

App. 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7149

IAN AULDEN CAMPBELL,
Plaintiff-Appellant,

v.

DONALD W. STEPHENS,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of North Carolina, at Raleigh. Terrence
W. Boyle, District Judge. (5: 16-ct-03321-BO)

Submitted: November 21, 2017 Decided: November 28, 2017

Before WYNN and THACKER, Circuit Judges, and
HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

App. 2

Bruce Tracy Cunningham, Jr., LAW OFFICE OF BRUCE T. CUNNINGHAM, JR., Southern Pines, North Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ian Aulden Campbell appeals the district court's order dismissing his 42 U.S.C. § 1983 (2012) complaint in which he alleged that the state court judge who denied his post-conviction motion for appropriate relief violated his rights to due process because the judge lacked the appearance of impartiality. Campbell's claims are without merit. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (discussing lack of appearance of impartiality of deciding judge as violation of defendant's rights to due process). Accordingly, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

App. 3

FILED: November 28, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7149
(5:16-ct-03321-BO)

IAN AULDEN CAMPBELL
Plaintiff-Appellant

v.

DONALD W. STEPHENS
Defendant-Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:16-CT-3321-BO

IAN AULDEN CAMPBELL,	)	
Plaintiff,	)	
	)	ORDER
v.	)	
DONALD W. STEPHENS,	)	(Filed Aug. 1, 2017)
Defendant.	)	

Plaintiff, a state inmate, filed this civil rights action, through counsel, pursuant to 42 U.S.C. § 1983, and named Judge Donald W. Stephens (“defendant” or “Judge Stephens”) as the defendant. The matter is before the court for frivolity review pursuant to 28 U.S.C. § 1915. When a prisoner seeks relief in a civil action from a governmental entity or officer, a court must review and dismiss the complaint if it is “frivolous, malicious, or fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915A(a)-(b)(1).

A complaint may be found frivolous because of either legal or factual deficiencies. First, a complaint is frivolous where “it lacks an arguable basis . . . in law,” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Legally frivolous claims are based on an “indisputably meritless legal theory” and include “claims of infringement of a legal interest which clearly does not exist.” *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994) (quoting *Neitzke*,

490 U.S. at 327). Under this standard, complaints may be dismissed for failure to state a claim cognizable in law, although frivolity is a more lenient standard than that for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Neitzke*, 490 U.S. at 328. Second, a complaint may be frivolous where it “lacks an arguable basis . . . in fact.” *Id.* at 325. Section 1915 permits federal courts “to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” *See Denton v. Hernandez*, 504 U.S. 25, 32 (1992) (citing *Neitzke*, 490 U.S. at 327).

In May 2013, plaintiff was convicted of first-degree murder and sentenced to life imprisonment without parole. (Compl. ¶ 14). On May 16, 2016, the North Carolina Court of Appeals affirmed plaintiff’s conviction and sentence. (1) Plaintiff subsequently petitioned the North Carolina Supreme Court for discretionary review and filed a petition for a writ of habeas corpus in this district. (*Id.* ¶¶ 15, 16). Both petitions were denied. (*Id.*) On October 4, 2013, plaintiff filed a motion for appropriate relief (“MAR”) in the Wake County Superior Court, asserting that he received ineffective assistance of his trial counsel – Thomas Manning. (*Id.* ¶¶ 17, 26). Plaintiff contemporaneously filed a motion captioned “Motion Requesting that Wake County Resident Superior Court Judge Donald Stephens Request Chief Justice Parker to Designate a Superior Court Judge from Outside Wake County to Consider the Defendant’s Motion for Appropriate Relief.” (*Id.* ¶ 18 and Ex. A). Judge

Stephens denied both motions on December 3, 2013. (*Id.* ¶ 19 and Ex. B).

On November 30, 2016, plaintiff filed the instant action alleging that defendant violated his rights pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution when defendant denied plaintiffs request that the Wake County Superior Court's Chief Justice designate a judge from outside Wake County to consider plaintiff's post-conviction MAR. Plaintiff contends that the denial of such request raises the appearance of impartiality because plaintiff's criminal defense attorney, Thomas Manning, is the brother of Wake County Superior Court Judge Howard Manning. Plaintiff seeks injunctive and declaratory relief only. Specifically, plaintiff requests that this court enter a declaratory judgment that plaintiff's due process rights were violated when Judge Stephens denied plaintiff's MAR and motion requesting that a judge from outside of Wake County adjudicate plaintiff's MAR. Plaintiff also requests that the court enter an order remanding this action to the Wake County Superior Court for reconsideration of plaintiff's MAR and an order prohibiting a judge from Wake County from reconsidering plaintiff's MAR.

Generally, "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts." *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978) (citations omitted). The proper recourse for a party who believes that the judge has ruled improperly or unfairly is to raise such errors on appeal. *See*

App. 7

Pierson v. Ray, 386 U.S. 547, 554 (1967). Here, plaintiff's allegations against Judge Stephens relate to the actions or inactions taken in Judge Stephen's judicial capacity. Thus, Judge Stephens is entitled to judicial immunity for any claims for monetary relief arising out of his adjudication of plaintiff's MAR and motion requesting that a judge from outside of Wake County adjudicate his MAR.

Judicial immunity, however, does not apply to claims for equitable relief. *Foster v. Fisher*, No. 16-1792, 2017 WL 2197875, at *1 (4th Cir. May 18, 2017). As stated, plaintiff seeks both declaratory and injunctive relief. The court begins with plaintiff's request for declaratory relief. "[D]istrict courts have great latitude in determining whether to assert jurisdiction over declaratory judgment actions[.]" *Aetna Cas. Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 422 (4th Cir. 1998). "[A] district court should normally entertain a declaratory judgment action when it finds that the declaratory relief sought: (1) will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." (*Id.*) (internal quotation and citation omitted)).

Here, a declaratory judgment would not serve a useful purpose in clarifying and settling the legal relations at issue because defendant, a state court judge, already has decided the issues presented in his superior court rulings. A declaratory judgment, likewise, will not relieve any "uncertainty, insecurity, and controversy." *See id.*; *Foster*, 2017 WL 2197875, at *1.

Rather, allowing plaintiff to proceed with this action would permit plaintiff to circumvent both the state court appellate and federal collateral review processes already in place, which is generally prohibited. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) (stating that federal district courts, generally, have “no authority to review final judgments of a state court in judicial proceedings.”); see *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 415-16 (1923); *Washington v. Wilmore*, 407 F.3d 274, 279 (4th Cir. 2005) (quotation omitted) (stating that the *Rooker-Feldman* doctrine prohibits a “party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violates the loser’s federal rights.”). Based upon the foregoing, the court finds that plaintiff is not entitled to declaratory relief in this action.

Finally, the court addresses plaintiff’s request for injunctive relief. Section 1983 specifically provides:

Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a

App. 9

declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

Here, a declaratory decree was not violated, nor was declaratory relief unavailable. Additionally, plaintiff is not entitled to injunctive relief against a sitting state court judge for actions taken in the judge's judicial capacity. *See, Lepelletier v. Tran*, 633 F. App'x 126, 127 (4th Cir. 2016) (concluding that the appellant's "claims seeking injunctive relief against a sitting state court judge for actions taken in his judicial capacity . . . were barred by the plain language of 42 U.S.C. § 1983"). Based upon the foregoing, this action is DISMISSED without prejudice. The clerk of court is DIRECTED to close this case.

SO ORDERED, this 31 day of July, 2017.

/s/ Terrence Boyle

TERRENCE W. BOYLE
United States District Judge

Judicial immunity does not apply to claims for equitable relief. *Foster v. Fisher*, No. 16-1792, 2017 WL 2197875, at *2 (4th Cir. 2017)

Lepelletier v. Tran, 633 Fed.Appx. 126, 127 (4th Cir. 2016) (per curiam) (holding that the plaintiff's "claims seeking injunctive relief against a sitting state court judge for actions taken in his judicial capacity . . . were barred by the plain language of 42 U.S.C. § 1983");

Malave v. Abrams, 547 Fed.Appx. 346, 347 (4th Cir. 2013) (acknowledging prior authority that judicial immunity did not apply to claims for injunctive relief, but noting that Section 1983 was amended in 1996 to provide that “injunctive relief [against a judicial officer] shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable”). Nasser has not alleged, let alone shown, that declaratory relief was sought, violated, or unavailable. Thus, if Judge Bryant has judicial immunity, it bars the entirety of the claims here.

There are two possible exceptions to judicial immunity. Specifically, it does not shield a judge for (1) non-judicial acts; or (2) acts taken in the clear absence of all jurisdiction. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Neither exception applies here. *Nasser v. Waller*, 2017 WL 913816, at *8

As a final matter, the Complaint’s requests for injunctive and declaratory relief also cannot proceed. Specifically, the Complaint asks the Court to enjoin Defendants from enforcing the 20 orders entered in Plaintiff’s child custody case and from engaging in unrecorded, ex parte proceedings. (See Docket Entry 3 at 44-48.) By statute, “injunctive relief shall not be granted” in an “action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable.” 42 U.S.C. § 1983. “Thus, the doctrine of judicial immunity in Section 1983 actions now extends to suits for injunctive relief.” *Clay v. Osteen*, 1:10CV399, 2010 WL 4116882, at *4 (M.D.N.C.

Oct. 19, 2010) (citing *Roth v. King*, 449 F.3d 1272, 1286 (D.C. Cir. 2006)), recommendation adopted, slip op. (M.D.N.C. Nov. 17, 2010); *see also* *Lepelletier v. Tran*, 633 Fed.Appx. 126, 127 (4th Cir. 2016) (concluding that the appellant’s “claims seeking injunctive relief against a sitting state court judge for actions taken in his judicial capacity . . . were barred by the plain language of 42 U.S.C. § 1983”). As discussed above, the Judge Defendants acted in their judicial capacities and within their jurisdiction, and Defendant Hauser acted in her quasi-judicial capacity, with regard to each of the alleged violations of Plaintiff’s constitutional rights. Accordingly, the judicial immunity bar extends to Plaintiff’s requests for injunctive relief.

Regarding relief under 28 U.S.C. § 2201, Plaintiff effectively seeks a declaration that would strip Defendants of judicial immunity and impose liability. (See Docket Entry 3 at 44-47 (requesting a declaratory judgment that Defendants’ practice of adjudicating child custody matters violates Plaintiff’s constitutional rights and warrants entry of an injunction to stop such violations).) However, “[d]eclaratory judgments are not meant simply to proclaim that one party is liable to another.” *Johnson v. McCuskey*, 72 Fed.Appx. 475, 478 (7th Cir. 2003) (citing *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1553-54 (Fed. Cir. 1994) (en banc)). Rather, declaratory judgments “define the legal rights and obligations of the parties in anticipation of some future conduct.” *Id.* at 477 (holding declaratory relief improper where the plaintiff sought declaration that the judicial defendants acted improperly when

deciding change of venue motion). Because Plaintiff's requests for declaratory relief merely attempt to have the Court proclaim Defendants' liability in this action, those requests fail. See Clay, 2010 WL 4116882, at *4 (denying request that the court declare dismissal of action exceeded judge's authority because the "[p]aintiffs are not seeking declaratory relief in the true legal sense," but instead attempting to impose liability on an immune defendant).

In sum, various immunity and related doctrines bar Plaintiff's claims for damages and injunctive relief, and Plaintiff has not requested proper declaratory relief.

App. 13

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

IAN AULDEN CAMPBELL,
Plaintiff,

v.

DONALD W. STEPHENS,
Defendant.

**Judgment in
a Civil Case**

Case Number:
5:16-CT-3321-O

Decision by Court.

This action came before the Honorable Terrence W. Boyle, United States District Judge, for frivolity review pursuant to 28 U.S.C. § 1915.

IT IS ORDERED AND ADJUDGED that this action is hereby dismissed without prejudice.

This Judgment Filed and Entered on August 1, 2017, with service on: Bruce T. Cunningham, Jr. (via CM/ECF Notice of Electronic Filing)

August 1, 2017

Peter A. Moore, Jr.
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

App. 14

FILED: January 3, 2016

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7149
(5:16-ct-03321-BO)

IAN AULDEN CAMPBELL

Plaintiff-Appellant

v.

DONALD W. STEPHENS

Defendant-Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Thacker and Senior Judge Hamilton.

For the Court

/s/ Patricia S. Connor, Clerk

STATE OF
NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT
CRIMINAL DIVISION
CASE NO. 02 CRS 71304

STATE OF
NORTH CAROLINA

v.

IAN AULDEN CAMPBELL,
Defendant.

)

)

)

)

)

MOTION FOR
APPROPRIATE
RELIEF

NOW COMES the Defendant, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and N.C.Gen.Stat. § 15A-1411 et seq., and moves that an Order be entered vacating the conviction and sentence in this matter and setting this case on the docket of the Superior Court of Wake County for a new trial on the noncapital charge of First Degree Murder. In support of this Motion, the Defendant shows as follows:

PROCEDURAL HISTORY

1. The Defendant was indicted by the Grand Jury of Wake County on the charge of noncapital First Degree Murder of Heather Domenie.
2. The State had informed the Court at the Rule 24 hearing that it intended to try the case capitally, requiring that a death-qualified jury be selected.

App. 16

3. The State obtained a superseding indictment specifically alleging two aggravating factors, putting defense counsel on notice of which aggravating factors the State contended existed.
4. The case came on for a capital trial before the Honorable W. Osmond Smith, and a jury, at the May 19, 2003 session of Wake County Superior Court.
5. Upon a verdict of guilty to First Degree Murder, the jury was instructed to consider whether aggravating factors existed. Pursuant to the superseding indictment Judge Smith submitted two aggravating factors to the Jury; (1) whether the offense was committed for pecuniary gain, and (2) whether the offense was especially heinous, atrocious and cruel.
6. The jury returned a verdict finding neither aggravating factor existed and recommending a sentence of life in prison without parole. Ex. A.
7. Upon the jury's verdict, Judge Smith imposed a sentence of life in prison without parole.
8. On May 16, 2006 the North Carolina Court of Appeals filed an opinion finding no error in the conviction or the sentence.
9. The Defendant's Petition for Discretionary Review was denied by the North Carolina Supreme Court.
10. On November 5, 2007 the Defendant filed a Petition for Writ of Habeas Corpus in the

App. 17

United States District Court for the Eastern District.

11. On September 16, 2008 the Honorable Terrence W. Boyle granted the Respondent's Motion for Summary Judgment.
12. On March 4, 2010, the Fourth Circuit Court of Appeals dismissed the Defendant's appeal.
13. The United States Supreme Court denied the Defendant's Petition for Writ of Certiorari.
14. The Defendant has not previously filed a Motion for Appropriate Relief in the Superior Court of Wake County.

CASE BACKGROUND AND LEGAL AUTHORITY

15. Pursuant to *Apprendi v New Jersey*, 530 U.S. (2000), *Blakely v Washington*, 542 U.S. 296 (2004) and *Ring v Arizona*, 536 U.S. 584,612 (2002), the maximum sentence for First Degree Murder, without the existence of at least one aggravating factor, is Life Without Parole. Therefore, in the words of Justice Scalia, writing for the majority in *Blakely v Washington*, 542 U.S. 296 (2004) "the crime the state actually sought to punish" in the Defendant's case was the greater offense of Aggravated First Degree Murder, or Capital Murder.
16. If "the crime the State actually seeks to punish" is Aggravated First Degree Murder, then the trial jury will be "death qualified" during jury selection. That is, any potential juror who holds such strong beliefs either in favor or

App. 18

against the death penalty such that their beliefs would substantially impair their ability to consider both a sentence of Life Without Parole and a sentence of Death, is challengeable for cause.

17. If a Defendant is being tried for basic First Degree Murder, without any aggravating factors, then the jury is not death qualified.
18. The Sixth and Fourteenth Amendments to the United States Constitution secure a defendant's right to an impartial jury. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."
19. When it comes to the composition of the general jury venire, from which the actual sitting trial jury is selected, the Sixth Amendment right to an impartial jury includes the right that the venire be composed of a fair cross section of the community.
20. The Defendant contends that the death qualification process culls the venire, because the criteria for exclusion does not depend upon the facts of a case or the characteristics of the defendant. Rather, the criteria used to determine whether a potential juror is suitable to serve on the trial jury is related solely to their views on the death penalty, which transcend the circumstances of the particular case being tried.
21. Therefore, the issue of whether or not a defendant is being tried for noncapital First

Degree Murder or Capital First Degree. Murder has significant constitutional implications, one of which is whether or not jurors who would be acceptable to serve as a member of a noncapital jury are eligible to serve in a capital trial.

22. In the case of *State v Watson*, 310 N.C. 384, (1984), for reasons of efficiency as well as to determine pretrial the applicability of a number of rights of a defendant associated with a capital trial, the North Carolina Supreme Court approved a process to determine before the trial begins whether or not a defendant could be exposed to the potential of a death sentence. No objectively reasonable attorney would unnecessarily subject a defendant to a capital trial.
23. In *Watson*, Justice Martin, writing for a unanimous court, began the opinion as follows, “We begin with a procedural note which we suggest is worthy of consideration by trial counsel in appropriate cases.” *Watson* at p. 387. Justice Martin explained that before the murder trial of Richard Eugene Watson began, defense counsel made a motion for the trial judge to determine whether or not there were any aggravating circumstances which would justify trying the case as a capital case. The trial judge ruled that there were not, and the trial proceeded noncapitally.
24. The unanimous Supreme Court stated, “We do commend this procedure for its judicial

economy and administrative efficiency.” *Watson* at p. 389.

25. Since *Watson* was decided, trial lawyers have employed the process of a “*Watson* hearing” from time to time under appropriate circumstances.
26. The Defendant contends that the circumstances in his case presented an appropriate circumstance for defense counsel to request a *Watson* hearing, based on the legal insufficiency of the State’s evidence relating to aggravating factors, and that the failure to do so constituted ineffective assistance of counsel in violation of the Defendant’s rights secured by the Sixth and Fourteenth Amendments.
27. To establish ineffective assistance of counsel, a defendant must prove that his counsel’s performance was deficient and that his case was prejudiced by his counsel’s alleged deficient performance. *Strickland v Washington*, 466 U.S. 668 (1984), *State v Braswell*, 31 N.C. 553.
28. To show that his counsel’s performance was deficient, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland* at 688.
29. To prove prejudice, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome.” *Strickland* at 694. Prior to jury selection, the Defendant acknowledged that his acts were the proximate cause of the victim’s death. Therefore, the determination of whether aggravating factors existed or not became a matter of paramount importance in the case.

LEGAL CLAIM ONE

- I. THE DEATH QUALIFICATION OF THE JURY VIOLATED THE DEFENDANT’S RIGHTS SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE DEFENDANT’S RIGHTS SECURED BY THE “FAIR CROSS SECTION” COMPONENT OF THE DEFENDANT’S RIGHT TO AN IMPARTIAL JURY, SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
 30. The Sixth and Fourteenth Amendments to the United States Constitution secure a defendant’s right to an impartial jury. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”
 31. The United States Supreme Court has decided that an essential component of a defendant’s right to an impartial jury is that the trial jury, or “petit” jury, shall be selected from a group of people, or venire, representative of a fair cross-section of the community. *Taylor v Louisiana*, 419 U.S. 522, 528 (1975).

32. The Defendant contends that if his defense counsel had requested a pretrial *Watson* hearing, that the result of the hearing would have been that the case would have been declared noncapital. The practical result of such a determination at the *Watson* hearing is that the jury selection process would not have included “death qualification” questions to potential jurors.
33. The death qualification process removes from the venire all persons who, based on their personal beliefs concerning the death penalty, would be substantially impaired in their ability to follow the law based upon their pro-death or anti-death penalty views.
34. The Defendant further contends that the removal of all persons from the venire who held strong death penalty views would deny the Defendant his right to have an impartial jury consider his case, because such people constitute a distinctive group and reflect “diverse societal values.”
35. The Defendant also contends that such error is structural, resulting in prejudice per se, and that the only effective remedy would be a new trial before a non-death-qualified jury. *U.S. v Cronin*, 466 U.S. 648 (1984) Alternatively, the Defendant contends that a failure of defense counsel to test whether a case was capital or not, when there is a basis for doing so, satisfies the prejudice prong of the test in *Strickland v Washington*, 466 U.S. 668 (1984). The Defendant also contends that it would clearly

be prejudicial to the Defendant to be subjected to a capital trial, rather than a noncapital trial.

36. Suppose a defendant was charged with first degree burglary and his jury was death-qualified. There would be no question that he would be entitled to a new trial because otherwise qualified jurors were improperly removed. Likewise, Defendant contends that the death qualification process in a noncapital murder trial commands that a new trial be awarded. The Defendant argues that, but for the ineffectiveness of trial counsel, his case would have been declared noncapital at a *Watson* hearing.
37. A fair cross-section of the community comprising the venire or jury pool from which trial jurors are selected is “fundamental to the American system of justice.” *Taylor* at p. 530.
38. The Defendant submits that the death-qualification process culls the venire, not the petit jury, because the questioning is not related to the facts of the particular case being tried. The questions are designed to determine the beliefs of the jurors on an issue that transcends the particular case being tried. It serves a “gate keeping function”, which decides which jurors would be unfit to serve on the jury due solely to their personal beliefs about the death penalty.
39. Further, for Sixth Amendment purposes, those individuals constitute a “distinctive group” because they are categorized as ineligible to

serve after an extensive probing of their strongly held beliefs.

40. *Duren v Missouri*, 439 U.S. 357 (1979) requires that the persons being excluded from a jury venire must not be a member of a “distinctive group.” The Defendant contends that the group of individuals whose death penalty views are so strong as to render them ineligible to serve on a jury is such a distinctive group, even though the group may consist of persons of different races, genders, or national origins.
41. The impact on the impartial nature of the jury system process is still evident, even though the exclusion is based on *beliefs*, not appearance, gender or national origin. In the United States, the First Amendment secures a person’s eligibility to serve on a jury despite a juror’s beliefs which are irrelevant to the case being tried. Death views are irrelevant in a noncapital trial.
42. In fact, the death qualification process in the Defendant’s trial removed from the venire ten jurors who would have been otherwise eligible to serve. Eight jurors were excused for cause due to their position that their views against the death penalty would substantially impair their ability to serve as an impartial juror. Specifically, the jurors removed for cause for anti-death penalty views were jurors, Pearson, Harris, Buschman, Brown, Legrant, King, Manus and Rogus. Two jurors were removed

for cause for their pro death penalty views. They were jurors Algadi and Pearson.

43. In addition to the Defendant's right to have all qualified jurors sit in the venire, the Defendant alleges that the rights of the individual jurors themselves to participate in the governance of the nation were violated when they were removed from the venire of a trial which could and should have been noncapital.
44. It is also submitted that there is empirical evidence that juries which have been culled by the death qualification process are more prone to convict. The Defendant contends that his Sixth Amendment right to an impartial jury was violated by the creation of a conviction-prone jury due to unnecessary death qualifications. See, e.g., J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 12 U.Colo. L. Rev. 1 (1970); J. Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 Woodrow Wilson L.J. 11 (1980).
45. Therefore, the fact that the jury venire was culled as a result of the death qualification process, which was due to the ineffective assistance of counsel for not following clearly established procedures, requires that a new trial be ordered.

LEGAL CLAIM TWO

II. THE FAILURE OF DEFENSE COUNSEL TO REQUEST A WATSON HEARING TO DETERMINE WHETHER THE STATE COULD SEEK THE DEATH PENALTY CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE DEFENDANT'S RIGHTS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

46. The Defendant contends that, prior to jury selection, defense counsel was aware of circumstances which would render the aggravating factor of "the offense was committed for pecuniary gain" inapplicable to this case. Such facts and circumstances are set forth below in Argument II A.
47. The Defendant also contends that prior to trial and jury selection counsel was aware of facts and legal authority supporting the contention that the aggravating factor that the offense was "especially heinous, atrocious and cruel" was inapplicable, to this case; as set forth in Argument II B.
48. In fact, when those two factors were submitted to the jury at the trial of Defendant's case, the jury did not find that either factor existed, validating the contention of the defendant pertaining to the legal insufficiency of the evidence of aggravating factors.
49. As presented in Argument One above, the Defendant contends that his rights secured by

the Fair Cross Section component of the Sixth Amendment impartial jury trial right was violated and that a new trial, without a death qualified jury, is necessary.

II A. If a *Watson* Hearing had been held there is a reasonable probability that the trial court would have determined that the State's evidence was legally insufficient to warrant the submission of the aggravating factor that the offense was committed for pecuniary gain.

50. Throughout the trial, defense attorney Manning argued repeatedly to the trial judge that there was no evidence of the aggravating factor of pecuniary gain, and that the Court should rule as a matter of law that the pecuniary gain aggravator should not be submitted to the jury. For example, at the end of the State's evidence, Mr. Manning argued to Judge Smith, "I think even in the light most favorable to the State in this matter, Your Honor, the insurance effect or the insurance issue in this matter as it relates to a possible statutory aggravating factor in this case and as a motive for the killing of which he is accused have failed, and *I don't believe that there is even a scintilla of evidence to support the State's position in this matter.*" (emphasis supplied) EX. B
51. Mr. Manning also argued to Judge Smith at the close of the State's evidence, "It is blatantly clear and apparent from the evidence that the State introduced both on direct and

cross-examination and in the documentary evidence introduced at trial, Your Honor, that there was no insurance policy, as the State has contended.” Ex. C

52. There were multiple other occasions throughout the trial, when defense counsel argued that the aggravator of pecuniary gain should not be submitted to the jury and that the court should decide as a matter of law that there was insufficient evidence to support the State’s claim. For example, State’s witness Ron Keever, the person who handled the application for the Defendant and victim’s insurance policies, testified that he had made the Defendant aware of the fact that there was no insurance on the victim. No evidence was submitted by the State to contradict Mr. Keever’s testimony. Ex. D
53. The Defendant contends that if Mr. Manning believed that there was not a “scintilla” of evidence supporting the pecuniary gain aggravator, it was ineffective not to present that argument before trial, by way of a *Watson* hearing. During the opening statement, defense counsel spent three pages of transcript informing the jury that, “There was no policy of insurance.” Ex E
54. During the guilt phase closing, the defense attorney made extensive argument about the fact that the Defendant was not motivated by any notion of pecuniary gain. Ex. E. Counsel stated, “. . . all he knew was that there was no policy, no policy issued, . . . there was no policy

at all. There was never going to be one, if that matters.” Finally, counsel described the insurance policy as a diversion. “And we submit that that issue is a red herring.” Ex. F.

55. Defense counsel moved to dismiss any allegation of pecuniary gain at the end of the State’s case on sentencing, and at the charge conference, because, as a matter of law, there was insufficient evidence to support the aggravator. Ex. G, H.
56. Had the issue been presented to the trial court before the trial began, the Defendant contends that Judge Smith would have found as the jury did, that there was insufficient evidence of the existence of pecuniary gain to allow it to play any part of the trial.
57. Aggravating factors of “pecuniary gain” and “especially heinous, atrocious and cruel” were submitted to the jury as Issue One during sentencing. In his charge to the jury, the trial judge instructed the jury that if they answered “No” to the first question, that no aggravating factors existed, then they were to stop their deliberation and return a sentence recommendation of life without parole.
58. The jury did stop deliberating after question number one and returned to the courtroom to announce their recommendation of life. Attached as Exhibit I is the portion of the transcript where each juror was asked, “your foreman has returned your recommendation, and you recommend that the defendant be sentenced to life imprisonment without

parole. Was this your recommendation?" Each juror responded, "Yes."

59. The Defendant contends that the jury unanimously rejected the State's argument that the aggravating factor of pecuniary gain existed.
60. Had defense counsel presented the question to a judge in a pretrial *Watson* hearing, the Defendant strenuously argues that the judge would have reached the same conclusion as the jury based upon the insufficiency of the evidence of aggravating factors, and struck the death penalty as a possible punishment. Therefore, under either the *Cronic* standard or the *Strickland* standard, the Defendant contends that he received ineffective assistance of counsel.

II B. If a *Watson* hearing had been held there is a reasonable probability that the trial court would have determined that, following *Ring v. Arizona*, 536 U.S. 584, 612 (2002), the aggravating factor that the offense was especially heinous, atrocious and cruel cannot serve as the sole aggravating factor making a defendant eligible to receive a death sentence, or in the alternative, that the evidence was insufficient to warrant trying the case as a capital case.

61. If the trial court had found at a pretrial *Watson* hearing that there was insufficient evidence of pecuniary gain to submit that factor to the jury, then the only possible fact that converted First Degree Murder to Aggravated

First Degree Murder was whether the offense was especially heinous, atrocious and cruel.

62. The Defendant first contends that, following *Ring v Arizona*, 536 U.S. 584,612 (2002) the aggravating factor of an offense being especially heinous atrocious and cruel can no longer serve as the sole aggravating factor to increase First Degree Murder to Aggravated First Degree Murder.
63. As Justice Scalia wrote in his opinion for the court in *Brown v Sanders*, 546 U.S. 212, the phrase “aggravating factor” has two separate meanings according to the circumstances of a case. Our cases have frequently employed the terms ‘aggravating circumstance’ or ‘aggravating factor’ to refer to those statutory factors which determine death eligibility in satisfaction of Furman’s narrowing requirement. See e.g. *Tuilaepa v California*, 512 U.S. at 972, 114 S.Ct. 2630. This terminology becomes confusing when, as in this case, a State employs the term ‘aggravating circumstance’ to refer to factors that play a different role, determining which defendants are *eligible* for the death penalty will actually *receive* that penalty. “*Brown* at 216. (emphasis in original)
64. Before *Ring*, death was a more severe punishment for First Degree Murder. Now, due to *Ring*, death is one of two possible punishments for the more severe crime of Aggravated First Degree Murder.
65. Therefore, if a single fact differentiates First Degree Murder from Aggravated First Degree

Murder, that fact is an element of a substantive criminal offense. The Defendant contends that Justice Scalia has correctly described the impact of *Apprendi* and *Ring* on capital litigation when he said, in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003)

Our decision in *Apprendi v New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed2d 435 (2000) clarified what constitutes an ‘element’ of an offense for purposes of the Sixth Amendment jury-trial guarantee. . . . Just last Term we recognized the import of *Apprendi* in the context of capital-sentencing proceedings. In *Ring v Arizona*, we held that aggravating circumstances that make a defendant eligible for the death penalty ‘operate as ‘the functional equivalent of an element of a greater offense. . . .

66. The Defendant contends that if the aggravator of “especially heinous atrocious and cruel” is a sole aggravator, then it is the functional equivalent of an element of a crime and must pass constitutional vagueness muster just as any element, not vagueness muster as a sentencing factor to use in deciding which of the individuals who are eligible to receive death should receive such a punishment. In the recent decision in *Alleyne v United States*, 570 U.S.____ (decided June 17, 2013), the Supreme Court made it irrefutably clear that capital murder is a greater offense than noncapital murder. “In *Apprendi* we held that a fact is by definition an element of the offense and must

be submitted to the jury if it increases the punishment above what is otherwise legally prescribed.”

67. “Under a challenge for vagueness, the Supreme Court has held that a statute is unconstitutionally vague if it either: (1) fails to ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited’; or (2) fails to ‘provide explicit standards for those who apply (the law)’” *State v Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998) (quoting *Grayned v City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-98, 33 L.Ed.2d 222, 227 (1972))
68. N.C.Gen.Stat. § 15A-2000(e)(9) provides that “The capital felony was especially heinous, atrocious, or cruel.”
69. During the jury charge the trial court instructed the jury, in terminology which did not convey the meaning of the terms in a way which can satisfy the objectivity and specificity required of an element of the criminal offense of Aggravated First Degree Murder. For example, “atrocious” is outrageously wicked, but “heinous” is extremely wicked. A juror could only guess at the distinction. Even if a juror could make a judgment about what is heinous or atrocious, a determination needed to be made that the death was “especially” heinous, atrocious and cruel. The Defendant contends that lay jurors with no experience in capital litigation can not make such judgments in any principled way.

70. The Defendant contends that, while the “EHAC” factor may pass muster as a sentencing factor, it does not pass constitutional vagueness muster as an element of a crime.
71. Therefore, the Defendant contends that if defense counsel had requested a *Watson* hearing and if defense counsel had argued that the aggravator of especially heinous, atrocious and cruel was the sole aggravating factor sought by the State, then the Defendant would not have been eligible for a death sentence.
72. *Lowenfield v Phelps*, 484 U.S. 231(1988) provides an illustration of the Defendant’s argument. In *Lowenfield*, the Supreme Court construed a Louisiana statute and ruled that the required narrowing process was satisfied when the defendant was convicted of First Degree Murder. Under the Louisiana statute, First Degree Murder is basic murder plus the existence of an aggravating factor, and Louisiana’s Second Degree Murder is like North Carolina’s First Degree Murder. Louisiana then has a list of aggravating factors which can serve as selection factors rather than eligibility factors. The aggravator of the offense was heinous atrocious and cruel is used in Louisiana as a selection factor, which by definition is not an element of a crime.
73. The Defendant contends that the failure of counsel to challenge the constitutionality of the factor of especially heinous, atrocious and cruel killing, when used as an eligibility

factor, and element of a crime, constituted ineffective assistance of counsel.

74. Had counsel challenged the factor there is a reasonable probability that the trial court would have held that there were no aggravating factors and the Defendant could not have been tried with the death sentence as a potential punishment.
75. As a second reason that a trial judge at a *Watson* hearing would have found the especially heinous atrocious and cruel aggravator insufficient to justify a capital trial, the Defendant argues that there was simply insufficient evidence under any standard to support the factor. In fact, the jury itself did not find the factor existed.
76. The Defendant argues that if a *Watson* hearing had been held, the aggravating factor of pecuniary gain would not have played any role in the trial, which would have left only the aggravator of the killing being especially heinous, atrocious and cruel as a possible fact to increase noncapital first degree murder to capital first degree murder.
77. In the argument above, Defendant contends that, while the aggravator of an especially heinous, atrocious and cruel killing may not have been unconstitutionally vague as a sentencing factor, it is too vague to serve as an element of a crime.
78. *Apprendi* and *Ring* and now *Alleyene*, stand for the proposition that the crime of first

degree murder with an aggravating factor is separate from and greater than, the crime of basic first degree murder; therefore the aggravator which increases the punishment is an element of a greater crime.

79. If the Court determines that the aggravator of *especially* heinous, atrocious and cruel can serve as an element of capital murder, the Defendant argues in the alternative that, under the facts of this particular case, the evidence is insufficient to support especially heinous, atrocious and cruel as the sole aggravator, and the case should have been concluded at the end of the guilt phase with a sentence of life. Again, the Defendant argues that defense counsel were ineffective to not test the sufficiency of the evidence of the aggravator at a pretrial *Watson* hearing, because once the improperly culled death qualified jury was seated it was too late.
80. Attached as Exhibit J is the portion of closing argument related to whether the death of Heather Domenie was especially heinous, atrocious and cruel. Throughout the argument, counsel argued it was not.
81. In support of his argument, counsel citing the medical examiner's testimony pointed out that Ms. Domenie lost consciousness in 15 to 30 seconds, there were no bruises, no evidence of broken bones, no torture, no stabbing, no use of a weapon and no evidence of struggling.
82. Counsel described the killing as "mercifully short."

83. Again, if counsel was convinced at sentencing that the killing was not “especially heinous, atrocious and cruel” he could have made the same argument at a *Watson* hearing. Had he made such an argument, Defendant contends that the hearing judge would have agreed:

LEGAL CLAIM THREE

III. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILURE TO RAISE ON APPEAL THE ISSUE OF WHETHER THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE DETERMINATION OF WHETHER THE TWO AGGRAVATING FACTORS EXISTED, AND WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A WATSON HEARING TO DETERMINE IF THE CASE SHOULD BE TRIED CAPITALLY OR NOT.

84. A defendant is entitled to effective assistance of counsel on appeal. *Evitts v Lucey*, 469 U.S. 387 (1985).
85. The Defendant contends that if a claim, such as ineffective assistance of counsel, is apparent from the face of the record, appellate counsel must raise such claim in the direct appeal. The factual basis for the claim that there was insufficient evidence of either aggravating factor was apparent on the face of the record. Although the claim of whether or not the aggravator of an “especially heinous, atrocious and cruel” killing can pass vagueness muster as an element, following *Ring*, is a question of first impression, the argument is based

squarely on the *Apprendi* principles underlying *Ring* and, if it had been presented to the Court of Appeals, the Defendant would have received a new trial which would have been noncapital.

86. Appellate counsel in Defendant's case did not raise the failure of trial counsel to request a *Watson* hearing on the direct appeal to the North Carolina Court of Appeals.
87. Had appellate counsel done so, the Defendant contends that there is a reasonable probability that the Court of Appeals would have found error and remanded for a new trial.
88. Also, appellate counsel did not raise an appeal the issue of whether the trial judge erred in overruling the Defendant's objections during trial that there was insufficient evidence of both of the two aggravating factors to submit the death sentence as a possible punishment to the jury. Therefore, the Defendant contends that the ineffectiveness of trial counsel in not requesting a pretrial *Watson* hearing is not cured by the denial of the motion to dismiss made by trial counsel during the trial. Defense counsel knew prior to trial that the State's evidence was insufficient to support both proposed aggravating factors and therefore were ineffective by not moving pretrial to strike the death penalty.

CONCLUSION

The Defendant contends that had his trial counsel requested a *Watson* hearing his case would have been declared noncapital, which would have resulted in jurors who were excused for cause being allowed to serve on the Defendant's jury. Since the Defendant's Sixth Amendment right to have his jury selected from a venire consisting of a fair cross section of the community was violated, constituting per se error under the *Cronic* standard, or in the alternative meeting the prejudice standard under *Strickland*, he is entitled to a new trial with a jury which is not death qualified.

WHEREFORE, the Defendant requests as follows:

1. That an evidentiary hearing be set to enable the Defendant to present witnesses and argument supporting the contentions herein.
2. That an Order declare that the Defendant received ineffective assistance of trial and appellate counsel.
3. That the present conviction and sentence be vacated and the Defendant receive a new trial.

App. 40

Respectfully submitted, this the 4th day of October,
2013.

THE LAW OFFICE OF
BRUCE T. CUNNINGHAM, JR.

By: /s/ Bruce T. Cunningham, Jr.
Bruce T. Cunningham, Jr.
225 N. Bennett Street
Southern Pines, NC 28387
Phone: 910.693.3999
Fax: 910.695.0983
btcunningham545@gmail.com
NC Bar No. 5564

STATE OF
NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT
CRIMINAL DIVISION
CASE NO. 02 CRS 71304

STATE OF
NORTH CAROLINA

v.

IAN AULDEN CAMPBELL,
Defendant.

)
) CERTIFICATE OF
) COMPLIANCE
) N.C. GEN. STAT.
) § 15A-1420 (A)
)

Now comes counsel for the Defendant and certifies, pursuant to N.C. GEN. STAT. § 15A-1420(a)(1)(c1), the following:

App. 41

1. In my professional judgment as a postconviction attorney, there is a sound legal basis for this motion; and
2. This motion is made in good faith; and
3. I hereby give notice to the following attorney who initially represented the defendant and the district attorney's office of this motion by simultaneously mailing, by first class mail, copies of the foregoing Motion for Appropriate Relief, together with any attachments, as well as a copy of this certification, to the following addresses:

C. Colon Willoughby, Jr.
District Attorney
P.O. Box 31
Raleigh, NC 27602

Mr. Thomas C. Manning
Manning Law Firm
P.O. Box 12105
Raleigh, NC 27605

4. I have
 - (X) Reviewed the trial transcript; OR
 - () Made a good-faith determination that the nature of the relief sought in the Motion does not require that the trial transcript be read in its entirety; OR
 - () Have been unable to locate the transcript, having undertaken the following efforts to locate the transcript:

App. 42

This the 4th day of October, 2013.

THE LAW OFFICE OF
BRUCE T. CUNNINGHAM, JR.

By: /s/ Bruce T. Cunningham, Jr.
Bruce T. Cunningham, Jr.
NC Bar No. 5564
225 N. Bennett Street
Southern Pines, NC 28387
Phone: 910.693.3999
Fax: 910.695.0983
btcunningham545@gmail.com

STATE OF
NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT
DIVISION
FILE NO. 02 CRS 71304

STATE OF
NORTH CAROLINA
v.
IAN AULDEN CAMPBELL,
DEFENDANT.

) MOTION REQUESTING
) THAT WAKE COUNTY
) RESIDENT SUPERIOR
) COURT JUDGE DONALD
) STEPHENS REQUEST
) CHIEF JUSTICE PARKER
) TO DESIGNATE A
) SUPERIOR COURT
) JUDGE FROM OUTSIDE
) WAKE COUNTY TO
) CONSIDER THE
) DEFENDANT'S
) MOTION FOR
) APPROPRIATE RELIEF

NOW COMES the Defendant, and respectfully moves that Chief Resident Superior Court Judge Donald Stephens request the Chief Justice of the North Carolina Supreme Court to designate a Superior Court Judge from outside of Wake County to consider the Defendant's Motion for Appropriate Relief. In support of this Motion the Defendant shows as follows:

1. The Defendant was convicted of the offense of First Degree Murder at the May 19, 2003 criminal session of Wake County Superior Court following a capital trial and received a sentence of Life Without Parole.

2. Simultaneously with this Motion, the Defendant has filed a Motion for Appropriate Relief raising complex issues of capital litigation, emanating from the impact of *Ring v. Arizona*, 536 U.S. 584,612 (2002) on aggravating factors under N.C.Gen.Stat. ¶ 15A-2000(e).
3. The Defendant was represented at trial by Wake County attorney Thomas C. Manning. The basic contention in the Motion for Appropriate relief is that counsel Manning rendered ineffective assistance of counsel to the Defendant.
4. The brother of defense counsel is a current Resident Superior Court Judge in Wake County.
5. Pursuant to the new statute relating to scheduling of Motions for Appropriate Relief, the Chief Resident Superior Court Judge is to designate a judge to consider the Motion for Appropriate Relief.
6. The Defendant respectfully contends that it would be inappropriate for a resident Superior Court Judge from Wake County to consider a motion alleging ineffective assistance of counsel by Mr. Manning, since his brother is current Superior Court Judge Howard Manning.
7. The Defendant does not allege that a Wake County judge, in fact, could not impartially consider the Defendant's Motion for Appropriate Relief.

8. However, the United States Supreme Court has held that an appearance of a lack of impartiality is sufficient to trigger a violation of the Due Process Clause of the Fourteenth Amendment. See *Tumey v. Ohio*, 273 U.S. 510 (1927)
9. The Chief Justice of the North Carolina Supreme Court is vested with supervisory powers over the assignment of judges in the courts of North Carolina.

WHEREFORE, the Defendant moves that the Honorable Donald Stephens request the Chief Justice of the North Carolina Supreme Court, Sarah Parker, to designate a Superior Court Judge from outside Wake County to consider the Defendant's Motion for Appropriate Relief.

This the 4th day of October, 2013.

By: /s/ Bruce T. Cunningham, Jr.
Bruce T. Cunningham, Jr.
Attorney for Defendant
The Law Office of
Bruce T. Cunningham, Jr.
225 N. Bennett Street
Southern Pines, NC 28387
Phone: 910.693.3999
Fax: 910.695.0983
btcunningham545@gmail.com
NC Bar No. 5564

STATE OF
NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT
DIVISION
02-CRS-71304

STATE OF
NORTH CAROLINA

v.

IAN AULDEN CAMPBELL,
Defendant.

)
)
)
)
)
)

ORDER

(Filed Dec. 5, 2013)

This matter is before the Court upon Defendant's Motion for Appropriate Relief filed October 8, 2013.

Upon a review of that motion, the State's response and all matters of record, the Court finds that the Defendant has failed to set forth in this motion any valid legal basis by which he is entitled to the relief sought.

WHEREFORE, the motion for evidentiary hearing is denied and the motion for relief sought is denied and dismissed with prejudice.

So ordered this, the 3 day of December, 2013.

/s/ Donald W. Stephens

DONALD W. STEPHENS
SENIOR RESIDENT SUPERIOR
COURT JUDGE

[The November 29, 2013 motion for a conference is denied. The motion to assign the case to an out-of-district judge is also denied.]

[Certificate Of Service Omitted]

App. 47

STATE OF
NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL
COURT OF JUSTICE
SUPERIOR COURT
DIVISION
02-CRS-71304

STATE OF
NORTH CAROLINA

v.

IAN AULDEN CAMPBELL,
Defendant.

ORDER

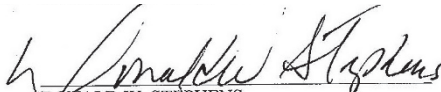
(Filed Dec. 5, 2013)

This matter is before the Court upon Defendant's Motion for Appropriate Relief filed October 8, 2013.

Upon a review of that motion, the State's response and all matters of record, the Court finds that the Defendant has failed to set forth in this motion any valid legal basis by which he is entitled to the relief sought.

WHEREFORE, the motion for evidentiary hearing is denied and the motion for relief sought is denied and dismissed with prejudice.

So ordered this, the 3 day of December, 2013.


DONALD W. STEPHENS
SENIOR RESIDENT SUPERIOR COURT JUDGE

The November 29, 2013 motion for a conference is denied. The motion to assign the case to an out-of-district judge is also denied.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:16-cv-923

IAN AULDEN CAMPBELL)	
a prisoner serving a)	
sentence of Life Without)	
Parole in the North)	
Carolina Department)	COMPLAINT FOR
of Adult Corrections,)	INJUNCTIVE RELIEF
Plaintiff,)	(JURY TRIAL NOT
HONORABLE)	REQUESTED)
DONALD W. STEPHENS)	(Filed Nov. 30, 2016)
in his official capacity as)	
Resident Superior Court)	
Judge for Wake County,)	
Defendant.)	

INTRODUCTION AND OVERVIEW

1. This is a civil action seeking injunctive relief as a result of the Defendant's violation of the Plaintiff's right to have a judge consider his Motion for Appropriate relief who is impartial in appearance, as well as fact.
2. Plaintiff brings his claim pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.
3. The claim arises out of the Defendant's denial, by way of a handwritten, one sentence Order, of Plaintiff's Motion for Judge Stephens to request the Chief Justice of the North Carolina Supreme Court to designate a Judge from outside Wake

County to consider Plaintiff's postconviction Motion for Appropriate Relief.

4. Plaintiff's claim of a violation of his federal right to due process under color of state law is based on the fact that the defense attorney alleged to be ineffective, is the brother of Wake County Superior Court Judge Howard Manning. Defendant and Judge Manning are long-time judicial colleagues in Wake County Superior Court.

JURISDICTION

5. This action arises under the authority vested in this Court by virtue of 28 U.S.C. § 1331(2007), which provides for original jurisdiction over all civil suits involving questions of federal law, and 28 U.S.C. § 1343 (2007), which grants this Court original jurisdiction in all actions authorized under 42 U.S.C. § 1983 (2006), to redress deprivations of any rights, privileges, or immunities under color of State law, guaranteed by the United States Constitution. Plaintiff seeks Declaratory and Injunctive relief, and any other appropriate relief, pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1651, 28 U.S.C. § 2201, 28 U.S.C. § 2202, Fed. R.Civ.P. 57, and Fed.R.Civ.P. 65.
6. The present petition and request for relief is concerned solely with whether Plaintiff was afforded Due Process, in the primary sense, in his State post-conviction proceeding, based upon the Plaintiff's contention that he was not afforded a post-conviction judge who was impartial in appearance as well as fact. The merits of the claims that were alleged in Plaintiff's Motion for Appropriate Relief

are not presented to the Court for determination. Rather, Plaintiff seeks a declaration that his right to an impartial judge to consider his Motion for Appropriate Relief, secured by the Due Process Clause of the Fourteenth Amendment, was violated.

7. Plaintiff Campbell exhausted all of his remedies in State Court and contends the issue is suitable for federal review.

VENUE

8. Venue is appropriate in the Eastern District of North Carolina, pursuant to 28 U.S.C. § 1391(b), because the conduct claimed took place in Wake County, which is located in the Eastern District of North Carolina.

THE PARTIES

9. Plaintiff, a state prisoner in the North Carolina Department of Adult Corrections, is a citizen of Canada and a resident of the State of North Carolina.
10. Defendant, the Honorable Donald W. Stephens, is the Senior Resident Superior Court Judge of Wake County. He was also the Judge in Plaintiff's pre-trial postconviction proceedings, entering an Order denying Petitioner's Motion for Appropriate Relief and Motion Requesting that Wake County Resident Superior Court Judge Donald Stephens Request Chief Justice Parker to Designate a Superior Court Judge from Outside Wake County to

Consider the Defendant's Motion for Appropriate Relief.

11. The Honorable Donald W. Stephens is made a party to this action solely in his official capacity.

PROCEDURAL AND FACTUAL BACKGROUND

12. The Plaintiff was indicted by the Wake County Grand Jury on the charge of First Degree Murder.
13. The matter came on for hearing at the May 19, 2003 Criminal Session of Wake County Superior Court.
14. The Plaintiff was convicted of First Degree Murder and a sentence of Life Without Parole was imposed. On May 16, 2006, the North Carolina Court of Appeals filed an opinion affirming Plaintiff's conviction and sentence.
15. Petition for Discretionary Review was denied by the North Carolina Supreme Court.
16. Plaintiff's Petition for Writ of Habeas Corpus, filed in the United States District Court for the Eastern District, was denied.
17. On October 4, 2013, Plaintiff filed a Motion for Appropriate Relief in Wake County Superior Court, requesting that his conviction be vacated. See Ex. C.
18. On October 4, 2013, Plaintiff also filed a Motion designated, "Motion Requesting that Wake County Resident Superior Court Judge Donald Stephens Request Chief Justice Parker to Designate a Superior Court Judge from Outside Wake County to

Consider the Defendant's Motion for Appropriate Relief." A copy of the Motion is attached as Ex. A.

19. On December 3, 2013, Judge Stephens signed an Order denying the Plaintiff's Motion for Appropriate Relief. The Order was filed on December 5, 2013. At the bottom of the Order, a handwritten note was added stating, "The motion to assign the case to an out-of-county judge is also denied." Ex. B.
20. The Plaintiff's sole contention before this Court is that his right to Due Process was violated when his Motion for Appropriate Relief was denied under circumstances constituting an appearance of a lack of impartiality of the postconviction Judge, whether or not Judge Stephens was in fact not impartial.
21. The federal constitutional question was presented to the North Carolina Court of Appeals and the North Carolina Supreme Court by way of Petitions for Writ of Certiorari. Orders denying both Petitions were filed, thereby exhausting Plaintiff's state law remedies before seeking federal relief.
22. Although not constitutionally compelled to do so, pursuant to N.C.GEN.STAT. § 15A-1415(2008), the North Carolina General Assembly bestowed upon Plaintiff Campbell, and other similarly situated individuals, an entitlement to obtain postconviction relief from violations of the United States Constitution.
23. Plaintiff contends he is entitled to Declaratory Relief declaring that his right to Due Process was violated, and Injunctive Relief ordering that Judge

Stephens' Order be vacated and the matter be placed before a different Superior Court Judge for reconsideration.

FIRST COUNT AND CLAIM FOR RELIEF

PLAINTIFF CONTENDS THAT THERE WAS AT LEAST AN APPEARANCE OF LACK OF IMPARTIALITY WHEN JUDGE STEPHENS DENIED PLAINTIFF'S MOTION FOR APPROPRIATE RELIEF AND MOTION FOR A JUDGE FROM OUTSIDE WAKE COUNTY TO CONSIDER THE MOTION FOR APPROPRIATE RELIEF, WHEN DEFENSE COUNSEL, WHO WAS CLAIMED TO BE INEFFECTIVE WAS THE BROTHER OF A JUDICIAL COLLEAGUE OF JUDGE STEPHENS.

**Violation of 42 U.S.C. § 1983 –
Due Process Violation**

24. The Plaintiff was convicted of First Degree Murder and received the mandatory sentence of Life Without Parole. North Carolina law has eliminated parole and the sentence imposed will guarantee that, unless the Plaintiff receives postconviction relief, he will die in prison.
25. The North Carolina General Assembly enacted a statutory procedure enabling incarcerated defendants to seek postconviction relief by way of a "Motion for Appropriate Relief." See N.C.GEN.STAT. § 15A-1411 *et seq.* Plaintiff's entitlement to seek postconviction relief, therefore, constitutes an interest, secured by the United States Constitution,

to not have “life, liberty, or property” denied without Due Process of Law.

26. Pursuant to this entitlement to postconviction relief, the Plaintiff, on October 4, 2013, filed a Motion for Appropriate Relief seeking to vacate the conviction of First Degree Murder because his Sixth Amendment rights were infringed, due to ineffective assistance of counsel.
27. Plaintiff’s trial was in Wake County, and his lead trial attorney, Thomas Manning, was a longtime criminal defense attorney in Wake County. Defense attorney Manning is also the brother of Wake County Superior Court Judge, Howard Manning.
28. Under N.C.GEN.STAT. § 15A-(b1)(2), all Motions for Appropriate Relief filed in a particular county are delivered to the Chief Resident Superior Court of that county for determination, or for assignment to another Superior Court Judge from Wake County. Because of a concern of at least the appearance of a lack of impartiality for a Wake County Superior Court to decide whether the brother of another Wake County Superior Court Judge was ineffective, Plaintiff filed with his Motion for Appropriate Relief a motion entitled, “MOTION REQUESTING THAT WAKE COUNTY RESIDENT SUPERIOR COURT JUDGE DONALD STEPHENS REQUEST CHIEF JUSTICE PARKER TO DESIGNATE A SUPERIOR COURT JUDGE FROM OUTSIDE WAKE COUNTY TO CONSIDER THE DEFENDANT’S MOTION FOR APPROPRIATE RELIEF.” The motion is attached as Ex. A.

29. Senior Resident Superior Court Judge Stephens reviewed Plaintiff's Motion for Appropriate Relief himself, and on December 5, 2013, filed a three sentence Order denying the Motion. In addition, by way of a handwritten postscript, Judge Stephens denied the Plaintiff's request for a Judge from outside Wake County to consider Plaintiff's Motion for Appropriate Relief by writing, "The motion to assign the case to an out-of-district judge is also denied." Ex. B.
30. 42 U.S.C. § 1983 provides a remedy for state defendants to seek redress when their federal constitutional rights are violated under color of state law. Plaintiff files this action seeking such relief.
31. It is clearly established federal constitutional law that the Due Process clause of the Fourteenth Amendment applies to state postconviction procedures. *Pennsylvania v. Finley*, 107 S.C. 1990, 107 S.Ct. 1990 (1987). It is also clearly established federal constitutional law that an impartial judge is guaranteed to defendants who want to take advantage of procedures that were established in the discretion of the State. *Ward v. City of Monroeville*, 409 U.S. 57, 93 S.Ct. 80 (1972)
32. Without an impartial judge hearing a criminal defendant's claims, all of the remaining constitutional rights are ineffectual. For the reasons set forth below, the Plaintiff respectfully contends that there was, at a minimum, an appearance of lack of impartiality of Judge Stephens in his denial of Plaintiff's Motion for Appropriate Relief and Motion for a Judge from outside Wake County to decide the Motion for Appropriate Relief.

33. In *Offutt v. United States*, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11(1954), the United States Supreme Court held that “Justice must satisfy the appearance of justice.” Likewise, in *Marshall v. Jericho*, 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), the Court eloquently articulated the necessity of the *appearance* of impartiality, as well as impartiality in fact. “The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law . . . At the same time, it preserves *both the appearance and reality of fairness*, generating the feeling, so important to a popular government, that justice has been done . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”
34. The case most often cited as the foundation of the principle that an appearance of lack of impartiality, as well as the fact of a lack of impartiality, violates the Due Process Clause is *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927). In *Tumey*, the Mayor of an Ohio municipality was also the Judge of the local Recorder’s Court, despite the fact that the town received a portion of any fines levied on defendants by the Judge/Mayor. In striking down the ordinance providing for such a situation, the Court memorably stated, “Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which would lead him not to hold the balance nice, clear and true between the State and the accused denies the latter

due process of law.” The same guarantee of an impartial judge in appearance as well as fact appears in *Capterton v. Massey Coal Co*, 556 U.S. 868, 129 S.Ct. 2252 (2009), and *Williams v. Pennsylvania*, 136 S.Ct. 1899, 195 L.Ed.2d 132 (2016).

35. With all due respect, the failure of Judge Stephens to recuse himself from deciding whether the brother of another Wake County Judge was ineffective, in a case as important as one which could consign the defendant to dying in prison, constituted at least the appearance of a lack of impartiality.
36. Plaintiff has attempted to seek relief in the State appellate courts, thereby exhausting his State possibilities for vindication of his federal right to due process. A Petition for Writ of Certiorari, raising the federal question presented here, was filed in the North Carolina Court of Appeals, and denied on November 14, 2014. A Petition was also filed in the North Carolina Supreme Court and denied on June 10, 2015.
37. Plaintiff emphasizes that he seeks only injunctive relief requiring a second determination of his Motion for Appropriate Relief by a judge from outside Wake County, North Carolina. No damages or personal liability is sought from Judge Stephens.
38. It is well-established that the burden of proving that federal constitutional rights have not been violated rests on the State.
39. However, it also established that a defendant bears a threshold requirement of proof sufficient to show an inference of a violation, before the

burden of persuasion shifts to the State. See *Batson v Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). Plaintiff concedes that he has “the burden of going forward” to show an inference of a violation of federal rights under color of state law, and submits that the reasons set forth below satisfy his burden. Therefore, the State must show why Judge Stephens *did not violate the Petitioner’s due process right to have his Motion for Appropriate Relief determined by a judge who was impartial in appearance as well as fact.*

40. For the following reasons, the Plaintiff submits that he has shown sufficient basis for shifting the burden of proof:

REASON ONE

THE FAILURE OF JUDGE STEPHENS TO COMPLY WITH THE REQUIREMENTS FOR ORDERS INVOLVING VIOLATIONS OF FEDERAL CONSTITUTIONAL CLAIMS SUPPORTS AN INFERENCE OF THE APPEARANCE OF THE LACK OF IMPARTIALITY.

41. The Motion for Appropriate Relief statute spells out the mandatory contents of Orders denying relief, when a defendant seeks relief under a federal constitutional right. N.C.GEN.STAT. § 15A-1420(c) (7) provides the Order must contain “. . . conclusions of law and a statement of the reasons for its determination to the extent required, when taken with other records and transcripts in the case, to indicate whether the defendant has had a full and fair hearing on the merits of the claims so asserted.”

42. Both the Order denying the Motion for Appropriate Relief and the Order denying the request for a judge from outside the district were entered without any statement of reasons by Judge Stephens supporting his decision. The failure of Judge Stephens to comply with established law concerning the contents of Orders denying a Motion for Appropriate Relief not only supports an inference of lack of impartiality, it interfered with adequate appellate review of the Plaintiff's contentions. Plaintiff has diligently pursued state appellate review in the North Carolina Court of Appeals and the North Carolina Supreme Court. Because the Orders denying the Motion for Appropriate Relief and the Motion for a Judge from outside Wake County contained no explanation of the basis for the rulings, the Plaintiff and the appellate courts could only speculate on Judge Stephens' rationale for denying Plaintiff relief.
43. While the ostensible purpose of the requirement of specific findings on federal constitutional issues is for the purpose of insuring exhaustion of federal claims in state court, the requirement also encourages the reviewing judge to thoroughly review the record before making a decision.
44. Therefore, Plaintiff contends that the failure of Judge Stephens to adhere to mandatory and longstanding procedure when deciding the Plaintiff's arguments concerning the lack of an impartial judge at Plaintiff's post-conviction proceeding, supports the shifting of the burden of proof from the Plaintiff to the State.

REASON TWO

THE BREVITY OF THE ORDER DENYING THE PLAINTIFF'S MOTIONS SUPPORTS AN INFERENCE OF THE APPEARANCE OF THE LACK OF IMPARTIALITY.

45. The Plaintiff's Motion for Appropriate Relief presented numerous complex issues of federal constitutional law, dealing with the death qualification of juries, the requirement of a fair cross section of jurors in the venire, pretrial *Watson* hearings, issues related to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), sufficiency of evidence, vagueness of criminal statutes, capital aggravating factors and ineffective assistance of both trial and appellate counsel, among other issues.
46. Plaintiff's Motion for a judge from outside Wake County to determine his Motion for Appropriate Relief likewise presented complex due process issues concerning the distinction between bias in fact and bias in appearance.
47. The Motion for Appropriate Relief consisted of 26 pages of argument and reference to current Sixth Amendment constitutional law and caselaw authority.
48. Judge Stephens' *entire order* denying the Motion for Appropriate Relief consisted of three sentences, with no citation to any authorities put forward to rebut the Plaintiff's contentions. The following is the complete Order denying the Motion for Appropriate Relief;

“This matter is before the Court upon Defendant’s Motion for Appropriate Relief filed October 8, 2013.

Upon a review of that motion, the State’s response and all matters of record, the Court finds that the Defendant has failed to set forth in this motion any valid legal basis by which he is entitled to the relief sought.

WHEREFORE, the motion for evidentiary hearing is denied and the motion for relief sought is denied and dismissed with prejudice.

So ordered, this the 3rd day of December, 2013.

DONALD W. STEPHENS
SENIOR RESIDENT
SUPERIOR COURT JUDGE”

49. Plaintiff rests his entire argument on whether there was an *appearance of lack of impartiality*, requiring an Order from this Court vacating Judge Stephens’ ruling that an out of county judge would not be appropriate. The Order states that Judge Stephens found no “valid legal basis” justifying relief. Plaintiff submits that a denial of a defendant’s right to an impartial judge is a clearly established “basis for relief”. Whether there was “adequate evidence” to carry the burden of proving the legal claim is a different issue. Respectfully, the position that there was “no legal basis”, as opposed to a “factual basis”, is akin to a claim under Rule 12(b)(6) in civil cases that the complaint does not state a claim upon which relief can be granted. The

traditional understanding of a statement that a claim lacks a “legal basis” is that even if a judge accepts the facts to be as a litigant contends, the law does not recognize the validity of the claim. In the context of Plaintiff’s case, the Fourteenth Amendment’s Due Process Clause provides a “legal basis” for Plaintiff’s argument. That basis is the Fourteenth Amendment guarantee that all persons are assured that they will not be deprived of life, liberty or property except by a determination of an impartial, unbiased, judge. Plaintiff argues that, at a minimum, there is a reasonable inference that Judge Stephens appeared to not be impartial, in violation of due process.

50. The handwritten postscript denying that portion of the Order reads as follows, in its entirety;

“The motion to assign the case to an out-of-district judge is also denied.”
51. As stated above in *Marshall*, “The neutrality requirement . . . preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done . . . ”
52. Plaintiff submits that the brevity of the Order in response to a lengthy and complicated Motion for Appropriate Relief and to a Motion for a Judge from outside Wake County to decide the case, in the light of the venerable caselaw authority and explicit statutory authority, supplies a reason which, when taken together with the other reasons put forth, constitutes a sufficient basis to shift the burden to the State to prove there was no constitutional violation.

REASON THREE

THE FACT THAT THE DENIAL OF THE REQUEST TO RECUSE JUDGE STEPHENS WAS A HANDWRITTEN NOTE AT THE BOTTOM OF A SEPARATE ORDER SUPPORTS AN INFERENCE OF THE APPEARANCE OF THE LACK OF IMPARTIALITY.

53. Plaintiff argues that the fact that the denial of his request for an out of county Judge was handwritten and attached to the bottom of an Order denying the Plaintiff's Motion for Appropriate Relief reinforces the appearance of a lack of impartiality.
54. The request was presented to Judge Stephens in a separate, self-contained Motion filed together with the Motion for Appropriate Relief. The unavoidable impression has been given that Judge Stephens did not consider the request that someone other than him decide the Motion for Appropriate Relief, until after he had already decided it. Indeed, the fact that Judge Stephens was involved in pretrial motions and litigation supports the inference of a lack of impartiality.
55. Sequentially, it is reasonable to expect that a Judge would decide the issue of whether he should rule on a Motion before deciding the motion.
56. Further, it is reasonable to assume that separate Orders should be entered with respect to separate Motions.
57. Again, the manner in which the denial was recorded supplies a reason to require the State to prove that there was no appearance of a lack of impartiality on Judge Stephens' part.

REASON FOUR

THE FAILURE OF JUDGE STEPHENS TO GRANT THE PLAINTIFF AN EVIDENTIARY HEARING, WHEN THERE WERE DISPUTED ISSUES OF FACT, SUPPORTS AN INFERENCE OF THE APPEARANCE OF A LACK OF IMPARTIALITY.

58. N.C.GEN. STAT. § 15A-1420(c) provides that an evidentiary hearing must be given to a defendant who presents disputed issues of fact in a Motion for Appropriate Relief.
59. The Motion alleged that defense counsel was ineffective in not asking for a *Watson* hearing, because if a pretrial testing of the State's case had taken place, the case would have been declared non-capital.
60. If the case had been declared non-capital, then a number of consequences would have followed. There would have been no death-qualification of the jury, which removes a segment of the community which is a discrete group, in violation of the Fair Cross Section component of the Sixth Amendment. Death qualification culls the venire, not the petit jury, and therefore the Fair Cross Section requirement comes into play.
61. The dynamics of plea bargaining would have been altered. With a death sentence not a potential punishment, the chances of a resolution which does not involve Life Without Parole would be higher.

App. 65

62. There is a persuasive argument that the death qualification process produces a jury which is more conviction-prone than a jury that is not death qualified.
63. It is well known that, from time to time, juries reach a “compromise verdict.” With death not one possible option for the jury to consider, it is reasonable to believe that, in a non-capital trial for First Degree Murder, the compromise position would be less than First Degree.
64. Ultimately, a defense lawyer cannot give effective advice on whether a defendant should accept or offer a plea bargain, or whether he should go to trial before a jury, if it is unknown whether a possible range of punishments includes a sentence of death.
65. An evidentiary hearing was necessary to examine whether defense counsel had a strategic reason to not ask for a *Watson* hearing, or did a *Watson* hearing simply not occur to counsel.
66. An evidentiary hearing was necessary to present evidence and argument on whether the aggravating factor of “the killing was heinous, atrocious or cruel” was supported by the evidence. If the pecuniary gain aggravating factor had been prohibited based on the undisputable evidence in the case, then the question of whether the heinous, atrocious and cruel aggravator is unconstitutionally vague, is presented.
67. Defense counsel argued vehemently that there was not a scintilla of evidence supporting the pecuniary gain aggravator. “I think even in the light

most favorable to the State in this matter, Your Honor, the insurance effect or the insurance issue in this matter as it relates to a possible statutory aggravating factor in this case and as a motive for the killing of which he is accused have failed, and *I don't believe that there is even a scintilla of evidence to support the State's position in this matter.*" Tr. p 2396.

68. Judge Stephens' denial of Plaintiff's request for an evidentiary hearing provides further support for shifting the burden of proof from the Plaintiff to the Defendant.

REASON FIVE

THE GENERIC NATURE OF BOTH ORDERS RAISES A REASONABLE CONCERN ABOUT HOW THOROUGHLY JUDGE STEPHENS REVIEWED THE PLAINTIFF'S MOTION FOR APPROPRIATE RELIEF AND MOTION FOR AN OUT OF COUNTY JUDGE.

69. As argued above, the Plaintiff's Motion for Appropriate Relief was based on complicated and extensive legal issues. The Motion itself was 26 pages in length.
70. The Order denying the Motion did not specifically address any claim or present any authority in support of the denial.
71. Plaintiff respectfully draws this Court's attention to the fact that, except for the name of the Plaintiff in the caption and file number, there is no way that a person reading the Order would know that the

Order pertained to the Plaintiff's case for First Degree Murder.

72. No rationale was presented for the ruling, except for the comment that the Motion possessed no valid legal basis.
73. Plaintiff contends that the existence of an Order which cannot, standing alone, be definitively associated with the Plaintiff, is an additional reason as to why the burden of proof should shift to the State.

PRAYER FOR RELIEF

Based on the arguments and authorities above, the Plaintiff respectfully requests this Court as follows:

- A. That it enter a declaratory judgment that the Due Process rights of the Plaintiff were violated when Judge Stephens denied the Petitioner's Motion for Appropriate Relief and Motion for a Judge From Outside Wake County, when the defense attorney alleged to be ineffective was the brother of a judicial colleague of Judge Stephens.
- B. That it enter an Order remanding this matter to the Superior Court of Wake County for reconsideration of Plaintiff's Motion for Appropriate Relief.
- C. That it grant the Plaintiff's Injunctive Relief by entering an Order that prohibits a Judge from

App. 68

Wake County from reconsidering the Plaintiff's
Motion for Appropriate Relief.

Respectfully submitted, this the 30th
of November, 2016.

/s/ Bruce T. Cunningham, Jr.
Bruce T. Cunningham, Jr.
btcunningham545@gmail.com
Attorney for Petitioner
225 North Bennett Street
Southern Pines NC 28387
910 693-3999
910 695-0983 – Fax
N.C. Bar No. 5564
