No. COA09-504 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Forsyth
	)	
PAUL JOSEPH SALVETTI	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

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DEFENDANT-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

I. WHETHER JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO ADJUDICATE, ACCEPT, AND MAKE DETERMINATIONS ABOUT DEFENDANT'S PLEA BEFORE IT ENTERED JUDGMENT IN VIOLATION OF G.S. 15A-1022?

II. WHETHER JUDGMENT MUST BE VACATED BECAUSE THERE WAS INSUFFICIENT FACTUAL BASIS TO SUPPORT DEFENDANT'S PLEA?

III. WHETHER JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO INFORM AND ADVISE DEFENDANT IN VIOLATION OF G.S. 15A-1022 BEFORE IT ENTERED JUDGMENT?

IV. WHETHER JUDGMENT MUST BE VACATED BECAUSE THE PROSECUTOR BROUGHT IMPROPER PRESSURE UPON DEFENDANT TO INDUCE HIS PLEA IN VIOLATON OF G.S. 15A-1021(b) AND THE PLEA WAS NOT VOLUNTARY IN VIOLATION OF THE FOURTEENTH AMENDMENT?

V. WHETHER JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO MAKE SUFFICIENT INQUIRY INTO THE VOLUNTARY AND "PACKAGE DEAL" NATURE OF THE PLEA?

VI. WHETHER DEFENDANT'S PLEA AND JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT'S RULING DENYING HIS MOTION TO WITHDRAW PLEA WAS ERRONEOUS IN LAW?

STATEMENT OF THE CASE

On August 27, 2007 and July 7, 2008, the Forsyth County Grand Jury indicted defendant-appellant Paul Salvetti for 1 count of felony Class C child abuse, 1 count of felony Class E child abuse, and misdemeanor contributing to the delinquency of a minor. (Rpp. 4, 6-7) Defendant's wife, Debbie Salvetti, was

also charged with the same offenses. (Rp. 37) On October 6, 2008, defendant's case and his co-defendant wife's case came on for a joint plea proceeding in Forsyth County Superior Court before Superior Court Judge L. Todd Burke. (Rp. 1) Defendant entered an *Alford* plea to the Class E felony pursuant to a plea arrangement. (Rpp. 9-12) Judge Burke conducted a hearing, entered Judgment and Commitment, and sentenced both defendant and his co-defendant wife to active terms of 20-33 months imprisonment. (Rpp. 15-16, 42-43) On October 8, 2008, defendant filed a motion to withdraw guilty plea in Superior Court. (Rp. 17) On October 10, 2008, Judge Burke held a hearing and orally denied defendant's motion to withdraw. (Rp. 29) Defendant gave notice of appeal. (Rpp. 29-32)

GROUND FOR APPELLATE REVIEW AND STATEMENT OF PLEADINGS IN THE APPELLATE DIVISION

The ground for appellate review of the Trial Court's ruling denying defendant's motion to withdraw guilty plea is G.S. 15A-1444(e). See *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980). Defendant's challenge to this ruling is an appeal of right and appears in this brief in Argument 6.

Contemporaneously with the filing of this appellate brief, defendant has filed a petition for writ of certiorari and an Appellate Rule 40 motion to consolidate actions. In his petition, defendant presents 5 arguments addressed to errors the Trial Court made in connection with the procedures employed in adjudicating his *Alford* plea during the plea proceeding for which

he does not have an appeal as of right. However, these errors are closely related to the error for which defendant does have an appeal as of right. Solely for this Court's convenience and in order to facilitate appellate review and conserve scarce judicial resources, defendant has reprinted the 5 arguments in his petition in this appellate brief (Arguments 1-5). Because all 6 arguments grow out of the same Superior Court proceeding and present closely-related issues about the propriety of defendant's plea, defendant believes this Court would appreciate the opportunity to adjudicate all of defendant's claims in one efficient appellate-division proceeding. As shown more fully in defendant's petition, the ground for appellate review via writ of certiorari of the 5 arguments is G.S. 15A-1444(e) and *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987).

STATEMENT OF THE FACTS

Briefly, defendant Paul Salvetti entered an *Alford* plea to Felony Class E child abuse of his 13-year-old adopted son TS against the advise of counsel, while protesting his factual innocence, when the Trial Court itself questioned the wisdom of the plea, and pursuant to a coercive "package deal" or "wired" plea arrangement. The "package" part of the "package deal" here was defendant and his co-defendant wife Debbie Salvetti; and the "deal" part was the prosecutor insisted on "all or nothing" participation - - namely, the prosecutor would allow Debbie to plead but only if defendant also pled. Defendant moved to withdraw his plea 48 hours after he entered it. However, the

Trial Court denied defendant's motion. As shown below and in defendant's petition for certiorari, the legality of "package deal" plea arrangements like the one here is a question of first impression in North Carolina, the Trial Court's appealable ruling denying defendant's motion to withdraw was erroneous in law, and other serious errors occurred in the plea proceeding.

A. The Plea Proceeding.

In 2008, defendant and Debbie Salvetti were 1) married and 2) co-defendants in similar criminal child abuse prosecutions. (Tp. 4) The alleged victim was the Salvettis' 13-year-old adopted son TS; the alleged date of offense was the 3-month period February 9, 2007 through May 9, 2007; and both defendant and his wife were charged with felony Class C child abuse, felony Class E child abuse, and misdemeanor contributing to the delinquency of a minor. (Rpp. 6-7, 37) The Class E charge alleged child abuse of TS by "intentionally inflict serious physical injury, starvation." (Rp. 6) None of the allegations involved any type of sex abuse. (Tp. 4) Defendant and Debbie Salvetti were represented by different attorneys. (Tp. 4) In October 2008, both defendant and Debbie Salvetti entered into *Alford* plea arrangements with the State: in his arrangement, defendant pled to 1 count of felony Class E child abuse with no arrangement as to sentence; and in her arrangement, Debbie pled to 2 counts of felony Class E child abuse and the misdemeanor consolidated with no arrangement as to sentence. (Tpp. 4, 7,

Rpp. 9-12, 38-41) Both Salvettis were Record Level One for purposes of sentencing. (Tp. 4)

On October 6, 2008, the State called both Salvettis' cases on for a joint plea proceeding and the Trial Court conducted the following joint G.S. 15A-1022 colloquy (Tpp. 4-6):

> THE COURT: Would the Salvettis stand, Paul and Debbie.
>
> (The defendants complied.)
>
> THE COURT: Have you gone over the transcript of plea with your lawyers?
>
> MRS. SALVETTI: Yes, sir.
>
> MR. SALVETTI: Yes, sir.
>
> THE COURT: Do you understand the questions on the transcripts of plea?
>
> MRS. SALVETTI: Yes, sir.
>
> MR. SALVETTI: Yes, sir.
>
> THE COURT: Do you understand the nature of the charges against you?
>
> MRS. SALVETTI: Yes, sir.
>
> MR. SALVETTI: Yes.
>
> THE COURT: Are you satisfied with your lawyers' services?
>
> MRS. SALVETTI: Yes, sir.
>
> MR. SALVETTI: Yes, sir.
>
> THE COURT: Do you understand you have the right to plead not guilty and be tried by a jury?
>
> MRS. SALVETTI: Yes, sir.
>
> MR. SALVETTI: Yes, sir.

THE COURT: Do you understand when you plead guilty you waive all your Constitutional rights to trial by jury?

MRS. SALVETTI: Yes, sir.

MR. SALVETTI: Yes, sir.

THE COURT: And you're pleading guilty, Paul, to Class E child abuse and, Debbie, to felony child abuse, contributing to the delinquency of a minor, and felony child abuse, all charges are consolidated in one Class E felony. Is that correct?

MRS. SALVETTI: Yes, sir.

MR. SALVETTI: Yes, sir.

THE COURT: Other than this plea arrangement, has anyone threatened you or promised you anything to cause you to enter this plea against your wishes?

MRS. SALVETTI: No, sir.

MR. SALVETTI: No.

THE COURT: It is with your own free will, fully understanding what you're doing?

MRS. SALVETTI: Yes.

MR. SALVETTI: Yes, sir.

THE COURT: Do you have any questions about what I've just said or anything else connected with your case?

MRS. SALVETTI: No, sir.

MR. SALVETTI: No, sir.

THE COURT: Put your left hands on the Bible, raise your right hand, and listen to Madam Clerk.

(The defendants are sworn to their answers.)

The State then presented DSS attorney Terry Boucher to provide a factual basis. (Tpp. 6-7) Boucher stated TS contacted DSS in May 2007 complaining about his parents. (Tp. 8) TS was born in Russia and adopted by defendant Paul Salvetti and his then-wife Leslie Salvetti. (Tp. 10) Subsequently, Leslie Salvetti died and defendant married Debbie Salvetti. (Tp. 10) In 2007, defendant, Debbie Salvetti, TS, and the Salvettis' three daughters all lived together in an "average everyday middle class home" in Forsyth County. (Tpp. 8-11) Boucher stated the Salvettis withdrew TS from school in January 2007 and subsequently "confined" TS inside the house in a bare bedroom with dark windows and no furniture for the next 3 months. (Tpp. 8-9) Boucher stated TS "was given very limited food" and "had to earn his way to have regular meals" during this time. (Tp. 9) Boucher stated DSS took custody of TS in May 2007 and sent TS to North Carolina Baptist Hospital, where TS gained 10 pounds in about one week on a normal adolescent diet. (Tp. 9)

The State then called on TS to read a "victim impact statement." (Tpp. 11-12) TS stated he was born in Russia in the 1990s and subsequently adopted and brought to the United States by defendant and Leslie Salvetti. (Tpp. 12-13, 20) TS stated that after defendant married Debbie Salvetti in the mid-1990s Debbie at times made him eat poisoned fish, drink his own urine, and hit him with a baseball bat and frying pan. (Tpp. 13-16) TS stated both the baseball bat and frying pan incidents were reported to DSS but "nothing happened." (Tpp. 16-17) TS stated

in January 2007 his parents took him out of school to be home schooled, locked him in his room, and took him to see a doctor named Federici. (Tp. 17) TS stated from February-May 2007 he was "hungry and cold," lost weight, "was supposed to earn [food] by working," and "had headaches and stomach aches." (Tpp. 17-18) Since DSS assumed custody, TS had "gone through a period of getting in trouble," "start[ed] to become self-destructive," and lived in many different treatment facilities. (Tpp. 19-20)

After TS finished his statement, the Trial Court stated it was going to impose active sentences of imprisonment rather than intermediate punishment on both defendant and Debbie. (Tpp. 22, 27) Both defense counsel objected and said what TS and Boucher stated was "not true." (Tpp. 21-26) The Trial Court then asked counsel "if you feel this strongly about the case, why are your clients pleading guilty?" and added "I don't understand why a competent attorney wouldn't try a case like this." (Tp. 27) Counsel for defendant responded (Tp. 30):

> Mr. Salvetti is pleading guilty against my advise. I've been advising him to go [to] trial the whole time. [Defendant is] doing it for two reasons. Number one, the children. And number two, his wife. *Apparently, [Debbie Salvetti] couldn't get a plea offer unless [Paul Salvetti] did*, so he's doing this against my advise. And this is not only an *Alford* plea, but it would be my contention he's not guilty of the crime.

Counsel for Debbie Salvetti responded Debbie was pleading "because she does not want to see any of these children have to go through" a trial. (Tp. 30)

Both defendants then called Dr. Ronald Federici, a pediatric neuropsychologist with a specialty in international adoption medicine and a private child psychology practice in McLean, Virginia, as a defense witness. (Tpp. 30-34) The Trial Court received Dr. Federici as an expert in child psychology and adoptive medicine. (Tp. 34) Dr. Federici testified TS's Winston-Salem therapist Phyllis Sutphin referred TS and the Salvettis to him in January 2007 for psychological evaluation. (Tpp. 33-38, 50, 61) In early February 2007, the Salvettis and TS traveled to Virginia and spent 3 days and $5200 undergoing extensive psychological evaluation and treatment in Dr. Federici's office. (Tpp. 33-35, 47-48, 53-54) Dr. Federici testified TS appeared to be in good health with no sign of starvation or malnourishment at the time. (Tpp. 48, 65-66) During the 3 days, Dr. Federici studied all of TS's Russian, adoption, medical, therapy, and school records, tested TS, did a complete psychological evaluation of TS, and had intensive one-on-one treatment sessions with TS and the Salvettis. (Tpp. 34-39, 48, 53, 59-60)

Dr. Federici testified TS was born in Russia in October 1993 to "Roma Gypsy" parents and quickly placed in a Russian orphanage. (Tpp. 36, 44, 58) Dr. Federici explained that children of such parents are "high risk" for genetic, physical, and developmental problems based on "inbreeding" and fetal alcohol syndrome; and that TS's "Russian records" did in fact show "first-cousin marriage" and "neurotoxic exposure to alcohol

or drugs." (Tpp. 35-36, 63-64) Shortly after TS entered the orphanage, TS was adopted by Paul and Leslie Salvetti. (Tpp. 36, 44) Dr. Federici testified TS's orphanage records show TS had developmental and personality problems associated with "out of control behavior" dating from at least as early as his placement in the orphanage. (Tpp. 35-39, 67) Dr. Federici testified TS's school records showed TS had many problems in school as he grew up in the United States, including "lots of incidence reports for aggression and disruptive behaviors, disrespect, [and] defiance." (Tpp. 39, 53, 57) By 2006, when TS was twelve years old, TS had a therapist and was taking psychiatric medication. (Tpp. 34, 39, 42, 48, 50, 61) Forsyth County Child Protective Services was also aware of TS's problems. (Tpp. 34, 50) Dr. Federici testified TS's medications and therapy were not helpful and the therapy records showed TS was defiant and aggressive. (Tpp. 38, 42, 48, 60) In January 2007, the Salvettis started to home school TS. (Tp. 49)

Dr. Federici testified testing showed TS had average intelligence but substantial psychological and developmental problems, including organic mood affective disorder, ADHD, transient reality impairment, pseudo-psychotic logic, and mild fetal alcohol related disabilities. (Tpp. 38, 41, 57, 63-64) Dr. Federici testified his evaluation showed many of TS's psychological issues involved "regulatory problems," including lack of self control, inappropriate behavior, lack of reasoning, impaired thought, and mood disorders. (Tpp. 38, 63-65) Dr.

Federici testified his clinical findings were corroborated by the testing and showed TS was manipulative, impulsive, deceitful, aggressive, sexually preoccupied, asocial, and unmanageable. (Tpp. 35-38, 40-42, 57) Dr. Federici testified TS's self-regulation issues, developmental problems, and learning disabilities manifested themselves in unrelenting "out of control" behavior inside the Salvetti home. (Tpp. 35-39, 57) Dr. Federici testified TS was "destroying the household," sneaking out at night, "trashing" the home, "busting out" windows and doors, and "unmanageable both at home and in school." (Tpp. 41-44, 51-53, 59) In February 2007, there was "a huge amount of family conflict," Debbie Salvetti in particular "was overwhelmed," and life in the Salvetti home was "an untenable situation." (Tpp. 35-37, 42)

Dr. Federici testified he "worked together" and separately with TS and the Salvettis to improve the family situation, made several recommendations, and generally tried "to re-parent" the Salvettis and "teach the parents how to repair a troubled kid." (Tpp. 39, 42, 57) One recommendation was to change TS's schooling from home-schooling to tutor-related "home-based schooling;" and Dr. Federici completed paperwork to accomplish this change. (Tpp. 39-40, 49) Another recommendation had to do with eating and family meals. (Tp. 55) Dr. Frederici testified TS was refusing to cooperate with the rest of his family and join the family structure at meal times, did not want to eat, refused to eat what the rest of the family ate, hoarded food, and gorged

on food. (Tpp. 42-43, 55-56) Dr. Federici testified he advised the Salvettis to encourage TS to eat with the family, but not to let TS disrupt the rest of the family at meal times; and that "if [TS] refuse[d] to cooperate with the family structure and chose not to eat what was available to him, that was [TS's] problem." (Tpp. 43, 55) If TS disrupted family meals, he should not eat with the family but should be given separate meals consisting of "lunch food," such as sandwiches and fruit. (Tpp. 43, 55-56)

Dr. Federici testified he discussed TS's case with Child Protective Services and TS's therapist after the February evaluation, tried to coordinate TS's care from Virginia, and stayed in constant telephone and email contact with the Salvettis after February. (Tpp. 34, 41, 44, 50-52, 56) Dr. Federici testified the Salvettis told him that TS continued to refuse to eat with the family, that they were "still supplying him with food and nutrition" like bologna sandwiches and vegetables but "weren't making it an elegant meal," that "sometimes [TS] would eat and sometimes he would refuse" to eat this separate meal, and that TS "continued to escalate in terms of his [overall] defiance" of recommended plans they had tried to institute after the evaluation. (Tpp. 43, 56) Dr. Federici testified to his knowledge the Salvettis never withheld food from TS. (Tp. 56)

Dr. Federici testified he also discussed TS's case with North Carolina Baptist Hospital staff in May 2007 when TS was hospitalized after DSS assumed custody. (Tpp. 44-45) Dr.

Federici testified TS showed no sign of dehydration, protein loss, malnutrition, or infection in the hospital. (Tpp. 45-46) Dr. Federici testified a key chemical marker of nutrition - - the prealbumin level - - was normal. (Tp. 45) Dr. Federici testified children with psychological problems like TS's "will lose weight more quickly if they're not taking in the right caloric intake because they're in a rage and they burn it off a lot quicker. It's not uncommon when you're starting to tap into a kid to have their weight go down when they're refusing [to] eat [and] in a rage." (Tp. 45) Finally, Dr. Federici testified as follows (Tp. 47):

> My opinion about the Salvettis is that of overwhelmed people stressed out with a very difficult disturbed kid . . . But I did not see any characteristics . . . of the traditional child abusers that I've evaluated. They didn't meet the profile.

The Trial Court also admitted several documentary exhibits into evidence, including a page of TS's diary in which TS wrote "I am a natural liar and lie even if the evidence is right there in front of" me; the hospital record showing the normal prealbumin level; and records showing the Salvettis investigated sending TS to a residential school for troubled youth. (Tpp. 24-25, 68-69) Some of these exhibits are attached in the Appendix to this brief. Defendant's counsel then proffered defendant's employer, who indicated defendant worked for the City of Winston-Salem and was an excellent employee. (Tpp. 75-76) Counsel then stated defendant was pleading guilty "for his kids and for his

wife . . . I think [defendant's] motives probably are maybe noble in some ways, but I think ill thought out." (Tp. 76) Counsel also stated the State had failed to make out a factual basis on starvation or any other kind of child abuse; defendant was "not guilty of what he's charged with;" and defendant had no prior criminal record. (Tp. 77)

At the end of the proceeding and without adjudicating, accepting, or making determinations about defendant's plea, the Trial Court stated (Tp. 79):

> All right. Consolidate the charges for Ms. Salvetti to one Class E felony. I'm going to sentence them to a minimum of 20, a maximum of 33 months in the [DOC].

B. The Motion to Withdraw Proceeding.

On October 8, 2008, two days after he entered the plea, defendant filed a motion to withdraw guilty plea in Forsyth County Superior Court. (Rp. 17) Debbie Salvetti did not join in this motion. (Rp. 25) In the motion, defendant alleged he entered his plea "because the State would not offer his co-defendant wife a plea if the defendant pleaded not guilty, meaning either both defendants plead guilty or both plead not guilty. For unknown reasons, co-defendant preferred her plea offer over going to trial, and defendant husband agreed to plead guilty to help his co-defendant wife receive the benefit of her plea offer." (Rp. 17) Defendant asserted it would be manifestly unjust to allow his plea to stand because the plea was an *Alford*

plea "entered against advise of counsel" and part of a coercive "package deal;" because he denied guilt and "disputed the [State's] factual assertions;" because there was insufficient factual basis for the plea; because he did not receive effective assistance of counsel; and because at the plea proceeding Judge Burke questioned the wisdom of the plea. (Rp. 17)

Defendant's motion to withdraw came on for a hearing before Judge Burke on October 10, 2008. (Rp. 22)[1] At the hearing, defendant referred to the arguments in his motion and orally moved to withdraw his plea. (Rpp. 22-25) The Trial Court recounted defendant had indicated he pled guilty because "the State said that both of them [had to] plead guilty." (Rpp. 25-26) The Trial Court then denied defendant's motion, orally ruling "I don't see any reason why [defendant] should be allowed to withdraw his plea at this stage. . . . The plea was their informed choice. The defendant answered all the questions . . . The defendant does not state a legitimate basis as to why the plea should be withdrawn." (Rpp. 26-28)

[1] The parties have stipulated there are 2 non-consecutively paginated transcripts of proceedings: an 80-page transcript of the October 6 plea proceeding; and a 12-page transcript of the October 10 motion to withdraw proceeding. (Rp. 8) The October 10 transcript is included in the printed Record on Appeal. (Rpp. 8, 20-30) In this brief, record references to the October 6 transcript are "Tp." and to the October 10 transcript are "Rp."

ARGUMENT

I. ARGUMENTS CONTAINED IN DEFENDANT'S PETITION FOR WRIT OF CERTIORARI.

I. JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO ADJUDICATE, ACCEPT, AND MAKE DETERMINATIONS ABOUT DEFENDANT'S PLEA BEFORE IT ENTERED JUDGMENT IN VIOLATION OF G.S. 15A-1022.

Certiorari should issue and judgment must be vacated because the Trial Court erroneously failed to adjudicate defendant's plea, accept defendant's plea, and make determinations about factual basis, improper pressure, and informed choice before it entered judgment in violation of G.S. 15A-1022. See assignment of error 9 in the Record on Appeal. On October 6, 2008, the Trial Court held a plea proceeding and engaged in a joint plea colloquy with both defendants. At no time before or during this October 6 proceeding did the Trial Court orally 1) adjudicate defendant's plea, 2) accept defendant's plea, 3) determine there was a factual basis for the plea, 4) determine no improper pressure was exerted on defendant, or 5) determine the plea was defendant's informed choice. At the end of the plea proceeding, the Trial Court sentenced defendant. (Tp. 79) Later on October 6, the Trial Court signed the written AOC form CR-300 transcript of plea form and entered written Judgment and Commitment. (Rpp. 10, 15-16)

G.S. 15A-1022(b) provides "the judge must determine . . . whether any improper pressure was exterted [on defendant] in violation of G.S. 15A-1021(b). The judge may not accept a plea of . . . no contest from a defendant without first determining

that the plea is a product of informed choice." G.S. 15A-1022(c) provides "the judge may not accept a plea of . . . no contest without first determining that there is a factual basis for the plea." "[A] finding by a court that there is a factual basis for the plea . . . and the entry of judgment thereon constitute an adjudication of guilt." *State v. Outlaw*, 326 N.C. 467, 469, 390 S.E.2d 336, 337 (1990).

In this case, the record plainly shows the Trial Court failed before it entered judgment to adjudicate, accept, and make required determinations about defendant's plea. First, the Trial Court did not make any "factual basis" determination during the October 6 plea proceeding in violation of 1022(c). Second, the Trial Court did not make "improper pressure" and "informed choice" determinations during the plea proceeding in violation of 1022(b). Third, the Trial Court did not even purport to adjudicate or accept defendant's plea during the plea proceeding. Significantly, the Trial Court did not make any determinations, conclusions, or adjudication, or even say "okay," after the joint plea colloquy. (Tp. 6) Indeed, the Trial Court could not have adjudicated the plea under *Outlaw* because it never made the condition-precedent "factual basis" determination. Fourth, the Trial Court's post-proceeding signature on the written transcript of plea form does not constitute lawful adjudication, acceptance, and determination under G.S. 15A-1022 because our Supreme Court has repeatedly held a written transcript of plea is inadequate to show compliance with G.S. 15A-1022. *State v. Agnew*, 361 N.C.

333, 337, 643 S.E.2d 581, 584 (2007); *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421 (1980). Fifth, the Trial Court's statements at the October 10 motion to withdraw hearing held four days after the October 6 plea proceeding also do not constitute lawful adjudication, acceptance, or determination because G.S. 15A-1022 determinations and adjudications must be made prior to acceptance of a plea. *State v. Agnew*, 361 N.C. at 337, 643 S.E.2d at 584; *State v. Barnett*, 113 N.C. App. 69, 77, 437 S.E.2d 711, 716 (1993). The Trial Court's failure to perform its most basic plea-taking duties here - - including adjudication of defendant's plea - - was more than mere technical non-compliance with G.S. 15A-1022 and substantive prejudicial error. *State v. Glover*, 156 N.C. App. 139, 146-147, 575 S.E.2d 835, 839 (2003).

II. JUDGMENT MUST BE VACATED BECAUSE THERE WAS INSUFFICIENT FACTUAL BASIS TO SUPPORT DEFENDANT'S *ALFORD* PLEA.

Certiorari should issue and judgment must be vacated because there was insufficient factual basis to support defendant's *Alford* plea in violation of G.S. 15A-1022(c) and *State v. Agnew*, 361 N.C. 333, 643 S.E.2d 581 (2007). See assignment of error 14 in the Record on Appeal. In this case, the indictment charged felony Class E child abuse by "starvation" of TS. (Rp. 6) Although defendant pled to that offense, defense counsel repeatedly contended throughout the plea proceeding there was insufficient factual basis for starvation or any other kind of child abuse and defendant was "not guilty of what he's charged with." (Tpp. 21, 30, 76-77) The Trial Court never made a

determination there was a factual basis for the plea but nevertheless entered Judgment and Commitment.

G.S. 15A-1022(c) provides "[t]he judge may not accept a plea of . . . no contest without first determining that there is a factual basis for the plea." It is well settled that "guilty pleas must be substantiated in fact as prescribed by the statute . . . the statute 'contemplates that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty.'" *State v. Agnew*, 361 N.C. at 335-336, 643 S.E.2d at 583, quoting in part *State v. Sinclair*, 301 N.C 193, 199, 270 S.E.2d 418, 421 (1980). Accordingly, a written transcript of plea itself and/or a stipulation by defense counsel to the existence of a factual basis are insufficient to establish a factual basis. *State v. Agnew*, 361 N.C. at 337, 643 S.E.2d at 584. "If the evidence contained in the record does not support defendant's guilty plea, then the judgment based thereon must be vacated." *State v. Brooks*, 105 N.C. App. 413, 417, 413 S.E.2d 312, 314 (1992).

In the instant case, there was insufficient factual basis defendant starved TS to support defendant's plea. Starvation has been recognized to be the willful refusal to feed and nourish another. See *State v. Fritsch*, 132 N.C. App. 262, 269-270, 511 S.E.2d 325, 330-331 (1999), reversed on other grounds, 351 N.C. 373, 526 S.E.2d 451 (2000). Here, there was no substantive material or information in the record tending to show defendant

willfully refused to feed and nourish TS, and all the medical evidence instead affirmatively showed TS was *not* suffering from starvation. First, despite the array of medical professionals at DSS's and its disposal, the State did not produce a scintilla of medical, expert, or even lay opinion evidence TS was starved. Second, DSS attorney Boucher did not ever assert TS was starved and her statement did not contain any information showing starvation. Indeed, Boucher's statement TS was "given limited food" and "had to earn regular meals" showed TS did in fact receive food and nourishment from his parents. Boucher was not a medical doctor and her statement TS gained 10 pounds during his May 2007 week of hospitalization does not show starvation, especially in light of the evidence TS was refusing to eat, not being starved, at home. Third, TS's statement he was "hungry," lost weight, had stomach aches, and was supposed to earn food by working is no factual basis for starvation. TS admitted he was given food to eat at home and never claimed defendant willfully refused to feed him. Fourth, Dr. Federici testified TS was not malnourished in February 2007, the Salvettis always said they were "supplying [TS] with food and nutritution," to his knowledge the Salvettis "never withheld any food," and TS "would refuse food because he may not have liked what he was given . . . [and] didn't want to eat." (Tpp. 43, 56, 66) Dr. Federici testified "they gave him sandwiches. They gave him fruit." (Tp. 56) Fifth, May 2007 North Carolina Baptist Hospital testing showed a key chemical marker for malnutrition - - TS's prealbumin level -

- was normal. (Tp. 45) Sixth, hospital staff told Dr. Federici in May 2007 there was no medical sign of starvation, malnutrition, or dehydration. (Tpp. 44-46) Seventh, the prosecutor never asserted and defendant never stipulated there was any willful refusal to feed and nourish. Indeed, defense counsel repeatedly insisted there was no evidence of starvation. In sum, nothing in the record tended to show starvation or any other kind of child abuse on the part of defendant, and there was thus insufficient factual basis for defendant's plea. Even if the Trial Court did make a "factual basis" determination, it was erroneous in law. Judgment must be vacated. See *State v. Weathers*, 339 N.C. 441, 453, 451 S.E.2d 266, 273 (1994).

III. JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO INFORM AND ADVISE DEFENDANT IN VIOLATION OF G.S. 15A-1022 BEFORE IT ENTERED JUDGMENT.

Certiorari should issue and judgment must be vacated because the Trial Court erroneously failed to inform and advise defendant in violation of G.S. 15A-1022 before it entered judgment. See assignment of error 11 in the Record on Appeal. During the plea proceeding, the Trial Court engaged in a joint plea colloquy with both defendants that is reprinted in full in the Statement of Facts. (Br. 5-6, Tpp. 4-6) The Trial Court did not during any part of the proceeding 1) inform defendant of his right to remain silent pursuant to 1022(a)(1); 2) inform defendant of maximum and minimum sentences pursuant to 1022(a)(6); or 3) advise defendant his *Alford* plea would be treated as a guilty plea pursuant to 1022(d).

G.S. 15A-1022(a) provides "a superior court judge may not accept a plea of guilty . . . from the defendant without first addressing him personally and (1) informing him that he has a right to remain silent and that any statement he makes may be used against him, . . . [and] (6) informing him of the maximum possible sentence on the charge . . . and of the mandatory minimum sentence." G.S. 15A-1022(d) provides "the judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt." Non-compliance with G.S. 15A-1022 "is error." *State v. Williams*, 65 N.C. App. 472, 474, 310 S.E.2d 83, 84 (1983). Such error is prejudicial if it "either affected defendant's decision to plead or undermined the plea's validity." *State v. Hendricks*, 138 N.C. App. 668, 670, 531 S.E.2d 896, 898 (2000).

In this case, the record plainly shows and the State must concede the Trial Court failed before it entered judgment 1) to inform defendant of his right to remain silent, 2) to inform defendant of the maximum possible sentence, and 3) to advise defendant if he pled no contest he would be treated as guilty whether or not he admitted guilt in violation of G.S. 15A-1022. This failure was error. The error was prejudicial because it affected defendant's decision to plead and undermined the plea's validity. First, the failure to inform about maximum sentencing consequences rendered the plea unknowing. The record clearly shows defendant did not understand or appreciate the seriousness of pleading to a Class E felony. (Tpp. 30, 76-77) The plea was

strongly against the advise of counsel. (Tpp. 30, 76) If the Trial Court had personally told defendant about the maximum sentence, defendant would have been startled into understanding the seriousness of his venture. The failure to orally inform about maximum punishment was particularly prejudicial because the statement of "maximum punishment" on the written transcript of plea form was incorrect - - it stated 89 months instead of 98 months. (Rp. 11) See G.S. 15A-1340.17(e). This incorrect understatement of punishment further encouraged defendant to underappreciate the seriousness of his plea. Second, the failure to advise about guilty treatment despite non-admission of guilt was very prejudicial. Defendant's *Alford* plea did not admit guilt; defendant's counsel repeatedly asserted defendant was not in fact guilty; and the Trial Court itself stated there was evidence from which a jury could find the State's case was "incredulous." (Tpp. 21, 27, 30, 76) Defendant knew he was eligible for intermediate punishment and believed the Trial Court would impose lesser punishment because he had not admitted guilt. (Tpp. 77-79) During the plea proceeding, the Trial Court did not at any time mention, much less explain to defendant, any aspect of the nature and attributes of an *Alford* plea. In these circumstances, the failure to inform defendant "he will be treated as guilty" regardless of his *Alford* plea affected defendant's decision to plead. If the Trial Court had warned defendant would be "treated as guilty," defendant would have changed his plea to not guilty. Accordingly, the Trial Court's

error was prejudicial and judgment must be vacated. *State v. Artis*, 174 N.C. App. 668, 677, 622 S.E.2d 204, 210 (2005), p.d.r. den., 360 N.C. 365, 630 S.E.2d 188. See *In Re T.E.F.*, 359 N.C. 570, 614 S.E.2d 296 (2005).

IV. JUDGMENT MUST BE VACATED BECAUSE THE PROSECUTOR BROUGHT IMPROPER PRESSURE UPON DEFENDANT TO INDUCE HIS PLEA IN VIOLATON OF G.S. 15A-1021(b) AND THE PLEA WAS NOT VOLUNTARY IN VIOLATION OF THE FOURTEENTH AMENDMENT.

Certiorari should issue and judgment must be vacated because the prosecutor brought improper pressure upon defendant and induced an involuntary plea - - namely, the prosecutor offered a "package deal" or "wired" plea which was contingent upon *both* defendant and his co-defendant wife Debbie Salvetti entering pleas, and coerced defendant to plead by offering a plea and lenient treatment to Debbie *but only on the condition* that defendant also plead as part of the package. This conduct violated G.S. 15A-1021(b) and defendant's constitutional rights. See assignment of error 10 in the Record on Appeal. The record shows that Debbie was by far the more culpable of the two defendants and wanted to plead. (Tpp. 30, 37, 40, 70) However, defendant did not want to plead. (Tpp. 30, 76) The prosecutor took unfair advantage of this situation and defendant's natural desire to want to help his wife by insisting on an unprecedented all-or-nothing "package deal." Defendant indicated at the plea proceeding he was pleading because "[Debbie] couldn't get a plea offer unless he" also pled. (Tpp. 30, 76) Counsel stated this motive of "pleading for his wife" was "noble . . . but ill

thought out." (Tp. 76) The Trial Court observed at the motion to withdraw hearing defendant pled "because that was the plea offered, that the State said that both of them [had to] plead guilty." (Rpp. 25-26) Thus, the record plainly shows and the Trial Court essentially found the State required a "package deal" plea arrangement and defendant pled to obtain favorable treatment for his wife as part of the package.

G.S. 15A-1021(b) provides that "[n]o person representing the State . . . may bring improper pressure upon a defendant to induce a plea of . . . no contest." The United States Supreme Court has indicated a guilty plea may be struck as involuntary under the Fourteenth Amendment if it is based on conditions "that are by their nature improper as having no proper relationship to the prosecutor's business." *Brady v. United States*, 397 U.S. 742, 755, 25 L.Ed.2d 747, 760 (1970). That Court has also indicated "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused, which might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider," could render a plea constitutionally involuntary. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8, 54 L.Ed.2d 604, 611 (1978) (emphasis in original). Although our North Carolina courts have not had occasion to consider "package deal" plea arrangements like the one here, courts in many other jurisdictions have long recognized there are "certain risks inherent in package pleas which could affect the voluntariness of

the plea." *United States v. Mescual-Cruz*, 387 F.3d 1, 3 (1st Cir. 2004). One voluntariness risk is "there may be a family relationship between two defendants which leads one defendant to involuntarily sacrifice his own best interests for those of a family member in a belief that the package deal will benefit the other." *Id*. at 7. Accordingly, all courts agree package deal pleas "are fraught with danger" and "deserve close scrutiny from the court" for voluntariness. 5 W. LaFave, Criminal Procedure §21.2(b) (3rd ed. 2007); *Harman v. Mohn*, 683 F.2d 834, 838 (4th Cir. 1982); *Howell v. State*, 185 S.W.2d 319, 333-336 (Tenn. 2005); *In Re Ibarra*, 666 P.2d 980, 986 (Cal. 1983); *State v. Danh*, 516 N.W.2d 539, 542 (Minn. 1994); *State ex rel. White v. Gray*, 203 N.W.2d 638, 643-644 (Wis. 1973).

In the instant case, the package deal plea arrangement constituted "improper pressure" under G.S. 15A-1021 and was constitutionally involuntary. First, this Court should adopt a per se rule that package deal pleas like this plea are improper pressure and involuntary as a matter of law. "Leniency should not be offered to a defendant's loved one as an inducement for his guilty plea. This inducement is not necessary for the prosecution to achieve its legitimate aims and it encourages the defendant to waive his right to trial on the basis of a factor that is extraneous to his actual guilt and to the strength of the State's case." Green, *"Package" Plea Bargaining and the Prosecutor's Duty of Good Faith*, 25 Crim. Law Bull. 507, 549 (1989). Second, this Court should hold on the facts of this

particular case that the plea arrangement here was coercive improper pressure. Thus, the record shows Debbie wanted to plead and could not plead except as part of the package; the package deal was a very substantial factor in defendant's decision to abandon his not-guilty plea and plead guilty; and defendant pled so his wife could plead. In short, defendant effectively and "nobly" sacrificed himself for his wife. This package deal arrangement brought improper psychological pressure on defendant, unfairly skewed defendant's assessment of risks, and caused an innocent man to plead guilty. While plea bargaining in general should be encouraged, the particular type of plea bargaining at issue here brings improper pressure and should not be happening in the Superior Courts of our State! Judgment must be vacated. See *People v. Sandoval*, 140 Cal. App. 4th 111, 124-127 (2006); *State v. Horning*, 761 P.2d 728, 728-732 (Ariz. App. 1988).

V. JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO MAKE SUFFICIENT INQUIRY INTO THE VOLUNTARY AND "PACKAGE DEAL" NATURE OF THE PLEA.

Certiorari should issue and judgment must be vacated because the Trial Court erroneously failed to make a special voluntariness inquiry into the "package deal" nature of defendant's plea. See assignment of error 12 in the Record on Appeal. In this case, the prosecutor did not inform the Trial Court about the package deal nature of the plea. During the G.S. 15A-1022 plea colloquy, the Trial Court asked only two questions that even touched on voluntariness - - namely 1) "other than this plea arrangement, has anyone threatened you or promised you

anything to cause you to enter this plea against your wishes?" and 2) "is it with your own free will fully understanding what you're doing?" (Tp. 6) During the plea proceeding, defense counsel informed the Trial Court about the package deal nature of the plea. (Tp. 30) However, the Trial Court did not at that or any other point make any further inquiry into the voluntary nature of defendant's plea.

All courts agree that when a package deal plea arrangement is presented in trial court 1) the prosecutor must disclose that fact and 2) the trial judge must then take "special care" to make a "particularly searching" inquiry into voluntariness. See, e.g., *United States v. Mescual-Cruz*, 387 F.3d 1, 8-9 (1st Cir. 2004). Many courts "go one step further" and require close inquiry into the package deal nature of the plea, including its "nature and degree of coercion and psychological pressure" and "whether the promise of leniency to another was a significant concern to the defendant in his choice to plead." See *State v. Danh*, 516 N.W.2d 539, 542 (Minn. 1994); *State v. Solano*, 724 P.2d 17, 21 (Ariz. 1986); *In Re Ibarra*, 666 P.2d 980, 986 (Cal. 1983).

In the instant case, the Trial Court erroneously failed to make sufficient inquiry into the voluntary and package deal nature of defendant's plea. First, the prosecutor failed to disclose the package deal nature of the plea. Second, the Trial Court totally failed to inquire into the package deal nature of the plea. The Trial Court never asked defendant about the degree

of coercion the package plea offer induced, about the nature of the psychological pressure he faced, or about how big a factor the package deal was in his decision to plead. Third, the Trial Court's two questions during the colloquy were insufficient to determine voluntariness. The first question was insufficient because it was addressed to threats or promises "*other than [those in] this plea arrangement;*" and the second question was insufficient because defendant did fully understand what he was doing. These two questions could not have ferreted out the involuntary coercion created by the package deal nature of the plea. Accordingly, the Trial Court's voluntariness inquiry was insufficient and judgment must be vacated. See *United States v. Martinez-Molina*, 64 F.3d 719, 734 (1st Cir. 1995).

II. DEFENDANT'S ARGUMENT ON DIRECT APPEAL.

VI. DEFENDANT'S PLEA AND JUDGMENT MUST BE VACATED BECAUSE THE TRIAL COURT'S RULING DENYING HIS MOTION TO WITHDRAW PLEA WAS ERRONEOUS IN LAW.

Assignment of Error Nos. 1, 5, Rp. 34

Defendant's *Alford* plea must be withdrawn and Judgment must be vacated because the Trial Court's ruling denying defendant's post-sentencing motion to withdraw guilty plea was error; here, all the evidence showed withdrawal of the plea would avoid "manifest injustice" as a matter of law under *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990). The appellate court "makes an independent review of the record" on review of a ruling denying a motion to withdraw plea. *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993). The record shows defendant

entered the *Alford* plea on October 6, 2008 and filed a written motion to withdraw the plea two days later on October 8. (Rp. 17) The Trial Court denied defendant's motion to withdraw on October 10, ruling "the defendant does not state a legitimate basis as to why the plea should be withdrawn." (Rp. 27)

A post-sentencing motion to withdraw plea should be allowed if withdrawing the plea will "avoid manifest injustice." *State v. Handy*, 326 N.C. at 536, 391 S.E.2d at 161. "Factors to be considered in determining the existence of manifest injustice include whether: defendant was represented by competent counsel; defendant is asserting innocence; and defendant's plea was made knowingly and voluntarily." *State v. Russell*, 153 N.C. App. 508, 509, 570 S.E.2d 245, 509 (2002).

In the instant case, the record shows the Trial Court's ruling denying defendant's motion to withdraw plea was error and withdrawal of the plea would "avoid manifest injustice." First, the plea should be withdrawn for all the reasons stated above and in defendant's petition for writ of certiorari: the Trial Court failed at the plea proceeding to adjudicate, accept, make statutorily-required determinations about, and inform and advise defendant about the plea; and there was an insufficient factual basis to support the plea. Defendant hereby incorporates those arguments in this Argument 6. Second, defendant's consistent assertion of innocence shows withdrawal would avoid manifest injustice. Thus, defendant has never admitted his guilt, pled

pursuant to *Alford*, and repeatedly asserted at both the plea and motion to withdraw proceedings he was legally and factually innocent. Defendant insisted even as he pled that TS's factual allegations were "not true" and he was "not guilty of what he was charged with." (Tp. 77) Third, the weakness of the State's proffer of evidence shows the Trial Court's ruling was error. As shown throughout this brief, the State's showing was insufficient to establish the minimum factual basis for the plea. The medical evidence affirmatively showed TS was *not* malnourished, and TS himself wrote in his journal "I am a natural liar and lie even if the evidence is right there in front of" me.

Fourth, the short length of time between entry of the plea and desire to change it - - 48 hours - - shows withdrawal would avoid manifest injustice. "The standard for judging the movant's reasons for delay remains low where the motion comes only a day or so after the plea was entered." *State v. Handy*, 326 N.C. at 539, 391 S.E.2d at 163. "A swift change of heart is itself strong indication that the plea was entered in haste and confusion: furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests." *Id*. Here, it is undisputed defendant had a swift change of heart and promptly moved to withdraw 2 days after the plea was entered. See *State v. Carriker*, 180 N.C. App. 470, 472, 637 S.E.2d 557, 559 (2006). Fifth, the Trial Court's own statements about the plea show it was a bad idea and withdrawal would avoid manifest

injustice. After hearing evidence at the plea proceeding, the Trial Court told defense counsel (Tp. 27):

> It seems like you have a case in which you could beat the State, or where at least the jurors are going to have some questions about it because [defendant's evidence] makes it seem like [TS] is incredulous. . . . Why are your clients pleading guilty? . . . I don't understand why a competent attorney wouldn't try a case like this.

Sixth, defendant's good employment history, job with the city of Winston-Salem, and lack of any prior criminal record shows the Trial Court's ruling was error. Defendant is a useful citizen who works for a living and contributes to society. Seventh, defendant's unfamiliarity with the criminal justice system is reason to withdraw the plea: the record plainly shows defendant simply did not understand the gravity of pleading to a Class E felony.

Eighth, defense counsel's incompetence at the plea proceeding shows the Trial Court's ruling was error. Thus, as counsel himself later recognized (Rpp. 23-25), counsel should have insisted during the plea proceeding that the plea be withdrawn before it was ever accepted when defendant still had the unilateral right to withdraw. Counsel's failure to withdraw the plea after the Trial Court had questioned its wisdom and said it was going to impose an active sentence constituted deficient and prejudicial professional performance. Ninth, the coercive "package deal" nature of the plea arrangement shows withdrawal would avoid manifest injustice. As shown in defendant's

petition, his plea was induced by improper pressure, coerced, and involuntary. Defendant hereby incorporates that argument in this Argument 6. The *Handy* Court's approving citation to the Michigan decision in *People v. Hollman*, 162 N.W.2d 817 (1968), shows defendant's involuntary "package deal" plea should be withdrawn. 326 N.C. at 542, 391 S.E.2d at 164. In *Hollman*, the defendant and his wife were both charged with conspiracy; pursuant to a "package deal" plea arrangement the defendant pled guilty and the charge against his wife was dismissed; the defendant subsequently moved to withdraw his plea on the ground he "pleaded guilty at the behest of his wife;" and the trial judge denied the motion to withdraw. On appeal, the Michigan Court held the record "cast grave suspicion upon the . . . voluntariness of the guilty plea," reversed, and vacated the plea. 162 N.W.2d at 818-819. The similarity of the facts in this case to *Hollman* shows the Trial Court's ruling here was error. Even if this Court believes the "package deal" nature of the plea is not sufficient to render the plea involuntary as a matter of constitutional law, it is still sufficient grounds to allow withdrawal of the plea under *Handy*.

Tenth, the Trial Court's ruling was error because the record as a whole clearly shows defendant is not a child abuser. Instead, defendant is an ordinary middle-class parent who was trying to provide for his family, live a useful life, and do his best in a very difficult situation. All the evidence showed TS was a troubled adopted child with genetic and fetal alcohol issues beyond his, defendant's, or anyone's control. Defendant

had recognized these issues and as early as age 12 had arranged for TS to receive therapy from a local child psychologist. However, school and therapy records showed therapy and psychiatric mediations did not help TS. In February 2007, defendant spent considerable thousands of dollars and a significant amount of his own time and energy obtaining truly expert help for TS. Defendant then attempted to follow the expert's recommendations in good faith without any intent to injure, harm, or abuse TS. Dr. Federici testified defendant "didn't meet the profile [or have] any characteristics" of a child abuser. At worst, defendant was an "overwhelmed [parent] stressed out with a very difficult disturbed kid." The record shows defendant did not ever maliciously, intentionally, or knowingly try to harm his child. In these circumstances, it is defendant's conviction of felony Class E child abuse and 20 months minimum active imprisonment that is "manifestly injust." In sum, the Trial Court's ruling denying defendant's motion to withdraw plea was erroneous in law and defendant's plea and judgment must be vacated.

CONCLUSION

For all the foregoing reasons, defendant respectfully contends the Trial Court's ruling denying his motion to withdraw plea was error and his plea and judgment must be vacated.

Respectfully submitted this the 12th day of May, 2009.

_____
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Defendant-Appellant's Brief has been filed by mail pursuant to Rule 26 by sending it first-class mail, postage prepaid to the Clerk of the North Carolina Court of Appeals, Post Office Box 2779, Raleigh, North Carolina 27602, by placing it in a depository for that purpose.

I further hereby certify that a copy of the above and foregoing Defendant-Appellant's Brief has been duly served upon Mr. R. Kirk Randleman, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by first-class mail, postage prepaid.

This the 12th day of May, 2009.

_____
Daniel R. Pollitt
Assistant Appellate Defender