No. 411A94-6 DISTRICT TWELVE

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	91 CRS 23143
	)	
MARCUS REYMOND ROBINSON	)	
	)	
Defendant-Appellant	)	

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DEFENDANT-APPELLANT'S BRIEF

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INTRODUCTION

In January of 2012 Marcus Robinson became the first person in North Carolina to present a case for disqualification of the death penalty because of systemic and individual discrimination that permeated capital jury selection at the time of his trial. North Carolina had embraced a historic new defense to the death penalty: anyone who could prove race was a significant factor in capital prosecutions would be ineligible for capital punishment under the North Carolina Racial Justice Act. App. 2-3 (N.C. Gen. Stat. §§ 15A-2010 to 2012).

The new law was enacted in the face of growing evidence that racial bias tainted capital cases in the state. Three men had been recently exonerated from death row before the law's passage: all three were Black, and all three were sentenced to death by all-white or nearly all-white juries. In a state that is 34 percent non-white, almost half of North Carolina's death row prisoners were sentenced to death by juries with no meaningful minority representation. App. 329-33. Thirty-five of the state's nearly 150 death row prisoners were sentenced to death by all-white juries and another 38 were sentenced by juries with only one Black juror. *Id*.

Mr. Robinson introduced a host of evidence showing these disturbing trends were no accident. He showed that prosecutors were more than twice as likely to strike Black jurors in capital cases at the time of his trial, and in his

own case, three times as likely. App. 194-261. He introduced evidence of prosecutor trainings designed to avoid rather than comply with *Batson v. Kentucky*'s prohibition on discrimination, and relied on statements from the prosecutor in his own case, including his admission that he himself may have engaged in unconscious discrimination in jury selection. The superior court concluded Mr. Robinson had proved his claim of racial bias, and that he was ineligible for the death penalty. He was resentenced to life without parole, and then removed from death row to serve his new sentence in April of 2012.

Approximately, one year later, on April 15, 2013, this Court granted certiorari of the lower court's RJA findings. Shortly thereafter, in June 2013, the Legislature repealed the RJA with a provision that purported to apply to Marcus Robinson and the three other prisoners who had prevailed under the RJA. In December 2015, this Court reversed the decision below, holding that the State should have been afforded additional time to prepare its rebuttal of the statistical evidence of bias, and remanding the case for new proceedings. Marcus Robinson was then transferred back to death row – the first time in North Carolina's history where someone was returned to death row without new sentencing proceedings. On remand, the superior court applied the repeal of the RJA and dismissed Mr. Robinson's RJA claims without a hearing.

North Carolina's path with respect to the Racial Justice Act is an unchartered violation of the guarantees of equal protection, due process and freedom from cruel and unusual punishment. Never before has any legislature enacted a statute designed to remedy suspected systemic racial bias in capital sentencing only to repeal such a statute when the racial bias was found, while denying judicial review to the individuals who had uncovered and alleged the racial bias.

A multitude of constitutional problems arise from the lower court's application of the Legislature's 2013 repeal of the RJA to Mr. Robinson. The first of these is the threshold question whether Mr. Robinson can be exposed again to the threat of the death penalty consistent with North Carolina law and the federal constitution. Because the constitutional protections against double jeopardy and the North Carolina statutory protections of N.C. Gen. Stat. § 15A-1335 prohibit such exposure, this Court should rule that Mr. Robinson cannot be subject to a death sentence after the superior court found in 2012 that he was ineligible for execution under the RJA.

If the Court does not grant relief under § 15A-1335 or the Double Jeopardy Clause, this Court must next confront whether the federal and state constitutions permit application of the RJA repeal to sweep proven evidence of racial bias under the rug and to foreclose all avenues of judicial review. Mr. Robinson convincingly established a prima facie case of racial

bias in jury selection, both in his case as well as across the county and state at the time of his trial. Application of the RJA repeal to Mr. Robinson, and denying him his day in court after he had already established a prima facie case that racial discrimination tainted his capital trial, would violate several of his constitutional rights.

First, a state may not, consistent with the Eighth Amendment, operate a capital punishment system infected by proven racial bias. The constitution similarly prohibits states from creating a statutory mechanism for uncovering impermissible racial bias in capital sentencing and then, after the evidence of bias is found, foreclosing all avenues for judicial review of that evidence. Further, as shown below, the dismissal of Mr. Robinson's RJA claims violated his vested rights, his right against being subject to bills of attainder and ex post facto laws, as well as the separation of powers requirement of the North Carolina Constitution. On remand, the lower court failed even to consider most of these constitutional defenses to application of the RJA repeal, and misapplied or misunderstood the law as to the others. This Court should reverse.

ISSUES PRESENTED

1. Whether Mr. Robinson may be subjected again to the threat of the death penalty, consistent with the Double Jeopardy Clause and N.C. Gen. Stat. § 15A-1335, after a fact finder found that he was ineligible for execution under North Carolina's statutory scheme and resentenced him to life without parole?

2. Whether the retroactivity clause of the repeal of the Racial Justice Act can be applied to Mr. Robinson's case and result in the dismissal of his claims of racial bias, consistent with the federal and state constitutions?

3. Whether the Remand Court erroneously dismissed Mr. Robinson's independent constitutional claims of racial bias without a hearing?

4. Whether, as a threshold matter, by failing to challenge the RJA Court's 2012 judgment imposing a life sentence without the possibility of parole, the State waived its right to now dispute its validity, resulting in Mr. Robinson's life sentence being in full force and effect and the present RJA issues being moot?

STATEMENT OF FACTS & PROCEDURAL HISTORY

Mr. Robinson was convicted and sentenced to death in 1994 for the robbery and murder of Erik Tornblom. Mr. Robinson had a co-defendant, Roderick Williams, who was tried separately and sentenced to life imprisonment. *State v. Williams*, 345 N.C. 137, 138 (1996). Mr. Robinson and Mr. Williams, both Black teenagers, ages 18 and 17, carjacked Mr. Tornblom, a white teenager aged 17, at a gas station near their apartments. Mr. Tornblom was shot at a construction site nearby.

At Mr. Robinson's trial, the State argued that he, not Mr. Williams, was the person who shot Erik Tornblom. But Mr. Robinson had told police it was Mr. Williams who pulled the trigger, and the issue was hotly contested at trial.[1]

The State argued that the killing of Mr. Tornblom was premeditated by Mr. Robinson and relied on a racially charged theory of prosecution. They presented testimony that Mr. Robinson had said he wanted to "burn a whitey" or "do a white boy." App. 511, 517, 522, 524.

Mr. Robinson was prosecuted at trial by a single prosecutor, John Dickson. Mr. Dickson asked demeaning questions during voir dire of one of the Black prospective jurors, like whether he had graduated from high school,

[1] Only after his direct appeal and post-conviction proceedings were over did prosecutors, in a case summary provided to legislators, describe Mr. Williams as the shooter. App. 403.

whether he had trouble reading, and whether he repeated any grades in school. He did not ask those questions of any other juror. Mr. Dickson struck 50.0% of the black venire members (5 strikes out of 10 eligible black venire members) and only 14.4% of the other eligible venire members (4 strikes of all of the non-Black 28 eligible venire members). App. 161, 244. Mr. Dickson's disparate strikes created an empaneled jury with fewer Black jurors than would have been expected with race-neutral strikes. App. 633-35. Nonetheless, Mr. Robinson's trial counsel did not raise a *Batson* challenge to the State's pattern of racially disparate strikes at trial.[2]

The backgrounds of the trial participants are relevant with respect to the failure to object to the prosecution's disparate strikes at trial,. Both the prosecutor and the defenses lawyers were white, as was the judge. Lead defense counsel, the prosecutor, and the trial judge also shared a common legal training: all had begun their legal careers working under or with Edward W. Grannis, Jr., a Cumberland County prosecutor who served as the elected district attorney from 1975 through 2010, including during Mr. Robinson's trial. App. 110-13, 170-73, 529-30.

On direct appeal, this court affirmed Mr. Robinson's convictions and death sentence. *State v. Robinson*, 342 N.C. 74 (1995), *cert. denied*, 517 U.S.

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[2] Nor was such an objection raised on direct appeal or during pre-RJA post-conviction proceedings.

1197 (1996). Mr. Robinson then sought post-conviction relief, which the state and federal courts denied. *State v. Robinson*, 350 N.C. 847 (1999); *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006),[3] *cert. denied*, 549 U.S. 1003 (2006). Mr. Robinson's execution, initially scheduled for January 2007, was stayed due to his challenges to the State's method of execution.

In 2009, the Legislature enacted the RJA. N.C. Gen. Stat. §§ 15A-2010 to 2012 (provided at App. 2-4). The law provided limited redress for the influence of racial bias in capital cases, mandating 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. If a defendant's RJA claim was successful, the mandatory (yet limited) relief was that the person's death sentence be vacated, and that the

[3] Mr. Robinson may well have obtained relief from his death sentence had his case only occurred in a different federal circuit. Mr. Robinson's petition for certiorari review raised the legal claim that his jury had consulted the Bible, provided by the bailiff, in deciding his death sentence. A divided Fourth Circuit panel denied the claim, holding that it was not clearly established under U.S. Supreme Court precedent that a Bible is an improper external influence. *Robinson*, 438 F.3d at 363. But, as the Fifth Circuit has recognized, the Fourth Circuit is the only circuit to hold that the Bible is not an external influence. *Oliver v. Quarterman*, 541 F.3d 329, 338 (5th Cir. 2008) (holding *Robinson* was wrongly decided in respect to the Bible, and in doing so, relying on decisions from the Eleventh, First, and Sixth Circuits); *see also Williams v. Kelley*, 858 F.3d 464, 477 (8th Cir. 2017) (Kelly, J., concurring in part, dissenting in part) (concurring in holding that claim was procedurally defaulted, but describing "[t]he jury's group reliance on the Bible" as "extraneous information").

court impose a sentence of life imprisonment without any possibility of parole. N.C. Gen. Stat. § 15A-2012(a)(3).

The RJA explicitly permitted defendants to use statistical evidence to make their case. N.C. Gen. Stat. § 15A-2011.[4] It specified three bases for proving race was a factor: discrimination based on the defendant's race, the victim's race, or the race of potential jurors excluded from service. The RJA extended its ameliorative effect retroactively to all North Carolina death row prisoners, and gave them one year from its enactment to file claims. N.C. Gen. Stat. § 15A-2012(a).

In response to the law's passage, researchers from Michigan State University (MSU) College of Law undertook statewide studies of capital charging, sentencing and jury selection in North Carolina. Relying on these studies, Mr. Robinson filed a motion for appropriate relief alleging statutory RJA claims and separate constitutional claims under the Sixth, Eighth, and Fourteenth Amendments and the North Carolina Constitution.[5] Mr.

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[4] *Compare McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (holding statewide statistical patterns of racial bias in capital cases, standing alone, do not violate the Constitution, but explaining that such "arguments are best presented to the [state] legislative bodies").

[5] Subsequent to this filing, in 2011, the Legislature made its first attempt to repeal the RJA. Governor Beverly Perdue vetoed that repeal and the Legislature failed to override. *See* S.B. 9, 2011 Gen. Assemb. (vetoed Dec. 14, 2011), available at: https://www.ncleg.net/Sessions/2011/s9Veto/govsig.pdf. Governor Perdue explained that she supported the death penalty but felt it was "simply

Robinson alleged racial bias in prosecutorial decisions to seek the death penalty, in the exercise of peremptory strikes, and in the jury decisions to impose the death penalty. He moved simultaneously for discovery and received new documents, never previously produced, from his case and others in Cumberland County.

The RJA Court[6] initially scheduled a hearing for September 6, 2011 on Mr. Robinson's RJA claims of discrimination in jury selection only.

Mr. Robinson's evidence consisted of two parts: (1) statistical evidence from the state, county and his prosecutor; and (2) lay testimony and documents drawn from his individual case and others in Cumberland County.

The MSU Study examined jury selection in 173 capital cases, involving 7,421 strike decisions by prosecutors. App. 269. The raw data showed large disparities in striking patterns against Black jurors and all other jurors in the county, state, and cases tried by the individual prosecutor from Mr. Robinson's case. App. 272-73. The State's statistical expert, Joseph Katz,

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unacceptable for racial prejudice to play a role in the imposition of the death penalty in North Carolina." Clayton Henkel, *Governor Vetoes Repeal of Racial Justice Act,* PROGRESSIVE PULSE, Dec. 14, 2011.

[6] Two different superior courts have ruled on Mr. Robinson's RJA claims. The court that granted Mr. Robinson relief in 2012 will be referred to in this brief as the RJA Court. The superior court that, after remand by this Court dismissed Mr. Robinson's claim under the repeal, will be referred to as the Remand Court.

agreed that strike patterns revealed statistically significant disparities and constituted a prima facie case of discrimination. App. 141, 144-48, 150-52.

At the 2012 hearing, in addition to the statistical evidence, the RJA Court heard and relied on additional evidence Mr. Robinson had presented of discrimination in jury selection in his case and others in his county and North Carolina at the time of his trial. This included the testimony of his trial prosecutor, Mr. Dickson, sharing why he had struck individual Black jurors. The record however, belied the reasons he offered. Mr. Dickson claimed he struck Black venire member Elliot Troy because Mr. Troy was charged with public drunkenness. App. 122-24. Mr. Dickson, however, accepted two non-Black venire members with DWI convictions. App. 179, 181-83, 186-87.

Mr. Dickson testified he struck Black venire member Nelson Johnson because he "said that he would require an eye witness and the defendant being caught on the scene in order for conviction." App. 124. But Mr. Johnson had repeatedly said he thought the death penalty was the appropriate punishment for all first degree murder. App. 189-93. In response to the prosecution's several questions about whether it would be appropriate for "a cold killing," murder with "no question of self-defense," Mr. Johnson offered that he thought it was appropriate if there was proof "beyond a reasonable doubt," and then when asked to restate this response, he suggested that it

would be appropriate if the defendant were caught at the scene and someone had seen him commit the murder. *Id*. When Mr. Johnson made this statement, Mr. Dickson immediately cut-off questioning without asking any follow-up or clarifying questions. Mr. Dickson then struck him from the jury. App. 193.[7] Mr. Dickson's approach to white venire member Cherie Combs was very different. When she noted her mixed feelings about the death penalty, Mr. Dickson asked multiple follow-up questions to permit Ms. Combs to clarify her answer. App. 189-93. Mr. Dickson then passed Ms. Combs. App. 185.

Mr. Dickson's reliance on race at Mr. Robinson's trial was part of a larger pattern. As shown at Mr. Robinson's RJA hearing, Mr. Dickson participated in two other capital trials that were part of the MSU Study. Mr. Dickson's race-based conduct was consistent. In each of the three capital cases, Mr. Dickson struck Black venire members at significantly higher ratios than all other venire members (2.2, 3.5, and 4.4). App. 243.

Mr. Dickson's improper use of race in capital jury selection is starkly illustrated by the difference in his handling of the 1997 capital trials of defendants James Burmeister and Malcolm Wright and his other capital

[7] The trial judge implicitly rejected the argument that Mr. Johnson would require a witness and arrest on the scene. Mr. Dickson moved to strike Mr. Johnson for cause and the judge denied the challenge. App. 193.

cases.[8] Mr. Burmeister and Mr. Wright were white supremacists accused of murdering two Black victims for racially-motivated reasons. In these cases, where Mr. Dickson had a strategic reason to seat jurors he perceived as more sensitive to racially-motivated white-on-Black crime, he reversed his usual practice of striking Black citizens. Mr. Dickson instead disproportionately struck white jurors.

In the Burmeister case, Mr. Dickson used 9 of 10 strikes to remove white jurors, and passed 8 of 9 Black jurors. App. 348. In the Wright case, Mr. Dickson used all ten strikes against white jurors, and did not strike a single Black juror. App. 337, 376. In both cases, even though the State was seeking the death penalty, Mr. Dickson repeatedly accepted Black jurors with strong reservations about imposing the death penalty. App. 348, 337, 376; App. 356 (State passes juror who said it would be "hard" and "difficult" for her to vote for the death penalty); App. 366 (State passes juror who said because of her religious views "I don't believe in the death penalty"); App. 378 (State passes juror who said "I really wouldn't like someone to be killed").

Mr. Dickson's race-based practices were longstanding. As early as 1978 – years before *Batson* was in force - he had tracked the race of prospective jurors in his jury selection notes. App. 367. His approach to jury selection was

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[8] The evidence about Burmeister and Wright was first presented during the *Golphin, Walters, and Augustine* case, and later proffered by Mr. Robinson to the Remand Court. App. 326 (Defendant's Filed Proffer Notice).

consistent with his stated views on race and criminal justice. He openly admitted at Mr. Robinson's RJA hearing that there was racial discrimination in the criminal justice system. App. 138-39. Mr. Dickson admitted that, like others, he himself harbors unconscious bias, and he could not say that race was not a part of his jury selection practice. App. 133-38.

Mr. Dickson's jury selection practice was like his fellow Cumberland County prosecutors. In all capital cases examined by the MSU Study over a twenty-year period, Cumberland County prosecutors struck Black venire members at 2.6 times the rate they struck non-Black venire members. App. 155, 234. Even the State's expert, Dr. Joseph Katz, agreed that the MSU Study demonstrated large, statistically significant disparities in jury selection, unlikely to be due to chance. App. 141, 144-48, 150. After applying a statistical regression analysis to account for possible race-neutral explanations for strikes, the MSU Study found a strong relationship between race and Cumberland County prosecutor strike decisions. App. 156-58, 164-66, 168-69, 282-83, 290.[9]

This race discrimination in jury selection was reinforced by race-based

[9] These findings about Cumberland County were consistent with the statewide trend the MSU Study identified. The Study found that, of the 7,421 peremptory strike-eligible jurors in North Carolina capital cases between 1990 and 2010, prosecutors statewide struck 52.6% of eligible Black venire members, but only 25.7% of all other eligible venire members. The study found that the probability of this disparity occurring in a race-neutral jury selection process is extremely small. App. 154, 279.

training.[10] Two Cumberland County prosecutors attended a training program where they were taught how to defeat *Batson* challenges using a cheat sheet of generic race-neutral "justifications" that could be used to respond to *Batson* objections, such as inappropriate dress, physical appearance, age, attitude, or body language. App. 175-77, 298, 300. One of those prosecutors was found by a trial judge to have violated *Batson* during a jury selection where she read from the cheat sheet. App. 372-75.

Another longtime Cumberland County prosecutor made a series of racially-charged notes about prospective jurors in the *Augustine* capital prosecution. The *Augustine* prosecutor described one Black potential juror as "ok" and a member of a "respectable black family." App. 346. While a Black juror with a criminal history was a "thug," a white juror who had trafficked in drugs was "a fine guy." App. 343, 347. He said a Black juror was a "blk wino," while a white juror with a DUI conviction was a "country boy – ok." App. 343, 338.

In a 1992 capital prosecution, just two years before the prosecution of Mr. Robinson, a Cumberland County prosecutor described a Black prospective juror as "B/M, early 20s, broad shoulders, strong as a bull" in his

[10] The evidence about prosecutors' training and notes, that follows this footnote, is from the *Golphin, Walters, and Augustine* hearing, proffered by Mr. Robinson in the trial court below. App. 326.

hand-written jury selection notes. App. 369.[11]

John Dickson's racial motivation in Mr. Robinson's case aligned with the race-consciousness of Cumberland County prosecutors' capital charging practices.[12] Of the 14 people Cumberland prosecutors sent to death row between 1990 and 2010, 12 were racial minorities, ten of whom were Black.[13]

Cumberland County prosecutors also discriminated based on the race of the victim. Sixty-three percent of Cumberland homicide victims were Black, yet in cases seeking the death penalty, 64% of the victims were white.

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[11] *C.f.,* Robert Smith and Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795 (2012) ("The use of animal imagery in reference to the accused can both depend on and perpetuate the negative effects of implicit racial bias."). Cumberland prosecutors' use of racially-charged note-taking was consistent with a broader trend among prosecutors. *State v. Jimmy and Richard Smith*, is one troubling example. Near the time of Mr. Robinson's trial, Martin county prosecutors capitally-tried two Black defendants for killing a white victim. In doing so, they sought to rehabilitate a white juror who stated in voir dire questioning he would "bring his rope," App. 330, wrote that another prospective white juror was "good" because she would "bring her own rope," App. 331, and decided that a third white juror was a "No," after noting that she had a child by a "BM," or Black male. App. 333. *See also Foster v. Chatman*, 136 S. Ct. 1737 (2016) (finding *Batson* violation based in part on prosecutor's notes reflecting race consciousness; for example, "No Black Church.").

[12] This aspect of the MSU Study was presented in Mr. Robinson's written RJA motion, but was not the subject of the evidentiary hearing.

[13] Cumberland County prosecutors pursued death sentences against minorities so aggressively that they obtained those sentences even where the minority defendants fell into categories of offenders rarely sentenced to death. For example, one of three female death row prisoners in North Carolina is from Cumberland County. Two of four juveniles sentenced to death in North Carolina were from Cumberland County.

The MSU Study found that in Cumberland County cases between 1990 and 2010, 8.0% of cases with a white victim resulted in a death sentence, while only 2.3% of cases *without* a white victim resulted in a death sentence. The MSU Study thus found that Cumberland County cases with a white victim were 3.4 times more likely to result in a death sentence than those without. App. 79-80. Mr. Robinson's case had a white victim.

Finally, the culture of discrimination that informed John Dickson's prosecution of Mr. Robinson, and other prosecutors from Cumberland County and beyond, continued on through the RJA litigation. The Cumberland County RJA prosecutors sought to recuse Senior Resident Superior Court Judge Gregory A. Weeks, who presided over the 2012 RJA proceedings, on the ground that he had presided over capital trials. The State's internal emails revealed that the prosecutors worried about a rumor that Judge Weeks would respond to the recusal motion by sending the case to another Black judge, such as Judge Quentin Sumner or Judge Orlando Hudson. In an email conversation with the Cumberland County prosecutors, a district attorney from another county wrote of Judge Sumner, "If I had to pick an African American to hear an RJA motion, he would be the one." App. 388.

In April, 2012, the RJA Court found that race was a significant factor in the State's peremptory strike decisions at the time of Mr. Robinson's trial under the RJA statute, and in his case. It based this factual conclusion on

370 individual findings of fact, including detailed findings related to the statistically-significant racial disparities in prosecutors' use of strikes set out in the MSU study, in Mr. Robinson's trial, as well as the capital justice system in Cumberland County and in North Carolina, over a twenty-year period. App. 532-698. The RJA Court further based its conclusion on other non-statistical evidence confirming that race was a motivating factor behind the prosecutors' use of peremptory strikes. Having found under the RJA that Mr. Robinson's trial was tainted by racial discrimination, the RJA Court then resentenced him to life imprisonment without possibility of parole, the only relief available under the RJA. The RJA Court reserved ruling on Mr. Robinson's claims under the RJA of discriminatory charging and sentencing, and reserved ruling on his constitutional claims.

In July 2012, the State petitioned this Court for certiorari review of the RJA Court's order. Also that July, the General Assembly enacted a limited amendment to the RJA modifying its evidentiary and procedural provisions. The Legislature enacted this amendment by overriding Governor Perdue's veto. App. 5-7 (S.L. 2012-136).

During its consideration of the amended RJA, the Legislature targeted Mr. Robinson's case with "surgical precision,"[14] repeatedly discussing the

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[14] *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). The same General Assembly that repealed the RJA also

evidence and findings in his case and expressing concern that he could be given a sentence less than death. One provision in the RJA amendment, Section 8, governing retroactivity, on its face, could only have referred to Mr. Robinson. App. 7.

Again with Mr. Robinson as a target, in June 2013, the Legislature acted, this time repealing the RJA. App. 8 (S.L. 2013-154). Again, the debates centered around Mr. Robinson and the three other prisoners who had prevailed under the Act: Tilmon Golphin, Christina Walters, and Quintel Augustine.

In December 2015, the Court issued orders vacating the RJA Court's orders and remanding for further proceedings. *State v. Robinson*, 368 N.C. 596 (2015); *State v. Golphin, Walters, and Augustine*, 368 N.C. 594 (2015). The remand in Mr. Robinson's case was based on the RJA Court's error in denying the State a third continuance to prepare its own study and respond to the MSU Study.[15] In *Golphin, Walters, and Augustine*, the error was consolidating the three cases, as well as prejudice to the State from the

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enacted laws restricting voting and voter registration, targeting "African Americans with surgical precision." *Id*. The evidence in this fact section is only an overview of the legislative record showing that the RJA repeal targeted Mr. Robinson. The full record is set forth below in the bill of attainder discussion.

[15] Though eight months passed between Mr. Robinson's hearing and the hearing in *Golphin, Walters, and Augustine*, the State presented no new statistical evidence.

continuance denial. In neither order did the Court address the effect of the repeal or address the prisoners' Double Jeopardy claims.[16]

The State produced no new evidence on remand. It instead filed a motion to dismiss Mr. Robinson's statutory RJA claims asserting that they were voided by the RJA repeal. The State sought dismissal of the separate constitutional claims on the ground that they were procedurally barred.

The Honorable W. Erwin Spainhour heard Mr. Robinson's case on remand.[17] In August 2016, the Remand Court, on its own motion, ordered the parties to file briefs limited to the following question:

> 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 Motions for Appropriate Relief filed by the defendants pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes of North Carolina?

In November 2016, the Remand Court held a consolidated oral argument in Mr. Robinson's case and the *Golphin*, *Walters*, and *Augustine* cases.[18] Mr.

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[16] Mr. Robinson sought certiorari review of this Court's order in the U.S. Supreme Court, limited to the question of whether there was a violation of the Double Jeopardy Clause. The U.S. Supreme Court denied review. *Robinson v. North Carolina*, 137 S. Ct. 67 (2016).

[17] The Court's remand order originally assigned the Senior Resident Superior Court Judge of Cumberland County, James Floyd Ammons. Mr. Robinson filed a motion to recuse. Judge Ammons denied the motion but voluntarily declined to preside.

[18] Mr. Robinson objected to the cases being heard together. But in its order, the Remand Court stated that it understood this Court's order in

Robinson requested discovery relevant to the resolution of this question, and sought to present evidence in support of his constitutional defenses to the application of the RJA repeal to dismiss his claims. The Remand Court did not rule on Mr. Robinson's motion for discovery, and it denied his request for an evidentiary hearing. At the oral argument, Mr. Robinson submitted an offer of proof in support of his defenses to the RJA repeal. *See State v. Marcus Robinson*, 91 CRS 23143 (Nov. 29, 2016), Exhibits 1 to 64 (proffered).[19]

In January 2017, the Remand Court dismissed Mr. Robinson's motion for appropriate relief, finding the repeal barred his RJA claims as a matter of law. App. 14-23. The Remand Court discussed only two of Mr. Robinson's defenses to the repeal: that it violated his vested rights and that it is an ex post facto law. *Id*. The Remand Court neither considered nor discussed Mr. Robinson's several other defenses, constitutional and otherwise.[20] Nor did the Remand Court consider or discuss Mr. Robinson's constitutional claims of race discrimination, which were independent of the RJA.[21]

Golphin, Walters, and Augustine to mean that consolidation was permissible so long as only common legal issues were heard and the proceeding was not evidentiary. App. 15-16.

[19] These 64 proffered exhibits were in addition to previous offer of proof submitted on February 17, 2017.

[20] "The court has not found it necessary to reach the questions of constitutional law raised by the defendants except as discussed in [*State v. Keith*, 63 N.C. 140 (1869)], *supra*." App. 22.

[21] In addition to proceedings before Judge Spainhour, on remand, Mr. Robinson sought review in two additional forums. *See Robinson v. Thomas*,

STANDARD OF REVIEW

The Remand Court ruled on the legal question whether the retroactivity repeal provision of the RJA warranted dismissal of Mr. Robinson's petition. The Remand Court did not accept evidence or make factual findings. App. 14-23. Conclusions of law are subject to de novo review. *State v. Williams,* 362 N.C. 628, 632 (2008) *State v. Lewis*, 188 N.C. App. 308, 310 (1982).

ARGUMENT

I. This Court Should Hold that Further Exposing Marcus Robinson to the Death Penalty Violates the North Carolina Statutory Bar Against Imposition of More Severe Punishments and Double Jeopardy.

This Court must first decide whether the fact that Mr. Robinson was found ineligible for the death penalty under state law and sentenced to life without parole means that he cannot be exposed again to the death penalty consistent with N.C. Gen. Stat. § 15A-1335 and the Double Jeopardy Clause.[22]

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855 F.3d 278 (4th Cir. 2017) (affirming dismissal, without prejudice, of federal habeas petition raising double jeopardy issue and holding federal abstention appropriate in deference to state court proceedings); *Walters, Augustine, Robinson, and Golphin v. State of NC and William West*, 16 CV 2916 (Wake County Superior Court) (challenging facial constitutionality of RJA repeal and seeking review by three-judge panel; the suit was later voluntarily dismissed by plaintiffs).

[22] Mr. Robinson raised this issue with the Court during the prior certiorari review proceedings, but the Court did not decide it. The issue is

A. Mr. Robinson's Life Without Parole Sentence is Protected by N.C. Gen. Stat. § 15A-1335.

Mr. Robinson's life verdict is protected by 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 following an initial sentencing. 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. *See, e.g., State v. Oliver*, 155 N.C. App. 209, 212 (2002) (holding that, for purposes of applying § 15A-1335, consecutive life sentences can never be considered more severe than a death sentence). Thus even though this Court previously reversed the

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now before the Court as a threshold question. In separate proceedings in the United States Court of Appeals for the Fourth Circuit, the State conceded that, at this stage in state court, the double jeopardy issue would be ripe for review by this Court and not subject to procedural bar merely because Mr. Robinson raised it earlier. *See Robinson v. Thomas*, 855 F.3d 278, 289, n.6 (4th Cir. 2017) ("The State has conceded [Robinson is] entitled to raise [his] double jeopardy argument in state court, and we accept the State's representation at oral argument that it would not assert as a defense a procedural bar to [Robinson] making a double jeopardy argument during the state proceedings by some reading of the North Carolina Supreme Court's order.").

substantive ruling below, no trial court can impose a death sentence subsequent to the RJA Court imposing a life sentence. Application of this statute, and the necessary ruling that a death sentence is barred under § 15A-1335, moots Mr. Robinson's claims to relief under the Racial Justice Act as there is no remaining controversy.

B. Mr. Robinson's Life Without Parole Sentence is Protected by the Double Jeopardy Clause.

The constitutional prohibition against double jeopardy also bars subjecting Mr. Robinson to further exposure to the death penalty. While the RJA statute is unique, the legal principles that govern whether the Double Jeopardy Clause protects the life verdict in his case are clear and well-established, including that: (1) penalty-phase acquittals of the death penalty in capital cases are entitled to double jeopardy protection, *Bullington v. Missouri*, 451 U.S. 430 (1981); (2) double jeopardy applies to judicial acquittals, *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 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 Mr. Robinson to the death penalty after the RJA Court acquitted Mr. Robinson of that penalty and imposed a sentence of life without parole.

For more than 35 years, the United States Supreme Court has recognized the application of double jeopardy to the jury's rejection of the death penalty in the sentencing phase of the trial because the "jury has already acquitted the defendant of whatever was necessary to impose the death sentence." *Bullington*, 451 U.S. at 445. Here, at Mr. Robinson's initial RJA hearing, the RJA Court acquitted him of "whatever was necessary to impose the death sentence" 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 any fact findings). The RJA Court in this case made hundreds of detailed factual findings on a lengthy evidentiary record, which collectively established Mr. Robinson's legal entitlement to the life sentence, acquitting 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 ("an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits"); *Evans v. Michigan*, 568 U.S. 313, 320-21 (2013) (acquittal by trial court, even if based on mistake of law, is protected by double jeopardy).

In this case, Mr. Robinson's original hearing of racial bias under the RJA was conducted in post-conviction as part of a new, system-wide procedure devised by the North Carolina Legislature to narrow eligibility for the death penalty to those cases free of racial bias. 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 such schemes are sufficiently narrow. *Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006). Under the scheme created by the North Carolina Legislature, the trial court was required to make fact findings that would establish whether life without parole or the death penalty would apply. N.C. Gen. Stat. § 15A-2012(a).

Nor does the fact that this acquittal arose in the context of a post-conviction hearing change the Double Jeopardy analysis. To be sure, post-conviction courts routinely decide fact-bound questions to determine whether a prior court committed a legal error such that a new trial is required. In that context, however, the post-conviction court does not make any findings

entitling the defendant to a particular sentence; it merely decides whether to vacate a prior conviction or sentence, and so there is no jeopardy bar to retrial.

Here, instead, the RJA Court fulfilled its role, in a statutory scheme designed to root out racial bias from capital sentencing and narrow the availability of the death penalty, as a fact finder in the first instance. The law set identical procedures for evaluating RJA claims for trial cases and persons previously sentenced to death who filed these unique post-conviction claims within a limited time window. N.C. Gen. Stat. §15A-2012(a). There can be no doubt that the trial level findings would be entitled to double jeopardy protection: the post-conviction findings based on the same fact finding should receive the same constitutional protection. *Burks*, 437 U.S. at 11 ("it should make no difference that the reviewing court, rather than the trial court," made the fact findings necessary to acquittal).

The body of case law considering sufficiency of the evidence claims and judgments of acquittal confirms the application of the Double Jeopardy Clause in this case. The Supreme Court has long recognized that 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.

In *McDaniel v. Brown*, 558 U.S. 120, 131 (2010), the Supreme Court went further, and strongly indicated that a finding of insufficient evidence,

even in a post-conviction context, is protected by the Double Jeopardy Clause. In *McDaniel*, the Court rejected the habeas petitioner's claim of insufficient evidence but recognized that had it ruled otherwise, "reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, [and] such a reversal bars retrial." The Court had assumed in an earlier case, without deciding, that retrial is prohibited when a federal habeas court reviews a state court conviction and finds the evidence to be insufficient. *Lockhart v. Nelson*, 488 U.S. 33, 37, n.6 (1988).

Federal circuit courts have routinely applied double jeopardy to habeas insufficiency findings, including to sentencing phase acquittals for insufficiency. *Young v. Kemp*, 760 F.2d 1097, 1099 (11th Cir. 1985) (finding the evidence insufficient to support an aggravating factor and thus the death sentencing, and holding that the state was barred under the Double Jeopardy Clause from seeking the death penalty on retrial); *O'Laughlin v. O'Brien*, 568 F.3d 287, 309 (1st Cir. 2009) (barring prosecution and ordering release after finding evidence of guilt insufficient in habeas review); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (where federal habeas court holds evidence of guilt of murder is constitutionally insufficient, "the double jeopardy clause bars [retrial]").

The Eleventh Circuit's decision in *Young* is particularly illustrative. After finding in federal habeas that the evidence was insufficient to support

an aggravating factor, the federal habeas court concluded that its acquittal of the death sentence barred a capital retrial. The circuit court reasoned that the holding of *Bullington* – that an acquittal of the death penalty bars retrial – should apply regardless of whether the collaterally reviewing court or the jury acquits the defendant of the death penalty. *Young*, 760 F.2d at 1106. A ruling otherwise would create the kind of purely arbitrary procedural distinction that the Supreme Court had rejected in *Burks*, 437 U.S. at 11. *Young*, 760 F.2d at 1105-06.

In this case, the RJA Court's order granting relief, and imposing a life imprisonment sentence and judgment, constituted 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. By concluding that Mr. Robinson'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. *See Burks,* 437 U.S. at 16-18.

The RJA created an affirmative defense to death sentences, a defense on which Mr. Robinson prevailed after the RJA Court made determinative

findings of fact. Once the RJA Court found Mr. Robinson ineligible for the death penalty, the Double Jeopardy Clause prohibited the future imposition of that penalty.

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The relief required under Mr. Robinson's double jeopardy and § 15A-1335 arguments is vacatur of the Remand Court's order, and a holding that the RJA Court's 2012 order and imposition of a judgment of life imprisonment was final and may not be disturbed.

II. Application of the RJA Repeal to Mr. Robinson Violates His State and Federal Constitutional Rights.

A. The North Carolina Legislature's Attempt to Strip Judicial Review of Mr. Robinson's Pending RJA Claims Violates Equal Protection, Due Process and the Guarantee Against Cruel and Unusual Punishment.

North Carolina statutorily created a new mechanism to prove and remedy systemic racial bias in capital sentencing. When that process demonstrated far reaching racial discrimination, the Legislature responded by denying judicial review to the individuals who had uncovered and alleged the racial bias. The Legislature's repeal and attempt to foreclose any judicial review of Mr. Robinson'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, § 27; *Furman v. Georgia*, 408 U.S. 238, 242 (1972); *United States v. Armstrong*, 517 U.S. 456 (1996).

The Legislature's enactment of the RJA was unquestionably motivated by its concerns that the existing legal avenues had been insufficient to remove racial bias from capital sentencing. *See e.g.,* App. 2 (preliminary statement of SB 461 that the Act is to prohibit "seeking or imposing the death penalty on the basis of race" by establishing a new "process by which relevant evidence," including statistical evidence, "may be used to establish that race was a significant factor")*;* 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 Legislature's intent to redress racial discrimination that is difficult to prove under the *McCleskey* standard); SB 461, Senate Floor Debate at 7 (May 14, 2009) (Senator Floyd McKissick pointing to recent exonerations where race had been a factor in sentencing and the existing law had proven inadequate); House Debate (July 14, 2009) (Representative Alma Adams referencing exoneration of three African American men in two years and arguing that the North Carolina Legislature must address the racial disparities in its system).

After the law passed, Mr. Robinson and other death row prisoners were afforded new discovery and access to new evidence concerning the role of race in this state's capital punishment system. Researchers from MSU conclusively documented how racial discrimination pervades North Carolina's

capital justice system, both in jury selection and in the charging and sentencing practices. *See* App. 62-104; 194-283. The State provided Mr. Robinson with previously unavailable explanations by the prosecutor in his own case of why he struck so many Black jurors. App. 114-32, 323-24. Some of these explanations were belied by the record and found by the RJA Court to be pretextual. App. 680, 683.

The RJA Court ruled in April 2012 that Mr. Robinson had proved both that purposeful racial bias infected his own case, that race had been a significant factor in Mr. Robinson's case, and that systemic racial bias infected the entire state at the time of his capital trial in 1994. App. 696.

The North Carolina Legislature enacted a narrowed version of the RJA on July 2, 2012. Three death row prisoners prevailed under that narrowed version on December 13, 2012. The Legislature debated the act once more, with significant discussion of the crimes committed by the four who had prevailed under the law, including Mr. Robinson. *See, e.g.*, App. 474-85 (Senate Judiciary Debate). It repealed the RJA in its entirety on June 19, 2013. Both the narrowed RJA statute and the repeal statute contained a clause that purports to strip judicial review of pending claims under the RJA, as well as pending claims where relief had already been awarded in the superior court and the State appealed. S.L. 2012-136, § 8 (2012 Amended RJA); S.L. 2013-154, § 5(d).

The Legislature thus purposefully stripped judicial review of significant, pending claims of racial bias, with the knowledge that such claims had previously been proven with evidence that both systemic and individual racial bias infected capital trials and sentencing in North Carolina. The resulting scheme of capital punishment, if permitted to stand, would violate the guarantees of equal protection and freedom from cruel and unusual punishment.

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*, 408 U.S. at 242 (Douglas, J., concurring); *see also*, *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 (1980) (holding state death penalty scheme unconstitutional under the state constitution based in part on the persistence of racial discrimination and the related conclusion that it "is inevitable that the death penalty will be applied arbitrarily").

Reviewing courts have an obligation to examine states' distinct capital punishment systems for their ability to protect against arbitrary and discriminatory sentencing. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). After

Furman, the approval of new capital punishment statutes like North Carolina's was "founded on an understanding that the new procedures would protect against the imposition of death sentences influenced by impermissible factors such as race." *Walker v. Georgia*, 129 S. Ct. 453, 454 (2008) (Stevens, J., statement respecting the denial of certiorari).

Through the RJA, the North Carolina Legislature directed courts to undertake an investigation of whether its procedures were sufficient to guard against the improper influence of racial bias and provided a remedy for such bias. When the courts found racial bias, the Legislature could not then strip the remedy and foreclose judicial review of such bias consistent with Eighth Amendment and North Carolina's prohibition against cruel or unusual punishment. "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).

Only last year, the Supreme Court made clear, even in the face of a longstanding rule barring impeachment of a verdict, that the Constitution requires some mechanism to redress racial discrimination. "A constitutional rule that racial bias in the justice system must be addressed – including, in some instances, after the verdict has been entered – is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Pena-Rodriguez v. Colorado*,

137 S. Ct. 855, 869 (2017). *See also Batson v. Kentucky*, 476 U.S. 79, 99 (1986) ("By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice."); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (finding the defendant's claim of racial bias "extraordinary" in light of evidence that he "may have been sentenced to death in part because of his race").

The Legislature's decision to remove the safeguard it had previously 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" is an unconstitutional denial of equal protection "if it is applied and administered by public authority with an evil eye and an unequal hand"). The resulting scheme is thus the product of the Legislature's discriminatory purpose, and has discriminatory effect. *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

The relief required in view of this constitutional violation is that this Court should vacate the Remand Court's order, and remand with instructions to the superior court to conduct a hearing on the merits of Mr. Robinson's statutory and constitutional claims of racial bias.

B. Bill of Attainder

The Remand Court's dismissal of Mr. Robinson's RJA claims also violated his constitutional rights because the retroactivity provision of the RJA repeal is a bill of attainder. It precisely and deliberately targeted Mr. Robinson for additional punishment by stripping his RJA defense to the death penalty. Bills of attainder are "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). These acts are unconstitutional. Article I, § 10, Clause 1 of the U.S. Constitution commands: "No State shall . . . pass any bill of attainder." The prohibition against bills of attainder "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U.S. 437, 445 (1965).

Establishing that legislation constitutes a bill of attainder requires Mr. Robinson to show that it: (1) specifically targeted him individually (or he was a member of an identifiable targeted group); and (2) inflicted punishment on him without a judicial trial. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984). In the proceedings below, the State

contended that the retroactivity repeal section was not a bill of attainder only because it "did not determine guilt and inflict punishment." *See State v. Robinson,* No. 94-CRS-23143, *State's Brief in Support of Motion to Dismiss Pursuant to Repeal of the Racial Justice Act Rendering All RJA Claims Void*, (Nov. 14, 2016) at 9-10.[23]

As shown below, whether a statute "determines guilt" is not the standard. Mr. Robinson demonstrated that the statutory section targets him and subjects him to punishment without a judicial trial, and thus he is entitled to relief on this ground. In the alternative, the Court should remand for an evidentiary hearing on this defense to the RJA repeal.

(1) The RJA retroactivity repeal section specifically targeted Mr. Robinson.

Shortly after this Court granted the State's petition for certiorari in April of 2013, the General Assembly enacted the RJA repeal with this retroactivity provision:

> This section is applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of [the RJA] prior to effective date of this act and the Order is vacated upon appellate review by a court of competent jurisdiction.

S.L. 2013-154, § 5.(d) (provided at App. 11).

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[23] The Remand Court did not address Mr. Robinson's claim of bill of attainder at all.

This provision unquestionably targeted Mr. Robinson. Only Mr. Robinson had received RJA relief and been resentenced under the initial RJA and only three others subsequently received relief and were resentenced before the repeal was enacted. Other than those four people, not one other life could have been affected by this provision because no one other than those four people could have had their already existing relief vacated by this Court. The exclusive purpose of that provision was to extend the repeal of the RJA to a known class of individuals, satisfying the requirement that the statute designate a person or group. *Community Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 86 (1981) ("The singling out of an individual for legislatively prescribed conduct 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.").

The fact that the Legislature targeted Mr. Robinson and the other Cumberland County prisoners is also apparent from its heavy and frequent discussion of the four cases during debates on the bill. *See, e.g.* App. 410 (House Committee member "requested the audio recording from the arguments being made in [Mr. Robinson's case] in Cumberland County"); App. 452-54 (House member describing impact of SB 416 on Mr. Robinson's case); App. 429-48 (House Committee members discussing details of the four

Cumberland County cases and allegations of racial bias); *see also*, App. 405-06, 456, 474-85.

In the prior 2012 amendment to the RJA, there was a retroactivity provision that applied exclusively to Mr. Robinson. S.L. 2012-136, § 8. The legislators explicitly acknowledged on the floor that this retroactivity provision would apply only to Marcus Robinson. App. 453 House Floor Debate*, SB 416 - Amend Death Penalty Procedures*, Second & Third Reading (June 12-13, 2012), at 27 ("if you look at section 8 of the bill . . . [t]hat's the Robinson case"); App. 462 (Judiciary B Committee Meeting: *Amending the Racial Justice Act* (June 11, 2012), at 6, where House Member explains that the provision is "essentially" referencing Robinson).

Neelley v. Walker, 67 F. Supp. 3d 1319 (M.D. Ala. 2014), presents a closely analogous situation. In *Neelley*, the court, applying the Bill of Attainder Clause, considered a parole statute with a retroactivity provision that applied to one prisoner alone, Judith Neelley. The court based its decision on a retroactivity provision designed to apply the legislation to Neelley's case and language in floor debates expressing the intent of the legislation to deny her the opportunity of parole. *Id*. at 1329-30. *See also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (in context of Ex Post Facto Clause, three capital defendants were "identifiable targets of the legislation" where the section applied only to three persons who had received the death

penalty from a three-judge panel). As in these cases, Mr. Robinson has proven that the retroactivity repeal section targeted him.

(2) The retroactivity provision of the RJA repeal inflicts punishment without a trial or adjudicative hearing.

The RJA repeal provision operates to strip Mr. Robinson of a defense to the death penalty and reimpose a previous sentence of death without new judicial proceedings. This unquestionably constitutes punishment without a trial. The fact that Mr. Robinson was found guilty by a jury is irrelevant: both the original RJA defense and its repeal dealt exclusively with the question of punishment. *Neelley*, 67 F. Supp. 3d at 1330 (plaintiff stated a claim for bill of attainder violation where she alleged the legislature interfered with her punishment by denying her access to a mechanism to reduce her punishment, and rejecting the State's claim that a guilty verdict inoculated sentencing bills of attainder from review).

In determining whether a statute imposes punishment, this Court should consider whether (1) 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.*, 468 U.S. at 852; *State v. Johnson,* 169 N.C. App. 301, 310 (2005) (applying elements from *Selective Serv. Sys. v. Minnesota Pub. Interest Research Grp.*); *see also Seariver Mar. Fin. Holdings,*

Inc. v. Mineta, 309 F.3d 662, 673 (9th Cir. 2002) ("A statute need not satisfy all of these factors to constitute a bill of attainder). The U.S. Supreme Court has applied each of the three punishment criteria as an "independent…indicator of punitiveness." *Foretich v. United States*, 351 F.3d 1198, 1225 (D.C. Cir. 2003) (summarizing Supreme Court precedent).

Mr. Robinson has demonstrated that the retroactivity provision constitutes punishment. First, the legislative record shows an intent to punish Mr. Robinson and the other three prisoners. The classic sources for considering whether the record shows an intent to punish include "legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation." *Eagleman v. Diocese of Rapid City*, 862 N.W.2d 839, 845 (S.D. 2015) (*quoting Foretich*, 351 F.3d at 1225); *see also Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 478 (1977)).[24]

Here, the legislators' emails and documents demonstrate that the purpose for the retroactivity repeal provision was their interest in depriving Mr. Robinson and the other three defendants of a life sentence and subjecting them to greater punishment. *See, e.g.*, App. 449-50 (Senate President Pro Tempore expressing a deep concern that Mr. Robinson could become eligible

[24] Although the Remand Court did not rule on Mr. Robinson's discovery requests before dismissing his RJA claims, effectively denying those requests, information from publicly-available legislative records and news reports amply prove the General Assembly's desire to impose a death sentence on Mr. Robinson without judicial process.

for parole in news article); App. 501-02 (Thom Goolsby, *Death Penalty Redux-Past Time to restart Executions*, stating "This new legislation will start the dead men walking once again."); App. 489 (House Representative dismissing ex post facto problems and saying that returning the four who had prevailed in Cumberland County under the RJA to the execution "queue" would be more consistent with the constitutional requirement of Equal Protection); App. 456 (Representative acknowledging that most of the effort to alter the RJA was in response to Mr. Robinson's case, and arguing against changes to the RJA on the ground that a life sentence is sufficient punishment for Robinson because he "will never leave prison alive").

Second, the retroactivity provision of the RJA repeal does not have a nonpunitive legislative purpose. The only reason to extend the repeal of the RJA to Mr. Robinson and the other three prisoners was to subject them again to the death penalty. The State did not argue otherwise below. *See State v. Robinson,* No. 94-CRS-23143, *State's Brief in Support of Motion to Dismiss Pursuant to Repeal of the Racial Justice Act Rendering All RJA Claims Void*, (Nov. 14, 2016) at 9-10.

Finally, the RJA repeal falls within the historical meaning of legislative punishment. The punishment in question is the ultimate one – a death sentence. The death penalty is the paradigmatic historic legislative punishment. "The classic example [of attainder] is death." *ACORN v. United*

States, 618 F.3d 125, 136 (2d Cir. 2010) (quoting *Consolidated Edison Co. of New York, Inc. v. Pataki,* 292 F.3d 338, 351 (2d Cir. 2002). *See also Selective Serv. Sys.*, 468 U.S. at 852 (similar); L. Ostler, *Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32 CAMPBELL L. REV. 227, 250 (2010) ("If the person's life was called for (by a legislative bill), then it was a true bill of attainder.").

Courts have repeatedly recognized that legislatively stripping away a defined group's right to assert a defense constitutes a bill of attainder. *See Putty v. United States*, 220 F.2d 473, 478 (9th Cir. 1955) (legislature's attempt to deny the defendants retroactively the grounds to attack the judgment 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 the defense). 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, 238-239 (1872), and *Cummings v. Missouri,* 71 U.S. (4 Wall) 277, 320-321 (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).

According to the Remand Court, the effect of the RJA repeal legislation was to render all RJA motions filed before the effective date of the repeal void. The repeal has had the desired effect of nullifying a pending RJA claim previously found to be meritorious, and subjecting Mr. Robinson to the threat of a sentence of death without a defense. Thus, the General Assembly's retroactive repeal of the RJA is an unconstitutional bill of attainder. This Court should so conclude based on the repeal's language alone, or by taking judicial notice of the legislative record. And the Court should remand for a hearing on the merits of the underlying RJA claims. Alternatively, the Court should remand for an evidentiary hearing on this bill of attainder defense.

C. Dismissal is Unconstitutional Because Mr. Robinson's Defense to Execution under the RJA Had Vested.

Mr. Robinson presents two independent bases under North Carolina and federal constitutional law for concluding that his substantive right to RJA relief had vested and therefore could not be legislatively destroyed: (1) his RJA right vested when he obtained a final judgment granting his RJA claim, and when he was sentenced to life without parole; and (2) his RJA right vested at the time of pleading because he had suffered a capital trial in which race was a significant factor. Under either theory, the Court should hold that application of the RJA repeal to Mr. Robinson violates his vested rights, and remand for an evidentiary hearing on the merits of the RJA

claims.

(1) Mr. Robinson's claim vested when he obtained a final judgment granting his RJA claim.

Article I, Section 19 and Article IV, Section 13 of the North Carolina Constitution, and the Fourteenth Amendment's Due Process Clause, bar the General Assembly from doing what it did here: depriving litigants of their vested, substantive rights under duly enacted legislation. *Fogleman v. D&G Equip. Rentals*, Inc., 111 N.C. App. 228, 230-33 (1993); *Booker v. Medical Center,* 297 N.C. 458, 467 (1979); *Lowe v. Harris*, 112 N.C. 472 (1893). As this Court and the Court of Appeals have explained, litigants' rights, if not already vested, vest when they obtain a lawful final judgment in their favor.[25] Once Mr. Robinson had a substantive, vested right to his relief after the RJA Court entered its order and sentenced him to life, the Legislature could not constitutionally rescind that relief.

This case is controlled by *State v. Keith*, 63 N.C. 140 (1869), where the Court found that the General Assembly's repeal of amnesty it had previously

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[25] *Bowen v. Mabry*, 154 N.C. App. 734, 736 (2002) (explaining "a lawfully entered judgment is a vested right"); *Dunham v. Anders*, 128 N.C. 207, 207 (1901) ("We are therefore of opinion that 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 not by legislative, proceedings."); *Dyer v. Ellington*, 126 N.C. 941, 941 (1900) (concluding Legislature could repeal previously available cause of action, and deny plaintiff penalty he would have been owed because "the penalty had [not] been reduced to judgment" and therefore had not vested).

granted improperly "took away from the prisoner his vested right to immunity." *Id*. at 145. The case involved a directly parallel situation to the events here: the RJA's enactment, its retroactive application to existing death sentences, and its subsequent repeal after Mr. Robinson won relief.

The defendant in *Keith* fought in the Civil War as a confederate officer and during that service in 1863 allegedly killed another man. 63 N.C. at 140-41. Three years after the killing, in 1866, the General Assembly issued a "full and unequivocal pardon for all 'homicides and felonies' committed by officers or soldiers" who were acting, for either side, under proper orders, or otherwise in fulfillment of their military duties. *Id.* at 142 (quoting Amnesty Act of 1866-67, 1866 N.C. Acts § 1). Beyond that, it provided that a soldier upon proof of being an officer or private for either side "shall be presumed [to have] acted under orders, until the contrary shall be made to appear.'" *Id.* (quoting 1866 N.C. Acts § 2). Two years after enacting the amnesty, the Legislature repealed it. *Id.* at 142 (citing Ordinance of 1868, ch. 29, p. 69).

Mr. Keith was indicted for the 1863 killing after the 1868 repeal. He claimed the protection of the Amnesty Act, but the State argued the repeal barred that. This Court rejected the State's argument because the repeal "took away from the prisoner his vested right to immunity." *Id.* at 145.[26]

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[26] As discussed further in (D) *supra*, this Court also found the repeal to be an impermissible ex post facto law. *Id.*

Mr. Robinson's claim of vested rights is stronger than Mr. Keith's: he filed his amnesty claim during the pendency of the statute, unlike Mr. Keith who did not seek to use the act until after it was repealed. Just as this Court protected Mr. Keith's vested rights from repeal, it must protect Mr. Robinson's.

In the proceedings below, the Remand Court denied Mr. Robinson's vested rights claim by concluding that the order granting Mr. Robinson RJA relief was not a "final judgment." App. 21. It distinguished *Keith* only by finding that – unlike the Amnesty Act which had provided a pardon or "in effect [a] final judgment" – the judgment in Mr. Robinson's case was not final.

The Remand Court's conclusion is directly contrary to this Court's authority. Mr. Robinson had proceeded on a motion for appropriate relief and won a judgment from the MAR Court. This Court has made clear that a judgment on such an MAR is final, where there is no *right* to appeal, regardless of whether it is subject to discretionary appeal. *See State v. Green*, 350 N.C. 400, 408 (1999).

In *Green*, this Court was deciding whether a prisoner could benefit from legislation providing new discovery rights which had become effective only after the prisoner's previously-filed motion for appropriate relief had been denied. The Court answered no. It explained:

> [D]efendant's motion for appropriate relief was

> denied by the trial court on 1 May 1996. *This was a final judgment*. Any appellate review of that judgment was subject to this Court's *discretionary* grant of certiorari. N.C.G.S. § 15A–1422(c)(3) (1997).

Green, 350 N.C. at 408 (emphasis added).

The Remand Court was persuaded by the State's suggestion that a judgment is "not final until it has undergone appellate review or the time for discretionary review has expired[.]" App. at 21 (citing *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986); *Linkletter v. Walker*, 381 U.S. 618, 622, n.5 (1965)). But the cases relied upon by the Remand Court and State are inapposite.

Linkletter and *Allen* say nothing of "final judgments." Rather, they address when a criminal trial *conviction* becomes final for application of new constitutional rules. *See*, *e.g.*, *Allen*, 478 U.S. at 257-58 (addressing "*convictions* that became final before our opinion [in *Batson v. Kentucky*] was announced") (emphasis added) (quoting *Linkletter*, 381 U.S. at 622, n.5 (same discussion of final convictions)). This context-specific definition comes into play when courts determine retroactivity for new constitutional rules of criminal procedure, because such rules are generally not available to prisoners whose convictions are final. *See*, *e.g.*, *Wharton v. Bockting*, 549 U.S. 406, 409 (2007) (holding that the rule of *Crawford v. Washington*, 541 U.S. 36 (2004), "is [not] retroactive to cases already final on direct review"). Criminal trial convictions become final after a *right* to direct appeal has been

exercised. Here, we deal with a motion for appropriate relief (the only vehicle for RJA claims raised by death row prisoners). And here, the judgment of the RJA Court was final when entered.

Green is the correct authority here, not *Linkletter* and *Allen* because, as in *Green,* and as the State recognized by filing for certiorari review of the RJA Court's order instead of filing a notice of appeal, further review of Mr. Robinson's relief could only be by a discretionary grant of certiorari from this Court.

The finality of Mr. Robinson's judgment aligns his case with the cases discussed above establishing that "a lawfully entered judgment is a vested right." *Bowen*, 154 N.C. App. at 736-37; *see also* n.25, *supra* (collecting cases).

Finally, if there were any doubt, then the equities of Mr. Robinson's situation come into play. *See*, *e.g.*, *Michael Weinman Assoc. Gen. P'ship v. Town of Huntersville*, 147 N.C. App. 231, 234 (2001) (recognizing that vested rights protect interests in certainty, stability, and fairness). The equities, on which the Remand Court below refused a hearing and refused to consider evidence, are the unfairness of the following succession of State actions: (1) passing a law to provide new investigation of suspected infection of racial bias in capital sentencing; (2) providing a mechanism for adjudicating claims of discrimination; (3) granting Mr. Robinson relief based on the proof of racial discrimination he uncovered; (4) sentencing Mr. Robinson to life without

parole, and transferring him off death row; and (5) then, reversing the statutory course, and seeking once again to execute Mr. Robinson without first allowing merits review of his evidence of racial bias.[27]

Mr. Robinson's vested right to a life sentence is further protected by state and federal due process. The passage of the RJA created a life, liberty, and property interest in the life sentence the statute mandated. State and federal due process therefore forbid applying the RJA repeal to retroactively abrogate that interest without an "opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *see also Jones v. Keller*, 364 N.C. 249, 256 (2010) (state statutes may create liberty interest protected by Due Process); *Sandin v. Conner,* 515 U.S. 472, 483-84 (1995); *DA's Office v. Osborne*, 557 U.S. 52, 68 (2009) (state statute created a liberty interest by providing for review of "newly discovered evidence" to show innocence); *Bd. Of Pardons v. Allen*, 482 U.S. 369, 377-78 (1987); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (liberty interest in law

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[27] North Carolina Appellate Rule 2 permits this Court to suspend its rules and order proceedings as necessary to "prevent manifest injustice to a party." The equities here are so concerning as to warrant this Court's consideration of reinstating the original order of the RJA Court finding impermissible racial discrimination. This is especially so given that this Court's prior decision vacating the RJA Court's order was premised on the RJA Court denying the State a third continuance to address the statistical evidence. But when the State had nine months of additional time to prepare between Mr. Robinson's hearing and the hearing in the *Golphin, Walters, Augustine* hearing, it presented no new statistical evidence.

that provided for jury sentencing); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state statute providing for good time prison credits create a liberty interest entitled to protection by due process).

Were the State successful, Mr. Robinson would go to the execution chamber holding solid proof obtained under a state statute that racial discrimination tainted his death sentence, never having had a single courthouse door open for him to vindicate his rights. As this Court explained more than a century ago, "when the plaintiff obtained judgment . . . he acquired a vested right of property that could be divested only by judicial, and not by legislative, proceedings." *Dunham*, 128 N.C. at 207. A remand for a hearing on the merits of the RJA claims is required.

(2) Mr. Robinson's rights vested when the violation, race discrimination, occurred and he perfected his legal claim.

The Court should also remand for a merits RJA hearing because, where the law allows a cause of action which provides redress for past injuries, this Court has repeatedly held that the parties' rights as to that cause of action vest at the time the cause of action accrues. *See, e.g., Bolick v. American Barmag Corp.,* 306 N.C. 364 (1982) (legislation could not apply retroactively to protect companies from liability because plaintiff's claims, based on injuries from a defective product, had vested at the time of injury, before the effective date of new statute); *Smith v. Mercer*, 276 N.C. 329, 337 (1970) (a

statute violates a vested right if it "invalidate[s] a defense which was good when the statute was passed"). The cause of action accrues when the injury has occurred and the party asserting the claim becomes entitled to file the action seeking redress for that injury. *See*, *e.g.*, *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 467 (1979) ("The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect."); *Robins v. Hillsborough*, 361 N.C. 193, 194-96 (2007); *cf. Dickson, et al v Rucho, et al*, No. 201PA12-5, Legislative Def. Br. 11-12 (arguing a vested right to review in this Court, after such review repealed by Legislature, because underlying litigation began in 2011, remained ongoing and included two prior decisions of this Court, and that the legislators are entitled to continue the litigation "pursuant to the statute that was in effect when the case was commenced and when this Court issued its first two decisions"). Once the right to redress becomes vested, it may not be defeated or modified by a subsequent statute. *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36 (1921). Under this precedent, Mr. Robinson's right to proceed under the RJA vested once he filed his MAR alleging previous discrimination and the Legislature is thus prohibited from interfering with this right.

D. Ex Post Facto

The Remand Court also erred in its decision that the repeal was not an

impermissible ex post facto punishment. Remand for an RJA merits hearing is warranted on this basis. Both the U.S. and North Carolina Constitutions bar ex post facto laws. U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16. *Keith*, *supra*, found the Legislature's removal of amnesty both the improper destruction of a vested right and an ex post facto law. *Keith*, 63 N.C. at 145.

The Remand Court discussed *Keith* at length in its discussion of vested rights, App. 21-22, before it reached the question of whether the RJA repeal was an ex post facto law. Yet it denied Mr. Robinson's ex post facto claim without considering *Keith*'s application, saying simply that the ex post facto prohibition applies to "'[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.'" App. 22 (quoting *Jones v. Keller*, 364 N.C. 249, 259 (2010) (emphasis in *Jones*)).

Jones' general statement in no way distinguished or silently overruled *Keith*. Instead, *Keith* continues to control here where legislative action *after* the crime provides relief against the prior available punishment, and thereafter the Legislature attempts to make that relief unavailable. Relief originally provided – even though after the time of the crime – may not be rescinded without violating the ex post facto punishment prohibition.[28] And,

[28] *See also In re Bray*, 158 Cal. Rptr. 745, 749 (Cal. Ct. App. 1979) (citing *Keith,* and holding that retroactive and ameliorative sentencing

as shown above, the Remand Court's attempt to distinguish *Keith* because it purportedly involved relief akin to "final judgment" was incorrect.

E. Separation of Powers

Mr. Robinson's final constitutional defense to the RJA repeal, and ground for seeking remand for an RJA merits hearing, is that the General Assembly's RJA repeal violates the Separation of Powers Clause of our State's constitution. *See* N.C. Const., art. I, § 6. It does so on its face and as applied to Mr. Robinson. The violation is direct – the repeal's language takes from the judicial branch its exclusive right to pronounce sentence on a defendant, in this case a death sentence on Marcus Robinson. If the mandate of that section of the repeal is followed, Mr. Robinson having last been sentenced to life without parole after his RJA hearing, could be executed under the repeal's authority without ever appearing before a judge again to be sentenced to death.

While our constitution gives the legislative branch the exclusive right to enact laws, nothing in it permits legislators to pronounce sentence. *See*

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reform of legislature placed "prisoners such as petitioner in a position as if the [reform] were the law at the time they committed their offenses[,]" and therefore could not be subsequently rescinded); *cf. Stogner v. California,* 539 U.S. 607, 617 (2003) (citing *Keith* and finding California law allowing prosecution of previously-time barred sex crimes an impermissible ex post facto law); *Thompson v. State*, 54 Miss. 740, 743 (1877) ("a subsequent repeal of . . . statute [setting forth statute of limitations], more than two years after the commission of the crime, could not take away the complete defense, which, by the act, would have become vested, if that act was applicable").

generally Jernigan v. State, 279 N.C. 556, 563-64 (1971) ("[t]he functions of the court with regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law").

The facial violation occurs in RJA repeal provision § 5.(d), where the General Assembly decreed that Mr. Robinson's RJA motion was "void," thus legislatively adjudicating the outcome of a legal claim. But it is a judicial branch function – not a legislative branch function, "to put an end to litigation." *Person v. Bd. Of State Tax Comm'rs*, 184 N.C. 499, 505 (1922).

The as-applied violation is that the legislation has the effect of sentencing Mr. Robinson to death without the intervention of a sentencing judge. Mr. Robinson's original sentence of death was imposed by a Superior Court judge. That remained his sentence until he was sentenced to life without parole after winning relief under the RJA. Again, it was a Superior Court judge who sentenced him. That life without parole sentence was Mr. Robinson's last sentence imposed by any judge.

On certiorari, this Court vacated the judgment below and remanded the matter for further consideration. The Remand Court simply applied the language of the repeal that said if Mr. Robinson's relief was ever vacated, the repeal took effect and ended his RJA claim. If that court's decision stands, the General Assembly's enactment will subject Mr. Robinson to execution by

operation of law – and without the judicial branch ever again imposing on him a sentence of death. The Separation of Powers Clause cannot permit the General Assembly itself to visit law's most extreme punishment on a citizen without a sentencing by the judicial branch. As such, that portion of the RJA repeal on its face and as-applied to Mr. Robinson is unconstitutional.

III. In the alternative, and at a minimum, this Court should remand to allow Mr. Robinson to develop and present the full evidence in support of his constitutional defenses to dismissal.

In Point I, Mr. Robinson shows why this Court should find Mr. Robinson's life without parole sentence binding under § 15A-1335 and the Double Jeopardy Clause, and dismiss any further proceedings. In Point II, Mr. Robinson shows meritorious constitutional defenses against application of the RJA repeal to his case (Cruel and Unusual Punishment and Equal Protection, Bill of Attainder, Ex Post Facto laws, the equities of Vested Rights, and Separation of Powers). If this Court does not rule on the existing record for Mr. Robinson on either of these bases, it should remand for the purpose of ordering discovery and providing an opportunity for Mr. Robinson to have a full hearing on his constitutional defenses.

Mr. Robinson repeatedly sought to conduct discovery and to present evidence to fully elucidate his constitutional defenses to the application of the RJA to his case. App. 705-09; App. 382-85; *see also, Defendant's Motion for*

Discovery of Information In Support of Defenses Set Forth In Defendant's Brief, Robinson v. North Carolina, 91 CRS 23143 (Nov. 16, 2016).

The Remand Court ignored his discovery motion, denied his request to present evidence, and indeed impermissibly narrowed the scope of issues to disregard wholesale some of his constitutional defenses. The Remand Court's erroneous understanding of the scope of the issues led to this unjustifiable de facto denial of Mr. Robinson's right to discovery and explicit denial of his right to present evidence. This was error. *Compare, State v. McHone*, 348 N.C. 254, 258 (1995) (evidentiary hearing is required if the defendant presents assertions of fact which will entitle him to relief if proven); N.C. Gen. Stat. § 15A-1415(f) (stating categories of mandatory discovery in post-conviction cases). While Mr. Robinson believes that he proffered sufficient evidence and raised legal defenses that should entitle him to prevail on the existing record, if this Court is not persuaded, it should at a minimum remand for Mr. Robinson to develop and present the additional evidence in support of his allegations of constitutional defenses to the RJA repeal.

IV. The Lower Court Improperly Dismissed Mr. Robinson's Constitutional Claims Related to Racial Discrimination Without a Hearing or Analysis.

In the proceedings below, Mr. Robinson raised both *Batson* and *McCleskey* constitutional claims, based on the new and powerful evidence of racial discrimination in his case. *Batson* and *McCleskey* Amendments (Feb.

18, 2016); *see also* App. 25-104 (Aug. 5, 2010 MAR filed pursuant to the RJA and the Sixth, Eighth and Fourteenth Amendments). He presented this evidence in the form of testimony and evidence at the initial RJA hearing and subsequent proffers of evidence. The Remand Court dismissed Mr. Robinson's MAR petition in its entirety, with no mention at all of his independent *Batson* and *McCleskey* constitutional claims for relief.[29] Mr. Robinson is entitled to relief on these claims. This Court should grant him relief based on the evidence presented in the record, or at a minimum, remand for an evidentiary hearing.

A. Violation of *Batson v. Kentucky*

The State conceded in the context of the 2012 RJA hearings that Mr. Robinson had set out a prima facie case of *Batson* discrimination, and offered for the first time purportedly race neutral explanations for the strikes. *See* App. 143-46, 151-52 (state expert testifying that the statistically significant racial disparities in jury selection required rebuttal under the *Batson* framework and accordingly, he sought explanations from the prosecution about the reasons for the strikes); App. 108-09 (prosecution arguing that they

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[29] At the hearing on whether the RJA repeal applied to Mr. Robinson, counsel for the prisoners noted that the State was asking the Court to rule on its motion to dismiss, a motion that went broader than the "sole issue" the Court had authorized the parties to brief and argue, whether the repeal applied to the prisoners. The Remand Court indicated that the scope of the RJA repeal was the only issue it intended to address. *State v. Augustine, et al.*, No. 01 CRS 65079 (Nov. 29 2016) App. 386-87.

demonstrated race-neutral reasons for the strikes in Mr. Robinson's case); *see also State v. Golphin*, 352 N.C. 364, 426 (2000) ("when the trial court does not explicitly rule on whether the defendant made a *prima facie* case, and where the State proceeds to the second prong of *Batson* by articulating its explanation for the challenge, the question of whether the defendant established a *prima facie* case becomes moot.") (citations omitted).

As shown below, these new explanations were themselves evidence of pretext. The entirety of the record, including new evidence unearthed for the first time during the RJA proceedings, shows that the state struck four eligible Black jurors, Nelson Johnson, Margie Chase, Elliot Troy, and Tandra Whitaker, with purposeful discrimination.

At Mr. Robinson's trial, the State struck 5 of the 10 Black jurors (50%), but struck only 4 of 28 non-Black jurors (14.3%). Thus, the State struck 1 of every 2 Black jurors, but only 1 of every 7 non-Black jurors. After the RJA's passage, Mr. Robinson was afforded broad discovery of jury selection in his case and others in Cumberland County. This new information included the prosecutor's pretextual explanations for striking Black jurors, a history and culture of discrimination against Black jurors by Cumberland County's prosecutors, disparate treatment by Mr. Robinson's prosecutor of white and Black potential jurors, and comparative juror evidence from a statistical study of the capital cases tried by Mr. Robinson's prosecutor and others in the

county.

Combined, the evidence in the record meets the standard for proving purposeful discrimination in Mr. Robinson's case in violation of the Equal Protection Clause under *Bats*on and its progeny. *See generally Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (finding *Batson* violation under the totality of circumstances, including disparate treatment and questioning of Black and white jurors, and statistical and historical evidence); *Foster v. Chatman*, 136 S. Ct. 1737, 1750 (2016) (applying comparative juror analysis); *see generally*, Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 Col. L. Rev. 713 (2018) (explaining that defendants are more likely to prevail post-trial and in post-conviction *Batson* claims because they have greater access to relevant evidence like prosecutors notes).

In addition, the consistent pattern of purposeful discrimination against Black jurors by Mr. Robinson's prosecutor and the Cumberland County office, over time, meets the different burden imposed by *Swain v. Alabama*, 380 U.S. 202, 227 (1965), for proving discrimination by pointing to a prosecutor's "systematic use of peremptory challenges against [Black jurors] over a period of time." *See also Horton v. Zant*, 941 F.2d 1449, 1453-60 (11th Cir. 1991) (finding a prima facie case of a *Swain* violation based in part on a statistical study of the prosecutor's peremptory strikes in capital cases over nine years).

The State filed a motion to dismiss Mr. Robinson's RJA and

constitutional claims. In this motion, it contended that Mr. Robinson's constitutional claim was procedurally barred under N.C. Gen. Stat. §§ 15A-1419(a)(3) and 15A-1419(a)(1) because he did not raise it on appeal or in post-conviction. This argument fails for three reasons.

First, the *Batson* claim is not procedurally barred because Mr. Robinson was not previously in a position to raise the claim, an express condition of the statutory bar. *See* N.C. Gen. Stat. §§ 15A-1419(a)(1) and (a)(3) ("Upon [prior appeal or MAR] defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so"). Only a small fraction of the proof was previously available. This new evidence warrants review. *See Foster* , 136 S. Ct. at 1746 (noting that the Georgia Supreme Court reviewed an otherwise unreviewable *Batson* claim in state post-conviction because "additional evidence allegedly supporting this ground was discovered" after the direct appeal proceedings).

The evidence previously available to Mr. Robinson consisted only of the strike ratio in Mr. Robinson's own case. Mr. Robinson did not have, because the State did not disclose: (1) the prosecutor's reasons for the strikes of Black venire members Mr. Johnson, Ms. Chase, Mr. Troy, and Ms. Whitaker in Mr. Robinson's case, and the related evidence showing disparate treatment of Black and white jurors; (2) evidence of the prosecutor's systemic discrimination in the form of explanations for strikes in his other cases that

did not withstand scrutiny; (3) a statistical study comparing Black and white jurors, which documented a pattern of discrimination in Cumberland County prosecutors' strikes across cases; (4) evidence of prosecutors' trainings intended to circumvent *Batson*; and (5) notes and testimony by Mr. Robinson's prosecutor, and others in his office, which reveal biased thinking regarding Black jurors. *See generally*, *supra* 10-17. This new evidence lifts the bar, and at a minimum, requires a hearing. *Cf., Foster*, 136 S. Ct. at 1746 (holding that the new evidence uncovered for the first time in collateral proceedings of "the shifting explanation, the misrepresentations of the record, and the persistent focus of race" by the prosecutor showed a constitutional violation and required relief); *see also*, *State v. Augustine, Golphin, and Walters,* No. No. 91 CRS 65079, 98 CRS 34832, 35044, and 97 CRS 74314-15, (Dec. 13, 2012) (order denying judgment on the pleadings and finding that defendants' similar "constitutional claims are not procedurally barred because defendants were not in a position to adequately raise those claims prior to the original RJA's enactment).

Second, even if the procedural bar were applied, Mr. Robinson can show cause and prejudice pursuant to N.C. Gen. Stat. § 15A-1419(b) to (d). As demonstrated above, Mr. Robinson relies on new factual evidence not previously available through due diligence. N.C. Gen. Stat. § 15A-1419(c)(3). This includes prosecutor testimony, a category of evidence previously

unavailable as a matter of law in North Carolina,[30] as well as the new evidence of training for Cumberland prosecutors in how to defeat *Batson*. *Cf., Amadeo v. Zant*, 486 U.S. 214, 224 (1988) (suppressed memo regarding jury selection was new evidence sufficient to excuse procedural bar).

Mr. Robinson can also show cause because there has been a retroactive change in the law.[31] The law in North Carolina regarding both the types and standards of proof required to prevail in a *Batson* challenge has changed dramatically since Mr. Robinson's direct appeal in 1995 and post-conviction petition in 1999. In 2005, the United States Supreme Court announced for the first time in *Miller-El v. Dretke*, 545 U.S. 231 (2005),the need for courts to consider comparative juror analysis as part of the *Batson* calculation. *Miller-El*, 545 U.S. at 240; *see also Snyder v. Louisiana*, 552 U.S. 472, 482-84 (2008) (finding evidence of pretext and intentional discrimination based in part upon differential treatment of white and Black jurors with respect to purported hardship). Before *Miller-El*, North Carolina courts had refused to give such comparisons the weight the Supreme court has since made clear is required. *See e.g., State v. Porter*, 326 N.C. 489, 501-02 (1990) (rejecting juror comparisons as evidence of pretext if the jurors were not similar in all

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[30] *State v. Jackson*, 322 N.C. 251, 258 (1988) (defendants do not have a right to examine the prosecuting attorney in *Batson* challenges).

[31] *See* N.C. Gen. Stat. § 15A-1419(c)(2) (procedural bar waived where failure to raise the claim earlier was "[t]he result of the recognition of a new federal or State right which is retroactively applicable").

respects); *State v. Lyons*, 468 S.E.2d 204, 209 (N.C.1996) (same); Amanda S. Hitchcock, Recent Development, *Deference Does Not By Definition Preclude Relief: The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. Rev. 1328, 1344-56 (2006) (explaining how the North Carolina Supreme Court rejected the approach of the majority in *Miller-El* to comparative juror analysis in "every case where a capital defendant has attempted to use side-by-side comparison of challenged and accepted jurors" by requiring that the struck and passed jurors be identical in all other respects).

Subsequent state and federal North Carolina cases have remanded for new consideration in light of the analysis required by *Miller-El*. *State v. Barden*, 362 N.C. 277, 279 (2008) (new comparative juror framework announced in *Miller-El* required remand for consideration of claim of discrimination in jury selection); *Kandies v. Polk,* 545 U.S. 1137 (2005) (remanding a North Carolina federal habeas case for a new *Batson* hearing consistent with *Miller-El).*

The law regarding the standard of proof required in North Carolina also changed with the express holding in *Miller-El* that litigants need show only that race was a significant factor motivating the jury strike. 545 U.S. at 252; *see also Snyder*, 552 U.S. at 485 (finding *Batson* violation based on "peremptory strike shown to have been motivated in substantial part by

discriminatory intent"). North Carolina had previously rejected powerful *Batson* claims on the ground that the defendant could not show that race was the sole factor motivating the prosecution. *See e.g., State v. White*, 131 N.C. App. 734, 740 (1998) (rejecting a claim where the prosecution conceded its strike was in part based on race and gender because a third basis for its strike, age, was constitutionally permissible, and observing that "our courts, in applying the *Batson* decision, have required that the challenge be based *solely* upon race") (emphasis in original). After *Miller-El*, this Court has clarified that the correct standard is whether race was a significant factor, not whether it was the sole factor. *State v. Waring*, 364 N.C. 443, 480-81 (2010).

Moreover, Mr. Robinson can meet the prejudice prong of the procedural bar waiver, *see* § 15A-1419(d), because there is a reasonable likelihood he will prevail on his *Batson* claim. Indeed, the RJA Court, in its initial RJA relief order, already found that intentional discrimination occurred at trial. App. at 695-96. Although the order was vacated because the RJA Court failed to grant the State a third continuance, that court's findings are at a minimum indicative of the strength of Mr. Robinson's evidence.

Third, Mr. Robinson's *Batson* claim is alternatively entitled to merits review because the General Assembly specifically predicated repeal on the availability of alternative avenues of relief. The repeal explicitly

contemplated that defendants with evidence of jury selection discrimination would be able to assert such a claim in a post-conviction motion for appropriate relief, as Mr. Robinson did here. *See* S.L. 2013-154, § 5.(b) (stating "a capital defendant retains all of the rights which the state and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race" and explaining that "these rights are protected through multiple avenues . . . [including] a postconviction right to file a motion for appropriate relief at the trial level where claims of racial discrimination may be heard"). This statutory language would be meaningless if the courthouse doors were closed to defendants who, for the first time in post-conviction proceedings, discovered evidence that their capital convictions were infected with racial bias. *See Porsch Builders Inc. v. City of Winston-Salem*, 302 N.C. 505, 556 (1981) ("It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.").

If this Court somehow concludes that the *Batson* claim would otherwise be barred, it should exercise its discretion to review the claim under North Carolina Appellate Rule 2, and its inherent authority to effectuate justice, to prevent manifest injustice and to expedite a decision in the public interest. *State v. Sanders*, 312 N.C. 318, 320 (1984) (exercising supervisory powers under Rule 2 "[i]n view of the gravity of the offenses for which defendant was

tried and the penalty of death which was imposed" and ordering a new capital trial); *cf. State v. Robbins*, 319 N.C. 465 (1987) (reviewing *Batson* claim where violation not objected to at trial in part because the defendant "was on trial for his life"). Providing review of the newly uncovered evidence of discrimination in Mr. Robinson's case is required in the interests of justice. "Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." *Davis v. Ayala,* 135 S. Ct. 2187, 2208 (2015); *see also Cofield v. State,* 320 N.C. 297, 304 (1987) (hereafter *Cofield I*) ("Article I, § 26 [prohibiting racial bias in jury selection] in particular is intended to protect the integrity of the judicial system."); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.").

Mr. Robinson alleged and introduced extensive proof of a *Batson* violation. This Court should enter relief or remand for an evidentiary hearing on Mr. Robinson's *Batson* claim.

B. Race discrimination in charging and sentencing

Mr. Robinson also alleged that his death sentence violates constitutional prohibitions on arbitrary and capricious punishment and equal protection, both under the preexisting *McCleskey v. Kemp*, 481 U.S. 279 (1987), standard for purposeful discrimination, and the more appropriate

standard required today by North Carolina's constitution and the evolving standards of decency, where a substantial risk of arbitrary and capricious punishment is sufficient to demonstrate a constitutional violation. U.S. Const. amends. VIII and XIV; N.C. Const. art. I, § 27. This claim, too, was improperly ignored by the Remand Court when it dismissed RJA motion without any discussion or explanation of the *Batson* or *McCleskey* claims.

The racially discriminatory application of the death penalty violates the Eighth Amendment's prohibition of arbitrary and capricious punishment. *McCleskey*, 481 U.S. at 292-97 (exceptionally clear proof of purposeful discrimination required to show Eighth Amendment violation).[32]

Under *McCleskey*, in order to succeed on a claim of racial discrimination in the imposition of the death penalty, the defendant must establish a "constitutionally significant risk of racial bias" with "exceptionally clear proof," including a showing that the "decisionmakers in his case acted with discriminatory purpose." *McCleskey,* 481 U.S. at 313, 297, 292; John

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[32] *See also Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (*Furman* recognized that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."); *Glossip v. Gross*, 135 S. Ct. 2726, 2760-62 (2015) (Breyer, J., dissenting) (concluding that research on the use of improper factors such as race in the application of the death penalty strongly suggests such application is arbitrary); *Baze v. Rees,* 553 U.S. 35, 85 (2008) (Stevens, J., concurring) (concluding capital punishment violates the Eighth Amendment, in part because of the persistent "risk of discriminatory application of the death penalty").

Blume & Lindsey S. Vann, *Forty Years of Death: the Past, Present and Future of the Death Penalty in South Carolina (still arbitrary*), 11 DUKE J. CONST. L. & PUB. POL'Y 183, 224 n.247 (2016) (describing *Kelly v. State*, No. 99-CP-42-1174 (S.C. Sup. Ct., Oct. 6, 2003), where the defendant won a claim of racial discrimination under *McCleskey*). The extensive evidence proffered in this case meets this high burden, and the Remand Court's failure to consider such evidence is contrary to the constitutional guarantee to be free from arbitrary and capricious punishment.

One of the shortcomings of the evidence that Mr. McCleskey introduced was a failure to prove discriminatory charging decisions at the county level. *See generally McCleskey*, 481 U.S. at 295-96, n.15. The Court recognized that Mr. McCleskey's statewide statistics were useful in the context of jury discrimination claims, but concluded that the charging decisions were too complex to be meaningfully analyzed statewide, across multiple prosecutorial districts. *Id*. In this case, Mr. Robinson relies on the charging evidence from his own county showing that cases, like his, with a white victim, are 3.4 times more likely to result in a death sentence. He relies on the cases prosecuted by his own prosecutor.

Equally important, unlike Mr. McCleskey, Marcus Robinson has pointed to evidence specific to his own case, including the deeds and acts of the prosecution in charging, in jury selection, and during his capital trial,

which support an inference of racial considerations in his sentence.[33] *Compare McCleskey*, 481 U.S. at 292-93 ("He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.").[34]

In support of his claim of an equal protection violation, Mr. Robinson has pointed to: (1) the prosecution's heavy reliance on a racially-charged theory at trial; (2) the prosecutor's starkly different approaches to litigating his Black-on-white capital case versus the *Burmeister* and *Wright* white-on-Black capital cases; (3) the prosecutor's pursuit of his case as capital despite the ambiguity of whether Mr. Robinson or Mr. Williams pulled the trigger, and despite Mr. Robinson's young age; (4) the evidence of racial disparities in death cases in the county; and (5) a wealth of evidence of discrimination in the county in jury selection, including in his own case.

Mr. Robinson further alleged that the Eighth Amendment's prohibition on cruel and unusual punishments and the State constitutional prohibition

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[33] Although Mr. Robinson was afforded some discovery of his claims of racial bias in jury selection, Mr. Robinson has not been afforded discovery on his claims of discrimination under *McCleskey* or the charging and sentencing claims of the RJA. Much of the new evidence of discrimination in jury selection came through the new discovery provided under the RJA. It is reasonable to assume Mr. Robinson would uncover additional facts with additional discovery on these claims.

[34] There are other differences as well. Unlike in *McCleskey*, the State here had an opportunity to conduct its own rebuttal to the MSU studies. *Compare McCleskey*, 481 U.S. at 296 ("Here, the State has no practical opportunity to rebut the Baldus study.").

against cruel or unusual punishments have evolved so that today's society no longer tolerates death sentences imposed under sentencing procedures that "create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *McCleskey,* 481 U.S. at 322, (Brennan, J., dissenting, joined by Blackmun, J., Marshall, J., and Stevens, J.); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman*, 408 U.S. at 382 (Burger, C. J., dissenting)) (the Eighth Amendment's "applicability must change as the basic mores of society change").

Public support for the death penalty is at its lowest point in over 40 years; only 49% of Americans support the death penalty for those convicted of murder. Baxter Oliphant, *Support for death penalty lowest in more than four decades*, Pew Research Center (Sept. 29, 2016).[35] Polling in North Carolina about racial bias in sentencing showed a majority of support (55%) for commuting death sentences in cases tainted by racial bias. *See* Public Policy Polling, *North Carolina Survey Results* (Sept. 27-30, 2012); *see also, Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (relying on polling data as a component of the Eighth Amendment calculus).

This Court should follow the path of other state courts that have refused to follow *McCleskey* when interpreting the cruel and unusual

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[35] http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades.

punishment provision of their state constitution. *See, e.g.*, *State v. Loftin*, 724 A.2d 129, 151 (N.J. 1999) (rejecting *McCleskey* under the New Jersey constitution); *see also District Attorney v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (holding, before *McCleskey,* that systemic evidence of discriminatory application of the death penalty violates the Massachusetts constitutional prohibition against "cruel" punishments).[36]

This Court may apply under the North Carolina Constitution a broader interpretation of equal protection and cruel and unusual punishment than the Supreme Court afforded in *McCleskey*. *See* N.C. Const. art. I, §§ 19, 26, and 27. North Carolina courts have recognized the need to address non-purposeful racial discrimination (or intentional discrimination that is evident in patterns but difficult to prove), in part because of the state constitutional commitment to ensure that the "judicial system of a democratic society operate evenhandedly and . . . be *perceived* to operate evenhandedly." *See State v. Cofield*, 324 N.C. 452, 460 (1989) (*Cofield II*) (quoting *Cofield I*, 320 N.C. at 302 (emphasis in original). In *Cofield II,* this Court applied the State

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[36] *McCleskey* has been roundly condemned as the "low point" in the quest for equality, comparable to *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Hi-Voltage Wire Works, Inc. v. City of San Jose,* 12 P.3d 1068, 1073 (Cal. 2000); *see also Santiago*, 122 A. 3d at 97 (Norcott and McDonald, JJs., concurring). In his retirement, Justice Lewis Powell, one of the five justices to vote in the majority, told his biographer that *McCleskey* stands as the sole case in which he would change his vote. *See* John C. Jeffries, JUSTICE LEWIS F. POWELL, JR. 451 (1994) (quoting Justice Powell in his biography).

Constitution to find an equal protection violation and granted relief based on racial discrimination in grand jury foreperson selection, even though there was "not the slightest hint of racial motivation." *Id*. at 459 (concluding "that the selection process used here was not racially neutral because it excluded from consideration as foreman all of the black grand jury members").

Furthermore, the text of the North Carolina constitution affords broader protection than the Eighth Amendment's promise to be free of "cruel and unusual punishments." The state constitution guards against "cruel *or* unusual punishments." N.C. Const. art. I, § 27 (emphasis added). Although in *State v. Green,* 348 N.C. 588, 603 (1998), the Court considered the protection of cruel or unusual punishment as similar to that afforded by the federal constitution, both the holding and framework of *Green* have been eroded by recent precedent. *Compare Green,* 348 N.C. at 609-10 (holding a mandatory life sentence acceptable for a 13 year-old defendant by looking only at gross proportionality of the sentence); *with Graham v. Florida,* 560 U.S. 48, 82 (2010) (striking mandatory juvenile life sentences and requiring an analysis under the "objective indicia" of consensus and actual sentencing practices).

Mr. Robinson has stated a valid claim of discriminatory capital charging and sentencing, and alleged and proffered substantial evidence to support the claim. The Court should enter relief for Mr. Robinson or remand for a hearing on the merits.

V. Mr. Robinson Has Been Sentenced To Life Imprisonment Without Parole And No Review Of That Judgment Has Ever Been Sought By The State; Thus, The RJA Issues Raised By the Parties are Moot.

The Court may also consider as a threshold question whether, by failing to challenge the RJA Court's 2012 judgment imposing a life sentence without the possibility of parole, the State waived its right to now dispute its validity, resulting in Mr. Robinson's life sentence being in full force and effect and the present issues pertaining to the RJA being moot.

When the RJA Court granted Mr. Robinson relief under the RJA, it also entered, on April 20, 2012, a separate judgment and commitment order resentencing him. *See State v. Robinson*, Judgment and Commitment, Cumberland County No. 91 CRS 23143. On July 10, 2012, the State filed a petition for writ of certiorari seeking review of the *order* issued by the RJA Court, but not the judgment.

Pursuant to Rule 21 of the Rules of Appellate Procedure, the State, as petitioner, was required to attach "certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matter set forth in the petition." Attached to the State's petition was a certified copy of the RJA Court's order. Then, on April 11, 2013, this Court issued an order allowing the petition "for writ of certiorari to review the order of the Superior Court, Cumberland County[.]" *See State v. Robinson*, No.

411A94-5. The State's brief, filed on June 10, 2013, made a similar request, seeking "reversal of the ORDER GRANTING MOTION FOR APPROPRIATE RELIEF filed on 20 April 2012." Again, attached to the State's brief was a copy of the order granting relief under the RJA.

The State's petition and brief did not mention or seek review of the RJA Court's judgment and commitment. No notice of appeal was filed by the State from the judgment.[37] The State did not seek certiorari review of the judgment and commitment pursuant to N.C. R. App. P. 21. And the judgment and commitment was not attached to either the State's petition for writ of certiorari or its brief. No mention of the judgment and commitment was made in either document filed in support of its appeal. This Court's subsequent decision vacated the RJA Court's order but left the judgment and commitment undisturbed. Because the State did not seek to challenge the judgment imposing a life sentence without the possibility of parole, it waived its right to dispute its validity.

This Court has clearly distinguished between trial court orders granting motions for appropriate relief and orders entering judgment and commitment. In *State v. Roberts*, 351 N.C. 325 (2000), this Court noted that a

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[37] The State had no right to appeal from the Judgment and Commitment resentencing Mr. Robinson to life imprisonment without the possibility of parole. *See* N.C. Gen. Stat. § 15A-1445 (listing the limited circumstances when the State may appeal from the superior court to the appellate division).

Court of Appeals' decision reversing a judgment and commitment "did not constitute a decision by the Court of Appeals on defendant's motion for appropriate relief because it did not review the decision by Judge Cornelius to grant the motion for appropriate relief to defendant." 351 N.C. at 328, 523.

Similarly, in Mr. Robinson's case, a decision by this Court reversing a trial court order granting defendant's motion for appropriate relief did not constitute a decision on defendant's judgment and commitment, because it did not review the judgment and commitment order entered by the superior court judge. *See also State v. Miller*, 205 N.C. App. 724 (2010) (appeal dismissed where defendant filed notice of appeal from order denying motion to suppress but failed to appeal from the judgment).

In short, this Court did not review the entry of the judgment and commitment by the RJA Court, because the State did not challenge it. With no review available to the State of the judgment and commitment, it is now final. All other issues presented herein pertaining to the RJA are rendered moot. *See In re Peoples*, 296 N.C. 109, 147-48 (1978) ("If the issues before a court or administrative body become moot *at any time* during the course of the proceedings, the usual response should be to dismiss the action.") (emphasis added; citations omitted).

CONCLUSION

Mr. Robinson asks that this Court first rule that N.C. Gen. Stat. § 15A-1335 and the Double Jeopardy Clause of the North Carolina and United States Constitutions prohibit the State from exposing Mr. Robinson again to the death penalty, and accordingly, to uphold his sentence of life without parole and dismiss the remaining questions presented here regarding his RJA claims as moot.

Should this Court rule otherwise, it will need to consider Mr. Robinson's constitutional defenses to application of the RJA repeal to his case, based on his constitutional rights to: (1) equal protection, due process and freedom from a scheme of discriminatory punishment; (2) freedom from punishment by bill of attainder; (3) due process protection of vested rights; (4) freedom from ex post facto laws; and (5) separation of powers.

As shown above, Mr. Robinson has introduced sufficient evidence to prevail on these defenses to the RJA repeal. If the Court disagrees, he respectfully requests an order remanding the case so that he may be afforded an opportunity to fully develop his constitutional defenses through discovery and an evidentiary hearing.

Finally, Mr. Robinson contends that the Remand Court erred when it declined to rule on his *Batson* and *McCleskey* constitutional claims of racial discrimination. This Court should enter relief on these claims, or in the

alternative, remand Mr. Robinson's constitutional claims for an evidentiary hearing.

The Court may also consider whether, by failing to challenge the RJA Court's 2012 judgment imposing a life sentence without the possibility of parole, the State waived its right to now dispute its validity. If the Court agrees, Mr. Robinson's life sentence is in full force and effect and the present issues pertaining to the RJA are moot.

Submitted on the 16th day of July 2018.

s/s Cassandra Stubbs
Cassandra Stubbs
American Civil Liberties Union
Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
cstubbs@aclu.org
State Bar No. 37172
ATTORNEY FOR MARCUS REYMOND ROBINSON

I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed it:

s/s Donald Beskind
Donald H. Beskind
Duke University School of Law
Box 90360
Durham, NC 27708
(919) 613-7085
beskind@law.duke.edu
NC State Bar No. 8138

s/s David Weiss
David Weiss

Center for Death Penalty Litigation
123 West Main Street, Suite 700
Durham, NC 27701
(919) 956-9545
dweiss@cdpl.org
State Bar No. 35647

s/s Brian Stull
Brian Stull
American Civil Liberties Union
Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
bstull@aclu.org
State Bar No. 36002

ATTORNEYS FOR MARCUS REYMOND ROBINSON

CERTIFICATE OF SERVICE

I HEREBY certify that the foregoing DEFENDANT'S OPENING BRIEF has been electronically served upon counsel of record for the State, Special Deputy Attorney Generals Danielle Marquis Elder, dmarquis@ncdoi.gov, and Jonathan P. Babb jbabb@ncdoi.gov.

This the 16th day of July, 2018.

s/s Cassandra Stubbs
Cassandra Stubbs
Attorney for Marcus Reymond Robinson