November 30, 2011
The Honorable Beverly Perdue
Governor of the State of North Carolina
20301 Mail Center Drive
Raleigh, NC 27699-0301

Re: Senate Bill 9 No Discriminatory Purpose in Death Penalty

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500
WWW.ACLU.ORG

Dear Governor Perdue,

We write today on behalf of the American Civil Liberties Union (ACLU), and the ACLU of North Carolina (ACLU-NC), our North Carolina affiliate, to ask that you veto Senate Bill 9, the wildly inaccurately named "No Discriminatory Purpose in Death Penalty," which effectively repeals the North Carolina Racial Justice Act (RJA). The ACLU is a national, non-profit, nonpartisan organization dedicated to preserving and defending the individual liberties provided for in the U.S. Constitution while the ACLU-NC affiliate defends and protects the rights guaranteed in the North Carolina Constitution. The ACLU-NC has approximately 7,000 members and supporters state-wide.

For three years the ACLU of North Carolina (ACLU-NC) fought to secure passage of the RJA with the support of the ACLU's Capital Punishment Project located in Durham. With many others, we celebrated the day that you signed the Racial Justice Act into law in 2009. The Racial Justice Act provides a mechanism to address racial disparities in North Carolina's capital punishment system. As you know, under the RJA, a defendant is allowed to present factual evidence to support his or her claim that a sentence of death was improperly obtained on the basis of race. If a defendant is successful in establishing this claim, a court could impose a sentence of life without parole instead of death. As you also know, no death row inmate would go free under the RJA.

If North Carolina is going to continue to use capital punishment, the Racial Justice Act is the very least we can do as a state to make sure that race is never a factor when considering an irreversible punishment. That is why we today urge you to veto SB 9.

Racial Bias in the Capital Punishment System

November 28th was a sad day indeed for North Carolina when the Senate succumbed to fear-mongering and voted to repeal a law fundamentally designed to ensure the principles set forth in Article 1 § 19 of the North Carolina Constitution, as well as the Fourteenth Amendment of the U.S. Constitution guaranteeing due process and equal protection under the law. Due process guarantees every North Carolinian charged with a crime a fair and impartial trial. Equal protection requires that bias never enter into either the jury selection or the decision to charge or sentence a defendant.

A study initially released in 2001 shows that a defendant is three times more likely to receive the death penalty in North Carolina if he is African American and his victim is white.[1] Moreover a recent Michigan State University College of Law study found that prosecutors statewide struck otherwise qualified African American jurors at a rate of at least twice the rate at which they struck white jurors.[2] These are only two of many recent reports released indicating serious racial bias in how North Carolina imposes the death penalty. To abandon the RJA now, before any hearings under the fledging law can be held would allow these troubling reports to go unanswered and put North Carolina in danger of executing a person based on race rather than the seriousness of the crime committed.

The RJA itself is already consistent with McClesky v. Kemp, in which the U.S. Supreme Court invited state legislatures to develop remedies and rights based on statistical evidence to address racial discrimination.[3] Statistics are routinely and appropriately used in housing and employment discrimination cases, and should likewise be relevant in cases of life or death. North Carolina judges are accustomed to weighing the strength of statistical evidence and prosecutors will have an opportunity to rebut statistical evidence showing with their own evidence that race was not a factor in their decisions. We should trust our courts to hear the evidence and dismiss frivolous claims while finally addressing the jarring reports discussed above rather than rush to repeal a new law that has yet to have a chance to prove its real need.

The *Ex Post Facto* Doctrine

Both in 2009 and in the days leading up to the vote on SB 9, opponents of racial justice argued that if a successful claim was made under the RJA, certain death row inmates sentenced before 1994 would be eligible for parole. Some opponents went so far as to argue that the RJA is unconstitutional as it may violate the *ex post facto* provision of the U.S. Constitution.[4] As an organization that defends and protects the rights provided in the Constitution, we took that suggestion very seriously. There is no danger either that the RJA violates the Constitution or that death row inmates may be released from prison should they successfully make a claim under the RJA. The *ex post facto* doctrine is a constitutional prohibition against imposing a harsher penalty against an individual than the punishment provided for by statute at the time of

---

[1] John C. Boger & Isaac Unah, Race and the Death Penalty in North Carolina, April 16, 2001.
[2] Barbara O'Brien & Catherine M. Grosso, Report on Jury Selection, 17, Sep. 29, 2011.
[3] McKlesky v. Kemp, 481 U.S. 279 (1987).
[4] U.S. CONST. art. I, § 10.

the crime.[5] The Conference of District Attorneys are entirely correct that a person sentenced to life in 1994 – when parole would have been an option for life sentenced inmates – cannot not be sentenced to life in prison without the possibility of parole as the RJA allows. However, none of the people on death row in North Carolina were sentenced to life in prison and no one sentenced to life in prison in 1994 would ever be able to make an RJA claim. The attachment of *ex post facto* is well settled law. The Supreme Court has stated that *ex post facto* was designed to give notice to the individual of what punishment his or her actions could carry. The Supreme Court has made clear that the *ex post facto clause* was meant, in part, to "give fair warning" of a law's effect and "allow individuals to rely on their meaning until explicitly changed." [6] The RJA gives clear notice that the only remedy provided for by the new law is life without parole and RJA claimants have included in their claims an acknowledgement of their understanding that life without parole is the only "relief" provided for. Therefore the first argument against *ex post facto* attaching to RJA claims is that claimants have waived their right to any other relief.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

In addition, established United States precedent dictates that when determining whether a law is *ex post facto* the court will look to the punishment *assigned by law* at the time of the commission of the crime and compare it to the current punishment being imposed.[7] It is beyond dispute that a sentence of life in prison – or even two consecutive life sentences – is not a worse punishment than execution.[8] Because life without parole is a lesser punishment than death, as the only relief available under the RJA, this punishment is ameliorative in nature. In 1994, the worst available punishment for first degree murder was the same as it is today – execution - and each and every claimant who may make an RJA claim was sentenced to die. There is, therefore, no viable *ex post facto* claim to be made and one need only look at the plain language of the RJA to know that the only relief available to a successful claimant under the act is life in prison without the possibility of parole.[9] In fact, this question has been tested five times when Republican and Democratic Governors have granted clemency to death row inmates, and have commuted their sentences to life without parole. In all of those cases, the inmates had been sentenced to death for murders under the old life with parole law. None of those people are considered parole eligible by the NC Department of Corrections or the Parole Commission. As the *ex post facto doctrine* applies to the executive and legislative branches with equal force, the fact that none of these five inmates have ever been considered eligible for parole seems to definitively demonstrate that the argument that the RJA is unconstitutional is completely baseless.

---

[5] *See* Dobbert v. Florida, 432 U.S. 282 (1977).
[6] Weaver v. Graham, 450 U.S. 24, 28-29 (1981).
[7] *See* Collins v. Youngblood, 497 U.S. 37, 54 (1990); Weaver v. Graham, 450 U.S. 24, 30 (stating that *Ex Post Facto* "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred").
[8] State v. Oliver, 155 N.C. App. 209, 212 (2002); *See also* Dobbert at 300 - 01 ("But we hold that petitioner, having been sentenced to death, may not complain of burdens attached to the life sentence under the new law which may not have attached to it under the old").
[9] NCGS §15A-2012(a)(3).

Satisfied that there is no constitutional violation inherent in the RJA and that no one will be released due to a successful RJA claim, the ACLU-NC whole-heartedly supported the RJA and we continue to believe it is necessary to ensure that a serious injustice is not committed by the State.

The RJA is Moving Efficiently and Cost-Effectively Through the Court System

The last point we wish you to consider is that the RJA claims have thus far moved efficiently and cost effectively through the courts. The DAs argued in 2009, and raise the claim again now, that the RJA will backlog the courts. Thus far there is no evidence that this is true. Instead, the courts have managed the cases by allowing one lead case in Cumberland County to proceed with hearings scheduled for January 30, 2012. Discovery in these cases has been largely accomplished through the exchange of electronic data, a low cost method to the State.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

The claim by the District Attorneys that repeal is necessary to save money is a hollow one: repeal will not extinguish the claims previously filed under the RJA. Defendants who have already filed claims will undoubtedly assert that the repeal is not retroactive because their rights have already vested. Instead of just litigating the merits of defendants' claims, North Carolina courts would then be faced with an additional layer of protracted litigation about retroactivity. Repeal may well cost more in litigation costs than allowing the RJA existing claims to proceed.

Conclusion

The ACLU is committed to ensuring that every criminal defendant receives a fair trial. That is why we supported the Racial Justice Act and why we were extremely disappointed by the General Assembly's recent action to repeal the new law. We believe that the courts in North Carolina are perfectly capable of identifying and dismissing frivolous claims made under the RJA as well as weighing the strength of statistical and other evidence of racial bias. North Carolina must not ignore the plain fact that race has played a role in the capital punishment system. We hope you will remain committed to a process that helps to ensure justice is truly served and preserve the RJA as you signed it into law in 2009 and stand behind the statement then made by North Carolinians that we will not seek or impose the death penalty based on race.

Respectfully,

Sarah Preston, Policy Director
ACLU of North Carolina
spreston@acluofnc.org
919-834-3466
919-830-4714

Tanya Greene, Advocacy and Policy Counsel
American Civil Liberties Union
tgreene@aclu.org