Simply ask a few questions entitled to know whether they can follow law

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NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 97CRS-39580

STATE OF NORTH CAROLINA

VS.

RONNIE LEE KIMBLE,
DEFENDANT.

MOTION TO PERMIT VOIR DIRE EXAMINATION OF POTENTIAL JURORS REGARDING THEIR CONCEPTIONS OF PAROLE ELIGIBILITY ON A LIFE SENTENCE

NOW COMES the defendant, above-named, through counsel, pursuant to the Sixth and Eighth Amendments to the Constitution of the United States as those Amendments are applied to the States through the Fourteenth Amendment to the Constitution of the United States and Pursuant to the parallel provisions of the Constitution of North Carolina, Article I, Sections 19, 23 and 27 and moves the Court to permit counsel for the defendant to ask prospective jurors questions to determine whether they harbor prejudicial misconceptions about the length of time the defendant will have to serve in prison before becoming eligible for parole if the defendant receives a life sentence for first degree murder. As grounds for this motion, the undersigned shows the Court the following:

1. The defendant is charged in the above-captioned case with first degree murder for which the State has indicated it intends to seek the death penalty.

2. Under North Carolina law if the defendant is sentenced to life imprisonment for first degree murder, he

does not become **eligible** for parole for twenty-five (25) years. N.C.G.S. 15A-1371(a1).

3. Current North Carolina law is well settled that parole eligibility is not a relevant factor for jury consideration in assessing punishment. *State v. Connor,* 241 N.C. 468 85 S.E.2d 584 (1955) and progeny. In addition the North Carolina Supreme Court has held that it is not error for a trial judge to deny voir dire examination on potential jurors' conceptions about parole eligibility. *State v. McNeil,* 324 N.C. 33, 375 S.E.2d 909, 916 (1989).

4. However, this line of cases is now obsolete. On July 24, 1993, the General Assembly changed the law concerning the jury's consideration of parole eligibility in capital cases. It amended N.C.G.S. 15A-2002 to provide:

> The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life with eligibility for parole consideration after twenty-five years."

1993 N.C. Session Laws Ch. 538, 277 (1993 Session) (emphasis added). Subsequent to that passage, the legislature again amended 15A-2002 so that it now reads:

> The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole.

1994, Ex. Sess. The act applied to offenses committed on or after October 1, 1994. However, it reflects the public policy of the Legislature of North Carolina that judges are no longer to be put in the awkward position of having to lie to juries

in capital cases. Clearly, the legislative intent in setting the effective date was simply to give judges and all members of the legal system time to be informed of the change. The new law reflects the public policy of our legislature that capital juries make their decisions concerning life and death on truthful, accurate information.

5. To deny voir dire on potential jurors' perception of parole eligibility is to invite a finding of constitutional error. The defendant is entitled to know what misconceptions potential jurors harbor because those misconceptions could determine whether the defendant gets a sentence of life or death. Additionally, there is strong precedence from the United States Supreme Court to support voir dire of jurors on such an issue. In *Turner v. Murray,* 476 U.S. 28, 90 L.Ed.2d 27 (1986), the Supreme Court held that criminal defendants are entitled to question potential jurors about race in inter-racial murder cases not because race is relevant but because it is an irrelevant fact that the jury might improperly consider. Similarly, defendants are entitled to "cover the topic" of pre-trial publicity on voir dire. *Mu'Min v. Virginia,* 500 U.S. ___, 114 L.Ed.2d 493 (1991). Finally, in *Morgan v. Illinois,* 504 U.S. ___, 119 L.Ed.2d 492, the Supreme Court held that defendants have a due process right to make sure that potential jurors are not biased in favor of a death sentence prior to trial.

6. The danger that jurors will be effected improperly by concerns about parole is real and ever present. Both

scholarship and practical experience have demonstrated that most jurors do not believe that life means life as the North Carolina Supreme Court has insisted we tell them; and more to the point most believe that life means substantially less than 20 years. Hood, The Meaning of "life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605, 1624 n. 101 (1989) (life sentence was thought to be ten years). *See* Paduano & Stafford Smith, *Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty,* 18 Col. Human Rts. L. Rev., Spring 1987 at 211; Dayan, Mahler and Widenhouse, *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials,* 23 Loy. L.A. L. Rev. 151, 166. A recent Georgia Study, for example, revealed that the average juror believed that a murderer given a life sentence would be **released** in seven or eight years. *Id.* (citing Codner, "The Only Game in Town: Crapping Out in Capital Cases Because of Juror Misconception about Parole," 47-50 (As yet unpublished paper, University of Michigan School of Law)). Exacerbating this general widespread misconception about parole eligibility, there has been a great deal of publicity and controversy over the past several years concerning the early parole release of prisoners in North Carolina, including those sentenced to life terms. *See, e.g., Parole of Murderer Defended,* Raleigh News and Observer, July 11, 1990, at 4B (regarding triple murder, suicide committed by man paroled in 1987 after receiving a sentence of 40 years to life in prison in 1974); *Legislature Lifts Prison Population*

Ceiling, Raleigh News and Observer, March 7, 1990 at 1A; North Carolina's prison overcrowding problem and cap on the prison population which has led to the early release of many inmates has received widespread publicity statewide and further fueled the public misconception that inmates convicted of first degree murder may receive early parole release if given a life sentence. *See, e.g., Prison Population Drops to 17,238; Emergency is Lifted,* Raleigh News and Observer, May 20, 1987 at 1C ("Parole Commission Chairman...said the inmates paroled during the emergency period were 'all across the board' in terms of types of crimes committed and length of sentences"). Recent news stories focusing on the Governor's special legislative session on crime have further heightened the perception of the general public that prisoners serve only a small fraction of their time.

7. *State v. Quesinberry, 325 N.C. 125, 381 S.E.2d* 681 (1989), presents a graphic illustration of the existence of juror misconceptions about parole. Immediately after a judgment of death was entered, one juror stated to a newspaper reporter: "If a person deserves a life sentence and gets it, he should serve life, instead of going and pulling five or ten years and getting parole." Greensboro News and Record, Feb. 3 1988, at A6. Another juror remarked, "We felt with the possibility of him being out in a short time, that wasn't fair." *Id.* Given this information, the defendant filed a motion appropriate relief asking that his sentence of death be set aside. The motion included affidavits from two jurors

other than those who spoke with the newspaper reporter. One juror admitted that "[t]he question of parole was primary factor in out deliberations." Motion for Appropriate Relief, *State v. Quesinberry,* No. 83 CRS- 05 & 06 (Superior Court for Randolph County filed February 12, 1988).

> [S]everal of the women jurors expressed concern that if [the defendant] received a life sentence he would be released on parole in ten (10) years, return to his drug use and commit another murder....[T]en (10 years was the time period that was used during our deliberations about how much time [the defendant] *would actually spend in prison* if a life sentence was returned.

Id. (emphasis added). Another juror agreed, saying "[t]he possibility of parole was a pretty hot issue during the deliberations" and that the jury maintained that a life sentence would cause the defendant to "serve approximately ten (10) and no more than twelve (12) years in prison." *Id.*

8. It is a fundamental precept of the Eighth Amendment that the "qualitative difference" between death and all other penalties necessitates a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (plurality opinion). Thus a capital trial is subject to heightened procedural protections to insure that the sentencing result is reliable. Placing limitation of voir dire that create a death sentence that could be returned for reasons that would render the sentence unreliable is unconstitutional. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (risk of racial prejudice infecting capital sentencing

proceeding entitles defendant to question potential jurors about racial prejudice). In addition to this Eighth Amendment requirement, it is now well established that the capital sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. In this context, the United States Supreme Court has condemned a procedure that permits the imposition of a death penalty on the basis of information that is kept secret from the defendant and thus provides the defendant with no opportunity to rebut or explain the information. *Gardner v. Florida*, 430 U.S. 349 (1977). Moreover, the Court noted that "[w]ithout full disclosure of the basis for the death sentence, the ... capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*[, 408 U.S. 238 (1972)]. Additionally, it is well-settled that defendants possess a Sixth Amendment right to intelligently exercise peremptory challenges. *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

9. To comport with these, and parallel state constitutional commands, capital defendants in North Carolina must be permitted to ask potential jurors questions during the jury selection process to find out if they harbor any prejudicial misconceptions about the length of time that a person convicted of first degree murder must spend in prison before becoming eligible for parole release. Surely, if a juror may base his or her sentencing decision on misconceptions about parole, *Quesinberry*, 325 N.C. 125, 135-

36, 381 S.E.2d 681, 688 (1989), the defendant at a minimum must be able to find out from the jurors whether they have such misconceptions. Otherwise jurors will be entitled to premise their sentencing decision on erroneous information that is kept secret from the defendant and which the defendant is not given the opportunity to correct. Since *Quesinberry* squarely holds that it is not permissible to make the inquiry in post-trial proceedings, the only opportunity the defendant has to ferret out this highly prejudicial and potentially deadly information is in the jury selection process.

THEREFORE, since the public policy of this State has changed with the passage into law of the bill that will require the courts to truthfully inform the jury what a life sentence means, there is no longer any reason to deny this motion. The defendant prays this Court allow him to inquire of prospective jurors whether they harbor incorrect assumptions concerning the least amount of time a defendant could serve if convicted of first degree murder.

This the 22 day of January, 1995.

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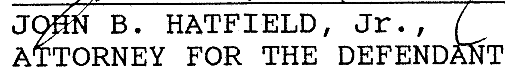

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