NO. 441A98-4 DISTRICT TWELVE

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
vs.	)	From Cumberland County
	)	
TILMON CHARLES GOLPHIN	)	
	)	
Defendant/Appellant.	)	

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DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED

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II. IS THE DEFENDANT ENTITLED TO HIS PREVIOUSLY-IMPOSED LIFE SENTENCE BECAUSE N.C. GEN. STAT. § 15A-1335 PROHIBITS RESENTENCING HIM TO ANY GREATER PUNISHMENT?

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INTRODUCTION

During the past century, racial discrimination has characterized the practice of executions in North Carolina and across the South. We have witnessed racial targeting, threats of violence, lynchings, and executions. See https://eji.org/death-penalty. Without considering this history of racial discrimination, this Court cannot fully decipher the motivation and intent of the General Assembly in passing, and later repealing, the Racial Justice Act. Fortunately, that history has been well-chronicled, among many other places, in amicus briefs submitted to this court, and in a comprehensive law review article, written prior to the repeal by Professors Seth Kotch and Robert Mosteller. *See* Seth Kotch & Robert Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2127 (2010) (detailing a "strong, pernicious and persistent" influence of race upon the death penalty in North Carolina).

Our system of government, through our state and federal constitutions, provides protections against the arbitrary exercise of power by a branch of government against individuals. Many of those protections are at issue here: double jeopardy, *ex post facto*, vested rights, separation of powers, prohibition against bills of attainder, equal protection of the laws, and cruel and/or unusual punishment. In these decisions, Tilmon Golphin's life is just one piece of the equation; so too is the

long-term legitimacy and efficacy of this Court's role in protecting individuals against the awesome power of the State.

This litigation also raises important questions about the limits of the reach of this Court's powers, circumscribed by doctrines such as law of the case and deciding only those cases and controversies that are raised by the parties who come before the court. When this Court ventures beyond those limitations, it risks trampling fundamental rights to due process.

While racial bias, both conscious and unconscious, infuses our practice of the death penalty, it is relatively rare to find chronicled in the history of the United States legislation that targets specific individuals for execution. The founders of our country and state placed in our constitutions great emphasis on the fundamental role of prohibitions against bills of attainder, *ex post facto* laws, and separation of powers. As a result, Congress and state legislatures have generally steered clear of targeting specific individuals for execution.

Nevertheless, the North Carolina General Assembly targeted Tilmon Golphin and three others for execution when it passed a repeal of the N.C. Racial Justice Act in 2013. All four had been on death row and were serving life sentences under relief granted pursuant to the N.C. Racial Justice Act. In each case, the State had pending appeals before this Court. The repeal of the RJA was driven by the lobbying and public campaign of prosecutors. But the legislators were motivated to target these

four defendants in order to assist particular family members of those victims to achieve private vengeance through legislative action.

The dangerous and noxious mix of crime, threat of mob violence, racial discrimination, the death penalty, and attempts at private vengeance through legislative action is illustrated by the following story told by historian David Oshinsky:

> In 1934, as national attention was riveted upon the fate of nine black youths accused of raping two white women near Scottsboro, Alabama, authorities in Mississippi arrested three Negroes for "criminally assaulting" a white high school student named Mildred Collins in the town of Hernando, fifteen miles south of Memphis. The suspects, described in local press reports as 'black terrorists' and 'lust-craven wretches,' were tracked down after a frantic manhunt involving 'practically every law enforcement officer' in northern Mississippi.
>
> Determined to avoid a multiple lynching, Governor Mike Conner ordered the prisoners held in Jackson until the day of their trial. In February 1934, the "heavily shackled negroes" were taken from their cells, marched to the train station by dozens of national guardsmen, placed in a steel baggage car, and transported north to Hernando, a distance of two hundred miles. The train made several stops along the way to pick up additional troops. It was met in Hernando by a large detachment of guardsmen from Clarksdale, Greenville and other Delta towns.
>
> In all, more than 350 soldiers ringed the DeSoto County courthouse, where the young men went on trial for their lives. The scene was reminiscent of a war zone, with barbed wire, machine-gun emplacements, and soldiers in full battle gear with fixed bayonets. Yet the crowd of several thousand refused to back down. There was so much firepower on both sides that General T.J. Grayson, the commanding officer, struck a desperate bargain with the girl's father, C. W. Collins. In return

for a note from Collins asking the mob to go home, Grayson would use his influence to see that the father got to kill these 'niggers' *himself* by acting as the hangman at the execution.

The bargain seemed to work. The crowd slowly dispersed after hearing Collins's words. ('No matter what passions well up in the breast of all of us,' his note read, 'I hope and pray no attempt will be made to interfere with the natural and normal course of the courts in this case.') The only reported casualty was Sheriff W. M. Birmingham, who died of a heart attack attributed by local doctors to 'mental and physical exertion.'

The trial itself was an afterthought. The jury took seven minutes to find the defendants guilty, and the judge sentenced them to death. The three Negroes-Isaac Howard, twenty-five; Ernest McGehee, twenty-two; and Johnnie Jones, twenty-one—offered no defense. 'We was drinking, I guess that was the reason,' Howard was quoted as saying. 'We intended just to rob [her] but this other thing just got into our minds.'

But then a problem arose. Word of the private bargain at Hernando reached the state attorney general, who ruled that Mr. Collins could not be deputized as the hangman because he did not reside in DeSoto County, site of the planned executions. The ruling set off a furor; it seemed to violate the code of personal vengeance and family honor that many held dear. Within days, state senator H. Clay Collins, a cousin of the assault victim, proposed a remarkable piece of legislation that gave each county sheriff the authority to appoint any Mississippi resident as an executioner. His so-called 'hanging bill' passed the state senate by a vote of eighteen to fifteen.

Some residents did not exactly welcome this privilege. The bill was not only barbaric, they believed; it also embarrassed Mississippi on the national stage. Did civilized people settle private scores by hanging each other? Sniffed the *Clarion-Ledger*. Of course not! Retribution was honorable only when exacted by representatives of the law. 'There is a vast difference between a sheriff impersonally performing this grim duty,' it

> said, 'and another citizen performing it to satisfy personal vengeance.'
>
> Such criticism stalled the bill's momentum. House leaders quietly tabled the measure, fearing the dreadful publicity it would bring. 'There will be no legalized butchery in Mississippi, no matter who favors it,' fumed Walter Sillers, chairman of the House Judiciary Committee. 'This bill is not civilized.'
>
> Shortly after midnight on March 17, the condemned men were brought back to Hernando to be hanged.
> . . .
>
> Word of the early executions circulated quickly through the town. At dawn, as the prisoners were led in shackles to the prison yard, a crowd of several hundred already surrounded the gallows. Sheriff Lauderdale acted as the hangman, with C.W. Collins standing at his side. 'The spectacle went on for over an hour,' a witness noted, and the father 'smiled through it all.'
> . . .
>
> Things did not go smoothly. The trap stuck, and Howard remained standing. He dropped on the second try, but the rope proved too short, leaving him barely conscious for fifteen minutes until his heart stopped beating. It took even longer for Ernest McGehee to die. ('Aw, hell,' someone yelled, 'knock him on the head with a hammer.') Sweating deputies lengthened the rope and smeared it with grease. When Johnnie Jones mounted the platform, all was finally in order. The snap of his broken neck could be heard a block away.
>
> The three corpses were packed in rough wood coffins, tossed into a pick-up, and driven to the Negro cemetery. Dozens of whites followed the truck in a noisy procession of honking automobiles. As the dirt was being shoveled, the crowd serenaded a small group of mourners. Their song was 'Bye, Bye, Blackbird.'

David M. Oshinsky, "*Worse than Slavery," Parchman Farm and the Ordeal of Jim Crow Justice* at 210-213. (Free Press Paperbacks 1996) (footnotes omitted).

This toxic brew of crime, threat of mob violence, race, death penalty, and attempts at private vengeance through legislative action has been present in different formulations in all of Tilmon Golphin's court proceedings. The family of slain Trooper Ed Lowry have campaigned for the execution of Tilmon Golphin, exploded in court proceedings, and expressed a willingness to take the law in their own hands if he is not executed by the State.

19-year-old Tilmon Golphin and his 17-year-old brother Kevin Golphin stole a car and shot and killed two law enforcement officers, Deputy David Hathcock and state Trooper Ed Lowry. Kevin had resisted arrest and struggled with Trooper Lowry, shouted that he "could not breathe," as Trooper Lowry pinned him to the ground, and Deputy Hathcock sprayed Kevin's face with mace.

Law officers from Dunn, Harnett, and Cumberland Counties and the Highway Patrol conducted a huge manhunt following the shootings, and after a high-speed chase, assaulted Tilmon and Kevin during their capture. Both Tilmon and Kevin confessed to their role in the murders within hours after their arrest. The *Fayetteville Observer* described the shocked reaction of the community in this way:

> The murders shocked people in Fayetteville and Cumberland County and rocked Hope Mills, the tight-knit town where Lowry and Hathcock lived. Thousands of people attended memorial services and the officers' funerals. Part of Main Street in Hope Mills was closed, and the nearby schools released their students two hours early to accommodate the funeral traffic.

Paul Woolverton, "*Bitter anniversary: 1997 murders rocked Cumberland County*" *Fayetteville Observer*, September 25, 2017, http://www.fayobserver.com/news/20170922/bitter-anniversary-1997-murders-rocked-cumberland-county.

During jury selection, African-American juror John Murray reported to the court that he had overheard two white jurors behind him saying that the defendants "should have never made it out of the woods." JTpp 2054-55.[1] Those two white prospective jurors were never identified and presumably could have served on the jury, but Murray was struck peremptorily by the State in part because he had reported to the court that he had "attributed to a male and a female white juror in the courtroom with respect to what he viewed as a challenge to the due process rights of defendants." JTp 2111.

The five-month period between the commission of the Golphins' crime and the beginning of jury selection in their capital trial was one of the shortest periods in the modern history of North Carolina's death penalty.

During the trial, "the prosecution sought to portray the Golphins' dreadlocked hairstyles and Afrocentric religion as part of a white hating cult." *The Indy*, Thomasi McDonald, *"This Bitter Earth."* May 27-June 2, 1998. The prosecutors introduced

[1] There are two trial transcripts for Golphin's 1998 trial: one for jury selection in Johnston County (JTp ___); and one for the trial in Cumberland County with the jury selected from Johnston County (Tp ___).

confiscated letters written by 19-year-old Tilmon in the jail expressing his anger at law enforcement officials and white people, and his belief that the world would come to an end in the year 2000.

During postconviction hearings in Cumberland County, family members of Trooper Lowry were quoted as follows:

Jim Davis, Ed Lowry's brother-in-law: "I would love to see him walk out of the gate. . . It would be the last step he ever took. Is that clear?"

Al Lowry, Ed Lowry's brother: "if they turn them loose, the family will take care of business."

Paul Woolverton, *"Tilmon Golphin, who murdered two lawmen, is trying to get his death sentence overturned."* Fayobserver.com (July 6, 2012) (App 364).

After Tilmon Golphin was afforded relief under the RJA and resentenced to life imprisonment, the Lowry family turned their full attention to the legislature to ensure that Tilmon Golphin would be executed. Their efforts included e-mailing legislators, coordinating lobbying efforts with prosecutors, conducting press conferences with legislators, and writing editorials in the media.[2] Their anger is understandable, and their efforts to persuade legislators are constitutionally protected pursuant to the First Amendment. But the resulting action by the legislature to target Tilmon Golphin was exactly the type of law that the

[2] See facts and discussion under Bill of Attainder Prohibition issue, *infra*.

constitutional prohibition against Bills of Attainder and *ex post facto* enactments were meant to prevent.

Mississippi legislators in 1934 recognized that passing legislation permitting the father of the victim to act as the executioner would be "legalized butchery." For Tilmon Golphin and North Carolina, the buck stops with this Court.

STATEMENT OF THE CASE

CRIME

Tilmon Golphin, a South Carolina resident, was nineteen years old at the time of the crime. His brother, Kevin Golphin, was seventeen years old. Both are African-American men who practiced the Rastafari religion and wore their hair in long dreadlocks. The victims of their crime were two white law enforcement officers, North Carolina state highway patrolman Lloyd "Ed" Lowry and Cumberland County Deputy David Hathcock.

On 23 September 1997, Tilmon and Kevin were driving a Camry on Interstate 95 in Cumberland County, followed for several miles, and then stopped by Trooper Lowry for not wearing a seatbelt. Tp 2586. Kevin was the driver; Trooper Lowry ordered him out of the car. Trooper Lowry and Kevin walked back to the trooper's patrol vehicle, got inside, and sat in the front seat for a few minutes. Tp 2550. Trooper Lowry discovered that the Camry had been stolen, and called for back-up. Deputy Hathcock drove up and parked beside Trooper Lowry's vehicle. Tp 2550. Trooper

Lowry and Kevin exited the patrol car and Trooper Lowry pushed Kevin up against the patrol car so that Kevin was facing the car. Tp 2551. Trooper Lowry pointed his gun at Tilmon. Tpp 2551-52. Tilmon got out of the Camry. Tp 2552. Deputy Hathcock approached him and pushed him against the Camry and searched him. Tp 2552. Kevin was struggling with Trooper Lowry. Tp 2589. Trooper Lowry pushed Kevin to the ground. Tp 2553. Deputy Hathcock and Tilmon began walking toward where Kevin and Trooper Lowry were on the ground. Tp 2553. As they walked, Deputy Hathcock held Tilmon by his left arm. Tp 2553. Trooper Lowry sat on top of Kevin while Kevin was lying face down, and pulled Kevin's hands behind his neck. Tp 2554. Tilmon heard Kevin say, "I can't breathe." Tp 2554. Tilmon heard Trooper Lowry tell Deputy Hathcock to spray Kevin with mace. Tp 2570. Both Kevin and Tilmon asked the officers not to spray Kevin with mace, but they did so anyway. Tpp 2570-71, 2590. Kevin began to scream when the spray hit his eyes. Deputy Hathcock turned and started to spray Tilmon with mace. Tp 2571. Tilmon knocked the can of mace out of Deputy Hathcock's hand and ran back to the Camry to obtain a rifle out of the back seat. Tpp 2571-72, 2590. As Deputy Hathcock approached him, Tilmon shot him twice. Tp 2590. Tilmon shot Trooper Lowry while he was on top of Kevin. Tpp 2574, 2592. Kevin took a pistol from the patrolman and shot and killed both officers.

Tilmon drove north on I-95. They switched drivers. Ron Waters followed the Camry in his car. Tilmon shot at the tires of Waters' car with the rifle. Tp 2596.

Kevin later wrecked the Camry. Both teenagers attempted to flee. An officer shot at Tilmon and he surrendered. Tpp 2555-59.

ARREST, INTERROGATION, AND INVESTIGATION

Tilmon confessed shortly after he was arrested for killing Trooper Lowry and Deputy Hathcock. Tilmon described police shooting at him and beating him in the head with the butt of a shotgun during the arrest. Tpp 44-45, 59-60. The interrogating officers observed a bump on his head and a tear in his pants consistent with his description of events. Tpp 44-45. Within hours of the beating, law enforcement officers began interrogating Tilmon. Despite the availability of tape recorders, the officers chose not to record the interrogation and the confession noting that "sometimes defendants don't want to talk in front of the tape recorder." Tpp 111-13.[3] Tilmon had little prior experience with law enforcement officials or with the criminal justice system. Officers gave Tilmon *Miranda* warnings only once, following which he immediately asserted his right to counsel. Tp 93. The officers lied to Tilmon about the existence of a videotape of the crime, in a successful effort to obtain a confession without honoring his request for counsel. Tpp 2546-47.

[3] Ten years later the General Assembly enacted N.C. Gen. Stat. § 15A-211 (2007-434, s. 1), which required that custodial interrogations in homicide cases be recorded. The idea was to "eliminate disputes about interrogations," *id.*, and to prevent and record any coercion by law enforcement that might result in a false confession.

Tilmon acknowledged stealing a car at gunpoint and later shooting Trooper Lowry and Deputy Hathcock in response to one of the officers' knocking down and macing his brother Kevin. Tilmon told law enforcement officials that he and Kevin had not planned to hurt or kill anyone. Tpp 2582, 2585. He told police officers he did not know why he shot Trooper Lowry and Deputy Hathcock. Tp 2582. He said that he felt "scared . . . like a rabbit being trapped." Tp 2582. He told officers:

> He wished that this thing had not happened; that he had a dream a few nights ago involving a gun; that he should have stayed at his grandmother's house; and that he was sorry that he had shot Trooper Lowry and Deputy Hathcock.

Tp 2597.

JURY VENIRE FROM JOHNSTON COUNTY

The defense counsel sought a change of venue because of pervasive pretrial publicity. The prosecution offered to stipulate to the change of venue, on condition that the jury be chosen in Johnston County with trial back in Cumberland County.[4] The parties agreed and the trial court ordered that the jury be selected in Johnston County. 5 January 1998 Tpp 2-4.

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[4] In contrast to their actions here, these prosecutors had recently opposed a change of venue for James Burmeister, a white defendant in a notorious capital murder case involving the killings of African-Americans on the streets of Fayetteville solely due to their race. Mr. Burmeister was sentenced to life imprisonment by a Cumberland County jury. *See State v. Burmeister*, 131 N.C. App. 190, 506 S.E.2d 278 (1998).

At the time of the trial, approximately sixty percent of the residents of Cumberland County were white, and nearly thirty-two percent were African-American. About eighty percent of the residents of Johnston County were white, and only seventeen-and-one-half percent were African-American.[5]

TRIAL PROCEEDINGS

On 1 December 1997 a Cumberland County Grand Jury returned an indictment against Petitioner and his brother Kevin for two counts of first-degree murder, two counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill, discharging firearm into occupied property, and possession of a stolen vehicle. Tilmon and Kevin were tried jointly beginning on 23 February 1998, just five months after the crime, by a jury bused to Cumberland from Johnston County. On 29 April 1998, the jury returned verdicts of guilty on all charges. After a sentencing hearing, on 13 May 2018, the jury returned death sentences for both brothers.

Tilmon authorized his attorneys to acknowledge his guilt of second degree murder and to admit that he shot David Hathcock and Ed Lowry, that he was in

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[5] Bureau of the Census: U.S. Dept. of Commerce, 1990 Census of Population: General Population Characteristics, North Carolina Table 54 (1990 CP-1-35); *see also State v. Golphin*, 352 N.C. 364, 393, 533 S.E.2d 168, 191 (2000) (considering the 1990 census and noting 14.3% absolute disparity and 45% comparative disparity in the percentages of African-Americans residents in Cumberland County and Johnston County).

possession of a vehicle stolen from Ava Rogers, and that he fired shots from the rifle at the vehicle of Ron Waters in an attempt to disable the vehicle. Tp 22.

Tilmon moved for severance of his case from Kevin's to allow the pursuit of antagonistic defenses, to promote a fair determination of guilt or innocence, and to prevent a prejudicial outcome. The trial court denied the motion and granted the State's motion for joinder.

Tilmon moved to suppress his confession to police, having asserted his right to counsel during the interrogation. The trial court found that Tilmon initiated the conversation with police after invoking his right to counsel.

The trial court denied a defense motion for *in camera* inspection of personnel files concerning an incident involving disciplinary action against Trooper Lowry two years prior to the crime. *See State v. Golphin*, 352 N.C. 364, 403-405, 533 S.E.2d 168, 197-198 (2000). The motion was supported by newspaper articles stating that Trooper Lowry had previously used deadly force in shooting at a fleeing vehicle trying to stop it. Trooper Lowry was demoted because he violated department policy by shooting at the car. He contested this demotion and apparently achieved reinstatement, although that reinstatement was being appealed by the North Carolina Department of Crime Control and Public Safety at the time of his death.

Tilmon and Kevin were tried by a jury comprised of eleven white jurors and one African-American juror. Out of thirteen black members of the ninety-five

person venire panel for Golphin's trial, only one served. DE120. Six were excused for cause, five were peremptorily struck by the prosecution, and one was peremptorily struck by attorneys for Kevin Golphin. The prosecutors used their peremptory challenges to exclude seventy-one percent (5/7) of the eligible African-American jurors, and thirty-one percent (14/45) of eligible white jurors. DE120.

The case against the defendant was straightforward given the confession and other evidence, but the State focused attention on race, introducing evidence of post-crime writings seized from Tilmon and Kevin while they were in custody. Prosecutors attempted to portray Tilmon as a racist with motive to kill white law enforcement officials. Tpp 4322, 4328-4329. Prosecutors instilled fear in the jurors by suggesting that Tilmon had dedicated himself to a race war. Tpp 4319, 4321-4322. Prosecutors attacked Tilmon's religion—Rastafarianism—as nothing more than a philosophy of racial hatred. Tpp 4321-4322.

Jailers intercepted a letter Tilmon wrote to a person named Phillip from the Cumberland County jail. Tp 3521. The letter stated the police officers deserved what happened to them because they were trying to "fuck me and my brotha up." Defendant wrote he did what he had to do and was not "trying to go out like Rodney King." He felt that America was only for white people. Tpp 3522-24.

In a letter to a woman named Pamela, written from Foothills and seized by officers there, Tilmon used a great deal of Rastafarian references. The letter was

essentially a love letter and said nothing about the crime. It referred to prison guards as "Bumbaclot" and "Bloodclot." Tpp 3546-48. In another letter to Pamela, he accused guards of taking his Rastafarian belongings because they claimed the items were gang-related. Tpp 3549-51.

Shaquan Sneed, an inmate at Foothills, befriended Tilmon. Sneed was in prison for drugs, armed robbery, and assault with the intent to kill. Tp 3582. Sneed was in segregation for assaulting an inmate when he met Tilmon. Tp 3583. Sneed testified that Tilmon said he shot the state trooper and the sheriff in defense of his brother. Tp 3584. Sneed testified about the meaning of Rastafarian language although he had no special expertise and was not himself a Rastafarian. Tpp 3593-94. When asked if Tilmon believed in a particular type of religion, Sneed said "Rasta… ain't no religion." Tp 3587. Sneed testified that Tilmon described shooting the officers as "firing on Babylon." Tp 3586. Sneed interpreted "Babylon" as a reference to "America" or "Caucasian run America" and the term "beast" as another synonym for the same concept. Tpp 3586-87. He defined a Rastafarian as a "buffalo soldier" or a "fearless black man." Tp 3587. Tilmon told Sneed that he believed that in the year 2000, Armageddon would come and there would be a race war between "slaves and masters," which the slaves, or black persons, would win. Tp 3590. By shooting the officers, "that's two less we got to kill. That's two less Babylon we got to destroy." Tp 3591.

Scott Brown transported the Golphins during jury selection from Central Prison to the Johnston County Courthouse. One day during jury selection, Kevin left the courtroom with a note, which Brown confiscated. The note was addressed to Ras One, and was signed "Roots." Tpp 3560-70. The note said:

> I and I is being held because of a self-defense. That took place in Sept. of 97. On I-95 for the murder of two beast. As of now Babylon is trying to hit on I N I and give I and I fleshy idrin the death penalty. But Jah is guiding I and I. They got I and I picking jury. The name of the town is Johnston County. Iman go to court every day from 9-5. From 9 to 5 I and I are sheep surrounded by wolves (cops). But, I and I say fiyah pon Babylon. Fire to the pope.

Tp 3570.

MITIGATING EVIDENCE

Dr. John Warren, a clinical psychologist, testified that Tilmon suffered from brain dysfunction and borderline mental retardation. Tpp 3903, 3911-12. Dr. Warren described Tilmon's significant history of physical abuse by his biological father, and witnessing extreme aggression and violence in the family between his mother and father. Tpp 3904-05. Dr. Warren testified that Tilmon and his brother Kevin had developed a "trauma bond," and they were bound by the assaults, emotional and physical, that they suffered. Tp 3922. Dr. Warren testified that:

> multiple sources, many people who have known Tilmon Golphin, described him as being more passive and submissive to his brother Kevin who, although was two years younger, they describe Kevin as being more likely to leap before he looked, more impulsive, more disobedient, having more behavioral

> problems. And that Tilmon was protective of him in some way, but was more submissive and at times even fearful of him.

Tp 3923.

According to Dr. Warren, this was extremely important to understanding Tilmon's actions since "he perceived his brother [Kevin] as being in significant danger of being hurt" when he began shooting at the officers. Tp 3923.

Tilmon told Dr. Warren that his attachment and beliefs in Rastafarianism had nothing to do with the commission of the crimes. Tpp 3920-21. Dr. Warren opined that Tilmon's religious beliefs were not a motivating factor in his crimes. Tp 3921. Tilmon told Dr. Warren:

> [t]hat the Rastafarianism way of life was basically peace and love; that the Rastafarian believers would be repatriated to Ethiopa, to Africa. He described Rastafarians as being descendants from the original tribe of Judah. That the abstaining from eating the flesh of animals was important. The goal being to make one brotherhood in the world.
>
> And he said he'd been living that way for two years and studying the Bible and affiliating with other Rastafarians trying to learn more about that.
> . . .
>
> Rastafarianism is important to Mr. Golphin, on the basis of what he said, because he talked about the spirit being important, the closeness to God being important, the following of the tenets, keeping a clean body, abstaining from premarital sex as being important to being more Godlike. . .
>
> He described the millennium - - and Rastafarianism has been called by some religious educators a millennium cult - - and that is at the millennium, things will happen to cause the un- - the

> downtrodden to be lifted up, that the world as we know it will end, and that there will be no more suffering for the people who have been socially and economically downtrodden and disenfranchised. So the millennium represents to him, in just a couple of short years, as a chance for a new beginning and a new world, whatever form that may take.

Tpp 3917-18. Dr. Warren testified that Tilmon denied believing in a race war:

> Well, he said that it is described by some Rastafarians as a race war, but that they miss the point in that it is not a racial war, but rather a have versus a have not.
>
> In the Rastafarian culture, they see Russia, Japan, United States, as being dominant technological cultures and Africa and parts of Asia being the downtrodden and disenfranchised from the wealth and power of the world. And the millennium, the end time, is going to change that around so that the people who have been suffering will be lifted up and that all the world will be more of a peace and brotherhood way.
>
> He said the reason that a lot of people describe that it's a race war was because primarily in Africa and parts of Asia, there were people of color, but it's not a racial thing, he said.

Tp 3919.

Tilmon's uncle, Willie McCray, had known Tilmon all his life and considered him "like [a] brother." Tpp 3657-59. He described the defendant as quiet and easygoing. Tp 3661. Tilmon lived with grandparents in South Carolina near his uncle for the past two years. Tp 3662. Tilmon took care of his grandmother who had suffered a broken hip from a serious accident. Tpp 3662-63.

McCray knew Tilmon's father. Tilmon's father had a serious alcohol problem and abused Tilmon as a child. Tp 3664. He also abused the defendant's mother. Tilmon was also very close to McCray's two sons. Tpp 3666-38. McCray never saw Tilmon act aggressively, describing him as a "peacemaker." Tp 3671.

Tilmon's aunt, Marvel Gay McCray, was an elementary school teacher who also had a part-time job at a store in Greeleyville. Tpp 3673. Tilmon would often visit her at her home. Tp 3674. Tilmon always respected her and she never saw him angry or upset or violent. Tp 3675. Tilmon would often babysit for her two children; she trusted him totally. Tp 3675. Tilmon discussed with her his Rastafarian beliefs including no sex before marriage and not eating meat. She also knew that he read the Bible daily. Tpp 3676-77.

Tilmon's cousin Carlos McCutcheon grew up with Tilmon. Tp 3686. They were around each other all the time and were "just like brothers." Tp 3686. He described Tilmon as "very quiet" and a "real soft person." Tp 3692. He never saw Tilmon get into a fight or be aggressive. Tp 3692. They read the Bible together even as Tilmon studied the Rastafarian religion, ate vegetables, and wore dreads. Tpp 3688-90. Tilmon was trying to get his GED and, out of concern for McCutcheon, he advised him to stay in school. Tpp 3693-94. Tilmon "never bragged" about killing the law officers, and told McCutcheon that he "didn't mean to do it intentionally." Tp 3695.

Other witnesses confirmed Defendant's commitment to his religious beliefs and his kind and calm demeanor. Tpp 3696-700, 3747. He loved his grandparents very much. Tpp 3701, 3705-06, 3712-16. No one noticed any racial animosity between Tilmon and people who were not African American. Tpp 3716-18, 3745-47.

John Golphin, another uncle, described Defendant's father, his brother, as a drug abuser and a severe alcoholic. He could be very violent when he was drinking. Tp 3766. He was very violent in his relationships with women, including the defendant's mother. "He was just a very brutal man to females. He would beat any women he had - - girlfriend. And, uh, he did that a lot of times." Tp 3767.

Dr. James Johnson, a sociologist at UNC, has extensively researched the plight of the African-American male in American society. Tpp 3798-3803.

Dr. Johnson identified several critical events in Tilmon's development. First, he grew up in a highly unstable family, with parents who did not have appropriate parenting skills and lived in an abusive relationship. Tpp 3806-07. His family frequently moved, so he had no opportunity to attach to significant peers or teachers. Tpp 3914-15. Tilmon experienced a series of negative encounters with police. Tp 3826-27. This history made him both suspicious and fearful of their motives and tactics. Tp 3827.

Tilmon grew up in a very violent household. His father abused alcohol and drugs. Tp 3816. There were really "tense, war-like incidences in the household between his father and his mother." In one of those fights between his parents, Tilmon was knocked out of his walker. Tp 3816.

Tilmon was beaten repeatedly, especially as a toddler. Tpp 3814-16. Tilmon was slow to develop speech, and he was called a "mute" by his father and his paternal grandfather. Because he was not easy to potty train, they used to beat him repeatedly. Tp 3815. At the age of two, he was beaten for wetting his bed, so he feared going to sleep. Tp 3815. He would stay up all night for fear that he was going to be beaten if he went to sleep and wet the bed. Tp 3815.

His father repeatedly burned him with cigarettes and by putting him either on the stove or in the stove. Tpp 3816-17. Dr. Johnson testified about one particular incident when Tilmon was in the fourth grade and his mom beat him with an electrical cord:

> But there was also some evidence of pretty serious abuse . . . by the mother. One particular incident where Tilmon went to school one day and his teacher noticed bruise marks and the like on him, and she asked him about it. And initially he didn't want to tell her, and later on he did tell her and it was turned over to Child Protective Services and they investigated.
>
> Basically, Tilmon had ridden his bike somewhere that he wasn't supposed to go, and he came home and got a pretty serious whipping with an electrical cord and it was very visible on his arms and the like because he was trying to shield himself apparently. And that's how the teacher got clues to it, when they

> investigated this. There's this long list in the record of these incidences of abuse.

Tpp 3818-19. His mother was convicted of child abuse for this and sentenced to probation. Tp 3905.

After Tilmon's mother and father split up, his mother introduced a number of male figures in and out of the household. Most of them abused Tilmon, and the cycle of abuse continued. Tp 3817.

In his early teens, Tilmon developed a close relationship with neighbors next door and particularly with their son, Tony Eakes. He began to have positive educational experiences. He participated in Kung Fu and gymnastics. His grades turned around, and he joined the Boy Scouts, along with Tony. He worked in a craft shop with Mrs. Eakes. This experience was short-lived because Tilmon's family moved once again. Tp 3823.

Tilmon became a Rastafarian. Dr. Johnson felt he was "a young man who was in search of an identity." Tp 3825. He had very little guidance in his life, particularly from men. Tilmon's belief in Rastafarianism caused him problems because he looked different. Police would follow him around. Merchants would question why he was in their stores. Tpp 3825-27. Dr. Johnson opined that a fundamental principle of Rastafarianism was the opposite of what happened in this case. Tp 3834. Basic tenets of this faith included abstaining from sex until marriage, being healthy and

clean with a vegetarian diet, and acting nonviolently except when protecting themselves. Tp 3835.

Tilmon came to live with his grandparents in October 1995. Tp 4040. Tilmon's grandmother, Christen McCray, broke her hip, was hospitalized, and underwent a period of recuperation. Tpp 4041-42. Tilmon took care of her during this time and they developed a close relationship. Tpp 3662-63, 3701-02, 3705, 766-770.

Christen McCray visited Tilmon in jail shortly after he was arrested for these crimes. She testified to Tilmon's acknowledgment of his role in the crime and to his remorse:

> Q. All right. Would you describe for the jury how he looked while you were talking to him up here?
>
> A. Well, he look all upset, you know. Well, really, that Saturday he really couldn't talk to me because he was crying, you know, and these the words he said. He said, "Well, Granny, I didn't intend to do this. I should have stayed home." I said, "Why not?" he said, "Well, it's a long story." And, you know, that was all. He just couldn't talk.
>
> Q. That's all he could get out that Saturday?
>
> A. That's all I could get from him - - in fact, the second time we came back - - he ain't been, you know, really able to talk until the third time then he, you know, talked some then, a little bit better.
>
> Q. Okay. Did he tell you what he said happened?
>
> A. Yes, he told me what - -

Q. (Interposing.) What did he tell you?

A. Well, he told me, uh, they stole the car, you know, and the money. And they was on the road. Say the officer pull them to the side. And Kevin was asking him, you know, why you pull me over. So the officers [sic] told him he wasn't buckled up.

Q. Wasn't buckled up?

A. Yeah, wasn't seat – you know, wasn't seat belt. And so, uh, he asked Kevin to get out of the car so Kevin got out. And say Kevin was cooperating, you know, doing what the deputies - you know, the state trooper tell him to do. But then all of a sudden, you know, it changed to violence. And that just how he explained to me - - just all of a sudden something occurred so quick, and it just changed into violence. And he told me, you know what he did.

Q. He told you it was bad out there, didn't he?

A. Right.

Q. And he told - -

A (Interposing) Then he told me, said, "Granny nobody know what happened that, uh, day beside the road." He said, "Nobody don't know that but me and Kevin and the Lord." I said, "Yeah." And so he said - - because I said, "The two officers they're gone and they can't talk, so really nobody but just you and Kevin and the Lord know what happened."

Q. Tilmon told you that he shot both the officers, didn't he?

A. Yes.

Q. Did he tell you he liked it?

> A. No, he didn't like it. I could tell that from the first time, you know, I visit him.
>
> Q. Did he tell you he was proud of it?
>
> A. No-o-o, no. Huh-uh.
>
> Q. What did he tell you?
>
> A. He was sorry. He was very sorry.

Tpp 4049-4051.

CLOSING ARGUMENT

Prosecutors argued that Tilmon and Kevin's crimes were an intentional manifestation of their alleged religious beliefs of racial hatred and violence.

In closing, the prosecutor reviewed the State's evidence focusing on the seized letters and alleged statements by Tilmon and Kevin in jail, and concluded: "The racial hatred is real. It's as real as it can be, folks." Tpp 4320-4327. He further argued, based on the Book of Genesis:

> 'Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man' . . .
>
> I think that is something that has been lost in this whole trial (put Bible on jury rail) with all this talk about Babylon and hatred based on race or hatred based on America or establishments. These defendants fail to recognize something. And I don't want to belabor the point, but you and I (held up photograph) and David Hathcock and Ed Lowry are sacred. We're all sacred. And there's a reason for that. We apparently are made in the image of God. And he has said that we are very precious. So precious that if we deliberately with premeditation and with malice take a human life, our life also must be forfeited. Now, that decision

> obviously will have to be based upon the laws of the State of North Carolina. And I think you need to understand the sanctity of human life and not take the position that because somebody is of a particular race, it's all right to kill 'em, because that's the position these defendants take.

Tpp 4328-29. The prosecutor concluded by warning the jury that "nobody is safe from these guys," and the only way to protect society, including people in prison, prison guards, and "those of us on the outside," was to impose the death penalty. Tpp 4329-30.[6]

Kevin and Tilmon were convicted of two first-degree murders and sentenced to die. This Court affirmed the convictions and sentences of death on direct appeal. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). Kevin's sentences of death were vacated in light of the U.S. Supreme Court decision in *Roper v. Simmons*, 543 U.S. 551 (2005).

POSTCONVICTION PROCEEDINGS UNDER THE RACIAL JUSTICE ACT

Tilmon Golphin was tried and sentenced to death by a jury that included only one African American. *GWA* HTp 1482; DE117 (prosecution jury chart with

[6] The prosecutor's prediction has proven untrue. Tilmon has harmed no one and averaged one minor infraction a year in the two decades since his sentencing. See North Carolina Department of Public Safety Offender Public Information, https://webapps.doc.state.nc.us/opi/viewoffenderinfractions.do?method=view&offenderID=0590940&listpage=&listurl=&obscure=Y (last checked 6/6/2018).

handwritten racial designations).[7] The prosecution used peremptory strikes to remove five of seven qualified[8] African Americans in the venire. DE108 (MSU Study).

At the evidentiary hearing on his RJA motion, Golphin presented evidence of racial bias in jury selection in Cumberland County capital cases generally and in his trial.[9] First, Golphin elicited lay and expert testimony and presented documents, including *voir dire* transcript excerpts showing the prosecution's race-conscious questions and strike of African American venire member John Murray. Second, Golphin presented evidence of disparate treatment of similarly-situated white and black venire members. Third, Golphin presented documents and testimony concerning the capital prosecutions of James Burmeister and Malcolm Wright, two white defendants charged with the racially-motivated murders of two African Americans. These three categories of evidence are discussed in turn.

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[7] Citations to SE__, DE__, *Robinson* HTp ___, and *GWA* HTp ___ (the *Golphin/Walters/Augustine* or "Golphin" hearing) are to the exhibits and hearing transcripts from the original RJA proceedings conducted in the Cumberland County Superior Court and previously made part of the record in this Court, No. 139PA13.

[8] A "qualified" venire member is one not subject to challenge for cause.

[9] The evidence discussed here is exclusively non-statistical and unrelated to the MSU Study. As a result, this evidence and the Court's findings concerning it are untouched by the denial of the State's request for a third continuance. *See State v. Augustine, Golphin, and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015) (remanding strictly on grounds of continuance denial and joinder).

Targeting of John Murray for Race-Based Questions and a Racially-Motivated Strike

At the RJA evidentiary hearing, defense counsel questioned the prosecutor who tried Golphin's case. In particular, counsel focused on the prosecutor's questioning of African American venire member John Murray, as well as his explanation for striking Murray, a 31-year-old married engineer. Murray was a veteran of the Air Force who supported the death penalty and believed it deterred crime. *GWA* HTpp 1021-1047; DE112 (John Murray's juror questionnaire); Tpp 2058-2068.

There can be little question that the prosecution subjected Murray to racially-biased questions during *voir dire*. First, in connection with a prior driving offense, the prosecutor asked Murray this question:

> MR. COLYER: Is there anything about the way you were treated as a taxpayer, as a citizen, *as a young black male* operating a motor vehicle at the time you were stopped that in any way caused you to feel that you were treated with less than the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?
>
> JUROR SEVEN: No.

JTp 2073. (emphasis added). The prosecutor admitted at the RJA hearing that when he asked this question, Murray's race was consciously in his mind. *GWA* HTp 1028. No venire members were asked how they felt "as white people." JTpp 1-4445.

Second, the prosecutor focused explicitly on race when he asked about a conversation Murray had overheard[10] among other venire members:

> MR. COLYER: Could you tell from any speech patterns of words that were used, expressions, whether they were majority or minority citizens, black or white, African-American?
>
> JUROR SEVEN: They were white.

JTp 2055. By questioning Juror Murray explicitly about the racial implications of this incident with other jurors present, the prosecutor added fuel to the racial animosity in the courtroom. Moreover, when the prosecutor struck Murray and trial counsel raised a *Batson* objection, the prosecutor again focused on race when he tried to explain the strike, citing as one of his reasons: "Mr. Murray's statement that he attributed to a male and a female white juror in the courtroom." JTp 2111. At the hearing, the prosecutor could offer no plausible or persuasive explanation as to why the race of the overheard venire members was relevant. *GWA* HTpp 1036-40.

Third, the prosecutor singled out Murray for questions about black culture, asking Murray, and Murray alone, about the following matters:

> MR. COLYER: Are you familiar with a musician called Bob Marley?
>
> JUROR SEVEN: Yes.
>
> MR. COLYER: Are you familiar with his son, Ziggy Marley?

---

[10] Murray overheard venire members suggesting that Golphin "should never have made it out of the woods." JTp 2054.

> JUROR SEVEN: Yes.
>
> MR. COLYER: And the type of music that they - - that Mr. Marley played and his son continues to play?
>
> JUROR SEVEN: Yes.
> . . .
>
> MR. COLYER: Are you familiar with the former emperor of Ethiopia, Haile Selassie?
>
> JUROR SEVEN: No. I've heard of the name.
>
> MR. COLYER: In your understanding, is there any connection between the former emperor of Ethiopia, Haile Selassie, and Rastafarian or the Rastafari religion?

JTpp 2083-84; *GWA* HTpp 30-31. As with his other explicitly race-based questions and statements, the prosecutor could offer no persuasive explanation for these questions and why Murray was uniquely singled out for a special cultural test. *GWA* HTpp 1031-35. Bryan Stevenson, an expert in race and the law, reviewed the *voir dire* of Murray.[11] *GWA* HTp 1517. Stevenson concluded that, in asking Murray these questions about black culture, he was "targeting jurors of color in a way that, again, reinforces that race is a significant factor." *GWA* HTp 1524; see also *GWA* HTpp 1523-1525, 1533-35 (further discussion of these black culture questions and

[11] Stevenson was accepted as expert at Defendant's RJA hearing. *GWA* HTp 1473.

how they evince race consciousness and the fact that, to the prosecutor, "race matters").

Comparative Juror Analysis: The Prosecution Is Willing to Accept a Juror Who Hesitates on the Death Penalty—As Long as She is White

The prosecution also engaged in disparate treatment when it struck African American venire member Freda Frink. In an affidavit produced for the first time in the RJA case, the prosecutor claimed he struck Frink because she had "mixed emotions" about the death penalty. SE32 (Colyer Affidavit).

While striking Frink ostensibly because of her hesitation about the death penalty, the prosecutor accepted Alice Stephenson, who also expressed reservations about the death penalty. In fact, Stephenson used language identical to that used by Frink in describing her feelings about imposing a death sentence. Yet, while Frink's "mixed emotions" were reason to strike her, the prosecution was untroubled by Stephenson's "mixed emotions" about the death penalty. JTpp 652, 679, 681, 683 (Frink); JTpp 2116, 2165, 2173 (Stephenson).

The difference: Frink was African American; Stephenson was white.

Burmeister and *Wright*: When Prosecutors Want Black Jurors, They Don't Strike Them

Golphin also presented evidence about the prosecution of James Burmeister and Malcolm Wright, two white defendants charged in the racially-motivated murders of two African Americans. *GWA* HTp 925. The same prosecutor who tried

these two cases tried Defendant's case. The contrast between Defendant's case, where the State sought to limit the number of African-American jurors, and the *Burmeister* and *Wright* cases, where the State sought to seat African-American citizens on the jury is stark. *GWA* HTpp 933-934. This evidence demonstrates convincingly that the prosecution in Defendant's case took race into account when selecting the jury.

Evidence about jury selection in the *Burmeister* and *Wright* cases was particularly telling in this case because the prosecutor insisted that he used the same jury selection method in every capital case, asking roughly the same questions and basing strikes on the same characteristics. *GWA* HTpp 811, 931-33. Indeed, as to nearly all of the prosecution's explanations for striking African American potential jurors in this case, the prosecutor justified them on the basis of their reluctance to impose the death penalty or criminal records of the potential juror or that of family members. *GWA* HTpp 835 (Freda Frink struck for her death penalty views and because of a pending criminal charge), 845, 851 (John Murray and Kenneth Dunston struck because of criminal records), 855 (Lescine Brown struck because of her death penalty views).[12]

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[12] At the hearing, neither prosecutor offered any explanation for striking Deardra Holder, the fifth African American venire member dismissed by the prosecution in this case. One of the prosecutors prepared an affidavit prior to the RJA hearing and stated that Holder was struck because of her age. SE32 (Colyer Affidavit).

In sharp contrast, the same prosecutor accepted African-American jurors in the *Burmeister* and *Wright* cases despite their significant misgivings about the death penalty and/or involvement with the criminal justice system. *GWA* HTpp 982-989; DE130, DE131, DE132, DE133.

It is significant also that in *Burmeister*, as in this case, the prosecution's jury selection notes included explicit racial designations. *GWA* HTp 940; DE117; DE126. Defense expert Stevenson explained that these actions show that the prosecutor's race consciousness was "very, very important in thinking about jury selection generally." *GWA* HTp 1540.

Testimony of prosecutors and documentary evidence obtained during discovery pursuant to the Racial Justice Act

Cumberland county prosecutors, Margaret "Buntie" Russ and Cal Colyer, testified about the culture in the office and their own participation in capital cases, including Golphin's. Their testimony, along with notes and transcripts from individual case files, confirm that race drove prosecutorial decisions in jury selection in Cumberland County capital cases.

Margaret "Bunti" Russ, one of the prosecution team members in the *Golphin* case, testified regarding her history with *Batson.* Russ, along with another capital prosecutor from Cumberland County, George Hicks III, attended a training for North Carolina prosecutors about how to defeat *Batson* challenges, entitled "Top Gun II"

in 1995. *Robinson* HTpp 864-65[13]; DE81A. They were provided a cheat sheet of ten "race neutral" explanations that prosecutors could provide in response to a *Batson* challenge. *Id*.; DE111. Defense counsel obtained this cheat sheet during the RJA litigation.

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity or rebelliousness
2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age - Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

[13] By agreement with the State, the *Robinson* transcript was admitted into evidence in the *Golphin, Walters and Augustine* RJA hearing.

In at least one Cumberland County capital case tried in the same year as Golphin, Russ appeared to read directly from the cheat sheet, citing the juror's "age, attitude and body language." *State v. Maurice Parker*, DE147, pp 444-45. She reported that the juror "folded his arms and sat back in the chair away and kept his arms folded," that he was "evasive." Defense counsel contested Russ's characterization of the juror's body language and demeanor. DE147, pp 454, 448. When pressed, Russ referred explicitly to the cheat sheet, saying that those "three categories for *Batson* justifications we would articulate is the age, the attitude of the defendant (*sic*) and the body language." DE147, pp 447. She reiterated that age, body language, and attitude "are *Batson* justifications, articulable reasons." *Id*. The trial judge did not have the benefit of knowing that Russ was reading from a pat list of explanations, but he nonetheless concluded that she had violated *Batson v. Kentucky* and impermissibly used race in jury selection. DE147, pp 455. The trial judge rejected the demeanor and body language explanations as pretextual and noted that although Russ had responded that the juror's age was objectionable, she had passed a white juror with the "very same birthday" as the black struck juror. DE147, p 447.[14]

[14] Russ is the same prosecutor who struck African-American juror Deardra Holder from Golphin's jury based upon her age.

Russ testified that she had done nothing wrong at the *Parker* trial when she moved to strike a juror based on race. *GWA* HTpp 1332 ("No, I don't think a ruling of the court on … *Batson* … is an indication that we are doing anything wrong."); 1302 ("The conduct was not unlawful."). Russ also stated that she had not relied upon the *Batson* cheat sheet when responding to the defendant's *Batson* claim in *Parker*. Russ conceded that if she had reported attendance for the purpose of CLE credit, which she did, that meant she did in fact attend. DE81-A; *GWA* HTp 1292.

Russ testified that she was neither reprimanded nor provided any training by the Cumberland County prosecutor's office after the *Batson v*iolation. *GWA* HTpp 917, 1360. The office did not monitor or otherwise respond to *Batson* violations within the office. Russ did not change her method of jury selection in any way after the *Batson* finding in *Parker*. *GWA* HTp 1336.

Calvin Colyer also testified. In most of the capital cases Colyer prosecuted, he struck black jurors at a significantly higher rate than other jurors. Colyer believed that this pattern was unrelated to race, and instead tied only to the specific characteristics of each juror he accepted or struck. *GWA* HTpp 795, 802, 814, 818, 821, 852, 855. Colyer testified that his approach to jury selection was consistent over the course of his career, from case to case, juror to juror. *GWA* HTpp 811, 903-04, 924. The jury selection practices of Colyer in the *Burmeister* and *Wright* cases in 1997 belied this testimony. Burmeister and Wright were white supremacist

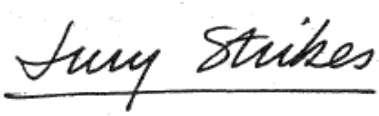
"skinhead" defendants accused of murdering black victims in racially-motivated murders. Colyer took a unique approach to jury selection. First, he filed a motion seeking funds for a jury selection expert, arguing that in that context, the "people of the State of North Carolina are entitled to a fair and impartial jury free from racist attitudes and reactionary positions." DE125. Citing the "covert nature" of views on race, the motion sought assistance in "recognizing potentially damaging racial attitudes." *Id*. In a case in which they believed that racial attitudes could obstruct their litigation goals of convictions and death sentences, the prosecutors deemed it important to ferret out those beliefs. *GWA* HTpp 930-31.

Colyer's pattern of strikes in *Burmeister* and *Wright* are the inverse of his typical pattern in Cumberland County cases: instead of disproportionately striking black jurors, in *Burmeister* and *Wright* he disproportionately struck a majority of white jurors. In *Burmeister*, he used nine of ten strikes to remove white jurors. DE127. He passed eight of nine black jurors, striking only a single black juror. *Id*. The disparities were even starker in *Wright*, where Colyer used all ten strikes against white jurors. He did not strike a single black juror in *Wright.* When hoping to rely on outrage about racial prejudice against African Americans to secure a death verdict, the prosecutors pursued a radically different jury selection strategy, accepting black jurors nearly identical to those they routinely struck in other capital cases.

This explanation, a tactical decision to pursue or strike black jurors based on group characteristics, explains the prosecutors' strikes in Defendant's case, and the *Burmeister* and *Wright* cases. While prosecutors generally struck jurors who expressed death penalty reservations, in the *Robinson*, *Golphin*, and *Augustine* cases, where the defendants were black, the prosecution still struck more black jurors with death penalty reservations compared to white jurors with death penalty reservations. In *Burmeister* and *Wright*, with white defendants and black victims, in contrast, Colyer repeatedly accepted black jurors with strong death penalty reservations. DE132 (State passes juror who said it would be "hard" and "difficult" for her to vote for the death penalty); DE133 (State passes juror who said because of her religious views "I don't believe in the death penalty"); DE153 at 519, 523 (State passes juror who said "I really wouldn't like someone to be killed").

Because of publicity and notoriety, two of the four RJA cases – *Golphin* and *Augustine* – involved the selection of juries from other counties. In *Golphin*, the jury was chosen in Johnston County, and in *Augustine*, the jury was selected in Brunswick County. In each case, the prosecutors met first with local law enforcement to discuss the jury panel and to investigate juror neighborhoods. DE98-103; DE158; *GWA* HTpp 997-98, 1356-57. The State was unable to produce in discovery Colyer's notes from the meeting between Colyer, Russ, and Johnston County law enforcement. Nevertheless, Colyer's notes from his meeting with

Brunswick County deputies in *Augustine* are instructive for the type of investigation Colyer performed on the potential jurors and which jurors he targeted for his peremptory strikes. In six pages of handwritten notes,[15] Colyer, the lead prosecutor in Golphin's and Augustine's cases, manifested in no uncertain terms his concern with race and his desire to exclude African Americans from jury service. On each page, Colyer explicitly noted his purpose—to identify venire members subject to exclusion by peremptory challenge:



DE98-103.

Augustine's trial was moved from Cumberland to Brunswick County after the defense requested a change of venue. Colyer made his notes after talking with Brunswick County law enforcement officers. *GWA* HTpp 183-185, 783. He had those conversations specifically to get information to use in jury selection, and he used these notes at trial. *GWA* HTpp 202-203, 1070-1071. Testimony at the RJA hearing proved the notes disproportionately concerned African Americans and were primarily negative comments about them. *GWA* HTpp 76-81.

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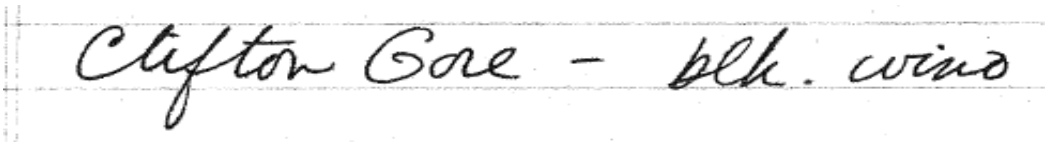
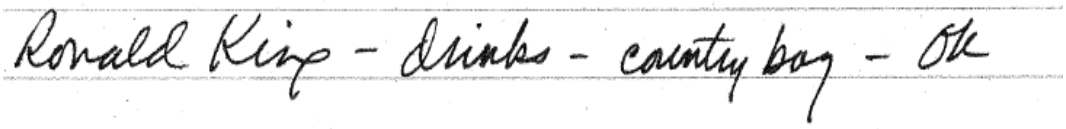
[15] These notes were admitted into evidence at Golphin's RJA hearing. DE98-DE103.

The "Jury Strikes" notes demonstrate powerfully that, in the prosecution's view, many African-American citizens summoned for jury duty in Augustine's case had a racial strike against their jury service before they even set foot in the courthouse. For example, one African-American man was disparaged for drinking in this way:



DE99; *GWA* HTpp 84-87. Colyer testified "blk" means black. *GWA* HTp 194.

Meanwhile, a white venire member with the same vice was not disparaged but deemed "ok":



DE99; *GWA* HTp 86.

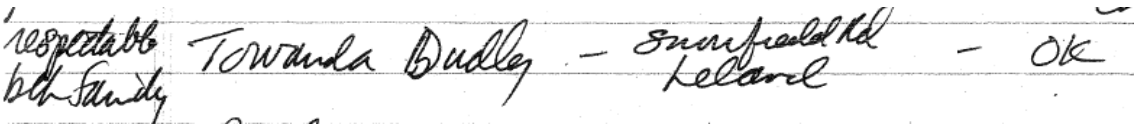
The prosecution condemned another African-American man in racially stereotyping, slurring terms because of his criminal record:

DE99; *GWA* HTpp 87, 89.

In contrast, the prosecutor shrugged off a white man's extensive criminal record, describing the potential juror this way:

DE100; *GWA* HTpp 88-89.

One woman was deemed "ok" after she was singled out for what the prosecutor seemed to believe was an unusual characteristic for an African American—the respectability of her family:



DE102; *GWA* HTp 90. There is no reference anywhere in Colyer's notes to "respectable" white people. In fact, the word "white" appears nowhere in his notes. DE98-103; *GWA* HTpp 90, 195. Bryan Stevenson, an expert in race and the law,[16] reviewed the prosecutor's "Jury Strikes" notes. *GWA* HTp 1500. Regarding the many explicit racial designations, including the Towanda Dudley notation, Stevenson testified that there is no reason to include a racial designation unless one believes race is important. *GWA* HTpp 1500-1503, 1510.

Another African-American woman was condemned for living in a black neighborhood, which the prosecutor seemed to consider synonymous with crime:

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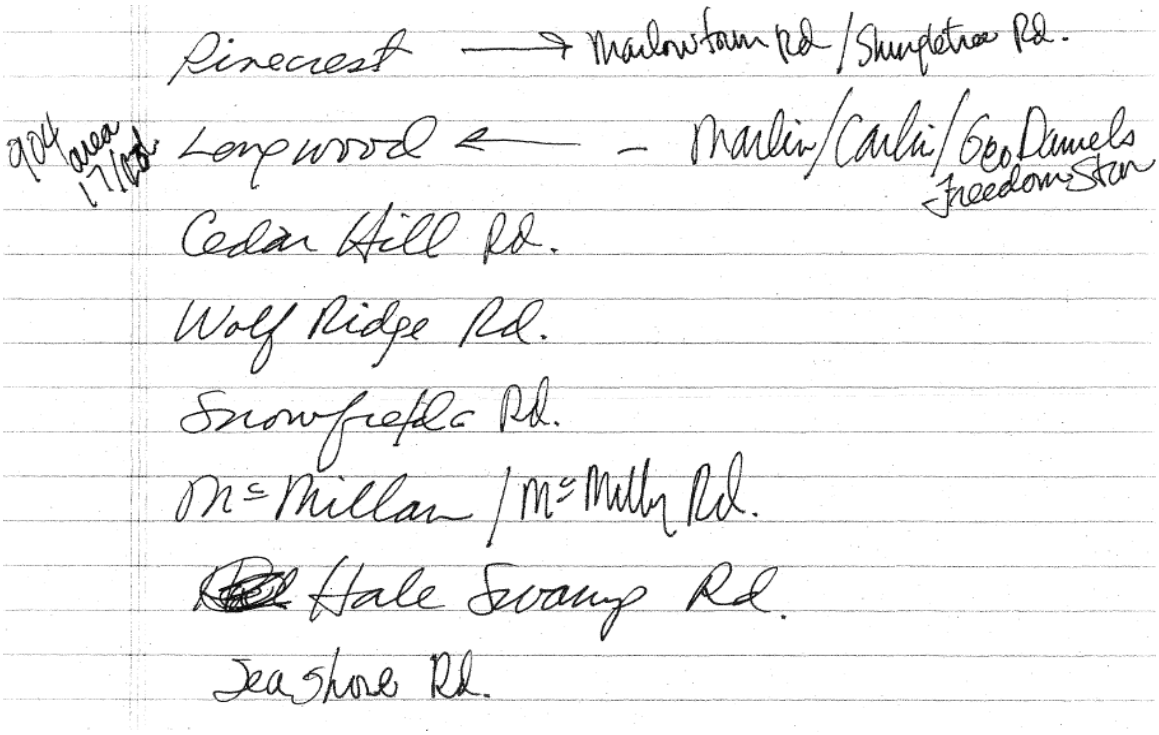
[16] Stevenson was accepted as an expert at Defendant's RJA hearing. *GWA* HTp 1473.

DE99; *GWA* HTp 89. The record shows that McDonald herself had no criminal record. *GWA* HTp 89.

On the last page of the prosecutor's notes was a list of 10 neighborhoods and streets.



DE103. Nine of the 10 were areas inhabited predominantly by African Americans. *GWA* HTpp 90, 1505-1507; DE166. Like Shirley McDonald, African-American venire member Mardelle Gore was included as a potential strike because of where she lived. Gore resided in Longwood, a so-called "bad area," included on the prosecutor's list of neighborhoods to be avoided. DE103; *GWA* HTp 1053.[17]

[17] The page of the prosecutor's notes on which Gore's name appears is partially cut-off in the copy the State provided to postconviction counsel in 2006. By the time of the RJA hearing, the original notes were no longer in the prosecution file. DE100;

In jury selection, the prosecutor questioned Gore. After confirming that Gore lived in Longwood—and after making additional notes explaining that Longwood is on Highway 904 and off Highway 17—the prosecutor struck her. *GWA* HTpp 1070-1071. When defense counsel lodged a *Batson* objection, the prosecutor gave a variety of reasons for the strike. He never mentioned Gore's residence in a black neighborhood and he never showed the trial judge his "Jury Strikes" notes. *GWA* HTpp 1053-1055, 1060; DE140.

In *Golphin*, Colyer testified at the RJA hearing that the prosecutors made "one or two visits to Johnston County" and talked with people in the DA's office and some of the sheriff's staff, but he did not think they discussed neighborhoods, or the jury list. *GWA* HTpp 997-98. Russ's notes from one of the pre-trial meetings with Johnston County troopers reveal otherwise. DE158.

Defense expert Stevenson testified "the preoccupation with race" reflected in Colyer's notes was "highly suggestive of race consciousness" and established that race was a significant factor in jury selection. *GWA* HTp 1503.

GWA HTp 71. Nonetheless, Gore's name and the description of Longwood as a "bad area" can be deciphered in the copy admitted into evidence. DE100; *GWA* HTp 1053.

Evidence from the Michigan State University College of Law statistical study

Social science researchers from the Michigan State University College of Law conducted an exhaustive, meticulous study of racial bias in capital jury selection in North Carolina across a twenty-year period (herein the "MSU study"). The lead researcher, Dr. Barbara O'Brien, testified at both the *Robinson* and *Augustine, Golphin, and Walters* hearings about the study's methodology and its findings of systemic bias. The State acknowledged in its closing argument that Dr. O'Brien was an honest and credible witness. *Robinson* HTp 2541. Another expert, statistician Dr. George Woodworth, testified for the defense supporting the study's methodology and results.

All three experts, including State expert Dr. Joseph Katz, agreed that the MSU Study demonstrated large, statistically significant disparities, unlikely to be due to chance. *Robinson* HTpp 1771, 1943-1947, 1949.[18] Dr. Katz further agreed with the other statistical experts that these results constituted a *prima facie* case of discrimination and required investigation. *Robinson* HTpp 1801, 1943, 1951.

The *Robinson* case was remanded by this Court because the trial judge failed to grant a third continuance request by the State. Nonetheless, the State produced no

[18] Dr. Katz testified that the statewide disparities were statistically significant. *Robinson* HTpp 1944-45.

new expert or statistical critique of the MSU Study when the Study was used in the *Golphin* hearing in October, nine months later. To this day, the State has failed to disclose or produce any expert witness or analysis showing that race was not a significant factor in jury selection.

The MSU Study collected jury selection data from all 173 capital proceedings for the defendants of North Carolina's 2010 death row. The MSU researchers gathered race and strike data for all but seven of the 7,421 venire members. DE6, p 8. They relied upon original source materials such as juror questionnaires, *voir dire* transcripts, and clerks' charts. *Robinson* HTp 122. If the race data was not available from these sources, they followed a rigorous protocol to match the jurors to identifying information in public records. DE6, pp 6-8; *Robinson* HTp 117. Prosecutors around the state reviewed the data for their districts and found only a few discrepancies. In the cases where errors were found, the MSU researchers updated the database to reflect the corrections. *Robinson* HTpp 131-32.

Analysis of the prosecutors' strike patterns of black venire members and all other venire members revealed large, statistically significant racial disparities. Statewide, across the full study period, prosecutors struck qualified[19] black venire members at slightly more than twice the rate they struck all other venire members.

[19] Only venire members who were not excluded for cause and were either struck or passed by the state were included in the study.

DE3, p 22. In Cumberland County, prosecutors struck black venire members at 2.6 times the rate they struck all other venire members. *Robinson* HTp 152, DE2, p 41.

The researchers also examined the explanations offered by prosecutors in North Carolina for exercising strikes. For this analysis, the MSU investigators collected data for all of the Cumberland County cases and for a randomly selected 25% sample of the statewide pool. DE6, p 5; *Robinson* HTpp 120-21, 135, 164-65.

This portion of the MSU Study, referred to during the RJA trials as "Part II" of the study, gathered extensive data relevant to analyzing strike decisions, including demographic information (e.g., gender, age, marital status, children, employment), prior legal experiences of the juror and his or her family members and close friends (e.g., prior jury service, experience as a defendant or victim, connections to attorneys and law enforcement), views on the death penalty, potential hardships, and any stated biases (collectively herein "descriptive variables"). *See* DE6, p 5; *Robinson* HTpp 120-21.[20]

The MSU researchers collected information for more than 65 descriptive variables. *Robinson* HTpp 185-87. They selected these variables after extensive research, including review of the North Carolina appellate courts' published

[20] The researchers used a double coding approach to this portion of the study, whereby two attorney researchers independently coded each venire member. Any differences between the two independent coding forms were reconciled by Dr. O'Brien personally. DE6, p 10; *Robinson* HTpp 131-33, 170-71.

decisions, law review articles, treatises on jury selection, numerous North Carolina jury *voir dire* transcripts, and the protocol used in a similar study. *Robinson* HTpp 121-33, 349-53; DE6, p 2. Many prosecutors provided affidavits and statements with their purported bases for striking African-American jurors, and these explanations were highly consistent with the variables selected by MSU. SE32; *Robinson* HTp 422.

This thorough dataset allowed the researchers to engage in what was essentially system-wide comparative juror analysis. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."). They asked whether the racial disparities could be explained by other possible factors, for example, the jurors' death penalty views, criminal history, or marital status. *Robinson* HTpp 177-82; DE3, p 63. If the prosecution was truly striking a higher percentage of black jurors because of their criminal histories—and not their race—the researchers would expect prosecutors to strike white jurors with criminal histories at the same ratio that they strike black jurors with criminal histories. *Robinson* HTpp 186-87; DE3, p 66.

For every analytical approach the researchers tried, racial disparities remained. Statewide, prosecutors accepted only 10% of black jurors who expressed

reservations about the death penalty, while they accepted 26% of all other jurors with reservations about the death penalty. DE3, p 66. In Cumberland County, the disparity among jurors who expressed reservations about the death penalty was even greater: the State accepted only 5.9% of the black venire members, but accepted 26.3% of the other venire members. DE3, p 67. To be sure, prosecutors struck jurors with death penalty reservations far more often than those jurors without. Even still, they found black jurors with death penalty reservations much less desirable than their white counterparts. This comparative analysis showed that the same explanations for white juror strikes do not hold for black juror strikes.

PROCEEDINGS FOLLOWING THIS COURT'S REMAND TO THE CUMBERLAND COUNTY SUPERIOR COURT

On remand, Defendant's case, as well as those of Defendants Robinson, Walters, and Augustine were assigned to the Senior Resident Superior Court Judge of Cumberland County, the Honorable James Floyd Ammons. Defendant filed a motion to recuse Judge Ammons, and on 9 June 2016 Judge Ammons denied the motion, but then announced that he would ask the Administrative Office of the Courts to assign the case to another judge. The Honorable W. Erwin Spainhour was assigned.

On 17 February 2016 Defendant filed an Amended Motion for Appropriate Relief Based on Racial Discrimination in Jury Selection based on new law and newly discovered evidence, including prosecutors' notes, prosecutors' affidavits and

testimony, and statistical data available only because of the Racial Justice Act litigation.

On 8 April 8 2016 Defendant asserted his double jeopardy rights in the lower court in Defendant's Response in Opposition to State's Motion to Dismiss Defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act.

On 28 August 2016 Judge Spainhour directed the parties that he intended to hear and consider the following issue:

> Did the enactment into law of Senate Bill 306, Session Law 2013-14, on June 19, 2013, specifically Sections 5. (a), (b) and (d) therein, render void the Motions for Appropriate Relief filed by the defendants pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes of North Carolina?

On 14 November 2016 Defendant filed Defendant's Brief in Support of Racial Justice Act Claims, arguing, inter alia, that the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution prohibits resentencing Defendant to death following his acquittal of the death penalty and that further proceedings following this acquittal are also barred. (App 221).

On 29 November 2016 Judge Spainhour heard arguments from counsel on the issue regarding the retroactive application of the RJA repeal. Judge Spainhour

denied Defendant's motion for an evidentiary hearing on all issues, but accepted a proffer of the evidence that Defendant would introduce if granted such a hearing.[21]

In an Order filed 25 January 2017 Judge Spainhour dismissed Defendant's RJA MAR. Judge Spainhour declined to address Defendant's motion for discovery (App 341), or any of the constitutional issues raised except Defendant's vested rights claim and his argument that the application of the RJA repeal to his case violated his rights pursuant to the *ex post facto* clauses of the state and federal constitutions.

GROUNDS FOR APPELLATE REVIEW

This death penalty case is before the Court on a petition for writ of *certiorari* filed, pursuant to N.C. R. App. Proc. 21(f), after the Superior Court dismissed Defendant's claims pursuant to N.C. Gen. Stat. §§ 15A-2010-2012, the North Carolina Racial Justice Act.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PROHIBITS FURTHER PROSECUTION OF DEFENDANT.

Golphin previously asserted to this Court that double jeopardy prohibited further prosecution that could lead to multiple punishments for the offense of first-degree murder, following the imposition of a judgment of life imprisonment without parole. This Court's Remand Order was silent on the issue of double jeopardy, as

[21] The evidence proffered at that hearing is fully incorporated herein by reference and is also discussed *infra* in the context of individual issues.

was the decision of the court below, and now this Court must resolve this issue. Double jeopardy is a threshold issue which must be resolved now before any further prosecution or appellate proceeding. *See* N.C. Gen. Stat. § 15A-1445(a) (providing, in pertinent part, that "[u]nless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division"); *United States v. Scott*, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal."); *cf.*, N.C. Gen. Stat. § 15A-1447(g) (stating that "[i]f the appellate court finds that there has been reversible error and the rule against double jeopardy prohibits further prosecution, it must dismiss the charges with prejudice.").

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits resentencing Defendant to death following his acquittal of the death penalty. The constitutional prohibition against double jeopardy has long been recognized to bar subsequent proceedings after acquittal. *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (tracing the origins of double jeopardy protections to Greek and Roman times, and its application in capital cases). This protection was extended to capital sentencing decisions. *See Bullington v. Missouri*, 451 U.S. 430, 443 (1981) (holding that an "acquittal" in the capital sentencing context turns on whether the

sentencer or reviewing court has "decided that the prosecution has not proved its case" that the death penalty is the appropriate sentence); *Monge v. California*, 524 U.S. 721, 731-32 (1998) (noting that a critical component of the court's reasoning in *Bullington* was the capital sentencing context and the "vital importance" that the decisions "be and appear to be, based on reason rather than caprice or emotion.").

The Court further extended this protection to life imprisonment verdicts imposed by trial judges after capital sentencing hearings. *Arizona v. Rumsey*, 467 U.S. 203 (1984). The trial court in *Rumsey* initially imposed a life sentence after finding insufficient evidence to support an aggravating factor, but the state supreme court reversed after concluding the trial court made a legal error in its analysis. The trial court then imposed death on remand. *Id.* at 206, 208. The United States Supreme Court reinstated the life imprisonment verdict, holding that double jeopardy barred resentencing when a life verdict was imposed after a trial-like determination, no matter what the alleged error. *Id*. at 209-10. The Supreme Court recognized two features of Arizona's sentencing scheme that triggered double jeopardy protections: the fact that the trial judge, like the jury, had to distinguish between the two verdicts of death and life without parole, and that the sentencing decision was guided by statutory standards. *Id*.

The Court emphasized the importance of fact-finding for the double jeopardy analysis in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). There, the jury had

deadlocked on the question of punishment, and the trial court had imposed a life sentence pursuant to state law. *Id*. at 105. The defendant successfully appealed his conviction; the state once again sought the death penalty on retrial, and a death sentence was imposed. *Id*. The Supreme Court upheld this death sentence after concluding that the sentencer had not made "findings sufficient to establish legal entitlement to the life sentence." *Id*. at 108. "[A]n 'acquittal' at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections." *Id*. at 107.

Like the Supreme Court double jeopardy cases finding in favor of defendants, the RJA trial required fact finding confined by statutorily-guided standards. *See Bullington*, 451 U.S. at 439; *Rumsey*, 467 U.S. at 209-10; N.C. Gen. Stat. § 15A-2011 (setting forth standards and evidence to be considered by the trial court in making its findings). The RJA statutory scheme sets forth the "findings sufficient to establish legal entitlement to the life sentence." *Sattazahn*, 537 U.S. at 108; N.C. Gen. Stat. § 15A-2012 ("If the court finds that race was a significant factor . . . the court shall order . . . that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.").[22]

[22] *Cf. Bobby v. Bies*, 556 U.S. 825, 833-34 (2009) (denying double jeopardy protection because there was no finding entitling the defendant to a life sentence under state law); *Poland v. Arizona*, 476 U.S. 147, 155-57 (1986) (holding that

The U.S. Supreme Court has long recognized that a verdict based on a defense is entitled to the full protection of double jeopardy. *See Burks v. United States,* 437 U.S. 1 (1978) (double jeopardy barred retrial of defendant after defendant raised insanity defense, lost with the jury, but appellate court reversed after concluding there was insufficient evidence to prove sanity). The RJA created an affirmative defense to death sentences, plainly stating that "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." N.C. Gen. Stat. § 15A-2010.

Superior Court Judge Gregory Weeks determined after an evidentiary hearing conducted pursuant to N.C. Gen. Stat. § 15A-2010, *et seq.*, that Golphin met the criteria under the RJA and thus was no longer eligible for the death penalty. He vacated the death sentence pursuant to N.C. Gen. Stat. § 15A-2012 and entered a separate Judgment and Commitment sentencing Golphin to life imprisonment. (App 351). At that point, Petitioner could not again be subject to retrial or resentencing pursuant to the Double Jeopardy clause of the Fifth and Fourteenth Amendments and Article I, § 19 of the North Carolina Constitution.

The United States Supreme Court has

> emphasized that what constitutes an "acquittal" is not to be controlled by the form of the judge's action. . . Rather, we must

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neither judge nor jury acquitted the defendant because neither made findings sufficient to establish legal entitlement to a life sentence).

> determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (citations omitted). "It is unquestionably true that [Judge Weeks'] decision 'represented a resolution, correct or not, of some or all of the factual elements'" necessary for eligibility for the death sentence in North Carolina. *See Burks v. United States*, 437 U.S. 1, 10 (1978) citing *Id.*

Judge Weeks' findings were more direct than an appellate court finding of insufficient evidence, because he made findings supporting his conclusion that Golphin was ineligible for the death penalty as an original matter after conducting an evidentiary hearing. Nevertheless, for purposes of a double jeopardy analysis, the two are functionally equivalent. *See McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (holding that a "reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, [and] such a reversal bars retrial"). Courts distinguish between reversals due to trial error and those, such as here, resulting from evidentiary insufficiency. *Burks v. United States*, 437 U.S. at 14-15. Double jeopardy applies whenever an appellate court decides that the prosecution has not proved its case. *Bullington v. Missouri*, 451 U.S. 430, 443 (1981).

Significantly, the State has never seriously challenged Judge Weeks' findings that the evidence presented by Golphin at his hearing supported his claim under the

RJA. While this Court subsequently found procedural errors including the denial of the State's third motion for a continuance and the improper joinder of parties, this fact makes no difference in the double jeopardy analysis:

> [A]n acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence was "correct or not," and regardless of whether the court's decision flowed from an incorrect antecedent ruling of law.

Evans v. Michigan, 568 U.S. 313, 320 (2013) (citations omitted).

The protections of the Double Jeopardy Clause apply equally to cases on appeal or in postconviction proceedings where the reviewing court, as here, acquits the defendant. *See Lockhart v. Nelson*, 488 U.S. 33, 39 (1988) ("Because the Double Jeopardy Clause affords the defendant who obtains a judgment of acquittal at the trial level absolute immunity from further prosecution for the same offense, it ought to do the same for the defendant who obtains an appellate determination that the trial court *should* have entered a judgment of acquittal."); *Burks v. United States*, 437 U.S. at 11 ("The appellate decision unmistakably meant that the District Court had erred in failing to grant a judgment of acquittal. To hold [that the Double Jeopardy Clause does not apply] would create a purely arbitrary distinction between those in petitioner's position and others who would enjoy the benefit of a correct decision by the District Court."); *cf. Evans v. Michigan*, 568 U.S. at 319 ("[A]n 'acquittal' includes a ruling by the court that the evidence is insufficient to convict, a factual

finding that necessarily establishes the criminal defendant's lack of criminal culpability, and any other ruling which relates to the ultimate question of guilt or innocence.") (internal quotation marks omitted, citations omitted).

Consequently, the Double Jeopardy Clause precludes a resentencing trial and imposition of a death sentence following an evidentiary hearing where the trial court found that Golphin was ineligible for the death penalty pursuant to the RJA, and resentenced him to life imprisonment without the possibility of parole.

II. N.C. GEN. STAT. § 15A-1335 PROHIBITS RESENTENCING DEFENDANT TO GREATER PUNISHMENT.

Judge Weeks resentenced Defendant to life imprisonment without possibility of parole in the superior court. A straightforward application of North Carolina law requires this Court to enforce Defendant's existing life imprisonment sentence and remove Defendant from death row. Once a defendant has been sentenced, North Carolina law does not permit the courts to inflict a more severe sentence:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335. "Pursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand." *State v. Wagner*, 356 N.C. 599, 602 (2002).

The "sentence[s] imposed in superior court" at issue here are the sentences of life without parole that the Superior Court imposed on Tilmon Golphin on 13 December 2012. (App 355).

The State contends Golphin's life sentences were subsequently "set aside on direct appeal or collateral attack" by this Court's Order on 18 December 2015. *See State v. Augustine, Golphin and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). As set forth in the argument regarding the mootness of the RJA claims, Defendant contends his life without parole sentence is undisturbed; however, even if the State is correct that it was this Court's intention to set aside the life sentence, the lower court "may not impose a new sentence for the same offense . . . which is more severe than the prior sentence." N.C. Gen. Stat. § 15A-1335.

This does not mean that every postconviction opinion granting relief to a criminal defendant is the final word not subject to reversal on appeal. To the contrary, the RJA uniquely required the superior court judge to resentence the defendant to a sentence of life imprisonment without parole upon a finding that race was a significant factor in the charging or sentencing of the defendant. It is this singular resentencing mandate of the RJA that in turn invokes the provisions of § 15A-1335.

Consequently, § 15A-1335 prohibits the imposition of the death penalty after appeal if, at any point, the defendant has been sentenced to life imprisonment for the same crime in the superior court. *See, e.g.*, *State v. Oliver*, 155 N.C. App. 209, 212,

573 S.E.2d 257, 258-59 (2002) (holding that, for purposes of applying § 15A-1335, consecutive life sentences can never be considered more severe than a death sentence).

III. GOLPHIN HAS BEEN SENTENCED TO LIFE WITHOUT PAROLE AND NO REVIEW OF THIS JUDGMENT HAS EVER BEEN SOUGHT BY THE STATE; THUS, THE ISSUES RAISED BY THE PARTIES ARE MOOT.

On 13 December 2012 the Honorable Gregory A. Weeks granted Defendant's RJA MAR. *State v. Golphin, Walters, and Augustine*, Cumberland County Superior Court Nos., 97 CRS 47314-15 (Golphin), 98 CRS 34832, 35044 (Walters), and 01 CRS 65079 (Augustine). (App 11). On that same date, Judge Weeks entered a separate Judgment and Commitment order resentencing Tilmon Golphin to life imprisonment without the possibility of parole. *State v. Golphin*, Judgment and Commitment, Cumberland County Nos. 97 CRS 47314-15. (App 355). On 21 March 2013, the State filed a petition for writ of *certiorari* seeking review of the ORDER GRANTING MOTIONS FOR APPROPRIATE RELIEF, State's Petition for Writ of *Certiorari*, at 1-2. Pursuant to Rule 21 of the Rules of Appellate Procedure, a petitioner is required to attach "certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matter set forth in the petition." Attached to the State's petition, *inter alia*, was a certified copy of the Order granting the Motion for Appropriate Relief. On 3 October 2013, this Court allowed the petition "for a writ of *certiorari* to review the order of the Superior

Court, Cumberland County[.]" *State v. Augustine, Golphin, and Walters*, 367 N.C. 236, 748 S.E.2d 318 (2013).

The State's brief made a similar request, seeking "reversal of the ORDER GRANTING MOTIONS FOR APPROPRIATE RELIEF filed on 13 December 2012." *State v. Augustine, Golphin, and Walters*, No. 138PA13 (18 November 2013). Again, attached to the State's brief was a copy of the Order granting the Motion for Appropriate Relief.

The State's petition and brief did not mention the Superior Court's Judgment and Commitment. No notice of appeal was filed by the State from the Judgment and Commitment,[23] the State did not seek *certiorari* review of the Judgment and Commitment pursuant to Rule 21 of the Rules of Appellate Procedure, and the Judgment and Commitment was not attached to either the State's petition for writ of *certiorari* or its brief. No mention of the Judgment and Commitment was made in either document filed in support of its appeal. This Court's Order of 15 December 2015 vacated the RJA Order granting relief to the defendant but left the Judgment and Commitment undisturbed. *State v. Augustine, Golphin and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015).

[23] The State had no right to appeal from the Judgment and Commitment resentencing Golphin to life imprisonment without the possibility of parole. *See* N.C. Gen. Stat. § 15A-1445 (listing the limited circumstances when the State may appeal from the superior court to the appellate division).

Because the State did not seek to challenge the judgment imposing a life sentence without parole on Tilmon Golphin, it waived its right to now dispute its validity. The life without parole sentence of the defendant is in full force and effect.

This Court has clearly distinguished between trial court orders granting motions for appropriate relief and orders entering judgment and commitment. In *State v. Roberts*, 351 N.C. 325, 523 S.E.2d 417 (2000), this court noted that a Court of Appeals' decision reversing a judgment and commitment "did not constitute a decision by the Court of Appeals on defendant's motion for appropriate relief because it did not review the decision by Judge Cornelius to grant the motion for appropriate relief to defendant." 351 N.C. at 328, 523 S.E.2d at 418-419. Similarly, in Golphin's case, a decision by this Court reversing a trial court order granting Defendant's motion for appropriate relief did not constitute a decision on Defendant's Judgment and Commitment, because it did not review the judgment and commitment order entered by the superior court judge. *See also, State v. Miller*, 205 N.C. App. 724, 696 S.E.2d 542 (2010) (Appeal dismissed where defendant filed notice of appeal from order denying motion to suppress but failed to appeal from the judgment.)

In short, this Court did not review the entry of the Judgment and Commitment by the trial court, because the State did not challenge it. With no review available to

the State of the Judgment and Commitment, it is now final. All other issues presented herein are rendered moot.

> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

In re Peoples, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978) (citations omitted).

IV. PETITIONER IS ENTITLED TO HIS PREVIOUSLY-IMPOSED LIFE WITHOUT THE POSSIBILITY OF PAROLE SENTENCE BECAUSE THIS COURT IMPROVIDENTLY GRANTED THE STATE'S 2013 PETITION FOR *CERTIORARI* AND REVERSED BASED ON ARGUMENTS NOT PRESENTED FOR THE COURT'S REVIEW.

This case was before this Court when it granted the State's 2013 petition for *certiorari* review. In 2015, this Court remanded Golphin's case to the court below for two reasons, one relating to the RJA Hearing Court's denial of a motion for a third continuance in *State v. Robinson*, and the other relating to the joinder of Mr. Golphin's case with the case of Petitioners Augustine and Walters. *State v. Augustine, Golphin, and Walters*, 368 N.C. 608, 781 S.E.2d 292 (2015).

This Court, pursuant to its inherent power, should exercise its inherent authority to determine that the grant of a writ of *certiorari* to review the RJA Order

granting relief to Golphin was improvidently granted. In the alternative, this Court should review its Remand Order, vacate that Order, and affirm the RJA Hearing Court's Order granting relief in this case. In light of the extraordinary circumstances here, this Court should take such action in order "[t]o prevent manifest injustice" to Golphin and "to expedite decision in the public interest." N.C. R. App. Proc. 2.

In its analysis of its powers under Rule 2, this Court has been clear: "This Court has tended to invoke Rule 2 for the prevention of 'manifest injustice' in circumstances in which substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007). As this Court has recognized, while this Court has utilized Rule 2 in both civil and criminal cases, the Court has used Rule 2 "more frequently in the criminal context when severe punishments were imposed." *Id*. *See also State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) ("In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and order a new trial.").

In the prior proceedings in this Court, the State was the appellant, seeking review of the RJA Hearing Court's grant of relief to Golphin. Under the Rules established by this Court to govern its review of cases, it is clear that "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated

will be taken as abandoned." *See* N.C. R. App. Proc. 28(b)(6). This Rule has been invoked by this Court and the lower appellate court in numerous cases to deny merits review of claims brought by prisoners. As this Court has clearly stated, "It is not the role of the appellate courts, however, to create an appeal for an appellant."). *Viar v. N.C. Dep't. of Transp*., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Our basic principles of appellate law require that the appellant raise the issue in order to have an appellate court review it.

Here, in identifying the denial of the State's third request for a continuance and the joinder of Golphin's case with those of Walters and Augustine as the basis for the 2015 Remand Order, the Court acted contrary to its Rules and precedent. Its actions were not to aid a prisoner who had failed to follow this Court's rules but, to the contrary, to aid the State in maintaining a death sentence. The Court's overreach in this case is entirely inconsistent with its role as the guardian of justice. *See State v. Fowler*, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967) ("It is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed *the unfortunate accused before his life is taken by the State*.") (emphasis added).

As set out in the procedural history above, the State did not raise these issues again at the start of the RJA evidentiary hearing and did not present them on *certiorari* review in this case.[24]

A. The RJA Hearing Court's Denial of the State's Request for a Third Continuance was not Raised in this Case and the State was not Prejudiced.

In remanding this case to the lower court, this Court first concluded that "the error recognized in this Court's Order in *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), infected the trial court's decision, including its use of issue preclusion, in these cases." *State v. Augustine, Golphin & Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). The error identified by this Court in *State v. Robinson* was that the RJA Hearing Court abused its discretion in that case by denying the State's third request for a continuance.

The RJA evidentiary hearing in Robinson's case commenced in January 2012. Robinson's evidentiary hearing had previously been scheduled for September 2011, and then November 2011, following continuance requests from the State. In its

[24] In light of this Court's reliance on issues not raised by the State to vacate the RJA Hearing Court's 210-page order which supported its resentencing of Golphin to life imprisonment without the possibility of parole, Golphin's rights to a fair review of the hearing under the Fourteenth and Eighth Amendments of the federal constitution and the Law of the Land clause of the state constitution have been violated. See G*ardner v. Florida*, 430 U.S. 349, 362 (1977) ("We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

requests, the State asked for more time to gather affidavits from North Carolina prosecutors explaining the strikes of African American venire members, as the State's statistical expert intended to use these affidavits to counter the study conducted by Robinson's experts at MSU. At the opening of the January 2012 hearing, the State, for the third time, moved for a continuance. The RJA Hearing court denied the motion and the hearing proceeded. On 20 April 2012 the RJA Hearing Court ruled in Robinson's favor and resentenced him to life imprisonment without the possibility of parole.

Eight months after the *Robinson* hearing, and four months after the General Assembly amended the RJA and narrowed the scope of the statute by eliminating state- and judicial division-wide disparities as grounds for RJA relief, the evidentiary hearing in Golphin's case was held in October 2012. The State offered no additional statistical evidence than it had offered in the *Robinson* RJA hearing.

Significantly, prior to the start of the RJA Hearing in this case, the State acknowledged it had completed the work gathering information from prosecutors across North Carolina that it had been unable to complete by the time of the *Robinson* RJA evidentiary hearing. *See* 27 September 2012 Hrg. Tp 61 (acknowledging that, as of that date, the State was "close to a hundred percent now" in gathering affidavits from prosecutors).

The State then sought review of the RJA Hearing Court's Order in *State v. Robinson* in this Court. In its petition for *certiorari* review, and then as an argument in its brief, the State argued that the RJA Hearing Court abused its discretion by denying the State's third request for a continuance. Thus, the denial of the State's third request for a continuance was ripe for this Court's review and Robinson was in a position to address the argument, initially in his opposition to the State's petition for *certiorari* and then again in his brief to this Court.

By contrast, at no point during the proceedings before this Court did the State in this case raise any issue regarding continuance. The State did not include the issue in its questions presented in the petition, nor did it brief, any issue pertaining to continuance. As a consequence, Golphin had no opportunity to argue in this Court that there was no prejudice to the State in *this* case from the denial of the third motion for continuance in *Robinson*.

Before addressing the issue of prejudice, it should be noted that the State had an extraordinary length of time to prepare whatever evidence it chose to counter the statistical study offered into evidence at Golphin's RJA hearing. The initial findings of the MSU Study were set out in an affidavit attached to Golphin's August 2010 RJA motion. Judge Weeks ordered an evidentiary hearing and discovery in Robinson's case in the spring of 2011, placing the State on notice that it needed to

prepare to present evidence in opposition to the MSU Study. Golphin's RJA hearing was 18 months after that.

In this case, the State was not prejudiced by the denial of the third motion for continuance in the *Robinson* case. *See State v. Cook*, 362 N.C. 285, 296, 661 S.E.2d 874, 881 (2008) (where trial court abused its discretion in denying motion to continue, finding error harmless beyond a reasonable doubt). Had the State raised the continuance issue, regardless of any prejudice to the State in *Robinson* by the denial of the State's third request for a continuance, Golphin could have identified numerous reasons why the State suffered no prejudice in this case.

As noted above, a week before Golphin's RJA hearing started, the State conceded that it was "close to a hundred percent now" in its efforts gathering affidavits from prosecutors concerning their reasons for striking African-American prospective jurors. At Golphin's RJA hearing, the State chose not to present the additional affidavits it had gathered after the completion of the *Robinson* hearing. In fact, the State objected to the introduction of these affidavits by Augustine, Walters, and Golphin. *See GWA* HTpp 269-70 (defense introduces prosecution affidavits); 271-90 (extended colloquy on State's objections); 291-92 (hearing court admits affidavits over State's objection). The State presented no other statistical evidence, despite having retained its own expert prior to the *Robinson* hearing, and having another eight months between the two RJA hearings.

In addition, at the *Robinson* hearing, the State had an opportunity to fully preview the statistical study and the experts who conducted it. Thus, at Golphin's hearing, it was not a situation where the State was facing for the first time a wholly unfamiliar body of evidence.

Finally, the scope of Golphin's RJA hearing was actually narrower than that at Robinson's RJA hearing. Due to the General Assembly's amendment of the RJA, Golphin's RJA claims based on state- and division-wide disparities were no longer cognizable. Thus, by the time of his hearing, the State had been afforded more time and had less to defend than in the *Robinson* case.

If the State had properly preserved and raised the continuance issue in Golphin's case, Golphin would have additionally argued that no prejudice flowed to the State from its purported lack of preparedness to confront the MSU Study because, as the trial court found, the State's study "was flawed from the outset by [the] poor research question." RJA Hearing Order at ¶¶ 373-74 (finding that the State's expert "instructed prosecutors to provide him with a 'true race-neutral explanation'" for peremptory strikes, "rather than ask[ing] an open-ended question about why prosecutors struck specific venire members") (App 204-05). The trial judge further found that the State's study design was flawed because it relied on self-reported data. RJA Hearing Order at ¶ 375 (App 205).

Furthermore, the State suffered no prejudice because the individualized, non-statistical evidence adduced at Golphin's RJA Hearing entitled Golphin to relief under the RJA. This evidence—the prosecution's prior improper use of race in the jury selection in another capital case, the prosecution's use of training to evade *Batson*, the prosecution's shifting, pretextual reasons given for striking African-Americans while accepting whites with similar characteristics—was not introduced at the *Robinson* hearing and was wholly independent of the statistical evidence. RJA Hearing Order at ¶ 53 (finding that "the credibility of Colyer's proffered explanations for strikes in Cumberland County cases, including *Augustine* and *Golphin*, is further undermined by the Court's comparative juror analysis") (App 76).

The RJA Hearing Court found this evidence established that race was a significant factor in Golphin's case. *See, e.g.*, RJA Hearing Order at ¶ 19, n 6 (finding prosecutor's notes equating black neighborhoods with high crime neighborhoods as "evidence that race was a significant factor in Golphin's jury selection") (App 64); RJA Hearing Order at ¶ 46 (finding in Golphin's jury selection that prosecutor's questions about black culture directed to African-American juror "target[ed] jurors of color in a way that again reinforces that race is a significant factor") (App 73); RJA Hearing Order at ¶ 53 (finding prosecutor struck African-American venire member Freda Frink in part because Frink had "mixed emotions" about the death

penalty while accepting non-black venire member Alice Stephenson who also used the phrase "mixed emotions" to describe her feelings about the death penalty) (App 77); ¶ 130 ("The evidence of Colyer's race-conscious 'Jury Strikes' notes in *Augustine*, Coyer and Dickson's conduct in the *Burmeister* and *Wright* cases, Russ' use of a prosecutorial 'cheat sheet' to respond to *Batson* objections, and the many case examples of disparate treatment by these three prosecutors, together, constitute powerful, substantive evidence that these Cumberland County prosecutors regularly took race into account in capital jury selection and discriminated against African-American citizens.") (App 107); RJA Hearing Order at ¶ 179 (finding that the prosecutor's "characterization of black venire members like John Murray, who was called for jury duty in *Golphin*, as 'antagonistic' or 'militant' and insufficiently 'deferential' to authority are deeply rooted in the history of violence against African Americans") (App 126).

Under well-established law, these findings, based on the RJA Hearing Court's weighing of the evidence and its opportunity to observe the demeanor of the prosecutor who prosecuted Golphin and testified at the hearing, are binding on this Court. *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000); see also *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971) (in contrast to an appellate court which "sees only a cold, written record[,]" a hearing judge "sees the

witnesses, observes their testimony as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth").

B. The State did not Raise a Claim about the Joinder of Golphin's Case with those of Petitioners Walters and Augustine in this Court; and the State was not Prejudiced by the Joinder.

In one sentence and without citing any legal authority, the Court's Remand Order also concluded that "the trial court erred when it joined these three cases [*Walters*, *Augustine* and *Golphin*] for an evidentiary hearing." *State v. Augustine, Golphin, and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). The State failed to present this issue on *certiorari* review to this Court in this case.

In the RJA Hearing Court, the State moved to have three separate RJA evidentiary hearings in the cases of Walters, Augustine, and Golphin. The State asserted two bases for its motion to separate these cases. First, the State suggested there were evidentiary concerns because the crimes and their convictions of the three defendants were in different years. The State also argued that separation of the three cases was necessary for security purposes. At the motions hearing, counsel for Petitioners Walters, Augustine, and Golphin noted that Walters and Golphin had waived their right to be present for the RJA evidentiary hearing and, as such, only Petitioner Augustine would be present for the RJA evidentiary hearing. The RJA Hearing Court denied the State's motion to separate. *See* 31 August 2012 Hrg. Tp 87.

As with the issue of a continuance, the State did not raise the issue of joinder again at the start of the RJA evidentiary hearing. Then, the State did not include in either its questions presented or argue in its brief any issue pertaining to joinder of Golphin's case with those of Walters and Augustine.[25] Thus, the State abandoned this issue.

Golphin, had he been able to address this issue before the Court, would have argued that the RJA Hearing Court's decision to join Golphin's case with those Petitioners Augustine and Walters was not an abuse of discretion and that the State suffered no prejudice from the joinder of these three cases. As this Court has held, "It is well established that a trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion. … A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (internal citations omitted). Had he been able to address this argument before this

[25] The State briefly mentioned its objection to joinder twice in its petition in this case: in footnote one on page two, and in the procedural history on page five. Similarly, in its brief in this case, the State referred to the objection on footnote two on page three, and in the procedural history on page six.

Court, he would easily have overcome the State's weak arguments for separating the three cases.

The RJA Hearing Court clearly exercised reasonable discretion in electing to hold a joint hearing on the identical RJA jury selection claims of Golphin, Walters, and Augustine who were prosecuted in the same county by the same office and tried within five years of each other. Indeed, the same prosecutor, Margaret Russ, was involved in all three cases and a second prosecutor, Calvin Colyer, participated in the jury selection in two of the cases.

Given the provisions of the amended RJA, joinder in these cases was appropriate and reasonably enabled the RJA Hearing Court to streamline and expedite the evidentiary hearing in these three cases. All of the evidence admitted in the joint hearing supported the claims of all three defendants and was admissible to show county-wide discrimination. See N.C. Gen. Stat. § 15A-2011(d) (amended 2012). Furthermore, the amended RJA provided that, for statistical evidence, the pertinent time period was from 10 years prior to the offense to two years after the imposition of the death sentence. *See* N.C. Gen. Stat. § 15A-2011(a) (amended 2012). Thus, there was overlapping evidence for all three cases. Under these circumstances, the RJA Hearing Court's decision to consolidate the three cases was not only appropriate but commendable insofar as it conserved judicial resources.

Furthermore, there can be no credible argument that the State was prejudiced by the joinder of these cases. At all points during the RJA evidentiary hearing, the State was in a position to object to the admissibility of any evidence as to Golphin or as to Petitioners Augustine and Walters. The State did not do so. The State also was not limited, by virtue of the joinder of these cases, in offering any evidence to rebut the evidence offered by Golphin. Additionally, the RJA evidentiary hearing was heard by Judge Weeks, an experienced judge,[26] and not a jury. There can be no question that the judge in this case knew the law and was well able to distinguish between admissible and inadmissible evidence. There were no jurors hearing the matter who might have been confused by evidence that only applied to one of the defendants and not another. *See City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971) ("In a nonjury trial, in the absence of words or conduct indicating otherwise, the presumption is that the judge disregarded incompetent evidence in making his decision."); *State v. Thompson*, 792 S.E.2d 177, 184 (N.C. App. 2016) (finding no error in joinder of cases and noting "[t]he rule is that a trial judge sitting without a jury is presumed to have considered only the competent,

[26] At the time of Petitioner's RJA hearing, Judge Weeks was the Senior Resident Superior Court Judge of the 12th District and had been on the bench for more than two decades.

admissible evidence and to have disregarded any inadmissible evidence that may have been admitted.") (citations omitted) (unpublished opinion).

Finally, the record in this case clearly demonstrates that Judge Weeks was capable of distinguishing which evidence applied to which defendant. *See* RJA Hearing Order at ¶¶ 269-87 (setting out "Disparities Unique to Each Defendant" based on "three groups of statistical analysis tailored to the time of their cases") (App 170-76); ¶¶ 312-22 (same with regard to regression analyses) (App 185-88). Likewise, the conclusions of law were specific for each defendant. *See* Order at ¶¶ 394-399 (Golphin); ¶¶ 400-405 (Walters), and ¶¶ 406-12 (Augustine) (App 212-17).

Both reasons identified by this Court for remanding this case to the court below were not raised during Golphin's evidentiary hearing and were not raised by the State, then the appellant, on *certiorari* review in this Court. These issues were, thus, not before this Court and should not have served as the basis for the remand in this case. N.C. R. App. Proc. 28(b)(6). Indeed, where an appellant does not properly preserve the error and does not identify the issue as one for plain error review, this Court routinely finds that the issue has been waived. *See State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007).

The Court's powers under Rule 2 are broad and appropriately exercised in the extraordinary circumstances of this case where a prisoner is under a sentence of death after a finding that the prosecution dismissed African-American citizens from

the jury on the basis of their race, and an appellate court reversed that finding based on unpresented arguments that the prisoner had no opportunity to confront. This case is one of "manifest injustice" in which "substantial rights of an appellant are affected." *Hart*, 361 N.C. at 316, 644 S.E.2d at 205.

In light of the circumstances set forth above, this Court should determine that the State's 2013 petition for writ of *certiorari* was improvidently granted. In the alternative, this Court should review its Remand Order, decide that its ruling was erroneous, and affirm the RJA Hearing Court's Order granting relief to Mr. Golphin.

V. THIS COURT'S REMAND ORDER CONTEMPLATED AN EVIDENTIARY HEARING.

This Court can avoid most of the constitutional issues raised herein simply by giving effect to the intent of its remand order, wherein the court stated:

> We express no opinion on the merits of respondents' motions for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional and statutory challenges pertaining to the Act. In any new hearings on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *Robinson*, in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

State v. Augustine, Golphin, and Walters, 368 N.C. 594, 780 S.E.2d 552, 552-53 (2015). The remand Order compels the conclusion that the Court contemplated an

evidentiary hearing at which the parties could present evidence, including "additional statistical evidence" and the trial court could appoint an expert under N. C. R. Evid. 706 to conduct a quantitative and qualitative study.

In the companion case of *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), the Court employed additional language incompatible with an interpretation that the trial court was free to avoid an evidentiary hearing. This Court found that "[c]ontinuing this matter to give [the State] more time would have done no harm to [Defendant]." This Court then reasoned that, "[u]nder these unique circumstances," the case should be remanded in order to give the State an "adequate opportunity" to prepare. *Id*. The State, of course, would need no time to prepare for an evidentiary hearing if there was to be no hearing. Further, continuing the case to give the State more time would have done grievous harm to Golphin if it meant a delay that permitted prosecutors an opportunity to seek a retroactive repeal of the RJA in the legislature.

This Court also directed on remand that the trial court "should address [the State's] constitutional and statutory challenges pertaining to the Act." *State v. Augustine, Golphin, and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). Repeal was not a defense raised by the State on appeal.[27] Significantly, no defense raised by the

[27] While this Court was considering this case, the General Assembly repealed the RJA. When this Court issued its ruling in Defendant's case, the RJA had been repealed for more than a year. Yet, the State did not petition this Court for relief

State in the appeal would foreclose an evidentiary hearing on remand. The State's statutory and constitutional arguments raised on appeal, if found to be valid, would affect the scope of the evidence, but not the mandate requiring the lower court to consider statistical evidence. For this reason, this Court's order permitting the trial court to consider additional statistical studies was entirely consistent with its order to consider the petitioner State's statutory and constitutional arguments, and inconsistent with an interpretation that this Court might have a free hand to ignore all of the evidence Defendant proffered in support of his RJA claims.

This Court's remand order constitutes the law of the case. In *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 374 S.E.2d 866 (1989), this Court stated:

> A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. Our mandate is binding upon the trial court and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. We have held judgments of Superior Court which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court to be unauthorized and *void*.

Id. at 699-700, 374 S.E.2d at 868 (internal citations omitted, emphasis in original). *See also D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966) (same).

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based on the repeal and did not argue the repeal in its brief, and this Court never discussed it in its remand order.

For these reasons, this Court should apply the law of the case, and remand for an evidentiary hearing.

VI. ONCE DEFENDANT FILED HIS RJA MOTIONS IN COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF THE RJA, SUFFICIENTLY ALLEGING THAT RACE WAS A SIGNIFICANT FACTOR IN THE IMPOSITION OF HIS DEATH SENTENCES, THE TRIAL COURT DETERMINED DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING, HE PRESENTED EVIDENCE AT AN EVIDENTIARY HEARING, AND THEN A SUPERIOR COURT JUDGE GRANTED RELIEF UNDER THAT LAW AND ENTERED A JUDGMENT IMPOSING A LIFE SENTENCE, HIS RIGHTS UNDER THE RJA VESTED AND COULD NOT BE TAKEN AWAY BY SUBSEQUENT LEGISLATION.

The superior court deprived Defendant of vested rights by redefining in a novel and cramped fashion the meaning of a judgment. The superior court held that "Judge Weeks' re-sentencing orders were vacated by the North Carolina Supreme Court and therefore were not final judgments." Order, p 8 (App 8). Further, the court stated that "Judge Weeks' resentencing orders to life imprisonment without parole were not affirmed upon appellate review, and because these orders were subject to appellate review, and were vacated,[28] they were not final orders by a court of competent jurisdiction." Order, p 6. (App 6).

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[28] While this Court vacated the Order granting the Racial Justice Act motion for appropriate relief entered by Judge Weeks, it was silent as to the Judgment and Commitment entering a life sentence without parole. See Issue III, *supra*. This Court did not hold that the Superior Court lacked jurisdiction to enter a valid judgment under the Racial Justice Act; the court below was therefore wrong when it characterized the judgment as "void." Order, p 8. (App 8) *See, e.g.*, *Stafford v. Gallops*, 123 N.C. 19, 21-22, 31 S.E. 265, 266 (1898) (distinguishing between a void

Pursuant to *State v. Keith*, 63 N.C. 140 (1869), Defendant's rights under the RJA vested when he filed his claim following the passage of the law. Alternately, his rights vested when judgment was entered in his favor in Superior Court. His right to an evidentiary hearing vested when the trial court's order granting an evidentiary hearing was undisturbed on appeal. Finally, the lower court erred by denying an evidentiary hearing to permit Defendant an opportunity to demonstrate that equitable principles support a finding that his rights vested.

A. The Outcome of this Case is Controlled by *State v. Keith*.

The outcome of this case is controlled by this Court's opinion in *State v. Keith*, 63 N.C. 140 (1869). The defendant Keith was charged with murdering individuals while serving as a soldier. Like the Racial Justice Act, the Amnesty Act of 1866-67, 1866 N.C. Acts, § 1, created retroactively an affirmative defense to homicides and felonies committed by officers or soldiers, whether of the United States or of the Confederacy, if the defendant could demonstrate that he was an officer or private in either of those organizations at the time of the offense, and that the acts were "done in the discharge of any duties imposed on him, purporting to be by a law of the State or late Confederate States government, or by virtue of any order emanating from any

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judgment and an erroneous judgment); *Moore v. Humphrey*, 247 N.C. 423, 428, 101 S.E.2d 460, 465 (1958) (holding that "[a]n erroneous judgment is one rendered contrary to law" and "cannot be attacked collaterally at all, but it must remain and have effect until by appeal to a Court of Errors it shall be reversed or modified.")

officer[.]" *Keith*, 63 N.C. at 142. The Constitutional Convention of 1868 subsequently repealed the Amnesty Act, attempting to abrogate the affirmative defense it provided. This Court held that the revocation of the defense took away the defendant's vested right. 63 N.C. at 145.

The Court below attempted to distinguish *State v. Keith*, 63 N.C. 140 (1869) by holding that the granting of legislative amnesty in *Keith* was a "final determination" and that "amnesties and pardons are, in effect, final judgments." Order, p 9 (App 9). Further, according to the trial court,

> No further proceedings are required or contemplated, so the benefits or provisions of an amnesty or pardon would vest immediately. The RJA, by contrast, established a rule that statistical evidence would be admissible in an MAR evidentiary hearing. However, as shown above, the rights conferred by the RJA were not vested in the defendants because they were not confirmed by a final judgment by a court of competent jurisdiction, and such rights were in fact abrogated by the RJA Appeal.

Order, p 9 (App 9). The trial court misconstrued the decision in *Keith*; the legislative enactment considered in *Keith* was not "final" because Keith was required "to show that he was an officer or soldier, and that the felony was committed in the discharge of his duties as such[.]" 63 N.C. at 143. Thus, in *Keith*, as in Petitioner's case, there could be no final order until the claim was adjudicated at an evidentiary hearing.

In addition to requiring evidentiary hearings, the RJA has much in common with the Amnesty Act. Both were applied retroactively to crimes committed before

the passage of the laws. Both provided new affirmative defenses to those crimes. The affirmative defenses at issue in both were meant to address public policy concerns that the legislature deemed so important as to override in some measure the criminal responsibility of the individual defendant. Both laws were subsequently repealed by the legislature. The only real difference was the remedy provided to defendants who met the requirements of the law: pursuant to the Amnesty Act, the defendant could not be convicted; while under the RJA, the defendant could not be executed.

This Court's observation in *Keith* applies equally to the legislature's attempt to abrogate the Racial Justice Act and reinstate the penalty of death to the defendant:

> The [repeal] ordinance in question was substantially an *ex post facto* law; it made criminal what before the ratification of the ordinance was not so; and it took away from the prisoner his vested right to immunity.

63 N.C. at 145.

B. Defendant's Rights Pursuant to the RJA Vested when a Judgment of Life Imprisonment was Entered.

Defendant's rights afforded by the RJA, if not vested earlier, vested when he obtained a judgment in his favor. *See Bowen v. Mabry*, 154 N.C. App. 734, 736-37, 572 S.E.2d 809, 811 (2002) (explaining "a lawfully entered judgment is a vested right"); *Dunham v. Anders*, 128 N.C. 207, 38 S.E. 832 (1901) (holding that when the plaintiff obtained judgment for the penalty before the justice of the peace he acquired

a vested right of property that could be divested only by judicial, and not by legislative, proceedings).

Once a judgment has been entered by the trial court, as it had been here, the Legislature may not interfere with the judgment:

> A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises. It must therefore be unconditional. When it has been rendered—except that during the term in which it is rendered it is open for reconsideration—the courts have discharged their functions, and have no authority to remit or mitigate the sentence of the law.

In re Greene, 297 N.C. 305, 309, 255 S.E.2d 142, 145 (1979) (citing *State v. Bennett*, 20 N.C. 170, 178 (1838) (citations omitted).

The Legislature had no power to "annul or interfere with judgments theretofore rendered" or "change the result of prior litigation[.]" *Piedmont Mem'l Hosp., Inc. v. Guilford County et al.*, 221 N.C. 308, 311, 20 S.E.2d 332, 334-35 (1942); *see Wilson v. Anderson*, 232 N.C. 212, 221, 59 S.E.2d 836, 843 (1950) (holding that the legislature has no right, directly or indirectly, to annul in whole or in part a judgment already rendered or to reopen and rehear judgments by which the rights of the party are finally adjudicated and vested); *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E.2d 592, 593 (1955) (holding that the legislature is without authority to invalidate, by subsequent legislation, a judgment entered by a Judge of the Superior Court which was valid at the time of entry); *Board of Comm'rs of Moore*

County v. Blue, 190 N.C. 638, 642-643, 130 S.E. 743, 746 (1925) (holding that the power to open or vacate judgment is "essentially judicial," and that the courts should not unfairly assume that the legislature "intended to exceed its powers or to interfere with rights already adjudicated . . .").

The trial court erred by holding that Golphin had no vested right because, in its view, the judgment entered in his case was not a final judgment because it had not undergone appellate review. Order, p 9 (App 9). Contrary to the trial court's holding, a superior court may enter a "final judgment" determining one or more of the claims of the parties, and "such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes." N.C. Gen. Stat., § 1A-1, Rule 54(b); *see also*, Official Comment to Rule 54(b) (noting that there must be either a "final judgment or a ruling affecting a substantial right for an appeal to lie").

In support of its mistaken view of vested rights as applied to judgments, the trial court cited *Blue Ridge Interurban R. Co. v. Oates*, 164 N.C. 167, 80 S.E. 398 (1913) for the vague proposition that "a right is vested when the right becomes absolute so that no subsequent repeal can invalidate it," Order at 8, while ignoring that this Court stated explicitly in *Oates* that "[a] right is vested when judgment is

entered." [29] *Id.* 171, 80 S.E. at 400. citing *Dunham v. Anders, supra.* Significantly, the plaintiffs had not properly commenced the lawsuit, and no judgment had been entered by the trial court in *Oates* at the time the repeal statute was enacted. *Id.* at 170, 80 S.E. at 399.

The trial court further relied on *Allen v. Hardy*, 478 U.S. 255, 258 n. 1 (1986) and *Linkletter v. Walker*, 381 U.S. 618, 622, n. 5 (1965) for the proposition that "[a]n order or judgment is not final until it has undergone appellate review or the time for discretionary review has expired." See Order, p 8 (App 8). These cases have no bearing on the question at issue here about whether a judgment is "final" for purposes of determining vested rights. Instead, they establish a bright-line rule according finality in criminal cases for purposes of applying new procedural rules in postconviction proceedings.

This Court should therefore find that Golphin's rights vested under the RJA when he obtained a judgment in his favor.

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[29] While the caselaw recognizes that rights protected by a statute vest unconditionally when a judgment is entered, a pre-judgment ruling affecting a substantial procedural right must be "secured, established and immune from further legal metamorphosis" before that procedural right is vested. *See Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (discussing vested rights in the context of a change of venue ruling by the trial court) and Claim VI.C. below.

C. Defendant's Right to an Evidentiary Hearing Pursuant to the RJA has been "Secured, Established and [is] Immune from Further Legal Metamorphosis" and Therefore has Vested.

Defendant's rights to an evidentiary hearing vested when the trial court ordered an evidentiary hearing pursuant N.C. Gen. Stat. § 15A-2012(a), and this Court did not vacate the order granting an evidentiary hearing.[30] Defendant satisfied the statutory requirement that he "state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2012(a). Once this was done, the legislature mandated that "the court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. § 15A-2012(a)(2).

Superior Court Judge Weeks found that Defendant filed a sufficient motion pursuant to N.C. Gen. Stat. §15A-2012(a) and scheduled an evidentiary hearing. The finding by Judge Weeks that Defendant met his burden to entitle him to an evidentiary hearing pursuant to N.C. Gen. Stat. § 15A-1212(a) was left undisturbed by this Court's remand order.[31]

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[30] On remand, the trial court was silent as to this issue, but it denied Defendant an evidentiary hearing.

[31] This Court implicitly upheld the trial court's Order granting an evidentiary hearing. The sole errors identified by the Court were the failure of the trial court to

This issue is controlled by *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980), where this Court found that the "substantial" procedural right to a change of venue vested because it was "secured, established and immune from further legal metamorphosis." *Gardner*, 300 N.C. at 719, 268 S.E.2d at 471.

In *Gardner*, the plaintiff filed a divorce complaint in Wayne County, and the district court ruled that venue properly lay in Wayne County. The General Assembly subsequently amended the venue statute, in a manner which would have required the divorce action to be heard in a different county where the defendant resided had it been applied retroactively to the parties. This Court held that the subsequently-passed venue statute was not applicable in determining the rights of the parties where it became effective after the trial court had made a decision settling the question of venue: "[P]laintiff's right to venue in Wayne County was firmly fixed by judgments which had long since passed beyond the scope of further judicial review. No further challenge to venue by defendant was possible in the courts. The question was then settled, and it could not be reopened by subsequent legislative enactment." *Gardner*,

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grant a continuance of the evidentiary hearing to permit the State "an adequate opportunity to prepare for this unusual and complex proceeding," *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), and the joinder of three defendants for purposes of conducting that proceeding. *State v. Golphin, Walters, and Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). If the trial court had erred in granting an evidentiary hearing then there would have been no proceeding for which the State needed to prepare, and the joinder of the defendants for that hearing would have been immaterial.

300 N.C. at 720, 268 S.E.2d at 472. *See also Stephenson v. Bartlett*, 358 N.C. 219, 225-26, 595 S.E.2d 112, 116-17 (2004) (reaffirming principle of *Gardner* but distinguishing facts because *Stephenson* was "complete" and since there was not an "ongoing case" the plaintiffs had no vested right to same venue where prior action was litigated).

As in *Gardner*, the trial court made a final determination ordering an evidentiary hearing on Defendant's RJA claim and, on appeal, this Court did not alter the Superior Court's holding that Golphin was entitled to an evidentiary hearing. For that reason, Golphin's right to an evidentiary hearing was "firmly fixed by judgment which had long since passed beyond the scope of further judicial review." *Gardner*, 300 N.C. at 720, 268 S.E.2d at 472. Therefore, Defendant is entitled to an evidentiary hearing pursuant to the RJA.

D. The Court Below Erred by Denying an Evidentiary Hearing to Permit Defendant an Opportunity to Demonstrate that Equitable Principles Support a Finding that the Defendant's Rights Vested Under the RJA.

The trial court also erred by denying Defendant an evidentiary hearing on equitable questions supporting his claim that his rights had vested. When deciding whether the defendant's rights under the original RJA are vested and thus protected from repeal, principles of equity and fundamental fairness must be considered. At its core, the application of due process to protect vested rights involves a concern

about certainty, stability, and fairness. *See, e.g.*, *Michael Weinman Assoc. Gen. P'ship v. Town of Huntersville*, 147 N.C. App. 231, 234, 555 S.E.2d 342, 345 (2001) (recognizing that vested rights protect interests in certainty, stability, and fairness); *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010) ("Constitutional provisions limiting retroactive legislation must therefore be applied to achieve their intended objectives—protecting settled expectations and preventing abuse of legislative power."); *Langston v. Riffe*, 754 A.2d 389, 419 (Md. Ct. App. 2000) ("Justice Holmes once remarked with reference to the problem of retroactivity that 'perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions,' and suggested that the criteria which really governed decisions are 'the prevailing views of justice.'") (citations omitted); *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 502-03 (Kan. 1995) (concluding that courts often decide whether rights are vested based on the nature of the rights at stake, and the degree to which the legislation affected those rights); *see generally* 2 Norman J. Singer, *Sutherland Statutory Construction*, §41:06 (7th ed. 2007) ("Judicial attempts to explain whether such protection against retroactive interference will be extended reveal the elementary considerations of fairness and justice govern."); *cf. Santobello v. New York*, 404 U.S. 257 (1971) (holding that detrimental reliance by a defendant on a promise or agreement by the State gives the defendant a due process right to

enforcement of the State's promise or agreement); *State v. Hudson*, 331 N.C. 122, 148, 415 S.E.2d 732, 746 (1992) (same).

Defendant would show at an evidentiary hearing that equities involving principles of fairness, expectations, and reliance weigh against applying the RJA repeal retroactively. Defendant relied on the RJA when he retained experts from the Michigan State University College of Law, among others, to undertake a massive study of North Carolina charging, sentencing, and peremptory strike practice in capital cases. Defendant relied on the RJA when he retained volunteer counsel in addition to appointed counsel to assist him in this difficult and time-consuming litigation. Defendant relied on the RJA when he participated in extensive public hearings in Cumberland County.

The defendant relied on the grant of an evidentiary hearing pursuant to the RJA to investigate and present evidence at an evidentiary hearing. Further, the defendant relied on the promise of relief offered by the RJA to place on hold other pending challenges or potential challenges to his conviction and/or sentence of death.

The defendant relied on the judgment granting him relief and resentencing him to life imprisonment. For Defendant, this judgment meant getting off of death row and, for the first time in over a decade, being free of the fear of execution.

Finally, the defendant relied on the explicit ruling by the North Carolina Supreme Court that there would have been no prejudice to Defendant Robinson (and, by implication, the other three defendants) from a continuance; that could only be true if his rights under the original RJA were vested and protected.

Defendant would show at an evidentiary hearing his dashed expectations of serving out his life sentence once a judgment was entered removing him from death row and reclassifying him as an inmate serving a life sentence. He had no expectation at that point, and no reason to expect, that he would ever return to death row or face a resentencing proceeding. Notwithstanding the fact that his life judgment was left undisturbed by this Court's order, he was returned to death row and again reclassified, this time as a death row inmate.

Due process, certainty, equity, and fairness demand that Defendant not be denied his rights under the RJA. Defendant seeks an evidentiary hearing to prove the factual claims contained in this pleading and the cumulative mental and emotional toll that he would suffer if the repeal of the RJA is applied to him.

VII. APPLYING THE RJA REPEAL RETROACTIVELY TO TILMON GOLPHIN WOULD VIOLATE THE *EX POST FACTO* CLAUSE.

Retroactive application of the RJA repeal law eliminating Petitioner's fully-retroactive death penalty defenses violates the *Ex Post Facto* Clauses of Article I, Section 16 of the North Carolina Constitution, and Article I, Section 10, Clause 1 of the United States Constitution.

The RJA established a defense to a death sentence even for cases involving crimes committed before it became effective on 11 August 2009. The Legislature's intent was not simply to provide a trial defense, but also to ensure that no person "*shall be executed* pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010 (emphasis added). The General Assembly enacted extraordinary measures to accomplish this purpose including making the statute retroactively applicable to all persons who committed their crimes prior to the enactment of the statute and eschewing pre-existing procedural bars. *See* Section 2 of S.L. 2009-464 and N.C. Gen. Stat. § 15A-2012(b). In contrast, the RJA repeal law sought to take away those defenses to the death penalty and execution. S.L. 2013-154, § 5(a).

The *ex post facto* prohibition forbids the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed. "Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981) (citations omitted).

There are two critical elements which must be present for a law to be considered *ex post facto*: (1) the case law or statute must apply to events occurring before its enactment, and (2) the case law or statute as applied must disadvantage the offender affected by it. *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991); *Harter v. Vernon*, 139 N.C. App. 85, 91-92, 532 S.E.2d 836, 840 (2000); *Weaver v. Graham*, 450 U.S. at 29. Both of these elements are satisfied here. In *State v. Vance, supra,* this court abandoned the rule that held that a killing was not a murder unless the death of the victim occurred within a year and a day of the act inflicting injury. *Id.*, 328 N.C. at 619, 532 S.E.2d at 499. The Court nevertheless refused to apply the new rule retroactively because to do so "would be to apply this decision to events occurring before this decision and severely disadvantage the defendant." 328 N.C. at 622, 532 S.E.2d at 501.

A law need not impair a vested right to violate the *ex post facto* prohibition. *Weaver v. Graham*, 450 U.S. at 29. According to the court,

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition . . . Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

450 U.S. at 30-31.

In explaining why the drafters of the United States Constitution added two *Ex Post Facto* clauses to limit the power of federal and state legislatures, Justice Chase explained that they had witnessed and learned from Great Britain's retroactive use of "acts of violence and injustice." *Calder v. Bull*, 3 U.S. 386, 389 (1798). One category of such unjust acts passed by Parliament included "times they inflicted punishments, where the party was not, by law, liable to any punishment." *Id*.

Justice Chase opined that "*ex post facto*" referred to certain types of criminal laws. He cataloged those types as follows:

> I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. at 390; *see also Calder*, 3 U.S. at 397 (opinion of Paterson, J.) ("[T]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty.").

The criteria first stated by Justice Chase in *Calder v. Bull* have been broadly construed by the United States Supreme Court. In *Stogner v. California*, 539 U.S. 607 (2003), that Court held that California's effort to prosecute Stogner pursuant to

a statute that permitted prosecutors to resurrect otherwise time-barred prosecutions and enacted after the applicable statute of limitations had expired in Stogner's case, violated the *ex post facto* clause. *Id.* at 609. *Stogner* held that the new law, by reviving time-barred charges, fit within the second of Justice Chase's four categories. The Court explained:

> After (but not before) the original statute of limitations had expired, a party such as Stogner was not "liable to any punishment." California's new statute therefore "aggravated" Stogner's alleged crime, or made it "greater than it was, when committed," in the sense that, and to the extent that, it "inflicted punishment" for past criminal conduct that (when the new law was enacted) did not trigger any such liability.

Id. at 613; *see also*, *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) (holding that the abolition of a defense is a type of disadvantage covered by the *Ex Post Facto* clauses).

Ordinarily, in applying *ex post facto* provisions, courts look to whether the legislature increased punishment beyond what was prescribed when the crime was consummated. *See, e.g.*, *Weaver v. Graham*, 450 U.S. at 29-31 (1981). However, the singular terms of the RJA, meant to be applied retroactively and as a defense to execution, cannot be so constrained.

In 2009, the North Carolina General Assembly made the RJA fully retroactive to capital crimes occurring before the passage of the act. S.L. 2009-464, Section 2. At the same time, the General Assembly created an affirmative defense to executions

as well as to death sentences, stating that, "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." N.C. Gen. Stat. § 15A-2010 (emphasis added). Finally, the General Assembly instructed the courts to eschew all time limitations and procedural bars in applying the RJA:

> *Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes,* a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.

N.C. Gen. Stat. § 15A-2012(b) (emphasis added). These provisions had the intent and effect of placing defendants on death row in the identical position as persons who had not yet committed capital crimes at the time of the passage of the RJA. The RJA became the law "annexed to the crime." 3 U.S. at 390. Thereafter, any subsequent law enacted by the legislature that reduced the defendant's eligibility for a lesser punishment pursuant to the RJA violates the *ex post facto* prohibition.

In two decisions that should inform this Court's decision, *State v. Keith*, 63 N.C. 140 (1869) and *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973), this Court applied the *ex post facto* prohibition to rule in favor of defendants who benefited from a change in law occurring after the commission of the crime and the criminal trial.

In *State v. Keith*, 63 N.C. 140 (1869), this Court considered a similar legal question in the context of the repeal of an amnesty statute. This Court held that the 1868 repeal of the amnesty law was unconstitutional and that it was "substantially an *ex post facto* law." 63 N.C. at 145, cited with approval in *Stogner v. California*, 539 U.S. 607, 617 (2003).

State v. Waddell, *supra*, is the second case requiring this Court to find that the RJA repeal cannot be applied retroactively consistent with Article I, Section 10, Clause 1 of the United States Constitution and Article I, Section 16 of the North Carolina Constitution. *Waddell* was decided shortly after the United States Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972) and involved a death row inmate who had been convicted and sentenced to die before the change in law.

At the time of the United States Supreme Court's decision in *Furman*, *supra*, North Carolina law, G.S. § 14-21, provided that in cases of first-degree murder, the jury in its unbridled discretion could choose whether the convicted defendant should be sentenced to death or to life imprisonment. After the *Furman* decision, this Court held unconstitutional the provision of the death penalty statute that gave the jury the option of returning a verdict of guilty without capital punishment, but held further that this provision was severable so that the statute survived as a mandatory death penalty law. *State v. Waddell*, 282 N.C. at 444-45 194 S.E.2d at 28-29.

The Court then was required to determine whether to reimpose the death penalty for Waddell pursuant to the now-mandatory statute as construed by the court, or to resentence him to life imprisonment. The Court chose life imprisonment, because to do otherwise would violate the prohibition against *ex post facto* laws:

> Since the invalid proviso in G.S. 14-21 was given effect from the time it was enacted in 1949 to the date of the *Furman* decision in all cases wherein the defendant was convicted of rape or other capital crimes under the statutes applicable thereto, the practical effect of a judicial determination that the proviso is severable and therefore eliminated from the statute is to change the penalty for rape (or other capital crimes) from *death or life imprisonment in the discretion of the jury* to *mandatory death.* An upward change of penalty by legislative action cannot constitutionally be applied retroactively. Article I, section 16 of the Constitution of North Carolina forbids the enactment of any *ex post facto* law. The Federal Constitution contains a like prohibition against *ex post facto* enactments by a state. See Constitution of the United States, Art. I, § 10. It has been held that this section of the Constitution "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. * * * It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." *Lindsey v. Washington*, 301 U.S. 397 (1937). It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as in the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change. *State v. Broadway*, 157 N. C. 598, 72 S.E. 987 (1911).

Id., 282 N.C. at 445-446, 194 S.E.2d at 29. Significantly, this Court characterized the revision of G.S. § 14-21 to a mandatory death penalty statute as an "upward

change in penalty" even though Waddell had been sentenced to death under the original version of the statute.

While *Furman v. Georgia, supra*, was new law decided by the court and not by the legislature, this Court explained that changes in law by courts and legislatures have the identical effect for purposes of analyses under the *ex post facto* and due process clauses of the constitution:

> While we recognize that the letter of the *Ex Post Facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. Columbia*, 378 U.S. 347 (1964).

State v. Waddell, 282 N.C. at 446, 194 S.E.2d at 29.

Both Waddell and Golphin were sentenced to death under laws in existence at the time of their crimes and trials. Positive changes in the law occurred for both men only after their trials: *Furman v. Georgia* was decided after Waddell was on death row, and the North Carolina Racial Justice Act was enacted after Golphin was on death row. The courts applied *Furman* retroactively to Waddell and the General Assembly applied the RJA retroactively to Golphin.

In *Waddell*, the North Carolina Supreme Court held that because of the prohibition against *ex post facto* laws, it had no power to apply its new construction of the state statute retroactively to Waddell's case. Similarly, the prohibition against *ex post facto* laws prevents the legislature from retroactively applying its repeal of the RJA to Tilmon Golphin.

For these reasons, the RJA repeal bill cannot be interpreted to deprive Tilmon Golphin of his RJA defenses consistent with the prohibition against *ex post facto* provisions.

VIII. THE RJA REPEAL PROVISION TARGETING TILMON GOLPHIN VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST BILLS OF ATTAINDER.

§ 5(d) of the RJA repeal bill violated the state and federal constitutional prohibitions against bills of attainder as applied to Tilmon Golphin. Following remand by this Court, the superior court declined to address the question. Order, pp 7, 9 (App 7, 9). For the reasons set forth below, this Court should find that the RJA Repeal is an unconstitutional Bill of Attainder as it applies to Golphin. In the alternative, at a minimum, this Court should remand for an evidentiary hearing on this defense to the RJA repeal.

Bills of Attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." *United States v.*

Lovett, 328 U.S. 303, 315 (1946). Such acts are unconstitutional. Article I, Section 10, Clause 1 of the United States Constitution commands: "No State shall . . . pass any bill of attainder."

The reason the Constitution precludes attainders is to avoid a loathed former English practice. In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial "specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). The prohibition against Bills of Attainder "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 445.

And the preclusion has always covered those at whom the bills were directed whether specifically named or members of a class. "The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1, 86 (1961); *Cummings v. Missouri*, 71 U.S. 277, 323 (1867). For example, the plaintiff in *Neelley v. Walker* alleged that Alabama's newly-enacted statute was a bill of attainder because it barred those like her serving a commuted life sentence from obtaining

parole. *Neelley v. Walker*, 67 F. Supp. 3d 1319 (M.D. Ala. 2014). The State asserted that the plaintiff's complaint was deficient since the law did not specifically name her. The court easily rejected that argument:

> Although the Act does not mention Plaintiff by name, the facts in Plaintiff's amended complaint plausibly support her allegation that she was targeted by the Legislature's amendment to § 15–22–27(b)—not only because the legislators sponsoring the bill allegedly vocalized their intent to "fix" Governor James's supposed error, but also because Plaintiff is the only person to receive a commuted sentence since 1962, and because the Legislature suspiciously made the Act retroactive to four months prior to the January 1999 commutation.

Id. at 1329;[32] *see also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (in context of *Ex Post Facto* Clause, three capital defendants were "identifiable targets of the legislation" where the section applied only to three persons who had received the death penalty from a three-judge panel).

The General Assembly included in the RJA repeal a provision affecting a class of only four easily-identifiable persons including Petitioner, all of whom had had their death sentences vacated under the RJA and were resentenced to life imprisonment without parole. S.L. 2013-154, § 5(d). § 5(d) strips Petitioner of all

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[32] The district court subsequently granted summary judgment for Neelley, finding the state law attempting to override the governor's grant of a life sentence with eligibility for parole violated the *ex post facto* prohibition and was an unconstitutional bill of attainder. *Neelley v. Walker*, ___ F. Supp. ___, 2018, U.S. Dist. LEXIS 53829, 2018 WL 1579474 (M.D. Ala. 2018).

pending RJA defenses to the death penalty and deprives him of an evidentiary hearing previously ordered by the superior court. This legislatively-inflicted punishment of Defendant is a prohibited Bill of Attainder.

The plain language of the statute evinces both that the North Carolina General Assembly targeted Golphin and the other three defendants who were "resentenc[ed] to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act." N.C. Sess. Laws 2013-154, § 5(d). While the General Assembly exhibited some awareness of constitutional boundaries posed by vested rights, ("This section does not apply to. . ."), the resulting legislation nevertheless tread on the vested rights of the defendant and the prohibition against Bill of Attainder.

The General Assembly deprived Tilmon Golphin of a defense to the death penalty and to execution without a judicial trial. Following the remand to the lower court, the lower court determined that the RJA Repeal rendered Golphin's RJA claims null and void. The retroactivity provision of the RJA Repeal was enacted by the Legislature using purely legislative processes, without any additional protections or safeguards akin to those present in a judicial trial. Indeed, there is no mechanism at all to allow Golphin to challenge the reinstatement of his death sentence.

While Golphin was initially afforded a judicial trial to establish guilt and his subsequent death sentence, a trial establishing guilt does *not* negate this element of

an unconstitutional bill of attainder. *See Neelley*, 2018 WL 1579474, at *11. In *Neelley*, the prisoner challenged retroactive legislation that removed the prisoner's parole eligibility. In response, the parole board argued that this element in the Bill of Attainder analysis was not met because the retroactive legislation did not deprive the prisoner of a judicial trial to determine her guilt, which was established at her earlier capital murder trial. In finding a Bill of Attainder violation, the court completely and totally rejected this argument, stating:

> This argument rests on an overly literal reading of some of the U.S. Supreme Court's bill-of-attainder definitions, one of which describes a bill of attainder as "the substitution of a legislative for a judicial determination of guilt." Although Ms. Neelley's guilt was determined at her criminal trial, *she did not receive any comparable form of process before her punishment was legislatively enhanced decades after her conviction*.

Id. (citations omitted) (emphasis added). Furthermore, the court noted that the challenged legislation "arbitrarily deprive[d]" the plaintiff of her eligibility for parole consideration "without notice, trial, or any other procedure." *Id*. Indeed, there was "no legal process that may have existed to do properly what the Legislature apparently intended to do—revoke the legal possibility of [the plaintiff's] eligibility for parole consideration." *Id*. The retroactivity provision of the RJA Repeal similarly runs afoul of the constitutional prohibitions against Bills of Attainder.

Here, while Golphin was found guilty and sentenced to death at his capital murder trial, his sentence was subsequently changed to life without the possibility

of parole after he presented powerful evidence of statistical disparities and intentional race discrimination at his RJA hearing. The General Assembly could not then constitutionally pass legislation to enhance Golphin's punishment, effectively resentencing him to death unless the enactment provides for a judicial trial or a comparable form of process. The retroactivity provision of the RJA Repeal took away his right to a new hearing that he would have had upon remand. Thus, the RJA Repeal fails to provide Golphin with a judicial trial, thus constituting an unconstitutional bill of attainder.

The United States Supreme Court has recognized three additional inquiries for determining whether an enactment is an attainder: (1) does the challenged statute fall within the historical meaning of legislative punishment; (2) does the statute, considering the "type and severity of burdens imposed, reasonably … further nonpunitive legislative purposes;" and (3) does the legislative record show an "intent to punish." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group,* 468 U.S. 841, 852 (1984); *see also State v. Johnson,* 169 N.C. App. 301, 310, 610 S.E.2d 739, 745 (2005). While the Supreme Court's jurisprudence does not require it, Tilmon Golphin can show that the repeal fails each inquiry.

A. Inflicting Death is a Historical Punishment.

At English common law, attainder was an "inseparable consequence" of a death sentence imposed by the courts. 4 William Blackstone, Commentaries *380. The added penalty of attainder proceeded on the theory that

> When it is . . . clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him . . . and takes no farther care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened . . . . [B]y an anticipation of his punishment, he is already dead in law.

Id., cited in C. Wilson, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Calif. L. Rev. 212, 213 (1966).

The United States Supreme Court has recognized since its inception inflicting the death penalty was the work of attainders and lesser punishments were enacted differently. "At common law, bills of attainder often imposed the death penalty; lesser punishments were imposed by bills of pains and penalties." *Selective Serv. Sys.*, 468 U.S. at 852; *see also ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2010) ("The classic example [of attainder] is death."); L. Ostler, *Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32 Campbell L. Rev. 227, 250 (2010) ("A legislative bill calling for a loss of liberty or property, but not the life of the named person, was known as a bill of pains and penalties. If the person's life was called for, then it was a true bill of attainder.").

Courts have also repeatedly recognized that stripping a defined group's legal process rights by legislation constitutes a Bill of Attainder. In *Putty v. United States*, 220 F.2d 473, 478-79 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955), the legislature attempted to enact and apply retroactively legislation prohibiting reversals of conviction on the ground that informations rather than indictments were used in charging. The defendant had been charged (improperly) by information, and while the case was on appeal, Congress enacted legislation that provided that no conviction in Guam could be reversed simply because the defendant was charged by information. The federal court concluded that the legislative "amendment's attempt to deny [defendants] any right to attack the judgment against them is a bill of attainder." 220 F.2d at 478. By trying to retroactively strip a valid defense from pending appellate cases, the legislation ran afoul of the constitution.

In *Pierce v. Carskadon*, 83 U.S. 234, 238-39 (1872), the Supreme Court found a Bill of Attainder violation where the trial court attempted to apply new legislation that dramatically changed the defense. The plaintiff had sued for trespass and won a money judgment. Under the law at the time of the trial, the defendant had a right to reopen the case by attacking a lack of service within one year of judgment. After plaintiff secured his judgment, and before the defendant's one-year window closed, the legislature enacted a new statute changing the rules governing a defendant's ability to reopen the case.

Other courts have continued to cite *Pierce* for the proposition that the "denial of access to the courts, or prohibiting a party from bringing an action" constitutes punishment by a Bill of Attainder. *Rhode Island Depositors Econ. Prot. Corp. v. Brown*, 659 A.2d 95, 104 (R.I. 1995) (citing *Pierce v. Carskadon*, 83 U.S. 234 (1872), and *Cummings v. Missouri*, 71 U.S. 277 (1867)); *see also Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 716 (D.R.I. 1994), *aff'd*, 45 F.3d 530 (1st Cir. 1995) (same).

In *Neelley v. Walker, supra*, the case where the Alabama legislature attempted to enact a law that would interfere with a former death row inmate's ability to seek parole, the federal court recognized that depriving an inmate of the right to seek alternative sentencing (even if not guaranteed) is punishment:

> But here, Plaintiff's guilt had been properly adjudicated; only her punishment concerned the Legislature. The court is unaware of any judicial process that may have existed to do properly what the Legislature allegedly intended to do — i.e., revoke the legal possibility of Plaintiff's eligibility for parole consideration. Yet the oddness of the nature of the Legislature's action does not negate the fact that Plaintiff has pleaded facts supporting her claim that she was arbitrarily deprived of her right to seek parole consideration in 2014 without any opportunity to contest the deprivation.

Neelley, 67 F.Supp.3d at 1330.

Subjecting a defendant to the penalty of death, and removing access to the courts, thus both fall within the historical meaning of legislative punishment. Any doubt is removed, however, as shown below because the legislative record "evinces

an intent to punish" and the statute cannot be said to further nonpunitive legislative purposes.

B. The Statute, Considering the Type and Severity of Burdens Imposed, did not Reasonably Further Nonpunitive Legislative Purposes.

The second inquiry requires the courts to engage in a "functional test" by asking "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475-76 (1977). The only justification that reasonably explains the North Carolina General Assembly's application of the repeal bill specifically to the four defendants who successfully litigated their claims to judgment was to ensure their execution.

The state may claim that the legislature had an interest in the even-handed administration of justice, and assuming that the repeal of the RJA applies to any inmate on death row, it should apply to every inmate on death row. However, this reasoning disregards that the four targeted defendants were not similarly situated as others on death row. In fact, they were not on death row at all: at the time the legislature passed the repeal bill, Tilmon Golphin had been awarded an evidentiary hearing under the RJA, granted relief under the RJA, resentenced to life imprisonment, removed from death row, and sent to a different prison where he served a portion of his life sentence. Moreover, the legislature itself recognized that

Golphin, Augustine, Walters, and Robinson were not similarly situated in section 5(d): "This section does not apply to a court order resentencing a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act. . ." The legislature explicitly recognized the distinct status of these four inmates. That this Court vacated the superior court's order granting his MAR on procedural technicalities and remanded Tilmon's case for a hearing did not place his case in the same procedural posture as others on death row who had never been afforded an evidentiary hearing under the RJA.

C. An Evidentiary Hearing on the Issue of "Intent to Punish" is Needed to Demonstrate that the Legislature Became a Vehicle for Private Vengeance and to Evade Court Proceedings.

Whether legislation is an unconstitutional Bill of Attainder "require[s] an interpretation of the meaning and purpose of the [legislation], which in turn requires an understanding of the circumstances leading to its passage." The classic sources for considering whether the record shows an intent to punish include "legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation." *Eagleman v. Diocese of Rapid City*, 862 N.W.2d 839, 845 (S.D. 2015) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 478 (1977)).

Petitioner has discussed above how specific aspects of the text or structure of the disputed legislation support his claim that the disputed legislation constituted a bill of attainder. Additionally, "[i]n judging the constitutionality of the Act, [the court] may . . . look . . . to the intent expressed by Members of [the legislature] who voted [for] its passage. . . ." *Nixon*, 433 U.S. at 484. The court must consider official reports, correspondence, and statements by proponents of legislation to determine legislative motive. *See Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 854-55 (1984) (considering legislative history and statements by individual legislators); *Nixon*, 433 U.S. at 480 (1977) (finding legislative history of any congressional sentiments probative to determine whether the legislature, "in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob."); *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 818-19 (9th Cir. 2016) (permitting evidence concerning the post-enactment statements by the sponsoring member of the legislature); *Consolidated Edison Co. of N.Y. v. Pataki*, 117 F. Supp. 2d 257 (N.D.N.Y. 2000) (considering letter written by chairman of the NY Public Service Commission to the sponsors of the bill); *Garner v. Bd. of Public Works*, 341 U.S. 716 (1951) (considering correspondence between the city and petitioners); *see also*, Nixon, 433 U.S. at 486 (1977) (Stevens, J., concur) (taking judicial notice of historical facts affecting the legislative decision including that Nixon resigned his office under

unique circumstances and accepted a pardon for any offenses committed while in office).

Defendant proffered evidence to the superior court, partially summarized below,[33] demonstrating that the legislature intended to punish Tilmon Golphin, Marcus Robinson, Quintel Augustine, and Christina Walters. The superior court ignored the proffer, denied an evidentiary hearing, and failed entirely to decide the issue of Bill of Attainder.

On 1 October 2012 the *Augustine, Golphin, and Walters* RJA evidentiary hearing began in Cumberland County. After the hearings concluded, but before a decision was issued in the case, Jim Davis, the brother-in-law of one of the victims in the *Golphin* case, Ed Lowry, published an op-ed in multiple outlets criticizing the hearings in all four cases and calling for repeal:

> Speaking as a taxpayer, I am outraged by the millions of dollars that have been wasted on three trials, two pre-hearings, and two hearings.
>
> I will give the Republicans credit for attempting to add teeth to the original act. But it should be repealed. It's very hard to add enough perfume to a carcass that has been rotting for three years.
>
> My family and I have waited over 15 years for justice. Some say patience will be rewarded. You may count me as a non-believer.

[33] The full set of evidence proffered in the superior court at the 29 November 2016 hearing by the defendant, Exhibits 1-64 in *State v. Golphin*, Cumberland County Superior Court #97 CRS 47314-15, is incorporated herein by reference. (App 361).

> I am proud to have called N.C. Highway Patrol Trooper Ed Lowry a neighbor, friend and brother-in-law.

Op-Ed: Jim Davis, *Anti-death penalty activism behind Racial Justice Act*, Fayetteville Observer, Nov. 7, 2012 (App 366).

On 13 December 2012 the Cumberland County Superior Court found that Defendant Golphin, as well as Defendants Walters and Augustine, had each demonstrated that race was a significant factor in their cases at the time of their trials. Judge Weeks then resentenced Defendant to a sentence of life imprisonment without the possibility of parole.

On 6 March 2013, Robert "Al" Lowry, the brother of Ed Lowry, sent an e-mail to several, and indeed, likely all, of the legislators in the North Carolina General Assembly, asking them to repeal the RJA in its entirety and to bring "justice and closure" to him and his family. The e-mail read:

> My name is Al Lowry, the brother of State Highway Patrol Ed Lowry. He was killed in the line of duty along with David Hathcock, a Cumberland County Sheriff Deputy on September 23, 1997. Both killers were sentenced to death but the US Supreme Court converted Kevin Golphin sentence to life without parole due to being 17 years old at the time of the murders. State of NC have determined that Tilmon Golphin, Christina Walters, Quintel Augustine and Marcus Robinson some of the most horrific criminals, sentences were changed from the death penalty to life without parole due to the Racial Justice Act. The Racial Justice Act is a way to get rid of the death penalty. Out of the 158 inmates on death row, 151 have applied for this act. It's in my deepest plea to have the Racial Justice Act overturned to bring justice and closure to me and my family and all that have been affected.

> Just one other thought. Judge Weeks, has ruled in favor for these criminals and overturned the verdict of 4 trials, 48 jurors, 7 state level appeals court judges, 3 federal appeals court judges per case, and the 4 judges residing over each case. All verdicts were made and the appeal process took place with no wrong doings found.
>
> This needs to be addressed to the General Assembly to overrule this act in its entirety.

See, e.g., *E-mail from Robert A. Lowry to Rep. Pricey Harrison* (Mar. 6, 2013, 10:41 A.M.) (App 367).

On 13 March 2013 Senator Thom Goolsby, Senate Judiciary Committee Chair, filed a bill to repeal the RJA entirely. "Goolsby announced the bill at a news conference attended by district attorneys from around the state, and relatives of murder victims." Craig Jarvis, *GOP bill would repeal Racial Justice Act once and for all*, News & Observer, Mar. 13, 2013 (App 369). The *Fayetteville Observer* reported on the news conference, noting that victim family members from the *Golphin* and *Augustine* cases participated in the conference, and highlighting the link between the repeal effort and the four Cumberland County cases:

> The families of two Fayetteville-area murder victims stood in support of legislation filed Wednesday to repeal North Carolina's Racial Justice Act and end the state's unofficial moratorium on executions.
>
> The Racial Justice Act of 2009 and 2012 provides condemned inmates an opportunity to escape death row if they have evidence that racism was a factor in their prosecutions and convictions. It

> was a response to concerns of institutional racism in the criminal justice system.
>
> Goolsby filed the bill, S306, to clear away the legal issues that halted executions six years ago and to delete the Racial Justice Act, which four convicted murderers from Cumberland County homicides last year used to get off death row. They were the first inmates in the state to have their claims heard.
>
> One of these was Tilmon Golphin, who with his brother shot and killed Cumberland County Deputy David Hathcock and state Trooper Ed Lowry during a traffic stop on Interstate 95 near Fayetteville in 1997.
>
> "I've been waiting 15 years," said Al Lowry, Ed Lowry's brother. "He was shot eight times, along with David Hathcock—five gunshot wounds."
>
> Al Lowry said the Racial Justice Act is a tool that death penalty opponents are using to try to eliminate the death penalty in North Carolina.
>
> Roy and Olivia Turner, parents of Fayetteville Police Officer Roy Turner Jr., also attended the news conference. Quintel Augustine was sentenced to death for Officer Turner's 2001 murder. He, too, was removed from death row last year under the Racial Justice Act.
>
> The decision "opened it up for the crooks," said Roy Turner Sr., in an interview.

Paul Woolverton, *Families of Fayetteville-area murder victims support bill to repeal Racial Justice Act,* Fayetteville Observer, Mar. 14, 2013 (App 370-72).

Senator Goolsby shortly thereafter ran an op-ed in multiple outlets calling for repeal of the RJA and complaining about the recent decision in Defendant Augustine's case. He specifically called for voiding all appeals under the RJA:

> The absurdity does not stop with this argument; it has gone much further. The murderer of Fayetteville Police Officer Roy Turner was recently granted relief under RJA and taken off death row. Again, there was no question that Officer Turner was murdered in cold blood. However, his killer got his sentence reduced by arguing that because he was black, he was unfairly targeted for a death sentence.
>
> Recent legislation was introduced in the North Carolina General Assembly, not only to rid our state of RJA, but also to void all appeals currently pending under the act. It is past time to get rid of this absurd law that turns murderers into victims while the real victims lie in their graves.
>
> *— Thom Goolsby is a state senator, practicing attorney and law professor. He is a chairman of the Senate Judiciary 1 and Justice and Public Safety Committees. He is also the sponsor of this legislation.*

Op-Ed, Thom Goolsby, *Time to kill the Racial Justice Act*, Bladen Journal, Mar. 21, 2103 (App 374-75). This op-ed also ran in other newspapers. *See also* Sen. Goolsby, https://www.youtube.com/watch?v=HdSqzTp6k3U (published on Mar. 20, 2013, last visited Oct. 30, 2016) (Sen. Goolsby refers to case of Defendant Augustine and states, "Recent legislation was introduced in NCGA not only to rid our state of RJA but also to void all appeals currently pending under the act. It's past time to get rid of this absurd law that turns murderers into victims.").

On 26 March 2013 there was debate in the Senate Judiciary I Committee on S.B. 306, including Section 5. The cases of the four RJA defendants, including Defendant, were mentioned repeatedly during this debate. During the debate, Sen. Goolsby, when questioned by Senator Earline Parmon as to why he felt it necessary to repeal the RJA when it has been proven that there is bias in the system, responded,

> We've had atrocious outcomes such as Officer Roy Turner whose family was here a couple of weeks ago—was a Fayetteville Police Officer murdered in cold blood. His murderer of course saw his death penalty commuted to life in prison …. Of course, again an outcome one would not expect if this act were acting like one would hope. Roy Turner, of course, was a black man murdered by a black man. The murderer got off death row much to the consternation and ...I met his parents and talked with them. They expected justice in that case. They did not get the justice the State had promised them after a jury had made that solemn decision after numerous appeals, and they simply wanted justice. And I don't know how you explain to the black family of a murdered police officer why the person who murdered their son got off death row. If Racial Justice Act was actually what it purports to be I don't believe you would have outcomes like that….

Senate Judiciary I Debate, *SB 306 – Capital Punishment/Amendment*, Mar. 26, 2013, p 3 (App 376). Later in the debate, Senator Goolsby linked S.B. 306 again to Tilmon Golphin's case and also that of Quintel Augustine. In urging the Committee to pass the bill substitute, Sen. Goolsby noted,

> We have victims who continue to wait. And I also see the family of trooper Ed Lowry—I see his brother and his family in the audience. He's another law enforcement officer who was murdered in cold blood and his death penalty was commuted to...the death penalty of the murderer of Ed Lowry was

> commuted to life in prison. I know his family continues to suffer and does not have the closure they expected from our judicial system…. It does repeal completely RJA. It will prevent, not what's happened to the Lowry family, not what's happened to Ed Turner's family, but hopefully, Ms. Howell, it will prevent the death penalty from being taken off the person who murdered your beautiful daughter and who so violently assaulted your son who continues to suffer.

Senate Judiciary I Debate, *SB 306 – Capital Punishment/Amendment*, Mar. 26, 2013, p 11 (App 386).

Legislators central to the push to repeal the RJA received e-mails from constituents asking for the repeal and highlighting the case of Defendant Golphin. On 3 April 2013 a constituent sent an e-mail to Senator Berger that was copied to Robert Lowry, the brother of deceased trooper Ed Lowry, thanking Senator Berger "on behalf of myself and the Lowry family for trying to expedite the Senate Bill 306 that was voted yesterday to be addressed on the Senate floor." *E-mail from Anthony J. Crumpler to Sen. Phil Berger* (Mar. 27, 2013, 10:52 A.M.) (App 388-89). In the response to the constituent's e-mail that was again copied to Robert Lowry, Senator Berger's Constituent Liaison stated, "Senator Berger's heart continues to go out to the Lowry family, and he strongly believes they deserve justice….Please be assured that I have passed along your comments to Senator Berger." *E-mail from Kolt Ulm to Anthony Crumpler* (April 3, 2013, 6:06:38 P.M.) (App 388). Then, on 6 April 2013 another constituent e-mailed Senator Berger, copying it to Senators Wesley Meredith and Thom Tillis, asking Senator Berger to "consider reversing the ruling

on the two men that shot and killed the Highway Patrolman and the Sheriff Deputy in Cumberland County. It was heartbreaking to hear that they had escaped the Death Penalty because of this law. Put them back on Death Row and start cleaning it out." *E-mail from Ken Lewis to Sen. Phil Berger* (Apr. 6, 2013, 3:28:26 P.M.) (App 390).

Beginning as early as 2011, prosecutors and legislators coordinated efforts to repeal the RJA. See generally, e-mail correspondence to and from Peg Dorer. Building to the vote on the repeal bill in 2013, the prosecutors focused on Tilmon's case and those of the other three RJA defendants in their lobbying efforts. On 29 May 2013 in response to a request from Peg Dorer, the Director of the Conference of District Attorneys, Cumberland County assistant district attorney Robert Thompson provided the racial makeup of the juries in the four RJA cases. *E-mail from Thompson to Dorer* (May 29, 2013, 12:36 P.M.) (App 393). Dorer then wrote to Majority Leader Stam on 31 May 2013 with the "information on the 4 cases that Judge Weeks removed from death row under the Racial Justice Act." She provided information on the race of the defendants and victims, jury composition, and the fact that the *Golphin* and *Augustine* cases involved law enforcement victims. *E-mail from Peg Dorer to Paul Stam* (May 31, 2013, 8:49 A.M.) (App 394-95).

Dorer also e-mailed legislative staff for Senator Thom Goolsby and House staff about talking points for the repeal legislation. The e-mail lists and identifies the four Cumberland County cases. *E-mail from Dorer to Joseph Kyzer and Weston*

Burleson (June 4, 2013; 12:03 P.M.) (App 396). Senator Goolsby's legislative assistant attached proposed talking points that discussed the fact that in Cumberland County "four murderers [were] removed from death row." *E-mail from Joseph Kyzer to Weston Burleson* (June 4, 2013, 11:38 A.M.) (App 402).

The House floor debates reflected the language from the family members of one of the victims in the *Golphin* case asking for "swift justice" for the four cases. *House votes to roll back Racial Justice Act*, WRAL, June 4, 2013 (App 407-08). On 4 June 2013 Representative Nelson Dollar, right before the passage of the House Committee Substitute for S.B. 306, recounted, "And just recently down in Cumberland County the three people who have accessed this under, I believe all under Judge Weeks, two of them involved cop killers. We have three murdered law enforcement officers: a Deputy Sheriff, a Highway Patrol Trooper out there doing their job. What's justice for them? Is it statistics?" House Floor Debate, *SB 306 – Capital Punishment/Amendments*, Second Reading (June 4, 2013) (App 435). The next day, on 5 June 2016 at the debate on the third reading of S.B. 306, there was again pointed and repeated discussion of the cases of the four RJA defendants. House Floor Debate, *SB 306—Capital Punishment/Amendments*, Third Reading (June 5, 2013) (App 439-53). On 19 June 2013, the General Assembly repealed the RJA, effective that date.

Those who drafted our charter document in Philadelphia wanted this country to be free from adjudication of punishment by legislation instead of after due process in the courts. Here, the General Assembly, intending to ensure that Defendant was executed, stripped him of his access to courts and deprived him of the ability to have a court impose a sentence of life imprisonment without parole, under the RJA, in violation of the prohibition against bills of attainder.

IX. THE RJA REPEAL VIOLATES THE SEPARATION OF POWERS AND JUDICIAL POWERS CLAUSES OF THE NORTH CAROLINA CONSTITUTION.

Session Law 2013-154, § 5 violates the bedrock rule that the judicial power is vested in the Judicial Branch alone.[34] The General Assembly addressed the four pending cases of the RJA defendants resentenced to life imprisonment without parole, Tilmon Golphin, Quentin Augustine, Christina Walters, and Marcus Robinson, and dictated to this Court that if it vacated the judgments in those cases *for any reason*, their rights under the RJA would forever disappear.[35] Because this

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[34] *See* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *see also* N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.").

[35] Session Law 2013-154 states: § 5.(d) Except as otherwise provided in this subsection, this section is retroactive and applies to any motion for appropriate relief filed pursuant to Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act. All motions filed pursuant to Article 101 of Chapter 15A

legislative fiat invades the province of this Court to determine remedies in specific cases, it cannot be honored.

The principle of separation of powers is "fundamental to our form of government" and "requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *State ex rel McCrory v. Berger*, 368 N.C. 633, 649, 636, 781 S.E.2d 248, 250, 255 (2016).

"Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant evenhanded justice, whether the interference occurs before or after the entry of a final judgment. *Cf. United States v. Klein*, 80 U.S. 128 (1872); *Hayburn's Case*, 2 U.S. 409 (1792)." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 266 (1995) (Stevens, J., dissent).

In *U.S. v. Klein*, *supra*, the United States Supreme Court considered a landmark case on separation of powers that informs this Court's judgment in this

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of the General Statutes prior to the effective date of this act are void. This section does not apply to a court order resentencing a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act if the order is affirmed upon appellate review and becomes a final Order issued by a court of competent jurisdiction. *This section is applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act, and the Order is vacated upon appellate review by a court of competent jurisdiction.* (emphasis added).

case. Klein was the administrator of the estate of V.F. Wilson, a confederate soldier whom Lincoln had pardoned. Klein had obtained for the estate a judgment in the Court of Claims for property seized by the government. 80 U.S. at 132-134. In a prior case of *United States v. Padelford*, 76 U.S. 531 (1869) the Supreme Court had held that a pardon was proof of loyalty and entitled its holder to compensation in the Court of Claims for property seized by Union forces during the war. Congress wished to prevent pardoned rebels from obtaining such compensation and thereafter passed a law barring use of a pardon as evidence of loyalty, instead requiring the Court of Claims and Supreme Court to dismiss for want of jurisdiction any suit based on a pardon.

The Supreme Court held that Congress "passed the limit which separates the legislative from the judicial power" and that "[i]t is of vital importance that these powers be kept distinct." *Klein*, 80 U.S. at 147. According to the court:

> The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?
>
> We think not. . . .

Id. at 146.

The fact that Golphin's life is at stake is of particular importance in separation of powers jurisprudence. In *Bayard v. Singleton*, 1 N.C. 5 (1787), this Court explained the significance of the principle of separation of powers and why it is considered a fundamental precept of our state constitution, *particularly* in the context of capital cases:

> That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all. . . .

Bayard, 1 N.C. at 7.

The Legislature has the authority to determine what conduct shall be punishable and to prescribe penalties, and the court's function is to impose sentences upon conviction. *In re Greene*, 297 N.C. 305, 311, 255 S.E.2d 142, 146 (1979).

Session Law 2013-154, § 5 violates the Separation of Powers Clauses because this law prevents the judiciary from accomplishing its constitutionally assigned function. *See Bacon v. Lee*, 353 N.C. 696, 549 S.E.2d 840 (2001). "[T]he courts have power to fashion an appropriate remedy 'depending upon the right violated and the facts of the particular case.'" *Simeon v. Hardin*, 339 N.C. 358, 374, 451 S.E.2d 858, 869 (1994), *citing Corum v. University of North Carolina*, 330 N.C. 761, 784, 413

S.E.2d 276, 291, *cert. denied*, 506 U.S. 985 (1992). It is the role of the judiciary, not the legislative branch, to interpret the law and determine the class of cases to which a retroactive change in law may legally be applied. *See generally State v. Whitehead*, 365 N.C. 444, 446, 722 S.E.2d 492, 494 (2012) (legislature has exclusive power to prescribe punishment while judicial branch is "to pronounce the punishment or penalty prescribed by law"); *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 632, 577 S.E.2d 650, 653 (2003) ("The inherent powers of the judicial branch are the powers which are 'essential to the existence of the court and the orderly and efficient exercise of the administration of justice.'"). It is the judiciary that "decide[s] questions of merit," and "render[s] judgments that may be enforced." *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 505, 115 S.E. 336, 341 (1922).

Specifically, the legislative repeal of the RJA as applied to the defendant, impeded on this Court's constitutional authority to "review upon appeal any decision of the courts below, upon any matter of law or legal inference" and to issue "'any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.'" N.C. Const. art. IV, § 12(1), cited in *In re Greene*, 297 N.C. 305, 312, 255 S.E.2d 142, 147 (1979); *see also State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (holding the legislature cannot exercise power granted to the judiciary under N.C. Const. art. IV, § 13(2) in making rules of appellate practice and procedure). This Court has further held,

> The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.

State ex rel. Lanier, Comm'r of Ins. v. Vines, 274 N.C. 486, 495, 164 S.E.2d 161, 166 (1968).

By enacting Session Law 2013-154, § 5, the General Assembly interfered with the authority of this Court by negating its ability to review decisions of the courts below upon appeal and to issue remedial writs pursuant to its powers under N.C. Const. art. IV, § 12. The General Assembly accomplished this by dictating to the Court that, no matter what it considered, said, or did in remanding the case, the result would necessarily be the same: the re-imposition of a death sentence. Thus, by robbing the courts of authority to issue remedial writs necessary to give them general supervision and control over the proceedings of the courts and to administer justice, Session Law 2013-154, § 5 violates the Separation of Powers clause and the judicial powers clauses of the North Carolina Constitution. "While it is a generally accepted principle of statutory construction that there is no constitutional limitation upon legislative power to enact retroactive laws which do not impair the obligation of contracts or disturb vested rights . . . this may not be held to empower the Legislature to annul or interfere with judgments theretofore rendered . . . or change the result of

prior litigation[.]" *Piedmont Memorial Hospital v. Guilford County*, 221 N.C. 308, 311, 20 S.E.2d 332, 334-35 (1942).

The separation of powers doctrine entitles Tilmon Golphin to an evidentiary hearing under the RJA, because the court order granting him an evidentiary hearing was a final judgment on a substantial right. "Neither the courts nor the Legislature can thereafter invalidate the right's exercise or annul the judgment which fixes its investiture." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). In *Hogan v. Cone Mills Corp*., 315 N.C. 127, 337 S.E.2d 477 (1985), this Court stated:

> The doctrine of separation of powers embodied in N.C. Const. Art. IV, § 3 precludes the legislature from enacting a statute which alters a result obtained by final judicial decision before the date of the statute's enactment. *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980). In *Gardner*, the trial court rendered a judgment that under existing law venue lay properly in Wayne County and would not be transferred to Johnston County for the convenience of the parties on defendant's motion. Defendant never questioned that decision in an appeal from a judgment awarding plaintiff temporary alimony. While the divorce action was still pending the legislature enacted a statute which, if applied to defendant's case, established venue in Johnston County. Defendant again moved to transfer venue to Johnston County. The Court held:
>
> > Article IV, § 1 of the North Carolina Constitution vests the judicial power of the State, including the power to render judgments, in the General Court of Justice, not in the General Assembly. Under this provision, the Legislature has no authority to invade the province of the judicial department. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967). It follows, then, that a legislative declaration

> may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction. *Hospital v. Guilford County*, 221 N.C. 308, 20 S.E.2d 332 (1942).
>
> *Id* at 719, 268 S.E.2d at 471.

Hogan at 142-143, 337 S.E.2d at 486.

Similarly, in Tilmon Golphin's case, the Superior Court of Cumberland ordered an evidentiary hearing pursuant to the RJA. (App 456, 457). This Court's remand order did not disturb the Superior Court's grant of an evidentiary hearing. Pursuant to the doctrine of separation of powers, the General Assembly may not enact legislation that "alter[s] or amend[s] a final exercise of the courts' rightful jurisdiction." *Hogan, supra.*

X. EQUAL PROTECTION AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS PROHIBIT THE DEATH PENALTY IN THIS CASE.

Petitioner respectfully seeks a remand for an evidentiary hearing to prove that his state and federal constitutional rights to equal protection of the laws and freedom from cruel and/or unusual punishment were violated. The superior court did not address this issue.[36]

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[36] While the court did not reach the merits of the constitutional claims, it denied the State's defense of procedural bar. In an Order Denying State's Motion for Judgment on the Pleadings entered on 13 December 2012, the Superior Court found that the General Assembly intended to eschew procedural bars as to constitutional claims of racial discrimination and, in the alternative, that "Defendants' constitutional claims are not procedurally barred because Defendants were not in a position to adequately

The State of North Carolina set forth on an unprecedented path when it passed the Racial Justice Act. Declaring that racial bias would not be tolerated in the decisions of who died and who lived under its criminal justice system, North Carolina instructed the parties in death penalty cases – defendants and prosecutors alike – to investigate whether race had played a role in those cases. What followed was a unique inquiry into the history of racial discrimination and the death penalty. Exhaustive statistical studies and historical evidence revealed systemic discrimination in how jurors were selected, which cases were declared capital, and which cases resulted in death verdicts. In the four cases that proceeded to hearing in Cumberland County, defendants also demonstrated particularized racial bias by prosecutors in Cumberland County and in each of their individual trials.

The State of North Carolina has responded to the showing of pervasive racial discrimination in capital punishment by repealing its statutory prohibition on racial bias, returning Golphin to death row without a hearing, and moving forward with his execution as if the racial discrimination evidence were never uncovered. The constitutional prohibition against the infliction of cruel and unusual punishment bars such a result. U.S. Const. amends. VIII, XIV; N.C. Const., art. I, § 27. "It would

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raise those claims prior to the original RJA's enactment. *See* N.C. Gen. Stat. § 15A-1419(a)(1) and (3) . . . ." (App 456). The superior court made this latter finding after a full evidentiary hearing. The court's order was supported by competent evidence and was not clearly erroneous.

seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it. . . . is imposed under a procedure that gives room for the play of [racial] prejudices." *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *see also Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (Equal Protection claims of selective prosecution based on race are subject to "ordinary equal protection standards."); John Blume & Lindsey S. Vann, *Forty Years of Death: the Past, Present, and Future of the Death Penalty in South Carolina (Still Arbitrary After All These Years*), 11 Duke J. Const. L & Pub. Pol'y 183, 224 n. 247 (2016) (describing *Kelly v. State*, No. 99-CP-42-1174 (S.C. Sup. Ct., Oct. 6, 2003) where court granted postconviction relief under *McCleskey* after prosecutor admitted he sought death because the "black community would be upset if we did not seek the death penalty because there were two black victims in this case").

The stubborn racial stain on Golphin's conviction and sentence is deep rooted and permanent. The State—and the courts—cannot close its eyes in the face of painful proof of invidious racial discrimination and remain true to the state and federal constitutions.

A. Neither the State nor the Federal Constitutions Permit Death Sentences Drawn from the Poisonous Well of Racial Discrimination.

1. The Eighth Amendment Bars the Discriminatory Imposition of the Death Penalty.

The racially discriminatory application of the death penalty violates the Eighth and Fourteenth Amendments' prohibition of arbitrary and capricious punishment. *McCleskey v. Kemp*, 481 U.S. 279, 292-94 (1987) (exceptionally clear proof of purposeful discrimination required to show Eighth Amendment violation); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (*Furman* recognized that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."); *see also Glossip v. Gross*, 135 S. Ct. 2726, 2760-64 (2015) (Breyer, J., dissenting) (concluding that research on the use of improper factors such as race in the application of the death penalty strongly suggests such application is arbitrary); *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (concluding capital punishment violates the Eighth Amendment, in part because of the persistent "risk of discriminatory application of the death penalty"); *Ring v. Arizona*, 536 U.S. 584, 613, 614-18 (2002) (Breyer, J., concurring) (jury sentencing is constitutionally necessary in capital cases, in part because of concerns that the death penalty is "potentially arbitrary" in light of evidence that "the race of the victim and socio-economic factors seem to matter").

Under the standards announced in *McCleskey*, in order to succeed on a claim of racial discrimination in the imposition of the death penalty, the defendant must establish a "constitutionally significant risk of racial bias" with "exceptionally clear proof," including a showing that the "decisionmakers in his case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 314, 312, 292. The extensive evidence detailed in the statement of the case and elsewhere in this brief meets this admittedly high burden.

One of the shortcomings of the evidence that Warren McCleskey introduced was that the evidence of charging decisions was statewide, rather than at the county level. *See generally*, 481 U.S. 295-6, n.15. The *McCleskey* court recognized that statistics were useful in the context of jury discrimination claims, but concluded that the charging decisions were too complex to be meaningfully analyzed statewide, across multiple prosecutorial districts. *Id*. In this case, Defendant relies on both anecdotal evidence and statistical data on charging and sentencing decisions in Cumberland County.

Equally important, unlike Warren McCleskey, Defendant points to evidence specific to his own case, including the deeds and acts of the prosecution in jury selection and during his capital trial, which supports an inference of racial considerations in his sentencing. *Compare, McCleskey*, 481 U.S. at 292-93 ("He offers no evidence specific to his own case that would support an inference that racial

considerations played a part in his sentence. Instead, he relies solely on the Baldus study.").[37] The evidence from Golphin's own case, combined with the evidence of the Cumberland County District Attorney's Office's discriminatory strike pattern, shows that imposing a death sentence on Golphin would violate the Eighth Amendment and Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. The State Constitutional Prohibition Against "Cruel or Unusual Punishment" and Guarantee of Equal Protection and Freedom from Discrimination Bar More than only Intentional Discrimination.

Defendant has proffered exhaustive evidence that satisfies the strict standard established by *McCleskey.* Assuming arguendo that Golphin has not satisfied the *McCleskey* standard, this Court should nevertheless follow the path of other state courts that have refused to follow *McCleskey* when interpreting the cruel and unusual punishment provision of their state constitution. *See, e.g.*, *State v. Loftin*, 724 A.2d 129, 151 (N.J. 1999) (rejecting *McCleskey* under the New Jersey constitution); *Claims of Racial Disparity v. Commissioner of Corr.*, No. CV054000632S, 2008 WL 713763, at *6, 2008 Conn. Super. LEXIS 458, *17 (Conn. Super. Ct. Feb. 27,

[37] There are other differences as well. Unlike in *McCleskey*, the State here had an opportunity to conduct its own rebuttal to the MSU Study. *Compare McCleskey*, 481 U.S. at 296 ("Here, the State has no practical opportunity to rebut the Baldus study.").

2008) (holding that petitioner "may seek to demonstrate that the imposition of the death penalty in Connecticut violates the Constitution of the state of Connecticut, even though such a statistical attack might be unavailing on the federal arena [under *McCleskey*]"); *State v. Santiago*, 318 Conn. 1, 161, 122 A.3d 1, 96 (2015) ("We have serious, indeed, grave doubts, however, whether a capital punishment system so tainted by racial and ethnic bias [as in *McCleskey*] could ever pass muster under our state constitution."); *see also District Attorney v. Watson*, 381 Mass. 648, 665, 411 N.E.2d 1274, 1283 (Mass. 1980) (holding, before *McCleskey*, that the discriminatory application of the death penalty violates the Massachusetts constitutional prohibition against "cruel" punishments and may violate the state constitutional guarantee of equal protection).

McCleskey has been roundly condemned as the "low point" in the quest for equality, comparable to *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1073 (Cal. S. Ct. 2000); *see also* Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 Colum. Hum. Rts. L. Rev. 34, 47 (2007) (describing *McCleskey* as "a decision for which our children's children will reproach our generation and abhor the legal legacy we leave them"); Hugo Bedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, Los Angeles Times (May 1, 1987) (predicting that historians will look back on

McCleskey and judge it to be yet another of the court's great failures—along with *Dred Scott*, *Plessy*, *Korematsu*, and *Hirabyashi*); *Santiago*, 318 Conn. at 165 (Norcott and McDonald, JJs., concurring) ("a legal scholar can invoke *McCleskey* confident that the reader will understand that the case is being used as shorthand for cases in which the Supreme Court failed the constitution's most basic values") (internal quotations and citations omitted). Justice Lewis Powell, one of the five justices to vote in the majority, publicly acknowledged after retirement that *McCleskey* stands as the sole case in which he would change his vote. *See* John C. Jeffries, JUSTICE LEWIS F. POWELL, JR. (1994), at 451 (quoting Justice Powell in his biography).

The New Jersey Supreme Court's experience is particularly instructive, because like North Carolina, New Jersey recognized the need to conduct a systemic inquiry of racial bias. *See State v. Ramseur*, 106 N.J. 123, 327, 524 A.2d 188, 292 (1987) (upholding New Jersey's death sentence as constitutional because it provided for a proportionality review, and thus provided a mechanism to "prevent any impermissible discrimination in imposing the death penalty"); *State v. Marshall*, 130 N.J. 109, 117-18, 613 A.2d 1059, 1063 (N.J. 1992) (describing the appointment by the state high court of a special master to investigate the statistical evidence of racial bias). The New Jersey high court emphasized the imperative, in light of that recognition, for the court to act on the findings:

> This Court cannot refuse to confront those terrible realities. We have committed ourselves to determining whether racial and ethnic bias exist in our judicial system and to recommend ways of eliminating it wherever it is found. . . . Hence, were we to believe that the race of the victim and race of the defendant played a significant part in capital-sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our system of law.

State v. Marshall, 130 N.J. 109, 209, 613 A.2d 1059, 1110 (1992) (punctuation omitted). Here, where the studies of Cumberland County's charging, sentencing, and jury selection practices were all prompted by the law of the North Carolina legislature, the State's courts must wrestle directly with whether its constitution would permit the State to tolerate executions handed out under a system infected by widespread discrimination.

Nothing in North Carolina's constitution prevents it from applying a broader interpretation of equal protection and cruel and unusual punishment than the Supreme Court afforded in *McCleskey*. *See* N.C. Const. art. 1, §§ 19, 26, and 27. North Carolina courts have recognized the need to address non-purposeful racial discrimination, in part because of the state constitutional commitment to ensure that the "judicial system of a democratic society [] operate evenhandedly and . . . be perceived to operate evenhandedly." *See State v. Cofield*, 324 N.C. 452, 460, 379 S.E.2d 834, 839 (1989) (quoting *State v. Cofield* (*Cofield I*), 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987)). In *Cofield*, the Supreme Court reversed in the face of

evidence of discriminatory effect in grand jury foremen selection under the state constitution even though there was "not the slightest hint of racial motivation." *Id*.

The text of the North Carolina constitution affords broader protection than the Eighth Amendment's promise to be free of cruel and unusual punishments because it guards against "cruel *or* unusual punishments." N.C. Const. art. I, § 27 of North Constitution (emphasis added). Although in *State v. Green,* 348 N.C. 588, 603, 502 S.E.2d 819, 828 (1998), the North Carolina Supreme Court considered the protection of cruel and unusual punishment as similar to that afforded by the federal constitution, both the holding and framework of *Green* have been eroded by recent precedent. *Compare Green*, 348 N.C. at 609-10, 502 S.E.2d at 832 (holding a mandatory life sentence acceptable for a 13-year-old defendant by looking only at gross proportionality of the sentence); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (striking mandatory juvenile life sentences and requiring an analysis under the "objective indicia of consensus" and "actual sentencing practices").

Basic principles of constitutional construction support the notion that "cruel" and "unusual" have independent meanings. "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989); *see also Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) ("When the language of a statute is clear and without

ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required."). As the late Justice Scalia succinctly explained in reference to a similarly drafted phrase, there is no question that the word "or" provides two alternatives:

> [T]he operative terms are connected by the conjunction "or." While that can sometimes introduce an appositive—a word or phrase that is synonymous with what precedes it ("Vienna or Wien," "Batman or the Caped Crusader")—its ordinary use is almost always disjunctive, that is, the words it connects are to "be given separate meanings."

United States v. Woods, 571 U.S. 31, 45 (2013) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

The history and case law regarding the prohibition on "cruel or unusual" punishments support giving separate and distinct meanings—and protections—to those terms. In North Carolina's original constitution of 1776, Section 27 referenced "cruel nor unusual" punishments. However, during the 1868 Constitutional Convention, the wording was changed to "cruel or unusual." In their treatise describing this history, Justice Paul Martin Newby and Professor John Orth observed that the change "may conceivably have practical consequences" and cited *Medley v. North Carolina Dep't of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992). *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 84 (2d ed. 2013).

Medley involved an inmate's claim of medical negligence filed against the prison. The issue for the court was whether the Department of Correction could avoid liability on the basis that the negligent physician was an independent contractor. In holding that liability could not be avoided on that basis, the court explained that the state had a non-delegable duty to provide prisoners with adequate care, relying in part on the state and federal constitutional prohibitions on cruel and/or unusual punishments. *Medley*, 330 N.C. at 842-44, 412 S.E.2d at 657-59. In a concurring opinion, Justice Martin wrote to emphasize that § 27's language is broader than the terms used in the Eighth Amendment and may, for that reason, provide inmates with greater protection:

> The disjunctive term "or" in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment. It therefore follows that the if the Cruel and Unusual Punishment clause of the federal Constitution requires states to provide adequate medical care for state inmates, the Cruel or Unusual Punishment claim of the North Carolina Constitution imposes at least this same duty, if not a greater duty.

Id. at 846, 412 S.E.2d at 660.

Sister state courts agree: when the disjunctive is used in provisions similar to North Carolina's, the provision bars both cruel and unusual punishments. *See People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (holding that the textual difference between Michigan's bar on "cruel or unusual" punishment and the federal prohibition on "cruel and unusual" punishment provided a "compelling reason" to

interpret the state prohibition more broadly); *People v. Anderson*, 6 Cal.3d 628, 636-37, 493 P.2d 880, 885-86 (1972) (interpreting "cruel or unusual" wording to manifest an "intent that both cruel punishments and unusual punishments be outlawed in this state" and observing that it cannot be presumed the disjunctive wording was chosen "haphazardly").[38]

Given this uniform recognition in North Carolina—by the Constitution, the Supreme Court, and the General Assembly—that, indeed, death is different, it cannot be said that § 27 of article I provides Golphin no greater protection from an unconstitutional execution than the Eighth Amendment, which is worded more narrowly. His death sentence, secured under a system infected by racial bias, should not be tolerated under the state constitution.

3. The Evolving Standards of Decency Prohibit the Imposition of the Death Penalty under a System that Creates a Substantial Risk of Arbitrary and Discriminatory Punishment.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. The "standard of extreme cruelty" remains stable over time in that "it necessarily embodies a moral judgment;" yet, "its applicability must change as the basic mores

[38] A subsequent amendment to California's constitution superseded *Anderson*'s conclusion that the death penalty was unconstitutional, but did not address the court's textual analysis of the disjunctive. *See Gardner v. Superior Court*, 185 Cal. App. 4th 1003, 1010 (2010).

of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)). Therefore, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *see also Kennedy*, 554 U.S. at 419.

Many of the statutory and constitutional protections in place today were not available to Tilmon Golphin at the time of his capital trial; the absence of these protections is constitutionally significant.

In the 1990's, when 19-year-old Tilmon Golphin and his 17-year-old brother Kevin were sentenced to death, there was no constitutional restriction against the execution of juveniles. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005) (holding that it is cruel and unusual punishment to impose death sentences on juveniles under eighteen because "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability). Since *Roper* was decided, scientific research has developed to explain the effects of brain maturation, or the lack thereof, on the behavioral and decision-making abilities of late adolescents in their late teens and early twenties. *See, Cruz v. United States*, 2018 WL 1541898, at *25 (D. Conn. Mar. 29, 2018) ("[W]hen the *Roper* Court drew the line at age 18 in 2005, the Court did not have before it the record of scientific evidence about late adolescence that is

now before this court."); *Commonwealth of Kentucky v. Bredhold*, No. 14-CR-161, *Order Declaring Kentucky's Death Penalty Statute as Unconstitutional* (Fayette Circuit Court, August 1, 2017) at 6 ("If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates [the] ruling [that the state's death penalty statute is unconstitutional as applied to those under the age of 21].").

In the 1990's, North Carolina sent an average of 23 people a year to death row at a higher per capita rate than Texas or Florida. Prior to 2001, North Carolina singularly required prosecutors to seek the death penalty for every aggravated first-degree murder, regardless of the mitigating facts and circumstances of the case or the prosecutor's belief about the appropriate punishment. *See, e.g., State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991) (holding that prosecutors could not choose to withhold evidence of an aggravating circumstance as part of a plea agreement). Prosecutors could not agree to a sentence other than death, even if, for example, the defendant played a relatively minor role in the crime or was a teenager. Consequently, prosecutors could not legally act as a check to the arbitrary use of the death penalty. In 2001, the legislature passed a law allowing prosecutors discretion to try a defendant capitally or non-capitally for first degree murder, even if evidence of an aggravating circumstance exists. N.C. Gen. Stat. § 15A-2004. The death sentencing rate dropped dramatically; just 37 of the 143 persons currently on death row were sentenced to death since 2002. See NC DPS Death Row Roster,

https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster (last visited 21 June 2018).

In the 1990's, there was no N.C. Indigent Defense Services, no uniform state standards for counsel representing persons in capital cases, and no statutory provision requiring recordation of statements by defendants. N.C. Gen. Stat. § 7A-498 *et. seq*; N.C. Gen. Stat. § 15A-211.

Moreover, North Carolinians' support for the death penalty has substantially dropped:

> In 2013, Public Policy Polling conducted a survey among 600 residents of the state which showed most of them opposed the death penalty altogether. Sixty-eight percent of them preferred replacing the sentence with life without parole (LWOP). They said they favored LWOP if the offender had to work and pay restitution to the victim's family.
>
> "The days when the death penalty enjoyed near-universal support are clearly over," said Tom Jensen, director of PPP. "Across the country, poll after poll has shown that. These results show that people in North Carolina are willing to consider alternatives to capital punishment."

David Eldridge, "Violent crimes rising in North Carolina; support for death penalty waning," *Macon County News*, June 21, 2018.

Further, numbers of persons on death row has dropped, despite the halt to executions almost 12 years ago:

> The state's death row has shrunk altogether after five inmates died of natural causes last year. As of Dec. 1, a total of 140 men and three women remain on death row in the state.

> Nearly half of them are at least 50 years of age, and more than three quarters were sentenced at least 15 years ago.

Id.

Most indicative of this dramatic change is that prosecutors and death-qualified juries are now rejecting the death penalty in almost every case; "in the last three-and-a-half years, only one person has been sentenced to die in North Carolina." *Id.*

While the use of the death penalty is increasingly rare, the risk of wrongful execution, arbitrariness in application, and excessive delays plague its application. *See Glossip v. Gross*, 135 S.Ct. 2726, 2755 (2015) (Breyer, J., dissent). North Carolina's most recent tragedy involved 15-year-old Leon Brown and 19-year-old Henry McCollum, two persons who cumulatively served over 35 years on death row prior to their exoneration by DNA, suggests that the risk of executing innocent persons in North Carolina greatly outweighs any potential rationale for the use of this ultimate punishment.[39]

In addition to all of this, this Court now must confront the substantial evidence proffered by Tilmon Golphin supporting the unavoidable conclusion that the North

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[39] It is hardly reassuring that this Court upheld McCollum's conviction and sentence of death in direct appeal proceedings. *See State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993), *cert. den., McCollum v. North Carolina*, 512 U.S. 1254 (1994); *see also State v. Brown*, 112 N.C. App. 390, 394-97, 436 S.E.2d 163, 166-68 (1993) (upholding Brown's conviction and affirming the trial court's findings that the waiver of *Miranda* rights by this intellectually-disabled 15-year-old boy, leading to an unrecorded confession outside the presence of a parent or guardian, was "voluntary, knowing and intelligent").

Carolina death penalty as applied in his case, in Cumberland County. and across the state is rife with racial discrimination.

This Court should hold that a death sentence imposed under the capital punishment system in effect in North Carolina at the time Tilmon Golphin was tried and sentenced to death violates the Eighth Amendment and/or Art. I, § 27 of the North Carolina constitution. In the alternative, the Court should remand this case for an evidentiary hearing to determine whether the death penalty, as applied to Tilmon Golphin, constitutes cruel and/or unusual punishment.

B. <u>Overwhelming Evidence of Racial Bias.</u>

The evidence proffered in the court below "makes clear that [Golphin] may have been sentenced to death in part because of his race." *See Buck v. Davis*, 137 S.Ct. 759, 778 (2017). In *Buck*, the United States Supreme Court rejected any tolerance for racial discrimination in the judicial process:

> As an initial matter, this is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. . . .
>
> This departure from basic principle was exacerbated because it concerned race. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 576 U.S. ——, ——, 135 S. Ct. 2187, 2208, 192 L.Ed.2d 323, 344 (2015). It thus injures not just the defendant, but "the law as an

> institution, ... the community at large, and ... the democratic ideal reflected in the processes of our courts." *Rose,* 443 U.S., at 556, (internal quotation marks omitted).

137 S.Ct. at 778. As described below and in the statement of the case, powerful evidence supports an inference of racial discrimination by the State in Tilmon Golphin's individual case.

1. Discrimination in the Exercise of Peremptory Strikes.

a. The historical and case evidence from Cumberland County regarding racially discriminatory jury selection.

Over the course of the two hearings, three Cumberland county prosecutors, Margaret "Buntie" Russ (Defendants Augustine, Golphin, and Walters), Calvin Colyer (Defendants Golphin and Augustine), and John Dickson (Defendant Robinson) testified about the culture in the office and their own participation in capital cases. Their testimony, along with notes and transcripts from individual cases files, confirm that race drove prosecutorial decisions in jury selection in Cumberland County capital cases.

Russ, one of the prosecution team members in the Golphin, Augustine, and Walters cases, testified regarding her history with *Batson.* Russ, along with another capital prosecutor from Cumberland County, George Hicks III, attended a training for North Carolina prosecutors about how to defeat *Batson* challenges, entitled "Top Gun." *Robinson* HTpp 864-65; DE 81A. They were provided a cheat sheet of ten

pat "race neutral" explanations that prosecutors could provide in response to a *Batson* challenge. *Id*.; DE111.

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity or rebelliousness
2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age - Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

In at least one Cumberland County capital case, Russ appeared to read directly from the cheat sheet, citing the juror's "age, attitude and body language." *State v. Maurice Parker*, DE147, pp 444-45. She reported that the juror "folded his arms and sat back in the chair away and kept his arms folded," that he was "evasive." Defense counsel vigorously contested Russ's characterization of the juror's body

language and demeanor. DE147, pp 454, 448. When pressed, Russ referred explicitly to the cheat sheet, saying that those "three categories for *Batson* justifications we would articulate is the age, the attitude of the defendant (sic) and the body language." DE147, p 447. She reiterated that age, body language, and attitude "are *Batson* justifications, articulable reasons." *Id*. The trial judge did not have the benefit of knowing that Russ was reading from a pat list of explanations, but he nonetheless concluded that she had violated *Batson v. Kentucky* and impermissibly used race in jury selection. DE147, p 455.[40] The trial judge rejected the demeanor and body language explanations as pretextual and noted that although Russ had responded that the juror's age was objectionable, she had passed a white juror with the "very same birthday" as the black struck juror. DE147, p 447. Courts have held that this practice of offering a "laundry list" of strike justifications is evidence of race discrimination. See, e.g., *Sheets v. State*, 535 S.E.2d 312, 315 (Ga. Ct. App. 2000) (concluding that prosecutor's "'laundry list' of reasons for almost every strike" was evidence of race discrimination); *McGlohon v. State*, 492 S.E.2d 715, 717-18 (Ga. Ct. App. 1997)

[40] Russ did describe much of the handout to the trial court in *Parker*, stating "Judge, I have the summaries here. I don't have the law with me. I hadn't anticipated this, of course for *articulable juror negatives*, and *body language, arms folded, leaning away from questioner are some of the things listed."* DE147, p 452 (emphasis added).

(affirming finding of purposeful discrimination where counsel "proffered a 'laundry list' of reasons for almost every strike, only some of which were facially neutral").

Russ testified at the *Augustine, Golphin, and Walters* RJA hearing. She insisted that she had done nothing wrong at the *Parker* trial when she moved to strike a juror based on race. *GWA* HTpp 1332 ("No, I don't think a ruling of the court on … *Batson* … is an indication that we are doing anything wrong."); 1302 ("The conduct was not unlawful."). Russ also insisted that she had not relied upon the *Batson* cheat sheet when responding to the defendant's *Batson* claim in *Parker*. Russ at first claimed that she had not attended the Top Gun training because she was in trial at the time of the training, but did concede that if she had reported attendance of the purpose of CLE credit, that meant she did in fact attend. *GWA* HTp 1292.[41]

[41] Russ appeared to testify falsely at the *Augustine, Golphin, and Walters* hearing regarding a collateral mater in the *Parker* case. Defense counsel wanted to question Russ about the meaning of a post-it note in her *Parker* trial notes, and the State objected. The trial court took the matter under advisement. The next morning, Russ testified that she understood that the trial court had ordered her sequestered, and that she had not talked about the note with anyone from the District Attorney's office. Russ's factual representations were in direct conflict with those from Assistant District Attorney Rob Thompson who had reported to the Court moments before the contents of his discussion earlier that same morning with Russ. He reported the surprising news that Russ intended to testify that the disparaging note referred not to the trial judge who had found the *Batson* violation, but instead to the defendant. Russ did in fact testify to that—a factual premise that was very hard to reconcile with the context of the note.

Russ testified that she was neither reprimanded nor provided any training by the Cumberland County prosecutor office after the *Batson v*iolation. *GWA* HTpp 917, 1360. The office did not monitor or otherwise respond to Batson violations within the office. Russ did not change her method of jury selection in any way after the Parker *Batson* finding. *GWA* HTp 1336.

Russ's pattern of resisting adverse court findings continued at the hearing when she denied remembering any wrongdoing in *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996). The Court of Appeals found that her closing argument was "calculated to mislead or prejudice the jury," 121 N.C. App. at 313, 465 S.E.2d at 338, but Russ remembered the case only by the defendant's conduct. No one in her office disciplined her for the conduct. *GWA* HTp 1266.

John Dickson, the prosecutor in Robinson's case, testified that there was racial discrimination in the criminal justice system, and that, on two or three occasions, he felt compelled to chastise other Cumberland County prosecutors after he observed that they had allowed race to influence their jury selection practices. *Robinson* HTpp 1182-83. He testified that like others, he himself harbors unconscious bias and that he could not say that race was not a part of his jury selection. *Robinson* HTpp 1177-82.

The third prosecutor to testify in the RJA hearings, Calvin W. Colyer, served as prosecutor in Cumberland County for almost 25 years. Colyer prosecuted dozens

of capital cases, including *Augustine* and *Golphin*. Colyer testified as a witness in the *Golphin*/*Augustine/Walters* hearings, and made several remarks, including in closing argument, as counsel in the *Robinson* hearing.

In most of the capital cases Colyer prosecuted, he struck black jurors at a significantly higher rate than other jurors. Colyer believed that this pattern was unrelated to race, and instead tied only to the specific characteristics of each juror he accepted or struck. *GWA* HTpp 795, 802, 814, 818, 821, 852, 855. Colyer testified that his approach to jury selection was consistent over the course of his career, from case to case, juror to juror. *GWA* HTpp 811, 903-04, 924. Dickson also testified that he approached jury selection essentially the same way all the time, *Robinson*, HTpp 1197-98, that there was "no difference" in his questioning of jurors, and that as a general rule he tried to approach jury selection "consistently case to case." *Robinson* HTp 1203.

The jury selection practices of Colyer and Dickson in the *Burmeister* and *Wright* cases in 1997 belied this testimony. *Burmeister* and *Wright* were white supremacist "skinhead" defendants accused of murdering black victims in racially-motivated murders. Colyer and Dickson took a unique approach to their jury selection. First, they filed a motion for a jury selection expert, arguing that in that context, the "people of the State of North Carolina are entitled to a fair and impartial jury free from racist attitudes and reactionary positions." DE125. Citing the "covert

nature" of views on race, the motion sought assistance in "recognizing potentially damaging racial attitudes." *Id*. In a case in which they believed that racial attitudes could obstruct their litigation goals of convictions and death sentences—the prosecutors deemed it important to ferret out those beliefs. *GWA* HTpp 930-31.

Colyer and Dickson's pattern of strikes in *Burmeister* and *Wright* are the inverse of their typical pattern in Cumberland County cases: instead of disproportionately striking black jurors, the prosecutors in *Burmeister* and *Wright* disproportionately struck a majority of white jurors. In *Burmeister*, they used nine of ten strikes to remove white jurors. DE127. They passed eight of nine black jurors, striking only a single black juror. *Id*. The disparities were even starker in *Wright*, where Colyer and Dickson used all ten strikes against white jurors. They did not strike a single black juror in *Wright.* When hoping to rely on outrage about racial prejudice against African Americans to secure a death verdict, the prosecutors pursued a radically different jury selection strategy, accepting black jurors nearly identical to those they routinely struck in other capital cases.

The strategy of the State in defending the *Robinson* hearing was further evidence of the Cumberland prosecutors' reliance on race in jury selection. Assistant District Attorney Rob Thompson suggested to state expert Dr. Katz that prosecutors were more likely to have struck black jurors because the history of discrimination against African Americans would make it more likely that African Americans would

not trust law enforcement. *Robinson* HTpp 871-72; DE24. The State called Dr. James Cronin, a social scientist, to testify that as a group, African Americans are more opposed to the death penalty, more skeptical of law enforcement, and have been subjected to inequality more than other groups. *Robinson* HTpp 2197-98. Bryan Stevenson, an expert for the defense, explained that these views are the kinds of group views that lead to discrimination against individuals. In other words, for tactical purposes, prosecutors may strike an individual African-American venire member because he or she believes that African-American venire members as a group are not as friendly to the police, or prosecution. *Robinson* HTp 867.

This explanation, a tactical decision to pursue or strike black jurors based on group characteristics, explains the prosecutors' strikes in Defendant's case, and the *Burmeister* and *Wright* cases. While prosecutors generally struck jurors who expressed death penalty reservations, in the *Robinson*, *Golphin*, and *Augustine* cases, where the defendants were black, the prosecution still struck more black jurors with death penalty reservations compared to white jurors with death penalty reservations. In *Burmeister* and *Wright*, with white defendants and black victims, in contrast, Colyer and Dickson repeatedly accepted black jurors with strong death penalty reservations. DE132 (State passes juror who said it would be "hard" and "difficult" for her to vote for the death penalty); DE133 (State passes juror who said because of

her religious views "I don't believe in the death penalty"); DE153 at 519, 523 (State passes juror "I really wouldn't like someone to be killed").

Colyer also made a series of racially charged notes about prospective jurors in the *Augustine* prosecution. The case had been transferred out of county on a change of venue, and Colyer met with members of the Brunswick County Sherriff's Department to discuss the jury summons list. He made a six-page list entitled "Jury Strikes." DE98-103; *GWA* HTpp 183-85, 998. These notes were not turned over during the RJA discovery, and had gone missing from the State's own files.[42]

The notes referred to jurors in racially charged terms. Colyer described African-American potential juror Tawanda Dudley as "ok" and noted that she was a member of a "respectable black family." DE102. Colyer did not describe a single white juror as okay because he or she was from a "respectable white family." Of jurors with substantial criminal histories, Colyer's descriptions differed dramatically based on race. Jackie Hewett (black) was a "thug" compared to white juror Tony Lewis, who trafficked in marijuana in the early 80s, "a fine guy." Clifton Gore, a black juror was a "blk wino" while Ronald King, who had a DUI conviction, was a "country boy – ok." DE99; *GWA* HTpp 86-87; DE104.

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[42] They had been produced years earlier to Defendant Augustine's MAR counsel, who had bates-stamped the file, and who ultimately gave them to Defendant Augustine's counsel at the RJA hearing. The documents immediately before and after the missing jury strikes list were given to RJA counsel by the State, but the handwritten notes were not disclosed.

In Defendant's case, Colyer questioned and ultimately struck an African-American prospective juror who had reported the misconduct of two white jurors who called for the lynching of the defendant. Colyer questioned that juror alone about his familiarity with Haile Selassie, the former emperor of Ethiopia and black musicians Bob Marley and Ziggy Marley. Colyer asked the juror about a traffic stop by asking him whether there was "anything about the way you were treated as a taxpayer, as a citizen, *as a young black male* operating a motor vehicle at the time you were stopped that in any way caused you to feel you were treated with less than the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?" DE2, *GWA* HTpp 2055, 2073 (emphasis added). Defense counsel raised a *Batson* violation, and the trial judge rejected two of the four responses given by Colyer as pretextual, but nonetheless upheld the strike. *Id*. at 2113, 2014-15.

b. New evidence about pretext.

The RJA litigation also produced new evidence that the prosecution relied on race in the form of pretextual explanations offered by the prosecution for its strikes of otherwise qualified black jurors from capital cases. Recognizing that the MSU Study showed statistically significant disparities in strike patterns, Dr. Katz devised a *Batson* model response. *Robinson* HTpp 1951-52. He asked prosecutors to provide race neutral explanations that he could use to analyze across cases—a kind of "super

Batson" approach. Cumberland County prosecutors provided purportedly race neutral explanations for scores of strikes of black jurors in the cases of defendants currently on North Carolina's death row, many in cases where *Batson* objections had never been lodged. *Robinson* HTp 1987. These responses were themselves powerful new evidence of pretext and racial discrimination. Defendants' Post Hearing Brief in Support of Proposed Findings regarding the State's Reasons for Striking African-American Venire Member (App 458-587).

c. Evidence from the powerful statistical study.

As described earlier, social science researchers from the Michigan State University College of Law conducted an exhaustive, meticulous study of racial bias in capital jury selection in North Carolina across a twenty-year period. The lead researcher, Dr. Barbara O'Brien, testified at both the *Robinson* and *Augustine, Golphin, and Walters* hearings about the study's methodology and its findings of systemic bias. The State acknowledged in its closing argument that Dr. O'Brien was an honest and credible witness. *Robinson* HTpp 2541 ("I mean no disrespect to Dr. O'Brien. She made a wonderful witness. She was very polite. She was very honest in her answers as they came back."); 2453 ("Again, all credit to Dr. O'Brien . . . She didn't hide. She wasn't bobbing and weaving these answers. She was giving them straight. She was straight when she got up on that witness stand."). Another expert,

statistician Dr. George Woodworth, testified for the defense supporting the study's methodology and results.

No expert witness who testified for the State at either hearing concluded that race was not a significant factor in Cumberland County or in the State of North Carolina. All three experts, including State expert Dr. Joseph Katz, agreed that the MSU Study demonstrated large, statistically significant disparities, unlikely to be due to chance. *Robinson* HTpp 1771, 1943-1947, 1949.[43] Dr. Katz further agreed with the other statistical experts that these results constituted a *prima facie* case of discrimination and required investigation. *Robinson* HTpp 1801, 1943, 1951.

The *Robinson* case was remanded by this Court because the trial judge failed to grant a third continuance request by the State. Nonetheless, the State produced no new expert or statistical critique of the MSU Study when the Study was used in the *Augustine, Golphin, and Walters* hearing in October, nine months later. To this day, the State has failed to disclose or produce any expert witness or analysis showing that race was not a significant factor in jury selection.

The MSU Study collected jury selection data from all 173 capital proceedings for the defendants of North Carolina's 2010 death row. The MSU researchers gathered race and strike data for all but seven of the 7,421 venire members. DE6, p

[43] Katz testified that the statewide disparities were statistically significant. *Robinson* HTpp 1944-45.

8. They relied upon original source materials such as juror questionnaires, *voir dire* transcripts, and clerks' charts. *Robinson* HTp 122. If the race data was not available from these sources, they followed a rigorous protocol to match the jurors to identifying information in public records. DE6, pp 6-8; *Robinson* HTp 117. Prosecutors around the state reviewed the data for their districts, and found only a few discrepancies. In the cases where errors were found, the MSU researchers updated the database to reflect the corrections. The study was meticulously carried out, with great transparency and an extremely low error rate. *Robinson* HTpp 131-32.

Analysis of the prosecutors' strike patterns of black venire members and all other venire members revealed large, statistically significant racial disparities. Statewide, across the full study period, prosecutors struck qualified[44] black venire members at slightly more than twice the rate they struck all other venire members. DE3, p 22. In Cumberland County, prosecutors struck black venire members at 2.6 times the rate they struck all other venire members. *Robinson* HTp 152, DE2, p 41.

The researchers also examined the explanations offered by prosecutors in North Carolina for exercising strikes. For this analysis, the MSU investigators

[44] Only venire members who were not excluded for cause and were either struck or passed by the state were included in the study.

collected data for all of the Cumberland County cases and for a randomly selected 25% sample of the statewide pool. DE6, p 5; *Robinson* HTpp 120-21, 135, 164-65.

This portion of the MSU Study, referred during the RJA trials as "Part II" of the study, gathered extensive data relevant to analyzing strike decisions, including demographic information (e.g., gender, age, marital status, children, employment), prior legal experiences of the juror and his or her family members and close friends (e.g., prior jury service, experience as a defendant or victim, connections to attorneys and law enforcement), views on the death penalty, potential hardships, and any stated biases (collectively herein "descriptive variables"). *See* DE6, p 5; *Robinson* HTpp 120-21.[45]

The MSU researchers collected information for more than 65 descriptive variables. *Robinson* HTpp 185-87. They selected these variables after extensive research, including review of the North Court's published decisions, law review articles, treatises on jury selection, numerous North Carolina jury *voir dire* transcripts, and the protocol used in a similar study. *Robinson* HTpp 121-33, 349-53; DE6, p 2. The MSU researchers had solicited input from North Carolina prosecutors but did not receive any response. *Robinson* HTp 422. Many prosecutors

[45] The researchers used a double coding approach to this portion of the study, whereby two attorney researchers independently coded each venire member. Any differences between the two independent coding forms were reconciled by Dr. O'Brien personally. DE6, p. 10; *Robinson* HTpp 131-33, 170-71.

later provided affidavits and statements with their purported bases for striking African-American jurors, and these explanations were highly consistent with the variables selected by MSU. SE32; *Robinson* HTp 422.

This thorough dataset allowed the researchers to engage in what was essentially system-wide comparative juror analysis. *See, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."). They asked whether the racial disparities could be explained by other possible factors, for example, the jurors' death penalty views, criminal history, or marital status. *Robinson* HTpp 177-82; DE3, p 63. If the prosecution was truly striking a higher percentage of black jurors because of their criminal histories—and not their race—the researchers would expect prosecutors to strike white jurors with criminal histories at the same ratio that they strike black jurors with criminal histories. *Robinson* HTpp 186-87; DE3, p 66.

For every analytical approach the researchers tried, racial disparities remained. Prosecutors accepted only 10% of black jurors who expressed reservations about the death penalty, while they accepted 26% of all other jurors with reservations about the death penalty. DE3, p 66. In Cumberland County, the disparity among jurors who expressed reservations about the death penalty was even

greater: the State accepted only 5.9% of the black venire members, but accepted 26.3% of the other venire members. DE3, p 67. To be sure, prosecutors struck jurors with death penalty reservations far more often than those jurors without. Even still, they found black jurors with death penalty reservations much less desirable than their white counterparts. This comparative analysis showed that the same explanations for white juror strikes do not hold for black juror strikes.

The researchers also used statistical models that allowed them to examine many factors at the same time to isolate the effect of race on the results. Those regression models, like the straight percentages, and comparative juror analyses by proffered prosecutor explanations, demonstrated a stubborn, indelible pattern of discrimination. Statewide, in counties both large and small, prosecutors struck black jurors at more than twice the rate that they struck all other similarly situated jurors. DE6. In other words, black prospective jurors who survived cause challenges and were fully qualified to serve were twice as likely as everyone else to be sent home without serving, regardless of their fitness to do so. The study was conclusive and unmistakable proof that black jurors experience widespread discrimination in jury selection in capital cases based on their race.

In every appropriately built model, race remained a powerful predictor of strike decisions. *Robinson* HTpp 199, 203, 206-07, 209, 213-16, 527-28, 545-46; DE6, pp 21-22, 66; DE10, p 7. Even after accounting for all of the other predictive

explanations like death penalty reservations, a powerful relationship between race and prosecutor strike decisions persisted. *Robinson* HTpp 199, 203, 207, 525-27, 545-46; DE6, p 21-22; DE10, p 7.

Examination of the strike patterns in the four individual cases of Defendants Golphin, Robinson, Augustine, and Walters is revealing. In the RJA hearing of Defendants Golphin, Walters, and Augustine, defendants introduced evidence of statistically significant disparities in each of the three cases. In Defendant's case, the State struck 71.4% of the black venire members and only 35.8% of the other eligible venire members. DE108, 117, 120. The race strike ratio was 2.0. *Id*. Only one person of color served on Defendant's jury. DE4; *GWA* HTp 1482.

2. Evidence About Racial Bias in Charging and Sentencing.

Both of the victims in this case are white and Defendant is black. Cumberland County has sentenced 14 individuals to death since 1990, nine of whom are still on the row today.[46] *Id*. Of those 14 individuals, only two were white: Jeff Meyer and Philip Wilkinson. The clear majority—ten—were black, one was Latino, and one was Native American.

Although the majority (63%) of homicide victims in Cumberland County are African American, the majority of Cumberland's death sentences have come in cases

[46] One of those 14 defendants had two trials since 1990.

with white victims. Of the 14 individuals sentenced to death since 1990, nine were in cases with white victims.

The researchers from Michigan State, Catherine Grosso and Barbara O'Brien, also conducted a thorough examination of the role of race in capital charging and sentencing practices in Cumberland County between 1990 and 2009.[47] They considered death eligible capital murder cases in Cumberland and reviewed charging and sentencing outcomes.

Their study found a large disparity based on the race of the victim. Between 1990 and 2009, 8.0% of death eligible cases with at least one white victim resulted in death sentences, while only 2.3% of cases without a white victim resulted in death sentences. Death eligible cases with at least one white victim were 3.4 times more likely to result in a death sentence than those without white victims. In other words, in Cumberland County capital cases, white lives matter most.

These disparities existed in the decisions of juries to impose the death penalty as well. For example, in the decade of Defendant's trial (1990-2000), cases with white victims were far more likely to result in death:

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[47] The general study methodology is described in a published article by the researchers of the statewide investigation of charging and sentencing. *See* Barbara O'Brien, *et al*., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina*, 1990-2009, 94 N.C. L. Rev. 1997 (2016).

	Cases reaching penalty phase (1990-2000)	Cases receiving death penalty (1990-2000)	Percentage receiving death
White victim cases	21	10	48%
Cases without white victims	9	2	22%
Total	30	12	40%

C. Conclusion.

Because Tilmon Golphin has pled the required elements of a constitutional claim pursuant to Art. I, § 27 of the North Carolina Constitution and the Eighth and Fourteenth Amendments to the United States Constitution, and has proffered credible evidence in support of that claim, he is entitled to an evidentiary hearing to prove the claim in the superior court. *See State v. McHone*, 348 N.C. 254, 258-259 (1998) (holding that defendant was entitled to an evidentiary hearing on his MAR when the trial court was presented "with a question of fact which it was required to resolve."). In these circumstances, the repeal of the Racial Justice Act had no impact on whether or not Defendant's constitutional rights have been violated.

XI. THE PROSECUTION EXERCISED ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER IN VIOLATION OF *BATSON V. KENTUCKY*.

Defendant is an African-American man convicted of killing two white law enforcement officials. At trial in this case, the prosecution intentionally discriminated against African-American potential jurors in violation of Defendant's rights under the Fourteenth Amendment of the United States Constitution; *Batson v.*

Kentucky, 476 U.S. 79 (1986), and its progeny, particularly *Snyder v. Louisiana*, 552 U.S. 472 (2008), and *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005); and Article I, §§ 26 and 27 the North Carolina Constitution.

Batson and its progeny established a three-step process a trial court must use to determine whether the State's peremptory challenges were based on race, and thus violated the Constitution:

> First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (internal quotations and citations omitted).

The Court must evaluate the record and consider each explanation of a strike decision within the context of the trial as a whole because "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts[.]" *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)); *see also Batson*, 476 U.S. at 94 ("In deciding if the defendant has carried his burden of persuasion, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") (internal quotation marks omitted); *Miller-El v. Dretke*, 545 U.S. 231, 251-52 (2005)

(*Miller-El II*) ("the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it.").

Therefore, in deciding whether the prosecutor's reasons for excusing African Americans with peremptory challenges were pretextual, the Court must consider the numbers describing the use of prosecutor's peremptory strikes and "side-by-side comparisons of [the] black venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. The Court must consider "contrasting *voir dire* questions posed respectively to black and nonblack panel members." *Miller-El II*, 545 U.S. at 255; *see also United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (The Court may consider "any questions or remarks made by the government during *voir dire* examination and in its exercise of challenges that tend to either support or negate an inference of discrimination."). The Court also must consider any other evidence of racial animus from the record as a whole. *See Miller-El II*, 545 U.S. at 254, 263-64 (considering evidence that court procedure permitted the prosecution to "shuffle" juror cards to keep African-American jurors from being drawn, and that prosecutors' handbooks used in the jurisdiction recommended racial strikes).

Finally, "the Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. at 478, citing *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994).

A. Trial Court Denied Golphin's *Batson* Motions Based upon Limited Information.

1. Juror Deardra Holder

The State peremptorily challenged juror number six, Deardra Holder. JTp 1981. Defendant objected under *Batson*. JTpp 1981-82. The trial court asked the State to state its reasons for excusing Ms. Holder, and the prosecutor, Margaret Russ, advanced several reasons for its challenge: (i) that the State "attempted to draw her out and to engage her in more than one-word answers or simply short-phrased answers . . . [b]ut [she] never was able to draw her out in that manner;" (ii) that Ms. Holder "is 22 and that she has a sister who is 18;" and (iii) that Ms. Holder paused when asked about the death penalty. JTpp 1982-86. Defense counsel responded that he "never heard the state asking about siblings other than to Ms. Holder" and that "[e]very question I heard [the prosecutor] ask [Ms. Holder] led to nothing but a yes or no answer, and I thought she answered those questions most appropriately on the death penalty questions." JTp 1987. The trial court found that "the articulated reason that the juror was relatively young and close to the age range of the defendants and that the juror had a sibling at approximately the age range of the defendants

constitutes an articulable race neutral reason for exercising a peremptory challenge, and so the motion is . . . denied." JTp 1987.

At the time the trial court denied the *Batson* motion, the judge was unaware Russ routinely utilized a *Batson* "cheat sheet" to respond to *Batson* objections. *See* Statement of the Case, *supra*, and Newly Discovered Evidence, *infra*. Also, evidence presented at the RJA hearing showed Russ violated *Batson* just a few months later with the same pretextual excuse—age. *State v. Maurice Parker*, DE147 (Passed white juror born the same day as black juror Russ attempted to strike).

2. Juror John Murray

During the questioning of John Murray, prosecutor Colyer repeatedly injected race into questions directed to Murray. *See* Statement of the Case, infra. Specifically, Colyer asked the following of Murray:

- Colyer asked about a prior driving offense by saying, "Is there anything about the way you were treated as a taxpayer, as a citizen, *as a young black male* operating a motor vehicle at the time you were stopped that in any way caused you to feel that you were treated with less than the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?" JTp 2073 (emphasis added).

- Colyer inquired about an incident involving other venire members whom Murray had overheard talking about the case, saying the defendants "should never have made it out of the woods." Colyer asked, "Could you tell from any speech patterns or words that were used, expressions,

> *whether they were majority or minority citizens, black or white, African-American*?" JTp 2055. (Later, when attempting to justify the strike of Murray, Colyer told the trial judge, he deemed Murray objectionable because Murray "attributed to a male and a female *white* juror in the courtroom with respect to what he viewed as a challenge to the due process rights of the defendants.") JTp 2111 (emphasis added).
>
> - Colyer singled out Murray for questions about black culture. In particular, Colyer asked Murray, and Murray alone, about his knowledge of black musicians Bob and Ziggy Marley, reggae music, and the former emperor of Ethiopia, Haile Selassie. JTpp 2083-84; *GWA* HTpp 30-31.

No non-black venire members were questioned about how they felt "as white people" about any past experiences. Further, no other juror was asked about the Marleys, reggae music, or Haile Selassie.

The State peremptorily challenged Murray and Defendant objected under *Batson*. JTp 2110. The trial court stated: "Now, having yesterday required an articulable reason, I am now going to hereafter, including this time, require an articulable reason for each minority peremptorily excused if a Batson challenge is raised." JTp 2111. The State advanced several reasons for peremptorily challenging Mr. Murray: (i) that he "ha[d] a prior conviction for driving while impaired;" (ii) that his "father ha[d] a prior conviction for robbery for which he served. . . six years in the Department of Corrections;" (iii) that he had reported to the Court that he had overheard two white jurors saying that the defendants "should have never made it

out of the woods;" (iv) that when he spoke "he did not refer to the Court with any deferential statement other than saying 'yes' or 'no' in answering [the Court's] questions" and "gave very short. . . sharp answers;" (v) that he "had a gold earring in his left ear;" and (vi) that he had "a rather militant animus with respect to some of his answers." JTpp 2111-12.

Counsel for Kevin Golphin responded that to exclude Mr. Murray for having overheard an improper conversation had by two other potential jurors "would stand justice on its head;" that the State did not challenge juror number two, Michael Covington, a white male who has prior convictions, including breaking and entering and trespassing; that Mr. Murray had stated that the fact that his father had been convicted of a crime when Mr. Murray was five years old "would not affect him at all as a juror in this case;" and that "exactly one-third of the state's peremptory challenges would be minority jurors." JTpp 2112-13.

Counsel for Defendant Tilmon Golphin noted that Virginia Broderick, a white juror the State had not challenged, had a DWI conviction. JTp 2113.

The Court found that "the state has established a non-racial basis for the peremptory challenge and the objection to that peremptory challenge upon Batson is overruled and denied." JTp 2114. The Court rejected some of the reasons posited by the State:

> I would just note for the record that I did not perceive . . . any conduct of the juror to be less than deferential to the Court.

> I think that the juror did demonstrate a consistent reticence to elaborate on questions, but all of his responses were appropriate to the specific question asked. And. . . there was a substantial degree of clarity and thoughtfulness in the juror's responses. And the Court will note for the record that it is primarily relying upon defendant's prior record, specifically which it involved an interaction with a traffic law enforcement officer, and the potential empathy that might be engendered from a father who was a criminal defendant as the basis for the exercise of the peremptory challenge. I would note further I am not relying upon the impact of the incident in the courtroom [where Mr. Murray overheard the two white jurors talking] as providing a basis for this and frankly . . . I do not consider it to be appropriate for even the exercise of a peremptory challenge.

JTpp 2114-15.

The trial judge made his decision based upon the representations of the prosecutor, and defense counsel had no opportunity to question why Colyer asked the special race questions of Murray. At the RJA hearing, Colyer admitted that when questioning Murray, the juror's race was consciously on his mind; and, for the first time, Golphin was permitted to obtain notes and other evidence to support his claim that the reasons given for Colyer's strike of Murray were pretextual.

B. The Strength of Petitioner's *Prima Facie* Showing Must be Considered in the *Batson* Analysis.

After Defendant's *Batson* objections to the prosecution's peremptory challenge to Holder and Murray, the trial court directed the State to advance reasons for the strikes, implying that the court had found a *prima facie* case of discrimination.

The State then advanced reasons for the strikes, and the trial court denied Petitioner's *Batson* motions with respect to both jurors. Once the State advances reasons for striking jurors, the issue of whether a defendant established a *prima facie* case of discrimination is moot. *Hernandez v. New York*, 500 U.S. at 359. Nevertheless, statistical disparities in the prosecutor's use of peremptory strikes is one factor which this Court must consider in ultimately determining whether the prosecutor engaged in intentional discrimination. *Miller-El v. Cockrell*, 537 U.S. 322, 344 (2003) (*Miller-El I)*.

In *Miller-El II*, only one African-American juror ultimately served on Miller-El's jury. The Court described the statistical evidence as "remarkable:"

> Out of 20 black members of the 108-person venire panel for Miller-El's trial, only 1 served. Although 9 were excused for cause or by agreement, 10 were peremptorily struck by the prosecution. "The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American members. . . . Happenstance is unlikely to produce this disparity."

545 U.S. at 240-41 (citations omitted). The Court considered these statistics in its ultimate determination that the prosecution used racial considerations to strike at least two of the prospective jurors: "It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black." 545 U.S. at 266. [48]

[48] The court's decision denying relief in *Kandies v. Polk*, 385 F.3d 457 (4th Cir. 2004) was vacated by the United States Supreme Court, and remanded for further

Here, Petitioner has established a strong statistical case of intentional discrimination. Out of thirteen black members of the ninety-five-person venire panel for Golphin's trial, only one served. Six were excused for cause, five were peremptorily struck by the prosecution, and one was peremptorily struck by attorneys for Kevin Golphin. The prosecutors used their strikes to exclude 71% of the eligible African-American jurors.

Early in jury selection, the prosecutor peremptorily struck the first two eligible African-American jurors, allowed one African-American juror to be seated, and then struck three more eligible African-American jurors. The African-American juror who was seated was ultimately the only African-American among all of the seated jurors, including the alternates. At the time the State challenged John Murray, fifty-seven jurors had been called, of which thirty-one were eligible for service. Twenty-four of these jurors identified themselves as white, and six identified themselves as African-American.[49] At that point, the State had peremptorily struck eighty-three percent (5/6) of eligible African-American jurors, and twenty-five percent (6/24) of eligible white jurors. By the time the twelve jurors were chosen, the State used its

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consideration in light of *Miller-El II*. *Kandies v. Polk*, 545 U.S. 1137 (2005). In *Kandies*, the prosecutor challenged nine out of twelve eligible jurors, or seventy-five percent. *State v. Kandies*, 342 N.C. 419, 435, 467 S.E.2d 67, 75 (1996).

[49] One juror, Cheryl Chang, was born and raised in Jamaica, and listed her race on the juror questionnaire as "other." The State exercised a peremptory strike to exclude Ms. Chang.

challenges against seventy-one percent (5/7) of eligible African-American jurors, and forty-five percent (14/31) of eligible white jurors.[50]

The State therefore demonstrated a pattern of using a disproportionately high percentage of its peremptory challenges to eliminate the great majority of African-American jurors.

C. Newly Discovered Evidence First Available Because of the Racial Justice Act Litigation.

This Court must now consider in addition to the evidence adduced at trial, evidence that has only become available because of the litigation under the Racial Justice Act cases. This new evidence includes, among other things: (1) evidence that prosecutor Calvin Colyer relied upon racial factors in his use of peremptory strikes in other Cumberland County capital cases including *State v. Burmeister* and *State v. Wright*; (2) evidence of prosecutors' testimony and prosecutors' notes in *Golphin* and *Augustine*; (3) testimony of prosecutor Colyer regarding his strike of juror John Murray at Defendant's trial; (4) evidence from Cumberland County capital cases of Colyer's disparate treatment of venire members; (5) evidence of prosecutors' use of demeanor as a proxy for race; (6) expert testimony and statistical evidence from the

[50] These percentages remained roughly the same after the selection of alternate jurors. The prosecutor had no further opportunity to strike African-American jurors, but exercised a peremptory challenge against the sole Hispanic juror in the venire. All four alternate jurors were white.

Michigan State University study of peremptory strikes and (7) affidavit of juror John Louis Murray, Jr.

1. Affidavit of John Louis Murray, Jr.

Defendant submitted the 29 July 2010 affidavit of John Louis Murray, Jr. at the RJA evidentiary hearing, and resubmits it in support of his showing of prejudice as a result of the *Batson* violation in his case. DE42. Murray discusses the two prospective jurors whom he overheard stating during jury selection that "those guys shouldn't have made it out of the woods." DE42, ¶ 3. Those two jurors were never identified by the Court, and Murray "thought the whole jury pool was tainted by the comments of the jurors who were sitting behind me." DE42, ¶ 6. Further, Murray discloses another event during jury selection that highlights the influence of racial prejudice on the proceedings. According to Murray,

> I was disturbed by another incident that happened during jury selection. When we had to take an oath about not being prejudiced, one juror wouldn't take the oath. He said he wouldn't say that he wasn't prejudiced *and other jurors snickered*. I was disturbed that other jurors found that amusing.

DE42, ¶ 7

2. Colyer and Dickson's Reliance on Race in Burmeister And Wright.

Three prosecutors were involved in the prosecution of Golphin, including Calvin Colyer. At the RJA hearing, Golphin introduced evidence of Colyer's jury selection in *Burmeister* and *Wright*, two Cumberland County capital cases tried in

1997. The defendants were soldiers stationed at Fort Bragg who belonged to a white supremacist "skinhead" gang. They were tried separately for the racially-motivated murders of two African-American victims and received life sentences. Colyer prosecuted both cases, along with John Wyatt Dickson, the prosecutor in *State v. Marcus R. Robinson*. Colyer's prior pattern of jury selection—of accepting far more white venire members than African-American venire members—was turned on its head in *Burmeister* and *Wright*. *GWA* HTpp 925-26.

Colyer testified on direct examination about his reasons for striking African-American venire members in *Augustine* and *Golphin*. Colyer stressed that his approach to jury selection was consistent over the course of his career, from case to case, juror to juror.[51] *GWA* HTpp 811, 903-04, 924. Colyer insisted that his strikes in general, and particularly with regard to each of the black venire members he struck in *Golphin* and *Augustine*, were driven by the potential juror's reservations about the death penalty or because the juror or a family member had been charged with a crime. *GWA* HTpp 792, 800, 814, 817, 821, 835, 845, 851, 855. Colyer denied he struck potential jurors because of race. *GWA* HTpp 796, 802, 814, 818, 821, 836, 846, 852, 855.

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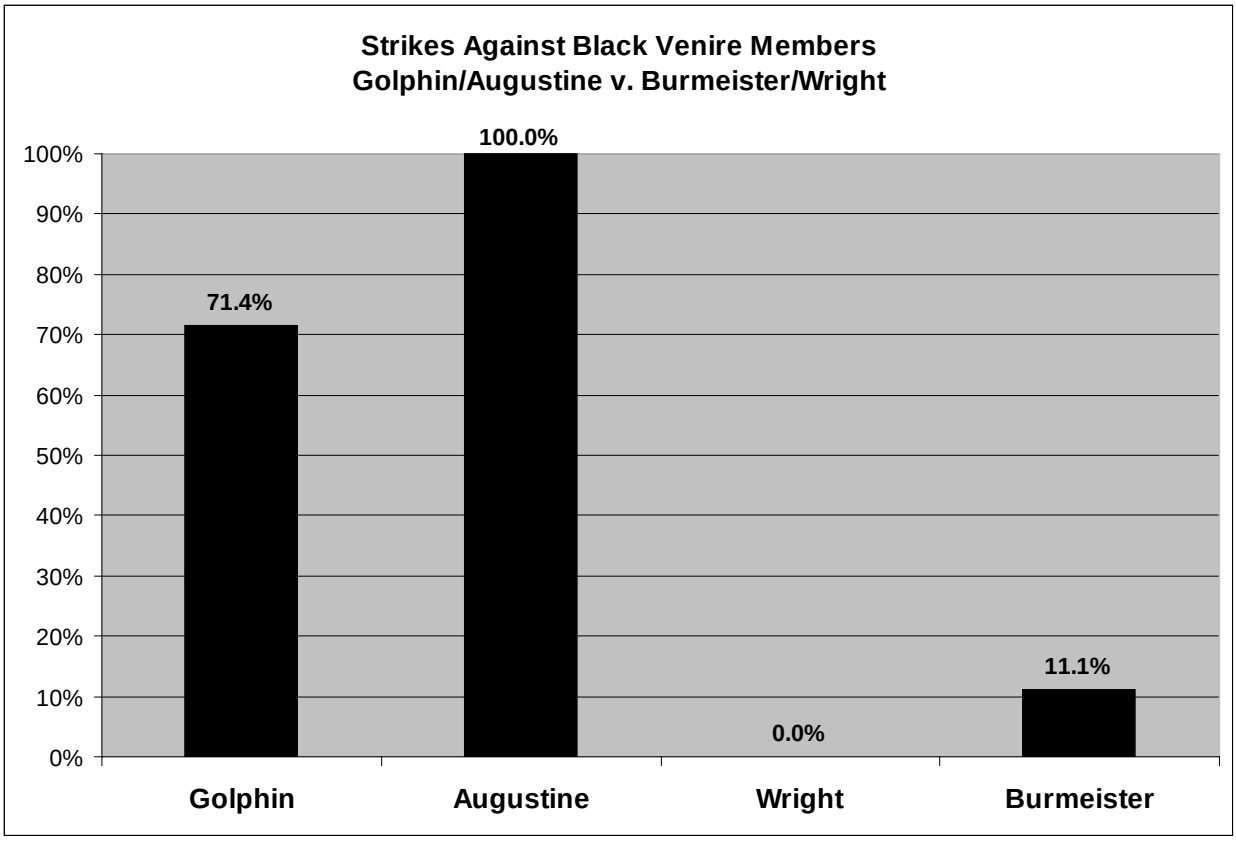
[51] Dickson gave similar testimony at the *Robinson* hearing. *See Robinson* HTpp 1197-98 (method of jury selection in capital cases was "fairly consistent in all of them"); 1199 ("you approach it essentially the same way all the time"); 1200 (affirming "no difference" in questioning of different jurors); 1203 (as a general rule, he tried to approach jury selection "consistently case to case").

Colyer approached jury selection very differently in *Burmeister* and *Wright* from his other capital cases. First, Colyer filed a motion requesting a jury selection expert in the *Burmeister* case. Colyer had never before and never again filed such a motion. *GWA* HTp 929. In the motion, Colyer argued that "the interest of justice requires that the people of the State of North Carolina are entitled to a fair and impartial jury free from racist attitudes and reactionary positions." DE125. Citing the "covert nature" of views on race, Colyer sought assistance in "recognizing potentially damaging racial attitudes or potential jurors with hidden racial agendas." *Id*. In a case in which he believed that racial attitudes might obstruct his litigation goals—a conviction and death sentence—Colyer deemed it important to ferret out those beliefs. *GWA* HTpp 930-31.

*Burmeiste*r and *Wright* differed in a second significant respect. The prosecution's pattern of strikes in *Burmeister* and *Wright* are complete anomalies among Cumberland County capital cases. In *Burmeister*, Colyer used nine of 10 strikes to excuse whites. DE127. The State struck one black venire member and passed eight. In *Wright*, Colyer used 10 of 10 strikes against white venire members. *Id*. The State did not strike a single black venire member in *Wright*. *Id.*; DE126. The discrepancies seen in Colyer's prosecutions are stark:[52]

[52] *See* DE126.



Colyer testified repeatedly that he struck jurors who expressed death penalty reservations. *GWA* HTpp 792, 814, 817, 855, 932-33. Indeed, in the statistical study of Cumberland County, death penalty views were the strongest predictor of strikes. *GWA* HTpp 354-56; DE120. But, in the upside-down world of *Burmeister* and *Wright*, Colyer repeatedly accepted as jurors African Americans with strong death penalty reservations.

In *Burmeister*, Colyer passed African-American venire member Lorraine Gaines, who said it would be "hard" and "difficult" for her to vote for the death penalty. DE132. Colyer also passed African-American potential juror Betty Avery who stated that, because of her religious views, "I don't believe in the death penalty.

I'm afraid." Avery also said she thought the death penalty was "kind of harsh." DE133.

Likewise, in *Wright*, Colyer passed African-American potential juror Tina Hooper. Hooper said, "That's kind of a hard one. I really wouldn't like someone to be killed." Hooper also stated, "I'd rather for a person not to be killed." Later she added, "I would probably want to have life imprisonment if they didn't pull the trigger." DE153, pp 519, 523.

On his copies of the jury questionnaires of passed African-American venire members, Colyer wrote notes about potential jurors' death penalty views. Thus, Colyer consciously elected to pass jurors despite being aware of reasons that, in other cases, he used to justify peremptory strikes. DE131-33.

Colyer's creation of a race-based list of all African-American potential jurors in *Burmeister* was additional evidence that race played a predominant role in jury selection. DE127. Colyer recorded the race of each prospective juror on his jury chart list, along with strike information. DE127. He tallied the prospective jurors by race and gender. *Id*. In addition, Colyer created a separate sheet entitled "Jury Composition/History," where he listed the seat, race and gender, and notes for only the African-American venire members. DE168. The creation of this segregated list is persuasive evidence that race consciousness was very important in Colyer's thinking about jury selection generally.

3. Colyer's "Jury Strikes" Notes in Augustine.

Defendant presented the results of Colyer's race-based jury selection research, including notes that disparaged African-American jurors on the basis of group characteristics and demonstrated Colyer's reliance on race and racial stereotypes in jury selection. DE98-103.

Golphin's case was sufficiently notorious that it was tried before a jury chosen in Johnston County, rather than Cumberland County. *GWA* HTpp 825-27. Similarly, Augustine's case was tried before a jury chosen in Brunswick County. Prior to each of their trials, the prosecutors met with law enforcement to discuss the jury panel and to investigate juror neighborhoods. DE158; DE98-103.[53]

In *Augustine,* Colyer met with members of the Brunswick County Sheriff's Department to review the jury summons list for Augustine's trial. Because a change of venue had been ordered and Colyer had never tried a case in Brunswick County, Colyer also asked these officers about different neighborhoods. The purpose of the meeting is clear from the notes. Colyer was trying to find out which citizens to

[53] Although Colyer testified that the prosecutors made "one or two visits" to Johnston County, he did not think they discussed neighborhoods, or the jury list. *GWA* HTpp 997-98. As the notes themselves reveal, and prosecutor Margaret Russ initially conceded, the prosecutors sought information from law enforcement about the "areas of the county" that might be helpful in jury selection. *GWA* HTpp 1356-57; *see also* DE158, p 1 (should avoid juror "because of where he lives," as "he lives in a bad area"); DE158, p 2 (avoid juror who "lives on Chickpee Rd. – We don't want anyone who lives on this road or in Gaines Mobile Home Park").

exclude from jury service. Hence the heading he wrote on each of the six pages, "Jury Strikes." Colyer listed potential jurors and wrote brief descriptions of them. DE98-103; *GWA* HTpp 183-86, 998.

The notes are direct evidence that race played a role in jury selection in Augustine's case based on the explicit references to race in the notes, the notes' equation of "black" neighborhood with "high crime," and racially biased comments about prospective jurors. While we don't have the notes in Golphin's case, a reasonable inference is that such notes would similarly reflect Colyer's thoughts and significant issues related to Golphin's potential jurors. The *Augustine* notes reflect that Colyer treated black and white potential jurors differently based on race. Colyer described African-American potential juror Tawanda Dudley as "ok" and noted that she was a member of a "respectable black family." DE102. Colyer did not describe a single white juror as okay because he or she was from a "respectable white family."

Colyer's notes reveal very different views of criminal records for black and white jurors. For example, African-American potential juror Jackie Hewett was castigated as a "thug[]" in view of his substantial criminal record, while Christopher Ray, who had a comparable record, but was white, was sympathetically described as a "n[e'er] do well." DE99-100; *GWA* HTpp 87-89. White venire member Tony Lewis who had been involved in "trafficking marijuana" in the early 1980's was described as a "fine guy." DE103; *GWA* HTpp 88-89.

While Colyer disparaged African-American potential juror Clifton Gore as a "bl[ac]k wino", the record illustrates Colyer's differential treatment of Gore and other potential jurors. The State ran criminal record checks on potential jurors. DE104. Gore had no alcohol-related offenses. In contrast, white potential juror Ronald King had a DWI conviction. However, unlike Gore who was denigrated as not just a "wino" but a black one, King was forgivingly described as a "country boy" who merely "drinks" and was "ok." DE99; *GWA* HTpp 86-87; DE104.

Colyer's notes concerned a disproportionate number of African Americans, and nine of the 10 neighborhoods and streets written in his notes were predominantly populated by African Americans. DE166. It is troubling that a number of African-American citizens Colyer listed in his "Jury Strikes" notes were condemned for living in a black neighborhood, rather than on the basis of their individual characteristics. DE98-99. Thus, despite having no criminal convictions herself, African-American venire member Shirley McDonald was condemned because she lived in Leland, North Carolina, which Colyer's notes described as a "bl[ac]k/high drug" area. DE99; *GWA* HTp 89.

Colyer clearly used the "Jury Strikes" notes at trial as can be seen in his questioning of African-American venire member Mardelle Gore. Colyer's notes reveal his concern that she lived in Longwood, a so-called "bad area." Longwood is a predominantly African-American neighborhood and is one of the 10

geographic areas identified by Colyer in his "Jury Strikes" notes. DE103; *GWA* HTpp 206-07, 1070. During *voir dire*, Colyer asked Gore a number of questions about the location of Longwood. Gore described Longwood as located off Highway 904, and Colyer wrote this down in his "Jury Strikes" notes. DE103.

4. Other Documents Showing Colyer's Race-Consciousness.

Other written documents illustrating Colyer's race-conscious method of jury selection were exposed during the RJA litigation. Colyer testified that sometimes on jury questionnaires he circled information he thought was important. *GWA* HTp 976. On the jury questionnaire of Arnold Williamson, a potential juror in *Wright*, Colyer circled Williamson's race, African American. DE129. In *Burmeister*, Colyer's personal notes segregated African-American venire members by race and he made a separate list of the black potential jurors with brief descriptions of each one. DE168. He took similar actions in *Augustine* and *Golphin*. This is additional new evidence of Colyer's race consciousness in jury selection in capital cases.

5. Race was Consciously on Colyer's Mind whe Questioning John Murray.

At the RJA hearing, Colyer testified extensively about jury selection, including his statements and questions where he explicitly referred to race.[54]

[54] The basis for defense counsel's questions was DE137, an excerpt from the *voir dire* in *Golphin*.

See GWA HTpp 1024-26 (questions about race of juror who made "woods" comment), 1028-29 ("as a young black male"), 1030-34 (black history and culture), 1036-40 (noting of race of "woods" jurors when explaining his strike of Murray) and Statement of Case, *supra*. Colyer's explanations at trial for his jury strikes had never been challenged in the crucible of cross-examination previously. Despite Colyer's insistence at the RJA hearing that race played no role in his jury selection in this case, he admitted that Murray's race was consciously in his mind when he questioned Murray. *GWA* HTp 1028. If race was consciously on Colyer's mind when he questioned juror John Murray, it is reasonable to infer and believe that race was on Colyer's mind when he struck juror Murray.

6. Colyer's Disparate Treatment of Black and White Jurors.

As noted earlier, Colyer testified at the RJA hearing that his strike decisions were motivated by potential jurors' reservations about the death penalty or because jurors or family members had been charged with a crime. *GWA* HTpp 792, 800, 814, 817, 821, 835, 845, 851, 855.

In *Golphin*, Colyer struck African-American venire member Freda Frink in part because she had "mixed emotions" about the death penalty. Post-Hearing Brief, pp 80-81. Colyer passed white venire member Alice Stephenson who also said she had "mixed emotions" about the death penalty.

Similarly, in *State v. Eugene Williams*, a Cumberland County capital case tried in 2004, Colyer struck African-American venire member Teblez Rowe because of her purported weakness on the death penalty. Rowe nevertheless clearly stated she could follow the law and impose the death penalty. A white venire member, Michael Sparks, also said he was against the death penalty. However, like Rowe, Sparks said he could follow the law. Colyer passed Sparks. Post-Hearing Brief (App 538-39).

In *State v. John McNeill*, a 1995 Cumberland County capital case, Colyer struck African-American potential juror Rodney Berry in part because he said he could not vote for the death penalty for a felony murder conviction. Post-Hearing Brief (App 540). Colyer passed white venire member Anthony Sermarini, who also expressed hesitation about imposing the death penalty in a case of felony murder. *Id.*

In *Augustine*, Colyer said he struck African-American venire members Ernestine Bryant and Mardelle Gore because they had family members who committed crimes. Bryant's son had been convicted on federal drug charges four or five years before and was sentenced to 14½ years. He was still incarcerated. Six years before, Gore's daughter had killed her abusive husband after he threatened to kill her; she served five years in prison in Tennessee and had since been released and was working for Duke University Hospital. Post-Hearing Brief (App 565-66).

Also in *Augustine*, Colyer passed white venire members with family members who had criminal records. Melody Woods' mother was convicted of assault with a deadly weapon resulting in serious injury when she stabbed Woods' first husband in the back. Gary Lesh's stepson was convicted on drug charges in the mid-1990s, and received a five-year sentence; his uncle got into a shooting match with another man and both men died. Post-Hearing Brief (App 566-67).

The United States Supreme Court has encouraged "side-by-side comparisons of the black venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. Such an analysis of Mr. Colyer's strike patterns and history reveals evidence of disparate treatment of jurors, including jurors Frink, Murray, and Holder in this case.

7. Russ' Past Violations of Batson *and Persistent Denials of Discrimination.*

Another prosecutor at this trial was Margaret Russ. In 1998, the same year as Golphin's trial, Russ capitally prosecuted Maurice Parker. In *Parker*, the trial judge found Russ had violated *Batson v. Kentucky*, 476 U.S. 79 (1986). He sustained defense counsel's objection to the strike of African-American citizen Forrester Bazemore and seated Bazemore on the jury. DE147, 149, 155.

The transcript of *voir dire* in *Parker* shows that Russ said her "first concern" with Bazemore was his age. Russ said the State also considered Bazemore's "body language," which Russ described as "evasive" and "defensive." DE147, pp 444-45.

The trial judge interjected to point out that Russ had passed a white juror with the "very same birthday" as Bazemore. DE147, p 447. Ultimately, the trial court sustained the *Batson* objection. The court noted the disparate treatment of Bazemore and a white juror of the same age. DE147, p 451. The court also rejected Russ' demeanor reasons as pretextual. DE147, p 455.

At the RJA hearing, Defendants' attorneys questioned Russ about the sustained *Batson* objection in *Parker*. First, despite saying many times how much she respected the trial court[55] in *Parker*, Russ absolutely denied she had done anything improper or unlawful in attempting to strike a black juror in violation of the Fourteenth Amendment. *GWA* HTpp 1295 ("Because I didn't intentionally use race to strike a juror, sir."); 1302 ("The conduct was not unlawful."); 1305 ("It's just not true."); 1332 ("No, I don't think a ruling of a court on . . . *Batson* . . . is an indication that we are doing anything wrong.").

Russ' denial of clear past wrongdoing was not confined to her practices in *Parker*, nor was *Parker* the first time a court had found that Russ had engaged in deceitful conduct. In *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996), the Court of Appeals found that Russ' argument to the jury was "calculated to mislead or prejudice the jury." 121 N.C. App. at 313, 465 S.E.2d at 338 (internal citation

[55] *GWA* HTpp 1296-97, 1303-04, 1330, 1360-61.

omitted). When cross-examined about this, Russ refused to admit any wrongdoing on her part. *GWA* HTp 1257-67.

Given her firm belief that she had done nothing wrong in attempting to strike Bazemore for pretextual reasons, Russ did not change her method of jury selection after she was deemed to have violated *Batson*. *GWA* HTp 1336. Likewise, her superiors did nothing to suggest they believed Russ' constitutional violation was problematic. *GWA* HTpp 917, 1360. Importantly, there is no reason to believe her jury selection in the instant case differed in any way from her conduct in *Parker*.

8. Russ' Testimony Regarding Batson *Training.*

In 1995, the North Carolina Conference of District Attorneys put on a training called *Top Gun II*. Russ reported to the North Carolina State Bar that she attended this seminar. DE81A. Among the materials *Top Gun II* attendees received was a handout that looked like this:

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress – attire may show lack of respect for the system, immaturity or rebelliousness.
2. Physical Appearance – tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age – Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors – or those who vacillated in answering DA's questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

Top Gun II *Jury Voir Dire*

DE111.

The *voir dire* transcript in *Parker* shows convincingly that Russ used this cheat sheet in responding to defense counsel's *Batson* objection. First, the reasons she gave appear on the cheat sheet. Age is number three and body language is number five. Russ' description of Bazemore's body language also tracks the cheat sheet. She claimed Bazemore "folded his arms and sat back in the chair away and kept his arms folded." DE147, p 445; *see also* DE147, p 449 ("body language that I clearly observed from here of the folded arms and so on, which those are very classic examples of body language that are negative"). Similarly, the cheat sheet says "arms folded, leaning away from questioner." DE111. Russ went on to talk about Bazemore's eye contact, a "juror negative" listed as number four on the cheat sheet. DE147, p 445. Russ also described Bazemore as "evasive." *Id*. This adjective appears at number seven on the cheat sheet, as does Russ' next voiced concern about Bazemore, namely that he gave "basically minimal answers." *Id*. On the cheat sheet, "mono-syllabic" comes right after "evasive."[56] DE111.

[56] Defense counsel vigorously contested Russ' characterization of Bazemore's demeanor. Counsel stated he had watched Bazemore "intently" during the individual *voir dire* and counsel "didn't notice any body language any different from any other persons in the courtroom, quite frankly, other jurors, parties, court personnel." DE147, p 448. Counsel disputed that Bazemore displayed any evasiveness, hostility, or defensiveness. *Id*. *See also* DE147, p 454 (defense counsel argues that there must be "some factual basis" for a demeanor reason). The trial judge ultimately rejected Russ' proffered demeanor reasons. *Id*. at 455. He described Bazemore as "thoughtful and cautious." *Id*. at 450.

Russ also used the language of the cheat sheet when addressing the trial judge in *Parker*. In summing up her reasons for striking Bazemore, Russ said, "Judge, just to reiterate, those three categories for *Batson* justification we would articulate is the age, the attitude of the defendant (*sic*) and the body language." DE147, p 447 (parenthetical in original).

It was at this point that the trial judge pointed out to Russ that she had passed a white juror with the same birthday as Bazemore. Russ responded, "Well, as I said, that's one of the factors, the body language and the attitude, which are *Batson justifications, articulable reasons* that the State relied upon." DE147, p 447 (emphasis added).

Later, after defense counsel's rebuttal, the trial judge asked Russ for case law on demeanor as a race-neutral reason. Russ' response makes clear she was reading straight from the *Top Gun II* handout:

> Judge, *I have the summaries here.* I don't have the law with me. I hadn't anticipated this, of course, *for articulable juror negatives*, and *body language, arms folded, leaning away from questioner are some of the things listed.*

DE147, p 452 (emphasis added). The *voir dire* transcripts in other cases tried by Russ, strongly suggest that Russ used the cheat sheet regularly in jury selection. DE156 (Russ' *voir dire* of juror Picart in *State v. Francisco Tirado & Eric Queen*); DE157 (Russ' *voir dire* of juror Radcliffe in *State v. Carlos Frinks*).

9. Powerful Statistical Evidence.

The MSU Study provided new, clear evidence of racially discriminatory strikes by prosecutors in NC, in Cumberland County, and in Defendant's own trial.

The strike ratio for strikes against black venire members in Golphin's own case was 2.0. The State struck five of the seven black venire members (71.4%), but only 24 of the 67 non-black venire members (35.8%). The strike disparity had an observed *p*-value < .10. There was only one black juror on Golphin's final jury. This disparity is even larger if the strike patterns for minorities and white venire members are compared. Of the group of 72 venire members questioned and struck or passed by the State, there were only eight minority venire members. The State struck six of the eight minority venire members (75.0%), and only 23 of the 66 White venire members (34.8%). The strike ratio for strikes against minority venire members in Golphin's own case was 2.15. There were no minorities, other than the single black juror, who served on Golphin's final jury.

The unadjusted statewide data reflected an odds ratio above 3.0 for 1998, the time of Golphin's trial. This disparity was also statistically significant. Similarly, the Cumberland County data reflected an odds ratio of approximately 4.0 for 1998, the time of Golphin's trial. These disparities were statistically significant.

The statutory window analysis is further evidence of disparate treatment of black venire members at the time of Golphin's trial. There were seven capital

proceedings in the MSU Cumberland study between September 23, 1987 and May 13, 2000. Looking only at those cases, the average rate of the State's strike ratio against black venire members in Cumberland County is 2.29.

The MSU researchers also developed a fully controlled logistic regression model for Cumberland County based upon carefully and scientifically selected statistically significant and relevant predictor variables that bore on the outcome of interest—the strike decisions by the prosecutors. With respect to Cumberland County, the MSU Study analyzed 100% of the venire members in the eleven capital cases. Out of approximately 65 candidate variables, O'Brien and Grosso selected eight non-racial explanatory variables for inclusion into the fully controlled logistic regression model shown on Table 13 of the MSU Study. These factors are highly representative of the explanations given by the Cumberland County prosecutors.

The predictive non-racial variables the MSU Study identified in Cumberland County and the results of the logistic regression analysis are:

Variable	**Odds Ratio**
Expressed reservation about death penalty	24.12
Unemployed	6.76
Accused of crime, or had close family/friend who was	2.21

Concerned that jury service would cause hardship	4.17
Job that involved helping others	2.69
Blue collar job	2.82
Expressed view that suggested bias or trouble following law, but the direction of bias is ambiguous	2.56
22 years of age or younger	4.00

After fully controlling for eight variables the Court finds are highly predictive for prosecutorial strike decisions, the race of the venire member is still statistically significant with a *p*-value <.01 and an odds ratio of 2.40, which is similar to the strike rate ratio seen in the unadjusted data.

D. <u>This Claim is Not Procedurally Barred.</u>

The superior court decided the State's claim of procedural bar as to constitutional violations in Defendant's favor. In an Order Denying State's Motion for Judgment on the Pleadings entered on 13 December 2012, the Superior Court found that "Defendants' constitutional claims are not procedurally barred because Defendants were not in a position to adequately raise those claims prior to the original RJA's enactment. *See* N.C. Gen. Stat. § 15A-1419(a)(1) and (3) . . . ." (App

456). This finding was supported by competent evidence[57] and was not clearly erroneous.

Although this Court vacated and remanded the superior court's orders granting relief in *State v. Augustine, Golphin, and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015), and *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015), the State did not seek *certiorari* review of, nor did this Court disturb, the superior court's finding that "Defendants were not in a position to adequately raise those claims prior to the original RJA's enactment." For this reason, the trial court's decision on the State's defense of procedural bar is final. *See Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (holding that the "substantial" procedural right to a change of venue vested because it was "secured, established and immune from further legal metamorphosis"); N.C. Gen. Stat. § 15A-1419(a)(2) (applying procedural bar where the "ground or issue underlying the motion was previously determined on the merits . . . upon a previous motion or proceeding"). Even though this issue is final, the defendant addresses below the evidence and legal arguments that support Judge Weeks' findings and conclusions.

In Golphin's direct appeal to this Court in 2000, he raised the claim that the State used its peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79

[57] The superior court deferred ruling on the State's motion until after the presentation of evidence by both parties.

(1986). N.C. Gen. Stat. § 15A-1419(a)(2) generally prohibits an MAR from raising an issue that "was previously determined on the merits upon an appeal from the judgment, or upon a previous motion or proceeding in the courts of this State or a federal court." However, North Carolina law also recognizes several exceptions to this general rule. Even assuming the applicability of any of the grounds for denial of relief listed in N.C. Gen. Stat. § 15A-1419(a), Golphin can show cause and actual prejudice pursuant to § 15A-1419(b)-(d). As explained below, the trial court properly found that Defendant's claim the State violated *Batson* by excluding African-American venire members from jury service was not procedurally barred, despite the fact that it was previously determined on the merits upon an appeal from his prior judgment.

1. Extensive New Evidence Supports Batson *Claim.*

New evidence exists today that didn't exist at the time of Golphin's trial or was unknown, and not reasonably discoverable, at the time of his trial. Only as a result of the RJA litigation has the following evidence become available to Defendant:

- New statistical evidence from the MSU Study which shows consistent racial disparities in the prosecutions use of peremptory strikes in prosecutorial strike decisions across North Carolina, in Cumberland County, and in Defendant's own case.

- New statistical evidence from the MSU Study, which demonstrates that statistical disparities in jury selection practices

persisted even after controlling for possible race-neutral explanations.

- New testimony from Defendant's prosecutors establishing that they engaged in racially-disparate treatment of black venire members in Defendant's case.

- New testimony from Defendant's prosecutors containing admissions about the role of race, and proxies for race, in their use of peremptory strikes.

- New testimony from Defendant's prosecutors establishing that they engaged in racially-disparate treatment of black venire members in other capital cases in Defendant's county of conviction.

- New documentary evidence showing the pre-occupation of race, including prosecutors' notes made pre-trial and during trial regarding black venire members.

- New documentary evidence of one of Defendant's prosecutors utilizing a "pat list" of excuses to circumvent *Batson*'s protections.

With particular regard to the critical new testimony by prosecutors, Defendant was not in an adequate position to raise that evidence prior to the passage of the RJA because access to that evidence was unavailable as a matter of law. In *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988), this Court held "that a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney." However, the RJA expressly made prosecutor testimony available to Defendant for the first time. *See* N.C. Gen. Stat. § 15A-2011(b).

2. The General Assembly Intended to Eschew Procedural Bars for the Litigation of Constitutional Claims of Racial Discrimination in Capital Cases.

The original RJA contained a provision eliminating procedural bars for all claims, statutory or constitutional, alleging that race was a significant factor in charging or sentencing proceedings. Pursuant to N.C. Gen. Stat. § 15A-2012(b), "notwithstanding any other provisions or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief." Even though the General Assembly repealed N.C. Gen. Stat. § 15A-2012 in the Amended RJA, SL 2012-136 § 4, consistent with the Due Process and Law of the Land clauses of the state and federal constitutions, it cannot retroactively reimpose procedural bars once they had been forgiven. Moreover, it is not at all clear that the General Assembly intended to do so.

Pursuant to Session Law 2013-154, § 5, enacted into law on 19 June 2013, defendants have the right to challenge race discrimination in postconviction proceedings pursuant to the State and federal constitutions, notwithstanding any statutory procedural bars. Thus, even assuming this bill retroactively applies to defendants' postconviction claims, those claims cannot be barred because the General Assembly clearly intended that all constitutional claims of racial

discrimination, such as the claim raised here, be decided on the merits. According to the statute:

> The intent and purpose of this section, *and its sole effect*, is to remove the use of statistics to prove purposeful discrimination in a specific case. Upon repeal of Article 101 of Chapter 15A of the General Statutes, *a capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race*, that the jury that hears his or her case is impartial, and that the trial was free from prejudicial error of any kind. These rights are protected through multiple avenues of appeal, including direct appeal to the North Carolina Supreme Court, and discretionary review to the United States Supreme Court; *a postconviction right to file a motion for appropriate relief at the trial court level where claims of racial discrimination may be heard*; and again at the federal level through a petition of habeas corpus. A capital defendant prior to the passage of Article 101 of Chapter 15A of the General Statutes had the right to raise the issue of whether a prosecutor sought the death penalty on the basis of race, whether the jury was selected on the basis of race, or any other matter which evidenced discrimination on the basis of race. All these same rights, existing prior to the enactment of Article 101 of Chapter 15A of the General Statutes, remain the law of this State after its repeal.

Session Law 2013-154, § 5(b). Furthermore, § 5(d) provides that "[e]xcept as otherwise provided in this subsection, this section is retroactive and applies to any motion for appropriate relief filed pursuant to Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act."

The plain meaning of this section requires the courts to hold that the legislature did not intend to procedurally bar constitutional claims of race discrimination in postconviction proceedings. First, the legislature stated that the

"intent and purpose of this section, and its sole effect is to remove the use of statistics to prove purposeful discrimination." The purpose was clearly not to reinstate procedural bars to constitutional claims.

Second, the legislature specifically stated in § 5(b) that "a capital defendant retains all of the rights which the state and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears his or her case is impartial and that the trial was free from prejudicial error of any kind." This statutory language would be meaningless unless defendants who raised constitutional claims in postconvictions proceedings could have those claims heard on the merits.

Third, the legislature specifically promises capital defendants that "claims of racial discrimination may be heard" and are protected by "a postconviction right to file a motion for appropriate relief at the trial court level." Again, this right would be entirely illusory if procedural bars robbed the defendants of those rights.

Finally, the legislature stated in § 5(b) that "a capital defendant prior to the passage of Article 101 of Chapter 15A of the General Statutes had the right to raise the issue . . . of whether the jury was selected on the basis of race," and that after the repeal the defendant retained the "same right." At a minimum, this means that if the defendant first became aware of evidence of race discrimination after the passage of Article 101, he could still raise this constitutional claim. *See, e.g.*, *State v. Robbins*,

319 N.C. 465, 488, 356 S.E.2d 279 (1987) (ruling on the merits of a *Batson* claim notwithstanding the absence of an objection during jury selection because "we find it difficult to hold that a defendant has waived a right which he did not know existed at the time of trial," and that the court "ordinarily feel[s] compelled" to consider arguments of a defendant "on trial for his life"); *Amadeo v. Zant*, 486 U.S. 214, 224 (1988) (finding cause to excuse a procedural bar where county officials concealed a memorandum hand-written by the prosecutor demonstrating intentional racial discrimination in the selection of the jury pool and therefore was not "reasonably available" to petitioner's lawyers).

3. Retroactive Change in Law.

North Carolina General Statute § 15A-1419(a)(2) also provides that an MAR may raise an issue previously determined on appeal if, "since the time of such previous determination there has been a retroactively effective change in the law controlling such issue." Since his *Batson* claims were rejected by the trial and appellate courts, there has been a retroactive change in the law controlling the presentation and evaluation of *Batson* claims. Specifically, this Court has previously recognized that the *Miller-El* line of cases constitutes a significant change in the controlling law that is retroactively applicable. In *State v. Barden*, this Court held that the trial court erred when it found that the defendant had not established a *prima facie* case of discrimination in jury selection; the court thus remanded the *Batson*

claim and ordered the trial court to hold a hearing so the State could present race-neutral reasons for striking prospective jurors. 356 N.C. 316, 345, 572 S.E.2d 108, 128 (2002) (*Barden I*). The trial court held that hearing in 2003 and thereafter denied the defendant's *Batson* claim. *State v. Barden*, 362 N.C. 277, 279, 658 S.E. 2d 654, 655 (2008) (*Barden II*). The defendant again appealed this denial to this Court, and on April 11, 2008 in *Barden II*, the court remanded his *Batson* claim for a second hearing in light of *Snyder*, *Collins*, and *Miller-El II* and specifically instructed the trial court to apply those intervening federal precedents. 362 N.C. at 279-80, 658 S.E.2d at 655-56.

Snyder, *Collins*, and *Miller-El II* have been retroactively applied by the federal courts. Therefore, by remanding for a second look at Barden's *Batson* claim in view of *Snyder*, *Collins*, and *Miller-El II*, the court in *Barden II* recognized that the *Batson* framework clarified in those federal cases had not previously been employed by North Carolina courts. *See* Amanda S. Hitchcock, Recent Development, "*Deference Does Not By Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. Rev. 1328, 1344-56 (2006) (explaining how the North Carolina Supreme Court's historical approach to *Batson* claims differs from the framework clarified in *Miller-El II*). Accordingly, § 15A-1419(a)(2) permits Golphin to raise his *Batson* claim in this pleading because,

since his 2000 direct appeal, there has been a "retroactively effective change in the law" controlling *Batson* claims.

E. Conclusion.

An examination of all the evidence that now exists shows that Golphin's rights under the federal and state constitutions were violated by the State's exercise of its peremptory challenges in a racially discriminatory manner. This issue is not procedurally barred, thus the issue is ripe for consideration by the Court. Based on the foregoing and pursuant to *Batson*, *Miller-El*, and their progeny, Defendant requests that the Court find that his trial was marred by intentional discrimination in jury selection, and vacate his convictions and death sentence. In the alternative, Defendant requests that the Court remand his case for an evidentiary hearing.

CONCLUSION

Further proceedings in this matter are barred by the double jeopardy clauses of the state and federal constitutions and N.C. Gen. Stat. § 15A-1335. Double jeopardy protections apply to Racial Justice Act proceedings, guided by statutory standards, where the sentencer made factual findings sufficient to establish a legal entitlement to a life sentence.

In prior proceedings, the State raised and this Court considered challenges to the superior court's order granting the MAR. The State did not challenge and this Court did not review the separate judgment and commitment order resentencing

Tilmon Golphin to life imprisonment without parole. The State has waived any potential challenge to the judgment and commitment; the life sentence without possibility of parole is now final and irrevocable.

In prior proceedings, this Court granted the State relief on two claims, a motion for continuance and the joinder of parties that were not properly raised and preserved in the State's pleadings to this Court. Golphin did not previously have an adequate opportunity to demonstrate that these issues had no merit. In the interest of justice, this Court should exercise its Rule 2 power to reconsider its prior order.

The Superior Court dismissed Golphin's Motion for Appropriate Relief filed pursuant to the Racial Justice Act by addressing a statutory provision not mentioned in this Court's remand order and not addressed in the State's prior petition for writ of *certiorari* or in its brief. This is not the result this Court had contemplated and exceeded the scope of the Court's mandate in violation of the law of the case.

The retroactive application of the RJA repeal statute to Tilmon Golphin violates his vested rights, prohibition against *ex post facto* laws, separation of powers, and the prohibition against Bills of Attainder. Furthermore, Golphin is entitled to relief from his unconstitutional conviction and sentence of death pursuant to *Batson* and its progeny, and the Eighth Amendment to the United States Constitution and Art. I, § 27 of the North Carolina Constitution.

The Superior Court addressed just two constitutional challenges to the RJA repeal in its opinion: *ex post facto* and vested rights, and did so without resolving disputed issues of material fact. The Court declined to address the following constitutional defenses to the application of the RJA repeal to Tilmon Golphin: law of the case, double jeopardy, separation of powers, prohibition against bills of attainder, or the substantive constitutional challenges to Golphin's conviction and sentence of death including a *Batson* claim and a claim pursuant to the cruel and/or unusual punishment clauses of the state and federal constitutions. The Superior Court denied discovery as to all of these claims and denied an evidentiary hearing.

When the General Assembly debated the repeal of the Racial Justice Act, the Cumberland County Superior Court had already found pervasive racial discrimination in the prosecutors' use of peremptory challenges in Cumberland County and in Tilmon Golphin's case. Some legislators predicted there would be efforts to sweep the findings under the rug, but that the court needed to intervene to "clean up this mess":

> When we passed the Racial Justice Act, we did not know what we would find when we looked at picking juries. You've been read[ing] what the judge found. He found handwritten notes from the DAs that they were using race to throw people off the jury. Now, the genie is out of the bottle. When we passed the Racial Justice Act, none of us knew that was going on. It can be any number of other things during the trial. Well, we told the courts, "look at these cases and see if it's there. If it is, give them life without parole and let's go forward and sin no more." And we found that there is – I believe in virtually every case that's been

> heard. I haven't kept up with how many have been heard, but in the ones that I've heard about they have found this problem. Now the answer apparently today is – "Uh, I don't want to talk about it anymore." …And I don't know what's going to come of all this, but you can't put this genie back in the bottle. And I'm telling you, we gave these people a right to be heard. The ones that have been heard, they found a problem, they remedied it. The world is still as safe as it was before the hearings. And we need to continue to let the court clean up this mess.

Senator Nesbitt, North Carolina SB-306 Capital Punishment/Amendments, Debate on 2nd and 3rd Readings, 3 April 2013 (App 601).

As Senator Nesbitt suggested during debate, the General Assembly, in response to the demands from victims in Tilmon Golphin's case and three others, sought to put the genie all the way back in the bottle. Those same cries call to this Court to demean its power as an independent branch of government and disregard evidence of racial discrimination in Tilmon Golphin's jury selection, ignore that he had been resentenced to life imprisonment, avoid addressing statutory and constitutional issues, and short-circuit discovery and an evidentiary hearing. The laws of North Carolina, and the constitutions of North Carolina and of the United States demand more.

Respectfully submitted, this the 16th day of July, 2018.

Electronically submitted
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N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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ATTORNEYS FOR
TILMON CHARLES GOLPHIN

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing pleading, by electronic means, upon:

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This the 16th day of July, 2018.

Electronically submitted
Jay H. Ferguson

NO. 441A98-4 DISTRICT TWELVE

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
vs.	)	From Cumberland County
	)	
TILMON CHARLES GOLPHIN	)	
	)	
Defendant/Appellant.	)	

****

APPENDIX TO DEFENDANT-APPELLANT'S BRIEF

****

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

****

STATE OF NORTH CAROLINA

v. File No. 01 CRS 65079

QUINTEL MARTINEZ AUGUSTINE,
Defendant.

****

STATE OF NORTH CAROLINA

v. File Nos. 98 CRS 34832, 35044

CHRISTINA SHEA WALTERS,
Defendant.

****

STATE OF NORTH CAROLINA

v. File Nos. 97 CRS 47314—15

TILMON CHARLES GOLPHIN,
Defendant.

****

STATE OF NORTH CAROLINA

v. File No. 91 CRS 23143

MARCUS REYMOND ROBINSON,
Defendant.

****

ORDER

THESE MATTERS pending in the Superior Court for Cumberland County coming on to be heard and being heard on 29 November 2016 before the undersigned Superior Court judge presiding, having been commissioned to consider and rule upon the respective Motions for Appropriate Relief ("MARs") filed pursuant to the Racial Justice Act for each of the above-captioned defendants;

AND IT APPEARING TO THE COURT that each of the defendants was represented by counsel; that counsel for each defendant and counsel for the State stipulated and agreed that the matters for hearing on 29 November 2016 could be heard in Mecklenburg County rather than Cumberland County; and that at the conclusion of the hearing on 29 November 2016 all counsel stipulated and agreed in open court that the court could enter this Order after the expiration of the session and outside the county, the prosecutorial district and judicial division;

AND IT FURTHER APPEARING TO THE COURT that the hearing on 29 November 2016 was not scheduled as an evidentiary hearing, and all counsel were so-informed prior to the hearing; that no evidence was presented, and no evidence was received by the court at the hearing; that the court previously had ordered that only a question of law would be considered by the court; that the sole question presented involves a consideration of Senate Bill 306, Session Law 2013-14, Sections 5. (a), (b) and (d), and specifically, the sole question that was considered by the court at the hearing was as follows: "Did the enactment into law of Senate Bill 306, Session Law 2013-14, on 19 June 2013, specifically Sections 5. (a), (b) and (d) therein, render void the Motions for Appropriate Relief filed by the defendants Augustine, Walter, Golphin and Robinson pursuant to the provisions of Article 101 of the General Statues of North Carolina?"; that this is a question of law that applies equally to each defendant, and that the court, in its discretion, heard arguments of counsel for each defendant and the State at one hearing, rather than conducting four separate hearings to hear essentially the same arguments four times; that the court is of the opinion that this was permissible because no evidence was presented or received during the hearing; and that the

court was aware that if evidentiary hearings were to be conducted, then it would have been error to hear jointly the defendants' Motions for Appropriate Relief;

AND THE COURT, taking judicial notice of its own records, the legislation of the General Assembly of North Carolina pertaining to these matters and applicable legal authorities including, but not limited to, appellate decisions and Orders of the Supreme Court of North Carolina, finds the following:

1. In the Superior Court of Cumberland County each defendant was indicted and convicted of first-degree murder and sentenced to death. Marcus Robinson was sentenced to death in 1994 for killing Erick Tornbloom, age 17, in 1991. Quintel Augustine was sentenced to death in 2002 for killing Roy Turner, a Fayetteville police officer, in 2001. Tilmon Golphin was sentenced to death in 1998 for killing two law enforcement officers, North Carolina Highway Patrol Trooper Lloyd E. Lowry and Cumberland County Deputy Sheriff David Hathcock, in 1997. Christina Walters was sentenced to death in 2000 for killing Susan Moore and Tracy Lambert as part of a gang initiation in 1998.

2. All of these convictions were appealed, and all convictions were affirmed in the Supreme Court of North Carolina. All Petitions for Writ of Certiorari for the defendants have been denied by the Supreme Court of the United States. State v. Robinson, 342. N.C. 74, 463 S.E.2d 218 (1995); cert. denied, Robinson v. North Carolina, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996); State v. Augustine, 359 N.C. 709, 616 S.E.2d 515 (2005); cert. denied, Augustine v. North Carolina, 548 U.S. 925, 165 L. Ed. 2d 988 (2006); State v. Golphin, 352 N.C. 364, 379-88, 533 S.E.2d 168 (2000); cert. denied, Golphin v. North Carolina, 532 U.S. 931, 149 L. Ed. 2d 305 (2001); State v. Walters, 357 N.C. 68, 588 S.E.2d 344 (2003); cert. denied, Walters v. North Carolina, 540 U.S. 971, 157 L. Ed. 2d 320 (2003).

3. The Racial Justice Act ("RJA") was enacted by the General Assembly of North Carolina in 2009. This legislation provided that a defendant sentenced to death could file a Motion for Appropriate Relief and offer evidence that sought to prove, through statistical or other evidence, "that race was a significant factor in decisions to seek or impose the sentence of death in the county,

the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed" in any capital case in North Carolina, wherever tried or indicted in the State. N.C. Gen. Stat. § 15 A-2011. In other words, statistical evidence of race playing a significant factor in a case or cases anywhere in the State could be considered by the court in an evidentiary hearing on a defendant's Motion for Appropriate Relief filed under the RJA.

4. The murders committed by the defendants occurred before the enactment of the RJA.

5. Each of the defendants filed a Motion for Appropriate Relief under the RJA in August of 2010.

6. The RJA was amended in 2012 and then repealed by the General Assembly on 19 June 2013. Session Law 2013-154. (The act repealing the RJA in 2013, is sometimes referred to as "the RJA Repeal" in this order.) Each of the defendants' MARs was filed prior to the RJA Repeal. Senate Bill 306, Session Law 2013-14, enacted into law on 19 June 2013, in Sections 5. (a), (b) and (d) therein, provided as follows:

> **SECTION 5. (a)** Article 101 of Chapter 15A of the General Statutes is repealed.
>
> **SECTION 5. (b)** The intent and purpose of this section, and its sole effect, is to remove the use of statistics to prove purposeful discrimination in a specific case. Upon repeal of Article 101 of Chapter 15A of the General Statutes, a capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears his or her case is impartial, and that the trial was free from prejudicial error of any kind. These rights are protected through multiple avenues of appeal, including direct appeal to the North Carolina Supreme Court, and discretionary review to the United States Supreme Court; a post-conviction right to file a motion for appropriate relief at the trial court level where claims of racial discrimination may be heard; and again at the federal level through a petition of habeas corpus. A capital defendant prior to the passage of Article 101 of Chapter 15A of the General Statutes had the right to raise the issue of whether a prosecutor sought the death penalty on the basis of race, whether the jury was selected on the basis of race, or any other matter which evidenced discrimination on the basis of race. All these rights, existing prior to the enactment of Article 101 of Chapter 15A of the General Statutes, remain the law of this State after its repeal.
>
> **SECTION 5. (d)** Except as otherwise provided in this subdivision, this section is retroactive and applies to any motion for appropriate relief filed pursuant to Article 101

of Chapter 15A of the General Statutes prior to the effective date of this act. All motions filed pursuant to Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act are void. This section does not apply to a court order resentencing a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statues prior to the effective date of this act if the order is affirmed upon appellate review and becomes a final Order issued by a court of competent jurisdiction. This section is applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act, and the Order is vacated upon appellate review by a court of competent jurisdiction.

7. On 20 April 2012, after an evidentiary hearing conducted by The Honorable Gregory A. Weeks pursuant to the RJA, the sentence of death as to the defendant Robinson was vacated, and the defendant Robinson was re-sentenced to life without parole.

8. On 13 December 2012, after an evidentiary hearing conducted by The Honorable Gregory Weeks pursuant to the RJA, the sentences of death as to the defendants Golphin, Augustine and Walters were vacated, and the defendants were re-sentenced to life imprisonment without parole.

9. On 18 December 2015 the Supreme Court of North Carolina vacated Judge Weeks' orders that had granted each defendant's RJA Motion for Appropriate Relief. State v. Augustine, Golphin and Walters, 368 N.C. 594, 780 S.E.2d 552 (2015); see also State v. Robinson, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015).

10. Upon remand, the State moved to dismiss each defendant's RJA Motion for Appropriate Relief upon the repeal of the RJA by the General Assembly, as detailed above. On 19 August 2016 the Chief Justice of North Carolina assigned the undersigned judge to preside over these matters.

ANALYSIS AND CONCLUSIONS OF LAW

The Racial Justice Act was repealed by the General Assembly with an effective date of 19 June 2013. This repealing legislation, noted above, unambiguously expressed the conclusion of the legislature that statistical evidence should not and could not be used to prove purposeful racial

discrimination in a specific case. However, Section 5. (b) specifically noted that "a capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears the case is impartial, and that the trial was free from prejudicial error of any kind," supra, listed the various appellate avenues available to a defendant in State and federal courts, and finally noted that "[a]ll these same rights, existing prior to the enactment of Article 101 of Chapter 15A of the General Statutes, remain the law of this State after its repeal." supra. The act preserved the right of anyone to a fair trial, from indictment to judgment, free from racial bias, but prohibited statistical evidence from unrelated cases from admission in evidence in a specific case.

The question becomes whether this legislation is effective as to the MARs in the cases before this court, i.e., did the enactment of the repealing legislation render void as a matter of law the MARs filed by the defendants in these cases as provided in Section 5. (d), supra? On its face, it appears that the answer to this issue must be "yes." The act provides that it is retroactive and applies to any MAR filed pursuant to the RJA before 19 June 2013, and that all MARs filed before that date are void. Each MAR in these cases was filed prior to the effective date of the act, 13 June 2013. Judge Weeks' resentencing orders to life imprisonment without parole were not affirmed upon appellate review, and because these orders were subject to appellate review, and were vacated, they were not final orders by a court of competent jurisdiction. If Judge Weeks' orders had been affirmed upon appellate review, and thus became final orders by a court of competent jurisdiction, then Section 5. (d) of the RJA Repeal would not apply to these cases. Instead, Judge Weeks' orders in each of these cases were vacated by the Supreme Court of North Carolina upon appellate review and were remanded to this court. The retroactive repealing legislation unequivocally provides that it "is applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act (i.e., 19 June 2013) and the Order is vacated upon appellate review by a court of competent jurisdiction." supra. Each of these cases fits squarely within this legislation, and each MAR is rendered void by the terms of the RJA Repeal.

The defendants contend that the repeal of the Racial Justice Act violates their constitutional rights or limits access to the protections from discrimination that already exist under the North

Carolina and United States Constitutions. It is noted that there is a presumption that legislation enacted by the General Assembly is constitutional. However, the courts in this State have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people. Glenn v. Bd. of Educ., 210 N.C. 525, 529-30, 187 S.E. 781,784 (1936); City of Asheville v. State of North Carolina, et al., __N.C.__, __S.E. 2d__; 2016 LEXIS 1133 (N.C. Dec. 21, 2016).

Central to the questions raised by each defendant is their contention that upon the enactment of the RJA and the filing of their respective MARs each became "vested" in the right to proceed under the RJA, and that once vested this right cannot be taken away by subsequent legislation. They contend that this right to offer statistical evidence from other cases across the State cannot be taken from them without violating the constitutional protection afforded by the Due Process Clause, the Ex Post Facto Clause, the Double Jeopardy Clause, the prohibition against Bills of Attainder, and the Eight Amendment's bar on cruel and unusual punishment. It is also alleged that the retroactive application of the RJA Repeal violates the Separation of Powers and Judicial Powers Clauses of the North Carolina Constitution. Once they filed their MARs, their right to offer statistical evidence was effectively written in stone, and that right cannot be repealed without abridging the most basic of our rights as citizens of this country.

If the rights provided by the RJA became vested in the defendants upon the filing of their MARs, then the General Assembly could not, by enacting the RJA Repeal, deprive the defendants of those statutory rights, arguably, without running afoul of certain constitutional provisions. However, if the defendants' rights under the RJA were not vested upon the filing of their MARs, the defendants' claims are now moot and the right to proceed in these MARs no longer exists.

The question of when one's rights are vested under a statute has received attention by several appellate courts. When a statute providing a particular remedy is unconditionally repealed the remedy is gone. Spooner's Creek Land Corp. v. Styron, 276 N.C. 494, 496, 172 S.E. 2d 54, 55 (1970); Heath v. Bd. of Commissioners, 292 N.C. 369, 233 S.E. 2d 889 (1997). The RJA Repeal was unconditional. In order to permit a proceeding to survive the repealing of the underlying statute authorizing the proceeding there must be a saving clause in the repealing act. In

re Incorporation of Indian Hills, 280 N.C. 659,663, 186 S.E. 2d 909, 912 (1972). The RJA Repeal did contain a saving clause, but it does not apply to the cases now before this court. The saving clause in the RJA Repeal applies only to those cases in which there was a final judgment entered before the effective date of 19 June 2013. Judge Weeks' re-sentencing orders were vacated by the North Carolina Supreme Court and therefore were not final judgments, as noted above. Therefore, the saving clause in the RJA Repeal does not apply to these cases.

Until the defendants' rights bestowed by the RJA become vested the Supreme Court has ruled that these rights can be "destroyed by the Legislature." The Legislature may alter a provision of law at any time before the rights of the parties are settled. A right is vested when the right becomes absolute so that no subsequent repeal can invalidate it. Blue Ridge Interurban R. Co. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913). i.e., until a judgment becomes final. That did not occur in these cases. An order or judgment is not final until it has undergone appellate review or the time for discretionary review has expired. See e.g., Allen v. Hardy, 478 U.S. 255, 258 n. 1, 92 L. Ed 2d 199, 204 n. 1 (1986); Linkletter v. Walker, 381 U.S. 618, 622 n. 5, 14 L. Ed. 2d 601, 604 n. 5 (1995).

The Supreme Court "vacated" the orders by which the defendants' were granted relief under the RJA. To vacate means "[t]o anul; to set aside; to cancel or rescind; to render an act void; as to vacate an entry of record, or a judgment." Alford v. Shaw, 327 N.C. 526, 544 n.6, 398 S.E. 2d 445, 455, n.6 (1990). "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless." Stafford v. Gallops, 123 N.C. 19, 21-22, 31 S.E. 265, 266 (1898); Hart v. Thomasville Motors, Inc., 244 N.C. 84, 90, 92 S.E. 2d 673, 678 (1956).

A case decided by the North Carolina Supreme Court is urged upon this court in support of the argument that the defendants' rights in the RJA were vested. In State v. Keith, 63 N.C. 140, 1869 N.C. Lexis 19 (1869) the defendant Keith, a former Confederate officer, was charged with murdering individuals while serving as a soldier. The Amnesty Act of 1866-67, 1866 N.C. Acts §1, contained a full pardon for all homicides and felonies committed by officers or soldiers, whether of the United States or of the Confederacy, done in the discharge of any duties imposed on them, purporting to be a law of either government, or by virtue of any order

emanating from any officer. It was a remission of guilt—not only of the punishment of guilt. Once amnesty was granted it was as if the offense never occurred. The succeeding legislature later abrogated the amnesty previously granted. The Supreme Court held that the revocation of the amnesty provision was an *ex post facto* law that took away the defendant's **vested** right to immunity.

While of historical interest, Keith is not applicable in the cases before this court. The granting of amnesty was a final determination, and is therefore different entirely from the issue before this court. The Supreme Court in Keith held that amnesty is "irrepealable", like a "pardon," and quoted Chief Justice John Marshall comparing an amnesty to "a deed vesting rights." Amnesties and pardons are, in effect, final judgments. No further proceedings are required or contemplated, so the benefits of provisions of an amnesty or pardon would vest immediately. The RJA, by contrast, established a rule that statistical evidence would be admissible in an MAR evidentiary hearing. However, as shown above, the rights conferred by the RJA were not vested in the defendants because they were not confirmed by a final judgment by a court of competent jurisdiction, and such rights were in fact abrogated by the RJA Appeal.

Although this court does not base this Order upon constitutional grounds, it is noted that the RJA Repeal is not an *ex post facto* law. The North Carolina Supreme Court, quoting Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 11 L. Ed. 2d 30, 38-39 (1990) and Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 648, 650, 3 Dall. 386 (1798), held that "...the *ex post facto* prohibition applies to: "Every law that **changes the punishment**, and inflicts a **greater punishment**, than the law annexed to the crime, when committed. Jones v. Keller, 364 N.C. 249, 259, 698 S.E. 2d 49, 57 (2010) (emphasis in original).

This court decided these cases based upon an analysis of the statute in question and the applicable law pertaining to the question presented. The court has not found it necessary to reach the questions of constitutional law raised by the defendants except as discussed in Keith, supra.

Based upon the foregoing findings and after carefully considering the applicable law, this court concludes as a matter of law that the Motions for Appropriate Relief filed on behalf of the defendants should be dismissed.

IT IS THEREFORE ORDERED that the Motions for Appropriate Relief filed by the defendants Qunitel Martinez Augustine, Christina Shea Walters, Tilmon Charles Golphin and Marcus Reymond Robinson in their respective cases, as shown in the caption, shall be, and the same are hereby DISMISSED.

This Order was prepared by the undersigned, and was signed on this the 23d day of January, 2017, after the expiration of the session and outside the district and judicial division pursuant to the stipulation of all counsel in open court, and shall be deemed entered on the record when filed with the Clerk of Superior Court for Cumberland County.

W. Erwin Spainhour

W. Erwin Spainhour
Superior Court Judge Presiding

STATE OF NORTH CAROLINA COUNTY OF CUMBERLAND		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	
	)	
	)	97 CRS 47314-15 (Golphin)
v.	)	98 CRS 34832, 35044 (Walters)
	)	01 CRS 65079 (Augustine)
	)	
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	
QUINTEL AUGUSTINE	)	
	)	
Defendants	)	

ORDER GRANTING
MOTIONS FOR APPROPRIATE RELIEF

This case is before the Court on Defendants' claims pursuant to the Racial Justice Act (RJA) that they are entitled to vacatur of their death sentences because race was a significant factor in the prosecution's use of peremptory strikes during jury selection. Defendants have each raised three claims under the original RJA as enacted in 2009. These claims allege RJA violations on the basis of prosecution decisions in North Carolina, Defendants' respective judicial divisions, and Cumberland County. Defendants have also raised one claim each under the amended RJA as enacted in 2012. These claims allege RJA violations on the basis of prosecution decisions in Cumberland County and their individual cases.

The Court convened an evidentiary hearing on October 1, 2012. The hearing concluded on October 11, 2012. Defendants Golphin and Walters waived their right to be present during the proceedings and were not in court during the hearing. Defendant Augustine was present throughout the hearing. Defendants were represented by James E. Ferguson II, of the Mecklenburg County Bar; Malcolm Ray Hunter, Jr., of the Orange County Bar; and Jay H. Ferguson and Cassandra Stubbs of the Durham County Bar. The State was represented by

assistant district attorneys Rob Thompson of the 12th Judicial District, Jonathan Perry of the 20th Judicial District, and Michael Silver of the 21st Judicial District.

After considering the evidence and arguments of counsel, the Court concludes that race was, in fact, a significant factor in the prosecution's use of peremptory strikes during jury selection, and therefore grants Defendants' motions for appropriate relief pursuant to the RJA, vacates their death sentences, and imposes sentences of life imprisonment without possibility of parole.

INTRODUCTION

These cases come before the Court with a tragic history. That history includes the senseless deaths of Roy Gene Turner, Jr., David Hathcock, Edward Lowry, Tracy Lambert, and Susan Moore. The Court has only compassion for the friends and family members devastated by Defendants' crimes.

The Court is called upon to issue a decision today because of the Racial Justice Act, which the North Carolina General Assembly enacted to achieve fairness and equality in the way our state approaches the most serious matter a court can adjudicate: whether the State may execute a prisoner. The legislature resolved that when capital decisions are made, the justice system must do all it can to bring fairness into that determination. The legislature determined that historically and under prior capital law, we have not achieved the fairness for which our system has long strived. The Racial Justice Act is the embodiment of the legislative conclusion that more can be done.

The enterprise proposed by the RJA is a difficult one. When our criminal justice system was formed, African Americans were enslaved. Our system of justice is still healing from the lingering effects of slavery and Jim Crow. In emerging from this painful history, it is more

comfortable to rest on the status quo and to be satisfied with the progress already made. But the RJA calls upon the justice system to do more. The legislature has charged the Court with the challenge of continuing our progress away from the past.

The Court has now heard nearly four weeks' worth of evidence concerning the central issue in these cases: whether race was a significant factor in prosecution decisions to strike African-American venire members in Cumberland County at the time the death penalty was sought and imposed upon Defendants Tilmon Golphin, Christina Walters, and Quintel Augustine. For the reasons detailed in this order, the Court concludes that it was.

This conclusion is based primarily on the words and deeds of the prosecutors involved in Defendants' cases. In the writings of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making. A Cumberland County prosecutor met with law enforcement officers and took notes about the jury pool in Augustine's case. These notes described the relative merits of North Carolina citizens and prospective jurors in racially-charged terms, and constitute unmistakable evidence of the prominent role race played in the State's jury selection strategy.

Another Cumberland County prosecutor, involved in all three Defendants' cases, had previously been found by a trial court to have violated the constitutional prohibition against discrimination in jury selection under *Batson v. Kentucky* by giving a pretextual explanation and incredible reason for her strike of an African-American venire member. Despite her testimony to the contrary, the evidence was overwhelming that this prosecutor relied upon a "cheat sheet" of pat explanations to defeat *Batson* challenges in numerous cases when her disproportionate and discriminatory strikes against African-American venire members were called into question. Her

testimony overall — rife with inconsistencies, frequently contradicted by other evidence, and often facially unbelievable — constituted additional evidence that Cumberland County prosecutors relied upon race in its jury selection practices.

The State overwhelmingly struck African-American venire members in capital cases from Cumberland County, removing African-American venire members purportedly for reasons such as reservations about the death penalty, or connections to the criminal justice system, while accepting comparable white venire members. This disparity was turned on its head in the notorious *Burmeister* and *Wright* capital cases in which the State sought, for tactical reasons, to seat African Americans as jurors. Comparing the prosecution's jury selection in *Burmeister* and *Wright* to Defendants' cases, the Court finds compelling empirical evidence that race, not reservations about the death penalty, not connections to the criminal justice system, but race, drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government.

The Court's conclusion that race was a significant factor in prosecution decisions to strike jurors in Cumberland County at the time of Defendants' cases is also informed by the history of discrimination in jury selection and the role of unconscious bias in decision-making. The criminal justice system, sadly, is not immune from these distorting influences.

In addition, Defendants' evidence shows that prosecutors across the State, including prosecutors in Cumberland County and in Defendants' own individual cases, frequently exclude African Americans for reasons that are not viewed as disqualifying for other potential jurors. The many examples Defendants presented of disparate treatment of black and non-black venire members is unsurprising in light of prosecutors' history of resistance to efforts to permit greater participation on juries by African Americans. That resistance is exemplified by trainings

sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.

Defendants' documentary and anecdotal evidence, their evidence rooted in history and social science research, and the many case examples of discrimination are fully consistent with Defendants' statistical evidence. That evidence shows that in Defendants' cases, in Cumberland County, and in North Carolina as a whole, prosecutors strike African Americans at double the rate they strike other potential jurors. This statistical finding holds true even when controlling for characteristics that are frequently cited by prosecutors as reasons to strike potential jurors, including death penalty views, criminal background, employment, marital status, hardship, and so on.

Significantly, the State's evidence, including testimony from prosecutors, two expert witnesses, and a volume of documents, rather than causing the Court to question Defendants' proof, leads the Court to be more convinced of the strength of Defendants' evidence.

The Court finds no joy in these conclusions. Indeed, the Court cannot overstate the gravity and somber nature of its findings. Nor can the Court overstate the harm to African Americans and to the integrity of the justice system that results from racially discriminatory jury selection practices. *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"); *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005) (explaining that racial discrimination in jury selection harms racial minorities because "prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice;'" and further explaining that such discrimination "casts doubt over the

obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial") (internal citations omitted); *State v. Cofield*, 320 N.C. 297, 302 (1987) (explaining that "the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly," and concluding that race discrimination in the selection of jurors "deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice"); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140 (1994), quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991) (discrimination in jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (discrimination against African Americans in jury selection is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others").

Discrimination in jury selection is "at war with our basic concepts of a democratic society and a representative government." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (internal citation omitted). The Court takes hope that acknowledgment of the ugly truth of race discrimination revealed by Defendants' evidence is the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law.

PROCEDURAL HISTORY: CASES OF INDIVIDUAL DEFENDANTS

On December 1, 1997, **Tilmon Golphin** was indicted for the September 23, 1997 murders of Edward Lowry and David Hathcock. Golphin filed a motion for change of venue. The Court ordered that the jury be selected from Johnston County and bused to Cumberland County for trial. The Honorable Coy E. Brewer, Jr. presided.

On April 29, 1998, Golphin was convicted of two counts of first-degree murder. On May 12, 1998, Golphin was sentenced to death for both murders.

The North Carolina Supreme Court affirmed Golphin's convictions and death sentence, *State v. Golphin*, 352 N.C. 364 (2000), and the United States Supreme Court denied certiorari review. *Golphin v. North Carolina*, 532 U.S. 931 (2001). Golphin unsuccessfully challenged his convictions and death sentences in post-conviction proceedings in state and federal court. *Golphin v. Branker*, 519 F.3d 168 (4th Cir. 2008).

Golphin filed an MAR and discovery motion pursuant to the RJA on August 9, 2010. On May 2, 2011, the State filed an Answer to the RJA MAR. On August 16, 2011, the State moved to dismiss Golphin's RJA MAR.

On December 1, 1998, **Christina Walters** was indicted for the August 17, 1998 murders of Susan Moore and Tracy Lambert. The case was tried in Cumberland County with the Honorable William C. Gore presiding.

On June 30, 2000, Walters was convicted of two counts of first-degree murder. On July 6, 2000, Walters was sentenced to death for both murders.

Post-conviction counsel were appointed and filed a Motion for Appropriate Relief (MAR) on Walters' behalf on June 16, 2004. The MAR remains pending.

Walters filed an MAR and discovery motion pursuant to the RJA on August 9, 2010. On May 2, 2011, the State responded to both motions and urged the Court to deny the RJA MAR without an evidentiary hearing and to deny Walters' request for discovery.

On February 25, 2002, **Quintel Augustine** was indicted for the November 29, 2001 murder of Roy Gene Turner, Jr. in Cumberland County. Augustine filed a motion for change of

venue and the case was transferred to Brunswick County for trial. The Honorable Jack A. Thompson presided.

On October 15, 2002, Augustine was convicted of first-degree murder. On October 22, 2002, Augustine was sentenced to death.

The North Carolina Supreme Court affirmed Augustine's conviction and sentence of death, *State v. Augustine*, 359 N.C. 709 (2005), and the United States Supreme Court denied certiorari review. *Augustine v. North Carolina*, 548 U.S. 925 (2006).

Post-conviction counsel were appointed and filed a Motion for Appropriate Relief (MAR) on Augustine's behalf on April 27, 2007. The MAR remains pending.

Augustine filed an MAR and discovery motion pursuant to the RJA on August 9, 2010. The State responded to Augustine's RJA MAR and discovery motion on May 2, 2011. The State urged the Court to deny Augustine's RJA MAR without an evidentiary hearing and to deny Augustine's discovery request.

PROCEDURAL HISTORY: POST-*ROBINSON* PROCEEDINGS

On May 15, 2012, following the Court's ruling in *State v. Marcus Robinson*, each Defendant filed a Motion for Grant of Sentencing Relief arguing that the evidence that compelled relief for Robinson equally warranted vacatur of Defendants' death sentences. On June 1, 2012, the State responded to Defendants' Motions. The State urged the Court to deny relief summarily or, in the alternative, to order an evidentiary hearing.

On June 11, 2012, this Court scheduled the evidentiary hearing in this case for July 23, 2012.

On July 2, 2012, the Amended RJA was enacted into law.

On July 3, 2012, each Defendant filed an Amendment pursuant to the new statute.

On July 6, 2012, the Court heard motions and arguments of counsel. Defendants' post-conviction attorneys withdrew in order that the attorneys who represented Marcus Robinson could litigate Defendants' RJA claims. James E. Ferguson, II, Jay H. Ferguson, and Malcolm Ray Hunter, Jr. were subsequently appointed as counsel, and Cassandra Stubbs entered an appearance on behalf of Defendants. The Court also granted the State's motion to continue the evidentiary hearing. The Court ordered the evidentiary hearing to commence on October 1, 2012. In its discretion, the Court denied the State's motion to sever and conduct three separate evidentiary hearings.

On August 15, August 31, and September 27, 2012, the Court heard a variety of motions related to discovery. On August 31 and September 27, 2012, the State moved for continuances of the evidentiary hearing. The Court, in its discretion, denied both motions. The State's August 31, 2012 continuance motion was not supported by any affidavit or evidence. A separate order has been prepared regarding the September 27, 2012 continuance motion.

The evidentiary hearing began on October 1, 2012, and concluded on October 11, 2012.

STATUTORY INTERPRETATION OF THE AMENDED RJA

Defendants' amended RJA claims are the first in North Carolina to be decided on the merits. The meaning of the amended RJA's statutory language is a matter of first impression. The Court must therefore interpret the amended RJA provisions at issue.[1]

Principles Of Statutory Interpretation

The cardinal principle of statutory construction is that the intent of the legislature is controlling. *State v. Fulcher*, 294 N.C. 503 (1978). The legislative purpose of a statute, and thus its proper construction, is first ascertained from an examination of the plain words of the statute.

[1] Defendants have also raised original RJA claims which the Court will consider on the merits. With regard to these claims, the Court will apply the statutory interpretation set forth in *Robinson*.

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209 (1990); *Electric Supply Co. of Durham v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656 (1991). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 387 (2006); *State v. Bates*, 348 N.C. 29, 34 (1998); *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276 (1988).

A statute must be construed so as to give effect to every part of it. It is presumed that the legislature did not intend any of a statute's provisions to be mere surplusage. *State v. Bates, supra*; *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556 (1981). A court has no power or right to strike out words in a statute or to construe them away. *Nance v. Southern Railway*, 149 N.C. 366 (1908).

If there is any ambiguity in a statute, courts must ascertain the legislative intent by examining a number of factors.

> [L]egislative intent is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means . . . . Other indicia considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes.

In re Banks, 295 N.C. 236, 239-40 (1978) (internal citations and quotations omitted). Statutes should be given a construction which, when practically applied, will tend to suppress the problem that the legislature intended to prevent. *In re Hardy*, 294 N.C. 90 (1978); *State v. Spencer*, 276 N.C. 535 (1970).

The General Assembly would not have passed a law which only recapitulated existing case law or constitutional doctrine. The General Assembly is presumed to be aware of prior case law or precedent when crafting related legislation. *Blackmun v. N.C. Dept. of Corrections*, 343 N.C. 259 (1996); *State v. Davis*, 198 N.C. App. 443, 451-52 (2009).

Meaning Of "Significant Factor"

The first question before the Court concerns the legal standard by which a defendant may obtain relief under the amended RJA. The amended RJA provides that "[n]o 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." N.C. Gen. Stat. § 15A-2010. The amended RJA further provides that "[a] finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the death penalty in the defendant's case at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2011(a). One type of evidence relevant to establishing that race was a significant factor in decisions to seek or impose a death sentence is evidence that "race was a significant factor in decisions to exercise peremptory challenges during jury selection." N.C. Gen. Stat. § 15A-2011(d).

The amended RJA does not explicitly define the term "significant factor." It falls to this Court, then, to determine its meaning. In doing so, the Court finds instructive decisions of the North Carolina Supreme Court defining "significant." In different contexts, the Court has held that "significant" means "having or likely to have influence or effect." *State v. Sexton*, 336 N.C. 321, 375 (1994) (interpreting mitigating circumstance contained in N.C. Gen. Stat. Sec. 15A-2000(f)(1)); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101 (1983) (applying definition in worker's compensation case). Therefore, when determining whether race was a "significant factor"

pursuant to the amended RJA, this Court will examine whether race had or likely had an influence or effect on decisions to exercise peremptory strikes during jury selection in capital proceedings.

The Court's application of this standard may include consideration of statistical evidence. *See* N.C. Gen. Stat. § 15A-2011(d) (providing that "[e]vidence relevant to establish a finding that race was a significant factor . . . may include statistical evidence"). When evaluating statistical evidence, the Court will follow the guidance provided by the Federal Judicial Center's *Reference Manual on Scientific Evidence*. *See* David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in Reference Manual on Scientific Evidence* (Federal Judicial Center 3d ed. 2011).

The *Reference Manual on Scientific Evidence* is commonly relied upon by the federal courts in assessing statistical and survey-based evidence. *See, e.g., Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1319, n. 6 (2011); *Atkins v. Virginia*, 536 U.S. 304, 327 (2002) (noting that the manual offers "helpful suggestions to judges called upon to assess the weight and admissibility of survey evidence on a factual issue before a court") (Rehnquist, C.J., dissenting). Ultimately, the Court will consider statistics as one category of evidence among an array informing the overall legal determination of whether race was a significant factor in prosecutorial decisions. *See* N.C. Gen. Stat. § 15A-2011(d) and (e) (permitting evidence including statistics and testimony from individuals involved in the criminal justice system, and providing that statistics alone cannot form the basis of an amended RJA claim).

Admissible Evidence

Amended RJA claims are circumscribed in certain respects. The amended RJA requires defendants to prove race was a significant factor "at the time the death sentence was sought or imposed" and defines that time "as the period from 10 years prior to the commission of the

offense to the date that is two years after the imposition of the death sentence." N.C. Gen. Stat. § 15A-2011(a). The amended RJA also removes the original RJA's freestanding claims based upon statewide or judicial division-wide evidence, and places the focus upon conduct within the county or prosecutorial district. N.C. Gen. Stat. § 15A-2011(c).

These parameters define the nature of amended RJA claims. A defendant may only prevail under the amended RJA if the evidence establishes that race was a significant factor in the prescribed time period and the county or prosecutorial district at issue. When attempting to prove such a claim, however, a defendant may present relevant evidence from both within and outside these statutory parameters. Likewise, the State may present such evidence in rebuttal.

This approach is consistent with the amended RJA's broad language, which provides that relevant evidence "may include statistical evidence . . . or other evidence . . . [or] evidence may include, but is not limited to" testimony of individuals involved in the criminal justice system. N.C. Gen. Stat. § 15A-2011(d).

The Court's approach is also consistent with the rules of evidence. Relevant evidence "means evidence having *any tendency*" to prove a fact at issue. N.C. R. Evid. 401 (emphasis added). Moreover, circumstantial evidence which proves statutorily-operative facts is as competent as direct evidence, and is generally permitted with great latitude. *See State v. Shipman*, 163 S.E. 657, 662-63 (N.C. 1932) (explaining that "great latitude is to be allowed in the reception of circumstantial evidence") (citation omitted); *Helms v. Rea*, 282 N.C. 610, 617 (1973) ("When sufficiently strong, circumstantial evidence is as competent as positive evidence to prove a fact."). In addition, judicially-decided RJA claims do not invoke the evidentiary concerns regarding prejudice or confusion that are typically involved in jury proceedings. *See*

N.C. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . misleading the jury.").

Admitting evidence from a broad period of time beyond the window defined in the amended RJA is additionally consistent with the United States Supreme Court's understanding of the evidence relevant to proving a *Batson* claim. In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Court acknowledged that "[t]he rub has been the practical difficulty of ferreting out [jury] discrimination in selections discretionary by nature." *Id.* at 238. The Court explained that when evaluating the credibility of a prosecutor's race-neutral *Batson* explanation, it is often necessary to look beyond the immediate circumstances. The Court observed that "[s]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Id.* at 239-40. In *Miller-El* itself, the Court found a *Batson* violation based in part upon evidence that, "for decades leading up to the time this case was tried prosecutors . . . had followed a specific policy of systematically excluding blacks from juries." *Id.* at 263-64.

Finally, accepted statistical practice considers conclusions strengthened where varied sources of information all point in the same direction. *See Reference Manual on Scientific Evidence*, 223 ("Sometimes, several studies, each having different limitations, all point in the same direction . . . . Convergent results support the validity of generalizations.").

In view of the foregoing, the Court concludes that litigants proceeding under the amended RJA may present evidence derived from within the statutory claim's parameters, as well as corroborative evidence outside the time and geographic parameters. The Court finds such evidence helpful to its ultimate determination. To the extent there is any danger of prejudice to

either party or improper consideration of incompetent evidence, the Court will carefully scrutinize all evidence to ensure it is reliable and relevant to the statutory claims.

The Court also finds it necessary to address the State's statutory argument that statistical evidence derived from Cumberland County is not relevant to Augustine's RJA claims because venue for Augustine's trial was moved to Brunswick County and Augustine's sentence of death was imposed in Brunswick County. The amended RJA provides in § 15A-2011(d) that evidence "may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence . . . ." The Court first notes that the plain language of the amended RJA refers to "other evidence" as well as evidence "from the county or prosecutorial district where the defendant was sentenced to death." This is a clear directive that courts are not to limit the evidence to that arising from the district or county where death was imposed. Evidence from the county where death was imposed is of obvious importance and relevance to a claim that there was discrimination in decisions to impose the death penalty. In this instant case, however, Defendants challenge decisions to seek the death penalty, and specifically, decisions by prosecutors to exercise peremptory strikes. Evidence of prosecutorial conduct in Cumberland County is highly relevant to Augustine's RJA jury selection claims because Augustine was prosecuted by Cumberland County district attorneys. For claims alleging jury selection discrimination, the relevant inquiry is about the conduct of the prosecuting county. The State fundamentally concurs with this proposition, as evidenced by the fact that it called Cumberland County prosecutors to testify about strike decisions in Augustine's case, not Brunswick County prosecutors. It would be patently illogical to require statistical evidence from one county and case evidence and testimony from a different one. The Court rejects such an interpretation by the State.

Case-Specific Evidence

The Court must next address whether the amended RJA requires defendants to prove that race was a significant factor in their individual trials. In doing so, the Court first notes that the amended RJA makes three references to proof in a defendant's particular case. Section 15A-2011(a) refers to "decisions to seek or impose the death penalty in the defendant's case at the time the death sentence was sought or imposed," and defines that time as ten years prior to the offense and two years after the death sentence was imposed. Section 15A-2011(f) refers to "decisions to seek or impose the sentence of death in the defendant's case in the county or prosecutorial district at the time the death sentence was sought or imposed." Section 15A-2011(g) refers to "decisions to seek or impose the sentence of death in the defendant's case at the time the death sentence was sought or imposed."

The Court is mindful that the original RJA did not contain any language referring to "in the defendant's case." As such, there must be some meaningful distinction in this regard between the original and amended RJA. The Court is likewise mindful that one potential reading of the language "in the defendant's case" is that the statute requires evidence of discrimination from defendants' individual trials. However, the Court is bound to give effect to every part a statute. It is presumed that the legislature did not intend any of the language in the amended RJA to be mere surplusage. Were the Court to hold that "in the defendant's case" meant that defendants proceeding under the amended RJA must prove race was a significant factor in their individual cases, the legislature's additional references to "in the defendant's case *at the time the death sentence was sought or imposed*" and "in the defendant's case *in the county or prosecutorial district*" would have no independent meaning. The temporal reference is

particularly relevant in view of the broad window permitting evidence from 10 years prior to the offense and two years following imposition of the death sentence.

Therefore, in order to appropriately give effect to all of the language in the amended RJA, the Court holds that "in the defendant's case" does not require proof in the defendant's individual trial. Indeed, the amended RJA does not even use the word "trial." More importantly, a trial-specific requirement would read the temporal and geographic provisions out of the amended RJA by making evidence that satisfied those parameters entirely unnecessary to a claim for relief. This the Court cannot do. Instead, the Court concludes that "in the defendant's case" requires defendants to prove that race was a significant factor within the temporal statutory window and the specified geographic areas. The Court finds that this is a meaningful additional requirement imposed by the amended RJA. Under the original RJA, there were essentially no temporal or geographic limitations on the types of evidence that could support a claim for relief. Accordingly, the Court's interpretation gives effect to all of the language in the amended RJA while at the same time preserving the legislature's clear intent to circumscribe original RJA claims.

In the amended RJA, the Court finds additional textual support for its conclusion that trial-specific proof is not an element of a claim. First, in setting forth the defendant's burden of proof, the amended RJA entirely omits any reference to case-specificity: "The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district." *See* N.C. Gen. Stat. § 15A-2011(c). Second, when the amended RJA does refer to "in the defendant's case," it does so permissively, stating that "[a] finding that race was the basis of the decision to seek or impose a death sentence *may be established* if the court finds that race was a significant factor . . . in the defendant's case." *See*

N.C. Gen. Stat. § 15A-2011(a) (emphasis added). The use of the permissive "may" allows defendants to prove their cases by a variety of means in addition to the case-specific route. Finally, the expansive period of time defined by the amended RJA permits courts to consider statistical evidence that is not connected to an individual case. The foregoing provisions all support the Court's conclusion that the most appropriate reading of "in the defendant's case" is to define it on the basis of the time period and geographic areas set forth in the statute.

Burden Of Proof

Under the amended RJA, it is the defendant's burden to prove by a preponderance of the evidence that race was a significant factor in the prosecutorial decisions at issue. *See* N.C. Gen. Stat. § 15A-2011(c) (placing burden of proving an RJA claim on the defendant); N.C. Gen. Stat. § 15A-2011(f)(1) (requiring that RJA claims be raised "in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes"); N.C. Gen. Stat. § 15A-1420(c)(5) (providing that, if an evidentiary hearing is held on a motion for appropriate relief, "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion").

The plain terms of the amended RJA establish an evidentiary burden shifting process in which defendants bear the burdens of production and persuasion and the State is afforded an opportunity for rebuttal:

> The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence.

N.C. Gen. Stat. § 15A-2011(c).

Under this scheme, a defendant's *prima facie* case may include statistical proof, although a defendant's *prima facie* case may not rely upon statistics alone. *See* N.C. Gen. Stat. § 15A-2011(d) and (e) (permitting statistical evidence but providing that such evidence alone is insufficient to establish that race was a significant factor). If a defendant establishes a *prima facie* case that race was a significant factor, it becomes the State's burden of production to actually rebut the defendant's case, or to dispel the inference of discrimination, not merely advance a non-discriminatory explanation. *Compare,* N.C. Gen. Stat. § 15A-2011(c) ("The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence."); *Castaneda v. Partida,* 430 U.S. 482, 498 n. 19 (1977) ("This is not to say, of course, that a simple protestation from a commissioner that racial considerations played no part in the [grand jury] selection would be enough. This kind of testimony has been found insufficient on several occasions."); *with Batson,* 476 U.S. at 96-97 (the State need only advance a race-neutral explanation). Like the defendant, the State may use statistical and other evidence in its rebuttal. *See* N.C. Gen. Stat. § 15A-2011(c). The ultimate burden of persuasion remains with the defendant and, in considering whether the defendant has met this burden, the Court will consider and weigh all of the admissible evidence and the totality of the circumstances.

Evidence Of Intent Is Not Required

The Court must next determine whether, in the context of this burden shifting "significant factor" framework, a defendant must prove intentional discrimination.

The Court first notes that the words intentional, racial animus, or any similar references to calculation or forethought on the part of prosecutors do not appear anywhere in the text of any amended RJA provision. To hold that a defendant cannot prevail under the amended RJA unless

he proves intentional discrimination would read a requirement into the statute that the General Assembly clearly did not place there.[2]

The broad language in the amended RJA confirms that evidence of intent is not required. Section 15A-2010 provides that "[n]o 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." (emphasis added). While the term "sought" invokes intention, the term "obtained" merely refers to a final result which may be reached intentionally or not. Similarly, the ultimate question under § 15A-2010 is whether the death sentence was sought or obtained *on the basis of race*. There is no specificity in the statute as to whether that basis should be intentional or unintentional.

This reasoning is in accord with a basic principle of statutory construction. This Court must presume the General Assembly was aware of the United States Supreme Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *McCleskey v. Kemp*, 481 U.S. 279 (1987), which required the defendant to prove intentional discrimination in the particular case.

This Court must also presume the General Assembly was aware of the explicit invitation in *McCleskey* to legislatures to pass their own remedies to race discrimination in capital cases, including permitting the use of statistics:

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility — or indeed even the right — of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

McCleskey, 481 U.S. at 319 (citations omitted).

[2] The Court does note, however, that while proof of intent is not required, it is permitted under the amended RJA's provision allowing testimony from witnesses within the criminal justice system. N.C. Gen. Stat. § 15A-2011(d).

This Court holds that the General Assembly was aware of both *Batson* and *McCleskey* when it enacted the amended RJA and therefore did not write the amended RJA as a mere recapitulation of existing constitutional case law. Were this Court to hold that the amended RJA incorporates the same intent requirement found in *Batson* and *McCleskey*, the amended RJA would have no independent meaning or effect. Such a conclusion would directly conflict with the basic canon of statutory construction that courts must presume the legislature did not intend any of its enactments to be mere surplusage. Further, the amended RJA states that "[i]t is the intent of this Article to provide for an amelioration of the death sentence. N.C. Gen. Stat. § 15A-2011(a1). This is direct proof that the legislature intended to do more than simply codify the existing law found in *Batson* and *McCleskey*.

The legislative history of the amended RJA confirms this analysis. In *Robinson*, the Court held that the original RJA does not require proof of intent. The legislature enacted the amended RJA subsequent to the Court's decision in *Robinson*, yet the legislature did not include any additional language regarding intent.

Furthermore, prior to the amended RJA's enactment, the legislature ratified on November 28, 2011, Senate Bill 9, which explicitly inserted an intent requirement into RJA claims. In its preamble, Senate Bill 9 stated that "it is the intent of the General Assembly to clarify the language in Article 101 of Chapter 15A of the General Statutes, to reflect the burden on the defendant to show that the decision makers in the defendant's case acted with discriminatory purpose." Section 1 of Senate Bill 9 further states that "a finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that the State acted with discriminatory purpose in seeking the death penalty or in selecting the jury." Senate Bill 9 never became law because it was vetoed by Governor Beverly E. Perdue on December 14,

2011, and the legislature failed to override. However, the fact that the legislature initially ratified an amendment to the original RJA that spoke directly to the question of intent, and later enacted the amended RJA without any reference to intent whatsoever, is evidence that the legislature's enactment of the amended RJA was not meant to introduce a requirement of purposeful discrimination. The legislature clearly knew how to create such a requirement, as reflected in Senate Bill 9, and it did not do so in the amended RJA.

By permitting capital defendants to prevail under the amended RJA upon a showing that does not require proof of intentional discrimination, the General Assembly adopted a well-established model of proof used in civil rights litigation. Indeed, in allowing a defendant to show that race "was a significant factor in decisions to exercise peremptory challenges," the General Assembly chose language that is directly analogous to the federal statutes that prohibit racial discrimination in employment decisions. Under those federal statutes, the United States Supreme Court held that the plaintiff was not required to prove intentional discrimination. *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 (1988).

In *Watson,* the Supreme Court held that it was appropriate to use statistical, disparate impact models of proof to challenge discretionary employment practices. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987. The Court recognized that this approach was necessary to redress discrimination that may result from unconscious prejudices. *Id.* at 990 ("Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices

would remain"); *see also Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that "result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner").

This rationale applies with particular force in the area of peremptory strikes, where discriminatory striking patterns may be the result of both deliberate and unconscious race discrimination. *See Batson*, 476 U.S. at 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."); *see also* Jeffrey Bellin & Junichi Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1104 (2011) (arguing that attorneys may be not only hesitant to admit racial bias when challenged under *Batson* to justify strikes but may not even be aware of the bias); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007) (finding in controlled experiments that test subjects playing the role of a prosecutor trying a case with an African-American defendant were more likely to challenge prospective African-American jurors and when justifying these judgments they typically focused on race-neutral characteristics and rarely cited race as influential); Anthony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 180–81 (2005) (arguing that unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes).

Evidence Derived From Prior *Batson* Proceedings

A portion of Defendants' evidentiary presentation includes analyses of supposed race-neutral reasons prosecutors across the state proffered in affidavits for striking African-American venire members. Defendants' evidence attempts to show that prosecutors accepted non-black venire members who possessed the very same characteristics used to justify striking African Americans. In a subset of this evidence, Defendants have advanced as examples of discriminatory treatment peremptory strikes of African Americans that were approved pursuant to *Batson* by the trial judge and in some instances by appellate courts as well. The State has objected to the Court relying on this subset of evidence in Defendants' favor. The State points to the rule prohibiting one superior court judge from overruling another in the same action.

In considering the State's argument, the Court notes that the question under *Batson* is whether the prosecutor has engaged in purposeful discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). In contrast, the question under the amended RJA is whether race was a significant factor in the prosecution's strike decisions. As the Court has explained, this is an entirely different inquiry from *Batson* that does not ask whether there was intentional conduct on the part of the prosecutor. The RJA instead focuses on whether race has been a significant factor over time and place such that prosecutors' strike decisions have had a disparate impact on African-American venire members. The absence of any intent requirement renders the RJA a less onerous standard than *Batson*. Indeed, it could be nothing else. The RJA could not set a higher standard than *Batson* for proving discrimination since the federal constitution establishes minimum protections. Nor could the RJA set the same standard as *Batson*, as the legislature did not intend the RJA to be an empty codification of existing federal law.

Because RJA proceedings operate under a different and less demanding standard of proof than *Batson*, this Court may properly consider instances of overruled *Batson* objections as evidence supporting Defendants' claims. Such consideration is akin to a civil jury that finds an individual liable even though that individual has already been acquitted of a similar criminal charge. Put another way, a prior finding that *Batson* was not violated does not prove race was not a significant factor in the strike decision; it simply proves discrimination was not engaged in purposefully. *See Dowling v. United States*, 493 U.S. 342, 349 (1990) (explaining "that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof").

Accordingly, consideration of overruled *Batson* objections in Defendants' favor does not violate the rule prohibiting one superior court judge from overruling another. This rule provides that "one judge may not modify, overrule, or change *the judgment* of another Superior Court judge previously made in the same action." *See State v. Woolridge*, 357 N.C. 544, 549 (2003) (citation omitted) (emphasis added). In the instances where this Court is evaluating Defendants' evidence derived from overruled *Batson* objections, the Court is thus not revisiting the prior courts' judgment regarding intentional discrimination. Similarly, the law of the case doctrine is inapplicable because it only prevents an issue from being reopened in subsequent proceedings where the same questions are involved. *See Hayes v. Wilmington*, 243 N.C. 525, 536 (1956) (explaining that the law of the case doctrine applies "provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.").

The Court also rests its determination on the Supreme Court of North Carolina's decision in *State v. Bone*, 354 N.C. 1 (2001). In that case, the defendant's own expert testified at trial that the defendant did not suffer from mental retardation. At the close of the sentencing phase, the

jury rejected the mitigating factor that the defendant's mental condition significantly reduced his culpability for the offense. The Supreme Court thus concluded that the defendant's IQ did not affect its proportionality review. However, following the defendant's trial, the General Assembly enacted legislation exempting capital defendants with mental retardation from the death penalty. The Court explained that "[a]t the time of defendant's trial, his counsel had no reason to anticipate that defendant's IQ would have the significance that it has now assumed." As such, the Court held that its ruling did not prejudice the defendant's right to seek post-conviction relief under the new law. *Id.* at 27-28. Likewise, in this case, prior *Batson* adjudications should not prevent Defendants from relitigating instances of prior discrimination under a new and lower legal standard.

The Court further notes that even if the RJA were governed by the same purposeful intent standard as constitutional jury discrimination cases, this Court would be bound by law to consider each individual strike anew upon the introduction of any new evidence bearing on the strike. As the Supreme Court has reiterated in the constitutional context, jury discrimination claims can only be determined in light of all of the evidence. When there is new evidence brought to bear, the reviewing court must necessarily evaluate the charge in light of the new facts. *See Hayes v. Wilmington*, 243 N.C. at 536 (application of the same facts is a requirement for law of the case). Accordingly, to determine whether the State engaged in purposeful discrimination with respect to any specific venire member or case previously adjudicated, the Court must consider any prior judicial *Batson* denial in light of all the new evidence.

In this regard, the Court notes that rarely on direct appeal did defense counsel argue, or the Supreme Court of North Carolina consider, disparate treatment of black and non-black venire members. *Compare State v. Kandies*, 342 N.C. 419, 435 (1996) (declining to consider

defendant's argument that prosecutor passed similarly-situated white jurors and disparate treatment revealed pretext) *with Miller-El*, 545 U.S. at 241 (disparate treatment of similarly-situated black and non-black potential jurors "is evidence tending to prove purposeful discrimination"). Similarly, the Court observes that none of the previous courts that denied *Batson* challenges had the opportunity to consider the data from the MSU Study.

In Defendants' evidence, there are also a number of instances where trial courts sustained *Batson* objections or, while overruling the *Batson* objection, explicitly rejected one or more of the prosecutions' proffered explanations. The Court gives weight to these prior findings of purposeful discrimination. As the Court has explained, *Batson* findings are relevant to the RJA determination because *Batson* involves a higher standard of proof of discrimination than does the RJA.

In considering evidence from prior *Batson* proceedings, or when analyzing Defendants' evidence derived from prosecutors' newly-proffered affidavits, the Court will often focus on a single reason among several provided by the State. The Court adopts this approach because the State's reference to even one pretextual explanation evinces discriminatory intent. This type of "mixed motive" analysis is a well-established practice in identifying the effects of race on seemingly race-neutral decisions. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (in order to prevail in a "mixed motive" disparate treatment case, plaintiff must show that, even though other factors may have played a role, race was a "motivating" or "substantial" factor). This approach is also consistent with the United States Supreme Court's jurisprudence under *Batson* and its progeny. *See, e.g., Miller-El*, 545 U.S. 231, 247 n. 6 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one . . . . A *per se* rule that a defendant

cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.").

Finally, the Court recognizes that prosecutors may deny any discriminatory motive. However, consistent with the Supreme Court's decision in *Batson*, this Court finds that a prosecutor may not rebut Defendants' claims "merely by denying that he had a discriminatory motive" or "affirm[ing] [his] good faith in making individual selections." Indeed, accepting these general assertions at face value would render the Equal Protection Clause "but a vain and illusory requirement." 476 U.S. at 98 (internal citations omitted, brackets in original). The Court further notes the unrebutted, credible expert testimony presented by Defendants indicating that individuals are not reliable reporters of the extent to which their decisions are influenced by race. As a consequence, the Court has considered prosecutors' blanket denials of race discrimination as a part of the Court's evaluation of the totality of the evidence. However, the Court awards those denials little credibility or weight.[3]

Prejudice Analysis Is Not Required

The Court must next determine whether the "significant factor" framework requires a defendant to prove that the use of race had an impact upon the outcome of his case or the final composition of his jury.

The Court first notes that the amended RJA does not contain any explicit language indicating that the General Assembly intended to impose any type of prejudice analysis in an RJA proceeding. To hold that a defendant cannot prevail under the amended RJA unless he

[3] *See, e.g.*, Affidavit of Mitchell D. Norton (Smith) ("I have never, with a discriminatory purpose, removed any juror from the trial of any case that I have prosecuted."); Statement of Benjamin R. David (Cummings) ("[A]t no time did race enter into our consideration of who to remove from the jury panel.").

proves an effect upon his case would be to read a requirement into the statute that the General Assembly clearly did not place there.

The language and structure of the amended RJA make it clear that a defendant need not show prejudice in order to establish a claim for relief. Under the MAR statute, even if a defendant shows the existence of the asserted ground for relief, relief must be denied unless prejudice occurred, in accordance with N.C. Gen. Stat. §§ 15A-1443 and 15A-1420(c)(6). The amended RJA, however, dispenses with the prejudice requirement. Pursuant to N.C. Gen. Stat. § 15A-2011(g), "[i]f the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the defendant's case at the time the death sentence was sought or imposed, the court shall order that . . . the death sentence imposed by the judgment shall be vacated."

The General Assembly's determination that individual defendants need not show prejudice under the RJA is consistent with the rule governing constitutional challenges to discrimination in jury pool cases because discrimination against prospective jurors based on race undermines the integrity of the judicial system and our system of democracy. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (explaining that "community participation [in the jury system] is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system").

It is well established that the harm of discrimination in jury selection is not confined to criminal defendants but extends to the citizens wrongfully excluded from jury service and society as a whole. *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005); *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *State v. Cofield*, 320 N.C. 297 (1987).

The amended RJA does not require that the defendant show that the prosecutor's decisions resulted in any specific final jury composition. This determination is well-supported by the courts' approach to *Batson* claims. *See Snyder v. Louisiana*, 552 U.S. 472, 477-78 (2008) (recognizing that the federal constitution forbids striking even a single African-American venire member for a discriminatory purpose, regardless of the outcome of the trial); *State v. Robbins*, 319 N.C. 465, 491 (1987) (explaining that "[e]ven a single act of invidious discrimination may form the basis for an equal protection violation"); *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (holding that, "striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, *even when other black jurors are seated* and even when valid reasons are articulated for challenges to other black prospective jurors") (emphasis in original; internal citations omitted).

Therefore, the exclusion of qualified African-American jurors based on race by prosecutors is not remedied in the event that defense counsel engaged in disproportionately striking white jurors. The amended RJA is clear that the exercise of peremptory strikes based in significant part on a juror's race cannot stand, regardless of the composition of the final jury.

Alternate Standards Of Proof

The Court holds that an appropriate evidentiary framework to apply to amended RJA claims is one that focuses on the disparate impact that prosecutors' peremptory strike decisions have on African-American venire members. Implicit in this holding is that the RJA does not require a showing of intentional discrimination, or a showing of impact upon the outcome of the defendant's case or composition of the defendant's jury.

The requirements of the amended RJA may also be satisfied by methods of proof other than disparate impact including disparate treatment models used in employment discrimination cases.

In a "mixed motive" disparate treatment case, the plaintiff may show by direct and circumstantial evidence that race was a "motivating" or "substantial" factor for an adverse employment action, even though other factors contributed. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003). The burden of production then shifts to the employer to prove a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff, that the employer would have taken the same action even in the absence of the plaintiff's race or gender. *Id.* at 94. The amended RJA's "significant factor" language bears similarity to the "motivating factor" concept used in mixed motive cases. Accordingly, under this alternate analysis, a defendant may establish a *prima facie* showing under the RJA by establishing that race was a "motivating" or "substantial" factor in the State's decisions to exercise peremptory strikes, even if other factors contributed to these decisions.

Similarly, in a case alleging that a defendant has engaged in a "pattern or practice" of discrimination, plaintiffs must "establish that racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (citation omitted). If the plaintiff has established a *prima facie* case, and the defendants have responded to the plaintiff's proof by offering evidence of their own, the fact-finder then must decide whether the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. *Id.* Here, the plaintiff will typically rely on statistical evidence as circumstantial evidence of intent. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336 (1977) ("We have repeatedly approved the use of

statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination . . ."). This type of employment discrimination claim is similar to the RJA's provisions permitting defendants to bring claims based on decision-making patterns within counties or prosecutorial districts. Under this alternate analysis, a defendant may establish an RJA violation if there is proof by a preponderance of the evidence that racial discrimination in the use of peremptory strikes in capital cases was prosecutors' standard or regular practice in the county or district.

The Amended RJA Is Not Retroactive

The Court must also address the question of retroactivity. In its pretrial motion for judgment on the pleadings, the State argued that Defendants' claims pursuant to the original RJA should be dismissed because the amended RJA applies retroactively, and under that law, Defendants' original RJA claims are insufficiently supported, insufficiently pled, or legally non-cognizable. The Court must thus decide whether Defendants' originally-filed claims should be analyzed under the 2009 or the 2012 version of the RJA.

In making this decision, the Court will engage in four analyses. The Court will first examine the language and structure of the amended RJA to discern the legislature's intent. The Court will then turn to the constitutional question of whether reading the amended RJA retroactively would impermissibly destroy Defendants' vested rights. Finally, the Court will discuss equitable considerations and constitutional concerns regarding arbitrariness.

Turning first to the language and structure of the amended RJA, while the amended RJA deletes certain provisions of the original RJA, it fails to provide any affirmative statement regarding the original RJA's viability for claims filed pursuant to that version of the law. The word retroactive does not appear in the amended RJA. The legislature simply failed to specify

that the amended RJA applies instead of the original RJA to claims filed under that law. Holding that the amended RJA is retroactive would require this Court to read a requirement into the statute that the legislature did not explicitly place there. This is strong evidence that the amended RJA was not intended to operate retroactively.

In this regard, the Court notes there are several provisions in the amended RJA where the legislature could have but failed to explicitly address retroactivity. In each of these provisions, the legislature failed to provide affirmative guidance on the original RJA's viability for already-filed claims. Section 4 of the amended RJA states that "G.S. 15A-2012 is repealed." Section 6 states that the amended RJA "applies to any postconviction motions for appropriate relief that were filed pursuant to S.L. 2009-464." Section 10 states that the amended RJA "applies to all capital trials held prior to, on or after the effective date of this act and to all capital defendants sentenced to the death penalty prior to, on, or after the effective date of this act." These provisions clearly require application of the amended RJA to motions filed under the 2009 law, but they fail to address whether the amended RJA applies in conjunction with or instead of original RJA. This omission constitutes evidence that the legislature did not intend the amended RJA to be retroactive.

Affirmative language in the statute also indicates that the amended RJA is not retroactive. The amended RJA states that "the intent of this Article [is] to provide for an amelioration of the death sentence." N.C. Gen. Stat. § 15A-2011(a1). An ameliorative statute is by definition one that is less "onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 282, 294 (1977) (contrasting an ameliorative law with an *ex post facto* law, which "must be more onerous than the prior law"). For the amended RJA to be less onerous than prior law, and thus ameliorative as the statute requires, it must permit defendants who filed motions under the original law to

proceed under both versions of the RJA. This is so because the original RJA is more expansive and favorable to defendants than the amended RJA. For example, the original RJA permits causes of action based upon a statewide or judicial division-wide showing, or based upon race-of-victim discrimination, while the amended RJA does not permit those claims. *See* S.L. 2012-136, N.C. Gen. Stat. § 15A-2011.

Sections 6 and 7 of the amended RJA provide further affirmative evidence that it was not intended to operate retroactively. Section 7 states that the amended RJA does not authorize any post-conviction motions in addition to those already filed under Article 89 of Chapter 15A of the General Statutes or the original RJA. Section 6 permitted defendants with pending motions sixty days to amend or modify their original motions. Read together, these provisions indicate that original RJA motions were not nullified by the amended RJA. Defendants were simply permitted to supplement these motions with additional claims under the new law. Such supplementation was necessary in view of the amended RJA's new parameters. *See, e.g.*, N.C. Gen. Stat. § 15A-2011(a) (defining the time period at issue as 10 years prior to the offense and two years after the sentence was imposed). The Court finds this to be a substantial indication that the amended RJA does not retroactively abrogate original RJA claims.

In view of the foregoing statutory analysis, the Court concludes that the amended RJA does not explicitly extinguish, and therefore permits, previously-filed claims to proceed under the law that existed at the time of filing. In reaching this conclusion, the Court acknowledges there are non-frivolous arguments that the amended RJA can be interpreted as retroactive. However, the Court is bound to apply North Carolina law. Under that law, statutes are presumed to operate prospectively unless they are clearly and unambiguously retroactive:

> There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so

> clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action, only that construction will be given it.

Hicks v. Kearney, 189 N.C. 316 (1925) (internal citation and quotations omitted); *see also* N.C. Gen. Stat. § 12-2 ("The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute."); *Lindh v. Murphy*, 521 U.S. 320, 328, n. 4 (1997) (explaining that "cases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.").

The Court cannot conclude that the amended RJA's language is "clear, strong, and imperative" with regard to retroactivity. *See Hicks*, 189 N.C. at 316; *see also State v. West*, 180 N.C. App. 664, 670 (2006) (explaining that "the 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.") (citation omitted). On the contrary, the Court finds persuasive evidence in the amended RJA's language and structure that it was not intended to operate retroactively.

The Court must next consider whether a retroactive construction of the amended RJA would destroy Defendants' vested rights to their original RJA claims. The Supreme Court of North Carolina has explained, "It is especially true that the statute or amendment will be regarded as operating prospectively only . . . where the effect of giving it a retroactive operation would . . . destroy a vested right." *Smith v. Mercer*, 276 N.C. 329, 337 (1970). Indeed, permitting a statute to destroy a vested right retroactively would violate Art. I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. *See*

Perry v. Perry, 80 N.C. App. 169, 173 (1986), citing *Wachovia Bank and Trust Co. v. Andrews*, 264 N.C. 531 (1965).

The Supreme Court of North Carolina has explained that when considering retroactivity, "[t]he proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time [the statute] took effect." *Booker v. Duke Medical Center*, 297 N.C. 458, 467 (1979). Therefore, the question before the Court is whether Defendants' rights to their original RJA claims have vested. In this regard, our state supreme court has repeatedly held that rights vest or accrue at the time of the injury that gives rise to the cause of action. *Id.*; *see also Bolick v. American Barmag Corporation*, 306 N.C. 364, 371 (1982); *Smith v. American & Efird Mills*, 305 N.C. 507, 511 (1982); *Raftery v. Wm. C. Vick Const. Co.*, 291 N.C. 180, 188 (1976); *Smith v. Mercer*, 276 N.C. 329, 338 (1970); *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36 (1921).

The State asserts that a defendant's rights are only vested upon final judgment by a court. However, the cases the State relies upon for this proposition do not apply here. The State first points to *Gardner v. Gardner*, 300 N.C. 715 (1980). In *Gardner*, the defendant sought retroactive application of a statute governing venue for alimony and divorce proceedings. However, the Supreme Court held that while procedural matters such as venue are generally retroactive, the general rule did not apply because the trial court and the Court of Appeals previously affirmed as proper the venue which the plaintiff sought. *Id.* at 718-20. The plaintiff's right to venue in *Gardner* was thus "secured, established, and immune from further legal metamorphosis." *Id.* at 719. The State argues that this holding permits retroactive application of the amended RJA in the absence of a fixed judgment.

However, *Gardner* does not apply here because it involved retroactive application of a procedural statute. In this case, the amended RJA would deny Defendants' substantive rights if applied retroactively. This is so because the original RJA provides substantive rights which the amended RJA does not. The original RJA permits freestanding post-conviction claims based upon statewide and judicial division-wide evidence, race discrimination based on the race of victims in murder cases, and statistical evidence alone. The amended RJA does not permit any of these claims. On this basis, the Court finds the differences between the two laws substantive. There can be no debate that a capital defendant's access to a legal vehicle for exposing geographically-expansive discrimination is a substantial and important right. Furthermore, by narrowing the time period upon which a claim may be based and removing defendants' ability to prevail based upon statistics alone, the amended RJA deprives defendants of procedural avenues in a way that affects their substantive ability to seek relief. *See Lindh v. Murray*, 521 U.S. 320, 327 (1997) (holding that a federal law involved substantive changes because "in its revisions of prior law to change standards of proof and persuasion in a way favorable to a State, the statute goes beyond mere procedure to affect substantive entitlement to relief").

The State also relies upon *Dyer v. Ellington*, 36 S.E. 177 (1900), to support its contention that rights only vest upon final judgment. In *Dyer*, the plaintiff sued town commissioners seeking a statutory penalty for the commissioners' failure to publish a statement of taxes. During the pendency of the suit, the legislature repealed the penalty but left the tax publication requirement intact. *Id.* at 177-78. The Supreme Court permitted the repeal to operate retroactively and held that the plaintiff could not recover the penalty in light of the legislative enactment because the plaintiff had "no vested right to the penalty until judgment." *Id.* at 178.

However, *Dyer* does not apply here because it only involved repeal of a penalty, not repeal of the substance of a statute, as is the case with the amended RJA. Moreover, the Supreme Court in *Dyer* explained that the repealed penalty was "not such a right as is intended to be protected by the act, but is one created by the act." *Id.* In this case, the statewide and judicial division claims repealed by the amended RJA were precisely the systemic blights on our justice system that the legislature intended to protect against. Finally, the Supreme Court noted in *Dyer* that the outcome may have been different in a criminal case. *Id.* ("Whatever doubts we may have as to the propriety of the act or its probable effect, had it related to a criminal prosecution, we are not called on to express.").

The State finally cites *Dunham v. Anders*, 38 S.E. 832 (1901), to show that rights only vest upon final judgment. In *Dunham*, the plaintiff brought suit to recover a penalty from a defendant who illegally served as both a county commissioner and a member of the same county's board of education. The plaintiff obtained a judgment before a justice of the peace and the defendant appealed to the superior court. While the appeal was pending, the legislature repealed the penalty at issue. The Supreme Court held that the repeal could not operate retroactively because the plaintiff had already obtained a judgment and thus "acquired a vested right of property." *Id.* at 834. Like *Dyer*, this case is not controlling here because it involved only the repeal of a penalty, not a substantive statute such as the original RJA.

Accordingly, the Court will not, as the State urges, permit the amended RJA to operate retroactively simply because Defendants have not previously obtained final judgment. Instead, to determine whether retroactivity is appropriate, the Court will determine whether Defendants' original RJA rights vested or accrued by injury prior to enactment of the amended RJA. Indeed, the state supreme court has explained that "in this State a statute will not be given retroactive

effect when such construction would interfere with vested rights, *or* with judgments already entered." *Wilson v. Anderson*, 232 N.C. 212, 221 (1950) (emphasis added).

With regard to the vesting inquiry, the Court first notes that Defendants have presented evidence of prosecutors' race-based conduct and use of peremptory strikes in each of their individual trials. Defendants have also presented the MSU study's examination of capital cases statewide between 1990 and 2010, and additional non-capital cases and capitally-tried cases resulting in life verdicts. All of this evidence arose well before the amended RJA was enacted.

The Court further notes that the foregoing evidence of discrimination became a legally operative claim when the original RJA was enacted in 2009. The original RJA provides that a death sentence shall not be carried out if race was a significant factor in capital case decisions in the county, district, judicial division, or state at the time the death sentence was sought or imposed. S.L. 2009-464, N.C. Gen. Stat. §§ 15A-2010 and 2011.

Indeed, the language of the original RJA indicates an intent on the part of the legislature to vest capital defendants' rights under that statute at the time it was enacted. The original RJA provides that "[n]o person shall be . . . executed pursuant to any judgment that was sought or obtained on the basis of race." S.L. 2009-464, N.C. Gen. Stat. § 15A-2010. The Supreme Court of North Carolina has "viewed such mandatory statutes as legislative enactments of public policy which require the trial court to act, even without a request to do so." *State v. Hucks*, 323 N.C. 574, 579-80 (1988) (holding that the failure to appoint the statutorily-required assistant capital defense counsel is reversible error even in the absence of a request at trial).

Moreover, Defendants established their right to a hearing under the original RJA at the time that they filed their original RJA motions. The original RJA provides that if a defendant states "with particularity how the evidence supports a claim that race was a significant factor . . .

[in] the judicial division, or the State . . . [t]he court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." S.L. 2009-464, N.C. Gen. Stat. §§ 15A-2012(a) and (a)(2). Defendants filed original RJA motions in 2010 in accordance with the statutory deadline. After reviewing Defendants' pleadings, the Court determined – prior to enactment of the amended RJA – that Defendants each pled sufficiently particularized facts and were entitled to a hearing under the standards set forth in the original RJA.

The Court finds Defendants' right to a hearing under the original RJA particularly relevant in view of the contrast between the law governing original RJA motions and all other motions for appropriate relief. As noted above, the original RJA requires a hearing once a defendant presents a particularized pleading. Thus, at the time Defendants filed those motions, they acquired a fixed right to a hearing under the original RJA. *See Rice v. Rice*, 159 N.C. App. 487, 494-95 (2003) ("Vesting occurs when 'the right to the enjoyment of [an interest] either present or future, is not subject to the happening of a condition precedent.'") (citation omitted) (alteration in original); *see also Gardner*, 300 N.C. at 719 (defining a vested interest as "a right which is otherwise secured, established, and immune from further legal metamorphosis"). By contrast, for typical post-conviction motions, the court may decline to hold an evidentiary hearing if it concludes that the claims raise pure questions of law, are insufficiently supported, or are otherwise meritless. *See* N.C. Gen. Stat. §§ 15A-1420(c)(1), (3), and (6). Similarly, North Carolina's statute regarding capital defendants alleging mental retardation provides only that, "[u]pon motion of the defendant, supported by appropriate affidavits, the court *may* order a pretrial hearing to determine if the defendant is mentally retarded." N.C. Gen. Stat. § 15A-2005(c) (emphasis added).

Finally, the Court notes that Defendants moved the evidence from *Robinson* into the record and utilized it as the basis for their statewide and division-wide original RJA claims. On April 20, 2012, prior to the enactment of the amended RJA, this Court issued its order in *Robinson* finding both statewide and division-wide RJA violations.

Based upon each of the foregoing conditions, individually and taken together, the Court concludes that Defendants' original RJA injuries accrued and vested prior to the amended RJA's enactment. As such, the amended RJA cannot be read to retroactively destroy Defendants' vested rights.

The question whether the amended RJA should be read retroactively is also informed by equitable considerations. *See Michael Weinman Associates General Partnership v. Town of Huntersville*, 147 N.C. App. 231 (2001) (recognizing that vested rights to land use are needed to "ensure reasonable certainty, stability, and fairness"); *Langston v. Riffe*, 359 Md. 396 (2000) ("Justice Holmes once remarked with reference to the problem of retroactivity that 'perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions,' and suggested that the criteria which really governed decisions are 'the prevailing views of justice.'"). The Court therefore considers whether Defendants' failure to obtain final judgment on their original RJA claims prior to enactment of the amended RJA is attributable to Defendants or some other factor.

The original RJA was enacted on August 11, 2009. Shortly thereafter, on September 15, 2009, counsel for Defendants met with representatives from the North Carolina Conference of District Attorneys and the Department of Justice. Counsel for Defendants initiated the meeting in an attempt to reach agreement on a streamlined, orderly method for proceeding with the numerous RJA motions filed across the state which shared common factual and legal issues. It is

undisputed that, in the winter of 2009, the district attorneys' representatives informed counsel they would not agree to a consolidated litigation format.

Despite the district attorneys' reluctance, counsel for Defendants continued to search for an efficient, consolidated litigation plan. On August 4, 2010, counsel for Defendants petitioned the Supreme Court of North Carolina for exceptional case designation on behalf of three death-sentenced inmates from three counties: Union, Davie, and Forsyth. Such designation would have allowed for the appointment of a judge and creation of a lead case in which common issues of fact and law would be resolved. The State again opposed the adoption of consolidated litigation and, on December 7, 2010, the state supreme court denied the petition for exceptional case designation.

In the absence of a consolidated format, RJA litigation in Cumberland County moved forward. However, the State repeatedly sought to delay the proceedings. The evidentiary hearing in *Robinson* was originally scheduled by the Court for September 6, 2011, a year after Robinson filed his original RJA motion. Upon the State's requests for additional time to prepare, the Court first delayed the *Robinson* hearing to November 14, 2011, and then again to January 30, 2012, at which time the *Robinson* hearing commenced. During the five-month period of time in which the State sought to delay the *Robinson* hearing, it is undisputed that the Conference of District Attorneys lobbied the legislature to repeal the original RJA.

The Court issued its decision in *Robinson* on April 20, 2012. Three weeks later, on May 15, 2012, Defendants initiated these proceedings by filing motions for entry of judgment based upon the preclusive effect of the Court's findings in *Robinson*. After reviewing the parties' filings, the Court ordered an evidentiary hearing. During this time, it is undisputed that the district attorneys continued to lobby the legislature to repeal the original RJA. The amended

RJA was thereafter enacted on July 2, 2012, and Defendants' hearing was continued once more to October 1, 2012.

The Court also takes note of the manner in which the State chose to proceed during the five additional months the State was afforded to prepare its case in *Robinson*. The State initially argued that it required a continuance in order to review the paper version of data collection instruments produced by the MSU study. However, at the hearing in *Robinson* and this case, the State made no arguments based upon these documents. The State also requested a continuance to permit prosecutors around the state additional time to produce affidavits explaining peremptory strikes against African-American venire members. However, in this case, the State presented no evidence or arguments based upon these additional affidavits. Finally, the Court finds it noteworthy that, in addition to using the five months for trial preparation, the State's representatives engaged in a concerted effort to persuade the legislature to alter the RJA, an effort that ultimately succeeded.

Having reviewed the relevant procedural history of *Robinson* and Defendants' RJA proceedings, the Court concludes that the equities weigh against applying the amended RJA retroactively. The reason Defendants did not proceed to a hearing and judgment prior to enactment of the amended RJA is the State's repeated requests for delay in *Robinson*. In the absence of these requests, *Robinson* would have concluded nearly five months earlier. This additional time would have permitted Defendants to bring their RJA cases to a close well before the amended RJA's enactment.

The Court's decision regarding retroactivity also involves an additional constitutional concern regarding arbitrariness. In enacting the original RJA, the legislature recognized that statewide, system-wide discrimination against African-American venire members in capital cases

is intolerable. In *Robinson*, this Court found precisely this insidious form of discrimination in cases throughout North Carolina between 1990 and 2010. Instead of confronting these findings with concern however, in July 2012, the legislature attempted to ignore them by enacting the amended RJA, which extinguishes at least some capital defendants' ability to pursue statewide claims.

Thus, having provided an opportunity for defendants to present evidence of the systemic use of race in capital jury selection, and having been presented with just such a determination by this Court, the legislature turned away. The Court is concerned that this action introduces an element of arbitrariness into the administration of the death penalty. If read retroactively, the amended RJA would allow Robinson relief from the death penalty on the basis of a statewide claim while denying that same relief to all other similarly-situated death row inmates, including Defendants. Even if the amended RJA is read prospectively, the Court finds that there is still some arbitrariness to the extent that future death row inmates whose juries are selected in a discriminatory system could be executed, while pre-amendment, similarly-situated inmates could not be executed.

The arbitrariness created by the enactment of the amended RJA stands in conflict with the Eighth Amendment to our federal constitution. *See Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) ("Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."); *see also id.* at 242 (explaining that it "would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it . . . is imposed under a procedure that gives room for the play of [racial] prejudices") (Douglas, J., concurring). It conflicts as well with our state constitution. *See State v. Case*, 330 N.C. 161, 163 (1991) (remanding a capital case for a new trial where the district

attorney took action that unconstitutionally rendered the capital sentencing system "irregular, inconsistent and arbitrary"). Accordingly, the Court's decision to apply the amended RJA prospectively is informed by substantial concern that ruling otherwise would introduce unacceptable arbitrariness into the proceedings.

Overall, the Court concludes that the amended RJA cannot be read to destroy retroactively Defendants' vested rights to their original RJA claims. The Court bases its conclusion upon the amended RJA's language and structure, the existence of Defendants' vested rights to their original RJA claims, equitable considerations, and constitutional concerns regarding arbitrariness. Accordingly, in this order, the Court will analyze Defendants' originally-filed RJA claims under the law as enacted in 2009.

Available Relief

The amended RJA requires a single remedy if the court finds that race was a significant factor in the decision to seek or impose the death penalty: the death sentence "shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole." *See* N.C. Gen. Stat. § 15A-2011(g). Thus, if the State does not, or cannot, rebut the defendant's *prima facie* showing, the court must vacate the defendant's sentence of death and impose a sentence of life imprisonment without the possibility of parole. This approach balances the State's interest in the finality of convictions with the greater public interest of ensuring that our system of capital punishment is not tainted by racial bias.

The amended RJA does not violate the *ex post facto* clause because it creates a new right that mitigates the punishment of death by reducing it to a sentence of life without parole. The amended RJA reduces, not increases, the available punishment to the defendant, and therefore

the *ex post facto* clause does not apply. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977); *State v. Pardon*, 272 N.C. 72, 76 (1967).

Statutory Waiver

The amended RJA requires any defendant who files a claim under the law to submit a signed waiver stating "that the defendant knowingly and voluntarily waives any objection to the imposition of a sentence to life imprisonment without parole based upon any common law, statutory law, or the federal or State constitutions that would otherwise require that the defendant be eligible for parole." N.C. Gen. Stat. § 15A-2011(a1). This provision applies only to defendants who have potential claims that would result in a sentence of life with parole.

The provision therefore does not apply to Defendants. None of the Defendants are eligible for a sentence of life imprisonment with the possibility of parole, as their offenses all occurred after October 1, 1994, when the legislature amended the law to forbid parole for such crimes. *See* N.C. Gen. Stat. § 14-17, Laws 1994, (Ex. Sess.), c. 21, § 1. In the alternative, the Court has reviewed the written waivers submitted by Defendants and conducted colloquies in open court regarding Defendants' waivers pursuant to § 15A-2011(a1). The Court finds that Defendants have complied with this provision in all respects.

Having set out the legal framework guiding the Court's decision, the Court now enters the following findings of fact and conclusions of law.[4]

OVERVIEW OF NON-STATISTICAL EVIDENCE

1. Defendants presented a wealth of case, anecdotal, and historical evidence of racial bias in jury selection in Cumberland County and in their individual cases. This evidence included notes from the prosecution's own files documenting race consciousness and race-based

[4] If any finding of fact herein is misidentified as a conclusion of law or any conclusion of law herein is misidentified as a finding of fact, then the item shall be deemed to be whichever it should be. *In re Helms*, 127 N.C. App. 505, 510-11 (1997).

decision-making in jury selection. The documentary and testimonial evidence of former Cumberland County prosecutors showed that race was a critical part of their jury selection strategy. While typically Cumberland County prosecutors disproportionately struck African-American venire members in capital cases, in two special cases, when they believed it was to their tactical advantage to seat African-American jurors, they did so. In these cases, involving white defendants and African-American victims, the prosecution accepted African-American venire members regardless of the presence of characteristics prosecutors commonly cite to justify the strikes of African-American venire members — death penalty reservations and connections to the criminal justice system. Defendants also presented evidence of the history of racial bias and disparate treatment in jury selection in North Carolina and Cumberland County, and expert testimony concerning the impact of unconscious racial bias on decision-making.

2. The State failed to meaningfully rebut this showing. Indeed much of the evidence introduced by the State, including the testimony of former prosecutors, buttressed Defendants' evidence.

Summary Of Defendants' Evidence

3. In their case in chief, Defendants called three lay witnesses, Shelagh R. Kenney, Margaret B. Russ, and Calvin W. Colyer. Kenney is an attorney at the Center for Death Penalty Litigation, and was previously appointed as post-conviction counsel for Augustine. She testified regarding documents she received in post-conviction discovery. Russ and Colyer are both former Cumberland County prosecutors. Russ prosecuted numerous murder and capital cases, including Golphin, Walters, and Augustine. She retired in the fall of 2011, after almost 25 years of service. Colyer prosecuted approximately 180 murder cases, including approximately 50 capital cases and retired in the spring of 2012, after nearly 25 years of service. Along with Russ,

Colyer prosecuted Augustine and Golphin. Both Colyer and Russ testified about their notes, training, and jury selection practices.

4. Defendants introduced testimony of three non-statistical experts as part of their case in chief: (1) Bryan A. Stevenson, a law professor and expert in race and the law; (2) Samuel R. Sommers, a psychology professor and expert in social psychology, research methodology, the influence of race on perception, judgment and decision making, race and the legal system, and race and jury selection; and, (3) Louis A. Trosch, Jr., a district court judge in Mecklenburg County and expert in implicit bias. Defendants introduced the prior testimony of Stevenson, Sommers, and Trosch from the *Robinson* hearing, and then called Stevenson to testify as a live witness in rebuttal.

5. In addition to this testimonial evidence, Defendants introduced scores of exhibits, including the complete voir dire transcripts from North Carolina capital cases, including Defendants' cases and other Cumberland County cases. Defendants also introduced affidavits and statements from Cumberland County prosecutors and other prosecutors statewide, purporting to offer race-neutral reasons for strikes of African Americans.

Summary Of State's Evidence

6. In rebuttal to Defendants' non-statistical showing, the State presented additional live testimony from Colyer and Russ. The State also moved its presentation in *Robinson* into evidence, which included documentary evidence and the testimony of: (1) Christopher Cronin, a political science professor and expert in American Politics; (2) John W. Dickson, another former Cumberland County prosecutor; and (3) multiple former and current judges. Regarding the non-statistical evidence, the Court makes the following finding of fact.

TESTIMONY OF CUMBERLAND COUNTY PROSECUTORS

7. The heart of this evidentiary hearing was the testimony of Cumberland County prosecutors. Russ had prosecuted all three Defendants, and Colyer had prosecuted two of the three, Augustine and Golphin. Colyer, Russ, and Dickson each testified about African-American potential jurors they questioned and struck in Cumberland capital cases. Russ testified about her reasons for striking 10 black venire members in *Walters*. Colyer testified about his exercise of strikes against four black venire members in *Golphin* and against five black venire members in *Augustine*. Dickson testified about the black venire members he struck in *Robinson*, *McNeill*, and the 1995 proceeding in *Meyer*. In their testimony before this Court, Dickson, Russ, and Colyer offered purportedly non-racial reasons for their strikes and steadfastly denied they had ever used a peremptory strike to exclude a potential juror because of race.

8. In view of the fact that Russ and Colyer were present during jury selection proceedings in Defendants' cases and actually made the peremptory strike decisions at issue, the Court has considered their testimony with great care and deliberation. However, as the Court will explain, it is necessary to view Russ and Colyer's denials of racial motivation in context with all of the evidence presented. In the same fashion, the Court will also consider Dickson's testimony in *Robinson*.

Evidence From Calvin Colyer

9. Turning first to Colyer, the Court finds several aspects of his testimony significant: his pretrial investigation principally devoted to African-American potential jurors in *Augustine*; Colyer's very different approach to jury selection and the seating of African Americans in the notorious skinhead murder cases of *Burmeister* and *Wright* from his approach in other capital cases; his explanations for striking African-American potential juror John Murray

in *Golphin*; his introduction at this hearing of additional reasons for strikes or repudiation of reasons previously presented in court; and finally, his disparate treatment of black and non-black venire members in capital cases. These matters are discussed in turn. The Court will first address Colyer's notes from *Augustine*.

Colyer's Race-Based Jury Selection Research And Notes In Augustine

10. Prior to Augustine's trial in 2002, Colyer investigated potential jurors. Due to the high profile nature of the case, venue was changed to Brunswick County. Having never tried a case there, Colyer was generally unfamiliar with that area. Consequently, on more than one occasion, Colyer met with members of the Brunswick County Sheriff's Department (BCSD). He asked questions about different neighborhoods and communities in Brunswick County and sought information about individuals on the jury summons list for Augustine's case. As a result of his meeting with members of the BCSD, Colyer wrote six pages of notes. These notes were introduced as DE98-DE103. Each page of Colyer's notes is titled, "Jury Strikes." The notations on DE98-DE103 consist primarily of negative comments about potential jurors. On the final page, DE103, there is a list of 10 neighborhoods and streets in Brunswick County. These notes are irrefutable evidence that race, and racial stereotypes, played a role in the jury selection process in Augustine's case.[5]

11. Colyer used these "Jury Strikes" notes in jury selection. Colyer testified, in response to a question from the State, that it was "very likely" he would have saved these notes

[5] The Court is concerned that the "Jury Strikes" notes were not produced to defense counsel during the *Robinson* litigation and, at this point, the original notes appear to have been misplaced or destroyed. Specifically, Augustine's post-conviction attorney Shelagh Kenney credibly testified regarding the whereabouts of Colyer's notes. According to Kenney, the notes were in the State's *Augustine* file in 2006. However, the notes were omitted from the materials the State disclosed in its *Robinson* discovery, though the "Jury Strikes" notes were clearly covered by the Court's discovery order. Moreover, Kenney reviewed the State's *Augustine* file again in 2012 in connection with this litigation and determined that Colyer's notes are no longer in the State's file. These facts could easily be construed to support an inference that the State intentionally destroyed the documents. The Court declines to make this finding, however, in light of the judicial testimony discussed below regarding Colyer's excellent reputation for truthfulness and integrity.

and used them during jury selection. Indeed, as Colyer conceded, they were prepared for the purpose of jury selection. The voir dire transcript confirms that the notes were used. On DE100, Colyer wrote an entry for black venire member Mardelle Gore: "Longwood – bad area." Longwood is the second community listed on DE103. During voir dire, Colyer asked Gore a number of questions about the Longwood neighborhood where she lived. Gore explained to Colyer that Longwood was located off Highway 904. In the margin next to Longwood, there is a notation of "904 area." As Colyer acknowledged, the reference to 904 appears to be in a "heavier hand" or different pen from the main body of notes. Based on this evidence, the Court concludes that Colyer used his race-based notes to inform his questions and strike decisions during jury selection.

12. The Court finds it significant that Colyer's "Jury Strikes" notes concern a disproportionate number of African Americans. At the time of Augustine's 2002 trial, African Americans made up approximately 14 percent of the population in Brunswick County. Colyer's "Jury Strikes" notes refer to approximately 70 potential jurors. Utilizing the State's criminal record checks and other public records, Defendants identified the race of approximately 55 of these 70. Of the potential jurors for whom race could be determined, more than 40 percent were African Americans. In addition, nine of the 10 neighborhoods and street designations listed on the "Jury Strikes" notes were all areas inhabited predominantly by African Americans.

13. Colyer's "Jury Strikes" notes identify a number of potential jurors as African Americans. There are references to individuals as "blk" which Colyer admitted meant black. Regarding potential juror Clifton Gore, Colyer wrote, "blk. wino - drugs." Regarding potential juror Shirley McDonald, Colyer noted she lived in Leland, an area he described as, "blk/high drug." Regarding potential juror Tawanda Dudley, Colyer noted she was from a "respectable blk

family" and lived on Snowfield Road. In addition, Colyer noted that Dudley was "ok." There is no reference anywhere in Colyer's notes to any potential juror being white or living in a white area.

14. Colyer indicated that the notes reflected comments and impressions of venire members by the Brunswick County Sherriff's department, not his own. Colyer, conceded however, that terms like "wino" were ones he uses on occasion. Most importantly, Colyer decided which things to write in his notes. The Court finds that it is highly significant that Colyer recorded the race of three prospective black venire members. The State offered no explanation for why Colyer recorded only the race of black venire members as part of his investigation of pretrial investigation of potential jurors.

15. This conclusion is supported by the testimony of Defendants' expert witness Bryan Stevenson. As noted above, Stevenson, a law professor, was admitted as an expert in race and the law. He testified that in his view, there is no reason to include a racial designation unless one believes race is important. Stevenson used Tawanda Dudley as an example: Colyer did not describe Dudley as from "a respectable family," he described her as from a "respectable black family." The use in that context of "black," suggests that it was notable to be from a family that was both black and respectable. Stevenson testified that the preoccupation with race reflected in Colyer's notes was highly suggestive of race consciousness and established that race was a significant factor in Augustine's case.

16. The Court also finds it significant that Colyer's notes reflect disparate treatment of potential jurors based on race. For example, black venire member Clifton Gore is described as "blk. wino – drugs" despite the fact he has no record of alcohol- or drug-related criminal convictions. By contrast, white potential juror Ronald King is described as "drinks – country

boy – ok." Elsewhere, black venire member Jackie Hewett is disparaged as a "thug[]" and, in fact, his criminal record was substantial. However, while Colyer noted white venire member Christopher Ray's similarly extensive criminal record, Ray is described more sympathetically as a "n[e'er] do well."

17. Especially troubling to the Court is that African-American potential jurors who appeared on the "Jury Strikes" notes were condemned simply for living in a predominantly black area perceived to be undesirable, and not on the basis of their own conduct. For example, African-American venire members Shirley McDonald and Mardelle Gore had no record of criminal convictions. Colyer's notes indicated that McDonald and Gore lived in a "blk/high drug" or "bad area." The State struck Gore. McDonald was not questioned during voir dire and the State had no opportunity to strike her. Meanwhile, in contrast, white potential juror Toney Lewis was passed by the State, and Colyer's notes deemed Lewis to be a "fine guy," despite the fact that he was involved in "trafficking marj[uana]" and running a "pot boat" in the early 1980s.

18. Stevenson also discussed the phenomenon whereby neighborhood becomes a proxy for race. He explained the significance of Colyer's notes about African-American communities and striking African-American venire members based on where they live. Housing in many communities in this country, and in Brunswick County, is racially segregated. Some of the neighborhoods Colyer listed on DE103 were close to 100 percent African-American communities. As a consequence of these facts, a potential juror's neighborhood can easily become a proxy for race.

19. Colyer suggested in his testimony that his concern about the neighborhoods listed on DE103 was not that they were black neighborhoods, but they were "neighborhoods where there's high crime rates." The Court does not doubt the sincerity of Colyer's belief that he was

motivated by the race-neutral fact of crime, and not race. However, as Stevenson explained and Colyer's own notes demonstrate, Colyer equated black neighborhoods with crime when he wrote "blk/high drug" and denominated Longwood as a "bad" area. Significantly, the State produced absolutely no evidence that these predominantly black neighborhoods were in fact "high-crime" neighborhoods or upon what exactly such characterizations were based. When potential jurors are excluded because they live in an all-black or nearly all-black community, "neighborhood" as a justification for the strike cannot be disentangled from race. Thus, the concern Colyer's notes evince about black neighborhoods is further evidence that race was a significant factor in Augustine's case.[6]

20. In sum, Colyer recorded negative comments about a disproportionately black group of potential jurors, he made explicit references to the race of African-American citizens, and he disparaged African-American potential jurors on the basis of group characteristics. Colyer did all of this on notes labeled "Jury Strikes" on every page. The "Jury Strikes" notes are powerful evidence that, in the prosecution's view, many African-American citizens summoned for jury duty in Augustine's case had a strike against them before they even entered the courthouse.

Colyer And Dickson's Reliance On Race In *Burmeister* And *Wright*

21. The Court next weighs the jury selection practices of Colyer and Dickson in the capital prosecutions of Malcolm Wright and James Burmeister, two Cumberland County defendants who were sentenced to life. Burmeister and Wright were soldiers stationed at Fort Bragg who belonged to a white supremacist "skinhead" gang. They were tried separately for the

[6] Colyer and Russ also discussed neighborhoods with law enforcement in Golphin's case after venue was transferred to Johnston County. The State attempted to suggest through its questioning of Russ that the purpose of this investigation was to determine which jurors lived too far to commute to the trial in Cumberland County. The answers of Russ, and the record itself, flatly contradict this theory. The Court finds that this is additional evidence that race was a significant factor in Golphin's jury selection and in Cumberland County.

racially-motivated murders of two African-American victims. Colyer, along with Dickson, prosecuted both cases. As background, in the instant cases, the bulk of Colyer's direct examination by the State was devoted to offering purportedly race-neutral reasons for the strike decisions of African-American venire members in the *Augustine* and *Golphin* cases. Colyer repeatedly stressed he did not strike potential jurors because of race. As to the nine black venire members whom Colyer struck in the *Augustine* and *Golphin* cases, Colyer testified that all nine of his strike decisions were motivated by the potential juror's reservations about the death penalty or because the juror or a family member had been charged with a crime.[7] Dickson testified about his strikes in *Robinson*, and similarly denied striking potential black jurors because of race. Like Colyer, Dickson attempted to justify many of his strikes based on venire members' death penalty reservations and involvement in the criminal justice system.

22. The Court further notes that Colyer testified that his approach to voir dire was consistent from case to case and juror to juror. Similarly, Dickson testified there was no difference in his voir dire strategy in cases that resulted in death sentences and those that ended in life verdicts. The Court agrees one would expect any racial disparity in strike rates to remain roughly constant from case to case.

23. Defendants presented empirical evidence about Dickson and Colyer's strike patterns in *Burmeister* and *Wright* that bears on the credibility of their strike explanations in other Cumberland County cases, including *Augustine* and *Golphin.* During cross-examination, Defendants confronted Colyer with his conduct in these cases. The first piece of evidence that the prosecution approached these cases differently from other capital cases was a pretrial motion

[7] There was no testimony about the reasons for the strike of Deardra Holder, who was summoned for jury duty in *Golphin.* Russ conducted jury selection alone that day and questioned and struck Holder. However, in her testimony, Russ merely confirmed the strike and stated that the trial court's denial of defense counsel's *Batson* objection was upheld on appeal.

for a jury consultant by Colyer in *Burmeister*. Colyer testified that this was the only such motion he filed during his career. Colyer argued as grounds for the motion that the "interest of justice requires that the people of the State of North Carolina are entitled to a fair and impartial jury free from racist attitudes and reactionary positions." Colyer was clearly concerned that, in this inter-racial murder case where the victims were two African Americans, racial attitudes could create barriers to a fair and just outcome. The Court credits Stevenson's opinion that the filing of this motion indicates that, in these particular cases, "it was in the interest of the State to protect against those concerns" regarding persons with racist attitudes serving on the *Burmeister* jury.

24. The next factor is the difference in strike rates from other Cumberland capital cases. In *Burmeister*, Colyer and Dickson used nine of 10 strikes to excuse non-black potential jurors. They struck one black venire member and passed eight. In *Wright*, Colyer and Dickson used 10 of 10 strikes against non-black venire members. The State struck not a single black venire member in *Wright*.

25. By contrast, in Cumberland County, between 1994 and 2007, black venire members were 2.6 times more likely than non-blacks to be struck by the State. In Defendants' cases, the strike rate disparity ranges from 2.0 to 3.7. In the 11 capital proceedings in the MSU Study from Cumberland County, there is no case in which the disparity falls below 1.0. Yet, in *Burmeister*, the racial disparity is 0.5, and in *Wright*, a disparity cannot even be calculated because the State struck no black potential jurors. On the basis of statistics alone, *Burmeister* and *Wright* are complete anomalies. They stand in stark contrast to Colyer and Dickson's claim that they approached voir dire the same way in every case.

26. There is more. In *Burmeister*, the prosecution's notes segregated African-American potential jurors by race and created a list of all black jurors accompanied by brief

descriptions. Colyer took similar actions in *Augustine* and *Golphin* by noting the race of black potential jurors in those cases. The Court credits Stevenson's opinion that these actions show that race consciousness was "very important in thinking about jury selection generally."

27. In addition, contrary to their direct examination testimony concerning strikes in *Augustine* and *Golphin*, in *Burmeister* and *Wright*, Colyer and Dickson consistently passed black venire members with significant misgivings about the death penalty and/or involvement with the criminal justice system. In *Burmeister*, Colyer and Dickson passed the following black venire members:

- Henry Williams, whose son had a pending cocaine charge.
- Lorraine Gaines, who said it would be "hard" and "difficult" for her to vote for the death penalty.
- Betty Avery, whose uncle had killed her aunt. Avery's uncle went to prison for that crime. Avery herself had been convicted of DWI. Someone shot out the windows of Avery's car and the police never apprehended anyone. On the death penalty, Avery was asked whether she had any religious, personal, or moral feelings against capital punishment. Citing her religious views, Avery stated, "I don't believe in the death penalty. I'm afraid." Dickson responded, "You don't think you believe in it?" To this, Avery said, "No. I don't believe in it that much." Avery later added that she thought the death penalty was "kind of harsh."

28. It is also significant that, on the jury questionnaires of these venire members, Colyer made notations indicating his awareness and interest in these potential jurors' death penalty views and connections to crime.

29. In *Wright*, Colyer and Dickson similarly passed black venire members who appear to fit the profile of potential jurors commonly struck by the State in Defendants' cases:

- Donald Bryant, whose cousin abused alcohol. Bryant's cousin was a "mean person" when he was drinking and often got into fights. Bryant thought it likely his cousin had gotten into trouble with the law for his violent, drunken behavior.
- Tina Hooper, whose nephew committed a robbery two or three years before. Hooper's nephew went to prison. Hooper was also weak on the death penalty.

> Asked if she had any personal, religious, or moral beliefs against the use of capital punishment, Hooper said, "That's kind of a hard one. I really wouldn't like someone to be killed." Hooper also stated, "I'd rather for a person not to be killed." Later she added, "I would probably want to have life imprisonment if they didn't pull the trigger."

30. Hooper merits additional discussion. In the 1999 *Meyer* case in Cumberland County, Colyer questioned black venire member Kenneth McIver and then struck him because of his reservations about the death penalty. However, McIver's views mirror Hooper's. Just as Hooper leaned against the death penalty, so did McIver. He told Colyer, "Life in prison will probably be a better solution." In the affidavit Colyer submitted in connection with the *Robinson* litigation, Colyer cited McIver's death penalty views as the reason explaining his strike.

31. In two other cases, Colyer again struck black venire members who gave answers that were similar to Hooper's. In the Cumberland County capital case of *McNeill*, Colyer struck black venire member Rodney Berry. Like Hooper, Berry had reservations about the death penalty for non-triggermen. Colyer said in his affidavit he struck Berry because he "could not consider the death penalty for a felony murder conviction." In the 2004 Cumberland County capital case of *Williams*, Colyer struck black venire member Forrester Bazemore.[8] Colyer said he struck Bazemore because he objected to the law permitting a non-killer being subjected to the death penalty. Colyer's acceptance of Hooper in *Wright* therefore undermines his claim that, in all cases, he consistently bases strikes on death penalty reservations, and not on race.

32. The State's disparate decisions to strike McIver in *Meyer*, Berry in *McNeill*, and Bazemore in *Williams* while accepting Hooper in *Wright* are notable for an additional reason. During the litigation in *Robinson*, State expert Katz disagreed with MSU's decision to code these jurors as not having reservations about the death penalty. Katz contended that these jurors'

[8] Incredibly, Forrester Bazemore was called for jury service in two Cumberland County capital cases: *Williams*, and *Parker*, discussed *infra*. In both cases, the State exercised a peremptory strike against him. In *Parker*, the judge found that the strike was racially based, and ordered that Bazemore be seated on the jury.

comments indicated they were in fact reticent about capital punishment and appropriately subject to being struck by the prosecution. The State, with Colyer acting as lead counsel, pressed this position at the *Robinson* hearing through cross-examination of defense expert O'Brien and direct testimony from Katz. The State's insistence that McIver, Berry, and Bazemore should have been struck for their death penalty views provides further evidence that Colyer acted with race consciousness in *Wright* when he accepted black juror Hooper, who held nearly identical views.

33. In *Wright*, there was additional evidence of Colyer's race consciousness. Colyer testified that he sometimes circled information on a jury questionnaire when he thought the information was important. On the jury questionnaire of Arnold Williamson, Colyer circled the fact that Williamson was African American.

34. Based on the Court's review of the evidence and testimony regarding the *Burmeister* and *Wright* cases, it cannot be said that death penalty reservations or connections to crime drove the prosecution's strike decisions in these cases. Rather, the salient fact, the determining fact, could only be race. Quite simply, in *Burmeister* and *Wright*, the State sought to seat black jurors, and Colyer and Dickson made strike decisions accordingly.

Colyer's Reliance On Race In Striking John Murray

35. Colyer testified extensively about his strike of black venire member John Murray in the *Golphin* case. Colyer attempted to rebut Defendants' claim that Colyer asked Murray race-conscious questions, targeted him for particular questions because of his race, and struck him for explicitly race-based reasons. Colyer generally denied these allegations.

36. The record shows that Murray was 30 years old. He was married and he and his wife had two children. Murray worked as an engineer. He had attended the University of North Carolina at Chapel Hill and served in the United States Air Force for four years. He supported

the death penalty. During voir dire, Colyer pursued three lines of questioning in which he asked Murray explicitly race-based questions.

- Colyer asked about a prior driving offense by saying, "Is there anything about the way you were treated as a taxpayer, as a citizen, ***as a young black male*** operating a motor vehicle at the time you were stopped that in any way caused you to feel that you were treated with less than the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?"

- Colyer inquired about an incident involving other venire members whom Murray had overheard talking about the case. Colyer asked, "Could you tell from any speech patterns or words that were used, expressions, ***whether they were majority or minority citizens, black or white, African-American***?" Then when attempting to justify the strike of Murray, Colyer told the trial judge, he deemed Murray objectionable because Murray "attributed to a male and a female ***white*** juror in the courtroom with respect to what he viewed as a challenge to the due process rights of the defendants."

- Colyer singled out Murray for questions about black culture. In particular, Colyer asked Murray, and Murray alone, about his knowledge of black musicians Bob and Ziggy Marley, reggae music, and the former emperor of Ethiopia, Haile Selassie.

These race-conscious aspects of Colyer's treatment of Murray are discussed in turn.

37. As to the first, Colyer admitted that when he asked Murray how he felt "as a young black male," Murray's race was consciously in his mind. No non-black venire members were questioned about how they felt "as white people" about any past experiences. The obvious disparate treatment and race-consciousness in Colyer's voir dire is evidence that race was a significant factor in Colyer's decision to strike Murray.

38. Regarding Colyer's question about whether the jurors Murray overheard were white or black, the record shows the following. During voir dire, Colyer asked Murray if he had previously heard anything about the case. Murray said he had heard something once he got to court, namely two jurors who were seated behind him said the defendants "should never have made it out of the woods." As noted earlier, Colyer inquired about the race of the two jurors who made these comments. Colyer also asked Murray about whether the comments had any

impact. Murray said he did not believe the comments showed much regard for the defendants' due process rights.

39. At this hearing, defense counsel asked Colyer why it had been important for him to ascertain the race of the overheard jurors. Colyer said, he "wanted to see, first of all, if his reaction, the impact that this was having on him as a potential juror." Asked if he had Murray's race in mind when he asked his question about the race of the overheard jurors, Colyer denied that it was. He again claimed he simply "wanted to know what the race of the people were that said this that Mr. Murray heard. I wanted to know what the impact of that was going to be on Mr. Murray."

40. The Court finds Colyer's answers unpersuasive. Colyer testified that the *Golphin* case had nothing to do with race. Consequently, there was no reason why the race of the overheard jurors, as distinct from the content of the overheard remarks, had anything to do with Murray's "reaction" to the overheard comment.

41. Colyer claimed additionally that he made this inquiry in order to assist the trial judge in determining whether anyone else had heard the comment. The Court notes that Colyer attempted to make this same point in the *Robinson* litigation when he cross-examined Stevenson. However, as Stevenson pointed out, nowhere in the *Golphin* transcript is there evidence of any additional effort Colyer made to identify the jurors who made the comment. Certainly, further steps could have been taken, including inquiry by the trial judge or questioning of the jury. Colyer himself acknowledged the "potentially devastating" impact the comment could have had on other venire members, including those who had already been seated before Murray reported the comment. In fact, Colyer requested no additional action, no steps were taken and, as a result,

the Court gives little weight to Colyer's suggestion that he was simply trying to ferret out more information about the overheard jurors.

42. Defense counsel also asked Colyer why, in proffering his reasons for striking Murray, he made a point of designating the race of the juror Murray overheard making the comment. In his testimony before this Court, Colyer said he was "just trying to reflect what Mr. Murray had said." Again, Colyer's explanation does not bear scrutiny. Colyer admitted he was the one who first injected race into the discussion of the other jurors' comments. Murray never suggested race had anything to do with the comments he overheard. Nonetheless, race appears to have been on Colyer's mind as he questioned Murray and explained his strike to the trial judge. The Court finds that Colyer's reliance on Murray's identification of the jurors as white as a reason for striking him reveals race-consciousness and race-based decision-making.

43. The third line of race-based inquiry to which Colyer subjected Murray concerned black culture. Colyer admitted he asked no other potential jurors about Bob and Ziggy Marley or Emperor Selassie. Colyer also admitted there was nothing on Murray's jury questionnaire that would spark any concern about Murray's knowledge of black culture. Nonetheless, Colyer attempted to link his race-based questioning with the *Golphin* defendants' appearance. Defense counsel asked if it was "fair to say" that when Colyer asked questions about the Marleys, "you were thinking about the race of the juror?" Colyer responded:

> No. What I was thinking about was there was information that we had gained, either from Kingstree, South Carolina, or Petersburg, Virginia, that the Golphin brothers had some connection with marijuana, Rastafarians, dreads, that sort of thing, and when they came into court, their hair was pulled back in buns and you could see they had long hair, and I was trying with this juror based upon what he had said about the due process, based upon what he had said about his experiences being — you know, the things he had done in his life to see if he knew anything about these subject matters because I wanted to know if it would impact on him as a juror if they came up. I didn't know if they were going to come up, but he had indicated his contact with law enforcement and I wanted to

> see if there would have been any empathy or any sympathy that he would have felt as a result of his experience, his life background as it related to these two young men who were sitting in court.

44. Colyer admitted there was nothing on Murray's jury questionnaire that would cause concern about the Marleys as compared to white jurors. Pressed again on why he singled out Murray for questions about black culture, Colyer said the following:

> The Golphins' appearance when they came in the courtroom and their hairstyles and his statements about them not having due process and the statements that he attributed to the white jurors about them not coming out of the woods alive and I didn't know, as I said, whether or not anything was going to come up in the case about their background related to marijuana, Rastafarian, their hairstyle, that sort of thing. I was just trying to find out if there was anything that would make him feel sympathy or empathy toward them based upon his experiences and what he had heard jurors say in the courtroom and what he had observed in the courtroom.

45. This explanation is not persuasive. There is no logical or plausible connection between the hairstyles of the defendants, the music of black reggae artists, an African political leader who died in 1975, and the venire member's unremarkable view that a statement calling for the Defendants' death is incompatible with due process.[9]

46. The Court agrees with Defendants' expert Stevenson that, in asking Murray questions about black culture, Colyer was "targeting jurors of color in a way that again reinforces that race is a significant factor." When Murray was questioned about the kind of music he listened to, he was being given a special cultural test designed only for African-American citizens. As Stevenson explained, consciously or not, the prosecutor seemed to be of the view that "if you identify with black music or other aspects of black culture, you're not an acceptable

[9] The Court also notes that Bob Marley was an internationally-acclaimed musician. An album of his music released three years after his death, *Legend*, is reggae's best-selling album and has sold 25 million copies. Marley was inducted into the Rock and Roll Hall of Fame and was given a Grammy Lifetime Achievement Award. Bob Marley's son, Ziggy Marley has won four Grammy Awards. *See* http://en.wikipedia.org/wiki/Bob_Marley and http://en.wikipedia.org/wiki/Ziggy_Marley. There can be little doubt that the Marleys have white and black fans.

juror." The Court is constrained to reject Colyer's explanation for these questions, and concludes that they display race consciousness and racially disparate treatment of Murray.

Colyer also told the trial judge he struck Murray in part because Murray purportedly

> did not refer to the Court with any deferential statement other than saying 'yes' or 'no' in answering your questions when you asked them" and had "a rather militant animus with respect to some of his answers. He elaborated on some things. Other things, he gave very short, what I viewed as sharp answers and also noted that when he spoke to the Court, that he did not defer, at least in his language, to the Court's authority, did not refer to the Court in answering yes, sir or no, sir. Did not address the Court as Your Honor.

47. The Court does not doubt the sincerity of Colyer's concern. Indeed, on Murray's jury questionnaire, Colyer made several notes about Murray's alleged "anger" and his "clipped" and "yes/no" answers. However, the trial judge rejected the suggestion that Murray was not sufficiently deferential, noting that he "did not perceive any conduct of the juror to be less than deferential to the Court." The trial judge added that there was a "substantial degree of clarity and thoughtfulness in the juror's responses."

48. The trial judge who observed Murray clearly rejected the suggestion that this African-American veteran and family man was insufficiently deferential to the white prosecutor and white presiding judge. The Court observes that the demeanor-based reason Colyer gave at trial for his strike of Murray may well reflect unconscious bias rather than any intentional discrimination by Colyer against Murray. *See Batson*, 476 U.S. at 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.").

49. Finally, with regard to Murray, Colyer offered four reasons for striking this venire member. Murray's father had been convicted of robbery and Murray had been convicted of

DWI. The other reasons are those the Court has discussed: Murray's concern about due process in light of the comments made by other jurors and Murray's purportedly disrespectful manner in voir dire. On Murray's jury questionnaire, Colyer noted his shorthand reasons for striking Murray. He also wrote the phrase "cumulative effect." When asked by the trial court to give reasons for the strike, Colyer began by saying the State was striking Murray because of the "cumulative effect" of several aspects of his voir dire. Colyer used this phrase again at the conclusion of his proffer to the trial judge. The Court finds it significant that the trial court rejected two of the four reasons proffered — cumulatively — for Murray's strike, specifically, the demeanor reason and Murray's due process comments. The fact that fully half of the reasons advanced by the State for Murray's strike were deemed invalid by the trial judge is evidence that race was indeed a significant factor in the strike.

Colyer's Explanation For Striking Black Venire Member Mardelle Gore

50. The Court finds the strike of Mardelle Gore is additional evidence of discrimination in Augustine's case and in Cumberland County. As discussed earlier, Gore's name appears on Colyer's "Jury Strikes" notes. She appeared in Colyer's notes because she lived in a nearly all-black community characterized as a "bad area." In voir dire, Colyer questioned Gore about her neighborhood. Despite strong evidence that Gore was targeted for exclusion from Augustine's jury because of her residence in a black neighborhood, Colyer never told the trial judge he was striking her for that reason. Instead, Colyer offered up a demeanor-based reason largely rejected by the trial court, along with the fact that Gore's daughter had killed her abusive husband and gone to prison.[10]

[10] As discussed below, Colyer accepted non-black venire members who had similar family involvement in the criminal justice system.

51. In the affidavit prepared for this case and in his testimony, Colyer no longer relies upon the discredited demeanor explanation. The Court notes that the State's own expert, Katz, asked prosecutors to provide a written affidavit setting for the explanations for strikes because of potential credibility problems that would arise if explanations varied over time. The Court finds that shifting explanations are themselves a reason to believe the explanation for the strike of Gore was pretextual.[11]

52. Gore herself had no criminal record. She supported the death penalty. Gore was a widow in her 50s and she had raised three children. Gore worked with people suffering from mental and physical disabilities. She went to church and was a regular voter. Based on the evidence presented in this hearing, the Court concludes that the prosecution struck Gore for race-based reasons. Had Gore been summoned for jury duty in the *Burmeister* or *Wright* case, the State would have deemed her an acceptable capital juror.

Colyer's Racially-Disparate Treatment Of Venire Members

53. The credibility of Colyer's proffered explanations for strikes in Cumberland County cases, including *Augustine* and *Golphin*, is further undermined by the Court's comparative juror analysis. In *Robinson* and these proceedings, Defendants alleged numerous instances of disparate treatment. The State had an opportunity in this case to attempt to counter this evidence. With the single exception of John Murray, the State utterly failed to address this aspect of Defendants' evidence. Consequently, evidence that Colyer treated similarly-situated black and non-black venire members differently is unrebutted in the following cases:

[11] Colyer added an additional explanation for the first time in this hearing for Sharon Bryant, a black venire member struck by Colyer in Augustine's case. His new explanation is that he struck her in part because she was concerned about meeting her quota as an Army Reserves recruiter. With respect to John Murray, the black venire member struck in the Golphin, Colyer told the trial judge he struck Murray in part because his manner was not sufficiently deferential. The trial judge rejected this reason and remarked on Murray's 'clarity and thoughtfulness.' In his affidavit, Colyer omitted any mention of this reason.

- In *Augustine*, Colyer struck African-American venire members Ernestine Bryant and Mardelle Gore because they had family members who committed crimes. Bryant's son had been convicted on federal drug charges four or five years before and was sentenced to 14½ years. He was still incarcerated. Gore's daughter had killed her abusive husband six years ago after he threatened to kill her; she served five years in prison in Tennessee and had since been released and was working for Duke University Hospital. Both Gore and Bryant said the problems their children had with the law would not affect their ability to be fair and impartial jurors. The prosecution accepted non-black venire members who also had family members with criminal records. Melody Woods' mother was convicted of assault with a deadly weapon resulting in serious injury when she stabbed Woods' first husband in the back. Gary Lesh's stepson was convicted on drug charges in the mid-1990s, and received a five-year sentence. In addition, Lesh's uncle got into an argument with another man and the confrontation escalated. Both men fired guns. Lesh's uncle's shot killed the other man instantly; her uncle died a few hours later.

- In *Golphin*, Colyer struck African-American venire member Freda Frink in part because Frink had "mixed emotions" about the death penalty. The transcript reveals that Frink stated she would follow the law and consider both possible punishments. Moreover, the prosecutor accepted non-black venire member Alice Stephenson, who expressed conflicting emotions about the death penalty. Stephenson used the same "mixed emotions" phrase Frink had used to describe her feelings about the death penalty.

- In the 2004 case of *State v. Williams*, Colyer struck African-American venire member Teblez Rowe because of her weakness on the death penalty. The transcript reveals that Rowe stated she did not feel the death penalty was "right," but she could still follow the law in that regard. The State accepted non-black venire member Michael Sparks, who, like Rowe, stated that he was against the death penalty but he would nonetheless be able to follow the law.

- In the 2007 case of *State v. Williams*, Colyer struck African-American venire member Wilbert Gentry in part because Gentry had a cousin who was convicted of murder. However, the prosecutor accepted non-black venire member Iris Wellman who had a family member who was convicted of murder and executed in North Carolina.

- In the 1995 case of *State v. McNeill*, Colyer struck African-American venire member Rodney Berry in part because he stated he could not vote for the death penalty for a felony murder conviction. However, the prosecution accepted non-black venire member Anthony Sermarini, who also expressed hesitation about imposing the death penalty in a case of felony murder.

Evidence From Margaret Russ

54. Having reviewed the evidence bearing on Colyer's strike decisions, the Court will turn next to the evidence concerning Russ' strike decisions, credibility and her assertions that she did not take race into account in her jury selection practices. In doing so, the Court will review the following evidence: an utter lack of independent recollection of her strikes and resulting vague testimony concerning her explanations, Russ' denial of misconduct in a case reversed by the Court of Appeals, a similar denial of wrongdoing when she violated *Batson*, Russ' clear reliance on a prosecution training "cheat sheet" to circumvent *Batson*, her false testimony concerning her consultation with counsel for the State, her shifting explanations for strikes of black venire members, and finally, her racially-disparate treatment of black and non-black venire members. These matters are discussed in turn.

Russ' Lack Of Independent Recollection Of Peremptory Strikes

55. The Court will first discuss Russ' lack of any independent or helpful recollection of her own peremptory strikes. In testifying about the 10 black venire members she struck in the *Walters* case, the Court permitted the State great leniency in "refreshing" Russ' recollection. The State presented Russ with highlighted portions of jury selection transcript and thereby effectively led Russ to testify to justifications for the strikes. However, Russ admitted several times that she had no independent memory of particular jurors, her voir dire, or the reasons for her strikes. In view of her total lack of recollection, Russ' explanations for peremptory strikes were nothing more than speculation or opinion based upon the transcript. The Court finds Russ' testimony unpersuasive and unhelpful to the fact-finding process. Had Russ proffered any account of the reasons for her strikes based on personal knowledge, the Court may have awarded that testimony some weight. However, Russ presented the Court with no such evidence.

56. Russ' inability to recall the reasons for her peremptory strikes in *Walters* is underscored by her failure to provide an affidavit in connection with the *Robinson* litigation. Assistant district attorney Charles Scott produced the affidavit explaining the State's strikes in *Walters*. Scott was the second chair attorney in that case and Russ, as lead counsel, was the one who actually conducted the voir dire of potential jurors. Moreover, although Russ was no longer a prosecutor, she was still employed in Fayetteville at the time Scott's affidavit was executed. Despite this, Russ took no part in the preparation of Scott's affidavit. Nor was Russ consulted in connection with the preparation of affidavits for the cases of *Augustine* and *Golphin*, even though Russ was counsel for the State in those cases as well.

57. With respect to all of the 10 strikes at issue in *Walters*, the Court further notes that Russ testified that she exercised a peremptory strike either in light of the "totality of the circumstances" or because of some unspecified nonverbal communication:

- Sylvia Robinson was struck because of "***the totality of the circumstance[s]***.... Everything that... the juror said, the things the juror did, how I viewed her and her ***demeanor*** during that time...."
- Norma Bethea was struck in part because of "the ***general demeanor***, the — the way that every juror conducts themselves is significant to me including, of course, this juror."
- Ellen Gardner was struck in part because she ***seemed uncomfortable*** about the death penalty, ***didn't seem to understand all the questions put to her, the inflection in her voice and the way she answered things.***
- Sally Robinson was struck because the juror ***seemed confused***, equivocal and unable to do what the law required and the "***totality of circumstances***."
- Marilyn Richmond was also struck in view the "***totality of the circumstances***."
- Laretta Dunmore was likewise struck in light of "***the combination of everything***."
- John Reeves was struck in part because he ***seemed confused*** and "***all of his answers and the way he answered things I observed about that, so on and so forth***."
- Jay Whitfield was struck in part because of "***his nonverbal communication, his mannerisms, so on***."

- Calvin Smith was struck in part "***based on observing him and the way he expressed himself.***"
- Sean Richmond was struck in part because of "***his entire voir dire, his entire demeanor, and his entire nonverbal communication.***"

58. The Court is not persuaded by Russ' vague testimony regarding demeanor. The Court further finds that the vague and utterly generic nature of the demeanor explanations Russ provided for Sylvia Robinson, Norma Bethea, Jay Whitfield, Calvin Smith, and Sean Richmond is evidence that they are pre-textual. It was clear to the Court that Russ needed excerpts from jury selection transcripts to refresh her recollection as to the details of each one of the struck black venire members. As Russ acknowledged, demeanor-based reasons are not apparent from the transcript. Her reliance on the transcripts to "refresh" her recollection gives this Court great pause that Russ was actually able to recall the demeanor and non-verbal communication of these black venire members.[12]

59. Certainly, body language and other demeanor reasons may be an appropriate consideration when evaluating the qualifications of a venire member. However, Russ admitted there is no higher incidence of objectionable demeanor among African Americans as compared to whites. In his testimony, Colyer echoed this sentiment. Thus, the frequency with which Russ invoked demeanor reasons for her strikes in *Walters* — and as shall be seen a number of other capital cases — undermines the credibility of Russ' strike explanations.

Russ' Improper Conduct In *State v. Bass*

60. On cross-examination, Defendants questioned Russ about her prosecution of a child sex offense case, *State v. Bass*, 121 N.C. App. 306 (1996). The North Carolina Court of

[12] Russ made handwritten notes in preparation for her testimony after reviewing the pleadings and select sections of the voir dire transcript for the excluded venire members. These notes were introduced into evidence. There is no reference on these notes to demeanor explanations. The Court finds this is additional evidence suggesting the generic demeanor explanations were pre-textual.

Appeals held that Russ' closing argument to the jury was "'calculated to mislead or prejudice the jury.'" *Bass*, 121 N.C. App. at 313. The opinion explains that Russ was aware that the defendant, prior to trial, had sought to offer evidence that the child victim had been sexually abused by her uncle. The defense was seeking to show an alternative source for the child's knowledge of sexual matters. The trial court excluded the defendant's proffered evidence. In closing argument, however, Russ argued the child victim "would know nothing of sexual activity but for defendant's alleged abuse." The appellate court held, "the prosecutor may not properly argue to the jury that the inference would be correct where the prosecutor is aware that the contrary is true." *Id.*

61. In her testimony before this Court, Russ refused to acknowledge wrongdoing in *Bass*. Russ' unwillingness to accept responsibility for her conduct and the judgment of the appellate court undermines Russ' credibility.

Russ' Violation Of *Batson*

62. Defendants additionally questioned Russ in connection with the judicial finding that Russ violated *Batson* in a capital case tried in 1998. In *State v. Parker*, Russ attempted to strike black venire member Forrester Bazemore. Defense counsel objected under *Batson* and the trial judge ultimately sustained the objection and seated Bazemore as a juror. Several aspects of the attempted strike of Bazemore merit attention.

63. The first is that the record shows Russ proffered pretextual reasons for the strike. The trial judge found a *prima facie* showing that the peremptory challenge was exercised on the basis of race and asked Russ to give her reasons for the strike. Russ asserted that her "first concern" was that Bazemore and the defendant were close in age. She then moved to discuss various demeanor-based reasons. The trial judge asked Russ whether she was aware that a non-

black venire member passed by the State had "the very same birthday" as Bazemore. This Court finds in Russ' attempted strike of Bazemore clear disparate treatment of black and non-black venire members.

64. The Court further notes that the trial judge in *Parker* concluded that Russ' proffered reasons for striking Bazemore were pretextual. The trial court noted it "had the opportunity to see, hear and observe the conduct of the examination by the prosecutor as well as the answers provided by Mr. Bazemore. That Mr. Bazemore did appear thoughtful and cautious about his answers."

65. Additionally, the Court finds it significant that, during her testimony in this proceeding, Russ repeatedly and vehemently denied any wrongdoing with regard to the jury selection in *Parker*. Although Russ said over and over again how much she respected the trial court's ruling in sustaining the *Batson* objection, Russ insisted she was not guilty of intentional discrimination, purposeful discrimination, or unlawful conduct. For example, Russ testified she was "trying to pick a jury. At the point we articulated our reasons [for the Bazemore strike], we were genuine. There were things we observed and seen. The conduct was not unlawful."

66. This Court finds, however, given the trial court's rejection of her reasons for the peremptory strike of black venire member Bazemore, Russ' persistent denials that she has ever used race as a factor in exercising a peremptory strike are not credible. Her bald protestations that she has never violated *Batson,* that she still believes she did not ever use race as a factor in exercising peremptory strikes, and that she has never discriminated on the basis of race ring hollow.

67. Russ' unwillingness to acknowledge that the trial court in *Parker* determined that she had intentionally used race as a factor undermines her credibility as a witness. Russ testified

that, despite the trial court's *Batson* ruling, she did not analyze what happened or deem her conduct unlawful. She further offered that, perhaps, she had merely failed to do a good job communicating the State's position to the trial court. Finally, Russ maintained that, despite the trial court's ruling, she still believed she had comported with *Batson*.

Russ' Testimony Regarding *Batson* Training

68. The Court also finds it significant that Russ proffered reasons based on a handout she received at a prosecution training on *Batson*. Specifically, Defendants presented evidence about a statewide prosecutor training conducted by the North Carolina Conference of District Attorneys. The training, *Top Gun II*, was a trial advocacy course. Russ was asked several times whether she had gone to the *Top Gun II* training. Russ did not have a clear recollection, but each time Russ was asked, she became more insistent that she had not attended. Russ' final answer on the subject was, "[M]y recollection is that I did not go to this seminar, the DAs' conference. I was in trial."

69. Records maintained by the North Carolina Bar and admitted as evidence at this hearing contradict Russ' testimony. According to her 1995 CLE Record, Russ reported to the Bar that she had attended *Top Gun II* and she received 25 hours of CLE credit for attendance at this seminar.

70. Among the materials distributed at *Top Gun II* was a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives." Thereafter follows a list of reasons a prosecutor might proffer in response to a *Batson* objection. It is clear from reading the transcript of the *Parker* case that Russ utilized the *Top Gun II* "cheat sheet" in attempting to justify her strike of African-American venire member Bazemore.

71. The "*Batson* Justifications: Articulating Juror Negatives" training sheet lists ten categories of justifications for striking venire members. The categories include in relevant part:

> Age – Young people may lack the experience to avoid being misled or confused by the defense
>
> Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney
>
> Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies
>
> Juror Responses – which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination

72. The explanations Russ offered in Parker track this list, even using some of the identical language from the handout. As already discussed, Russ began her attempted justification of the Bazemore strike by citing Bazemore's age. She then moved to his "body language" and noted that Bazemore "folded his arms," and sat back in his chair. Russ then described Bazemore as "evasive" and "defensive" and said he gave "basically minimal answers."

73. Moreover during the colloquy with the trial judge, Russ used language and unwieldy phrases that leave little doubt that she was reading from the handout. At one point, Russ said, "Judge, just to reiterate, those **three categories** for ***Batson justification*** we would **articulate** is the age, the attitude of the defendant (sic) and the body language." The fact that Russ chose to summarize her explanations as "categories," and then used the precise language for those category titles provided on the handout, rules out coincidence as an explanation. Similarly, it is very convincing evidence that Russ used the title of the handout when addressing the trial judge. Later, Russ referred to "body language and attitude" as "***Batson justifications, articulable reasons*** that the state relied upon." At another point, after the trial judge asked Russ to show him case law concerning demeanor-based reasons, Russ said, "Judge, I have the

summaries here. I don't have the law with me." It is apparent to the Court that the so-called "summaries" included the *Top Gun II* handout and that Russ was unwilling to share that handout with the trial judge.

74. The Court has considered additional cases in which Russ appears to have utilized the demeanor-based reasons listed on the *Top Gun II* handout when striking minority venire members. Russ prosecuted two of Walters' codefendants, Francisco Tirado and Eric Queen, shortly before Walters' trial. In Tirado and Queen's trial, Russ secured two death sentences after striking at least eight minority venire members. In explaining her strike of Amilcar Picart, a potential juror who was Hispanic, Russ cited his body language, in particular his lack of eye contact with the prosecutor, his eye contact with the defendant, and his failure to "give us more than a few words answer." These reasons echo the *Top Gun II* handout's suggestion that a prosecutor cite an undesirable juror's poor eye contact and monosyllabic answers.

75. Shortly after Walters' trial, Russ capitally prosecuted another of Walters' co-defendants, Carlos Frink. Frink was sentenced to life. In jury selection, Russ struck black venire members at a rate 4.6 times higher than she struck non-black venire members. In all, Russ used her strikes to exclude eight African-American potential jurors. In attempting to justify her strike of black venire member Wayne Radcliffe, Russ first focused on Radcliffe's involvement in his church and the fact he printed a newsletter for a local Bible college. First the trial court, and then defense counsel, expressed skepticism about this explanation. Indeed, defense counsel argued Russ had offered "nothing more than a pretext for discrimination." At that point, Russ came forward with an additional reason for striking Radcliffe, namely that he "was nodding" during the voir dire of another juror. Russ said Radcliffe's "body language . . . was also a great concern of ours."

76. The reasons Russ offered in these three cases, and Russ' accompanying verbiage in *Parker* are nearly verbatim renditions of the *Top Gun II* handout. Based on all of the evidence in the record, the Court finds that Russ used the *Top Gun II* handout in a calculated — and largely successful — effort to circumvent *Batson*. The fact that Russ relied on a training handout to avoid *Batson*'s mandate is evidence of Russ' untrustworthiness. In addition, it is evidence of her inclination to discriminate on the basis of race.

77. During the hearing in this matter, defense counsel devoted a substantial amount of time asking Russ to comment on the similarities between her explanations to the trial courts in *Parker*, *Frink*, and *Tirado* and *Queen* and the training handout. Russ undermined her credibility further when, after close questioning on this issue, Russ suggested that the source of her knowledge was not the *Top Gun II* handout, but her experience teaching at Fayetteville Tech. Russ claimed she learned about body language and non-verbal communication from a textbook she used there. Given that Russ parroted language from the handout in at least three capital trials when *Batson* objections were made, this Court is not persuaded by Russ' effort to cover up her obvious reliance on the training materials. The Court finds her testimony regarding this point to be misleading and evasive and concludes that it damages her credibility overall. Indeed, as a general matter, the Court observed that Russ was agreeable and expansive when questioned by counsel for the State and unduly evasive and argumentative when Defendants' attorney cross-examined her.

78. Stevenson testified that, unfortunately, training of prosecutors after *Batson* all too often has emphasized how to avoid a *Batson* violation, rather than how to avoid conscious or unconscious discrimination. The Court credits Stevenson's observation that the handout from

the *Top Gun II* training, utilized by Russ in a number of capital cases, including a number of Walters' capitally-tried codefendants, is a paradigmatic example of this phenomenon.

Russ' Misrepresentations During This Proceeding

79. In evaluating Russ' credibility, the Court also gives significant weight to the fact that Russ gave clearly misleading testimony during the hearing in this matter. Russ' misrepresentations were made in connection with her actions following the sustained *Batson* objection in *Parker*.

80. After the trial judge in *Parker* sustained the *Batson* objection regarding venire member Bazemore, Russ twice objected to defense counsel's strikes of white venire members. Russ lodged her second *Batson* objection when defense counsel moved to strike white venire member Belinda Lynch. The trial judge asked defense counsel to give reasons for the strike, but then overruled the objection, saying, "I may not agree with the statement in *Purkett v. Elem*, but it's the law. I have to call them like I see them."

81. Defendants introduced hand-written notes Russ made during the jury selection in *Parker*. The notes are dated and clearly follow the progression of jury selection. Russ noted the defense strike of Lynch, the State's *Batson* objection, the trial judge's finding of a *prima facie* case and request for defense counsel's reasons, and the trial judge's ultimate ruling, "DENIED + overruled." In the margin immediately to the left of these notations, Russ wrote a coarse epithet, followed by "No chance he'll ever know the law." Russ' testimony concerning the meaning of this note and her consultation with the State's attorneys about this matter gives rise to particular concerns about her credibility.

82. Defendants first asked Russ about the vulgar note late in the afternoon. The State objected, Russ was sent out of the courtroom, and the Court heard argument. The Court deferred

ruling until the next day and recessed proceedings for the evening. The next morning, the Court heard further argument from the State on its objection. Pursuant to this Court's order, Russ was not present in the courtroom during the argument.

83. In the course of his argument, Rob Thompson, counsel for the State, stated, "We have spoken to Ms. Russ . . . about the statement and who it may be in reference to and that kind of thing." Thompson argued to the Court that the statement was not relevant because it "wasn't in reference to the judge." The Court overruled the objection, finding that the evidence was relevant to impeachment of Russ' credibility.

84. Russ returned to the witness stand and Defendants resumed their cross-examination. Defendants asked Russ to whom the vulgar note referred. Russ claimed she wrote the note about the defendant. Russ stated that Parker was cocky, extremely confrontational, extremely belligerent, had pranced around inside the courtroom, and throughout the trial comported himself flamboyantly.

85. After reminding Russ that the subject of the vulgar note came up right before the evening recess, Defendants next asked Russ, "[D]id anybody from the State ask you at that time who this comment was directed to?" Russ stated, "Absolutely not. In fact they specifically told me not to talk to them about it once we left court . . . they said ... I don't want to be offensive to you, but just don't bring this up [and] don't even talk about it [as] we're not going to have any conversation." Russ continued, "They just said as to this issue, we are not trying to be ugly to you or anything but ... we probably don't want to talk about this issue — not sure if we're allow[ed to do so] or not so the safer thing to do is not do it so we didn't talk about it."

86. At that point, defense counsel asked for a recess and this Court again excused Russ from the courtroom, cautioning her not to discuss any of the matters involved in her testimony with anyone.

87. Defense counsel Hunter recounted for the Court a conversation he had with State's attorney Mike Silver. Hunter had asked Silver before court in the morning what Russ had to say concerning the note in her *Parker* file. Silver recounted that Russ had told him the night before that she did not know to whom the note referred and she was going to have to think about it. Silver confirmed those facts to the Court. Thompson reported to the Court that, the night before, he, separately from Silver, also had a very brief conversation with Russ on the subject.

88. Following a break, Defendants stated they had no additional questions for Russ. On redirect, the State attempted, on six occasions, to elicit testimony from Russ acknowledging that she had had conversations with the State's counsel concerning the note. On each occasion, Russ emphatically denied having done so.

89. Indeed, in response to the Court's inquiry, Russ testified,

> What I testified to earlier, Judge, that we were not to talk about it . . . [T]hey specifically wanted to mention before I brought it up in case I did that . . . that they didn't want me to ask them any questions about this and they did not want to say anything to me . . . I think I might have said I'm not sure what I'm suppose[d] to[] be saying and not saying and so one or both of them told me out of an abundance of caution, we were not — none of us in the room were to talk to each other about any of it.

90. The Court finds first that Russ' claim that the note was directed to the defendant is utterly unbelievable. Considering all of the circumstances, the Court finds that Russ' crude comment was directed towards the trial judge. In making this finding, the Court relies upon the following: the note was written during jury selection, presumably before the defendant had much opportunity to prance about the courtroom; the note was written shortly after the trial judge's

ruling that Russ had violated *Batson* by proffering pretextual reasons; the placement of the comment next to notes about the trial judge's subsequent overruling of Russ' *Batson* objection against the defense; the fact that defendant Parker was represented by counsel and made no comments whatsoever during the *Batson* colloquy; the trial judge's statement "it's the law" just before he overruled the objection; and the coupling of the vulgarity with the statement "No chance he'll ever know the law." The Court rejects Russ' elaborate and vociferous testimony to the contrary.

91. The Court additionally finds that Russ' comment concerning the trial judge, her unwillingness, 14 years later, to take responsibility for it, and her preposterous effort to cover up its true meaning severely undercut the credibility of her testimony concerning her "respect" and "reverence" for the trial court's ruling that she violated *Batson*. Rather than respect and reverence, Russ' conduct illustrates a phenomenon described by Defendants' expert Stevenson, namely the history of strong resistance to constitutional requirements of equal participation in jury selection by African Americans.

92. Finally, the Court finds that Russ gave false testimony concerning her conversations with counsel for the State concerning the subject of her vulgar note. Contrary to Russ' vigorous and repeated denials, the record establishes that she spoke with counsel for the State about this matter on two separate occasions: first, when she told Silver she did not remember who was the subject of the note and, second, when she told Thompson the note was not about the trial judge.

93. The Court observes that the question of who was the subject of Russ' crude note is collateral and not determinative of the weighty issues before the Court. At the same time, the fact that Russ gave false testimony is probative of her credibility generally. Just as in the case of

a *Batson* objection, Russ was called to account for her conduct in open court, under the pressure of time, and in a high-stakes case. That she chose not to be candid with the Court casts doubt on all of her testimony, and in particular, her vehement denial that race has ever been a factor in her jury selection. Had Russ simply acknowledged the inappropriate nature of her note and apologized for her misjudgment in writing it, the Court would have credited Russ for her honesty and forthrightness. Russ' decision instead to conjure a misleading explanation is strong evidence that her denials of improper motive are not reliable.

Russ' Shifting Explanations For Striking Black Venire Members

94. The Court has also considered Russ' testimony in the context of the State's defense in *Robinson*. As discussed earlier, the State's expert Katz asked prosecutors in North Carolina to provide race-neutral reasons for strikes. Colyer and Scott prepared affidavits for all of the Cumberland County cases, and Colyer represented the State in court. The State chose not to involve Russ in its defense in *Robinson*. Scott alone prepared the affidavit explaining why the State excluded 10 African-American citizens from the jury in *Walters*. Then in this case, the State called Colyer and Russ as witnesses but did not involve Scott. Moreover, despite the fact that Russ testified that she and Scott consulted each other about potential jurors and strikes, Russ gave explanations for the strikes that diverged significantly from the explanations Scott included in his sworn affidavit. For example, Scott cited no demeanor-based reasons for the 10 strikes of African Americans in *Walters*. In contrast, as to nine of those 10 strikes, Russ advanced body language and mannerisms as justifications. The Court is perplexed by the lack of consistency in the State's defense and in its failure to, in the words of its own expert, "stand behind what — what they're testifying to as to the reason."

95. The strike of black venire member Laretta Dunmore is particularly troubling in this respect. In Scott's affidavit, the stated reason for striking Dunmore was that her brother had a prior robbery conviction for which he had gone to prison and Dunmore "said 'there wasn't a fair trial' for her brother that she was pretty close to." In the *Robinson* litigation, defense counsel unmasked this reason as entirely unsupported by the record. The transcript showed that Dunmore's brother pled guilty and there was no trial, let alone an unfair one. In addition, Dunmore said she believed her brother's case was handled appropriately, and there was nothing about her brother's experience that would affect her ability to be fair and impartial as a juror. In view of the record, this Court concluded in *Robinson* that Scott's characterization of Dunmore's voir dire answers was inaccurate and misleading.

96. Against this backdrop came Russ' testimony about Dunmore. Dunmore was the one black venire member struck by Russ for whom Russ relied entirely on the venire member's answers to questions in voir dire. Russ gave extensive, detailed testimony about Dunmore having taken a paralegal course Russ taught, Russ' inability to remember if she had given Dunmore a low grade, and her desire not to embarrass Dunmore by asking about her mark in the course. Significantly, none of this is featured in Scott's affidavit.

97. The Court declines to credit Russ' newly-minted reason for striking Dunmore. First, Russ testified that she and Scott consulted one another about strikes. Second, Russ claimed that she "made it a practice not to embarrass the students," and she suggested that she struck potential jurors "in each and every one of those times in a trial that I have had a former student." It strains credulity to believe that Scott would have been unaware of Russ' longtime practice of striking former students, if in fact that was her reason for striking Dunmore. Third, the Court is struck by the disparity between the clarity of Russ' recollection of Dunmore and her vague or

nonexistent memory of the other black venire members she struck in *Walters*. Fourth, the Court agrees with one of the principles enunciated in prosecution training materials and admitted into evidence at this hearing, namely that a prosecutor "should articulate all race neutral justifications without delay. Any justifications given in rebuttal to defense arguments or court inquiry will be suspect at best."

98. Based on all of the evidence, including the State's knowledge that credibility of the reason initially proffered for Dunmore's strike had been obliterated, the Court rejects Russ' testimony concerning her strike of Dunmore. The Court finds that variance between the reasons sworn to by Scott in his affidavit and those offered by Russ in her testimony casts doubt on the credibility of both Scott and Russ.

Russ' Racially-Disparate Treatment Of Venire Members

99. The credibility of Russ' proffered explanations for strikes in Defendants' cases is further undermined by the Court's comparative juror analysis. In *Robinson* and these proceedings, Defendants alleged numerous instances of disparate treatment, including in Walters' case. The State had an opportunity in this case to attempt to counter this evidence. In questioning Russ, the State utterly failed to address this aspect of Defendants' evidence. Consequently, evidence that Russ treated similarly-situated black and non-black venire members differently is unrebutted in the following cases:

- In *Walters*, Russ struck African-American venire member Sean Richmond because he "did not feel like he had been a victim even though his car had been broken into at Fort Bragg and his CD player stolen." The record shows that, after his car CD player was stolen, Richmond received a pamphlet for crime victims and a telephone number for counseling at a trauma center. Richmond did not feel so victimized that he needed these services. Moreover, the prosecution passed non-black venire members who, like Richmond, minimized the impact of minor property crimes. Lowell Stevens, when asked about being the victim of a crime, laughed, and explained that he was a military range control officer and felt responsible when a lawn mower was stolen from his equipment yard. Ruth Helm explained that "someone stole our gas

blower out of the garage. I know that is minor, but I assumed you needed to know everything."

- In *Walters*, Russ struck African-American venire members Ellen Gardner and John Reeves in part because they both had family members who were charged or convicted of crimes. Gardner's brother had been convicted of gun and drug charges and received five years on house arrest. The transcript reveals that Gardner was not close to her brother; she believed he was treated fairly; and his experience would not affect her jury service. Reeves' grandson had a pending theft offense in Fayetteville. Reeves stated he did not know much about it, he had discussed the matter with his grandson or his grandson's parents, and there had not been any court proceedings up to that point. Like Gardner, Reeves told Russ that nothing about his grandson's pending theft charge would affect his ability to serve as a juror. Significantly, the State accepted non-black venire member Amelia Smith, whose brother was in jail for a first-degree murder charge at the time of the jury selection proceeding. Smith was in touch with her brother through letters.

- In *Walters*, Russ struck African-American venire members Marilyn Richmond and Jay Whitfield, citing their contacts with gang members. Richmond was objectionable because she "worked with 'wanna be' gang guys" and because she "knew" one of the defendant's accomplices. The State excused Whitfield because he "knew some gang guys from playing basketball." The record shows Richmond was a substance abuse counselor who worked with adolescents, some of whom professed to belong to gangs. The defendant's accomplice was a client at the mental health center where Richmond worked. Although she knew who he was, she had never spoken with him and stated she did not know him personally. Whitfield played pick-up basketball and some of the people he played with talked about being members of a gang. Whitfield had no other contact with these individuals and had never talked directly with them about their potential gang activities. Richmond and Whitfield clearly stated that these limited contacts with possible gang members would not affect their ability to be fair and impartial. Meanwhile, the State accepted non-black venire member Tami Johnson who was good friends with a former gang member. The State also accepted non-black venire member Penny Peace. Peace had a friend from work whose son was involved in a gang and had been sent to a detention center. Peace's son and her friend's son had played ball together in the past. Asked whether this situation would enter into her decision-making and cause her to be unfair, Peace said, "I don't think so."

- In the 2001 case of *State v. Frink*, Russ struck African-American venire member Wayne Radcliffe in part because of his involvement in church and in a local Bible college, as well as his connections to law enforcement officers. While rejecting Radcliffe for his church activities, the State passed a number of non-black venire members who were equally active in their churches. The State also failed to inquire about the church involvement of non-black venire members. Radcliffe's brother-in-law and a close friend worked as guards at a North Carolina penitentiary. The State passed non-black venire members with family members and colleagues who also worked in the prison system.

- In the 1998 case of *State v. Parker*, Russ struck African-American venire member Forrester Bazemore in part because of his age. The State passed John Seymour Sellars, a non-black venire member who had the same birthday as Bazemore.

Evidence From John Dickson

100. The State also presented the testimony of former prosecutor Dickson. In contrast to Colyer and Russ, Dickson acknowledged racial bias as both a historical antecedent and an ongoing challenge. Dickson testified that, when he began his career in 1976, he observed minority individuals being discriminated against by court personnel. Dickson stated that discrimination is still ongoing in one form or another.[13]

101. Dickson also conceded that everyone discriminates and that this discrimination is sometimes unconscious and sometimes purposeful. Dickson testified that a person may not be conscious of his discrimination and may not intend to discriminate, but nonetheless discrimination persists. Dickson admitted that, despite his efforts, he may have engaged in unconscious discrimination in jury selection, because no one can say he has never unconsciously discriminated. Dickson also conceded that a prosecutor's self-report is not the best way to determine whether race was a factor in jury selection.

102. The Court credits Dickson's forthright observations about discrimination in the Cumberland County court system. However, in spite of his recognition of ongoing racial bias, both conscious and unconscious, Dickson denied race could have been a significant factor in his jury selection. As the Court explained in *Robinson*, Dickson's testimony in this regard cannot be credited. Dickson testified that any bias he may have harbored was unconscious. Logically then, there is no way for Dickson to determine whether his bias was significant or not.

[13] Colyer disagreed with Dickson's testimony and testified that, in his tenure as a prosecutor in Cumberland County, he had never seen any discrimination against African Americans in how they "were treated by the court, by the bailiffs, by the State, by the attorneys. I would say no to that."

103. The Court's conclusion in this regard is confirmed through an examination of peremptory strikes Dickson exercised in capital cases. Dickson attempted to explain his disproportionate strikes of black venire members in Cumberland County cases. However, in his testimony, Dickson cited characteristics of black venire members which he found acceptable in non-black venire members he passed in the same case:

- In the 1994 case of *State v. Robinson*, Dickson struck African-American venire member Nelson Johnson because he "said that he would require an eye witness and the defendant being caught on the scene in order for conviction." The transcript reveals that Johnson repeatedly stated his support for the death penalty. When Johnson gave one answer alluding to a higher standard of proof, the prosecutor immediately removed him from the jury without asking any further questions. However, when non-black venire member Cherie Combs indicated she had mixed feelings about voting for the death penalty, the prosecutor asked follow-up questions to permit Combs to clarify her answer. The State then passed Combs.

- In the 1994 case of *State v. Robinson*, the State struck African-American venire member Elliot Troy in part because Troy was charged with public drunkenness. However, the State accepted Cynthia Donavan and James Guy, two non-black venire members with DWI convictions.

- In the 1995 case of *State v. Meyer*, Dickson struck African-American venire member Randy Mouton because he "had financial concerns about serving as a juror and losing money because his child support payments had increased." The State passed non-black venire member Terry Miller who stated he could not give total attention to the case because of his work for the military and dire situation in the Middle East.[14]

104. Finally, in weighing the credibility of Dickson's testimony, the Court has considered that Dickson, along with Colyer, was involved in the prosecutions of *Burmeister* and *Wright*, where the State reversed its normal practice of disproportionately striking black venire members. Dickson's participation in this process, in cases where the State perceived it had

[14] The Court declines to credit as race-neutral the reason for striking Mouton that was offered for the first time in closing argument in the *Robinson* hearing. *See Robinson* HTp. 2545 (asserting there are "not many prosecutors that want somebody on the jury who had to be ordered and has to go to court for child support"). This reason is inconsistent with the sworn affidavit submitted by the State and with the sworn testimony of the prosecutor who actually struck the juror. This newly-minted reason for striking Mouton illustrates how easy it is to rationalize race-based conduct.

something to gain by seating African Americans on the jury, is strong evidence that he took race into account in his jury selection practices in a very considered fashion.

History Of Discrimination And The Role Of Unconscious Bias

105. The testimony of the prosecutors must be weighed in the context of the historical record and social science evidence. Defendants' expert witnesses testified about North Carolina's history regarding jury strikes, and the myriad and insidious ways racial bias influences human decision-making, including jury strike decisions by attorneys of good will.

106. Expert witness Bryan Stevenson placed the Cumberland County prosecutors' jury selection practices in historical context, and testified regarding the continued legacy of those practices for today. Stevenson, an academic who has received numerous prestigious awards, has published in the area of criminal justice and race, including authoring a significant report about jury selection and multiple relevant law review articles. Expert witness Samuel Sommers testified about the scientific and cross-disciplinary evidence demonstrating that race influences decision making at a subconscious level. Sommers has conducted his own original research, which has been published in peer review journals, and has published extensively in the field. Trosch, another expert, testified regarding the role of unconscious bias in the legal system and methods to reduce the bias. Trosch has received and given extensive trainings in implicit bias. The Court found all three experts to be well qualified and concluded that their testimony was highly credible, and of great assistance to the Court.

Historical Evidence And Rational Bias

107. Stevenson first described the historical record regarding jury selection practices in the United States and in North Carolina. For most of this country's history, African Americans were not permitted to serve on juries in the United States. Although much of the nation's earliest

civil rights work was devoted to winning the right of African Americans to serve on juries, the response to these civil rights advances has been defined by resistance. The Civil Rights Act of 1875 made it a crime to exclude people on the basis of race, and in 1880, the United States Supreme Court held in *Strauder v. West Virginia*, 100 U.S. 303 (1879), that the state improperly prohibited African Americans from serving on juries. Despite the new federal law and the Supreme Court's holding in *Strauder*, there was little change. In many jurisdictions, no people of color served on juries. In some states, like North Carolina, there was outrage and even violent resistance to implementing these laws of inclusion. The Wilmington riots of 1898 are one dramatic illustration of the resistance to federal law.

108. Change was slow to come in many states, including North Carolina. In the 1920s, and 1930s, there were no African-American jurors in North Carolina. It was only after the civil rights movement of the 1960s and 1970s, that the need for participation of African Americans in juries was taken seriously. In that period, there were advancements in the area of jury pool compositions, allowing African Americans to be included in jury pools for the first time. It is during this same period that peremptory strikes became relevant to race discrimination. Before that there were very few eligible African Americans to strike.

109. Prosecutors' power to use peremptory strikes increased significantly during this same period. In North Carolina, prosecutors' strikes increased from six to nine in capital cases in 1971, and from nine to the current 14 in 1977. Stevenson noted that the number of strikes available to the State in capital cases in North Carolina is higher than in many other jurisdictions and thus prosecutors who are of a mind to discriminate have greater ability to do so.

110. Although there were meaningful reforms to jury pools, such reforms were lacking in the area of jury selection itself. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Supreme

Court recognized that race discrimination in jury selection was wrong and unconstitutional, but the Court also made the claim almost impossible for a defendant to prove. Subsequently, in *Batson v. Kentucky*, decided in 1986, the Court attempted to make it marginally less difficult to prove race discrimination in the use of peremptory strikes.

111. *Batson*, however, has been plagued by its own barriers to implementation. First, some prosecutors continue to believe that, there is a tactical advantage for the State to limit the number of African Americans on a capital jury. This is based upon a commonly held perception that African Americans are less inclined toward the prosecution in general and the death penalty in particular than members of other ethnic groups. Therefore, the motive to exclude African Americans remains. Second, defense lawyers often have been reluctant to object under *Batson*. Third, as the research on unconscious bias shows, it is very easy for a lawyer accused of a *Batson* violation to summon a race-neutral reason for almost any strike decision even when race was a factor in the exercise of the strike.

112. Stevenson testified about how the history of discrimination is self-perpetuating as prosecutors strike African Americans for reasons rooted in that very history. As a result of the history, racial bias may seep into prosecution strike decisions today, even in the absence of racial animus. It is axiomatic that prosecutors want to win their trials. Prosecutors especially want to win in capital cases, where the crimes are often more heinous, the defendants more culpable, and the justified emotions of the victims' family and the community more raw. This drive to win in capital cases creates an opening where unconscious bias can take hold. *See Turner v. Murray*, 476 U.S. 28, 41 (1986) (Court interprets Eighth Amendment to require heightened protections in capital voir dire because, in the sentencing hearing, there is a "unique opportunity for racial

prejudice to operate, but remain undetected"). Stevenson described this form of bias as "rational bias."

113. The prosecutor may believe, for example, that because crimes against African Americans have historically been prosecuted less vigorously and African Americans have suffered maltreatment at the hands of the police, they are generally less trusting of law enforcement and the prosecution. As well, prosecutors may believe that African Americans who live in high crime neighborhoods have less confidence in prosecutors and police. Thus, as a consequence of the history of discrimination, a prosecutor may rationally believe African Americans are less likely to convict or less likely to impose the death penalty. Similarly, in view of the history of disproportionately high rates of arrest and incarceration of African Americans, prosecutors may rationally believe African Americans may be less favorable jurors for the State. These stereotypes about black citizens — which have some rational basis in our history — may well prevent prosecutors from objectively evaluating potential capital jurors. Instead of assessing potential jurors as individuals, prosecutors may, consciously or unconsciously, rely on these stereotypes.

114. Defendants introduced compelling evidence that Cumberland County prosecutors do in fact strike African-American potential jurors because of the history of prior discrimination. State expert Katz made notes of only one of his conversations with prosecutors about their strikes. That conversation was with counsel for the State, Thompson. Next to notes about the disparate strike rates for black and non-black venire members, Katz wrote, "explain why these disparities exist." Underneath this note, Katz wrote, "past discrimination help[s] explain why blacks are less accepting of law enforcement testimony."

115. In *Burmeister* and *Wright*, the Court finds the operation of rational bias in reverse. There, the prosecution perceived a tactical advantage in seating African-American jurors. In these racially-motivated murder cases, the prosecution appears to have believed that, despite stated misgivings about the death penalty or interactions with the criminal justice system, African Americans would be favorable jurors for the State and might be more inclined than whites to impose the death penalty.

116. The corollary of *Burmeister* and *Wright* is that, in Defendants' cases, where the prosecution did not perceive such an advantage in obtaining black jurors, the State reverted to its normal practice of assuming black jurors will not be friendly toward the State. There is little doubt that this has been, and continues to be, the State's general assumption. Indeed the State presented the expert testimony of Cronin in both the *Robinson* hearing and the instant cases precisely to argue that, in light of the history of discrimination, African Americans generally do not favor the State in criminal cases. The quantitative and qualitative comparisons of the State's treatments of black and non-black venire members throughout Cumberland County and North Carolina show a conclusive record of disparate treatment, even when non-racial characteristics that are concerning to the State are taken into account and removed from the equation. By submitting this group-based stereotype as the defense of jury selection practices, rather than addressing the very specific allegations of disparate treatment in the individual cases, the State failed to rebut the allegations of discrimination and demonstrated the powerful pull of rational bias. The Court is especially troubled by the suggestion that prosecutors may justify the striking of African-American venire members based on the belief that past discrimination may affect their present ability to be fair. That logic would necessarily mean that African Americans, as a group, will continue to be discriminated against in the future. That prospect is unacceptable.

Unconscious Bias

117. Defendants introduced persuasive, and uncontested, evidence of the pervasive and powerful effects of unconscious bias. As Sommers explained, there is general consensus in the scientific community that while explicit and blatant forms of racial bias are generally disapproved and therefore less present and visible than in the past, race continues to have an impact on our thought processes and decision-making, most often as an unconscious process.

118. As a result of the large body of interdisciplinary research, we know that the way people obtain information and judge each other is the result of innate and largely unconscious thought processes. Trosch explained how, often, decisions are made on an unconscious, gut level and then the conscious mind will develop a more rational explanation to justify the decision. People tend to take in information in a way that confirms preexisting opinions, and reject information that does not fit preconceived ideas. In addition, people tend to be overconfident about their ability to make decisions, detect falsehoods, judge non-verbal cues, and underestimate their thinking errors.

119. Unconscious bias affects all of us, including actors in the legal system. When prosecutors evaluate potential jurors, they must quickly decide — often on the basis of the prosecutor's gut feel — whether a particular venire member will be a "good" juror for the State. This is precisely the type of decision and environment likely to be most susceptible to implicit bias. When people are called upon to make quick judgments, they are very likely relying on their own experiences and unconscious biases. It is in these moments of instinctive decision-making that prosecutors, without realizing it, may allow their ideas about race to obscure the actual juror sitting before them.

120. One of the most important features of unconscious bias for the issues at hand is its potential to affect how actors understand their own actions. Sommers described well-established research showing that when people are asked to explain the reasons for decisions that can be shown to have been influenced by considerations of race, they are remarkably good at giving non-discriminatory explanations for their actions. Quite often, people seem genuinely unaware of the influence of race.[15] In one of Sommers' own research studies, he investigated a possible causal relationship between race of the potential juror and decisions to strike the juror. In a controlled experimental setting, using undergraduates, law students and lawyers, he found a statistically significant difference between the use of strikes based on the race of the potential juror when race was the only variable that could influence the strike decision. In addition, he found that the participants in the study rarely acknowledged race as a factor in the strike decision. These results were consistent with the research showing a significant prosecutorial preference for white jurors.

121. The general risk that unconscious biases will contribute to discrimination against African-American venire members is heightened in capital cases. Sentencing decisions in capital cases are uniquely important and subjective. If certain groups are perceived as untrustworthy to make decisions generally, that lack of trust will only increase the motivation to strike from a jury given the increased power and discretion with which capital juries are entrusted. This risk is additionally amplified by the fact that prosecutors feel additional pressure in capital cases to secure convictions.

[15] Sommers also testified that people know that they should not let race influence them, so they are reluctant to admit it even if they are aware of it. People are very motivated to avoid having their conduct evaluated as biased or racist.

122. Turning to the evidence in Cumberland County, we see significant opportunities for unconscious bias to operate in these high pressure capital cases.[16] All three prosecutors stressed that jury selection involves the consideration of intangible factors in an effort to seat jurors favorable to the State's case. Colyer repeatedly stated that, in voir dire, he tried to get a "gut feel" about potential jurors as to "whether or not they were amenable to the State's point of view." He admitted he could not articulate how he arrived at his gut feeling about a particular venire member, but explained that he tried to determine whether he could convince the particular venire member or whether he was "going to be knocking my head up against a wall trying to get them to accept my point of view." Dickson echoed this testimony, saying "But if I'm not comfortable with the juror for whatever reason, I'm not going to leave that juror on." For her part, Russ repeatedly emphasized that she based strike decisions on her overall assessment of the juror's responses and body language.

123. The phenomenon of unconscious bias has particular salience in the context of Defendants' empirical evidence of prosecution jury selection practices in Cumberland County. In *Golphin* and *Augustine*, the prosecution wanted to seat jurors who would be sympathetic to law enforcement victims and more likely to impose the death penalty on a defendant convicted of killing a law enforcement officer. Consequently, the prosecution sought to investigate the summoned jurors before trial and deemed it important that some potential jurors lived in black neighborhoods. Then, at trial, the State seated one all-white jury and one nearly all-white jury. The State disproportionately struck African-American venire members to secure these results. When defense counsel objected to the many strikes of African Americans, Colyer explained his strikes in terms of death penalty reservations and connections to crime.

[16] Colyer testified that the elected district attorney Grannis exerted pressure in Cumberland County to expedite capital cases.

124. The research on unconscious bias helps the Court to make sense of this conduct. The Court has no doubt that Colyer genuinely believes his strikes in *Augustine* and *Golphin* were motivated not by race but by death penalty views and crime connections. The Court has no doubt that Colyer genuinely believes his gut feelings about the black venire members he struck were not influenced by race. However, a volume of social science research and empirical data show otherwise. Quite simply, despite our best efforts, an attorney's feelings of comfort with a particular venire member may be influenced by unconscious prejudices formed in a society with a history of race discrimination.

125. The Court finds the foregoing evidence regarding unconscious bias and the history of discrimination in jury selection and the importance of this history to understanding current issues of race and jury selection to be credible, persuasive, and well-grounded in established social science research methods and case law. Indeed, the State presented no rebuttal evidence or testimony in these areas.

Absence Of Meaningful Training To Combat Bias

126. The Court finds it significant that the Cumberland County District Attorney's Office never undertook any post-*Batson* training that involved examining prejudices. Indeed, post-*Batson* training seminars for prosecutors focused on evading *Batson*. Furthermore, the Cumberland County District Attorney's Office never monitored nor disciplined findings of intentional discrimination in violation of *Batson*.

127. Colyer served in the United States Air Force in the 1970s as a race relations officer and was trained on the effects of personal and institutional racism. Nonetheless, Colyer never took any steps to initiate similar training in his office. He did not take any affirmative steps as an assistant district attorney to ensure that such bias did not affect prosecutorial

decisions in the county. *See* N.C. Gen. Stat. § 15A-2011(c) (explaining that when considering an RJA claim, a court "may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.").

128. It is notable also that the Cumberland County District Attorney's Office did not subject Russ to any discipline or require her to undergo any training as a result of the appellate court's determination that her closing argument in *Bass* had been misleading and improper. Given Colyer's long tenure and senior status in the office, the Court finds it particularly remarkable that he was unaware of the decision in *Bass* and the Court of Appeals' determination that Russ had made an argument that was "calculated to mislead." It is similarly notable that Russ was not subjected to any discipline or required to undergo any training as a result the court's ruling that Russ' exercise of a peremptory strike against black venire member Bazemore violated *Batson*.

129. Overall, Russ and Colyer described an office culture of indifference to the problem of discrimination against African-American citizens in jury selection. The resistance to *Batson* on the part of Cumberland County prosecutors is a monumental stumbling block to progress and change. Only by acknowledging discrimination against African Americans can we expect to create a justice system where all citizens are truly equal under the law.

Conclusions Regarding Prosecutors' Testimony

130. Having considered testimony from Colyer, Russ, and Dickson in conjunction with all of the foregoing evidence, the Court concludes that their denials that they took race into account in Cumberland County capital cases are unpersuasive and not credible. Their contention that they selected capital juries in a race-neutral fashion does not withstand scrutiny and is

severely undercut by all of the evidence to the contrary. The evidence of Colyer's race-conscious "Jury Strikes" notes in *Augustine*, Colyer and Dickson's conduct in the *Burmeister* and *Wright* cases, Russ' use of a prosecutorial "cheat sheet" to respond to *Batson* objections, and the many case examples of disparate treatment by these three prosecutors, together, constitute powerful, substantive evidence that these Cumberland County prosecutors regularly took race into account in capital jury selection and discriminated against African-American citizens.

131. Finally, this Court would be remiss were it to fail to acknowledge the difficulties involved in reaching these determinations. Colyer, Russ, and Dickson each represented the State in Cumberland County for over two decades. During that time — as judges testified in this proceeding — these prosecutors gained reputations for good character and integrity. The Court first notes that its conclusion that unconscious biases likely operated in their strike decisions does not impugn the prosecutors' character. The Court additionally finds that there is no evidence that any of these prosecutors acted with racial animus towards any minority venire member. To the extent that the actions of these prosecutors were informed by purposeful bias, the Court finds that such bias falls within the category of "rational bias," and was motivated by the prosecutors' desire to zealously prosecute the defendants, rather than racial animosity.

TESTIMONY OF FORMER AND CURRENT JUDGES

132. The Court considered the testimony of current and former superior court judges. The State introduced sworn testimony of the judges from the *State v. Robinson* hearing, and also proffered additional testimony by submitting sworn and transcribed statements of the judges. The State designated the judges as lay, rather than expert, witnesses, and accordingly did not produce expert disclosures for the judges.

133. The Honorable E. Lynn Johnson is a retired senior resident superior court judge from Cumberland County. Judge Johnson received a J.D. from the University of North Carolina at Chapel Hill in 1966. Thereafter, Judge Johnson worked for the Federal Bureau of Investigation, as an assistant solicitor in Cumberland and Hoke counties, and in private practice. Judge Johnson was appointed as a resident superior court judge for the 12th Judicial District in 1983. He became the senior resident judge in 1998, and retired in 2011. Judge Johnson presided over the capital trials of Marcus Robinson and Philip Wilkinson, two Cumberland County defendants whose cases were included in the MSU Study.

134. The Honorable William C. Gore, Jr. was a superior court judge in the 13th Judicial District for 17 years. Judge Gore has worked in private practice and also served as the North Carolina Commissioner of Motor Vehicles. Judge Gore received his J.D. from North Carolina Central University in 1977. Judge Gore presided over the capital trial of Defendant Christina Walters.

135. The Honorable Thomas H. Lock is the senior resident superior court judge in the 11th Judicial District. He has served in that position for six years. Judge Lock previously served as the district attorney for Lee, Harnett, and Johnston counties for 16 years. Judge Lock received his J.D. from the University of North Carolina at Chapel Hill in 1981. Judge Lock presided over the capital sentencing hearing of Eugene Williams, a Cumberland County defendant whose case was included in the MSU Study.

136. The Honorable Knox V. Jenkins is a retired senior resident superior court judge. Judge Jenkins served as a superior court judge in the 11th Judicial District for 16 years. Judge Jenkins received a J.D. from the University of North Carolina at Chapel Hill. Before he ascended to the bench, Judge Jenkins worked in private practice for 30 years. Judge Jenkins is

also a veteran of the United States Army. Judge Jenkins presided over the 1999 capital resentencing of Jeffrey Meyer, a Cumberland County defendant whose case was included in the MSU Study.

137. The Honorable Jack A. Thompson was a resident superior court judge for the 12th Judicial District from 1991 until 2010. Judge Thompson received a J.D. from Wake Forest Law School in 1965. Judge Thompson worked as an assistant solicitor in Cumberland and Hoke counties and later served as the district solicitor for four years. At various points prior to becoming a judge, Judge Thompson worked in private practice in Fayetteville. Judge Thompson is also a veteran of the United States Army. Judge Thompson presided over the capital trials of Defendant Quintel Augustine and John McNeil, another Cumberland County defendant whose case was included in the MSU Study.

138. The Honorable Coy E. Brewer, Jr. is a retired superior court judge from Cumberland County. Judge Brewer was a superior court judge in the 12th Judicial District from 1977 to 1998 and was the senior resident superior court judge for the district from 1986 through 1998. Judge Brewer received his J.D. in 1972. After graduating from law school, Judge Brewer worked for Supreme Court Justice Dan Moore for a year and then entered private practice in Wilmington for a year. Judge Brewer then joined the Cumberland County District Attorney's office for two years. Judge Brewer was appointed to the district court bench in 1976, and to the superior court in 1977. Judge Brewer presided over the capital trial of Defendant Tilmon Golphin.

Character Testimony

139. The judges testified regarding the reputations of Cumberland County prosecutors, including Edward Grannis, John Dickson, Margaret Russ, Charles Scott, and Calvin Colyer. The

judges' testimony concerning the reputations of Cumberland prosecutors for various character traits is admitted, in part because defense counsel withdrew its previously lodged objections to character evidence, and in part because Colyer, Russ, Scott, and Dickson have now all testified or submitted sworn evidence.

140. Any previously sustained objections to character evidence are now overruled, in light of the fact that Colyer, Russ, Scott, and Dickson have now all testified or submitted sworn evidence. The Court notes that this is a close call because of the general rule, discussed below, that the State must first show that there is no other source for this evidence before relying upon judicial testimony. The Court suspects that the State could have called other witnesses, such as practicing attorneys, regarding these Cumberland County prosecutors' reputation. Nonetheless, in the absence of a specific objection on this ground, the State was not questioned regarding this possibility. Accordingly, the testimony and proffered evidence of character is now admitted.

141. The Court finds and credits the testimony of the judges with respect to the following character opinions: Judge Gore ("My opinion is that all three of them [Grannis, Russ, and Scott] were very capable prosecutors."); Judge Jenkins (Colyer's reputation for honesty and integrity is that "he exemplifies the best"); Judge Brewer (Colyer was ethical and capable); Judge Thompson (Dickson had a "tremendously good reputation for honesty and integrity, and Russ has an "extremely good reputation" for equal treatment of all races); and Judge Johnson (Dickson had exceptional credibility and Dickson did not have a reputation for racially discriminating against jurors).

142. The Court finds that prosecutors Grannis, Dickson, Russ, Scott, and Colyer all enjoyed good reputations, among the judges who testified, for integrity, truthfulness, and equal treatment of individuals regardless of race.

Opinion Testimony

143. In addition to character testimony, the State sought to introduce two lines of additional testimony from the judges, both calling for opinions: (1) whether race was a significant factor in the State's exercises of peremptory strikes in particular Cumberland County cases over which the judges presided; and (2) speculative testimony about hypothetical rulings given hypothetical situations and hypothetical testimony from the cases over which they presided.[17] The Court sustained Defendants' objections to proffered testimony regarding the "mental processes" of the judges for the capital trials over which they presided and speculation by the judges on how they may have ruled years ago had *Batson* motions been made.

144. As will be explained in greater detail below, the Court sustained these objections because: a) the State failed to demonstrate that the judicial testimony was necessary to prove events from jury selection; b) the proposed lines of questioning invoked the mental processes of judges; c) the proposed lines of questioning conflict with judicial ethical guidelines; d) some of the proposed questioning was speculative; and e) the proposed lines of questioning called for expert opinions and the judges were not designated by the State as experts.

No Showing Of Unique Necessity

145. First, the State bears the burden of showing that the judicial testimony is necessary and that there are no alternative methods of proving the facts in question. *State v. Simpson*, 314 N.C. 359, 372-73 (1985). Here, there is a complete record for each of the capital

[17] The Court also sustained objections to numerous questions seeking to have the witnesses merely read sections from the transcript. For example, the State asked Judge Lock, "does it appear, on page 915, which is the second page of State's Exhibit Number 59, that juror number 6 entered the courtroom and the court said good afternoon, Mrs. Patten" *State v. Robinson*, HTp. 2034. Copies of the transcripts were admitted into evidence and speak for themselves. *See generally*, N.C. Rules of Evidence 1002, 1003; *Dalenko v. Peden General Contractors, Inc,*. 197 N.C. App. 115, 124 (2009). Similarly, there can be no prejudice to the State from these rulings because the actual transcripts were admitted, and the State was free to use them as a basis for any arguments or questioning it thought appropriate.

cases resulting in the death penalty over which Judges Brewer, Gore, Lock, Jenkins, Johnson and Thompson presided, pursuant to N.C. Gen. Stat. §15A-1241(a).[18] This affects the evidentiary value of the judges' proposed testimony:

> Only in the rarest of circumstances should a judge be called upon to give evidence as to matters upon which he has acted in a judicial capacity, and these occasions, we think, should be limited to instances in which there is no other reasonably available way to prove the facts sought to be established. **A record of trial or a judicial hearing speaks for itself as of the time it was made.** It should reflect, as near as may be, exactly what was said and done at the trial or hearing.

State ex rel. Carroll v. Junker, 79 Wash.2d 12, 20-21 (1971), cited in *State v. Simpson*, 314 N.C. 359, 372 (1985); *see also Dalenko v. Peden General Contractors, Inc.*, 197 N.C. App. 115, 124 (2009) (noting that the order in the prior case was final and the matter was complete, and that "any orders entered by Judge Stephens spoke for themselves").

146. The State has not met its burden of demonstrating that the judges' testimony is uniquely necessary to prove any disputed fact. Although the State argued that the judges possessed information relating to events not reflected in the record from their observations about jury selection at capital trials, the testimony of the judges, including the proffers of evidence, do not bear this out. The State failed to show a single instance where the judges had a relevant direct observation that was not reflected in the record, or could not have been proven by other witnesses. The State has not shown that other court personnel, including lawyers for the parties, court reporters, clerks and bailiffs were not similarly able to observe and to testify about jury selection in these cases. The State has made no showing that these judges are "the only witnesses who could testify" about any facts in question, or that the trial transcripts and other

[18] The State urged that this Court should permit the judges to testify regarding the matters over which they presided because this Court previously permitted a district court judge to testify in open court. The district court judge, however, testified regarding events from an unrecorded hearing, and thus is in entirely distinguishable from the instant case.

available evidence are inadequate for purposes of establishing relevant facts. The Court finds that the State has failed to demonstrate the proffered judicial testimony was necessary to prove any disputed factual issue. *Simpson*, 314 N.C. at 372.

Mental Processes

147. The proffered questioning is also properly excluded because it called directly for testimony about the "mental processes" of the judges. *Simpson*, 314 N.C. at 372-73 (describing the "danger" that if permitted to testify, judges "might be subjected to questioning as to the mental processes they employed to reach a particular decision"). It is a "cardinal principle of Anglo-American jurisprudence that a court speaks only through its minutes" and that a presiding judge's testimony regarding his or her mental processes is inadmissible. *Perkins v. LeCureux*, 58 F.3d 214, 220 (6th Cir. 1995); *see also Glenn v. Aiken*, 409 Mass. 699 (1991) (probing the mental processes of a trial judge, that are not apparent on the record of the trial proceedings, is not permissible); *United States v. Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978) ("A judge's statement [at trial] of his mental processes is absolutely unreviewable. The court has no means of observing mental process. . . . The trial judge's statement of his mental process is so impervious to attack that even if he were to come forward today and declare his memorandum misstated his reasons for the mistrial, we could not consider his explanation."); *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982) (overruled on other grounds) ("It is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision."); *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir. 1982) (post-decision statements by a judge about his mental processes should not be used as evidence). According to the United States Supreme Court:

> [T]he testimony of the trial judge given six years after the case has been disposed of, in respect to matters he considered and passed upon, was obviously

> incompetent. . . . A judgment is a solemn record. Parties have the right to rely on it. It should not lightly be disturbed and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.

Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904); *see also U.S. v. Morgan*, 313 U.S. 409, 421-22 (1941) (citing *Fayerweather* for the proposition that judges cannot be subjected to a probe of their mental processes because "such an examination of a judge would be destructive of judicial responsibility").

148. In *Strickland*, an *en banc* reversal of a district court death penalty habeas corpus decision, the Fifth Circuit underscored that "once a judicial opinion is written and filed, we are all as expert in its interpretation as the hand that wrote it. It belongs to us all." 693 F.2d 1243, 1263 (citing *Morrison v. Kimmelman*, 650 F.Supp. 801, 807 (D.N.J. 1986)).

149. In reversing the Fifth Circuit's determination of ineffective assistance of counsel, the United States Supreme Court agreed with the circuit court that "evidence about the *actual process* of decision, if not part of the *record* of the proceeding under review . . . should not be considered in the prejudice determination." *Id.* (emphasis added). Accordingly, the Supreme Court deemed "the trial judge's testimony at the District Court hearing" to be "irrelevant to the prejudice inquiry." *Strickland v. Washington*, 466 U.S. 668, 700 (1984).

Conflict With Ethical Guidelines

150. The judges were asked whether race was a significant factor in jury selection in specific Cumberland County cases. These are determinative legal questions for numerous Cumberland County defendants with pending RJA claims, including, but not limited to, Golphin, Walters, and Augustine. This line of questioning by the State puts judges in the untenable position of having to testify in conflict with their duty under the Judicial Code of Conduct not to comment publicly on pending legal matters. A.O. 10, Canon 3B(9). ("A judge shall not, while

a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness.").

151. The Court notes that Judge Gore stated in his proffered testimony that he was concerned that answering the State's questions presented conflicts with the Judicial Code of Conduct. He nonetheless agreed to answer the State's questions because he was under subpoena. The Court finds as a fact that all of the judges gave testimony only in response to the State's subpoenas. They gave testimony under this circumstance, and without voluntarily offering public statements regarding pending legal matters. None of the judges agreed to serve as expert witnesses for the State.

152. The Court is aware of no previous instance in North Carolina where the State has attempted in post-conviction proceedings to call the presiding trial judge to offer testimony regarding a legal question at issue in the post-conviction proceedings. In Vermont, however, the prosecution did exactly this. The prosecution called the presiding judge as an expert witness to testify in front of a different court that the deficient performance by defense counsel would not have affected the outcome of the trial. *In re Wilkinson* 165 Vt. 183 (1996). The Vermont Supreme Court reversed, based in part upon the mandates of the Code of Judicial Conduct:

> The Code of Judicial Conduct ("CJC") provides further guidance on this issue. Judges are required to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," A.O. 10, Canon 2(A), and to "perform judicial duties without bias or prejudice." A.O. 10, Canon 3B(5). Although we assume that Judge Grussing was not motivated by actual bias, his testimony was unduly prejudicial given its elevated aura of expertise. Moreover, "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness." A.O. 10, Canon 3B(9). Although Judge Grussing's 'comment' was his expert testimony, such testimony is certainly public, and is no more appropriate than the comments expressed in a newspaper editorial or interview. In fact, the testimony is more troubling because it was not only likely to affect the outcome of the proceeding but *the State intended that it do so.*

Id. at 187 (emphasis added).

153. The *Wilkinson* Court held that permitting "judges, clothed in the authority of the office, to testify at post-conviction relief hearings that the criminal trials over which they presided were conducted fairly and resulted in the correct verdict . . . would undermine both the propriety of the judicial office and the fairness of post-conviction relief proceedings." *Id.* The Court agrees.

154. Finally, given that these cases involve a new statute, and are the first of what may be many such post-conviction hearings under the RJA, it is worth considering the systemic consequences should this Court rule that presiding judges can testify regarding their mental processes and give opinions on the final legal question. Either party would be able to issue subpoenas to any judge who has presided over a relevant capital trial, effectively disqualifying a huge swath of the North Carolina trial bench. Indeed, on this record, if this testimony were admitted, the Court does not see a limiting principle that would prevent a party in the future from subpoenaing any judge to give a legal opinion after reviewing a selection of the transcript, even without any connection to the trial. Furthermore, any judge who testifies, and gives an opinion at an RJA hearing, presumably would be excluded from being able to hear any related matters under the RJA. By conforming to precedent, and the applicable North Carolina Judicial Code provisions, this Court avoids these thorny dilemmas.

Speculative Questions

155. The State asked numerous questions about how the trial judges would have responded to hypothetical scenarios. These questions called for speculation and were inadmissible. N.C.R.E. 602, 701.

Not Designated As Experts

156. The questions by the State, whether race was a significant factor, and how the judges would have ruled on various *Batson* hypotheticals, call for opinions based upon specialized knowledge of the law, and thus fall outside of the opinion testimony permitted by Rule of Evidence 701. Although all of the current and former judges questioned are unquestionably qualified to give expert legal opinions under Rule of Evidence 702, the State did not seek such a designation. Accordingly, even if the testimony of judges were otherwise admissible, it would be improper in this instance.

157. Despite these evidentiary and ethical rules, the State urged this Court to admit the judges' testimony regarding their observations and mental processes based upon the language of the amended RJA. The amended section 15A-2011(d), unlike its predecessor, explicitly includes "judicial officials" in the illustrative list of "criminal justice system" individuals from whom sworn testimony may be relevant. Nothing in the amended RJA, however, alters the existing rules of evidence, ethics rule, or body of case law limiting judicial testimony. N.C. Gen. Stat. § 15A-2011. The Court's ruling in this case – that judicial testimony may be admissible in some limited circumstances — is entirely consistent with the language of the amended RJA that the "relevant" evidence "may" include sworn testimony of judicial officials. N.C. Gen. Stat. § 15A-2011(d).

158. For these reasons, the Court sustains Defendants' objections to the judges' testimony as to events they observed which are recorded in the trial transcripts or as to their thought processes as presiding judges in capital cases in Cumberland County. However, because these issues arise under a new statute, this Court reviews the excluded testimony in the alternative.

Weight Of The Testimony

159. The Court has reviewed all of the testimony introduced, and the full offers of proof submitted by the State showing what the judges would have testified to if permitted by the Court. The Court finds that testimony, even if considered by the Court, would not have changed the result in this case.

160. First, the Court credits the testimony of the judges that they lacked specific, independent recollection of the jury selection processes over which they presided. All of the judges testified to long and busy judicial careers, during which they presided over numerous homicide and capital cases. All of the trials were years ago, some more than a decade ago. The value of the judicial testimony is limited by the judges' lack of specific recall of events.

161. The understandable effect of time on memory is another reason why the official record is a superior evidentiary source to the testimony of the judges. For example, Judge Thompson testified regarding a *Batson* violation that he had sustained in a case that was tried in Cumberland County after a change of venue, *State v. McCollum*. He testified that he recalled he had sustained the *Batson* violation *ex mero motu*, and without a defense objection. The transcript of the proceeding reflects that in fact, defense counsel had objected on two occasions pursuant to *Batson*, and that Judge Thompson's finding that the State purposefully discriminated was in response to defense counsel's second *Batson* motion.

162. The Court also finds that the responses of the judges to hypothetical *Batson* scenarios posed by the State are, necessarily, of limited value. The State typically began this line of inquiry by asking the judges to read aloud a highlighted portion of the transcript. The State then asked the judges to imagine there had been a *Batson* challenge, and that the State had proffered an explanation for the strike, related to the portions of the transcript just read aloud.

The State next asked the judges whether they would have sustained *Batson* violations in light of those facts. This line of hypothetical questioning is utterly unrealistic, contrary to the well-established law of *Batson*, and of extremely limited utility. Courts would not typically find a *prima facie* showing, and ask the State to state a race-neutral reason, without facts raising an inference of discrimination. The State did not posit any such facts in their hypothetical. Essentially, the State's questioning amounted to asking the judges whether, in the absence of any facts supporting a *Batson* challenge, the judges would have found a *Batson* violation.

163. For example, when questioning Judge Gore regarding Walters' jury selection, the State did not ask him to consider that the State had used 10 of its 14 peremptory strikes to exclude African-American venire members. Nor did the State ask Judge Gore, or any of the judges, to consider the State's treatment of similarly-situated non-black venire members jurors. Most of the judges had only looked at the portions of the transcripts describing the questioning of African-American venire members. And even in this limited context, the State cherry-picked its examples. The State did not question Judge Gore about Sean Richmond, a venire member excluded by the State in Walter's case, whom this Court had identified previously as an example of disparate treatment.

164. The State was aware of numerous examples from the Cumberland County cases of disparate treatment of black and white venire members from the *Robinson* litigation and order. Yet the State chose not to present the judges with any of these examples when asking about hypothetical *Batson* rulings.[19] The Court finds that this decision by the State skewed and severely undercut any probative value of testimony of the judges regarding *Batson* decisions in Cumberland County.

[19] As discussed *supra*, the State elected not to submit new offers of proof and to rely instead on the proffers submitted in *Robinson*.

165. More broadly, the Court notes that how trial judges would have ruled on *Batson* objections is itself of limited value given the difference between the legal standard under the RJA, whether race was a significant factor, and under *Batson v. Kentucky*, whether the State purposefully discriminated. *C.f.*, *State v. White,* 131 N.C. App. 734, 740 (1998) (finding that "[w]hile race was a certainly a factor" in the State's strike, the Court could not conclude that the strike was "based solely upon race," as required by North Carolina courts interpreting *Batson*).

166. The State additionally asked the judges about whether they would have *ex mero motu* raised *Batson* objections in the cases in which they presided. The value of this testimony is limited by several realities.

167. The current and former judges are highly qualified and greatly respected members of our Bench. It is beyond question that they would at all times seek to enforce the law, fairness, and justice in their courtrooms. Nonetheless, it does not follow that the judges would necessarily intervene in jury selection if race were a significant factor. First and foremost, as discussed above, it is not always immediately apparent or obvious that race is a significant factor. The Court notes — consistent with the testimony of Dickson, and experts Trosch, Stevenson, and Sommers — that we all suffer from unconscious biases. As the Supreme Court explained in *Miller-El*, a detailed examination of the difference in treatment of prospective jurors may be necessary to expose racially disparate questioning. 545 U.S. at 241 ("More powerful than [] bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."). There is no reason to believe — included in the State's proffer or otherwise — that Courts always have the information necessary to conduct such an investigation.

168. The parties in capital cases, with multiple attorneys and assistants, will often have information and resources unavailable to the judge. Ours is an adversary system: courts rely upon the parties to sharpen and present the necessary evidence. Furthermore, judges may defer to the strategic and tactical decisions of trial counsel in jury selection. With respect to this line of questioning, the Court credits the testimony of Judge Brewer:

> That is a very difficult question to answer because in this case there were very experienced and capable defense attorneys representing the two defendants that I believe had a thorough understanding, at least equal to mine, of the *Batson* case and the basis for which *Bats*on challenges could – could be raised. And because of the quality of the defense attorneys, I would probably have been inclined to defer to their judgment and ***their strategic and tactical judgment*** as to whether they were going to raise *Batson* challenges.

169. Most fundamentally, with respect to all of the judicial opinion testimony regarding the role of race in jury selection in Cumberland County trials, the Court finds that such testimony was limited by the limited sources of information provided to them. None of the judges, for example, was shown the "Jury Strikes" notes from *Augustine*, indicating that Cumberland County prosecutors collected and recorded information about prospective venire members in a Cumberland County case in highly racialized terms. As previously discussed, none of the judges was provided with the arguments of defense counsel, or the findings of this Court, with respect to disparate treatment of black and non-black venire members. None seemed aware of Russ's prior *Batson* violation. None had reviewed the MSU Study, or any of the enormous amount of statistical data. None had heard the testimony of Cumberland County prosecutors regarding the disparate jury selection processes employed in racially charged cases, or the lack of training in avoiding racial bias. The Court heard evidence over a total of four weeks: two and a half weeks in February, all of which was introduced into this record; and one

and a half weeks in October. This constituted a large amount of data and information all available to the Court, and not presented to the testifying trial judges.

170. In sum, the Court appreciates that this is a new statute and the question of whether, and to what extent, judicial testimony is admitted may be an important one. The record in this case demonstrates the high risk of prejudice to the judicial system that would be imposed by permitting parties to subpoena and call presiding judges. It further demonstrates the limited probative value of such testimony, absent the unusual circumstance where a judge may have specific factual knowledge of an issue unreported in a transcript.

STATEWIDE CASE EXAMPLES OF DISCRIMINATION

171. In connection with RJA litigation, prosecutors from around the State, including Cumberland County, prepared affidavits or unsworn statements purporting to offer race-neutral reasons for the strikes of African-American citizens from capital juries.[20] In their post-hearing brief, Defendants presented analyses of many of the prosecutors' proffered reasons. These analyses were based upon the prosecutors' affidavits or statements, the transcripts of jury selection proceedings, and juror questionnaires.

172. In its earlier discussion of Defendants' non-statistical evidence, the Court addressed the several instances of disparate treatment and race-based questioning in Cumberland County cases, including Defendants' individual cases. The Court addresses here examples from elsewhere in the state. After careful review, the Court concludes that the case examples Defendants presented in their brief support a finding that race was both a significant and intentionally-employed factor in the State's exercise of peremptory strikes in North Carolina, in Cumberland County, and in Defendants' individual cases.

[20] The idea for collecting post-hoc *Batson*-style explanations for every struck African-American venire member originated with Joseph Katz, the State's statistical expert.

Exclusion Based Purely On Race

173. It is a rare case when the prosecution admits race was the reason for a peremptory strike. In the following case, the Court finds "exceptionally clear proof" of purposeful discrimination based on race. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987)

- In the 1994 Davie County case of *State v. Gregory*, the prosecution struck African-American venire member Tonya Anderson in part because "***[t]he victim is a black female. That juror is a black female. I left one black person on the jury already.***"

The prosecution's discriminatory intent could not be clearer.

Exclusion Based On Race Or Racial Proxy: African-American Institutions

174. Short of an outright admission — "I struck him because he's black" — the closest articulation of discriminatory intent is to exclude African-American potential jurors because of their association with historically or predominantly black institutions. The Court finds a number of cases where that is precisely what happened:

- In the 1996 Rutherford County case of *State v. Fletcher*, the prosecution attempted to strike African-American venire member Benjamin McKinney because he belonged to the NAACP. The trial court sustained defense counsel's *Batson* objection.
- In the 1992 Guilford County case of *State v. Robinson,* the prosecution struck African-American venire member Lolita Page in part because she was a graduate of North Carolina State A&T University.
- In the 1995 Anson County case of *State v. Prevatte*, the prosecution struck African-American venire member Stanley Webster in part because he attended Shaw University.
- In the 1999 Davie County case of *State v. Al-Bayyinah*, the prosecution struck Laverne Keys in part because she had worked with an African-American lawyer on a black history program at her local library.

175. The Court finds that invocation of membership in an African-American organization or attendance at a predominantly African-American institution constitutes a facially discriminatory explanation for striking African-American venire members. The NAACP, historically black colleges and universities, and formal acknowledgments of black history, were

all born out of our country's history of race discrimination. That prosecutors would rely on African Americans' participation in these institutions as a basis to continue denying their civil rights is deeply troubling to the Court.

Exclusion Based On Race Or Racial Proxy: Race-Based Questioning

176. A prosecutor's questions during jury selection "may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97. Defendants' expert Stevenson explained the phenomenon of "targeting," whereby African-American potential jurors are scrutinized more carefully and more intensely questioned in order that the prosecutor might find a basis for which to strike the venire member. *Robinson* HTpp. 873-74. In addition to *Golphin* venire member John Murray discussed earlier, the Court finds numerous instances of race-conscious jury selection wherein prosecutors singled out African-American venire members for repetitive and idiosyncratic questions, subjected them to explicitly race-based inquiries, and then, in most instances, struck them based on these racialized inquiries.

- In the 1994 Rowan County case of *State v. Barnes, Blakeney & Chambers*, the prosecution singled out African-American venire member Melody Hall for questions about the impact of race on her decisions as a juror. The prosecutor specifically asked Hall, "Would the people . . . you see every day, ***your black friends***, would you be the subject of criticism if you sat on a jury that found these defendants guilty of something this serious?"

- In the 1994 Brunswick County case of *State v. Cummings*, the prosecution singled out African-American venire member Alfredia Brown for questioning about whether her ability to be fair would be affected by the defendant's race.

- In the 1994 Mecklenburg County case of *State v. Harden*, the prosecution struck African-American venire member Kennith Brown in part because he reported a negative experience with law enforcement in which "he was called 'black' and was hit, pushed and locked up by white law enforcement."

- In the 1995 Transylvania County case of *State v. Sanders*, the prosecution subjected African-American venire member Renita Lytle to a series of increasingly invasive questions about her son's father, where he lived, whether he was working, how long Lytle had been estranged from him, and whether he was "carrying out his

responsibilities for child support." The trial court sustained an objection by defense counsel, who described the questions as "blatantly racist."

- In the 1993 Catawba County case of *State v. Bowie*, the prosecution targeted African-American venire member Johnny Lewis for questioning on the effect of the defendant's race on his decision-making.

- In the 1996 Randolph County case of *State v. Trull*, the prosecutor attempted to strike African-American venire member Rodney Foxx. The trial court sustained defense counsel's *Batson* objection after finding that the prosecution had subjected Foxx to repetitive questioning and "spent noticeably more time conferring" during Foxx's voir dire.

Exclusion Based On Race Or Racial Proxy: Lack Of Intelligence

177. In a number of cases, prosecutors have offered as reasons for striking African Americans that they are not smart, educated, or articulate enough to serve. These explanations evoke the troubling stereotype of African-American inferiority. *See Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (noting that, after slavery, states sought to bar African Americans from jury service because "[t]he colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence").

- In the 2006 Brunswick County case of *State v. Maness*, the prosecution struck African-American venire members Theresa Ann Jackson and Triston Robinson in part because of their intellectual or educational deficiencies. Jackson was found unworthy because, on her jury questionnaire, she twice misspelled her occupation and that of her husband — "fort lift driver" rather than "fork" — and she also misspelled the name of the town where she worked — "Reilgwood" instead of "Riegelwood." Robinson had a 10th grade education.

- In the 2001 Davidson County case of *State v. Watts*, the prosecutor struck African-American venire member Christine Ellison in part because of misspellings and errors on her questionnaire, including her state of birth and occupation.

- In the 1997 Lenoir County case of *State v. Bowman*, the prosecution struck African-American venire member Lee Lawrence in part because she lacked a high school education.

- In the 1999 Forsyth County case of *State v. Thibodeaux*, the prosecutor struck African-American venire member Marcus Miller in part because he "answered questions 'Yeah' 6 times during questioning."

- In the 1994 Davidson County case of *State v. Elliot*, the prosecution struck African-American venire member Lisa Varnum in part because she "responds to a number of direct inquires by nodding her head and making uh-huh responses."

- In the 1995 Bertie County case of *State v. Bond*, the prosecution struck African-American venire member Mary Watson Jones in part because she answered "uh-huh" to a number of questions.

178. Tellingly, in each of these cases, the State passed non-black venire members who had comparable levels of education or made similar spelling errors, or gave identical "yeah" or "uh huh" answers.

Exclusion Based On Race Or Racial Proxy: Demeanor

179. Defendants' evidence shows that prosecutors in North Carolina and Cumberland County have been trained to cite the demeanor of African Americans as reasons for striking them. The prosecutors' characterizations of a number of potential jurors described here are particularly disturbing because they invoke traits stereotypically ascribed to African Americans. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."). In addition, characterizations of black venire members like John Murray, who was called for jury duty in *Golphin*, as "antagonistic" or "militant" and insufficiently "deferential" to authority are deeply rooted in the history of violence against African Americans. *See* "People & Events: Lynching in America, PBS American Experience Series: *The Murder of Emmett Till*, available online at http://www. pbs.org/wgbh/amex/till/peopleevents/e_lynch.html (Many victims of lynching between 1880 and 1930 were African Americans "who violated white expectations of black deference, and were deemed 'uppity' or 'insolent.'").

180. In the following cases, the trial court specifically found that the State's demeanor-based explanations were pretextual. This Court gives weight to these rulings and finds that the proffering of pretextual demeanor-based reasons constitutes further evidence of discrimination.

- In the 1991 Robeson County case of *State v. McCollum*, the prosecutor moved to strike African-American venire member DeLois Stewart in part because, in answering questions about the death penalty, she was "evasive and antagonistic." The trial court deemed this demeanor-based reason pretextual.

- In the 1997 Mecklenburg County case of *State v. Fowler*, the prosecutor struck African-American venire member Pamela Collins. The prosecutor initially offered as his reason for striking Collins that her body language, lack of eye contact, laughter, and hesitancy established "physical indications . . . of an insincerity in her answers." The trial court found this reason was neither credible nor race-neutral and rejected all suggestion that Collins was untruthful.

Exclusion Based On Race Or Racial Proxy: Lack Of Community Connection

181. Defendants have presented instances of prosecutors justifying strikes of African-American venire members on the basis that they lacked sufficient ties to the local community. Defendants' evidence shows that these justifications were often not supported by the record. In some instances, the prosecutors accepted non-black venire members who were even less tethered to the community than the excused African Americans. The Court finds from this evidence that the State has misused the notion of community connection to exclude black persons from capital juries. With great concern, the Court further notes that the State's practice in this regard is evocative of a time when African Americans were not considered citizens and full members of the communities in which they lived. *Dred Scott v. Sandford*, 60 U.S. 393, 404-405 (1857); *see also Jones v. Alfred H. Mayer Co.* 392 U.S. 409 (1968) (Civil Rights Act of 1866 applies to housing discrimination by private sellers; purpose of Act was to limit "ability of white citizens to determine who [would] be members of [their] communit[ies]" and to employ "federal authority to deal with 'the white man . . . [who] would invoke the power of local prejudice' against the

Negro") (brackets in original). The cases here show this offensive stereotype persists and is self-perpetuating as it is invoked to exclude African Americans from jury service and thereby deprive them of one of the most salient emblems of citizenship.

- In the 1995 Union County case of *State v. Strickland*, the State struck African-American venire member Leroy Ratliffe in part because he was a native of Anson rather than Union County. However, the State accepted non-black venire members Robert Berner, who was originally from the Midwest, and Albert Ackalitis, a native of New York.

- In the 2002 Rowan County case of *State v. Smith*, the State struck African-American venire member Sandra Connor in part because she had worked in adjoining Davie County for the past 14 years and thus purportedly had "limited ties" to the community. The record shows that the State passed non-black venire member Dana Edwards who did not live in North Carolina until he was an adult, had lived in Rowan County for only four years, and commuted to work in Mecklenburg County every day.

- In the 1993 Iredell County case of *State v. Burke*, the State struck African-American venire member Vanessa Moore in part because she had previously lived in Maryland and Washington, D.C. The record shows that Moore was raised and went to school in North Carolina and had been living in the state for the past eight years, five at her current address. The State passed non-black venire members Scott Tucker, Rita Johnson, Jeffrey Smallwood, and Janis McNemar, all of whom had been born and/or lived for substantial periods of time in other states; three of the four had lived in North Carolina less than four years.

- In the 1996 Richmond County case of *State v. Peterson*, the State struck African-American venire member Carletter Cephas in part because she was originally from Washington, D.C. According to the prosecution, "The murder in this case . . . involved the killing of a woman working in a convenience store in Richmond County. Such murders occur every day in Washington, D.C., but they are very rare in Richmond County. Cephas is a potential juror with big city values that are not a good fit for a small town murder case." The record shows that Cephas had lived in Richmond County for 14 years, as had her father and grandmother and other family members. The prosecutor asked Cephas no questions about her familiarity with Washington D.C. crime generally or daily convenience store murders. In sum, nothing in her voir dire answers suggested Cephas had anything but small town values. Meanwhile, the prosecutor passed non-black venire member William Waterman, who was originally from Los Angeles. The prosecutor passed several other non-black venire members from other states, but did not ask them whether they came from big cities or small towns. Mary Van Nest was born in Massachusetts and lived in Florida before moving to Richmond County. Lee Jenkins was born in Virginia. Patrick Comninaki was an "army brat" who moved around a lot. Patrick

Cullen moved to North Carolina at his mother's insistence after he "got in trouble" in Oregon.

Admissions — No Race-Neutral Reason

182. In a substantial number of cases, the State conceded there were no apparent race-neutral explanations for the strikes against African-American venire members. The State's failure to come forward with a race-neutral explanation for these strikes is strong evidence of intentional discrimination. *See Batson*, 79 U.S. at 97 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.").

- *State v. Jennings*, Walter Curry (Wilson County, 1990)
- *State v. Barrett*, Phyllis Brooks, Felecia Boyce, Nancy Sheffield, Sandra Banks, Marsha Ingram (Northampton County, 1993)
- *State v. Tyler*, Janet Burke, Nellie Fennell, Terry Lee, Barbara Jenkins (Hertford County, 1995)
- *State v. Bond*, Wallace Jones (Bertie County, 1995)
- *State v. Richardson*, Donnell Peoples (Nash County, 1995)
- *State v. Larry*, Tonya Reynolds (Forsyth County, 1995)
- *State v. Williams*, Thomas White (Bertie County, 1996)
- *State v. Anthony*, Angela Meeks (Gaston County, 1999)
- *State v. Duke*, Patrick Odems (Gaston County, 2003)
- *State v. Sherrill*, Dwayne Wright (Mecklenburg County, 2009)

183. Based upon its review of the voir dire transcripts, the Court finds these African-American venire members were qualified to serve as jurors and would have given fair consideration to the evidence and governing law, including the death penalty. The State's failure to explain its exclusion of these 17 African-American citizens, at times after extremely perfunctory questioning, is evidence of discrimination.

184. The Court also finds it significant that the State failed to proffer explanations for strikes of African-American venire members in more than 20 capital proceedings from Districts 16A, 16B, 18, and 28, among others. The State's expert, Joseph Katz, admitted that one potential reason explaining why prosecutors did not respond to his statewide request for race-neutral explanations was that those prosecutors had been using race as a basis for selecting juries. Certainly prosecutors who believed they had not used race as a basis for peremptory strikes had every incentive to respond to Katz in order to assist the State in demonstrating the integrity and race-neutral nature of capital proceedings in North Carolina. Consequently, the Court finds that the failure of a significant number of prosecutors to respond to Katz's survey suggests that those prosecutors may have discriminated on the basis of race in selecting capital juries. At a minimum, the prosecutors who did not respond to Katz's survey evaded Katz's inquiry without providing any reasonable justification for doing so. The Court finds that the failure to respond to Katz's survey is evidence of discrimination on a statewide basis.

Exclusion Based On Gender

185. The State submitted sworn affidavits from a former assistant district attorney in Cumberland County admitting that the prosecution struck African-American venire members on the basis of gender in two cases.

- In the 1999 Sampson County case of *State v. Barden*, the prosecution struck African-American venire member Elizabeth Rich because the State was "looking for strong male jurors."
- In the 2001 Onslow County case of *State v. Sims & Bell*, the prosecutor struck African-American venire member Viola Morrow in part because the State was "looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the Defense as they were taking off every male juror."

186. The Court finds that the stated reason in these two cases reveals an unconstitutional use of peremptory strikes on the basis of gender, in violation of *Batson* and

E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). The Court also finds that the State's actions these cases constitute evidence of a willingness to consciously and intentionally base strike cisions on discriminatory reasons, and evidence that race was a significant factor in prosecutor ike decisions.

Irrational Reasons For Exclusion: Service In United States Military

187. Prosecutors must give "clear and reasonably specific" explanations of "legitimate sons" for exercising peremptory strikes and these explanations must be "related to the ticular case to be tried." *Batson*, 476 U.S. at 98 n.20. In the cases described below, secutors struck African Americans and then gave irrational explanations having nothing to do h the case.

188. The Court is deeply troubled by the following three instances in which African- rican veterans were rejected for jury duty in capital cases because they served their country the armed forces. There is no rational reason why a military veteran should be considered unworthy for jury service. If these citizens were fit to serve the United States as soldiers, they were certainly fit to serve as jurors.

- In the 1995 Anson County case of *State v. Prevatte*, the prosecution struck African-American venire member Randal Sturdivant in part because he was a veteran of the United States Army.
- In the 1997 Mecklenburg County case of *State v. Fowler*, the prosecution excluded African-American venire member Clarence Stewart from jury service in part because he "served in the Army and was halfway to retirement when he left the Army. Even though the State did not ask about why he left the Army they were concerned about that fact."
- In the 1998 Mecklenburg County case of *State v. Steen*, the prosecution struck African-American venire member Andrew Valentine in part because he "worked as a military police officer in the Army."

189. The Court notes further that, in all three of these cases, the prosecution passed non-black military service veterans.

Irrational Reasons For Exclusion: Religious Faith

190. The Court finds that, in the following cases, African-American potential jurors were struck because of their religious beliefs and church membership. Earlier, in connection with its discussion of Russ' jury selection in the case of Walters' codefendant Carlos Frink, the Court noted the strike of Wayne Radcliffe based on his church membership and status as a deacon. This explanation lacks any rational basis.

- In the 1998 Harnett County case of *State v. Brewington*, the prosecution struck African-American venire member Ursula McLean in part because her favorite TV programs were "religious programs" and she "very frequently" attended church. While rejecting McLean for her religious faith, the State passed 15 non-black venire members who also said they "very frequently" attended church.

- In the 1994 Beaufort County case of *State v. Ball*, the prosecution struck African-American venire member Sheila Driver in part because she wrote on her questionnaire, "My religious background does not stop me from serving and being fair and honest on the jury."

- In the 1997 Buncombe County case of *State v. Davis*, the prosecution struck African-American venire member Wanda Jeter in part because of "a religious consideration," namely that Jeter was "wearing a cross earring in her right ear."

Irrational Reasons For Exclusion: Affiliation With The State

191. The Court has identified a number of cases in which African-American citizens were excluded from capital jury service because of their connections to law enforcement or prosecutorial agencies. Earlier, the Court discussed Russ' excusal of Wayne Radcliffe from the *Frink* jury because he had relatives and friends who worked for the prison system. Given that close association with law enforcement is typically and commonsensically considered a pro-State attribute, this explanation is as mystifying as it is irrational. *See State v. Porter*, 326 N.C. 489, 498 (1990) (State may reasonably seek jurors who are "stable, conservative, mature, ***government oriented***, sympathetic to the plight of the victim, and ***sympathetic to law enforcement crime solving problems and pressures***") (emphasis added, internal citations omitted).

- In the 1991 Rockingham County case of *State v. Rose*, the prosecution struck African-American venire member Sharon Sellars in part because she had friends and relatives in law enforcement: "Sellars indicated her father was a deputy sheriff, and that a State Trooper was a friend."

- In the 1994 Beaufort County case of *State v. Ball*, the prosecution struck African-American venire member Ella Pierce Johnson in part because "her son was a lawyer that was at one time an assistant district attorney but was presently in private practice in Greensboro."

- In the 1997 Wake County case of *State v. Mitchell*, the prosecution struck African-American venire member Ricky Clemons in part because his wife worked at the Attorney General's Office.

- In the 1997 Halifax County case of *State v. Hedgepeth*, the prosecution struck African-American venire member Rochelle Williams in part because her husband worked at the county jail.

192. In each of these cases, the State passed non-black venire members with similar connections to prosecutors or law enforcement officers.

Irrational Reasons For Exclusion: Nonsensical Reasons

193. The Court finds that there are a number of cases in which the proffered explanations simply make no sense. Among the reasons lacking any basis in logic or common sense are excluding an African-American citizen from jury duty because he had not heard the facts of the case, for having a hyphenated name, and for being a fervent UNC alumna. Similarly, as discussed earlier, Sean Richmond was excluded from the Walters' jury because he did not seek crime victim counseling after his car stereo system was stolen. Excluding African-American citizens from jury service for such patently irrational, nonsensical reasons evinces pretext, particularly in light of the fact that, in a number of the examples described here, the State passed non-black venire members with the same traits deemed objectionable in black venire members.

- In the 2002 Washington County case of *State v. Smith*, the State peremptorily struck African-American venire member William Cahoon in part because he "indicated

during voir dire that he had not heard of the crime" and there were "few residents that claimed no knowledge of the brutal crime." In fact, the State passed six non-black venire members who, like Cahoon, said they knew nothing about the crime.

- In the 1998 Harnett County case of *State v. Brewington*, the State struck African-American venire member Belinda Moore-Longmire in part because "her hyphenated last name was circled by one of the prosecutors."

- In the 1998 Wake County case of *State v. Williams*, the State struck African-American venire member Harry Smith in part because he "did not fill out the questionnaire completely." The record shows that the only question Smith omitted was whether any member of his family or any close friend had ever been a defendant in a jury trial. When he was asked about this, Smith informed the prosecutor he had no close friends or family members who had been defendants in a jury trial. While excluding Smith for a simple omission, the State accepted a non-black venire member who answered the same question falsely. Donna Aycock, who was seated as an alternate juror, answered "no" to the question about close friends or family members who had been criminally charged. Aycock admitted on voir dire she was best friends with the wife of a man tried capitally and sentenced to life without parole for a double murder during a robbery.

- In the 1997 Wake County case of *State v. Mann*, the State struck African-American venire member Regina Locke in part because when she was asked which University of North Carolina campus she attended, Locke said UNC-Chapel Hill was "the only one that counts." The prosecution asserted that this response reflected Locke's lack of maturity. The record does not support the prosecutor's supposition. Indeed, Locke's comment elicited light-hearted banter from the trial judge concerning "whatever that institution is in Orange County."

- In the 1992 Cabarrus County case of *State v. McCarver*, the State peremptorily struck African-American venire members Renee Ellis and Charlotte Rucker for mutually exclusive reasons. Ellis was struck in part because she had a small child and consequently, "she would have a greater sense of taking someone else's child away (and thus would be less likely to vote for the death penalty)." Meanwhile, Rucker was struck in part because she had no children, "therefore giving her little life experience and wisdom to draw upon when evaluating the case and determining the appropriate sentence for crimes of this magnitude."

- In the 1991 Robeson County case of *State v. McCollum*, the State struck African-American venire member DeLois Stewart in part because she knew people who worked in the public defender's office. In fact, Stewart worked in the office of the trial court administrator and, as a result, she was familiar with all kinds of judicial employees, including members of the public defender's office and the district attorney's office. The trial court sustained defense counsel's *Batson* objection.

Exclusion Based On Misleading Characterizations Of Voir Dire

194. The Court finds that there are numerous instances where purported race-neutral explanations submitted by the State mischaracterize the voir dire responses of African-American potential jurors.

- In the 1995 Forsyth County case of *State v. Woods*, the State struck African-American venire member Sadie Clement in part because she was "with her child in juvenile court because he was the victim of a molestation." The voir dire transcript does not reveal any instance in which Clement said her child was in juvenile court because he was the victim of a molestation. Rather, the transcript reveals that non-black venire member Neva Martin said her son was molested and the matter was handled in juvenile court. Martin was seated on the jury.

- In the 2006 Rutherford County case of *State v. Garcell*, the State peremptorily struck African-American venire member Tonette Hampton in part because she "stated on voir dire that she had a cousin who had been stabbed and 'nobody did anything.'" This is a misstatement of the facts. The record shows that Hampton said nobody did anything ***to her***, and Hampton expressed no concern about the way law enforcement handled her cousin's stabbing.

- In the 1996 Guilford County case of *State v. Thomas*, the State attempted to strike African-American venire member Quimby Mullins. When the defense objected under *Batson*, the prosecutor claimed he had observed Mullins and another potential juror "come into court, separate themselves from the rest of the jurors, and sit behind the defendant. ... They did not identify themselves [to the bailiff] as jurors. ... They said they're here with [the defendant]. ... [T]hey gave the bailiff some degree of difficulty, eventually he figured out that they were jurors and asked them to go back . . . ." The court then took testimony from the bailiff, who gave a very different story. According to the bailiff, Mullins and another venire member sat in the very back of the courtroom and not right behind the defendant; they were only in the courtroom for a moment before the bailiff approached them; and they told the bailiff they were there for jury duty in a murder trial. After the bailiff informed the prosecution they were potential jurors, Mullins and the other venire member were escorted to the jury room. The trial court disallowed the State's peremptory strike and seated Mullins as a juror.

- In the 1994 Davidson County case of *State v. Elliot*, the State struck African-American venire member Lisa Varnum in part because "[t]here appears to be an indication in the transcript that the juror is having difficulty in hearing." The affidavit points to the transcript showing that the prosecutor asked Varnum, "You can hear me okay, can't you?" In fact, the transcript shows that the prosecutor asked

this question of numerous potential jurors, including non-black venire members passed by the State.

- In the 1997 Forsyth County case of *State v. Moses*, the State struck African-American venire member Broderick Cloud in part because "[t]he juror stated that he may have gone to school with the defendant and played on sports teams with him but that he was not sure." The record shows Cloud said he was not sure but he thought he might have gone to school with the defendant and perhaps knew him through sports. After the trial judge informed Cloud that the defendant was from out of state and did not go to school in Winston-Salem, Cloud affirmed that he did not know the defendant.

- In the 1993 Johnston County case of *State v. DeCastro*, the State struck African-American venire member Harry James in part because "[t]his juror was a sociology major. I feel some sociologists may be more likely to forgive and have sympathy for defendant based upon socioeconomic circumstances." The voir dire transcript shows James had taken some sociology courses in college; however, he never worked as a sociologist. Moreover, James said nothing about "socioeconomic circumstances" and the prosecutor did not ask any questions in this area. Finally, James had served in the United States Army for 17 years, a trait typically considered to make a juror pro-prosecution.

Exclusion Based On Disparate Treatment: Misgivings About The Death Penalty

195. Disparate treatment of black and non-black venire members is clearly probative of racial bias. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination."). The Court finds the following numerous instances when prosecutors throughout North Carolina struck African-American venire members for a purportedly objectionable characteristic but accepted non-black venire members with comparable or even identical traits.

196. One of the most frequently-proffered reasons for excluding African-American citizens from capital juries is reservations about the death penalty. The cases described below confirm, however, what Defendants' statistical evidence shows. These cases also reflect the examples of disparate treatment in Cumberland County cases discussed earlier, Freda Frink in *Golphin*, Teblez Rowe in *Williams* (2004), and Rodney Berry in *McNeill*. Among venire

members who express tepid support for the death penalty, the State is more likely to strike African Americans than other potential jurors. Remarkably, in some instances, the State is even willing to accept non-black venire members challenged for cause for their death penalty views.

- In the 1994 Camden County case of *State v. Cole*, the State struck African-American venire members Alvin Aydlett, Marvin Abbott, and Miles Walston because of their death penalty views. The Court has reviewed the voir dire of these black venire members, and finds no meaningful difference between their death penalty reservations and those of John Carpenter, Paulette Newberry, and Terri Toppings, non-black venire members passed by the State. The Court finds it significant that, as with Aydlett, Abbott, and Walston, the prosecution challenged Carpenter and Toppings for cause based on their misgivings about the death penalty.

- In the 1995 Union County case of *State v. Strickland*, the State struck African-American venire member Leroy Ratliffe in part because he had a "moderate" belief in the death penalty. Yet, the State accepted non-black venire members with comparable views on the death penalty. Marlon Funderburk said his belief in the death penalty was "moderate." Brenda Pressley said her belief in the death penalty was "slight." Donald Glander, when asked to describe his belief in the death penalty as strong, moderate, or slight, said, "I'd have difficulty describing it. I think that, uh, without knowing the circumstances or the facts here may be, I'm not sure I could answer that question. I don't have a strong feeling, you know, about it."

- In the 1999 Sampson County case of *State v. Barden*, the prosecutor struck African-American venire member Lemiel Baggett because, when asked if he could impose the death penalty, Baggett spoke very quietly and said, "'Well, in some cases" and "Yes, I ***think*** so." (emphasis in original). The State accepted several non-black venire members who expressed similar views and gave nearly identical answers to the question of whether they could impose the death penalty. Teresa Birch, who was also soft-spoken, said, "Yes, I ***think*** I could." Joseph Berger said, "I ***guess*** I could. Yes." Betty Blanchard said, "I ***think*** so."

- In the 1996 Johnston County case of *State v. Guevara*, the State struck African-American venire member Gloria Mobley because of her purported reservations about the death penalty. The State passed Mary Matthews, Carolyn Sapp, Edna Pearson, Teresa Bryant, Walda Stone, and Natalie Beck, all of whom were non-black venire members who indicated similar reluctance to impose the death penalty.

- In the 1993 Randolph County case of *State v. Williams*, the State struck African-American venire member Mary Cheek in part because she was "hesitant" on the death penalty." The record shows Cheek had no strong feelings for or against the death penalty and she could consider it depending on the case and the evidence. The State passed non-black venire members Larry Frazier and Julie Humble, both of whom stated they leaned more towards life than the death penalty.

- In the 2006 Randolph County case of *State v. Wilkerson*, the State struck African-American venire member Richard Leonard in part because of his death penalty views. During voir dire, Leonard said, "No strong feelings [regarding the death penalty], but I'm not against it. I don't agree with it, but, I could you know, I mean if it's the law it's just the law, you know." The State passed Pamela Daniels, Rosa Allred, and Fay Reitzel, non-black venire members who expressed thoughts about the death penalty that were virtually identical to Leonard's.

Exclusion Based on Disparate Treatment: Hardship

197. Another frequently-heard reason for striking African Americans is concern about the hardship jury service will cause. The examples described here, as well as the previously-discussed treatment of venire members Sharon Bryant in *Augustine* and Randy Mouton in *Meyer* (1995), illustrate that hardship serves as a convenient, seemingly race-neutral reason to disproportionately exclude African-American citizens from jury service in capital cases. This is consistent with Defendants' statistical evidence showing racial disparities among potential jurors with hardships. In addition, these examples illustrate a practice recently condemned by the United States Supreme Court. In *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Court considered the prosecution's disparate treatment and questioning of black and non-black venire members with hardships. The Court noted that, even when a non-black venire member had obligations that "seem substantially more pressing," the prosecution strived to "elicit assurances that he would be able to serve despite his work and family obligations" and pressed the venire member to "try to make other arrangements as best you could." 552 U.S. at 484.

- In the 1998 Harnett County case of *State v. Brewington*, the State struck African-American venire member Pamela Simon in part because of hardship, namely that she was "divorced, receives no child support, and is the sole financial provider." The record shows that the prosecution passed non-black venire member Barbara Roller, a single mother who was scheduled to have cancer surgery in a few weeks. Roller was concerned about her health as other forms of treatment had failed and this was to be her first surgical operation.

- In the 1997 Sampson County case of *State v. Parker*, the State struck African-American venire member George McNeill in part because he had a fractured bone and blood pressure problems. McNeill had sought a hardship excusal for medical

reasons. The State passed non-black venire member Lois Ivey despite concerns about her fitness to serve because of crippling migraine headaches. Ivey stated, "I don't think it would be fair of me or them to have to sit up here in that excruciating pain."

- In the 1996 Martin County case of *State v. Bonnett*, the State struck African-American venire member Ossie Brown in part because, "as guardian of three grandchildren, [she] expressed concern about caring for her grandchildren during a lengthy capital trial." The record shows Brown's youngest grandchild was 10 years old and all three were in school. Brown never voiced any concern about the length of the trial and she unequivocally stated that her childcare responsibilities would not be a problem. Brown never sought to be excused for hardship. The State accepted Maurice Roberson and John Daniels, two non-black venire members who were highly vocal about the hardship jury service would cause for them. The State also passed Michael Jernigan, Marvin Perry, Rudy Bullock, and Abner Winslow, non-black venire members who had small children at home.

- In the 2006 Rutherford County case of *State v. Garcell*, the State struck African-American venire member Pamela Wilkerson because "she had upcoming appointments with doctors for two of her children. She further stated that her own mother, who babysat her children, was ill and that serving on the jury would be a problem for her." The prosecution's questioning of non-black venire member Lorraine Emory, who had small children and whose husband was out of town, differed markedly from that of Wilkerson. As in *Snyder*, the prosecutor asked Emory leading questions designed to persuade her she could serve on the jury. Further, the prosecution passed non-black venire member John Shepard, despite his plea to be excused from jury service because of work and family responsibilities. Shepard's wife was out of town and consequently, like Wilkerson, Shepard was solely responsible for his children.

- In the 2004 New Hanover County case of *State v. Cummings*, the State struck African-American venire member Letari Thompson in part because of hardship, namely that Thompson had an educational training scheduled. The record shows that Thompson's training was unlikely to create a scheduling problem. The State passed non-black venire members Diane Hufham and Rebecca Council, who, unlike Thompson, specifically asked to be excused from jury service for hardship reasons.

- In the 2006 Randolph County case of *State v. Wilkerson*, the State struck African-American venire member Richard Leonard in part because of concerns that his work responsibilities would prevent him from giving proper attention to jury service. In particular, the prosecution had concerns that Leonard "might possibly be planning to work all night and then show up for jury service." The State passed Kenneth Justice and Melissa Sands, non-black venire members who, like Leonard, said they had substantial work commitments in the evening. Sands worked two jobs every day and had two children at home. Justice told the prosecutor that jury service was going to "put me working at night." The prosecution's response was to suggest that if Justice

he felt himself "getting sleepy and you're not paying attention . . . let us know, I need a break."

Exclusion Based On Disparate Treatment: Criminal Involvement

198. African Americans are frequently excluded from capital juries because they, or their family members or friends, have been involved in the criminal justice system. The case examples described here, along with the examples from Cumberland County discussed earlier — Ellen Gardner, John Reeves, Wilbert Gentry, Ernestine Bryant, Mardelle Gore, and Elliot Troy — demonstrate that it does not matter whether black venire members are merely charged or actually convicted, whether black venire members are perpetrators or victims, or how distant the relationship to a family member or friend with a criminal record. African Americans are often excluded from jury service for the slightest association with crime. In contrast, prosecutors frequently accept non-black venire members with criminal records and comparable or more serious criminal histories. These examples are consistent with Defendants' statistical evidence showing that being black predicts whether or not the State will strike a venire member, even when holding constant or controlling for factors such as involvement in the criminal justice system.

- In the 2001 Onslow County case of *State v. Miller*, the State struck African-American venire members Tyron Pickett, Sean Duckett, and Josephine Chadwick because of their involvement in the criminal justice system. Pickett and Duckett had criminal convictions, the nature of which is not in the record. Chadwick's niece had been charged with a drug offense. The prosecution passed a half dozen non-black venire members with criminal records or friends and family members with criminal histories. Valerie Russell's husband pled guilty to misdemeanor child abuse. Rebecca Amaral's cousin was convicted and had been in prison for 20 years for a sex offense against a child. William Gagnon was convicted of marijuana possession. Harold Fletcher had a DUI conviction. Brian Odum had a prior conviction for possession of drug paraphernalia. Someone in Aaron Parker's family had been charged with a child support violation but the prosecution did not seek to elicit any further information about Parker's connections to the criminal justice system.

- In the 1998 Harnett County case of *State v. Brewington*, the State struck African-American venire member Ursula McLean in part because her aunt had recently been

murdered in Harnett County and the crime remained unsolved. However, on voir dire, McLean expressed no dissatisfaction with the pace or quality of the investigation. In addition, State passed non-black venire members whose family members had also been the victims of homicide: Eugenia Stewart's brother-in-law was killed by a drunk driver and Craig Matthews' second cousin was murdered the week before he was questioned as a potential juror.

- In the 1994 Brunswick County case of *State v. Cummings*, the State struck African-American venire member Alfredia Brown in part because "she had a friend with a drug abuse problem." The State passed non-black venire members Barbara Ruby, Robert Morris, and Janet Coster, all of whom had children or friends with substance abuse problems. The record shows the prosecution displayed little or no interest in learning about these matters when the potential juror in question was not an African American.

- In the 1997 Halifax County case of *State v. Hedgepeth*, the State struck African-American venire member Rochelle Williams in part because her husband had "failed to pay off tickets." The record confirms that William's husband was once arrested for failure to pay speeding tickets. However, the State passed several similarly-situated non-black venire members, including two who had themselves been arrested. Freddie Ezzell had been arrested for failing to pay child support. H.T. Hawkins had been arrested for DWI. Willie Hammack's son had been arrested for DWI and William Massey's brother had been arrested for disorderly conduct. Anthony Hux was passed even though he had testified as a character witness on behalf of a murder defendant.

- In the 1994 Pitt County case of *State v. Wooten*, the State struck African-American venire member Janice Daniels because she was charged with DWI and possession of drug paraphernalia. She initially pled guilty in district court, but then appealed and pled not guilty in superior court. The charges were then dismissed. While rejecting Daniels after she was found ***not guilty*** of criminal charges, the State accepted a non-black venire member who was found ***guilty*** of a similar offense. The State passed William Paramore, who was convicted of DWI.

- In the 2000 Forsyth County case of *State v. White*, the State struck African-American venire member Mark Banks because Banks' wife was a rape victim and the State was purportedly concerned about the impact his wife's experience might have on him. During questioning, Banks indicated the rape occurred before he and his wife were married and it had happened "in the past." The State passed non-black venire member Scott Morgan whose his wife had been robbed and assaulted two years before; the perpetrator had not been apprehended.

- In the 1992 Craven County case of *State v. Reeves*, the State struck African-American venire member Nancy Holland in part because, within the past year, a family member had been involved in a matter requiring contact with the district attorney's office. The transcript shows that the prosecutor asked few questions about this matter, other than to ascertain that the case had been resolved without a trial and

Holland did not go to court about it. The State passed non-black venire member Charles Styron; a couple of years before, the trial prosecutor had personally prosecuted Styron's sister-in-law on a drug charge.

- In the 1997 Forsyth County case of *State v. Moses*, the State struck African-American venire member Broderick Cloud in part because he had a cousin who was murdered six years before. The transcript shows that Cloud did not attend the trial and nothing about his cousin's murder would have prevented him from being a fair juror. The State passed Doris Folds, a non-black prospective juror whose best friend had been murdered seven years earlier. Folds had attended the entire trial of the perpetrator.

- In the 2001 Wake County case of *State v. Garcia*, the State struck African-American venire member Thomas Seawell in part because his son was convicted of conspiracy to traffic in cocaine and served more than a year in federal prison. The prosecution passed non-black venire member David Oakley who had himself been convicted of possession of more than one pound of marijuana; he pled guilty and was given an active sentence. The prosecution also passed non-black venire member Delma Chesney, whose brother was arrested for selling cocaine to a police officer as part of a large, federal undercover operation. Chesney said that her brother "participated in it, and he received a [federal] prison sentence."

Exclusion Based On Disparate Treatment: Connections To Defense

199. Another seemingly race-neutral reason that prosecutors frequently invoke to exclude African Americans from jury duty in capital cases is a connection to defense counsel or defense witnesses. The examples below demonstrate that this reason is not applied equally to black and non-black venire members.

- In the 1995 Union County case of *State v. Strickland*, the State struck African-American venire member Leroy Ratliffe in part because he knew one of the defense attorneys in the case, Harry Crowe. Crowe had done some work for Ratliffe several years before. However, the State accepted non-black venire member Pamela Sanders, who also knew one of the defense attorneys. Sanders knew defense attorney Stephen Goodwin, who was related to the president of the bank where Sanders worked. Sanders also knew Goodwin through their work with the American Cancer Society.

- In the 1999 Craven County case of *State v. Anderson*, the State struck African-American venire member Evelyn Jenkins in part because she worked in the home of the defense attorney's family. The record shows that Jenkins's sister worked for the family and became ill. Jenkins then worked for the family for, at most, three months, 25 years before. She had no direct contact with defense counsel, who was then a child, and she maintained no further contact with the family. The State accepted

non-black venire member Joseph Shellhammer, who retained defense counsel to represent him in a criminal matter 15 or 16 years ago. The State also accepted non-black venire member Richard Nutt, who retained defense counsel to handle a house closing 12 years previously.

- In the 1995 Surry County case of *State v. East*, the State struck African-American venire member Michael Stockton in part because he knew a potential defense witness. The record shows that Stockton had limited contact with the witness a decade before. The State passed non-black venire members Glenn Craddock, Amy Frye, Sarah Gordon, and James Sands, all of whom knew at least one potential defense witness and some of whom had current contact with the witness. Non-black venire members Frye and Sands also had connections to the defendant or his family.

Exclusion Based On Disparate Treatment: Helping Professions

200. Prosecutors sometimes attempt to justify the strikes of African Americans by citing their familiarity or experience with mental health issues, or a background working with children or other helping professions. Prosecutors claim they are concerned about sympathy for the defendant or an inclination to more easily accept evidence in mitigation. This rationale makes sense, except, as the following cases illustrate, this rationale is applied with much greater force to exclude African Americans.

- In the 1998 New Hanover County case of *State v. Taylor*, the State struck African-American venire member Zebora Blanks entirely because of "her employment in the mental health field. The defense relied heavily on mental health witnesses in their trial strategy." According to her voir dire testimony, Blanks had worked in the business administration section at Southeastern Mental Health for five years and dealt with medical and personnel records. Blanks made appointments for the counselors, but was not involved in counseling in any way. Her previous job was a clerical position with the health department. The State passed non-black venire member Vicky Poplin, who had at least as much contact as Blanks did with the mental health field. Poplin had been working as a medical transcriptionist for two years. Poplin's clients were five medical groups. Four of the five groups were made up of psychologists and psychiatrists. Poplin's previous job was with Cape Fear Psychological and Psychiatric Services.

- In the 1994 Beaufort County case of *State v. Ball*, the State struck African-American venire member Ella Pierce Johnson in part because "she was a teacher for a number of years and that she had prior educational experience in the field of psychology." The State passed non-black venire members Carolyn Newcomb McNeill and Mollie Bowen. McNeill and Bowen were both teachers who had studied psychology.

- In the 1995 Forsyth County case of *State v. Woods*, the State struck African-American venire member Sadie Clement in part because she had an elementary education degree and "vast experience in psychology and the development of children." The State passed Holly Coffey, Romaine Hudson, and Mary Joyce, all of whom were non-black venire members who had worked with children and had degrees and/or experience in elementary education and psychology.

- In the 2006 Brunswick County case of *State v. Maness*, the State struck African-American venire members Alveria Bellamy, Sanica Maultsby, and George McLaurin in part because of purported concerns that their experiences with mental health would make them sympathetic to the defendant's mitigation case. Bellamy had a brother with schizophrenia and a grandson with hyperactivity or Attention Deficit Disorder (ADD). Maultsby "worked as a Detox nurse, doing mental health counseling and people on substance abuse." McLaurin worked with at-risk teenage girls who had issues with drugs, alcohol, sex, and pregnancy. The prosecutor passed numerous non-black venire members who had similar experiences or familiarity with mental illness and other matters related to the defendant's mitigating evidence. Elisa Woodard's mother had suffered from depression and sought treatment for that disorder. Charles Stancil's aunt had been sent for treatment at Dorothea Dix Hospital. Michael Hardison had a relative who suffered from depression and his son had friends with ADD. Mary Ganus, who was later seated on the jury, had a daughter who taught students with ADD. Joyce Inman, who was also seated on the jury, had friends with children diagnosed with ADD. Jennifer Forti, another seated juror, worked in a physician's office, had a brother and niece who suffered from ADD, and had herself been treated by a psychologist and prescribed medication for a mental health condition. Deborah Delsorbo studied psychiatric nursing. Kenneth Boren was a nurse who had studied psychology or psychiatry and worked with psychiatrists and psychologists on a weekly basis; Boren had worked with patients who had ADD and he thought he had administered Ritalin during his nursing career.

- In the 1994 Randolph County case of *State v. Kandies*, the State struck African-American venire member Altrea Jinwright in part because "she had done extensive work with three to four year old children, the age of the victim in the case." The voir dire transcript shows that Jinwright had worked for four months at Presbyterian Day Care. While excluding Jinwright for her brief stint as a daycare worker, the State passed non-black venire members who had worked with young children more recently and for substantially longer periods of time. Read Spence taught kindergarten for two years at First Presbyterian Church and worked with four- and five-year-old children. Peggy Arrington served as an elementary school librarian for 21 years. The prosecution also accepted five non-black venire members with children ranging in age from two to five years old.

Exclusion Based On Other Disparate Treatment

201. The cases below, demonstrate that prosecutors throughout North Carolina have treated similarly-situated black and non-black venire members differently with regard to a

variety of seemingly race-neutral characteristics. African Americans may be struck because they served on a jury that deadlocked like John Reeves in *Walters* or because of their age or employment history, while non-black venire members with comparable traits are passed.

- In the 1999 New Hanover County case of *State v. Wiley*, the State peremptorily struck African-American venire member Gail Mayes in part because she was "on a jury that failed to reach a verdict." However, the State passed non-black venire members Arnfelth Bentsen, Walter Simmons, John Youngs, Thomas Houck, and Martin Mathews, all of whom had previously served on a jury. Significantly, the prosecutor asked not one of these non-black venire members whether the previous jury had reached a verdict. Houck was not asked about his jury service at all. The State also passed non-black venire member Stephen Dale who, like Mayes, had served on two prior juries. The prosecutor questioned Dale only about whether his most recent jury had reached a verdict. The State cited as an additional reason for striking Mayes that she had a "short work history." However, the record shows that the State passed Brian Morrison, James Bahen, Leonard Cuthbertson, non-black venire members with similar employment histories.

- In the 1997 Lenoir County case of *State v. Bowman*, the State peremptorily struck African-American venire member Lee Lawrence in part because of her "sporadic employment in the past." The record shows the State passed several non-black venire members with similar work histories. In addition, the prosecution displayed great curiosity about the details of Lawrence's employment history and marked disinterest in the work histories of non-black venire members. Like Lawrence, Sybil Pate had recently started a job; in fact, Pate's new job commenced two months after Lawrence's. David Chambers and Gary Adams had both held a variety of jobs.

- In the 1997 Forsyth County case of *State v. Moses*, the State struck African-American venire member Broderick Cloud in part because he worked for the *Winston-Salem Journal*. Another potential juror, Rene Dyson, also worked for the *Winston-Salem Journal*. Dyson worked in the circulation department while Cloud worked in distribution. Dyson was non-black, and the State passed her.

- In the 1994 Mecklenburg County case of *State v. Harden*, the State peremptorily struck African-American venire member Shannon Smith in part because she was "very young" — 23 years old. The prosecution accepted two non-black venire members who were younger than or the same age as Smith: Michelle Canup and Diamondo Katopodis.

- In the 1994 Davidson County case of *State v. Elliot*, the State struck African-American venire member Kenneth Finger in part because he was not married and had never been married. According to the prosecution, because the victim was two years old, "the State would generally want a trier of the facts who had experience with family and children. A juror with no marital background would not have life experiences that would relate to child abuse and would be a proper juror to excuse

through use of a peremptory challenge." The State passed numerous similarly-situated non-black venire members. Like Finger, Robert Bryant, Martha Sink, and Kristie Fisher were unmarried and had never been married. The State also passed two non-black venire members who were married but had no children: Dawn Johnson and Kristie Oxendine.

- In the 1997 Halifax County case of *State v. Hedgepeth*, the State struck African-American venire member Rochelle Williams in part because she did not have "a lot of community involvement." On her jury questionnaire, Williams answered "no" to questions asking "are you a member of a church?" and "do you belong to any business or social clubs or organizations?" The questionnaire provided to jurors in this case contained five such questions, and Williams answered "no" to all five. However, the State also passed three non-black venire members with identical responses: Anthony Hux, Freddie Ezzell, and Rachel Reid.

Conclusion Of Case Example Evidence

202. The many instances described here — of striking African-American venire members for their association with African-American institutions, asking African-American venire members race-based questions or singling them out for idiosyncratic lines of inquiry, offering irrational and unconstitutional reasons for striking African-American venire members, striking African-American venire members for any or no reason at all, and treating African-American venire members differently from similarly-situated non-black venire members — are significant in that they come from cases tried between 1990 and 2009, from a multitude of prosecutorial districts across North Carolina. The Defendants' evidence is credible and persuasive and corroborates the evidence of discrimination in Cumberland County and in Defendants' individual cases.

STATISTICAL EVIDENCE

203. Defendants' statistical proof is drawn from an exhaustive study of jury selection conducted by lead investigator Barbara O'Brien (O'Brien) and her co-investigator, Catherine Grosso (Grosso), professors at the Michigan State University (MSU) College of Law. The MSU statewide jury selection study (MSU Study) consists of two parts: (1) a complete, unadjusted

study of race and strike decisions for 7,424 venire members drawn from the 173 proceedings for the inmates of North Carolina's death row in 2010; and (2) adjusted, regression studies that analyzed whether alternative explanations impacted the relationship between race and strike decisions. The second part includes regression studies of 100 percent of the venire members from the Cumberland County cases, and a 25 percent random sample drawn from the 7,424 venire member data set.

204. Two expert witnesses, O'Brien and Woodworth, testified for Defendants regarding the methodology, conclusions, and validity of the MSU Study. One expert witness, Katz, testified for the State regarding the same.[21] All three experts are highly qualified. Of the three, O'Brien alone has legal training.

205. O'Brien is an associate professor at the Michigan State University College of Law. She has a law degree and a doctorate degree in social psychology. Before earning her doctorate, she worked as an appellate criminal attorney and as a clerk in the federal courts. She has had substantial training in research methodology and statistics. O'Brien has published multiple legal empirical studies in peer-reviewed articles, including studies applying different statistical methods such as multivariate and logistic regression. The Court accepted O'Brien as an expert in social science research and empirical legal studies.

206. Woodworth is a professor emeritus of statistics and of public health at the University of Iowa. He received a Ph.D. in mathematical statistics and has served as a professor of statistics, actuarial science, and biostatistics. Woodworth has extensive experience with the use of logistic regression and statistics in his applied research in the areas of biostatistics, employment discrimination, and criminal justice. He has published a textbook on biostatistics,

[21] O'Brien and Woodworth testified at both the *Robinson* hearing and the *Golphin, Walters,* and *Augustine* hearing. Their testimony was admitted from *Robinson* as part of Defendants' case in chief. Katz testified only at the *Robinson* hearing. His testimony was admitted as part of the State's case.

and numerous articles in the subject areas of his research. The Court accepted Woodworth as an expert statistician.

207. Katz is retired professor of statistics from Georgia State University College of Business. He earned a Ph.D. in quantitative methods at Louisiana State University, and has taught mathematical theory of probability and statistics as well as general statistical courses. Since 2002, he has worked as an independent consultant on statistical matters in Medicaid fraud cases and in audits for the Internal Revenue Service. Katz previously testified as an expert in cases involving statistical claims of bias in the administration of the death penalty or jury selection, including *McCleskey v. Kemp* and *Horton v. Zant.* The Court accepted Katz as an expert in applied statistics, data analysis, and sampling.

208. As described below in detail, the Court finds the MSU Study to be a valid, highly reliable, statistical study of jury selection practices in capital cases from Cumberland County and North Carolina between 1990 and 2010. The results of the unadjusted study, with remarkable consistency across time and jurisdictions, show that race is highly correlated with strike decisions in Cumberland County and North Carolina. The adjusted, regression results show that none of the explanations for strikes frequently proffered by prosecutors or cited in published opinions, such as death penalty views, criminal backgrounds, or employment, diminish the robust and highly consistent finding that race is predictive of strike decisions in Cumberland County and North Carolina.

209. Although Katz was the State's statistical expert, he gave no opinion as to whether race was a significant factor in the exercise of peremptory challenges in capital cases by prosecutors in North Carolina, the former Second Judicial Division, or Cumberland County at any time. With respect to the unadjusted results, Katz performed calculations of the disparities

in strike rates and reached the same conclusions as O'Brien. Katz conceded that the large disparities essentially satisfied Defendants' prima facie burden and required further investigation. Katz nonetheless testified that he believed the design of the MSU Study to be flawed. For the reasons explained below, this Court rejects this criticism. With respect to the adjusted, regression analyses, Katz testified regarding what he perceived to be problems with the study's variable definitions. The Court does not find these criticisms to have merit.[22]

210. Katz finally testified that for some, but not all, of the jurisdictions, he was able to produce statistical models using O'Brien's data that did not show a statistically significant correlation between race and the exercise of peremptory strikes. Katz himself conceded, however, that these models were not appropriately constructed and are of no explanatory value. Accordingly, the Court awards no weight to these models.

211. Defendants presented evidence within different temporal windows. First, Defendants presented evidence of the discrimination targeted to the precise time of their capital trials. Woodworth testified that he utilized a commonly accepted statistical method to pinpoint the precise relationship between race and the exercise of peremptory strikes at the time of Defendants' trial based on the adjusted and unadjusted data for the entire 20-year study period. The State did not impeach or rebut this testimony in any way. The Court finds Woodworth's technique to be an appropriate way of determining whether race was a significant factor in the year of the Defendants' trials.

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[22] Katz also testified at length regarding the composition of the final seated juries and the strike rates of defense counsel. Katz testified that there was substantial evidence of a correlation between race and the strikes of defense counsel. This evidence could potentially form the basis of an additional claim for relief under the RJA. This Court need not decide, however, whether a defendant may be entitled to relief because of discriminatory actions of defense counsel because Defendants have waived any such claims to relief by not alleging these claims. While this Court permitted Katz to testify regarding the racial composition of final juries, for the reasons the Court has clearly set forth in the statutory construction section of this order, the composition of final juries is not the appropriate inquiry under the statute, and accordingly, the Court awards no probative weight to the testimony regarding seated jurors.

212. Defendants also presented evidence of discrimination within their statutory windows, which are the intervals of time that conform to the definition of "at the time of defendant's trial" as set forth under the amended RJA. These windows span from ten years before the Defendants' crimes and two years after the Defendants' sentencing. Both Woodworth and O'Brien presented analyses for Defendants that included only the cases that fell within these statutory windows. The appropriateness of the statutory window analysis was also not challenged in any way by the State. The Court finds that this technique is an acceptable method of determining whether race was a significant factor in the Defendants' statutory windows.

Statistical Concepts And Definitions

213. The statistical and empirical experts Katz, Woodworth, and O'Brien testified regarding various fundamental statistical concepts and techniques throughout their testimony. Their testimony with respect to these concepts was also consistent with the chapters on statistical evidence in the *Reference Manual on Scientific Evidence, Third Edition*, a resource cited by both parties throughout the litigation. *See* David H. Haye & David A. Freedman, *Reference Guide on Statistics*, 211-302, and Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, 303-358. Before turning to the testimony regarding the experts' analyses, it is useful to set forth some of these basic statistical concepts and techniques.

214. The experts testified regarding "unadjusted" data. Unadjusted data, as the term implies, refers to the raw numbers; here, before they are "adjusted" by regression analysis. The unadjusted numbers were presented in simple totals (i.e., the total numbers of strikes of black and non-black venire members), and simple statistics, such as percentages of black and non-black venire members struck.

215. With respect to these unadjusted statistics, the experts testified regarding various significance tests. Generally, tests of statistical significance attempt to measure the likelihood that observed disparities are due to chance. One measure, called a *p*-value, reflects the probability of observing a disparity of a given magnitude simply by the luck of the draw. The lower the *p*-value, the lower the chance that an observed disparity was due merely to chance. The generally accepted threshold for a finding that is statistically significant is a *p*-value <.05.

216. Another method of expressing statistical significance is the two sigma rule, which measures the number of sigmas (or standard deviations) from the null hypothesis for a particular finding. The null hypothesis in a race-neutral system and for this analysis is a coefficient of zero and represents neutrality. Still another method of expressing statistical significance is specifying the level of confidence in the stated odds ratio through a calculated confidence interval. For example, a 95% confidence interval means there is a 95% probability of the odds ratio falling between the lower confidence limit and upper confidence limit.

217. Statistical significance, however, is necessarily dependent upon the power of the study. A study's power is a function of the sample size, and the strength of the association. A study with a small sample size may lack sufficient power to produce statistically significant results, regardless of the strength of the association. Statistical results from small samples that do not satisfy traditional thresholds of statistical significance may still nonetheless be probative evidence. *See, e.g., Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1353 n.1 (6th Cir. 1992); David Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH.L.REV. 1333, 1343-44 (1986). Conversely, very large studies may have great power, and detect statistically significant results of little practical, or material, significance. Accordingly, the investigator should report the size of the samples, the significance level, and the size of the effect detected.

218. Here, the experts conducted their statistical analyses using two widely accepted statistical software programs, SPSS and SAS.[23] Both of these programs are appropriate for the statistical analyses performed in this litigation.

219. The three experts also performed regression analyses. Simple regression is a statistical procedure used to a investigate relationship between a dependent variable, or outcome variable, and a single independent variable. Here, the independent variable is black, and the dependent variable is being struck. Multiple regression allows the researcher to include multiple variables, and thus disentangle multiple factors that might bear on the outcome. The regression model "controls" for possible alternative explanations by holding all other factors constant. In the instant case, as is described in detail below, the multiple regression models included factors that correlate with strike decisions, such as death penalty reservations and criminal background. A regression model allows researchers to examine whether a correlation remains between black and strike decisions, after taking into account these alternative variables.

220. Regression analysis is widely accepted and utilized in legal cases, and indeed, in our everyday life. Economists, sport analysts, social scientists, advertisers, polling experts, and medical researchers all commonly rely upon regression models. In the courts, regression models are frequently used in such diverse areas of the law as anti-trust cases, tort cases, and discrimination cases. Indeed, "regression analysis is probably the best empirical tool for uncovering discrimination." Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 Geo. L.J. 237, 238 (1996).

221. A logistic regression analysis, as opposed to a linear regression analysis, is appropriate when the outcome of interest is binary – an either/or choice – such as a determination

[23] O'Brien used SPSS and Woodworth and Katz used SAS.

of whether the venire member is to be struck or not struck by the prosecutor. Logistic regression is widely accepted, and is the appropriate method of statistical analysis for the issue before the Court.

222. The result of a logistic regression analysis is an estimate of the influence of each of several explanatory factors on the outcome, stated as an adjusted odds ratio. The odds ratio measures the impact of an explanatory factor and is the amount by which the odds on the outcome are multiplied by the presence of a particular factor.

The MSU Study Design Was Appropriate

223. O'Brien testified, and this Court so finds, that in order to perform a valid study, a researcher must first have a clear research question. O'Brien's research question was validly and appropriately informed and driven by the RJA, to-wit: was race a significant factor in decisions to exercise peremptory challenges by prosecutors in capital cases in North Carolina? O'Brien designed the MSU Study to address this question. The MSU Study examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of 173 proceedings.[24] All but one of these proceedings was tried between 1990 and 2010.

224. The decision to include these 173 capital proceedings by O'Brien and Grosso as the study population is valid and appropriate in light of the following: (1) the population of interest is defined by the RJA such that current death row inmates constitute all of the individuals to which the RJA could possibly provide relief who had peremptory strike information available;

[24] MSU excluded only one capital proceeding from among the inmate's residing on death row as of July 1, 2010. Jeffrey Duke's 2001 trial was not included because the case materials were unavailable. *See State v. Duke*, 360 N.C. 110, 135 (2005) (explaining that Duke received a new trial because "the transcription notes and tapes in defendant's first capital trial were unavailable, thereby preventing preparation of a transcript for appellate review.").

and (2) the case materials necessary to conduct a robust and valid analysis were more likely available and would therefore provide better quality data.

225. The State contested the appropriateness of this study design. Katz testified that, in his opinion, the RJA requires an analysis of all capitally tried cases during a relevant time period and that the selection of the 173 cases was an invalid probability sample. Relying upon information from the MSU researchers related to MSU's separate charging and sentencing study, Katz indicated there were 696 capital trials in North Carolina and 42 in Cumberland County between 1990 and 2010. He opined that the RJA requires an analysis of all capitally-tried cases during a relevant time period, including cases that resulted in life verdicts.

226. According to Katz, the 173 cases in the MSU Study do not constitute a random sample of the total number of capital trials, and therefore one cannot support any inference from the statistical findings of the 173 cases that can be generalized to the entire population of capital trials. While noting that the 696 capital proceedings included trials that resulted in death sentences where the defendant has been executed or removed from death row for some other reason, as well as cases where the defendant received a life sentence or a result less than the death penalty, Katz never offered any explanation to the Court why the strike decisions in these cases would differ from the 173 cases analyzed. As evidenced by notes taken by Katz during a conversation with a Cumberland County prosecutor, Katz originally considered analyzing some of the capital proceedings that were not included in the MSU Study; however, no such results were presented to the Court.

227. The Court is not persuaded by Katz's criticism of the study design and finds that the RJA does not require an analysis of the larger population of all capital trials during a relevant

time period. The Court also rejects the suggestion that the selection of the 173 cases constitutes an invalid sample.

228. However, assuming *arguendo* that the appropriate study population under the RJA is all capitally tried cases during a relevant time period, the Court takes judicial notice of the section of *The Reference Manual on Scientific Evidence* entitled, *Reference Guide on Statistics*. The Court finds, based upon this authority, it is appropriate to generalize and infer statistical findings to a larger population from a subset of the population if the subset is analogous to the larger population. According to the *Reference Guide on Statistics*, the question becomes: "how good is the analogy?" *Id.* at 241.

229. Again, assuming *arguendo* that the appropriate study population under the RJA is all capitally tried cases during a relevant time period, the Court finds that the 173 capital proceedings examined by O'Brien and Grosso are analogous to the larger population of all capitally tried cases and the statistical findings from the 173 proceedings may validly and appropriately be generalized and inferred to the larger population of all capitally tried cases because:

- There is no reason to believe that other capitally tried cases – whether the result was a life sentence or a death sentence that has since been vacated or accomplished – would yield any different results from the current death row inmates since the motivations of the prosecutor are the same at the time the decisions are made to peremptorily challenge venire members;[25]
- The selection of the 173 cases was not a form of "cherry-picking" proceedings that would be more favorable toward one party;
- The State produced no evidence from any prosecutor in North Carolina that suggested their strike decisions or motivations may be different in capitally-tried

[25] O'Brien testified that she was provided by defense counsel with transcripts from a handful of capital cases resulting in life verdicts. She did not rely upon those cases, however, because they were gathered by defense counsel and not pursuant to any scientific sampling protocol. As noted above, the State elected not to conduct any study of capital cases resulting in life verdicts.

cases that either concluded with a result less than a death verdict or ended in a death verdict but the defendant is no longer on death row;[26]

- Cumberland County prosecutors Dickson and Colyer testified that their approach in jury selection was consistent regardless of the outcome of the case. This evidence was not contradicted generally by either the State or Defendants and this Court finds this as a fact;

- Katz offered no theoretical or practical reason why the prosecutorial strike decisions in the larger population of cases would be any different from the strike decisions in the 173 cases which could thus prevent the generalization of the results to the larger population.

230. With respect to Cumberland County, eleven proceedings fell within the study's definition of all capital proceedings between 1990 and 2009 for death row inmates from Cumberland County. This dataset provided sufficient numbers and variability to allow the MSU researchers to analyze the dataset for any possible race effects. In light of this, O'Brien did not need to expand the universe of cases for Cumberland County.

231. O'Brien and Grosso, as part of the study design, separated the study into two sections – one which analyzed the race and strike decisions by prosecutors of qualified venire members and another which looked at more detailed information about individual venire members to examine whether any alternative explanations may factor into the peremptory challenge decisions of prosecutors. The second study section analysis for the statewide data was based upon a random sample of the 7,424 venire members included in the first study part. There was no testimony critiquing this design, and the Court finds this design to be an appropriate one.

The MSU Study Methodology Was Thorough And Transparent

232. For Part I of the MSU Study, O'Brien and Grosso examined all venire members who were subjected to voir dire questioning and not excused for cause by the trial court,

[26] The Court notes the exceptional cases of *Burmeister* and *Wright*, discussed above. Although these cases resulted in life verdicts, and had very different strike patterns, the Court finds that this difference was persuasively demonstrated to be attributable to the difference in overall case strategy for these prosecutions.

including alternates, producing a database of 7,424 venire members. The researchers were meticulous in their data collection and coding processes, producing highly transparent and reliable data.

233. O'Brien and Grosso created an electronic and paper case file for each proceeding in the MSU Study. The case file contains the primary data for every coding decision made as part of the study. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' and clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision. All of this information was provided to the State in discovery.

234. All coding decisions and data entry for the MSU Study were made and completed by staff attorneys at Michigan State University College of Law. The staff attorneys received detailed training on each step of the coding and data entry process and worked under the direct supervision of O'Brien and Grosso. As part of the methodology of the study, O'Brien and Grosso developed data collection instruments (DCIs) which are forms that staff attorneys completed based on a review of the primary documents and transcripts. The DCIs allowed for the systematic coding of the data.

235. For each of the proceedings in the study, the DCIs collected information about the proceeding generally, including the number of peremptory challenges used by each side and the name of the judge and attorneys involved in the proceeding. For each of the venire members in the study, the DCIs collected: basic demographic and procedural information; determination of strike eligibility of each venire member; and race of the venire member and the source of that information. This information, if reliable, is sufficient to conduct an unadjusted study of the peremptory challenges by prosecutors in capital cases.

236. Part II of the MSU Study included coding for additional descriptive information that might bear on the decision of a prosecutor to peremptorily challenge a venire member. After coding for the basic demographic information, strike decision, and race in Part I of the study, the staff attorneys coded more detailed information for a random sample of venire members statewide.

237. The statewide sample of venire members for Part II of the MSU Study was determined by SPSS which randomly selected approximately 25% of the venire members statewide resulting in a group of approximately 1,700 venire members. O'Brien did not subjectively select the venire members for the sample. O'Brien confirmed that the 25% sample constituted an accurate representation of the statewide population of venire members by comparing the racial and gender distributions found in the 25% sample and the statewide population of venire members. This comparison shows that the 25% sample and the statewide population of venire members contain substantially the same distribution of race and gender. Specifically, the statewide population was 16.3% black, 83.6% non-black, and 0.1% missing race information; the 25% sample contained the same percentages. The statewide population was 46.7% male and 53.3% female; the 25% sample was 48.1% male and 51.9% female. O'Brien concluded that the 25% sample is representative of the statewide population of venire members examined by the MSU Study. O'Brien concluded that it is appropriate to draw inferences about the statewide population from the 25% sample.

238. The Court finds that the 25% sample drawn from the statewide data constitutes an accurate representation of the statewide population of venire members and it is appropriate for the researchers to draw inferences about the whole statewide population of venire members from the 25% sample.

239. In addition to the random 25% statewide sample, in Part II, O'Brien and Grosso conducted a descriptive coding study of all 471 venire members in the 11 Cumberland County proceedings in the MSU Study. They coded the additional descriptive information for all 471 venire members from Cumberland County.

240. For the venire members included in either the statewide 25% sample or the Cumberland County study, the DCIs collected information regarding:

- Demographic characteristics (e.g., gender, age, marital status, whether the venire member had children, whether the venire member belonged to a religious organization, education level, military service and employment status of the venire member and the venire member's spouse);
- Prior experiences with the legal system (e.g., prior jury service, experience as a criminal defendant or victim for the venire member and the venire member's close friend or family member, whether the venire member or venire member's close friend or family member worked in law enforcement);
- Attitudes about potentially relevant matters (e.g., ambivalence about the death penalty or skepticism about or greater faith in the credibility of police officers);
- Other potentially relevant descriptive characteristics (e.g., whether jury service would cause a substantial hardship, familiarity with the parties or counsel involved, whether the venire member possessed prior information about the case or had expertise in a field relevant to the case); and
- Any stated bias or difficulty in following applicable law.

241. In determining what data to collect on individual venire members, O'Brien and Grosso relied upon many sources of information including juror questionnaires used in North Carolina capital cases; review of capital jury voir dire transcripts, literature regarding jury selection, *Batson* literature, litigation manuals, treatises on jury selection, review of *Batson* cases, and other studies, specifically including a jury selection study in Philadelphia County, Pennsylvania by Professor David Baldus. The researchers also consulted with Professor

Baldus.[27] O'Brien and Grosso utilized the variables from the Philadelphia County study as a starting point before refining them for the MSU Study. O'Brien and Grosso invited input and participation from prosecutors through Bill Hart from the NC Attorney General's Office but got no response.

242. O'Brien and Grosso took numerous measures and precautions to ensure the accuracy of the coding of the identification of the race of each venire member in the study by implementing a rigorous protocol to produce data in a way that was both reliable and transparent. All of the staff attorneys received a half-day training on the race coding protocol by O'Brien and Grosso, which the Court finds is adequate and appropriate.

243. A venire member's self-report of race was deemed by O'Brien and Grosso to be highly reliable and for 62.3% of the venire members, the study relied upon the venire member's self-report. The race for an additional 6.9% of the venire members in the study was explicitly noted in the trial record through voir dire (of the 6.9%, 6.4% were identified through a court clerk's chart that had been officially made a part of the trial record, and 0.5% were identified through a statement made on the trial record). The Court finds that it is reasonable and appropriate to rely upon these sources of information for the determination of the race of venire members.

244. For the remainder of the venire members (30.6%), O'Brien and Grosso used electronic databases in conjunction with the juror summons lists with addresses to find race information, including the North Carolina Board of Elections website, LexisNexis "Locate a Person (Nationwide) Search Non-regulated," LexisNexis Accurint, and the North Carolina Department of Motor Vehicles online database. The Court finds that it is reasonable and

[27] Professor Baldus passed away on June 13, 2011. *See* http://en.wikipedia.org/wiki/David_C._Baldus.

appropriate to rely upon these public record sources for the determination of the race of venire members.

245. O'Brien and Grosso prepared a strict protocol for use of the websites for race coding by the staff attorneys, which minimized the possibility of researcher bias. Additionally, MSU employed the safeguard of blind coding. Under the blind coding protocol, staff attorneys who searched for venire members' race information on electronic databases were blind to the strike decision whenever possible. This safeguard further minimized any possible researcher bias. The Court finds that these protocols and safeguards enhance the integrity and reliability of the study.

246. O'Brien and Grosso saved an electronic copy of all documents used to make race determinations and these documents were provided to the State, another step that promoted transparency and reliability in the study.

247. The reliability of the electronic database protocol for race coding was confirmed by a self-test performed by O'Brien and Grosso. They independently recoded the race information for 1,897 venire members for whom they had the juror questionnaires reporting race or express designations of race in a voir dire transcript and compared that data to the coding based upon data from electronic database. The two sources produced an exceptionally high match rate. The Court finds the coding of the race of the venire members to be accurate. The MSU Study documented the race information for all but seven of the 7,424 venire members in the study.

248. After the venire members were coded, the staff attorneys transferred the data that had been coded on paper DCIs into a machine-readable format. Reasonable and appropriate

efforts were made to ensure the accuracy of the data transfer, including the use of a software program designed to reject improper entries.

249. O'Brien and Grosso utilized a double coding procedure for the coding of the additional descriptive characteristics for Part II of the study. Under these procedures, two different staff attorneys separately coded descriptive information for each venire member to ensure accuracy and intercoder reliability. Then a senior staff attorney with extensive experience working on the study compared and reviewed their codes for consistency and either corrected errors, or, when necessary, consulted with O'Brien. Any discrepancies in judgment were resolved by O'Brien or Grosso. The Court finds that these rigid precautionary safeguards enhance the reliability and validity of the MSU Study.

250. A coding log was maintained to document coding decisions which involved differences in judgment. All of the staff attorneys had access to the coding log, which enhanced intercoder reliability. The coding log is entitled "Coding Questions and Answers," and is part of the MSU Study.

251. In addition to the coding log, O'Brien and Grosso maintained a document referred to as a "cleaning document." This document sets forth every instance in the study where there was a discrepancy between the two independent staff attorney coders. The coding log and cleaning document were both provided to the State.

252. The documentation by the researchers and coders in the coding log and cleaning document enhanced the MSU Study's consistency, accuracy and transparency. Any third party may review the coding log and cleaning document to examine the coding decisions of the study. The Court finds that the thoroughness of the documentation of the coding decisions and

transparency of all coding decisions are strong indicators to the Court of the MSU Study's reliability, validity and credibility.

Unadjusted Disparities: Statewide Evidence

253. The statewide database of the MSU Study included 7,424 venire members. Of those, 7,402 were eligible to be struck by the State. The study only analyzed the strike patterns for the venire members who were eligible to be struck, and did not include venire members where the State had already exhausted its peremptory challenges. Among strike eligible venire members, 1,212 were black and 6,183 were of other races. The Court finds that it is reasonable and appropriate to employ this methodology.

254. O'Brien testified, without contradiction, to large disparities in strike rates based on race.[28] Across all strike-eligible venire members in the MSU Study, the Court finds that prosecutors statewide struck 52.8% of eligible black venire members, compared to only 25.7% of all other eligible venire members. This difference is statistically significant with a *p*-value <.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in ten trillion. Katz, the state's statistical expert, concurred that the statewide strike ratio disparity was statistically significant.

255. The strike rate ratio is the relative rate of the percentage of black eligible venire members who were peremptorily struck by the State compared to the percentage of other eligible venire members who were struck by the State. The Court finds that the statewide strike rate ratio across all strike-eligible venire members in the MSU Study is 2.05.

[28] The MSU Study reported the data by comparing State strike rates between black venire members and the venire members of all other races. Katz confirmed, and the Court so finds, that the results are comparable when the comparison is between black and white venire members.

256. For all of the peremptory strike rates reported by the MSU Study, the numbers could be inversely reported as acceptance or pass rates. For example, the acceptance rates of eligible black venire members in the MSU Study is 100% - 52.8% = 47.2% and the acceptance rates of non-black venire members is 100% - 25.7% = 74.3%.[29]

257. The Court finds that the average rate per case at which prosecutors in North Carolina struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members. Of the 166 cases statewide that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.26. This difference is statistically significant with a *p*-value <.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 10,000,000,000,000,000,000,000,000,000,000. Katz concurred that this disparity is statistically significant.

258. The MSU Study also analyzed the average rate per case at which prosecutors struck eligible black venire members, excluding the venire members whose race was coded from public records. Excluding these venire members, the Court finds that the disparity is substantially the same: prosecutors struck an average of 55.7% of eligible black venire members compared to only 22.1% of all other eligible venire members. This difference is statistically significant with a *p*-value <.001.

259. Woodworth testified, and the Court so finds, that there is a distinction between an odds ratio – or disparity in the use of peremptory strikes based upon race – that is statistically

[29] There were small differences in some of the statewide calculations in the *Robinson* hearing and the *Golphin, Walters,* and *Augustine* hearing based on a limited number of error corrections performed by O'Brien. The updated data was presented at the *Golphin, Walters,* and *Augustine* hearing. O'Brien testified, and the Court so finds, that these new changes did not materially change any of her prior testimony or significantly alter the data in any way.

significant and one that is substantively important. Woodworth testified that, whether an odds ratio has practical or material significance is context dependent. Woodworth explained that, for example, in the public health context, a 1.3 odds ratio – which is a 30% increased risk that a particular environmental exposure will increase the rate of a disease – constitutes a practically significant odds ratio. Applying this standard, Woodworth testified that the odds ratio of roughly 2 found by the MSU Study is "enormous" with respect to practical significance.

260. The statewide disparity in strike rates has been consistent over time, whether viewed over the entire study period, in four five-year periods, or two ten-year periods. Katz concurred that the statistical disparities within each subdivided time period are statistically significant. These disparities are as follows.

Time Period	No. of Cases	Blacks Struck	Non-Blacks Struck	Strike Rate Ratio	Statistical Significance
1990-99	122	55.8%	24.7%	2.26	p<0.001
2000-10	44	57.1%	25.1%	2.27	p<0.001
1990-94	42	57.3%	25.9%	2.21	p<0.001
1995-99	80	55.0%	24.0%	2.29	p<0.001
2000-04	29	57.5%	24.9%	2.31	p<0.001
2005-10	15	56.4%	25.3%	2.23	p<0.01

261. The probabilities that the disparities within each of these time periods occurred in a race-neutral jury selection process are exceedingly small: 1990-99, less than one in one septillion; 2000-10, less than one in ten million; 1990-94, less than one in a million; 1995-99, less than one in ten quadrillion; 2000-04, less than one in 100,000; 2005-10, less than one in 100.

262. O'Brien and Grosso also analyzed the data by prosecutorial districts and again found a strikingly consistent pattern of strike disparities. The Court finds that the average rate per case at which prosecutors in North Carolina struck eligible venire members for each prosecutorial district is as follows:

Prosecutorial District	Number of cases	Black Venire Members	Other Venire Members	Strike Rate Ratio
1	3	47.8%	23.3%	2.1
2	3	59.3%	18.3%	3.2
3A	3	59.7%	18.3%	3.3
3B	3	61.1%	20.4%	3.0
4	6	71.7%	19.0%	3.8
5	5	56.6%	27.0%	2.1
6A	2	47.4%	9.0%	5.3
6B	5	48.6%	17.3%	2.8
7	4	38.3%	17.4%	2.2
8	6	61.6%	21.8%	2.8
9A	1	42.1%	31.0%	1.4
10	10	61.5%	24.9%	2.5
11	12	48.5%	27.6%	1.8
12	11	52.7%	20.5%	2.6
13	4	59.0%	23.2%	2.5
14	1	50.0%	17.9%	2.8
15A	1	60.0%	27.8%	2.2
16A	2	40.9%	31.1%	1.3
16B	5	56.0%	21.4%	2.6
17A	2	62.5%	26.6%	2.3
17B	2	50.0%	25.3%	2.0
18	4	47.0%	23.2%	2.0
19A	3	55.6%	25.4%	2.2
19B	9	69.4%	29.0%	2.4
19C	1	16.7%	22.9%	0.7
19D	1	00.0%	31.8%	0.0
20	7	87.0%	24.0%	3.6
21	13	55.5%	24.5%	2.3
22	8	65.6%	27.4%	2.4
22.1	1	100.0%	22.0%	4.8
23	1	50.0%	31.7%	1.6
25	1	25.0%	33.9%	0.7
26	5	57.8%	27.0%	2.1
27A	7	38.7%	31.5%	1.2
28	9	56.9%	30.4%	1.9
29	5	42.0%	31.9%	1.3

Prosecutors struck black venire members at a higher rate than other venire members in all but three prosecutorial districts: 19C, 19D, and 25. In each of these three districts there was only one case represented in the MSU Study.

263. O'Brien and Grosso also analyzed the data by counties. The Court finds that the average rate per case at which prosecutors in North Carolina struck eligible venire members for each county is as follows:

County	Number of cases	Black Venire Members	Other Venire Members	Strike Rate Ratio
Alamance	1	67.67%	25.71%	2.6
Anson	1	62.50%	13.33%	4.7
Ashe	1	50.00%	31.71%	1.6
Beaufort	1	62.50%	27.03%	2.3
Bertie	2	54.73%	14.17%	3.9
Bladen	1	33.33%	26.32%	1.3
Brunswick	2	72.12%	23.24%	3.1
Buncombe	9	56.88%	30.64%	1.9
Cabarrus	1	50.00%	25.00%	2.0
Camden	1	66.67%	28.21%	2.4
Caswell	1	42.11%	33.33%	1.3
Catawba	1	25.00%	33.87%	0.7
Columbus	1	58.33%	20.00%	2.9
Craven	3	61.11%	20.43%	3.0
Cumberland	11	52.69%	20.48%	2.6
Davidson	3	77.78%	31.33%	2.5
Davie	4	54.17%	24.51%	2.2
Durham	1	50.00%	17.86%	2.8
Forsyth	13	54.17%	24.41%	2.2
Gaston	7	37.31%	31.74%	1.2
Gates	2	38.39%	20.87%	1.8
Guilford	4	45.58%	23.17%	2.0
Halifax	2	47.43%	9.02%	5.3
Harnett	5	42.97%	26.79%	1.6
Hertford	1	50.00%	23.81%	2.1
Hoke	1	36.36%	25.81%	1.4
Iredell	2	87.50%	27.18%	3.2
Johnston	7	52.38%	28.23%	1.9
Lenoir	1	44.40%	28.57%	1.6

Martin	1	88.89%	6.45%	13.8
Mecklenburg	5	56.36%	27.04%	2.1
Montgomery	1	33.33%	32.35%	1.0
Moore	2	25.00%	32.98%	0.8
Nash	1	30.00%	27.78%	1.1
New Hanover	4	54.05%	27.79%	1.9
Northampton	2	41.67%	17.26%	2.4
Onslow	3	69.44%	18.63%	3.7
Pender	1	66.67%	23.68%	2.8
Pitt	3	59.72%	18.26%	3.3
Polk	2	0.00%	33.75%	0.0
Randolph	7	77.38%	27.82%	2.8
Richmond	1	71.43%	20.00%	3.6
Robeson	5	56.00%	21.43%	2.6
Rockingham	2	62.50%	25.68%	2.4
Rowan	3	44.44%	24.69%	1.8
Rutherford	3	70.00%	30.63%	2.3
Sampson	3	73.94%	19.43%	3.8
Scotland	1	45.45%	36.36%	1.3
Stanly	2	100.00%	26.91%	3.7
Stokes	1	0.00%	31.71%	0.0
Surry	1	100.00%	18.92%	5.3
Union	3	91.67%	27.01%	3.4
Wake	10	61.50%	24.88%	2.5
Washington	1	37.50%	18.18%	2.1
Wayne	5	63.92%	20.44%	3.1
Wilson	3	41.11%	13.93%	3.0

Prosecutors struck black venire members at a higher rate than other venire members in all but four counties: Catawba, Moore, Polk and Stokes. This shows a remarkably consistent pattern of strike ratios across counties.

Unadjusted Disparities: Judicial Division Evidence

264. At the time of Golphin's capital trial, Cumberland County was in the Second Judicial Division. Since January 1, 2000, including the time of Walters' and Augustine's trials, Cumberland County has been in the Fourth Judicial Division. The Court finds as fact the

following strike ratios and disparities for the current Fourth Judicial Division, and former Second Judicial Division:

Geographic Area	Time Period	No. of Cases	Blacks Struck	Non-Blacks Struck	Strike Rate Ratio	Statistical Significance
Current Division 4	2000-10	8	62.4%	21.9%	2.84	p<0.001
Former Division 2	1990-99	37	51.5%	25.1%	2.05	p<0.001

265. The probabilities that the disparities within each of these geographic areas occurred in a race-neutral jury selection process are exceedingly small: Current Division Four, less than one in 1,000; Former Division Two, less than one in 100 billion; Cumberland County, less than one in 1,000. Katz concurred that the judicial division disparities are statistically significant.

Unadjusted Disparities: Cumberland County Evidence

266. The Court makes the following findings of facts regarding disparities in Cumberland County.[30] In Cumberland County, 11 proceedings are represented in the MSU Study for nine death row inmates. The State struck 52.7% of qualified black venire members in these Cumberland Cases, but only 20.5% of all other qualified venire members. Cumberland County's strike ratio, 2.57, is higher than the statewide average strike ratio, 2.05.

267. The Court finds that, in every case in Cumberland County, the State peremptorily challenged black venire members at a higher rate than other eligible venire members as set forth below:

[30] Cumberland County and Prosecutorial District 12 constitute the same geographic area and this has been constant during the entire period examined by the MSU Study.

Year	Defendant	Black Venire Members	Other Venire Members	Strike Rate Ratio
2002	Quintel Augustine	100.0%	27.0%	3.70
1995	Richard E. Cagle	28.6%	27.5%	1.04
1998	Tilmon C. Golphin	71.4%	35.8%	1.99
1995	John D. McNeil	60.0%	13.6%	4.40
1995	Jeffrey K. Meyer	41.2%	19.0%	2.16
1999	Jeffrey K. Meyer	50.0%	15.4%	3.25
1994	Marcus Robinson	50.0%	14.3%	3.50
2000	Christina S. Walters	52.6%	14.8%	3.55
1994	Philip E. Wilkinson	40.0%	23.3%	1.71
2005	Eugene J. Williams	38.5%	15.4%	2.50
2007	Eugene J. Williams	47.4%	19.0%	2.49

268. In 10 of the 11 Cumberland County cases, the Court finds that prosecutors struck black jurors at a significantly higher rate than other eligible venire members, with only one case (*State v. Richard E. Cagle*) having almost an equal strike rate. The strike rate ratio and the disparity represented by the strike rate ratio in eight of the 11 cases is higher than the disparity seen in the statewide data of the MSU Study.

Unadjusted Disparities Unique To Each Defendant

269. Defendants presented three groups of statistical analyses tailored to the time of their cases. First, defendants presented the strike ratios for their individual cases: 2.0 (Golphin), 3.6 (Walters), and 3.7 (Augustine). The Court finds that these strike ratios are highly probative evidence, and, standing alone, constitute some evidence of discrimination "in the defendant's case."

270. Second, Defendants presented the county and statewide results of time "smoothing" analyses performed by Woodworth. Time smoothing analyses consider all of the data over a broad period of time, and allow the researcher to examine relationships in the data for

a specific point in time. Woodworth has utilized this time smoothing analysis in the past, has published articles utilizing the analysis in peer reviewed publications and knows of its accepted use by professionals in environmental and medical research. The time smoothing analysis gives a kind of running average of an odds ratio over time, giving other trials closer in time to the point of analysis more weight. It allows the confidence interval to be determined on the exact date of Defendants' trials.

271. The Court finds that the smoothing analysis performed by Woodworth is an accepted and appropriate method of calculating the odds of being struck between black and nonblack venire members for the exact date of Defendants' trials. The Court credits the testimony of Woodworth that this method is a superior statistical method because it allows the researcher to use all of the available data.

272. Third, Defendants presented evidence from the "statutory windows." The statutory window is defined as the period spanning ten years prior to the commission of the offense to two years after the defendant's sentence was imposed. The statutory window analyses limited the data from the MSU study to just those cases that fell within the statutory window for each defendant, and excluded all data from outside the window. The Court finds the statutory window analysis directly relevant to the question whether there was discrimination within this period. The Court notes that this analysis does not include the broader evidence from the surrounding years, data which may be relevant to whether there was discrimination within the statutory window itself. Nonetheless, the analysis is highly relevant and probative of the precise question at issue, and accordingly, the Court affords it significant weight.

Unadjusted Disparities: *State v. Golphin* (1998)

273. The strike ratio for strikes against black venire members in Golphin's own case was 2.0. The State struck five of the seven black venire members (71.4%), but only 24 of the 67 non-black venire members (35.8%). The strike disparity had an observed p-value < .10. There was only one black juror on Golphin's final jury. This disparity is even larger if the strike patterns for minorities and white venire members are compared. Of the group of 72 venire members questioned and struck or passed by the State, there were only eight minority venire members. The State struck six of the eight minority venire members (75.0%), and only 23 of the 66 White venire members (34.8%). The strike ratio for strikes against minority venire members in Golphin's own case was 2.15. There were no minorities, other than the single black juror, who served on Golphin's final jury.

274. The smoothing analysis of the unadjusted statewide data reflected an odds ratio above 3.0 for 1998, the time of Golphin's trial. This disparity was also statistically significant. The 95% confidence interval spanned from odds ratios of two and five and excluded the null hypothesis. This is strong evidence that in 1998 race was correlated with prosecutor strike decisions statewide.

275. Similarly, the smoothing analysis of the unadjusted Cumberland County data reflects an odds ratio of approximately 4.0 for 1998, the time of Golphin's trial. This disparity was also statically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 1998 race was correlated with prosecutor strike decisions in Cumberland County.

276. The statutory window analysis is further evidence of disparate treatment of black venire members at the time of Golphin's trial. There were seven capital proceedings in the MSU

Cumberland study between September 23, 1987 and May 13, 2000.[31] Looking only at those cases, the average rate of the State's strike ratio against black venire members in Cumberland County is 2.29. This difference in strike rates for Cumberland County cases in Golphin's statutory window is statistically significant with a p-value < .01.

Unadjusted Disparities: *State v. Walters* (2000)

277. The strike ratio for strikes against black venire members in Walters's case was 3.6. The State used 10 of its 14 peremptory strikes to remove black venire members. The State struck 10 of the 19 black venire members (52.6%) in Walters' case, and only four of the 27 non-black venire members in Walters' case (14.8%). The difference between the 52.6% strike rate against black venire members and 14.8% strike rate against all other venire members is statistically significant with the *p*-value < .01.

278. The smoothing analysis of the unadjusted statewide data reflected an odds ratio above 3.0 for 2000, the time of Walters' trial. This disparity was also statistically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 2002 race was correlated with prosecutor strike decisions statewide.

279. Similarly, the smoothing analysis of the unadjusted Cumberland County data reflects an odds ratio above 4.0 for 2000, the time of Walters' trial. This disparity was also statistically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 2000 race was correlated with prosecutor strike decisions in Cumberland County.

280. The statutory window analysis is further evidence of disparate treatment of black venire members at the time of Walters' trial. There were eight capital proceedings in the MSU

[31] The jury selection proceedings for Quintel Augustine, Christina Walters, and both Jeffrey Meyer trials, fall outside of Golphin's statutory window and were excluded for the purpose of these analyses.

Cumberland study between August 17, 1998 and July 6, 2002.[32] Looking only at those cases, the average of the State's strike ratio against black venire members in Cumberland County cases is 2.4. This difference is strike rates is statistically significant with a p-value < .01.

281. The raw unadjusted data, whether viewed within the prescribed statutory windows of Defendants' cases or over the entire study period, constitutes powerful evidence that race was a significant factor in the State's exercise of peremptory strikes at the time of Defendants' trials. This evidence weighs very heavily in favor of finding a prima facie case, and finding that race was a significant factor in the State's exercise of peremptory strikes at the time of Defendants' trials.

Unadjusted Disparities: *State v. Augustine* (2002)

282. The strike ratio for strikes against black venire members as compared to all other venire members in Augustine's own case was 3.7. In Augustine's case, the State questioned and struck or passed a total of 42 venire members. Of the 42 venire members for whom the State questioned and either struck or passed, five were black (14%). The State struck all five, or 100 percent, of the eligible black venire members in Augustine's case, passing no black venire members to defense counsel. As a direct result of the State's strikes, the final jury in Augustine's case was all white. If the final jury composition had been representative of this percentage of eligible black venire members, there would have been two black venire members selected for the final jury (including alternates). The Court finds that the reduction of the qualified black venire members from 14% to 0.0% caused an impact on the final composition of Augustine's jury by reducing the number of black jurors from two to zero.

[32] The jury selection for Quintel Augustine and the two trials for Jeffrey Meyer fall outside of Walters' statutory window and were excluded for the purpose of these analyses.

283. The State struck 10 of the other 37 venire members it questioned, or 27% of all other venire members in Augustine's case. The difference between the 100% strike rate against black venire members and 27% strike rate against all other venire members is statistically significant with the p-value < .01.

284. The smoothing analysis of the unadjusted statewide data reflected an odds ratio above 3.0 for 2002, the time of Augustine's trial. This disparity was also statistically significant. The 95% confidence interval spanned from odds ratios of three to six and excluded the null hypothesis. This is strong evidence that in 2002, race was correlated with prosecutor strike decisions statewide.

285. Similarly, the smoothing analysis of the unadjusted Cumberland County data reflects an odds ratio above 4.0 for 2002, the time of Augustine's trial. This disparity was also statically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 2002 race was correlated with prosecutor strike decisions in Cumberland County.

286. The statutory window analysis is further evidence of disparate treatment of black venire members at the time of Augustine's trial. There were nine capital proceedings in the MSU Cumberland study between November 29, 1991 and October 22, 2004.[33] Looking only at those cases, the State's strike ratio against black venire members in Cumberland County is 2.59. This difference is strike rates is statistically significant with a p-value < .01.

287. O'Brien and Woodworth performed various analyses including Augustine's case as part of Cumberland County. They chose to treat Augustine as part of Cumberland County because they were studying prosecutor strike decisions, and the prosecution office which made

[33] The two jury selections for Jeffrey Meyer fall outside of Augustine's statutory window and were excluded for the purpose of these analyses.

the strike decisions is from Cumberland. The Court finds this analysis to be appropriate. The State urges, based upon the statutory language, only statistical evidence from the county where the defendant was sentenced to death should be admitted. The State contends that because Augustine was sentenced to death in Brunswick County after a change of venue, only Brunswick County data is appropriate. Although the Court rejects this argument, it considers in the alternative the data presented from Brunswick County. The strike ratio for the two Brunswick County capital cases in the MSU study is 3.1. Augustine's own strike ratio is 3.7. Including Augustine with the Brunswick County yields a County strike rate of 3.3.[34] This disparity is strong evidence that race was a significant factor in the State's exercise of peremptory strikes in Brunswick County cases at the time of Augustine's trial.

Controlled Regression Analysis: Statewide Evidence

288. In Part II of the MSU Study, the researchers examined whether the stark disparities in the unadjusted data were affected in any way by other potential factors that correlate with race but that may themselves be race-neutral.

289. The first controlled analysis that the MSU Study performed was a type of cross-tabulation. To explore the relationships between possible explanatory factors and the observed racial disparities, the MSU Study simply removed venire members with a particular characteristic from the 25% random sample data set and then analyzed strike patterns for the remaining venire members. The study identified four explanatory factors to assess using this procedure, removing: (1) venire members with any expressed reservations on the death penalty,

[34] The two Brunswick County capital cases are Daniel Cummings and Darrell Maness. The strike rate ratio for Daniel Cummings is 2.83 (75.00%/26.47%) and the strike rate ratio for Darrell Maness is 3.46 (69.23%/20.00%). The average of the three strike rate ratios, 2.83, 3.46, and 3.70 is 3.33. The Cummings jury selection was in 1994, and falls within Augustine's statutory window. The Maness jury selection was in 2006, and thus falls outside of Augustine's statutory window. Considering only the strike rates for Augustine and Cummings, the Brunswick County strike ratio is 3.27.

(2) unemployed venire members, (3) venire members who had been accused of a crime or had a close relative accused of a crime, (4) venire members who knew any trial participant, and (5) all venire members with any one of the four characteristics. The theory was that if a particular explanatory factor were the true explanation for the observed racial disparity, when venire members with that factor were removed, the collection of remaining venire members would no longer reflect racially disparate strike rates. For example, if venire members' death penalty reservations were the true explanation for the apparent observed relationship between race and strike decision, then removing all venire members who expressed death penalty reservations would cause the racial disparities seen in the unadjusted analysis to disappear for the remaining venire members.

290. These cross-tabulations did not dispel the link between race and prosecutor strike decisions. As shown in the following table, even after each of the foregoing categories of venire members were removed from the 25% statewide sample, disparities in prosecutors' use of peremptory strikes persisted in the remaining sample.

Type of Jurors Removed	**No. of Jurors Removed**	**Blacks Struck**	**Non-Blacks Struck**	**Strike Rate Ratio**	**Statistical Significance**
Death Penalty Reservations	192	42.9%	20.8%	2.1	$p<0.001$
Unemployed	26	48.7%	24.7%	2.0	$p<0.001$
Accused of Crime	399	50.3%	23.6%	2.1	$p<0.001$
Knew Trial Participant	47	53.3%	25.3%	2.1	$p<0.001$
All Four Categories	583	33.9%	17.8%	1.9	$p<0.001$

291. The factors that the MSU Study controlled for in the aforementioned analysis were chosen because, based upon O'Brien's review of *Batson* litigation and the race-neutral

reasons offered by prosecutors during *Batson* arguments at trial, they were commonly considered to make a venire member less attractive to the prosecution. O'Brien reviewed the affidavits provided by prosecutors with purported explanations for strikes of black venire members and found that these explanations were in fact frequently the explanations given by North Carolina prosecutors. The Court finds that these four factors are among the most common and ubiquitous explanations given by prosecutors throughout North Carolina for exercising peremptory strikes of venire members.

292. The Court finds that the disparities in prosecutorial strike rates against eligible black venire members persist at a constant level even when other characteristics the Court might expect to bear on the decision to strike are removed from the equation and these disparities remain stark and significant. The Court finds that the foregoing analysis suggests that those non-racial factors do not explain the racial disparity shown in the unadjusted study.

293. While the MSU analysis is probative and instructive to the Court, this Court is aware that the decision to strike or pass a potential juror can turn on a number of factors in isolation or combination. The MSU researchers also acknowledged this in their study and then appropriately and adequately controlled for the variables and combination of variables through a statistical logistic regression analysis.

294. O'Brien and Grosso, with the use of SPSS statistical software that is accepted as reliable by social scientists and statisticians, developed a fully-controlled logistic regression model based upon carefully and scientifically selected statistically significant and relevant predictor variables that bore on the outcome of interest – the strike decisions by the prosecutors. Out of approximately 65 candidate variables, O'Brien and Grosso, using the SPSS statistical software, identified 13 non-racial variables for inclusion into the fully controlled logistic

regression model. These non-racial variables were selected by the SPSS software program because of their low *p*-value and predictive value. Each of these variables has a very low *p*-value, indicating high statistical significance. The Court finds that each of these 13 variables is a potential alternative explanation for apparent race-based disparities. Further, these factors are highly representative of the explanations given by prosecutors as factors used in their exercise of peremptory strikes.

295. Before building the logistic regression model, O'Brien screened for interactions among variables.[35] Variables "interact" if together the variables demonstrate something beyond the main effect of the variables. If two variables each independently contribute to the risk of the outcome occurring, they would "interact" if the effect of the combination is more than merely additive. After investigation, O'Brien was satisfied that there were no interactions that should be included in the final model. Woodworth independently screened for interactions between race and the candidate variables. He also was satisfied that there were no interactions that should be included in the final model.

296. The predictive non-racial variables the MSU Study identified and the results of the statewide logistic regression analysis, which the Court finds is credible, are as follows.

Variable with description	**Odds Ratio**
Expressed reservation about death penalty	12.41
Not married	1.72
Accused of crime	2.00
Concerned that jury service would cause hardship	2.81
Homemaker	2.31
Works or close other works with police or prosecutor	0.46
Knew defendant	11.03
Knew a witness	0.50
Knew attorney in the case	2.03

[35] O'Brien and Grosso also initially investigated whether a hierarchical model would be necessary. They consulted with a specialist in this area of analysis, and determined that such a model would be neither necessary nor appropriate in this case.

Expressed view that suggests favorable to State	0.13
Attended graduate school	2.62
22 years of age or younger	2.37
Works or close other works as or with defense attorney	2.31

With respect to the foregoing odds ratios, the Court notes that an odds ratio of one represents an even chance of being struck. If the odds ratio is higher than one, the chances of being struck by the State are increased. If the odds ratio is less than one, the chances of being struck by the State are decreased.

297. After fully controlling for the 13 non-racial variables which the Court finds are highly predictive for prosecutorial strike decisions, the race of the venire member is still statistically significant with a *p*-value <.001 and an odds ratio of 2.31, which is similar to the strike rate ratio seen in the unadjusted data. There is a 95% chance that the odds of a black venire member being struck by the State, after controlling for non-racial variables, is between 1.57 and 3.31 times higher than the odds of other venire members being struck. The Court finds that this result is very powerful evidence that race was a significant factor in the exercise of peremptory strikes statewide and is more likely than not the result of intentional discrimination by prosecutors.

298. On cross-examination, O'Brien reviewed early handwritten notes regarding the construction of her model, as well as log files related to the regression models she introduced. These notes and models are consistent with her testimony that she relied upon commonly accepted methods of model building. O'Brien tried multiple different methods of model building, including but not limited to, building a forward conditional "step wise" model, to ensure that the results she observed were robust and stable. The Court finds that the fact that O'Brien used multiple methods and achieved the same, stable results increases the reliability of the study.

299. The appropriateness of O'Brien's model selection was additionally confirmed by the testimony of Woodworth. Woodworth replicated the analysis of the MSU researchers utilizing a different statistical software program, SAS, and achieved the exact same results. SAS is widely accepted as reliable by statisticians. Woodworth, using SAS, independently selected the appropriate explanatory race-neutral variables. He found the most highly explanatory variables matched precisely with the variables which were initially identified by MSU. Woodworth found that some of the less significant variables differed in these models, but these changes made virtually no difference in the odds ratio for black venire members. Woodworth testified and the Court so finds that the ability of the racial disparity to withstand various properly constructed alternative models supports a robust finding that race was a significant factor in prosecutor's use of peremptory strikes.

300. Multiple analyses were conducted by O'Brien, Grosso, and Woodworth to determine if any missing data within the variables skewed the findings of the fully controlled logistic regression model, including a method known as multiple imputation of missing data, which is an accepted standard statistical procedure used to determine whether missing data is affecting statistical findings. Alternative analyses imputed the missing data but did not materially alter the odds ratio relative to black venire members. The missing data did not skew the results found by the researchers and the Court finds that the missing data does not invalidate or bias the MSU findings in any way.

301. In addition to the cross-tabulation tables and the regression models, the MSU researchers performed additional analyses that support a finding that race was a significant factor in the exercise of peremptory strikes. As described in greater detail in separate sections of this Order, many prosecutors in North Carolina provided to Katz explanations for striking black

venire members. Statewide, the most common reasons that prosecutors provided to Katz were that the venire members expressed reservations or ambivalence about the death penalty and that they, or someone close to them, had been accused of a crime. These two reasons were also proffered by Katz as possible race-neutral explanations for the disparities. The MSU researchers had collected data on both of these factors and were able to do an analysis of these two factors by examining the acceptance rates of venire members based upon race within each of the factors. If these factors are motivating prosecutors to exercise their peremptory strikes, as this Court finds that they are, then there should be equivalent strike patterns among races within these individual factors. By way of example, the Court notes that it is entirely reasonable for prosecutors to be motivated to strike venire members who express a reservation about the death penalty; however, one would expect that there would not be a significant difference in the percentage of venire members accepted by the State between black and other eligible venire members who express such reservations.

302. Statewide, among the 191 venire members in the MSU Study who expressed reservations about the death penalty, the State accepted 9.7% of the black venire members but accepted 26.4% of the other venire members. This disparity is statistically significant.

303. In North Carolina, among the 398 venire members in the MSU Study who themselves or a family member or close friend had been accused of a crime, the State accepted 42.1% of the black venire members but accepted 66.7% of the other venire members. This disparity is statistically significant.

304. The Court finds that the racial disparities in prosecutorial strikes seen within these individual variables are compelling evidence of discrimination as there are no valid reasons for the disparities.

Controlled Regression Analysis: Cumberland County

305. O'Brien and Grosso also developed a fully controlled logistic regression model for Cumberland County based upon carefully and scientifically selected statistically significant and relevant predictor variables that bore on the outcome of interest – the strike decisions by the prosecutors. With respect to Cumberland County, the MSU Study analyzed 100% of the venire members in the eleven capital cases. Out of approximately 65 candidate variables, O'Brien and Grosso, using the SPSS statistical software, selected eight non-racial explanatory variables for inclusion into the fully controlled logistic regression model shown on Table 13 of the MSU Study. These factors are highly representative of the explanations given by the Cumberland County prosecutors. Each of these variables has a low *p*-value indicating high statistical significance and is a factor and alternative explanation the Court finds is a practical predictor variable. Only one variable, "leans ambiguous," has a *p*-value > .05, but the Court is satisfied that there is a theoretical and statistically valid purpose for inclusion of this variable in the model; specifically, its marginal significance and its exclusion does not materially change the results.

306. O'Brien testified, and the Court finds as a fact, that the non-racial variables controlled for in the regression analysis of this study population differed from the 25% sample because, in Cumberland County, different non-racial variables had a statistically significant effect in predicting prosecutors' use of peremptory strikes. For example, in Cumberland County, the data reveal that no venire member knew the defendant, thus the Court would not expect this variable to appear in the Cumberland County model.

307. The predictive non-racial variables the MSU Study identified in Cumberland County and the results of the logistic regression analysis, which the Court finds is credible, are as follows.

Variable	Odds Ratio
Expressed reservation about death penalty	24.12
Unemployed	6.76
Accused of crime, or had close family/friend who was	2.21
Concerned that jury service would cause hardship	4.17
Job that involved helping others	2.69
Blue collar job	2.82
Expressed view that suggested bias or trouble following law, but the direction of bias is ambiguous	2.56
22 years of age or younger	4.00

308. After fully controlling for eight variables the Court finds are highly predictive for prosecutorial strike decisions, the race of the venire member is still statistically significant with a *p*-value <.01 and an odds ratio of 2.40, which is similar to the strike rate ratio seen in the unadjusted data. There is a 95% chance that the odds of a black venire member being struck by the State in Cumberland County, after controlling for non-racial variables, is between 1.39 and 4.14 times higher than the odds of other venire members being struck.

309. O'Brien and Grosso also analyzed the Cumberland County data set based on the explanations Cumberland County prosecutors commonly proffered in their affidavits: death penalty reservations, having been accused personally of a crime, or having a close family member or friend who had, and financial hardship.

310. In Cumberland County, among the 72 venire members in the MSU Study who expressed reservations about the death penalty, the State accepted 5.9% of the black venire members but accepted 26.3% of the other venire members. This disparity is statistically significant. Of the 159 venire members in the MSU Study who themselves or a family member

or close friend had been accused of a crime, the State accepted 40.0% of the black venire members but accepted 73.7% of the other venire members. This disparity is also statistically significant. And among the 20 venire members in the MSU Study who expressed that jury service would impose a hardship on them, the State accepted 14.3% of the black venire members but accepted 61.5% of the other venire members. This disparity is also statistically significant.

311. The Court finds that the racial disparities in prosecutorial strikes seen within these individual variables is additional compelling evidence of discrimination.

Controlled Regression Analysis: *State v. Golphin* (1998)

312. As with the unadjusted analyses, Defendants presented adjusted analyses that are specific to the times of trial for each defendant. These analyses include statewide and Cumberland County "time smoothing" analyses, and regression analyses based on data that falls only within each defendant's individual statutory window.

313. Woodworth conducted adjusted time smoothing analyses statewide and in Cumberland County to calculate an odds ratio at the time of Golphin's trial. The odds ratio at the time of Golphin's trial in 1998 for a black venire member being struck by the State in capital cases across North Carolina, after controlling for appropriate factors, is just above two. This finding excludes the null hypothesis and is statistically significant. He performed a similar smoothed, adjusted analysis using the Cumberland County data. This analysis reflected an odds ratio at the time of Golphin's trial of approximately 2, and is also statistically significant.

314. Woodworth and O'Brien each performed a regression analysis including the seven Cumberland County cases that fell within Golphin's statutory window. O'Brien constructed a new model for Golphin using these cases by first screening all of the potential candidate variables to determine which variables to include in the model, and following the same

scientific modeling practices she previously described for the statewide and Cumberland County models. The model was very similar to the full Cumberland County model. Based on this model, O'Brien found that race was a significant factor with an odds ratio of 2.11 and a p-value <.05, even after controlling for other explanatory variables in the model.

315. O'Brien observed significant similarities among the unadjusted and adjusted results for Golphin, and among the results using the full Cumberland County model and Golphin's statutory window model. These similarities gave her additional confidence that the observed relationship between race and prosecutorial strike decisions in Golphin's statutory window was not merely due to chance.

316. Woodworth conducted a logistic regression analysis based exclusively on the data from Cumberland County in Golphin's statutory window, and adjusted for the factors that were identified as significant in the Cumberland County statutory model. The adjusted odds ratio using data in Golphin's statutory window was 2.09, and it was statistically significant.

Controlled Regression Analysis: *State v. Walters* (2000)

317. Woodworth further analyzed the data from Part II of the MSU Study with the same time smoothing analysis that he performed on the unadjusted data. The smoothing allowed him to use all of the data from the full study period to calculate an odds ratio at the time of Walters' trial. The odds ratio at the time of Walters' trial in 2000 for a black venire member being struck by the State in capital cases across North Carolina, after controlling for appropriate factors, is just above five. This finding excludes the null hypothesis and is statistically significant. He performed a similar smoothed, adjusted analysis using the Cumberland County data. This analysis reflected an odds ratio at the time of Walters' trial of approximately 3, is also statistically significant.

318. O'Brien and Woodworth each performed a regression analysis using the eight Cumberland County cases that fell within Walters' statutory window. As with Golphin, O'Brien built a new regression model for Walters. The odds ratio for black venire members being struck for all Cumberland County cases in Walters' statutory window was 2.61, and the p-value <.01.

319. Woodworth also conducted a logistic regression analysis based only on the data from Cumberland County in Walters' statutory window and adjusted for the factors that were identified as significant in the Cumberland County statutory model. The adjusted odds ratio using data in Walters' statutory window is 2.47, and it is statistically significant.

Controlled Regression Analysis: *State v. Augustine* (2002)

320. Woodworth further analyzed the data from Part II of the MSU Study with the same time smoothing analysis that he performed on the unadjusted data. The smoothing allowed him to use all of the data from the full study period to calculate an odds ratio at the time of Augustine's trial. The odds ratio at the time of Augustine's trial in 2002 for a black venire member being struck by the State in capital cases across North Carolina, after controlling for appropriate factors, is just above five. This finding excludes the null hypothesis and is statistically significant. Woodworth performed a similar smoothed, adjusted analysis using the Cumberland County data. This analysis reflected an odds ratio at the time of Augustine's trial of approximately 3.0, and is also statistically significant.

321. O'Brien and Woodworth each performed regression analysis using the nine cases that fell within Augustine's statutory window. As with Golphin and Walters, O'Brien constructed a new model for Augustine. The odds ratio for black venire members of being struck in the regression model for Augustine's statutory window was 2.61, with a p-value <.01.

The 95% confidence interval for the odds ratio was 1.41 to 4.81, indicating that there is a 95% certainty that the true odds ratio lies within this range.

322. Woodworth conducted a logistic regression analysis based only on the data from Cumberland County in Augustine's statutory window and adjusted for the factors that were identified as significant in the Cumberland County statutory model. The adjusted odds ratio using data only in Augustine's statutory window was 2.61, and it was statistically significant.

Convergence and General Observations

323. From the narrow lens of Golphin, Walters, and Augustine' individual cases to the panoramic view afforded by the full statewide study, the disparity in prosecutor strike rates is remarkably consistent. The disparities, in both the unadjusted and adjusted data, are large and striking, and the conclusions of the statistical models are robust.

324. None of the alternate explanations frequently cited by the State explain the disparities in any of the models. O'Brien testified, and this Court finds as fact, that no regression analysis model with any combination of non-racial potential explanatory variables was ever identified that revealed the predictive effect of race to be attributable to any non-racial variable.

325. The Court finds that the magnitude of the effect of race on predicting prosecutorial strikes in the MSU Study is so robust that the inclusion of another variable, even if predictive of outcome, is not likely to not explain the racial disparity.

326. O'Brien testified, and this Court finds as fact, that in North Carolina and Cumberland County, throughout the 20-year study period, being black does predict whether or not the State will strike a venire member, even when holding constant or controlling for non-racial variables that do affect strike decisions. When those predictive, non-racial variables are controlled for, the effect of race upon the State's use of peremptory strikes is not simply a

compound of something that is correlated or associated with race; race affects the State's peremptory strike decisions independent of the other predictive, non-racial factors.

327. The findings of the fully-controlled logistic analysis performed by MSU researchers are consistent with other jury studies that have been completed in the United States, specifically including the Philadelphia County study, which was similar to the MSU Study, a study performed by Mary Rose in Durham, North Carolina, and a study by the *Dallas Morning News* of jury selection in Texas. The Court finds that the similarity of the findings in the MSU Study with other reported jury studies finding racial bias in jury selection lends validity to the MSU Study.

328. In light of all of the statistical evidence presented, the Court finds that the statistical evidence constitutes strong evidence that race was a significant factor in the State's decision to exercise peremptory challenges throughout the State of North Carolina and Cumberland County throughout the full study period, between 1990 and 2010, and at the time of Defendants' trials, and in Defendants' own cases.

Adjusted Analysis Used Appropriate Variables

329. A chief criticism of the State, through their expert Katz, was that the MSU Study failed to appropriately define and include all relevant variables in its analysis. Katz noted that O'Brien and Grosso did not code for variables that could not be captured from the written record in the case. As described below, O'Brien and Grosso created a candidate variable list of 65 factors that could potentially explain strike decisions. The Court finds that the State has presented no credible evidence that the MSU Study failed to consider any non-racial variable that might affect strike decisions and which could correlate with race and provide a non-racial explanation for racial disparities.

330. Woodworth testified and the Court finds that in determining whether variables are statistically appropriate, one must look at the quality of the variable, which is determined by its validity and reliability. Validity means that the variable actually measures what it purports to measure. Reliability means that two different people assessing whether or not a variable is present would most of the time concur. Woodworth testified and the Court so finds that the MSU researchers took appropriate measures to ensure reliability and validity of its variables.

331. O'Brien and Grosso used generally accepted methodology for ensuring reliability and validity for this empirical research and the Court finds the candidate variables and explanatory variables utilized by them are statistically appropriate, reliable and valid.

332. O'Brien and Grosso did not capture in the study non-verbal information that may have been relied upon by prosecutors, such as negative demeanor. For a variable such as negative demeanor to have any impact on the findings of the MSU Study in the adjusted (Part II) analysis, it must correlate both with race and prosecutorial strike decisions. In other words, black venire members must, overall, more frequently display negative demeanors than other venire members. O'Brien presented testimony, and the Court finds as a fact, that there is no evidence to suggest that objectionable demeanor is correlated with race, and thus the absence of the non-verbal information being captured in the study does not affect the findings of the MSU Study.

333. In reviewing the purported race-neutral explanations provided by the prosecutors statewide and from Cumberland County, it is clear that the vast majority of the stated reasons for striking the black venire members appear in the trial record. In the affidavits provided by Cumberland County prosecutors, every purported race-neutral explanation appears in the trial

record.[36] The Court further finds that the MSU Study has collected information on all potential non-racial variables that might bear on the State's decision to exercise peremptory challenges and which could correlate with race and provide a non-racial explanation for the racial disparities found in the unadjusted (Part I) analysis.

334. In his report, Katz further criticized some of the explanatory variables defined and selected by the MSU researchers. O'Brien agreed with Katz, and the Court so finds, that one variable was imprecise initially because it sought information regarding venire members who worked in law enforcement or who had close friends or family members who worked in law enforcement. The definition of "law enforcement" was overly broad. For example, it included prosecutors and public defenders who have the potential for opposing biases. In light of this criticism, O'Brien and Grosso determined it would be appropriate to recode the variable. They used the existing information in the database and recoded the variable into more precise sub-variables, thus remedying this error with the variable. Katz could have done this same recoding but did not. This error did not skew, bias, or invalidate the findings of the MSU Study. Although the recoding created better variables, and thus improved the statewide model slightly, it did not significantly alter the statewide model, nor materially alter the odds ratio for black. The recoding did not affect the Cumberland County model.

335. O'Brien did not agree with Katz's other criticisms of variable definitions, and the State failed to show in any way why any of the other variables were inappropriate. The State did not introduce any recoding or alternative coding, despite the fact that it had the data available to do so. Katz offered no evidence to suggest that recoding any of the variables altered the

[36] The Court notes one qualification to this finding. Dickson testified that, in *Meyer (1995)*, the lack of eye contact exhibited by African-American venire member Tera Farris was one basis on which Dickson exercised a peremptory strike against her; however, Colyer's affidavit failed to mention this.

findings of the MSU Study. The Court finds that the absence of such analysis is an indication of the validity and reliability of the variables

336. The Court rejects the remainder of Katz's criticisms of the variables. The Court further finds that the MSU Study controlled for all significant variables that influence prosecutorial strike decisions. The Court additionally finds that the presence of idiosyncratic reasons for strike decisions by prosecutors do not influence, bias or skew the findings of the MSU Study.

337. O'Brien and Grosso's acceptance of critique of the MSU Study and willingness to correct issues with the study are positive indicators of the validity of the MSU Study and the credibility of the researchers.

338. Finally, the Court notes that established case law in the field of discrimination rejects the approach taken by the State here: namely, to attempt to discredit a regression model by merely suggesting that the model should have included other factors. *See, e.g., Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1266 (8th Cir. 1987) ("M]ere conjecture or assertion on [a] defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by [a] plaintiff['s] statistics."). Moreover, even if the State had met this burden, and had pointed to some appropriate variable that was not included, "it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a [party']s case." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

The MSU Study's Responsiveness To New Information

339. The Court's confidence in the reported results and findings of the MSU study is strengthened by the consistency in the findings over time and the researchers' willingness to

constantly update their work to reflect the most accurate information. As described below, the MSU researchers timely provided the State with all of their underlying data and analyses. The State, through the efforts of their statistician, Katz, and prosecutors around the State identified a number of purported errors. The MSU researchers diligently reviewed every purported error, and when appropriate, made changes to their data and analyses.

340. The MSU researchers initially produced to the State a complete and thorough written report of the jury study, dated July 20, 2011, in the context of the *Robinson* litigation. The State sought, and received, multiple continuances of the evidentiary hearing in that case. In response to new discovery deadlines, the MSU researchers produced updated versions of the same written report on September 29, 2011, and December 15, 2011. The MSU Study included many thousands of coding decisions and data entries into the database which support the analyses by the researchers. Every time the MSU researchers identified any kind of error, in coding, data entry, or otherwise, they updated their database.

341. After the December disclosures by O'Brien, the State, through Katz's report, contended that the database contained some errors. Specifically, Katz identified 20 purported errors with 18 venire members in the database, including only four race-coding errors in the entire data set. This assertion by Katz was made after the State had received all of the DCIs, all of the primary source documents and all database entries from the MSU Study. O'Brien examined each purported error identified by Katz and determined, and the Court so finds, that nine of the 20 purported errors were in fact errors, and 11 were not.

342. In addition to the purported errors identified by Katz, the State provided the defense with numerous affidavits, spreadsheets, or statements from prosecutors throughout the State which intended to state race-neutral reasons for striking black jurors in capital cases. These

documents asserted there were additional errors in the coding by MSU, specifically that there were 35 additional coding errors for 32 venire members.

343. O'Brien examined each purported error identified by prosecutors and determined, and the Court so finds, that 10 of the 35 additional purported errors were in fact errors, and 25 were not. O'Brien testified at the *Robinson* hearing in February that she had updated the database to correct all of the identified errors.

344. O'Brien testified in these hearings that she has continued to update the database when she becomes aware of any errors. In the many months since the *Robinson* hearing, additional prosecutor affidavits were generated from some of the districts that had not complied with Katz's earlier request for reviews of the MSU study. These were provided to O'Brien. Since February 2011, O'Brien has identified, and corrected the database to reflect, a total of five errors. These five errors included one venire member whose strike eligibility was erroneously coded and four venire members whose strike information was erroneously coded. Correcting these errors did not make any significant difference in the models.

345. The Court finds the miniscule number of errors in such a large database to be remarkable and a strong indicator of the validity, reliability and credibility of the MSU Study. This exceptionally low error rate is a reflection of the great degree of care in data collection and coding taken by the MSU researchers. Assuming *arguendo* that all 55 purported errors identified by the State were actual errors, this is such a small error rate that it would not skew or invalidate the findings of the MSU Study.

346. None of the corrections made to the MSU Study since the first version produced to the State in July 2011 has had any significant impact on the racial disparity of strikes by prosecutors in any time period or any geographical region of North Carolina. The consistent

finding in all the models produced by MSU is that race was a significant factor in the prosecutorial strike decisions.

347. O'Brien did further analyses for this Court which she referred to as "shadow coding." This methodology involved incorporating every purported coding error in the manner which the State contends it should have been coded by recoding the data per the State's assertion. This new coding is the shadow coding and while it is not necessarily accurate or true, it gives the State every benefit of the doubt, produces results that are in a light most favorable to the State and skews the results in the favor of the State. The Court notes that Katz could have easily done this analysis but no such analysis was produced by the State or introduced into evidence by the State.

348. The shadow coding also included every instance where a prosecutor indicated there was some non-verbal reason for striking the venire member that did not appear in the written record. For the shadow coding, O'Brien coded the non-verbal behavior as the code "leans defendant" to reflect some bias for the defendant. This allowed O'Brien to incorporate every reason the prosecutors offered for striking a particular black venire member.

349. With the shadow coding analysis, in the statewide fully-controlled logistic regression model shown in Table 12 of the MSU Study, the race of the venire member is still statistically significant with a p-value <.02 and an odds ratio of 1.99. In Cumberland County, in the fully-controlled logistic regression model shown in Table 13 of the MSU Study, the race of the venire member is still statistically significant with a p-value <.02 and an odds ratio of 2.02. Even viewed in a light most favorable to the State, giving the State every benefit of the doubt and skewing the results in its favor, race was still a significant factor in decisions to exercise

peremptory challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases in North Carolina and Cumberland County.

350. The Court finds that adhering to principles of academic excellence and valid scientific quality control, O'Brien and Grosso, corrected errors in their database as they became known to them in order to provide the most accurate and transparent information in their analyses. They were constantly alert and actively searching for any kind of inconsistencies or disputes of coding in the data and they then resolved them in a transparent fashion. These corrections were made after the December 15, 2011, MSU Study report.

351. The Court finds that, based upon the very small number of errors detected by the State, the MSU researchers' adherence to appropriate and strict coding protocol to prevent researcher bias, documentation of coding discrepancy decisions and continued quality control, the Court finds the MSU database to be accurate.

Overall Findings Regarding The MSU Study

352. In addition to the other findings herein, the Court finds the following with respect to the MSU Study:

- An empirical legal study requires researchers to have sufficient knowledge and qualifications in the legal concepts, study design, methodology, data collection and statistical analyses, and O'Brien possesses all of these skills;
- The researchers, O'Brien and Grosso, are competent and qualified researchers to perform an empirical legal study such as the MSU Study;
- O'Brien has the legal training and background which is necessary for an empirical study such as the MSU Study;
- All aspects of the study are well-documented and transparent such that the entire study is replicable by other researchers;
- The thorough documentation of the coding decisions increases the transparency and replicability of the study by other researchers;

- The study was well-designed from inception with a clear, precise and relevant research question;

- The blind race coding minimized researcher bias and resulted in accurate race coding of the venire members;

- The coders and individuals entering the data into the database were well-qualified and well-trained;

- The researchers received no financial remuneration for their work on the study except their normal salary as professors. Their motivation was not financial gain, but rather academic advancement which requires exceptional quality to be accepted by their peers;

- The Court, being in a unique position to judge the credibility of witnesses, and based on the totality of her testimony, finds O'Brien to be competent, qualified, unbiased and credible. The Court further notes that the State conceded in argument, and the Court finds as a fact, that O'Brien was an honest, forthright witness for Defendants; and

- The Court, being in a unique position to judge the credibility of witnesses and based upon the totality of his testimony, finds Woodworth to be competent, qualified, unbiased and credible.

353. Mindful that appellate courts in North Carolina and throughout the United States have used differing standards for statistical significance, the Court finds that each of the statistical analyses from the MSU study set forth below are more than three standard deviations, or sigmas, from the null hypothesis, all of which are statistically significant: the statewide average strike rate disparity over the entire study period; the statewide average strike disparities for eleven, ten, and five year intervals (1990-1999; 2000-2010; 1990-1994; 1995-1999; 2000-2004); the current Fourth Judicial Division average strike rate disparity; the former Second Judicial Division average strike rate disparity; the Cumberland County average strike rate disparity; the Cumberland County average strike rate disparities when limited to data from cases that fall within the statutory windows for Golphin, Walters, and Augustine; and the odds ratio for

a black venire member being struck as shown in the statewide fully-controlled logistic regression model.

354. The Court finds that each of the statistical analyses from the MSU study set forth below are more than two standard deviations, or sigmas, from the null hypothesis, all of which are statistically significant: the statewide average strike rate disparities for the time period from 2005 through 2010; the odds ratio for a black venire member being struck as shown in the Cumberland County logistic regression model; the disparities in average rates of State strikes in Cumberland County when limited to data that falls within the statutory windows for Golphin, Walters, and Augustine; the odds ratios for black venire members of being struck as shown in Cumberland County logistic regression models, with data limited to the statutory windows for Golphin, Walters, and Augustine; the adjusted strike disparities in Golphin's case, shown in the Cumberland County smoothed graph; the adjusted and unadjusted strike disparities in Walters' case; and the adjusted and unadjusted strike disparities in Augustine's case.

355. Another common measure of significance in employment litigation is the EEOC's four-fifths rule. Under this basic rule of thumb, disparate impact will be presumed if the minority's success rate under a challenged employment policy is equal to or less than four-fifths (80%) of the majority's success rate. For example, if the State passed 75% of non-black venire members, the four-fifths threshold would be triggered if the State passed less than 60% of the black venire members (75% x .8 = 60%). *See generally*, Paul Secunda and Jeffrey Hirsch, Mastering *Employment Discrimination Law* 88 (Carolina Academic Press 2010).

356. The four-fifths threshold is satisfied with respect to the disparities observed in every relevant comparison presented from this hearing, to wit: statewide;[37] in the current Fourth

[37] In the statewide patterns aggregated across cases over the entire study period, the State passed 47.2% of the black venire members and 74.3% of the other venire members. The minority's success rate is lower than the four-fifths

Judicial Division;[38] in the former Second Judicial Division;[39] in Cumberland County;[40] in the Cumberland County cases from Golphin's window,[41] Walters' window;[42] and Augustine's window;[43] in Golphin's case,[44] in Walters' case,[45] and in Augustine's case.[46]

Seated Jury Compositions

357. The State presented evidence, through Katz's testimony and report, regarding the racial compositions of seated juries in the capital cases statewide, former Second Judicial Division, current Fourth Judicial Division and in Cumberland County. While the Court permitted Katz to testify to the findings regarding final jury composition over Defendants'

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threshold of 59.4%. In the statewide average of individual cases the entire study period, the State passed 43.9% of the black venire members and 75.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60.2%.

[38] In the current Fourth Judicial Division cases, the State passed 37.6% of the black venire members and 78.1% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 62.5%.

[39] In the former Second Judicial Division cases, the State passed 48.7% of the black venire members and 75% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60%.

[40] In the Cumberland County cases, the State passed 47.3% of the black venire members and 79.5% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 63.6%.

[41] In the Cumberland County cases limited to those within Golphin's window, the State passed 54.8% of the black venire members and 75.6% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60.5%.

[42] In the Cumberland County cases limited to those within Walters' window, the State passed 53.3% of the black venire members and 76.6% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 61.3%.

[43] In the Cumberland County cases limited to those within Augustine's window the State passed 50.5% of the black venire members and 76.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 61.0%.

[44] In Golphin's case, the State passed 28.6% of the black venire members and 64.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 51.4%.

[45] In Walters' case, the State passed 47.4% of the black venire members and 85.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 68.16%.

[46] In Augustine's case, the State passed 0% of the black venire members and 73.0% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 58.4%.

objections pursuant to Rule 401 of the Rules of Evidence, the Court finds that the inquiry under the RJA is whether "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection" and as seen in the conclusions of law below, the appropriate inquiry of the Court is to analyze the decisions to exercise peremptory challenges.[47]

358. If the Court were to consider the evidence of the defense strikes, this would be additional evidence that race is a significant factor in jury selection. The State's evidence showed that just as the discrimination in the decisions to exercise peremptory challenges by prosecutors in capital jury selection statewide, in the former Second Judicial Division, the current Fourth Judicial Division and in Cumberland County, is statistically significant, so is the discrimination by defense attorneys. Defense attorneys have discriminated in the decisions to exercise peremptory challenges in capital cases statewide, in the former Second Judicial Division, the current Fourth Judicial Division and in Cumberland County.

359. The Court additionally finds that the disparate strike patterns by prosecutors set forth in the findings herein are not cured or alleviated by the disparate strikes of white venire members by the defense attorneys. Even with the operation of the dual, competing discrimination between prosecutors and defense attorneys statewide, the Court notes and finds as a fact that of the 173 proceedings, 35 of the proceedings had all-white juries, including *Augustine*, and 38 had juries with only one black venire member, including *Golphin*.[48]

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[47] Katz testified that he informs his forensic work based upon his prior experience and instructions from courts in other cases. In his sole prior jury selection claim case where the allegation was disparate peremptory strikes by the prosecutor against black jurors, the trial judge informed the State, in open court during Katz's testimony, that Katz's analysis of calculating the final jury composition with the inclusion of the defense strikes as opposed to focusing on the strike decisions by the prosecutor was "skewing the figures." Despite this admonition, Katz did the same analysis in this case and the Court finds that examination of the final jury composition is not the appropriate analysis for the RJA.

[48] The following proceedings had all white juries (where no racial minority was seated as a regular juror): Randy Atkins (10.0), Quintel Augustine (11.0), Roger Blakeney (32.0), Paul Brown (48.1), Rayford Burke (53.0), Eric Call (56.1), Eric Call (56.2), Phillip Davis (86.0), Keith East (89.0), Andre Fletcher (95.2), Christopher Goss (116.0),

Katz's Regression Models

360. In a further effort to challenge the validity of the MSU Study, Katz constructed logistic regression models in an effort to see if he could find some combination of variables where the race variable black was not statistically significant. These models are shown in State's Exhibit 44, pp. 457-81. These models were not constructed in an effort to explain the prosecutorial strikes and each model has a warning: "NOT INTENDED AS A MODEL TO EXPLAIN HOW PROSECUTORS EXECUTE THEIR PEREMPTORY STRIKES."

361. The variables and descriptive codes selected by Katz were not made upon any statistical, practical, theoretical or other appropriate basis. In the MSU logistic regression models, each of the included explanatory variables has a low *p*-value indicating statistical significance. In Katz's models, most of the *p*-values are greater than .05 and many are above .50 indicating the variables are in no way predictors or explanatory. The Court finds that the logistic models found in SE44, pp. 458-81 are not appropriate or significant, either practically or statistically.

362. Katz conceded that the sole purpose of the models he developed was to attempt to find a combination of variables to render the black venire member disparity to become statistically insignificant. Katz produced five such constructed models for Cumberland County

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Mitchell Holmes (143.0), Cerron Hooks (144.0), James Jaynes (156.2), Thomas Larry (174.0), Wayne Laws (176.0), Jathiyah al-Bayyinah (220.1), Carl Moseley (223.0), Alexander Polke (243.0), William Raines (252.0), Martin Richardson (255.0), Clinton Rose (269.0), Kenneth Rouse (272.0), Tony Sidden (278.0), Darrell Strickland (293.0), Gary Trull (305.0), Russell Tucker (306.0), Lesley Warren (319.0), George Wilkerson (326.0), James Williams (329.0), Wade Cole (341.0), Ted Prevatte (388.2), Guy LeGrande (690.0), Carl Moseley (786.0), and Andrew Ramseur (999.0). The following proceedings had juries in which only one black juror was chosen: Billy Anderson (6.0), Shawn Bonnett (36.0), James Campbell (59.0), Terrance Campbell (60.0), Frank Chambers (66.0), Daniel Cummings, Jr. (76.0), Paul Cummings (79.0), Johnny Daughtry (82.0), Edward Davis (83.0), James Davis (85.0), Eugene Decastro (87.0), Terrence Elliot (91.0), Danny Frogge (100.1), Ryan Garcell (105.0), Malcolm Geddie Jr. (109.0), Tilmon Golphin (113.0), William Gregory (122.1), William Gregory (122.2), Alden Harden (1270.0), Jim Haselden (131.0), James Jaynes (156.1), Marcus Jones (166.0), Leroy Mann (191.0), John McNeill (205.0), Clifford Miller (211.0), Jathiyah al-Bayyinah (220.2), Jeremy Murrell (228.0), Kenneth Neal (229.0), Michael Reeves (253.0), Christopher Roseboro (270.2), Jamie Smith (281.0), James Watts (320.0), Marvin Williams Jr. (330.0), John Williams Jr. (331.0), Darrell Woods (335.0), Vincent Wooten (336.0), and Jerry Cummings (343.0).

and one such constructed model for a truncated time period for the statewide data. Even though the *p*-value exceeds .05 in each of the models, the Court notes and finds that the odds ratios for a black venire member being struck never fell below one. In the statewide data, the odds ratio was 1.798 and the odds ratios for Cumberland County ranged from a low of 1.38 to a high of 1.6. The Court finds that Katz's inability to produce a model with an odds ratio less than one is an indication of the validity and robustness of the MSU findings.

363. Woodworth testified and the Court so finds that the logistic regression models produced by Katz are no evidence of any systematic features of the voir dire process. The models did not utilize the variables from the MSU report but rather individual descriptive codes, which improperly causes there to be a much greater possibility for chance to account for the strike decision. The Court finds that it is not appropriate social science to construct a logistic regression model without reference to whether the variables are predictors, in order to make the racial disparity become insignificant. While Katz was open and truthful with this Court in explaining his purpose in constructing these models, the lack of appropriate scientific adherence by Katz further adversely reflects upon the credibility of his analysis.

364. Katz performed a cross-tabulation analysis in an attempt to control for explanatory variables. This analysis is detailed in his report. It involves the segregation of data into subgroups based on potential explanatory variables. However, Katz's approach segregated the data on factors that were not explanatory or statistically significant, such as whether a venire member had served on a jury previously, even though no prosecutor ever suggested that prior jury service, standing alone, was a reason for striking a capital juror.

365. According to Woodworth, and this Court so finds, the purpose of a cross-tabulation analysis is to investigate the relationship between one or more factors and an outcome.

There is a danger in using cross-tabulation methods with too many factors because there are too many splits of the data to the point where one is looking not at reliable associations between the factors but rather chance co-occurrences.

366. Woodworth testified, and was not questioned by the State, about his opinion that the extreme cross-tabulation method employed by Katz has not appeared in any peer reviewed publication and would not be accepted because it is not a generally accepted statistical method. Woodworth also testified that the cross-tabulation method produces models that are not reliable because of the problem of overfit. Overfitting exploits chance idiosyncratic features of a dataset by including insignificant factors in a descriptive model.

367. As part of the cross-tabulation method, Katz created a logistic regression model based upon his cross-tabulation analysis. The model had an explicit warning: "The validity of the model fit is questionable." Despite this warning, Katz relied upon the model.

368. Sommers, another defense expert, testified, and the Court finds, that Katz's cross-tabulation method sliced the data so thinly that one cannot ever find anything that is significant statistically. Sommers concurred with Woodworth that this method is not used in peer reviewed literature or published studies.

369. The Court finds that Katz's cross-tabulation analysis, as employed by him, is not generally accepted in the scientific community, that the process segregated the data too thinly for any meaningful analysis including the use of variables that were not predictors and that the regression analyses produced from the cross-tabulation data are not credible, reliable or valid.

370. Katz testified, and the Court so finds, that the cross-tabulation analysis was not for the purpose of explaining why venire members were struck but rather to explain that there are

many possible strike explanations. As such, the probative nature of this analysis is minimal and limited to explain that there are many possible strike explanations.

371. Katz presented no statistical analysis to rebut the MSU Study's findings of statistically significant disparities found statewide, in the former Second Judicial Division and current Fourth Judicial Division and the Court finds that the State has not rebutted these findings in the MSU Study.

Katz's *Batson*-Style Study

372. As discussed above, Katz concluded that the State would need to rebut the statistically significant disparities reflected in the unadjusted data from the MSU Study. Although not a legal expert, Katz attempted to perform an analysis that he referred to as a *Batson* methodology. Katz's plan was to determine the best possible race-neutral reason for the peremptory strikes of every African-American venire member in the 173 cases by asking prosecutors who were actually involved in the selection of jurors to provide those race-neutral reasons; and, if that was not possible, to have district attorneys identify a reviewer who would be best able and available to provide those race-neutral explanations.[49]

373. Katz's *Batson* survey was flawed from the outset by his poor research question. Rather than ask an open-ended question about why prosecutors struck specific venire members, Katz instructed prosecutors to provide him with a "true race-neutral explanation" for the strike. Katz acknowledged and the Court so finds that a determination of whether a prosecutor can articulate a race-neutral reason for a peremptory strike is different from a determination of the true reason for the strike. Throughout his report to this Court dated January 9, 2012, Katz

[49] Although the State repeatedly characterized this project as a "study," Katz himself conceded early on that this endeavor was not a statistical one, and repeatedly refused to call it a study. While Katz quibbled about whether this request to prosecutors was a "survey," or "data collection," or "request for affidavits," the Court finds no material difference between these for the purposes of his testimony in this case and thus refers to the efforts using these terms interchangeably.

indicated that he was seeking the reasons for the peremptory strikes; however, the Court finds that his research question does not seek this information. This research question was decided in consultation with the Attorney General's Office and the Cumberland County District Attorney's office. This inquiry was set up in a way to produce only race-neutral explanations and denials that race was a factor.

374. In the design of the survey, Katz never considered that a prosecutor could have a mixed motive for striking a juror, including a valid race-neutral reason coupled with race. This was another flaw: an appropriate study design would have accounted for the possibility of a prosecutor's mixed motives.

375. Another weakness of Katz's survey was his reliance on self-reported data. The generally accepted standard in the scientific community is that a researcher will not find sufficient information regarding the true influences on decisions by relying upon self-report because much of the influence of race on people's perceptions and judgments is unconscious, and even where the actor may be conscious of a race-based decision, there is a strong psychological motive to deny it and search for other "race-neutral" reasons. Katz's research method is not an accepted way of determining whether race was a significant factor in jury selection method and most likely would not be accepted for a peer review publication.

376. Katz's close work with the State in designing and implementing the survey and the State's participation in giving feedback regarding individual responses further undermines the integrity of the survey. Katz relied upon the assistance of Peg Dorer, director of the North Carolina Conference of District Attorneys, and counsel for the State, Colyer and Thompson, in contacting prosecutorial districts where Katz had unsuccessfully made contact himself.

377. Katz designed a proposed survey instrument to be sent to prosecutors around the state requesting that the trial prosecutor, if available, and if the trial prosecutor was not available, another prosecutor selected by the district attorney, review the capital voir dire and provide a race-neutral reason for the peremptory challenge of each African-American venire member. Katz circulated his survey instrument to Colyer and Thompson for their review and editing assistance.

378. For each prosecutor reviewer, Katz sent an email that included general instructions as well as attachments with 1) a more detailed survey and data collection instructions; 2) a list of all venire members involved in each capital trial in the district with the excluded African-American venire members highlighted; and 3) an excel spreadsheet prepared by Katz in which the prosecutor could provide his or her race-neutral explanations and other information.

379. After sending emails to the prosecutors throughout the state requesting the aforementioned information, Katz received his first response from a prosecutor, Sean Boone, from Alamance County. Boone provided a draft, unsigned affidavit for Katz's review and approval along with a completed spreadsheet with his purported race-neutral reasons. Katz reviewed the draft affidavit, made a correction to it, made further suggestions for changes to Boone and sent these changes and suggestions to Boone.

380. The Court finds that it is suspect for an expert witness to rely upon affidavits in the support of an expert opinion after the same expert is involved in preparing some of the content of the affidavits. This is further evidence of the lack of scientific validity of Katz's work.

381. After making the changes to Boone's affidavit and spreadsheet, Katz circulated Boone's affidavit and spreadsheet review to prosecutors throughout the State. Boone's affidavit and spreadsheet review had listed for each African-American venire member purported race-neutral reasons for the peremptory challenge. The wide circulation of Boone's affidavit with an explanation that it was an example of what was requested and anticipated from prosecutors calls into question the validity of the affidavits received by Katz after that date. No effort was made by Katz to have the reviewers make independent judgments on each peremptory strike blind as to other reviewers. At the time Katz circulated Boone's review and affidavit to the other prosecutors, he had not received many responses from other prosecutors and Boone's review and affidavit were sent to all the prosecutors who had not yet responded.

382. Prior to sending these documents to the prosecutors, Katz spoke with, or attempted to speak with, every prosecutor who was going to provide information about the strikes of African-American potential jurors. However, Katz took no notes of his conversations with any of these prosecutors except his one conversation with Thompson. Despite the fact that Katz intended to rely upon conversations with prosecutors in the formulation of his opinions, he purposely took no notes of these conversations because he did not want to document something in the conversation that he would have to disclose in discovery that would be misleading and then he would have to explain later. This is persuasive to the Court and indicative of and probative for the lack of transparency and scientific validity of Katz's work and opinions.

383. The low response rate is another problem with the Katz survey. As of the time of Katz's testimony in the *Robinson* hearing, Katz had received purported race-neutral explanations for 319 venire members, approximately half of the struck African-American venire members. Of these, approximately half were explanations from prosecutor reviewers who were not involved in

the trial. The responses from prosecutors throughout North Carolina for the statewide database were in no way a randomly selected subgroup of the entire population of African-American venire members.[50] The Court finds that prosecutors' 50% statewide response rate to Katz's survey warns of nonresponse bias. The Court finds in light of this bias that the results of Katz's survey carry minimal persuasive value. In further support of this finding, the Court notes that Katz testified that low survey response rates suggest that the responses may have problems with bias and should be regarded with significant caution.

384. In the period since Katz's testimony in Robinson and the instant hearing, the State continued to collect additional affidavits. These new affidavits are also suspect in light of the fact that they were not generated timely. Furthermore, the State elected, however, not to introduce any of these additional affidavits and thus has abandoned apparently any argument that these constitute rebuttal evidence.[51]

385. The Court notes that, even among the prosecutors who did respond to Katz's survey, some failed to provide such responses in the form of sworn affidavits. Instead, a number of prosecutors provided unsigned, unsworn statements. The Court finds that prosecutors' use of unsigned, unsworn statements introduces further bias to Katz's survey and further diminishes its persuasive value, particularly because Katz specifically asked prosecutors to provide sworn

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[50] According to the *Reference Guide on Statistics*, to which the Court again takes judicial notice, surveys are most reliable when all relevant respondents are surveyed or when a random sample of respondents is surveyed. A convenience sample occurs where the interviewer exercises discretion in selecting a subgroup of all relevant respondents to interview, or where a subgroup of the relevant respondents refuses to participate. Where a subgroup of the relevant respondents refuses to participate, the survey may be tainted by nonresponse bias. This commonly occurs in contexts such as constituents who write their representatives, listeners who call into radio talk shows, interest groups that collect information from their members, or attorneys who choose cases for trial. *Reference Guide on Statistics*, pp. 224-26.

[51] As discussed earlier, the Court has reviewed these new affidavits, along with the previously submitted affidavits, and concluded that they in fact overall constitute evidence that race was a significant factor in jury selection.

affidavits. Katz testified that he requested affidavits from prosecutors in order to obtain reasons that were as accurate and truthful as possible. He wanted the prosecutors to stand behind what they were providing as the reasons for their peremptory strikes. Katz also wanted to conduct his survey in a way where the reasons the prosecutors provided were not going to change from hearing to hearing. Katz wanted to definitively identify the reason for each peremptory strike in order to provide the courts with the best information available for determining whether there is a race-neutral explanation for the disparity in strike rates. In light of the fact that the State's expert recognized the importance of sworn affidavits in identifying potentially truthful explanations for peremptory strikes, the Court finds that prosecutors' use of unsworn statements is additional evidence that intentional discrimination in the selection of capital juries occurred on a statewide basis.

386. The survey results are further undermined by the large number of responses from prosecutors who did not participate in the trial proceedings and based their responses only upon review of the voir dire transcript. Even for prosecutors who participated at trial, the probative value of a post hoc response from a prosecutor several years after trial about why he or she struck a particular juror is limited. *See, e.g., Miller-El*, 545 U.S. at 246 ("it would be difficult to credit the State's new explanation, which reeks of afterthought"). The Court finds the value of post-hoc explanations of strikes by prosecutors who did not participate in the proceedings to be even more limited.[52]

[52] There was evidence at the hearing that the State's own advocates, Colyer and Thompson, had initially objected to the inclusion in the survey of reviews from prosecutors who did not participate in the proceedings. The Court notes Katz's testimony that a prosecutor who provided a race-neutral explanation, but was not present at trial, would be unable to know the actual reasons for the State's exercise of a peremptory strike against a black venire member

387. Katz's opinion that the MSU Study could not be relied upon to explain why prosecutors used their peremptory strikes, based in part upon the prosecutors' responses, is not credible or reliable.

388. Cumberland County prosecutors produced affidavits to Katz providing the purported race-neutral explanations for 100% of the black venire members in the 11 capital proceedings in the MSU Study. While the Cumberland County data collection effort does not suffer the same nonrandom sample infirmity of Katz's statewide database, the reasons for 12 of the 47 black venire members were stated by a prosecutor reviewer who was not present at the trial of the cases, including Robinson's. These responses are speculative and of limited evidentiary value to the Court.

389. Katz testified that he patterned his methodology to rebut MSU's unadjusted findings on *Batson*. He viewed the unadjusted statistical disparity as the first prong of *Batson* and the collection of race-neutral explanations as the second prong of *Batson*. However, setting aside the weakness of Katz's analysis of the second prong, the Court finds that Katz's *Batson* methodology failed because he did not even attempt to consider the third prong of *Batson*, and never considered the totality of the circumstances. Katz did no analysis whatsoever of whether the purported race-neutral reasons were pretextual or whether prosecutors could have had mixed motives for peremptory strikes, including race.

Conclusions Regarding Statistical Evidence

390. Overall, the Court finds that the disparities in strike rates against eligible black venire members compared to others are consistently significant to a very high level of reliability. There is a very small and insignificant chance that the differences observed in the unadjusted data are due to random variation in the data or chance. The Court further finds, consistent with

the expert testimony of O'Brien and Woodworth, that the statistical evidence demonstrates that race was a materially, practically, and statistically significant factor in the exercise of peremptory strikes by prosecutors statewide in North Carolina, in Cumberland County, and in Defendants' individual cases at the time of their trials.

391. Based upon the totality of all the statistical evidence presented at the hearing, the Court finds significant support for the proposition that race was a significant factor in decisions to exercise peremptory challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases in North Carolina, in Cumberland County, and in Defendants' own cases. The Court finds that these conclusions are true whether the data from the full study period is considered, whether the data is focused through "time smoothing" on the precise time of Defendants' trials, or whether only cases that fall within defendants' "statutory windows" are considered.

392. In addition, based upon the totality of statistical evidence presented at the hearing, the Court finds significant evidence that prosecutors have intentionally discriminated against black venire members during jury selection by prosecutors when seeking to impose death sentences statewide, in Cumberland County, and in Defendants' own cases.

CONCLUSIONS OF LAW: AMENDED RJA CLAIMS

393. Having made all relevant and material findings of fact, the Court turns next to conclusions of law. Defendants have each raised an amended RJA claim alleging that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in his or her case and in Cumberland County. The Court reaches the following conclusions:

State v. Tilmon Golphin

394. Under the amended RJA, "at the time the death sentence was sought or imposed" for Golphin is 10 years prior to Golphin's offenses on September 23, 1997, and two years after the imposition of his death sentences on May 12, 1998. This period constitutes Golphin's statutory window.

395. Considering all of the evidence presented, the Court finds Golphin's case in chief established by a preponderance of the evidence a prima facie showing, that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in his case and in Cumberland County, and that race was a significant factor in decisions to seek or impose the death penalty in his case. The Court reaches the same conclusions regarding the existence of a prima facie case when it considers all of the evidence that falls within Golphin's statutory window, and when it considers only the Cumberland County evidence that falls within Golphin's statutory window.

396. The State's evidence failed to rebut Golphin's prima facie showing. However, even if the State's evidence were sufficient in rebuttal, the Court finds that Golphin ultimately carried his burden of persuasion.

397. The Court finds, in light of all of the evidence presented, that Golphin demonstrated race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. The Court finds Golphin has demonstrated that race was a significant factor in decisions to seek or impose the death penalty in his case at the time the death sentence was sought or imposed. Golphin has further demonstrated that race was a significant factor in decisions to seek or impose the death penalty in Cumberland County at the time Golphin's death sentences were sought or imposed.

398. The Court also finds, considering only the evidence presented from within Golphin's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. Considering only the evidence presented from within Golphin's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Golphin's case at the time the death sentence was sought or imposed. In light of the statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Golphin's death sentences were sought or imposed.

399. The Court further finds, considering only the evidence presented from Cumberland County and within Golphin's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentences were sought or imposed. The Court further finds, considering only the evidence from Cumberland County within Golphin's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Golphin's case at the time the death sentence was sought or imposed. Considering the Cumberland County statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Golphin's death sentences were sought or imposed.

State v. Christina Walters

400. For Walters, "at the time the death sentence was sought or imposed" is 10 years prior to her offenses on August 17, 1998, and two years after the imposition of her death sentences on July 6, 2000. This period constitutes Walters' statutory window.

401. Considering all of the evidence presented, the Court finds Walters' case in chief established by a preponderance of the evidence a *prima facie* showing, that, at the time the death

sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in her case and in Cumberland County, and that race was a significant factor in decisions to seek or impose the death penalty in her case. The Court reaches the same conclusions regarding the existence of a *prima facie* case when it considers all of the evidence that falls within Walters' statutory window, and when it considers only the Cumberland County evidence that falls within Walters' statutory window.

402. The State's evidence failed to rebut Walters' *prima facie* showing. However, even if the State's evidence were sufficient in rebuttal, the Court finds that Walters ultimately carried her burden of persuasion.

403. The Court finds, considering all of the evidence presented, Walters demonstrated race was a significant factor in decisions to exercise peremptory challenges during jury selection in her case and in Cumberland County at the time her death sentences were sought or imposed. The Court finds Walters has demonstrated that race was a significant factor in decisions to seek or impose the death penalty in her case at the time the death sentences were sought or imposed. Walters has further demonstrated that race was a significant factor in decisions to seek or impose death in Cumberland County at the time Walters' death sentences were sought or imposed.

404. The Court also finds, considering only the evidence presented from within Walters' statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in her case and in Cumberland County at the time her death sentences were sought or imposed. In light of only the evidence presented from Walters' statutory window, race was a significant factor in decisions to seek or impose the death penalty in Walters' case at the time the death sentences were sought or imposed. Considering the

statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Walters' death sentences were sought or imposed.

405. The Court further finds, considering only the evidence presented from Cumberland County and within Walters' statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in her case and in Cumberland County at the time her death sentences were sought or imposed. The Court further finds, considering only the evidence from Cumberland County within Walters' statutory window, race was a significant factor in decisions to seek or impose the death penalty in Walters' case at the time her death sentences were sought or imposed. Considering the Cumberland County statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Walters' death sentences were sought or imposed.

State v. Quintel Augustine

406. For Augustine, "at the time the death sentence was sought or imposed" is 10 years prior to his offenses on November 29, 2001, and two years after the imposition of his death sentence on October 22, 2002. This period constitutes Augustine's statutory window.

407. Considering all of the evidence presented, the Court finds that Augustine's case in chief established by a preponderance of the evidence a *prima facie* showing, that at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in his case and in Cumberland County, and that race was a significant factor in decisions to seek or impose the death penalty in his case. The Court reaches the same conclusions regarding the existence of a *prima facie* case when it considers all of the evidence that falls within Augustine's statutory window, and when it considers only the Cumberland County evidence that falls within Augustine's statutory window.

408. The State's evidence failed to rebut Augustine's *prima facie* showing. However, even if the State's evidence were sufficient in rebuttal, the Court finds that Augustine ultimately carried his burden of persuasion.

409. The Court finds, in light of all of the evidence presented, Augustine demonstrated race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. The Court finds that Augustine has demonstrated that race was a significant factor in decisions to seek or impose the death penalty in his case at the time the death sentence was sought or imposed. Augustine has further demonstrated that race was a significant factor in decisions to seek or impose death in Cumberland County at the time his death sentence was sought or imposed.

410. The Court also finds, considering only the evidence presented from within Augustine's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. Considering only the evidence presented from Augustine's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Augustine's case at the time the death sentence was sought or imposed. In light of the statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time the Augustine's death sentence was sought or imposed.

411. The Court further finds, considering only the evidence presented from Cumberland County and within Augustine's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. The Court further finds,

considering only the evidence from Cumberland County within Augustine's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Augustine's case at the time the death sentence was sought or imposed. Considering the Cumberland County statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Augustine's death sentence was sought or imposed.

412. Although the Court finds that Cumberland County is the appropriate county under the amended RJA for Augustine's jury discrimination claims, the Court additionally finds Augustine demonstrated that race was a significant factor in decisions to seek or impose death in Brunswick County, where his death sentence was imposed, at the time his death sentence was sought or imposed.

Additional conclusions

413. Although not essential to Defendants' statutory claims in view of the Court's interpretation of the amended RJA, the Court makes the following additional conclusions of law. The Court finds each of the following conclusions to be the appropriate conclusions when all of the evidence is considered as a whole, when only the evidence that falls within each Defendant's statutory window is considered, and when the only evidence considered is that which falls within each Defendant's statutory window and is derived from Cumberland County.

414. Defendants have persuaded the Court that the State's use of race in peremptory strike decisions in each of their cases, and in Cumberland County, was intentional.

415. Race was a significant and intentionally-employed factor in the State's decisions to exercise peremptory strikes in each of Defendants' cases and in Cumberland County at the time the death sentences were sought or imposed.

416. Defendants have proven their claims under the alternative standards of proof known as "mixed motive" disparate treatment and "pattern or practice" discrimination, both of which the Court set forth in detail in the statutory interpretation section of this order.

417. In view of the foregoing, the Court finally concludes, based upon a preponderance of the evidence, that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed in each of their cases and in Cumberland County.

418. The judgments in *Golphin*, *Walters*, and *Augustine* were sought or obtained on the basis of race.

CONCLUSIONS OF LAW: ORIGINAL RJA CLAIMS

419. Although the Court has already found Defendants are entitled to relief under their amended RJA claims, the Court will reach Defendants' original RJA claims as well to ensure a complete record for appellate review.

420. In their originally-filed pleadings, Defendants also raised peremptory strike claims pursuant to the original RJA. These are claims I, II, and III of Defendants' original pleadings. They alleged that, at the time of Defendants' trials, race was a significant factor in the State's decisions to exercise peremptory strikes throughout North Carolina, in the former Second and current Fourth Judicial Divisions, and in Cumberland County.

421. In considering Defendants' original RJA claims, the Court incorporates all of the foregoing findings of fact made in conjunction with Defendants' amended RJA claims. To these facts, the Court will apply the same statutory interpretation set forth in its order in *Robinson*. Unless otherwise indicated, the Court has reached all of its conclusions in view of the totality of the evidence.

422. Defendants' case in chief established by a preponderance of the evidence a *prima facie* showing that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in their cases, in Cumberland County, in the judicial division,[53] and in North Carolina. The Court reaches this conclusion on the basis of the totality of the evidence, and on the basis of Defendants' unadjusted statistical findings standing alone.

423. The State's evidence failed to rebut Defendants' *prima facie* showing. However, even if the State's evidence was sufficient in rebuttal, Defendants ultimately carried their burden of persuading the Court by a preponderance of the evidence that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in their cases, in Cumberland County, in their respective judicial division, and in North Carolina.

424. Although not essential to Defendants' statutory claims in view of the Court's interpretation of the original RJA, the Court makes the following additional conclusions of law.

425. Defendants have persuaded the Court that the State's use of race in peremptory strike decisions in their cases, in Cumberland County, in their respective judicial division, and in North Carolina was intentional.

426. Race was a significant and intentionally-employed factor in the State's decisions to exercise peremptory strikes in each of Defendants' individual trials.

427. Defendants have proven their claims under the alternative standards of proof known as "mixed motive" disparate treatment and "pattern or practice" discrimination, both of

[53] Defendants Walters and Golphin were charged prior to 2000. Therefore, their cases arise out of the Second Judicial Division. Augustine was charged after 2000. Therefore, his case arises out of the Fourth Judicial Division.

which the Court set forth in detail in the statutory interpretation section of this order and the *Robinson* order.

428. In view of the foregoing, the Court finally concludes based upon a preponderance of the evidence that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed. Defendants' judgments were sought or obtained on the basis of race.

NOW, THEREFORE, IT IS ORDERED THAT:

The Court, having determined that Golphin, Walters, and Augustine are entitled to appropriate relief on their RJA jury selection claims, concludes that Defendants are entitled to have their sentences of death vacated, and Golphin, Walters, and Augustine are resentenced to life imprisonment without the possibility of parole.

The Court reserves ruling on the remaining claims raised in Defendants' RJA motions, including all constitutional claims.

This order is hereby entered in open court in the presence of Golphin, Walters, and Augustine, their attorneys, and counsel for the State.

The 13th day of December 2012.

The Honorable Gregory A. Weeks
Senior Resident Superior Court Judge Presiding

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
97 CRS 47314-15

STATE OF NORTH CAROLINA)
)
v.)
)
TILMON CHARLES GOLPHIN,)
Defendant.)

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DEFENDANT'S BRIEF IN SUPPORT OF RACIAL JUSTICE ACT CLAIMS

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COUNTY OF CUMBERLAND	97 CRS 47314-15

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
TILMON CHARLES GOLPHIN,	)
Defendant.	)

****

DEFENDANT'S BRIEF IN SUPPORT OF RACIAL JUSTICE ACT CLAIMS

****

INTRODUCTION

In enacting the Racial Justice Act, North Carolina declared no defendant could face execution if racial bias infected the trial. Following enactment of the RJA, litigation under this new law occurred in the cases of four death-sentenced prisoners from Cumberland County, focusing on the defendants' claim that race was a significant factor in jury selection. Over the course of two evidentiary hearings each lasting two weeks, these defendants presented evidence concerning the role of race in prosecution decisions about which citizens were fit to serve on capital juries in North Carolina. The defendants introduced complex statistical analyses of North Carolina capital jury selection practices, evidence of specific training to avoid findings of racial bias, as well as case-specific instances of racial bias found in transcripts and prosecutors' notes.

The Superior Court of Cumberland County concluded, in both hearings, that the evidence showed that, over a twenty-year period, prosecutors around the state, in Cumberland County, and in the defendants' own cases, routinely excluded African Americans from capital jury service at

more than twice the rate they struck whites. The Court granted the defendants' motions for appropriate relief and resentenced them to life imprisonment without possibility of parole.

The Court noted that this was a wrenching decision for it to make, explaining it found "no joy in these conclusions" and could not "overstate the gravity and somber nature of its findings." The Court plainly acknowledged the tragic, senseless, and devastating effects of the defendants' crimes on the victims and their families. Yet, the Court observed, it could not ignore "the harm to African Americans and to the integrity of the justice system that results from racially discriminatory jury selection practices."

These developments sparked both passionate and divergent reactions. Some hailed the Cumberland County superior court's rulings as a much-needed remedy for the problem of racial disparities in death penalty cases. Others expressed anger and frustration at the depiction of the system as racially biased. The General Assembly first narrowed and then repealed the statute.

Fundamentally, then, this case presents core issues about the role of an independent judiciary in enforcing statutory and constitutional precepts in an area that has long troubled our justice system and our democracy. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule."). As set out here, Defendant asks this Court to find that the RJA repeal does not render his RJA claims void. Defendant's arguments rest on a host of strong constitutional and statutory arguments. At bottom, though, we ask this Court to recognize that, having embarked on a searching inquiry into the role of race in decisions about whether who should live and die, and having found that, indeed, race matters in prosecution decisions about which citizens may serve on death penalty

juries, North Carolina cannot now move forward with these defendants' executions as if the troubling evidence of racial taint had never been uncovered.

QUESTIONS PRESENTED

This Court asked the parties to brief and argue a seemingly simple question: Whether the enactment of Senate Bill 306, Session Law 2013-154, Sections 5.(a), (b) and (d) "renders void" the Motions for Appropriate Relief filed by Defendant under Article 101 of Chapter 15A of the General Statutes of North Carolina, the Racial Justice Act ("RJA"). The answer to the question is equally simple: No, it did not.

The reasons for that answer, however, are not simple because they require an analysis of myriad and complex constitutional doctrines, including Due Process and vested rights, the prohibition against Bills of Attainder, the Ex Post Facto Clause, and the Eighth Amendment's bar on cruel and unusual punishment. Three of these defenses and constitutional questions raise pure questions of law that may be briefed, argued and decided on the current record. Of those three purely legal questions, however, two are now pending before a three-judge panel appointed by Chief Justice Martin in Defendant's case challenging the constitutionality of the repeal statute. *See* Order Appointing Three-Judge Panel, *Walters, Augustine, Robinson and Golphin v. State of North Carolina, et al.,* No. 16 CVS 002916 (Aug. 19, 2016) (Martin, J.).

Other defenses and constitutional challenge involve questions of fact for which discovery and presentation of evidence will be necessary before reaching the inherent legal questions.[1] Only if each of Defendant's challenges to the RJA repeal is resolved against him could the answer to the Court's question be unfavorable to Defendant. In other words, if Defendant

[1] Defendant has simultaneously filed a motion for discovery.

prevails on even a single one of his challenges, the answer to the Court's question is "No" and Defendant's RJA claims cannot be deemed void.

Defendant respectfully suggests that only the first question presented in this case is now fully ripe for review by this Court:

1. Do the law of the case and the limited scope of the remand by the North Carolina Supreme Court preclude this Court from considering the application of the repeal statute to Defendant's case?

This first question is unique to the four defendants whose RJA evidentiary hearings were considered by the North Carolina Supreme Court. It is an as applied legal question that requires evaluation of the law, briefing, and court orders in this case without consideration of additional evidence. The question is not a facial challenge to the repeal statute, and is not raised in the litigation pending before the three-judge panel. *See* Complaint, *Walters, Augustine, Robinson and Golphin v. State of North Carolina, William West,* No. 16 CVS 002916 (Wake Co.). As a matter of judicial economy, Defendant respectfully suggests that this issue be argued and considered by this Court on November 29, 2016. If Defendant prevails on this issue, the Court and the parties avoid incurring the costs and time required for discovery and hearings on the defenses that require consideration of evidence.

The following two purely legal questions also raise no need for presentation or consideration of evidence:

2. Does application of the repeal statute to Defendant violate the Ex Post Facto Clause of the North Carolina and United States Constitutions?
3. Does application of the repeal statute to Defendant violate the Separation of Powers Clause of the North Carolina Constitution?

These second and third legal questions are ripe for review in the sense that they do not require presentation or consideration of evidence. However, they are squarely raised in the civil claim for declaratory judgment now pending before the three-judge panel appointed by Chief Justice Martin in the Wake County litigation. *See* Complaint at 16-17 (ex post facto claim), 19-20 (separation of powers claim), *Walters, Augustine, Robinson and Golphin v. State of North Carolina, William West,* No. 16 CVS 002916 (Wake Co.).

Defendant, along with the other RJA litigants, filed suit in Wake County for injunctive and declaratory relief on March 4, 2016, challenging the facial constitutionality of Session Law 2013-154, sec. 5, and requesting that the challenge be submitted to a three-judge panel of Superior Court Judges pursuant to N.C. Gen. Stat. § 1-267.1. *Id.* On May 9, 2016, the State filed its Motion to Dismiss in Lieu of Answer. On August 19, 2016, Chief Justice Mark Martin of the Supreme Court of North Carolina, in accordance with N.C. Gen. Stat. § 1-267.1 and acting upon a request made in a June 17, 2016 letter from Senior Resident Superior Court Judge of the Tenth Judicial District Donald W. Stephens, appointed a three-judge panel in this case.[2] On November 4, 2016, the three-judge panel, the Honorable W. Osmond Smith, III, the Honorable Quentin T. Sumner, and the Honorable Nathaniel J. Poovey, entered a Notice of Hearing and Briefing Schedule Order, and set a January 6, 2017 hearing date on the State's pending motion to dismiss.

The clear intent of the statutory scheme providing for appointment of three-judge panels to consider facial challenges is to confer exclusive jurisdiction over the facial constitutionality

[2] Defendant only learned of these events recently. The parties were provided copies of the order appointing the panel, and the letter requesting such appointment on October 28, 2016. Apparently unaware of Judge Stephens' letter asking for referral of the three-judge panel to consider the State's motion to dismiss, Judge Michael O'Foghludha held a hearing in Wake County Superior Court on the State's motion. On July 25, 2016, Judge O'Foghludha signed a written order dismissing the action. Judge O'Foghludha then signed an order, sua sponte, striking his dismissal order on August 24, 2016.

of statutes. *See* N.C. Gen. Stat. § 1-267.1(a1) ("any facial challenge to the validity of an act of the General Assembly . . . shall be heard and determined by a three-judge panel of the Superior Court of Wake County. . . ."); N.C. R. Civ. P. 42(b)(4) (providing facial challenges "shall by heard by a three-judge panel in the Superior Court of Wake County," and requiring other superior courts to transfer of any "portion of action challenging the validity of the act of the General Assembly to the Superior Court of Wake County," while "maintain[ing] jurisdiction over all matters other than the challenge to the act's facial validity" and "stay[ing] all matters that are contingent upon the outcome of the challenge").

The first issue presented here is neither a facial challenge, nor contingent upon the outcome of the Wake County litigation, and is therefore ripe for determination by this Court. The second and third, however, are facial challenges, and are directly contingent upon the outcome in the Wake County litigation. Should the three-judge panel grant the State's motion to dismiss on the ground that those issues should not have been referred to a three-judge panel after the hearing on January 6, 2017, those issues would then be ripe for determination by this Court.

The following four constitutional questions as raised herein require consideration of facts:

4. Does application of the repeal statute to Defendant violate the Due Process Clause?
5. Does Defendant have a vested right to litigate his claims?
6. Did the North Carolina General Assembly specifically target Defendant for heightened punishment, rendering the repeal statute an unconstitutional Bill of Attainder?

7. Does denying Defendant an opportunity to litigate the pervasive racial bias in his case and in North Carolina's system of capital punishment at the time of his trial violate Equal Protection and the Eighth Amendment?

Because questions four through seven require consideration of facts at an evidentiary hearing, Defendant respectfully requests that these claims be held until resolution of the non-evidentiary arguments as a matter of judicial economy.[3] Even before discovery, Defendant has uncovered significant evidence in support of his claims, including transcripts from legislative hearings, emails from legislators and prosecutors, news articles, case notes, and case transcripts that he will seek to introduce at an evidentiary hearing if he does not prevail on the non-evidentiary issues first.[4] Defendant further would seek to present the relevant testimony of expert statisticians, legislators, and attorneys in support of these claims.

Only if the Court decides for the State on each of these seven issues, would the Court need to reach the final issues in the case. Those issues are whether Defendant, who is currently under a sentence of life without parole, can be resentenced to death without violating double jeopardy[5] and North Carolina General Statute § 15A-1335. Defendant submits briefing on these questions, but respectfully suggests that the Court defer argument on them until after the

[3] In this brief, Defendant addresses why he is entitled to prevail on each of these constitutional defenses as applied in his case: vested rights, due process, bill of attainder, cruel and unusual punishment, and equal protection. Full consideration of these issues encompasses both facial defenses and as applied arguments that are factually based. The facial portions of these claims are raised in the Wake County litigation.

[4] Defendant asks the Court to order the requested discovery on these four issues, and allow supplemental briefing after discovery. In addition, Defendant requests the opportunity to present evidence and argument on these issues.

[5] Defendant previously argued that the N.C. Supreme Court should not consider the State's appeal because subjecting him to additional appellate proceedings after a trial-like proceeding acquitted him of the death penalty constituted double jeopardy. The Supreme Court did not address this argument, implicitly rejecting it. Defendants Golphin and Robinson have raised this double jeopardy violation in federal court, an issue that is now pending in the Fourth Circuit. Defendant notes that the State has argued in federal court that the Supreme Court's action in ordering the remand neither considered nor rejected double jeopardy. In the event the State is correct, Defendant re-raises the double jeopardy violation of additional appellate proceedings. Defendant also contends that a court order that Defendant's RJA claims are null and void and resentencing him to death would further violate double jeopardy.

resolution of the other seven issues since they becomes timely only if the State defeats Defendant's RJA claims.

PROCEDURAL HISTORY

1. In 1998, Defendant was convicted of first-degree murder and related crimes and sentenced to death in the Superior Court of Johnston County, venue having been changed from Cumberland County. Defendant's convictions and death sentences were affirmed on direct appeal. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931 (2001). Defendant sought post-conviction relief, which was denied by the state and federal courts. *State v. Golphin*, 358 N.C. 157, 593 S.E.2d 84 (2004), *Golphin v. Branker*, 519 F.3d 168 (4th Cir. 2008), *cert. denied, Golphin v. North Carolina*, 555 U.S. 975 (2008).

2. On August 10, 2009, North Carolina's legislature enacted the Racial Justice Act ("RJA"). *See* N.C. Gen. Stat. § 15A-2010 to 2012; *see also* S.L. 2009-464. The RJA was intended to address the historic and persistent influence of racial bias in the death penalty and provided that: "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." N.C. Gen. Stat. § 15A-2010.

3. The statute specified various bases for proving race was a factor in the case: discrimination based on the defendant's race, the victim's race, or the race of potential jurors excluded from service. The statute explicitly permitted defendants to use statistical evidence to make their case. N.C. Gen. Stat. § 15A-2011.

4. The RJA was applied retroactively to all North Carolina death row inmates. N.C. Gen. Stat. § 15A-2012(a). It allowed inmates to file their claims within one year of the effective date of the law.

5. After the RJA became law, two professors from the Michigan State University College of Law (hereafter "MSU") conducted a comprehensive analysis of hundreds of murder cases in North Carolina. They considered prosecution decisions to seek the death penalty, jury decisions to impose the death penalty, and, in capital cases, prosecution decisions to exercise peremptory strikes. 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). The coding was a labor intensive process carried out by law graduates directly supervised by the researchers. DE4, *Robinson* HTp. 133.[6]

6. In the 173 capital cases, during jury selection, 7,421 strike decisions were made by prosecutors. 97 IOWA L. REV. at 1542-43. For all but seven of these 7,421 venire members, the researchers recorded basic demographic and procedural information based on juror seating charts, juror questionnaires, attorney and/or clerk notes, and jury selection transcripts. *Id*.

7. The MSU researchers also determined and recorded their race by reviewing, in addition to the sources identified above, jury summons lists, information from the North Carolina State Board of Elections, LexisNexis Accurint, and the North Carolina Department of Motor Vehicles databases. *Id*. at 1545-47.

8. MSU also recorded detailed demographic information for every venire member involved in all Cumberland County cases and a random sample of nearly a quarter of the venire members statewide. *Id*. at 1547; DE4, *Robinson* HTp. 135.

9. Defendant filed a timely RJA motion in August of 2010.

[6] References in this brief to SE __, DE __, *Robinson* HTp. ___, and *GWA* HTp. ___ are the exhibits and hearing transcripts from the original RJA proceedings conducted in the Cumberland County Superior Court.

10. On November 28, 2011, the North Carolina legislature passed a bill to repeal the RJA.[7]

11. On December 14, 2011, Governor Beverly Perdue vetoed the bill, saying that while she supported the death penalty, she felt it was "simply unacceptable for racial prejudice to play a role in the imposition of the death penalty in North Carolina." Clayton Henkel, "Governor Vetoes Repeal of Racial Justice Act," *Progressive Pulse*, Dec. 14, 2011.[8] The General Assembly failed to override Perdue's veto.

12. On January 30, 2012, the Superior Court of Cumberland County, the Honorable Gregory A. Weeks presiding, commenced a 13-day evidentiary hearing in the RJA case of another Cumberland County defendant, Marcus Robinson. Robinson alleged that race was a factor in prosecutorial decisions to seek the death penalty, in the exercise of peremptory strikes, and in the jury decisions to impose the death penalty. The hearing dealt with the portion of the RJA motion alleging that prosecutors relied on race in their exercise of peremptory strikes during jury selection.

13. At the hearing, Robinson presented complex statistical and historical evidence from over 170 capital proceedings in North Carolina over the course of two decades. Seven expert witnesses testified at the hearing, and the parties submitted over 170 exhibits.

14. On April 20, 2012, Judge Weeks issued a 167-page memorandum order which included 370 findings of fact. Judge Weeks concluded that statistical disparities and intentional discrimination infected Robinson's trial, as well as the capital justice system in Cumberland

[7] This article is available at http://www.journalnow.com/news/local/prosecutors-seek-repeal-of-racial-justice-act/article_f32f8bf3-4cf1-5943-9067-ec0510898dcd.html, last read October 31, 2016.

[8] This article is available on the website of the NC Policy Watch at http://pulse.ncpolicywatch.org/2011/12/14/governor-vetoes-repeal-of-racial-justice-act/, last read November 5, 2016.

County and in North Carolina, over a twenty-year period. *State v. Robinson*, 91 CRS 23143, Cumberland County Superior Court (April 20, 2012) (hereafter "*Robinson* Order").[9]

15. Among Judge Weeks' findings of fact in the *Robinson* Order are these:

- Of the 7,400 peremptory strike-eligible jurors in North Carolina capital cases between 1990 and 2010, prosecutors statewide struck 52.6% of eligible black venire members, but only 25.7% for all other eligible venire members. The probability of this disparity occurring in a race-neutral jury selection process is less than one in ten trillion. Findings of Fact, ¶¶ 42, 46.

- During the twenty-year period, Cumberland County prosecutors, including Defendant's prosecutors, conducted eleven capital jury selection proceedings. In those proceedings, prosecutors struck eligible black venire members at an average of 52.69%, compared to only 20.48% for all other eligible venire members. *Id.* at ¶ 61. In ten of those eleven cases, prosecutors struck black jurors at a significantly higher rate than other eligible venire members. *Id.* at ¶¶ 68-69.

- These statistical disparities persisted even after Robinson's experts controlled for non-racial factors that could influence the State's exercise of peremptory strikes, such as a venire member's expressed reservations on the death penalty or criminal history using logistic regression analysis, a standard statistical method. *Id.* at ¶¶ 81-119.

- Judge Weeks also found racially disparate peremptory challenges by the prosecutor in Robinson's individual case. *Id.* at ¶¶ 72-73, 75.

16. Judge Weeks found that race was a significant factor at the time of Robinson's trial and granted relief. Judge Weeks resentenced Robinson to life imprisonment without possibility of parole.

17. On July 2, 2012, only a little more than two months after Judge Weeks' decision, the North Carolina General Assembly modified certain evidentiary and procedural provisions of the RJA, but kept in place its retroactive application to all death row inmates, and its statutory mandate that a successful claim would result in vacatur of the death sentence and imposition of a

[9] The Superior Court of Cumberland County's order in *State v. Robinson* is available at https://www.aclu.org/legal-document/north-carolina-v-robinson-order, last read October 31, 2016.

sentence of life imprisonment with no mechanism for appeal of that sentence. *See* S.L. 2012-136. Pursuant to this change in law, Defendant filed a timely amendment to his pending RJA motion.

18. On October 1, 2012, the Superior Court of Cumberland County, Judge Weeks presiding, commenced an evidentiary hearing on the RJA claims in the cases of three death-sentenced prisoners, Quintel Augustine, Christina Walters, and Defendant. The hearing was limited to the question of whether race was a significant factor in decisions to seek and impose the death sentence when prosecutors relied on race in their exercise of peremptory strikes during jury selection.

19. The evidentiary hearing held by Judge Weeks in these three cases lasted almost two weeks, and, like Robinson's hearing, included detailed treatment of complex statistical and historical evidence from more than 170 capital proceedings, including Defendant's case.

20. On December 13, 2012, Judge Weeks issued a 210-page memorandum order which included lengthy findings of fact. Judge Weeks concluded that statistical disparities and intentional discrimination infected Defendant's trial, as well as the capital justice system in Cumberland County, over a twenty-year period. *State v. Golphin, Walters & Augustine*, 97 CRS 47314-15, 98 CRS, 34832, 35044, 01 CRS 65079, Cumberland County Superior Court Order, (December 13, 2012) (hereafter "Golphin/Walters/Augustine Order").[10]

21. In addition to the comprehensive statistical evidence presented in Robinson's RJA case, the proceedings involving Defendants Walters, Augustine, and Golphin presented substantial non-statistical evidence, including prosecution testimony and jury selection notes,

[10] The Superior Court of Cumberland County's order is available at https://www.aclu.org/legal-document/north-carolina-racial-justice-act-order-granting-motions-appropriate-relief, last read October 31, 2016.

annotated jury questionnaires, and other documents showing that prosecutors in Cumberland County had a practice of using race in jury selection. Judge Weeks described this evidence as "powerful evidence of race consciousness and race-based decision making" and "unmistakable evidence of the prominent role race played in the State's jury selection strategy." Golphin/Walters/Augustine Order at 3. In addition, Judge Weeks concluded there was "compelling empirical evidence that race . . . drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government." *Id*. at 4.

22. Judge Weeks found that race was a significant factor at the time of Defendants Golphin, Walters, and Augustine's trials and granted relief. He resentenced the three defendants to life imprisonment without possibility of parole.

23. The State, to whom the RJA gave no right to appeal the life sentences imposed by Judge Weeks, petitioned the North Carolina Supreme Court to exercise its discretion to review the orders granting relief in Robinson's case and in the consolidated cases involving Defendant. The Court granted review.

24. During the appeal, the General Assembly repealed the RJA, effective June 19, 2013. *See* Sess. Law 2013-154.

25. Also during the appeal, on June 3, 2014, the Superior Court of Iredell County dismissed the RJA claims of two death-sentenced prisoners, Rayford Burke and Andrew Ramseur. The Superior Court concluded that, in view of the RJA repeal, Burke and Ramseur's RJA claims were void as a matter of law.[11]

[11] The Superior Court's orders appear in the records on appeal filed in *State v. Burke*, No.181A93-4, and *State v. Ramseur*, No. 388A10, and are available on the website of the Supreme Court of North Carolina. *See* https://www.ncappellatecourts.org/, last viewed October 31, 2016.

26. On August 29, 2014, Burke filed a petition in the North Carolina Supreme Court for discretionary review challenging the Superior Court's conclusion that the RJA repeal rendered his claims null and void. Ramseur filed a similar petition on April 9, 2015.[12]

27. In the four Cumberland County cases, on December 18, 2015, the North Carolina Supreme Court issued orders vacating the trial court's RJA orders and remanding the cases. *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015); *State v. Golphin, Walters & Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). In neither opinion did the Court address the effect of the repeal of the RJA or in any way suggest that the repeal should be applied retroactively to defeat the claims of the Cumberland County RJA defendants.

28. Three months later, on March 18, 2016, the Court granted review in the cases of Burke and Ramseur.

29. On remand, Defendant's case, as well as those of Defendants Robinson, Walters and Augustine were assigned to the Senior Resident Superior Court Judge of Cumberland County, James Floyd Ammons. Defendant filed a motion to recuse Judge Ammons and, after a hearing on June 9, 2016, Judge Ammons denied the motion but then announced that he would ask the Administrative Office of the Courts to assign the case to another judge. The Honorable W. Erwin Spainhour was assigned.

30. On August 28, 2016, the Court directed the parties to file briefs by October 31, 2016, on the following question:

> Did the enactment into law of Senate Bill 306, Session Law 2013-14, on June 19, 2013, specifically Sections 5. (a), (b) and (d) therein, render void the Motions for Appropriate Relief filed by the defendants pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes of North Carolina?

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[12] The petitions for discretionary review in *Burke* and *Ramseur* are also available on the Supreme Court's website, as are the docket sheets showing the Court's disposition of the petition in each case. *See* n. 10, *supra*.

The Court subsequently extended the deadline for filing of this brief to November 14, 2016.

STATEMENT OF FACTS

Tilmon Golphin is an African American. Golphin was tried and sentenced to death by a jury that included only one African American. HTp. 1482; DE117 (prosecution jury chart with handwritten racial designations).[13] The prosecution used peremptory strikes to remove five of seven qualified[14] African Americans in the venire. DE108 (MSU Report).

At the evidentiary hearing on his RJA motion, Golphin presented evidence of racial bias in jury selection in both Cumberland County and in Golphin's own case.[15] First, Golphin elicited lay and expert testimony and presented documents, including voir dire transcript excerpts showing the prosecution's race-conscious questions and strike of African American venire member John Murray. Second, Golphin presented evidence of disparate treatment of similarly-situated white and black venire members. Third, Golphin presented documents and testimony concerning the capital prosecutions of James Burmeister and Malcolm Wright, two white defendants charged with the racially-motivated murders of two African Americans. These three categories of evidence are discussed in turn.

Targeting of John Murray for Race-Based Questions and a Racially-Motivated Strike

At the RJA evidentiary hearing, defense counsel vigorously questioned the prosecutor who tried Golphin's case.[16] In particular, counsel focused on the prosecutor's questioning of

[13] Citations to HTp. __ refer to the transcript of Defendant's 2012 RJA hearing. Citations to DE__ refer to defense exhibits admitted into evidence at Defendant's October 2012 RJA hearing.

[14] A "qualified" venire member is one not subject to challenge for cause.

[15] The evidence discussed here is exclusively non-statistical and unrelated to the MSU study. As a result, this evidence and the Court's findings concerning it are untouched by the denial of the State's request for a third continuance. *See State v. Augustine, Golphin, and Walters*, 780 S.E.2d 552 (N.C. 2015) (remanding strictly on grounds of continuance denial and joinder).

African American venire member John Murray, as well as his explanation for striking Murray, a 31-year-old married engineer. Murray was a veteran of the Air Force who supported the death penalty and believed it deterred crime. HTpp. 1021-1047; DE112 (John Murray's juror questionnaire); Tpp. 2058-2068.[17]

There can be little question that the prosecution subjected Murray to racially-biased questions during voir dire. First, in connection with a prior driving offense, the prosecutor asked Murray this question:

> MR. COLYER: Is there anything about the way you were treated as a taxpayer, as a citizen, as a young black male operating a motor vehicle at the time you were stopped that in any way caused you to feel that you were treated with less than the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?
>
> JUROR SEVEN: No.

[16] It has long been the law in North Carolina that defense counsel has no right to question a prosecutor under oath in connection with a *Batson* objection. *See State v. Jackson*, 322 N.C. 251, 258 (1988) ("We hold that a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney."); *State v. Sessoms*, 119 N.C. App. 1, 4 (1995)(same). In contrast, under the RJA, testimony of attorneys, prosecutors, law enforcement officers, jurors, and other members of the criminal justice system became admissible. N.C. Gen. Stat. § 15A-2011(b). Thus, it was only after enactment of the RJA that Golphin was in a position to obtain and use sworn testimony from prosecutors regarding jury selection in his case. Because he presented new evidence with regard to the strike of John Murray, namely the prosecutor's testimony, and because the legal standard under *Batson* and the RJA differed, the findings of prior courts rejecting Golphin's *Batson* challenge to the strike of Murray were not binding on the Superior Court at the RJA hearing. RJA Order, pp. 24-28.

[17] Citations to Tp. __ refer to the transcript of Defendant's 1998 trial.

Tp. 2073. The prosecutor admitted at the hearing that when he asked this question, Murray's race was consciously in his mind. HTp. 1028. No venire members were asked how they felt "as white people." DE2 (Golphin Trial Transcript).

Second, the prosecutor focused explicitly on race when he asked about a conversation Murray had overheard[18] among other venire members:

> MR. COLYER: Could you tell from any speech patterns or words that were used, expressions, whether they were majority or minority citizens, black or white, African-American?
>
> JUROR SEVEN: They were white.

Tp. 2055. Moreover, when the prosecutor struck Murray and trial counsel raised a *Batson* objection, the prosecutor again focused on race when he tried to explain the strike, citing as one of his reasons:

> Mr. Murray's statement that he attributed to a male and a female white juror in the courtroom

Tp. 2111. At the hearing, the prosecutor could offer no plausible or persuasive explanation as to why the race of the overheard venire members was relevant. HTpp. 1036-40.

Third, the prosecutor "singled out Murray for questions about black culture," asking Murray, and Murray alone, about the following matters:

[18] Murray overheard venire members suggesting that Golphin "should never have made it out of the woods." Tp. 2054.

MR. COLYER: Are you familiar with a musician called Bob Marley?

JUROR SEVEN: Yes.

MR. COLYER: Are you familiar with his son, Ziggy Marley?

JUROR SEVEN: Yes.

MR. COLYER: And the type of music that they -- that Mr. Marley played and his son continues to play?

JUROR SEVEN: Yes.

...

MR. COLYER: Are you familiar with the former emperor of Ethiopia, Haile Selassie?

JUROR SEVEN: No. I've heard of the name.

MR. COLYER: In your understanding, is there any connection between the former emperor of Ethiopia, Haile Selassie, and Rastafarian or the Rastafari religion?

Tpp. 2083-84; HTpp. 30-31. As with his other explicitly race-based questions and statements, the prosecutor could offer no persuasive explanation for these questions and why Murray was uniquely singled out for a special cultural test. HTpp. 1031-35. Bryan Stevenson, an expert in race and the law, reviewed the voir dire of Murray.[19] HTp. 1517. Stevenson concluded that, in asking Murray these questions about black culture, he was "targeting jurors of color in a way

[19] Stevenson was accepted as expert at Defendant's RJA hearing. HTp. 1473.

that, again, reinforces that race is a significant factor." HTp. 1524; see also HTpp. 1523-1525, 1533-35 (further discussion of these black culture questions and how they evince race consciousness and the fact that, to the prosecutor, "race matters").

Comparative Juror Analysis: The Prosecution Is Willing to Accept a Juror Who Hesitates on the Death Penalty — As Long as She is White

The prosecution also engaged in disparate treatment when it struck African American venire member Freda Frink. The prosecutor claimed he struck Frink because she had "mixed emotions" about the death penalty. SE32 (Colyer Affidavit).[20]

While striking Frink ostensibly because of her hesitation about the death penalty, the prosecutor accepted Alice Stephenson, who also expressed reservations about the death penalty. In fact, Stephenson used language identical to that used by Frink in describing her feelings about imposing a death sentence. Yet, while Frink's "mixed emotions" were reason to strike her, the prosecution was untroubled by Stephenson's "mixed emotions" about the death penalty. Tpp. Tpp. 652, 679, 681, 683 (Frink); Tpp. 2116, 2165, 2173 (Stephenson).

The difference: Frink was African American; Stephenson was white.

Burmeister and Wright: When Prosecutors Want Black Jurors, They Don't Strike Them

Golphin also presented evidence about the prosecution of James Burmeister and Malcolm Wright, two white defendants charged in the racially-motivated murders of two African Americans. HTp. 925. The same prosecutor who tried these two cases tried Defendant's case. The contrast between Defendant's prosecution, where the prosecution sought to limit the number of African American jurors, and the *Burmeister* and *Wright* cases, where the prosecution sought to seat African American citizens on the jury is stark. HTpp. 933-934. This evidence

[20] Citations to SE__ refer to State Exhibits admitted into evidence at Defendant's RJA hearing.

demonstrates convincingly that the prosecution in Defendant's case took race into account when selecting the jury.

Evidence about jury selection in the *Burmeister* and *Wright* cases was particularly telling in this case because the prosecutor insisted that he used the same jury selection method in every case, asking roughly the same questions and basing strikes on the same characteristics. HTpp. 811, 931-33. Indeed, as to nearly all of the prosecution's explanations for striking African American potential jurors in this case, the prosecutor justified them on the basis of their reluctance to impose the death penalty or criminal records of the potential juror or that of family members. HTp. 835 (Freda Frink struck for her death penalty views and because of a pending criminal charge), 845, 851 (John Murray and Kenneth Dunston struck because of criminal records), 855 (Lescine Brown struck because of her death penalty views).[21]

In sharp contrast, the same prosecutor accepted African-American jurors in the *Burmeister* and *Wright* cases despite their significant misgivings about the death penalty and/or involvement with the criminal justice system. HTpp. 982-989; DE130, DE131, DE132, DE133. It is significant also that in *Burmeister*, as in this case, the prosecution's jury selection notes included explicit racial designations. HTp. 940; DE117; DE126. Defense expert Stevenson explained that these actions show that the prosecutor's race consciousness was "very, very important in thinking about jury selection generally." HTp. 1540.

[21] At the hearing, neither prosecutor offered any explanation for striking Deardra Holder, the fifth African American venire member dismissed by the prosecution in this case. One of the prosecutors prepared an affidavit prior to the RJA hearing and stated that Holder was struck because of her age. SE32 (Colyer Affidavit).

ARGUMENT

PURE QUESTIONS OF LAW

I. The North Carolina Supreme Court's remand order directs this Court to proceed to the merits of Defendant's RJA claims, and the State is barred from raising new arguments not raised on appeal.

While our Supreme Court was considering this case, the General Assembly repealed the RJA. In fact, when the Supreme Court issued its ruling in Defendant's case, the RJA had been repealed for more than a year. The critical facts here are that the State did not petition the Supreme Court for relief based on the repeal and did not argue the repeal in its brief, and the Supreme Court never discussed it in its remand order.

The Supreme Court's remand order states:

> We express no opinion on the merits of respondents' motions for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional and statutory challenges pertaining to the Act. In any new hearings on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *Robinson*, in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

State v. Augustine, Golphin, and Walters, 368 N.C. 594, 780 S.E.2d 552 (2015).

The North Carolina Supreme Court's plain language quoted above about "any new hearing on the merits" compels the conclusion that the Court contemplated an evidentiary hearing at which the parties could present evidence. At the time it remanded Defendant's case, the Supreme Court was certainly aware that the RJA had been repealed. Just as the legislature is "always presumed" to act with "knowledge of prior and existing law," *see Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977), we can be assured that

our state's highest court was well aware of the RJA repeal when it discussed a future hearing in defendant's case.

Other language in the remand order is consistent with the analysis that repeal of the RJA is not before this Court. At another place in the remand order, the Court concluded that "[c]ontinuing this matter to give [the State] more time would have done no harm to [Defendant]. *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015). The Court then reasoned that, "[u]nder these unique circumstances," the case should be remanded in order to give the State an "adequate opportunity" to prepare. *Id*. It defies logic that the Supreme Court would think the State would need the time to prepare for an evidentiary hearing on remand if there was to be no hearing. The Court vacated the trial court's order in *Robinson* because the State did not have sufficient time to respond to the statistical studies presented by the defense and vacated the order in *State v. Augustine, Golphin, & Walters* in part because the three cases were joined and in part because the trial court's denial of a continuance in *Robinson* "infected the trial court's decision, including its use of issue preclusion in these cases." The remedy it must have contemplated for both defects was a separate evidentiary hearing for each defendant after adequate preparation time for the State.

Aside from language discussing a future hearing being inconsistent with the Court believing that Defendant's case could be barred by the repeal enactment, much of the remand order was devoted to ensuring that the State could have the resources to present statistical evidence at that hearing. The order took the unusual step of specifying that the Administrative Office of the Courts must fund work by any expert appointed by the trial court. It is inconceivable that the Court would have done this if it believed that the repeal statute had ended the case. Instead, the logical conclusion is that the Court believed that the case would continue

to an evidentiary hearing at which the State would need evidence to rebut the evidence previously introduced by defendant.

Beyond the language contemplating a hearing and arranging for experts at that hearing, the Court directed on remand that this court "should address petitioner's constitutional and statutory challenges pertaining to the Act." *State v. Augustine, Golphin, and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). This language can only be read to address the State's [petitioner in the Supreme Court] statutory and constitutional defenses.[22] While Defendant, as the respondent in the North Carolina Supreme Court, also had raised statutory and constitutional defenses to being resentenced in his pleadings, the Supreme Court's remand order does not permit this Court to consider them on remand. For the same reason, the North Carolina Supreme Court's remand order does not permit this Court to consider new statutory and constitutional arguments that the State had not raised previously on appeal.

The intent of the Supreme Court was clear: the case must return to Superior Court for consideration of those statutory and constitutional defenses that were raised, and if those defenses do not bar the case, the Court must convene a new hearing with adequate time and resources for the State. Repeal is not one of those defenses.

Defendant respectfully suggests that the remand order and law of the case preclude this court from considering on remand any argument by the State that S.L. 2013-154 bars any proceedings on the merits of the Defendant's claims. In *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C.

[22] Significantly, the petitioner's [State's] statutory and constitutional arguments raised on appeal, if found to be valid, would affect the scope of the evidence, but not the mandate requiring the lower court to consider statistical evidence. For this reason, the Supreme Court's order permitting this Court to consider additional statistical studies was entirely consistent with its order to consider the petitioner's [State's] statutory and constitutional arguments, and inconsistent with an interpretation that this Court might have a free hand to ignore all of the evidence Defendant proffered in support of his RJA claims.

697, 374 S.E.2d 866 (1989), the North Carolina Supreme Court explained the law of the case doctrine:

> A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. Our mandate is binding upon the trial court and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. We have held judgments of Superior Court which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court to be unauthorized and *void.*

Id. at 699-700, 374 S.E.2d at 868 (internal citations omitted). *See also D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966) (same).

The circumstances and timing of the remand in this case also compel the conclusion that the repeal statute did not render Defendant's RJA claims void. Significantly, at the time it remanded Defendant's case, the Supreme Court was fully aware that the RJA had been repealed. Further, the Supreme Court had to have been aware of the repeal because Defendant specifically informed the court of the repeal in a court filing on August 21, 2013. *Defendant's Response in Opposition to Petition for Writ of Certiorari*, pp. 5-6.

Moreover, while Defendant's case was pending in the Supreme Court, defendants in two cases from Iredell County, Burke and Ramseur, filed petitions for writ of *certiorari* challenging orders in which the judge ruled that the RJA repeal rendered their RJA claims null and void. The first of these petitions was filed in August of 2014, more than a year before the Supreme Court issued its decision in this case. As to those two defendants, the Supreme Court granted review to consider the procedural questions raised by the retroactive application of S.L. 2013-154, the RJA repeal. *State v. Burke*, No.181A93-4, and *State v. Ramseur*, No. 388A10.

The appellate court treated *Ramseur* and *Burke*, cases that did not proceed to evidentiary hearing, very differently from *Robinson*, *Golphin*, *Augustine* and *Walters*. In *Burke* and

Ramseur, the Supreme Court granted review to consider the procedural questions raised by the retroactive application of S.L. 2013-154, the RJA repeal. In Defendant's case, and the other RJA hearing appeals, the Supreme Court remanded for statistical studies, new evidentiary hearings, and decisions on the merits. Had the Supreme Court believed the Defendant's RJA claims were even potentially barred from further merits consideration because of the RJA repeal, at the very least, the Supreme Court would have refrained from remanding the case and, instead, held it pending a decision in *Burke* and *Ramseur*. In the alternative, the Supreme Court may have concluded that, by failing to raise the repeal in its briefing to the Court and failing to argue that Defendant's claims were rendered void, the State waived the argument.

Finally, because the State did not raise the repeal of the RJA as an issue on appeal, nor did it challenge the Cumberland County Superior Court Judge's order granting an evidentiary hearing on RJA claims, it is barred from doing so now. *See City of Lumberton v. U.S. Cold Storage, Inc.*, 178 N.C. App. 305, 309–10, 631 S.E.2d 165, 168–69 (2006) ("[A] party may not file suit seeking relief for a wrong under one legal theory and, then, after that theory fails, seek relief for the same wrong under a different legal theory in a second legal proceeding . . . . We can perceive no reason why [the appellant] should be given two bites at the apple[.]"). The State has therefore defaulted and forfeited its arguments that the repeal statute applies to this proceeding and that Defendant's claims are therefore void.

For all of these reasons, this Court should issue an order that S.L. 2013-154 cannot now be considered and applied to Defendant's case on remand, because to do so would be inconsistent with the remand order, law of the case and the State's procedural default.

II. Retroactive Application of the RJA Repeal to Defendant Would Violate the Prohibition Against Ex Post Facto Laws in the United States and North Carolina Constitutions.

The RJA established a defense to a death sentence even for cases involving crimes committed before it became effective on August 11, 2009. Retroactive application of the RJA repeal eliminating this defense would violate the Ex Post Facto Clauses of Article I, Section 16 of the North Carolina Constitution, and Article I, Section 10, Clause 1 of the United States Constitution.

There are two critical elements which must be present for a law to be considered ex post facto: (1) the case law or statute must apply to events occurring before its enactment, and (2) the case law or statute as applied must disadvantage the offender affected by it. *Harter v. Vernon*, 139 N.C. App. 85, 91-92, 532 S.E.2d 836, 840 (2000). Both of these elements are satisfied here.

The RJA repeal statute threatens the kind of harm that the Ex Post Facto Clauses seek to avoid. The United States Supreme Court stated at the very beginning of the Republic,

> A constitution that permits such action, by allowing legislatures to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation, and erosion of the separation of powers."

Weaver v. Graham, 450 U.S. 24, 29, n. 10 (1981). *See also Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810) (viewing the Ex Post Facto Clause as a protection against "violent acts which might grow out of the feelings of the moment").

Similarly, in support of the inclusion of an ex post facto clause in the constitution, James Madison argued,

> Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the

> community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the proceeding.

The Federalist No.10, at 282 (James Madison) (Clinton Rossiter ed., 1961).

More recently, the Court has emphasized that "there is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000).

In explaining why the drafters of the United States Constitution added two Ex Post Facto clauses to limit the power of federal and state legislatures, Justice Chase explained that they had witnessed and learned from Great Britain's retroactive use of "acts of violence and injustice." *Calder v. Bull*, 3 U.S. 386, 389 (1798). One category of such unjust acts passed by Parliament included "times they inflicted punishments, where the party was not, by law, liable to any punishment." *Id.*

Justice Chase opined that "ex post facto" referred to certain types of criminal laws. He cataloged those types as follows:

> I will state *what laws* I consider *ex post facto laws,* within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*").

Id. at 390 (emphasis in original); *see also Calder,* 3 U.S. at 397 (opinion of Paterson, J.) ("[T]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty.").

Application of the RJA repeal to Defendant violates Justice Chase's third rule by changing the punishment, or by inflicting greater punishment, and his fourth rule by altering the legal rules of evidence, and requiring less, or different testimony than the law previously required in order to sentence an offender to death. Prior to repeal of the RJA in 2013, no person in North Carolina could be executed pursuant to any judgment that was sought or obtained on the basis of race. After passage of the repeal, executions were once again a possibility for those persons whose judgments of death were tainted by racial discrimination. Pursuant to the RJA and prior to its repeal, statistical evidence could be used to prove that race was a significant factor in seeking or imposing the death penalty. The RJA repeal prevented use of such evidence to establish a claim for relief under state law.

While the RJA was not in effect at the time Defendant was arrested and tried, this does not bar application of the Ex Post Facto prohibition. In *State v. Keith*, 63 N.C. 140 (1869), the Supreme Court considered a similar legal question in the context of the repeal of an amnesty statute. The Supreme Court held that the 1868 repeal of the amnesty law was unconstitutional and that it was "substantially an ex post facto law." 63 N.C. at 145, cited with approval in *Stogner v. California*, 539 U.S. 607, 617 (2003). The RJA is analogous to a pardon because at the time it was passed it created a defense to executions to previously-committed crimes and applied to trials held before the passage of the law.

Ordinarily, in applying Ex Post Facto provisions, courts look to whether the legislature increased punishment beyond what was prescribed when the crime was consummated. *See*, *e.g.*, *Weaver v. Graham*, 450 U.S. 24, 29-31 (1981). However, the singular terms of the RJA, meant to be applied retroactively and as a defense to execution, cannot be so constrained.

In 2009, the North Carolina General Assembly created an affirmative defense to the death penalty, stating that, "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." N.C. Gen. Stat. § 15A-2010 (emphasis added). The General Assembly further indicated that the defense was not moored to the timing of the commission of the crime in two additional ways. First, it stated:

> *Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes*, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by a filing a motion seeking relief.

N.C. Gen. Stat. § 15A-2012(b) (emphasis added). Further, the General Assembly applied the law "retroactively" in Section 2 of S.L. 2009-464. By enacting these provisions, the General Assembly made it crystal clear that a defendant's expectations at the time of the commission of the crime were immaterial.

While Defendant's case is in a unique procedural posture, a federal court addressed a similar, but atypical, situation regarding a legislature's attempt to increase a person's commuted sentence of life imprisonment to life imprisonment without parole. In *Neelley v. Walker*, 67 F. Supp. 3d 1319 (M.D. Ala. 2014), the plaintiff's death sentence had been commuted by the governor to "life imprisonment." Under Alabama law, a life imprisonment sentence entitled the inmate to consideration of parole but the only two permissible sentences for someone convicted of a capital crime were life imprisonment without parole or death. *Id*. at 1322. After the commutation, the Legislature passed a law to provide that when the governor commutes a death sentence, the inmate "shall not be eligible for parole" and made it retroactive to a date prior to the governor's commutation of the plaintiff's death sentence. *Id*. at 1323. Plaintiff sued,

asserting "that her ex post facto claim arises from the Legislature's effort to impose a harsher sentence than the one granted by the Governor." *Id*. at 1327. The defendant countered there was no ex post facto violation because the sentence of life imprisonment without parole under the retroactive legislative enactment "was a punishment 'annexed' to the crime at the time that Plaintiff committed first degree murder." *Id*. After acknowledging the general rule put forth by the defendant that ordinarily there is no ex post facto violation when the Legislature does not increase the punishment for the crime which existed at the time of the offense, the *Neelley* court noted that no case had "addresse[d] the truly extraordinary situation of a legislative branch retroactively increasing a punishment declared by the executive branch in a commuted sentence." *Id*. at 1328. The court recognized that life imprisonment without parole was one of the two possible sentences available at the time of her crime but held this was not "legally relevant" to the plaintiff's ex post facto claim because at the time of the legislative enactment, Neelley was "serving a commuted sentence, and her commuted sentence is now the only legal sentence in the universe of possible, legal sentences for her crime." *Id*. at 1329.

The RJA is no different. When Judge Weeks granted relief under the RJA and sentenced the defendant to life imprisonment without parole, this sentence became "the only legal sentence in the universe of possible, legal sentences" for his conviction of first degree murder. *Id*. at 1329. By filing a claim under the RJA, and subsequently under the amended RJA, Defendant demonstrated reliance on legislation passed by the General Assembly. The General Assembly may not now deprive Defendant of these defenses to execution that were available prior to the time of the repeal.

III. Retroactive Application of the RJA Repeal to Defendant Violates the Separation of Powers and Judicial Powers Clauses of the North Carolina Constitution.

Session Law 2013-154, sec. 5 violates the Separation of Powers Clauses of the North Carolina Constitution. N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *see also* N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.").

"'[T]he principle of separation of powers is a cornerstone of our state and federal governments,'" *State ex rel McCrory v. Berger*, 368 N.C. 633, 649, 781 S.E.2d 248, 255 (2016) (quoting *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982)), and "requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *Berger*, 368 N.C. at 636, 781 S.E.2d at 250.

In *Bayard v. Singleton*, 1 N.C. 5 (1787), this Court explained the significance of the principle of separation of powers and why it is considered a fundamental precept of our state constitution, *particularly* in the context of capital cases:

> That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all. . . .

Bayard, 1 N.C. at 7.

The Legislature has the authority to determine what conduct shall be punishable and to prescribe penalties, and the court's function is to impose sentences upon conviction. *In re*

Greene, 297 N.C. 305, 311, 255 S.E.2d 142, 146 (1979). Once judgment has been entered by the Court, as it has here, neither the Legislature nor the courts may interfere with the judgment:

> A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises. It must therefore be unconditional. When it has been rendered except that during the term in which it is rendered it is open for reconsideration the courts have discharged their functions, and have no authority to remit or mitigate the sentence of the law.

In re Greene, 297 N.C. at 309, 255 S.E.2d at 145 (citing *State v. Bennett*, 20 N.C. 170, 178 (1838)).

Session Law 2013-154, sec. 5 violates the Separation of Powers Clauses because this law prevents the judiciary from accomplishing its constitutionally assigned function. *See Bacon v. Lee*, 353 N.C. 696 (2001). "The courts have power to fashion an appropriate remedy 'depending upon the right violated and the facts of the particular case.'" *Simeon v. Hardin*, 339 N.C. 358, 374 (1994), *citing Corum v. University of North Carolina*, 330 N.C. 761, 784, 413 S.E.2d 276, 291, *cert. denied*, 506 U.S. 985 (1992). It is the role of the judiciary, not the legislative branch, to interpret the law and determine the class of cases to which a retroactive change in law may legally be applied. *See generally State v. Whitehead*, 365 N.C. 444 (2012) (legislature has exclusive power to prescribe punishment while judicial branch is "to pronounce the punishment or penalty prescribed by law"); *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 632 (2003) ("The inherent powers of the judicial branch are the powers which are 'essential to the existence of the court and the orderly and efficient exercise of the administration of justice.'"). It is the judiciary that has to "decide questions of merit, to render judgments that may be enforced, to do practical work, and to put an end to litigation." *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 505, 115 S.E. 336, 341 (1922).

Specifically, the North Carolina Supreme Court has the constitutional authority to "review upon appeal any decision of the courts below" and to issue "'any remedial writs necessary to give it general supervision and control over the proceedings of the other courts.'" N.C. Const. art. IV, § 12(1), cited in *In re Greene*, 297 N.C. 305, 312, 255 S.E.2d 142, 147 (1979). The North Carolina Supreme Court has held,

> It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution.

Smith v. State, 289 N.C. 303, 328, 222 S.E.2d 412, 428 (1976).

Our Court has further held,

> The legislative authority is the authority to make or enact laws; that is, the authority to establish rules and regulations governing the conduct of the people, their rights, duties and procedures, and to prescribe the consequences of certain activities. Usually, it operates prospectively. The power to conduct a hearing, to determine what the conduct of an individual has been and, in the light of that determination, to impose upon him a penalty, within limits previously fixed by law, so as to fit the penalty to the past conduct so determined and other relevant circumstances, is judicial in nature, not legislative.

State ex rel. Lanier, Comm'r of Ins. v. Vines, 274 N.C. 486, 495, 164 S.E.2d 161, 166 (1968).

By enacting Session Law 2013-154, sec. 5, the General Assembly usurped the function of the North Carolina courts to impose sentence in two separate respects.

First, the General Assembly sought to upend a judgment of life imprisonment imposed by the Superior Court, and left undisturbed by the North Carolina Supreme Court. The repeal statute mandated that, irrespective of the imposition of a judgment of a life sentence pursuant to the RJA, the effect of a remand order by the North Carolina Supreme Court would automatically negate both the judgment and any future opportunity by Defendant to defend against his death sentence based on the defense on which his life sentence was grounded.

Second, the Legislature interfered with the jurisdiction of the North Carolina Supreme Court by negating its ability to review decisions of the courts below upon appeal and to issue remedial writs pursuant to its powers under N.C. Const. art. IV, § 12. The General Assembly accomplished this by dictating to the Court that, no matter what it considered, said or did in remanding the case, the result would necessarily be the same: the reimposition of a death sentence.

Thus, by robbing the courts of their authority to issue remedial writs necessary to give them general supervision and control over the proceedings of the courts and to administer justice, Session Law 2013-154, sec. 5, violates the Separation of Powers clause and the judicial powers clauses of the North Carolina Constitution.

MIXED QUESTIONS OF LAW AND FACT

IV. Retroactive Application of the RJA Repeal Would Violate the Due Process and Law of the Land Clauses of the Federal and State Constitutions and Deprive Defendant of Life, Liberty, and Property Interests Created by the RJA.

The RJA's enactment established life, liberty, and property interests in receiving the lesser sentence of life imprisonment in lieu of death once Defendant showed that race was a substantial factor in the capital prosecution. Defendant claimed the benefit of those procedures by filing and litigating his case but the General Assembly repealed and declared that all pending motions under the RJA were "void." Applying the RJA repeal retroactively to Defendant's case, particularly after he presented compelling and powerful evidence of pervasive race discrimination in his own case, would trample Defendant's due process rights guaranteed by the North Carolina and United States Constitutions.

Due process is fundamentally about preventing arbitrary action by the state. For example, when the defendant in *Hicks v. Oklahoma* was denied "the jury sentence to which he

was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision[,]" the United States Supreme Court held that "[s]uch an arbitrary disregard of the Defendant's right to liberty is a denial of due process of law." *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

Liberty interests can be created by a statute. "'[A] state may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures.'" *Jones v. Keller*, 364 N.C. 249, 256, 698 S.E.2d 49, 55 (2010) (citation omitted). In determining whether a life, liberty, or property interest arose "from an expectation or interest created by state laws or policies," *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), courts look to the "*nature* of the interest at stake." *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972) (emphasis in original). In this case, that interest is literally life or death.

In a number of cases, the United States Supreme Court has held that, for the lesser interest of liberty as compared to life, when a state-created process entitled a litigant to a benefit after making a specified showing, the state thereby creates a protected interest which may not be taken away without due process. For example, in *DA's Office v. Osborne*, 557 U.S. 52 (2009), the State gave the respondent "a liberty interest in demonstrating his innocence with new evidence under state law" by virtue of state law establishing that "those who use 'newly discovered evidence' to 'establis[h] by clear and convincing evidence that [they are] innocent' may obtain 'vacation of [their] conviction or sentence in the interest of justice.'" *Id.* at 68 (brackets in original).

Similarly, in *Hicks v. Oklahoma*, 447 U.S. 343, 345 (1980), the defendant was statutorily "entitled to have his punishment fixed by the jury." In rejecting the State's argument that "the defendant's interest in the exercise of that discretion [was] merely a matter of State procedural

law[,]" the Court recognized that "[t]he defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion[.]" *Id.* at 346.

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 424 (1982), the Court recognized a protected property interest in a "comprehensive [statutory] scheme for adjudicating allegations of discrimination" on the basis of physical disability. Under that scheme, a complainant had to bring a charge of unlawful practices before a designated commission, which then had 120 days to convene a fact finding conference. If the commission then found substantial evidence of illegal conduct, it was required to take steps to eliminate the discriminatory effects by means set out in the statute.

The claimant, in fact, brought a timely charge but the Commission inadvertently scheduled the hearing for a date five days after the end of the 120-day period. The Supreme Court of Illinois held that the Commission's failure to convene the hearing within the statutory time limit deprived the Commission of jurisdiction to consider Logan's claim. The United States Supreme Court reversed, holding that the State created a property interest in the adjudicatory procedure and the dismissal of his claim "deprived Logan of a property right" without "the opportunity to present his case and have its merits fairly judged." *Logan*, 455 U.S. at 433. Logan was "entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim." *Id.* at 434. In reaching that conclusion, the Court recognized that Logan's interests in retaining his employment, disproving his employer's claim of inability, and redressing the alleged discrimination were "all substantial[,]" and further emphasized that "the deprivation here is final." *Id.* The Court also recognized that "[a] system or procedure that deprives persons of their

claims in a random manner . . . necessarily presents an unjustifiably high risk that meritorious claims will be terminated." *Id.* at 434-35.

Similarly, Defendant had a substantial interest in the "opportunity to present his claim of entitlement," *id.* at 434, to redress the discrimination that pervaded capital punishment in North Carolina, and in potentially obtaining the benefit of a life sentence in lieu of death – "the most irremediable and unfathomable of penalties[.]" *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Moreover, as in *Logan*, 455 U.S. at 434, the "deprivation here is final" because the General Assembly did not retain or substitute any mechanism by which Defendant could vindicate his initial claims that race was "a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State" at the time his death sentence was sought or imposed. Furthermore, especially given that the Defendant was initially successful on the merits of his claims, the arbitrary nature of the retroactive repeal of the Racial Justice Act "presents an unjustifiably high risk that meritorious claims will be terminated." *Id.* at 434-35.

Also, as in *Logan*, the balance of interests here is not even close. The State never asserted any specific interest in depriving Defendant of the hearing to which he was entitled under the Racial Justice Act. Furthermore, even if Defendant succeeds in a hearing on his claims, he would pose no danger to society because he would simply be resentenced to life without the possibility of parole. *See Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) ("Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

The Supreme Court of North Carolina faced this issue squarely nearly 150 years ago. In *State v. Keith*, 63 N.C. 140 (1869), the defendant served as a soldier in the Civil War. In 1866,

the legislature enacted an Amnesty Act, granting a general pardon to persons who fought in the war. The Amnesty Act provided that no soldier or officer "shall be held to answer on any indictment for any act done in the discharge of any duties imposed on him" during the Civil War and, in all cases then pending, "if the defendant can show that he was an officer or private … it shall be presumed that he acted under orders until the contrary shall be made to appear." Amnesty Act of 1866-'67, §§ 1, 2.

In 1868, five years after the defendant in *Keith* allegedly committed his murder in 1863, the North Carolina Constitutional Convention repealed the Amnesty Act. This was analogous to the General Assembly repealing the provisions of the RJA. The defendant in *Keith* was brought to trial after the repeal. The trial court denied his motion for discharge under the Amnesty Act relying solely on the repeal statute. Were this Court to find that the repeal statute barred further RJA litigation, the situations would be nearly identical. Both defendants were given an important interest by statute: Keith in avoiding possible loss of liberty and Defendant here in avoiding execution. Both would lose their interest if the later repeal of the statute were to be enforced. Not surprisingly, in *Keith*, our Supreme Court reversed, recognizing that, despite the repeal, denying the defendant the benefits of the Amnesty Act deprived the defendant of due process of law guaranteed by both the State and federal constitutions. *Keith*, 63 N.C. at 144-45 (citing, *inter alia*, the Fifth Amendment to the United States Constitution and Section 12 of the Bill of Rights of North Carolina). The result in this case should be no different, especially where the right to life is so much more critical than the right to avoid a trial.

Similar to the state-created processes in *Osborne*, *Hicks*, *Logan*, and *Keith*, the RJA created a comprehensive procedure for a death-sentenced defendant to live – to have a sentence of life imprisonment in lieu of death. Once the right to use that process was conferred on

Defendant and Defendant timely and properly filed thereby claiming that right, he obtained protected life (and liberty) interests in that process because the RJA's creation gave him/her "a substantial and legitimate expectation" that he would be resentenced to life if he successfully proved his RJA claim.

Mandatory language has proven important in cases determining whether statutes create protected interests. For example, in *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979), the Court examined a parole statute that provided, "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred" for any one of four reasons. *Greenholtz*, 442 U.S. at 11 (internal quotations omitted). The Court held that because of the "unique structure and language" of the statute, the State created a liberty interest in release on parole. *Id.* at 12 (emphasis added, citation omitted).

Similarly, in *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987), a Montana parole statute provided that, subject to several restrictions, the parole board "'*shall* release on parole … any person confined in the Montana state prison or the women's correction center … when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community[.]'" *Allen*, 482 U.S. at 376 (emphasis in original). The Court held that the statute "create[d] a liberty interest in parole release" because it "use[d] mandatory language ('shall') to 'creat[e] a presumption that parole release will be granted' when the designated findings are made." *Id.* at 377-78 (citations omitted). Moreover, the Court recognized that "the presence of general or broad release criteria – delegating significant discretion to the decision maker – did not deprive the prisoner of the liberty interest in parole

release" because release was "required after the Board determine[d] (in its broad discretion) that the necessary prerequisites exist[ed]." *Id.* at 375-76.

The RJA, exactly like the parole statutes at issue in *Allen* and *Greenholtz*, provided that relief was mandatory "when the designated findings [we]re made." *Allen*, 482 U.S. at 377-78. Specifically, the RJA mandated "that the death sentence imposed by the judgment *shall* be vacated" and the defendant resentenced to life imprisonment if "the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2012(a)(3). Even if the ultimate determination that "race was a significant factor in decisions to seek or impose the sentence of death" was initially discretionary with the trial court, the presence of that discretion did not deprive Defendant of his protected interests because a life sentence was still required if the trier of fact determined that "the necessary prerequisites exist[ed]." *Allen*, 482 U.S. at 375-76.

Here, Defendant filed both an RJA Motion for Appropriate Relief and Amendment within the times set by the original and amended RJA, he attached affidavits and other exhibits in support of the claims, as required by N.C. Gen. Stat. §15A-1420(b)(1), and he expressly requested the hearing to which he was entitled. *See* N.C. Gen. Stat. § 15A-2012(a)(2); N.C. Gen. Stat. § 15A-2011(f)(3). Defendant then presented substantial evidence at an evidentiary hearing, evidence that persuaded Judge Weeks to grant relief. At that point, as demonstrated above, Defendant had fully asserted his rights under the RJA, and any subsequent repeal of the RJA could not be applied to him without violating due process as protected under the Due Process and Law of the Land Clauses.

Simply put, North Carolina created life, liberty, and property interests in the adjudicatory procedures of the RJA and in securing a life sentence instead of facing execution. Defendant took all required actions required to secure a life without parole sentence. Were this Court to rely on the retroactive repeal of the RJA to dismiss Defendant's pending motions, it would deprive Defendant of his protected interests in violation of the Due Process and Law of the Land Clauses of the federal and state constitutions. To provide Defendant the process he is due, this Court must "consider the merits of [Defendant's] claim, based upon the substantiality of the available evidence[.]" *Logan*, 455 U.S. at 434.

V. Once Defendant Filed his RJA Motions in Compliance with the Procedural Requirements of the RJA, Sufficiently Alleging that Race Was a Significant Factor in the Imposition of his Death Sentences, and Presented Evidence at an Evidentiary Hearing, and then a Superior Court Granted Relief Under that Law and Entered a Judgment Imposing a Life Sentence, his Rights under the RJA Vested and Could Not be Taken Away by Subsequent Legislation.

The RJA repeal legislation cannot be applied retroactively to deprive Defendant of vested rights under the RJA because such application would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article IV, Section 13 and Article I, Section 19 of the North Carolina Constitution.

Article IV, Section 13 of the North Carolina Constitution states: "No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury." This constitutional provision has been interpreted to protect vested substantive rights. *Fogleman v. D&G Equip. Rentals, Inc.*, 111 N.C. App. 228, 230, 431 S.E.2d 849, 851 (1993). Similarly, Article I, Section 19 of the North Carolina Constitution states in pertinent part that, "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land." This provision has

been interpreted to prevent interference with vested rights. *See Lowe v. Harris*, 112 N.C. 472, 17 S.E. 539 (1893) (holding that the legislature's authority to give a repealing statute retroactive operation is restricted by the fundamental rule that "no law will be allowed to operate as to disturb or destroy rights already vested").

Where the law allows a cause of action which provides redress for past injuries, our Court has repeatedly held that the parties' rights with respect to that cause of action vest at the time the cause of action accrues. *See, e.g., Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982); *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970). The cause of action accrues when the injury has occurred and the party asserting the claim becomes entitled to file the action seeking redress for that injury. *See, e.g., Booker v. Duke Med. Ctr.*, 297 N.C. 458, 467, 256 S.E.2d 189, 195 (1979). Once the right to redress becomes vested, it may not be defeated or modified by a subsequent statute. *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36, 106 S.E. 133 (1921). Separate and apart from vested rights, the Court has directly recognized that governmental bodies must follow their own rules for processing claims; if the government were allowed to change the rules in order to defeat a claim by legislative fiat, the result would be arbitrary and capricious. *Robins v. Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007).

As argued below, Defendant's rights vested when he filed a substantial claim under the RJA. As an alternate basis for relief, Defendant's rights under the RJA vested when the Superior Court entered a judgment in his favor resentencing him to life imprisonment without the possibility of parole. Defendant seeks to present evidence to demonstrate he would be prejudiced by the retroactive application of the repeal statute because of his detrimental reliance on the RJA that upended his settled expectations and violated fundamental principles of fairness and justice that underlie many of the vested rights determinations. Finally, Defendant's right to

an evidentiary hearing under the RJA has vested because it is "secured, established and immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980).

A. Defendant's Claim Vested when he filed a Substantial Claim Under the RJA or When Judgment was Entered by the Superior Court.

In *Mizell*, the plaintiff was injured when exiting a train and filed a lawsuit in state court seeking damages. *Mizell*, 181 N.C. at 38, 106 S.E. at 134. The defendants filed a petition to remove the case to federal court, claiming, *inter alia*, that they were entitled to removal under a federal statute enacted after the plaintiff was injured. *Id*. at 40, 106 S.E. at 135. This Court affirmed the denial of removal, holding that "[t]he injury occurred and the cause of action arose 19 December, 1919…. Action could have been instituted that day. A vested right of action is property. The statute … cannot defeat or modify a right of action that has already accrued." *Id*. at 38-39, 106 S.E. at 135.

Similarly, in *Smith v. Mercer*, the law governing liability for damages in wrongful death cases was substantially amended after the plaintiff's decedent was killed but before the plaintiff filed the lawsuit. 276 N.C. at 331, 172 S.E.2d at 490. The new law, if applicable, would have substantially expanded the defendants' liability for damages. *Id*. at 331-34, 172 S.E.2d at 490-92. Recognizing that retroactive application of the new provisions would raise "serious questions as to the constitutionality of such retroactive application," the Court held that the plaintiff could not rely on the new law. *Id*. at 337. The Court explained:

> statute or amendment will be regarded as operating prospectively only, … where the effect of giving it a retroactive operation would be to … destroy a vested right, *or create a new liability in connection with a past transaction,* ***invalidate a defense which was good when the statute was passed****, or, in general, render the statute or amendment unconstitutional.*

Id. at 337, 172 S.E.2d at 494 (citations omitted, italics in original, additional emphasis added).

In *Booker*, the plaintiff's decedent contracted hepatitis as a result of handling blood samples pursuant to his employment as a laboratory technician. After his death, his dependents sought death benefits under the Workmen's Compensation Act. After the decedent contracted hepatitis, but before he died, the legislature broadened the definition of "occupational disease" so that the term covered the decedent's hepatitis when, the defendants contended, it had not previously done so. The North Carolina Supreme Court rejected the view that only the definition of "occupational disease" that was in place at the time the decedent contracted the disease could constitutionally apply. Because the dependents' claim for death benefits arose only when the decedent died, it was the law at the time of death that determined the parties' rights. The Court explained: "The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *Booker*, 297 N.C. at 467, 256 S.E.2d at 195.

In *Bolick*, the plaintiff was injured by a yarn-crimping machine manufactured by the defendant, which had been purchased by the plaintiff's employer over six years prior to the injury. The plaintiff filed a lawsuit seeking damages for his injuries, based on theories of negligent design and manufacture and of breach of warranties of merchantability and fitness. After the injury had occurred, but before the plaintiff filed his lawsuit, the legislature enacted a statute of repose prohibiting products liability lawsuits, such as the plaintiff's, which were brought more than six years after the initial purchase. *Bolick*, 306 N.C. at 365-66, 293 S.E.2d at 417. Citing, *inter alia*, *Mizell*, *Smith*, and *Booker*, the North Carolina Supreme Court recognized that the plaintiff had a viable claim when the statute of repose went into effect and that the statute "would, if applied retroactively to plaintiff's claim, destroy plaintiff's cause of action which had vested before its effective date." *Id*. at 371, 293 S.E.2d at 420. Noting that "[w]hen a statute

would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only[,]" *id*., the Court refused to give retroactive effect to the statute.

In *Robins*, the plaintiff filed an application with the town of Hillsborough, seeking approval of a development plan to construct an asphalt plant on his property. After conducting multiple hearings and repeatedly postponing a decision on the plaintiff's application, the town first enacted a moratorium on the construction of manufacturing and processing facilities involving petroleum products (including asphalt), and then amended its zoning ordinance to completely prohibit such facilities within the town's zoning jurisdiction. *Robins*, 361 N.C. at 194-96, 639 S.E.2d at 422-23. The North Carolina Supreme Court held that the plaintiff "was entitled to receive a final determination from defendant regarding his application *and to have it assessed under the ordinance in effect when the application was filed.*" *Id*. at 199, 639 S.E.2d at 425 (emphasis added).

The Court noted that the ordinance in effect at the time of the application provided that the town's Board of Adjustment "shall … hear and *decide* all matters … upon which it is required [to] pass[,]" which included applications such as the plaintiff's application. *Id*. at 197, 639 S.E.2d at 424 (emphasis and alterations in original). The Board's hearings constituted quasi-judicial proceedings. *Id*. at 198, 639 S.E.2d at 424. The Court explained that "we must determine whether defendant followed its own procedures. 'In no other way can an applicant be accorded due process and equal protection[.]'" *Id*. at 198-99, 639 S.E.2d at 424 (citation omitted). In holding that the town could not amend its ordinance while the application was pending in order to obtain its desired outcome, the Court explained that by "essentially *dictating by legislative fiat the outcome* of a matter" that should have been "resolved through quasi-

judicial proceedings, defendant did not follow its own ordinance[,]" which left "the Town Board no defense to the charge that *its actions were arbitrary and capricious*." *Id*. at 199, 639 S.E.2d at 425 (emphasis added).

The application of all of this case law to Defendant's RJA motions is clear. At the time Defendant filed his RJA motion, the RJA mandated that once a defendant under sentence of death filed a motion alleging "with particularity how the evidence supports a claim that race was a significant factor" in his case, as defined in the statute, the court was required to schedule a hearing. Moreover, the RJA provided that if the defendant made the requisite showing at the hearing, "the death sentence … shall be vacated and the defendant resentenced to life imprisonment[.]" N.C. Gen. Stat. § 15A-2012(a) (2009) (repealed 2013). Defendant's "cause of action" under the RJA accrued when he had suffered the requisite injury – a capital trial resulting in death sentences in which race was a significant factor – and when the statute allowed him to file a claim for relief from those sentences.

Defendant's rights under the RJA vested when his claim accrued, and he filed a timely claim asserting those rights. Once Defendant's rights under the RJA vested, they could not be "defeat[ed] or modif[ied]," *Mizell*, 181 N.C. at 38-39, 106 S.E. at 135, by any subsequent legislation. The RJA repeal "would, if applied retroactively to [Defendant]'s claim, destroy [his] cause of action which had vested before its effective date." *Bolick*, 306 N.C. at 371, 293 S.E.2d at 420. Just like the town board's post-application attempt to change the rules in *Robins*, the legislature's attempt, through the retroactivity provisions of the RJA repeal, to "dictat[e] by legislative fiat the outcome" of Defendant's RJA claims, when those claims should have been resolved through judicial proceedings was "arbitrary and capricious," *Robins*, 361 N.C. at 199, 639 S.E.2d at 425, and cannot be upheld.

B. As an Alternate Basis for Relief, Defendant's Rights Pursuant to the RJA Vested when a Judgment was Entered Resentencing Him to Life Imprisonment Without Parole.

Assuming *arguendo,* that Defendant's rights under the RJA did not vest at the time he filed his claim under the RJA, they certainly vested at the time the superior court entered its judgment resentencing him to life imprisonment without parole.

Once judgment has been entered by the Court, as it has been here, the Legislature may not interfere with the judgment:

> A judgment, though pronounced by the judge, is not his sentence, but the sentence of the law. It is the certain and final conclusion of the law following upon ascertained premises. It must therefore be unconditional. When it has been rendered except that during the term in which it is rendered it is open for reconsideration the courts have discharged their functions, and have no authority to remit or mitigate the sentence of the law.

In re Greene, 297 N.C. at 309, 255 S.E.2d at 145 (citing *State v. Bennett*, 20 N.C. 170, 178 (1838) (citations omitted). The Legislature has no power to "annul or interfere with judgments theretofore rendered" or "change the result of prior litigation." *Piedmont Mem'l Hosp., Inc. v. Guilford County et al.*, 221 N.C. 308, 311, 20 S.E.2d 332, 334-35 (1942); *see Board of Comm'rs of Moore County v. Blue*, 190 N.C. 638, 130 S.E. 743, 746 (1925) (holding that the power to open or vacate judgment is "essentially judicial," and that the courts should not unfairly assume that the legislature "intended to exceed its powers or to interfere with rights already adjudicated . . .").

The North Carolina Supreme Court considered a similar question in *Morrison v. McDonald*, 113 N.C. 327, 18 S.E. 704, 705 (1893). In *Morrison*, judgment had been rendered for the plaintiff on the verdict of the jury in December, 1892. Under the existing statute, the judgment could not be set aside for excusable neglect. The Legislature of 1893 amended the statute to permit the courts to set aside judgments based on verdicts. The defendant in that case

moved to set aside the judgment for excusable neglect. The Court held that the Act of 1893 was "applicable only to judgments rendered after its enactment," and that plaintiff's rights under the judgment could not be disturbed by subsequent legislation. According to the Court:

> 'Both upon principle and authority we conclude that the legislature has no right, directly or indirectly, to annul, in whole or in part, a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees already final, by which the rights of the parties are finally adjudicated, fixed and vested; and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void.'

Morrison, 113 N.C. 327, 331 (cited by *Piedmont Mem'l Hosp., Inc.*, 221 N.C. at 313, 20 S.E.2d at 335 (internal citations omitted)).

C. Defendant's Right to an Evidentiary Hearing Pursuant to the RJA has been "Secured, Established and [is] Immune from Further Legal Metamorphosis" and Therefore has Vested Pursuant to the RJA.

Defendant satisfied the statutory requirement that he "state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2012(a). Once this was done, the legislature mandated that "the court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. § 15A-2012(a)(2). The Defendant has done everything he could to pursue his claim.
The provisions of the statute were mandatory. They entitled a defendant who filed a sufficient motion to an evidentiary hearing and, upon meeting the statutory burden of proof, to the imposition of a life sentence in lieu of death.

The Superior Court of Cumberland County found that Defendant filed a sufficient motion pursuant to N.C. Gen. Stat. §15A-2012(a), and scheduled an evidentiary hearing. The finding by the Superior Court that Defendant met his burden to entitle him to an evidentiary hearing

pursuant to N.C. Gen. Stat. § 15A-1212(a) was unchallenged by the State on appeal and was left undisturbed by the remand order by the North Carolina Supreme Court.

This resolution of this issue is controlled by the North Carolina Supreme Court's decision in *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980), where the Court found that the "substantial" procedural right to a change of venue vested because it was "secured, established and immune from further legal metamorphosis." *Gardner*, 300 N.C. at 719, 268 S.E.2d at 471.

In *Gardner*, the plaintiff filed a divorce complaint in Wayne County, and the district court ruled that venue properly lay in Wayne County. The General Assembly subsequently amended the venue statute, in a manner which would have required the divorce action to be heard in a different county where the defendant resided had it been applied retroactively to the parties. The North Carolina Supreme Court held that the subsequently-passed venue statute was not applicable in determining the rights of the parties where it became effective after the trial court had made a decision settling the question of venue: "[P]laintiff's right to venue in Wayne County was firmly fixed by judgment which had long since passed beyond the scope of further judicial review. No further challenge to venue by defendant was possible in the courts. The question was then settled, and it could not be reopened by subsequent legislative enactment." Gardner, 300 N.C. at 720, 268 S.E.2d at 472. *See also Stephenson v. Bartlett*, 358 N.C. 219, 225-26, 595 S.E.2d 112, 116-17 (2004) (reaffirming principle of *Gardner* but distinguishing facts because *Stephenson* was "complete" and therefore was not an "ongoing case").

As in *Gardner*, the trial court here made a final determination ordering an evidentiary hearing. The State never challenged that ruling, although it had ample opportunity to do so on appeal. For the same reasons stated by the court in *Gardner*, Defendant is entitled to an evidentiary hearing pursuant to the RJA.

D. Defendant Seeks to Present Evidence to Demonstrate that Equitable Principles Support a Finding that the Defendant's Rights Vested Under the RJA.

When deciding whether the Defendant's rights under the original RJA are vested and thus protected from repeal, principles of equity and fundamental fairness must be considered. At its core, the application of due process to protect vested rights involves a concern about certainty, stability and fairness. *See, e.g.*, *Michael Weinman Assoc. Gen. P'ship v. Town of Huntersville*, 147 N.C. App. 231, 234, 555 S.E.2d 342, 345 (2001) (recognizing that vested rights protect interests in certainty, stability and fairness); *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010) ("Constitutional provisions limiting retroactive legislation must therefore be applied to achieve their intended objectives—protecting settled expectations and preventing abuse of legislative power."); *Langston v. Riffe*, 754 A.2d 389, 419 (Md. 2000) ("Justice Holmes once remarked with reference to the problem of retroactivity that 'perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions,' and suggested that the criteria which really governed decisions are 'the prevailing views of justice.'") (citations omitted); *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 502-03 (Kan. 1995) (concluding that courts often decide whether rights are vested based on the nature of the rights at stake, and the degree to which the legislation affected those rights); *see generally* 2 Norman J. Singer, *Sutherland Statutory Construction*, §41:06 (7th ed. 2007) ("Judicial attempts to explain whether such protection against retroactive interference will be extended reveal the elementary considerations of fairness and justice govern."); *cf. Santobello v. New York*, 404 U.S. 257 (1971) (holding that detrimental reliance by a defendant on a promise or agreement by the State gives the defendant a due process right to enforcement of the State's promise or agreement); *State v. Hudson*, 331 N.C. 122, 148, 415 S.E.2d 732, 746 (1992) (same).

The equities involving these principles of fairness, expectations and reliance weigh against applying the RJA repeal retroactively. Defendant relied on the RJA when he retained experts from the Michigan State University College of Law, among others, to undertake a massive study of North Carolina charging, sentencing and peremptory strike practice in capital cases. Defendant relied on the RJA when he retained volunteer counsel in addition to appointed counsel to assist him in this difficult and time-consuming litigation. Defendant relied on the RJA when he participated in extensive public hearings in Cumberland County.

The Defendant relied on the grant of an evidentiary hearing pursuant to the RJA to investigate and present evidence at an evidentiary hearing. Further, the Defendant relied on the promise of relief offered by the RJA to place on hold other pending challenges or potential challenges to his conviction and/or sentence of death.

The Defendant relied on the judgment granting him relief and resentencing him to life imprisonment. For Defendant, this judgment meant getting off of death row and, for the first time in over a decade, being free of the fear of execution.

Finally, the Defendant relied on the explicit ruling by the North Carolina Supreme Court that there would have been no prejudice to Defendant Robinson (and, by implication, the other three defendants) from a continuance; that could only be true if his rights under the original RJA were vested and protected.

Defendant has suffered from great uncertainty caused by the lack of finality of his judgment and by his treatment in the custody of the Department of Public Safety following the conclusion of the State's appeal to the North Carolina Supreme Court. Since the North Carolina Supreme Court issued its opinion vacating the orders of the Cumberland County Superior Court,

the Defendant has been removed from his classification as an inmate serving a life sentence entitled to certain privileges, and placed back on death row.

The many years during which the Defendant lived on death row has been "aggravated by the uncertainty as to whether a death sentence will in fact be carried out." *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J. dissenting). Living under the constant threat of execution for a substantial period of time is cruel. *See Glossip*, 135 S. Ct. at 2764 (Breyer, J. dissenting). Since at least 1890, the courts have recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected to during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). The Defendant has been a witness to many executions in the time he has been on death row. Witnessing his fellow inmates, year after year, face the ultimate punishment, cruelly concretizes the punishment he/she could face.

The uncertainty faced by any death row inmate was dramatically heightened in North Carolina by the State's treatment of the RJA. First the General Assembly passed the RJA, which was hailed by commentators as landmark legislation that would finally address racial inequity in the administration of the death penalty. Then it was amended by the legislature in a form that the Governor viewed as crippling the salutary purpose of the RJA, but passed over the Governor's veto. Finally, it was repealed by the General Assembly in 2013, but only after the Superior Court of Cumberland County granted relief to Defendant under the original RJA as amended.

The State's treatment of Defendant singularly fostered uncertainty and shattered his expectations, a fate Defendant shares with just three other inmates. Defendant was promised by the State of North Carolina that if he pleaded a substantial claim that race was a significant factor in his case, that claim would be heard. *See* N.C. Gen. Stat. § 15A-2012(a) ("The court shall

schedule a hearing on the claim . . . ."). Defendant was further promised by the State that if he could show that race was a significant factor in decisions to seek or impose the death penalty at the time his death sentence was sought or imposed, his death sentence would be vacated. *See* N.C. Gen. Stat. § 15A-2012(a) ("[T]he court shall order . . . that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without possibility of parole.").

When the Superior Court of Cumberland County ordered an evidentiary hearing, Defendant was therefore assured that he would have an opportunity to prove a claim entitling him to a life sentence. When Defendant produced an abundance of statistical and anecdotal proof that race was a significant factor in his case and proved his claim, he was assured that the judge would enter a judgment required by law imposing a life sentence.

Defendant in fact was removed from death row and reclassified as an inmate serving a life sentence. He had no expectation at that point, and no reason to expect, that he would ever return to death row or face a resentencing proceeding. He believed that any appeal by the State would be barred by equitable, statutory and constitutional principles. Yet, contrary to all of his expectations, the appellate court granted the State's petition, and vacated the trial court's order. Notwithstanding the fact that his life judgment was left undisturbed by the Supreme Court's order, he was returned to death row and again reclassified, this time as a death row inmate.

That profound injustice would be multiplied exponentially by dashing any hope of another evidentiary hearing at which Defendant has an opportunity to demonstrate again that race was a significant factor in his case. An evidentiary hearing is the fundamental premise and promise of the remand ordered by the North Carolina Supreme Court. That order is solicitous also of the State's need to have adequate time to prepare and respond to Defendant's statistical

evidence. Yet granting a continuance to prepare evidence can have no meaning if there is then no hearing. That is the heart of the injustice and unfairness that Defendant now faces unless this Court recognizes his vested right to the protections required under the RJA.

Due process, certainty, equity and fairness demand that Defendant not be denied his rights under the RJA. Defendant seeks an evidentiary hearing to prove the factual claims contained in this pleading and the cumulative mental and emotional toll that he would suffer if the repeal of the RJA is applied to him.

VI. The RJA Repeal Provision Targeting Defendant Violates the Constitutional Prohibition against Bills of Attainder.

The General Assembly included in the RJA repeal a provision affecting a class of only four easily-identifiable persons including Defendant, all of whom had had their death sentences vacated under the RJA and were resentenced to life imprisonment without parole. "This section [making null and void pending claims] is applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act and the Order is vacated upon appellate review by a court of competent jurisdiction." S.L. 2013-154, sec. 5.(d). That provision resentences Defendant to death without a trial by stripping from him his pending RJA defenses to the death penalty. This legislatively inflicted punishment of Defendant is a prohibited Bill of Attainder.

Bills of Attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). Such acts are unconstitutional. Article I, Section 10, Clause 1 of the United States Constitution commands: "No State shall . . . pass any bill of attainder."

The reason the Constitution precludes attainders is to avoid a loathed former English practice. "In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial "specifically designated persons or groups." *United States v. Brown*, 381 U.S. 437, 447 (1965). The prohibition against Bills of Attainder "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 445.

And the preclusion has always covered those at whom the bills were directed whether specifically named or members of a class. "The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of United States v. Subversive Activities Control Board,* 367 U.S. 1, 86 (1961); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866). For example, the plaintiff in *Neelley v. Walker* alleged that Alabama's newly-enacted statute was a bill of attainder because it barred those like her serving a commuted life sentence from obtaining parole. *Neelley v. Walker*, 67 F. Supp. 3d 1319 (M.D. Ala. 2014). The State asserted that the plaintiff's complaint was deficient since the law did not specifically name her. The court easily rejected that argument:

> Although the Act does not mention Plaintiff by name, the facts in Plaintiff's amended complaint plausibly support her allegation that she was targeted by the Legislature's amendment to § 15–22–27(b)—not only because the legislators sponsoring the bill allegedly vocalized their intent to "fix" Governor James's supposed error, but also because Plaintiff is the only person to receive a commuted sentence since 1962, and because the Legislature suspiciously made the Act retroactive to four months prior to the January 1999 commutation.

Id. at 1330. *See also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (in context of Ex Post Facto Clause, three capital defendants were "identifiable targets of the legislation" where the section applied only to three persons who had received the death penalty from a three judge panel).

Courts have found legislation to constitute Bills of Attainder in a variety of contexts where the class of affected persons is readily identifiable even though the persons are not named. *See, e.g., Owens v. Ivey*, 138 Misc. 2d 671, 525 N.Y.S.2d 508 (City Ct. 1988) (parents of children age 10 to 18 who commit acts are an identifiable class); *Office of Health Care Access v. Housatonic Valley Radiology Assocs., P.C.,* No. CV074034061, 2009 WL 1424662, *8 (Conn. Super. Ct. Apr. 28, 2009) (finding state statute singled out a group of health care providers who leased equipment as an identifiable class); *State ex rel. Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381, 387 (Mo. 1990) ("Given the nature of the multiple conditions essential to membership in the class, the only rational conclusion is that the legislature intended the statute to affect" a specific municipal waste facility and constituted a Bill of Attainder.).

The United States Supreme Court has recognized three inquiries for determining whether an enactment is an attainder: (1) does the challenged statute fall within the historical meaning of legislative punishment; (2) does the statute, considering the "type and severity of burdens imposed, reasonably … further nonpunitive legislative purposes;" and (3) does the legislative record show an "intent to punish." *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *see also State v. Johnson*, 169 N.C. App. 301, 310, 610 S.E.2d 739 (2005). While the Supreme Court's jurisprudence does not require it, Defendant here can show that the repeal fails each inquiry.

A. Inflicting Death is a Historical Punishment.

The Supreme Court has recognized since its inception inflicting the death penalty was the work of attainders and lesser punishments were enacted differently. "At common law, bills of attainder often imposed the death penalty; lesser punishments were imposed by bills of pains and penalties." *Selective Serv. Sys.*, 468 U.S. 852; *see also ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2010) ("The classic example [of attainder] is death."); L. Ostler, *Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32 Campbell L. Rev. 227, 250 (2010) ("A legislative bill calling for a loss of liberty or property, but not the life of the named person, was known as a bill of pains and penalties. If the person's life was called for, then it was a true bill of attainder.").

Courts have also repeatedly recognized that stripping a defined group's legal process rights by legislation constitutes a Bill of Attainder. In *Putty v. United States*, 220 F.2d 473, 478-79 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955), the legislature attempted to enact and apply retroactively legislation prohibiting reversals of conviction on the ground that informations rather than indictments were used in charging. The defendant had been charged (improperly) by information, and while the case was on appeal, Congress enacted legislation that provided that no conviction in Guam could be reversed simply because the defendant was charged by information. The federal court concluded that the legislative "amendment's attempt to deny [defendants] any right to attack the judgment against them is a bill of attainder." 220 F.2d at 478. By trying to retroactively strip a valid defense from pending appellate cases, the legislation ran afoul of the constitution.

In *Pierce v. Carskadon*, 83 U.S. (16 Wall) 234, 238-39 (1872), the Supreme Court found a Bill of Attainder violation where the trial court attempted to apply new legislation that

dramatically changed the defense. The plaintiff had sued for trespass and won a money judgment. Under the law at the time of the trial, the defendant had a right to reopen the case by attacking a lack of service within one year of judgment. After plaintiff secured his judgment, and before the defendant's one-year window closed, the legislature enacted a new statute changing the rules governing a defendant's ability to reopen the case.

Other courts have continued to cite *Pierce* for the proposition that the "denial of access to the courts, or prohibiting a party from bringing an action" constitutes punishment by a Bill of Attainder. *Rhode Island Depositors Econ. Prot. Corp. v. Brown*, 659 A.2d 95, 104 (R.I. 1995) (citing *Pierce v. Carskadon*, 83 U.S. (16 Wall) 234 (1872), and *Cummings v. Missouri*, 71 U.S. (4 Wall) 277 (1866)); *see also Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 716 (D.R.I. 1994), *aff'd*, 45 F.3d 530 (1st Cir. 1995) (same).

In *Neelley*, the case where the Alabama legislature attempted to enact a law that would interfere with a former death row inmate's ability to seek parole, the federal court recognized that depriving an inmate of the right to seek alternative sentencing (even if not guaranteed) is punishment:

> But here, Plaintiff's guilt had been properly adjudicated; only her punishment concerned the Legislature. The court is unaware of any judicial process that may have existed to do properly what the Legislature allegedly intended to do — i.e., revoke the legal possibility of Plaintiff's eligibility for parole consideration. Yet the oddness of the nature of the Legislature's action does not negate the fact that Plaintiff has pleaded facts supporting her claim that she was arbitrarily deprived of her right to seek parole consideration in 2014 without any opportunity to contest the deprivation.

Neelley, 67 F.Supp.3d at 1330.

Subjecting a defendant to the penalty of death, and removing access to the courts, thus both fall within the historical meaning of legislative punishment. Any doubt is removed,

however, as shown below because the legislative record "evinces an intent to punish" and the statute cannot be said to further nonpunitive legislative purposes.

B. The statute, considering the type and severity of burdens imposed, does not reasonably further nonpunitive legislative purposes.

Defendant cannot anticipate whether or how the State will attempt to claim that the purpose of the repeal provision targeting the four capital defendants who had prevailed at a hearing furthered non-punitive legislative purposes. As shown below, the legislative history is clear that the RJA repeal had two predominant goals: ensure Defendant's execution, and that no record be made of the role that race played in the process of his death sentence. Should the State offer a non-punitive purpose for the provision of the RJA repeal targeting him, Defendant will respond to the specific claim at the next opportunity.

C. The legislative record shows an intent to punish.

The classic sources for considering whether the record shows an intent to punish include "legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation." *Eagleman v. Diocese of Rapid City*, 862 N.W.2d 839 (S.D. 2015) (quoting *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 478 (1977)).

We begin with the plain language of the statute, which evinces both that the North Carolina General Assembly targeted Defendant and the other three defendants who prevailed on their RJA claims, and that it intended to inflict punishment on the defendants by guaranteeing their execution. Indeed, the very language used in the RJA repeal legislation -- declaring that all RJA motions filed before the effective date of the repeal "are void" -- confirms that the legislation was enacted to supplant the judicial determination leading to lesser punishment. N.C. Sess. Laws 2013-154, sec. 5.(d).

The language of the statute is merely the tip of the iceberg. Defendant at an evidentiary hearing will provide plenary evidence of what was below the waterline an attempt to prevent Defendant's RJA proceedings to ensure his death and to ensure that no official record be made of the role that race played in his death sentence. This Court has before it discovery requests, critical to Defendant's ability to establish the General Assembly's intent. The record is not yet complete.

Prosecutors and legislators began the repeal campaign in earnest shortly after Marcus Robinson's evidentiary hearing was ordered in the spring of 2011. The hearing was originally set for September 6, 2011. On June 1, 2011, a Senate committee substituted "An Act to Reform the Racial Justice Act of 2009 To Be Consistent with the United States Supreme Court's Ruling in *McCleskey v. Kemp*" for the existing text in Senate Bill 9, which had previously been a bill about synthetic marijuana. S.B. 9 (N.C. 2011). This first version of the bill explicitly repealed all of the hearing and proof provisions of the RJA and, in its place, stated that a defendant could prove discrimination by showing purposeful discrimination in his or her case, the existing standard under the United States Supreme Court's much-maligned decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

In June, shortly after the repeal bill was introduced, David Hall, on the Conference of District Attorney's Executive Committee, an assistant district attorney in Forsyth County, and one of the leaders of the State's RJA litigation strategy, wrote to the State's retained statistical experts, Stan Young and Joseph Katz, and instructed them the "pace had slowed markedly [as] a direct result of the legislation now pending in Raleigh." *Email from David Hall to Joseph Katz and Stan Young, et al* (June 8, 2011, 11:30 A.M.). Hall promised to let them know the status of the case work by August.

After the conference slowed the pace of work for their experts, Cumberland County prosecutors moved in the Cumberland litigation to continue the evidentiary hearing set for September 6, 2011, asking for more time to prepare. Meanwhile, the Conference and prosecutors continued to work on repeal efforts in hopes that there would never be a hearing for Defendant Robinson. On July 29, 2011, Peg Dorer, the Director of the Conference of District Attorneys, sent a proposed letter for all District Attorneys to use to lobby their legislators. *E-mail from Peg Dorer to Frank Garry and Susan Doyle* (July 29, 2011, 9:10 A.M.). Dorer said that if the legislature did not repeal the RJA in September, "it will be too late" because of the RJA hearing set in October or November in Cumberland County. She expressed her advice that "all the D.A.s [] write and call their Republican Senators and strongly urge them to take this up in September." *Id*. On the same day, Dorer wrote individually to every elected District Attorney, urging them to contact their senators, saying the "RJA issue has become a time sensitive issue." *See, e.g., E-mails from Peg Dorer to Clark Everett* (July 29, 2011, 2:55 P.M.); *Scott Thomas* (2:56 P.M.); *Benjamin David* (2:57 P.M.); *Ernest Lee* (2:58 P.M.); *C.B. Vickery* (2:58 P.M.); *Wallace Bradsher* (2:59 P.M.); *Vernon Stewart* (3:00 P.M.) *Garland Yates* (3:06 P.M.); *Pat Robinson* (3:08 P.M.); *Sarah Kirkman* (3:14 P.M.). In each, she warned, "As we have a hearing that has been fast-tracked in Cumberland for September/November, in front of a judge who may be favorable to the defense, we must get the legislature to take this up during their September session or it won't matter." *Id.* Following this outreach, Dorer requested a meeting with Senator Philip Berger, President of the North Carolina Senate, to discuss repealing the Racial Justice Act on September 13, 2011. *E-mail from Peg Dorer to Phil Berger* (September 13, 2011, 8:55 A.M.).

In response to the request by the Cumberland County District Attorney's office for more time to prepare its case, and without knowing that the District Attorneys had "slowed" the pace of work for their statistical experts, Judge Weeks granted the prosecution's request to continue the evidentiary hearing in Robinson's case to November 14, 2011.

On October 27, 2011, Dorer wrote to Grant Brooks in Senator Berger's office, asking for another meeting. *Email from Peg Dorer to Grant Brooks* (October 27, 2011, 10:41 A.M.). Dorer explained that the "[w]ith the pending motions for the Racial Justice Act coming up quickly, and considering the judge that will hear this motion (in Cumberland County on November 14th), the District Attorneys are becoming increasing concerned that there will be a judicial finding of statistics exhibiting racial bias in the use of the death penalty statewide." *Id.* A group of District Attorneys also planned to meet with the Governor. *Id.*

Meanwhile, the Cumberland County prosecutors moved to recuse Senior Resident Superior Court Judge Gregory A. Weeks, an African-American judge, from hearing the case. Prosecutors and staff from the Conference of District Attorneys followed the recusal motion closely. On November 2, 2011, Peg Dorer wrote to all of the elected district attorneys and many others to share the RJA update from Cumberland County District Attorney William R. (Billy) West. *E-mail from Peg Dorer to Andrew Murray, et al.* (Nov. 2, 2011, 3:20 P.M.) Dorer explained that the prosecution had asked Judge Weeks to recuse himself, and reported that Judge Weeks indicated that, if he is a necessary witness, he would appoint Judge Orlando Hudson from Durham to hear the motion. *Id.* Judge Hudson is also African-American. Many prosecutors responded, including Tom Anglim, a senior assistant district attorney from Martin County, who asked whether anyone was concerned about Hudson. In response to Anglim's question, Dorer

wrote, "I sent that message out to get everyone's attention. Hudson would be a circus." *E-mail from Peg Dorer to Thomas Anglim* (Nov. 2, 2011, 3:28 P.M.).

David Hall, an assistant district attorney from Forsyth County, suggested there may be a judicial standards complaint if Judge Weeks appointed Judge Hudson. *E-mail from David Hall to Peg Dorer* (Nov. 3, 2011, 9:20 A.M.). He later suggested that they talk with senior deputy attorney general William Hart, Sr. about abuse of appointment power if Judge Weeks appointed Judge Hudson. *E-mail from David Hall to Peg Dorer* (Nov. 3, 2011, 4:05 P.M.). Peg Dorer explained to a large group of prosecutors by email on November 3, 2011 that Judge Weeks had appointment power under the MAR statutes. She opined that "apparently Judge Hudson was a little too obvious, so now there is talk that Quentin Sumner may be the judge." *E-mail from Peg Dorer to Colon Willoughby et al* (Nov. 3, 2011, 9:03 A.M.). Seth Edwards, the former President of the Conference of District Attorneys, shared his view with District Attorney West and Peg Dorer that he had great respect for Judge Sumner, and that "[i]f I had to pick an African American to hear an RJA motion, he would be the one." *E-mail from Seth Edwards to William R. West and Peg Dore*r (Nov. 3, 2011, 10:10 A.M.) The recusal issue had in fact been referred to Judge Quentin Sumner. Judge Sumner denied the recusal motion, and the case reverted to Judge Weeks.

Peg Dorer and Richard Shaffer, District Attorney for Lincoln and Cleveland Counties, exchanged emails over November 2, 2011 and November 3, 2011 that discussed the legislative timing and lobbying efforts. Shaffer explained he had warned Representative Tim Moore that if the "cases go forward and we lose[,] the issue may be moot and they will be the ones with egg on their faces." *E-mail from Richard Shaffer to Peg Dorer* (Nov. 2, 2011 4:58 P.M.). Dorer responded that she and other district attorneys, including District Attorney West, had met with

the Governor and Senator Berger. *E-mail from Peg Dorer to Richard Shaffer* (Nov. 3, 2011, 10:39 A.M.). Senator Berger told them that the Senate planned to wait for approval of redistricting and that they would not take up the repeal bill until the end of November. *Id.* Senator Berger's staff asked for the District Attorneys to sign a joint resolution.

With that knowledge that the repeal bill would not be passed before the end of November, West's office again sought a continuance of the November 14, 2011 hearing date. Judge Weeks continued the hearing from November 14, 2011 to January 30, 2012.

On November 14, 2011, the very day the hearing had been set to start, District Attorney Susan Doyle sent a letter to Senator Berger and asked the legislature to "amend RJA as soon as possible." *Letter from Susan I. Doyle to Sen. Berger* (Nov. 14, 2011).

Senate Bill 9, introduced in January 2011 as a substitute for the existing text in Senate Bill 9 about synthetic marijuana, was titled, "An Act to Reform the Racial Justice Act of 2009 To Be Consistent with the United States Supreme Court's Ruling in *McCleskey v. Kemp*." S.B. 9 (N.C. 2011). The new bill explicitly repealed all of the hearing and proof provisions of the RJA and, in its place, stated that a defendant could prove discrimination by showing purposeful discrimination in his or her case, the existing standard under the United States Supreme Court's much-maligned decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

Senate Bill 9 also contained a retroactivity provision. That provision was one of general applicability to all past and future claims, and read, "This act is effective when it becomes law and applies to all capital trials held prior to, on, or after the effective date of this act and to all capital defendants sentenced to the death penalty prior to, on, or after the effective date of this act." S.B. 9 (N.C. 2011).

Dorer issued a media advisory to newspapers and legislators about the cases. She attached summaries of the RJA cases, including summaries of Defendant's case, as well as those of the other three defendants. She attached the Conference's "Resolution of the Racial Justice Act" in which the Conference "support[ed] the amendment of the Racial Justice Act" to limit claims of racial injustice to the specific case before the court, as suggested by Senator Berger and his staff. This resolution was signed by all but one elected District Attorney, District Attorney West. *E-mail from Peg Dorer to News Media with attached Resolution on the Racial Justice Act* (Nov. 15, 2011, 4:28 P.M.). The following day, on November 16, 2011, the Conference held a press conference in Raleigh calling for repeal of the RJA.

Less than two weeks later, on November 28, 2011, the North Carolina Senate and House voted to repeal the RJA, ratifying Senate Bill 9. On December 14, 2011, Governor Beverly Perdue vetoed the bill. S.B. 9 (vetoed Dec. 14, 2011).

Legislators did not override the veto, and on January 30, 2012, Judge Weeks began the evidentiary hearing in Marcus Robinson's case. At the same time that the hearing was unfolding, legislators were debating changes to the RJA in the House Select Committee on Racial Discrimination in Capital Cases. *House committee clashes over Racial Justice Act*, NBC-17/WNCN, Feb. 10, 2012 (reporting on the legislative committee hearing and noting that the "first evidentiary hearing under the law continued Friday in Fayetteville involving convicted killer Marcus Robinson"). District attorneys and relatives of murder victims gave presentations to the committee, following similar presentations from the winter and fall in support of S.B. 9. *Id*. It was evident that the House Committee was paying close attention to the developments at the *Robinson* hearing. For example, Rep. Stevens "requested the audio recording from the arguments being made in Cumberland County because they are important." *House Select*

Committee on Racial Discrimination in Capital Cases, Minutes (Feb. 10, 2012), at 4. The House Select Committee met again on March 27, 2012, and the bulk of the discussion concerned the *Robinson* case. *See House Select Committee on Racial Discrimination in Capital Cases*, Minutes (March 27, 2012).

On April 20, 2012, Judge Weeks entered the order in Marcus Robinson's case finding pervasive, systemic discrimination against African American jurors in jury selection over a twenty-year period, including at the time of Robinson's trial, vacating Robinson's death sentence and resentencing him to life without parole.

Senator Berger reacted quickly to Robinson's removal from death row, noting his "deep concern" that he could become eligible for parole, and calling on the State to appeal the decision. Senator Berger also used the *Robinson* decision to call for a revision of the RJA, describing it as an "an ill-conceived law that has very little to do with race and absolutely nothing to do with justice." *See* Sommer Brokaw, *First Racial Justice ruling finds racial discrimination*, The Charlotte Post, Apr. 26, 2012.

On June 5, 2012, Gretchen M. Engel of the Center for Death Penalty Litigation, sent Judge Weeks a letter on behalf of Defendants Augustine, Golphin and Walters, requesting an evidentiary hearing pursuant to N.C. Gen. Stat. § 15A-2012(a)(2).

Also on June 5, 2012, the House Judiciary Subcommittee substituted a new version of the RJA into S.B. 416 (herein the "Amended RJA"). This new bill amended, rather than repealed, the RJA. It required defendants to prove discrimination in their own cases, but still permitted a defendant to use county-wide statistical evidence as part of his or her proof. On June 6, 2012, the House Judiciary Subcommittee approved the new bill. During that subcommittee meeting, Rep. Paul Stam, the House Majority Leader, passed out a copy of Engel's June 5, 2012 letter to

Judge Weeks concerning the ongoing litigation in the cases of Defendants Augustine, Golphin and Walters.

The *New & Observer* reported on the connection between the House's action, and the cases of Defendant Augustine, Golphin and Walters:

> Earlier this month, the Center for Death Penalty Litigation said three clients it represents in Cumberland County cases were also entitled to reduced sentences because of Weeks' ruling.
>
> Stam circulated a letter the Center wrote to Weeks stating that position, saying it was an example of how the Racial Justice Act undermines the basic concept of considering each case on its merits. Gretchen Engel, the lawyer who wrote the letter, said later Wednesday that it made legal sense and saved taxpayers' money because the cases were all in the same county.
>
> The proposed legislation would prevent that.

Craig Jarvis, *House committee approves more restricted Racial Justice Act,* News & Observer, June 6, 2012.

Prosecutors lobbying on behalf of the amended act were clear that they wanted a new law because they disliked the findings of statewide discrimination from the *Robinson* decision:

> "Prosecutors hate the thought that a statistical study blending results from across the state taints them with having racial motivations," said Peg Dorer, executive director of the of the North Carolina Conference of District Attorneys.
>
> "The fact that Judge Weeks found that all prosecutors have intentionally used racial bias is repugnant," she said. "District attorneys have expressed a lot of concern, for instance that the Wake County DA is being compared to statistics from the western part of the state and being held accountable."

NC GOP seeks sharp limits to racial justice law, WRAL, June 6, 2012.

The Conference of District Attorneys, through Dorer, kept legislators apprised of the ongoing litigation on behalf of Defendants Augustine, Golphin and Walters. On June 11, 2012, Dorer emailed Majority Leader Stam, forwarding the email correspondence from the prosecution

regarding the scheduling of the *Augustine*, *Golphin*, and *Walters* cases in Cumberland County. *E-mail from Peg Dorer to Rep. Stam* (June 11, 2012, 6:58:55 P.M.).

In the House floor debates, legislators referenced explicitly the *Robinson* case. *See* House Floor Debate, *SB 416 - Amend Death Penalty Procedures*, Second & Third Reading (June 12-13, 2012). In explaining the import of the bill, Rep. Richard Glazier stated, "There is an exception carved out in this bill for the Robinson case. So, Robinson, if this order gets upheld, gets relief [not] every other defendant." House Floor Debate, *SB 416 – Amend Death Penalty Procedure*, Second and Third Reading, June 12-13, 2012, at 11. He later added, "[I]f you look at section 8 of the bill, section 8 of this bill says that this act does not apply to any motion that is pending that was heard and findings were made. That's the Robinson case." House Floor Debate, *SB 416 – Amend Death Penalty Procedure*, Second and Third Reading, June 12-13, 2012, at 27; *see also* at 10. At the floor debates the next day, on June 13, 2012, there was additional discussion of the four cases, with a particular focus on the cases of Defendants Augustine, Golphin, and Walters. Rep. Stam discussed the June 5, 2012 letter from the Center for Death Penalty Litigation to Judge Weeks concerning a hearing for those three Defendants. House Floor Debate, *SB 416 – Amend Death Penalty Procedures*, Third Reading, June 13, 2012, at 2; *see also* at 3. *See also Judiciary B Committee Meeting: Amending the Racial Justice Act*, June 11, 2012, at 6 (Rep. Glazier noted, "[I]n section 8, it essentially says this: the *Robinson* case, since it's been tried and had findings of fact is excluded from the new bill. That's great for Mr. Robinson."). On June 21, 2012, the legislature ratified Session Law 2012-136, the Amended RJA.

The Governor vetoed the law on June 29, 2012, but, on July 2, 2012, the legislature overrode the veto and enacted the Amended RJA.

Media articles about the amended RJA show that the legislators were motivated by their anger with the *Robinson* decision. The *Fayetteville Observer* reported:

> Murderer Marcus Reymond Robinson of Fayetteville, a black man, this year used statistics alleging racism in how prosecutors selected his jury to persuade Judge Weeks to take him off death row. The Robinson decision outraged state lawmakers, who had been trying since last year to overturn the Racial Justice Act but were stymied by a veto from the governor.
>
> The legislature tried again this year with another bill that was vetoed, but lawmakers overrode the veto on Monday afternoon.

Paul Woolverton, *Racial Justice Act: Four killers get a hearing on claims of racial bias*, Fayetteville Observer, July 6, 2012; *see also* Paul Woolverton, *Tilmon Golphin, who murdered two lawmen, is trying to get his death sentence overturned*, Fayetteville Observer, July 6, 2012 ("After the *Robinson* ruling, upset lawmakers on Monday scaled back the means by which a death-row prisoner can advance a Racial Justice Act claim.").

House Majority Leader Paul Stam was clear he expected the law to allow executions to move forward. The *Courier-Tribute* reported:

> "With today's override of the governor's veto, the end of the moratorium is in sight," House Majority Leader Paul Stam, R-Wake, the bill's chief proponent in the chamber, said in a statement. "The basic principle of justice is restored: individual responsibility."

Gary D. Robertson, *NC Legislature overrides death penalty veto*, The Courier-Tribute, July 3, 2012. WRAL similarly reported that proponents of the legislation called for the amendments to avoid litigation in the many cases that had already been filed. *NC judge sets Racial Justice Act appeals for October*, WRAL, July 7, 2012.

On July 26, 2012, Stam sent senior deputy attorney general Hart an email attaching transcripts of the legislative history of SB 416, saying that he hoped the transcripts would support an interpretation in the cases in litigation that the new Amended RJA was a total repeal

of the RJA. *E-mail from Rep. Stam to William Hart* (July 26, 2012, 7:41 P.M.). This email was then forwarded from Hart to Dorer and to the prosecutors in Cumberland County who were handling the cases of Defendants Augustine, Golphin and Walters. *E-mail from Hart to Danielle Marquis, Dorer, Rob Thompson, Jonathan Perry, Jim O'Neill* (July 27, 2012, 9:12:29 A.M.).

Cumberland County prosecutors filed motions to dismiss the RJA claims in the *Augustine*, *Golphin* and *Walters* cases on or about August 30, 2012, arguing that the original RJA no longer applied to their cases and that they were not entitled to relief under the Amended RJA.

On October 1, 2012, Defendant's RJA evidentiary hearing began in Cumberland County. After the hearings concluded, but before a decision was issued in the case, Jim Davis, the brother-in-law of one of the victims in the *Golphin* case, Ed Lowry, published an op-ed in multiple outlets criticizing the hearings in all four cases and calling for repeal:

> Speaking as a taxpayer, I am outraged by the millions of dollars that have been wasted on three trials, two pre-hearings, and two hearings.
>
> I will give the Republicans credit for attempting to add teeth to the original act. But it should be repealed. It's very hard to add enough perfume to a carcass that has been rotting for three years.
>
> My family and I have waited over 15 years for justice. Some say patience will be rewarded. You may count me as a non-believer.
>
> I am proud to have called N.C. Highway Patrol Trooper Ed Lowry a neighbor, friend and brother-in-law.

Op-Ed: Jim Davis, *Anti-death penalty activism behind Racial Justice Act*, Fayetteville Observer, Nov. 7, 2012.

On December 13, 2012, the Cumberland County Superior Court found that Defendants Augustine, Golphin and Walters had each demonstrated that race was significant factor in their cases at the time of their respective trials. Cumberland County prosecutors, along with the

Conference of District Attorneys, responded by increasing their lobbying for total repeal of the RJA. In January of 2013, Dorer and her staff exchanged emails with Cumberland County assistant district attorney Rob Thompson to obtain photographs of Defendant Robinson and the crime scene photographs of the victim. *E-mails from Thompson to Kimberly Overton and Kimberly Overton to Dorer* (Jan. 18, 22, 23, 2013).

On March 6, 2013, Robert "Al" Lowry, the brother of Ed Lowry, sent an email to several, and indeed, likely all, of the legislators in the North Carolina General Assembly, asking them to repeal the RJA in its entirety and to bring "justice and closure" to him and his family. The email read:

> My name is Al Lowry, the brother of State Highway Patrol Ed Lowry. He was killed in the line of duty along with David Hathcock, a Cumberland County Sheriff Deputy on September 23, 1997. Both killers were sentenced to death but the US Supreme Court converted Kevin Golphin sentence to life without parole due to being 17 years old at the time of the murders. State of NC have determined that Tilmon Golphin, Christina Walters, Quintel Augustine and Marcus Robinson some of the most horrific criminals, sentences were ganged from the death penalty to life without parole due to the Racial Justice Act. The Racial Justice Act is a way to get rid of the death penalty. Out of the 158 inmates on death row, 151 have applied for this act. It's in my deepest plea to have the Racial Justice Act overturned to bring justice and closure to me and my family and all that have been affected.
>
> Just one other thought. Judge Weeks, has ruled in favor for these criminals and overturned the verdict of 4 trials, 48 jurors, 7 state level appeals court judges, 3 federal appeals court judges per case, and the 4 judges residing over each case. All verdicts were made and the appeal process took place with no wrong doings found.
>
> This needs to be addressed to the General Assembly to overrule this act in its entirety.

See, e.g., E-mail from Robert A. Lowry to Rep. Pricey Harrison (Mar. 6, 2013, 10:41 A.M.).

On March 13, 2013, Senator Thom Goolsby, Senate Judiciary Committee Chair, filed a bill to repeal the RJA entirely. "Goolsby announced the bill at a news conference attended by district attorneys from around the state, and relatives of murder victims." Craig Jarvis, *GOP bill would repeal Racial Justice Act once and for all*, News & Observer, Mar. 13, 2013. The *Fayetteville Observer* reported on the news conference, noting that family members from Defendant's case and the case of Defendant Augustine participated in the conference, and highlighting the link between the repeal effort and the four Cumberland County cases:

> The families of two Fayetteville-area murder victims stood in support of legislation filed Wednesday to repeal North Carolina's Racial Justice Act and end the state's unofficial moratorium on executions.
>
> The Racial Justice Act of 2009 and 2012 provides condemned inmates an opportunity to escape death row if they have evidence that racism was a factor in their prosecutions and convictions. It was a response to concerns of institutional racism in the criminal justice system.
>
> Goolsby filed the bill, S306, to clear away the legal issues that halted executions six years ago and to delete the Racial Justice Act, which four convicted murderers from Cumberland County homicides last year used to get off death row. They were the first inmates in the state to have their claims heard.
>
> One of these was Tilmon Golphin, who with his brother shot and killed Cumberland County Deputy David Hathcock and state Trooper Ed Lowry during a traffic stop on Interstate 95 near Fayetteville in 1997.
>
> "I've been waiting 15 years," said Al Lowry, Ed Lowry's brother. "He was shot eight times, along with David Hathcock - five gunshot wounds."
>
> Al Lowry said the Racial Justice Act is a tool that death penalty opponents are using to try to eliminate the death penalty in North Carolina.
>
> Roy and Olivia Turner, parents of Fayetteville Police Officer Roy Turner Jr., also attended the news conference. Quintel Augustine was sentenced to death for Officer Turner's 2001 murder. He, too, was removed from death row last year under the Racial Justice Act.
>
> The decision "opened it up for the crooks," said Roy Turner Sr., in an interview.

Paul Woolverton, *Families of Fayetteville-area murder victims support bill to repeal Racial Justice Act,* Fayetteville Observer, Mar. 14, 2013.

Senator Goolsby shortly thereafter ran an op-ed in multiple outlets calling for repeal of the RJA and complaining about the recent decision in Defendant Augustine's case. He specifically called for voiding all appeals under the RJA:

> The absurdity does not stop with this argument; it has gone much further. The murderer of Fayetteville Police Officer Roy Turner was recently granted relief under RJA and taken off death row. Again, there was no question that Officer Turner was murdered in cold blood. However, his killer got his sentence reduced by arguing that because he was black, he was unfairly targeted for a death sentence.
>
> Recent legislation was introduced in the North Carolina General Assembly, not only to rid our state of RJA, but also to void all appeals currently pending under the act. It is past time to get rid of this absurd law that turns murderers into victims while the real victims lie in their graves.
>
> *— Thom Goolsby is a state senator, practicing attorney and law professor. He is a chairman of the Senate Judiciary 1 and Justice and Public Safety Committees. He is also the sponsor of this legislation.*

Op-Ed, Thom Goolsby, *Time to kill the Racial Justice Act*, Bladen Journal, Mar. 21, 2103. This op-ed also ran in other newspapers. *See also* Sen. Goolsby, https://www.youtube.com/watch?v=HdSqzTp6k3U (published on Mar. 20, 2013, last visited Oct. 30, 2016) (Sen. Goolsby refers to case of Defendant Augustine and states, "Recent legislation was introduced in NCGA not only to rid our state of RJA but also to void all appeals currently pending under the act. It's past time to get rid of this absurd law that turns murderers into victims.").

On March 26, 2013, there was debate in the Senate Judiciary I Committee on S.B. 306, including Section 5. The cases of the four RJA defendants, including Defendant, were mentioned repeatedly during this debate. During the debate, Sen. Goolsby, when questioned by

Senator Earline Parmon as to why he felt it necessary to repeal the RJA when it has been proven that there is bias in the system, responded,

> We've had atrocious outcomes such as Officer Roy Turner whose family was here a couple of weeks ago -- was a Fayetteville Police Officer murdered in cold blood. His murderer of course saw his death penalty commuted to life in prison …. Of course, again an outcome one would not expect if this act were acting like one would hope. Roy Turner, of course, was a black man murdered by a black man. The murderer got off death row much to the consternation and ...I met his parents and talked with them. They expected justice in that case. They did not get the justice the State had promised them after a jury had made that solemn decision after numerous appeals, and they simply wanted justice. And I don't know how you explain to the black family of a murdered police officer why the person who murdered their son got off death row. If Racial Justice Act was actually what it purports to be I don't believe you would have outcomes like that….

Senate Judiciary I Debate, *SB 306 – Capital Punishment/Amendment*, Mar. 26, 2013, at 3. Later in the debate, Senator Goolsby linked S.B. 306 again to Defendant Augustine's case and also that of Defendant. In urging the Committee to pass the bill substitute, Sen. Goolsby noted,

> We have victims who continue to wait. And I also see the family of trooper Ed Lowry - I see his brother and his family in the audience. He's another law enforcement officer who was murdered in cold blood and his death penalty was commuted to...the death penalty of the murderer of Ed Lowry was commuted to life in prison. I know his family continues to suffer and does not have the closure they expected from our judicial system…. It does repeal completely RJA. It will prevent, not what's happened to the Lowry family, not what's happened to Ed Turner's [*sic*] family, but hopefully, Ms. Howell, it will prevent the death penalty from being taken off the person who murdered your beautiful daughter and who so violently assaulted your son who continues to suffer.

Senate Judiciary I Debate, *SB 306 – Capital Punishment/Amendment*, Mar. 26, 2013, at 11.

Legislators central to the push to repeal the RJA received emails from constituents asking for the repeal and highlighting the case of Defendant. On April 3, 2013, a constituent sent an email to Senator Berger that was copied to Robert Lowry, the brother of deceased trooper Ed Lowry, thanking Senator Berger "on behalf of myself and the Lowry family for trying to expedite the Senate Bill 306 that was voted yesterday to be addressed on the Senate floor." *E-*

mail from Anthony J. Crumpler to Sen. Phil Berger (Mar. 27, 2013, 10:52 A.M.). In the response to the constituent's email that was again copied to Robert Lowry, Senator Berger's Constituent Liaison stated, "Senator Berger's heart continues to go out to the Lowry family, and he strongly believes they deserve justice….Please be assured that I have passed along your comments to Senator Berger." *E-mail from Kolt Ulm to Anthony Crumpler* (April 3, 2013, 6:06:38 P.M.). Then, on April 6, 2013, another constituent emailed Senator Berger, copying it to Senators Wesley Meredith and Thom Tillis, asking Senator Berger to "consider reversing the ruling on the two men that shot and killed the Highway Patrolman and the Sheriff Deputy in Cumberland County. It was heartbreaking to hear that they had escaped the Death Penalty because of this law. Put them back on Death Row and start cleaning it out." *E-mail from Ken Lewis to Sen. Phil Berger* (Apr. 6, 2013, 3:28:26 P.M.).

Building to the vote, the prosecutors continued to use Defendant's case and those of the other three RJA defendants in their lobbying efforts. On May 29, 2013, in response to a request from Dorer, assistant district attorney Thompson provided the racial makeup of the juries in the four RJA cases. *E-mail from Thompson to Dorer* (May 29, 2013, 12:36:18 P.M.). Dorer then wrote to Majority Leader Stam on May 31, 2013 with the "information on the 4 cases that Judge Weeks removed from death row under the Racial Justice Act." She provided information on the race of the defendants and victims, jury composition, and the fact that the *Golphin* and *Augustine* cases involved law enforcement victims. *E-mail from Peg Dorer to Paul Stam* (May 31, 2013, 8:48:39 A.M.).

Dorer also emailed legislative staff for Senator Thom Goolsby and House staff about talking points for the repeal legislation. The email lists and identifies the four Cumberland County cases. *E-mail from Dorer to Joseph Kyzer and Weston Burleson* (June 4, 2013; 12:03:12

P.M.). Senator Goolsby's legislative assistant attached proposed talking points that discussed the fact that in Cumberland County "four murderers [were] removed from death row." *E-mail from Joseph Kyzer to Weston Burleson* (June 4, 2013, 11:38 A.M.).

The House floor debates reflected the language from the family members of one of the victims in the *Golphin* case asking for "swift justice" for the four cases. *House votes to roll back Racial Justice Act,* WRAL, June 4, 2013. On June 4, 2013, at the House Debate on the Second Reading of S.B. 306, there was discussion about the case of Defendant Walters, "[o]ne of the cases that Judge Weeks removed from death row." House Floor Debate, *SB 306 – Capital Punishment/Amendments*, Second Reading (June 4, 2013), at 18, 21-22. Later in the debate, Representative Nelson Dollar, right before the passage of the House Committee Substitute for S.B. 306, recounted, "And just recently down in Cumberland County the three people who have accessed this under, I believe all under Judge Weeks, two of them involved cop killers. We have three murdered law enforcement officers: a Deputy Sheriff, a Highway Patrol Trooper out there doing their job. What's justice for them? Is it statistics?" House Floor Debate, *SB 306 – Capital Punishment/Amendments*, Second Reading (June 4, 2013), at 27. The next day, on June 5, 2016, at the debate on the third reading of S.B. 306, there was again pointed and repeated discussion of the cases of the four RJA defendants. Majority Leader Stam, in response to concerns about claims that the bill would violate the Ex Post Facto and Equal Protection Clauses, stated, with respect to the concept of equal protection:

> Just because Judge Weeks … picks out four out of the queue of 154 therefore you have to apply to all 150 others that same law. Well, that would constitute Judge Weeks the lawgiver of North Carolina. If you want to apply equal protection to that claim, you would apply it the other way and get his four people back in the queue.

House Floor Debate, *SB 306 – Capital Punishment/Amendments*, Third Reading (June 5, 2013), at 4. On June 19, 2013, the General Assembly repealed the RJA, effective that date.[23]

The General Assembly's retroactive repeal of the RJA is an unconstitutional Bill of Attainder because, as was the case with the earliest Bills of Attainder, it imposed the death penalty on Defendant. Though not using his name, he was the easily-ascertainable member of a class of four people targeted by the bill. Those four are the only four people whose death sentences had been vacated before the effective date of the repeal.

Those who drafted our charter document in Philadelphia wanted this country to be free from adjudication of punishment by legislation instead of after due process in the courts. Here, the General Assembly, intending to ensure that Defendant was executed, stripped him of his access to courts and deprived him of the ability to have a court impose a sentence of life imprisonment without parole, in lieu of a death sentence, after making the showing required by the RJA. No societal good was served by the legislation's provision targeting the four defendants: instead, responding to pressure, the legislature succumbed to the loathsome attainder our Constitution thankfully bars.

[23] Following the passage of the RJA repeal legislation, Sen. Goolsby posted on Facebook a photo of Fayetteville Police Officer Roy Turner prior to his death, stating "This week Governor Pat McCrory signed legislation getting rid of RJA. However, it's too late for Roy Turner's family…. Four of them, including Roy's murderer, had their sentences reduced to life in prison before the GOP-controlled General Assembly could STOP the madness." Sen. Goolsby, Facebook (June 21, 2013) https://www.facebook.com/permalink.php?story_fbid=10151553249886553&id=120879346552&substory_index=0 (last visited Oct. 30, 2016). He later suggested in an op-ed that the "new legislation will start the dead men walking once again." Thom Goolsby, Death Penalty Redux- Past Time to Restart Executions, pittcountynow.com, August 12, 2013, *see* http://pittcountynow.com/post/4362/death-penalty-redux-past-time-to-restart-executions.html (last visited Nov. 7, 2016). Even now, three years after the repeal, legislators continue to focus on Defendant and Defendants Robinson, Augustine and Walters as the reason for the legislation. In a recent advertisement, Sen. Buck Newton, a candidate for Attorney General, touted in a campaign advertisement, "Buck Newton repealed [the Racial Justice Act] because it let cold-blooded murderers escape death row for unreleased statistical data – not the evidence of their crimes. It was an outrageous law (the only one of its kind in the country), and delayed the justice that victims and their families deserved." Buck Newton, http://www.bucknewton.com/justice (published on Oct. 19, 2016, last visited Oct. 30, 2016).

VII. Equal Protection and the Prohibition Against Cruel and Unusual Punishment under the State and Federal Constitutions Prohibit the Death Penalty in this Case.

Introduction

The State of North Carolina set forth on an unprecedented path when it passed the Racial Justice Act. Declaring that racial bias would not be tolerated in the decisions of who died and who lived under its criminal justice system, North Carolina instructed the parties in death penalty cases – defendants and prosecutors alike – to investigate whether race had played a role in those cases. What followed was a unique inquiry into the history of racial discrimination and the death penalty. Exhaustive statistical studies found systemic discrimination in how jurors were selected, which cases were declared capital, and which cases resulted in death verdicts. The forest-view pattern of racial basis was born out on close examination in each of the four cases that proceeded to hearing in Cumberland County.

The State of North Carolina now seeks to respond to the showing of pervasive racial discrimination in capital punishment by repealing its statutory prohibition on racial bias, returning Mr. Golphin to death row without a hearing, and moving forward with his execution as if the racial discrimination evidence were never uncovered. The constitutional prohibition against the infliction of cruel and unusual punishment bars such a result. U.S. Const. amends. VIII, XIV; N.C. Const., art. I, § 27. It "would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it . . . is imposed under a procedure that gives room for the play of [racial] prejudices." *Furman v. Georgia,* 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *see also Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (Equal Protection claims of selective prosecution based on race are subject to "ordinary equal protection standards"); John Blume & Lindsey S.

Vann, *Forty Years of Death: the Past, Present and Future of the Death Penalty in South Carolina (still arbitrary*), 11 Duke J. Const. L & Pub. Pol'y 183, 224 n. 247 (2016) (describing *Kelly v. State*, No. 99-CP-42-1174 (S.C. Sup. Ct., Oct. 6, 2003) where court granted post-conviction relief under *McCleskey* after prosecutor admitted he sought death because the "black community would be upset if we did not seek the death penalty because there were two black victims in this case").

The State cannot close its eyes in the face of painful proof of invidious racial discrimination and remain true to the state and federal constitutions.

A. Overwhelming evidence of racial bias

1. Discrimination in the Exercise of Peremptory Strikes

a. Evidence from the powerful statistical study.

As described earlier, social science researchers from the Michigan State University College of Law conducted an exhaustive, meticulous study of racial bias in capital jury selection in North Carolina across a twenty-year period (herein the "MSU study"). The lead researcher, Dr. Barbara O'Brien, testified at both the *Robinson* and *Augustine, Golphin and Walters* hearings about the study's methodology and its findings of systemic bias. The State acknowledged in its closing argument that Dr. O'Brien was an honest and credible witness. *Robinson* HTp. 2541 ("I mean no disrespect to Dr. O'Brien. She made a wonderful witness. She was very polite. She was very honest in her answers as they came back."); 2453 ("Again, all credit to Dr. O'Brien . . . She didn't hide. She wasn't bobbing and weaving these answers. She was giving them straight. She was straight when she got up on that witness stand."). Another expert, statistician Dr. George Woodworth, testified for the defense about the study's methodology and results.

No expert witness who testified for the State at either hearing concluded that race was not a significant factor in Cumberland County or in the State of North Carolina. All three experts,

including State expert Dr. Joseph Katz, agreed that the MSU study demonstrated large, statistically significant disparities, unlikely to be due to chance. *Robinson* HTpp. 1771, 1943-1947, 1949.[24] Dr. Katz further agreed with the other statistical experts that these results constituted a prima facie case of discrimination and required investigation. *Robinson* HTpp. 1801, 1943, 1951.

The *Robinson* case was remanded by the North Carolina Supreme Court because the trial judge failed to grant a third continuance request by the State. Nonetheless, the State produced no new expert or statistical critique of the MSU Study when the Study was used in the *Augustine, Golphin, and Walters* hearings in October, nine months later. To this day, the State has failed to disclose or produce any expert witness or analysis showing that race was not a significant factor in jury selection.

The MSU Study collected jury selection data from all 173 capital proceedings for the defendants of North Carolina's 2010 death row. The MSU researchers gathered race and strike data for all but seven of the 7,421 venire members. DE 6, p. 8. They relied upon original source materials such as juror questionnaires, voir dire transcripts, and clerks' charts. *Robinson* HTp. 122. If the race data was not available from these sources, they followed a rigorous protocol to match the jurors to identifying information in public records. DE6, pp. 6-8; *Robinson* HTp. 117. Prosecutors around the state reviewed the data for their districts, and found only a few discrepancies. In the cases where errors were found, the MSU researchers updated the database to reflect the corrections. The study was meticulously carried out, with great transparency and an extremely low error rate. *Robinson* HTpp. 131-32.

Analysis of the prosecutors' strike patterns of black venire members and all other venire members revealed large, statistically significant racial disparities. Statewide, across the full

[24] Katz testified that the statewide disparities were statistically significant. *Robinson* HTpp. 1944-45.

study period, prosecutors struck qualified[25] black venire members at slightly more than twice the rate they struck all other venire members. DE3, p. 22. In Cumberland County, prosecutors struck black venire members at 2.6 times the rate they struck all other venire members. *Robinson* HTp. 152, DE2, p. 41.

The researchers also examined the explanations offered by prosecutors in North Carolina for exercising strikes. For this analysis, the MSU investigators collected data for all of the Cumberland County cases and for a randomly selected 25% sample of the statewide pool. DE6, p. 5; *Robinson* HTpp. 120-21, 135, 164-65.

This portion of the MSU Study, referred during the RJA trials as "Part II" of the study, gathered extensive data relevant to analyzing strike decisions, including demographic information (e.g., gender, age, marital status, children, employment), prior legal experiences of the juror and his or her family members and close friends (e.g., prior jury service, experience as a defendant or victim, connections to attorneys and law enforcement), views on the death penalty, potential hardships, and any stated biases (collectively herein "descriptive variables"). *See* DE 6, p. 5; *Robinson* HTpp. 120-21.[26]

The MSU researchers collected information for more than 65 descriptive variables. *Robinson* HTpp. 185-87. They selected these variables after extensive research, including review of the North Court's published decisions, law review articles, treatises on jury selection, numerous North Carolina jury voir dire transcripts, and the protocol used in a similar study. *Robinson* HTpp. 121-33, 349-53; DE 6, p.2. The MSU researchers had solicited input from North Carolina prosecutors but did not receive any response. *Robinson* HTp. 422. Many

[25] Only venire members who were not excluded for cause and were either struck or passed by the state were included in the study.

[26] The researchers used a double coding approach to this portion of the study, whereby two attorney researchers independently coded each venire member. Any differences between the two independent coding forms were reconciled by Dr. O'Brien personally. DE6, p. 10; *Robinson* HTpp. 131-33, 170-71.

prosecutors later provided affidavits and statements with their purported bases for striking African-American jurors, and these explanations were highly consistent with the variables selected by MSU. SE32; *Robinson* HTp. 422.

This thorough dataset allowed the researchers to engage in what was essentially system-wide comparative juror analysis. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step"). They asked whether the racial disparities could be explained by other possible factors, for example, the jurors' death penalty views, criminal history, or marital status. *Robinson* HTpp. 177-82; DE3, p. 63. If the prosecution was truly striking a higher percentage of black jurors because of their criminal histories – and not their race – the researchers would expect prosecutors to strike white jurors with criminal histories at the same ratio that they strike black jurors with criminal histories. *Robinson* HTpp. 186-87; DE3, p. 66.

For every analytical approach the researchers tried, racial disparities remained. Prosecutors accepted only 10% of black jurors who expressed reservations about the death penalty, while they accepted 26% of all other jurors with reservations about the death penalty. DE3, p. 66. In Cumberland County, the disparity among jurors who expressed reservations about the death penalty was even greater: the State accepted only 5.9% of the black venire members, but accepted 26.3% of the other venire members. DE3, p. 67. To be sure, prosecutors struck jurors with death penalty reservations far more often than those jurors without. Even still, they found black jurors with death penalty reservations much less desirable than their white counterparts. This comparative analysis showed that the same explanations for white juror strikes do not hold for black juror strikes.

The researchers also used statistical models that allowed them to examine many factors at the same time to attempt to isolate the effect of race on the results. Those regression models, like the straight percentages, and comparative juror analyses by proffered prosecutor explanations, demonstrated a stubborn, indelible pattern of discrimination. Statewide, in counties both large and small, prosecutors struck black jurors at more than twice the rate that they struck all other similarly situated jurors. DE6. In other words, black prospective jurors who survived cause challenges and were fully qualified to serve were twice as likely as everyone else to be sent home without serving, regardless of their fitness to do so. The study was conclusive and unmistakable proof that black jurors experience widespread discrimination in jury selection in capital cases based on their race.

In every appropriately built model, race remained a powerful predictor of strike decisions. *Robinson* HTpp. 199, 203, 206-07, 209, 213-16, 527-28, 545-46; DE6, pp. 21-22, 66; DE10, p.7. Even after accounting for all of the other predictive explanations like death penalty reservations, a powerful relationship between race and prosecutor strike decisions persisted. *Robinson* HTpp. 199, 203, 207, 525-27, 545-46; DE6, p. 21-22; DE 10, p.7.

Examination of the strike patterns in the four individual cases of Defendants Golphin, Robinson, Augustine and Walters is revealing. In the RJA hearing of Defendants Golphin, Walters and Augustine, defendants introduced evidence of statistically significant disparities in each of the three cases. In Defendant's case, the State struck 71.4% of the black venire members and only 35.8% of the other eligible venire members. DE 120, pp. 29-30. The race strike ratio was 2.0. *Id*. Only one person of color served on Defendant's jury. DE 4; *GWA* HTp. 1482.

In *Walters*, the State struck 52.6% of the black venire members and only 14.8% of the other eligible venire members. DE 120, pp. 31-32. The State used 10 of its 14 peremptory strikes to remove black venire members. DE 120, p. 31. The strike ratio was 3.6. DE 120, p. 32. Walters' jury was comprised of six black jurors and six white jurors. DE 4.

In *Augustine*, the State struck 100% of the black venire members and only 27% of other eligible venire members. DE 120, pp. 33-34; Vol. II, pp. 336. The strike rate ratio was 3.7. *Id*. No African Americans served on Augustine's jury. DE 4; *GWA* HTpp. 336-37.

In Defendant Robinson's case, the State struck 50.0% of the black venire members (5 strikes out of 10 eligible black venire members) and only 14.4% of the other eligible venire members (4 strikes of all of the other 28 eligible venire members). DE4, Cumberland Data. The disparate strikes of the prosecutor resulted in a final jury with a lower number of black jurors than would have been expected had the strikes been exercised in a race-neutral manner. *Id.*

The sole prosecutor in Marcus Robinson's case, John Wyatt Dickson, participated in three capital cases in the MSU Study. In each of the three cases, the prosecution struck black venire members at significantly higher ratios than all other venire members (2.2, 3.5, and 4.4). DE3, p. 50.

Drs. O'Brien and Woodworth were also able to construct a regression model for Defendant Robinson's case and the other two capital cases prosecuted by Dickson. This model revealed that race was strongly correlated with strike decisions in the three cases prosecuted by Dickson even after accounting for all of the relevant other predictive explanations. *Robinson* HTpp. 214-16.

b. The historical and case evidence from Cumberland County regarding jury selection.

The statistical evidence did not stand alone.

Over the course of the two hearings, three Cumberland county prosecutors, Margaret "Buntie" Russ (Defendants Augustine, Golphin, and Walters), Cal Colyer (Defendants Golphin and Augustine), and John Dickson (Defendant Robinson) testified about the culture in the office and their own participation in capital cases. Their testimony, along with notes and transcripts

from individual cases files, confirm that race drove prosecutorial decision in jury selection in Cumberland County capital cases.

John Dickson, the prosecutor in Robinson's case, testified that there was racial discrimination in the criminal justice system, and that, on two or three occasions, he felt compelled to chastise other Cumberland County prosecutors after he observed that they had allowed race to influence their jury selection practices. *Robinson* HTpp. 1182-83. He testified that like others, he himself harbors unconscious bias and that he could not say that race was not a part of his jury selection. *Robinson* HTpp. 1177-82.

Russ, one of the prosecution team members in the Golphin, Augustine, and Walters cases, testified regarding her history with *Batson.* Russ, along with another capital prosecutor from Cumberland County, George Hicks III, attended a training for North Carolina prosecutors about how to defeat *Batson* challenges, entitled "Top Gun." *Robinson* HTpp. 864-65; DE 81A. They were provided a cheat sheet of ten pat "race neutral" explanations that prosecutors could provide in response to a *Batson* challenge. *Id*.; DE 111.

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress - attire may show lack of respect for the system, immaturity or rebelliousness

2. Physical Appearance - tattoos, hair style, disheveled appearance may mean resistance to authority.

3. Age - Young people may lack the experience to avoid being misled or confused by the defense.

4. Attitude - air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.

5. Body Language - arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.

6. Rehabilitated Jurors, or those who vacillated in answering D.A.'s questions.

7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.

8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.

9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."

10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

In at least one Cumberland County capital case, Russ appeared to read directly from the cheat sheet, citing the juror's "age, attitude and body language." *State v. Maurice Parker,* DE 147 at 444-45. She reported that the juror "folded his arms and sat back in the chair away and kept his arms folded," that he was "evasive." Defense counsel vigorously contested Russ's characterization of the juror's body language and demeanor. DE 147 at 454, 448. When pressed, Russ referred explicitly to the cheat sheet, saying that those "three categories for *Batson* justifications we would articulate is the age, the attitude of the defendant (sic) and the body

language." DE 147 at 447. She reiterated that age, body language and attitude "are *Batson* justifications, articulable reasons." *Id*. The trial judge did not have the benefit of knowing that Russ was reading from a pat list of explanations, but he nonetheless concluded that she had violated *Batson v. Kentucky* and impermissibly used race in jury selection. DE147 at 455.[27] The trial judge rejected the demeanor and body language explanations as pre-textual and noted that although Russ had responded that the juror's age was objectionable, she had passed a white juror with the "very same birthday" as the black struck juror. DE147 at 447.

Russ testified at the *Augustine, Golphin and Walters* RJA hearing. She insisted that she had done nothing wrong at the *Parker* trial when she moved to strike a juror based on race. *GWA* HTp. 1332 ("No, I don't think a ruling of the court on … *Batson* … is an indication that we are doing anything wrong."); 1302 ("The conduct was not unlawful."). Russ also insisted that she had not relied upon the *Batson* cheat sheet when responding to the defendant's *Batson* claim in *Parker*. Russ at first claimed that she had not attended the Top Gun training because she was in trial at the time of the training, but did concede that if she had reported attendance of the purpose of CLE credit, that meant she did in fact attend. *GWA* HTp. 1292.[28]

Russ testified that she was neither reprimanded nor provided any training by the Cumberland County prosecutor office after the *Batson v*iolation. *GWA* HTpp. 917, 1360. The

[27] Russ did describe much of the handout to the trial court in *Parker*, stating "Judge, I have the summaries here. I don't have the law with me. I hadn't anticipated this, of course for *articulable juror negatives*, and *body language, arms folded, leaning away from questioner are some of the things listed."* DE147 at 452 (emphasis added).

[28] Russ appeared to testify falsely at the *Augustine*, *Golphin* and *Walters* hearing regarding a collateral mater in the *Parker* case. Defense counsel wanted to question Russ about the meaning of a post-it note in her *Parker* trial notes, and the State objected. The trial court took the matter under advisement. The next morning, Russ testified that she understood that the trial court had ordered her sequestered, and that she had not talked about the note with anyone from the District Attorney's office. Russ's factual representations were in direct conflict with those from Assistant District Attorney Rob Thompson who had reported to the Court moments before the contents of his discussion earlier that same morning with Russ. He reported the surprising news that Russ intended to testify that the disparaging note referred not to the trial judge who had found the *Batson* violation, but instead to the defendant. Russ did in fact testify to that – a factual premise that was very hard to reconcile with the context of the note.

office did not monitor or otherwise respond to Batson violations within the office. Russ did not change her method of jury selection in any way after the Parker *Batson* finding. *GWA* HTp. 1336.

Russ's pattern of resisting adverse court findings continued at the hearing when she denied remembering any wrong doing in *State v. Bass,* 121 N.C. App. 306, 465 S.E.2d 334 (1996). The Court of Appeals found that her closing argument was "calculated to mislead or prejudice the jury," 121 N.C. App. at 313, 465 S.E.2d at 338, but Russ remembered the case only by the defendant's conduct. No one in her office disciplined her for the conduct. *GWA* HTp. 1266.

The third prosecutor to testify in the RJA hearings, Calvin W. Colyer, served as prosecutor in Cumberland County for almost 25 years. Colyer prosecuted dozens of capital cases, including *Augustine* and *Golphin*. Colyer testified as a witness in the *Golphin*/*Augustine/Walters* hearings, and made several remarks, including in closing argument, as counsel in the *Robinson* hearing.

In most of the capital cases Colyer prosecuted, he struck black jurors at a significantly higher rate than other jurors. Colyer believed that this pattern was unrelated to race, and instead tied only to the specific characteristics of each juror he accepted or struck. *GWA* HTpp. 795, 802, 814, 818, 821, 852, 855. Colyer testified that his approach to jury selection was consistent over the course of his career, from case to case, juror to juror. *GWA* HTpp. 811, 903-04, 924. Dickson also testified that he approached jury selection essentially the same way all the time, *Robinson,* HTpp. 1197-98, that there was "no difference" in his questioning of jurors, and that as a general rule he tried to approach jury selection "consistently case to case." *Robinson* HTp. 1203.

The jury selection practices of Colyer and Dickson in the *Burmeister* and *Wright* cases in 1997 belied this testimony.[29] *Burmeister* and *Wright* were white supremacist "skinhead" defendants accused of murdering black victims in racially-motivated murders. Colyer and Dickson took a unique approach to their jury selection. First, they filed a motion for a jury selection expert, arguing that in that context, the "people of the State of North Carolina are entitled to a fair and impartial jury free from racist attitudes and reactionary positions." DE125. Citing the "covert nature" of views on race, the motion sought assistance in "recognizing potentially damaging racial attitudes." *Id*. In a case in which they believed that racial attitudes could obstruct their litigation goals of convictions and death sentences – the prosecutors deemed it important to ferret out those beliefs. *GWA* HTpp. 930-31.

Colyer and Dickson's pattern of strikes in *Burmeister* and *Wright* are the inverse of their typical pattern in Cumberland County cases: instead of disproportionately striking black jurors, the prosecutors in *Burmeister* and *Wright* disproportionately struck a majority of white jurors. In *Burmeister*, they used nine of ten strikes to remove white jurors. DE127. They passed eight of nine black jurors, striking only a single black juror. *Id*. The disparities were even starker in *Wright*, where Colyer and Dickson used all ten strikes against white jurors. They did not strike a single black juror in *Wright*. When hoping to rely on outrage about racial prejudice against African Americans to secure a death verdict, the prosecutors pursued a radically different jury selection strategy, accepting black jurors nearly identical to those they routinely struck in other capital cases.

The strategy of the State in defending the *Robinson* hearing was further evidence of the Cumberland prosecutors' reliance on race in jury selection. Assistant District Attorney Rob

[29] At the time of Mr. Robinson's hearing, the *Burmeister* and *Wright* transcripts had not been produced by the State, although they had been requested in discovery.

Thompson suggested to state expert Dr. Katz that prosecutors were more likely to have struck black jurors because the history of discrimination against African Americans would make it more likely that African Americans would not trust law enforcement. *Robinson* HTpp. 871-72; DE 24. The State called Dr. Cronin, a social scientist to testify that as a group, African Americans are more opposed to the death penalty, more skeptical of law enforcement, and have been subjected to inequality more than other groups. *Robinson* HTpp. 2197-98. Bryan Stevenson, an expert for the defense, explained that these views are the kinds of group views that lead to discrimination against individuals. In other words, for tactical purposes, prosecutors may strike an individual African-American venire member because he or she believes that African-American venire members as a group are not as friendly to the police, or prosecution. *Robinson* HTp. 867.

This explanation, a tactical decision to pursue or strike black jurors based on group characteristics, explains the prosecutors' strikes in Defendant's case, and the *Burmeister* and *Wright* cases. While prosecutors generally struck jurors who expressed death penalty reservations, in the *Robinson*, *Golphin*, and *Augustine* cases, where the defendants were black, the prosecution still struck more black jurors with death penalty reservations compared to white jurors with death penalty reservations. In *Burmeister* and *Wright*, with white defendants and black victims, in contrast, Colyer and Dickson repeatedly accepted black jurors with strong death penalty reservations. DE132 (State passes juror who said it would be "hard" and "difficult" for her to vote for the death penalty); DE 133 (State passes juror who said because of her religious views "I don't believe in the death penalty"); DE 153 at 519, 523 (State passes juror "I really wouldn't like someone to be killed").

Colyer also made a series of racially charged notes about prospective jurors in the *Augustine* prosecution. The case had been transferred out of county on a change of venue, and Colyer met with members of the Brunswick County Sherriff's Department to discuss the jury summons list. He made a six page list entitled "Jury Strikes." DE 98-103; 183-85, 998. These notes were not turned over during the RJA discovery, and had gone missing from the State's own files.[30]

The notes referred to jurors in racially charged terms. Colyer described African-American potential juror Tawanda Dudley as "ok" and noted that she was a member of a "respectable black family." DE102. Colyer did not describe a single white juror as okay because he or she was from a "respectable white family." Of jurors with substantial criminal histories, Colyer's descriptions differed dramatically based on race. Jackie Hewett (black) was a "thug" compared to white juror Tony Lewis, who trafficked in marijuana in the early 80s, "a fine guy." Clifton Gore, a black juror was a "blk wino" while Ronald King, who had a DUI conviction, was a "country boy – ok." DE 99; *GWA* HTpp. 86-87; DE104.

In Defendant's case, Colyer questioned and ultimately struck an African-American prospective juror who had reported the misconduct of two white jurors who called for the lynching of the defendant. Colyer questioned that juror alone about his familiarity with Haile Selassie, the former emperor of Ethiopia and black musicians Bob Marley and Ziggy Marley. Colyer asked the juror about a traffic stop by asking him whether there was "anything about the way you were treated as a taxpayer, as a citizen, *as a young black male* operating a motor vehicle at the time you were stopped that in any way caused you to feel you were treated with less than

[30] They had been produced years earlier to Defendant Augustine's MAR counsel, who had bates stamped the file, and who ultimately gave them to Defendant Augustine's counsel at the RJA hearing. The documents immediately before and after the missing jury strikes list were given to RJA counsel by the State, but the handwritten notes were not disclosed.

the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?" DE 2, *GWA* HTpp. 2055, 2073 (emphasis added). Defense counsel raised a *Batson* violation, and the trial judge rejected two of the four responses given by Colyer as pretextual, but nonetheless upheld the strike. *Id*. at 2113, 2014-15.

The approach of the State to the appointment of an African-American judge, Judge Weeks, to hear the first claims under the Racial Justice Act in the state was further evidence of racial bias. The State coordinated its efforts to respond to the RJA hearings statewide through Peg Dorer at the Conference of District Attorneys and its executive committee, and Hart in the Attorney General's office. *See e.g., supra,* pages 60-78. Although the prosecutors purportedly objected to Judge Weeks because he had presided over a capital trial, the State had no objection to Judge Wood, a white judge hearing the Racial Justice Act cases in Forsyth County, though he too had presided over a capital trial. *See E-mail from David Hall to James O'Neil, et al.* (September 9, 2011, 3:29 P.M.) (referring to their statewide RJA litigation plans in front of Judge Wood and lamenting the hearings in front of Judge Weeks); *E-mail from David Hall to Joseph Katz and Stan Young* (June 8, 2011, 11:20 A.M.) (discussing litigation plans in front of Judge Wood); *State v. Murrell*, 362 N.C. 375 (2008) (Judge William Z. Wood, Jr. presided over Murrell's capital trial).

The true complaint of the State – an objection to having Robinson's RJA hearing heard by an African-American judge - is revealed in the emails among the conference of District Attorney's executive committee members. Seth Edwards, the former president of the conference, wrote that "[*i*]*f I had to pick an African American to hear an RJA motion,* [Judge Sumner] would be the one." *E-mail from Seth Edwards to William R. West and Peg Dore*r (Nov.

3, 2011, 10:10 A.M.) (emphasis added).[31] David Hall, the prosecutor who appeared in front of Judge Wood repeatedly on RJA matters, expressed his view that the referral of the RJA case by Judge Weeks to Judge Hudson could warrant a Judicial Standards complaint due to a perceived bias. *E-mail from David Hall to Peg Dorer, et al.* (Nov. 3, 2011, 9:20 A.M.). Dorer responded that with "assistance and guidance from Bill Hart, Billy West is mounting the offensive" to such an appointment. *E-mail from Peg Dorer to David L. Hall* (Nov. 3, 2011, 9:24 A.M.). Hall wrote again that the Attorney General's office should consider an abuse of appointment power theory if Judge Weeks selected Judge Hudson. *E-mail from David Hall to Peg Dorer et al.* (Nov. 3, 2011, 4:05 P.M.).

The State also consciously sought to put African American victims in the spotlight to undercut the claims filed by defendants regarding widespread race of the victim discrimination. On November 18, 2011, Peg Dorer wrote to elected District Attorney Garry Frank from Davidson and Davie Counties, and said that the Conference needed a DA to go on a public radio television interview "and take an African American victim family member with them." *E-mail from Peg Dorer to Garry Frank* (Nov. 18, 2011, 11:31 A.M.). She had earlier suggested that Wake County District Attorney Colon Willoughby take a specific victim family member, noting that she is African American, to see the Governor. *E-mail from Peg Dorer to Colon Willoughby* (June 16, 2011, 10:13 A.M.).

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[31] Edwards' comment is reminiscent of the statement of a prosecutor recently found by the United States Supreme Court to have violated *Batson*. *See Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (evidence that prosecutor anticipated "*having to pick* one of the black jurors" supports finding of intentional race discrimination) (emphasis in original).

c. New evidence about pretext

The RJA litigation also produced new evidence that the prosecution relied on race in the form of pre-textual explanations offered by the prosecution for its strikes of otherwise qualified black jurors from capital cases. Recognizing that the MSU study showed statistically significant disparities in strike patterns, Dr. Katz devised a *Batson* model response. *Robinson* HTpp. 1951-52. He asked prosecutors to provide race neutral explanations that he could use to analyze across cases – a kind of "super Batson" approach. Cumberland County prosecutors provided purportedly race neutral explanations for scores of strikes of black jurors in the cases of defendants currently on North Carolina's death row, many in cases where *Batson* objections had never been lodged. *Robinson* HTp. 1987. These responses were themselves powerful new evidence of pretext and racial discrimination. Defendants' Post Hearing Brief in Support of Proposed Findings regarding the State's Reasons for Striking African-American Venire Members, pp. 17-19, 24-25, 27-29, 50-55, 57-58, 69, 80-85, 95-98, 106-110, 120, 124-28.

2. Evidence about racial bias in charging and sentencing

Both of the victims in this case are white and Defendant is black. Cumberland County has sentenced 14 individuals to death since 1990, nine of whom are still on the row today.[32] *Id.* Of those 14 individuals, only two were white: Jeff Meyer and Philip Wilkinson. The clear majority – ten – were black, one was Latino, and one was Native American.

Although the majority (63%) of homicide victims in Cumberland County are African American, the majority of Cumberland's death sentences have come in cases with white victims. Of the 14 individuals sentenced to death since 1990, nine were in cases with white victims.

[32] One of those 14 defendants has had two trials since 1990.

The researchers from Michigan State, Catherine Grosso and Barbara O'Brien, also conducted a thorough examination of the role of race in capital charging and sentencing practices in Cumberland County between 1990 and 2009.[33] They considered death eligible capital murder cases in Cumberland and reviewed charging and sentencing outcomes.

Their study found a large disparity based on the race of the victim. Between 1990 and 2009, 8.0% of death eligible cases with at least one white victim resulted in death sentences, while only 2.3% of cases without a white victim resulted in death sentences. Death eligible cases with at least one white victim were 3.4 times more likely to result in a death sentence than those without white victims. In other words, in Cumberland County capital cases, white lives matter most.

These disparities existed in the decisions of juries to impose the death penalty as well. For example, in the decade of Defendant's trial (1990-2000), cases with white victims were far more likely to result in death:

	Cases reaching penalty phase (1990-2000)	Cases receiving death penalty (1990-2000)	Percentage receiving death
White victim cases	21	10	48%
Cases without white victims	9	2	22%
Total	30	12	40%

[33] The general study methodology is described in a published article by the researchers of the statewide investigation of charging and sentencing. *See* Barbara O'Brien, *et al*., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina*, 1990-2009, 94 N.C. L. Rev. 1997 (2016).

Race of defendant discrimination is also apparent in the county in the groups that juries typically are reluctant to sentence to death: women, juveniles, and non-triggerman. Christina Walters, a woman of color convicted of the murders of two white women, is one of only three women in the entire state on death row. When *Roper v. Simmons*, 543 U.S. 551 (2005), outlawed the use of the death penalty against juveniles under the age of eighteen, there were only four people in that category (all 17 year olds at the time of their crimes) on death row in North Carolina. Two of those four, one black and one Latino, were from Cumberland County. After their removal from death row, Defendant Robinson became the youngest person at the time of the offense sentenced to death in North Carolina. There are only four individuals on North Carolina's death row who did not themselves kill the victims in their cases. All four are persons of color: Charles Bond (Black), Robert Brewington (Native American), Marcus Robinson (Black), and Christina Walters (Native American). Marcus Robinson and Christina Walters are both from Cumberland County.

Mr. Robinson, according to Cumberland County Assistant District Attorney Rob Thompson, did not deserve the right to complain of racial bias in his case. Mr. Thompson compared Mr. Robinson to Mr. Burmeister in his closing argument – and noted that in his opinion, neither could complain about racial bias. *Robinson* HTpp. 2555-56.[34] But of course, the State did not treat these two cases similarly in their prosecution: they pursued directly opposing jury selection strategies. Nor were the outcomes the same. Mr. Burmeister is serving a life sentence, while the State seeks to execute Mr. Robinson.

[34] The evidence of a race motivation in Mr. Robinson's case was testimony that he wanted to "get a whitey," and that Mr. Robinson and his codefendant had robbed and killed a white teenager. The evidence of race motivation in Mr. Burmeister's case was extensive testimony about his neo-nazi skinhead group membership, his hatred of black people, his desire to earn the "spider web tattoo," by killing a black victim, and white supremacist literature and bomb-making manuals found in his trailer. The evidence at trial showed that he and his friend had randomly targeted two black residents and killed them for no other reason. *See generally Ex-GI at Fort Bragg is Convicted in Killing of 2 Blacks* New York Times (Feb. 28, 1997).

B. Neither the State nor the Federal Constitutions Permit Death Sentences Drawn from the Poisonous Well of Racial Discrimination.

1. The Eighth and Fourteenth Amendments Bars the Discriminatory Imposition of the Death Penalty

The racially discriminatory application of the death penalty violates the Eighth Amendment's prohibition of arbitrary and capricious punishment. *McCleskey v. Kemp*, 481 U.S. 279, 292-94 (1987) (exceptionally clear proof of purposeful discrimination required to show Eighth Amendment violation); *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (*Furman* recognized that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."); *see also Glossip v. Gross*, 135 S. Ct. 2726, 2760-64 (2015) (Breyer, J., dissenting) (concluding that research on the use of improper factors such as race in the application of the death penalty strongly suggests such application is arbitrary); *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (concluding capital punishment violates the Eighth Amendment, in part because of the persistent "risk of discriminatory application of the death penalty"); *Ring v. Arizona*, 536 U.S. 584, 613, 614-18 (2002) (Breyer, J., concurring) (jury sentencing is constitutionally necessary in capital cases, in part because of concerns that the death penalty is "potentially arbitrary" in light of evidence that "the race of the victim and socio-economic factors seem to matter").

Under the standards announced in *McCleskey*, in order to succeed on a claim of racial discrimination in the imposition of the death penalty, the defendant must establish a "constitutionally significant risk of racial bias" with "exceptionally clear proof," including a showing that the "decisionmakers in his case acted with discriminatory purpose." *McCleskey*,

481 U.S. at 314, 312, 292. The extensive evidence detailed above meets this admittedly high burden.

One of the shortcomings of the evidence that Warren McCleskey introduced was that the evidence of charging decisions was statewide, rather than at the county level. *See generally*, 482 U.S. 295-6, n.15. The *McCleskey* court recognized that statistics were useful in the context of jury discrimination claims, but concluded that the charging decisions were too complex to be meaningfully analyzed statewide, across multiple prosecutorial districts. *Id*. In this case, Defendant relies on the charging evidence from his own county, Cumberland County.

Equally important, unlike Warren McCleskey, Defendant has pointed to evidence specific to his own case, including the deeds and acts of the prosecution in jury selection and during his capital trial, which supports an inference of racial considerations in his sentencing. *Compare, McCleskey*, 481 U.S. at 292-93 ("He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.").[35] The evidence from Mr. Golphin's own case, combined with the evidence of the Cumberland County District Attorney's Office's discriminatory strike pattern, shows that imposing a death sentence on Mr. Golphin would violate the Eighth Amendment and Equal Protection.

C. The Evolving Standards of Decency Prohibit the Imposition of the Death Penalty under a System that Creates a Substantial Risk of Arbitrary and Discriminatory Punishment

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. The "standard of extreme cruelty" remains

[35] There are other differences as well. Unlike in *McCleskey*, the State here had an opportunity to conducts its own rebuttal to the MSU studies. *Compare McCleskey*, 481 U.S. at 296 ("Here, the State has no practical opportunity to rebut the Baldus study.").

stable over time in that "it necessarily embodies a moral judgment;" yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)). Therefore, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *see also Kennedy*, 554 U.S. at 419.

Today's society is no longer tolerant of death sentences that were imposed under sentencing procedures that "create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *McCleskey*, 481 U.S. at 322, 107 S. Ct. 1756 (Brennan, J., dissenting, joined by Blackmun, J., Marshall, J and Stevens, J). Public support for the death penalty is at its lowest point in over 40 years; only 49% of Americans support the death penalty for those convicted of murder. Baxter Oliphant, *Support for death penalty lowest in more than four decades*, Pew Research Center (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ (last visited Nov. 10, 2016). Polling in North Carolina in 2012 about sentence commutations showed that the majority of all voters (55%) support commutations of death sentences in cases tainted by racial bias. *See* Public Policy Polling, *North Carolina Survey Results* (Sept. 27-30, 2012). This Court should hold that a death sentence imposed under such a system violates the Eighth Amendment and overrule *McCleskey*'s majority holding to the contrary.

D. The state constitutional prohibition against "cruel or unusual punishment" and guarantee of equal protection and freedom from discrimination bar more than only intentional discrimination.

This court should follow the path of other state courts that have refused to follow *McCleskey* when interpreting the cruel and unusual punishment provision of their state

constitution. *See, e.g.*, *State v. Loftin*, 724 A.2d 129, 151 (N.J. 1999) (rejecting *McCleskey* under the New Jersey constitution); *Claims of Racial Disparity v. Commissioner of Corr.*, No. CV054000632S, 2008 WL 713763, at *6 (Conn. Super. Ct. Feb. 27, 2008) (holding that petitioner "may seek to demonstrate that the imposition of the death penalty in Connecticut violates the Constitution of the state of Connecticut, even though such a statistical attack might be unavailing on the federal arena [under *McCleskey*]"); *State v. Santiago*, 318 Conn. 1, 161, 122 A.3d 1, 96 (2015) ("We have serious, indeed, grave doubts, however whether a capital punishment system so tainted by racial and ethnic bias [as in *McCleskey*] could ever pass muster under our state constitution."); *see also District Attorney v. Watson*, 381 Mass. 648, 665, 411 N.E.2d 1274, 1283 (Mass. 1980) (holding, before *McCleskey*, that the discriminatory application of the death penalty violates the Massachusetts constitutional prohibition against "cruel" punishments and may violate the state constitutional guarantee of equal protection).

McCleskey has been roundly condemned as the "low point" in the quest for equality, comparable to *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1073 (Cal. 2000); *see also* Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 Colum. Hum. Rts. L. Rev. 34, 47 (2007) (describing *McCleskey* as "a decision for which our children's children will reproach our generation and abhor the legal legacy we leave them"); Hugh Dedau, *Someday McCleskey Will Be Death Penalty's Dred Scott*, Los Angeles Times (May 1, 1987); *Santiago*, 318 Conn. at 165 (Norcott and McDonald, JJs., concurring) ("a legal scholar can invoke *McCleskey* confident that he reader will understand that the case is being used as shorthand for cases in which the Supreme Court failed the constitution's most basic values")(internal quotations and citations omitted). Justice Lewis Powell, one of the

five justices to vote in the majority, publicly acknowledged after retirement that *McCleskey* stands as the sole case in which he would change his vote. *See* John C. Jeffries, JUSTICE LEWIS F. POWELL, JR. (1994), at 451 (quoting Justice Powell in his biography).

The New Jersey Supreme Court's experience is particularly instructive, because like North Carolina, New Jersey recognized the need to conduct a systemic inquiry of racial bias. *See State v. Ramseur*, 106 N.J. 123, 327 (1987) (upholding New Jersey's death sentence as constitutional because it provided for a proportionality review, and thus provided a mechanism to "prevent any impermissible discrimination in imposing the death penalty"); *State v. Marshall*, 130 N.J. 109, 109 (N.J. 1992) (describing the appointment by the state high court of a special master to investigate the statistical evidence of racial bias). The New Jersey high court emphasized the imperative, in light of that recognition, for the court to act on the findings:

> This Court cannot refuse to confront those terrible realities. We have committed ourselves to determining whether racial and ethnic bias exist in our judicial system and to recommend ways of eliminating it wherever it is found. . . . Hence, were we to believe that the race of the victim and race of the defendant played a significant part in capital-sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our system of law.

State v. Marshall, 130 N.J. 109, 209, 613 A.2d 1059, 1110 (1992) (punctuation omitted). Here, where the studies of Cumberland County's charging, sentencing, and jury selection practices were all prompted by the law of the North Carolina legislature, the State's courts must wrestle directly with whether its constitution would permit the State to tolerate executions handed out under a system infected by widespread discrimination.

Nothing in the North Carolina's constitution prevents it from applying a broader interpretation of equal protection and cruel and unusual punishment that the Supreme Court afforded in *McCleskey*. *See* N.C. Const. art. 1, §§ 19, 26, and 27. North Carolina courts have

recognized the need to address non-purposeful racial discrimination, in part because of the state constitutional commitment to ensure that the "judicial system of a democratic society [] operate evenhandedly and . . . be perceived to operate evenhandledly." *See State v. Cofield*, 379 S.E.2d 834, 839 (N.C. 1989) (quoting *Cofield I*, 320 N.C. 297, 302 (1987)). In *Cofield*, the Supreme Court reversed in the face of evidence of discriminatory effect in grand jury foremen selection under the state constitution even though there was "not the slightest hint of racial motivation." *Id*.

The text of the North Carolina constitution affords broader protection that the Eighth Amendment's promise to be free of "cruel and unusual punishments because it guards against "cruel *or* unusual punishments." N.C. Const. art. I, § 27 of North Constitution (emphasis added). Although in *State v. Green*, 348 N.C. 588, 603, 502 S.E.2d 819, 828 (N.C. 1998), the North Carolina Supreme Court considered the protection of cruel and unusual punishment as similar to that afforded by the federal constitution, both the holding and framework of *Green* have been eroded by recent precedent. *Compare Green*, 348 N.C. at 609-10, 502 S.E.2d at 832 (holding a mandatory life sentence acceptable for a 13 year-old defendant by looking only at gross proportionality of the sentence); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (striking mandatory juvenile life sentences and requiring an analysis under the "objective indicia of consensus and actual sentencing practices).

Basic principles of constitutional construction support the notion that "cruel" and "unusual" have independent meanings. "In interpreting our Constitution – as in interpreting a statute – where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989); *see also Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) ("When the language of a statute is

clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required."). As the late Justice Scalia succinctly explained in reference to a similarly drafted phrase, there is no question that the word "or" provides two alternatives:

> [T]he operative terms are connected by the conjunction 'or.' While that can sometimes introduce an appositive—a word or phrase that is synonymous with what precedes it ("Vienna or Wien," "Batman or the Caped Crusader")—its ordinary use is almost always disjunctive, that is, the words it connects are to be "given separate meanings."

United States v. Woods, 134 S. Ct. 557, 567 (2013) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

As in *Woods*, there is "no way" cruel could be regarded as synonymous with unusual. *Id.* The *Oxford English Dictionary* defines unusual as "[n]ot usual; uncommon; exceptional." *Oxford English Dictionary* vol. XIX at 249 (2d ed. 1989); *see also Merriam-Webster's Collegiate Dictionary* 1375 (11th ed. 2005) ("Not usual: uncommon, rare"). Cruel means "[p]roceeding from or showing indifference to or pleasure in another's distress." *Oxford English Dictionary* vol. IV at 78; *see Merriam-Webster's Collegiate Dictionary* 301 ("1: disposed to inflict pain or suffering: devoid of human feelings. . . 2a: causing or conducive to injury, grief or pain . . . b: unrelieved by leniency"). Moreover, "or" is a "particle co-ordinating two (or more) words, phrases, or clauses between which there is an alternative." *Oxford English Dictionary* vol. X at 882; *see Merriam Webster's Collegiate Dictionary* 872. "Unusual" is not an appositive to "cruel." The plain meaning of the prohibition on "cruel or unusual" thus reaches punishments that are either cruel or unusual. Because the "meaning is clear from the words used," this Court need not "search for a meaning elsewhere." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449 (1989).

However, the history and case law regarding the prohibition on "cruel or unusual" punishments also support giving separate and distinct meanings – and protections – to those terms. In North Carolina's original constitution of 1776, Section 27 referenced "cruel nor unusual" punishments. However, during the 1868 Constitutional Convention, the wording was changed to "cruel or unusual." In the treatise describing this history, Justice Paul Martin Newby and Professor John Orth observed that the change "may conceivably have practical consequences" and cited *Medley v. North Carolina Dep't of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992). *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 84 (2d ed. 2013).

Medley involved an inmate's claim of medical negligence filed against the prison. This issue for the court was whether the Department of Correction could avoid liability on the basis that the negligent physician was an independent contractor. In holding that liability could not be avoided on that basis, the court explained that the state had a non-delegable duty to provide prisoners with adequate care, relying in part on the state and federal constitutional prohibitions on cruel and/or unusual punishments. *Medley*, 330 N.C. at 842-44, 412 S.E.2d at 657-59.

In a concurring opinion, Justice Martin wrote to emphasize that Section 27's language is broader than the terms used in the Eighth Amendment and may, for that reason, provide inmates with greater protection:

> The disjunctive term "or" in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment. It therefore follows that the if the Cruel and Unusual Punishment clause of the federal Constitution requires states to provide adequate medical care for state inmates, the Cruel or Unusual Punishment claim of the North Carolina Constitution imposes at least this same duty, if not a greater duty.

Id. at 846, 412 S.E.2d at 660. Sister state courts agree: when the disjunctive is used in provisions similar to North Carolina's, the provision bars both cruel and unusual punishments. *See also People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (holding that the textual difference between Michigan's bar on "cruel or unusual" punishment and the federal prohibition on "cruel and unusual" punishment provided a "compelling reason" to interpret the state prohibition more broadly); *People v. Anderson*, 6 Cal.3d 628, 636-37 (1972) (interpreting "cruel or unusual" wording to manifest an "intent that both cruel punishments and unusual punishments be outlawed in this state" and observing that it cannot be presumed the disjunctive wording was chosen "haphazardly").[36]

The historical record from the 1868 North Carolina Constitutional Convention supports the same construction. Although the Journal of the Convention is silent on the circumstances surrounding the inclusion of the "cruel or unusual" provision, the historical record makes clear that the delegates to the convention intended a broad protection. Delegate Albion Tourgee participated in the committee which considered the provision.[37] His biographer wrote "that 'nearly every article' of the state's 1868 constitution 'bore the marks of [his] influence.'" Delegate Tourgee eliminated from the constitution various types of corporal punishment, including whipping posts and branding irons. As an opponent of the death penalty, he also accomplished a "reduction in the number of crimes punishable by death from eighteen to four . . . [although ultimately] unable to achieve his objective of abolishing the death penalty." Carolyn

[36] A subsequent amendment to California's constitution superseded *Anderson*'s conclusion that the death penalty was unconstitutional, but did not address the court's textual analysis of the disjunctive. *See Gardner v. Superior Court*, 185 Cal.App.4th 1003, 1010 (2010).

[37] The Hill Library of the University of North Carolina at Chapel Hill maintains an electronic edition of the *Journal* which is available at http://docsouth.unc.edu/nc/conv1868/conv1868.html. The relevant portions of the *Journal* are at 292-95.

L. Karcher, introduction, Albion W. Tourgee, *Bricks Without Straw* 16-17 (2009). In light of Tourgee's opposition to the death penalty and active participation in the framing of the constitution's protections, it is likely that he intended the "cruel or unusual" clause as more inclusive that the already-existing federal protection. *See Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) ("Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption.") The history of the adoption of this protection suggests it should be given an expansive reading.

Moreover, the heightened need for reliability in capital cases, as recognized in our state's constitution and by our legislature, supports a broader reading of North Carolina's protection against cruel or unusual punishments. At every level, North Carolina provides for an exacting treatment of capital cases.

The North Carolina Constitution explicitly limits the application of the death penalty to a small subset of crimes for which the punishment was being imposed across the nation at the time our constitution was adopted. That is, the death penalty could have only been imposed to punish murder, arson, burglary, and rape. N.C. Const. art. IX, § 2. Even then, the punishment is only available "if the General Assembly shall so enact." *Id.*

The Supreme Court has followed the state constitution's lead, carefully reviewing the record in capital cases with greater care and scope than applied in non-capital cases. As the Court has explained, "[i]t has long been [their] rule" in capital cases to review "the entire record . . . without limitation to the assignments of error made by the defendant." *State v. Atkinson*, 275 N.C. 288, 321, 167 S.E.2d 241, 261 (1969) sentence vacated by *Atkinson v. North Carolina*, 403 U.S. 948 (1971). The Court has adopted this approach to ensure that "all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State." *State v. Fowler*,

270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967). It is the court's practice in every capital case to review the record with "minute care." *Id.*

Given this uniform recognition in North Carolina — by the Constitution, the Supreme Court, and the General Assembly — that, indeed, death is different, it cannot be said that section 27 of article I provides Mr. Robinson no greater protection from an unconstitutional execution than the Eighth Amendment, which is worded more narrowly. His death sentence, secured under a system infected by racial bias, should not be tolerated under the state constitution.

Even if Defendant's RJA claims were null and void, resentencing him to death would violate Double Jeopardy and N.C. Gen. Stat. § 1335.

VIII. The Double Jeopardy Clause Prohibits Resentencing Defendant.[38]

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution also prohibits resentencing Defendant to death following his acquittal of the death penalty. The constitutional prohibition against double jeopardy has long been recognized to bar subsequent proceedings after acquittal. *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (tracing the origins of double jeopardy protections to Greek and Roman times, and its application in capital cases). This protection was extended to capital sentencing decisions by *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

Before *Bullington*, the United States Supreme Court had treated capital sentencing decisions like all other sentencing issues: an ancillary outcome of the trial that was not entitled to double jeopardy protections. *Stroud v. United States*, 251 U.S. 15 (1919) (double jeopardy does

[38] Defendant previously argued that the N.C. Supreme Court should not consider the State's appeal because subjecting him to additional appellate proceedings after a trial-like proceeding acquitted him of the death penalty constituted double jeopardy. The Supreme Court did not address this argument, implicitly rejecting it. Defendants Golphin and Robinson have raised this double jeopardy violation in federal court, an issue that is now pending in the Fourth Circuit. Defendant notes that the State has argued in federal court that the Supreme Court's action in ordering the remand neither considered nor rejected double jeopardy. In the event the State is correct, Defendant re-raises the double jeopardy violation of additional appellate proceedings. Defendant also contends that a court order that Defendant's RJA claims are null and void and resentencing him to death would further violate double jeopardy.

not bar the state from seeking death after successful appeal of life verdict in murder case); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (double jeopardy does not prohibit imposition of harsher sentence for same offense after retrial if defendant successfully appeals conviction).

The Supreme Court changed course in *Bullington* because of the enormous changes wrought after *Furman v. Georgia*, 408 U.S. 238 (1972), with bifurcated trials and separate sentencing proceedings. In contrast to the unfettered discretion in sentencing in *Stroud* and *Pearce*, the court in *Bullington* recognized that capital defendants face a full sentencing proceeding with the "hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439. "It was itself a trial on the issue of punishment so precisely defined by the [state] statutes." *Id.* at 438. After a separate sentencing proceeding with guided discretion, the jury's imposition of life imprisonment means the "jury has already acquitted the defendant of whatever was necessary to impose the death sentence." *Id*. at 445 (quotation and citation omitted).

The Supreme Court further extended this protection to life imprisonment verdicts imposed by trial judges after sentencing hearings. *Arizona v. Rumsey*, 467 U.S. 203 (1984). The trial court in *Rumsey* initially imposed a life sentence after finding insufficient evidence to support an aggravating factor, but the state supreme court reversed after concluding the trial court made a legal error in its analysis. The trial court then imposed death on remand. 467 U.S. at 206, 208. The Supreme Court reinstated the life imprisonment verdict, holding that double jeopardy barred resentencing when a life verdict was imposed after a trial-like determination, no matter what the alleged error. *Id*. at 209-10. The Supreme Court recognized two features of Arizona's sentencing scheme that triggered double jeopardy protections: the fact that the trial judge, like the jury, had to distinguish between the two verdicts of death and life without parole, and that the sentencing decision was guided by statutory standards. *Id*.

The Supreme Court emphasized the importance of fact finding for the double jeopardy analysis in *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003). There, the jury had deadlocked on the question of punishment, and the trial court had imposed a life sentence pursuant to state law. *Id*. at 105. The defendant successfully appealed his conviction; the state once again sought the death penalty on retrial, and a death sentence was imposed. *Id*. The Supreme Court upheld this death sentence after concluding that the jury had not made "findings sufficient to establish legal entitlement to the life sentence." *Id*. at 108. "[A]n 'acquittal' at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections." *Id*. at 107.

The imposition of a life sentence in Defendant's case is clearly protected by this case law. In 2009, the state legislature redefined the statutory eligibility for the death penalty in North Carolina when it enacted the RJA. *See* N.C. Gen. Stat. § 15A-2011. The RJA created an affirmative defense to death sentences, plainly stating that "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." N.C. Gen. Stat. § 15A-2010. The Supreme Court has long recognized that a verdict based on a defense is entitled to the full protection of double jeopardy. *See Burks v. United States*, 437 U.S. 1 (1978) (double jeopardy barred retrial of defendant after defendant raised insanity defense, lost with the jury, but appellate court reversed after concluding there was insufficient evidence to prove sanity).

The RJA applied both prospectively to all trial cases and, retroactively, to defendants already under sentence of death. N.C. Gen. Stat. § 15A-2012(a). For both classes, the RJA required separate evidentiary proceedings by trial courts to determine if the death sentence was impermissibly tainted by racial bias. N.C. Gen. Stat § 15A-2012(a). Like the Supreme Court

double jeopardy cases finding in favor of defendants, the RJA trial required fact finding confined by statutorily-guided standards. *See Bullington*, 451 U.S. at 439; *Rumsey*, 467 U.S. at 209-10; N.C. Gen. Stat. § 15A-2011 (setting forth standards and evidence to be considered by the trial court in making its findings). The RJA statutory scheme sets forth the "findings sufficient to establish legal entitlement to the life sentence." *Sattazahn*, 537 U.S. at 108; N.C. Gen. Stat. § 15A-2012 ("If the court finds that race was a significant factor . . . the court shall order . . . that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.").

Like the Supreme Court cases, the RJA permits only two possible outcomes: life without parole or death. *Bullington*, 451 U.S. at 439; *Rumsey*, 467 U.S. at 209-210; N.C. Gen. Stat. § 15A-2012(a)(3). These two clearly delineated options in RJA trials are in sharp contrast to the standard relief available in post-conviction cases, which includes a new trial, dismissal of the charges, and other appropriate relief. N.C. Gen. Stat. § 15A-1417. In short, whether defendants are at the trial or the post-conviction stage, the RJA established new, trial-like proceedings where courts must hear evidence, apply the evidence to statutory guidelines, and make findings sufficient to establish or refute legal entitlement to a life sentence. A life sentence produced by this process is protected by the Double Jeopardy Clause from future proceedings. *Sattazahn*, 537 U.S. at 108; *Bullington*, 451 U.S. at 439; *Rumsey*, 467 U.S. at 209-10.

The RJA trials that were conducted in state court constitute "trial-like" proceedings, and involve constitutionally-protected fact finding by the trial court. In Defendant's case, Judge Weeks heard two weeks of evidence in an adversarial setting subjected to cross-examination and argument. The proceedings included the testimony of numerous expert witnesses and the introduction of over 170 exhibits. To answer the factual question whether "race was a significant

factor" in the exercise of peremptory strikes by the prosecution in the State of North Carolina and Cumberland County at the time of Defendant's capital trial, Judge Weeks issued lengthy orders with hundreds of findings of fact. Applying the evidence to the statutory guidelines, Judge Weeks concluded that race was a significant factor at the time of Defendant's trial and that he was entitled to life imprisonment without possibility of parole. Pursuant to the statute, Judge Weeks resentenced Defendant to life imprisonment without parole.

Finally, *Evans v. Michigan*, 133 S. Ct. 1069 (2013), provides additional support for the conclusion that Judge Weeks' findings at the RJA trials are protected by the Double Jeopardy Clause. In *Evans*, the Court explained that whether a trial court's action is accorded double jeopardy protection "turns not on the form of the trial court's action, but rather whether the action 'serve[s]' substantive 'purposes' or procedural ones." *Id.* at 1078 (quoting *United States v. Scott*, 437 U.S. 82, 98, n.11 (1978)).

There is no doubt that the RJA proceedings at issue here were substantive, not procedural. The RJA required Judge Weeks to determine whether Defendant was ineligible for execution under state law. The RJA embodies a substantive guarantee that exempts from execution the class of defendants whose capital trials and prosecutions were tainted by racial bias. Because of the racial taint at Defendant's trial, Judge Weeks made a substantive finding that Defendant was legally entitled to a life sentence under state law, and that finding is protected by the Double Jeopardy Clause. *See, e.g.*, *Rumsey*, 467 U.S. at 211 ("The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life

sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.").[39]

The RJA, to be sure, has a procedural component in that it directs the trier of fact to assess whether the processes used in sentencing a defendant to death was tainted by racial considerations. But, as the Supreme Court made clear in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this "procedural requirement" – a capital trial free of racial taint – merely "implements" the RJA's "substantive guarantee."[40] Judge Weeks' substantive findings under the RJA in Defendant's case is thus protected by the Double Jeopardy Clause, and he may not constitutionally be again subject to the death penalty.

IX. N.C. Gen. Stat. § 15A-1335 Prohibits Resentencing Defendant to Greater Punishment.[41]

Judge Weeks resentenced Defendant to life imprisonment without possibility of parole in the superior court. A straightforward application of North Carolina law requires this Court to enforce Defendant's existing life imprisonment sentence and remove Defendant from death row.

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[39] *Cf. Bobby v. Bies*, 556 U.S. 825, 833-34 (2009) (denying double jeopardy protection because there was no finding entitling the defendant to a life sentence under state law); *Poland v. Arizona*, 476 U.S. 147, 155-57 (1986) (neither judge nor jury "acquitted' the defendant because neither made findings sufficient to establish legal entitlement to a life sentence"); *Sattazahn*, 537 U.S. at 108-10 (Judge did not enter "findings sufficient to establish legal entitlement to the life sentence.").

[40] In *Montgomery*, the Court considered whether its decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which "required that sentencing courts consider a child's 'diminished culpability and heightened capacity for change' before condemning him or her to die in prison," announced a substantive or procedural rule. *Montgomery*, 136 S. Ct. at 726-27 (quoting *Miller*, 132 S. Ct. at 2469). The Court explained that "[s]ubstantive rules include . . . 'rules forbidding a certain category of punishment for a class of defendants because of their status or offense.'" 136 S. Ct. at 728 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). It held that "[u]nder this standard, … *Miller* announced a substantive rule" because it "rendered life without parole an unconstitutional penalty for a class of defendants because of their status – that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S. Ct. at 732, 734 (citations and internal quotation marks omitted). The Court acknowledged that "*Miller's* holding has a procedural component," but explained that the decision merely established "a procedural requirement necessary to implement [its] substantive guarantee." *Id*. at 734-35.

[41] Defendant previously raised this argument on appeal to the state supreme court. The state supreme court's decision to remand without ordering reimposition of the death sentence supports Defendant's interpretation that section 15A-1335 prohibits such reimposition.

Once a defendant has been sentenced, North Carolina law does not permit the courts to inflict a more severe sentence:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335. "Pursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand." *State v. Wagner*, 356 N.C. 599, 602 (2002).

In *Wagner*, the defendant pled guilty to the offense of attempted possession of cocaine as an habitual felon. *Id.* at 600. The trial court then sentenced defendant to imprisonment for a minimum of 101 months to a maximum of 131 months. *Id.* Defendant subsequently filed a motion for appropriate relief asserting that his record level had been improperly calculated as a level VI when, in fact, his criminal history resulted in a level V for sentencing purposes. *Id.* The trial court vacated and set aside the defendant's guilty plea and the judgment entered thereon. *Id.* After the trial court set aside defendant's plea and sentence and the defendant went to trial, a jury found him guilty of attempt to possess cocaine, felonious possession of drug paraphernalia, and being an habitual felon. *Id.* at 600-01. The trial court subsequently sentenced defendant to serve two consecutive prison sentences of a minimum of 135 months to a maximum of 171 months. *Id.*

On appeal, the Supreme Court explained N.C. Gen. Stat. § 15A-1335 as follows: "Pursuant to this statute a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense or conduct on remand." *Id.* at 602. The Court then determined that, since the trial court imposed a more severe sentence for defendant's

conviction at trial for the same offense to which he initially pled guilty, the statute was applicable to the case and the trial court's second sentence was contrary to the mandate of § 15A-1335. *Id*. at 602.

Consequently, Section 15A-1335 prohibits the imposition of the death penalty after appeal if, at any point, the defendant has been sentenced to life imprisonment for the same crime in the superior court. *See, e.g.*, *State v. Oliver*, 155 N.C. App. 209, 212, 573 S.E.2d 257, 258-59 (2002) (holding that, for purposes of applying § 15A-1335, consecutive life sentences can never be considered more severe than a death sentence). Thus, "the court may not impose a new sentence for the same offense," which is more severe than a life sentence without the possibility of parole.

The sole exception to § 15A-1335 is inapplicable to Defendant's case. The only circumstance in which a higher sentence is allowed on resentencing is when a statutorily mandated sentence is required by the General Assembly. *See State v. Holt*, 144 N.C. App. 112, 117 (2001), *disc. review dismissed as improvidently allowed*, 355 N.C. 347 (2002) (where defendant could have been punished by imprisonment up to 50 years, life imprisonment, monetary fine, or both imprisonment and fine, life imprisonment was not a statutorily mandated sentence under the statute and § 15A-1335 applies); *State v. Kirkpatrick*, 89 N.C. App. 353, 355 (1988) ("where the trial court is required by statute to impose a particular sentence, § 15A-1335 does not apply to prevent the imposition of a more severe sentence"). Here the death sentence was never statutorily mandated.[42] To the contrary, the RJA statute mandated that the superior court sentence the Defendant to life imprisonment without the possibility of parole once it found a violation of the RJA. N.C. Gen. Stat. § 15A-2012(a)(3).

[42] Indeed, it is settled law that the Legislature may not statutorily impose the death penalty in an entire class of cases. *See Woodson v. North Carolina*, 428 U.S. 280 (1976).

The State may suggest that Defendant's interpretation of § 15A-1335 means that any order or opinion granting relief to a criminal defendant would be the final word and consequently any further review would be rendered meaningless. This is a straw dog. Section 15A-1335 protection is not triggered by appellate decisions which merely vacate the guilty verdict or sentence, and do not themselves impose sentences, nor enter new judgments. To the contrary, § 15A-1335 applies only to those rare cases where a "sentence [has been] imposed in superior court" and then "set aside on direct review or collateral attack." These are precisely the circumstances here and, as a consequence, Defendant may not be resentenced to a greater punishment than life imprisonment without possibility of parole.

CONCLUSION

For the reasons argued, Defendant asks this Court to rule, as a matter of law, that the RJA repeal does not render his/her claims of race discrimination void. In the alternative, Defendant asks this Court to permit full factual development, through discovery and an evidentiary hearing, of the arguments based on mixed questions of law and fact.

Respectfully submitted, this the 14th of November 2016.

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STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF CUMBERLAND	97 CRS 47314-15

STATE OF NORTH CAROLINA)
)
v.)
)
TILMON CHARLES GOLPHIN)
Defendant.)

****

DEFENDANT'S MOTION FOR DISCOVERY OF INFORMATION IN SUPPORT OF DEFENSES SET FORTH IN DEFENDANT'S BRIEF

****

Defendant, Tilmon Charles Golphin, through counsel, respectfully requests that the Court enter an order requiring the State and third parties to produce to the Defendant information in their possession that is relevant to Defendant's Brief in Support of Racial Justice Act Claims which is filed contemporaneously with this motion.

STATEMENT OF THE CASE

1. On 1 December 1997, a Cumberland County Grand Jury returned an indictment against Defendant and his brother, Kevin Golphin, for two counts of first-degree murder, two counts of robbery with a dangerous weapon, assault with a deadly weapon with intent to kill, discharging firearm into occupied property and possession of a stolen vehicle.

2. Defendant and his brother were tried jointly at the 23 February 1998 Criminal Session of Cumberland County Superior Court by a jury bused in from nearby Johnston County. On 29 April 1998, the jury returned verdicts of guilty of all charges against both defendants. After a sentencing hearing, the jury returned death sentences for both brothers.

3. On 25 August 2000, the North Carolina Supreme Court issued its decision affirming the convictions and sentences of death. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000). The United States Supreme Court denied certiorari review on 19 March 2001. *Golphin v. North Carolina*, 532 U.S. 931 (2001).

4. On 31 January 2002, Defendant filed a Motion for Appropriate Relief (MAR) pursuant to N.C. Gen. Stat. § 15A-1415 challenging his 1998 convictions and death sentences in Cumberland County Superior Court. On 18 November 2002 the State filed its Answer and a Motion to Deny Defendant's MAR without a Hearing. On 9 May 2003, the Superior Court granted the State's Motion to deny the MAR without a hearing.

5. On 10 July 2003, Defendant filed a Petition for Writ of Certiorari in the North Carolina Supreme Court. By Order dated 6 February 2004, the North Carolina Supreme Court denied Defendant's Petition for Writ of Certiorari.

6. On 24 March 2004, Defendant filed a timely Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina. On 13 March 2007, the District Court issued an Order and Judgment dismissing Defendant's remaining claims and dismissing his Petition for Writ of Habeas Corpus. The United States Court of Appeals for the Fourth Circuit affirmed the District Court decision on 7 March 2008.

7. On August 10, 2010, Defendant properly filed a Motion for Appropriate Relief pursuant to N.C. Gen. Stat. §15A-2010-12, the Racial Justice Act (hereafter RJA). Defendant also requested discovery under the RJA. The RJA was subsequently amended and, on July 3, 2012, Defendant properly filed an Amendment to his RJA MAR under the amended statute. In his original RJA MAR and in his Amendment, Defendant alleged statutory and constitutional claims and requested an evidentiary hearing on those claims.

8. After an evidentiary hearing in the fall of 2012, the Court granted RJA relief to Defendant and two additional defendants, Quintel Augustine, 01 CRS 65079, and Christina Walters, 98 CRS 34832, 35044. *State v. Golphin et al.* (Cumberland Cnty., Dec. 13, 2012). The Court found statutory violations under both the original and amended RJA,[1] and reserved ruling on other statutory and constitutional claims.

9. On October 3, 2013, the North Carolina Supreme Court granted a writ of certiorari in *Golphin.* The Court heard oral argument in his case on April 14, 2014.

10. On December 18, 2015, the Supreme Court of North Carolina filed a *per curiam* order vacating Judge Weeks' order and remanding this case, along with the cases of the other defendants, to the Senior Resident Superior Court Judge of Cumberland County for reconsideration of Defendant's Motion for Appropriate Relief. The Supreme Court instructed that, in the interest of justice, further proceedings may include consideration of additional statistical studies and appointment of an expert under N.C. R. Evid. 706.

11. On June 9, 2016, the Senior Resident Superior Court Judge of Cumberland County decided that he would not preside over defendant's RJA motion.

12. The Honorable W. Erwin Spainhour notified undersigned counsel on August 25, 2016, that he had been assigned to resolve this case through its final disposition in Superior Court. On said date and by subsequent court orders, Judge Spainhour notified counsel that a hearing would be held on November 29, 2016 to resolve the following issue: "Did the enactment into law of Senate Bill 306, Session Law 2013-14, on June 19, 2013, specifically Sections 5. (a), (b) and (d) therein, render void the Motions for Appropriate Relief filed by the defendants

[1] The April 20, 2012 Order of Senior Resident Superior Court Judge Gregory A. Weeks in *State v. Robinson*, 91 CRS 23143 ("*Robinson* Order"), is available online at: http://www.aclu.org/files/assets/marcus_robinson_order.pdf. The *Golphin* Order is available at http://www.aclu.org/racial-justice/north-carolina-racial-justice-act-order-granting-motions-appropriate-relief.

Augustine, Walters, Golphin and Robinson pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes of North Carolina?"

LEGAL BASIS FOR GRANTING DISCOVERY

13. Defendant makes this request pursuant to the provisions of the RJA, N.C. Gen. Stat. §§ 15A-2010 to 2012; N.C. Gen. Stat. § 15A-1415(f); the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, §§ 19 and 27 of the North Carolina Constitution; *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; and the Court's inherent power, *see State v. Taylor*, 327 N.C. 147 (1990), and *State v. Buckner*, 351 N.C. 401 (2000).

14. Defendant disputes the purported repeal of the RJA on June 19, 2013 has any application to his previously filed RJA motion; however, alternatively, Defendant intends to provide evidentiary support of his claims that such an interpretation would violate (i) the Due Process and Law of the Land Clauses of the Federal and State Constitutions; (ii) his vested rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article IV, Section 13 and Article I, Section 19 of the North Carolina Constitution; (iii) the constitutional prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution, and (iv) the federal constitutional prohibition against Bills of Attainder. Defendant intends to present evidence in support of these defenses to meet his burden of showing constitutional violations. *See 640 Broadway Renaissance Co. v. Cuomo*, 740 F. Supp. 1023 (S.D.N.Y. 1990)(plaintiff failed to meet its burden of proving legislative intent to punish as required for a Bill of Attainder claim by failing to present evidence from the legislative record or elsewhere); *McChrystal v. City of Burbank,* 1984 U.S. Dist. LEXIS

17350 (N.D. Ill. 1984)(plaintiffs made no factual allegations and presented no direct evidence in support of their claim that the city ordinance was an unconstitutional bill of attainder).

15. Courts around the country have permitted the admission of broad and varied evidence to support claims that legislative acts were constitutionally infirm under the Ex Post Facto and/or Bill of Attainder clauses of the federal constitution:

a. In *Consolidated Edison Co. of N.Y. v. Pataki,* 117 F. Supp. 2d 257 (N.D.N.Y. 2000), the Court analyzed a letter the Chairman of the New York Public Service Commission wrote to the legislative sponsors of a bill warning them of the bill's constitutional infirmity under the Bill of Attainder Clause;

b. In *Goodin v. Clinchfield R. Co.*, 125 F. Supp. 441 (E.D.T.N. 1954), the Court examined an enactment under the Bill of Attainder Clause, and accepted as evidence, protest letters sent by railroad employees to the Railroad Union, a federal agency, that were written before the Railroad Union took their first vote on the Railway Labor Act;

c. In a challenge under the Ex Post Facto and Bill of Attainder clauses to a local ordinance which required loyalty oaths from city employees, the Court examined correspondence between the City of Los Angeles and a group of city employees who had refused to take loyalty oaths as part of their employment. *Garner v. Board of Public Works*, 341 U.S. 716 (1951);

d. In a Bill of Attainder case, a municipality and town officials used an "abundance of sworn testimony" including a deposition and affidavit of the Town Zoning Administrator to support their summary judgment motion on Bill of Attainder claim, *Falls v. Dyer*, 756 F. Supp. 384 (N.D. Ind. 1990); and

e. The Court noted that a press release by a United States Congressman was "noteworthy" in a Bill of Attainder analysis with respect to allegations that the enactment was intended to punish a community organization. *ACORN v. United States*, 662 F. Supp. 2d 285 (E.D.N.Y. 2009).

16. Defendant seeks materials from legislators (and others) who were substantially involved with the enactment of amendments to the RJA which Defendant contends violates his rights as set forth in Defendant's Brief in Support of Racial Justice Act Claims. Any documents "made or received pursuant to law or ordinance in connection with the transaction of public business" are public records subject to disclosure. *See* N.C. Gen. Stat. § 132-1(a); *Virmani v.*

Presbyterian Health Servs. Corp., 350 N.C. 449, 462 (1999)("Absent clear statutory exemption or exception, documents falling within the definition of public records in the Public Records Law must be made available for public inspection.")(internal quotations and citations omitted); *See also N.C. State Conf. of the NAACP v. McCrory*, 2016 U.S. App. LEXIS 13797 (4th Cir. 2016)("[W]hen considering whether discriminatory intent motivates a facially neutral law, a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.")(internal quotations and citations omitted). *See also* N.C. Op. Att'y Gen. 11 (Feb. 14, 2002).

17. The requested public records are not shielded from production on any claim of legislative privilege. While the United States Supreme Court has held that state legislators enjoy legislative immunity, *Tenney v. Brandlove*, 341 U.S. 367, 373 (1951), the Court has never held that it is absolute as to state lawmakers. *See U.S. v. Gillock*, 445 U.S. 360, 369 (1980). The United States District Court has noted that document requests are less intrusive to the legislative process (and thus less likely to frustrate the goals of legislative immunity) than compelled testimony or civil liability. *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994)("[T]he primary purpose of legislative immunity is not to protect the confidentiality of legislative communications, nor is it to relieve legislators of the burdens associated with document production. The privilege is intended only to shield legislators from 'the harassment of hostile questioning.'")

18. Additionally, the evidence sought in this motion will support Defendant's factual allegations set forth in Defendant's Brief in Support of Racial Justice Act Claims filed contemporaneously with this motion. Finally, Defendant incorporates by reference all factual

allegations and legal arguments made in Defendant's Brief in Support of Racial Justice Act Claims as if fully set forth herein.

19. Assuming the third-parties subject to this discovery request raise a work-product, attorney-client, or other privilege to the requested documents, this court may conduct an *in camera* inquiry of the substance of the communication where the party seeking the information has, in good faith, come forward with a nonfrivolous assertion that the privilege does not apply. *Medlin v. North Carolina Specialty Hospital,* 233 N.C. App. 327, 338 (2014)*; see also State v. Buckner*, 351 N.C. at 411–12 (trial court must conduct *in camera* review when there is a dispute as to the scope of a defendant's waiver of the attorney-client privilege, such as would be the case when a defendant has asserted an ineffective assistance of counsel claim); *State v. Taylor,* 327 N.C. at 155 (same)*; Willis v. Duke Power Co.,* 291 N.C. 19, 36 (1976) (trial court may require *in camera* inspection of documents to determine if they are work-product).

INFORMATION REQUESTED

Documents Requested From Third Parties

20. Defendant requests an order from the court to obtain the following documents (including "documents" as that term is defined in Rule 34 of the North Carolina Rules of Civil Procedure, "documents" as that term is defined in N.C. Gen. Stat. § 120-129(1), and specifically including correspondence and electronic mail) from the offices of North Carolina Senators Phil Berger, Andrew C. Brock, Ben Clark, Thomas Goolsby and Wesley Meredith, and North Carolina Representatives N. Leo Daughtry, Nelson Dollar, Elmer Floyd, Pat B. Hurley, Marvin W. Lucas, Tim Moore, Paul Stam, and John Szoka, regarding the RJA or any proposed amendments (specifically Session Law 2009-464, Senate Bill 461; Session Law 2012-136,

Senate Bill 416; Senate Bill 9 from Session 2011; Session Law 2013-154, Senate Bill 306; or any other proposed amendments to the RJA):

a. All documents and communications received or created concerning the rationale, purpose, implementation and/or text of the RJA or any proposed or enacted amendment;

b. All documents and communications between these legislators and their constituents regarding any provision of the RJA or any proposed or enacted amendment;

c. All documents and communications between these legislators and any other legislators in the North Carolina General Assembly regarding any provision of the RJA or any proposed or enacted amendment;

d. All documents and communications between these legislators and the office of the Governor of North Carolina and/or office of the Lieutenant Governor of North Carolina regarding any provision of the RJA or any proposed or enacted amendment;

e. All documents and communications between these legislators and any North Carolina state agency regarding any provision of the RJA or any proposed or enacted amendment;

f. All documents and communications between these legislators and any lobbyists, political organizations, public interest groups, District Attorneys, Assistant District Attorneys or the North Carolina Conference of District Attorneys regarding any provision of the RJA or any proposed or enacted amendment;

g. All documents and communications between these legislators and any legislative analyst and/or staff attorney regarding any provision of the RJA or any proposed or enacted amendment;

h. All documents and communications between these legislators and anyone regarding Tilmon Golphin, Quintel Augustine, Christina Walters, Marcus Robinson or Judge Gregory Weeks (or any other reference to the Cumberland County RJA cases);

i. All documents and communications between these legislators and Al Lowry or other family members of Lloyd E. Lowry, David Hathcock, Erik Tornblom, Tracy Lambert, Susan Moore and/or Roy G. Turner, Jr.;

j. All documents from these legislators regarding any requests, including any accompanying documents, made to an agency employee by a legislative employee

of the Fiscal Research Division for assistance in the preparation of a fiscal note pursuant to N.C. Gen. Stat. §120-131.1; and

k. All documents from these legislators reflecting any public statements made regarding any provision of the RJA or any proposed or enacted amendment.

21. Defendant requests an order from the court to obtain the following documents (including "documents" as that term is defined in Rule 34 of the North Carolina Rules of Civil Procedure, "documents" as that term is defined in N.C. Gen. Stat. § 120-129(1), and specifically including correspondence, electronic mail, minutes or other notes) from the North Carolina Conference of District Attorneys (hereafter NCCDA), specifically including but not limited to Director Peg Dorer, regarding the RJA or any proposed amendments (specifically Session Law 2009-464, Senate Bill 461; Session Law 2012-136, Senate Bill 416; Senate Bill 9 from Session 2011; Session Law 2013-154, Senate Bill 306; or any other proposed amendments to the RJA):

a. All documents and communications received or created concerning the rationale, purpose, implementation and/or text of the RJA or any proposed or enacted amendment;

b. All documents and communications sent or received by any employee of the NCCDA regarding any provision of the RJA or any proposed or enacted amendment;

c. All documents and communications sent by any employee of the NCCDA to any news media regarding any provision of the RJA or any proposed or enacted amendment;

d. All documents and communications sent by any employee of the NCCDA to any news media regarding Tilmon Golphin, Quintel Augustine, Christina Walters, Marcus Robinson or Judge Gregory Weeks (or any other reference to the Cumberland County RJA cases);

e. All documents and notes from any participant of meetings between any legislator and Peg Dorer or any District Attorney or Assistant District Attorney regarding the RJA or any proposed or enacted amendment;

f. All documents and notes from any participant of meetings between the Governor or any member of the Governor's staff and Peg Dorer or any District Attorney or

Assistant District Attorney regarding the RJA or any proposed or enacted amendment;

g. All documents and notes from any meeting of any committee formed by the NCCDA that addressed legislative positions to be taken by the NCCDA with respect to any provision of the RJA or any proposed or enacted amendment;

h. Any opinions, documents, electronic communications to or from any person consulted by the State which pertain to or reflect upon in any way the statistical analyses performed by George Woodworth, Catherine Grosso and/or Barbara O'Brien;

i. Any opinions, documents, electronic communications from any person consulted by the State which pertain to or reflect upon in any way the study and analysis by Joseph Katz that was done in any North Carolina case;

j. Any opinions, documents, electronic communications to or from any person consulted by the State regarding any analysis of the data used by Catherine Grosso and/or Barbara O'Brien for their jury selection and/or charging and sentencing studies; and

k. All opinions, documents, electronic communications or oral statements to or from any person consulted by the State (including the NCCDA) for any analysis of (i) racial disparities in North Carolina capital prosecutions, (ii) the MSU College of Law data, (iii) peremptory challenges by prosecutors or defense attorneys in North Carolina capital trials, (iv) capital charging decisions by prosecutors for North Carolina homicides, and/or (v) decisions of juries in North Carolina capital trials, including but not limited to any such documents to/from Stan Young, Donald Rubin, Joseph Katz, and/or Elliot Cramer.

22. Defendant requests an order from the court to obtain the following documents (including "documents" as that term is defined in Rule 34 of the North Carolina Rules of Civil Procedure, "documents" as that term is defined in N.C. Gen. Stat. § 120-129(1), and specifically including correspondence, electronic mail, minutes or other notes) from the Office of the Governor of North Carolina regarding the RJA or any proposed amendments (specifically Session Law 2009-464, Senate Bill 461; Session Law 2012-136, Senate Bill 416; Senate Bill 9 from Session 2011; Session Law 2013-154, Senate Bill 306; or any other proposed amendments to the RJA):

a. All documents and communications between any legislator in the North Carolina General Assembly and the Office of the Governor regarding any provision of the RJA or any proposed or enacted amendment;

b. All documents and communications between the NCCDA and/or any District Attorney or Assistant District Attorney and the Office of the Governor regarding any provision of the RJA or any proposed or enacted amendment; and

c. All documents and notes from any participant of meetings between any staff member of the Office of the Governor and Peg Dorer or any District Attorney or Assistant District Attorney regarding the RJA or any proposed or enacted amendment.

Documents Requested From the State

23. Defendant requests an order from the court to obtain the following documents (including "documents" as that term is defined in Rule 34 of the North Carolina Rules of Civil Procedure, "documents" as that term is defined in N.C. Gen. Stat. § 120-129(1), and specifically including correspondence, electronic mail, minutes or other notes) from the State with respect to any analysis performed by any expert regarding the allegations of racial bias set forth in defendant's motion and amended motion filed pursuant to the RJA:

a. Any opinions, documents, electronic communications to or from any person consulted by the State which pertain to or reflect upon in any way the statistical analyses performed by George Woodworth, Catherine Grosso and/or Barbara O'Brien;

b. Any opinions, documents, electronic communications from any person consulted by the State which pertain to or reflect upon in any way the study and analysis by Joseph Katz that was done in any North Carolina case;

c. Any opinions, documents, electronic communications to or from any person consulted by the State regarding any analysis of the data used by Catherine Grosso and/or Barbara O'Brien for their jury selection and/or charging and sentencing studies; and

d. All opinions, documents, electronic communications or oral statements to or from any person consulted by the State (including the NCCDA) for any analysis of (i) racial disparities in North Carolina capital prosecutions, (ii) the MSU College of Law data, (iii) peremptory challenges by prosecutors or defense attorneys in

North Carolina capital trials, (iv) capital charging decisions by prosecutors for North Carolina homicides, and/or (v) decisions of juries in North Carolina capital trials, including but not limited to any such documents to/from Stan Young, Donald Rubin, Joseph Katz, and/or Elliot Cramer.

24. Defendant requests that, in the event any legislator or former legislator no longer has access to any of the above-requested documents, the Court order the Legislative Services Office of the North Carolina General Assembly to produce the requested documents as they may be retrieved from files – electronic or otherwise.

Depositions

25. Defendant requests and reserves the right to depose necessary legislators, prosecutors and other witnesses, with leave of court, after reviewing all documents produced pursuant to this Order.

RELIEF REQUESTED

1. Defendant requests that this discovery motion be heard prior to any hearing on the issue proposed by Judge Spainhour in order for the Defendant to produce substantial and necessary evidence to support his defenses to the purported repeal of the RJA.

2. Defendant further requests that the Court order the aforementioned third parties to disclose all documents requested related to the subject matter; or, in the alternative, that the Court order *in camera* review of such documents.

3. Defendant requests any further relief the Court deems just and appropriate.

Respectfully submitted, this the 14th day of November, 2016.

Kenneth J. Rose
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COUNSEL FOR DEFENDANT

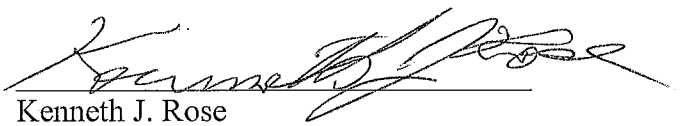
CERTIFICATE OF SERVICE

I certify that the foregoing document has been served on the following parties by electronic mail and first class mail:

Danielle Marquis Elder
Jonathan P. Babb
Attorney General's Office
P.O. Box 629
Raleigh, NC 27602
dmarquis@ncdoj.gov
jbabb@ncdoj.gov

Robert T. Thompson
Cumberland County District Attorney's Office
117 Dick Street, Suite 427
Fayetteville, NC 28301
Robert.T.Thompson@nccourts.org

This the 14th day of November, 2016.



Kenneth J. Rose

STATE OF NORTH CAROLINA

File No. 97CRS047314 51

CUMBERLAND County FAYETTEVILLE Seat of Court

In The General Court Of Justice ☐ District ☒ Superior Court Division

NOTE: *[This form is to be used for (1) felony offense(s) and (2) misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use AOC-CR-342 for DWI offense(s).]*

STATE VERSUS

Name Of Defendant: GOLPHIN,TILMON,CHARLES,JR

Race	Sex	Date Of Birth
B	M	6/25/1978

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT - FELONY
(STRUCTURED SENTENCING)
(For Convictions On Or After Jan. 1, 2012)

G.S. 15A-1301, 15A-1340.13

Attorney For State	☐ Def. Found Not Indigent ☐ Def. Waived Attorney	Attorney For Defendant	☒ Appointed ☐ Retained	Crt Rptr Initials
				VM

The defendant ☐ pled guilty (☐ pursuant to *Alford*) to ☒ was found guilty by a jury of ☐ pled no contest to

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
97CRS047314	51	FIRST DEGREE MURDER RE-SENTENCE	9/23/1997	14-17	F	A	

***NOTE:** Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

PRIOR RECORD LEVEL: ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

The Court:

☐ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☒ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

The Court: (**NOTE:** *Block 1 or 2 MUST be checked.*):

☒ 1. makes no written findings because the term imposed is: ☐ (a) in the presumptive range. ☒ (b) for a Class A felony. ☐ (c) for adjudication as a violent habitual felon, G.S. 14-7.12. ☐ (d) for drug trafficking ☐ for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). ☐ (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).

☐ 2. makes ☐ the aggravating and mitigating factors Determination as set forth on the attached AOC-CR-605. ☐ the findings of egregious aggravation for conviction under G.S. 14-27.2A or G.S. 14-27.4A, as set forth on the attached AOC-CR-618 incorporated herein by reference, which require a sentence in excess of that authorized by G.S. 15A-1340.17.

☐ 3. adjudges the defendant to be an habitual felon to be sentenced ☐ *(offenses committed before December 1, 2011)* as a Class C felon. ☐ *(offenses committed on or after December 1, 2011)* four classes higher than the principal felony *(no higher than Class C)*.

☐ 4. adjudges the defendant to be an habitual breaking and entering status offender, to be sentenced as a Class E felon.

☐ 5. finds enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ G.S. 14-50.22 (gang). ☐ Other: _____. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 6. finds that the defendant used, displayed, or attempted to use or display a firearm or a deadly weapon at the time of the felony and, pursuant to G.S. 15A-1340.16A, has increased the minimum term of imprisonment to which the defendant would otherwise be sentenced by sixty (60) months. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 7. finds the above designated offense(s) is a reportable conviction under G.S. 14-208.6 *(check only one)*
- ☐ a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One.
- ☐ b. but makes no finding or order concerning registration or satellite-based monitoring due to defendant's sentence of life imprisonment without parole.

☐ 8. finds the above designated offense(s) involved the ☐ physical or mental ☐ sexual abuse of a minor. (**NOTE:** *If offense(s) is not also a reportable conviction in No. 7 above, this finding requires no further action by the court.*)

☐ 9. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and this conviction shall be reported to DMV.

☐ 10. finds this is an offense involving assault or communicating a threat, and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.

☐ 11. *(offenses committed on or after December 1, 2008, only)* finds the above designated offense(s) involved criminal street gang activity G.S. 14-50.25.

☐ 12. finds that the defendant refused to consent to conditional discharge under G.S. 90-96(a).

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be sentenced *(check only one)*

☒ to Life Imprisonment Without Parole for ☐ Class A Felony. ☐ Class B1 Felony. ☐ Violent Habitual Felon. ☐ G.S. 14-27.2A or G.S. 14-27.4A with egregious aggravation.

☐ to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 93.

for a minimum term of: _____ months and a maximum term of: _____ months ☐ ASR term *(Order No. 4, Side Two)* _____ months

in the custody of:
☒ N.C. DAC.
☐ Other: _____.
☐ to Death *(see attached Death Warrant and Certificates)*

The defendant shall be given credit for 5561 days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☐ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File No.	Offense	County	Court	Date

Material opposite unmarked squares is to be disregarded as surplusage.
(Over)

The Court further Orders: *(check all that apply)*

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs	Fine	Restitution*	Attorney's Fees	SBM Fee	Appt Fee/Misc	Total Amount Due
$	$	$	$	$	$	$

*See attached "Restitution Worksheet, Notice and Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

☐ 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.

☐ 3. The Court finds just cause to waive costs, as ordered on the attached ☐ AOC-CR-618. ☐ Other: _____.

☐ 4. Without objection by the State, the defendant shall be admitted to the Advanced Supervised Release (ASR) program.. If the defendant completes the risk reduction incentives as identified by the Division of Adult Correction, then he or she will be released at at the end of the ASR term specified on Side One. G.S. 15A-1340.18.

☐ 5. Other:

The Court recommends:

☐ 1. Substance abuse treatment. ☐ 2. Psychiatric and/or psychological counseling. ☐ 3. Work release ☐ should ☐ should not be granted.

☐ 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.
☐ but the Court **does not recommend** restitution be paid ☐ as a condition of post-release supervision. ☐ from work release earnings.

The Court further recommends:
PREVIOUS JUDGMENT IS HEREBY VACATED

ORDER OF COMMITMENT/APPEAL ENTRIES

☐ It is ORDERED that the Clerk deliver **two** certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☐ The defendant gives notice of appeal from the judgment of the trial court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
12/13/2012	GREGORY A WEEKS	

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency **two** certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

CERTIFICATION

I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.

☐ Appeal Entries (AOC-CR-350)
☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
☐ Victim Notification Tracking Form
☐ Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)
☐ Additional Findings (AOC-CR-618)
☐ Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
☐ Other: _____

Date	Date Certified Copies Delivered To Sheriff	Signature Of Clerk	☒ Deputy CSC ☐ Assistant CSC ☐ CSC	SEAL
12/13/2012	12/13/2012			

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No. 97CRS047314 51

CUMBERLAND County

In The General Court Of Justice
☐ District ☒ Superior Court Division

STATE VERSUS

Name Of Defendant: GOLPHIN,TILMON,CHARLES,JR

Race	Sex	Date Of Birth	Social Security No.
B	M	6/25/1978	

JUDGMENT/ORDER OR OTHER DISPOSITION

Attorney For State:

☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant: ☒ Appointed ☐ Retained

Offense: FIRST DEGREE MURDER

NOTE: *(For use in recording Misdemeanor conviction levels under S.S.A.)*

PLEA	VERDICT	PRIOR CONVICTIONS:
☐ Guilty/Responsible ☐ No Contest	☒ Guilty/Responsible	MISD. CLASS: ☐ 1 ☐ 2 ☐ 3
☐ Guilty/Responsible ☐ No Contest	☐ Guilty/Responsible	MISD. CLASS: ☐ 1 ☐ 2 ☐ 3
☒ Not Guilty/Not Responsible	☐ Not Guilty/Not Responsible	

No./Level ___ ☐ I (0) ___ ☐ II (1-4) ___ ☐ III (5+)

IN OPEN COURT THE HONORABLE GREGORY A WEEKS HAS ENTERED HIS RULING AS TO THE RACIAL JSUTICE ACT, IN THAT THE PREVIOUS DEATH SENTENCE BE VACATED AND THE DEFENDANT TO BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

A TRUE COPY
CLERK OF SUPERIOR COURT
CUMBERLAND COUNTY
BY Christine Hare
ASSISTANT

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
12/13/2012	GREGORY A WEEKS	Gregory A Weeks

APPEAL ENTRIES

☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.
☐ The current pretrial release order is modified as follows:

☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge

AOC-CR-305, Rev. 7/95

Original - File

STATE OF NORTH CAROLINA

File No. 97CRS047314 52

CUMBERLAND County FAYETTEVILLE Seat of Court

In The General Court Of Justice
☐ District ☒ Superior Court Division

NOTE: *[This form is to be used for (1) felony offense(s) and (2) misdemeanor offense(s), which are consolidated for judgment with any felony offense(s). Use AOC-CR-342 for DWI offense(s).]*

STATE VERSUS

Name Of Defendant: GOLPHIN,TILMON,CHARLES,JR

Race	Sex	Date Of Birth
B	M	6/25/1978

JUDGMENT AND COMMITMENT
ACTIVE PUNISHMENT - FELONY
(STRUCTURED SENTENCING)
(For Convictions On Or After Jan. 1, 2012)

G.S. 15A-1301, 15A-1340.13

Attorney For State ☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant ☒ Appointed ☐ Retained

Crt Rptr Initials: VM

The defendant ☒ pled guilty (☐ pursuant to *Alford*) to ☐ was found guilty by a jury of ☐ pled no contest to

File No.(s)	Off.	Offense Description	Offense Date	G.S. No.	F/M	CL.	*Pun. CL.
97CRS047314	52	FIRST DEGREE MURDER RE-SENTENCE	9/23/1997	14-17	F	A	

***NOTE:** Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).*

PRIOR RECORD LEVEL: ☐ I ☐ II ☐ III ☐ IV ☐ V ☐ VI

The Court:

☐ 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____. Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☒ 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.

The Court: **(NOTE:** *Block 1 or 2 MUST be checked.*):

☒ 1. makes no written findings because the term imposed is: ☐ (a) in the presumptive range. ☒ (b) for a Class A felony. ☐ (c) for adjudication as a violent habitual felon, G.S. 14-7.12. ☐ (d) for drug trafficking ☐ for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). ☐ (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).

☐ 2. makes ☐ the aggravating and mitigating factors Determination as set forth on the attached AOC-CR-605. ☐ the findings of egregious aggravation for conviction under G.S. 14-27.2A or G.S. 14-27.4A, as set forth on the attached AOC-CR-618 incorporated herein by reference, which require a sentence in excess of that authorized by G.S. 15A-1340.17.

☐ 3. adjudges the defendant to be an habitual felon to be sentenced ☐ *(offenses committed before December 1, 2011)* as a Class C felon. ☐ *(offenses committed on or after December 1, 2011)* four classes higher than the principal felony *(no higher than Class C)*.

☐ 4. adjudges the defendant to be an habitual breaking and entering status offender, to be sentenced as a Class E felon.

☐ 5. finds enhancement pursuant to: ☐ G.S. 90-95(e)(3) (drugs). ☐ G.S. 14-3(c) (hate crime). ☐ G.S. 50B-4.1 (domestic violence). ☐ G.S. 14-50.22 (gang). ☐ Other: _____. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 6. finds that the defendant used, displayed, or attempted to use or display a firearm or a deadly weapon at the time of the felony and, pursuant to G.S. 15A-1340.16A, has increased the minimum term of imprisonment to which the defendant would otherwise be sentenced by sixty (60) months. This finding is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.

☐ 7. finds the above designated offense(s) is a reportable conviction under G.S. 14-208.6 *(check only one)*
- ☐ a. and therefore makes the additional findings and orders on the attached AOC-CR-615, Side One.
- ☐ b. but makes no finding or order concerning registration or satellite-based monitoring due to defendant's sentence of life imprisonment without parole.

☐ 8. finds the above designated offense(s) involved the ☐ physical or mental ☐ sexual abuse of a minor. **(NOTE:** *If offense(s) is not also a reportable conviction in No. 7 above, this finding requires no further action by the court.*)

☐ 9. finds that a ☐ motor vehicle ☐ commercial motor vehicle was used in the commission of the offense and this conviction shall be reported to DMV.

☐ 10. finds this is an offense involving assault or communicating a threat, and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.

☐ 11. *(offenses committed on or after December 1, 2008, only)* finds the above designated offense(s) involved criminal street gang activity G.S. 14-50.25.

☐ 12. finds that the defendant refused to consent to conditional discharge under G.S. 90-96(a).

A TRUE COPY
CLERK OF SUPERIOR COURT
ASSISTANT

The Court, having considered evidence, arguments of counsel and statement of defendant, Orders that the above offenses, if more than one, be consolidated for judgment and the defendant be sentenced *(check only one)*

☒ to Life Imprisonment Without Parole for ☐ Class A Felony. ☐ Class B1 Felony. ☐ Violent Habitual Felon. ☐ G.S. 14-27.2A or G.S. 14-27.4A with egregious aggravation.

☐ to Life Imprisonment With Parole, pursuant to G.S. Chapter 15A, Article 93.

for a minimum term of:	and a maximum term of:	☐ ASR term *(Order No. 4, Side Two)*
months	months	months

in the custody of:
☒ N.C. DAC.
☐ Other: _____
☐ to Death *(see attached Death Warrant and Certificates)*

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judgment as a result of this charge(s).

☐ The sentence imposed above shall begin at the expiration of all sentences which the defendant is presently obligated to serve.

☒ The sentence imposed above shall begin at the expiration of the sentence imposed in the case referenced below:

File No.	Offense	County	Court	Date
97CRS047314	51	CUMBERLAND	SUPERIOR	12/13/2012

AOC-CR-601, Rev. 12/12

Material opposite unmarked squares is to be disregarded as surplusage.
(Over)

The Court further Orders: *(check all that apply)*

1. The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below.

Costs	Fine	Restitution*	Attorney's Fees	SBM Fee	Appt Fee/Misc	Total Amount Due
$	$	$	$	$	$	$

*See attached "Restitution Worksheet, Notice and Order (Initial Sentencing)," AOC-CR-611, which is incorporated by reference.

☐ 2. The Court finds that restitution was recommended as part of the defendant's plea arrangement.

☐ 3. The Court finds just cause to waive costs, as ordered on the attached ☐ AOC-CR-618. ☐ Other: _____.

☐ 4. Without objection by the State, the defendant shall be admitted to the Advanced Supervised Release (ASR) program. If the defendant completes the risk reduction incentives as identified by the Division of Adult Correction, then he or she will be released at at the end of the ASR term specified on Side One. G.S. 15A-1340.18.

☐ 5. Other:

The Court recommends:

☐ 1. Substance abuse treatment. ☐ 2. Psychiatric and/or psychological counseling. ☐ 3. Work release ☐ should ☐ should not be granted.

☐ 4. Payment as a condition of post-release supervision or from work release earnings, if applicable, of the "Total Amount Due" set out above.
☐ but the Court **does not recommend** restitution be paid ☐ as a condition of post-release supervision. ☐ from work release earnings.

The Court further recommends:
PREVIOUS JUDGMENT IS ORDERED VACATED

ORDER OF COMMITMENT/APPEAL ENTRIES

☐ It is ORDERED that the Clerk deliver **two** certified copies of this Judgment and Commitment to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.

☐ The defendant gives notice of appeal from the judgment of the trial court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
12/13/2012	GREGORY A WEEKS	

ORDER OF COMMITMENT AFTER APPEAL

Date Appeal Dismissed	Date Withdrawal Of Appeal Filed	Date Appellate Opinion Certified

It is ORDERED that this Judgment be executed. It is FURTHER ORDERED that the sheriff arrest the defendant, if necessary, and recommit the defendant to the custody of the agency named in this Judgment on the reverse and furnish that agency **two** certified copies of this Judgment and Commitment as authority for the commitment and detention of the defendant.

Date	Signature Of Clerk	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

CERTIFICATION

I certify that this Judgment and Commitment with the attachment(s) marked below is a true and complete copy of the original which is on file in this case.

☐ Appeal Entries (AOC-CR-350)
☐ Felony Judgment Findings Of Aggravating And Mitigating Factors (AOC-CR-605)
☐ Judicial Findings As To Forfeiture Of Licensing Privileges (AOC-CR-317)
☐ Victim Notification Tracking Form
☐ Additional File No.(s) And Offense(s) (AOC-CR-626)
☐ Restitution Worksheet, Notice And Order (Initial Sentencing) (AOC-CR-611)
☐ Judicial Findings And Order For Sex Offenders - Active Punishment (AOC-CR-615, Side One)
☐ Additional Findings (AOC-CR-618)
☐ Convicted Sex Offender Permanent No Contact Order (AOC-CR-620)
☐ Other: _____

Date	Date Certified Copies Delivered To Sheriff	Signature Of Clerk	☒ Deputy CSC ☐ Assistant CSC ☐ CSC	SEAL
12/13/2012	12/13/2012			

Material opposite unmarked squares is to be disregarded as surplusage.

STATE OF NORTH CAROLINA

File No. 97CRS047314 52

CUMBERLAND County

In The General Court Of Justice
☐ District ☒ Superior Court Division

STATE VERSUS

Name Of Defendant: GOLPHIN,TILMON,CHARLES,JR

Race	Sex	Date Of Birth	Social Security No.
B	M	6/25/1978	

JUDGMENT/ORDER OR OTHER DISPOSITION

Attorney For State

☐ Def. Found Not Indigent ☐ Def. Waived Attorney

Attorney For Defendant ☒ Appointed ☐ Retained

Offense: FIRST DEGREE MURDER

NOTE: *(For use in recording Misdemeanor conviction levels under S.S.A.)*

PLEA	VERDICT	PRIOR CONVICTIONS:
☒ Guilty/Responsible ☐ No Contest	☒ Guilty/Responsible	No./Level ☐ I (0) ☐ II (1-4) ☐ III (5+)
☐ Guilty/Responsible ☐ No Contest	☐ Guilty/Responsible	MISD. CLASS: ☐ 1 ☐ 2 ☐ 3
☐ Not Guilty/Not Responsible	☐ Not Guilty/Not Responsible	MISD. CLASS: ☐ 1 ☐ 2 ☐ 3

IN OPEN COURT THE HONORABLE GREGORY A WEEKS HAS ENTERED HIS RULING AS TO THE RACIAL JSUTICE ACT, IN THAT THE PREVIOUS DEATH SENTENCE BE VACATED AND THE DEFENDANT TO BE SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE.

A TRUE COPY
CLERK OF SUPERIOR COURT
CUMBERLAND COUNTY
BY Christine Hare
ASSISTANT

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
12/13/2012	GREGORY A WEEKS	Gregory A Weeks

APPEAL ENTRIES

☐ The defendant gives notice of appeal from the judgment of the District Court to the Superior Court.
☐ The current pretrial release order is modified as follows:

☐ The defendant gives notice of appeal from the judgment of the Superior Court to the Appellate Division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge

AOC-CR-305, Rev. 7/95

Original - File

State v. Tilmon Charles Golphin
97 CRS 47314-15
November 29, 2016 Hearing

EXHIBITS

1. List of People Removed from Death Row since North Carolina's death penalty was reinstated in 1977
2. *E-mail from David Hall to Joseph Katz and Stan Young, et al.* (June 8, 2011, 11:30 A.M.)
3. *E-mail from Peg Dorer to Garry Frank and Susan Doyle* (July 29, 2011, 9:10 A.M.)
4. *E-mails from Peg Dorer to Clark Everett, et al.* (July 29, 2011, 2:55 P.M.)
5. *E-mail from Peg Dorer to Phil Berger* (September 13, 2011, 8:55 A.M.)
6. *E-mail from Peg Dorer to Grant Brooks* (October 27, 2011, 10:41 A.M.)
7. *E-mail from Peg Dorer to Andrew Murray, et al.* (Nov. 2, 2011, 3:20 P.M.)
8. *E-mail from Peg Dorer to Thomas Anglim* (Nov. 2, 2011, 3:28 P.M.)
9. *E-mail from David Hall to Peg Dorer* (Nov. 3, 2011, 9:20 A.M.)
10. *E-mail from David Hall to Peg Dorer* (Nov. 3, 2011, 4:05 P.M.)
11. *E-mail from Peg Dorer to Colon Willoughby et al.* (Nov. 3, 2011, 9:03 A.M.)
12. *E-mail from Seth Edwards to William R. West and Peg Dore*r (Nov. 3, 2011, 10:10 A.M.)
13. *E-mail from Richard Shaffer to Peg Dorer* (Nov. 2, 2011 4:58 P.M.)
14. *E-mail from Peg Dorer to Richard Shaffer* (Nov. 3, 2011, 10:39 A.M.)
15. *Letter from Susan I. Doyle to Sen. Berger* (Nov. 14, 2011)
16. *E-mail from Peg Dorer to Walton Dalton et al.* (Nov. 14, 2011, 12:13 P.M.)
17. *E-mail from Peg Dorer to News Media with attached Resolution on the Racial Justice Act* (Nov. 15, 2011, 4:28 P.M.)
18. *Prosecutors Seek Repeal of Racial Justice Act*, Winston-Salem Journal, Nov. 16, 2011
19. Clayton Henkel, *Governor Vetoes Repeal of Racial Justice Ac*t, Progressive Pulse, Dec. 14, 2011
20. *House committee clashes over Racial Justice Act*, NBC-17/WNCN, Feb. 10, 2012
21. *House Select Committee on Racial Discrimination in Capital Cases*, Minutes (Feb. 10, 2012)
22. *House Select Committee on Racial Discrimination in Capital Cases*, Minutes (March 27, 2012)
23. Sommer Brokaw, *First Racial Justice ruling finds racial discrimination*, The Charlotte Post, Apr. 26, 2012
24. Craig Jarvis, *House committee approves more restricted Racial Justice Act,* News & Observer, June 6, 2012
25. *NC GOP seeks sharp limits to racial justice law*, WRAL, June 6, 2012
26. *E-mail from Peg Dorer to Rep. Stam* (June 11, 2012, 6:58:55 P.M.)
27. House Floor Debate*, SB 416 - Amend Death Penalty Procedures,* Second & Third Reading (June 12-13, 2012)
28. House Floor Debate, *SB 416 – Amend Death Penalty Procedures*, Second Reading (June 12, 2012)
29. House Floor Debate, *SB 416 – Amend Death Penalty Procedures*, Third Reading (June 13, 2012)
30. *Judiciary B Committee Meeting: Amending the Racial Justice Act*, June 11, 2012

31. Paul Woolverton, *Racial Justice Act: Four killers get a hearing on claims of racial bias*, Fayetteville Observer, July 6, 2012
32. Paul Woolverton, *Tilmon Golphin, who murdered two lawmen, is trying to get his death sentence overturned*, Fayetteville Observer, July 6, 2012
33. Gary D. Robertson, *NC Legislature overrides death penalty veto*, The Courier-Tribute, July 3,2012
34. *NC judge sets Racial Justice Act appeals for October,* WRAL, July 7, 2012
35. *E-mail from Hart to Danielle Marquis, Dorer, Rob Thompson, Jonathan Perry, Jim O'Neill* (July 27, 2012, 9:12:29 A.M.) and *E-mail from Rep. Stam to William Hart* (July 26, 2012, 7:41 P.M.)
36. Op-Ed: Jim Davis, *Anti-death penalty activism behind Racial Justice Act*, Fayetteville Observer, Nov. 7, 2012
37. *E-mails from Rob Thompson to Kimberly Overton and Kimberly Overton to Dorer* (Jan. 18, 22, 23, 2013)
38. *E-mail from Robert A. Lowry to Rep. Pricey Harrison* (Mar. 6, 2013, 10:41 A.M.)
39. Craig Jarvis, *GOP bill would repeal Racial Justice Act once and for all,* News & Observer, Mar. 13, 2013
40. Paul Woolverton, *Families of Fayetteville-area murder victims support bill to repeal Racial Justice Act,* Fayetteville Observer, Mar. 14, 2013
41. Op-Ed, Thom Goolsby, *Time to kill the Racial Justice Act*, Bladen Journal, Mar. 21, 2103.
42. Sen. Goolsby, https://www.youtube.com/watch?v=HdSqzTp6k3U (Mar. 20, 2013)
43. Senate Judiciary I Debate, *SB 306 – Capital Punishment/Amendment*, Mar. 26, 2013
44. *E-mail from Anthony J. Crumpler to Sen. Phil Berger* (Mar. 27, 2013, 10:52 A.M.) *and E-mail from Kolt Ulm to Anthony Crumpler* (April 3, 2013, 6:06:38 P.M.)
45. *E-mail from Ken Lewis to Sen. Phil Berger* (Apr. 6, 2013, 3:28:26 P.M.)
46. *E-mail from Thompson to Dorer* (May 29, 2013, 12:36:18 P.M.)
47. *E-mail from Peg Dorer to Paul Stam* (May 31, 2013, 8:48:39 A.M.)
48. *E-mail from Peg Dorer to Joseph Kyzer and Weston Burleson* (June 4, 2013, 12:03:12 P.M.)
49. *E-mail from Joseph Kyzer to Weston Burleson* (June 4, 2013, 11:38 A.M.)
50. *House votes to roll back Racial Justice Act,* WRAL, June 4, 2013
51. House Floor Debate, *SB 306 –Capital Punishment/Amendments*, Second Reading (June 4, 2013)
52. House Floor Debate, *SB 306 – Capital Punishment/Amendments*, Third Reading (June 5, 2013)
53. Sen. Goolsby, Facebook (June 21, 2013)
54. Thom Goolsby, Death Penalty Redux- Past Time to Restart Executions, pittcountynow.com, August 12, 2013
55. Buck Newton, http://www.bucknewton.com/justice (published on Oct. 19, 2016)
56. *E-mail from David Hall to James O'Neil, et al.* (September 9, 2011, 3:29 P.M.)
57. *E-mail from Peg Dorer to David L. Hall* (Nov. 3, 2011, 9:24 A.M.)
58. *E-mail from Peg Dorer to Garry Frank* (Nov. 18, 2011, 11:31 A.M.)
59. *E-mail from Peg Dorer to Colon Willoughby* (June 16, 2011, 10:13 A.M.)
60. Barbara O'Brien, *et al., Untangling the Role of Race in Capital Charging and Sentencing in North Carolina*, 1990-2009, 94 N.C. L. Rev. 1997 (2016)

61. *Ex-GI at Fort Bragg is Convicted in Killing of 2 Blacks* New York Times (Feb. 29, 1997)
62. Baxter Oliphant, *Support for death penalty lowest in more than four decades*, Pew Research Center (Sept. 29, 2016)
63. Public Policy Polling, *North Carolina Survey Results* (Sept. 27-30, 2012)
64. *Judiciary B Committee Meeting: Amending the Racial Justice Act*, June 6, 2012

fayobserver.com

Published: 07:55 PM, Fri Jul 06, 2012

Tilmon Golphin, who murdered two lawmen, is trying to get his death sentence overturned

By Paul Woolverton
Staff writer

The family of slain Highway Patrol Trooper Ed Lowry quietly watched with anger as a phalanx of lawyers on Friday worked to get his killer off death row.

"It's just ridiculous in our opinion, and it needs to end," Dixie Lowry Davis, Lowry's widow, said during a courtroom break Friday morning.

One of Ed Lowry's killers, Tilmon Golphin, is one of four Fayetteville-area murderers whose Racial Justice Ac claims had a preliminary hearing Friday in Cumberland County Superior Court. Senior Resident Superior Cou Judge Greg Weeks presided.

The four killers contend that racism was a factor in the decisions to sentence them to death and therefore, under the Racial Justice Act, they should have their sentences converted to life in prison without parole.

The defendants are Golphin; Jeffery Karl Meyer, who killed an elderly couple in 1986; Quintel Augustine, who killed a police officer in 2001; and Christina S. "Queen" Walters, who killed two women in a gang-initiation ritual in 1998. Golphin and Augustine are black, Walters is American Indian, and Meyer is white.

None of the defendants attended the hearing.

Some of the outcomes of Friday's proceedings:

Golphin, Augustine and Walters had their lawyers replaced with Malcolm "Tye" Hunter, Cassandra Stubbs, James Ferguson II and Jay Ferguson. That is the team that successfully used the Racial Justice Act this yea to get Marcus Reymond Robinson of Fayetteville removed from death row.

A hearing to delve into the facts of those three cases was postponed from July 23 to Oct. 1. In part, the dela is because the prosecutors won't be ready by July 23. But also the legislature on Monday, as part of a revision to the Racial Justice Act law, delayed all RJA evidentiary hearings until Aug. 31.

Weeks denied a request from prosecutors Rob Thompson of Cumberland County and Mike Silver of Forsyth County that he recuse himself from presiding over the claims.

The prosecutors want to call Weeks as a witness on their behalf, along with six other judges, to present evidence there was no racism in these murder cases. Weeks said the request was incorrectly presented an regardless, another judge has already rejected a similar request for Weeks to remove himself in the Robinso RJA case.

Defendant Meyer chose to stay with his legal team, Paul Green and Gordon Widenhouse. His next hearing date has not been determined.

The prosecutors said they want to contact law students who helped prepare the Michigan State University study that analyzed North Carolina death penalty convictions and reported evidence of racism in the court system. They contend the students were not qualified to work on the study.

The prosecutors also are seeking other materials from that study, which was used to persuade Weeks to tak Robinson off death row.

The courtroom arguments revealed that the state has been in talks with Harvard University statistics professor Donald R. Rubin to analyze and refute the Michigan State study.

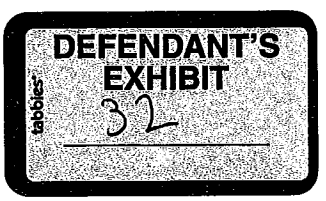
According to a document obtained by the defense lawyers, Rubin wants to charge the state $600 per hour fo his work, plus $200 for post-doctoral students and lower rates for graduate students.

The defense lawyers want the prosecutors to turn over numerous affidavits from other prosecutors across th state. The statements were prepared by the prosecutors in the Robinson case to try to show there was no racism in prosecutors' work on death penalty cases.

Weeks plans to review the affidavits and decide whether to share them with the defense lawyers.

After the Robinson ruling, upset lawmakers on Monday scaled back the means by which a death-row prisone can advance a Racial Justice Act claim.

Lawyers for Walters, Golphin and Augustine are seeking to use both the 2009 version of the law and the 2012 version approved Monday. They say they can use the 2009 version because their cases were under way before the law was changed this week.



Tilmon Golphin and his brother Kevin killed Trooper Lowry and a Cumberland County sheriff's deputy during a traffic stop on Interstate 95 in 1997. Kevin is serving a life sentence, and may qualify for parole under a U.S. Supreme Court ruling issued last month.

The Lowry family worries that the Golphins could eventually get out of prison.

"These people are evil. It's not because of their color - they are evil," Dixie Lowry Davis said. "If they were pink or purple or white, it would be the same thing. They still did the crime. They still should have justice. We should be ending this a long time ago. They did it. They're guilty and that's all there is to it."

"I would love to see him walk out of the gate," said Jim Davis, Dixie Davis' brother. "It would be the last step he ever took. Is that clear?"

"If they turn them loose, the family will take care of business," said Al Lowry, Ed Lowry's brother.

Staff writer Paul Woolverton can be reached at woolvertonp@fayobserver.com or 486-3512.

Recommend . 1

fayobserver.com

Published: 08:52 PM, Wed Nov 07, 2012

Jim Davis: Anti-death penalty activism behind Racial Justice Act

By Jim Davis

The Cumberland County Courthouse just concluded hosting the latest hearing dealing with the Racial Justice Act.

Those on the left politically would have you believe the act is all about racial bias in North Carolina's juror selection process. What they don't say is that this is another attempt to rid the state of the death penalty. It is a con on the residents of North Carolina.

They are determined, motivated and well-funded. They are also backed by political heavyweights.

I am also convinced that some members of our court system are aiding and abetting their cause. I believe it i called judicial activism.

I offer the following to support my allegation. In February, our local Chief Superior Court Judge Greg Weeks presided over a Racial Justice Act hearing - the case of convicted murderer Marcus Reymond Robinson. It was the first in our state under the Democratic version of the act that passed in 2009. That version was so watered down and favored plaintiffs so much that no district attorney could mount a credible defense. Judge Weeks ruled for the plaintiff, and a killer was removed from death row. To be fair to Judge Weeks, under the 2009 act it was probably the only ruling that could be made.

This is where I have major concerns. After the Robinson ruling the legislature passed a more restrictive version. As expected, Gov. Bev Purdue vetoed it but Republicans were able to override her veto. Their act became law in 2012.

The hearing that just concluded involved three defendants. All were convicted of first-degree murder. This included the murder of three law enforcement officers.

Judge Weeks assigned himself to the hearing. At the pre-hearing, the state asked him to recuse himself, since he had ruled just 10 months earlier on the Robinson case. Judge Weeks refused.

A reasonable person may ask if Judge Weeks has an incentive to validate his prior decision. I contend that h should have named a replacement. That judge may very well have ruled the same way as in the Robinson case. At least the perception of bias would have been removed.

A separate request by the state dealt with the issue or severability. This was again rejected by Judge Weeks. This decision puzzles me because each case was tried on its own circumstances. Obviously, jury selection would have been unique to each case, with different jury pools and racial makeups. Since juror selection is the heart of the plaintiffs' contentions, shouldn't each case have been heard individually? It make me wonder if Judge Weeks' agenda includes clearing the docket of all Cumberland County cases since he is retiring in December.

I attended the hearing each day and felt throughout that it was a waste of time and money, as I believe the decision was already etched in stone.

And then there is the most troubling aspect of all - one that all North Carolina residents need to think long an hard about. We now have a situation where, in a capital murder case, a single Superior Court judge has absolute power over a life-and-death decision that previously belonged to a 12-person jury.

Call me old-fashioned, but didn't our forefathers set up our system to avoid what is now taking place?

Politicians and pundits often talk about unintended consequences. What this act does is to effectively rule a jury's decision null and void. It has already happened in the Robinson case. Could it happen in any or all thre of the most notorious trials in the history of Cumberland County? Don't bet against it.

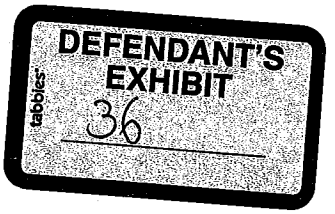
Speaking as a taxpayer, I am outraged by the millions of dollars that have been wasted on three trials, two pre-hearings, and two hearings.

I will give the Republicans credit for attempting to add teeth to the original act. But it should be repealed. It's very hard to add enough perfume to a carcass that has been rotting for three years.

My family and I have waited over 15 years for justice. Some say patience will be rewarded. You may count me as a non-believer.

I am proud to have called N.C. Highway Patrol Trooper Ed Lowry a neighbor, friend and brother-in-law.

Jim Davis lives in Hope Mills. Recommend 0



From: Lowry, Robert A CIV (US) [mailto:robert.a.lowry14.civ@mail.mil]
Sent: Wednesday, March 06, 2013 10:41 AM
To: Rep. Pricey Harrison
Subject: Racial Justice Act (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Dear Sir or Maam,

My name is Al Lowry, the brother of State Highway Patrol Ed Lowry. He was killed in the line of duty along with David Hathcock, a Cumberland County Sheriff deputy on September 23, 1997. Both killers with sentenced to death but the US Supreme Court converted Kevin Golphin sentence to life without parole due to being 17 years old at the time of the murders. State of NC have determined that Tilman Golphin, Christina Walters, Quintel M. Augustine and Marcus Robinson some of most horrific criminals, sentences were changed from the death penalty to life without parole due to the Racial Justice Act. The Racial Justice Act is a way to get rid of the death penalty . Out of 158 inmates on death row, 151 have applied for this act. It's in my deepest plea to have the Racial Justice Act overturned to bring justice and closure to me and my family and all that have been affected.

Just one other thought. Judge Weeks, has ruled in favor for these criminals and overturned the verdict of 4 trials, 48 jurors, 7 State level appeals court Judges , 3 Federal appeals court judges per case, and the 4 Judges residing over each case. All verdicts were made and the appeal process took place with no wrong doings found.

This needs to be addressed to the General Assembly to overrule this act in it's entirety.

Al Lowry

910-437-5874 Home

910-309-2914 Cell

DEFENDANT'S EXHIBIT 36

Classification: UNCLASSIFIED
Caveats: NONE

NewsObserver.com

GOP bill would repeal Racial Justice Act once and for all

Submitted by cjarvis on 2013-03-13 15:11
Tags: Under the Dome | Center for Death Penalty Litigation Tye Hunter | district attorneys | General Assembly | Racial Justice Act | Sen. Thom Goolsby

Resurrecting last session's bruising battle over the death penalty in North Carolina, a Republican state senator on Wednesday filed a bill to wipe all traces of the Racial Justice Act off the books.

The 2009 law allowed statistics compiled statewide to be used to prove racial bias in the prosecution, jury selection or sentencing in capital cases. But prosecutors and Republican legislators contended the law was a smokescreen to prevent all executions by using broad statistics that didn't have anything to do with individual cases.

They pointed out that all but a few of the 152 inmates on death row have filed claims under the 2009 law.

Last session, the General Assembly passed a bill dramatically narrowing how those statistics could be used and putting more of the burden of proof on the convict. That in effect gutted the effectiveness of the RJA.

SB306, filed by Sen. Thom Goolsby, a Wilmington Republican, would repeal the RJA in its entirety. Goolsby announced the bill at a news conference attended by district attorneys from around the state, and relatives of murder victims.

The bill would apparently not bring an end to the claims that have already been filed under the Racial Justice Act, however.

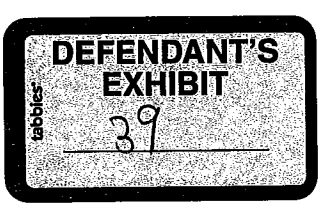
Goolsby said the bill would "restart the death penalty in North Carolina to ensure justice for the more than 100 families whose loved ones were taken brutally from them."

Tye Hunter, director of the Center for Death Penalty Litigation, in an interview noted that Republican legislators last session insisted they weren't repealing the Racial Justice Act. "Now the mask is off," Hunter said.

The bill would also allow doctors, nurses and pharmacists to participate in executions without retribution from licensing boards. That was an issue several years ago when the state medical board prohibited doctors from executions; the state Supreme Court ruled against the medical board.

It would also require the state attorney general to update the General Assembly every year on the status of death penalty appeals, establishes a timeline for each execution and gives the secretary of the Department of Public Safety responsibility for lethal injection protocols.

Login to post comments



http://www.fayobserver.com/news/crime_courts/families-of-fayetteville-area-murder-victims-support-bill-to-repeal/article_e15e6b28-8bf4-5a45-bdf1-2bd5c3260d87.html

Families of Fayetteville-area murder victims support bill to repeal Racial Justice Act

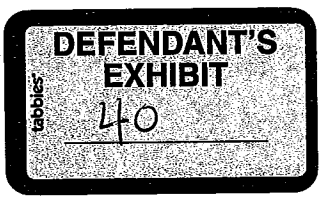
Paul Woolverton Staff writer Mar 14, 2013

RALEIGH - The families of two Fayetteville-area murder victims stood in support of legislation filed Wednesday to repeal North Carolina's Racial Justice Act and end the state's unofficial moratorium on executions.

The Racial Justice Act of 2009 and 2012 provides condemned inmates an opportunity to escape death row if they have evidence that racism was a factor in their prosecutions and convictions. It was a response to concerns of institutional racism in the criminal justice system.

Independently from the Racial Justice Act, all executions in the state were halted in January 2007 by court challenges questioning the legality and constitutionality of North Carolina's execution practices.

"The beginning of the end of that moratorium starts today," said state Sen. Thom Goolsby, a Wilmington Republican and criminal defense lawyer, during a news conference to announce his legislation.



The families of murder victims have waited too long for the punishments to be carried out, Goolsby said.

A death penalty lawyer had doubts that Goolsby's legislation will kick-start executions anytime soon.

Goolsby filed the bill, S306, to clear away the legal issues that halted executions six years ago and to delete the Racial Justice Act, which four convicted murderers from Cumberland County homicides last year used to get off death row. They were the first inmates in the state to have their claims heard.

One of these was Tilmon Golphin, who with his brother shot and killed Cumberland County Deputy David Hathcock and state Trooper Ed Lowry during a traffic stop on Interstate 95 near Fayetteville in 1997.

"I've been waiting 15 years," said Al Lowry, Ed Lowry's brother. "He was shot eight times, along with David Hathcock - five gunshot wounds."

Al Lowry said the Racial Justice Act is a tool that death penalty opponents are using to try to eliminate the death penalty in North Carolina.

Roy and Olivia Turner, parents of Fayetteville Police Officer Roy Turner Jr., also attended the news conference. Quintel Augustine was sentenced to death for Officer Turner's 2001 murder. He, too, was removed from death row last year under the Racial Justice Act.

The decision "opened it up for the crooks," said Roy Turner Sr., in an interview.

"It's like a slap in your face, tapping people on the wrist for doing many horrific crimes," Olivia Turner said.

Goolsby's bill wouldn't put Augustine or Golphin back on death row, but it's intended to stop all pending Racial Justice Act claims. Most of the state's 152 condemned inmates have claims pending.

In addition to repealing the Racial Justice Act, Goolsby's legislation would:

Clarify in statute that medical personnel can participate in an execution without jeopardizing their medical licenses. This was a factor in the state's moratorium that the state Supreme Court has resolved in the state's favor.

Place in statute a requirement that the legislature will be kept abreast of the training status of the employees who carry out executions.

Give the secretary of public safety flexibility in developing humane and constitutional methods of carrying out executions. The method was an issue in the moratorium. It also has been resolved by the N.C. Supreme Court in the state's favor.

The state is still in litigation over the constitutionality of its execution procedures, whether they violate the Eighth Amendment's prohibition on cruel and unusual punishment, said David Weiss, a lawyer with the Center for Death Penalty Litigation. Goolsby's bill would have not have an effect on that case, Weiss said, and until it's resolved, executions will remain on hold in North Carolina.

He thinks it will take at least a year.

The matter is pending before the N.C. Court of Appeals, and from there, it's expected to be heard by the N.C. Supreme Court, Weiss said.

Bills questioned

Tye Hunter, head of the Center for Death Penalty Litigation and one of the lead defense lawyers handling Racial Justice Act claims, questioned Goolsby's bill.

The act is to keep racism out of the criminal justice system and remedy past instances of it, Hunter said. "it sounds like what they're attempting to do is take that protection away, which I don't think most people will be in favor of."

Statistics show that North Carolina juries have grown reluctant to impose death, Hunter said, and he cited a recent survey by Public Policy Polling indicating that it's losing favor with the public.

"As with a lot of things, it seems to me this legislature is probably behind, is going contrary to what the majority of people in North Carolina think about this," Hunter said.

Staff writer Paul Woolverton can be reached at woolvertonp@fayobserver.com or 486-3512.

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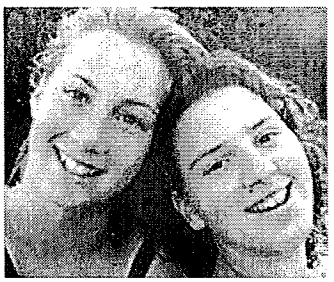

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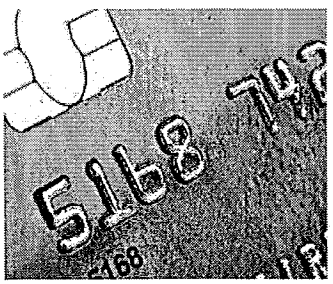

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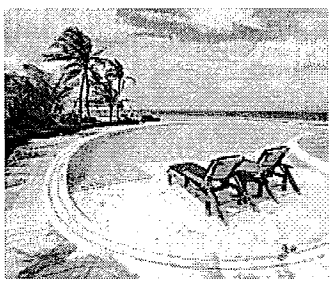

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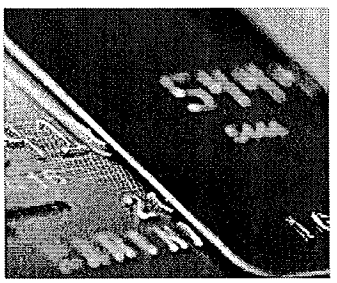

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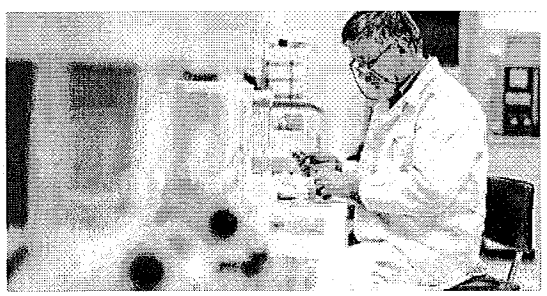

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Time to kill the Racial Justice Act

03.21.13 - 03:01 pm

Who could possibly be against a law entitled the Racial Justice Act? Aren't we all for ending racial injustice? The sad fact is that this law has nothing to do with race or justice. Instead, RJA is the Orwellian title of a sneaky law that does an end-run around our state's death penalty.

RJA attempts to turn convicted, cold-blooded murderers into victims of racial discrimination. That's right – as the real victims rot in the ground and their families continue to suffer, RJA allows death row inmates yet one additional avenue of appeal. This time it is statistical analysis – numbers fudging – if you will.

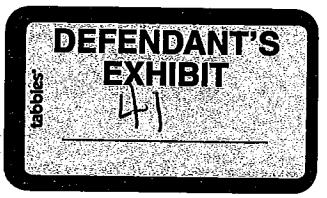
The alleged victim (the convicted murderer) is allowed to present statistics to a judge in an effort to demonstrate that the death penalty was sought against him due to his race. In other words, the murderer-turned-victim should have been given a life sentence, except for the racism of the trial judge, prosecutor or jury.

Do not be confused. RJA has nothing to do with the innocence or guilt of the murderer. This fact was previously established by a jury trial and countless other appeals afforded to the death row inmate.

Instead, RJA is a last ditch effort to get a murderer off death row and represents Monday morning quarterbacking to the Nth degree. Death penalty opponents passed this law, adding yet one more out for convicted murderers to avoid an appointment with the executioner.

To say that RJA was poorly written and ill conceived is an understatement. Virtually every inmate (white, black, Hispanic and Native American) has appealed his death sentence under RJA. All claim that statistics will show that their death sentences (not their convictions) were racist acts and that they should receive life in prison instead.

The absurdity does not stop with this argument; it has gone much further. The murderer of Fayetteville Police Officer Roy Turner was recently granted relief under RJA and taken off death row. Again, there was no question that Officer Turner was murdered in cold blood. However, his killer got his sentence reduced by arguing that because he was black, he was unfairly targeted for a death sentence. Here's the real kicker in the case — Officer Turner was also black. So try to wrap your mind around this — a black man murdered another black man and the fact that the murderer received a death sentence is somehow racist under RJA. Needless to say and to paraphrase Shakespeare, "Something is rotten in the State of North Carolina."



The stench you smell is RJA. Regardless of where you come down on the death penalty, it is currently the law of our land. If you do not believe in the death penalty, it is incumbent upon you to fight to have it overturned in the General Assembly, not support a ridiculous law that defies logic and common sense. The de facto moratorium on the death penalty created by RJA is a legislative embarrassment and should be abolished.

Recent legislation was introduced in the North Carolina General Assembly, not only to rid our state of RJA, but also to void all appeals currently pending under the act. It is past time to get rid of this absurd law that turns murderers into victims while the real victims lie in their graves.

— Thom Goolsby is a state senator, practicing attorney and law professor. He is a chairman of the Senate Judiciary 1 and Justice and Public Safety Committees. He is also the sponsor of this legislation.

North Carolina Senate
SB 306 – Capital Punishment/Amendments
Senate Judiciary I Debate
March 26, 2013

Click HERE to listen to the debate.

Debate begins at: 01:25

Chair (Newton?): Ok, the first matter - as I indicated before we will not be hearing Senate Bill 107. We are only going to do deal with Senate Bill 306. So that's the first item before us. We do have a PCS on this. Do I have a motion to take up the PCS? So moved from Senator Apodaca. All those in favor please say aye. Alright, no opposed – the ayes have it. The PCS is before us. So if I could, I would like to call Senator Goolsby to come forward and please explain the bill. Thank you.

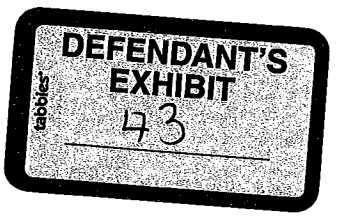
Sen. Goolsby: Thank you. What this bill does is really simple. I'll get Susan to go over it here in just a minute. But it goes through several things to basically restart the de facto moratorium that exists on the death penalty in North Carolina. It repeals in total RJA and all pending appeals under it.

It also goes through a number of things that currently appear to be slowing down the carrying out of our State's laws. Wherever you come down on the death penalty I would urge you to consider it is the law of our State. We have juries who have heard these cases, performed their solemn duties. We have prosecutors, many of whom were here I guess two weeks ago concerned about the status of this. And it is the law of the land and it needs to be carried out until and unless the people of North Carolina decide they do not want a death penalty. We have a number of families who continue to suffer. Their dead continue to rot in their graves. And they are waiting for justice in this State. They have a right to it; they have a right to expect it. And they have a right to see to it that our laws are carried out.

I'll have Susan please brief the Committee on the status of the changes.

Susan Sitze: First of all, the PCS is all just kind of some clean up technical changes. There were no changes to the substance other than some clarifying and just a few typos that we had found.

The bill does several things and I'm going to hit the high points and not get into the weeds, but I can answer questions if you want more specifics. All the subsections of Section 1essentially amend several statutes relating to the practice of medicine, the practice of pharmacy, the practice of nursing all to specify that the administration of lethal substances in an execution and any assistance rendered with an execution are not the practice of medicine, the practice of pharmacy, the practice of nursing, and that no one in any of those practices can be disciplined for their participation in an state execution.



Section 2 makes a change to the statute regarding the setting of the execution date. Under the current law the warden of Central Prison does that based on a written notice from the Attorney General or the prosecuting DA. However, the statute doesn't specifically require the Attorney General or the prosecuting DA to provide that written notice. So the only real change is that it specifically puts in there that the AG will have to provide the written notice upon the occurrence of one of the triggering events.

Section 3 amends the statute relating actual execution and the drugs administered. The current statute is very specific that it should be a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent, and the language is changed to be an intravenous injection of a substance or substances in lethal quantities sufficient to cause death and leaves it to the Secretary of the Department of Public Safety to determine what that appropriate drug is, what the appropriate amount is, and makes it not quite so specific. It does provide that any current procedures are not necessarily abated if the Secretary of the Department of Public Safety feels that they should be continued.

Section 4 of the bill is a report requirement from the warden at Central Prison to the Joint Legislative Oversight Committee on Justice and Public Safety – an annual requirement that they report on the status of the availability of death team and their training and that they are available and have been trained appropriately.

I'm sorry, I forgot to mention in Section 2 there is also an additional written report requirement that the Attorney General submit an annual report on the status of every death penalty pending case in North Carolina to the same Joint Legislative Committee on Justice and Public Safety Oversight.

Section 5, as Senator Goolsby mentioned, repeals the Racial Justice Act and it does so retroactively to all pending appeals, pending hearings, pending cases, with the exception of any case that has been fully heard and an order has been issued resentencing that offender to life without parole and that order has been through the appellate process and has been upheld. So if there's been a final order issued of the resentencing, that will stay in effect, but any other order that has already been issued prior to the effective date of this if it is overturned on appeal will not be effective. So the only thing that would be saved, for lack of a better term, is a final order that has already been through the appellate process.

There's also provision that requires the Attorney General, upon the request of any District Attorney, to take over the appeal process or any hearing on any of those pending Racial Justice matters that are still out there. And the act would be effective when it becomes law. I'm happy to answer any questions.

Chair: Thank you, Susan. Senator Goolsby, do you wish to add anything else before we open it up for discussion?

Sen. Goolsby: Do not.

Chair: Ok. At this time, I'll take questions from the committee. I first have Senator Parmon and then Senator Clodfelter, and we'll go from there. Senator Parmon.

Sen. Parmon: Thank you, Mr. Chairman. A question from the bill sponsor. Senator, under your bill those inmates that have already filed or have their cases reheard based on proof of race – they w ill not have an opportunity. Is that unconstitutional since they filed under a valid law for [*having their hearing*]?

Sen. Goolsby: We don't believe so. No, ma'am.

Chair: Follow up?

Sen. Parmon: Yes, follow up. So the fact that they already have filed and the law was valid at that time, not having the opportunity to have their case heard is not unconstitutional in your opinion?

Sen. Goolsby: Yes, ma'am.

Sen. Parmon: Ok. Follow up?

Chair: Yes, ma'am.

Sen. Parmon: Senator, I've worked a long time, and many of us, on this bill. Why do you feel it's necessary at this time to repeal the RJA when we know and it's been proven that there has been bias in our judicial system?

Sen. Goolsby: We do have, of course, Senator, a number of ways to appeal cases to the North Carolina Supreme Court, U.S. Supreme Court. You have various motions that you can make, both pre-trial, during trial and after trial – Batson motions which I of course have used as a trial attorney when I feel like race may be a factor in the picking of a jury. Racial Justice was an ill-conceived law. We have of course everyone on death row – white, black, Native American, Hispanic – who've pretty much everyone appealed under it.

We've had atrocious outcomes such as Officer Roy Turner whose family was here a couple of weeks ago – was a Fayetteville Police Officer murdered in cold blood. His murderer of course saw his death penalty commuted to life in prison right, I guess, before Christmas. Of course, again an outcome one would not expect if this act were acting like one would hope. Roy Turner, of course, was a black man murdered by a black man. The murderer got off death row much to the consternation and…I met his parents and talked with them. They expected justice in that case. They did not get the justice the State had promised them after a jury had made that solemn decision after numerous appeals, and they simply wanted justice. And I don't know how you explain to the black family of a murdered police officer why the person who murdered their son got off death row. If Racial Justice Act was actually what it purports to be I don't believe you would have outcomes like that, nor do I believe you would have virtually every person on death row regardless of race appealing under this law.

Sen. Parmon: Follow up?

Chair: One more follow up, Senator, and then I want to move to other members of the committee. Yes – Senator Parmon.

Sen. Parmon: Senator, first of all I want to say that it doesn't matter whether it's a black man killing black or white; we just want to ensure fairness in our judicial court system. Are you aware that in North Carolina in the past five or six years we have released people from death row who were actually innocent, there was no error, in their case they were actually innocent?

Sen. Goolsby: Are you aware, Senator, that this bill as far as if you're talking about the Racial Justice Act, that has absolutely nothing to do with the Innocence Commission. There is no question that the people who this RJA deals with are not cold-blooded, convicted killers. Roy Turner's murderer is a cold-blooded convicted murderer; there's no question about that. The fact that he got off death row for killing a black police officer is the crime here, in addition to the fact that Roy Turner was murdered in cold blood. Please do not confuse that issue. RJA has absolutely nothing to do with the innocence or guilt of the murderer. This is completely after the fact. It deals only with statistics and it is an attempt to end run around the death penalty. It is not valid. If it were valid, you would not have cases like Roy Turner's murderer being taken off death row. Nobody questions that Roy Turner was murdered in cold blood. I'm telling you, when you have an act where a black officer is murdered in cold blood and his murderer gets off based on RJA, that's just wrong.

Where you have another person such as the family who was also here – Yvette Howell. She was murdered in Davie County. Her murderer sits on death row, currently has appealed under RJA. Yvette Howell's family was here. Her mother was here with Fonzie (?), Yvette's brother, who the same cold-blooded killer tied to kill – shot him in the head and hit him with the claw-side of a hammer. He's still mentally impaired, 38 years old. Thos of you who were there at that meeting heard his mother's tearful testimony, saw her showing the picture to everyone, wondering how the murder of her daughter - a black lady - is appealing under RJA claiming that somehow racial bias put him on death row for killing a black lady. Folks, that's just not justice, that's just not right and this needs to end.

Chair: Senator Clodfelter.

Sen. Clodfelter: Thank you. Mr. Chairman, I have two questions either for the bill sponsor or for staff. One of them for Senator Goolsby goes to the Innocence Commission issue. On page three there are a series of six things that deal with [*inaudible*] the occurrence of a triggering event. We do not have included among those items if a petition is accepted and is under review by the Innocence Commission. That would not delay a triggering event in setting an execution date. Should that not be a [*separate fight*] perhaps? That's the first question, Mr. Chair. I would like to go ahead and ask them both [*unintelligible*].

Secondly, I don't know the process of the RJA whether there's an automatic appeal for a resentencing order so that there's not an automatic appeal then it could be that that we have to have a court order that becomes final, a resentencing order that becomes final without appeal

because nobody appeals it but it still becomes a final order. But that would not be covered by the language [*unintelligible*]. So those are my two questions.

Sen. Goolsby: I do not believe that the language currently contemplates an Innocence Commission review of the case. Susan, can you answer the second?

Chair: Please.

Susan Sitze: Thank you, Mr. Chair. The statute that is being amendment on page 3, those are the triggering events upon which, the occurrence of which the warden of Central Prison must establish an execution date. That statute doesn't deal with what could suspend that execution date. So I would have to look. I'm not sure if there's another more appropriate statute where that either might be addressed or could be addressed, but I don't think this is where it would be addressed even specifically.

Sen. Clodfelter: Could I just leave the question as pending with staff, Mr. Chair?

Chair: Yes.

Susan Sitze: I mean, I can check on that.

Chair: Please.

Susan Sitze: I'm trying to remember quickly. I do not believe that there is an automatic appeal of a denial of an RJA claim. So I believe Senator Goolsby is correct that the retroactive language would not recognize...Let's see. Wait a minute...Would not recognize an order because it was not affirmed upon appellate review the way it is currently written. But I'll double check that while we're talking. Let me locate [*unintelligible*]...

Chair: Alright

Sen. Clodfelter (?): If I could just suggest to the bill sponsor that if there's a final order that's become final by the absence of an appeal, that it should be viewed the same way as a final order that became final after the appeal. It still becomes a final order.

Chair: Okay. Senator Tillman, then Senator Stein, and that's the hands that I have at this time. Senator Tillman.

Sen. Tillman: Some of you legal scholars may be able to tell me. I just know basically what I've been reading about this. In death penalty cases from the time of conviction to the time of execution - in our case that's been many, many years – there are many appeals; there are many chances in the courts. I'd like to know basically what the average number of appeals are and a lot of times that's at state expense. The attorney is being provided, is it not – certainly in death penalty cases. And what's the average number of years that someone serves on death row? When we talk about fairness I think that may bring some light on the subject.

Chair: Thank you, Senator Tillman. Senator Goolsby, do you want to respond personally?

Sen. Goolsby: I don't have any of those statistics. I don't know if staff does?

Susan Sitze: I can get them, but I don't…

Sen. Goolsby: There's not been an execution, as I understand it, since 2000...

Sen. Tillman: I think Jesse James was the last…

Sen. Goolsby: …Six.

Chair: Follow up? Okay. Senator Stein.

Senator Stein: Thank you. Just to follow up on Senator Parmon's question. I want to ask staff, if I may: walk me through your analysis on how somebody who has a valid motion filed under State law can have that right taken away. They have that affirmative right under the law and how can you undermine whatever right they have? Is that not *ex post facto*?

Susan Sitze: Well, first of all, I'm not a court. It hasn't been decided. So can tell you the argument that they're…I suppose there can be an argument made either way. The argument that it's not *ex post facto* is that this is a State-granted procedure. This is not a right. Rights are granted by the Constitution, not by statute. So that's the reason…And also we are not…The argument is that this is not an increase of punishment, decrease of punishment as far as the procedure being provided. The procedure offers a way to look at the punishment but does not provide additional or decrease punishment that was or was not available. So the opinion of another attorney on staff…I haven't looked at this as much…Hal Pell has looked at this issue a lot more than I have, and looking at that, the opinion is that there is a sustainable argument this is not *ex post facto* because it is a State-granted procedure. The State can remove that procedure. And that because we are not increasing or decreasing the penalty necessarily, that it does not violate the *ex post facto.* Whether or not there might be a due process claim, it is also [*unintelligible*] this is not a right that that is probably not an issue, as well. It's going to be…If it ultimately gets…And if this is repealed, there will be court cases and I think it will be ultimately up to a court to decide. But I think there is a sustainable argument that it is not a violation of the Constitution.

Chair: Follow up?

Sen. Stein: Just a comment. One certainty is that there's going to be litigation. I happen to believe that the strength of the legal argument is going to be [*unintelligible*] filed motions that you can't give them a procedural right and they have exercised it and then remove it. And so what this is going to do is…I guess another question is who's going to have to handle all these appeals? This is going to create a whole new wave of litigation across the State. That's my comment.

Chair: Okay.

Sen. Goolsby: The way that the Act's structured, Senator, is that the District Attorneys are able to ask for assistance from the Attorney General to assist with that.

Chair: Alright, further questions or comments from committee?

Unknown: We do have some people, Mr. Chair…

Chair: Right. I am trying to allot some time for some public comment. Not seeing any more hands from the committee, let me clearly – if everybody would pay attention - clearly lay out the ground rules for how we're going to have public comment. First of all, those who have signed up, if time allows, we'll go beyond four, but right now I have four checked off. I'm going to allow everybody two minutes. If you'll please come forward to the podium and we're going to strictly enforce that time. The first person…We're going to go in alternating manner if I can. The first person I'd like to call forward would be Ms. Marsha Howell. And then the next person after that will be Mr. Darrell Hunt. So if Ms. Howell could come forward. Is she still here? I don't see Ms. Howell. Oh, please, Ms. Howell, if you would come forward to the podium. And then following her will be Mr. Darrell Hunt.

Marsha Howell: I would like for everyone to take a good look at what I'm missing at this time. In 1992 my daughter was murdered and the murder was planned out the night before. Her ex-boyfriend planned to murder her, had the shotgun in his car the next morning. And he carried out exactly what he started out to do. The other problem was my son was there at the same time and at that time he decided to get rid of my son. Now he turned 16 in a hospital in ICU. The boy beat him with the claw part of a hammer, as Senator Goolsby has told you – beat him with the claw part. His brains were coming out. Then he shot him. If the gun had not locked up on him, he would have shot him twice. He left a child – now he's a young adult – he left him in a bed with a sippy cup right beside the bed, and he locked the door behind him, leaving a child beside a gun, and he left the scene. He and his cousins thought they were getting away. He turned himself in, but at that point he had already committed the crime.

We have waited 21 years, and my daughter is black, by the way, and he is black – both guys were black. They had no remorse when they were telling their story – no remorse whatsoever. Now put yourself in my shoes. Racial Justice has brought this case right back to start over. And we're getting ready to another how many years? It's been 21, so how many more years do we have to suffer?

Thank you.

Chair: Thank you very much and I appreciate you being here. Thank you very much. Mr. Hunt, are you here? Okay, would you come forward? And then following that will be District Attorney Bell. And Mr. Bell, if you would go ahead and make your way up here so that we can keep the time moving? Okay, Mr. Hunt, thank you for being here. We appreciate it.

Darrell Hunt: Good morning. I'm speaking this morning as a victim. My mother was killed when I was 9, and she never received justice. And to be here to hear that we're going to start

executions all over again and without having justice when we have evidence that proves that race plays factors in sentencing people when we don't have it right. We talk about our court system. I went through 36 judges and appeals and was still sitting in prison for a crime I didn't commit. And it wasn't until the Legislature passed a law, another law that allowed us to put DNA into the data bank, that I was actually freed. But I went through 36 judges and all of them denied my appeal, even though I was innocent. And we have to make sure that we get it right because when I look at this, and this is when my mother was killed and I was 9 years old, and just last week if I had been executed – if I'd have been executed in 1994, I would not have had an opportunity to meet my sister who I just met after 46 years after my mother was killed. So I think we have to make sure that we have it right when we do execute people. Thank you.

Chair: Thank you, Mr. Hunt. Alright, Mr. Bell? Thank you. Two minutes, sir.

Locke Bell: Two minutes?

Chair: Everybody's got two minutes. I'm trying to keep it…

Locke Bell: I'm Locke Bell…I'm sorry.

Chair: Go ahead, please.

Locke Bell: I'm Locke Bell, the District Attorney in Gaston County. According to the Racial Justice Act as it stands now, it would be very easy to argue, based on the statute, that I am a racist. It would be very easy to argue that I have sought the death penalty in a very racist fashion, because I've only got against white people. All but one of the people on death row from Gaston County is white. I have sought the death penalty against three people – white men. As it is now, that could be argued statistically - and the Racial Justice Act is statistics – to show statistically that I am a racist. And statistically a white man who is a member of the Aryan Nation could get off death row – a white man who murdered two women with his bare hands and was asked, "Why did you do it?" And I'm going to clean up his answer: "I had to. They were having sex with black men." On death row, white – but statistically it's show, or could be shown, that I'm discriminating.

On the way up here from Gaston County I did a quick count of six black me who, under the statute, qualified for the death penalty. In all six cases I decided that they didn't deserve it and I did not seek it. Letting six black men not go to death row, or at least be presented to the jury, is more evidence – statistically. As the Racial Justice Act says, I am a racist. My predecessor, who was just as white as I am – same thing. I'd be glad to answer any questions. I respect the two minutes. I had a whole lot more to say. Thank you.

Chair: Thank you very much. And let's see, the next one I had was Mr. Chris Simms – I think it's Simms…Simes. I'm sorry. And then we'll…I think with time will allow one or two more.

Chris Simes: Thank you. Good morning, ladies and gentlemen. My name is Chris Simes. I was born in North Carolina and I expect I'll die here. I follow a man named Jesus. I find it both ironic and appropriate that we're discussing restarting the death penalty during Holy Week.

Two-thousand years ago the political authorities of that time executed Jesus Christ despite his actual innocence of any wrongdoing. Religious authority was claimed to justify that act. Sadly, today religious authority is claimed still to justify a thirst for blood.

There are many compelling reasons to oppose the death penalty. The biggest one for me is that the State of North Carolina will murder innocent people. We've seen many times now how our justice system, while it is the best in the world, is imperfect. We've sentenced people to death who were later found to be innocent. We just heard from one. You cannot hold yourself to be a moral and ethical person while supporting a system that can, and almost certainly has before DNA showed its face, murdered innocent people.

The Bible was trotted out here again today. People quote "an eye for an eye" as if it's the last word. Jesus said, "You've heard an eye for an eye, but I say..." For those who take Jesus seriously, "an eye for an eye" has been taken off the table. Jesus went much further. He addressed the subject of capital punishment directly. A real woman had been caught in adultery. Her guilt was not in question and the political and religious authorities gathered a crowd to carry out her execution. As we know, Jesus put a stop to it.

So you sit here today in this chamber with your rocks in your hands. Jesus draws in the dirt with a stick and looks you straight in the eye.

Chair: Thank you, sir...Thank you, sir. I think we have time for two more comments. If I could have, I think, Garry Frank – if I'm reading the writing correctly. And then following that we'll have Dwayne Beck.

Garry Frank: I'll try to beat my two minutes. My name's Garry Frank – the District Attorney in Davidson and Davie Counties. I want to speak in support of the bill. One of the most grave, serious decisions any District Attorney makes is trying to evaluate a case as to whether, under the law and the evidence, it merits the death penalty and whether it merits the wear and tear on the victim's family. The reason I support this bill is that this body is what passed the capital punishment. It's the law of the land. First, the speaker immediately prior to me says "reinstitute the death penalty." Well, it's been on the books. And when we have a homicide I, like all the other DAs, evaluate the case and then you bring the victim's family in to tell them where you plan to go with the case. I've had capitalist families tell me, when I'm trying to explain to them whether the case is a capital case or not, say, "Well, Mr. Frank, do we really even have a death penalty anymore anyway? It may be on the books, but is it really an enforceable, doable thing, even if the law merits it?" And the reason I support this bill is it puts in place procedures to try to hold accountability for these cases that have been tried and to the reporting back to this body. And I think it's a clear step forward that this body would say you're going to support the law that's on the books and the law that's the law of this land that requires capital punishment in certain vicious, atrocious crimes. I won't talk about any in my district, but I applaud the body for stepping up and trying to put the steps in place to make sure that the law that's already on the books is executed. Thank you.

Chair: Thank you, sir. Alright. Mr. Beck, if you're coming forward? Okay. I'm keeping score. It should be three for the bill and three against, just for the public. Mr. Beck?

Dwayne Beck: Good morning. Thank you all for your service to this State. I'm Dwayne Beck. I'm pastor of the Raleigh Mennonite Church. I live on North Blount Street within walking distance here and I come over here every once in a while at noon hour to sit and to pray. I just hope the security doesn't suspect something about me because I kind of move from lobby to lobby and just sit quietly and pray for you all.

I'm a conservative Christian and I speak to those of you who are Christian. Others can listen if you want to. I'm conservative in that I want the words...I want to conserve the words and way of life of Jesus Christ, God's Son. I believe that Jesus died on the cross for our sins, for my sins, for the sins of the world. And when on that cross Jesus said, "Father, forgive them. They don't know what they're doing," He said that for me; He said that for everybody in this world. And I believe that God raised Jesus from the dead and raised us up with Him so that we could know and live the way and the truth and the life. \

The foundation of my faith is that Jesus died for my sins so that I would not have to die. And He died for the sins of the world so that they would not have to die. And therefore I speak against the death penalty reinstatement and speak for life in prison to give opportunity for murderers, like King David and the Apostle Paul, to repent.

And as a pastor, I end with gentle, yet very direct counsel. If you vote in favor of the death penalty to reinstate it at this point, I would not want to be in your shoes when you meet the risen Lord on Judgment Day and He asked you why you voted against your faith.

I will continue to pray for you and pray that God's will be done. Thanks for your service to the State and if you'd like to talk with me about your faith, I'd be happy to do that.

Chair: Thank you, Mr. Beck. At this time we're going to move back to the committee. Are there further comments or questions from members of the committee? The Chair recognizes Senator Parmon.

Sen. Parmon: Yes, thank you, Mr. Chairman. May I ask a question? Representative Paul Stam amended the RJA and said – and I quote – "We have reorganized the law so that it was fair." And I hear talk today about the death penalty, and RJA is thrown in with the death penalty and other issues in Senate Bill 306. The RJA, first of all, is not about the death penalty. It's about ensuring fairness in our courts. And I heard talk about white men being convicted. I don't think anyone deserves to be tried unfairly.

Senator, would you be amenable to pulling out the RJA based on the fact that it's not to stop the death penalty? It's to ensure fairness in our court system. Representative Stam said that it did not need any more work because of the amendment he did in the last session. So my concern is that we have thrown the RJA in and mixed it with the death penalty, and it's two different issues, as you said earlier. We've got two different issues here.

Sen. Goolsby: You make a...

Sen. Tillman: Mr. Chair?

Chair: Senator Tillman.

Sen. Tillman: We've had a good discussion about this. I think it's time that we [*inaudible*] the death penalty. It's been on the books. I like the bill in its entirety and I make a motion for a favorable report.

Chair: Thank you, Senator Tillman. Senator Goolsby, was there anything that you wanted to say in response to Senator Parmon, or anything else in closing?

Sen. Goolsby: Yes, only I respect the Reverend and the other two people that came up and spoke against the death penalty. This bill is not about whether or not our State should have a death penalty. We currently have it. We have victims who continue to wait. And I also see the family of trooper Ed Lowery – I see his brother and his family in the audience. He's another law enforcement officer who was murdered in cold blood and his death penalty was commuted to...the death penalty of the murderer of Ed Lowery was commuted to life in prison. I know his family continues to suffer and does not have the closure they expected from our judicial system.

This bill simply deals with some legal technicalities so that the death penalty, which is the law of the land, can move forward. It does repeal completely RJA. It will prevent, not what's happened to the Lowery family, not what's happened to Ed Turner's family, but hopefully, Ms. Howell, it will prevent the death penalty from being taken off the person who murdered your beautiful daughter and who so violently assaulted your son who continues to suffer. And it will give you closure in the case as you expected, as you expected it as you went through the trial and the endless appeals as this case has continued to wear on since 1992. I'm sorry you have to keep trucking down here dealing with this, going to endless court proceedings and expecting justice as you were promised from your state.

I would just urge folks to please carefully consider - this is the law of our land. As Gary Franks said – the District Attorney who I guess prosecuted your daughter's case – as he said, it is the law of the land and people expect the law of the land to be carried out. It needs to be carried out. This *de facto* moratorium that's been created by this bad law that's allowed anybody, regardless of race, to appeal under it needs to be down away with. And we need to see to it that the justice these victims expected is carried out.

This is not about people who are not cold-blooded, convicted murderers on death row who are wrongfully there. The gentleman who we heard who was let off by the Innocence Commission – we're not talking about his case. Okay, folks, we're talking about there is no question the person who committed this crime did it in cold blood. The RJA accepts that as a fact and then tries to use statistics in order to get them off death row. We're not talking about innocence or guilt here. We're talking about whether or not we're going to allow an end run to continue to go around the death penalty and for murderers to get off death row, as they've been found guilty by a jury.

So I would urge the committee to vote in favor of passage of this so that we can send it to the Senate floor and then over to the House so that we can correct this law in North Carolina and see that the law of the land, as currently constituted, is carried out.

Sen. Parmon: Mr. Chairman?

Chair: Thank you, Senator Goolsby.

Sen. Parmon: Mr. Chairman, can I call for the ayes and noes?

Chair: Yes you may. We'll allow that. Thank you, Senator Parmon. Time is running short. We do have a motion before us for a favorable report on the PCS. All those in favor please indicate by raising their hand and saying aye.

Members: Aye.

Chair: Alright, if you'll hold it for just a minute. We'll let the…I think it's going to be clear, but we'll go through the rest of it. Okay, you got it all? Alright, thank you. And all those opposed please indicate by saying no and raising your hand.

Members: No.

Chair: Okay. I think it's clear that the ayes have it and this PCS is going to be reported favorably from this committee. And we are hereby adjourned. Thank you.

From:	"Kolt Ulm (President Pro Tem's Office)" <NCGA/EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/RECIPIENTS/KOLT ULM (PRESIDENT PRO TEM'S OFFICE)52E>
Sent:	4/3/2013 6:06:38 PM +0000
To:	"'Crumpler, Anthony J CIV (US)'" <anthony.j.crumpler.civ@mail.mil>
CC:	"Lowry, Robert A CIV (US)" <robert.a.lowry14.civ@mail.mil>
Subject:	RE: RE: SB306 (UNCLASSIFIED)

Dear Mr. Crumpler,

Thank you for your email. Senator Berger뭘 heart continues to go out to the Lowry family, and he strongly believes they deserve justice. SB 306 is on today뭘 Senate calendar to be debated and voted on. Please be assured that I have passed along your comments to Senator Berger.

Once again, thank you for writing.

On Senator Berger뭘 behalf,

Kolt D. Ulm

Constituent Liaison

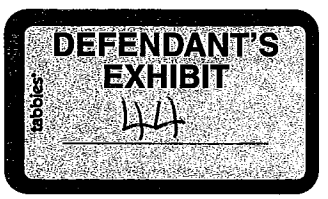
Office of the Senate President Pro Tempore

(919) 301-1783

kolt.ulm@ncleg.net

If you would like to receive our periodic newsletters, please click Subscribe Me.

From: Crumpler, Anthony J CIV (US) [mailto:anthony.j.crumpler.civ@mail.mil]



Sent: Wednesday, March 27, 2013 10:52 AM
To: Sen. Phil Berger
Cc: Lowry, Robert A CIV (US)
Subject: SB306 (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Mr. Berger,

Wanted to take a moment and thank you on behalf of myself and the Lowry family for trying to expedite the Senate Bill 306 that was voted yesterday to be addressed on the Senate floor.

V/R,

Tony Crumpler

Project Manager

Network Enterprise Center

Infrastructure Support Branch

?Ph: 910-643-6761

?Cell: 910-705-2528

Don't think twice....say it on ICE!" <http://ice.disa.mil/>

Classification: UNCLASSIFIED
Caveats: NONE

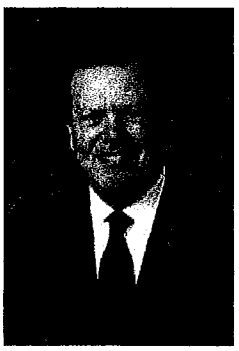
From:	micronet61@aol.com
Sent:	4/6/2013 3:28:26 PM +0000
To:	Sen. Phil Berger <Phil.Berger@ncleg.net>
CC:	Sen. Wesley Meredith <Wesley.Meredith@ncleg.net>; "Rep. Thom Tillis (Speaker)" <Thom.Tillis@ncleg.net>
Subject:	Re: Re: Senate Update - April 5, 2013

This is great work. Has needed to be done a long time. Congratulations on this and also some other bills that I saw was working their way thru. Voter ID, Repealing the Racial Justice Act, Repealing Obamacare,etc. You might consider reversing the ruling on the two men that shot and killed the Highway Patrolman and the Sheriff Deputy in Cumberland County. It was heartbreaking to hear that they had escaped the Death Penalty because of this law. Put them back on Death Row and start cleaning it out. It's been long enough!

Also the ones that are not on Death Row should be made to work everyday of the week at whatever the State/Cities and Towns needs done, Never could figure out why they stopped the chain gangs in the first place. State Parks, Roadways, Canals, Snow Removal when required etc. Whatever needs doing, put them at it! Not volunteer either? Mandatory!

Again, great work going on up there. Enjoy reading newsletters like this one.
Ken Lewis

-----Original Message-----
From: Sen. Phil Berger <Phil.Berger@ncleg.net>
To: 'micronet61@aol.com' <micronet61@aol.com>
Sent: Fri, Apr 5, 2013 4:54 pm
Subject: Senate Update - April 5, 2013



Phil Berger
Senate President Pro Tempore

Senate Update

April 5, 2013

Ending the De-facto Moratorium on the Death Penalty

This week the Senate passed legislation to end the de-facto moratorium on the death penalty in North

DEFENDANT'S EXHIBIT 45

Carolina. For nearly a decade, liberal death penalty opponents have orchestrated a series of legal challenges designed to impede the law.

Senate Bill 306 ends this legal wrangling and restarts the death penalty to ensure justice for more than 100 North Carolina families whose loved ones' lives were brutally taken.

Our bill:

Allows doctors, nurses and pharmacists to participate in executions without fear of punishment from state licensing boards. The North Carolina Medical Board issued a statement in 2007 that would have prohibited doctors from participating in executions, even though state law requires a doctor to be present. The North Carolina Supreme Court later ruled that the board could not punish doctors who participate in executions, and Senate Bill 306 codifies this ruling.

Brings certainty to the timeline of when the Attorney General starts the legal process toward execution and when the Secretary of Public Safety schedules an execution.

Requires the Attorney General to update the General Assembly each year on the status of pending post-conviction death penalty cases.

Gives the Secretary of Public Safety flexibility to develop the most humane and constitutionally-sound method possible to conduct execution by lethal injection.

Directs the Department of Public Safety to update the General Assembly periodically on its ongoing training of personnel who participate in the execution process.

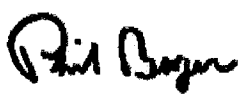
Repeals a law allowing judges to use arbitrary statistics and random data to decide whether a death row inmate was sentenced because of his or her race. The law has allowed nearly every criminal on death row, regardless of race, to file an appeal. The bill reaffirms the various avenues of appeal available to ensure a fair hearing of race discrimination claims in capital cases.

Despite having 152 inmates – all convicted of the most heinous crimes imaginable – on death row, North Carolina has not conducted an execution since 2006. Justice delayed is justice denied. It is past time for the state to defend public safety and ensure justice for victims and closure for their families.

Capital Tonight Interview

Ten weeks into the legislative session, Senate Republicans are continuing to focus on important priorities for the citizens of North Carolina, including meaningful tax reform that helps us create jobs and provide bigger family paychecks; a streamlined regulatory environment that makes our state a more attractive place to do business; and education reforms that guarantee our students have opportunities to succeed in the classroom and beyond.

Last night, I spoke with News 14's Tim Boyum about a number of these issues, including reforming our tax code, empowering our private sector job creators and ensuring eligible voters have an opportunity to cast their ballots. If you are a Time Warner customer, you can watch the interview on Capital Tonight here.



Senator Phil Berger
President Pro Tempore
2008 Legislative Building
Raleigh, NC 27601-2808
Phone: 919.733.5708
Fax: 919.754.3246
philbe@ncleg.net

Now you can keep up with Senator Berger on twitter and facebook

To unsubscribe, please reply to this e-mail with "unsubscribe" in the subject line.

From: Thompson, Rob
Sent: Wednesday, May 29, 2013 12:36 PM
To: Dorer, Peg
Subject: RE: Juries

Breaking down of the 12 original jurors in each of the cases removed because of RJA;

Augustine - all white jury
Golphin - one black, eleven white
Robinson - one american indian, two black, nine white Walters - six black, six white

Sorry it took so long to get this to you - long morning. I know 306 passed out of committee - please keep me informed.

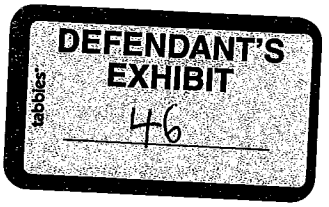
Thanks so much for all you do - let me know if you need anything else.

R.

-----Original Message-----
From: Dorer, Peg
Sent: Wednesday, May 29, 2013 6:31 AM
To: Thompson, Rob
Subject: Juries

Rob:

In the four cases that the Honorable Judge Weeks saw fit to remove from death row because of the RJA, did any of the juries have African American members?...and if so, how many?
Peg Dorer
Conference of District Attorneys



From: Dorer, Peg
Sent: Friday, May 31, 2013 8:49 AM
To: Paul.Stam@ncleg.net
Subject: Racial Justice Act - Cumberland County
Attachments: RJA cases Cumberland County.doc

Representative Stam:

Here is the information on the 4 cases that Judge Weeks removed from death row under the Racial Justice Act. It includes the races of the defendants and the victims.

Peg Dorer
Director
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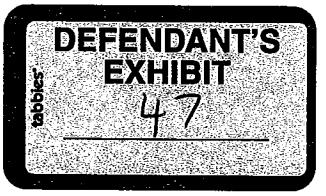

Cumberland County Racial Justice Act Cases Removed from Death Row

Year	Case	Jury
1991	State v. Robinson *black defendant* *white victim*	1 Native American 2 Black 9 White
1997	State v. Golphin *Black defendant* *2 white victims* *(Law enforcement officers)*	1 Black 11 White
2000	State v. Walters *Native American Defendant* *2 white victims* *(gang initiation)*	6 Black 6 White
2002	State v. Augustine *Black defendant* *Black victim* *(Law enforcement officer)*	All White Jury *Brunswick County*

Note: Most recent Death Penalty Case

Shaniya Davis Case - Cumberland County

2013	State v. McNeill *Black defendant* *Black victim* *(5 year old)*	1 Native American 4 Black 7 White
Jury selection: *Prosecutors struck 6 whites, 6 blacks* *Defense struck 12 whites, 2 blacks*		

From: Dorer, Peg
Sent: Tuesday, June 04, 2013 12:03 PM
To: Joseph Kyzer (Sen. Thom Goolsby); Weston Burleson (House Staff)
Subject: RE: Racial Justice Act Talkers
Attachments: RaceChallenges.doc.rtf; govs meeting.doc; RJA cases Cumberland County.doc

Here are a couple of things that may help:

(1) Race Challenges are all the instances where a defendant may raise the issue of racial bias currently in the system (not including RJA)
(2) Govs meeting are some general talking points that we used when meeting with the governor several years ago (I've updated them)
(3) Last is a listing of the 4 cases from Cumberland County that Judge Weeks removed from death row. It lists the race of the defendant, victim(s) and seated jurors. You can see by the vast differences between cases, that there is no pattern of racial bias.

Hope this helps.

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FAX 919-890-1931
www.ncdistrictattorney.org

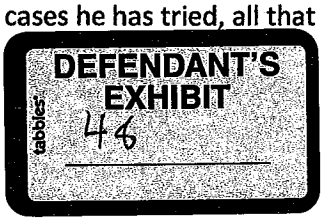
From: Joseph Kyzer (Sen. Thom Goolsby) [mailto:Goolsbyla@ncleg.net]
Sent: Tuesday, June 04, 2013 11:38 AM
To: Weston Burleson (House Staff)
Cc: Dorer, Peg
Subject: Racial Justice Act Talkers

Weston,

I CC'd Peg Dorer, President of the Conference of District Attorneys, who may follow-up with your office as you prepare talking points for House members.

Sen. Goolsby detailed his opposition to the Racial Justice Act in two recent columns (attached). Those are a good place to read his major talking point – that the RJA deals with racial FREQUENCY and not racial PROPORTIONALITY of seeking the death penalty, which allowed nearly every convict on death row to appeal under RJA. This single factor makes the law unjust and poorly written.

For example, Gaston County District Attorney Locke Bell has only sought the death penalty against three murderers, all white. Because he has sought the death penalty against three times as many white murderers as any other race, the death row inmates have an appeal under RJA. RJA says nothing about the proportionality of cases he has tried, all that matters is the frequency.



The result is an end-run around the death penalty and an indefinite moratorium on capital punishment

Other talkers:
-RJA turns district attorneys into racists and convicted murderers into victims
-There are sufficient motions for appropriate relief and the 'Batson' motion, for death row inmates to appeal their sentence
-All but four inmates on NC death row appealed under RJA
- A Democratic District attorney resigned from Gov. Perdue's crime commission when she vetoed the RJA in 2011. I suggest someone read from his statement of resignation on the floor:
http://projects.newsobserver.com/under_the_dome/da_resigns_from_crime_commission_over_rja_veto

Sen. Goolsby detailed further opposition to the bill in a floor speech about RJA in January '12, which may be helpful to develop talking points.
http://www.youtube.com/watch?v=Y7XlgttZViU

Thanks!

Joseph A. Kyzer
Legislative Assistant
Office of Senator Thom Goolsby, District 9
300 N. Salisbury Street #406
Raleigh, NC 27603-5925
Goolsbyla@ncleg.net
919.715.2525

Claims of Racial Discrimination CAN and should be raised at trial when appropriate:

Selection of the Case

Claim of Racial Discrimination in Selective Prosecution: Selection for prosecution may not be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 7 L. Ed. 2d 446 (1962); Wayte v. United States, 470 U.S. 598, 607-610, 84 L. Ed. 2d 547, 555-58 (1985), State v. Lawson, 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1984).

Grand Jury Selection

Claim of Racial Discrimination in Selection of Grand Jury Foreman: Grand jury foremen may not be selected on racially discriminatory grounds. State v. Mitchell, 321 N.C. 650, 653, 365 S.E.2d 554, 556 (1988); State v. Cofield (I), 320 N.C. 297, 3030, 357 S.E.2d 622, 626 (1987); State v. Cofield (II), 324 N.C. 452, 458, 379 S.E.2d 834, 838 (1989); Rose v. Mitchell, 443 U.S. 545, 61 L. Ed. 2d 739 (1979)

Jury Pool

U.S. Const., Amend. 6: "In all criminal prosecutions, the accused shall enjoy the **right to a speedy and public trial, by an impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Claim of Disproportionate Representation of Defendant's Race in the Jury Venire (Fair Cross-Section): Constitutional right to jury of one's peers includes the constitutional protections that the race of a defendant has not been systematically and arbitrarily excluded from the jury pool. State v. Bowman 349 N.C. 459, 509 S.E.2d 428 (1998), State v. McNeill, 326 N.C. 712, 718, 392 S.E.2d 78, 81 (1990); State v. Avery, 299 N.C. 126, 130, 261 S.E.2d 803, 806 (1980); Duren v. Missouri, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 587 (1979); Washington v. Davis, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 607 (1976).

Jury Selection

N.C. Const. Art. I § 26 (2010): "No person shall be excluded from jury service on account of sex**, race,** color, religion, or national origin."

Claim of Racial Discrimination in Jury Selection (Peremptory Challenges):A State's purposeful or deliberate denial of participation of jurors on account of race, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the Constitution of North Carolina. Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), Hernandez v. New York, 500 U.S. 352, 114 L. Ed. 2d 395 (1991), and Purkett v. Elem, 514 U.S. 765, 131 L. Ed. 2d 834 (1995); see also, State v. Glenn, 333 N.C. 296, 301, 425 S.E.2d 688, 692 (1993); State v. Carter, 338 N.C. 569, 586, 451 S.E.2d 157, 166 (1994).

Statistics

US Constitutional Claim of Racial Discrimination Based Upon Race-of-Defendant and Race-of Victim Effects: Entitlement to constitutional relief based on statistical evidence of race-of-defendant and race-of-victim effects is based upon very exacting standards. McCleksey v. Kemp, 481 U.S. 279, 95 L. Ed. 2d 262 (1987),
State Constitutional Claim of Racial Discrimination Based upon Statistical Studies of Race-of-Defendant and Race-of-Victim Effects: State v. Green, 329 N.C. 686, 689, 406 S.E.2d 852, (1991), sentence vacated for McKoy error, remanded for new sentencing hearing, appeal after remand, 336 N.C. 142, 443 S.E.2d 14 (1994))

Catch All

U.S. Const., Amend. 14, §1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State **deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the **equal protection of the laws."**

N.C. Const. art. I, § 19 (2010): "No person shall be denied the **equal protection** of the laws; nor shall any person be subjected to discrimination by the State because of **race,** color, religion, or national origin."

RACIAL JUSTICE ACT

North Carolina's criminal justice system has numerous protections in place to guard against racial bias. These protections allow prosecutors, defense attorneys or judges to address any claims of racial bias at any time during proceedings. Additionally, our appellate courts review cases and specifically look for any concerns of racial bias. Despite significant protections, the Racial Justice Act (RJA), as touted by inmates who have filed claims, allows statistics alone to establish racial bias without regard to the actions of the defendant, decisions made by juries and judges or concerns of the victims' families.

Like many other aspects of life, these statistics are vulnerable to manipulation and bias in their derivation and presentation. Additionally, statistics are not readily understandable to courts and lawyers, so the use of experts is necessary and understandable. As such, the Act creates a quagmire of litigation that requires the accumulation and distribution of over 20 years of homicide case files, easily numbering in the thousands. Statistical experts, being paid exorbitant fees, are being brought in from across the country to testify on a variety of statistical data, none of which relate to the convicted murderers acts. It has become apparent that while RJA is law in North Carolina, it is unlikely that the death penalty will be employed.

Filings:

- 156 of 158 death row inmates have filed RJA motions.
- 60 of these inmates are white, with many of their victims being white and many of the juries consisting of mostly white jurors.
- Black defendants are claiming racial bias by the criminal justice system.
- White defendants are claiming reverse bias as a result of the system's efforts to eliminate discrimination against black defendants.
- Almost every district in our state is facing at least one of these motions, while many are burdened with multiple motions.
- Filing an RJA motion is now standard procedure in capital cases, with no duty on the part of the defendant to ascertain the necessity of the filing or to show any good faith in that course.

Resource Impact:

- District Attorneys are being forced to devote a inordinate amount of time and resources to these convicted murderers' cases.
- While District Attorneys bear the responsibility of responding to RJA, they have received no additional resources, and in fact have lost significant resources in past budget years.
- This impact is resulting in fewer resources to prosecute the murderers, rapists and drug traffickers whose cases are now pending and who are sitting in jail.
- At this time two motions have begun to move forward. They each are addressing different issues within the RJA.

Forsyth:

- Motion addresses the statewide statistical issues regarding the DA decisions to proceed capitally and the race of victim.
- Preliminary hearings were conducted in January, 2011.
- The Judge entered a discovery scheduling order that will take 2 years to complete.

Cumberland:

- Motions centered on jury voir dire and the race of those persons struck from the jury...not the make up of the jury
- Two hearings have been completed and four murderers removed from death row

Racial Justice Study

The defense uses the Michigan study as a basis for most of their filings. This study has never even been completed.

Cumberland County Racial Justice Act Cases Removed from Death Row

Year	Case	Jury
1991	State v. Robinson *black defendant* *white victim*	1 Native American 2 Black 9 White
1997	State v. Golphin *Black defendant* *2 white victims* *(Law enforcement officers)*	1 Black 11 White
2000	State v. Walters *Native American Defendant* *2 white victims* *(gang initiation)*	6 Black 6 White
2002	State v. Augustine *Black defendant* *Black victim* *(Law enforcement officer)*	All White Jury *Brunswick County*

Note: Most recent Death Penalty Case

Shaniya Davis Case - Cumberland County

2013	State v. McNeill *Black defendant* *Black victim* *(3 year old)*	1 Native American 4 Black 7 White
Jury selection: *Prosecutors struck 6 whites, 6 blacks* *Defense struck 12 whites, 2 blacks*		

From: Joseph Kyzer (Sen. Thom Goolsby) <Goolsbyla@ncleg.net>
Sent: Tuesday, June 04, 2013 11:38 AM
To: Weston Burleson (House Staff)
Cc: Dorer, Peg
Subject: Racial Justice Act Talkers
Attachments: csc, Death of Racial.doc; Why the Racial Justice Act is a Sham (3).doc

Weston,

I CC'd Peg Dorer, President of the Conference of District Attorneys, who may follow-up with your office as you prepare talking points for House members.

Sen. Goolsby detailed his opposition to the Racial Justice Act in two recent columns (attached). Those are a good place to read his major talking point – that the RJA deals with racial FREQUENCY and not racial PROPORTIONALITY of seeking the death penalty, which allowed nearly every convict on death row to appeal under RJA. This single factor makes the law unjust and poorly written.

For example, Gaston County District Attorney Locke Bell has only sought the death penalty against three murderers, all white. Because he has sought the death penalty against three times as many white murderers as any other race, the death row inmates have an appeal under RJA. RJA says nothing about the proportionality of cases he has tried, all that matters is the frequency.

The result is an end-run around the death penalty and an indefinite moratorium on capital punishment

Other talkers:
-RJA turns district attorneys into racists and convicted murderers into victims
-There are sufficient motions for appropriate relief and the 'Batson' motion, for death row inmates to appeal their sentence
-All but four inmates on NC death row appealed under RJA
- A Democratic District attorney resigned from Gov. Perdue's crime commission when she vetoed the RJA in 2011. I suggest someone read from his statement of resignation on the floor:
http://projects.newsobserver.com/under_the_dome/da_resigns_from_crime_commission_over_rja_veto

Sen. Goolsby detailed further opposition to the bill in a floor speech about RJA in January '12, which may be helpful to develop talking points.
http://www.youtube.com/watch?v=Y7XlgttZViU

Thanks!

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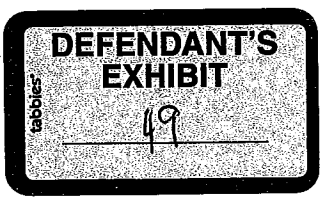


Why the Racial Justice Act is a Sham

Racial or ethnic bias should be taken seriously by people of good will with honest intentions, but the aim of the Racial Justice Act (RJA) is not racial justice. RJA's purpose is to increase cost and delay death penalty cases, with a goal of assisting the end of the death penalty in North Carolina.

The RJA states that proof of racial discrimination is established if "Death sentences were sought or imposed significantly "MORE FREQUENTLY" upon persons of one race than upon persons of one race than upon persons of another race."

Frequency is a measure of occurrence, not a measure of disproportion, discrimination or measurable bias. For example, if 10 death sentences are sought and imposed for both black and white murderers, the frequency of death sentences for each race is equal. However, equal frequency can be totally disproportionate.

If whites had committed 100 death penalty eligible murders, yet only 10 death sentences were sought and imposed, and blacks had committed 12 "identical" death penalty eligible murders, yet 10 death sentences were sought and imposed, there would be equal frequency, but striking disproportionality.

For those truly looking for discrimination, it does not matter how frequently, how often or how rarely the death penalty is sought or imposed for murderers of different races or ethnicities. It only matters if it is disproportionally sought or imposed based upon discrimination by significant and measureable means.

In any jurisdiction, if death sentences are sought or imposed 10 times for whites and 7 times for blacks or 10 times for blacks and 7 times for whites, the frequency is 30% less or 43% more and, voila, a claim of "more frequently" will be made and discrimination will be pronounced, even if death sentences are proportionately sought and imposed to any race/ethnicity involvement in capital murders and there is zero discrimination.

The "study" most often cited by the media establishing racial bias in North Carolina's death penalty was written by two UNC law professors and is entitled, "Race and The Death Penalty in North Carolina". In actuality, the paper establishes no facts.

First, the only alleged racial "disparity" (not bias) uncovered in the "study" is based upon: ". . . the "death odds multiplier" is 3.5, indicating that, on average, the odds of receiving a death sentence are increased by a factor of 3.5 when the murder victim is white." IF true, that 3.5 odds multiplier might be about a 2%-4% differential – completely meaningless, based upon actual cases sent to death row.

NOTE: Many, in the media and elsewhere, misinterpreted the 3.5 as "times" (a 250% differential) as opposed to the actual "odds multiplier" (maybe a 2-4% differential). There is no report of the authors, Professors Boger or Unah, ever attempting to correct this misunderstanding.

Second, the study looks at 1993-1997, or 16% of the 32 years of current death penalty laws and 99 out of the 383 death sentences, or 26%. Even in the unlikely case the study is sound, the results show no discrimination. In the context of the full 32 year database, this study is irrelevant in discussing the death penalty in North Carolina, today

Third, academics, lawmakers, the media and others have been trying, without success, to get the database/methodology on the Boger/Unah study for nearly a decade. Is there a legitimate academic reason for withholding that information?

The bottom line is that the RJA it is not about race or justice. The law intentionally allows cases to be challenged and overturned based upon a definition of "discrimination" which has nothing to do with discrimination. RJA makes a mockery of justice and is a direct insult to those who truly wish to end racism and discrimination. The law is a sham with no validity that has been used by death penalty opponents to create a de facto moratorium on our state's death penalty.

-- Presented by Senator Thom Goolsby

Death of Racial (In)justice Act

"The prosecutor is a racist and the first-degree, cold-blooded killer is a victim." This two-part statement is the claim of every legal appeal under the ill-conceived Racial Justice Act (RJA).

Written by death penalty opponents and passed in 2009, RJA has accomplished its desired effect: it has created a de facto moratorium on the death penalty in North Carolina. The poorly written law allows every murderer on death row, regardless of color or ethnicity, to appeal his sentence. Of the 152 inmates on death row, all but four have used RJA to forestall their executions.

All people of goodwill should take racism and ethical bias seriously. However, the aim of RJA is not racial justice. Its purpose is to increase the costs and delays of executions, with the goal of assisting the end of the death penalty in our state.

Here's how the creators of RJA set it up. Proof of racial discrimination is established under the law if "Death sentences were sought or imposed significantly MORE FREQUENTLY upon persons of one race that upon persons of another race." Notice the use of the words "more frequently." The drafters of RJA were warned about their poor use of language, but went forward with their efforts anyway. What they apparently did not care about was that "frequency" is a measure of occurrence, not a measure of disproportion, discrimination or bias.

Here's an example: 100 white men commit death penalty eligible murders and 10 death sentences are sought and imposed. 15 black men commit identical death penalty eligible murders and 10 death sentences are sought and imposed. The frequency is equal at 10 to 10. However, the result is strikingly disproportional.

To determine true discrimination, it does not matter how frequently the death penalty is sought or imposed for murderers of different races. What matters is any disproportion based upon discrimination by significant and measurable means.

The poor language of RJA has allowed three white killers convicted in Gaston County to accuse the local white district attorney, Locke Bell, of being a racist. Why? He has only put white people on death row. Under RJA they have an appealable issue because the DA has sought the death penalty more frequently against persons of one race than against persons of another race. If you ask the DA, he will tell you that these were the only three cases he thought were legitimate death penalty cases. There was no racism involved in his decision. He did what he thought was right, regardless of race. However, RJA looks at frequency.

The result of this sham of a law is endless litigation and a moratorium on the death penalty. Legislation that passed the Judiciary B Committee in the NC House will soon end this bad law. S306 repeals RJA in its entirety. The repeal is retroactive and voids any motion filed pursuant to RJA.

Our state has a moral obligation to ensure that death row killers convicted of the most heinous crimes imaginable finally face justice. Victims' families have suffered for far too long and it is past time to stop the legal wrangling and bring them the peace and closure they deserve. When RJA is repealed, first-degree murderers will no longer be able to claim victim status and accuse prosecutors of racism based upon an ill written and ill-conceived law.

We owe it to the families of murder victims across our state to impose the punishment the law requires. Nothing more, nothing less -- without prejudice or passion. With the ending of RJA, justice will be served, both for the families of the long silent victims and for the juries of North Carolina who did their solemn duty and for the district attorneys who prosecuted these cases.

Thom Goolsby is a state senator, practicing attorney and law professor. He is a chairman of the Senate Judiciary 1 and Justice and Public Safety Committees. He is also the sponsor of this legislation.

House votes to roll back Racial Justice Act

Posted: 34 minutes ago

House lawmakers have given tentative removal to repeal the remaining sections of the state's Racial Justice Act, the 2009 law that allows death row inmates to seek to have their sentences commuted to life without parole if they can prove that racial bias played a role in their death sentence.

Republican leaders repealed large portions of the law in 2012. Senate Bill 306 would repeal what's left of the law, leaving in limbo scores of cases pending review under it.

Rep. Skip Stam, R-Wake, said the RJA had become a de facto moratorium on the death penalty.

"No one wants actual racial discrimination. What we don't want also is for race to be used for a pretext – a pretext in order to stop the death penalty," he said in Tuesday's floor debate.

"We don't need this Racial Justice Act," said Rep. Sarah Stevens, R-Surry. "It has created nothing but a delay in the system, a tremendous amount of cost."

Four former death row inmates have already had their sentences commuted under the law. Cumberland County Judge Gregory Weeks granted the motions after finding "overwhelming evidence" that the state's judicial system is biased, especially in the area of jury selection, where studies have found qualified black jurors to be more than two and a half times more likely than white jurors to be stricken from the pool.

Rep. Rick Glazier, D-Cumberland, was one of the law's original backers. He said to repeal it after its merit has been proven is equivalent to legislative malpractice.

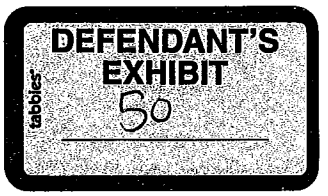
"We remain imprisoned by the past as long as we continue to deny its existence," said Glazier. "We simply bury the evidence."

Other Democrats cited the names of former death row inmates who were exonerated after judges found they were wrongfully convicted. "The justice system is comprised of human beings, and human beings aren't perfect," said Rep. Alma Adams, D-Guilford.

Republicans responded with the names of victims who were killed by death row inmates, arguing that repealing the Racial Justice Act would allow "swift and sure" justice for those victims' families.

Rep. Leo Daughtry, R-Johnston, said he doesn't believe the current judicial system is inherently racially biased. "I think our court system is the finest in the world," he said. "This debate is not about racial discrimination. It never has been. It's about the death penalty."

"It's unfortunate that you haven't walked in my shoes or the shoes of any other black person in this state when you were convicted because you were black," replied Rep. Mickey Michaux, D-Durham. "There should be no prejudice of any kind in the picking of a jury that's going to impact



your life or anybody else's life."

"We might not like to talk about it, but racism is alive, it's well, and it's real," agreed Rep. Alma Adams, D-Guilford. "Let's not undo the good that we did."

The bill also protects medical professionals who take part in executions from sanctions by their governing bodies, and requires the Attorney General to deliver regular status updates on pending executions to the General Assembly.

The House tentatively approved the repeal 77-40, with one Democrat, Bladen Rep. Bill Brisson, voting with the Republican majority in favor. The bill needs one more House vote Wednesday before it's sent back to the Senate for final approval.

SB 306, "Capital Punishment/Amendments"

North Carolina House of Representatives

Debate on 2nd Reading

June 4, 2013

Edited for clarity and grammar

Click HERE to listen to the debate.

Debate begins at: 53:28

The audio may also be accessed at www.ncleg.net under "Audio" – "House Audio Archive" – 06-04-2013

Speaker Tillis: Senate Bill 306, the Clerk will read.

Reading Clerk: House Committee Substitute for Senate Bill 306, a bill to be entitled "An Act to exclude the administration of a lethal injection from the practice of medicine, to codify the law that prohibits regulatory boards from sanctioning health care professionals for assisting in the execution process, to amend the law on administration of a lethal injection, to require the setting of an execution date if any of the events which are provided by this statute have occurred, to eliminate the process by which a defendant may use statistics to have a sentence of death reduced to life in prison without parole, to require periodic reports on the training and availability of personnel to carry out a death sentence, and to require periodic reports on the status of pending post-convictions capital cases." The General Assembly of North Carolina enacts…

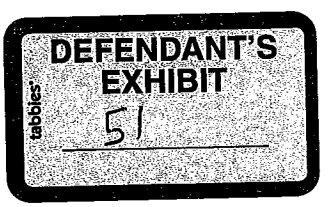
Speaker Tillis: Representative Stam, please state your purpose.

Rep. Stam: To speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Stam: Mr. Speaker and Members of the House, for many of you this will be the fifth time that you have debated this, not including second and third readings as more than one time. If you've been on the relevant committees, it may have been ten or twelve times. And so I'm tempted to say very little and just vote. But I realize that a very large portion of this House is new. You're not new to the public debate that has occurred in your communities but you may be new to the legal debate. So I will say something about it. It's very serious.

I'm passing around two pages of excerpts from debates that we've had in the past in 2009, 2011 and 2012, and I'll come to that at the end. What it addresses is a phenomenon that we had a couple of years ago and even last week – that is, people who support the so-called Racial Justice Act but had no idea that it could be applied to, or relief could be sought by, for example, a white defendant who killed a white person, tried by a white judge and a white jury and claimed that he



or she was discriminated against on the basis of race. That's what the underlying bill we want to repeal does. Whether you believe it or not, that's true.

I'd like to go through the bill with you because it does some other things other than that repeal, although I expect most of the debate to occur on that repeal. The first section allows doctors, nurses, pharmacists to participate in executions, in other words do their job, without fear of professional retribution. In 2007 the Medical Board issued a statement prohibiting doctors from participating in executions even though State law required a doctor to be there. The North Carolina Supreme Court later ruled that the Board could not punish doctors for doing that and this section codifies that decision.

Section 2 directs the Attorney General to notify the Department of Public Safety when legal appeals are exhausted for a particular case, and then directs the Department of Public Safety to ensure the protocols for execution remain constitutionally sound. It directs the Attorney General to provide the Assembly with periodic updates on what's happening with these 150 or so appeals that have been wandering around in the appellate courts for 15, 20, 25 years.

Section 5(a) repeals the so-called Racial Justice Act while reaffirming in Section 5(b) the multiple avenues of appeal available to ensure a fair hearing in any case where there's actual discrimination based on race. And so that I don't have to jump up and down every time someone claims that there's no remedy if there's actual racial discrimination, all I'll do is just hold up my hand. It will say "five" and five means Section 5(b). Read Section 5(b); you'll see it there. No one wants actual racial discrimination. What we don't want also is for race to be used as a pretext – a pretext in order to stop the death penalty which has been the public policy of this State for those who have committed deliberate, premeditated murder under aggravating circumstances.

When the Racial Justice Act passed in 2009 it effectively imposed a 5 to 6 year moratorium on the death penalty (I prophesied it would be 3 or 4 years - I was wrong.) by allowing all inmates on death row at the time to claim that they were racially discriminated against. As I said, even white defendants claimed racial discrimination. I think there were 156 inmates at that time. One-hundred and fifty-two of them made these claims. I guess the other four are just volunteers who want to be executed. The reason for this is that it (the RJA) allows murderers to seek relief by proving that someone else was discriminated against in another time, another place, another decade, another county. As I said, almost all the murderers sought relief.

Why does this matter? I've shown this book before. This is probably the fifth time I've shown this book. It's 28 studies furnished to me by the Attorney General's office which demonstrate that there is statistically significant deterrent effect of having the death penalty on whether or not you have additional homicides. And a rough count – a rough count of the people who have now died in North Carolina – innocent people who have died in North Carolina, a majority of whom are African Americans - because of this moratorium would be approximately the number of people seated here and the number of people filling the galleries. That's been the human cost of this so-called Racial Justice Act.

Let me go to the paper I passed out – two page piece of paper there.[1] I'm not going to read the whole thing. I could quote myself but that's boring even to me. In the debate on the 2009 act before it went into effect what's underlined there is we told them this allows every person of the 163 murderers currently on death row to make this claim. Every one of them has had the right to make the claim that racial prejudice was exhibited against them for the last 8 to 15 years they've been on death row. In other words, before this act went into effect the typical murderer had 8 to 15 years on death row if they ended up being executed, having their case reviewed by 45 judges. What the Racial Justice Act did was add 6 years approximately. So that becomes then 14 to 21 years - and instead of 45 judges, 53 judges. How many judges is enough?

It was easy to tell from the bill itself why this would happen. They got an immediate 1-year stay because they had a year to make their motion. And now they've been in litigation on those motions for, I believe, about three years now. If they're African American they claim it's disproportionality according to population. If not, they'll claim disproportionality in other ways. Locke Bell, the prosecutor in Gaston County, told us in committee and in paper that one of the ironies of the bill is that it will make seeking the death penalty almost impossible. Of all the defendants in Gaston County on death row only one is black, all the rest are white men. He said, "I have two pending capital cases both involving white defendants. In order to prosecute more white men capitally, I'm going to have to first get some death sentences imposed on some black men." That's the way the bill will work if we're foolish enough to pass it: quotas on the death penalty.

And then in that debate in 2011 when we knew what had happened, we explained again that this was not about actual racial discrimination, but rather discrimination proved that somebody else did it in somebody else's case in somebody else's time.

Well we weren't able to get an override of the Governor's veto in 2011, but in 2012 we did. And I have a short excerpt from that. "Another proponent was quoted publicly [I think that was Representative Womble] as saying he didn't understand that white defendants could use it if they murdered white people or of the same race and had the same race of jurors. But it has all of those effects." It (the RJA) is probably one of the most foolish laws we ever passed.

And if you would look at Section 5(b) of the bill you'll see that even after this (This is on page 4, beginning on line 44) upon repeal...When we pass this law a capital defendant retains all of the rights which the State and Federal Constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears his or her case is impartial and that the trial was free from prejudicial error of any kind. These rights are protected through multiple avenues of appeal, habeas corpus, motions for appropriate relief and we don't need this extraneous act which is unique in the nation. They'll try to tell you that Kentucky has a similar law and I'll explain why Kentucky's is completely different if that comes up.

But remember this – every time you hear that this law is necessary to ensure that we are free from racial discrimination, I'm going to hold up my hand here. It's going to say "5(b)." I want you to go look at page 4, those lines, and you'll see that that is not so. Thank you, Mr. Speaker.

[1] See Addendum on page 28.

Speaker Burr: ...Representative Glazier, please state your purpose.

Rep. Glazier: To debate the bill, Mr. Speaker.

Speaker Burr: The gentleman has the floor.

Rep. Glazier: Thank you, Mr. Speaker. Members, my son is much smarter than his dad and he studied the RJA in college and in grad school as we were going through this. And so I called him and asked if he would play devil's advocate with me as I defended the Act and while he gave the arguments against it. The conversation went a bit like this:

Philip said, "Dad, isn't the RJA designed to answer whether anyone on death row was sentenced to death due to a significant reason that it was the color of their skin?"

And I said, "That's right, son."

And he said, "Dad, didn't the Act allow overwhelming statistic evidence of discrimination to show patterns of discrimination just like we do in civil cases?"

"Yup."

"And Dad, didn't the original Act order an outside university with no ties to North Carolina to look at two decades of cases and present their findings wherever that massive evidence led?"

"Absolutely."

"It was Michigan State, wasn't it, Dad?"

"Go Spartans," said I.

"That study, Dad," said Philip, "found in jury selection that the prosecution struck over two times as many qualified black jurors as white jurors in those two decades of cases. And in fact, over 40% of those on death row had all white juries or just one minority juror on that jury."

"Yes," said I. "Son, you have to know that wasn't a North Carolina study and you have to remember it was done out of state."

"Well, Dad, the study was peer-reviewed, wasn't it?"

"Yup."

"And it had the same findings as the Carolina study done by professors at the university two years prior with a smaller number of cases?"

"Yup."

"And its authors were nationally acclaimed?"

"That's true."

"And it was introduced into evidence in the first RJA trial and the judge found it valid and credible and statistically unassailable?"

"That's true. But you've got to remember, Son," said I, "as one Senator said in this debate on this bill on the Senate floor about five weeks ago, the judge who tried that RJA case was black and probably biased."

"I see," said my son. "So Judge Weeks, that same judge who's on the law faculty at Carolina and Central and Duke?"

"Yeah, that's the one."

"And he's been on the bench 20 years?"

"Yes, he has."

"And he has one of the lowest reversal rates the state over that 20 years?"

"Yes, he does."

"And he was asked by the Chief Justice to be the specific judge to try the murder of Michael Jordan's father?"

"He was."

"And he's handed down death sentences in cases as a trial judge, including one of yours, Dad – isn't that the case?"

And I said, "Yes, he did and we're not going to talk about that."

"But the Senator still said he was biased because he was black? Dad, do you think if Judge Ammons or Judge Don Stephens out of Wake County had tried the case that that Senator would have said they were biased because they were white?"

"No, Son, that would be discriminatory, wouldn't it?"

"Oh, I see," said Philip. "Well, Dad, since the RJA passed there have been several trials."

"That's true."

"And in the first trial didn't Judge Weeks find overwhelming evidence that discrimination in Cumberland County in jury selection occurred, where he said there was very powerful evidence race was a significant factor in the exercise of grand pre-jury strikes in Cumberland County? And he found evidence that North Carolina prosecutors systemically 'engaged in training from 1995 till 2011, not in how to comply with the Batson decision prohibiting race as part of jury strikes, but in how to circumvent it.' And didn't he find that race was a materially, practically and statistically significant factor in jury selection in these cases for twenty years in North Carolina in the Second Judicial Division and in Cumberland County?"

"Yes, he did, Son. But some of that evidence was contradicted at trial."

"Well," Philip said, "by another study?"

And I said, "Well, no – not exactly. The State had a partial study, but they said they didn't have time to complete the study."

"But Michigan State did?" said my son.

And I said, "Yes."

He said, "Well who then contradicted it?"

I said, "Well the prosecutors who tried those cases said that they didn't make their strikes based on race and they should have been believed."

And my son said, "Well, kind of like when the defendant said he didn't do it. They should be believed?"

I said, "Well, not exactly. There's a difference."

"Well, aren't they both self-serving?"

"Well, maybe – but one's an argument made by an officer of the State and the other is facing a penalty."

"Oh," said my son.

Well, the other thing I said is, "Remember who has the burden of proof here. It's the defendant. The State has already found him guilty. The defendant has to prove that there was race here."

"Oh," said my son. "So the State controls all of the records of their own jury selection, and they control those records on trial and on appeal, and they don't have to disclose their jury records to anybody. But the defendant has to prove that those jury records show discrimination."

"Now you're getting it, Philip. We live in a great State."

"Well, didn't Judge Weeks and the expert statistician from Michigan State find the probability that racial disparity like he found occurring in these cases - that they would occur in a racially-neutral process would be less than one in ten trillion squared?"

"Yes, but Son, you know what Mark Twain said about statistics: 'Statistics – damn statistics and lies.' And remember also, Son, that the Supreme Court in McCleskey vs. Kemp said that statistics should never be enough to prove race discrimination in capital cases."

"But Dad," said my son, "didn't Justice Powell, who wrote that opinion, before he died state to the New Your Times that the one wish he had was that he had voted differently in that case and that he had come to the conclusion that was the biggest mistake he ever made on the Supreme Court?"

"Well, that's true, Son. But you've got to remember judges never make mistakes. He just did that for posterity."

"Oh," said Philip, recalling the Dred Scott opinions, and Korematsu and Plessy vs. Ferguson.

"And remember, Philip, we're talking about the original RJA. We repeal that last year. So now statistical evidence can only be used as background evidence, not dispositive. It has to be geographically limited and time limited, and racial discrimination can only be proven by real anecdotal evidence of race."

"I see," said Philip. "But didn't Judge Weeks just hold a second trial after that new Act? And after a long opinion in which both sides got to put on all their evidence and cross examine their witnesses and make full arguments, and didn't he find this time a few months ago even more evidence, this time in the prosecutor's own notes, of racial bias in jury selection."

"Well, that's what the order said, Son, but judges make mistakes."

"But Dad, I thought you just said a minute ago that judges never make mistakes."

"Philip, you have a memory like your mother. Two points, my son: first, Judge Weeks' decision was just about Cumberland County and that's on appeal and that's not affected by this order, and we'll know whether Judge Weeks was right or not after that appeal. But this new act is going to stop that from happening in any other county. So we'll find out what happened in Cumberland County really."

"I see," said Philip. "So it's OK for Cumberland County defendants to have the opportunity to prove that their trials were racially tainted by race-based jury selection, but now it won't be OK for anyone else in the State to have the same opportunity. What exactly do you call that, Dad?"

"A uniform system of justice of general courts," says I. And then there was the second point. "This Act, as Representative Stam says, creates a very long process, it delays executions, and besides – a defendant can always prove race discrimination at trial, or on appeal, or on motions

for appropriation relief or all those five-fingered things that Representative Stam is talking about."

"Well Dad, let me ask you about that. Don't you think it's worth time to get an answer to the most pressing and divisive issue of race in death penalty cases that's existed in the criminal justice system for generations? And isn't it true that both cases are at the North Carolina Supreme Court and, should that court decide those cases, once they do (which should be within the next year) all of the other cases will then fall very quickly one way or the other? And isn't it true, Dad, don't you think that the prosecutors now have the ability and have always had the ability to move to dismiss RJA appeals that are frivolous? And isn't it possible, Dad, that other judges like Judge Weeks in other places might find that race played a significant role in jury selection? And isn't it right, Dad, that the RJA was designed to ferret out and stop now and forever race discrimination in jury selection? And isn't it time, if the repeal is done, isn't it true that we will never, ever get the final answer that we have now spent all this time and money and emotion trying to find? And wouldn't we want to remember that over the last twelve years there have been three innocent people released from death row in North Carolina after they were convicted by a jury, had their appeal upheld by the courts, lost their motions for appropriate relief or lost their federal habeas petitions and all those five wonderful things that Representative Stam's figures raise?"

"Well Son, those are all great questions, but witness's families need finality. The system needs finality."

"But Dad, you always taught me that nothing is settled until it's settled right, didn't you?"

"Yes, I did."

"And here we're talking about life and death, and race and prejudice, Dad. Shouldn't we take time and the money needed to get it right for future generations?"

"Well, that may be true, Son."

"Dad, I have just one last question. If all this evidence could have been uncovered at people's trials and appeals and MARs and habeas – and we've had great lawyers trying those cases – why did it never happen? Why did it take the RJA to find out about all that evidence?"

"Well, Son, there really is a good answer to this: because a prosecutor's notes on jury selection and trial strategy are protected. Lawyers have to be able to write down their thoughts and opinions and strategy and innermost thoughts free from the belief that someone will then get to review them."

"So," said Philip, "the RJA was the first time those notes really were made available?"

"Basically that's true."

Well Dad, if that's true, then wasn't it the first time that these things were uncovered? For example," he said, "that Kenneth Rouse had an all-white jury because the prosecutor dismissed all the people of color who were qualified for the jury, and one of the jurors who voted to sentence him to death admitted that he lied to be on the jury. That juror's mother was sexually assaulted and murdered and her killer executed, and the juror deliberately concealed that fact from the judge and the prosecutor and the defense attorneys. And he admitted after trial that 'black men rape white women so they can brag to their families,' and 'blacks don't care about living as much as whites,' and referred to African Americans routinely as 'niggers,' and that bigotry influenced his decision to vote for death. Isn't that true, Dad?"

"Well, it is."

"And isn't it true that the courts have never meaningfully considered that claim but would have to under the Racial Justice Act? And how about Quintel Augustine who was convicted by an all-white jury and there were unsigned, handwritten notes turned over many years ago that said 'jury strike list' on it. And those notes had comments like, 'This juror is from a respectable black family.' 'This juror is a black wino.' Or a white juror as 'a trafficking marijuana pot boat early in the 80s, but a fine guy.' And those notes and many like them were never uncovered because lawyers never had access to them before RJA. And we learned through RJA discovery that prosecutors were trained in this State how to avoid Batson through cheat-sheets that we'll talk about later through other people."

"That's true."

"And isn't it true, Dad, that we learned in 1995 in a case called State vs. Prevette the prosecutor struck an African American member from the jury because he was a veteran in the United States Army but then kept white veterans?"

"That's true."

"And didn't we learn the prosecutor in another case called State vs. Fibido struck a black member because he answered questions 'yeah' instead of 'yes' six times. And isn't it true in another case the notes suggested a prosecutor struck an African American because he didn't feel like he'd been a victim even though he had his car broken into one time?"

"Yeah, and many more."

"Well," said my son, "what do you say about that?"

"Well," I said, "there were great notes – clear and specific. Good grammar and syntax on those notes. All told, they were great notes."

"But juries and judges didn't get to see them," said my son."

"No," I said. "But remember that sometimes lawyers, like people, write down things they don't mean."

Speaker Burr: The gentleman's time has expired. If you'd like to be recognized for a second time, you may be and have five additional minutes.

Rep. Glazier: Recognized for a second time.

Speaker Burr: The gentleman is recognized.

Rep. Glazier: Thank you.

Speaker Burr: I will state, based on the Speaker's intentions, there is I believe 45 minutes left for the minority to speak and…

Rep. Blust: Mr. Speaker?

Rep. Glazier: And Mr. Speaker, I'll be finishing in about 3 or 4 minutes.

Rep. Blust: Mr. Speaker?

Speaker Burr: Representative Blust, please state your purpose.

Rep. Blust: Will the gentleman yield for a question since he was interrupted?

Speaker Burr: Representative Glazier, do you yield?

Rep. Glazier: No, sir.

Speaker Burr: The gentleman does not yield. Representative Glazier, you have the floor.

Rep. Glazier: Thank you very much, Mr. Speaker.

"Remember sometimes, Son, lawyers write down things by mistake."

"So," he said, "the DAs who wrote on those notes that said 'black wino – strike 'em' might really have meant 'white and sober?'"

"Well, not exactly, Son."

"Or maybe when they wrote 'black – bad neighborhood' they meant 'white – good neighborhood?'"

"No, Son."

"So Dad, let me ask you finally, if this RJA is repealed, it's going to be repealed despite a UNC study showing racial prejudice in jury selection in North Carolina and a $1 million Michigan State study that says the odds against race discrimination having occurred fortuitously is one to

ten trillion squared, and two court decisions headed to the Supreme Court with detailed findings by a respected judge holding the study to be valid and finding massive anecdotal evidence from pages of prosecutors' notes that race played a significant factor in those cases, and cases pending in other courts around this State that would be stopped, and the North Carolina Supreme Court hasn't even had time to rule on the first two cases, but it they did, they would establish the law for the State if we let them do it, and all the rest of the cases would be resolved, and now we will never know whether race played a part or didn't play a part in those cases? Is that true?"

And I said, "Yes."

And he said, "Well Dad, what exactly do you call this system?"

And I said, "Equal justice under the law, Son. We're very proud of it here in North Carolina."

For the reasons my son articulated more eloquently than I and the many inconvenient truths he's highlighted, they should resolve our decision today. We can no more pretend that we have completely escaped the grip of a historical legacy spanning centuries as a society and the prosecutor and defense lawyers who tried these cases could rise above the legal culture of that same society in which they operated and were trained. We remain imprisoned by the past as long as we continue to deny its existence. And if instead of accepting the consequences of what we did and hoping and ensuring it never happens again, we simply bury the evidence in Hogan's Heroes' Sergeant Schultz 'I see nothing, I know nothing, I hear nothing' routine, we will never again have the confidence of our full society in the fairness and accuracy of the criminal justice system and, more importantly, in the truth of equal justice under the law.

We will not, on this floor, be remembered for most decisions we ever cast – unemployment changes, tax reform changes, employment security changes. But every once in a while in the generation when you're a legislator you will cast a vote for which history will remember you. I know you came to this floor many of you from caucuses - we did – and have a set view perhaps of coming in, but what we do today goes way past our caucuses and our ideology and our political obligations. We decide here today a matter of life and death and of whether we leave ragged questions unanswered about our own history or whether we move together confidently to heal all those wounds. We decide a case, an issue about the soul of this State and have an opportunity that generations have asked for to resolve the issue of race discrimination in the criminal justice system. Fundamentally that decision is up to each of you, and for me I will be voting to give the courts a chance to answer it. Thank you.

Speaker Burr: Representative Stevens, please state your purpose.

Rep. Stevens: To speak on the bill.

Speaker Burr: The lady has the floor.

Rep. Stevens: Thank you, Mr. Speaker. Ladies and Gentlemen of the House, I too have been involved with the Racial Justice Act since its inception. I was in two of the initial committees

that heard the initial Racial Justice bill, and as an attorney I saw it fraught with all kinds of problems and concerns.

I will tell you about the first – and it was a pretrial motion – the first Racial Justice Act case motion that was heard in my district. A young man fleeing from a murder in South Carolina came through my county, stopped at a rest area, climbed the fence and went into a house and killed two people just to get their car and a little bit of money. They didn't know him. It didn't matter. He didn't care who his victims were. Should Racial Justice apply to him? Oh yeah, I forgot to tell you – he's white and so were the victims, but he got to claim under the Racial Justice Act. He got to not have it considered on the facts of the case. And that's the biggest thing about the Racial Justice Act – it doesn't matter what the underlying facts are. It doesn't matter how many offenses this person has done in their own life. Everything we've ever learned about criminal justice is we judge a person based upon their prior record, their prior acts in terms of sentencing. We look at the actual crime they did. Was it heinous? Was it in the commission of another felony? You know, there are very specific facts to get the death penalty. And there is not a person on death row that the jury has not found that they had prior criminal histories – multiple prior criminal histories – that the crime they committed was especially heinous. To me, race doesn't and shouldn't matter, the facts of the case should matter.

Now I sat in on some interim study committees with Racial Justice and listened to some of the facts and statistics. And what I heard was we're looking at jury selection only from the perspective of the prosecutor. We're not looking at final jury composition. And I've been told that that's racially consistent when you get to the end. It's racially consistent with the makeup of the general population. So we're only looking at it from the prosecutor's perspective.

Now as we talk about the trial in Cumberland County that went on, guess what? The trial judge who tried him initially wanted to take the stand and testify about any type of racial prejudice he saw in the trial, and he was not allowed to even though the original bill allowed that.

Representative Glazier said he'd like to see this go on up to the Supreme Court. But if it goes up to the Supreme Court it's going up under the old law which said if there was a racial justice problem factually or statistically, 15, 20 years ago in one area of the State it could be used to apply to the entire State.

I too had some discussions with my daughter about Racial Justice. She was taking an African American Studies class at the University of Tennessee and she wanted to ask me a lot more questions about Racial Justice. And every time I tried to explain to her that we're going to try a criminal case based on statistics, she kept going, "That doesn't make sense. Why are you using statistics? Why don't the facts of the case matter?" I mean, we were told about cases in these committees where one person tied up another one and then taped his face completely with the thick packing tape and left him to die. Now for us, did that matter what his race was? Did it matter what the person who committed the crime was? A cruel and heinous left to die and suffocate for the want of $100. Look at the facts underlying a case.

The true intent of the initial Racial Justice Act was to end the death penalty – to put a moratorium on it. Ladies and gentlemen, we don't need the Racial Justice Act. As

Representative Glazier indicated, we've had Batson challenges where you can challenge about racial motivations in jurors. There are other things that if you can show the kind of prejudices that he was showing...I mean, we had one in our area in which a diner in a dining area was overheard to be using racial slurs and that stopped the entire jury and went for a mistrial. We have the abilities in place. If there are specific areas of the State where we are having this kind of problem, we need to focus on tackling the problem, not letting murderers get off. We either have the actual vote and speech on doing away with the death penalty or we don't. But this is not the way to go about it.

I just jotted down some notes because I wasn't expecting to stand up, but to me we need to look at all death penalty cases under the specific facts. If you really wanted to do away with any kind of prejudices at all, you have a jury picked at random, you find facts without them even seeing the witnesses, and then you put it in a computer and let the computer decide. That makes more sense than what we're doing. But we do not need this Racial Justice Act. It has created nothing but a delay in the system, a tremendous amount of costs that were understated grossly by our Fiscal Research Department. It has been used and abused to delay trials and to try to effectively end the death penalty. So I would ask you to support this repeal.

Speaker Burr: Representative Harrison, please state your purpose.

Rep. Harrison: To debate the bill.

Speaker Burr: The lady has the floor.

Rep. Harrison: Thank you. Mr. Speaker, ladies and gentlemen of the House, I'm not as eloquent as my seatmate across the aisle here, but I do want to point out the need for the Racial Justice Act and why this bill is so wrong-headed.

We know that our country has had a long history of racial discrimination in our court system, especially in jury selection. It dates back two centuries. We've had multiple efforts to address it in 19th Century congressional acts and US Supreme Court decisions in the 20th Century and even more recently. The Supreme Court confirmed in McKleskey that racism in our country is a problem and that states need to figure out a way to address it at the state level, which is what we had done with RJA.

In the recent rulings on RJA, Judge Weeks had found intentional racial discrimination throughout our court system. Studies, as Representative Glazier has pointed out, have shown that in North Carolina qualified black jurors have been struck two and a half to three times as often as qualified white jurors and that 40% of defendants on death row have been sentences to death by a jury that was either all white or had only one person of color the jury. This is clearly a problem and this is one of the many that RJA was meant to address.

The US Supreme Court ruled in Batson vs. Kentucky that qualified jurors could not be struck based on race alone. And it's been stated by others, like Representative Stam and Stevens, that Batson provides sufficient protections to ensure that race doesn't play a role in our criminal justice system. But all a prosecutor needs to do to comply with the ruling is to offer a race-

neutral reason for striking the juror. And it's because of the RJA litigation we found through discovery that instead of complying with Batson the Conference of DAs has provided DAs with cheat sheets on how to get around Batson. It was in the evidence, these cheat sheets. They reference items such as inappropriate dress, physical appearance, age, attitude. These are ways that the DAs got around the Batson restriction. The Conference of DAs held what they called "Top Gun Training" in which one-pager cheat sheets listing these race neutral reasons a prosecutor could use in a Batson objection in striking a black juror. So rather than being trained how to comply with the law, this demonstrates a calculated and largely successful effort to circumvent Batson. In the Racial Justice Act cases heard thus far, the court has found that DAs across this State have relied on this training handout to avoid Batson's mandate resulting in racial discrimination in juror selection. It's clearly a problem.

Additional evidence, as Representative Glazier pointed out, in the Cumberland County cases are the notes - these prosecutor's notes that were written in the jurors' strikes, and that's very troubling. You've got an Assistant DA who's writing comments like 'black wino,' 'drugs,' and 'respectful black family' but when inquired by the judge the prosecutor did not have a similar comment on a white family. In contrast to the 'black wino' you've got a white country boy that drinks, but he's OK. We never would have known about this were it not for the RJA litigation. There's no other mechanism in the law for finding this out because many of the defendants have already exhausted their appeals and there's no other way to introduce this evidence. This is another important reason why we should not be repealing the statute.

Judge Weeks said in his most recent ruling: "I had hoped that acknowledgment of the ugly truth of racial discrimination revealed by defendants' evidence in RJA cases around the State would be the first step in creating a system of justice that is free from the pernicious imbalance of race, a system that truly lives up to our ideal of equal justice under the law." This will not happen if we pass Senate Bill 306.

When decisions are being made based on the color of one's skin, justice is not being served. I urge you to vote no. Thank you.

Rep. Stam: Mr. Speaker?

Speaker Burr: Representative Stam, please state your purpose.

Rep. Stam: Would Representative Harrison yield?

Speaker Burr: Representative Harrison, do you yield?

Rep. Harrison: I yield.

Speaker Burr: She yields.

Rep. Stam: Representative Harrison, assuming just for sake of argument that there's been racial discrimination in the selection of a particular jury, why should the defendant get life in prison without parole, which is what the Racial Justice Act calls for?

Rep. Harrison: I'm not an expert in this area of criminal law, but it's my understanding that you want a jury that represents the diversity of the community and also a jury of one's peers. And when the jury does not reflect that diversity you don't get fair rulings from the jury. That's my understanding.

Rep. Stam: Mr. Speaker, a second question?

Speaker Burr: Does the lady yield?

Rep. Harrison: I yield.

Speaker Burr: She yields.

Rep. Stam: Here's my question. If you have this bad jury, why should the defendant who had this bad jury – and we know he's a murderer because none of them have raised a claim of innocence – why should he get life in prison without parole if this prejudiced jury tried his case?

Rep. Harrison: If I could, I believe that the point is that you want a process that's transparent and fair. And if you have a jury that's issuing these decisions that's not a fairly composed jury that there is some lack of confidence in the system and the ruling from the jury. I guess that's my answer. Thank you.

Speaker Burr: Members, at this time we have six members of the minority party that are still in the queue to speak and there's 36 minutes left for the minority side. So that's six minutes apiece. Nobody's going to be cut off from debate but at the six-minute mark, just if we want to split the time up among the six that are left, I'll hit the bell. You can continue to speak and eat up other's times but just to make sure that every member has an opportunity to speak, we want to make sure they are aware as they're speaking. So at this time, Representative Daughtry, please state your purpose.

Rep. Daughtry: To debate the bill.

Speaker Burr: The gentleman has the floor.

Rep. Daughtry: Thank you, Mr. Speaker. Hearing Representative Glazier's remarks is very troubling to me - to hear about our court system and the way he described it as DAs that were, I would say, even crooked, judges that were biased. I've been going around the courts of this State for over 40 years and I don't know that I'm in the same country that he's in. I don't see what he sees. I see a place where people are doing the best they can do and an institution to provide justice for all.

I've also been around here a long time and this debate is not about racial discrimination. It never has been. It's about the death penalty. That's what we're debating. Five or six years ago we were here and we didn't have lethal injection because we couldn't get a doctor to give the

injection for fear of losing their license. So we did not have the death penalty carried out since 2006, and this is a continuation of us not having the death penalty.

I don't know about you, but in my district my constituents favor the death penalty. They believe that crimes are committed that are so egregious and so horrible that the only appropriate punishment is the death penalty. You may think otherwise in your district. You may think that the best approach would be life in prison. But I submit to you the thing for you to do is run a bill to decide whether or not we should end the death penalty or whether or not we should continue the death penalty because right now we're doing this side attack, this end run. We haven't had a death penalty since 2006. We've had people on death row since 1985. We ought to have justice that's swift and sure. But the way we're trying to do this is to put people in prison for their life, as Representative Stam said, and not give them a lethal injection.

I don't understand the kind of court that I've been hearing described over there. It's not the way we have our court system. And we have some of the finest lawyers. We have specialists who defend those people who have been convicted and received the death penalty as a cottage industry where people go and they defend the death penalty all the way to the Supreme Court. We have the Commission on Actual Innocence in our state. We have Motions for Appropriate Relief. I think our court system is the finest in the world and I think the attack on our court system is wrong. And I don't know of anybody that should be any prouder of what we've done to protect our citizens and at the same time protect the defendants than we've done. I hope you'll support the bill.

Speaker Burr: Representative Michaux, please state your purpose.

Rep. Michaux: To speak on the bill, Mr. Speaker.

Speaker Burr: The gentleman has the floor.

Rep. Michaux: Mr. Speaker and ladies and gentlemen of the House, you know I don't try to get up and become an edifier of anything; I try to be plain and true.

Representative Daughtry, it's unfortunate that you haven't walked in my shoes or in the shoes of any other black person in this State when you were convicted because you were black. I've had to defend that. I've walked in the courtroom when the judge looked at me and I had a law book in my hands and said, "Boy, what you doing with that book? It ain't going to do you no good. I'm the law here." Now that's fact and that has happened. So when you walk in my shoes then you will understand what's happening here.

Now the other thing is that this bill...The Racial Justice Act is not about the death penalty. It is about an individual getting a free trial, a trial free from any prejudice at all. And when you knock out jurors because you think that they have a prejudice in favor of the defendant, or that they would be more in favor of the prosecution's side, that is discrimination in picking a jury.

Judge Weeks I think did a great job. He didn't use the statistics that everybody says that this thing used from out of state, he used what he called this: "defendants presented a wealth of case

anecdotal and historical evidence of racial bias in jury selection." And he was talking about Cumberland County, but it affected every other county in the State because there was other anecdotal evidence that came in that case from other counties also. The case is now before the Supreme Court. It's been appealed and they are in the process of making a decision on that and we ought to let them go ahead and make the decision on that.

But as I said before, this is not about the death penalty. It's not about the heinous act or anything like that. These persons have been convicted and were given the death penalty. There's not a "get out of jail" pass. It's simply stating that simply because you had a jury that was not of your peers, that there was racial prejudice involved in the picking of that jury, that you were guilty of the crime but instead of putting you to death you're going to be put in prison for the rest of your life. And to some that may be, you know, more...Some folks wish for death more than having to spend life in prison.

The other thing is that some folks have said that this adds time to the people who are on death row. It gives them additional time. That does not have to be true. There are things that a District Attorney can do in order to shorten that time: a motion to dismiss a motion for appropriate relief. I asked one district attorney this when this was in committee and he said, "Yes, I have filed a motion, but it's not going to be until 2015 before we hear it." Well, there's several things there. Number one is the he can ask for an expedited hearing. And I have not appeared in court yet when an expedited hearing was asked for that it wasn't given. So that means that you don't have to have that extra time in there that's involved.

The second thing that's been said is, "Well, if you've got a white on white case that you can't show racial prejudice in the picking of a jury." Well, as Representative Daughtry says, I have a little bit of faith fortunately in the justice system, and I believe that those claims that are frivolous will be thrown out in a matter of a few days if the District Attorney asks for it to be done.

There's just so many ways to do this, but the bottom line, my friends, is there should be no prejudice of any kind in the picking of a jury that's going to impact your life or anybody else's life. There are scare tactics used in here. They bring in pictures of these heinous crimes and what not. These people have been convicted. They've already been convicted. They don't get out of jail because of this. But there should have been no racial prejudice shown in the picking of that jury, and that's what has been shown in this instance.

I'm simply asking that - let the courts make the decision. Representative Daughtry, if you have that much faith in the courts, that matter is now being decided by our Supreme Court. So let's see what our Supreme Court has to say about this matter before we rush into something that we're going to regret later on. I would suggest that you vote against this bill, or, Representative Stam, take Section 5 out of the bill and let's...You raised your hand. You're right. Five - take it out. Thank you.

Rep. Jordan: Mr. Speaker?

Speaker Burr: Representative Jordan, please state your purpose.

Rep. Jordan: To ask the gentleman if he would yield to an inquiry.

Speaker Burr: Representative Michaux, do you yield?

Rep. Michaux: Yes.

Rep. Jordan: Since you've done, Representative Michaux…One of the cases that Judge Weeks removed from death row was a 2000 case, State vs. Walters (a Native American defendant, two white victims), was a gang initiation. That had a six black and six white jury. Can you explain the racism that would be present in that kind of case?

Rep. Michaux: I can't explain it because I didn't hear the case and I don't have the facts before me at this time. If you give me a few moments, I've got Judge Weeks' decision here. If you give me a few minutes and ask me later maybe I'll have a chance to go through it and see why he did that, if you don't mind.

Rep. Larry Hall: Mr. Speaker, inquiry of the chair?

Speaker Burr: Yes sir, Representative Hall, please state your inquiry.

Rep. Larry Hall: I just want to know and make sure that any time that we spend responding to questions, that that time does not count against our allotment?

Speaker Burr: That's correct, sir. Representative Adams, please state your purpose.

Rep. Adams: Thank you, Mr. Speaker. To speak on the bill.

Speaker Burr: The lady has the floor.

Rep. Adams: Thank you. Mr. Speaker, ladies and gentlemen of the House, there are many things as individuals that we don't like to talk about because those things tend to make us uncomfortable. Racism is one of those things. Race shouldn't matter, but it does matter, and in some cases it matters whether you live or whether you die. Racism is everywhere, and it's even in the justice system. And North Carolina took a big step to eradicate racism and to ensure fairness and integrity in our justice system when we passed the Racial Justice Act.

Representative Larry Womble did a lot of work on this bill and I'm sure he's frowning about what we're doing right now. Integrity and fairness are not foolish words. Fairness is a good "f" word. The Racial Justice Act allows people facing the death penalty - black, white, male or female - to present evidence of racial bias, including statistics, in court. And as Representative Michaux has said, it doesn't get them out of jail, just off of death row. And none of us really should want to execute any person whose death sentence was based on race discrimination, whether discrimination was utilized or applied by prosecutors or jurors.

The first priority of our criminal justice system - and I'm not a lawyer - should be to ensure justice and fairness and to not uphold verdicts that have any hint of racial discrimination. No one, supporters of capital punishment or opponents of capital punishment, want racial discrimination to be a factor in the courtroom and it should not be.

In this General Assembly we talk a lot about working across the aisle. Now the concepts imbedded in the Racial Justice Act as it was proposed was supported by a cross section of people around this State, including Democrats and Republicans, by supporters and opponents of the death penalty. And, as a matter of fact, 8 Republicans in the Senate voted for the Racial Justice Act.

As an African American I certainly can understand the comments that Representative Michaux has made because if you haven't walked in these shoes you don't know how they feel. But I can tell you that more people who look like me fall victim to a justice system that is not always just for us. And because of the impact of that existing racism we needed the Racial Justice Act in the first place to ensure the fairness and integrity in our justice system to help prevent more innocent African American defendants from being wrongly sentenced to death. And there are many cases to support the fact right here in North Carolina that race has been a factor, and we've heard several of those today. We've had several cases that were mentioned by Representative Glazier.

The point I'm trying to make is simply this: that the justice system is comprised of human beings, and human beings are not perfect. None of us are. And unfortunately, some people are still guided by conscious or unconscious racial bias. We might not like to talk about it, but racism is alive, it's well and it's real. It's real and it is a real problem. And as policymakers we have a responsibility to ensure that, as much as possible, that fairness prevails in everything that we do. And the least we can do is to put in place a mechanism that provides for all people, regardless of race or religion, regardless of socioeconomic status, the right to a system that treats them fairly and justly.

The Racial Justice Act provides that sense of assurance and we should leave this law intact to continue to do what it was intended to do to ensure fairness, equity and justice. So let's not undo the good that we did by instituting the Racial Justice Act that was needed then and it's still needed now. Vote against this bill. Thank you, Mr. Speaker.

Speaker Burr: Representative Luebke, please state your purpose.

Rep. Luebke: To speak on the bill.

Speaker Burr: The gentleman has the floor.

Rep. Luebke: Thank you. Mr. Speaker and members of the House, I just wish to comment on a few points that have been made in debate and add a few points that have not yet been raised.

The first is that there's been a lot of reference, I think primarily from Representative Stam, about the deterrent effect of the death penalty. And I would just like to note, as has been noted, we have not had any executions since 2006, and since 2006 the murder rate in this State has

dropped. So that whole linkage that some talk about is simply not there. The murder rate has dropped since 2006 and no executions since 2006. First point.

Second point – this is not, Representative Stam, the so-called "Racial Justice Act." It *is* the Racial Justice Act. And I was one of the primary sponsors of this bill. And I want to thank publically former Representative Larry Womble of Forsyth County for his great leadership in working on this bill and ultimately having this bill come into law.

Actually what we have here today are two bills. I think that Representative Daughtry said you want a death penalty restoration bill or, you said, Representative Daughtry, of course abolition bill, you said put one in. I feel the same way. You want a death penalty restoration bill, put that in. But what we have here is two separate bills merged into one. We have the death penalty restoration clear and we have the repeal of the Racial Justice Act. And that's most unfortunate because there are some members here who would vote to restore the death penalty but will not vote to repeal the Racial Justice Act. And people should just be very clear about that. And it's most unfortunate that they're not separate bills. Senator Goolsby chose to put them together and unfortunately the committee system here brought it that way as well.

It's important again to remember that in the Racial Justice Act that people are not let out. The infamous and reprehensible campaign ad from 2010 that was used that said that those who voted for the Racial Justice Act voted to let convicted murderers out of jail and back on the street some of you know was actually used against one of our Representatives no here who had voted against the bill, yet it was used against him in his attempt to be reelected and he did lose that campaign. The fact is it's life without parole. It's no picnic to be in jail without parole for the rest of your life.

Rep. Stam: Mr. Speaker?

Speaker Burr: Representative Stam…

Rep. Luebke: I will yield at the end of my remarks, Mr. Speaker.

Speaker Burr: The gentleman does not yield.

Rep. Luebke: The fascinating thing about the bill is Section 5(a), Representative Stam's reference to Section 5 – 5(a) just repeals the use of statistics. Now some of you know I teach sociology and it's just kind of amazing if you went into class and said, "Now class, we're not going to use any data in our class. We just don't want to use data." But that's basically what this bill says is, "Let's not use data. Let's not look at jury compositions." That's really what the Racial Justice Act is about is looking at jury compositions and its impact on court cases. And there's been a lot of consternation on the part of some people that white defendants, whites on death row were making use of the Racial Justice Act. But look, the Racial Justice Act allows people to do that because it's asking about jury composition and whether jury composition has something to do with the conviction of someone and the giving of a capital sentence – the death penalty, whether the defendant is black, white or green. It's looking at the fact whether the jury,

having constituted relatively, well, basically one or zero African Americans on the jury whether that has some impact on the death penalty.

Now I know some of you say, "Oh god, don't go into sociology, Luebke." But the fact is that African Americans are far more skeptical of the justice system than are white Americans (Representative Michaux addressed that directly) with good reason. If you don't know what DWB is, ask an African American, especially an African American male: "driving while black." And that just summarizes a lot of the problems that African Americans have with the criminal justice system. It's why African Americans might be more likely not to give a white defendant the death penalty. It's as simple as that. So there's nothing complex why white defendants on death row would abuse the Racial Justice Act.

In sum, the Racial Justice Act is a good act. It's unfortunate that it's gotten merged with the other bill about death penalty restoration. They should have been split and we should sustain the Racial Justice Act. Thank you. I hope, Members, you'll vote no this bill.

Rep. Stam: Mr. Speaker?

Speaker Burr: Representative Stam, please state your purpose.

Rep. Stam: Would Representative Luebke yield for two questions.

Speaker Burr: Representative Luebke do you yield?

Rep. Luebke: For two? Okay, of course. Go ahead.

Rep. Stam: First one: Would you explain to the House why these 152 convicted murderers who apparently had tainted juries, why they should spend their life in prison without parole instead of getting a new trial?

Rep. Luebke: Under this bill it simply asks the question of whether there is a problem with jury selection. And it's saying in order not to have…I don't want to be personal, but folks like you say, "Oh, these folks got off," it's saying "You're not going to get off. You're going to have life without parole," precisely to try to undercut the criticism that this bill is about letting murderers back out on the street.

Rep. Stam: Second question, Mr. Speaker?

Speaker Burr: Does the gentleman yield?

Rep. Luebke: I yield.

Rep. Stam: And here I address you as a sociologist – probably the only one here. Representative Jordan asked Representative Michaux about one of the cases that Judge Weeks said was infected with racism: State vs. Walters – a gang initiation case. Had six black citizens

of Cumberland County on the jury. Do you believe that six black jurors from Cumberland County could be so infected by racism that they would sentence someone to death?

Rep. Luebke: Representative Stam, Judge Weeks worked on that case. I didn't. Talk to him.

Speaker Burr: Representative Pierce, please state your purpose.

Rep. Pierce: To speak on the bill, Mr. Speaker.

Speaker Burr: The gentleman has the floor.

Rep. Pierce: Thank you, Mr. Speaker. I just want to add a few comments. There's a question that's asked, and I think many of us have talked around it today, but why does jury diversity matter? Beyond the constitutional issues which sometimes strike individuals from the pool based on their race systematically includes the inclusion of African American jurors undermine the public confidence of both individuals who are in the court systems. Studies have shown that communities' perceptions of justice is based upon its faith in the process by which the outcome achieved by the process and make sure that it's fair and transparent. A lack of jury diversity represents just the type of procedure issues that trigger community fears about the unfairness of the system. Additionally, diversity in the makeup of the jury influences decisions during the trial which determines a person's guilt or innocence is a matter significant, especially in a first degree murder trial.

Twelve jurors from different groups who are not a part of that group sometimes weigh their experiences not understanding the experiences of others. Jury diversity does in no way guarantee that a jury is more likely to be friendly to the defendant than an all-white jury. It simply means that the conversation deliberation to reach the final decision will be more thoughtful and based on a full rate of experience than a jury selection from one homogenous group that shares the racial identity or socioeconomic background.

And I think sometimes in our communities, particularly the African American community, as many have already said, there is a fear of the court system, not being aware of what's going to happen. Many of our young men sometimes, and women, when they go into the system they feel like, and sometimes justice, I know that she said that she's blind, but sometimes she pulls up to see who's on trial. And that's sad that in America, even in North Carolina, that we still have those issues. So I would ask you to vote no on this bill. Thank you.

Speaker Burr: Representative Terry, please state your purpose.

Rep. Terry: Thank you, Mr. Speaker. To debate the bill.

Speaker Burr: The lady has the floor.

Rep. Terry: Thank you very much. Ladies and gentlemen, I don't know the law as these eloquent lawyers have spoken here today, and therefore I'm going to speak about this from a very personal standpoint. And I hope you'll bear with me as I do so.

Since 1999, five innocent men have been released from death row. Wrongfully convicted individuals often serve decades incarcerated before the courts recognize their innocence. When someone is placed on death row wrongfully, our state perpetuates the cycle of victimization. And I want to stand here today to tell you that my neighbor, whom I have learned to love and respect for his gentle nature and his humility, was on death row for 19 years. His case was twice appealed by the North Carolina Supreme Court, one granting a new trial in 1989 and one denying a new trial in 1994 despite new DNA that declared Darrell innocent of the crime that he was convicted of twice in this State.

I must say to you today that I am honored to be just a person who had learned to find out about this man who fell victim to a system that our State - good, bad or indifferent - just did not find a way forward to do anything about until those who recognized that this is a life, that there is not enough evidence, that despite all of the trials, despite all of the court processes that took place, the fact remained that he was an innocent and is an innocent person.

I simply ask you to listen to your heart and realize that everybody who goes through these systems of court trials and justice often times is confronted by situations that have been perpetuated because of a culture of whatever it is that really does say that race matters. And there are those who also believe that class matters. There is also the whole note of the idea that if you don't have enough money you cannot pay your way out of this stuff. I simply ask you to consider the fact that I live next door to a gentleman who spent 19 years of the best part of his life incarcerated, convicted by two juries here in the great State that I love that is North Carolina. I cannot support anything that allows this to continue to happen. The whole world is watching. Thank you.

Speaker Tillis: Representative Tim Moore, please state your purpose.

Rep. Tim Moore: To debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Tim Moore: Thank you, Mr. Speaker. Members of the House, I know the hour is growing long. I'll make this brief. Last year the Speaker asked me to chair an interim committee that looked at the issue of capital punishment and we did that. A number of you were on that committee. Part of that even included a visit to death row. And we went over there - saw everything from where they live to where the executions take place. Talked with a number of folks and we had several hearings. Had folks come in who testified. We had those who had been wrongfully convicted and we had a number of the family members, folks who came in and testified. There were family members of all races. There were death row defendants of all races. So the one thing I picked up from it is it wasn't a racial issue.

You know, there's been much made about the fact there have been some bad convictions. That's true. I think we acknowledge that's happened. But in those cases those folks were vindicated through motions for appropriate relief, through DNA evidence, through other things.

The flaw of this bill is that it doesn't go to a problem with a particular case. It tries to put a carte blanche solution to something that is not that. Under this law, under this bill as it presently is, unless we amend it, a person could walk into a Wal-Mart and shoot 10 people, point blank range, caught on video, no dispute that they did it, and still try to use the Racial Justice Act as a basis to avoid the death penalty.

Here's another irony with the Racial Justice Act the way it presently is: it would allow a man who was an avowed white supremacist, a member of the Aryan Nation who murdered an African American victim, to argue that he was a victim of racism. That's the flaw with the law as it's currently written.

Members, this bill corrects that. This bill is to push through justice to make sure that a person is judged for crimes they committed, not for what somebody else did. Members, I would urge the body to support this bill.

Speaker Tillis: Representative Farmer-Butterfield, please state your purpose.

Rep. Farmer-Butterfield: To speak on the bill.

Speaker Tillis: The lady is recognized to debate the bill.

Rep. Farmer-Butterfield: Ladies and gentlemen, the passage of this bill and its goal is to restart executions do not make North Carolina a safer place to live. The death penalty ties up tremendous amounts of money, a lot of resources. Yet less than 1% of individuals tried for first degree murder receive death sentences. What if you were not able to serve on a jury because you went to a particular university, were not a high school graduate, had no law enforcement connections or military connections, or you just lacked eye contact?

Instead of focusing our efforts on rushing to restart executions, we ought to be considering how we can better serve victims and actually take steps to make communities safer. Killing somebody by mistake once in a while is not OK. North Carolina is better than this. I ask that you oppose Senate Bill 306.

Speaker Tillis: Representative Larry Hall, please state your purpose.

Rep. Larry Hall: Inquiry of the Chair.

Speaker Tillis: The gentleman may state his inquiry.

Rep. Larry Hall: The amount of time left for…?

Speaker Tillis: Thirteen minutes.

Rep. Larry Hall: To speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Larry Hall: Thank you, Mr. Speaker, and I'll certainly save some time for others. But I wanted to make sure we didn't get too far off the subject. And part of the question we face now...And yes, racism is uncomfortable and all of us in here, black, white, Indian or other have experienced moments when we caught ourselves and said, "That was probably a racist thought. That was probably a stereotypical thought that I had. And of course, being a Marine, I have thoughts of people being inferior to me all the time. Maybe so. But our responsibility is probably the greatest. You know, we talk about passing bills that will create judgeships and bills that will eliminate judgeships, and bills that increase the penalties and bills that take away the funding necessary to pay the judges to enforce the greater penalties. And all of that responsibility falls on us. So we can't take part of it and walk away from the rest of it.

You know, when we talk about these cases and the question of these constitutional rights involved – this jury of your peers and the selection process, it's important to note that not only are the rights of the accused at issue, but the rights of those who are in jury service are at issue as well. That they deserve to be treated fairly and not discriminated against, that is a portion of this act that we have to understand.

Samuel Poole – many of you might not know him, or Christopher Spicer [?]. Maybe Tim Ennis – some of you might know that name. Alfred Rivera – sound familiar? Alvin Gell, Jonathan Hofner, Glenn Chapman. Maybe Levon Bo Jones. How about Ronald Cotton? You know Darrell Hunt – you heard his name. Duane Dell. Maybe you don't know these gentlemen, but they are North Carolinians. Maybe you think they should have the same rights as the rest of us to be treated fairly. They're death-row and non-death-row exonerees, though. They went through the system, they were treated unfairly. And as a result we had people on death row that should not have been there.

Now what does that do to our system and the confidence of our public in that system? That responsibility we still have. If we have not improved that system since we've been here, then we failed our duty. We make judges. We make the law. We give them the budget and we tell them to enforce it. I love DAs – they have a role to serve. If they want to be legislators, they need to put their name on the ballot and run if they want to make the laws. They have a duty to enforce the law through prosecution. And sure, they have a lot of discretion, but to have the shameful act of consciously having training to subvert the law in order to be able to mete out the death penalty after we know time after time how dangerous that is, thinking about the number of innocent people who we have taken off of death row in North Carolina.

So every precaution we can take to ensure fairness is essential. And the names of those gentlemen I read who lost parts of their lives that we can never repay, no matter what price. I don't know what the price it is to you to hold your grandbaby in your arms. I don't know what price it is to you to hold your loved one before you get on that trip to come to Raleigh and when you get back. I don't know what the price was for you to see your child graduate or see your parent on their 80th birthday. I don't know what that value is to you and I don't know what it was to those men. But everything we can do to make this system work properly and fairly and abide by the highest standards we have an obligation to do. Let the rest follow.

We're paid to lead. We come down here, we take that oath – and this is one of the times we should take it the most seriously that we should hold that standard high and say we do not want there to be any question when the ultimate penalty is given as to whether there was any bias. Whether it's as to race of a juror or race of a defendant, we don't want there to be a question. We want to sleep at night with a clear conscience, get up in the morning and look in the mirror and know we did what we should do in our position with the responsibility we have as legislators. There's no one else we can look to. No one else has this ultimate power. This is the ultimate power. Any power that the judges have, we've given to them – we, as representatives of the people. And they entrust us to ensure those powers are used not only judiciously but fairly. And there can be no room in our system for there to be a question in anyone's mind as to whether discrimination played a role in the selection of the jury, in the selection of the punishment to be requested, in the decision that's made by the jury.

We've been down this road – yes, it's a tough issue. I've faced discrimination and I know I've battled discrimination. Every one of you in your heart and in your mind know that you have to battle that every day, whether it's sex discrimination, race discrimination, classism, all of them. But the one thing that we can all aspire to is justice, the standard we can set – and no one can say that this bill will further the interest of justice. It may further those who want revenge, those who want to even the score, those who want to feel better, but not those who want justice.

So I'm going to ask you to vote for justice. I'm going to ask you to hold the State to a higher standard and lead the way to get there. Don't take the easy out and say let's just let things go by the way. Take a position. Make a difference. You wanted to be here - this is your opportunity. You say you're a leader – this is your opportunity. You say North Carolina is the best State in the best country in the world – this is your opportunity to live up to it. But you can't take a vote and bow your head and skulk home and then just hope that everything turns out alright. North Carolina's depending on you.

Speaker Tillis: Representative Dollar, please state your purpose.

Rep. Dollar: To debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Dollar: Thank you. Mr. Speaker and Members of the House, you know, I've heard a lot about process today. I've heard a lot about statistics. But let's talk about justice because that's what this is about. As Representative Daughtry said, this is about the death penalty and what is just. And I put the question to the House today: What is just?

A couple of cases. Anne Mangus – do you know what she was doing one morning? She and her husband went to the home of Mr. Denning over in Winston Salem. They were delivering Meals on Wheels. A gentleman by the name of Timothy Herford happened to come back to the house because the person they were delivering the meals to he had beaten to death earlier in the morning but had left his sunglasses. He comes back for his sunglasses. He sees the Manguses. He pulls his gun; he shoots her in the back and kills her. And the only reason why her husband was also not killed to become the third murder victim that morning was that Hertford ran out of

bullets. This gentleman in the sad case of the Racial Justice Act the Winston Salem Journal a couple of years ago…Do you know what he had? It was a white victim…victims, a white defendant, white lawyers, white judge, eight out of fifteen jurors were white, yet he accesses the supposed Racial Justice Act. Is that justice? Is that right?

Think about the case…This is back in 1995. You may remember it from way back in Readers Digest: "Free to Kill: the murder of an 11-year-old girl." You know, she would have been 38 today. She could be a member of this House. She could be in the gallery. She could have kids. She could be a career person. She could be all of those things. Where is she? What's justice for her? Her name was Amy Jackson, by the way. Look it up.

Go down to Charlotte. Let's talk about some African American victims. You were naming names a while ago. Let me give you some names. Let me give you the name of Tashanda Bethaya, Michelle Stinson, Shawna Hawk, Carolina Love, Sharon Nance, Valencia Jumper, Audrey Spane, Brandi June Henderson, Vanessa Little Mack, Betty Jean Baucom. Do you know what they have in common? Many of them were raped. Many of them kidnapped. Many of them were tortured. And they were all murdered by Henry Wallace. And now he is appealing under the North Carolina Racial Justice Act? What's justice about that? Where's the justice for the victims in this State?

And just recently down in Cumberland County the three people who have accessed this under, I believe all under Judge Weeks, two of them involved cop killers. We have three murdered law enforcement officers: a Deputy Sheriff, a Highway Patrol Trooper out there doing their job. What's justice for them? Is it statistics?

You need to decide in your heart what is just. When someone takes a 4-year-old girl in Randolph County, rapes her, murders her, puts her tortured body in a bag of trash, throws it in a closet, throws trash on it, what's justice? Keep in your mind the victims of these hideous, horrible, coldblooded killers and decide for yourself what is justice in North Carolina.

Speaker Tillis: Further discussion, further debate. If not, the question before the House is the passage of the House Committee Substitute for Senate Bill 306 on its second reading. All in favor vote aye; all opposed vote no. The Clerk will open the vote…The Clerk will lock the machine and record the vote. Seventy-seven having voted in the affirmative and 40 in the negative, the House Committee Substitute to Senate Bill 306 has passed its second reading and without objection…

Rep. Glazier: Objection.

Speaker Tillis: Objection having been raised, the bill remains on the calendar.

Addendum

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Representative
Paul Stam

Excerpts from the Racial Justice Act Debates

2009 Session
Racial Justice Act - SB 461
July 14, 2009

Rep. Stam: ...It's interesting that Rep. Womble talked about the Kentucky Act. The Kentucky Act was not retroactive. It's the retroactive feature of this bill, of course, that creates the huge financial train wreck costs. This allows every person of the 163 murderers currently on death row to make this claim. Now, they've already had a chance to make similar claims in litigation but the US Supreme Court has said that they can't use only statistical evidence about what other people did at another time to prove motive in this case. But every one of them has had the right to make the claim that racial prejudice was exhibited against them for the last 8 to 15 years they have been on death row...

... We're constantly told that it's minority, African American population on death row. But 65% of those actually executed have been white. That sheds a new light on the claim of disproportionality...

...To me the big problem with the bill is the clogging of the systems so that there will be no death sentences carried out for several years. On page 3 you see that every person on death row has a year to make this motion. And why would any person on death row NOT make the motion? If they're African American, they'll claim it's disproportionality according to population. If they are not African American, they'll claim disproportionality in consideration of the numbers of murders committed. Locke Bell, the prosecutor in Gaston County, says one of the ironies of this bill is that it will make seeking the death penalty almost impossible. "Of all the defendants in Gaston County on death row, only one is black. All the rest are white men. I have two pending capital cases, both involving white defendants." In order to prosecute more white men capitally, he's first going to have to get some death sentences imposed on some black men. That's the way the bill will work if we are foolish enough to pass it...

2011 Session
Second Reading – SB 9: "No Discriminatory Purpose in Death Penalty."
June 16th, 2011

Rep. Stam: ...Two years ago Representative Womble talked a lot about the Kentucky bill. That's the only other state that has something called the Racial Justice Act. But that bill was not retroactive. It's the retroactive feature that is causing the huge financial train wreck in our state. We predicted in 2009 that every murderer on death row would raise an issue here. We were scoffed at. Now 152 out of 156 of these cold-blooded murders made that motion. Don't tell us you're surprised. We told you on the floor that's what would happen under Senate Bill 461. Their lawyers would be guilty of legal malpractice not to file...

...I'd like to close with excerpts from a letter from a district attorney..."The RJA is about ending the death penalty sanction in all murder cases regardless of the circumstances. Their intention is to stop all executions. It is intentionally drafted in a way to permit all defendants, regardless of race or the race of their victims, to challenge their death sentence based on nothing more than statistics or things that happened in a different place at a different time. It has created a quagmire of new and very complex litigation which my small office must deal with. It has forced me to reallocate resources within my office, as has every other DA in the state, and re-litigate cases that are years old."

...He mentions these three cases, and I'll let you decide whether these people are subject to the death penalty because of their race.

M. R. randomly abducted and murdered a pregnant woman from the mall a few days before Christmas while she was shopping for toys for her nieces and nephews. He robbed her, raped her, stabbed her, left her to die, naked except for her socks, inside a creek. It took her fifteen to twenty minutes to die and she would have been conscious half that time but died from blood loss. He bought himself a color TV with her credit card later that night. Was he executed because of his race? We're going to spend about five or six years to find out.

S. F, out on bond for another homicide in the same county. He got drunk and shot a man in the back with a shotgun in front of the man's wife. The same guy had served time previously for belaying a victim at gas station with a bowie knife. He cut from the back of his neck all the way down to his buttocks for no reason.

R. B., a crackhead, broke into his elderly mother's house to steal from her and ran into his mother's elderly boyfriend. Pistol-whipped him, robbed him, tied him to a chair, and burned the house down around him while he was still alive and conscious. He had previously served time for armed robbery.

Then the DA concludes: "the RJA is about stopping all executions. It's not about race; race is a pretext. Race is a means to an end. It's a red-herring intended to deceive well-meaning legislators who didn't know the truth of what they were voting for."

SB 416 – Amend Death Penalty Procedures
House Floor Debate - Second Reading
June 12th 2012

Rep. Stam: …One of the proponents was quoted after we passed it saying this is the end of the death penalty. Another proponent was quoted publically as saying he didn't understand that white defendants could use it if they murdered white people or of the same race and had the same race of jurors. But it has all those effects. It's an indefinite moratorium and it just clogs up the prosecutorial function that is so important to any concept of ordered liberty…

SB 306, "Capital Punishment/Amendments"

North Carolina House of Representatives

Debate on 3rd Reading

June 5, 2013

Edited for clarity and grammar

Click HERE to listen to the debate.

Debate begins at: 01:00:44

The audio may also be accessed at www.ncleg.net under "Audio" – "House Audio Archive" – 06-05-2013

Speaker Tillis: Senate Bill 306, the Clerk will read.

Reading Clerk: House Committee Substitute for Senate Bill 306, a bill to be entitled "An Act to exclude the administration of a lethal injection from the practice of medicine, to codify the law that prohibits regulatory boards from sanctioning health care professionals for assisting in the execution process, to amend the law on administration of a lethal injection, to require the setting of an execution date if any of the events which are provided by this statute have occurred, to eliminate the process by which a defendant may use statistics to have a sentence of death reduced to life in prison without parole, to require periodic reports on the training and availability of personnel to carry out a death sentence, and to require periodic reports on the status of pending post-convictions capital cases." The General Assembly of North Carolina enacts…

Speaker Tillis: Representative Stam, please state your purpose.

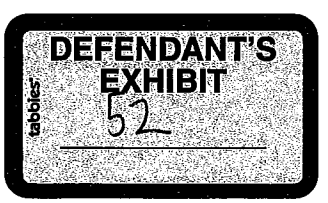
Rep. Stam: To speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Stam: Mr. Speaker and Members of the House, we debated this a long time yesterday and we learned, of course, that the so-called "Racial Justice Act" – Whoa! Section 5. If it's repealed, a capital defendant retains all of the rights which the State and Federal constitutions provide to ensure that the prosecutors who selected a jury who sought a capital conviction did not do so on the basis of race, that the jury that hears his or her case is impartial, that the trial was free of prejudicial error of all kinds. And yet 90% of the debate from the opposition assumed that that wasn't still the law. It is.

I saw a newspaper report today that said, "The Racial Justice Act allows a defendant to prove that race infected *his* case." Actually they said "their" – bad grammar. But "his case." It doesn't. Other laws do that.

I encourage you to vote again for the bill. Get justice back into the death penalty scenario.



Speaker Tillis: Representative Jackson, please state your purpose.

Rep. Jackson: To send forth an amendment.

Speaker Tillis: The gentleman is recognized to send forth an amendment. The Clerk will read.

Reading Clerk: Representative Jackson moves to amend the bill on page1, lines 8 through 10 by rewriting the lines to read...

Speaker Tillis: The gentleman is recognized to debate the amendment.

Rep. Jackson: Thank you, Mr. Speaker. Ladies and gentlemen, yesterday I objected to third reading so I could prepare this amendment because I do support capital punishment. But I also am proud to have voted for the Racial Justice Act four years ago. You can say how I voted four years ago but you cannot say why. You don't know what was in my mind, nor do you know what was in my heart. Many of us that voted for the Racial Justice Act did not do so because we wanted to see an end to the death penalty as stated yesterday by proponents of this bill. We voted for the RJA because we wanted the death penalty to be applied uniformly and without regard to race. Be it the perpetrator, the victim or an individual juror, race should play no part in the process.

Now you don't need my vote to pass this bill, so I know what kind of support I'm going to get for my amendment. But it's important to let my constituents know why I voted the way I did on this bill. I would absolutely vote for this bill should my amendment succeed. My amendment would delete Section 5 of the bill while allowing the remainder to move forward in an effort to restart capital punishment.

I agree that health care professionals that choose to participate in a state-sanctioned punishment shouldn't be at risk of professional discipline. I certainly believe that lethal injection is a better, more humane alternative to the electric chair or gas chamber. This more humane method requires the assistance of professionals and so I support it.

But let me tell you why I think deleting Section 5 will actually result in capital punishment restarting sooner and why many of you as proponents of the death penalty should support deleting this section. Passage of Section 5 will have the unintended consequence of giving 140 convicted murderers at least two additional claims to litigate in State and Federal courts. You heard Representative Stam say that Section 5 spells out all these rights that these people already have, but by deleting Section 5 you are actually giving two additional claims based upon constitutional doctrines that were not discussed on the floor yesterday, at least not in detail.

The first is equal protection. Judges Weeks has made decisions already in a few cases. These cases are on appeal to the Supreme Court. Now we're going to come behind them and say that the Racial Justice Act cannot be used by over 140 other defendants. How do we tell other defendants, some in Cumberland County, some in Bladen County, which I believe is in the same district, that a few defendants were allowed use of this procedural defense but the remaining of

you are not. How is that equal protection under the law? What court is going to uphold that unequal treatment?

The second potential claim created by Section 5 of this bill is what is known as the prohibition against ex post facto, or retroactive laws. And that's actually something I was surprised not to hear about yesterday. In the United States, the Congress and the States are prohibited from passing ex post facto laws by the US Constitution. No criminal laws regarding punishment may be retroactive. When it comes to a criminal law or punishment, you don't give someone a right, allow them to assert it and then take it away. To do so I believe is a violation of the ex post facto laws. It certainly will raise a claim that will have to be litigated in courts for years to come, which brings me to my final point.

There's no fiscal note with this bill and you should expect a high cost with passage of Section 5 of this bill because you are giftwrapping even more avenues for appeals for these murderers. And the State is going to have to defend those cases and those actions and maybe even pay their attorneys to prosecute them. But regardless of the cost, you are

Rep. Collins: Mr. Speaker?

Speaker Tillis: Representative Collins, please state your purpose.

Rep. Collins: To see if Representative Jackson would yield for a question.

Speaker Tillis: Does the gentleman yield?

Rep. Jackson: Yes, I yield.

Rep. Collins: Representative Jackson, do you have any estimate as to how much the Racial Justice Act has already cost in court costs in North Carolina?

Rep. Jackson: Mr. Speaker, if I could respond? I looked at the fiscal note, Representative Collins, last night from the Act back in 2009 and it was an indeterminate amount and I don't have anything to add to that.

But regardless of the cost, like it or not, the Racial Justice Act gave these 140 murderers an avenue of contesting their death sentences. Now many of these claims are probably not legitimate or valid and they're probably going to be dismissed soon when the Supreme Court makes its pronouncement or when some prosecutors actually start to make and schedule motions to dismiss. So while we are currently less than a year from closing many, if not all of these claims, passage of Section 5 will add new constitutional claims that will require many more years of litigation in State and Federal court.

It may sound counterintuitive to those of you who fought the Racial Justice Act since its inception in 2009, but if you actually support restarting capital punishment any time soon, then you shouldn't support Section 5 of this bill. It will add five, ten years more to the delay in

executing anyone. Deleting Section 5 as my amendment does is the only way to truly restart capital punishment. I would ask for your support.

Speaker Tillis: Representative Stam, please state your purpose.

Rep. Stam: To debate the amendment and then make a motion.

Speaker Tillis: The gentleman is recognized to debate the amendment.

Rep. Stam: Mr. Speaker and Members of the House, at the conclusion of my remarks I'm going to do a motion to table and I informed Representative Jackson that I'd do this after giving him a chance to explain it. The reason, of course, is that we've debate this exact same issue an hour and a half yesterday and this is the fifth time we've debated this in the last three or four years. One thing that's not a reason is the fact that when it was passed in 2009 the question was called without allowing the Minority Leader (then Rep. Stam) even to speak on the bill, if you can imagine that, Representative Hall.

But I would like to address these two claims. First of all, the ex post facto law doesn't apply. We had a very good memorandum from staff – Hal Pell. In the North Carolina Constitution, it's Article 1, Section 16 if you want to open your books if you have it there. "Retrospective laws punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust and incompatible with liberty, and therefore no ex post facto law shall be enacted." Well, the reason I mention that is the only person who can claim ex post facto on this would be the murderer who committed the murder after 2009 but before Senate Bill 416. That would be an interesting case. But none of the people on death row are in that category, or if they are maybe it's one of them.

Secondly, equal protection. This is interesting. Just because Judge Weeks applied facts, many of which could still be asserted even without the Racial Justice Act, but he shoehorned it into the Racial Justice Act (I think he thought we were kidding with the 2012 law), just because he picks out four out of the queue of 154 therefore you have to apply to all 150 others that same law. Well, that would constitute Judge Weeks the lawgiver of North Carolina. If you want to apply equal protection to that claim, you would apply it the other way and get his four people back in the queue.

So I think we've debated this at great length. It's a serious subject. It needs to be debated at great length and we've done that. And so therefore, Mr. Speaker, I move to table the amendment.

Speaker Tillis: The motion by Representative Stam has been duly seconded by Representative Moore. The question before the House is the motion to lay upon the table the amendment sent forth by Representative Jackson to the House Committee Substitute for Senate Bill 306. All in favor vote aye; all opposed vote no. The Clerk will open the vote...The Clerk will lock the machine and record the vote. Seventy-three having voted in the affirmation, 39 in the negative, the motion passes. Ladies and gentlemen, we're back on the bill. Representative Lucas, please state your purpose.

Rep. Lucas: To debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Lucas: Thank you, Mr. Speaker. I too, like Representative Jackson, believe in the death penalty. I believe that certain crimes are so hideous and so despicable that capital punishment is in order. But I also believe that we in society - we the collective society - must be moral in administering whatever judgment that we administer. There's no question that all of the instances that I listened to yesterday in terms of perpetrators of hideous crimes deserve the death penalty. I don't feel sorry for any of them.

But my problem, like that of Representative Jackson, is with Section 5. How we go about our jury selection. Yes, I wish we had another bill. And perhaps one day we'll get one. This is what Judge Weeks was alluding to. In our society we have to and we should, if we're going to stick with our moral fortitude, do it the right way. We all want justice we all want to see criminals who commit despicable crimes receive justice for their immoral acts. But you know, District Attorneys, as we saw yesterday, and I would say also Defense Attorneys are given liberal latitude when it comes to recusals or strikes in jury selection, and that's a problem. We ought to admit that that's a problem. We shouldn't want it either way – for the DAs or for the defense. We ought to respect our citizens' rights to serve on juries. I understand that there are needs at times for strikes, but these strikes should not be arbitrary or capricious, or in some instances immoral strikes. Let's do it the right way. And we can, as legislators, do it the right way. If we could fix this Section 5, you have my unequivocal support of the death penalty. I don't think we need to confuse the two. Let us do the right thing and until we can do the right thing, I have to vote no.

Speaker Tillis: Representative Baskerville, please state your purpose.

Rep. Baskerville: To debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Baskerville: Thank you, Mr. Speaker. I had intended on making some remarks yesterday afternoon, but we ran out of time. So I'll make them today. I can certainly understand and respect Representative Daughtry's remarks yesterday and can certainly relate to Representative Michaux's sentiments regarding his experience as an attorney in our state. As a former Assistant District Attorney in six different counties spread across two prosecutorial districts, I believe that we have good District Attorneys in our state. And I believe that by and large, most of them are good and fair and try to dispense justice in a neutral fashion. But just like over the years this body, who by and large have been filled with good members who follow the law and do things the right way, from time to time we've had members here who didn't follow the law and didn't do things how they should have. There's no difference in any other aspect of society.

Now, we all are moved by the stories that we heard from Representative Moore and Dollar yesterday – acts so heinous that they almost are unimaginable. Now the Racial Justice Act is not designed to overturn the jury's decision…

Rep. Moore: Mr. Speaker?

Speaker Tillis: Representative Moore, please state your purpose.

Rep. Moore: Would the gentleman yield to a question?

Speaker Tillis: Representative Baskerville, does the gentleman yield?

Rep. Baskerville: Certainly.

Speaker Tillis: The gentleman yields.

Rep. Moore: Representative Baskerville, is the gentleman familiar with the notion of motions for appropriate relief?

Rep. Baskerville: Yes, sir.

Rep. Moore: Additional question?

Speaker Tillis: Does the gentleman yield?

Rep. Baskerville: Yes.

Speaker Tillis: The gentleman yields.

Rep. Moore: Is the gentleman aware that a motion for appropriate relief can be filed and is filed before the existence of and exclusive of the Racial Justice Act to address exactly the kinds of questions that the gentleman is speaking of?

Rep. Baskerville: I'm aware that individuals can file motions for appropriate relief, you know, in very limited circumstances. I mean, the avenues to file the motions were just limited last session, I believe. I am *not* aware of a motion for appropriate relief that allows individuals to look at their jury selection.

Rep. Moore: One additional question?

Speaker Tillis: Does the gentleman yield?

Rep. Baskerville: Yes, sir.

Speaker Tillis: The gentleman yields.

Rep. Moore: Is the gentleman aware that under the motion for appropriate relief statute that one of the grounds upon which that a defendant may assert is prejudicial error?

Rep. Baskerville: I am aware that…

Rep. Moore: Thank you.

Rep. Baskerville: Yes. Sure.

Speaker Tillis: The gentleman has the floor.

Rep. Baskerville: Thank you, Mr. Speaker. Once again, RJA is not designed to overturn the jury's decision regarding guilty or not guilty. The RJA is designed to ensure a fair, equal treatment in jury selection process. Now any trial lawyer worth their salt is going to tell you how critical jury selection is. It's perhaps the most critical juncture in a jury trial. Those are the twelve people that are going to listen to your side and listen to the other side and render their decision. Selecting the twelve people that are going to decide guilty or not guilty – that's a critical juncture in the proceedings. The RJA provides a vehicle to ensure that that selection process was executed properly.

You know, that's why when I hear stories recounting the heinous, horrible crimes that occur, or stories that detail a racially equal jury (six blacks and six whites), I respect those stories, but the RJA does not mandate that you have black folks on the jury. The RJA does not mandate that you have to have equal blacks and whites on a jury. The RJA is a process to make sure that that selection was done with impartiality and not done in a discriminatory fashion.

It does not prohibit executions. Just like my other colleagues, if the RJA would prohibit executions in this state I would not be able to support it because there are certain aggravated crimes that are so reprehensible that person has made it clear that they don't want to participate in civil society anymore and they've got to go, and I support that.

But I also don't see a problem when we hear stories about, you know, white folks availing themselves of the protection of the RJA. The RJA is to eliminate racial discrimination in jury selection regardless of whether it's a black person or a white person. I think that it's a great idea that white North Carolinians, black North Carolinians, Hispanic North Carolinians – all of them are going to be entitled to a jury that was selected properly. I wonder if we had a bill that said only black folks could avail themselves of the protections of the RJA, would that pass this House? Of course it wouldn't. That's a completely specious argument.

I wonder would the proponents…

Rep. Stevens: Mr. Speaker?

Speaker Tillis: Representative Stevens, please state your purpose.

Rep. Stevens: To see if the gentleman would yield for a question.

Speaker Tillis: Does the gentleman yield?

Rep. Baskerville: Certainly.

Speaker Tillis: The gentleman yields.

Rep. Stevens: And Representative Baskerville, on your same argument, how do you feel about discrimination based on gender?

Rep. Baskerville: How do I feel about discrimination based on gender? I think it's a bad thing. I don't think we ought to discriminate based on gender.

Rep. Stevens: And…I mean, follow up?

Speaker Tillis: Does the gentleman yield?

Rep. Stevens: Do you know how many women are on death row as compared to men?

Rep. Baskerville: I would imagine it's less women on death row as men on death row.

Speaker Tillis: Does the lady wish to ask another question?

Rep. Stevens: Please.

Speaker Tillis: Does the gentleman yield?

Rep. Baskerville: Certainly.

Speaker Tillis: The gentleman yields.

Rep. Stevens: And would it be substantially less women than there are men?

Rep. Baskerville: I would…I don't know the answer to that, but I'm willing to venture the answer is yes.

Rep. Stevens: So, one last follow up?

Speaker Tillis: Does the gentleman yield?

Rep. Baskerville: Yes.

Speaker Tillis: The gentleman yields.

Rep. Stevens: So based on that statistically don't we have gender bias on death row?

Rep. Baskerville: Once again…Once again, Representative Stevens, I appreciate your question. The issue is not who is on death row, whether they're male or female, whether they're black or white. The issue is the selection of the jurors. I mean, I think we're getting off tangent here. I don't think we ought to discriminate against women. I don't think we ought to discriminate against anybody when we're selecting the twelve people who are going to decide whether someone lives or dies. There is no rectifying situation after you, you know, pull that switch. So I think that's the wrong argument. If there was a bill that said that...I just think that's not the issue here with the Racial Justice Act.

Justice: the establishment or determination of rights according to the rules of law and equity. Justice, we heard a lot about justice yesterday. The rule of law says that there shall be no discrimination in a jury selection process. RJA allows us to make sure that those rights are protected. The rules of equity insure that victims of crimes, they know that our government (the prosecutors) will protect their interests and pursue those responsible individuals in a legal fashion. It's not just justice for the victims. It's not just justice for the criminals. It's justice for all. I think that the RJA is a just bill and ask that y'all vote against this particular bill. Thank you.

Speaker Tillis: Representative Richardson, please state your purpose.

Rep. Richardson: Thank you, Mr. Speaker. I would like to ask a question of Representative Stam.

Speaker Tillis: Representative Stam?

Rep. Richardson: Yes. I'm sorry. I think he is one of the sponsors of this bill and that's why I'm directing this question to him. As a freshman…

Speaker Tillis: The Chair assumes the gentleman yields.

Rep. Richardson: I'm sorry.

Rep. Stam: I do.

Speaker Tillis: The gentleman yields.

Rep. Richardson: Okay. As a freshman, naturally I do not have the history of the RJA and the issues surrounding the passing of it. But in committee meetings we were presented with information and "evidence as to the reason why we have RJA." And it was because it was proven that discrimination was being done in jury selection. So when I lay down at night, I think about this bill and I think about the fact that we have a bill and now we want to repeal the bill, and I wonder what kind of impact does that have on me as a voter here in this body that because a bill may be written badly or because people don't like the bill we want to repeal the bill. So what kind of consequences do I as a voter have to face based on whether or not this bill passes today?

Rep. Stam: Thank you for your question, Representative. You heard a speech by Representative Glazier and you thought it was evidence, but Representative Glazier is an advocate. And for example, he gave, you know, a Michigan State survey. I went to Michigan State – the School of Criminal Justice. And I had little juvenile delinquents that I took care of as part of an independent study. And this was in 1971-72, and I guarantee you that every one of them thought that the death penalty for murder was that you got the electric chair because they watched…What's that FBI show?...Dragnet! But you know what? Michigan had not had the death penalty since it was a territory in 1843.

The deterrent factor of the death penalty is not what you have on the books but what actually happens. Now if you think that some professor at Michigan State University is going to get tenure, when the public policy of the State of Michigan is opposed to capital punishment for almost 200 years, for doing a rational study, you're not thinking the way universities think.

There were so many problems with that study that was cited as evidence and the biggest problem was this: They compared murder versus a murder, but not with the same aggravating circumstances. In other words, you have to almost volunteer to be executed to be executed, or else kill six people or slice people up. But that study did not adequately take into account aggravating circumstances. In other words, you heard evidence but you didn't hear the cross-examination.

Rep. Richardson: Follow up?

Speaker Tillis: Representative Stam, does the gentleman yield?

Rep. Stam: I do.

Speaker Tillis: The gentleman yields.

Rep. Richardson: Excuse me for up and downing. I mean, somebody says "stand up" and somebody else says "sit down." But also, I'm still not sure that my question was answered because I thought there was a case (and maybe I misunderstood) that had been taken to court that some evidence had come out of it. Am I incorrect on that?

Rep. Stam: Yes, the Robinson case – Judge Weeks, who's one judge, found that there had been prejudice in other cases in North Carolina in other places, other years, other decades, other cases. And then in Robinson's case where there were three minority people on the jury, which at that time was roughly proportional to the population in Cumberland County, he decided that therefore Mr. Robinson had been discriminated against. But that's not what the law should be. The law should be whether Mr. Robinson was discriminated against, not whether other people had been discriminated against in other cases.

Rep. Robinson: Can I follow up?

Speaker Tillis: Does the gentleman yield?

Rep. Stam: I do.

Speaker Tillis: The gentleman yields.

Rep. Robinson: So, this is a law that we're repealing. My question again is as a legislator and we vote to repeal that law, what consequences will this body face by doing away with a law that was a law, to make it…

Rep. Stam: As far as I know, it's been 450 years since a legislature was actually punished for its legislative acts. So no, you can't be punished for anything you do here, except you can be unelected.

Rep. Robinson: Thank you.

Speaker Tillis: Representative Stevens, please state your purpose.

Rep. Stevens: To see if Representative Moore would yield for a question.\

Speaker Tillis: Representative Moore, does the gentleman yield?

Rep. T. Moore: Of course.

Speaker Tillis: The gentleman yields.

Rep. Stevens: Representative Moore, you heard me ask the question about gender differences on death row?

Rep. T. Moore: I did. Yes.

Rep. Stevens: And Representative Moore, did you inquire and see what the gender makeup was on death row?

Rep. T. Moore: I did. According to the data I received from the Department of Corrections there are presently 156 people on death row. One-hundred and fifty-two are men, four are women.

Rep. Stevens: One last question.

Rep. T. Moore: I yield.

Speaker Tillis: The gentleman yields.

Rep. Stevens: Representative Moore, are you aware that anyone has tried to bring up the issue of gender discrimination?

Rep. T. Moore: No, and it's an interesting thing with this whole concept of this bill that no one has. I think if you take some of the arguments used for the RJA, just looking at raw numbers and nothing else, you would have had to come to a conclusion that there was a...that a gender justice act is necessary just based off of the numbers alone. And I think it just highlights the flaw in this bill...or excuse me, the flaw in the current law and the necessity for this bill to roll it back.

Speaker Tillis: Representative Glazier, please state your purpose.

Rep. Glazier: To debate the bill very briefly.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Glazier: Thank you very much, Mr. Speaker. I had my say on the merits of the bill yesterday and don't plan to abuse the body today. But I did rise to answer a couple of questions because they were raised and this is such an important bill. I think at least the information ought to be available to people.

First, and I wasn't planning to address this, but since the last go around of questions I agree completely with Representative Stevens and Representative Moore on the data. Of course, that's like comparing apples and oranges and suggesting they come from the same tree. I mean, in the end the question is how many women are on death row versus how many murders there are versus how many men versus how many murderers. So sex discrimination may or may not be there but it has nothing to do with this and we're not even comparing the correct data. That being said, I'll move past gender discrimination which, by the way, is also unconstitutional. And we know that by Supreme Court decisions.

The issue that was interesting was raised by Representative Jordan yesterday. Representative Jordan asked the question and I think it deserves a really full response as to why Judge Weeks looked at and found race discrimination in jury selection in the Waters case when the Waters jury had six African Americans on the jury and six white members of the jury, or at least that appears to be based on the record. Well, I think there are a couple of answers.

First, the Supreme Court has made it very clear, as Representative Jackson and Baskerville and Michaux have said, that racially motivated exclusion of even one juror is unconstitutional. Batson said that. And so whether it's one or it's ten doesn't really matter – that violates the law.

But in the Waters case there really is a much more interesting answer. And since it's from my home county - I actually wasn't sure of it - I went back and read the record last night. The prosecutors in Waters struck 10 of the 19 eligible African American jurors – that is, they made their discretionary challenges to 10. That's 52.6% of them. They struck only four of the 26 white jurors who were potential for a strike rate of 15%. Secondly, they excluded many of those African American jurors, but they couldn't exclude them all because the prosecutor ran out of challenges. And some of the additional jurors who got on the jury because she had no more challenges to exercise were black. And if she could have struck them she might would have, but she couldn't because she ran out of challenges.

The interesting third part of this is if you go read the judge's findings and then the record in this case, the judge found that the reasons that prosecutor in that struck ten of those 19 African American jurors were so "transparently pretextual" that he came close to finding that she perjured herself on the witness stand. And just for the record, let me tell you three things that came out – and this is of many findings. So the State struck black minority member Jay Whitfield "because in part he knew some gang guys from playing basketball." The record showed that that juror had potential limited contact with certain individuals during a pick-up game and he overheard them talking about potential gang activity. He was asked by the prosecutor would that affect his decision and he said that that exposure wasn't going to affect him at all. But the State struck him. However, they didn't strike a non-black jury member named Tami Johnson who'd gone through basic training and become "good friends" with a gang member and also testified she knew people in high school who were in gangs. That was one example, said the judge.

Second example, said the judge: the State submitted an affidavit asserting that in this case the prosecutor struck a black juror, Ellen Gardner, because her brother had been convicted of drug charges and received five years house arrest. And by the way, that's a legitimate reason to strike a juror in and of itself. The problem, of course, is, said the court, that her explanation that that's why she struck the juror was implausible for a couple of reasons. One, the transcript revealed that Gardner wasn't close to her brother. She testified she believed he'd been treated fairly by the system and that her experience wouldn't affect jury service. Okay, you may or may not believe her. Her brother's experience was six years before jury selection. Well, that may or may not be sufficient. But here's the problem: the prosecutor then went on and accepted a non-black, a white jury member, Amelia Smith, whose brother was then at the moment she testified in jail for first degree murder and she was in touch with her brother through letters. Now you go explain that one.

And finally, this is again just several examples, the State struck minority member, Calvin Smith, because he was 74 years of age they said. Alright, but in other cases tried in nearly the same county, same area of time by the same prosecutor, she accepted white jurors who were 70, 70 and 73 years old. Now I admit there's a difference between 73 and 74 and I appreciate each year at my age, that one year. But those are what we're talking about.

Those are transparently pretextual reasons for strikes. And I don't know, I wasn't the judge who decided this but he found that among many others were so obviously aimed based on the sheets that the prosecutor had where she was checking off using anything she could to get black jurors off that that violated the Constitution. Our job here isn't to say whether he was right or wrong or whether she was. But our job is also not to cut off the process.

I'm going to close my comments with a very personal comment. And I take this act very personally because I don't think it was and I've never said it was written the best way. And I am a pretty deep believer, like Representative Jackson actually, in capital punishment. I would have had no problem voting for the death penalty for every single defendant at the Nuremburg trials and I wouldn't have any problem voting in a lot of egregious cases. But I also probably know more than anyone else on this floor, having been appointed by the court to defend defendants in eight capital cases and then eight on appeal, that sometimes we get it right and sometimes we get

it wrong. I said this to my caucus and in our committee. I know some of these prosecutors. Some of them are good friends and they, in many cases, have no race-based bones in my view in their body. But they also were a product of their culture and their training and their time. I'm a product of my culture and training and time.

I grew up and my mom grew up in a very white area of Pennsylvania and I loved her very much. She died 25 years ago. But my mom grew up teaching me when I was a kid that I wasn't allowed to go in a swimming pool if a black person was in that pool. It took me a long time to realize as a kid how wrong my mom was. I never stopped loving her, but she was wrong and I had to face that and move past it. And the prosecutors that made these strikes were good people, but they were wrong. And we have to acknowledge that and then try to make sure that we do better. And we cannot acknowledge it by throwing away the Racial Justice Act. Thank you.

Speaker Tillis: Representative McNeill, please state your purpose.

Rep. McNeill: To debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. McNeill: Thank you. I'll be brief. There were a lot of names read on the floor yesterday. I want to read another name: Tony Summy. April the 27th, 2003 was a quiet Sunday. And I got a phone call at home that would change my life tremendously. Tony Summy was one of my deputies sheriffs, worked for me for several years. Got a call that he and another officer had been shot and I responded to that scene. And I saw that deputy lying on the front steps of that trailer, his blood spread on the ground where the person he was trying to serve a warrant on had taken his gun away from him and shot him in the chest and in the neck. And he lay there and he bled to death. The officer that was with him...the same defendant pointed the gun between his eyes and was fixing to pull the trigger and the gun malfunctioned giving the officer just a few seconds to escape. But the guy followed him, shot him in the arm. He almost bled to death before help could get there. He was airlifted. Luckily he lived.

Now the person that did all that, when he came to trial he pled guilty, so he was found guilty. The trial was the punishment phase where you either get the death penalty or not. He did get the death penalty and he's on death row now. Now he was officially listed as an American Indian, but I don't believe that jury found him guilty because of his race. I think that jury found him guilty because he was a hard-working deputy sheriff out trying to do his duty, because he committed the crime and he deserved that punishment. I don't think any law is fair - whether it was passed last week, today or next week - that allows anyone to cite statistics...statewide statistics in the repeal. If something was done wrong in that trial it should serve on its merits and it should be investigated. And if a district attorney or a judge or somebody did something wrong in that particular trial, that's fine. They should have to stand for that and the wrong should be made right. But the use of statewide statistics to overturn or to look at some of these convictions in my mind is totally wrong and it will never be right, no matter what anyone says. Thank you.

Speaker Tillis: Representative Collins, please state your purpose.

Rep. Collins: To briefly debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Collins: First of all, let me say to Representative Jackson I empathize with you extremely and I would never try to divine what your motives are or anything – but welcome to my world. I can't tell you how many times in the last three years I've had people from the other side of the aisle tell me what a horrible person I am because they can read my mind and tell exactly why I'm voting for a bill. So I have great empathy for you on that. I would never try to tell anybody what their motives are because I simply am not a mind reader. I've never been good at it, don't claim to be.

I do know that I and most people on my side of this issue believe that the Racial Justice Act, regardless of what the intent was, has been basically a de facto moratorium on the death penalty. I didn't realize though that the public on the other side of this issue also feels that way until I began to get an email earlier this week - the very same one at least five times. And it's only two lines long and my response is only three lines long, so I'd like to read it to you. That email says, "Dear Representative, please vote against S306. The bill will amend the capital punishment law and will effectively reinstate the death penalty in North Carolina. I believe that capital punishment is wrong and I urge you to oppose this legislation." My response was: "I agree that the bill will reinstitute the death penalty and thank you for your honesty on this matter. Most proponents of the so-called Racial Justice Act will not admit that it is in effect a moratorium on the death penalty. For my part, I believe the death penalty is reasonable justice for those who wantonly take innocent human life, so I plan to vote for this bill."

I would encourage you to do likewise so that we can relieve our state from this de facto moratorium on the death penalty.

Speaker Tillis: Further discussion, further debate? If not, the question before the House is the passage of the House Committee Substitute to Senate Bill 306 on its third reading. All in favor vote aye, all opposed vote no. The Clerk will open the vote…The Clerk will lock the machine and record the vote. Seventy-six having voted in the affirmative…The Chair will be recorded as having voted aye. Seventy-seven having voted in the affirmative and thirty-nine in the negative, the House Committee Substitute to Senate Bill 306 has passed its third reading and will be returned to the Senate.

STATE OF NORTH CAROLINA COUNTY OF CUMBERLAND	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA v. TILMON GOLPHIN CHRISTINA WALTERS QUINTEL AUGUSTINE Defendants	97 CRS 47314-15 (Golphin) 98 CRS 34832, 35044 (Walters) 01 CRS 65079 (Augustine)

ORDER DENYING
STATE'S MOTION FOR JUDGMENT ON THE PLEADINGS

Prior to the hearing in this case, the State filed motions for judgment on the pleadings requesting dismissal of Defendants' claims under the original and amended RJA, as well as Defendants' related constitutional claims. The Court deferred ruling on the State's motions until after the presentation of evidence and argument by the parties. Having now considered the matters raised in the State's motions, the Court makes the following findings.

Turning first to Defendants' original RJA claims, the State contends those claims are not cognizable under the amended RJA. In support of this contention, the State asserts the amended RJA does not permit claims based solely upon statewide, judicial division-wide, or statistical evidence; the State further asserts the amended RJA requires an allegation of discrimination in the individual case. For the reasons set forth in its order granting Defendants relief, the Court finds the amended RJA is not retroactive.

Turning next to Defendants' amended RJA claims, the State argues Defendants cannot properly rely upon peremptory strikes which were objected to at trial pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), and approved by the trial court. The State directs this argument at

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ENTERED IN COURT ON
12-13-12
BY: Deputy Clerk of Superior Court

Defendants' original RJA claims as well. The State points to the law of the case doctrine and the rule prohibiting one superior court judge from overruling another. For the reasons set forth in its order granting Defendants relief, the Court finds that Defendants may rely upon the facts and circumstances of these strikes in considering whether race was a significant factor.

The State also contends that Defendants' amended RJA claims relating to charging and sentencing are improperly based upon statistics alone. After careful review of the pleadings, the Court finds Defendants alleged sufficient non-statistical evidence to proceed to a hearing.

With regard to Defendants' constitutional claims, the State has argued they are procedurally barred. The Court notes, however, that the original RJA exempted all race-based claims from procedural bar without distinguishing between statutory and non-statutory claims. *See* S.L. 2009-464, Section 2 ("Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.").

Even if the procedural bars applied generally, they would not bar Defendants' constitutional claims in this proceeding. Prior to this litigation pursuant to the RJA, Defendants were not in a position to develop a constitutional claim based upon an inference of intentional discrimination drawn from statewide, judicial division-wide, and countywide evidence, in conjunction with a case-specific showing. Discovery conducted pursuant to the RJA made available to Defendants, for the first time, jury selection materials, including prosecutorial notes, records, strike sheets, and training materials maintained in the exclusive possession of prosecutors. Prosecutors also provided explanations for their use of peremptory strikes that were previously unavailable to Defendants. In addition, in 2012, Defendants had access to a major

statistical study of the use of peremptory strikes by Michigan State University College of Law that was previously unavailable. The Court therefore finds Defendants' constitutional claims are not procedurally barred because Defendants were not in a position to adequately raise those claims prior to the original RJA's enactment. *See* N.C. Gen. Stat. § 15A-1419(a)(1) and (3) (barring claims that could have been adequately raised in a prior direct appeal or post-conviction motion); *compare Amadeo v. Zant*, 486 U.S. 214, 224-27 (1988) (finding cause to excuse a procedural default when, as a result of interference by officials, the otherwise defaulted claim was reasonably unknown to petitioner's lawyers and petitioner's lawyers made no intentional decision to forego the claim; in the case, the State withheld jury selection notes containing racial designations).

After careful review, the Court concludes the allegations contained in Defendants' pleadings, if believed, support an award of relief under the original RJA, the amended RJA, and the state and federal constitutions. *See State v. McHone*, 348 N.C. 254, 258 (1998) (explaining that "an evidentiary hearing is required unless the motion presents assertions of fact which will entitle the defendant to no relief even if resolved in his favor"). The Court therefore denies the State's motions for judgment on the pleadings in full.

The 13th day of December 2012.

Gregory A. Weeks

The Honorable Gregory A. Weeks
Senior Resident Superior Court Judge Presiding

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 97 CRS 47314

STATE OF NORTH CAROLINA)
)
v.)
)
TILMON C. GOLPHIN)
Defendant)
)

DISCOVERY ORDER

THIS MATTER coming on before the undersigned Senior Resident Superior Court Judge of the Twelfth Judicial District upon request of Defendant for discovery related to Golphin's motion filed pursuant to the Racial Justice Act, G.S. §15A-2010 *et seq.*, (hereafter RJA); and, following arguments of counsel, the Court hereby orders as follows:

The State shall produce to Defendant on or before August 25, 2012, the following:

1. The name, curriculum vitae, and report of any expert(s) the State intends to call to testify at the evidentiary hearing;

2. All information considered and relied upon by said expert(s);

3. All affidavits or unsworn statements prepared by prosecutors or their assistants describing reasons for striking African-American venire members; and

4. Any and all notes or other documents, other than trial transcripts, relied upon by affiants charged with proffering reasons for strikes of African American venire members.

IT IS FURTHER ORDERED that the State is under a continuing duty to disclose supplemental evidence, analyses, and discoverable information as it may become available after the stated deadlines.

SO ORDERED this the 6th day of July 2012.

Honorable Gregory A. Weeks
Senior Resident Superior Court Judge

CLERK OF SUPERIOR COURT
CUMBERLAND COUNTY
SUBMITTED FOR COURT ON
7-6-12
BY: Asst./Deputy Clerk of Superior Court

STATE OF NORTH CAROLINA COUNTY OF CUMBERLAND		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	
	)	
	)	97 CRS 47314-15 (Golphin)
v.	)	98 CRS 34832, 35044 (Walters)
	)	01 CRS 65079 (Augustine)
	)	
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	
QUINTEL AUGUSTINE	)	
	)	
Defendants	)	

DEFENDANTS' POST-HEARING BRIEF IN SUPPORT OF PROPOSED FINDINGS REGARDING THE STATE'S REASONS FOR STRIKING AFRICAN-AMERICAN VENIRE MEMBERS

Defendants have provided the Court with proposed fact findings regarding the discriminatory intent behind the State's strikes of African-American venire members from capital juries in Cumberland County and North Carolina. This discriminatory intent is evident in numerous instances of disparate questioning or treatment of black and non-black venire members, proffering of race-based, irrational, or unconstitutional reasons, proffering of reasons not supported by the record, and instances of race-conscious questioning by prosecutors. Defendants submit this brief in order to provide the Court with the facts supporting each of the proposed findings. The statewide case examples presented in this brief appear in the same sequence in which they are found in the proposed order. The case examples from Cumberland County are discussed at various points in the proposed order; they are organized under the pertinent topical headings.

The evidence Defendants rely upon in this brief is found in the transcripts of voir dire and juror questionnaires in the 173 jury selection proceedings examined by the MSU Study, and affidavits and unsworn statements of prosecutors containing the State's proffered reasons for peremptorily striking certain African-American venire members. The evidence may also be found in court orders and voir dire transcripts of capitally-tried cases not included in the MSU Study but considered by Robinson's expert Bryan Stevenson or otherwise admitted into evidence. With respect to capital proceedings that resulted in a death sentence, Defendants have relied on the MSU Study databases to determine the race of each venire member and whether the juror was struck or passed by the State. With respect to capitally-tried cases not included in the MSU Study, Defendants have relied on jury questionnaires or prosecution notes to identify race.[1] Defendants have compiled relevant materials for the struck black venire members discussed here and they are included in an Appendix to this brief.

In considering the evidence presented in this brief, Defendants ask the Court to bear in mind the harm to African Americans and to the integrity of the justice system that results from racially discriminatory jury selection practices. These dual harms have been recognized by both the United States Supreme Court and the North Carolina Supreme Court. *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"); *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005) (explaining that racial discrimination in jury selection harms racial minorities because "prosecutors drawing racial lines in picking juries establish

[1] Most of these materials were admitted into evidence in *State v. Robinson* and were reintroduced in these proceedings. *See* DE2 (capital voir dire transcripts), DE4 (MSU databases), DE25-34 and 45 (materials reviewed by defense expert Bryan Stevenson), DE67 (jury questionnaires), DE82-96 (compiled materials on selected struck black venire members), and SE32 (prosecutor affidavits). In these proceedings, Defendants introduced additional evidence relevant to the State's disparate treatment of black and non-black venire members. *See* DE113 (compilation of all affidavits and unsworn statements of prosecutors).

'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice;'" and further explaining that such discrimination "casts doubt over the obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial") (internal citations omitted); *State v. Cofield*, 320 N.C. 297, 302 (1987) (explaining that "the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice."); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140 (1994), quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991) (discrimination in jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (discrimination against African Americans in jury selection is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others").

Each of the examples of discrimination recounted here is "at war with our basic concepts of a democratic society and a representative government." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (internal citation omitted). The Court should, for this reason, take this evidence into account when evaluating whether Defendants prevail under the Racial Justice Act.

I. Exclusion Based Purely on Race

As discussed earlier, the RJA was enacted in part as a response to the United States Supreme Court's decision in *McCleskey*. *McCleskey* requires that capital defendants present "exceptionally clear proof" of racial discrimination. 481 U.S. at 297. Critics of the decision have noted the difficulty of proving a *McCleskey* violation because prosecutors rarely leave a "smoking gun." In the following case, there is a smoking gun.

African-American Venire Member Tonya Anderson: In *State v. William Gregory*, tried in Davie County in 1994, the State struck African-American venire member Tonya Anderson. The defense objected under *Batson*.

In response to the *Batson* objection, the prosecution gave the following reasons for striking Anderson:

> Twenty years old, she indicated to the Court right up front she knew people in the case. She knew the defendant. She had been in a class with him. She knew the victim, spoke to her in passing. She's unemployed. Has an eleventh grade education. That's not the kind of juror I'm looking for in this case.

The prosecutor continued, elaborating on why Anderson was "not the kind of juror" the State wanted:

> Her age is almost identical to what the victim's age would be, 20 years old. If the victim were alive, she would be 20 years old. ***The victim is a black female. That juror is a black female. I left one black person on the jury already***.

The trial judge asked defense counsel if they wanted to "say anything in opposition to that for the record." Defense counsel replied, "Just note our objection."[2]

II. Exclusion Based on Race or Racial Proxy: African-American Institutions

Short of an outright admission — "I struck him because he's black" — the closest articulation of discriminatory intent is to strike African-American potential jurors because of their association with historically or predominantly black institutions. That is precisely what happened in the following four capital cases tried in North Carolina.

African-American Venire Member Benjamin McKinney: In *State v. Andre Fletcher*, tried in Rutherford County in 1996, the prosecutor questioned an African-American venire

[2] The *Batson* colloquy in appears in *State v. Gregory* (1994), Vol. VII, Tpp. 764-65 (emphasis added). The trial court overruled the objection saying, "All right. I'm going to find based upon what I have heard that the State has asserted a valid non-racial reason for not accepting this person as a juror. All right." The *Batson* objection was not raised on direct appeal. *State v. Gregory*, 342 N.C. 580 (1996). The State continues to assert that all of the prosecution's proffered reasons were race-neutral. *See* Affidavit of Gregory J. Brown.

member named Benjamin McKinney.[3] McKinney had written on his questionnaire that he belonged to the NAACP. The prosecutor asked him whether the NAACP took any position on capital punishment. McKinney responded, "Not that I know of." Asked whether the NAACP took a stand on capital punishment or had a position on capital punishment as part of its platform, McKinney said that the NAACP "takes more or less individual cases."

The State moved to peremptorily strike McKinney. Defense counsel lodged a *Batson* objection and the prosecutor was asked to state his reasons for excusing McKinney. The prosecutor stated that he wished to strike McKinney "primarily" because McKinney belonged to an association that was "in many instances . . . anti-law enforcement" and to the prosecutor's knowledge "sponsors and funds a legal defense fund which frequently files briefs in death penalty cases." The prosecutor concluded, "He's a member of an organization which I strongly associate with being anti-state and anti-death penalty." Asked to identify the organization, the prosecutor stated, "The NAACP."

The prosecutor went on to note that, "when we talk about the NAACP we're not talking about an organization that means exclusively black, there are white members in the NAACP and I will assert to this Court that if he were white and a members of the NAACP, I would challenge him, without hesitation."

The trial court responded, "I'm troubled, though, for you to make a blanket statement that you're going to remove every person who is a member of the NAACP, you're gonna remove a substantial [sic] and have a disproportionate effect on the minority community."

After hearing arguments of counsel, the trial judge observed, "To excuse all members of the jury pool who happen to be members of an organization which is overwhelmingly but not

[3] The voir dire of McKinney and subsequent arguments regarding the *Batson* objection to the State's peremptory strike appear in *State v. Fletcher I*, Vol. I, Tpp. 98, 107-08, 117-18; *see also* McKinney Jury Questionnaire.

entirely composed of members of one race, I believe would be unconstitutionally discriminatory. Therefore, we have a *Batson* problem." The trial judge went on to say that he had found a violation of the "defendant and the juror's constitutional right to be free of racially discriminatory peremptories and I must fashion a remedy." The trial court said he would dismiss all the jurors who had already been selected unless the State decided to withdraw its motion to strike McKinney. The State ultimately chose to withdraw its proposed strike and McKinney was seated on the jury.

The State's attempt to strike an African-American juror based on membership in the NAACP was unconstitutionally discriminatory and constitutes evidence of race-based conduct.[4]

African-American Venire Member Lolita Page: In *State v. Dwight Robinson*, a capital case tried in Guilford County in 1992, the prosecutor questioned an African-American venire member named Lolita Page.[5] Page was called for questioning with 11 other potential jurors. The prosecutor posed several questions to the group: whether the potential jurors were able to sit in judgment on another person and whether they could follow trial judge's instructions on aggravating and mitigating factors, fairly consider the death penalty, and fairly consider life imprisonment. Like the other 11 venire members, Page affirmed her ability to do so.[6]

[4] The State's affidavit purporting to give race-neutral reasons for strikes of African Americans fails to note that in *Fletcher*, the trial court found that the prosecutor had discriminated against an African-American venire member. Thus, the affidavit prepared by the State, intended to rebut the Defendants' contention that race was a significant factor in jury selection, skips over the fact that the trial court ***found*** race discrimination by the prosecutor in the very case. This affidavit does not rebut discrimination but evinces an intention to cover it up.

[5] Robinson was removed from death row in 2003, after the Superior Court of Guilford County determined that his mental retardation rendered him ineligible for execution. *See* the North Carolina Department of Correction list of "Persons removed from Death Row," available at http://www.doc.state.nc.us/DOP/deathpenalty/removed.htm. Robinson was consequently not included in the MSU study. The voir dire of Page and subsequent arguments regarding the *Batson* objection to the State's peremptory strike appear in *State v. Robinson*, Vol. I, Tpp. 68-72, 83, 89, 91, a case reviewed by Bryan Stevenson.

[6] The court reporter made notations such as "(All twelve prospective jurors gave an affirmative response.)."

The prosecutor then moved to question jurors individually. The prosecutor asked Page no further questions about her death penalty views. He did ask about her work as an English teacher and her education at North Carolina A&T State University. The prosecutor asked Page if the fact that she had a child "somewhat the age of the defendant" would influence her in any way. Page said, "no, not at all." The prosecutor then asked what subject Page's husband taught.

Next the prosecutor returned to group questions and asked whether any of the 12 venire members belonged to any organizations that advocated against capital punishment. Like the rest of the panel, Page said no.

The State subsequently moved to peremptorily strike Page. The defense lodged a *Batson* objection. The trial court invited the State to give its reasons on the record. Among other things,[7] the prosecutor said that Page "would not be sympathetic to the State's position as to capital punishment, given her liberal arts education at North Carolina A&T State University." Page was one of the first two African-American jurors struck by the State. The trial court found no prima facie case and did not rule on the reasons proffered by the State. The Supreme Court of North Carolina did not rule on the question of whether this explanation was credible or race-neutral. *See State v. Robinson*, 336 N.C. 78, 94-95 (1994) (discussing other proffered reasons and finding no *Batson* error).

There is no evidence to support the prosecutor's assertion that Page had death penalty views that were not sympathetic to the State. She was never questioned individually about her views of capital punishment and her answers to death penalty questions posed to the group were

[7] In this and several other instances of racially discriminatory jury selection practices recounted in this brief, Defendants will contend that, from among a number of reasons provided by the State for each African-American venire member, a select portion of those reasons may be shown to be not credible or pretextual. This type of "mixed motive" analysis is a well-established approach to ferreting out the effects of race on nominally race-neutral decisions. In a "mixed motive" disparate treatment case in employment law, the plaintiff may show by direct and circumstantial evidence that race was a "motivating" or "substantial" factor for an adverse employment action, even though other factors may have contributed. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003).

indistinguishable from those of other jurors. Further, linking Page's education at a historically black university with her supposed death penalty views evinces race consciousness and racial bias. It is worth reflecting on why there are "historically black" schools in the North Carolina system. The reason is racism. North Carolina A & T was created because blacks were forbidden by law from attending "historically white" schools like UNC at Chapel Hill, N.C. State or UNC-Greensboro, just a few miles west of the campus of North Carolina A & T. The prosecutor's explanation is neither credible nor race-neutral. To the contrary, it evinces race-conscious conduct with respect to Page.

African-American Venire Member Stanley Webster. In *State v. Ted Prevatte*, tried in Anson County in 1995, the prosecutor struck black venire member Stanley Webster.

Kenneth R. Honeycutt and Lisa D. Blue prosecuted the case. Nick Vlahos provided an affidavit concerning the State's strike of Webster.

The affidavit asserts that the prosecution struck Webster in part because he attended Shaw University.

Shaw University is a historically black institution. Striking a potential juror because of his association with an African-American university is patently discriminatory.

It is notable also that the trial prosecutor also asked Webster a number of questions about his membership in the NAACP. The prosecutor began his voir dire of Webster with questions about other venire members he knew, prior jury service, and employment.[8] The prosecutor then turned to Webster's views on the death penalty. Webster stated clearly that he had no opposition to the death penalty and he would not hesitate to impose it.

[8] The voir dire of Webster appears in *State v. Prevatte* (1995), Vol. I, Tpp. 224-32.

After death qualification and a few inquiries about Webster's family, employment, education, and prior criminal history, the prosecutor asked about Webster's membership in the NAACP. The prosecutor wanted to know whether Webster had ever been an officer in the NAACP. Webster had not; he was "just a member." The prosecutor went on to ask about Webster's church activities, familiarity with psychology, knowledge of the case, and his wife's education and employment. The prosecutor then returned to Webster's membership in the NAACP. He asked Webster about the NAACP's position on the death penalty. Webster stated clearly that he did not share the NAACP's position on capital punishment.

African-American Venire Member Laverne Keys: In *State v. Jathiyah Al-Bayyinah*, tried in Davie County in 1999, the State peremptorily struck African-American venire member Laverne Keys. The defense lodged a *Batson* objection.[9] Al-Bayyinah, an African American, was sentenced to death by an all-white jury.

Gregory J. Brown provided an affidavit regarding the State's strike of Keys. Brown, along with Patricia Bruce, prosecuted *State v. Al-Bayyinah*.

The State's affidavit cited as one reason for striking Keys that she "talked about being friends with defense attorney, Mr. Darryl Davidson, who is a defense attorney here in Iredell County." The prosecutor's claim that it struck Keys in part due to the fact that she was friends with a defense attorney is, in fact, a race-based reason.

The record shows that the prosecutor asked Keys, "You say you do know some lawyers, District Attorneys, or Judges; is that right?" Keys responded,

[9] The pertinent portion of Keys' voir dire and the *Batson* colloquy appear in *State v. Al-Bayyinah* (1999), Vol. VI, Tpp. 1075-76. The trial court overruled the defense's *Batson* objection. However, the trial judge did not consider the State's disparate treatment of similarly situated white venire members. On appeal, no *Batson* objection was raised. *State v. Al-Bayyinah*, 356 N.C. 150 (2002). Regardless, the facts and circumstances of Keys' voir dire may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

> Well, I've had my dealings with them in the past . . . . Well, let's see. I don't want to get personal. I'm divorced, so Mr. Eddie Gaines — Edmund Gaines was my lawyer. Let's see. Who else do I know? I know a new lawyer here in town, Mr. Davidson, Darryl . . . . I don't know judges personally, nothing like that. I mean I coached basketball at the YMCA so a lot of folk come and talk, and I can't remember their names, but a couple of lawyers and stuff. But that's about it. Those two I know — I know I know for the most part.

The prosecutor then asked, "Mr. Davidson, is he a friend of yours?" Keys said, "He's done some things for us. I say us, me and my sister do a black history program at the library. He spoke — he spoke at our program year before last." The prosecutor asked no further clarifying questions in this area.

Thus, after Keys said she was familiar with a number of judges and lawyers and knew two attorneys well, the prosecutor expressed interest only in Davidson, a lawyer who had assisted Keys in putting on a black history program at a library. Further, when attempting to explain its strike of Keys, the prosecution cited only Keys' connection to Davidson. The State did not mention attorney Gaines, who had actually represented Keys. Notably, attorney Davidson is black and attorney Gaines is white.[10] Therefore, the State's questioning of Keys and its proffered explanation for striking her were explicitly based upon race.

III. Exclusion Based on Race or Race-Proxy: Race-Based Questioning and Targeting

A prosecutor's questions during voir dire "may support or refute an inference of discriminatory purpose." *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). Defendants' expert Bryan Stevenson explained the phenomenon of "targeting," whereby African-American potential jurors are scrutinized more carefully and more intensely questioned in order that the prosecutor might find a basis for which to strike the venire member. *Robinson* HTpp. 873-74. The following six capital cases illustrate race-conscious jury selection wherein the prosecutors singled out African-

[10] *See* www.daryldavidsonlaw.com and www.homesleylaw.com.

American venire members for repetitive and idiosyncratic questions or subjected them to explicitly race-based inquiries.

African-American Venire Member Melody Hall: In *State v. William Barnes, Robert Blakney, and Frank Chambers*, tried in Rowan County in 1994, the State peremptorily struck African-American venire member Melody Hall. Only one minority member served on the jury.

At trial, the judge overruled the defense's *Batson* objection as to Hall and that ruling has been upheld on appeal. *See Barnes v. Branker*, No. 1:08CV271, 2012 WL 373353 (M.D.N.C. Feb. 3, 2012); *State v. Barnes/Blakney/Chambers*, 345 N.C. 184 (1997), *cert. denied*, 522 U.S. 876 (1997), 523 U.S. 1024 (1998).[11]

During voir dire in *Barnes/Blakney/Chambers*, the State addressed Hall as follows:

> You have heard earlier and I don't know how to do this other than to direct myself to Mr. Wilson[12] and Mrs. Hall. I think you were both in the Courtroom and you heard earlier questions by defense counsel when they addressed jurors and asked them questions about whether the fact that the defendants charged in this case are each black and the victims in this case are both white and they asked that panel of jurors that was here when they started this morning, asked each one of them about r—basically about their relationship with people of the black race, and I suppose that I would address that same question to Mr. Wilson and Mrs. Hall. Does that fact that these defendants are black and that Mr. and Mrs. Tutterow were white, is that going to affect your ability to sit on this case and follow the law and do what the law and the facts dictate?
>
> Hall said, "No, it's not."

[11] The voir dire of Hall and subsequent arguments regarding the *Batson* objection to the State's peremptory strike appear at *State v. Barnes/Blakney/Chambers*, Vol. I, Tpp. 340-42; 363-66, 370-73. On direct review, the Supreme Court of North Carolina considered "variation in the number of questions asked or the manner of questioning" and noted that a difference in the manner of questioning "*in itself* does not necessarily lead to a conclusion that the reasons given by the prosecutor were pretextual." 345 N.C. 184, 211-12 (1997) (emphasis added). The facts and circumstances of the voir dire of Hall may yet constitute evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

[12] Chalmers Wilson was also African American.

Later in voir dire, the State asked Hall, "Would the people . . . you see every day, ***your black friends***, would you be the subject of criticism if you sat on a jury that found these defendants guilty of something this serious?" (emphasis added). Hall said yes, but any criticism would not prevent her from doing her duty as a juror honestly.

The State returned during voir dire to the question of whether Hall would be criticized for her role as a juror, asking:

> I understood you to say earlier that people that you saw regularly, if not co-workers, that other people that you saw had before, maybe not in connection with this trial, but at least before you came up here this week, had said things to you that would indicate that it wouldn't be appropriate for you to find a black person guilty of first-degree murder. Is that right or wrong? That it would be — that you would be subject to being criticized if you were part of a jury that found a black person guilty of first-degree murder. Is that right or is it wrong?

Hall replied that people would have to "respect my answer" as to the question of guilt and that nobody had ever made critical comments to her about sentencing a black person to death.

The State's questioning of Hall demonstrates race-consciousness. The State directed certain questions to Hall because she was black. The State asked Hall whether criticism from her black friends would affect her ability to be fair as a juror. The State asked Hall whether she would be criticized by her black friends for finding a black person guilty or sentencing a black person to death. The State's questions and decision to direct those questions specifically to Hall an African American, indicates that race was directly considered during voir dire.

<u>African-American Venire Member Alfredia Brown</u>: In *State v. Daniel Cummings*, tried in Brunswick County in 1994, the prosecutor struck African-American venire member Alfredia Brown. The defense objected under *Batson*.[13]

[13] The *Batson* colloquy and cited portions of voir dire appear in *State v. Cummings*, Tpp. 672-80.

During questioning of Brown, the prosecutor introduced the subject of the defendant's race, asking,

> Do you feel that the fact that he's an American Indian would interfere with your ability to fairly and impartially judge the evidence in the case? I don't mean to put you on the spot, that's just a question that needs to be asked. Do you feel that would pose you any problem?

Brown said no and the State subsequently moved to strike her.

Defense counsel objected and specifically noted that the prosecutor had previously questioned eight or nine non-black venire members and had not asked any of them questions about race. However, with Brown, the "only black person to date," the prosecutor introduced the subject of race. Trial counsel said, "She is the only juror [the prosecutor] asked or brought up the issue of race, [the Defendant's] race. The only one." The prosecutor did not refute this fact. Nor did the prosecutor ask this question again of any potential juror. The trial court did not mention it in overruling the *Batson* objection.[14]

African-American Venire Member Kennith Brown: In *State v. Al Harden*, tried in Mecklenburg County in 1994, the State peremptorily struck African-American venire member Kennith Brown. The defense lodged a *Batson* objection.[15]

[14] On direct appeal, the defendant argued that the strike of Brown violated *Batson*. The Supreme Court found no error. *State v. Cummings*, 346 N.C. 291, 307-10 (1997). The Court did not consider disparate treatment of Brown and similarly-situated non-black venire members. Evidence of disparate treatment is relevant to a determination of whether there is race discrimination. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination."). The facts and circumstances of this strike may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

[15] The trial court overruled the objection, finding the State's explanations to be race-neutral. The *Batson* objection as to Brown was not addressed in the North Carolina Supreme Court's direct appeal opinion. *State v. Harden*, 344 N.C. 542, 557-59 (1996). Regardless, the facts and circumstances of voir dire may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

Gentry Caudill, Thomas Porter, and David Maloney prosecuted the case at trial. Anna Greene has provided an affidavit and claims the State struck Brown in part because he reported an unpleasant experience with law enforcement in which he was called black, hit, pushed, and locked up by white law enforcement.

The notion that the State can justify the striking of African-American venire members based upon the belief that past discrimination might affect their present ability to be fair is troubling. That logic would necessarily mean that African Americans, as a group, will continue to be discriminated against in the future. Therefore, the State's reliance on Brown's concern that he was the victim of race-conscious policing – namely, being called black, hit, and pushed by a white law enforcement officer – is itself evidence of discrimination.[16]

Moreover, the prosecutor failed to challenge a non-black venire member who, like Brown, had negative interactions with the police. Faye Deese initially described how frightening it was for her when the police came to arrest her son. Deese subsequently said the police used excessive force during the search and arrest.[17]

African-American Venire Member Renita Lytle: In *State v. Stanley Sanders*, a capital case tried in Transylvania County in 1995, the prosecutor questioned an African-American venire member named Renita Lytle.[18] The prosecutor asked Lytle about the death penalty

[16] Defendants' expert Bryan Stevenson gave extensive testimony on this issue in *State v. Robinson*, concluding, "[Y]ou cannot allow the past history of discrimination disqualify you from jury service because then people of color will never get to serve on juries." *Robinson* HTpp. 867, 872-73, 877-78.

[17] *State v. Harden*, Vol. II, Tpp. 402-03, 619-22 (Deese). Deese's statement about "more force than necessary" came out during voir dire by defense counsel. The prosecution's failure to fully voir dire Deese about her son's "frightening" arrest suggests a lack of interest in attitudes toward the police — at least when the potential juror in question is not black.

[18] Sanders was resentenced to life in 2009. *See* the North Carolina Department of Correction list of "Persons removed from Death Row," available at http://www.doc.state.nc.us/DOP/deathpenalty/removed.htm. Sanders was consequently not included in the MSU study. However, the transcript of jury voir dire in this case was considered by Defendants' expert Bryan Stevenson.

followed by some general questions about where she lived and her family. He then asked a series of increasingly invasive questions about the father of Lytle's son, where he lived, whether he was working, and how long Lytle had been estranged from him. When the prosecutor asked whether he was "carrying out his responsibilities for child support," defense counsel objected and asked to be heard. The trial court overruled the objection.[19]

The prosecutor next asked whether the fact that the father of her child was not paying child support would cause Lytle to have negative feelings about the justice system. Defense counsel again objected and asked to be heard. The trial judge agreed to hear from the defense. Counsel stated, "I believe this juror is being asked these questions solely because she is black . . . the questions are blatantly racist." Counsel noted that no other prospective juror had been questioned about child support. The defense attorney concluded, "I think these questions are demeaning to all of us who are sitting here and to the juror who's sitting up there and I'm asking the court to stop it." The trial court agreed, noting, "We've had innumerable jurors who've had children and been here and no one's been asked that question before." Following the court's admonishment, the State passed Lytle.

The questioning of African-American venire member Lytle exhibits disparate questioning on the basis of race and the trial court's ruling to that effect should be given weight.

African-American Venire Member Johnny Lewis: In *State v. Nathan & William Bowie*, tried in Catawba County in 1993, the trial prosecutor engaged in disparate treatment of black and non-black venire members. Only two African Americans were questioned during voir dire in this case. The State unsuccessfully challenged Carolyn Loritts for cause and then struck her based on her misgivings about the death penalty. The second African American, Johnny Lewis,

[19] The pertinent voir dire of Lytle appears in *State v. Sanders*, Vol. III, Tpp. 984-89.

expressed no hesitation about the death penalty. However, the prosecutor did not pass him until asking this explicit, race-based question:

> All right, let me ask you, Mr. Lewis, since you're black and the defendants are black, is anything that would cause you maybe to lean toward them simply because of the fact you and they belong to the same race?[20]

Lewis responded, "No, sir."

In 250 pages of voir dire transcript, the prosecutor questioned Lewis and only Lewis about his ability to set race aside and be a fair and impartial juror.[21]

African-American Venire Member Rodney Foxx: In *State v. Gary Trull*, tried in Randolph County in 1996, the defendant was convicted and sentenced to death by an all-white jury.

In that case, the prosecutor questioned an African-American venire member named Rodney Foxx. The State moved to strike Foxx peremptorily and the defense objected under *Batson*. The trial court sustained the *Batson* objection.

The trial court noted that Foxx was married and had two children, he had worked full-time for the same company for 25 years, he served as a pastor, he knew nothing about the case, and he said he could follow the law fairly and impartially. In addition, the trial judge noted specifically that the prosecutor "has spent noticeably more time conferring with the law enforcement officer at the State's table and requestioning this potential juror on things that he had already questioned him about more so than he has any other juror during the entire selection process." The trial court concluded that there was a prima facie case of purposeful, racially motivated discrimination.

[20] The fact that the prosecutor, Jason Parker, is African-American, does not mitigate the State's conduct.

[21] *State v. Bowie*, Vol. I, Tp. 175.

The State's actions with regard to venire member Foxx reveal disparate questioning and disparate treatment on the basis of race.

African-American Venire Member John Murray: In the 1998 Cumberland County case of *State v. Tilmon Golphin*, the State peremptorily struck African-American venire member John Murray.[22] Only one minority member served on the jury.

During jury selection in *Golphin*, the defense lodged a *Batson* objection to the State's use of a peremptory strike against Murray. The trial court overruled the defense's *Batson* objection as to Murray. This ruling has been upheld on appeal. *See Golphin v. Branker*, 519 F.3d 168 (4th Cir. 2008), *cert. denied*, 555 U.S. 975 (2008).[23]

During voir dire, in response to a question by the prosecutor, Murray testified that, during the first day he came to court for jury selection, two people sitting behind him whom he did not know said, "The defendants should never have made it out of the woods." Murray testified that he did not turn around to see who they were, but he "thought they weren't giving much consideration to due process." The prosecutor asked Murray, "Could you tell from any speech patterns or words that were used, expressions, whether they were majority or minority citizens, black or white, African-American?" Murray said they were white. Murray testified that hearing the white jurors' comments would not affect his ability to be fair as a juror.

The prosecutor's race-conscious questioning continued when he asked Murray about his experience being stopped for a traffic violation:

> Is there anything about the way you were treated as a taxpayer, as a citizen, as a young black male operating a motor vehicle at the time you were stopped that in

[22] The voir dire of Murray and subsequent arguments regarding the *Batson* objection to the State's peremptory strike appear in *State v. Golphin*, Vol. B, Tp. 359; Vol. C, Tp. 493; Vol. J, Tpp. 2052-58, 2068-74, 2083-84, 2111-16; Vol. L, Tpp. 2479-82; Vol. S, Tp. 4379.

[23] The effect of the prosecutor's race-based questioning of Murray, which is the subject of this portion of Defendants' brief, was not discussed or ruled upon by the North Carolina Supreme Court. *State v. Golphin*, 352 N.C. 364, 425-33 (2000).

> any way caused you to feel that you were treated with less than the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?

Murray said no. He testified it would not affect his fairness as a juror.

Later during voir dire, the prosecutor singled out Murray by asking a number of additional race-conscious questions. The prosecutor asked Murray whether he was "familiar with a religious organization called Rastafarian?" Murray said no. The prosecutor asked whether Murray "ever heard an individual called or proclaim themselves to be a Rastafarian?" Murray said, "[n]ot in the context of religion." The prosecutor asked whether Murray was familiar with the musician Bob Marley, his son Ziggy Marley, and the type of music they play. Murray said yes. The prosecutor asked Murray if he knew whether Bob Marley was a Rastafarian at the time of his death. Murray said no. The prosecutor asked Murray if he was familiar with the former emperor of Ethiopia, Haile Selassie. Murray said no, but that he had heard the name. The prosecutor asked whether Murray knew of any connection between Selassie and the Rastafarian religion. Murray said no. The prosecutor did not ask a single other venire member about these three individuals.[24]

When the prosecutor exercised a peremptory strike against Murray, the defense lodged a *Batson* objection. The trial court required the State to provide his reasons for striking Murray. The prosecutor gave as one of his reasons Murray's observation regarding the white jurors' comments that the defendants "should never have made it out of the woods." The prosecutor deemed Murray objectionable because "he attributed to a male and a female white juror in the courtroom with respect to what he viewed as a challenge to the due process rights of the

[24] In its opinion, the Fourth Circuit addressed the issue of the prosecutor's questions about Rastafarianism and found that they were not indicative of pretext. The Fourth Circuit did not address any of the prosecutor's questions related to the Marleys or Haile Selassie, or any of the prosecutor's other race-based questions of Murray. *Golphin*, 519 F.3d at 187.

defendants."

After hearing the parties' arguments, the trial court overruled the *Batson* objection and determined that the State had established a non-racial basis for striking Murray.

The trial court rejected as a race-neutral reason for the strike that Murray was concerned about the due process implications of two white jurors suggesting that the defendants should have been subjected to extra-judicial killing. The trial judge said, "I am not relying upon the impact of the incident in the courtroom as providing a basis for this and frankly is not – I do not consider it to be appropriate for even the exercise for a peremptory challenge."

In reviewing the State's strike of Murray, this Court should take note of the trial court's conclusion that the prosecutor's proffer of Murray's observation of the white jurors' comments was not an appropriate justification for a peremptory challenge.

The prosecutor's questioning of Murray demonstrates race-consciousness. When reporting the white jurors' comments, Murray did not initially note their race or raise the issue of race. The prosecutor spontaneously introduced race into the discussion by asking Murray whether he could tell if the jurors were black or white. When explaining his prior conviction, Murray did not initially raise the issue of race. The prosecutor spontaneously introduced race into the discussion by asking Murray if, "as a young black male," he felt disrespected by the officer. The prosecutor further questioned Murray about his knowledge of the Rastafarian religion, Bob and Ziggy Marley, reggae music, and the former emperor of Ethiopia. A review of the voir dire transcript reveals that the prosecutor did not question non-black venire members about the Marleys and the former emperor of Ethiopia. This line of questioning indicates that the State considered race when deciding whether to strike Murray.

IV. Exclusion Based on Race or Race-Proxy: Lack of Intelligence

The State's explanations for striking the venire members described below invoke the troubling stereotype of African-American inferiority. *See Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (noting that, after slavery, states sought to bar African Americans from jury service because "[t]he colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence").

African-American Venire Members Theresa Ann Jackson and Triston Robinson: In *State v. Darrell Maness*, tried in Brunswick County in 2006, the State struck African-American venire members Theresa Ann Jackson and Triston Robinson. No *Batson* objection was raised as to either venire member.

At trial, the State was represented by Rex Gore, Lee Bollinger and Christopher Gentry. Bollinger has provided an affidavit for the State.

The State's affidavit asserts that Jackson and Robinson were struck in part because of their intellectual or educational deficiencies. The prosecutor found Jackson unworthy because, on her jury questionnaire, she twice misspelled her occupation and that of her husband — "fort lift driver" rather than "fork" — and she also misspelled the name of the town where she worked — "Reilgwood" instead of "Riegelwood." Meanwhile, Robinson had only a 10^{th} grade education.

Nothing in the record shows Jackson and Robinson were incapable of understanding the evidence and instructions from the judge. The facts of *Maness* did not call on any sophisticated understanding of forensic evidence or otherwise complex testimony. The defendant faced the death penalty for killing a law enforcement officer during a traffic stop. The defendant gave a videotaped confession and the two passengers in his car who were eyewitnesses to the murder

testified for the prosecution.[25] *State v. Maness*, 363 N.C. 261, 267-68 (2009).

A review of the record demonstrates these reasons are also pretextual. The State passed several non-black venire members who made similar spelling mistakes on their questionnaires. Bradley Ward, who was passed by the State and seated on the jury, wrote "land scap" for "landscape" and "feild" for "field." The State passed Mary Ganus who wrote "construstion" for "construction" and "robery" for "robbery." Ganus was seated on the jury. Travis Wilkins was passed by the State and seated as an alternate juror even though he misspelled his employer's name — "Kieth Wilkins Logging" instead of "Keith" — and also the name of his wife's employer — "Rodger Bacon Acadamy Charter School" instead of "Roger Bacon Academy."

The prosecution also passed non-black venire members with less than a high school education, demonstrating the State was concerned with a lack of education only when it came to black venire members. The State passed Jennifer Forti, who had a 10th grade education and was seated on the jury. Gary Cox had an 11th grade education and was passed by the State.[26]

African-American Venire Member Christine Ellison: In *State v. James Watts*, tried in Davidson County in 2001, the State peremptorily struck African-American venire member Christine Ellison. The defense did not lodge a *Batson* objection at trial.

Gregory J. Brown provided an affidavit concerning the State's strike of Ellison. Brown was the trial prosecutor along with Patricia Bruce.

One of the purportedly race-neutral reasons Brown offered for the strike of Ellison was her lack of education and the fact that she misspelled words on her questionnaire. Ellison wrote

[25] Assistant district attorney Bollinger is not himself immune from the vagaries of spelling. Elsewhere in his affidavit, Bollinger described a potential juror who was "concerned about *loosing* her job." This demonstrates the absurdity and arbitrariness of citing spelling errors as a basis for striking black venire members.

[26] *See* Cox, Forti, Ward, Ganus, and Wilkins Jury Questionnaires.

that she grew up in "South Caroline" rather than South Carolina. Ellison also wrote that her occupation was "repair fishis" rather than repair finisher.[27] She marked the wrong marital status and left questions about her former husband blank. Ellison had a 10th grade education.

The questionnaires of non-black venire members Tammy Alley and John Thomas Reaves, both of whom were seated on the jury, reveal comparable errors. Alley spelled Randolph County as "Randolf." Reaves spelled Asheboro as "Ashebore."[28]

African-American Venire Member Lee Lawrence: In *State v. Terrance Bowman*, tried in Lenoir County in 1997, the State peremptorily struck African-American venire member Lee Lawrence.

Imelda Pate, who tried the case, has provided an affidavit concerning the State's strike of Lawrence. The affidavit asserts the State struck Lawrence in part because she lacked a high school education.

The State meanwhile accepted non-black venire member Pamela Andrus, who was seated on the jury. Like Lawrence, Andrus had a 10th grade education.[29]

African-American Venire Member Marcus Miller: In *State v. Raymond Thibodeaux,* tried in Forsyth County in 1999, the State peremptorily struck African-American venire member Marcus Miller. The defense did not lodge a *Batson* objection at trial.

David Hall provided an unsigned, unsworn statement explaining that the State struck Miller in part because he "answered questions 'Yeah' 6 times during questioning."

Hall was not the prosecutor in *Thibodeaux*. The case was prosecuted by Vincent Rabil

[27] *See State v. Watts*, Vol. IV, Tp. 646 (juror describes her job).

[28] *See* Alley and Reaves Jury Questionnaires.

[29] *See* Andrus Jury Questionnaire.

and Randall Galyon.

The State's reason makes no logical sense. There is no indication in the voir dire transcript that Miller's demeanor made him a less desirable venire member for the State, nor is this assertion made in Hall's affidavit. Miller's use of a common shorthand for the word "yes" is not a rational basis for peremptorily striking a person from jury service.

Moreover, the State accepted several non-black venire members who also repeatedly said "yeah" in response to the State's questions: Lowell Parker said "yeah" a total of 10 times; Tammy Stewart said "yeah" twice; Joseph Leo said "yeah" twice; David Abel said "yeah" once; Kathy Runge said "yeah" once; and Sandra Henricks said "yeah" once.[30]

African-American Venire Member Lisa Varnum: In *State v. John Elliot*, tried in Davidson County in 1994, the State struck African-American venire member Lisa Varnum. The defense did not object under *Batson*.

Gregory J. Brown has provided an affidavit proffering supposedly race-neutral explanations for the strike of Varnum. Brown was not involved in the trial, wherein the State was represented by Garland N. Yates and Warren McSweeney.

The affidavit asserts that the State struck Varnum in part because she "responds to a number of direct inquires by nodding her head and making uh-huh responses."

Many people nod their heads or say "uh-huh" to express an affirmative response. This is particularly the case when asked question after question as happens during voir dire in a death penalty case. This reason lacks any rational basis.

Moreover, non-verbal or semi-verbal responses were common during the *Elliott* trial, and were certainly not confined to venire members struck by the State. According to the trial

[30] *State v. Thibodeaux,* Vol. II-B, Tp. 224 (Abel); Vol. III-A, Tp. 41 (Runge); Vol. III-B, Tp. 145 (Leo), 180, 184 (Stewart), 197 (Henricks); Vol. IV, Tpp. 44-54 (Parker).

transcript, Kristie Fisher said "uh-huh" a total of 18 times and nodded twice. Robert Bryant gave non-verbal responses eight times, nodding five times and shaking his head three times. Vickie Pierce nodded in response to eight questions. Kristie Oxendine nodded three times and said "uh-huh" once. All of these non-black venire members were passed by the State.[31]

African-American Venire Member Mary Watson Jones: In *State v. Charles Bond*, tried in Bertie County in 1995, the prosecutor struck black venire member Mary Watson Jones.

David Beard prosecuted the case at trial. Assata Buffaloe has provided an affidavit attempting to justify the strike of Jones. There was no *Batson* objection.

The affidavit asserts that Jones was struck in part because she answered "uh-huh" to a number of questions. This reason lacks any rational basis.

Moreover, the State passed numerous non-black venire members who also answered "uh-huh" or "um-hum" to questions: Iris White, Delanie Castello, Betty Jenkins, Florence Cullipher, Deborah Boyd, and Betty Hill.[32]

V. Exclusion Based on Race or Race-Proxy: Demeanor

Defendants' evidence shows that prosecutors in North Carolina and Cumberland County have been trained to cite the demeanor of African Americans as reasons for striking them. The prosecutors' characterizations of a number of potential jurors described here are particularly troubling because they invoke traits stereotypically ascribed to African Americans. *See Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is

[31] *State v. Elliot*, Vol. IV, Tpp. 408, 410-13 (Bryant); Vol. V, Tpp. 668, 671-72, 674 (Pierce); Vol. VI, Tpp. 823, 824, 826 (Oxendine; Vol. VII, Tpp. 994-1002 (Fisher).

[32] *State v. Bond*, Vol. 1, Tp. 202 (White); Vol. 2, Tpp. 342-43 (Castello); 393-95 (Jenkins); Vol. 4, Tpp. 789, 811-12 (Cullipher); Vol. 5, Tp. 1008 (Boyd); 1164 (Hill); Vol. 6, Tp. 1217 (Hill).

'sullen' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."). In addition, characterizations of black venire members as "antagonistic" or "militant" and insufficiently "deferential" to authority are deeply rooted in the history of white supremacy and violence against African Americans. *See* "People & Events: Lynching in America, PBS American Experience Series: *The Murder of Emmett Till*, available online at http://www.pbs.org/wgbh/amex/till/peopleevents/e_lynch.html (Most victims of lynching between 1880 and 1930 were political activists and labor organizers or African Americans "who violated white expectations of black deference, and were deemed 'uppity' or 'insolent.'").

African-American Venire Member DeLois Stewart: In the 1991 Robeson County case of *State v. Henry McCollum*, the prosecutor moved to strike African-American venire member DeLois Stewart.

Asked to give reasons for striking Stewart, the prosecutor said Stewart was "evasive and antagonistic" in answering questions about the death penalty. The trial court rejected the State's explanation and deemed it pretextual.

The trial court's finding constitutes evidence that the prosecution in *McCollum* acted on the basis of race.

African-American Venire Member Pamela Collins: In *State v. Elrico Fowler*, tried in Mecklenburg County in 1997, the State peremptorily struck African-American venire member Pamela Collins. The defense lodged a *Batson* objection at trial.[33]

Anna Greene provided an affidavit concerning the State's strike of Collins. Greene was not the trial prosecutor. The case was tried by David Graham and Ann Gleason.

[33] The voir dire of Collins and subsequent arguments regarding the *Batson* objection to the State's peremptory strike appear at *State v. Fowler*, October 24, 1997 Volume, Tpp. 50-54, 72-77.

As recounted in Greene's affidavit, after the defense made its *Batson* objection, the prosecutor cited Collins' body language, lack of eye contact, laughter, and hesitancy as "physical indications . . . of an insincerity in her answers." The prosecutor also stressed that he had previously passed "two other black females."[34] The trial court announced he would question the jurors further and stated that he had not decided how to rule on the *Batson* objection. The trial judge questioned the jurors further and then asked counsel for both sides whether they had additional questions. The prosecutor suggested a lunch break and asked the trial court to hold the matter open over lunch.[35]

During the lunch break, the prosecutor researched Collins' criminal record. Collins had been charged with obtaining property by false pretenses 13 years before and had received a deferred prosecution. On her questionnaire, Collins did not say anything about this charge. The prosecutor argued that this was further evidence that Collins was "not being completely truthful." According to the prosecutor, Collins was dishonest in answering "no" to the question of whether she had ever been charged with a criminal offense.

The trial judge stated on the record, "I was prepared to sustain the *Batson* objection . . . based on what we heard before lunchtime." The trial court stated with regard to the proffered demeanor reasons that they were "so subjective as to mak[e] it impossible to determine the extent to which those factors might or might not be valid racially neutral reasons." The trial court also stated, with respect to whether Collins had been dishonest, that "participants in the deferred prosecution program are able to answer truthfully that they have not been charged or

[34] The record shows clearly the prosecutor's race consciousness in this regard. In response to an earlier *Batson* challenge, the prosecutor argued it was "perfectly obvious" that the State had already accepted a juror who "is just as black as the defendant." *State v. Fowler*, October 20, 1997 Volume, Tp. 94.

[35] The prosecutor's actions here, asking for additional time to come up with a reason that would pass muster, is similar to that of the prosecutor found to have violated *Batson* in *State v. Trull*, *supra*.

convicted of criminal offenses once they have successfully completed the program." However, the trial judge went on to overrule the *Batson* objection after concluding that the fact that Collins was charged with a felony was a "sufficiently racially neutral reason in and of itself."

Because the trial court found based upon its first-hand observations that the demeanor reasons initially offered by the State were too subjective to constitute valid racially neutral reasons, and because the trial court found that Collins gave truthful answers on her questionnaire regarding her criminal history, the State's treatment of Collins evinces treatment based upon race.

African-American Venire Member John Murray: In the 1998 Cumberland County case of *State v. Tilmon Golphin,* the prosecutor struck African-American venire member John Murray in part because

> I would also note that during the course of his answers at no time other than answering the questions and facing the person that was asking him the questions, while I certainly don't expect to be afforded any courtesy or recognition of authority because I don't have any authority, so to speak, but I noticed that when he spoke, he did not refer to the Court with any deferential statement other than saying "yes" or "no" in answering your questions when you asked them.
>
> . . .
>
> I also noted and perceived from my point of view a rather militant animus with respect to some of his answers. He elaborated on some things. Other things, he gave very short, what I viewed as sharp answers and also noted that when he spoke to the Court, that he did not defer, at least in his language, to the Court's authority, did not refer to the Court in answering yes, sir or no, sir. Did not address the Court as Your Honor.

The trial judge rejected the suggestion that Murray was not sufficiently respectful, noting that he "did not perceive any conduct of the juror to be less than deferential to the Court." The trial judge added that there was a "substantial degree of clarity and thoughtfulness in the juror's responses."[36] The trial judge's findings in *Golphin* were based upon his first-hand observation

[36] *State v. Golphin,* Vol. J, Tpp. 2111-15.

of Murray's demeanor. The trial judge's findings therefore constitute evidence that the State's demeanor-based explanation for striking Murray is not credible and demonstrates race-consciousness and racial bias.

African-American Venire Member Forrester Bazemore: In *State v. Maurice Parker*, capitally-tried in Cumberland County in 1998, the State peremptorily struck African-American venire member Forrester Bazemore.[37]

When the State in *Parker* exercised a peremptory challenge against Bazemore, the defense objected under *Batson*. Defense counsel noted that, at that point in voir dire, 83 percent of the State's peremptory strikes had been used against African-American venire members. The trial judge concurred with defense counsel's calculation. The trial judge noted, "considering the answers he gave, his demeanor and considering also that of six challenges which the state has now exercised, five have been against blacks, do you [the State] wish to be heard as to a race neutral reason?"

The prosecutor gave as one of her reasons for striking Bazemore,

> The body language of the juror was important to the State on several occasions and most notably to the state perhaps is the – when I started to talk to him about the death penalty issues, he folded his arms and sat back in the chair away and kept his arms folded, and that body language along with the – some closing of his eyes and blinking or holding back at that point on the issue of the death penalty was also noted by the state so that we also actually made a note about that body language.

The prosecutor also stated that Bazemore seemed "evasive" and "defensive."

In ruling on the *Batson* objection, the trial judge stated,

[37] Although *Parker* was capitally-tried, the case resulted in a sentence of life imprisonment. *State v. Parker*, 140 N.C. App. 169 (2000). The voir dire transcripts relating to the *Batson* arguments and ruling in *Parker* may be found in *State v. Parker*, Vol. III, Tpp. 443-455.

> [T]he Court had the opportunity to see, hear and observe the conduct of the examination by the prosecutor as well as the answers provided by Mr. Bazemore. That Mr. Bazemore did appear thoughtful and cautious about his answers. He did appear to have some specific desire – let me rephrase that, not a specific desire but a determination to make sure he understood exactly what question was being posed before he answered.

The trial judge concluded with respect to Bazemore's demeanor and body language, "having had the opportunity to observe this juror, that the proffered reason is pretextual, that the defendant's objection should be sustained."

The trial judge's first-hand observations of Bazemore and subsequent finding that the prosecutor's attempts to justify the use of a peremptory strike against Bazemore was pretextual constitutes evidence that the prosecutor in *Parker* acted on the basis of race during jury selection.

VI. Exclusion Based on Race or Race-Proxy: Lack of Community Connection

African-American venire members are frequently excluded from capital juries on the grounds that they lack sufficient ties to the local community. In some instances, the prosecutors accepted non-black venire members who were even less tethered to the community than the excused African Americans. The State's practice in this regard is evocative of a time when African Americans were not considered citizens and full members of the communities in which they lived. *Dred Scott v. Sandford*, 60 U.S. 393, 404-405 (1857); *see also Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (Civil Rights Act of 1866 applies to housing discrimination by private sellers; purpose of Act was to limit "ability of white citizens to determine who [would] be members of [their] communit[ies]" and to employ "federal authority to deal with 'the white man . . . [who] would invoke the power of local prejudice' against the Negro.") (brackets in original). The cases here show this offensive stereotype persists and is self-perpetuating as it is invoked to exclude African Americans from jury service and thereby deprive them of one of the most salient emblems of citizenship.

African-American Venire Member Leroy Ratliff: In *State v. Darrell Strickland*, tried in Union County in 1995, the Native American defendant was convicted and sentenced to death by an all-white jury. In this case, the State peremptorily struck African-American venire member Leroy Ratliff. The defense did not lodge a *Batson* objection at trial.

Jonathan Perry provided an affidavit purporting to explain the strike of Ratliff. Perry was not the prosecutor in *Strickland*. The case was tried by Michael Parker and Scott Brewer.

The affidavit asserts that the prosecution struck Ratliff in part because he was a native of neighboring Anson rather than Union County. This reason is pretextual on its face. Not surprisingly, the State accepted non-black venire members Robert Berner, who was originally from the Midwest, and Albert Ackalitis, a native of New York.[38]

African-American Venire Member Sandra Connor: In *State v. Wesley Smith*, tried in Rowan County in 2002, the State peremptorily struck African-American venire member Sandra Connor. The defense did not lodge a *Batson* objection at trial.

Thomas M. King provided an affidavit concerning the State's strike of Connor. King was not the prosecutor. Campbell was tried by William D. Kenerly.

King offered as a purportedly race-neutral reasons for striking Connor that she had worked in an adjoining county for 14 years. According to King, the State struck Connor because "she had limited ties to Rowan County by virtue of her employment in an adjoining county for an extended period of time."

A review of the voir dire shows that the prosecutor asked no questions designed to elicit information about other ties Connor may have had to Rowan County. For example, he did not ask her how long she had lived in the county, or whether she was involved in a local church or

[38] *State v. Strickland*, Vol. I, Tp. 254 (Berner); 256 (Ratliff), 321 (Ackalitis).

other community activities.

The State passed Dana Edwards, a non-black venire member who was seated as an alternate on the jury. Edwards was born in Norfolk, Virginia, and lived there until he got married, after which he moved to North Carolina. Edwards had lived in Rowan County for four years, having previously lived in Mecklenburg County. Edwards reported that he worked in Mecklenburg County and commuted there every day.[39]

African-American Venire Member Vanessa Moore: In *State v. Rayford Burke*, tried in Iredell County in 1993, the State peremptorily struck African-American venire member Vanessa Moore. The defense did not lodge a *Batson* objection at trial. The defendant in *Burke* was African American and was convicted and sentenced to death by an all-white jury.

Mikko Red Arrow provided an affidavit concerning the State's strike of Moore. Red Arrow was not the trial prosecutor, but he did review notes made by Patricia Bruce and Debra Brown, the prosecutors who tried the case.

One of the purportedly race-neutral reasons Red Arrow offered for the strike of Vanessa Moore was that she previously lived in Washington D.C. and Maryland.

On voir dire, Moore reported that she grew up and went to high school in North Carolina. She had been living in North Carolina for the past eight years. She had lived at her current address for five years.[40]

The State passed non-black venire member Scott Tucker, who was later seated on the jury. Tucker had lived in North Carolina for nine years. Prior to that, he lived in Chicago, Illinois, for 16 years. The State also passed non-black venire member Rita Johnson who was born in Georgia, had lived in Virginia, and had lived at her current address in North Carolina for

[39] *State v. Smith*, Vol. III, Tpp. 355-56, 362 (Connor), 492-93 (Edwards).
[40] *State v. Burke*, Vol. II, Tpp. 284-85 (Moore), 325 (Tucker), 327-28 (Johnson), 333-35 (Smallwood); Vol. IV, Tp. 803 (McNemar).

two years. The State passed non-black venire member Jeffrey Smallwood. Smallwood was seated on the jury. He had lived in Statesville for three and a half years. Before that he lived in Iowa and Missouri; he was born and raised in Alabama. The State also passed Janis McNemar. McNemar was also seated on the jury. She had lived at her current address for about five months and in the county for two and a half years. Before that, she lived in Kentucky.

African-American Venire Member Carletter Cephas: In *State v. Lawrence Peterson*, tried in Richmond County in 1996, the prosecutor struck black venire member Carletter Cephas.

The trial prosecutors were Kenneth W. Honeycutt and Michael D. Parker. Nick Vlahos has provided an affidavit purporting to give a race-neutral reason for striking Cephas.

The State's affidavit asserts that the prosecution struck Cephas in part because she was originally from Washington, D.C. According to the affidavit, "The murder in this case . . . involved the killing of a woman working in a convenience store in Richmond County. Such murders occur every day in Washington, D.C., but they are very rare in Richmond County. Cephas is a potential juror with big city values that are not a good fit for a small town murder case." The record shows that Cephas had lived in Richmond County for 14 years. Her father and grandmother and "a lot of other family" had all lived in Richmond County. The prosecutor asked Cephas no questions about her familiarity with Washington, D.C. crime generally or the supposedly everyday convenience store murders. The claim that convenience store robberies are an everyday occurrence in Washington, D.C. is unsupported by the facts. In sum, nothing in her voir dire answers suggested Cephas had anything but small town values and the special concern about Washington, D.C., a predominantly African-American city, is independent evidence of the affiant's racial bias.

Meanwhile, the prosecutor passed non-black venire member William Waterman, who was originally from the big city of Los Angeles, California. The prosecutor passed several other non-black venire members from other states, but did not ask them whether they came from big cities or small towns. Mary Van Nest was born in Massachusetts and lived in Florida before moving to Richmond County. Lee Jenkins was born in Virginia. Patrick Comninaki was an "army brat" who moved around a lot. Patrick Cullen moved to North Carolina at his mother's insistence after he "got in trouble" in Oregon.[41]

VII. Admissions: No Race-Neutral Explanation

In a startling number of cases, prosecutors across North Carolina have been unable to identify any reason, let alone a race-neutral one for excluding African Americans from jury service. In the face of Defendants' strong statistical showing, combined with evidence of historic and implicit bias against African-American potential jurors, the State's failure to come forward with a race-neutral explanation for these strikes is strong evidence of intentional discrimination. *See Batson*, 79 U.S. at 97 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.).

African-American Venire Member Walter Curry: In the 1990 Wilson County case of *State v. Patricia Jennings*, the prosecutor struck African-American venire member Walter Curry.

The case was tried by Ernest H. Josephs, Jr., and John Covolo. William D. Wolfe provided an affidavit that attempted to explain the reason for the State's peremptory challenge of Curry.

[41] *State v. Peterson*, Vol. I, Tpp. 196 (Waterman), 207 (Jenkins); Vol. II, 326 (Cephas) 331 (Van Nest); Vol. III, 477-78 (Cullen); Vol. IV, 785 (Comninaki).

The affidavit states, "Unknown from available facts, believed to be disinterest in the judicial process."

Wolfe's inability to determine the reason for the State's strike of Curry is evidence that the State did not have a race-neutral reason for striking him.

Furthermore, the fact that Wolfe was not involved in jury selection in *Jennings* and, at best, is able to note a race-neutral reason which he believes to be the basis for the State's strike of Curry demonstrates that Wolfe cannot credibly determine from the transcript whether any race-neutral reason existed at all. Wolfe's statement that the strike may have been based upon Curry's disinterest in the judicial process is nothing more than speculation. Wolfe admits as much in his affidavit when he wrote that the basis for the strike is unknown.

Finally, a review of the transcript of voir dire reveals that Curry was qualified to serve on a capital jury. Curry stated that he did not have any moral or religious beliefs against sentencing a person to death. Curry stated that he would be able to return a verdict of death if the State proves its case at the sentencing phase of the trial.[42] This supports a finding that the State has presented no evidence that the prosecution had a non-racial reason for striking Curry.

African-American Venire Members Phyllis Brooks, Felecia Boyce, Nancy Sheffield, Sandra Banks, and Marsha Ingram: In *State v. Jeffrey Barrett*, tried in Northampton County in 1993, the prosecutor excluded five African-American citizens from jury service for no identifiable reason at all. No *Batson* objection was raised by the defense.

David Beard prosecuted the case at trial. Assata Buffaloe, who was not involved in the trial, has provided an affidavit for the State. The State is currently "unable to determine the reasoning for the peremptory strike[s]" of these venire members.

[42] *State v. Jennings*, Vol. 6, Tpp. 1287-94.

All five of these venire members were qualified to serve as jurors in the case. Brooks had no personal or religious feelings about the death penalty and could vote to impose it in an appropriate case. Brooks was employed and had two children. She attended church and enjoyed softball. Boyce similarly expressed no death penalty reservations and answered "yes" to the question of whether she was strong enough to vote for death. Boyce was the mother of two children and did not work outside the home. Sheffield affirmed her ability to impose the death penalty in appropriate circumstances and said she could stand up in open court and announce a death sentence. Sheffield was born in Northampton County. She had worked as a seamstress and was a widow. She was a church-going grandmother and enjoyed many hobbies, including gardening and fishing. Like the others, Banks had no reservations about the death penalty. She attended church and had two daughters. Her hobbies were fishing and singing in her church choir. Ingram expressed no hesitation on the death penalty. After asking her his death qualification questions, the prosecutor made no further inquiries and simply struck Ingram.[43]

Thus, these five black venire members were qualified to serve as jurors and would have given fair consideration to the death penalty. This supports a finding that the State has presented no evidence that the prosecution had non-racial reasons for striking them.

African-American Venire Members Janet Burke, Nellie Fennell, Terry Lee, and Barbara Jenkins: In *State v. Stacy Tyler*, tried in Hertford County in 1995, the State excluded four African-American citizens from jury service for no identifiable reason at all. No *Batson* objection was raised by the defense.

David Beard prosecuted the case at trial. District Attorney Valerie Asbell, who was not involved in the trial, has provided an affidavit for the State. The State is currently "unable to

[43] *State v. Barrett*, Vol. I, Tpp. 90-91, 108 (Brooks), 122, 124 (Boyce), 155-59 (Sheffield), 167-68 (Banks); Vol. II, Tpp. 268-70 (Ingram).

determine the reasoning for the peremptory strike[s]" of Janet Burke, Nellie Fennell, Terry Lee, and Barbara Jenkins.

A review of the record demonstrates that all four of these black venire members were qualified to serve as jurors in a death penalty case.[44] The prosecutor asked Burke only three question before striking her. All three concerned the death penalty and, to all three, Burke gave yes or no answers. Burke had thought about the death penalty before, she had no personal or religious feelings about it, and she could personally recommend the death penalty in an appropriate case.

Fennell expressed no reservations about the death penalty. Fennell studied business administration in college and was involved in community functions.

Lee likewise had no reservations about capital punishment, answering each of the prosecutors three standard questions with "no, sir" or "yes, sir." Immediately after asking these death qualification questions, the prosecution struck Lee.

Jenkins had never thought about the death penalty before. However, she stated that, depending on the evidence, she could personally recommend the death penalty in an appropriate case. Jenkins was employed and had never been convicted of a crime.

Thus, these four black venire members qualified to serve as jurors and would have given fair consideration to the death penalty. This supports a finding that the State has presented no evidence that the prosecution had non-racial reasons for striking them.

<u>African-American Venire Member Wallace Jones</u>: In *State v. Charles Bond*, tried in Bertie County in 1995, the prosecutor struck African-American venire member Wallace Jones for no identifiable reason. No *Batson* objection was raised by the defense.

[44] *State v. Tyler*, Vol. I, Tpp. 163, 191-92, 255-56, 274, 285-86 (Jenkins); Vol. II, Tp. 428, 452 (Burke), 538-41 (Fennell), 541-42 (Lee).

David Beard prosecuted the case at trial. Assata Buffaloe, who was not involved in the trial, has provided an affidavit for the State. The State is currently "unable to determine the reasoning for the peremptory strike" of Jones.

Jones was a solid citizen who was fully qualified to serve on a capital jury. Jones expressed no hesitation about the death penalty and stated he was strong enough to impose a death sentence in an appropriate case. Jones had no reservations about finding a person guilty on an accomplice liability theory, and no trouble imposing the death penalty upon a defendant who did not actually kill the victim. Jones had some pretrial knowledge of the case, but stated he could set that aside and decide the case based on the evidence presented at trial. Jones was married and worked for the government. He went to church and was a member of several civic organizations.[45] The State's failure to explain the strike of Jones, coupled with his obvious fitness to serve, constitute evidence that the prosecution struck Jones because of his race.

African-American Venire Member Donnell Peoples: In the 1995 Nash County case of *State v. Timothy Richardson*, the State struck African-American venire member Donnell Peoples. In connection with this litigation, William D. Wolfe provided an affidavit stating that the State's race-neutral reason for striking Peoples is "Unknown from available facts."

Wolfe was not involved in the trial prosecution in *Richardson*. The case was prosecuted by Keith E. Werner and Eliot P. Smith.

Wolfe's inability to determine the reason for the State's strike of Peoples is evidence that the State did not have a race-neutral reason for striking him.

A review of the transcript of voir dire reveals that Peoples was qualified to serve on a capital jury. With respect to his ability to vote for the death penalty, Peoples stated, "I could

[45] *State v. Bond*, Vol. II, Tpp. 402-403, 409, 412, 426-29, 451, 453, 458.

vote. No problem." Peoples stated that he could be a fair and impartial juror to the defense and the State in a capital trial proceeding.[46] This supports a finding that the State has presented no evidence that the prosecution had a non-racial reason for striking Peoples.

African-American Member Tonya Reynolds: Patrick B. Weede provided an unsworn statement regarding the State's decision to peremptorily strike African-American venire member Tonya Reynolds in *State v. Thomas Larry*, tried in Forsyth County in 1995.

Weede was not the prosecutor in *Larry*. The case was tried by Eric Saunders and David Spence.

Weede stated with respect to venire member Reynolds, "I am not able to determine the reason for the strike. There was not a *Batson* motion or challenge for cause for this juror."

A review of the voir dire transcript reveals that the defense did lodge a *Batson* objection at trial to the State's strike of Reynolds. The trial judge overruled the objection, finding no prima facie case.[47] The issue was not raised on appeal. *State v. Larry*, 345 N.C. 497 (1997).

Weede's inability to determine the reason for the State's strike of Reynolds is evidence that the State did not have a race-neutral reason for striking her.

A review of the transcript of voir dire reveals that Reynolds testified that she believed in the death penalty and felt it was a necessary part of the law. Reynolds testified that she could vote to impose death if she were convinced it was the appropriate punishment. She stated that she could be part of a jury that would recommend death. She stated that, as a jury foreperson, she could write the word death on the recommendation sheet and return it in open court.

[46] *State v. Richardson*, Vol. V, Tpp. 802-18.

[47] *State v. Larry*, Vol. II, Tpp. 259-60, 316-17, 360-61. Weede's statement overlooked the *Batson* objection lodged at trial. A review of the voir dire transcript reveals that the defense did not give any reasons supporting the objection and the State was not asked to provide a race-neutral explanation. The trial judge summarily overruled the objection without hearing argument from either party.

Therefore, the transcript reflects that Reynolds was qualified to serve as a juror and would have given fair consideration to the death penalty. This supports a finding that the State has presented no evidence that the prosecution had a non-racial reason for striking Reynolds.

African-American Venire Member Thomas White: In *State v. David Williams*, tried in Bertie County in 1996, the State struck African-American venire member Thomas White for no identifiable reason. No *Batson* objection was raised by the defense.

David Beard prosecuted the case at trial. District Attorney Valerie Asbell, who was not involved in the trial, has provided an affidavit for the State. The State is currently "unable to determine the reasoning for the peremptory strike."

A review of his voir dire shows White was qualified to serve on a capital jury. White believed the death penalty was appropriate in some cases and he had no reservations about it. White went to school in Bertie County and graduated from high school. He was a member of the National Guard for six years and he belonged to a church. His parents and grandparents had all lived in Bertie County. White had previously worked with people with disabilities. He worked for a state-funded agency and at a group home. He had also previously worked as a machine operator for R.J. Reynolds. White had three children. He had previously been seated as a juror, but the case settled before the jury issued a verdict. White had several hobbies, including basketball, cooking, and reading.[48]

Thus, White was qualified to serve as a juror and would have given fair consideration to the death penalty. This supports a finding that the State has presented no evidence that the prosecution had a non-racial reason for striking him.

[48] *State v. Williams*, Vol. 7, Tpp. 1707-15.

African-American Venire Member Angela Meeks. In *State v. William Anthony*, tried in Gaston County in 1999, the prosecution excluded African-American citizen Angela Meeks for no apparent reason. Defense counsel did not lodge a *Batson* objection.

The prosecution has admitted there is "nothing that stood out in the type written transcript to say why this lady was excused." A review of the record shows Meeks was qualified to serve as a juror.

Meeks expressed no reservations about the death penalty. She affirmed her ability to follow the court's instructions on the evidence and burden of proof. The trial in this case concerned a domestic dispute that escalated to fatal violence and the prosecutor consequently asked potential jurors about their experiences with domestic problems. Meeks was divorced but said her divorce would not affect her consideration of the case. She had never been involved in a child custody dispute, nor had she or any of her friends or relatives been involved with domestic violence in anyway. Meeks was employed and had a five-year-old son. She had never been convicted of a crime.[49]

Thus, Meeks was qualified to serve as a juror and would have given fair consideration to the death penalty. This supports a finding that the State has presented no evidence that the prosecution had a non-racial reason for striking her.

African-American Venire Member Patrick Odems: Mikko Red Arrow provided an affidavit regarding the State's decision to peremptorily strike African-American venire member Patrick Odems in *State v. Jeffrey Duke*, tried in Gaston County in 2003. Red Arrow was the prosecutor at trial in *Duke*. The defense did not lodge a *Batson* objection at trial.

[49] *State v. Anthony*, Vol. I, Tpp. 163-73.

Red Arrow states in his affidavit, "Juror Patrick Odems, African-American Male, was excused by the State and at the time that he was excused, no *Batson* challenge was raised. I do not specifically recall questioning this juror. I did not indicate any reasons for the strike in my notes nor was I asked to place reasons on the record."[50]

Red Arrow's inability to determine the reason for the State's strike of Odems is evidence that the State did not have a race-neutral reason for striking him. Notably, Red Arrow was present and participating during jury selection in *Duke*, and Red Arrow's review of the voir dire transcript did not refresh his memory of the reason for striking Odems.

A review of the voir dire transcript reveals that Odems testified that he believed in the death penalty and felt its application should be determined on a case-by-case basis. Odems agreed with the proposition that the death penalty would be appropriate where the law and the facts warrant its imposition. Furthermore, in order to begin the day's lunch break, the trial judge interrupted the voir dire of Odems in the midst of questions relating to the death penalty. Red Arrow at that point was in the process of asking Odems a question about the death penalty. Following the lunch break, instead of completing the voir dire of Odems, Red Arrow decided to exercise a peremptory strike against Odems at that time. Red Arrow did not explain on the record why he prematurely ended his questioning of Odems with a peremptory strike.[51]

In view of the foregoing, Odems was qualified to serve as a juror and would have given fair consideration to the death penalty. This supports a finding that the State has presented no evidence that the prosecution had a non-racial reason for striking Odems.

[50] Red Arrow's statement that "race had absolutely no bearing on the State's decision for the strike" is entitled to no weight from the Court. *See Batson*, 476 U.S. at 98 (prosecutor may not rebut defendant's case "merely by denying that he had a discriminatory motive" or "affirm[ing] [his] good faith in making individual selections"; accepting these general assertions at face value would render the Equal Protection Clause "but a vain and illusory requirement." (internal citations omitted, brackets in original).

[51] *State v. Duke*, Tpp. 909-11.

African-American Venire Member Dwayne Wright: Anna C. Greene provided an affidavit regarding the State's decision to peremptorily strike African-American venire member Dwayne Wright in *State v. Michael Sherrill*, tried in Mecklenburg County in 2009. The defense did not lodge a *Batson* objection at trial.

Greene was not the prosecutor in Sherrill. The case was tried by Clayton Jones and Robert Corbett, III.

The State's affidavit concedes with respect to venire member Wright, "After reviewing the trial transcript and the notes of the assistant district attorney the affiant is unable to determine the reasons that the juror was struck." The State's inability to determine the reason for the prosecutor's strike of Wright is evidence that the State did not have a race-neutral reason for striking her.

A review of the voir dire transcript reveals that Wright testified, "I think the death penalty is appropriate and under some circumstances based on, you know, how it's outlined in the law. Based on my knowledge of the law." Wright said he could personally vote for the death penalty if the State met its burden of proof at the sentencing phase. Wright testified that he could give fair and equal consideration to both possible punishments. Wright said he did not have any concerns about standing up in open court and announcing his sentencing recommendation. Wright stated that he had felt that the death penalty was appropriate since he was a young adult in his early 20s and he had not changed his position or wavered at any point.[52]

Thus, Wright was qualified to serve as a juror and would have given fair consideration to the death penalty. This supports a finding that the State has presented no evidence that the prosecution had a non-racial reason for striking Wright.

[52] *State v. Sherrill*, Vol. VI, Tpp. 1034-36.

The State's failure to explain their exclusion of these 17 African-American citizens, at times after the most perfunctory questioning, is evidence that race has been a significant factor in prosecution strike decisions.

VIII. Exclusion Based on Gender

In two cases, the prosecutor was so concerned to avoid being found to have discriminated on the basis of race that he inadvertently admitted to discriminating on the basis of gender. This reason is unconstitutional under *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Moreover, the proffer of an unconstitutional reason for striking these African-American venire members is evidence that the State is willing to consciously take improper and discriminatory considerations into account when selecting capital juries.

African-American Venire Member Elizabeth Rich: In *State v. Iziah Barden*, tried in Sampson County in 1999, the prosecution struck African-American venire member Elizabeth Rich. The defense did not lodge a *Batson* objection.

Gregory C. Butler provided an affidavit regarding the State's decision to strike Rich. Butler was the prosecutor at trial in *Barden*.

The affidavit asserts, "State was way ahead on preemptory [sic] challenges and was looking for strong male jurors. Took off Ms. Rich and a white female at same time who both answered Death Penalty questions satisfactorily but I used preemptory [sic] challenges to get someone stronger."

African-American Venire Member Viola Morrow: In *State v. Antwaun Sims and Bryan Bell*, tried in Onslow County in 2001, the prosecution struck African-American venire member

Viola Morrow. The defense lodged a *Batson* objection to the State's strike of Morrow. The objection was overruled and the trial judge's ruling was upheld on appeal.[53]

Gregory C. Butler provided an affidavit regarding the State's decision to strike Rich. Butler was the prosecutor at trial in *Sims/Bell*.

The affidavit asserts the State struck Morrow in part because: "State was looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the Defense as they were taking off every male juror."

IX. Irrational Reasons

Prosecutors must give "clear and reasonably specific" explanations of "legitimate reasons" for exercising peremptory strikes and these explanations must be "related to the particular case to be tried." *Batson v. Kentucky*, 476 U.S. 79, 98 n.20 (1986). In the cases described below, prosecutors struck African Americans and then gave irrational explanations having nothing to do with the case.

A. Irrational Reason for Exclusion: Service in United States Military

Military service is rightly revered in North Carolina, the home of several military bases. Yet, preposterously, African-American veterans have been rejected for jury duty in capital cases because they served their county in the armed forces.

African-American Venire Member Randal Sturdivant: In *State v. Ted Prevatte*, tried in Anson County in 1995, the State peremptorily struck African-American venire member Randal Sturdivant. The defense did not lodge a *Batson* objection at trial.

Nick Vlahos provided an affidavit concerning the State's strike of Sturdivant. Vlahos was not the trial prosecutor. Kenneth R. Honeycutt and Lisa D. Blue tried the case.

[53] At trial, the prosecutor did not admit to his unconstitutional, gender-based reason for excluding Morrow. Consequently, Supreme Court of North Carolina was unable to review this reason. *State v. Bell*, 359 N.C. 1, 14 (2004).

The affidavit asserts that the prosecution struck Randal Sturdivant in part because he had recently completed service in the United States Army. This reason is pretextual on its face. There is no rational reason why a military veteran should be considered unfit for jury service. Furthermore, the State passed non-black venire member Haywood Calvin Newton, a veteran of the United States Air Force. Newton was ultimately seated on the jury.[54] In view of the State's disparate treatment of these two armed services veterans, the Court should find that prior military service is neither a credible nor race-neutral reason for striking Sturdivant.

African-American Venire Member Clarence Stewart: In *State v. Elrico Fowler*, tried in Mecklenburg County in 1997, the State exercised a peremptory strike to excuse African-American venire member Clarence Stewart. Defense counsel objected to the strike under *Batson*.[55]

Anna Greene provided an affidavit concerning the State's strike of Collins. Greene was not the trial prosecutor. The case was tried by David Graham and Ann Gleason.

The affidavit asserts that the prosecutor struck Stewart in part because he "served in the Army and was halfway to retirement when he left the Army. Even though the State did not ask about why he left the Army they were concerned about that fact."

This reason is irrational on its face. Stewart served in the Army for approximately nine years and achieved the rank of Staff Sergeant. He was stationed in five different locations including Vietnam and Germany. If Stewart was fit to serve the United States in Vietnam, he was fit to serve as a juror in North Carolina. Moreover, during questioning, the prosecutor asked

[54] *State v. Prevatte I*, Vol. IV, 1285-86.

[55] The pertinent portion of Stewart's voir dire and the *Batson* colloquy appear in *State v. Fowler*, Vol. I, Tpp. 50, 54-56; *see also* Pennell, Welch, and Hoffacker Jury Questionnaires. The trial court overruled the *Batson* objection but declined to find Stewart's service to his country for nearly a decade to be a race-neutral reason for the strike. The trial court's refusal to credit this reason is some evidence that the reason is, in fact, a pretext for race. The *Batson* issue was not raised on direct appeal. *State v. Fowler*, 353 N.C. 599 (2001).

no questions of Stewart regarding his purportedly suspicious retirement from military service, later explaining, "We thought it was – didn't want to go into this with him in the questioning, because of the delicacy of it."

There was nothing delicate about the State's disparate treatment of this African-American veteran. The prosecutor passed white venire member Hayden Pennell, who listed prior military service in the Army from 1951 to 1953 on his juror questionnaire. The State also passed white venire member Sterling Welch, who listed service in the Army from 1963 to 1965. In addition, the State passed non-black venire member Rex Hoffacker, who listed his military service in the Army from 1962 to 1969.

The State's unfounded attack on Stewart's nine years of military service was rightfully rejected by the trial court and should be recognized by this Court for what it is: intentional discrimination based on race.

African-American Venire Member Andrew Valentine. In *State v. Patrick Steen*, tried in Mecklenburg County in 1998, the State struck black venire member Andrew Valentine. The defense did not object under *Batson*.

David Graham and Robert Gleason served as prosecutors at trial. Anna C. Greene has provided an affidavit purporting to give a race-neutral reason for striking Valentine.

According to the affidavit, the prosecution struck Valentine in part because he "worked as a military police officer in the Army."

The record shows Valentine served in the United States Army Reserve for five years. He became an officer, achieving the rank of 2nd Lieutenant. Valentine was an airborne MP.

The State's rejection of Valentine because he served his country is not only irrational; it is offensive. The Court should find that the State's strike of this African-American veteran is

some evidence of discrimination based on race.

The Court should also find that the State engaged in disparate treatment. While rejecting Valentine for his military service, the prosecution passed non-black venire member William Johnson, a WWII veteran who served in the U.S. Army for two years. Like Valentine, Johnson also served as a military police officer. The State also passed Quay Cullison, who served in the U.S. Navy for 12 years.[56]

B. Irrational Reason for Exclusion: Religious Faith

As it should, North Carolina has a strong tradition of respecting religious freedom and affirming the right of citizens to worship as they choose. Yet prosecutors in capital cases have excluded African Americans precisely because they are people of faith.

African-American Venire Member Ursela McLean: In *State v. Robbie Brewington*, tried in Harnett County in 1998, the State struck black venire member Ursela McLean. The defense objected under *Batson*. The trial court found no prima facie case and the State did not offer any reasons for the strike. The *Batson* objection was not raised on direct appeal. *State v. Brewington*, 352 N.C. 489 (2000).

This case was prosecuted by Thomas Lock and Peter Strickland. Michael S. Beam, who was not involved in the trial, has provided an affidavit purporting to give race-neutral reasons for the strike of McLean.

The State suggests the prosecution struck McLean in part because her favorite TV program was "religious programs" and she "very frequently" attended church.

This reason is patently irrational. Church attendance is hardly a reason to exclude a

[56] The pertinent portions of the record concerning these three venire members appears in *State v. Steen*, August 4, 1998 Volume, Tpp. 33-34, 38 (Johnson); August 5, 1998 Volume, Tpp. 33-34, 36-39 (Valentine); August 7, 1998 Volume, Tp. 78 (Cullison).

person from jury duty. It is notable that the prosecutor asked McLean no questions about her faith or church affiliation.

McLean was employed at Harnett Correctional Center and had previously worked for the Sheriff's Department for a year. McLean was working on her college degree and hoping to become a probation or parole officer. She had never been convicted of any crime and had previously served on a jury in a criminal case. No one in her family had been charged with a crime. McLean's paternal aunt had been murdered about a year before the trial. As a result of her work experience and the ongoing investigation into her aunt's murder, McLean was familiar with "most of the people with the Harnett County Sheriff's Department." McLean stated that she could follow the law and impose the death penalty in an appropriate case. McLean was obviously qualified to serve on a jury and excusing her because of her church attendance and predilection for religious television programs smacks of pretext.

The State's proffered reason also reveals disparate treatment of black and non-black venire members. McLean's questionnaire reflected that she "very frequently" attended church. However, the State passed numerous white venire members who indicated that they also attended church very frequently. The State passed the following venire members who indicated on their questionnaires that they also "very frequently" attended church: Edward Bennett, Linda Butler, James Dorman, Melane Faucette, Roger Johnson, Dee Langdon, Terry Manahan, Craig Matthews, William Matthews, Mary Murphy, Kimberly Snead, Eugenia Stewart, Cindi Wilburn, Marie Wilson, and Elizabeth Wood. In fact Manahan, had been an ordained minister since 1981, and was still a pastor at the time of Brewington's trial.[57]

[57] The pertinent portion of the record of these venire members appear in *State v. Brewington*, Vol. 2, Tp. 156 (Manahan); Vol. 7, Tpp. 132-40 (McLean); and the Jury Questionnaires of Bennett, Butler, Dorman, Faucette, Johnson, Langdon, Manahan, C. Matthews, W. Matthews, McLean, Murphy, Snead, Stewart, Wilburn, Wilson, and Wood.

African-American Venire Member Sheila Driver: In *State v. Terry Ball*, tried in Beaufort County in 1994, the State peremptorily struck African-American venire member Sheila Driver. The defense did not lodge a *Batson* objection at trial.

Ball was prosecuted at trial by Mitchell Norton and Frank Bradsher. Thomas D. Anglim was not involved in the *Ball* prosecution but provided an affidavit regarding the State's decision to strike Driver.

The affidavit states that the State struck Driver in part because she wrote on her questionnaire, "My religious background does not stop me from serving and being fair and honest on the jury." A review of the record reveals that this is not a rational basis on which to strike a venire member.

The jury questionnaire asked venire members about church attendance and membership in religious organizations. Driver answered that she attended church two to three times a week and was involved in church missionary work. In answer to a question asking for any other information that "might be important for the court or the lawyers to know about you," Driver wrote that her religious background would not stop her from serving as an impartial juror. On voir dire, the prosecutor asked what church Driver attended and whether there was anything about her service with the church that would affect her ability to sit as a juror. Driver said no. The prosecutor asked Driver no further questions on the matter.[58]

Nothing in the record explains why the State would have been concerned with Driver's statement regarding her religious background.

African-American Venire Member Wanda Jeter: In *State v. Phillip Davis*, tried in Buncombe County in 1997, the State struck African-American venire member Wanda Jeter.

[58] *State v. Ball*, Tp. 278; Driver Jury Questionnaire.

Ronald L. Moore and Kate Dreher prosecuted the case. Davis was tried and sentenced to death by an all-white jury.

The defense objected under *Batson*. The trial court asked the State to explain its strike of Jeter. The prosecution responded, "Ms. Jeter was wearing a cross earring in her right ear . . . which suggests to the State a religious consideration that may impact her ability to actually send somebody to death, but the state doesn't know." The State went on to give additional reasons for the strike, namely that she was wearing a Tweetie Bird shirt and her brother had a criminal record.

The record shows that Jeter was not against the death penalty, she could consider both life and death as potential punishments, she could vote to impose the death penalty, and she could "walk back in here and stand up and say so." Jeter was specifically asked if she had any religious beliefs against the death penalty and she said no.

In overruling the *Batson* objection, the trial court did not refer to the prosecution's complaint about Jeter's display of religious faith. However, the court ruled that Jeter's brother's pending charge "would be a reason for excusing the juror, regardless of their race, and they have stated a race neutral reason."[59] The *Batson* objection was not raised on direct appeal. *State v. Davis*, 353 N.C. 1 (2000).

<u>African-American Venire Member Wayne Radcliffe</u>: In *State v. Carlos Frink*, a capital case tried in Cumberland County in 2001, the State struck African-American venire member Wayne Radcliffe. Defendant Frink, a codefendant of Christina Walters, was sentenced to life.

Margaret Russ was one of the prosecutors in this case and she conducted the voir dire of Radcliffe. Radcliffe joined the United States Army in 1962, and was stationed at Fort Bragg. He

[59] The relevant portion of Jeter's voir dire and the *Batson* colloquy appear in *State v. Davis*, Vol. I, Tpp. 230-234, 256-58, 265-68. The Buncombe County prosecutor's office did not provide any affidavits to the State's expert Joseph Katz.

spent his career in the Army and, at the time of the trial, he was retired. Radcliffe did two tours in Vietnam. He served as a combat photographer. Radcliffe was also active in his church and a small Bible college in his town. Radcliffe stated that he could fairly consider the death penalty. Radcliffe had a close friend and a family member who worked as guards at a nearby state prison.

Pursuant to *Batson*, defense counsel objected to the strike of Radcliffe. The trial court asked Russ to explain the strike. Russ stated,

> As to then Mr. Radcliffe, who's juror number ten, the concerns that were raised during the course of talking with Mr. Radcliffe centered basically on his involvement — extent of his involvement in what we perceived to be his involvement in the church and in the Bible college, his relationship with a minister friend who works in the prison system and a brother-in-law who is a guard in the county jail. He indicated if my recollection serves correctly, that he prints a newsletter for a local Bible college. That's his involvement in that and that he has involvement in putting together the newsletter and then prepares it on his computer for distribution.

At this point, the trial judge interjected to ask, "What is there about that that bothers you?" Russ continued,

> It's not that alone, Judge. It's that along with his repeated references to — well, his church involvement. He says he's in his church. He's a deacon. I don't think that in and of itself is a problem but those two incidents along with that he has a friend who is a minister. He is a church member. In fact, he describes him as a close friend or he answers the question, How close a friend is he? He says, A church member who is a guard at the Columbus County prison system, as well as having a brother-in-law who is a guard there. It's the totality of those concerns that we have that caused us to have some concerns about him.

The court then heard from defense counsel. After pointing out that the State had failed to ask Radcliffe whether his involvement in church would have any effect on his ability to be a fair and impartial juror, defense counsel argued that Russ' responses were "inadequate and it's nothing more than a pretext for discrimination." Russ asked for an opportunity to respond. At that point, Russ added for the first time an additional reason for striking Radcliffe, namely that he "was nodding" during the voir dire of another juror. Russ said Radcliffe's "body language . . . was

also a great concern of ours." Such newly minted reasons, added only after the judge expressed skepticism and the opposing lawyer described as pretextual the original reasons, are inherently less credible, a fact recognized even by prosecutor training. In overruling the *Batson* objection, the trial judge noted the State's concerns about Radcliffe's religious faith and his relationship with law enforcement officers, but found "most convincing" the State's reliance on Radcliffe's head nodding.[60] The *Batson* objection was not raised on direct appeal. *State v. Frink*, 158 N.C. App. 581 (2003).

The pretextual nature of the State's faith-based reason is revealed in the State's disparate treatment of non-black church members. The State passed Rhonda Alderman, who attended a church where her brother served as pastor. She went to church every Sunday and had formerly served as church secretary. The State also passed Frank Marlowe. Marlowe had been the Sunday school secretary at his church for 15 years. The State passed Chandra Booth. Booth attended Grace Bible Church and had done so her entire married life. Booth's father-in-law was the church treasurer. The State also passed Louise Howell. Howell had attended the same Baptist church since she was 10 years old. She attended every Wednesday and Sunday. Her husband was a deacon and a Sunday school teacher. Howell herself had also taught classes at church. Howell was seated on the jury.

The State displayed a marked lack of interest in the church activities of these non-black venire members. Russ asked Alderman only the name of her church. Alderman named the church and added that her brother was the pastor. Russ asked if the church were

[60] The relevant portion of Radcliffe's voir dire and the *Batson* colloquy appear in *State v. Frink*, Vol. B, Tpp. 179, 260-263, 285, 294-300. The voir dire of the similarly-situated non-black venire members appear at Vol. B, Tpp. 205-206 (Howell), 277-79 (Alderman); Vol. D, Tp. 790 (Marlowe), 804-805 (Alderman); Vol. E, Tpp. 882-83 (Booth), 888-89 (Howell), 919 (Booth). The race of Alderman, Howell, and Marlowe is identified on the first page of their jury questionnaires. Booth's race is identified in the transcript.

nondenominational and moved on. Russ asked Booth and Howell no questions about their church attendance, even after Howell volunteered that she knew Booth because Booth's parents went to the same church as Howell. Russ asked Marlowe no questions about church.

C. Irrational Reason for Exclusion: Affiliation with State

It is difficult to conjure up a more irrational reason for striking potential jurors than that they counted among their family members and friends people who worked as prosecutors or police officers. *See State v. Porter*, 326 N.C. 489, 498 (1990) (State may overcome *Batson* objection by arguing it exercised strikes "in pursuit of a jury that is 'stable, conservative, mature, ***government oriented***, sympathetic to the plight of the victim, and ***sympathetic to law enforcement crime solving problems and pressures***.'") (emphasis added, internal citations omitted). Yet, that is what happened to the African-American citizens called for jury duty in the following capital cases.

<u>African-American Venire Member Sharon Sellars</u>: In *State v. Clinton Rose*, tried in Rockingham County in 1991, the prosecutor struck black venire member Sharon Sellars. The defense lodged no *Batson* objection. Thurman Hampton prosecuted the case at trial. Philip E. Berger Jr. has provided an affidavit purporting to explain the strike of Sellars.

The affidavit asserts that Sellars was struck in part because she had friends and relatives in law enforcement: "Sellars indicated her father was a deputy sheriff, and that a State Trooper was a friend."

Sellars stated clearly that she could set aside those relationships and be fair and impartial to both sides. If anything, one would expect a person with close ties to law enforcement to be inclined to favor the State, giving the prosecution little reason for a strike.

Moreover, the State did not strike seated non-black venire member William Wall, who knew one of the courtroom officers and a former deputy testifying on behalf of the State. Seated non-black juror Andrew Talbert had himself been a reserve deputy sheriff. Seated non-black juror George Satterfield knew several courtroom deputies and a deputy in nearby Forsyth County. Satterfield had discussed an infamous murder case with the latter.[61]

African-American Venire Member Wayne Radcliffe: In *State v. Carlos Frink*, a capital case tried in Cumberland County in 2001, the State struck African-American venire member Wayne Radcliffe. Defendant Frink was sentenced to life.

As discussed earlier, Margaret Russ was one of the prosecutors in this case and she struck Radcliffe in part because his brother-in-law and a "close friend" worked as guards at the Columbus County Correctional Institution, a state prison.

The defense lodged a *Batson* objection and the trial judge ultimately overruled the objection, citing demeanor-based reasons proffered by Russ. The *Batson* objection was not raised on direct appeal. *State v. Frink*, 158 N.C. App. 581 (2003).

It is notable that the State passed non-black venire member Joanne Long, who had an uncle and a co-worker who had worked at the Brunswick prison camp, a state facility. Her uncle had served as a prison guard. Long worked with a man who worked part-time with her while he was employed at the prison. The State also passed Annie Buffkin, a non-black venire member who was later excused for cause. Buffkin's son worked for the Department of Correction as a prison guard. Finally, the State passed non-black venire member Hazel Edwards despite the fact that her nephew worked at the Brunswick prison. Edwards was close to her nephew as he was

[61] *State v. Rose*, Vol. 2, Tpp. 687-88 (Sellars), 734-35 (Wall), 753 (Talbert), 831, 839, 858 (Satterfield).

raised next door to her.[62]

African-American Venire Member Ella Pierce Johnson: In *State v. Terry Ball*, tried in Beaufort County in 1994, the State peremptorily struck African-American venire member Ella Pierce Johnson. The defense did not lodge a *Batson* objection at trial.

Ball was prosecuted at trial by Mitchell Norton and Frank Bradsher. Thomas D. Anglim was not involved in the *Ball* prosecution but provided an affidavit regarding the State's decision to strike Johnson in that case.

The affidavit asserts that the State struck Johnson in part because "her son was a lawyer that was at one time an assistant district attorney but was presently in private practice in Greensboro." However, the record reveals no rational reason why this fact would have prompted the State to exclude Johnson from the jury.

During voir dire, the prosecutor said, "Mrs. Johnson, you indicated, I believe, on your questionnaire that you have a son that was at one time an Assistant District Attorney somewhere?" Johnson explained that her son had been a prosecutor in Greensboro three years prior and was now in private practice in an office in downtown Greensboro. The prosecutor asked, "Is there anything about the fact that your son is a lawyer and the fact that he served at one time as a prosecutor that you feel would tend to influence or affect your judgment or your verdict in this case?" Johnson said no. The prosecutor next asked whether Johnson "could listen to the evidence, the law and base your decision solely on that?" Johnson said yes.[63]

[62] Radcliffe's voir dire and the *Batson* colloquy were cited in the previous section on exclusion based on religious faith. The voir dire of non-black venire members passed by the State who had connections to law enforcement, including friends and family members in the prison system, appear in *State v. Frink*, Vol. D, Tpp. 784-85 (Long); Vol. G, Tpp. 1470-72 (Buffkin); Vol. H, Tp. 1589 (Buffkin); Vol. I, Tpp. 1821-22, 1866 (Edwards). The race of Long, Buffkin and Edwards is identified on the first page of their jury questionnaires.

[63] *State v. Ball*, Vol. I, Tpp. 66-67 (Johnson).

Based upon this exchange, any bias Johnson might have had would have been in favor of the State, as her son was a former prosecutor. There is no rational basis for the State to cite this reason as a justification for striking Johnson from the jury.

African-American Venire Member Ricky Clemons: In *State v. Marcus Mitchell*, tried in Wake County in 1997, the State struck African-American venire member Ricky Clemons. There was no *Batson* objection.

Frank Jackson and Doug Faucette prosecuted the case at trial and Faucette prepared an affidavit purporting to explain the strike of Clemons. The affidavit states that the State struck Clemons in part because he "stated that his wife worked for the Attorney General, but he did not know in what section she was employed." The affidavit does not explain why it would have been undesirable to have a juror whose spouse was a state employee working for the chief law enforcement officer in North Carolina.

Moreover, the prosecution passed non-black venire member Ann Watts, despite the fact that Watts worked "very closely" with an SBI agent. Watts stated she saw this individual "on a regular basis." Watts was also friends with a highway patrolman, who had coached her older son in soccer.[64]

African-American Venire Member Rochelle Williams: In *State v. Roland Hedgepeth*, a resentencing trial in Halifax County in 1997, the State, represented by prosecutor Robert Caudle, struck African-American venire member Rochelle Williams. Melissa D. Pelfrey has provided an affidavit proffering supposedly race-neutral explanations for the strike of Williams.

The affidavit asserts that the State struck Williams in part because her husband worked at the jail. If anything, her husband's job in law enforcement should have made her a more

[64] *State v. Mitchell*, October 22, 1997 Vol., Tp. 16 (Clemons); October 23, 1997 Vol., Tpp. 233-36, 244 (Watts).

appealing juror for the State. And furthermore, this justification fails because the State, not surprisingly, passed eight white venire members with family or friends in law enforcement: David Rhoden, H.T. Hawkins, Robert Lucas, Rachel Reid, Sharon Andrews, William Crawley, Willie Hammack, and William Massey.[65]

D. Irrational Reasons for Exclusion: Nonsensical Reasons

The following African-American citizens were excluded from jury service for reasons that would be comical if they were not outrageous.

African-American Venire Member Sean Richmond: In the 2000 Cumberland County case of *State v. Christina Walters*, the State peremptorily struck African-American venire member Sean Richmond. The defense did not lodge a *Batson* objection at trial.

An affidavit submitted by one of the trial prosecutors, Charles Scott, states that the prosecution struck Richmond because he "did not feel like he had been a victim even though his car had been broken into at Fort Bragg and his CD player stolen."

The voir dire transcript reflects Richmond's statement that, "when I was gone to Fort Lee last month . . . somebody had broke in my car and stole my CD player. As far as they're concerned, they gave me this little pamphlet saying, 'If You're the Victim of a Crime.' They gave me a number for a trauma center, but I didn't feel like I was the victim of a crime." The prosecutor replied, "Okay. Didn't feel like you were a victim of crime that needed to have any counseling or anything so – [t]hat what that's for?" Richmond said, "No." Richmond said the experience would not cause him to be unfair. The State's proffered reason for striking African-American venire member Sean Richmond from Walters' jury is not credible and does not make logical sense. Richmond was the victim of a minor property crime and did not feel the need to

[65] *See* Rhoden, Hawkins, Lucas, Reid, Andrews, Crawley, Hammack, and Massey Jury Questionnaires.

speak with a trauma center or receive counseling. This is not a rational basis for peremptorily striking a person from jury service.

Moreover, the State accepted non-black venire members who, like Richmond, minimized the impact of minor property crimes.[66] The prosecutor accepted non-black venire member Lowell Stevens, who, when asked about being the victim of a crime, laughed, and explained that he is a military range control officer and felt responsible when a lawn mower was stolen from his equipment yard. The prosecutor also accepted non-black venire member Ruth Helm, who explained that "someone stole our gas blower out of the garage. I know that is minor, but I assumed you needed to know everything."

The State's acceptance of non-black venire members who minimized the impact of minor property crimes supports the finding that the reason proffered for striking Sean Richmond is not credible. These non-black venire members are similar to Richmond with respect to their attitudes about minor crimes, yet the State did not exercise peremptory strikes against them.

African-American Venire Member William Cahoon: In *State v. Reche Smith*, tried in Washington County in 2002, the State peremptorily struck African-American venire member William Cahoon. The defense did not lodge a *Batson* objection at trial.

Mitchell D. Norton, who tried the case along with Todd Amundson, has provided an affidavit regarding the State's decision to strike Cahoon. Norton states in his affidavit that Cahoon was struck in part because he "indicated during voir dire that he had not heard of the crime that formed the basis of the trial of Reche Smith." The affidavit notes that the crime spanned two counties, Cahoon was a resident of one of the counties, and there were "few residents that claimed no knowledge of the brutal crime."

[66] *State v. Walters*, Vol. A, Tpp. 274-75 (Richmond), 407-08 (Helm); Vol. G, Tp. 1265 (Stevens).

A venire member who has not heard about the crime prior to coming to court will not have formed opinions about the verdict and is well-positioned to maintain an open mind during the trial. When selecting a jury, prosecutors typically seek venire members who possess these traits. It is well-accepted that such traits are desirable characteristics for a potential juror to have. Therefore, the State's attempt to justify striking Cahoon because he had not heard about the case has no basis in logic or common sense.[67]

Moreover, the record makes clear that the State was not genuinely concerned about venire members who had not heard about the crime. The prosecution passed six non-black venire members who, like Cahoon, also had no prior knowledge of the crime: Ann Tew, Gordon Price, Aaron Fuell, Kathy Rinker, Thomas Potter, and Patricia Place.[68]

African-American Venire Member Belinda Moore-Longmire: In *State v. Robbie Brewington*, tried in Harnett County in 1998, the State struck black venire member Belinda Moore-Longmire. The defense objected under *Batson*. The trial judge found no prima facie case and the State offered no explanation for the strike. The *Batson* claim was not raised on direct appeal.[69] *State v. Brewington*, 352 N.C. 489 (2000).

This case was prosecuted by Thomas Lock and Peter Strickland. Michael S. Beam, who was not involved in the trial, has provided an affidavit purporting to give race-neutral reasons for striking Moore-Longmire.

[67] The prosecutor's claim that, "I have never, with a discriminatory purpose, removed any juror from the trial of any case that I have prosecuted" is entitled to no deference from this Court. *See Batson*, 476 U.S. at 98 (prosecutor may not rebut defendant's case "merely by denying that he had a discriminatory motive" or "affirm[ing] [his] good faith in making individual selections"; accepting these general assertions at face value would render the Equal Protection Clause "but a vain and illusory requirement.") (internal citations omitted, brackets in original).

[68] *State v. Smith*, Vol. I, Tpp. 65 (Tew), 226 (Price); Vol. II, Tpp. 437 (Cahoon), 443 (Fuell), 500 (Rinker); Vol. III, Tpp. 723-24 (Potter), 726 (Place).

[69] The pertinent portions of voir dire, including the *Batson* colloquy, appear in *State v. Brewington*, Vol. 3, Tpp. 129, 134-35.

According to the prosecutor's affidavit, Moore-Longmire was struck in part because "her hyphenated last name was circled by one of the prosecutors."

The fact that a potential juror has a hyphenated name is neither a rational nor legitimate reason to exclude a citizen from jury service. There is nothing in the record to suggest the prosecutors were bothered by this venire member utilizing a common practice of hyphenating her name after marriage. Moreover, any concerns about this should have been assuaged when the venire member said she preferred to be called Longmire instead of Moore-Longmire.[70]

African-American Venire Member Henry Smith: In *State v. John Williams*, tried in Wake County in 1998, the State struck black venire member Henry Smith. The defense objected under *Batson*.[71]

The case was prosecuted at trial by Shelley Desvousges and Rebecca W. Holt. Holt has provided an affidavit attempting to explain the strike of Smith. The affidavit asserts the State struck Smith in part because he "did not fill out the questionnaire completely."

The record shows that the only question Smith omitted was whether any member of his family or any close friend had ever been a defendant in a jury trial. However, when asked about this during voir dire, Smith informed the prosecutor that no close friend or family member had been a defendant in a jury trial. Excluding a citizen from jury service for a simple omission when, as here, there is no evidence of any intention to deceive, is ridiculous.

[70] Moreover, the State's reason appears to be a surrogate for gender because it applies to women who keep their names after marrying. As such, the State's reason violates *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). *See also Robinson* Order at ¶ 346 (prosecutor's defense that he struck venire member because of gender and not race constitutes "some evidence of a willingness to consciously and intentionally base strike decisions on discriminatory reasons, and some evidence that race was a significant factor in prosecutor strike decisions").

[71] The trial judge overruled the objection, and the Supreme Court found no error. *State v. Williams*, 355 N.C. 501, 550-51 (2002). Defense counsel did not cite any instances of disparate treatment to the trial judge and the Supreme Court did not consider any. Regardless, the facts and circumstances of voir dire may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

The pretextual nature of this explanation is fully revealed by the State's acceptance of a non-black venire member who answered the same question falsely. Donna Aycock, who was passed by the State and seated as an alternate juror, answered "no" to the question about close friends or family members who had been criminally charged. However, on voir dire, Aycock revealed that she had worked at a Food Lion grocery and was best friends with the wife of a man charged in a robbery and double murder at another Food Lion. This murder had occurred just a few years before. Aycock's best friend's husband and his brother were tried capitally. Aycock was questioned by the police at the time.[72]

African-American Venire Member Regina Locke: In *State v. Leroy Mann*, tried in Wake County in 1997, the State struck black venire member Regina Locke. There was no *Batson* objection.

The State was represented at trial by Howard Cummings, who has submitted an affidavit purporting to offer a race-neutral reason for the strike. According to the affidavit, Locke was struck in part because when she was asked which campus of UNC she attended, she said that UNC-Chapel Hill "is the only one that counts." The affidavit asserts that this response demonstrates a lack of stability and maturity that would be required in a death penalty case.

Locke's statement about Chapel Hill was a not a rational basis for excluding her from jury service. The pertinent exchange follows:

[PROSECUTOR]: I see that you graduated from college from — what institution was that?

JUROR: UNC.

THE COURT: There are several of those around. Is that Chapel Hill?

JUROR: Yes, sir, the only one that counts.

[72] *State v. Williams*, Jan. 26, 1998 Vol., Tpp. 40-41 (Smith); January 27, 1998 Vol., Tpp. 244-46 (Aycock); *see also* Aycock and Smith Jury Questionnaires.

THE COURT: Well, then we will know what you mean. I figured if you do not say UNC Wilmington or UNC Charlotte that you mean that — whatever that institution is in Orange County.

The juror's response that Chapel Hill was "the only one that counts" no more demonstrates a lack of maturity or stability than the Court's response "whatever that institution is in Orange County" does. This manner of exchange is not uncommon in this state, where school rivalries, especially in March, are pervasive. The trial judge's willingness to join in the banter confirms that these kinds of exchanges happen even during jury selection in a death penalty case. It certainly does not reflect on Locke's ability to serve as a juror and does not reflect any bias against the State.[73]

African-American Venire Members Renee Ellis and Charlotte Rucker: In *State v. Ernest McCarver*, tried in Cabarrus County in 1992, the State peremptorily struck African-American venire members Renee Ellis and Charlotte Rucker. The defense lodged no *Batson* objection.

At trial, *McCarver* was prosecuted by William D. Kenerly and Ariadne Symons. Roxann Vaneekhoven provided an affidavit regarding the State's decisions to strike Ellis and Rucker.

The affidavit states that the prosecution struck Ellis in part because she had a small child and consequently, "she would have a greater sense of taking someone else's child away (and thus would be less likely to vote for the death penalty)." At the same time, the affidavit says the State struck black venire member Charlotte Rucker in part because she had no children, "therefore giving her little life experience and wisdom to draw upon when evaluating the case and determining the appropriate sentence for crimes of this magnitude."

To recap, the State supposedly struck Ellis because ***having a child*** made her undesirable to the State. Meanwhile, the State supposedly struck Rucker because ***not having a child*** also

[73] *State v. Mann*, June 24, 1997 Vol., Tp. 770.

made her undesirable. These mutually exclusive reasons for striking black venire members provide a veil too thin to conceal the State's racial motivations.

African-American Venire Member DeLois Stewart: In the 1991 Robeson County case of *State v. Henry McCollum*, the prosecutor questioned an African-American venire member named DeLois Stewart. The State moved to strike Stewart peremptorily and the defense objected under *Batson*. The trial court sustained the *Batson* objection.[74]

The prosecution offered as one of its reasons the fact that Stewart knew people who worked in the public defender's office. The trial court ruled this reason was pretextual because Stewart was the Cumberland County trial court administrator and, consequently, was familiar with employees not only in the public defender's office but also the district attorney's office and other judicial employees. The trial court concluded that the State had exercised this peremptory challenge in a discriminatory manner.

The prosecutor's reason for striking Stewart was not race-neutral. To the contrary, the pretextual reasons offered by the State constitute evidence of race-based conduct.

X. Exclusion Based on Misleading Characterizations of Voir Dire

In a number of cases, prosecutors have offered reasons for strikes of African Americans which are not borne out by the transcript. These attempts to embroider or, in some cases, completely distort the record concerning strikes of African Americans are additional, independent evidence of improper intent and a desire to cover up discrimination.

African-American Venire Member Sadie Clement: In the 1995 Forsyth County case of *State v. Darrell Woods*, the State struck African-American venire member Sadie Clement. There was no *Batson* objection.

[74] The trial court's order in *State v. McCollum* was admitted as part of DE45 in *State v. Robinson*.

Eric Saunders and David Spence prosecuted the case at trial. Mike Silver has provided an unsigned, unsworn statement attempting to offer race-neutral reasons for striking Clement.

The statement asserts that Clement was struck in part because she was "with her child in juvenile court because he was the victim of a molestation." However, the transcript of voir dire does not reveal any instance in which Clement stated her child was in juvenile court because he was the victim of molestation. Instead, a review of the transcript reveals that non-black venire member Neva Martin, who was ultimately seated on the jury, testified her son was molested and the matter was handled in juvenile court.[75] Therefore, Silver's explanation in this regard is not credible and constitutes evidence that the reason is a pretext for race-based action.

African-American Venire Member Tonette Hampton: In *State v. Ryan Garcell*, tried in Rutherford County in 2006, the State peremptorily struck African-American venire member Tonette Hampton. The defense did not lodge a *Batson* objection at trial.

Garcell was prosecuted at trial by Charlie C. Walker. Walker has provided an affidavit explaining his decision to strike Hampton from the jury.[76]

Walker's affidavit states that Hampton was struck in part because she "stated on voir dire that she had a cousin who had been stabbed and 'nobody did anything.'" This is a misstatement of the facts. The record shows that Hampton noted that nobody did anything ***to her***, and Hampton expressed no concern about the way law enforcement handled her cousin's stabbing.

Specifically, question number 16 on the jury questionnaire asked whether the venire member or any family member or friend had been a crime victim and, if so, what kind of crime. Hampton wrote, "stabbing (cousin) Nobody did anything *to me*[,] she died" (emphasis added).

[75] *State v. Woods*, Vol. I, Tp. 181.

[76] Walker's affidavit incorrectly identifies Hampton's first name as Torette.

In voir dire, the prosecutor asked Hampton about her cousin. Hampton stated that the case was pending. The prosecutor then asked, "I notice you said on here nobody did any time, is that right?" Hampton stated, "No, I said nobody did anything to me." The prosecutor responded, "Oh, 'did anything to me'? That case is still pending in court?" Hampton again affirmed that it was.[77]

Thus, contrary to the misleading recitation in the affidavit, Hampton never asserted that no one did anything about her cousin's stabbing. Hampton clarified that she herself had never been the victim, and that an investigation was ongoing in her cousin's case. Therefore, the State's proffered reason for striking Hampton is unsupported by the record and could not have been the result of an 'honest" mistake. What is more, the proffered reason is irrational. Hampton made clear on the record that the case was still pending. As a result, Hampton was not in a position to conclude that "nobody did anything," as the State claims in its affidavit.

African-American Venire Member Quimby Mullins: In *State v. Walic Thomas*, tried in Guilford County in 1996, the State attempted to strike African-American venire member Quimby Mullins. The defense objected under *Batson*. The trial court did not credit the State's reason and Mullins was eventually seated as an alternate juror.[78]

After initially striking Mullins, the State offered the following reason for the strike:

> I observed . . . this juror and another individual who was in the jury pool come into court, separate themselves from the rest of the jurors, and sit behind the defendant. … They did not identify themselves [to the bailiff] as jurors. … They said they're here with Mr. Thomas. … [T]hey gave the bailiff some degree of difficulty, eventually he figured out that they were jurors and asked them to go back . . . .

[77] *State v. Garcell*, 3/22-23/06 Volume, Tpp. 129-32; *also see* Hampton jury questionnaire.

[78] *State v. Thomas*, Vol. IV, Tpp. 616-20.

In light of these allegations, the trial court held a hearing and the bailiff was called to testify. The bailiff's testimony flatly contradicted the prosecution's assertions concerning Mullins' actions. According to the bailiff, Mullins and another venire member sat in the very back of the courtroom and not right behind the defendant; they were only in the courtroom for a moment before the bailiff approached them; and they told the bailiff they were there for jury duty in a murder trial. After the bailiff informed the prosecution they were potential jurors, Mullins and the other venire member were escorted to the jury room.

Following the bailiff's testimony, the trial court disallowed the peremptory strike, stating,

> I just cannot see why you would think that would be anything other than what [the] bailiff said it was, that she came into court, she sat on the wrong side, she said she was a juror, and he escorted her back in the room. And I'm not going to allow a challenge for that reason.
>
> All right. … If you find — if there's a legitimate reason that the State wants to excuse these people, fine. I'm not saying that it was racially motivated, you may genuinely feel that way, but I have personally seen jurors come in this courtroom, sit on one side or the other, mistakenly, and I just can't allow it, and I'm not.

In finding the reason unsupported by the record, disallowing the State's strike, and seating Mullins as a juror, the trial court effectively granted the defendant's *Batson* motion.[79]

African-American Venire Member Lisa Varnum: In *State v. John Elliot*, tried in Davidson County in 1994, the State struck black venire member Lisa Varnum. The defense did not object under *Batson*.

Gregory J. Brown has provided an affidavit proffering supposedly race-neutral explanations for the strike of Varnum. Brown was not involved in the trial, wherein the State

[79] The trial court's statement, "I'm not saying that it was racially motivated" is at odds with the court's actions and is reflective of the general reluctance to sustain *Batson* objections. *See* "Illegal Racial Discrimination in Jury Selection: A Continuing Legacy," Equal Justice Initiative Report, August 2010 (noting that trial judges "too often tolerate racial basis" and calling for "dedicated and thorough enforcement of anti-discrimination laws designed to prevent racially biased jury selection").

was represented by Eugene T. Morris.

The affidavit asserts that the State struck Varnum in part because "There appears to be an indication in the transcript that the juror is having difficulty in hearing." The affidavit points to the transcript showing that the prosecutor asked Varnum, "You can hear me okay, can't you?"

A review of the transcript unmasks this reason for what it is: unsupported pretext. On voir dire, the following exchange took place between the prosecutor and potential juror Varnum:

> MORRIS: You can hear me okay, can't you?
>
> VARNUM: Yes.
>
> MORRIS: If during the course of the trial if you are selected to sit as a juror, if you miss something, will you raise your hand so we know you missed it and we can have it repeated for you?
>
> VARNUM: (Prospective juror nods.)

From the above, the State draws the conclusion that Varnum had difficulty hearing. In truth, however, the prosecutor asked numerous jurors whether they could hear him — this appears to have been one of his standard questions — and nearly identical exchanges can be found throughout the transcript, including with non-black venire members passed by the State. For example, the prosecutor had this exchange with Kristie Oxendine:

> MORRIS: You able to hear me okay?
>
> OXENDINE: Yes, sir.
>
> MORRIS: If you miss something that's said, will you life your hand at that time so we can have it repeated if you are selected as a juror?
>
> OXENDINE: Yes, sir.

The prosecutor had similar exchanges with Robert Bryant, Freddie Dorsett, and Jerry Fulp.[80]

African-American Venire Member Broderick Cloud: In *State v. Errol Moses*, tried in Forsyth County in 1997, the State struck African-American venire member Broderick Cloud. No *Batson* objection was raised by the defense.

Vince Rabil prosecuted the case at trial. Patrick Weede has prepared an unsigned, unsworn statement purporting to explain the strike of Cloud. The statement asserts that the prosecution struck Cloud in part because "[t]he juror stated that he may have gone to school with the defendant and played on sports teams with him but that he was not sure."

This explanation is deeply misleading. The voir dire transcript shows that the trial court asked whether any of the prospective jurors knew the defendant or the victims. Cloud said he was not sure but he thought he might have gone to school with the defendant and perhaps knew him through sports. After the trial court told Cloud that the defendant was from out of state and did not go to school in Winston-Salem, Cloud affirmed that he did not know the defendant. Thus, any initial confusion on Cloud's part was cleared up by the trial judge. Tellingly, the trial prosecutor did not ask anything about this, indicating he was satisfied by Cloud's response.[81]

African-American Venire Member Harry James: In *State v. Eugene DeCastro*, tried in Johnston County in 1993, the State struck black venire member Harry James. No *Batson* objection was raised by the defense. Thomas Lock prosecuted the case at trial. Paul Jackson, who was not involved in the trial, has provided an affidavit purporting to give race-neutral reasons for striking James. According to the affidavit, the State struck James in part because, "This juror was sociology major. I feel some sociologists may be more likely to forgive and

[80] *State v. Elliot*, Vol. IV, Tpp. 391 (Varnum), 409-10 (Bryant), 540 (Dorsett and Fulp); Vol. VI, Tp. 822 (Oxendine).

[81] *State v. Moses*, Tp. 492.

have sympathy for defendant based upon socioeconomic circumstances."

In fact, James never said he was a sociology major. Rather he recounted that he had attended college for two years and had taken mostly sociology courses: "I took a lot of courses in and dealing with human relationships." James said nothing about "socioeconomic circumstances" and the prosecutor asked him no questions about his purported sympathy for the defendant. Not only was James not a sociologist, James had been a member of the United States Army for 17 years and served in Desert Storm. His MOS involved training military personnel on how defend themselves against chemical warfare.[82]

African-American Venire Member Laretta Dunmore: In *State v. Christina Walters*, tried in Cumberland County in 2000, the State peremptorily struck African-American venire member Laretta Dunmore. The defense did not lodge a *Batson* objection at trial.

Charles Scott provided an affidavit stating that Dunmore was struck because she "said her brother in New Jersey had been charged with armed robbery ten (10) or eleven (11) years before and was 'out now'. She said 'there wasn't a fair trial' for her brother that she was pretty close to."

The voir dire transcript reflects Dunmore's statements that her brother pled guilty and there was no trial, let alone an unfair one. In addition, Dunmore felt her brother's case was handled appropriately, and there was nothing about her brother's experience that would affect her ability to be fair and impartial as a juror.[83] Therefore, the State's proffered reason for striking African-American venire member Laretta Dunmore from the jury is not credible. The transcript clearly contradicts the State's explanation for the strike of Dunmore.

[82] *State v. DeCastro*, Vol. 2, Tp. 129, 137, 139, 143.

[83] *State v. Walters*, Vol. B, Tpp. 313-16.

XI. Disparate Treatment

Disparate treatment of black and non-black venire members is obviously probative of racial bias. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination."). As shall be seen, prosecutors in North Carolina and Cumberland County frequently reject black potential jurors for reasons that apply equally to non-black venire members.

A. Disparate Treatment: Misgivings about the Death Penalty.

One of the most frequently proffered reasons for excluding African-American citizens from capital juries is reservations about the death penalty. The cases described below confirm, however, what the MSU data show, namely that non-black venire members who are ambivalent about the death penalty are much more likely to be deemed acceptable to the State than black venire members with comparable death penalty views. Indeed, in some instances, the State is willing to accept non-black venire members challenged for cause for their death penalty views while consistently striking black venire members and then justifying those strikes by citing the potential jurors' reservations about the death penalty.

<u>African-American Venire Members Alvin Aydlett, Marvin Abbott, and Miles Walston</u>: In *State v. Cole*, tried in Camden County in 1994, the State struck black venire members Alvin Aydlett, Marvin Abbott, and Miles Walston. No *Batson* objections were raised.

Phillip Hayes and Robert Trivette prosecuted the case at trial. District Attorney Frank R. Parrish has provided an affidavit purporting to offer race-neutral reasons for these strikes.

The prosecutor's affidavit asserts these three venire members were struck because of their death penalty views. Aydlett expressed "some hesitation" about the death penalty and stated "it

might prohibit me for voting for the death penalty." Abbott said he "opposed the death penalty" and would "automatically vote for life imprisonment." Walston stated, "Well, I don't believe in sending anybody to the chair."

Asked whether he could personally sit on a jury that might impose the death penalty in appropriate circumstances, Aydlett said, "I wouldn't like to but I guess I could." The prosecutor later asked Aydlett if his religious beliefs would cause any hesitation about the death penalty. Aydlett said, "Yes, it would be some hesitation." Aydlett went on to say his hesitation "might prohibit me for voting for the death penalty." Asked whether his views might substantially impair his performance as a juror in this case, Aydlett said, "Yes, it might." State challenged Aydlett for cause. The Court took over questioning and Aydlett affirmed his ability to set aside his religious beliefs and follow the law. The Court then denied the cause challenge and the State exercised a peremptory strike.

Abbott said he was opposed to the death penalty based on his personal beliefs. Abbott said he would rather not impose the death penalty on anyone and would automatically vote for life imprisonment instead of death. The State challenged Abbott for cause and the trial court took over questioning. Abbott said deciding between life and death would be "a hard decision" but he could do it. Despite his misgivings, Abbott said he would follow the law and the court denied the challenge. In answer to more questions from the prosecutor, Abbott said he could personally sit on a jury and, under appropriate circumstances, vote to impose the death penalty. The State struck Abbott.

Walston said he did not believe in the death penalty: "Well, I don't believe in sending anybody to the chair." Walston said he would prefer to punish a person by making them "do some labor." Walston clarified, "I don't believe in killing a person, but if he killed somebody, I

believe in punishing him . . . If you give him the chair, that's not doing anything for him. He's dead. You want to punish him, give him something to run with what he done." The State challenged Walston for cause and the trial judge took over questioning. Walston said he could consider life and death and impose the death penalty in appropriate circumstances. The trial judge denied the cause challenge. Questioned again by the prosecutor, Walston reaffirmed his ability to personally sit on a jury that might impose the death penalty. The State struck Walston.

Aydlett, Abbott, and Walston were, without doubt, negative about the death penalty. However, consistent with MSU data showing disparate treatment among black and non-black venire members with death penalty reservations, the transcript reveals disparate treatment in this case.

Non-black venire member John Carpenter was at least as weak on the death penalty as Aydlett, Abbott, and Walston, but was passed by the State. After the prosecutor explained the burden of proof in first-degree murder cases, he asked Carpenter if he could think of any reason he might hesitate to find the defendant guilty. Carpenter responded, "The only thing I would have a problem with would be with the death penalty." Asked how he felt about the death penalty and whether he was opposed to it, Carpenter said, "Basically, yes."

The prosecutor then asked Carpenter if he was so strongly opposed to the death penalty that he would be unwilling to vote for it, regardless of the evidence. Carpenter answered, "If I could be convinced beyond the shadow of a doubt that a person was and did actually do the crime, I think I could vote for the death penalty." Carpenter then added that voting for the death penalty "just runs against my nature."

On further questioning, Carpenter affirmed that he would hold the State to a higher burden of proof in a death penalty case. The prosecutor then challenged Carpenter for cause.

The court questioned Carpenter. Carpenter stated he would not automatically vote against the death penalty regardless of the law, and the court denied the cause challenge, and the State subsequently passed Carpenter.

Like Carpenter, non-black venire member Paulette Newberry expressed sincere reservations about the death penalty. Asked whether she could personally be part of a jury that might impose the death penalty, Newberry said, "I don't think I could." She added, "I don't think if I want to be the person responsible for someone else's death." Newberry also explained she didn't know if she could personally be part of a jury which might bring about the imposition of a death sentence, but if she had to do she would try: "I said I didn't know if I could—I wouldn't like—I don't know what I'm saying. I don't like the responsibility but if it's something I have to do then I have to do it." The prosecutor passed Newberry.

Non-black venire member Terri Toppings also expressed hesitation on the death penalty. She told the trial judge, "I feel that I would be against the death penalty because I don't think that I could sit here and — read a paper later on to see that someone had been killed out of something that I said." Under questioning by the prosecutor, Toppings confirmed her opposition to the death penalty and said she could not personally be part of a jury that might impose the death penalty. Asked whether her beliefs were such that she would be unwilling to vote for the death penalty regardless of the evidence, Toppings said, "Yes, I think so." The prosecutor challenged Toppings for cause. Toppings initially told the court that under no circumstances would she impose a death sentence. Asked whether she could consider both punishments, life and death, Toppings said, "Maybe." The court denied the challenge.

The prosecutor then asked whether Toppings could consider death as a possible punishment. She said, "No, I couldn't. I would hope that I wouldn't have to make that

decision." Asked the same question again, Toppings said, "I'm going to have to say no." The State renewed the cause challenge. Defense counsel were permitted to ask Toppings questions. After Toppings says she guessed she could consider both punishments, the trial judge asked a few more questions and then denied the renewed challenge. The prosecutor asked several more questions of Toppings. Near the conclusion of her voir dire, the prosecutor asked Toppings if she could think of any reason why she should not sit as a juror in the case. Toppings said, "I don't think that I could be fair." Asked if this answer was based on her feelings about the death penalty, Toppings affirmed that it was. The State passed Toppings.[84]

The trial prosecutors had no reason to challenge a potential juror for cause other than that they believed the venire member was not qualified to serve on a capital jury. The State's racially-disparate treatment of black and non-black venire members thought to be unqualified because of their death penalty views is particularly strong evidence that race was a significant factor in the strikes of the black venire members.

African-American Venire Member Leroy Ratliff: In *State v. Darrell Strickland*, tried in Union County in 1995, the Native American defendant was convicted and sentenced to death by an all-white jury. In this case, the State peremptorily struck African-American venire member Leroy Ratliff. The defense did not lodge a *Batson* objection at trial.

Jonathan Perry provided an affidavit purporting to explain the strike of Ratliff. Perry was not the prosecutor in *Strickland*. The case was tried by Michael Parker and Scott Brewer.

The affidavit asserts that the prosecution struck Ratliff in part because he had only a "moderate" belief in the death penalty. However, the State accepted non-black venire members Marlon Funderburk, who said his belief in the death penalty was "moderate," and Brenda

[84] *State v. Cole*, Vol. I, 64-68 (Carpenter), 292-94 (Newberry), 959-69, 976 (Topping), 1196-1207 (Aydlett), 1378-84 (Abbott), 1412-22 (Walston).

Pressley, who said her belief in the death penalty was "slight." The State also accepted non-black venire member Donald Glander, who, when asked to describe his belief in the death penalty as strong, moderate, or slight, said, "I'd have difficulty describing it. I think that, uh, without knowing the circumstances or the facts here may be, I'm not sure I could answer that question. I don't have a strong feeling, you know, about it." [85]

African-American Venire Member Lemiel Baggett: In *State v. Iziah Barden*, tried in Sampson County in 1999, the State peremptorily struck black venire member Lemiel Baggett.

During voir dire, the defense lodged a *Batson* objection to the State's peremptory strike of Baggett. The trial judge overruled the objection, finding that the defense did not establish a prima facie case.[86] This ruling is currently under review in the North Carolina courts. *State v. Barden*, 362 N.C. 277 (2008).

Gregory C. Butler, who conducted voir dire in *Barden*, provided an affidavit stating,

> At time of this juror's questioning, State had used 5 and Defense 10 peremptory challenges. State was intent on being very selective on the Death Penalty issue and was also trying to seat strong unequivocal leaders and a potential foreman. Wanted to make defendant's attorney have to make tough decisions since he was low on preemptory challenges. In response to The Death Penalty question, he said, 'Well, in some cases. Spoke very quiet and was very hesitant in answering the DP questions. Can you give the DP? 'Yes I think so.' State believed that Mr. Baggett's words and manner of response indicated that he would not be a strong leader and that he was not a strong and unequivocal supporter of the Death Penalty.

During voir dire in *Barden*, the prosecutor asked Baggett how he personally felt about the death penalty and whether it is appropriate in some cases. Baggett said, "Well, in some cases." The prosecutor replied, "So, is it fair to say that in some cases you believe it's bad enough impose the death penalty but, the other cases it ought not to be used?" Baggett replied, "Yes sir.

[85] *State v. Strickland*, Vol. I, Tp. 226 (Ratliff) 245 (Funderburk), 460 (Pressley), 938 (Glander).

[86] The pertinent portions of voir dire, including the *Batson* colloquy, appear in *State v. Barden*, Vol. I, Tpp. 245-49 (Blanchard); Vol. III, Tpp. 526 (Birch), 538-39, 553-55 (Birch and Baggett), 579 (Berger).

Yes sir." The prosecutor asked whether Baggett would wait to hear all the evidence before deciding between life and death. Baggett agreed. The prosecutor asked whether Baggett's decision would depend on the circumstances. Baggett said yes. The prosecutor asked Baggett whether he could vote to give someone the death penalty in the appropriate case. Baggett said yes, he thought so. The prosecutor asked Baggett whether he had "the strength of your convictions to comply with the law and return a sentence of death if the evidence so required." Baggett said yes.

Furthermore, in *Barden*, the State, accepted several non-black venire members who expressed views on the death penalty similar to those of Baggett. When asked whether she could vote for the death penalty in an appropriate case, Teresa Birch said, "It would depend upon what happened." When asked again whether she could vote for the death penalty in an appropriate case, Birch, like Baggett, said, "Yes; I ***think*** I could." Furthermore, like Baggett, Birch was soft-spoken. At one point during voir dire, the trial judge found it necessary to say to Birch, "I need you to speak up just a little bit. I know it might be a little bit unusual for you to be in this atmosphere but you're going to have to speak up because you do need to be heard all the way over here and all the way up here." The State nevertheless accepted Birch.[87]

Similarly, when asked whether he could vote for the death penalty, Joseph Berger said, "I guess I could. Yes." The prosecutor followed up and said he needed Berger to be certain that he could vote to give someone the death penalty. Berger said yes. Betty Blanchard, when asked about the death penalty, replied, "I don't hardly know." Blanchard expressed concern about sentencing an innocent person to death, explaining, "Well, in some I would think so if I would know for sure that they were guilty but I hate to sentence someone and then find out later that

[87] Birch and Baggett were questioned at the same time. It is hard to see from the voir dire that Birch represented a "strong unequivocal leader" or "potential foreman."

they were not the one." Blanchard agreed with the prosecutor's statement that whether she voted for the death penalty would depend on the circumstances. When asked again whether she could vote for the death penalty, like Baggett, Blanchard said, "I ***think*** so." (emphasis added)

African-American Venire Member Gloria Mobley: In *State v. Angel Guevara*, tried in Johnston County in 1996, the State peremptorily struck African-American venire member Gloria Mobley. The defense did not lodge a *Batson* objection at trial.[88]

Paul Jackson provided an affidavit purporting to explain the strike. Jackson was not the prosecutor in *Guevara*. The case was prosecuted by Thomas H. Lock and Michael S. Beam.

The affidavit asserts the prosecution struck Mobley because she said

> [I]f a person just goes out and kills someone then it may be appropriate but if there is provocation then the death penalty not appropriate. The case factual summary indicates that the defendant was in his home and the victim entered to arrest him. The defendant claimed the victim was holding the defendant's child, his child was screaming, that he was provoked in his home, and was trying to protect his child.

During voir dire in *Guevara*, the trial judge asked Mobley, "can and will you vote to return a verdict of guilty of first-degree murder, even though you know that death is one of the possible penalt[ies]?" Mobley said yes. The judge asked Mobley whether she could "consider the death penalty based on the evidence and the law?" Mobley said yes. The judge asked Mobley whether she would "automatically vote to impose life in prison?" Mobley said no. The judge asked Mobley whether she could follow the law "regarding the sentencing phase as I will explain it to you?" Mobley said yes.

The State then questioned Mobley about her death penalty views. Mobley testified that, "well, I believe that if a person sort of sets out – just go out and kill someone, I sort of believe that they should get the death penalty then. But if it is like an accident or they didn't

[88] The voir dire of Mobley appears in *State v. Guevara*, Vol. 8, Tpp. 1476-88.

intentionally mean to do it, then I don't feel like they should get it." Lock asked Mobley, "would it be fair to say then that you support the death penalty in some, but not necessarily in every case of first-degree murder?" Mobley responded, "right." Lock asked Mobley whether she could fairly consider both possible punishments. Mobley said yes.

Based upon the totality of the circumstances, the Court should find that the State's proffered reason for striking African-American venire member Gloria Mobley from Angel Guevara's jury is not credible. The voir dire transcript reflects Mobley's statements that she firmly supported the death penalty for first-degree murder but not lesser degrees of homicide involving accidental or unintentional killing. Furthermore, the reason proffered in Jackson's affidavit is that Guevara argued provocation at trial and Mobley stated the death penalty would not be appropriate if there was provocation. However, the voir dire transcript reflects that Mobley did not mention provocation. The proffered affidavit is simply not an honest reflection of the facts.

Moreover, the State accepted several non-black venire members who indicated reluctance to impose the death penalty except in especially heinous cases. Mary Matthews said, "I personally am in favor of the death penalty if beyond a shadow of a doubt the person can be proven guilty and if it is a very sever[e] case, if the case and the evidence is strong enough to warrant that punishment."[89] Carolyn Sapp said regarding the death penalty, "I feel like the facts have to justify such action. I've always been a person to believe that when an act of wrong is done that it needs to be punished. But also, I think, the punishment has to justify the severity of the crime that was committed." Edna Pearson testified, "well, I believe that if there are people, if they commit hideous crimes or certain crimes, I think they should – if they are found guilty –

[89] *State v. Guevara*, Vol. 3, Tp. 541 (Matthews); Vol. 4, Tpp. 630-31 (Sapp); Vol. 7, Tpp. 1317-18 (Bryant); Vol. 9, Tpp. 1697-98 (Pearson); Vol. 10, Tpp. 1924 (Stone), 1990 (Beck).

they should be sentenced to death. I think – I think it would be a fair punishment." Teresa Bryant testified that, "in some cases I can see it. In some case, I probably would not. I would see life in prison." Bryant testified, "that's how I feel. In some cases, I would say that would be a justifiable punishment. In other cases, I might not." Bryant said she could return a death verdict if she was "convinced by the evidence." Walda Stone testified, "I do believe in the death penalty, I guess if it is proved to me that it is deserved." Natalie Beck said, "I do believe in the death penalty, if I can see cause or reason for it. I do believe in capital punishment."

African-American Venire Member Mary Cheek: In *State v. James Williams*, tried in Randolph County in 1993, the State struck African-American venire member Mary Cheek. The defense did not raise a *Batson* objection.

Garland N. Yates and Mary Hedrick represented the State at trial. Yates has provided an affidavit attempting to justify the strike of Cheek. The affidavit asserts that the State struck Cheek in part because she was "hesitant" on the death penalty.

The record shows Cheek said she had no strong feelings for or against the death penalty and she could consider it depending on the case and the evidence. Asked if she could consider the death penalty "as a form of punishment in this case," Cheek first said, "I think I can." The prosecutor said, "You think you can?" and Cheek said, "Yes."

Meanwhile, the State passed non-black venire members who were at least as equivocal about the death penalty. Larry Frazier and Julie Humble both stated they leaned more towards life than the death sentence.[90]

African-American Venire Member Richard Leonard: In *State v. George Wilkerson*, tried in Randolph County in 2006, the State struck African-American venire member Richard Leonard.

[90] *State v. Williams*, Vol. V, 844-846 (Cheek); Vol. VI., Tpp. 26-29 (Frazier), 240-45 (Humble).

Andrew Gregson tried the case and has provided an affidavit attempting to explain the strike. The affidavit says the State struck Leonard in part because of his death penalty views. Specifically, the affidavit expresses concern that Leonard said, "No strong feelings [regarding the death penalty], but I'm not against it. I don't agree with it, but, I could you know, I mean if it's the law it's just the law, you know."

However, the prosecutor accepted non-black venire members who expressed thoughts about the death penalty that were virtually identical to Leonard's views. When asked whether she had strong feelings for or against the death penalty, Pamela Daniels said, "I do in one respect, but I know we need to observe the law, but you know, not really strong feelings."

Likewise, Rosa Allred said, "When I think about having to choose one way or another, I actually get confused, because when I think of going one direction, my conscience leads me in another." And when the prosecutor asked Fay Reitzel if she had any strong feelings for or against the death penalty, Reitzel said, "I'm not sure. I think it would have to do with what it was, the circumstances." Reitzel explained that her decision would depend upon the evidence. When asked again whether she could consider the death penalty, Reitzel said, "I think that would be a lot more difficult [than voting for life imprisonment]. I mean it's not say a decision I could make lightly.[91]

African-American Venire Member Freda Frink: In the 1998 Cumberland County case of *State v. Tilmon Golphin*, the State peremptorily struck African-American venire member Freda Frink. The defense did not lodge a *Batson* objection to the strike. Only one minority member served on the jury.

[91] *State v. Wilkerson*, Vol. III, Tpp. 687-90 (Reitzel); Vol. VI, Tpp. 1325 (Daniels), 1351 (Allred).

One of the trial prosecutors, Calvin W. Colyer, provided an affidavit in this proceeding. In his affidavit, Colyer offered as one of the race-neutral reasons for the strike that

> Freda Frink had mixed emotions about punishment and capital punishment. She didn't know if her objections to capital punishment were on religious or moral grounds. She felt that having to deal with punishment might affect her view of guilt-innocence. She said that she had personal reservations and misgivings about participating as a juror in the punishment process.

While Frink did admit to mixed emotions about the death penalty, a review of the voir dire transcript also reveals that Frink stated several times that she could follow the law and consider both possible punishments.[92]

Moreover, the prosecutor accepted non-black venire members who expressed similarly conflicting emotions about the death penalty. Non-black venire member Alice Stephenson said, "I have some ***mixed emotions*** about any type of sentencing phase . . . . sometimes I wonder, you know, if we have the right. But then again, I know that the punishment does have to fit the crime." Stephenson later said, "I think anybody would have ***mixed emotions*** about taking a life . . . . I have no problem with deciding on those matters. But I still have ***mixed feelings*** about it personally."

<u>African-American Venire Member Teblez Rowe</u>: In *State v. Eugene Williams*, tried in Cumberland County in 2004, the State peremptorily struck African-American venire member Teblez Rowe. The defense did not lodge a *Batson* objection at trial.

One of the prosecutors, Calvin W. Colyer, provided an affidavit, which proffered as the race-neutral reason for striking Rowe that she "said the death penalty is sad and 'I don't feel death penalty is right . . . I don't think you should kill a person.'"

A review of the voir dire transcript reveals that, while Rowe stated she did not feel the

[92] *State v. Golphin*, Vol. D. Tpp. 652, 679, 681, 683 (Frink); Vol. J, Tpp. 2116, 2165, 2173 (Stephenson) (emphasis added).

death penalty was "right," she was still able to follow the law in that regard. Rowe said she disagreed with the statement that the death penalty is never an appropriate punishment. Rowe said there were some murders where she felt it would be appropriate. Rowe expressed some initial hesitation regarding her willingness to impose death for felony murder, but later explained that was only because she "didn't understand because I didn't understand the law until he [the judge] told me." Rowe said she could vote for the death penalty. She explained, "I believe if you commit a crime, you deserve your punishment. And if it's the death penalty, I think you should get it. I really – I don't feel it's right, but if it' the law, it's the law. That's how I feel."

Moreover, the State accepted non-black venire member Michael Sparks, who, like Rowe, stated that he was against the death penalty but he would still be able to follow the law. Sparks said, "I'm kind of against the death penalty, but it's in our system." The prosecutor asked Sparks to explain this answer further. Sparks said, "I don't know. Just – I mean to kill somebody seems wrong. But if somebody killed somebody, I would – I could see that he – they could get the death penalty if that's what the finding was."[93]

Unlike his treatment of Rowe, the prosecutor gave Sparks the benefit of the doubt. The prosecutor said to Sparks, "If I'm hearing you correctly, it sounds like you're opposed to killing, period. And that if you were a jury member, even though you were generally opposed to killing, you could consider both possible punishments?" Sparks agreed with the prosecutor, and the prosecutor accepted him as a juror.

The prosecutor's decision to accept Sparks' assertion that he could put aside personal reservations about the death penalty and follow the law shows that the State's proffer of the very same reason to strike African-American venire member Rowe is not credible.

[93] *State v. Williams (2004)*, Vol. E, Tp. 910; Vol. F, Tpp. 1249-56 (Rowe); Vol. E, Tpp. 908, 1017-19 (Sparks).

African-American Venire Member Rodney Berry: In the 1995 Cumberland County case of *State v. John McNeill*, the State peremptorily struck African-American venire member Rodney Berry. The defense did not lodge a *Batson* objection at trial

Calvin W. Colyer provided an affidavit asserting that Berry was struck in part because "he could not vote for the death penalty for a felony murder conviction."

However, the prosecution passed non-black venire member Anthony Sermarini despite similar answers. Sermarini was asked whether he would be able to consider the death penalty as a punishment for first-degree murder regardless of whether the defendants were convicted under the theory of premeditation and deliberation or the felony murder rule. The prosecutor explained the felony murder rule to Sermarini:

> Also, the theory of felony murder where an individual is perpetrating, in our state, certain enumerated felonies like rape, robbery, arson, burglary, and during the commission or the attempt to commit that offense, a person is killed: convenience store clerk, bank teller, service station attendant is an example, say, if it was a robbery. The individual didn't necessarily intend to kill the person when they went in to rob, but during the course, gun's pulled, somebody gets shot: customer, convenience store clerk, or whatever. That also would be first degree murder. Different theory.

Sermarini replied, "I'd have to hear a lot of evidence. When you're talking about something like – during a robbery or something, I believe that's different circumstances. And the death penalty, I don't know if I would go that way on something like that."[94]

African-American Venire Member Nelson Johnson: In *State v. Robinson*, tried in Cumberland County in 1994, the State peremptorily struck African-American venire member Nelson Johnson. The defense did not lodge a *Batson* objection at trial.[95]

Calvin W. Colyer, who was not involved in the trial, provided an affidavit stating that

[94] *State v. McNeil*, Vol. IV, Tpp. 1014, 1026 (Sermarini).

[95] *State v. Robinson*, Vol. I, Tpp. 331-32 (Combs); Vol. V, Tpp. 1793-98 (Johnson); .

Johnson was struck because he "said that he would require an eye witness and the defendant being caught on the scene in order for conviction." The affidavit notes that Johnson was struck after the State's challenge for cause was denied.

John Dickson, who prosecuted the case and testified at the RJA hearing in *Robinson*, recalled that Johnson stated that "he would require an eyewitness and that the defendant would have to be caught on the scene in order to convict. I don't have any cases like that." *Robinson* HTp. 1132.

During voir dire, Johnson testified about his feelings regarding the death penalty. Johnson's testimony indicated that he supported capital punishment. Johnson testified, "If they did it and it won't self-defense, just to be killing somebody, then I think they should get the death penalty." He testified that his sentencing decision would depend upon how the case came out, but in a case involving "a cold killing," Johnson said, "if you take a life for that reason, you need the death penalty I think." Johnson further indicated that he believed the death penalty has a deterrent effect, stating that it "will make people think twice for that kind of action." When the prosecutor asked Johnson whether he thought the death penalty is always the appropriate punishment for first-degree murder, Johnson said, "If they prove that he done it beyond a reasonable doubt, yes." Johnson was asked to repeat his answer when defense counsel indicated he did not hear Johnson. This time, Johnson said, "If they prove he done it beyond a reasonable doubt and he was there and someone seen him do it and they caught him on the scene, yes." Immediately after Johnson gave this response, the prosecutor moved to excuse him for cause. When that motion was denied, the prosecutor exercised a peremptory challenge. Despite Johnson's statements indicating his support for the death penalty, the prosecutor did not attempt to clarify Johnson's last answer with any further questions. An unbiased reading of the entire

exchange does not lead to the conclusion that the juror would only convict if there were an eyewitness and the defendant was caught at the scene. Instead, it appears that the juror was merely giving an example of a very strong case and not setting a minimum standard. If the prosecutor genuinely believed that was possibly the juror's view, then the prosecutor could have asked for clarification. However, if the prosecutor was simply waiting for an excuse to strike an African-American juror, then clarification was not desirable. The prosecutor in this case took the latter course of action.

The prosecutor's conduct at trial and after-the-fact justification is also suspect in light of the prosecutor's treatment of Cherie Combs, a non-black venire member questioned during Robinson's jury selection proceeding. When asked whether she could vote for the death penalty under appropriate circumstances, Combs said, "I don't know. I have mixed feelings about it." In response to a follow-up question, Combs said she did not know whether she could personally vote for the death penalty. She said she would "have to hear the case, know more about it." In contrast to his treatment of venire member Johnson, the prosecutor allowed Combs an opportunity to clarify her position. The prosecutor said, "I'm not trying to find out right now what you would do in this case. Okay? But in your own mind, do you think under some situation you personally could vote for the imposition of the death penalty?" Combs responded, "Yes." The prosecutor then explained, "Sometimes the way I may word the question may affect the way you answer it. So if you're not clear on something, you want me to explain something, jump right in. Okay?" The prosecutor did not provide this cautionary explanation to Johnson before moving to strike him. Thus, the State's proffered reason for striking African-American venire member Nelson Johnson is not credible.

B. Disparate Treatment: Hardship

Another frequently-heard reason for striking African Americans is concern about the hardship jury service will cause. The examples below illustrate that, as with death penalty views, hardship serves as a convenient, seemingly race-neutral reason to disproportionately exclude African-American citizens from jury service in capital cases. Again, this is consistent with the MSU data showing racial disparities among potential jurors with hardships. In addition, these examples illustrate the conduct recently condemned by the United States Supreme Court in *Snyder v. Louisiana*, 442 U.S. 472 (2008). In *Snyder*, the Court considered the prosecution's disparate treatment and questioning of black and non-black venire members regarding hardship. The Court noted that even when a non-black venire member had obligations that "seem substantially more pressing," the prosecution strived to "elicit assurances that he would be able to serve despite his work and family obligations" and pressed the venire member to "try to make other arrangements as best you could." 452 U.S. at 484.

African-American Venire Member Pamela Simon: In *State v. Robbie Brewington*, tried in Harnett County in 1998, the State struck black venire member Pamela Simon. The defense objected under *Batson*. The trial court found no prima facie case, and the prosecution offered no explanation for the strike. The *Batson* objection was not raised on direct appeal.[96] *State v. Brewington*, 352 N.C. 489 (2000).

This case was prosecuted by Thomas Lock and Peter Strickland. Michael S. Beam, who was not involved in the trial, has provided an affidavit in this case.

According to the affidavit, Simon was struck in part because she was "divorced, receives no child support, and is the sole financial provider." Thus, the justification for the strike appears

[96] *State v. Brewington*, Vol. 1, Tpp. 71-72, 128-29 (Simon); Vol. 4, Tpp. 34-36 (Roller); *see also* Roller Jury Questionnaire.

to be that serving as a juror would be a hardship for Simon. The record, however, reflects that jury service would not have been a hardship. After being questioned by the prosecutor, Simon said she believed she would be paid by her employer while serving on the jury and she would be able to find someone to pick up her children.

Moreover, the State passed a non-black venire member who had a much more significant hardship concern. White venire member Barbara Roller was also a single mother. That, however, was not the hardship Roller brought to the Court's attention. Roller said she had surgery scheduled for cervical and uterine cancer in three weeks. Roller had been diagnosed with cancer nine months before. Other methods of treatment had failed and surgery was Roller's last resort. The prosecutor clarified that this was not elective surgery nor would it be outpatient. Roller explained that she would be in the hospital for three days and then out of work for a month. Roller acknowledged she was concerned about the operation; this would be the first time she would undergo surgery.

The prosecutor said he could not predict how long the trial would last and stated he could not promise it would conclude in under three weeks. The prosecutor then asked Roller, "[W]ould rescheduling of the surgery be possible or pose any hazard to you?" Roller responded, "It would be possible. As far as I know, it wouldn't cause any more damage than what it's already caused." The State passed Roller.

<u>African-American Venire Member George McNeill</u>: In the 1997 Sampson County case of *State v. Johnny Parker*, the prosecution struck black venire member George McNeill.

William H. Andrews and Gregory C. Butler prosecuted the case at trial. Butler has provided an affidavit asserting that McNeill was struck in part because he had a fractured bone and blood pressure problems and he had sought a hardship excusal for medical reasons.

The State's differential treatment of black and non-black venire members with hardships exposes the proffered reason as a pretextual one. The prosecution passed non-black venire member Lois Ivey despite her medical problems and concerns about her fitness to serve. The record shows that the prosecutor asked Ivey if there were any reason she might not be a fair and impartial juror capable of giving her full attention to the trial. Ivey volunteered that she was a migraine patient and she "never [knew] when they are going to hit." Ivey went on to say that when she got migraines they lasted 24 to 48 hours and she gave herself injections to treat them. She suffered a migraine once a month and was expecting one in the next 30 days. Stress tended to aggravate her condition and Ivey thought it "very possible" that the stress of serving as a juror in a capital case could bring on a migraine. At one point, the prosecutor commented, "So, you really don't know . . . whether or not you feel that you can fulfill your duties due to your medical condition."

Ivey thought she was capable of serving as a juror only if the trial did not last more than two weeks. She feared another migraine that would cause her to "be out for a day at least. Maybe two days." The prosecutor acknowledged that the trial could take as long as a month, but noted the jurors would have weekends off. Asked if she would "be comfortable in going forward," Ivey said, "I do not if it going to last more than two weeks. I don't think it would be fair of me or them to have to sit up here in that excruciating pain, if one were to come on me." Immediately after Ivey made this statement, the prosecutor said, "Your Honor, the State is satisfied."

In contrast, when asked whether his medical situation would keep him from sitting on the case and listening to the evidence, McNeill said, "I don't think so." The prosecutor immediately

said, "Your Honor, we'll exercise a peremptory."[97]

African-American Venire Member Ossie Brown: In *State v. Shawn Bonnett*, tried in Martin County in 1996, the State peremptorily struck African-American venire member Ossie Brown. The defense lodged a *Batson* objection at trial, which was overruled.[98]

Mitchell Norton and Thomas D. Anglim selected the jury in *Bonnett*. Anglim provided an affidavit regarding the State's decision to strike Brown. The affidavit asserts that the State struck Brown in part because, "as guardian of three grandchildren, [she] expressed concern about caring for her grandchildren during a lengthy capital trial."

During voir dire, the prosecutor asked Brown whether she had "several grandchildren I believe that you're keeping; is that correct, ma'am?" Brown responded that she had three grandchildren. The prosecutor asked whether they were all in school in Martin County. Brown said they were. The prosecutor asked Brown whether "keeping your three grandchildren would that create any problems for you in sitting, sitting on this case that you're aware of?" Brown said, "No." The prosecutor did not ask Brown any further questions about childcare.

Following the defense's *Batson* objection, the prosecutor claimed that Brown was "excused for a number of reasons, one of the last questions that I asked her about was about the grandchildren. . . . ***[A]lthough the lady did indicate that that would not cause any, any problems for her***, she, she was very, very particular in pointing out that these were grandchildren

[97] *State v. Parker*, Vol. I, Tp. 28 (McNeill); Vol. IV, Tpp. 527- 29 (Ivey); Vol. VI, Tpp. 881-87 (McNeill).

[98] On appeal, the Supreme Court concluded that the trial court's *Batson* findings were "not clearly erroneous." *State v. Bonnett*, 348 N.C. 417, 435 (1998). However, as discussed below, defense counsel did not point out and neither the trial court nor the Supreme Court considered non-black venire members who were similarly-situated to Brown but passed by the State. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination."). Regardless, the facts and circumstances of Brown's voir dire may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

and that she had temporary custody, indicated to me that there was some concern that she had about these children."

The prosecutor's explanation lacks support in the record. The transcript shows that it was the prosecutor, not Brown, who first brought up the subject of Brown's grandchildren during voir dire. Moreover, as the prosecutor acknowledged, Brown never expressed any concern that caring for her grandchildren would interfere with her duties as a juror. On the contrary, Brown unequivocally stated that her childcare responsibilities would not be a problem. Indeed, at no time during voir dire did Brown seek to be excused from jury service or mention that the length of the trial would cause her hardship.[99]

Moreover, the State's claim that it struck Brown due to her supposed concern about childcare is suspect because the State accepted non-black venire members who were highly vocal about the hardship jury service would cause for them. Maurice Roberson ran his own business and expressed concern that "we're really backed way up" because of recent hurricane damage. When asked whether he could listen to the evidence and instructions and be fair and impartial, Roberson said, "I guess so." When asked if there were any reason he felt he should not serve as a juror, John Daniels cited financial hardship. Asked whether he could set aside his financial concerns, Daniels stated he would try but if the case "happens to drag along [] I would get so that I would not feel like deliberating when we got to the jury room."

Furthermore, Brown's grandchildren were 12, 10, and nine years old. The record shows that the State passed non-black venire members who had children at home. Michael Jernigan had a five-year-old son and a two-year-old daughter. Marvin Perry had a 17-year-old son and a daughter who was eight. Rudy Bullock had a 17-year-old son and girl twins who were 15 years

[99] *State v. Bonnett*, Vol. 1A, Tpp. 67-69 (Roberson), 381-83 (Daniels); Vol. 2A, Tpp. 573-74, 577-81 (Brown) (emphasis added); *see also* Bullock, Jernigan, Perry, and Winslow Jury Questionnaires.

old. Abner Winslow had a daughter who was 13 and an 11-year-old son. Were the State in *Bonnett* truly concerned about venire members' childcare responsibilities, these non-black venire members would have been struck along with Brown.

African-American Venire Member Pamela Wilkerson: In *State v. Ryan Garcell*, tried in Rutherford County in 2006, the State peremptorily struck African-American venire member Pamela Wilkerson. The defense did not lodge a *Batson* objection at trial.

Garcell was prosecuted at trial by Charlie C. Walker. Walker has provided an affidavit explaining his decision to strike Wilkerson from the *Garcell* jury.

The affidavit states that Wilkerson was struck because

> This juror's answers in regard to the death penalty were acceptable to the State, however it was apparent that she did not want to be on the jury and recited that she had upcoming appointments with doctors for two of her children. She further stated that her own mother, who babysat her children, was ill and that serving on the jury would be a problem for her.

The record reveals that the prosecutor questioned Wilkerson differently from non-black venire members when it came to the issue of hardship. In response to the prosecutor asking the panel whether any venire members had hardships, Wilkerson said, "Well, I have children that have got doctor appointments, and my mother they don't know if they are going to have to do surgery right now. It could be any time." The prosecutor asked Wilkerson whether her mother was ill. Wilkerson replied, "Yes, and that would be a problem because she babysits for me." The prosecutor asked Wilkerson no further questions to determine whether she could fulfill her duties as a juror despite her situation.[100]

The prosecutor's treatment of Wilkerson's hardship stands in stark contrast to his treatment of non-black venire member Lorraine Emory. Emory told the prosecutor,

[100] *State v. Garcell*, Vol. I, Tpp. 113-114 (Wilkerson); 114-115 (Shepard); 3/22-23/06 Volume, 297-98 (Emory).

> Well, I have four children. I'm the sole care giver of my children. My husband's out of town during the week . . . . This year I took a year off from teaching so that I could be a stay-at-home mom because my husband's traveling. My other two are in school.

Emory explained that her husband had recently returned from military duty in Iraq and was required to stay at Fort Bragg during the week. Unlike his treatment of African-American venire member Wilkerson, this time, the prosecutor explored Emory's situation instead of simply accepting her hardship. The prosecutor asked, "If you had to could you make arrangements for the next few days?" Emory said yes. The prosecutor replied, "It would be a pain, but you could do it?" Emory said she could. The prosecutor's use of leading questions to persuade non-black Emory she could serve on the jury, and contrasting failure to employ those questions or any others with Wilkerson, supports the inference that the strike was motivated by race.

At the same time that Wilkerson was supposedly struck because of her statement of hardship, the prosecutor was forgiving of the hardship of non-black venire member John Shepard. Shepard told the prosecutor,

> I currently – well, I manage about 40 employees. I work 60 to 70 hours [each] week. In addition to that my wife is out in Arizona, flew out yesterday. Her mother is not doing well. And I'm the only one that's picking our kids up from school for the rest of this week as well. It's kind of hard for me to get any vacation time besides having the luxury to sitting here for the next three weeks and participate unfortunately.

Despite Shepard's clear statement that he had too much going on in his life to serve on the jury, the prosecutor did not strike him, but passed him. This decision differs markedly from the prosecutor's decision to strike Wilkerson on the sole basis of her hardship and is further support for the inference of race motivation in the Wilkerson strike.

<u>African-American Venire Member Letari Thompson</u>: In *State v. Paul Cummings*, tried in New Hanover County in 2004, the State peremptorily struck African-American venire member

Letari Thompson. The defense did not lodge a *Batson* objection at trial.

At trial, *Cummings* was prosecuted by Benjamin R. David and Dru Lewis. David has submitted an unsworn, unsigned statement regarding the State's decision to strike Thompson.

The prosecutor's statement asserts that the State exercised a strike in part because Thompson

> had a conflict with his schedule where he had to be on the west coast for educational reason[s] for a week during these proceedings. I do not recall whether this would have been a real concern, but often, especially where there is a juror who might be questionable, I will remove people who have an additional hardship if impaneled. This helps humanize the State's position in any proceeding but especially a capital murder case.[101]

The record shows that the State passed non-black venire members Diane Hufham and Rebecca Council, who, unlike Thompson, specifically asked to be excused from jury service for hardship reasons. Hufham cited her position as a manager of food service at Carolina Beach where she supervised 25 employees; Hufham expressed concern that her work was seasonal and she asked to be deferred until winter. Council explained she was on a team responsible for closing down her company's operations in North America. Council feared losing severance pay and her financial package if she did not participate in the phase-out operation.[102]

<u>African-American Venire Member Richard Leonard</u>: In *State v. George Wilkerson*, tried in Randolph County in 2006, the State struck African-American venire member Richard Leonard.

Andrew Gregson tried the case and has provided an affidavit attempting to explain the

[101] David's "unequivocal assertion that at no time did race enter into our consideration of who to remove from the jury panel" and his accompanying statement that he struck Thompson because of hardship and "certainly not [his] race" are of no moment. *See Batson*, 476 U.S. at 98 (prosecutor may not rebut defendant's case "merely by denying that he had a discriminatory motive" or "affirm[ing] [his] good faith in making individual selections"; accepting these general assertions at face value would render the Equal Protection Clause "but a vain and illusory requirement." (internal citations omitted, brackets in original).

[102] *State v. Cummings*, Vol. I, Tpp. 57-58 (Hufham), 62-64 (Council), Vol. II, 377-78 (Thompson).

strike. The affidavit says the State struck Leonard in part because of hardship. Specifically,

> [J]uror Leonard inquired of the trial judge whether he should go to work after court and work his third shift job. I remember making note of this fact and of the possibility that juror Leonard might possibly be planning to work all night and then show up for jury service. This caused me to be concerned about his ability to pay appropriate attention should he be selected to serve as a juror.

This explanation is not supported by the record. First, during his conversation with the trial judge, Leonard did not say whether he worked the third shift every single night. He simply said he was working the third shift that evening and asked whether it made sense for him to go to work given his jury service the next day. Moreover, during voir dire, the prosecutor did not ask Leonard any further questions about his employment, indicating a lack of genuine interest in the subject.

Indeed, the State accepted several non-black venire members who, like Leonard, indicated that they had substantial work commitments in the evening. When asked about his employment, Kenneth Justice said, "That's one thing that's going to be a problem . . . Because I'm an owner plus worker. I have to be there. That's the only thing that's going to be a problem." Like Leonard, Justice explained, "Well, it's going to put me working at night. Like I said, I don't have no problem serving but that's going to be my only problem is my work." Justice explained he might have to work up to four hours a night.

Remarkably, the prosecutor told Justice, "Well, you have the right when you're in court here, you know, to raise your hand. If you feel yourself getting sleepy and you're not paying attention . . . . you let us know, I need a break."

Similarly, non-black venire member Melissa Sands worked two jobs every day, including a second shift job. She also had two children at home. When Sands said that she would not be going to work after court if she became a juror, the prosecutor said, "I mean some people, you

know, work after court. And that's okay. That's fine. It's just that we want to make sure that you can pay attention and listen closely during the day."

The prosecutor also told non-black venire member Jurine Shane, who indicated that her childcare duties would "be a problem," that "we try to be sensitive to those needs and we understand that . . . there's no way you can drop everything in your life and come and serve as a juror but what we need are citizens to serve obviously."

The understanding and flexibility the prosecution extended to white venire members belies the claim that Leonard was struck because of his work schedule. Were the State truly concerned about this, the prosecutor would not have told non-black venire members that he did not mind if they worked in the evenings or needed breaks during the day due to drowsiness.[103]

African-American Venire Member Randy Mouton: In *State v. Jeffrey Meyer*, tried in Cumberland County in 1995, the State peremptorily struck African-American venire member Randy Mouton. The defense did not lodge a *Batson* objection at trial.

Calvin W. Colyer provided an affidavit stating that the prosecutor in *Meyer* struck Mouton because he "had financial concerns about serving as a juror and losing money because his child support payments had increased."

Colyer did not try *Meyer* in 1995 The case was prosecuted at trial by John Wyatt Dickson.

Dickson testified at the hearing in *Robinson* that Mouton "really didn't want to be there, that he had financial concerns, that he was losing money being out of work and, particularly, because his child support had increased. And his financial concerns were, to me, were obviously going to be bothering him during the trial." *Robinson* HTp. 1150.

[103] *State v. Wilkerson*, Vol. II, Tp. 271 (Shane); Vol. III, Tpp. 498-02 (Sands), 684-85, 1096-1102 (Leonard); Vol. VI, Tpp. 1231-34 (Justice).

During voir dire, the prosecutor asked the panel whether any venire member had any experience with the court system. Mouton raised his hand because he had been asked to pay additional child support. Mouton acknowledged that serving on the jury would be a financial hardship due to his child support obligations, but said it would not affect his ability to base his decision as a juror on the evidence. During their exchange, the prosecutor asked Mouton whether his inability to meet his child support obligations would "get [him] in trouble with the court system." Mouton agreed that it would. The prosecutor struck Mouton.[104]

In the same case, the prosecutor accepted Terry Miller, a non-black venire member who said that serving as a juror would be a hardship and distraction. Miller stated,

> I would be very frank and up front with you: I probably am not going to have all my total thoughts here because I've got a lot going on at work right now because I'm going through an operational readiness inspection, and with the world situation happening in Kuwait right now, I'm drumming up for that stuff, too, so that's a possible factor, too – because I'm in charge of all the airlift that goes on out there.

The prosecutor replied, "All we can ask is that you give it your best effort. Do you think you can do that?" When Miller agreed he could, the prosecutor questioned him no further. Unlike his exchange with Mouton, the prosecutor did not ask Miller whether his inability to meet his work obligations would get him in trouble with his employer.

The State's proffered reason for striking African-American venire member Randy Mouton from Meyer's jury is not credible. The State asserts that Mouton was struck due to hardship, but the prosecutor accepted Miller, a non-black juror with a hardship at least as onerous as that expressed by Mouton.

This finding is supported by the differences between the questioning of Mouton and Miller. The prosecutor asked Miller one question to determine whether Miller could overcome

[104] *State v. Meyer (1995)*, Vol. I, Tpp. 101-07 (Mouton), 122-23 (Miller).

his hardship to serve on the jury. Then, like the prosecutor in *Snyder* who admonished a non-black venire member to "try . . . as best you could," the prosecutor told Miller to "give it your best effort." 552 U.S. at 484.

In contrast, the prosecutor asked Mouton five times whether his child support situation would impede his ability to serve as a juror. The prosecutor never encouraged Mouton to do his civic duty. Finally, the prosecutor suggested to Mouton that his potential difficulty with child support would get him in trouble with the court system. The prosecutor did not suggest to Miller that his potential difficulty with his work responsibilities would get him in trouble with his employer, the United States Air Force.

In closing argument at the *Robinson* RJA hearing, counsel for the State Thompson, who was not involved in the case at trial, suggested for the first time that the "real" reason the State struck Mouton was because there are "not many prosecutors that want somebody on the jury who had to be ordered and has to go to court for child support." Robinson HTp. 2545. This reason is inconsistent with the sworn affidavit submitted by the State and with the sworn testimony of the prosecutor who actually struck the juror. This newly-minted reason for striking Mouton illustrates the ease with which a person may justify race-based conduct, and should not be credited by the Court. Further, this reason is not supported by the record. There is no evidence that Mouton ever failed to pay child support and had to be ordered to pay. Instead the record indicates that Mouton was in court because the mother of his child was seeking an increase in the payment.

As these examples illustrate, the State's reliance on hardship to justify striking numerous African-American venire members is unpersuasive in light of the State's acceptance of non-black venire members who asked to be excused from the jury because of comparable or greater

hardships. These examples illustrate why the MSU study found that race had a strong and persistent effect on so-called hardship strikes.

C. Disparate Treatment: Criminal Involvement

African Americans are frequently excluded from capital juries because they, or their family members or friends, have been involved in the criminal justice system. As shown in the following cases, it does not whether black venire members are merely charged or actually convicted; it does not matter whether black venire members are perpetrators or victims; and it does not matter how distant the relationship to a family member with a criminal record. Any association with crime will do. In contrast, prosecutors routinely accept non-black venire members with criminal records and comparable or more serious criminal histories.

African-American Venire Members Tyron Pickett, Sean Duckett, and Josephine Chadwick: In *State v. Clifford Miller,* tried in Onslow County in 2001, the State struck African-American venire members Tyron Pickett, Sean Duckett, and Josephine Chadwick. No *Batson* objections were raised to these strikes.

The case was prosecuted by Ernie Lee and Michael D. Maultsby, both of whom have provided affidavits attempting to explain these strikes in race-neutral terms. These affidavits assert that Pickett was struck in part because "he was convicted in the past of a criminal offense." Duckett was struck in part because he "admitted he was convicted in the past of a criminal offense," and Chadwick was struck in part because her niece was "being convicted in Kenansville for drug use."[105] Prosecutor Lee added, "From my experience as a prosecutor, I do consider whether relatives, family members or close friends of a potential juror have pending

[105] Pickett and Duckett's offenses are not revealed in the record. The prosecutor asked Duckett one question on voir dire, whether he had been convicted of a criminal offense in Onslow County. Vol. 4, Tp. 207. The State's perfunctory questioning indicates the prosecutors had run a criminal record check on Duckett. *Id*.

charges or have been convicted in deciding whether to exercise a peremptory challenge."

The prosecution's purported concern with criminal convictions is sorely undermined by its treatment of similarly-situated white venire members. The prosecution passed a half dozen white venire members with criminal records or friends and family members with criminal histories.

First, the prosecution passed non-black venire members who, like black venire member Chadwick, had relatives charged or convicted of crimes. About a year before Miller's trial, Valerie Russell's husband had been charged with felony child abuse. He pled guilty to a misdemeanor. The prosecutor also passed white venire member Rebecca Amaral. Amaral's cousin was convicted of a sex offense against a child. He had been in prison for 20 years.

Second, the State passed white venire members who, like black venire members Pickett and Duckett, had criminal records themselves. The prosecution accepted William Gagnon despite the fact that Gagnon had been convicted of marijuana possession 15 or 20 years earlier. Harold Fletcher was passed by the State and seated on the jury even though he had a DWI in 1985. The prosecution also accepted seated alternate Brian Odum. Odum had a prior drug offense, possession of drug paraphernalia.

Third, in its questioning the State displayed a marked lack of interest in the criminal pasts of white venire members. Aaron Parker was found to be an acceptable juror by the State. Parker said in voir dire that someone in his family or a friend had been charged with a child support violation. The prosecutor was not sufficiently interested in this matter to find out any additional details and Parker was seated on the jury.[106]

[106] *State v. Miller*, Vol. I, Tpp. 477-78 (Russell); Vol. II, Tpp. 149, 197 (Amaral), 304, 307 (Fletcher), 306-307 (Parker); Vol. 4, Tpp. 111 (Gagnon), 170 (Odum); *see also* Fletcher and Odum Jury Questionnaires.

African-American Venire Member Ursela McLean: In *State v. Brewington*, tried in Harnett County in 1998, the State struck African-American venire member Ursela McLean. The defense objected under *Batson*. The trial court found no prima facie case and the State did not offer any reasons for the strike. The *Batson* objection was not raised on direct appeal.[107]

This case was prosecuted by Thomas Lock and Peter Strickland. Michael S. Beam, who was not involved in the trial, has provided an affidavit purporting to give race-neutral reasons for striking McLean.

The State's affidavit says the prosecution struck McLean in part because her aunt had been murdered in Harnett County and the crime remained unsolved. The affidavit does not offer any explanation as to why the fact she had a relative murdered would make her an undesirable juror for the State. On voir dire, McLean expressed no dissatisfaction with the pace or quality of the law enforcement investigation.

Moreover, the State passed non-black venire members whose family members had also been the victims of homicide. Eugenia Stewart's brother-in-law was killed by a drunk driver. Craig Matthews' second cousin was murdered within a week before he was questioned as a potential juror. Yet the State passed both Stewart and Matthews.[108]

African-American Venire Member Alfredia Brown: In *State v. Daniel Cummings*, tried in Brunswick County in 1994, the State struck African-American venire member Alfredia

[107] *State v. Brewington*, Vol. 4, Tp. 67 (Matthews); Vol. 7, Tpp. 125 (Stewart), 131-40 (McLean).

[108] The State's affidavit suggests that, at trial, the prosecutor offered this reason for the strike. In fact, after the defense made its *Batson* objection, the prosecutor commented as to why ***the defense*** should wish to excuse McLean. *See* Vol. 7, Tp. 140 ("I am absolutely incredulous, Your Honor, that defense counsel might want this juror to decide the guilt or innocence of the defendant in light of what she has most recently been through with her aunt."). The State's decision to now adopt this reason as its own further highlights the irrational and pretextual nature of the proffered reason.

Brown. The defense objected under *Batson*.[109]

Lee B. Bollinger, who prosecuted Cummings at trial, has provided an affidavit purporting to offer a race-neutral reason for striking Brown. The affidavit asserts that Brown was struck in part because "she had a friend with a drug abuse problem." The affidavit stresses that the prosecution understood that "a large part of the defendant's defense would be voluntary intoxication based on the abuse of cocaine." Despite this recognition, the State only intermittently asked potential jurors about substance abuse.

For example, the State passed non-black venire member Barbara Ruby, whose son had been "giving us some trouble." In fact, the State had no interest in Ruby's son, and asked her no follow-up questions. Only on questioning from the defense did Ruby reveal that her son had problems with alcohol and substance abuse and, as a result, problems with the law. The State also passed non-black venire member Robert Morris, whose younger son had "been charged with darn near everything," including DWI. The prosecutor displayed no interest in Morris's connections to people with alcohol or drug problems. Only on questioning from the defense did Morris reveal that both of his sons had problems with alcohol. Both had been "picked up for DWI" and the younger one was also arrested for possession of marijuana. In addition, Morris had a "good friend" whose grandchild was born addicted to cocaine. The State also passed non-black venire member Janet Coster despite the fact that Coster had friends and family members with alcohol problems.[110]

<u>African-American Venire Member Rochelle Williams</u>: In *State v. Roland Hedgepeth*, a resentencing trial in Halifax County in 1997, the State, represented by prosecutor Robert Caudle,

[109] The *Batson* colloquy and cited portions of voir dire appear in *State v. Cummings*, Tpp. 672-80.

[110] *State v. Cummings*, Tpp. 191, 196-97 (Ruby), 451 460-61, 472-73 (Morris), 922-23 (Coster).

struck African-American venire member Rochelle Williams. Melissa D. Pelfrey has provided an affidavit proffering supposedly race-neutral explanations for the strike of Williams.

The affidavit asserts that the State struck Williams in part because her husband had "failed to pay off tickets." The record confirms that William's husband was once arrested for failure to pay speeding tickets. However, why such a minor offense — committed not by Williams herself but by her husband — would implicate her ability to serve as a juror is unclear.

Even more to the point, the State passed several similarly-situated non-black venire members, including two who had themselves been arrested for relatively minor offenses. Freddie Ezzell had been arrested for failing to pay child support. H.T. Hawkins had been arrested for DWI. Two other white venire members were passed by the State despite the fact that, like Williams, they had close relatives who had been arrested. Willie Hammack's son had been arrested for DWI and William Massey's brother had been arrested for disorderly conduct. Anthony Hux was passed even though he had testified at a murder trial as a character witness on behalf of the defendant.[111]

African-American Venire Member Janice Daniels: In *State v. Vincent Wooten*, tried in Pitt County in 1994, the State struck African-American venire member Janice Daniels.

Thomas D. Haigwood and Clark Everett prosecuted the case at trial. Everett has provided an affidavit purporting to give a race-neutral reason for the strike of Daniels. The affidavit asserts the following with regard to this potential juror:

> Ms. Janice Daniels was charged with DWI and possession of drug paraphernalia in Pitt County in 1991. She appealed her guilty plea from District Court and pleaded not guilty in Pitt County Superior Court. She was prosecuted by an Assistant District Attorney from our office and was found not guilty on both charges by a jury on 05-12-91.

[111] *State v. Hedgepeth*, Vol. I, Tpp. 2594-95 (Hawkins), 3309-10 (Hux), 3801-3803 (Williams), 4082 (Ezzell); *see also* Hammack and Massey Jury Questionnaires.

The pretextual nature of this reason is revealed in the State's disparate treatment of black and non-black potential jurors. While rejecting Daniels after she was found ***not guilty*** of criminal charges, the State accepted a non-black venire member who was found ***guilty*** of a similar offense. The State passed William Paramore, who was convicted of DWI in Pitt County.[112]

African-American Venire Member Mark Banks: In *State v. Timothy White*, tried in Forsyth County in 2000, the State peremptorily struck African-American venire member Mark Banks. The defense did not lodge a *Batson* objection at trial.[113]

The case was tried by Eric Saunders and Beirne Harding. Mike Silver has provided an unsworn statement attempting to give a race-neutral reason for striking Banks. According to the affidavit, Banks was struck in part because of concern about "an incident that required prosecution," namely the rape of his wife. The affidavit says the State "may have been unsure about the venire's feelings toward law enforcement and the prosecution of the case involving his wife."

The record shows Banks was asked, "The incident with your wife, was that here in Forsyth County?" Banks said, "That was in Lexington." The prosecutor asked, "Was that case investigated and prosecuted to your satisfaction?" Banks replied, "That was before we were married. It happened in the past and she doesn't talk about it much." Thus, the case did not involve local law enforcement or prosecutors and was "in the past."

The record shows markedly disparate treatment of non-black venire member Scott Morgan. Morgan noted on his questionnaire that his wife had been robbed and assaulted.

[112] *State v. Wooten*, Tp. 523.

[113] *State v. White*, Vol. I, Tpp. 107-08, 118 (Banks), 128 (Morgan); *see also* Morgan Jury Questionnaire.

During voir dire, Morgan explained that the incident occurred in Forsyth County two years prior to the jury selection proceeding. Morgan said the perpetrator had not been caught. Morgan indicated he was satisfied with the investigation into the incident. The State passed Morgan.

African-American Venire Member Nancy Holland: In *State v. Michael Reeves*, tried in Craven County in 1992, the State peremptorily struck African-American venire member Nancy Holland. The defense did not lodge a *Batson* objection at trial. Only one minority member served on the jury.

Karen Hobbs has submitted an affidavit purporting to explain the strike. Hobbs was not involved in the trial, which was prosecuted by David McFadyen.

The affidavit asserts that the State struck Holland in part because, within the past year, a family member had been involved in a matter requiring contact with the district attorney's office.

The voir dire transcript reflects that Holland was asked whether the prosecutor or any member of his office had ever been involved in any matter relating to Holland's family or friends. Holland said yes, a matter involving her family. The prosecutor asked how recently that occurred and whether it required Holland to come to court. Holland stated that the case occurred in the last year and she had not come to court. The prosecutor then excused Holland without asking any further questions.[114]

The voir dire transcript further reveals that the State accepted non-black venire member Charles Styron, who, immediately upon being called for questioning, informed the prosecutor that the prosecutor had tried his sister-in-law for a drug charge "a couple of years ago."

The prosecutor's superficial interest in the criminal matter involving Holland's family, coupled with the prosecutor's acceptance of a non-black venire member whose family member

[114] *State v. Reeves*, Tpp. 223 (Styron), 707-08 (Holland).

had similar criminal involvement, is evidence of race-based jury selection.

African-American Venire Member Broderick Cloud: In *State v. Errol Moses*, tried in Forsyth County in 1997, the State struck African-American venire member Broderick Cloud. No *Batson* objection was raised by the defense.

Vince Rabil prosecuted the case at trial. Patrick Weede has prepared an unsigned, unsworn statement purporting to explain the strike of Cloud. The statement asserts that the prosecution struck Cloud in part because he had a cousin who was murdered six years before.

The record shows that Cloud did not attend the trial and nothing about his cousin's murder would prevent him from being a fair juror. Meanwhile, the State passed Doris Folds, a non-black prospective juror whose best friend had been murdered seven years earlier. Folds had attended the entire trial.[115]

African-American Venire Member Thomas Seawell: In the 2001 Wake County case of *State v. Fernando Garcia*, the State struck African-American venire member Thomas Seawell. There was no *Batson* objection at trial.

Doug Faucette and Susan Spurlin served as the prosecutors at trial and Spurlin has prepared an affidavit attempting to explain the strike of Seawell. The affidavit asserts that the State struck Seawell in part because his son was convicted of conspiracy to traffic in cocaine and served more than a year in federal prison.

The record shows that the State accepted non-black venire members with comparable or stronger connections to serious drug offenses. The prosecution passed nonblack venire member David Oakley who had himself been convicted of possession of more than one pound of marijuana. Oakley pled guilty and was given an active prison sentence. The prosecution also

[115] *State v. Moses*, Tpp. 505-507 (Cloud), 762-63 (Folds).

passed non-black venire member Delma Chesney, whose brother was arrested for selling cocaine to a police officer as part of a large, federal undercover operation. Chesney said that her brother "participated in it, and he received a [federal] prison sentence."[116]

African-American Venire Members Ellen Gardner and John Reeves: In the 2000 Cumberland County case of *State v. Christina Walters*, the State peremptorily struck African-American venire members Ellen Gardner and John Reeves. The defense did not lodge *Batson* objections at trial.

Charles Scott provided an affidavit in this proceeding asserting that the State struck Gardner in part because she "had a younger brother who had been convicted in Miami, Florida on gun and drug charges six (6) years prior to jury selection. Her brother received five (5) years house arrest." With respect to Reeves, the affidavit states he was struck in part because he "had a grandson who was twenty-two (22) years old and had been charged with a 'serious' crime, theft."

However, a review of the voir dire transcript reveals that Gardner stated that she had no concerns about how her brother was treated and his experience would not affect her jury service. Gardner said, "he was treated fairly." With respect to the impact of her brother's experience in Florida on her jury service, Gardner said, "Oh, it won't interfere. I been put that – (pause) – out of my mind – you know." Gardner said she was not close to her brother and that she did not have much contact with him.

During questioning by the State, Reeves revealed that his grandson had been charged with a theft offense in Fayetteville, he did not know much about it, had not had any discussions with him or his grandson's parents about the case, had asked his grandson's parents only if he

[116] *State v. Garcia*, Tpp. 881 (Chesney), 1262-63 (Oakley).

was going to trial, and there had not been any court proceedings up to that point and he thought the case was taking too long to get to trial. He further stated three times, after being asked repeatedly, that there was nothing about his grandson's pending theft charge that would affect his ability to serve as a juror.[117]

Moreover, in the same case, the State accepted non-black venire member Amelia Smith. At the time of the jury selection proceeding, Smith's brother was in the Nash County jail due to a first-degree murder charge.[118] In contrast to Gardner, whom the State struck, Smith was in contact with her incarcerated brother by letter.

In light of its acceptance of Smith, whose brother's crime was more serious than Gardner's and who was closer to her brother than Gardner, the State cannot credibly claim that it struck Gardner due to her brother's criminal involvement. The same holds true for Reeves: Reeves' grandson had merely a pending theft charge and Reeves had not discussed the matter at all with his grandson.

African-American Venire Member Wilbert Gentry: In the 2007 Cumberland County sentencing hearing of *State v. Eugene Williams*, the State peremptorily struck African-American venire member Wilbert Gentry. The defense did not lodge a *Batson* objection at trial.

One of the trial prosecutors, Calvin W. Colyer, provided an affidavit purporting to explain the strike.

The affidavit asserts that the State struck Gentry in part because he had a cousin who was the Atlanta child murderer Wayne Williams.

However, the prosecutor accepted non-black venire member Iris Wellman, whose

[117] *State v. Walters*, Vol. G, Tpp. 1169, 1185-89 (Gardner); *State v. Walters*, Vol. G, Tpp. 1329-32 (Reeves).

[118] *State v. Walters*, Vol. May 18, 2000, Tpp. 4, 8 (Smith).

stepmother's brother was John Noland, who was convicted of murder, sentenced to death, and executed in North Carolina in 1998. As a child, Wellman was aware of the execution when it occurred. At that time, Noland's sister was Wellman's stepmother.[119]

African-American Venire Members Ernestine Bryant and Mardelle Gore: In *State v. Quintel Augustine*, tried in Cumberland County in 2002, the State struck African-American venire members Ernestine Bryant and Mardelle Gore. The defense lodged *Batson* objections to both strikes.[120]

Calvin W. Colyer, along with Margaret Russ, prosecuted the case at trial. Colyer has given an affidavit asserting that the State struck these venire members because they had family members who committed crimes. Bryant's son had been convicted on federal drug charges four or five years before and was sentenced to 14½ years. He was still incarcerated. Gore's daughter had killed her husband six years before and served five years in prison in Tennessee. She had been released from prison and was working as a histologist at Duke University Hospital.

The record shows Bryant answered the prosecutor's questions about her son with no hesitation. She stated that the fact that her son had been in trouble with the law would not affect her ability to be a fair juror. Gore was similarly forthcoming in discussing her daughter's

[119] *State v. Williams (2007)*, Vol. 9, Tpp. 1914, 1917-19.

[120] The *Batson* colloquy and pertinent voir dire appear in *State v. Augustine*, Vol. A, Tpp. 112-13, 174, 190-91 (Bryant); Vol. C, Tpp. 651-52 (Lesh); Vol. D, Tpp. 715-16 (Lesh), 827-29 (Woods), 914-17, 928-32 (Gore); Vol. E, Tpp. 933-35.

The trial court found no prima facie case as to Bryant, who was the first African-American to be questioned, and the State offered no reasons for the strike. The trial court overruled the objection as to Gore. At trial, in addition to her daughter's conviction, the prosecutor also said he struck Gore because of her demeanor. The prosecutor claimed Gore gave "monosyllabic" answers, was "somewhat defensive" and "didn't make a whole lot of eye contact." As well, the prosecutor said she had "kind of a quizzical look on her face, almost a bit of a smile." The trial judge acknowledged that Gore responded "in a slightly unusual manner," but concluded that the State's multiplicity of demeanor-based reasons were, standing alone, not reasonably specific nor legitimate explanations. Apparently because the trial judge rejected these explanations, the prosecution did not see fit to repeat them in the affidavit presented to this Court. The *Batson* objection to the strike of Gore was not brought forward on direct appeal. *State v. Augustine*, 359 N.C. 709, 715-16 (2005).

conviction and the events surrounding it. Gore explained that her daughter was the victim of domestic abuse:

> [H]er husband tried to kill her and she, uh — he had been threatening to kill her for about a week. And she picked up a gun off the bed, uh — she got to it before he did, and she picked up the gun and shot him and he died.

When asked if there was anything about her daughter's situation that would affect Gore's ability to be a fair and an impartial juror in a murder case, Gore said there was not.

The prosecution had no trouble accepting non-black venire members who also had family members with criminal records. Melody Woods' mother was convicted of assault with a deadly weapon resulting in serious injury when she stabbed Woods' first husband in the back. Woods' father was arguing with Woods' husband at the time. Woods later divorced her husband.

The prosecution similarly found no fault in non-black venire member Gary Lesh. Lesh's stepson was convicted on drug charges in the mid-1990s, around the same time as Bryant's son. Lesh's stepson received a five-year sentence and was now living with Lesh. Lesh said his stepson had turned his life around since the crime. Lesh also described how his uncle ran a gas station and, while working, got into an argument with a man who stopped at the station. The man shot Lesh's uncle, who then pulled a gun and shot the man. The man was killed instantly. Lesh's uncle died a few hours later.

The State's acceptance of these similarly-situated non-black venire members puts the lie to its claim that Bryant and Gore were struck because of their children's criminal convictions and imprisonment. Like Gore's daughter, Woods' mother committed a violent act during a domestic dispute and, like Gore's daughter, Lesh's uncle killed another in self-defense. Like Lesh's stepson, Gore's daughter had turned her life around and was working productively. As with Bryant's son, Lesh's stepson was involved in drugs and had been imprisoned. Finally, Bryant's

son committed a drug offense while Lesh's uncle killed someone and Woods' mother violently attacked someone else.

African-American Venire Member Elliot Troy: In the 1994 Cumberland County case of *State v. Marcus Robinson*, the State peremptorily struck African-American venire member Elliot Troy. The defense did not lodge a *Batson* objection at trial.

Calvin W. Colyer provided an affidavit saying that the State struck Troy in part because he "had a prior public drunkenness charge." At the hearing in *State v. Robinson*, John W. Dickson, who was the trial prosecutor, also identified Troy's public drunkenness as a basis for striking him. *Robinson* HTp. 1130.

However, the State accepted non-black venire members Cynthia Donovan and James Guy, both of whom had convictions relating to driving while intoxicated.[121] The State has therefore failed to offer a credible, race-neutral reason for striking Troy.

D. Disparate Treatment: Connections to Defense

Another nominally race-neutral reason that prosecutors frequently invoke to exclude African Americans from jury duty in capital cases is a connection to defense counsel or defense witnesses. The examples below demonstrate that this reason is not applied equally to black and non-black venire members and is merely another pretext for excusing African Americans from capital juries.

African-American Venire Member Leroy Ratliff: In *State v. Darrell Strickland*, tried in Union County in 1995, the Native American defendant was convicted and sentenced to death by an all-white jury. In this case, the State peremptorily struck African-American venire member Leroy Ratliff. The defense did not lodge a *Batson* objection at trial.

[121] *State v. Robinson*, Vol. II, Tpp. 507, 509-11 (Donovan); Vol. III, Tpp. 820, 840 (Guy).

Jonathan Perry provided an affidavit purporting to explain the strike of Ratliff. Perry was not the prosecutor in *Strickland*. The case was tried by Michael Parker and Scott Brewer.

The affidavit asserts that the prosecution struck Ratliff in part because he knew one of the defense attorneys in the case, Harry Crowe. Crowe had done some work for Ratliff several years before. However, the State accepted non-black venire member Pamela Sanders, who also knew one of the defense attorneys. Sanders knew defense attorney Stephen Goodwin, who was related to the president of the bank where Sanders worked. Sanders also knew Goodwin through their work with the American Cancer Society.[122]

African-American Venire Member Evelyn Jenkins: In *State v. Billy Anderson*, tried in Craven County in 1999, the State peremptorily struck African-American venire member Evelyn Jenkins. The defense did not lodge a *Batson* objection at trial. Only one minority member served on the jury.

Karen Hobbs has provided an affidavit asserting that the State struck Jenkins in part because she worked in the home of the defense attorney's family. Hobbs was not involved in the trial, which was tried by David McFadyen.

The voir dire transcript shows that Jenkins's sister worked for defense counsel's family and became ill. Jenkins then worked for the family for, at most, three months, 25 years before. She had no direct contact with defense counsel, who was then a child, and she maintained no further contact with the family.

The voir dire transcript further shows that the State accepted non-black venire member Joseph Shellhammer, who retained defense counsel to represent him in a criminal matter 15 or 16 years prior to the jury selection proceeding. The State also accepted non-black venire

[122] *State v. Strickland*, Tp. 225 (Ratliff); 833 (Sanders).

member Richard Nutt, who retained defense counsel to handle a house closing 12 years previously.[123]

African-American Venire Member Michael Stockton: In *State v. Keith East*, tried in Surry County in 1995, the State peremptorily struck African-American venire member Michael Stockton. The defense did not lodge a *Batson* objection at trial. East, an African American, was tried and sentenced to death by an all-white jury.

C. Ricky Bowman was the trial prosecutor and he provided an affidavit offering race-neutral reasons for the strike of Stockton. One of the reasons Bowman gave was, "When the Court read the names of the possible witnesses to the potential jurors and inquired if the jurors knew of them, Juror Stockton acknowledged that he knew [potential defense] witness Reverend Mittman. Juror Stockton knew him as a minister. Juror Stockton also said he had been in his service." Bowman also noted, "During my questioning, he stated that he and Reverend Mittman had sang together, thus admitting to a closer relationship than he had described for the court."

In addition to the facts highlighted by Bowman, Stockton stated during voir dire that Reverend Mittman had never presided at his church and Stockton was not a member of Reverend Mittman's congregation. Stockton went to Reverend Mittman's service and sang with him over 10 years ago. Stockton also stated on two occasions that his brief contact with Reverend Mittman would not affect his ability to serve as a juror.[124]

The State passed several non-black jurors who admitted familiarity with defense witnesses. Glenn Craddock knew three potential defense witnesses: Barry Hall, David Diamont, and June Snow. Amy Frye knew potential defense witness June Snow. Frye also knew the

[123] *State v. Anderson*, Vol. II, Tpp. 265-66 (Jenkins), 456-57 (Shellhammer), 458 (Nutt).

[124] *State v. East*, Vol. 3, Tpp. 327, 356 (Stockton), 403-404, 407-408 (Frye); Vol. 3, Tpp. 418 (Craddock), 447-49 (Sands), 472-75 (Gordon). The defense witnesses are listed at Vol. I, 71-72.

defendant's cousin, as they worked together in the Mount Airy school system. Sarah Gordon knew potential defense witnesses Barry Hall, David Diamont, and June Snow. In addition, Gordon's brother went to school with the defendant. James Sands knew potential defense witness David Diamont. Sands' son also went to school with the defendant and they graduated together.

In light of the different treatment afforded similarly-situated non-black potential jurors, the Court should find that familiarity with a defense witness is not a credible, race-neutral reason for striking Stockton.

E. Disparate Treatment: Helping Professions

Prosecutors frequently attempt to justify the strikes of African Americans by citing their familiarity or experience with mental health issues, or a background working with children or other helping professions. Prosecutors explain that they are concerned about sympathy for the defendant or an inclination to more easily accept evidence in mitigation. This is all perfectly plausible, except, as the following cases illustrate, this rationale is applied with much greater force on African Americans than others.

African-American Venire Member Zebora Blanks: In *State v. Rodney Taylor*, tried in New Hanover County in 1998, the State peremptorily struck African-American venire member Zebora Blanks. The defense did not lodge a *Batson* objection at trial.

At trial, *Taylor* was prosecuted by John W. Sherrill and W. Holt Trotman. Trotman has provided an unsigned, unsworn statement regarding the prosecution's decision to strike Blanks.

Trotman's statement asserts that Blanks was struck in view of "her employment in the mental health field. The defense relied heavily on mental health witnesses in their trial strategy." Trotman provided no additional reasons for striking Blanks.

According to her voir dire testimony, Blanks had worked in the business administration section at Southeastern Mental Health for five years and dealt with medical and personnel records. Blanks made appointments for the counselors, but was not involved in counseling in any way. Her previous job was a clerical position with the health department.[125] Thus, describing her employment as "in the mental health field" is like describing an accountant for a nuclear power company as being employed in the "nuclear energy field." Neither position implies any specialized knowledge or receptivity to arguments concerning the science of a particular mental health diagnosis or the physics of how nuclear power is generated.

In addition and predictably, the record shows the State passed non-black venire member Vicky Poplin, who had at least as much contact as Blanks did with the mental health field. Poplin had been working as a medical transcriptionist for two years. Poplin's clients were five medical groups. Four of the five groups were made up of psychologists and psychiatrists. Poplin's previous job was with Cape Fear Psychological and Psychiatric Services. In that position, she had contact with patients. Poplin, however, was passed by the State. The State's decision to strike Blanks – a clerical worker in the mental health field – but accept Poplin – a transcriptionist in the mental health field – can only be explained on the basis of race, particularly in view of the fact that the State's affidavit cites only Blanks' employment in its attempt to explain why she was struck.

African-American Venire Member Ella Pierce Johnson: In *State v. Terry Ball*, tried in Beaufort County in 1994, the State peremptorily struck African-American venire member Ella Pierce Johnson. The defense did not lodge a *Batson* objection at trial.

Ball was prosecuted at trial by Mitchell Norton and Frank Bradsher. Thomas D. Anglim was not involved in the *Ball* prosecution but provided an affidavit regarding the State's decision

[125] *State v. Taylor*, Vol. II, Tpp. 452-53 (Blanks), 482-84, 488, 527-30 (Poplin); *see also* Poplin Jury Questionnaire.

to strike Johnson in that case.

The affidavit asserts that the State struck Johnson in part because "she was a teacher for a number of years and that she had prior educational experience in the field of psychology." However, these were not characteristics the State was truly concerned about in *Ball*. In that case, the record, including juror questionnaires, shows that the State passed two non-black venire members who were teachers: Carolyn Newcomb McNeill and Mollie Bowen. Bowen and McNeill had also studied psychology.[126]

African-American Venire Member Sadie Clement: In *State v. Darrell Woods*, tried in Forsyth County in 1995, the State peremptorily struck African-American venire member Sadie Clement. The defense did not lodge a *Batson* objection at trial.

Mike Silver provided an unsworn statement offering as one of the State's reasons for striking Clement.

> Venire member [Clement] has bachelors in elementary education, eight months worked at the battered children's home in Thomasville, NC working with children with behavioral and other issues. Took psychology classes to obtain her elementary education degree and continuing education classes on child psychology. The State likely used a preemptory challenge on this venire member based on her vast experience in psychology and the development of children. This type of evidence is often submitted during the aggravating and mitigating phase of a sentencing hearing in a capital murder trial.

Silver was not the prosecutor in *Woods*. The case was tried by Eric Saunders and David Spence.

A review of the voir dire transcript reveals that the State accepted non-black venire member Holly Coffey, who held a master's degree in counseling, minored in psychology, and gave primarily career and minor psychological counseling to underprivileged high school and college students from western North Carolina. Coffey had previously provided psychological

[126] *State v. Ball*, Tpp. 55-56 (Johnson), 122-23 (McNeill), 209-10 (Bowen); *see also* McNeill and Bowen Jury Questionnaires.

counseling for six years. At the time of voir dire, it had been 15 years since Coffey did any psychological counseling and she had not kept up with the literature in the field. However, when she was asked whether she would be inclined to give evidence of psychological testing or the testimony of a psychologist any greater weight than other evidence, Coffey replied, "Only to the extent that I might be familiar with the tests themselves." Coffey testified that she was familiar with the MMPI and the Rorschach, which are psychological tests. When asked whether those tests have any special validity, Coffey said, "I think you have to have a total picture, so not necessarily taken out of context."[127] Moreover, the State accepted non-black venire members Romaine Hudson, who held a bachelor's degree in early elementary education and took a psychology class as part of her training, and Mary Joyce, who was a kindergarten teacher and held bachelor's and master's degrees in elementary education.[128]

African-American Venire Members Alveria Bellamy, Sanica Maultsby, George McLaurin, and Recaldo Simmonds: In the 2006 Brunswick County case of *State v. Darrell Maness*, the State struck African-American venire members Alveria Bellamy, Sanica Maultsby, George McLaurin, and Recaldo Simmonds. As to potential jurors Bellamy, Maultsby, and Simmonds, the defense objected under *Batson*.[129] There was no *Batson* objection as to

[127] *State v. Woods*, Vol. I, Tpp. 56-59 (Coffey); Vol. II, Tpp. 387-88 (Joyce), 512, 515 (Hudson).

[128] It is noteworthy that Silver said in his unsworn statement that the State "likely used" a peremptory challenge against Clement due to her work experience. Silver was not present during voir dire in *Woods*. Silver's use of the word "likely" thus constitutes a recognition he is unable to provide meaningful assistance to the Court in determining the State's real reasons for striking Clement, or any other African-American venire member. Silver's statements with respect to Clement are nothing more than speculation that cannot be credited.

[129] On direct appeal, the Supreme Court reviewed the defendant's *Batson* objection to the State's striking of Maultsby and Simmons. The Court summarily dismissed the Maultsby objection by saying, "[W]e have reviewed the trial court's findings and conclude that they are not clearly erroneous." *State v. Maness*, 363 N.C. 261, 273 (2009). As to Simmons, the Court found no prima facie case. 363 N.C. at 275. Nowhere did the Court consider disparate treatment of black and non-black venire members. Evidence of disparate treatment is undoubtedly relevant. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination."). Regardless, the facts and circumstances of these strikes may be considered as

McLaurin.

At trial, the State was represented by Rex Gore, Lee B. Bollinger and Christopher Gentry. Bollinger has provided an affidavit for the State. The State's affidavit asserts that these venire members were struck in part because of purported concerns that their experiences with mental health would make them sympathetic to the defendant's mitigation case. Bellamy had a brother with schizophrenia and a grandson with hyperactivity or Attention Deficit Disorder. Maultsby "worked as a Detox nurse, doing mental health counseling and people on substance abuse." Maultsby had also been diagnosed with obsessive compulsive disorder and would consequently "overly identify" with testimony from the defense expert.[130] McLaurin worked with at-risk teenage girls who had issues with drugs, alcohol, sex, and pregnancy. Recaldo Simmonds "aspired to become a psychiatrist" and, as a consequence, the State feared he would give psychiatric testimony particular weight.

The prosecutor passed numerous non-black venire members who had similar personal experiences and/or positive feelings about psychologists and psychiatrists, or other matters related to the defendant's mitigating evidence. The differential treatment of similarly-situated black and non-black venire members reveals this reason to be a pretext for race.

The State passed non-black venire member Elisa Woodard, whose mother had suffered from depression and sought treatment for that disorder. The State also passed non-black venire member Charles Stancil, whose aunt had been sent for treatment at Dorothea Dix Hospital.

evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

[130] Bollinger's affidavit offering explanations for the strikes of African-American venire members in *Maness* omits any mention of Maultsby. This may have been an inadvertent omission. In the alternative, the prosecution may have reviewed the reasons proffered for striking Maultsby and realized they were not race-neutral insofar as they applied equally to non-white venire member Forti. The facts recited here about Maultsby's purportedly objectionable characteristics are taken from the *Batson* colloquy following defense counsel's objection to the strike of Maultsby.

Michael Hardison had a relative who suffered from depression and his son had friends with ADD. Mary Ganus, who was later seated on the jury, had a daughter who was a teacher and worked with students with ADD. Ganus had talked with her daughter about these children and how mental health treatment helped them. Joyce Inman was also seated on the jury. Inman had friends with children diagnosed with ADD. She would see them regularly at church. The State passed non-black venire member Jennifer Forti, who worked in a physician's office, had a brother and niece who suffered from Attention Deficit Hyperactivity Disorder, and had herself been treated by a psychologist and prescribed medication for her mental health condition.

The State also passed non-black venire members who had professional connections to psychology or psychiatry. Deborah Delsorbo had studied psychiatric nursing. Kenneth Boren was a nurse who worked with psychiatrists and psychologists on a weekly basis. He had also studied psychology or psychiatry as part of his training. He had worked with patients who had ADD and likely had administered Ritalin during his career.[131]

African-American Venire Member Altrea Jinwright: In *State v. Jeffrey Kandies*, tried in Randolph County in 1994, the State peremptorily struck African-American venire member Altrea Jinwright. The defense lodged a *Batson* objection at trial, which was overruled.[132]

At trial, Garland N. Yates and Beth Toomes were the prosecutors. Yates has provided an affidavit purporting to explain the State's strike of Jinwright. The affidavit asserts that Jinwright was excluded from jury service in part because "she had done extensive work with three to four

[131] *State v. Maness*, Vol. 7, Tpp. 742-43 (Hardison), 893 (Ganus); Vol. 10, Tpp. 1263 (Stancil), 1365 (Inman); Vol. 16, Tpp. 2022-23 (Boren), 2054-55 (Maultsby), 2061 (Delsorbo); Vol. 17, Tpp. 2128-33, 2148-50 (Forti); 2219 (Woodard).

[132] The trial court's finding was upheld on appeal. *State v. Kandies*, 342 N.C. 419, 434-38 (1996). Kandies pursued his *Batson* claim in post-conviction proceedings and the United States Supreme Court remanded the case for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). *Kandies v. Polk*, 545 U.S. 1137 (2005). The claim is still pending in federal court.

year old children, the age of the victim in the case." Yates also claimed he "had doubts" that Jinwright "having worked with children in day care, could sit through that evidence and be able to pay close attention to it." The affidavit does not explain why someone who had worked with children would be unfavorable to the State in the case of a murdered child.

The voir dire transcript shows that Jinwright had worked for four months at Presbyterian Day Care. Since that time, she had worked at American Express and, at the time of trial, was employed as a housing counselor. Thus, the affiant's claim that Jinwright's work with children was "extensive" is an exaggeration and independent evidence of intent to mislead the Court.

While excluding Jinwright for her brief stint as a daycare worker, the State passed non-black venire members who had also worked with toddlers, albeit more recently and for longer periods of time. Read Spence was working as a teaching assistant at Greensboro Day School, a school for children pre-kindergarten through 12th grade. From 1988 to 1990, she was a kindergarten teacher at First Presbyterian Church and worked with four- and five-year-old children. Peggy Arrington, who sat as an alternate juror, had been working as the librarian at an elementary school for 21 years. The prosecution also accepted five non-black venire members with children near the victim's age. Rick Puckett had a five-year-old and two-year-old; Pamela Martin had a two-year-old; Michael Shields had a two-year-old and five-year-old; Maxine Shina had a two-and-a-half-year-old; and Rhonda Kinnecom had a three-year-old.[133]

F. Disparate Treatment: Miscellaneous

The cases below demonstrate that prosecutors throughout North Carolina have treated similarly-situated black and non-black venire members differently with regard to all kinds of seemingly race-neutral characteristics. These examples show, if you are African American, you

[133] *State v. Kandies*, Vol. I, Tpp. 114-15 (Jinwright); Vol. IV, Tpp. 1004-05 (Arrington); *see also* Jinwright, Spence, Arrington, Puckett, Martin, Shields, Shina, and Kinnecom Jury Questionnaires.

can never be too young, too old, or too gainfully employed to be excluded from capital jury service.

African-American Venire Member John Reeves: In *State v. Christina Walters*, tried in Cumberland County in 2000, the State peremptorily struck African-American venire member John Reeves. No *Batson* objection was made at trial. In his affidavit, Charles Scott offered that Reeves had been peremptorily struck because he "had been a juror in a federal bank robbery case in 1996 and that resulted in a hung jury." The State passed, however, white venire member Rebecca Honeywell, who was later seated. Honeywell had served on a state court jury on a charge of assault with intent and robbery and the jury had not reached a verdict after deliberations.[134]

African-American Venire Member Gail Mayes: In *State v. Keith Wiley*, tried in New Hanover County in 1999, the State peremptorily struck African-American venire member Gail Mayes. The defense lodged a *Batson* objection at trial, which was overruled.[135]

At trial, the case was prosecuted by John W. Sherrill and Phyllis M. Gorham. Todd H. Fennell did not participate in the *Wiley* trial but provided an affidavit regarding the State's decision to strike Mayes.

The affidavit asserts that the State struck Mayes in part because she was "on a jury that failed to reach a verdict." However, the prosecutor in *Wiley* passed non-black venire members Arnfelth Bentsen, Walter Simmons, John Youngs, Thomas Houck, and Martin Mathews, all of

[134] *State v. Wa*lters, Vol. B, Tp. 282.

[135] The trial court's adjudication of the *Batson* objection was limited to the statement, "At this point, it's overruled." The trial judge permitted the prosecutor to place his reasons for the strike on the record, but the court did not hear argument from the defense or the State. No *Batson* claim was raised on direct appeal. *State v. Wiley*, 355 N.C. 592 (2002). The facts and circumstances of Mayes' voir dire may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

whom had previously served on a jury. Significantly, the prosecutor asked not one of these non-black venire members whether the previous jury had reached a verdict. Houck was not asked about his jury service at all. The State also passed non-black venire member Stephen Dale who, like Mayes, had served on two prior juries. The prosecutor questioned Dale only about whether his most recent jury had reached a verdict.[136]

The State's marked lack of interest in whether non-black venire members had ever served on a deadlocked jury gravely undermines the credibility of the State's proffered reason for striking Mayes.

In addition, the record demonstrates disparate questioning and treatment of black and non-black venire members with regard to employment history. The affidavit asserts the State struck Mayes in part because of her "short work history." However, the record shows that the State passed non-black venire members with employment histories similar to Mayes' work record and, further, that the prosecutor did not question non-black venire members about gaps in their employment history and, in some cases, did not ask about work history at all.

Questions eight and nine on the jury questionnaire asked venire members about the nature of their work, name of employer, and dates of employment for their current position and employment over the past five years. On her questionnaire, Mayes said she had held her current position for two months, held her previous job for a year, and the job before that for four years.

Non-black venire member Brian Morrison had held his current job for a year and a half; in the previous four years, he worked for five different employers. The State passed Morrison after asking no questions about his employment history. Non-black venire member James Bahen had worked in his current position for about a year and a half; this was his only employment over

[136] *State v. Wiley*, Vol. I, Tpp. 79, 159 (Bentsen), 170-71 (Mathews); Vol. II, Tpp. 514-15 (Dale); Vol. III, Tpp. 613 (Simmons), 621-24 (Mayes) 773-74 (Youngs); Vol. IV, Tpp. 998-1004 (Houck); *see also* Houck Jury Questionnaire.
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the past five years. The State passed Bahen after confirming his current place of employment. Non-black venire member Leonard Cuthbertson retired three months before the trial. He described his employment history only for the previous three years, during which time he had held two jobs, one for two years and one for seven months. The State passed Cuthbertson after asking him no questions about his employment history.[137] The State was therefore not genuinely interested in striking venire members with truncated work histories, unless they were African Americans.

African-American Venire Member Lee Lawrence: In *State v. Terrance Bowman*, tried in Lenoir County in 1997, the State peremptorily struck African-American venire member Lee Lawrence.

Imelda Pate, who tried the case, has provided an affidavit concerning the State's strike of Lawrence. The affidavit asserts the State exercised a peremptory strike in part because

> Juror Lawrence had had sporadic employment in the past. She had just started working at Maury Guard in September 1996. Prior to Maury Guard, she had worked one year and three months in housekeeping at a local nursing home (Britthaven). Prior to her employment at Britthaven, she had been employed for two and one half years at Barnett Southern.

The State accepted three white venire members with work histories similar to Lawrence. As to the assertion that Lawrence "had just started" at her current job in September 1996, the State passed the following white venire members: Sybil Pate, who started her current job at a cafeteria in November 1996; David Chambers, who wrote on his questionnaire that he was employed since August 1996 at a construction company but on *voir dire* said he was self-employed as an industrial pipe fitter; and Gary Adams, who started his current job as a driver at U.S. Food Service in April 1996.

[137] *State v. Wiley*, Vol. II, Tpp. 457-60 (Morrison); Vol. III, Tpp. 613-14 (Bahen), 617 (Cuthbertson), 620-21 (Mayes); *see also* Bahen, Cuthbertson, Mayes, and Morrison Jury Questionnaires.

As to prior employment, the State asked white venire member Adams how long he was at his previous job and he said, "A couple of years maybe, something like that." Following this vague answer, the State did not ask any questions regarding that or any of Adams' prior jobs. Unlike Adams, African-American venire member Lawrence was questioned about her current job, her prior job, and her job prior to that. Moreover, unlike Adams, Lawrence knew how long she had worked at each.

Additionally, the State did not question white venire member Chambers regarding his prior employment, notwithstanding his admission on *voir dire* that, contrary to what he wrote on his questionnaire, he was self-employed. It should also be noted that the State did not appear to doubt Chambers' veracity or otherwise require Chambers to explain the inconsistency between his answers on *voir dire* and his questionnaire. This stands in stark contrast to the State's extensive questioning of Lawrence regarding her work history.[138]

African-American Venire Member Broderick Cloud: In *State v. Errol Moses*, tried in Forsyth County in 1997, the State struck black venire member Broderick Cloud. No *Batson* objection was raised by the defense.

Vince Rabil prosecuted the case at trial. Patrick Weede has prepared an unsigned, unsworn statement purporting to explain the strike of Cloud. The statement asserts that the prosecution struck Cloud in part because he worked for the *Winston-Salem Journal* distributing newspapers to carriers. Cloud was not involved in any way in the content of the paper. The affidavit fails to explain what about Cloud's job made him a poor juror for the State.

The State's concern about Cloud's employer is entirely suspect given the fact that the prosecution passed Rene Dyson, a non-black venire member, who also worked for the *Winston-*

[138] *State v. Bowman*, Vol. 2, Tp. 245 (Chambers); Vol. 4, Tpp. 621-22 (Adams), 645-46 (Pate); Vol. 6, Tpp. 1001-04 (Lawrence); *see also* Chambers Jury Questionnaire.

Salem Journal. Dyson worked in the circulation department.[139]

African-American Venire Member Forrester Bazemore: In *State v. Maurice Parker*, a case that was capitally-tried in Cumberland County in 1998, the State peremptorily struck African-American venire member Forrester Bazemore. The defense objected under *Batson*. The prosecutor said that it was because the juror was close in age to the defendant.

The trial judge noted that Bazemore and non-black venire member John Seymour Sellars, already passed by the State, shared the same birth date. Although the prosecutor quickly supplemented her original reason with others, the trial judge ruled that the prosecutor's purported reason was pretextual.[140] This trial judge's finding is evidence that the State's strike of Bazemore was based upon racial considerations.

African-American Venire Member Shannon Smith: In *State v. Al Harden*, tried in Mecklenburg County in 1994, the State peremptorily struck African-American venire member Shannon Smith. The defense lodged a *Batson* objection.[141]

Gentry Caudill, Thomas Porter, and David Maloney prosecuted the case at trial. Anna Greene has provided an affidavit and claims the State struck Smith in part because she was very young. The record shows that Smith was 23 years old.

The prosecutor accepted two white venire members who were younger than or the same age as Smith. Michelle Canup graduated high school in 1990, making her 22 years old at the

[139] *State v. Moses*, Tpp. 255-256 (Dyson), 504-505 (Cloud).

[140] The voir dire transcripts relating to the *Batson* arguments and ruling in *Parker* may be found in *State v. Parker*, Vol. III, Tpp. 443-455.

[141] The trial court overruled the objection. *State v. Harden*, Vol. III, Tp. 733. The *Batson* objection as to Smith was addressed on direct appeal, but the North Carolina Supreme Court did not consider the comparisons of similarly-situated white venire members presented here. *State v. Harden*, 344 N.C. 542, 557-59 (1996). Regardless, the facts and circumstances of voir dire may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

time of trial. Diamondo Katopodis graduated college in the summer of 1993, making her either 22 or 23 years old at the time of trial. This proves that the prosecutor was not actually concerned about potential jurors' age.[142]

African-American Venire Member Kenneth Finger: In *State v. John Elliot*, tried in Davidson County in 1994, the State struck African-American venire member Kenneth Finger. The defense did not object under *Batson*.

Gregory J. Brown has provided an affidavit proffering supposedly race-neutral explanations for the strike of Finger. Brown was not involved in the trial, wherein the State was represented by Garland N. Yates and Warren McSweeney.

The affidavit asserts that the State struck Finger in part because he was not married and had never been married. According to the affidavit, because the victim was two years old, "the State would generally want a trier of the facts who had experience with family and children. A juror with no marital background would not have life experiences that would relate to child abuse and would be a proper juror to excuse through use of a peremptory challenge."

The State passed six similarly-situated non-black venire members. Like Finger, Robert Bryant, Martha Sink, and Kristie Fisher were unmarried and had never been married. The State also passed two white venire members who were married but had no children: Dawn Johnson and Kristie Oxendine. The State also passed Freddie Dorsett, who stated that he was unmarried and was never asked if he had ever been married or whether he had children.[143]

African-American Venire Member Rochelle Williams: In *State v. Roland Hedgepeth*, a resentencing trial in Halifax County in 1997, the State, represented by Robert Caudle, struck

[142] *State v. Harden*, Vol. II, Tp. 690 (Smith); Vol. III, Tp. 764 (Canup); Vol. IV, Tp. 1349 (Katopodis).

[143] *State v. Elliot*, Vol. III, Tp. 241 (Johnson); Vol. IV, Tpp. 404 (Bryant), 483-84 (Sink), 535 (Dorsett); Vol. VI, Tpp. 819 (Oxendine); Vol. VII, 995 (Fisher).

African-American venire member Rochelle Williams. Melissa D. Pelfrey has provided an affidavit proffering supposedly race-neutral explanations for the strike of Williams.

The affidavit claims that Williams was struck in part because she did not have "a lot of community involvement." Presumably, the State had reviewed Williams' juror questionnaire and noticed that she answered "no" in response to questions such as "are you a member of a church?" and "do you belong to any business or social clubs or organizations?"

The questionnaire provided to jurors in this case contained five such questions, and Williams did indeed answer "no" to all five. However, the State also passed three non-black venire members with identical responses: Anthony Hux, Freddie Ezzell, and Rachel Reid.[144]

African-American Venire Members Marilyn Richmond and Jay Whitfield: In the 2000 Cumberland County case of *State v. Christina Walters*, the State struck African-American venire members Marilyn Richmond and Jay Whitfield. The defense did not lodge a *Batson* objection at trial.

One of the trial prosecutors, Charles Scott, has provided an affidavit. The affidavit claims that Richmond was struck in part because she "worked with 'wanna be' gang guys." As for Whitfield, the affidavit says the State struck him because he "knew some gang guys from playing basketball." At the hearing, one of the other trial prosecutors, Margaret Russ, testified. Russ said she excused Richmond because of her connections to gang members. Russ asserted that Richmond "knew at least of one" of Walters' codefendants. Similarly, Russ testified that Whitfield's gang contacts led her to strike him.

The record shows Richmond worked with adolescents as a substance abuse therapist. She explained that "quite a few of my clients profess to be gang members." Walters' codefendant, Paco Tirado, was a client at the mental health center where Richmond worked. She

[144] *See* Ezzell, Hux, and Reid Jury Questionnaires.

knew him by name but had never spoken with him. Asked by the trial judge whether she knew him or just knew he was a client, Richmond stated, "I just know that he was a client there at the same time I was employed there." Richmond was asked whether her work might in any way enter into her decision-making. Richmond said, "No, it wouldn't."

With respect to Whitfield, the record shows that the group of individuals he occasionally played pick-up basketball games with included some possible gang members. Whitfield's contact with these individuals was limited to the basketball games. He thought they were involved in gangs because he had overheard them talking about it. Whitfield did not indicate that he had any direct interactions or conversations with these individuals regarding their potential gang activities. Like Richmond, Whitfield testified that knowing those people would not affect his ability to be fair

Gang affiliation would seem to be a reasonable, race-neutral reason for excluding potential jurors in this case of gang-initiation murders. However, the State's disparate treatment of black and non-black venire members reveals the explanation to be pretextual. The State accepted two non-black venire members with connections to gang members that were at least as strong as those of Richmond and Whitfield.

The State accepted non-black venire member Tami Johnson, who stated during voir dire that in basic training she was "good friends with a girl who was in a gang." Johnson said, "[I]t's basic training so – you bond with your bed buddy. So she was from Fayetteville, too, so we bonded just during that time. But I don't remember her name, and we've both been stationed at different places, so I haven't kept in touch with her." When asked whether the friend told Johnson about gang activities, Johnson replied, "Not really." Johnson also testified that, when she was in high school, she met people at parties who were in gangs.

The State also accepted non-black venire member Penny Peace. Peace had a friend from work who was a single mother. Her friend's son was involved in a gang and he had been sent to a detention center. Peace's son and her friend's son had played ball together in the past, before her friend moved away. Asked whether this situation would enter into her decision-making and cause her to be unfair to either side, Peace said, "I don't think so."[145]

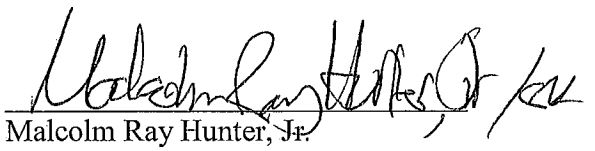
The State's acceptance of Johnson and Peace and decisions to strike Richmond and Whitfield illustrate racially disparate treatment of similar venire members. The State's proffered explanation with respect to Richmond and Whitfield cannot be accepted as a credible race-neutral justifications.

XII. Conclusion.

The case examples discussed in this brief show that prosecutors throughout North Carolina and in Cumberland County have treated African-American venire members differently because of their race. These examples constitute evidence that the State has provided supposed race-neutral reasons for peremptorily striking African-American venire members that are not credible and has offered these reasons as a pretext for the use of race as a basis for exercising peremptory strikes. These case examples therefore constitute evidence that race has been a significant factor in prosecution decisions to exercise peremptory strikes, and that prosecutors have exercised peremptory strikes intentionally and consciously on the basis of race.

[145] *State v. Walters*, Vol. B, Tpp. 246-52 (Richmond, Peace, and Whitfield); Vol. C, Tpp. 391-95 (Johnson).

Respectfully submitted, this the 9th day of November, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to N.C. Gen. Stat. § 15A-1420(b1)(1), I caused to be served a copy of the foregoing document by first class mail or hand delivery, and by electronic mail, upon:

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This the 9th day of November, 2012.

Malcolm Ray Hunter, Jr.

North Carolina Senate
SB 306 – Capital Punishment/Amendments
Debate on 2nd and 3rd Readings
April 3, 2013

President Pro Tem Berger: Senate Bill 306, the Clerk will read.

Reading Clerk: Senate Bill 306, Capital Punishment/Amendments.

President Pro Tem Berger: Senator Goolsby is now in the chamber and is recognized to explain the bill.

Senator Goolsby: Thank you, Mr. President. Ladies and Gentlemen, the legislation that is before you today…Despite having 152 inmates on death row, our State has not conducted an execution since 2006. This is due to a slew of legal challenges that have resulted in a *de facto* moratorium on the death penalty in our State, which is the law of the land. We have a moral obligation to insure that death row criminals convicted of the most heinous crimes imaginable finally face justice in North Carolina. Victims' families have suffered far too long, and it's time to stop the legal wrangling and to bring them peace and the closure they deserve. We owe it to the families of murder victims across North Carolina to impose punishment that our laws require, nothing more, nothing less – without prejudice and without passion.

The bill before you acts to reduce that uncertainty and to ensure that capital punishment is administered in a constitutionally sound and humane manner in our state. While the measures in this law won't change the execution landscape overnight and they certainly won't rush the legal process that our law requires. They will provide the certainty that our law currently lacks.

Most importantly, though, I believe these measures will see to it that justice is served, both for the families of the long-silent victims, for the jurors of North Carolina who did their solemn duty, and for our district attorneys who prosecuted these cases. Now it is time that we do ours.

Let me tell you what Senate Bill 306 does. First, it protects doctors, nurses and pharmacists. You will see in the first sections it allows doctors, nurses and pharmacists to participate in executions without fear of punishment. If you will recall, the North Carolina Medical Board back in 2007 issued a statement that would have prohibited doctors from participating in executions even though our state law requires a doctor to be present. The North Carolina Supreme Court later ruled that the Board could not punish doctors who participated in executions, and what this bill does is it codifies that Supreme Court ruling.

Next, the law clarifies who initiates the execution process once legal appeals are exhausted. This bill would give clear direction to our current Attorney General - and all future Attorney Generals – to notify the Department of Public Safety when legal appeals are exhausted for a particular case. That does not happen now.

It also provides flexibility to insure that humane conditions and constitutionally sound execution protocols are observed in our state. What this bill does specifically is it grants the Secretary of the Department of Public Safety the flexibility necessary to insure North Carolina's lethal injection protocol remains both humane and constitutionally sound.

Next, it fosters improved dialogue between the Attorney General and us the General Assembly. The bill directs the Attorney General to provide us with periodic updates on the status of post-conviction capital appeals in this state. For those of you who were at the press conference that we did with the District Attorneys a couple of weeks ago, you had the press asked me a question about how many people are ready for execution. I could not answer that question. One of the DAs who has a man on death row who he doesn't think has any appeals pending did not know when that individual should be executed under our laws. He also had not appealed under RJA. We currently don't have anything in our state that sets up this kind of protocol. This bill does that.

It also insures heightened training of the execution professionals. Our law requires the execution teams to be trained periodically. What this bill does is it requires the Department of Public Safety to update the General Assembly periodically on the status of this training. The net effect of the requirement is to insure that professionals asked to participate in judicial executions have the fullest training available to insure the execution's compliance with all applicable statutory and constitutional mandates.

It also eliminates the Racial Justice Act, which I would contented to you is nothing but an end run-around capital punishment in North Carolina. The bill repeals RJA while reaffirming the various multiple avenues of appeal available to insure a fair hearing in any cases of race discrimination claims in capital cases.

And lastly, it lessens the burdens on our district attorneys. The bill directs the Attorney General, upon the request of a District Attorney, to assume primary responsibility for any litigation related to RJA claims, both existing claims and any claims challenging the repeal, as mandated in this bill.

I'll be happy to take any questions.

President Pro Tem Berger: Further discussion or debate.

Sen. McKissick: Mr. President…

President Pro Tem Berger: Senator McKissick, for what purpose do you rise?

Sen. McKissick: To speak on the bill.

President Pro Tem Berger: You have the floor.

Sen. McKissick: This bill in its totality deeply concerns me. One of the things Senator Goolsby did last year was to bring before us a bill dealing with the modification of the Racial Justice Act.

At the time he came before us, he stated that the time limits that they were going to impose, the conditions that they were going to require, in his opinion, made it a fair, a reasonable and a balanced bill. That was a year ago. Back then I believed the goal was basically to repeal it, but he said no – it wasn't to repeal it; it was to make it fair, reasonable, balanced.

I might ask you, what's happened since that time that would have caused him to reach a contrary conclusion? And that's simply that we've had another case involving the Racial Justice Act that was decided in Cumberland County, North Carolina. And for some of you new to this chamber that may not be familiar with the Racial Justice Act, I'll provide a little bit of a historical overview.

Back when the Racial Justice Act was passed, those that supported the death penalty, as well as those that were opposed to the death penalty, came together to say that when that ultimate penalty was imposed by our judicial system that it should be free of racial bias. We all wanted to restore integrity and confidence in our criminal justice system – that's what the goal was. If we look at the evidence that existed before then, if we have looked at the mountain of evidence that's accumulated since then, we know a number of things that we've now discovered.

First of all, there's by a systematic exclusion of African Americans serving on juries in death penalty cases. We know that if you are African American and you're part of that potential jury pool that prosecutors in this state have basically decided that they don't want you on a jury. And they exclude you - strike you because of your race. That's wrong. It's unconstitutional and it's repugnant – totally repugnant. Just a few weeks ago we went up to the old State Capitol and we sat there and we talked about the Bill of Rights, how those cherished liberties that it articulated were things that were close to our heart, near and dear – the principles that embodied everything this country represents and this state represents. One of the provisions in the Bill of Rights is the entitlement to a jury of your peers in this type of a criminal case. It's one of the things our fore founders thought was absolutely imperative. And one thing we did with the Racial Justice Act was to send a strong message to the prosecutors in this state – when you go out and you pick your juries, don't exclude people based upon race. It's 2.5 times more likely that you're going to be excluded if you're African Americans. That's what's happening in this state consistently.

There was discussion about in the Racial Justice Act the use of statistical evidence. Well, in the case that was decided down in Cumberland County most recently, underneath the new law – the new law that this body passed last year – statistical evidence was not one of the things that the judge looked at and made his decision based upon. His decision – I have a copy of it right here. See it? It's over 200 pages - over 200 pages. One of the things he says: "The court has now heard nearly four weeks of evidence concerning the central issue in these cases – whether race was a significant factor in the prosecution's decision to strike African American [inaudible] members in Cumberland County at the time the death penalty was sought and imposed."

He goes on to say, and he sites his conclusion: "This conclusion is based primarily on the words and deeds of the prosecutors involved in defendants' cases, in the writings of prosecutors long buried in case files and brought to light for the first time in this hearing. The court finds powerful evidence of race-consciousness and race-based decision making. A Cumberland County prosecutor met with law enforcement officers and took notes about the jury pool in the

Augustine case. These notes describe relative merits of North Carolina citizen respective jurors in racially-charged terms and constitute unmistakable evidence of the prominent role race played in the State's jury selection strategy."

It goes on to talk about one prosecutor in particular who had be charged by a trial court previously with violating the constitutional prohibition against discrimination in jury selection. She would have a little cheat sheet she just used to systematically exclude African American jurors. That's what we're talking about.

He goes on to say the criminal justice system sadly is not immune from these distorting influences. He discusses conferences held by the North Carolina Conference of District Attorneys and what their goal was: not to introduce fairness into the court room but to circumvent the constitutional prohibition against race-selection in a jury-selection process – to teach them how to get around the law. And why? Because they didn't think African Americans would likely come back with a conviction. And they're wrong. If people are guilty of things that they're charged with and the evidence is overwhelming, then fair-minded African Americans will come back and find that person guilty. The fact that they look like me, the pigmentation of their skin is like me, doesn't mean they are going to be unfair. They have a right to serve on that jury. That constitutes a jury of their peers.

And I can guarantee you today for those that are not like me in this chamber, if you were in fact on trial, charged in a capital case, and every Caucasian that came along that was a part of the jury pool, that could potentially serve was stricken one by one by one by one by one, and they told you that you had a jury of your peers in the end, and there was this systematic history of discrimination, how would you feel? What would you think?

We've come a long way in this country but there are still vestiges of race discrimination that continue to exist today. We all know it, we all see it, we all recognize it despite the fact that we may not want to admit it. It was for all those very reasons that the Racial Justice Act was passed. It was to make sure that when prosecutors sought the death penalty, that when juries decided to impose the death penalty, that it was free of racial bias – free of racial prejudices. That's a laudable goal. That's a commendable goal. That is not a goal that we should repudiate by the passing of this legislation that is before us.

If you look at Judge Weeks' decision it's pretty strong. It's pretty persuasive. It's not something we should bury. And you already have a law that's been on the books the last four years now. Don't assume there won't be litigation that goes on forever. It will be going on for quite some time, a lot of it at our own taxpayer expense. And that could even be avoided completely by letting this law stay on the books because if the cases don't have merit, then I trust our judges to strike them down – strike them down. And always remember that the only thing that would have happened under the Racial Justice Act, rather than that person being on death row, they would have stayed in prison for life without the possibility of parole. It's not a get-out-of-jail-for-free card.

And we talk about these capital cases as if they're fool-proof. Well since 1999, five people on our death row have left death row and were exonerated. We're not fool-proof. When we start

making decisions about capital punishment and the ultimate punishment that will be imposed for our judicial system, we should be exceedingly reluctant to do so. And why do I say that? The only thing you've got to do is watch CNN. The only thing you have to do is read the newspapers throughout this country month after month after month. What do we see? DNA evidence coming forth, people that were convicted, stayed in jail for 40 years and they've been freed because the jury got it wrong.

On a death penalty case, my friends, when they get it wrong, it's an execution. I don't want a governor posthumously saying, "Oh, we made a mistake. I'm sorry." Paying the family perhaps a little bit of money. More importantly, when that person is put to death, there may not be any cheerleaders left to cheer for them anymore, and you'll never know that the wrong man was charged, convicted and died for that crime. We should be exceedingly reluctant to go back and revisit all these conditions dealing with capital punishment in this state. We need to think about it in a serious, profound way and have meaningful dialogue and discussion. This shouldn't be something that we rush to judgment upon because, my friends, it could be your family, your friends, your neighbor who gets wrongly charged, wrongly convicted and may find themselves on death row. But for the twist of fates of luck and time, we don't know who among us and our friends and neighbors and networks may find themselves in that situation one day.

And yes, as the framers of our Constitution saw it, we're all entitled to justice with a jury of our peers hearing that case. And I want to know that perhaps a member of that jury looks like me. I think that's a fair and I think that's a reasonable expectation. That's an aspiration that we can all share, embrace, and more importantly – articulate. That's what the Racial Justice Act did. You don't want to think that because you're African American and the victim happens to be white that it's three times more likely that the prosecutor will seek the death penalty and that the jury will impose it. We cannot play to emotions; we cannot play to those worst parts of our core and our soul and our consciousness that may continue to harbor feelings of racial prejudices. We need to be above it all. We need our community to be above it all – our communities and our state to be above it all. We need to make certain that when that ultimate penalty is imposed in this great State of North Carolina, that racism does not taint that process. We can do that by keeping the Racial Justice Act on the books, not repudiating it – and continue to take a courageous moral stand, a noble stand for which North Carolina deserves high recognition for its efforts.

Sen. Kinnaird: Mr. President?

President Pro Tem Berger: Further discussion, further debate? Senator Kinnaird, for what purpose do you rise?

Sen. Kinnaird: To speak on the bill.

President Pro Tem Berger: You have the floor.

Sen. Kinnaird: Thank you, Mr. President. The death penalty has been a concern of mine for many years. I have been involved with death penalty legislation during my tenure in the Senate. Some years ago working with others in our Senate, we were able to pass a moratorium on the

death penalty. For those of you who were here for that debate, it will be remembered as the most meaningful heard in the Senate with each person articulating his deliberation process and speaking and voting his conscience. While it didn't pass the House, it led to measures that have made the system more fair and more just.

First, we prohibited the execution of the mentally retarded. This was significant because when the US Supreme Court took up that issue, they cited that states had prohibited such executions, calling it "evolving standards of decency." We then passed measures that helped to assure fair trials in capital cases, requiring expert witnesses for the defense, expert representation, complete discovery, a fair lineup. Most importantly we gave the district attorneys discretion to charge capitally. Since that time these cases have plummeted. I'm proud of that work. The imposition of the death penalty has dropped precipitously since those measures were passed such that last year no death penalties were awarded by the jury in North Carolina. I believe this reflects the feelings of the people of our state.

I was also instrumental with medical doctors in persuading the Medical Board that killing a person is inconsistent with their life-giving and life-sustaining mission. Apparently my colleague agrees with that, as this bill allows anyone - not a health professional - to administer the chemicals to kill the inmate.

I was also an author, with Senator McKissick, of the Racial Justice Act. The bill was a result of several studies that showed the unfairness of the imposition of the death penalty. We have on our desk a concern that that was not accurate, that those studies were not accurate, but I want to tell you the way that those studies were carried out. UNC law school graduates went into 100 counties' court houses and looked at every death penalty jury selection and the results. So you can argue with statistics – those percentages – but you cannot argue with their findings. And of course, what we found in addition is a poor defendant, a person from a rural area and finally the race of the defendant and the race of the victim will more often result in the imposition of the death penalty. And of course this is most dramatically reflected in jury selection.

The studies done after the passage of the Racial Justice Act reveal the role of racial bias in jury selection. In one case tried last year, the District Attorney's notes from a capital trial were found with explicit comments about the potential jurors' race.

Victims' families – Senator Goolsby says that those victims' families need closure and need justice, but not all victims' families speak in one voice. There is an organization called "Murder Victims Against the Death Penalty" and they are against this bill. They are against all killing, including by the State.

What difference does this make? We must have a system that is fair and untainted with racial bias. Over and over since I have been engaged in this debate I was told that there are numerous court reviews which guarantee that mistakes can't be made in imposing the death penalty. But what happened in those seven wrongfully convicted people? Over and over, appeal after appeal said the conviction was fair, but they were not fair.

What difference does all of this make? Dead is dead. Those with numerous court reviews were still wrongfully convicted. Those outside the system who believe in a fair and just system have found those seven innocent people on death row who were exonerated. And may I say that two of those prosecutors who hid exculpatory evidence in those cases - in one case - did not lose their jobs and were not even censored. But those seven people lost their lives, their family lost the years of their lives together. We cannot afford more wrongfully convicted people. We need safeguards.

The District Attorneys seem to feel that they are under attack, that this questions their competency, their integrity. I ask the District Attorneys to work with us for a fair and just system. We can all be proud when we have the most fair and just system possible. This bill does not do that, it takes that away. I ask that you vote against this bill. Thank you.

Woman: Mr. President?

Sen. Goolsby: Mr. President? Will the Senator yield for a question?

President Pro Tem Berger: Senator Goolsby, you have the floor.

Sen. Kinnaird: I yield.

Sen. Goolsby: Senator Kinnaird, can you tell the body how RJA impacts the guilt or innocence of the defendant on death row?

Sen. Kinnaird: Mr. Chair? What it impacts is a system of jury selection, and we know that guilt or innocence is decided by a jury. And we also know that an impartial jury – and that's the word in the Constitution – would reflect the people of the State. And that's why it's so important that we have impartial jury selection, and we know who picks the jury – the prosecutor and the defending attorney.

Sen. Goolsby: Follow-up, Mr. President?

President Pro Tem Berger: Senator Kinnaird, do you yield?

Sen. Kinnaird: I yield.

President Pro Tem Berger: She yields.

Sen. Goolsby: Senator, can you tell the body how RJA impacts the guilt or the innocence of the defendant who's on death row? How does RJA impact their guilt or innocence?

Sen. Kinnaird: Mr. President?

President Pro Tem Berger: You may answer.

Sen. Kinnaird: We will find out through trials, such as the two that have taken place, whether a person was perhaps – in these cases they were found guilty, that's not… but there are other cases where the jury that was constituted may very well have been biased and at that point it would affect the guilt or the innocence.

Sen. Goolsby: Last follow-up, Mr. President?

President Pro Tem Berger: Senator Kinnaird, do you yield?

Sen. Kinnaird: I yield.

President Pro Tem Berger: She yields.

Sen. Goolsby: Senator, isn't it a fact that the Racial Justice Act's impact on the guilt or innocence of the defendant on death row is zero? The only thing that can happen under Racial Justice is for a defendant to be taken off death row and placed life in prison. There is no impact. This is a cold-blooded, deliberative killer. And everything that you say beyond that is completely irrelevant. Am I not correct, ma'am?

Sen. Kinnaird: Mr. President?

President Pro Tem Berger: You may answer.

Sen. Kinnaird: They get a retrial and they can have an MAR. At that point we would start over again.

Sen. Goolsby: I'm sorry, Mr. President - one more question?

President Pro Tem Berger: Senator Kinnaird, do you yield?

Sen. Kinnaird: I yield.

Sen. Goolsby: Ma'am, have you read the Racial Justice Act and are you familiar that it is simply appealing on whether or not racial bias was used to put you on death row instead of for life in prison – that it has no impact on a Motion for Appropriate Relief or for any other type of appeal? It's not a constitutional appeal; it's one simply based on statistics? And it's used solely to get someone off death row and to put them in prison for life – it has nothing to do with their guilt or innocence whatsoever?

Sen. Kinnaird: Mr. President?

President Pro Tem Berger: Senator Kinnaird, you have the floor to answer.

Sen. Kinnaird: You are right within a certain parameter, but it can lead to further and that's what I think we need to consider.

President Pro Tem Berger: Senator Robinson, for what purpose do you rise?

Sen. Robinson: To speak on the bill.

President Pro Tem Berger: You have the floor.

Sen. Robinson: Thank you, Mr. President. And to the members of this body, I'm certainly not an attorney. I don't profess to be. I guess in this sense I'm probably one of the normal people. But I am certainly concerned about this being brought up again in this body. We all remember that in 2012 Senate Bill 416 Section 3(g) said that if the court finds that race was a significant factor in decisions to seek or impose a sentences of death in the defendant's case at the time the death sentence was sought or imposed, the court shall order a death sentence not to be sought or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without possibility of parole.

And since that time, we all should be aware of the findings. Let me cite a few of those. Black jurors have been intentionally excluded from jury service in capital trials. And this is evidenced information; you can have a copy. Four death row inmates have proven that qualified African Americans were intentionally excluded from their juries. All four were resentenced to life in prison without parole. And just as Senator Kinnaird said that we all should expect and we have a right, and I hope we're saying to the young people that are here that you have a right to be judged by a jury of your peers. I hope we're sending out the right message here.

It also says that defendants prove specific discrimination in their own cases. They also unearth evidence that prosecutors – and this is by testimony from prosecutors themselves, their own admissions before Judge Weeks – prosecutors remove blacks from juries and other cases for reasons such as that a juror attended Shaw University, was not a high school graduate, had law enforcement or military connections or lack of eye contact. Similarly situated white jurors were not dismissed for the same reasons. And then, as well, we find that since 1999 five innocent men were released from death row and had life in prison. And thence, many claims of innocence still have not been fully investigated.

A repeal of the Racial Justice Act would set us back in North Carolina. I believe that as citizens, and we've heard from people across the State, that folk want to believe that in this State in 2013 we all have the right to be judged by a jury of our peers, and that these folks who have been unfairly convicted without that opportunity have a right for the cases to be reheard. And therefore, we should not be revisiting this again. It's mean-spirited. It's unnecessary. It's even unethical. We have a lot of work to do in this body as opposed to pulling up issues that continue to divide this entire State and continue to put races of people against each other. That's not what North Carolina is about. And I really don't understand why we have colleagues here who want to do those kinds of things that inflict unjustly on one group of people. I ask you to vote against the bill.

President Pro Tem Berger: Senator Parmon, for what purpose do you rise?

Sen. Parmon: Thank you, Mr. President. To speak on the bill.

President Pro Tem Berger: You have the floor.

Sen. Parmon: Thank you, Mr. President. Colleagues, I won't repeat many of the facts that you've heard stated by some of my colleagues on the Racial Justice Act. I was a primary sponsor of the Racial Justice Act as a member of the House, and it took us many, many years to get to 2009 where we finally enacted the Racial Justice Act. And I just want to state here today that the Racial Justice Act is not about guilt or innocence; it's about fairness in our court system. Study after study has proven that our court system is flawed, and because of excluding qualified blacks from juries, even when the defendant was white, was discriminatory.

In 2012 I was also a member of the House when Representative Paul Stam amended the Racial Justice Act, and he stated as it passed that his amendment made the Act fair and balanced, and that it would not need any more work on that bill. But here we are today a few months later totally repealing the Racial Justice Act. I'm sort of disappointed as a member of this body that we refuse to recognize that racism is alive and well in our court system. And while we, as elected officials, may not want to acknowledge that, it is true.

So I want to ask you as colleagues, as members of this body elected by the public, are we willing to repeal this Act and not let there be a review of the possibility of injustice in our court system? I just want you to ask yourselves that. I think we would err on the side of making sure that fairness is afforded to every person that's in our court room, particularly in capital cases, because once you kill someone we cannot go back and get a bill to bring them back to life.

With that, Mr. President, I'd like to send forth an amendment.

President Pro Tem Berger: Do members have copies?

Sen. Parmon: Yes.

President Pro Tem Berger: Send forward your amendment. Okay, we have it up here. The Clerk will read.

Reading Clerk: Senator Parmon moves to amend the bill.

President Pro Tem Berger: Senator Parmon has the floor to explain the amendment.

Sen. Parmon: Thank you, Mr. President and members. This amendment would simply allow the Racial Justice Act portion of Senate Bill 306 to be removed so that members who are in favor of the death penalty can vote on the death penalty and support the Racial Justice Act. I've heard time and time again that people support the death penalty but also support the Racial Justice Act because they want to ensure that people we may kill in the future were given a fair trial. I ask you to support the amendment. Thank you.

President Pro Tem Berger: Further discussion or debate on Amendment 1.

Sen. Goolsby: Mr. President?

President Pro Tem Berger: Senator Goolsby, for what purpose do you rise?

Sen. Goolsby: To speak on the amendment.

President Pro Tem Berger: You have the floor.

Sen. Goolsby: I'd like to point out in this section of the law that it does reiterate all the rights available. And I've heard two of the members – the last two – speak about unfairly convicted, about minorities being excluded from juries, and again, as I questioned Senator Kinnaird, all RJA does is attempt to take a cold-blooded convicted killer off death row and give them life in prison. RJA does not address in any way the murder and the people that have totally been forgotten about in all of these discussions. As I heard Senator Kinnaird talk about how wonderful it was to deal with the death penalty and to do all that we could and the grand debates, I keep thinking about the families of the murder victims that I've met. I met Fayetteville police officer Roy Turner's family. He was murdered in cold blood. His murderer appealed under RJA and right before Judge Weeks made his ruling and retired, never to face the voters, he took the murderer of officer Roy Turner, Fayetteville Police Department, off death row. Now here's the ultimate irony – Roy Turner was black; his murderer was black. And that's the result of RJA.

One more even crazier - for those of you who were at the JI committee meeting last week when Senator Harrington's District Attorney, Locke Bell, appeared and stood up and said, "I'm accused of being a racist. I'm a white district attorney and the three people I put in Gaston County on death row have accused me of being a racist – the murderers have – all three of them. And the evidence is that I put only the people of one color on death row." Guess what the color [is] of the three murderers accusing Locke Bell, a white man, of racial discrimination? Those three murderers are all white. They're accusing the white district attorney under the Racial Justice Act for only seeking the death penalty against white men. And Locke said, "I looked at all the cases, and the only people that I thought warranted the death penalty, black or white, were these three white men. Racial Justice Act, because it uses frequency, allows those individuals to appeal under the Racial Justice Act and claim that they've been discriminated against. Folks, the Racial Justice Act is bad law when you have those kinds of results.

The last person I'll tell you about is Marcia Howell. She is the mother of murder victim Yvette Howell. Those of you who were at the JI meeting, you heard her mother's impassioned plea to please put this to an end. "It is time for my daughter's murderer to meet his Maker." He was sentenced back in 1994 to death row and he has appealed under RJA. Yvette Howell was a black 17-year-old woman who was murdered with a shotgun blast by a black criminal who has appealed under RJA. It is wrong. It needs to be repealed and I ask you to vote against this amendment.

Sen. McKissick: Mr. President?

President Pro Tem Berger: Further discussion or debate on Amendment 1? Senator McKissick, for what purpose do you rise?

Sen. McKissick: To speak on the amendment.

President Pro Tem Berger: You have the floor.

Sen. McKissick: First, I believe it's a good amendment. We need to pull this out. And secondly, I heard Senator Goolsby speak about a variety of cases. There's one way to resolve those issues – let the judge in Superior Court who's going to hear these Racial Justice Act claims hear them one by one. If they have validity, the person will stay in jail for life without the possibility of parole. If they lack validity, they will be stricken down and they will remain on death row. It's very simple. That's what we do – we let judges hear the cases. These claims are claims that a Superior Court judge can hear and render an appropriate decision based upon the facts of that case. No two cases are alike – never have been, never will be. Different defendants, different victims, completely different circumstances.

One thing we know is that race ought not to be a factor in these cases. And if we look at Judge Weeks and we look at his decision and he talks about the systematic exclusion of African Americans from these juries and he states, "The court finds no joy in these conclusions. Indeed, the Court cannot overstate the gravity and the somber nature of these findings, nor can the Court overstate the harm to African Americans and to the integrity of the justice system that results from racially discriminatory jury selection practices that purposely exclude black persons from juries undermines public confidence in the fairness of our system of justice." That's what we're talking about. I'm not going to tell you every claim that's been filed under the Racial Justice Act is valid. If they don't have validity, they ought to be stricken down. But the problem is…

Sen. Goolsby: Would the Senator yield for a question?

President Pro Tem Berger: Senator McKissick, do you yield?

Sen. McKissick: I do not.

President Pro Tem Berger: He does not.

Sen. McKissick: The fact of the matter is the facts of each case will determine the outcome in each case. It's not a broad brush answer to every case, but when it's appropriate – that person stays in jail for life without the possibility of parole. What we passed was commendable. What we passed sent a message to our prosecutors. Don't sit there and let racial bias come into the court room. And the last thing we need is seminars to tell them how to get around the constitution law.

Sen. Goolsby: Will the Senator now yield for a question?

President Pro Tem Berger: Senator Goolsby, for what purpose do you rise?

Sen. Goolsby: I'm sorry, to see if the Senator now yield for a question.

President Pro Tem Berger: Senator McKissick, do you yield?
Sen. McKissick: No.

President Pro Tem Berger: He does not yield. Further discussion or debate on Amendment 1 to Senate Bill 306. Senator Nesbitt, for what purpose do you rise?

Senator Nesbitt: Thank you, Mr. President. To speak on the amendment.

President Pro Tem Berger: You have the floor.

Senator Nesbitt: Thank you, Mr. President. Members of the Senate, I rise today to point out what all of you know. This is your opportunity to vote to get the Racial Justice Act out of this bill so you can support the death penalty. Obviously this bill was put together like it was so that you had to vote to repeal the Racial Justice Act in order to vote for the death penalty. And this gives you an opportunity to vote for the death penalty and get this out of the way if you care, as we do, about racial bias in death penalty cases.

I've listened to the debate, and here's kind of what we're about. I'm an officer of the court; all of us lawyers are - Judges are; DAs are. And we are bound to make that system fair and impartial and balanced and to do everything in our power, I think, to earn the public's respect for the court system. We don't like it when the system fails, but we're all taught from the time we start studying law that it is not a perfect system and that injustice can occur. The person that should win civil cases doesn't always win them; they can go either way. We've got a little saying - you go to a jury, it's kind of like jumping out of a burning building. You go to a jury when you've got no other place to go because you lose control when you do that and bad things can happen to good people.

And I think we're sitting here…We're trying to do what the court system has always done, and that is – give it the ability to clean up its own mess. We did that with DNA. When that came along, you know, some people thought it was snake oil and we didn't know what it was and we didn't know if it was really pure. You know they used to have breathalyzers and said they were perfect and we found out they weren't. So, we didn't know what to do, but we adapted and we started accepting scientific evidence. And we found out that we had totally innocent people on death row. Some had been there in the tens of years waiting to be executed that were totally innocent.

We did another thing - we realized if those people are innocent, there may be some more out there. Justice I. Beverly Lake who was a Republican led us in an effort to create the Innocence Commission. They go and look at cases to determine if somebody else is in prison that shouldn't be there and have their case heard so that so that if in fact they are innocent - they must prove their innocence – you can get them out of there. They let two people who had been convicted in my county of Buncombe out of prison last year because they were innocent, and they were charged in a home invasion. This is how we clean up our mess. This is how we have a court system that keeps the respect of the public, because we are willing to admit it's not perfect. We are willing to admit mistakes are made and fix it so going forward it doesn't happen again, and, to the extent that you can, remediate it.

If you want to see something that you can't fix, wait till one of these people who've been in prison for 12 or 15 years on death row appear before one of your committees and say that they are not angry at anyone. It's the most humbling experience you'll have in your life that someone can have their life taken away and not be bitter about it and be willing to go on with life, but they can't sleep at night, etc., etc., etc. If you can imagine being in prison as an innocent man sitting there waiting for the death penalty. And we passed the Racial Justice Act for a simple principle. Is racial bias playing a part in people being put to death? If it is, then we don't want them put to death - we want them to have life without parole. They're probably murderers, their probably the most despicable people in the world. So we want to keep them there with life without parole, but just on the outside chance that they got the death penalty because of racial bias, we don't want them executed.

Now to some of you all that might look like good versus evil and all this stuff. To those of us that practice in the courts, we don't want the courts to impact society in that way. And racial bias can occur in any number of ways. A DA can decide whether to charge a death case or not. Well, you're probably not going to prove that one way or another because only the DA knows. Then you pick a jury. When we passed the Racial Justice Act, we did not know what we would find when we looked a picking juries. You've been read what the judge found. He found hand-written notes from the DAs that they were using race to throw people off the jury.

Now, the genie is out of the bottle. When we passed the Racial Justice Act, none of us knew that was going on. It can be any number of other things during the trial. Well, we told the courts, "look at these cases and see if it's there. If it is, give them life without parole and let's go forward and sin no more." And we found that there is – I believe in virtually every case that's been heard. I haven't kept up with how many have been heard, but in the ones that I've heard about they have found this problem. Now the answer apparently today is – "Uh, I don't want to talk about it anymore." It's kind of like the bill we had last year to stop the sea level rise by introducing a bill – I just don't want to talk about that anymore, so I'll pass a bill and won't talk about it anymore. The sea's going to keep rising and we're going to bury our heads in the sand.

I was reading a clip today where apparently there's some theory now that we can create a state religion because the Supreme Court doesn't matter in North Carolina and we can do what we want to, or something like that. You can't just do what you want to. And I don't know what's going to come of all this, but you can't put this genie back in the bottle. And I'm telling you, we gave these people a right to be heard. The ones that have been heard, they found a problem, they remedied it. The world is still as safe as it was before the hearings. And we need to continue to let the court clean up this mess.

I said when we passed this bill that I hope that no one got relief under this bill. That would mean that we didn't have a problem. That's what we all wanted to find. That's not what we found. And the best thing we can do…You all amended the bill last year the way you wanted it and I thought we were done and the cases would move forward. And the way to allow that to happen and for us to clean up this mess in a timely and in an orderly fashion is to pass this amendment, get this out of the bill and then you can proceed on with what you want to do with this bill, the main thrust of this bill which has to do with the death penalty. And I would ask you to please

consider this amendment and vote for it and give us a chance to clean up the court system so that we can earn the respect of the people. The only way the courts can survive is if they have the respect of the people who stand before them.

President Pro Tem Berger: Further discussion or debate on Amendment 1? Senator Meredith, for what purpose do you rise?

Sen. Meredith: Mr. President, to speak on the amendment.

President Pro Tem Berger: You have the floor.

Sen. Meredith: Thank you, Mr. President. Members of the Senate, I've listened to the debate here and we continue to use Cumberland County as an example of how this is a poster child for doing the right thing, to look at the facts and based on those facts make a decision. I'd like to let the members of the Senate know, if you don't know, a little bit about the case in Cumber land County. The District Attorney, with all the facts that he needed, went to Judge Weeks and asked himself to recuse himself from the case based on his prior knowledge and being involved in the case prior to it coming back to his court.

Now I would share with you all, if everything that was stated here about racial bias and the facts being as they are in this case, why did Judge Weeks not recuse himself after being asked by the local district attorney, all the facts being presented to him, why did he feel led to no recuse himself? If everything was there that needed to be there and racial bias could be proved and was proved, why did Superior Court Judge Weeks decide that he needed to hear the case?

That is what I would like to share with the Senate, that if we're going to be fair and equitable and each one of these case is going to stand on their own then why do we need a judge, a minority judge who knew the facts prior to this case – why did he need to hear the case? Why could he not recuse himself? And with that said, I cannot support this amendment because of that fact alone. If each one of these cases can stand on their own, let them stand on their own. But I think that is a poster child for them not being able to stand on their own, because a judge would not recuse himself after being asked to recuse himself. So I cannot support this amendment. This is not something we need to support in this chamber, and I'm glad that I'm here at this moment, at this time to be able to vote against this amendment and vote for this bill. Thank you and I appreciate y'all's time.

President Pro Tem Berger: Further discussion or debate on Amendment 1? Hearing none, the question before the Senate is the passage of Amendment 1 to Senate Bill 306. All in favor of the amendment will vote aye; all opposed will vote no. Five seconds will be allowed for voting. The clerk will record the vote…Fourteen having voted in favor of the amendment and 33 against the amendment, Amendment 1 to Senate Bill 306 fails and Senate Bill 306 is back before you on second reading. Further discussion, further debate?

Sen. Bryant: Mr. President?

President Pro Tem Berger: Senator Bryant, for what purpose do you rise?

Sen. Bryant: To debate the bill.

President Pro Tem Berger: You have the floor.

Sen. Bryant: Members of the Senate, Mr. President, as a constitutional officer myself I want to say that I am disappointed that our District Attorneys are determined to push us to proceed to cover up the actual deeds and behaviors and actions that have been unearthed in the cases that have been heard so far on the parts of their staffs in implementing and perpetuating racial discrimination in these particular cases where that has been found.

While it is true that the symptoms of this problem were indicated to us by the frequencies and the statistics that have been noted, and though they surely have amplified the nature of the problem, the underlying racial prejudice involved in the actions of the prosecutors in these cases have been clarified in detail and with direct evidence from their own words and deeds not based on statistics. And they are, by pursuing and pushing us to repeal this bill, drawing all of us into the web of racial prejudice that afflicts the criminal justice system in some instances. They know as well as many of you know that our current procedures and avenues do not provide a way in the existing cases for these issues to be raised.

That is the reason that the Racial Justice Act was needed, just as we need the Innocence Commission to adjudicate and investigate the cases of actual innocence. We need that process because our existing post-conviction and appellate procedures are, in many instances, not sufficient to address these issues. Yes, most of these folks are probably guilty, and even they have the constitutional right to not be convicted or tried in a racially discriminatory manner. Our fidelity to the constitutional principles that we are sworn to uphold and the integrity of our system are our only assurance that innocent people will not be convicted, and that those who are convicted are done so fairly.

This cover-up that the DAs want here and want to draw us into through this repeal is the same dynamic that we've seen with the bogus crime lab statistics and fighting DNA tests and not coming forth with files and evidence, and we can go on and on in terms of these behaviors that we've seen. We make a mistake in thinking that only black and brown people can be hurt by racial prejudice. Indeed, if you all are discriminating against me as a person of color, as an African American representative, you not only hurt me, you also hurt the white people that I'm elected and sworn to represent. Similarly, if Senator Hise is a DA and he has some thinking in his mind that he can't trust me to serve on a jury because of my background or experience somehow – he things I won't be favorable to his side, and Senator Newton is the defendant- I doesn't just hurt me that he has a prejudice against black people serving, It also Senator Newton who's white who would be the defendant in the case who is entitled to a jury of his peers and a fairly selected jury that can include all kinds of opinions from the community that might raise questions, look at the evidence, make sure there's an adequate consideration of this case.

So these behaviors of racial discrimination are not just isolated and against any one person; they weave everybody in the court room into a web of racial discrimination. And ultimately it pervades into the whole community. And we are being brought into that web today by being

asked to repeal this bill. Our complicity here and our fidelity to the principles of fairness and justice put at risk our whole system.

And for that reason, Mr. President, I'd like to send forth a motion, and I have that motion in writing – a motion under Rule 28.

President Pro Tem Berger: Send forward your motion.

Sen. Bryant: Thank you.

President Pro Tem Berger: Senator Bryant, it's my understanding that you need to sign the motion. The motion has not been signed. If you'll come up to the Clerk's desk and sign the motion, please…And if the pages will go ahead and pass around copies to the members, please…Senator Apodaca, could you come up here, please?...Senator Bryant, if you would like to come up here, please? The Senate will stand at ease for just a couple of minutes…

Alright, the Senate will come back to order. Motion 11 to divide the question – the Clerk will read.

Reading Clerk: Senate Bill 306, Motion to Divide – Senator Bryant moves, pursuant to Rule 28 of the Rules of the Senate, to divide the question with Section 5 of the bill as a separate question and the remainder of the bill as a separate question.

President Pro Tem Berger: Senator Bryant is recognized to explain the motion.

Sen. Bryant: Members, this is an effort to divide the question so that we can vote on the death penalty provisions and the Racial Justice Act provisions. While it may be a nuance, it's different from whether you're voting to remove it; it is dividing the question so we can vote up or down on each part. So I would appreciate your support of the motion. Thank you.

President Pro Tem Berger: Senator Apodaca is recognized.

Sen. Apodaca: Thank you, Mr. President. Members, I ask that you vote no on this amendment. There is no need to divide this question and we ought to just go ahead and hear it as one. Thank you.

President Pro Tem Berger: Further discussion or debate on the motion? Hearing none, the question before the Senate is the passage of Motion 11 to divide the question. All in favor will vote aye; all opposed will vote no. Five seconds will be allowed for voting. The Clerk will record the vote…Kinnaird – aye. Fourteen having voted in the affirmative and 33 in the negative, the motion fails and we're back on Senate Bill 306 second reading. Further discussion or debate? Hearing none, the question before the Senate is the passage of Senate Bill 306 on its second reading. All in favor will vote aye; all opposed will vote no. Five seconds will be allowed for the voting. The Clerk will record the vote…Thirty-three having voted in the affirmative and 14 in the negative, Senate Bill 306 passes its second reading and will, without objection, be read a third time.

Reading Clerk: North Carolina General Assembly enacts…

President Pro Tem Berger: Further discussion or debate?

Female Senator: Objection.

Senator Apodaca: It's already been read in third reading.

President Pro Tem Berger: The bill was read in third reading. We'll proceed to vote third reading. Further discussion or debate on third reading?...Hearing none, the question before the Senate is the passage on third reading of Senate Bill 306. All in favor will say aye…All opposed no…The ayes have it and Senate Bill 306 having passed its third reading will be sent to the House.