No. 548A00-2 DISTRICT TWELVE

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	98 CRS 34832, 35044
	)	
CHRISTINA SHEA WALTERS	)	

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DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

1. **IS PETITIONER ENTITLED TO HER PREVIOUSLY-IMPOSED LIFE SENTENCE BECAUSE THIS COURT IMPROVIDENTLY GRANTED THE STATE'S 2013 PETITION FOR CERTIORARI AND THEN REVERSED BASED ON ARGUMENTS NOT PRESENTED FOR THE COURT'S REVIEW?**

2. **CAN WALTERS BE SUBJECTED AGAIN TO THE DEATH PENALTY AFTER SHE WAS FOUND TO BE INELIGIBLE FOR THE DEATH PENALTY UNDER THE RACIAL JUSTICE ACT AND WAS RESENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE?**

3. **IS PETITIONER ENTITLED TO PURSUE HER CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE RETROACTIVE APPLICATION OF THE REPEAL OF THE RACIAL JUSTICE ACT TO WALTERS VIOLATES THE STATE AND FEDERAL CONSTITUTIONS?**

4. **IS PETITIONER ENTITLED TO PURSUE HER CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE THIS COURT'S 2015**

REMAND ORDER ESTABLISHED THE LAW OF THE CASE AND COMMANDS MERITS REVIEW OF PETITIONER'S RACE DISCRIMINATION CLAIMS?

5. **ARE THE ISSUES RAISED BY THE PARTIES MOOT AS WALTERS HAS BEEN SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE AND NO REVIEW OF THIS JUDGMENT HAS EVER BEEN SOUGHT BY THE STATE?**

INTRODUCTION

In 2009, the General Assembly enacted the North Carolina Racial Justice Act (RJA), N.C. Gen. Stat. §§ 15A-2010-2012. Our State, recognizing the long history of racial discrimination in capital cases, crafted the RJA in an effort to address and correct the impact of such discrimination.

Christina Walters is one of only four death-sentenced defendants to proceed to an evidentiary hearing on her claim of race discrimination in jury selection under the RJA and to prevail at such a hearing. Walters offered the following evidence at her RJA evidentiary hearing: evidence that the prosecutor who picked Walters' jury struck 10 of 14 qualified African American prospective jurors, evidence that the prosecutor who picked the jury in Walters' case had a history and practice of excluding African Americans from jury service in capital cases, evidence of disparate treatment of similarly-situated black and white venire members in Walters' case, evidence of such disparate treatment in other cases in Cumberland County, evidence that the prosecutor had been trained to strike African Americans and evade the guidelines of

Batson v. Kentucky, 476 U.S. 79 (1986), and evidence of a decades-long culture of race discrimination in the office which prosecuted Walters. The evidence was so compelling that, in 2012, the RJA Hearing Court granted relief and resentenced Walters to life imprisonment. Walters then began serving her new sentence of life imprisonment without the possibility of parole.

Despite overwhelming evidence at her RJA evidentiary hearing that racial bias infected the jury selection at her capital trial, the State appealed to this Court. While this case was pending in this Court, the North Carolina General Assembly repealed the RJA. Then, in December 2015, three years after Walters began serving her life sentence, this Court vacated the order granting Walters relief and Walters was returned, once again, to death row. Back on death row, Walters again sought an opportunity to present her evidence of racial bias in her capital jury selection at another evidentiary hearing. That door was closed when the court below, relying on the retroactivity provision of the RJA repeal, dismissed her claims without a hearing.

PROCEDURAL HISTORY

Walters is incarcerated at the North Carolina Correctional Institution. She was convicted of the first-degree murders of Susan Moore and Tracy Lambert and sentenced to death. This Court affirmed her convictions and death sentenced. *State v. Walters*, 357 N.C. 68, 588 S.E.2d 344 (2003). In

August 2010, Walters timely filed a motion for appropriate relief pursuant to the North Carolina Racial Justice Act, N.C. Gen. Stat. §§ 15A-2010-2012.

On January 30, 2012, the Superior Court of Cumberland County, the Honorable Gregory A. Weeks presiding, commenced a 13-day evidentiary hearing in Marcus Robinson's case. Robinson's hearing under the original RJA dealt with the portion of his RJA motion alleging that prosecutors relied on race in their exercise of peremptory strikes during jury selection. Robinson's hearing had originally been scheduled for September 2011, and then November 2011 following continuance requests from the State. 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, with both sides presenting evidence over the course of 13 days.

On April 20, 2012, in the *Robinson* case, Judge Weeks issued a 167-page memorandum order which included extensive 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 County and in North Carolina, over a twenty-year period. *State v. Robinson*, 91 CRS 23143, Cumberland County Superior Court (April 20, 2012).[1]

[1] The Order in *State v. Robinson* was Attachment 1 to the State's petition for certiorari in its 2013 RJA appeal. *State v. Robinson*, No. 411A94-5.

In July of 2012, the General Assembly amended the RJA, modifying its evidentiary and procedural provisions. *See* N.C. Sess. Law 2012-136. Pursuant to the new law, Walters filed an amendment to her RJA MAR in August 2012, and Judge Weeks ordered an evidentiary hearing on Walters' RJA claims, as well as the claims of two additional death-sentenced prisoners from Cumberland County, Tilmon Golphin and Quintel Augustine. Judge Weeks set the hearing to commence on October 1, 2012.

Following the passage of the amended RJA in August 2012, the State moved for separate hearings for Walters, Augustine and Golphin. The State raised two issues: one relating to provisions in the amendment and the other concerning the issue of courtroom security for three death-sentenced prisoners for the hearing. Walters, as well as Golphin, subsequently waived their right to presence. Augustine was the only prisoner at the RJA evidentiary hearing.

On October 1, 2012, Judge Weeks held a joint evidentiary hearing on Walters' RJA claims, as well as the RJA claims of Golphin and Augustine. While Walters had raised claims concerning racial discrimination in the prosecutor's decision to seek the death penalty and in the jury's decision to sentence her to death, the 2012 hearing was limited to the question of whether prosecutors relied on race in their exercise of peremptory strikes during jury selection. The RJA evidentiary hearing lasted almost two weeks with testimony and included the admission of statistical and historical evidence

from more than 170 capital proceedings, including from the jury selection in Walters' case.

On December 13, 2012, Judge Weeks issued a 210-page memorandum order which included lengthy findings of fact. In that order, Judge Weeks made specific findings of fact concerning the jury selection in Walters' case and concluded that racial disparities and intentional race discrimination infected her trial and also the jury selection practices of the prosecutors 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 (Dec. 13, 2012). (App. at 1.) Having found that race had been a significant factor in the prosecutors' exercise of peremptory strikes in the selection of Walters' jury, Judge Weeks imposed a sentence of life imprisonment without the possibility of parole.

The State petitioned for certiorari review in Robinson's case, and in the cases of Walters, Golphin and Augustine. This Court granted review. During the appeal, the General Assembly repealed the RJA, effective June 19, 2013. *See* 2013 N.C. Sess. Law 2013-154.

On December 18, 2015, this Court ruled in the two cases. In *Robinson*, the Court determined that the RJA Hearing Court had abused its discretion by denying the State's third continuance request. *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015). In Walters' case, the Court *sua sponte* determined

that the denial of the State's third request for a continuance in Robinson's case also tainted the result in this case. Additionally, the Court *sua sponte* determined that the RJA Hearing Court had improperly joined the three cases of Walters, Golphin and Augustine. *State v. Golphin, Walters & Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). The four cases, including Walters' case, were remanded to the superior court.

As contemplated by this Court's Remand Order, this case was assigned to the Senior Resident Superior Court Judge of Cumberland County, James Floyd Ammons, Jr. Walters filed a motion to recuse Judge Ammons and, after a hearing on June 9, 2016, Judge Ammons denied the motion but agreed to ask the Administrative Office of the Courts to assign Walters' RJA motion to another judge. The Administrative Office of the Courts assigned the Honorable W. Erwin Spainhour to the matter.

Upon his assignment, Judge Spainhour asked for briefing on 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 Motion[] for Appropriate Relief filed by the defendant[] pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes of North Carolina?

The parties briefed the issue and Walters also sought discovery. After briefing by the parties, Judge Spainhour heard oral argument in Walters' case and in

the cases of Robinson, Augustine and Golphin on November 29, 2016. The lower court did not rule on her motion for discovery, and denied her request for an evidentiary hearing. At oral argument, Walters made a proffer of the evidence that Walters would introduce if granted a hearing.[2] On January 25, 2017, Judge Spainhour entered an order dismissing Walters' RJA claim of race discrimination in jury selection, finding the retroactivity provision of the RJA repeal barred her claims. The lower court discussed only two of Walters' defenses to the application of the RJA repeal -- vested rights and *ex post facto*. App. at 221.

Walters filed her petition for certiorari review. The State did not oppose her petition. This Court granted Walters' petition for certiorari on March 2, 2018.

GROUNDS FOR APPELLATE REVIEW

This capital case is before the court on a petition for writ of certiorari filed, pursuant to N.C. R. App. P. 21(f), after the superior court dismissed Walters' claims pursuant to N.C. Gen. Stat. §§ 15A-2010-2012, the North Carolina Racial Justice Act.

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

STATEMENT OF FACTS

Ms. Walters, a Native American, was sentenced to death in 2000 after she was convicted for the 1998 first-degree murders of two white victims, Susan Moore and Tracy Lambert.[3] Walters was not the shooter in the killings of either Moore or Lambert. She was convicted and sentenced on the theory she was the leader of a gang and directed the killings of Moore and Lambert, but the only evidence of that was from the self-serving testimony of a co-defendant who received a reduction in charges for her testimony. Walters, who was 20 years old and only four feet, seven inches tall at the time of the crimes, had failed two grades while in school, had low scores on achievement testing, and did not graduate from high school. Of the nine individuals prosecuted for these murders, Walters is the only one on death row.[4]

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[3] Walters was also convicted of attempted murder and related charges for her role in the non-fatal shooting of Debra Cheeseborough.

[4] Walters' co-defendant, Eric Queen, who was 19 at the time of the crimes and the shooter of one of the two victims, was convicted and sentenced to death for his role in these crimes. In 2007, Queen committed suicide while under sentence of death. Francisco Tirado, who was the shooter of the other victim, was 17 at the time of the crime. He was also convicted and sentenced to death for his role but this Court ordered a new sentencing hearing. Tirado was then later resentenced to life without the possibility of parole due to his age. Ione Black, the co-defendant who testified against Walters, pled to reduced charges and was given a term of less than seven years.

Evidence of Race Discrimination

At her RJA evidentiary hearing on her claim of race discrimination in jury selection, Walters presented extensive evidence of race discrimination in her own case and in Cumberland County.

Walters, a Native American who was sentenced to death for the murder of two white women, offered evidence that the lead prosecutor in her case, Assistant District Attorney Margaret Russ, had previously been found to have improperly used race when striking a prospective juror in a capital case. Walters also presented evidence that Russ had been trained on ways to exclude African Americans from juries while evading the impact of *Batson*. Walters further presented evidence that Russ engaged in widespread disparate treatment of similarly-situated white and black venire members in striking 10 of 14 qualified black venire members in her case. App. at 337 and 294. Finally, Walters presented evidence demonstrating race consciousness and a culture of race discrimination in the Cumberland County prosecutor's office.

Evidence of Walters' Prosecutor Improperly Using Race when Striking Prospective Jurors in Another Capital Case

Just two years before Margaret Russ tried Walters for her life, Russ tried the capital case of *State v. Maurice Parker*, 96 CRS 4093 (Cumberland County). In *Parker*, Russ attempted to strike black venire member Forrester Bazemore.

Defense counsel objected under *Batson* and the trial judge, the Honorable D. Jack Hooks, Jr., ultimately sustained the *Batson* objection.

The jury selection transcript in that case reveals that Russ proffered pretextual, non-racial reasons for the strike of Bazemore. The trial judge found a *prima facie* showing that race was the basis for the challenge and asked Russ to give her reasons for the strike. Russ asserted her "first concern" was that Bazemore and the defendant were close in age. After asserting this concern about age, Russ added various demeanor-based reasons. The trial judge then asked Russ whether she was aware that the State had passed John Seymour Sellars, a non-black venire member who had the same exact birthday as Bazemore. App. at 302-305.

The trial judge in *Parker* then concluded that Russ' proffered non-racial 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." App. at 306. Bazemore was then seated as a juror.

Evidence that the State Struck Similarly-Situated African American Prospective Jurors and Passed White Prospective Jurors in Walters' Case

At Walters' trial, the State struck 10 out of 14 qualified African American prospective jurors. RJA HTp. 1482;[5] App. at 294, 297. The State struck only four of 27 white jurors. App. at 294. Thus, the State struck 52.6% of the black venire members and only 14.8% of the other eligible venire members. App. at 297-298. The race strike disparity was 3.6, meaning that the prosecution excluded African American citizens at more than three and a half times the rate for whites. App. at 298. In addition to this marked race strike disparity, the prosecution engaged in disparate treatment when it struck African American prospective jurors Sean Richmond, Ellen Gardner, John Reeves, Laretta Carter Dunmore, Norma Bethea, Marilyn Richmond, Jay Whitfield and Calvin Smith.

While no reasons were given for these strikes at the time of Walters' capital trial, the State offered purportedly race-neutral reasons for Russ' strikes in Walters' case during the RJA litigation. Assistant District Attorney Charles Scott prosecuted Walters with Russ. In the RJA proceedings in *State v. Robinson*, the State produced an affidavit from Scott concerning the strikes

[5] Citations to RJA HTp. __ refer to the transcript of Walters' 2012 RJA evidentiary hearing conducted in the Cumberland County Superior Court.

against black venire members in Walters' case. App. at 337. Russ personally conducted the jury selection in Walters' case but Russ testified at Walters' RJA hearing that she consulted with Scott concerning jury selection. RJA HTp. 1118. Only Russ, and not Scott, testified at Walters' RJA hearing.

1. *Exclusion of Jurors for Nonsensical Reasons*

According to the State's affidavit, the prosecution 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." App. at 338. 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. App. at 224-225. The prosecution passed white venire members who, like Richmond, minimized the impact of minor property crimes. The State passed Lowell Stevens, a white venire member. When asked about being the victim of a crime, Lowell Stevens laughed, and explained he was a military range control officer and that he felt responsible when a lawn mower was stolen from his equipment yard. App. at 270. The State also accepted white prospective juror Ruth Helm, who was later seated as a juror. Helm had also been a victim of a minor property crime and did not seem troubled by it. As she explained, "someone stole our gas blower out of the

garage. I know that is minor, but I assumed you needed to know everything." App. at 254.

2. *Exclusion of African American Jurors for Reasons Unsupported by the Record*

The prosecution affidavit asserted that African-American venire member Laretta Carter 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.'" The State further asserted that, during jury selection, Dunmore said "'there wasn't a fair trial' for her brother that she was pretty close to." App. at 338. In fact, while Dunmore stated that her brother had an armed robbery conviction in New Jersey, she clearly stated *there was no trial since he pled guilty*. She further stated the situation with her brother was handled appropriately and she said nothing about the situation would affect her ability to be fair. App. at 226-227. By contrast, the State readily accepted white prospective juror Amelia Smith. At the time of Walters' capital trial, Smith's brother was in a Nash County jail on a first-degree murder charge. Smith was in contact with her brother through letters. App. at 260-61.

3. *Exclusion of African-American Jurors where White Jurors Equally Implicated*

a. Family Members with Criminal Histories

The prosecution also claimed it struck African-American prospective jurors because they had a family member who had been charged with a crime. One reason offered for striking African-American prospective juror Norma Bethea was that she "had a great nephew who went to prison for less than five (5) years on a breaking and entering case." App. at 337. During voir dire questioning, Bethea noted she was "not close" to her great nephew, and that she "guessed it was a trial" but she was not sure, agreed that she did not know much about her great nephew's situation, responded "not really" when she asked if she had some conversations with her family about it, stated she "felt that it was handled proper, from [her] standpoint," and said there was nothing about the situation that might cause her to be biased to either side. App. at 255-257.

The prosecution also asserted it struck African American venire member Marilyn Richmond because "[h]er oldest brother was convicted in 1978-79 for armed robbery and went to prison for fifteen (15) years to life but got out of prison in 1990." App. at 338. During questioning, she offered that she was out of the country at the time that it happened, she had talked to him about the incident, she thought he was treated fairly, "he did what he did and there was

no doubt about that … [a]nd he paid for it," and that her brother was doing okay now. App. at 230-32.

According to the State's affidavit, the prosecution struck African-American venire members Ellen Gardner and John Reeves also in part because they had family members who were charged or convicted of crimes. App. at 337. Gardner's brother had been convicted of gun and drug charges and received five years on house arrest. During voir dire, Gardner clearly articulated that she was not close to her brother; she believed he had been treated fairly; and his experience would not affect her jury service. App. at 264-269. Her brother's involvement in the criminal justice system was six years before the jury selection in Walters' case. App. at 266.

Reeves' grandson had a pending theft offense in Fayetteville. Reeves stated he did not know much about it, he had not 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. App. at 271- 274.

Significantly, the State accepted non-black venire member Amelia Smith, whose brother was in a North Carolina jail for a first-degree murder charge at the time of the jury selection proceeding. Smith was keeping in touch with her brother through letters to him at the jail. App. at 259, 262-263.

b. *Connections to Gangs*

The prosecution struck African-American venire members Marilyn Richmond and Jay Whitfield, citing their contact with gang members. According to Scott's affidavit, Richmond was objectionable because she "worked with 'wanna be' gang guys" and because she "knew" one of the defendant's alleged accomplices. App. at 338. According to Scott, the State excused Whitfield because he "knew some gang guys from playing basketball." App. at 337.

The record shows Richmond was a substance abuse counselor who worked with adolescents, some of whom professed to belong to gangs. One of Walters' accomplices was a client at the mental health center where Richmond worked. Although Richmond knew who he was, she had never spoken with him and stated she did not know him personally. App. at 228-29.

Whitfield played pick-up basketball at a local park 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 stated these limited contacts with possible gang members would not affect their ability to be fair and impartial. App. at 237-39; 223.

Despite the State's professed concern about relationships with individuals in gangs, the State accepted non-black venire member Tami Johnson who had known people in high school who had been in gangs. She was good friends with a former gang member in basic training. App. at 249-53. 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 expressed some hesitation, stating, "I don't think so." App. at 236-37.

c. *Prior Jury Service*

The prosecution offered that it also struck John Reeves because the African American prospective juror "had been a juror in a federal bank robbery case in 1996 and that resulted in a hung jury." App. at 337. While participation in a jury that fails to reach a verdict might be logical grounds for striking a juror, the prosecution accepted white prospective juror Rebecca Honeywell, who had also been on a jury that had not reached a verdict. Honeywell, on her jury questionnaire and in questioning by the prosecution during jury selection, indicated she had served on a criminal jury in Cumberland County in state court. The charges had been an assault and a robbery. While the jury deliberated, it did not reach a verdict. App. at 242-243.

4. *Exclusion of African-American Jurors for Reasons that Are Generally Considered Pro-Prosecution*

The prosecution asserted that it struck African-American prospective juror Calvin Smith, in part, because he "had a son-in-law who had killed his (the juror's) grandchildren in 1986 and had received seventy-five years in prison for murder." App. at 337. Generally, one would consider the fact that the prospective juror's family had been victimized by violence to be something that would make that prospective juror more favorable to the prosecution. During questioning, he stated that he "knew what he had done," that he had gone to the trial to support his daughter, and, in his view, his son-in-law "should have got more than -- should have got more than 75 years," and that he could still sit on the jury and be fair and impartial to both sides. App. at 275-79.

The State accepted white prospective juror Ruth Helm, whose sister had been killed by a drunk driver 10 years prior to jury selection in Virginia. App. at 246 – 248.

5. *Further Evidence of Russ' Disparate Treatment of Similarly-Situated African American Prospective Jurors in other Capital Cases*

There is evidence from other capital cases Russ prosecuted that similarly-situated African-American venire members were treated differently from white venire members.

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 white venire member who had the same birthday as Bazemore. App. at 305; 335.

In the 2001 case of *State v. Frink*, Russ stated she struck African-American venire member Wayne Radcliffe in part due to his involvement in church and in a local Bible college, as well as his connections to law enforcement. While rejecting Radcliffe for his church activities, the State passed a number of white venire members who were also active in their churches. With respect to Radcliffe's connections to law enforcement, Radcliffe's brother-in-law and a close friend worked as guards at a North Carolina penitentiary. The State passed white venire members with family members and colleagues who also worked in the prison system. App. at 315A-315D; 316-318; 319; 320-326; 327; 328-329; 330-331; 334.

Suspect Demeanor-Based Reasons given for Strikes in Walters' Case

As set forth above, Scott identified non-demeanor-based reasons for each of the State's peremptory strikes in Walters' case. Then, at Walters' RJA hearing, the State called Russ, not Scott, as a witness. During her testimony, as to all 10 of her strikes of African American prospective jurors, Russ testified

she exercised a peremptory strike either in light of the "totality of the circumstances" or as a result of general 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*."

RJA HTpp. 1125, 1128-1217.

At the 2012 RJA evidentiary hearing, Russ offered no contemporaneous notes from her exercise of these strikes or of jury selection generally to support these justifications that differed from those sworn to by prosecutor Scott in his affidavit. In preparation for her testimony at Walters' RJA hearing, Russ made handwritten notes after reviewing the RJA pleadings and select sections of the voir dire transcript for the excluded venire members. RJA HTp. at 148. These handwritten notes were introduced into evidence at Walters' RJA hearing. App. at 291. In these notes, there is no reference to demeanor explanations for the strikes of the black venire members. Given the shifting explanations for these strikes and Russ' general lack of candor to the RJA Hearing Court, Judge Weeks found Russ' credibility to be suspect and the vague nature of the demeanor-based reasons given for the strikes of African American prospective jurors to be evidence that they were pretextual. App. at 49, 68-70, 81-83

Evidence of Training to Strike Qualified African American Prospective Jurors and Evade the Impact of Batson.

At Walters' RJA hearing, evidence was also presented about a state-wide prosecutor training conducted by the North Carolina Conference of District Attorneys in 1995. The training, *Top Gun II*, was a trial advocacy course. Among the materials distributed at *Top Gun II* was a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives." Below the title of the document is a list of reasons a prosecutor might proffer in response to a *Batson*

objection.

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*

App. at 293.

During her testimony at the RJA evidentiary hearing, Russ gave conflicting testimony about whether she had or had not attended this training.

See RJA HTpp. 152 ("not absolutely sure"), 169-71 ("may or may not have gone"), 172 ("…I'm almost sure I did not"), 174 ("I didn't go to this."), 1291-92 ("I did not go . . . I was in trial."); 1393 (It's my impression and opinion that I did not – that I wanted to, and that I was in trial ….). However, when confronted with her CLE records, Russ eventually admitted she had attended the seminar. RJA HTpp. 1292-93. According to Russ' 1995 CLE Record maintained by the North Carolina Bar and admitted as evidence at Walters' RJA hearing, Russ reported to the Bar that she had attended *Top Gun II* and received 25 hours of CLE credit for her attendance. RJA HTp. 1292; App. at 280.

Russ also denied ever using the 1995 *Top Gun II* training handout when conducting jury selection and exercising peremptory strikes. RJA HTpp. 173-74. However, transcripts of jury selection in a number of capitally-tried cases admitted at Walters' RJA hearing reveal that Russ relied on the *Top Gun II* handout in responding to *Batson* objections.

Russ was found to have intentionally discriminated against Forrester Bazemore, an African-American venire member, because of his race in *State v. Maurice Parker*, 96 CRS 4053 (Cumberland County). App. 307-311. At Walters' hearing, Russ was questioned extensively about her use of the *Top Gun II* handout in responding to the *Batson* objection to her strike of Bazemore in *Parker*. RJA HTpp. 1272-91. Russ disputed the trial judge's conclusion that she

violated *Batson* in the *Parker* case. RJA HTpp. 1295-97, 1302. The *Parker* transcript shows that Russ' explanations for the strike closely tracked the *Top Gun II* training handout.

In *Parker*, Russ offered numerous ostensibly race-neutral reasons for excusing Bazemore. As set forth above, Russ first attempted to justify her strike on the basis of Bazemore's age and then offered 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." During a colloquy with the trial judge, Russ used language markedly similar to the *Top Gun II* handout. Russ said, "Judge, just to reiterate, those three *categories for Batson justification* we would *articulate* is the *age, the attitude of the [juror] and the body language*." Later, Russ referred to "body language and attitude" as "*Batson justifications, articulable reasons* that the state relied upon." RJA HTpp. 1275-87; App. at 311, 313.

Russ' use of the training handout from *Top Gun II* in *Parker* was not an isolated occurrence. Russ prosecuted two of Walters' codefendants, Francisco Tirado and Eric Queen, shortly before Walters' trial in 2000. In Tirado and Queen's trial, Russ secured 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." App. at 336. These demeanor-based reasons, including body language, eye contact and monosyllabic answers, are all reflected in the *Top Gun II* handout.

Then, shortly after Walters' 2000 trial, Russ capitally prosecuted another of Walters' co-defendants, Carlos Frink. In jury selection, Russ used peremptory 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. App. at 320-321. The trial court, and then defense counsel, expressed skepticism about this explanation. App. at 321. Indeed, defense counsel argued Russ had offered "nothing more than a pretext for discrimination." App. at 321-322. 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." App. at 322.

In, at least three capital cases, Russ used the *Top Gun II* handout exactly as it was intended – to circumvent *Batson* and discriminate against African American citizens.

Evidence of a Culture of Discrimination
in the Cumberland County District Attorney's Office

At Walters' RJA hearing, evidence was offered that the Cumberland County District Attorney's Office had a practice and culture of intentionally using race as a factor in jury selection before and during her 2000 trial.

Of the fourteen people prosecutors in the Cumberland County District Attorney's Office sentenced to death between 1990 and 2010, twelve were racial minorities, including Walters.

Russ, who prosecuted Walters, served as a prosecutor at the same time as Calvin W. Colyer, who prosecuted Golphin with Russ and later prosecuted Augustine with Russ. Colyer was a prosecutor for nearly 25 years until his retirement in 2012. RJA HTp. 181.

Colyer prosecuted the capital cases involving co-defendants James Burmeister and Malcolm Wright. These white co-defendants were charged with the racially-motivated murder of two black citizens. In the *Burmeister* case, nine of ten peremptory strikes were used against non-black venire members. The State struck one black prospective juror and passed eight. In the *Wright* case, ten of ten strikes were used against non-black venire members. No black prospective jurors were struck. These numbers were starkly different than the pattern of jury strikes in other Cumberland County capital cases. Furthermore, the prosecution's jury selection notes identified

potential jurors by race, segregated names of potential jurors who were African American, and created a list of all African American jurors with brief descriptions. App. at 299, 300, 301; RJA HTpp. 940-47.

Colyer also prosecuted Augustine and conducted the jury selection. Prior to Augustine's capital trial in 2002, after conversations with members of the Brunswick County Sheriff's Department, Colyer made and used notes about potential black jurors during jury selection, such as "blk. wino – drugs" or being from a "respectable blk family" or from a "blk/high drug" area. A black venire member with a criminal history was described as a "thug," while white venire members with similar histories were noted only as being a "n[e'er] do well" or "fine guy." *See* App. 285-290. *See also* RJA HTpp. 180-205, 215-222, 925-52, 971-1076 (detailing Colyer's racially-disparate and racially-targeted questioning of potential black jurors in other Cumberland County capital cases). There was testimony at Walters' RJA hearing demonstrating that the notes disproportionately concerned African Americans and comprised primarily negative comments about them. RJA HTpp. 76-81. Testimony at the hearing also showed that Augustine's post-conviction counsel received these notes in 2006, pursuant to the post-conviction discovery statute and before the passage of the RJA. Significantly, the State failed to produce these notes to the defense during the *Robinson* RJA litigation, despite having been ordered to provide discovery of jury selection notes in capital cases. Even more

troublingly, by the time of the RJA hearing in this case, the original notes were no longer in the State's files. RJA HTpp. 97-98.

In summary, the evidence of race discrimination in this case was overwhelming. Only Walters, a Native American, and a non-trigger person, remains under sentence of death for the killing of the two white victims, Tracy Lambert and Susan Moore. Not upholding Walters' sentence of life imprisonment without the possibility of parole and further denying her an opportunity to again present this strong evidence of race discrimination at a second RJA hearing represent a miscarriage of justice and conflict with North Carolina's commitment to racial justice.

ARGUMENT

I. PETITIONER IS ENTITLED TO HER 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 Walters' 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 the RJA proceedings in *State v. Robinson* and the other relating to the joinder of Walters' case with the cases of Augustine

and Golphin. *State v. Augustine, Golphin & Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015).

This Court, pursuant to its inherent power, should exercise its authority to determine that the 2013 grant of a writ of certiorari to review the RJA Order granting relief to Walters 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 Walters and "to expedite decision in the public interest." N.C.R. App. P. 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.").

The North Carolina Constitution confers on this Court the authority to promulgate rules of appellate procedure. N.C. Const. art. IV, § 13(2). As a consequence of its constitutional powers, the Court is both the drafter and enforcer of its own rules. In the prior proceedings in this Court, the State was the appellant, seeking review of the RJA Hearing Court's grant of relief to Walters. 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. P. 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 in the *Robinson* case and the joinder of Walters' case with those of Golphin 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 at the start of the RJA evidentiary hearing and did not present them on certiorari review in this case.

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 hearing had previously been scheduled for September 2011, and then November 2011, following continuance requests from the State. In its 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 Michigan State University (MSU). At the opening of the January 2012 hearing, the State, for the third time, moved again for a continuance. The RJA Hearing Court denied the motion and the hearing proceeded. On April 20, 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 RJA evidentiary hearing in Walters' case was held in October 2012. The State offered no additional statistical evidence than it had offered in the *Robinson* RJA hearing ten months earlier.

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 hearing. *See* September 27, 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 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, Walters 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 Walters' RJA hearing. The initial findings of the MSU statistical study were set out in an affidavit attached to Walters' 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. Walters' 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 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, Walters could have identified numerous reasons why the State suffered no prejudice in *this* case.

As noted above, a week before Walters' RJA hearing started, the State conceded it was "close to a hundred percent now" in its efforts gathering affidavits from prosecutors concerning their reasons for striking African American prospective jurors. Then, at Walters' 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* RJA 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 to prepare.

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 Walters' RJA 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 her RJA hearing was actually narrower than that at Robinson's RJA hearing. While this Court noted the "breadth" of the statistical study in concluding that the RJA Hearing Court erred in not granting the third request for a continuance in *Robinson*, due to the General Assembly's amendment of the RJA, the State argued that Walters' RJA claims based on state- and division-wide disparities were arguably no longer cognizable. Additionally, while the RJA Hearing Court made alternative findings under the original and the amended RJA, the focus of the RJA hearing and the thrust of the RJA Hearing Court's findings were on the county-wide and individual evidence. Thus, by the time of Walters' RJA hearing, the State had been afforded more time and had less to defend than in the *Robinson* case.

If the State had raised the continuance issue in Walters' case, Walters 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 RJA Hearing Court found, the State's study "was flawed from the outset by [the]

poor research question." App. at 194-195, ¶ 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"). The RJA Hearing Court further found that the State's study design was flawed because it relied solely on self-reported data. App. at 195, ¶ 375.

Additionally, the State suffered no prejudice because the individualized, non-statistical evidence adduced at Walters' RJA Hearing alone entitled Walters to relief under the RJA. This evidence relating to Walters – 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.

The RJA Hearing Court found this evidence alone established that race was a significant factor in Walters' case. *See*, *e.g.*, App. at 70, ¶ 58 (prosecutor's "vague and utterly generic nature of the demeanor explanations" for prospective jurors "evidence that they are pre-textual"); App. at 70, ¶ 59 ("frequency with which Russ invoked demeanor reasons for her strikes in *Walters*…undermines the credibility of Russ' strike explanations"); App. at 76, ¶ 76 (Walters' prosecutor's reliance on a training handout to evade *Batson* is

"evidence of her inclination to discriminate on the basis of race"); App. at 80, ¶ 91 (Walters' prosecutor's conduct with respect to trial court's finding that she violated *Batson* illustrative of "the history of strong resistance to constitutional requirements of equal participation in jury selection by African Americans"); App. at 83, ¶ 98 (with respect to the strike of prospective juror Dunmore, "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"); App. at 83, ¶ 99 ("evidence that Russ treated similarly-situated black and non-black venire members differently is unrebutted" with respect to African American prospective jurors Sean Richmond, Ellen Gardner, John Reeves, Marilyn Richmond, Jay Whitfield); App. at 97, ¶ 130 ("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.").

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 Walters and those who 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 demeanor 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 Walters' Case with those of Golphin 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 & 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 the 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 Walters, Augustine and Golphin noted that Walters and Golphin had waived their right to be present at the RJA hearing

and, as such, only Augustine would be present. The RJA Hearing Court denied the State's motion to separate. *See* August 31, 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 Walters' case with those of Golphin and Augustine.[6] Thus, the State abandoned this issue.

Walters, had she been able to address this issue before the Court, would have argued that the RJA Hearing Court's decision to join Walters' case with those of Augustine and Golphin 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 she been able to

[6] 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.

address this argument before this Court, Walters 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 clearly linked RJA jury selection claims of Walters, Augustine and Golphin 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 case. At all points during the RJA evidentiary hearing, the State was in a position to object to the admissibility of any evidence as to Walters or as to Augustine and Golphin. 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 Walters. Additionally, the RJA evidentiary hearing was presided over by Judge Weeks, an experienced judge,[7] 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 for each defendant. 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, admissible evidence and to

[7] At the time of Walters' 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.

have disregarded any inadmissible evidence that may have been admitted.") (citations omitted).

Finally, the record in this case clearly demonstrates that Judge Weeks was capable of distinguishing which evidence applied to which defendant. *See* App. at 160-166, ¶¶ 269-87 (setting out "Disparities Unique to Each Defendant" based on "three groups of statistical analysis tailored to the time of their cases"); App. at 175-178, ¶¶ 312-22 (same with regard to regression analyses). Likewise, the conclusions of law were specific as to each defendant. *See* App. at 201-203, ¶¶ 394-399 (Golphin); App. at 203-205 ¶¶ 400-405 (Walters), and App. at 205-207, ¶¶ 406-12 (Augustine).

Neither reason identified by this Court for remanding this case was discussed during Walters' evidentiary hearing or 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. P. 28(b)(6). Analogously, 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 consistency with which a government follows its own rules is a hallmark of the rule of law and due process. *Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *see also Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945) (statutes

and rules designed to afford due process and "as safeguards against essentially unfair procedures" must be applied at the "crucial stage of the proceedings or not at all"); *Jones v. Board of Governors of the Univ. of N. C.*, 704 F.2d 713, 717 (4th Cir. 1983) ("significant departures from stated procedures of government . . . if sufficiently unfair and prejudicial, constitute procedural due process violations"); *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964)(Brown, J., concurring)(our law does not permit the government "to grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday, a rule for general application, but denied outright in a specific case."), *rev'd on other grounds*, 382 U.S. 46 (1965). Likewise, a fundamental precept of due process is the opportunity to be heard. Here, Walters was denied an opportunity to be heard on the crucial issues which sent her back to death row. As a consequence, she "was denied due process of law [because her] death sentence was imposed, at least in part, on the basis of information which [s]he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

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 addition, this is a case of substantial public interest insofar as it presents the question of whether our courts will "tolerate the corruption of their juries by racism." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987); *see also Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 868 (2017) (describing racial bias as "a familiar and recurring evil" that must be addressed in order "to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy").

In light of the circumstances set forth above, this Court should use its powers under Rule 2 to 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 Walters.

II. WALTERS CANNOT BE EXPOSED TO THE DEATH PENALTY AGAIN AS SUCH EXPOSURE WOULD VIOLATE DOUBLE JEOPARDY AND THE NORTH CAROLINA STATUTORY BAR AGAINST THE IMPOSITION OF MORE SEVERE SENTENCES.

Following her RJA evidentiary hearing on her claim of race discrimination in jury selection, Walters was acquitted of the death penalty and resentenced to life imprisonment without the possibility of parole. The RJA Hearing Court found she had proved the existence of a defense to the death penalty. Under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, Walters cannot be exposed to the death penalty again. Walters is also protected by N.C. Gen. Stat. §15A-1335, which prohibits the imposition of a more severe sentence after a lesser one has been imposed.

A. Walters Cannot be Sentenced to a More Severe Sentence than Her Previously-Imposed Life Sentence under N.C. Gen. Stat. § 15A-1335.

Under N.C. Gen. Stat. § 15A-1335, Ms. Walters' previously-entered judgment for a life sentence without the possibility of parole cannot be disturbed. This issue was raised in the court below but the court's Order was silent. As no further proceedings are required to resolve this issue, this Court should address this issue as a threshold matter.

The statutory scheme in place at the time of Walters' RJA hearing was clear: once it was determined that race was a significant factor in the prosecution's exercise of peremptory strikes in the case of a death-sentenced

prisoner, then the prisoner must be resentenced to life imprisonment without the possibility of parole. *See* N.C. Gen. Stat. § 15A-2012. Once a defendant has been sentenced, North Carolina law does not permit a court to inflict a more severe sentence. Walters' life sentence must stand.

North Carolina law precludes sentencing Walters to the death penalty following the imposition of the sentence of life imprisonment without the possibility of parole. Section 1335 provides:

> 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 [, N.C. Gen. Stat. §15A-1335,] a defendant whose sentence has been successfully challenged cannot receive a more severe sentence for the same offense of conduct on remand." *State v. Wagner*, 356 N.C. 599, 602, 572 S.E.2d 777, 779 (2002); *see also State v. Daniels*, 203 N.C. App. 350, 354, 691 S.E.2d 78, 80 (2010) (same). Not every grant of relief in the post-conviction context triggers the application of Section 1335. 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.

Here, the "sentence imposed in superior court" for purposes of Section 1335 is the sentence of life imprisonment without the possibility of parole imposed on Walters by the RJA Hearing Court after her RJA evidentiary hearing. The State contends that the life sentence was then "set aside on direct review or collateral attack" by this Court's 2015 Remand Order. Walters contends that her life sentence remains undisturbed, *see*, *e.g.*, Claim V; however, even if it were the Court's intention to "set aside" this 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. Thus, under Section 1335, Walters' life sentence must be protected and given effect as no court can impose a more severe sentence – a death sentence -- following the RJA Hearing Court's imposition of a life sentence.

To comport with the Double Jeopardy Clause of the United States Constitution and North Carolina law, this Court should vacate the lower court's order dismissing Walters' RJA claims, and hold that the RJA Hearing Court's Order and that the imposition of a sentence of life imprisonment without the possibility of parole were final and may not be disturbed.

B. Given the Prior Proceedings in this Case, Double Jeopardy Requires that Walters not be Exposed to the Death Penalty Again.

Following an evidentiary hearing properly held under the RJA, Walters was acquitted of the death penalty and resentenced to life imprisonment without the possibility of parole. At that proceeding, the RJA Hearing Court acquitted her of the death penalty when it found she had proved the existence of a defense to the death penalty under the RJA. Under the Double Jeopardy Clause, Walters cannot be exposed to the death penalty again through further prosecution.

In the court below, Walters raised this issue but the court did not address it.[8] As no further proceedings are required to resolve this issue, this Court should address this issue as a threshold matter.

1. The Applicability of the Double Jeopardy Clause to Walters' Acquittal of the Death Penalty and Resentencing to Life Imprisonment is Clear.

The legal principles governing the applicability of the Double Jeopardy Clause are clearly established. These principles prohibit the courts from again exposing Walters to the threat of the death penalty given that the trial court

[8] Walters 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. This Court's Order remanding this matter to the state superior court was silent on the issue of double jeopardy.

acquitted her of the death penalty and imposed a sentence of life imprisonment without the possibility of parole.

The Double Jeopardy Clause provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This constitutional prohibition has long been recognized to bar subsequent proceedings after acquittal. *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969). The reach of the Double Jeopardy Clause extends to acquittals of the death penalty at capital sentencings. *See Bullington v. Missouri*, 451 U.S. 430, 445 (1981). The reach of Double Jeopardy protections also extend to life sentences imposed by a trial judge after sentencing hearings. *Arizona v. Rumsey*, 467 U.S. 203, 204 (1984). They also apply to actions by reviewing courts, including acquittals of the death penalty in appellate and post-conviction proceedings. *See Burks v. U.S.*, 437 U.S. 1, 11 (1978).

2. Walters' Acquittal of the Death Penalty and Resentencing under the RJA Fall Within the Scope of the Double Jeopardy Clause's Protections.

Double Jeopardy protections are not limited to acquittals at an initial trial and extend to Walters' acquittal of the death penalty at her RJA hearing. Double jeopardy protections would certainly apply where a defendant raised and secured relief under the RJA at trial. Given that a claim under the RJA could have been raised in the trial context and the protections of the Double Jeopardy Clause would apply in those circumstances, there is no support for a

finding that these double jeopardy principles would apply in the trial context but not here.

The protections of the Double Jeopardy Clause apply equally to cases on appeal or in post-conviction proceedings where the court, acting as fact-finder, 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."); *see also Burks*, 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.").

In addition, Double Jeopardy protections extend to those situations where there has been an acquittal based on insufficiency of the evidence. *See McDaniel v. Brown*, 558 U.S. 120, 131 (2010) (on habeas review, Supreme Court rejected claim of insufficiency of evidence but noted that "reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, [and] such a reversal bars retrial.").

Significantly, the United States Supreme Court has also long recognized that a verdict based on a defense is entitled to the full protection of double jeopardy. *See Burks,* 437 U.S. at 7 (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.

The fact that a later court disagrees with the legal basis for the acquittal does not foreclose Double Jeopardy protections. As the United States Supreme Court has recognized,

> what constitutes an acquittal is not to be controlled by the form of the judge's action. . . Rather, we must 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) (emphasis added). *See Evans v. Michigan*, 133 S. Ct. 1069, 1075-76 (2013) ("[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."). Thus, here, in granting relief Walters' relief under the RJA, the RJA Hearing Court's 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. *Burks*, 437 U.S. at 10 (citations omitted).

Indeed, the lengthy findings issued by the RJA Hearing Court finding Walters ineligible for the death penalty are at least as direct as an appellate court finding of insufficient evidence, as the RJA Hearing Court made findings supporting its conclusion as an original matter after conducting an adversarial evidentiary hearing. Significantly, the State has never seriously challenged the RJA Hearing Court's findings. While this Court subsequently found procedural errors including the denial of the State's third request for a continuance in *Robinson* and the improper joinder of the parties, this make no difference to the analysis and, under the Double Jeopardy Clause, the RJA Hearing Court's grant of relief amounted to a finding that there was insufficient evidence to support the death sentence under the RJA. The Double Jeopardy Clause applies under these circumstances and Walters cannot be exposed to the death penalty again.

3. Double Jeopardy Protections are to be Afforded where the Decision to Resentence Petitioner to Life were Guided by Fact-Finding and Statutory Standards.

The United States Supreme Court, in analyzing the reach of the Double Jeopardy Clause, has emphasized the need for the decision to have been guided

by statutory standards and the importance of fact-finding. *See Rumsey*, 467 U.S. at 209-10; *Bullington*, 451 U.S. at 439.

In *Rumsey*, in determining that the judicial sentencing scheme in Arizona qualified for Double Jeopardy protection, the Court relied on two factors: first, the trial judge, like a jury, had to distinguish between verdicts of death and life imprisonment without the possibility of parole; second, the trial judge's discretion in making a sentencing decision was guided by standards set out by statute. *Id.* at 209-10. The trial court had, after finding insufficient evidence to support an aggravating factor, imposed a life sentence. *Id*. at 206. Upon review, the state supreme court reversed the trial court's decision, concluding that the trial court erred in its analysis. On remand, the trial court then imposed death. On appeal, the United States Supreme Court reinstated the life verdict, holding that Double Jeopardy barred resentencing the defendant when a life verdict had been imposed after a trial-like determination at the sentencing hearing, no matter what the alleged error had been. *Id*. at 209-10. Thus, the protections afforded by Double Jeopardy principles apply when a trial court makes factual findings that are guided by statutory standards and are "sufficient to establish legal entitlement to the life sentence, [which] amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty." *Id.* at 211.

In *Sattazahn v. Pennsylvania*, 537 U.S. 101, 103-4 (2003), the defendant was convicted of murder and other charges, but the jury deadlocked on the question of punishment so the trial judge imposed a sentence of life imprisonment. The defendant appealed and the state appellate court reversed. On retrial, the state again sought the death penalty, and this time a death sentence was imposed. Under those circumstances, the Supreme Court declined to extend Double Jeopardy protections because the jury's deadlock on the sentence was merely a "non-result [that] cannot fairly be called an acquittal based on findings sufficient to establish legal entitlement to the life sentence." Moreover, the judge's entry of a life sentence involved "no findings" and "resolve[d] no factual matter." *Id*. at 109-10 (internal quotations and citation omitted).

Walters' case is like *Rumsey*, and distinguishable from *Sattazahn*. The grant of RJA relief required fact-finding guided by statutory standards, precisely the type of proceeding warranting the application of Double Jeopardy protections. *See* N.C. Gen. Stat. § 15A-2011 (setting forth standards and evidence to be considered by the trial court in making its findings). Further, the RJA statutory scheme sets forth the "findings sufficient to establish legal entitlement to the life sentence." *Sattazahn*, 537 U.S. at 108. *See* 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.").[9]

In this case, Walters' RJA hearing that led to her acquittal of the death penalty followed the provisions of the RJA statute. Under the RJA statute, Walters' hearing was part of a new, post-conviction proceeding. *See* N.C. Gen. Stat. § 15A-2012(a)(1). Upon conclusion of her RJA hearing, the trial court, in finding that she should be resentenced to life, made detailed factual findings based on a voluminous evidentiary record.

Here, the RJA Hearing Court made a determination, after an evidentiary hearing, which was supported by fact-findings that Walters met the criteria under the RJA and was entitled to life imprisonment and was no longer eligible for the death penalty. At that point, Walters could not again be exposed to the death penalty pursuant to the Double Jeopardy clause of the Fifth and Fourteenth Amendments.

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

III. PETITIONER IS ENTITLED TO PURSUE HER CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE RETROACTIVE APPLICATION OF THE REPEAL PROVISION TO HER CLAIMS VIOLATES THE FEDERAL AND STATE CONSTITUTIONS.

Numerous provisions of our federal and state constitutions prevent the application of the retroactivity provision of the RJA Repeal to Walters. In light of these arguments, this Court should vacate the lower court's order dismissing Walters' RJA MAR, and remand again with instructions to the superior court to hold a hearing on the merits of Walters' claims. At a minimum, Walters should have an opportunity, where appropriate, to have a hearing on her constitutional defenses to the application of the retroactivity provision of the repeal statute.

A. The Trial Court Erred in Dismissing Walters' RJA Motion because her Rights under the Racial Justice Act had Vested prior to Its Repeal.

Walters' rights under the RJA vested before the legislature repealed the statute. Once Walters invoked her rights under the RJA, properly filed a motion, proceeded to hearing, and prevailed on her claims, her rights vested. Specifically, she had a vested right to have the progress of her case determined solely by judicial review, and not be limited by legislative action. Under the United States and North Carolina constitutions, once a litigant's rights have vested, these rights may not be taken away by the legislature. N. C. Const. art. I, § 19 and art. IV, § 13; U.S. Const. amend. IV; *Dist. Attorney's Office for Third*

Judicial Dist. V. Osborne, 557 U.S. 52, 68 (2009); *Fogleman v. D&G. Equip. Rentals, Inc.*, 111 N.C. App. 228, 230-33, 431 S.E.2d 849, 850-52 (1993).

In the court below, the lower court deprived Walters of vested rights by first redefining the meaning of a judgment, holding that the RJA Hearing Court's Orders for Walters and the other prisoners who had secured relief "were vacated by the North Carolina Supreme Court and therefore were not final judgments." App. at 218, 220. Further, the lower court stated that the RJA Hearing Court's Orders "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." App. at 218.

Walters' rights under the RJA vested when she filed her claim following the passage of the RJA. Alternately, her rights vested when judgment was entered in her favor in Superior Court. Her right to an evidentiary hearing under the RJA vested when the RJA Hearing Court's Order granting an evidentiary hearing was undisturbed on appeal. Finally, the lower court erred by denying Walters an evidentiary hearing to permit her an opportunity to demonstrate that equitable principles support a finding that her rights vested.

1. Walters' Rights Vested under RJA when She Filed Claim at a Time when RJA entitled her to an Evidentiary Hearing and when Judgment of Life Imprisonment was Entered.

This Court's decision in *State v. Keith*, 63 N.C. 140 (1869), should guide this Court's review of this issue. This case remains good law. In reaching its

result below, the court erroneously distinguished this case. *See* App. at 221. The *Keith* case is strikingly similar to the matter here. In both cases, there was the enactment of a law, application of the law as an affirmative defense, and the subsequent repeal of the law.

Defendant Keith fought in the Civil War as a soldier in the Confederate Army and, during his time as a soldier, killed another man. *Keith*, 63 N.C. at 140. Soon after the end of the Civil War, the North Carolina legislature, under the Amnesty Act of 1866-67, 1866 N.C. Acts, § 1, retroactively created 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 officer, etc." *Id.* at 142. Thereafter, when a different political party gained control of the North Carolina legislature, the Amnesty Act was repealed.

Keith was indicted after the Amnesty Act had been repealed but he attempted to plead the Amnesty Act as a defense to his murder prosecution for crimes that occurred during the war. The court denied Keith's plea under the Act on the grounds that the Act had been repealed and no longer existed. This Court rejected that ruling and held that interpreting the subsequent repeal of

the Act to bar the Act's application to Keith's case was improper as the repeal "took away from the prisoner his vested right to immunity." *Id*. at 145.

The court below attempted to distinguish *Keith* by holding that the granting of legislative amnesty in *Keith* was a "final determination" and that "amnesties and pardons are, in effect, final judgments." *See* App. at 221.

According to the court below,

> No further proceedings are required or contemplated [in *Keith*], 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.

See App. at 221. The trial court misconstrued the legislative enactment considered in *Keith* as "final" because, in fact, 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." *Keith*, 63 N.C. at 143. Thus, in *Keith*, as in Walters' 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 previously-committed crimes. Both were affirmative defenses

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. And finally, both laws were repealed by the legislature. Significantly, though, by the time Keith asserted his right to a pardon for his actions as a soldier in the Confederate Army, the Amnesty Act had already been repealed. Whereas, here, Walters filed her claim and got relief under the RJA prior to its repeal. If anything, Walters has a stronger case than Colonel Keith, because she pled and proved her case under the RJA prior to the repeal of the statute. This Court's holding in *Keith*, which has not been overruled or questioned by this Court in nearly 150 years, cannot help but be controlling.

The lower court also erred in finding that Walters had no vested rights under the RJA because, in its view, the judgment entered after securing relief at her RJA evidentiary hearing was not a final judgment because an "order or judgment is not final until it has undergone appellate review or the time for discretionary review has expired." App. at 220. Contrary to the lower 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").

Further, this Court has considered the question of when a judgment on a motion in the post-conviction context is deemed final. A judgment on a motion for appropriate relief is final where there is no *right* to appeal. *See State v. Green*, 350 N.C. 400, 408, 514 S.E.2d 724, 729 (1999). In *Green*, this Court addressed whether a prisoner had a right to discovery where legislation providing that right had become effective after the prisoner's motion for appropriate relief had already been denied. In concluding that the prisoner could not benefit from the newly-enacted legislation, this Court explained that the motion for appropriate relief had been denied prior to the enactment of the legislation and "[*t*]*his* [order denying the motion for appropriate relief] was a final judgment. Any appellate review of that judgment was subject to this Court's discretionary grant of certiorari. N.C. Gen. Stat. § 15A-1422(c)(3) (1997)." *Green*, 450 N.C. at 408. Indeed, as was the case here, the Order granting Walters' RJA relief was a final judgment as it could only have been reviewed, and was reviewed, following this Court's grant of certiorari.

The court below, in reaching its conclusion that there was no final judgment, 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). These cases, however, have no bearing on the question at issue here about whether a judgment is "final" for purposes of determining vested rights. These decisions address the narrow and specific question of whether a federal habeas petitioner may receive the benefit of new

United States Supreme Court decisions. The rule established in *Allen* and *Linkletter*, and in *Teague v. Lane*, 489 U.S. 288 (1989), is that a *case* becomes "final" once direct review has been completed and, after that point, a habeas petitioner cannot claim the advantage of new rules established by the United States Supreme Court. *See Teague*, 489 U.S. at 295-96 (discussing *Allen* and *Linkletter* and rejecting petitioner's argument that "*Batson* should be applied retroactively to all cases pending on direct review"). Whether Walters may gain the benefit of a new Supreme Court rule is obviously not at issue here. This case concerns the repeal of a state statute that was clearly applicable to prisoners whose convictions were "final" for purposes of *Teague*, but nonetheless were eligible to seek RJA relief.

Thus, under this Court's controlling precedent in *Keith* and *Green*, Walters must be afforded the protections of the RJA and her RJA claims remain untouched by the statute's repeal. Numerous other cases decided by this Court confirm that Walters' rights under the RJA vested. As discussed above, the RJA hearing court's grant of relief and entry of a life sentence constituted a final judgment and, consequently, Walters' rights under the RJA vested at least when she obtained a judgment in her favor sentencing her to life imprisonment without the possibility of parole. 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, 213, 38

S.E. 832, 834 (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"); *see also Dyer v. Ellington*, 126 N.C. 941, 941, 36 S.E. 177, 178 (1900) (concluding that legislature could repeal previously available cause of action, and deny plaintiff penalty he would have been owed as "the penalty had [not] been reduced to judgment" and had not thus vested).

In positing 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," *see* App. at 220, while ignoring that this Court stated explicitly in that very case that "[a] right is vested when judgment has entered." *Id*. at 172-73, 80 S.E. at 400, *citing Dunham v. Anders*, *supra*. Significantly, the plaintiffs in *Oates* had not properly commenced the lawsuit, and no judgment had been entered by the trial court at the time the repeal statute was enacted. *Id*. at 168-70, 80 S.E. at 399. Thus, the lower court's reliance on *Oates* to dismiss Walters' RJA claims is without support.

Importantly, 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 Cnty., et al.*, 221 N.C. 308, 311, 20

S.E.2d 332, 334-35 (1942); *see also Wilson v. Anderson*, 232 N.C. 212, 221, 59 S.E.2d 836, 843-44 (1950) (citations omitted) (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, 698, 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 Cnty. v. Blue*, 190 N.C. 638, 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 . . . .").

In this case, the General Assembly has interfered in the normal course of litigation and has attempted to divest Walters of her right to further proceedings. When this Court found error in the RJA Hearing Court's continuance and joinder rulings, it remanded for further proceedings. At that point, Walters reasonably expected a second evidentiary hearing, one at which the State would have no complaint that it was not ready to counter her evidence of racial bias. However, the very specific language in the repeal statute targeted the precise procedural posture of Walters and the other three death-sentenced prisoners who prevailed on their RJA claims. *See* N.C. Sess.

Law 2013-154 §5.(d) (retroactively applying repeal to "any case where a court resentenced a petitioner to life imprisonment without possibility of parole . . . and the Order is vacated upon appellate review"). In determining that the retroactivity provision of the RJA Repeal rendered Walters' RJA claims null and void, the lower court seemingly approved the Legislature's interference with the judiciary's power to order a new hearing on remand. The Legislature's retroactivity provision, which targeted Walters, infringed upon the judiciary's power following a finding of error.

2. Walters' Right to an Evidentiary Hearing under RJA has Vested.

Walters' rights to an evidentiary hearing under the RJA vested when the RJA Hearing Court ordered an evidentiary hearing pursuant to N.C. Gen. Stat. § 15A-2012(a), and this Court did not vacate the order granting an evidentiary hearing when remanding this matter to the court below. The lower court was silent as to this issue, but it did deny Walters an evidentiary hearing.

When Walters filed her RJA claims, she satisfied the statutory requirement that she "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). Upon such a showing, the legislature mandated under the

RJA 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) (emphasis added). After Walters filed a motion sufficient under the RJA, the RJA Hearing Court scheduled an evidentiary hearing. That finding by the RJA Hearing Court that Walters met her burden entitling her to an evidentiary hearing pursuant to N.C. Gen. Stat. § 15A-2012(a) was left undisturbed by this Court's remand order.[10]

This Court's opinion in *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980), controls this issue. In *Gardner*, 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 that case, 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

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

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. As this Court found, "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 case at issue was "complete" and therefore was not an "ongoing case").

As in *Gardner*, the RJA Hearing Court made a final determination ordering an evidentiary hearing on Walters' RJA claim and, on review, this Court did not alter that court's holding. For that reason, Walters' 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, Walters is entitled to an evidentiary hearing to pursue her RJA claims.

3. Equitable Principles Support a Finding that Walters' Rights Vested under the RJA.

The lower court erred by denying Walters an evidentiary hearing on equitable questions supporting her claim that her rights under the RJA had vested. When deciding whether Walters' rights under the original RJA are vested and thus protected from repeal, principles of equity and fundamental fairness must be considered. The application of due process to protect vested rights involves a concern about certainty, stability and fairness. *See*, *e.g.*, *Michael Weinman Assocs. v. Town of Huntersville*, 147 N.C. App. 231, 234, 555 S.E.2d 342, 345 (2001) (recognizing vested rights protect interests in certainty, stability and fairness); *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 court below failed to consider and failed to allow Walters an opportunity to show at an evidentiary hearing that equities involving principles of fairness, expectations and reliance weigh against application of

the RJA repeal retroactively. These considerations should weigh in favor of Walters. After the legislature created the RJA, Walters prevailed at an evidentiary hearing with individual evidence of discrimination in her case. She was then, as required under the RJA, sentenced to life without the possibility of parole. At that juncture, she was transferred from death row and began serving her life sentence. It is at this point that the General Assembly changed course and, in repealing the RJA and enacting the retroactivity provision to specifically apply to Walters, sought to sweep clear evidence of race-based discrimination under the rug and Walters was returned to death row. The principles of due process, certainty, equity and fairness require that Walters not be denied her rights under the RJA.

For the reasons set forth above, this Court should hold that the application of the retroactivity provision of the RJA Repeal violates Walters' vested rights and should remand for an evidentiary hearing on the merits of her RJA claims. Additionally, Walters seeks an evidentiary hearing on the issue of equities.

B. The Lower Court's Summary Rejection of Walters' Ex Post Facto Defense to the Retroactive Application of the RJA Repeal was Error.

In the lower court, Walters argued the application of the retroactivity provision of the RJA repeal violated the prohibitions against ex post facto laws

in the federal and state constitutions. U.S. Const. art. I, § 10, cl. 1; N.C. Const. art. I, § 16.

The RJA established a defense to a death sentence even for cases involving crimes committed before the RJA's effective date. The General Assembly'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). To accomplish this lofty goal, the General Assembly enacted extraordinary measures 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* N.C. Gen. Stat. § 15A-2012(b).

There are two critical elements for a law to be considered ex post facto: (1) the statute must apply to events occurring before its enactment, and (2) the statute as applied must disadvantage the individual affected by the statute. *Harter v. Vernon*, 139 N.C. App. 85, 91-92, 532 S.E.2d 836, 840 (2000). Both of these elements are present here.

In explaining why two ex post facto clauses were added to the Constitution to limit the power of federal and state legislatures, Justice Chase explained that the drafters 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*.

In *Calder*, Justice Chase opined that the term ex post facto referred to certain types of criminal laws. He cataloged those types as follows:

> 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 id.* 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.").

These criteria first laid out in *Calder* have been broadly construed by the United States Supreme Court. In *Stogner v. California*, 539 U.S. 607 (2003), for example, that Court held that the state's effort to prosecute the defendant pursuant to a statute that permitted prosecutors to resurrect otherwise time-barred prosecutions and enacted after the applicable statute of limitations had expired in a defendant's case, violated the ex post facto clause. *Id.* at 609. The *Stogner* Court held that the new law, by reviving time-barred charges, fit within the second of the four *Calder* 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.

Stogner, 539 U.S. 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); *Carmell v. Texas*, 529 U.S. 513, 530 (2000) (holding that an amendment to a statute authorizing conviction of certain sexual offenses on victim's testimony alone, where previous statute required victim's testimony plus other corroborating evidence to convict, "plainly fits" within *Calder's* identified categories).

The broad construction of ex post facto includes the General Assembly's elimination of Walters' defense to the death penalty. In analyzing whether an enactment violates the ex post facto prohibition, courts look to whether the legislature increased punishment beyond what was prescribed when the crime was committed. *See*, *e.g.*, *Weaver v. Graham*, 450 U.S. 24, 29-31 (1981). However, the terms of the RJA, meant to be applied retroactively and as a defense to execution, cannot be so constrained. In 2009, the General Assembly made the RJA fully retroactive with respect to capital crimes occurring before the passage of the act. N.C. Sess. Law 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 a filing a motion seeking relief.

N.C. Gen. Stat. § 15A-2012(b) (emphasis added). These provisions had the intent and effect of placing death-sentenced prisoners in the identical position as individuals who had not yet committed capital crimes at the time of the passage of the RJA. 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. *See Neelley v. Walker*, No. 2:14-CV-269-WKW, 2018 WL 1579474, at *10 (M.D. Ala. Mar. 30, 2018) (finding ex post facto violation where retroactive legislation that made changes in parole law was enacted after plaintiff's crime, conviction, sentencing and commutation, and "terminate[d] her prospects for release on parole after her sentence was commuted"); *Mickens-Thomas v. Vaughn*, 321 F.3d 374, 393 (3d Cir. 2003) (finding ex post facto violation where changes to parole law were made after prisoner's conviction and commutation as the "parole change substantially impacted" the prisoner).

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 the law occurring after the commission of the crime and, in Waddell's case, the criminal trial.

While the lower court considered *Keith* and addressed it in its discussion of Walters' vested rights argument, it failed to acknowledge the applicability of *Keith* to this argument.[11] In *Keith*, this Court held that the repeal of an amnesty law was unconstitutional and that it was "substantially an *ex post facto* law." *Keith*, 63 N.C. at 145, cited with approval in *Stogner v. California*, 539 U.S. 607, 617 (2003).

As with *Keith*, this Court's decision in *State v. Waddell,* requires this Court to find that the RJA repeal cannot be applied retroactively without running afoul of the prohibition against ex post facto laws. *Waddell* was decided shortly after the United States Supreme Court's 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.

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[11] In dismissing Walters' claim, the court below, without any examination of the issue, rejected her argument, merely stating that, "[a]lthough this court does not base this Order upon constitutional grounds, it is noted that the RJA Repeal is not an *ex post facto* law." App. at 221.

At the time of the United States Supreme Court's decision in *Furman*, North Carolina law, N.C. Gen. Stat. § 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 North Carolina death penalty statute that gave the jury the option of returning a verdict of guilty without capital punishment, but further held that this provision was severable so that the statute survived as a mandatory death penalty law. *Waddell*, 282 N.C. at 445-46, 194 S.E.2d at 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:

> 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. … 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.

Id. at 445-46, 194 S.E.2d at 29 (citation omitted). Significantly, this Court characterized the revision of N. C. Gen. Stat. § 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* 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."

Id. at 446, 194 S.E.2d at 29 (citation omitted).

Walters, like Waddell, was sentenced to death under the law in existence at the time of her crime and trial. In both cases, positive changes in the law occurred for both defendants only after their trials: *Furman v. Georgia* was decided after Waddell was on death row, and the RJA was enacted after Walters had been sentenced to death. Similarly, the courts applied *Furman*

retroactively to Waddell and the General Assembly applied the RJA retroactively to Walters. In *Waddell*, this 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 applying the retroactivity provision of the RJA Repeal to Walters.

Thus, the General Assembly's attempt to retroactively deprive Walters of her defense to execution under the RJA runs afoul of the ex post facto clauses of the state and federal constitutions and cannot stand. Accordingly, this Court should remand for a merits hearing on her RJA claims.

C. The Retroactive Application of the RJA Repeal Violates the Constitutional Prohibition against Bills of Attainder.

The court below erred in dismissing Walters' RJA claim because the retroactivity provision of the RJA Repeal is an unconstitutional bill of attainder. U.S. Const. art. I, § 10, cl. 1. The retroactivity provision, Section 5.(d) of the RJA Repeal, specifically targeted Walters -- one of only four easily-identified defendants who had proceeded to an evidentiary hearing under the RJA -- for additional punishment after she secured RJA relief and eliminated her defense to the death penalty under the RJA. The court below acknowledged Walters had raised this issue, *see* App. at 219, but failed to address the matter

and failed to permit Walters an evidentiary hearing on this defense to the retroactivity provision.

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 prohibition against bills of attainder stems from the belief of the Framers of the Constitution 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." *United States v. Brown*, 381 U.S. 437, 445 (1965).

In order to assess whether an enactment by the legislature is an unconstitutional bill of attainder, Walters must demonstrate that: (1) the legislation in question targeted her specifically or that she was a member of an identifiable group targeted by the legislation, (2) the legislative enactment imposes punishment; and (3) the legislative enactment fails to provide for a judicial trial. *See Planned Parenthood of Mid-Missouri and E. Kan. v. Dempsey*, 167 F.3d 458, 465 (8th Cir. 1999); *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977) (describing a bill of attainder as "a law that legislatively

determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."). To be considered punishment under the Bill of Attainder Clause, the harm as a result of the legislative enactment "must fall within the traditional meaning of legislative punishment, fail to further a nonpunitive purpose, or be based on a congressional intent to punish." *Planned Parenthood of Mid-Missouri*, 167 F.3d at 465 (citing *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984), and *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 473–76 (1977)); *see also State v. Johnson*, 169 N.C. App. 301, 310, 610 S.E.2d 739, 745 (2005).

a. The Retroactivity Provision in the RJA Repeal Targeted Walters Specifically.

The retroactivity provision in the RJA Repeal specifically targeted Walters. After Walters obtained relief after her RJA evidentiary hearing in 2012, the State sought review by way of a petition for certiorari, which this Court then granted. Soon thereafter, the General Assembly enacted the RJA Repeal with the following retroactivity provision:

> This section is applicable *in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of [the RJA]* prior to the effective date of this act *and the Order is vacated upon appellate review* by a court of competent jurisdiction.

N.C. Sess. Laws 2013-154, p. 4, §5.(d) (emphasis added). Given the timing of the RJA Repeal, passed in June 2013, this retroactivity provision can only – at

most – apply to Walters and the three other Cumberland County prisoners who prevailed under the RJA after an evidentiary hearing. No other prisoners, other than these four, had been resentenced to life imprisonment without the possibility of parole before the effective date of the enactment.

It is clear from the plain language of the statute that the General Assembly targeted Walters who was resentenced 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, p.4, §5.(d). The prohibition against bills of attainder covers those legislative enactments directed to individuals either specifically named or identified as 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 U. S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866) (noting "[t]hese bills are generally directed against individuals by name; but they may be directed against a whole class.").

The fact that Section 5.(d) did not name Walters and the other three prisoners who had secured relief under the RJA does not end the inquiry. In a case with striking similarities to the one here, the plaintiff, who had previously

secured a commutation to a life sentence, alleged that Alabama's newly-enacted statute was a bill of attainder because it barred similar individuals serving a commuted life sentence from obtaining parole. *Neelley v. Walker*, 2018 WL 1579474 (M.D. Ala. Mar. 30, 2018). The parole board asserted that the plaintiff's complaint was deficient since the law did not specifically name her. The court readily rejected that argument:

> Admittedly, the Act does not specifically name her, and its retroactive application reaches before the date of her commutation. But the Act was not subtle in identifying Ms. Neelley. The Legislature suspiciously made the Act retroactive to four months before [the plaintiff's] commutation. And the retroactivity provision ensured that the Act would proximately affect one more person than it might have otherwise: Ms. Neelley. *Indeed, the Act demonstrates that a legislature does not need to specifically name an individual to identify that person and designate that person as the subject of a piece of legislation.*

Neelley, 2018 WL 1579474, at *11 (emphasis added). *See also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (in context of ex post facto prohibition, three capital defendants were "identifiable targets of the legislation" where the section applied only to the three persons who had received the death penalty from a three-judge panel).

Here, Section 5.(d), the retroactivity provision, clearly targets Walters as a member of an identified class.

(2) The RJA Repeal is Clearly Punishment as it is Applied to Walters.

The RJA Repeal applies specifically to Walters, and the three other prisoners who secured relief under the RJA, and the retroactivity provision clearly punishes Walters.

a. The Legislative Record Demonstrates an Intent to Punish Walters.

Newspaper articles, legislative emails, and other documents establish that the Legislature intended to punish Walters and the three other similarly-situated prisoners who had secured relief under the RJA.[12]

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." *United States v. Lovett*, 328 U.S. 303, 307 (1946). 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

[12] In the court below, Walters filed a Motion for Discovery, with her Brief in Support of Racial Justice Act Claims, seeking discovery to support her constitutional arguments. App. at 469. The court below did not rule on those discovery requests before dismissing her RJA claims. In support of her argument to the lower court on the question of whether the retroactivity provision of the RJA Repeal was intended to punish Walters, Walters made a proffer of evidence, consisting of documents from the legislative record. *See* November 29, 2016 Hrg. Tp. at 39. The full set of evidence proffered in the superior court at the November 29, 2016 hearing by Walters, Exhs. 1-65 in *State v. Walters*, Cumberland County Superior Court (98CRS034832, 350444), is incorporated herein by reference. App. at 482.

839, 845 (S.D. 2015) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 478 (1977)). 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.*, 468 U.S. at 854-55 (considering legislative history and statements by individual legislators); *Nixon*, 433 U.S. at 480 (finding 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 sponsoring member of legislature); *Consol. Edison Co. of N.Y. v. Pataki*, 117 F. Supp. 2d 257 (N.D.N.Y. 2000) (in analysis, considering letter written by chairman of the NY Public Service Commission to sponsors of the bill); *Garner v. Bd. of Pub. Works*, 341 U.S. 716 (1951) (considering correspondence between city and petitioners); *see also Nixon*, 433 U.S. at 486 (Stevens, J., concurring) (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).

In their persistent efforts to repeal the RJA, the General Assembly was focused on Walters' case, as well as those of the other three prisoners who had prevailed under the RJA. In the court below, Walters proffered evidence, partially summarized below, demonstrating that the retroactivity provision of the RJA Repeal enacted by the Legislature was intended to single out and punish Walters and the other three prisoners who were removed from death row. *See Planned Parenthood of Cent. N. C. v. Cansler*, 877 F.Supp.2d 310, 324-35 (M.D.N.C. 2012) (finding legislative enactment an unconstitutional bill of attainder by reviewing comments made by legislators in support of enactment); *see also Planned Parenthood of Cent. N. C. v. Cansler*, 804 F.Supp.2d 482, 496 (M.D.N.C. 2011) (in granting preliminary injunction on bill of attainder claim, the court noted that "legislators opposed to Section 10.19 raised concerns that singling out Planned Parenthood in this manner could constitute an unconstitutional Bill of Attainder, but their concerns were disregarded.").

While legislators began their efforts to repeal the RJA soon after Robinson's evidentiary hearing on his RJA claims was ordered in the spring of 2011, those efforts intensified and became more feverish after Robinson secured relief under the original RJA. On April 20, 2012, Judge Weeks entered the order in Robinson's case finding pervasive, systemic discrimination against African-American jurors in jury selection over a twenty-year period, including

at the time of his trial. Judge Weeks vacated Robinson's death sentence and resentenced him to life without parole.

Senator Berger, then Senate President, reacted sharply to Robinson's removal from death row, noting his "deep concern" that Robinson could become eligible for parole, calling on the State to appeal the decision. He also used the *Robinson* decision to garner support for a revision of the RJA, describing it as "an ill-conceived law that has very little to do with race and absolutely nothing to do with justice." *See* App. at 358.

On June 5, 2012, as the evidentiary hearing in Walters' case, and that of Golphin and Augustine, was being scheduled, the House Judiciary Subcommittee substituted a new version of the RJA into Senate Bill 416 ("the Amended RJA"). 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 a June 5, 2012 letter from RJA counsel for Augustine to Judge Weeks regarding the ongoing litigation in the cases of Walters, Golphin and Augustine. App. at 464.

Prosecutors lobbying on behalf of the amended RJA 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 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."

App. at 359-360.

The Conference of District Attorneys, through its staff, kept legislators apprised of the ongoing litigation in the cases of Augustine, Golphin and Walters. On June 11, 2012, the Conference emailed Majority Leader Stam, forwarding the email correspondence from the prosecution regarding the scheduling of an evidentiary hearing in the *Augustine*, *Golphin*, and *Walters* cases in Cumberland County. App. at 361.

On June 13, 2012, during additional floor debates on the amendment to the RJA, there was additional discussion of the four cases, with a particular focus on the cases of Walters, Augustine and Golphin. The House Speaker again referenced the letter sent by RJA counsel for Augustine to Judge Weeks concerning the scheduling of an evidentiary hearing in the cases of Walters, Augustine and Golphin**.** App. at 365; *see also* App. at 362. *See also* App. at 397 (Rep. Glazier noted, "[I]n section 8 [of the bill], 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.").

During this floor debate, legislators raised concerns about the impact of amending the RJA on pending cases. As one legislator argued, "under the Equal Protection Clause of the United States Constitution there's going to be a substantial argument about how you can treat these other folks differently from Marcus Robinsons. His rights of course have already vested. It's arguable whether the other folks' rights have vested as well." App. at 366. These concerns fell on deaf ears.

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. Cumberland County prosecutors then filed motions to dismiss the RJA claims in Walters' case, and those in Augustine's and Golphin's 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, the RJA evidentiary hearing began in Cumberland County for Walters, Golphin and Augustine. On December 13, 2012, the RJA Hearing Court found Walters, Golphin, and Augustine, had each demonstrated that race was a significant factor in their individual cases at the time of their trials. Judge Weeks then resentenced Walters to a sentence of life imprisonment without the possibility of parole.

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, the Conference exchanged emails with Cumberland County prosecutor Rob Thompson to obtain photographs of Defendant Robinson and the crime scene photographs of the victim. *See* App. at 409-10. 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." App at 412. 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, including that of Walters. *See* App. at 413.

Senator Goolsby shortly thereafter ran an Op-Ed in multiple outlets calling for repeal of the RJA and complaining about the decision removing Walters, Golphin and Augustine from death row. He specifically called for voiding all appeals under the RJA:

> 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.

See App. at 418. This Op-Ed also ran in other newspapers and was posted on Sen. Goolsby's YouTube page. Walters, along with Robinson, Augustine, and Golphin were the only defendants in the state with pending RJA appeals at that time.

On March 26, 2013, the Senate Judiciary Committee debated the repeal statute, including Section 5.(d), the retroactivity provision that could only apply to Walters and the three other prisoners who secured RJA relief. During those debates, the cases of the four RJA defendants, including Walters, were mentioned repeatedly. *See* App. at 429. Leading up to the vote, the cases of the four defendants, including that of Walters, were used to push for the repeal.

Again, concerns about the constitutionality of the repeal statute were ignored. App. at 421 (Sen. Parmon: "Senator, under your bill those inmates that have already filed or have their cases reheard based on proof of race -- they will not have an opportunity. Is that unconstitutional since they filed under a valid law for [*having their hearing*]?; So the fact that they already have filed and the law was valid at that time, not having the opportunity to have their cases heard is not unconstitutional in your opinion?); App. at 424 (Sen. Stein: "[W]alk 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*?"; "I happen to believe that the strength of

the legal argument is going to be … filed motions that you can't give them a procedural right and they have exercised it and then remove it.").

Efforts to secure a repeal of the RJA continued with both Cumberland County prosecutors and the Conference of District Attorneys providing information to the Legislature. On May 29, 2013, in response to a request from the Conference of District Attorneys, Cumberland County prosecutor Rob Thompson provided the racial makeup of the juries in the four RJA cases, including that in Walters' case. *See* App. at 431. On May 31, 2013, the Conference forwarded information to Rep. Stam "on the 4 cases that Judge Weeks removed from death row under the Racial Justice Act." It provided information on the race of the defendants and victims, and jury composition. *See* App. at 432. The Conference 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. *See* App. at 434.

During House debates on the RJA Repeal bill in early June of 2013, the cases of the four RJA defendants, including Walters' case, were repeatedly mentioned and discussed. Majority Leader Stam discussed the cases and his criticism of the favorable outcomes in the cases in court and noted that "equal protection" would be to "get [Judge Weeks'] four people back in the queue" for execution. *See* App. at 439. Shortly thereafter, on June 19, 2013, the General Assembly repealed the RJA, effective that date.

From the beginning, the General Assembly focused on Walters and the other three prisoners who had secured RJA relief and their efforts to first amend and then repeal the RJA were part of its desire to return these four prisoners to death row.

b. The Retroactivity Provision of the RJA Repeal Falls Within the Historical Meaning of Punishment.

The retroactivity provision of the RJA Repeal is a Bill of Attainder as its enactment results in the legislative imposition of a type of punishment that clearly falls within the historical meaning of punishment. Here, the enactment both removes her access to the courts and subjects Walters again to the ultimate penalty of death.

There can be no question that the death penalty is the quintessential legislative punishment. "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. "The classic example [of attainder] is death." *ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2010).

Courts have also recognized that removing 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 defendant in Guam had been charged 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 court concluded that the legislative "amendment's attempt to deny [defendants] any right to attack the judgment against them is a bill of attainder." *Putty*, 220 F.2d at 478-79. By trying to retroactively strip a valid defense from pending appellate cases, the legislation ran afoul of the constitution. *See also Pierce v. Carskadon*, 83 U.S. 234, 238-39 (1872) (finding bill of attainder violation where trial court attempted to apply new legislation that dramatically changed a defense); *R. I. Depositors Econ. Prot. Corp. v. Brown*, 659 A.2d 95, 104 (R.I. 1995) (citing *Pierce* for proposition that "denial of access to the courts, or prohibiting a party from bringing an action" constitutes punishment by a bill of attainder); *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 enacting the retroactivity provision of the RJA Repeal, the General Assembly eliminated an affirmative defense to the death penalty. By applying the retroactivity provision to Walters and the other three RJA defendants already on appeal, the Legislature improperly cut short Walters' rights to have her RJA claims heard.

Subjecting a prisoner to the penalty of death, and removing access to the courts, both fall within the historical meaning of legislative punishment and, thus, the retroactivity provision of the RJA Repeal is an unconstitutional Bill of Attainder.

c. The RJA Repeal Fails to Further a Nonpunitive Legislative Purpose.

In order to determine whether a legislative enactment runs afoul of the "punishment" prong of the bill of attainder inquiry, the Court must determine "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*, 433 U.S. at 475-76.

Given that the RJA Repeal applies specifically to Walters and the other three prisoners who successfully litigated their RJA claims to judgment, the only justification that reasonably explains the General Assembly's purpose in enacting the retroactivity provision was its desire to ensure their eventual execution, at a time when Walters and the other prisoners were serving life sentences without possibility of parole. Given the concerted and targeted efforts by the legislature to enact the RJA Repeal and the voluminous legislative record demonstrating that the goal was to eliminate an avenue for Walters to secure relief, there can be no question that the RJA Repeal lacks a nonpunitive legislative purpose.

While the State may argue that the Legislature had an interest in the even-handed administration of justice for all those on death row, this reasoning ignores that Walters and the other three prisoners who secured RJA relief were not similarly-situated to other prisoners on death row. Indeed, they were not on death row at all: at the time the Legislature passed the RJA Repeal, Walters

had been awarded an evidentiary hearing under the RJA, granted relief under the RJA, resentenced to life imprisonment, removed from death row, and was serving her life sentence. Furthermore, the Legislature itself recognized that Walters and Augustine, Golphin and Robinson were not similarly situated to other prisoners in Section 5.(d) of the RJA Repeal: "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 . . . ." N.C. Sess. Law 2013-154. The Legislature explicitly recognized that Walters' case was not in the same procedural posture as those on death row who had never been afforded an evidentiary hearing under the RJA.

While there is strong support for all three inquiries -- intent to punish, historical punishment and lack of nonpunitive legislative purpose --, the Court is not required to find that all are satisfied in order to conclude that the retroactivity provision of the RJA Repeal is a bill of attainder. *See, e.g., Consolidated Edison Co. of New York Inc. v. Pataki*, 117 F.Supp.2d 257, 267 (2000) ("Although it need not do so in order to be found violative of the Bill of Attainder Clause, Chapter 190 satisfies all three of these tests."). Regardless of whether this Court accepts that all three inquiries have been met, the weighing of these inquiries overwhelmingly favors a finding of a Bill of Attainder. *See Matter of Extradition of McMullen*, 989 F.2d 603, 617-19 (2d

Cir. 1993) (while court found that the historical punishment inquiry was not satisfied, court found evidence of intent, as well as a lack of non-punitive purpose, such that enactment imposed a punishment and held that treaty was Bill of Attainder). Similarly, here, there is persuasive evidence from each inquiry that the retroactivity provision of the RJA Repeal imposes punishment, therefore, this Court should find that this part of the RJA Repeal is a Bill of Attainder.

(3) The RJA Repeal Fails to Provide for a Judicial Trial.

The third and final element that must be present in order to determine that a legislative enactment is an unconstitutional bill of attainder is that it fails to provide a judicial trial. *See Dempsey*, 167 F.3d at 465; *see also Nixon*, 433 U.S. at 538-39 (identifying third "hallmark[]" of a Bill of Attainder as "an arbitrary deprivation" of individual rights "without notice, trial, or other hearing."). The enactment's failure to afford Walters a judicial hearing is incontrovertible.

Following the remand to the lower court, the lower court determined that the RJA Repeal rendered Walters' 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 whatsoever to allow Walters to challenge the reinstatement of her death sentence.

While Walters was initially afforded a judicial trial to establish guilt and her subsequent death sentence, a trial establishing guilt does *not* negate the third 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 Neelley had not established the third element in the bill of attainder analysis 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 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 Walters was found guilty and sentenced to death at her capital murder trial, her sentence was subsequently changed to life without the possibility of parole after she presented powerful evidence of statistical disparities and intentional race discrimination at her RJA hearing. The General Assembly could not then constitutionally pass legislation to enhance Walters' punishment, effectively resentencing her to death without a new RJA hearing where the enactment fails to provide for a judicial trial or a comparable form of process. The retroactivity provision of the RJA Repeal took away her right to a new hearing that she would have had upon remand. Thus, the RJA Repeal fails to provide Walters with a judicial trial, thus fulfilling the third element of an unconstitutional bill of attainder.

In the court below, the lower court determined that the RJA Repeal rendered her RJA motion null and void. In so doing, the Legislature has denied Walters the opportunity for a hearing to determine whether she was again eligible for relief under the RJA. After the remand by this Court, Walters was entitled to a new hearing but for the Legislature's interference with the Court's jurisdiction through its enactment of the retroactivity provision. Thus, the effect of the retroactivity provision of the RJA Repeal has stripped Walters of her RJA claim that had been found meritorious and has left Walters again

facing the death penalty. For the reasons set forth above, this Court should find that the RJA Repeal is an unconstitutional Bill of Attainder as it applies to Walters. In the alternative, at a minimum, because the lower court did not permit the defendant to present evidence to support this claim, this Court should remand for an evidentiary hearing on this defense to the RJA repeal.

D. The Denial of Review of Walters' Pending Claims of Race Discrimination Violates Equal Protection and the Prohibition Against Cruel and Unusual Punishment under the State and Federal Constitutions.

The legislature's repeal of the RJA and its attempt to foreclose any further review of Walters' claims of racial bias violates the prohibition on discriminatory application of the death penalty and equal protection. U.S. Const. amends. VIII, XIV; N.C. Const., art. I, § 19, § 27; *Furman v. Georgia,* 408 U.S. 238 (1972); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

In enacting the Racial Justice Act, North Carolina declared that racial bias would not be tolerated in the decisions of who got life and who was sentenced to death. The RJA was clearly in alignment with our ideals, namely that the people of North Carolina "will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987). But the enactment of the RJA was also a recognition that, in practice, we do not always act in accordance

with our aspirations. Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO ST. J. CRIM. L. 103, 116 (2012) (describing legislative history of intent to address racial discrimination that has persisted despite constitutional prohibition and judicial condemnation).

The enactment of the RJA led to a unique inquiry into the history of racial discrimination and the death penalty in our state and, in turn, this inquiry yielded a comprehensive and damning analysis of pervasive racial disparities in capital cases, as well as documentary and historical evidence of intentional discrimination based on race. Unfortunately, a newly-constituted Legislature sought to turn away from this evidence and moved to repeal the RJA. When that initial effort failed because of a gubernatorial veto, the legislature sought to narrow the reach of the RJA and the RJA was amended.

As the efforts to repeal the RJA came to a head in the spring of 2013, many in our General Assembly recognized that, despite the findings of race discrimination in the RJA hearings for Walters, Robinson, Golphin and Augustine, the goals of the RJA were still ones to pursue. As then Sen. Nesbitt stated,

> 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. … When we passed the Racial Justice Act, we did not know what we would find when we looked a[t] picking juries. You've [] read 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. … [W]e 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 and sin no more.' … Now the answer apparently today is . . . I just don't want to talk about that anymore so I'll pass a bill and won't talk about it anymore . . . and we're going to bury our heads in the sand. … [Y]ou can't put this genie back in the bottle. … [W]e 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.

App. 352.

Ultimately, however, in June 2013, despite the recognition by some in the General Assembly that a repeal of the RJA would dismantle the very safeguard it had first deemed necessary to protect against racial discrimination, the General Assembly was successful in repealing the RJA. Unsatisfied, however, with simply foreclosing future claims of racial discrimination, the General Assembly also endeavored to ensure that Walters and the three other death-sentenced prisoners who had prevailed on their RJA claims would also be out of luck. On remand, the lower court, pointing to the RJA's repeal, closed the courthouse door to Walters' powerful claims of race discrimination.

The Eighth Amendment to the United States Constitution forbids race discrimination in capital sentencing. Where there is a "constitutionally significant risk of racial bias" with "exceptionally clear proof," including a

showing that decision makers in the case "acted with discriminatory purpose," the death sentence cannot stand. *McCleskey v. Kemp*, 481 U.S. 279, 314 (1987). The evidence presented at her RJA evidentiary hearing, and proffered to the court below on remand, meets the *McCleskey* standard and bars the State from now executing her. November, 29, 2016 Hrg. Tpp, 40-41.

The United States Supreme Court has also held that a racially-tainted death sentence is "unusual" and therefore violates the Eighth Amendment. According to that Court, it would "seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it is imposed upon him by reason of his race . . . or if it is imposed under a procedure that gives room for the play of such prejudices." *Furman v. Georgia,* 408 U.S. 238, 242 (1972) (Douglas, J., concurring); *see also Walker v. Georgia*, 129 S. Ct. 453, 454 (2008) (Stevens, J., statement respecting the denial of certiorari) (approval of post-*Furman* capital punishment statutes was "founded on an understanding that the new procedures would protect against the imposition of death sentences influenced by impermissible factors such as race."); *Connecticut v. Santiago*, 122 A.3d 1, 85 (Conn. 2015) (finding state death penalty scheme constitutes cruel and unusual punishment in part because of "racial, ethnic, and social-economic biases"); *District Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1930) (holding state death penalty scheme unconstitutional

under the state constitution based in part on the persistence of racial discrimination).

If anything, North Carolina's Constitution provides even greater protections against racial bias in the death penalty. The state constitution forbids not only "cruel and unusual" punishments, but "cruel *or* unusual" punishments. N.C. Const. art. I, § 27 (emphasis added). Indeed, this Court has construed this disjunctive language to amplify constitutional protections. *See*, *e.g.*, *State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562, (1988) (declining to "engraft a good faith exception to the exclusionary rule under our state constitution"); *Medley v. N. C. Dep't of Corr.*, 330 N.C. 837, 846, 412 S.E.2d 654, 660 (1992) (Martin, J., concurring) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment" and where the federal constitution imposes certain requirements, "the North Carolina Constitution imposes at least this same duty, if not a greater duty."). In addition, this Court has recognized the need to root out race discrimination because of our state constitutional commitment to ensure that the "judicial system of a democratic society [] operate evenhandedly and . . . be perceived to operate evenhandedly." *Cofield*, 320 N.C. at 302, 357 S.E.2d at 625.

The Legislature's decision to remove the safeguard it had deemed necessary to protect against racial discrimination, after confronted with

evidence of powerful racial discrimination, is evidence of its intent to administer capital punishment in an unequal manner, in denial of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (a law "fair on its face, and impartial in appearance" is an unconstitutional denial of equal protection "if it is applied and administered by public authority with an evil eye and an unequal hand"). "Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). This Court cannot close its eyes in the face of proof of invidious racial discrimination and remain true to the state and federal constitutions.

In the court below, Walters argued that the retroactive application of the RJA repeal violated equal protection and the prohibition of cruel and/or unusual punishments. U.S. Const. amend VIII, XIV. Walters also proffered evidence on these issues. The lower court did not address these arguments and declined to admit the evidence. This Court should vacate the lower court's order dismissing Walters' RJA claims and remand this case with instructions to hold a hearing on the merits of her RJA claims. Alternatively, at a minimum, this Court should remand for an evidentiary hearing on these defenses to the retroactivity provision of the RJA Repeal.

E. The RJA Repeal Violated the Due Process and Law of the Land Clauses of the United States and the North Carolina Constitutions.

The retroactive application of the RJA Repeal to Walters' RJA claims violates her rights to due process under the federal and state constitutions. The provisions of the RJA established life, liberty and property interests in receiving a sentence of life imprisonment once she showed that race was a substantial factor in the selection of her jury. Walters exercised her rights to secure those protected interests by litigating her claim to judgment under the RJA and presenting compelling evidence of race discrimination in the selection of her jury at an evidentiary hearing. Thus, the retroactive application of the RJA repeal ran afoul of her rights to due process. *See*, *e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 424 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 345-46 (1980).

Due process is fundamentally about preventing arbitrary action by the state. For example, in *Hicks*, when the defendant 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." 447 U.S. at 346.

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 created by the RJA can be no more important as the issue is literally life or death.

When a state-created process entitles 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 *Dist. Attorney's Office for the Third Judicial Dist. 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*, where the defendant was statutorily "entitled to have his punishment fixed by the jury," the Court, 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[,]"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[.]" 447 U.S. at 346. *See also Logan,* 455 U.S. 424 (holding that the State created a property interest in adjudicatory procedure and dismissal of claim "deprived Logan of a property right").

Courts have looked to the presence of mandatory language in determining whether statutes create protected interests. In *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979), the United States Supreme Court examined a Nebraska parole statute and held that because of the "unique structure and language" of the statute, the state had created a liberty interest in release on parole. Similarly, in *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987), the United States Supreme Court held that a Montana parole 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). The RJA, exactly like the parole statutes at issue in *Allen* and *Greenholtz*, provided that relief was mandatory when sufficient findings were made. Specifically, the RJA mandated 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 RJA further provided "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) (emphasis added).

While discussed more fully above, in *State v. Keith*, 63 N.C. 140 (1869), the defendant had served as a soldier in the Civil War and was arrested for his actions while in combat during the war. While the legislature had, in 1866, enacted an Amnesty Act granting a general pardon to persons who fought in the war, the Amnesty Act was repealed prior to the time that Keith was arrested. The trial court denied his motion for discharge under the Amnesty Act relying solely on the repeal statute. This Court then 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 as Walters' right to life must be considered a more fundamental right than Keith's right to avoid trial.

Here, 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 Walters and she timely and properly filed under the RJA thereby claiming that right, she obtained protected life (and liberty) interests in that process because the RJA's creation gave her "a substantial and legitimate expectation" that she would be resentenced to life and not executed by the State if she successfully proved her RJA claim. N.C. Gen. Stat. § 15A-2012(3). Walters filed her RJA MAR and an Amendment within the times set by the original and amended RJA, she attached affidavits and other exhibits in support of the claims, as required by N.C. Gen. Stat. §15A-1420(b)(1), and she expressly requested the hearing to which she was entitled. *See* N.C. Gen. Stat. § 15A-2012(a)(2); N.C. Gen. Stat. § 15A-2011(f)(3). She then presented substantial evidence at an evidentiary hearing, evidence that persuaded the RJA Hearing Court to grant relief.

The retroactivity provision of the RJA Repeal interferes with Walters' right to a new hearing after this Court found error in the first hearing. Such a result violates her rights to due process as protected under the Due Process and Law of the Land Clauses of the federal and state constitutions.[13] This

[13] Walters' evidence that the General Assembly targeted her, along with Golphin, Augustine, and Robinson is also relevant to the due process inquiry. *See, e.g., Bridges v. Wixon*, 326 U.S. 135, 158 (1945) (Murphy, J., concurring) (finding due process violation for failure to follow deportation procedures

Court should vacate the lower court's order and Walters should have an evidentiary hearing on her RJA claims.

F. The RJA Repeal Violates the Separation of Powers and the Judicial Powers Clauses of the North Carolina Constitution.

Before the lower court, Walters argued that the retroactivity provision of the RJA repeal violated the Separation of Powers and the Judicial Powers Clauses of the North Carolina Constitution. N.C. Const. art. I, § 6, art. IV, § 1. The General Assembly, with its retroactivity provision that targeted Walters and the other prisoners who had secured RJA relief Augustine, Golphin and Robinson, interfered with this Court's jurisdiction to determine the remedy in Walters' case.

As set forth in 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." Similarly, in N.C. Const. art. IV, § 1, it is provided: "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."

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established by statute and describing as "persistent" and "unabated" the demands that "laws be changed to make sure that Bridges was exiled").

The "separation of powers doctrine is well established in North Carolina." *Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001). "[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, 258 (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.

While the North Carolina Constitution has an express separation of powers provision, the United States Constitution also seeks to prevent the encroachment of one branch of government by another. *See* The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers provides for each branch "to resist encroachments of the others"); *see also United States v. Klein*, 80 U.S. 128, 147 (1871) ("It is the intention of the Constitution that each of the great co-ordinate departments of the government … shall be, in its sphere, independent of the others."). In *Klein*, the United States Supreme Court determined that Congress had encroached on the authority of the Executive Branch. Klein, was the administrator of an estate for an individual who had been pardoned by President Lincoln. After the Court determined that a presidential pardon served as proof that the individual had not provided aid to the Confederacy, Klein sought to recover the proceeds of the seizure and sale

of his client's property during the Civil War by government agents. During the appeal of the action to the United States Supreme Court, Congress enacted a statute providing that a pardon could not serve as a proof that one had not provided aid to the Confederacy. The Supreme Court, however, held that Congress could not change the effect of a pardon and since Congress lacked the authority to impair the pardon power held by the Executive, Congress could not "direc[t] the court to be instrumental to that end." *Klein*, 80 U.S. at 148.

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). The retroactivity provision of the RJA Repeal violates the Separation of Powers Clauses because it prevents the judiciary from accomplishing its constitutionally assigned function. *See Bacon*, 353 N.C. at 715-16, 549 S.E.2d at 853. "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, 373, 451 S.E.2d 858, 869 (1994), citing *Corum v. Univ. of N. C.*, 330 N.C. 761, 784, 413 S.E.2d 276, 291, *cert. denied*, *Durham v. Corum*, 506 U.S. 985 (1992).

Specifically, the legislative repeal of the RJA, as applied to Walters, impeded on this Court's 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). 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). *See also Hogan v. Cone Mills Corp.*, 315 N.C. 127, 142-43, 337 S.E.2d 477, 486 (1985) (citations omitted) ("[T]he Legislature has no authority to invade the province of the judicial department. It follows, then, that a legislative declaration may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction.").

By enacting the retroactivity provision of the RJA Repeal, the General Assembly usurped the function of the North Carolina courts. Here, the Legislature interfered with the Court's power to order a new hearing by enacting the retroactivity provision of the RJA Repeal. It is not the province of the Legislature to decide how this case should be treated upon a finding of error and the Legislature could not divest the courts' jurisdiction after this Court found error. For these reasons, the retroactivity provision of the RJA Repeal violates the Separation of Powers and Judicial Powers Clauses of the North

Carolina Constitution. Walters should have an evidentiary hearing on her RJA claims.

IV. PETITIONER IS ENTITLED TO PURSUE HER CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE THIS COURT'S 2015 REMAND ORDER ESTABLISHED THE LAW OF THE CASE AND COMMANDS MERITS REVIEW OF PETITIONER'S RACE DISCRIMINATION CLAIMS.

In dismissing Walters' RJA claims without an evidentiary hearing, the lower court violated the express terms of this Court's 2015 Remand Order. In light of this express violation, Walters asks this Court to enforce its original mandate and remand this case for an evidentiary hearing on her RJA claims. This Court can avoid the constitutional issues raised herein by giving effect to the intent of its Remand Order.

When it remanded this case to the Superior Court of Cumberland County, this Court said:

> We express no opinion on the merits of [Walters'] motion[] for appropriate relief at this juncture. On remand, the trial court should address [the State'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 plain language of the Court's Remand Order requires an evidentiary hearing on Walters' RJA claims. In its Remand Order, the Court directed a "new hearing" at which Walters' statistical evidence might be subject to scrutiny by experts for the prosecution and the hearing court. The Remand Order took the unusual step of specifying that the Administrative Office of the Courts must fund work by any appointed expert. The level of specificity in the Remand Order clearly reflected this Court's commitment to ensuring that the State would have the resources to challenge Walters' statistical study offered at her RJA hearing and to present its own statistical evidence at that hearing. Notably, the Court said the appointment of these experts was "in the interest of justice."

It does not make sense that this Court would specify, not only the provision of a prosecution and court expert on remand, but also the manner of payment for those experts, if the RJA Repeal of which this Court was well aware were to preclude a second evidentiary hearing in this case. To suggest that these portions of the Remand Order were needless surplusage casts aspersions on the integrity and competence of this Court.

Significantly, this Court's Remand Order constitutes the law of the case

> 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*.

Lea Co. v. N.C. Bd. of Transp., 323 N.C. 697, 699-700, 374 S.E.2d 866, 868 (1989) (internal citations omitted). *See also D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966).

The Court's language concerning its continuance ruling is equally clear in calling for a new hearing. As a matter of law, the remedy for the failure to grant a continuance is to provide a new proceeding. Once this Court decided that the State had not received a fair opportunity to counter the statistical evidence offered at Walters' RJA hearing, there had to be a second hearing. Only then could the error in denying the State more time be cured.

In the companion RJA case, *State v. Robinson*, the Court's language is at odds with an interpretation that the court on remand could avoid an evidentiary hearing. As this Court expressly stated, "Continuing this matter to give [the State] more time would have done *no harm* to [the defense]. *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015) (emphasis added). The Court then reasoned, "Under these unique circumstances," the case must be remanded in order to give the State an "adequate opportunity" to prepare. *Id.* Surely, this Court would not have predicated its continuance ruling on the absence of harm to Walters only to subject her to the paramount harm of

vacating the order, resentencing her to death, and then speeding her towards execution with no further review of her substantial race discrimination claims.

Walters is one of only four death-sentenced prisoners who had an RJA evidentiary hearing. At her hearing, she presented powerful evidence of race discrimination in Cumberland County and in her own case. After Walters prevailed at that hearing, the State, claiming it was denied a fair hearing, came to this Court for relief, which this Court provided. Then the State turned around and argued in the court below, in essence: never mind, this was never about a fair hearing, we just needed the North Carolina Supreme Court to vacate the prior order granting relief so that the case could then be dismissed under the retroactivity provision of the RJA Repeal and the prisoner's execution can proceed. That cannot be right. For these reasons, the Court should apply the law of the case, and remand for an evidentiary hearing.

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

Following the RJA Hearing Court's grant of relief to Walters, the State did not seek to challenge the RJA Hearing Court's judgment imposing a life sentence without the possibility of parole on Walters. As such, the State waived its right to now dispute its validity. Walters' life without parole sentence is in full force and effect.

On December 13, 2012, the RJA Hearing Court granted Walters' RJA MAR. App. at 1. On that same date, the RJA Hearing Court entered a separate judgment and commitment order resentencing Walters. *State v. Walters*, Judgment and Commitment, Cumberland County Nos. 98 CRS034832, 35044. App. at 211. On March 21, 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, the State, as petitioner was 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. Then, on October 3, 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, filed on November 18, 2013, made a similar request, seeking "reversal of the ORDER GRANTING MOTIONS FOR APPROPRIATE RELIEF filed on 13 December 2012." Again, attached to the State's brief was a copy of the Order granting the Motions for Appropriate Relief.

The State's petition and brief did not mention the RJA Hearing Court's Judgment and Commitment. No notice of appeal was filed by the State from

the Judgment and Commitment,[14] 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 December 15, 2015 vacated the RJA Order granting relief to Walters but left the Judgment and Commitment undisturbed. *State v. Augustine, Golphin and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015). Because the State did not seek to challenge the judgment imposing a life sentence without the possibility of parole on Walters, it waived its right to now dispute its validity. Walters' life without parole sentence 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

[14] The State had no right to appeal from the Judgment and Commitment resentencing Walters 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).

S.E.2d at 418-419. Similarly, in Walters' 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 RJA Hearing 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).

CONCLUSION

For the reasons argued here, Walters asks this Court to resentence her to life imprisonment without possibility of parole or, in the alternative, remand her case for an evidentiary hearing on her RJA claims or, in the alternative, remand her case so that the Superior Court of Cumberland County might address her statutory and constitutional defenses to retroactivity in the first instance and, where appropriate, receive evidence and, ultimately, enter findings of fact and conclusions of law.

With respect to Claim I above, Walters asks that this Court rule that the State's 2013 petition for certiorari review granted in this case was improvidently granted, as the State did not raise the issues that formed the basis for this Court's 2015 remand. This Court should exercise it Rule 2 power and reconsider its prior Order.

As to Claim II, in the alternative, Walters asks that this Court rule that the Double Jeopardy Clause of the United States Constitution and North Carolina statutory law, N.C. Gen. Stat. § 15A-1335, prohibit exposing Walters again to the death penalty and to uphold her sentence of life imprisonment without the possibility of parole.

If the Court rules otherwise on these issues, then Walters asks, under Claim III, that this Court find that she has established the existence of constitutional defenses to the application of the retroactivity provision of the

RJA Repeal to her case and she should be afforded an evidentiary hearing on her RJA claims. In the alternative, Walters asks that this Court remand this case to the lower court so that Walters may complete discovery and present evidence in support of the constitutional defenses.

As to Claim IV, the Court's 2015 Remand Order constitutes law of the case and this case should be remanded for an evidentiary hearing on the merits of Walters' RJA claims.

As to Claim V, as the State did not challenge, and this Court did not review, the separate judgment and commitment order resentencing Walters to life imprisonment without parole, the Court should find Walters' life sentence without possibility of parole is now final and irrevocable.

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

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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 PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing pleading, by electronic means upon Danielle Marquis Elder and Jonathan Babb of the Capital Litigation Section of the N.C. Department of Justice at dmarquis@ncdoj.gov and jbabb@ncdoj.gov.

This the 16th day of July 2018.

/s/Shelagh R. Kenney
Shelagh R. Kenney

No. 548A00-2 DISTRICT TWELVE

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	98 CRS 34832, 35044
	)	
CHRISTINA SHEA WALTERS	)	

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APPENDIX INDEX

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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 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 *Batson* 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

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). The Court also finds that the State's actions in these cases constitute evidence of a willingness to consciously and intentionally base strike decisions on discriminatory reasons, and evidence that race was a significant factor in prosecutor strike decisions.

Irrational Reasons For Exclusion: Service In United States Military

187. 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*, 476 U.S. at 98 n.20. In the cases described below, prosecutors struck African Americans and then gave irrational explanations having nothing to do with the case.

188. The Court is deeply troubled by the following three instances in which African-American veterans were rejected for jury duty in capital cases because they served their country in 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

File No. 98CRS034832 51

CUMBERLAND County FAYETTEVILLE Seat of Court

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).]*

In The General Court Of Justice
☐ District ☒ Superior Court Division

STATE VERSUS

Name Of Defendant
WALTERS,CHRISTINA,SHEA

Race	*Sex*	*Date Of Birth*
I	F	7/15/1978

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.
98CRS034832	51	FIRST DEGREE MURDER RE-SENTENCE	8/17/1998	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, 2006, 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 5230 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 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

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.

CUMBERLAND COUNTY, C.S.C.
2017 JAN 25 A 11: 42

****

FILED

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

JUROR #1: I just know that he was a client there at the same time I was employed there.

THE COURT: Ma'am, would that knowledge make any difference in your ability to be fair in this case?

JUROR #1: No.

THE COURT: All right. Now, let's go back to what you saw on television, ma'am. Is there anything about that -- you understand that that had nothing to do with this particular trial?

JUROR #1: Yes.

THE COURT: But even knowing that, intellectually, is that going to affect your ability to be fair and open-minded in this case?

JUROR #1: No, I don't think so.

THE COURT: All right. Is it fair to say, then, that there's nothing that you've seen or heard on television that would keep you from giving Ms. Walters the presumption of innocence in this case?

JUROR #1: No.

THE COURT: That is a fair statement?

JUROR #1: That's a fair statement.

THE COURT: Okay. And by the same token, there's nothing that you heard that would keep you from being able to follow the law and to return a verdict of not guilty if you thought that was the appropriate verdict

MS. RUSS: I see. Oh, I see. Okay. And you, too, indicated you had been a victim of crime, is that right?

JUROR #5: According to the MP's when I was gone to Fort Lee last month for a thing on water purification units, 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. But that's what they said, so --

MS. RUSS: Okay. Didn't feel like you were a victim of crime that needed to have any counseling or anything so --

JUROR #5: No.

MS. RUSS: That what that's for?

JUROR #5: Yeah, they just gave you a number to call, I guess.

MS. RUSS: Okay. And I -- excuse me, I'm sorry.

JUROR #5: I said, I guess they just give you a number to call if you want to get ahold of a JAG or --

MS. RUSS: I presume from the way you answered that question -- so correct me if I'm wrong -- that there's nothing about that situation that you feel, as you

evaluate it, that would enter into your decision-making process here that might cause you to be unfair to either side, is that accurate?

JUROR #5: Yes, ma'am.

MS. RUSS: Okay. Thank you. And you enjoy bowling. And I noticed you read *The Times* for sports. So is it a fair statement to say you're a sports fan?

JUROR #5: Yes, ma'am.

MS. RUSS: Okay, thanks for answering my questions.

Ms. Whitted, you are a native of Cumberland County?

JUROR #6: (Nodded head up and down.)

MS. RUSS: Spent all of your life here?

JUROR #6: Most.

MS. RUSS: I was interested in -- do you drive to Raleigh each day?

JUROR #6: Um-hum. Yes, I do.

MS. RUSS: Been doing that for a long time?

JUROR #6: For the last eight months -- eight years.

MS. RUSS: Okay. Doesn't that ride get any shorter?

JUROR #6: If I leave early enough.

MS. RUSS: Does it? Yeah, you don't have to

THE REPORTER: Her brother was convicted of armed robbery 10 or 11 years ago in New Jersey.

JUROR #1: '86.

MS. RUSS: '86. All right. Is he incarcerated now or is he out?

JUROR #1: No, he's out.

MS. RUSS: He's out. He's out. Do you see him now?

JUROR #1: Yes.

MS. RUSS: Okay. Did you see him much during -- around 1986?

JUROR #1: Yes.

MS. RUSS: Okay. And I guess it might be easier if you just described your relationship with him then and now, and that would help us understand.

JUROR #1: We were pretty close.

MS. RUSS: Close. Okay. Did you attend the trial if there was a trial?

JUROR #1: Uh, there wasn't a trial.

MS. RUSS: All right. So he pled guilty --

JUROR #1: Yes.

MS. RUSS: -- am I accurate? All right. And I -- and I presume from your being close to him that you have had conversations about that incident with him and other family members --

JUROR #1: Yes.

MS. RUSS: -- is that accurate? Okay. Based on the information that you have from him and from your family members, do you feel that that situation was handled appropriately or inappropriately?

JUROR #1: Appropriately.

MS. RUSS: Appropriately. Okay. Is there anything about it at all that causes you to have any reservations at all about your ability to sit in this matter and be fair and impartial to both sides?

JUROR #1: No.

MS. RUSS: Okay. And so if I misstate this position, please correct me. So though this happened to you and someone who was really close to you, you feel that that's a separate situation, doesn't have anything to do with this, you're able to separate it out in your mind and you would not in any way let it enter into your decision making --

JUROR #1: No.

MS. RUSS: -- process. Did I understand right?

JUROR #1: Yes.

MS. RUSS: Okay. Is he doing well today?

JUROR #1: Yes.

MS. RUSS: Good. Anything else? Anyone else that you've known?

THE COURT: Ms. Richmond, just for right now, would you sit down here in front of the microphone and talk in that just so we can hear you a little bit.

Let the record show now that Marilyn Richmond, juror number one, is present. The other jurors are not here.

Ms. Richmond, you indicated earlier that you had heard something about the case or that you thought you knew something about the case, is that right?

JUROR #1: Yes.

THE COURT: Could you tell us about that, please?

JUROR #1: Um, just what I saw on the television. And back to one of the questions that you had asked earlier about knowing one of the earlier defendants --

THE COURT: Yes, ma'am.

JUROR #1: -- um, Paco Tirado --

THE COURT: Yes, ma'am.

JUROR #1: -- I think is his last name, was a client at Cumberland County Mental Health where I work. He was -- we never had an opportunity to communicate. But I know him from there. I know him by name.

THE COURT: Did you actually know him personally or you just know that he was a client there?

JUROR #1: I just know that he was a client there at the same time I was employed there.

THE COURT: Ma'am, would that knowledge make any difference in your ability to be fair in this case?

JUROR #1: No.

THE COURT: All right. Now, let's go back to what you saw on television, ma'am. Is there anything about that -- you understand that that had nothing to do with this particular trial?

JUROR #1: Yes.

THE COURT: But even knowing that, intellectually, is that going to affect your ability to be fair and open-minded in this case?

JUROR #1: No, I don't think so.

THE COURT: All right. Is it fair to say, then, that there's nothing that you've seen or heard on television that would keep you from giving Ms. Walters the presumption of innocence in this case?

JUROR #1: No.

THE COURT: That is a fair statement?

JUROR #1: That's a fair statement.

THE COURT: Okay. And by the same token, there's nothing that you heard that would keep you from being able to follow the law and to return a verdict of not guilty if you thought that was the appropriate verdict

your hand, please. I'm not talking about a speeding ticket when I'm asking you about that. I'm talking about breaking and entering, drug charges, assault charges, robberies, kidnappings, any of those crimes that we would call serious crimes. If so, would you raise your hand.

(Number one raised hand.)

MS. RUSS: Okay. All right. Ms. Richmond, would you mind telling us, please, ma'am, how it is you would have known someone and what your relationship with them was?

JUROR #1: It's my oldest brother.

MS. RUSS: Okay. All right. And I hope that you all understand that none of my questions are intended to pry or embarrass you, and so I hope you won't mind answering a few questions. If at any point it becomes too personal, just let me know, all right?

JUROR #1: Okay.

MS. RUSS: But you got to please try to remember that we, Mr. Scott and I, don't know what's going on up here, and we're trying to, all right?

Would you tell us what you feel comfortable telling us about that situation, then I might have to ask you some questions.

JUROR #1: Okay. I can't remember the exact year. Somewhere between '78 and '79.

MS. RUSS: Yes, ma'am.

JUROR #1: He was charged with armed robbery. And --

MS. RUSS: Was that here?

JUROR #1: Yes, ma'am.

MS. RUSS: Okay. All right.

JUROR #1: And I was -- he went to trial, was found guilty, and went to prison. He was sentenced to -- from -- I think it was 15 to life. Something like that. And he got out in, let's see, '89, '89 or '90 --

MS. RUSS: Yes, ma'am.

JUROR #1: -- I think he was released from prison.

MS. RUSS: Okay. Do you mind if I ask you his name?

JUROR #1: Howard Broadnax.

MS. RUSS: All right. Did you come to the trial at all?

JUROR #1: No.

MS. RUSS: Okay. I'm honestly sitting here trying to think if I prosecuted the case. I don't know. I don't know if you happen to know. That's why I asked you -- (pause) -- I apologize for that question, but I honestly don't remember either.

Is he in the area now, and do you have contact

with him?

JUROR #1: Um-hum, (nodded head up and down).

MS. RUSS: All right. Do you -- well, at the time, did you know much about the case? Did you talk with him or your other relatives about it?

JUROR #1: Well, no, I was out of the country during the time it happened.

MS. RUSS: I see. All right.

Have you had conversations with him and your family members about the incident?

JUROR #1: Yes, of course.

MS. RUSS: Okay. And I -- I ask you the same questions I was asking the other folks. As you reflect on those matters and how they were handled, do you feel that it was handled appropriately? Do you feel that he was treated fairly or unfairly?

JUROR #1: I think he was treated fairly.

MS. RUSS: All right.

JUROR #1: He did what he did and there was no doubt about that. And, uh, he paid for it.

MS. RUSS: Okay. All right. Doing okay now?

JUROR #1: Um-hum, (nodded head up and down).

MS. RUSS: Good, good. And that same question I asked Ms. Whitted, Ms. Parsons, and probably the ultimately important question. As you reflect on the

is, but it was Angie Jones.

MS. RUSS: Okay. All right. Any of those folks, as you reflect on it, if you think about it -- I'm going to ask you to think about it for just a minute -- any of 'em at all that you mentioned would any way influence your thinking, cause you any problem in sitting on this jury were they to be on the jury and you, too?

JUROR #3: No.

MS. RUSS: Any problems at all?

JUROR #3: No.

MS. RUSS: Wouldn't feel you had to just agree with them because you knew them or worry about what they thought about things you said --

JUROR #3: No.

MS. RUSS: -- or decisions you made?

JUROR #3: No.

MS. RUSS: All right. None of that would cause you any problems?

JUROR #3: No.

MS. RUSS: Okay. Thanks for bringing that to our attention.

I believe we're down to you, Ms. Peace. You raised your hand, am I right?

JUROR #9: I just know Evie. Her son and my son played ball together.

JUROR #3: (Interposing.) Oh, I'm sorry.

MS. RUSS: I see. All right. Okay. And you're acquainted because your children participated in the sport together?

JUROR #9: (Nodded head up and down.) We just figured it out back there. We kept -- we knew we knew each other, so we narrowed it down it was ball.

MS. RUSS: It sounds like from what you're saying that you haven't maintained close contact through the years?

JUROR #3: No.

JUROR #9: (Shook head back and forth.)

MS. RUSS: Is there anything at all about what you just told us for either one of you that would in any way interfere with your jury service and your ability to be a fair and impartial juror were you to end up on the jury, both of you?

JUROR #9: No.

MS. RUSS: Either one?

JUROR #3: (Shook head back and forth.)

MS. RUSS: All right. Thank you very much for bringing that to our attention. Anyone else --

(Pause.)

MS. RUSS: -- Ms. Peace, in the big group of people?

MS. RUSS: Okay.

JUROR #1: And they may associate with some gang members, but I don't think that there's any real true gang members in my clientele at this time.

MS. RUSS: Okay. All right. And as far as you know, and you've been told, none of the folks that you work with are in any way related to this case. Is that an accurate statement?

JUROR #1: Yes.

MS. RUSS: As far as you know?

JUROR #1: That's correct.

MS. RUSS: Okay. Thank you. I wrote down, Ms. Peace, that you raised your hand. Is that accurate --

JUROR #9: Yes.

MS. RUSS: -- also? Would you tell us about your situation, please.

JUROR #9: I used to work with a nurse whose son was involved in a gang.

MS. RUSS: Okay. All right.

MR. WALEN: I'm sorry, but we can't hear her.

JUROR #9: I'm sorry. I used to work with a nurse whose son was involved in a gang. He's in a detention center right now.

MS. RUSS: Okay. And I presume from that, the fact that you know that, that maybe you and she are still

friends, is that right?

JUROR #9: I haven't talked with her recently.

MS. RUSS: I see, okay. And she and you apparently discussed that situation at the time or his situation, is that right to some extent or no?

JUROR #9: To some extent. You know, just what could be done with him.

MS. RUSS: All right.

JUROR #9: She's a single mother.

MS. RUSS: Okay. And so it seems to me that perhaps you didn't know the son or did you?

JUROR #9: Uh, he and my son used to play ball together years ago, and then they moved into a different development, and they did not attend the same schools.

MS. RUSS: Okay, is there anything about that situation that you feel would enter into your decision-making here that would cause you to be unfair to either side?

JUROR #9: I don't think so.

MS. RUSS: Okay. And, Ms. Richardson, I was listening to what you said, and I apologize, I don't believe I asked you that question. I just assumed that it wouldn't. But I probably need to ask you, is there anything about your work with some folks that you think might have some activity with gangs in any way enter into

your decision-making process here?

JUROR #1: No, it wouldn't.

MS. RUSS: Okay, I assumed it wouldn't. I thought when you said work and so on that you -- but I apologize. I needed to ask you that also. Thanks.

Ms. Peace, any other involvement or any other associations at all?

JUROR #9: (Shook head back and forth.)

MS. RUSS: Okay. And, Mr. Whitfield, I believe you raised your hand, is that accurate?

JUROR #11: Yes.

MS. RUSS: Okay. Would you tell us the situation on your mind.

JUROR #11: Like playing ball in the neighborhoods and stuff. That's about it.

MS. RUSS: Okay. All right. And so would I be accurate if I said that in your recreational activities that there are people who either claim to be gang members or you think they're gang members --

JUROR #11: Yes.

MS. RUSS: -- or something like that. Is that accurate?

JUROR #11: (Nodded head up and down.)

MS. RUSS: And, Mr. Whitfield, would you say that was in your past or is that still --

JUROR #11: Past and present.

MS. RUSS: Okay. All right. What would be, sir, in your mind the best way for us to characterize your relationship with those people? Just you play ball with them occasionally, are they friends, or how -- what's accurate?

JUROR #11: Only occasionally.

MS. RUSS: Is that like a pickup game --

JUROR #11: Yes.

MS. RUSS: -- that you're talking about?

JUROR #11: Pickup games. You know, go to different neighborhoods, play ball with them, you know. That's about it.

MS. RUSS: Okay. And is your contact with those folks limited then to those sort of pick-up games --

JUROR #11: Yeah.

MS. RUSS: -- and sort of situations? All right. Do they discuss with you any of their activities or do you just hear 'em talking among themselves?

JUROR #11: Just hear 'em talking.

MS. RUSS: Okay. Is there anything about those situations that you feel would enter into your decision-making process here either way causing you to be unfair to either side?

JUROR #11: No.

MS. RUSS: Do you happen to know when these people you hear 'em talk among themselves -- are these Bloods, Crips, local gangs, or do you know?

JUROR #11: It really doesn't matter. It's like Bloods, Crips, you know, it's -- you don't know if they're real or not because they hang around with one another, you know, so -- you know what I mean.

MS. RUSS: All right. Okay. Thank you, sir.

JUROR #11: All right.

MS. RUSS: Anything else that you hear or know as a result of that that you think we might need to know in order to make our decision?

JUROR #11: No.

MS. RUSS: Thanks for letting us know that also. And I assume that -- that those associations through recreation would not in any way bother you in sitting on the jury were you to sit such that it would interfere with your jury service, is that accurate?

JUROR #11: Yeah. It wouldn't. I mean, it's not going to affect me.

MS. RUSS: All right. Okay. Thank you, sir. Okay. During the course of this trial, you may hear evidence from an individual -- from a witness who is in trouble herself and who is testifying pursuant to a plea agreement. Do you feel that -- do you have any opinions

MS. RUSS: I see. Oh, I see. Okay. And you, too, indicated you had been a victim of crime, is that right?

JUROR #5: According to the MP's when I was gone to Fort Lee last month for a thing on water purification units, 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. But that's what they said, so --

MS. RUSS: Okay. Didn't feel like you were a victim of crime that needed to have any counseling or anything so --

JUROR #5: No.

MS. RUSS: That what that's for?

JUROR #5: Yeah, they just gave you a number to call, I guess.

MS. RUSS: Okay. And I -- excuse me, I'm sorry.

JUROR #5: I said, I guess they just give you a number to call if you want to get ahold of a JAG or --

MS. RUSS: I presume from the way you answered that question -- so correct me if I'm wrong -- that there's nothing about that situation that you feel, as you

evaluate it, that would enter into your decision-making process here that might cause you to be unfair to either side, is that accurate?

JUROR #5: Yes, ma'am.

MS. RUSS: Okay. Thank you. And you enjoy bowling. And I noticed you read *The Times* for sports. So is it a fair statement to say you're a sports fan?

JUROR #5: Yes, ma'am.

MS. RUSS: Okay, thanks for answering my questions.

Ms. Whitted, you are a native of Cumberland County?

JUROR #6: (Nodded head up and down.)

MS. RUSS: Spent all of your life here?

JUROR #6: Most.

MS. RUSS: I was interested in -- do you drive to Raleigh each day?

JUROR #6: Um-hum. Yes, I do.

MS. RUSS: Been doing that for a long time?

JUROR #6: For the last eight months -- eight years.

MS. RUSS: Okay. Doesn't that ride get any shorter?

JUROR #6: If I leave early enough.

MS. RUSS: Does it? Yeah, you don't have to

MS. RUSS: You indicated that you had been either on a grand jury, a trial jury, state or federal, before here in Cumberland County, and I presume you were talking about a state court?

JUROR #8: Right.

MS. RUSS: Was that right in '97? And, uh, do you happen to remember if that was a criminal or a civil matter?

JUROR #8: It -- I believe it was criminal, the charges were.

MS. RUSS: Okay. Do you remember what kind of charges they were?

JUROR #8: It was, um -- I don't -- it was assault with intent --

MS. RUSS: Okay.

JUROR #8: -- to - --

MS. RUSS: Some kind of assault, too?

JUROR #8: And a robbery.

MS. RUSS: And a robbery, okay. And you all -- you indicated that the jury did not reach a verdict. Did the jury deliberate or was -- did it -- was the case somehow handled before it got to the jury?

JUROR #8: No. We deliberated.

MS. RUSS: Okay. All right. Is there anything about that process, jury -- serving on the jury, jury not

reaching a verdict, so on and so on -- anything at all now that you think about it that you feel might cause a problem serving on this jury in any way?

JUROR #8: I don't know actually. I think it probably would help me more.

MS. RUSS: Okay.

JUROR #8: Because I think there was some misunderstanding about the law with one of our jurors, if I could say that much.

MS. RUSS: I see. Okay. All right. But there isn't anything you feel would personally interfere into your decision-making process that would cause you any problem sitting on this jury and being fair to both sides?

JUROR #8: No.

MS. RUSS: Okay. Thank you. Okay, thank you, ma'am, for answering my questions.

And, Ms. Peace --

JUROR #9: Um-hum.

MS. RUSS: -- I notice your birth place is Germany?

JUROR #9: Yes, ma'am.

MS. RUSS: And did you come here --

JUROR #9: My father was in the military.

MS. RUSS: -- as a result of the military? Okay. All right. Okay. I notice that -- and you

THE REPORTER: Her brother was convicted of armed robbery 10 or 11 years ago in New Jersey.

JUROR #1: '86.

MS. RUSS: '86. All right. Is he incarcerated now or is he out?

JUROR #1: No, he's out.

MS. RUSS: He's out. He's out. Do you see him now?

JUROR #1: Yes.

MS. RUSS: Okay. Did you see him much during -- around 1986?

JUROR #1: Yes.

MS. RUSS: Okay. And I guess it might be easier if you just described your relationship with him then and now, and that would help us understand.

JUROR #1: We were pretty close.

MS. RUSS: Close. Okay. Did you attend the trial if there was a trial?

JUROR #1: Uh, there wasn't a trial.

MS. RUSS: All right. So he pled guilty --

JUROR #1: Yes.

MS. RUSS: -- am I accurate? All right. And I -- and I presume from your being close to him that you have had conversations about that incident with him and other family members --

JUROR #1: Yes.

MS. RUSS: -- is that accurate? Okay. Based on the information that you have from him and from your family members, do you feel that that situation was handled appropriately or inappropriately?

JUROR #1: Appropriately.

MS. RUSS: Appropriately. Okay. Is there anything about it at all that causes you to have any reservations at all about your ability to sit in this matter and be fair and impartial to both sides?

JUROR #1: No.

MS. RUSS: Okay. And so if I misstate this position, please correct me. So though this happened to you and someone who was really close to you, you feel that that's a separate situation, doesn't have anything to do with this, you're able to separate it out in your mind and you would not in any way let it enter into your decision making --

JUROR #1: No.

MS. RUSS: -- process. Did I understand right?

JUROR #1: Yes.

MS. RUSS: Okay. Is he doing well today?

JUROR #1: Yes.

MS. RUSS: Good. Anything else? Anyone else that you've known?

any way who was accused of, charged with, blamed for, responsible for a homicide, a death, any sort of death or killing at all? Would you put your hand in the air and let us know.

(Number one raised hand.)

MS. RUSS: Okay. Ms. Helm, would you tell us a little bit about how you knew that, who that was and so on and so forth?

JUROR #1: Well, I'm not sure that this falls into the category of the question you just asked. But my sister was killed by a drunk driver.

MS. RUSS: Okay. All right. And I apologize for bringing that up, but if you don't mind, I do need to ask you just a few things about it.

JUROR #1: Okay.

MS. RUSS: And I will try to be brief and so on and I apologize. Was that here?

JUROR #1: No. It was in Fredericksburg, Virginia.

MS. RUSS: All right. And just roughly, how long --

JUROR #1: Ten years ago.

MS. RUSS: Okay. Was there a trial?

JUROR #1: Yes.

MS. RUSS: All right. Did you attend?

JUROR #1: No, I did not.

MS. RUSS: Okay. Was that person --

MR. WALEN: Ma'am, I'm sorry, you've got a soft voice, and we're having a hard time hearing you over here.

JUROR #1: Oh, okay.

MR. WALEN: If you could maybe holler or something --

MS. RUSS: All right. So that was about 10 years ago in Fredericksburg, Virginia?

JUROR #1: Yes.

MS. RUSS: And there was a trial and you didn't attend it?

JUROR #1: That's correct. That's correct. Did not attend the trial.

MS. RUSS: All right. And was that person found guilty?

JUROR #1: The person was found guilty. I was never really clear on what -- he was found guilty on a lesser charge, and spent -- I believe spent about nine months in jail.

MS. RUSS: Okay.

JUROR #1: That is all I know about it.

MS. RUSS: Okay. All right. And as you sit here now, do you feel that, in spite of that terrible thing that happened, that you could put that out of your

mind and listen to this case and decide this case on the evidence that you hear in this courtroom alone, and do you feel confident that that situation would not enter into your decision making? I'm not saying you wouldn't be aware of it and so on, not saying you have to forget that it ever happened, but I'm saying you are conscious of it. You can use your ability to sort it out and not allow it to enter into your decision making in this courtroom?

JUROR #1: Yes.

MS. RUSS: All right.

JUROR #1: Because it was so long ago.

MS. RUSS: All right.

JUROR #1: I doubt whether it would --

MS. RUSS: Okay. I appreciate your speaking to me about that. And I apologize for having to ask, okay? Anyone else?

JUROR #5: (Shook head back and forth.)

MS. RUSS: Okay. Anyone known anyone who's ever been charged or anything with --

JUROR #5: (Shook head back and forth.)

MS. RUSS: Or accused or blamed?

(No hands were raised.)

MS. RUSS: Have you ever known anyone who was charged with any other crime, serious crime? Now, I'm not talking about somebody that got charged with speeding, but

your oath. And you say to yourself, "Oh, I thought the law was something else. I don't agree with that," or, "I think the law ought to be something else." Now, at that point, would you be able to put those personal feelings aside even if you disagreed with the law very strongly, even if you disagreed with it and follow the law of North Carolina as his Honor gives it to you even if you think it is wrong?

JUROR #5: Yes, ma'am.

JUROR #10: Yes.

JUROR #1: (Nodded head up and down.)

MS. RUSS: Okay. And that wouldn't cause you any problem I presume with your conscience --

JUROR #1: No.

MS. RUSS: -- or any of your personal beliefs, is that accurate?

JUROR #5: Yes.

JUROR #1: (No response.)

MS. RUSS: Okay. You might, during the course of this trial, hear evidence of gang activity. And I'd like for you to tell me if you would -- number one, if you have ever known anyone who was in a gang or claimed to be in a gang, and if so, would you raise your hand.

(Number five raised hand.)

MS. RUSS: Yes, ma'am. Ms. Johnson?

JUROR #5: I didn't know them. I've met people at parties and so forth. Being in high school, I've known people who have been in gangs. But nobody close to me.

MS. RUSS: Okay.

JUROR #5: And in basic training I was good friends with a girl who was in a gang.

MS. RUSS: Okay. What gang was she in?

JUROR #5: Crips.

MS. RUSS: And you were good friends with her, did you say?

JUROR #5: Just for the time. Because it'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.

MS. RUSS: Did she tell you very much about the gang or gang activities, or did you have any of those kinds of discussions?

JUROR #5: Not really.

MS. RUSS: Is that because she wasn't interested in telling you or you weren't or it just never came up or what would be the explanation?

JUROR #5: You don't really talk, in explanation.

MS. RUSS: I see.

JUROR #5: We don't have time to. But we just talked about friends. Her friends and so forth. If I knew any of her friends, and I didn't. But past experience, no, no details of any criminal activity. Just friends just talking.

MS. RUSS: Um-hum. Okay. Did you meet any of her friends that were in the Crips?

JUROR #5: It was only in Lackland, Texas. No, ma'am.

MS. RUSS: I see. No time to talk, still, right?

JUROR #5: Yes, ma'am.

MS. RUSS: Anyone else?

JUROR #1: No.

JUROR #10: (No response.)

MS. RUSS: Did you develop any feelings or attitudes based on your knowing her or anything she said regarding the Crips or gang activity that you feel are strong feelings or anything like that?

JUROR #5: No, ma'am. I knew her as a person, not as a gang member.

MS. RUSS: Um-hum.

JUROR #5: I knew her as a person. Just as a friend.

MS. RUSS: Um-hum.

JUROR #5: Most of the people I had met was just an acquaintance. I was just, "Hey, how are you doing?" Not anything really as far as gang activity. Just as a person I met them.

MS. RUSS: Okay. Well, did -- I guess I'm kind of asking you, did you have any strong feelings about that or as a result or about gangs or anything?

JUROR #5: No, ma'am.

MS. RUSS: Okay. Do you have any feelings about gangs at all either way?

JUROR #5: I have my personal feelings as far as I wouldn't want to be in a gang, and I don't agree with their activity, but they're all people. So you can't judge a person just because they're in a gang. I feel you have to judge them by their character and how you know them as a person. And as far as their character towards me was outstanding so --

MS. RUSS: So you're saying that though you don't personally endorse -- and you correct me, please, if I'm wrong. "I don't personally want to be in a gang or endorse those kinds of activities." The relationship that you had with her, very limited there in basic training was not a problem?

JUROR #5: Yes, ma'am.

MS. RUSS: Am I right about that?
JUROR #5: Yes, ma'am.
MS. RUSS: Please correct me if I'm wrong.
JUROR #5: Yes.
MS. RUSS: Do you have any sources of information or knowledge about gangs other than your association with her and these -- I think you said you met some folks at parties when you were in school?
JUROR #5: It's just talk. I've heard talk. But I hadn't known as far as like, "Oh, what did you do this weekend?" I just met them said, "Hey, we all had a good time and danced," and that's pretty much it.
MS. RUSS: Sort of general knowledge?
JUROR #5: Yes, ma'am, I wasn't any -- I wasn't close to talk to them about, you know, the personal things, their personal views.
MS. RUSS: Um-hum.
JUROR #5: I was just meeting them.
MS. RUSS: Okay. Thank you for letting us know that. Ms. Helm, how would you characterize any information if you do have any knowledge about gangs, would it be from the media or what would you say?
JUROR #1: From -- I guess anything I would know would be from TV or media and then I have heard my children say, come home and say, "Well, there are people

JUROR #1: Um, I have not been employed away from home for 13 years, I had been at home with my children for that long, and so prior to that, I was employed by Cyntel (phonetic spelling) in Charlottesville, Virginia.

MS. RUSS: I see. And I note that you have a daughter who's a college student?

JUROR #1: Yes.

MS. RUSS: Would you tell us where and what she's studying if she's made a determination about that.

JUROR #1: Yes, she just finished her freshman year at UNC-Wilmington. Um, a little uncertain about her major right now. Plans to go into web design and will be transferring to Methodist for the fall because she doesn't like being away from home.

MS. RUSS: Well, that's a compliment for you, isn't it?

JUROR #1: Yes, I think so.

MS. RUSS: Okay. Let's see. And, oh, you indicated also that you've been a victim of a crime?

JUROR #1: Well, someone stole our gas blower out of the garage. I know that is minor, but I assumed you needed to know everything.

MS. RUSS: Yes, ma'am. And I appreciate your letting us know. Was anyone ever charged with that?

MS. RUSS: Ten years ago, five years ago, two years ago, 20 years ago?

JUROR #10: No, not that long. About -- about -- probably been about five years.

MS. RUSS: About five years, okay. All right. And what happened to that charge?

JUROR #10: He went to prison.

MS. RUSS: He went to prison?

JUROR #10: Yes.

MS. RUSS: Okay. All right. And since he was here locally, I presume you are fairly close to him, is that right?

JUROR #10: Not close, no.

MS. RUSS: Not close. All right. Was this your sister or brother's child?

JUROR #10: My, uh, sister's daughter. He's my great nephew.

MS. RUSS: I see.

JUROR #10: He's my sister's daughter's child.

MS. RUSS: Okay. All right. Okay. Was there a trial or did he plead guilty, do you know?

JUROR #10: Well, I guess it was a trial. I -- I really don't know.

MS. RUSS: You didn't go to it?

JUROR #10: No.

MS. RUSS: So I'm assuming -- and you need to correct me if I'm wrong -- from your answers that you really didn't know much about it, is that right?

JUROR #10: No, I didn't. No.

MS. RUSS: But I guess you did have some conversations with your relatives regarding that situation?

JUROR #10: Not really.

MS. RUSS: Not really. Just to let you know what happened?

JUROR #10: (Nodded head up and down.)

MS. RUSS: I guess I'm trying to find out this question maybe. How do you feel about the way that matter was handled? Do you feel it was handled appropriately or fairly or do you feel like he was unfairly charged or unfairly blamed? Or it was handled inappropriately in court, or just what are your feelings about that?

JUROR #10: Well -- well, I felt that it was handled proper, from my standpoint.

MS. RUSS: Okay. Uh-huh. From what you know about it?

JUROR #10: Yes.

MS. RUSS: All right. And, of course, again, I think I'm finally getting around to, is there anything in your mind about that that would in any way influence your

thinking in here that might cause you to be unfair to either side in this matter?

JUROR #10: No.

MS. RUSS: All right. And so you just put that down because we asked you the question?

JUROR #10: Yes.

MS. RUSS: As far as you're concerned, it was handled appropriately in the system, and there's nothing about it that relates to this in any way --

JUROR #10: No.

MS. RUSS: -- and it wouldn't be a problem for you in any way. Did I say that right?

JUROR #10: Yes.

MS. RUSS: Okay. Thank you. And you read the newspaper. Is that the local newspaper?

JUROR #10: (Nodded head up and down.)

MS. RUSS: Two times a week. Do you read any other publications or is that basically it? Magazines or anything?

JUROR #10: (Shrugged shoulders.) Family Circle.

MS. RUSS: Uh-huh. Okay. And you watch TV some. What -- do you have any particular things that you watch regularly or that are your favorites or anything like that?

JUROR #10: Not -- not really because -- okay, I work, and then my daughter is home with me and she can't walk, so, I mean -- and, uh --

MS. RUSS: Okay.

JUROR #10: -- and basically I have duties to do with her.

MS. RUSS: I see.

JUROR #10: And usually I'm tired and I sleep.

MS. RUSS: You don't have a lot of time --

JUROR #10: No.

MS. RUSS: -- to sit around and watch TV. Okay. So just whatever is on as you come in the room, you happen to hear it?

JUROR #10: (Nodded head up and down.)

MS. RUSS: Your daughter is home. Is this the daughter that you were referring to earlier as medically retired?

JUROR #10: Um-hum. Yes.

MS. RUSS: And she's in your care?

JUROR #10: Yes.

MS. RUSS: All right. If you were to be here for four or so weeks, would that in any way affect the care of that daughter, or do you have an arrangement with someone who looks after her or what -- would that in any way be a problem?

IF YOU COULD GET MS. AMELIA SMITH FOR US OUT OF THE JURY ROOM. MS. SMITH, IF YOU WILL HAVE A SEAT UP IN SEAT NO. 9, THAT IS THE THIRD CHAIR IN THERE FROM THE END ON THE FRONT ROW. LET THE RECORD SHOW NOW THAT SAMUEL BLOSSOM IN SEAT NO. 3 AND AMELIA SMITH, IN SEAT NO. 9 ARE THE ONLY PROSPECTIVE JURORS IN THE COURTROOM. GOOD AFTERNOON TO EACH OF YOU. MR. BLOSSOM AND MS. SMITH, WERE YOU ABLE TO HEAR THE PRELIMINARY INFORMATION I GAVE TO YOU FOLKS EARLIER IN THE WEEK ABOUT THIS CASE?

MS. SMITH: YES, SIR.

MR. BLOSSOM: YES, SIR.

THE COURT: LET ME REMIND YOU THAT THE DEFENDANT IN THIS MATTER, CHRISTINE SHEA WALTERS, IS CHARGED WITH TWO COUNTS OF FIRST DEGREE MURDER, ONE COUNT OF ATTEMPTED MURDER, AND SEVERAL OTHER COUNTS INCLUDING ARMED ROBBERY - STRIKE THAT - ROBBERY WITH A DANGEROUS WEAPON, ASSAULT, AND KIDNAPPING. NOW, AT THIS POINT I WANT TO ASK YOU SOME QUESTIONS AND I WANT TO REMIND YOU THAT ANYTHING I ASK YOU IS NOT MEANT TO EMBARRASS YOU OR TO PRY IN ANY WAY BUT IF I, OR THE ATTORNEYS, ASK YOU SOMETHING THAT YOU FEEL LIKE IS INAPPROPRIATE OR YOU JUST DON'T WANT TO ANSWER, PLEASE TELL ME HOW YOU FEEL AND WE WILL TRY TO WORK AROUND IT TO YOUR SATISFACTION. BUT IT IS VERY NECESSARY THAT YOU GIVE US YOUR HONEST AND MOST COMPLETE ANSWERS TO THESE QUESTIONS. PLEASE

DURING THE TRIAL OF THE CASE? MR. BLOSSOM?

MR. BLOSSOM: NO, SIR.

MS. SMITH: NO, SIR.

THE COURT: DO EITHER OF YOU KNOW OF ANYTHING IN YOUR BACKGROUND, AND THAT MIGHT BE SOMETHING THAT HAS HAPPENED TO YOU OR TO A FRIEND OR FAMILY MEMBER, POSSIBLY THEY HAVE BEEN A VICTIM OR THEY HAVE BEEN CHARGED WITH A CRIME OR YOU HAVE BEEN THROUGH SOME OTHER EXPERIENCE THAT MIGHT CAUSE YOU TO IDENTIFY YOURSELF WITH ONE SIDE OR THE OTHER IN THIS CASE? MR. BLOSSOM, ANYTHING LIKE THAT?

MR. BLOSSOM: NO, SIR.

THE COURT: MS. SMITH?

MS. SMITH: WELL, SIR, AT THIS TIME, I HAVE A BROTHER WHO IS SITTING IN NASH COUNTY JAIL FOR A FIRST DEGREE MURDER CHARGE.

THE COURT: IS YOUR BROTHER OLDER OR YOUNGER, MA'AM?

MS. SMITH: YOUNGER.

THE COURT: WHAT IS HIS AGE?

MS. SMITH: 19.

THE COURT: DO YOU KNOW ANYTHING ABOUT THE FACTS OF THAT CASE OR THE CHARGE?

MS. SMITH: NO, SIR.

THE COURT: ARE YOU IN CONTACT WITH YOUR BROTHER?

MS. SMITH: JUST IN WRITING.

THE COURT: I SEE. WELL, JUST TELL US HOW DO YOU FEEL ABOUT THAT, ABOUT HIM BEING THERE CHARGED WITH MURDER AND YOU BEING A JUROR IN ANOTHER CASE WHERE SOMEONE IS CHARGED WITH MURDER? DOES THAT BOTHER YOU?

MS. SMITH: NO, SIR.

THE COURT: DO YOU UNDERSTAND AND REALIZE THAT THAT CASE HAS TO RISE OR FALL ON ITS OWN MERITS AND THAT JUSTICE HAS TO BE DONE ACCORDING TO THE FACTS IN THAT CASE JUST AS THIS CASE HAS TO RISE OR FALL AND JUSTICE BE DONE BASED ON THE FACTS OF THIS CASE? DO YOU UNDERSTAND THAT, MA'AM?

MS. SMITH: YES, SIR, I DO.

THE COURT: NOW, SOMETIMES WE UNDERSTAND THINGS INTELLECTUALLY BUT AT THE SAME TIME FROM AN EMOTIONAL STANDPOINT IT MAY BE HARD TO PUT THEM ASIDE. I JUST NEED YOU TO TELL ME DO YOU BELIEVE THAT YOU CAN COMPLETELY PUT THAT CONSIDERATION OUT OF YOUR MIND AND BE FAIR TO THE STATE AND TO THE DEFENDANT IN THIS CASE?

MS. SMITH: OH, YES, SIR.

THE COURT: OKAY. AND I GUESS THE MAIN THING IS YOU RECOGNIZE THAT THE DISTRICT ATTORNEY IN NASH COUNTY, WHOEVER THAT IS, IS PROSECUTING OR WILL BE PROSECUTING YOUR BROTHER JUST AS THE DISTRICT ATTORNEY IN THIS COUNTY IS PROSECUTING MS. WALTERS.

MS. SMITH: YES, SIR.

MR. BLOSSOM: I COULD PUT IT ASIDE.

MS. RUSS: OKAY, SO YOU DON'T HAVE ANY TROUBLE SEPARATING OUT THAT SITUATION?

MR. BLOSSOM: NO, I DON'T.

MS. RUSS: AND NOT LETTING IT ENTER INTO YOUR DECISION-MAKING PROCESS ON EITHER SIDE, IS THAT ACCURATE?

MR. BLOSSOM: YES, IT IS ACCURATE.

MS. RUSS: THANK YOU FOR LETTING US KNOW BECAUSE THAT IS THE KIND OF THING WE NEED TO KNOW. ANYTHING - ANYONE ELSE THAT YOU HAVE KNOWN THAT WAS CHARGED WITH HOMICIDE OR BLAMED FOR A DEATH OR ANYTHING?

MR. BLOSSOM: NO.

MS. RUSS: MS. SMITH, CAN I TALK TO YOU ABOUT YOUR SITUATION A LITTLE BIT?

MS. SMITH: YES, MA'AM.

EXAMINATION OF MS. SMITH BY MS. RUSS:

Q. And then just as I told Mr. Blossom, we appreciate your letting us know about that. Did I understand you to say that you do correspond with your brother presently?

A. Yes, ma'am, I write letters to him.

Q. All right. I don't want you to go into any details about it but I would like to know, if you don't mind telling me, and if you know, the nature of that, the relationship that your brother had, if any at all, with the person in that case who was killed.

A. To the best of my knowledge, it was a drug deal.
Q. Okay.
A. And that is just what I have been told but I don't have any idea, knowing for sure.
Q. Okay. And I guess I need to ask you, were you having contact with your brother at that time much or did you know much about his activities or what?
A. Well, I went into the military 12 years ago, and like I said, my brother is 19. So I went in when he was a young child or younger, I should say; so, really we weren't as close as we would have been if he had been older when I went into the military. Then as he got older, he kind of became his own person, I guess you would want to say, so there wasn't really an overly close relationship with my brother. He is my brother and I love him but as far as being overly close, no. We weren't.
Q. Is that situation still the same today?
A. Yes.
Q. I guess you can see why I might be concerned and need to hear how you feel about the fact that you have contact with him now and so forth and I would be concerned about - the same thing I asked Mr. Blossom. As you sit there, you are the only person that can tell us, just like he was the only person that could tell us about his situation, is there any chance that in this matter you

(On Wednesday, May 24, 2000, at 9:56 a.m., the defendant was present with counsel, Mr. Winfrey and Mr. Walen; Ms. Russ and Mr. Scott were present representing the state, and the following proceedings were had.)

THE COURT: Let me apologize to everyone for being late. I went by my office in Columbus County, and that always results in my being late. I don't do it very often, but sometimes I have to.

Let the record show the defendant and counsel are present. The state's attorneys are present. Anything from anyone before we continue with jury selection?

MR. WALEN: No.

MS. RUSS: No, Judge.

THE COURT: All right. Madam Clerk, call the first alternate juror, prospective, please.

THE CLERK: Ellen Gardner.

(Number 13, Ms. Gardner, entered the courtroom.)

THE COURT: Ma'am, you're Ms. Ellen Gardner?

JUROR #13: Yes, sir.

THE COURT: Ms. Gardner, we would like for you to have a seat right there in the number seven seat for the time being. And I will tell you now that we have selected 12 jurors in this case, and we are attempting to select some alternate jurors. Are you familiar with what

Cheeseborough -- ?

JUROR #13: No, ma'am.

MS. RUSS: -- or any member of her family as far as you're aware? Okay.

JUROR #13: I don't know any of them.

MS. RUSS: Okay. All right. Never heard of her before?

JUROR #13: No, ma'am.

MS. RUSS: Okay. Have you ever known anyone who was accused of, charged with, blamed for a homicide, a killing, a murder of any kind?

JUROR #13: No, ma'am.

MS. RUSS: Okay. Have you ever known anyone who was charged with or blamed for any sort of serious crime? Now, I'm not talking about a speeding ticket, but I'm talking about breaking and entering, drugs, kidnapping, sex offenses, robbery, murder, any of those serious crimes?

JUROR #13: My brother.

MS. RUSS: Your brother?

JUROR #13: Yes.

MS. RUSS: Would you also tell us, if you don't mind -- and I want you to understand, this is not -- certainly not an attempt to pry or embarrass you, but we do need to know about that a little bit. Would you tell

us, was it in here in Cumberland County?

JUROR #13: No, ma'am. In Miami, Florida.

MS. RUSS: Miami. Would you tell us approximately how long ago? Five years, two years, 10?

JUROR #13: Uh, it's been about six years.

MS. RUSS: Okay.

JUROR #13: I think.

MS. RUSS: Okay. And what kind of crime was that, Ms. Gardner?

JUROR #13: Um, he found a weapon, a gun, and some drugs. I think my mom said it was marijuana.

MS. RUSS: Yes, ma'am.

JUROR #13: And, uh -- in the car -- in his car. He was driving.

MS. RUSS: Okay. All right. And is he younger than you are?

JUROR #13: Yes, ma'am.

MS. RUSS: Okay.

JUROR #13: A year younger.

MS. RUSS: A year? Okay. And I don't know, so correct me, please, ma'am, if I ever misstate anything -- were you close to him growing up then, because you're near each other in age, or not?

JUROR #13: No, ma'am. We really wasn't close.

MS. RUSS: Okay. Did you go to the trial or

was there a trial?

JUROR #13: No, ma'am.

MS. RUSS: Okay. No trial or you didn't go?

JUROR #13: It was a trial, but I didn't go.

MS. RUSS: Okay. And I sensed from what you're saying -- please correct me if I'm wrong -- that you got most of your information about it from your mom --

JUROR #13: Yes, ma'am.

MS. RUSS: -- is that right? Okay. And did -- I presume she attended it, would that be right?

JUROR #13: Yes, ma'am.

MS. RUSS: And was it her opinion that that was handled appropriately or not?

JUROR #13: Um, she really didn't talk to me about what went on in court. She just told me they gave him five years.

MS. RUSS: Okay. Okay. Based on what you know about it, which I understand you didn't go, you know --

JUROR #13: Yes.

MS. RUSS: -- but based on what you do know about it, do you feel that he was treated fairly or unfairly or appropriately or inappropriately?

JUROR #13: He was treated fairly.

MS. RUSS: Okay. All right. And do you know -- where is he today?

JUROR #13: In Miami, Florida.
MS. RUSS: In Miami. Is he incarcerated or is he --
JUROR #13: Um, they had, uh -- what you call, um, house --
MS. RUSS: House arrest?
JUROR #13: Yes, um-hum.
MS. RUSS: House arrest?
JUROR #13: But it's over with him. He did his, uh, time with the house arrest.
MS. RUSS: Finished with it?
JUROR #13: Yes.
MS. RUSS: Okay. And did you have much contact with him during that time?
JUROR #13: No.
MS. RUSS: And how about now?
JUROR #13: No.
MS. RUSS: Okay. All right. Does he live with your mom?
JUROR #13: No, ma'am.
MS. RUSS: Okay. Is your mom here or there?
JUROR #13: In Miami, Florida.
MS. RUSS: Miami?
JUROR #13: All my family is in Miami, Florida.
MS. RUSS: Okay. As you sit there now and

think about that, is there anything about that entire experience that you feel would in any way enter into your mind affecting your decision-making process here in this matter, or do you feel like you could put that entirely aside and not let it enter into your decision-making process at all?

JUROR #13: Oh, it won't interfere. I been put that -- (pause) -- out of my mind --

MS. RUSS: All right.

JUROR #13: -- you know.

MS. RUSS: Okay. Anything -- anyone else that you've known that's been charged with a serious crime?

JUROR #13: No, ma'am.

MS. RUSS: Okay. When you first came into this courtroom, Ms. Gardner, and Judge Gore gave you some instructions to start with --

JUROR #13: Yes.

MS. RUSS: -- there was a big group of people. Did you know anyone else in that group?

JUROR #13: No, ma'am.

MS. RUSS: Okay. And I apologize for asking you this question, but I do think it's important. Have you ever been charged with a criminal offense of any kind?

JUROR #13: No, ma'am.

MS. RUSS: Okay, Judge Gore spoke to you about

your participation in that with them that would any way bother you or influence you in this matter --

JUROR #13: No.

MS. RUSS: -- is that accurate also?

JUROR #13: Yes, ma'am.

MS. RUSS: Okay. And you indicated you had been a victim of crime. Would you tell us about that.

JUROR #13: (Laughed.) I'm a range control officer at Camp Mackall. I'm responsible for like 70,000 acres out there. And three weeks ago -- I think about four weeks now, we just got a brand new ride-around mower, cost $1400, and somebody cut two locks on my fence, on the gate to my equipment yard and stole it. We'd only used it twice, so that's the Army equipment. But I felt like it personally belongs to me because I signed for it.

MS. RUSS: You're responsible.

JUROR #13: So as far as I'm concerned, it was directed towards me.

MS. RUSS: Okay. All right.

JUROR #13: But that's the only way I've had any association with that.

MS. RUSS: Okay. And you understand that, as I take it from your response, that that cannot influence your decision here --

JUROR #13: Naw.

JUROR #14: No.

MS. RUSS: Okay. Have you ever known anyone in any way who was charged with any sort of serious crime? I'm not talking about speeding, but I am talking about serious crimes.

JUROR #14: Yes.

MS. RUSS: Okay. Would you tell us about that, please, sir?

JUROR #14: Well, my grandson is charged with a serious crime.

MS. RUSS: Okay. Your grandson is -- and I don't mean to embarrass you, but I hope you can understand that we need to know about these things. Would you talk with us a little bit about it?

JUROR #14: Well, I really don't know that much about it.

MS. RUSS: Okay.

JUROR #14: All I know is that he's just charged with it.

MS. RUSS: Okay. Your grandson is presently charged with --

JUROR #14: Yes.

MS. RUSS: -- a homicide?

JUROR #14: No.

MS. RUSS: I'm sorry, I misunderstood you.

JUROR #14: A theft.

MS. RUSS: Theft. All right. And is that here in Fayetteville?

JUROR #14: Yes.

MS. RUSS: Okay. All right. Is that in superior court, district court, juvenile court, or do you know?

JUROR #14: I don't know.

MS. RUSS: Okay.

JUROR #14: I know that -- I know it's here in Fayetteville.

MS. RUSS: Okay. Just about how old was he? What's his age, if you know, or about how old?

JUROR #14: About 22.

MS. RUSS: About 22, okay. And what would be, Mr. Reeves, the accurate description of your relationship with him? Are you real close to him? Are you not real close to him? Just tell us what it is.

JUROR #14: Well, um, he's my grandson and he was, uh -- you know -- just a grandfather, that's all.

MS. RUSS: Okay. And I don't ask you these questions for any reason other than just trying to find out information. Have you had any discussions with him or his parents concerning his case?

JUROR #14: No, no, I have not.

MS. RUSS: Okay.

JUROR #14: I just asked them, you know, if he -- if he's going to go to trial or what, you know.

MS. RUSS: Uh-huh. I see. I see. Have there been any court proceedings as far as you know at this point --

JUROR #14: No.

MS. RUSS: -- in his case?

JUROR #14: Hum-um, (shook head back and forth).

MS. RUSS: Okay. I guess that I have to ask you this question, and I'll ask you just to search your heart and mind and tell us, sir, if it's possible in any way that any of that might in any way slip into your decision-making process here in such a way that it might influence you?

JUROR #14: No.

MS. RUSS: And I don't know any other way to ask it other than that.

JUROR #14: No, it won't.

MS. RUSS: Okay. I see. Would you correct me if I misstate this because I'm trying to make sure I understand. Your position is that, um, he's your grandson and you love him. I mean, it's a family member and so on. You don't know much about the situation. But you feel

that whatever the facts and situation happens to be in that case, that it wouldn't in any way influence you in this matter. Is that an accurate statement?

JUROR #14: That's an accurate statement.

MS. RUSS: Okay. As far as you're concerned, as you sit now -- and I understand you to say that you don't know a whole lot about the situation --

JUROR #14: Right.

MS. RUSS: -- as far as you know right now, would you say that so far that's been handled appropriately by the system, his case, as far as you know?

JUROR #14: The only thing I have is that it's taking too long, I think for 'em to go -- go to trial.

MS. RUSS: Uh-huh.

JUROR #14: The system is too long.

MS. RUSS: Okay. Okay. Do you know about how long that case has been pending?

JUROR #14: About a year.

MS. RUSS: About a year. Okay. Okay. When you came into the courtroom initially, the very first time, and you were in that big group of people, was there anyone in that group that you knew at all?

JUROR #14: No --

MS. RUSS: Okay.

JUROR #14: -- I didn't know anybody.

that, okay? Have you ever known anyone who was accused or charged or blamed for a homicide or a killing or a death of any kind?

JUROR #16: No, I haven't.

MS. RUSS: Okay. Have you ever known anyone who was charged with any serious crime? I don't mean speeding. I mean a serious crime.

JUROR #16: Well, my son-in-law killed my grandchildren, eighty- -- (pause) -- uh, '86, I believe.

MS. RUSS: Okay. I'm sorry. Was that here in Cumberland County?

JUROR #16: Yes, Cumberland County. Off of Murchison Road. On Edgar Street.

MS. RUSS: I'm sorry?

JUROR #16: Edgar Street.

MS. RUSS: And what was his name?

JUROR #16: His name was, uh --

MS. RUSS: Is his name?

JUROR #16: Leon Melvin.

MS. RUSS: Leon Melvin. And he was charged with that?

JUROR #16: Charged with murder.

MS. RUSS: All right. Was there a trial, Mr. Smith?

JUROR #16: Yeah. They gave him 75 years.

He's still in prison.

MS. RUSS: Okay. And did you attend that trial?

JUROR #16: Yes, I was (sic).

MS. RUSS: Were you a witness in it, sir?

JUROR #16: Well, didn't ask me anything, but, you know, I knew what he had done.

MS. RUSS: Okay.

JUROR #16: So I just sit in to see what was the outcome.

MS. RUSS: Yes, sir.

JUROR #16: They didn't ask me nothing; I didn't say nothing.

MS. RUSS: Yes, sir. All right. And I understand what you said. You attended to see the outcome.

JUROR #16: Yes.

MS. RUSS: And was it true also that you would have attended that to support the -- I guess the mother of those children would be your daughter, is that right?

JUROR #16: My daughter, yes, it was.

MS. RUSS: So to support her during that trial, too, is that right?

JUROR #16: Yes, ma'am. Yeah -- she didn't attend the hearing.

MS. RUSS: Okay.

JUROR #16: I don't think she was asked to go.

MS. RUSS: Okay. All right. During the course of that, did you speak with the prosecutors at any time?

JUROR #16: I spoke with a prosecutor, uh, the morning of the hearing.

MS. RUSS: Yes, sir. Okay. Do you recall that prosecutor's name?

JUROR #16: No, I -- it's been so long, I can't.

MS. RUSS: How about John Dickson? Do you think that might be --

JUROR #16: I'm afraid to say. It might not be, you know.

MS. RUSS: Okay. All right.

JUROR #16: Might have the wrong man.

MS. RUSS: Okay. Do you remember anything about what that person looks like? Was he tall, short, male, female?

JUROR #16: Well, if I could see him, you know, I would know, uh-huh. He --

MS. RUSS: Okay.

JUROR #16: He's not in here.

MS. RUSS: Okay. All right. And that -- there actually was a trial and a jury decision?

JUROR #16: Yes, there was.

MS. RUSS: Okay. Did -- and you attended the entire trial?

JUROR #16: No, I didn't attend it all.

MS. RUSS: Uh-huh. The majority of it?

JUROR #16: Yeah, most of it. The majority of it.

MS. RUSS: And as you reflect on that -- I apologize for having to ask you these questions --

JUROR #16: That's all right.

MS. RUSS: -- but I have to. I certainly understand how you feel about that. Is there anything about that situation at all in your mind that you feel would enter into your decision-making process here such that it would affect you in any way?

JUROR #16: Like, to me, now, he should have got more than -- should have got more than 75 years.

MS. RUSS: Okay.

JUROR #16: Because he killed three of these children.

MS. RUSS: Okay. Do you recall -- Judge Gore was other the judge. Was he our judge here?

JUROR #16: No. No, he wasn't.

MS. RUSS: Okay. All right. And in spite of your belief that he should have gotten more than 75 years,

do you feel that you can sit on this jury and be fair and impartial to both sides?

JUROR #16: Oh, yeah.

MS. RUSS: All right. Nothing about that trial --

JUROR #16: No.

MS. RUSS: -- that would cause you to be unfair to either side?

JUROR #16: No.

MS. RUSS: Okay. Have you ever known anyone else who was charged with a serious crime of any kind?

JUROR #16: No, I don't.

MS. RUSS: Okay. Mr. Smith, when you came into this room originally with that big group of people, did you know anyone else in that group, sir?

JUROR #16: No, I didn't.

MS. RUSS: Okay. I apologize for this, but I feel like I do need to ask you, have you ever been charged with a crime?

JUROR #16: (Pause.) Now -- what did you say now?

MS. RUSS: Have you ever been charged with a crime? I apologize for asking.

JUROR #16: No. No, I haven't.

MS. RUSS: The judge told you the burden of

NORTH CAROLINA STATE BAR
CLE HISTORY REPORT BY MEMBER NUMBER

Ms. Margaret R. Russ [redacted]
[redacted]

LIC. DATE: 03/23/1985
CLASS: A
GROUP: A

YEAR 1990

SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
546	Homicide Seminar for Prosecutors	12.00	0.00	6.75	18.75	N	Y	$23.44	$0.00
3372	1990 Fall Conference of NC District Attorneys	0.00	3.00	0.00	3.00	Y	Y	$3.75	$0.00
	YEAR TOTALS	12.00	3.00	6.75	21.75				

YEAR 1991

SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
2238	1991 Summer Conference of NC District Attorneys	10.00	2.00	0.00	12.00	N	Y	$15.00	$0.00
3778	Fall Conference of the NCDA	9.00	0.00	0.00	9.00	N	N	$11.25	$0.00
	YEAR TOTALS	19.00	2.00	0.00	21.00				

YEAR 1992

SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
3226	Fall Conference of North Carolina District	9.00	0.00	0.00	9.00	N	Y	$11.25	$0.00
3227	Fall Conference of North Carolina District	1.00	2.00	0.00	3.00	N	Y	$3.75	$0.00

SPONSOR **NAME**
355 ***National Center for Prosecut. of Child Abuse APRI***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
4019	Basic Training for Child Abuse Prosecutors	27.75	0.00	0.00	27.75	N	N	$0.00	$0.00

SPONSOR **NAME**
919 ***North Carolina State Bureau of Investigation***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
2110	DNA Workshops for Prosecutors	6.00	0.00	0.00	6.00	N	N	$0.00	$0.00
	YEAR TOTALS	43.75	2.00	0.00	45.75				

YEAR 1993

SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
3733	1993 Summer Conference of North Carolina District	9.00	3.00	0.00	12.00	Y	N	$15.00	$0.00
4866	Fall Conference of North Carolina District	9.00	0.00	0.00	9.00	N	Y	$11.25	$0.00
4867	Fall Conference of North Carolina District	0.00	3.00	0.00	3.00	Y	Y	$3.75	$0.00

SPONSOR **NAME**
454 ***National College of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
5353	Anatomy of Violent Crime Prosecution	0.00	1.00	12.75	13.75	N	N	$0.00	$0.00
	YEAR TOTALS	18.00	7.00	12.75	37.75				

YEAR 1994

SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
539	Sexual Assault Prosecution Seminar For Prosecutors	12.00	0.00	0.00	12.00	N	Y	$15.00	$0.00
1269	June Conference of NC District Attorneys Assoc.	10.00	2.00	0.00	12.00	N	Y	$15.00	$0.00

NORTH CAROLINA STATE BAR
CLE HISTORY REPORT BY MEMBER NUMBER

1731	Structured Sentencing Training Sessions	5.50	0.00	0.00	5.50	N	N	$0.00	$0.00
2034	Fall Conference of NC District Attorneys (1994)	9.00	0.00	0.00	9.00	Y	N	$11.25	$0.00
	YEAR TOTALS	36.50	2.00	0.00	38.50				

YEAR 1995
SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
1578	Summer Conference Program-NC Association of	0.00	0.00	12.25	12.25	N	N	$15.31	$0.00
1578	Summer Conference Program-NC Association of	10.00	2.00	-12.25	-0.25	N	Y	-$0.31	$0.00
4645	NC District Attroneys' Fall Conference	9.00	3.00	0.00	12.00	Y	Y	$15.00	$0.00

SPONSOR **NAME**
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
1468	Top Gun II (Trial Advocacy Course)	25.00	0.00	0.00	25.00	N	N	$0.00	$0.00
	YEAR TOTALS	44.00	5.00	0.00	49.00				

YEAR 1996
SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
7296	NC District Attorney Summer Meeting	9.00	3.00	0.00	12.00	N	Y	$15.00	$0.00
	YEAR TOTALS	9.00	3.00	0.00	12.00				

YEAR 1997
SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
9052	1997 June Meeting of NC District Attorneys' Assoc	10.00	2.00	0.00	12.00	N	Y	$15.00	$0.00

SPONSOR **NAME**
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
6534	Domestic Violence Prosecution Training	22.25	0.00	0.00	22.25	N	N	$0.00	$0.00

SPONSOR **NAME**
454 ***National College of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
9913	Forensic Evidence	8.75	2.00	10.25	21.00	N	N	$0.00	$0.00
	YEAR TOTALS	41.00	4.00	10.25	55.25				

YEAR 1998
SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
3613	1998 June Meeting of the North Carolina District A	10.00	2.00	0.00	12.00	N	Y	$15.00	$0.00
5671	1998 Fall Meeting of the NC District Attorney's A	6.00	0.00	3.00	9.00	Y	Y	$11.25	$0.00
	YEAR TOTALS	16.00	2.00	3.00	21.00				

YEAR 1999
SPONSOR **NAME**
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
8783	1999 District Attorneys June Meeting	4.00	3.00	9.00	12.00	Y	Y	$27.00	$0.00
	YEAR TOTALS	4.00	3.00	9.00	12.00				

NORTH CAROLINA STATE BAR
CLE HISTORY REPORT BY MEMBER NUMBER

YEAR 2000
SPONSOR NAME
13 ***School of Government***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
4794	North Carolina District Attorneys Association June	0.00	2.00	10.00	12.00	N	Y	$27.00	$0.00
	YEAR TOTALS	0.00	2.00	10.00	12.00				

YEAR 2001
SPONSOR NAME
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
9234	Fall Meeting of the North Carolina Conference of	0.00	3.00	9.00	12.00	N	N	$27.00	$0.00
	YEAR TOTALS	0.00	3.00	9.00	12.00				

YEAR 2002
SPONSOR NAME
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
8	Confronting Motions Claiming Mental Retardation Under	0.00	0.00	6.00	6.00	N	N	$0.00	$0.00
11	North Carolina District Attorneys Fall 2002 Conference	0.00	0.00	9.00	9.00	N	Y	$20.25	$0.00
	YEAR TOTALS	0.00	0.00	15.00	15.00				

YEAR 2003
SPONSOR NAME
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
9	North Carolina District Attorneys' Association	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
17	NCDAA Fall Meeting	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
	YEAR TOTALS	0.00	6.00	18.00	24.00				

YEAR 2004
SPONSOR NAME
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
3	NC District Attorney's Association Summer Conference	1.00	2.25	8.75	12.00	Y	Y	$27.00	$0.00
	YEAR TOTALS	1.00	2.25	8.75	12.00				

YEAR 2005
SPONSOR NAME
3 ***University of North Carolina School of Law***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
4	Women in the Legal Profession Symposium	0.00	2.00	0.00	2.00	N	Y	$4.50	$0.00

SPONSOR NAME
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
5	Handling the Experts	0.00	0.00	5.00	5.00	N	N	$0.00	$0.00
8	NCDAA 2005 Summer Meeting	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
9	Current Issues in the Law of Search and Seizure	0.00	0.00	3.00	3.00	N	N	$0.00	$0.00
11	NC District Attorneys Association Fall Meeting	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
	YEAR TOTALS	0.00	8.00	26.00	34.00				

YEAR 2006

NORTH CAROLINA STATE BAR
CLE HISTORY REPORT BY MEMBER NUMBER

SPONSOR **NAME**
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
6	NC District Attorneys Association Summer Conference 2006	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
10	NC District Attorneys Fall Association Meeting	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
	YEAR TOTALS	0.00	6.00	18.00	24.00				

YEAR 2007
SPONSOR **NAME**
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
7	2007 Summer Association Meeting	1.00	2.00	9.00	12.00	Y	Y	$27.00	$0.00
13	NC Conference of DAs 2007 Fall Association Meeting	1.00	2.50	8.50	12.00	Y	Y	$27.00	$0.00
	YEAR TOTALS	2.00	4.50	17.50	24.00				

YEAR 2008
SPONSOR **NAME**
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
15	2008 Summer Association Meeting	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
15	2008 Summer Association Meeting	0.00	-3.00	-9.00	-12.00	N	Y	-$27.00	$0.00
24	2008 Fall Association Meeting	0.00	3.00	9.00	12.00	N	Y	$27.00	$0.00
	YEAR TOTALS	0.00	3.00	9.00	12.00				

YEAR 2009
SPONSOR **NAME**
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
55	2009 Summer Association Meeting	0.00	2.00	10.00	12.00	N	Y	$27.00	$0.00
	YEAR TOTALS	0.00	2.00	10.00	12.00				

YEAR 2010
SPONSOR **NAME**
44 ***North Carolina Conference of District Attorneys***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
13	2010 Summer Association Meeting	1.00	2.00	9.00	12.00	Y	Y	$36.00	$0.00

SPONSOR **NAME**
1038 ***Mediation, Inc.***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
7	NC Superior Court Mediation Training	0.00	3.00	21.00	24.00	N	Y	$72.00	$0.00
10	Family and Divorce Mediation Training	0.00	2.75	13.25	16.00	N	Y	$48.00	$0.00

SPONSOR **NAME**
2591 ***Cumberland County Family Court***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
4	Family Court Practice	0.00	0.00	1.50	1.50	N	N	$0.00	$0.00
	YEAR TOTALS	1.00	7.75	44.75	53.50				

YEAR 2011
SPONSOR **NAME**
2591 ***Cumberland County Family Court***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
4	Custody Action & Psychological Evaluation	0.00	0.00	1.50	1.50	N	Y	$4.50	$0.00
5	Electronic Evidence	0.00	0.00	2.00	2.00	N	Y	$6.00	$0.00
6	Third Party Custody in Domestic & Juvenile Court	0.00	0.00	2.00	2.00	N	Y	$6.00	$0.00

NORTH CAROLINA STATE BAR
CLE HISTORY REPORT BY MEMBER NUMBER

9	Veterans Services	0.00	0.00	1.50	1.50	N	N	$0.00	$0.00

SPONSOR **NAME**

4388 ***Cumberland County Bar Association***

COURSE	TITLE	SUBS	ETHIC	GENRL	TOTAL	SUB	FEE PAID	S-AMT	M-AMT
1	Equitable Distribution Primer	0.00	0.00	1.50	1.50	N	N	$0.00	$0.00
	YEAR TOTALS	0.00	0.00	8.50	8.50				
	MEMBER TOTALS	247.25	77.50	236.25	557.00				

(1)

Jury Strikes

(15th)

? Sharon Atkinson - OI

✓ × Walter Johnson Ballard - Leland (drugs)

✓ × Bryant - Snowfield Rd - Leland (drugs)

✓ × Jerry Carter - Shallotte — (drugs)

× Bonnie Clevenger - Southport
↳ domestic history ext

? Collins - (bad drug) area ... Port Loop Rd off Long Bch Rd.
beware Port Loop Motel area

× Coster - Leland (drugs) Mt Misery Rd.

? Crisp - Leland (dangerous dogs)

× Desfonds — Boiling Sp. Lk (one chromosome fam.)

× Della Dorda - drugs

✓ Evans - not best pick- son found burned in a car

✓ × Gerald Fisher - (dopes) - Supply

DEFENDANT'S EXHIBIT 99

(2)

Jury Strikes (cont'd)

García - Leland -

Gibbs - crack cocaine / pros. - Southport

Clifton Gore - blk. wino - drugs

Jerry Harden - Shallotte

Jackie Hewett - drugs - Supply

Ronald King - drinks - country boy - Ok

✓ Carolyn Lambert - Supply - marijuana (drugs)

Teresa Long - Ash - domestics / drugs

prison - Robt. Lowe - Supply ... stabbing / murder felony incest

Inagio Equeda - Ash - idiot

Charle Nance - Supply drugs

Shirley McDonald Leland - blk / high drug area

? Candace McKoy - Leland - Blue Bank Rd

Vickie McNeill - Leland - high drug area

DEFENDANT'S EXHIBIT 100

(5)

Mark Mitchell - Shallotte - oyster stealer

✓? → Mark Paul - Shallotte
Sanders Forest Rd - decent neighborhood -
716 marij bust recently...

✓ X Christopher Ray - Southport - ext. record - ne'er do well

Reeder - Bolivia

✓ Amanda Gayle Reeves - Riegelwood

✓ Connie Faye Stanley - Ocean Isle Bch - domestics

drugs Sweet - Cedar Hill Rd - high drug Rd

(17th)

✓✓ X Anthony Barnard - Southport (Oak View drive) - high drug area

X Sheila Butler - Ashe (Marlow Rd) - drugs / arrested

✓ X Wm. Cribb - Supply - sons in jail - doesn't like LEO - kidnap/rape

Butler - Ashe - dope - HW 130 - Whiteville

✓ Lisa Gore Floyd - Ashe - H dope deal

✓ Garcia - Leland

✓. ✓ Mc... ... Longwood ... [illegible]

DEFENDANT'S EXHIBIT 101

Terry Strikes (cont'd) (4)

Pealene Jordan - McMillan Rd - high drug area

✓ Eric Scott Karr - Supply - domestic

Lonnie Linker - Calabash 1967 revolving idiot

X ✓ Scottie Lumpkin - Winnabow - BLE's jail

X ✓ Massey - Pearl Peal Way - Supply - drug area

✓? James Richard - Leland - rough area/anti LEO

Terry Rivenbark - Leland - drugs

Ilisha Robbins - Leland - drugs

✓ Harold Scoggins - Leland - "pillar of community record!"

Dianne Fate Tacki - Neck Rd Bolivia - high crime road

Earl Turner - Winnabow - ext. record...

? Terry Vaught - Chapel Rd Winnabow - prob.

Oreda Waddell - Chapel hoop Rd Leland - crazy family

✓ Karen White - 12th Street SoPort - drug area

DEFENDANT'S EXHIBIT 102

Jury Strikes

(5)

(19th)

Andrews - Leland (Vassel?) - questionable area

Bass - Blake Cir Leland -

Luciana Bellamy - Supply - crack dealers

✓ Michael Bishops - Supply - thief / bf's

Bobby Black - Supply - OBPBFP hook up

(off) ✓ Ronnie Buffkin - Supply - ???

~~Charlotte~~ - ~~Blake Circuit~~ -

✓ Deann Cobb - Leland - drug area

(off) ✓ Lenwood Davis - Bolivia - Statutory rape charge?

respectable bch family ✓ Towanda Dudley - Snowfield Rd Leland - OK

Paul Floyd - OI Bch - Floyd family

✓ Ethyl Gause - - family member shot "Flip"

Louis B. Hewett - Supply - anti police →

Pamela Hewett - Shallotte - drugs

Catrol [illegible] - [illegible] - [illegible]

Tony Stukes (cont'd) (6)

Tony Lewis - Shallotte - trafficking marij pot boat days early 80's fine guy...

Brenda Vroomman - Supply - domestic viol. vic

John H. Wayland - Supply - ~~suspect unsolved M~~

Pinecrest → Marlowtown Rd / Shingletree Rd.

904 area 1/1/08 Longwood ← - Marlin/Carlin/Geo Daniels Freedom Star

Cedar Hill Rd.

Wolf Ridge Rd.

Snowfield Rd.

McMillan / McMillan Rd.

~~Bell~~ Hale Swamp Rd.

Seashore Rd.

171 — Mike Silver — call [redacted] — p.

→ 1st panel A

Jean Richmond – "did not feel like a victim even though his car had been broken into at Ft. Bragg + CD player stolen"
AA — SW

DEFENDANT'S EXHIBIT 110

Lowell Stevens – v. of crime –
panel 5 E — Non-black on
military range control officer + felt victimized when lawn mower stolen –

Ruth Helm – someone stole gas blower –
non-black 2nd panel B on
minor – I assumed you needed to know everything –
p. 343 read in newspaper –
p. 377 – sister killed by a drunk driver

---

172 — in part

"Nah, I scratched my head" p. 288 — guys go around playing — played like any other people
p. 251 – different — I go to neighborhoods, play ball w/ them, you know
p. 252

Jay Whitfield – "knew some gang guys from playing basketball" – past + present – p. 250
(p. 181 — um, like you know) 1st panel A — black — yeah

exposure not affect him –

Father w/ FPD when this happened p. 418 – was thinking about what you asked last night

Jami Johnson – basic training + had become "good friends" w/ a gang member – Also knew people in high school who were in gangs
(ear imp. — p. 394 – wouldn't want to hear a gang don't agree with it, in training)
Non-black — Panel 2-B
I knew her as a person, not a gang member — didn't meet her friends in Texas ←
p. 392 – just for basic training – bond w/ bed buddy + she was from Fayetteville too — I don't remember her name — Hoard? Brockman?

---

21 — # 173 — A → 1st panel A

'78–'79 – oldest brother charged w/ AR – 15 to life – got out '89 or '90 — Did I prosecute the case? He paid for it!

Marilyn Richmond – b/c she had worked w/ gang members as a teenage counselor –
(client at CUMHC where I work p. 159) — black
She doesn't believe they are gang members — p. 247 – I think most of kids I work w/ are wannabes
p. 262 psychology

Jami Johnson – who had become "good friends" w/ a gang member during her basic training + knew people in gangs in high school
Non-black — panel 2 – B

#177 in part

p.1206 I have (refer voting for D.)

p.1215 I don't like stuff like that - b/c I hate to hear about violence

p.1172 - [illegible] understand Judge's ?'s - 1st real jury

p.1179 - pause - I can't say ~~I don't~~...

Judge even says I'm not trying to give you a hard time

Ellen Gardner - Black - b/c her brother had been convicted of gun & drug charges & received 5 yrs. house arrest - not close to brother, believed he was treated fairly & his experience would NOT affect jury service

- grieves my spirit to hear about stuff like that - 1205 - would I have [illegible]

alternate seat

p. 1186 he found a weapon, a gun & some drugs in the car in his car

p.1190 - Repeat

p.1196 - Repeat that again

"If one ... it's ... I'll do it" - trial - treated fair

Amelia Smith - brother in jail for 1° murder charge 6 years before at the time of jury selection - don't touch w/brother through letters -

#9 non-black

Georgia Mical panel 3-C

#175 in part

Calvin Smith - b/c he was 74 yrs. old -

Harold MacNaught - 70 yrs. old in Augustine

Non-black

Dolphin Adam Cretini & Larry Raynor 73 + 70

Non-blacks

#176 Seat 1

p.297 - knows ME - ~~taught her - Paralegal course -~~

Laretta Dunmore - "brother in NJ been charged w AR 10 or 11 yrs before & was out now - wasn't a fair trial for brother that she was pretty close to" -

AA

2nd panel B

cured p.340 no challenge by D

p.315 brother - convicted '86 AR - out now

Sees him a lot - saw him in '86 pretty close

had conversations w/him about it - he plead guilty

records says otherwise -

p.334 '96 at FTCC

p.337 son in Job Corps & is student 20

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.

Michigan State University College of Law
Report on Jury Selection Study
Tables Using Database as of August 28, 2012
Time Period Applicable to Christina Walters (January 1990 – July 2002)

TABLE 1
Prosecutorial Peremptory Strike Patterns in Cumberland County
(Strikes against venire members aggregated across 8 cases)

		A Black Venire members	B All Other Venire members	C Total
1.	**Passed**	49 (53.3%)	200 (76.6%)	249 (70.5%)
2.	**Struck**	43 (46.7%)	61 (23.4%)	104 (29.5%)
3.	**Total**	92 (100.0%)	261 (100.0%)	353 (100.0%)

*Chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fisher's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at $p < .001$.

TABLE 2
Average Rates of State Strikes in Cumberland County
(Average of strike rates calculated in individual cases and number of cases averaged)

	A Average Strike Rate	B Number of Cases Averaged
1. **Strike Rates Against Black Qualified Venire Members**	49.2% (*SD* =13.1%)	8
2. **Strike Rates Against All Other Qualified Venire Members**	20.5% (*SD*=7.9%)	8

*A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

TABLE 3
Prosecutorial Peremptory Strike Patterns in Christina Walter's Case

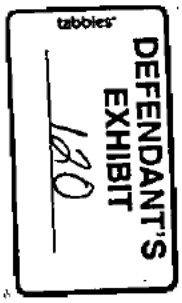
		D Black Venire members	E All Other Venire members	F Total
1.	**Passed**	9 (47.4%)	23 (85.2%)	32 (69.6%)
2.	**Struck**	10 (52.6%)	4 (14.8%)	14 (30.4%)
3.	**Total**	19 (100.0%)	27 (100.0%)	46 (100.0%)

*Chi square tests (Pearson Chi-Square, $p < .01$; Continuity Correction, $p < .02$; Likelihood Ratio, $p < .01$; Fisher's Exact Test, $p < .01$; and Linear-by-Linear Association, $p < .01$.

Table 4
Cumberland County Fully Controlled Logistic Regression Model for Time Period Applicable to Christina Walter's Case

	A	B	C	D	F	G	E
	Variable Name	**Variable Description**	**Coefficient**	**S.E.**	**Odds Ratio**	**C.I.**	***p*-value**
1.	**Intercept**		-2.97	0.34	0.05		< 001
2.	**Black**	**Venire member is black**	**0.88**	**0.32**	**2.40**	**1.29, 4.47**	**< .01**
3.	**DP_Reservations**	Venire member expressed reservations about the death penalty	3.31	0.50	27.43	10.32, 72.89	< .001
4.	**Unemployed**	Venire member is unemployed.	1.829	0.96	6.23	0.94, 41.08	< .10
5.	**Accused_all**	Venire member or close other accused of a crime	0.91	0.32	2.49	1.34, 4.63	<.01
6.	**Blue_all**	Venire member or close other worked in blue collar job	0.96	0.32	2.61	1.41, 4.85	<.01
7.	**Hardship**	Venire member worried serving would impose a hardship	1.53	0.65	4.61	1.29, 16.49	<.02
8.	**Helping**	Venire member works in a job that involves helping others	1.37	0.40	3.91	1.78, 8.63	<.01
9.	**Young**	Venire member is 25 or younger.	1.08	0.47	2.95	1.18, 7.41	<.03
10.	**DOC**	Venire member or close other worked for Department of Corrections	2.49	1.48	12.05	0.66, 219.28	<.10

$R^2 = .42$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DEFENDANT'S
EXHIBIT
180

TABLE 3
Prosecutorial Peremptory Strike Patterns in Christina Walter's Case

		A Black Venire members	B All Other Venire members	C Total
1.	**Passed**	9 (47.4%)	23 (85.2%)	32 (69.6%)
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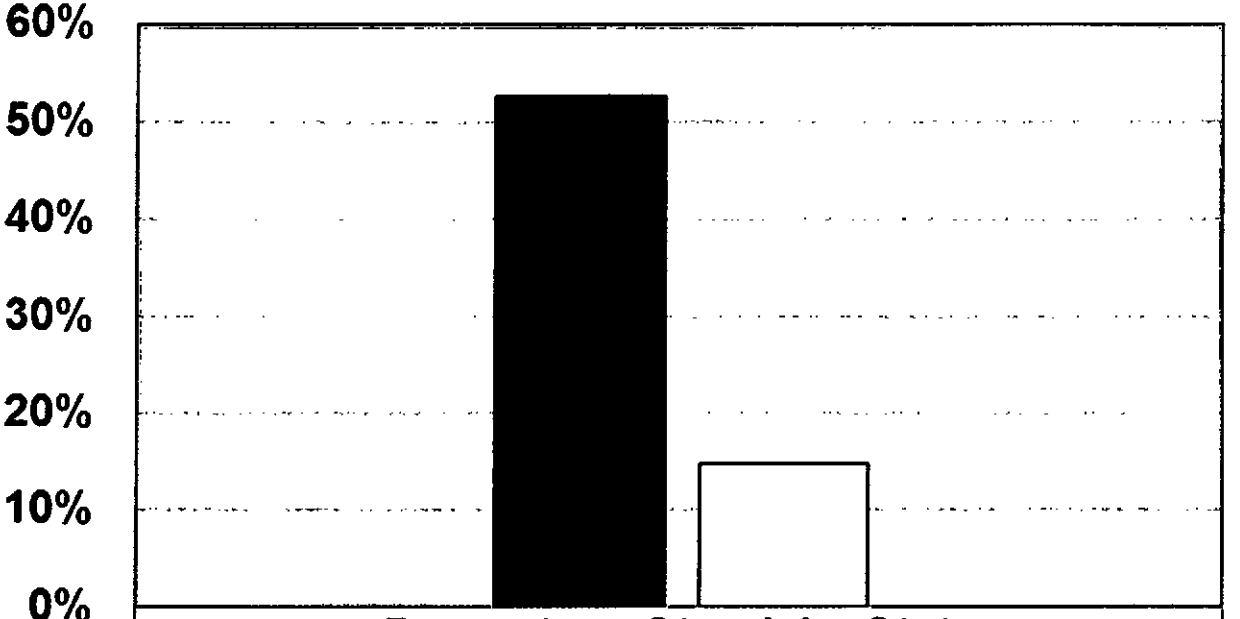
*Chi square tests (Pearson Chi-Square, $p < .01$; Continuity Correction, $p < .02$; Likelihood Ratio, $p < .01$; Fisher's Exact Test, $p < .01$; and Linear-by-Linear Association, $p < .01$.

Strike Rate for Christina Walters Trial

Table 3



	Percentage Struck by State
Black VM	52.6%
Other VM	14.8%
Strike Ratio	3.6

State

vs.

Wright

JURY

File No. 97 CRS 6493

Film No.

3/31/97 - 4/ /97

BACK ROW

1 Jack Ledford W/M double murder then DP... (Δ)	2 Kathy Flowers W/F (Δ)	3 Donald Bryant B/M (Δ)	4 Hugo Hansen W/M	5 Rosemary Merritt W/F (St) p/	6 Margaret Brown W/F Joint Cause
Zelda Sharratt W/F bro... murder... (Δ)	STEVEN CAVANAUGH W/M f excused court	WALTER Ryczek W/M (⊖) cause	(2) Carol Forestell W/F Cause	Jack Myrick W/M Cause	Robert Lucas W/M
Doris Failing W/F judgment — lic. (Gd) Cause	Betty Simmons B/F (Δ)	Marcia Kolb W/F (St)	Debbie Sawyer W/F (St)	Lawrence Bale W/M	ALTERNATE 2/14 Arnold Williams B/M Cause
Arthur Strauss W/M pros w/ the Δ Cause	Anita Jacobs W/F pros pha/ft M Cause knew Δ VIC M-Teen	Michael Roncone W/M	Vicki Powell W/F Cause	ALTERNATE 1/13 David Allen W/M (Δ)	Alice Edwards (Δ) W/F
Ardelia Grasse B/F Cause	Traci Dinwiddie W/F (St)	(2) Melanie James W/F Cause	Rebecca Hardee W/F (Δ)	Frances Smith W/F ex	Matthew Dunlop W/M ex
Frank Wolfe W/M	Rubin Jones (Δ) W/M	Aaron Eady B/M Cause	Peggy Beasley W/F Cause	Margaret McCartney W/F	Connie Wagner W/F Cause
	Catherine Rollinitis W/F Cause	Alice Thurber W/F Cause	Zelene Hart B/F Cause		Barbara Grinnell W/F W/S
		Paul Albritton W/M (Δ)	Peter Ruffin W/M Cause		Patricia Gilligan W/F
			Liam DePaor W/M Cause		
7 Jean Middleton W/F	8 Brian Berg W/M (St)	9 Brenda Wade W/F	10 Henry Sellers W/M (Δ)	11 Marie Ellis W/F personal... prob w/ guilty Cause	12 Catherine Steele W/F
	Jane Kirk W/F Cause p1	(2) Joan Gleason W/F (St)	Jonathan Rankin W/M f 1992 BR vic could off. - inv. ? Cause	Robt. Steinkraus W/M Dr. Cause p DP	ALTERNATE 3/15 Judith Jones W/F
	James Summey W/M Cause p/	Carlton Hewitt W/F by agreement	Eliza. Russell W/F rape - family... (Δ)	Tina Hooper B/F	
	Thomas Bowker W/M (Δ)	Richard Williams W/M	Jeff Turpin W/M (St)		
	Audrey Barnes B/F - No Show -		Janet Veazey W/F serious fel. L. (St)		
	Jack Shoemaker W/M (Δ)		Robin Framilla W/F (St)		
	Barbara Angelo W/F nephew charged w/ killing Tx dur prose. N.C.		David Oxendine W/M Cause		
			Helen Thomas W/F Cause		
			Jacqueline Ellison W/F Cause		
			Angela Tillman B/F pdy Δ Cause		
			Shaun Patrick W/M (St)		
			Patricia Coburn W/F		

DEFENDANT'S EXHIBIT 126

L 14 / illegible 13 / sch. 14 / DP 15 / L 2 / HS 10 / L 2 / ffli 2 / ppl 2 / op 2 / LEO 2 / L 2 / DP 2 / ffli 2 / I 2 / By As 2 FROM M/S 15

CHALLENGES: L FFI 11 / ch 3 / L 11 / Δ 8 / 6 / 5 / L 3 / ffli 10 / sch 2 / L 1 / op 1 / L 1 / L 10 / ffli 10

For Cause

State or Plaintiff 5/8/3/10/10/10/2/10/2/2

Defendant 1/2/3/8/10/1/8/10/2/2/2/2/A1 13/A2 14

I, the undersigned clerk of the above-numbered case the persons whose names appear above were called as jurors, that those whose names are marked through were excused, and that those whose names are not marked Called were empanelled to serve as jurors.

This the 7th day of April

Clerk

ACMC-C-111 (Replaces L-168)

Print Out

State

vs.

Wright

JURY

File No. 97 CRS 6493

Film No. 3/31/97 - 4/ /97

BACK ROW

1	2	3	4	5	6
Jack Ledford W/M double murder then DP... (A)	Kathy Flowers W/F (A)	Donald Bryant B/M (A)	Hugo Hansen W/M	Rosemary Merritt W/F (St) p/L	Margaret Brown W/F cause
Zelda Sharratt W/F bro... murder... (A)	STEVEN CAVANAUGH W/M f excused court	WALTER Ryczek W/M (-) cause	(2) Carol Forestell W/F cause	Jack Myrick W/M cause	Robert Lucas W/M
Doris Failing W/F judgment — rel. (A) cause	Betty Simmons B/F (A)	Marcia Kolb W/F (St)	Debbie Sawyer W/F (St)	Lawrence Bale W/M	ALTERNATE 2/14 Arnold Williams B/M cause
Arthur Strauss W/M prob w/ the A... cause	Anita Jacobs W/F prob p/a/fi/M cause knew of D VIC M-Teen	Michael Roncone W/M	Vicki Powell W/F cause	ALTERNATE 1/13 David Allen W/M (A)	Alice Edwards W/F (A)
Ardelia Grause B/F cause	Traci Dinwiddie W/F (St)	(2) Melanie James W/F cause	Rebecca Hardee W/F (A)	Frances Smith W/F ex	Matthew Dunlop W/M ex
Frank Wolfe W/M	Rubin Jones (A) W/M	Aaron Eady B/M cause	Peggy Beasley W/F cause	Margaret McCartney W/F	Connie Wagner W/F cause
	Catherine Rollinitis W/F cause	Alice Thurber W/F cause	Zelene Hart B/F cause		Barbara Grinnell W/F N/S
		Paul Albritton W/M (A)	Peter Ruffin W/M cause		Patricia Gilligan W/F
			Liam DePaor W/M cause		

7	8	9	10	11	12
Jean Middleton W/F	Brian Berg W/M (St)	Brenda Wade W/F	Henry Sellers W/M (A)	Marie Ellis W/F personal... prob w/ guilty cause	Catherine Steele W/F
	Jane Kirk W/F cause FI	(2) Joan Gleason W/F (St)	Jonathan Rankin W/M f 1992 BR vic could off. - inv. ? cause	Robt. Steinkraus W/M Dr. cause p/DP	ALTERNATE 3/15 Judith Jones W/F
	James Summey W/M cause p/L	Carlton Hewitt W/F by agreement	Eliza. Russell W/F rape - family... (A)	Tina Hooper B/F	
	Thomas Bowker W/M (A)	Richard Williams W/M	Jeff Turpin W/M (St)		
	Audrey Barnes B/F - No Show -		Janet Verley W/F Serious fel. L. (St)		
	Jack Shoemaker W/M (A)		Robin Framilla W/F (St)		
	Barbara Angelo W/F replan charged w/ killing Tx- dur pose. N.C.		David Oxendine W/M cause		
			Helen Thomas W/F cause		
			Jacqueline Ellison W/F cause		
			Angela Tillman B/F (A) cause		
			Shaun Patrick W/M (St)		
			Patricia Coburn W/F		

L /illness /Sch. /DP /L /HS /O /L /fli /PDP /op /LEO /L /DP /fli /I /By Ag FROM
14 /13 /14 /15 /2 /10 /2 /2 /2 /2 /2 /2 /2 /2 /2 /2
N/S /15

CHALLENGES: L /FI /DP /L /fli /sch /L /op /L /L /fli
For Cause 11 /3 /11 /8 /6 /5 /3 /10 /2 /1 /1 /1 /10 /10 /10
State or Plaintiff 5/8 /3 /10 /10 /10 /2 /10 /2 /2
Defendant 1/2 /3 /8 /10 /1 /8 /10 /2 /2 /2 /2 /A1 /13 /A2 /14

AOC-G-411 (Replaces L-168) Rev. 7/95

I certify that the above-numbered case the persons whose names appear above were called as jurors, that those whose names are marked through were excused, and that those whose names are not marked Called were empanelled to serve as jurors.

This the 7th day of April 1997

3 Clerk

DEFENDANT'S EXHIBIT 126-A

PENGAD-Bayonne, N.J.

-APP.300-

NORTH CAROLINA vs.

JAMES BURMEISTER

JUROR PANELS

File No(s).

95CRS58129

F names were selected into panels as indicated below. Each juror was selected at random within the panel for jury selection.

	PANEL NO. 1 (W B 9 3 — M F 5 7)	PANEL NO. 2 (W B 8 4 — M F 8 4)	PANEL NO. 3 (W B 14 6 — M F 11 9)	PANEL NO. 4 (W B 13 5 — M F 10 8)
	~~SHERRY MATTHEWS~~ C	~~JANE LENNON~~ 8 (A) B	~~JOSEPH YERGEAU~~ 3 (A)	~~STEPHEN BROWN~~ A2 (A)
	~~STEPHEN YETTER~~ C	~~FRANLKIN CLARK~~ C	~~CLIFFORD PEPPER~~ 16 (A)	~~VELMA ROWLAND~~ 3 (A)
B	~~JOHN TATE~~ 3 (A)	~~MICHAEL ELLISON~~ C	~~BETTY AVERY~~ B 10	~~REGINALD MCIVER~~ B CA
	~~HEATHER BARBER~~ 11	~~LARRY ATWELL~~ 1	~~SUSAN RAMEY~~ 8 (A)	~~TWAND CARTER~~ B 3 H/S
B	~~LORRAINE GAINES~~ 6	~~PAUL HOLLOWAY, JR~~ 5 (A)	~~MICHELE HOLBROOK~~ 4 EX	~~ROBERTO HERNANDEZ~~ H E
B	~~HAZEL MANUEL~~ B C	~~RUBY HERRING~~ C	~~GERALD GIBBS~~ 8 (SH)	SUSAN ROSE PH 4
	~~GLENN HARKNESS~~ 12	~~MICHAEL GRIFFIN~~ 10 (A)	~~JIMMIE BROWN~~ 5 (SH)	~~ISMAEL MONTES, JR~~ (8) H
	~~DANIEL PEACHER~~ C	~~ELIZABETH FORSYTHE~~ 7 (A)	~~GERALD OLSEN~~ C 7	~~PATRICIA SLAPPE~~ (8) (SH)
	~~LORI CAULDER~~ 2	~~EDWARD WOODARD, JR~~ C	~~VIRGINIA HICKS~~ 9 EX	~~MARCIA MORITZ~~ 3 (SH)
	~~KATIE ELSBERRY~~ C	~~HENRY WILLIAMS~~ 9 (A) B	~~LAFONTE WHITTED~~ B N/S 10 EXCUSED	~~ROBERT MOREAU, JR~~ A1 4
	~~JEANNE SMITH~~ (SH)	~~GARY FOX~~ C	~~JACQUELINE GILES~~ B 3 EXCUSED	~~BARBARA CASHWELL~~ CA
	~~LEE HART,~~ JR (SH)	~~RICKEY FLOWERS~~ 4 (A)	~~LOWELL WALL~~ EX.	~~CLIFF MCMILLAN~~ 3 CA
			~~WILLIAM BLACKMAN~~ 8 C	~~BARBARA WILLIAMS~~ B 3 C (SH)
			~~SUZANNE ASHBAUGH~~ 8 C	~~WILLIAM KIKER~~ 3 EX.
			~~VALERIE FERGUSON~~ B 5 (SH)	~~STANLEY STEPHENSON~~ 3 (SH)
			~~JOHN STRONG~~ 5	~~NICHOLAS CULBRETH~~ B CA
			~~TARA PARRISH~~ 8 (A)	~~DARCY DAY~~ 3
			~~TERRY ROWE~~ B 3 (A)	~~DOLORES SMITH~~ B 3 C (SH)
			~~TABETHA ROBINSON~~ 9 (A)	
			~~WILLIE MELVIN~~ B 3 C	

	PANEL NO. 5 (W B 15 5 — M F 11 9)	PANEL NO. 6 (W B — M F 9 11)	PANEL NO. 7 (W B — M F 7 9)	PANEL NO. 8
1 B	~~JAMES HAWKINS~~ A5 A	HERMAN CARTER	PATRICA DRUKENBROD	
2	~~MICHAEL HUEY~~ A6 C	LEON HALL, JR	EMILY VINES	
3	~~GARY LEVINER~~ A5 A3	CAROL HICKMAN	CHARLES ROARK	
4	RICHARD WEBB A2 9	LINNETTE HILL	ROBIN DEZELLE	
5	TAMMIE BARANOWSKI	MICAHEL CANADY	CONNIE HESTER	
6 B	~~JAMES FREEMAN~~ A4 EX	RANDY FRYE	DONALD GAUTHIER	
7	~~CATHERINE HAYES~~ A4 EX	TRACEY MAXWELL	JAMES WIKE	
8	~~SHIRELY BOLES~~ A4	JOHN GERBER	OLIVER SCHALLERT	
9	JOHNATHAN SPELL	CECEILIA REGISTER	MARVIN HERNDON	
0 B	~~RICHARD DICKERSON~~ A3 A1	THELMON TURNER	WYNDE WEBBER	
1	CHRISTOPHER HYATT	CHRISTOPHER ELLIS	CATHY WOODLEY	
2 B	~~ROXANNE GRANT~~ A2 (A)	REGINALD FORD	SARA RAMBO	
3	SAMUEL SPECIALE, JR H A4	JACK PHILLIPS	AMY SHIPMAN	
4	ANNA BARE H A2	CHARZINER LESANE	LAURA LANE	
5	~~ARTHUR HANSEN~~ A4 C.	KATIE FLEETING	MATTIE HEMINGWAY	
6	~~JONNA NEVINGER~~ A4 (A)	GENIA TATUM	JAMES BLAINE, JR	
7	~~SARAH FAIRLCOTH~~ A2 (SH)	LORIE DECKER		
8	~~WANDA HUGGINS~~ A6 A4	ALICE DAVIS		
9	~~KENNETH MUCHA, JR~~ A2 (SH)	NANCY GATES		
0 B	~~JILL EVANS~~ EX	HYTHA SANDERS		

DEFENDANT'S EXHIBIT 127

The state wish to be heard as to race neutral reason?

MS. RUSS: Judge, I presume from that the Court has found -- is finding a prima facie showing; is that right?

THE COURT: I would have the record reflect, considering the manner in which he was questioned -- I am not so concerned with the manner in which he was questioned or the length of it. However, 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 wish to be heard as to a race neutral reason?

MS. RUSS: Yes, sir. If the Court will note on his questionnaire, his first -- the first concern that the state has is the defendant's age as compared to this juror's age. That was a consideration for the state.

One -- some other considerations that the state had were his body language. If you noticed when I started --

THE COURT: One moment, please. What is the age of the defendant? I mean I don't know.

MR. BRITT: 30 years old, Your Honor.

THE COURT: Okay.

MS. RUSS: 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 issue, 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.

He seemed to us at points evasive. When I would ask him a question, he would respond with a question, sort of in a defensive tone is what I wrote down here on my paper.

I was trying to draw him out some about his background and references based on his jury questionnaire. It was our feeling that we got from him basically minimal answers. We also were concerned a great deal about the answers -- the responses that this juror gave regarding the investigations that he did in terms of his not forming opinions or not making decisions. He seems extremely reluctant in that area to us.

Those are some of the concerns that the state based its opinion -- based its decision on. Now, I would like to point out to the Court that at this point also I think that the Court should consider the fact that we have -- the state has passed -- kept in this twelve I believe it's three black female jurors, retained those individuals

at this point.

I think that those statistics, if you give them the way that Mr. Britt did, are a little misleading in the sense that they don't reflect the number of black jurors total. They don't reflect the fact that the state has passed on three black jurors and kept them. They also don't reflect the fact that, if my numbers are right, two of the black jurors who have come before this court have been excused for cause.

THE COURT: Well, the statistics that I have down are based solely on peremptories. I'm not keeping statistics on cause.

MS. RUSS: I understand.

THE COURT: Not for this purpose and I don't think Batson applies to cause.

MS. RUSS: I don't either but I think one of the things that's important is the fact that the state has passed on three black jurors and kept them.

THE COURT: All right.

MS. RUSS: And I believe that's a fourth of the twelve, in other words, that the state has kept.

THE COURT: All right. Anything further for the state?

MS. RUSS: No, sir, Judge.

THE COURT: Do you wish to be heard?

Give me one moment. Then I'll hear from you.

MS. RUSS: 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 COURT: You are aware Mr. Sellars in seat six has the very same birthday?

MS. RUSS: 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.

THE COURT: All right. Do you wish to be heard, sir?

MR. BRITT: Your Honor, I was going to mention Mr. Sellars and I didn't realize the birth date.

THE COURT: Take a look at it, folks.

MR. BRITT: He is about the same age and Ms. Jackson appears to be about the same age. Mr. Greb appears to be about the same age.

As to body language, as our jury selection has developed, Mr. Bazemore, because of where he falls in being called into the box, is the first juror I believe that we've had in the box alone. I watched him intently. He was the only one I watched throughout his questioning. I didn't notice any negative body language. I didn't notice any body

the state can articulate race neutral reasons for their decision, they have met -- that we have met our burden.

THE COURT: Do you wish to be heard further? Having the right of surrebuttal, I take it you have the last argument in the matter?

MR. BRITT: Of course, Your Honor has sat through this and watched the whole thing. Only to say the obvious, that the race neutral reasons have to be valid or the expression thereof.

THE COURT: All right. If we would have the record reflect that Mr. Forrester Bazemore was called as prospective juror this day seated in seat number five. Forrester Bazemore is a black male, born November 16th of 1965. That thereafter, he was questioned by the prosecutor extensively.

It would be noted that while we are conducting group voir dire that we were solely trying to fill one seat before the state passes to the defendant for examination, therefore, Mr. Bazemore was examined alone. That the 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.

That the Court further finds as a fact that, thereafter, the prosecution did move to exercise a peremptory challenge as to juror five, Mr. Forrester Bazemore. That the Court does note that the state has previously exercised five peremptory challenges against -- and of those five, four were against members of the black race, one black male, three black females. That the state has seated to this point one, two, three black females but, otherwise, the jury is composed of whites, male and female.

That the state -- strike that. That the Court finds that a prima facie case had been established and required the state to offer race neutral reasons. The state's first noted reason is the similarity in age between juror Bazemore and the defendant. I believe it was indicated he is 30 years old?

MR. BRITT: Yes, sir.

THE COURT: The Court notes Mr. Bazemore is approximately 33 years of age and does note that incredibly he has the very same birthday as John Seymour Sellars, a white male who is currently seated in seat number seven, that birthday being November 16 of 1965.

That the second noted reason -- or proffered reason by the state was body language of the prospective

juror, particularly during examination regarding the death penalty. The state citing that he folded his arms, appeared to sit back. And the third cited reason was that Mr. Bazemore had been involved in the conduct of investigations while in the military and the state cited his reluctance to form opinions during that military experience. The Court would note that Mr. Bazemore answered -- Bazemore's answer was that it was not his duty, per se, to form opinions but to gather facts and to forward those and that he was not involved in any decision making process.

The Court further finds that the fact Mr. Bazemore -- strike that. We would have the record further reflect that as we earlier noted, the defendant is a 30 year old black male, that allegedly the victim was a white male.

I tell you what. If you're going to cite me something regarding his body language, I want to see some law on it.

MS. RUSS: 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. If the Court sees fit --

THE COURT: I would like to see a case on that. I assume there is one. Why don't we -- they don't need to give them a break right yet. Just stand at ease. If you

can locate a case, I will be glad to look at it when you bring it back in. We'll stand at ease for ten minutes.

(Recess taken.)

THE COURT: All right. Let's return to the record and have it reflect the presence of all counsel and Mr. Parker and the absence of all jurors including particularly prospective juror seat five is it? That being Mr. Bazemore. All right. Yes, ma'am.

MS. RUSS: Judge, I would cite for you the State of North Carolina versus Clarence Leonard Martin, 105 NC App. 182, 1992, headnote number two where the state was called upon to show neutral reasons for exercising peremptory challenges. There was more than one actually. But as to one of the jurors, it says the second juror had an unstable work history and demeanor and body language which the investigator did not like and that was interpreted or ruled on by the court as a neutral reason and was upheld on appeal.

I did not have enough time to make copies of this case --

THE COURT: That's okay.

MS. RUSS: -- or read the entire case, Judge, but I would be happy to go and do that.

THE COURT: Is this the one with Judge Johnson's dissent?

MS. RUSS: I didn't get that far in it.

THE COURT: That's okay. Don't read it.

MS. RUSS: No, sir. This opinion Hedrick and Greene concurred and it was written by Judge Eagles.

THE COURT: Okay.

MS. RUSS: Okay.

THE COURT: Thank you. All right. Anything further?

MR. BRITT: Your Honor, we recognize that the law is the body language can be a factor to be considered. However, just the bold statement doesn't make it a legitimate factor. There has to be some factual basis to support it. We would contend there is not in this case. The Court has observed this witness (sic) as have we. As I indicated, I haven't noted anything that would come even close to negative body language.

There are many reasons people lean one way or another, many reasons people fold their arms. It could be chill. It could be discomfort at the situation they are in. We would contend that standing alone, that is no more than an attempt at mind reading and it is not a valid factor to be considered. When you put that together with the other reasons offered by the state and what I would contend is their lack of validity, I think the state has no basis for this challenge.

THE COURT: All right. Taking it where I left off on my -- I think I was in the conclusions. The Court has considered the proffered statement regarding the prospective juror's body language and finds after considering all of the circumstances regarding the nature of the trial, prior strikes as well as the information provided by this juror and further upon having had the opportunity to observe this juror, that the proffered reason is pretextual, that the defendant's objection should be sustained. Motion to strike -- well, let's put it this way, at this point it's ordered that the defendant's objection under Batson is sustained.

Now, folks, what are we going to do about it? He has been out some 40, 45 minutes I guess. The only person in here. The only thing we were -- he could see no other discussion. Nobody has examined him other than Ms. Russ. I can't help but wonder and suspect that he has on his mind the possibility that we're arguing about him. I'll be glad to hear from you, but as much as I hate to think about it, the only absolutely safe thing I know to do is follow what Judge Thompson did in McCall, back to square one. You folks want to be heard?

MR. BRITT: May we have a few minutes to think about it?

THE COURT: Sure. Absolutely.

consideration to both of those punishments.

JUROR TEN: Right.

MS. RUSS: And if you couldn't vote for both of them, then obviously you couldn't give fair consideration and that's why I am asking you that. Am I stating your position accurately or am I doing it inaccurately?

JUROR TEN: That's --

MS. RUSS: Is that right?

JUROR TEN: That's right.

MS. RUSS: Okay. Judge, I challenge him for cause.

THE COURT: Sorry?

MS. RUSS: I challenge him for cause.

THE COURT: Defense wish to be heard?

MR. RANSOM: Briefly, Your Honor.

THE COURT: Yes, sir.

MR. RANSOM: Mr. Freeman, you told the judge earlier that you could consider the death penalty as a possible punishment in this type of case.

JUROR TEN: No. I -- I -- after we went back, I thought about it, you know, and I told her I told the judge before -- I raised my hand and said did I have anything to say, then I told her I had to -- judge had mentioned that to me but I referred it to her.

MR. RANSOM: So maybe -- are you telling us you

just didn't get an opportunity to explain to Judge Gore your true feelings?

JUROR TEN: There you go, um-hmm, until it really got to me.

MR. RANSOM: Okay. I see. And that is your true feelings?

JUROR TEN: Right.

MR. RANSOM: You could not consider the death penalty as a possible punishment in this type of case?

JUROR TEN: I wouldn't vote -- I wouldn't -- I wouldn't say it wasn't proper but for me, I wouldn't.

MR. RANSOM: You personally could not consider it?

JUROR TEN: Right, there you go.

MR. RANSOM: Under any set of circumstances?

JUROR TEN: Right.

MR. RANSOM: And how long have you held that belief, Mr. Freeman?

JUROR TEN: For years.

MR. RANSOM: Years?

JUROR TEN: I mean I don't know. It just goes on with me if anybody get killed, I mean hurt, I hate that.

MR. RANSOM: Yes.

JUROR TEN: But, you know, I don't like it so I wouldn't -- I don't want to be in that position to do that.

MR. RANSOM: No further questions, Your Honor.

THE COURT: Mr. Freeman, I'm sorry I didn't give you a chance to make yourself clear. I did not mean to cut you off, sir.

JUROR TEN: And I apologize to you too. I didn't catch you right so I could tell you about it.

THE COURT: I understand. All right. Let me ask you folks to step back with the other jurors for just a minute, please.

(Jurors three, six and ten leave the courtroom.)

THE COURT: Ms. Russ, are you going to want to talk with them further?

MS. RUSS: Yes, sir. I just thought since I had gotten to that, I might as well go ahead.

THE COURT: Madam Clerk, if you would make a note that in the morning I need to bring back Mr. Sbardella and Ms. Todd for the state to complete their inquiry. All right. As it relates -- let the record show there are no prospective jurors present at this time. As it relate to the prospective juror Mack Freeman, the state has challenged for cause. Defense wish to be heard?

MR. RANSOM: No, Your Honor.

THE COURT: The Court has allowed the defense an opportunity to attempt to rehabilitate Mr. Freeman. Mr. Freeman has stated unequivocally that under no circumstances could he personally vote to impose the death penalty.

Therefore, the Court finds he would be unable to discharge his duty as a juror to fairly consider both sentences and the Court excuses him for cause in the Court's discretion. The -- go ahead and tell us who the next juror is going to be, please, ma'am.

THE CLERK: Arthur Thompson.

THE COURT: I believe what we'll do is go ahead and allow the state to finish their inquiry as it relates to the two jurors, Mr. Sbardella and Ms. Todd, and then, depending upon what the state's determination is after that, we will call Mr. Thompson and such other juror or jurors as we need to complete the panel again. Anything from the state before we recess for the day?

MS. RUSS: No, sir.

THE COURT: The defense?

MR. RANSOM: Judge, we made inquiries yesterday and I think the Court instructed someone to check with the jail to inquire whether or not we could have access to pens.

THE COURT: That was not done? Did you go out to the jail today?

MR. RANSOM: I went out to the jail, Judge. Unfortunately the visiting hours are from 4:00 to 7:00 out there and it was a madhouse and it was impossible to talk to anyone.

THE COURT: Have you made contact with anyone

JUROR ELEVEN: Yeah. That was pretty much basically the whole curriculum except for, you know, a few in psychology and science and things like that.

MS. RUSS: Okay. And about what year was that or years that you were there just roughly?

JUROR ELEVEN: I think I graduated in '91 so maybe that summer through like '94.

MS. RUSS: Okay. All right. Thank you. Thank you, ma'am. And Mr. Radcliffe --

JUROR TEN: Yes.

MS. RUSS: -- I notice that you grew up in Ohio?

JUROR TEN: Yes, ma'am.

MS. RUSS: And based on your earlier indications to us, I am assuming that you came to North Carolina as a result of the military?

JUROR TEN: Yes, ma'am.

MS. RUSS: Is that right or wrong?

JUROR TEN: Yes, ma'am.

MS. RUSS: Would you tell us a little bit about that, were you at Fort Bragg, were you at Jacksonville?

JUROR TEN: Fort Bragg, 1962, '63.

MS. RUSS: Okay. Did you like us okay?

JUROR TEN: I stayed.

MS. RUSS: All right. Okay. I was interested in what you said that you did in the military.

JUROR TEN: Combat photographer.

MS. RUSS: Yes, sir.

JUROR TEN: Yes.

MS. RUSS: Can you just tell us briefly a little bit about that. Is it what I think it is?

JUROR TEN: Yes, ma'am.

MS. RUSS: You made pictures of actual combat and so on?

JUROR TEN: Yes, ma'am. We did that -- that's my whole career. We did that -- two tours in Vietnam I did that.

MS. RUSS: And that's for military purposes --

JUROR TEN: Yes, ma'am.

MS. RUSS: -- was then to use them to make decisions and prepare for future military things?

JUROR TEN: History and intelligence, things like that.

MS. RUSS: I see. All right. And I also noticed that your -- one of your hobbies is computer?

JUROR TEN: Try to be, yes, ma'am.

MS. RUSS: And I just was wondering what you're particularly interested in, the computer or is it just the whole phenomena?

JUROR TEN: Just the technology phenomena I guess and trying to build a page for our church activities and

stuff like that.

MS. RUSS: I see.

JUROR TEN: And do a newsletter for our Bible college.

MS. RUSS: I see. For your Bible college. Does your church have -- connected with a Bible college?

JUROR TEN: We have a little Bible college here in Whiteville. It's called Bread of Life.

MS. RUSS: I see. And you do a newsletter?

JUROR TEN: Yes, ma'am.

MS. RUSS: Did you also -- it sounds like you designed a web page for them?

JUROR TEN: We're working on it.

MS. RUSS: Working on it.

JUROR TEN: Yes, ma'am.

MS. RUSS: And I also was interested in -- you indicated that you have a brother that is a guard -- and I --

JUROR TEN: Brother-in-law.

MS. RUSS: Brother-in-law is a guard at the county jail here in Columbus?

JUROR TEN: Yes, ma'am.

MS. RUSS: All right. And then you have a friend who is in --

JUROR TEN: Reverend Pridgen. He's at the

Columbus County Correctional Institute.

MS. RUSS: And his work there, if you know, is a --

JUROR TEN: He's a guard.

MS. RUSS: A guard. All right. And you, if I understand right, actually have a brother, not a brother-in-law but a brother who is a guard there also?

JUROR TEN: No. Just brother-in-law and friend. That's all.

MS. RUSS: Okay. I wanted to clear that up. All right. And do you talk with those two gentlemen from time to time about their work or is it --

JUROR TEN: Very, very seldom.

MS. RUSS: Okay. And ultimately I want to ask you this question. Is there anything that you feel as you examine yourself about the fact that those two folks that appear to be fairly close to you are involved in those -- that line of work? Is there anything about that at all that you feel would cause you to be unfair to either side, sir?

JUROR TEN: No, ma'am.

MS. RUSS: All right. Thank you. I appreciate you answering my questions also, sir. Thank you, sir.

JUROR TEN: Yes, ma'am.

MS. RUSS: And Ms. Davis --

JUROR NINE: Yes, ma'am.

yeah, okay. I understand.

JUROR SIX: Yeah, I have the permit -- a permit.

MS. RUSS: Yes, sir. All right. Thank you. Have you ever been a victim of a crime at all, Mr. Salter?

JUROR SIX: No.

MS. RUSS: Any close friends been victims of crimes that you are aware of?

JUROR SIX: Not that I am aware of.

MS. RUSS: Okay. Have you ever gone to court and been a witness or testified in any sort of court proceeding at all, taken the witness stand or anything?

JUROR SIX: I talked -- not the jury duty. A witness on the -- I don't recall that.

MS. RUSS: Okay. All right. And I apologize for needing to ask you this question but it's on the questionnaire. Have you ever been charged or arrested for anything?

JUROR SIX: No.

MS. RUSS: Okay. And then I think the other questions are answered. Thank you, sir. All right. Appreciate your talking with me, too. And Ms. Alderman --

JUROR FIVE: Yes, ma'am.

MS. RUSS: -- what area of this county do you live in generally?

JUROR FIVE: Beaver Dam.

MS. RUSS: Beaver Dam?

JUROR FIVE: Yes, ma'am.

MS. RUSS: Thank you. And you've been there most or all of your life?

JUROR FIVE: Yes, ma'am.

MS. RUSS: And I notice -- do you have some schooling past your high school work.

JUROR FIVE: I went in -- I was going in for nursing and I got accepted into the nursing program. Then I got pregnant and that sort of -- but I was taking courses for that.

MS. RUSS: Okay. I see. All right. And you've been at Wal-Mart quite some time --

JUROR FIVE: Yes, ma'am.

MS. RUSS: -- haven't you? And, you know, we come down here from Fayetteville each day and so we don't really know what people from this area know so I -- I -- your church is the Dayspring Ministry?

JUROR FIVE: Yes, ma'am.

MS. RUSS: Okay. Is that here in Whiteville or is that --

JUROR FIVE: It's like at Peacock and Rough and Ready Road. My brother, he's a pastor there.

MS. RUSS: Okay. All right. Is that a nondenominational?

JUROR FIVE: Yes, ma'am.

MS. RUSS: Okay. And I also was interested -- you've been on a jury one time before; is that right?

JUROR FIVE: Yes, ma'am.

MS. RUSS: Do you -- about when was it? About how long ago, just roughly?

JUROR FIVE: It was about three years ago.

MS. RUSS: About three years ago. Was it -- if you recall, was it civil or was it criminal?

JUROR FIVE: I think it was civil.

MS. RUSS: Okay. Was it about money?

JUROR FIVE: They were trying to prove something about a car.

MS. RUSS: Okay. Civil. Okay.

JUROR FIVE: Something about a car wreck.

MS. RUSS: And the jury actually deliberated and made a decision; is that right?

JUROR FIVE: Yes, ma'am, we did.

MS. RUSS: I would like to ask you, as you think about that, is there anything about that experience that you feel would enter into your decision making process in this case that would cause you to be unfair to either side?

JUROR FIVE: No, ma'am.

MS. RUSS: Thank you. As I read your questionnaire, that's the only jury experience you have?

MS. RUSS: Yes, sir. Judge the state will exercise peremptories as to jurors number three, six and ten. As to the others we're --

THE COURT: Three, six and ten. That is Mr. Nealey, Mr. Salter and Mr. Radcliffe; is that correct?

MS. RUSS: Yes, sir.

THE COURT: Bring the jurors back in. Does the defense wish to be heard on anything?

MR. RANSOM: Yes, sir, Judge, we do. Judge, we wish to raise a Batson issue with the Court before the jury comes back in.

THE COURT: All right.

MR. RANSOM: If the Court will hear me now?

THE COURT: Have we got the jury back in there?

THE BAILIFF: Yes, sir.

MR. RANSOM: Judge, in doing so we're relying on Batson versus Kentucky and State versus Spruill, North Carolina case. We realize at this time it's incumbent upon defense counsel to make a prima facie case as to discrimination. In relying on the holding in State versus Spruill, Judge, we would allege that of the three persons the state has elected to use peremptory challenges on, jurors number six and ten are black.

Judge, in meeting the requirements of Spruill and other case law in establishing the prospective juror's race,

where there had been an acquittal, that he might be more prone to acquittal?

MS. RUSS: Yes, sir. And those were the concerns I had based on this short questionnaire and realizing that we had a long trial. That's a concern of ours.

THE COURT: All right.

MS. RUSS: 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.

THE COURT: What is there about that that bothers you?

MS. RUSS: 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: All right. Anything further from the defense in response to the state's position?

MR. RANSOM: Judge, I'll be very brief. Judge, it strikes me that Ms. Russ has expressed her concerns as to Mr. Salter and Mr. Radcliffe, specifically Mr. Salter's age and his ability to follow detailed instructions. She never asked him that. She never said, Mr. Salter, you're 76. Is your health good? Is your hearing good? Are you going to be able to sit up here and listen to instructions and follow a lengthy trial? She never inquired of that. Mr. Radcliffe's involvement in the church that concerns Ms. Russ, his Bible college and his newsletter, she never asked detailed questions into that. She never asked him whether or not his involvement in the church would have any effect on him being fair and impartial if he's chosen as a juror.

We would just say, Judge, that Ms. Russ's response -- responses are inadequate and it's nothing more than a

pretext for discrimination. Thank you.

THE COURT: All right.

MS. RUSS: Judge, could I respond to that?

THE COURT: Yes, ma'am.

MS. RUSS: I meant to also point out that Mr. -- we observed Mr. Radcliffe when Mr. Nealey was expressing the concerns that he had about two people being convicted of the same crime and appeared to do the same thing and getting different sentences, Mr. Radcliffe was nodding and we observed that body language and recorded it on our jury forms also and that was, of course, a concern we had with Mr. Nealey and Mr. Radcliffe's apparent agreement there was also a great concern of ours.

And, Judge, I don't know of anything that requires us to put ourselves in a situation where, number one, we embarrass jurors by saying, Mr. Salter, do you feel that you can follow instructions, da, da, da, da, da, or put us in a position where we -- by asking questions that other folks might find offensive if we chose not to, would we offend other jury members. I think we can rely on things we ask and what the jurors say and observations of their behaviors and so on and make judgments. I really prefer not to embarrass them if I can nor put us in a position where we jeopardize any relationship either with them or fellow jurors, frankly.

THE COURT: All right.

MS. RUSS: Thank you.

THE COURT: Thank you. Let the record show now the Court has conducted a Batson hearing out of the presence of the jury. That the defendant and counsel and state's attorneys were present at all times except for Mr. Grannis, who is absent with leave of the Court. The Court finds that of the three -- the first three peremptory challenges exercised by the state, that juror number three, Billy Nealey, is a white male. James Salter, seat number six, is a black male and Wayne Radcliffe in seat number ten is a black male. That the Court further for the record takes judicial notice of the defense counsel's statement that the defendant in this matter is black; is that correct, Counsel?

MR. RANSOM: Yes, Your Honor.

THE COURT: The Court has further considered the defense position that 66 and two-thirds percent of the first three jurors excused were black persons of the same racial identity as the defendant. The Court has listened and observed the voir dire conducted by the state and finds as follows. That Ms. Russ, assistant district attorney, has engaged in the same -- essentially the same pattern of initial questions to each juror, varying therefrom based upon the juror's initial response -- individual responses to

her initial questions and based upon the information provided on a volunteer basis by jurors and based further upon further information provided in the questionnaires completed by the jurors at the consent of the state and the defense.

The Court finds that -- and concludes as a matter of law that the questions put by the prosecutor were reasonably posed and unbiased, and based on information provided by the prospective jurors in their questionnaires, that the questions were not specifically geared to the race of the juror but rather to their background and biographical information as listed in the answers on the questionnaires. The Court finds, therefore, that there is no Spruill violation here and finds the same is -- concludes the same as a matter of law.

In regard to the Batson issue, the Court finds that the reasons given by Ms. Russ, specifically that Mr. Salter is 76 years old, that he did not complete one page of the questionnaire, although it was facing a page of the questionnaire that was completed by him, that he has been on the jury before and that the verdict was acquittal, are sufficient to show race neutral basis for exercising a peremptory challenge. And as to Mr. Salter, the Batson challenge is denied.

The Court, concerning juror number ten, Mr.

Radcliffe, Wayne Radcliffe, finds the state has evinced concerns based upon the juror's considerable involvement in a church and Bible college and because of the relationship he has with other persons who are also involved in the church and/or Bible college with him and who also serve as law enforcement officers, specifically jailers at the Columbus County Sheriff's Department and at the local prison unit. The Court finds most convincing, however, the state's concern as stated by Ms. Russ that they -- that she observed Mr. Radcliffe nodding his head in agreement with the responses given by juror Billie Nealey, a white male, when Mr. Nealey was indicating that he had a problem with people charged with the same offense getting substantially different sentences and outcomes in their trials or pleas. And because this concern as evinced by Mr. Nealey and apparently agreed to, according to his body language, by Mr. Radcliffe, the state had concerns about his ability to be fair and impartial in this case. The Court, therefore, finds that Mr. Radcliffe's answers and body language as specified by the prosecutor are sufficient in the Court's opinion, having observed the same, to show a race neutral reason for the state's exercising of a peremptory challenge.

And the Court, therefore, concludes as a matter of law, without finding that the defendant has necessarily

shown a threshold Batson violation -- strike that, a prima facie Batson violation, that the state has voluntarily given the Court its proposed race neutral reasons and the Court is satisfied with the same for each of these jurors. Therefore, the motion for remedies under Batson is denied.

All right. Bring the jurors back in, please.

MR. RANSOM: Judge, while they are coming in, will you note our exception?

THE COURT: Exception is noted to the Court's ruling.

(Jurors return to the courtroom.)

THE COURT: Let the record show now the prospective jurors have returned. Ladies and gentlemen, if you'll bear with me just a minute.

(The Court talks to bailiff.)

THE COURT: All right. Mr. Nealey, Mr. Salter and Mr. Radcliffe, you will be excused from this particular jury. However, you will remain in the jury pool and we will ask you folks to come back at 2:00, the three of you, Mr. Nealey, Mr. Salter and Mr. Radcliffe, to be available to serve next door in another jury that they are selecting next door. If you folks could be back at -- it's 1:15. If you can be back at 2:15 and come to the grand jury room. The sheriff will show you where that is. And you three folks are excused at this time.

JUROR TWO: No.

MR. RANSOM: How long would you say it was last, Mr. Marlowe, that you belonged to the NRA?

JUROR TWO: Probably five or six years ago.

MR. RANSOM: You have one daughter?

JUROR TWO: Right.

MR. RANSOM: Does she live locally, Mr. Marlowe?

JUROR TWO: Yes, sir.

MR. RANSOM: In Columbus County?

JUROR TWO: Right.

MR. RANSOM: And she has one son?

JUROR TWO: Right.

MR. RANSOM: Who's about age 12?

JUROR TWO: Right.

MR. RANSOM: Mr. Marlowe, you -- do you hold any offices in the church you attend?

JUROR TWO: No. I'm a Sunday school secretary is all.

MR. RANSOM: How long have you been doing that?

JUROR TWO: Probably 15 years.

MR. RANSOM: Have you been attending, I take it, Delco Baptist Church --

JUROR TWO: Right.

MR. RANSOM: -- for those 15 years or more?

JUROR TWO: Yeah.

MR. RANSOM: Your husband works at Chadbourn Feed?

JUROR FIVE: Yes, sir.

MR. RANSOM: I take it that's a feed store over in the Chadbourn area?

JUROR FIVE: Yes, sir.

MR. RANSOM: And he has been there for some time now?

JUROR FIVE: Oh, yes, sir.

MR. RANSOM: Your two sons, Ms. Alderman, do they live in the home there with you still?

JUROR FIVE: Yes, sir.

MR. RANSOM: Your 18-year-old son, is he still attending school?

JUROR FIVE: No. He went and got a GED. He quit school in the tenth grade but he went back and got a GED.

MR. RANSOM: And you've got a 14-year-old as well?

JUROR FIVE: Yes, sir.

MR. RANSOM: Where does he attend school at?

JUROR FIVE: Williams Township.

MR. RANSOM: Ms. Alderman, you've indicated that you attend a church that is pastored by your brother; is that correct?

JUROR FIVE: Yes, sir.

MR. RANSOM: How long have you been attending there?

JUROR FIVE: I don't know. We've moved it. See, it used to be in Tabor City but I will say six or seven years at this one place I think. I don't really know exactly how long we have been there.

MR. RANSOM: Has your brother been pastor there the whole time you've attended?

JUROR FIVE: Yes, sir, um-hmm.

MR. RANSOM: Do you or your husband hold any offices in that church?

JUROR FIVE: Well, I used to be a secretary and then I had to step down because it was a little bit too much on me.

MR. RANSOM: I'm sorry. A little bit too much on you?

JUROR FIVE: Um-hmm.

MR. RANSOM: What about your husband?

JUROR FIVE: No, sir.

MR. RANSOM: Would you say you attend regularly?

JUROR FIVE: Yes, sir.

MR. RANSOM: I notice you put four times per month. I take it you mean four Sundays --

JUROR FIVE: Yes, sir.

MR. RANSOM: -- that you attend? Do your children attend church there with you?

JUROR FIVE: No. They go to Old Dock.

MR. RANSOM: Leland. How long has he been there, Ms. Booth?

JUROR ELEVEN: Little over three years I think.

MR. RANSOM: And what is it he does at --

JUROR ELEVEN: He just runs like a machine. They make yarn.

MR. RANSOM: Now, you attend Grace Bible Church here in Whiteville?

JUROR ELEVEN: Right.

MR. RANSOM: Is that the church you grew up in?

JUROR ELEVEN: No. I went with my parents in Delco, and right before my husband and I -- we started dating, we started going there. That's his parents' church.

MR. RANSOM: That's his family church?

JUROR ELEVEN: Right.

MR. RANSOM: Okay. And how long have you been attending there, since marriage?

JUROR ELEVEN: Yeah. We started going right before we got married, few months before. We got married in that church and we've been going there ever since.

MR. RANSOM: Now, do you and your husband participate in any offices there in the church other than attending worship service Sundays?

JUROR ELEVEN: No.

MR. RANSOM: How about his family? Do they hold any offices in the church, teach Sunday school, deacon, anything like that?

JUROR ELEVEN: I think his father is like the treasurer.

MR. RANSOM: Now, Ms. Booth, you indicated on your questionnaire that your mother has been the victim of a crime; is that correct?

JUROR ELEVEN: (Nodding head.)

MR. RANSOM: Was it her home that was burglarized?

JUROR ELEVEN: No. It was the store that she owns.

MR. RANSOM: The store. Now, is that store located here in Whiteville?

JUROR ELEVEN: In Delco.

MR. RANSOM: In Delco. Someone came in at night and took things, is that --

JUROR ELEVEN: Right.

MR. RANSOM: -- basically what happened? No one was ever arrested?

JUROR ELEVEN: Not as far as I know.

MR. RANSOM: Is there anything about that situation involving your mother's store being broken into that leaves you with a bad feeling about the judicial system? No arrest was made. Do you hold that against the

than taking that medication for high blood pressure, you appear to be in good health?

JUROR TWELVE: I think. Some arthritis.

MR. RANSOM: Arthritis. That was my next question. What is it you take, Vioxx? Am I pronouncing that --

JUROR TWELVE: Vioxx.

MR. RANSOM: Vioxx. That's for your arthritis?

JUROR TWELVE: Right.

MR. RANSOM: And is your arthritis under control with that medication?

JUROR TWELVE: My knees bother me a little bit but that's what it's mostly for.

MR. RANSOM: Okay. And you don't foresee any problems with your health as far as being involved in a lengthy trial and traveling back and forth every day?

JUROR TWELVE: No, sir.

MR. RANSOM: You feel like you're certainly capable of doing that?

JUROR TWELVE: (Nodding head.)

MR. RANSOM: You and your family attend Livingston Baptist Church in Delco?

JUROR TWELVE: Yes, sir.

MR. RANSOM: How long have you been attending there?

JUROR TWELVE: Since I was about ten years old.

MR. RANSOM: Since you were ten years old. So you basically grew up in that church. You have indicated that you attend about 12 times per month, am I reading that --

JUROR TWELVE: Regular.

MR. RANSOM: So you not only go to Sunday services, you may go to Wednesday night services?

JUROR TWELVE: Sunday night, Wednesday night.

MR. RANSOM: Sunday night. Okay. Do either you or your husband, Ms. Howell, hold any offices in that church, deacons, trustees, Sunday school teachers?

JUROR TWELVE: He's a deacon and a Sunday school teacher. I have taught but -- small classes but not major.

MR. RANSOM: And you take the Wilmington newspaper?

JUROR TWELVE: Yes, sir.

MR. RANSOM: Do you take the newspaper out of Myrtle Beach?

JUROR TWELVE: No.

MR. RANSOM: The newspaper you take -- I asked you if you take the Wilmington paper; is that correct?

JUROR TWELVE: (Nodding head.)

MR. RANSOM: Do you take the local Columbus County newspaper?

JUROR TWELVE: We just buy that sometimes --

And we're satisfied with the rest, Your Honor.

THE COURT: Okay. Just let me go through that again. You're excusing juror number one, Ms. Long; juror number two, Mr. Marlowe; juror number four, Ms. Jenkins; juror number six has already been excused; juror number seven, Shannon Greene; and juror number eleven, Chandra Booth. So you're exercising five peremptories at this time; is that correct?

MR. RANSOM: That's correct, Your Honor.

THE COURT: All right. Give me just a moment. All right. Does the state wish to be heard as to any of these?

MS. RUSS: Judge, it appears to us that all five of these jurors are white, and at this point, we would object to that and bring that to the Court's attention actually I guess on a Batson basis.

THE COURT: All right. Without making a finding as to a prima facie showing, do you care to tell the Court what your purported race neutral reasons are for exercising peremptories to these people?

MR. RANSOM: Mr. Dunn will do it, Your Honor.

MR. DUNN: First of all, Your Honor, there was only one black juror remaining on the panel.

THE COURT: Yes, sir. So your opportunity to exclude nonwhite jurors is somewhat limited.

point, that there were six white males and they took off four of them and kept two for a 33 percent retention or if you look at the percentage in the total they took off, they took off 80 percent white males. And that would be basically our contention as to the prima facie showing.

THE COURT: All right. The record reflects my earlier findings as to the victim, the defendant, the nature of the offense, etc. I certainly incorporate those. Would have the record reflect that after examination of a panel of twelve, that the defendant exercised five peremptory challenges, four of which were exercised against white males, that being Albert Whitlow, John Sellars, Robert Hawk and Sherry Koerber, respectively jurors three, seven, eight and twelve.

That the Court has had the opportunity to consider the nature of questions asked, the manner in which questions were posed to the jurors individually and collectively by defense counsel, the nature of the responses as well as the current composition of seated jurors which were accepted by the defendant. Finds that a prima facie showing has been established. I will require some rebuttal. You want to be heard, sir?

MR. BRITT: Your Honor, as to Mr. Whitlow, our primary consideration with him was he had been doing business with Hall's Motor Company. He initially indicated

Additionally, Your Honor, we repeatedly asked about criminal histories and things that people had been convicted of. Ms. Morrisey did not -- we felt was not forthcoming and we have with us what we believe is her criminal history of Mary A. Morrisey having been convicted -- excuse me, of having been convicted of aiding and abetting a DWI. So based on those things, we also excused her.

THE COURT: All right, and Mr. Picart?

MS. RUSS: Yes, sir. As to Mr. Picart, we have notes that we've made as to the manner in which he conducted himself. We were observant of his body language. We observed it on several occasions when we would ask questions, he would not maintain eye contact with us. He would then -- on other occasions, he'd look at us and look down and look away to the left and try to avoid eye contact on many occasions with us. In addition to that, I tried to draw him out on some of his answers and I could not get him to give us more than a few words answer.

Based on that total lack of participation as far as the answers go and the fact that he would not -- we could not -- we had lack of eye contact with him, number one, and when we did have it, he was quick to look away and look down to the left and then, in addition to that,

AFFIDAVIT

I, Charles Scott, hereby state that the following information is true and accurate to the best of my knowledge:

I am an Assistant District Attorney in Cumberland County, Prosecutorial District 12. I have worked as a prosecutor in Cumberland County from 1990 to the present. I was involved in the jury selection of the capital trial, State v. Christine Walters, with prospective jurors from Cumberland County.

I have examined the jury selection transcripts and juror questionnaires from the Walters case where Margaret Russ was the lead prosecutor during jury selection and I acted as second chair. Ten (10) of nineteen (19) black veniremen were struck peremptorily by the State, I have provided the reasons those venire members were excused and have either quoted or paraphrased their answers to questions which provided the basis for a peremptory excusal. (The numbers in relation to veniremen and strikes are based upon the names and numbers reflected in Table 3 (pgs 6 & 7) Cumberland County Data of the MSUJSS.)

State v. Christine S Walters, 98 CRS 34832 (May, 2000)

In this trial, nine (9) black veniremen were passed to the defense which ten (10) were struck by the State peremptorily.

1.) Ellen Gardner 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. Ms. Gardner said it "grieves" her spirit to think about violence. She said she would "have to think about the death penalty" real hard.
2.) John Reeves had a grandson who was twenty-two (22) years old and had been charged with a "serious" crime, theft. Mr. Reeves had been a juror in a federal bank robbery case in 1996 and that resulted in a hung jury.
3.) Calvin Smith had a son-in-law who had killed his (the jurors') grandchildren in 1986 and had received seventy-five (75) years in prison for murder. Mr. Smith was born in 1926 and was seventy-four (74) at trial.
4.) Sallie Robinson said she could "possibly" consider both punishments but she would have to be convinced "beyond a doubt". She said the death penalty might be appropriate for someone in limited circumstances.
5.) Jay Whitfield was twenty-one (21) years old and knew some gang guys from playing basketball.
6.) Norma Bethea had knee surgery and couldn't sit for "too long". She said she had to move around every two (2) hours or so and couldn't sit for five (5) to six (6) hours. Ms. Bethea had a great nephew who went to prison for less than five (5) years on a breaking and entering case.

7.) Sean Richmond 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.
8.) Sylvia Robinson didn't feel comfortable judging other people. She listed herself as a Jehovah's Witness. She said she had a problem with judging.
9.) Marilyn Richmond had a BA degree in psychology and worked as a teen-age drug counselor and she worked with "wanna be" gang guys. Her oldest brother was convicted in 1978-79 for armed robbery and went to prison for fifteen (15) years to life but got out of prison in 1990.
10.) Laretta Carter Dunmore 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.

This the 23rd day of November, 2011.

Charles Scott
Assistant District Attorney
12th Prosecutorial District
Suite 427, 117 Dick Street
Fayetteville, NC 28301
(910) 475-3010

Sworn and subscribed before the
undersigned Notary this
the 23 day of November, 2011.

Kathy L Fancher Notary Public

Commission expires: 9-1-2013

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.

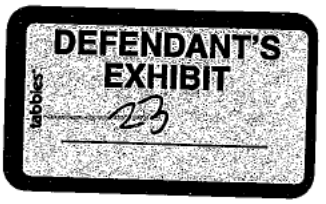
First Racial Justice ruling finds racial discrimination

The Charlotte Post (NC)

April 26, 2012

Section: NEWS; Pg. 1A

Length: 997 words



Byline: Sommer Brokaw, SOMMER.BROKAW@THECHARLOTTEPOST.COM

Body

Racial discrimination affects death penalty sentencing in North Carolina, according to the ruling in the lead case for the N.C. Racial Justice Act.

North Carolina Superior Court Judge Gregory Weeks found that prosecutors deliberately excluded qualified black jurors from jury service in death row inmate Marcus Robinson's case, in Cumberland County, and throughout the state. The court re-sentenced him to life imprisonment without the possibility of parole on April 20.

Robinson's defense team presented evidence of significant discrimination in jury selection in his case, based on a comprehensive study by Michigan State University professors. The study found that in nearly every prosecutorial district in North Carolina, prosecutors have struck qualified black jurors at more than twice the rate as white jurors.

Defense attorney Cassy Stubbs said one of the findings was that prosecutors had struck three times the number of African Americans as white jurors in his case. Jay Ferguson, another defense attorney on Robinson's team, added that the judge found "systematic discrimination" by prosecutors in jury selection throughout the state, from 1990-2010. "The state can either embrace this ruling and move forward or prosecutors can fight the ruling and move backward," Ferguson said. "The judge made it very clear that he hopes this is the beginning of the end of racial discrimination in the death penalty process." Robinson was sentenced to death in Cumberland County for the 1991 murder of Erik Tornblom. Robinson and co-defendant Roderick Williams robbed Tornblom of his car and a small amount of cash after he gave them a ride from a convenience store. "There was conflicting evidence at trial about whether Robinson or Williams actually shot Tornblom," according to a statement from the Center For Death Penalty Litigation.

Williams is serving a life sentence. Robinson came close to death in January 2007, but a judge blocked his scheduled execution.

In August 2010, Robinson filed a motion under the newly enacted N.C. RJA, but his case - the first to fall under the controversial law - was chal- lenged and delayed with an unsuccessful attempt to prevent Weeks - who is black - from hearing the case.

The North Carolina NAACP, which has rallied in support of RJA, released the following statement: "Today is a day where we must reflect on a dual tragedy," said NAACP President Rev. Dr. William J. Barber said. "The loss of life of the Tornblom family is a tragedy that should grieve us all and the court's finding is a reminder of the tragedy that racial

bias still affects and impacts the judicial process. Let all of us - black families, white families, Latino families, Native American families - join hands and pray to our Creator to forgive us as a society for both types of tragedies. Over the weekend, we will continue to reflect on how our human family has been so damaged." Barber continued: "We will conduct an in-depth review of the ruling over the weekend and on Monday, hold a full briefing on the court's decision and the next steps on the long road to one nation, indivisible, with justice for all." District attorneys have fought and lobbied the legislature against the RJA, which allows defense attorneys to use statistical evidence to establish that race was a significant factor in seeking or imposing the death penalty since its inception in 2009. The RJA states that "if race is found to be a significant factor in the imposition of the death penalty, the death sentence shall be vacated and the defendant resentenced to life imprisonment without possibility of parole." This is what happened in Robinson's case.

But prosecutors claimed that someone who committed firstdegree murder before Oct. 1, 1994 - before the life without parole sentence was legal - could be eligible for release after 20 years in prison under State versus Connor.

"I think that was always a facetious claim," said Tye Hunter, another attorney on Robinson's defense team. "The judge's ruling that it's life without parole, there was no contest about that...that's just political talk. There's political talk, and then there is reality when you have litigation." Deputy Democratic Leader Sen.

Floyd McKissick (D-Durham), a RJA supporter, said he hopes it will be a model for other states because it is one of the only acts of its kind in the country. The only law similar to it is in Kentucky, but that legislation only applied to cases that occurred after the implication of the act so it didn't impact people who were already on death row.

"It's kind of a wake up call to the criminal justice system that race should not be a factor when prosecutors seek the death penalty or when they are selecting jurors or when jurors decide to impose the death penalty," McKissick said. "If we can eliminate race to the maximum extent feasible that will be a wonderful outcome." "The Cumberland County District Attorney's Office will request that the Appellate Section of the Attorney General's Office review the court's order and pursue any possible grounds for appeal," the N.C. Conference of District Attorneys said in a statement.

"Due to the fact that this matter is still pending further comment would be inappropriate.

"In every case, a prosecutor's focus is on the facts, the law and the victim. "Claims of racial bias are best addressed by the trial judge hearing the case, not by generalized statistics presented more than 20 years after conviction." Senate President Pro Tempore Phillip Berger (R-Rockingham) said: "Despite the judge's intent, I am deeply concerned that today's ruling could make Marcus Robinson eligible for parole based on an earlier Supreme Court decision. We cannot allow cold-blooded killers to be released into our community, and I expect the state to appeal this decision. Regardless of the outcome, we continue to believe the Racial Justice Act is an ill-conceived law that has very little to do with race and absolutely nothing to do with justice."

Load-Date: November 1, 2012

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NC GOP seeks sharp limits to racial justice law

Posted: 2:52 p.m. today
Updated: 4:07 p.m. today

RALEIGH, N.C. &MDASH North Carolina lawmakers presented legislation Wednesday to overhaul the Racial Justice Act, bidding to stop convicted killers from using certain provisions of the landmark act in a bid to show racial bias influenced their death sentences.

A state House panel on Wednesday narrowly cleared a bill that would strip away much of the act, which passed the legislature in 2009 when it was under Democratic control. Kentucky is the only state with a similar law.

The state Senate hasn't yet taken up the overhaul.

Republicans who took over the General Assembly last year have sought to void the Racial Justice Act, which allows death row inmates to use statistics and other evidence to persuade a judge that bias influenced their sentences. Successful cases convert their sentence into a life term without parole. More than 150 condemned killers, nearly all of the state's Death Row, have filed for a review of their cases under the act.

GOP lawmakers have failed to override Gov. Beverly Perdue's veto and are now trying to sharply limit what opponents complain was a backdoor effort to end the death penalty.

"We have 155 people who claim – practically everyone on death row claims – the only reason they're there is because of their race. That's broken," House Majority Leader Paul Stam said. "The General Assembly has agreed that the correct punishment for first-degree murder is death, or at the discretion of the jury, life without parole."

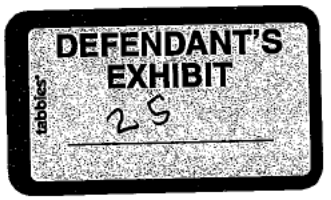
The existing state law allows judges to consider statistical analysis of cases showing race must have been a factor in prosecution decisions, even if no one testifies bias played a role in a specific case. Such statistical analysis is "completely contrary to concepts of Western justice that we consider each case on its own," Stam said.

In the first case under the law in which a judge considered the evidence, Superior Court Judge Greg Weeks ruled in April that condemned killer Marcus Robinson's 1991 trial was so tainted by the racially influenced decisions of Cumberland County prosecutors that he should be removed from death row.

Robinson is a black man convicted of killing a white teenager. He was nearly executed in 2007, but a judge blocked it.

Prosecutors said they plan to appeal the sentencing decision.

Weeks said he found highly reliable a study by two Michigan State University law professors that compared death penalty cases across North Carolina over a 20-year period. Their research said prosecutors eliminated black jurors more than twice as often as white jurors and that a defendant is



nearly three times more likely to be sentenced to death if at least one of the victims is white.

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."

Tye Hunter, executive director of the Center for Death Penalty Litigation in Durham and one of Robinson's attorneys, said the changes would prevent inmates from considering the Michigan State study's findings.

"What you're doing is deciding, we have a 20-year history of intentional discrimination in jury selection in capital cases (and) let's turn our backs away and make it so that nobody else can litigate that. That's the answer?" Hunter said.

The law's supporters said its aim is removing racial discrimination from the criminal justice system.

"I was born and raised in North Carolina, and I can say with certainty that there was and remains racism in my home state" that shows up in criminal cases, said Rep. Grier Martin, D-Wake.

From: Dorer, Peg
Sent: Monday, June 11, 2012 6:59 PM
To: Skip Stam
Subject: Fwd: Augustine; Golphin, and Walters

Rep. Stam;

Just thought you would like to see the addition of Meyers (see below) to the cases that are asking for relief from their death sentences in Cumberland. The CDPL has added Meyers who is white and has been sentenced to death 3 different times. Judge Weeks will now consider his motion for relief based on his previous ruling.

Sent from my iPad

Begin forwarded message:

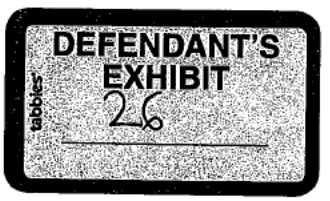
From: "Thompson, Rob" <Robert.T.Thompson@nccourts.org>
Date: June 11, 2012 3:26:47 PM EDT
To: "Bloomfield, Janet E." <Janet.E.Bloomfield@nccourts.org>, Gretchen Engel <GRETCHEN@CDPL.ORG>, "West, William R." <William.R.West@nccourts.org>, "Hicks, George R." <George.R.Hicks@nccourts.org>, "Perry, Jonathan" <Jonathan.Perry@nccourts.org>, "Babb, Jonathan" <JBABB@ncdoj.gov>, "Marquis, Danielle" <Dmarquis@ncdoj.gov>, Mike Silver <miketsilver@hotmail.com>
Cc: Ken Rose <ken@CDPL.ORG>, Shelagh Kenney <Shelagh@CDPL.ORG>, Jonathan Broun <Jonathan@CDPL.ORG>, "thjohnsonlaw@bellsouth.net" <thjohnsonlaw@bellsouth.net>, June Arlinghaus <june@CDPL.ORG>, Barrie Wallace <barrie@CDPL.ORG>
Subject: RE: Augustine; Golphin, and Walters

Janet,
Just so there's no miscommunication, is this hearing (the one to be scheduled on the week of July 23) for the purpose of determination whether there will be an evidentiary hearing at a later date?

<Signature.png>

From: Bloomfield, Janet E.
Sent: Monday, June 11, 2012 3:06 PM
To: Gretchen Engel
Cc: Ken Rose; Shelagh Kenney; Jonathan Broun; thjohnsonlaw@bellsouth.net; June Arlinghaus; Barrie Wallace; Thompson, Rob
Subject: RE: Augustine; Golphin, and Walters

Judge Weeks has asked me to contact all of you to advise that he is scheduling the hearing on Defendants' Motion for Sentencing Relief on the Motion for Appropriate Relief in Augustine, Golphin, Walters and also the newly filed case of Meyers.



Judge Weeks has checked the court schedule and the earliest time that is available, is the week of July 23, 2012 due to July 9th being our Administrative Court week and Mr. Thompson being in trial the Week of July 16th. The hearing will be held in Courtroom 4A.

Janet Bloomfield
Judicial Assistant
(910)475-3260
(910)475-3017 (Fax)

From: Gretchen Engel [mailto:GRETCHEN@CDPL.ORG]
Sent: Tuesday, June 05, 2012 2:51 PM
To: Bloomfield, Janet E.
Cc: Ken Rose; Shelagh Kenney; Jonathan Broun; thjohnsonlaw@bellsouth.net; June Arlinghaus; Barrie Wallace; Thompson, Rob
Subject: Augustine; Golphin, and Walters

Dear Judge Weeks:

Attached to this email is the Reply to State's Answer from Defendants Augustine, Golphin, and Walters, with an accompanying cover letter. We are also sending hard copies to the Court and counsel for the State and putting those in the mail this afternoon.

In light of the State's request for a hearing, we believe it is appropriate for the Court to convene an evidentiary hearing pursuant to N.C. Gen. Stat. §15A-2012(a)(2). We ask the Court to set these three cases for hearing on July 9, 2012, or at the earliest possible setting thereafter.

The Defendants anticipate introducing the transcript and exhibits from *Robinson*. The State would then be free to present its evidence. We will object to any evidence that is duplicative or cumulative of evidence the State presented at the *Robinson* hearing. We believe the hearing can be concluded in a couple of days.

Thank you for allowing us to submit this Reply. We look forward to hearing from the Court.

Sincerely,

Gretchen M. Engel
(919) 956-9545

SB 416 – Amend Death Penalty Procedures
House Floor Debate
Third Reading
June 13th 2012
Edited for clarity and grammar

Speaker Tillis: Senate Bill 416. The clerk will read.

Reading Clerk: House committee substitute 2 for Senate Bill 416, a bill to be entitled An Act to Amend Death Penalty Procedures. The General Assembly of North Carolina enacts.

Speaker Tillis: Representative Stam, please state your purpose.

Representative Stam: To debate the bill.

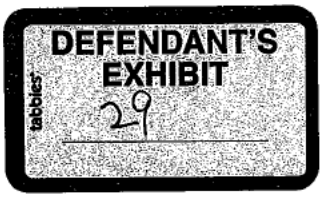
Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Stam: Mr. Speaker, members of the House, I hope to speak no more than five minutes on this. I want to just mention a few things that are not particularly repetitive. I had a statistician visit my house. I decided he was unpleasant company. So I stuck his head in the oven and his feet in the freezer and asked him how he felt. He said "on average, I feel fine." So with statistics if you ask the wrong question you get the wrong answer.

We have a statistician here in North Carolina, a professor emeritus at the Department of Psychology at UNC Chapel Hill, retired, who has testified in some of these cases and examined the studies that were quoted by the opponents of the death penalty. He says, first of all, all these studies refer to odds, a very different concept than probability. The studies cited are so badly controlled that even the odds statements are wrong. He concludes:

> "I do not believe that there is valid statistical evidence of racial discrimination in the death penalty. Death penalty opponents should focus their attention on other issues such as morality of the death penalty."

Dr. Elliot Cramer is a card-carrying member of the ACLU and actually opposes the death penalty. He just says the statistical studies are bogus.



Let me explain why I think that's important. At our subcommittee meeting I passed out a June 5th letter from the Center for Death Penalty Litigation to the presiding Judge in Fayetteville. This is in reply to something it appears apparent—what it is replying to is a suggestion by the judge that he is just going to enter judgment without another hearing for 3 defendants because they're also from Cumberland County. But these folks say "Well, the state's actually requested a hearing. We'll have to have a hearing. We're not going to do any new evidence. We're just going to introduce all the same old evidence. We'll object to any evidence that is cumulative. No additional evidence from the state will alter the court's conclusion." In other words, what happened in Marcus Robinson's case is really irrelevant because the same statewide statistics mean that these other folks are going to get relief under the Senate Bill 461.

Now, on that point, I think the opponents of the death penalty have not gone nearly far enough. If they really and truly in their hearts believe what they say about the evidence about peremptory challenges, just think about it: what they're really saying is that the trial itself was unfair and biased, not just the sentence, but the trial. So they should be asking for a new trial for every single person on death row. They should be asking for a new trial, not just a commutation of the sentence, for every felon convicted before a jury in the state of North Carolina since 1990 because that's what they think their evidence proves: that every jury has been tainted by this. But, in fact, Marcus Robinson, to take a case as an example, had a jury and, oh, he had three members of minority races on his jury. So, the argument of the representative from Mecklenburg that having just one minority on a jury will really help wouldn't have helped Marcus Robinson because he had three. They were willing to give him death. But Judge Weeks says: "No, these first-degree murderers should stay in prison instead."

I urge your support for the bill and to get us back to the basic principle of Western Civilization that justice is individual and personal—based on what you did.

Speaker Tillis: Representative Hackney, please state your purpose.

Representative Hackney: Speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Hackney: Thank you, Mr. Speaker and members. I will try not to be long but I want to make several points that are hopefully not repetitive. The first point I want to make is that whether you believe in the death penalty and speeding up the death penalty in North Carolina or not, you should be against this bill because, in my opinion, and I will explain what I'm going to talk about, in my opinion this adds to the current process of getting through these cases, these death penalty post-conviction matters, I believe it adds a minimum of two years to the process. There was substantial additional litigation added by this bill over and above the others.

Now you will note that an orderly process had been put in place for the Racial Justice Act claims. Everybody agreed that one case would go first, certain others would go behind, and there's an orderly process they would go up on appeal. Now you have this bill come along, and if it's enacted, if the Governor signs it, and it goes into law, you have the additional argument of "what does this bill mean?". So, what you're going to have is all the rest of the litigation is going to be put on hold while we go litigate for two years. As Representative Glazier already said to you, under the Equal Protection clause of the United States Constitution there's going to be a substantial argument about how you can treat these other folks differently from Marcus Robinson. His rights of course have already vested. It's arguable whether the other folks rights have vested as well.

In addition, there's going to be additional litigation about the so-called "waiver" language in the bill. Now Representative Stam has explained to you that it's supposed to clear something up. I submit to you that it's fogged it up and is itself fodder for litigation. You read it in its plain terms and it says you give up all your rights if you file a racial discrimination claim and, of course, you have to do that at the beginning. So, how in the world can that work? It is not going to work, there will be additional litigation about it and it will not be fair.

Representative Stam criticizes statistical evidence. I will note with respect to Mr. Cramer that he mentioned, that it is my understanding that the state examined his evidence and decided not to

submit it to the jury. So I guess that can tell you what they thought about it, even though Representative Stam seems to be convinced by it.

But let me tell you what this bill does. If you can show that 100% of the black defendants get death and 100% of the white defendants get life you still do not have a claim under the Racial Justice Act. Now how can that be? Is that really what we want to be saying in North Carolina? How can that be? That statistical evidence, no matter what, no matter how overwhelming, and even though, as Representative Faison has noted, it's used in employment cases and housing cases and in other kinds of cases, it's never enough on its own.

The territorial limitation in this bill is nonsensical because, as has been noted already, the assistant DA's do move around. You could have an assistant DA who's an avowed racist who moves from one district to the other and his record could not be considered under this bill.

I'll go back, lastly, to the first thing Representative Stam said yesterday, something about 53 judges having passed on a death penalty case to get it to the end. Well, I'll tell you this. 53 judges were not enough to keep seven innocent people from being released from death row because of actual innocence. Seven. I don't know about you but the worst thing that could happen in the criminal justice system--we know we have people who sometimes get sent to prison who are innocent and we do the best we can to correct those. We know that sometimes mistakes are made--the absolute single worst thing that can happen in the criminal justice system is an innocent person being put to death under the death penalty by the state of North Carolina. I don't know if that's ever happened, but I know that there have been some mighty close calls. I think we should take every avenue we have to try to assure that that does not happen.

I just end up with the, I don't always agree with Dr. Barber and the NAACP, but I think what he put out has it right. We now know, as a result of litigation, that race does impact death penalty trials and death penalty sentencing in North Carolina. We know that. The judge has found it. The judge has done a thorough job, and we know that. Yet we still, we come back with a bill after that to say that you have no remedy. Make no mistake, under this bill there will be no remedy, no remedy in North Carolina for any additional...

Representative Blust: Mr. Speaker.

Speaker Tillis: Representative Blust, please state your purpose.

Representative Blust: To see if Representative Hackney will yield for a question.

Representative Hackney: I do yield.

Speaker Tillis: He yields.

Representative Blust: Representative Hackney, am I not understanding the whole Racial Justice Act set up here? Wouldn't, even without the Racial Justice Act, whether the way it was passed in 2009 or the way this bill amended, does it at all affect a defendant's appeal rights that have existed all along? Wouldn't any defendant have a right if there were discrepancies in a trial, if there was a racist district attorney, couldn't a defendant bring that out in appeals or motions that have existed all along?

Representative Hackney: Representative Blust, I would have said "Yes, he has the option to bring that out," until you look at the waiver language that Representative Stam has put in here which I think forecloses some of that. But the answer to your question is: do you want someone who can now show, even though their appeals may be exhausted, that they got the death penalty rather than life imprisonment to be executed when they can show that it was a result of racism? Is that what you want? Because that's what this bill would do.

Mr. Speaker, I simply end up by saying again, back to my point that I was making, that the Racial Justice Act has been used in the courts to prove that systemic racism exists and needs to be addressed. This bill takes away, if it survives after all the litigation that is going to ensue because of it, takes away the right to a remedy for that discrimination.

Speaker Tillis: Ladies and gentleman of the House, for your planning purposes, it is the intent of the chair to move through the entire calendar today. There may be one other potential bill added but the chair anticipates significant debate. Representative Ross, please state your purpose.

Representative Ross: To speak on the bill.

Speaker Tillis: The lady is recognized to debate the bill.

Representative Ross: Thank you, Mr. Speaker and ladies and gentleman. I only want to make two points. I think that they're important points because they're points that you're going to hear about later on, particularly in September, October, and early November. The first point is that all the Racial Justice Act does, the current one, is give people who are on death row an opportunity to challenge that death sentence for a possibility of getting life imprisonment without parole. I want to be clear about that. Representative Stam said that too. A few people have said that. But given that there were so many mailers sent out in the fall of 2010 lying about what the Racial Justice Act does, I think it's just important that we all know that and agree so that if we consent to having such flyers mailed out in the fall of 2012 we'll tell people that that's a lie. It is a lie to say that the Racial Justice Act results in people getting out of prison. They would be there for life without parole.

The second lie I would like to expose is that this bill does not repeal the Racial Justice Act. There is absolutely no question at all, under the law, that this bill repeals the Racial Justice Act. It also goes on to invalidate some things that our North Carolina Supreme Court said within the last two years, our Republican-controlled North Carolina Supreme Court. That wasn't good enough for the people who are running this bill. But if you want to know where the repeal of the Racial Justice Act is the biggest part of this is on page 2, lines 49 and 50. I'll just read them to you in case you're confused about whether or not this bill repeals the Racial Justice Act:

> "Statistical evidence alone is insufficient to establish that race was a significant factor under this Article"

That's the repeal. You can't prove that there was racial discrimination based on statistics, even if all of those statistics come in the same prosecutorial district, come from the same prosecutor, come within a ten-year limit from before the case. So, even if all the statistics that you have

involve the same exact prosecutor in the same exact prosecutorial district and involve, say, a hundred cases because, you know, if the death penalty comes back in force we may just have that, you can't use those statistics. You have to catch the person saying something racist. Can't use the statistics. That's what this bill does.

There were a lot of complaints about the current Racial Justice Act because it goes statewide. We've heard why that might be necessary since prosecutors move around. But this bill didn't just limit it to the prosecutorial district. It limited it to the district, to the time, and then said "Oh, by the way, even if you show these overwhelming statistics—not good enough." Now, right after that it says that the state can use statistics to rebut a claim. So, evidently statistics are good enough for the prosecutor but not good enough for the person who's on death row.

I just want those two facts to be very, very clear in your mind when you vote. If you vote for this bill and you have that conviction, go on ahead. Just don't go home and lie about it.

Speaker Tillis: Representative Luebke, please state your purpose.

Representative Luebke: To speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Luebke: Thank you, Mr. Speaker and members of the House. I'm struck from the debate yesterday about the position of the advocates of the bill. It comes across as if there is no prejudice and no discrimination in North Carolina, or that there is no history of prejudice and discrimination in North Carolina.

Let's just think about our state's history. Until 1964, until the passage of the federal Civil Rights Act, discrimination was legal in North Carolina. There is, with that, a great deal of learning that goes on among all citizens, especially white citizens, about the notion of racial discrimination and racial prejudice. That it is, in fact, acceptable. We can go to 1983 when a well-known U.S. Senator on the floor of the U.S. Senate argued vociferously against a national holiday to honor Dr. Martin Luther King. We can go, around that same period to a discrimination suit that was

filed against the state of North Carolina about voting discrimination. Federal courts heard that suit, looked at the totality of circumstances which included primarily statistics. It was on the basis of statistics that the court ruled. In 1986, the U.S. Supreme Court agreed. The U.S. Supreme Court agreed that the totality of circumstances the statistics demonstrated in the suit was sufficient to require changes in our voting rights law.

Now we come to basically 25 years later and the question seems to be "Is there any discrimination or prejudice left in North Carolina?". It seems the argument is being made, no. The bill is written in such a way that the criminal justice system would produce members of that system who would, if there were any prejudice, would be coming forward and acting out that prejudice and discrimination. Friends, in 25 years people have learned in this state, white people have learned in this state, to use the right language, to use the proper words. That doesn't change what's in people's hearts and it doesn't change what is, in fact, how people act. That's why we come to a situation like the Racial Justice Act because people have been claiming in the court system for a long time that there's no prejudice, there's no discrimination.

So, the study is undertaken by the Michigan State researchers and they find this extraordinary difference in terms of the number of African Americans who are struck potentially from being jurors compared to whites. When they see that in the numbers it shows something about how unconsciously or consciously many in the criminal justice system are operating. It shows that when you actually get to the point there is plenty of prejudice and discrimination in the criminal justice system. But, you won't find people saying it. So that the part of the bill that requires there to be statements from those in the criminal justice system that can be put into the record, those are not likely to be said. When you have, as Representative Blust references, a racist district attorney or assistant district attorney, that ADA is not going to use the language of racism, so it's not going to be in the record.

That's why, friends, we need to rely on statistics. We have, in the current bill, a reliance on statistics. In voting for the bill before us today, we are undermining the idea of racial justice in the criminal justice system. Members, I urge you to vote no on this bill.

Speaker Tillis: Representative Womble, please state your purpose.

Representative Womble: Thank you Mr. Speaker, to speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Womble: Thank you again, Mr. Speaker and ladies and gentleman. I will not be long. I believe most of us, if not all of us, have already decided how we're going to vote on this. The eloquent renditions of Paul Luebke, Leader Hackney, Deborah Ross, and so many others I don't think are going to convince you. I like surprises every now and then. I hope that you will surprise me and vote this terrible, terrible bill down. You have to find it within your heart. You know it. Everyone else in this state knows that there is racism. There's no way in the world that we can continue to cover this up, we can continue to sugar coat it, we can continue to sweep it under the rug. Let's be big boys and big girls and face reality. Yes, it does exist. Yes, this legislature is going to do something about it. I don't mean for us to do something about it in the negative way like this bill here. 416 is a negative bill. It guts the bill that was passed in 2009. There is widespread support for the bill we have now. So why tamper with it? Why bother with it?

I mentioned to you yesterday about the number of people of faith across all colors, across all faiths, that support this. I want to let you know today that there is an organization of overall several people HKonJ, Dr. William Barber, that exists and speaks to the right thing to do, not the political thing, not the social thing, but the right thing to do. My grandmother used to say "right is right, and right won't wrong nobody."

Let's do the right thing here. Surprise me. Vote this very negative bill down. North Carolina cannot stand with honor if we pass this bill. I urge you to vote red. Thank you so very much.

Speaker Tillis: Representative Lucas, please state your purpose.

Representative Lucas: To speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Lucas: Thank you, Mr. Speaker. Ladies and gentleman, I'm not naïve to a level of thinking that my commentary will change one vote in this chamber. But I would like to lay something on your conscience and, yes, on your hearts. In medieval times, and I'm sure that Representative Stam would attest to this, logic and persuasive oratory had merit. Today, sometimes it does, sometimes it doesn't. But, moral oratory should always supersede logical oratory. I would like to submit to you a moral perspective.

I'd like to begin by saying that I favor capital punishment. I do favor capital punishment.

Lyndon Johnson, one of our favorite presidents used to say that it's easy to do what's right but it's hard to know what's right. But, in your hearts I know that the representatives on this floor know what's right. I know we know what's right. When one analyzes jury selection practices that use preemptory challenges that can be arbitrary and capricious, to the extent that it yields exemption of greater than 50% of persons who look like me or minorities, I know that in your heart that you recognize that this is wrong. We can do better than that.

All of this, most of this, stems from a case from my county, Cumberland, involving a defendant named Marcus Robinson who'd been given the death sentences. As a result of the action taken by Judge Weeks many conclude that that death sentences no longer exists. But I submit to you that it does. The man still is condemned to death, and it doesn't matter whether the execution is carried out by sources here in Raleigh or whether it will be carried out by the ultimate grim reaper, God Himself. That man will never leave prison alive. So, he has a death sentence. That's not going to change.

Why not continue to do what's right? We know that in our heart of hearts, this is the right thing to do. Nobody will, as we say, get away from the death sentence because of this legislation. If they've been condemned they will continue to be condemned for the rest of their lives in prison, and they will die there. I urge you to vote no.

Speaker Tillis: Representative Brandon, please state your purpose.

Representative Brandon: To speak on the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Brandon: I appreciate you, Mr. Speaker. I have to admit that I had never heard of the Racial Justice Act until I came into the General Assembly. My good friend Larry Womble talked to me about the merits of the bill. I am one that really tries to stay out of racial politics. I think sometimes it's unproductive and I try to stay out of it. But you can never, ever make the mistake of taking race out of a lot of factors, especially when it involves life or death situations like we're talking about right now. The fact is that, and this is just a fact, African Americans do represent a disproportionate number of people on death row. This is not just in death row cases, any justice system. You can go to Guilford County and you can see a line of people outside for traffic court and even though we have a county that's 60% white, 80% of the people in the line are black. These are just facts.

One of the things that people ask me is "what is your biggest surprise that you have learned in your first year in the General Assembly?". I tell them: "the blatant ignoring of facts." We just ignore it. It happens on both sides of the aisle. We just look at facts and we're like "Oh, that's right there but we're just going to ignore that." Now we have a bill where we put into the bill that we're going to ignore the facts. I think that's very, very disappointing because facts are really the only thing that drives us. It's the only concrete thing that we have to make decisions. Now we have a bill that says "you know what? We don't need that. We're just going to go off of what we think we know, not what we should know." That is a big mistake for this body to do that.

So we're ignoring facts and doing things in politics. On the right, I understand your perspective on this and I understand what Representative Dollar said yesterday about the emotions of this. But we are still the United State of America and I don't care if someone came in and killed all of us on this floor: that person is still entitled to due process and is still entitled to a fair shake under

the law. All of us are and that's what the United States is. We cannot just go off of emotion. We can't just ignore facts. We have to have due process of the law. That's just who we are as people.

The truth is, the intent of this law is really brilliant. We've been having this debate for 200 years or more and we're trying to figure it out. Now we have finally got the courage to stand up and try to deal with the situation that we've been dealing with for centuries. North Carolina said that we're going to deal with it and we're going to look at it on its merits and we're going to make sure that people have equal access and equal opportunity under the law, which is what we all should be here for.

I'm very disappointed in the fact that We're dealing all this time with 150 of our constituents whose two options are: they're going to spend life in jail or they're going to be terminated by death by our justice system. I feel that if you're going to do something that egregious, if we're going to go that far, then of course we should make sure that we look at all the facts. We should look at all the processes and make sure that people have their fair shake. This is not necessarily about Democrats and Republicans, I think that this law should not be repealed but it should serve as a national model. In the United States and in North Carolina we should not and cannot have a justice system that weighs punishment by the putting of the value of someone's life and the currency being race. No matter who you are, that is not who we are as people. I urge you to vote no.

Speaker Tillis: Representative Adams, please state your purpose.

Representative Adams: To speak on the bill.

Speaker Tillis: The lady is recognized to debate the bill.

Representative Adams: Thank you. Representative Brandon some other things that you should probably have learned is that we do what we want to down here and we use facts when they're appropriate for us to use that. History is still known to serve as a viable record to which we must refer and acknowledge. Statistics and data are acceptable variables, but we choose to ignore them

when we want to. The bill that we passed in this chamber yesterday which shamefully guts, as has been said, the Racial Justice Act, is a clear indication that we have disregarded history because history does document evidence of racial disparity. The passage of Senate Bill 416 gutted a bill that had already become law and was used in the courts to prove that systemic racism, as has already been noted, does exist in North Carolina. In fact, it exists through this nation.

Gutting the Racial Justice Act under the guise of an amendment to that bill is a clear indication that we really don't want to address the reality of racial bias in our current legal system or, for that matter, racism in our society and even in our state. We are a body voted on by the people of our state who trust us to do the right thing because it is the right thing. Most of us try to do what's right, I think. But we need to be fair to all people, whether you like those people or not, whether you like what they've done or not. They should have an opportunity, if they are innocent, to provide the evidence.

But all of the evidence shows that the death penalty is flawed with racial bias. As we take this final vote today, we need to be reminded that the Racial Justice Act passed this chamber. When it passed this chamber in 2009 with the support of proponents and opponents of the death penalty--we need to remember that--they all agreed that racial bias has no application in the ultimate punishment of death.

The Racial Justice Act has revealed what the racial justice movement in our country has become and argued for centuries. That is that racism hurts everybody. It hurts white people too. So, we'll all be hurt, our citizens also, by the action that we've taken here. I urge you to vote no on this bill.

Speaker Tillis: Representative Parmon, please state your purpose.

Representative Parmon: To speak on the bill.

Speaker Tillis: The lady is recognized to debate the bill.

Representative Parmon: Thank you, Mr. Speaker and colleagues. Most of what I was going to talk about on this day has been articulated very adequately by my colleagues. Those are some of the legal issues that we as a state will have to face. I understand that some of my colleagues that voted for this bill were under the impression that if we pass Senate Bill 416 that it will fast forward the death penalty. I will stand here today and tell you, not from a legal standpoint because I don't know a lot about the legal stuff but this in fact will prolong anyone on death row now from being executed because of the appeals and other issues we will have to address.

Yesterday, I heard one of my colleagues speak about the guilt of all of the people on death row from a particular county. Well I'm standing here today to tell you that the Racial Justice Act is not about the guilt or innocence of any of the people that have filed under this act. What it is about, though, is that are we as policymakers, as has been said, going to ignore the fact and discrimination knowingly in our criminal justice system. As I look at the votes, it's just strange to me how that many people can vote without thinking about the facts or proven statistical data and would rather continue the racist sentencing in our criminal justice system.

Yesterday I had visits from victims' families, people that had been killed and the defendant is actually on death row, who said that they were against this bill. I'm just appealing to you today as colleagues and policymakers in the state of North Carolina with the facts known to each of us that there is racial discrimination in sentencing and in jury selection in the state of North Carolina. I want to appeal to you in the name of justice. Let's not knowingly put discrimination in our criminal justice system Please vote no on Senate Bill 416. Thank you.

Speaker Tillis: Representative McGuirt, please state your purpose.

Representative McGuirt: To debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative McGuirt: Thank you, Mr. Speaker. I have neither the oratorical skills not the articulation of many who speak in this chamber. But I sometimes wonder what good all the rhetoric does. I looked around a while ago and there were probably about a fourth of the members out of the chamber. I know, to paraphrase Mr. Lincoln, what I say here will not be long remembered.

Representative Dollar doesn't need to tell me about the horrors committed by murderers. I've been there, done that. I've picked up the pieces. I have photographed, I have fingerprinted, I have bagged the hands of the victims. I've put them in the bag. I've been there with the medical examiner. I've been to the autopsy.

Representative Stam implied that all of those who oppose this bill are opposed to the death penalty. I favor the death penalty. I feel that there must be an ultimate penalty for those whose heinous acts result in first degree murder under our law. I've investigated first degree murders. I've testified in the cases of first degree murder. I've supervised investigations of first degree murders. There are two inmates that are probably on death row right now that I helped put there. I think they both deserve to die.

But I know that while our justice system is the best on earth, it's not perfect. We've read, and it seems like we've read of several times recently, of cases right here in North Carolina of conviction being overturned, set-aside because of errors made by our system. People freed for unintentional mistakes: Daryl Hunt, Ronald Cotton, Greg Taylor, I'm sure there are others.

While I think we must have an ultimate penalty, I also know that we must leave no stone unturned when it comes to insuring that justice is done, that no one is wrongly convicted. How horrible it would be to convict and innocent man or woman, especially if any prejudice, perhaps a latent prejudice, contributed to that execution. Please join me in voting no on this bill. Thank you.

Speaker Tillis: Representative Martha Alexander, please state your purpose.

Representative Alexander: To speak please.

Speaker Tillis: The lady is recognized to debate the bill.

Representative Alexander: Thank you very much, Mr. Speaker and ladies and gentleman of the House. When I left the chamber last night, the only thing that kept coming to me was the fact that we're not just dealing with people on death row, whether you are for or against the death penalty, we are talking about human beings. We are talking about people who've gotten into trouble. We are talking about human beings.

I don't know about you, but over the years I have taken interest in some of the different cases on death row. I've been called at home and I've been called here in Raleigh when the execution was about to take place. It was about 10 o'clock at night and they would say "so and so is going to be killed. We're going to implement the death penalty at 2 o'clock in the morning." I don't know if you've ever spent those kind of four hours wondering "How did they get there? Who are their families? Who are they leaving behind? What about the victims?" I've been staying at the same place over these years that I've been here and that's where the families stayed. So when I was called and I was here, I was very aware that I was in the same place and that we the state take part in all of this.

So, why, why would we now take away another tool? Why would we take away something that can be utilized in our court system to ensure that we don't have the death of someone who is innocent? It matters not the race, it matters not the sex, it matters not the crime, it is whether or not we are going to commute a sentence to someone who is innocent. We've heard all of the statistics, a lot of the legal issues have been brought forward, but the bottom line for me is that we're talking about human beings. We need to be very careful about what we do. So, I would plead with you, please vote no on Senate Bill 416.

Speaker Tillis: Ladies and gentleman of the House, at this time we have four lights on. It is the intent of the chair to take a vote on this matter at 4:45. Currently the order, and it will be called

in order, is Glazier, Farmer-Butterfield, Weiss, and Bordsen. Representative Glazier please state your purpose.

Representative Glazier: To briefly debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Glazier: Thank you, Mr. Speaker. I rise, even though I spent a lot of time yesterday, I really just want to respond with four points that haven't been raised in any of the debate previously in the hopes that the information is helpful and for the record.

First, Representative Stam mentioned at the beginning the expert who's testimony was not heard for a lot of reasons. For those of you who haven't read the opinion, just so it's clear who the experts where who have rendered the testimony, here are the four credentials: the first graduated from Tufts University with his PhD from Michigan, the second graduated from NYU with his second degree from Harvard, the third is a PhD mathematician from the University of Minnesota who teaches at the University of Iowa and at Stanford and has written one of the seminal texts in the country on biostatistics, and the fourth is a professor from Michigan State with a JD from Colorado and a PhD from the University of Michigan. You couldn't have four more credentialed statisticians, mathematicians, and experts who gave their testimony in this case. If there's a question about that, I would answer it.

Second, we have a part of the death penalty statute in this state, and those who are in the criminal justice system know it and Representative Stam and I actually worked on a bill several years ago to deal with the issue, called proportionality review. What it requires is that if there be a death penalty in this state that one of the issues the court must look at is whether or not that death sentence is proportionate to other death sentences in the case in terms of the facts, unrelated to the issue we're talking about except as I'll connect it in a moment. When the court does that proportionality review in every death case, the comparison pool it looks at is statewide. It doesn't look at district or prosecutorial district. It looks at all the other death cases in the state. So here we have a bill that says you can't use statistics as the final way to look at it from a statewide

point of view, they're no longer relevant. But if we're going to affirm the death sentence on proportionality review, there we look at all the cases from the state. The inconsistency is patently transparent, and I would suggest will also raise a new level of litigation.
The third issue that I would suggest, I don't know how many of you have talked to any Superior Court judges who've tried some death cases since the Racial Justice Act has been in effect and the hearing has been held, but if you talk to them the one thing you will know is that what they say is deterrent effect of this act has led to a whole new regime in how jury selection is conducted in the state. In fact, it is meticulously looked at now and all of those things that we have talked about that have happened historically both the judges, the prosecutors, and the defense attorneys now are making doubly sure don't happen again. So, exactly what you want to happen, a change in the system has occurred. You undo this bill, you undo the deterrents and you change back to the same culture that existed before.

Finally, what I would suggest to you: if we vote, and we did yesterday, for those who are going to vote, everyone on the floor today, we don't write on a clean slate. We have Judge Weeks' opinion. How many of you in here have read it? How many read the opinion you're getting ready to reverse? Did you read any of the findings, the 350 or so that were made, or the conclusions upon which they were based? We can't all read everything that comes our way or we'd all be carried out in strait jackets I think. But we're about to change one of the biggest policy changes in the state. We are about to embark the state on a whole new course of litigation and cost. We are upsetting the confidence of a portion of our system. And we're doing it on the basis of not having read, I suspect most of you, the opinion that we've been talking about. When we're talking about life and death, it seems to me that we owe at least that amount of justice to ourselves and to the state of North Carolina and to the citizens who elected us, let alone the people who were the victims in these cases or those on death row. If you can go tonight and vote to reverse this opinion by voting to reverse this bill and tell yourself you did it with full knowledge and understanding without having read that opinion, with all due respect I think you're lying to yourself. I would hope that no one would vote for this bill who hasn't at least read this opinion. Thank you.

Speaker Tillis: Representative Farmer-Butterfield, please state your purpose.

Representative Farmer-Butterfield: To debate the bill.

Speaker Tillis: The lady is recognized to debate the bill.

Representative Farmer-Butterfield: Thank you, Mr. Speaker. In North Carolina there have been eight men exonerated from death row who would have actually been murdered in this state if the system had went faster or if they had not followed up on their right to appeal. Representative McGuirt talked about three people who were exonerated who were not on death row but had life imprisonment. I say to you that racial bias has no place in the application of the ultimate punishment of death. Support for the Racial Justice Act was not an endorsement of violence. It was not a sign that anyone is soft on crime. And voting no on Senate Bill 416 is neither a sign.

Criminal justice enforcement is always strengthened when the system confronts racial bias directly and attempts to rid it of its practices. Family members of murder victims supported the Racial Justice Act. People who are for and against the death penalty supported the Racial Justice Act. In fact, some of the members right here on this floor have indicated that today. So, I ask that you vote no on Senate Bill 416.

Speaker Tillis: Representative Weiss, please state your purpose.

Representative Weiss: To speak on the bill.

Speaker Tillis: The lady is recognized to debate the bill.

Representative Weiss: Thank you, Mr. Speaker and members. I know the hour is late. I would simply say that those of us who voted for the Racial Justice Act a few years ago did it because we recognized that there was a problem with our justice system. We voted that way to try to ensure that our justice system was fair, to make it fairer, to make it right for all of us because if people don't have confidence in their justice system then it is not just. It is broken and we did it

to try to fix it. In thinking about yesterday's vote and about today's vote, I would just say when I came to the General Assembly the lesson I learned was that change was incremental. I guess what I've learned recently is that sometimes we don't always move forward. But I am reminded of a quote by Dr. Martin Luther King Jr. that he uttered on a few occasions. He uttered it a few days before he died, but earlier than that he uttered it on March 25th 1965 having completed the third march to Montgomery. He said this on the steps of the Alabama State Capital. He said:

> "I know you're asking today, "How long will it take?" I come to say to you this afternoon I come to say to you this afternoon, however difficult the moment, however frustrating the hour, it will not be long. Because truth crushed to earth will rise again. How long? Not long, because no lie can live forever. How long? Not long, because you shall reap what you sow. How long? Not long, because the arc of the moral universe is long but it bends toward justice."

I have faith that no matter what happens today, I hope that people reconsider and will change their vote, but no matter what happens today I have faith that ultimately the arc of the moral universe bends toward justice.

Speaker Tillis: Representative Bordsen, please state your purpose.

Representative Bordsen: To speak on the bill.

Speaker Tillis: The lady is recognized to speak on the bill.

Representative Bordsen: What we do today is really more about us than anything else. It's about whether we are fair and consistent and predictable in the decisions we make about what happens to that guilty person. Whether that guilty person who has done terrible things is allowed to live in a confined situation but is allowed to live, or whether we kill them.

Every one of us here speaks from a position of what they know or what their experiences are, but I don't think that we've talked very much about those who are left behind. Those who have suffered from the loss of such a terrible act that puts that guilty person in the position of either being imprisoned for life or being killed. Maybe there are people in this room who have had the terrible experience of that loss. I have. Six years ago, one of our closest friends was murdered and was murdered in such a way that identifying his body was a challenge. The person who did

that, subsequent to that murder went on to kill his infant daughter, attempt to kill his girlfriend who was the mother of that baby, and raped and murdered the caretaker for that baby. This is one of the people that fits in Representative Dollar's categories of monsters.

It is an indescribable experience to have a loss like this. You spend a great deal of time just trying to figure out "Is it real?" and how can something that awful that you only read about happen in your life to somebody you knew so well and somebody who was, in this case, such a gentle person. Then you have to deal with the thoughts of that person's actual demise. In this case it was a person who was extraordinarily brutalized then left in a dark basement to expire alone. That is no small thing to come to grips with. Then you try to figure out what to do with that person's family, and with the other people who knew them so well. Once you get through some of those things, and it takes a few years, then everything that happens in the legal system is important because it starts putting pieces back so that you can build a structure around that event, so that you can handle it. So when the person is finally apprehended that's an enormous relief. When there is a trial going on, that's an enormous relief. You have to feel that it's going along well because it's putting something back together and it's making some sense. When there is a verdict of guilt or innocence, that's a relief. It's one more step.

But when the decision is made about what to do with that person, in this case we're talking about a person who might be allowed to live or we might kill them, if there is uncertainty about it, it takes away enormously from any relief. You don't have a resolution to it. What you really need is clarity. You need to know that if they were allowed to live, you know why it was and that it was the right thing for the right reasons. If they are to be killed by us, if we are to take that profound step of killing them because they killed, then we have to know that if they're going to be killed that there's pattern to it—that that fits, it's a natural thing to happen. It's being done for the right reasons.

Right now, I would say there's a great lack of public confidence, especially when it comes to any aspect of race, about how we reach that decision about which murderers get to live and which murderers are we going to kill. So, as long as we let that fester, and just defeating this bill today will not resolve the issue, it is festering. As long as it continues to fester, and you know it's going

to, we have a history in this state and we don't deal with it honestly, we don't talk about it well enough. We deal with it reactively but as long as we don't confront it and turn ourselves inside out to make sure that everybody knows that race played no part in the decision whether to let them live or whether to let them die we do a disservice to everybody who's left. Each person who sees that murderer continuing to live or knowing that they died, if you don't know for sure that it was done for the right reasons, you really can't move on.

It's important that we defeat this bill. It's important that we be willing to every day do what it takes to open whatever books, look at whatever statistics, do whatever it is, to make sure that anybody that we're going to kill is killed for the reasons that we have set out and that we believe are right and it does not involve any kind of even imbedded racism. You know we can't escape it, we are all born with prejudice, we are all born with things that we do and we think and we act upon without ever really wanting to. I would ask you to think again and vote no on this bill.

Speaker Tillis: Representative Moore please state your purpose.

Representative Moore: To debate the bill.

Speaker Tillis: The gentleman is recognized to debate the bill.

Representative Moore: Thank you, Mr. Speaker, ladies and gentlemen of the House. I had the pleasure of chairing the House Select Committee on Racial Discrimination in Capital Cases. We had two formal meetings and then one meeting where we went over and actually toured Central Prison to actually see death row, to actually be there. In the meetings we had, I think members would agree, we brought in a lot of information on both sides. We heard from those who support the current version of the Racial Justice Act and from those who support this proposed amendment. It's important to note a couple of things because a lot of things have been said that frankly aren't completely accurate. So I want to address a couple of those briefly, given the late hour.

First of all, the statistics that were presented had to do with the jury pool and the challenges. Those were the statistics that came from the Michigan State study. What that study showed, and there were numerous attacks on those statistics, and what it showed in some cases is that a higher number of black jurors were removed from the jury pool by the state and also that a higher number of white jurors were removed by the defense attorneys in some cases but not all. Then there were other factors that came into play. Folks, we heard from district attorneys. We heard from folks involved.

The whole point is that when jurors are excused from a jury there are a myriad of reasons why they may. Maybe they have a criminal record. Maybe they know something about the case. Maybe they're related to someone involved. There are a number of factors. Maybe they have strong opinions one way or the other about the death penalty. In trying to take one characteristic and say "that's it" is simply not appropriate. We had numerous folks that would testify to that.

When we had our testimony, and again this was a few months ago, but I think I may have been the one who asked the question of the presenter from Michigan State which was: "Are you saying that there was racism in the trials?". The answer was no. What they were saying was that in isolated cases there were these statistics. That's what it was. Well, that has mushroomed into this concept that simply has not been proven.

Now, let's talk about the process. I'm going to tell you, if a person has not received a fair trial on a death penalty case, if they truly didn't get a fair trial, then, guess what, they shouldn't be staying in prison for life. If they didn't get a fair trial, they should get a new trial. This bill simply says that if they have some sort of finding that it's not a fair trial then they spend the rest of their life in prison. That makes no sense.

So, where is North Carolina in the picture of this? We're the only state that does this. Kentucky has something somewhat similar but it's not retroactive. It doesn't go nearly as far. Nobody else is doing this. Nobody. What we are doing is allowing death penalty cases from years ago to be re-litigated, to be brought back up, over something that--if there was a problem in the trial that's what the appellate courts are there for. When a person goes through a trial and they're convicted,

this is an issue to raise. If there was racism involved that is prejudice, that is a prejudicial issue, that is an issue that you argue on appeal with the facts. On a death penalty appeal I think most folks agree, the courts are pretty lenient. They're going to make sure that they give every benefit to that defendant as they should.

I do believe it is in some ways a well thought out plan by those who oppose the death penalty to try to find one way or another to do a collateral attack. But we shouldn't do it. This bill is a fix. Folks in our committee, we heard from families…I won't yield yet, but I will when I'm done.

Speaker Tillis: The gentleman does not yield if that was the intent. Was the intent to make an inquiry?

Representative Hall: Well, I hadn't decided which one and I didn't know if Representative Moore was reading my mind or not, but I was thinking about asking if…

Speaker Tillis: Representative Hall, please state your purpose.

Representative Hall: Ask the member a question.

Speaker Tillis: The gentleman does not yield.

Representative Moore: At the conclusion I'd be glad to.

Representative Hall: Thank you, Mr. Speaker. I'll ask at the conclusion.

Representative Moore: We heard from a number of folks in our committee. We heard from victims of crimes, families of victims. We heard from African-American families, we heard from white families. We heard from everybody. The thing that they all had in common was that they had a family member, a loved one, who was murdered. It didn't matter who did it but they were murdered, and that defendant had been found guilty by a jury of 12 peers, had gone through

multiple appellate processes, and at the end of the day was told "Yes, you did it. You are convicted."

Even the proponents of the bill, I don't think anybody is alleging that this is an innocence based thing. Nobody is standing up to say that this is defending someone who is innocent. There are other ways to do that. A couple of speakers against this bill made a comment that this is the only tool available. No it's not. A motion for appropriate relief is available. How do you think the folks who had gotten convicted before and had DNA evidence brought forward, how do you think they got out? It was through a motion for appropriate relief where there was evidence, where there was something brought forward to show they did not commit the crime. There's nobody saying, that I've heard, that the folks who are convicted that are potentially going to be freed from the death penalty on this are innocent. Nobody is saying that.

Let's cut to the chase. I submit to you, if you support the death penalty, support this bill. The district attorneys have reviewed it. They're solidly in support of it. The law enforcement folks I've heard from support our bill. It's a carefully crafted approach at trying to ensure that there is not racial discrimination in capital cases. In fact, I don't think there should be racial discrimination in any case from a speeding ticket to whatever else. A person is entitled to a fair trial, regardless of how they look or where they're from.

That being said, Mr. Speaker, I would urge the body to support. If the gentleman from Durham still wishes to propound a question, I'll be glad to yield.

Speaker Tillis: Representative Hall, please state your purpose.

Representative Hall: Ask the member a question.

Speaker Tillis: Does the gentleman yield?

Representative Moore: I do.

Speaker Tillis: He yields.

Representative Hall: Yes, thank you Mr. Speaker. Representative Moore, I wanted to ask you a question about whether or not, when we had that study committee, whether or not the expert, I believe Mr. Cramer, admitted that he had not done a statistical study himself or any other study of the death penalty selection process for juries in North Carolina.

Representative Moore: With respect to that, I know we heard from such a number of statisticians that sometimes it felt like we were back in statistics class in college, I think. With respect to Cramer, I don't remember exact remarks. I do know he went through and critiqued the method and identified several flaws to the methodology. I think Representative Stam went into more detail about that when he spoke yesterday. There were several flaws with the way it was done. It's like anything with statistics. You can take a number of things and try to draw a pattern. I do recall his testimony. I think he actually spoke to us twice, if I'm not mistaken about that. If you'll recall even, I believe it was professor O'Bryant that spoke to our committee, she even acknowledged some of the flaws in the statistics. She didn't call it flaws but some of the issues.

Representative Hall: Follow-up?

Representative Moore: I yield.

Speaker Tillis: The gentleman yields.

Representative Hall: And isn't it correct, that despite the fact upon adjournment of our second committee meeting where we were instructed we would come back and draft some legislation to be presented to this session, that we did not have a third meeting to draft such legislation? Is that correct?

Representative Moore: That is correct, what we decided to do was to allow more collaboration to happen. As you know our last meeting was on, I believe, March the 27th. We were getting close to session and it was my opinion as chair of the committee that we should take a more

measured approach to try to see if we could find a way to build consensus. I submit to you that the vote yesterday indicates that we did.

Representative Hall: Another follow-up?

Representative Moore: I yield.

Speaker Tillis: The gentleman yields.

Representative Hall: Isn't it correct that you did not file an extension of time for us to report back and that you did not communicate with the other members of the committee, myself in particular, that you wanted to do this additional collaboration and have that additional time?

Representative Moore: Well, I don't think anyone's going to argue that this issue being on the calendar since it's been pending since last year is going to be something that no one expected to see. With respect to this particular legislation, this was transferred back over to Representative Stam's judiciary committee that dealt with it back last year during the long session. We felt that was more appropriate. So, as the gentleman is aware it's gone through the committee process here. It's gone through the multiple hearings that Representative Stam has detailed and followed the normal course. Once we came back in session there was obviously no need for the select committee to meet anymore.

Representative Hall: One last follow-up?

Speaker Tillis: The gentleman yields.

Representative Hall: Isn't it correct that the members of the committee were not notified that you had planned to transfer the matter to Representative Stam of your own volition and that other committee members weren't allowed to vote or participate in that decision process?

Representative Moore: I don't know that that's really a decision for the committee to make just to be frank with you. You know the rules as well as I do, that's just part of the way the process works. It went through the open process. I don't recall how many meetings. Representative Stam had two meetings of his judiciary committee. There have been multiple conversations, so I don't know what the exact complaint is. This thing has been thoroughly vetted. We've got through the process. We went through the process last year. This body passed it, but the Governor vetoed it. It came back and then it's gone back through the committee process and everybody who's wanted to have a say-so on it has been involved. Obviously, there's been several hours of debate allowed on this bill, both yesterday and today. So, I really would take issue with any procedural complaints. I think this bill has had its day and it's time to vote.

Speaker Tillis: Further discussion, further debate? If not, the question before the House is the passage of the House committee substitute for Senate Bill 416. All those in favor will vote aye. All those opposed will vote no. The clerk will open the vote. The clerk will lock the machine and record the vote. 73 having voted in the affirmative and 47 in the negative, the House committee substitute for Senate Bill 416 has passed its third reading and will be returned to the Senate by special messenger.

Rep. Paul Stam

House Majority Leader

Judiciary B Committee Meeting: Amending the Racial Justice Act

June 11th, 2012 at 5:00 p.m.

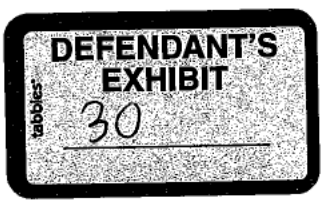
Edited for clarity and grammar

Representative Ingle: Today we have a PCS that we're looking at. Do I have a motion on a PCS for Senate bill 416? So moved. Thank you representative Daughtry. It is before us now. Members this is what I plan to do today. This will be a roll call vote. We will take that vote at 5:50 p.m. I'd like Representative Stam to explain the changes to the members that are in that PCS. Then we'll ask Hal Pell of our staff to give his explanations of the changes. During that time, if there's anyone here who would like to speak, if they would see our committee clerk Julie Garrison and sign up. We will give you three minutes apiece because of our time constraints. Once we finish with the speakers, then we'll take questions from members up until 5:50. So that's what plans are and at this time I'll call on Representative Stam.

Representative Stam: Thank you Mr. Chairman. This proposal has four changes from the one we did last Wednesday. Two of the changes were based upon comments that the opponents had. There was a proposed amendment that was put in a PCS that went out Friday that has been taken out of this version that related to discovery motions. That was taken out based on comments made by opponents and agreed to by the D.A.'s. What's left is before you, aside from a few format changes. Substantively, there are four changes.

The first one is section one. On page 1, line 14 this takes the Council of State out of the protocol business. No offense to the Secretary of Agriculture but he just doesn't have a particular expertise on this subject, nor does the State Treasurer. This just takes them out of this.

Section 2 relates to what happens if there is a notice of intent to seek the death penalty that is perhaps not scheduled at the right time. This is based upon some important decisions and some



dissents that Hal Pell will speak to at greater length. This was suggested by some D.A.'s who presented amendments on the miscarriages of the Racial Justice Act.

Then Section 3. If you recall, the previous proposal called for the time period to be from two years prior to the time of the commission of the offence. Based upon some relatively good thinking by some of the opponents, this has been extended to ten years prior to the commission of the offence. (This is just technical but the previous version said 24 months after the imposition of the death penalty and we changed that to two years so we were consistent in terminology.)

In Subsection a(1) the language is as the committee had it when it left us. We made it clear down in lines 13-17 that this waiver does not constitute a waiver for claiming that you are, for example, innocent of the offence. It's that waiving a claim that you can somehow get parole if you receive this alternate punishment.

The fourth one was a major point sought by Representative Glazier. In line 45 on page 2, the previous version said that "if the court finds that race was a significant factor in the decision to impose the death penalty" but did not include "(ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection." That's back in the bill; it previously was in page 2 lines 30 and 31 which had been stricken. It's still stricken but it is effectively put back in the bill on line 46.

Those are the changes. Those changes are consistent with the theory of the last PCS that the focus should be on the defendant's case, not the world in general, not all the problems of the past but on this case, this decade, this county or prosecutorial district. I highly recommend the PCS to you.

I move that we give this a favorable report, unfavorable to the original bill.

Representative Ingle: We have a motion. Representative Burr makes that motion at this time. I noticed that a couple of people continued to come in while Representative Stam was speaking. If any of you in the audience would like to speak, you may sign up for three minutes. See Julie Garrison our committee clerk to sign up. I'll call on Mr. Pell at this time.

Staff Attorney Hal Pell: I don't have anything to add as far as the specific changes between the third edition and what went out on Friday. If there are any questions about those changes, let me know.

Representative Ingle: Thank you Mr. Pell. At this time, the chair calls on Mr. Ty Hunter.

Ty Hunter: Thank you Mr. Chairman, members of the committee. I'm Ty Hunter, a lawyer with the Center for Death Penalty Litigation. With my three minutes I'll just make a couple of comments. I commented the last time that a similar version of this bill came up. My opening comment would be the same then as now. Although there has been some change to the draperies of this bill, it's still a veto, still a repeal bill. I think it's intended to be a repeal bill. I would oppose it on that basis.

On the issue of the waiver, just to talk about one thing in particular that's here. I don't think there's any dispute or any contest that there's any need for a waiver for anyone except for people whose crimes occurred before the law changed from requiring life without parole. You're requiring a waiver of something for everyone since 1994. That's completely unnecessary. It begs the question of "is there some other interpretation of this waiver?" It doesn't really make sense to require a waiver of people who were originally sentenced to life without parole that have absolutely no argument about life without parole. I think this does open things up to misinterpretation. Just a suggestion for things to make sense on the waiver is to have the waiver directed only at people who were originally sentenced to life sentences that were eligible for parole and not apply across the board. It seems to me that you're just going to cost a lot of money obtaining those waivers and that they're completely unnecessary based on what I've been told about the intent.

I don't think that this change affects my view that the intent of this is to make it impossible for defendants who can, in fact, demonstrate race discrimination, as the defendant did down in Cumberland County. In that case Judge Weeks, looking only at the statistics, found that there was sufficient evidence to show intentional race discrimination state-wide, division-wide, and in Cumberland county at the time of that defendants conviction. To now rewrite the law, in light of what we found out after that hearing, to now forbid judges from doing that seems to me not a

good idea. It's the equivalent to closing our eyes to what we've already found. We have a bad situation with race discrimination in jury selection.

Thank you very much; I'm assuming my three minutes are up.

Representative Ingle: Thank you Mr. Hunter. Call Ken Rose at this time.

Ken Rose: Thank you Mr. Chairman, members of the committee. My name is Ken Rose and I'm a staff attorney at the Center for Death Penalty Litigation. I spoke at the last committee meeting. I'd like to speak about some of the provisions of this act.

As Mr. Hunter said, this is an act that repeals the RJA. Why do I say that? The section that says that statistics will not be allowed to be used to establish a violation of the act essentially guts the Racial Justice Act. The reason why you allow statistics is because ordinarily you don't have admissions by prosecutors or by jurors that they intended to discriminate on the basis of race. Before the RJA, the law required admissions under McClesky v. Kemp. What this bill does is bring us back to the law before the Racial Justice Act was passed. Again, I know this statute requires that there be some sort of smoking gun, some kind of admission by prosecutors that they intended to discriminate on the basis of race. That just does not happen. What you're doing is putting the State of North Carolina back into a situation where it is impossible to prove race discrimination in these cases.

We have findings by a Superior Court judge, Judge Weeks, based on statistics that there is a significant problem, that race discrimination is a significant problem in the State of North Carolina in jury selection. But you are sending a message that we are to ignore those findings based on statistics, and instead require prosecutors to admit that they are discriminating on the basis of race. That just is not going to happen.

There's a second provision that makes this a repeal of the Racial Justice Act. That is the provision under Section 6 and Section 5 of this act. Section 5 repeals the part of the act that said procedural bars and time limitations do not apply to post-conviction proceedings. Section 6 says the older law on procedural bars applies. The combination of those two sections means that persons who are already in post-conviction proceedings, who are already a year past their direct appeal proceedings, cannot take advantage of any relief provided under this act. So, therefore,

they have no recourse. People in the position of Marcus Robinson could not qualify for relief under this act.

Thank you very much Mr. Chairman.

Representative Ingle: Thank you Mr. Rose. Before we start on questions, members Representative Stam has one announcement he'd like to make.

Representative Stam: For those who may not be here till the end, it is the intent that the bill be on the floor tomorrow.

Representative Ingle: Thank you Representative Stam. I will take questions from members at this time. Representative Glazier.

Representative Glazier: Are we taking questions or debate at this time?

Representative Ingle: We have about 35 minutes and I'll be happy to do both, sir.

Representative Glazier: I have a number of comments on the bill but I won't repeat the comments I made last time. First, for the changes that were made I find the addition of Section 2 interesting since it has not appeared in any prior version and has utterly nothing to do with the Racial Justice Act. It is my view, based on prior case law from the North Carolina Supreme Court, that Section 2 is patently unconstitutional. The General Assembly has no capacity to do what it is doing in Section 2. I'll argue that further on the floor, but I think that if you are trying to write a bill for a section to be stricken, that will be stricken pretty quickly based on prior precedent in the Supreme Court of North Carolina.

We've now got a ten-year limitation, let's talk about what that means. The first thing it means is that there's going to be intense additional cost in litigation and delay on all these cases. What it will do is possibly have the opposite intention of those who propose it. There isn't any study out there that does the ten-year data. The ten-year data is based on ten year increments, obviously depending on when the event took place. You're going to have to have a completely new data set and new analysis done statistically by both those in favor of the bill and those opposing it. That would be extraordinarily problematic in terms of how it's going to proceed.

But I have a much more difficult (inaudible). The definition in this bill says all of the evidence that is relevant is in that ten-year period. So I raise the issue of what happens with a prosecutor who has a long history of issues outside that ten-year period, does that become irrelevant? Now we're just saying that it's equally irrelevant if the prosecutor has been a prosecutor for twenty years. We're legislatively marking the first ten years irrelevant and saying only the last ten-years of their career matter.

The second problem that we have is assumed because the standard is that we can only apply for those ten years in the judicial district. Judicial division and state-wide evidence are now irrelevant, if we pass this. So I have an ADA. who's been in Wake County for ten years and prosecuted death cases, and then moved, as DA's do to become the DA of another county for 5 years. So the bill says that all those cases the ADA tried in the other county, whether it's ten years or none, are irrelevant, we don't get to know about the discrimination that that ADA did in other counties. First, because part of it is time-barred, but more importantly because all of it is barred because it's not in this prosecutorial district. You could have an ADA who prosecuted 20 death cases and has a record of discrimination statistically and anecdotally but it all becomes irrelevant under this bill because it didn't occur in the district that he's now prosecuting this one case in. That makes utterly no sense to me, at all.

Stereotyping, prejudice, and discrimination are enduring human phenomenon. This bill simply seeks to discredit it all. It is yet another part of the sort of "science doesn't matter right now" theory. It seeks to discredit all of the science cited it Weeks' opinion, and makes it irrelevant.

Third, what it also does, in 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. It says that, whatever the findings are in that case, we're not going to have this bill apply here. Here's what it raises: I can't think of a better equal protection, due process, law of the land, access to courts, series of claims that, for example, other defendants in Cumberland County tried by the same prosecutors. What we're saying in this bill is that the data is relevant enough and clear enough that in *Robinson* we're going to allow it to prevail and we're going to give him life. But that same data not only is irrelevant, it may not under this bill form the basis alone to change the sentence of the other people tried in the same county by the same prosecutors. I can't think of a clearer case of an equal protection or a due process violation than this bill creates by saying:

"Robinson's data is good for Robinson, but it's not good to be applied or used in any other circumstance and can't, can't, by this bill, be the basis upon which relief is granted. Whereas it was the basis on which relief was granted in Robinson."

Finally, this bill is government at its disingenuous worst. This is a bill that pays absolutely lip-service to the existence of racial bias in the criminal justice system. It eviscerates the only method of relief that's available. The bill makes facial improvements while at the same time ensuring that the result will always be the same: repealing the racial justice act and make it absolutely, totally impossible for a defendant to ever, ever obtain relief on those grounds.

For those reasons, I urge you to vote no.

Representative Ingle: Thank you Representative Glazier. Representative Stam.

Representative Stam: Representative Glazier claims that a couple of things are patently unconstitutional. I'd refer the committee to article IV, section 13:

> "Rules of procedure. The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court."

It's clear by our constitution that the General Assembly can establish rules of procedure in the district and superior courts. For example, in the Rules of Evidence we have a limitation going back ten years for certain kinds of evidence—prior crimes for example. According to Representative Glazier that's patently unconstitutional because someone else may have had a crime 11 years ago and it's an equal protection problem to allow it if it's 9 years ago but not if it's 11 years ago. I reject that argument.

Representative Ingle: Thank you Representative Stam. Representative Martin.

Representative Martin: Thank you very much Mr. Chairman. Like Representative Glazier, I'm concerned about the addition of some of the new sections here that we really have not seen at all before.

I don't understand why we would want to rush in so casually to remove the Council of State from the process. The bill sponsors act as if we're going to remove them just because they don't

know anything about this. From my reading of the Constitution and the statutes where the Council of State is mentioned, we don't expect our Council of State to be experts in anything other than the field from which they're appointed. But we do, over time, seem to place them in a position of council of advisors as wise men and women whose advice and consent is required because of their wisdom and the trust placed in them by the people.

There may be arguments to take them out of the process by which they approve the method of execution. There may be arguments for that, there may be arguments against that, and I'd like to hear those. I don't know what any single member of the Council of State has to say about this. I would like to learn more about the role they've played in these decisions in the past. Maybe it belongs here, maybe it doesn't, but this needs a lot more process before I can say for sure.

Mr. Chairman, I'd be more than happy to yield to a question or comment from Representative Stam.

Representative Ingle: Thank you. Representative Stam.

Representative Stam: Just on that point, that provision in Section 2 was put out 72 hours ago so we've had a chance to look over things. To discuss the *Connor* case with regard to the Council of State, would you direct that to staff Mr. Pell?

Hal Pell: The Supreme Court in *State v. Connor* ruled that, in fact, the Governor and the Council did not have to have any substantive knowledge or information to review those procedures. The basis of that case was that the objection that the Governor and the Council being in the law having to approve it made it subject to an attack under the Administrative Procedures Act. That's the case that went up to the Supreme Court. The Court ruled in *Connor*: 1. that the Governor and Council did not have to have any real substantive knowledge and know about those procedures but 2. that it was not subject to attack under the Administrative Procedures Act. Basically, the ruling in *Connor* is as stated in the summary: that if a defendant has an objection to the protocols as they are currently written, their remedy is superior and federal courts. What this change would basically do is to say that any issues regarding review of Council of State would no longer be an issue in the state or federal courts as far as their role in the process.

Representative Ingle: Thank you, Mr. Pell. Representative Martin.

Representative Martin: Now I'm up to level 2 on my knowledge on this issue. Again, that's why this sort of thing really should go through a more extensive process. I appreciate the 72 hours' notice we got but I was at the beach, checking my phone only occasionally. There are members of the public who know more about this. The weekend is a bad time to do that. In any case, 72 hours on matters of life and death is probably not the standard we'd like to live up to here.

Beyond that, I don't see any reason to ignore racism that existed 12 years ago because of an arbitrary 10 year cutoff. This again, as Representative Glazier said, seems to be part of a disturbing trend towards ignoring facts and ignoring reality. We know racism exists. There is significant statistic evidence out there to show that it has an effect on the imposition of the death penalty in North Carolina. To not say that that is sufficient when it may, in certain cases, be overwhelming, is just burying our head in the sand to the facts that are out there.

With regard to geographic boundaries, it is true that varying parts of our state do differ in the effect that racism has on society as a whole and particularly in the imposition of the death penalty. That's the sort of thing that I think is right for debate between the prosecution and the defense. Evidence can be introduced on state-wide racism and its effect on the death penalty and that can be countered with evidence that it doesn't apply locally. That's exactly the sort of debate that should be had. I think this bill would limit that.

For those reasons, I am as opposed to this version as I was to the previous version.

Representative Ingle: Thank you, Representative Martin. Representative Michaux.

Representative Michaux: If I may ask a question first, Mr. Chairman. What we're discussing here this afternoon will bring us back to what we had before, is that the whole bill or just the changes that are being made?

Representative Ingle: I would respectfully appreciate if we just stayed with the changes. We've got 20 minutes, sir. Go ahead, Representative Michaux. You speak on any part of it you'd like to, sir.

Representative Michaux: Thank you, sir. I'm still confused, Mr. Chairman, about how this is going to affect those cases that are already undergoing trial. I'd like to have someone explain that to me.

Representative Ingle: I'd ask Mr. Pell if he could explain that.

Hal Pell: This, as pointed out in Section 6, would apply to pending claims. Any motion that was filed by a petitioner after the passage of the Racial Justice Act would not be terminated. The bill does provide for a 60 day period of time, if this bill passes, for them to amend their pleadings accordingly. The procedures would apply to those cases. In the Robinson case, and there may be another, if they do have findings of fact and conclusions of law before the effective date, this would not affect those cases unless they were overturned on appeal.

What was pointed to earlier in Section 5, was to point out that this is not, if it passes, a new act which gives persons on post-conviction another motion, it just allows for amendment of those motions.

Representative Ingle: Representative Michaux.

Representative Michaux: I just have another question. Persons who have already been tried under the Racial Justice Act in the past, nothing will happen to those people, they will follow the course as they are still under that Racial Justice Act?

Hal Pell: No, it would not. They would be limited to county and prosecutorial district statistics, as opposed to statewide if this passes.

Representative Michaux: How can you do that? You've got people who have already filed under the law that's in effect, and you're going to change the rules of the game in the middle of the game?

Hal Pell: Our laws do not prevent the state, as mentioned, from changing procedural rules for a defendant. In other words, if the case has not been tried and adjudicated, the legislature can change rules. I don't have it with me but I have a memorandum on that point.

Representative Michaux: I'd like to see that. I guess the further question is, there are no Constitutional guarantees that those persons who have already filed a case will be heard based on the law that they filed the case under? Is that what you're telling me?

Hal Pell: That's correct. If the law changes on procedural requirements. There are limitations, of course, on punishment, but that is correct.

Representative Michaux: Ok, I will let it end on that.

Representative Ingle: Thank you, Representative Michaux. Representative Haire.

Representative Haire: Thank you, Mr. Chairman. I've got three sets of questions I'd like to ask. Number 1 is under Section 2. It says:

> "A court may discipline or sanction the State for failure to comply with the time requirements in Rule 24, but shall not declare a case as noncapital as a consequence of such failure."

If the defendant is sitting in jail and the state fails to comply with Rule 24, what can the judge do? They can tell the defendant sitting in jail the state is not complying with its' time requirements. Looking at Mr. Pell's argument, it removes the authority of the judge to declare a case as a noncapital due to failure to comply with the time limits for holding a Rule 24 hearing. Who has the authority then to tell the state that they must comply with the rule? If the judge can't say "well, either you're going to do it or I'm going to dismiss it and make the case a noncapital case," if the judge can't do that, what are you going to do?

Hal Pell: Let me give a little background on this. In 2001 the Supreme Court of North Carolina decided a judge could not declare a case noncapital. At that time the court said that it was not discretionary upon the district attorney to bring a case capital or not, they are required to bring it capital if there are aggravating circumstances. In 2010, in a case called *State v. Defoe* the Supreme Court said that the rationale the court had was based on the fact that the legislature passed a law making it discretionary for the district attorney to bring a case capital. At that time and from that point on, judges could declare a case noncapital. The argument was not constitutionally based, they just said it was within the prerogative of the court to do that. The dissent in that case said that this was a violation of separation of powers for the court to change a case from capital to noncapital.

The court can discipline the D.A. for failing to comply. I'll give you the example from *Defoe*. There was a conflict of interest and the case was turned over to the Attorney General to prosecute. There was delay of a year or two in bringing the case to court. There's no indication of whether the defendant was out on bond or not. The D.A. can be sanctioned for not having the hearing or can be held in contempt of court for not having the hearing. There are mechanisms with which to take.

The only thing I can say is that this issue of whether the judge has discretion or not is not constitutionally based; it's just the Court saying that the judge has the authority to do that as a sanction.

Representative Haire: Just to follow up on that, there was a case that went unresolved for two years until they got around to the issue of what happened to the defendant. Chances are, if he's charged with a capital offence, they're not letting him out on a bond. That's my first problem with this piece of legislation.

The second one I would see is on page 3. It says on line 5:

> "The claim shall be raised by the defendant at the pretrial conference."

That's what it says. It doesn't say "may"; it says "shall" be filled then. Yet you come down in subsection (g) on line 19:

> "If 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."

Now if the death sentence is imposed, that means the case has already taken place. How, at a pre-trial meeting, could the defendant know whether or not the district attorney's office was going to use racial bias in the selection of a jury?

Hal Pell: On line 8 it says "shall be raised at the pretrial conference…*or* in postconviction proceedings," because again you have the dual timelines. A defendant, based on information, may believe that the case was actually charged capitally before the trial. If the defendant has that information, that a capital charge was sought on the basis of race, then it can be brought in a pre-trial proceeding to avoid the case being tried capitally. So there are two circumstances: one where the defendant has the information before trial, can avoid a capital proceeding, and can raise it at pre-trial.

But if he or she does not have that information, the law provides for a post-conviction proceeding where they will be able to have that information if it was imposed.

It's my understanding, and this is somewhat anecdotal, that a lot of judges are actually delaying these hearings to post-conviction proceedings at this time. That's just for the committee's benefit. That's my understanding from practice. The state bar or the D.A.'s may be able to corroborate that, but that's my understanding.

Representative Haire: Assuming a defendant was tried, found guilty, and the death penalty was imposed, but it was subsequently found out that there was racism involved in the trial so the case was set aside and he was sentenced to life imprisonment without the possibility of parole. Would this preclude the defendant from subsequently bringing a petition under the innocence act that shows that evidence was withheld or anything else or he or she was not guilty. Would this preclude that?

Hal Pell: No, it would not. In the same way, because a defendant has a claim under this act doesn't mean that defendant with a claim of racial prejudice can't bring a claim in the normal course of appellate proceedings that is not under this act for a new hearing, for a new trial, for a new sentencing hearing based on racial discrimination.

Representative Haire: One other quick question, on page 2 it says on line 45:

> "either (i) the race of the defendant was a significant factor or (ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection."

Could race enter into the equation as far as the victim was concerned?

Hal Pell: I think that goes to on lines 27 and 28, perhaps that's what you're asking. In the current Racial Justice Act, statistics based on the race of the victim are allowed. Under this act, that would not be allowed. Statistics based on race would not be allowed.

Representative Ingle: Thank you. Representative Bryant.

Representative Bryant: Thank you Mr. Chair. I just need you to follow up on that final answer because that threw me out of the loop. I'd ask you to repeat that final answer that you gave.

Hal Pell: Under the current act, on page 2 lines 27-29, statistics that relate to the race of the victim are admissible. Now, under the two measures on line 45 and 46 they aren't. In other words, it's the race of the defendant or race was a factor to exercise preemptory challenges.

Representative Bryant: Can Representative Stam or staff tell me the origin of the governor or council of state having this role to approve the protocol in the bill?

Representative Stam: I think it's been in for many, many, many decades. We really need to change those protocols and that's a barrier to doing things that might actually benefit defendants. I've discussed this with the minority leader in years past.

Representative Bryant: Follow up on that? Is that statutory?

Representative Stam: Statutory? Yes.

Representative Bryant: Do we know the reason behind that? What was it before the Council of State?

Hal Pell: I can't tell you. The D.A.'s requested this. Perhaps the sponsor can. You mean the reason why the Council of State was put in there originally? I cannot tell you; it's over a hundred years old. We're trying to check the exact date.

Representative Bryant: Thank you. Follow up? In repealing 15(a)-2012, and again I haven't had a chance to track all of this, where is it that the life imprisonment without parole would be the consequence of a successful finding under this act or is it there?

Hal Pell: That was actually in the original bill that went through committee it was just printed out in a line-through so this is nothing new in the PCS from that bill. It was moved on page 3 lines 19-23.

Representative Bryant: Ok, the ten years before commission of the offence and the two years after the imposition of the death penalty is the timeframe within which the allegations of discrimination and evidence can be used to prove discriminatory behavior as an aspect of the challenge, is that correct? What are the timeframes, remind me again of the timeframes, for bringing the challenge?

Hal Pell: A post-conviction motion? It's in article 8 and it's in the statues. It is a period of time based on a final denial of writ of certiorari to the U.S. Supreme Court.

Representative Ingle: Thank you. Representative Faircloth and then Glazier.

Representative Faircloth: (inaudible)

Representative Ingle: Thank you. Representative Glazier.

Representative Glazier: With respect to the Cumberland case that's been referred to, one of the speakers said (inaudible) statistics not only state-wide but also by prosecutorial district and by county were used in determining racial discrimination. If that's the case, what in this document would have (inaudible) that other than that ten years of probation? (inaudible) On page 3 section d (inaudible) Statistical evidence, that's why it's a gutting and full repeal of the RJA. That sentence, no matter what else you do here, says the RJA is irrelevant and data is irrelevant.

Representative Ingle: Thank you. I have Glazier, Daughtry, and Bryant signed up. Members, we'll go an extra five minutes if we need to, but we are going to take the vote at five minutes 'til. Representative Glazier.

Representative Glazier: Hal Pell just kind of made my point, but the point is that you could have, as you do in the *Robinson* case, a finding that there is a one in ten-trillion-squared chance that there was a racially neutral reason for what happened and it is insufficient under this act. That to me is the gist of why this is a gross repeal of the Racial Justice Act.

Representative Ingle: Thank you, Representative Bryant.

Representative Bryant: I had a question for Mr. Pell about sections 6, 7, and 8. It was somewhere in there that you mentioned that we had a case that said that you could make procedural changes ex post facto. It appears to me that these changes are substantive because we are actually changing what the course of action is. Are there cases that define the difference between substantive and procedural or can we make substantive changes because of that last one?

Representative Stam: Mr. Chair, can I answer that?

Representative Ingle: Representative Stam.

Representative Stam: We actually distributed that memo a year ago and I will ask the staff to distribute it to every member of the committee as soon as possible.

Representative Ingle: Thank you. Mr. Pell, I think you have an answer for Representative Bryant.

Hal Pell: The way he's framed it, for a capital defendant they have a 120 days from the latest whole series of things, including if the U.S. Supreme Court denies a writ of certiorari on direct appeal following a denial of discretionary review by the Supreme Court of North Carolina. It's all based upon final orders after a series of appeals.

Representative Bryant: Thank you, anything on the substantive switch?

Hal Pell: Again, there's a difference between changes in the law that affect the amount of punishment someone can receive and whether they have an vested rights in how the state procedurally tries a case versus what was the law at the time of the offence: what the maximum punishment was, whether the intent of the change was to increase the punishment of the crime or whether it was just a change in the procedure under which the person is being tried. Like I said, it's a lengthy memo and I will provide it.

Representative Ingle: Alright members. At this time I'll ask if our clerk will call the roll. We have a motion before us: favorable report on the PCS.

Representative Hair: Point of order, Mr. Chair.

Representative Ingle: Point of order.

Representative Haire: I believe we have until 5 minutes until 6. I still see four minutes on the clock.

Representative Ingle: Yes sir, Representative Haire. I also called the names out for the last three that signed up to vote, and Representative Daughtry decided he did not want to speak so I did exactly what I said I was going to do.

Representative Haire: Follow-up on the question I asked earlier please.

Representative Ingle: No sir, we will take the vote at this time. We have run over sir. I was going to allow those five minutes for those three speakers that had signed up. We do have the

motion for a favorable report on the PCS from Representative Burr, unfavorable on the last PCS. Ms. Clerk, if you'd call the roll please.

From: Dixon, Chadwick K.
Sent: Wednesday, January 23, 2013 9:05 AM
To: Dorer, Peg
Subject: RE: Photos
Attachments: Scene pictures of victim Eric T-2.jpg; Scene pictures of victim Eric T-3.jpg; Scene pictures of victim Eric T-4.jpg; Scene pictures of victim Eric T-5.jpg; murder-220x165.jpg; Scene pictures of victim Eric T-1.jpg

Second batch of pics…

Chadwick Dixon
Conference of District Attorneys
(919) 890-1500

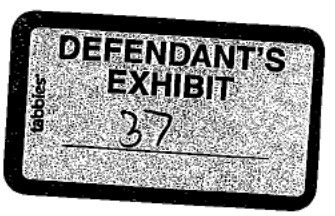
From: Dorer, Peg
Sent: Tuesday, January 22, 2013 4:21 PM
To: Dixon, Chadwick K.
Subject: FW: Photos

Here are some more for conversion to jpeg

Peg Dorer
Director
NC Conference of District Attorneys
P.O. Box 3159
Cary, NC 27519
919-890-1500
FAX 919-890-1931
www.ncdistrictattorney.org

From: Overton, Kimberly N.
Sent: Friday, January 18, 2013 12:42 PM
To: Dorer, Peg
Subject: FW: Photos

Kimberly N. Overton
Chief Resource Prosecutor
North Carolina Conference of District Attorneys
Post Office Box 3159
Cary, NC 27519
Office - (919) 890-1500
Cell - (919) 270-9403
Fax - (919) 890-1931
www.ncdistrictattorney.org



From: Thompson, Rob
Sent: Friday, January 18, 2013 12:40 PM
To: Overton, Kimberly N.
Subject: RE: Photos

I am checking on the guy with the tattoos - I don't think that's a big deal story though.

Attached are the live and after-murder pictures of the victim in marcus robinson, and a picture of robinson. I have a better picture of robinson I'll try to send once I get a hold of it.

These are rough - like some of the others I've sent.

I'm still working on the live pictures of the Meyer victims.

thanks.

r.

Rob Thompson
Assistant District Attorney
Cumberland County
Direct Line - 910.475.3194
Office Number 910.475-3010

From: Overton, Kimberly N.
Sent: Friday, January 18, 2013 10:05 AM
To: Thompson, Rob
Subject: RE: Photos

Also, do you have the info on the guy with the tattoos?

Kimberly N. Overton
Chief Resource Prosecutor
North Carolina Conference of District Attorneys
Post Office Box 3159
Cary, NC 27519
Office - (919) 890-1500
Cell - (919) 270-9403
Fax - (919) 890-1931
www.ncdistrictattorney.org

From: Thompson, Rob
Sent: Friday, January 18, 2013 9:37 AM
To: Overton, Kimberly N.
Subject: Fwd: Photos

Begin forwarded message:

From: "Kellie Berg" <kberg@ci.fay.nc.us>
To: "Thompson, Rob" <Robert.T.Thompson@nccourts.org>
Subject: Photos

Hopefully this is what you need. Kellie

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.

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DEFENDANT'S EXHIBIT 39 tables

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

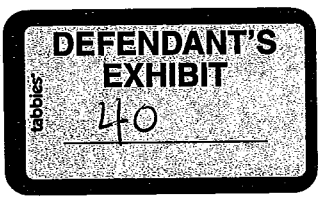
Paul Woolverton Staff writer Mar 14, 2013

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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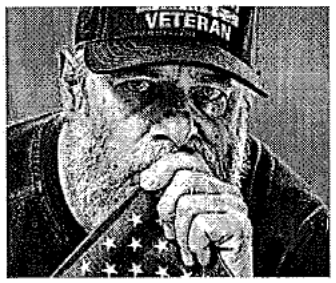

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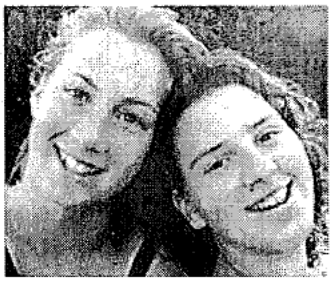

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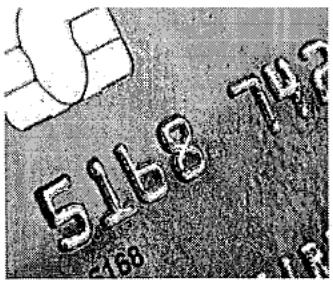

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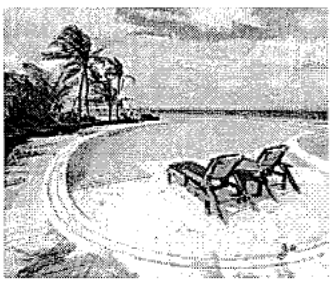

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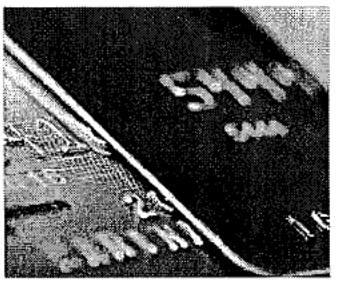

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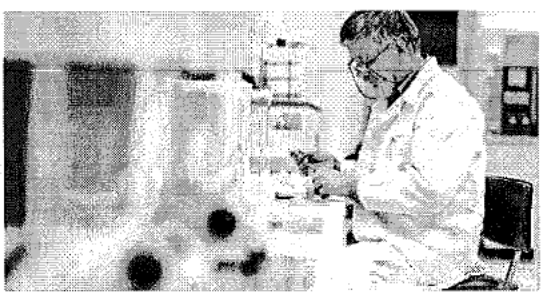

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Time to kill the Racial Justice Act

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.

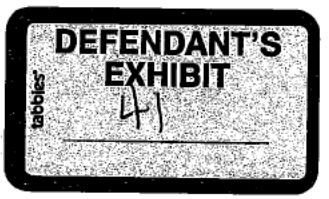
The alleged victim (the convicted murderer) is allowed to present statistics to a judge in an effort to demonstrate that the death penalty was sought against him due to his race. In other words, the murderer-turned-victim should have been given a life sentence, except for the racism of the trial judge, 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.

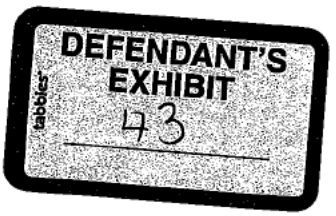
Sen. Goolsby: Thank you. What this bill does is really simple. I'll get Susan to go over it here in just a minute. But it goes through several things to basically restart the de facto moratorium that exists on the death penalty in North Carolina. It repeals in total RJA and all pending appeals under 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: 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.

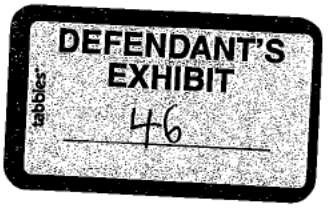
Thanks so much for all you do - let me know if you need anything else.

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
NC Conference of District Attorneys
P.O. Box 3159
Cary, NC 27519
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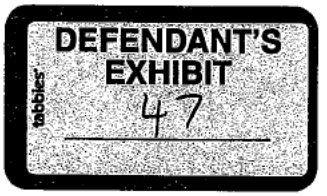

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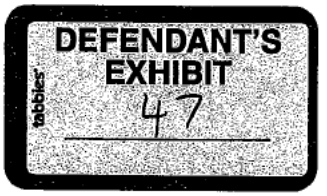

From: Dorer, Peg
Sent: Tuesday, June 04, 2013 12:03 PM
To: Joseph Kyzer (Sen. Thom Goolsby); Weston Burleson (House Staff)
Subject: RE: Racial Justice Act Talkers
Attachments: RaceChallenges.doc.rtf; govs meeting.doc; RJA cases Cumberland County.doc

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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www.ncdistrictattorney.org

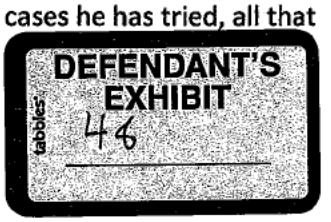
From: Joseph Kyzer (Sen. Thom Goolsby) [mailto:Goolsbyla@ncleg.net]
Sent: Tuesday, June 04, 2013 11:38 AM
To: Weston Burleson (House Staff)
Cc: Dorer, Peg
Subject: Racial Justice Act Talkers

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
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919.715.2525

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.

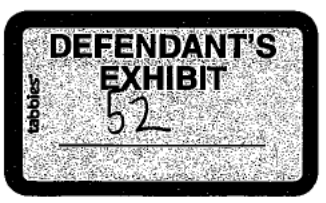
Rep. Stam: To speak on the bill.

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.

Rep. Paul Stam

House Majority Leader

Judiciary B Committee Meeting: Amending the Racial Justice Act

June 6th, 2012

Edited for clarity and grammar

Representative Stam: Thank you ladies and gentlemen. This committee considered Senate Bill 9 in the last session which in legal effect would have been a repeal of the Racial Justice Act. Although technically it wasn't, it would have had that effect.

This is an amendment to the Racial Justice Act. What this amendment does is enshrine the law, what we think that law is, that is "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." What it does that's different is it looks at statistics that are somehow relevant to that question both as time and location. The location would be in the county or the prosecutorial district. The time period would be on line 19-20:

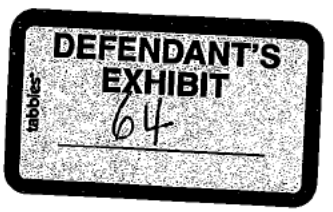
> "from the date that is 24 months prior to the commission of the offense to the date that is 24 months after the imposition of the death sentence."

In other words, something that has something to do with the question, as opposed to going into statistics about what happened three hundred miles away in a different district, in a different era, in somebody else's court. That's trying to get relevancy to the statistics.

The second thing it does, in lines 23-32, is clear up what had been a bone of contention and that is what would happen if someone were successful in one of these petitions but was originally sentenced to death a couple of decades ago and there is at least some chance that they would not be sentenced to life without parole but would rather go under the old parole procedures. What this bill does is say that "If you're going to ask for this relief, then you have to put in black and white on the record, in writing and orally, that you are waiving any requests for parole." That's lines 23-32. The court, in lines 29 and 30, makes an oral inquiry to confirm the defendant's waiver which shall be part of the record. In other words, that dispute would no longer be part of the dialogue.

Page 3, lines 19-21 make it clear that it's in the county or prosecutorial district.

Line 23 requires that "the race of the defendant was a significant factor." This bill expands what can be included as evidence. We had in the other bill, sworn testimony of attorneys, prosecutors, and law enforcement officers; this adds judicial officials as well. Statistical evidence by itself would be insufficient but it would be admissible. The state gets to offer rebuttal evidence.



Line 35 tells when the claim must be raised. If before trial, under the general rules of practice; currently, that's rule 24 but that could conceivably change so it's just under the general rules. It tells where to raise it in post-conviction. If the court, on the record, finds that on its face it doesn't state a claim, the court can dismiss it. But if the court does find that it states a sufficient claim, the court will schedule a hearing and may prescribe a time prior to the hearing for each party to give a forecast of its proposed evidence. That's sort of a discovery hearing. Then lines 46-50 specify what the Court does if it finds that race was a significant factor in the decision to superimpose the sentence of death.

I believe that this bill has the original intent of the Racial Justice Act by those who spoke in favor of it. That is, to make sure we're not sentencing people to death because of their race. What it doesn't do is include the intent of those who knew what the racial justice act was, and that was just an indefinite moratorium on the death penalty. That is gone.

There's a lot of technical stuff: how it affects current hearings. This bill would put a stop to current hearings. They could, within 60 days, recast their motions under the new law and still be in the queue to having their hearings.

I hope the committee will support this. The spectacle of virtually every person on death row who was sentenced to death for cold blooded murder claiming racial prejudice, no matter what their race, revealed to everybody the deficiencies in Senate Bill 461.

Thank you.

Representative Stevens: It is the intent of the chair to allow members of the public who wish to speak an opportunity to speak, but we are going to limit that. You can either speak in favor of this bill or against this bill. Those members of the public who would like to speak, we'd ask you to make your way around and speak with Nicole, an intern with my office, and we'll sign up with a list of pro or con. In the meantime, I'm going to be taking some comments from the members of the committee. I'm going to ask Representative Burr in about seven minutes if he would come up and co-chair; I need to step out for a few minutes. We'll first ask staff if they have anything they need to add to what Representative Stam has done.

Staff Attorney Hal Pell: Nothing, unless there are any questions concerning session law language on procedure.

Representative Stevens: Ok. Representative Glazier.

Representative Glazier: Requesting if we can reserve any time for comment and questions.

Representative Stevens: Sure.

Representative Glazier: Question for Mr. Pell: could you explain in a little bit more detail subsection f of page 2 and the limitations it puts on the time in which a defendant can file?

Hal Pell: Which section number?

Representative Glazier: It is page 2, f.

Hal Pell: Ok, the practice under the Racial Justice Act would be the same as it currently is. In other words, if it's before trial, then they would bring a pre-trial motion. If it's a post-conviction motion, it would be under the normal rules in article 8 of chapter 15a. For a post-conviction motion for appropriate relief, that would be under the current deadlines for filing a motion. All those who have already filed under the prior session law, their appeal would still be preserved.

Representative Glazier: So the only limitation you see, at least on time, is the time on the use of statistical evidence or the evidence period in that 2 plus 2 year category?

Hal Pell: The bill provides that there would be the two years before the defense and the two years after the imposition of the death sentence. That would be the time period that statistical evidence would be deemed relevant under this bill.

Representative Glazier: Is that just limited to statistical evidence or does it include any evidence?

Hal Pell: Any evidence.

Representative Glazier: So, the prosecutor can in this case have been a prosecutor for 25 years and have struck 93 percent of jurors on the basis of race over the prior 24 years of his career. But he had only one case in the next two years, the defendant's case, and didn't strike a black juror during that period of time. Then the only evidence that a defendant can present is that two year period? The fact that he racially struck 93 percent of jurors over that 24 year period would never be used, is that correct?

Hal Pell: That would be correct. Under that act, statistical evidence would have to be limited to the two years before the offence. There could be other relevant evidence that is not statistical, such as witness testimony concerning the prosecutor's motive.

Representative Glazier: You told me a minute ago that the two year limitation is for all evidence.

Hal Pell: No, I meant during that two year period as well.

Representative Glazier: So, the prosecutor who struck 93 percent of the jurors in a 24 year career, then had just one case after and didn't strike any. He was a member of the KKK, and called blacks "niggers", and we had evidence of that fact—all this had occurred five years prior. That couldn't come into evidence either under this?

Hal Pell: That's a good question because I don't know whether a motion for appropriate relief based on newly discovered evidence if it was direct evidence like that or testimony like that would be admissible. I'm not sure if that would be excluded or not.

Representative Glazier: You just said though, that your reading of this is that it excludes any evidence prior to the two years before the event. If that's the case, how could it come in to evidence?

Representative Stam: Point of order.

Representative Stevens: Representative Stam.

Representative Stam: Point of order was that he sought to just ask questions and yet he is debating the staff.

Representative Stevens: Alright.

Hal Pell: I've had an opportunity to look over that issue and I'd like to respond.

Representative Stevens: Alright. I'm going to get back to you. That is a good point; let's take questions right now and we'll invite you to come back to comment. And again, nobody is signed up for public comment. Ok, we have one now. Representative Haire.

Representative Haire: Under the Racial Justice Act, how many people have been acquitted or found to be subject to racial prejudice?

Hal Pell: I know of one case, the *Robinson* case, in which the Judge has ruled that.

Representative Haire: Do you know how many cases are pending?

Hal Pell: I can't give you a number. I know anecdotally, there's two cases maybe in Forsyth County, but I can't be totally accurate.

Representative Stevens: Representative Bryant.

Representative Haire: Excuse me, just another question for Representative Stam.

Representative Stevens: Representative Haire.

Representative Haire: What is broken about this current law that needs to be fixed?

Representative Stam: That's debate, but I'll be glad to answer the question. The General Assembly, Representative Haire, has decreed that the correct punishment for first degree murder is either death or, upon the discretion of the jury, life imprisonment. We have 155 people, practically everyone on death row, who claimed that the only reason they're there is because of their race. That's broken.

Representative Stevens: Representative Haire, do you have additional questions at this time?

Representative Haire: I would like to ask Representative Stam another question. Based on the fact that we know at least one person has been turned loose (inaudible).

Representative Stevens: The committee will come to order.

Representative Haire: Excuse me, I misspoke. I've always heard (inaudible)

Representative Stam: There's not a shred of evidence that any of these people are innocent. They have all been convicted by a jury, they've had 45 Judges at least look at their cases, they've taken an average of eight to fifteen years already, and this adds an additional eight Judges to each case and an additional four, five, or six years. That's broken.

Representative Burr: I believe Mr. Pell wants to address that question as well.

Hal Pell: No, no. I had a specific comment about the relevancy issue. There were two cases in Buncombe County that were recently turned loose because of misconduct on behalf of the state prosecution for the case.

Representative Burr: Do we have additional questions for staff at this point? Representative Bryant.

Representative Bryant: I'd like to ask two questions, but I'd just like to make sure I'm reserving time for comment. This is not my comment.

Representative Burr: Go ahead.

Representative Bryant: I just know that we don't have a bill summary. Is there a reason we don't have a bill summary? Am I missing something?

Hal Pell: No, there is a bill summary.

Representative Bryant: Ok, if I could get a copy of the bill summary. I apologize if I'm somehow missing it, but it's not in my paperwork. Ok, thank you. Then my question, Representative Burr, is what are the differences as it relates to the finding of race being a significant factor? I was trying to read as I heard Representative Stam on this bill, and in that process he said something about race of the defendant and race as a significant factor. So what is the change?

Hal Pell: In the original bill, on page 2 as part of subsection b, you'll see that lines 3-9 are struck through. Originally, there were provisions that one or more of the following applies. In other words, the statistical evidence would be irrelevant relating to whether a death penalty was:

> "sought or imposed significantly more frequently upon persons of one race than upon persons of another race." or "Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons"

That's race of the victim and the last one is preemptory challenges. The PCS just provides a general statement that proving race was a factor and does not specifically set out those categories for relevancy.

Representative Bryant: Follow-up. That's in subsection d?

Hal Pell: Correct. That's in subsection d.

Representative Bryant: And the follow-up is, where in this area is something about the race of the defendant or somebody?

Hal Pell: That's on line 23 of page 2.

Representative Bryant: And how does that factor into the rest of the bill? Would you walk me through that? And is that different, is what I'm asking?

Hal Pell: (inaudible) relevant to a finding that it was sought or imposed and includes statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to

death or other evidence that the race of the defendant was a significant factor. So this would say that the defendant was sentenced to death because of their race.

Representative Bryant: So, statistical evidence would be allowed where race of the defendant was a significant factor—that's the only basis upon which statistical evidence would be relevant, as it related to the race of the defendant?

Hal Pell: That would be my reading: that it's the race of the defendant that was a significant factor.

Representative Bryant: So it would have to be direct discrimination related to the defendant's race, and if there's racial discrimination related to others involved in the criminal process that would affect the fairness or justice experienced by the defendant that evidence is not allowed?

Hal Pell: Not necessarily. If a juror was excluded because of his attitudes toward the race of the defendant that would be relevant.

Representative Bryant: But if a juror is struck because of stereotypes and presumptions, about the juror's attitude toward the death penalty or the prosecutors or the criminal justice system or whatever rationale they use for striking black people irregardless of their race. Excuse me, let me rephrase. If you are accused of the death penalty and they strike me from the jury because they believe that I might, because I'm black and I have sympathetic attitudes or prejudices—I don't know what the prejudice is—or something else that would not somehow make me capable, then that would not be allowed even though it may affect your ability to have a nondiscriminatory jury?

Hal Pell: If you had a bias against the defendant, then you could be struck by a challenge for cause. In other words, you would not be eligible to be a juror in the first instance. If, for example, there was a black defendant under North Carolina federal law, if the prosecutor uses a preemptory challenge to strike that prospective juror, then the state is required to state a race-neutral reason why under *Batson v. Kentucky* for why they would strike that juror. If it's not apparent from their testimony that they're biased, according to the Judge, and the state has no basis for a challenge for cause and the state uses a preemptory challenge then that challenge would be subject to review by the court.

Representative Bryant: Sorry, one more follow-up. Under *Batson* the race-neutral reason is not related to the defendant, it's related to race discrimination across the board, is that correct?

Hal Pell: My understanding would be that it would be related to the juror and that defendant. In other words, based on the testimony of that juror the Court can decide that that juror does not appear to be biased. But if the prosecutor moves to strike the juror or moves a preemptory challenge against the juror, then the prosecutor has to provide a race-neutral reason why that juror should not be allowed on the jury. So it is confined to that system.

I can, I think, respond to Representative Glazier's question earlier in a couple of ways. The current Racial Justice Act requires that the evidence be at the time of the offence. I do believe that one of the Judges hearing these cases has limited that evidence to a 5-year period before and after the offence in an attempt to apply some reasonableness standard to the question of what "at the time of the offence" means in our statute. Some Judges may have looked at 10 or 20 years,

like you mentioned, from when the offence occurred and allowed that evidence. My understanding was this was an attempt to create some kind of statutory framework for the language that is currently in the statute: "at the time of the offence."

However, you also raised the question about a prosecutor that, maybe 20 years before, whether that evidence was admissible. This only applies to claims that were brought under the Racial Justice Act. If the defendant has a due process or equal protections claim that may be brought against his conviction based on other newly discovered evidence, that could be a separate constitutionally based challenge that would not even be proceeding under this because the relief would certainly be not to just be sentenced to life without parole but, because they did not receive a fair trial, they should get a rehearing in the normal appellate process.

That's what distinguishes this from other statutes, such as Kentucky's. Kentucky law says that you can't seek the death penalty; it doesn't say anything about imposing. Kentucky's act ensures that there's no real issue whether a defendant received a fundamentally fair trial or not and then go back and try to undo that. North Carolina is the only jurisdiction anywhere that says that if the defendant shows that he was deprived of the right for a case to be tried where race was not a factor, that they're still convicted. They still have life without parole. That's the distinguishing factor.

That type of situation where it's outside of those two year periods would necessarily be brought outside of this act. Then it would be up to the courts to determine whether it's relevant to an equal protection or a due process claim and those procedures.

Representative Burr: Representative Bordsen, I believe you're next. Please keep in mind that we do have public comments and would like to get to those. It is the intention to try to vote on this at 15 after 11. Go right ahead.

Representative Bordsen: If you don't mind, I'd rather hear Representative Glazier's response if I could. Mine is a question about process.

Representative Burr: Well, is it a response or is it a question, Representative Glazier?

Representative Glazier: I have a question.

Representative Bordsen: Ok well then my question is purely about process for today and it's colored somewhat by the fact that I'm very disturbed that this very significant piece of legislation is being revisited so soon. I came in a couple minutes late, so help me understand here. I was interested very much in the initial exchange between Hal Pell and Representative Glazier. To which Representative Stam raised a point of order that that exchange was actually going into the area of debate, and that we are to have the opportunity for questions and then it will be followed by a period of public comment then we will vote rather than having a meeting where this huge issue is debated. We will not be having this meeting for discussion purposes only. It sounds like we are not to have actual engaged debate but we are expected to vote in such a short amount of time. So let me understand. Is that true, that we are not to be engaging in debate in this meeting? We are to have time for questions, a separate time for comment, and then vote?

Representative Burr: Maybe because you walked in a few minutes late you missed it, but the point at this time is to take questions for staff that you may have. If you have questions for staff, you can address those now. We're then going to move into public comments, and as soon as we finish up public comments if you would like to debate you'll be recognized at that time.

Representative Borden: I do have a question. The question came because I was struck by the fact that although Representative Glazier had continuing questions, one question begets another question begets another question, on the same subject that really needed clarification that was objected to and point of order was called. I fail to understand. That was really not debate that was clarifying a series of questions, which we need, I think, in making our vote and informed vote.

Representative Stam: Brief response. I note the opponents are using all their time for questions. Since you weren't here earlier, you didn't realize that Representative Glazier was on his eighth question at that time. The point is seldom noticed that in a deliberative assembly, you actually have to ask permission of the body the third time you speak. We frequently grant permission, but if you want to move on to the debate part, we need to move on to the debate part.

Representative Martin: Mr. Chairman, point of order.

Representative Burr: Representative Martin.

Representative Martin: Thank you. Representative Stam has, I believe, correctly stated what the default rule is for a deliberative body. However, it has been a longstanding custom and practice in this body that in committee we don't observe that rule. It is clear that the custom and the rule by which we're governed does not apply.

Representative Burr: Well, it would be the chair's preference that we get back to the discussion on the bill rather than debating procedures as we are trying to have that discussion at that time which seems to me, there's an effort being made to delay the discussion. Hopefully we'll hear from the public. So at this time, we'll move to Representative Glazier who I believe has a question for staff.

Representative Glazier: I do have a question and it's on page one. Can you tell us under a(1), there are a couple ways to read this, and my question is, would a defendant who is deciding whether to file an RJA petition but may also have an actual innocence petition if he files RJA, does a(1) bar him from filing actual innocence?

Hal Pell: I believe if this defendant goes through the process and receives relief under this act, life without parole, I don't see how that's a bar to any future claim. This would just be a waiver as to getting relief under this act.

Representative Glazier: Follow-up. So it's meant to be a section that says if you sort of solve the issue that some thought was out there for life without parole, and that you're consenting to that if you win your petition? So, staff's point is that this does not bar a defendant from filing actual innocence or any other petition as a result of this language. Is that correct?

Hal Pell: I would say so. I believe we've had actual innocence proceedings where the defense pled guilty.

Representative Glaizer: That's why I'm asking, to make sure that's correct.

Representative Burr: Ok, Representative Haire.

Representative Haire: Down on page 1, starting with subsection a(1) about if a person agrees to plead guilty to life imprisonment without parole it says here that he gives up any rights that they might have to file any motion to the court for any reason, is that correct?

Hal Pell: No sir, this only says that a condition for filing this motion and consideration of this motion is that if they get their relief then they're waiving any objections to the imposition of that relief. That's all this is saying.

Representative Haire: Is there any other place where if a person agrees to take this life without parole that he or she cannot go and file any objection that he or she might have to any of the procedure that took place or violation of prosecutorial rights or anything?

Hal Pell: I would have to confirm this, but if there's a plea agreement, and maybe the practitioners who are currently practicing may be able to answer this better than I can, if you have a plea agreement, unless there's some fundamental flaw in that process of obtaining the plea, the defendant pleads guilty in return for a life sentence. I believe that they can't then challenge that on appeal if they negotiated that plea unless there's so fundamental defect in the process of obtaining that plea.

Representative Haire: Of course, when you're facing a death sentence that's a heck of a roll of the dice as you would call it that you'd be taking (inaudible) but rather than risk it you would elect to take the life sentence without parole.

Hal Pell: A defendant would most likely claim a violation of equal protection or due process if they had evidence of discrimination such as information that a juror was prejudiced or et cetera as part of an appeal.

Representative Haire: But, see, this says here that the defendant

> "knowingly and voluntarily waives any objection based upon any common law, statutory law, or the federal or State constitutions to the imposition of the sentence of life imprisonment without parole."

Hal Pell: Correct, for this particular proceeding.

Representative Haire: And there's no recourse? Once you enter the plea that's it, it's over, under this?

Hal Pell: If you file a petition under the current act or under this act and you are successful then you will get a life without parole sentence. The petitioner in filing under this act, this act clarifies perhaps current law, cannot object later and say: "This is ex post facto. I asked for life without parole. There's a constitutional law issue here that I couldn't have been punished this way before, and therefore I must get life with parole instead of life without parole." They're waiving that objection to that constitutionally based challenge.

There may also be a due process challenge to this because in this situation the courts are saying the defendant basically did not receive a fundamentally fair trial, that they did not receive what they are entitled to which is a sentence that was not based on race. Under this act the court is basically finding that race was a significant factor in their receiving the death penalty. That could be a potential due process violation.

That separates our RJA from other jurisdictions that are just ameliorating death sentences. There's no issue in those cases of whether the defendant was denied any rights. The state is just saying "We're going to reduce your sentence from death to life without parole." Our statue is singular in that form as far as jurisprudence in that it says: "We are saying that race was a factor in your case. But you're not getting a new trial; you're not getting a new rehearing because if you got a new rehearing you would not be eligible for life without parole if you committed your crime before 1994." So, there's a potential due process issue as well and that's why, at least to my understanding, that the sponsors wanted a waiver provision in this act. Just to clarify that those constitutional issues would not be potentially raised by a petitioner.

Representative Bryant: I think I've got a better way to ask this question. In the elements that are stuck on page 2 in lines 3-9, which of those elements are still allowable under the new subsection d and which are not?

Hal Pell: Well, the first one

> "Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race."

I think that fairly encompasses that the race of the defendant was a factor. So I believe that would be encompassed in the PCS that we have. If you're looking at the race of the victim, I don't think that's necessarily encompassed in the PCS. Line 23 is pretty clear that it's the race of the defendant that was a significant factor.

Representative Bryant: So number 3 is excluded?

Hal Pell: 3

> "Race was a significant factor in decisions to exercise peremptory challenges."

That could be possible as well because the race of the defendant would be an issue in the use of a preemptory challenge.

Representative Bryant: That means that the discriminatory use of preemptory challenges has to somehow be connected to the race of the defendant which would more than likely eliminate any opportunities for racial discrimination against a white defendant by striking black jurors who the striker believes would be less favorable to them and more favorable to a defendant not being given the death penalty?

Hal Pell: The court, if it's not clear from testimony, for example if it's a white defendant and a black juror would not be favorable to the death penalty and the district attorney believes that he doesn't want that juror on the jury, because he believes that they might be. First of all, if the black juror does not indicate, especially if the prosecutors ask "Would you be able to return a

death penalty?" and they say yes but the prosecutor thinks that he might not or she might not, then yes they could use preemptory challenge.

Representative Bryant: That's not my question. My question is can that kind of racial discrimination be alleged under this act if it's a white defendant and the discrimination is against jurors or a group of people serving in the jury and that affected the fairness of the trial process itself.

Hal Pell: I can't give you a clear answer on that. All I can say is that sometimes jurors, it's not based on their race whether they're white or they're black or whatever they are, if the district attorney doesn't think they can vote for the death penalty then they want to challenge that juror. But, the way this is drafted it's the race of the defendant that is the statistical evidence.

Representative Burr: At this time we're going to move into a time for public comment. We will allow up to three minutes for each speaker and we have four that have signed up. We'll start with the first person to sign up which was Ken Rose.

Ken Rose: Thank you, Chairman Burr, and distinguished members of the committee. My name is Ken Rose. I'm a staff attorney at the Center for Death Penalty Litigation. This is a repeal bill. This is, in the important respects, the same bill that was passed by the legislature and vetoed by the governor and they did not have the votes apparently to override that veto. So if you think you're voting on an amendment, if you think you're voting on reform of the racial justice act, that is not what this does.

Why do I say that? The repeal bill that was vetoed required that there be discriminatory purpose in seeking or imposing the sentence of death in the defendant's case. That was the bill that was passed and vetoed. That is what this current bill requires: discrimination in the defendant's case.

Now why is that a problem? That is exactly what the law was prior to the passage of the Racial Justice Act. So under *McClesky v. Kemp*, which was the law prior to the passage of the Racial Justice Act, there was a requirement of discrimination in the defendant's case. That is what this current bill requires. I would point out specifically line 47 of page 2 which says specifically "in the defendant's case". That is *McClesky v. Kemp*. That is the law prior to the Racial Justice Act. If you pass this bill I understand you may want to pass a repeal bill but that is what you're doing here.

A few specific other details that were in answer to some of the questions that came up today. I, by the way, litigate death penalty cases, so that's my experience. That's my limitation. That's also my strength.

There was comment about the provision on waiver which is on the first page of the act. This bill requires that defendants who have filed a claim, who intend to file a claim under the racial justice act, to waive any other claims. That includes innocent people who may want to maintain their innocence, and may also feel that they've been discriminated against because of their race. So this legislation gives them a choice: you can waive any relief other than life without parole or you can maintain your innocence and not file anything under this law. So anyone who is innocent, anyone currently on death row who maintains they're innocent, waives their right to maintain those claims because they're waiving any objection to life without parole.

There were also some questions about the time period and statistics. Representative Glazier raised the two years before and afterwards. This limitation on statistics renders that meaningless. This period is used only in the county and the district. We cannot present evidence of statistics in that limited period in that limited jurisdiction that means anything. Representative Haire, you were involved in the draft of this, you understood those limitations. This does the same thing. This renders the Racial Justice Act meaningless and it repeals it. Thank you.

Representative Burr: Thank you Mr. Rose. Representative Parmon.

Representative Parmon: Thank you, Mr. Chairman and committee. As one of the original sponsors of the Racial Justice Act whose main intention was to create in North Carolina a fair and unbiased criminal justice system, Senate Bill 416 will simply take us back where we started. On April the 20th of this year, Judge Weeks found significant racial bias in the North Carolina death penalty cases. Judge Weeks concluded that the defendant introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection.

Senate Bill 416 simply will gut the RJA which is nationally recognized as a historic piece of legislation for North Carolina that would ensure that we have an unbiased criminal justice system. I realize as I stand here that Senate Bill 416 will probably pass. But I want to go on record as saying that North Carolina continues to go backwards when we will knowingly allow racial discrimination in our criminal justice system. This bill will not only allow people not to claim racial discrimination but even if they're innocent, under what we're doing here today, they cannot claim it. I just think that this is the wrong thing for us to do in North Carolina.

Representative Burr: Thank you, Representative Parmon. Next we have Ty Hunter.

Ty Hunter: Thank you Mr. Chairman and members of the committee. I am Ty Hunter. I am the executive director at the Center for Death Penalty Litigation. I wanted to talk, since I only have three minutes, about a very narrow area and it relates to the question Representative Glazier talked about at the very beginning when he was talking about a long history of jury discrimination.

The one hearing we've had under the Racial Justice Act, the Judge who heard all the evidence in that--the state got a chance to rebut and the state got to put on all the evidence they had--the Judge considered that and he concluded that there was a 20 year history of intentional race discrimination in jury selection all over the state: not just one or two places and then it has affected everyone else but all over the state. I hope all of you will look at Judge Weeks' order and read his order before you see what you're doing. Judge Weeks' order is eviscerated by this law.

What you are doing is you're deciding: "We found out we have a twenty year history of intentional discrimination in jury selection in capital cases. Oh, let's turn our backs away and make it so that nobody else can litigate that." That's the answer to Judge Weeks' finding that we have twenty years of intentional race discrimination in jury selection in capital cases all over the state? And the answer is to amend the law so that we can no longer litigate that? I can't believe that's what the people of North Carolina want or the legislature of North Carolina wants.

This is going to be pushed through. 95% of you will not honestly understand what you're voting for. But that's one thing that's going to happen, I promise you. The intent of this is to make it so

that we can't talk about these twenty years of race discrimination. That's the solution: don't talk about it. Thank you very much.

Representative Stevens: I believe we have one more, Scott Bass. Thank you Mr. Bass.

Scott Bass: I'm Scott Bass. I'm the director of Murder Victims Families for Reconciliation. I have a number of murder victim family members, those people who are most directly and traumatically affected by murder, who worked very hard in 2009 to pass the Racial Justice Act and worked very hard in the past thirteen months or so to try to protect it. There are that many murder victim family members who are willing to give up their family time and their work time because they believe that the RJA improves the quality of justice delivered. They don't want so-called "justice" that's tainted by racial bias.

A number of those family members made trips to Raleigh in the past 13 months. A number of them would love to have been here today so you could hear from them directly. Unfortunately, because of the short timeframe in which this was brought up they're not able to be here and address you. One who was on the way to address you actually had a rock hit his windshield and was unable to be here: a man whose brother was murdered on his own 18th birthday and is reminded of that every time that he celebrates his birthday. Had he been here he would have told you himself, had any number of the dozens members who are members of the MVFR in North Carolina had the opportunity to address you they would say the RJA improved the quality of justice and that they don't want so-called justice tainted by racial bias.

Finally as a native eastern North Carolinian, actually one of your colleagues, Representative Larry Bell down in Sampson county, taught me in seventh and eighth grade and coached me in basketball. I'm aware that he would have never had the opportunity to coach me and teach me had it not been for strong laws and court rulings that allowed him to be in that position. I believe the RJA is the same type of strong law and ruling like Judge Weeks provide are the same type of strong court ruling that we need to move forward with a justice that's not tainted by racial injustice.

Representative Stevens: Thank you, and that concludes our public comment based on the list that I was provided. The chair now recognizes Representative Stam and I believe he has an amendment to send forth.

Representative Stam: I'd like to debate and then when the copies are made I'll send forth the amendment.

Representative Stevens: Representative Stam is recognized.

Representative Stam: What the amendment relates to is a question that Representative Glazier raised on page 1 sub a(1) and I think Representative Haire asked about. The intent of that section is to put to bed this question about whether someone who committed a crime in 1993 could, in fact, get parole even though the Racial Justice Act said they can't get parole. That's what they're waiving is that claim. The amendment will make that clear. They're not waiving claims to innocence or that type of thing. As soon as it gets back, I'll offer it. I'll just speak a minute on the bill itself.

Representative Stevens: Representative Glazier, do you have comments on the amendment?

Representative Glazier: I do but I'll wait until you have sent forth the amendment.

Representative Stevens: Alright, go ahead Representative Stam.

Representative Stam: I passed out a copy of a letter from Gretchen Ingle from the Center for Death Penalty Litigation about the Fayetteville litigation which I think explains what's wrong with the RJA. Apparently, if you read between the lines here, Judge Weeks was willing and able to issue an order granting relief to three other defendants without even granting a hearing to the state on the theory "Oh, we've already proved that there was discrimination in the state for twenty years. We don't have to consider Mr. Augustine or Coffman or Walters because they live in the same state, they live in the same county." That's what's wrong with that case. It's completely contrary to the basic principles of Western justice: we consider each case on its' own merits. Therefore, I'm going to be supporting the bill. At this point, I'd like to introduce a motion for the adoption of the amendment which is being passed out.

Representative Stevens: Representative Stam has an amendment before us. Representative Stam, you're recognized to explain the amendment.

Representative Stam: What it does is just rewrite those lines to make it clear that, if you go down to lines 10 and 11, on any

> "federal or state constitution that would otherwise require that the defendant be eligible for parole."

This is a provision about parole or not parole, not about innocence. So I move the introduction of the amendment.

Representative Stevens: Discussion on the amendment? Representative Glazier.

Representative Glazier: (inaudible)

Representative Stevens: Any other questions or comments on the amendment? Seeing none, we have a motion to support the amendment. All those in favor say "aye." All those opposed, "no." Seeing none, the amendment passes and is rolled into the PCS. Let's have some discussion and debate but let's limit it to about ten or twelve minutes because we do have a lot of people here for mechanics lien which we are simply having discussion on. Representative Glazier.

Representative Glazier: Thank you, madam Chair. I'll try to be very brief with my comments. What this bill does is effectively what Ty Hunter says it does. It leaves the law "no person may be executed on the basis of race" and then eliminates any practical method to ever prove it. It eliminates statistical evidence that is not done in a manner that is 100% accurate and proved to 100% degree insufficient to prove discrimination. It blatantly disregards the role of unconscious bias that all the social research indicates occurs not only in the criminal justice system but in our lives. It ignores every bit of evidence that was taken in the case. Before, the argument against racial justice was at least had the cover that we didn't know and that we were attacking finality of judgments and people thought "there's never been any evidence proven of racial discrimination." Now we have, after a multi-million dollar study and case of enormous magnitude, the following findings from Judge Weeks' order:

> "The main testimony, without contradiction, is large disparities in strike rates based across the state, across all struck eligible venire members in the MSU study. The court finds the prosecutor struck 56.2% of eligible black venire members compared to 25.7% of all other members. This difference is statistically significant. The probability of this disparity occurring in a race neutral jury selection process is less than one in ten-trillion. 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 others. Of the 166 cases statewide including at least one black member prosecutors struck and average of 56% of eligible black venire members compared to only 24.8% of all other eligible members. The probability of this disparity occurring in a racially neutral jury selection process is less than one in ten-trillion squared"
>
> And he goes on:
>
> "Race was a significant fact in the prosecutorial decisions to exercise preemptory strikes in capital cases in North Carolina at the time of Robinson's trial in 1994. Race was a significant factor in prosecutorial decisions to exercise preemptory strikes in capital cases in North Carolina in the former second Judicial Division at the time of Robinson's trial in 1994"

And he goes on and he concludes that

> "The prosecutors intentionally used the race of venire members as a significant factor to exercise preemptory strikes in capital cases in North Carolina, the former second Judicial Division, and Cumberland County in this case"

What this bill essentially does, and mandates, is that we play ostrich and completely disregard the findings of race. Yesterday, on the floor of the House of Representatives, we sought to right a decades-old wrong. Today, sadly, we appear ready to extend one in the face of all the evidence to the contrary.

Representative Stevens: Thank you, Representative Glazier. Just as a chair, I'm going to take a few minutes to make a personal comment. I was part of the interim study committee that looked at this. I think for the first time we all actually looked at the statistics, the shocking factor for was what he's saying about prosecutors is true, if you look only that way. But when you go to the defense side, you find that racial balance reoccurs because they're more likely to strike the white jurors. When we got to the end, there were racially balanced juries according to the statistical evidence that was there. But this bill says only look at the prosecutorial strikes. That does seem a little patently unfair. Representative Martin.

Representative Martin: Thank you, madam chair. I'd like to talk about, first of all, the process that this bill is following and, second of all, delve into the merits. The title of the bill suggests that this is a bill to amend the Racial Justice Act. Others have contended that it repeals the Racial Justice Act. It is just an attempt to amend it. First of all, if it's repealing it we've already got a bill in the garage to do that, so this is not necessary. This whole process is not at all necessary, we could just continue to deal with the bill in the garage that actually, I think folks would agree, does repeal the Racial Justice Act.

If, on the other hand, this bill just seeks to amend the RJA, then I think it really, I think everyone on all sides of this issue would agree that the death penalty is a serious matter literally a matter of life and death and this bill deserves a more deliberative process than what it so far has gotten. I've found in my time here in this body that it's best when we deal with complicated issues of great magnitude when we follow the proper process with extensive time for notification, debate, and to get the interested parties here to talk about it. On the other hand, this body is at its worst when leadership of Democratic or Republican parties runs bills through quickly with the specific intent of, I think, trying to minimize that sort of discussion and debate. I think there's still time for the process this bill takes to fall into the former category rather than the latter. It's my hope that this is what will happen.

Let me talk now about the merits in this case. My criminal experience is limited to second-chair non-capital offences. There are those in this room on both sides of the issue with more capital experience than I have. But I was born and raised in North Carolina, and I can say with certainty that there was and remains racism in my home state. I am certain that racism still affects death penalty sentencing. I've also found that the type of racism we have in my home state does cross geographic boundaries, it does cross prosecutorial boundaries, and it does, most certainly, cross county lines. I've also found that it crosses temporal lines, that racism persists over time. To try to limit the discussion of the impact of racism on death penalty cases artificially to geographic boundaries and temporal boundaries does not fit in with my understanding of racism in North Carolina. Thank you.

Representative Stevens: Thank you, Representative Martin. Representative Michaux I have you down and I'll give you up to five minutes. Representative Bordsen wants to speak, but we may run out of time because we do want to vote on this bill. To just make one comment to Representative Martin's contentions, this bill has been extensively reviewed and studied and this is a compromise that has been reached. We did extensive studies and reviews of Judge Weeks' decisions and the information that came in in that study. So it's not an immediate rush to judgment. Representative Michaux.

Representative Michaux: Well first of all, I want to object to you trying to you trying to limit me in my response to just five minutes. Here you've got an important bill sitting out here that some people want to get passed and some people don't want it to pass. My take on it is it's unnecessary for us to even be talking about this situation. The reason for that is, you have already passed a bill that repeals the Racial Justice Act. You, Mr. Stam and the rest of your colleagues, have passed that bill. That bill was vetoed by the Governor. You don't have the votes to override the veto, so you're going to repeal this bill in a backdoor manner. That's exactly what you're doing. You don't want to tell the truth about what you're doing it for but that's it. If you had the votes to override…

Representative Stevens: Representative Michaux, I just want you to stick to the bill.

Representative Michaux: I'm talking--I talk the way I want to talk.

Representative Stevens: Representative Michaux.

Representative Michaux: You don't tell me what to talk about. I'm talking about this bill and the effects of that this bill will have. Don't tell me what to say.

Representative Stevens: Representative Michaux, I am directing the committee and I want to keep it relevant to the bill.

Representative Michaux: And I'm talking about what you're up to, which involves this bill. Now if you don't like what I'm saying, that's too bad. That's your problem; it's not mine. What I'm telling you is that you've got a bill that has passed that has repealed the Racial Justice Act. You're trying to do it with this bill because you know you can't override the bill that you passed.

Representative Stevens: And we'd like your comments to be on this bill.

Representative Michaux: I will make my comments any way I want to.

Representative Stevens: And Representative Michaux, we may end the comments.

Representative Michaux: No, no, no. Do what? You're not going to tell me about my comments. I make them the way I want to.

Representative Stevens: They need to be relevant to the bill. That's what we're trying to do

Representative Michaux: (continues inaudibly)

Representative Stevens: The bill. The bill. I'm not trying to; he is.

Representative Michaux: You've got the votes. You've got the votes to do what you want to do. So why are you going to limit anybody in what they want to say? You got the votes to do it, and it's probably going to end in another veto. You're going to be looking at the same thing. So, I'm going to say what I want to say whether you like it or not. And you've interrupted me so much here that it gets to a point that the only thing I'm saying is that this bill that you've got here today simply subterfuge trying to do something to reintroduce a veto override on the Racial Justice Act because you can't do it any other way. It's not going to be successful this time. Take your questions (inaudible)

Representative Stevens: We do have another bill to take up, that is somewhat time sensitive, on mechanics and materialmens liens. It has not been resolved and it's going to take a little while to fully resolve it, but this committee needs to get on board. It is something that's very much going to be affecting commerce. We've already heard title insurance companies maybe refusing to write coverage in the state, which is going to affect banking.

This bill has, in essence, been debated many times, you're right. All of the issues surrounding that have been debated. Representative Bordsen.

Representative Bordsen: Yes, madam chair. I would like to (inaudible)

Representative Haire: Inquiry of the chair, inquiry of the chair please.

Representative Stevens: Yes?

Representative Haire: It was my understanding that the Mechanics bill was not going to be voted on today, it was just going to be discussed.

Representative Stevens: It's not going to be voted on, but we want to present the information so that we will be in a position to start taking it up next week and you can start to deal with some of the issues your constituents may raise. Representative Bordsen.

Representative Bordsen: Thank you, madam chair. It is interesting to note that we can spread the mechanics lien bill over two meetings but we can only have one on this matter. I would also like to back-up Representative Martin's comments about being a native of North Carolina and hearing that with my work on JPS. In the time that I have been here it has been an enlightening process. Anybody who's from this state and think that we are not hardwired to be engaging in discriminatory thinking, it's just part of being. We have a history that leads us to it. We have to keep working all the time to make sure we do better and that is exactly the purpose of the Racial Justice Act: to keep us working hard to root it out, especially in this most important area of our life, our public life that dictates private life.

I find this whole experience today really a sad exercise. We all know what the purpose of this bill is. It is not to reform the Racial Justice Act. So when the Racial Justice Act cannot be gutted in a legitimate veto override, because of this questionable garage process that we seem to have started. Under the guise of reform the sponsors are engaging in a very sad process. You may have spent time studying during the interim. If you recall, most of us were not allowed to be on interim study committees. So, whatever study there was during the interim it did not include this committee, and it is this committee that has to make a vote today. It doesn't speak well for the bill sponsors to do this in a time and a manner, especially in consideration of a matter of life and death, race and prejudice. It's a sad exercise at any time. It's especially sad since we have really only started dealing with the Racial Justice Act and here we are trying to end it. So as we vote, madam chair, that's my opinion but I would like to ask for the ayes and no's.

Representative Stevens: The ayes and no's having been called for, Representative Stam.

Representative Stam: I move that the committee substitute as amended be rolled into a new committee substitute to be given a favorable report, unfavorable to the original bill.

Representative Stevens: That motion being before us, we'll call for the ayes and no's.

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF CUMBERLAND	98 CRS 34832, 35044

STATE OF NORTH CAROLINA

v.

CHRISTINA SHEA WALTERS,
Defendant.

****

DEFENDANT'S MOTION FOR DISCOVERY OF INFORMATION IN SUPPORT OF DEFENSES SET FORTH IN DEFENDANT'S BRIEF

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Defendant, Christina Shea Walters, 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. Defendant was capitally tried for her involvement in the homicide of Susan Moore and Tracy Lambert, in the Superior Court of Cumberland County, the Honorable William C. Gore presiding. Defendant was found guilty of first-degree murder on June 30, 2000, and sentenced to death on July 6, 2000.

2. The Supreme Court of North Carolina found no prejudicial error in the trial or sentencing hearing. *State v. Walters*, 357 N.C. 68, 564 S.E.2d 232 (2003). The United States Supreme Court denied review. *Walters v. North Carolina*, 540 U.S. 971 (2003).

3. 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 her RJA MAR under the amended statute. In her original RJA MAR and in her Amendment, Defendant alleged statutory and constitutional claims and requested an evidentiary hearing on those claims.

4. After an evidentiary hearing in the fall of 2012, the Court granted RJA relief to Defendant Walters and two additional defendants, Tilmon Golphin, 97 CRS 47314-15, and Quintel Augustine, 01 CRS 65079. *State v. Augustine, Golphin & Walters* (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.

5. On October 3, 2013, the Court also granted a writ of certiorari in *Augustine, Golphin & Walters*. The Court heard oral argument in her case on April 14, 2014.

6. 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 three 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.

7. On June 9, 2016, the Senior Resident Superior Court Judge of Cumberland County decided that he would not preside over Defendant's RJA motion.

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[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.

8. 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 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

9. 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).

10. Defendant disputes the purported repeal of the RJA on June 19, 2013 has any application to her previously filed RJA motion; however, alternatively, Defendant intends to provide evidentiary support of her claims that such an interpretation would violate (i) the Due Process and Law of the Land Clauses of the Federal and State Constitutions; (ii) her 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 her 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).

11. 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).

12. Defendant seeks materials from legislators (and others) who were substantially involved with the enactment of amendments to the RJA which Defendant contends violates her 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).

13. 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.'")

14. 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.

15. 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

16. 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.

17. 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.

18. 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

19. 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.

20. 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

21. 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 her 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.

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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:

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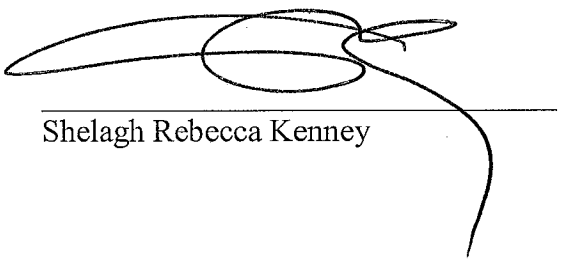
This the 14th day of November, 2016.



Shelagh Rebecca Kenney

State v. Christina Shea Walters
98 CRS 34832, 35044-47, 35391
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
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