No. 181A93-4 DISTRICT 22A

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA

v.

RAYFORD LEWIS BURKE

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From Iredell County

92-CRS-1195

AMICUS BRIEF OF PROMISE OF JUSTICE INITIATIVE AND 12 FORMER JUDGES, JUSTICES AND LAW ENFORCEMENT OFFICIALS

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INTEREST OF THE AMICI CURIAE[1]

The Promise of Justice Initiative (PJI) is a non-profit organization founded in 2009 in New Orleans, Louisiana, to address issues of injustice. PJI, amongst other work, drafts policy papers and files amicus briefs in the state and federal courts, including the United States Supreme Court.

The former North Carolina judges, prosecutors, and law enforcement officials who join as amici have watched and participated in the processes of capital punishment closely in this state for decades. They are former Superior Court Judges Wade Barber, Melzer A. Morgan, Jr., and Leon Stanback, Court of Appeals Judge Linda Stephens, former District Attorney George Hunt, former Assistant District Attorneys Robert K. Corbett, III, Vincent Rabil, and Octavis White, and former Southern Pines Police Chief Gerald Galloway, former Chief Homicide Detective in the Wake County Sheriff's Office, Steve Hale, and former Chief Deputy Secretary of the North Carolina Division of Adult Corrections, Jennie Lancaster. Kami Chavis, a former Assistant United States Attorney in the District of Columbia, and now a professor and Director of the Criminal Justice Program at Wake Forest University

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[1] Amici curiae state that amici and their counsel authored this brief in its entirety. No person or entity other than amici, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief.

School of Law, joins her North Carolina colleagues as another former prosecutor deeply concerned with the administration of the death penalty in this state.

INTRODUCTION

Capital punishment is now constrained to a dwindling handful of locations, reserved not for the most culpable offenders, but for those unlucky few prosecuted under anachronistic circumstances. In North Carolina, whatever standard method of measurement used, it is now beyond dispute that use of the death penalty is unusual. Indeed, use of capital punishment has dropped to such low levels that it would be hard to argue that it fulfills an indispensable role in the criminal justice system. And yet, the death penalty has an out-sized effect on our confidence in the fair administration of punishment.

Experience has taught us that while many prisoners undergo significant transformation, the death penalty leaves no room for the possibility of redemption.[2] It thereby diminishes the dignity of human life that it was designed to enhance.[3]

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[2] *See* Wilbert Rideau, *In The Place Of Justice: A Story Of Punishment And Deliverance*, (Knopf, New York, 2010).

[3] 161 Cong. Rec. H6192 (daily ed. Sept. 24, 2015) (Statement of Pope Francis) ("[S]ince every life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes. …[A] just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation.").

In every generation, there are those who counsel deliberation, patience, and a measured approach to the evolution of the standards of decency. But it comes at a cost: delay in addressing the constitutionality of capital punishment serves to further undermine and erode confidence in the administration of the system that capital punishment was once enacted to protect.[4] The time has come to consider whether the system of capital punishment that currently operates in North Carolina violates the evolving standards of decency. Amici suggest that the death penalty in North Carolina is inconsistent with the standards of decency that prevail, and, therefore, constitutes "cruel" punishment under the North Carolina Constitution. Further, imposition of the death penalty today is unusual, rendering it arbitrary, excessive and unnecessary.

In every generation, courts are expected to undertake their constitutional responsibility and to assess the standards of decency as they exist today. Amici do not ask the Court to address the constitutionality of the death penalty in 1976, or

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[4] *Compare* Martin Luther King Jr., *Letter from a Birmingham Jail*, April 16, 1963 ("Now is the time to make real the promise of democracy and transform our pending national elegy into a creative psalm of brotherhood. Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity.") *with Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) ("[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."); *see* Charles J. Ogletree, *All Deliberate Speed,* Center for American Progress, April 12, 2004, https://www.americanprogress.org/issues/general/news/2004/04/12/660/all-deliberate-speed/.

even when the death sentence was imposed upon the appellant in 1993. Rather, the Court should consider the standards of decency as of today.

As Justice Marshall explained:

> The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. … Several Justices have also expressed their individual opinions that the death penalty is constitutional. Yet, some of these same Justices and others have at times expressed concern over capital punishment.
>
> There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, stare decisis would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open.

Furman v. Georgia, 408 U.S. 238, 329-330 (1972) (Marshall, J., concurring) (footnotes omitted). Nor did Justice Stewart's plurality opinion in *Gregg v. Georgia* (joined by Powell & Stevens, JJ.) resolve the matter as it only addressed the evolving standards of decency as they existed at that time. 428 U.S. 153, 174 (1976).

Gregg ultimately held that under the standards of decency that existed in 1976, "the punishment of death does not invariably violate the Constitution." But the Court's assessment of decency at that time does not foreclose reexamination today.

Indeed, a growing list of justices have raised questions concerning the death penalty. See *Gregg*, 428 U.S. at 257, 314 (Brennan & Marshall, JJ., dissenting); *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting); *Baze v. Rees*, 553 U.S. 35, 71 (2008) (Stevens, J., concurring); *Glossip v. Gross,* 135 S. Ct. 2726 (2015) (Breyer and Ginsburg, JJ., dissenting). Justice Powell, in conversations with

his biographer after his departure from the bench noted "I have come to think that capital punishment should be abolished." He stated that he would have changed his vote in capital cases, particularly *McCleskey v. Kemp*. John Jeffries, *Justice Lewis F. Powell, Jr.* 451-52 (Fordham U. Press 1994).

And in addition to state high-court rulings invalidating the death penalty in New York, Massachusetts, Connecticut, Delaware and now Washington, a growing list of state court judges have expressed concern about the death penalty.[5] Courts

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[5] See e.g. *Tucker v. Louisiana*, Amicus Brief of Former Appellate Court Jurists, NO. 15-946, 2016 U.S. S. Ct. Briefs LEXIS 913, at *1 (Feb. 26, 2016) (filed by former state high court jurists: Justice Penny White, Tennessee, Chief Justice Sol Wachtler, New York, Justice Gerald Kogan, Florida, Joseph Grodin, California, Chief Justice Karla Gray, Montana, Chief Justice Norman Fletcher, Georgia, Chief Justice Stanley Feldman, Arizona, Justice Oliver Diaz, Mississippi, Chief Justice Pascal Calogero, Louisiana, Chief Justice Harry Lee Anstead, Florida). *See also Doss v. State*, No. 2007-CA-00428-SCT (Miss. Dec. 11, 2008) (Diaz, J., dissenting) ("I am convinced that the progress of our maturing society is pointed toward a day when our nation and state recognize that, even as murderers commit the most cruel and unusual crime, so too do executioners render cruel and unusual punishment."), *majority opinion withdrawn and replaced by* 190 So. 3d 690 (2009); *State v. Wogenstahl*, 981 N.E.2d 900 (Ohio 2013) (O'Neill, J., dissenting); see also Reginald Fields, *Ohio Supreme Court Justice Paul Pfeifer Wants to Scrap the Death Penalty*, The Plain Dealer, Jan. 19, 2011 (noting statements by Ohio Supreme Court Justice Paul Pfeifer, who helped write the state's death penalty law); *Ex parte Murphy*, No. WR-38,198-04, 2016 Tex. Crim. App. Unpub. LEXIS 558, 3-4 (Tex. Crim. App. June 15, 2016) ("Alcala J., concurring and dissenting) (arguing to hear merits of claim "that the time has come for this Court to reconsider whether the death penalty remains a constitutionally acceptable form of punishment under the current Texas scheme").

have recognized that the penalty is corrupted by arbitrariness,[6] plagued by error and discrimination,[7] and unsupported by evidence that it deters.

I. ARTICLE I, SECTION 27 OF THE NORTH CAROLINA CONSTITUTION PROVIDES BROADER PROTECTION THAN THE EIGHTH AMENDMENT.

Article I, Section 27 of the North Carolina Constitution prohibits the infliction of "cruel ***or*** unusual punishments." N.C. Const. art. I, § 27 (emphasis added). The Eighth Amendment to the United States Constitution prohibits "cruel ***and*** unusual punishments." U.S. Const. amend. VIII (emphasis added). While this Court "historically has analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions," *State v. Green*, 348 N.C. 588, 603 (1998), several justices of this Court have suggested that the disjunctive 'or' required a separate nuanced assessment. *Id.* at 615 (Frye, Whitehead, and Parker, JJ., concurring and dissenting) (observing that the North Carolina Constitution since 1868 has prohibited punishments that are cruel or unusual" and

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[6] See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014) (noting "to carry out the sentences of the 748 inmates currently on Death Row, the State would have to conduct more than one execution a week for the next 14 years" and that "only 17 inmates currently on Death Row have even completed the post-conviction review process and are awaiting their execution."), *rev'd on procedural grounds, Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

[7] See Jolie McCullough, *Eight years on Texas' highest criminal court turned Elsa Alcala into a death penalty skeptic. How will the court change without her?*, Texas Tribune, Jan. 16, 2019.

finding punishment "unusual within the meaning of" of this provision); *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 846 (1992) (Martin, J., concurring) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment."). While in the millrun inquiry application of North Carolina's disjunctive may not change the outcome from an Eighth-Amendment analysis, it does here. As shown below, the death penalty in North Carolina has fallen by the wayside so significantly that it satisfies the unusual prong of the constitutional protection – without even reaching whether the punishment is cruel.

Other states, with similar constitutional provisions, have recognized the textual significance of the difference. The Michigan Supreme Court has held that the federal constitutional protection against "cruel and unusual punishment" is less broad than the protections against "cruel or unusual punishment" afforded under its state constitution. *People v Bullock*, 485 N.W.2d 866 (Mich. 1992). The Florida Supreme Court held that Article I, Section 17 of the Florida Constitution provides broader protection for the rights of a capital defendant than the United States Constitution because of its prohibition of "'cruel *or* unusual punishment.'" *Tillman v. State*, 591 So. 2d 167, 169 n.2 (Fla. 1991). *See also District Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1281-83 (Mass. 1980) (relying on disjunctive language in article 26 of Massachusetts Constitution, and finding death penalty unconstitutionally *cruel*, notwithstanding constitutionality under Eighth Amendment); *State v. Perry*, 610 So. 2d 746, 755 (La. 1992) (holding that "our state constitution's declaration of individual rights . . . represents more specific . . . [and]

broader protection of the individual," and is "far broader" in case concerning competence for execution); *Bland v. State*, 164 P.3d 1076, 1079 n.1 (Okla. Crim. App. 2007) (Chapel, J., dissenting) ("Since the language of our State provision is otherwise identical to that of the corresponding Federal provision, the use of the word 'or' in our State Constitution is highly significant and implies a broader constitutional protection, prohibiting punishments that are either 'cruel' *or* 'unusual.'").

As Justice Winthrop of the Arizona Supreme Court observed last year, although the United States Supreme Court's rejection of "Eighth Amendment attacks on the death penalty preclude a state court from interpreting" the provision to provide any greater protections than the high court has already established:

> [S]tate courts "are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." … Because we may interpret Arizona's Constitution to provide greater protections to Arizona citizens, I would hold, as a matter of state law, that the death penalty is unconstitutional.

State v. Bush, 423 P.3d 370, 396 (Ariz. 2018) (Withrop, J., dissenting in part and concurring in part).

Here, in addition to his own concurring and dissenting opinions, former Justice Harry C. Martin has strongly encouraged the use of our State Constitution as a "living, breathing document":

> When faced with an opportunity to provide its people with increased protection through expansive construction of state constitutional liberties, a state court should seize the chance. By doing so, the court develops a body of state constitutional law for the benefit of its people that is independent of federal control.

Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C.L. Rev. 1749, 1751, 1755 (1992) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment.").

II. THIS COURT HAS AN INDEPENDENT OBLIGATION TO ASSESS THE CONSTITUTIONALITY OF CAPITAL PUNISHMENT.

Ultimately, even to the extent that this Court holds that the state and federal constitutions have the same meaning, this Court has a unique and especial responsibility to assess whether the standards of decency have evolved in North Carolina, rendering the death penalty excessive and unnecessary. In doing so, the Court should apply United States Supreme Court jurisprudence for assessing whether a punishment is excessive to the facts in North Carolina.

The *first step* is to set out the measuring stick the United States Supreme Court has fashioned. As the Court established six decades ago, the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). The "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman*, 408 U.S. at 382 (Burger, C. J., dissenting)).

To gauge whether a punishment practice has fallen outside these evolving standards, the Court looks to objective indicia of societal consensus. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002). Legislative authorization of a punishment is one indicia, but "[t]here are measures of consensus other than legislation." *Kennedy*, 554 U.S. at 433; s*ee also Graham v. Florida*, 560 U.S. 48, 62 (2010) (finding a societal consensus against juvenile life without parole sentences for non-homicide offenses even where the vast majority of jurisdictions formally authorized the practice). Because it is a "well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime," *Atkins*, 536 U.S. at 315, legislative activity may reflect an acceptance of harsh punishment in the abstract that does not, in fact, exist in practice. Therefore, "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62. Under this analysis, the Court will consider not only actual sentences imposed, *id.*, but also the number of executions. *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005).

The *second step* is to assess the salient North Carolina facts on this measuring stick. Applying a state-specific evolving-standards analysis, other state high courts have not hesitated, where appropriate, to find the death penalty violates state constitutional provisions. *See*, *e.g.*, *State v. Gregory*, 427 P.3d 621, 645 (Wash. 2018) (applying evolving standards analysis, but without the "constrain[t] . . . of federalism . . . and focus[ing] on *practices, trends, and experiences within our state*" and finding capital punishment unconstitutional) (emphasis added); *State v.*

Santiago, 122 A.3d 1, 30–31 (Conn. 2015) (finding executions post non-retroactive repeal would violate state constitution and noting that in line with the approach of "our sister courts . . . under the state constitution, the pertinent standards by which we judge the fairness, decency, and efficacy of a punishment are necessarily those of Connecticut"); *Watson*, 411 N.E.2d at 1281-82 (finding death penalty violates Massachusetts constitutional ban on "cruel or unusual" punishment, after applying evolving standards analysis to facts within the commonwealth, including that no execution had occurred since 1948).

The seriousness with which state courts safeguard state constitutional protections for those facing execution is also reflected in contexts beyond the evolving-standards analysis. For example, even after the voters of Massachusetts reinstated the death penalty by amending the Commonwealth's constitution in the wake of *Watson*, *supra*, the Massachusetts high court once again invalidated the death penalty in Massachusetts based on a procedural provision that unduly interfered with the Commonwealth's constitutional right to a jury trial and to plead not guilty. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 129 (Mass. 1984). Similarly, roughly a decade after the New York legislature reestablished the death penalty, New York's highest court found the new procedure violated the state constitution, citing, among other things, "the irrevocable nature of capital punishment" as well as "the concomitant need for greater certainty in the outcome of capital jury sentences." *People v. Taylor*, 878 N.E.2d 969, 983 (N.Y. 2007); *see id.* at 978 (noting state constitution required – but that legislature failed to provide –

an anticipatory deadlock instruction to ensure that doubts concerning imposition of a sentence ameliorated to a life sentence). *See also Rauf v. State*, 145 A.3d 430 (Del. 2016) (finding death penalty statute violates *Ring v. Arizona,* 536 U.S. 585 (2002) and *Hurst v. Florida*, 577 U.S. __, 136 S. Ct. 616 (2016) and the federal constitution, where jurors did not find beyond a reasonable doubt that death was the appropriate punishment); *State v. Cline*, 397 A.2d 1309, 1311 (R.I. 1979) (holding Rhode Island's death penalty statute unconstitutional where it mandated capital punishment for individuals convicted of a killing while in prison).

The measuring stick already fashioned, guiding precedent already set out, this Court too should "develop[ ] a body of state constitutional law for the benefit of its people that is independent of federal control." Martin, *supra,* at 1751. No more pressing need to apply this benefit may exist than here – when considering whether the state is authorized to impose the ultimate, irrevocable sanction.

III. THE EVOLVING STANDARDS OF DECENCY DEMONSTRATE THAT CAPITAL PUNISHMENT IN NORTH CAROLINA IS CRUEL, AND ENTIRELY UNUSUAL.

The current community standards of our state reveal that capital punishment is excessive, unnecessary, and as a result a cruel or unusual punishment in violation of the North Carolina Constitution. Factually, the death penalty here is unusual. Indeed, since 2010, lightning has killed in North Carolina more often than execution, and lightning has struck more frequently than juries have returned new death sentences. *See* National Weather Service, *Weather Fatalities* (April 25, 2018), http://www.nws.noaa.gov/om/hazstats.shtml (10 lightning fatalities in North

Carolina between 2010 and 2017); Death Penalty Information Center (DPIC), *Searchable Execution Database*, https://deathpenaltyinfo.org/views-executions (hereafter Execution Database) (zero executions between 2007 and today); DPIC, *Death Sentences in the United States From 1977 By State and By Year* (hereafter *DPIC Death Sentences From 1977*), https://deathpenaltyinfo.org/death-sentences-united-states-1977-present (seven new death sentences since 2010).

And the death penalty in North Carolina appears to have lost public support. A poll released on February 6, 2019, found that more than 50 percent of voters said they favor life without parole, while only 44 percent leaned toward keeping the death penalty. Public Policy Poll, *Survey of 501 North Carolina voters Jan. 30-Feb. 1, 2019*, http://www.cdpl.org/wp-content/uploads/2019/02/ncpoll2019-1.pdf. The percentage of those supporting the death penalty dwindled even further, to 25 percent, when those polled were offered a larger range of alternatives, including requirements that offenders work and pay restitution to victims' families. *Id.* Driving these numbers, among other things, appear to have been concerns about racial injustice and the execution of the innocent. 70 percent of those polled believed it is likely that an innocent person has been executed in North Carolina, while 57 percent believed it was likely that racial bias influences who is sentenced to death. *Id.* The public's perception in this regard aligns with the significant problems with North Carolina's implementation of the death penalty outlined below. *See* IV (A)(2), (4), *infra*.

A. **North Carolina's Near Total Abandonment of Capital Punishment Demonstrates a Consensus Against its Use.**

At the time of Appellant-Burke's trial, the death penalty in North Carolina was a common-place feature of the criminal justice system. In 1993, there were 32 death sentences in North Carolina. *See* DPIC, *Death Sentences From 1977*. Although capital punishment remains authorized by law, administration of the penalty reveals a consensus that the punishment is excessive, entirely unusual and, therefore, unconstitutional. North Carolina has increasingly rejected the death penalty as a punishment over the last half-century—and particularly in the last ten years. "Statistics about the number of executions may inform the consideration whether capital punishment … is regarded as unacceptable in our society." *Kennedy*, 554 U.S. at 433.

Between 2007 and 2017, there were over 5,971 intentional homicides committed in North Carolina.[8] After 2006, there have been zero executions in North Carolina. Over the last seven years, North Carolina has averaged less than one death sentence a year. See DPIC Death Sentences From 1977 (NC has had 5 death sentences over the last 7 years). Indeed, during the last 7 years, there have been 25 trials that resulted in life sentences.

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[8] North Carolina State Bureau of Investigations, *Crime Reporting, 2017 Annual Summary Report and Violent Crime Offenses Ten Year Trends*, http://crimereporting.ncsbi.gov/Reports.aspx.

In 2015, the North Carolina Office of Indigent Defense Services published a study of the state's capital cases, tracking those disposed of between fiscal years 2007 and 2015. It found that the large majority of declared capital cases, 58.1%, resulted *not* in life or death verdicts – but rather in second-degree murder convictions or less. *Id.* at 4. Meanwhile, only 2.2% ended in a death verdict. *Id.* The rare instances when a North Carolina jury returned a death sentence made up an even lower percentage, when considered as a percentage of *all* potential capital cases based on the top charge. Less than one-half of one percent of such cases resulted in death sentences. *Id.* at 31 (Disposition Table, totally 3,913 cases disposed of, with only 18 death sentences). Even in the relatively small universe of cases in which prosecutors sought death, and then persisted to do so all the way through a trial's sentencing phase, leaving it to a North Carolina (death qualified) jury to decide, only roughly 14% resulted in a death sentence. *Id.* (Disposition Table, 17/119). The numbers have only since plummeted further. No person in this state has been sentenced to death since April of 2016. North Carolina Department of Public Safety, *Death Row Roster*, https://www.ncdps.gov/Index2.cfm?a=000003,002240,002327,002328 (listing all death row inmates by year of admission).

In death penalty cases, "'the jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved,' and … it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (quoting *Gregg*, 428 U.S. at 181

(concluding that the death penalty for rape of an adult woman is unconstitutional, in part, because 9 out of 10 rape cases had not resulted in a death sentence)).[9] These decisions, made by citizens who actually implement the death penalty, are substantially more relevant than statements by pundits or public opinion polls. *See Santiago*, 122 A.3d at 54 (finding a statewide consensus in Connecticut against the death penalty where, "[a]lthough some opinion polls continue to reflect public support for the death penalty in theory, in practice, our state has proved increasingly unwilling and unable to impose and carry out the ultimate punishment"). Regardless, as described above, the most recent polling confirms that public opinion among North Carolinians mirrors the record of recent North Carolina juries, who have overwhelmingly favored life verdicts.

The total number of death sentences imposed is a particularly telling measure of consensus because it reflects not only the decision of the jury itself, but also the

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[9] Even the incredibly low numbers set forth above actually overstate the degree to which North Carolina's citizenry supports the death penalty. Because capital juries are entirely composed of death-qualified members, i.e., those who will commit to considering and imposing the death penalty in an appropriate case, verdicts reflect the consensus of the dwindling portion of society open to imposing a death sentence. *See Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). The significant segment of the population that is entirely opposed to capital punishment is excluded from service and therefore, its views are unrepresented in this metric. *Baze*, 553 U.S. at 84 (Stevens, J., concurring) ("The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.").

exercise of discretion by locally-elected prosecutors handling potentially capital cases. *See Enmund v. Florida*, 458 U.S. 782, 796 (1982) (noting that lack of death sentences for felony murder "tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder"). This "examination of actual sentencing practices . . . where the sentence in question is permitted by statute discloses a consensus against its use." *Graham*, 560 U.S. at 62.

B. North Carolina's Abandonment of the Death Penalty Is Not An Anomaly But is Consistent with a Nationwide Trend Away from Its Use.

The consensus against the death penalty in North Carolina leads a strong and growing rejection of the punishment nationwide. Review of the "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions," *Kennedy*, 554 U.S. at 421, reveals a growing consensus against the death penalty. Of the fifty-three jurisdictions in the United States (fifty states, the District of Columbia, the U.S. military, and U.S. government), the death penalty is now entirely prohibited in 21 jurisdictions, but has essentially been abandoned or is in disuse in an additional 14 jurisdictions, summing to 35 the jurisdictions where the death penalty is either unlawful or in a period of disuse.

Death sentences and executions have declined dramatically over time. The abandonment of capital punishment is broad, non-partisan, and based upon a broad set of circumstances, including moral aversion to the death penalty, cost, and an acknowledgment of the inability to identify the most culpable offender and the

unsuccessful efforts to regulate capital punishment. This process reflects the broad evolution of a civilized society and a transformative movement that brings us closer to our founding ideals.

1. Twenty-one jurisdictions do not have the death penalty.

Twenty states plus the District of Columbia do not have the death penalty. These states are: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. DPIC, *States With and Without the Death Penalty*, https://deathpenaltyinfo.org/states-and-without-death-penalty.

Significantly, as the Court noted in *Atkins* and *Simmons*, the trend is clear. *Atkins*, 536 U.S. at 315-316 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Simmons*, 543 U.S. at 566 (same). Eight of these states have rejected capital punishment in the past dozen years: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013); Delaware (2016); and Washington (2018).

2. Three Additional Jurisdictions Have Suspended The Death Penalty And Exhibit Long-Term Disuse.

As the Court observed in *Hall v. Florida*, 572 U.S. 701, 716 (2014), states that have suspended use of the death penalty, coupled with long-term disuse are similar to those that have abolished the punishment. *Id.* (placing "on the abolitionist side of

the ledger . . . Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years").

Three jurisdictions—Colorado, Oregon, and Pennsylvania, have moratoria in place, suspending use of the death penalty, and a long history of disuse. *See* DPIC, *2018 Midterm Elections: Governors in Moratorium States Re-Elected, Controversial California D.A. Ousted*, https://deathpenaltyinfo.org/node/7239 (noting the moratoria in Colorado, Oregon, and California, and linking to media reports). Colorado has executed one individual since 1967. Execution Database (filter for indicated states). Oregon has executed two individuals since 1962—both were volunteers. *Id.* Pennsylvania has executed only three individuals since 1962—each was a volunteer. *Id.*

3. Seven Additional Jurisdictions Have Constitutionally Significant Long-Term Disuse and No Expected Use.

At least seven states have exhibited long-term disuse by limiting death-sentencing and executions.

i) *New Hampshire*. Though it retains the death penalty by statute, New Hampshire has not performed an execution in 80 years, Execution Database (filter for NH), and has not sentenced a person to death in ten years. DPIC, *New Hampshire*, https://deathpenaltyinfo.org/new-hampshire-1.

ii) Wyoming has executed one person in the last 50 years. Execution Database (filter for WY). Wyoming has no person on death row, and has not sentenced a person to death in more than ten years. DPIC, *Wyoming*,

https://deathpenaltyinfo.org/Wyoming-1; Nick Reynolds, *Will the Wyoming legislature repeal the death penalty this year?,* Casper Star Tribune, Jan. 13, 2019, https://trib.com/news/local/govt-and-politics/will-the-wyoming-legislature-repeal-the-death-penalty-this-year/article_796673c0-bdc2-5493-8de7-2c70692e01b2.html (observing "no sentenced criminals currently sit on death row").

iii) Kansas, as the *Hall* Court noted, "has not had an execution in almost five decades[,]" *Hall*, 572 U.S. at 716, and has only sentenced two people do death in the last seven years. DPIC, *Kansas*, https://deathpenaltyinfo.org/Kansas-1.

iv) Idaho has executed two offenders in the last twenty-five years, Execution Database (filter for ID), and has only sentenced one person to death in the last eight years. DPIC, *Idaho*, https://deathpenaltyinfo.org/Idaho-1.

v) South Dakota has three people on its row and has only sentenced one person to death in the last five years. DPIC, *South Dakota*, https://deathpenaltyinfo.org/South-Dakota-0. Three of the four individuals executed in South Dakota over the last fifty years have waived appeals and volunteered for execution. Execution Database (filter for SD).

vi) Kentucky has executed three individuals since 1968 and has only sentenced one person to death in the last seven years. DPIC, *Kentucky*, https://deathpenaltyinfo.org/kentucky-1; Execution Database (filter for KY).

vii) Montana has not sentenced a person to death in twenty-three years, and has not executed a person for more than ten years. DPIC, *Montana*, https://deathpenaltyinfo.org/montana-1; Execution Database (filter for MT). The only

execution in the last twenty years was a "volunteer." Execution Database (filter for MT).

In sum, of the 14 death sentences carried out by these seven jurisdictions, seven have involved inmates who volunteered for execution.

4. Four Additional Jurisdictions Have Not Executed An Individual For Ten Years.

Four additional jurisdictions, including North Carolina, have not executed anyone for more than ten years: California (2006); Pennsylvania (1999); Nevada (2006); North Carolina (2006). Execution Database (filter for indicated states). Pennsylvania, Nevada, North Carolina and California have large death rows, but the death penalty exists only in theory. It has been more than ten years since California executed anyone. A federal judge has remarked that California's "dysfunctional administration" of the death penalty is so broken that the death penalty has become arbitrary and serves "no retributive or deterrent purpose." *Jones*, 31 F. Supp. 3d at 1053.

This July, it will have been 20 years since Pennsylvania executed anyone, and all three of the individuals executed in Pennsylvania "volunteered for execution." Recently, the Pennsylvania Supreme Court has called for briefing on the constitutionality of its death penalty. Order, *Cox and Marinelli v. Penn.,* Nos. 102 & 103 EM (Dec. 3, 2018).

It has been 13 years since Nevada executed a person. Execution Database (filter for NV). And eleven of the twelve people executed in Nevada waived their appeals and sought their own execution. *Id.*

And while North Carolina executed 43 persons between 1984 and 2006, it has executed not one since, Execution Database (filter for NC), and juries have only imposed death sentences once in the last four years. NC Death Row Roster.

5. Even in States that Retain the Death Penalty, the Decline in Use is Substantial.

Even in states that retain the death penalty, decline is substantial. Virginia has not sentenced a person to death in seven years. DPIC, Virginia, https://deathpenaltyinfo.org/virginia-1. South Carolina has not sentenced a person to death in four years, DPIC, South Carolina, https://deathpenaltyinfo.org/south-carolina-1, or executed a person since 2011. Execution Database (filter for SC). Utah has not sentenced a person to death for ten years, DPIC, *Utah*, https://deathpenaltyinfo.org/utah-1#sent, or executed a person since 2010. Execution Database (filter for UT). Louisiana has executed one person (a volunteer, Gerald Bordelon) in the last fifteen years. *Id.* (filter for LA). The death penalty has been confined to a narrowing group of states, and limited number of instances.

And even those retention states are using the ultimate sanction less and less. In 2015, only 49 new death sentences were imposed nationally, an all-time post-*Furman* low. The average over the last four years (2015-2018) has been just over 40 death sentences per year. Executions have also steadily decreased for over a decade

and are at their lowest levels in twenty-five years, with only nine states performing a total of 25 in 2018. Over the last four years, the average number of executions has been 24. Execution Database (filter for years 2015-2018). Only five states (Texas, Florida, Georgia, Missouri and Alabama) have had executions in at least three of the last four years. *Id.* These five states are responsible for 81 of the 98 executions since 2015. *Id.* (filter for years 2015-2019). Indeed, 58 of the 98 executions between 2015 and today, have occurred in Texas and Georgia. *Id.*

Significantly, where prosecutors and politicians formerly stood on pro-death platforms, reflecting what Justice Stevens described as "the general popularity of anticrime legislation," *Roper*, 543 U.S. at 566, more and more prosecutors reflect an evolved sense that retribution undermines confidence in the justice system. *See* Emily Bazelon & Miriam Krinsky, *There's A Wave of New Prosecutors. And they Mean Justice,* N.Y. Times, December 11, 2018, https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html.

IV. EXERCISE OF THIS COURT'S INDEPENDENT JUDGMENT REVEALS THE DEATH PENALTY IS CRUEL AND UNUSUAL.

Applying its independent duty to determine whether a legislatively-imposed penalty is constitutionally excessive this Court should look at the below factors and determine that the death penalty is disproportionate and, therefore, cruel.

A. Capital Punishment Serves No Legitimate Penological Purpose.

The purposes purportedly served by capital punishment are "retribution and deterrence." *Gregg*, 428 U.S. at 183. But when the infliction of capital punishment no longer serves a penological purpose, its imposition represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312. Simply stated, it is necessarily cruel. *Kennedy*, 554 U.S. at 440-44. Capital punishment, as it is administered in North Carolina, is cruel because it serves neither deterrence, retribution, nor any other valid purpose.

1. The Death Penalty Does Not Deter Murder.

No reliable evidence supports the theory that the death penalty deters murder. In a 2012 analysis of several deterrence studies, the National Research Council concluded, "research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates." National Research Council, *Deterrence and the Death Penalty* 102 (Daniel S. Nagin & John V. Pepper eds. 2012). *See also Baze*, 553 U.S. at 79 (Stevens, J., concurring in judgment) ("The legitimacy of deterrence as an acceptable justification for the death penalty is also questionable, at best. Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment.") (footnote omitted); *Glossip,* 135 S. Ct. at 2768

(Breyer, J., dissenting) (discussing why death penalty is unlikely to deter murder). Even without resort to statistical analysis, however, it is obvious that a punishment as infrequently imposed as the death penalty is in North Carolina can serve no deterrent purpose.

2. The Death Penalty Does Not Contribute Any Significant Retributive Value Beyond That Afforded By A Sentence of Life Without Parole.

Retribution is the principle that "most often can contradict the law's own ends," because, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Kennedy*, 554 U.S. at 420. Though the death penalty must be reserved for only the most aggravated homicides committed by the most culpable offenders, *see, e.g.*, *Atkins*, 536 U.S. at 319, experience demonstrates that a number of systemic factors—overzealous prosecution, inadequate defense lawyering, and the imprecision of assessing the culpability of people with serious functional impairments—undermine the ability of jurors to accurately assess whether death is the appropriate sentence. Moreover, whether it is the historical connection between capital punishment and lynching, or the contemporary findings that racial disparities continue to plague the death penalty in North Carolina and other states, it is hard to escape the conclusion

that in the context of the death penalty, race and retribution remain inextricably tied.[10]

3. The Death Penalty Is Not Reserved For The Most Aggravated Offenses or the Most Culpable Offenders.

The United States Supreme Court has consistently attempted to limit the imposition of capital punishment to "a narrow category of the most serious crimes," in order to ferret out those crimes which, while severe, are not deserving of the ultimate punishment. *Atkins*, 536 U.S. at 319; *see also Kennedy,* 554 U.S. at 446-447 (banning the death penalty for non-homicide offenses); *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (requiring states to narrow their homicide statutes).

While the imposition of the ultimate sanction of death is undeniably rare, this infrequency has not ensured the punishment is limited to the most culpable offenders. Justice Breyer recently noted that numerous studies "indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*." *Glossip,* 135 S. Ct. at 2760 (Breyer, J., dissenting).

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[10] See Justin D. Levinson, Robert J. Smith, & Danielle Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513 (2014).

Nor is the death penalty reserved for those most culpable. "[D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Thus, the death penalty ought to be limited to those offenders with "a consciousness materially more depraved" than that of the typical person who commits a murder. *Godfrey*, 446 U.S. at 433.

And yet, despite the numerous procedural safeguards in place, a substantial proportion of the executed and condemned suffer or suffered from limited intellectual ability, severe mental illness, addiction, or an abusive upbringing such that death is neither a just nor a constitutionally proportionate sentence.[11] Timothy Richardson, a current death row prisoner, illustrates the failure of these safeguards. Richardson, was born with fetal alcohol syndrome, and developed acute lead poisoning as a child. He never functioned independently, often wore his clothes inside out, and had IQ scores in the range of intellectual disability. Yet Richardson remains on death row. Center for Death Penalty Litigation, *Unequal Justice: How obsolete laws and unfair*

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[11] Smith, Robert J. Smith, Sophie Cull, and Zoe Robinson, *The Failure of Mitigation?*, 65 Hastings L. J. 1221 (June 2014).

trials created North Carolina's outsized death row 24-25 (September 2018), https://www.cdpl.org/category/reports/ (hereafter "CDPL, Unequal Justice").

Perhaps more troubling are the many impairments or disadvantages of which a jury and court are entirely unaware because of the failure of our system to provide effective counsel. The failure of defense counsel to discover and present mitigation causes the system to break down: it is not the most culpable who are executed, but those with the worst counsel.[12]

The risk of execution due to inadequate counsel and undisclosed mitigation runs particularly high in older cases in North Carolina, like Mr. Burke's. In 2001, North Carolina overhauled its system of indigent defense funding and imposed new standards on counsel. CDPL, Unequal Justice, *supra*, at 10-11. In just one such egregious North Carolina case, powerful evidence of childhood abuse went undeveloped at trial and unpresented in post-conviction after MAR counsel filed a two page pleading with no evidence attached. *Id.* at 17.

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[12] *See*, *e.g.*, *Justice Backs Death Penalty Freeze*, CBS News, Apr. 10, 2001 at http://www.cbsnews.com/news/justice-backs-death-penalty-freeze (quoting Supreme Court Justice Ruth Bader Ginsburg) ("People who are well represented at trial do not get the death penalty."); Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1883 (1994).

As a result of those reforms, new death sentences plummeted. Of the 142 death row prisoners in North Carolina, 103 were sentenced before July, 2001, when the new indigent defense standards went into effect. *Id.*

Waiver of the right to present mitigation is another factor that distorts the outcome, resulting in the potential execution of those who are not the worst of the worst. Waiver makes it impossible to know what hidden factors or impairments may drive a defendant's (typically) irrational opposition to the jury's consideration of mitigating information. *See*, *e.g.*, *Godinez v. Moran*, 509 U.S. 389, 416-17 (1993) (Blackmun, J., dissenting) ("Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf. The psychiatrists' reports supplied one explanation for Moran's self-destructive behavior: his deep depression.").

Finally, the failed experiment of guided discretion is reflected in the abandonment by the American Law Institute of the Model Penal Code's approach to the death penalty. North Carolina based its capital sentencing scheme in large part on the Model Penal Code. *State v. Johnson*, 298 N.C. 47, 60 (1979). But the American Legal Institute has now determined that "on the whole the section has not withstood the tests of time and experience[.]" *See* The Executive Office of the American Law Institute, *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty*, 3-5 (2009),

https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf.

All in all, the foundation has now revealed its many fatal fault lines.

4. There Remains an Unacceptable Risk of Executing the Innocent.

In North Carolina, as elsewhere, it is now incontrovertible that states have sentenced to death startling numbers of innocent people. *See Glossip*, 135 S. Ct. at 2756-58 (Breyer, J., dissenting). Advances in forensic evidence, particularly DNA testing, have contributed to a substantial number of exonerations in capital cases – 164 to date. *Id*.[13] In North Carolina alone, nine persons have been exonerated following capital convictions. Center for Death Penalty Litigation, *On Trial For Their Lives: the Hidden Costs in North Carolina* (June 2015).[14]

Condemning an innocent person to death represents the most horrific state failure imaginable. The disproportionate concentration of this horror in North Carolina may well relate to unbridled prosecutorial zeal in seeking executions, even when the defendant's guilt is in serious question. Over a period of 26 years, North

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[13] Death Penalty Information Center, *Innocence and the Death Penalty*, https://deathpenaltyinfo.org/innocence-and-death-penalty.

[14] A federal court of appeals recently reinstated a North Carolina defendant's habeas petition based on his showing of actual innocence. *Finch v. McKoy*, __F.3d __, No. 17-6518, 2019 WL 324667 (4th Cir. 2019). The defendant had originally been sentenced to death and had his sentence commuted in 1977. *Id*. at *1.

Carolina tried capitally defendants in 50 cases that resulted in acquittal of the defendants' murder charges. *Id*. African-American defendants were significantly overrepresented in this group of overcharged defendants. *Id*.

The horror and injustice the state causes by sentencing the innocent to death cannot be overstated. As just one example, Justice Scalia used Henry McCollum as a poster child for the death penalty for his purported role in "the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that!" *Callins*, 510 U.S. at 1143 (Scalia, J., concurring). After being so vilified, Henry McCollum spent twenty more years on death row, before his ultimate exoneration just five years ago. *See* Jonathan Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. Times, Sept. 2, 2014.

As if that were not bad enough, concern grows daily that states have already executed actually innocent defendants.[15] As Justice Stevens recently noted, the risk of killing an innocent person, which cannot be entirely eliminated, is a "sufficient argument against the death penalty: society should not take the risk that that might

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[15] Public Policy Poll, *Survey of 501 North Carolina voters Jan. 30-Feb. 1, 2019*, http://www.cdpl.org/wp-content/uploads/2019/02/ncpoll2019-1.pdf (finding 70 percent of North Carolinians believe that the state has executed an innocent person). *See Glossip*, 135 S. Ct. at 2758 (Breyer, J., dissenting); Maurice Possley, *Fresh Doubts Over a Texas Execution*, Washington Post, Aug. 3, 2014 (discussing case of Cameron Todd Willingham); James Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (Columbia Univ. Press 2014 ed.) (discussing case of Carlos DeLuna).

happen again, because it's intolerable to think that our government, for really not very powerful reasons, runs the risk of executing innocent people."[16]

5. North Carolina's Death Penalty is Particularly Broken.

North Carolina has also distinguished itself by failing, in many instances, to provide meaningful appellate review. In theory, proportionality review is supposed to safeguard against the execution of those who are not the worst of the worst. In practice, here, it plays out as an opaque, unduly narrow, and "dysfunctional process." Brooks Emanuel, *North Carolina's Failure to Perform Comparative Proportionality Review: Violating the Eighth and Fourteenth Amendments by Allowing the Arbitrary and Discriminatory Application of the Death Penalty*, 39 N.Y.U. Rev. L. & Soc. Change 419, 433 (2015). The process does not even require the Court to identify the cases it considered as part of its analysis. *Id.* at 442-443. Unsurprisingly, the Court has found just one case disproportionate in a span of 24 years.

Only against this backdrop of racial bias and arbitrariness in its administration, uncorrected by meaningful proportionality review, has North Carolina's death penalty even been able to continue in its limping, ineffectual, and unjust state.

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[16] *See also* Robert Sanger, *CACJ'S Past President Robert Sanger Interviews United States Supreme Court Justice John Paul Stevens*, California Attorneys for Criminal Justice, Feb. 21, 2016, http://www.cacj.org/Resources/Educational-Video-Archive/Interview-with-Justice-Stevens.aspx.

V. THE DEATH PENALTY IN NORTH CAROLINA HAS A SORDID HISTORY THAT UNDERMINES CONFIDENCE IN THE ADMINISTRATION OF JUSTICE.

The death penalty in America has been infected by the disease of racial bias and racism since inception. North Carolina regrettably is no different.

As noted above, if the death penalty does not serve either penological goal of deterrence or retribution, it is excessive. Justice Stewart's opinion in *Gregg*, noted the ambiguous evidence of deterrence. *Gregg*, 428 U.S. at 185 (Opinion of Stewart, Powell, and Stevens, JJ.) ("[T]here is no convincing empirical evidence either supporting or refuting this view.").[17] The Court nevertheless found that the death penalty served a purpose of ensuring confidence in the administration of justice: "'When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds

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[17] See *Glossip*, 135 S. Ct. 2768 (Breyer & Ginsburg, JJ., dissenting) (noting "30 years of empirical evidence" insufficient to establish a deterrent effect) (citing *Baze*, 553 U.S. at 79 (Stevens, J., concurring in judgment)); *see also United States v. Fell*, 224 F. Supp. 3d 327, 349 (D. Vt. 2016) ("Although deterrence of future murders is identified as a basis for the death penalty, the statistical evidence that executions, many years after the offense conduct, affect the murder rate has not been accepted by the National Resource Council and continues to be unprovable."). The court in *Fell* ultimately held after a multi-week evidentiary hearing that "[t]he time has surely arrived to recognize that the reforms introduced by *Gregg* and subsequent decisions have largely failed to remedy the problems identified in *Furman*. Institutional authority to change this body of law is reserved to the Supreme Court." *Id.* at 359.

of anarchy of self-help, vigilante justice, and lynch law.'" *Gregg,* 428 U.S. at 183 (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring)). Like other troubling historical vestiges, the reliance on the death penalty – rather than the constitutional protections – to reduce lynching, gives pause.

After the Civil War, federal troops in states across the south protected the right to vote, and other civil rights guaranteed to African-Americans. State constitutions were progressive, inclusive, and protective of rights. *See*, *e.g.*, W.E.B. Du Bois, *Reconstruction and Its Benefits*, 15 Am. Hist. Rev. 781, 795 (1910). The Tilden-Hayes Compromise changed all of that. The removal of federal troops led to lynchings in North Carolina and across the South. Editorial, *New Museum Offers a Chance to Acknowledge a Shameful History*, Charlotte Observer, April 23, 2018. By 1898, with no federal protection left, white Democrats took control of North Carolina by stuffing ballot boxes and intimidating black voters. LeRae Umfleet, *1898 Wilmington Race Riot Report* 194-211 (N.C. Dep't of Cultural Resources 2006). In Wilmington, for example, white Democrats employed "rapid fire guns" and mob violence. *Id.* at 146, 160-65. This was lethal.

> Several black men were identified as killed or wounded in sporadic skirmishes throughout the day. Some black men were found and taken to the hospital on the eleventh. Several men died from their wounds in the days following the riot. One white man was critically wounded, a few other whites were also wounded, but there were no white casualties.

Id. at 121. And it resulted in a coup, replacing black people in power with whites:

> During the riot, members of Waddell's Committee of Twenty-Five, George Rountree, John D. Bellamy, and others worked to

> facilitate a coup d'etat to overthrow the Republican mayor, Board of Aldermen, and chief of police. By 4:00 P.M., the elected officials were resigning and being replaced by men selected by the Committee of Twenty-Five. The newly placed Board of Aldermen elected Waddell mayor.

Id. The massacre was not about crime or corruption but was about political power. It was designed to terrorize the free press. The massacre began an almost hundred years of political power. Advancing capital punishment in order to allow the "steam" of racist venting to blow off, in retrospect is a judicial failure warranting some remedy.

As the Supreme Court explained:

> The Nation must continue to make strides to overcome race-based discrimination. The progress that has already been made underlies the Court's insistence that blatant racial prejudice is antithetical to the functioning of the jury system and must be confronted in egregious cases like this one despite the general bar of the no-impeachment rule. It is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history. The Court now seeks to strengthen the broader principle that society can and must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution.

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) ("Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process. … It thus injures not just the defendant, but 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'") (internal citations omitted). North Carolina's history deserves special consideration. According to historian Vann R. Newkirk, between

1865 and 1941, 168 human beings have suffered and died at the hands of North Carolina lynch mobs. *See* Vann R. Newkirk, *Lynching in North Carolina: A History, 1865-1941* app. II at 167-70 (2009). *See also* Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (3d Ed., 2017), https://lynchinginamerica.eji.org/report/.

Other state courts have taken on this responsibility. Recently, the Washington Supreme Court declared the death penalty unconstitutional under the Washington State Constitution, observing:

> The death penalty is invalid because it is imposed in an arbitrary and racially biased manner. While this particular case provides an opportunity to specifically address racial disproportionality, the underlying issues that underpin our holding are rooted in the arbitrary manner in which the death penalty is generally administered. As noted by appellant, the use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant. The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of our state constitution.

Gregory, 427 P.3d at 627. A true reckoning of North Carolina's similar facts, evaluated under a similar state constitution, can yield only the same result.

CONCLUSION

All of the factors discussed above undermine the constitutionality of capital punishment within North Carolina. As Justice Stevens observed:

> Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time. . . . . While Justice Thomas would apparently not rule out a death sentence for a

> $50 theft by a 7-year-old, . . . the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

Graham, 560 U.S. at 85 (Stevens, J., concurring). Such a change has occurred here. It is the province and duty of this Court to recognize it.

Respectfully submitted this the 15th day of February 2019.

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