NO. _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

37P01
COA99-1518

STATE OF NORTH CAROLINA

V.

THEODORE MEAD KIMBLE

FROM: GUILFORD COUNTY
97 CRS 23656; 97 CRS 39581;
98 CRS 23486; 99 CRS 23241-48.

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MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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STATEMENT OF CASE

Petitioner Theodore Mead Kimble, was arrested on April 1, 1997, thereafter indited on First Degree Murder; Conspiracy To Commit First Degree Murder; Arson of an Unoccupied Dwelling; First Degree Arson; and coerced to sign "Bill of Waivers" on 8 Counts of Solicitation to Commit First Degree Murder; Presiding Judge. Peter M. McHugh.

On December 3, 1998, the trial Court "Excused" and appointed the Petitioner Counselor (retired Judge) H.W. Zimmerman, which sentenced the Petitioner to prison on December 8, 1997, for unrelated charges. Clearly a "CONFLICT OF INTEREST" from the begining; Thus a violation

of DUE PROCESS, and Petitioner's Constitutional Right to Effective Assistance of Counsel. Petitioner was also represented by attorney Fred Crumpler Jr., whom acted as Mr Zimmerman's puppet throughout.

- On January 28, 1999, Petitioner was taken from "Solitaire Confinement" at Southern Correctional (Troy, N.C.) to Guilford County Superior Court for a Change of Venue Hearing, But after arrival Counselor Zimmerman bullied, threaten, and deceived the Petitioner into signing a Plea Agreement and eight Bills of Information, which Counsel said was NOT final until after sentencing. The Plea Agreement reads as follows:

"The State of North Carolina agrees to accept a plea to Second Degree Murder in 97CRS39581. Count 1 of 97CRS23656 shall be dismissed. In return, the Defendant agrees to enter guilty pleas to Second Degree Murder in 97CRS39581, Conspiracy to Commit First Degree Murder in 97CRS23656, First Degree Arson in 98CRS2386, and eight counts of Solicitation to Commit First Degree Murder in Bills of Information which are to be filed this date. The Defendant agrees and understands that he will receive consecutive sentences in each of these cases. Further, the Defendant agrees to return the ashes of Patricia Blakley Kimble to the Blakley family. The State agrees to dismiss any Breaking and Entry or Larceny indictments against Theodore Meade Kimble which are presently pending in Guilford County."

"The parties stipulate that the Defendant is a level II offender, and that under the Structured Sentencing Act the maximum sentence he can receive for each B-2 felony is 254 months, for each Class C felony 159 months, and for the Class D felony 108 months."

- On January 28, 1999, Petitioner was coerced to enter a ... Guilty

Plea to all cases per Plea Agreement, except an ALFORD PLEA was entered on the eight counts of Solicitation. Counsel assured the Petitioner that regardless of what the Plea Agreement said a 20 year sentence was arranged. The eight counts of Solicitation was a single case, thus Petitioner was to receive only (4)-four sentences, for a total of four cases.

- On January 29, 1999, Petitioner wrote Counselor Zimmerman and asked to Withdraw and go to trial, And letters to others.
- On. February 24, 1999, Petitioner became worried because he had not heard from Counselor Zimmerman, so Petitioner wrote letters to ALL parties.
- On March 4, 1999, Petitioner was returned to Court for what was suppose to be the Sentencing Date, But instead Petitioner was granted an Evidentiary Hearing, which became a "Pro-se Withdrawl Hearing." Counselor Zimmerman told the Petitioner, he was embarrassing, and that Counsel would sit-out this Hearing, Counselor Crumpler told the Court that Counsel would remain "NEUTRAL". Petitioner was FORCED to represent himself. Clearly a Violation of Petitioner's Constitional Right to Counsel a "CRITICAL STAGE" of the proceedings. Nor was Petitioner given opportunity to prepare "Evidence." The Court DENIED Petitioner's request to Withdrawl and go to trial. Then went straight into Sentencing, Further violating Petitioner's Right of Appeal
- On March 5, 1999, Petitioner was illegally sentenced on all CASES and COUNTS; in violation of LAW and Plea Agreement. Counsel fail to object to anything, and sat there as if Petitioner had no counsel. Instead of (4) four Sentences, Petitioner received (11) eleven Sentences. A sentence for each CASE and for each of the eight COUNTS of Solicitation, despite the State's factual

showing which proved only (1) one CASE.

- On April 5, 1999, Petitioner's Discretionary Review was DENIED by the Supreme Court of North Carolina; having already been DENIED on Direct Appeal by the North Carolina Court of Appeals. Counsel ABANDON issues of the illegal sentences, fail to file a M.A.R. and raise New evidence.

ISSUES PRESENTED

Did the State deny Petitioner's Rights under Federal laws by imposing sentences that were NOT authorized by applicable State or Federal Laws, and denying his Motion For Appropriate Relief without a hearing; and his Right to Effective Assistance of Counsel under State and Federal Laws?

ARGUEMENT

1) Petitioner is serving sentences which are **Not** authorized by applicable State or Federal Law; in violation of the protection against Double-Jeopardy.

(U.S. Const. Am. 5, 14; NC. Const. Art. I, Sec. 19, 23.)

Petitioner was sentenced under "DOUBLE JEOPARDY" in cases# 97 CRS 23656 and# 98 CRS 23486. (See **EXHIBIT A M.A.R.**; Pages# 24 and# 25.) Also see JACKSON v. LEONARD, 162 F. 3d 81 (2nd cir. 1998). Petitioner does NOT relinquish his protection under Constitution Rights, if he did NOT have Effective Assistance of Counsel. The Prosecution and Counsel "**DECEIVED**" the Petitioner by dismissing Case# 97 CRS 23656 (Count 1) as part of the Plea Agreement, without listing the title of the charge.

2) Petitioner's conviction was obtained by the Unconstitutional Failure of the

state to disclose to the defendant evidence favorable to the defendant. (U.S. Const. AM. 5, 6, 14, N.C. Const. Art I, Sec. 18, 19, 23.)

Petitioner has SCREAMED "Prosecutor Misconduct" from the begining, but no one would lissen. New Evidence proves the claims raised in the Motion For Appropriate Relief. For more details (see Exhibit A M.A.R, there in Exhibit S Affidavit by T.M. Kimble.) Witness Jeff Roberts and James Ogburn were interviewed several times, but the State SUPPRESSED the Evidence. The State coerced witnesses to change their statements, or threaten them to keep silent. Edna Kimble is prepared to testify as a witness to Detectives interviews James Ogburn, who swore the Defendants were 15 miles away at the time of the crime. The State violated the Petitioner's Constitutional Rights. See State v. RICH, 130 N.C. App. 113, 502 S.E. 2d. 49 (1998); BOYLE v. MILLION, 201 F.3d 711 (6th Cir 2000), and BERGER v. U.S., 295 US. 78, 88, 79, L.Ed. 1314, 55 S Ct. 629 (1935). Also in violation of N.C.G.S. 15A-1340.14; For More Evidence (See Exhibit C Affidavit by Janet Smith) Yet another witness threaten by the State, and willing to testify. Ms. Smith was threaten to change her statement and go against the Petitioner. See U.S. v. ESTRADA, 849 F2d. 1304 (10Th Cir 1988) and U.S. v. AGUILAR, 90 F. Supp. 1152 (D. Col 2000). There's so many acts of Prosecutor Misconduct over Withheld Evidence, Petitioner prepared a brief. (See Exhibit E; Grievance to the N.C. State BAR.) Contained therein is more NEW Evidence with supporting Exhibits to prove claims as FACTUAL. Petitioner Prays this honorable Court will make a perusal of these important Exhibits. Although these claims were raised in the M.A.R; it lacked these Exhibits. Especially note STATE'S witness Jeff Clark, who testified lead Detective

J. D. Church showed him pictures of the crime, told him facts about the case, wrote a false statement for him to sign, even signed Jeff's name in places. At this time, the Petitioner can now prove 3 star witnesses for the State (Nicholas, Pardee, Dyers) each committed PERJURY at the Co-defendant's trial, all of which had Plea Arrangements in exchange for their false testimony. (See Exhibits J; K; L.)

The Prosecution is NOT allowed to "CUT DEALS" with witnesses on pending charges (or) threaten with severe prosecution if they don't say what he wishes, which is SELECTIVE PROSECUTION, (See Exhibit A M.A.R., there in Exhibit BB TTp 115 Lines 3-15) Also, Robert Nicholas STOLE Petitioner's new trailer and the Prosecution REFUSED to do anything, and in FACT, COVERED-UP the CRIME! (See Exhibit A M.A.R. therein Exhibit CC TTp 176 Lines 15-19) (Also therein Exhibit S Affidavit by T.M. Kemble) New Evidence as to this CRIME is "STILL COMING" to light.

3) Petitioner's conviction was obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charges and consequences of the plea.

(U.S. Const. Am. 5, 6, 14; N.C. Const. Art. I, Sec. 19, 23.)

Petitioner's plea of guilty was unlawfully induced when Counselor Zimmerman had him enter the plea with the belief it was NOT final until the sentencing. Further, the Petitioner could NOT have known the consequences of the plea, because of the DECEPTIVE wording of the Plea Agreement. Case in point, when the Agreement said the Petitioner was to receive consecutive sentences on all "CASES," it listed each CASE, and then

said, "eight counts of Solicitation". The State's factual showing proved only one "CASE" of Solicitation, but the Petitioner was illegally sentenced on each COUNT. Instead of being sentenced to four CASES, Petitioner was sentenced to 3 CASES and 8 COUNTS. Petitioner could NOT have known the State would pull a "fast-one" and assign each Count it's own Case number (99 CRS 23241-48), after the fact. It was not listed on the Plea Agreement. The Judge should have known, and not sentenced the Petitioner 8 Consecutive times for the same Case. The same Rule Applies as Follows in Comparison:

KNOWING ERRONEOUS CONVICTION - Convicting Defendants of reckless driving when they were charged with Driving while Impaired was an act which respondent Judge knew or should have known to be improper and ULTRA VIRES, (Unauthorized; Beyond the scope of powers allowed or granted by a corporate charter or by laws) or beyond the powers of his office; Therefore, Respondents actions constituted conduct in violation of **CANONS 2A** and **3A(1)** of the Code of Judicial Conduct. In Re **MARTIN**, 333 N.C. 242, 424 SE. 2d 118 (1993) Same "**Standards**" apply above in case at bar.

Further DECEPTIVE wording in the Plea Agreement shows the dismissal of case #97 CRS 23656 (Count 1), but never listed what the indictment was, because the Def. wanted to cover up the fact he committed Double-Jeopardy. Yet the Judge never read the indictment title into the record, simply dismissed it. Also, Judge McHugh illegally sentenced the Petitioner in 8 of 11 sentences, in the Aggravative Range using the same supporting evidence, which under Sentencing Rules is only allowed twice. In all cases the

Mitigating Factors out-weighed the Aggravating Factors 3 to 1, but the Clerk of Court marked the wrong box on the findings in each case.

4.) Petitioner's conviction was obtained due to the ineffectiveness of trial and/or appellate defense Counsel.

(U.S. Const. Am. 5, 6, 14; N.C. Const. Art I, Sec. 19, 23.)

Petitioner's case is used in the N.C. Defender's Manual as an example of what Attorneys should NOT do. (See Exhibit B ; Page 2 of 2 / From: N.C. Defender Manual / Oct 2002 / @ Institute of Government Vol. 2, Ch. 21: Guilty Pleas) "In STATE v. KIMBLE, 141 NC. App. 144, 539 S.E.2d 342 (2000), the defendant pled guilty to eight counts of soliciting to murder, but the State's factual showing proved one solicitation only. The appellate court upheld Kimble's convictions because the defense lawyer did not move to withdraw the defendant's plea on the grounds of the inadequacy of the factual basis." When the Petitioner was sentenced 8 times for a Single CASE, Counsel "Fail" to Object. On Appeal Counselor Carman (Appellate Defender) "Fail" to withdraw the plea on the proper grounds, thus the Court upheld the convictions. This ERROR cost 70-90 years, to be added to the Petitioner's sentence. The Exhibit used above is "New Evidence".

Counselor Zimmerman had a "Conflict of Interest" from the beginning in that he sentenced the Petitioner to Prison. (See Exhibit A WHAR, therein Exhibit EE; Judgment and Commitment by Judge Zimmerman) (Also therein Page 3.) See GARDNER v. US 619 F. Supp. 1143 (D. ME 1988) Counsel FAIL to request bond, See U.S. v. IANNONOS, 425 F 2d 597 (D.C. Cir 1970) Counsel FAIL to get

statement from Star Witness. See U.S. v. JOHNSON, 995 F. Supp 1259 (D Kansas 1998); See Exhibit A M.A.R. therein AH Tr. p. 149-150; See COSS v. LACKAWANNA COUNTY DISTRICT ATTORNEY, 204 F.3d. 453 (3rd Cir. 2000); Also, HART v. GOMEZ, 174 F.3d. 1067 (9th Cir. 1999). It was FAULTY legal advice to have the Petitioner sign 8 Bills of Information on charges that would have been dismissed. See U.S. v. SCOTT 625, F.2d. 683 (5th Cir 1981); LORD v. WOOD, 184 F.3d. 1083 (9th Cir. 1999); U.S. v. TAYLOR, 139, F.3d. 924 (D.C. Cir 1998); Also See U.S. v. SANDERSON, 595, F.2d. 1021 (5th Cir 1979). Counsel and Appellate Counsel FAIL to report Prosecutor Misconduct. (See Exhibit A M.A.R. therein Exhibit I, Witnesses Statements) Counsel "FAIL" to investigate State's witnesses. See MEDINA v. BARNES, 71, F.3d. 363 (10th Cir. 1995). Fail to raise Double-Jeopardy. For more information on Ineffective Assistance of Counsel; See Exhibit A M.A.R; Pages 25-33.

5.) Petitioner's conviction was obtained by denial of Counsel at a critical state of the proceedings, without a knowing, voluntary and valid waiver by defendant of the right to Counsel.

(U.S. Const. Am. 5, 6, 14; N.C. Const. Art I, Sec. 19, 23.)

Petitioner was DENIED the Right to Counsel at the Pro-se Withdrawal Hearing. The Petitioner was NOT given notice of the Hearing. Only once at Court did Counsel notify the Petitioner they plan to, "Sit-out this Hearing". Clearly there was a "Conflict of Interest", when Counselor Crumpler stood up and told the Court they plan to remain "NEUTRAL". See Exhibit A M.A.R; therein Exhibit X Tr. p. 3) See GARDINER v. U.S., 679 F. Supp 143 (D Me. 1988). Counsel refused to represent the Petitioner, Thus the Petitioner was FORCED to defend himself. Denial of DUE PROCESS.

See U.S. v. ALVAREZ-TAUTIMEZ, 160 F.3d. 573 (9th Cir 1998); US v. ELLISON, 798 F.2d. 1102 (7th Cir 1986).

6.) Petitioner's conviction was obtained by denial of the defendant's right to present evidence in his own defence.

(U.S. Const. Am. 5, 6, 14; N.C. Const. Art I, Sec. 18, 19, 21, 23.)

Petitioner's right to DUE PROCESS was DENIED at his Evidentiary Hearing; ie. Pro-Se Withdrawal Hearing. Counselor Zimmerman, nor the Court notified the Petitioner that such a Hearing had been granted. The Petitioner was "BLIND-SIDED" and "AMBUSHED"; NO opportunity was granted to the Petitioner to prepare a defense or to present the FACTS with SUPPORTING EVIDENCE. A) Due Process requires as general matter, opportunity to be heard at meaningful time and in a meaningful manner. B) Citizen must be afforded Due Process before deprivation of life, liberty, or property. See ARMSTONG v. MONZO, 380 U.S. 545, 552, 14 L.Ed. 2nd 62, 85 S.Ct. 1187 (1965); MATTHEWS v. ELDRIDGE, 424 U.S. 319, 333, 47 L.Ed. 2nd. 18, 96 S.Ct. 893 (1976). By all the "NEWLY DISCOVERED EVIDENCE," the Petitioner has been DENIED the right to present the evidence, because of Prosecutor Misconduct.

7.) Petitioner's conviction was obtained do to the denial of defendant's right to appeal, without a knowing, voluntary and valid waiver by deffendant of his right to appeal.

(U.S. Const. Am. 5, 6, 14; N.C. Const. Art. I, Sec. 18, 19, 21, 23.)

Petitioner listed several ways his Right to Appeal was denied in his

Motion For Appropriate Relief. (See Exhibit A M.A.R. / Pages # 15-17.) The trial Court denied Petitioner's Pro-Se Motion to withdrawl erroneously, and went straight into sentencing, thus denying the Petitioner his right to appeal. see LOZADA v. DEEDS, 488 U.S. 430, 112, L. Ed. 2nd 956, 111 S. ct. 860 (1991); PARKUS v. DELE, 33 F.3d. 933, 939-940 (8th Cir 1994); And TONY v. GAMMON, 79 F.3d. 693, 697 (8th Cir 1996).

8.) Petitioner's conviction was obtained by a violation of the privilege against self-incrimination.

(U.S. Const AM 5, 14; N.C. Const Art I, Sec 19, 23.)

Petitioner's Counsel never seem to care about the FACT of "INNOCENCE" despite the Petitioner's pleas. See HOLLINESS v. ESTELLE, 569 F. Supp. 1146 (W.D. Tex 1983). Counsel knew the Petitioner was innocent, yet had him enter a plea with the belief it would NOT be final until the Sentencing. Counsel never tried to talk with EYE-WITNESS James Ogburn or other witnesses who could varify the Defendants location at the time of the crime. Also See Exhibit A M.A.R. Pages # 19-20.

9.) Petitioner's conviction was obtained by the denial of his right to cross-examine witnesses against him.

(U.S. Const. AM. 6, 14; N.C. Const. Art I, Sec 19, 23)

Petitioner's sixth U.S. Constitutional Right was DENIED when the trial Court errored and allowed State's witness Det James Bowman

take the stand during sentencing, and testify to what is known as HEARSAY-EVIDENCE. Mr Bowman testified as to statements made by third party (inmate) William Stewart. Those statements were in reference to the eight counts of Solicitation, which the Petitioner did NOT plead Guilty; An ALFORD Plea was entered, thus the Constitutional Right should "NOT" be waived. The U.S. Supreme Court ruled on the Right to Confront witnesses just last year. See CRAWFORD v. WASHINGTON (No. 02-9410. Argued Nov 10, 2003 - Decided March 8, 2004.) (See Exhibit D(*).)

10.) Petitioner's conviction was obtained by use of a coerced or illegally obtained confession.

(U.S. Const. Am. 5, 6, 14; N.C. Const. Art I, Sec 19, 23.)

Petitioner covered this throughout his M.A.R. Counselor Zimmerman coerced the Petitioner to sign a Plea Agreement, with the belief it would NOT be final until sentencing. Counsel assured the Petitioner and his family a sentence of 20 years total would be granted, Instead Petitioner received over 100 years. See MOORE v. U.S. 950 F.2d. 656 (10th Cir 1991); BOBIN v. KEANE, 83 F.48 (2nd Cir 1996); Also See TREJO v. U.S., 166 F. Supp. 2nd. 1294 (S.D. Fla 1999) Counsel and Prosecutor TRICKED the Petitioner into believing he would receive 4 Sentences on four Cases, NOT 11 sentences for three Cases and eight Counts. (See Exhibit A MAR Pages "6", 7, and "8") Petitioner was threaten the penalty of Death. See U.S. v. ELLISON 798 F.2d. 1102 (7th Cir 1998); U.S v. UNGER, 665 F.2d. 25 (8th Cir 1981) Compare case at bar with UNGER v. COHEN, 718 F. Supp 185 (S.D. N.Y. 1989) Clearly

mirrors how Petitioner was SHANGHEID.

The Defendant in a Criminal case is entitled to Assistance of Counsel at all stages. Where Counsels performance was sub-standard and ineffective, Plaintiffs Right to "DUE PROCESS" of Law is violated. When Counselor Crumpler and Zimmerman refused to defend the Petitioner, "Conflict of Interest", became a FACT. Petitioner has proven the two prong test necessary to show ineffective assistance of counsel.

1) The Counsel's performance for a fact deviated from the ethical standards in the community, and

2) That Petitioner was prejudiced thereby.

The Prosecutor's failure to disclose James Cogburns statement, or Janet Smith is in fact a denial of Due Process of Law. See U.S. Constitution, Am V, VI and XIV; N.C. Const Art. I sec 18, 19, 23. Due Process requires a defendant be sentenced on basis of ACCURATE information. See U.S. v. HERRERA-ROJAS, 243 F. 3d. 1139 (9th Cir 2001) If the District Court fails to make the required findings or determinations during sentencing, the sentence must be VACATED and the Defendant resentenced. see U.S. v. CONTRERAS, 249 F. 3d. 595 (7th Cir 2001) Sentencing determination must be based on RELIABLE evidence. See U.S. v. DOE, 860 F. 2d. 488 (1st Cir 1988)

Finally, Petitioner was DENIED DUE PROCESS of Federal Law by DENIAL of his M.A.R, without a hearing. (See N.C.G.S. 15A-1420(c)(1) and (4)

CONCLUSION

The State Trial Court should be ordered to give the Petitioner a RESENTENCING HEARING, (or) DISMISS THE CASE

If the Record, enclosed Motions, Exhibits, and Facts, are not sufficient to establish the ILLEGALITY of his present sentences, (or) that he was convicted "WITHOUT" Due Process of Law, the order of the Trial Court Dismissing the Petitioner's M.A.R. without a Hearing should be VACATED, and the Court should be Ordered to give the Petitioner an Evidentiary Hearing in accordance with applicable State Law.

Pro-Se: Theodore M. Kimble

Respectfully Submitted this
the 7th Day of November 2005.

THEODORE M. KIMBLE
1300 WESTERN BLVD.
RALEIGH N.C. 27606

LARRY D. VICK NOTARY PUBLIC WAKE COUNTY, N.C.

My Commission Expires 1-5-2009.

Larry D Vick

VERIFICATION

I, THEODORE MEAD KIMBLE, Being first Duly Sworn depose and say, I am the Petitioner in the foregoing Memorandum in Support of Petition for Writ of Habeas Corpus, I have drafted and read the same, And the statements contained therein are True, As for any statements made on information and belief, Are made in good faith, And I believe to be True. Signed under penalty of perjury this the 7th day of November 2005.

Pro-Se: Theodore Mead Kimble

THEODORE MEAD KIMBLE

Sworn to and before me this the 7th Day of November 2005.

Witness: Larry D. Vick

My Commission Expires: My Commission Expires 1-6-2009.

LARRY D. VICK NOTARY PUBLIC WAKE COUNTY, N.C.