No. 15-1397

IN THE

Supreme Court of the United States

MARCUS ROBINSON, QUINTEL AUGUSTINE, TILMON GOLPHIN, and CHRISTINA WALTERS,

Petitioners,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent raises two arguments for denying the petition: a jurisdictional objection and a claim that the Double Jeopardy clause does not prohibit further proceedings because the petitioners were not found ineligible for the death penalty at a trial-like proceeding. As discussed below, neither argument has merit. To the contrary, only a grant of certiorari can protect petitioners from the double jeopardy of again facing the death penalty and preserve the life sentences they received after the historic and sweeping showing of racial bias in their cases.

I. THE COURT HAS JURISDICTION BECAUSE THE DOUBLE JEOPARDY ISSUE WAS PRESENTED TO AND IMPLICITLY REJECTED BY THE STATE SUPREME COURT.

Respondent asserts that the Court lacks jurisdiction under 28 U.S.C. § 1257 because "[t]he state supreme court remanded these cases to the lower state postconviction court for further proceedings without deciding any federal issue." BIO at 9. Respondent is mistaken. The state supreme court implicitly rejected petitioners' double jeopardy claims when it heard the State's appeal and remanded for further proceedings under North Carolina's Racial Justice Act ("RJA"). By subjecting petitioners to additional proceedings following their acquittal of the death penalty, the state supreme court necessarily rejected the petitioners' contention that the Double Jeopardy Clause barred further proceedings. *See Smalis v. Pennsylvania*, 476 U.S. 140, 142, 145 (1986) ("when a trial court enters such

a judgment [of acquittal], the Double Jeopardy Clause bars an appeal by the prosecution . . . . [S]ubjecting the defendant to postacquittal factfinding proceedings . . . violates the Double Jeopardy Clause."); *United States v. Scott*, 437 U.S. 82, 91 (1978) ("A judgment of acquittal . . . may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."); *see also Abney v. United States*, 431 U.S. 651, 660 (1977); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

Respondent does not dispute that petitioners raised their double jeopardy claims in the North Carolina Supreme Court. Indeed, respondent contested that claim on the merits in its reply briefing to the state high court. Reply Brief of Petitioner-Appellant at 7-8, *State v. Robinson*, No. 411A94-5 (August 23, 2013); Reply Brief of Petitioner-Appellant at 3-4, 7-8, *State v. Augustine, Golphin, Walters,* No. 139PA13 (January 24, 2014). Had petitioners prevailed on their double jeopardy claim, the state's appeal would have been dismissed and the case could not have been remanded for further proceedings. Of necessity, then, the state supreme court's decision to send the case back to the trial court for further proceedings was premised on a rejection of petitioner's double jeopardy claim.[1]

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[1] *See, e.g., Smith v. Digmon*, 434 U.S. 332, 333 (1978) (per curiam) ("It is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U.S.C. §§ 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court, and, indeed, in this case, vigorously opposed in the State's brief."); *Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam) ("the Court of

The language of the remand order further reinforces that inescapable conclusion. Under the terms of the remand order, the trial court was specifically permitted to conduct a second RJA trial by "consider[ing] additional statistical studies presented by the parties" and by "appoint[ing] an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study . . . ." *See* App. 3a, 6a. The state supreme court could only have allowed the trial court, the designated trier of fact under the RJA, to conduct further fact-finding by first deciding such proceedings were not barred by the Double Jeopardy Clause.[2]

The state supreme court's denial of petitioners' motions for clarification provides yet more evidence that the state supreme court rejected their double jeopardy claims. Petitioners asked in the motions for the state court to articulate its reasons for denying those claims, arguing again that by remanding and subjecting petitioners to additional proceedings the state court was causing precisely the harm the Double Jeopardy Clause was intended to prevent. Motion for Clarification at 4, *State v. Robinson,* No.

Appeals was incorrect . . . to conclude that, when seeking review in the state appellate court, petitioner failed to raise the federal claim based on prosecutorial misconduct. The Court of Appeals examined the opinion of the state appellate court and noted that it made no mention of a federal claim. That, however, is not dispositive. Failure of a state appellate court to mention a federal claim does not mean the claim was not presented to it.").

[2] The court also directed the state trial court to only "address [the State's] constitutional and statutory challenges pertaining to the Act." App. 3a, 6a. The state supreme court made no similar provision for the constitutional issues that defendants raised on appeal, which included double jeopardy.

411AA94-5 (January 4, 2016); Motion for Clarification at 4, *State v. Augustine, Golphin, Walters*, No. 139P13 (January 4, 2016). The court denied both of these motions, clearly rejecting the arguments and subjecting petitioners to new proceedings.[3]

Under these circumstances, this Court clearly has jurisdiction to review petitioners' double jeopardy claim. *See Bullington v. Missouri*, 451 U.S. 430, 437, n. 8 (1981) ("Although further proceedings are to take place in state court, the judgment rejecting petitioner's double jeopardy claim is 'final' within the meaning of the jurisdictional statute, 28 U.S.C. § 1257."); *Harris v. Washington*, 404 U.S. 55, 56 (1971) (holding that a state supreme court's rejection of a pretrial plea of double jeopardy constitutes a "final" order for purposes of 28 U.S.C. § 1257); *Burks v. United States*, 437 U.S. 1, 11, n.6 (1978); *Abney v. United States*, 431 U.S. 651, 660-61 (1977) ("the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined

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[3] Respondent also claims that the state supreme court's failure to decide the claim is shown by the petitioners re-raising the double jeopardy issue in the state trial court after remand from the state supreme court. Resp't Br. in Opp'n, p. 10. However, the decision to re-raise the claim on remand in no way can be reasonably construed as a concession that the state supreme court did not decide the claim. Petitioners re-raised the claim on remand out of an abundance of caution. *See generally Smith v. Kemp*, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part) (acknowledging the importance of issue preservation in capital cases; noting that the mastermind of the murder received a life sentence as a result of a preserved constitutional error, while the co-defendant whose attorneys did not preserve the issue faced execution).

if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense.").

II. THIS CASE RAISES SERIOUS DOUBLE JEOPARDY ISSUES IN THE CONTEXT OF SWEEPING RACIAL BIAS IN CAPITAL JURY SELECTION.

Respondent argues certiorari review is not appropriate because petitioners' double jeopardy claim lacks merit. Respondent asserts this case is "[u]nlike *Bullington*, [because] "no fact-finding has ever acquitted petitioners of the death penalty," and argues that the more apt analogy is to *Sattazahn v. Pennsylvania,* 537 U.S. 101 (2003) and *Bobby v. Bies*, 556 U.S. 825 (2009), where the Court found the Double Jeopardy Clause inapplicable. BIO at 14-15. Respondent fundamentally misperceives the essence of those cases, and the facts here.

In *Sattazahn* and *Bies*, the Court found the Double Jeopardy Clause did not protect defendants from a second capital sentencing proceeding because, in the initial proceedings, the triers of fact never made a decision on issues that bore on the defendants' capital eligibility under state law. In

Sattazahn, the jury deadlocked on the question of punishment and the trial judge entered a life sentence because that was what state law required under the circumstances. 537 U.S. at 104-05. The Court explained that "the relevant inquiry for double-jeopardy purposes was . . . whether a life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence . . . ." *Id.* at 108. There were no such findings in *Sattazahn* because the jury deadlock was a "non-result," and the judge's entry of a life sentence was non-discretionary, involved "no findings and resolve[d] no factual matter." *Id.* at 109-10. Likewise, in *Bies*, a state appellate court's pre-*Atkins* determination that the defendant's mild intellectual disability merited "some weight" in mitigation was not a "state-court determination of Bies' mental retardation entitl[ing] him to a life sentence" because, at the time of the state court's decision, the legal framework permitting acquittal of the death penalty on intellectual disability grounds did not exist. 556 U.S. at 833-34 (2009) (internal quotations and citation omitted).

Here, by contrast, the trial court's determination to vacate petitioners' death sentences and impose life sentences instead was based on extensive fact finding that followed an adversarial proceeding where the parties submitted and hotly contested evidence. Pet. at 12-13. The trial judge, sitting as the designated trier of fact, weighed the evidence according to standards and burdens of proof established by statute. Those findings were "sufficient to establish legal entitlement to the life sentence," *see Sattazahn*, 537 U.S. at 108, pursuant to the RJA provision mandating imposition of that

sentence upon proof that race was a significant factor in petitioners' cases. These are precisely the "hallmarks" relied on by the Court in *Bullington* in deciding whether the Double Jeopardy Clause applies to a capital sentencing determination.

Respondent also contends that under *United States v. Wilson*, 420 U.S. 332 (1975), there is no double jeopardy violation because the state supreme court's reversal of the state trial court's RJA orders was nothing more than a reinstatement of the juries' initial death sentences of petitioners. BIO at 17. This analogy fails. *Wilson* does not apply because there was no prior jury rejection of petitioners' RJA defense to the death penalty.

Respondent finally argues that the Double Jeopardy Clause is inapposite because the RJA was fashioned as a post-conviction remedy rather than a component of the state capital-sentencing scheme, and the determinative issue under the RJA does not relate to capital aggravating or mitigating circumstances. *See, e.g.,* BIO at 11, 14, 18.

This argument is plainly incorrect. In 2010, the North Carolina legislature created the RJA as an affirmative defense to the death penalty to be heard in bench trials for cases pending in post-conviction proceedings.[4] The fact that RJA trials occur in the temporal context of post-conviction litigation, rather than trial-level sentencing, does not change their essential character as proceedings to determine

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[4] *See* N.C. Gen. Stat. § 15A-2010 ("No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.") (eff. August 11, 2009 to June 18, 2013).

capital eligibility. The state legislature decided to address the great potential of race discrimination in its system of capital punishment in this manner, and there is certainly nothing in the U.S. Constitution that prevented it from doing so. *See McCleskey v. Kemp*, 481 U.S. 279, 312, 319 (1987) (observing that "discrepanc[ies] [in capital sentencing] that appear[] to correlate with race" are "best presented to the legislative bodies" which can take account of "local conditions" through "a flexibility of approach."). *Cf. Oregon v. Guzek*, 546 U.S. 517, 526 (2006) (under the Eighth Amendment ". . . States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty.") (citations and internal quotation marks omitted).

Because the RJA established, and petitioners prevailed on, a procedure to narrow the class of individuals eligible for the death penalty in North Carolina – a procedure which "was like the trial on the question of guilt or innocence," *see Bullington*, 451 U.S. at 446 – the Court should grant certiorari in order to hold that the Double Jeopardy Clause applies in this case, a landmark proceeding concerning the influence of race in capital jury selection.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated above and in the petition.

Respectfully submitted,

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