STATE OF NORTH CAROLINA LEE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. XX CRS XXXXX

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
DEFENDANT	)

****

MOTION TO REMOVE CONFEDERATE SYMBOLS AND MEMORIALS FROM THE COURTHOUSE WHERE TRIAL IS SCHEDULED

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The Defendant, by and through counsel, hereby moves this Court to provide a setting for his trial that does not contain images that could be interpreted as glorifying, memorializing or otherwise endorsing the efforts of those who fought on behalf of the Confederate cause or its principles. In making this motion, the Defendant relies upon the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 23 and 27 of the North Carolina Constitution.

In support of this motion, counsel states:

1. The Defendant stands currently charged with first degree murder. The State is seeking the death penalty. The possibility of a death sentence imposes an extraordinary burden upon the Court, the State and the Defense to ensure the fairness, accuracy and reliability of the trial and any subsequent sentencing hearing. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case." *Johnson v Mississippi*, 486 U.S. 578, 584 (1988) (citations omitted). It is well established that when a defendant's life is at stake, a

court must be "particularly sensitive to insure that every safeguard is observed." *Gregg v Georgia*, 428 U.S. 153, 187 (1976). This heightened standard of reliability in a capital case is an acknowledgement that "death is different." *Ford v Wainwright*, 477 U.S. 399, 411 (1986).

2. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v North Carolina*, 428 U.S. 280, 305 (1976).

3. There is a long-established history of race influencing sentencing determinations. Under slavery, rape was a capital offense when committed by a black man against a white woman but was not if the victim was a black woman.[1] North Carolina's Black Codes, adopted in 1866, imposed different punishments for people based on their race.[2] Case law from this time period justified these sentencing discrepancies, stating "the more debased or licentious a class of society is, the more rigorous must be the penal rules of restraint."[3] While modern sentencing laws are facially race neutral, studies show disparate sentencing outcomes under systems with imbedded discretion. Recently, the United States Sentencing Commission released a report concluding that, between 2007 and 2011, federal prison sentences for black men were almost 20% longer than those imposed on white men for

[1] John Hope Franklin, The Free Negro in North Carolina 1790-1860, 98-99 (1943).

[2] Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-77 (1988).

[3] *State v. Tom, a slave,* 13 N.C. 569 (1830).

similar crimes.[4]

4. Racial discrepancies in the application of the death penalty have been widely known and acknowledged for many years. In the Baldus study considered in *McCleskey v. Kemp,* 481 U.S. 279 (1987), researchers found that people convicted in Georgia of murdering white victims were approximately four times as likely to receive a death sentence as those convicted of murdering black people. A recent North Carolina study found that between the years of 1980 and 2007, the odds of a death sentence for people accused of killing a white victim was around three times higher than for those accused of killing a black victim.[5]

5. In North Carolina, one of the most extensive studies of the influence of race on the death penalty was recently reported. Between the years of 1990 and 2010, *even after controlling for race neutral culpability factors*, defendants who were charged with killing at least one white victim were 2.17 times more likely than defendants charged with killing only black victims to be sentenced to death.[6]

6. Further, race infects the death penalty system through improper preemptory striking decisions. In a study of the trials of all North Carolina death row residents as of July 1, 2010, even when controlled for race neutral strike reasons, black venire members were 2.48 times more likely to be struck by the State than white venire members.[7]

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[4] Mark Hansen, Black Prisoners are Given Longer Sentences than Whites, Study Says, ABAJournal.com (Feb. 15 2013).

[5] Michael L. Radelet & Glenn L. Pierce, Race and Death Sentencing in North Carolina: 1980-2007, 89 N.C.L. Rev. 2119, 2120 (2011).

[6] Barbara O'Brien, Catherine M. Grosso, George Woodworth & Abijah Taylor, *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C.L. Rev. 1997 (2016).

[7] Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2012).

7. In the capital trials in XXXX County between the years of 1990-2010, prosecutors struck black qualified venire members at XX times the rate they struck qualified white venire members.[8]

8. The United States Supreme Court has repeatedly emphasized the principle that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth and Fourteenth Amendments to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. *Eddings v Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring); *see also*, *Beck v Alabama*, 447 U.S. 625, 637-38 (1980); *Lockett v Ohio*, 438 U.S. 586, 604 (1978); *Gardner v Florida*, 430 U.S. 349, 357-58 (1977).

9. The Defendant's trial is set to begin on September 3, 2019 in the Lee County Courthouse. At the entrance to the courthouse, there is a large monument featuring a bronze bas-relief portrait of Confederate general Robert E. Lee for whom Lee County was named. The bas-relief is attached to a free standing red brick wall like structure, approximately eleven feet wide and seven feet tall. A history of Lee's life appears on the bronze plaque attached to the wall.[9] Inside the courthouse lobby, there is a painting and plaque describing Lee.

10. The appearance of justice is a necessary component of the decorum and integrity of the courtroom that the Court has a duty preserve. See *Deck v Missouri*, 544 U.S. 622, 631 (2007) (finding shackling unconstitutional based upon its impact on the dignity and decorum

[8] Please contact CDPL for information on your North Carolina jurisdiction.

[9] A photograph of the memorial and its accompanying text maybe be viewed at the website of the UNC-Chapel Hill Institute of Museum and Library Services, https://docsouth.unc.edu/commland/monument/654/.

of judicial proceedings). As the Court stated in *Estes v Texas*, 381 U.S. 532, 561 (1965)

> [T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.

11. The message being sent by the presence of Confederate symbols and icons can have a powerful influence on jurors, witnesses, family and citizens. While the defense is certain that the Court will do its best to prevent any overt racial animus or bias from entering into the proceedings, neither the parties nor the public can be assured that the judicial process has not been infected with improper influences due to the presence of symbols of racial bias in the courthouse.

12. This Court has a duty and obligation to ensure that the proceedings are fair and impartial both in reality and perception. *See generally North Carolina Code of Judicial Conduct* (1973).

13. Courts have long acknowledged the importance of symbolism and appearance in the courtroom. This is obvious from the symbols universally deemed appropriate to represent the highest ideals for a court of justice to maintain.[10]

14. Our own Chief Justice Cheri L. Beasley gave a statement after nationwide protests following the police murder of George Floyd in Minneapolis in which she said, "The data overwhelmingly bears out the truth . . . in our Courts, African Americans are more harshly

[10] The official seal of North Carolina is a circle 2¼ inches in diameter that features the robe-covered figures of "Liberty" and "Plenty" in its center. Around the outside border of the seal are the phrases "The Great Seal of the State of North Carolina" and Esse Quam Videri, the state motto, meaning "to be rather than to seem."

treated, more harshly punished and more likely to be presumed guilty."[11] When the Supreme Court decided to remove the portrait of enslaver and defender of slavery Thomas Ruffin from the courtroom, former Chief Justice Beasley said **"***It is important that our courtroom spaces convey the highest ideals of justice and that people who come before our Court feel comfortable knowing that they will be treated fairly*."

15. The display of a Confederate icon gives the inference of racial bias against African-Americans. By analogy, the Fourth Circuit Court of Appeals has held that the display of the Confederate flag gives the inference of racial bias.

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppression. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African-Americans.

United States v Blanding, 250 F. 3d 858, 861 (4th Cir. 2001).

16. Like the Confederate flag, General Robert E. Lee is a Confederate icon that many people revere for the express reason that he represents the southern way of life and the ideology that promotes racial bias. In a 2019 interview by WRAL anchor David Crabtree, Robert W. Lee, the great-great-great-great nephew of Robert E. Lee, referred to Confederate monuments as "idols of white supremacy".

THEREFORE, for the reasons set out above, and those to be argued at hearing on

[11] Josh Shaffer & Will Doran, Emotional NC Supreme Court Chief Says Racism, Prejudice 'Stubbornly Persist' in Courts, News & Observer, June 2, 2020, https://www.newsobserver.com/news/politics-government/article243197746.html?fbclid=IwAR0IgMAClpEgumteQmhlaSYbVEkmnNWoF9WzUQ2MurzamY-PSETS3MKMDLI.

this motion, the Defendant, through counsel, moves this Court to order that the trial in this matter proceed in a courthouse that is free from symbols, displays and portraits that could be perceived as supporting or endorsing the Confederate cause.

This the _____ day of _____, 202X.

Kellie Mannette	Stephen Freedman	Emilia Beskind
Counsel #1	Counsel #2	Counsel #3