No. EIGHTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

****

PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31(c)(2) and (3)

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****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendant-Petitioner Theodore Mead Kimble hereby petitions this Court to certify for discretionary review the published decision of the Court of Appeals in this second-degree murder, conspiracy to commit first-degree murder, first-degree arson, and solicitation to commit first-degree murder case (No. COA99-1518).

First, certification should issue because the Court of Appeals' holding -- that defendant failed to preserve for appellate review his alternative challenges to the State's factual basis for his eight *Alford* pleas -- conflicts with a long line of this Court's decisions, and the cause involves legal principles of major significance to the jurisprudence of the State. G.S. 7A-31(c)(2) and (3). Second, certification should issue because the Court of Appeals' holding -- that defendant failed to preserve for appellate review his challenges to the Trial Court's aggravating sentencing findings in the murder, arson, and six solicitation cases -- conflicts with this Court's decision in *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). G.S. 7A-31(c)(3).

STATEMENT OF THE FACTS

A. The Proceedings at the Plea and Sentencing Hearings.

1. 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.

With respect to the 1998 solicitation charges to which defendant entered *Alford* pleas, the prosecutor continued his narrative as follows:

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

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

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. 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 named himself as the beneficiary of his wife Patricia's $50,000 life insurance

policy in June 1994, increased the coverage on that policy to $100,000 in November 1994, and signed Patricia's signature on a $200,000 policy application in September 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.

The prosecutor's unsworn summary of the evidence continued as follows: that Patricia arrived home at 3:45 p.m. on October 9, 1995 and went inside; that co-defendant Ronnie Kimble was inside the house, shot Patricia once in the head with defendant's .45-caliber pistol, 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. and arrived at his second job at Precision Fabrics at 6:00 p.m.; that Patricia's brother found the house on fire after 7:00 p.m.; and that Patricia's body was later recovered from inside the house.

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.

In late 1998, defendant was incarcerated at Southern Correctional Institution for unrelated larceny, and breaking and entering charges. SBI Agent James Bowman testified that he interviewed Southern Correctional inmate William Stewart on November 23 and December 17, 1998 and Stewart told him the following: that he told defendant he would be released from prison 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;" that defendant suggested different

methods for the killings; and that he reported this information to the superintendent when he realized defendant was "serious."

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. 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.

3. Defendant's Evidence at the Sentencing Hearing.

Twenty-nine year old defendant testified on his own behalf at the sentencing hearing, including that he "loved [his] wife," is "not guilty of this," never confessed anything to Nichols and Pardee, was working at the time of Patricia's murder, and never asked Stewart to kill any witnesses. Four fellow Southern Correctional inmates testified that Stewart is a thief and habitual liar, who repeatedly said he was "trying to play [defendant] out of some money" by getting defendant to hire him to kill someone, stole a list of names from defendant's locker, and threatened to write the Guilford County District Attorney if defendant did not hire him. Defendant also presented the testimony of six character witnesses.

B. The Proceedings on Appeal.

On appeal, defendant contended, *inter alia*, that: 1) there was an insufficient factual basis to support his eight *Alford* pleas in the solicitation cases in violation of G.S. 15A-1022(c) and the Fourteenth Amendment to the United States Constitution; 2) even if the prosecutor's factual narrative at the plea hearing showed a factual basis, it showed only one solicitation as a matter of law; 3) the Trial Court erroneously used the same item of evidence to prove two statutory aggravating sentencing factors (numbers 5(a) and 5(b)) in six of the solicitation cases in violation of G.S. 15A-1340.16(d); and 4) the Trial Court erroneously found non-statutory aggravating

sentencing factors in the murder and arson cases that were not supported by any competent record evidence.

In a published decision filed December 19, 2000, a Court of Appeals panel (Greene, J., with Timmons-Goodson, J. and Fuller, J. concurring) found that defendant had failed to preserve any of these issues for appellate review. *State v. Kimble*, __ N.C. App. __, __ S.E.2d __ (2000). The panel refused to address defendant's argument that there was an insufficient factual basis to support his eight *Alford* pleas in the solicitation cases, because defendant "did not object during the plea hearing to the State's summary of the factual basis." Slip op. at 5. Similarly, the panel refused to address defendant's argument that the prosecutor's narrative at the plea hearing showed only one solicitation as a matter of law, because defendant "did not argue before the trial court that the factual basis . . . supported only one count of solicitation." *Id.* Finally, the panel refused to address defendant's sentencing arguments -- that the Trial Court erroneously used the same item of evidence to prove two statutory aggravating factors in six of the solicitation cases, and that the Trial Court erroneously found unsupported non-statutory aggravating sentencing factors in the murder and arson cases -- because defendant "did not object to these findings during the sentencing hearing;" and refused to review the Trial Court's sentencing findings for plain error, because while defendant asserted plain error in his brief, he did "not make any argument . . . regarding the prejudicial impact of the alleged plain error." *Id.* at 4, 6.

REASONS WHY CERTIFICATION SHOULD ISSUE

I. THE COURT OF APPEALS' DECISION THAT DEFENDANT FAILED TO PRESERVE FOR APPELLATE REVIEW HIS ALTERNATIVE CHALLENGES TO THE STATE'S FACTUAL BASIS FOR HIS *ALFORD* PLEAS APPEARS TO CONFLICT WITH A LONG LINE OF THIS COURT'S DECISIONS, AND THE CAUSE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.

Certification should issue because the Court of Appeals' decision that defendant failed to preserve for appellate review his alternative challenges to the State's factual basis for his *Alford* pleas -- that the prosecutor's narrative constituted an insufficient factual basis to support his eight

Alford pleas, or that the narrative showed only one solicitation as a matter of law -- conflicts with a long line of this Court's decisions. G.S. 7A-31(c)(3). Certification should also issue because the cause involves legal principles of major significance to the jurisprudence of the State. G.S. 7A-31(c)(2).

A. The Court of Appeals' Decision that Defendant Waived Appellate Review of the Sufficiency of the Factual Basis for his *Alford* Pleas Conflicts with a Long Line of this Court's Decisions.

In the instant case, the panel below erroneously concluded that defendant's failure to object to the prosecutor's summary of the factual basis for his eight *Alford* pleas, and failure to argue to the Trial Court that the factual summary showed only one solicitation as a matter of law, waived appellate review of the sufficiency of the factual basis. This Court has addressed the merits of these exact same arguments, despite the absence of a defense objection to the factual basis and even in the face of a defense stipulation to that factual basis, on numerous occasions. *See, e.g.*, *State v. Atkins*, 349 N.C. 62, 95-97, 505 S.E.2d 97, 118-19 (1998), *cert. denied*, 526 U.S. 1147, 143 L.Ed.2d 1036 (1999); *State v. Heatwole*, 333 N.C. 156, 160-61, 423 S.E.2d 735, 737-38 (1992); *State v. Barts*, 321 N.C. 170, 176-78, 362 S.E.2d 235, 238-39 (1987); *State v. Ahearn*, 307 N.C. 584, 605-06, 300 S.E.2d 689, 702-03 (1983); *State v. Sinclair*, 301 N.C. 193, 197-99, 270 S.E.2d 418, 421-22 (1980). Moreover, if waiver principles preclude a defendant from challenging the State's factual basis for a guilty plea, there could never be any appellate review of the sufficiency of that factual basis.

B. The Cause Involves Legal Principles of Major Significance to the Jurisprudence of the State.

Defendant's alternative arguments -- that there was an insufficient factual basis to support his eight *Alford* pleas, or that the prosecutor's factual narrative at the plea hearing showed only one solicitation as a matter of law -- involve legal principles of major significance to the jurisprudence of the State. First, defendant's argument that the prosecutor's narrative provided an insufficient factual basis for his eight *Alford* pleas to solicitation involves legal principles of major significance to the jurisprudence of the State. "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). Here, the prosecutor's narrative -- the sole evidence at the hearing in support of the solicitation pleas -- was insufficient. That narrative 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. *See Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421-22. Further, 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). Finally, defendant did not stipulate that there was a factual basis; defendant stipulated only to the existence of a factual basis for his *guilty* pleas, not his *Alford* pleas.

Second, defendant's alternative argument that the prosecutor's factual narrative showed only one solicitation as a matter of law involves legal principles of major significance to the jurisprudence of the State because it raises an issue of first impression in this State.[1] This Court should reach the merits of this issue; 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

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[1] 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).

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, "a single agreement to commit multiple offenses is only a single conspiracy." *Brooks*, 105 N.C. App. at 418, 413 S.E.2d at 314-15. 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).

Here, there was insufficient evidence of eight separate and distinct solicitations; instead, the prosecutor's narrative plainly showed only one criminal incitement. The 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." 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 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 incitement, and the prosecutor's factual narrative supported only one solicitation conviction.

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, *supra*, § 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.

In sum, defendant's challenges to the State's factual basis are preserved for appellate review; the Trial Court's acceptance of defendant's *Alford* pleas and entry of judgment in at least seven of the eight solicitation cases were erroneous as a matter of law, and violated his constitutional rights; and this Court should certify the decision below for review.

II. THE COURT OF APPEALS' DECISION THAT DEFENDANT FAILED TO PRESERVE FOR APPELLATE REVIEW HIS CHALLENGES TO THE TRIAL COURT'S FINDINGS OF DUPLICATIVE AGGRAVATING SENTENCING FACTORS IN SIX OF THE SOLICITATION CASES, AND UNSUPPORTED AGGRAVATING SENTENCING FACTORS IN THE MURDER AND ARSON CASES, APPEARS TO CONFLICT WITH THIS COURT'S DECISION IN *STATE V. CANADY.*

Certification should issue because the Court of Appeals' decision -- that defendant failed to preserve for appellate review his challenges to the Trial Court's findings of duplicative statutory aggravating sentencing factors in six of the solicitation cases, and of unsupported non-statutory aggravating sentencing factors in the murder and arson cases -- conflicts with this Court's decision in *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). G.S. 7A-31(c)(3).

First, the panel below erroneously concluded that defendant's failure to object to the Trial Court's aggravating sentencing findings waived appellate review of those findings. This 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; *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 at the sentencing hearing and urged the Trial Court to "closely scrutinize the evidence" of actual guilt; 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, the Trial Court's errors are fully preserved for appellate review.

Second, even assuming the errors are not fully preserved for appellate review, the panel below erroneously concluded that defendant waived plain error review by not more fully arguing the "prejudicial impact" of the alleged plain error. In his brief, defendant claimed that his challenges to the Trial Court's sentencing findings were fully preserved for appellate review under this Court's decision in *Canady*. Defendant further asserted that if the Court of Appeals disagreed, the Trial Court's errors in finding duplicitous and unsupported aggravating factors amounted to plain error. The "prejudicial impact" from the Trial Court's errors in making improper sentencing findings, and thus sentencing defendant to terms longer than the authorized presumptive terms, could not be more obvious or plain.

Third, the Trial Court's duplicitous aggravating sentencing findings in the six solicitation cases directly violate this Court's decision in *State v. Morston*, 336 N.C. 381, 445 S.E.2d 1 (1994). In sentencing, "the same item of evidence shall not be used to prove more than one factor in aggravation." G.S. 15A-1340.16(d). Here, the Trial Court erroneously used the same item of evidence -- defendant's alleged commission of the offenses to thwart law enforcement -- to prove both aggravating factors 5(a) and 5(b). Indeed, this 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.

In this case, any and all evidence that proved defendant committed the offense to "disrupt" law enforcement also proved he committed the offense to "hinder" law enforcement, and vice versa. 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.

Fourth, the Trial Court's aggravating sentencing findings in the murder and arson cases were supported only by the prosecutor's mere unsworn assertions in direct violation of this Court's decisions in *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986), and *State v. Mullican*, 329 N.C. 683, 406 S.E.2d 854 (1991). It is well settled 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," *Swimm*, 316 N.C. at 32, 340 S.E.2d at 70-71; *accord Mullican*, 329 N.C. at 685, 406 S.E.2d at 855; and that a defendant's silence in the face of such mere prosecutorial assertions does *not* constitute an admission or stipulation, *Canady*, 330 N.C. at 400, 410 S.E.2d at 877. Here, the Trial Court's findings of aggravating sentencing factors in the murder and arson cases were not supported by any competent record 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. 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).

In sum, defendant's challenges to the Trial Court's sentencing findings are preserved for appellate review; the Trial Court erroneously used the same item of evidence to prove more than one aggravating factor in six solicitation cases, and erroneously found aggravating factors that were not supported by any evidence in the murder and arson cases; and this Court should certify the decision below for review.

CONCLUSION

For all the foregoing reasons, defendant respectfully contends that this Court should certify the decision below for discretionary review.

Respectfully submitted this the 16th day of January, 2001.

Electronic Submission
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Petition for Discretionary Review Under G.S. 7A-31(c)(2) and (3) has been filed by electronic means with the Clerk of the Supreme Court of North Carolina.

I further hereby certify that a copy of the above and foregoing Petition for Discretionary Review Under G.S. 7A-31(c)(2) and (3) 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 16th day of January, 2001.

Electronic Submission
Danielle M. Carman
Assistant Appellate Defender