised in the appeal, and affirmed Movant's convictions on the remaining claim in Case # COA15-800, decided on February 16, 2016. The Movant and the State both petitioned the Supreme Court of North Carolina for discretionary review in Case # 70PA16. The Supreme Court of North Carolina granted the State's petition for discretionary review for the limited purpose of remanding to the North Carolina Court of Appeals for reconsideration in light of the correct statute of conviction, decided on June 9, 2016 and June 10, 2016. Upon remand, the North Carolina Court of Appeals found the trial court had not erred in failing to arrest judgment on the jury's four verdicts finding Movant guilty of trafficking heroin by delivery where the jury also returned guilty verdicts for trafficking the same heroin by sale, which it had originally remanded for resentencing in Case # COA15-800-2, decided on September 20, 2016.

4. Counsel hereby gives notice to the State that he is asserting substantial violations of his rights under the United States Constitution, including but not limited to those guaranteed under the Sixth, and Fourteenth Amendments to the United States Constitution; and that he is asserting substantial violations of his rights under the North Carolina Constitution, including but not limited to the provisions contained in Article I, Sections 19, and 23; and that Movant is further asserting substantial violations of his rights under the criminal statutes of the State of North Carolina, including but not limited to those contained in Chapters 14, 15, and 15A of the North Carolina General Statutes. Movant is asserting other violations of Federal and State statutory and common

law, all of which will be cited in greater particularity prior to the Court's consideration of the Motion for Appropriate Relief at a hearing.

5. In support thereof, Movant attaches the following documents and respectfully states as follows:

Exhibit A - Indictments

Exhibit B - Pro se motion, dated September 17, 2012

Exhibit C - Court Correspondence, dated December 12, 2012

Exhibit D - Pro se motion, dated October 1, 2012 & pro se Motion for Discovery

Exhibit E - Pro se motion, filed January 4, 2013

Exhibit F - Court Correspondence, dated April 11, 2013

Exhibit G – Pro se motion

Exhibit H - Pro se motion

Exhibit I - Pro se motion

Exhibit J – Court Correspondence, dated December 2, 2013

Exhibit K - Pro se motion, dated November 14, 2013

Exhibit L - Pro se Motion To Request For Voluntary Discovery GS § 15A-902(A)-903, filed on June 1, 2013

Exhibit M – Pro se Motion For Bill of Particulars Under GS § 15A-925, filed on June 6, 2013

Exhibit N-Pro se Motion To Request All Disposition of Motion Filing Documents; Motion to Be Placed On Court Calendar; Motion II Speedy Trial G.S. 15A-701-710 And/Or Motion To Dismiss And/Or Request For Hearing; The Motion for Joinder Of Offenses; GS 15A-926; and, Motion to Produce Brady Material

Exhibit O - Pro se Motion Appropriate Speedy Dismissal pursuant Felon Deverson program and "Tainted Evidence" due to Overwhelm of prejudice by appointed lawyer "Charles Caldwell", filed on November 16, 2011

Exhibit P – Order, dated March 25, 2012

Exhibit Q- Pro se Motion For Dismissal

Exhibit R-Transcript of Trial Volume 1, commenced on May 19, 2014, p. 3

Exhibit S-Transcript of Trial Volume 2, commenced on May 20, 2014
Exhibit T-Transcript of Trial Volume 3, commenced on May 21, 2014
Exhibit U - Transcript of Trial Volume 4, commenced on May 22, 2014
Exhibit V – Verdict Sheets, dated May 23, 2014
Exhibit W - Transcript of Trial Volume 5, commenced on May 23, 2014
Exhibit X – Defendant-Appellant’s Brief, filed on September 14, 2015
Exhibit Y – North Carolina Court of Appeals Opinion, filed on February 16, 2016
Exhibit Z – State’s Petition for Discretionary Review Under N.C. Gen. Stat. # 7a-31(c),
filed on March 4, 2016
Exhibit AA – Petition for Discretionary Review, filed October 25, 2016
Exhibit AB – North Carolina Court of Appeals Opinion, filed on September 20, 2016

STATEMENT OF RELEVANT FACTS

6. On April 19, 2011, the Wake County Grand Jury returned a series of indictments charging Pineda with trafficking in heroin on five different dates. The indictments charged that on each of four dates, November 3, 2010, December 21, 2010, February 4, 2011, and February 14, 2011, Pineda trafficked in heroin (1) by possession of 28 grams or more, (2) by transportation of 28 grams or more, (3) by sale of 28 grams or more to L. Anthony, and (4) by delivery of 28 grams or more to L. Anthony. The indictments charged that on November 23, 2010, Pineda trafficked in heroin (1) by possession of 14 grams or more, (2) by transportation of 14 grams or more, (3) by sale of 14 grams or more to L. Anthony, and (4) by delivery of 14 grams or more to L. Anthony. On February 25, 2014, the Wake County Grand Jury returned an additional indictment charging that, during the period of November 3, 2010 through February 14, 2011, Pineda conspired with Demetrius Watson, Miguel Torres-Flores and D’Antonio Mitchell to traffic in heroin by sale of 28 grams or more to L. Anthony. (Exhibit A).

Pre-trial Proceedings

7. Pineda was assigned Assistant Public Defender Charles Caldwell. Over the course of three years while Pineda was awaiting trial he filed numerous pro se motions. First, on September 12, 2012, Pineda informed the Court that he was disappointed in Caldwell's representation. (Exhibit B). Specifically,

I have only seen him 3 times since my incarceration...I would like for you to accept my request for speedy trial. I feel as though I should no something instead of being in the dark.

(Exhibit B).

8. On December 19, 2012, Superior Court Judge Paul C. Ridgeway sent Caldwell a correspondence informing him that they had received a pro se motion from Pineda on November 6, 2012 and to take appropriate action. (Exhibit C). In this pro se motion, dated October 1, 2012, Pineda requested:

...a hearing to fire my lawyer...I have had Charles Caldwell for 19 months. He has done nothing for me! I have not been to court in a year; the last time I saw him was in July, he is always to busy for me. He never wants to translate and leaves me sitting to rot. I need help, please have a hearing or give me appropriate relief (a new lawyer).

I am also sending paperwork for a new motion for discovery for all of my evidence.

...

Enclosed: Motion for Discovery

(Exhibit D).

9. On January 4, 2013, Pineda filed another pro se motion that stated:

...last time I went to court I wanted to and tried to fire my lawyer. He is not working for me; the state, but not me. I been trying to fire him and receive my motion for discovery for 15 months now. He is too busy for me, won't translate anything for me; doesn't care about me, begging me to sign a plea, won't let me see my evidence, any pictures and so on. He says it's a plea or trial; but why would I sign my life away? Away from my family, and I haven't seen any paperwork, help, or defense at all from him! The DA try to scare me and said 'sign this paper for 18 years; or we will give you life! I

am not getting represented right, I am having rights broken, and people are doing illegal stuff to me! I need a up to date motion with all evidence. I need to listen to audio, see pictures. All I have been seeing and receiving is lies!

I need help because, I don't want to be railroaded. I need help because they are giving me extra charges; Charges that I didn't do. I need help because my lawyer is trying to force me to do things I don't wanna do. I need help because my family needs me and I am not getting any kind of defense. I need help because I need a new lawyer who will help me. Please grant my hearing to do so; please help me however you can! I need to put my charges together.

(Exhibit E).

10. On April 11, 2013, Superior Court Judge Paul C. Ridgeway sent Caldwell another correspondence informing him that they had received more pro se motions from Pineda and to take appropriate action. (Exhibit F). In the first pro se motion, attached to the correspondence, Pineda stated:

I Nicolas Pineda am convinced that it is in my best interest to dismiss my present attorney. Please allow my attorney to withdraw from my case.

(Exhibit G).

11. The second pro se motion attached stated:

I was seeking in getting a new attorney. The thing's that my lawyer have offered me...I am not satisfied nor am I willing to plea to 18 years! I would consider "8-10" years as soon as I go to court. Also they haven't showed me any evidence pointing me to the scene! My present lawyer is "Charles Caldwell" and Im willing to fire him! And reappoint me another asap. Thank you for your cooperation!

(Exhibit H).

12. The third pro se motion attached stated:

I Nicolas Pineda strongly feel like my lawyer Charles Caldwell (assistant public defender) isn't trying to represent my case or trying to do anything about it. 18 years is too long. I am asking if I can get into the courtroom so I can fired my lawyer and ask for a new

public defender who will fight for me and my rights. The reason why I am asking is because I only have seen him about two time in the 22 months I been locked up and he doesn't show me any type of change or outcome. Thank you for taking time to understand where I am coming from.

(Exhibit I-ROA, p. 62).

13. The forth pro se motion attached was the one filed on January 4, 2013 in above paragraph number 9. (Exhibit E).

14. On December 2, 2013, Senior Resident Superior Court Judge Donald W. Stephens sent Caldwell a correspondence informing him that he had received a pro se motion from Pineda and “[t]here appears to be a counsel issue that the Court may need to address.” (Exhibit J). If, so, take necessary action. (Exhibit J). This pro se motion, dated November 14, 2013, Pineda stated:

...I have already reached out to the public defender's office as well as the State Bar and the result was me being pointed into your direction...I am Inadequately being represented and that my legal defense don't have my best interest at heart.
My Court appointed Attorney Charles Caldwell has not done any work what so ever con-cerning my case. I honestly feel like I am being discriminated against due to my ethnicity. In the almost 3 years that I have been detained by the Wake County Detention Center it has taken him over 24 months to produce my requested Motion for Discovery. In 33 months he has only come to visit me 6 times and they were very brief. Since my first offered plea in April 2011, he continuously pressures me to take it which I decline and ask for a trial date. I am very dissatisfied with my legal defense and am requesting to be appointed different legal Counsel. What I have been through the last 3 years is a injustice and lack of human compassion. I ask that you take my request seriously and am looking forward to your prompt response.

(Exhibit K).

15. Pineda also attached his pro se Motion To Request For Voluntary Discovery GS § 15A-902(A)-903, filed on June 1, 2013. (Exhibit L); Motion For Bill of Particulars Under GS § 15A-925, filed pro se on June 6, 2013. (Exhibit M). Pro se motions including: Motion To

Request All Disposition of Motion Filing Documents; Motion to Be Placed On Court Calendar; Motion II Speedy Trial G.S. 15A-701-710 And/Or Motion To Dismiss And/Or Request For Hearing; The Motion for Joinder Of Offenses; GS 15A-926; and, Motion to Produce Brady Material. (Exhibit N). Pineda also attached his Motion Appropriate Speedy Dismissal pursuant Felon Deverson program and "Tainted Evidence" due to Overwhelm of prejudice by appointed lawyer "Charles Caldwell", filed pro se on November 16, 2011, and the Order, dated March 25, 2012 in regards to his pro se filings. (Exhibit O; Exhibit P).

16. The March 25, 2012 Order from Superior Court Judge Paul C. Ridgeway stated Pineda's pro se motions had been forwarded to the Clerk, the District Attorney, and Caldwell. Pineda was required to file a Motion to Dismiss Caldwell and serve the motion on Caldwell and the District Attorney and then a hearing could be scheduled. Otherwise no further action would be taken. (Exhibit P). On May 15, 2014, Pineda filed a pro se Motion For Dismissal.¹ (Exhibit Q).

Trial

17. Prior to voir dire, Pineda told the Court he wanted a different attorney, as he had indicated in all of his previous motions, and did not want to put his life in Caldwell's hands. (Exhibit R, p. 3). Then the following transpired:

THE COURT: And why is that, Mr. Pineda?

DEFENDANT PINEDA: Because it's my life. I can't put my life in his hands. He hasn't done anything in my defense.

THE COURT: Anything else?

DEFENDANT PINEDA: That's it.

THE COURT: Mr. Caldwell, anything you want to say?

MR, CALDWELL: Thank you, Your Honor. Your Honor, Mr. Pineda made a similar request in open court in front of Judge Stevens. I believe it was back in the fall. I'm sorry. It looks like

¹ All of Pineda's pro se motions he had other Wake County Inmates write in English on his behalf.

January 6 motion for new counsel was denied in front of Judge Stephens, as I recall, for pretty much the same sentiment as Mr. Pineda addressed today. He -- for whatever reason, he's been dissatisfied with me. I've been to visit him many times in the jail and have, as best I could, explained to him the evidence, his relative situation, and his choices.

THE COURT: Why don't you want Mr. Caldwell to represent you, sir?

DEFENDANT PINEDA: He hasn't showed me any evidence. He hasn't showed me any evidence. He hasn't showed me photos of the drugs. He hasn't showed me anything.

THE COURT: Mr. Pineda, I just want you to know, from my vantage point -- I've tried cases with Mr. Caldwell before. He is the chief public defender in Wake County. He's a most competent attorney and represents his clients quite well. And I have nothing before me to show that he would not do that for you in this case. In fact, I would think that he would have more expertise and experience than just about anyone else who might be considered to take his place in this case. And I think that's probably one of the reasons that we're having a little problem. You can't tell me why you don't want him to represent you other than you don't want him. Okay? If Mr. Caldwell is allowed to stay on, would you work with him?

DEFENDANT PINEDA: Well, I can't represent myself.

THE COURT: Okay. So you don't think you can represent yourself and --

DEFENDANT PINEDA: No.

THE COURT: Okay. Thank you, sir.

...

...Mr. Pineda, I'm going to deny your request to remove Mr. Caldwell. I think he will serve you well in this case.

(Exhibit R, pp. 3-5; 13).

18. The charges were then joined for trial and the State moved for a voluntary dismissal of two of the charges alleged to have occurred on February 14, 2011, trafficking in heroin by sale of 28 grams or more and trafficking in heroin by delivery of 28 grams or more. (Exhibit R, pp. 1; 16; 24). The State then informed the Court it intended on introducing 404(b) evidence. (Exhibit R, p. 17). The evidence would include offenses that occurred prior to the first indictment date of November 3, 2010 to show how Pineda was introduced to Anthony. (Exhibit R, p. 17). Caldwell

objected for the record but stated he had no argument. (Exhibit R, p. 17). The State also informed the Court that Pineda had not yet been arraigned on case # 14 CRS 196 and requested permission to do at that time. (Exhibit R, p. 18). The Court granted the State's request and Caldwell waived formal reading of the indictment. (Exhibit R, p. 20). Caldwell also informed the Court they may be a question of venue in case numbers 11 CRS 203632 and 636. (Exhibit R, p. 23). Specifically:

MR, CALDWELL: -- on December 21st, 2010, that is 11 CRS 203632 and 636. Reviewing the information that was supplied to defense by the State in regards to that, it appears that that event took place in Johnston County, which raised a question of venue that we recognize in our -- my research in looking at that question, it appears that this situation is covered by General Statute 15A-132(b), concurrent venue, which reads, "Charged offenses which may be joined in a single criminal pleading occurred in more than one county, each county has concurrent venue as to all charged offences." I would just like the Court to know that we have -- we are aware of that question. We do not -- and we do not intend to bring objections as to that charge as it is covered by statute and is otherwise properly joinable. Thank you.

MS. JACOBS: That is correct. I apologize, Your Honor. Mr. Caldwell and I did speak about that. That is correct, 15A-132 does cover this. The actual offense date of December 21st, 2010, occurred -- began in Wake County. The actual sale occurred in Johnston County. I don't need to be heard further unless you have any further questions.

THE COURT: Okay. That's a jurisdictional issue which was never raised on behalf of the defendant so, in the event that it's an incorrect assumption by either the State or the defendant, that can be raised at any point.

MR, CALDWELL: Right. Thank you, Your Honor.

THE COURT: Including the appellate.

...
MS. JACOBS: Prior to lunch, Your Honor, we indicated to the Court that the December 21st, 2010, offense date occurred in Johnston County. At this point, with regard to indictments in the State of North Carolina versus Nicolas Pineda, specifically, 11 CRS 203632 and 11 CRS 203636, the initial charges as reflected or counts reflected in the indictment do reflect trafficking heroin by possession, transportation, sale, and delivery but reflect that it did, in fact, occur in Wake County, and that is erroneous. I've spoken to

Mr. Caldwell. It would be my motion at this time to amend this and have it reflect that it did occur in Johnston County.

MR. CALDWELL: Your Honor, I have looked into this. It appears to be a question of venue rather than of conferring jurisdiction upon the Court. I think for the record and for any post proceedings that might come along, I would object. However, I have no argument in support of my motion, and apparently the State -- in support of my objection and will concede that the case law tends in favor of the amendment.

THE COURT: Motion to amend is allowed.

(Exhibit R, pp. 23-24; 28-29).

The State's Case

19. Lance Anthony was an investigator employed by the Wake County Sheriff's Office in the drug and vice unit. In the late 1990's, he was assigned to a drug trafficking task force supervised by the federal Drug Enforcement Administration (DEA). In 2010, following a call from someone in the Florence, South Carolina, drug task force, he began an investigation into heroin distribution in the Raleigh area, working undercover. (Exhibit S, pp. 57; 60-64)

20. In October 2010, Anthony got a telephone call from Angela or Angel Magiapane. They arranged to meet on October 15, 2010 in the Wal-Mart parking lot off Highway 64 in Cary. (Exhibit S, pp. 77-78)

21. When Anthony arrived at the Wal-Mart, he called Magiapane's telephone. A male answered. Anthony stated he was in the lot and described his car, a black Mustang, Pineda, walked to Anthony's car and got in the passenger seat. Anthony told him he was a large scale heroin dealer and not a user. Pineda took a balloon of heroin from his mouth and gave it to Anthony, telling him to try it out and see what he thought. (Exhibit S, pp. 78-83)

22. Anthony told Pineda that he wanted to meet Magiapane. Pineda said she was there and they walked over to a brown Bonneville with South Carolina tags. Magiapane was in the passenger seat and the driver was Miguel Torres. (Exhibit S, pp. 81-82; 84)

23. Anthony called Magipane's phone on October 17, 2010. Pineda answered and asked Anthony how he liked the sample. Anthony said his people liked it a lot and wanted to buy a larger amount. On the phone the next day, Anthony said he wanted to buy \$3,000.00 worth. Anthony talked to Pineda again on October 19, 2010. Pineda told Anthony to come to Lowe's on I-40 and Highway 42 in Johnston County. (Exhibit S, pp. 87-88)

24. When Anthony arrived at the Lowe's, he called to say that he was there. A short while later, the brown Bonneville pulled up. Torres was driving and Magipane was in the passenger seat. Pineda was not in the car. Magipane got into the passenger seat of Anthony's car and gave him fourteen (14) small balloons. Anthony called Pineda to complain that the amount provided was light, but they agreed to go ahead with the transaction for \$3,000.00 with the expectation of a larger amount the next time. (Exhibit S, pp. 88-90; 93)

25. Magipane got back in the Bonneville with Torres and they drove to the Hess Station next door. Anthony saw Pineda run across the Hess parking lot and get in the Bonneville with Torres and Magipane. (Exhibit S, pp. 93-94)

26. After a series of conversations between Anthony and Pineda, a meeting was set up for the purchase of \$3,000.00 of heroin on October 27, 2010 at the Burger King on Jones Sausage Road and I-40. Shortly after Anthony parked at the Burger King, Pineda arrived in the Bonneville being driven by Torres. Pineda wanted Anthony to drive him across the bridge to pick up the heroin, but Anthony refused. Pineda got into a truck with two white males and left. Anthony and Torres went into the Burger King. (Exhibit S, pp. 94-95; 98-99)

27. Pineda returned about fifteen (15) minutes later where he, Torres, and Anthony all got in Anthony's car. There was a large balloon of heroin wrapped in duct tape on the floor of Anthony's car and Anthony gave Pineda \$3,000.00. Pineda gave some of the money to Torres

and the two of them counted it. Anthony and Pineda agreed they would talk again in about five days. (Exhibit S, pp. 99-102).

28. Officers from the DEA located the Bonneville in Johnston County on October 29, 2010 and followed it for a while. At their request, Danny Johnson, a lieutenant with the Johnston County Sheriff's Department, stopped the Bonneville in order to get identification of the occupants. Torres was the driver and Pineda was the passenger. (Exhibit S, pp. 103-104; Exhibit T, pp. 295-299)

29. In a series of telephone conversations between Anthony and Pineda, the next meeting was set for November 3, 2010 at the same Burger King. Anthony wanted to buy two Mexican ounces, about 50 grams, of heroin for \$6,000.00. Anthony parked in the Burger King lot and Pineda arrived in the Burger King lot in the Bonneville driven by Torres. Pineda said they needed ten (10) minutes to get the heroin, and they drove off. (Exhibit S, pp. 106-107; 113)

30. Surveillance officers followed the Bonneville. When it stopped, Pineda got out, walked into some woods, and got back in the Bonneville. They then returned to the Burger King and parked on the berm instead of in the lot. Pineda and Torres walked to Anthony's car in the Burger King lot and they got in Anthony's car. Torres handed Anthony a sock containing two balls of substance wrapped in duct tape and Anthony gave Pineda \$6,000.00. They also talked about doing another transaction in the future. (Exhibit S, pp. 113-116; 120-124; 266-267).

31. In a series of telephone conversations between Anthony and Pineda, the next meeting was set for November 23, 2010 at Dick's Sporting Goods in the White Oak Mall in Cary. Anthony wanted to buy one Mexican ounce of heroin for \$3,000.00. Anthony parked his car in front of Dick's and Pineda arrived in a blue pickup truck being driven by Torres. Pineda got out of the truck and got into Anthony's car. He put a blue cup holding a ball of heroin on the center

console and Anthony gave him \$3,000.00. Pineda got out and walked through the parking lot to a place where surveillance officers saw him get back in the blue pickup truck. (Exhibit S, pp. 137-143).

32. On December 19, 2010, Anthony called Pineda and said that he wanted to buy two Mexican ounces of heroin for \$6,000.00. The meeting was set for December 21, 2010 at Lowe's home improvement on I-40 and Highway 42 in Johnston County. Anthony went to the Lowe's parking lot and Pineda arrived in the Bonneville being driven by an African-American male. Pineda got in Anthony's car and put two balls of substance on the center console. Anthony gave him a Dunkin Donuts bag holding \$6,000.00. Defendant Pineda got out of Anthony's car and walked across the parking lot to a place where surveillance officers saw him get back in the Bonneville. (Exhibit S, pp. 154-156; 159- 164).

33. The DEA team planned to get back the money paid on this occasion and the Bonneville was kept under surveillance after it left Lowe's. At the request of the DEA officers, Johnston County Sheriff's Lt. Danny Johnson, pulled the Bonneville over after it crossed two lanes and made a left turn without giving a signal. Pineda was in the passenger seat and the driver was Demetrius Watson. Watson told Lt. Johnson that the car belonged to Pineda's cousin. Pineda gave consent to search the car and he found over \$1,000.00, in Pineda's pocket. Pineda said that money was his. In the car, Lt. Johnson found the Dunkin Donuts bag containing \$6,000.00. Watson said the money in the bag was his. Lt. Johnson gave Pineda a receipt for the money from his pocket and gave Watson a receipt for the money found in the car. After he released them with a warning ticket, Lt. Johnson turned the \$6,000.00 over to DEA agents. (Exhibit S, p. 158; Exhibit T, pp. 297- 304).

34. After a series of telephone conversations between Anthony and Pineda, the next meeting was set for February 4, 2011 at Kohl's in the White Oak Mall in Cary. Anthony wanted to buy 2.5 Mexican ounces of heroin. Anthony parked at Kohl's; Pineda came up on foot and got into his car. Pineda gave Anthony three balls of product wrapped in duct tape and Anthony gave him a Dunkin Donuts bag with \$7,000.00 in it. Pineda said that Anthony owed an additional \$500.00 for the amount provided. Anthony then drove Pineda to the other side of the parking lot where Torres was waiting for him. (Exhibit S, pp. 172; 179-185).

35. At this point, the DEA drug trafficking team had orders for wire taps on three telephones that Pineda had used. They listened to a telephone conversation that Pineda had with Watson on February 11, 2011. From that call, they determined that Watson was buying ounce quantities of heroin from Pineda for distribution in the Durham area that Watson owed Pineda money and that Pineda was getting ready to leave the area. (Exhibit S, pp. 172-79; Exhibit T, pp. 207-09).

36. The DEA team made arrangements for one last transaction at which arrests would be made. In a series of telephone conversations between Anthony and Pineda, the next meeting was set for noon on February 14, 2011 at the Wal-Mart in Cary. Pineda said he would supply 5 Mexican ounces of heroin. Anthony said he would have the money for that sale and the \$500.00 he still owed on the last transaction. The plan was that, after Anthony had seen the delivered substance, he would say that the money was in the trunk of his car. When he got out of the car and went to the trunk, that action would be the signal for others to move in and make the arrest. (Exhibit T, pp. 211-216; 218- 220).

37. Shortly before noon, Pineda called Anthony to say that he was running behind and needed another 25-30 minutes. Anthony parked in the lot at Wal-Mart and eventually the brown

Bonneville arrived. It was being driven by D'Antonio Mitchell, who the DEA team knew from monitoring telephone conversations was a person who often drove Pineda around. Torres was a passenger in the Bonneville. By monitoring the location of Pineda's cell phone, he had been located at a Lowe's Food in Johnston County. (Exhibit T, pp. 217-224; 226; 274-275).

38. Torres got in the passenger seat of Anthony's car and gave him a dirty sock that Anthony could feel the five balls of substance in the sock. Anthony told Torres that he had the money in a backpack in the trunk of his car. When Anthony got out and went to the trunk of his car, other officers descended on the car and arrested Torres. (Exhibit T, pp. 222; 224; 227-228).

39. Anthony then contacted the group in Johnston County that had Pineda under surveillance at a shopping center at the intersection of Highways 52 and 50. They arrested Pineda there. Before he was removed from the truck he was in, Pineda drank some Mountain Dew and maneuvered his mouth. He was then taken to a hospital where X-rays showed foreign material in his colon. At the hospital, he was given a large amount of laxative and kept under surveillance until he expelled twelve (12) pellets of substance. (Exhibit T, pp. 228-229; 274-279; 281-282, 287-294).

40. Mitchell, the driver of the Bonneville that brought Torres to the Wal-Mart on February 14, 2011, was arrested there and charged with trafficking in 28 grams or more of heroin. Mitchell entered a plea of guilty to that charge in May 2011. Sentencing was continued until after he testified as a State's witness at the trial of Pineda. Mitchell was aware that if he provided substantial assistance to the State, it could have a favorable impact on his sentence. Mitchell was a heroin addict. He testified that he began buying heroin from Pineda in 2010 and he began driving Pineda to meetings with customers after he became indebted to him. (Exhibit T, pp. 307-308; 313-316; 319-321; 339; 345-347; 350-353).

41. Mitchell testified that Pineda picked him up at his house on February 14, 2011 about 8:00 a.m. They drove to a location in Smithfield where Pineda went into the woods and came back with a sock, containing something, which he put in the fender well of the Bonneville. Mitchell and Pineda then went to Lowe's Food with Torres following in a truck. Mitchell overheard Pineda on the telephone with his customer discussion the transaction. Pineda then told Mitchell and Torres to go to the Wal-Mart in the Bonneville to make the delivery. Mitchell and Torres stopped at a Blockbuster, in the same parking lot as the Wal-Mart, where Torres got the sock from the fender well. After Torres went to the Mustang, law enforcement officers came from everywhere. They got Mitchell out of the Bonneville and arrested him. (Exhibit T, pp. 339-345).

42. The material delivered on each of the five transaction dates covered by the indictments was in the shape of balls with an outer wrapping of duct tape or electrical tape. Inside the outer tape wrapping was a variety of additional wrapping material, plastic wrapping, tissue paper and rubber balloon material, and either a brown resinous material or a black tar like substance. After opening the tape wrapped packets and field testing the brown resin or black tar substance, the evidence was packaged by Wake County Sheriff's Detective Shelburn Menizie. The evidence was sent to CCBI where it was tested by forensic chemist Amanda Aharon. (Exhibit S, pp. 115-117; 124-127; 161; 182; Exhibit T, pp. 205-206; 230-231; 241-267; Exhibit U, pp. 371; 375-376).

43. The evidence from the November 3, 2010 transaction was a brown resinous material packaged in a manila envelope. Using a scalpel, Aharon scraped out of the manila envelope as much of the brown resinous material as she could. Aharon testified that the net weight of the material scraped out was 17.7 grams and that testing showed that it contained heroin. Some

brown material was stuck to the manila envelope. The gross weight of the brown material not scraped out and the packaging and the envelope was 47.28 grams. When asked whether the brown material not scraped out was heroin, Aharon could only say that it was visually consistent with material scraped out and tested. (Exhibit U, pp. 376-382; 396-398; 403).

44. The evidence from the November 23, 2010 transaction was packaged in a plastic bag inside a manila envelope. Aharon was able to remove and test all of the substance. Aharon testified that the net weight of the material was 24.1 grams and that testing showed that it contained heroin. (Exhibit U, pp. 382-385; 399).

45. The evidence from the December 21, 2010 transaction was a brown sticky material. Plastic wrapping material was embedded in the material. Aharon testified that the plastic wrapping could not be removed and that she was not able to determine a net weight of just the material. Aharon testified that the gross weight of the brown material and plastic wrapping embedded in it was 50.0 grams and that testing showed that the material contained heroin. (Exhibit U, pp. 385-388; 399-400; 402-403).

46. The evidence from the February 4, 2011 transaction was a brown resinous material packaged in a manila envelope. Aharon scraped out of the manila envelope as much of the brown resinous material as she could. Aharon testified that the net weight of the material scraped out was 38.46 grams and that testing showed that it contained heroin. Some brown material was stuck to the manila envelope. The gross weight of the brown material not scraped out and the packaging and envelope was 34.16 grams. (Exhibit U, pp. 388-391; 400).

47. The evidence from the February 14, 2011 transaction was a brown sticky material. Plastic wrapping material was embedded in the material. Aharon testified that the plastic wrapping material could not be removed and she was not able to get a net weight of just the

material. Aharon testified that the gross weight of the brown material and plastic wrapping embedded in it was 124.1 grams and that testing showed that the material contained heroin. (Exhibit U, pp. 391-394; 400-402).

Motion to Dismiss

48. The defense moved to dismiss all of the indictments against Pineda. (Exhibit U, p. 416). Specifically, on November 3, November 23, and December 21 there was no photographs of Pineda anywhere near Anthony when he made the purchases. (Exhibit U, p. 416). On February 14, 2011, Pineda was no at the location that Anthony made the purchase. (Exhibit U, p. 416). Further, on November 3, case numbers 11 CRS 203626 and 635, the weight of the heroin was 17.76 grams not 28 grams or more of heroin. (Exhibit U, p. 416). On December 21, case numbers 11 CRS 203632 and 636 there was no of evidence of the amount of heroin that was involved in those charges, which was trafficking of 28 grams or more. (Exhibit U, p. 417). On February 14, 2011, case numbers 11 CRS 203627 and 630 there was no evidence of the amount of heroin only gross weights as the product contained mixtures of packaging that did not allow the substance to be weighed. (Exhibit U, pp. 417-18). In case # 14 CRS 196, the conspiracy alleged from November 3, 2010 through February 14, 2011 the State's only evidence was conversations between Pineda and law enforcement, which cannot form a basis for the conspiracy. (Exhibit U, p. 418). After hearing argument from the State, the Court denied the motion. (Exhibit U, p. 419).

The Defense's Case

49. The defense presented no evidence and renewed its motion to dismiss. (Exhibit U, p. 422). The Court inquired from Pineda if he wished to testify on his own behalf, which Pineda responded as follows:

THE DEFENDANT: I mean, I don't speak much English. I don't want to.

THE COURT: So you think it's good for you not to testify in this case?

THE DEFENDANT: No, I don't believe so, but it's not a good thing either.

THE COURT: Well, if you want to tell the jury something, you may. If you do not want to tell them, nobody can force you.

THE DEFENDANT: Okay. Very well.

THE COURT: What do you want to do?

THE DEFENDANT: Well, I have nothing to say to the jury.

THE COURT: Okay. Nobody's forced you not to talk to the jury?

THE DEFENDANT: No, no.

THE COURT: And you've made this decision after talking to Mr. Caldwell?

THE DEFENDANT: Well, he's the only one. I mean, I have to trust him.

(Exhibit U, pp. 421-22).

Verdict

50. On May 23, 2014, the jury returned a verdict finding Pineda guilty of all of the nineteen (19) charges. (Exhibit V).

Sentencing

51. Pineda was sentenced after the jury returned its verdicts. On each of the fifteen (15) charges involving 28 grams or more of heroin, Pineda was sentenced to the statutorily mandated term of imprisonment for a minimum of 225 months and maximum of 279 months and fined \$500,000.00. On each of the fifteen charges involving 14 grams or more of heroin, Defendant Pineda was sentenced to the statutorily mandated term of imprisonment for a minimum of 90 months and maximum of 117 months and fined \$100,000.00. All of the nineteen (19) sentences were ordered to be served consecutively. (Exhibit W, pp. 495-499)

52. The Court inquired from Caldwell how much time he had in the case, which Caldwell responded eight-four (84) hours. (Exhibit W, p. 494).

53. Pineda then gave notice of appeal in open court at the time of entry of the judgment and commitment (Exhibit W, pp. 499-500).

Appeal

54. Pineda argued that the trial court erred in denying his motions to (1) arrest judgment on the jury's four verdicts finding him guilty of trafficking heroin by delivery and (2) dismiss the charges with offense dates November 3, 2010, December 21, 2010, and February 14, 2011. (Exhibit X).

55. On February 16, 2016, the North Carolina Court of Appeals found no error in the denial of Pineda's motion to dismiss, but held that the trial court erred in entering judgments upon Pineda's convictions for trafficking the same heroin by both sale and delivery, citing case law on N.C. Gen. Stat. § 90-95(a)(1) (2015) (providing that "it is unlawful for any person ... [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance"). (Exhibit Y). Pineda and the State both petitioned the Supreme Court of North Carolina for discretionary review in Case # 70PA16. (Exhibit Z; Exhibit AA). The State's petition correctly noted that Pineda was actually indicted and convicted of violating a different subsection of the Controlled Substances Act, N.C. Gen. Stat. § 90-95(h)(4). (Exhibit Z). Upon remand, the North Carolina Court of Appeals found the trial court had not erred in failing to arrest judgment on the jury's four verdicts finding Pineda guilty of trafficking heroin by delivery where the jury also returned guilty verdicts for trafficking the same heroin by sale, which it had originally remanded for resentencing in Case # COA15-800-2, decided on September 20, 2016. (Exhibit AB).

56. Pineda is currently incarcerated pursuant to the judgment of conviction attacked in this motion.

ARGUMENT

POINT I – TRIAL COUNSEL WAS INEFFECTIVE AND VIOLATED DEFENDANT’S SIXTH AMENDMENT RIGHTS WHERE TRIAL COUNSEL FAILED TO FULFILL THE REQUIREMENTS OF COUNSEL AS DELINEATED BY *STRICKLAND*, *CRONIC*, AND THEIR PROGENY OF CASES

57. It is axiomatic that both the United States Constitution and the Florida Constitution guarantee each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a due process of law in an adversarial system of justice. United States v. Cronic, 466 U.S. 648, 658 (1984).

58. The United States Supreme Court has held that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (i) trial counsel’s performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the “counsel guaranteed the defendant by the Sixth Amendment;” and (ii) the deficient performance prejudiced the defendant enough to deprive him of the due process of law. Id. at 687.

59. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's

function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Strickland at 690.

60. Under Strickland, a defendant must establish the following two components to demonstrate that counsel was ineffective: (1) counsel’s performance was deficient and (2) counsel’s deficient performance prejudiced the defense. Strickland, 466 U.S. at 686.

61. Under the deficiency prong, the defendant must establish that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. To prove the prejudice prong, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 686. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Id. at 694.

A. Trial Counsel Failed to Honor Defendant’s Right to Participate in the Decisions Which Were Fundamental to His Defense and Failed to Honor His Right to be Informed of Important Developments in the Course of the Prosecution

62. Courts have continued to flesh out the responsibilities and actions counsel must take to be considered effective under the Sixth Amendment. One of the most critical duties of counsel is to properly prepare him or herself for an impending legal proceeding. This tenant stands particularly true for pre-trial preparation, because it is considered to possibly be the most critical stage when it comes to preparing on behalf of a client. See Von Moltke v. Gillies, 332 U.S. 708, 721-23 (1948); Powell v. Alabama, 287 U.S. 45, 57 (1932). Furthermore, the accused have the constitutional rights of assistance of counsel and to confront witnesses, which requires a reasonable amount of time and opportunity to investigate and produce competent evidence in defense of the crime of which he stands charged. State v. Tunstall, 334 N.C. 320, 328 (1993).

63. When trial counsel failed to provide Pineda with the discovery, or review these documents as a whole with him, trial counsel violated Camacho's Sixth Amendment rights. "It is undisputed that a defendant has a constitutional right to participate in the making of certain decisions which are fundamental to his defense." Johnson v. Duckworth, 793 F.2d 898, 900 (7th Cir. 1986) (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)). In order to protect this fundamental right and effectively represent one's client, counsel has an affirmative duty to "consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland v. Washington, at 689.

64. Here, trial counsel failed to provide or discuss the discovery they received prior to trial, which is evinced by the numerous pro se motions Pineda wrote to the Court. (See Exhibits Exhibit B; Exhibit D; Exhibit E; Exhibit G; Exhibit H; Exhibit I; Exhibit K; Exhibit L; Exhibit M; Exhibit N; Exhibit O; Exhibit Q). Instead counsel simply ignored Pineda. Caldwell refused to spend any time reviewing the case with Pineda or translate the State's evidence against him. Over the course of three years, Caldwell met with Pineda six times and only to tell him to accept the State's plea offer of eighteen (18) years' incarceration or go to trial. They never discussed what the strategy would be at trial, he never advised him about testifying on his own behalf, or what evidence the State intended to introduce. Trial counsel had the ability to remedy this error by advising or explaining what the evidence against his client was. However, when requested and urged by Pineda to discuss the discovery or at the very least provide it to him, counsel did nothing. This is exactly why he begged the Court to substitute counsel, but just like his pleas to Caldwell his pleas to the Court fell on deaf ears.

65. Here, Pineda was prejudiced by refusing to provide or discuss the discovery in this case, trial counsel failed to keep the defendant informed of important developments during the

prosecution. This failure kept Pineda from being able to participate in making fundamental decisions in his case. Specifically, Camacho was unable to participate in his own trial.

66. First, shortly after Pineda's arrest, Caldwell told him that the State had made a plea offer of eighteen (18) years' incarceration. However, Pineda was unable to make an informed decision of whether he should accept the State's offer or proceed to trial because counsel refused to provide or discuss any of the State's potential evidence against him. United States v. Grammas, 376 F.3d 433, 436 (5th Cir. 2004) ("When the defendant lacks a full understanding of the risks of going to trial, he is unable to make an intelligent choice of whether to accept a plea or take his chances in court.", quoting Teague v. Scott, 60 F.3d 1167, 1171 (5th Cir. 1995); see also State v. Samuels, 156 N.C. App. 699 (2003).

67. "During plea negotiations defendants are entitled to the effective assistance of competent counsel." Lafler v. Cooper, 566 U.S. —, —, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398, 406 (2012) (quotation omitted). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." Id. at —, 132 S.Ct. at 1384–85, 182 L.Ed.2d at 407.

[A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id.

68. Prejudice is shown when but for counsel's deficient performance there is a reasonable probability Pineda and the trial court would have accepted the guilty plea. Further, as a result of not accepting the plea and being convicted at trial, Pineda received a minimum sentence of almost

two times greater than he would have received under the plea. See Id., 566 U.S. at —, 132 S.Ct. at 1390–91, 182 L.Ed.2d at 413–14.

69. Here not only was counsel’s performance deficient, but the record was clear that Pineda rejected the plea cause Caldwell flat out refused to provide or review the discovery with him. (See Exhibits Exhibit D; Exhibit E; Exhibit H; Exhibit K; Exhibit L; Exhibit N). Had counsel reviewed the discovery with him he would have been able to intelligently choose whether to accept the plea offer or proceed with the trial. Further, had he been able to make this choice he clearly would have benefited from being sentenced to eighteen (18) years’ incarceration versus more than three hundred and eight-seven (387) months.

70. Trial counsel denied Pineda the discovery and discussions related to such critical aspects of his case. Trial counsel’s failure to inform Pineda and include him on fundamental decisions of his defense directly resulted in Pineda’s Sixth Amendment rights being violated.

B. The Court’s Refusal to Appoint Substitute Counsel Denied Movant of his Sixth Amendment Right of Effective Assistance of Counsel

71. The Sixth Amendment to the United States Constitution and Art. I, §§ 19 and 23 of the North Carolina Constitution, guarantee an indigent defendant the right to court-appointed counsel. See United States v. Morrison, 449 U.S. 361, 364 (1981); Gideon v. Wainwright, 372 U.S. 335 (1963). “Once counsel has been appointed to represent an indigent defendant, the appointment of substitute counsel at the request of either the defendant or the original counsel is constitutionally required only when it appears that representation by original counsel could deprive defendant of his right to effective assistance of counsel.” State v. Nelson, 76 N.C. App. 371, 372, 333 S.E.2d 499, 500 (1985). To be granted substitute counsel, “the defendant must show good cause, such as a conflict of interest, a complete breakdown in communication, or an irreconcilable conflict which leads to an apparently unjust verdict.” State v. Covington, 205 N.C.

App. 254, 256 (2010) (quoting State v. Sweezy, 291 N.C. 366, 372 (1976)); State v. Gary, 348 N.C. 510, 516 (1998). This is not an empty formality but required to guarantee effective assistance of counsel. State v. Robinson, 290 N.C. 56 (1976).

72. A violation of a defendant's constitutional rights is prejudicial unless the violation is found to have been harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b). The State bears the burden of demonstrating, beyond a reasonable doubt, that the error was harmless. Id.

73. Here, Pineda established "good cause" for the Court to appoint substitute counsel because Caldwell could not provide him with constitutionally adequate representation. Over the course of three years, Pineda constantly informed the Court of his serious concerns about his discovery and information he could not obtain from his attorney. Specifically, they experienced such a complete breakdown in their communications such that Caldwell could not provide effective assistance to Pineda on these matters.

74. More than a year after Pineda was arrested and incarcerated, he wrote the Court informing it that

I have only seen him 3 times since my incarceration...I would like for you to accept my request for speedy trial. I feel as though I should no something instead of being in the dark.

(Exhibit B).

75. The Court told Caldwell to take appropriate action which he ignored. (Exhibit C). Again, Pineda informed the Court that he wanted

...a hearing to fire my lawyer...I have had Charles Caldwell for 19 months. He has done nothing for me! I have not been to court in a year; the last time I saw him was in July, he is always to busy for me. He never wants to translate and leaves me sitting to rot. I need help, please have a hearing or give me appropriate relief (a new lawyer).

I am also sending paperwork for a new motion for discovery for all of my evidence.

...

Enclosed: Motion for Discovery

(Exhibit D).

76. Almost two years after Pineda's arrest he still was provided no relief and informed the Court that

I Nicolas Pineda am convinced that it is in my best interest to dismiss my present attorney. Please allow my attorney to withdraw from my case.

(Exhibit G).

I was seeking in getting a new attorney. The thing's that my lawyer have offered me...I am not satisfied nor am I willing to plea to 18 years! I would consider "8-10" years as soon as I go to court. Also they haven't showed me any evidence pointing me to the scene! My present lawyer is "Charles Caldwell" and Im willing to fire him! And reappoint me another asap. Thank you for your cooperation!

(Exhibit H).

I Nicolas Pineda strongly feel like my lawyer Charles Caldwell (assistant public defender) isn't trying to represent my case or trying to do anything about it. 18 years is too long. I am asking if I can get into the courtroom so I can fired my lawyer and ask for a new public defender who will fight for me and my rights. The reason why I am asking is because I only have seen him about two time in the 22 months I been locked up and he doesn't show me any type of change or outcome. Thank you for taking time to understand where I am coming from.

(Exhibit I).

...last time I went to court I wanted to and tried to fire my lawyer. He is not working for me; the state, but not me. I been trying to fire him and receive my motion for discovery for 15 months now. He is too busy for me, won't translate anything for me; doesn't care about me, begging me to sign a plea, won't let me see my evidence, any pictures and so on. He says it's a plea or trial; but why would I sign my life away? Away from my family, and I haven't seen any paperwork, help, or defense at all from him! The DA try to scare

me and said 'sign this paper for 18 years; or we will give you life! I am not getting represented right, I am having rights broken, and people are doing illegal stuff to me! I need a up to date motion with all evidence. I need to listen to audio, see pictures. All I have been seeing and receiving is lies!

I need help because, I don't want to be railroaded. I need help because they are giving me extra charges; Charges that I didn't do. I need help because my lawyer is trying to force me to do things I don't wanna do. I need help because my family needs me and I am not getting any kind of defense. I need help because I need a new lawyer who will help me. Please grant my hearing to do so; please help me however you can! I need to put my charges together.

(Exhibit E).

77. Again the Court told Caldwell to take appropriate action which he ignored. (Exhibit F).

78. Finally, after Pineda contacted Senior Resident Superior Court Judge Donald W. Stephens stating the following he was afforded a hearing:

...I have already reached out to the public defender's office as well as the State Bar and the result was me being pointed into your direction...I am Inadequately being represented and that my legal defense don't have my best interest at heart.

My Court appointed Attorney Charles Caldwell has not done any work what so ever con-cerning my case. I honestly feel like I am being discriminated against due to my ethnicity. In the almost 3 years that I have been detained by the Wake County Detention Center it has taken him over 24 months to produce my requested Motion for Discovery. In 33 months he has only come to visit me 6 times and they were very brief. Since my first offered plea in April 2011, he continuously pressures me to take it which I decline and ask for a trial date. I am very dissatisfied with my legal defense and am requesting to be appointed different legal Counsel. What I have been through the last 3 years is a injustice and lack of human compassion. I ask that you take my request seriously and am looking forward to your prompt response.

(Exhibit K).

79. Despite the court's ruling, on or about January 6-five months before trial, requiring Caldwell to continue as Pineda's attorney, they continued to be unable to communicate effectively

and continued to have conflict. Pineda made nine different written or oral motions to have Caldwell withdrawn as attorney of record. However, the Court again denied Pineda's request for substitute counsel prior to jury selection. When Pineda pleaded with the Court for relief the following transpired:

THE COURT: And why is that, Mr. Pineda?

DEFENDANT PINEDA: Because it's my life. I can't put my life in his hands. He hasn't done anything in my defense.

THE COURT: Anything else?

DEFENDANT PINEDA: That's it.

THE COURT: Mr. Caldwell, anything you want to say?

MR, CALDWELL: Thank you, Your Honor. Your Honor, Mr. Pineda made a similar request in open court in front of Judge Stevens. I believe it was back in the fall. I'm sorry. It looks like January 6 motion for new counsel was denied in front of Judge Stephens, as I recall, for pretty much the same sentiment as Mr. Pineda addressed today. He -- for whatever reason, he's been dissatisfied with me. I've been to visit him many times in the jail and have, as best I could, explained to him the evidence, his relative situation, and his choices.

THE COURT: Why don't you want Mr. Caldwell to represent you, sir?

DEFENDANT PINEDA: He hasn't showed me any evidence. He hasn't showed me any evidence. He hasn't showed me photos of the drugs. He hasn't showed me anything.

THE COURT: Mr. Pineda, I just want you to know, from my vantage point -- I've tried cases with Mr. Caldwell before. He is the chief public defender in Wake County. He's a most competent attorney and represents his clients quite well. And I have nothing before me to show that he would not do that for you in this case. In fact, I would think that he would have more expertise and experience than just about anyone else who might be considered to take his place in this case. And I think that's probably one of the reasons that we're having a little problem. You can't tell me why you don't want him to represent you other than you don't want him. Okay? If Mr. Caldwell is allowed to stay on, would you work with him?

DEFENDANT PINEDA: Well, I can't represent myself.

THE COURT: Okay. So you don't think you can represent yourself and --

DEFENDANT PINEDA: No.

THE COURT: Okay. Thank you, sir.

...
...Mr. Pineda, I'm going to deny your request to remove Mr. Caldwell. I think he will serve you well in this case.

(Exhibit R, pp. 3-5; 13).

80. Their conflict was genuine and continued throughout the trial. Nor was Pineda responsible for the breakdown in their communications. Specifically, Caldwell flat out refused to review or provide discovery to Pineda, as argued supra. The record reveals no ability or intention on Caldwell's behalf to communicate the State's evidence to Pineda in Spanish, the only language he understands, or provide an interpreter to explain to him the evidence.

81. Instead Caldwell's mere six times he met with Pineda over the course of three years was take the plea or go to trial nothing more. Although this Court found that Pineda could not articulate why he did not want Caldwell to represent him over looks the fact that he repeatedly told the Court he did not know what the evidence against him was. Counsel's lack of representation is also evinced by a mere eight-four (84) hours he requested from the Court in time he had spent on Pineda's case. (Exhibit W, p. 494). This sparse amount of time where there were was a voluminous amount of discovery, including wire taps, video and audio recordings of transactions, photographs, a co-defendant that was severed, and seven State's witnesses shows minimal time was spent with Pineda and/or minimal amount of time was spent preparing for trial. Either way two weeks of logged time for a five day trial was deficient and prejudicial.

82. The continued conflict between Pineda and Caldwell prevented Caldwell from providing effective assistance of counsel. Thus, the trial court erred in denying Pineda's repeated requests to substitute counsel.

C. The Net Effect Of Trial Counsel's Combined Failures Deprived Movant of Effective Assistance

83. Here, Caldwell's deficient performance and the prejudice against Pineda is readily apparent. Trial counsel refused to review with or provide the State's evidence with Pineda, refused to request a speedy trial that Pineda constantly begged for, refused to prepare him to testify on his own behalf, conceded to 404(b) evidence being introduced without argument, conceded to arraignment on a new charge just prior to jury selection, conceded to venue of one of the charges without argument, and utterly failed to apprehend the most basic requirement; the charges levied against Pineda. As a consequence, this Court must reverse the convictions and grant a new trial.

D. Conclusion

84. In the event this Court finds that Caldwell's representation was clear on the face of the record. Undersigned promotes the same arguments against appellate counsel for failure to address them in the appeal.

85. According to N.C. Gen. Stat. § 15A-1419(a)(3), a motion for appropriate relief must be denied in the event that, in "a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen.Stat. § 15A-1419 " 'is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review.' " State v. Thompson, 359 N.C. 77, 122 (2004) (quoting State v. Fair, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001) (internal citation omitted). For that reason, "ineffective assistance of counsel claims 'brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary

procedures as the appointment of investigators or an evidentiary hearing.’ ” Thompson, 359 N.C. at 122-23 (quoting Fair, 354 N.C. at 166). As the Supreme Court has clearly noted:

“It is not the intention of this Court to deprive criminal defendants of their right to have [ineffective assistance of counsel] claims fully considered. Indeed, because of the nature of [ineffective assistance of counsel] claims, defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal. Nonetheless, to avoid procedural default under N.C. [Gen. Stat.] § 15A-1419(a)(3), defendants should necessarily raise those [ineffective assistance of counsel] claims on direct appeal that are apparent from the record.”

Thompson, at 123 (quoting Fair, at 167, 557 S.E.2d at 525).

86. Here appellate counsel was afforded the same record evidence that undersigned has argued in this motion for appropriate relief. Any cause for concern by undersigned should have been addressed by appellate counsel and in the event she should have brought these arguments on direct appeal she was deficient in her performance and thus prejudiced Pineda.

CONCLUSION AND RELIEF REQUESTED

87. Movant has set forth factually intensive issues which can and should only be properly presented during an evidentiary hearing. 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.”

88. In State v. McHone, 348 N.C. 254 (1998) the North Carolina Supreme Court found that the right to a hearing is not automatic, but is to be determined by the trial court from the motion and any supporting or opposing information presented. In McHone, the Court found that the defendant was entitled to a hearing because there was a question of fact that could only be determined by a fact-finding hearing.

89. In State v. Hardison, 126 N.C.App. 52, 483 S.E.2d 459(1997), the Court of Appeals determined that a hearing was appropriate to determine factually disputed issues such as ineffective assistance of counsel. In Hardison, the defendant argued that there existed a conflict of interest with the counsel representing him during the entry of his guilty plea. The Court determined that the nature of the claim was such that it would not appear on the face of the record but would instead require a hearing.

90. The Movant respectfully submits that the issues presented herein require an evidentiary hearing to be properly presented and fully litigated.

91. Pursuant to N.C.G.S. § 15A-1420(a)(1)(c1), counsel certifies that there is a sound legal basis for the motion and that it is being made in good faith; and that the attorney has notified both the district attorney's office and the attorney who initially represented the Defendant of the motion; and further, that counsel has reviewed the trial transcript.

WHEREFORE, Nicolas Pineda, respectfully requests that this Court grant the instant motion, vacate his judgment of conviction, and order a new trial; permit counsel to file any additional memoranda or briefs at least 30 days prior to signing any Order; permit counsel to review any proposed Order submitted by the State before this Court makes a decision on the motion; and grant Nicolas Pineda such other and further relief as this Court deems just, proper and equitable.

Dated: September 19, 2017

Respectfully Submitted,

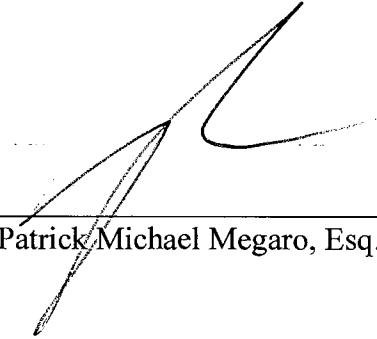


Patrick Michael Megaro, Esq.
33 East Robinson Street, Suite 210
Orlando, Florida 32801
(o) 407-255-2164
(f) 855-224-1671
pmegaro@ahalscottmegaro.com
North Carolina Bar ID # 46770
New Jersey Bar ID # 3634-2002
New York Bar ID # 4094983
Florida Bar ID # 738913
Texas Bar ID # 24091024
Washington Bar ID #50050

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. First Class Mail this 19th day of September, 2017 to:

Wake County District Attorney
316 Fayetteville Street
Raleigh, North Carolina 27601



Patrick Michael Megaro, Esq.