No. 388A10 DISTRICT TWENTY-TWO A

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
ANDREW DARRIN RAMSEUR	)

****

DEFENDANT-APPELLANT'S BRIEF

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STATE OF NORTH CAROLINA)
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DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

I. WHETHER THE RETROACTIVE APPLICATION OF THE RJA REPEAL TO MR. RAMSEUR, WHO DETRIMENTALLY RELIED UPON ASSURANCES HE WOULD NOT BE PREJUDICED BY FOREGOING A PRETRIAL RJA CLAIM AND THEN FULLY ASSERTED HIS SUBSTANTIAL RIGHTS UNDER THE RJA BY FILING TIMELY POST-CONVICTION RJA MOTIONS, VIOLATED THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS AND THE COMMON LAW GOVERNING THE RETROACTIVE APPLICATION OF STATUTES?

II. WHETHER THE TRIAL COURT'S ALTERNATIVE HOLDINGS – THAT (1) MR. RAMSEUR'S RJA MAR AND RJA AMAR WERE WITHOUT MERIT AND COULD BE DENIED WITHOUT A HEARING, AND (2) MR. RAMSEUR WAS NOT ENTITLED TO DISCOVERY – WERE PATENTLY ERRONEOUS?

STATEMENT OF THE CASE

Mr. Ramseur appeals, pursuant to a Writ of Certiorari, from an order denying his motion and amended motion for relief pursuant to the Racial Justice Act (RJA).

Mr. Ramseur was tried at the May 10, 2010, Criminal Session of Iredell County Superior Court, the Honorable Ronald E. Spivey presiding, on indictments charging him with two counts of first-degree murder and one count of robbery with a dangerous weapon. (R pp 9-11) On May 28, 2010, the jury returned verdicts finding Mr. Ramseur guilty. On June 7, 2010, the jury returned binding recommendations that he be sentenced to death for each murder. On June 8, 2010, Judge Spivey sentenced Mr. Ramseur to death for each of the murder charges and to a concurrent term of 61 to 83 months for armed robbery. (R pp 13-18) Mr. Ramseur gave notice of appeal to this Court. (R p 19)

On August 10, 2010, Mr. Ramseur filed his Motion for Appropriate Relief under the RJA (RJA MAR)[1] in both Iredell County Superior Court and this Court. (R pp 394-588) On August 13, 2010, Mr. Ramseur filed a Motion for Discovery of Information Relevant under the North Carolina Racial Justice Act in Iredell County

[1] Mr. Ramseur's original Motion for Appropriate Relief filed under the RJA, as initially enacted in N.C. Sess. Laws 2009-464, will generally be referred to as the "RJA MAR." The amendment to his RJA MAR, filed pursuant to the requirements of N.C. Sess. Laws 2012-136, will generally be referred to as the "RJA AMAR[.]" When it is appropriate to refer to the two motions collectively, they will generally be referred to as Mr. Ramseur's "RJA motions" or "RJA claims."

Superior Court. (R pp 589-95) On September 7, 2010, this Court entered an order dismissing without prejudice the RJA MAR filed in this Court and staying further proceedings in Mr. Ramseur's direct appeal "until after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Iredell County." (R pp 596-97)

On August 30, 2012, Mr. Ramseur filed his RJA AMAR. (R pp 598-658) On November 29, 2012, the State filed its Answer to Motion for Appropriate Relief Pursuant to the RJA, Answer to Amended Motion for Appropriate Relief Pursuant to the RJA, and Motions for Judgment on the Pleadings on All RJA Claims. (R pp 659-87) On August 29, 2013, the State filed its Motion to Dismiss Defendant's Claims under the Repealed Article 101 of Chapter 15A & Motions for Judgment on the Pleadings on Defendant's Constitutional Claims. (R pp 689-730)

On June 3, 2014, the Iredell County Superior Court, the Honorable Joseph N. Crosswhite presiding, entered an order that (1) dismissed Mr. Ramseur's RJA claims based on the repeal of the RJA; (2) in the alternative, summarily denied Mr. Ramseur's RJA claims on the grounds that his RJA motions were facially without merit; and (3) denied Mr. Ramseur's Motion for Discovery of Information Relevant under the North Carolina Racial Justice Act. (R pp 762-67)

On April 9, 2015, Mr. Ramseur filed a Petition for Writ of Certiorari and Motion to Maintain Stay of Direct Appeal. On May 7, 2015, the State filed its

Response to Petition for Writ of Certiorari and its Response to Motion to Maintain Stay of Direct Appeal. On May 11, 2015, Mr. Ramseur filed a Reply to State's Response to Petition for Writ of Certiorari. On June 10, 2015, this Court entered an order granting Mr. Ramseur's Motion to Maintain Stay of Direct Appeal. (R p 770) On March 21, 2016, this Court entered an order granting Mr. Ramseur's Petition for Writ of Certiorari. (R p 771)

GROUNDS FOR APPELLATE REVIEW

Appellate review of the denial of Mr. Ramseur's RJA motions is pursuant to this Court's March 21, 2016, order granting Mr. Ramseur's petition for a Writ of Certiorari. *See* N.C. Const. Art. IV, §12; N.C. Gen. Stat. §7A-32(b); N.C. R. App. P. Rule 21.

STATEMENT OF THE FACTS

Mr. Ramseur, a twenty-one-year-old African-American man, was led into court on the first day of his capital trial for the murder of two white victims and saw that the first four rows closest to the defense table were cordoned off by crime scene tape. His African-American family members sat in the back of the courtroom. There was no crime scene tape in any other part of the courtroom. Six prospective jurors who ultimately served during the guilt/innocence and/or penalty phases of Mr. Ramseur's trial were in the courtroom on the first day of trial and saw the crime scene tape.[2] (Vol. 1T pp 8, 15; Vol. 2T pp 294-95; Vol. 5T p 1072; R pp 288-301, 394-95, 429-30)

(R p 294)

[2] Those jurors were Richard Forte, Jana Cook, Cynthia Floyd, Carrie Webb, Helen Deal, and Edward Neal. (Vol. 1T pp 35, 51, 55, 134, 201)

Although the trial court was not concerned about any specific security risk, the court denied an oral motion to modify the arrangements, explaining, "I'll let the sheriffs handle the security. That's the way they do it here, and that's the way it will be done." (Vol. 2T pp 294-95, 356-57; R pp 284-87) The next day, defense counsel filed a written motion to modify this security arrangement. The motion specifically alleged that the crime scene tape and the cordoning off of the rows of seats behind the defense table resulted in a segregated courtroom in which the black members of Mr. Ramseur's family, including his elderly grandparents, were "forced to sit in the proverbial 'back of the bus'" while the white members of the victims' families were able to sit in the front of the courtroom behind the prosecution table. The motion alleged that these arrangements created a substantial risk that race would be a factor in the proceeding, in violation of the Racial Justice Act. Despite the trial court's assertion the previous day that rows were cleared both behind the attorneys and behind the jury box, photographs attached to the defense motion showed that only the rows behind the defense table were cordoned off by crime scene tape; no such tape appeared in the rows behind the jury box. (R pp 288-95) In response to the defense motion, the trial court ordered the crime scene tape removed, but only allowed Mr. Ramseur's family to move one row closer. (Vol. 3T pp 478-79; R pp 298-99)

During jury selection, the State peremptorily struck all qualified African-American jurors who were questioned. The defense interposed *Batson* objections to

the State's use of peremptory challenges to remove the black jurors. The trial court overruled the objections. Ultimately, all fifteen jurors selected to hear the case – twelve regular jurors and three alternates – were white. (Vol. 5T pp 1042-80; Vol. 6T pp 1232-54; Vol. 7T pp 1594-96; R pp 427, 720-30)

Outside of the courtroom, local media outlets covered the case from the time of the crimes on December 16, 2007, through trial. As detailed in a motion for change of venue, the Assistant Chief of the Statesville Police Department declared to *The Charlotte Observer* that Andrew Ramseur's actions were "clear-cut, premeditated murder" and incorrectly told the media that the female victim was shot in the head, "execution style." The District Attorney announced the State would seek the death penalty less than two weeks after the crimes and before indictments were sought. (R pp 38-40, 395, 425-30)

Shortly after the crimes, surveillance video, which captured the shootings, was disseminated to local media outlets and broadcast repeatedly in the area. Members of the community reacted with racially-biased rhetoric, clamoring for the "monkey" to be "hung from the nearest tree." (R pp 38, 395, 426)

The citizen calls for a public lynching continued in comments on various websites, including the website of the *Statesville Record & Landmark*. Examples of these comments included the following: "Filthy Feral Nigger Beast Kills White Mom Of 3 During Robbery," http://viewmydeath.com/Murders/1067.html, 12/23/2007, in

which the writer stated, "Ramseur is a former student at West Iredell High School. He is in the Iredell County jail, charged with robbery and two counts of first-degree murder. He should be hanging from the nearest traffic light as a warning to the rest[;]" http://incogman.wordpress.com 3/8/2008 – "YOU KNOW NOTHING!!!! for a nigger animal like RAMSEUR and what he did, he DOES AND will get the DEATH PENALTY" and 1/11/2009 – "The person who SHOT and KILLED our Jennifer is/was a dam [sic] nigger animal and not a human being and deserves to get what he gave her and Mr. Peck." (R pp 37-41, 48-51, 125, 139, 148-49, 154, 156, 395-96)

Another comment, which was in response to an earlier article and which purported to be from a cousin of Jennifer Vincek, one of the victims, was posted on 12/27/2007 at http://exposethemall.whitenationalist.info, and read: "Jennifer Vincek was my cousin[.] … Niggers have no place on this continent with human beings. I here [sic] the prosicution [sic] will be seeking the death penalty for this black bastard, you know an eye for an eye really doesn't apply here, this niggers [sic] life had no equity he was and is worth nothing. So I hope he lives another 50 to 60 years in jail with no possibility of parol [sic]. And I hope he has to take it up the ass every single day." (R pp 37-41, 48-51, 125, 139, 148-49, 154, 156, 395-96)

In the days leading up to trial, and during jury selection, local residents made the following comments on media websites:

> "Why even have a trial and waste my hard earned tax dollars on this scum-bag. He should have been hung before sundown on the day of his arrest." May 14, 2010, 11:51 a.m. www.statesville.com (*Statesville Record & Landmark*)
>
> "WTF U NEED A TRIAL FOR? HANG THAT MONKEY!" May 14, 210, 2:18 p.m. www.statesville.com (*Statesville Record & Landmark*)
>
> "why have a trial at all? Just stand him up it [sic] the Shell parking lot and let family members of those he killed so cowardly have at him. He is a worthless piece of dog shi*." May 8, 2010, 11:48 a.m. www.statesville.com (*Statesville Record & Landmark*)
>
> "always bring up rights after the fact. I will kill him and all the others. Then, I can holler about my rights. Just like when the police beat the hell out of some one, save your energy and just shoot the head. Then we act like these bastards and do it ourselves. I WISH I WERE IN DIXIE." May 9, 2010, 10:19 a.m. www.statesville.com (*Statesville Record & Landmark*)

(R pp 396-97)

After the guilty verdicts, and as the jury began hearing penalty phase evidence, local residents commented:

> "Once upon a time…during another time, these senseless crimes did not happen. There was a group that took care of these people at night. 'WE' were able to sleep at night with our doors unlocked without fear of these vermin. We were all safer. WE ARE NOT SAFE NOW. The law can't and won't take [sic] of us." May 29, 2010 5:35 p.m.
> www.wsoctv.com/news/237117669/detail.html
>
> "Racism, shmacism. Get a rope and let's go hang us one." May 28, 2010, 8:45 p.m. www.statesville.com (*Statesville Record & Landmark*)

> "Let's see now….Where did I put that noose?" May 28, 2010, 6:25 p.m. www.statesville.com (*Statesville Record & Landmark*)
>
> "He should have never made it to court!!!" May 29, 2010, 8:22 a.m. www.statesville.com (*Statesville Record & Landmark*)
>
> "[C]an you say deep south fried." June 4, 2010, 6:37 p.m. www.wcnc.com

(R pp 397-98)

On August 6, 2009, the General Assembly passed the Racial Justice Act, N.C. Sess. Laws 2009-464, which declared, "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 (2009) (repealed). (R pp 23-25) The RJA was signed by the governor and became law on August 11, 2009. The provisions of the RJA were codified at N.C. Gen. Stat. §§15A-2010 through 2012.

The RJA provided that "[a] finding that race was the basis of the decision to seek or impose a death sentence" may be established if a court found that "race was a significant factor" in the decisions to seek or impose a sentence of death in the county, prosecutorial district, judicial division, or state at the time of the decision to seek or impose a sentence of death. N.C. Gen. Stat. §15A-2011(a) (2009) (repealed). The Act further provided that a defendant could make this showing through "statistical evidence or other evidence" that death sentences were sought or imposed

"significantly more frequently" for defendants of one race than of another race, or in cases involving victims of one race than of another race, or where race "was a significant factor" in decisions to exercise peremptory challenges during jury selection. N.C. Gen. Stat. §15A-2011(b) (2009) (repealed). The Act then provided "[I]f the court finds that race was a significant factor" in the relevant decisions to seek or impose the sentence of death, "the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole." N.C. Gen. Stat. §15A-2012(a)(3) (2009) (repealed). The session law enacting the RJA provided that the Act "applies retroactively." N.C. Sess. Laws 2009-464, Section 2. (R pp 23-25)

On December 7, 2009, Mr. Ramseur filed a verified motion to continue his trial to enable him to fully litigate his rights under the RJA at trial. (R pp 158-249) This motion was accompanied by a motion seeking discovery relevant to a potential RJA claim. The motion to continue, supported by affidavits, explained:

(a) The RJA had been enacted while the case was pending.

(b) The RJA contemplated that motions for relief could be filed pretrial or in post-conviction and provided that the appropriate time to raise RJA claims prior to trial was at the Rule 24 hearing.

(c) Although the Rule 24 hearing in Mr. Ramseur's case had taken place prior to the enactment of the RJA, the trial court had entered an "Order Deferring Deadlines" prior to the Rule 24 hearing. This order deferred the deadline for the defense to file "all other pretrial motions" until after the State certified the completion of discovery and up to 45 days before trial. (R pp 250-51) This meant that a pretrial RJA motion would have remained timely despite the fact that the Rule 24 hearing had already been conducted. Alternatively, the motion to continue argued that the failure to allow Mr. Ramseur to litigate an RJA claim prior to trial would violate his rights to due process and equal protection under the state and federal constitutions.

(d) Mr. Ramseur intended to file a motion for relief under the RJA. The motion to continue cited various statistical surveys showing that race has historically had a significant impact on the imposition of the death penalty in North Carolina. The motion also explained that two professors at Michigan State University College of Law were conducting a statewide comprehensive study of the impact of race in capital prosecutions in North Carolina (the MSU study). The motion specifically requested a continuance until after the completion of the MSU study in

> August 2010 so that Mr. Ramseur could rely on the results of that study in presenting his RJA claims.
>
> (e) The motion to continue also asserted grounds to believe that race could constitute a significant factor in the case. This was principally accomplished by incorporating the change of venue motion by reference, reiterating some of the racially-charged comments about the case, and noting that the jurors who would decide the case would be drawn from a jury pool exposed to this racially-charged public atmosphere.

(R pp 158-249)

On December 14 and 18, 2009, the Honorable Jerry Cash Martin held a hearing on Mr. Ramseur's motion to continue, motion for RJA-related discovery, and motion for change of venue. At the hearing, Assistant District Attorney Mikko Red Arrow opposed the motion to continue:

> Again, the statistical studies to which the Defense has referred, your Honor, fine. Let it go on. Let it take place. If it's beneficial to the Defendant, it can be raised post-conviction. He's not going to be prejudiced in any shape or form by allowing the State to proceed with this trial[.]

(12/14 and 12/18/2009 T p 54; R p 272)

At the conclusion of the hearing, the trial court denied the motion for change of venue and the motion for RJA-related discovery. Although the trial court allowed a continuance of four to five months to allow for additional trial preparation, the trial

court denied the defense motion to continue the trial for a sufficient period to allow for pretrial litigation of Mr. Ramseur's RJA claims. In its oral and written rulings, the trial court implicitly endorsed Mr. Red Arrow's argument that Mr. Ramseur would not be prejudiced because he could raise his RJA claims in post-conviction:

> The Court finds that the Legislature carefully considered and enacted the Racial Justice Act … [a]nd included within that provision for the Defendant to raise the issues by motion – post-conviction motion seeking relief and by motion for appropriate relief.… The Court finds further that … the defendant still may pursue the relief under the Racial Justice Act while the State proceeds with the trial of the defendant.

(12/14 and 12/18/2009 T pp 103-04; R pp 277-78, 281-83)

On May 18, 2010, defense counsel filed a Renewed Motion to Continue (RJA) and Change Venue, which noted that at that point, all twelve jurors selected to hear the case were white. (R pp 302-45) The motion alleged that the selection of an all-white jury raised concerns under *Batson* and indicated the substantial possibility that race would be a significant factor in the case in violation of the RJA. The motion also noted some of the calls for a lynching, detailed above, and even noted one comment, which had been deleted by the paper, calling for defense *counsel* to be killed. The motion argued that the ongoing racially-charged atmosphere surrounding the case made it impossible for Mr. Ramseur to obtain a fair trial – one in which race did not play a significant role – in Iredell County. The motion renewed Mr. Ramseur's requests for a change of venue and for a continuance to allow sufficient time to file a

pretrial RJA claim. (R pp 309-10, 312) The trial court denied the motions. (Vol. 7T pp 1380-83)

During the penalty phase, defense counsel again renewed the request to "continue the trial of this case so that Defendant may further investigate a possible claim pursuant to the Racial Justice Act." (R pp 346-93) The trial court again denied the motion. (Vol. 19T pp 4086-87)

On August 10, 2010, Mr. Ramseur filed a post-conviction Motion for Appropriate Relief seeking relief pursuant to the RJA (RJA MAR) in Superior Court. Mr. Ramseur alleged that race was a significant factor in the State's exercise of peremptory challenges, in the State's capital charging decision, and in the imposition of the death penalty. Mr. Ramseur based his allegations on both statistical and non-statistical evidence. As expressly allowed by the RJA, Mr. Ramseur alleged that his statistical evidence showed racial discrimination at the county, district-wide, division-wide, and statewide levels. (R pp 394-588)

The non-statistical allegations in Mr. Ramseur's RJA MAR described the racially-charged atmosphere surrounding this case, including the public calls for lynching, as detailed above. Mr. Ramseur also alleged race was a significant factor in the decision to impose his death sentence because several of the jurors saw the crime scene tape blocking the first four rows behind the defense table and because Mr.

Ramseur was tried by an all-white jury. Mr. Ramseur supported these allegations with an affidavit from one of his trial lawyers, S. Mark Rabil. (R pp 395-98, 425-30)

The statistical allegations in Mr. Ramseur's RJA MAR were largely derived from the MSU study discussed above. The MSU study was conducted by Professors Catherine Grosso and Barbara O'Brien of the Michigan State University's College of Law. They worked in collaboration with George Woodworth, a professor of statistics and actuarial science at the University of Iowa. A joint affidavit from Professors Grosso and O'Brien and an affidavit from Professor Woodworth describing the results of their work, as relevant to Mr. Ramseur's case, were attached to the RJA MAR. (R pp 431-78)

In addition to the MSU study, the RJA MAR also contained statistical evidence derived from a study conducted by Professor Radelet of the University of Colorado and Professor Pierce of Northeastern University, which examined capital sentencing in North Carolina between 1990 and 2007. Mr. Ramseur attached an affidavit from Professor Radelet. Finally, the RJA MAR included allegations describing the results of earlier published studies addressing the impact of race on capital prosecutions. (R pp 431-588)

In sum, the statistical allegations in the RJA MAR included the following:

(a) In the Iredell County capital trials included in the MSU study, prosecutors struck qualified black venire members at an average rate of

87.5% but struck qualified non-black venire members at an average rate of only 27.2%.[3] Thus, prosecutors were 3.2 times more likely to strike qualified black venire members. (RJA MAR at ¶¶ 76-79, R p 411)

In Iredell County from 1990-2009, prosecutors brought 5.85% of death-eligible cases involving racial minority defendants to a capital trial and 0% of death-eligible cases with white defendants to a capital trial. In cases with at least one white victim, the State was 1.54 times more likely to bring the case to a capital trial than if there were none, and in cases with a white victim and a racial minority defendant, the State was 2.83 times more likely to bring a case to a capital trial than in all other cases. (RJA MAR at ¶¶ 132-35, R pp 419-20)

(b) Former Prosecutorial District 22 was split into District 22A and District 22B in 2007. In Mr. Ramseur's case, which was the only trial within the MSU study from current Prosecutorial District 22A, the State struck 100% of qualified black venire members but only 21.95% of other qualified venire members. In former District 22, prosecutors struck 65.6% of qualified black venire members but only 27.8% of other qualified venire members, meaning prosecutors were 2.4 times more

[3] In this brief, the term "qualified venire member" refers to a prospective juror who was not excused for cause.

likely to strike qualified black venire members. This difference in strike levels is statistically significant at the 0.01 level. (RJA MAR at ¶¶ 70-75, R pp 410-11)

For former Prosecutorial District 22 and current District 22A, from 1990-2009, death-eligible cases with at least one white victim were 2.17 times more likely to result in a death sentence than cases without such a victim. (RJA MAR at ¶¶ 106-11, R p 416) Prosecutors were 2.51 times more likely to bring a case to a capital trial where there was at least one white victim. (RJA MAR at ¶131, R p 419)

(c) Former Judicial Division III was split into current Judicial Divisions V and VI in 2000. Within current Judicial Division VI, from 2000 to 2010, the State struck qualified black venire members at a rate of 70.8% but struck all other qualified venire members at a rate of 25.7%, meaning that prosecutors were 2.8 times more likely to strike a qualified black venire member. Within former Judicial Division III from 1990 through 1999, prosecutors struck qualified black venire members at a rate of 65.4% but struck all other qualified venire members at a rate of 25.3%, meaning that prosecutors were 2.6 times more likely to strike a qualified black venire member. The probability of observing a disparity

of this magnitude in a race-neutral system is less than 0.001. (RJA MAR at ¶¶ 66-69, R p 409)

For Judicial Division VI, from 2000-2009, 3.34% of death-eligible cases with at least one white victim resulted in death sentences, while 0% of cases without a white victim resulted in death sentences. During this period, cases with racial minority defendants and at least one white victim were 5.52 times more likely to result in a death sentence than all other death-eligible cases. From 1990-1999 in former Judicial Division III, death-eligible cases with at least one white victim were 2.55 times more likely to result in a death sentence than cases without a white victim. (RJA MAR at ¶¶ 100-05, R pp 414-15)

Within Current Judicial Division VI, from 2000-2009, the State was 8.04 times more likely to bring a death-eligible case to a capital trial if it involved at least one white victim. In former Judicial Division III, from 1990-1999, the State was 1.97 times more likely to bring a case to a capital trial if it involved at least one white victim.

In current Judicial Division VI, from 2000-2009, prosecutors were 1.42 times more likely to seek the death penalty in cases involving minority defendants. Prosecutors were 1.44 times more likely to seek the death penalty in cases with minority defendants and at least one white

victim. (RJA MAR at ¶¶ 124-28, R p 418)

(d) On a statewide basis, from 2005 through 2010, the State struck qualified black venire members at a rate of 56.4% and all other qualified venire members at a rate of 25.4%. The probability of observing a disparity of this magnitude in a race-neutral system is less than 0.01. During the twenty-year period from 1990 through 2010, the State struck qualified black venire members at a rate of 55.5% and all other qualified venire members at a rate of 24.8%. Again, the probability of observing a disparity of this magnitude in a race-neutral system is less than 0.01. (RJA MAR at ¶¶ 59-65, R pp 408-09)

With respect to the impact of race on capital charging and sentencing decisions on a statewide basis, the MSU study separately analyzed the raw data, controlled for aggravating and mitigating circumstances, and also included a controlled regression analysis factoring in numerous other variables. On a statewide basis, from 2000-2009, the likelihood of a defendant receiving a death sentence if at least one victim in the case was white ranged from 2.78 times more likely to 2.16 times more likely. From 2005-2009, the numbers ranged from 5.69 times more likely to 10.68 times more likely. For the period of 1990-2009, the numbers ranged from 1.64 to 2.59 times more likely. (RJA

MAR at ¶¶ 86-99, R pp 413-14)

> Looking strictly at charging decisions, on a statewide basis from 2000-2009, the different analyses showed that the State was between 1.42 to 1.66 times more likely to bring a case to a capital trial where there was at least one white victim. From 2005-2009, the numbers ranged from 3.21 to 5.40 times more likely, and from 1990-2009, the numbers ranged from 1.53 to 1.94 times more likely. (RJA MAR at ¶¶ 112-123, R pp 416-18)

On August 13, 2010, Mr. Ramseur filed a Motion for Discovery of Information Relevant under the RJA. Mr. Ramseur filed the motion pursuant to N.C. Gen. Stat. §15A-1415(f), which provides for complete discovery of state files in capital post-conviction cases, *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990), and *State v. Buckner*, 351 N.C. 401, 527 S.E.2d 307 (2000) (empowering superior court to order discovery from the State in the interests of justice and the search for the truth), and pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He requested particular information about policies and procedures of the Iredell County District Attorney's Office and particular information about specific murder cases handled by that office on or after January 1, 1990. (R pp 588-95)

On September 7, 2010, this Court entered an order staying further proceedings in Mr. Ramseur's direct appeal "until after the trial court's hearing and determination

of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Iredell County." (R pp 596-97)

The State did not respond to Mr. Ramseur's RJA MAR. The trial court did not "schedule a hearing on the claim" or "prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. §15A-2012(a)(2) (2009) (repealed).

On April 20, 2012, the trial court in *State v. Robinson*, Cumberland County file 91 CRS 23143, entered an order granting RJA relief to the defendant (hereinafter "*Robinson* order").[4] This was the first trial court ruling resolving any defendant's RJA claim. As discussed more fully below, Mr. Ramseur included allegations regarding pertinent findings and conclusions from the *Robinson* order in his RJA AMAR.[5] (R pp 601-05, 610-11)

On July 2, 2012, the General Assembly overrode a veto by the Governor and thereby enacted N.C. Sess. Laws 2012-136, which amended the original RJA. N.C. Sess. Laws 2012-136 repealed N.C. Gen. Stat. §15A-2012 and substantially amended N.C. Gen. Stat. §15A-2011. (R pp 26-28) Among other changes, N.C. Sess. Laws 2012-136 deleted the language in §15A-2011(c) referring to race constituting a

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[4] Contemporaneously with the filing of this brief, undersigned counsel filed a motion for this Court to take judicial notice of the *Robinson* order within its own records.

[5] On 18 December 2015, this Court held the trial court abused its discretion by denying the State's third motion for a continuance and vacated and remanded the matter for reconsideration of Robinson's MAR. However, this Court stated, "We express no opinion on the merits of respondent's motion for appropriate relief at this juncture." *State v. Robinson*, ___ N.C. ___, 780 S.E.2d 151 (2015).

significant factor in the imposition of the death penalty in the judicial division or on a statewide basis; the remaining language limited the requisite showing to the county or prosecutorial district in which the defendant was sentenced to death. In addition, §15A-2011(a) was amended to define the phrase "at the time the death sentence was sought or imposed" to mean the period from ten years prior to the commission of the offense to two years after the imposition of the death sentence. Additionally, N.C. Sess. Laws 2012-136 added new subsections to §15A-2011, including new subsection (d), which provided in part that "evidence relevant to establish a finding that race was a significant factor … may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence[.]" New subsection (e) provided, "Statistical evidence *alone* is insufficient to establish that race was a significant factor[.]" (emphasis added).

Section 6 of N.C. Sess. Laws 2012-136 provided that the Act applied to motions filed under the original RJA and allowed defendants who had filed RJA motions 60 days after the effective date of the Act to amend their RJA motions.

On August 30, 2012, Mr. Ramseur filed an amendment to his original RJA MAR. The RJA AMAR specifically alleged and incorporated by reference all of the allegations contained in the original RJA motion. (R p 598) The RJA AMAR expressly alleged that Mr. Ramseur was constitutionally entitled to pursue his claims

under both the original RJA and the amended RJA. (RJA AMAR, ¶¶ 156-61, R pp 600-01)

The RJA AMAR identified four trials resulting in death sentences that occurred in former Prosecutorial District 22 and current District 22A during the period beginning ten years prior to the offense: *State v. al-Bayyinah* (1999), *State v. Watts*, (2001), *State v. al-Bayyinah* (2003), and Mr. Ramseur's trial. Collectively, in these trials the State peremptorily challenged eight of ten qualified black prospective jurors, an 80% strike rate, and 41 of 162 other qualified prospective jurors, a strike rate of only 25.3%. Three of these cases involved juries selected from Iredell County venires – both of the *State v. al-Bayyinah* trials and Mr. Ramseur's trial.[6] Cumulatively, the State peremptorily challenged six of seven qualified black prospective jurors, an 85.7% strike rate, and 28 of 121 other qualified prospective jurors, a strike rate of only 23.1%. Thus, the prosecutors in these trials were 3.7 times more likely to strike qualified venire members who were black. (RJA AMAR, ¶¶ 153-55, R pp 599-600)

In the RJA AMAR, Mr. Ramseur noted the *Robinson* order, which found, *inter alia*, that race was a significant factor in the exercise of peremptory strikes statewide between 1990 and 2010 and that prosecutors intentionally discriminated on the basis of race during this period. The RJA AMAR alleged a number of the findings of fact

[6] The offenses involved in the *al-Bayyinah* case were committed in Davie County, and the trials were held in Davie County using Iredell County venires. Both trials occurred before former Prosecutorial District 22 was split into two districts.

from the *Robinson* order, including findings related to statistical evidence showing that race was a significant factor in the exercise of peremptory strikes on a statewide basis as well as findings that related to both statistical and non-statistical evidence about the impact of race in the imposition of the death penalty in Iredell County, former Prosecutorial District 22, and current District 22A. (RJA AMAR, ¶¶ 162-66, 184-87, R pp 601-05, 610-11)

The *Robinson* order included findings addressing evidence presented by the State during the *Robinson* litigation, including affidavits from prosecutors across the state attempting to explain the State's exercise of peremptory challenges in specific cases by offering what the State purported to be race-neutral explanations of those challenges. Of particular relevance for Mr. Ramseur's case, the *Robinson* order found that the State's proffered explanation of a peremptory strike in the 1993 Iredell County case of *State v. Rayford Burke* in fact proved discrimination based on differential treatment of non-white venire members. The State's proffered explanation was in the form of an affidavit from Mr. Red Arrow, one of the trial prosecutors in Mr. Ramseur's case. (RJA AMAR, ¶ 185, R pp 610-11)

The *Robinson* order found that the MSU study was a "valid, reliable statistical study." Based on the study and on the other evidence presented during the hearing, the trial court in *Robinson* found that on a statewide basis, the State's exercise of

peremptory challenges revealed a statistically significant pattern of racial influence. (RJA AMAR, ¶ 164, R p 602)

With respect to former District 22 and its constituent counties, the *Robinson* order included the following strike rates as findings of fact:

Prosecutorial District Strike Rate

Prosecutorial District	Number of cases	Black Venire Members	Other Venire Members	Strike Rate Ratio
22	8	65.6%	27.8%	2.4

Robinson Order at ¶ 59.

Prosecutorial Strike Rates by County

County	Number of cases	Black Venire Members	Other Venire Members	Strike Rate Ratio
Davidson	3	77.78%	31.33%	2.5
Davie[7]	4	54.17%	24.41%	2.2
Iredell	2	87.50%	27.18%	3.2

Robinson Order at ¶ 61. (RJA AMAR, ¶ 165, R pp 602-03)

Mr. Ramseur's RJA AMAR also raised specific non-statistical allegations regarding the impact of race in Prosecutorial District 22A and former District 22, including the recent history of the Ku Klux Klan in those districts. (RJA AMAR, ¶¶ 172-83, R pp 605-10, 657-58)

[7] It appears that for purposes of these findings, the *Robinson* court included the *al-Bayyinah* trials in the Davie County totals, rather than the Iredell County totals.

Finally, after raising allegations based on the *Robinson* order, and after addressing his right to have the claims raised in his original RJA MAR decided based on the original RJA, Mr. Ramseur raised specific claims contoured to the rights established under the amended RJA.

Initially, the RJA AMAR explained that the relevant time frame for this case under the amended RJA was December 16, 1997 through June 8, 2012. (RJA AMAR, ¶219, R p 619) The RJA AMAR asserted a claim that within this time period, race was a significant factor in the State's decisions to exercise peremptory challenges in former District 22, current District 22A, and Iredell County, including in Mr. Ramseur's case. (RJA AMAR, ¶¶ 220-26, R pp 619-20) The RJA AMAR then asserted claims that within this time period, race was a significant factor in the State's capital charging decisions and in capital sentencing decisions in former District 22, current District 22A, and Iredell County, including in Mr. Ramseur's case. (RJA AMAR, ¶¶ 227-33 (charging decisions) and ¶¶ 234-39 (sentencing decisions), R pp 620-22)

On November 29, 2012, the State filed a response to Mr. Ramseur's RJA MAR and RJA AMAR. The State's response included a request for judgment on the pleadings. (R pp 659-87)

On December 13, 2012, the Cumberland County Superior Court entered an order granting RJA relief in three cases that had been consolidated for an evidentiary hearing. *State v. Golphin, Walters and Augustine*.[8]

On June 13, 2013, the General Assembly passed N.C. Sess. Laws 2013-154, which repealed the RJA in its entirety. N.C. Sess. Laws 2013-154, Sec. 5.(a). N.C. Sess. Laws 2013-154 took effect on June 19, 2013, and provided, "All motions filed pursuant to Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act are void." N.C. Sess. Laws 2013-154 Sec. 5.(d). (R pp 29-33)

On August 29, 2013, the State filed a second response to Mr. Ramseur's RJA MAR and RJA AMAR and requested that Mr. Ramseur's RJA claims be dismissed based on the repeal of the RJA. (R pp 689-736) On November 26, 2013, Mr. Ramseur filed a response to the State's motion to dismiss his RJA claims. In this response, Mr. Ramseur asserted that retroactively applying the repeal of the RJA to dismiss his pending RJA claims would violate his constitutional rights and his rights under North Carolina common law. The response asserted a request to be heard, asserted that it would be premature for the trial court to dismiss Mr. Ramseur's RJA claims prior to

[8] Contemporaneously with the filing of this brief, undersigned counsel filed a motion for this Court to take judicial notice of the *Golphin* order within its own records. On December 15, 2015, this Court vacated this order and remanded the matter for reconsideration of the respondents' motions for appropriate relief, but stated, "We express no opinion on the merits of respondents' motions for appropriate relief at this juncture." *State v. Augustine*, ___ N.C. ___, 780 S.E.2d 552 (2015).

the completion of discovery, and asked the trial court to hold the matter in abeyance until this Court's decisions in *Robinson* and *Golphin*. (R pp 738-56)

On June 3, 2014, Judge Crosswhite entered an order dismissing Mr. Ramseur's RJA claims based on the repeal of the RJA. The order alternatively summarily denied Mr. Ramseur's claims on the ground that his RJA MAR and RJA AMAR were facially without merit and denied Mr. Ramseur's Motion for Discovery of Information Relevant under the North Carolina Racial Justice Act. (R pp 762-67)

ARGUMENT

Standards of Review:

The first issue is whether the repeal of the RJA may be applied retroactively to require the dismissal of Mr. Ramseur's RJA MAR and RJA AMAR. Constitutional questions are reviewed *de novo*. *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014). The second issue is whether the trial court erred by dismissing Mr. Ramseur's RJA MAR and RJA AMAR, before allowing discovery, on the ground that the motions were facially without merit. The questions of whether the pleadings were sufficient to withstand a motion to dismiss and whether Mr. Ramseur was entitled to discovery before the merits of his claim were adjudicated are questions of law that are reviewed *de novo*. *State v. Jackson*, 220 N.C. App. 1, 7-8, 727 S.E.2d 322, 329 (2012); *see also* N.C. Gen. Stat. §15A-1420(c)(1) and (3). Under *de novo* review, this

Court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 609 S.E.2d 290, 294 (2008).

I. THE RETROACTIVE APPLICATION OF THE RJA REPEAL TO MR. RAMSEUR, WHO DETRIMENTALLY RELIED UPON ASSURANCES HE WOULD NOT BE PREJUDICED BY FOREGOING A PRETRIAL RJA CLAIM AND THEN FULLY ASSERTED HIS SUBSTANTIAL RIGHTS UNDER THE RJA BY FILING TIMELY POST-CONVICTION RJA MOTIONS, VIOLATED THE UNITED STATES AND NORTH CAROLINA CONSTITUTIONS AND THE COMMON LAW GOVERNING THE RETROACTIVE APPLICATION OF STATUTES.

Introduction:

Outside the courtroom, Mr. Ramseur faced hate speech labeling him a "feral nigger beast" and "dam [sic] nigger animal" and multiple race-based calls for him to be lynched – "He should be hanging from the nearest traffic light as a warning to the rest[;]" "Racism, shmacism. Get a rope and let's go hang us one." Inside the courtroom, Mr. Ramseur encountered crime scene tape behind the defense table forcing his African-American family members to the back of the courtroom. He faced a capital trial in which the State struck every qualified black juror resulting in an all-white jury. Meanwhile, statistics showed that both in Iredell County and all across the state, (1) black defendants and defendants accused of murdering white victims were capitally prosecuted and sentenced to death at greater rates than other defendants, and (2) prosecutors struck qualified black jurors at more than twice the rate they struck all other jurors.

Yet, at least Mr. Ramseur knew that less than a year before his trial, the General Assembly declared in the Racial Justice Act, "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[,]" and created a comprehensive procedure for vindicating his right to have his capital prosecution be free from racial bias. N.C. Gen. Stat. §15A-2010 *et seq.* (2009) (repealed).

Mr. Ramseur tried to avail himself of his right to file a pretrial Racial Justice Act claim, but the State assured him he would not "be prejudiced in any shape or form" by waiting to file a post-conviction claim and the trial court agreed he could "raise the issues by motion, post-conviction motion seeking relief[.]" So Mr. Ramseur waited, and filed a timely post-conviction Racial Justice Act claim.

At that point, Mr. Ramseur also knew the Racial Justice Act mandated, "The court shall schedule a hearing on the claim[.]" N.C. Gen. Stat. §15A-2012 (2009) (repealed). This provision gave the trial court the "sole responsibility to schedule the hearing" on his claim. *State v. Mitchell*, 298 N.C. 549, 551, 259 S.E.2d 254, 255 (1979). Yet, the trial court did nothing.

When the first Racial Justice Act claimant prevailed, the General Assembly amended the Act to narrow the avenues for relief, and Mr. Ramseur filed a timely amended Racial Justice Act claim. However, after the next three claimants also prevailed, the General Assembly repealed the Racial Justice Act entirely and declared

that all pending claims were "void[,]" resulting in the trial court's dismissal of Mr. Ramseur's claims.

"There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533, 146 L. Ed. 2d 577, 594-95 (2000). From the very beginning of our nation, the founders were concerned that overbroad legislative power would overwhelm private rights because "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 128 L. Ed. 2d 229, 252 (1994). "It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution," including the Due Process Clause, the *Ex Post Facto* Clause and "[t]he prohibitions on 'Bills of Attainder[,]'" *id.* at 266, 128 L. Ed. 2d at 252-53, which "the Framers … considered to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains.'" *Carmell*, 529 U.S. at 521, 146 L. Ed. 2d at 587-88 (quoting The Federalist No. 84, p. 511 (C. Rossiter ed. 1961) (A. Hamilton)).

For all of the reasons that follow, the General Assembly's retroactive declaration that Mr. Ramseur's claims were void, and the trial court's resulting dismissal of his claims, after he did everything possible to claim the benefits of the Racial Justice Act, violated *all* of these fundamental constitutional guarantees.[9] The fact that the General Assembly swept the rug out from under him in direct response to others prevailing under the Racial Justice Act, and took away his entitlement to a life sentence if he prevailed on his claims, also violated constitutional guarantees of equal protection and separation of powers and resulted in cruel and unusual punishment. Because Mr. Ramseur must have his day in court, this Court should reverse the trial court and remand for a hearing on the merits of his claims.

[9] For ease of reading, this brief treats the repeal of the RJA as though it repealed all of Mr. Ramseur's rights under the original RJA as well as under the amended RJA. To the extent that the amended RJA took away categories of claims that were available under the original RJA or impaired Mr. Ramseur's ability to assert any of his RJA claims, the retroactive application of the amended RJA was unconstitutional for all the same reasons the retroactive application of the repeal bill was unconstitutional. Likewise, the retroactive application of the repeal bill was just as unconstitutional if it were viewed as only repealing what was left of the RJA after the unconstitutional retroactive application of the amended RJA. It thus makes no substantive difference to any of Mr. Ramseur's arguments whether the elimination of Mr. Ramseur's rights under the RJA is analyzed as a whole or broken down into two parts. The overall effect is the same. For that reason, undersigned counsel determined that the simplified presentation of the arguments by treating the repeal as a single event was appropriate.

A. Retroactive Application of the RJA Repeal to Mr. Ramseur Violated the Due Process and Law of the Land Clauses of the Federal and State Constitutions by Depriving Mr. Ramseur of the Life, Liberty, and Property Interests Created by the RJA Without Any Process at All.

By passing the Racial Justice Act, the State of North Carolina gave Mr. Ramseur life, liberty, and property interests in receiving the lesser sentences of life without parole in lieu of death sentences upon a successful showing under the comprehensive adjudicatory procedures of the Act. However, after Mr. Ramseur claimed the benefit of those procedures, the State reversed course and declared that all pending motions under the original and amended Racial Justice Act were "void." When the trial court relied upon the retroactive repeal of the Racial Justice Act to dismiss Mr. Ramseur's pending motions, it "arbitrarily abrogated[,]" *Wolff v. McDonnell*, 418 U.S. 539, 557, 41 L. Ed. 2d 935, 951 (1974), his protected interests in violation of the Due Process and Law of the Land Clauses of the federal and state constitutions. The retroactive application of the repeal to Mr. Ramseur further deprived him of due process because he detrimentally relied upon the State's assurance – acceded to by the trial court – that he would not be prejudiced in any way, shape, or form by foregoing a pretrial Racial Justice Act Claim. Mr. Ramseur must be granted "the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 71 L. Ed. 2d 265, 276 (1982). This

Court should reverse and remand to the trial court for a hearing on the merits of Mr. Ramseur's claims under the original and amended Racial Justice Act.

i. States are free to create life, liberty, and property interests which are thereafter protected by the Due Process and Law of the Land Clauses.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees that no "State [shall] deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. The Law of the Land Clause of the North Carolina Constitution, which is synonymous with the Due Process Clause, *State v. Tolley*, 290 N.C. 349, 364, 226 S.E.2d 353, 365 (1976), similarly provides that "no person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, §19.

"'[A] state may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures.'" *Jones v. Keller*, 364 N.C. 249, 256, 698 S.E.2d 49, 55 (2010) (citation omitted). In determining whether a life, liberty, or property interest arose "from an expectation or interest created by state laws or policies," *Wilkinson v. Austin*, 545 U.S. 209, 221, 162 L. Ed. 2d 174, 189 (2005), courts look "not to the 'weight' but to the *nature* of the interest at stake." *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71, 33 L. Ed. 2d 548, 557 (1972) (emphasis in original).

ii. The General Assembly's establishment of a process to obtain life in lieu of a death sentence upon a delineated showing of racial discrimination created life, liberty, and property interests in Mr. Ramseur by virtue of the fundamental nature of the benefits conveyed.

Both the United States Supreme Court and this Court have consistently recognized protected interests in state-created processes entitling a claimant to a particular benefit upon making a specified showing. For example, in *DA's Office v. Osborne*, 557 U.S. 52, 174 L. Ed. 2d. 38 (2009), the State gave the respondent "a liberty interest in demonstrating his innocence with new evidence under state law" by virtue of Alaska state law establishing that "those who use 'newly discovered evidence' to 'establis[h] by clear and convincing evidence that [they are] innocent' may obtain 'vacation of [their] conviction or sentence in the interest of justice.'" *Id.* at 68, 174 L. Ed. 2d at 51 (brackets in original).

Similarly, the petitioner in *Hicks v. Oklahoma*, 447 U.S. 343, 345, 65 L. Ed. 2d 175, 179-80 (1980), was statutorily "entitled to have his punishment fixed by the jury." In rejecting the State's argument that "the defendant's interest in the exercise of that discretion [was] merely a matter of State procedural law[,]" the Court recognized that "[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion[.]" *Id.* at 346, 65 L. Ed. 2d at 180.

In *Logan*, the Court recognized a protected property interest in a "comprehensive scheme for adjudicating allegations of discrimination" on the basis of physical handicap. Under that statutory procedure, a complainant had to bring a charge of unlawful practices before a designated Commission, which then had 120 days "to convene a factfinding conference[.]" "If the Commission found 'substantial evidence' of illegal conduct, it was to attempt to 'eliminate the effect thereof'" by means set out in the statute. As the United States Supreme Court held, a claimant had "more than an abstract desire or interest in redressing his grievance: *his right to redress is guaranteed by the State*, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of the evidence." *Id.* at 431, 71 L. Ed. 2d at 275 (emphasis added).

In *State v. Keith*, 63 N.C. 140 (1869), this Court examined the Amnesty Act of 1866, which provided that: (1) no soldier or officer of the Confederate States or United States "shall be held to answer on any indictment for any act done in the discharge of any duties imposed on him" during the Civil War, and (2) in all cases then pending, "if the defendant can show that he was an officer or private … it shall be presumed that he acted under orders until the contrary shall be made to appear." Amnesty Act of 1866-'67, §§1, 2. The second section of the Amnesty Act operated as a trial defense in that it created a rebuttable presumption that acts committed by soldiers during the Civil War were committed pursuant to orders.

In 1868, the Constitutional Convention subsequently passed a Repeal Ordinance,[10] repealing the Amnesty Act, and the defendant in *Keith* was thereafter tried for a murder allegedly committed in 1863. The trial court, relying exclusively upon the Repeal Ordinance, denied the defendant's motion for discharge under the Amnesty Act. This Court reversed, recognizing not only that the Repeal Ordinance was an invalid *ex post facto* law, but also that denying the defendant the benefits of the Amnesty Act deprived him of due process of law. *Keith*, 63 N.C. at 144-45 (citing, *inter alia*, the Fifth Amendment to the United States Constitution and Section 12 of the Bill of Rights of North Carolina, which provided "[t]hat no freeman ought to be taken, imprisoned, or disseized, of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the law of the land.").

Here, the Racial Justice Act established a comprehensive "process by which relevant evidence may be used to establish that race was a significant factor in seeking or imposing the death penalty within the county, the prosecutorial district, the judicial division, or the state[.]" 2009 N.C. Sess. Laws 464 (original in all caps). (R p 23) In so doing, the Racial Justice Act set forth the evidence that was relevant to a showing

[10] Copies of both the Amnesty Act and the Repeal Ordinance are included in the appendix to this brief. As noted in *Keith*, the Constitutional Convention of 1868 had general legislative powers in addition to its task of enacting a new state constitution. *Id.* at 144.

under the Act, which "include[d] statistical evidence or other evidence" that "(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race;" "(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race;" and "(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection[.]" N.C. Gen. Stat. §15A-2011 (2009) (repealed). (R pp 23-24)

The Racial Justice Act also placed the burden of proof upon the claimant, N.C. Gen. Stat. §15A-2011(c) (2009) (repealed), and created pleading requirements. N.C. Gen. Stat. §15A-2012 (2009) (repealed); 2009 N.C. Sess. Laws 464, sec. 2. Once the petitioner claimed the benefits of the adjudicatory procedures of the Racial Justice Act, the Act provided, "The court *shall* schedule a hearing on the claim and *shall* prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. §15A-2012(a)(2) (2009) (repealed) (emphases added). This provision gave the trial court "the authority and sole responsibility to schedule the hearing[]" on the motion. *See State v. Mitchell*, 298 N.C. 549, 551, 259 S.E.2d 254, 255 (1979). Most importantly, the Racial Justice Act provided:

> If the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time

> the death sentence was sought or imposed, the court *shall* order that a death sentence not be sought, or that the death sentence imposed by the judgment *shall* be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

N.C. Gen. Stat. §15A-2012(a)(3) (2009) (repealed) (emphases added).

Similar to the state-created processes in *Osborne*, *Hicks*, *Logan*, and *Keith*, the Racial Justice Act created a comprehensive procedure whereby the claimant could obtain a sentence of life imprisonment without parole in lieu of death upon making a particular evidentiary showing. Thus, Mr. Ramseur obtained protected life and liberty interests in that process because he had "a substantial and legitimate expectation" that he would be resentenced to life imprisonment without parole upon successfully proving his Racial Justice Act claim, which was certainly "a right that substantially affects the punishment imposed." *Hicks*, 447 U.S. at 346-47, 65 L. Ed. 2d at 180.

As in *Logan*, the Racial Justice Act bestowed a protected property interest upon Mr. Ramseur because his right to redress racial discrimination in the decisions to seek or impose his death sentence was "guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of the evidence." *Logan*, 455 U.S. at 431, 71 L. Ed. 2 at 275. Indeed, "it would require a remarkable reading of a 'broad and majestic [term],' … to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right to redress discrimination is not." *Id.* (internal

citation omitted, brackets in original). Thus, Mr. Ramseur's interests in the Racial Justice Act's adjudicatory process, and in the ultimate benefit of life without parole in lieu of death, were protected under the Due Process and Law of the Land Clauses.

Moreover, the benefit Mr. Ramseur sought to claim – life in lieu of death – could hardly have been a more substantial right. "By common understanding imprisonment for life is a less penalty than death." *Biddle v. Perovich*, 274 U.S. 480, 487, 71 L. Ed. 1161, 1164 (1927). Because "execution is the most irremediable and unfathomable of penalties[,]" *Ford v. Wainwright*, 477 U.S. 399, 411, 91 L. Ed. 2d 335, 347 (1986), "'[death] is a different kind of punishment from any other which may be imposed in this country[.]'" *Beck v. Alabama*, 447 U.S. 625, 637-38, 65 L. Ed. 2d 392, 403 (1980) (citation omitted).

Furthermore, because "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race[,]" *Batson v. Kentucky*, 476 U.S. 79, 99, 90 L. Ed. 2d 69, 89 (1986), the establishment of a procedure to redress racial discrimination in capital prosecutions created a right of "real substance." *Wolff*, 418 U.S. at 557, 41 L. Ed. 2d at 951. Indeed, the Racial Justice Act created the very liberty interest envisioned by the United States Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279, 95 L. Ed. 2d 262 (1987), where the Court commented that McCleskey's arguments based upon statistical evidence of racial discrimination in capital prosecutions were "best

presented to the legislative bodies" because legislatures are "'constituted to respond to the will and consequently the moral values of the people[,]'" and are "better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts[.]'" *Id.* at 319, 95 L. Ed. 2d at 296 (citations omitted).

iii. The mandatory directive of the Racial Justice Act that a death sentence "shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole" created protected life and liberty interests in Mr. Ramseur.

The mandatory language of the Racial Justice Act also created life and liberty interests in obtaining a life sentence in lieu of death. In *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 60 L. Ed. 2d 668 (1979), the Court examined a parole statute that provided, "'Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred'" for any one of four reasons. The Court held that because of the "unique structure and language" of the statute, the State created a liberty interest in release on parole. *Id.* at 12, 60 L. Ed. 2d at 678-79 (emphasis added, citation omitted).

Similarly, in *Bd. of Pardons v. Allen*, 482 U.S. 369, 96 L. Ed. 2d 303 (1987), a Montana parole statute provided that, subject to several restrictions, the parole board "'*shall* release on parole … any person confined in the Montana state prison or the women's correction center … when in its opinion there is reasonable probability that

the prisoner can be released without detriment to the prisoner or to the community[.]'" (emphasis in original). The Court held that the statute "create[d] a liberty interest in parole release" because it "use[d] mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." *Id.* at 377-78, 96 L. Ed. 2d at 312 (citations omitted). Moreover, the Court recognized that "the presence of general or broad release criteria – delegating significant discretion to the decisionmaker – did not deprive the prisoner of the liberty interest in parole release" because release was "required after the Board determine[d] (in its broad discretion) that the necessary prerequisites exist[ed]." *Id.* at 375-76, 96 L. Ed. 2d at 311.

The Racial Justice Act, like the parole statutes at issue in *Allen* and *Greenholtz*, provided that a sentence of life without parole was mandatory "when the designated findings [we]re made." *Allen*, 482 U.S. at 377-78, 96 L. Ed. 2d at 312. Specifically, the Racial Justice Act mandated that "the court *shall* order that a death sentence not be sought" or "that the death sentence imposed by the judgment *shall* be vacated and the defendant resentenced to life imprisonment without the possibility of parole" if "the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. §15A-2012(a)(3) (2009) (repealed). (R p 24) Even if the ultimate determination that "race

was a significant factor in decisions to seek or impose the sentence of death" was discretionary, the presence of that discretion did not deprive Mr. Ramseur of his life and liberty interests because a life sentence was still required if the trier of fact determined that "the necessary prerequisites exist[ed]." *Allen*, 482 U.S. at 375-76, 96 L. Ed. 2d at 311.

iv. The dismissal of Mr. Ramseur's original and amended Racial Justice Act claims without any process at all violated the federal and state constitutions.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff*, 418 U.S. at 557, 41 L. Ed. 2d at 952. Thus, when Oklahoma denied the petitioner in *Hicks* "the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision[,]" the Supreme Court held that "[s]uch an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Hicks*, 447 U.S. at 346, 65 L. Ed. 2d at 180.

In *Logan*, the claimant brought a timely charge of discrimination before the appropriate Commission. Although the statute gave the Commission 120 days within which to hold a fact-finding conference, the Commission inadvertently scheduled the hearing for a date five days after the end of the 120-day period. The Supreme Court of Illinois held that the Commission's failure to convene the hearing within the

statutory time limit deprived the Commission of jurisdiction to consider Logan's claim. The United States Supreme Court reversed, holding that the State created a property interest in the adjudicatory procedure and the dismissal of his claim "deprived Logan of a property right" without "the opportunity to present his case and have its merits fairly judged." *Logan*, 455 U.S. at 433, 71 L. Ed. 2d at 276.

Here, Mr. Ramseur filed both his RJA MAR and RJA AMAR within the times set by the original and amended RJA, he attached affidavits and other exhibits to his pleadings, as required by N.C. Gen. Stat. §15A-1420(b)(1), and he expressly requested the hearing to which he was entitled. *See* N.C. Gen. Stat. §15A-2012(a)(2) (2009) (repealed); N.C. Gen. Stat. §15A-2011(f)(3) (2012) (repealed). At that point, Mr. Ramseur had done everything required of him to fully assert his rights under the RJA, and any subsequent repeal of the RJA could not be applied to him without violating due process. However, the manner in which Mr. Ramseur's claims were dismissed was particularly arbitrary because the trial court – despite its statutory duty to schedule a hearing – *never* scheduled a hearing, and the claims were dismissed because, through passage of time, the law changed. The dismissal of Mr. Ramseur's claims was therefore just as arbitrary, if not more so, than the dismissal of Logan's claim. As a result, the retroactive application of the RJA repeal, which destroyed Mr. Ramseur's protected life, liberty, and property interests, violated due process.

v. The retroactive application of the repeal to Mr. Ramseur deprived him of due process because he detrimentally relied upon the State's assurance – acceded to by the trial court – that he would not be prejudiced by foregoing a pretrial Racial Justice Act claim.

Mr. Ramseur deferred the filing of his RJA motion until after the trial in reliance on the State's assurance and Judge Martin's ruling that he could file the motion after the trial as a post-conviction MAR. Under *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427 (1971), the retroactive application of the RJA repeal to Mr. Ramseur's case violated his federal and state constitutional rights to due process in light of his detrimental reliance on the State's assurance and Judge Martin's order.

Mr. Ramseur filed a motion on December 7, 2009 to continue the trial to autumn 2010 to give defense counsel more time for mitigation investigation and to give defense counsel time to file a pretrial RJA motion after completion of the MSU statistical study. (R pp 158-249) The State opposed the motion during a hearing on December 14, 2009. In opposing a continuance to enable defense counsel to file a pretrial RJA motion, one of the prosecutors, Mr. Red Arrow, said that if the MSU study is "beneficial to the Defendant, it can be raised post-conviction. He's not going to be prejudiced in any shape or form by allowing the State to proceed with this trial[.]" (Dec. 14 & 18, 2009 Motions Hearing T p 54)

On December 18, 2009, Judge Martin granted a continuance to April or May 2010 to give defense counsel more time for their mitigation investigation, but he

denied the defense request for a longer continuance, to autumn 2010, to permit counsel to use the MSU study to file a pretrial RJA motion. (Dec. 14 & 18, 2009 Motions Hearing T p 106) In denying the longer continuance, Judge Martin agreed with Mr. Red Arrow's assurance that Mr. Ramseur could file an RJA motion after the trial. Judge Martin stated in his oral and written orders that "the legislature carefully considered and enacted the Racial Justice Act on August 11, 2009 and *included within that provision for the Defendant to raise the issues by motion, post-conviction motion seeking relief and by motion for appropriate relief*" and further ruled that "the Defendant still may pursue the relief under the Racial Justice Act while the State proceeds with the trial of the Defendant." (Dec. 14 & 18, 2009 Motions Hearing T pp 103-04; R pp 281-83) (emphasis added). The trial court later denied Mr. Ramseur's multiple renewed requests for a continuance in order to file a pretrial RJA motion. (R pp 302-45, 346-93; Vol. 7T pp 1380-83; Vol. 19T pp 4086-87)

Relying on the State's assurance and Judge Martin's order, Mr. Ramseur deferred filing an RJA motion until August 10, 2010, after his trial. In the absence of such an assurance by the State or Judge Martin's order, Mr. Ramseur could have prepared and filed a pretrial RJA motion. Although he would not have been able to use the then-unfinished MSU study, he could have based a pretrial RJA motion on other evidence, which was summarized in the Motion to Continue Trial to Investigate

Claim Pursuant to the Racial Justice Act (N.C. Gen. Stat. §15A-2010 *et seq.*) ("Motion to Continue"), pp. 5-15, filed on December 7, 2009. (R pp 162-73)

In *Santobello*, the Supreme Court of the United States held that detrimental reliance by a defendant on a promise or agreement by the State gives the defendant a due process right to enforcement of the State's promise or agreement. *Accord State v. Hudson*, 331 N.C. 122, 148, 415 S.E.2d 732, 746 (1992); *State v. Collins*, 300 N.C. 142, 148, 265 S.E.2d 172, 176 (1980). This due process principle also applies to a defendant's detrimental reliance on a promise made by a court. *United States v. Wood*, 378 F.3d 342 (4th Cir. 2004). The Court of Appeals has applied this principle in a number of cases. *See, e.g.*, *State v. Tyson*, 189 N.C. App. 408, 658 S.E.2d 285 (2008) (vacating guilty plea where apparent misrepresentations by State about terms of plea offer induced defendant to accept offer); *State v. Sturgill*, 121 N.C. App. 629, 631, 469 S.E.2d 557, 558 (1996) (granting new trial after an officer promised the defendant he would not be prosecuted as a habitual felon in exchange for information from defendant about his role in break-ins, defendant provided the information, but State refused to honor the bargain); *State v. Isom*, 119 N.C. App. 225, 458 S.E.2d 420 (1995) (allowing defendant to withdraw guilty plea where plea agreement specified a sentence, judge accepted plea and imposed that sentence, but State later learned that the sentence was unauthorized); *State v. Rodriguez*, 111 N.C. App. 141, 431 S.E.2d 788 (1993) (ordering resentencing where State promised in plea agreement not to take

a position about sentencing, but State violated the agreement by making an argument about sentencing).

Moreover, where State action induces an individual to take (or refrain from taking) some action, due process prohibits the State from penalizing the individual for such action or inaction. Thus, in *Raley v. Ohio*, 360 U.S. 423, 3 L. Ed. 2d 1344 (1959), a Commission informed the appellants, who had been summoned to testify, that they could rely upon the privilege against self-incrimination in the Ohio Constitution when in fact an Ohio immunity statute deprived them of the protection of the privilege. The appellants were later prosecuted for inappropriately refusing to answer the questions as to which they asserted the privilege. The United States Supreme Court held that the judgments affirming their convictions violated due process because it was fundamentally unfair to "convict[] a citizen for exercising a privilege which the State clearly had told him was available to him." *Id.* at 425, 438, 3 L. Ed. 2d at 1348, 1355.

These due process principles apply to this case because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 128 L. Ed. 2d 229, 252 (1994). Mr. Ramseur relied on the State's assurance and Judge Martin's order in deferring the filing of his RJA claim until after the trial. If he had filed a pretrial RJA motion, he could have obtained a ruling and potentially prevented the

case from proceeding capitally in the first place. In light of this detrimental reliance, Judge Crosswhite's retroactive application of the RJA repeal to this case violated Mr. Ramseur's federal and state constitutional rights to due process.

vi. Mr. Ramseur is entitled to a hearing on the merits of his claims under the original and amended Racial Justice Act.

"[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged[,]" *Logan*, 455 U.S. at 433, 71 L. Ed. 2d at 276, because "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1363, 1369 (1914). Thus, for example, despite the Repeal Ordinance at issue in *Keith*, all claimants under the Amnesty Act got their day in court. As discussed more fully below in Section B, some claimants were successful, *Keith*, 63 N.C. 140; *State v. Blalock*, 61 N.C. (1 Phil. Law) 242 (1867); others were not, *State v. Cook*, 61 N.C. (1 Phil. Law) 535 (1868). Similarly, as the United States Supreme Court recognized,

> [T]he welfare recipients in *Goldberg v. Kelly*, . . . had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Roth, 408 U.S. at 577, 33 L. Ed. 2d at 561.

In *Logan*, the Supreme Court held that Logan was "entitled to have the Commission consider the merits of his charge, based upon the substantiality of the

available evidence, before deciding whether to terminate his claim." *Id.* at 434, 71 L. Ed. 2d at 277. In reaching that conclusion, the Court recognized that Logan's interests in retaining his employment, disproving his employer's claim of inability, and redressing the alleged discrimination were "all substantial[,]" and further emphasized that "the deprivation here is final." *Id.* The court also recognized that "[a] system or procedure that deprives persons of their claims in a random manner, as is apparently true of [the 120-day provision], necessarily presents an unjustifiably high risk that meritorious claims will be terminated." On the other side of the equation, the Court held that "the State's interest in refusing Logan's procedural request is, on this record, insubstantial." *Id.* at 434-35, 71 L. Ed. 2d at 277.

Similarly, Mr. Ramseur had a substantial interest in the "opportunity to present his claim of entitlement," *id.* at 434, 71 L. Ed. 2d at 276-77, to redress the discrimination that pervaded capital punishment in North Carolina, and in potentially obtaining the benefit of a life sentence in lieu of death – "the most irremediable and unfathomable of penalties[.]" *Ford*, 477 U.S. at 411, 91 L. Ed. 2d at 347. Moreover, as in *Logan*, 455 U.S. at 434, 71 L. Ed. 2d at 277, the "deprivation here is final" because the General Assembly did not retain or substitute any mechanism by which Mr. Ramseur could vindicate his initial claims that race was "a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State" at the time his death sentence was sought or

imposed. Furthermore, especially given that the claimants in *Robinson* and *Golphin* were initially successful on the merits of their claims, the arbitrary nature of the retroactive repeal of the Racial Justice Act "presents an unjustifiably high risk that meritorious claims will be terminated." *Id.* at 434-35, 71 L. Ed. 2d at 277.

Also as in *Logan*, the balance of interests here is not even close. The State never asserted any specific interest in depriving Mr. Ramseur of the hearing to which he was entitled under the Racial Justice Act. (R pp 689-95) To the contrary, the State's pretrial comment that Mr. Ramseur's RJA claim "can be raised post-conviction" shows that the State fully expected Mr. Ramseur to ultimately get his day in court. Furthermore, even if Mr. Ramseur succeeds in a hearing on his claims, he would pose no danger to society because he would simply be resentenced to life without the possibility of parole. *See Simmons v. South Carolina*, 512 U.S. 154, 163-64, 129 L. Ed. 2d 133, 142 (1994) ("Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

vii. The state common law cases relied upon by the trial court are inapposite and unavailing.

In dismissing Mr. Ramseur's claims under the original and amended Racial Justice Act, the trial court relied upon this Court's common law decisions in *Spooner's Creek Land Corp. v. Styron*, 276 N.C. 494, 172 S.E.2d 54 (1970) (per

curiam), and *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E.2d 909 (1972). (R p 766) Neither decision supports the dismissal of Mr. Ramseur's claims.

In *Spooner's Creek Land Corp.*, the plaintiffs and defendants submitted a "controversy without action" to the trial court seeking a determination of their respective rights under a contract to buy and sell real property. However, while the case was on appeal, "the statutes under which this proceeding was brought [were] unconditionally repealed, effective 1 January 1970, by enactment of the new Code of Civil Procedure." Thus, relying on the principle that "[w]hen statutes providing a particular remedy are unconditionally repealed the remedy is gone[,]" this Court remanded for the dismissal of the action. However, as this Court recognized, "If plaintiff desires to pursue the matter further, action must be brought under the new statutes with additional necessary parties defendant as pointed out by the Court of Appeals." *Id.* at 495, 172 S.E.2d at 55.

In *In re Incorporation of Indian Hills*, the petitioners filed a petition with the Municipal Board of Control (the Board) on January 7, 1969 seeking incorporation of a particular area. The intervenors filed objections to the proposed incorporation. After notice and a hearing, the Board ordered the incorporation on March 19, 1969, and the intervenors appealed to Superior Court, which affirmed the order of incorporation on March 28, 1969. After the Court of Appeals reversed and remanded for further findings of fact on June 24, 1970, the Superior Court again affirmed the order of

incorporation on February 19, 1971. The intervenors appealed to the Supreme Court of North Carolina.

This Court recognized that effective June 2, 1969, the General Assembly repealed the statute that had created the Board and had empowered it to incorporate municipalities, and that "'[u]nder the common law, it has been held that, if a statute is unconditionally repealed without a saving clause in favor of pending suits, all pending proceedings thereunder are terminated, and if final relief has not been granted before the repeal goes into effect, it may not afterwards.'" *In re Incorporation of Indian Hills*, 280 N.C. at 663, 186 S.E.2d at 911 (quoting 50 Am. Jur. § 530, Statutes). The Court held that "[a]t the time the Court of Appeals reversed the Board's incorporating order, the act creating the Board had been repealed and the Board had been abolished" and was not saved by any provision. As a result, this Court reversed the Superior Court order affirming the incorporation. *Id.* at 664-65, 186 S.E.2d at 912.

First and foremost, both cases are inapposite because they relied exclusively upon the common law; neither dealt with a claim, such as this one, that a statutory procedure created life, liberty, and property interests that could not be arbitrarily abrogated without due process of law. "'While the legislature may elect not to confer a property interest'" in the first place, "'it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [*The*] *adequacy of statutory procedures for deprivation of a statutorily*

created property interest must be analyzed in constitutional terms.'" *Logan*, 455 U.S. at 432, 71 L. Ed. 2d at 275-76 (quoting *Vitek v. Jones*, 445 U.S. 480, 490-91, n.6, 63 L. Ed. 2d 552, 563, n.6 (1980)) (citation omitted) (emphasis added).

Second, neither involved a criminal case in which the rights of a criminal defendant to protection against retroactive legislation are greater than those of civil litigants. *Compare Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 89 L. Ed. 2d 1620 (1945) (the federal Due Process Clause does not prohibit a state from reviving a civil cause of action otherwise barred by a statute of limitation),[11] *with Stogner v. California*, 539 U.S. 607, 156 L. Ed. 2d 544 (2003) (the *Ex Post Facto* Clause prohibits a state from reviving a criminal prosecution otherwise barred by a statute of limitation), and *Keith*, 63 N.C. 140 (repealing an amnesty violates the *Ex Post Facto* Clause and deprives the criminal defendant of due process of law).

viii. Conclusion.

The State of North Carolina created life, liberty, and property interests in the adjudicatory procedures of the Racial Justice Act and in obtaining the ultimate benefit of a life sentence in lieu of death. Mr. Ramseur took all the actions that were required to secure those rights. When the trial court relied upon the retroactive repeal of the

[11] The North Carolina Constitution provides greater protection than the federal constitution and prohibits the State from passing legislation reviving a civil cause of action that had been barred by the applicable statute of limitations. *Chase Sec. Corp.*, 325 U.S. at 312-13, 89 L. Ed. 2d at 1635; *Wilkes County v. Forester*, 204 N.C. 163, 170, 167 S.E. 691, 695 (1933).

Racial Justice Act to dismiss Mr. Ramseur's pending motions, the trial court deprived Mr. Ramseur of those protected interests in violation of the Due Process and Law of the Land Clauses of the federal and state constitutions. The retroactive application of the repeal to Mr. Ramseur further deprived him of due process of law because he detrimentally relied upon the State's assurance – acceded to by the trial court – that he would not be prejudiced in any "shape or form" by foregoing a pretrial Racial Justice Act Claim. This Court should reverse and remand for the trial court to "consider the merits of [Mr. Ramseur's] claim, based upon the substantiality of the available evidence[.]" *Logan*, 455 U.S. at 434, 71 L. Ed. 2d at 277.

B. Retroactive Application of the RJA Repeal to Mr. Ramseur Violated the Prohibitions Against *Ex Post Facto* Laws in the United States and North Carolina Constitutions.

When the original RJA was enacted, it was expressly made retroactive to offenses committed before its effective date. Thus, the RJA provided a defense to the death penalty even for defendants such as Mr. Ramseur whose offenses were committed before the RJA's effective date, August 11, 2009. Because the RJA's defense to the imposition of the death penalty was available to Mr. Ramseur prior to the RJA's repeal and because the repeal bill operated retrospectively to Mr. Ramseur's detriment, the retroactive repeal of the RJA violated Mr. Ramseur's constitutional protections against *ex post facto* legislation. Simply put, once the legislature provided that Mr. Ramseur had a right to the imposition of a life sentence

if he could prove – in the manner set out in the RJA – that race was a significant factor in the imposition of his death sentence, no subsequent legislature could take that right away without violating the federal and state *Ex Post Facto* Clauses.

i. The purpose and meaning of the Ex Post Facto *Clauses*.

Article I, Section 10, Clause 1 of the United States Constitution prohibits states from passing any *ex post facto* law. Article I, Section 16 of the North Carolina Constitution similarly prohibits the enactment of *ex post facto* laws. The state and federal constitutional *ex post facto* prohibitions "are evaluated under the same definition." *State v. Wiley*, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002).

The most common definition of an *ex post facto* law comes from Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), which identified four categories of *ex post facto* laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Id. at 390-91, 1 L. Ed. at 650. The Supreme Court has further explained this definition by providing additional formulations of the rule: "two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be

retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 67 L. Ed. 2d 17, 23 (1981). This formulation from *Weaver* echoes an earlier formulation of the rule in *Lindsey v. Washington*: "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Lindsey v. Washington*, 301 U.S. 397, 401, 81 L. Ed. 1182, 1186 (1937).

The various formulations of the rule are complementary; this Court has conducted an *ex post facto* analysis using both the *Calder v. Bull* and *Weaver v. Graham* formulations of the test. *See State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991) (citing *Calder* and quoting *Weaver*). The term "disadvantage the offender" as used in *Weaver* and other similar cases does not mean any change that in some way disadvantages the offender. Rather, the "disadvantage" must relate to the *Calder* categories – "the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." *Collins v. Youngblood*, 497 U.S. 37, 51, 111 L. Ed. 2d 30, 45 (1990).

The Supreme Court has recognized that the precise limits of the term "*ex post facto*" as used in the Constitution are not always discernable from the text. "Building on Justice Chase's formulation of what constitutes an '*ex post facto*' law, our cases 'have not attempted to precisely delimit the scope of that Latin phrase, but have

instead given it substance by an accretion of case law.'" *Peugh v. United States*, __ U.S. __, 186 L. Ed. 2d 84, 96 (2013) (quoting *Dobbert v. Florida*, 432 U.S. 282, 292, 53 L. Ed. 2d 344, 356 (1977)). One consistent theme that has emerged from the Supreme Court case law is that the *Ex Post Facto* Clause is only intended to protect "substantive personal rights." *Malloy v. South Carolina*, 237 U.S. 180, 183, 59 L. Ed. 905, 906 (1915). Purely procedural changes do not violate the *Ex Post Facto* Clause, even if they work to a particular defendant's disadvantage. *Dobbert*. *See also, Landgraf v. USI Film Prods.*, 511 U.S. 244, 290, 128 L. Ed. 2d 229, 268 (1994) (Scalia, J., concurring) (noting that the Court's *ex post facto* jurisprudence has "adopted a substantive-procedural line" and describing a test of "whether the new provision attaches new legal consequences to events completed before its enactment" as derived from the Court's *ex post facto* jurisprudence).

The *Ex Post Facto* Clauses serve two purposes. The principal purpose is to protect against arbitrary, oppressive or vindictive legislation. The second purpose is to provide fair notice regarding the imposition of punishment for conduct deemed criminal. As the United States Supreme Court has explained,

> Justice Chase explained that the reason the *Ex Post Facto* Clauses were included in the Constitution was to assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation. Justices Paterson and Iredell, in their separate opinions in *Calder*, likewise emphasized that the Clauses were aimed at preventing legislative abuses. In addition, the Justices' opinions in *Calder*, as well as other early authorities, indicate that the Clauses were aimed at a

> second concern, namely, that legislative enactments "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."

Miller v. Florida, 482 U.S. 423, 429-30, 96 L. Ed. 2d 351, 359 (1987) (internal citations omitted) (quoting *Weaver*, 450 U.S. at 28-29, 67 L. Ed. 2d at 23).

These two purposes are distinct, and the prohibition against arbitrary retroactive legislation applies even in circumstances that do not implicate fair notice. "There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533, 146 L. Ed. 2d 577, 594-95 (2000). The Supreme Court recently reiterated this point, explaining that "the *Ex Post Facto* Clause does not merely protect reliance interests. It also reflects principles of 'fundamental justice.'" *Peugh*, 186 L. Ed. 2d at 101 (2013) (plurality opinion) (citing *Carmell*).

ii. State v. Keith, *63 N.C. 140 (1869), governs the application of* ex post facto *principles to the situation where an ameliorative and retroactive change in the law occurs after the commission of the offense and before the law being challenged as an* ex post facto *violation.*

The cases that define the scope of the *ex post facto* prohibition do not, for the most part, contemplate the specific situation presented in this case, where there has been an intervening change in the law, favorable to the defendant and expressly

made retroactive, after the commission of the offense but before the law being challenged as an *ex post facto* violation. The few cases that have directly addressed this situation have found *ex post facto* violations in legislation that deprived the defendant of the benefit of the intervening favorable legislation.

The most important of these cases is *State v. Keith*, 63 N.C. 140 (1869), which is directly controlling in this regard. As discussed above, *Keith* involved the enactment and subsequent repeal of an Amnesty Act for crimes committed by soldiers, acting under orders, on either side during the Civil War. The Amnesty Act was ratified on December 22, 1866. It was subsequently repealed by an ordinance passed by the Constitutional Convention of 1868 on March 13, 1868. The defendant in *Keith* was tried after the Repeal Ordinance was enacted for a murder committed in 1863. The trial court denied his motion for discharge under the Amnesty Act, relying exclusively on the Repeal Ordinance. *Id*. at 143. The North Carolina Supreme Court reversed the trial court, holding that the Repeal Ordinance was an *ex post facto* law[12] and therefore unconstitutional.

The first section of the Amnesty Act provided that no soldier or officer of the state militia or of the Confederate States or United States "shall be held to answer on any indictment for any act done in the discharge of any duties imposed on him"

[12] As discussed above, see pp. 38-39, *Keith* also held that the Repeal Ordinance violated due process.

during the Civil War. The second section of the Amnesty Act provided that in all cases then pending, "if the defendant can show that he was an officer or private … it shall be presumed that he acted under orders until the contrary shall be made to appear." Amnesty Act of 1866-'67, §§1, 2. In other words, the second section created a rebuttable presumption that acts committed by soldiers during the war were committed pursuant to orders. This was important because the Amnesty Act applied to an entire class of potential defendants and, unlike an individual pardon or amnesty, did not specifically name its beneficiaries. Rather, in order to take advantage of the Amnesty Act, a person charged with a crime had to demonstrate that he was entitled to benefit from its provisions. Thus, the Amnesty Act created a trial defense for persons accused of crimes committed during the war.

The operation of the Amnesty Act is demonstrated in two cases cited in *Keith*. In *State v. Blalock*, 61 N.C. (1 Phil. Law) 242 (1867), the defendants were convicted of affray arising from a skirmish with members of the Home Guard. Blalock was a federal soldier. The remaining defendants, while attempting to reach the federal lines, met one Davis, who claimed to be a Major and an enlistment officer in federal service. Davis administered the usual enlistment oath to those defendants. Unable to reach federal lines, these putative enlistees returned home. Subsequently, a federal officer, Lieutenant Hartley, ordered Blalock to take a squad of men and capture the Home Guards. *Id.* The Amnesty Act was enacted after the defendants had been tried

and convicted but before their appeal was decided. This Court recognized that the Amnesty Act was intended to promote reconciliation after the war and should be broadly interpreted to serve that purpose. As a result, the Court held that the defendants were entitled to benefit from the Amnesty Act even though it was enacted after their trial (and they had therefore obviously not invoked it at trial) and despite any questions regarding the irregularity of some of the defendants' enlistment in the federal army. *Id*. at 244-48.

In contrast, the evidence in *State v. Cook*, 61 N.C. (1 Phil. Law) 535 (1868), showed that the defendant, although a conscript in the Confederate Army, was a deserter at the time of his crimes. As a result, the Court held that the defendant could not benefit from the Amnesty Act "because it does not appear that his offense had any connection with his war duties." *Id*. at 536.

In *Keith* itself, the defendant was tried for a murder alleged to have been committed in 1863, during the war. The defendant moved for a discharge under the Amnesty Act. The trial prosecutor "admitted … that the case came within that act, but he submitted that that act had been repealed[.]" The trial court, "being of the opinion that the Amnesty Act had been repealed[,]" denied Keith's motion for a discharge. *Keith*, 63 N.C. at 140. This Court recognized that the question of the validity of the Repeal Ordinance was one of first impression, as "we have searched in vain for any instance in which a parliamentary or legislative or other act of general

amnesty or pardon has been revoked.… We are left therefore to determine on its effects from general principles alone." *Id*. at 143. Discussing these general principles, the Court explained in no uncertain terms that the Repeal Ordinance could only be given effect if the Constitutional Convention of 1868 "was subject neither to the Constitution of the United States nor to the previous Constitution of North Carolina, nor to the fundamental rules of public law and morals, which bind every political community[.]" *Id*. at 144. Ultimately, the Court held that "[t]he ordinance in question was substantially an *ex post facto* law; it made criminal what *before the ratification of the ordinance* was not so; and it took away from the prisoner his vested right to immunity." *Id*. (emphasis added).

Keith remains one of the only cases to address the retroactive repeal of a provision favorable to a defendant that was itself enacted after the offense date but made retroactively applicable to the defendant. Indeed, undersigned counsel have only been able to identify two comparable examples. In *Thompson v. State*, 54 Miss. 740 (1877), the Mississippi Supreme Court addressed a statute of limitations which was enacted after the defendant's offense date and expressly made retroactive, but which was subsequently repealed before the defendant's trial. The Court explained, in *dictum*,[13] that "a subsequent repeal of that statute [of limitations], more than two

[13] The actual holding of the case was that because the indictment upon which the defendant was tried was a replacement for a timely indictment – obtained before the

years after the commission of the crime, could not take away the complete defence, which, by the act, would have become vested[.]" *Id*. at 743.

Similarly, in *In re Bray*, 97 Cal. App. 3d 506, 158 Cal. Rptr. 745 (1979), California retroactively modified its sentencing law after the defendant's conviction in a way that benefited him by substantially reducing his time on parole. The legislature subsequently amended the new law in a manner that extended the defendant's parole supervision, but still kept it shorter than what it was under his original sentence. The court held that once the legislature enacted the first beneficial change in the law and made that change retroactive, it could not thereafter impose any new, harsher measure which took away any of the benefits conferred in the original modification. Citing *Keith*, the court explained that the first, favorable modification of the law placed "prisoners such as petitioner in a position as if [it] were the law at the time they committed their offenses." *Id*. at 513, 158 Cal. Rptr. at 749.

iii. Stogner v. California *demonstrates that the status of the case when a new law is enacted is equally important to an* ex post facto *challenge as the law at the time of the commission of the offense*.

The United States Supreme Court case that bears most directly on Mr. Ramseur's *ex post facto* claim is *Stogner v. California*, 539 U.S. 607, 156 L. Ed. 2d

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enactment of the subsequently repealed two-year statute of limitations – that had been destroyed by fire, the prosecution was not time-barred. *Id*. at 745

544 (2003). In *Stogner*, the defendant was indicted in 1998 for various child sex-abuse charges alleged to have occurred between 1955 and 1973. At the time of the alleged offenses, they were governed by a three-year statute of limitations. However, in 1993 California passed a new statute of limitations allowing such charges to be brought within one year after they were reported to the police by the victim, and in 1996 amended this new statute to clarify that it "shall revive any cause of action barred" by the prior statute of limitations. *Id*. at 609-10, 156 L. Ed. 2d at 550-51. The Supreme Court held that applying the new statute of limitations to revive charges which would have been time-barred under the old statute constituted an *ex post facto* violation. *Id*. at 609, 156 L. Ed. 2d at 550. In reaching this holding, *Stogner* cited *State v. Keith* with approval. *Id*. at 617, 156 L. Ed. 2d at 555.

The reason *Stogner* is critically important to understanding the application of the *Ex Post Facto* Clause to the retroactive repeal of the RJA is that, as in *Keith*, the outcome did not depend on the law at the time of the alleged offenses. Although the opinion noted that the three-year statute of limitations was the law at the time of the alleged offenses, this alone was not sufficient to show an *ex post facto* violation.[14] Instead, the dispositive consideration was the fact that Stogner had a winning defense

[14] This is because, as the opinion makes clear, there would have been no *ex post facto* violation in applying the new law to Stogner if it had been enacted before the old statute of limitations had fully run.

immediately before the enactment of the new law being challenged under the *Ex Post Facto* Clause. *Id*. at 613, 615-21, 156 L. Ed. 2d at 553, 554-58.

Stogner held that the new law, by reviving time-barred charges, fit within the second of Justice Chase's four categories. The Court explained:

> After (*but not before*) the original statute of limitations had expired, a party such as Stogner was not "liable to any punishment." California's new statute therefore "aggravated" Stogner's alleged crime, or made it "greater than it was, when committed," in the sense that, and to the extent that, it "inflicted punishment" for past criminal conduct that (*when the new law was enacted*) did not trigger any such liability.

Id. at 613, 156 L. Ed. 2d at 553 (emphases added). In reaching this holding, the Court rejected the dissent's view "that '*Calder's* second category concerns only laws' that both (1) 'subjec[t] the offender to increased punishment' and (2) do so by '*chang[ing] the nature of an offense* to make it greater than it was at the time of commission.'" *Id*. at 622, 156 L .Ed. 2d at 558 (quoting *id*. at 642, 156 L. Ed. 2d at 571 (Kennedy, J., dissenting)) (emphasis and bracketed portions added in majority opinion). The Court rhetorically questioned

> why would recharacterization be the *ex post facto* touchstone? Why, in a case where (a) application of a previously inapplicable punishment and (b) recharacterization (or "changing the nature") of criminal behavior do not come hand in hand, should the absence of the latter make a critical difference? After all, the presence of a recharacterization without new punishment works no harm. But the presence of the new punishment without recharacterization works *all*

> the harm. Indeed, it works retroactive harm[15] – a circumstance relevant to the applicability of a constitutional provision aimed at preventing unfair retroactive laws.

Id. at 627, 156 L. Ed. 2d at 561-62 (emphasis in original).

The Court went on to suggest that a law reviving a time-barred charge also implicated Justice Chase's fourth category. This is because once the statute of limitations has expired, no quantum of evidence is sufficient to support a conviction. As the Court explained, "to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, *at the time the new law is enacted*, would have been legally insufficient." *Id*. at 616, 156 L. Ed. 2d 554-55 (emphasis added).

The Court's explanation that California's retroactive extension of its statute of limitations falls within Justice Chase's second and fourth categories of *ex post facto* laws shows that the status of the case immediately prior to the enactment of the challenged law is at least as important, if not more so, for purposes of *ex post facto* analysis as what the law was at the time of the commission of the offense. After all, if Stogner's trial had proceeded, as the dissent would have allowed, he could have been convicted based on the exact same quantum of evidence as he could have been

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[15] Keeping in mind that the "new punishment" that "work[ed] retroactive harm" in *Stogner* was the reinstatement of liability for the same punishment that was in place at the time of the commission of the offenses.

at the time of the commission of the offenses. If convicted, he would have been subject to the same punishment as at the time of the commission of those offenses. In this regard, *Stogner*, like *Carmell* before it, was concerned with the *Ex Post Facto* Clause's purpose to protect against arbitrary and oppressive punitive legislation rather than its fair notice purpose. As the Court summed up, "California's law … retroactively withdraws a complete defense to prosecution after it has already attached, and it does so in a manner that allows the State to withdraw this defense at will and with respect to individuals already identified. 'Unfair' seems to us a fair characterization." *Id*. at 632, 156 L. Ed. 2d at 565.

iv. *In light of* Keith, Stogner*, and the general principles of* ex post facto *law established by the United States Supreme Court, the retroactive application of the RJA repeal constituted an* ex post facto *violation*.

Once it is understood that the change between the state of affairs immediately prior to and after the enactment of a new law dictates whether that law is *ex post facto*, there can be no doubt that the retroactive repeal of the RJA constituted an *ex post facto* law. When the RJA repeal bill was enacted, Mr. Ramseur had filed a timely RJA MAR and RJA AMAR and had the right to a hearing at which he would have the opportunity to meet his evidentiary burden under the RJA; if he could meet that burden he would then have had an unequivocal right to the imposition of life sentences in lieu of his sentences of death. These were substantive rights which were taken away by the RJA repeal bill, disadvantaging Mr. Ramseur in a manner

cognizable under the *Ex Post Facto* Clause. The RJA repeal bill thus met the two elements described in *Weaver* as showing that a law is *ex post facto*: "it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29, 67 L. Ed. 2d at 23.

First, the RJA operated in a substantially similar manner to the Amnesty Act addressed in *State v. Keith*. Both statutes expressly applied to offenses committed prior to their enactment. Defendants covered by each statute were thereby put in the same position as if the statutes had been the law at the time of the commission of their offenses. The first section of the Amnesty Act created a class of defendants who were immune from prosecution for crimes committed during the war and the second section of the Amnesty Act established a procedural rule for defendants to show that they fell within the protected class. Similarly, the first provision in the RJA created a class of defendants who were immune from the death penalty: "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 (2009) (repealed). The remaining provisions of the RJA established the necessary showing for a defendant to demonstrate that he fell within the protected class, N.C. Gen. Stat. §15A-2011(2009) (repealed), established the hearing procedure, and instructed the trial court on how to effectuate the remedy if the defendant successfully established that he was within the protected class. N.C. Gen. Stat. §15A-2012 (2009) (repealed).

In essence, the RJA established an amnesty from the death penalty for defendants who could show that they fell within the protected class under the Act. Just as the defendant in *Keith* could not be retroactively deprived of his opportunity to secure immunity from prosecution once the legislature had provided a means for doing so, Mr. Ramseur could not be retroactively deprived of the opportunity to secure his immunity from the death penalty once the legislature established a means of securing that immunity.

In this regard, it is immaterial that Mr. Ramseur had not yet established that he was within the protected class at the time the RJA was repealed. The same was true of the defendant in *Keith*. His trial did not occur until after the Repeal Ordinance, and he could not establish that he fell within the protected class until he was afforded the opportunity to make the requisite showing under the Amnesty Act at that trial.

It is also immaterial that the RJA only provided an amnesty from the death penalty, not a complete amnesty from all prosecution, as provided by the Amnesty Act. This is because the *Ex Post Facto* Clause is just as concerned with retroactive increases in punishment as it is with retroactive imposition of any punishment at all. The third of Justice Chase's categories of *ex post facto* laws is no less significant or enforceable than the second.

The repeal of the RJA also operated similarly to the law struck down in *Stogner*. The terms of the RJA were mandatory. If a defendant could make the

requisite factual showing that race was a significant factor in his capital prosecution, he was categorically ineligible to be executed. Thus, prior to the enactment of the RJA repeal bill, the RJA provided Mr. Ramseur with a complete defense to the death penalty, just as California's prior statute of limitations provided Stogner with a defense to his prosecution. The repeal of the RJA, which eliminated Mr. Ramseur's defense to execution, was no less a violation of the *Ex Post Facto* Clause than the California law that took away Stogner's defense. Like California's law, the repeal of the RJA "retroactively withdraws a complete defense to [capital] prosecution after it has already attached, and it does so in a manner that allows the State to withdraw this defense at will and with respect to individuals already identified." *Stogner,* 539 U.S. at 632, 156 L. Ed. 2d at 565.

Again, the fact that the RJA only provided a defense to capital punishment rather than to all prosecution cannot defeat Mr. Ramseur's *ex post facto* claim. In *Beazell v. Ohio,* 269 U.S. 167, 70 L. Ed. 216 (1925) the Court explained that any statute that "deprives one charged with crime of any defense" violates the *ex post facto* prohibition. *Id*. at 169-70, 70 L. Ed. at 217. In *Collins v. Youngblood,* the Court explained that the term "defense," as used in *Beazell,* includes not only defenses that wholly exonerate, but also those that affect "'the nature or amount of punishment imposed[.]'" *Youngblood*, 497 U.S. at 50, 111 L. Ed. 2d at 44 (quoting *Beazell*).

The repeal of the RJA also implicated the fourth of Justice Chase's categories from *Calder* in exactly the same manner as the law struck down in *Stogner*. Immediately prior to the enactment of California's new law, no quantum of evidence regarding Stogner's commission of the alleged crimes could have sustained a conviction once the original statute of limitations expired. Similarly, before the repeal of the RJA, no quantum of evidence regarding Mr. Ramseur's commission of capital murder and no quantum of evidence regarding the existence or weight of any aggravating factors could have sustained a death sentence against Mr. Ramseur if he could establish the statutory defense provided by the RJA by showing that race was a significant factor in the imposition of his death sentences.

With regard to the third category of *ex post facto* laws, laws which retroactively increase the punishment for previously committed offenses, the United States Supreme Court has "never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause." Rather, "[t]he touchstone of this Court's inquiry is whether a given change in the law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Peugh*, 186 L. Ed. 2d at 97 (citations omitted). Thus, in *Lindsey*, the Court prohibited the retroactive application of a law that changed what was previously a maximum 15-year sentence into a mandatory 15-year sentence. The Court held that because the new law deprived the defendant of the

opportunity to receive a sentence less than the maximum, it violated the *Ex Post Facto* Clause. *Lindsey*, 301 U.S. at 400-02, 81 L. Ed. at 1185-86. Similarly in *Miller*, the Court reversed the retroactive application of a law which amended Florida's sentencing guidelines, finding that the defendant was "substantially disadvantaged" by the new guidelines, which subjected the defendant to a higher guideline range without increasing the maximum sentence to which he was exposed. *Miller*, 482 U.S. at 432-33, 96 L. Ed. 2d at 361-62. Likewise, in *Peugh* itself, the Court rejected the retroactive application of a change in the sentencing guidelines which increased the defendant's guideline range, even though those guidelines were merely advisory and the defendant might have received the same sentence under the earlier, lower guidelines. *Peugh*, 186 L. Ed. 2d at 102-04.

In light of these principles, it is immaterial to Mr. Ramseur's *ex post facto* claim that the RJA did not eliminate the death penalty as his maximum sentence. It is also immaterial that it is not yet known whether Mr. Ramseur can succeed in making the evidentiary showing required under the RJA. Before the RJA repeal bill was enacted, Mr. Ramseur might have ended up with either life sentences or death sentences. If he could make the necessary showing under the RJA, his sentences would become life sentences. If not, they would remain death sentences. After the enactment of the RJA repeal bill, this was no longer the case. Because the RJA repeal bill deprived Mr. Ramseur of the opportunity to receive life sentences instead of

death sentences, it retroactively increased the punishment for Mr. Ramseur's crimes and fell within Justice Chase's third category of *ex post facto* laws. As the Court observed in *Lindsey*, "[i]t could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied" retroactively. *Lindsey*, 301 U.S. at 401, 81 L. Ed. at 1186.

In sum, once the RJA was enacted and made retroactive to all prior offenses, Mr. Ramseur was placed in the same position as if the RJA was the law at the time of his offenses. *Keith*. As a result, Mr. Ramseur could not be subject to the death penalty if race was a significant factor in his capital prosecution. When the RJA was repealed, the repeal act substantially disadvantaged Mr. Ramseur by taking away his opportunity to demonstrate his entitlement to life sentences. The retroactive repeal of the RJA fell into the second category of *ex post facto* laws by taking away a previously available defense to the death penalty; it fell within the third category of *ex post facto* laws because it retroactively increased the punishment for Mr. Ramseur's previously committed offenses; and it fell within the fourth category of *ex post facto* laws by changing the quantum of evidence sufficient to sustain Mr. Ramseur's death sentences. For these reasons, the RJA repeal bill constituted a constitutionally impermissible *ex post facto* law as applied retroactively to Mr. Ramseur.

C. Retroactive Application of the RJA Repeal to Mr. Ramseur Violated the Constitutional Prohibition Against Bills of Attainder.

By removing life imprisonment without parole as a possible sentence for the class of defendants with pending RJA motions, the retroactive application of the RJA repeal abolished an existing defense to the death penalty in their pending cases by legislative action rather than by judicial determination of their claims. As a result, the retroactive repeal of the RJA constituted an unconstitutional bill of attainder.

Article I, Section 10, Clause 1 of the United States Constitution provides that "No State shall … pass any bill of attainder." Article I, Section 9, Clause 3 contains an identical prohibition against bills of attainder passed by Congress. Like its "textual and conceptual neighbor" the *Ex Post Facto* Clause, *Carmell v. Texas*, 529 U.S. 513, 566, 146 L. Ed. 2d 577, 615 (2000), the prohibition against bills of attainder was a response to perceived abuses by the British Parliament. Specifically, like the *ex post facto* prohibitions, the prohibition against bills of attainder was designed to prevent vindictive punitive legislation, particularly against unpopular or disfavored individuals or groups. *See, e.g.*, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389, 1 L. Ed. 648, 649-50 (1798).

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, 90 L. Ed. 2d 1252, 1259 (1946). The Supreme Court emphasized in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323, 18 L. Ed. 356, 363 (1866), that while bills of attainder "are generally directed against individuals by name … they may be directed against a whole class." The Court explained in *United States v. Brown*, 381 U.S. 437, 14 L. Ed. 2d 484, 491 (1965), the constitutional prohibition against bills of attainder must "be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." The Court observed in *Brown* that 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." *Id*. at 445, 14 L. Ed. 2d at 490.

The Supreme Court has made it clear that the prohibition against bills of attainder is not limited to explicit legislative pronouncements of criminal guilt or punishment without a trial. As the Court emphasized as early as 1866 in *Cummings*, the Constitution, through this prohibition, "intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." 71 U.S. at 325, 18 L. Ed. 356.

Thus, courts have held that a variety of legislative acts have violated the prohibition. *See, e.g., Cummings* (reversing a conviction for serving as a priest without

taking a designated oath under the post-Civil War Missouri Constitution, which, *inter alia*, prohibited anyone from serving as a member of the clergy without swearing that he or she had never supported the Confederacy); *Lovett* (striking down an act of Congress that prohibited payment of salaries to three federal employees who were alleged to have engaged in subversive activity); *Brown* (reversing a conviction for violating a federal statute that prohibited members of the Communist Party from serving as officers or employees of unions); *Putty v. United States*, 220 F.2d 473, 478-79 (9th Cir. 1955) (after the defendant was improperly charged in Guam by information rather than by indictment, and was then convicted, Congress enacted legislation providing that no conviction in Guam may be reversed on the ground that the defendant had not been charged by indictment; the court reversed the conviction, holding, *inter alia*, that the post-conviction legislation was a bill of attainder).

The General Assembly's retroactive repeal of the RJA was an unconstitutional bill of attainder because it legislatively imposed punishment on easily ascertainable members of a designated class of people. The class consisted of those defendants who had RJA motions pending in Superior Court when the repeal became effective on June 19, 2013. The defendants in that class can be readily identified from the website of the Division of Adult Correction. Mr. Ramseur was a member of that class. The retroactive repeal deprived the members of the class of the right to an individualized judicial determination of each member's claim to relief under the RJA and in place of

that right, substituted a legislative determination that no member of the group was entitled to relief.

The retroactive application of the RJA repeal legislation imposed punishment because it deprived those defendants of a defense to the death penalty. Specifically, it deprived them of their right under the RJA to have a court impose a sentence of life imprisonment without parole, in lieu of their existing death sentences, upon making the showing required by the RJA. The imposition of punishment was a bill of attainder because it was accomplished by legislation instead of through a judicial proceeding. Indeed, the very language used in the RJA repeal legislation – a declaration that all RJA motions filed before the effective date of the repeal "are void" – confirms that the legislation was enacted to supplant the judicial determination of punishment. N.C. Sess. Laws 2013-154 Sec. 5.(d).

The federal legislation in *Putty* was an unconstitutional bill of attainder that abolished a defense that had been available to easily identifiable members of a designated group with cases pending on appeal, before a court could consider the defense. Similarly, the retroactive repeal of the RJA was an unconstitutional bill of attainder because it abolished a defense to the death penalty that had been available to easily identifiable members of a designated group – RJA litigants with unresolved claims – before a court could consider the defense.

There should be no question that removing an option for a life sentence is inherently punitive. However, the Supreme Court has held that the determination of whether an act constitutes punishment for purposes of determining whether it is a bill of attainder may depend on the legislative purpose behind the enactment. *See, e.g.*, *Lovett*, 328 U.S. at 308-317, 90 L. Ed. at 1255-60 (reviewing the extensive legislative history leading up to the enactment of the bill in question in order to determine that the bill's intent was punitive and that it therefore constituted a prohibited bill of attainder).

Here, even if this Court does not agree that eliminating Mr. Ramseur's opportunity to receive a lesser sentence is inherently punitive, there are substantial indicia that the retroactive repeal was intended to be punitive. First, of course, was the timing of the bill. After the defendant in *Robinson* obtained relief in Superior Court, the legislature amended the RJA in a manner that restricted the availability of relief under the Act. Then, after the *Golphin* defendants obtained relief in Superior Court under the new standards provided under the amended RJA,[16] the legislature repealed the Act in its entirety. This history strongly suggests that because the first four claimants under the RJA prevailed and were resentenced to life without parole, the

[16] While the Superior Court order in *Golphin* held that the amendment to the RJA could not be retroactively applied to the detriment of litigants with pending claims under the original RJA, the order also held, in the alternative, that each of the three defendants whose claims were addressed in the order had made the requisite showing to be entitled to relief under the amended RJA.

legislature decided to punish the entire class of RJA litigants with then-pending claims by eliminating their opportunity to obtain, through judicial review of their claims, life sentences in lieu of their death sentences.

Secondly, although there is scant legislative history available, comments by various legislators in support of the retroactive repeal demonstrate that the retroactivity of the RJA repeal was, indeed, intended to be punitive. The principal sponsor of the RJA repeal bill, Senator Goolsby, declared that the "new legislation will start the dead men walking once again." Thom Goolsby, Death Penalty Redux – Past Time to Restart Executions, pittcountynow.com, August 12, 2013.[17] Similarly, during the floor debates in the General Assembly on the RJA repeal bill, several legislators identified specific cases arising in their districts and argued that enacting the bill would allow "swift and sure justice," enabling the execution of the defendants in those cases. Laura Leslie, House Votes to Roll Back Racial Justice Act, WRAL.com, June 4, 2013.[18]

These indicia provide ample support for a determination that the retroactivity of the RJA repeal was specifically intended by the General Assembly to be punitive legislation directed at the class of affected individuals. The inherently punitive nature

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[17] Available at http://pittcountynow.com/post/4362/death-penalty-redux-past-time-to-restart-executions.html, last visited on August 24, 2016.

[18] Available at http://www.wral.com/house-votes-to-roll-back-racial-justice-act-/12516075/ last visited on August 24, 2016.

of the repeal and these indicia should be sufficient to enable this Court to determine this intent as a matter of law. However, to the extent this Court believes that the summary dismissal of Mr. Ramseur's RJA motions resulted in a record that contains insufficient development of the legislative purpose of the retroactivity of the RJA repeal, then a remand for an evidentiary hearing at which such a record could be more fully developed would also be an appropriate remedy.

The retroactive repeal of the RJA constituted legislative punishment of a limited, identifiable class of disfavored individuals by withdrawing an available remedy of receiving life sentences in lieu of their death sentences. Because the General Assembly substituted its legislative determination for a judicial determination of the merits of their pending claims, the retroactive repeal of the RJA amounted to an unconstitutional bill of attainder.

D. Retroactive Application of the RJA Repeal to Mr. Ramseur Violated the State and Federal Equal Protection Clauses Because it Rested on an Arbitrary Distinction Between Mr. Ramseur and the Four Defendants Who Obtained RJA Relief Before the RJA Repeal Became Effective.

Section 5.(d) of the Session Law 2013-154 retroactively abolished the RJA for all defendants, including Mr. Ramseur, whose RJA claims were still pending in Superior Court on the effective date of the Act, June 19, 2013. However, Section 5.(d) carved out an exception to its retroactive application for defendants who had already obtained relief under the RJA in Superior Court before the effective date of

the Act, if the Superior Court's order were affirmed on appellate review. This exception applied exclusively to the four defendants who obtained relief under the RJA in Superior Court before June 19, 2013: Marcus Robinson, Tilmon Golphin, Christina Walters, and Quintel Augustine.[19] The distinction made by Section 5.(d) between these four defendants and the remaining RJA litigants, including Mr. Ramseur, whose RJA claims were still pending in Superior Court on June 19, 2013, was an arbitrary distinction that lacked a rational relation to any legitimate state interest. Accordingly, this distinction violated the Equal Protection Clauses of the United States and North Carolina Constitutions.

In all ways rationally related to the timing of the trial court's disposition of his RJA claims, Mr. Ramseur was similarly situated with Robinson, Golphin, Walters, and Augustine. Mr. Ramseur filed both his RJA MAR and his RJA AMAR in a timely manner, and he expressly requested a hearing on his RJA claims. These were the same steps taken by Robinson, Golphin, Walters, and Augustine.

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[19] This Court vacated the orders granting RJA relief to Robinson, Golphin, Walters and Augustine and remanded those cases for new hearings on the merits of each of those litigants' RJA claims. *State v. Robinson*, __ N.C. __, 780 S.E.2d 151 (2015); *State v. Augustine*, __ N.C. __, 780 S.E.2d 552 (2015). This in no way affects the validity of Mr. Ramseur's equal protection claim. Those litigants remain entitled to a hearing on the merits of their claims and remain eligible for RJA relief. Mr. Ramseur and the other litigants with RJA claims pending on June 19, 2013 are no longer eligible for hearings on the merits of their claims or for relief under the RJA and are therefore treated differently under the law than the first four litigants.

If there are any rational distinctions between Mr. Ramseur and those four defendants, they are distinctions that work in Mr. Ramseur's favor. The Original RJA was in effect at the time of Mr. Ramseur's trial. He even sought a continuance of the trial to autumn 2010 for the express purpose of using the then-unfinished MSU study in an RJA motion to be filed before his trial. Moreover, the trial court ruled, as the State had asserted, that the denial of that continuance was without prejudice to Mr. Ramseur's right to file a post-conviction RJA MAR.

The appropriate equal protection test for this issue is whether the challenged distinction was rationally related to a legitimate state interest. *See generally Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 86 L. Ed. 2d 487 (1985); *State ex rel. Utilities Comm'n for Carolina Utilities Customers Ass'n*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994). Retroactive application of the RJA repeal to Mr. Ramseur but not to Robinson, Golphin, Walters, and Augustine violated the Equal Protection Clauses of the United States and North Carolina Constitutions because it was not rationally related to a legitimate state interest.

Two equal protection decisions by the Supreme Court of the United States concerning state statutes that limited a party's right to adjudication of a claim govern this case: *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265 (1982), and *Lindsey v. Normet*, 405 U.S. 56, 31 L. Ed. 2d 36 (1972). As discussed in Mr. Ramseur's due process argument (*see* section I.A, above), *Logan* involved a claim

filed under an Illinois fair employment statute with the appropriate state Commission by an employee who alleged that his employer had unlawfully discharged him because of a physical disability unrelated to his ability to perform his duties. The statute required the Commission to hold a fact-finding conference within 120 days after the filing of a claim. However, the Commission inadvertently scheduled the hearing five days after the expiration of the 120-day period. The Supreme Court of Illinois held that the Commission's failure to convene the hearing within the time mandated by the statute deprived the Commission of jurisdiction to consider Logan's claim.

In addition to *Logan's* due process holding, a majority of the Court, in two concurring opinions, ruled that the application of the Illinois statute to bar the claim violated the Equal Protection Clause. Although neither of the two concurring opinions in *Logan* that addressed the equal protection issue constituted a majority opinion, the six concurring justices agreed that the application of the Illinois statute to bar the claim violated the Equal Protection Clause. Since Justice Powell's concurring opinion rests on the narrowest ground, it is the controlling opinion with respect to equal protection. *See Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 266 (1977).

As Justice Powell wrote in his concurring opinion, the Illinois statute created two classes of claimants: those whose claims were processed by the Commission within the required time and those whose claims were not processed by the

Commission within the required time. Justice Powell observed, "Under this classification, claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time." *Id*. at 443, 71 L. Ed. 2d at 283 (Powell, J., concurring). Justice Powell then concluded,

> The State no doubt has an interest in the timely disposition of claims. But the challenged classification failed to promote that end – or indeed any other – in a rational way. *As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so*. The State also has asserted goals of redressing valid claims of discrimination and of protecting employers from frivolous lawsuits. Yet the challenged classification, which bore no relationship to the merits of the underlying charges, is arbitrary and irrational when measured against either purpose.

Id. at 444, 71 L. Ed. 2d at 283 (Powell, J., concurring) (emphasis added).

Similarly, in his concurring opinion in *Logan*, Justice Blackmun emphasized that it was the Commission that scheduled timely hearings on some claims but not others. By doing so, Justice Blackmun observed, "the State converts similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This, I believe, is the very essence of arbitrary state action." *Id*. at 442, 71 L. Ed. 2d at 282 (Blackmun, J., concurring).

In *Lindsey*, the Court struck down, as a violation of the Equal Protection Clause, an Oregon statute that required a tenant to post a double bond as a condition of

appealing a judgment ordering eviction for nonpayment of rent when no other category of appellant was subject to the double bond requirement. The Supreme Court explained that although the constitution did not require any appeal process at all, "[w]hen an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey*, 405 U.S. at 77, 31 L. Ed. 2d at 52. The Court held that the double bond provision created "a substantial barrier to appeal faced by no other civil litigant in Oregon," and that the provision was "arbitrary and irrational[.]" *Id*. at 79, 31 L. Ed. 2d at 54.

Our Court of Appeals applied similar considerations in *Best v. Wayne Mem'l Hospital*, 147 N.C. App. 628, 556 S.E.2d 629 (2001), to avoid an unfair literal reading of Rule 9(j) of the Rules of Civil Procedure which would have allowed plaintiffs in some counties, but not others, to move for an extension of the statute of limitations in medical malpractice cases. Rejecting the literal interpretation of the Rule in favor of one that would allow plaintiffs in all counties to move for an extension, the Court explained, "It is a basic tenet that our laws are to treat all citizens equally. N.C. Const. Art. I, §19. Within this tenet is the equally important right that all citizens have an equal opportunity to avail themselves of the law." *Id*. at 634, 556 S.E.2d at 633.

Logan, *Lindsey* and *Best* govern this case. As in *Logan*, Mr. Ramseur and Robinson, Golphin, Walters, and Augustine presented their RJA claims with "equal

diligence." 445 U.S. at 443, 71 L. Ed. 2d at 283. Also as in *Logan*, Mr. Ramseur had no power to set timely schedules for the State's response, a hearing on his RJA claims, or the trial court's decision. Accordingly, "it is unfair and irrational to punish [him] for the [trial court's] failure to do so." *Id*. at 444, 71 L. Ed. 2d at 283. As in both *Logan* and *Lindsey*, the distinction in Section 5.(d) between Mr. Ramseur and the four defendants who obtained RJA relief in Superior Court before June 19, 2013 was arbitrary, and was not rationally related to any legitimate state interest. As in *Best*, Mr. Ramseur should have had "an equal opportunity to avail [himself] of the law." Accordingly, the retroactive repeal of the RJA violated the Equal Protection Clauses as applied to Mr. Ramseur.

E. Retroactive Application of the RJA Repeal to Mr. Ramseur Violated the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution.

In *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346 (1972) (per curiam), the Supreme Court emphasized the importance of preventing the arbitrary imposition of the death penalty. As Justice Brennan wrote in his concurring opinion, "Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." *Id*. at 274, 33 L. Ed. 2d at 369. Justice Stewart described the death penalty, as it was then administered, in his concurring opinion as "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id*. at 309, 33 L. Ed. 2d at 390. He decried the imposition of the death

penalty on a "capriciously selected random handful" and concluded, "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." *Id*. at 309-10, 33 L. Ed. 2d at 390. Similarly, Justice White's concurring opinion condemned a system in which "there is no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." *Id*. at 313, 33 L. Ed. 2d at 392. Justice Douglas likewise expressed concern in his concurring opinion about the absence of standards governing capital punishment and the result that people "live or die, dependent upon [a] whim…." *Id*. at 253, 33 L. Ed. 2d at 357. *Accord Mills v. Maryland*, 486 U.S. 367, 374, 100 L. Ed. 2d 384, 393 (1988); *Woodson v. North Carolina*, 428 U.S. 280, 302, 49 L. Ed. 2d 944, 960 (1976); *Gregg v. Georgia*, 428 U.S. 153, 189, 49 L. Ed. 2d 859, 889 (1976).

Sections I.A and I.D, above, explain why the retroactive application of the RJA repeal to Mr. Ramseur was arbitrary and, therefore, violated the Due Process and Equal Protection Clauses of the United States and North Carolina Constitutions. The same analysis applies under the Eighth Amendment. If the Superior Court had chosen to adjudicate Mr. Ramseur's RJA motions before June 19, 2013, Mr. Ramseur would have retained all of the rights granted under the RJA and would now be entitled to life sentences if he made the requisite showing in Superior Court and that determination was upheld on appeal. By dismissing Mr. Ramseur's RJA motions because his RJA

claims had not been adjudicated before June 19, 2013, the trial court deprived Mr. Ramseur of his rights under the RJA and left him with death sentences. Inasmuch as Mr. Ramseur had no control over when his claims would be adjudicated, the trial court's ruling was the height of arbitrariness. As a result, the arbitrary application of the RJA repeal to Mr. Ramseur's case violated the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution.

F. Retroactive Application of the RJA Repeal, Which Legislatively Dictated the Outcome in Mr. Ramseur's Pending Legal Actions, Violated the North Carolina Constitution's Guarantee of Separation of Powers.

Because "[o]ur founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty[,]" our state Constitution "vests each of these powers in a different branch of government and declares that '[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.'" *State ex rel. McCrory v. Berger*, ___ N.C. ___, ___, 781 S.E.2d 248, 250 (2016) (quoting N.C. Const. art. I, §6). "In tandem with Article I, Section 6, the North Carolina Constitution mandates that 'the General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government.'" *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 168, 594 S.E.2d 1, 7 (2004) (quoting N.C. Const. art. IV, §1). "'[T]he principle of separation of

powers is a cornerstone of our state and federal governments,'" *Berger*, ___ N.C. at ___, 781 S.E.2d at 255 (quoting *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982)), and "requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *Berger*, ___ N.C. at ___, 781 S.E.2d at 250.

The declaration that a pending legal action is "void" is necessarily a judicial function because it is the judiciary that has to "decide questions of merit, to render judgments that may be enforced, to do practical work, and to put an end to litigation." *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 505, 115 S.E. 336, 341 (1922). Indeed,

> The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities. Usually, it operates prospectively. The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.

State ex rel. Lanier, Comm'r of Ins. v. Vines, 274 N.C. 486, 495, 164 S.E.2d 161, 166 (1968).

Here, the General Assembly legislatively decreed that all Racial Justice Act motions pending on June 19, 2013, were "void[.]" Thus, the General Assembly

purported to legislatively adjudicate the outcome of those pending claims – including Mr. Ramseur's legal actions – thereby tying the hands of the judicial tribunal whose sole province it was to adjudicate those claims. As a result, the General Assembly "exercise[d] power that the constitution vests exclusively in another branch" and thereby violated the Separation of Powers Clause. *See Berger*, ___ N.C. at ___, 781 S.E.2d at 256, 258.

G. Under This Court's Case Law, Once Mr. Ramseur Filed his RJA Motions in Compliance with the Procedural Requirements of the RJA, Sufficiently Alleging that Race Was a Significant Factor in the Imposition of his Death Sentences, Mr. Ramseur had a Right to Have his Claim Adjudicated Under the RJA. That Right Could Not be Taken Away by Subsequent Legislation.

Where the law allows a cause of action which provides redress for past injuries, this Court has repeatedly held that the parties' rights with respect 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, 293 S.E.2d 415 (1982); *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970). 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. *E.g., Booker v. Duke Medical Center*, 297 N.C. 458, 467, 256 S.E.2d 189, 195 (1979). 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, 106 S.E. 133 (1921). Separate and apart from vested rights, this Court has directly recognized that governmental bodies must follow their own rules for processing claims; if the

government were allowed to change the rules in order to defeat a claim by legislative fiat, the result would be arbitrary and capricious. *Robins v. Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007).

In *Mizell*, the plaintiff was injured when exiting from a train and filed a lawsuit in state court seeking damages. *Id*. at 38, 106 S.E. at 134. The defendants filed a petition to remove the case to federal court, claiming, *inter alia*, that they were entitled to removal under a federal statute enacted after the plaintiff was injured. *Id*. at 40, 106 S.E. at 135. This Court affirmed the denial of removal, holding that "[t]he injury occurred and the cause of action arose 19 December, 1919…. Action could have been instituted that day. A vested right of action is property. The statute … cannot defeat or modify a right of action that has already accrued." *Id*. at 38-39, 106 S.E. at 135.

Similarly, in *Smith v. Mercer*, the law governing liability for damages in wrongful death cases was substantially amended after the plaintiff's decedent was killed but before the plaintiff filed the lawsuit. 276 N.C. at 331, 172 S.E.2d at 490. The new law, if applicable, would have substantially expanded the defendants' liability for damages. *Id*. at 331-34, 172 S.E.2d at 490-92. Recognizing that retroactive application of the new provisions would raise "serious questions as to the constitutionality of such retroactive application," the Court held that the plaintiff could not rely on the new law. The Court explained that a

> statute or amendment will be regarded as operating prospectively only, … where the effect of giving it a retroactive operation would be to … destroy a vested right, *or create a new liability in connection with a past transaction,* ***invalidate a defense which was good when the statute was passed****, or, in general, render the statute or amendment unconstitutional.*

Id. at 337, 172 S.E.2d at 494 (citations omitted, italics in original, additional emphasis added).

In *Booker*, the plaintiff's decedent contracted hepatitis as a result of handling blood samples pursuant to his employment as a laboratory technician. After his death, his dependents sought death benefits under the Workmen's Compensation Act. After the decedent contracted hepatitis, but before he died, the legislature broadened the definition of "occupational disease" so that the term covered the decedent's hepatitis when, the defendants contended, it had not previously done so. This Court rejected the view that only the definition of "occupational disease" that was in place at the time the decedent contracted the disease could constitutionally apply. Because the dependents' claim for death benefits arose only when the decedent died, it was the law at the time of death that determined the parties' rights. The Court explained: "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." *Booker*, 297 N.C. at 467, 256 S.E.2d at 195.

In *Bolick*, the plaintiff was injured by a yarn-crimping machine manufactured by the defendant, which had been purchased by the plaintiff's employer over six years prior to the injury. The plaintiff filed a lawsuit seeking damages for his injuries, based on theories of negligent design and manufacture and of breach of warranties of merchantability and fitness. After the injury had occurred, but before the plaintiff filed his lawsuit, the legislature enacted a statute of repose prohibiting products liability lawsuits, such as the plaintiff's, which were brought more than six years after the initial purchase. *Bolick*, 306 N.C. at 365-66, 293 S.E.2d at 417. Citing, *inter alia*, *Mizell*, *Smith*, and *Booker*, this Court recognized that the plaintiff had a viable claim when the statute of repose went into effect and that the statute "would, if applied retroactively to plaintiff's claim, destroy plaintiff's cause of action which had vested before its effective date." *Id*. at 371, 293 S.E.2d at 420. Noting that "[w]hen a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only[,]" *id*., the Court refused to give retroactive effect to the statute.

In *Robins*, the plaintiff filed an application with the town of Hillsborough, seeking approval of a development plan to construct an asphalt plant on his property. After conducting multiple hearings and repeatedly postponing a decision on the plaintiff's application, the town first enacted a moratorium on the construction of manufacturing and processing facilities involving petroleum products (including

asphalt), and then amended its zoning ordinance to completely prohibit such facilities within the town's zoning jurisdiction. *Robins*, 361 N.C. at 194-96, 639 S.E.2d at 422-23. This Court held that the plaintiff "was entitled to receive a final determination from defendant regarding his application *and to have it assessed under the ordinance in effect when the application was filed.*" *Id*. at 199, 639 S.E.2d at 425 (emphasis added).

The Court noted that the ordinance in effect at the time of the application provided that the town's Board of Adjustment "shall … hear and *decide* all matters … upon which it is required [to] pass[,]" which included applications such as the plaintiff's. *Id*. at 197, 639 S.E.2d at 424 (emphasis and alterations in original). The Board's hearings constituted quasi-judicial proceedings. *Id*. at 198, 639 S.E.2d at 424. The Court explained that "we must determine whether defendant followed its own procedures. 'In no other way can an applicant be accorded due process and equal protection[.]'" *Id*. at 198-99, 639 S.E.2d at 424 (citation omitted). In holding that the town could not amend its ordinance while the application was pending in order to obtain its desired outcome, this Court explained that by "essentially *dictating by legislative fiat the outcome* of a matter" that should have been "resolved through quasi-judicial proceedings, defendant did not follow its own ordinance[,]" which left "the Town Board no defense to the charge that *its actions were arbitrary and capricious*." *Id*. at 199, 639 S.E.2d at 425 (emphasis added).

The application of all of this case law to Mr. Ramseur's RJA motions is obvious. At the time Mr. Ramseur filed his RJA motion, the RJA mandated that once a defendant under sentence of death filed a motion alleging with particularity how "race was a significant factor" in his case, as defined in the statute, the court was required to schedule a hearing. Moreover, the RJA provided that if the defendant made the requisite showing, "the death sentence … shall be vacated and the defendant resentenced to life imprisonment[.]" N.C. Gen. Stat. §15A-2012(a) (2009) (repealed). The provisions of the statute were mandatory. They entitled a defendant who filed a sufficient motion to an evidentiary hearing and, upon meeting the statutory burden of proof, to the imposition of a life sentence in lieu of death. Mr. Ramseur's "cause of action" under the RJA accrued when he had suffered the requisite injury – a capital trial resulting in death sentences in which race was a significant factor – and when the statute allowed him to file a claim for relief from those sentences.

Mr. Ramseur's rights under the RJA vested when his claim accrued, and he filed a timely claim asserting those rights. Once Mr. Ramseur's rights under the RJA vested, they could not be "defeat[ed] or modif[ied]," *Mizell*, 181 N.C. at 38-39, 106 S.E. at 135, by any subsequent legislation. The RJA repeal "would, if applied retroactively to [Mr. Ramseur]'s claim, destroy [his] cause of action which had vested before its effective date." *Bolick*, 306 N.C. at 371, 293 S.E.2d at 420. Just like the town board's post-application attempt to change the rules in *Robins*, the legislature's

attempt, through the retroactivity provisions of the RJA repeal bill, to "dictat[e] by legislative fiat the outcome" of Mr. Ramseur's RJA claims, when those claims should have been resolved through judicial proceedings was "arbitrary and capricious," *Robins*, 361 N.C. at 199, 639 S.E.2d at 425, and cannot be upheld.

II. THE TRIAL COURT'S ALTERNATIVE HOLDINGS – THAT (1) MR. RAMSEUR'S RJA MAR AND RJA AMAR WERE WITHOUT MERIT AND COULD BE DENIED WITHOUT A HEARING, AND (2) MR. RAMSEUR WAS NOT ENTITLED TO DISCOVERY – WERE PATENTLY ERRONEOUS.

In addition to holding that the repeal of the RJA rendered Mr. Ramseur's RJA and amended RJA claims void, the trial court's order held in the alternative that Mr. Ramseur's RJA MAR and RJA AMAR were without merit and could therefore be denied without conducting a hearing. The trial court also denied Mr. Ramseur's Motion for Discovery of Information Relevant under the RJA. These alternative holdings were factually and legally erroneous. Mr. Ramseur's RJA MAR and RJA AMAR contained allegations raising valid original RJA and amended RJA claims which, if proven, would constitute grounds for relief. As a result, Mr. Ramseur was entitled to discovery and to an evidentiary hearing in order to prove his allegations.

The original RJA contained a requirement mandating that the trial court conduct an evidentiary hearing to resolve RJA claims: "The Court *shall* schedule a hearing on the claim and *shall* prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. §15A-2012(a)(2) (2009) (repealed) (emphasis added). The use of the

term "shall" ordinarily constitutes a statutory mandate which must be followed by trial courts. *E.g.*, *Morningstar Marinas/Eaton Ferry v. Warren Cnty.*, 368 N.C. 360, 365-66, 777 S.E.2d 733, 737 (2015). Based on §15A-2012(a)(2) alone, Mr. Ramseur was unequivocally entitled to an evidentiary hearing on his RJA claims.[20]

The Original RJA also included a catch-all procedural provision which provided that "[e]xcept as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion seeking relief [under the RJA] … shall follow and comply with G.S. 15A-1420, 15A-1421 and 15A-1422." N.C. Gen. Stat. §15A-2012(c) (2009) (repealed). Pursuant to N.C. Gen. Stat. §15A-1420(c)(1), parties are "entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine … whether an evidentiary hearing is required to resolve questions of fact." N.C. Gen. Stat. §15A-1420(c)(4) goes on to

[20] The amended RJA repealed the mandatory evidentiary hearing requirement of §15A-2012(a)(2). Instead, the amended RJA added a provision stating that "[i]f the court finds that the defendant's motion states a sufficient claim under this Article, the court shall schedule a hearing on the claim and may prescribe a time prior to the hearing for each party to present a forecast of its proposed evidence." N.C. Gen. Stat. §15A-2011(f)(3) (2012) (repealed). Thus, Mr. Ramseur does not claim that an evidentiary hearing on the distinct claims raised in his RJA AMAR was statutorily mandated by the RJA itself. Rather, it appears that the standard for conducting an evidentiary hearing as to his RJA AMAR claims would be the same as the standards for MARs generally as discussed below, based on §15A-1420 and *McHone*.

provide, "If the court cannot rule upon the motion without the hearing of evidence, it must conduct a hearing for the taking of evidence, and must make findings of fact."

In *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998), this Court considered the various subsections of §15A-1420(c) *in pari materia* and explained that, taken as a whole, the statute required an evidentiary hearing "unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor[.]"[21] *Id.* at 258, 499 S.E.2d at 763. The Court went on to explain that to determine "whether an evidentiary hearing is necessary, the trial court not only considers defendant's motion for appropriate relief, but also 'any supporting or opposing information presented.'" *Id*. at 259, 499 S.E.2d at 764.

Mr. Ramseur's RJA MAR and RJA AMAR stated valid claims for relief under the RJA, and they supported those claims with forecasts of substantial evidence. Specifically, Mr. Ramseur's RJA MAR alleged that race was a significant factor in the imposition of his sentences of death. Mr. Ramseur broke his RJA claims down into claims that race was a significant factor in the prosecution's use of peremptory challenges on a countywide level, on a Prosecutorial District-wide level, on a Judicial Division-wide level, and on a statewide level. He further alleged that race was a

[21] *McHone* discussed two other situations where an evidentiary hearing was not required – when the MAR is a 10-day MAR pursuant to N.C. Gen. Stat. §15A-1414, and when the MAR only presents questions of law – but neither of these situations has any bearing on Mr. Ramseur's case.

significant factor both in the prosecution's decision to proceed capitally and in the actual imposition of death sentences on each of these levels. He supported his allegations with statistical evidence showing that (1) prosecutors exercised peremptory challenges against qualified black jurors at more than twice the rate they used peremptory challenges against all other jurors at each of these levels, and (2) black defendants and defendants accused of murdering white victims were capitally prosecuted and sentenced to death at greater rates than other defendants at each of these levels. (R pp 394-422)

Mr. Ramseur attached affidavits to his RJA MAR from the professors who conducted the MSU study that generated these statistics. These affidavits explained the methodology used in the study, supported the specific statistical allegations contained in Mr. Ramseur's RJA MAR, and explained that the results of the study were statistically significant, such that the observed racial discrepancies were extremely unlikely to have occurred naturally in a system that was racially neutral. (R pp 432-94)

In addition to the statistical evidence, the RJA MAR alleged a historical background of race-based considerations affecting the imposition of death sentences on both a statewide and local level. The RJA MAR also alleged the direct impact of race on Mr. Ramseur's case itself. These allegations included the fact that Mr. Ramseur, a black man who was convicted of murdering two white victims, was tried

by an all-white jury from which the State peremptorily struck every qualified black juror. They also included the fact that the trial was conducted in a racially-charged atmosphere, which included calls for a lynching in the comments sections of local media websites. In addition, on the first day of trial, the rows of seats in the courtroom behind the defense table were blocked off with crime scene tape, forcing any of Mr. Ramseur's family and other supporters to sit at the back of the courtroom, a scene that harkened back to the days of segregated courtrooms. Jurors were present for the beginning of jury selection and were exposed to this courtroom scene. Even after the defense complained about these arrangements and the trial court ordered the crime scene tape removed, the rows of seats immediately behind the defense table remained off-limits.

These case-specific allegations were supported by an affidavit from one of Mr. Ramseur's trial attorneys, S. Mark Rabil. (R pp 425-30) In addition, these allegations were addressed in various motions Mr. Ramseur filed during the trial, including his motion and renewed motion to change venue, his motion and renewed motions to continue, and his motion to modify security. These motions were in turn supported by attached affidavits. These materials were all discussed in the RJA MAR, were part of the court record in this case, and constituted part of the "supporting or opposing information" that should have been considered by the trial court to determine whether

an evidentiary hearing was needed to decide Mr. Ramseur's RJA MAR. *McHone*, 348 N.C. at 257, 259, 499 S.E.2d at 763, 764.

Similarly, Mr. Ramseur's RJA AMAR specifically alleged that within the relevant period under the Amended RJA, race was a significant factor in the State's exercise of peremptory challenges in Former Prosecutorial District 22, Current District 22A, and Iredell County;[22] race was a significant factor in the State's capital charging decisions at both the district and county level; and race was a significant factor in jury sentencing decisions at the district and county level. The RJA AMAR incorporated all of the allegations in Mr. Ramseur's original RJA MAR, including both the case-specific factual allegations and the statistical allegations based on the MSU study, and also attached a new affidavit from the professors who conducted the MSU study. (R pp 598-658) These materials supported the claims raised in the RJA AMAR.

In addition to raising independently supported claims under the Amended RJA, Mr. Ramseur's RJA AMAR also constituted a part of the "supporting information" with respect to the claims raised in his original RJA MAR. In particular, the RJA

[22] Specifically, Mr. Ramseur's RJA AMAR alleged that within the relevant time frame, prosecutors were 3.6 times more likely to exercise peremptory challenges against qualified black jurors than against all other jurors in the prosecutorial district, 3.2 times more likely to exercise peremptory challenges against qualified black jurors than against all other jurors in Iredell County, and 3.7 times more likely to exercise peremptory challenges against qualified black jurors than against all other jurors in cases involving Iredell County jurors (*i.e.*, including the *al-Bayyinah* trials). (RJA AMAR at ¶¶ 153-55, R pp 599-600)

AMAR discussed the *Robinson* order, which is important for at least three reasons. First, the *Robinson* order contained additional non-statistical evidence demonstrating that race was a significant factor in the State's use of peremptory challenges on a statewide basis, within the Prosecutorial District, and in Iredell County. Second, the trial court in *Robinson* heard extensive testimony from the professors who conducted the MSU study as well as from the State's statistical expert, and on the basis of that testimony, found that the MSU study was properly designed and the results of the study were statistically valid. Third, in the *Robinson* order, the trial court found that the evidence, including both the anecdotal evidence and the statistical evidence from the MSU study, established that race was a significant factor in the State's exercise of peremptory challenges on a statewide basis and therefore concluded that the defendant was entitled to relief under the RJA.

In this case, Mr. Ramseur's RJA MAR claim based on race constituting a significant factor in the State's statewide use of peremptory challenges in capital trials was substantially similar to, and based on substantially the same evidence as, the same claim in *Robinson*. The *Robinson* order demonstrates that Mr. Ramseur's RJA claim based on statewide exercise of peremptory challenges was sufficiently pled and supported by sufficient allegations to require an evidentiary hearing.[23]

[23] The fact that this Court vacated and remanded the matter for reconsideration of Robinson's MAR, *State v. Robinson*, ___ N.C. ___, 780 S.E.2d 151 (2015), does not

All of the factual matters alleged in Mr. Ramseur's RJA MAR and RJA AMAR, all of the supporting affidavits attached thereto, and all of the trial motions in the Superior Court file for this case that were discussed in the RJA MAR and RJA AMAR were part of the "motion and any supporting or opposing information" which the trial court was required to consider under *McHone* and N.C. Gen. Stat. §15A-1420(c) in determining whether an evidentiary hearing was required before the trial court could decide Mr. Ramseur's RJA MAR and RJA AMAR. For all the reasons discussed above, Mr. Ramseur alleged sufficient facts that, if proven, would have been sufficient to support his claims and to entitle him to relief under the RJA. As a result, Mr. Ramseur was entitled to an evidentiary hearing for the purpose of proving his factual allegations. The trial court's determination that it could deny the RJA MAR and RJA AMAR without an evidentiary hearing constituted reversible error under *McHone*, §15A-1420(c), and the Due Process Clauses of the federal and state constitutions.

The trial court's denial of discovery was also erroneous. As discussed in the discovery motion, Mr. Ramseur's RJA MAR and RJA AMAR were motions for appropriate relief. Accordingly, Mr. Ramseur was entitled to discovery under N.C. Gen. Stat. §15A-1415(f), which provides for complete discovery of state files in capital post-conviction cases; *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998) (applying §15A-1415(f)); *State v. Buckner*, 351 N.C. 401, 527 S.E.2d 307 (2000); and

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diminish the value of the trial court's order for this purpose.

State v. Taylor, 327 N.C. 147, 154, 393 S.E.2d 801, 806 (1990) (empowering superior court to order discovery in post-conviction case in the interests of justice and the search for the truth); and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Moreover, since §15A-1415(f) necessarily contemplates that a trial court may not adjudicate an MAR until discovery is complete, the trial court erred by issuing an alternative ruling on the merits of Mr. Ramseur's RJA claims before discovery was complete. This Court should reverse the trial court and remand so that the parties can engage in discovery and the trial court can conduct an evidentiary hearing on all of Mr. Ramseur's claims.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the order below and remand the case for discovery and an evidentiary hearing on Mr. Ramseur's RJA MAR and RJA AMAR. In the alternative, this Court may vacate the order below and remand for an evidentiary hearing on whether the retroactive repeal of the RJA acted as an unconstitutional bill of attainder.

Respectfully submitted this the 26th day of August, 2016.

(Electronically Submitted)
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I hereby certify that that a copy of the above and foregoing Brief has been duly served by email, upon:

Mr. Jonathan Babb
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jbabb@ncdoj.gov

This the 26th day of August 2016.

(Electronically Submitted)
Daniel K. Shatz

INDEX TO APPENDIX

App. 1

PUBLIC LAWS

OF THE

STATE OF NORTH CAROLINA,

PASSED BY THE

GENERAL ASSEMBLY

AT THE

SESSIONS OF 1866 '67.

RALEIGH:

WM. E. PELL, STATE PRINTER,

1867

Pupils may be admitted to the Branches of agriculture, &c., without previous literary training.

SEC. 4. *Be it further enacted*, That in order to promote the liberal and practical education of the industrial classes of the State, pupils may be admitted to the branches of Agriculture and Mechanic Arts, who possess the requisite qualifications for those studies, without requiring the previous literary training requisite for admission into the regular college courses.

Ratified February 11, A. D., 1867.

AMNESTY.

CHAPTER III.

AN ACT GRANTING A GENERAL AMNESTY AND PARDON TO ALL OFFICERS AND SOLDIERS OF THE STATE OF NORTH CAROLINA, OR OF THE LATE CONFEDERATE STATES ARMIES, OR OF THE UNITED STATES, FOR OFFENCES COMMITTED AGAINST THE CRIMINAL LAWS OF THE STATE OF NORTH CAROLINA.

Shall not be held to answer on any indictment for acts done in discharge of duties imposed by law or orders.

SECTION 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same*, That no person who may have been in the civil or military service of the State, as officers or soldiers of the militia, officers or soldiers of the home guard, officers and soldiers of the local police, officers and soldiers of the late Confederate States, or as officers and soldiers of the United States, shall be held to answer on any indictment for any act done in the discharge of any duties imposed on him purporting to be by a law of the State or late Confederate States Government, or by virtue of any order emanating from any officer, commissioned or non-commissioned, of the Militia or Home Guard, or local police of North Carolina, or any officer, commissioned or non-com-

missioned, of the late Confederate States Government, or any officer, commissioned or non-commissioned, of the United States Government: That no one of the above named officers or privates, who now are or may hereafter be indicted for any homicides, felonies or misdemeanors, committed prior to the first day of January, A. D., 1866, shall be held to answer for the same, but shall be entitled to a full and complete amnesty, pardon and discharge from the same upon the payment of the costs: *Provided*, they shall not be taxed with the payment of the costs upon any indictment preferred against them, from and after the passage of this bill; or, in other words, that no officers or privates in any of the above named organizations, against whom no indictment is now pending, shall be liable to prosecution for any offence committed against the criminal laws of North Carolina prior to the 1st day of January, A. D., 1866, as aforesaid.

Presumption that act was done by order, until contrary appears.

SEC. 2. *Be it further enacted*, That in all cases where indictments are now pending, either in the County or Superior Courts, if the defendant can show that he was an officer or private in either of the above named organizations at the time, it shall be presumed that he acted under orders until the contrary shall be made to appear.

Provisoins extended to organizations of exempts from service.

SEC. 3. *Be it further enacted*, That all private citizens, who, on account of age or from any other cause, were exempt from service in any or all of the above named organizations, who, for the preservation of their lives or property, or for the protection of their families, associated themselves together for the preservation of law and order, in their respective counties or districts, shall be entitled to all the benefits and provisions of this act.

Not liable in civil action.

SEC. 4. *And be it further enacted*, That no person who may have been in the civil or military service of the State, or late Confederate States Government, or in the service of the United States Government, in either of the above named organizations, shall be held liable in any civil action for any act done in the discharge of any duties imposed upon him by any law or authority purporting to be a law of the State or late Confederate States Government.

SEC. 5. *Be it further enacted,* That this act shall be in force from and after its ratification.

Ratified December 22, A. D., 1866.

CHAPTER IV.

AN ACT TO GRANT AMNESTY AND PARDON TO FEMALES.

SECTION 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* That the provisions of a law, passed by this General Assembly at its last session, and ratified the 22d day of December, 1866, entitled "An Act granting a general amnesty and pardon to all officers and soldiers of the State of North Carolina, or of the late Confederate States armies, or of the United States," for offences committed against the criminal laws of the State of North Carolina, be and the same are hereby extended, as far as the same is applicable, to all females, who may at any time, from the 20th day of May, 1861, to the 20th day of May, 1865, have violated any of the criminal laws of the State, by making raids upon any county, State or Confederate States Commissaries or Quartermaster, or other person or persons, who had in his possession supplies or Quartermaster stores belonging to the public, or who may have broken into or entered, or taken from any Commissary or Quartermaster depot, or other place where provisions or Commissary or Quartermaster stores were kept, or any other place where unusual quantities of provisions, supplies or Quartermaster or Commissary stores, either by the aforesaid Quartermaster or Commissary or other persons, speculators or producers, were kept, for the purpose of hoarding, speculation or re-rating the same; and if any bill of indictment has been found and is now pending in any Court of record in this State against any female, for the commission of the

Provisions of chapter 3 extended, as far as applicable, to Females.

App. 5

CONSTITUTION

OF THE

STATE OF NORTH-CAROLINA,

TOGETHER WITH THE

ORDINANCES AND RESOLUTIONS

OF THE

CONSTITUTIONAL CONVENTION,

Assembled in the City of Raleigh, Jan. 14th, 1868.

RALEIGH:
JOSEPH W. HOLDEN, CONVENTION PRINTER.
1868.

Granville County, are hereby dissolved, and either party are at liberty to marry again.

Ratified this 12th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

CHAPTER XXIX.

AN ORDINANCE IN RELATION TO THE PARDON OF OFFICERS AND SOLDIERS OF THE LATE CONFEDERATE SERVICE.

General Amnesty act repealed.

SECTION 1. *Be it ordained by the people of North-Carolina in Convention assembled, and it is hereby ordained by the authority of the same,* That an act of the General Assembly, ratified December the 22d, 1866, granting a general amnesty and pardon to all officers and soldiers of the State of North-Carolina, of the late Confederate States armies, or of the United States, or any person or class of persons to which said general amnesty was intended to apply, be and the same is hereby repealed, except so much of it as applies to females.

Ratified this 13th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

CHAPTER XXX.

AN ORDINANCE TO CHANGE THE MANNER OF PAYMENT OF THE STATE'S SUBSCRIPTION TO THE CAPITAL STOCK OF THE WESTERN RAIL ROAD.

The Company authorized to return half million of mortgage bonds to the Treasurer.

SECTION 1. *Be it ordained by the people of North-Carolina in Convention assembled, and it is hereby ordained by the authority of the same,* That the Western Rail Road Company are hereby authorized to return to the Public Treasurer the sum of one-half million of dollars of the second mortgage