

STATE OF NORTH CAROLINA
COUNTY OF ROWAN

THE GENERAL COURT OF
JUSTICE
SUPERIOR COURT DIVISION

| | | |
|-------------------------|---|---------------------------------|
| STATE OF NORTH CAROLINA |) | CASE # 98-CRS-19025, # 98-CRS- |
| |) | 19275, #98-CRS-19276, #98-19277 |
| |) | |
| V. |) | <u>MOTION FOR APPROPRIATE</u> |
| |) | <u>RELIEF</u> |
| |) | |
| RANDALL BERT CASSELLS |) | |

NOW COMES THE MOVANT, RANDALL BERT CASSELLS, “Cassels” and moves this Court to grant him appropriate relief from his convictions of three counts of Indecent Liberties with a Child in violation of N.C.G.S. §14-202.1. In support thereof, the movant shows the following:

INTRODUCTION AND PROCEDURAL HISTORY

1. Cassels was charged with one count of Indecent Liberties with a Child in File Numbers 98CR19025, 98CR19275, 98CR276, and 98CR19277. On January 22, 1999, he entered pleas of guilty to three counts of Indecent Liberties with a child in Files 98CR19025, 98CR19275, and 98CR19277. Each count carried a maximum penalty of sixty-eight (68) months imprisonment as a maximum sentence.

2. Upon his guilty pleas, the trial court sentenced Cassels to a suspended sentence of a minimum of sixteen months and a maximum of twenty months

imprisonment and placed Cassels on supervision for a period of five years. He was ordered to register as a sex offender and to report for sex offender treatment.

3. On January 21, 2004, Cassels was successfully discharged from probation. On June 7, 2012, the trial court granted Cassels' petition to terminate his requirement to register as a sex offender.

4. Cassels did not file a direct appeal in this matter.

5. Counsel hereby gives notice to the State that Cassels is asserting substantial violations of his rights under the United States Constitution, including but not limited to those guaranteed under the Fifth, 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 Cassels 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.

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

Exhibit A - Transcript of Plea Form signed January 22, 1999

Exhibit B - Judgment Suspending Sentence

Exhibit C - North Charlotte VA Clinic Discharge Summary signed
November 6, 1998

Exhibit D - North Charlotte VA Clinic Discharge Summary signed
February 16, 1999

Exhibit E - Department of Veterans Affairs Rating Decision dated April 29,
2002

Exhibit F - Affidavit of Randall B. Cassels

Exhibit G - Information in Case number 98CR19275

Exhibit H - Information in Case number 98CR19025

Exhibit I - Report of Thomas J. Harbin, Ph.D.

STATEMENT OF RELEVANT FACTS

7. Cassels served in the military for twenty-eight (28) years. He became a Chief Warrant Officer (CW4) in the United States Army and served in Vietnam. (Exhibit F). He eventually became a pilot instructor for the Department of Defense. (Exhibit F).

8. While serving in Vietnam, among other tragic events he endured, he killed an eleven-year-old civilian who was holding a pile of wood that he believed was a weapon. (Exhibit F). He made eye contact with the child as she was falling to her death. (Exhibit F). He also watched a friend get killed in a mid-air collision and viewed another friend's decapitated head on the ground. (Exhibit I). In another incident, he was ordered to drop the body of a dead Vietnamese soldier out

of a helicopter in order to intimidate the enemy. (Exhibit I). These events and others had a disturbing effect on Cassels' mental stability. He had nightmares regularly and was eventually diagnosed with post-traumatic stress disorder in 2002. (Exhibit E).

9. Cassels became an alcoholic and drank daily. On October 8, 1998 he was admitted into the Salisbury Veterans Affairs Medical Center for in patient detoxification. (Exhibit C). He stayed there and received therapy until he was discharged on October 14, 1998. (Exhibit C). During the seven day visit he reported that he had been consuming one fifth of liquor per day. (Exhibit C). He reported to his counselor he drank because he was not adjusting well to retirement and that his teaching position disappointed him because the kids were so rude. (Exhibit C). The doctor's discharge summary did not mention that Cassels had involvement with taking indecent liberties with a child in their privileged communications.

10. Cassels began drinking daily the same day he was discharged. (Exhibit F). On December 10, 1998 he again admitted himself into the Salisbury Veterans Affairs Medical Center for in-patient detoxification. (Exhibit D). He again reported that he had been drinking one fifth of alcohol for the past thirty-two (32) months. (Exhibit D). He admitted that he drank at 8:30 a.m. on the date of admission on December 10, 1998. (Exhibit D). He informed the doctors that his wife and children were upset about his drinking, which is why he came to the

hospital. (Exhibit D). He was discharged on December 16, 1998. (Exhibit D). The doctor's discharge summary did not mention that Cassels admitted involvement with taking indecent liberties with a child.

11. Cassels continued to drink daily, commencing the same day he was discharged from the Salisbury Veterans Affairs Medical Center. (Exhibit F). He was eventually arrested for the instant matters on December 22, 1998. The State filed an Information in file number 98CR19275 that alleged Cassels took Indecent Liberties with a child between October 1, 1998 and October 23, 1998, a three week time frame including the week where Cassels was hospitalized. (Exhibit G). File number 98CR19025 alleged the offense was committed on December 21, 1998, five days after Cassels was discharged from his second hospital visit. (Exhibit H).

12. Cassels was represented by Robert Davis, Esq. (now deceased). Throughout the duration of his representation, Davis met with Cassels on only two occasions. (Exhibit F). On the first visit, he asked Cassels about his background information including his military experience and his health issues. (Exhibit F). Cassels explained that he had entered an inpatient program at the Salisbury Veterans Affairs Medical Center from October 8, 1998 through October 14, 1998, and one week in December of 1998. (Exhibit F). He explained to Davis that he was an alcoholic and had been drinking daily for the past few years, including every day after his discharge up to the date of arrest. (Exhibit F). At the time he informed Davis about the hospital stays, Cassels had not reviewed the charges and

Davis did not review it with him after becoming aware that Cassels had an alibi. (Exhibit F).

13. Throughout the representation, Davis never discussed trial strategy or a defense. (Exhibit F). Cassels explained to him that he had no memory of the alleged crimes charged. (Exhibit F). Davis never provided Cassels with any of the discovery or discussed any of the relevant dates or times of the case with him. (Exhibit F).

14. On his second visit, the only visit where he talked about the case, Davis told Cassels that he had to plead guilty; if he did not he would be forced to testify at his trial and the jury would not believe him. (Exhibit F). He never explained to Cassels the ramifications of the charge, including whether it was a felony or misdemeanor, or that he would end up registering as a sex offender. (Exhibit F; B). The transcript of plea form that Cassels signed on January 22, 1999 did not indicate that he entered a plea to a felony. (Exhibit A). Mr. Davis never advised Cassels about an involuntary intoxication defense and never obtained the medical reports that stated Cassels was at the Salisbury Veterans Affairs Medical Center during the period that the State alleged he committed the offense.

Dr. Thomas J. Harbin Evaluation

15. Undersigned counsel retained Dr. Thomas J. Harbin to evaluate Cassels to ascertain the characteristics of his psychological functioning. (Exhibit I). Dr. Harbin concluded:

[Cassels] has been in psychiatric treatment since 1999. He began rehabilitation for his alcohol abuse while in prison and has abstained from alcohol since then. He entered treatment with the Veterans Affairs hospital in 1999 and has been in treatment since. He has participated in a long-term program for PTSD, including targeted group treatment. He has also been treated psychiatrically.

...

[Cassels] suffers from chronic PTSD and his description of his psychological status at the time of his plea suggested that he did not comprehend the consequences of entering a guilty plea. He was suffering from untreated PTSD which cannot be ruled out as a factor in his decision to enter a guilty plea. He reported that he did not understand many of the factors necessary to knowingly enter a plea...He also reported [he] did not understand the ramifications of registering as a sex offender. Therefore, the available evidence (limited to Mr. Cassels' report) suggests that Mr. Cassels did not knowingly plead guilty to Indecent Liberties with a Minor.

(Exhibit J).

16. The last alcohol Cassels consumed was the day of his arrest on December 22, 1998. He has been sober for eighteen years. The only criminal convictions in his life involve the instant matters. He now asks this court to vacate his plea.

SUMMARY OF THE ARGUMENT

17. Cassels was denied his right to the effective assistance of counsel guaranteed to him by the United States and North Carolina constitutions where Trial Counsel failed to investigate a valid alibi defense, failed to investigate and advise Cassels about a voluntary intoxication defense, the type of crime he entered a plea to and its ramifications, and failed to provide Cassels with discovery, which rendered the entry of his plea unknowingly, unintelligently, and involuntarily.

ARGUMENT

POINT I – CASSELS WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL FAILED TO INVESTIGATE A VALID ALIBI DEFENSE AND FAILED TO INVESTIGATE AND ADVISE CASSELS OF THE INVOLUNTARY INTOXICATION DEFENSE.

18. The United States Constitution guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. U.S. Const. Amend. VI. 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 due process of law in an adversarial system of justice. United States v. Cronin, 466 U.S. 648, 658 (1984).

19. The 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 established when the defendant shows that (1) 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 (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

20. "To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." State v. Allen, 360 N.C. 297, 316 (2006) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

21. 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, 466 U.S. at 690. Strickland cautions courts to refrain from second-guessing counsel's strategic decisions from the superior vantage point of hindsight. Id. at 689. "Strategic choices made **after a thorough**

investigation of law and facts relevant to plausible options are virtually unchallengeable.” *Id.* at 690-691 (emphasis added).

A. Trial Counsel Was Ineffective Because He Failed to Investigate a Valid Alibi Defense.

22. Effective assistance of counsel requires that an attorney do more than simply stand next to a client in court as a potted plant. The Supreme Court described the duty to provide effective assistance as follows:

The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, **neither is it a sacrifice of unarmed prisoners to gladiators.**” *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (CA7), cert. denied sub nom. *Sielaff v. Williams*, 423 U.S. 876 (1975).

United States v. Cronin, 446 U.S. 648, 656-657 (1984) (emphasis added).

23. *Strickland* holds that counsel may not make a “strategic” decision on a whim, but instead must make a **thorough investigation** of law and facts regarding his options. *Strickland supra* at 690-691 (emphasis added).

24. To establish prejudice, a “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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” See Wiggins v. Smith, 539 U.S. 510, 534 (2003) (quoting Strickland, 466 U.S. at 694). However, prejudice to a defendant is presumed when “the likelihood that any lawyer, even a fully competent one, could provide effective assistance’ is remote.” See Tunstall, 334 N.C. at 329, 432 S.E.2d at 336 (quoting Cronic, 466 U.S. at 659-660); see also State v. Maher, 305 N.C. 544, 550, 290 S.E.2d 694, 698 (1982).

25. “It is implicit in the constitutional guarantees of assistance of counsel and confrontation that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense.” See State v. McFadden, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977). The North Carolina Constitutional right to effective assistance of counsel requires a defense lawyer to interview potential defense witnesses, prepare a defense, and secure witnesses’ attendance at trial. See State v. McEntire, 71 N.C. App. 720 (N.C. Ct. App. 1984); State v. Moorman, 320 N.C. 387, 402 (1987).

26. Trial counsel made no effort to have meaningful discussions with Cassels, let alone do any investigation. Cassels informed Davis that he was in the hospital **during the time that the State alleged he committed the crime**, yet he chose to do nothing to investigate. All he needed to do was contact the hospital

and obtain the records, which would have provided a defense to the charge stemming from the October incident. His failure to do that deprived Cassels, who was not aware of the offense dates, of a viable alibi defense.

27. Defense attorneys are ineffective if they fail to investigate viable defenses. In McNeill v. Branker, 601 F.Supp.2d 694, 717 (E.D.N.C. 2009) trial counsel was ineffective where he failed to investigate the Defendant's background and present mitigating evidence of his troubled childhood, which was marked by depression, substance abuse, and a suicide attempt, in mitigation at the sentencing phase of a capital murder trial. See also Stitts v. Wilson, 713 F.3d 887 (7th Cir. 2013) where trial counsel was found to be ineffective where he did not investigate possible alibi witnesses at a nightclub; United States v. Debang, 780 F.2d 81, 85 (D.C. Cir. 1986) where the complete failure to investigate potentially corroborating witnesses was found to be ineffective; Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir.1984) where counsel's failure to investigate three alibi witnesses whose names were supplied by the defendant constituted ineffective assistance of counsel because this information was critical in assessing intelligently whether the defendant was guilty.

28. "Strickland's objective reasonableness prong requires counsel to conduct appropriate factual and legal inquiries and to allow adequate time for trial preparation and development of defense strategies." Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir. 1998).

29. Nothing is more crucial to the defendant's decision of whether to enter a plea, than knowing exculpatory evidence exists that could be presented at trial.

30. Trial counsel failed to investigate and obtain medical records or statements from hospital employees to demonstrate he could not have contacted the alleged victim when the State claimed he did. Cassels was prejudiced because if he was aware that he had an alibi defense, he would not have entered a plea. (Exhibit F). No valid, strategic reason existed to justify such inaction.

B. Trial Counsel Was Ineffective Because He Failed to Investigate and Inform Cassels About The Voluntary Intoxication Defense

31. The crime of taking indecent liberties with a minor is a specific intent crime. A specific intent crime requires the State to prove that defendant acted willfully or with purpose in committing the offense... Where a crime requires a showing of specific intent, voluntary intoxication may be a defense to the criminal charge. State v. Merrell, 212 N.C. App. 502, 505-06 (N.C. App. 2011) (citations and quotation marks omitted).

32. When Cassels was admitted on December 10, 1998, two months after his last hospital stay, he advised the doctor that he had been drinking daily for the past thirty-two (32) months. (Exhibit D). Medical records indicate that Cassels' wife and children were upset because of his drinking. (Exhibit D).

33. If Davis had investigated these matters, he could have introduced the documents and corroborated Cassels' condition through the testimony of his family members.

34. Prior to entering his plea, Cassels was not made aware that voluntary intoxication is a defense that he could have presented at trial, and was not made aware that the hospital records could have been admitted. (Exhibit F). If he had knowledge of that information, Cassels would not have entered a plea. (Exhibit F).

35. "Trial counsel has a duty to investigate a defendant's mental state if there is evidence to suggest that the defendant is impaired." Douglas v. Woodford 316 F.3d 1079, 1085 (9th Cir. 2003). In Woodford, trial counsel became aware that a psychiatric defense could be helpful early in the case. Id. The Defendant had some tests conducted initially and counsel instructed experts to determine if there was a defense of a psychological nature. Id. Counsel was told by the doctors that there was not an indication of a major mental disorder, but additional testing could be done. Id. Counsel requested and received \$35,000 for additional mental health testing. Id. No further tests were performed. Id. The Defendant advised counsel he should not pursue any further testing. Id. In one of the Defendant's prior criminal matters, a doctor opined that Defendant was "confused, his thought process chaotic, and that he suffered from severe paranoia." Id. at 1086. The court held that counsel's performance was deficient because even after he was told by the

client not to pursue psychological issues at trial, counsel **still** should have investigated leads to prior mental health information. Id. at 1086 (emphasis added).

36. In Gray v. Branker, 529 F.3d 220, 229-230 (4th Cir. 2008) defense counsel's performance was deficient because he failed to investigate and develop evidence of mental impairment for purposes of mitigation at a penalty phase where attorneys were confronted repeatedly with indications of defendant's mental impairment, including affidavits from mental health professionals and diagnosis of psychiatrists, but, without making reasoned strategic decisions, ignored the evidence and did not investigate mental health evidence or consider introducing such evidence.

37. Efficient representation required trial counsel to not only investigate Cassels complete mental health, but also to advise him that he had the defense of involuntary intoxication available to him. A criminal defense lawyer is an advocate for his client and Strickland and its progeny require defense counsel to advocate on the behalf of a legally uninformed defendant. Trial counsel's failures were prejudicial because it deprived Cassels of knowing a valid defense prior to entering a plea that he would not have entered if his lawyer had properly advised him.

**POINT II - DEFENDANT'S PLEA WAS IN VIOLATION OF THE
UNITED STATES CONSTITUTION AND THE NORTH**

**CAROLINA CONSTITUTION WHERE IT WAS ENTERED
INVOLUNTARILY AND UNKNOWNGLY**

38. A motion for appropriate relief is proper when a Defendant challenges the validity of a plea after the trial court has imposed its sentence. See N.C.G.S § 15A-1420; State v. Dickens, 299 N.C. 76 (1980). "[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover up of unconstitutionality." Boykin v. Alabama, 395 U.S. 238, 242-243 (1969).

39. The Supreme Court in Boykin held:

A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.

Boykin v. Alabama, supra at 243 (citing McCarthy v. United States, 394 U.S. 459 (1969)).

40. A court may accept a guilty plea only if it is "made knowingly and voluntarily." State v. Wilkins, 131 N.C.App. 220, 224 (1998) (citing Boykin v. Alabama, 395 U.S. 238, (1969)). A plea is voluntarily and knowingly made if the

defendant is made fully aware of the direct consequences of his plea. Wilkins, 131 N.C.App. at 224 (citing Brady v. United States, 397 U.S. 742, 755 (1970)).

41. When determining whether a guilty plea is made knowingly, voluntarily and intelligently, a court must consider all the relevant facts and circumstances in the case, including, but not limited to, the nature and terms of the agreement and the age, experience, and background of the accused. Iowa v. Tovar, 541 U.S. 77, 78 (2004). A reviewing court must examine the totality of the relevant circumstances. Brady v. United States, 397 U.S. 742, 749 (1970).

42. Where a defendant seeks to withdraw a guilty plea after he is sentenced, the defendant is entitled to withdraw his plea only upon a showing of manifest injustice. State v. Russell, 153 N.C.App. 508, 509 (2002); State v. Olish, 164 W.Va. 712, 715 (1980); see State v. Copple, 218 Neb. 837, (1984); see generally Kercheval v. United States, 274 U.S. 220, 224 (1927). “Factors to be considered in determining the existence of manifest injustice include whether: [d]efendant was represented by competent counsel; [d]efendant is asserting innocence; and [d]efendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion.” Id. (citing State v. Handy, 326 N.C. 532, 539 (1990)).

43. As described in full detail above, trial counsel did not competently advise Cassels. He did not alert him to any of the defenses that were available to him to allow Cassels the ability to make an informed decision about whether to

enter a plea. He also did not provide Cassels with the knowledge of the ramifications of his plea. Cassels had no idea that he was entering a plea to a felony because trial counsel did not inform him and the transcript of plea form did not indicate whether the crime was a misdemeanor or a felony. (Exhibit A). Cassels advised counsel that he had no recollection of the alleged acts in the Information, and thus was not guilty.

44. Moreover, when trial counsel failed to provide Cassels with the discovery, or review it with him, trial counsel violated Cassel'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.

45. Here, trial counsel never provided or discussed any of the discovery received from the State with Cassels. That failure was incredibly troubling in this case where Cassels advised Davis that he had no recollection of the charges against him due to his own intoxication, and had an alibi.

46. By refusing to provide or discuss the discovery in this case, or any viable defense theory, trial counsel failed to keep the defendant informed of

important developments in the course of the prosecution. This failure kept Cassels from being able to participate in making fundamental decisions in his case. Specifically, Cassels was unable to enter a knowing and voluntary plea.

47. It is well documented that when determining the validity of a guilty plea, the plea must represent a knowing and voluntary choice on the part of the defendant. Hill v. Lockhart, 474 U.S. 52, 56 (1985) (citing North Carolina v. Alford, 400 U.S. 25, 31 (1970)). “During plea negotiations defendants are entitled to the effective assistance of competent counsel.” State v. Redman, 736 S.E.2d 545 (N.C. App., 2012) citing Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012).

48. Cassels did not knowingly, voluntarily, and intelligently enter a plea in this case. Trial counsel was not competent; Cassels did not have any knowledge of whether he plead to a felony or misdemeanor; he had a valid involuntary intoxication defense he was not made aware of; had an alibi that trial counsel never investigated and would have been supported by hospital staff; and never reviewed discovery. Cassels has shown manifest injustice exists to justify this court to withdraw his plea.

CONCLUSION AND RELIEF REQUESTED

49. 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.”

50. 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 Movant was entitled to a hearing because there was a question of fact that could only be determined by a fact-finding hearing.

51. In State v. Hardison, 126 N.C.App. 52 (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 Movant 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.

52. The Movant respectfully submits that the issues presented herein require remand for new sentencing hearing, or in the alternative, an evidentiary hearing to be properly presented and fully litigated. 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 the District Attorney's office of the motion; however the attorney who initially represented the Movant is now deceased; and further, that counsel has reviewed the trial transcripts.

53. WHEREFORE, RANDALL BERT CASSELS 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 thirty (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 Movant such other and further relief as this Court deems just, proper and equitable.

Dated: _____

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. First Class Mail on _____ to:

Office of the Clerk of Court
Superior Court Division
In and for Rowan County
232 N Main St #333,
Salisbury, NC 28144

Office of the District Attorney
In and for Rowan County
232 N Main St #333,
Salisbury, NC 28144

Patrick Michael Megaro, Esq.

CERTIFICATION OF MOTION

I HEREBY CERTIFY pursuant to N.C.G.S. §15A-1420, there is a sound legal basis for the above motion, and it is being made in good faith. I have notified the District Attorney's office of this motion, and also discovered that Cassels prior counsel is now deceased. I do not believe the transcript in this matter is necessary.

Date: June _____, 2017

Patrick Michael Megaro, Esq.