No. COA99-1518 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford
	)	
THEODORE MEAD KIMBLE	)	

****

DEFENDANT-APPELLANT'S BRIEF

****

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

No. COA99-1518 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

STATE OF NORTH CAROLINA)
)
v.) From Guilford
)
THEODORE MEAD KIMBLE)

****

DEFENDANT-APPELLANT'S BRIEF

****

QUESTIONS PRESENTED

I. WHETHER DEFENDANT'S EIGHT *ALFORD* PLEAS IN THE SOLICITATION CASES SHOULD BE VACATED BECAUSE THERE WAS AN INSUFFICIENT FACTUAL BASIS TO SUPPORT THE PLEAS?

II. WHETHER SEVEN OF DEFENDANT'S EIGHT SOLICITATION CONVICTIONS SHOULD BE VACATED BECAUSE THE PROSECUTOR'S NARRATIVE SHOWED ONLY ONE SOLICITATION AS A MATTER OF LAW?

III. WHETHER DEFENDANT IS ENTITLED TO NEW SENTENCING HEARINGS IN THE MURDER AND ARSON CASES BECAUSE THE TRIAL COURT ERRONEOUSLY FOUND NON-STATUTORY AGGRAVATING FACTORS THAT WERE NOT SUPPORTED BY ANY COMPETENT RECORD EVIDENCE?

IV. WHETHER DEFENDANT IS ENTITLED TO NEW SENTENCING HEARINGS IN SIX OF THE SOLICITATION CASES BECAUSE THE TRIAL COURT ERRONEOUSLY FOUND STATUTORY AGGRAVATING FACTORS THAT WERE NOT SUPPORTED BY ANY COMPETENT RECORD EVIDENCE AND ERRONEOUSLY USED THE SAME ITEM OF EVIDENCE TO PROVE TWO AGGRAVATING FACTORS?

STATEMENT OF THE CASE

On April 7, 1997, the Guilford County Grand Jury indicted defendant-appellant Theodore Kimble for the 1995 first-degree murder of his wife Patricia Kimble (97 CrS 39581). (Rp. 4) On

November 3, 1997 and July 6, 1998, the same Grand Jury further indicted defendant for conspiracy to commit first-degree murder (97 CrS 23656) and first-degree arson (98 CrS 23486). (Rpp. 5-6) On January 28, 1999, the Guilford County prosecutor issued eight Bills of Information charging defendant with eight counts of solicitation to commit first-degree murder in 1998 (99 CrS 23241-48). (Rpp. 8-15) On January 28, 1999, defendant entered guilty pleas to second-degree murder, conspiracy to commit first-degree murder, and first-degree arson; and entered *Alford* pleas to eight counts of solicitation to commit first-degree murder. (Rpp. 17-20) In February, 1999, defendant filed a *pro se* motion to withdraw his guilty and *Alford* pleas. (Rpp. 23-26) This motion came on for a hearing at the March 1, 1999 Criminal Session of Guilford County Superior Court before Superior Court Judge Peter M. McHugh. (Rp. 1) On March 4, 1999, Judge McHugh denied defendant's motion and held a sentencing hearing in all cases. (Rp. 1)

On March 5, 1999, Judge McHugh entered Judgment and Commitment in all cases; found defendant to have a prior record level of II; found no aggravating or mitigating factors in the conspiracy and two solicitation cases; and found aggravating and mitigating factors and that the aggravating factors outweighed the mitigating factors in the murder, arson, and six solicitation cases. (Rpp. 37-75) Accordingly, Judge McHugh sentenced defendant to presumptive minimum terms of 163 months imprisonment in the conspiracy case, and 96 months in each of two of the

solicitation cases; sentenced defendant to aggravated minimum terms of 204 months imprisonment in the murder case, 82 months in the arson case, and 108 months in each of six of the solicitation cases; and ordered that all sentences run consecutively for a total minimum term of 1,289 months (107.4 years imprisonment). (Rpp. 54-75) Defendant appealed to this Court. (Rpp. 78-81, 84-85)

STATEMENT OF THE FACTS

A. The Prosecutor's Factual Narrative at the Plea Hearing for the 1995 and 1998 Offenses.

At the plea hearing, the prosecutor stated as a factual basis for defendant's guilty pleas to murder, conspiracy, and arson in 1995 that defendant and his brother Ronnie Kimble agreed to kill defendant's wife Patricia for insurance money; and that at about 4:00 p.m. on October 9, 1995, Ronnie entered defendant's house, shot Patricia in the head, and set the house on fire. (Plea Tpp. 14-15)[1]

With respect to the 1998 solicitation charges to which defendant entered *Alford* pleas, the prosecutor continued his narrative as follows (Plea Tpp. 15-16):

> Since [mid-1997], the defendant has pled guilty [to breaking and entering] and he was

---

[1] "Tp. __" references are to the volume of proceedings numbered 1 through 228 and dated March 4-5, 1999. "Plea Tp. __" references are to the volume of plea proceedings numbered 1 through 20 and dated January 28, 1999. (Rp. 16)

> incarcerated in the State Department of Corrections. . . . [On] about November 4, 1998, he communicated to one William Stewart his desire . . . to have witnesses killed. Believing that Mr. Stewart was about to get out of prison, he delivered to him a handwritten list of eight witnesses and spouses of witnesses that he wanted killed, and instructions that were somewhat in code but . . . very easy to determine. Mr. Stewart, upon receiving these documents, notified the D.A.'s office. We interviewed him. He turned them over to us. Subsequently, the defendant's fingerprints were found on those documents, along with the S.B.I. opinion that shows that it was his handwriting. The list of witnesses was on a diagram of . . . this courtroom and the courtroom below it, and also, the holding cells, and it also listed the . . . witnesses that he wanted to kill, and directions to their homes. Your Honor, that would be the basis of the eight counts of solicitation to commit murder.

B. The State's Evidence at Defendant's Sentencing Hearing.

1. The 1995 Murder, Conspiracy, and Arson Offenses.

At the beginning of the sentencing hearing, the prosecutor stated "I'd like to summarize the evidence" and immediately began reciting the evidence from co-defendant Ronnie Kimble's earlier trial; defendant said nothing. (Tp. 40) Thus, the State's evidence about the 1995 offenses to which defendant pled guilty was comprised solely of the prosecutor's following unsworn statements: that defendant and Patricia Kimble had a private marriage ceremony in December 1993 and a public ceremony in May 1994; that defendant named himself as the beneficiary of Patricia's $50,000 life insurance policy on June 28, 1994,

increased the coverage on that policy to $100,000 on November 5, 1994, and signed Patricia's signature on a $200,000 policy application on September 14, 1995; that Patricia found out about the forged application and a blood test scheduled for October 5, became "very upset," and told several friends she was "concerned about her marriage" and "afraid for her life;" and that defendant and Patricia subsequently resolved the matter, decided not to take out the policy, and cancelled the blood-drawing appointment. (Tpp. 40-43)

The prosecutor's unsworn summary of the evidence continued as follows: that Patricia arrived home at 3:45 p.m. on October 9, 1995 to cut the lawn and went inside; that co-defendant Ronnie Kimble was inside the house and shot Patricia once in the head with defendant's .45-caliber pistol; that someone ransacked the back bedrooms of the house "to make it look like a burglar had killed her," poured gasoline around her body, and ignited it at about 4:00 p.m.; that defendant was at work at Lyles Building Supply all day on October 9, left at 5:30 p.m., met with his mother, and arrived at his second job at Precision Fabrics at 6:00 p.m.; that defendant called Patricia's brother (Rubin) at 7:00 p.m. and asked him to check on Patricia; that Rubin drove to defendant's home and found it on fire; and that Patricia's body was later recovered from inside the house. (Tpp. 43-51)

The prosecutor further stated that defendant's home-owner insurance policy ultimately paid him $52,606 for lost personal

property and paid $53,417 to Patricia's estate to be held in escrow; that defendant unsuccessfully attempted to collect on the pending $200,000 insurance policy; that defendant subsequently admitted to Rob Nichols he was responsible for Patricia's death and told Patrick Pardee his brother Ronnie killed Patricia with his gun for the insurance money; and that in January 1997, Ronnie confessed his involvement in Patricia's murder to Reverend Mitchell Whidden. (Tpp. 51-55)

2. The 1998 Solicitation Offenses.

In late 1998, defendant was incarcerated at Southern Correctional Institution for unrelated larceny, and breaking and entering charges. (Rp. 22) SBI Agent James Bowman testified that he interviewed Department of Correction's inmate William Stewart on November 23 and December 17, 1998 and Stewart told him the following: that he was serving 10-12 months for auto larceny, was incarcerated with defendant at both Piedmont and Southern Correctional Institutions, and told defendant he would be released soon; that defendant spoke about plans to escape from both Southern Correctional and Guilford County Courthouse, and offered him $100,000 to "eliminat[e] [8] witnesses in [defendant's] pending murder trial" in 5 different "missions;" and that defendant suggested different methods for the killings. (Tpp. 55-59, 62, 70) Agent Bowman testified that Stewart said he did not intend to help defendant, initially went along with these conversations because defendant gave him small sums of money totaling about $200, and reported this information to the

superintendent when he realized defendant was "serious;" and that Stewart was released from prison several days early because of his information. (Tpp. 59, 69)

Agent Bowman testified that Stewart gave him a letter from defendant containing the name, address, and phone number of defendant's girlfriend, and a hand-drawn map of Guilford County Courthouse; and that one latent print on the letter matched defendant's known prints and the letter and map were in defendant's hand-writing. (Tpp. 57-66, 70-73) Bowman testified that he subsequently seized a list of the eight witnesses, hand-drawn directions "to the location of one of the intended targets" in Greensboro, and notes Stewart handwrote during a conversation with defendant, including amounts of money and suggested means of killings. (Tpp. 63-65)

C. Defendant's Evidence at the Sentencing Hearing.

1. The 1995 Murder, Conspiracy, and Arson Offenses.

Twenty-nine year old defendant testified that he met Patricia at a housewarming party and later "grew together" with her through church; that they became friends, dated, fell in love, and got married; and that they had a "wonderful relationship," he "loved [his] wife," and is "not guilty of this." (Tpp. 140-42) Defendant further testified that he applied for the $200,000 life insurance policy but understood that no policy would be issued until Patricia underwent a medical

examination; that he forgot to have Patricia sign the application, signed Patricia's name for her, and "never denied" having signed the application; that he had no intention of hiding the policy from Patricia and knew the insurance company had to verify medical matters with her before issuing the policy, but failed to talk it over with her before the agent called; that Patricia initially overreacted and was scared, but understood and agreed when they discussed their financial situation; that they made an appointment to have Patricia's blood drawn for the week before her death, but he cancelled it due to his work schedule; and that he never made a claim on the policy after Patricia's death, but only asked for reimbursement of the premium he paid. (Tpp. 142-47) Defendant testified that he never made any inculpatory statements or confessed anything to Nichols and Pardee; and that Nichols and Pardee both admitted making up their incriminating statements because of pressure from the prosecutor. (Tpp. 149-50, 165, 170-71)

Defendant testified that he went to work at 8:00 a.m. on October 9 and stayed all day; that Patricia brought him lunch at 1:00 p.m. and said she was going home to cut the grass; that he "feared for her safety" and "told her to be careful" because their lawn was steep and their lawnmower flipped easily; that he called Patricia at work at 3:30 and she was getting ready to go home; that co-defendant Ronnie Kimble came to his work at 3:45 and stayed until 4:30; that he left work at about 5:30, stopped to see his mom, and arrived at his second job at 6:00; that

Patricia was supposed to page him when she was finished cutting the grass and he became worried when she did not do so; that he unsuccessfully tried to call and page her; and that he left work when he was notified that his house was on fire. (Tpp. 152-59) Defendant testified that he arrived home and was told there was a body in the house; that he was "shaking, hysterical, upset, crying," and "scared . . . to death" thinking about Patricia; that it was "horrible . . . like a nightmare;" and that he subsequently learned the body in the house was Patricia's. (Tpp. 159-60) Defendant further testified that they had been robbed twice and he kept the .45 pistol that was used to kill Patricia in the house for protection. (Tpp. 163-64)

2. The 1998 Solicitation Offenses.

Defendant testified that he worked at Lyles Building Supply since ninth grade and had a "[f]ather and son type relationship" with Gary Lyles (one of the victims of the alleged solicitation), "greatly admired" him, and is "deeply offended at the accusations that [he] would ever harm" him. (Tpp. 138-40, 148) Defendant further testified that the inmates at Southern Correctional think he has money; that Stewart approached him "trying to get money out of [him]," suggested escaping from Southern or the courthouse, asked for money, and offered to kill people for money; that he drew maps of the courthouse because Stewart convinced him he could escape from Guilford County Courthouse if he was sentenced to death; that he never asked Stewart to kill any witnesses, goes to church with the witnesses, believes they

are nice people, and would never ask anyone to do them harm; that he prepared the list of witnesses for his private detective to interview them; that Stewart stole the witness list from his locker; and that Stewart subsequently called his girlfriend and upset her. (Tpp. 165-70, 178-81, 188-89)

Inmate Michael Hollman testified that he was incarcerated in Southern Correctional with defendant and Stewart; and that Stewart repeatedly told him he was "trying to play [defendant] out of some money." (Tpp. 76-79) Inmate Jamie Gayles testified that he met Stewart in 1993 at Polk Youth Center and "knowed him through . . . coming up in prison;" that Stewart's "thing was stealing, breaking in people stuff, . . . going in people's lockers;" and that Stewart said he "wanted to break into [defendant's] locker" to get defendant's radio and stamps. (Tpp. 89-91) Gayles further testified that Stewart told him the following in October: he was "trying to get [defendant] into thinking . . . he was . . . a expert killer" so he could "get [defendant's] money;" the "only way he can get money out of [defendant] is to convince him that he needs somebody killed;" he was "trying to get [defendant] to give him some people's names to . . . kill" or hurt; defendant was "making him mad because he . . . saying that he don't want nobody killed;" and when defendant did not give him names, he "broke in [defendant's] locker and he got a whole lot of stuff that belonged to [defendant]" including a list of names. (Tpp. 91-95)

Inmate Gary Durham testified that he knows both defendant and Stewart from Southern Correctional; that defendant "comes from a christian background" and attends church regularly in prison; that Stewart is an "habitual liar," "doesn't tell the truth," and "approach[es] young white guys and . . . tr[ies] to use them for money . . . and brag[s] about it to other people;" that Stewart said he was "try[ing] to get [defendant] to pay him to kill somebody" so he had money when he was released, and if defendant "doesn't . . . he was going to write the D.A. . . . in [defendant's] case because he knew [defendant] was facing a murder trial in Guilford County;" that defendant "never asked [Stewart] to do anything . . . [and] certainly never asked him to kill anyone;" and that Stewart broke into defendant's locker. (Tpp. 108-13) Inmate Rodney McLean testified that defendant told him he was "afraid for his girlfriend's safety" because Stewart had called her "asking for money;" and that defendant never said anything about any plans to escape or have witnesses killed. (Tpp. 124-26)

3. Defendant's Character Evidence.

Defendant called four character witnesses who testified that defendant was a "great kid," a "straight up . . . honest kind of kid," a "fine boy," "always very well behaved, very well spoken, very polite," and a "perfect gentleman;" that defendant is an "upright" and "outstanding young man," and a "hard worker;" that defendant and Patricia were a "lov[ing] and caring couple" and always "seemed to be fine" at church functions; that this matter

seems "totally out of character" for defendant; and that defendant has a "positive" reputation in the community. (Tpp. 81-89, 99-108, 116-18) In addition, defendant's parents Reverend Ronnie Kimble and Edna Kimble testified that they know their sons are innocent; that they spent a lot of time with defendant and Patricia and saw them as a close and loving couple; and that defendant was raised a Christian and often taught Sunday school to children. (Tpp. 120-24, 128-31, 134-35)

Based on this undisputed evidence, the Trial Court found the following statutory mitigating factors in all cases in which it made sentencing findings: that "defendant has been a person of good character or has had a good reputation in the community in which [he] lives" (G.S. 15A-1340.16(e)(12)); that "defendant has a support system in the community" (G.S. 15A-1340.16(e)(18)); and that "defendant has a positive employment history or is gainfully employed" (G.S. 15A-1340.16(e)(19)). (Rpp. 38-53)

ARGUMENT

I. DEFENDANT'S EIGHT *ALFORD* PLEAS IN THE SOLICITATION CASES SHOULD BE VACATED BECAUSE THERE WAS AN INSUFFICIENT FACTUAL BASIS TO SUPPORT THE PLEAS.

Assignment of Error Nos. 3 & 6; Rpp. 88-89

Defendant's eight *Alford* pleas in the solicitation to commit first-degree murder cases should be vacated because there was an insufficient factual basis to support the pleas in violation of G.S. 15A-1022(c) and the Fourteenth Amendment to the United States Constitution. Defendant entered his eight *Alford* pleas on

January 29, 1999. At the hearing, the Trial Court asked (emphasis added): "Does the defendant stipulate that a factual basis exists *for the entry of the pleas of guilty*?;" and "[d]o you stipulate that, if necessary, the State may summarize the factual basis?" (Plea Tp. 13) Defendant responded yes. (Plea Tp. 13) The prosecutor then gave a narrative as shown in the Statement of the Facts. (Br. pp. 3-4)

G.S. 15A-1022(c) provides that a trial "judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea." While a defendant's "bare" plea of no contest in the plea transcript does not provide a sufficient factual basis, *State v. Sinclair*, 301 N.C. 193, 199, 270 S.E.2d 418, 421 (1980), the factual basis may be grounded on "[a] statement of the facts by the prosecutor," G.S. 15A-1022(c); *accord State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185 (1980). "If the evidence contained in the record does not support defendant's . . . 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).

Solicitation to commit murder is a common law crime and "[t]he gravamen of the offense . . . lies in counseling, enticing or inducing another to commit a crime." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199 (1977). "Solicitation involves the asking, enticing, inducing, or counselling of another to commit a crime. . . . The solicitor . . . furthers [the crime's]

commission via another person by suggesting to, inducing, or manipulating that person . . . [T]he solicitor plans, schemes, suggests, encourages, and incites the solicitation." *State v. Mann*, 317 N.C. 164, 171-72, 345 S.E.2d 365, 369-70 (1986) (citations omitted).

In the instant case, the Trial Court erred in accepting defendant's *Alford* pleas because there was an insufficient factual basis to support them. First, the prosecutor's narrative -- the sole evidence at the hearing in support of the solicitation pleas -- was insufficient. Thus, as shown in the Statement of the Facts (Br. pp. 3-4), it alleged only: 1) that defendant "communicated to one William Stewart his desire" to have certain individuals killed; and 2) that defendant "delivered to [Stewart] a handwritten list" of the individuals, directions to their homes, a diagram of the courthouse, and some unspecified "instructions." However, communicating a "desire," and delivering a list of people and some unspecified "instructions" -- the only actions alleged here as a factual basis -- surely do not amount to asking, counseling, manipulating, enticing, and inducing. Thus, the narrative never alleged the type of conduct that is an essential element of the offense of solicitation. Second, defendant's bare entry of *Alford* pleas does not constitute a sufficient factual basis; rather, it is a mere "statement by the defendant that he will not resist the imposition of . . . sentence[s] in the case in which the plea[s are] entered." *State v. Petty*, 100 N.C. App. 465, 467, 397

S.E.2d 337, 339 (1990); *see North Carolina v. Alford*, 400 U.S. 25, 37, 27 L.Ed.2d 162, 171 (1970) (treating an *Alford* plea as a plea of *nolo contendere*). Third, defendant did not stipulate that there was a factual basis; as shown above, defendant stipulated only to the existence of a factual basis for his *guilty* pleas, not his *Alford* pleas. Accordingly, defendant's eight *Alford* pleas in the solicitation cases should be vacated. *See Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421-22.

II. SEVEN OF DEFENDANT'S EIGHT SOLICITATION CONVICTIONS SHOULD BE VACATED BECAUSE THE PROSECUTOR'S NARRATIVE SHOWED ONLY ONE SOLICITATION AS A MATTER OF LAW.

Assignment of Error Nos. 3 & 6; Rpp. 88-89

Even assuming there was a sufficient factual basis to support defendant's *Alford* pleas (see Argument I), seven of defendant's eight solicitation pleas and convictions should be vacated because the prosecutor's factual narrative showed that there was only one solicitation as a matter of law. As shown in the Statement of the Facts (Br. pp. 3-4), the prosecutor's summary showed only one conversation between defendant and Stewart, during which defendant allegedly communicated a desire to have Stewart kill eight individuals. The issue in the instant case -- whether defendant's actions constituted one or multiple solicitations -- is one of first impression in this State.[2] This

---

[2] Defendant's appellate counsel has located only one North Carolina case mentioning, but not deciding, the issue here. *See State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977).

Court should extend settled conspiracy law to the offense of solicitation; and hold that one criminal incitement constitutes only one solicitation, despite the fact that there were multiple intended victims.

It is well settled that the gravamen of the offense of solicitation lies in the act of incitement to commit a crime, *see State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199 (1977); and that the gravamen of the crime of conspiracy is the agreement, *see State v. Brooks*, 105 N.C. App. 413, 417, 413 S.E.2d 312, 314 (1992). "Solicitation may, indeed, be thought of as an attempt to conspire." MODEL PENAL CODE AND COMMENTARIES § 5.02, at 365-66 (Am. Law Inst. 1985). Under settled conspiracy law, "[o]ne conspiracy 'may, and often does, consist of a series of different [substantive] offenses.' " *State v. Fink*, 92 N.C. App. 523, 532, 375 S.E.2d 303, 308 (1989) (citation omitted). Moreover, "a single agreement to commit multiple offenses is only a single conspiracy;" and " 'a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy.' " *Brooks*, 105 N.C. App. at 418, 413 S.E.2d at 314-15 (citations omitted). The number of conspiracies is based on several factors, including the objective, participants, number of meetings, and time interval. *See State v. Dalton*, 122 N.C. App. 666, 673, 471 S.E.2d 657, 662 (1996). By analogy to the law of conspiracy, defendant contends "that a solicitation on one occasion concerning several criminal objectives . . . involves but a single instance of the requisite

act for the crime of solicitation, and consequently but one solicitation offense." 2 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 6.1, at 16 (1986 & Supp. 1999).

In the instant case, seven of defendant's eight solicitation pleas and convictions should be vacated because there was insufficient evidence of eight separate and distinct solicitations; instead, the prosecutor's narrative plainly showed only one criminal incitement. Thus, applying settled conspiracy law here, the prosecutor's factual summary revealed only one act of criminal incitement. The prosecutor's narrative showed that, on November 4, 1998, in one informal encounter involving only two participants, defendant expressed a desire to have certain individuals killed and delivered to Stewart a list of names and unspecified "instructions." *See Dalton*, 122 N.C. App. at 673, 471 S.E.2d at 662. Moreover, the narrative showed that defendant had only one common motive or objective in wanting all eight individuals killed -- to eliminate the witnesses against him in his pending murder trial. *See Brooks*, 105 N.C. App. at 418, 413 S.E.2d at 315 (single conspiracy where conspirators "pursued the same goal throughout -- to commit robberies"); *see also Braverman v. United States*, 317 U.S. 49, 87 L.Ed 23 (1942) (only one conspiracy where there is a single agreement to commit several offenses). Thus, although there were eight intended victims, the record shows there was only one single solicitation. Accordingly, the prosecutor's factual narrative showed only one incitement and, thus, supported only one solicitation conviction.

See *Brooks*, 105 N.C. App. at 417-18, 413 S.E.2d at 314-15 (prosecutor's narrative provided factual basis for guilty pleas to conspiracy, but "only point[ed] to the existence of a single agreement" to commit two crimes).

As a matter of sound public policy and legislative intent, this Court should apply settled conspiracy law to the offense of solicitation; and hold that, as in conspiracy cases, whether there has been one or multiple solicitations is a question of fact to be resolved on a case-by-case basis.

> The conceptual underpinnings of [conspiracy and solicitation] are quite similar in that both serve as vehicles to punish planned crimes before they reach the stage of an attempted crime. . . . [T]he difference between solicitation and conspiracy lies in the response [of] the solicitee. If he agrees to cooperate in committing the crime, a conspiracy is formed . . . If he reports the planned crime to authorities, . . . the crime is "merely" a solicitation.

California v. Morocco, 191 Cal. App. 3d 1449 (1987). While "the fortuity that the person solicited does not agree to commit . . . the incited crime plainly should not relieve the solicitor of liability," MODEL PENAL CODE AND COMMENTARIES § 5.02, at 365-66, that same fortuity also should not expose the solicitor to *greater* liability. Here, as shown above, if Stewart had agreed to commit the offenses and kill the eight intended victims, defendant would have been liable for only one conspiracy under settled law in this State. Regardless of Stewart's response to defendant's alleged request, defendant's *mens rea* was exactly the same.

Accordingly, allowing conviction and punishment for multiple counts of solicitation here contravenes sound public policy.

Moreover, our Legislature has determined that solicitation is a *less* culpable crime than conspiracy; solicitation to commit murder is a Class C felony, *see* G.S. 14-2.6(a), while conspiracy to commit murder is a Class B2 felony, *see* G.S. 14-2.4(a). Thus, had Stewart agreed to commit the offenses, defendant could have been convicted of only one count of the more serious crime of conspiracy and sentenced to, at *most*, a minimum term of 237 months (less than 20 years) imprisonment. However, because Stewart did *not* agree and instead went to the authorities, defendant entered *Alford* pleas to and was convicted of eight counts of the less serious crime of solicitation and sentenced to 840 months (70 years) imprisonment. Accordingly, allowing conviction and punishment for multiple counts of solicitation here defeats our Legislature's intent to treat solicitation as a less serious offense.

Other jurisdictions have approached this issue on a case-by-case basis. In *Meyer v. Maryland*, 425 A.2d 664 (Md. App. 1980), the defendant was convicted of four counts of solicitation based on two conversations and four intended victims. On appeal, the Maryland court stated (emphasis added):

> We see no reason why . . . in a single conversation, . . . a person cannot make successive and distinct incitements . . . and we therefore reject the notion that merely because there is but one solicitor, one

> solicitee, and one conversation, only one solicitation can arise. *We similarly reject, however, as being equally simplistic, the "per capita" theory that there are necessarily as many solicitations as there are victims.*

Id. at 669-70. Thus, the *Meyer* court held that whether there is one solicitation or several is a factual question that depends on the number of *incitements*, rather than the number of *victims*. *See id.; see also Morocco*, 191 Cal. App. 3d at 1452 (the question is whether the multiple crimes requested were part of a "larger, all-inclusive" plan and the relevant factors include "whether the requested crimes involved different motives and were to occur at different times by different means"). As shown above, applying such a case-by-case approach to the prosecutor's narrative here reveals the existence of but one criminal incitement. Accordingly, the Trial Court's acceptance of defendant's *Alford* pleas and entry of judgment in all eight solicitation cases was erroneous as a matter of law, and violated his constitutional rights against double jeopardy and to due process of law; and defendant's pleas, convictions and sentences in seven of the solicitation cases should be vacated.

III. DEFENDANT IS ENTITLED TO NEW SENTENCING HEARINGS IN THE MURDER AND ARSON CASES BECAUSE THE TRIAL COURT ERRONEOUSLY FOUND NON-STATUTORY AGGRAVATING FACTORS THAT WERE NOT SUPPORTED BY ANY COMPETENT RECORD EVIDENCE.

Assignment of Error Nos. 8, 9, 10; Rpp. 89-90

Defendant is entitled to new sentencing hearings in the second-degree murder and first-degree arson cases because the

Trial Court erroneously found non-statutory aggravating factors that were not supported by any competent record evidence. As shown in the Statement of Facts, at the beginning of the sentencing hearing, the prosecutor stated "I'd like to summarize the evidence" and then immediately began reciting the evidence from co-defendant Ronnie Kimble's earlier trial. The Trial Court subsequently found the following two non-statutory aggravating sentencing factors in the murder case: that "defendant acted with premeditation and deliberation in committing this offense" and that "defendant acted for pecuniary gain in committing the offense." (Rp. 38) The Trial Court also found the following non-statutory aggravating factor in the arson case: that "the offense was committed for the purpose of avoiding detection in the murder . . . and for the purpose of covering up the murder." (Rp. 40) The Trial Court then sentenced defendant to greater-than-presumptive terms in both cases. As shown below, the State's presentation at the sentencing hearing was insufficient as a matter of law to support the two aggravating factors in the murder case and the one aggravating factor in the arson case.

It is well established that "[t]he State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists" if it seeks a greater-than-presumptive sentence, G.S. 15A-1340.16(a); *accord State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983); and that "a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists," *State v.*

Swimm, 316 N.C. 24, 32, 340 S.E.2d 65, 70-71 (1986); *accord State v. Mullican*, 329 N.C. 683, 685, 406 S.E.2d 854, 855 (1991). Moreover, our Supreme Court has held that a defendant's silence in the face of such mere prosecutorial assertions does *not* constitute an admission or stipulation. *See State v. Canady*, 330 N.C. 398, 400, 410 S.E.2d 875, 877 (1991). Finally, it is well settled that if a trial judge's findings of sentencing factors are not supported by sufficient evidence, "the case *must* be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983) (emphasis added).

In the instant case, the Trial Court's findings of aggravating sentencing factors in the murder and arson case were not supported by any competent record evidence. First, the non-statutory aggravating factors in the murder case were not supported by competent evidence. The only conceivable "evidence" to support the factors is the prosecutor's unsworn statements at the sentencing hearing. The State did not call any witnesses or introduce any testimony to support the factors. Further, the prosecutor was never placed under oath or otherwise sworn in as a witness at the sentencing hearing. The prosecutor's unsworn comments to the Trial Court were *not* competent record evidence and did *not* constitute "evidence" sufficient to support the Trial Court's findings in aggravation. *See State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992); *State v. Mack*, 87 N.C. App. 24, 34-35, 359 S.E.2d 485, 491-92 (1987); *State v. Frazier*, 80 N.C. App. 547, 548-49, 342 S.E.2d 534, 535 (1986). Thus, the

State presented *no* competent evidence in support of the aggravating sentencing factors and "utterly failed to meet" its burden of proving factors in aggravation by a preponderance of the evidence. *State v. Thompson*, 314 N.C. 618, 622-23, 336 S.E.2d 78, 80-81 (1985).

Second, the non-statutory aggravating factor in the arson case was not supported by competent evidence. As above, the State did not call any witnesses at the sentencing hearing, the prosecutor was never placed under oath or sworn in as a witness, and the prosecutor's unsworn comments to the Trial Court were *not* competent record evidence and did *not* constitute "evidence" sufficient to support the Trial Court's finding in aggravation. Thus, the State again presented *no* competent evidence in support of the aggravating sentencing factor and failed to meet its burden of proving factors in aggravation by a preponderance of the evidence. Accordingly, the prosecutor's unsworn assertions, standing alone, are insufficient to support the Trial Court's findings in aggravation in the murder and arson cases.

The Trial Court's errors here are fully preserved for appellate review. Our Supreme Court has held that a defendant is not required to object to a trial judge's erroneous findings at sentencing in order to preserve that issue for appeal. *See Canady*, 330 N.C. at 401-02, 410 S.E.2d at 877; *accord State v. Gordon*, 104 N.C. App. 455, 459-61, 410 S.E.2d 4, 8 (1991); *see also* G.S. 15A-1446(d)(18) (no objection requirement when the

sentence imposed was unauthorized or otherwise invalid as a matter of law). Here, defendant presented evidence and argument in support of mitigating factors and urged the Trial Court to "closely scrutinize the evidence" of actual guilt (Tpp. 208-11); thus, as in *Canady*, "defendant did not want the court to find the aggravating factor[s] and the court knew or should have known it." 330 N.C. at 402, 410 S.E.2d at 877. Accordingly, these errors are fully preserved for appellate review; if this Court disagrees, defendant asserts plain error. Thus, defendant is entitled to new sentencing hearings in the second-degree murder and first-degree arsons cases.

IV. DEFENDANT IS ENTITLED TO NEW SENTENCING HEARINGS IN SIX OF THE SOLICITATION CASES BECAUSE THE TRIAL COURT ERRONEOUSLY FOUND STATUTORY AGGRAVATING FACTORS THAT WERE NOT SUPPORTED BY ANY COMPETENT RECORD EVIDENCE AND ERRONEOUSLY USED THE SAME ITEM OF EVIDENCE TO PROVE TWO AGGRAVATING FACTORS.

Assignment of Error No. 11; Rp. 90

Defendant is entitled to new sentencing hearings in six of the eight solicitation to commit first-degree murder cases (99 CrS 23241-44 and 23246-47) because the Trial Court erroneously found aggravating sentencing factors that were not supported by any competent record evidence and erroneously used the same item of evidence to prove more than one aggravating factor in each case. In six of the solicitation cases, the Trial Court found the following two statutory aggravating factors: "5(a). The offense was committed to disrupt the lawful exercise of a governmental function or the enforcement of the laws;" and "5(b).

The offense was committed to hinder the lawful exercise of a governmental function or the enforcement of the laws." (Rpp. 42-53) The Trial Court then sentenced defendant to greater-than-presumptive terms in all six cases. (Rpp. 60-67, 70-73)

A. The Trial Court Erroneously Found Two Aggravating Factors That Were Not Supported by any Competent Record Evidence.

G.S. 15A-1340.16(a) provides that "[t]he State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists" if it seeks a greater-than-presumptive sentence. Although "the rules of evidence may be relaxed during the sentencing phase," our courts have "never stated that the rules of evidence should be totally abandoned." *State v. Stephens*, 347 N.C. 352, 364, 493 S.E.2d 435, 442 (1997), *cert. denied*, __ U.S. __, 142 L.Ed.2d 66 (1998). Thus, "for a hearsay statement to be permitted in a sentencing proceeding, it *must* . . . bear indicia of reliability" and trustworthiness. *Id.* at 363-64, 493 S.E.2d at 442 (emphasis added); *accord State v. Strickland*, 346 N.C. 443, 461, 488 S.E.2d 194, 204 (1997), *cert. denied*, __ U.S. __, 139 L.Ed.2d 757 (1998); *see also State v. Bond*, 345 N.C. 1, 31, 478 S.E.2d 163, 179 (1996) (rules of evidence "may be helpful as a guide to reliability" at sentencing). Moreover, it is well settled that "[u]nsolicited whispered representations and rank hearsay are to be disregarded" in sentencing. *State v. Pope*, 257 N.C. 326, 334-35, 126 S.E.2d 126, 133 (1962). Finally, the constitutional requirements of due

process and fundamental fairness apply at sentencing proceedings. *See State v. Barts*, 321 N.C. 170, 180, 362 S.E.2d 235, 240-41 (1987); *State v. Williams*, 295 N.C. 655, 670-72, 249 S.E.2d 709, 719-21 (1978).

In the instant case, the Trial Court's findings of aggravating sentencing factors in the six solicitation cases were based on nothing more than unreliable rank hearsay incapable of lawfully supporting aggravating factors. First, the only "evidence" supporting the aggravating factors -- SBI Agent Bowman's testimony that prison inmate William Stewart told him defendant offered Stewart $100,000 to kill eight witnesses scheduled to testify at defendant's murder trial -- was clearly hearsay. Second, no part of the evidence was admissible under any hearsay-rule exception.

Third, the evidence was not reliable. The declarant (Stewart) was a convicted felon who was serving time for theft, and who was released from prison early because of the information he supplied to authorities. In addition, undisputed evidence showed that Stewart continued to steal while in prison, is an habitual liar, and has a reputation for theft and dishonesty even among other prisoners. Moreover, Stewart admitted to a number of inmates that he was trying to convince defendant to pay him to kill someone, defendant was not cooperating and did not want anyone killed, he planned to write the prosecutor if defendant did not cooperate, and he ultimately stole the witness list he

turned over to Bowman from defendant's locker. Significantly, the State did not call Stewart himself or any other person with personal knowledge of the alleged solicitation to testify at the hearing. While formal rules of evidence are relaxed at sentencing, they are surely not relaxed to the point here -- where a law enforcement officer testifies to the hearsay statements of a patently unreliable and untrustworthy prisoner. Thus, Bowman's evidence of Stewart's hearsay statements was unreliable and incompetent, and does not provide any evidentiary support for the Trial Court's findings of aggravating factors. *See State v. Oliver*, 309 N.C. 326, 350-51, 364, 307 S.E.2d 304, 321, 328 (1983) (error to submit capital aggravating factor where only evidence to support it was inadmissible hearsay).

Fourth, the Trial Court's use of Bowman's unreliable hearsay evidence to find aggravating sentencing factors violated defendant's constitutional rights to confrontation, due process, and a fundamentally fair sentencing hearing. As shown above, the hearsay statements here had *no* guarantees of trustworthiness and the declarant could not have been *less* worthy of belief. Moreover, the procedure employed here gave defendant no opportunity whatsoever to confront and cross-examine the chief witness against him -- inmate Stewart. Accordingly, the imposition of aggravated sentences based on this unreliable hearsay evidence violated defendant's rights to confrontation, due process, and a fundamentally fair sentencing hearing. *See Barts*, 321 N.C. at 180-82, 362 S.E.2d at 240-41.

Fifth, our Supreme Court's decision in *State v. Perry*, 265 N.C. 517, 144 S.E.2d 591 (1965), shows that the Trial Court erred here. The defendant in *Perry* pled guilty; at sentencing, the trial judge received hearsay testimony from police officers in support of an aggravated sentence. On appeal, our Supreme Court expressly disapproved of the same procedure that was utilized here, stating "the procedure . . . of the court's hearing testimony of officers as to what witnesses said instead of having the witnesses present in court to testify is *not approved*." *Id.* at 520-21, 144 S.E.2d at 594 (emphasis added). While the *Perry* court ultimately held that "under the facts of th[at] case" the hearing of such testimony was not prejudicial or manifestly unjust, *id.*, the hearsay evidence received and used to find aggravating factors *here* was patently unreliable and untrustworthy. Accordingly, this Court should find that under the facts of *this* case, the sentencing hearing *was* manifestly unjust; and should hold that the Trial Court erred in finding aggravating sentencing factors based solely on Bowman's unreliable hearsay evidence. *See Oliver*, 309 N.C. at 350-51, 364, 307 S.E.2d at 321, 328.

B. The Trial Court Erroneously Used the Same Item of Evidence to Prove Two Aggravating Factors.

G.S. 15A-1340.16(d) provides that, in sentencing, "the same item of evidence shall not be used to prove more than one factor in aggravation." This provision bars the finding of two or more sentencing factors in one case that are "duplicitous,"

"cumulative," and "essentially restatements of each other." *State v. Higson*, 310 N.C. 418, 423, 312 S.E.2d 437, 441 (1984); *State v. Isom*, 73 N.C. App. 306, 307, 326 S.E.2d 94, 95 (1985); *State v. Massey*, 62 N.C. App. 66, 69, 302 S.E.2d 262, 264, *aff'd*, 309 N.C. 625, 308 S.E.2d 332 (1983). Moreover, our Supreme Court has specifically held that it is error for a trial judge to find both aggravating factors 5(a) and 5(b) where the same evidence supports each. *See State v. Morston*, 336 N.C. 381, 409-10, 445 S.E.2d 1, 16-17 (1994).

In the instant case, the Trial Court erroneously used the same item of evidence -- defendant's alleged commission of the offenses to retard law enforcement -- to prove both aggravating factors. Indeed, our Supreme Court has specifically and expressly held that the very findings here are error. *See Morston*, 336 N.C. at 409-10, 445 S.E.2d at 16-17. Moreover, aggravating factors 5(a) and 5(b) are identical except for the use of the words "disrupt" and "hinder" and these two words have very similar meanings: disrupt means to "break apart" and "disturb or interrupt the orderly course of," and hinder means to "get in the way of" and "make more difficult for," "thwart," or "impede." WEBSTER'S NEW WORLD DICTIONARY 407, 663 (2d college ed. 1986). In this case, any and all evidence that proved that defendant committed the offense to "disrupt" law enforcement also proved that he committed the offense to "hinder" law enforcement, and vice versa. Accordingly, the Trial Court erred in using the same item of evidence to prove more than one aggravating

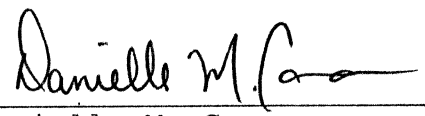
sentencing factor in six of the solicitation cases. *See State v. McKinney*, 88 N.C. App. 659, 665, 364 S.E.2d 743, 747 (1988); *see also State v. Canipe*, 64 N.C. App. 102, 104-05, 306 S.E.2d 548, 550 (1983) (improper to "derive two separate items of evidence from what is essentially one fact").

There can be no doubt that, in finding both factors 5(a) and 5(b) here, the Trial Court was finding two separate aggravating factors. Indeed, the Trial Court clearly indicated that it found both factors in G.S. 15A-1340.16(d)(5) by specifically checking both boxes 5(a) and 5(b) on the sentencing forms. There is no reason to speculate that the Trial Court did not give separate weight to each aggravating factor it found as it imposed sentence. The Trial Court's errors here are fully preserved for appellate review for the same reasons stated in Argument III; if this Court disagrees, defendant asserts plain error. Accordingly, defendant is entitled to new sentencing hearings in the six solicitation cases because the Trial Court erroneously used the same item of evidence to prove more than one aggravating factor.

CONCLUSION

For all the foregoing reasons, defendant respectfully contends that all eight of his *Alford* pleas and convictions must be vacated. Alternatively, defendant contends that seven of his solicitation convictions should be vacated. Defendant also contends that he is entitled to new sentencing hearings in the murder, arson, and six solicitation cases.

Respectfully submitted this the 24th day of March, 2000.



Danielle M. Carman
Assistant Appellate Defender

Malcolm Ray Hunter, Jr.
Appellate Defender
Office of the Appellate Defender
123 West Main Street, Suite 600
Durham, North Carolina 27701
(919) 560-3334

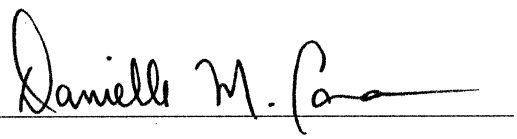
ATTORNEYS FOR DEFENDANT

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 Edwin W. Welch, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, by first-class mail, postage prepaid.

This the 24th day of March, 2000.



Danielle M. Carman
Assistant Appellate Defender