No. 130A03-2 DISTRICT TWELVE

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland
	)	01-CRS-65079
QUINTEL AUGUSTINE	)	

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PETITIONER'S BRIEF

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PETITIONER'S BRIEF

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QUESTIONS PRESENTED

IS PETITIONER ENTITLED TO HIS PREVIOUSLY-IMPOSED LIFE SENTENCE BECAUSE THIS COURT IMPROVIDENTLY GRANTED THE STATE'S 2013 PETITION FOR CERTIORARI AND REVERSED BASED ON ARGUMENTS THE STATE DID NOT PRESERVE FOR REVIEW?

IS PETITIONER ENTITLED TO HIS PREVIOUSLY-IMPOSED LIFE SENTENCE BECAUSE IT WAS ENTERED AFTER A FINAL JUDGMENT BASED ON THE POWERFUL EVIDENCE OF RACE DISCRIMINATION IN HIS CASE?

IS PETITIONER ENTITLED TO PURSUE HIS CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE RETROACTIVE APPLICATION OF THE STATUTE'S REPEAL TO PETITIONER VIOLATES THE STATE AND FEDERAL CONSTITUTIONS?

IS PETITIONER ENTITLED TO PURSUE HIS CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE THIS COURT'S 2015 REMAND ORDER ESTABLISHED THE LAW OF THE CASE AND COMMANDS MERITS REVIEW OF PETITIONER'S CLAIMS OF RACE DISCRIMINATION?

And we passed the Racial Justice Act for a simple principle. Is racial bias playing a part in people being put to death? If it is, then we don't want them put to death – we want them to have life without parole. … When we passed the Racial Justice Act, we did not know what we would find when we looked a[t] picking juries. You've [] read what the judge found. He found handwritten notes from the DAs that they were using race to throw people off the jury. Now, the genie is out of the bottle. When we passed the Racial Justice Act, none of us knew that was going on. … [W]e told the courts, 'look at these cases and see if it's there. If it is, give them life without parole and let's go and sin no more.' … Now the answer apparently today is . . . I just don't want to talk about that anymore so I'll pass a bill and won't talk about it anymore . . . and we're going to bury our heads in the sand. … [Y]ou can't put this genie back in the bottle. … [W]e gave these people a right to be heard. The ones that have been heard, they found a problem, they remedied it. The world is still as safe as it was before the hearings. And we need to continue to let the court clean up this mess.

— Sen. Martin Luther Nesbitt (1946-2014), speaking on the NC Senate floor, April 3, 2013

INTRODUCTION

Quintel Augustine is one of an extremely unlucky quartet of death-sentenced prisoners of color who have been uniquely whipsawed by our legislature and courts. Augustine was one of only four prisoners who had an opportunity to present evidence under the short-lived Racial Justice Act. After the court heard Augustine's powerful evidence of race discrimination in jury selection in his case and in death penalty cases tried throughout North Carolina over twenty years, it vacated Augustine's death sentence and resentenced him to life imprisonment without possibility of parole. Augustine left death row and began to serve his life without parole sentence. Then the legislature repealed the RJA and, a few years later, in a decision as unprecedented as it was overreaching, this Court reversed. Augustine returned to death row but retained hope that he would prevail at a second evidentiary hearing on his claim of pervasive racial bias in capital jury selection. That hope was dashed when his claims were dismissed. Too late, the court said, the RJA has been repealed.

This case presents the stark question of whether, having unearthed substantial and troubling evidence of how racial bias taints jury selection in capital cases in our state, can North Carolina now turn a blind eye to that

evidence? Augustine seeks reimposition of his life without parole sentence. In the alternative, Augustine asks this Court to order an evidentiary hearing on his race discrimination claims. At a minimum, Augustine requests a remand in order that the Superior Court might address his constitutional defenses to retroactive application of the RJA repeal.

PROCEDURAL HISTORY

Augustine is currently incarcerated at Central Prison, having been convicted of the first-degree murder of Roy Turner and sentenced to death. This Court affirmed the murder conviction and death sentence. *State v. Augustine*, 359 N.C. 709, 616 S.E.2d 515 (2005), *cert. denied*, 548 U.S. 925 (2006). In August 2010, Augustine timely filed a motion for appropriate relief pursuant to N.C. Gen. Stat. §§ 15A-2010-2012, the North Carolina Racial Justice Act (hereafter "RJA").[1]

In January of 2012, in the case of death-sentenced prisoner Marcus Robinson, the Superior Court of Cumberland County convened the first RJA hearing in the state. Senior Resident Superior Court Judge Gregory A. Weeks

[1] In his RJA MAR, Augustine alleged race was a factor in charging and sentencing decisions, in addition to the prosecution's jury strike decisions. The litigation in this case has centered on the latter, but at no time has Augustine waived his charging and sentencing claims.

presided. This hearing had previously been scheduled for September, and then November following continuance requests from the State. At the opening of the January 2012 hearing, the State for the third time moved for a continuance. The court denied the motion and the hearing proceeded, with both sides presenting evidence over the course of 13 days.

On April 20, 2012, the court ruled that race was a significant factor in prosecution decisions to use peremptory strikes against African-American citizens, and resentenced Robinson to life imprisonment without the possibility of parole. *State v. Robinson*, 91 CRS 23143 (April 20, 2012).[2]

In July of 2012, the General Assembly amended the RJA, modifying its evidentiary and procedural provisions. Sess. Law 2012-136. Pursuant to the new law, Augustine filed an amendment to his RJA MAR in August 2012. Judge Weeks ordered an evidentiary hearing on Petitioner's RJA claims, as well as the claims of two additional death-sentenced prisoners from Cumberland County, Tilmon Golphin and Christina Walters. Judge Weeks set the hearing to commence on October 1, 2012

[2] The hearing court's order was included in the record in this Court in prior proceedings in *State v. Robinson*, 411A94-5. The order is also available at https://www.aclu.org/legal-document/north-carolina-v-robinson-order.

Almost immediately, the State moved to continue the hearing. Judge Weeks heard argument in August and denied the State's motion. In September, the State again asked for a continuance but, at a hearing on the matter, conceded that it had completed the data collection effort directed by the State's statistical expert. Judge Weeks denied the motion.

Also over the summer, the State moved for separate hearings for Augustine, Walters, and Golphin. The State was particularly concerned about maintaining security for three death-sentenced prisoners in one courtroom. Walters and Golphin subsequently waived their right to presence, leaving Augustine as the only prisoner under guard. The evidentiary hearing commenced as scheduled on October 1, 2012. At no time during the hearing did the State ask for a continuance or severance.

Like Robinson, Augustine's hearing centered on whether race was a significant factor in the prosecution's peremptory strike decisions. At the two-week hearing, the court heard detailed documentary, historical, and statistical evidence from more than 170 capital proceedings, including Augustine's case.

On December 13, 2012, the hearing court issued a 210-page memorandum order, which included lengthy, detailed findings of facts. The court concluded that statistical disparities and intentional discrimination

infected Augustine's trial, as they had the entire Cumberland County system of capital jury selection over a period of two decades. Accordingly, the hearing court vacated Augustine's death sentence and resentenced him to life imprisonment without possibility of parole. *State v. Golphin, Walters & Augustine,* 97 CRS 47314-15, 98 CRS, 34832, 35044, 01 CRS 65079, Cumberland County Superior Court Order (December 13, 2012).[3] Augustine was removed from death row and began to serve his life without parole sentence.

The State sought writs of *certiorari* in Robinson's case, and in the case of Petitioner, Golphin, and Walters, and this Court granted review. While these cases were pending, the General Assembly repealed the RJA, effective June 19, 2013. Sess. Law 2013-154.

In its petition for review, and its brief in the Robinson case, the State argued that the RJA hearing court abused its discretion by denying the State's third request for a continuance. In Augustine's case, the State did not include in its questions presented in the petition, nor did it brief, any issue pertaining to continuance. Likewise, the State did not include in its questions presented

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[3] The hearing court's order was included in the record in this Court in prior proceedings in this case, 13PA13. The order may also be read online at: https://www.aclu.org/legal-document/north-carolina-racial-justice-act-order-granting-motions-appropriate-relief.

or argue in its brief any issue pertaining to joinder of Augustine's case with those of Golphin and Walters.

The Court heard oral argument on in April 2014, and ruled in both cases on December 18, 2015. In Robinson, the Court issued a three-page order holding that the hearing court had abused its discretion by denying the State's third continuance request. *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015).

The Court's order in Petitioner's case was one and a half pages. The Court *sua sponte* determined that the denial of the State's request for a continuance in Robinson's case also tainted the result in this case. Likewise, the Court *sua sponte* determined that Judge Weeks had improperly joined the three cases for hearing. *State v. Golphin, Walters & Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015).

The Court remanded the cases of all four defendants to the Superior Court of Cumberland County. Three years into his life sentence, Augustine was returned to death row in January 2016.

Remand was to Judge James Floyd Ammons Jr., the Senior Resident Superior Court Judge in Cumberland County. Augustine moved to recuse Judge Ammons and, after a hearing on June 9, 2016, Judge Ammons denied

the motion, but never the less asked the Administrative Office of the Courts to assign the four cases to another judge. The Honorable W. Erwin Spainhour was subsequently appointed. On its own initiative, on August 28, 2016, the Court asked for briefing on the following issue:

> Did the enactment into law of Senate Bill 306, Session Law 2013-14, on June 19, 2013, specifically Sections 5. (a), (b) and (d) therein, render void the Motion[] for Appropriate Relief filed by the defendant[] pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes of North Carolina?

On November 29, 2016, Judge Spainhour heard argument from counsel, but refused to hear any evidence. Thereafter, on January 25, 2017, Judge Spainhour entered an order dismissing Augustine's RJA claims, and those of Robinson, Golphin, and Walters.

Augustine petitioned for review in this Court on May 30, 2017. On August 2, 2017, the State filed a response in which it did not oppose the grant of *certiorari*. In an order issued March 2, 2018, this Court granted review.

GROUNDS FOR APPELLATE REVIEW

This death penalty case is before the Court on a petition for writ of *certiorari* filed, pursuant to N.C. R. App. Proc. 21(f), after the Superior Court dismissed Petitioner's claims pursuant to N.C. Gen. Stat. §§ 15A-2010-2012, the North Carolina Racial Justice Act.

STATEMENT OF FACTS

Enactment of the Racial Justice Act

The RJA was the first law in the country permitting a finding of race discrimination in jury selection based on statistical patterns alone, and not requiring proof of intentional discrimination. In enacting the RJA, the legislature was responding to a long history of exclusion of African Americans from jury service in our state:

- Following the Civil War and the end of enslavement of African Americans, North Carolina's 1868 Constitution and Reconstruction "brought a brief era of black jury participation." Mosteller & Kotch at 2054, n.44; *see e.g.*, *State v. Holmes*, 63 N.C. 18, 21 (1868) (25 white men and 25 black men summoned for jury duty; four blacks served on the jury).

- However, once Reconstruction ended in 1875, and through the first half of the twentieth century, African Americans lost any meaningful opportunity to serve as jurors. Blacks were largely excluded from the jury pool, either because they were not tax-paying property owners or had been determined by local officials to be of insufficient intelligence or moral character. *See State v. Perry*, 250 N.C. 119, 125, 108 S.E.2d 447, 451 (1959) (prior to 1947, North Carolina law limited jury service to "all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence"); *State v. Lord*, 225 N.C. 354, 355, 34 S.E.sd 205, 206 (1945) (African Americans who were not "freeholders" were properly excused from jury service for cause).

- Nearly a century after the Civil War, the United States Supreme Court was repeatedly called upon to condemn the systematic and purposeful discrimination by officials responsible for administering the selection of jurors. *Hernandez v. Texas*, 347 U.S. 475 (1954); *Avery*

v. Georgia, 345 U.S. 559 (1953); *Patton v. Mississippi*, 332 U.S. 463 (1947).

- Only in the second half of the twentieth century did African Americans start to be seen on juries in capital cases in North Carolina. *See Miller v. State*, 237 N.C. 29, 74 S.E.2d 513 (1953) (three African Americans served on the jury in this death penalty case); *State v. Roman*, 235 N.C. 627, 70 S.E2d 857 (1952) (four African Americans on capital jury); *cf*. State v. Brown, 233 N.C. 202 (1951) (African-American defendant executed after being sentenced to death by all-white jury).

- By 1965, the battle for African-American participation on juries had shifted. Now that Africans were included in the jury pool, "exclusion through peremptory challenges provided a new barrier." Mosteller & Kotch at 2086; *see also* Paul H. Schwartz, *Equal Protection in Jury Selection – the Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C.L.Rev. 1533, 1541 (1990) ("As the Court struck down states' discriminatory practices in [the formation of jury pools] and black persons finally were included on jury lists, however, prosecutor found other ways to prevent black persons from sitting on juries. One method prosecutors used was exercising peremptory challenges . . . .).

- In *Swain v. Alabama*, 380 U.S. 202 (1965), a case in which the petitioner showed that African Americans constituted 26% of the county population and, since 1953, made up 10-15% of the jury pool, but no African American had served on a jury since "about 1950," the Court attempted to tackle the discriminatory use of peremptory challenges.

- States, including North Carolina, responded by increasing the number of peremptory challenges available to prosecutors. For more than three decades, since 1935, capital defendants had been given 14 peremptory challenges while prosecutors were given six. Act of May 11, 1935, ch. 475, §§ 2, 3, 1935 N.C. Sess. Laws 834, 835 (current version at N.C. Gen. Stat. § 15A-1217 (1988). However, in 1971, the number of peremptory challenges for prosecutors was increased to nine in capital cases and, in 1977, following reinstatement of the death penalty, the State was given a total of 14 peremptory challenges in capital cases. Act of March 11, 1971, ch. 75, § 1, 1971 N.C. Sess. Laws 56

(codified as amended at N.C. Gen. Stat. § 9-21(b) (1971)) (current version at N.C. Gen. Stat. § 15A-1217(a)(2) (1988)); Act of June 23, 1977, ch. 711, § 1, 1977 N.C. Sess. Laws, 853, 858 (codified at N.C. Gen. Stat. § 15A-1217 (1988)).

- Two decades after its attempt to rein in the use of discriminatory peremptory challenges, the Supreme Court recognized the persistent and pernicious effect of race in jury selection, and the utter failure of *Swain*. The Court acknowledged that *Swain* placed on defendants alleging racially discriminatory peremptory strikes "a crippling burden of proof" that left prosecutors' peremptory challenges "largely immune from constitutional scrutiny." *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986).

- Unfortunately, the less burdensome *Batson* standard had little effect in North Carolina. In the three decades since *Batson* was decided, the North Carolina appellate courts have ***never*** found a single instance of discrimination against a minority juror. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1961-62 (2016); James E. Coleman Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, The North Carolina State Bar Journal, Vol. 22, No. 3 (2017) at 13.

- As a result, peremptory strikes have been an extraordinarily effective way to limit capital jury service to white people. *See* Mosteller & Kotch at 2120, n. 356 (as of 2010, more than 30 North Carolina death row prisoners were sentenced to death by all-white juries). Quintel Augustine is in that group.

It was against this backdrop that North Carolina enacted the Racial Justice Act, N.C. Gen. Stat. §§ 15A-2010 to 2012 (eff. August 11, 2009 to July 1, 2012). The RJA provided that: "No person shall be subject to or given a

sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010.

In order to implement the RJA's substantive guarantee of capital proceedings free of racial bias, the RJA mandated that a defendant was ineligible for the death penalty if race was a "significant factor" in charging or sentencing decisions, including the exercise of peremptory strikes. N.C. Gen. Stat. § 15A-2011(a); § 15A-2011(b)(1), (b)(2) & (b)(3). A defendant could rely on statistical evidence, and could show bias in his or her individual case, county, judicial division, or the entire state. N.C. Gen. Stat. § 15A-2011(a) & (b). A subsequent amendment of the law narrowed relief to require defendants to show bias in his or her own case. N.C. Sess. Laws 2012-136.

Under the RJA, if a defendant showed race was a significant factor in decisions leading to the death sentence, the only remedy was to vacate the sentence of death and resentence the defendant to life imprisonment without possibility of parole. N.C. Gen. Stat. § 15A-2012(a)(3).

Repeal of the Racial Justice Act

This case is before the Court because the legislature repealed the Racial Justice Act. Consequently, it is important to understand the intertwined nature of the litigation in the RJA cases, including Augustine's, and efforts by

the General Assembly first to amend the RJA and, ultimately, to repeal it. This history bears on a number of the constitutional arguments presented.

News reports, legislative emails, and other documents proffered to the Superior Court demonstrate that, from the beginning, members of the General Assembly followed the RJA cases with keen interest. Even before Robinson's evidentiary hearing began, his case was a focal point for prosecutors lobbying for repeal of the RJA. HE3, HE5, HE13-15.[4] Cumberland County prosecutors and their colleagues urged the legislature to repeal the act before Robinson's hearing started and simultaneously worked to delay the hearing. *Id*.

Robinson's evidentiary hearing was ordered in the spring of 2011, and originally scheduled for September 6, 2011. On June 1, 2011, the North Carolina Senate commenced its repeal effort with the introduction of Senate Bill 9. Shortly after this bill was introduced, an assistant district attorney who was helping to lead the State's RJA litigation strategy wrote to two of the State's retained statistical experts to assure them there was plenty of time before any hearing because the "pace [of litigation] had slowed markedly [as] a direct result of the legislation now pending in Raleigh." HE2.

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[4] Petitioner proffered these exhibits at the November 2016 oral argument in Superior Court.

Cumberland County prosecutors moved to continue the September evidentiary hearing in Robinson and, at the same time, kept working on repeal. On July 29, 2011, the Conference of District Attorneys sent a proposed letter for all prosecutors to use to lobby their legislators. HE3. The Conference also individually contacted elected district attorneys, urging them to contact their senators, saying the "RJA issue has become a time sensitive issue" and "As we have a hearing that has been fast-tracked in Cumberland for September/November, in front of a judge who may be favorable to the defense, we must get the legislature to take this up during their September session or it won't matter." HE4. Following this outreach, the Conference requested a meeting with the Senate president to discuss RJA repeal. HE5.

The motion to continue Robinson's hearing was granted, and the hearing was postponed to November 14, 2011. Prosecutors continued to work diligently to pass a repeal bill before Robinson's evidence could be heard. In October, the Conference again contacted the office of the Senate president, urging him that RJA motions were "coming up quickly" and also that prosecutors were "becoming increasing concerned that there will be a judicial finding of statistics exhibiting racial bias in the use of the death penalty statewide." HE6.

In November, Cumberland County prosecutors moved to recuse Judge Weeks from hearing Robinson's case. When this effort failed, prosecutors continued to lobby the legislature. Members of the Conference discussed warning the speaker of the House that if the "cases go forward and we lose[,] the issue may be moot and they will be the ones with egg on their faces." HE13.

The next day, prosecutors learned from the Senate president that the RJA repeal would not be taken up until late November. With that knowledge, Cumberland County prosecutors moved to continue the November 14 hearing. The motion was granted and Robinson's hearing was again postponed, this time to January 30, 2012.

On November 28, 2011, the North Carolina Senate and House voted to repeal the RJA, and on December 14, 2011, Governor Beverly Perdue vetoed the bill. HE19. On January 30, 2012, Robinson's hearing began.

During Robinson's hearing, legislators continued to debate changes to the RJA. HE20. It was evident that the House Committee was paying close attention to the developments at the *Robinson* hearing. For example, one representative "requested the audio recording from the arguments being made in Cumberland County because they are important." HE21 at 4. The

House Committee met again on March 27, 2012, and the bulk of the discussion concerned the *Robinson* case. HE22.

On April 20, 2012, Robinson was resentenced to life after the hearing court found pervasive, systemic discrimination against African Americans called for jury duty. The Senate president reacted quickly to the ruling, calling on the State to appeal the decision. He also used the *Robinson* decision to build support for amending the RJA. HE23.

On June 5, 2012, as the evidentiary hearing was being scheduled in Augustine's case, the House introduced a new bill amending, rather than repealing, the RJA. It required defendants to prove discrimination in their own cases, but still permitted a defendant to use county-wide statistical evidence as part of the proof. On June 6, 2012, the House Judiciary Subcommittee approved the new bill. During that meeting, the House speaker, passed out a copy of a letter RJA counsel had sent to Judge Weeks concerning the ongoing litigation in Augustine's case. The *New & Observer* reported on the connection between the House's action, and this case:

> Earlier this month, the Center for Death Penalty Litigation said three clients it represents in Cumberland County cases were also entitled to reduced sentences because of Weeks' ruling.
>
> Stam circulated a letter the Center wrote to Weeks stating that position, saying it was an example of how the Racial Justice Act

> undermines the basic concept of considering each case on its merits. Gretchen Engel, the lawyer who wrote the letter, said later Wednesday that it made legal sense and saved taxpayers' money because the cases were all in the same county.
>
> The proposed legislation would prevent that.

HE24.

Prosecutors lobbying on behalf of the amended act were clear that they wanted a new law because they disliked the findings of statewide discrimination from the *Robinson* decision:

> "Prosecutors hate the thought that a statistical study blending results from across the state taints them with having racial motivations," said Peg Dorer, executive director of the of the North Carolina Conference of District Attorneys.
>
> "The fact that Judge Weeks found that all prosecutors have intentionally used racial bias is repugnant," she said. "District attorneys have expressed a lot of concern, for instance that the Wake County DA is being compared to statistics from the western part of the state and being held accountable."

HE25.

The Conference of District Attorneys kept legislators apprised of the ongoing litigation on behalf of Augustine and the other two Cumberland County prisoners. On June 11, 2012, the Conference emailed the House majority leader about the scheduling of the RJA hearing in this case. HE26.

In the House floor debates, legislators explicitly and repeatedly referred to Robinson's case. HE27; HE30 at 6. There was also discussion of Petitioner. The House speaker again referred to defense counsel's letter to Judge Weeks concerning the scheduling of Augustine's evidentiary hearing. HE29 at 2-3.

On June 21, 2012, the legislature voted to amend RJA. The Governor vetoed the law on June 29, 2012, but, on July 2, 2012, the legislature overrode the veto and the amendment became law. Sess. Law 2012-136; HE30.

Media reports of the amended RJA show that legislators were motivated by their anger with the *Robinson* decision. The *Fayetteville Observer* reported:

> Murderer Marcus Reymond Robinson of Fayetteville, a black man, this year used statistics alleging racism in how prosecutors selected his jury to persuade Judge Weeks to take him off death row. The Robinson decision outraged state lawmakers, who had been trying since last year to overturn the Racial Justice Act but were stymied by a veto from the governor.
>
> The legislature tried again this year with another bill that was vetoed, but lawmakers overrode the veto on Monday afternoon.

HE31; *see also* HE32 ("After the *Robinson* ruling, upset lawmakers on Monday scaled back the means by which a death-row prisoner can advance a Racial Justice Act claim.").

The explicit goal of the amendment was to move executions forward. In the words of the House speaker, "With today's override of the governor's veto, the end of the moratorium is in sight." HE33.

In late July, the House speaker sent an email to the Office of the Attorney General urging the State to argue that the newly -amended RJA was, in fact, a total repeal of the RJA. HE35. This email was forwarded to the Cumberland County prosecutors handling Augustine's case. HE35. These prosecutors took the speaker's advice and filed motions to dismiss Augustine's RJA claims, arguing that the original RJA no longer applied to his case and that he was not entitled to any relief under the amended RJA.

Following the evidentiary hearing and grant of relief in Augustine's case, Cumberland County prosecutors, along with the Conference of District Attorneys, redoubled their efforts to lobby for total repeal of the RJA. On March 13, 2013, a repeal bill was filed in the Senate. District attorneys from around the state attended a press conference in support of repeal. HE39. The sponsor of the bill wrote an op-ed calling for repeal of the RJA and complaining about the recent decision in Augustine's case. He specifically called for voiding all appeals under the RJA:

> Recent legislation was introduced in the North Carolina General Assembly, not only to rid our state of RJA, but also to void all appeals currently pending under the act. It is past time to get rid of this absurd law that turns murderers into victims while the real victims lie in their graves.

HE41; *see also* HE42 (YouTube video expressing similar sentiments).

On March 26, 2013, there was debate in the Senate Judiciary I Committee on the RJA repeal bill. The cases of the four RJA defendants, including Augustine, were mentioned repeatedly during debate. The repeal sponsor drew attention in particular to the "atrocious outcome" whereby Augustine "saw his death penalty commuted to life in prison." HE43 at 3; *see also* HE52 at 4 (House speaker urged repeal in order to "get [Judge Weeks'] four people back in the queue" for execution).

Repeal proponents were spurred on by constituents outraged by the ruling in favor of Augustine and in the two other Cumberland County cases. One wrote to the Senate president urging the legislature to "Put them back on Death Row and start cleaning it out." HE45.

Building to the vote, prosecutors continued to use Augustine's case and those of the other three RJA defendants in their lobbying efforts. On May 29, 2013, in response to a request from the Conference, one of the Cumberland County prosecutors gave legislators information on the racial makeup of the

juries in the four RJA cases. HE46-47. The Conference also sent legislative staff talking points for the repeal again referring to the four Cumberland County cases. HE48-49.

During House debates on the repeal bill in early June of 2013, there were numerous and pointed references to Augustine and the other three Cumberland County prisoners. HE51 at 18, 21-22, 27; HE52 at 4. On June 19, 2013, the General Assembly repealed the RJA, effective that date.

Thus, the historical record shows that, in the run-up to the first RJA hearing in the state, while prosecutors were asking for one continuance after another, they were also lobbying for repeal of the RJA. The General Assembly voted for repeal and only the Governor's veto saved the law and permitted Robinson's hearing to go forward. The grant of RJA relief to Robinson caused further consternation and the legislature moved swiftly, this time to amend the statute. Uproar at the General Assembly only intensified after Augustine and two others prevailed on their RJA claims. The legislature again moved to repeal the RJA and, this time, the Governor signed the repeal bill into law. Significantly, at nearly every step in the path to repeal, there was an effort to target Augustine and to ensure he returned to death row to await the executioner.

Evidence of Race Discrimination in Augustine's Case

Quintel Augustine is African American. He was tried and sentenced to death by an all-white jury after the State used five peremptory strikes to exclude every qualified[5] African American in the venire. HTp. 1482; DE118.[6] At his RJA hearing, Augustine presented four distinct categories of evidence of racial bias in jury selection in Cumberland County and his individual case:

- Notes from Augustine's file documenting the lead prosecutor's race consciousness and race-based decision-making in jury selection.
- Documents and testimony concerning the capital prosecutions of James Burmeister and Malcolm Wright, two white defendants charged with the racially-motivated murders of two African Americans.
- Evidence that one of Augustine's prosecutors had studied how to exclude African Americans from juries and evade detection.
- Evidence of disparate treatment of similarly-situated white and black venire members.

These four categories of evidence are discussed in turn.[7]

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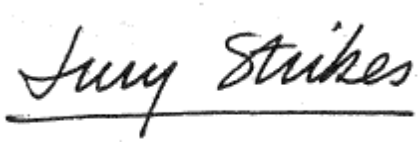
[5] A "qualified" venire member is one not subject to challenge for cause.

[6] References to SE__, DE__, *Robinson* HTp. ___, and HTp. ___ are to the exhibits and hearing transcripts from the original RJA proceedings conducted in the Cumberland County Superior Court and previously made part of the record in this Court, No. 139PA13.

[7] The evidence discussed here is exclusively historical and documentary, and unrelated to Augustine's statistical study. As a result, this evidence and the hearing court's findings concerning it are untouched by the denial of the

Prosecution Notes Show the State was Planning to Strike African Americans before Jury Selection Started.

In six pages of handwritten notes,[8] Calvin Colyer, the lead prosecutor in Augustine's case manifested in no uncertain terms his concern with race and his desire to exclude African Americans from jury service. On each page, Colyer explicitly noted his purpose — to identify venire members subject to exclusion by peremptory challenge:



DE98-103.

Augustine's trial was moved from Cumberland to Brunswick County pursuant to a defense request for change of venue. Colyer made his notes after talking with Brunswick County law enforcement officers. HTpp. 183-185, 783. He engaged in those conversations with the specific intent of obtaining information to use in jury selection, and he used these notes at trial. HTpp.

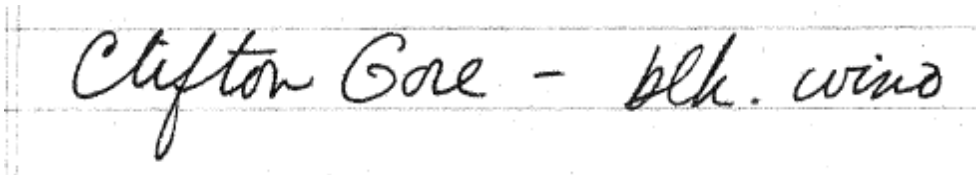
State's request for a third continuance in *Robinson*. It is also evidence that Augustine would be entitled to present at a second evidentiary hearing devoted entirely to his own case and, consequently, it is untouched by considerations of joinder.

[8] These notes were admitted into evidence at Augustine's RJA hearing. DE98-DE103.

202-203, 1070-1071. Testimony at Augustine's hearing proved the notes disproportionately concerned African Americans and comprised primarily negative comments about them. HTpp. 76-81.

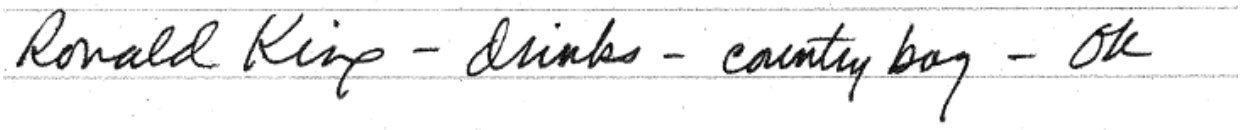
Testimony at the hearing also showed that Augustine's post-conviction counsel received these notes in 2006, pursuant to the post-conviction discovery statute. Significantly, the State failed to produce these notes to the defense during the *Robinson* litigation, despite having been ordered to provide discovery of jury selection notes in capital cases, including Augustine's. Even more troublingly, by the time of Augustine's hearing, the original notes were no longer in the State's files. On these facts, the hearing court found support for "an inference that the State intentionally destroyed the documents." Order at 50, n.5.

The "Jury Strikes" notes demonstrate powerfully that, in the prosecution's view, many African-American citizens summoned for jury duty in Augustine's case had a racial strike against their jury service before they even set foot in the courthouse. For example, one African-American man was disparaged for not just for drinking but also for his race:



DE99; HTpp. 84-85-87.

Meanwhile, a white venire member with the same vice was not disparaged but deemed "ok":



DE99; HTp. 86.

The prosecution condemned another African-American man in racially stereotyping,[9] slurring terms because of his criminal record:

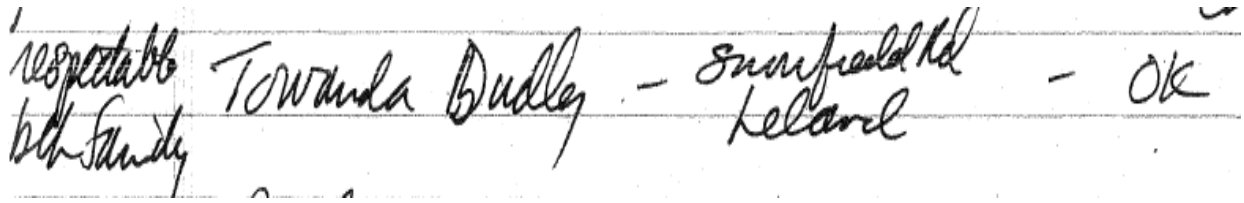
DE99; HTpp. 87, 89.

In contrast, the prosecutor shrugged off a white man's extensive criminal record, describing the potential juror this way:

DE100; HTpp. 88-89.

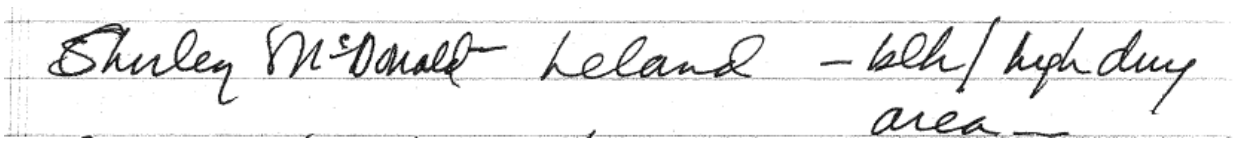
[9] *See* Smiley, C.J. & Fakunle, D.,"From 'brute' to 'thug:' The demonization and criminalization of unarmed Black male victims in America," *Journal of Human Behavior in the Social Environment*, 26 (3-4), 350-366 (2016) (terms like "thug" which "draw on past racial stereotypes" are "examples of coded language that are used to refer to or speak of Blackness without overtly sounding racially prejudiced"). At trial, the prosecution repeatedly referred to Augustine as a "thug." Tpp. 1749, 1753, 1898, 2263.

One woman was deemed "ok" after she was singled out for what the prosecutor seemed to believe was an unusual characteristic for an African American — the respectability of her family:



DE102; HTp. 90. There is no reference anywhere in Colyer's notes to "respectable" white people. In fact, the word "white" appears nowhere in his notes. DE98-103; HTpp. 90, 195. Bryan Stevenson, an expert in race and the law,[10] reviewed the prosecutor's "Jury Strikes" notes. HTp. 1500. Regarding the many explicit racial designations, including the Towanda Dudley notation, Stevenson testified that there is no reason to include a racial designation unless one believes race is important. HTpp. 1500-1503, 1510.

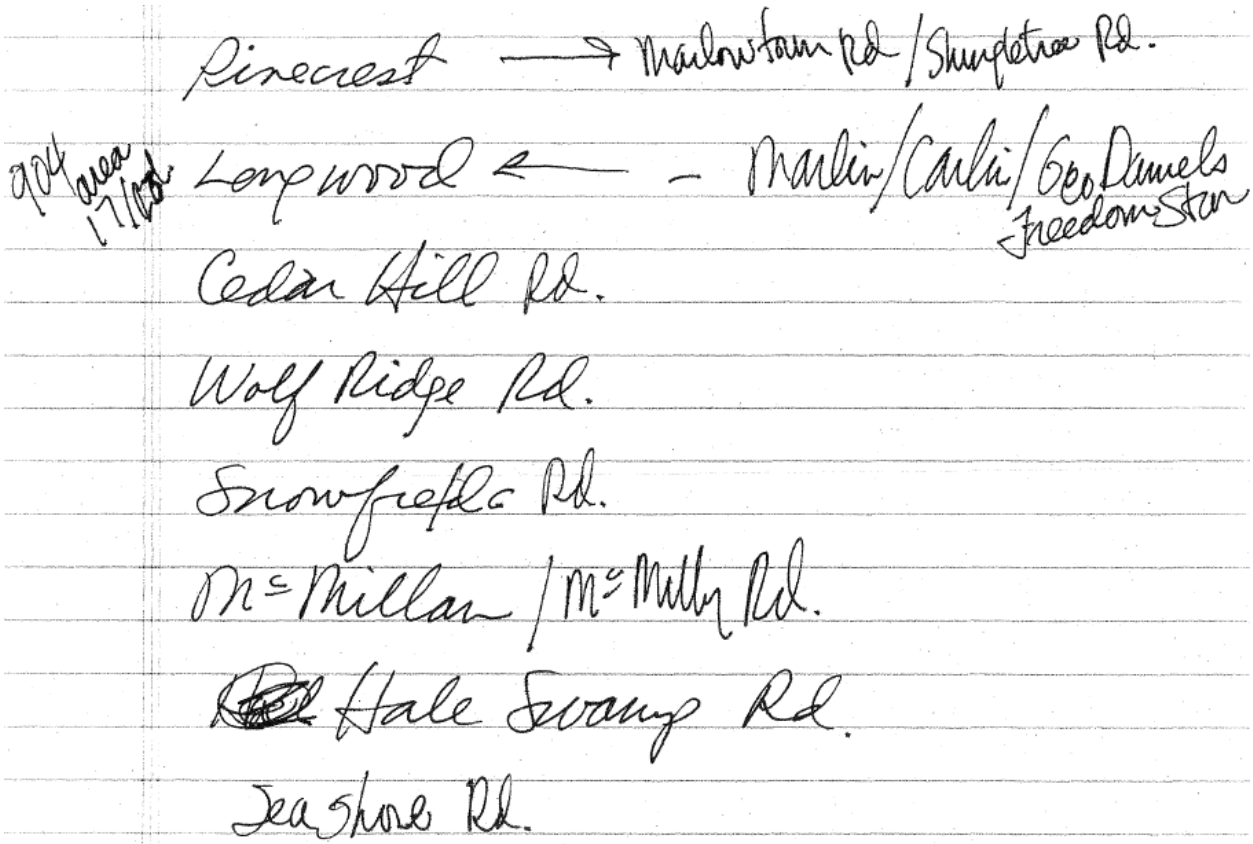
Another African-American woman was condemned for living in a black neighborhood, which the prosecutor seemed to consider synonymous with crime:



[10] Stevenson was accepted as expert at Defendant's RJA hearing. HTp. 1473.

DE99; HTp. 89. The record shows that McDonald herself had no criminal record. HTp. 89.

On the last page of the prosecutor's notes was a list of 10 neighborhoods and streets.



DE103. Nine of the 10 were areas inhabited predominantly by African Americans. HTpp. 90, 1505-1507; DE166. Like Shirley McDonald, African-American venire member Mardelle Gore was included as a potential strike

because of where she lived. Gore resided in Longwood, a so-called "bad area," included on the prosecutor's list of no-no neighborhoods. DE103; HTp 1053.[11]

In jury selection, the prosecutor questioned Gore. After confirming that Gore lived in Longwood — and after making additional notes clarifying that Longwood is on Highway 904 and off Highway 17 — the prosecutor struck her. HTpp. 1070-1071; DE103. When defense counsel lodged a *Batson* objection, the prosecutor gave a variety of reasons for the strike. He never mentioned Gore's residence in a black neighborhood and he never showed the trial judge his "Jury Strikes" notes. HTpp. 1053-1055, 1060; DE140.

Defense expert Stevenson testified "the preoccupation with race" reflected in Colyer's notes was "highly suggestive of race consciousness" and established that race was a significant factor in jury selection in Augustine's case.[12] HTp. 1503.

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[11] The page of the prosecutor's notes on which Gore's name appears is partially cut-off in the copy the State provided to post-conviction counsel in 2006. As discussed earlier, by the time of Augustine's RJA hearing, the original notes had gone missing from the prosecution file. DE100; HTp. 71. Nonetheless, Gore's name and the description of Longwood as a "bad area" can be deciphered in the copy admitted into evidence. DE100; HTp 1053.

[12] Augustine's hearing was held four years before the United States Supreme Court decided *Foster v. Chatman*, 136 S.Ct. 1737 (2016). In that case, the Court reviewed prosecution notes similar to Colyer's "Jury Strikes" notes and found that "the persistent focus on race in the prosecution's file" bore on the "racial

The Prosecution's Jury Selection in the Burmeister and Wright Cases Demonstrates that When Prosecutors Wish to Seat Black Jurors, They Don't Strike Them.

Augustine also presented evidence about the prosecution of James Burmeister and Malcolm Wright, two white men charged in the racially-motivated murders of two African Americans. HTp. 925. Calvin Colyer, Augustine's lead prosecutor, also tried these two cases. The evidence revealed a stark contrast between Augustine's trial, where the prosecution sought to exclude African American as jurors, and the *Burmeister* and *Wright* cases where, when prosecuting white defendants for the murder of black victims, Colyer sought to seat African Americans as jurors. HTpp. 933-934. The stark disparity demonstrates convincingly that race was a factor in selecting the jury that sentenced Augustine to death.

Colyer insisted that he used the same jury selection method, asked roughly the same questions, and based his strikes on the same characteristics in every case. HTpp. 811, 931-33. In trying to justify the five strikes he used to eliminate all of the African-American potential jurors in Augustine's case,

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animosity" apparent in the case and left the Court with the "firm conviction" that the prosecution's strikes of two African Americans were "motivated in substantial part by discriminatory intent." 136 S.Ct. at 1754 (internal citation omitted).

Colyer said he struck those jurors because of their reluctance to impose the death penalty or the criminal records of their family members.[13] Yet in *Burmeister* and *Wright,* Colyer accepted African Americans as jurors despite their clear misgivings about the death penalty and/or involvement with the legal system. HTpp. 982-989; DE130, DE131, DE132, DE133.

It is significant also that in *Burmeister*, as in this case, the prosecution's jury selection notes included explicit racial designations. HTp. 940; DE117; DE126. Defense expert Stevenson explained that these actions showed that the prosecutor's race consciousness was "very, very important in thinking about jury selection generally." HTp. 1540.

One of Augustine's Prosecutors Was Trained in How to Strike African-American Jurors and Evade Batson and She Utilized those Lessons in Selecting Capital Juries.

The North Carolina Conference of District Attorneys presented a CLE training entitled *Top Gun II* in July 1995. A handout from this training was titled, "Batson Justifications: Articulating Juror Negatives." Despite the benign title, the *Top Gun II* handout was clearly a cheat sheet of 10 facially non-racial

[13] *See* HTp. 792, 814, 817 (Ronald Williams, Sharon Bryant, and William Miller struck for their death penalty views); 797 (Mardelle Gore struck because of her daughter's criminal record); 821 (Ernestine Bryant excluded because of her son's criminal record).

"justifications" a prosecutor could "articulate" to justify the strike of an African-American venire member without running afoul of *Batson*. This handout was produced in discovery before Robinson's RJA hearing and introduced at Augustine's RJA hearing.

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress – attire may show lack of respect for the system, immaturity or rebelliousness.
2. Physical Appearance – tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age – Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors – or those who vacillated in answering DA's questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

Top Gun II *Jury Voir Dire*

DE111.

At Augustine's RJA hearing, Margaret Russ, one of his trial prosecutors, gave conflicting testimony about whether she had attended the *Top Gun II* seminar. Sometimes she was undecided about her attendance. *See* HTpp. 152 ("not absolutely sure"), 169-71 ("may or may not have"), 172 ("I'm almost sure I did not"). Later Russ said definitively she did not attend and offered a reason for her certainty. *See* HTpp. 1291-92 ("I did not go . . . I was in trial."). Russ ultimately confessed to attending *Top Gun II* after she was confronted with CLE records showing she had reported her attendance to the North Carolina State Bar. HTpp. 1292-93, 1393; DE81.

Russ also denied relying on the training handout. HTpp. 173-74. But transcripts of jury selection from a number of cases tried by Russ show otherwise. In the 1996 Cumberland County capital case of *State v. Parker*, 96 CRS 4053, Russ was found to have intentionally discriminated against African-American venire member Forest Bazemore because of his race. DE147 at 451-55. At Augustine's RJA hearing, Russ was questioned extensively about her use of the *Top Gun II* handout in responding to this *Batson* objection. HTpp.

1272-91. Russ hotly disputed the trial judge's conclusion that she violated *Batson* in striking Bazemore.[14] HTpp. 1295-97, 1302.

In *Parker*, Russ offered numerous ostensibly race-neutral reasons for excusing Bazemore. For example, Russ attempted to justify her strike on the basis of Bazemore's age and his body language, noting that Bazemore "folded his arms," and sat back in his chair. Russ then described Bazemore as "evasive" and "defensive" and said he gave "basically minimal answers." DE147. These explanations closely track the *Top Gun II* handout, providing additional evidence that the trial judge in *Parker* was absolutely correct in finding that Russ attempted to strike an African American because of his race.

During a colloquy with the trial judge, Russ appeared to be reading directly taken from the *Top Gun II* handout. Russ said, "Judge, just to reiterate, those three *categories for Batson justification* we would *articulate* is the *age, the attitude of the [juror] and the body language*." *Id*. (emphasis added). The word justification could hardly be an accident — it came from the title of the handout. Later, Russ referred to "body language and attitude" as "*Batson*

[14] The opinions Russ expressed at the RJA hearing concerning the trial judge's ruling were consistent with her jury selection notes from *Parker*. These notes include an entry concerning the trial judge's handling of *Batson* objections that reads, "What an a-----e!! No chance he'll ever know the law." DE148 at 16.

justifications, articulable reasons that the state relied upon." HTpp. 1275-87; DE147 (emphasis added).

A review of jury selection transcripts in other cases Russ prosecuted in Cumberland County reveals that Russ appears to have used the cheat sheet's demeanor-based justifications frequently when called on to explain her strikes of minority venire members. For example, evidence presented at Augustine's RJA hearing showed that Russ employed the *Batson* evasion techniques she learned at *Top Gun II* in the 2000 capital cases of *State v. Frink* and *State v. Tirado & Queen*. DE156 at 352; DE157 at 294-296.[15]

Comparative Juror Analysis Shows the Prosecution Accepted Potential White Jurors Who Hesitated on the Death Penalty or had Connections to the Criminal Justice System.

The prosecution engaged in disparate treatment when it struck African-American venire members Ernestine Bryant and Mardelle Gore at Augustine's trial. The lead prosecutor claimed he struck Bryant and Gore in part because

[15] In a recent American Bar Association publication, race discrimination in jury selection in North Carolina was described as "rampant." The article cited, among other things, prosecutors' use of the *Top Gun II* handout. *See* Bright & Chamblee, "Litigating Race Discrimination Under *Batson v. Kentucky*," ABA Criminal Justice, Vol. 32, Num. 1 (Spring 2017) at 11.

their family members had committed crimes.[16] Bryant's son went to prison for 14½ years on federal drug charges. Gore's daughter had previously served five years for killing her abusive husband; she was out of prison and working for Duke University Hospital at the time of Augustine's trial. Tpp. 112-13, 174, 190-91 (Bryant), 914-17, 928-32 (Gore); SE32.

While striking Bryant and Gore ostensibly because of the criminal convictions of their offspring, the prosecutor accepted Gary Lesh as a juror. Lesh is white. The State accepted him despite the fact that his stepson had received a five-year sentence for drug crimes, and despite his uncle having been in a confrontation with another man that was so violent both men died from gunshot wounds. Tpp. 651-52, 715-16.

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[16] As discussed earlier, the prosecutor never admitted to the trial judge that, even before jury selection commenced, he was concerned about Gore's residence in a predominantly African-American neighborhood. It is notable also that, at trial, the prosecutor claimed that Gore's demeanor was objectionable. Tracking the *Top Gun II* handout, Colyer alleged that Gore was "fairly monosyllabic in her answers" and her "body language tended to be a — I don't want to say defensive, but somewhat defensive in that she didn't make a whole lot of eye contact." Colyer also suggested that Gore had "kind of a quizzical look on her face." Tpp. 930-31. The trial judge ruled this demeanor reason was not "reasonably specific" or a "legitimate reason" for the strike. Tp. 933. By the time of the RJA hearing, Colyer had abandoned his demeanor-based reason for striking Gore. HTpp. 800-801; SE32. The Supreme Court of the United States recently observed, when a prosecutor's reasons for a strike shift over time, this suggests the reasons are pretextual and indicative of intentional discrimination. *Foster*, 136 S.Ct. at 1751-52, 1754.

In addition to passing Lesh, the State also passed Melody Woods. Melody Woods, too, is white. She was passed even though her mother stabbed Woods' first husband in the back and was convicted of assault with a deadly weapon resulting in serious injury. Tpp. 827-29.

ARGUMENT

I. PETITIONER IS ENTITLED TO HIS PREVIOUSLY-IMPOSED LIFE SENTENCE BECAUSE THIS COURT IMPROVIDENTLY GRANTED THE STATE'S 2013 PETITION FOR CERTIORARI AND REVERSED ON GROUNDS THE STATE DID NOT PRESERVE FOR REVIEW.

Petitioner was last before this Court when the Court granted the State's 2013 request for *certiorari* review. In 2015, the Court remanded Augustine's case after finding that Judge Weeks had erred in joining the cases of Augustine, Walters, and Golphin in a single RJA hearing. In addition, the Court concluded that Judge Weeks' denial of the State's third continuance motion in Robinson "infected" the hearing held in Petitioner's case eight months later. *State v. Golphin, Walters & Augustine*, 368 N.C. 594, 781 S.E.2d 292 (2015).

Pursuant to its inherent power, this Court should exercise its authority to determine that the grant of a writ of *certiorari* to review Judge Weeks' order was improvidently granted. In the alternative, this Court should review its

remand order, vacate that order, and affirm the hearing court's order granting RJA relief. As shown below, the Court's unprecedented remand order – granting relief to the State on claims it abandoned and entirely failed to present in this Court – is so extraordinary that this Court must act to "prevent manifest injustice" to Augustine, as well as to "expedite decision in the public interest." N.C. R. App. Proc. 2.

The North Carolina Constitution confers on this Court the authority to promulgate rules of appellate procedure. N.C. Const. Art. IV, §13(2). As a consequence of its constitutional powers, the Court is both the drafter and enforcer of its own rules. Under the rules established by this Court to govern its review, "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated will be taken as abandoned." N.C. R. App. Proc. 28(b)(6). This rule has been invoked in countless cases to deny merits review to claims brought by prisoners serving lengthy prison terms, life sentences, and even death sentences. Over and over this Court has affirmed that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Yet that is precisely what happened in this case. And not to spare the life of a prisoner facing execution. To the contrary, to aid the State in maintaining a

death sentence. The Court's overreach in this case is contrary to precedent and entirely inconsistent with the Court's role as the guardian of justice. *See State v. Fowler*, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967) ("It is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed *the unfortunate accused before his life is taken by the State*.") (emphasis added).

As set out in the procedural history, the State did not preserve the continuance and joinder issues in this case. Augustine first discusses continuance. To briefly recap: In *Robinson*, the evidentiary hearing was continued twice, from September to November 2011, and then to January 2012. The State said it needed more time to gather affidavits from prosecutors explaining the strikes of African-American venire members, as the State's statistical expert intended to use these affidavits to counter the study conducted by Robinson's experts at Michigan State University (MSU). At the beginning of Robinson's hearing in January, the State moved for a third continuance. Judge Weeks denied the motion and the hearing proceeded. On April 20, 2012, the hearing court ruled in Robinson's favor and resentenced him to life.

Eight months after the Robinson hearing, six months after the ruling in that case, and four months after the General Assembly amended the RJA and narrowed the scope of the statute by eliminating state- and judicial division-wide disparities as grounds for relief, Augustine's hearing began in October 2012. At that hearing, the State offered no additional statistical evidence.

Significantly, prior to the start of the hearing in this case, the State acknowledged it had completed the data collection effort from prosecutors across North Carolina that it had been unable to complete by the time of the *Robinson* hearing. *See* September 27, 2012 Motions Hearing, Tp. 61 (acknowledging the State was "close to a hundred percent now" in gathering affidavits from prosecutors).

The State subsequently sought review of the order granting RJA relief to Robinson. In its petition for *certiorari* review, and then as an argument in its brief, the State argued that Judge Weeks abused his discretion by denying the State's third request for a continuance. Thus, the denial of the State's third request for a continuance was ripe for this Court's review and Robinson was in a position to address the argument.

By contrast, at no point during Augustine's evidentiary hearing did the State raise any issue regarding continuance. Nor did the State did include in

its brief or in its questions presented in the petition in this case, any issue pertaining to continuance. As a consequence, Augustine had no opportunity to argue in this Court that the State had adequate time to prepare and suffered no prejudice *in his case* on account of the denial of the continuance motion in *Robinson*.

Initially, it should be noted that the State had a substantial period of time to prepare whatever evidence it chose to counter Augustine's statistical study. The RJA was enacted in August 2009, and the initial findings of the MSU statistical study were set out in an affidavit attached to Petitioner's RJA motion filed in August 2010. Judge Weeks ordered an evidentiary hearing and discovery in Robinson's case in the spring of 2011, placing the State on notice that it needed to prepare to present evidence in opposition to the MSU study. Augustine's evidentiary hearing was 18 months after that. The notion that two plus years, or even a year and a half was not enough time for the State to commission whatever statistical analyses it desired strains credibility.[17]

[17] The original RJA directed prisoners under sentence of death to file any RJA motion within one year. The MSU study was completed 11 months after the RJA was enacted.

Had the State properly preserved and raised the continuance issue, Augustine could have cited a number of persuasive reasons why the State's argument was baseless. The record in this case demonstrates the State had more than enough time to prepare and was as ready as it would ever be by the time Augustine's hearing commenced. First, a week before Augustine's hearing started, the State conceded that is was "close to a hundred percent now" in its affidavit gathering effort.[18]

Second, the State chose not to present the additional affidavits it gathered after the completion of the Robinson hearing. In fact, the State objected to the introduction of these affidavits by Augustine, Walters, and Golphin. *See* HTpp. 269-70 (defense introduces prosecution affidavits); 271-90 (extended colloquy on State's objections); 291-92 (hearing court admits affidavits over State's objection).

Third, the State presented no other statistical evidence, despite having retained its own expert prior to the Robinson hearing, and having another eight months to get organized.

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[18] The most likely explanation as to why the prosecution said nothing at Augustine's hearing about needing a continuance is that the State had gathered a sufficient number of affidavits for its purposes.

Fourth, at the Robinson hearing, the State had an opportunity to fully preview the study and the experts who conducted it. Thus, this was not a case of "ambush." Rather, the State was in the unusually fortunate position of having a second opportunity to take on a wholly familiar body of evidence.[19]

Fifth, the scope of Augustine's RJA hearing was actually narrower than in *Robinson*. In view of the General Assembly's amendment of the RJA, the State argued that Augustine's claims based on state- and division-wide disparities were no longer cognizable. While the hearing court made alternative findings under the original and amended statute, the focus of Augustine's hearing, and the thrust of the court's findings, was the evidence of county disparities and discrimination in Augustine's own case. Thus, by the time of Augustine's hearing, the State had been afforded more time and had less to defend than in *Robinson*.

If the State had properly preserved and raised the continuance issue in Augustine's case, Petitioner would have additionally argued that no prejudice flowed to the State from its purported lack of preparedness to confront the MSU study. There was no prejudice because the individualized, non-

[19] The State was represented by three attorneys at the hearing in Petitioner's case, one of whom had expertise in statistics.

statistical evidence admitted at Augustine's hearing alone entitled him to RJA relief. This evidence – of racially-biased notes about African-American citizens called for jury duty in Augustine's own case, the completely different approach to jury selection the prosecution took in Augustine's case compared to the cases of two white defendants charged with hate crimes against blacks, the prosecution's use of training to evade *Batson*, and the shifting, pretextual reasons given for striking African-Americans while accepting whites with similar characteristics – was not introduced at the Robinson hearing and was independent of the statistical evidence.

The hearing court found this evidence alone established that prosecutors selected jurors in Augustine's case on the basis of race. *See* Order at ¶ 10 ("These notes are irrefutable evidence that race, and racial stereotypes, played a role in the jury selection process in Augustine's case."); ¶ 11 (prosecutor "used his race-based notes to inform his questions and strike decisions"); ¶16 (notes "reflect disparate treatment of potential jurors based on race"); ¶ 20 (notes are "powerful evidence" of race discrimination); ¶ 34 (evidence and testimony about the *Burmeister* and *Wright* cases refute prosecution's proffered reasons for strikes in Augustine's case and "[r]ather, the salient fact, the determining fact, could only be race"); ¶ 50-51 (strike of

Mardelle Gore "is additional evidence of discrimination in Augustine's case" and prosecutor's "shifting explanations are themselves a reason to believe the explanation for the strike of Gore was pretextual"); ¶ 53 (finding "unrebutted" evidence of disparate treatment of jurors by race despite fact that the State "had an opportunity in this case to attempt to counter this evidence"); ¶ 76 (prosecutor's reliance on a training handout to evade *Batson* is "evidence of her inclination to discriminate on the basis of race"); ¶ 91 (prosecution's conduct illustrative of "the history of strong resistance to constitutional requirements of equal participation in jury selection by African Americans"); ¶ 130 (notes on potential jurors in Augustine's case, prosecution's conduct in *Burmeister* and *Wright*, use of a "cheat sheet" to respond to *Batson* objections, and numerous case examples of disparate treatment "together, constitute powerful, substantive evidence that these Cumberland County prosecutors regularly took race into account in capital jury selection and discriminated against African-American citizens").

Under well-established law, these findings, based on Judge Weeks' weighing of the evidence and his opportunity to observe the demeanor of the testifying prosecutors, were binding on this Court. *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000); *see also State v. Smith*, 278 N.C. 36, 41, 178

S.E.2d 597, 601 (1971) (in contrast to an appellate court which "sees only a cold, written record[,]" a hearing judge "sees the witnesses, observes their testimony as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth"). In sum, the binding fact findings, based on the overwhelming non-statistical evidence Augustine presented, entitled him to relief independent of any statistical evidence and, consequently, any error with regard to the State's third request for a continuance eight months before was harmless.

Turning to joinder, the State also failed to preserve this issue in Augustine's case. Before Judge Weeks, the State moved to have three separate hearings in the cases of Augustine, Walters, and Golphin. The State posited two reasons for this request. First, the State suggested there were evidentiary concerns because the crimes and convictions of the three defendants were in different years. Second, the State said separation of the cases was necessary in view of security concerns. Prior to the evidentiary hearing and after Walters and Golphin each waived their right to be present at the hearing, Judge Weeks denied the State's motion to separate the three cases. The State did not renew its motion at the commencement of Augustine's hearing. Then, in this Court,

the State abandoned the issue entirely, omitting any mention of joinder from its questions presented and failing to present any argument in its brief.[20]

As with the continuance issue, Augustine had no opportunity to argue in this Court that the hearing court's joinder of these cases was not an abuse of discretion and also that the State suffered no prejudice from the joinder of these cases.[21] Had he been able to do so, he would easily have overcome the State's weak arguments for separating the three cases.

Judge Weeks clearly exercised reasonable discretion in electing to hold a joint hearing on the identical RJA jury selection claims of these three death-sentenced prisoners prosecuted in the same county, by the same office, and

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[20] The State briefly mentioned its pre-hearing objection to joinder twice in its petition: in footnote one on page two, and in the procedural history on page 5. Similarly in its brief, the State briefly referred to the objection on footnote two on page three, and in the procedural history on page six.

[21] On appeal, a trial court's ruling on consolidation or severance is discretionary and will not be disturbed absent a showing of abuse of discretion. *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985). Moreover, a joinder or severance ruling may be reversed for an abuse of discretion only upon a showing that it was "so arbitrary that it could not have been the result of a reasoned decision." *Id*.

In his research, Petitioner has been unable to find any case in which a court's ruling on joinder or severance was overturned because of prejudice to the State.

tried within five years of each other. Indeed, all three of the defendants were tried by the same prosecutor, Margaret Russ, and a second prosecutor, Calvin Colyer, participated in jury selection in two of the cases, including Augustine's.

The same evidence supported the claims of all three prisoners and was admissible to show county-wide discrimination. N.C. Gen. Stat. § 15A-2011(d) (amended 2012). Furthermore, the amended RJA provided that, for statistical evidence, the pertinent time period was from 10 years prior to the capital offense to two years after the imposition of the death sentence. N.C. Gen. Stat. § 15A-2011(a) (amended 2012). Thus, there was overlapping evidence for all three cases. Under these circumstances, Judge Weeks' decision to consolidate the three cases was not only appropriate but commendable insofar as it conserved judicial resources.[22]

There can be no credible argument that the State was prejudiced by joinder of the cases. At all points during the hearing, the State was in a position to object to the admissibility of any evidence as to any of the prisoners. The State did not do so. The State also was not limited, by virtue

[22] The 2015 Remand Order's discussion of this issue comprises one sentence and no citation to any legal authority.

of joinder, from offering any evidence to rebut the evidence offered by Augustine. Additionally, the hearing was heard, not by a jury, but by an experienced judge quite unlikely to be confused by evidence that applied only to one of the prisoners and not another.[23] *See City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-115 (1971) ("In a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision."); *State v. Thompson*, 792 S.E.2d 177, 184 (N.C. App. 2016) (finding no error in joinder of cases and noting "[t]he rule is that a trial judge sitting without a jury is presumed to have considered only the competent, admissible evidence and to have disregarded any inadmissible evidence that may have been admitted.") (citations omitted).

Finally, the record clearly demonstrates that Judge Weeks was capable of distinguishing which evidence applied to which defendant. *See* Order at ¶¶ 269-87 (setting out "Disparities Unique to Each Defendant" based on "three

[23] At the time of Petitioner's RJA hearing, Judge Weeks was the Chief Resident Superior Court Judge of the 12th District and had been on the bench for more than two decades. During his tenure, Weeks often presided over complex cases, notably the murder trials of two men charged with killing James Jordan, father of North Carolina's famous basketball star, Michael Jordan. *See* Paul Wolverton, "Senior Resident Superior Court Judge to retire in 2012," *Fayetteville Observer*, November 1, 2011.

groups of statistical analysis tailored to the time of their cases"); ¶¶ 312-22 (same with regard to regression analyses). Likewise, the conclusions of law were specific for each defendant. *See* Order at ¶¶ 394-399 (Golphin); ¶¶ 400-405 (Walters), and ¶¶ 406-12 (Augustine).

Neither reason identified by this Court for remanding this case, continuance nor joinder, was discussed during Augustine's evidentiary hearing and neither was raised by the State on *certiorari* review in this case. These issues were consequently not before this Court and should not have served as the basis for the remand in this case. N.C. R. App. Proc. 28(b)(6).

The consistency with which a government follows its own rules is a hallmark of due process and the rule of law. *Accardi v. O'Shaughnessy*, 347 U.S. 260, 268 (1954); *see also Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945) (statutes and rules designed to afford due process and "as safeguards against essentially unfair procedures" must be applied at the "crucial stage of the proceedings or not at all"); *Jones v. Board of Governors of the University of North Carolina*, 704 F.2d 713, 717 (4th Cir. 1983) ("significant departures from stated procedures of government . . . if sufficiently unfair and prejudicial, constitute procedural due process violations"); (Mary *Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964)(Brown, J., concurring)(our law does not

permit the government "to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case"), *rev'd on other grounds*, 382 U.S. 46 (1965). Likewise, a fundamental precept of due process is the opportunity to be heard. Here, Augustine was denied an opportunity to be heard on the crucial issues which sent him back to death row. As a consequence, he "was denied due process of law [because his] death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

The Court's powers under Rule 2 are broad and appropriately exercised in the extraordinary circumstances of this case where a prisoner facing execution was found to have been tried by an all-white jury after the prosecution dismissed African-American citizens because of their race, and an appellate court reversed that finding based on unpresented arguments that the prisoner had no opportunity to confront. Surely this is a case of "manifest injustice" in which "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007). In addition, this is a case of substantial public interest insofar as it presents the question of whether our

courts will "tolerate the corruption" of capital juries by racism. *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987); *see also Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017) (describing racial bias as "a familiar and recurring evil" that must be addressed in order "to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy").

II. PETITIONER IS ENTITLED TO HIS PREVIOUSLY-IMPOSED LIFE WITHOUT PAROLE SENTENCE BECAUSE IT WAS ENTERED AFTER A FINAL JUDGMENT BASED ON POWERFUL EVIDENCE OF RACE DISCRIMINATION IN HIS CASE.

Following an evidentiary hearing properly held under the RJA, Augustine was acquitted of the death penalty and resentenced to life imprisonment. The hearing court acquitted Augustine of his death sentence by finding he had proved the existence of a defense to the death penalty. Under the Double Jeopardy Clause of the Fifth Amendment, U.S. Const. *amend. V*, Augustine cannot be subjected to the death penalty again. As well, Augustine is protected by N.C. Gen. Stat. §15A-1335, which prohibits the imposition of a more severe sentence after a lesser one has been imposed.

Augustine raised these issues below, but the Superior Court did not address them.[24] As no further proceedings are required to resolve these issues, this Court should address them as a threshold matter.

The legal principles that govern whether the Double Jeopardy Clause protects Augustine's life verdict are clear and well-established, including that: (1) penalty-phase acquittals of the death penalty in capital cases are entitled to double jeopardy protection the same as guilt acquittals, *Bullington v. Missouri*, 451 U.S. 430 (1981); (2) Double Jeopardy applies to judicial acquittals made under guided discretion, *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); and (3), death penalty acquittals in appellate and post-conviction proceedings fall within the scope of the Double Jeopardy Clause, *Burks v. United States*, 437 U.S. 1, 11 (1978); *Young v. Kemp*, 760 F.2d 1097, 1099 (11th Cir. 1985). Under this clear and binding precedent, the Double Jeopardy Clause prohibits exposing Augustine again to the death penalty because he was acquitted of that penalty and resentenced to life imprisonment without parole.

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[24] Augustine also previously asserted in this Court that, following imposition of a judgment of life imprisonment, Double Jeopardy and § 15A-1335 prohibited the State from again subjecting him to the death penalty. The Court's 2015 remand order was silent on these issues.

The United State Supreme Court has long recognized the application of Double Jeopardy protections to a jury's rejection of the death penalty in the sentencing phase because the "jury has already acquitted the defendant of whatever was necessary to impose the death sentence." *Bullington*, 451 U.S. at 445. Here, the hearing court acquitted Augustine of "whatever was necessary to impose death" when it found he proved his RJA defense to the death penalty.

The Supreme Court has been equally clear that death penalty acquittals, when imposed by trial courts rather than juries, are entitled to double jeopardy protections. *Rumsey*, 467 U.S. at 211. This protection applies when trial courts make factual findings, guided by statutory standards that are "sufficient to establish legal entitlement to the life sentence, [which] amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Id*. *See also, Sattazahn v. Pennsylvania*, 373 U.S. 101, 109-10 (2003) (no double jeopardy protection when trial court's sentence was not based on fact findings).

The hearing court in this case made hundreds of detailed factual findings on a lengthy evidentiary record, which collectively established Augustine's legal entitlement to a life sentence, and acquitted him of the death

penalty. This acquittal, even if based on an erroneous legal principle, is protected by Double Jeopardy. *Rumsey*, 467 U.S. at 211.

Augustine's hearing was conducted as part of a new, system-wide procedure created by the North Carolina legislature to narrow eligibility for the death penalty to those cases free of race discrimination. States are both empowered to design their own mechanisms for determining capital eligibility, *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), and required to ensure that these schemes are sufficiently narrow, *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Under the scheme created by the RJA, the hearing court was required to make fact findings that would establish whether life without parole or the death penalty could be imposed. N.C. Gen. Stat. § 15A-2012(a).

The fact that Augustine was acquitted of the death penalty following a post-conviction proceeding does not change the Double Jeopardy analysis. Post-conviction courts routinely decide claims after entering significant fact findings. In those routine claims, however, the question is whether a prior court committed a legal error requiring a new trial or sentencing hearing and there is no double jeopardy bar to further proceedings. Here, in contrast, the RJA court exercised its role as a fact finder in a statutory scheme designed to root out racial bias from capital sentencing and narrow the availability of the

death penalty and, rather than order a new sentencing hearing, Judge Weeks followed the RJA procedure and resentenced Augustine to life.

The legislature set identical procedures for evaluating RJA claims from pretrial defendants and persons previously sentenced to death who filed claims within a limited time window. N.C. Gen. Stat. §15A-2012(a). Just as any trial level findings would be entitled to Double Jeopardy protections, so also do the post-conviction findings in Augustine's case.

The body of case law considering sufficiency of the evidence claims and judgments of acquittal is further evidence that the posture of the case is of little significance to the Double Jeopardy analysis. A judgment of acquittal on direct appeal is protected by Double Jeopardy to the same extent as one at trial. *Burks*, 437 U.S. at 11. Likewise, a finding of insufficiency on habeas review also triggers Double Jeopardy protections. *See Young v. Kemp*, 760 F.2d 1097, 1099 (11th Cir. 1985) (finding the evidence insufficient to support an aggravating factor and vacating the death sentence; further holding that the State could not seek the death penalty on retrial).

In this case, Augustine's receipt of RJA relief amounted to a finding that there was insufficient evidence to impose a death sentence under state law in effect at that time. The RJA stated that "no person shall be subject to or given

a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010. In concluding that Augustine's judgment was sought or obtained on the basis of race, the trial court determined there was insufficient evidence to support a death sentence under prevailing state law. The Double Jeopardy Clause protects that acquittal, just as it would protect a defendant's acquittal at trial from an appeal by the State. Put another way, the RJA created an affirmative defense to death sentences, a defense that Augustine successfully proved. Once the hearing found Augustine ineligible for the death penalty, the Double Jeopardy Clause prohibited the future imposition of that penalty.

Augustine's life without parole verdict is also protected by North Carolina law, in particular N.C. Gen. Stat. § 15A-1335, which prohibits imposition of a more severe sentence after a lesser one has been imposed:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

This law is a blanket prohibition on the imposition of a more severe sentence. Consequently, it prohibits the imposition of the death penalty if, at

any point, the defendant has been sentenced to a lesser sentence for the same crime. Thus even though this Court previously reversed the substantive ruling below, no trial court can impose a death sentence.

III. PETITIONER IS ENTITLED TO PURSUE HIS CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE RETROACTIVE APPLICATION OF THE REPEAL TO PETITIONER VIOLATES THE FEDERAL AND STATE CONSTITUTIONS.

After North Carolina enacted the RJA, Petitioner complied with all statutory requirements to present claims under the law: He met the statutorily-imposed deadline and supported his claims with affidavits and other documentary evidence. After the General Assembly amended the RJA, Petitioner complied with new statutory requirements: He timely filed his amendment and properly supported his claims. In connection with his original RJA MAR and his Amendment, Petitioner asked for discovery and an opportunity to present evidence. The evidentiary hearing in Petitioner's case revealed a persistent pattern of race discrimination in North Carolina and in Augustine's own case.

The question before the Court now, after the General Assembly's repeal of the RJA, is how does this case go forward? Can the Court pretend the powerful and troubling taint of racism in this case was never discovered? The

answer is no. Outlined below are the numerous constitutional barriers to retroactively applying the RJA repeal to Petitioner, and closing the courthouse door on his undisputed evidence of discrimination against African Americans in jury selection.

A. Equal Protection and the Prohibition Against Cruel and Unusual Punishment under the State and Federal Constitutions Prohibit the Death Penalty in this Case.

In enacting the RJA, North Carolina declared that racial bias would not be tolerated in the decisions of who died and who lived under its criminal justice system. The RJA was clearly in alignment with our ideals, namely that the people of North Carolina "will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987). But the RJA's enactment was also a recognition that, in practice, our court system does not always comport with our aspirations. Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 116 (2012) (describing legislative history of intent to address racial discrimination that has persisted despite constitutional prohibition and judicial condemnation).

The enactment of the RJA led to a unique inquiry into the history of racial discrimination and the death penalty in our state and, in turn, this inquiry yielded a comprehensive and damning analysis of pervasive racial disparities in capital cases, as well as documentary and historical evidence of intentional discrimination based on race.

Unfortunately, a newly-constituted legislature sought to turn away from this evidence and moved to repeal the RJA. When that effort failed because of gubernatorial veto, the legislature sought to narrow the reach of the law. Ultimately, the legislature was successful in repealing the RJA but, unsatisfied simply with foreclosing future claims of racial discrimination, the General Assembly also endeavored to ensure that Petitioner and the three other death-sentenced prisoners who had previously prevailed on their RJA claims would also be out of luck. On remand, the Superior Court went along with this gambit and, pointing to the RJA's repeal, closed the courthouse door to Petitioner's powerful claims of race discrimination.

The legislature's repeal and attempt to foreclose any further review of Petitioner's claims of racial bias violates the prohibition on discriminatory application of the death penalty and equal protection. U.S. Const. amends. VIII, XIV; N.C. Const., art. I, § 19, § 27; *Furman v. Georgia,* 408 U.S. 238 (1972);

Rose v. Mitchell, 443 U.S. 545, 555 (1979) *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

The Eighth Amendment to the United States Constitution forbids race discrimination in capital sentencing. Where there is a "constitutionally significant risk of racial bias" with "exceptionally clear proof," including a showing that decision makers in the case "acted with discriminatory purpose," the death sentence cannot stand. *McCleskey v. Kemp*, 481 U.S. 279, 314 (1987). Petitioner submits that the evidence[25] presented at his RJA hearing, and proffered to the Superior Court on remand, meets the *McCleskey* standard and bars the State from executing him.

The United States Supreme Court has also held that a racially-tainted death sentence is "unusual" and therefore violates the Eighth Amendment. According to the Court, it would "seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it is imposed upon him by reason of his race . . . or if it is imposed under a procedure that gives room for the play of such prejudices." *Furman v. Georgia,* 408 U.S. 238, 242 (1972)

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[25] As discussed in his Rule 2 argument, independent of the Michigan State University statistical analysis, Augustine's documentary and historical evidence alone makes clear that prosecutors discriminated against African-American citizens summoned for jury service in this case. The MSU evidence only confirms Augustine's evidence.

(Douglas, J., concurring); *see also Walker v. Georgia*, 129 S. Ct. 453, 454 (2008) (Stevens, J., statement respecting the denial of *certiorari*) (approval of post-*Furman* capital punishment statutes was "founded on an understanding that the new procedures would protect against the imposition of death sentences influenced by impermissible factors such as race."); *Connecticut v. Santiago*, 122 A.3d 1, 85 (Conn. 2015) (finding state death penalty scheme constitutes cruel and unusual punishment in part because of "racial, ethnic, and social-economic biases"); *District Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 665 (1930) (holding state death penalty scheme unconstitutional under the state constitution based in part on the persistence of racial discrimination).

If anything, North Carolina's Constitution provides even great protections against racial bias in the death penalty. The state constitution forbids not only "cruel and unusual" punishments, but "cruel *or* unusual" punishments. N.C. Const. art. I, § 27 (emphasis added). Indeed, this Court has construed this disjunctive language to amplify constitutional protections. *See, e.g.*, *State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562, (1988) (declining to "engraft a good faith exception to the exclusionary rule under our state constitution"); *Medley v. North Carolina Dep't of Correction*, 330 N.C. 837, 846, 412 S.E.2d 654, 660 (1992) (Martin, J., concurring) ("The disjunctive term 'or'

in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment" and where the federal constitution imposes certain requirements, "the North Carolina Constitution imposes at least this same duty, if not a greater duty."). In addition, this Court has recognized the need to assiduously root out race discrimination because of our state constitutional commitment to ensure that the "judicial system of a democratic society [] operate evenhandedly and . . . be perceived to operate evenhandledly." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987).

The legislature's decision to remove the safeguard it had deemed necessary to protect against racial discrimination, after confronted with evidence of powerful racial discrimination, is evidence of its intent to administer capital punishment in an unequal manner, in denial of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (a law "fair on its face, and impartial in appearance" denies equal protection "if it is applied and administered by public authority with an evil eye and an unequal hand").

"Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). This Court cannot close its eyes in the face of painful proof of invidious racial discrimination and remain true to the state and federal constitutions.

Augustine argued below that retroactive application of the RJA repeal violated equal protection and the prohibition of cruel and/or unusual punishments. Augustine also proffered evidence on these issues. The Superior Court did not address Augustine's arguments and declined to admit his evidence. This Court should reverse and reimpose Augustine's life without parole sentence. In the alternative, Augustine asks the Court to remand the case in order that he might present evidence in support of his arguments under the Equal Protection clause and the Eighth Amendment and Article I, § 27.

B. Retroactive application of the RJA Repeal to Petitioner Would Constitute an Unconstitutional Bill of Attainder.

Under the United States Constitution, "no State shall . . . pass any bill of attainder." U.S. Const. Article I, § 10. The prohibition on bills of attainder forbids "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). The RJA repeal, if applied to Augustine, would constitute an unconstitutional bill of attainder.

Augustine raised this defense to retroactive application of the RJA repeal below, but the Superior Court did not address Augustine's arguments. Augustine proffered evidence on this issue, but the Superior Court declined to admit this evidence. This Court should reverse and re-impose Augustine's life without parole sentence. In the alternative, Augustine asks the Court to remand the case in order that he might present evidence showing he was the target of an unconstitutional bill of attainder.

A law constitutes a bill of attainder if the legislation specifically targeted an individual or a member of an identifiable group and inflicted punishment. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984). With respect to punishment requirement, this Court can consider whether (1) the legislative record shows an intent to punish; (2) the statute can reasonably be viewed as furthering a nonpunitive legislative purpose; and (3) the statute falls within the historical meaning of legislative punishment. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *State v. Johnson,* 169 N.C. App. 301, 310, 610 S.E.2d 739, 745 (2005) (using elements from *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*). The RJA repeal, as applied to Augustine, meets these criteria and thus should be struck down as an unconstitutional bill of attainder.

As set out in the statement of facts, Augustine and the three other Cumberland County prisoners who prevailed on their RJA claims were clearly targeted by the legislature: in the words of the primary sponsor, the intent of the repeal bill was to address the "outrageous outcome" in Augustine's case, namely the commutation of his death sentence and resentencing to life without parole. HE43 at 3. The method the General Assembly chose was to "void all appeals currently pending." HE41.

The plain language of the repeal statute confirms the legislature's intent to target Augustine and to punish him. In particular, the General Assembly was careful to say the repeal applied "in any case where a court resentenced a petitioner to life imprisonment without parole . . . and the Order is vacated upon appellate review." Sess. Law 2013-154, § 5.(d). This provision could only apply to four individuals, one of whom is Augustine and thus the repeal constitutes a bill of attainder. As the Supreme Court explained, "The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961).

A recent death penalty case from Alabama, *Neelley v. Walker*, 2018 WL 1579474 (M.D. Ala. Mar. 30, 2018), demonstrates the operation of a "designation of particular persons." The petitioner, Judy Neelley, was a death-sentenced prisoner who received a commutation to life. After Neelley's commutation, the Alabama legislature enacted a law barring parole for anyone serving a commuted life sentence. The law was made retroactive to four months prior to Neelley's commutation.

Neelley argued that the newly-enacted statute was a bill of attainder that unconstitutionally deprived her of her right to parole. The parole board responded that Neelley could not prevail because the law did not specifically name her. The court easily rejected that argument, noting that "the Act was not subtle" in identifying Neelley as its target. *Id*. at *11. Looking to the circumstances and the language of the Act, the court concluded that, "a legislature does not need to specifically name an individual to identify that person and designate that person as the subject of a piece of legislation." *Id*. Similarly here, the General Assembly plainly targeted Augustine as a member of a small, identifiable class.

In voiding Augustine's claims, the RJA repeal was meant to ensure that Augustine was again incarcerated under sentence of death and, ultimately,

that he would be executed. Thus, the legislature imposed on Augustine a punishment well within the historical meaning of punishment. Indeed, the death penalty is the quintessential legislative punishment. "At common law, bills of attainder often imposed the death penalty; lesser punishments were imposed by bills of pains and penalties." *Selective Serv. Sys.*, 468 U.S. at 852. "The classic example [of attainder] is death." *ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2010).

Courts have also recognized that legislatively depriving a defined group's right to assert a defense constitutes a bill of attainder. *See Putty v. United States*, 220 F.2d 473, 478-79 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955) (legislature's attempt to retroactively deny defendants grounds to attack their convictions was a bill of attainder); *Pierce v. Carskadon*, 83 U.S. (16 Wall) 234, 238-39 (1872) (finding a bill of attainder violation where the trial court attempted to apply new legislation that dramatically changed a defense).

As well, the "denial of access to the courts, or prohibiting a party from bringing an action" which was previously authorized by law, constitutes punishment by a bill of attainder. *Rhode Island Depositors Econ. Prot. Corp. v. Brown*, 659 A.2d 95, 104 (R.I. 1995) (citing *Pierce v. Carskadon,* 83 U.S. (16 Wall) 234 (1872), and *Cummings v. Missouri,* 71 U.S. (4 Wall) 277 (1866); *see also*

Ernst & Young v. Depositors Econ. Prot. Corp., 862 F. Supp. 709, 716 (D.R.I. 1994), *aff'd*, 45 F.3d 530 (1st Cir. 1995) (same). Re-subjecting Augustine to the penalty of death, and removing any recourse in the courts, both fall within the historical meaning of legislative punishment and, thus, the RJA repeal should not be applied retroactively to him.

The General Assembly wrote the RJA repeal in such a way as to apply specifically to Augustine and three other prisoners. It follows that the General Assembly's purpose was to ensure Augustine's eventual execution. Given the concerted and targeted efforts by the legislature to enact the RJA repeal and the voluminous legislative record demonstrating that the goal of the RJA repeal was to eliminate an avenue for Augustine to secure relief, there can be no question that applying the RJA repeal' retroactivity provision to Augustine would violate the prohibition on bills of attainder.

C. Retroactive Application of the RJA Repeal Would Violate Petitioner's Vested Rights and the Separation of Powers Clause.

Augustine' rights under the RJA vested before the legislature repealed the statute. Once Augustine invoked his rights under the RJA, properly filed a motion, proceeded to hearing, and prevailed on his claims, his rights vested. Specifically, he had a vested right to have the progress of his case determined solely by judicial review, and not be limited by legislative action. Under the

United States and North Carolina constitutions, once a litigant's rights have vested, these rights may not be taken away by the legislature. N. C. Const. art. I, Section 19 and art. IV, Section 13; U.S. Const. amend. IV; *Osborne v. District Attorney's Office for Third Judicial District*, 557 U.S. 52, 68 (2009); *Fogleman v. D&G. Equip. Rentals, Inc.*, 111 N.C. App. 228, 230-33, 431 S.E.2d 849, 850-52 (1993).

The Superior Court, in addressing whether any of the rights conferred under the RJA had vested prior to repeal, erroneously circumscribed its review and improperly construed what is considered a final judgment. The Court should reverse and find that Petitioner's rights under the RJA vested and resentence him to life imprisonment. Alternatively, the Court should remand for an evidentiary hearing on his claims of race discrimination.

State v. Keith, 63 N.C. 140 (1869), guides this Court's review. The facts of *Keith* are strikingly similar to the instant case: in both cases, a law was enacted, the defendant invoked the law as an affirmative defense, and the law was later repealed.

Defendant Keith was a Confederate soldier. During the Civil War, Keith killed another man. *Keith*, 63 N.C. at 140. After Appomattox, the North Carolina legislature enacted the Amnesty Act of 1866-67. 1866 N.C. Acts, § 1.

The Amnesty Act retroactively created an affirmative defense to homicides and felonies committed by officers and soldiers, blue and grey, if the defendant could demonstrate that he was enlisted at the time of the offense, and that the otherwise felonious acts were "done in the discharge of any duties imposed on him, purporting to be by a law of the State or late Confederate States Government, or by virtue of any order emanating from any officer, etc." *Keith*, 63 N.C. at 142. Thereafter, a different political party gained control of the legislature and repealed the Amnesty Act.

Keith was subsequently indicted for his wartime killing. At trial, he attempted to invoke the Amnesty Act as a defense to the murder prosecution. The trial judge denied Keith's plea on the grounds that the Act had been repealed and was therefore no longer available as a defense.

This Court reversed. The gravamen of the Court's opinion was that interpreting the repeal of the Act to bar its application to Keith improperly "took away from the prisoner his vested right to immunity." *Id*. at 145.

The similarities between Augustine's situation and that of Keith are striking. The RJA and the Amnesty Act were both applied retroactively to crimes committed before their passage. Both provided new, affirmative defenses to previously-committed crimes. Both required a defendant to

present evidence showing that he qualified for relief. Both were affirmative defenses that were meant to address public policy concerns that the legislature deemed so important as to override in some measure the criminal responsibility of the individual defendant. And finally, both laws were repealed by the legislature.

Significantly, though, by the time Keith asserted his right to a pardon for his actions as a Confederate soldier, the Amnesty Act had already been repealed. Here, Augustine filed his claim, presented his evidence, and obtained relief *before* the RJA's repeal. Thus, if anything, Augustine has a stronger case than Keith, who first invoked the Amnesty Act *after* it was repealed. This Court's holding in *Keith*, which has not been overruled or questioned by this Court in nearly 150 years, cannot help but be controlling.

However, the Superior Court distinguished *Keith* by holding that the granting of legislative amnesty in *Keith* was a "final determination" and that "amnesties and pardons are, in effect, final judgments." The Superior Court also concluded that Augustine's rights under the RJA were not vested "because they were not confirmed by a final judgment by a court of competent jurisdiction." Order at 9.

The Superior Court's analysis missed the mark in two critical respects. First, under the Amnesty Act, the pardon was not, in itself, final. To the contrary, Keith was required "to show that he was an officer or soldier, and that the felony was committed in the discharge of his duties as such." *Keith*, 63 N.C. at 143. Thus, in *Keith*, as in Petitioner's case, there could be no final order until the defendant presented evidence and his claim to this affirmative defense was adjudicated.

Second, the Superior Court erred by drawing on the wrong body of case law to determine the meaning of "final judgment." The Superior Court cited the definition of "final judgment" discussed in *Allen v. Hardy*, 478 U.S. 255 (1986) and *Linkletter v. Walker*, 381 U.S. 618 (1995). These decisions address the narrow and specific question of whether a federal habeas petitioner may receive the benefit of new United States Supreme Court decisions. The rule established in *Allen* and *Linkletter*, and in *Teague v. Lane*, 489 U.S. 288 (1989), is that a case becomes "final" once direct review has been completed and, after that point, a habeas petitioner cannot claim the advantage of new rules established by the United States Supreme Court. *See Teague*, 489 U.S. at 295-96 (discussing *Allen* and *Linkletter* and rejecting petitioner's argument that "*Batson* should be applied retroactively to all cases pending on direct review").

Whether Augustine may gain the benefit of a new Supreme Court rule is obviously not at issue here. This case concerns the repeal of a state statute that was clearly applicable to prisoners whose convictions were "final" for purposes of *Teague*, but were nonetheless eligible to seek RJA relief.

Instead of reaching for inapposite federal cases, the Superior Court would have done better to look closer to home, and this Court's clearly controlling precedent. *State v. Green*, 350 N.C. 400, 514 S.E.2d 724 (1999), dealt specifically with the question of a superior court judgment on a motion for appropriate relief and the retroactivity of a newly-enacted statute. The Court, in an opinion by Chief Justice Mitchell, clearly held that the superior court decision denying the petitioner's motion for appropriate relief was a "final judgment" for purposes of determining whether the new statute applied to the defendant's case. 350 N.C. at 405, 514 S.E.2d at 727.

Utilizing a similar analysis, in *State v. Basden*, 350 N.C. 579, 515 S.E.2d 220 (1999), another post-conviction case in which the defendant sought to invoke the same statute as the petitioner in *Green*, the Court granted relief because "final judgment on defendant's motion for appropriate relief was

entered [by the superior court] . . . after the effective date" of the new law.[26] 350 N.C. at 583, 515 S.E.2d at 222.

Thus, under controlling law – *Keith*, *Green*, and *Basden* – Augustine is entitled to receive the protections of the RJA and is untouched by the statute's repeal. Numerous other cases decided by this Court confirm that Petitioner's rights under the RJA vested. As discussed above, the RJA hearing court's grant of relief and entry of a life sentence constituted a final judgment and, consequently, Augustine's rights under the RJA vested at least when he obtained a judgment in his favor sentencing his to life imprisonment without the possibility of parole. *See Bowen v. Mabry*, 154 N.C. App. 734, 736-37, 572 S.E.2d 809, 811 (2002) ("a lawfully entered judgment is a vested right"); *Dunham v. Anders*, 128 N.C. 207, 213, 38 S.E. 832, 834 (1901) ("when the plaintiff obtained judgment for the penalty before the justice of the peace[,] he acquired a vested right of property that could be divested only by judicial, and

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[26] *See also* N.C. Gen. Stat. § 1A-1, Rule 54(b) (a superior court may enter a "final judgment" determining one or more of the claims of the parties, and "such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes"; Official Comment to Rule 54(b) (noting that there must be either a "final judgment or a ruling affecting a substantial right for an appeal to lie").

not by legislative, proceedings"); *see also Dyer v. Ellington*, 126 N.C. 941, 941, 36 S.E. 177, 178 (1900) (concluding that legislature could repeal previously available cause of action, and deny plaintiff penalty he would have been owed as "the penalty had [not] been reduced to judgment" and had not thus vested).[27]

Importantly, the legislature has no power to "annul or interfere with judgments theretofore rendered" or "change the result of prior litigation." *Piedmont Mem'l Hosp., Inc. v. Guilford Cnty., et al.*, 221 N.C. 308, 311, 20 S.E.2d 332, 334-35 (1942); *see also Wilson v. Anderson*, 232 N.C. 212, 221, 59 S.E.2d 836, 843-44 (1950) (citations omitted) (holding that the legislature has no right, directly or indirectly, to annul in whole or in part a judgment already rendered or to reopen and rehear judgments by which the rights of the party are finally adjudicated and vested); *Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 593 (1955) (holding that the legislature is without authority to invalidate, by subsequent legislation, a judgment entered by a judge of the superior court which was valid at the time of entry); *Board of Comm'rs of Moore Cnty. v. Blue*,

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[27] The Superior Court's citation of *Blue Ridge Interurban R. Co. v. Oates*, 164 N.C. 167, 80 S.E. 398 (1913), in which the plaintiffs had not properly commenced the lawsuit, and no judgment had been entered by the trial court at the time the repeal statute was enacted further illustrates the weakness of its legal analysis. Order at 8.

190 N.C. 638, 643, 130 S.E. 743, 746 (1925) (holding that the power to open or vacate judgment is "essentially judicial," and that the courts should not unfairly assume that the legislature "intended to exceed its powers or to interfere with rights already adjudicated . . .").

Here, the General Assembly has attempted to interfere in the normal course of litigation and divest Augustine of his right to further proceedings. When this Court found error in Judge Weeks' continuance and joinder rulings, it remanded for further proceedings. At that point, Augustine reasonably expected a second evidentiary hearing, one in which the State would have no complaint that it was not ready to counter his statistical evidence of racial bias. However, the very specific language in the repeal statute targeted the precise procedural posture of Augustine and the other three death-sentenced prisoners who prevailed on their RJA claims. *See* Sess. Law 2013-154§5.(d) (retroactively applying repeal to "any case where a court resentenced a petitioner to life imprisonment without possibility of parole . . . and the Order is vacated upon appellate review").

In construing the RJA repeal to close the courthouse door to Augustine's RJA claims, the Superior Court put its stamp of approval on the legislature's interference with the judiciary's power to order a new hearing on remand. The

General Assembly's targeted retroactivity provision thus violated the judiciary's power to determine how Augustine's case should proceed after a finding of error.

Additionally, Augustine's rights under the RJA vested when Judge Weeks ordered an evidentiary hearing pursuant N.C. Gen. Stat. § 15A-2012(a), and this Court, when remanding this matter to the court below, did not vacate the order granting an evidentiary hearing. When Augustine filed his RJA claims, he satisfied the statutory requirement that he "state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death." N.C. Gen. Stat. § 15A-2012(a). Upon such a showing, the legislature mandated under the RJA that "the court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. § 15A-2012(a)(2). After Augustine properly filed under the RJA, Judge Weeks ordered an evidentiary hearing. The hearing court's finding that Augustine met his burden entitling him to an evidentiary hearing pursuant to N.C. Gen. Stat. § 15A-2012(a) was left undisturbed by this Court's remand order.

Pursuant to this Court's opinion in *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980), Petitioner's right to an evidentiary hearing under the RJA

has vested. In *Gardner*, the plaintiff filed a divorce complaint in Wayne County, and the district court ruled that venue properly lay in Wayne County. The General Assembly subsequently amended the venue statute, in a manner which would have required the divorce action to be heard in a different county. This Court held that the newly-passed venue statute was not applicable because it became effective after the trial court had made a decision settling the "substantial" procedural right to a change of venue. The plaintiff's right to venue in Wayne County vested because it was "secured, established and immune from further legal metamorphosis." 300 N.C. at 719, 268 S.E.2d at 471. Accordingly, "No further challenge to venue by defendant was possible in the courts. The question was then settled, and it could not be reopened by subsequent legislative enactment." *Id*. at 720, 268 S.E.2d at 472.

As in *Gardner*, the hearing court made a final and substantial determination that Augustine was entitled to an evidentiary hearing. This Court did not alter that holding and, therefore, Augustine's right to an evidentiary hearing was "firmly fixed by judgment which had long since passed beyond the scope of further judicial review." *Gardner*, 300 N.C. at 720, 268 S.E.2d at 472.

In addition to violating Augustine's vested rights, the legislature's divestiture of the courts' jurisdiction after this Court found error is at odds with the timeworn principle of the separation of powers. North Carolina's constitution provides that "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," and also that the legislature "shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government." N.C. Const. art. IV, § 1; N.C. Const. art. I, § 6. Among the powers that rightfully pertain to the judiciary is the "power to fashion an appropriate remedy 'depending upon the right violated and the facts of the particular case.'" *Simeon v. Hardin*, 339 N.C. 358, 373, 451 S.E.2d 858, 869 (1994), citing *Corum v. University of N. C.*, 330 N.C. 761, 784, 413 S.E.2d 276, 291, *cert. denied*, *Durham v. Corum*, 506 U.S. 985 (1992).

The United States Constitution also bars the legislature from infringing on the courts' power to decide cases as the law and facts command and "attempt[ing] to direct the result" of a judicial proceeding. *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1324 (2016); *see also United States v. Klein*, 80 U.S. 128, 148 (1871) (Congress is not permitted to "direct[] a court to be instrumental to [its] end").

Consistent with the principles of vested rights and the separation of powers, the Superior Court's order should be reversed.

D. Application of the RJA Repeal to Petitioner Would Violate the Ex Post Facto Clause.

Retroactive application of the RJA repeal to Augustine would violate the prohibitions against ex post facto laws in the federal and state constitutions. U.S. Const. art. I,§ 10; N.C. Const. art. I, § 16. There are two critical elements for a law to be considered ex post facto: (1) the statute must apply to events occurring before its enactment, and (2) the statute as applied must disadvantage the affected individual. *Harter v. Vernon*, 139 N.C. App. 85, 91-92, 532 S.E.2d 836, 840 (2000). Both of these elements are present here.

It is clear that any law that "*changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime when committed" constitutes an ex post facto law. *Calder v. Bull*, 3 U.S. 386, 390 (1798) (emphasis in original); *see also id.* at 397 (opinion of Paterson, J.) ("[T]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty."). Likewise, the abolition of a defense is the type of disadvantage barred by the *Ex Post Facto* clause. *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925).

Turning to the facts of this case, the RJA established a defense to a death sentence for cases like Augustine, where the capital offense occurred years before the RJA's effective date. The General Assembly's intent was not simply to provide a trial defense, but to ensure that no person "*shall be executed* pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010 (emphasis added). To accomplish this admirable goal, the General Assembly instructed the courts to eschew all time limitations and procedural bars in applying the RJA:

> *Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes*, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by a filing a motion seeking relief.

N.C. Gen. Stat. § 15A-2012(b) (emphasis added). These provisions had the intent and effect of placing death-sentenced prisoners in the identical position as persons who had not yet committed capital crimes at the time of the passage of the RJA. Thus, the RJA became the law "annexed to the crime." *Calder*, 3 U.S. at 390, and as a result, any law subsequently enacted by the legislature that reduced the defendant's eligibility for a lesser punishment pursuant to the RJA violates the *ex post facto* prohibition. *See Neelley v. Walker*, No. 2:14-CV-269-WKW, 2018 WL 1579474, at *10 (M.D. Ala. Mar. 30, 2018) (finding *ex post*

facto violation where retroactive legislation that made changes in parole law was enacted after petitioner's crime, conviction, sentencing and commutation, and "terminate[d] her prospects for release on parole after her sentence was commuted"); *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 393 (3d Cir. 2003) (finding ex post facto violation where changes to parole law were made after prisoner's conviction and commutation as the "parole change substantially impacted" the prisoner).

In two decisions that should inform this Court's decision, *State v. Keith*, 63 N.C. 140 (1869), and *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973), this Court applied the *ex post facto* prohibition to rule in favor of defendants who benefited from a change in the law occurring after the commission of the crime and the criminal trial.

While the lower court considered *Keith* to some extent in its discussion of Petitioner's vested rights argument, it failed to acknowledge the applicability of *Keith* to his argument regarding the prohibition against ex post facto laws. This Court held that the repeal of an amnesty law was unconstitutional and that it was "substantially an *ex post facto* law." *Keith*, 63 N.C. at 145, cited with approval in *Stogner v. California*, 539 U.S. 607, 617 (2003). Despite its age, *Keith* remains the law and, where the legislature has enacted an law granting relief

against previously-available punishment, *Keith* clearly bars any future legislative attempt to take away that relief.[28]

This Court's decision in *Waddell* also requires this Court to find that the RJA repeal cannot be applied to Augustine and remain consistent with Article I, Section 16 of the North Carolina Constitution. *Waddell* was decided shortly after the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and involved a death row inmate who had been convicted and sentenced to die before the Supreme Court struck down Georgia's capital punishment as unconstitutional.

When *Furman* was decided, North Carolina law, N.C. Gen. Stat. § 14-21, provided that in cases of first-degree murder, the jury in its full discretion could choose whether the convicted defendant should be sentenced to death or to life imprisonment. After *Furman*, this Court held unconstitutional the provision of the death penalty statute that gave the jury the option of

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[28] When the General Assembly debated the repeal bill, some legislators recognized the ex post facto problem. In the words of one legislator,

> [W]alk me through . . . how somebody who has a valid motion filed under State law can have that right taken away. They have that affirmative right under the law and how can you undermine whatever right they have? Is that not ex post facto? . . . [Y]ou can't give them a procedural right and they have exercised it and then remove it.

HE43 at 6 (Statement of then-Senator Josh Stein).

returning a verdict of guilty without capital punishment, but held further that this provision was severable, thus preserving the statute as a mandatory death penalty law. *Waddell*, 282 N.C. at 445–46, 194 S.E.2d at 29. The Court then was required to determine whether to reimpose the death penalty for Waddell pursuant to the now-mandatory statute, or to resentence him to life imprisonment. The Court chose life imprisonment because, to do otherwise, would violate the prohibition against ex post facto laws:

> An upward change of penalty by legislative action cannot constitutionally be applied retroactively. Article I, section 16 of the Constitution of North Carolina forbids the enactment of any *ex post facto* law. The Federal Constitution contains a like prohibition against *ex post facto* enactments by a state. ... It has been held that this section of the Constitution "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. * * * It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as in the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change.

Id. at 445–46, 194 S.E.2d at 29 (citations omitted). Significantly, this Court characterized the revision of G.S. § 14-21 to a mandatory death penalty statute as an "upward change in penalty" even though Waddell had been sentenced to death under the original version of the statute.

While *Furman* was new law decided by the judiciary and not by the legislature, this Court explained that changes in law by courts and legislatures have the *identical* effect for purposes of analyses under the ex post facto and due process clauses of the constitution:

> While we recognize that the letter of the ex post facto clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,' or 'that aggravates a crime, or makes it greater than it was, when committed.' [Citation omitted] If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

Id. at 446, 194 S.E.2d at 29.

Augustine, like Waddell, was sentenced to death under the law in existence at the time of his crime and trial. In both cases, positive changes in the law occurred for both defendants only after their trials: *Furman v. Georgia* was decided after Waddell was on death row, and the RJA was enacted after Augustine had been sentenced to death. Similarly, the courts applied *Furman* retroactively to Waddell and the General Assembly applied the RJA

retroactively to Augustine. In *Waddell*, this Court held that because of the prohibition against *ex post facto* laws, it had no power to apply its new construction of the state statute retroactively to Waddell's case. Similarly, the prohibition against *ex post facto* laws prevents the legislature from retroactively applying its repeal of the RJA to Augustine.

E. Retroactive Application of the RJA Repeal to Bar Petitioner's RJA Claims Would Violate Due Process.

The retroactive application of the RJA repeal to Augustine' claims violates his state and federal constitutional rights to due process. The RJA established life, liberty and property interests in receiving a sentence of life imprisonment once he showed that race was a substantial factor in the selection of his jury. Augustine exercised his rights to secure those protected interests by litigating his claim to judgment under the RJA and presenting compelling evidence of race discrimination in the selection of his jury at an evidentiary hearing. The Superior Court's dismissal of his RJA claims based on the statute's repeal ran afoul of his rights to due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 424 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 345-46 (1980).

Due process is fundamentally about preventing arbitrary action by the state. For example, when the defendant in *Hicks v. Oklahoma* was denied "the

jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision[,]" the Supreme Court held that "[s]uch an arbitrary disregard of the Defendant's right to liberty is a denial of due process of law." 447 U.S. at 346

Liberty interests can be created by a statute. "'[A] state may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures.'" *Jones v. Keller*, 364 N.C. 249, 256, 698 S.E.2d 49, 55 (2010) (citation omitted). In determining whether a life, liberty, or property interest arose "from an expectation or interest created by state laws or policies," *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), courts look to the "nature of the interest at stake." *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (emphasis in original). In this case, the interest created by the RJA can be no less important. The issue is literally life or death.

When a state adopts a procedure entitling a litigant to a benefit after making a specified showing, the state thereby creates a protected interest which may not be taken away without due process. For example, in *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009), the State gave the respondent "a liberty interest in demonstrating his

innocence with new evidence under state law" by virtue of a statute establishing that "those who use 'newly discovered evidence' to 'establis[h] by clear and convincing evidence that [they are] innocent' may obtain 'vacation of [their] conviction or sentence in the interest of justice.'" *Id*. at 68 (brackets in original). Similarly, in *Hicks*, where the defendant was statutorily "entitled to have his punishment fixed by the jury," the Court, in rejecting the State's argument that "the defendant's interest in the exercise of that discretion [was] merely a matter of State procedural law[,]"recognized that "[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion[.]" 447 U.S. at 346. *See also Logan v. Zimmerman Brush Co*., 455 U.S. 422, 424 (1982) (holding that the State created a property interest in adjudicatory procedure and dismissal of claim "deprived Logan of a property right").

Courts have looked to the presence of mandatory language in determining whether statutes create protected interests. In *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979), the United States Supreme Court examined a parole statute and held that because of its "unique structure and language," Nebraska had created a liberty interest in

parole release. Similarly, in *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987), the Supreme Court held that a Montana parole statute "create[d] a liberty interest in parole release" because it "use[d] mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." *Id*. at 377-78 (citations omitted).[29]

The RJA, exactly like the parole statutes at issue in *Allen* and *Greenholtz*, provided that relief was mandatory when sufficient findings were made. Specifically, the RJA mandated that "[n]o person *shall* be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010 (emphasis added). The RJA further provided "that the death sentence imposed by the judgment *shall* be vacated" and the defendant resentenced to life imprisonment if "the court finds that race was a significant factor in decisions

[29] This Court's decision in *Keith*, discussed in Petitioner's arguments on vested rights and ex post facto laws, is also applicable here. The Court held that applying the Amnesty Act repeal to the defendant would deprive him of due process of law guaranteed by both the state and federal constitutions. *Keith*, 63 N.C. at 144-45 (citing, *inter alia*, the Fifth Amendment to the United States Constitution and Section 12 of the Bill of Rights of North Carolina).

to seek or impose the sentence of death." N.C. Gen. Stat. § 15A-2012(a)(3) (emphasis added).

Augustine filed his RJA MAR and an Amendment within the times set by the original and amended RJA, he attached affidavits and other exhibits in support of the claims, as required by N.C. Gen. Stat. §15A-1420(b)(1), and he expressly requested the hearing to which he was entitled. *See* N.C. Gen. Stat. § 15A-2012(a)(2); N.C. Gen. Stat. § 15A-2011(f)(3). He then presented substantial evidence that persuaded the hearing judge to grant relief. At that point, Augustine had fully asserted his rights under the RJA, and thereby obtained protected life (and liberty) interests. Any subsequent repeal of the RJA could not be applied to him without violating due process.[30]

[30] Petitioner's evidence that the General Assembly targeted him, along with Golphin, Walters, and Robinson is also relevant to the due process inquiry. *See Bridges v. Wixon*, 326 U.S. 135, 158 (1945) (Murphy, J., concurring) (finding due process violation for failure to follow deportation procedures established by statute and describing as "persistent" and "unabated" the demands that "laws be changed to make sure that Bridges was exiled").

IV. PETITIONER IS ENTITLED TO PURSUE HIS CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE THIS COURT'S 2015 REMAND ORDER ESTABLISHED THE LAW OF THE CASE AND COMMANDS MERITS REVIEW OF PETITIONER'S CLAIMS OF RACE DISCRIMINATION.

In dismissing Augustine's RJA claims without an evidentiary hearing, the Superior Court violated the express terms of this Court's 2015 remand order. Augustine asks this Court to enforce its original mandate and remand this case for an evidentiary hearing.

When it remanded this case to the Superior Court of Cumberland County, this Court said:

> We express no opinion on the merits of [Augustine's] motion[] for appropriate relief at this juncture. On remand, the trial court should address [the State's] constitutional and statutory challenges pertaining to the Act. In any new hearings on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *Robinson*, in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

State v. Augustine, Golphin, and Walters, 368 N.C. 594, 780 S.E.2d 552 (2015).

The plain language of the Court's remand order requires an evidentiary hearing on Augustine's RJA claims. In its remand order, the Court directed a

"new hearing" at which Augustine's statistical evidence might be subject to scrutiny by experts for the prosecution and the court. The order took the unusual step of specifying that the Administrative Office of the Courts must fund work by any appointed expert. The level of specificity in the remand order clearly reflected this Court's commitment to ensuring that the State would have the resources to challenge Augustine's statistical study and to present its own statistical evidence at that hearing. Notably, the Court said the appointment of these experts was "in the interest of justice."

It does not make sense that this Court would specify, not only the provision of a prosecution and court expert on remand, but also the manner of payment for those experts, if the RJA repeal were to preclude a second evidentiary hearing. To suggest that these portions of the remand order were needless surplusage casts aspersions on the integrity and competence of this Court.

Significantly, this Court's remand order constitutes the law of the case:

> A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. Our mandate is binding upon the trial court and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. We have held judgments of Superior Court which were inconsistent and at variance with, contrary to, and

> modified, corrected, altered or reversed prior mandates of the Supreme Court to be unauthorized and *void*.

Lea Co. v. N.C. Bd. of Transp., 323 N.C. 697, 699-700, 374 S.E.2d 866, 868 (1989) (internal citations omitted). *See also D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966).

The Court's language concerning its continuance ruling is equally clear in calling for a new hearing. As a matter of law, the remedy for the failure to grant a continuance is to provide a do-over. Once this Court decided that the State had not received a fair shot at countering Augustine's statistical evidence, there had to be a second hearing. Only then could the error in denying the State more time be cured.

This Court expressly stated, "Continuing this matter to give [the State] more time would have done *no harm* to [the defense]. *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015) (emphasis added). The Court then reasoned, "Under these unique circumstances,"[31] the case must be remanded in order to give the State an "adequate opportunity" to prepare. *Id*. Surely, this Court would not have predicated its continuance ruling on the absence of harm to Augustine only to subject him to the paramount harm of vacating the order,

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[31] Among the "unique circumstances" presented to the Court was the fact that the RJA had already been repealed at the time of the remand order.

resentencing him to death, and then speeding him towards execution with no further review of his substantial race discrimination claims.

Augustine is one of only four death-sentenced prisoners who had an RJA evidentiary hearing. At his hearing, he presented powerful evidence of race discrimination in Cumberland County and in his own case. Claiming it was denied a fair hearing, the State came to this Court for relief, which this Court provided. Then the State turned around and argued in the Superior Court, in essence: never mind, this was never about a fair hearing, we just needed the Supreme Court to vacate the prior order granting relief so that the case could then be dismissed under the repeal statute and the prisoner's execution can proceed. That cannot be right. Surely this Court will not sanction this kind of gamesmanship.

CONCLUSION

For the reasons argued here, Petitioner asks this Court to resentence him to life imprisonment without possibility of parole or, in the alternative, remand his case for an evidentiary hearing on his RJA claims or, in the alternative, remand his case so that the Superior Court of Cumberland County might address his statutory and constitutional defenses to retroactivity in the

first instance and, where appropriate, receive evidence and, ultimately, enter findings of fact and conclusions of law.

Respectfully submitted this the 16th day of July 2018.

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Pursuant to Rule 33(b) of the North Carolina Rules of Appellate Procedure, I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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I hereby certify that I caused to be served a copy of the foregoing Brief of Defendant-Appellant by email upon Jonathan P. Babb, Assistant Attorney General, JBabb@ncdoj.gov, and Danielle Marquis Elder, Special Deputy Attorney General, Dmarquis@ncdoj.gov, N.C. Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629.

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