

CLEMENCY PETITION

Presented on behalf of

ROBERT BACON, JR.

Submitted on _____

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WHY GOVERNOR EASLEY SHOULD SPARE ROBERT BACON, JR.'S LIFE

The death penalty is excessive in this case. Robert Bacon, Jr. is on death row for his first and only crime. His codefendant, Bonnie Clark, masterminded the murder and pushed Robert to do it. Bonnie Clark, who is white, received a life sentence. Robert, who is African-American, was sentenced to death. Bonnie Clark stands to be paroled while Robert faces execution. At Bonnie Clark's trial, prosecutors argued that she was "the brains" behind the murder; although Robert was the one who wielded the knife, the prosecutor argued that Robert was "only a pawn." The prosecution also took the position that Robert and Bonnie Clark deserved the "same sentence." Two former chief justices of the Supreme Court of North Carolina wrote that the disparity in punishments meted out to Bonnie Clark and Robert was patently clear. Justices Exum and Frye said that when inconsistent, inherently contradictory results lead to the sentence of life imprisonment in one case and the sentence of death in another, it is the court's duty to remedy the result by setting aside the death sentence and imposing life imprisonment. The judicial system failed in this case, and it falls to the Governor to impose a fair and just punishment: life imprisonment without parole.

Governor Easley should not tolerate the risk that Robert Bacon, Jr. faces the death penalty because of the color of his skin. Jurors admitted in post-trial interviews that, when they were deciding whether Robert should live or die, they held it against him that he, an African-American man, was dating a white woman, Bonnie Clark. At trial, jurors made racial jokes. No court has been willing to compel jurors to take the stand and testify under oath as to the role racial prejudice played in determining Robert's punishment. As a consequence, the specter of racism haunts this case. The State must not carry out an execution in a case so tainted by racial bias.

Law enforcement officers with substantial involvement in the investigation of this case believe that the execution of Robert Bacon, Jr. would be unfair. Dennis Dinota, formerly with the Jacksonville Police Department, has given an affidavit stating that he believes Robert should be sentenced to life imprisonment. Mr. Dinota is a 20-year veteran of the United States Marine Corps and worked in law enforcement for more than two decades. He was awarded the Silver Star, the Bronze Star for Heroic Achievement, a Battle Field Commission, and two Purple Hearts. Mr. Dinota is a proponent of the death penalty. As part of the homicide investigation in this case, Mr. Dinota interviewed Bonnie Clark. He thinks that it is unfair to execute Robert because Bonnie Clark was at least as guilty as Robert and she received a life sentence. J.J. Phillips has also given an affidavit attesting to the unfairness of an execution in this case. Officer Phillips has been with the Jacksonville Police Department since 1976. He found the body of Glennie Clark and testified at the Bacon and Clark trials. Officer Phillips believes that Bonnie Clark pushed Robert to commit the crime and that it is not fair to execute Robert. A third officer who was involved in the investigation of the case has also expressed the view that it would be unfair to execute Robert. This officer declined to give an affidavit but has agreed to speak privately with the Governor's representative.

Robert Bacon, Jr.'s jury did not hear critical evidence about the events leading to the crime. A significant factor in the offense was the substantial and sustained abuse inflicted on Bonnie Clark by her husband. It was this abuse that led to the crime. Bonnie Clark's jury heard substantial evidence of the abuse, but Robert's jury did not. Evidence presented at Bonnie Clark's trial showed that Glennie Clark was a severe alcoholic who was violent and mean when he was drunk. Glennie Clark's behavior was such that Bonnie Clark was afraid to leave their children with him. He had threatened to kill Bonnie Clark if she ever went out with another man. Bonnie Clark confided in Robert and sought his help. The jury that heard this evidence returned a life sentence. The jury that did not hear this critical evidence sentenced Robert to die.

The death sentence is unreliable because the jury never heard compelling mitigating evidence about Robert Bacon, Jr.'s background. Trial counsel devoted a single weekend to the investigation of penalty phase evidence. Consequently, the jury heard little evidence about why Robert should be sentenced to life imprisonment. The Supreme Court of North Carolina vacated Robert's death sentence so that a new jury could hear available, constitutionally mitigating evidence about Robert's cooperation with the police and how his assistance resulted in Bonnie Clark's arrest. On resentencing, trial counsel conducted no new investigation and failed to present the very evidence that the Supreme Court had ruled should have been admitted. In addition, post-conviction investigation revealed a wealth of other evidence that counsel never discovered. One judge on the Fourth Circuit found that this newly discovered family history evidence "uniquely mirrors the circumstances surrounding the crime" and, therefore, it would have helped the jurors understand how Robert could have been manipulated by Bonnie Clark. The jury deliberated nearly six hours in this close case. Had it been presented, this evidence likely would have persuaded the jury to reject the death penalty.

The jury was never told that Robert Bacon, Jr. promptly accepted responsibility for his actions and that his cooperation with the police aided their investigation. The General Assembly has specified only eight statutory mitigating factors which a jury must consider mitigating in a capital case. One of these eight is whether the defendant aided in the apprehension of another capital felon. Testimony of State witnesses at pretrial hearings established that, when Robert was first questioned by police, he promptly admitted that he had stabbed the victim. In addition, Robert voluntarily showed the police incriminating physical evidence. It was only after Robert's confession that the police realized that Bonnie Clark was involved in her husband's murder. Prior to her arrest, Bonnie Clark had lied to the police for approximately four hours and told them that she and her husband were attacked by unknown assailants. According to testimony from the investigating officer, once she was placed under arrest and confronted with Robert's confession, Bonnie Clark finally admitted her role in the killing. The jury that sentenced Robert to death did not know that Robert's cooperation with law enforcement authorities led to Bonnie Clark's arrest. The omission of this crucial evidence undermines the reliability of the death sentence in this case.

Trial counsel made other grave mistakes in this case. Not only did trial counsel fail to spend enough time preparing, but they interviewed all potential sentencing witnesses in

the presence of the prosecutor X the person charged with seeking Robert's execution. At resentencing, after painstakingly excusing prospective jurors who were familiar with the case and might be biased because of their knowledge of the case, Robert's trial lawyers unnecessarily told the jury that another jury had previously sentenced Robert to death. Further, Robert's attorneys inexplicably invited the jury to think that Robert would be released from prison if he were sentenced to life. In opening statement, Robert's lawyers promised evidence about Glennie Clark's drinking and Robert's relationship with Bonnie Clark. Counsel then inexplicably failed to present this evidence to the jury. Trial counsel aided the State by helping the prosecutor present testimony supporting its case for death. In closing argument, the prosecutor bolstered the credibility of the State's case by drawing the jury's attention to defense counsels' personal participation in the presentation of the State's evidence. These serious errors place in grave doubt the fairness of Robert's death sentence.

Fundamental fairness is in question in this case because, at different stages of the proceedings, the State has taken inconsistent positions on vital issues. The State argued to the jury in this case that death was appropriate because Robert was the "leader and organizer" of this crime. The State took a starkly contrasting position in the trial of codefendant Bonnie Clark, where the prosecutor argued that Robert was "only a pawn." Two former prosecutors have questioned the fairness of the State's contradictory arguments in the Clark and Bacon trials. The State has taken similarly inconsistent position on the quality of Robert's defense and other critical issues. By repeatedly switching horses in midstream, the State has undermined the reliability of the death sentence in this case.

The State systematically excluded people of color from jury service in this case. Approximately 20 percent of the population of Onslow County is African-American. Yet Robert Bacon, Jr., who is African-American, was tried and sentenced to death by two all-white juries. All of the persons of color who were questioned and were found by the trial court to be qualified for jury service were dismissed by the State.

Many of the state and federal judges who have reviewed this case have found unfairness. The first time the Supreme Court of North Carolina examined this case, all seven justices concluded that there was significant constitutional error and threw out the death sentence. The second time the court reviewed the case, one-third of the justices concluded that the death sentence was unusually cruel and excessive. Former Chief Justices Exum and Frye dissented and wrote that Robert should be given a life sentence. United States District Judge W. Earl Britt heard evidence concerning the quality of representation in this case and found that Robert had received ineffective assistance of counsel X the only federal court finding of its kind in a North Carolina capital case in more than a decade. One of the three judges who reviewed this case in the Fourth Circuit X a court that has not granted relief in a death penalty case since 1992 X concluded that the notion that Robert had received a "full measure of fair procedure" was a "legal fiction."

Governor Easley cannot have confidence in the legal process afforded Robert Bacon, Jr. on direct appeal. The Supreme Court of North Carolina is required by statute in every death penalty case to ensure that the death penalty is applied fairly and that the punishment fits the crime. The court's proportionality analysis in this case was tainted by irregularities that render it unreliable. When it first reviewed this case, the court said that Robert's death sentence was not disproportionate because another capital defendant, Willie Gladden, had committed a very similar crime and had also been sentenced to death. Appellate counsel informed the court that Willie Gladden had obtained relief in post-conviction proceedings and had been resentenced to life imprisonment. Accordingly, counsel asked that Robert be sentenced to life. The court responded by issuing a new opinion that again affirmed Robert's death sentence. However, this time the court said the *Bacon* and *Gladden* cases were not comparable cases. The public can have no confidence in the proportionality review in this case.

Governor Easley cannot have confidence in the legal process afforded Robert Bacon in state post-conviction proceedings. Without hearing evidence, the state post-conviction court summarily denied relief on all of Robert's claims. The Supreme Court of North Carolina has ruled that post-conviction discovery is an essential component of "thorough and complete review" in capital cases. However, in Robert's case, the courts refused to order the State to disclose its investigative and prosecutorial files. It is incumbent upon the Governor to act in a case that, by definition, has not been subjected to thorough and complete review.

Governor Easley cannot have confidence in the legal process afforded Robert Bacon in federal habeas proceedings. In federal habeas proceedings, even though the defense was refused discovery and denied an opportunity to present evidence in state court, the federal habeas court granted an evidentiary hearing. United States District Judge W. Earl Britt ruled that Robert had received ineffective assistance of counsel and ordered resentencing. The State appealed. Had Robert Bacon Jr.'s appeal been heard in any other circuit in the country, it is likely that he would have received a new sentencing hearing. However, the Fourth Circuit reversed the district court's grant of sentencing relief. The appeals court did so by ignoring trial counsel's clear testimony in the district court and by disregarding decades of North Carolina law. The appeals court also refused to grant a hearing on other evidence raising serious questions about the adequacy of Robert's counsel. The Fourth Circuit has not granted relief in a death penalty case since 1992, despite having reviewed more than 100 capital cases. Robert's was the twenty-second capital case in a row in which the court reversed a grant of relief. One judge on the Fourth Circuit was moved to dissent in despair, "In a case such as this — where a life hangs in the balance — it is more important than ever that justice not only be done, but that justice also be seen to be done." The Governor is the only one who can do justice in this case.

Robert Bacon, Jr. deserves a sentence of life imprisonment without parole. Robert has accepted responsibility for his actions and is remorseful. Robert had no criminal record at the time of this offense. If he is sentenced to life imprisonment without parole, Robert Bacon, Jr. can be expected to pose no danger in prison.

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THE DEATH SENTENCE IS EXCESSIVE IN THIS CASE

The facts of this case, as summarized in *State v. Bacon (Bacon I)*, 326 N.C. 404, 390 S.E.2d 327 (1990); *State v. Bacon (Bacon II)*, 337 N.C. 66, 446 S.E.2d 542 (1994); and *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989), and other court documents, are as follows:

In 1986, Robert moved from Massachusetts to North Carolina where he met Bonnie Clark. The two became romantically involved and moved in together. Bonnie Clark frequently complained to Robert about her estranged husband, Glennie Clark, an alcoholic who abused her and their two children. Glennie Clark learned that his wife was seeing Robert; Glennie Clark would call the house and call Robert names.

Bonnie Clark asked Robert to help her kill her husband and at some point mentioned to him that she was the beneficiary of her husband's life insurance policies. Robert had never been involved in criminal activity before but, eventually, he succumbed to pressure from Bonnie Clark and agreed to help Bonnie Clark get rid of her husband. However, he "chickened out" when he was supposed to kill Glennie Clark.

Bonnie Clark persisted and the next night arranged another meeting with her husband. This time, Bonnie Clark made sure she was present when the killing was supposed to occur. She and Robert went to Glennie Clark's home to pick him up. On his way out the door to the waiting car, Glennie Clark tossed a beer can into the yard. He was drunk and had a blood-alcohol-level of .31. He was also angry; the first thing Glennie Clark did when he saw Robert was to point at him and say, "What is this shit?" Then Glennie Clark got into the car and an argument ensued concerning Bonnie Clark's relationship with Robert. During the argument, Glennie Clark called Robert a "nigger."

Before Robert and Bonnie Clark left for Glennie Clark's home, Robert had removed a knife from his coat pocket and thrown it in the back of Bonnie Clark's car. Upon hearing the racial epithet, Robert picked up the knife and repeatedly stabbed Glennie Clark while Bonnie Clark drove. Bonnie Clark parked the car outside a movie theater. The pair agreed that Bonnie Clark would tell police that she and her husband were attacked by unknown assailants. The two hoped to fake a robbery and Robert knocked Bonnie Clark out. Then Robert went home.

That night, around 11:00 p.m., a police officer found Bonnie Clark unconscious and seated in the car next to her deceased husband. Bonnie Clark told the officer that she and her husband had been attacked by unknown assailants. Officer Donna Waters took Bonnie Clark to the hospital and Bonnie Clark repeated her story to Officer Waters. Officer Dennis Dinota picked Bonnie Clark up at the hospital and took her to the police station. Bonnie Clark repeated her story to Officer Dinota. Bonnie Clark also gave a written statement describing an attack by unknown assailants.

In the meantime, other officers went to Bonnie Clark's home to check on her children. At the house, the officers met Robert. According to testimony from the officers

who questioned him, Robert was cooperative with the authorities, who had no reason to suspect his involvement in the murder. Only one time did Robert answer a question untruthfully and he quickly admitted the falsehood and confessed. Robert described the racial slur and admitted that he killed Glennie Clark. Then he directed the police to inculpatory evidence. Robert also alerted police to the fact that Bonnie Clark was involved in the murder.

In contrast, when questioned by the police, Bonnie Clark repeatedly and, for a number of hours, lied about her involvement in her husband's death. In the words of one of the interrogating officers, she "play[ed] us for dummies." Only after Robert had come clean did the police place Bonnie Clark under arrest.

Robert and Bonnie Clark were tried separately. Although both were convicted of first degree murder, Bonnie Clark was given a life sentence; Robert was sentenced to die.

Former Chief Justices Exum and Frye examined the case and concluded the following:

In short, Bonnie Clark and defendant committed the same crime. Although defendant dealt the fatal blows, Clark was the instigator, planner and motivator who was actually present during and actively participated in the murder. Considering the findings of both juries, I conclude Clark and Bacon are at least equally culpable. Considering only the findings in the case before us, I would conclude Clark is more culpable.

Viewed side by side, the disparity between the perceptions of the same crime by these two sentencing juries is patent. When such inconsistent, inherently contradictory results lead to the sentence of life imprisonment in one case and the sentence of death in another, it is this Court's duty on proportionality review to remedy the result by setting aside the death sentence and imposing life imprisonment.

...

From every perspective the instant case is a misfit among similar cases in the proportionality pool. First, it is the only case in which the death penalty has been ultimately imposed where the sole aggravating circumstance found was the motive of pecuniary gain. Second, it is the only case in the proportionality pool in which a defendant determined by the sentencing jury to have been under the domination of a confederate was condemned to death while the confederate was sentenced to life. Third, defendant Bacon, who killed at the behest and under the inspiration, direction, and domination of another and whose sentencing jury found [seven] mitigating circumstances, is less culpable than [other defendants] whose death sentences were determined disproportionate by this Court.

State v. Bacon, 337 N.C. 66, 128 and 131, 546 S.E.2d 542, 577-78 (Exum, C.J., and Frye, J., dissenting).

At Bonnie Clark's trial, the State did not disagree with the views expressed by the dissenting justices. For example, District Attorney William H. Andrews argued:

The idea originated in her mind. She had more reasons to have him killed than Robert Bacon. Robert Bacon had what he wanted X her. Money was the main reason she wanted him dead.

Assistant District Attorney Dewey Hudson argued, "Who was the brains? **Robert Bacon was only a pawn.**"

Robert did wield the knife and kill Glennie Clark. This fact, standing alone, does not justify the disparity between the death sentence in this case and the life sentence for Bonnie Clark. As argued by the State in Bonnie Clark's trial, Bonnie Clark was not a hapless "wheelman" but was responsible for each and every stab wound. According to the jury findings in this case, the idea for the murder came from Bonnie Clark, who dominated Robert.

Notably, in other capital cases involving adulterous lovers who planned the demise of a spouse, the "triggermen" have received life sentences. *See, e.g. State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (1986) (defendant was having affair with married woman and lovers schemed to kill the husband; defendant shot husband repeatedly and received life sentence); *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982) (defendant was having affair with married woman who asked defendant to "rig up" her husband's death; defendant shot husband in the head and, pursuant to a plea agreement, received a term of incarceration); *State v. Harris*, 333 N.C. 543, 428 S.E.2d 823 (1993) (defendant was having affair with married woman and lovers planned to kill the husband; defendant choked husband to death and received life sentence); *State v. Collins*, 345 N.C. 170, 478 S.E.2d 191 (1996) (husband asked defendant to kill wife for a "cut" from life insurance proceeds, defendant is found guilty of first degree rape, conspiracy to commit murder, and first degree murder on the basis of premeditation and deliberation and sentenced to life); *State v. McKeithan*, ___ N.C. ___, 537 S.E.2d 526 (2000); *State v. Lee*, 140 N.C.App. 384, 539 S.E.2d 696 (2000) (unpublished); and *State v. Brewington*, 352 N.C. 489, 532 S.E.2d 496 (2000) (male and female codefendant were lovers who plotted murder of two of the male codefendant's relatives for insurance money; murder was committed by defendant and female codefendant, both of whom received life sentences; male codefendant who was not present and did not physically participate in murder received death sentence). *See also* newspaper clippings on *State v. Cole* (defendant and lover plan murder, defendant solicits two others to assist in killing but personally kills victim, defendant receives life sentence); *State v. Johnson* and *State v. Kemmerlin* (married woman having affair plans with her lover the killing of husband for life insurance proceeds, lover commits murder and receives life sentence while wife who was not present at crime scene is sentenced to death); *State v. Watkins* and *State v. Carruth* (man hires another to kill his pregnant wife, killer fires five shots, three of which

struck the victim, State offers plea to triggerman for life sentence in exchange for testimony at capital trial of defendant who planned the murder).

In addition, the Supreme Court of North Carolina has said that the fact that a defendant in a particular case was not the actual shooter of the victims does not necessarily mean that the defendant is any less culpable. *State v. Lemons*, 348 N.C. 335, 377, 501 S.E.2d 309 (1998) (case involving three defendants, evidence suggested that defendants who actually shot the two victims were sentenced to life). Similarly, in *State v. Bonnett*, 348 N.C. 417, 502 S.E.2d 563 (1998), four men were charged with homicide. One pled to lesser charges while three were convicted of first degree murder. The shooter received a life sentence. In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), the Supreme Court of North Carolina found the death sentence excessive despite the jury's finding and sufficient evidence of the fact that the defendant delivered the fatal blows that killed the victim. In short, the fact that Robert wielded the knife does not mean that he is any less deserving of a life sentence than Bonnie Clark, the one who planned, persisted, and participated in the offense.

No North Carolina death sentence has been found disproportionate since 1988. Former Chief Justice Exum has said that, for many years while he was a member of the Supreme Court of North Carolina, the court struggled in its proportionality review to search out evidence of capriciousness or discrimination. The court hoped sensibly to reserve the death penalty for those cases that are the most heinous, the most awful. However, Justice Exum confessed, "Toward the end of my career on the court, I gave up on the idea of ever being able to do that with any rationality." Kytle, Calvin & Pollitt, Daniel H., Editors, *Unjust in the Much, The Death Penalty in North Carolina*, Chestnut Tree Press (1999) at 42.

An examination of capital punishment in North Carolina found that no case better illustrated the "arbitrary nature of the death penalty" than this one. "The Death Lottery," *Independent Weekly*, October 13-19, 1999. An editorial in the *Jacksonville Daily News* recently pointed to Robert's case as "another inequity" on North Carolina's death row. The editorial noted the disparate treatment of Bonnie Clark and Robert and asked, "Equal justice for all?" The answer: "Not really."

Many of the state and federal judges who have reviewed this case have found serious constitutional error and unfairness. Former Chief Justices Exum and Frye found Robert's death sentence manifestly unfair even though the record they examined did not include significant mitigating evidence that was never presented to the jury.

In 1999, Governor James B. Hunt, Jr. commuted the death sentence of Wendell Flowers. Governor Hunt noted that Flowers and three other men were charged in the case. However, only Flowers received the death penalty. The Governor said it was "clear as a bell that Flowers did not kill [the victim] alone. None of the other participants in the crime received the death penalty." Governor Hunt concluded that "the right and fair thing to do is to commute Wendell Flowers' sentence to life in prison without parole."

As in the Flowers case, the prosecution here argued different theories of moral culpability in Robert's case and in codefendant Bonnie Clark's case. At Bonnie Clark's trial, the prosecution said Robert was "only a pawn." In Robert's case, however, the prosecution argued to the jury that Robert was "a leader and an organizer." The assistant district attorney who tried both cases expressed the view that Robert and Bonnie Clark deserved the same sentence. However, in subsequent appeals, the State took the position that Robert was more culpable and therefore more deserving of the death penalty.

The State also argued different theories of motive. In Bonnie Clark's case, the State argued that she killed for money and that all Robert wanted was to be with Bonnie Clark. But in Robert's case, the State argued that Robert killed "purely" for money.

These are precisely the sorts of inconsistencies that plagued the Flowers prosecution and led Governor Hunt to say it was "not clear exactly what role Flowers actually carried out."

The facts here are even stronger for clemency than they were in Flowers. Flowers was "a very dangerous criminal who was already serving a life sentence for the vicious killing of an elderly shop owner in Wilkes County." His capital offense involved the murder of a fellow prisoner. In stark contrast, Robert is not dangerous; he is on death row for his first and only criminal conviction.

The disparity between Bonnie Clark's life sentence and Robert's death sentence can be explained in two ways. One explanation is that Bonnie Clark's attorneys did a better job of presenting to the jury the abuse that led to the crime. This critical evidence helped jurors understand the context of the murder and thereby mitigate Bonnie Clark's actions. In addition, this evidence showed that Bonnie Clark had mixed motives and that she did not kill for money alone. The other explanation is racism. A comprehensive statistical study of homicide cases in North Carolina between 1993 and 1997 shows that the rate of death sentences for a person of color charged with capital murder for the killing of a white victim is more than twice the rate for a white defendant charged with killing a white victim. Jurors in this case admitted that they held Robert's race against him when deciding punishment.

Whether a person faces execution or life imprisonment without parole cannot depend on the quality of representation. Nor should imposition of the death penalty turn on the race or gender of the perpetrator and victim. The Governor has the opportunity to examine the entire record in this case and to correct what would be an extreme miscarriage of justice: the execution of Robert Bacon, Jr. The Governor must act to ensure fairness in this case and commute Robert Bacon, Jr.'s death sentence to life imprisonment without parole.

RACE DISCRIMINATION HAS TAINTED THIS CAPITAL PROSECUTION

Robert Bacon, Jr., was sentenced to die for the killing of his girlfriend's estranged husband, Glennie Clark. Bonnie Clark was also convicted of first degree murder, but she was sentenced to life imprisonment. Robert is African-American; Bonnie and Glennie were both white. Just before the stabbing, Glennie Clark called Robert a "nigger."

The United States Supreme Court has observed that, in a capital case, "there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). This is because jurors in a death penalty case are called upon to make a "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." 476 U.S. at 33-34. The court acknowledged that a juror who harbors racial prejudice might well be influenced by those beliefs in deciding that a defendant's crime is more deserving of the death penalty. *Id.* at 35. "It remains an unfortunate fact in our society," wrote the court, "that violent crimes perpetrated against members of other racial or ethnic groups often raise [a reasonable possibility that racial prejudice would influence the jury]." *Id.*, fn. 7 (brackets in original). Consequently, the court ruled that, when a capital defendant is charged with an inter-racial crime, the accused is constitutionally entitled to question jurors carefully so as to ensure that racial prejudice does not infect the capital prosecution. *Id.* at 36-37.

Robert's case was one in which there was a "unique opportunity for racial prejudice to operate." Not only was the victim white and the defendant black, but the homicide was immediately preceded by the victim's use of an incendiary racial epithet. In addition, Robert had violated an age-old taboo: he was romantically involved with Bonnie Clark, a white woman. Individuals questioned during jury selection at the resentencing hearing were asked what they remembered about the crime. It is telling that one prospective juror, who remembered little about the case, immediately noted, "I know that the man that was killed was a white man, and his wife was also white; I do remember that."

There was not only an opportunity for racial prejudice to operate in this case; in fact, racial prejudice did operate in this case. *The Charlotte Observer* noted, "Few N.C. death penalty cases in recent history have been as thoroughly suffused with racial issues and tensions as the Robert Bacon case." First, people of color were systematically excluded from the jury. Robert was convicted and sentenced to death by an all-white jury in 1987. The death sentence was vacated by the Supreme Court of North Carolina and the case remanded. Robert was resentenced to death by an all-white jury in 1991.

Robert's trial and resentencing hearing were held in Onslow County which has a population that is approximately 20 percent African-American. Before Robert's 1987 trial, trial counsel filed a motion to prohibit the prosecutor from dismissing African-American jurors. Robert's attorneys argued in their motion that the District Attorney had shown "a pattern of discrimination against black jurors" by excusing them in death penalty cases. The trial judge denied the motion.

Forty-two citizens were called and questioned for jury service in the 1987 trial. Of these, only four were African-American. The trial judge found two of these were not qualified to serve and dismissed them. Over defense objection, the State dismissed the other two. The prosecutor gave as reasons for dismissing the two jurors the criminal record of one juror and the jurors' views on the death penalty. The defense pointed out that there was no evidence of the juror's criminal record and disputed the prosecutor's characterization of the jurors' views on the death penalty. In addition, defense counsel stated that the prosecutor's manner of questioning with one of the African-American jurors was different from his questioning of white jurors.

On appeal, counsel assigned error to the prosecutor's use of peremptory challenges to remove African-American jurors. However, counsel did not brief the issue.

During jury selection in the 1991 resentencing hearing, 48 jurors were called and questioned. Another 20 jurors were questioned during the selection of alternates. Of these, the trial court found that there were three qualified minority jurors: an African-American man, a Hispanic man, and a Hispanic woman. The State dismissed all three people of color. The defense objected to the dismissal of the African-American juror and the prosecutor stated that he excused this juror because of his criminal record. Defense counsel did not object to the dismissal of the two Hispanic jurors.

On appeal, counsel assigned error and briefly argued that the prosecutor improperly removed the African-American juror because of his race. The Supreme Court of North Carolina summarily denied relief. In state post-conviction proceedings, counsel argued that the State's dismissal of all persons of color in both capital proceedings constituted a pattern of purposeful discrimination under *Swain v. Alabama*, 380 U.S. 202 (1965). This claim was summarily denied by the state and federal courts.

Regardless of whether the State was within its legal rights in removing jurors of color, the fact remains that Robert Bacon, Jr. was never judged by a jury of his peers. Not one of 24 jurors who convicted or sentenced him had a personal understanding of what it meant or how it felt to be called a "nigger" by an angry, drunk white man in the confines of a small automobile.

Even more troubling than the racial make-up of the jury is the fact that racial bias infected the deliberations on whether Robert Bacon, Jr. should live or die. In interviews conducted by post-conviction counsel, jurors admitted that they improperly considered race. At trial, jurors made racial jokes. During deliberations at the resentencing hearing, jurors held it against Robert that he was romantically involved with a white woman. And because the State had excluded all jurors of color, there was not one African-American juror to object to these improper racial comments.

Jurors were reluctant to discuss these matters. On one occasion, a juror initially denied that racial comments were made during the penalty phase deliberations, but then admitted that, in fact, such comments had been made. No jurors were willing to sign affidavits attesting to the facts they described to counsel. Nevertheless, counsel presented

this claim to the courts. Unfortunately, the State successfully opposed Robert's efforts to obtain an evidentiary hearing on these allegations, and the courts denied relief on this claim.

Legislation pending before the N.C. General Assembly provides that no person "shall be subject to or given a sentence of death that was sought or obtained on the basis of race." This legislation, which would apply retroactively, would permit a defendant to establish that race was a basis for the death sentence by presenting testimony of members of the criminal justice system.

However, in this case, all of the courts refused to conduct an evidentiary hearing. The courts ruled that testimony from jurors concerning their improper consideration of race in determining punishment was inadmissible.

The fact that racial prejudice played a part in determining Robert's punishment is an inescapable conclusion when one considers that the white codefendant who masterminded the murder and pushed Robert to do it was sentenced to life.

Numerous studies have shown that the statistical likelihood of being sentenced to death is much greater if the victim is white. A study by researchers at the University of North Carolina in Chapel Hill entitled "Race and the Death Penalty in North Carolina, An Empirical Analysis: 1993-1997" was released on April 16, 2001, and reported in *The New York Times*, *The Washington Post*, *Chicago Tribune*, national wire services, and newspapers throughout North Carolina. The study shows that when a homicide victim is white, the risk of a death sentence is increased 3.5 times. In addition, the study showed that, when minorities murdered whites, the death sentencing rate was 6.4 percent. When whites murdered whites, the rate fell to 2.6 percent. Thus, the chances that a minority defendant who kills a white victim will receive the death penalty are nearly two and one half times greater than the chances that a white defendant who kills a white victim will face execution. After reviewing the study, former Chief Justice Exum stated that the study constituted powerful evidence that race does play a part in the administration of the death penalty that the legislature never intended.

In a report requested by the General Assembly's Legislative Research Commission, and prepared by the N.C. Academy of Trial Lawyers, Robert's case was highlighted as an example of the pernicious effect of racial prejudice on the administration of the death penalty in North Carolina. This report was made part of the record of the Legislative Research Commission.

A recent examination of the role race plays in the application of the death penalty also featured Robert's case. Wissink, Stephen, "Race and the Big Needle," *Spectator*, March 7-13, 2001 (also reprinted on AlterNet.org). The *Spectator* story noted that Robert was sentenced to death for killing a white person and then said that if the victim had been black, the "odds were extremely good that [Robert] would have been sentenced to live." North Carolina has executed 17 prisoners. Twenty-two of the twenty-four victims were white.

Concerns about the effect of racial bias on this prosecution have prompted the NAACP to call for clemency in this case. The Chairman of the Board of Directors of the NAACP, Julian Bond, has written, "The disparity in the punishment of Bonnie Clark and Bacon shows that capital punishment in the United States has not yet overcome its history of racism and inequality." The Onslow County Branch of the NAACP has also called for clemency in this case on the grounds that equal justice under the law must not be compromised. Similar concerns have prompted the N.C. Legislative Black Caucus to urge clemency for Robert.

The Inter-American Commission on Human Rights, an agency under the auspices of the Organization of American States, has also urged a stay of execution. The Commission has requested a stay in order to conduct a full review of Robert's claims of racial bias.

In this case, Bonnie Clark hatched the plot to kill her husband. Jurors found that Bonnie Clark dominated Robert and manipulated him into committing the killing. Yet, Bonnie received a life sentence. Racism is one explanation for the disparity in punishment.

The people of North Carolina have declared that "they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987). We cannot be assured in this case that racial prejudice did not infect the jury's decision to sentence Robert Bacon, Jr. to die. The Governor now has the opportunity and obligation to demonstrate the truth of axiom proclaimed in *Cofield*, and to commute the death sentence to life imprisonment without parole.

LAW ENFORCEMENT OFFICERS SUPPORT CLEMENCY IN THIS CASE

Three officers involved in the investigation of this case believe that the execution of Robert Bacon, Jr. would be unfair. Two of the officers, Dennis Dinota and J.J. Phillips, have given affidavits attesting to their view that Robert's death sentence is unfair in light of Bonnie Clark's life sentence. A third officer, who has requested not to be identified publicly, recently told counsel with regard to Robert's execution, "I just don't see that as fair." This officer also noted that Bonnie Clark was the reason for the murder because the crime "wouldn't have happened without her."

Dennis Dinota is retired from the Jacksonville Police Department. Mr. Dinota is a 20-year veteran of the United States Marine Corps and worked in law enforcement for more than two decades. He was awarded the Silver Star, the Bronze Star for Heroic Achievement, a Battle Field Commission, and two Purple Hearts. Mr. Dinota is a proponent of the death penalty. As part of the homicide investigation in this case, Mr. Dinota interviewed Bonnie Clark. He thinks that it is unfair to execute Robert because Bonnie Clark was at least as guilty as Robert and she received a life sentence.

J.J. Phillips has been with the Jacksonville Police Department since 1976, and is still on the force. He found the body of Glennie Clark and testified at the Bacon and Clark trials. Officer Phillips believes that Bonnie Clark pushed Robert to commit the crime and that it is not fair to execute Robert.

The third officer has agreed to speak privately with the Governor's representative concerning this case.

Counsel knows of no other N.C. capital case since reinstatement of the death penalty in which law enforcement authorities involved in the investigation of the capital offense have voiced support for clemency.

**ROBERT BACON, JR.'S DEATH SENTENCE IS UNFAIR
BECAUSE THE JURY DID NOT HEAR ALL OF THE
RELEVANT EVIDENCE CONCERNING ROBERT'S MOTIVE**

Glennie Clark's emotional and physical abuse of his wife Bonnie Clark was the impetus leading to the capital offense in this case. The police officer in charge of the investigation of the crime put it this way, at the conclusion of his interview with Robert:

I know you regret it's happened, too. Like I say, you know, I know Bonnie had a lot of ill feelings for this man because he caused a lot of heartache in her life and I'm sure you love her like you told us you did, and we talked about that at the house. Sometimes what a man will do for a woman, and I know I regret that it had to come to this. I never met her husband, but from what she told me, it was a very sordid affair. Sad affair. It is. It is sad.

Evidence at Bonnie Clark's trial documented her husband's substantial and sustained abuse and the alcoholism that precipitated it. Moreover, the worse things got between Bonnie Clark and her husband, the more she confided in Robert. According to testimony introduced at the Bonnie Clark trial, Robert hated Glennie Clark as much as Bonnie Clark did. Evidence showing that the killing of Glennie Clark was not simply a cold-blooded murder for money meant the difference between a death sentence and life imprisonment for Bonnie Clark. However, at the resentencing hearing in this case, the jury learned very little about the relationships between Bonnie and Glennie Clark, between Bonnie Clark and Robert, and, ultimately, between Robert and Glennie Clark. These relationships were clearly relevant and helped to explain what led Robert to commit the offense. In addition, these relationships mitigated Robert's actions.

The State read into the record Robert's testimony from the first sentencing hearing. That testimony contained a single reference to the fact that Bonnie Clark had told Robert that her husband was always drinking and abused her and the children. Little evidence was presented showing that Robert killed for reasons other than money. The jury learned from Robert's testimony that Glennie Clark had called him a "nigger" before the stabbing. The only other evidence related to motive came from a psychiatrist. This psychiatrist was not certified in forensic psychiatry, a fact capitalized on by the prosecutor. *See State v. Bacon*, 337 N.C. 66, 95-96, 446 S.E.2d 542, 557 (1994) (discussing prosecutor's impeachment of defense expert).

The psychiatrist had reviewed Bonnie Clark's testimony but had very little information about Robert's background. Even more importantly, following an objection from the prosecutor, the trial judge instructed the jury not to consider what little testimony there was about Robert's history as substantive evidence. This instruction also applied to the testimony about Bonnie Clark's problems with her husband. Thus, although the psychiatrist told the jury that Robert had a history of "becoming involved in [sic] people that were in need of assistance" and that Robert presented a "picture of trying

to help rescue Ms. Clark from her reported abuse by her husband," there was no evidence before the jury documenting the history of Glennie Clark's abuse.

Resentencing counsel promised in his opening statement to present evidence showing that Glennie Clark was a severe alcoholic, that when he drank he became extremely abusive, and that he had a .31 blood-alcohol-level on the night of the offense. However, counsel never even attempted to present that evidence to the resentencing jury.

In addition, counsel promised in his opening statement to present evidence that the last thing Robert told Bonnie Clark after he killed Glennie Clark was that he loved her. This evidence was never presented to the jury either. The failure to deliver on this promise served only to highlight the significant absence of evidence about Glennie Clark's alcoholism and abuse and the role that these factors had on Bonnie Clark's ability to dominate and manipulate Robert.

At the resentencing hearing, the prosecution argued strongly that Robert's sole motivation was pecuniary gain. In addition, the prosecutor belittled the notion that Glennie Clark harassed or otherwise bothered Robert and Bonnie Clark. Elsewhere, however, the State has acknowledged that Robert's motive was not solely monetary. At Bonnie Clark's trial, District Attorney William H. Andrews argued this in opening statement:

The idea originated in her mind. She had more reasons to have him killed than Robert Bacon. Robert Bacon had what he wanted X her. Money was the main reason she wanted him dead.

The jury's failure to consider the plentiful evidence that Robert killed Glennie Clark for reasons other than money was plainly prejudicial. The jury that heard this evidence X Bonnie Clark's jury X rejected the pecuniary gain aggravating circumstance, despite the fact that the insurance policies were in Bonnie Clark's name. That same jury also rejected the death penalty.

At the resentencing hearing, the State presented Robert's testimony from the previous sentencing hearing. At that time, Robert testified that he did not love Bonnie Clark. He also stated that he had no affection for the children. These statements were not credible. The night Robert was arrested, and at the end of his interrogation, Robert asked to see Bonnie and told law enforcement officers that he loved Bonnie. In addition, Bonnie Clark testified at her trial that Robert "always treated the kids really good, like he was their father." She went on to say that he used to tuck them into bed at night and got along with them "real well." Elsewhere in her testimony, Bonnie Clark attempted to place responsibility for the murder on Robert. It is obvious in her testimony that she was trying to help herself and was decidedly not trying to help Robert. Consequently, her statements about Robert's good relationship with her children have added weight.

Prior to meeting Bonnie Clark, Robert had never been in trouble before. Had he never met Bonnie Clark, Robert would not have faced capital murder charges.

Consequently, it is understandable how, at the time of his trial, he would feel angry and bitter about ever being involved romantically with Bonnie Clark. It is telling that Bonnie Clark also downplayed her feelings for Robert. Shortly after her arrest, Bonnie sent a note to Robert saying that the situation they were in was her fault. She also sent a message to Robert saying, "I still love you with all my heart." Nonetheless, at trial, when asked whether she had loved Robert, Bonnie Clark stated, "possibly." To the question of whether she loved him then, she said she didn't know. The jury that heard all of the evidence concerning Glennie Clark's abuse of Bonnie Clark and how that abuse drove Robert and Bonnie Clark together was able to see that, in fact, the murder of Glennie Clark was not simply a cash proposition. Robert's jury did not have that same opportunity.

In addition, if the jury had heard this evidence but nonetheless imposed a death sentence X because of Robert's race, for example X this evidence would have made a significant difference on appeal. The fairness and proportionality of Robert's death sentence was hotly contested in the Supreme Court of North Carolina. A four-two majority declined to find Robert's death sentence disproportionate because it believed that Robert killed for money and was not motivated by reports of continuing physical abuse and threats against his lover by her husband. *See State v. Bacon*, 337 N.C. 66, 114, 446 S.E.2d 542, 568-69 (1994) (distinguishing *State v. Gladden* in proportionality analysis). Had the substantial, available evidence of Robert's knowledge of Glennie Clark's abuse of his wife and their children been presented at his resentencing hearing, it is very likely that the Supreme Court of North Carolina would have vacated Robert's death sentence as disproportionate.

The following chart illustrates the wealth of evidence the resentencing jury never heard about the circumstances of the crime.

Evidence the Jury Never Heard Showing that Glennie Clark's Abuse of Bonnie Clark and Their Children Motivated the Crime

Bonnie Clark felt she could talk to Robert about anything and she confided in him about all the problems she was having. For Bonnie Clark, the worse things got with Glennie Clark, the better things were with Robert.

Robert knew how miserable Bonnie Clark was and he hated Glennie Clark for the things Glennie Clark did to Bonnie Clark.

Robert was the only one Bonnie Clark told about her problems with Glennie Clark. She was too ashamed to tell her family.

Robert was aware of numerous instances when Glennie Clark had physically abused Bonnie Clark.

For example, Robert knew that, on one occasion, Glennie Clark smashed Bonnie Clark's head against a kitchen cabinet and held a knife to her throat.

Another time, while Glennie Clark was supposed to be watching his son, he passed out and the little boy injured himself so badly that he had to go to the hospital and received six stitches in his head.

When he was drinking, Glennie Clark was violent and he would be mean to the children. As a result of the way he acted when he was drinking, the children were afraid of Glennie Clark and Bonnie Clark did not trust Glennie Clark with the children.

There were times when Glennie Clark forced himself sexually on Bonnie Clark.

On a number of occasions, Glennie Clark threatened to kill Bonnie Clark. Glennie Clark told Bonnie Clark that, if she ever went with another man, he would kill her.

When Glennie Clark was drunk, he was violent and physically abusive; on the night of the offense, Glennie Clark's blood-alcohol-level was .31

Shortly after her arrest, Bonnie Clark sent a note to Robert saying that the situation they were in was her fault.

**ROBERT BACON, JR.'S DEATH SENTENCE IS UNFAIR
BECAUSE THE JURY NEVER HEARD COMPELLING MITIGATING
EVIDENCE ABOUT ROBERT'S BACKGROUND**

Robert was charged with first degree murder in February of 1987. Three months later, the case went to trial. Trial counsel's investigation of Robert's background and history consisted of a single weekend trip to Ayer, Massachusetts, where Robert spent many of his growing up years. After the Supreme Court of North Carolina ordered a new sentencing hearing, the same attorneys were appointed to represent Robert. They conducted no new investigation of Robert's background. That bears repeating: counsel conducted no new investigation for sentencing despite the fact that the **only** issue was whether Robert would live or die. The presentation by defense counsel the first time was obviously not enough to persuade a jury to return a life sentence, yet counsel conducted no new investigation. The result is that Robert's defense at resentencing was based on investigation plagued by the following problems:

- ≤ Counsel devoted one weekend prior to trial to investigating Robert's family history.
- ≤ Counsel interviewed potential witnesses in the presence of the assistant district attorney charged with seeking Robert's execution.
- ≤ Counsel interviewed friends and family members for about five minutes each.
- ≤ the only time counsel met with potential witnesses outside the presence of the prosecutor was in a group setting.
- ≤ Counsel did not go to Robert's schools because they were closed over the weekend.
- ≤ Counsel never interviewed any of Robert's teachers and never obtained any of his educational records.
- ≤ Although counsel had secured Robert's prison records for the resentencing hearing, and although these records showed that Robert was a model inmate, counsel failed to use these records to rebut the State's argument of future dangerousness.
- ≤ Counsel did not contact Robert's family concerning the need to testify at resentencing.
- ≤ Other than securing funds for a psychiatrist who was not certified in forensic psychiatry, counsel did nothing more to prepare. At resentencing, following an objection from the State that was sustained by the trial judge, the psychiatrist's testimony about Robert's family history was not admitted as substantive evidence. Counsel presented no substantive evidence from lay witnesses concerning

Robert's background and history; instead, counsel presented four-year-old videotaped interviews of witnesses in Massachusetts rather than bringing live witnesses to court.

Significantly, counsel admitted to Robert's post-conviction attorneys that he had no informed strategic or tactical reason for not contacting Robert's family regarding the resentencing hearing, for not interviewing teachers or securing educational records, and for not presenting evidence of Robert's positive adaptation to incarceration. Unfortunately, as a consequence of these deficiencies, the jury that sentenced Robert Bacon, Jr. to death was ignorant of many vital facts.

One of the three Fourth Circuit judges who reviewed this case questioned the constitutionality of Robert's death sentence in light of the fact that counsel did not present substantial, available mitigating evidence to the jury. Judge King was particularly concerned that no court had ever allowed Robert's post-conviction attorneys to present this evidence at a hearing.

At the resentencing hearing, defense counsel presented a videotape consisting of several interviews with neighbors in Ayer. These interviews are brief and superficial. One gathers that the participants, although well-meaning, did not know Robert very well. Even those witnesses who did know Robert well appear as if they did not. Overall, the videotape is hardly compelling. Supplementing the videotape, counsel presented the testimony of a psychiatrist. As mentioned in the previous section, this psychiatrist also had little information about Robert. In addition, the jury was told not to treat the psychiatrist's limited testimony about Robert's background as substantive evidence. The State did a masterful job cross-examining the psychiatrist, revealing among other things that he had failed the examination to be licensed as a forensic psychiatrist. Then the defense presented brief testimony from Robert's sister. All told, the defense did not present a strong case for life. The jury nevertheless found some substantial mitigating factors. Importantly, these were supported by the **prosecution's** evidence.

Resentencing counsels' failure to develop mitigating evidence is particularly troubling in this case because there was substantial evidence that could have been presented. As described in Judge King's dissent and other documents attached to this Petition, the evidence included:

- ≤ Robert was eight months old when he first saw his father, a member of the armed services who was frequently stationed overseas. Until Robert was nine years old, he had very little contact with his father.
- ≤ Economic circumstances compelled Robert's mother to work when he was a child. Robert was left in the care of his older half-brothers, who often inflicted physical pain on their younger siblings. Robert and his sibling were often forced to fight each other for the entertainment of these old boys, one of whom was ultimately sent to reform school.

- ≤ Robert's father was an alcoholic. His children rarely saw him without his pint of alcohol. Robert's father would leave his children in the car while he went to bars.
- ≤ Robert's parents had an extremely unhappy and tense marriage. The bitterness in the marriage affected Robert, who became a chronic nail-biter.
- ≤ Robert's father engaged in numerous adulterous affairs.
- ≤ When Robert was still quite young, his mother sought his advice on family problems, including his father's adultery and other sensitive subjects.
- ≤ Robert's mother encouraged him to eavesdrop on his father's telephone calls and she informed Robert of her plan to investigate his father's adultery. Robert's mother also encouraged Robert to listen in on conversations in which his father's girlfriends would berate and curse Robert's mother.
- ≤ These family problems were a source of anxiety for Robert, who experienced bed-wetting until he was fourteen years old. Robert's bed-wetting, which occurred almost nightly, was a significant source of shame. Robert's school performance also took a dramatic downturn after he first learned of his father's affairs.
- ≤ Robert saw various incidents of his father's physical abuse of his mother. For example; on one occasion, when Robert's mother confronted his father, Robert's father drove his car down the driveway, dragging Robert's mother behind him.
- ≤ Robert's teachers recalled how he once intervened to stop a fight in the school cafeteria and how he did not like it when kids picked on other kids.
- ≤ Like Robert's mother, Bonnie Clark confessed her marital problems to Robert and sought his help. Robert knew of numerous incidents when Glennie Clark physically abused Bonnie, including a time when he smashed her head against a cabinet and held a knife to her throat.
- ≤ Robert was good to Bonnie Clark's children and she trusted him to watch them. He did things with the children and tucked them into bed at night.

These circumstances of Robert's background "uniquely mirror[ed] the circumstances surrounding the crime." *Bacon v. Lee*, 225 F.3d 470, 493 (4th Cir. 2000) (King, J., dissenting). This evidence showed that in his own family and in his relationship with Bonnie Clark, Robert served as the confidant for an abused woman. Further, this evidence showed that, when faced with these circumstances, Robert "was manipulated to take steps he otherwise might not have taken." *Id.*

There was a substantial difference between this evidence and the general character evidence presented at the resentencing hearing. The jury deliberated for close

to six hours in this close case. Had it been presented, the jury likely would have imposed a life sentence.

The evidence presented in support of the death penalty in this case was weak. The sole aggravating factor submitted in this case was that the murder was committed for pecuniary gain, N.C.G.S. §15A-2000(e)(6). Prior to the Supreme Court of North Carolina's 1994 decision in Robert's case, no death sentence based on this single aggravating circumstance had been sustained in North Carolina. In the previous 14 cases in which pecuniary gain was the sole aggravating factor, juries had returned life sentences in 12 cases and the Supreme Court of North Carolina had found the other two death sentences to be disproportionate. *State v. Bacon*, 337 N.C. at 66, 128, 546 S.E.2d 542, 577 (1994) (Exum, C.J., and Frye, J., dissenting).

Legislation pending before the N.C. General Assembly would eliminate the pecuniary gain aggravating circumstance.

The evidence of pecuniary gain was weaker in this case than in many of the 14 cases where juries found (e)(6) but imposed a life sentence. *See e.g., State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989) (defendant bludgeoned shop clerk to death by striking him with a hammer in order to steal \$545 from a country store); *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988) (defendant repeatedly stated his intention to "kill that son-of-a-bitch and rob him"); *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988) (defendant broke into home of 69-year-old woman for whom he had done odd jobs, struck her in the head fracturing her skull, and stole her checks, one of which he cashed for \$475).

The State's theory at trial was that Robert committed the offense in order to share in the proceeds of the victim's life insurance policy. The theory was based on the following admission Robert made at 7:14 a.m., after Robert had been up all night and had been interrogated for nearly six hours:

Q: Did she at any time offer you any money?

A. No.

Q: How about insurance money?

A. Together.

Q: In other words, O.K., but together you all finally would have a life together and the money would have been both [sic] of you?

A. Yes.

The evidence of Robert's monetary motive was undeniably weak. In fact, the State argued at Bonnie Clark's trial that, while Bonnie Clark wanted the money, "Robert

Bacon had what he wanted X her.” Even more troubling is the fact that the jury did not hear other, substantial evidence that would have further weakened the State’s case for death. The following chart illustrates the weakness of the State’s evidence in aggravation.

Evidence Presented at Robert’s Trial Concerning the Life Insurance Policy	Evidence the Jury Never Heard about the Life Insurance Policy
<p>Glennie Clark had a life insurance policy worth \$50,000, with Bonnie Clark named as the beneficiary.</p> <p>Robert testified that he knew there was an insurance policy but denied that there was a plan to kill Glennie in order to receive the insurance proceeds.</p> <p>Robert admitted that he had told the police that the insurance money “would have been ours.” He also admitted that the police had next asked him whether he meant his and Bonnie Clark’s and he said yes. (No details of the circumstances under which Robert made this admission were before the jury.)</p>	<p>The only time Bonnie ever discussed the insurance policy in Robert’s presence was when she was joking with her housemates about how, if Glennie never came back from overseas, she would be rich</p> <p>Bonnie Clark testified at trial that she did not know if the life insurance premiums had been paid or whether the policy had lapsed and, in fact, she assumed that the policy had been cancelled.</p> <p>Bonnie did not know the amount on the policy and learned only after she was arrested that it was for \$50,000.</p> <p>Bonnie emphatically denied ever talking with Robert about the insurance money. She was equally emphatic in denying that Robert had ever talked about the insurance money.</p>

Bonnie Clark’s jury heard that Bonnie Clark had admitted to law enforcement authorities that the subject of Glennie Clark’s life insurance had come up in conversation with Robert. Her jury also heard other evidence related to the insurance policy. Nonetheless, Bonnie Clark’s jury did not find the pecuniary gain aggravating circumstance and Bonnie Clark received a life sentence.

Resentencing counsels’ failure to investigate their case made the difference between life and death. The jury did not have before it all of the evidence relevant to punishment. The Governor is in a unique position to decide the appropriate sentence in this case, based on all of the relevant evidence. An examination of all of that evidence clearly tips the scale in favor of life imprisonment without parole.

- ≤ Robert was emotionally abused and neglected by his alcoholic father
- ≤ Robert's father's infidelity had a devastating effect on Robert
- ≤ Robert witnessed acts of physical violence between his parents
- ≤ Tension at home led to Robert's bed-wetting and poor school performance
- ≤ Robert's relationship with Bonnie and Glennie Clark mirrored the relationship between Robert and his parents
- ≤ Bonnie Clark was able to manipulate Robert the same way his mother did
- ≤ Robert knew of and hated Glennie Clark's abuse of Bonnie Clark and her children
- ≤ At the time of the offense, Glennie Clark was drunk and called Robert a "nigger"
- ≤ As a student, Robert had a strong sense of fairness and acted to protect others, even in the face of danger
- ≤ Robert's behavior while incarcerated demonstrates that he responds positively to a structured environment
- ≤ Robert aided the police in apprehending another capital felon, Bonnie Clark
- Robert has no significant history of prior criminal history
- Robert acted under the domination of Bonnie Clark
- Robert has no history of violent behavior
 - Robert's character, habits, mentality, propensities, and activities indicate he is unlikely to commit another violent crime
- Robert's criminal conduct was the result of circumstances unlikely to recur
- The initial idea for the plan that resulted in the death of the victim was Bonnie Clark's
- Robert's codefendant, Bonnie Clark, was convicted of the same offense and was given a life sentence
- Robert has shown remorse since his arrest
- Robert's family loves him and has continued to visit him while incarcerated and will continue to do so

When Robert was asked about insurance he admitted it would be his and Bonnie's

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(A ≤ indicates a mitigating circumstance not presented to the jury while a □ indicates mitigating circumstances submitted and found by the resentencing jury.)

**THE DEATH SENTENCE IS UNFAIR BECAUSE THE JURY NEVER
LEARNED THAT ROBERT BACON, JR. PROVIDED VITAL ASSISTANCE TO
THE AUTHORITIES IN APPREHENDING BONNIE CLARK**

The Supreme Court of North Carolina unanimously vacated Robert's first death sentence because the jury was precluded from considering constitutionally mitigating evidence of a statutory mitigating factor. *State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990). This factor, N.C.G.S. §15A-2000(f)(8), provides that if the evidence shows that the defendant aided in the apprehension of another capital felon, the jury must give that circumstance weight in determining punishment. In *Bacon I*, the court held that the evidence in the record supported submission of this mitigating factor and that the jury's failure to consider this factor prejudiced Robert. The evidence presented at the trials of Robert and Bonnie Clark established the following facts:

According to testimony from the State's witnesses, the police found the body of the victim in his car shortly after 11 p.m. on February 1, 1987. Bonnie was seated next to her deceased husband. Bonnie Clark awoke and told an Officer Phillips that two unknown assailants had attacked her and her husband. She repeated this story at least once at the scene. She told the story again to an Officer Waters, who transported her to the hospital. She continued to tell the story to an Officer Dinota, who questioned her at the police station. Asked to provide a written statement, Bonnie Clark wrote down this false story. All of these officers believed Bonnie Clark and thought she was the victim of a crime, and not a suspect.

Meanwhile, the police went to Bonnie Clark's home around 1:20 a.m. that same night to check on her children. Robert answered the door and, shortly thereafter, he freely and voluntarily gave police a statement admitting that he had stabbed the victim while Bonnie Clark drove the car. Robert also showed the officers the bloody clothes he had been wearing during the offense. Law enforcement authorities immediately telephoned the station. At approximately 3:05, after she had consistently lied for about four hours, Bonnie Clark was arrested. Shortly thereafter, she confessed

Thus, the Supreme Court of North Carolina concluded in *Bacon I*:

The record reveals that on the night of the murder Bonnie Sue Clark told the police that mysterious assailants had opened her car door and slammed her head against the steering wheel thus rendering her unconscious. She was unable to provide further information as to her assailants. After being examined at the hospital, she reiterated her exculpatory statements and reduced them to writing at the police station. See *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989). At approximately the same time, defendant told police officers that: He had been in the automobile with Bonnie Sue Clark and the victim, Glennie Leroy Clark; the victim called him a "nigger" and pulled a knife on him; he grabbed the knife from the victim and stabbed him; and, all of this took place while Bonnie Sue Clark was in

the vehicle. It was at this point that the investigators first began to focus on Bonnie Sue Clark as a possible accomplice in the murder.

State v. Bacon, 326 N.C. 404, 418-19, 390 S.E.2d 327, 335 (1990). The court went on to conclude that the trial court had erred by not instructing the jury on the statutory mitigating circumstance that Robert had aided in the apprehension of another capital felon, N.C.G.S. §15A-2000(f)(8). The court then vacated Robert's death sentence and remanded so that this constitutionally mitigating evidence could be presented to the jury.

At resentencing, despite a "road map" from the state's highest court, Robert's attorneys X the same lawyers who had represented him the first time X failed to present available evidence supporting (f)(8). *State v. Bacon*, 337 N.C. 66, 100-101, 446 S.E.2d 542, 560 (1994).

In state post-conviction proceedings, Robert's attorneys argued that counsels' failure to present evidence of (f)(8) constituted ineffective assistance of counsel. Counsel asked for an opportunity to present evidence of this violation of the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984). The State argued that no hearing was necessary and urged the court to deny relief summarily. In one sentence that mentioned neither the Sixth Amendment nor *Strickland*, the post-conviction judge concluded that Robert's claim had no merit.

In federal court, the State continued to urge summary dismissal of the (f)(8) claim. However, United States District Judge W. Earl Britt ordered an evidentiary hearing on the issue. At the hearing, two former officers of the Jacksonville Police Department testified about the circumstances of Bonnie Clark's arrest. In addition, attorney Harold J. Bender of Charlotte testified as an expert witness. Mr. Bender expressed his view that trial counsels' failure to investigate and present the (f)(8) evidence constituted ineffective assistance of counsel.

The State presented testimony from former District Attorney William H. Andrews and three police officers. These witnesses attempted to ridicule the defense evidence of (f)(8).

After conducting a hearing and taking evidence, the United States District Court granted a writ of habeas corpus in this case. The court concluded that Robert's attorneys had rendered ineffective assistance of counsel in his resentencing hearing. Judge Britt found that the testimony from the State's witnesses "did not belittle the facts" supporting (f)(8). In addition, Judge Britt emphasized that the Supreme Court of North Carolina in *Bacon I* had found that the evidence supported (f)(8). Judge Britt also noted the many decisions by the state supreme court finding prejudicial error where the jury was not required to consider a statutory mitigating circumstance supported by the evidence.

The importance of the evidence that Robert assisted the police in apprehending Bonnie Clark cannot be overstated. The United States Supreme Court has observed with regard to a criminal defendant's cooperation with law enforcement authorities that:

Few facts available to [the sentencer] are more relevant to the likelihood that a defendant will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, and the degree to which he does or does not deem himself at war with his society.

Roberts v. United States, 445 U.S. 552, 558 (1980). A century before the decision in *Roberts*, the Supreme Court expressed the view that, if an accomplice "behaves fairly and discloses the whole truth, he may, by a recommendation to mercy, save himself." *United States v. Ford*, 99 U.S. 594, 599-600 (1878) (*The Whiskey Cases*). More recently, the Supreme Court noted with regard to the federal court practice of giving lighter sentences to those who provide substantial assistance in the investigation or prosecution of another criminal that this factor is among the "most important offense and offender characteristics" in determining punishment. *Mistretta v. United States*, 488 U.S. 361, 377 (1989).

As suggested in the Supreme Court case, the "judicial practice of sentencing more leniently defendants who evidence contrition and cooperate with law enforcement authorities" is well-established. *U.S. v. Frazier*, 971 F.2d 1076, 1084 (4th Cir. 1992). *Frazier* forcefully explains that the longstanding practice of affording leniency to cooperating defendants serves "legitimate societal interests." *Id.* When a defendant acts on the "deeply rooted social obligation" to cooperate with authorities and aids in apprehending other criminals, as Robert did, that defendant is "appropriately" given a lesser punishment. *Id.*

A recent death penalty case in Onslow County illustrates the point. Keith Cole was convicted of capital murder in April of this year. The State's evidence showed that Mr. Cole and a codefendant planned the murder and that Mr. Cole actually carried it out. A strong component of the case for life was Mr. Cole's cooperation with law enforcement authorities. As in this case, police officers met Mr. Cole by chance. Authorities noticed a stain that looked like blood and asked about it. Mr. Cole immediately confessed and implicated his cohorts. The trial judge submitted and the jury found as a mitigating circumstance that Mr. Cole had aided in the apprehension of another capital felon. Significantly, Mr. Cole was sentenced to life imprisonment. The same result likely would have occurred had counsel in Robert's case presented the available evidence of (f)(8).

Clearly it was a mistake for Robert's resentencing attorneys not to investigate and present this vital evidence. Robert's is the only North Carolina death penalty case in more than a decade in which a federal court has found constitutionally inadequate representation. See *Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989) (reversing district court's finding of ineffective assistance of counsel). The findings of Judge Britt were fully supported by the evidence. As detailed elsewhere in this petition, by distorting facts and ignoring North Carolina law, the United States Court of Appeals for the Fourth Circuit reversed, thus maintaining its nine-year record of reversing every grant of relief in every capital case from Maryland, Virginia, North Carolina and South Carolina.

Careful study of the record demonstrates that the district court's finding of ineffective assistance of counsel was accurate. The Governor should not allow Robert Bacon, Jr.'s execution to proceed.

THE DEATH SENTENCE IN THIS CASE IS UNFAIR BECAUSE COUNSEL MADE NUMEROUS GRAVE ERRORS

Counsel did not thoroughly investigate Robert's case prior to the resentencing hearing. Previous sections have set forth the plethora of evidence that went undiscovered by counsel and was never presented to the jury that sentenced Robert Bacon, Jr. to death. Counsel made several other serious errors at the resentencing hearing. No court has heard evidence concerning these errors, which include:

- ≤ In jury selection for the resentencing hearing, counsel asked potential jurors about their knowledge of the case and exercised peremptory challenges to remove jurors who were familiar with the case. However, in closing argument at resentencing, counsel needlessly and inexplicably told the jury that Robert had previously been sentenced to death.
- ≤ Counsel interviewed potential witnesses for about five minutes each in the presence of the assistant district attorney charged with seeking Robert's execution.
- ≤ Counsel assisted the State in its presentation by reading testimony to the jury.
- ≤ Counsel elicited testimony from several of the videotaped witnesses concerning Robert's possible release from prison if he were sentenced to life imprisonment.

Judge King of the Fourth Circuit dissented and wrote that Robert was entitled to an evidentiary hearing on a number of his claims of ineffective assistance of counsel.

Judge King was particularly troubled by counsels' action in informing the jury of Robert's prior death sentence. "I can conjure no possible legitimate reason why Bacon's own lawyer would believe it necessary to reveal this fact . . . to the jury," wrote Judge King, adding, "Certainly there were several more appropriate ways to explain his mother's absence." *Bacon v. Lee*, 225 F.3d 470, 491 (4th Cir. 2000) (King, J., dissenting).

The district court also had "grave questions about the competence of any attorney who would mention the prior death penalty of his client in any context." The Supreme Court of North Carolina has held that telling a jury that the defendant has previously received the death penalty in the very same case is one of the few "transgressions" that is "so gross" and its "effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors." *State v. Britt*, 288 N.C. 699, 713, 220 S.E.2d 283, 292 (1975).

Judge King also noted counsels' "unusual manner of interviewing witnesses" and argued that Robert was entitled to a hearing on the adequacy of his legal representation given the "cursory" and "perfunctory" interviews conducted in the presence of the prosecutor. 225 F.3d at 492-93. The evidence that resentencing counsel did not discover was of a sensitive and personal nature; witnesses cannot be expected to open up and

discuss such issues in a five-minute interview in the presence of the person whose interest is in seeing the loved one executed.

At the resentencing hearing, the State presented only five witnesses. The first two witnesses, taxi driver Buffalo Smith and police officer J.J. Phillips, testified briefly about their discovery of Bonnie Clark and the deceased. The heart of the State's case was the testimony of the next three witnesses, none of whom testified live before the jury. Karen Rosser, Robert and Bonnie Clark's former roommate, and Charles Bilderback, who explained that Bonnie was the beneficiary of a \$50,000 life insurance policy, could not be found to testify. The State therefore asked that their testimony be read into the record. The prosecution also asked to read into the record testimony Robert had given at the first sentencing hearing.

Defense counsel inexplicably participated in the presentation of this evidence. Not only did defense counsel favor the prosecutor by reenacting the cross-examination of Rosser and Bilderback, but they also recreated their direct examination of their own client. In closing argument, District Attorney Andrews bolstered the credibility of the State's case by drawing the jury's attention to defense counsels' personal participation in the presentation of the State's evidence. Repeatedly the prosecutor asked the jury to give credence to the State's case because the testimony was introduced "by his own lawyer." Ironically, defense counsel commented to the jury that the clerk of court who assisted in reading prior testimony into the record was the "State's hired gun," apparently failing to recognize that the defense too had served as a "hired gun" for the prosecutor.

The Sixth Amendment requires the assistance of counsel for the **defense** of the accused. "If no actual assistance for the accused's defense is provided, then the constitutional guarantee has been violated." *United States v. Cronin*, 466 U.S. 648, 654 (1984) (internal quotation marks omitted). The cornerstone of the Supreme Court's holding in *Cronin* was the notion that the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an **advocate**." *Anders v. California*, 386 U.S. 738, 743 (1967)(emphasis added). In this case, counsel abandoned their role as advocates and served instead as adjuncts to the prosecution. There can be no reasonable explanation for counsels' willingness to aid the State in its efforts to secure the death penalty against the very man they had a sworn duty to defend.

Defense counsel presented the videotaped depositions of several witnesses at the resentencing hearing. In response to defense questioning, a number of these witnesses explicitly or implicitly referred to the possibility that Robert might be released on parole, if sentenced to life imprisonment. In his closing argument, the prosecutor capitalized on this testimony and emphasized that Robert might be a danger in the future.

The North Carolina Supreme Court has consistently held that information concerning parole should not be placed before capital sentencing juries, because consideration of a defendant's possible release "is calculated to prejudice the jury and influence them against a recommendation of life imprisonment." *State v. Conner*, 238 N.C. 468, 470, 85 S.E.2d 584 (1955). Moreover, "it is entirely reasonable for a

sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not.” *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994).

Certainly there were other ways of conveying to the jury that many people still considered Robert a valuable member of society. No reasonable tactical judgment can justify the presentation of evidence that had the effect of pushing jurors away from a vote for life imprisonment and towards a death sentence.

Counselors’ errors in this case were numerous and substantial. They made the difference between life and death. Whether the State takes a life should not depend on the quality of counsel afforded by the State. The Governor should grant clemency in this case.

THE DEATH SENTENCE IN THIS CASE IS UNFAIR BECAUSE THE STATE HAS TAKEN INCONSISTENT POSITIONS ON VITAL ISSUES

On four vital issues, the State has taken inconsistent positions during the litigation of this case. The first concerns the relative culpability of Robert and his codefendant, Bonnie Clark. The second concerns Robert's motive. The third concerns whether Robert aided the police in apprehending Bonnie Clark. The fourth concerns the relative strength of the mitigating evidence presented by the defense at resentencing. The Governor should grant clemency in this case because the integrity of the judicial process has been undermined by the State's adoption of inconsistent positions.

Concerning the relative culpability of Robert and Bonnie Clark, newspaper reports show that the State argued at Bonnie Clark's trial, "Who was the brains? Robert Bacon was **only a pawn**." However, at Robert's resentencing hearing, the prosecutor argued, "Says he acted under the domination of another person. That's not what the evidence shows. . . . That's exactly what he was in this case, **a leader and an organizer**."

The State also flip-flopped on the question of Robert's motive. At the resentencing hearing, District Attorney William H. Andrews argued that Robert killed "purely and simply for the money." The prosecutor told the jury that there was "no other reason why he killed him."

Yet, at Bonnie Clark's trial, the State argued to the jury that the monetary motive was exclusively Bonnie Clark's:

The idea originated in her mind. She had more reasons to have him killed than Robert Bacon. **Robert Bacon had what he wanted X her**. Money was the main reason she wanted him dead.

After Bonnie Clark's trial, assistant prosecutor Dewey Hudson told the *Jacksonville Daily News*, "We felt she deserved the **same sentence** as he received."

Bonnie Clark was sentenced to life and Robert was sentenced to die. On appeal, the State abandoned its position that Bonnie Clark and Robert deserved the same punishment and, instead, vigorously defended Robert's death sentence. When the question was the proportionality of Robert's sentence of death, the State argued that the death sentence was justified because "Bonnie Sue Clark did not wield the knife." In addition, after acknowledging that Bonnie Clark wanted money while Robert wanted Bonnie Clark, the State argued in the Supreme Court of North Carolina that Robert killed "for money, not for love nor even for hate."

The court reporter at Bonnie Clark's trial did not transcribe the jury arguments and the only record of what the prosecutor argued to the jury comes from newspaper reports and the recollections of trial counsel. Consequently, the issue of the inconsistent positions taken by the State in the Bacon and Clark trials has never been presented in court.

The third critical issue on which the State has taken an inconsistent position concerns the evidence of (f)(8). At trial, the State's witnesses clearly acknowledged Robert's purposeful assistance to them in apprehending Bonnie Clark. At the suppression hearing in the Clark case, police admitted telling Bonnie Clark, "Robert ain't stupid. He was the one that turned on you."

At Bonnie Clark's trial, the prosecutor even gave Robert credit for helping the police to obtain a confession from Bonnie Clark. The district attorney put the following question to Bonnie Clark on cross-examination:

You told them the truth when they confronted you with the bloody clothes and they told you what Robert had told them, that's when you knew the jig was up?

At Robert's first sentencing hearing, the jury did not have before it the mitigating circumstance that Robert's cooperation with the police had aided in the apprehension of another capital felon. On appeal, Robert's counsel argued this omission as a reason why Robert should be resentenced. Significantly, the State did not argue that there was insufficient evidence of this mitigating circumstance. Indeed, the State conceded that the trial court had "reviewed the evidence which, if believed, supported this mitigator."

Again on resentencing, the jury was precluded from considering evidence of (f)(8). Defense counsel raised this issue on appeal. Again, the State did not argue that there was insufficient evidence of this statutory mitigating factor. Instead, the State argued that the evidence at resentencing was different from the evidence presented at trial. The State's brief noted that, unlike the earlier proceeding, "the State here introduced less testimony and the defendant chose not to present the additional evidence which would have mandated submission of the apprehension mitigating circumstance."

In federal habeas proceedings, the question before the court was whether resentencing counsel's representation was inadequate because counsel did not introduce sufficient evidence to require submission of (f)(8). It was at this point that the State switched horses. Having earlier maintained that "the jig was up" for Bonnie Clark when Robert confessed, now the State took the position that:

. . . Bacon was **not** assisting law enforcement officers before Mrs. Clark was apprehended. . . before Mrs. Clark's apprehension Bacon was nothing but a lying murderer trying witlessly to tell a Big Lie that would somehow incredibly save his skin. (emphasis in original)

The State also argued to the federal district court that the police "apprehended Bonnie before Bacon decided to come clean with us." Further, despite previously arguing that Robert was not stupid but had deliberately turned on Bonnie Clark, the State contended that Robert did not intend to assist the police in apprehending Bonnie Clark.

After many years and numerous proceedings in which the State never once challenged the existence of evidence in the record sufficient to mandate submission of (f)(8), the State now presented this testimony from one of the investigating officers:

Chief, if you were asked at the time of the resentencing hearing to describe to the jury what your reaction would be to an allegation that Mr. Bacon assisted you in the apprehension of a capital felon, that is Bonnie Sue Clark, how would you respond?

That's ridiculous.

The federal district court did not buy this argument and ordered resentencing. In fact, Judge Britt expressly rejected the officer's testimony and found it did "not belittle the facts."

However, the State pressed the point in the Fourth Circuit, a friendly forum for prosecutors arguing against death row prisoners. The Fourth Circuit accepted the State's argument and reversed after concluding that Robert's "inadvertent" assistance would have carried "slight weight" with the jury. *Bacon v. Lee*, 225 F.3d 470, 479 (2000).

The fourth critical issue on which the State has vacillated is the strength of the defense evidence in mitigation. At trial, the prosecutor denigrated the defense evidence, arguing to the jury that the mitigating circumstances presented by the defense "simply border on the ridiculous." Elsewhere, the district attorney told jurors they "ought not to put much weight" in the defense evidence.

On direct appeal in *Bacon II*, the State continued to belittle as "insignificant" the evidence resentencing counsel presented in their effort to save Robert's life. According to the State, Robert's "pleasant, middle class childhood, playing high school sports and enjoying a close family relationship with his parents and siblings" failed to mitigate his actions. The State cast doubt on the scant testimony before the resentencing jury concerning any problems in Robert's family, noting that the only one to testify about Robert's father's "purported absence and womanizing" was a psychiatrist retained by the defense. The State went on to note that the psychiatrist's opinions carried "little force."

The State took a markedly different position when the question was whether Robert had received effective assistance of counsel at his resentencing hearing. Post-conviction counsel argued that Robert's resentencing lawyers had failed to uncover significant evidence about Robert's background and history. The defense argued further that this evidence would likely have made the difference between life and death.

In response, the State cited the "ample" and "plenary" evidence" resentencing counsel had presented concerning Robert's childhood and background. The State then recounted facts about Robert's background testified to by the psychiatrist. The State did not mention that none of this evidence was before the jury as substantive evidence, nor

did the State say that this evidence "carries little force." Of course, this was the same evidence that the State had previously denominated as "insignificant."

The State's argument prevailed. The Fourth Circuit refused to order an evidentiary hearing on the adequacy of Robert's counsel. The Fourth Circuit accepted the State's position that counsel had presented ample evidence of Robert's background and that the evidence the jury never heard was merely "cumulative." *Bacon v. Lee*, 225 F.3d 460, 482 (4th Cir. 2000).

In an adversarial system, each side has a duty to give zealous representation and to argue the facts persuasively. In this case, the State has argued a number of positions that are inconsistent, thus leaving the Governor with these questions: Was Robert Bonnie Clark's pawn or was he the leader? Did Robert simply want to be with Bonnie Clark or did he kill for money? Did Robert deliberately help the police or witlessly lie? Did Robert's attorneys put up a ridiculous defense or an ample one? It is now up to the Governor to sift through the record and to determine the truth as best he can. The truth is that it would be manifestly unfair to execute Robert Bacon, Jr.

MANY OF THE STATE AND FEDERAL JUDGES WHO HAVE REVIEWED THIS CASE HAVE FOUND FUNDAMENTAL UNFAIRNESS

Two juries have returned the death sentence in this case. This fact has no bearing on whether the Governor should grant clemency. As noted in previous sections, the juries never heard critical evidence related to Robert's motive, evidence relevant to the State's sole aggravating circumstance, and evidence of compelling mitigation. In addition, the resentencing jury improperly considered Robert's race when deciding his punishment. Absent all relevant evidence, and operating on racial prejudice, it would not matter if 100 juries returned the death penalty in this case X the death sentence would still be manifestly unfair.

Significantly, many of the state and federal judges who have reviewed this case have voted to vacate the death sentence. At nearly every stage of the proceedings in this case, judges have found serious constitutional error and unfairness:

Proceeding	Judges Voting to Grant Relief	Judges Voting Against Granting Relief
<i>Bacon I</i> Direct Appeal	7	0
<i>Bacon II</i> Direct Appeal	2	4
State Post-Conviction	0	1
Federal District Court	1	0
Fourth Circuit	1	2

In *Bacon I*, the court unanimously concluded that the Robert's first jury was precluded from considering constitutionally mitigating evidence. The court found that there was "a reasonable possibility that had this mitigating circumstance been submitted to the jury, a different result would have been reached at the sentencing hearing."

The failure of the jury to consider this evidence "created too great a 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Citing the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), the court ordered resentencing after concluding, "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *State v. Bacon*, 326 N.C. 404, 420, 390 S.E.2d 327, 336 (1990).

In *Bacon II*, Former Chief Justices Exum and Frye said that this case was a "misfit" among cases in which a death sentence was returned. The dissenting justices noted that Robert's was the only case in which a defendant who was under the inspiration, direction, and domination of a confederate was condemned to death while the confederate was sentenced to life. *State v. Bacon*, 337 N.C. 66, 128 and 131, 546 S.E.2d 542, 577-78 (Exum, C.J., and Frye, J., dissenting). Significantly, in the near-quarter century since reinstatement of the death penalty, members of the Supreme Court of North Carolina have questioned the proportionality of a death sentence only 15 times.

In federal district court, U.S. District Judge W. Earl Britt found that Robert's resentencing counsel had failed to provide constitutionally effective assistance. The court noted that the jury's decision was a close one and that the introduction of additional mitigating evidence "could have resulted in a life sentence." Thus, the result of the sentencing hearing in this case was "fundamentally unfair, or at the very least, unreliable." Again, the significance of the district court's finding of unfairness cannot be overstated. Only once in more than a decade has a federal district court judge found ineffective assistance of counsel in a North Carolina death penalty case.

In the Fourth Circuit, Judge King wrote, "We are delving into the realm of legal fiction when we assert that Bacon received a full measure of fair procedure" in state court. Judge King despaired that the Fourth Circuit had "compounded the lack of fair procedure" by denying an evidentiary hearing on the adequacy of resentencing counsels' representation. Judge King concluded, "In a case such as this — where a life hangs in the balance — it is more important than ever that justice not only be done, but that justice also be seen to be done." 225 F.3d 470, 495 (4th Cir. 2000) (King, J. dissenting).

**THE SUPREME COURT OF NORTH CAROLINA'S
CONCLUSION THAT ROBERT BACON JR.'S DEATH SENTENCE
WAS NOT DISPROPORTIONATE IS UNRELIABLE**

Since reinstatement of the death penalty, North Carolina juries have sentenced more than 300 people to death. At present there are more than 200 men and women on death row. In only 15 cases have members of the Supreme Court of North Carolina questioned the proportionality of the death sentence duly imposed by a jury. In seven cases, the Court vacated the death sentence and imposed a life sentence. In eight other cases, one or more justices dissented on the grounds of proportionality. Since 1988, no death sentence has been vacated as disproportionate.

On June 30, 1993, the Supreme Court of North Carolina issued an opinion finding that Robert Bacon, Jr.'s sentencing hearing was free of prejudicial error and that the death sentence was not excessive. Former Chief Justices Exum and Frye dissented and argued that Robert's death sentence was disproportionate and that the court should impose a sentence of life imprisonment.

On August 17, 1993, the court withdrew its June 30 opinion. Nearly a year later, on July 29, 1994, the court reissued its opinion. Again, the court divided four-two on the issue of proportionality. A comparison of the two opinions, and an understanding of the surrounding litigation, demonstrates that the majority's conclusion that Robert's death sentence was fair and proportionate was not the result of an impartial analysis expected of courts in a democracy. Unfortunately, the facts reveal a result-oriented jurisprudence unworthy of deference by the Chief Executive.

The sole aggravating circumstance submitted and found by the jury was that the murder was committed for pecuniary gain, N.C.G.S. §15A-2000(e)(6). As the dissent pointed out in both opinions, in the previous 14 cases in which pecuniary gain was the sole aggravating factor, juries had returned life sentences in 12 cases and the Supreme Court of North Carolina had found the other two death sentences disproportionate.

In the court's opinion from June of 1993, the majority justified its finding of proportionality by comparing Robert's case to *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (1986), which the majority treated as a "death-affirmed" case. The majority said that Robert's case appeared "comparable in many respects" to *Gladden*, which involved the "brutal killing of a Marine sergeant." The majority summarized the facts of *Gladden* as follows:

The defendant in *Gladden* was having an affair with the victim's wife at the time of the murder. Six months prior to the actual murder, defendant attempted to hire someone to kill the victim. When this failed, defendant planned and participated in a scheme with the victim's wife whereby they lured the victim to a secluded area by telling the victim that his wife's car had broken down. When the victim arrived at the scene, the defendant slashed the victim's throat, shot him twice, dragged him into a ditch, and

then shot him two more times in the face. After the attack, the defendant went back to his apartment and changed clothes. He then returned to the scene, dragged the victim's body into the woods, and took the victim's wallet and watch in order to make it appear as though a robbery had occurred.

...

In the case at bar, defendant and Bonnie Sue Clark, the victim's wife, with whom the defendant was having an affair, planned to kill the victim weeks prior to the actual murder so that they could obtain insurance money. Defendant and Bonnie Sue Clark enticed the defendant into Bonnie Sue Clark's car under the pretense of going to see a movie. Defendant then reached over the back seat and stabbed the victim sixteen times. After stabbing Glennie Clark to death, defendant tried to conceal the crime by setting up the scene to look as if a botched robbery had occurred.

Gladden was the only case the majority likened to *Bacon* and it was on the basis of the similarity between *Bacon* and *Gladden* that the majority concluded that Robert's death sentence was not disproportionate.

Robert's appellate attorney Samuel J. Ervin, IV, promptly filed a motion for reconsideration in the Supreme Court of North Carolina. Unbeknownst to the court, the defendant in *Gladden* had obtained relief in state post-conviction proceedings and had been, thereafter, sentenced to life imprisonment. Therefore, Mr. Ervin argued, since the majority had concluded that the cases of *Bacon* and *Gladden* were similar, then Robert too should be sentenced to life imprisonment. "A failure to find Mr. Bacon's death sentence disproportionate in light of the majority's conclusion that the most similar case in the 'proportionality pool' is *State v. Gladden*, would be completely arbitrary and capricious," wrote Mr. Ervin.

The court responded by withdrawing its June 1993 opinion. A little more than a year later, the court issued a new opinion. This is what the court had to say about *Gladden* in July of 1994:

Defendant contends there are two other cases in the pool in which the jury recommended a life sentence which are most similar to the present case, that of his codefendant, Bonnie Sue Clark, *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989), and *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, 479 U.S. 871, 93 L.Ed.2d 166 (1986).

In *Gladden*, the defendant was having an affair with the victim's wife at the time of the murder. Six months prior to the actual murder, defendant attempted to hire someone to kill the victim. When this failed, defendant planned and participated in a scheme with the victim's wife whereby they lured the victim to a secluded area by telling the victim that his wife's car

had broken down. There the defendant slashed the victim's throat, shot him twice, dragged him into a ditch, and then shot him two more times in the face. After the attack, the defendant went back to his apartment, changed clothes, and returned to the scene. He dragged the victim's body into the woods and took the victim's wallet and watch to make it appear as though a robbery had occurred. *Gladden*, 315 N.C. at 404-06, 340 S.E.2d at 677-79.

While *Gladden* is similar to the present case X for example, both victims were Marine noncommissioned officers, and both defendants planned the murders, in advance, with their lovers X the distinguishing circumstance is that the defendant in *Gladden*, unlike defendant here, did not commit the murder for pecuniary gain. Rather, he was apparently motivated by reports of continuing physical abuse against his lover by her husband and by threats by her husband that he would kill both his wife and the defendant.

State v. Bacon, 337 N.C. 66, 114, 446 S.E.2d 542, 568-69 (1994). Missing from the court's opinion is the fact that *Gladden* involved a "brutal and especially torturous murder." *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673 (1986). In addition, evidence presented at trial showed that, after shooting the victim the last two times, Gladden laughed for several seconds. 315 N.C. at 434. There was also evidence that Gladden stated after the murder that he was glad he did it and would do so again "for the pleasure of it." *Id.* The court concluded on the basis of this evidence that Gladden had exhibited an "unusual depravity of mind." *Id.*

These facts are significant because they show that, in fact, there was a stronger case for death in *Gladden* than there was in this case. Robert promptly accepted responsibility for his actions and expressed remorse at trial. In addition, the jury in *Bacon I* rejected the State's argument that the murder of Glennie Clark was "especially heinous, atrocious, or cruel," N.C.G.S. §15A-2000(e)(9), and this aggravating circumstance was not before the resentencing jury.

Noted earlier was the fact that, at the time of Robert's direct appeal, the Supreme Court of North Carolina had reviewed 14 cases in which the only aggravating circumstance was pecuniary gain. In these 14 cases, juries returned life sentences in 12 and the Court imposed life in the other two. It is significant to note that the evidence of pecuniary gain was stronger in many of these cases than in this one. Additionally, it is significant that life sentences were imposed despite the fact that, in all but two of the cases, the defendant personally killed the victim. The following chart illustrates these points:

Case Name	Did <input type="checkbox"/> Personally Kill?	Evidence of Pecuniary Gain
State v. Stager	Yes	<input type="checkbox"/> made numerous statements to different people about victim's life insurance policy
State v. Weddington	Yes	<input type="checkbox"/> was beneficiary of victim's life insurance policy
State v. Payne	Yes	<input type="checkbox"/> told police he killed wife for insurance money
State v. Quesinberry	Yes	<input type="checkbox"/> told friend he was going to rob victim; after killing stole \$545
State v. Hogan	Yes	<input type="checkbox"/> planned with wife to rob store for money for cocaine; stole \$1500-\$2000
State v. Locklear	Yes	<input type="checkbox"/> planned robbery to obtain money to pay off drug debts
State v. Murphy	Yes	<input type="checkbox"/> robbed elderly victim and forged check for \$475
State v. Bauguss	Yes	<input type="checkbox"/> robbed gas station of \$80
State v. Woods	No	<input type="checkbox"/> offered another money from life insurance proceeds to kill her husband
State v. Hawkins	Yes	<input type="checkbox"/> beat victim to death and stole \$60-\$80
State v. Moore	Yes	<input type="checkbox"/> killed victim in apparent robbery of grocery store
State v. Weimer	No	<input type="checkbox"/> assisted in apparent robbery of grocery store
State v. Benson	Yes	<input type="checkbox"/> waited more than two hours for victim to make night deposit; after killing, stole moneybag
State v. Jackson	Yes	<input type="checkbox"/> killed after victim refused to give him money; after killing, robbed victim

The Supreme Court of North Carolina has a statutory obligation to ensure that no death sentence be imposed and affirmed "under the influence of passion, prejudice, or any other arbitrary factor." N.C.G.S. §15A-2000(d)(2). In terms of aggravation and personal culpability, Robert clearly falls within the other 14 cases in which pecuniary gain was the only aggravating circumstance. In addition, the mitigating evidence X that presented to the jury and that not found until post-conviction proceedings X weighs in favor of a life sentence.

When the court thought that *Gladden* was a death affirmed case, the court concluded that *Bacon* and *Gladden* were very similar and that the two defendants should receive the same punishment. Yet, when the court found that *Gladden* was a life case, suddenly the court found that *Bacon* and *Gladden* were very different. The facts of the two cases did not change between June of 1993 and July of 1994. The court said Robert and Willie Gladden deserved the same punishment. Willie Gladden's punishment was

life imprisonment; so too should Robert's punishment be life imprisonment. Only the Governor can ensure a fair and just punishment in this case.

THE CONVICTION AND DEATH SENTENCE IN THIS CASE ARE UNRELIABLE BECAUSE THE STATE'S EVIDENCE HAS NOT BEEN SUBJECTED TO FULL ADVERSARIAL TESTING

In 1996, the legislature enacted a statute requiring full discovery in all capital cases. The discovery provision, codified at N.C.G.S. §15A-1415(f), reads as follows:

In the case of a defendant who has been convicted of a capital offense and sentenced to death [t]he State, to the extent allowed by law, shall make available to the capital defendant's counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.

A great deal of litigation ensued concerning the scope of this new provision. One question concerned the applicability of this provision to cases in which the superior court had denied the defendant's motion for appropriate relief (MAR) prior to June 21, 1996, the effective date of §1415(f). In *State v. Green*, 350 N.C. 400, 514 S.E.2d 724 (1999), the court held that §1415(f) applied to cases in which, as of June 21, 1996, either (a) the defendant's motion for appropriate relief had not yet been denied by the superior court; or (b) the defendant's petition for writ of certiorari from the denial of the MAR had been filed but not yet denied by the Supreme Court of North Carolina.

Robert's case is one of a small number of cases in which the court denied discovery under §1415(f) because his petition for writ of certiorari was not pending on June 21, 1996. Rather, Robert's petition was filed and denied **after** June 21, 1996, and, under the terms of *Green*, fell outside the ambit of the discovery provision.

Robert's motion for appropriate relief was denied by the Superior Court of Onslow County on May 10, 1996. On April 15, 1998, a week after the Supreme Court of North Carolina decided *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998), and held that §15A-1415(f) applied to work product materials, counsel moved for full discovery in this case. The State opposed the defense motion and the superior court refused to order discovery. Defense counsel moved for reconsideration and again the superior court declined to order discovery. Robert's post-conviction counsel then filed a petition for writ of certiorari in the Supreme Court of North Carolina. In this petition, filed on August 11, 1998, counsel again requested discovery under §15A-1415(f). The State opposed the petition. On August 24, 1999, after it decided *Green*, the court denied certiorari review in Robert's case.

On June 21, 1996, Robert's attorneys were awaiting the production of a transcript of two oral arguments that had been held during state post-conviction proceedings. Under the law, the transcript was required before Robert could petition for review of the superior court's denial of his MAR. N.C. Rules App. P. 21(f). *See also Miller v. State*, 237 N.C. 29, 74 S.E.2d 513 (1953) (in capital post-conviction case where petitioner's life hangs in the balance, court must examine **entire record** with meticulous and painstaking care).

On May 15, 1996, after learning that Robert's MAR had been denied, counsel contacted the State and the court and requested that a transcript be prepared. The court, after finding the transcript was "necessary for further proceedings in this case," issued an order for the transcript's production on May 16, 1996. That transcript, prepared by a court reporter employed by the State, was delivered to counsel more than three months later, on August 23, 1996. Thereafter, Robert timely filed a petition for writ of certiorari. Nevertheless, because his petition was not pending in the appellate division on June 21, 1996, the court refused to order the State of North Carolina to provide to Robert's counsel the complete investigative and prosecutorial files in this case.

The arbitrariness of the court's ruling is patent. Consider the case of a defendant whose MAR was denied in the trial court on June 20, 1996. Assuming there was no transcript to be prepared, the defendant had 60 days in which to file a petition for discretionary review. N.C. Rules App. P. 21(f). Assume this defendant filed a certiorari petition on June 22, 1996, 58 days ahead of time. Under *Green*, this exceedingly diligent defendant is barred from obtaining discovery under \S 15A-1415(f) because, on June 21, 1996, he had no pleading filed in any court.

Consider also the case of *State v. Ward*. Ward's MAR was denied by the superior court on April 1, 1996, more than a month before the superior court denied Robert's MAR. There was no transcript to prepare and Ward's attorneys timely filed a petition for writ of certiorari on May 30, 1996. On June 21, 1996, although well within his right to file for discretionary review, Robert was not able to petition the court because he was waiting for the State to provide him with a necessary transcript. On that same date, Ward's petition was still pending in the appellate division. The court denied Ward's petition for writ of on July 31, 1996, and Ward thereafter initiated federal habeas corpus proceedings. After *Green* was decided, Ward received discovery under \S 1415(f) even though *Ward* was the **older** of the two cases.

The Supreme Court held in *State v. Bates*, 348 N.C. 29, 497 S.E.2d 276 (1998), that, by enacting \S 1415(f), the General Assembly had expressed its judgment that post-conviction discovery is essential to "thorough and complete review" in death penalty cases. By virtue of a technicality, discovery has not been provided in this case. As a result, **this case has not been subjected to thorough and complete review.**

The failure of the courts to order full discovery in this case is even more disturbing when one considers the record of the prosecutor in this case. The courts ordered discovery in *State v. Basden* and *State v. Levon Jones*, two cases prosecuted by the same district attorney that prosecuted Robert. Attached to this petition is a letter from counsel for Basden, outlining the extensive evidence not turned over to the defense at trial. Also included is an excerpt from the N.C. Academy of Trial Lawyers' report on capital cases. The *Levon Jones* case was one highlighted by the Academy, because critical evidence was not turned over to the defense by the prosecutor. These attachments document the prosecutor's pattern of withholding evidence favorable to the defense.

In evaluating a case for clemency, the Chief Executive must assess how much confidence to place in the court process afforded the prisoner. By enacting the discovery provision, North Carolina has increased the level of confidence the Chief Executive may have in the court proceedings. In this case, through no fault of Robert Bacon, Jr., there can be no confidence in the legal proceedings because the case has not been subjected to the rigorous procedural protections accorded other death-sentenced prisoners. Taken together with the many injustices in this case, the lack of fair process constitutes yet one more reason why Robert's death sentence should be commuted to life imprisonment without parole.

IF ROBERT BACON, JR.'S APPEAL HAD BEEN HEARD IN ANY APPEALS COURT OTHER THAN THE FOURTH CIRCUIT, THE ORDER GRANTING A WRIT OF HABEAS CORPUS WOULD HAVE BEEN AFFIRMED

In the last decade, the federal courts in North Carolina have found ineffective assistance of counsel in only one capital case, that of Robert Bacon, Jr. Convinced that the death penalty should not be carried out in this case, and aware of the extreme likelihood that the Fourth Circuit would, as it always does, reverse, counsel requested that the State not appeal. The State appealed. The Fourth Circuit reversed. An examination of the facts presented in federal district court, relevant law, and the decision of the Fourth Circuit, should persuade the Governor that Robert's case did not receive fair review. It falls to the Governor to impose the appropriate sentence in this case.

The last death penalty case in which the Fourth Circuit granted relief was *Williams v. Dixon*, 961 F.2d 448 (1992). Since that time, the court has reviewed more than 100 capital cases. The court has denied relief in every single one. More than that, in close to a quarter of the cases, either the district court or the three judge panel granted relief. In all of those cases, the three judge panel or the *en banc* court has reversed. Robert's was the 22nd death penalty case in a row in which the court reversed a grant of relief. No North Carolina judges sit on the Fourth Circuit. No person of color has ever been named to a permanent position on the Fourth Circuit, despite the nomination of a number of prominent and respected African-American jurists. In all other federal circuits across the country, habeas relief is granted in about 40 percent of the cases. These facts have led to questions about the fairness of review afforded capital defendants in the Fourth Circuit. It is certainly difficult to understand how the courts in the Fourth Circuit can be 100 percent wrong in the 20 percent of the cases in which they grant relief, and meanwhile be 100 percent right in the 80 percent of the cases in which they deny relief. Capital defendants would seem to have better odds of winning at three-card monte than at winning relief in the Fourth Circuit.

The Fourth Circuit's disposition in this case was manifestly unfair. In order to prevail on a claim of ineffective assistance of counsel, a defendant must show two things: that his attorneys rendered deficient performance and counsels' errors prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). In order for counsels' performance to be adjudged deficient, counsels' actions must have been unreasonable. If the challenged action was the product of a tactical or strategic decision on the part of trial counsel, there can be no finding of deficient performance.

In this case, Judge Britt found both prongs of the *Strickland* test. Judge Britt concluded that the Supreme Court of North Carolina had laid out a "roadmap" of the (f)(8) mitigating evidence and counsels' failure to present this evidence rendered Robert's death sentence fundamentally unreliable. In finding that counsels' representation fell well below the standard of reasonableness, and in finding that counsels' performance prejudiced Robert, Judge Britt placed substantial reliance on the facts found by the Supreme Court of North Carolina in *Bacon I*. In addition, the district

court emphasized the numerous decisions by the Supreme Court of North Carolina concerning the vital importance of statutory mitigating circumstances.

The Fourth Circuit reversed after determining that the defense had failed to show that resentencing counsels' performance was deficient. According to the Fourth Circuit, counsel "could have" made a tactical decision not to present the (f)(8) evidence. 225 F.3d 470, 479 (4th Cir. 2000). The court's decision was flatly contradicted by the record developed in the district court hearing. Before Judge Britt, attorney L. Robert Coxe testified unequivocally as follows:

Q. Did you have a conversation with Mr. Merritt in which he advocated as a tactical strategy not presenting evidence of this [(f)(8)] mitigator?

A. No.

...

Q. Okay. Do you recall having any disagreements with [co-counsel] Mr. Merritt about the defense strategy in this case?

A. No.

...

Q. I asked you earlier if you had made a conscious decision not to present evidence [of (f)(8)]?

A. No, we did not. Did we make a decision not to pursue this as a mitigator; no, we did not.

Other evidence presented at the district court hearing corroborated Mr. Coxe's testimony concerning the absence of a strategic decision to forego (f)(8) evidence. The evidence supporting (f)(8) could only come from the officers who were with Bonnie Clark prior to Robert's confession. These officers testified only in *Clark* and did not testify at Robert's trial. Robert's attorneys did not attend Bonnie Clark's trial or suppression hearing. Prior to the resentencing hearing, Robert's lawyers did not read the *Clark* opinion and did not interview these officers. Having failed to interview the officers and having never seen them testify, resentencing counsel were unaware of the potentially beneficial (f)(8) evidence. Consequently, counsel were hardly in a position to make, as *Strickland* requires, a reasoned, informed assessment of the value of the officers' testimony.

It is clear that the very foundation of the Fourth Circuit's reversal of the grant of relief is untrue. There can be no justice in this case unless the Governor intervenes.

The Fourth Circuit also ignored the Supreme Court of North Carolina's judgment that "substantial" evidence was available to support (f)(8) in this case, and that statutory mitigating circumstances play a uniquely significant role in capital sentencing in North

Carolina. According to the Fourth Circuit, there was no constitutional claim of ineffective assistance of counsel because the evidence of (f)(8) would have carried "little weight" and provided "only a slight benefit." This conclusion is directly contrary to the holding of the Supreme Court of North Carolina in *Bacon I*. There, the court held that that the record contained sufficient evidence of the (f)(8) mitigating circumstance. *State v. Bacon*, 326 N.C. 404, 419, 390 S.E.2d 327, 335-36 (1990). Under North Carolina law, evidence must be "substantial" in order to support submission of a mitigating circumstance to the jury. *State v. Laws*, 325 N.C. 81, 109, 381 S.E.2d 609, 627 (1989). Moreover, the Supreme Court of North Carolina found that the absence of jury consideration of the (f)(8) mitigating circumstance resulted in "ascertainable prejudice." *State v. Bacon*, 326 N.C. 404, 419, 390 S.E.2d 327, 335-36 (1990).

In addition, the Supreme Court of North Carolina has consistently found that the failure to submit a statutory mitigating factor supported by the evidence is prejudicial error. In no case has the Court found the failure to submit a statutory mitigating circumstance supported by the evidence to be harmless error. Thus, only by eschewing more than twenty years of North Carolina case law was the Fourth Circuit able to conclude that substantial evidence of the (f)(8) statutory mitigating circumstance would have proved of only "slight benefit" at the resentencing hearing in this case.

North Carolina's legislature fared little better than her courts in the Fourth Circuit's view. The General Assembly has determined that jurors in North Carolina death penalty cases must give mitigating value to only eight aspects of a capital defendant's character or the circumstances of the offense. Among these eight features is the question of whether the defendant aided in the apprehension of another capital felon. The General Assembly did not include an intent requirement when drafting the (f)(8) mitigating circumstance. Rather, the General Assembly decided that the critical question for the jury is whether the defendant "gave any assistance which in any way advanced the time or reduced the difficulty of taking that person into custody." N.C.P.I.XCrim. 150.10 (8A). Yet, the Fourth Circuit's conclusion that the evidence of (f)(8) would have carried "little weight" turned significantly on the Fourth Circuit's view that Robert had provided "inadvertent" assistance to law enforcement authorities in the apprehension of the mendacious and manipulative Bonnie Clark. As noted earlier, the facts do not support the Fourth Circuit's view on this issue. In addition, however, the Fourth Circuit's opinion simply ignores the North Carolina Legislature's decision to draft statutory mitigating circumstances as it saw fit. It is certainly not the Fourth Circuit's place, least of all without any North Carolina representation, to second-guess the General Assembly on what constitutes a mitigating factor.

A fundamental principle of habeas jurisprudence is that federal habeas courts must respect the state's "dignitary interest in seeing that their state law decisions are not ignored." *Coleman v. Thompson*, 501 U.S. 722, 738 (1991). This is precisely what the Fourth Circuit did in this case. The Governor now has an opportunity not only to restore respect for North Carolina's law and institutions, but to do justice by imposing a fair and just sentence in this case: life imprisonment without parole.

LIFE WITHOUT PAROLE IS SUFFICIENT PUNISHMENT IN THIS CASE

Robert Bacon, Jr. is on death row for his first and only crime. Robert adapted well to incarceration in the four years prior to resentencing, and he has continued to do so since. He has not had an infraction in the last six years. Prior to that time, his infractions consisted of disobeying orders concerning such things as the placement of a t-shirt and playing his radio too loud. Robert has had only two infractions involving fighting. In the first, another inmate shoved him first. The report of the incident states that there were "no injuries" and "no force" involved. The second incident, involving a "misunderstanding" between Robert and another inmate, was so minor that Robert received a suspended punishment for it.

Prior to arrest for this crime, Robert promptly took responsibility for his actions. While Bonnie Clark prevaricated with the police, Robert was very cooperative and confessed. As noted earlier, the practice of giving more lenient sentences to defendants who show contrition and cooperate with law enforcement authorities is well-established.

Robert is remorseful for his actions. He told the officers who first interviewed him that he regretted what he had done, he expressed remorse at trial, and he continues to do so today.

Robert understands that the alternative to execution is life imprisonment without parole and he is reconciled to a life of incarceration. He desires to make restitution to the children of Glennie Clark and to otherwise make a positive contribution while behind prison walls.

DECLARATION

I, Pamela Bloom Smith, swear or affirm that the following facts are true, to the best of my knowledge:

1. I am over the age of 18 and am a resident of Jacksonville, North Carolina.
2. I served as a juror at the 1991 resentencing hearing of Robert Bacon, Jr.
3. In June of 1995, I moved to Hawaii, where I lived until I returned to Jacksonville in August of 1998. On May 8, 2001, I had lunch with my sister and her former co-worker. My sister's former co-worker currently works for L. Robert Coxe. Mr. Coxe represented Bacon at the resentencing hearing. After talking with Mr. Coxe's employee, I asked her to get in touch with Mr. Bacon's current lawyers and ask them to contact me. On May 9, 2001, I talked with Bacon's attorney, Gretchen M. Engel on the telephone. This declaration documents statements I made to Ms. Engel.
4. During deliberations we took three votes. The first two votes were ten to two in favor of the death penalty. I voted for life both times. The other jurors thought that the two of us who wanted life were crazy. They complained that this should be an easy decision and that we were taking too long. The other jurors emphasized that Bacon had received the death penalty the first time, a fact we knew because Bacon's attorney had told it to us in closing argument. I felt I could never convince the other ten to change their minds. I knew the ten jurors who wanted the death penalty were getting frustrated with me and that is why, eventually on the third vote, I gave in.
5. I wanted to ask someone what would happen if all twelve of us could not agree on a verdict. But I didn't know who to ask. I wish I had stood my ground and had told the judge that we could not all agree on the death penalty and that I wanted to sentence Bacon to life.
6. I do not believe Bacon got a fair shake. He and Bonnie Clark both committed murder. Even though he was the one who actually killed the victim, I think Bonnie Clark was more responsible for the murder than he was. I do not believe his life should be taken when hers will be spared. I understand that the Governor has the power to change Bacon's sentence to life without parole. I believe that is fair punishment in this case.
7. I remember that during our deliberations there was a discussion of the fact that Bacon was dating a white woman. This topic came up after the first vote; a female juror first brought up the issue.
8. Some jurors felt that it was wrong for a black man to date a white woman. Jurors also felt that black people commit more crime and that it is typical of blacks to be

involved in crime. We talked about this for at least ten to fifteen minutes and some jurors were adamant in their feeling that Bacon was a black man and "he deserved what he got." I understood this to mean that those jurors believed that Bacon should receive the death penalty again.

9. I felt that the jurors who expressed these attitudes about race believed that these views justified the death penalty. I was offended by this discussion. I strongly believe that race should not play a part in whether someone lives or dies.

FURTHER AFFIANT SAYETH NOT:

Pamela Bloom Smith

Sworn and subscribed to before me, a Notary Public for the County of Onslow, State of North Carolina on this, the ____ day of May, 2001.