THE EMPEROR SAYS HE HAS CLOTHES: A RESPONSE TO NORTH CAROLINA'S FAILURE TO PERFORM PROPORTIONALITY REVIEW

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I. INTRODUCTION 139
II. PROPORTIONALITY ARGUMENTS SIMILAR TO THOSE MADE BY EMANUEL HAVE FAILED TO GAIN TRACTION WITH THE NORTH CAROLINA SUPREME COURT 140
III. RECENT COURT DECISIONS IMPERIL EMANUEL'S RELIANCE ON THE RACIAL JUSTICE ACT 142
IV. CONCLUSION 144

I. INTRODUCTION

In *North Carolina's Failure to Perform Comparative Proportionality Review*,[1] Brooks Emanuel argues that the North Carolina Supreme Court's mechanism for evaluating the proportionality of death sentences is skewed in favor of upholding them, and that the evidence of racial discrimination in jury selection gleaned from the recent Racial Justice Act cases[2] is proof of the North Carolina Supreme Court's failure to recognize and address the arbitrary administration of the death penalty in North Carolina. In this response, I will first examine how the Court has responded in the past to arguments similar to those made by Emanuel. I will then provide an update about the status of the Racial Justice Act litigation.

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[1] 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 (2015).

[2] Emanuel discusses the case of Marcus Raymond Robinson, *id.* at 451-57, as well as those of Tilmon Golphin, Christina Walters, and Quintel Augustine, *id.* at 457-62 [hereinafter the Racial Justice Act Litigation]. Robinson obtained relief under the North Carolina Racial Justice Act, § 15A-2012(a)(3), S.L. 2009-464, 2009 N.C. Sess. Laws 1213, 1214 (repealed 2012). *See* Emanuel, *supra* note 1, at 451. Golphin, Walters, and Augustine received relief under the revised version, Act to Amend Death Penalty Procedures, § 15A-2011(a) & (c), S.L. 2012-136, 2012 N.C. Sess. Laws 471, 471 (amending North Carolina Racial Justice Act, § 15A-2011, S.L. 2009-464, 2009 N.C. Sess. Laws 1213, 1214) (repealed 2013)). *See* Emanuel, *supra* note 1, at 457-58.

II.
PROPORTIONALITY ARGUMENTS SIMILAR TO THOSE MADE BY EMANUEL HAVE FAILED TO GAIN TRACTION WITH THE NORTH CAROLINA SUPREME COURT

Mr. Emanuel conducts an impressive review of North Carolina Supreme Court proportionality decisions in capital cases.[3] Mr. Emanuel argues that because proportionality review is the primary mechanism for protecting against the arbitrary use of the death penalty,[4] the court's failure to conduct a true comparative proportionality review--considering cases in which the defendant was sentenced to life as well as cases in which the defendant was sentenced to death--is unconstitutional.[5] Unfortunately for the men and women on North Carolina's death row, the court has been confronted with similar arguments in the past and come to the opposite conclusion.

In *State v. Parker*, counsel for Carlette Parker argued that the standards set by the North Carolina Supreme Court are so vague and arbitrary that they deny defendants their rights to notice, effective assistance of counsel, due process of law, and freedom from cruel and unusual punishment.[6] Although proportionality review is not constitutionally required under *Pulley v. Harris*, Parker contended that once the state develops such a mechanism the defendant has a liberty right therein.[7] Parker argued that the defendant's due process right had been violated because the court's proportionality review system failed to give adequate weight to mitigating evidence, considered non-statutory aggravating factors, and inserted its own judgment in an undefined and unknowable manner.[8] The court, however, noted that its methodology had been "clearly set forth in numerous cases," even while it was "not susceptible to exact definitions or precise numerical comparisons."[9] The court further observed that proportionality review is neither vague nor arbitrary so long as it "allow[s] broad consideration of all [relevant] evidence" from both the state and the defendant, and permits members of the court to "utilize their experienced judgment."[10] The court cited only death cases in affirming Ms. Parker's death sentence.[11]

In *State v. McNeill*, counsel argued that the North Carolina Supreme Court's methodology was inconsistent with the legislative intent of the statute mandating proportionality review, N.C. Gen. Stat. § 15A-2000(d)(2).[12] In 1995, the legislature amended N.C. Gen. Stat. § 7A-27(a) so that first-degree murder cases resulting in a life sentence would be considered on direct appeal by the North Carolina Court of

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[3] Emanuel, *supra* note 1, at 431-43.
[4] *Id.* at 422.
[5] *Id.* at 432.
[6] Brief of Defendant-Appellant at 74, State v. Parker, 553 S.E.2d 885 (N.C. 2001) (No. 556A99).
[7] *Id.* at 85 (citing Pulley v. Harris, 465 U.S. 37 (1983)).
[8] *Id.*
[9] State v. Parker, 553 S.E.2d 885, 903 (N.C. 2001).
[10] *Id.*
[11] *Id.*
[12] Brief of Defendant-Appellant at 71, State v. McNeill, 624 S.E.2d 329 (N.C. 2006) (No. 615A03).

Appeals rather than the North Carolina Supreme Court.[13] Since then, McNeill argued, the only cases regularly added to the North Carolina Supreme Court's pool for consideration of proportionality have been death cases.[14] Because death cases continue to accrue while life cases do not, McNeil argued that it becomes easier for the court to find similarities in the death part of the pool.[15] This results in a significant and unconstitutional modification to the court's approach. In its opinion, the court flatly stated that McNeill had "misconstrued" the mechanisms of review and that it would "consider all cases which are roughly similar in facts to the instant case."[16] Nonetheless, the court went on to cite no life cases in its analysis, relying exclusively on the eight death cases in which it previously found the sentence of death to be disproportionate.[17]

Litigants often challenge the court to follow its stated policy of considering the entire pool of first degree murder cases by comparing their client's case not only to death cases, but also to several cases in which similar facts led a jury to return a life sentence.[18] In *Taylor*, the defense reviewed decisions issued by the Court of Appeals and Supreme Court in other robbery-murders and found that life was imposed in at least twenty-three out of twenty-six cases.[19] The three other cases resulting in death were significantly more aggravated than Taylor's crime.[20] The *Taylor* brief closely examined a handful of life cases,[21] but in its decision, the North Carolina Supreme Court discussed only cases resulting in a sentence of death.[22]

Because federal courts regard "proportionality review [as] solely a matter of state law," any change to North Carolina's methodology must come from either the state legislature or its highest court.[23] However, both routes appear inauspicious. First, as Emanuel observes, the legislature has taken a conservative turn in recent years, making defendant-friendly change unlikely from that direction.[24] Second, although there have been changes to the membership of the court, there is no reason to believe it does not still cling fast to its assertion in *State v. McNeill* that "[w]e

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[13] *Id.* at 76.
[14] *Id.*
[15] *Id.*
[16] State v. McNeill, 624 S.E.2d 329 (N.C. 2006).
[17] *Id.* at 344-345.
[18] *See, e.g.*, Brief of Defendant-Appellant at 211-12, State v. Taylor, 669 S.E.2d 239 (N.C. 2008) (No. 719A05).
[19] *Id.*
[20] *Id.* at 204-11.
[21] *Id.* at 211-14.
[22] *Taylor*, 669 S.E.2d at 265-279. There are other instances in which the North Carolina Supreme Court has failed to discuss even life cases relied upon by the defendant in his proportionality argument. *See, e.g.*, State v. Hooks, 548 S.E.2d 501, 507 (N.C. 2001) (declining to address the "numerous" life cases cited by the defendant); State v. Jaynes, 549 S.E.2d 179 (N.C. 2001) (declining to consider fact of co-defendant's life sentence in evaluating proportionality); and State v. McNeill, 509 S.E.2d 415, 427 (N.C. 1998) (noting "that the fact that a defendant is sentenced to death while a codefendant receives a life sentence for the same crime is not determinative of proportionality.").
[23] Flippen v. Polk, No. 1:01CV00674, 2004 WL 1348220, at *27, *44 (M.D.N.C. 2004).
[24] Emanuel, *supra* note 1, at 457.

consider all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison."[25] In other words, although the court has not discussed a life case in its proportionality analysis in at least fifteen years, practitioners should have faith that the court is considering such cases in its private and confidential deliberations. Unfortunately, litigants have little else to rely on--due in part to the Racial Justice Act, the North Carolina Supreme Court has not issued a decision reaching the proportionality question since 2011.[26] For better or worse, "[t]he final decision of whether a death sentence is disproportionate ultimately rests upon the experienced judgments of the members of [the] Court."[27]

III.
RECENT COURT DECISIONS IMPERIL EMANUEL'S RELIANCE ON THE RACIAL JUSTICE ACT

Emanuel argues in part that the information about bias in capital jury selection revealed in the course of North Carolina's Racial Justice Act litigation is proof that the state's current proportionality review scheme fails to prevent the arbitrary and discriminatory application of the death penalty.[28] Recent developments limit the ability of advocates to rely on the outcome of the prior litigation, though it is important to note that the evidence of racial bias developed to date has yet to be rebutted.

As discussed in Emanuel's article, Marcus Robinson's was the first and only case to go to a hearing under the original Racial Justice Act as passed in 2009.[29] After a two-week evidentiary hearing, Senior Resident Superior Court Judge Gregory A. Weeks concluded that race was a significant factor in the prosecution's use of peremptory strikes and re-sentenced Marcus Robinson to life imprisonment without the possibility of parole.[30]

On December 18, 2015, the North Carolina Supreme Court vacated Judge Weeks' landmark ruling.[31] The court found that Judge Weeks erred in denying the

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[25] 624 S.E.2d 329, 344 (N.C. 2006).

[26] Since the original Racial Justice Act went into effect in August 2009, the North Carolina Supreme Court has not issued decisions in any cases involving death sentences imposed after that date with the exception of *State v. Hembree*, 770 S.E.2d 77 (N.C. 2015), in which a new trial was ordered on other grounds, *id.* at 83. Of the cases pending on direct appeal at the time the Racial Justice Act was passed, the North Carolina Supreme Court has issued a decision in only three, and in all three decisions, the Court's written analysis was confined to death cases only. *See* State v. Waring, 701 S.E.2d 615, 666-67 (N.C. 2010); State v. Lane, 707 S.E.2d 210, 229-30 (N.C. 2011); and State v. Phillips, 711 S.E.2d 122, 153-54 (N.C. 2011).

[27] State v. Smith, 588 S.E.2d 453, 465 (N.C. 2003) (citation omitted).

[28] Emanuel, *supra* note 1, at 447-61.

[29] *Id.* at 451.

[30] Order Granting Motion for Appropriate Relief at 6-12, State v. Robinson, No. 91 CRS 23143, (N.C. Super. Ct. Apr. 20, 2012).

[31] Order at 2, State v. Robinson, 780 S.E.2d 151 (N.C. 2015) (No. 411A94-5).

State's third motion for a continuance, made at the beginning of the hearing, because the State had not received the final version of the statistical study at the heart of Robinson's evidence until a month prior.[32] However, as the court noted, the State long ago received all of the data underlying the study and a report summarizing its findings.[33] The court further found, without explanation, that the State was prejudiced by the denial of its third motion to continue.[34] The court expressed no opinion on the merits of Robinson's claim or Judge Weeks' finding that racism infected jury selection not only in his case, but statewide over a period of twenty years.[35] The case was remanded back to Cumberland County Superior Court.[36] Robinson has been returned to death row, where he awaits further proceedings.

Emanuel's article further discusses the cases of Quintel Augustine, Tilmon Golphin, and Christina Walters, which proceeded to a consolidated hearing under the amended Racial Justice Act in October 2012.[37] In an order spanning over 200 pages, Judge Weeks again concluded that the defendants had proven that race was a significant factor in jury selection and re-sentenced them to life without the possibility of parole.[38]

On December 18, 2015, the North Carolina Supreme Court also reversed Judge Weeks' ruling on these consolidated cases, finding that Judge Weeks' ruling on the motion to continue in *Robinson* "infected" this later proceeding.[39] In addition, the court found without explanation that the State was prejudiced by Judge Weeks' decision to join the three defendants in one evidentiary hearing.[40] Augustine, Golphin, and Walters have all been returned to death row.

Since his rulings in the RJA cases, Judge Weeks has retired from the bench. The cases are now before the current Senior Resident Superior Court Judge, James F. Ammons, Jr. Counsel for the defendants have asked Judge Ammons to recuse himself from future proceedings for reasons including Judge Ammons' own service as a prosecutor in Cumberland County, as well as his ongoing personal and professional relationships with several of the State's key witnesses in the prior hearings.[41]

For its part, the State has moved to dismiss the RJA defendants' cases without a new hearing.[42] The State contends that because the Racial Justice Act was repealed

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[32] *Id.* at 1-2.
[33] *Id.* at 1.
[34] *Id.* at 2.
[35] *Id.* at 3-4.
[36] *Id.* at 2-3.
[37] Emanuel, *supra* note 1, at 458-60.
[38] Order Granting Motions for Appropriate Relief at 210, State v. Golphin, No. 97 CRS 47314-15 (N.C. Super. Ct. Dec. 13, 2012), *rev'd sub nom*. Order at 2, State v. Augustine, 780 S.E.2d 552 (N.C. 2015) (No. 139PA13).
[39] Order at 2, State v. Augustine, 780 S.E.2d 552 (N.C. 2015) (No. 139PA13).
[40] *Id.* at 1.
[41] Defendant's Motion for Recusal at 1, North Carolina v. Augustine, No. 1 CRS 65079 (N.C. Super. Ct. Jan. 21, 2016).
[42] State's Motion to Dismiss Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act at 1, North Carolina v. Augustine, No. 01 CRS 65079 (N.C. Super. Ct.

in 2013 and the orders granting relief prior to that date have now been vacated, the defendants' claims are void.[43] The defense objected and asked to be heard on a variety of issues related to the State's motion. No action is expected at the state court level in the immediate future.

Meanwhile, counsel for Robinson and Golphin filed Petitions for Writ of Habeas Corpus in federal court contending that those defendants are being unlawfully held on death row under 28 U.S.C. § 2241 and challenging the possibility of a re-hearing and resentencing to death under double jeopardy.[44] The State has answered that the Petitions should be summarily dismissed for failure to exhaust their claims in state court pursuant to 28 U.S.C. § 2254(b)(1)(A).[45] A final decision on the petitioners' motions for a stay of state court proceedings is expected soon.

Finally, in related proceedings, the North Carolina Supreme Court granted certiorari on March 17, 2016 in the case of Rayford Burke.[46] Burke is one of approximately 150 death row inmates who filed petitions under the Racial Justice Act which were not heard before the Act was repealed. The *Burke* litigation is expected to decide whether the repeal of the Racial Justice Act will apply retroactively to those defendants. On the same date, the North Carolina Supreme Court granted certiorari on March 17, 2016 in the case of Andrew Ramseur.[47] The *Ramseur* litigation is expected to decide how the repeal affects the handful of cases that were pending on direct appeal at the time.

IV.
CONCLUSION

While recent developments imperil the precedential value of the original Racial Justice Act litigation, Emanuel's sense that something is amiss is not without support. The North Carolina Supreme Court last found a death sentence to be disproportionate in *State v. Kemmerlin*, which was decided well over a decade ago.[48] Since then, the Court has affirmed all forty death sentences it has examined for proportionality. Where a state supreme court appears unwilling to overturn any death sentence, its commitment to the duties of appellate review will continue to be questioned.[49] Although history has not smiled on past demands for true proportionality review, this does not foreclose the possibility that future courts will

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Feb. 1, 2016).

[43] *Id.* at 3-4.

[44] Petition for Writ of Habeas Corpus at 2, Robinson v. Joyer, No. 5:16-hc-02028 (E.D.N.C. Feb. 4, 2016); Petition for Writ of Habeas Corpus at 2, Golphin v. Joyer, No. 5:16-hc-02029 (E.D.N.C. Feb. 4, 2016).

[45] Supporting Brief for Motion to Dismiss at 6-9, Golphin v. Joyer, No. 5:16-hc-02029 (E.D.N.C. Feb. 24, 2016).

[46] Order Granting Certiorari, State v. Burke, No. 181A93-4 (N.C. March 17, 2016).

[47] Order Granting Certiorari, State v. Ramseur, No. 388A10 (N.C. March 17, 2016).

[48] State v. Kemmerlin, 573 S.E.2d 870 (N.C. 2002).

[49] *Cf.* Barfield v. Harris, 719 F.2d 58, 62 (4th Cir. 1983) (finding no deficiency in appellate system that regularly granted relief through proportionality review).

see fit to take a different approach.[50]

[50] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (barring the execution of juveniles and overruling *Stanford v. Kentucky*, 492 U.S. 361 (1989)); Atkins v. Virginia, 536 U.S. 304 (2002) (barring the execution of individuals with intellectual disabilities and overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).