

# Examples of Offensive Motions

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STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 15 CRS 219491, 219539-40, 219654-55

\_\_\_\_\_)  
STATE OF NORTH CAROLINA )  
 )  
v. )  
 )  
IAN POWELL, )  
 )  
Defendant. )  
\_\_\_\_\_)

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**MOTION TO BAR THE STATE FROM SEEKING THE DEATH PENALTY AGAINST  
A MAN WITH SEVERE MENTAL ILLNESS**  
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Ian Powell is a young man with severe mental illness. Ian Powell suffered from psychosis before these offenses, during these offenses, and since his arrest. He was hospitalized for mental illness no fewer than twenty times in the year before these offenses occurred. Since his arrest, doctors at Central Regional Hospital have evaluated Ian numerous times and have consistently found him to suffer from severe mental illness. The office of the Wake County District Attorney wants to put this young man with severe mental illness to death. While it may have once been permissible to execute people who suffered from severe mental illness, our nation, state, and community's standards of decency have evolved. Sentencing people with mental illness to death in 2020 constitutes cruel and unusual punishment. Therefore, the State should be prohibited from seeking the death penalty in this case pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 19 and 27 of the North Carolina Constitution.

## **Factual Background**

On December 11, 2014, Ian went to the emergency room at Duke Raleigh Hospital seeking psychiatric support because voices were telling him to harm himself. On December 25, 2014, Ian was admitted to Holly Hill Hospital; it was the third time he was admitted for psychiatric reasons that month. This would be the first of eight in-patient admissions to Holly Hill Hospital over the next eight months leading up to August 31, 2015, the day Ian was charged with committing murder, rape, robbery, and felonious assault. From December 2014 through July 2015, Ian was admitted to inpatient hospitalizations for mental illness twenty times -- at Wake Med, UNC Wake Brook, Duke University Hospital, Old Vineyard Behavioral Services, and other psychiatric facilities. At his initial Holly Hill hospitalization on Christmas Day 2014, Ian was diagnosed with schizoaffective disorder. This condition combines the psychosis of schizophrenia with the mania found in bipolar disorder. Throughout his twenty hospitalizations in the months before these offenses, Ian was diagnosed with various psychoses. He was diagnosed with schizophrenia, schizoaffective disorder, bipolar disorder, and major depression with psychotic features. Regardless of the specific diagnosis, psychiatrists consistently found that Ian was not malingering and was in fact suffering from severe mental illness and psychosis.

*Exhibit 1, Affidavit of Katelin Rey.*

In the months before these offenses, Ian was consistently prescribed antipsychotic medication upon his discharge from in-patient psychiatric care. However, when Ian left the supervision of mental health providers, he did not take his medication. Ian's last hospitalization prior to the offense was at Duke Raleigh Hospital on July 8, 2015. *See Exhibit 2, Excerpts of Records from Ian's July 8, 2015 Duke Raleigh Hospital Report.* Ian admitted himself because he was hearing voices, and contemplating suicide. Ian told emergency room staff that he had a gun

at home, was going to retrieve it and kill himself. In response, doctors reviewed his medical record and history, noting diagnoses of major depression with psychotic features and schizophrenia. Based on this information, the hospital sought and received an order from the Wake County District Court involuntarily committing Ian. *Id.*

After the district court involuntarily committed Ian, the staff at Duke Raleigh Hospital began looking for a psychiatric unit where Ian could be admitted and treated in-patient. Apparently, no psychiatric beds were available at Duke Raleigh. Duke Raleigh called several other local hospitals but no beds were available for Ian. It could not be determined whether Duke Regional had any beds available because their fax machine was broken. *Id.* After Duke Raleigh staff exhausted local options for psychiatric support for Ian, and concluded no beds were available for him anywhere, records show the staff changed their medical opinion about Ian. The Duke Raleigh doctor now decided that, despite the fact that Ian was hearing voices, threatening suicide, and had a well-documented history of psychosis, on this day, Ian presented in the emergency room with nothing more than marijuana intoxication. The Duke doctor noted that Ian had no history of violence or antisocial behavior, and the hospital asked the district court to rescind its order involuntarily committing Ian. The court complied with this request, and Ian was released. *Id.* This was the last admission Ian prior to his arrest on the underlying charges. Upon information and belief, Ian did not take any antipsychotic medication after Duke Raleigh released him when they could not find a bed.

On August 1, 2015, within three weeks of Duke Raleigh's discharge of Ian because there was no available bed space, Ian was arrested for a number of nonviolent offenses on August 1, 2015. As a result of this arrest, Ian spent the next three weeks in jail before pleading to a probationary sentence. Records from the Wake County Detention Center show Ian did not

receive antipsychotic medication while in the custody of Wake County during August 2015. *Exhibit 1*. Further, there is no indication of mental health issues or history in Detention Center documentation for this period of confinement, nor in the corresponding court file.

Ian was arrested in New York on September 1, 2015, the day after the alleged capital offenses. An evaluation in the New York jail, confirmed Ian's noncompliance with prescribed antipsychotic medication. The medical staff at New York's Rikers Island Jail diagnosed Ian with schizophrenia. They prescribed him antipsychotic medication. *Exhibit 1*.

After Ian's extradition to North Carolina, defense counsel requested an evaluation for capacity to proceed to trial. On December 15, 2017, doctors at Central Regional Hospital (CRH) opined that Ian was incapable of proceeding to trial because of his severe mental illness. *Exhibit 3, 2017 Central Regional Report*. The Honorable Paul Ridgeway entered an Order finding the same on February 6, 2018. Ian was then admitted to CRH for competency restoration. It took approximately two months of hospitalization and treatment for CRH medical staff to restore Ian's capacity. A subsequent report from CRH June 19, 2018 concluded that Ian did not have a mental health defense in his case. That report, however, still acknowledges that Ian is severely mentally ill.

On December 16, 2019, both the defense and the prosecution filed motions asking that Ian be reevaluated for capacity to proceed. On January 29, 2020, doctors at CRH concluded that Ian was once again, too mentally ill to stand trial. Ian was acutely psychotic. According to the report, "Mr. Powell has presented with many serious psychiatric symptoms throughout his life including psychosis (a disconnect from reality) depression with reported suicide attempts and mania (excessive energy, euphoria and/or irritability)." *Exhibit 4, January 2020 Central Regional Report*. CRH opined that Ian had been incapable of standing trial since August of

2019, when documentation from the detention center reflects compliance with medication ceased.

The prosecutors assigned this case moved to have Ian forcibly medicated with antipsychotic drugs on February 19, 2020. The State argued that Ian would continue to be too mentally ill to meet the minimum requirements to stand trial, unless forcibly medicated. The State's motion to forcibly medicate him was heard on March 5, 2020. On behalf of the State, Nicole Wolfe, Md. and Brandon Harsch, Md. testified. Both psychiatrists reported that Ian was psychotic, and would not be restored and capable of proceeding to trial without antipsychotic medication.

Without requiring forcible medication, the Honorable Thomas Lock ordered Ian's transfer to Central Regional Hospital for competency restoration. Ian has complied with his antipsychotic medication since his second admission to CRH. Two months after his readmission to CRH, Ian remained actively psychotic, and was not yet returned to competency. On June 6, 2020, Ian was committed for an additional two months to CRH as a result of his severe mental illness.

After Ian had been in CRH for approximately five months, Dr. Harsch concluded he had finally been restored to competency. Dr. Harsch, however, continues to maintain Ian suffers from a psychotic disorder. His report dated September 4, 2020 concludes that when Ian is not taking antipsychotic medication, he decompensates and becomes too psychotic to proceed to trial. *Exhibit 5, September 2020 Central Regional Hospital Report.*

Psychiatrist Dr. Moria Artigues, MD, evaluated Ian for the defense. She has concluded that at the time of his offense, Ian had a severe mental disorder or disability. She found Ian suffers from Schizoaffective Disorder Bipolar type. She notes, "By its very nature,

Schizoaffective Disorder, Bipolar Type causes severe impairments in behavioral controls, reality testing, and judgment. Mr. Powell was suffering under such impairments at the time of his criminal behavior.” *Exhibit 6, Affidavit of Dr. Moria Artigues, MD.*

### **Legal Argument**

#### **The humanity we all share is more important than the mental illnesses we may not — *Elyn R. Saks***

We should not execute children, the intellectually disabled, or people with severe mental illness. Our society, although far from perfect, is too moral, too decent and too evolved, to tolerate the execution of such vulnerable people. It is true that in our lifetime the execution of these groups was not considered to be a violation of the Eighth Amendment to the United States Constitution. But the Eighth Amendment’s ban on cruel and unusual is not stagnant. “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

#### **A. THE EXECUTION OF PEOPLE WITH SEVERE MENTAL ILLNESS SHOULD BE BARRED FOR THE SAME REASONS THE DEATH PENALTY IS PROHIBITED FOR PEOPLE WITH INTELLECTUAL DISABILITY AND JUVENILES**

On June 26, 1989, the United States Supreme Court announced in two separate decisions that the Eighth Amendment did not bar the execution of children who were as young as sixteen years old or the execution of intellectually disabled persons. See *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Eighth Amendment does not bar the execution of children who were sixteen at the time of their offense); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Eighth Amendment does not bar the execution of intellectually disabled offenders). Since the dawn of the twenty first century, the United States Supreme Court has reversed course and concluded that our evolving standards of decency now bar the execution of both children under the age of eighteen and intellectually

disabled offenders. See *Roper v. Simmons*, 543 U.S. 551 (2005) (barring the execution of children under eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (barring the execution of intellectually disabled defendants)<sup>1</sup>.

The reasoning of *Roper* and *Atkins* also explains why the execution of people with severe mental illness like Ian Powell is morally wrong, does not pass constitutional muster, and is prohibited. The Court said that the chief justifications for the death penalty are retribution and deterrence. *Atkins*, 536 U.S. at 318-19; *Roper*, 543 U.S. at 571. In *Atkins*, the Court said that retribution did not apply to intellectually disabled offenders because the death penalty was reserved for the most depraved of murderers.

If the culpability of the average murderer is insufficient to justify the most extreme sentence available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

536 U.S. at 319.

Three years later, the Court used a similar rationale in prohibiting the execution of children under the age of eighteen. “Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished.” *Roper*, 543 at 571. The same applies to a person with severe mental illness. A person with a psychotic

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<sup>1</sup> In *Atkins*, the United States Supreme Court used the term “mental retardation” However, in *Hall v. Florida*, 572 U.S. 701, 704 (2014), the Court noted the more appropriate terminology was now intellectual disability. North Carolina has also replaced the term “mental retardation” with intellectual disability in N.C. Gen. Stat. §15A-2005. Therefore, even in discussing prior court decisions that used the phrase “mental retardation” we will use the phrase “intellectual disability.”

condition, like Ian, simply does not have the same culpability as a murderer who does not suffer from severe mental illness.

In both *Atkins* and *Roper* the Court discussed deterrence as a justification for the death penalty, and the Court said that neither intellectually disabled nor children would be deterred from committing murder by the death penalty. *Atkins* at 320; *Roper* at 571-72. The Court explained in *Atkins* why deterrence did not justify the execution of intellectually disabled persons.

With respect to deterrence—the interest in preventing capital crimes by prospective offenders—it seems likely that ‘capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. Exempting the mentally retarded from that punishment will not affect the cold calculus that precedes the decision of other potential murderers. Indeed, that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.

*Atkins* at 320-21. This exact logic applies to people with severe mental illness. A person with schizophrenia, like Ian, suffers from delusional behavior and disorganized thinking. The death penalty is not going to deter such a person from committing murder any more than the threat of a long prison sentence.

In *Atkins*, the Court expressed concern that intellectually disabled capital defendants would be placed at a greater risk of the death penalty because of their “lesser ability... to make a persuasive showing of mitigation.” *Id.* at 320. The Court noted that people with intellectual disabilities “may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 320-21. These factors all apply to Ian and other people who suffer with severe mental illness.

Since his arrest, Ian has been found to be incapable of proceeding to trial twice because his severe mental illness rendered him incapable of assisting his attorneys. For the vast majority of our representation, Ian has been unable to effectively assist us in representing him. Even if Ian is restored to competency, his defense team will never be able to get back those many months, if not years, of work on the case while Ian was incompetent. It is highly doubtful that even if Ian’s capacity to proceed is restored, his ability to assist counsel will be the same as a capital defendant without severe mental illness. *Exhibit 7, Affidavit of Deonte’ Thomas.*

In order to properly defend against the death penalty, a capital defendant needs to assist his counsel by being able to tell him or her what happened during the offense, explain his background from childhood to the present and identify potential mitigation witnesses. As a result of Ian’s psychosis, we have not been able to engage him in meaningful discussions about whether he should testify, what his strategy should be at trial and whether he should accept a plea to avoid a capital trial. *Id.*

Like a defendant with an intellectual disability, people with severe mental illness are unlikely to make good witnesses on their behalf. Ian’s mental illness will certainly affect his demeanor in the courtroom. In the hearings we have had, Ian’s mental illness causes him to have

outbursts in court, laugh aloud for no reason, to appear aloof and to appear otherwise inappropriate. *Id.* Our state supreme court has said that a defendant's demeanor in court can and will be used against him in a capital proceeding. *State v. Brown*, 320 N.C. 179, 199 (1987).

In prohibiting the execution of children under eighteen and the intellectually disabled, the Supreme Court expressed concern that without a ban on such executions, the defendants' youth or disability could enhance a defendant's likelihood of receiving death. *Roper* at 573; *Atkins* at 321. In *Simmons*, the Court noted that the prosecution at trial argued that the defendant's youth should be considered aggravating and not mitigating. *Roper* at 573. The Court also noted that reliance on intellectual disability as a mitigating factor "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins* at 321.

There is a similar fear that a defendant's severe mental illness may prove aggravating instead of mitigating. North Carolina does not have a "future dangerousness" aggravating circumstance. The prosecution, however, may argue a client's future dangerousness in prison as a reason why the jury should sentence a person to death. *State v. Ward*, 338 64, 119 (1994). Courts recognize evidence of mental illness "is a double-edged sword that might as easily have condemned [defendant] to death as excused his actions." *Wright v. Angelone*, 151 F.3d 151, 162 (4th Cir. 1998); see also *Martinez v. Dretke*, 404 F.3d 878, 889 (5th Cir. 2005) (jurors' potential concern about the aggravating effect of mental illness justifies counsel's decision not to present such evidence at a capital sentencing hearing.) Academics who have studied the issue have also found empirical evidence that evidence of mental illness, instead of mitigating punishment, actually increases the likelihood that a defendant will be sentenced to death. See Slobogin, Christopher, "Mental Illness and the Death Penalty", CALIFORNIA CRIMINAL LAW REVIEW, 2000.

(Noting studies that show that mental illness often contributes to defendants receiving the death penalty, including studies showing that a failed insanity defense is one of the most accurate predictors of who will get the death sentence).

Defendants with severe mentally illness may also be in more serious danger of receiving the death penalty because of the treatment they receive for their mental illness. Ian, like most defendants suffering from psychosis, is taking antipsychotic medication. Such medication has side effects, and those side effects make him more vulnerable to receiving the death penalty.

By administering medication, the State may be creating a prejudicial negative demeanor in the defendant—making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive.... That such effects may be subtle does not make them any less real or potentially influential. As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.

*Riggins v. Nevada*, (KENNEDY Concurring) 504 U.S. 127, 143–44 (1992).

Another reason why there needs to be more protection for defendants with severe mental illness facing the death penalty is that effects of racism, discrimination and implicit bias means that jurors may not give as much credence to a mental illness mitigating circumstance for an African American defendant as it would for other severely mentally ill defendants. In order to establish such a mitigating circumstance, it is essential that the defense produce the defendant's mental health history. A compelling mental health mitigating circumstance is supported by a history of mental problems that is well documented. But racial bias means that African

American defendants might not have as accurate and compelling documented history of mental health problems. “Implicit bias pervades the mental health system.” Merino, Yesenia, Adams, Leslie; Hall, William J., “Implicit Bias and Mental Health Professionals: Priorities and Direction for Research” *PSYCHIATRIC SERVICES* (2018), p. 725. “These biases affect every aspect of the mental health care continuum, from screening to treatment.” *Id.* Merino, Adams and Hall’s research follows other articles which noted that in the mental field there are “disparities in access, treatment, and quality of mental health care,” but before research had been done about whether those disparities were the result of bias. Snowden, Lonnie, “Bias in Mental Health Assessment and Intervention Theory and Evidence”, *AMERICAN JOURNAL OF PUBLIC HEALTH* 93:239-43 (2003). Studies indicate that racial and ethnic disparities in mental health care remain large and persistent today. Cook, B.L.; Zuvekas, S.H.; Carson, N; Wayne, G.F.; Vesper, A & McGuire, T. “Assessing Racial/Ethnic Disparities in Treatment Across Episodes in Mental of Mental Health Care”, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3844061/>, *HEALTH SERVICES RESEARCH*, (49:1) 206-229 (2014). ). “Blacks and Latinos access mental health care at half the rate of non-Latino whites, even after accounting for mental health status, with higher rates of attrition following initiation of care.” *Id.* (internal citations omitted). Blacks and Latinos were also significantly less likely than whites to have minimally adequate mental health care, and more likely to have some of this health care depend on emergency room treatments rather than full psychiatric care. *Id.* The treatment Ian received before his arrest is an example of how African Americans often do not receive necessary mental health treatment. The manner in which Duke Raleigh treated Ian in his July 8, 2015 is probably starkly different than any hospital would treat a similarly situated white patient. Ian came to the hospital reporting hearing voices commanding him to commit suicide and having an established history of suicide attempts and

psychosis. Doctors there originally concluded his condition was so serious he needed to be involuntarily committed. But just because the hospital could not find a bed for him, they changed his diagnosis to marijuana intoxication and discharged him. Sadly, it appears this is how our mental health institutions treat poor African Americans and other minorities.

The implicit bias and discrimination that causes disparate treatment in mental health officials is not limited to psychiatrists, psychologists and other mental health workers. It appears that society in general may be more likely to view white people with potential mental illness more sympathetically than similarly situated African Americans. See Bouie, Jamelle “Racial Blindness” SLATE, March 23, 2018 <https://slate.com/news-and-politics/2018/03/in-texas-and-maryland-white-killers-receive-more-sympathy-than-black-victims.html>; Herbert, Bob “Empathy for a Killer”, NEW YORK TIMES, July 5, 2001. While jurors might be willing to give weight to mental health mitigation for white defendants or other people they might relate to, implicit bias and other problems means they are less likely to give as great a weight to such a mitigating circumstance, even if they are convinced the defendant was mentally ill.

**B. THE EVOLVING STANDARDS OF DECENCY IN THIS COMMUNITY, STATE, NATION AND WORLD REQUIRES THAT WE DO NOT SENTENCE TO DEATH AND EXECUTE PEOPLE WITH SEVERE MENTAL ILLNESS**

There is a growing national consensus in the United States against executing people with severe mental illness. Mental health organizations, such as the American Psychological Association, the American Psychiatric Association, the National Alliance on Mental Illness, and Mental Health America have all called for prohibiting the death penalty for people with severe mental illness.

Regardless of whether the defendant is able to show causation required by the insanity defense, no one should be threatened or put to death while experiencing serious mental illness. It is

irrational to use the death penalty where there is no evidence that it enhances deterrence and rehabilitation is possible.

MENTAL HEALTH AMERICA, “Position Statement 54: Death Penalty and People With Mental Illness.”

The American Bar Association, which has no position on the death penalty generally, adopted a resolution in 2006 calling for a prohibition on executing severely mentally ill people.

The resolution says

A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

*See Exhibit 8, ABA 2006 Resolution.* Psychiatrist Dr. Moria Artigues, MD, has diagnosed Ian with suffering from Schizoaffective Disorder Bipolar type at the time of the offenses in this case. She has found that Ian meets the ABA’s proposed criteria for exemption from the death penalty.

A national poll conducted by Public Policy Polling in 2014 found that 58% of Americans opposed the death penalty for people with mental illness while only 28% favored such executions. A Public Policy Polling survey of Wake County residents in 2017 found that 74% believed that a prosecutor should not seek the death penalty against a person with severe mental illness. *Exhibit 9, 2017 Public Policy Polling Results of Wake County*

In evaluating whether executing people with severe mental illness constitutes cruel and unusual punishment, it is appropriate for a court to consider the practices and positions of the

international community. In *Roper*, the Court said, while not controlling, the views of other countries are important in Eighth Amendment jurisprudence.

Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." 356 U.S., at 102–103, 78 S.Ct. 590 (plurality opinion) ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime"); see also *Atkins*, *supra*, at 317, n. 21, 122 S.Ct. 2242 (recognizing that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Thompson [v. Oklahoma]*, 487 U.S. 815, 830–831, and n. 31 (1987)] (plurality opinion) (noting the abolition of the juvenile death penalty "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," and observing that "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"); *Enmund v. [Florida]*, 458 U.S. 782, 796–797, n. 22 (1982)] (observing that "the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe"); *Coker [v. Georgia]*, 433 U.S. 584, 596, n. 10 (1977)] (plurality opinion) ("It is ... not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue").

*Roper*, 543 U.S. at 575–76.

The Wake County District Attorney's attempt to execute this young man who suffer from severe mentally illness man goes against the standards upheld by most of the rest of the world. The death penalty itself has either been abolished in practice or by law in 135 countries. See "Abolitionist and Retentionist Countries", DEATH PENALTY INFORMATION CENTER <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries>.

Only 63 countries carry out the death penalty. *Id.* It has been abolished in every European country except for Belarus. *Id.* Canada, Mexico, Australia and South Africa have all abolished the death penalty.

Many of the countries that do allow the death penalty, however, do not allow for it to be applied to individuals like Ian, who suffer from severe mental illness. Countries that continue to uphold the death penalty but exclude the practice for people with severe mental illness include India, St. Lucia, Syria, Thailand, and Trinidad and Tobago. *Id.* The defense acknowledges, however, some countries like Iran and Iraq have similar sentiments to the Wake County District Attorney's office and pursue the execution of people with severe mental illness.

Executing or sentencing to death a person with severe mental illness like Ian violates the international community's standards of humanity. The United Nations Human Rights Committee made that clear in a 2018 report. "States parties must refrain from imposing the death penalty on individuals who face special barriers in defending themselves on an equal basis with others, such as persons whose serious psycho-social and intellectual disabilities impeded their effective defense, and on persons that have limited moral culpability. "General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life." UNITED NATIONS HUMAN RIGHTS COMMITTEE, paragraph 49.

### **C. THE NORTH CAROLINA CONSTITUTION PROHIBITS THE EXECUTION OF PEOPLE WITH SEVERE MENTAL ILLNESS**

The death penalty against persons with severe mental illness is also prohibited by the North Carolina constitution. Article I, § 27 of the North Carolina Constitution prohibits a defendant from being subjected to "cruel *or* unusual punishment." The drafters of this provision intentionally made it broader than the Eighth Amendment to the United States Constitution. For the reasons stated above, Article I, § 27 means the State is not permitted to seek Ian's execution. Therefore, Section 27 forbids the execution of persons with severe mental illness even assuming *arguendo* that the United States Supreme Court would not agree that the Eighth Amendment imposes such a bar. The United States Supreme Court has ruled that a State may "adopt in its

own Constitution individual liberties more expansive than those conferred by the Federal Constitution.” *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980). Our State Supreme Court has established that our state constitution does provide individual rights more expansive than the federal constitution. *See State v. Robinson*, 846 S.E.2d 711, 720 (2020) (finding that North Carolina Constitution’s Law of the Land Clause has more expansive definition of Double Jeopardy than the Fifth Amendment of the United States Constitution); *State v. Ramseur*, 374 N.C. 658, 670, fn. 4 (2020) (finding that the *ex post facto* clause of the North Carolina Constitution is more expansive than the United States Constitution). In evaluating whether sentencing to death people with severe mental illness violates Section 19, it is appropriate to look at the United States Supreme Court decisions in *Roper*, *Atkins* and other Eighth Amendment United States Supreme Court cases. The North Carolina Supreme Court says that rulings from the United States Supreme Court on similar provisions of the United States and North Carolina Supreme Court are “highly persuasive.” *Robinson* at 720. But in the end, the proper and application of the North Carolina Constitution is the responsibility of the North Carolina courts alone. *Id.* Regardless of whether the United States Supreme Court might rule about the constitutionality of executing persons with severe mental illness, for the reasons stated above, executing such persons is cruel or unusual punishment under Section 27 for the reasons stated in the rest of this motion.

That Ian Powell suffers from severe mental illness is not seriously disputed. We have now reached the point in this world, this country, this state and this county that the death penalty is not appropriate for someone with severe mental illness. This Court should prohibit the Wake County District’s County office from seeking the death penalty.

Respectfully submitted, this the \_\_\_\_ day of December, 2020.

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Public Defender

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Raleigh, N.C. 27601

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by first class mail or by hand delivery upon:

Matt Lively and Sherita Walton  
Assistant District Attorneys  
Office of the District Attorney  
10<sup>th</sup> Prosecutorial District  
P.O. Box 31  
Raleigh, NC 27602

This the \_\_\_\_ day of December, 2020.

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Jonathan E. Broun



STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 17 CRS 202280

\_\_\_\_\_)  
STATE OF NORTH CAROLINA )  
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V. )  
 )  
ANTWAN CARTER )  
\_\_\_\_\_)

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**MOTION FOR DEPOSITION OF KEY WITNESS WHO HAS KNOWLEDGE OF  
MATERIAL THAT SHOULD HAVE BEEN DISCLOSED PURSUANT TO BRADY V.  
MARYLAND**  
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NOW COMES Defendant, by and through counsel, and respectfully requests that this Court permit the taking of a deposition by the parties of Demetria Houston. Houston has knowledge of materially exculpatory and impeaching material. While the defense has attempted to interview Houston, she has stymied those attempts. Therefore, the only way for counsel to obtain exculpatory information it is entitled to is for counsel to use compulsory power of a subpoena that would be available if a deposition was ordered in the case. Houston’s deposition is necessary to preserve Defendant's rights to due process, and to effective assistance of counsel, and also is necessary in the general interest of justice, and therefore should be granted pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 18, 19, and 23 of the North Carolina Constitution, *Brady v. Maryland*, 373 U.S. 83 (1963), *State v. Buckner*, 351 N.C. 401, 527 S.E.2d 307 (2000) and as part of the Court’s inherent authority.

Houston is the key witness in this case. She claims Defendant confessed to her. Presently, she is the only person who connects Defendant to the murder of Kareem Jones. Her credibility is everything.

In its original discovery package, the State provided a copy of Houston's record. That record, however, only consisted of misdemeanor and traffic charges from the early 1990s. Undersigned counsel on his own learned that Houston has twice gone to federal prison for drug trafficking offenses. Counsel informed the State of Houston's true criminal record as part a motion he filed on November 16, 2018. Four months later, on February 22, 2018, the State provided the defense with a new copy of Houston's record. This newly disclosed record consists only of the convictions the defense had previously informed the State about.

On January 22, 2018 undersigned counsel filed multiple motions in this case. Two of those motions dealt with requests for any deals that Houston received in this case. Specifically, counsel pointed out that Houston had received credit for substantial assistance in her most recent federal conviction and the defense wanted to know if she was receiving credit for this case. The State said they were unaware of any deals or benefits Houston had received for this case, and that this case was too old for them to be able to find out if the federal system had given her credit for providing information against Antwan Carter.

On February 22, 2018, undersigned counsel learned that the federal government did in fact give Houston credit for her assistance in helping the Raleigh Police Department with two unrelated homicides. Based on the timing of this information, it is clear that one of the cases she was receiving credit for was this case. Undersigned counsel provided this newly discovered evidence to the prosecutor handling the case, Howard Cummings, the same day that counsel discovered it. This new information shows that Houston pled guilty to Distribution of Crack in the Eastern District of North Carolina and was facing a minimum mandatory sentence of ten years in prison. She was facing a maximum sentence of life imprisonment. The crime happened a year before she made her statements to police. The plea happened after she implicated Carter.

After she pled, the United States Attorney for the Eastern District of North Carolina filed a motion saying she provided the Raleigh Police Department with information about two homicides. Instead of receiving a life sentence, or even ten years in prison, Houston received two years in prison. She had also received five years in prison for violating her previous supervised release conditions, but it is unclear if those sentences ran concurrent or consecutive to each other.

Undersigned counsel also learned that following her sentence the United States Attorney office filed a motion asking Houston's sentence to be further reduced pursuant to Rule 35 of the Federal Rules of Criminal Procedure. The Federal Government asked that the motion be held in abeyance. The motion noted that Houston was assisting both the Raleigh Police Department and federal agents in a narcotics investigation, and they expected that she would be providing valuable information and testimony. There does not appear to have ever been a ruling on the Rule 35 motion. It is certainly possible that her information and testimony did not actually prove to be valuable or trustworthy.

The State of North Carolina had and has an absolute duty to disclose all of the above information to the defense. In *Giglio v. United States*, 405 U.S. 150 (1972) the United States Supreme Court said that the prosecution has a duty to disclose deals that were made with testifying witnesses. The Court vacated the defendant's conviction even though the prosecutor handling the trial was unaware of the deal with the witness. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court emphasized that *Brady* applied to material evidence which could be used to impeach a prosecutor's witness.

The defense recognizes that Assistant District Attorney Cummings was completely unaware of this impeaching information until we provided him with it. We know from working

with Mr. Cummings on this case and other cases, and from his reputation in the community, that he understands and appreciates his *Brady* obligations, that he strives to fulfill them, that he timely discloses information within his possession and does not hide evidence. But Mr. Cummings personal knowledge about exculpatory and impeaching material is irrelevant under *Brady*. As the United States Supreme Court has noted

[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether that is, a failure to disclose is in good faith or bad faith) the prosecution's responsibility for disclose known favorable evidence rising to a material level of importance is inescapable.

*Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). The Raleigh Police Department was involved in helping secure a very good deal for Houston in exchange for her information about this case and another homicide.

The reason that the State has not lived up to its *Brady* obligations is that this case is too old. That in no way excuses the State for failing to provide this information. Nor has the State's obligations under *Brady* ceased because the defense has unearthed some significant impeachment materials in this case. What has been found by the defense is simply the tip of the iceberg. What the defense has found presents more questions than answers. The defense entitled to know 1) exactly what the Raleigh Police Department told Houston before and after their interview with her about her pending charges, 2) what Houston knew about her pending charges when she spoke to the police; 3) what the Raleigh Police Department told members of the U.S. Attorney's office about Houston's involvement in this case; 4) whether the Raleigh Police Department approached the U.S. Attorney's on their own, or were asked to do so by Houston or her attorney; 5) the extent of Houston's cooperation with other Raleigh Police Department

investigations, and 6) whether this information proved accurate. These are just some of the information that must be disclosed under *Brady*. It is type of information that would ordinarily be disclosed by Mr. Cummings. It is information that we now know the State is incapable of finding because of the age of the case.

The defense has attempted to talk with Houston numerous times. Defense investigator Steve Hale and undersigned counsel have been to Houston's home several times, but we have never been able to speak to her. Mr. Hale has also approached the house without me. We have left business cards and phone numbers with her family members and asked that she call us. She has the right not to talk with us absent a compulsory court appearance, and she is taking advantage of it. But we cannot learn important impeaching material that should have been disclosed to us under *Brady* by simply trying to talk to her.

Since Houston is unwilling to talk with the defense team, the defense suggests that this Court permit depositions to be taken in the case. This is the only way to even remotely assure that the defense receives *Brady* information before trial. The defense recognizes that depositions are very unusual in criminal cases in North Carolina. In this case, however, the defense may never be able to ascertain critical information unless depositions are ordered. This Court has within its inherent authority the ability to order depositions. In *State v. Buckner*, 351 N.C. 401, 412-413, 527 S.E.2d 307, 314 (2000), the North Carolina Supreme Court said that a superior court judge had the authority to order depositions in order to collect information that was essential in a capital post-conviction case. In *Buckner*, the defendant had challenged both his convictions and death sentences on the basis of ineffective assistance of counsel. The prosecution attempted to talk with the defendant's trial counsel, but they refused to speak to the State. The trial court ordered the attorneys to talk to the State *ex parte*, and Buckner appealed.

The North Carolina Supreme Court found that the trial court erred in ordering an *ex parte* communication between the State and trial counsel, but said that the trial court had the inherent authority to order trial counsel to provide all relevant information to the state. The Court then specifically ruled that the trial court had the authority to order depositions of trial counsel. *Id.*

Although *Buckner* involved a post conviction case, its holding should apply to trial cases as well. *Buckner* relied on *State v. Taylor*, 327 N.C. 147, 393 S.E.2d. 801 (1990). In *Taylor*, the North Carolina Supreme Court said that superior court's have the inherent authority to order disclosure of relevant facts "where it is in the interest of justice to do so." *Id.* at 153-54, 393 S.E.2d at 801. The superior court has the same inherent authority to order such discovery at both trial and post conviction. *Id.*

This Court should order that Houston be deposed a week before Defendant's March 12, 2018 trial. After that deposition it may be determined what further steps need to be taken to assist the State in fulfilling its *Brady* obligations. Or to determine whether it is simply impossible for the State to fulfill its obligations and to recognize that Antwan Carter cannot receive a fair trial.

This the \_\_\_ day of \_\_\_\_\_, 2018.

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Jonathan E. Broun  
Senior Staff Attorney  
North Carolina Prisoner Legal Services  
N.C. State Bar No. 18108  
1110 Wake Forest Road  
Raleigh, NC 27611  
919-856-2200

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing **Motion** by first class mail or by hand delivery upon:

Howard Cummings  
Assistant District Attorney  
Office of the District Attorney  
10<sup>th</sup> Prosecutorial District  
P.O. Box 31  
Raleigh, NC 27602

This the \_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
Jonathan E. Broun



STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 15 CRS 52177

STATE OF NORTH CAROLINA )  
 )  
v. )  
 )  
BRICE BERRY, )  
 )  
Defendant. )

\*\*\*\*\*  
**MOTION TO DISCLOSE PRISON AND MENTAL HEALTH RECORDS OF THE  
STATE'S KEY WITNESS MARCUS HICKS**  
\*\*\*\*\*

NOW COMES Defendant, Brice Berry, by and through counsel, and respectfully moves this Court for an order releasing to the defense, the prison records and psychiatric records of the State's key witness Marcus Vander Hicks (DOB: 03/05/1985). Defendant requests that the Court order records in the possession of persons or institutions in North Carolina be provided directly to the defense. Defendant requests that, in the case of records being held in other jurisdictions, a local court there order a release of records to the defense. Defendant is entitled to such information pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19, 23, and 27 of the North Carolina Constitution, as well as *United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny; *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Love v. Johnson*, 57 F.3d 1305 (4<sup>th</sup> Cir. 1995); *Chavis v. North Carolina*, 637 F.2d. 213 (4<sup>th</sup> Cir. 1980); and *State v. Hunt*, 64 N.C. App. 81 (1983).

**Factual Background**

Brice Berry ("Brice") is charged with two counts of first degree murder for the January 8<sup>th</sup> 2012 deaths of Timothy McGhee and Paul Noel. There were no arrests made in the case until

April of 2015 when Brice was arrested for the murders. Based on a review of the discovery provided by the State, it appears Brice was arrested after Detective S.M. Pate took over the investigation approximately three years after Mr. McGhee and Mr. Noel died. Detective Pate sought an arrest warrant after listening to a recording of an interview with Marcus Hicks (“Hicks”), an inmate in South Carolina, conducted by the former detective assigned to the case. Detective Pate’s report indicates that, in the interview, Hicks says that Brice Berry told him about the murders and a motive for the killings. Detective Pate also asserts that a gun found in Brice’s car was linked to the homicides through ballistics. *Exhibit 1, Excerpt of Detective Pate’s Report.*

Marcus Hicks’s credibility is paramount to this case. Without him, the State has no case. It is important that Defendant receive the information requested herein, in order to be able to properly prepare a cross examination of Hicks, should this case proceed to trial. It is, however, essential that Defendant receive the requested information now: after spending three months in jail, Defendant continues to be confined based on the statements of a person, who, as we shall demonstrate, has little credibility. The requested records may play a vital role in ensuring that Defendant receives a reasonable bond in this case. It is also Defendant’s hope that upon reviewing the information provided in this Motion, the State will realize the charges against Brice Berry must be dismissed.

**In his report, Detective Pate mischaracterized what is contained in Hicks’s interview.**

On July 2, 2015, the defense was furnished with a taped copy of Hicks’s statement. Upon review of the interview, counsel discovered that Detective Pate was greatly mistaken in his account of Hicks’s statements. According to Pate, Hicks claimed that Brice told him about the double homicide in Durham. Instead, the recording reveals that Brice’s brother, Terrance Berry

("Terrance"), was actually the person who described the Durham homicides to Hicks. Hicks claims to have known Terrance since he was a child growing up in South Carolina, and that he saw Terrance one or two days after the shootings. According to Hicks, Terrance, not Brice, disclosed a detailed account of how the murders happened. Hicks alleges that Terrance said he was mad at one of the victims for shooting him, Terrance, a year beforehand. During the time he was in jail, Terrance ordered a hit on this victim, and the second victim was simply a "casualty of war."

**Hicks's taped statement is inadmissible hearsay and contradictory to established facts.**

Hicks's information is problematic as it clearly constitutes inadmissible hearsay. *See State v. Canady*, 355 N.C. 242 (2002) (prejudicial error to allow Sheriff's deputy to testify that one inmate told him that another inmate told him that defendant confessed to the murders, even when the information was offered for non-hearsay purpose). In addition to being hearsay, Hicks's statement is inconsistent with known facts. Hicks claims that Terrance told him about the Durham murders while both men were in South Carolina one or two days after the Durham shootings. However, upon information and belief, Terrance was confined at the Durham County Jail in North Carolina, when he allegedly made the statement in person to Hicks in South Carolina. Court and confinement records demonstrate that Terrance was arrested in Durham, North Carolina, on January 6, 2012, and released on bond on January 19, 2012. *Exhibit 2, Record of Confinement from Durham County Jail.*

During the course of his interview, Hicks denies ever spending time in Durham except for the one time his semi-pro football team played in the city. Hicks emphatically denies being near the crime scene the night of the offense or ever in his life. Yet, Hicks offers incredibly specific details concerning the events of that night, including the layout of the property

surrounding the scene, as well as the reactions of people both in the house and in the street while the crime was occurring. Hicks's statement is simply inconsistent with someone who was given a third-hand account of events nearly three years ago. Hicks's claim that he has never been to Durham except for the single instance related to his football team is contradicted by discovery that shows the Durham Police Department registered Hicks as a gang member in 2012. Further, Hicks also inconsistently claims to have been dating a woman who lived in Durham.

**Marcus Hicks has a history of lying about others in an effort to implicate them in crimes for which he has been charged.**

At the time he disclosed information concerning the Durham homicides, Marcus Hicks was an inmate at a local detention center in Horry County, South Carolina. Following a guilty verdict at trial, Hicks was convicted of second degree burglary and sentenced to a thirteen year prison term. Hicks was originally charged with 37 counts of burglary as well as additional felonies, including perjury. See *Exhibit 3, Arraignment Statement* and *Exhibit 4, Perjury Indictment*. The day after Hicks made his statements to the Durham police, Hicks's lawyer filed a motion requesting a sentence reduction for his client. Hicks's lawyer argued that Hicks's codefendants received lesser sentences. In its response, The State of South Carolina made it clear that Hicks had lied about another person's criminal involvement as a means of self-gain. In rejecting Hicks's motion, the South Carolina prosecutor wrote:

This Court did not consider the sentences received by the co-Defendants in sentencing the Defendant, and properly so. The sentence of the co-Defendant were not relevant to the consideration of the Defendant's sentence for burglary of November 21, 2013, as neither co-Defendant pled guilty participation in that crime. In fact, the State presented evidence during the course of the trial that the co-Defendants were arrested solely on evidence provided by the Defendant, and that evidence proved unreliable. *Some of the charges for which the Defendant accused co-Defendant Henry, for instance, actually occurred while Henry was incarcerated in Horry County jail. Since the information provided by the*

*Defendant proved unreliable, Henry pled only to an unrelated Shoplifting charge*, and co-Defendant Brandenburg pled only to an Accessory charge which was based on her admission of helping the Defendant dispose of stolen televisions.

See *Exhibit 5, Response to Defendant's Motion* (emphasis added).

**Hicks has an extensive criminal record from multiple jurisdictions.**

In responding to Hicks's motion, the State of South Carolina further stipulated that Hicks's sentence was the result of his extensive criminal history. "[T]he sentence of 13 years was based on the Defendant's extensive and appalling prior criminal record of criminal convictions, including crimes against the public order, crimes falsehood, crimes against property, and crimes of violence against persons. These crimes were all committed within the last 15 years and in at least 4 separate states." See *Exhibit 5*. According to the State, Hicks's prior convictions are:

**South Carolina**

2004	Driving Without a License
2004	Public Disorderly Conduct
2011	Simple Possession of Marijuana
2012	Possession of Marijuana with Intent to Distribute
2012	Shoplifting

**Virginia**

2012	Possession of Marijuana 1 <sup>st</sup>
2013	Identity Theft

**New York**

2002	Assault 3 <sup>rd</sup> Degree
2002	Menacing 2 <sup>nd</sup> Degree with a Weapon
2005	Possession of Marijuana 5 <sup>th</sup> Degree

**North Carolina**

2005	Common Law Robbery
2005	Conspiracy to Commit Robbery with a Deadly Weapon
2008	Assault on a Female

The judge in South Carolina denied the defense's motion to reduce Hicks's sentence. Undersigned counsel is unsure whether other legal mechanisms now exist to reduce Hicks's sentence in South Carolina.

**Without Marcus Hicks, the State does not have enough to prosecute Brice Berry for any role in this case.**

Without Marcus Hicks's statement, the only other evidence against Brice is the weapon he was found with, that ballistics maintains is connected to the murder. Discovery received in this case does not provide the circumstances surrounding the police stop that uncovered the weapon. However, per the Lakeview South Carolina police department, undersigned counsel has obtained a copy of the police report for the stop when Brice was in the car where the gun was found. *Exhibit 6, Lakeview Police Department Report.*

According to the police department of Lakeview, Brice Berry was pulled over on October 20, 2012; this date is over nine months after the Durham homicides. Also according to the report, Brice was not alone in the car. The second individual, a passenger, fled the scene and

was never apprehended. A search of the vehicle uncovered a gun under the passenger's seat, in addition to other weapons found in the trunk of the car. The fact that Defendant drove a car where the murder weapon was located more than nine months after the trial, and where Defendant was not the sole person in the car, is not sufficient by itself to warrant a trial of Defendant.

### **Claim for Relief**

Defendant is incarcerated and facing a possible sentence of life without parole based on the statement of Marcus Hicks. As this Motion demonstrates, Hicks is an unreliable witness and his statement, problematic. Nevertheless, the State, in its case against Brice Berry, relies on it. Therefore, Defendant has a constitutional obligation to seek out additional information to impeach Hicks. While Hicks was facing charges for perjury and 37 counts of burglary, his lawyer in South Carolina requested a competency evaluation. See *Exhibit 7, Motion for Competency Evaluation*. The results of that competency evaluation may offer the evidence needed to verify Hicks's lack of credibility. In considering Mr. Hicks has been incarcerated in four different states, it is very possible mental health records or other impeaching materials exist in the files of those correctional institutions.

Provided this and the information in this Motion, Defendant requests the following relief:

1. That this Court issue an order requiring North Carolina Department of Corrections to release to Defendant, all records it has relating to Marcus Hicks, including, but not limited to, disciplinary records, medical records, and mental health records;
2. That this Court issue a request to a court in South Carolina to provide the results of any and all competency evaluations or other mental health evaluations conducted on

Marcus Hicks during the pendency of his most recent South Carolina case, which included charges of perjury, burglary, and other felonies;

3. That this Court issue a request to courts in South Carolina, Virginia, and New York to provide copies of the prison files of Marcus Hicks held by those Department of Corrections to the defense.

Respectfully submitted, this the \_\_\_\_ day of July, 2015.

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Jonathan E. Broun  
Assistant Capital Defender  
N.C. State Bar No. 18108  
123 W. Main Street, Suite 601  
Durham, NC 27701

#### **CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that the undersigned attorney served a copy of the foregoing Motion on the State of North Carolina same by first class mail or hand delivery to:

Kelley L. Gauger  
Office of the District Attorney  
Durham County Courthouse  
510 S. Dillard Street  
Durham, NC 27701

This the \_\_\_\_ day of July, 2015.

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Jonathan E. Broun