No. 411A94-6 **TWELFTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	**)**	
	)	
	)	
v.	**)**	**From CUMBERLAND**
	)	**91 CRS 23143**
	)	
MARCUS REYMOND ROBINSON	**)**	
Defendant	**)**	

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DEFENDANT'S PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

North Carolina enacted the Racial Justice Act to address its concern that existing constitutional and statutory protections were insufficient to root out racial bias in capital cases. This concern was borne out when Marcus Robinson showed during his 2012 RJA hearing that troubling racial discrimination tainted his capital trial.

Mr. Robinson's case presents a question of substantial public importance: after a defendant has demonstrated the odious role race played in deciding his death sentence, does the Constitution permit application of the RJA repeal to sweep that evidence under the rug by foreclosing all avenues of judicial review?

In 1994, Mr. Robinson, a young Black man, was convicted of killing Erik Tornblom, a young white man. At trial, Mr. Robinson's prosecutor struck qualified Black venire members three times more often than other eligible jurors in his case. He struck Black venire members who were similar to the white venire members he accepted. And he asked different and demeaning questions of a Black prospective juror, like whether he, a high school graduate, could read. The same prosecutor exhibited the same racially-disparate strike patterns in his other capital cases, where that prosecutor treated similar Black and white jurors differently. He kept notes of the race

of jurors in his capital cases. The prosecutor admitted that his jury selection may have been informed by his unconscious racial biases.

The prosecutor's racially biased jury selection in Mr. Robinson's case was part and parcel of a larger strategy at that time by Cumberland County's prosecutors. Their mindset was to exclude Black citizens from capital juries. Some of the Cumberland County prosecutors attended a statewide training in how to circumvent *Batson* where prosecutors where provided a cheat sheet of ten pat "race neutral" explanations to give in response to *Batson* challenges. Mr. Robinson's prosecutor described a history of discrimination against Black jurors in the office. This culture was confirmed by sophisticated statistical studies of jury selection in the county that showed that similarly situated Black jurors were overwhelmingly removed by the Cumberland County prosecutors in comparison to other non-Black jurors.

The State's tactics in Mr. Robinson's 2012 RJA proceedings regrettably continued this same racial bias. The State (unsuccessfully) maneuvered to remove Cumberland County's Senior Resident Superior Court Judge, who is Black, from hearing the case. They sent emails explicitly discussing his race and objecting to the possible appointment of other Black judges, and received emails in which one prosecutor indicated his tolerance for a particular Black judge, "[i]f [he] had to pick an African American to hear an RJA motion."

Against this backdrop of unequal justice, Mr. Robinson asks the Court to grant certiorari to review the dismissal of his RJA claims, his separate constitutional claims of race discrimination, and the extensive evidence of racial bias supporting those claims. As shown below, the Constitution simply does not permit the RJA repeal to be applied in a way that insulates such evidence from any statutory or constitutional avenue of judicial review.

Mr. Robinson's case also warrants review because it presents some of the same issues the Court will consider in *Ramseur v. State*, No. 388A10, and *State v. Burke*, No. 181A93-4, where the Court has already granted certiorari review, but in a stronger posture: Mr. Robinson proved racial bias infected his death sentence in a full evidentiary hearing, and obtained judgment in his favor, entitling him under the RJA to a life imprisonment without parole sentence.

Yet another reason to grant review is the erroneous dismissal of Mr. Robinson's RJA claims without judicial consideration of most of his constitutional defenses against application of the RJA repeal to his case. Inexplicably, the court below held it could apply the RJA repeal without addressing all of Mr. Robinson's constitutional challenges to that statute.

Finally, the Court should grant review to consider Mr. Robinson's Double Jeopardy claim, which was not previously considered by the Court. The Double Jeopardy Clause bars the State from attempting to reimpose Mr.

Robinson's death sentence, because the RJA court in 2012 entered a final order acquitting him of that penalty. A favorable ruling on that claim will finally dispose of Mr. Robinson's RJA case and, through imposition of a life imprisonment sentence, restore racial justice here.

For these and the reasons discussed below, the Court should grant Mr. Robinson's petition for a writ of certiorari.

STATEMENT OF FACTS & PROCEDURAL HISTORY

I. History of Mr. Robinson's case prior to enactment of the RJA.

Mr. Robinson was convicted and sentenced to death in 1994 for the robbery and murder of Erik Tornblom. Because Mr. Robinson turned 18 just 80 days before the crime, he would have been ineligible for the death penalty had the murder been committed less than three months earlier. *See Roper v. Simmons*, 543 U.S. 551 (2005). After *Roper*, Mr. Robinson became North Carolina's youngest person still sentenced to death.

Mr. Robinson had a co-defendant, Roderick Williams, who was tried separately and sentenced to life imprisonment. *State v. Williams*, 345 N.C. 137, 138 (1996). At Mr. Robinson's trial, the State argued that he, not Mr. Williams, was the person who shot Erik Tornblom. But Mr. Robinson had told police it was Mr. Williams who pulled the trigger, and the issue was hotly contested at trial. Only after his direct appeal and post-conviction proceedings were over did prosecutors, in a case summary provided to

legislators, describe Mr. Williams as the shooter. *See* Nov. 15, 2011 Email from Peg Dorer to News Outlets, *Re: Media Advisory – with attachments*.[1]

Mr. Robinson's convictions and death sentence were affirmed on direct appeal. *State v. Robinson*, 342 N.C. 74 (1995), *cert. denied*, 517 U.S. 1197 (1996). Mr. Robinson sought post-conviction relief, which the state and federal courts denied. *State v. Robinson*, 350 N.C. 847 (1999); *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006), *cert. denied*, 549 U.S. 1003 (2006).

When an execution date was set in January 2007, Mr. Robinson filed a successor motion for appropriate relief based on challenges to lethal injection, and new developments in science relating to brain development in light of Mr. Robinson's childhood trauma and head injuries. Mr. Robinson had been hospitalized at age three with severe seizures, following extensive physical abuse by his father. He was diagnosed as a battered child with brain dysfunction. He never received the treatment he needed for these serious mental health problems.

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[1] This email was produced on December 15, 2011 in response to a public records request to the Conference of District Attorneys. Mr. Robinson did not proffer it below with his other exhibits at the hearing regarding whether the repeal statute could be applied to his case. No hearing has ever been scheduled on his claims of discrimination in charging and sentencing under the RJA or *McCleskey*.

Mr. Robinson's execution, initially scheduled for January 2007, was stayed due to his challenges to the State's method of execution, which are still pending.

II. Enactment of the RJA.

In 2009, the Legislature enacted the RJA. *See* N.C. Gen. Stat. § 15A-2010 to 2012; *see also* S.L. 2009-464. The law provided limited redress for the influence of racial bias in capital cases, mandating 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. If a defendant's RJA claim was successful, the mandatory (yet limited) relief was that the person's death sentence be vacated, and that the court impose life imprisonment without any possibility of parole. N.C. Gen. Stat. § 15A-2012(a)(3).

The RJA explicitly permitted defendants to use statistical evidence to make their case. N.C. Gen. Stat. § 15A-2011.[2] It specified three bases for proving race was a factor: discrimination based on the defendant's race, the victim's race, or the race of potential jurors excluded from service. The RJA extended its ameliorative effect retroactively to all North Carolina death row

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[2] *Compare McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (holding statewide statistical patterns of racial bias in capital cases, standing alone, do not violate the Constitution, but explaining that such "arguments are best presented to the [state] legislative bodies").

inmates, and gave them one year from its enactment to file claims. N.C. Gen. Stat. § 15A-2012(a).

Legislators enacted the RJA because they recognized that constitutional remedies for addressing racial bias in capital cases had failed. The high evidentiary thresholds for those claims meant they provided no meaningful check on the pernicious influence of racial bias on death sentences. *See e.g.,* 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 shortfalls of *McCleskey*); May 14, 2009 Senate Floor Debate at 7 (Senator Floyd McKissick pointing to recent exonerations where race had been a factor in sentencing and the existing law had proven inadequate).

The legislators had good reason to know additional protections were needed. By the time they enacted the RJA, North Carolina had discovered four men who were wrongly convicted and sent to death row, three of whom were Black. That trend continues. Since the RJA was passed, yet another Black man, Henry McCollum, was exonerated from North Carolina's death row.

At the time the RJA became law, almost half of North Carolina's death row inmates were sentenced by juries with no meaningful minority

representation – despite North Carolina being 35 percent non-white. Thirty-five of the state's nearly 150 death row inmates were tried by all-white juries. Another 38 were sentenced by juries with only one Black member. *See generally Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (noting that group-based exclusion of jurors "deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented").

When the General Assembly passed the RJA, the protections the U.S. Supreme Court established in *Batson v. Kentucky*, 476 U.S. 79 (1986), had proven to be ineffectual in North Carolina. It was 30 years since *Batson*. Our appellate courts had decided over a hundred North Carolina cases involving *Batson* claims. Yet, in all those many cases, not once did an appellate court find discrimination against a minority juror.[3]

III. Procedural history of RJA litigation and related legislative developments.

After the RJA became law, researchers from the Michigan State University College of Law conducted an analysis of hundreds of murder cases in North Carolina. They considered prosecution decisions to seek the death

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[3] *See* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957 (2016); Amanda S. Hitchcock, *Deference Does not by Definition Preclude Relief: The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328, 1328 (2006); Catherine Grosso and Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1535 (2012).

penalty, jury decisions to impose the death penalty, and, in capital cases, prosecution decisions to exercise peremptory strikes. The MSU Study examined jury selection in 173 capital cases, involving 7,421 strike decisions by prosecutors. App. at 204.

Relying in part on the MSU Study, in August of 2010, Mr. Robinson filed a motion for appropriate relief alleging statutory RJA claims and separate constitutional claims under the Sixth, Eighth, and Fourteenth Amendments and the North Carolina Constitution.[4] Mr. Robinson alleged racial bias in prosecutorial decisions to seek the death penalty, in the exercise of peremptory strikes, and in the jury decisions to impose the death penalty.

On January 30, 2012, the Superior Court of Cumberland County, the Honorable Gregory A. Weeks presiding, commenced a 13-day evidentiary hearing in Mr. Robinson's case, involving testimony by seven expert witnesses and introduction of over 170 exhibits.[5] The hearing dealt solely with the RJA claim that prosecutors relied on race in their exercise of

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[4] Subsequent to this filing, in 2011, the Legislature made its first attempt to repeal the RJA. Governor Beverly Perdue vetoed that repeal and the Legislature failed to override. *See* Senate Bill 9 (vetoed Dec. 14, 2011). Governor Perdue explained that she supported the death penalty but felt it was "simply unacceptable for racial prejudice to play a role in the imposition of the death penalty in North Carolina." Clayton Henkel, "Governor Vetoes Repeal of Racial Justice Act," *Progressive Pulse*, Dec. 14, 2011.

[5] The trial court, with Judge Weeks presiding, will be referred to in this petition as the RJA Court. When referring to subsequent proceedings in the trial court on remand from this Court, before the Honorable W. Erwin Spainhour, this petition will use the term Remand Court.

peremptory strikes. The RJA Court reserved hearing and ruling on Mr. Robinson's constitutional claims.

On April 20, 2012, the RJA Court found that race was a significant factor at the time of Mr. Robinson's trial under the RJA statute. It concluded that statistical disparities and intentional discrimination infected Mr. Robinson's trial, as well as the capital justice system in Cumberland County and in North Carolina, over a twenty-year period. Mr. Robinson was resentenced to life imprisonment without possibility of parole, the only relief available under the RJA.

In July 2012, the State petitioned this Court for certiorari review of the RJA Court's order. Also that July, the General Assembly enacted a limited amendment to the RJA modifying its evidentiary and procedural provisions. The Legislature enacted this amendment by overriding Governor Perdue's veto. *See* S.L. 2012-136.

During its consideration of the amended RJA, the Legislature targeted Mr. Robinson's case with "surgical precision."[6] A member of the House Select Committee on the RJA requested audio recordings from Mr. Robinson's RJA

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[6] *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). The evidence discussed here, and later in this section concerning final repeal of the RJA (by the same General Assembly whose enactment was invalidated in *NAACP v. McCrory*), is only an overview of the legislative record. That evidence is set forth in full in the analysis below of the bill of attainder defense to the RJA repeal.

hearing. That committee later discussed Mr. Robinson's case at length. On the Senate side, a senator reacted to Mr. Robinson winning his RJA hearing by noting "deep concern" and urging the State to appeal. Most significantly, one provision in the RJA amendment itself applied exclusively to Mr. Robinson. Section 8 stated that any defendant who had received relief under the initial version of the RJA, but later had the relief vacated on appeal, was subject to the amended RJA. S.L. 2012-136, § 8. Mr. Robinson was the only defendant in the state who, at the time of the RJA amendment, had obtained relief under the initial RJA, and whose relief the State was trying to vacate.

On October 1, 2012, the RJA Court began a consolidated evidentiary hearing on the RJA claims of death row inmates Tilmon Golphin, Christina Walters, and Quintel Augustine. On December 13, 2012, the RJA Court found that they too had established racial discrimination in jury selection under the RJA, and resentenced them to life imprisonment without parole. The State petitioned this Court for certiorari review of the RJA Court's order.

In April 2013 this Court granted the State's petitions to review the RJA Court's order in Mr. Robinson's case, and in October 2013 granted the State's separate petition in the consolidated cases of Mr. Golphin, Ms. Walters and Mr. Augustine.

Again with Mr. Robinson as a target, in June 2013, the Legislature acted, this time repealing the RJA. *See* S.L. 2013-154. The senator who filed

the repeal bill announced it in a news conference that discussed Mr. Robinson and the other three Cumberland County defendants who had received RJA relief. During the debate, legislators supporting the repeal repeatedly invoked Mr. Robinson by name. And as with the earlier RJA amendment, the repeal's retroactivity provision applied to Mr. Robinson. S.L. 2013-154, § 5.(d). That provision said the repeal applied to any case where the defendant obtained RJA relief prior to repeal, but later had that relief vacated on appeal. Mr. Robinson – and the three other Cumberland County defendants – were the only defendants in the state to whom that provision could apply.

In December 2015, the Court issued orders vacating the RJA Court's orders and remanding for further proceedings. *State v. Robinson*, 368 N.C. 596 (2015); *State v. Golphin, Walters, and Augustine*, 368 N.C. 594 (2015). The remand in Mr. Robinson's case was based on the RJA Court's error in denying the State a third continuance to prepare its own study and respond to the MSU Study.[7] In *Golphin, Walters, and Augustine*, the error was consolidating the three cases, as well as prejudice to the State from the

[7] Though eight months passed between Mr. Robinson's hearing and the hearing in *Golphin, Walters, and Augustine*, the State presented no new statistical evidence.

continuance denial. In neither order did the Court address the effect of the repeal or address the Double Jeopardy argument.[8]

The State produced no new evidence on remand. It instead filed a motion to dismiss Mr. Robinson's statutory RJA claims asserting that they were voided by the RJA repeal. The State sought dismissal of the separate constitutional claims on the ground that they were procedurally barred.

In March 2016, three months after issuing its remand orders, the Court granted certiorari review of two other RJA repeal cases. In *State v. Burke*, No.181A93-4, the Superior Court of Iredell County applied the repeal to dismiss RJA claims raised in a post-conviction motion, but that never proceeded to a hearing. The lower court in *Burke* also procedurally-barred constitutional claims of race discrimination. In *State v. Ramseur*, No. 388A10, the same court applied the repeal to dismiss the RJA claims of a defendant who first raised those claims before his capital trial, but agreed to a consent order deferring his RJA claims until post-conviction, since they would not need to be heard if he received a life sentence. Like *Burke*, there was no hearing on the RJA claims in *Ramseur* prior to dismissal.

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[8] Mr. Robinson sought certiorari review of this Court's order in the U.S. Supreme Court, limited to the question of whether there was a violation of the Double Jeopardy Clause. The U.S. Supreme Court denied review. *Robinson v. North Carolina*, 137 S. Ct. 67 (2016).

The Honorable W. Erwin Spainhour heard Mr. Robinson's case on remand.[9] In August 2016, the Remand Court, on its own motion, ordered the parties to file briefs limited to the following question:

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

In November 2016, the Remand Court held a consolidated oral argument in Mr. Robinson's case and the *Golphin*, *Walters*, and *Augustine* cases.[10] Because the Remand Court had denied Mr. Robinson's request for an evidentiary hearing, he submitted an offer of proof in support of his defenses to the RJA repeal that required evidentiary support.

In January 2017, the Remand Court dismissed Mr. Robinson's motions for appropriate relief, finding the repeal barred his RJA claims as a matter of law. The Remand Court discussed only two of Mr. Robinson's defenses to the repeal: that it violated his vested rights and that it is an ex post facto law.

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[9] The Court's remand order originally assigned the Senior Resident Superior Court Judge of Cumberland County, James Floyd Ammons. Mr. Robinson filed a motion to recuse. Judge Ammons denied the motion but voluntarily declined to preside.

[10] Mr. Robinson objected to the cases being heard together. But in its order, the Remand Court stated that it understood this Court's order in *Golphin, Walters, and Augustine* to mean that consolidation was permissible so long as only common legal issues were heard and the proceeding was not evidentiary. App. 2a-3a.

The Remand Court neither considered nor discussed Mr. Robinson's several other defenses, constitutional and otherwise. Nor did the Remand Court consider or discuss Mr. Robinson's constitutional claims of race discrimination, which were independent of the RJA. The Remand Court summarily dismissed those separate claims without explanation.[11]

IV. Evidence of race discrimination in Mr. Robinson's case.

The trial record and RJA proceedings in Mr. Robinson's case, and the evidence later developed in the RJA hearing in *Golphin, Walters, and Augustine*,[12] demonstrate that racial bias permeated the State's imposition of a death sentence on Mr. Robinson at trial.

Mr. Robinson was an 18-year-old Black teenager alleged to have murdered Erik Tornblom, a 17-year-old white teenager. The State alleged, and presented evidence at trial, that Mr. Robinson said he was going to "burn him a whitey" or "do" a white boy. *Robinson*, 342 N.C. at 80.

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[11] In addition to proceedings before Judge Spainhour, on remand, Mr. Robinson sought review in two additional forums. *See Robinson v. Thomas*, 855 F.3d 278 (4th Cir. 2017) (affirming dismissal, without prejudice, of federal habeas petition raising double jeopardy issue; holding federal abstention in deference to state court proceedings was proper); *Walters, Augustine, Robinson, and Golphin v. State of NC and William West*, 16 CV 2916 (Wake County Superior Court) (challenging facial constitutionality of RJA repeal and seeking review by three-judge panel; the suit was later voluntarily dismissed by plaintiff). Given their outcome, neither of those matters bear on the Court's consideration here.

[12] During proceedings before the Remand Court, in February 2016, Mr. Robinson proffered in his case all of the evidence that was developed in *Golphin, Walters, and Augustine*.

The State's racial motivation extended well beyond this theory of the case, to jury selection. At trial, John Dickson, the sole prosecutor, struck 50.0% of the black venire members (5 strikes out of 10 eligible black venire members) and only 14.4% of the other eligible venire members (4 strikes of all of the non-Black 28 eligible venire members). Http. 215; DE4, Cumberland Data.[13] Mr. Dickson's disparate strikes created an empanelled jury with fewer Black jurors than would have been expected with race-neutral strikes. DE4.[14]

Mr. Dickson testified at Mr. Robinson's RJA hearing. The record belied the reasons he offered for striking Black jurors. He said he struck Black 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." *Robinson* Http. 1132. Although Mr. Johnson had repeatedly stated his support for the death penalty, when he gave one answer alluding to the need for an eyewitness, Mr. Dickson struck him from the jury without

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[13] Citations to *Robinson* Http. refer to the transcript of the Robinson 2012 RJA hearing. This hearing transcript was previously made part of the record in this Court. Citations to DE refer to defense exhibits at the 2012 RJA hearings in *Robinson* and later in *Golphin, Walters, and Augustine*. The *Golphin, Walters, and Augustine* exhibits were made part of Robinson's record on remand by proffer.

[14] Despite these disparities, Mr. Robinson's trial counsel did not raise a *Batson* objection. Nor was such an objection raised on direct appeal or during pre-RJA post-conviction proceedings. In one sense, it should not surprise that the racial problems at Mr. Robinson's trial went unnoticed. Not a single minority was involved in the prosecution or trial defense of the case.

further questions. But when non-Black venire member Cherie Combs noted her mixed feelings about the death penalty, Mr. Dickson asked follow-up questions to permit Ms. Combs to clarify her answer. DE 2, *State v. Robinson*, Vol. V, Tpp. 1794-98. Mr. Dickson then passed Combs. *Id*. at 619.

Mr. Dickson claimed he struck Black venire member Elliot Troy because Mr. Troy was charged with public drunkenness. *Robinson* Htpp. 1130-32. Mr. Dickson, however, accepted Cynthia Donavan and James Guy, two non-Black venire members with DWI convictions. DE2, *State v. Robinson*, Vol. II, Tpp. 507, 509-11 (Donovan); Vol. III, Tpp. 820, 840 (Guy).

Mr. Dickson asked a Black juror, Nelson Johnson, a high school graduate, what kind of grades he earned in school, whether he repeated any grades, and whether he had problems reading. App. at 226a-228a. Mr. Dickson never asked any prospective white juror such questions. DE 2, *State v. Robinson*.

Mr. Dickson's reliance on race at Mr. Robinson's trial was part of a larger pattern. As shown at Mr. Robinson's RJA hearing, Mr. Dickson participated in two other capital trials that were part of the MSU Study. Mr. Dickson's race-based conduct was consistent. In each of the three capital cases, Mr. Dickson struck Black venire members at significantly higher ratios than all other venire members (2.2, 3.5, and 4.4). DE3, p. 50. Even after applying a statistical regression analysis to account for other possible

explanations for strikes, the MSU Study continued to find a strong relationship between race and strike decisions in the cases Mr. Dickson prosecuted. *Robinson* HTpp. 214-16.

Mr. Dickson's use of race in capital jury selection is starkly illustrated by his handling of the 1997 capital trials of defendants James Burmeister and Malcolm Wright.[15] Mr. Burmeister and Mr. Wright were white supremacists accused of murdering two Black victims for racially-motivated reasons. In these cases, where Mr. Dickson had a strategic reason to seat jurors he perceived as more sensitive to racially-motivated white-on-Black crime, he reversed his usual practice of striking Black citizens. Mr. Dickson instead disproportionately struck white jurors.

In the Burmeister case, Mr. Dickson used 9 of 10 strikes to remove white jurors, and passed 8 of 9 Black jurors. DE127. In the Wright case, Mr. Dickson used all ten strikes against white jurors, and did not strike a single Black juror. DE153. In both cases, even though the State was seeking the death penalty, Mr. Dickson repeatedly accepted Black jurors with strong reservations about imposing the death penalty. DE132 (State passes juror who said it would be "hard" and "difficult" for her to vote for the death penalty); DE 133 (State passes juror who said because of her religious views

[15] The evidence about Burmeister and Wright was first presented during the *Golphin, Walters, and Augustine* case, and later proffered by Mr. Robinson to the Remand Court.

"I don't believe in the death penalty"); DE 153 at 519, 523 (State passes juror who said "I really wouldn't like someone to be killed").

Mr. Dickson's race-based practices were longstanding. As early as 1978, he had tracked the race of prospective jurors in his jury selection notes. App. at 16a. His approach to jury selection was consistent with his stated views on race and criminal justice. He openly admitted at Mr. Robinson's RJA hearing that there was racial discrimination in the criminal justice system. *Robinson* HTpp. 1182-83. Mr. Dickson admitted that, like others, he himself harbors unconscious bias, and he could not say that race was not a part of his jury selection practice. *Robinson* HTpp. 1177-82.

In these ways, Mr. Dickson was like his fellow Cumberland County prosecutors. In all capital cases examined by the MSU Study over a twenty-year period, Cumberland County prosecutors struck Black venire members at 2.6 times the rate they struck non-Black venire members. *Robinson* HTp. 152; DE2, p. 41. Even the State's expert, Dr. Joseph Katz, agreed that the MSU Study demonstrated large, statistically significant disparities in jury selection, unlikely to be due to chance. *Robinson* HTpp. 1771, 1943-1947, 1949. Even after applying a statistical regression analysis to account for possible race-neutral explanations for strikes, the MSU Study found a strong relationship between race and Cumberland County prosecutor strike decisions. *Robinson* HTpp. 199, 203, 207, 525-27, 545-46; DE6, p. 21-22; DE

10, p.7.[16]

This race discrimination in jury selection was reinforced by race-based training of Cumberland County prosecutors.[17] Two Cumberland County prosecutors attended a training program where they were taught how to defeat *Batson* challenges using a cheat sheet of generic race-neutral "justifications" that could be used to respond to *Batson* objections, such as inappropriate dress, physical appearance, age, attitude, or body language. *Robinson* HTpp. 864-65; App. at 194a; DE 81A; DE 16. One of those prosecutors was found by a trial judge to have violated *Batson* during a jury selection where she read from the cheat sheet. DE 147 at 444-47.

Another longtime Cumberland County prosecutor made a series of racially-charged notes about prospective jurors in the *Augustine* capital prosecution. The *Augustine* prosecutor described one Black potential juror as "ok" and a member of a "respectable black family." App. at 22a. While a Black juror with a criminal history was a "thug," a white juror who had trafficked

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[16] These findings about Cumberland County were consistent with the statewide trend the MSU Study identified. The Study found that, of the 7,400 peremptory strike-eligible jurors in North Carolina capital cases between 1990 and 2010, prosecutors statewide struck 52.6% of eligible Black venire members, but only 25.7% of all other eligible venire members. The study found that the probability of this disparity occurring in a race-neutral jury selection process is less than one in ten trillion. App. at 214a; *Robinson*, Http. 143.

[17] The evidence about prosecutors' training and notes, that follows this footnote, was first presented during the *Golphin, Walters, and Augustine* hearing, and later proffered by Mr. Robinson to the Remand Court.

in drugs was "a fine guy." App. at 23a. He said a Black juror was a "blk wino," while a white juror with a DUI conviction was a "country boy – ok." App. at 19a; *GWA* HTpp. 86-87; DE104.

In a 1992 capital prosecution, just two years before the prosecution of Mr. Robinson, a Cumberland County prosecutor described a Black prospective juror as "B/M, early 20s, broad shoulders, strong as a bull" in his hand-written jury selection notes. App. at 15a.[18]

John Dickson's racial motivation in Mr. Robinson's case aligned with the race-consciousness of Cumberland County prosecutors' capital charging practices.[19] Of the 14 people Cumberland prosecutors sent to death row

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[18] *C.f.,* Robert Smith and Justin D. Levinson, *The Impact of Implicit Racial Bais on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795 (2012) ("The use of animal imagery in reference to the accused can both depend on and perpetuate the negative effects of implicit racial bias."). Cumberland prosecutors' use of racially-charged note-taking was consistent with a broader trend among prosecutors. A capital prosecution in a Martin County capital case tried near the time of Mr. Robinson's trial, with two Black defendants and a white victim, *State v. Jimmy and Richard Smith*, is one troubling example. There, the prosecutor flagged a white juror to rehabiltate in voir dire questioning who would "bring his rope," App. at 11a, and wrote that another prospective white juror was "good" because she would "bring her own rope," App. at 12a, and indicated that a third white juror was a "No," noting that she had a child by a "BM," or Black male. App. at 13a; *see also Foster v. Chatman*, 136 S. Ct. 1737 (2016) (finding *Batson* violation based in part on prosecutor's notes reflecting race consciousness; for example, "No Black Church.").

[19] This aspect of the MSU Study was presented in Mr. Robinson's written RJA motion, but was not the subject of the evidentiary hearing.

between 1990 and 2010, 12 were racial minorities, ten of whom were Black.[20]

Cumberland County prosecutors also discriminated based on the race of the victim. Sixty-three percent of Cumberland homicide victims were Black, yet in cases seeking the death penalty, 64% of the victims were white. The MSU Study found that in Cumberland County cases between 1990 and 2010, 8.0% of cases with a white victim resulted in a death sentence, while only 2.3% of cases *without* a white victim resulted in a death sentence. The MSU Study thus found that Cumberland County cases with a white victim were 3.4 times more likely to result in a death sentence than those without. *State v. Robinson*, Motion for Appropriate Relief Under the Racial Justice Act, Affidavit of Catherine Grosso and Barbara O'Brien. Of course, Mr. Robinson's case had a white victim.

Finally, the discrimination-infused culture that informed John Dickson's prosecution of Mr. Robinson, and Cumberland County prosecutors generally, continued right up until the time of the RJA litigation. The prosecutors in Cumberland County sought to recuse Judge Weeks on the

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[20] Cumberland County prosecutors pursued death sentences against minorities so aggressively that they obtained those sentences even where the minority defendants fell into categories of offenders rarely sentenced to death. For example, one of three female death row inmates in North Carolina is from Cumberland County. Two of four juveniles sentenced to death in North Carolina were from Cumberland County. And two of four persons on North Carolina's death row who did not themselves personally kill the victims are from Cumberland County (including Mr. Robinson).

ground that he had presided over capital trials. The State's internal emails revealed that the prosecutors worried that Judge Weeks would respond to the recusal motion by sending the case to another Black judge, Judge Sumner. In an email conversation with the Cumberland County prosecutors, a district attorney from another county wrote, "If I had to pick an African American to hear an RJA motion, he would be the one." App. at 24a.

REASONS FOR GRANTING CERTIORARI REVIEW

I. This case presents the same issues as *State v. Ramseur* and *State v. Burke*, but in a stronger posture.

Marcus Robinson is the only person whose RJA hearing was held under the original RJA, who received relief, and who was resentenced to life imprisonment under the original RJA.

The Court previously granted certiorari review in *State v. Ramseur*, No. 388A10, and *State v. Burke*, No. 181A93-4. *Ramseur* and *Burke* sought review of the retroactive application of the RJA repeal to bar their claims. In granting their requested review, the Court acknowledged the significance of the defenses to RJA repeal retroactivity. Those are also raised by Mr. Robinson. However, a broad overview of the issues raised in these three cases

shows Mr. Robinson's case presents the key issues in *Ramseur* and *Burke* but in a stronger posture.[21]

Ramseur and *Burke* argue that the state constitution's Due Process Clause bars retroactive application of the RJA repeal because their RJA rights vested when the racial discrimination occurred, and accrued at the RJA's enactment, both of which were before the repeal became effective. *See Burke*, Defendant-Appellant's Brief, pp. 48-53; *Ramseur*, Defendant-Appellant's Brief, pp. 92-98. Mr. Robinson raised these same arguments in the alternative. His primary contention, however, rests on the case law establishing that his rights vested when he received a final order after an evidentiary hearing and was resentenced to life imprisonment under the RJA.

Burke also argues that equity dictates that his due process right to proceed under the RJA vested prior to repeal because he diligently filed his claims and sought relief when the RJA was in effect. In contrast, Mr. Robinson shows that the State, through the actions of prosecutors, consistently sought to delay any RJA hearings while at the same time lobbying the General Assembly to repeal the law. *See Burke*, Defendant-

[21] In this section, Mr. Robinson discusses the claims only in summary form, in order to compare and contrast with *Ramseur* and *Burke*. The claims are more fully explained in the petition in Point III, *infra*.

Appellant's Brief, pp. 53-55.[22] Mr. Robinson's equity claim is stronger. He won RJA relief over a year before the repeal. And the retroactivity provision of the repeal was then specifically tailored to cover his case and set to apply only if this Court vacated the order granting him relief. When this Court did vacate the RJA relief order – partly because "[c]ontinuing this matter to give petitioner more time would have done no harm to [Mr. Robinson]" – on remand, the State used the repeal to argue that, by vacating his relief, this Court had barred Mr. Robinson's claims. *State v. Robinson*, 368 N.C. at 596.

Mr. Burke and Mr. Ramseur argue that their RJA pleadings securing them a right to a hearing gave them a constitutional life, liberty, and property interest in an RJA proceeding that could not arbitrarily be abrogated by the General Assembly. *See Burke*, Motion to Amend Petitioner-Appellant's Brief, Appendix A; *Ramseur*, Defendant's-Appellant's Brief, pp. 34-45. Again, Mr. Robinson has the stronger argument, as he won his case and was resentenced before the repeal. App. at 5a.

Mr. Burke and Mr. Ramseur assert that the retroactive RJA repeal – which rescinded a death penalty defense – imposed punishment on the identifiable class of inmates who sought RJA relief, making the repeal an

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[22] The defendant in *Ramseur* also raised an equity argument, but under the different theory that the defendant detrimentally relied on the State's promise at trial that he could litigate his RJA claims in post-conviction proceedings. *See Ramseur*, Defendant-Appellant's Brief, pp. 46-50.

unconstitutional bill of attainder. *See Burke*, Defendant-Appellant's Brief, pp. 55-59; *Ramseur*, Defendant-Appellant's Brief, pp. 76-82. Again, Mr. Robinson's claim is stronger. The retroactivity provision in § 5.(d) refers to the easily identifiable class of only four litigants who had won their RJA hearings before the repeal.

Mr. Burke argues that it was arbitrary, and thus cruel and/or unusual punishment, when the General Assembly enacted a mechanism to identify and address patterns of capital case discrimination, and then repealed that mechanism after it proved the very discrimination it was designed to correct. *See Burke*, Defendant-Appellant's Brief, pp. 65-68.[23] Again, Mr. Robinson has the stronger argument. He proved racial discrimination in his own trial and in Cumberland County. App. at 232.

The other arguments raised in *Burke* and *Ramseur* – that the repeal is an ex post facto law and that it violates the separation of powers clause – are raised by Mr. Robinson as well.[24]

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[23] The defendant in *Ramseur* raised a cruel and/or unusual punishment claim as well, but under the different theory that it was arbitrary for the defendant to lose his RJA claims simply because the trial court failed to hold a hearing in a timely fashion, prior to repeal. *See Ramseur*, Defendant-Appellant's Brief, pp. 88-90.

[24] *See Burke*, Defendant-Appellant's Brief, pp. 59-64 (ex post facto); *Ramseur*, Defendant-Appellant's Brief, pp. 56-75 (ex post facto); *Ramseur*, Defendant-Appellant's Brief, pp. 90-92 (separation of powers).

Mr. Burke argues that the Court should find that new evidence adduced in RJA proceedings can form the basis for a successor motion for appropriate relief based on *Batson*. He also asserts that the plain language of the original RJA lifted procedural bars to discrimination claims. *See Burke*, Defendant-Appellant's Brief, pp. 40-47. Again, Mr. Robinson has the stronger claim. His successor *Batson* claim is based on racial discrimination evidence presented at an RJA evidentiary hearing in his own case. What's more, the RJA court found that Mr. Robinson established the intentional discrimination *Batson* requires.

As this Court recognized, *Ramseur* and *Burke* raise important legal issues. Mr. Robinson is no different on that point. And in fact, Mr. Robinson's case is even more worthy of the writ, not only because his claims are stronger, but because they are unique: Marcus Robinson is the only person whose RJA hearing was held under the original RJA, who received relief, and who was resentenced to life imprisonment under the original RJA.

II. The Remand Court dismissed Mr. Robinson's RJA claims without resolving the constitutionality of the repeal.

Relying on the repeal statute, the Remand Court dismissed Mr. Robinson's statutory RJA claims. But by applying the repeal to foreclose Mr. Robinson's RJA claims without evaluating all of his constitutional defenses to repeal, the Remand Court failed to fulfill its "duty to determine whether that

action exceeds constitutional limits." *Leandro v. State*, 346 N.C. 336, 345 (1997).

The legal principle at stake is as straightforward as it is settled. "The state laws respecting crimes, punishments, and criminal procedure are, of course, subject to the overriding provisions of the United States Constitution." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). Unconstitutional statutes are by definition void and may not be applied. North Carolina courts have applied this principle for more than two centuries. *See*, *e.g.*, *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787) ("The act of Assembly therefore of 1785 . . . is unconstitutional and void"); *University v. Foy*, 3 N.C. (1 Mur.) 374, 374 (1805) ("I am therefore of opinion, that the repealing act, 1800, ch. 5 . . . is repugnant to the constitution, and void"). The U.S. Supreme Court set out the same precedent in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

As this Court has explained, "[i]f there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *Nicholson v. State Ed. Assistance Authority*, 275 N.C. 439, 447 (1969).

Applying these principles, North Carolina courts, when properly called to do so, review the constitutionality of the General Assembly's acts. *See*, *e.g.*,

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49 (1989) (explaining the Court's duty to review constitutionality of legislative acts).

To be sure, the Remand Court could have – and should have – "avoid[ed the] constitutional questions[,]" *Anderson v. Assimos*, 356 N.C. 415, 416 (2002), by denying the State's motion to dismiss on other available grounds. It should have denied the State's motion to dismiss under the law of the case doctrine, because the State did not rely on the RJA repeal in its appellate arguments seeking reversal of Mr. Robinson's RJA relief. The Remand Court also should have denied the State's motion because this Court was aware of the repeal when it remanded based upon the State's need for more time to prepare and further ordered that AOC make resources available for that appointment of additional experts. Alternatively, by relying on N.C. Gen. Stat. § 15A-1335, the Remand Court could have avoided the constitutional issues by finding that Mr. Robinson, once having been sentenced to life imprisonment without parole, could not again face a death sentence. The Remand Court could have also avoided constitutional issues by finding, as a matter of statutory interpretation, that the RJA repeal did not apply to Mr. Robinson. Indeed, the repeal, § 5.(d), only applied to "final Order[s]", and Mr. Robinson's case is not final, having been remanded by this Court on a procedural ground that left the underlying judgment intact.

But in fact the Remand Court did not avoid the constitutional questions, and instead simply applied the repeal statute without considering Mr. Robinson's constitutional defenses. Not only that, it refused to hold the necessary evidentiary hearing or to enforce the discovery requests filed to obtain evidence relevant to those defenses. Def. Br. 28-109; Remand Hearing Tp. 22 (defense counsel explaining that "the next four issues are the constitutional challenges that are mixed questions of law and fact that do require the presentation of evidence in order to properly present the defendants' defenses to the repeal").

Once the Remand Court decided the repeal statute applied to Mr. Robinson's RJA claims, the next question should have been whether the repeal statute stood up to Mr. Robinson's many constitutional challenges. But, except for the vested rights and ex post facto claims the court did address, App. at 8a-9a, the court failed to assess Mr. Robinson's constitutional challenges to the repeal. As the court's order states, "The court has not found it necessary to reach the questions of constitutional law raised by the defendants except as discussed[.]" By "as discussed," the Remand Court was referring to its earlier rejection of Mr. Robinson's claim that his rights in the RJA had vested and could not be constitutionally stripped from him, and the court's terse conclusion that the RJA repeal was not an ex post-facto punishment. App. at 8a-9a. *See* Point III (C), (D), *infra*.

Nor did the court share in its order any justification for its choice to ignore the constitutional defenses to repeal, which are discussed below in Point III, and include violations of the constitutional prohibitions against bills of attainder, arbitrary application of the death penalty, and of the doctrine of separation of powers.

By avoiding important constitutional arguments against applying remand, the Remand Court violated Mr. Robinson's fundamental constitutional rights to access to the courts and to judicial review: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. The Fourteenth Amendment to the U.S. Constitution also provides a "constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). *See also Lewis v. Casey,* 518 U.S. 343 (1996) (clarifying the right); U.S. Const. amend. XIV; N.C. Const. art. I, § 19 (setting out, among others, the right to due course of law).

This Court should grant certiorari to remedy the Remand Court's inexplicable abdication of its duty to provide Mr. Robinson access to judicial review of his constitutional defenses to the RJA repeal.

III. This Court should address the constitutional defenses to application of the RJA repeal to Marcus Robinson.

Whether improperly decided by the Remand Court (vested rights and ex post facto), or ignored altogether (bill of attainder, Eighth Amendment, and separation of powers), this Court should grant review to consider Mr. Robinson's constitutional defenses to the RJA repeal.

A. Bill of Attainder

This Court should grant certiorari because the General Assembly's retroactivity provision of the RJA repeal is a bill of attainder. It precisely and deliberately targeted Mr. Robinson for additional punishment by stripping from him his RJA defense to the death penalty. 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). These acts are unconstitutional. Article I, § 10, Clause 1 of the U.S. Constitution commands: "No State shall . . . pass any bill of attainder." The prohibition against bills of attainder "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U.S. 437, 445 (1965).

Establishing that a legislative enactment is a bill of attainder requires Mr. Robinson to show that: (1) the legislation specifically targeted him individually (or he was a member of an identifiable targeted group), (2) the legislative record shows an intent to punish, and (3) the statute falls within the historical meaning of legislative punishment. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984); *State v. Johnson,* 169 N.C. App. 301, 310 (2005) (using elements from *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*). Mr. Robinson demonstrates all three below sufficiently for this Court to hold the repeal to be a prohibited bill of attainder or at a minimum to order an evidentiary hearing on his claim.

(1) The RJA retroactivity repeal section specifically targeted Mr. Robinson.

Shortly after this Court granted the State's petition for certiorari in April of 2013, the General Assembly enacted the RJA repeal with this included retroactivity provision:

> This section [making pending RJA claims null and void] 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 effective date of this act and the Order is vacated upon appellate review by a court of competent jurisdiction.

S.L. 2013-154, § 5.(d). The first question is to whom could this provision

apply. The answer is Mr. Robinson and only three others. Only Mr. Robinson had received RJA relief and been resentenced under the initial RJA and only three others subsequently received relief and were resentenced before the repeal was enacted. Other than those four people, not one other life could have been affected by this provision because no one other than those four people could have had their already existing relief vacated by this Court.

The language alone proves the General Assembly's intent to target Mr. Robinson, but that was not the first time the General Assembly had specifically targeted Mr. Robinson in the RJA retroactivity provision. While for the RJA repeal he was the first of four persons to whom the retroactive punishment could apply, in the RJA amendment he was the only person targeted. When enacted, the RJA amendment applied to the then unique procedural posture of his case. After saying the RJA amendment did not apply to completed cases meeting certain standards, the General Assembly went directly at Mr. Robinson adding that if

> an order by a trial court which would otherwise meet the requirements of this section is vacated or overturned upon appellate review, then any further proceedings required to prove a claim that racial discrimination was a significant factor in seeking or imposing the death penalty shall be subject to the provisions of this act.

S.L. 2012-136, § 8. When this provision became law, only Mr. Robinson had received relief and been resentenced to life without parole and thus faced

death again. So, not once but twice, the General Assembly specifically targeted Mr. Robinson.

Most important, by directly targeting Mr. Robinson's case, Section 5.(d) of the repeal "operate[ed] only as a designation of particular persons." *Communist Party of United States v. Subversive Activities Control Bd.,* 367 U.S. 1, 86 (1961); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866).

Necessarily, the RJA is a unique fact pattern as North Carolina was the first state to adopt such legislation. However, *Neelley v. Walker*, 67 F. Supp. 3d 1319 (M.D. Ala. 2014) presents an analogous situation. In *Neelley*, the court upheld a complaint whose theory was that a law retroactively rescinding the right to parole review targeted one former death row prisoner (who had won a rare grant of clemency). The court based its decision on a retroactivity provision designed to apply the legislation to her case and language in floor debates expressing the intent of the legislation to deny her the opportunity of parole. *Id*. at 1329-30. *See also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (in context of Ex Post Facto Clause, three capital defendants were "identifiable targets of the legislation" where the section applied only to three persons who had received the death penalty from a three-judge panel).

(2) The legislative record shows an intent to punish Mr. Robinson.

Beyond the fact that the enactments' plain language applies specifically to Mr. Robinson's case, legislators' emails and documents revealing the legislation's history establish that the provisions were a response to Mr. Robinson receiving a life sentence. The classic sources for considering whether the record shows an intent to punish include "legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation." *Eagleman v. Diocese of Rapid City*, 862 N.W.2d 839, 845 (S.D. 2015) (quoting *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 478 (1977)).

Although the Remand Court did not rule on Mr. Robinson's discovery requests before dismissing his RJA claims, effectively denying those requests, information from publicly-available legislative records and news reports amply prove the General Assembly's desire to impose a death sentence on Mr. Robinson without judicial process.

Legislators followed Mr. Robinson's case from its start. His pending RJA hearing became the prosecutors' focal point for RJA repeal lobbying efforts. *See, e.g.,* App. at 26a-37a (Proffered Exhibits 3, 5, 13, 14, 15). Cumberland County prosecutors and their colleagues urged the legislature to repeal the act before Mr. Robinson's hearing started. *Id*. This effort failed.

Soon after the hearing started, legislators were debating changes to the RJA in the House Select Committee on Racial Discrimination in Capital

Cases. *See* App. at 38a, *House committee clashes over Racial Justice Act*, NBC-17/WNCN, Feb. 10, 2012. That House Committee paid close attention to the developments at Mr. Robinson's hearing. One member "requested the audio recording from the arguments being made in Cumberland County because they are important." App. at 43a, *House Select Committee on Racial Discrimination in Capital Cases*, Minutes (Feb. 10, 2012), at 4. One Committee meeting largely focused on Mr. Robinson's case. *See* App. at 62a-81a, *House Select Committee on Racial Discrimination in Capital Cases*, Minutes (March 27, 2012).

The Senate President Pro Tempore reacted quickly to Mr. Robinson's life sentence when the RJA court entered its order, focusing on the issue of assuring Mr. Robinson's punishment. He announced his "deep concern" that Mr. Robinson could become eligible for parole and went further – actually urging the State to appeal. *See* App. at 82a, Sommer Brokaw, *First Racial Justice ruling finds racial discrimination*, The Charlotte Post, Apr. 26, 2012.

Shortly after Robinson's decision, the House Judiciary Subcommittee substituted new language creating an amended RJA, S.B. 416. In the House floor debates of the new bill, legislators continued to reference explicitly the *Robinson* case. *See* App. at 110a, House Floor Debate*, SB 416 - Amend Death Penalty Procedures*, Second & Third Reading (June 12-13, 2012), at 27; App. at 124a, Judiciary B Committee Meeting: *Amending the Racial Justice Act*

(June 11, 2012), at 6. A representative noted that the retroactivity provision, Section 8, would apply to the "Robinson case." *Id*.

The General Assembly ratified the amended RJA. S.L. 2012-136. The Governor vetoed it, but a legislative override made it law.

The *Fayetteville Observer* reported that the "Robinson decision outraged state lawmakers, who had been trying since last year to overturn the Racial Justice Act but were stymied by a veto from the governor." App. at 137a, Paul Woolverton, *Racial Justice Act: Four killers get a hearing on claims of racial bias*, Fayetteville Observer, July 6, 2012; *see also* App. at 138a, Paul Woolverton, *Tilmon Golphin, who murdered two lawmen, is trying to get his death sentence overturned*, Fayetteville Observer, July 6, 2012.

Defendants Golphin, Walters, and Augustine obtained RJA relief under the amended law in December 2012. Cumberland County prosecutors, along with the DA Conference, responded by increasing their General Assembly lobbying efforts seeking a repeal of the RJA, focusing on the four individual cases. In January of 2013, DA Conference staff exchanged emails with a Cumberland County Assistant District Attorney to obtain photographs of Mr. Robinson and the crime scene photographs of the victim in his case, Erik Tornblom. App. 140a-149a, *E-mails from Thompson to Kimberly Overton and Kimberly Overton to Dorer* (Jan. 18, 22, 23, 2013).

On March 6, 2013, Robert "Al" Lowry, the brother of Ed Lowry, sent an

email to some and possibly all of the legislators in the North Carolina General Assembly, criticizing the decisions in Mr. Robinson's and in those of Mr. Golphin, Ms. Walters, and Mr. Augustine, and asking legislators to repeal the RJA in its entirety and to bring "justice and closure" to him and his family. *See*, *e.g.*, App. at 150a, *E-mail from Robert A. Lowry to Rep. Pricey Harrison* (Mar. 6, 2013, 10:41 A.M.).

On March 13, 2013, Senator Thom Goolsby, filed a bill to repeal the RJA entirely. The *Fayetteville Observer* reported a news conference announcing the repeal and highlighting the link between the repeal effort and the four Cumberland County cases. App. at 152a, Paul Woolverton, *Families of Fayetteville-area murder victims support bill to repeal Racial Justice Act,* Fayetteville Observer, Mar. 14, 2013.

On March 26, 2013, the Senate Judiciary Committee debated the repeal statute, including § 5.(d), the retroactivity provision. The Cumberland County cases were mentioned repeatedly during this debate. App. at 156a-67a, *Capital Punishment/Amendment*, Mar. 26, 2013.

Building to the vote, the prosecutors continued to use Mr. Robinson's case in their lobbying efforts. On May 29, 2013, in response to a request from DA Conference Director Dorer, a Cumberland County Assistant District Attorney provided the racial makeup of the juries in Mr. Robinson's and the three other RJA cases. App. at 168a, *E-mail from Thompson to Dorer* (May

29, 2013, 12:36:18 P.M.). Dorer then wrote to Senator Stam on May 31, 2013 with the "information on the 4 cases that Judge Weeks removed from death row under the Racial Justice Act." She provided information on the race of the defendants and victims, and jury composition. App. at 169a, *E-mail from Peg Dorer to Paul Stam* (May 31, 2013, 8:48:39 A.M.).

Dorer also emailed legislative staff for Senator Goolsby and the House staff about talking points for the repeal legislation. The email specifically identifies Mr. Robinson's and the three other Cumberland County cases. App. at 171a, 176a, *E-mail from Dorer to Joseph Kyzer and Weston Burleson* (June 4, 2013; 12:03:12 P.M.).

On June 5, 2013, at the debate on the third reading of S.B. 306, legislators repeatedly discussed the cases of the four RJA defendants. Senator Stam discussed the cases and his criticism of their outcomes. App. at 177-78, Ex. 52, House Floor Debate, *SB 306 – Capital Punishment/Amendments*, Third Reading (June 5, 2013), at 2, 4.

On June 19, 2013, the General Assembly repealed the RJA, effective that date. Even three years after the repeal, legislators continued to point to the goal of reinstating death sentences for Mr. Robinson and the other Cumberland County RJA defendants as the reason for the legislation. In his recent campaign for attorney general, Sen. Newton touted, "Buck Newton repealed [the Racial Justice Act] because it let cold-blooded murderers escape

death row for unrelated statistical data – not the evidence of their crimes." App. at 192a, Buck Newton, http://web.archive.org web/20161117172149 http://www.bucknewton.com/justice (snapshot dated 10/19/16).

(3) The repeal statute falls within the historical meaning of legislative punishment.

Beyond the General Assembly's specific targeting of Mr. Robinson with an intent to punish him, the retroactivity provision of the repeal is a bill of attainder because it results in the legislative imposition of a punishment that is well within the historical meaning of punishment. The punishment in question is the ultimate one – a death sentence. Here it is achieved by legislatively stripping away Mr. Robinson's pending RJA defenses to the death penalty.

The death penalty is the paradigmatic historic legislative punishment. "The classic example [of attainder] is death." *ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2010). *See also, Selective Serv. Sys.*, 468 U.S. at 852 (similar); L. Ostler, *Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic*, 32 CAMPBELL L. REV. 227, 250 (2010) ("If the person's life was called for (by a legislative bill), then it was a true bill of attainder.").

Courts have repeatedly recognized that legislatively stripping away a defined group's right to assert a defense constitutes a bill of attainder. *See*

Putty v. United States, 220 F.2d 473, 478 (9th Cir. 1955) (legislature's attempt to deny the defendants retroactively the grounds to attack the judgment was a bill of attainder); *Pierce v. Carskadon*, 83 U.S. (16 Wall) 234, 238-39 (1872) (finding a bill of attainder violation where the trial court attempted to apply new legislation that dramatically changed the defense). The "denial of access to the courts, or prohibiting a party from bringing an action" which was previously authorized by law, constitutes punishment by a bill of attainder. *Rhode Island Depositors Econ. Prot. Corp. v. Brown*, 659 A.2d 95, 104 (R.I. 1995) (citing *Pierce v. Carskadon,* 83 U.S. (16 Wall) 234 (1872), and *Cummings v. Missouri,* 71 U.S. (4 Wall) 277 (1866); *see also Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 716 (D.R.I. 1994), *aff'd*, 45 F.3d 530 (1st Cir. 1995) (same).

According to the Remand Court, the effect of the RJA repeal legislation was to render all RJA motions filed before the effective date of the repeal void. The repeal has had the desired effect of nullifying a pending RJA claim previously found to be meritorious, and subjecting Mr. Robinson to the threat of a sentence of death without a defense. Thus, the General Assembly's retroactive repeal of the RJA is an unconstitutional bill of attainder. This Court should so conclude based on the repeal's language alone, or by taking judicial notice of the legislative record. Alternatively, the Court should remand for an evidentiary hearing.

B. Arbitrary Application of the Death Penalty

Certiorari is required to determine whether the Eighth Amendment and N.C. Const. art. I, § 27 tolerate the unique and troubling circumstances presented here. North Carolina passed the RJA, thus committing itself to investigating and remedying racial bias in capital cases. This legislation's new discovery mechanism prompted disclosure of new evidence. That evidence showed discrimination in Mr. Robinson's trial and sentence of death, and in death cases in Cumberland County.

Armed with the new evidence, including new statistical studies and previously undisclosed statements and notes by Cumberland County prosecutors, Mr. Robinson proved at his RJA evidentiary hearing that racial bias tainted his death sentence. When the Remand Court dismissed this case, it ignored this evidence. Meanwhile, members of the Legislature who had objected to the RJA Court's findings of sweeping discrimination had rewritten the RJA to strip judicial review and to take away a new hearing for Mr. Robinson should his case be remanded.

On remand, the State argued that Mr. Robinson's constitutional claims were procedurally barred, and further argued that his statutory RJA rights were repealed during the pendency of the appeal to this Court. The Remand Court adopted these arguments and dismissed Mr. Robinson's statutory and constitutional claims without affording him any opportunity to prove racial

bias infected his trial, and subjecting Mr. Robinson to execution.

Neither the federal nor state constitution permit a state to create a statutory mechanism for uncovering evidence of racial bias, and then to foreclose any mechanism, either statutory or constitutional, for review of that evidence. U.S. Const. amends. VIII, XIV; N.C. Const., art. I, § 27. It "would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it is imposed 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); *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").

Just this year, the Supreme Court made clear, even in the face of a longstanding rule barring impeachment of a verdict, that the Constitution requires some mechanism to redress racial discrimination. "A constitutional rule that racial bias in the justice system must be addressed – including, in some instances, after the verdict has been entered – is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). *See also Batson*, 476 U.S. at 99 ("By requiring trial courts to be sensitive to the racially discriminatory use of peremptory

challenges, our decision enforces the mandate of equal protection and furthers the ends of justice."); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (finding the defendant's claim of racial bias "extraordinary" in light of evidence that he "may have been sentenced to death in part because of his race").

It falls to this Court to grant certiorari to consider the constitutionality of North Carolina enacting a law to allow uncovering any evidence of discrimination in capital cases and then, after evidence of discrimination is uncovered, repeal that law while simultaneously imposing procedural bars on any constitutional claim based on that evidence. Without certiorari, the General Assembly has foreclosed any judicial review of racial bias in capital cases, eliminating an inquiry essential to maintaining the integrity of and public confidence in the justice system.

C. Vested Rights

Like *Burke* and *Ramseur*, Mr. Robinson presents a strong claim that his right to RJA relief vested when, having suffered a capital trial in which race was a significant factor, the RJA gave him a claim for relief from execution.[25] The Court should grant certiorari, here, too, on that same basis.

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[25] *See Smith v. Mercer*, 276 N.C. 329, 337 (1970) (instructing it would be unconstitutional for legislation, given "retroactive operation . . . to . . . destroy a vested right, or create a new liability in connection with a past transaction, [or] invalidate a defense which was good when the statute was

But separate from the vested rights issue in *Burke* and *Ramseur*, Mr. Robinson's case presents an additional, compelling vested rights claim: his right to his RJA defense against execution vested when he obtained a final judgment granting his RJA claim, and when he was sentenced to life without parole.

Article I, Section 19 and Article IV, Section 13 of the North Carolina Constitution, and the Fourteenth Amendment's Due Process Clause, bar the General Assembly from doing what it did here: depriving litigants of their vested, substantive rights under duly enacted legislation. *Fogleman v. D&G Equip. Rentals*, Inc., 111 N.C. App. 228, 230-33 (1993); *Lowe v. Harris*, 112 N.C. 472 (1893). Once Mr. Robinson had a substantive, vested right to his relief after the RJA Court entered its order and sentenced him to life, the legislature could not constitutionally rescind that relief. *State v. Keith*, 63 N.C. 140, 145 (1869) (finding General Assembly's repeal of amnesty it had previously granted improperly "took away from the prisoner his vested right to immunity[,]" discussed further *infra*).[26]

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passed"); *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36, 38 (1921) (finding vested right accrued upon the date of injury, and legislature could not defeat or modify it once accrued).

[26] Similarly, once Mr. Robinson proved his RJA claim, he obtained a life, liberty, and property interest in the life sentence the statute mandated. State and federal due process therefore forbid applying the RJA repeal to retroactively abrogate that interest. *See Jones v. Keller*, 364 N.C. 249, 256 (2010); *DA's Office v. Osborne*, 557 U.S. 52, 68 (2009); *Bd. Of Parole v. Allen*,

As this Court and the Court of Appeals have explained, litigants' rights, if not already vested, vest when they obtain a lawful final judgment in their favor.[27] In denying this claim, the Remand Court did not disagree that the General Assembly had deprived Mr. Robinson of his rights under the RJA, or that those rights were substantive, or that he had already obtained judgment in his favor. Rather, it found that Mr. Robinson had no vested right because the order granting Mr. Robinson RJA relief was not a "final judgment." App. at 9a. The court was persuaded, by the State's argument, that an "order or judgment is not final until it has undergone appellate review or the time for discretionary review has expired[,]" App. at 8a (citing *Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986); *Linkletter v. Walker*, 381 U.S. 618, 622, n.5 (1965)). But those cases provide no basis for the Remand Court's decision.

Linkletter and *Allen* say nothing of "final judgments." Rather, they address when a criminal *conviction* becomes final for application of new constitutional rules. *See*, *e.g.*, *Allen*, 478 U.S. at 257-58 (addressing

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482 U.S. 369, 377-78 (1987); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

[27] *Bowen v. Mabry*, 154 N.C. App. 734,736 (2002) (explaining "a lawfully entered judgment is a vested right"); *Dunham v. Anders*, 128 N.C. 207, 207 (1901) ("We are therefore of opinion 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."); *Dyer v. Ellington*, 126 N.C. 941, 941 (1900) (concluding legislature could repeal previously available cause of action, and deny plaintiff penalty he would have been owed because "the penalty had [not] been reduced to judgment" and therefore had not vested).

"*convictions* that became final before our opinion [in *Batson v. Kentucky*] was announced") (emphasis added) (quoting *Linkletter*, 381 U.S. at 622, n. 5 (same discussion of final convictions)). This context-specific definition comes into play when courts determine retroactivity for new constitutional rules of criminal procedure, because such rules are generally not available to prisoners whose convictions are final. *See*, *e.g.*, *Wharton v. Bockting*, 549 U.S. 406, 409 (2007) (holding that the rule of *Crawford v. Washington*, 541 U.S. 36 (2004) "is [not] retroactive to cases already final on direct review"). Convictions become final after a *right* to direct appeal has been exercised. Here we deal with a motion for appropriate relief (the only vehicle for RJA claims). And here, the judgment of the RJA Court was final when entered.

This Court has answered the question of when a judgment on a motion for appropriate relief is final. The Court said that a judgment on such a motion is final where there is no *right* to appeal. *See State v. Green*, 350 N.C. 400, 408 (1999). In *Green*, this Court was deciding whether a prisoner could benefit from legislation providing new discovery rights which had become effective only after the prisoner's previously-filed motion for appropriate relief had been denied. The Court answered no. It explained: "defendant's motion for appropriate relief was denied by the trial court on 1 May 1996. *This was a final judgment*. Any appellate review of that judgment was subject to this Court's *discretionary* grant of certiorari. N.C.G.S. § 15A–

1422(c)(3) (1997)" (emphasis added). *Green* is the correct authority here, not *Linkletter* and *Allen* because, as in *Green* and as the State recognized by filing for certiorari review of the RJA Court's order instead of filing a notice of appeal, further review of Mr. Robinson's relief could only be by a grant of certiorari from this Court.

The finality of Mr. Robinson's judgment aligns his case with the cases discussed above establishing that "a lawfully entered judgment is a vested right." *Bowen*, 154 N.C. App. at 736-37; *see also* n. 27, *supra* (collecting cases). This Court's grant of certiorari and its decision on grounds other than the repeal of the RJA changes nothing. That decision considered no constitutional questions but, instead, limited itself to the question of whether the denial of a continuance entitled the state to a new hearing.

The Remand Court reached its result on the vested rights claim in part by erroneously distinguishing *State v. Keith*, 63 N.C. 140 (1869). *Keith*, however, presents a stunningly parallel situation to events here: the RJA's enactment, its retroactive application to existing death sentences, and its subsequent repeal after Mr. Robinson won relief.

The defendant in *Keith* fought in the Civil War as a confederate officer and during that service in 1863 allegedly killed another man. 63 N.C. at 140-41. Three years after the killing, in 1866, the General Assembly issued a "full and unequivocal pardon for all 'homicides and felonies' committed by officers

or soldiers" who were acting, for either side, under proper orders, or otherwise in fulfillment of their military duties. *Id.* at 142 (quoting Amnesty Act of 1866-67, 1866 N.C. Acts § 1). Beyond that, it provided that a soldier upon proof of being an officer or private for either side "shall be presumed [to have] acted under orders, until the contrary shall be made to appear.'" *Id.* (quoting 1866 N.C. Acts § 2). Two years after enacting the amnesty, the Legislature repealed it. *Id.* at 142 (citing Ordinance of 1868, ch. 29, p. 69).

Mr. Keith was indicted after the repeal. He claimed the protection of the Amnesty Act, but the State argued the repeal barred that. This Court rejected the State's argument because, in its opinion, the repeal "took away from the prisoner his vested right to immunity." *Id.* at 145. As discussed further in (D) *supra*, this Court also found the repeal to be an impermissible ex post facto law. *Id*.

Here, the Remand Court below distinguished *Keith* only by finding that – unlike the Amnesty Act which had provided a pardon or "in effect [a] final judgment" – the judgment was not final. As shown above, this reasoning was erroneous. *Green*, 350 N.C. at 408.

Finally, with regard to vested rights, Mr. Robinson has equity arguments not found in *Burke* and *Ramseur*. The record, as it stands, is sufficient to hold that Mr. Robinson's right has vested – but if there were any doubt, then the equities of his situation come into play. *See*, *e.g.*, *Michael*

Weinman Assoc. Gen P'ship v. Town of Huntersville, 147 N.C. App. 231, 234 (2001) (recognizing that vested rights protect interests in certainty, stability, and fairness). The equities, on which the Remand Court below refused a hearing and refused to consider, are the unfairness of the State in creating a law to address the infection of racial bias in capital sentencing; providing a mechanism for adjudicating such claims; granting Mr. Robinson relief based on the deep proof of racial discrimination he uncovered; sentencing Mr. Robinson to life without parole, and transferring him off death row, only to have the State reverse this statutory course, sweep the evidence of racial discrimination under the rug, and seek once again to execute Mr. Robinson. Were the State successful, Mr. Robinson would go to his death holding solid proof obtained under a state statute that racial discrimination tainted his death sentence, never having had a single courthouse door open for him to vindicate his rights. As this Court explained more than a century ago, "when the plaintiff obtained judgment . . . he acquired a vested right of property that could be divested only by judicial, and not by legislative, proceedings." *Dunham*, 128 N.C. at 207.

D. Ex Post Facto

The Remand Court also erred in its decision that the repeal was not an impermissible ex post facto punishment. Both the U.S. and North Carolina Constitutions bar ex post facto laws. U.S. Const. art. I, § 10, cl. 1; N.C. Const.

art. I, § 16. *Keith*, *supra*, found the Legislature's removal of amnesty both the improper destruction of a vested right and an ex post facto law. *Keith*, 63 N.C. at 145.

The Remand Court discussed *Keith* at length in its discussion of vested rights, App. at 8a-9a, before it reached the question of whether the RJA repeal was an ex post facto law. Yet it denied Mr. Robinson's ex post facto claim without considering *Keith*'s application saying simply that the ex post facto prohibition applies to "'[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.'" App. at 9a (quoting *Jones v. Keller*, 364 N.C. 249, 259 (2010) (emphasis in *Jones*)).

Jones' general statement in no way distinguished or silently overruled *Keith*. Instead, *Keith* continues to control here where legislative action *after* the crime provides relief against the prior available punishment, and thereafter the Legislature attempts to make that relief unavailable. Relief originally provided – even though after the time of the crime – may not be rescinded without violating the ex post facto punishment prohibition.[28] And,

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[28] *See also In re Bray*, 158 Cal.Rptr. 745, 749 (Cal. App. 1979) (citing *Keith,* and holding that retroactive and ameliorative sentencing reform of legislature placed "prisoners such as petitioner in a position as if the [reform] were the law at the time they committed their offenses[,]" and therefore could not be subsequently rescinded); *cf. Stogner v. California,* 539 U.S. 607, 617 (2003) (citing *Keith* and finding California law allowing prosecution of

as shown above, the Remand Court's attempt to distinguish *Keith* because it purportedly involved relief akin to "final judgment" was incorrect.

The Court should grant certiorari to reaffirm *Keith*, or at a minimum to clarify whether it should apply in the directly pertinent circumstances here.

E. Separation of Powers

The repeal of the RJA violates the Separation of Powers Clause in the state constitution, both on its face and as applied to Mr. Robinson. The specific constitutional violation is that the language of the repeal takes from the judiciary its exclusive right to pronounce sentence on a defendant. If the law's mandate is followed, Marcus Robinson could be executed under the authority of the legislative enactment without a judge pronouncing his sentence. It appears that in nearly two centuries, the General Assembly has never usurped the judiciary's powers in a similar way, so the constitutional question here is fundamental, novel and therefore worthy of certiorari.

Key among the state constitutional protections of the individual from the State is our system of checks and balances. *See* N.C. Const., art. I, § 6. Separation of powers were so important to the drafters that protection was not only enshrined in the Declaration of Rights, it was declared to exist

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previously-time barred sex crimes an impermissible ex post facto law); *Thompson v. State*, 54 Miss. 740, 743 (1877) ("a subsequent repeal of . . . statute [setting forth statute of limitations], more than two years after the commission of the crime, could not take away the complete defense, which, by the act, would have become vested, if that act was applicable").

"forever." In the Declaration, only two rights are to last in perpetuity: separation of powers and freedom from slavery. *Id.* at art. I, § 17.

Though article II, § 22 gives the legislative branch the exclusive right to enact laws, nothing in the Constitution permits legislators to pronounce sentence. *See generally Jernigan v. State*, 279 N.C. 556, 563-64 (1971) ("[t]he functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law").

How does the General Assembly's enactment violate separation of powers on its face? In § 5.(d) it legislatively decreed that Mr. Robinson's RJA motion was "void," thus legislatively adjudicating the outcome of a legal claim. But it is a judicial function "to put an end to litigation," not a legislative function. *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 505 (1922).

How does the General Assembly's enactment violate separation of powers as applied to Mr. Robinson? It legislatively imposed a death sentence on Mr. Robinson. Mr. Robinson was sentenced to death by the judge after his original trial. That was his sentence until he won relief under the RJA, and he was sentenced to life in prison without the possibility of parole. That was Mr. Robinson's last sentence. After hearing this case on certiorari, this Court ordered the matter remanded for further consideration, upon which the

Remand Court simply applied the repeal and rescinded Mr. Robinson's relief. If the Remand Court's decision is permitted to stand, the General Assembly will have succeeded in claiming the power of the judiciary to decide Mr. Robinson's sentence. North Carolina's Constitution does not allow this.

IV. The Court should consider Mr. Robinson's separate constitutional defenses against execution.

In the proceedings below, Mr. Robinson raised three constitutional claims, each independent from his statutory RJA claims and the constitutional defenses barring application of the repeal. The Remand Court dismissed these claims without an evidentiary hearing, and without even permitting oral argument. The Remand Court summarily dismissed the claims without any comment whatsoever. As set forth below, this was error.

A. Double Jeopardy[29]

The Court should grant review because, under the rare circumstances of this case, the Double Jeopardy Clause prohibits imposing the death

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[29] Robinson raised this issue with the Court during the prior certiorari review proceedings, but the Court did not decide it. The issue is now before the Court as a threshold question. In separate proceedings in the United States Court of Appeals for the Fourth Circuit, the State conceded that, at this stage in state court, the double jeopardy issue would be ripe for review by this Court and not subject to procedural bar merely because Mr. Robinson raised it earlier. *See Robinson v. Thomas*, 855 F.3d 278, 289, n.6 (4th Cir. 2017) ("The State has conceded [Robinson is] entitled to raise [his] double jeopardy argument in state court, and we accept the State's representation at oral argument that it would not assert as a defense a procedural bar to [Robinson] making a double jeopardy argument during the state proceedings by some reading of the North Carolina Supreme Court's order.").

penalty after the trial court acquitted Mr. Robinson of that penalty, and imposed a sentence of life without parole.

In *Bullington v. Missouri*, 451 U.S. 430 (1981), the U.S. Supreme Court held that double jeopardy bars subsequent proceedings after acquittal of the death sentence in the sentencing phase of a capital trial because the "jury has already acquitted the defendant of whatever was necessary to impose the death sentence." 451 U.S. at 445 (quotation and citation omitted). Identically, at Robinson's initial RJA hearing, the trial court acquitted him of whatever was necessary to impose death by finding he proved his RJA defense to the death penalty. In other words, the trial court entered "findings 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." *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984).

For double jeopardy purposes, an acquittal of the death penalty in post-conviction proceedings has the same effect as one at trial. In the context of federal habeas review of the sufficiency of the evidence, the U.S. Supreme Court has explained that "reversal for insufficiency of the evidence is equivalent to a judgment of acquittal, [and] such a reversal bars retrial." *McDaniel v. Brown*, 558 U.S. 120, 131 (2010). In *Lockhart v. Nelson*, 488 U.S. 33, 37, n.6 (1988), the Court assumed without deciding – and the State conceded in *Lockhart* – that "the rule that retrial is prohibited after a

conviction is set aside by an *appellate* court for evidentiary insufficiency is applicable when the determination of evidentiary insufficiency is made instead by a federal habeas court in a collateral attack on a state conviction" (emphasis in original; citations omitted).

Every lower court that has considered whether an acquittal entered in a post-conviction context bars retrial has held the Double Jeopardy Clause applies in this circumstance.

In *Young v. Kemp*, the Eleventh Circuit considered whether the federal habeas court's "holding that there was insufficient evidence to support the death sentence, i.e. insufficient evidence to prove the alleged statutory aggravating factors beyond a reasonable doubt . . . bars the state under the Double Jeopardy Clause from seeking the death penalty in its current retrial of Young." 760 F.2d 1097, 1099 (11th Cir. 1985). It held that the habeas court's acquittal of the death sentence barred a capital retrial, and the circuit court reached this conclusion even though Young's situation was different from that in *Bullington v. Missouri*, 451 U.S. 430 (1981), where the death sentence acquittal was by a jury. The Eleventh Circuit reasoned that where the district court, rather than a jury, acquits the defendant of the death penalty, "the finding of the federal district court . . . also invokes double jeopardy principles." *Young*, 760 F.2d at 1106. It explained that double jeopardy applied because denying access to the right established in

Bullington would create a purely arbitrary procedural distinction that the Supreme Court rejected in *Burks v. United States*, 437 U.S. 1, 11 (1978) (holding that a judgment of acquittal rendered on direct appeal is protected by double jeopardy to the same extent as one rendered at trial).[30] *Young*, 760 F.2d at 1105-06. The *Young* court concluded that "[t]he principle of *Burks* leads us inexorably to the conclusion that *Bullington* is fully applicable to the facts of this case." *Id.* at 1106.

The First, Fifth, and Seventh Circuits agree that the Double Jeopardy Clause protects habeas acquittals from retrial. *See O'Laughlin v. O'Brien*, 568 F.3d 287, 309 (1st Cir. 2009) (upon finding evidence of guilt insufficient in habeas review, citing *Burks*, and "remand[ing] to the district court to order O'Laughlin's unconditional release with prejudice to reprosecution."); *Jones v. Thigpen*, 741 F.2d 805, 814-15 (5th Cir. 1984) (holding that double jeopardy bars capital retrial after a federal habeas court's finding of insufficient evidence to justify the death penalty under *Enmund v. Florida*, 458 U.S. 782 (1982)), *rev'd on unrelated grounds*, 788 F.2d 1101 (5th Cir. 1986); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (where federal habeas court holds evidence of guilt of murder is constitutionally insufficient, "the double jeopardy clause bars [retrial]").

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[30] Indeed, the Supreme Court has consistently held that double jeopardy applies to cases involving acquittals rendered on appeal. *See Evans v. Michigan*, 133 S. Ct. 1069, 1074-76 (2013).

In this case, the RJA Court's order granting RJA relief amounted to a finding that there was insufficient evidence to impose a death sentence under state law in effect at that time. The RJA stated 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. By concluding that Robinson's judgment was sought or obtained on the basis of race, the trial court determined there was insufficient evidence to support a death sentence under prevailing state law. The Double Jeopardy Clause protects that acquittal, just as it would protect a defendant's acquittal at trial from an appeal by the State. *See Burks,* 437 U.S. at 16-18.

While the RJA consideration of racial bias in death penalty sentencing was unique, states are empowered to design their own mechanisms for determining capital eligibility. *See Spaziano v. Florida*, 468 U.S. 447, 464 (1984) ("As the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme.") (citations omitted). In at least one sense, the RJA actually performed a traditional capital sentencing function because it narrowed the class of defendants eligible for the death penalty. In this instance, it excluded those whose cases were affected by racial bias. *See Kansas v. Marsh*, 548 U.S. 163, 173-74 (2006) ("state capital sentencing system must . . . rationally narrow the class of death-eligible defendants . . . ").

The State cannot argue that the RJA Court's error in not granting a continuance negates the double jeopardy consequences of the death penalty acquittal. *See Arizona v. Rumsey*, 467 U.S. at 209-10 (1984) (double jeopardy barred re-sentencing after life verdict, even though the trial judge imposed the life sentence based on a misinterpretation of state law); *Evans*, 133 S. Ct. at 1074 (explaining that "an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a 'misconstruction of the statute' defining the requirements to convict") (citations omitted).

The RJA created an affirmative defense to death sentences, a defense on which Robinson prevailed. Acquittals based on affirmative defenses are accorded double jeopardy protection. *See Burks,* 437 U.S. at 5-6, 18 (double jeopardy barred retrial of defendant where he raised insanity defense, lost with the jury, but appellate court concluded there was insufficient evidence to prove sanity).

Once the RJA Court found Mr. Robinson ineligible for the death penalty, the Double Jeopardy Clause prohibited the future imposition of that penalty. Every court that has faced a similar issue in a post-conviction context agrees. Certiorari is warranted to prevent the irreparable constitutional violation of imposing the penalty of death on Mr. Robinson.

B. Violation of *Batson v. Kentucky*

At Mr. Robinson's trial, the State struck 5 of the 10 Black jurors (50%), but struck only 4 of 28 non-Black jurors (14.3%). Thus, the State struck 1 of every 2 Black jurors, but only 1 of every 7 non-Black jurors.

After the RJA's passage, Mr. Robinson was afforded broad discovery of jury selection in his case and others in Cumberland County. The newly uncovered information revealed that, at his trial, the State struck four eligible Black jurors – Nelson Johnson, Margie Chase, Elliot Troy, and Tandra Whitaker – with purposeful discrimination.

This new information included the prosecutor's pretextual explanations for striking Black jurors, a history and culture of discrimination against Black jurors by Cumberland County's prosecutors, disparate treatment by Mr. Robinson's prosecutor of white and Black potential jurors, and comparative juror evidence from a statistical study of the capital cases tried by Mr. Robinson's prosecutor and others in the county.

This new evidence meets the standard for proving purposeful discrimination in Mr. Robinson's case in violation of the Equal Protection Clause under *Bats*on and its progeny. *See generally Miller-El v. Drekte*, 545 U.S. 231, 265 (2005) (finding *Batson* violation under the totality of circumstances, including disparate treatment and questioning of Black and white jurors, and statistical and historical evidence); *Foster v. Chatman*, 136

S. Ct. 1737, 1750 (2016) (applying comparative juror analysis). In addition, the consistent pattern of purposeful discrimination against Black jurors by Mr. Robinson's prosecutor and the Cumberland office, over time, meets the different burden imposed by *Swain v. Alabama*, 380 U.S. 202, 227 (1965) for proving discrimination by pointing to a prosecutor's "systematic use of peremptory challenges against [Black jurors] over a period of time." *See also Horton v. Zant*, 941 F.2d 1449, 1453-60 (11th Cir. 1991) (finding a prima facie case of a *Swain* violation based in part on a statistical study of the prosecutor's peremptory strikes in capital cases over nine years).

Although Mr. Robinson had not raised a *Batson* claim at trial, he raised one in connection with his RJA motion, and again in an amended motion in the Remand Court.

The Remand Court summarily denied this claim without discussion or explanation. The Remand Court's summary dismissal is contrary to controlling precedent by this Court and the U.S. Supreme Court recognizing the corrosive effect of racial discrimination in jury selection. "Discrimination in the jury selection process undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." *Davis v. Ayala,* 135 S. Ct. 2187, 2208 (2015); *see also Cofield v. State,* 320 N.C. 297, 304 (1987) ("Article I, § 26 [prohibiting racial bias in jury selection] in particular is intended to protect the integrity of the judicial system."); *Rose v.*

Mitchell, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice").

The State contended below that Mr. Robinson's claim was procedurally barred. This argument fails for three distinct reasons.

First, the *Batson* claim is not procedurally barred because Mr. Robinson was not previously in a position to raise the claim. *See* N.C. Gen. Stat. §§ 15A-1419(a)(1) and (a)(3). Only a small fraction of the proof was previously available. This new evidence lifts the bar, and at a minimum, requires a hearing. *See Foster v. Chatman*, 136 S. Ct. 1737, 1746 (2016) (noting that the Georgia Supreme Court reviewed an otherwise unreviewable *Batson* claim in state post-conviction because "additional evidence allegedly supporting this ground was discovered" after the direct appeal proceedings).

The evidence previously available to Mr. Robinson consisted only of the strike ratio in Mr. Robinson's own case. Mr. Robinson did not have, because the State did not disclose: (1) the prosecutor's reasons for the strikes of Black venire members Mr. Johnson, Ms. Chase, Mr. Troy, and Ms. Whitaker in Mr. Robinson's case, and the related evidence showing disparate treatment of Black and white jurors; (2) evidence of the prosecutor's systemic discrimination in the form of explanations for strikes in his other cases that did not withstand scrutiny; (3) a statistical study comparing Black and white

jurors, which documented a pattern of discrimination in Cumberland County prosecutors' strikes across cases; (4) evidence of prosecutors' trainings intended to circumvent *Batson*; and (5) notes and testimony by Mr. Robinson's prosecutor, and others in his office, which reveal biased thinking regarding Black jurors. This new evidence lifts the bar, and at a minimum, requires a hearing. *See Foster*, 136 S. Ct. at 1746 (holding that the new evidence uncovered for the first time in collateral proceedings of "the shifting explanation, the misrepresentations of the record, and the persistent focus of race" by the prosecutor showed a constitutional violation and required relief).

Second, the General Assembly specifically predicated repeal on the availability of alternative avenues of relief. The repeal explicitly contemplated that defendants with evidence of jury selection discrimination would be able to assert such a claim in a post-conviction motion for appropriate relief, as Mr. Robinson did here. *See* S.L. 2013-154, § 5.(b) (stating "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" and explaining that "these rights are protected through multiple avenues . . . [including] a postconviction right to file a motion for appropriate relief at the trial level where claims of racial discrimination may be heard."). This statutory language would be meaningless if the courthouse doors were closed

to defendants who, for the first time in post-conviction proceedings, discovered evidence that their capital convictions were infected with racial bias.

Third, there has been a retroactive change in the law concerning *Batson* claims.[31] Mr. Robinson's direct appeal was decided in 1995, nine years before the Supreme Court announced for the first time in *Miller-El v. Dretke*, 545 U.S. 231 (2005), the need for courts to consider comparative juror analysis as part of the *Batson* calculation. *Miller-El*, 545 U.S. at 240. The new comparative juror analysis was applied retroactively in *Miller-El* itself, a federal habeas proceeding. *Id.* at 240. Furthermore, it has been treated as a controlling analysis by the Supreme Court in subsequent *Batson* cases. *See Snyder v. Louisiana*, 552 U.S. 472, 482-84 (2008) (finding evidence of pretext and intentional discrimination based in part upon differential treatment of white and Black jurors with respect to purported hardship); *Kandies v. Polk,* 545 U.S. 1137 (2005) (remanding a federal habeas case for a new *Batson* hearing consistent with *Miller-El*); *compare State v. Barden*, 362 N.C. 277, 279 (2008) (new comparative juror framework announced in *Miller-El* required remand for consideration of claim of discrimination in jury selection); *State v. Robbins*, 319 N.C. 465 (1987) (reviewing *Batson* claim

[31] *See* N.C. Gen. Stat. § 15A-1419(c)(2) (procedural bar waived where failure to raise the claim earlier was "[t]he result of the recognition of a new federal or State right which is retroactively applicable").

where violation not objected to at trial in part because the defendant "was on trial for his life").

Moreover, Mr. Robinson can meet the prejudice prong of the procedural bar waiver, *see* § 15A-1419(d), because there is a reasonable likelihood he will prevail on his *Batson* claim. Indeed, the RJA Court, in its initial RJA relief order, already found that intentional discrimination occurred at trial. Although the order was vacated because the RJA Court failed to grant the State a third continuance, that court's findings are at a minimum indicative of the strength of Mr. Robinson's evidence.

Mr. Robinson alleged extensive proof of a *Batson* violation – a claim that has never been heard or even addressed by the courts below. The Court should grant certiorari review to order a remand for merits consideration of Mr. Robinson's *Batson* claim.

C. Race discrimination in charging and sentencing

This Court should also grant certiorari to review Mr. Robinson's claims that his death sentence violates constitutional prohibitions on arbitrary and capricious punishment and equal protection, both under the existing, stringent *McCleskey v. Kemp*, 481 U.S. 279 (1987) standard for purposeful discrimination, and the more appropriate standard required today by North Carolina's constitution and the evolving standards of decency. U.S. Const. amends. VIII and XIV; N.C. Const. art. I, § 27.

The racially discriminatory application of the death penalty violates the Eighth Amendment's prohibition of arbitrary and capricious punishment. *McCleskey*, 481 U.S. at 292-97 (exceptionally clear proof of purposeful discrimination required to show Eighth Amendment violation).[32]

Under *McCleskey*, in order to succeed on a claim of racial discrimination in the imposition of the death penalty, the defendant must establish a "constitutionally significant risk of racial bias" with "exceptionally clear proof," including a showing that the "decisionmakers in his case acted with discriminatory purpose." *McCleskey,* 481 U.S. at 313, 297, 292; John Blume & Lindsey S. Vann, *Forty Years of Death: the Past, Present and Future of the Death Penalty in South Carolina (still arbitrary*), 11 DUKE J. CONST. L & PUB. POL'Y 183, 224 n. 247 (2016) (describing *Kelly v. State*, No. 99-CP-42-1174 (S.C. Sup. Ct., Oct. 6, 2003) where the defendant won a claim of racial discrimination under *McCleskey*). The extensive evidence proffered in this case meets this admittedly high burden, and the Remand Court's failure to

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[32] *See also Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (*Furman* recognized that the death penalty "may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."); *Glossip v. Gross*, 135 S. Ct. 2726, 2760-62 (2015) (Breyer, J., dissenting) (concluding that research on the use of improper factors such as race in the application of the death penalty strongly suggests such application is arbitrary); *Baze v. Rees,* 553 U.S. 35, 85 (2008) (Stevens, J., concurring) (concluding capital punishment violates the Eighth Amendment, in part because of the persistent "risk of discriminatory application of the death penalty").

consider such evidence is contrary to the constitutional guarantee to be free from arbitrary and capricious punishment.

One of the shortcomings of the evidence that Mr. McCleskey introduced was a failure to prove discriminatory charging decisions at the county level. *See generally McCleskey*, 481 U.S. at 295-96, n.15. The Court recognized that Mr. McCleskey's statewide statistics were useful in the context of jury discrimination claims, but concluded that the charging decisions were too complex to be meaningfully analyzed statewide, across multiple prosecutorial districts. *Id*. In this case, Mr. Robinson relies on the charging evidence from his own county showing that cases, like his, with a white victim, are 3.4 times more likely to result in a death sentence. He relies on the cases prosecuted by his prosecutor.

Equally important, unlike Mr. McCleskey, Marcus Robinson has pointed to evidence specific to his own case, including the deeds and acts of the prosecution in charging, in jury selection, and during his capital trial, which support an inference of racial considerations in his sentence.[33] *Compare McCleskey*, 481 U.S. at 292-93 ("He offers no evidence specific to his

[33] Although Mr. Robinson was afforded some discovery of his claims of racial bias in jury selection, Mr. Robinson has not been afforded discovery on his claims of discrimination under *McCleskey* or the charging and sentencing claims of the RJA. Much of the new evidence of discrimination in jury selection came through the new discovery provided under the RJA. It is reasonable to assume Mr. Robinson would uncover additional facts with additional discovery on these claims.

own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study.").[34] In support of his claim of an equal protection violation Mr. Robinson has pointed to: (1) the prosecution's heavy reliance on a racially-charged theory at trial; (2) the prosecutor's starkly different approaches to litigating his Black-on-white capital case versus the *Burmeister* and *Wright* white-on-Black capital cases; (3) the prosecutor's pursuit of his case as capital despite the evidence that he did not pull the trigger and despite his young age; (4) the evidence of racial disparities in death cases in the county; and (5) a wealth of evidence of discrimination in the county in jury selection, including in his own case.

In addition, this Court should grant certiorari to consider whether the Eighth Amendment's prohibition on cruel and unusual punishments and the State constitutional prohibition against cruel or unusual punishments have evolved so that today's society no longer tolerates death sentences imposed under sentencing procedures that "create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *McCleskey,* 481 U.S. at 322, (Brennan, J., dissenting, joined by Blackmun, J., Marshall, J., and Stevens, J.); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)

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

(quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)) (the Eighth Amendment's "applicability must change as the basic mores of society change.").

Public support for the death penalty is at its lowest point in over 40 years; only 49% of Americans support the death penalty for those convicted of murder. Baxter Oliphant, *Support for death penalty lowest in more than four decades*, Pew Research Center (Sept. 29, 2016).[35] Polling in North Carolina about racial bias in sentencing showed a majority of support (55%) for commuting death sentences in cases tainted by racial bias. *See* Public Policy Polling, *North Carolina Survey Results* (Sept. 27-30, 2012).

Certiorari is also appropriate so that this Court can consider whether to follow the path of other state courts that have refused to follow *McCleskey* when interpreting the cruel and unusual punishment provision of their state constitution. *See, e.g.*, *State v. Loftin*, 724 A.2d 129, 151 (N.J. 1999) (rejecting *McCleskey* under the New Jersey constitution); *see also District Attorney v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (holding, before *McCleskey,* that systemic evidence of discriminatory application of the death penalty violates the Massachusetts constitutional prohibition against "cruel" punishments).[36]

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[35] http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ (last visited May 27, 2017).

[36] *McCleskey* has been roundly condemned as the "low point" in the quest for equality, comparable to *Dred Scott v. Sanford*, 60 U.S. 393 (1857),

Nothing in North Carolina's constitution prevents it from applying a broader interpretation of equal protection and cruel and unusual punishment than the Supreme Court afforded in *McCleskey*. *See* N.C. Const. art. I, §§ 19, 26, and 27. North Carolina courts have recognized the need to address non-purposeful racial discrimination, in part because of the state constitutional commitment to ensure that the "judicial system of a democratic society operate evenhandedly and . . . be *perceived* to operate evenhandedly." *See State v. Cofield*, 324 N.C 452, 460 (1989) (quoting *Cofield I*, 320 N.C. 297, 302 (1987) (emphasis in original). In *Cofield,* this Court, applying the state constitution, reversed in the face of evidence of discriminatory impact in grand jury foreperson selection, even though there was "not the slightest hint of racial motivation." *Id*. at 459.

Furthermore, the text of the North Carolina constitution affords broader protection than the Eighth Amendment's promise to be free of "cruel and unusual punishments." The state constitution guards against "cruel *or* unusual punishments." N.C. Const. art. I, § 27 (emphasis added). Although in *State v. Green,* 348 N.C. 588, 603 (1998), the Court considered the protection

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and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See Hi-Voltage Wire Works, Inc. v. City of San Jose,* 12 P.3d 1068, 1073 (Cal. 2000); *see also Santiago*, 122 A. 3d at 97 (Norcott and McDonald, JJs., concurring). Justice Lewis Powell, one of the five justices to vote in the majority, publicly acknowledged after retirement that *McCleskey* stands as the sole case in which he would change his vote. *See* John C. Jeffries, JUSTICE LEWIS F. POWELL, JR. (1994), at 451 (quoting Justice Powell in his biography).

of cruel or unusual punishment as similar to that afforded by the federal constitution, both the holding and framework of *Green* have been eroded by recent precedent. *Compare Green,* 348 N.C. at 609-10 (holding a mandatory life sentence acceptable for a 13 year-old defendant by looking only at gross proportionality of the sentence); *Graham v. Florida,* 560 U.S. 48, 82 (2010) (striking mandatory juvenile life sentences and requiring an analysis under the "objective indicia" of consensus and actual sentencing practices).

Certiorari is thus necessary to address the numerous important constitutional questions raised by the Remand Court's summary dismissal of Mr. Robinson's claims of racial bias.

CONCLUSION

The constitutional protections Mr. Robinson requests all strike the same chord: once an injury occurs; a process for redressing that injury is put in place; and a litigant avails himself of the process and wins relief; the law may not be changed to take it away. This chord rings loudest when the injury is a death sentence obtained through pernicious racial discrimination. *Compare Pena-Rodriguez*, 137 S. Ct. at 867-68 (cataloging a range of precedent affirming the duty of courts to act because "discrimination on the basis of race 'odious in all aspects, is especially pernicious in the administration of justice'") (quoting *Rose*, 443 U.S. at 555). For this and the

foregoing reasons, Mr. Robinson respectfully requests that the Court grant review.

Submitted on the 30th day of May 2017.

s/s Cassandra Stubbs
Cassandra Stubbs
American Civil Liberties Union
Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-5659
State Bar No. 37172
cstubbs@aclu.org
ATTORNEY FOR MARCUS REYMOND ROBINSON

I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed it:

s/s Donald Beskind
Donald H. Beskind
NC State Bar No. 8138
Duke University School of Law
Box 90360
Durham, NC 27708
(919) 956-9545
State Bar No. 8138
beskind@law.duke.edu

s/s David Weiss
David Weiss
Center for Death Penalty Litigation
123 West Main Street, Suite 700
Durham, NC 27701
(919)956-9545
State Bar No. 35647
dweiss@cdpl.org

ATTORNEYS FOR MARCUS REYMOND ROBINSON

VERIFICATION

COUNSEL FOR DEFENDANT

I, Cassandra Stubbs, first being duly sworn, hereby deposes and says that she has read the foregoing PETITION FOR A WRIT OF CERTIORARI and knows the same to be true to the best of her knowledge except as to those matters and things therein alleged upon information and belief, and as to those she believes them to be true.

Cassandra Stubbs
American Civil Liberties Union
Capital Punishment Project

Sworn to and subscribed before
me this 30th day of May, 2017.

Notary Public

My Commission Expires: 2/26/19

CERTIFICATE OF SERVICE

I HEREBY certify that the foregoing DEFENDANT'S PETITION FOR WRIT OF CERTIORARI has been electronically served upon counsel of record for the State, Special Deputy Attorneys General Danielle Marquis Elder, dmarquis@ncdoi.gov, and Jonathan P. Babb, jbabb@ncdoi.gov.

This the 30th day of May, 2017.

s/s Cassandra Stubbs
Cassandra Stubbs
Attorney for Marcus Reymond Robinson

No. 411A94-6 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
	)	
v.	)	From CUMBERLAND
	)	
	)	
MARCUS REYMOND ROBINSON	)	
Defendant	)	

****

DEFENDANT'S APPENDIX

****

Marcus Robinson Petition for Certiorari

APPENDIX

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

****

STATE OF NORTH CAROLINA

v. File No. 01 CRS 65079

QUINTEL MARTINEZ AUGUSTINE,
Defendant.

****

STATE OF NORTH CAROLINA

v. File Nos. 98 CRS 34832, 35044

CHRISTINA SHEA WALTERS,
Defendant.

****

STATE OF NORTH CAROLINA

v. File Nos. 97 CRS 47314—15

TILMON CHARLES GOLPHIN,
Defendant.

****

STATE OF NORTH CAROLINA

v. File No. 91 CRS 23143

MARCUS REYMOND ROBINSON,
Defendant.

****

ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS AND CONCLUSIONS OF LAW

The Racial Justice Act was repealed by the General Assembly with an effective date of 19 June 2013. This repealing legislation, noted above, unambiguously expressed the conclusion of the legislature that statistical evidence should not and could not be used to prove purposeful racial

discrimination in a specific case. However, Section 5. (b) specifically noted that "a capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears the case is impartial, and that the trial was free from prejudicial error of any kind," supra, listed the various appellate avenues available to a defendant in State and federal courts, and finally noted that "[a]ll these same rights, existing prior to the enactment of Article 101 of Chapter 15A of the General Statutes, remain the law of this State after its repeal." supra. The act preserved the right of anyone to a fair trial, from indictment to judgment, free from racial bias, but prohibited statistical evidence from unrelated cases from admission in evidence in a specific case.

The question becomes whether this legislation is effective as to the MARs in the cases before this court, i.e., did the enactment of the repealing legislation render void as a matter of law the MARs filed by the defendants in these cases as provided in Section 5. (d), supra? On its face, it appears that the answer to this issue must be "yes." The act provides that it is retroactive and applies to any MAR filed pursuant to the RJA before 19 June 2013, and that all MARs filed before that date are void. Each MAR in these cases was filed prior to the effective date of the act, 13 June 2013. Judge Weeks' resentencing orders to life imprisonment without parole were not affirmed upon appellate review, and because these orders were subject to appellate review, and were vacated, they were not final orders by a court of competent jurisdiction. If Judge Weeks' orders had been affirmed upon appellate review, and thus became final orders by a court of competent jurisdiction, then Section 5. (d) of the RJA Repeal would not apply to these cases. Instead, Judge Weeks' orders in each of these cases were vacated by the Supreme Court of North Carolina upon appellate review and were remanded to this court. The retroactive repealing legislation unequivocally provides that it "is applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act (i.e., 19 June 2013) and the Order is vacated upon appellate review by a court of competent jurisdiction." supra. Each of these cases fits squarely within this legislation, and each MAR is rendered void by the terms of the RJA Repeal.

The defendants contend that the repeal of the Racial Justice Act violates their constitutional rights or limits access to the protections from discrimination that already exist under the North

Carolina and United States Constitutions. It is noted that there is a presumption that legislation enacted by the General Assembly is constitutional. However, the courts in this State have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people. Glenn v. Bd. of Educ., 210 N.C. 525, 529-30, 187 S.E. 781,784 (1936); City of Asheville v. State of North Carolina, et al., __N.C.__, __S.E. 2d__; 2016 LEXIS 1133 (N.C. Dec. 21, 2016).

Central to the questions raised by each defendant is their contention that upon the enactment of the RJA and the filing of their respective MARs each became "vested" in the right to proceed under the RJA, and that once vested this right cannot be taken away by subsequent legislation. They contend that this right to offer statistical evidence from other cases across the State cannot be taken from them without violating the constitutional protection afforded by the Due Process Clause, the Ex Post Facto Clause, the Double Jeopardy Clause, the prohibition against Bills of Attainder, and the Eight Amendment's bar on cruel and unusual punishment. It is also alleged that the retroactive application of the RJA Repeal violates the Separation of Powers and Judicial Powers Clauses of the North Carolina Constitution. Once they filed their MARs, their right to offer statistical evidence was effectively written in stone, and that right cannot be repealed without abridging the most basic of our rights as citizens of this country.

If the rights provided by the RJA became vested in the defendants upon the filing of their MARs, then the General Assembly could not, by enacting the RJA Repeal, deprive the defendants of those statutory rights, arguably, without running afoul of certain constitutional provisions. However, if the defendants' rights under the RJA were not vested upon the filing of their MARs, the defendants' claims are now moot and the right to proceed in these MARs no longer exists.

The question of when one's rights are vested under a statute has received attention by several appellate courts. When a statute providing a particular remedy is unconditionally repealed the remedy is gone. Spooner's Creek Land Corp. v. Styron, 276 N.C. 494, 496, 172 S.E. 2d 54, 55 (1970); Heath v. Bd. of Commissioners, 292 N.C. 369, 233 S.E. 2d 889 (1997). The RJA Repeal was unconditional. In order to permit a proceeding to survive the repealing of the underlying statute authorizing the proceeding there must be a saving clause in the repealing act. In

re Incorporation of Indian Hills, 280 N.C. 659,663, 186 S.E. 2d 909, 912 (1972). The RJA Repeal did contain a saving clause, but it does not apply to the cases now before this court. The saving clause in the RJA Repeal applies only to those cases in which there was a final judgment entered before the effective date of 19 June 2013. Judge Weeks' re-sentencing orders were vacated by the North Carolina Supreme Court and therefore were not final judgments, as noted above. Therefore, the saving clause in the RJA Repeal does not apply to these cases.

Until the defendants' rights bestowed by the RJA become vested the Supreme Court has ruled that these rights can be "destroyed by the Legislature." The Legislature may alter a provision of law at any time before the rights of the parties are settled. A right is vested when the right becomes absolute so that no subsequent repeal can invalidate it. Blue Ridge Interurban R. Co. v. Oates, 164 N.C. 167, 80 S.E. 398 (1913). i.e., until a judgment becomes final. That did not occur in these cases. An order or judgment is not final until it has undergone appellate review or the time for discretionary review has expired. See e.g., Allen v. Hardy, 478 U.S. 255, 258 n. 1, 92 L. Ed 2d 199, 204 n. 1 (1986); Linkletter v. Walker, 381 U.S. 618, 622 n. 5, 14 L. Ed. 2d 601, 604 n. 5 (1995).

The Supreme Court "vacated" the orders by which the defendants' were granted relief under the RJA. To vacate means "[t]o anul; to set aside; to cancel or rescind; to render an act void; as to vacate an entry of record, or a judgment." Alford v. Shaw, 327 N.C. 526, 544 n.6, 398 S.E. 2d 445, 455, n.6 (1990). "A void judgment is in legal effect no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless." Stafford v. Gallops, 123 N.C. 19, 21-22, 31 S.E. 265, 266 (1898); Hart v. Thomasville Motors, Inc., 244 N.C. 84, 90, 92 S.E. 2d 673, 678 (1956).

A case decided by the North Carolina Supreme Court is urged upon this court in support of the argument that the defendants' rights in the RJA were vested. In State v. Keith, 63 N.C. 140, 1869 N.C. Lexis 19 (1869) the defendant Keith, a former Confederate officer, was charged with murdering individuals while serving as a soldier. The Amnesty Act of 1866-67, 1866 N.C. Acts §1, contained a full pardon for all homicides and felonies committed by officers or soldiers, whether of the United States or of the Confederacy, done in the discharge of any duties imposed on them, purporting to be a law of either government, or by virtue of any order

emanating from any officer. It was a remission of guilt—not only of the punishment of guilt. Once amnesty was granted it was as if the offense never occurred. The succeeding legislature later abrogated the amnesty previously granted. The Supreme Court held that the revocation of the amnesty provision was an *ex post facto* law that took away the defendant's **vested** right to immunity.

While of historical interest, Keith is not applicable in the cases before this court. The granting of amnesty was a final determination, and is therefore different entirely from the issue before this court. The Supreme Court in Keith held that amnesty is "irrepealable", like a "pardon," and quoted Chief Justice John Marshall comparing an amnesty to "a deed vesting rights." Amnesties and pardons are, in effect, final judgments. No further proceedings are required or contemplated, so the benefits of provisions of an amnesty or pardon would vest immediately. The RJA, by contrast, established a rule that statistical evidence would be admissible in an MAR evidentiary hearing. However, as shown above, the rights conferred by the RJA were not vested in the defendants because they were not confirmed by a final judgment by a court of competent jurisdiction, and such rights were in fact abrogated by the RJA Appeal.

Although this court does not base this Order upon constitutional grounds, it is noted that the RJA Repeal is not an *ex post facto* law. The North Carolina Supreme Court, quoting Collins v. Youngblood, 497 U.S. 37, 42, 110 S. Ct. 2715, 11 L. Ed. 2d 30, 38-39 (1990) and Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 648, 650, 3 Dall. 386 (1798), held that "...the *ex post facto* prohibition applies to: "Every law that **changes the punishment**, and inflicts a **greater punishment**, than the law annexed to the crime, when committed. Jones v. Keller, 364 N.C. 249, 259, 698 S.E. 2d 49, 57 (2010) (emphasis in original).

This court decided these cases based upon an analysis of the statute in question and the applicable law pertaining to the question presented. The court has not found it necessary to reach the questions of constitutional law raised by the defendants except as discussed in Keith, supra.

Based upon the foregoing findings and after carefully considering the applicable law, this court concludes as a matter of law that the Motions for Appropriate Relief filed on behalf of the defendants should be dismissed.

IT IS THEREFORE ORDERED that the Motions for Appropriate Relief filed by the defendants Qunitel Martinez Augustine, Christina Shea Walters, Tilmon Charles Golphin and Marcus Reymond Robinson in their respective cases, as shown in the caption, shall be, and the same are hereby DISMISSED.

This Order was prepared by the undersigned, and was signed on this the 23rd 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

1. _____ 5. _____
2. _____ 6. _____
3. _____ 7. _____
4. _____ 8. _____

County: _____

CHARLIE EDDIE GODLEY

No.	Name	Occupation	Comments
			Family in trouble
			CI
	Don't cut slack even for his boy		Bring his Rope
			- Rehab.

JJR1090 RUN DATE 4/03/97

JURY SELECTION LIST

SUMMONS FOR WEEK OF 5/19/1997

DEF	ACCT. NO	DISPOSITION	DAYS SERVED	ENTER DATE	NAME		ADDRESS	CITY/STATE	ZIP CODE
D-DEFERRED *TEMP* E-EXCUSED G-GRAND JUROR S-SERVED X-DISQUALIFIED							IF APPLICABLE - ENTER DAYS AND DATES		
D	[redacted]				PHILLIPS	JEFFREY	PO BOX 303 WESTON RD	GRIMESLAND NC 27837	
D	405052	D E G S X		__/__/__	PINADA	NATO A.	RT 3 BOX 227A	GREENVILLE NC 27834	
[redacted]					PITTMAN	GENEVA B.	PO BOX 683 308 N CHURCH	GRIFTON NC 28530	
[redacted]					PORTER	THELMA W.	PO BX 163 304 S SIMPSON S	SIMPSON NC 27879	
D	414740	D E G S X		__/__/__	PRATT	THERESA F.	RT 6 BOX 309C	GREENVILLE NC 27834	
D	411805	D E G S X		__/__/__	PRAYER JR	JIMMY L.	RT 1 BX 150	GREENVILLE NC 27834	
D	417499	D E G S X		__/__/__	PRETTY	DEBORAH T.	3301 BAYWOOD LANE	GREENVILLE NC 27834	
D	431624	D E G S X		__/__/__	PRIVETT	CARTY J.	1861 APT B QUAIL RIDGE RD	GREENVILLE NC 27858	
D	418562	D E G S X		__/__/__	PRZYCHODA	T B.	3400 TOBACCO RD NO 21	GREENVILLE NC 27834	
D	[redacted]				PULLIAM	CHARLES E.	109 FOXFIRE RD	FARMVILLE NC 27828	
D	402513	D E G S X		__/__/__	PURNELL	DOLORES H.	117 N ELM ST APT 4	GREENVILLE NC 27858	
D	418553	D E G S X		__/__/__	QUICK	BENJAMIN M.	3200 BAYWOOD LANE	GREENVILLE NC 27834	
[redacted]					RAWLS	CATHERINE A.	123 PINE BRANCHES CLOSE	WINTERVILLE NC 28590	
D	423528	D E G S X		__/__/__	RAYFIELD	EARL E.	116 SANTREE	GREENVILLE NC 27834	
[redacted]	405728	D E G S X		__/__/__	REGISTER	EDWARD G.	PO BX 460	GRIFTON NC 28530	
D	412266	D E G S X		__/__/__	REID	MICHAEL A.	PO BOX 494	FOUNTAIN NC 27829	

JJR1090 RUN DATE 4/03/97

JURY SELECTION LIST

SUMMONS FOR WEEK OF 5/12/1997

D-DEFERRED *TEMP* E-EXCUSED G-GRAND JUROR S-SERVED X-DISQUALIFIED

DEF	ACCT. NO	DISPOSITION	DAYS SERVED	ENTER DATE	NAME			ADDRESS	CITY/STATE	ZIP CODE
					MURPHY	AMANDA	G.	202 FRANKLIN DR	AYDEN	NC 28513
D	401758	D E G S X		__/__/__	MURPHY	JON	P.	1104 FAWN RD	AYDEN	NC 28513
								↳Good Area - Wtns - Robbery Suspect - Abandoned Vehicle -		
D	427723	D E G S X		__/__/__	NAJERA JR	REYNALDO		RT 1 BOX 128	FARMVILLE	NC 27828
A	430712	D E G S X		__/__/__	NEWTON	EVELYN	L.	PO BOX 342	FARMVILLE	NC 27828
					OAKLEY	KELLY SELBY		108-E VICTORIA CT	GREENVILLE	NC 27834
					ODENWELDER	LAURA EILEEN		1308-B E 10TH ST	GREENVILLE	NC 27858
NP D	V 107289	D E G S X		__/__/__				↳Dope & Weapons Charges		
D	415541	D E G S X		__/__/__	ORTEGA	FLORINDO	M.	HWY 11 PINEWOOD MHP BOX 63	AYDEN	NC 28513
					PARKER	HELEN	W.	1605 CANTERBURY RD	GREENVILLE	NC 27858
					PATTERSON	ANITA		112 E CONCORD DR ↳Dope	GREENVILLE	NC 27834
					PAYTON	DORETHA		RT 8 BOX 532	GREENVILLE	NC 27834
NP D	416316	D E G S X		__/__/__	PAYTON	JASPER	L.	701 WYATT ST	GREENVILLE	NC 27834
								↳Dad's a Crook - Son is following in Steps -		
D	412323	D E G S X		__/__/__	PENDERGRASS	TIMOTHY	C.	114 AMY CR	GREENVILLE	NC 27834
A	407696	D E G S X		__/__/__	PERKINS	SAMUEL	L.	114 E CATAWBA RD	GREENVILLE	NC 27834
D	422475	D E G S X		__/__/__	PERRY	DEBORAH	R.	1419-B GREEN POINTE APTS	GREENVILLE	NC 27834
								↳Cousin/Bro. killed someone on 4/12/97 - Family in jail 6X		
D	413871	D E G S X		__/__/__	PERRY	JAMES	L.	LOT 6 BOX 6 SPRING V	AYDEN	NC 28513
								↳Comm Threats;		
D	411549	D E G S X		__/__/__	PERRY	LORETTA	S.	812 ENGLEWOOD PL	AYDEN	NC 28513
								↳Projects		

if Motor Rock gg - ok. but clean no tobe real religious

Related

62 - BF - Victim - Damage Prop.

0133

SUMMONS FOR WEEK OF 5/19/1997

DEF	ACCT. NO	DISPOSITION	DAYS SERVED	ENTER DATE	NAME		ADDRESS	CITY/STATE	ZIP CODE
	D-DEFERRED *TEMP* E-EXCUSED G-GRAND JUROR S-SERVED X-DISQUALIFIED						IF APPLICABLE - ENTER DAYS AND DATES		
E	424246	D E G S X		__/__/__	BARRETT	LINDA W.	3137 CLEERE COURT Hearing	GREENVILLE NC	27834
F	403681	D E G S X		__/__/__	BARRETT	PHYLLIS S.	203 PEARL DR	GREENVILLE NC	27834
	[redacted]				BARROW	AMY Q D.	501 EVANS ST	GREENVILLE NC	27858
	[redacted]				BECKERT	MICHAEL R.	229 CHURCHILL DR	GREENVILLE NC	27828
	[redacted]				BELL	MELISSA No Q	RT 2 BOX 271 Man-pesd-She had child by BM-Sympathetic to plight	FARMVILLE NC	
E	408565	D E G S X		__/__/__	BELL	MORRIS Cole	PO BOX 508 CHURCH ST	GRIFTON NC	28530
G	400649	D E G S X		__/__/__	BENNETT	JUDITH Q C.	102 CHELSEA PL	WINTERVILLE NC	28590
	103419	D E G S X		__/__/__	BERRY	LANYA MICHELL	500 VERDANT DR APT C-1	GREENVILLE NC	27858
	414813	D E G S X		__/__/__	BESS	THOMAS Q L.	RT 2 BOX 358	GREENVILLE NC	27834
D	420044	D E G S X		__/__/__	BLOUNT	HAZEL Q V.	1305 S MAIN ST	FARMVILLE NC	27828
	424787	D E G S X		__/__/__	BOMAR	PERRI J.	3414 DUNHAVEN DR	GREENVILLE NC	27834
	107574	D E G S X		__/__/__	BOWENS	CHENA L SPELL	1302-B E 10TH ST	GREENVILLE NC	27858
F	404096	D E G S X		Q__/__	BOYD	JASON G.	3209 SUMMER PLACE APT 2B	GREENVILLE NC	27834
	429667	D E G S X		__/__/__	BOZELLE	AIMEE D. No Q	LOT 19 JACKSONS TRPK	GREENVILLE NC	27834
	432456	D E G S X		__/__/__	BRADLEY	JOHN B.	RT 6 BOX 131F	GREENVILLE NC	27834
E	406355	D E G S X		__/__/__	BRANCH	VALERIE G.	3302 TUCKER DR Family Problems - Serving Papers -	GREENVILLE NC	27858

D Lorretta Barrett

E CATHERINE BRIDGES

014a

Juror #3

STRONG - BELIEVES IN D.P. - 8

GARY GILLESPIE

Lives in E-town, Native
West Point Ryewell - 2 mi outside of town on 57
Delivery - w/sis 2 yrs down, that
5 mo old son
HS Educ.
Fishing & some hunting / Deer hunter
Straight 2d shift at WPS

Black
B/M, early 20s, broad shoulders, strong as a bull

DP: If the crime is proven to a fact that the person is guilty I AM FOR IT

DEFENSE:

INSANITY: some people can put on an act not all the time
(Read an article @ insanity @ 6 yrs ago)

DEFENDANT'S EXHIBIT
tabbies
144

State

VS.

Buck Junior Coldman

FINAL **JURY** 10/10/78

File No. 77 CRS 33823

Film No.

BACK ROW

1 Charles W. King (MECHANIC - Gulf Oil Co.) 55yr. W/M	2 CAROLYN HORTON Carolina Telephone employee 40yr. W/F	3 * JAMES A. CRUICKSHANK (Real Estate Broker) Ret. Lt. Col ARMY 52yr. W/M	4 Cheryl F. Gill (LAB ASSISTANT) Cape Fear Valley Hospital 32yr. W/F	5 ROSIE M. DAVIS (Cook for Herbert L. Fleischman) 45yr. B/F	6 GARY LEVINER (Mill Worker Elk Cotton Mill) (formerly Dixie Yarns) 34yr. W/M
7 Edward Lee Keel (CARPET SALESMAN) - Trudeau Carpets - 27yr. W/M	8 JIMMY BATSON (ASST. PARTS MGR. M&O Chevrolet) 50yr. W/M	9 WALLACE E. Berry (Piggy-back trucking) Commercial Merchandising 40yr. W/M	10 Bobbie F. CALDWELL housewife (former registered Medical Technologist) 42yr. W/F	11 * JAMES E. BAKER (Plumber by trade) (Jimmy's Plumbing) self employed 32yr. W/M	12 * LEWIS GALIMORE (INSURANCE Agent - former truck driver - (UNITED INS. OF AMERICA) 40yr. W/M

FRONT ROW

CHALLENGES

For Cause

State or Plaintiff

Defendant

I certify that in 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 through were empanelled to serve as jurors.

This 10th day of Oct, 1978.

Clerk.

53yr. W/M — 11 kids — 016a

Riley Rd. Elementary School W/F

AOC-L Form 168 * ALTERNATES: 1) [illegible] 2) [illegible]

STATE

VS. GOODMAN

JURY

File No. 77 CRS 25683

Film No.

BACK ROW

1 Richard L. Martin	2 Willie Spell	3 Floyd B. Sessoms	4 Bruce H. Perry	5 Ava R. Monroe	6 Gilda Plummer
7 Wm. Richardson	8 Phillip Montaldo (Foreman)	9 Sharon J. Stinson	10 Hardy Parker, Jr.	11 Wm. H. Roberts	12 Stacey Whittington

FRONT ROW

ALT: Lucille B. Thomas

CHALLENGES

For Cause _____

State or Plaintiff _____

Defendant _____

I certify that in 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 through were empanelled to serve as jurors.

This _____ day of _____, 19____.

_____ Clerk

AOC-L Form 168

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 dog)

× Desfonds — Boiling Sp. Lk (one chromosome fam.)

× Della Donda - drugs

✓ Evans - not best pick- son found burned in a car

✓ × Gerald Fisher - (doper) - Supply

Jerry Stokes (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 Egueda – Ash – idiot

Charlie Nance – Supply drugs

Shirley McDonald Leland – blk / high drug area

? Candace McKoy – Leland – Blue Bank Rd

Vickie McNeill – Leland – high drug area

(5)

Mark Mitchell – Shallotte – oyster stealer

✓? → Mark Paul – Shallotte
Sanders Forest Rd – decent neighborhood –
?16 many bust recently...

✓ X Christopher Ray – Southport – ext. record
nice do well

Reeder – Bolivia

✓ Amanda Gayle Reeves – Ripplewood

✓ Connie Faye Stanley – Ocean Isle Bch – domestics

drugs Sweet – Cedar Hill Rd – high drug Rd

(17th)

✓✓ X Anthony Barnard – Oak View drive
Southport – high drug area

X Sheila Butler – Marlow Rd
Ashe – drugs / arrested

✓ X Wm. Cribb – Supply – sons in jail – doesn't like LEO
kidney/dope

Butler – Ashe – dope – HW 130 – Wadesville

✓ Lisa Gore Floyd – Ashe – H dope deals

Garcia – Leland

✓ ✓ Mr. Hall – Longwood – Hall ...

Terry Strikes (cont'd)

Peelene Jordan – McMillan Rd – high drug area

✓ Eric Scott Karr – Supply – domestic

Lonnie Linker – Calabash 1967 revolving idiot

X ✓ Scottie Lumpkin – Winnabow – B&E's jail

X ✓ Nasey – Pearl ~~Peal~~ Way Supply – drug area

✓? James Richard – Leland – roughhouse/anti LEO

Terry Rivenbark – Leland – drugs

Elisha Robbins – Leland – drugs

✓ Harold Scoggins – Leland – "pillar of community record!"

Dianne ~~Fo~~ Tacki – Neck Rd Bolivia – high erratic road

Earl Turner – Winnabow – ext. record...

? Terry Vaught – Chapel Rd Winnabow – prob.

Oreda Waddell – Chapel Hog Rd Leland – crazy family

✓ Karen White – 12th Street So Port – drug area

Jury Strikes

(5)

(19th)

✓ Andrews - Vassel? Leland - questionable area

Bass - Blake Cir Leland -

Luciana Bellamy - Supply crack dealers

✓ Michael Bishops - Supply - Thief / bf's

Bobby Black - Supply - OBP BFP hookup

(OP) ✓ Ronnie Buffkin - Supply - ???

~~[redacted]~~ - ~~Black Avenue~~ -

✓ Deann Cobb - Leland drug area

(OP) Linwood Davis - Bolivia - Statutory rape charge?

respectable bch family Towanda Dudley - Smithfield Rd Leland - OK

Paul Floyd - OI Bch - Floyd family

✓ Ethyl Gause - - family member shot "Flop"

Louis B. Hewett - Supply - anti police →

Pamela Hewett - Shallotte - drugs

Catrol [illegible] - [illegible] - [illegible]

<u>Jury Strikes</u> (cont'd)

Tony Lewis - Shallotte - trafficking mainly pot boat days early 80's fine guy...

/ Brenda Vroomman - Supply - domestic viol. vic

John H. Wayland - Supply - (~~suspect unsolved H~~)

Pinecrest ⟶ Marlowtown Rd / Shingletree Rd.

904 area 17/10 Longwood ⟵ - Marlin/Carlin/Geo Daniels Freedom Star

Cedar Hill Rd.

Wolf Ridge Rd.

Snowfields Rd.

McMillan / McMilly Rd.

~~[illegible]~~ Hale Swamp Rd.

Seashore Rd.

From: Edwards, Seth H.
Sent: Thursday, November 03, 2011 10:10 AM
To: West, William R.
Cc: Dorer, Peg
Subject: RE: Racial Justice Update

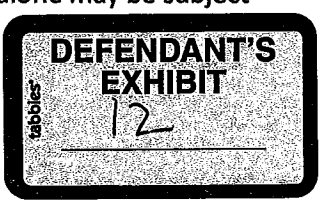
Billy and Peg (not for dissemination elsewhere]

[Please call me at 252.940.4058 if you need lots of details] BUT I have the greatest respect for Judge Sumner. He is the senior resident in Robert Evans' district, is a member of the Innocence Commission, and is by no means a defense leaning judge. It has been my experience that he is very fair and impartial and I personally would have no qualms with him hearing a RJA motion in the 2nd district.

To me the obvious card being played is the race card, but even if that is the case, my opinion of Judge Sumner does not change one bit. If I had to pick an African American to hear an RJA motion, he would be the one. If I had to pick a judge regardless of race to hear an RJA motion, he would be in the top 5 for sure.

Of course other DAs east of Raleigh may have different opinions. -Seth Edwards -----Original Message-----
From: Hall, David L.
Sent: Thursday, November 03, 2011 9:26 AM
To: Dorer, Peg; Blackberry - Colon Willoughby
Cc: Andrew Murray; Gregson, Andrew M.; Anna Greene; David, Benjamin R.; Brandy Cook (blcook12@hotmail.com); Greenway, Brad; Cook, Brandi L.; Colyer, Calvin W.; Clark Everett (clarkeverett@mac.com); Vickory, C B.; Bowman, C R.; Kristy Newton (da16anewton@aol.com); Valerie Asbell; Bellas, Eric R.; Lee, Ernest R.; Andrew Murray (esqmurray@aol.com); Parrish, Frank R.; Yates, Garland N.; Frank, Garry W.; Wilson, Gerald W.; Butler, Gregory C.; Cummings, Howard J.; Neumann, Howard P.; Boone, H S.; Gaither, James C.; O'Neill, James R.; Woodall, James R.; Jay Ashendorf; Johnson Britt (jbritt16B@yahoo.com); jdavidlaw@gmail.com; Hunt, Jeff P.; Mcdonald, Jennie; Jim O'Neill; Jim Woodall (jimwoodall@hotmail.com); Perry, Jonathan; David, Jonathan M.; Henderson, J D.; Hobbs, Karen; Dreher, Kate; Newton, Kristy; Bollinger, Lee B.; Bell, Locke; Britt, Luther J.; Krueger, Maureen; Mike Bonfoey (mbonfoey@hotmail.com); Pelfrey, Melissa D.; Bonfoey, Michael L.; Nadolski, Patrick T.; Robison, Pat S.; Berger, Philip; pat nadolski; Shaffer, Richard L.; Evans, Robert A.; Ron Moore (ronron444@aol.com); Vaneekhoven, Roxann L.; Dooies, Samantha; Currin, Samuel B.; Kirkman, Sarah M.; Thomas, Scott E.; Edwards, Seth H.; Doyle, Susan I.; Anglim, Thomas D.; Horner, Tom E.; Cline, Tracey E.; Asbell, Valerie M.; Stewart, Vernon K.; Bradsher, Wallace W.; Garry Frank (westgwf@aol.com); Wolfe, William D.; West, William R.; William T Stetzer Meck; wwwbradsher@esinc.net; Everett, W C.; Saunders, W R.; xRodgers, Timothy R.
Subject: RE: Racial Justice Update

I do not know or know of Judge Sumner. In your opinions, does he have any established propensities re: capital punishment? Peg didn't you say that Judge Weeks mentioned Judge Hudson on the record? That alone may be subject to inquiry. Food for thought.



-----Original Message-----
From: Dorer, Peg
Sent: Thursday, November 03, 2011 9:03 AM
To: Blackberry - Colon Willoughby
Cc: Andrew Murray; Gregson, Andrew M.; Anna Greene; David, Benjamin R.; Brandy Cook (blcook12@hotmail.com); Greenway, Brad; Cook, Brandi L.; Colyer, Calvin W.; Clark Everett (clarkeverett@mac.com); Vickory, C B.; Bowman, C R.; Kristy Newton (da16anewton@aol.com); Valerie Asbell; Hall, David L.; Bellas, Eric R.; Lee, Ernest R.; Andrew Murray

(esqmurray@aol.com); Parrish, Frank R.; Yates, Garland N.; Frank, Garry W.; Wilson, Gerald W.; Butler, Gregory C.; Cummings, Howard J.; Neumann, Howard P.; Boone, H S.; Gaither, James C.; O'Neill, James R.; Woodall, James R.; Jay Ashendorf; Johnson Britt (jbritt16B@yahoo.com); jdavidlaw@gmail.com; Hunt, Jeff P.; Mcdonald, Jennie; Jim O'Neill; Jim Woodall (jimwoodall@hotmail.com); Perry, Jonathan; David, Jonathan M.; Henderson, J D.; Hobbs, Karen; Dreher, Kate; Newton, Kristy; Bollinger, Lee B.; Bell, Locke; Britt, Luther J.; Krueger, Maureen; Mike Bonfoey (mbonfoey@hotmail.com); Pelfrey, Melissa D.; Bonfoey, Michael L.; Nadolski, Patrick T.; Robison, Pat S.; Berger, Philip; pat nadolski; Shaffer, Richard L.; Evans, Robert A.; Ron Moore (ronron444@aol.com); Vaneekhoven, Roxann L.; Dooies, Samantha; Currin, Samuel B.; Kirkman, Sarah M.; Thomas, Scott E.; Edwards, Seth H.; Doyle, Susan I.; Anglim, Thomas D.; Horner, Tom E.; Cline, Tracey E.; Asbell, Valerie M.; Stewart, Vernon K.; Bradsher, Wallace W.; Garry Frank (westgwf@aol.com); Wolfe, William D.; West, William R.; William T Stetzer Meck; wwwbradsher@esinc.net; Everett, W C.; Saunders, W R.; xRodgers, Timothy R.
Subject: RE: Racial Justice Update

After talking with Billy West who has talked to Bill Hart, the MAR statutes allow the Resident to appoint the judge. Also, apparently Judge Hudson was a little too obvious, so now there is talk that Quentin Sumner may be the judge.

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
-----Original Message-----
From: cwilloughby@wakegov.com [mailto:cwilloughby@wakegov.com]
Sent: Wednesday, November 02, 2011 4:43 PM
To: Dorer, Peg
Cc: Andrew Murray; Gregson, Andrew M.; Anna Greene; David, Benjamin R.; Brandy Cook (blcook12@hotmail.com); Greenway, Brad; Cook, Brandi L.; Colyer, Calvin W.; Clark Everett (clarkeverett@mac.com); Vickory, C B.; Bowman, C R.; Kristy Newton (da16anewton@aol.com); Valerie Asbell; Hall, David L.; Bellas, Eric R.; Lee, Ernest R.; Andrew Murray (esqmurray@aol.com); Parrish, Frank R.; Yates, Garland N.; Frank, Garry W.; Wilson, Gerald W.; Butler, Gregory C.; Cummings, Howard J.; Neumann, Howard P.; Boone, H S.; Gaither, James C.; O'Neill, James R.; Woodall, James R.; Jay Ashendorf; Johnson Britt (jbritt16B@yahoo.com); jdavidlaw@gmail.com; Hunt, Jeff P.; Mcdonald, Jennie; Jim O'Neill; Jim Woodall (jimwoodall@hotmail.com); Perry, Jonathan; David, Jonathan M.; Henderson, J D.; Hobbs, Karen; Dreher, Kate; Newton, Kristy; Bollinger, Lee B.; Bell, Locke; Britt, Luther J.; Krueger, Maureen; Mike Bonfoey (mbonfoey@hotmail.com); Pelfrey, Melissa D.; Bonfoey, Michael L.; Nadolski, Patrick T.; Robison, Pat S.; Berger, Philip; pat nadolski; Shaffer, Richard L.; Evans, Robert A.; Ron Moore (ronron444@aol.com); Vaneekhoven, Roxann L.; Dooies, Samantha; Currin, Samuel B.; Kirkman, Sarah M.; Thomas, Scott E.; Edwards, Seth H.; Doyle, Susan I.; Anglim, Thomas D.; Horner, Tom E.; Cline, Tracey E.; Asbell, Valerie M.; Stewart, Vernon K.; Bradsher, Wallace W.; Garry Frank (westgwf@aol.com); Wolfe, William D.; West, William R.; William T Stetzer Meck; wwwbradsher@esinc.net; Everett, W C.; Saunders, W R.; xRodgers, Timothy R.
Subject: Re: Racial Justice Update

I thought the Chief Justice assigned Superior Court Judges? Colon Willoughby

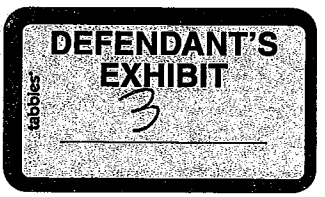
From: Dorer, Peg
Sent: Friday, July 29, 2011 9:10 AM
To: Frank, Garry W.; 'Susan Doyle'
Subject: RJA - urgency
Attachments: legislative urgency.doc

At your suggestion, I have been working on a proposed letter for D.A.s to send to their legislators
regarding Racial Justice. However, after a conversation with Bill Hart the other day, I completely
agree with Garry…if we don't get them to act in September, then it will be too late. Bill Hart
indicated that if just one of these motions receives a favorable ruling then all death row inmates
will have a right to an RJA hearing no matter what the General Assembly does. Cumberland
County is set to hear a motion October / November on the jury selection issue only. So I've put
aside the letter I was working on and wrote the attached this morning. My suggestion would be to
get all the D.A.s to write and call their Republican Senators and strongly urge them to take this up
in September.

I would like for the two of you to look at this letter and make any edits you think are
necessary. As soon as you get it back to me, I'll send it out…then I'll get back to the other letter.

Thanks.

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



Dear

As you know, the Racial Justice Act, passed in 2009, placed an unnecessary, overwhelming and impossible burden on North Carolina's Criminal Justice System. Now an Attorney General's analysis indicates that this issue has become extremely time-sensitive.

Senate Bill 9 contains language that would bring North Carolina laws in line with the U.S. Supreme Courts decisions regarding racial justice. This bill would continue to protect against racial bias while preserving the death penalty as a punishment and saving the state over $25 million. Senate Bill 9 passed the House during the regular session of the General Assembly but was not addressed in the Senate. It has become imperative, that if you are going to address the Racial Justice Act with any effect at all, Senate Bill 9 must be passed in September.

The Attorney General's analysis indicates that if even one of these motions receives a favorable ruling, before Senate Bill 9 is made law, then all inmates on death row will have a right to an RJA hearing no matter what the General Assembly does after the fact. Although most of 156 motions are not moving at this time, and a few are mired down in the infinite litigation that comes with RJA, a coupe of motions have been fast-tracked by the defense and put in front of judges who will be favorable to the issue. These motions will be coming to court in the Fall of 2011. If these motions receive a favorable ruling, the state's death penalty will no longer be a reality. RJA litigation for death row inmates will overburden the District Attorneys' offices, millions of dollars will be wasted, the death penalty will cease to exist, and some death row inmates could actually be released.

I am imploring you to address this vital issue when you return to Raleigh in September. If you wait until the 2012 session, it will simply be too late.

Respectfully,

From: Dorer, Peg
Sent: Tuesday, September 13, 2011 8:55 AM
To: 'Phil.Berger@ncleg.net'
Subject: District Attorneys - RJA

Senator Berger:

I know that you are extremely busy this week. However, I have two District Attorneys, Jeff Hunt
and the Conference President, Susan Doyle, who would like to meet with you for a few minutes
today. The Racial Justice Act is continuing to escalate in activity and we are seriously concerned
about the deleterious effect it is having on the criminal justice system.

We will be arriving at the legislative building at 11:00 and will be available to meet with you
anytime after that.

You can just respond directly to me or you can have someone call my cell phone (919-621-5988)
if you would like to set a particular time.

I look forward to a response from your office.

Thank you.

Peg Dorer
Director
NC Conference of District Attorneys
P.O. Box 3159
Cary, NC 27519
919-890-1500
FAX 919-890-1931
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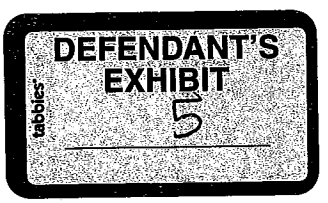

From: Shaffer, Richard L.
Sent: Wednesday, November 02, 2011 4:58 PM
To: Dorer, Peg
Subject: RE: Racial Justice Update

I am only sending this to you to avoid potential problems.

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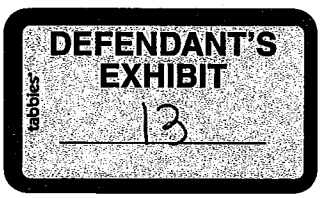
From: Dorer, Peg
Sent: Wednesday, November 02, 2011 3:20 PM
To: Andrew Murray; Andrew Murray (esqmurray@aol.com); Asbell, Valerie M.; David, Benjamin R.; Greenway, Brad; Bradsher, Wallace W.; Brandy Cook (blcook12@hotmail.com); Vickory, C B.; Clark Everett (clarkeverett@mac.com); Everett, W C.; Colon Willoughby (cwilloughby@co.wake.nc.us); Cook, Brandi L.; David, Jonathan M.; Henderson, J D.; Evans, Robert A.; Parrish, Frank R.; Gregson, Andrew M.; Yates, Garland N.; Frank, Garry W.; Garry Frank (westgwf@aol.com); Gaither, James C.; jdavidlaw@gmail.com; Hunt, Jeff P.; Wilson, Gerald W.; Jim O'Neill; Woodall, James R.; Jim Woodall (jimwoodall@hotmail.com); Johnson Britt (jbritt16B@yahoo.com); Britt, Luther J.; Kristy Newton (da16anewton@aol.com); Newton, Kristy;



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(mbonfoey@hotmail.com); Bonfoey, Michael L.; Nadolski, Patrick T.; O'Neill, James R.; pat
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919-890-1500
FAX 919-890-1931
www.ncdistrictattorney.org

From: Dorer, Peg
Sent: Thursday, November 03, 2011 10:39 AM
To: Shaffer, Richard L.
Subject: RE: Racial Justice Update
Attachments: Racial Justice Act.doc

I did not publicize this but let me tell you where we are. We (Susan, Billy West, Jim O'Neill, Scott Thomas and myself) met with the Governor on Tuesday. It was a relatively good meeting and she got it…and got how it could affect her. I'm not saying she'll actually do anything, but she does realize the mess it has caused. When then met with Sen. Berger. He said that they were waiting until redistricting was approve by DOJ…which it was the day after. They will come back in next week and probably won't do anything and then re-adjourn until the end of November. Hopefully then they will take it up. Senator Berger's staff has begun work on this…they have met with Bill Hart and now they have asked us for a resolution signed by all the DAs.

I've put together the resolution and am polishing it up to send out to all the DAs. I'm attaching it to get your feedback.

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From: Shaffer, Richard L.
Sent: Wednesday, November 02, 2011 4:58 PM
To: Dorer, Peg
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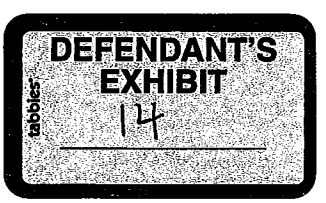

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November 14, 2011

The Honorable Phil Berger
North Carolina General Assembly
2008 Legislative Building
Raleigh, North Carolina 27601

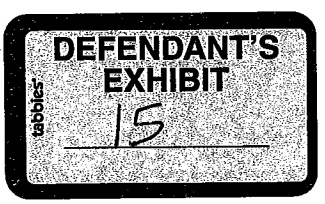
Dear Senator Berger:

On behalf of North Carolina's 44 elected District Attorneys, I am asking for your assistance in correcting poorly constructed legislation that is having unintended and deleterious consequences. The Racial Justice Act (RJA), passed in 2009, purports to protect murderers from racial bias. Let me assure you, it does not. This act simply allows complex statistical maneuvering to overrule a jury's decision, ignore the heinous acts of a murderer and ultimately put an end to the death penalty in our state. I am asking that you consider the information provided in this letter and support an amendment to RJA as soon as possible.

Since this bill passed, concerns expressed, by District Attorneys, yet disregarded, during the initial legislative debate have become reality. And now, if action is not taken quickly the criminal justice system will be saddled with litigation that will crush an already under-funded and overburdened system. Consider the impact:

(1) Death row inmates, regardless of race, have taken advantage of RJA. Of the 158 inmates on death row, 156 have filed motions. Fifty-seven of these inmates are white, with many of their victims being white and many of the juries consisting of mostly white jurors. Yet, by manipulating statistics, they will prevail. While black defendants are claiming racial bias by the system, white defendants are claiming reverse bias as a result of the system's efforts to eliminate discrimination against black defendants. This was not the intent of RJA.

(2) The cost of this act is proving to be prohibitive and the burden is crippling our criminal justice system. Almost every district in our state is facing at least one of these motions, while many are burdened with multiple motions. District Attorneys are being forced to devote a ridiculous amount of time and resources to these convicted murderers' cases. In one pending motion, conservative estimates for just copying prosecution discovery range from $35,000 to $50,000. While District Attorneys bear the responsibility of responding to RJA, we have received no additional resources. That means there are fewer resources to prosecute murderers, rapists and drug traffickers whose cases are now pending and who are sitting in jail. This was not the intent of RJA.



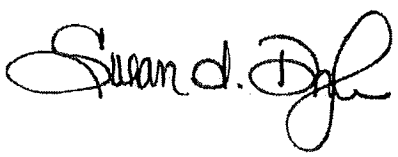
(3) The act creates a quagmire of litigation that requires the accumulation and distribution of over 20 years of homicide case files, easily numbering in the thousands. Thus far, the judge in one district litigating RJA has set a schedule for the discovery process that extends for 2 years before the actual hearing is ever reached. Additionally, statistical experts, being paid exorbitant fees, are being brought in from across the country to testify on a variety of statistical data, none of which relate to the convicted murderers' actions. This was not the intent of RJA.

(4) Proponents of RJA guarantee that none of these inmates will go free if they prevail on a claim. There is no guarantee. Inmates sentenced before October 1994 under Fair Sentencing, whose sentences were commuted to life in prison can be considered for parole after 20 years. There are at least 27 such inmates currently on death row. This means the courts could indeed release a number of these heinous offenders, whose victims' were promised they would never be released to threaten or re-offend. This was not the intent of RJA.

Do not allow North Carolina to continue this charade on its citizens, your constituents, with regards to the death penalty. In its current state, with RJA in place, we truly do not have a death penalty. District Attorneys are obligated by law to pursue litigation and defend the decisions of the judges and juries in our state. However, there is little we can do to prevent RJA from draining the scarce resources of our criminal justice system and possibly vacating death row.

I implore you to reconsider this Act. At a time in our state when resources are scarce, it seems these resources should be devoted to more worthy endeavors like our children, schools or healthcare systems. Senate Bill 9 – No Discriminatory Purpose in the Death Penalty seeks to amend the RJA and bring it in line with the U.S. Supreme Court's ruling on the use of statistics in death penalty cases. Nothing about RJA fulfills the stated intent of the act. I challenge you see RJA for what it really is, not a search to eliminate racial bias, but a backdoor deal to end the death penalty in North Carolina.

Sincerely,



Susan I. Doyle
District Attorney, Johnston County
President, North Carolina Conference of District Attorneys.

D R A F T

DISTRICT ATTORNEYS CALL FOR CHANGES TO RACIAL JUSTICE ACT

Raleigh, NC – District Attorneys from across North Carolina are calling for the General Assembly and the Governor to make much-needed changes to the Racial Justice Act (RJA). Forty-two elected District Attorneys support a resolution calling for these changes.

"No District Attorney supports race as a factor in either death penalty cases or in the criminal justice system in general," says Susan Doyle, President of the Conference of District Attorneys. "While the name of the act sounds well-intentioned, the actual application is a threat to justice, truth and public safety,"

The Racial Justice Act, passed in 2009, purports to prevent and correct racial bias in death penalty cases. However, the bill is written in such a broad manner that it allows any murderer, regardless of race to file an RJA claim. Of the 157 inmates on death row, 152 have filed claims under the Racial Justice Act (RJA). Fifty-seven of those individuals are white. Under the RJA, statistics alone can be used to overrule a death sentence without regard to the facts of the case, murderer's actions or the jurors' decisions.

A press conference will be held on Wednesday, November 16th at 11:00 a.m. at the North Carolina Judicial Center, 901 Corporate Center Drive. At that time, District Attorneys will elaborate on the issues surrounding the Racial Justice Act and their resolution calling for change.

Resolution on the Racial Justice Act

WHEREAS, North Carolina District Attorneys' constitutional responsibility is to seek justice in criminal cases based on the facts and circumstances of each individual criminal case without regard to race; and

WHEREAS, North Carolina state and federal laws, criminal procedure rules and ethical guidelines specifically prohibit the factor of race in the prosecution of criminal cases; and

WHEREAS, procedural hearings already allow for racial injustices to be raised and addressed by the court process; and

WHEREAS, a defendant, especially in a death penalty case, should be judged solely on his or her conduct and culpabilities, not on race nor the statistical values associated with a geographical area; and

WHEREAS, the Racial Justice Act purports to protect murderers from racial bias and in fact, it does not; and

WHEREAS, the Racial Justice Act has been interpreted to allow statistics alone to override the deliberations and decisions of jurors and judges and discounts the actions of a murderer; and

WHEREAS, 154 inmates on death row have filed racial justice motions without regard to the race of the defendant, victim, prosecutor or jurors; and

WHEREAS, the Racial Justice Act, passed in 2009, sets broad, ambiguous and inappropriate standards for vacating death sentences; and

WHEREAS, the Racial Justice Act is a thinly veiled attempt to overburden the criminal justice system and end the death penalty process in North Carolina; and

WHEREAS, the Racial Justice Act allows death sentences to be vacated on the basis of statistics of broad geographic areas and time periods and could potentially allow the parole of many murderers currently on death row;

THEREFORE, BE IT RESOLVED the North Carolina Conference of District Attorneys, comprised of the forty-four elected District Attorneys, oppose the use and manipulation of statistics alone to vacate a death sentence. And the Conference of District Attorneys supports the amendment of the Racial Justice Act to limit claims of racial injustice to the specific case before the court identified in the motion, in accordance with the United States Supreme Court's ruling.

House committee clashes over Racial Justice Act

NBC - 17 WNCN (Raleigh-Durham, North Carolina)

February 10, 2012 Friday

Section: POLITICS

Length: 752 words

Byline: Associtated Press | NBC17.com

Body

RALEIGH, N.C.

Sharp partisan differences surfaced once again as lawmakers considering changes to North Carolina's Racial Justice Act held their first meeting Friday.

The House Select Committee on Racial Discrimination in Capital Cases met one month after Republicans fell a few votes short of overriding Democratic Gov. Beverly Perdue's veto of a bill that would have essentially repealed the 2009 law. House leaders sent the bill to the new committee to see if changes could be worked out to avoid another veto or sway enough Democrats to secure an override.

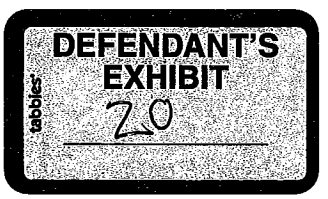
Rep. Tim Moore, who chairs the panel, said he'll seek a consensus to address concerns by prosecutors and others about how the law is applied. The law creates a new legal process by which a judge must reduce a death sentence to life in prison without parole if the judge determines race was a significant factor in the sentencing. Defendants can use statistics to make their case - a big hang-up for the law's opponents.

"Since the majority of both chambers passed this bill and it was kept from going into law by the executive branch, the thought is to ... give it another try and to hear from the folks who are actually having to deal with the application of this law," said Moore, R-Cleveland. The committee aims to have recommendations by May, when the next extended General Assembly work session is scheduled.

Democrats on the committee questioned why the law should be altered when the first such case involving a death-row inmate is just beginning to make its way through the courts. The first evidentiary hearing under the law continued Friday in Fayetteville involving convicted killer Marcus Robinson.

House Minority Leader Joe Hackney, D-Orange, told Moore the Racial Justice Act shouldn't be interfered with until at least after Robinson's case is resolved, if it all, because there are no known unintended consequences. A death penalty litigation lawyer estimated it would take a year for Robinson's case to be completed given likely appeals.

"We have an active application of the act in court as we speak," Hackney said.



But Rep. Sarah Stevens, R-Surry, said there were already unintended consequences. Nearly all of the 158 prisoners currently on death row have filed papers seeking relief under the Racial Justice Act, including white defendants convicted of murdering white defendants. Racial Justice Act supporters say white defendants can also face discrimination if prosecutors deliberately remove black citizens from jury pools as a strategy to seat a jury that will sentence someone to death.

The state's district attorneys - nearly all of whom sought the override of Perdue's veto - have said the requests by so many defendants show how overly broad the 2009 law is and how it will extend a de facto death penalty moratorium that has gone on for 51/2 years largely for other reasons.

Wake County District Attorney Colon Willoughby told the committee the use of statistics to attempt to prove racial bias is too expansive. The 2009 law also is vague on how judges should conduct a hearing, giving them room to "impose their own political philosophy" and deny certain evidence from being heard, Willoughby said.

Ken Rose, a senior attorney for the Center for Death Penalty Litigation in Durham, disagreed, saying "the courts are in the best position to sort out this evidence, to interpret this law and to apply the law," pointing out that trial judges already preside over murder trials that may end with a death sentence.

"If we can't trust them to interpret and apply this Racial Justice Act, why would we trust these same judges in deciding important issues of who lives or dies under our capital punishment law?" Rose asked the committee.

Committee members heard from other supporters and opponents of the Racial Justice Act, including district attorneys and relatives of murder victims. The speakers have given similar presentations to legislators in recent months as the Racial Justice Act repeal was heard.

Moore said the committee would look at several ideas, including whether to narrow the scope of the use of statistics in these evidentiary hearings.

The Racial Justice Act also applies to murder defendants who have not yet gone to trial and are challenging a prosecutor's decision to seek the death penalty. Committee members also wanted more information on a Michigan State University study that showed a defendant in North Carolina is 2.6 times more likely to be sentenced to death if at least one of the victims is white.

Graphic

North Carolina Legislature

Load-Date: January 3, 2013

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MINUTES

HOUSE SELECT COMMITTEE ON RACIAL DISCRIMINATION IN CAPITAL CASES

February 10, 2012
10:00 a.m.
Room 1027, Legislative Building

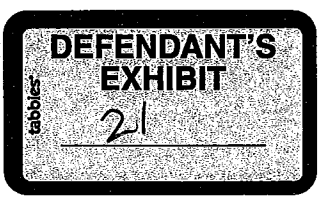
The House Select Committee on Racial Discrimination in Capital Cases met on Friday, February 10, 2012, at 10:05 a.m. in Room 1027 of the Legislative Building. The following members were present: Representative Tim Moore, Chair; Representatives Burr, Faircloth, Hackney, Hall, Parmon, Randleman, Spear, Stevens, and Stam.

Representative Moore, Chair, presided. He thanked the members for being there and recognized the Sargent-of-Arms staff: Carlton Adams and Bill Bass. Chairman Moore gave the background of the committee. There was a bill to modify the Racial Justice Act that passed both chambers but was vetoed by the Governor. The veto fell short and as result, the bill was referred to this committee to be dealt with during the interim in hopes we could find a solution to the issue. The purpose of the meeting today was to get some background. This committee was designed to get down to where the rubber meets the road and hear from both sides on the issue. Everyone who wanted to speak could speak on the issue, and public comment was allowed. We reached out to a number of stakeholders---criminal defendants and then those who represent the state in prosecuting these crimes.

Chairman Moore recognized Colon Willoughby, Wake County District Attorney, to speak on behalf of NC Conference of District Attorneys.

Representative Hackney asked Representative Moore to elaborate more on the committee. Representative Hackney stated there was an active application of the law in court and asked what purpose the committee served? Chairman Moore said this committee, during the interim period, could come up with some recommendations for a bill in a different form. There could be a consensus bill for when we come back for short session ---maybe so or maybe not, but at least, to explore it since both chambers passed this bill and the Executive branch kept it from becoming law. The thought is to give the bill another try and to hear from the folks who actually have to deal with the application of this law as we presently have it. Representative Hackney said they did not vote for the veto, and it is the law of North Carolina, and that this issue should be finished. Chairman Moore said he supposed there is a difference of opinion on that, and the committee would move forward.

Representative Larry Hall inquired what the committee's procedure would be. Are you going to have some rehash? He inquired about a schedule so the public will know what to expect moving



forward. Chairman responded there would be no votes during the committee meeting, and today would just be information.

Representative Parmon asked if the committee was going to have recommendations for the short session. She asked, what are we going to do? Chairman Moore said what they do is up to everyone on the committee, but he wanted to see what they could come up with; for example, if there are particular concerns with the bill that was vetoed. If there are concerns with that bill that can be addressed through new legislation that would amend the previous Racial Justice Act, we may look at that. It will be the will of this body and committee.

Presentations

Colon Willoughby, Wake County District Attorney, NC Conference of District Attorneys

Chairman Moore recognized Colon Willoughby again to speak on behalf of the NC Conference of District Attorneys. Their belief is the Racial Justice Act, as currently drafted and passed, is overbroad. From a legal standpoint, they believe it is poorly constructed because it fails to provide guidelines on specific instructions as to how some of these issues are supposed to be dealt with. It ultimately amounts to imposing a moratorium on the death penalty in North Carolina rather than looking at whether race was truly an issue in the case in front of the court. The first of those concerns is the law, as drafted, does not focus on the case that is before the court. It allows the use of statistics to be basis for overturning a sentencing hearing in a jury's verdict. If you look at the law and look at the way it is actually worded, it really does not provide any specific issues as to whether or not the person has been subjected to any kind of either constitutional or racially impermissible exercise of guided discretion in the 15A-2000, which is our death penalty statute. Under the wording used in the statute where death sentences are sought or imposed, significantly more frequently on persons of one race than another, the standard used could be used to show discrimination in many organizations within society; probably, in most houses of worship if you looked at the memberships—people that were sought or added as a member in that house of worship in any particular time period were probably significantly and more frequently of one race than another. That whole idea does not address the issue of whether or not there is a disparity, much less whether there is discrimination. It also allows for individual judges to impose their political philosophy as to how to interpret these particular provisions of how the procedure is to go.

One of them is playing out right now in Cumberland County. The trial judge who you would think would be a neutral and detached person who presided over this particular trial and would be in a unique position to provide guidance and insight into what went on in that trial is not. In this particular case, as a former FBI agent who would have been trained at looking at things and making that kind of assessment or investigation, that person's testimony has been excluded despite the fact that the wording of the statute calls for testimony from attorneys, prosecutors, law enforcement or other members of the criminal justice system. The ability to exclude these testimonies really calls into question whether or not this statute is drafted as it should be to set up specific guidelines of how these cases ought to be litigated when they come to court. It also, if you read into the statute, allows you to look at what goes on in other districts or other divisions---things that were not involved in this particular case and allows you to super-impose what has

happened in those cases into the case at bar. It might be a case from another division or another district that had nothing to do with this case or any of the people involved in this case. These decisions from other cases can come back and penalize the victim or impose a new verdict on this particular case that is not based on what happened in that case, but based on what happened somewhere else in the state. Always focused on applying the law and facts to a particular case and in this one, seeking some vicarious remedy if there has been a problem or injustice in some other case, it allows based on that case, that another case should be handled differently. That has sort of been the antithesis of what our criminal justice system has been about. If you look at it, the further wording of the statute, it says you are to look at these factors irrespective of statutory factors. So, it specifically says you don't take into consideration the statutory factors.

Willoughby said I believe based on what I have been able to read so far that the studies being introduced deal with a broad range of homicide cases and not just those cases determined to be eligible to be tried under the death penalty. The statute says that is the way to do it. To not look just look at capital cases and say among these capital cases there has been some type of problem, but look at all cases and take the correlation from all cases and apply it just to the capital cases. This method allows these verdicts to be attacked and are not sound based on the legal principles that we have had imposed here in North Carolina law.

This law is also out of the mainstream. Willoughby said he thinks 48 other states do not have a similar law. The only other state he can tell has one is Kentucky. It appears to be different and has not generated any significant litigation. So, we in North Carolina seem to be out there by ourselves with this piece of legislation. We believe it was done because it was just a Trojan horse for the moratorium. As district attorneys in the conference, they believe it needs to be significantly changed. We think if someone can show discrimination in his or her case that person should have a remedy. If it is a pretrial issue, then it ought to be a remedy that would prevent that injustice from going forward. If it is a post conviction, then there should be a remedy for that person whether the remedy is to commute the sentence or whether it is to provide a new sentencing hearing and is certainly a matter for the legislature to decide. In most cases in which we have some impropriety or errors in a sentencing hearing, the case comes back and is resentenced under our law. An example of why we know this law has created problems are: if we look at the people who have filed these motions so far, the death row population, over 95 percent of those folks there have filed it. When you look at the racial makeup of defendants and victims, it is completely skewed and has no bearing on any kind of rational assumptions as to some type of racial discrimination. These are the same type of problems law enforcement and prosecutors predicted would happen if this law passed in the form it is in when it was up in 2009, and we encouraged legislators to look at this and to tailor this law so it accomplished whatever goal was specified---not just operate as a moratorium. The Conference of District Attorneys recommends you make some significant and meaningful changes to this law so that in fact it is worthy of its name of racial justice and that it does seek to put justice back in our system.

Chairman Moore asked members if there were any questions for Mr. Willoughby. Representative Hackney was recognized to speak. Representative Hackney asked Mr. Willoughby if he believed, based on his experience and knowledge in North Carolina, racial factors sometimes play a role when a person gets the death penalty in the jury verdict. Mr. Willoughby's experience in capital cases is limited to Wake County, and he has never defended

or prosecuted a case outside of Wake County. Willoughby said he did not think so and said juries tend to look at horrific facts. They tend to impose sentences of death on people who either have terrible records or the facts of their cases are terrible facts. He thinks that is what motivates most of the people. Representative Hackney said his prosecutorial experience is limited to Orange and Chatham counties and some in Alamance. Representative Hackney asked if he thought it was fair to criminal defendants across North Carolina and to the population at large that we almost never have a death case in some counties; for instance, Orange County, but they are very frequent in other counties across the state simply because of the difference in population in that county. Representative Hackney asked if that was a fair thing. Mr. Willoughby said he did not know if it was fair or not. Fair is kind of like beauty is in the eye of the beholder. He thinks juries in those communities across the state operate under what our United States Supreme Court says is guided discretion. People have to weigh things based on their life experiences just like those in this room have different life experiences and some things are important to one and not important to others. Juries honestly try to do that whether it is Orange or Wake or Iredell or whatever county it is in. Representative Hackney asked if there was anything they should try to do about it if the death penalty is applied and can be shown to be applied differently from county to county across the state---that is not something the legislature should be concerned about, and we should just go on about our business. Mr. Willoughby thinks people in Orange County should be educated about some of the problems and that you are out of touch with other folks and maybe you should change who you are rather than everybody else changing the way they are.

Representative Stevens commented and wanted to get more information. As a committee, she requested a copy of the study the bill is based on. Also, she requested the audio recording from the arguments being made in Cumberland County because they are important. Representative Stevens asked staff to look into that.

Representative Stam told the committee that the death penalty opponents got the legislature to pass a bill to allow discretion to District Attorneys; in other words, is this a self-imposed problem that we could repeal that bill and it would solve the disparity between districts? Mr. Willoughby said prior to, he thinks, 1998, that if there was a change before that, if there were aggravating facts, statutory aggravating factors and if you proceeded on first degree murder, you were required to qualify the jury and present that evidence to the jury and make that decision. You could go forward on second degree murder and not do that or you could accept a plea. In 1998, you gave us the authority to use our discretion and not go forward in first degree murder even if the statutory aggravating factors were there. I think you will see a short drop off in the number of trials after that. Some folks felt they could accept a second degree plea, but that they had to go through with the process, but once the jury found them guilty of first degree then they did not feel like they had to have a death verdict, but it was up to the jury to make that decision. Chairman Moore thanked Mr. Willoughby for coming.

Ken Rose, Senior Staff Attorney, Center for Death Penalty Litigation

Ken Rose, Senior Staff Attorney, Center for Death Penalty Litigation, was recognized to speak by Chairman Moore. He is involved in lead cases in Forsyth and Cumberland Counties. There is the availability of the MSU study which was done over a two year period, and the testimony

that is also being put out by the MSU website. He should have available to the staff of the committee links to those sites that they can then provide to the committee. Representative Stam said a couple of months ago that MSU would not release their underlying data. Have they ever released their data? Mr. Rose said yes and it happened about a couple of months ago. Mr. Rose thinks there are things everyone can agree on. No one on the committee believes race should play a role in the capital punishment system. We are all looking for ways that race does not affect juries, jury decisions, and selection of juries. The second thing everyone can agree on is this affects real people---family members of victims, defendants, and families of defendants. All of us have an interest that race does not affect capital punishment decisions.

In five years preceding the passage of the act, there were three African Americans who were exonerated from death row. In addition, there was antidotal evidence at that time of real problems of the infection of race in the juries in some of these capital cases. In particular, the Kenneth Rouse case and the case of Robert Bacon---in both cases jurors gave affidavits saying racial prejudice was a part of the deliberations in those cases. There were studies presented at that time, preliminary studies I would say. One by Professor Jack Boger, now of UNC Law School, and Professor Isaac Unah that showed race was a factor in who got the death penalty in one context, and that was race of the victims. There were a lot of real concerns raised.

What has happened in the two plus years since the passage of the act? Trials have proceeded on pace. We have heard how the Racial Justice Act obstructed the use of the death penalty, and in the words of Mr. Willoughby, has caused a moratorium. In fact, as many trials have gone per year as before the Act passed, and it has not interpreted death penalty trials. There have been some people put to death since the passage, and again, it has been at about the same rate as the sentencing before the passage of the Act. Appeals have also proceeded since the passage of the act---appeals both in state and federal court.

Initially after the passage of the act, attorneys representing death row inmates attempted to consolidate the cases---the Racial Justice Act cases in an effort to speed up the process and make it efficient, and that was not agreed to by prosecutors, and did not succeed. When that fell through, there was an effort to make a lead case model for the use of the Racial Justice Act, and that has worked. What you have is initially Forsyth County had a lead case, and you had a Cumberland County lead case. The Cumberland County lead case was referred to by Representative Stevens and that is in process right now. There have been two weeks of hearings so far in that case. Prosecutors in the last year have tested this law so you have heard arguments from Mr. Willoughby about the vagueness of the law—about the fact that the law is overbroad. Those arguments were raised in motions and in Forsyth and Cumberland counties. In both situations separate Superior Court judges have found this law is not unconstitutionally vague and not unconstitutionally overbroad. The judges have denied motions to dismiss the proceedings in those cases. The courts considering the same arguments that Mr. Willoughby brought to you today have rejected those arguments at least in a constitutional context.

There have been two major studies since the passage of the Act: one by Michigan State University College of Law on charges of sentencing and on the prosecutorial use of preemptive strikes to exclude African-American jurors. The Michigan State University School of Law study took about two years to finish. The Katz study is the second study and that included a survey of

prosecutors around the state who had capital cases and asked those prosecutors to give reasons for their use of preemptive strikes. They asked specifically for nonracial reasons that they exercised preemptive strikes for perspective black jurors. They heard yesterday in testimony by Dr. Katz that he received responses in about half of the cases that he surveyed around the state from prosecutors and that evidence has been presented to Judge Weeks in the form of affidavits. (I think between 20 or 30 affidavits by prosecutors from around the state). Dr. Katz also performed a cross tabulation analysis, and he performed his own regression analysis analyzing the MSU data and analyzing the prosecutors' affidavits.

In short, this lead case in Cumberland County has worked in the sense that it has made it efficient and making it a way the courts can interpret this statute. Get one interpretation from the Superior Court Judge and then have that go up to the North Carolina Supreme Court for review. The judge in Cumberland County considered numerous things: considered historical evidence, considered experimental data by social scientists, considered statistical evidence considered by social scientists on an unconscious bias, considered testimony by prosecutors, and about individual cases. The affidavits, instead of requiring all the prosecutors from around the state to come in and testify to take their time and take up the time of the court, were stipulated as hearsay and subjected to the rules of evidence so the courts set up a very efficient method that both sides agreed to to allow this testimony to be considered. There were some areas of agreement between experts. The experts from both sides testified about large and statistical disparities by race and the prosecutors exercise of preemptive strikes. There were major areas of disagreement. The experts disagreed about whether those significant disparities can be explained by non-racial factors. This lead case that the Superior Court has heard testimony for over two weeks is still going in to next week and maybe through next Wednesday. He has found that Marcus Robinson has met his initial burden of production so in that race is a significant factor in the use of preemptive strikes, and he has allowed the state to respond to that case. That is where we are now. The judge will probably make his decision in the next couple of months, and it will certainly be reviewed by the North Carolina Supreme Court. That will serve to clarify the law and address some of the problems that we have heard expressed by Mr. Willoughby, if in fact, there are problems.

Mr. Rose believes the courts are in the best position to sort out this evidence, to interpret this law, and to apply the law. They have spent a lot of time looking at the evidence, hearing it for two weeks, and making their decision. Keep in mind these are the same courts that are applying our death penalty law. These are the ones making decisions every day of whether people live or die under our capital punishment law. Mr. Rose raised the question if we cannot trust them to interpret and apply this Racial Justice Act, why would we trust these same judges in deciding important issues of who lives and who dies under our capital punishment law.

Chairman Moore asked if there were any questions for Ken Rose. Representative Stevens asked if they do not allow the judge who tried the case to testify. Is that the problem? Mr. Rose said that was accurate, and the reason is that we have a long standing rule of evidence that is applied in North Carolina and almost everywhere else. It says that trial judges that hear the case and preside over a trial and hear new evidence and make decisions are generally not permitted to testify in a subsequent post-conviction case. So, what the judge in Cumberland County was doing was applying this general rule of evidence to the situation. There was a basic reason for

doing that. The reason is we do not want several judges in a position to be making noise on the same thing and have conflict among judges as to what the law is and applying the law. In fact, we have one judge make these decisions, and that is the judge presiding in the post-conviction proceedings. Secondly, the policy reason for doing this is that we have a record at trial that is created through a transcript and through other documents that are finalized at the trial level. We do not want anybody, judges or anybody else, going behind that record and disputing facts at a later point. What Judge Weeks was doing in this case was applying that law, that legal basis to protest many of the judges in Mr. Robinson's trial. Representative Stevens had another question. The problem is that we are going to take sworn testimony of attorneys and put on the record, law enforcements testimony is on the record, and then invade a jury which we have never done before. Mr. Rose said we put limits on the jurors' testimony in the Racial Justice Act. He said, if a judge would be subjected to Rule 606, which does not allow the court to go into the mental processes of the jurors and does not allow that as evidence, so the Racial Justice Act was consistent in saying we would not look at the mental processes of the jurors and did not specifically mention in this statute that judges were able to testify. The fact is we have had two judges already testify in this Racial Justice Act hearing in Cumberland County. They have not testified about what happened in proceedings in which they decided and that is because of this rule that Judge Weeks applied.

Representative Stevens said which two judges testified? Stevens named one. Mr. Rose said Judge Trosch of Mecklenburg County's District Court, and he was not testifying about anything that he did while presiding as a Judge. He was testifying as an expert witness in this case about things that prosecutors, judges, all of us can do to reduce the problem of racial bias in the proceedings.

Representative Stam had three questions for Mr. Rose. Preemptive strikes – constitutional right---would you be happy not to have preemptive strikes in capital cases so we would just do away with this issue? That is one of the remedies that Justice Marshall recommended in his concurrent opinion in Batson v. Kentucky, and I think that is one option that we have; however, he thinks the Racial Justice Act is a deterrent to prosecutors and defense attorneys to use race as a factor in preemptive strikes and it works as a remedial effort if we find race has been a problem in the use of prosecutors preemptive strikes. Second question: ----Batson v. Kentucky, Rep. Stam's understanding is the defendant would have had every opportunity under Batson to challenge every preemptive strike in his case and all the statistical stuff is about appropriate strikes in his case, but the preemptive strikes in somebody else's case twenty years ago in a different county. Stam asked if he was right that he had the right to challenge. Mr. Rose has shown that having the statistical evidence about the county, the district, and the state. Mr. Robinson has also made a showing that in case, the statistical evidence supports the showing but the prosecutors used preemptive strikes. Particularly, the prosecutors struck 50 percent of eligible African-American jurors and only approximately 15 percent of eligible white jurors. Representative Stam referred back to that point. Would a trial judge not have looked to see if there were compounding variables in his case with his jurors that gave legitimate reasons? Mr. Rose stated if Batson objection had been made. In Mr. Robinson's case, no Batson objection was made so the trial judge did not have an opportunity to rule. Third question from Representative Stam: we are now two and one half years in, and I am sure the case will be appealed so that will make 3 ½ years, then have to apply it to 106 people, when would you expect the appeals to be finished on

the Racial Justice Act? For the people already on death row but not a lead case, what year do you expect their appeals to be finished? Mr. Rose said he expects Mr. Robinson's appeal will be decided within the next year approximately. Then he would expect a lot of cases would be settled or negotiated with the prosecutors depending on what the State Supreme Court rules because we will have a clear interpretation of the Racial Justice Act from the State Supreme Court and we will be able to use that guidance as clear indication of whether defendants have a chance to win in their individual cases. Representative Stam graduated from Michigan State University School of Criminal Justice, and it may surprise people to know that Michigan has not had the death penalty, and the professor leaving the state.....

Chairman Moore recognized Representative Hall who had a question about the overall effect on Mr. Rose's opinion on people's confidence in the system. Mr. Rose said initially what the studies have shown is that there is something to be worried about. There is concern about exclusion of qualified African-American citizens from juries. He believes if we address this, and yes, we are the lead state looking at this, then in the long run we will give people greater confidence in the criminal justice system that can be addressed and look honestly at race and change things if we find that race is a significant factor in these cases. Representative Hall has a follow up question regarding efforts to consolidate the cases and have they heard that would make the process move quicker. Could you tell us why the District Attorneys do not proceed with a more expedited process? Mr. Rose is not sure why. Representative Hall asked if we consolidated those cases could we have moved faster in the process. Mr. Rose said yes, he thinks it would have moved somewhat faster, but also thinks what all the plaintiffs have done in all these cases is treat the Cumberland County case as a lead case that is going to go first and they are holding off on their litigation. That makes sense and saves resources. It looks to efficient justice and we will have one interpretation on most of the issues in the Racial Justice Act---maybe not all of them but most of them when that case is decided by the State Supreme Court.

Representative Hackney asked where Rule 606 limitations are found in the Act. Mr. Rose said he did not know because he did not have it in front of him. Representative Stevens referenced a sentence under number three. General Statute 15A-2011(b)(3), stated Hal Pell, committee counsel. Representative Stevens asked if the court would rule on the state's rebuttal to get the individual facts of this case. Mr. Rose said yes and part of approval of both sides. Judge Dickson was the prosecutor in the case, and Judge Dickson testified as part of the state's case so that is part of the court's elements. Representative Stevens said that is probably a good reason not to try all the 100 plus cases together and look at each case individually. Mr. Rose said yes. Representative Hackney said the judge's conclusion will not necessarily rest on the statistical evidence or the statistical evidence alone. Mr. Rose said that is right. Representative Hackney said if the judge would decide in that particular case that without consideration of the statistical evidence that the judgment was solely obtained on the basis of race then the amendments proposed in Senate Bill 9 this year would be irrelevant for that consideration. Mr. Rose stated yes.

Representative Stevens wanted explained how antidotal evidence is going to be heard in a verdict. Mr. Rose gave example from the Rouse case. Rouse case was an affidavit from a juror that said one reason I voted for the death penalty was racial prejudice. We were very surprised

the attorneys from Mr. Rouse got that affidavit from this juror. No mechanism in the court process before the Racial Justice Act to considered that evidence. This affidavit was never considered on the merits by a court, state or federal. Because of the passage of the Racial Justice Act, Mr. Rouse will be able to present that evidence and possibly the testimony of the juror to show that in his case race discrimination was a significant factor. Chairman Moore thanked Mr. Rose for coming to the meeting.

Professor (Retired) Elliott Cramer, University of North Carolina at Chapel Hill

Chairman Moore recognized retired Professor Elliot Cramer from the University of North Carolina at Chapel Hill to speak. See attachment 1.

Chairman Moore asked if there were any questions from the committee. Representative Stam asked a question on the discretion between males and females. Mr. Cramer said women do not tend to murder people; of course, we have the example of Velma Barfield who was executed. You have to consider the aggravating circumstances. If you look at cross race cases, there are very few white cases murdering African-Americans and the cases of African Americans murdering whites generally are pretty horrific. Chairman Moore thanked Professor Cramer.

Locke Bell, District Attorney, Gaston County

Chairman Moore recognized Locke Bell, District Attorney, Gaston County. Mr. Bell stated he was a defense attorney before becoming a District Attorney and he handled capital defense work and prosecuted council cases. He talked about the law of unintended consequences, the horrible miscarriage of justice that this law, as written, will cause. Members may have seen in the paper where Danny Hembry, a white man, wrote a letter from death row laughing. Danny Hembry wrote: tell me if you can suckers, ha, ha, ha. Mr. Bell put Mr. Hembry on death row last fall. Mr. Henbry is white. When he was 18 years old, he robbed a man and said the man had committed the unpardonable sin of being black so they kidnapped him. Mr. Hambry and his friend tied his hands behind his back, blindfolded him, and put him in the back of a car. They took him to South Carolina and made him sing, We Shall Overcome, at the point of a gun. Their idea was to take him to the top of a cliff and push him off blindfolded and hands tied, but there were people camping. They put him on the ground and shot him in the back with a 25 caliber, but the gun jammed and the man lived. The man is now a minister in Cleveland County. Danny Hambry then went off to prison about 13 separate times for armed robberies. By Mr. Hambry's own admission, he escaped from prison 5 times. He said on the stand that no prison could hold him. Mr. Hambry got out January 1, 2009. In October, he killed a 17 year old girl with his bare hands. Mr. Hambry was asked why he killed her, and he said, he would clean it up a lot. Mr. Hambry said he had to do it because she was having sex with a black man. Three and a half weeks later, he killed another girl who was found. The police asked Danny Hambry why did you kill this woman. He looked at them again, and again, he responded he had to. She was having sex with a black man. The law is now going to afford Danny Hembry the opportunity to hide behind the Racial Justice Act. The law, as it is now, means that Danny Hembry cannot be held accountable for the evil that he did. Mr. Locke said he does not have the mother and father of Heather Catterton here. They cannot handle it. When Danny Hembry wrote that letter to the

newspaper laughing, it tore them up. The law of unintended consequences. This is why the Racial Justice Act must be corrected. This man stands on his own sins.

Mr. Bell addressed another issue. In Gaston County, there are seven people on death row---six are white. I personally have put two white men on death row. We have gone after three, one in three did not agree. The other white man had a long history of violent crime. He was also a very proud member of the Arian nation, a sworn white supremist organization. He has filed a racial justice claim, and the law now protects him. That is not what the legislature had in mine. Mike Rhyne can be that way. His favorite method of dealing with people was with a baseball bat. In my county, if you look at it statistically, Mr. Bell is discriminatory against white people. He has gone after three white men. He can count four black men that qualified for the death penalty that he said no, and he did not go after the death penalty because he did not believe they deserved the death penalty, and they did not. Statistically, I go after whites, and my predecessor who is white goes after whites. Statistically anything can be created. Mr. Bell went after career monsters. Mr. Hembry confessed to a third murder. He took the police out and found the body. Mr. Bell had a picture of the lady who was killed because she was a black person. (See picture attachments of three victims: attachment 2, attachment 3, and attachment 4).

Chairman Moore asked if there were any questions for Mr. Bell. There were no questions from the committee. Chairman Moore thanked Mr. Bell.

Scott Bass, Murder Victims Families for Reconciliation

Chairman Moore introduced Scott Bass, Murder Victim Families for Reconciliation who had a couple of people who would speak on behalf of the association with him. See attachment 5 for Mr. Bass' comments to the committee.

Mr. Bass said two folks were there to speak.

Richard Joyner

Richard Joyner from Edgecombe County is a pastor of a church and is the Director of Nash Health Center Pastoral Care. About twenty years ago, his brother died after being brutally murdered by a young man. Mr. Joyner and his family suffered a tremendous loss. His brother was his family's first loss of thirteen siblings. It was their first entrance into the court system as a victim. It felt cold and callous from both sides. Mr. Joyner supports the Racial Justice Act because it is a system that brings consciousness to an unconscious system. This is not to make accusations to anyone, but when two people sit on opposite sides, someone sits in the middle of them that is not experiencing either factor. To make decisions you need to have conscious. The Racial Justice Act at least gives our system the opportunity for conscious. He and his family and the family that murdered his family ask the system to maintain a level of conscious. Mr. Joyner thanked the committee.

Tom Fewel, Victim Family Member

Tom Fewel, from Orange County, spoke next. He has lived in Chapel Hill for over thirty-six years. His daughter, Jean, was kidnapped shortly after walking off to school twenty-seven years and eleven days ago. Jean has been more vivid in his family's mind recently. Mr. Fewel still recalls what it was like to have a stack of napkins—just the right ones for four people now that Jean had joined their family. He recalled how she would stand on his feet when he came home from work, and they would dance around the kitchen while his wife prepared dinner for them. He recalled things Jean said that brought such joy to them. Much is taken from us, but much that is wonderful abides with them. Yesterday, it was a delight to see their one year old granddaughter, their son's child, toddle towards a computer screen so they could see her on SKYPE. Murder victim family members have different ideas about what they need from the criminal justice system. What all of them need from criminal justice is justice. He hopes the committee will leave the Racial Justice Act intact during these first months while we see what is going on. He and his family's experience with the criminal justice system were, for the most part, very positive. He remembers Joe Jackson at the Chapel Hill Police Department who came with one of his ministers to tell them their daughter had been found molested and murdered---hung from a low limb tree that was not many miles from their home. The District Attorney in Orange County at that time, Carl Fox, was very sympathetic to them and talked to them about a lot of issues including how he felt about the death penalty. Mr. Fewel and his wife told Mr. Fox they were opposed to the death penalty, but Mr. Fox explained to them very respectfully and patiently that he did not represent them in this trial. Mr. Fox represented the State of North Carolina, and he chose to prosecute that case and asked for the death penalty. It was hard for Mr. Fewel and his wife, but in the end, the jury sentenced their daughter's murderer to a number of consecutive life sentences for the crimes he committed. At that time, life without possibility of parole was not an option, but since then, the murderer has actually pled guilty to killing another young girl in Orange County prior to the murder of his daughter. He is now serving a sentence of life without possibility of parole in that case. We, family members, have different expectations what we want from this system of justice. He thanked the committee.

Scott Bass

Scott Bass said when Tom tells that story it is never easy to retell. Mr. Bass said he wished we were studying how we can do better by families, like Richard's and Tom's, and the families who are depicted in those photos and some other families. If we put a fraction of the efforts, time, talent, and treasure into doing a better job of serving victims by asking the question of what do they really need from us anyway---taking a step back from arguing about the death penalty and reforms and things like that and ask what they need. We need to examine what they need and turn as much focus and time, talent, and treasure to addressing those needs and those questions. That is the hearing he would really like to be here addressing---the committee, and maybe, next time, one of you will take the lead on that. But until that is done, no matter who is saying it, these claims of our moral obligation to the victims, our moral duty to victims which I heard a lot about during this debate on the Racial Justice Act, ring hollow. They sound just like so many politically opportunist statements that do not do anything close to our moral duty to victims. So, Mr. Bass challenged them as they continue discussion about this whether it is in a room like this or the media or wherever it is to be careful about the power of your words and to let victims

speak for themselves. To be aware that when you say things like that the Racial Justice Act will set dangerous people free, to realize that there is a family out there hearing that, and that you are adding to their trauma and fear. I talked to Eric Tornblum's father last week about the impact of those statements on him. At least one retired Chief Justice of the North Carolina Supreme Court have said that is not going to be the case and nobody is going to be set free. That life without parole is what is going to happen if someone commits a crime that is judged as racially biased. In spite of that, people continue to say these statements and continue to traumatize these families, and so I beg you to be careful with your words.

The last thing he wanted to say that is in addition to his experience as a minister, a therapist, and as an advocate for people working closely with people who have traumatic loss, he is a life-long resident of North Carolina, native of Sampson County, and he has seen firsthand the racial history of this state. He has seen some good things and then some things he is not so proud of. He has studied the history before his life time. He saw firsthand, for example, some of the tensions, misunderstandings, and fears around desegregation of schools including being unwittingly part of a boycott of schools. When he was in second grade, his white parents joined a lot of white parents in keeping kids out of school as a boycott against his going to school with students of black skin and having teachers with black skin. He remembers that vividly, and he did not understand what that was about then, but he understands now what that was about. He is aware that if rarely or ever we have done the right thing in this state and nation with regard to racial justice without at least, some resistance if not outright strident opposition. Typically the kind of statements they use in these struggles, stir fear---like the statements about dangerous people getting out. Sometimes rather heroic efforts are made to stop the bus from moving forward; figuratively, and sometimes literally on matters of racial justice. Mr. Bass was so proud of North Carolina, his home state, in 2009 when we passed the Racial Justice Act, that we were taking the lead. To him, the fact that forty eight other states do not have it is fine. We are taking the lead and not waiting to be the 48th or 49th state, and he is so proud of our state for doing that rather than being dragged along kicking and screaming. He hopes to remain proud of North Carolina as we figure out and give the Racial Justice Act time to work. Figure out what does and does not need to be fixed and tweak and then take action.

Last thing, he wants to make it very clear that there are families who have different views on the Racial Justice Act and the death penalty, but we are not against them. Again, our members have much more in common with those families than differences. We agonize when we see their faces of this 10 to 20 to 25 years, what the broken death penalty system has inflicted on their families, the additional trauma that did not start two years ago with the Racial Justice Act. Everybody knows that, although, sometimes it is betrayed as if the Racial Justice Act is something new that is creating. These families have been there already---going through that journey of 10, 20 or 25 years. We are not against those families, and we are not against our District Attorneys. Families like Tom's and Richard's and others know better than anybody the importance of District Attorneys who have the tools and resources to do their jobs well and do their jobs effectively. But, we also know that those in such important decision making places, like those making decisions of life and death, are as susceptible to racial bias as any of us. We also need tools to make them accountable and to help them make sure that rather than being race blind, they are actually seeing race because that is the way we address a cancer like racial bias. It is not by not seeing it. If I go to the doctor, I want him to see the cancer cells and treat them. I

do not want him to say he does not see them; therefore, they are not there. We need to see them and address them effectively. Our organization believes that the Racial Justice Act is a tool to help District Attorneys, our entire system, to avoid unconscious or subconscious racial bias and actually give victim's families the justice they deserve. Mr. Bass thanked the committee.

Chairman Moore asked the committee if they had any questions for Mr. Bass or his guests. There were none, and Chairman Moore thanked them for coming.

Garry Frank, District Attorney, Davidson County

Chairman Moore recognized Garry Frank, District Attorney for Davidson County, who had family members of a murder victim with him who would speak.

Garry Frank introduced himself as the District Attorney for Davidson and Davie counties. He wanted to elaborate on what Colon Willoughby said about the application of the Racial Justice Act being overly broad and having unintended consequences. His main representation is two of the four Racial Justice Act cases that are pending in his district to try to give a total factual representation of those cases so you can see the type of cases the Racial Justice Act is being applied for. The two cases in the handout (see attachments 6 and 7) have been pending in Davidson County for over fifteen years. Mr. Frank did not prosecute those cases but his predecessors in office did. He was a defense lawyer at the time those cases were prosecuted.

One of those cases is in Davie County and involves the Howell family, who was standing behind him, in the murder of Evette Howell, a black defendant with a black victim. He has tried to give a thorough representation of the facts of that case, a profile of the victim as well as you a copy of the NC Supreme Court opinions that upheld the death sentence in those two cases. The opinion in each of those cases was written one by Justice Mitchell and one by Justice Parker. Justice Mitchell has been quoted as talking about his opinion on this. For those that do not review this regularly, one may see the extent of the review that the Supreme Court gives in a death penalty case. They do what is called a proportionality review where, if you are reading the language in the opinion, they basically weigh that death sentence and the facts of that case against all the other cases where a death sentence has been given. If they find it to be disproportionate or out of whack with the system, they can reverse the death sentence. It was important to give the committee that. Those two particular cases because they both involve---one of them is a black murder with a black victim and the other is a white murderer with a white victim. In each of those cases, there is no question about the guilt. This is not a case with potential exoneration. There is no question about either one of these defendants. In each of those cases, the victim was totally in an innocent position in a place where they had every right to be as opposed to some murder cases that we have to evaluate. In each of those cases, an initial verdict was overturned and a new trial was given so there was something that was corrected in the matter. In each of those cases, there was a multi-racial jury. The two trial judges in the cases where the death penalty was given were some of the finest judges I have ever practiced in front of. My practice was as a defense lawyer. Two Supreme Court Chief Justices wrote the opinion upholding the death penalty in each one of them.

Mrs. Howell will tell the committee some of the facts in her opinion. I would not speak for her at this stage of the proceedings and will let Mrs. Howell speak about her case and Mr. Gregory's current occupation of death row where he has been for over fifteen years as this family waits for justice.

Mr. Frank is compelled to speak every time for Brandie Freeman. A packet is in the file for the committee (see attachment 7). Christmas 1992 was Brandie Freeman's last Christmas. She was two years old. Her mother was living with Mr. Elliott who was a live-in boyfriend. Brandie's mother went to work, and Brandie was left in the care of the live-in boyfriend. The child made the mistake of messing in her pants and getting up and asking Mr. Elliott to assist her. He had developed what he called the punishment position to punish the child. There is a picture of how they got introduced, and why anyone would make that picture I do not know, but there is a picture of what the child was required to do when she was in the punishment position (see attached). Mr. Frank was trying to speak as close as he could from the facts of this case, and he has given the committee the opinion so they can see that it is not his rendition of the facts, but the Supreme Court's rendition of the facts. Mr. Elliott went to get a drink of water after putting the child in the punishment position because she had awakened him to ask for some help with having messed in her pants. When Mr. Elliott got back, the child had gotten tired and put her head down, and that enraged him so he grabbed her by the hair of the head and slammed her face into the floor and caused her death. Not to be horrific, but to show the facts, Mr. Frank included pictures of the child's scalp and pictures of the child's face that were taken on the autopsy table. Brandie's mother has never talked to Mr. Frank about the case, and Mr. Frank did not prosecute the case. Mr. Frank was just at the committee to speak as a District Attorney. He wanted to tell why, at one point, he would not agree to let some other district take all of the cases and let it be consolidated to being heard in Orange County or Wake County or wherever. This is a murder that occurred in his district which he has the responsibility to represent as the District Attorney, and if there is something to be done in that case, it is his responsibility, and he answers to the people of Davidson and Davie counties in those cases. He does not want it sent off somewhere.

He contends that no matter what they do in Fayetteville or anywhere else, he is going to have to try to see that the law and the evidence as applied to the case in his district is litigated based on the facts and the law. One of the things that bothers him is when statistics and opinions have bearing on a legal case. It is the facts of that particular case and the perspective, that for the majority of his legal career he pursued, of representing the defendant. That defendant was entitled to what we called individual justice, but it did not really matter what went on in the case ahead of him in the same courtroom. The defendant is entitled to the law being applied to the facts of his case, and Mr. Frank submits that the state and the people and the victims are entitled to the same rule. That is why it gets a little dicey when we go talking statistics and the role statistics play. At a couple of other legislative hearings, Mr. Frank has been sorely tempted to talk about this fact, but since it has taken this course, he felt compelled to tell the committee about a situation where he believes racism did play a factor. He said he cannot tell them that racism does not play a subconscious factor in decisions people make every day, but the issue is on a particular case. Is there anything to indicate individual defendants and the facts that the legislature and the courts have said makes them entitled to a particular punishment? He submits in the two cases he gave the committee and of the 4 or 40; however many you want to pick out in

the folks in this district, that that would be true. That defendant did the crime, and the punishment was a punishment for that offense and to use statistics to change that.

The issue he had resisted talking about, but felt compelled to talk about, is maybe we should not have a death penalty anyway, which he suspects is what is behind the Act anyway. When Mr. Frank first took office, during his first week in office in Iredell County, an entire family was murdered. The Dad had a drug debt, and two dealers murdered him one night. His wife called around and said her husband was missing. His wife knew where all of the crack houses were in Iredell County, and she knew if he did not show up, she was going to start calling law enforcement. That next night, she and her two year old or two and half year old son were kidnapped from a home where the telephone wires had been clipped. They were taken to a remote place in Iredell County out near Union Grove. She was executed, and the two and half year old child was executed. They sought the death penalty only for the death of the two and half year old child. Clear aggravated basis based on a series of events and of course, of conduct and the outrageousness of it. First jury hung up eleven to one with the one being the black juror on guilt innocence. The other eleven were tearful and could not understand. They indicated that during the course of deliberations the black juror would say nothing. He would not argue when they talked about the evidence. He would not discuss the evidence or anything. He would just sit there with his arms crossed saying I am never voting to convict. It was a mistrial. It was tried again, and again, the black juror voted to convict but would not give the death penalty. I do not know what we can do that totally eliminates people's background perspective or racial perspective from things. Mr. Frank was just saying that the court system with the two trial judges that have tried to interpret this Act so far are doing the best they can and will try to interpret the law. The point is that this law is overbroad and departs and throws factors into consideration that ordinarily have been outside of what we deemed to be the operation of course. Do we want to get into a situation to where what happened on somebody else's case impacts the guilt, somebody else's case impacts the consideration of whether someone is guilty---no, so why should the reverse be true. Mr. Frank introduced Ms. Marsha Howell, mother of Evette Howell, Mrs. Howell's husband, and son were with her.

Marsha Howell, mother of Evette Howell

Ms. Howell asked the committee to look at her daughter's pictures (see attachment 6). August of 1992, Ms. Howell and her husband got up to go to get ready to work. The night before they had been up late trying to find out exactly what was going on with their daughter who was having problems with her boyfriend. They found out a lot of stuff they had not been aware of until that night. Mr. Howell told Evette she needed to go get a restraining order. Those were the final words they said to Evette before going to bed that night. Early that morning, she and her husband talked about it and they wanted to let Evette get the restraining order. Then, they felt, everything would be fine.

About 9:00 a.m., Ms. Howell received a phone call to get home because her children had been hurt. Ms. Howell ran out of the plant where she was working and got into her van. She almost lost control when she looked up at her home and saw an ambulance. Her husband met her and her grandson met her, and he had blood all over his onesie. When she walked up, she was told if you want us to save your son, you need to stay back. At the point they told her that her daughter

was pronounced dead. Evette had been shot in her head while she was screaming for help. Her baby was lying in the bed with her. Her son, Fonzie, was in his bed when Evette started hollering for him. Fonzie got up. Chris Gregory, the boyfriend, and his cousin had broken into the Howell home and gone in the home with the intentions of killing her children. If she and her husband had been there that morning, they probably would have also been victims---been murdered the same way. He had a claw hammer, and he beat Fonzie with the claw hammer. Fonzie has marks on his head, and Fonzie has a shunt on the back of his head. He had a trachea in, and by God's grace, Fonzie is here today. He not only beat him with the claw hammer and admittedly told that he hit him with the claw part. Part of Fonzie's brain was hanging out, and then he admittedly shot him----was not going to shoot him one time; the only reason he did not shoot him twice was because the gun jammed. Chris Gregory took that gun and placed it on a pillow by the baby, by a sippie cup, and went out and locked the door, and left that child alone with the child's mother dead and his uncle fighting for his life on the floor.

Ms. Howell applauds the District Attorneys for pushing for the death sentence. Ms. Howell, if she could have given him the death sentence herself, would have done it. Ms. Howell showed a picture of her grandbaby visiting his mother's grave. This is the only way her grandson can talk to his mother. Chris Gregory gets a visit from all of the church members from the church where his stepfather preaches and they go visit him. Chris Gregory's mother gets to visit him. The grandchild is twenty years old, and this man knows he has a child. He has never called the child, never sent him a card, never anything. Mr. and Mrs. Howell are the grandchild's parents because Chris Gregory had a role that he played out. He received the death penalty, and Mrs. Howell said Racial Justice had nothing to do with this because he admittedly stated to all the facts. He told what happened because Fonzie could not. They did not want to put Fonzie on to make him rethink what happened because they told the Howells that he would have to go through all the pain of the holes being drilled in his head to let fluid out. The Racial Justice Act might be fine for some, but in this case, it is not fine for Chris Gregory. Chris Gregory does not need the Racial Justice Act and it had nothing to do with it. The facts are in front of the committee. Chris Gregory admitted to everything he did. Did Chris Gregory show any remorse? No, he did not. Is his family crying? No, why would they cry? They are getting ready to see their son. In this bill, it will make them see him more. Ms. Howell pleas with anyone who has anything to do with the Racial Justice Act to go back and look at it again. Rewrite this bill where death row people cannot just walk up and get a free pass. These are Ms. Howell's words and no one prompted her to say this. Ms. Howell has to live this herself every day and she spoke from the heart. That child should not have died the way she died. Her son should not have to live a life the way he has to live his life right now. Please relook at this Racial Justice Act.

Mr. Howell

Mr. Howell spoke and said they are not against the Racial Justice Act. His problem is that in the past twenty years they have been to court four times. Four times---hundreds and hundreds of jurors. The first death penalty was sent to the Supreme Court and overturned. Two years later, right back in court and he received the death penalty again. It has been really screened. He was really impressed after sitting through trial after trial, how he was guilty and then one works---not just put on one person. You work your way through the death penalty sentencing. Mr. Howell cannot believe they have waited twenty years and been through trial after trial. Mr. Howell said

his son was only given two hours to live, and he stayed in the hospital a solid year. Fonzie never ate for a year. There was spirit in his son, and this man was going to get out and come back to get him so still there is a fear. Twenty years is enough. Do I have to go another twenty years? The Howells are not against the Racial Justice Act but rather against what his family went through. Mr. Howell had a truck stolen a couple of years ago, and after he found out who stole it, he picked the guy up one day to figure out what was going on. It turns out that the guy had just gotten out of court and was going somewhere. Mr. Howell said he and another guy were laughing at the court system. The gentlemen mentioned to kill me if you can. This young man talked about what a joke the court system was. Mr. Howell could not believe it. Who are we serving and who are protecting? They did not bury Evette for four or five days thinking they would have to bury their son too. Now they have to go through this again.

Garry Frank said the main problem he has with this is that there is no indication that these folks' case or the other cases in his district had anything improper in the cases under the law of the land. The aggravating factors that the folks in the General Assembly said to be applied were applied. Some of the finest judges presided and our highest court closely scrutinized it. That is the rule of law. This Act and the introduction of statistics and subconscious thinking about people and how we evaluate that and how that might impact this family are the main problems. Please review and make an amendment to the Racial Justice Act.

Chairman Moore asked if there were any questions for Garry Frank from the committee members. Representative Faircloth asked if there any individual or collective suggestions from the District Attorneys as to what would be a remedy? Garry Frank does not report to speak for the Conference but will speak for this District Attorney. The constitutional safeguards that were in place and the provisions that say if a defendant can show a prejudicial purpose in their prosecution, then that in conjunction with the constitutional law that is in place on jury selection and all the rights that the defendant has to challenge that is in effect, is the best we can do on this. That if you put the statistical analysis and the application of other cases to a particular case into it, then that is the problem and that is the thing that should be eliminated from this law. Chairman Moore thanked Garry Frank for coming to the meeting.

Chairman Moore said public comments would be allowed now and to come forward. They could speak up to five minutes.

Jennifer Marsh, NAACP

Jennifer Marsh, on behalf of NAACP, was welcomed to the committee to speak. She is the Legal Regional Coordinator and Public Policy Analyst for the NAACP. The NAACP does support the Racial Justice Act as it is currently written. The law stands with a check on racial biases, whether intentional or unintentional. Sadly, the fact is we all have unintentional biases that are part of us just from our upbringing, from our experiences, but also from society. This society has a legacy of slavery that has shaped many of our societal biases. These biases have been shown in many of the studies mentioned earlier and many others that have not even come up today. These biases do play a role in the entire court system, including the use of the death penalty. We do need a check on the court system and the RJA, as it is, serves as a check on the use of the death penalty today to assure that racial bias is not a factor---conscious or

unconscious. We need to also ensure minorities are not being excluded from other parts of the court system, such as serving on juries or any other issue that comes up. The RJA is proceeding through the court system, and we should allow that to continue. Let the court rule and make its decision, and let the law work its way through. The only relief available is life without parole, and you need to remember that. Ms. Marsh thanked the members for their time and the NAACP continues to stand by this.

Darryl Hunt

Darryl Hunt was recognized to speak by Chairman Moore. Mr. Hunt said they were asking for justice, for fairness, and the Racial Justice Act is about fairness for him. Mr. Hunt lived on both sides of it---from the court side to having a mother who was killed when he was nine, and having the person who killed her not receive any sorts of justice just because his mother was African-American. The person who killed her was African-American, and it was considered just what blacks do in the neighborhood. Mr. Hunt has no bitterness or hatred for the lady. The lady stays three doors from him right now, and he speaks to her every day. Mr. Hunt thinks it is wrong for our system to treat African-Americans one way and whites another way when it comes to our criminal justice system. The Racial Justice Act is a way to at least remedy justice and fairness in our system. To go through a system where he was a defendant for a crime he did not commit, and have people----he watched the jury pools and he watched how juries were selected. His jury ----the first one was eleven whites and one black, and he lived in Forsyth County. The second trial-----he had an all-white jury. The reason it was moved from Forsyth County to Catawba County was because of the chances of having blacks, African-Americans on the jury. He had a segregated courtroom. It was blacks on one side and whites on the other side, and he had a white, 6th grade school teacher, who happened to sit on the side where the African-Americans were sitting. She was told she was sitting on the wrong side because blacks only sat on that side of the courtroom. We have a problem, and the Racial Justice Act is a way to help bring about fairness in our system. He hopes and prays we allow the courts to continue to do what the courts are doing in bringing about some fairness to our system. The General Assembly has done a great job in creating the Racial Justice Act. The law, as it is, is a great law that needs to be applied, and we can bring about some fairness and confidence back in our system. Chairman Moore thanked Mr. Hunt.

Chairman Moore asked if anyone else from the public wanted to speak, and there was none.

Chairman Moore opened it up to members of the committee. He stated Senate Bill 9 was in their packet and he knew they had covered a lot of the issues. There has been interest expressed by a number of members in trying to find ways to work through this bill; perhaps, to modify it in some manner that may avoid a veto or get more votes or whatever we need to do get something done. The concerns highlighted by the District Attorneys and by some of the folks, at least take a look at and modify the bill. Certainly, Senate Bill 9 did that, but we are where we are.

Representative Hall was recognized to speak. Representative Hall said we were kind of back where we were with this question, having gone through a lot of this information. Things still seem to be premature of using tools we have in place already. The idea is that the court would again be hearing this case and may be only half way through or a little further---the question of

verifying some of the information that is still out there, and we have not done that. If we try to move forward, we are depriving ourselves of making a better decision. If we are going to make the changes, we are denying ourselves of information that is going to be available to us because we could actually report those. If we do that, are we going to find ourselves back in this position again very shortly because we failed to take advantage of what we have in place now? He has some questions about the proceedings. Another issue of looking at Senate Bill 9 is that we had questions come up today from members, and he hopes that we would provide the opportunity for staff to get answers to all these questions asked today, and in particular, some questions he would have. There seems to be a lot of questions of whether or not our judges can make decisions that they make every day and apply rules of evidence and analyze statutes just like they do every day, but somehow that might be impugned or somehow they would lose that ability when they have to look at the Racial Justice Act. In his experience, it is seeing and noting the number of folks that end up being judges and that a significant number of them are prosecutors. We have to be very careful in how we approach this without the proper information to really look at it. Should we trust our judiciary? If we are not going to trust them, why do we not trust them? If we do not trust them on this issue then do we trust them on any issue or are we going to just make it up as we go? We have a judiciary we can trust, and maybe we do not trust them.

Representative Parmon was recognized to speak by Chairman Moore. Representative Parmon said as a policymaker, an issue as important and critical to this state as the Racial Justice Act was worth looking at. She wants them to tell with facts, and she understands where victims are coming from, but we have had this rehash over and over again. It concerns her that is what is said that we need to tweak this Act. She does not know what the suggestions would be, but if we remove the statistics, we know it renders the bill invalid, period. She hopes that when they come back with suggestions or what this committee is trying to work up to that we be honest about what we are trying to do. Representative Parmon is one of the sponsors of this bill. When she came to the legislature in 2003, she was as much for the death penalty as anybody else in the General Assembly until she started looking at facts and cases and talking to people on the jury. One person from Alamance County called her and said she had to be physically taken out of the courtroom because she had been intimidated as a lone black juror on a death penalty case, and the judge did not even recognize her. Representative Parmon has another case where she is dealing with a white male who was the victim of sterilization by the state of North Carolina. If we are going to deal with this issue in committee, she wants to deal with facts, and something that will make this bill stronger and not to tweak it to make it invalid. Chairman Moore thanked her.

Representative Faircloth was recognized to speak. It concerns him that if this method of delivering justice moves forward and becomes ingrained in the way we operate in North Carolina as far as trying facts, then he can perceive down the road somewhere you could have somebody who intentionally gets mad at their girlfriend and lets the air out of her front tire. She has a wreck and kills herself and at the trial, statistics are brought in and say because, statistics indicate that the majority of people having the wrong air pressure in their tires, that this person ought not to be convicted of wrong doing. I know that is carrying it to the extreme, but to many, many people out there who are not attorneys and see things in the light of reasonable approach to justice, there are a lot questions both ways. He would encourage them to take the time to consider this and be sure we give the input that is necessary into this. He does not know what

the outcome of the committee would be, but there are enough concerns on both sides of this issue.

Representative Stevens is recognized to speak. She was part of the committee it came through to begin with. Those reports and statistics were not even released to them to consider. So using statistics, she would like to at least know what they are before we use them, and it would have been nice to know before that bill. She would like to look at those statistics, and the hearing that is going on in Cumberland County. It is important they look at all this. They even heard from the proponents of the bill that there are unintended consequences. He did not mean for it to apply in this case or that way, and we need to look at it.

Representative Hackney is recognized. The time for review of the Racial Justice Act is after we have a reasonable time to see how it works. In his view, we should not be doing this in the middle of the first hearing. At the minimum, we ought to wait til that is over and see how the judge handles it, see what evidence came in, see what was excluded, and take a look at it if the leadership wants to take a look at it—that is the time to do it. Now is not the time and it is disruptive. It will appear to everyone that it will be an attempt to undermine the hearing underway.

Chairman Moore commented. Chairman Moore did not ask to Chair the Committee. The Speaker appointed him to deal with this. He thanked the District Attorneys, Victim's Family Members, and others for coming. Everyone who wanted to speak today was allowed to speak on it. There was no vote today. The bill did pass both the House and the Senate, did go to the Governor, and of course, the Governor vetoed it. Procedurally the veto was overridden in the Senate, and we fell short of that in the House so the bill was then referred to this special committee to deal with it. It is the intention, if I understand it, from the proponents of the bill, and from the leadership to try and find a way to address, perhaps, unintended consequences of the Racial Justice Act. There are two views out there. There are those who would say that the proponents of the original bill are simply against the death penalty and saw this as one more way to make it difficult to have the death penalty. Then there are those who would say that the proponents of the bill really were concerned about racial issues and felt like this remedial tool was necessary. That is a point of questioning folks motives, and Chairman Moore does not feel comfortable doing that at any point. Regardless, it is the opinion of the Chair, and he is speaking more as a fellow member at this point, that there are some issues that we need to address. Specifically, Mr. Bell, who he knows being in the neighboring county as DA, and he talked about it. The question Mr. Bell came to him about was: so you guys passed this law so does that mean in a case where you have a white murder and a white victim, are they going to be able to argue the Racial Justice Act as a basis to get away from the death penalty. That is what he told you about, Danny Hembry. What is being discussed is potentially yes under this bill by simply taking statistics. He has seen a number of approaches to try to address this bill both in terms of either putting more reasonable limitations on the statistics, if they are going to be used instead of statewide, being district specific or county specific. Does what happens in Orange County really have any bearing on what is going on in Cleveland County? Sometimes yes, but on something like this, probably not---very different---trying to come up with something along those lines. Also, the Professor who spoke about specifics, talking about statistics, are we going to look at what happened in the 1920s or are we going to look at what happened since 1987. What are we

looking at. Right now it is an unknown area, and the concern the Chairman is hearing is from the District Attorneys and from some victim's families is avoiding the unintended consequences of allowing all these cases to be reopened many years later with perhaps, going beyond what the General Assembly intended the Racial Justice Act. The Chairman's intention is to try and work through those issues with respect to the bill.

Representative Hackney was recognized and said there are no unintended consequences yet because there are no consequences yet---intended or unintended. Until we know what those consequences are, he does not think they can fairly judge that. It is apparent that Mr. Hembry is a horrible, horrible person. It is not apparent to him that anything he files will get any consequence at all. To assume in some way that claim will have merit does not seem to make much sense.

Representative Stevens was recognized. In her district, the first one to file was a white man fleeing from a murder charge in South Carolina who killed two white people. It is an unintended consequence, and it is being heard.

Chairman Moore directed to staff the requests that they heard from the committee members. Chairman Moore adds a couple to that. Do we have an idea of the fiscal impact from the Racial Justice Act—both in terms of the hearing, and there is a hearing going on right now, but in terms of future hearings. That did not come up today but is something we ought to at least have the information as to the fiscal impact this is projected to have and has had. Additionally, he would ask staff to explore issues surrounding, and he invites any member of the stakeholders who spoke today to provide comments, suggestions, and they can be sent to Chairman Moore or any member of the committee. Chairman Moore mentioned some of the suggestions: defining the time period, defining the rail that geographic area for that area if we are going to look at statistics, defining if there is a set reliable means or method of determining the statistics. Someone mentioned antidotal evidence. What is antidotal evidence to be taken into account? In looking at further defining those and seeing if Senate Bill 9 in and of itself, if we are unable to eventually override that veto, if there is another mechanism that would achieve many of the concerns that have been expressed and perhaps earn more support of members of the Assembly.

Representative Hall was recognized, and he wants to follow up on the question he had about the number of judges we have currently sitting who are former District Attorneys.

Representative Stevens was recognized and requested information on the study and the recordings for Cumberland County.

Representative Hackney said if the study is going to be a central part of this, the folks from Michigan State who did the study, ought to be able to defend themselves and come here and present their evidence.

Chairman Moore said if they would like to that, he would let them speak. Representative Hackney said he was sure they would like to be invited. Chairman Moore said would honor that request. Chairman Moore asked if they actually testified before the judiciary committee, the committee, if anyone knows of.

Chairman Moore thanked everyone for coming.

The Committee adjourned at 12:35 p.m.

Representative Tim Moore, Chair	Nancy Garriss, Clerk

MINUTES

HOUSE SELECT COMMITTEE ON RACIAL DISCRIMINATION IN CAPITAL CASES

March 27, 2012
10:00 a.m.
Room 1228, Legislative Building

The House Select Committee on Racial Discrimination in Capital Cases met on Tuesday, March 27, 2012, at 10:03 a.m. in Room 1228 of the Legislative Building. The following members were present: Representative Tim Moore, Chair; Representatives Burr, Faircloth, Hackney, Hall, Randleman, Spear, and Stevens.

Representative Moore, Chair, presided. He thanked the Sargent-of-Arms staff: Carlton Adams, Young Bae, and Jesse Hayes. Chair Moore said a number of committee members and non-committee members toured death row at the prison since the last committee meeting. It was interesting to see where folks end up. Today's agenda is the result of some suggestions from a number of committee members. We want to get as much detail as we can in the amount of time we have. Those on both sides of the issue take this very seriously.

Representative Moore asked if the members had an opportunity to look over the minutes from the last meeting. Representative Stevens made a motion to approve the minutes. No debate or discussion. The minutes from the February 10, 2012 meeting were adopted.

Presentations

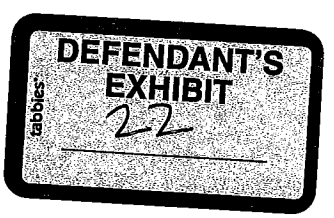
Dr. Barbara O'Brien, Associate Professor of Law, Michigan State University College of Law

Chairman Moore recognized Dr. Barbara O'Brien, Associate Professor of Law at Michigan State University College of Law to speak. She was one of the authors of one of the studies that have been cited in this process with respect to racial discrimination. Chair Moore said we want to allow time for questions.

See Attachment 1 for Dr. O'Brien's presentation. Attachment 2: Michigan State University College of Law – Report on Jury Selection Study. Attachment 3: Tables from Michigan State University Study.

Chair Moore recognized Representative Stevens. When was the study actually done? Dr. O'Brien said they started collecting the data and designed protocol in the summer of 2009.

Chair Moore recognized Representative Stevens for a series of questions. Representative Stevens asked was there a predecessor study to this in another state or area? Dr. O'Brien said there was a study that was done in Philadelphia on jury selection that detected similar patterns in capital cases.



Representative Stevens understands that what Dr. O'Brien had done became the basis for the law we now have in North Carolina---is that correct? Dr. O'Brien said this study they undertook was undertaken just as the Racial Justice Act was being passed.

Representative Stevens said had you not done these studies before? Dr. O'Brien said she had not done a jury selection study. Representative Stevens asked if Dr. O'Brien used any .....Dr. O'Brien said yes.

Representative Stevens had another question. Dr. O'Brien said there were a number of things. One was they had better quality data than he had available to him in the Philadelphia study that he worked on. He was one of the authors of the study of jury selection in Philadelphia. She and Dr. Grosso had better data and more complete race data. For instance, in the Philadelphia study, they had to impute rates. They did not have rates of potential jurors---they would impute, and she and Dr. Grosso did not have to do that. She and Dr. Grosso had better transcript information and they tailored it to how North Carolina jury selection works because in order to design a study, to understand, one has to have a basic understanding of what are the rules governing jury selection here; who goes first. Some places they alternate. In North Carolina, the prosecution goes first. They had to become knowledge of the jury selection law in North Carolina.

Representative Stevens questioned. Dr. O'Brien said that is an important find to determine who is eligible to be struck. For instance, if one had a system where the state does not go first, that sometimes the defense goes first and the defense struck somebody and the state never had a chance, they would not want to include that person in assessing the state's strike decisions. For studying prosecutor strike decisions, they only want to look at those jurors who the state had an opportunity to strike. Batson was very important.

Representative Stevens: if the state has a chance to strike them first, then how do you weigh that against showing more bias to the .....Dr. O'Brien said the first part of the study, the first numbers that she talked about, she is looking at is how many people does the state have a chance to strike and what percentage do they strike them. That equation is that you have three jurors you could strike---one is black, two are not black so how many of the black jurors did you strike and how many of the white jurors did you strike. In looking at prosecutorial strike decisions, that does not skew it in any way. How did the prosecution exercise its discretion it had when it had the chance to exercise that discretion.

Representative Stevens asked does it come back balanced in the number of jurors eligible; prosecution struck the black juror, and then struck both white jurors. Does that come back balanced? Dr. O'Brien thinks what Representative Stevens is asking about is the effect on the final jury. Representative Stevens said that is right. Dr. O'Brien said what she presented is how prosecutors are exercising the strikes which is different from what is the final composition of the jury. They found the final composition of the jury was roughly equivalent to the representation of qualified black jurors in the veneer. Then that takes into account both sides exercising their peremptory. What she has presented is how the prosecutors exercised their strikes which is a different research question as to the final composition of the final jury.

Representative Stevens asked is not the final composition of the jury more critical? Dr. O'Brien said under Batson, the Supreme Court Case that said one cannot strike on the basis of race. The court explained that this is an injury to the person being struck. That the person struck on racial grounds is suffering an injury. If someone is not hired because of their race, even if an employer hires a person of the same race down the road, that does not rectify the discrimination that person suffered. She wanted to point out that one does see a big number of all white juries. She thinks there were 35 juries in their study that were all white. 30 of which only had a nonwhite or black person on the jury. It is a different

research question. She would say the law recognizes the injury suffered by the person who is struck peremptorily on the basis of race independently of how the final jury looks.

Representative Stevens said that in the end we have juries that are racially proportionate and that the defendant who is being tried has not been discriminated against. Or that is not what your research has shown. Dr. O'Brien said not all cases. One does see quite a few all white juries.

Representative Stevens asked if their study went only into Cumberland County or did it do every prosecutorial district in every county itself? Dr. O'Brien said the statewide study looked at least one proceeding from every single death row inmate who was on death row as of July 2010 so it is statewide. They did look beyond Cumberland County.

Representative Stevens said Dr. O'Brien talked about a statewide study vs. a county study or a prosecutorial district study. When you are saying statewide, statewide and Cumberland County seem to be the same. Is there anywhere that seems to be disproportionate or is there anywhere that seems to be even a reverse situation? Dr. O'Brien said any place that does not currently have an inmate on death row would not be in their study. They found three districts where they did not see a racial disparity. She believed it was 19C, D, and 25. Those were districts that only had one case in their study so those districts they did not see disparity; otherwise, they did see disparity statewide.

Representative Stevens asked how many cases did a county need to have in order to determine whether there was disparity? Dr. O'Brien said when only have one case, one cannot say---one needs a couple in order to draw statistical inference. As far as the pattern over the state, one does not see one place that is really driving it. That everybody else is really doing it right and that one place is really driving it, and it is skewing it. It is pretty consistent across the state except for the few places she mentioned. One does not see pockets of the state that have a number of trials where one does not see disparity or where one sees it go in the other direction. If look across divisions, those 8 divisions, she thinks the lowest disparity they saw was 1.5 to 1 so that is 8 divisions across the state.

Representative Stevens had a question on the report and jury selection, and it would more correctly be prosecutorial jury selection and not total jury selection. Dr. O'Brien said right. She thinks it is a question that the courts are going to figure out as far as far as what the Racial Justice Act requires, but because of the language of the statute says in the exercise of preemptory strike, she thinks that is a legal question the courts are going to have to sort out what they means. They looked at preemptory strikes across tiers.

Representative Stevens asked if all this underlying data been released? Dr. O'Brien said they had turned everything over to the state.

Representative Stevens can you explain the differences between what you found and what the state expert found saying 58.1% of the black were struck in issues regarding bias...because of criminal background.....Dr. O'Brien responded so looked at that, at those break downs of the individual jurors where someone would say we struck this juror because of bias against the state or this juror because of reservations about the death penalty. The review they received is only for the black jurors that were struck. Those explanations do apply to nonblack jurors and so if what one sees, that nonblack jurors who have the same characteristics are not being struck at the same rate as a black juror with that characteristic. That is part of what the controlled analysis can do to say what are the odds of being struck if you have this characteristic---all of the things being equal. It is not just the black jurors with the characteristic but nonblack jurors with that characteristic. So if the same characteristic matters, but it matters more for black potential jurors than nonblack potential jurors, then that is evidence of bias.

Representative Stevens had a question. Dr. O'Brien said when coding for these characteristics, they have to be looser with the definition. If someone said they are 100% opposed to the death penalty and they would never impose the death penalty, they should be struck for cause. When they code a person for having as having death penalty reservations, they necessarily mean something more subtle than that because if someone gets up there and says they are not against this, but they are not really sure it would do any good and it would be hard to be the one—they may not necessarily get removed for cause, but that is something a prosecutor should take into account in whether to exercise a strike. They were careful to be clear. They were not looking for someone who says they can never impose the death penalty before we say that characteristic is there. They tried to be fairly liberal in their application of this characteristic assuming that the prosecutors are picking up on these, and they were. Their data tracked that. That was a big predictor of who was struck. They were capturing that characteristic. It was not just black people that would have those reservations; just like it is not just the black people who are related to someone who is accused of a crime. Part of what they are estimating is so these things predicting strike, raised the odds of being struck, but cannot explain all the race effect. Why is it that 25 percent of the white people who they coded having reservations about the death penalty were being passed as opposed to 9 percent of the nonwhite people. That is part of what gets taken into account---what controlled analysis can do.

Representative Stevens had a follow up question. Dr. O'Brien had mentioned the human element in all of this. That human element, is the prosecutor looking for a jury that will be on their side.....from what Dr. O'Brien is telling her, this only looks at the prosecution side, and Representative Stevens mentions the defense side. Dr. O'Brien said right and wants to make it clear that the data they turned over to the state includes all the different strikes. So the report does focus on prosecutorial strikes and that was what she was talking about. Their data base has the information of both prosecution and defense strikes so the state has that information. They have not held that back or deliberately not coded that. They are really interested in figuring out, getting as much information as they can.

Representative Stevens said that it appears that from the data that when you get through the jury selection you have a balanced jury based on population. Dr. O'Brien said that they were not looking at who gets called at the cause stage, I would like to look at that at some point, what you see is that 7,400 is about 16% percent black and what you see in the final juries it is about that. It is not statistically different in the final jury. It comes down to a legal question as a researcher. I can tell you what was found but whether the law should be concerned with state...The Supreme Court has been clear that neither the state nor the defense can have preemptory strikes based on race. It is about the juror who has experienced discrimination and what you as lawmakers or how courts want to interpret that may be beyond what she can infer.

Representative Stevens agreed, and what you are saying is that a person still has the Batson protection and that is that there is the prosecution clearly showing that qualifying a jury or racially profiling a jury there is a legal claim for defendants on that basis. Dr. O'Brien said that despite Batson's protection, we have had Batson on the books for 25 years; we are still seeing huge disparities. What a statistical study can do that is so valuable is to help detect patterns that are not apparent in a particular case. You have to look at the big picture. The first part of the study looks at how many people the state has a chance to strike. The equation in if you have three black jurors and one white which one do you strike.

Representative Moore asked in how many of the 35 all-white juries were the defendants black? Dr. O'Brien said the information in her database but not with her.

Representative Moore had a question: is the study of the defendant's jury selection challenges, do you have that data that can be broken down and juxtaposed against the prosecutorial challenges also? Dr. O'Brien said that was in the database that she turned over to the state.

Representative Moore asked if there is something like the charts and graphs that we can compare side by side. It would be interested to see if on the defendant's side these charts were flipped. Dr. O'Brien said that from their data they could be made.

Representative Moore asked if they could be supplied to the committee at a later data. Dr. O'Brien said yes but they would need a specific request for what they wanted the charts to look like.

Representative Stevens asked question…..

Representative Moore said maybe compare the same criteria that was used verbatim to match up the same so we could compare apples to apples.

Representative Faircloth asked if there was any consideration given to the race of the striking prosecutor. Dr. O'Brien said no, but it would be an interesting question.

Representative Faircloth asked if there was any consideration given to the process of choosing the jury and whether or not there were some fallacies there. Dr. O'Brien said they did not look at the composition of the jury pool. They only looked at people who made it into the box.

Representative Faircloth asked if from a statistical standpoint if it would appear to be a valid question for those two items: how the pool was chosen and race of the prosecutor. Dr. O'Brien said, it is interesting but because the Racial Justice Act talks about the use of preemptory strikes, it raised a significant factor in the use of preemptory strikes. It narrowed the question to people who could or could not be struck. Other studies have looked at ways of summoning jurors and if that used a skewed pool. It seemed beyond the scope of the Racial Justice Act allows a claim for so we just focused on preemptory strikes.

Representative Hackney asked if she testified in the Cumberland County trial. Dr. O'Brien said she did.

Representative Hackney asked what principle lines of attack on her study were. Dr. O'Brien said she believed the focus was on coding decisions and coding errors and the experience of the coders, her own experience in jury selection and death penalty work. One line of argument involved if you have an idiosyncratic variable, does not occur often but is predictive when it does occur, how do you deal with that? For example, if you have someone who knew the defendant from high school. It would be relevant on whether to strike or pass but does not happen very often. It would not come into the model as a significant predictor because for it to be significant, you would have to have enough of it to say there is a pattern. Her response was that she coded things very finely and in recoding, they lumped things together or broke them down. They tried things different ways to see what they could predict. They coded things finely and the state has all of their underlying data. If they were packaging variables that are too idiosyncratically or too broad that is what the scientific process allows. By sharing data and code books, other experts can try it for themselves. This kind of work is transparent so others can go back and try it another way.

Representative Hackney asked if there was an attack on the methodology by Dr. Cramer or others. Dr. O'Brien said Dr. Cramer did not testify. Dr. Joseph Katz testified. She said his criticism of the study was that a model could be created with enough variables that would make the race effect not statistically significant if you had just the right variables. Her response was that a person should be suspicious of a statistical model that requires the perfect cocktail of variables to make the effect statistically significant. They do not have that situation. The race effect in their model is not dependent; it does not become statistically significant only if they include all of these other control variables. It is very robust. One should be skeptical of a study that you only get an effect if you include all of these control variables in a precise combination. She did not want to miss state his arguments.

Representative Hackney asked if she was familiar with the criticisms that Professor Cramer has made. Dr. O'Brien said that she was not familiar with his criticisms as to the jury selection study. Representative Hackney said that in respect to the comments to Representative Stevens made in regard to the final jury and in respect to violation of Batson in matter in the final jury. Dr. O'Brien agreed because Batson is about the equal protection rights for people. We have people who are legally qualified to serve on juries and Batson recognizes that there is an injury. That is in the constitutional context. We are dealing with a state statute, but if there is an injury that a person suffers when they are excluded based on their race. The study shows that Batson does not provide sufficient protection because we still see these very striking patterns.

Representative Moore asked if there were further questions from the committee. There were none. He thanked Dr. O'Brien for speaking.

Jonathan Perry, Assistant District Attorney from Prosecutorial District 20B, Union County

Chairman Moore introduced Jonathan Perry who is an Assistant District Attorney in Union County. He welcomed Mr. Perry to the Committee.

Mr. Perry explained that the Conference of District Attorneys has asked him to speak because of his involvement in the Cumberland County litigation. He wanted to offer observations about the process in terms of how the Racial Justice Act has played out, what the information shows, and what the data reveals. He calls his presentation a snapshot of the Cumberland County experience. He explained he would go through the Defense arguments, the State's argument, and review the Cumberland County experience, and most importantly he would encourage everyone to look at the materials from the trial that are available thanks to Michigan State.

See Attachment 4 for Mr. Perry's presentation.

Representative Stevens was recognized and she said that neither study, his study nor the defense's study, talked about jury pool selection, who is in the jury pool. Mr. Perry answered that was correct.

Representative Stevens said that his study looked at the prosecution as well as the defense strikes. Mr. Perry said that like Dr. O'Brien said that the Michigan State study included all of the jurors and whether or not they were stricken so if the state had the chance to strike them, they were included. If the defense got a chance to strike them, they were included, and that was preemptory strikes. What was not included were for-cause jurors that were stricken by the court. So, sort of yes and no, if that makes sense.

Representative Hall was recognized for a series of questions.

Representative Hall thanked Mr. Perry for coming. I hear you saying the study is incomplete and that it is not your expertise. Is that correct? Mr. Perry answered that it was really not the state's area of expertise. In other words, there are not Assistant District Attorney's across the state who are use to doing this kind of empirical legal analysis, as Dr. O'Brien called it.

Representative Hall... Mr. Perry said that they had insufficient time to finish completing the reviews from their side.

Representative Hall wanted to ask a question about whether he was familiar with Dr. Katz's testimony in Cumberland County. Mr. Perry responded yes.

Representative Hall asked if Dr. Katz had done all of the analysis by himself...

Mr. Perry asked if he meant in consultation with other expert witnesses, maybe. Representative Hall said anyone who helped him outline the data, whether it was expert witnesses or mathematicians or... Mr. Perry said he did not want to speak for Dr. Katz, but he said he could tell who he was aware of that they had worked with. Mr. Perry said he had worked with Dr. Katz. Mr. Perry worked with Dr. Young, who is a statistician in the RTP area. As far as other experts he was not sure who else he talked to. Mr. Perry said Dr. Katz was the main one that he had discussions with in the Cumberland County case. Dr. Katz and Dr. Young are the two folks Mr. Perry has had discussions with.

Representative Hall asked when they analyzed this data with the fact that the states do their strikes first. Do you think there should be a change in the system there that does not allow the state to examine the jurors first so that in response to that a different type of strike is made to try to compensate for the...? Is there a system you would suggest... Mr. Perry said that was way above his pay grade.

Representative Hall asked whether he thought that was a problem. Mr. Perry said that as far as the order as who goes first in exercising preemptory strikes, he thinks Dr. O'Brien is right in that there is a lot more information that could be collected, especially on the defense side, in terms of what is driving juror strikes one way or the other. Does it make a difference who goes first? He said he would hate to say one way or the other because he does not feel comfortable, and he would not feel comfortable offering another system. It is not his area. Even in the background he has, he deals with industrial organization economic development, so as far as that kind of research or suggestion, he would not have much to do with it.

Representative Hackney was recognized for a question.

Representative Hackney said that the central thesis you have is that the statistics do not represent what happens in the courtroom. He said it strikes him just the opposite. He asked whether he had ever met a defense attorney who didn't believe race frequently played a part in the prosecutor's strikes. Mr. Perry said he hated to answer that. Has he ever met one? It certainly seemed like the folks in Cumberland County who were representing folks did.

Representative Hackney said that to him it was just a part of court house lore over a lot of years that frequently race plays a part in strike decisions. And so somebody does a study and finds that race plays a part in strike decisions for prosecutors, and I just wonder why anyone would be surprised by the data. Mr. Perry said you are asking why I am surprised by that. Representative Hackney answered yes. Mr. Perry said that he was not surprised, but he thinks the danger is confusing correlation and causality. In other words, when he put the slide up, it said there was a disparity in strikes rates. He said he could not argue against that. Clearly that is what is going on.

Representative Hackney said it was causality. It is a violation of Batson. Mr. Perry said he would not say that. For a Batson violation you have to show that someone was being discriminatory in their strike. His suggestion throughout all of this is that there are a bunch of reasons why jurors come in and it can be fair and it can be impartial. He does not buy, from what he has looked at in terms of the statistical analysis done that they have done anything but capture things that are, as Dr. O'Brien said, present in quantities large enough to be statistically significant. That is his criticism. He is saying that when there is correlation that does not lead you directly to causality.

Representative Hackney asked if he had heard Dr. O'Brien say that the factors that were controlled for were the same ones that were indicated on the questionnaires for the prosecutors. Mr. Perry said he would give him an example about that. One of things he did, when he was looking through Cumberland County and what was done in that case, was he went through and Dr. Katz gave him a copy of the

spreadsheet that had reasons listed according to the Michigan State study for prosecutor's strikes. So here are four reasons that were included in the Michigan State study. When they went back and asked the prosecutor in that particular case, he indicated that the reason he struck a particular juror was because of one factor. So, in the prosecutor's mind, he is striking because of this but the defense model is including all four of these factors. As you can see from the dozens of pages he had, there is not a match up between what the defense gives the prosecutor in terms of what they are considering to make their decision and what they say their decision was. So, in some cases they have got too little information and in some cases they have got too much information, but the problem with the model is that from the surveys all of that is attributed and treated as equally present and equally considered by the prosecutor who is exercising the strike. That is what they found to be not true. So when he says it does not actually and accurately capture reality, in his mind, they would have to go back and for these categories where there are not circles or not check marks by the prosecutor, they would have to take a lot of those factors out. Maybe one could model it then. He was not suggesting they do that because he does not think even the way it is set up that the model does a good job doing it. That is one of his criticisms, that their model...Again, if they set up a model for you folks, why did you vote for a particular piece of legislation. You come from an urban district, you are a certain age, and you have a certain marital status. All of those things would be included in this type of model in addition to one or two specific reasons why you might support or not support a particular piece of legislation. But because of the way the survey is set up, it treats the county of your origin, in terms of its rural or urban status, your age, your marital status, and then reasons present in your decision making process. He thinks they would probably say that it did not matter that they were single, does not matter if they are from an urban county, what matters is the price of legislation does not do x does not do y. That is a little more detail in to why he has problems with the study and the way it was done the way it was.

There were no further questions. Chairman Moore thanked Mr. Perry.

Chairman Moore recognized the next speaker, Jay Ferguson, who is an attorney with the firm of Thomas, Ferguson and Mullins in Durham. Chairman Moore welcomed Mr. Ferguson to the committee.

Jay Ferguson, Attorney at Law from Thomas, Ferguson, &Mullins, L.L.P.

Mr. Ferguson thanked them for allowing him to come before the committee. He introduced himself. He had the privilege of being in Cumberland County for a hearing that lasted about two and half weeks, almost three weeks, on the issues that are being discussed. He wanted to share from his prospective what was seen in Cumberland Co. He said it would not be a surprise to anyone there that Mr. Perry and he disagree on some things. While he enjoyed being down and meeting him and litigating with him, he thinks the evidence is abundantly clear that race is a significant factor in the exercise of preemptory challenges in North Carolina and that is the inquiry for the court that is pending in the court in Cumberland County. In respect to Dr. O'Brien that there were three expert witnesses who testified all of who said that the Michigan State was a very, very good study. One of the experts, the state's own expert, Dr. Kronin said it was a fairly good. If you can get the other side to make such an admission, he is here to say it is a good study. He has practiced law for about twenty three years, and he has never seen the level of care, the level of professionalism, and the level of transparency in something done for a court. Obviously, the Michigan State University Investigators knew from day one that every single decision they made in their process would be carefully examined. They were going to be subject to cross-examination, committees like this would want to view the evidence and view every single decision and it is all there anyone to see. It has been admitted as evidence and is now available too. The Cumberland County District Attorney's office has it as well as the Clerk of Court. I want to clarify there was no law student involved in the study. Every coding decision, everything done in the study was done by law graduates. Mr. Perry just misspoke on that.

Now the status of the litigation is after this hearing, both sides presented evidence, and it is now under the advisement with the court. The judge is a very senior judge, he has been around for a long time, and he is going to make a ruling. If he was a betting man, he would bet that the losing side is going to appeal. In this case, it will go to the North Carolina Supreme Court. The North Carolina Supreme Court is by far the highest ranking subject matter experts in the State to deal with the complex issues that have presented in this litigation. It took about three weeks to present it, there is going to be a decision, and then the North Carolina Supreme Court will resolve a lot of the issues that he has read about in the paper and that he heard about in the committee about what about this what about that. Instead of a lot of what if's, a lot of those decisions are going to be resolved by the North Carolina Supreme Court that will then guide us in our examination of the cases around the state. Right now, he thinks there is a single track of litigation. By that Mr. Ferguson means this case will go to the North Carolina Supreme Court. There are two other jurisdictions where cases are sort of percolating: one in Forsyth and one in Union County, but for right now, by and large, this is the lead case and will resolve the issues. Any amendment whatsoever to the Racial Justice Act will cause dual tracks of litigation. Then we are going to have the track of litigation on the Racial Justice Act as well as a track of litigation that is going to have to resolve issues about taking away rights that have been confirmed under the Racial Justice Act. He firmly believes in the interest of expediency and judicial economy to allow this case to move forward and resolve these issues is going to best for all of those involved.

Mr. Ferguson then wanted to talk a few minutes about what he learned in Cumberland County, what we learned in Mr. Robinson's case, and in the Michigan State study. You have heard the statistics about the disparities statewide of prosecutorial strikes of African American jurors. The state's expert conceded over and over that the disparities seen in the raw data statewide and jurisdiction wide, and everywhere is a statistically significant finding. It is hugely significant. We also see in Mr. Robinson's individual case, there is a disparity in his final jury composition as caused by the district's strikes by the prosecution. He thinks what was most notably absent, after two and a half weeks of testimony, no expert from the state testified that race is not a significant factor in the exercise of preemptory challenges by the prosecutor. The absence of that evidence looms large over the court and should loom large here. The reason their experts cannot opine that race is not a significant factor is because of the robust findings of the Michigan State study. Those findings can stand the test of time. They have had an expert who was challenged everything he could possibly challenge with those findings and he could still not testify under oath that race was not a significant factor.

Now the state designed a system of coming up with explanations, and there were 637 African American jurors in this twenty year time period who were struck by the prosecution. So their attempt was to find a race neutral explanation, if possible, for every single one of these jurors. This was a study that was designed by Dr. Joseph Katz who was their statistical expert and noticeably absent from that inquiry, he did not ask the prosecution to state why they struck the juror. It was only to mind the data, mind the transcript, and see if they can come up with some explanation based upon something other than race as to why they struck those jurors. So, that is their theory. I want to agree with Mr. Perry about one thing. Everything done here has to be transparent. On one hand we have the Michigan State researchers who have turned over gigabytes and gigabytes of data, everything asked for by the state. Dr. Katz, the state's expert, testified he received everything he had asked for from the defense. In return, they asked Dr. Katz, who had interviewed prosecutors all around the state of North Carolina as to why they struck jurors and he only gave notes from one conversation. He asked Dr. Katz where were the notes from the study he did, all of these notes you took from the interviews of the prosecutors, and he said he stopped taking notes. He asked why, and he said he knew he would have to turn them over to the defense, and he did not want to confuse anybody. So, if you are comparing the two studies, you have one who turned over every single decision and one who purposely hid information from the other side. When you see these findings from Michigan State, and by the way, there is no study from Katz. He kind of threw rocks at the study and tried to complain about it, but he never came up with any model or any opinion that was contrary to

the Michigan State researchers. One of things Dr. Katz asked for, as part of his study, is he wanted the prosecutors to be required to sign affidavits as to these race neutral explanations. That is important. He said the reason he wanted actual affidavits is because that is under oath, they won't change their testimony, and he can then rely upon it in the formulation of his opinion. He only got affidavits from half of the jurisdictions around the state, and half of those were by prosecutors who were not even involved in the trial. For example, Mr. Silver provided race neutral explanations, purportedly, for cases in Forsyth County where the actual trial prosecutor is still employed by the Forsyth county District Attorney's Office. So, here the state is relying upon explanations provided by someone who was not even there. The same thing with Union County and the 20th district where Mr. Perry works where he provided race neutral explanations and the first things out of his mouth when he got up here is that he is not a capital litigator but he is the one providing information for the state to rely upon. And what we are seeing is anybody, any trial lawyer, can look at a transcript and try to provide some reason for striking a juror. You can make things up. The great things about these explanations and these affidavits that the prosecutors have provided to us is that it is a great source of data because we can compare these reasons for striking these African American jurors to other jurors who were seated who were not African American.

What we have seen is that, all over the state, we have seen a case where the prosecutor said I want to strike this woman because she is young and the judge said wait a minute Mr. prosecutor, do you realize that Mr. Smith who is seated three seats away was born on the exact same day and you accepted him and he is white. Then we see other examples that are just offensive. I met a man who was struck presumably because of his involvement in church and he talked to this man. And he said involvement in church? Everybody he knew went to church. Why should that have kept him off of the jury? Here is a man who had served as a lifelong career in the Marines, he was a war photographer, he did three terms in Vietnam, and he learned he was struck from a jury because of his church involvement. Another excuse from a prosecutor was that a man had recently retired from the Army. It should be offensive that prosecutors from around the state of North Carolina are striking people who have served their country and then using that as an excuse to strike them from the jury. It was not because he was in the Army that he was struck because the person whose wife got seated on that exact same jury had served in the Air Force. What we have learned, these reasons are not why they are struck. It is those reasons plus the color of your skin is why prosecutors are striking African Americans from the jury. That is why they are being struck.

Now, at this point we have these dual tracks of litigation we can go on or we can let this case be the guide and let this lead case resolve the issues. I think at the end of the day that worst thing that is going to happen is a handful of capital inmates may get relief, may, and I emphasize may. But what we all hope is that at the end of the day attorneys, prosecutors and defense lawyers, start judging jurors based upon the content of their attitudes and not the color of their skin. That is our goal and that should be everyone's goal because no one wants race to play a role in the implementation of the death penalty. He said he would be glad to answer any questions that anyone has.

Representative Stevens was recognized for a question.

Representative Stevens asked him if he found the law to be very clear. Mr. Ferguson asked in what respect. Rep Stevens said if race is a significant factor in decisions to exercise preemptory challenges to jurors during jury selection. Do you think that intended to only look at only the prosecutions jury selection? Mr. Ferguson said he could tell her that that is the only claims that he was aware of that were brought because there is another concept of invited error doctrine that he thinks would prevent defense attorney strikes from coming into play. Does he believe that defense attorneys have struck based on race? Yes. That is up to the Supreme Court and they are the subject matter experts and they will make that decision. In Mr. Robinson's case that was not raised so it would be deemed waived at this point.

Representative Stevens was recognized for a follow up question.

Representative Stevens asked if he heard Ms. O'Brien say that when she looks at the end result the juries have been racially composed, for the race part, similar to the population. Mr. Ferguson said not similar to the population but similar to the pre-strike pool and there is a difference there. He does not believe the law allows them to look at the difference between the census population and the people summoned to court but he understood her point. Representative Stevens said she thought her statements were that she did not look at the jury pool but only the people who were called to serve, not the people in the pool itself but those called up by chance to serve. Mr. Ferguson said that when he referred to jury pool he is referring to those summoned to the court room. He said he may be wrong on that but, to be clear, she did not look at the census population, she did not look at the pool, only those where strike decisions were made because the law does not say you can base a claim based upon jury pool disparities. That is a whole separate area of litigation. I don't think that is permitted under the Racial Justice Act.

Representative Stevens said that under the Racial Justice Act couldn't it be a consideration of looking at all of the preemptory strikes to see what you ultimately come up with as a jury? Mr. Ferguson said that over his strong objection at the hearing the judge did consider that evidence, or allowed the evidence in. He said he could not emphasize enough that we have had 35 all-white juries in North Carolina, 38 juries with only one person of color. That simply is not a jury of one's peers. That's a very high percentage of these 173 proceedings.

He went on to tell a story of a marine that served on a jury who found out he was struck because he was African American. Mr. Ferguson said he was just a very, very nice man. Mr. Ferguson asked him how it made him feel to be struck. He thought about it for a while. Mr. Ferguson was interviewing him and was videotaping him, and he looked at him and said that when he first got in the military him and two of his friends went to the movies one day. He said that his buddies, two white guys, went up and paid their money and they went in. The woman at the window said they don't serve your kind here when he went to the window. Mr. Ferguson said there was just a chill in the air and he started to cry and he said I cannot believe it is still happening today. So, to say that you should only look at the final jury undermines what it means to be discriminated upon, discriminated against based on skin tone. It matters to the person struck, for those 637 African Americans who were struck from the juries it matters. Just like it matters if you said they could not vote.

Representative Stevens said that the reality we are looking at here is was there a fair jury selected to try this defendant, not the juror who was excused. She asked if that was correct. Mr. Ferguson said he thought that under the Racial Justice Act you are looking at whether race was a significant factor in the exercise of preemptory challenges.

There were no further questions. Chairman Moore thanked him for being there.

Mike Silver, Assistant District Attorney from Prosecutorial District 21, Forsyth County

Chairman Moore recognized the next speaker, Mike Silver, who is an Assistant District Attorney with Prosecutorial District 21 in Forsyth County. He welcomed him to the committee.

Mr. Silver said he appreciated that they had the opportunity to have a forum where everyone can come together and talk substuntly at the issues that are addressed in the Racial Justice Act. He said he thought it was important to have these types of discussions where we can hear from both sides and people have an opportunity to truly speak and be heard. So often these things have a two, three or five minute kind of time frame that cuts it off quick so, he appreciates everyone's time for that. He introduced himself. He said his county seats Winston Salem, North Carolina. He said that himself, as well as Patrick Weed who was at the meeting, are the two District Attorneys responsible for litigating the 13 Racial Justice Act

claims in Forsyth County. He had a couple of things he wanted to talk about. One, he wanted to talk about some problems that Forsyth County, and he believes the state of North Carolina, has with the Racial Justice Act itself. He wanted to suggest potential amendments for the committee that he believes would be helpful to move forward in the Racial Justice Act and he wanted to start by addressing the speaker before me.

The first thing he said was that in Cumberland County the state never said that race was a significant factor in the case and that is slightly disingenuous because the state tried to say that race was a significant factor in the case. However, the defense objected to it every time they asked the judge to say something about it. So, to say that it was never brought up, he thinks, is disingenuous of this concept of openness and transparency that that has been themed throughout this day when the state actually tries to have a transparent hearing and it is continually objected to.

The second thing he wanted to address was the juror reviews. He said he had performed reviews of jury selections from Forsyth County. He had performed a jury review from an Assistant District Attorney who does work in his office; however, he was out on medical leave. He said he did not sign an affidavit and the reason he did not sign an affidavit is the same reason he imagines that the coders from Michigan State probably did not sign affidavits because he does not know. All he said he could do was look at a transcript and say he found reasons, me as someone who does litigate homicides and violent felonies and everything else, why he would see that would be a race neutral reason to remove that juror. But does he want to sign an affidavit? He said he did not prosecute the case, some of these cases prosecuted when he was in middle school down here in Durham, North Carolina. He said he would not risk his law license saying he knows specifically what is going on. He said he did not want to get caught in that trap. When they say the state did not offer all of these affidavits, of course not because they are not going to risk their law license for things they just do not know the answer to. He thinks it is unreasonable that they placed that burden upon them.

He then wanted to get in to what he came to talk about. In Forsyth County he said they were focusing on, he thinks, the other side of the Racial Justice Act. They are not initially dealing with the jury selection and the preemptory strikes of jurors. They are dealing with subsection (B) (1) and (2) of 15A-2001 which is the decision to seek or impose the death penalty. When you look at this and say death penalties were sought or imposed significantly more frequently of persons of one race than another in subsection 2 where they sought or imposed more significantly as punishment. That is what they are litigating in Forsyth County and he wanted to bring up two issues that he has with Racial Justice Act as it is written.

First, as it is written, the statute is impossible for the state to comply with. When you look at the Racial Justice Act as it is written it says that if you can prove it in your county, which is fine, that is where our judges are located, that is fair, that is where our jury pools come from so that makes sense. But then when you say the state of North Carolina, if you prove it in one county it applies to another county, basically says that in the Cumberland County hearing that if they find that race was a significant factor, it applies to Forsyth County regardless of what they have done in Forsyth County. Regardless of the prosecutors there, regardless of the decisions that are made, regardless of the individual facts of their cases it will matter. Logically that just does not make sense and what it does is it creates this odd burden on the state that says if someone else happens to lose the hearing you are deemed to have discriminated against people and that is unfair not only to the individual prosecutors because these are real people. This is not abstract numbers. We are talking about real people who have careers, families, and they are being deemed to have discriminated based on race. That injures people and it hurts the families of victims because the families of victims will then turn and look at them and ask why would do that in our case. And they can say it was not them it was somewhere else but that was imputed on us. That is an unfair burden on the state of North Carolina and he said he would talk about suggestions to remedy that part of the statute.

The use of stats as a whole creates, at its core, an unconstitutional burden on the state. If you go by Dr. O'Brien and Dr. Grosso's study, and you say there is a disproportionate number of African Americans that are struck opposed to Caucasians, well the decision to seek or impose is disproportionate based on statistics. Well the question then becomes what is the remedy. Like how does the state actually fix this because if the General Assembly is not going to eliminate the death penalty, then how do we proceed with the death penalty. How can we get a case where there are an egregious set of facts, and we can honestly and truly proceed with the death penalty. Well, if we go by the Racial Justice Act, the only other way to comply is to consider statistics and to say when we pick a jury we have to make sure statistically we have a balanced number. One does not want to win the case, the jury comes back with the recommendation of death, and then he be coded with this veil of the Racial Justice Act. If we look at statistics when picking a jury, if we look at race when we are deciding which of these egregious cases go capital, which by the way he is on their committee for capital decisions, if they did that, then that is per say unconstitutional. That is wrong. We should not be looking at race in that manner to make sure this case works. We have to consider race to balance it out. Who would want to be that African American that says I am the one that has to have my death penalty case. They are going to choose my case death penalty just to make sure the numbers work out. Who wants to be that Caucasian defendant that says my case is the one that is chosen for death penalty so the Racial Justice Act is complied with. Clearly that is not the intention of the Racial Justice Act for the state to do that.

If we are going to comply with the Racial Justice Act, if it is going to be something that we are going to use and is going to be effective, there are a couple of necessary amendments that he deemed. He heard his predecessor say let's slow down on the amendments because he does not want to be caught up in this dual legal battle of the law versus rights that are vested. The state has never said repeal; repeal is not what he has ever said. What they are saying is amend it so the state can comply with this statute so they can have a functional model to proceed and handle these cases.

The first thing he would say is to make sure the amendment allows for the facts of the individual case. When you are talking about the decisions to seek or impose the death penalty, facts matter and the people on this committee, as well as the people who have heard these victims come up and speak before, have heard these egregious facts. In Davidson County, there was a girl that was shot in the head and her brother was shot and left crippled and the mother was crying. We could go on and on about these egregious facts. Statistics cannot account for that decision making process. It just can't and the facts have to matter. If the facts do not matter, then really what we are doing is we are saying just let the statistics apply wherever they are statewide; and if the statistics say that you chose this person to be sentenced to death, then oh well without a consideration for the facts of the individual case. He thinks that is a very difficult standard. In his opinion, it could lead to potential issues later in the process of capital litigation in North Carolina if we do get an egregious case, a case that might garner national attention, like say what is going on down in Florida now, and there is this national outcry for justice. Yet, the state of North Carolina is going to have to say we cannot proceed on that kind of case because the Racial Justice Act says we cannot do it. He thinks we have to be careful when we use these broad statistics and forget about the individual facts of the case.

Second, in 15A-2011 (B), when it talks about the people that are going to testify, it says other members of the criminal justice system; you know it talks about attorneys and then other members of the criminal justice system. This is what he was talking about in terms of judges testifying. In Cumberland County they actually had the judge in the Marcus Robinson trial get on the stand, and they said your honor you preceded over this case, you saw the jury selection from the state, you saw the jury selection from defense. Did he think race was a significant factor? The defense objected. They cannot help what the judge who actually heard the case said, but instead what we have is and with all due respect to Professors Grosso and O'Brien, they came down from Michigan State and they have their study and they say this prosecutor who was then a District Court judge is the most racist person with strikes. They had never

seen that person or met them. They can make a deduction from Michigan State about a prosecutor based on statistics, but the judge who heard the case can't make a determination if race was a factor. Logically that does not make sense, and so we need to make sure of that, and they applied this rule as 8C-605 that says a judge cannot be a witness in their own trial. The concept of that is if you are in a trial, you do not want that judge testifying, but the Racial Justice Act is not that trial. That trial has been decided. They have heard, they have ruled on the merits, the jury has made their decision. This is a whole separate hearing. So in that respect, we need an amendment that specifically allows these judges to testify about whether race was a significant factor. He thinks if a judge ruled on the Batson Challenge we should ask them, you have heard the Batson Challenge, was race a significant factor. He would be in the best position to know. He is the neutral fact finder.

The next amendment he would ask them to consider is 15A-2011(B)(C). This is really important. It says the court may consider programs to eliminate race. That needs to be changed to shall consider programs to eliminate race. The court should be mandated to look at programs that the state used to eliminate race during the relevant time the trial was preceded. He can tell us that in Forsyth County they have had a procedure in place since the mid-nineties. The program they had in place was put together by Mr. Vince Rabil who is with the center for death penalty litigation. The concept that they have a program in place by the folks who currently work for the Center for Death Penalty Litigation, made by him to be race neutral, and a judge can say I don't have to consider that is not transparent. He thinks if we are going to continue on this theme of transparency, that is what we are talking about. How can that not be a factor if we have a program in place to eliminate race. The court shall consider and so we are going to ask for that amendment as well.

The next part of this statute that he wants to see amended is 15A-2012. 15A-2012 talks about the procedure for a hearing. Now, in the procedure for a hearing, it says lets mirror the motion for appropriate release statute which is found in 15A-1419. The problem they have with that, it starts at 15A-1420; well it takes out 15A-1419 which allows for the denial of a hearing. So, like in the Racial Justice Act, if you file under the Racial Justice Act, if you say, hey we have the study from Grosso and O'Brien, and we got the form template from Rose and everybody else, boom, Racial Justice Act. They are automatically guaranteed a hearing. This has included some of the frivolous cases that we know inherently exist. This included people who might be serial killers, people who may have injected race into their own case. People who say hey I was going to go out and kill a white person and then actually do it. People who inject race into their cases, people who do things that we know race was not a significant factor in where their actions were the significant factor. We have no mechanism to take that before a court and say we don't need an evidentiary hearing on this because we can strike this just as a matter of law.

He thinks that specifically excluding 15A-1419 and the list of the procedure for this is a grave mistake and he would ask that you include that section of the motion for appropriate relief statute to provide an avenue to say if this is frivolous, we can deal with this without going through the discovery and having the two week trials. They started litigating in Forsyth County in 2010. He called Mr. Rose three weeks ago to a month. They are still in discovery, and they will not hear this thing until 2014 at best. They need an avenue for certain cases. He is not saying all of the cases necessarily, but for certain cases that process should be diverted. Not every defendant should have that resource available to them simply to waste the court's time and resources. Also, he wanted to remind them 15A-1419, if you actually read the very top of it, it says that it applies to capital cases. So, when you look at that motion for appropriate relief statute that he asked to be included, it applies to every other capital case but the Racial Justice Act. He thinks the intention at the time was to say let's divert any concept of there not being a hearing and let's make sure there is a hearing. However, if it applies to every other capital case, he thinks it ought to apply to the Racial Justice Act. It only makes sense.

The last thing he wanted to ask them to amend is to define relevant time frame. There is a lot of talk about what is the relevant time frame. That issue has been litigated in Forsyth County and it has also been litigated in Cumberland County. He can tell them that Grosso and O'Brien did not know what the relevant time frame was, which is why you have a five year study, a ten year study, and a twenty year study. They did not know what to do so they kind of threw the kitchen sink at you and whatever stuck was going to be the relevant time frame. He thinks it is a violation of due process if they leave it to judges to define what the relevant time frame is. This is what he means by that: So let's imagine that in Cumberland County the relevant time frame for that case is ten years and in Forsyth County their judge ruled that the relevant time frame is five years. Is it fair to Marcus Robinson that he gets a larger time frame or to Carl Mosley in Forsyth, either way, that you have two distinctly different time frames to look at these statistical analysis? Somebody may wind up with the short end of the stick on this and if we are about transparency, if we are really going to be about justice on this thing, he thinks it needs to be more clearly defined. He thinks if you have it more clearly defined, the statisticians don't have to waste their time doing all of these studies because they can limit in on what they need to do. But then the judges know what to do, they know how to apply the law, defendants have an expectation of what applied, the state has an expectation and we are not going into court guessing as to what each individual judge is going to do with these time frames. He thinks it truly creates a due process issue if that standard is applied different ways across the state of North Carolina.

He did want to address two things in terms of monetary. First, he heard Professor O'Brien say that she is not in this for the money and he believes it. He thinks she is a real articulate speaker and seems like a nice person but there is no doubt there is a financial benefit to this because when we are talking about the relevant time frame being five years, well what happens in ten years when someone gets a capital case and the statistics that were done in 2010 are no longer applicable. What do we need again? A new study. They are going to need more funding from the state to do these studies. So, if the time frame is five years, we are going to have to continually pay them over and over and over to do these studies. So, he is not saying that there is a financial motive; he does not want to insinuate that. What he is saying is that clearly there is an incentive in keep this thing going for the foreseeable future until one, this thing is modified correctly or two, the legislature abolishes the death penalty at some point.

The second thing about resources and monetary, J.P., Rob Thompson, Cal Collier, himself, Patrick, Assistant District Attorneys... He checked his case load the day before and he has 145 felony cases ranging from violent assaults, two homicides, robberies, breaking and entering. You have people who have legitimate needs, people who have children who are scared because someone broke into their home. There is just not a lot of time with the Racial Justice Act and his caseload. The state is just strapped for resources; the state being the prosecutors. Jonathan Perry (J.P.) is a statistician; Mr. Silver was a Political Science and Education major out of A&T. Mr. Silver said he had no concept of these statistics. It takes him a little bit longer than everybody else to do this but when he is taking time here to talk to ya'll, which he thinks is important or time working on the Racial Justice Act researching these issues, this is one more day that he is not calling the victims of his robberies. This is one more day he is not calling victims who really truly need his attention. What J.P. asked you for is absolutely correct; the state needs more resources to appropriately function with this Racial Justice Act. We need to allocate more positions, we need more funding, and we need a statistical group. If we do not have it, then we are just wasting time. What we are truly hurting is not just the defendants out here who are on this Racial Justice Act because we are out here just trying to litigate, but we are hurting the core of your constituency. You are hurting the core of the people who I work for because I work for the elected District Attorney, these victims in our county who demand that he make time for. He truly appreciated the time and would take questions if necessary.

Chairman Moore recognized Representative Stevens for a question.

Representative Stevens said that he raised some of the very issues she raised when this bill was heard the first time. She said she was on two separate committees, and they never gave it as full attention as it is getting now. Representative Stevens had some of the same concerns and raised them at that time. Relevant time frame, going throughout the entire state, but another thing that we have really not discussed is what the intent of this bill is. Representative Womble was the initial bill presenter, and he indicated that he has seen unintentional consequences or at least, he was quoted that way in the paper. Representative Stevens is from Surry County so she knows the Carl Steven Moseley case very well. Is your burden then to prove different statistically for him? For example, if he shows that the racial makeup of African Americans was definitely skewed against him, and he being a white man charged with killing white people, does he need to show that there were not enough white jurors and that white jurors were preempted from that point or can he simply show that somewhere else in the state there was some racial prejudice and therefore he should be the victim. Mr. Silver said it is not clear, but he imagines what he will see from the filing from the defense and from the study from Grosso and O'Brien is that we can anticipate a couple of things. One, the victim was Caucasian therefore I am more likely to get the death penalty. So, there is that avenue of the statistics that he thinks they are going to present. Then again what they can always rely on, the way the statute is written, is to say I really don't have to prove that much here because if I can get a victory somewhere else, whether it be in Cumberland if that ruling goes for the defense or whether it is in Union County when the hearing comes up around October if that goes for the defense, they have an argument. If Carl Steven Mosley comes up, they have a legitimate argument of saying this statute says county, judicial division, state. In the state, they are going to find being; therefore, I don't care what happened in my case I get reprieve under this statute. That is why the facts of the individual case matter and that is why we are asking for that amendment.

Representative Stevens asked if he knew of anywhere else in the judicial system where statistics was used to this degree. Mr. Silver said he did not---not in the criminal justice system.

Representative Moore asked if in a particular case where there are allegations of some sort of racial bias, is that not an issue that can be addressed on appeal for that particular case. Mr. Silver said absolutely. One of the things that is fascinating to them about the Racial Justice Act is that they have not brought up the constitutional remedy, the remedy that the federal government provides, which is a stronger remedy than the Racial Justice Act. If there is an allegation of racial bias, or racial discrimination they get a new trial, flat out. That is the way our constitution was designed and he thinks that is the right result. We should not be discriminating on any kind of racial boundary and the Racial Justice Act is life without parole. Of course, there have been some issues with how that plays with fair sentencing versus structured sentencing. There is another remedy that is avoided.

Chairman Moore recognized Representative Hackney for a question.

Representative Hackney said of course it is not a remedy because it is not in the record so you cannot consider something on appeal that is not in the record. Mr. Silver asked what is not in the record. Representative Hackney said evidence of discrimination. Mr. Silver said he would contend that if it is not in the record then he does not know what Grosso and O'Brien have been doing because they have got DCI's that fill up their laptops full of transcripts, jury strikes, and all of this other stuff. He thinks there is a sufficient amount. He thinks Grosso and O'Brien would tell you there is a sufficient amount of stuff in the record and he would also like to say that he thinks that besides the fact Grosso and O'Brien would say there is a sufficient amount on the record; the defense attorney in the trial had the chance to object. He thinks that we forget that outside of these statistics, there are live bodies there that are watching all of this play out and the defense attorney does have the right to object and say hey, what is going on, why are all of these strikes happening. That would be in the record, because of course every Superior Court case, whether it be a misdemeanor or a felony, is recorded and transcribed. Representative Hackney said that mostly it is not in the record. Unless the judge stopped the hearing, the trial, and conducted an inquiry

into the issue of race, which he has never seen happen, then it would not be on the record would it. Mr. Silver said that he still thinks it would be on the record because he has seen situations where if a certain number of African Americans jurors were struck it is the procedure in Forsyth County where we would approach the judge, say we want to be heard on the Batson, the jury leaves, and we have a Batson argument, or a Batson discussion, that is entirely in the record. The information that Grosso and Obrien obtained, if you actually look at this stuff, there is tons of stuff in the record. Where they work, are they married, where did they go to school, all kinds of stuff are in the record and they used that in their study. He said he respectfully disagreed with him when he says it is not in the record because we have a statistical study that the state has probably paid millions of dollars for that actually says it is on the record.

Representative Hackney said that of course their study used multiple sources outside of the record also. Mr. Silver said that it does use sources out of the record, but again, all of those sources are state resources, none the less. So, they use DCI, which is a state resource, they used Lexis Nexus which is a private source granted, but the state does pay for us as state employees as attorneys and he does appreciate that. But, most of this stuff is on the record and the contention that it is not on the record, in fact, his contention is that more is on the record than was in their study. When he did his jury selection coding he found multiple errors. Hey, we don't know where this person works and the first question was where do you work. We don't know if this person is married, the second question, are you married. He thinks there is a whole lot more in the record then he thinks is given credit for in this regard. There is case law that says that the Superior Court judge hearing the cases is in the best position to determine if attorney is discriminating against jurors based on race. He thinks that actually means something.

There were no further questions. Chairman Moore thanked Mr. Silver for coming.

Elliot Cramer, Retired Professor from the University of North Carolina- Chapel Hill

Chairman Moore recognized Elliot Cramer as the next speaker. Mr. Cramer has spoken with the committee before. Chairman Moore said he planned to adjourn around one o'clock unless he sensed a strong will of the committee to break for lunch and come back. He said it was the committee's intention to hear from Mr. Cramer for about ten minutes since they had had the opportunity of hearing from him previously. After Mr. Cramer, they would have some committee discussion. He welcomed Mr. Cramer back to the committee.

Mr. Cramer said it was a pleasure to be back again, and there are advantages and disadvantages of speaking last. He saw where a number people had already talked about some of the issues that he wanted to raise. He has taught statistics for thirty-five years, and he learned that repetition is a good thing in statistical ideas, particularly with some of his students who would rather be off somewhere else. He was particularly delighted that there were two different attorneys who were involved in the first hearing under the act in Fayetteville. Jay Ferguson and I almost crossed sorts two years ago in a death penalty case in Durham. He did a good job there, but he had a rather bad case. I think he did much better in Fayetteville, and he hopes that if he is ever personally involved in a murder case that he will be able to get him to defend him. He suspects he is doing pretty well there.

Now in Durham, there was a particularly bad study concerning usual race of a victim affect that murderers of African Americans, mostly African Americans, being less likely to get the death penalty than murderers of whites. That has not come up in our discussion today but is the other study that was done and will be coming up in other hearings. He regrets that they never got to argue that in Durham, because he thinks it has no merit whatsoever, and he thinks that is true of all similar studies, including the one done by Ms. O'Brien. Now in Fayetteville, he was disappointed in the statistical defense of the state. He thinks there are lots of statistical deficiencies there that really weren't brought out, but he suspects that

they will be brought out in further litigation and he does not think he is going to talk about that except in reference to some statements that were made before.

He regrets that the Racial Justice Act has had the enthusiastic support of many of his fellow Democrats including several whom he holds in very high regard: Joe Hackney, Verla Insko, Ellie Kinnaird. Were he Catholic, he might attribute this to invincible ignorance. Perhaps they did not realize that only 52 percent of those on death row are African American and that almost everyone would appeal their sentences. Of course, there are going to be many lengthy hearings; it was three weeks in Fayetteville. He would imagine that every trial in the future will be that long. There is no doubt that North Carolina has a serious history of discrimination in the death penalty, but that ended in 1961 as a result of the Supreme Court decision. He might quickly mention something, 1910-1920 42 blacks executed, 8 whites. Next decade, 51 blacks, 7 whites; 98 blacks, 32 whites; 78 blacks, 26 whites; 32 blacks, 2 whites. Pretty abysmal, but since then 13 blacks, 28 whites; so things have completely turned around.

He thinks that Racial Justice Act supporters placed much more faith in the notorious UNAH Study of 2001, which has still not been accepted in any of three contradictory versions. That study, like all of the other studies, including the other one by Ms. O'Brien, have failed to account for the very large differences in the aggravating circumstances that are found between murders involving African American victims and white victims. For example, in the Grosso Study, victim killed during an armed robbery, 33% white cases and 7% black victims. Victim kidnapped 13% white victims and 2% black victims. Victims raped 6% white victim and 3% black victim. And it goes on like that. Now he understands that the late David Baldus was a consultant in the current study as done by Ms. O'Brien and her co-author Ms. Grosso. Now, his notorious study was used in the famous McClesky case that went to the Supreme Court. The district court, in a devastating critique, rightfully said his results were not a product of good methodology. He thinks the same can be applied to most of the other studies since then.

He thinks there is similar difference in aggravating circumstances in North Carolina, and he is sure they will show up in both the UNAH data and Ms. O'Brien's data, if he can ever get his hands on them. The UNAH data was sealed by the court and he understands that Ms. O'Brien attempted to get her data sealed by the court. Evidently they changed their mind about that. He believes that anyone who thinks they can adequately take into account in the very large differences in aggravating circumstances using the crude variables that are available to the authors of these studies is incredibly naive about statistics. You simply can't. Now in the Marcus Reymond Robinson Case in Fayetteville, there is a claim of racial bias in jury selection, but there were three non-white juries in the original trial and that is just about what one would expect by chance given the jury pool. It was mentioned that the state's expert showed that both in Cumberland County and in the state generally approximately the same proportion of blacks and whites are struck overall. So, he asked, where is the discrimination? Now, it is true, as was mentioned, that the state strikes a higher proportion of African Americans and the defense strikes a higher proportion of whites. But it is not evident that this is due to discrimination on either side. There are valid reasons, such as the well-known fact that African Americans are more likely to oppose the death penalty than whites. This is one reason but there are lots of different reasons that would be appropriate.

He thinks particularly objectionable in the Racial Justice Act is, of course, that murderers need not prove that he was discriminated against himself. This has been referred to and this is very important point. It seems as though, under the statute, if the defense discriminates against whites in its challenges this would be a basis for an African American to be removed from death row and vice versa. That is a horrible flaw in the Racial Justice Act. In Ms. O'Brien's study, only the state's preemptory challenges are considered, as was mentioned, and evidently this is appropriate under the Racial Justice Act. Indeed, even if the state did not remove more potential African American jurors than whites, it would be sufficient, apparently, to show that the defense acted with discriminatory intent in removing potential white jurors. This would be evidence of discrimination under the Racial Justice Act and could be a justification for converting death

sentences for both whites and African Americans to life without parole. This is absurd and is only one of the flaws in the Act, as has been mentioned by Mike. I do not object to abolishing the death penalty but I do object to using bogus statistical evidence to achieve the same end.

He did make some notes about Ms. O'Brien's statements. He wanted to comment on those briefly. He said the committee had an advantage over him in that they had a copy of the report. He has been trying to get a report from them for over a year without any success but he is glad to see it is now on a website. He also wanted to mention that the study that was done by them was not by any means an academic exercise. Their grant application said that it was "to develop and conduct the study required to bring a legal claim under the North Carolina Racial Justice Act of 2009." There was a reference made to the fact that there have been a number of all-white juries in the state, but he is perhaps the only person who has ever looked at what the probability is of getting an all-white jury given the racial composition in the state. He did not even have, except in Cumberland County, the actual proportion of whites and blacks in the jury. He looked at several counties and it seemed to him from his computations that in many jurisdictions, it is very probable to that you will get an all-white jury or a jury with only one white member.

With regard to the variables that were used in the study, it seems to him, that the variables are very crude. For example, there is the issue of the one variable that has to do with whether or not a potential jury member has reservations about the death penalty. Well, there are reservations and reservations. It certainly would have been far better to have had something about strength of reservations about the death penalty and that probably explains the differences that were referred to in the state's expert and the defense. A further thing is the issue of rare events that were referred to. It is absolutely true that when you have rare events, they are not going to be taken into account in any kind of statistical analysis. He does not believe that there is any way of getting around this. In fact, he is skeptical about the use of statistics in situations like this because he questions whether it is possible to capture what is going on in the selection of the jury or in decisions of a jury with crude statistical variables that are available.

Another concern is the very number of variables that are used and it is not clear to him how they pruned down the many variables they started with to the actual variables they used. Mr. Perry pointed that out in Cumberland and throughout the state, different variables were used and that was certainly a concern to him.

With regard to Mr. Perry's statements, he thinks there were was one misstatement that he made with regard to what is in the tables that have been presented referring to the odds ratio. The odds ratio has been missed used repeatedly in the newspapers where they talk about murders of whites being three and one half times more likely to get the death penalty than murders of blacks, and no studies have shown anything like this. The concept of odds ratio is very different from the ratio of probabilities.

Finally, in respect to Jay's comments, he believes that this was a very good study that was done in Cumberland. Well, his feeling is that the design was quite good, and he thinks they did a very careful job about collecting their data but his criticism is with regard to the statistical analysis. He thinks the statistical analysis is really very bad. Jay also referred to Joe Katz with regard to not taking notes. He thinks it is fair to say that he commented that the reason he didn't take notes was because he was a very bad note taker and he didn't want to mislead anybody. He does not think that he meant that he wanted to hide things from the defense. He said he would be happy to answer any questions.

There were no questions. Chairman Moore thanked him for coming.

Chairman Moore turned the meeting over to the committee for discussion in light of the testimony they had heard before the committee. He asked is there were any requests for additional information that anyone would like for their next meeting whenever they set that date.

Representative Hall was recognized to follow up on the requests from the previous meeting on the backgrounds of prosecutors.

Brenda Carter said the information that was requested from the Administrative Office of the Court would require surveys in order to obtain that information and that would take some time.

There was no additional information requested from the committee.

Chairman Moore thanked all of the speakers.

Chairman Moore adjourned the meeting at 12:40 p.m.

Representative Tim Moore, Chair

Nancy Garriss, Clerk

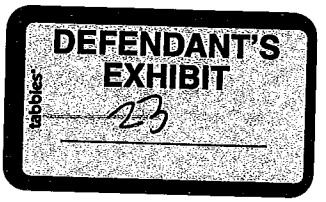
First Racial Justice ruling finds racial discrimination

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."

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SB 416 – Amend Death Penalty Procedures
House Floor Debate
Second & Third Reading
June 12th & 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 the death penalty procedures." General Assembly of North Carolina enacts.

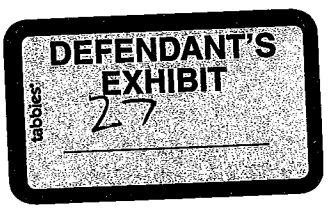
Speaker Tillis: Rep. Stam is recognized to debate the bill.

Rep. Stam: Thank you, Mr. Speaker. May I have the assistance of staff?

Speaker Tillis: The gentleman will have, without objection, the assistance of staff.

Rep. Stam: Mr. Speaker, Members of the House, since the late 70s, North Carolina in the modern era has had a legislative policy that we'll have an opportunity for death penalty for first-degree murderers, decided by the jury. But we've had a moratorium in effect since 2006. And of course there is no deterrent effect from a penalty that is not carried out. Now this will be the fourth debate on this same subject in the last few years, not including third readings in the Senate or whatever: 2008, 2009, 2011, 2012. I'll try not to be more repetitive than I have to be.

Before Senate Bill 461 was passed in 2009 – sometimes called the "Racial Justice Act," but inappropriately since it has very little to do with race and nothing to do with justice – it took 45 judges an average of 8 to 15 years before someone could conceivably be executed for first-degree murder. With the advent of the Racial Justice Act, it now appears that it will be 53 judges and 14 to 20 years. In effect, it's an indefinite moratorium on the death penalty. One of the proponents was quoted after we passed it saying this is the end of the death penalty. Another proponent was quoted publically as saying he didn't understand that white defendants could use it if they murdered white people or of the same race and had the same race of jurors. But it has



all those effects. It's an indefinite moratorium and it just clogs up the prosecutorial function that is so important to any concept of ordered liberty.

In January the House did not have enough votes to put into law Senate Bill 9. The Speaker appointed a Select Committee on Discrimination in the Death Penalty and we had several hearings. We had heard that the opponents of the death penalty might have some suggestions of ways to change things. But I, for one – maybe others heard some suggestions from the opponents of the death penalty – I never heard any. So the proponents of the death penalty have come forward with a proposal which is before you.

Now Senate Bill 9, I candidly told people last year that although technically it was not a repeal of Senate Bill 461, it was, in operative effect, a repeal. This one is not. It amends certain death penalty procedures, including the Racial Justice Act, to do what justice is supposed to do, that is focus on the defendant and the crime instead of society in general.

Let me just take you briefly through the sections of the bill. Section 1 deals with the protocols for administering the death penalty and this amendment takes the Governor and the Council of State out of it. That was just another avenue for people to have litigation about. It tied up the death penalty for a while on claims that the methodology for executing murders had not been properly approved by the Council of State. This just removes that archaic provision from the statutes.

Section 2 addresses a separation of powers issue. If you look at your bill summary which has been placed on your desk, there are time limits for when a district attorney has to give notice of whether the district attorney is going to seek the death penalty or not and there have been conflicting rulings on this. In 2010 the North Carolina Supreme Court held a trial court could require a case to be tried non-capitally if the State had delayed in seeking this Rule 24 proceeding. This Section 2, which was sought by the Conference of District Attorneys, basically says you can have all of the other remedies against the District Attorney that you want to have, but what a judge can't do is declare it non-capital because that really violates the separation of powers doctrine.

If you go to Section 3 of the bill – page 1, line 33 – this is really the heart of it. I'm going to start in the middle of the sentence...Maybe I won't start in the middle of the sentence. That would be improper. But the change is in the middle of the sentence.

> "A finding that race was the basis of a decision to seek or impose the 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.*"

This gets back to the first principle of justice in western civilization. I won't go back through the history of that; there's a lot to it. We're trying to discover what happened. In a criminal case we're trying to find out what the defendant did, why and to what effect at the time the death sentence was sought or imposed. Here the bill limits that time to approximately a 15-year window: 10 years before the offense, 2 years after the sentence is imposed, and then there are usually 2 or 3 years in-between. That's about how long it takes to get these cases to trial. So it's a pretty wide area. Now the original bill was 2 and 2, and Rep. Glazier said that just wasn't long enough, so we accommodated that thought by making it 15 years. I'm sure he'll say it should be forever and we'll talk about that.

Lines 5 through 15 address a question that has been raised by some and that is: what is the effect of this law that says if the finding is made that the defendant gets a sentence of life imprisonment without parole. There is a plausible and possible argument that those convicted before 1994 can take advantage of the act and still get parole. I don't know what a court would rule on that, but what this does is it lays that question to rest by saying that for a defendant to seek relief under this act the defendant has to say in writing and before the judge, "I realize that if I win under this act, it's life in prison without parole." There were questions whether that waiver meant that a person couldn't appeal on other grounds, for example – innocence. And the answer is no, it doesn't mean that. We changed the wording to make that clear.

The next part of the bill, Subsection (b) – a lot is stricken out there on line 16 to 31, but then part of it is put back in lines 39 to 48, so I'll explain what is left out and what is included. On line 39, the evidence "relevant to establish the finding that race was a significant factor in decisions to seek or impose the sentence of death in the *county or prosecutorial district.*" That is: where this happened and where it was tried as opposed to all over the state. That's a change.

> "...where the defendant was sentenced to death or *other* evidence that (1) the race of the defendant was a significant factor or (2) race was a significant factor in decisions to exercise peremptory challenges during jury selection."

Now members need to know that without regard to this act, even if this act had never passed, under *Batson v. Kentucky* if a prosecutor in a capital case or any criminal case strikes a person of a minority race, the prosecutor has to explain to the judge a race-neutral reason why that peremptory was done. Those claims under *Batson v. Kentucky* are there whether or not the defendant seeks relief under this act. And this can be proved by sworn testimony of attorneys, prosecutors, law enforcement officers, and this bill adds judicial officials. That is the judge presiding over the case can testify about what happened at the trial. "Jurors or others involved in the criminal justice system..." And then there's a limitation under our rules of evidence. That's not changed under what you can ask a juror.

Lines 49 to 51: Statistical evidence *is* admissible. And if it's relevant, it can be very important, but all by itself it's not sufficient to establish that race is a significant factor under this article. If you look at page 3, the defendant has to state with particularity how the evidence supports the claim that race was a significant factor in these decisions in that county or prosecutorial district. It tells when to raise it and how the judge is to handle it.

Down on line 17 again the emphasis is on the defendant's case at the time the death sentence was sought or imposed. If the judge makes these findings, then the court shall order that the death sentence shall not be sought, or that the death sentence imposed by the judgment shall be vacated and be sentenced to life imprisonment without the possibility of parole.

The rest of the bill in summary basically says we're changing the rules of procedure and that applies to all these folks who are on death row. In committee there was tremendous angst about this. "How in the world can you change the procedures on these hundred and fifty-some people who have already filed their motions?" Well, all 150 of them took advantage of the change of procedure that this assembly gave them in 2009 and there's no constitutional prohibition on changing the procedure. It might be different if they had committed their murder during the interim and perhaps told their attorney, "You know, I'm going to have some proof that I'm only committing this murder because I'm counting on that Senate Bill 461," and then we changed the

rules on them and they detrimentally relied on that act. I don't think too many of them will make that claim.

So I recommend the bill to you for approval. As I say, it gets the focus where it should belong – on the person who is alleged to be a first-degree murderer. It puts the focus on the prosecution where the prosecution occurred and when it occurred, not in another century, not in another state...Where's Roger West? It really doesn't affect Fayetteville. It's not affected that much by Cherokee County or by different people. So I urge you to vote for the bill.

Speaker Tillis: Rep. Parmon, please state your purpose.

Rep. Parmon: Thank you, Mr. Speaker. To speak on the bill.

Speaker Tillis: The lady is recognized to debate the bill.

Rep. Parmon: Thank you. I am listening to Rep. Stam's insistence that Senate Bill 416 is an amendment, but I want you to really look at the bill as outlined and understand that this is repealing the Racial Justice Act, it's not an amendment. The Racial Justice Act was just passed in 2009, ladies and gentlemen. And that Act was passed to ensure that we would have fairness in our criminal justice system after many studies have proven that there is discrimination through jury selection in our criminal justice system. The Supreme Court in many instances when dealing with issues like housing and unemployment has used statistics to rule on such issues. And under Senate Bill 416 page 3, lines 1-3 states in no uncertain terms "statistical evidence alone is insufficient to establish that race was a significant factor under this article." As we know, recently in Cumberland County a judge found by the preponderance of the evidence that racial discrimination across this state was prevalent and therefore ruled that the Racial Justice Act was needed and now we find ourselves less than two months later trying to push discrimination again into the law.

Rep. Stam would have us to believe that the Racial Justice Act should just focus on the county in which a defendant was sentenced and convicted. But the data showed by studies by the

University of Michigan shows across North Carolina that systematically exclusions of jurors, black jurors and other minorities indeed played significantly in the outcome in the sentence of death. So I'm asking you to really think about this news editorial in the *Winston-Salem Journal* today, and I quote – I want you to really think about this question – "What does the legislature have to fear in insuring that there is no racial bias in carrying out the ultimate punishment because, after all, errors made in death penalty cases can't be corrected once the sentence is carried out."

Ladies and gentlemen, the Racial Justice Act is needed because we know that there is racial discrimination and it's been proven by data by many universities. I would ask you to vote against Senate Bill 416. North Carolina does not need to continue to move in the wrong direction. Thank you.

Speaker Tillis: Rep. Glazier, please state your purpose.

Rep. Glazier: To debate the bill, Mr. Speaker.

Speaker Tillis: The gentleman is recognized to debate the bill.

Rep. Glazier: Thank you very much, Mr. Speaker. Members, I will not be short in my comments today. This is a matter of life and death, and a matter, in my view, as well of soul of the State of North Carolina. And for those reasons I'm going to be very deliberative in my comments.

I'm going to break my comments into three parts. First, I think for so many of us who in here aren't lawyers, those of us who talk about this case often talk as lawyers, but it is important to understand what peremptory challenges are and aren't and at the heart of what we're doing here. So I'm going to talk about little about that. Then I want to talk about the findings of Judge Weeks because we're not writing on a clean slate anymore. We have a court opinion that says there is overwhelming evidence in this state of historical racial discrimination in the selection of juries in the State of North Carolina in every place in the state, almost without regard to

geography or date. And so I want to talk about what this bill will do to Judge Weeks' decision and what it means when we talk about the effect of this bill on the history that we are seeking to wipe out by what we're doing. And then third I want to talk about the three big issues I have with the bill and why I agree completely with Rep. Parmon and why I think no reasoned observer can think differently. This bill simply pays lip-service to the notion that we have racial bias in our criminal justice system but then proceeds to simply eviscerate the only way left to prove it. And so I want to talk about that.

So what's a peremptory challenge? A peremptory challenge allows a lawyer to challenge a potential juror on any basis. I may not like Rep. Horne because of the fact that his arms are crossed or that he's a Winston Churchill fan. I can get rid of him. I can get rid of anybody off a jury – six in a criminal case, 14 in a capital case – for any reason but a discriminatory one on the basis of race and gender. Now, at best it's an educated process and an educated guess, but at worst it is an expression of naked prejudice.

In 1965 it go so bad in our country that that United State Supreme Court passed a decision, *Swain v. Alabama,* and they said this: "A state's purposeful or deliberate denial to Negros on account of race as participation as jurors violates the equal protection clause of the United States." And 21 years later in *Batson v. Kentucky* the court recognized that *Swain* presented no ability to prove the claim that they said might exist. And so they created a three-prong test to try to improve the circumstances, and said that when a juror is challenged, if a defendant believes the juror was being challenged on the basis of race, they first had to create some inference that that occurred. If that happened, the prosecutor had to respond with what was an articulable race-neutral reason, and then the burden to show that the prosecutor improperly exercised the challenge shifted back to the defendant to essentially show pretext. At a time in our history when racism may have been more blatant, and we all know that existed, there were lots of ways to filter through that. People admitted to their biases. We had statements to friends. We had organizations they belonged to. There were ways to get there. But over time as we have become, I hope, less prejudiced as a society and as people, people still harbor those prejudices and biases, but they are much more subtle and much more hidden. And so the devices that ferreted them out to some degree no longer are sufficient.

The big question now, and has been for the last twenty years in racial bias in jury selection, is not was the attorney consciously, deliberately exercising racial prejudice. That happened. But in a lot of cases what happened, and on the defense side – I've been there, was involved in 8 capital cases, did multiple felony trials; I understand the circumstances – but the issue was whether we subconsciously, unconsciously discriminated. And that, I think, has become imminently clear through the social data that has been accumulated in the last 15 years.

We all categorize things. It's the only way we get to survive and sort of filter data. And to put it simply, good people discriminate even when they're not aware that they are discriminating. You know, in that regard we all have probably three sets of attitudes. We have the attitude that we agree and make public. That attitude might be something like, "I think that everyone should be treated equally." Then some, we have the attitudes that we keep to ourselves; we don't want to make them public. They may not be politically correct. They may not be part of the majority, and so we hold them. So maybe someone has an attitude, "You know, I think that more people that are black are on welfare because there are more lazy black people." That's an attitude. People aren't going to tell you that if they have it, but we all know some people who have it. And then there is the third set of attitudes. And they're the sort of attitudes that we aren't even aware that we have that we've simply accumulated over time: part of our culture, part of an environment, part of our family. They are the things we think unconsciously.

I can remember when Rep. Burris-Floyd was first elected and she came into the chamber a couple of sessions ago. I didn't know her, didn't know who she was, didn't know her political party, but I immediately assumed, "black female – must be a Democrat." Wasn't. That was my background that gave me that assumption. I might see someone walking down the street who is an old gentleman in bad tattered clothes who's begging, and I will immediately think, "homeless and not doing well, and how sad." But of course, if I learn that person is a monk and that's part of their training and their religion and what they do, that piece of information changes completely what I think. But I need that information to have made that decision.

Remember in the context of jury selection we don't have that information. In the context of jury selection it is our attitudes, those first, second and third things that control. We have to make, as lawyers, split-second judgments. And if, in fact, those attitudes reflect, either consciously or sub-consciously, the biases or prejudices that surrounded our upbringing, it's not a surprise, nor is it a terrible thing to admit that that was part of a system. And the only way that we get past that is to accept responsibility that that was part of the system and then spend our time, instead of trying to find ways to get around that, to find ways not to do it anymore - to improve.

So you would think that given that context it wouldn't come as a surprise, or it shouldn't come as a surprise that there would be a lot of training for defense attorneys and for lawyers who are prosecutors as ways to think about *Batson v. Kentucky* and comply. But instead nearly every bit of training in North Carolina over the last 20 years by the Conference of District Attorneys and otherwise - and this is true in many states throughout the country – was exactly the opposite. The training there is to come up with a list of reasons you can always articulate at a moment's notice that would make your reason for striking that juror not because they're black or Hispanic, but because it's facially neutral.

Listen to some of the reasons that lawyers are trained to use – trained to use: They failed to make eye contact, seemed nervous, strong personality, I'm going to get rid of them because their arms were crossed. Here's one I particularly like: Wore a hat one day and squinted the next. Too grandmotherly; too young. This person was divorced. Had someone who was in an accident. Unmarried; married. Held a Bible in their hand. Didn't hold a Bible in their hand. Wore a t-shirt. Wore earrings in each ear. Wore a nose ring. Worked two jobs. Seemed to over-intellectualize the case. All of those, by the way, from cases where jurors were struck for those reasons.

There's an interesting study that was done about a prosecutor who actually said this...gave this information at a training session – not in this state, but similar to training here. He was caught on the video saying, quote,

> "Let's face it, there's the blacks in the low-income areas. You don't want those people on your jury. You know, in selecting blacks again you really don't want the educated ones either. And this goes across the board all races. You don't want the smart people.

> In my experience black women, young black women are very bad. There's an antagonism. I guess maybe that's because they're downtrodden in two respects. They got two minorities: they're women and blacks that are downtrodden. So young black women are difficult, I've found."

And then he noted ways in this training for district attorneys to conceal race-based strikes:

> "If you have a black juror, you question him at length. Find something you can mark down and articulate later. "Well, the woman had a kid about the same age as the defendant and I thought she'd sympathize with him.'"

And then he even warned of the consequences of failing to heed his advice:

> "I'm telling you, rookie prosecutors, if you go in there and you think you're going to be able to be some noble civil libertarian and try to get those jurors and be fair, you're going to lose and you're going to be out of office."

Now that's the reality of the peremptory strike process that leads to what happens in this case and all of these cases.

So what does Judge Weeks find in North Carolina? He says in his findings, and what you will overrule effectively and end if you vote this bill, Judge Weeks says *Robinson* introduced a wealth of evidence showing the persistent, pervasive and distorting role of race in jury selection throughout North Carolina. The evidence, largely unrebutted by the state, requires relief in this case and should serve as a clear signal of the need for reform in the capital jury selection proceedings in the future. But instead of meeting that challenge, here we sit today to deny its existence.

Well here are some of the other findings of Judge Weeks. Judge Weeks says the heart of Robinson's evidence was an exhaustive study of jury selection in North Carolina. Seventy-four hundred minority members drawn from 173 death cases, and two studies done – one a complete unadjusted study for race and decisions, the other a regression study of a 25% random sample drawn from those. And here's what the judge finds:

> "Finding: The result of the unadjusted study with remarkable consistency across time and jurisdiction shows race is highly correlated with strike decisions in North Carolina. The adjusted regression results show that none of the explanations for strikes frequently proffered by prosecutors or cited in published opinions diminish the robust and consistent finding that race is correlated distinctly with strike decisions in North Carolina."

Here come the two findings that I think we all should be concerned about:

> "The statistician testified without contradiction to large disparity in strike rates based across race. Across all strike-eligible minority members in the study, 52.6% of eligible black citizens were struck and only 25.7% of everyone else. This probability of this disparity occurring in a racially neutral jury selection process is less than 1 in 10 trillion…1 in 10 trillion. The court also finds the average rate per case at which prosecutors in North Carolina struck eligible minority members significantly higher than the rates at which they struck other members."

The probability of this disparity occurring in a racially neutral jury selection process is less than 1 in 10 trillion squared. So he makes the not-remarkable finding that race was a materially practically and statistically significant factor in the exercise of peremptory challenges by prosecutors seeking to impose the death penalty in capital cases.

Speaker Folwell: For what purpose does the gentleman from Alamance, Rep. Ingle, rise?

Rep. Ingle: To ask if the gentleman would respectfully yield to a brief question.

Speaker Folwell: Does Representative Glazier yield?

Rep. Glazier: Mr. Speaker, I will gladly yield at the end of my comments if that's alright.

Speaker Folwell: Representative Glazier you have about 45 seconds left in your comments.

Rep. Glazier: Thank you. In North Carolina between January of 1990 and 2010, in North Carolina between 1990 and 1990, in North Carolina between 1990 and 1994, all of those findings. So where does that leave us? Well, three things that Representative Stam's bill does. The first, Representative Stam's bill says that the statistical evidence can never be sufficient. Never, not one in ten trillion, not one in ten trillion squared. It can never prove the case. Which means, effectively, you can never prove race discrimination in jury selection.
Second point and then I'll conclude. There is an exception carved out in this bill for the Robinson case. So, Robinson, if this order is upheld, gets relief but every other defendant.

Speaker Folwell: Representative Glazier, your time is expired. I gave you another minute.

Rep. Glazier: Thank you, Mr. Speaker. I'll ask to speak a second time.

Speaker Folwell: Thank you Representative Glazier. For what purpose does the gentleman from Wake, Representative Dollar, rise?

Representative Dollar: To speak on the bill.

Speaker Folwell: The gentleman has the floor.

Representative Dollar: Thank you Mr. Speaker, members of the House. I want to tell you a quick couple of stories. The first one involves Bob Denning. Bob Denning was in his house. He was waiting for a meal on April the 24th 2008. Along comes Tim Hartford. Tim Hartford and his girlfriend broke in. They robbed the old man, and then they started beating him. Tim Hartford beat this man to death and then left.

But he comes back. He forgot his sunglasses. When he comes back, walking up the sidewalk are Bill Magnus and Anne Magnus delivering Meals on Wheels. So what did Tim Hartford do? He shot Anne Magnus in the back and killed her in cold blood. He shot multiple times. He also shot her husband, Bill Magnus. Bill Magnus survived. Do you know why he survived? Because Hartford ran out of bullets. It's the only reason.

And we come in here today and we say: "oh, you know, we've got to go through all the statistics and everything." This is about monsters. Monsters. Evil people doing unspeakable, inhuman acts. That's what this is about.
We said just a few years ago that this act would be accessed by people like Tim Hartford for which race is no factor whatsoever in his jury, in his victims, and in the killer. But he's accessed the Racial Justice Act. What sense does that make?

Let me mention another one of these 150 of the most evil, vile people that you can't even imagine unless you really read the files. The truth is never put in the paper of what these people do, the inhumanity. Let's talk about Henry Wallace. Let me read you the list of the people that

Henry Wallace killed. Tashonda Bethea. Michelle Stinson. Shawna Hawk. Caroline Love. Sharon Nance. Valencia Jumper. Audrey Spain. Brandi June Henderson. Vanessa Little Mack. Betty Jean Baucom. Ten women murdered viciously. Michelle Stinson was murdered in front of her own son. That doesn't even count all the rapes and all the torturing that Henry Wallace inflicted on his victims and on others that he wasn't successful at killing. This is ridiculous.

A couple of weeks ago I talked to a dear friend of mine who is now retired, a former Chief Superior Court judge in the state of North Carolina. He presided over the trial of 30 capital cases during his career here in North Carolina. 30 capital cases. He had but one thing to ask of me. He said to me "Nelson, are y'all please going to repeal that Racial Justice Act? People do not know what these killers are all about. They haven't seen them. They haven't read the crime records. They don't know about a little girl left mutilated and dying in a pea field and having that defended in court with no remorse whatsoever."

However well-intended the Racial Justice Act was, and I'm sure it was well-intended, the effect has been obscene. The victims cry out. Change this injustice. I hope you'll think about the victims. I hope you will vote in favor of this bill.

Speaker Folwell: Representative Hall from Durham is recognized to speak on the bill.

Representative Hall: Thank you, Mr. Speaker and members of the House. I want to talk a little bit, probably from a different perspective, because I think in the overall discussion of these matters a lot has been lost about the people of North Carolina. I had two handouts that I sent out to your desks. The first one I'd ask you to look at is the North Carolina State Constitution. The first page about halfway down, the middle of the page, it says "the Oath of Members" and it details the oath that a lot of us took but maybe forgot about.

Maybe we got up here and decided that we have a responsibility to just the neighbor down the street and not the neighbor across town or maybe to our individual family or maybe to our business partner and not the rest of the community. Maybe we've lost the magnitude of the

responsibility that we have and the challenge that we have as a result of the oath that we took. So, when you look at the Oath of Members I'll draw your attention to the last line:

> "and will faithfully discharge his duty as a member of the Senate or House of Representatives."

What is that duty? To support the Constitution and laws of the United States and the Constitution and laws of the state of North Carolina. I'd also draw your attention to the last section, section 26: Jury Service. It reads:

> "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin."

So, certainly the Racial Justice Act really is about that. It really is about the sanctity of our justice system, about our oath to support and defend the Constitution of the state. It doesn't give us the opportunity to say: "We like this part of the Constitution but we don't like that part, so let's pick and choose. This is a menu at a restaurant." It doesn't say that in our oath that we take. It doesn't say: "support the part of the Constitution you like, that fits well within your comfort zone." It doesn't say that. So, as we talk about this, don't forget our responsibility to the Constitution and the citizens, all of them, of North Carolina and their rights under the constitution, one of which is severely under attack under this bill: jury service:

> "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin."

It gets real simple. Before we get to all the theories that have been spun by Representative Stam about why this should or should not happen, it comes back to something you can basically understand, you don't have to be a criminal defense lawyer, you don't have to be a judge, you don't have to be any of those other things, you don't have to be a statistician, you just have to be able to understand what was your oath, what was your pledge, and what is your duty. A lot of people have made a lot of hey about "I'm going down there and I'm going to defend the Constitution. I'm going to do what's right under the Constitution. I'm going to protect your rights."

Now the challenge comes. Some people now want to back out of the challenge and say: "Well I just don't understand, so I'm just going to vote because I like the guy who's putting up the bill" Or "I just didn't have the time and I don't have the experience."

Well, this is real simple: the statistics show, the court hearing was held, the discrimination is latent, pervasive throughout the jury systems in North Carolina whether by County, whether statewide, whether by prosecutorial district. The studies were done. The experts were there. The hearing was held. The facts are there. So now people are saying "I don't like the facts. I don't like the outcome. So I don't want you to be able to prove it again." I want you to exclude statistics basically from being given the consideration they should be, so I don't have to admit that on my watch I failed the people of North Carolina. I didn't defend their right to serve on a jury. I ignored the Constitution I swore to uphold and defend. I did all of that.

Now, real interesting, we started today's session with the National Guard coming in here and everybody on their feet clapping and encouraging them. But did you really see what happened? Did you see people from all corners of North Carolina, from all races and national hues and colours, and folks from different sexes in here? Did you see what really came before you? Did you see who you sent out to defend your right to sit here and claim you're going to defend the constitution and they defend your right to do it. Then you take the oath, then you face the challenge, and you turn away and you celebrate. It's not an option. We sent them out of here under the presumption that we're going to support them, that when they come home they'll have a fair chance at justice.

That's not what we're doing today. We're saying: "you're going to fight. You leave your blood on the battlefield wherever it might be that we decide. When you come home, if we like you, we'll let you have a shot at justice. If the skin color of people in the jury pool is right, we'll let you have a shot at justice. If the sex or the age or the hairstyle of the people in the jury pool suits our prejudices then you might have a chance at justice. But, because you fought for it, because you risked your life for it, that gives you no guarantee because we will not carry out our oath in this body."

I want to direct your attention quickly to what we did do because I contend that what we're doing is a bait and switch. I want you to look at the second item I handed out. It's the House Select Committee on Racism in Capital Cases. I heard Representative Stam say something to the effect that, he was on the committee, if you look at the list of names of the persons we had these meetings and that people who supported the Racial Justice Act didn't come forward with

solutions or ways to change the act. Well that's correct, but let's look at what this House Select Committee was established for:

> "The committee may study evidence of racial discrimination in capital cases and determine if legislative action is needed to address such issues."

Now as you look at that committee, you will note the make-up of the party members whether they may be Democrat or Republican. So, certainly there should not have been a fear let's say as to what if anything was put forward from that committee as recommended legislation as to what would have come out of that committee.

I want to direct your attention to number 6 on the second page:

> "Members of the committee shall receive per diem, assistance, and travel allowance"

At the time it appeared that we thought it was so important that we have this committee look at these issues that we would pay the expense of supporting the committee and pay for the members to attend. The members did attend and we did have two meetings. Finally, look at section number 9:

> "The committee may submit an interim report on the results of this study, including an proposed legislation, on or before May 1st 2012 by filing a copy of the report with the Office of the Speaker of the House."

We never had any suggested or recommended legislation. Representative Stam was on that committee and he never submitted any recommended legislation. I don't want you to get confused and think that his piece of legislation came out of that committee. There was no discussion of a piece of legislation out of that committee. There was no meeting where we voted on it. We had two meetings. The notes and the minutes from those meetings are available. Now people around this building have been implying that somehow this was a compromise or somehow this was a piece of legislation that came out of a joint effort. The singular accomplishment in the committee meetings that we had was to review the study that led to the case decision in Fayetteville and show the validity of that study.

The validity of our court system is at stake. It's that way every day. I want to read just a small portion of the judge's statements about our court system and how important it is that we have our juries play their role without being impeded by discrimination.

> "Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by an impartial jury. Racial minorities are harmed more generally from prosecutor's drawing racial lines in picking juries established, state-sponsored group stereotypes rooted or reflective of historical prejudice. Nor is the harm just limited to minorities. When the government's choice of jurors is tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial. The very integrity of the court is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines the public confidence in adjudication."

The case that happened in Fayetteville was one where it was acknowledged even by the prosecution's expert that the statistics were indeed important and correct. There is an acknowledgement that selection procedures that purposefully exclude one segment of our society from juries undermines the public confidence in the fairness of our system of justice. Fairness and reliability in the imposition of capital sentences, that is what this case is about. That is what promotes confidence in our system of justice.

So we're here today. We want to ignore the facts. We don't want to be measured. We say "Everything we do should have measurable outcomes." Then when we have the measurable outcomes and we don't like what they say, we say "let's exclude measurable outcomes from the process now. Let's not be bound by the same standard that we have put everyone else on." I'd ask that you vote against this bill, that you not yield to your temptation to avoid having the courage to do the right thing. Don't turn away from the mirror that shows us the errors of our past and the errors that we will repeat if we don't measure what we do and how it affects us. I'd ask you again to vote against this bill.

Speaker Folwell: Representative Alexander from Mecklenburg is recognized to speak on the bill.

Representative Alexander: Thank you, Mr. Speaker. First I want to apologize for my voice. I've been attacked by allergies or something so it's not quite the way I normally talk. But I've been sitting back here and I've been listening and it's remarkable to me how small the world is. Earlier somebody mentioned Henry Wallace. Many of you know about my background with the NAACP, but I doubt that many of you know about my involvement with an organization called Mothers of Murdered Offspring. I got involved with this organization because one of Mr.

Wallace's victims, Shawna Hawk, was very close to a gentleman that used to work for me when I served on the Charlotte City Council. I got more information than I ever wanted to know about serial killers and about the victims of Mr. Wallace. I spent more time than I want to remember standing around at candlelight vigils at sites where violence has taken place.

I understand from a personal standpoint the emotions that rack people. Because in my professional life I'm a funeral director, I've had to stand with families who have suffered violence and have had to try to console parents and sons and daughters who have been left behind. But even in the midst of all of that, I understand that there is one thing that we can't do. There are many things that we can do in this General Assembly. But one of the things that we can't do is that if we make a mistake and someone is executed because of that mistake, we cannot bring them back.

Duke University did a study recently and I had circulated to everybody's desk information about that study. Much of what we debated when the Racial Justice Act was approved, we talked about peremptory challenges and there has been a lot of focus on that. But Duke University did something very different; they looked at the jury pool. In looking at the jury pool what they found kind of echoed what judge Weeks said in his opinion. What they found in this Duke study is that when you have juries formed from an all-white jury pool, convictions for black defendants are 16 percent more frequent than for white defendants. 16 percent. Then they discuss the inclusion of at least one African-American in the jury pool: not on the jury, in the jury pool. One African-American nearly eliminates that 16 percent disparity.

We truly have a problem. The problem that we should be focusing on rather than repealing the Racial Justice Act ought to be how to create equitable jury pools. Only when we have an equitable jury pool can we approach justice. When you had a jury pool that had no African-Americans in it, black defendants were convicted 81% of the time and white defendants were convicted 66% of the time. One African-American in the jury pool, just one, eliminated statistically these disparities.

So what we ought to be debating today is some kind of bill that would make it virtually impossible for prosecutors to go to these jumped up schools and learn how to subvert the process and exclude black folk from the jury pool. Duke didn't have the ability to study what happens when you exclude Asians, what happens when you exclude Jews, what happens when you take Hindus out of the jury pool. But I suspect that when we get to the point when we can really analyze this stuff, we're going to find that when you don't have a jury pool that is truly reflective of the makeup of your community that we have a problem.

We have, I think, a sixth amendment problem right now. The sixth amendment to the Constitution was adopted on December the 15th 1791, a few years before any of us got here. It says, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

That is the United States Constitution, the sixth amendment to the Constitution, one of the amendments that was very important... Incidentally, it was important for the people in North Carolina that this amendment along with some others were put into the Constitution in order for us to ratify that Constitution and adhere to the proto-United States. Here we are a couple of hundred years down the trail. My good friend, Representative Hall, shared with you what the North Carolina Constitution, just amended about 30 or 40 years ago, says about the same thing: jury pools. This piece of legislation that we are debating today would go a long way to reversing what we just did to try to address what a judge has already found to be a universal problem in this state.

Remember, ladies and gentleman, members of this legislature, that we are talking about here something that if we make a mistake we cannot reverse. As much as I despise people like Henry Wallace and what folks like Henry Wallace have done, I want you to understand that he is not having a happy feelings party being locked up over there in Central Prison right now. The people who, under the Racial Justice Act, find that their sentences are going to be changed, those sentences are not being changed to anything that anybody actually in this body would want to experience because life without benefit of parole in our prison system with all of its problems is

not a vacation. Some people would consider it a lingering death. But the issue should be creating an equitable jury pool.

I'm standing up here today not speaking from the head but speaking from the heart. I remember the struggle that Representative Womble put forward time and time again to bring the Racial Justice Act and the essence of the relief that he wanted us to consider to the forefront. I remember my conversations. When I got to this body one of the things that I remember him coming to my desk and saying to me was how important this was. He wanted to know whether or not I was going to be on board to work with him on it. I was proud to sign up and sail with that ship. I hope that we will have the wisdom not to reverse something that people all over the country now look to as a model.

I want to thank you for giving me these few minutes to share my thoughts with you I'm not going to take all of my time. In fact, I'm going to sit down. I'm going to hope as I sit down that you will actually think, that this won't be our standard, set-piece debates, that we will actually think what we are doing because what we do today will resonate. It will resonate into the future and it will resonate with the families not just of victims but with the families of people who every day go into our judicial system and look at juries who don't look like themselves and listen to erudite, highly-educated folk game the system against them. It is for those people that I have stood this afternoon to speak.

Speaker Folwell: Representative Michaux from Durham is recognized to speak on the bill.

Representative Michaux: Thank you, Mr. Speaker. I shall be extremely brief on this because here again Representative Alexander indicated that what we seem to lack here is a thought process that says things should be fair, equitable and straightforward. I'm not going to try to inflame you by bringing out any statistics because I think anybody hates heinous acts of crime and believe that those persons who commit those heinous acts of crime ought to be punished. The problem is that they should be fairly punished. We don't live in a time of Inquisition or anything like that. What we're living in is a time when we understand that to treat one person differently from another person is just not the right thing to do.

I just want to limit it to just this one thing. We have had a case already heard under the current Racial Justice Act. It was a full hearing. Nobody can doubt that Judge Weeks carried out a hearing that examined every facet of what the Racial Justice Act, as it now exists, called for. In making his decision, he made his decision based on the evidence that was given him. The evidence given him at that hearing were the fact that racism is still a matter of fact in this state, not because of anything else that just popped up in his mind, but because of what he was given statistically. So now he has made his ruling. His ruling did not, contrary to what a lot of people will tell you, turn that defendant loose. It took him off of death row and put him in prison for the rest of his life.

It's decided now that maybe what we need to do now is appeal this decision, but let me give you the effects of the decision. The decision that he made says the Racial Justice Act is legal. It is lawful. It is what is in the law. We follow the law all the way down. So you've got another 150 folks out there who have filed under the Racial Justice Act to have their cases heard also.

But, right now, the Racial Justice Act is the law because it has been ruled on in a court of law. But it's going up on appeal. The decision now rests in the courts of appeal. What happens when those judges and the justices say that Weeks ruled legally and constitutionally on the Racial Justice Act? You are here today trying to subvert what should be going through the courts. You can't even wait. You may even get a good decision out of the courts that says it's unconstitutional. But you don't want to wait for that. You want to go out here and do something now.

The other problem there is that the Racial Justice Act is the law, a case has been heard, has been ruled on based on what the law is now. You've got other folks out there who are going to file. It just appears to me that these folks out of a sense of whatever you want to call it, out of just a pure sense of coming together with everything, that there is an equal protection involvement here. Since the law has already been done, these folks that have already filed are entitled to some equal protection under the law as it exists now. Not in any *ex post facto* because that simply procedural, but simply because of the fact that the law has been done, then here we have a

problem. So why can't we just wait until this thing takes its course right on through the courts like it should and the final decision is given there? Then you will have an opportunity to act on that instead of making a rush to judgment on what should be. It's just too early to do anything about it. All the bugaboos that you hear about it are totally wrong. Let's just wait and see what the courts do about it and vote this bill down.

Speaker Folwell: Representative Faison from Orange is recognized to speak on the bill.

Representative Faison: To debate the bill, Mr. Speaker.

Speaker Folwell: The gentleman has the floor.

Representative Faison: Thank you, Mr. Speaker. You know folks, there's some difference in what has been demonstrated very well by Representative Glazier and Representative Alexander going back through some of the statistics, and that is, plain and simple, that racial discrimination still exists and that there are ways to demonstrate and prove and show it and so it does exist.

When we look at the criminal law it's not just about how we punish someone and whether or not we can punish them enough for the bad things they've done. As much as anything, it is about whether the rest of folks feel like the law is fair and whether it is providing adequate protection to them.

As I look at this body, most of it looks Caucasian from here. It's difficult, I think, for the majority of this body to put itself in a position to think about what it's like if a series of laws get applied differently not because of what you did or who you did it to but because of the shade of your skin or the texture of your hair. It's just not right. It's important within our society that all people within our society not only are treated correctly but feel like they're treated correctly. What we know is, not everybody is treated correctly and correctly feels like they're not getting treated correctly. So to that end this bill takes a move in the direction of saying to folks "Look, we are going to take a special effort to deal with what we already know exists, which is the discriminatory application of some laws." How are we going to deal with it? Well, the way we're

going to deal with it is give the same judge who decides whether to impose the death penalty the ability to decide what facts the judge will let into evidence. That's generally what happens now.

Do you realize, when we go into a courtroom now a judge decides what is relevant and what is material? If that's statistics, fine, it comes in. If that's the testimony of a witness, fine, it comes in. If it is some other demonstrative thing that will help that judge discern the truth of what has happened and that is material, that is, that it makes it more likely that it applies to the issue at hand, or that is probative, it makes it more likely than not that it occurred, then the judge lets it in. All the Racial Justice Act has done up to now is to say it's up to the judge to decide what it is the judge should consider in weighing the question of whether or not discrimination that we know exists has played a role in the imposition of the death penalty. What this bill now does is take away from the judge the broad discretion to decide what is probative and what is not. This body shouldn't be deciding that or limiting that.

There's nothing unusual about using statistics. We have cases now that are referred to as 1981 and 1983 cases dealing with discrimination. They are proved by statistics, but we don't stop there if we're looking at patent and trademark infringement cases. Those cases are largely proved or disproved by statistics. But it's not unusual that we use those in that regard because when we're trying to make decisions about whether to expand a business or not, we use statistics. When we're trying to make decisions about whether to invest or not, we use statistics. In trying to make decisions about whether or not to get involved in a banking operation or expand a banking operation. It is ultimately statistics that are modeling for us the truth of the situation, so we can make decisions.

Permitting a judge broad discretion in using statistics to decide this very fundamental question which goes not just to whether or not someone's life will be taken, which heaven knows is important enough, but goes even to a broader societal question of whether or not roughly 20 and a half percent of the population in this state will be in a position to feel like someone is taking an extra effort, as they should, to administer laws fairly and justly without regard to issues such as identifiable race. So in that regard, I think we got it right, when we named it the Racial Justice Act because that's what it seeks to achieve. I think we got it right when passed the Racial Justice

Act and included within it the full scope of what a judge may now consider. I think what this bill proposes to do is to start getting it wrong again by reducing from the judge, taking away from a judge, that which may be considered to decide the fundamental question. For me, I'm voting against this and I would encourage everyone else to do the same.

Speaker Folwell: Representative Bryant from Nash is recognized to speak on the bill.

Representative Bryant: Thank you, Mr. Speaker and ladies and gentleman of the House. I just want to make a few brief points about the bill. First is that I, like everyone else, was moved by Representative Dollar's description of the monsters who engage in this act and, therefore, may take advantage of the Racial Justice Act or other legal remedies and procedures that our constitution and our statues of laws provide for citizens. I think the unique role we have as citizens of the United States is a decision by our founders that we, by our oaths, are bound by and that is that just because we face monsters we will not ourselves become monsters. We are upholding a system of laws that will apply regardless of what monsters we face. Just as the men and women on death row have done monstrous things it is also monstrous that we would uphold discrimination that would keep myself and people from my group from serving on juries because some district attorney believed that people like me are less likely to favor them or favor the death penalty or favor whatever it is they are basing their stereotype on. That is also monstrous in its years of replication over and over again in the cases in this state.

Similarly, it is also a concern to me and monstrous that we would want to validate without this judicial procedure a death penalty that we know is applied differentially based on who the victims are. It also really bothers me and is scary to me that there are people who are offended by the fact that white people would challenge being racially discriminated against. It really concerns me that we only see that going in one direction.

It also bothers me that we are angry that X number of people have filed under this act. We have all kinds of provisions in our laws for people to take account of and the principle under our constitution and our rule of law is that it is open to everybody. We have procedures to deal with

and judges to dismiss claims that are invalid and not properly brought and sanctions and consequences for doing that.

But we don't narrow the window of the causes of action because we're just upset by how many people file a claim for their rights. We live under a system where we would rather you file and it be reviewed and dismissed than not to have the right at all. That is what our freedom depends on: that we all have that right. We, as wise and wonderful as we are, cannot imagine and prejudge every case and circumstance that may be brought in terms of racial discrimination. That's why it disturbs me that we have this time limit that will apply when we don't know every factual circumstance that may be presented. It's a ten-year window before a case was closed that the records of the district attorney in that case has done in the past. It goes back beyond ten years because they went and did something else and then came back and started prosecuting cases. Or we limit it to two years after the fact when we know by watching the work of the Innocence Commission and other post-conviction proceedings we've had in our state that there are things that have come to light several years after many of these cases that have been egregious and have been proved to violate people's rights. So that was the concern I raised to you on that point.

It also bothers me that the district attorneys want us to trust them in their implementation of the rule of law, but yet, somehow, they don't trust themselves being reviewed under the same rule of law and judicial process that they want us to trust them to administer. That really is scary to me.

I am concerned about striking the Council of State in the first section of this bill from the responsibility to review and be responsible for the protocol for the death penalty. Leaving that to the superintendent of the penitentiary really bothers me when I think it is appropriate that the highest elected officials of our state together as a body are responsible for one of the most serious acts of our state that occurs. The fact that they are responsible for that protocol does not impede, at this point, the death penalty because the court cases have reviewed the protocol and found it to be appropriate. That process did work in terms of them having that role and the court system and the rule of law being used to review how they implemented that protocol and whether it was fair under our constitution.

Finally, it is concerning to me that we narrowed the scope of these cases to the prosecutorial district that the cases is in. How we are influenced by racial prejudice and discrimination and how we are influenced by racism in our community does not end and begin at some geographical line. The standards and expectations and stereotypes about when DA's need to implement the death penalty in order to have community support, what kind of people they need to have on the jury to win verdicts, all of the ways in which racial prejudice permeates the death penalty system, doesn't end and begin at the county line. I disagree with the member who said that what happens in Cherokee does not influence what happens in Fayetteville and vice-versa. What happens all over our state influences the standards and expectations that our district attorneys and court system personnel are implementing and the ways we as communities are responsible in demanding of them to take action around this most ultimate penalty.

For these reasons I ask that you vote "no" on this bill which is indeed a repeal of the Racial Justice Act and not an amendment. I am very sad that we would for the political reasons involved in this like we want to support continuing the racial discrimination that has already been well documented in the implementation of the death penalty in this state. It is a very sad day for me that we would want to vote for that. So I ask you to please vote "no". Thank you.

Speaker Folwell: Representative Glazier from Cumberland is recognized to speak on the bill a second time.

Representative Glazier: Thank you, Mr. Speaker. I'll conclude my remarks by citing the three major deficits this bill has and what the result will be. First, if you look at page 3 of your bill, subparagraph e, the line, of course, that guts the bill is the line that says:

> "Statistical evidence alone is insufficient to establish that race was a significant factor under this Article."

The point here being that no matter whether you prove by 100% your statistics, no matter that the statistics show a one in ten trillion squared chance, this act says statistics alone will never be significant enough. They will never be able to prove the ultimate issue. If that's the case, you have essentially through this bill eliminated the Racial Justice Act.

Second, if you look at section 8 of the bill, section 8 of this bill says that this act does not apply to any motion that is pending that was heard and findings were made. That's the *Robinson* case. So, if the *Robinson* case is upheld on appeal because of the findings of Judge Weeks, Robinson will get life without parole. But any other defendant tried the same year, by the same prosecutors, in the same county, who put on the exact same evidence, would lose. They would have to lose because they're under the new act. This act would say: "The evidence that Judge Weeks found and we're upholding that's relevant enough, important enough, that it's sufficient enough for him to get relief—that same evidence is insufficient for those defendants similarly situated and they should die." Now, regardless of your view of the Racial Justice Act or the death penalty that is fundamentally as unfair as it gets. It is the classic equal protection and due process argument set up for all of these defendants. You want them clearly to prevail? You have just signed a bill that will do that, in my opinion.

Third, if you go to section 3(d), we've eliminated in this bill the ability not only to have statewide statistical evidence but lost in the shuffle is this bill's elimination of judicial division evidence. The only evidence allowed is, not only statistical but anecdotal, is county or prosecutorial district. I raised this in committee. You have an ADA who works for 10 years in Wake County, prosecutes lots of death cases, and has a record of fairly demonstratively clear racial bias in the jury selection. He comes to Cumberland County. He's there five years. He tries a couple cases. Now, all the data, if one of those cases comes through the Racial Justice Act under this bill, all the data of what he did in Wake County is not usable. Not usable because the limitation is only the evidence in that judicial district. Well, almost all of our ADAs move and become DA's if they want to and not necessarily in their county. We're mobile. We may be an ADA in Wake and get experience and move back home to Halifax or move back home to Cherokee and try the case.

What makes this argument about not looking at statewide evidence even more significant is we all forget we are a uniform system of courts. A general court of justice where what happens in one county ought to be the same kind of justice one gets in another but this repeal makes clear that cannot happen as a matter of law, ever. Again, whatever your view of the RJA this is an

extremely flawed bill in every respect. No one should doubt the intent and what it does. It is to repeal and wipe clean an historical slate.

In the end, my final comment, I guess, would be no one can disagree with Representative Dollar. There are a lot of monsters out there, who've done some terrible, awful, heinous, atrocious, and cruel things. That is precisely why when it comes to the issue of race and law, when emotion holds sway, we ought to let reason hold the day. I close with an op-ed from a murder victim's family in Fayetteville who said, at the end, in opposing this repeal:

> "executions tainted by racial bias are a dishonor to all of us and to the memories of our murdered family members. We do not solve the problem of crime, we don't solve the problem of the death penalty, by casting aside findings of Judge Weeks that have found that we have a bad history in these cases of racial prejudice in jury selection."

Instead, I think we would all be better served if we did what Representative Daughtry suggested a couple of weeks ago and look to find ways to find the resources that our criminal justice system desperately needs, look to find ways to make sure that the errors that we committed before are systemically eliminated, look to find ways to create confidence by all segments in our community in the criminal justice system. If we focused our efforts on that instead of repeatedly on this, we would find, I think, a lot of answers to these problems. If we err at all I would prefer to err on the side of life as opposed to choosing to err on the side of death. I think in the end God will favor us for that decision far more.

Speaker Folwell: Representative Harrison from Guilford County is recognized to speak on the bill.

Representative Harrison: Thank you, Mr. Speaker. Ladies and gentleman of the House, it's very difficult to follow Representative Glazier on this subject but I'll try. We know that race has been an issue in our judicial system for more than 150 years. As has been stated a number of times today, Judge Weeks very unequivocally stated in his opinion that intentional discrimination based on race occurs throughout North Carolina in capital cases. The Racial Justice Act was an attempt to address this problem.

It's important to remember the historical context because we've had a number of attempts to fix this but we've always gotten around it for some reason. The U.S. Congress and the Supreme

Court have been dealing with this since 1975 with the Civil Rights Act that prohibited excluding jurors based on race. That continued with the numerous court cases have been cited here on the floor. It wasn't even until the 60s and 70s that African-Americans were allowed to be on juries, and then we started to get around that with the preemptive strikes. As Representative Glazier mentioned, we've got 14 available on capital cases. That's more than any other state in the country.

Despite these efforts to reign in racial bias in judicial proceedings, we continue to try and get around them. Representative Stam mentioned *Batson* which requires race-neutral decisions in jury selections. Well, as Judge Weeks pointed out in his findings, in 1995 and in 2011 North Carolina prosecutors were actually trained to get around the requirements of *Batson*. I think that's fairly significant. We know that we have a racial discrimination problem. We're training the prosecutors how to get around that.

It continues to be a problem which is why we need the Racial Justice Act. Even if you don't understand or agree with the Racial Justice Act as passed two years ago, you do need to understand the problem is significant. Attempts to address it have never been enough. It's not just about the criminals, it's also about the rights of all citizens regardless of race to serve on our juries and participate in our government. This is about law abiding citizens being excluded from jury service because of the color of their skin. It's about the integrity of our court system and of our government.

A court has found, based on extensive research, scientific study, and evidence from both sides overwhelming evidence of discrimination in jury selection in North Carolina. To ignore that, to defy that, by repealing our mechanism for addressing it is wrong.

I urge you to vote "no".

Speaker Folwell: Members, it's five o'clock. We thank you for your service today and we look forward to seeing you tomorrow. Pages are now released and we look forward to seeing you tomorrow. What purpose does the representative from Guilford, Representative Blust, rise?

Representative Blust: Were you about to dismiss the members?

Speaker Folwell: Noted. Representative Haire from Jackson is recognized to speak on the bill.

Representative Haire: Thank you, Mr. Speaker. I've got a couple of observations perhaps I'd like to make. It's interesting that we've heard a lot of talk about Judge Weeks' ruling down in Fayetteville. If you go look at this summary of the death sentences bill, in 2010 the North Carolina Supreme Court held that a trial court could require a case to be tried non-capitally if the state delayed in seeking a hearing under rule 24. That's been taken away.

You know, when you look back, and I know a lot of you folks go to Church, in the history of this country there has been a whole lot of prejudice in the past. We're not immune to anything. If you go back and you look the first people who came over here were Puritans. They were prosecuted in England, and they came over and set up a very structured society. Then, later on, the Irish came over and they were discriminated against for years upon years. Then, later on, during World War I the Germans were discriminated against. In fact, many of you may have, if you go back in your history far enough and look, you'll find that your names might have been German at one time but it was Anglicized during World War I. In World War II, what did we do? We locked the Japanese up in internment camps on the West Coast because we didn't trust them. Now we have a lot of problems, we think, with Latinos. It's interesting if you go over to the Museum of History that there's an exhibit in the North Carolina Museum of History right now, today, called Latino Life. Of course, now we hear a lot about Muslims. Wonder where you'd be if you'd go into court and you'd see somebody in a turban or a female in the head covering that they wear. Of course, unfortunately for African-Americans we had a long history or prejudice against them.

What have we tried to do? I'll complement Representative Hall for giving us a copy of the North Carolina State Constitution. That's what we believe in, so what we're trying to do here is to complement or give meaning to the North Carolina State Constitution. Those of us that go to Church or synagogue or whatever you go to, how can you say "Well, we believe that this stuff

that we believe in the Bible, but when it comes to being fair and equitable we have a question about it."

It gets back to remind me what the whole court system should be about. Those of us that are old enough to remember the old TV show called Dragnet. The head detective used to say "Just the facts ma'am." Well that's what we want in this judicial system, is just the facts--that everything be fair and reasonable and equitable. Finally, I would go, and I heard what Representative Dollar said, I would make an observation on it: the statistics show that it costs twice as much to kill somebody as it does to lock them up for life. But that's not the issue here. The issue here is: we believe in the court system, and I see Representative Stam leaving, I've obviously not stirred him, but in the court system where we try criminal cases we've heard for years it's better to turn ten guilty people loose than it is to convict one innocent person. We've all heard that. It's been around court for years. I say that what we have now is an opportunity to protect the innocent and not take an opportunity on convicting someone that's guilty.

For that reason I ask you to vote against this bill.

Speaker Folwell: For what purpose does the representative from Wake, Representative Stam, rise?

Representative Stam: To ask Representative Haire a question.

Representative Haire: I yield, yes.

Speaker Folwell: Representative Haire, do you yield?

Representative Haire: I certainly do yield.
Representative Stam: Do you realize that every one of these folks have been convicted as first degree murderers and none of these claims are based on innocence?

Representative Haire: The only thing I know is it might be based on innocence because we had an instance up in Asheville just last fall that the Innocence Commission found two men that were locked up in prison on a crime they did not even commit but they had all this evidence against them and they were released after serving some 20 years in prison because the state had not disclosed the evidence that it should have disclosed in the case.

Speaker Folwell: The lady from Randolph, Representative Hurley is recognized to speak on the bill.

Representative Hurley: Thank you, I'd like to speak on the bill. I did not know much about this until this came up and I started researching it last December. As of December the 12th 2011, there were 158 people on death row. Of those, in my county there were 8. Of those 8 there were 6 white people, there was 1 black defendant, and there was 1 American-Indian defendant. Of the victims, the first was a white defendant and a white victim. The next was a white defendant and a white victim and it was a child rape. She was put into a garbage bag and thrown in a closet, and she was murdered. Another one was a white defendant and white victim. He was previously convicted of first degree rape and sentenced to life but he was paroled and got out and killed. The third defendant was a black defendant with a white victim. He raped and stabbed the victim. Then there was another white defendant-white victim. Defendant here too had a previous manslaughter charge. Another one was a white defendant-white victim. The defendant robbed and shot the victim while victim begged for his life. Then there was another white-defendant-white victim. He shot two young men over a 30 dollar drug debt. The Indian defendant had a white victim. He killed a deputy serving warrants and shot a second deputy. None of these cases are in doubt of the guilt of the defendant. I ask you to vote for this bill. Thank you.

Speaker Folwell: Representative Womble, please state your purpose.

Representative Womble: To speak on the bill, Mr. Speaker.

Speaker Folwell: The gentleman is recognized to debate the bill.

Representative Womble: Thank you, Mr. Speaker. Thank you ladies and gentleman. Representatives of this great House, I won't keep you long because fatigue is setting in on me just as I am sure it is setting in on you. But there is such a thing as justice and "just us." Too many times the needle or the hand has swung not to justice but to "just us." It shouldn't be that way, but it is. I am very proud of this legislature in the last few recent years for the legislation that we have done. It means that we are compassionate. It means that we want to do the right thing. No matter what your pigmentation, no matter what's the texture of your hair, no matter what side of the railroad track you grew up on, in North Carolina you can get a fair deal.

I, like some of you and hopefully all of you, am appalled at those kinds of things that Representative Dollar mentioned. I abhor them too. I hate them. At the same time, we must set an example as not to sink to the same level of some of these other people who seek revenge based upon color alone. Yes, I've been very proud of you, all of you, individually and collectively because when it came to those kinds of bills that I have sponsored with your help you stood with me and you passed them. I don't have to name them. Now is your opportunity to stand again for rightness and justice.

The Racial Justice Act was passed in the year 2009 to address the documented, I said to address documented, racial disparities in our state of North Carolina. I'm not a legislator in the other states, but I am a legislator in North Carolina. That's what we tried to do in 2009. This is not a prefect bill. I never said it was perfect when I originated this bill with a lot of you all's help. But it's a good bill that goes a long way to saying "North Carolina is going to do the right thing." The Supreme Court has widely upheld the use of statistics in proving discrimination in cases relating to housing and employment and in other areas. If we can uses stats in these areas, what's wrong with using stats in this area.

Before the pages left, I was going to refer to them because they're watching us. Hopefully somewhere somebody, some young person, is watching us instead of talking about doing the right thing we will do the right thing. Somewhere I read that we should be rather than to seem. Section(f), page 3, line 47, states:

> "with particularity how the evidence supports the data that race was a significant factor in" the seeking of the death penalty

Now, I'm going to let you in on a little secret and some of you have heard me say this. There are people in my family that believe in the death penalty. There are people who say, who use such terms: "Larry, we need to fry 'em. Let's go ahead and fry 'em." Go on and kill 'em. Kill 'em out of the way, we won't have to worry about 'em no more." And I say "Yes, if that's what you want to do. But let's make sure we do it fair. Let's make sure that we do the right one. We have Daryl Hunt, a good example, one vote short, one. We should not make a mistake like that. If you do happen to kill an innocent person, we made a mistake. We can't say "oops. I forgot" or "That was a mistake." It's too late now.

The Racial Justice Act is just a tool. It's not the end all to everything. We just say that it's a tool in the toolbox. You don't have to use it, the person doesn't have to use it if they don't want to. Then it's up to the judge. The judge will make that decision.

I also want to let you know that there are rumors that have been going around. Somebody told me if you tell a lie long enough and often enough somebody will believe it. There's a rumor going around that this bill that we passed in 2009 is a get out of jail bill. You can get out of jail. They're going to come and get out of jail and be right back in your neighborhood. They're going to move next door to you, and they're going to wreak havoc on you and your family. That is the farthest thing from the truth, They will spent the rst of their natural life incarcerated, in jail. So don't believe the hype. That's a scare tactic, ladies and gentleman. You ought to be able to see through that. If somebody tells you they're going to allow them to get out of jail, tell them to read the bill.

The other thing, and I'm almost through, is that the bill that we passed had large and widespread support across this entire state, those who believe in the death penalty and those who don't. This is not a death penalty bill that we passed. People have made it that. It wasn't anything to do with the death penalty; it was about fairness and objectivity. More than 700 people of faith, religious leaders, across this state endorsed and supported what we've called the Racial Justice Act. Yes, some people say it's a misnomer but I believe it's the correct title. North Carolina has never

shied away or ran or buried its head in the sand. Yes, Racial Justice Act. We need to be cognizant of that.

Let me close by saying that we have a magnificent opportunity before us. Don't squander it. Don't let it slip through your fingers because of what your friends or neighbors might say if you repeal this bill that's before us: Senate Bill 416. Stand up. Have some courage. Have some backbone. Have some conviction. This 416 is not representative of this great body. I hope that we will defeat this. Plus, keep in mind ladies and gentleman it's already a law and it's already been ruled on more than once.

I thank you for your attention. I thank you for the service. And I thank you for listening to me. You've been hearing me speak on racial justice so many times and maybe too many times. Mr. Speaker, ladies and gentleman, I beg you, I implore you, whatever else I have to do, for you to vote "no". Punch red for Senate Bill 416. Thank you.

Speaker Folwell: Further discussion, further debate? If not, the question before the House is the passage of the House committee substitute for Senate Bill 416 on its second reading. 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. 72 having voted in the affirmative and 47 in the negative, the House committee substitute for Senate Bill 416 has passed its second reading and will remain on the calendar.

Rep. Paul Stam

House Majority Leader

Judiciary B Committee Meeting: Amending the Racial Justice Act

June 11th, 2012 at 5:00 p.m.

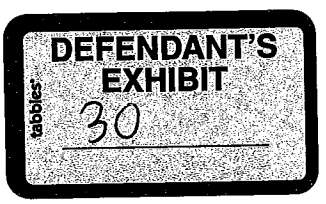
Edited for clarity and grammar

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.

http://www.fayobserver.com/news/crime_courts/racial-justice-act-four-fayetteville-convicted-murderers-get-a-hearing/article_bf25fb1a-88c9-510b-8612-e1edb0056f69.html

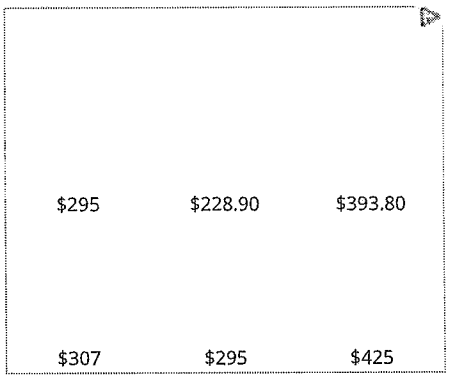
Racial Justice Act: Four Fayetteville convicted murderers get a hearing on claims of racial bias

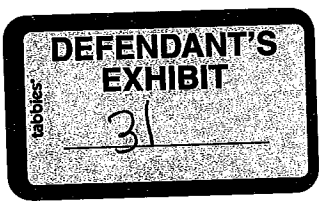
Paul Woolverton Staff writer Jul 6, 2012

A Racial Justice Act hearing is scheduled for 10 a.m. today for four of the Fayetteville area's most notorious murderers, just four days after the legislature voted to roll back much of the controversial law.

The three men and one woman claim that racism was a factor in the decisions to give them the death penalty. Today's hearing, before Senior Resident Superior Court Judge Greg Weeks, is to take up preliminary matters before an evidentiary hearing scheduled for July 23 in Fayetteville.

The killers are:





Christina S. "Queen" Walters, 33, a Native American woman who was the leader of a gang that killed two women and shot another in gang initiation murders in 1998.

Quintel M. Augustine, 34, a black man on death row for shooting to death Fayetteville Police Officer Roy Turner Jr. in November 2001.

Jeffery Karl Meyer, 45, a white man known as the "ninja killer" because he and another man, both Fort Bragg soldiers, dressed in ninja-style clothing and stabbed to death an elderly couple during a house robbery in Eastover in 1986. The other defendant, Mark Edward Thompson, 43, is serving multiple life sentences.

Tilmon Golphin, 34, a black man who killed N.C. Highway Patrol Trooper Ed Lowry and Cumberland County Deputy David Hathcock during a traffic stop in September 1997.

Golphin's brother, Kevin, was also sentenced to death for the Lowry and Hathcock murders. He was taken off death row after the U.S. Supreme Court decided that people who are younger than 18 when they commit crimes cannot be sentenced to death. Kevin Golphin was 17 at the time of the murders. He is serving a sentence of life in prison without parole.

The Racial Justice Act of 2009 allowed convicts on death row to use statistical data to prove that racism in the criminal justice system was a significant factor in the imposition of the death penalty. If a defendant's data convinces the judge, the judge must convert his sentence to life in prison without parole.

The law was intended to rectify a history of institutional racism in the state criminal justice system.

Nearly every one of North Carolina's more than 150 death-row defendants filed Racial Justice Act claims. White defendants advance their claims on allegations that blacks were blocked from serving on juries by racist prosecutors and on claims that people who kill white people are more likely to be sentenced to death than people who kill nonwhites.

Murderer Marcus Reymond Robinson of Fayetteville, a black man, this year used statistics alleging racism in how prosecutors selected his jury to persuade Judge Weeks to take him off death row. The Robinson decision outraged state lawmakers, who had been trying since last year to overturn the Racial Justice Act but were stymied by a veto from the governor.

They legislature tried again this year with another bill that was vetoed, but lawmakers overrode the veto on Monday afternoon.

The 2012 version of the law says statistical data may be used as evidence of racism but that statistics alone are not sufficient to overturn a death sentence. The new law says no defendant may use the 2009 law any more, although it allows the Robinson decision to stand.

In court today, lawyers for Augustine, Walters, Meyer and Golphin may argue that they should be allowed to pursue their racism claims under both the 2009 law and the 2012 revised Racial Justice Act. They have filed court papers making these arguments.

According to court documents and spokeswoman Gerda Stein of the N.C. Center for Death Penalty Litigation, prosecutors and defense lawyers are expected to argue whether Weeks must recuse himself from the case because the prosecutors intend to call him as a witness, whether the prosecutors are obeying requirements to share evidence with the defendants' lawyers, and whether the July 23 hearing should be delayed.

Assistant Cumberland County District Attorney Rob Thompson, who is handling local Racial Justice Act claims, declined Thursday to comment on the issues because the cases are pending.

Staff writer Paul Woolverton can be reached at woolvertonp@fayobserver.com or 486-3512.

fayobserver.com

Published: 07:55 PM, Fri Jul 06, 2012

Tilmon Golphin, who murdered two lawmen, is trying to get his death sentence overturned

By Paul Woolverton
Staff writer

The family of slain Highway Patrol Trooper Ed Lowry quietly watched with anger as a phalanx of lawyers on Friday worked to get his killer off death row.

"It's just ridiculous in our opinion, and it needs to end," Dixie Lowry Davis, Lowry's widow, said during a courtroom break Friday morning.

One of Ed Lowry's killers, Tilmon Golphin, is one of four Fayetteville-area murderers whose Racial Justice Ac claims had a preliminary hearing Friday in Cumberland County Superior Court. Senior Resident Superior Cou Judge Greg Weeks presided.

The four killers contend that racism was a factor in the decisions to sentence them to death and therefore, under the Racial Justice Act, they should have their sentences converted to life in prison without parole.

The defendants are Golphin; Jeffery Karl Meyer, who killed an elderly couple in 1986; Quintel Augustine, who killed a police officer in 2001; and Christina S. "Queen" Walters, who killed two women in a gang-initiation ritual in 1998. Golphin and Augustine are black, Walters is American Indian, and Meyer is white.

None of the defendants attended the hearing.

Some of the outcomes of Friday's proceedings:

Golphin, Augustine and Walters had their lawyers replaced with Malcolm "Tye" Hunter, Cassandra Stubbs, James Ferguson II and Jay Ferguson. That is the team that successfully used the Racial Justice Act this yea to get Marcus Reymond Robinson of Fayetteville removed from death row.

A hearing to delve into the facts of those three cases was postponed from July 23 to Oct. 1. In part, the dela is because the prosecutors won't be ready by July 23. But also the legislature on Monday, as part of a revision to the Racial Justice Act law, delayed all RJA evidentiary hearings until Aug. 31.

Weeks denied a request from prosecutors Rob Thompson of Cumberland County and Mike Silver of Forsyth County that he recuse himself from presiding over the claims.

The prosecutors want to call Weeks as a witness on their behalf, along with six other judges, to present evidence there was no racism in these murder cases. Weeks said the request was incorrectly presented an regardless, another judge has already rejected a similar request for Weeks to remove himself in the Robinso RJA case.

Defendant Meyer chose to stay with his legal team, Paul Green and Gordon Widenhouse. His next hearing date has not been determined.

The prosecutors said they want to contact law students who helped prepare the Michigan State University study that analyzed North Carolina death penalty convictions and reported evidence of racism in the court system. They contend the students were not qualified to work on the study.

The prosecutors also are seeking other materials from that study, which was used to persuade Weeks to tak Robinson off death row.

The courtroom arguments revealed that the state has been in talks with Harvard University statistics professor Donald R. Rubin to analyze and refute the Michigan State study.

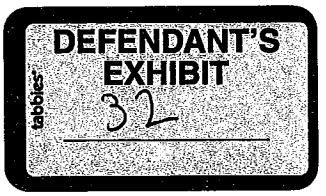
According to a document obtained by the defense lawyers, Rubin wants to charge the state $600 per hour fo his work, plus $200 for post-doctoral students and lower rates for graduate students.

The defense lawyers want the prosecutors to turn over numerous affidavits from other prosecutors across th state. The statements were prepared by the prosecutors in the Robinson case to try to show there was no racism in prosecutors' work on death penalty cases.

Weeks plans to review the affidavits and decide whether to share them with the defense lawyers.

After the Robinson ruling, upset lawmakers on Monday scaled back the means by which a death-row prisone can advance a Racial Justice Act claim.

Lawyers for Walters, Golphin and Augustine are seeking to use both the 2009 version of the law and the 2012 version approved Monday. They say they can use the 2009 version because their cases were under way before the law was changed this week.



Tilmon Golphin and his brother Kevin killed Trooper Lowry and a Cumberland County sheriff's deputy during a traffic stop on Interstate 95 in 1997. Kevin is serving a life sentence, and may qualify for parole under a U.S. Supreme Court ruling issued last month.

The Lowry family worries that the Golphins could eventually get out of prison.

"These people are evil. It's not because of their color - they are evil," Dixie Lowry Davis said. "If they were pink or purple or white, it would be the same thing. They still did the crime. They still should have justice. We should be ending this a long time ago. They did it. They're guilty and that's all there is to it."

"I would love to see him walk out of the gate," said Jim Davis, Dixie Davis' brother. "It would be the last step he ever took. Is that clear?"

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

Staff writer Paul Woolverton can be reached at woolvertonp@fayobserver.com or 486-3512.

Recommend . 1

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

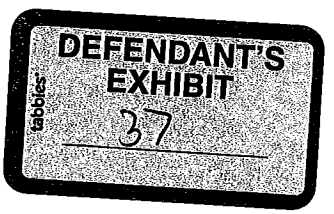
From: Dorer, Peg
Sent: Tuesday, January 22, 2013 4:21 PM
To: Dixon, Chadwick K.
Subject: FW: Photos

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?

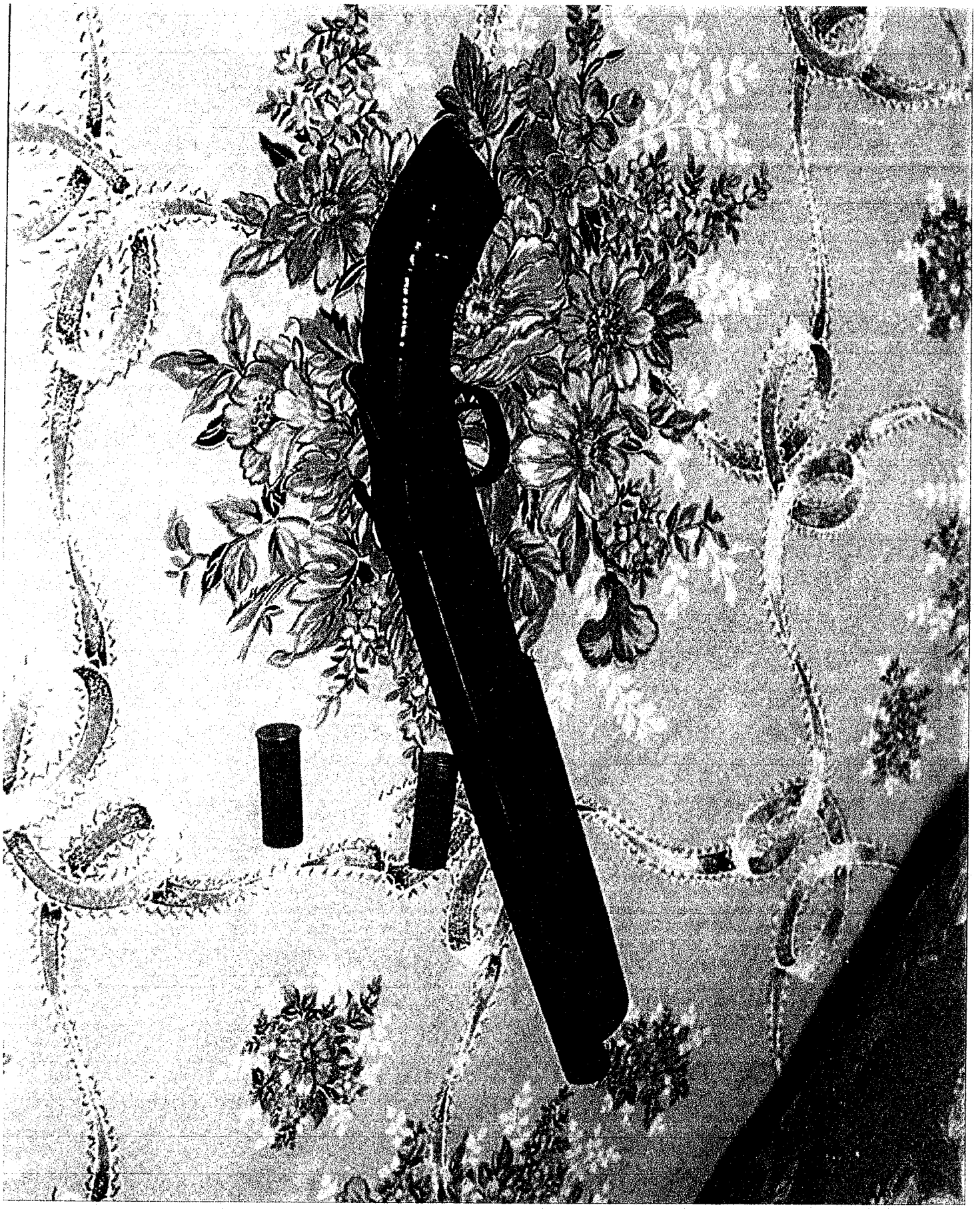
Kimberly N. Overton
Chief Resource Prosecutor
North Carolina Conference of District Attorneys
Post Office Box 3159
Cary, NC 27519
Office - (919) 890-1500
Cell - (919) 270-9403
Fax - (919) 890-1931
www.ncdistrictattorney.org

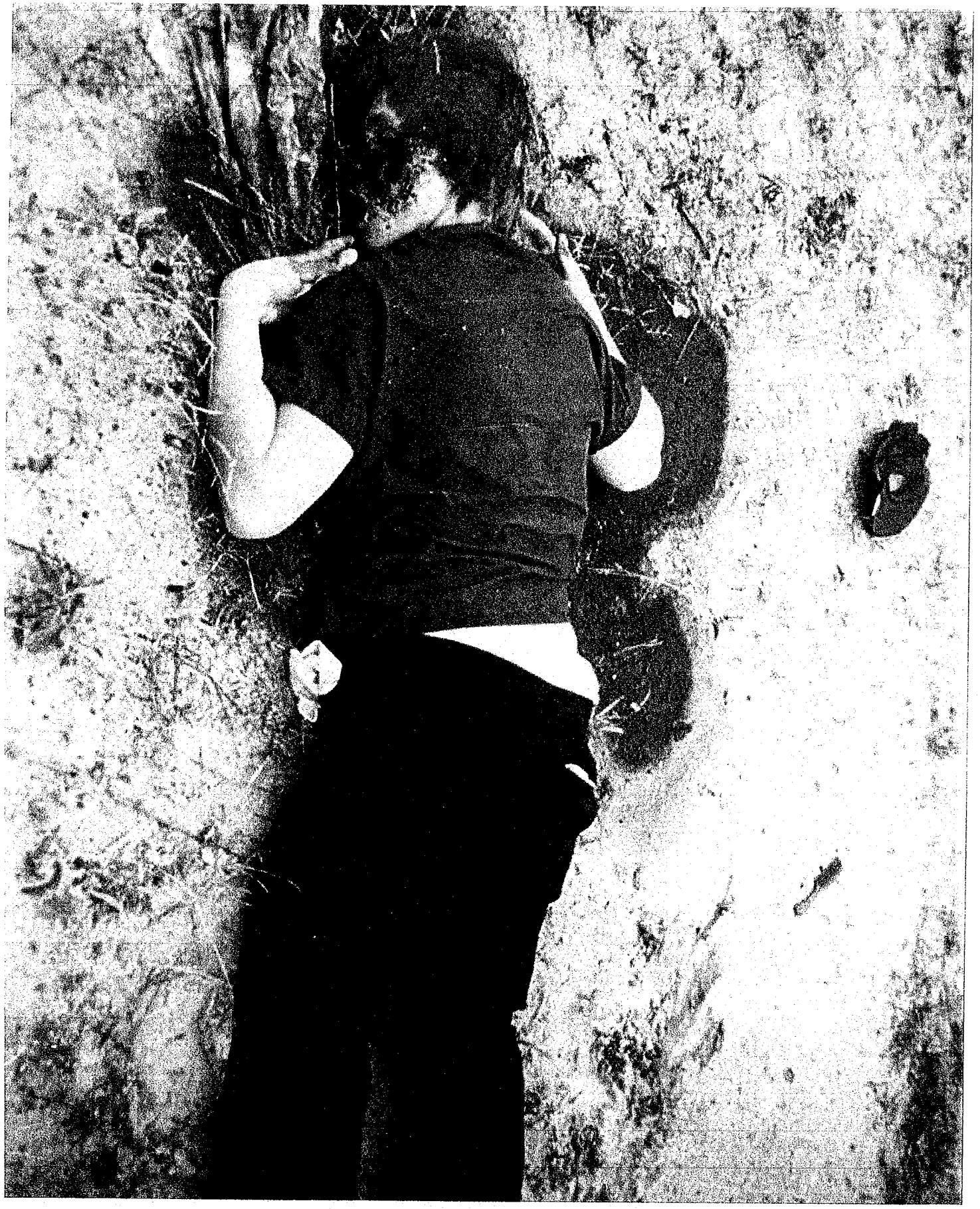
From: Thompson, Rob
Sent: Friday, January 18, 2013 9:37 AM
To: Overton, Kimberly N.
Subject: Fwd: Photos

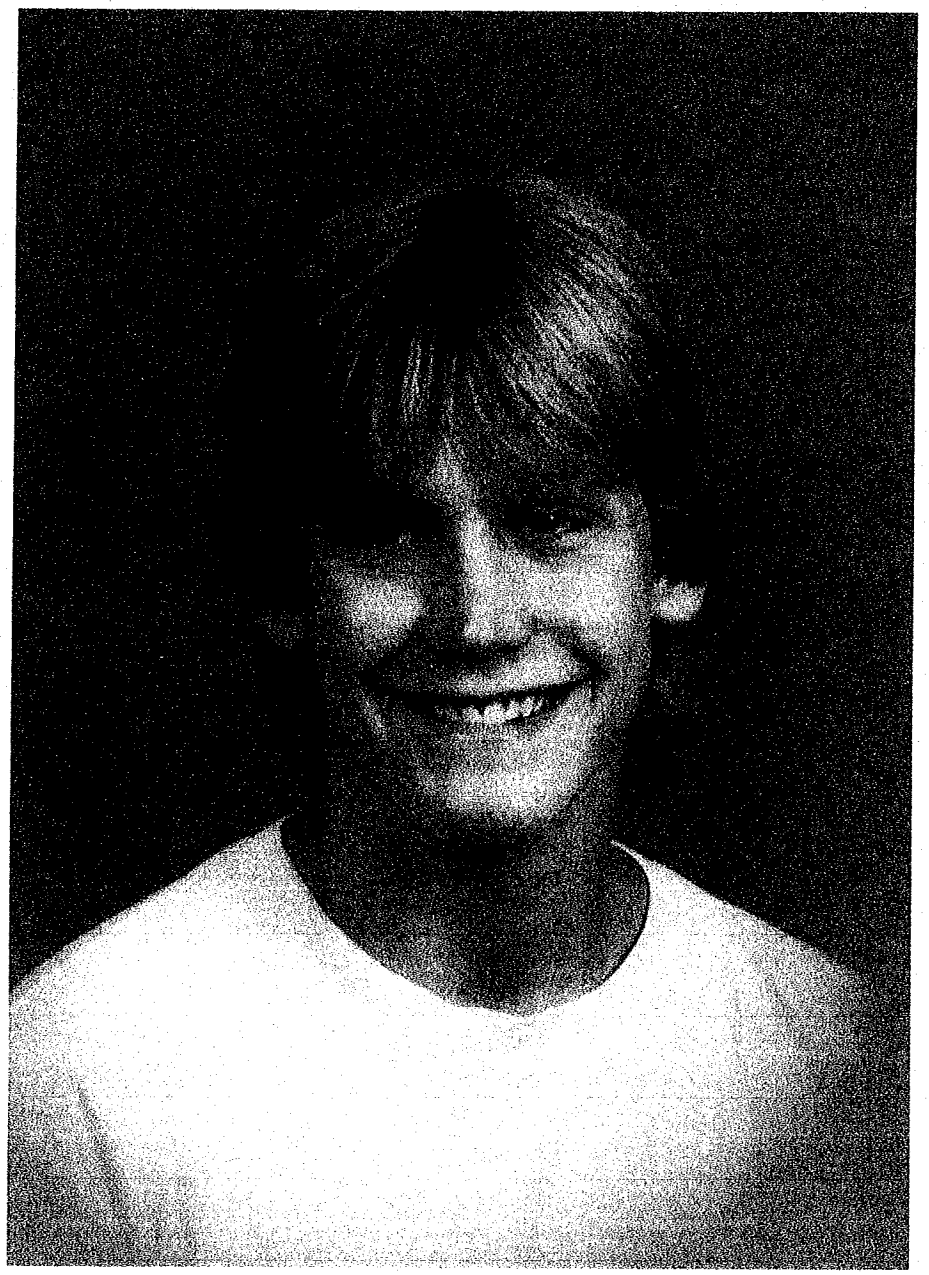
Begin forwarded message:

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







Erik Richard Tornblom
November 1990
Age 16

From: Lowry, Robert A CIV (US) [mailto:robert.a.lowry14.civ@mail.mil]
Sent: Wednesday, March 06, 2013 10:41 AM
To: Rep. Pricey Harrison
Subject: Racial Justice Act (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: NONE

Dear Sir or Maam,

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

Just one other thought. Judge Weeks, has ruled in favor for these criminals and overturned the verdict of 4 trials, 48 jurors, 7 State level appeals court Judges , 3 Federal appeals court judges per case, and the 4 Judges residing over each case. All verdicts were made and the appeal process took place with no wrong doings found.

This needs to be addressed to the General Assembly to overrule this act in it's entirety.

Al Lowry

910-437-5874 Home

910-309-2914 Cell

DEFENDANT'S EXHIBIT 36

Classification: UNCLASSIFIED
Caveats: NONE

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

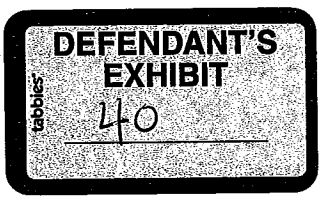
Paul Woolverton Staff writer Mar 14, 2013

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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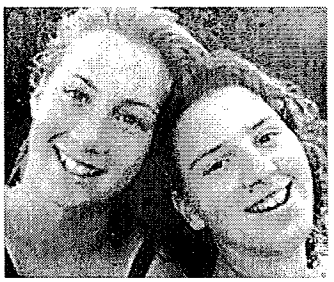

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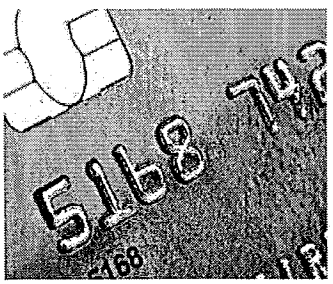

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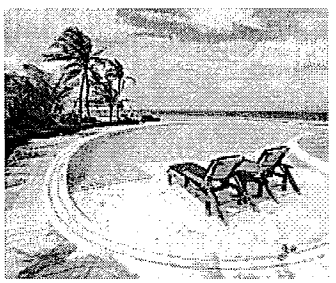

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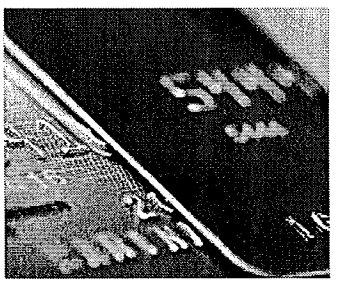

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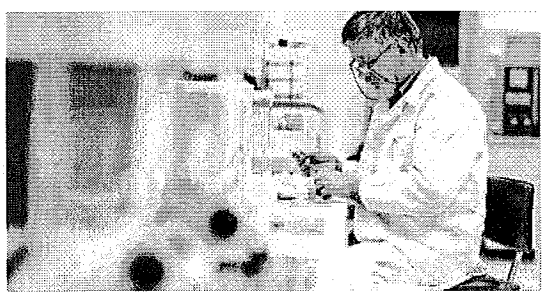

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North Carolina Senate
SB 306 – Capital Punishment/Amendments
Senate Judiciary I Debate
March 26, 2013

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.

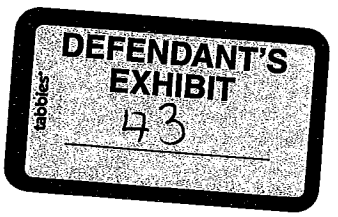
Sen. Goolsby: Thank you. What this bill does is really simple. I'll get Susan to go over it here in just a minute. But it goes through several things to basically restart the de facto moratorium that exists on the death penalty in North Carolina. It repeals in total RJA and all pending appeals under 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.

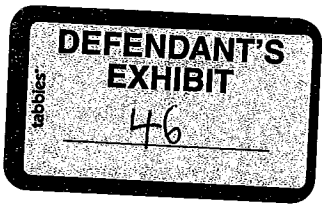
Thanks so much for all you do - let me know if you need anything else.

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

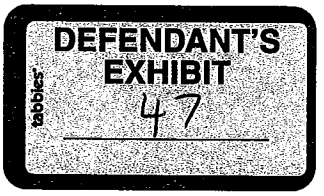


From: Dorer, Peg
Sent: Friday, May 31, 2013 8:49 AM
To: Paul.Stam@ncleg.net
Subject: Racial Justice Act - Cumberland County
Attachments: RJA cases Cumberland County.doc

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
919-890-1500
FAX 919-890-1931
www.ncdistrictattorney.org



Cumberland County Racial Justice Act Cases Removed from Death Row

Year	Case	Jury
1991	State v. Robinson *black defendant* *white victim*	1 Native American 2 Black 9 White
1997	State v. Golphin *Black defendant* *2 white victims* *(Law enforcement officers)*	1 Black 11 White
2000	State v. Walters *Native American Defendant* *2 white victims* *(gang initiation)*	6 Black 6 White
2002	State v. Augustine *Black defendant* *Black victim* *(Law enforcement officer)*	All White Jury *Brunswick County*

Note: Most recent Death Penalty Case

Shaniya Davis Case - Cumberland County

2013	State v. McNeill *Black defendant* *Black victim* *(5 year old)*	1 Native American 4 Black 7 White
Jury selection: *Prosecutors struck 6 whites, 6 blacks* *Defense struck 12 whites, 2 blacks*		

From: Dorer, Peg
Sent: Tuesday, June 04, 2013 12:03 PM
To: Joseph Kyzer (Sen. Thom Goolsby); Weston Burleson (House Staff)
Subject: RE: Racial Justice Act Talkers
Attachments: RaceChallenges.doc.rtf; govs meeting.doc; RJA cases Cumberland County.doc

Here are a couple of things that may help:

(1) Race Challenges are all the instances where a defendant may raise the issue of racial bias currently in the system (not including RJA)
(2) Govs meeting are some general talking points that we used when meeting with the governor several years ago (I've updated them)
(3) Last is a listing of the 4 cases from Cumberland County that Judge Weeks removed from death row. It lists the race of the defendant, victim(s) and seated jurors. You can see by the vast differences between cases, that there is no pattern of racial bias.

Hope this helps.

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

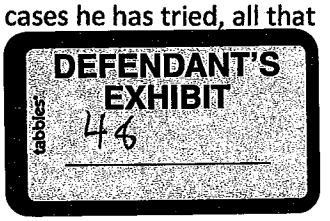
From: Joseph Kyzer (Sen. Thom Goolsby) [mailto:Goolsbyla@ncleg.net]
Sent: Tuesday, June 04, 2013 11:38 AM
To: Weston Burleson (House Staff)
Cc: Dorer, Peg
Subject: Racial Justice Act Talkers

Weston,

I CC'd Peg Dorer, President of the Conference of District Attorneys, who may follow-up with your office as you prepare talking points for House members.

Sen. Goolsby detailed his opposition to the Racial Justice Act in two recent columns (attached). Those are a good place to read his major talking point – that the RJA deals with racial FREQUENCY and not racial PROPORTIONALITY of seeking the death penalty, which allowed nearly every convict on death row to appeal under RJA. This single factor makes the law unjust and poorly written.

For example, Gaston County District Attorney Locke Bell has only sought the death penalty against three murderers, all white. Because he has sought the death penalty against three times as many white murderers as any other race, the death row inmates have an appeal under RJA. RJA says nothing about the proportionality of cases he has tried, all that matters is the frequency.



The result is an end-run around the death penalty and an indefinite moratorium on capital punishment

Other talkers:
-RJA turns district attorneys into racists and convicted murderers into victims
-There are sufficient motions for appropriate relief and the 'Batson' motion, for death row inmates to appeal their sentence
-All but four inmates on NC death row appealed under RJA
- A Democratic District attorney resigned from Gov. Perdue's crime commission when she vetoed the RJA in 2011. I suggest someone read from his statement of resignation on the floor:
http://projects.newsobserver.com/under_the_dome/da_resigns_from_crime_commission_over_rja_veto

Sen. Goolsby detailed further opposition to the bill in a floor speech about RJA in January '12, which may be helpful to develop talking points.
http://www.youtube.com/watch?v=Y7XlgttZViU

Thanks!

Joseph A. Kyzer
Legislative Assistant
Office of Senator Thom Goolsby, District 9
300 N. Salisbury Street #406
Raleigh, NC 27603-5925
Goolsbyla@ncleg.net
919.715.2525

Claims of Racial Discrimination CAN and should be raised at trial when appropriate:

Selection of the Case

Claim of Racial Discrimination in Selective Prosecution: Selection for prosecution may not be based upon an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 7 L. Ed. 2d 446 (1962); Wayte v. United States, 470 U.S. 598, 607-610, 84 L. Ed. 2d 547, 555-58 (1985), State v. Lawson, 310 N.C. 632, 644, 314 S.E.2d 493, 501 (1984).

Grand Jury Selection

Claim of Racial Discrimination in Selection of Grand Jury Foreman: Grand jury foremen may not be selected on racially discriminatory grounds. State v. Mitchell, 321 N.C. 650, 653, 365 S.E.2d 554, 556 (1988); State v. Cofield (I), 320 N.C. 297, 3030, 357 S.E.2d 622, 626 (1987); State v. Cofield (II), 324 N.C. 452, 458, 379 S.E.2d 834, 838 (1989); Rose v. Mitchell, 443 U.S. 545, 61 L. Ed. 2d 739 (1979)

Jury Pool

U.S. Const., Amend. 6: "In all criminal prosecutions, the accused shall enjoy the **right to a speedy and public trial, by an impartial jury** of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Claim of Disproportionate Representation of Defendant's Race in the Jury Venire (Fair Cross-Section): Constitutional right to jury of one's peers includes the constitutional protections that the race of a defendant has not been systematically and arbitrarily excluded from the jury pool. State v. Bowman 349 N.C. 459, 509 S.E.2d 428 (1998), State v. McNeill, 326 N.C. 712, 718, 392 S.E.2d 78, 81 (1990); State v. Avery, 299 N.C. 126, 130, 261 S.E.2d 803, 806 (1980); Duren v. Missouri, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 587 (1979); Washington v. Davis, 426 U.S. 229, 239, 48 L. Ed. 2d 597, 607 (1976).

Jury Selection

N.C. Const. Art. I § 26 (2010): "No person shall be excluded from jury service on account of sex**, race,** color, religion, or national origin."

Claim of Racial Discrimination in Jury Selection (Peremptory Challenges):A State's purposeful or deliberate denial of participation of jurors on account of race, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the Constitution of North Carolina. Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), Hernandez v. New York, 500 U.S. 352, 114 L. Ed. 2d 395 (1991), and Purkett v. Elem, 514 U.S. 765, 131 L. Ed. 2d 834 (1995); see also, State v. Glenn, 333 N.C. 296, 301, 425 S.E.2d 688, 692 (1993); State v. Carter, 338 N.C. 569, 586, 451 S.E.2d 157, 166 (1994).

Statistics

US Constitutional Claim of Racial Discrimination Based Upon Race-of-Defendant and Race-of Victim Effects: Entitlement to constitutional relief based on statistical evidence of race-of-defendant and race-of-victim effects is based upon very exacting standards. McCleksey v. Kemp, 481 U.S. 279, 95 L. Ed. 2d 262 (1987),
State Constitutional Claim of Racial Discrimination Based upon Statistical Studies of Race-of-Defendant and Race-of-Victim Effects: State v. Green, 329 N.C. 686, 689, 406 S.E.2d 852, (1991), sentence vacated for McKoy error, remanded for new sentencing hearing, appeal after remand, 336 N.C. 142, 443 S.E.2d 14 (1994))

Catch All

U.S. Const., Amend. 14, §1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State **deprive any person of life, liberty, or property, without due process of law;** nor deny to any person within its jurisdiction the **equal protection of the laws."**

N.C. Const. art. I, § 19 (2010): "No person shall be denied the **equal protection** of the laws; nor shall any person be subjected to discrimination by the State because of **race,** color, religion, or national origin."

RACIAL JUSTICE ACT

North Carolina's criminal justice system has numerous protections in place to guard against racial bias. These protections allow prosecutors, defense attorneys or judges to address any claims of racial bias at any time during proceedings. Additionally, our appellate courts review cases and specifically look for any concerns of racial bias. Despite significant protections, the Racial Justice Act (RJA), as touted by inmates who have filed claims, allows statistics alone to establish racial bias without regard to the actions of the defendant, decisions made by juries and judges or concerns of the victims' families.

Like many other aspects of life, these statistics are vulnerable to manipulation and bias in their derivation and presentation. Additionally, statistics are not readily understandable to courts and lawyers, so the use of experts is necessary and understandable. As such, the Act creates a quagmire of litigation that requires the accumulation and distribution of over 20 years of homicide case files, easily numbering in the thousands. Statistical experts, being paid exorbitant fees, are being brought in from across the country to testify on a variety of statistical data, none of which relate to the convicted murderers acts. It has become apparent that while RJA is law in North Carolina, it is unlikely that the death penalty will be employed.

Filings:

- 156 of 158 death row inmates have filed RJA motions.
- 60 of these inmates are white, with many of their victims being white and many of the juries consisting of mostly white jurors.
- Black defendants are claiming racial bias by the criminal justice system.
- White defendants are claiming reverse bias as a result of the system's efforts to eliminate discrimination against black defendants.
- Almost every district in our state is facing at least one of these motions, while many are burdened with multiple motions.
- Filing an RJA motion is now standard procedure in capital cases, with no duty on the part of the defendant to ascertain the necessity of the filing or to show any good faith in that course.

Resource Impact:

- District Attorneys are being forced to devote a inordinate amount of time and resources to these convicted murderers' cases.
- While District Attorneys bear the responsibility of responding to RJA, they have received no additional resources, and in fact have lost significant resources in past budget years.
- This impact is resulting in fewer resources to prosecute the murderers, rapists and drug traffickers whose cases are now pending and who are sitting in jail.
- At this time two motions have begun to move forward. They each are addressing different issues within the RJA.

Forsyth:

- Motion addresses the statewide statistical issues regarding the DA decisions to proceed capitally and the race of victim.
- Preliminary hearings were conducted in January, 2011.
- The Judge entered a discovery scheduling order that will take 2 years to complete.

Cumberland:

- Motions centered on jury voir dire and the race of those persons struck from the jury...not the make up of the jury
- Two hearings have been completed and four murderers removed from death row

Racial Justice Study

The defense uses the Michigan study as a basis for most of their filings. This study has never even been completed.

Cumberland County Racial Justice Act Cases Removed from Death Row

Year	Case	Jury
1991	State v. Robinson *black defendant* *white victim*	1 Native American 2 Black 9 White
1997	State v. Golphin *Black defendant* *2 white victims* *(Law enforcement officers)*	1 Black 11 White
2000	State v. Walters *Native American Defendant* *2 white victims* *(gang initiation)*	6 Black 6 White
2002	State v. Augustine *Black defendant* *Black victim* *(Law enforcement officer)*	All White Jury *Brunswick County*

Note: Most recent Death Penalty Case

Shaniya Davis Case - Cumberland County

2013	State v. McNeill *Black defendant* *Black victim* *(3 year old)*	1 Native American 4 Black 7 White
Jury selection: *Prosecutors struck 6 whites, 6 blacks* *Defense struck 12 whites, 2 blacks*		

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.

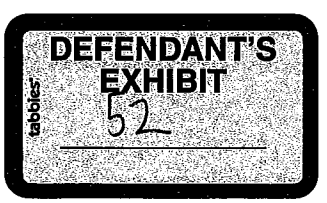
Rep. Stam: To speak on the bill.

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.

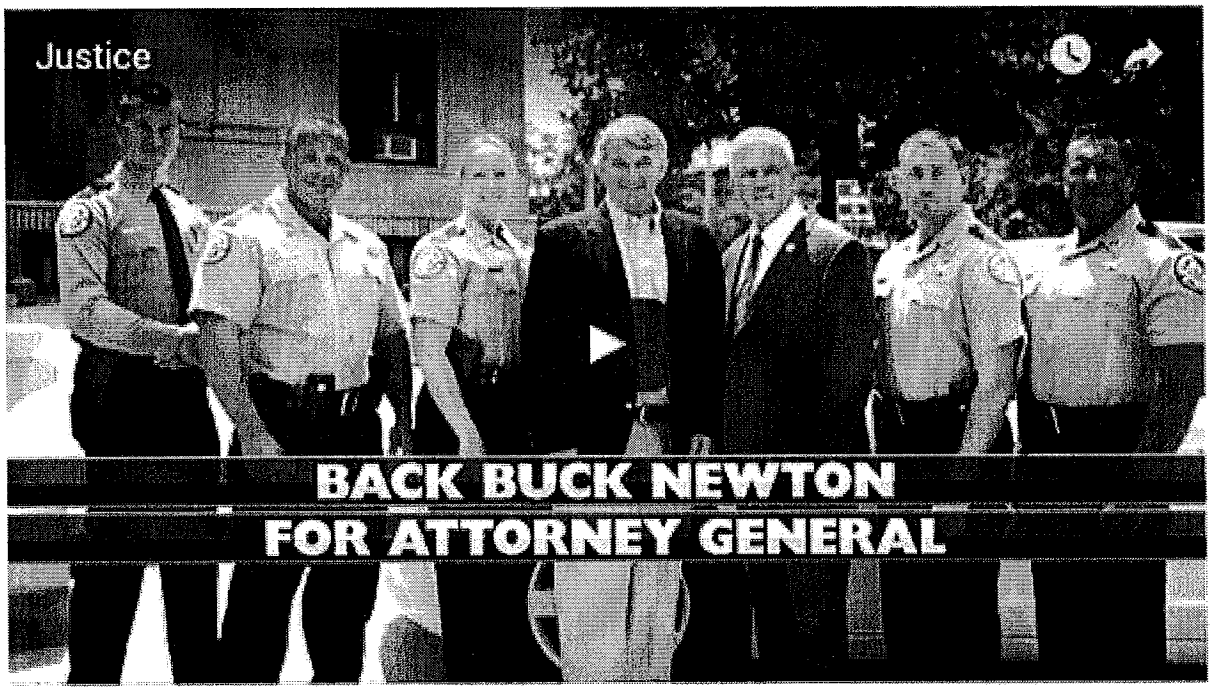
Speaker Tillis: Further discussion, further debate? If not, the question before the House is the passage of the House Committee Substitute to Senate Bill 306 on its third reading. All in favor vote aye, all opposed vote no. The Clerk will open the vote…The Clerk will lock the machine and record the vote. 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.

News Jessica's Law Ad

Justice ad

POSTED BY CITIZENS FOR BUCK NEWTON OSC ON OCTOBER 19, 2016

Our newest ad describes the clear contrast in this race. Josh Stein passed the Racial Justice Act; Buck Newton repealed it because it let cold-blooded murderers escape death row for unrelated statistical data -- not the evidence of their crimes. It was an outrageous law (the only one of its kind in the country), and delayed the justice that victims and their families deserved.



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Like Share One person likes this. Be the first of your friends. Tweet G+1

DEFENDANT'S EXHIBIT 55

CAPITAL CASE SEMINAR
7/4-8/95

DEFENDANT'S EXHIBIT 20

JURY VOIR DIRE

1. Purpose of Voir Dire

   - select a jury that can determine facts from the evidence, take the law from the Judge and make a decision

   - able to "pass judgment" on another's conduct?

2. Pre-Trial Knowledge

   - don't ask what they know

   - formed an opinion? expressed an opinion?

   - any knowledge of defendant, his / her family, his / her attorneys, or prosecutors

3. Death Qualification

   - set aside punishment considerations until guilt phase is concluded?

   - moral, personal, philosophical, religious or other beliefs which would prohibit you from returning a death verdict if State proves death to be the appropriate and legally authorized punishment for this crime?

   - jury poll - can the juror return death as his / her individual verdict, delivered in open court?

4. Burden of Proof

   - Beyond Reasonable Doubt in all criminal cases - a legal standard the State expects to apply, and which the Court will define

     = not hold State to standard higher than Beyond Reasonable Doubt cause is death case?

   - for co-defendants, jury must be convinced Beyond Reasonable Doubt as to each but this does not mean evidence must be equal as to each

5. Difficult Legal and Factual Issues

- if otherwise convinced Beyond Reasonable Doubt of guilt, and that death penalty is appropriate, would you ignore the facts and law and find defendant not guilty / life because:

  = no eye witness
  = no confession
  = co-defendant testified / deal
  = circumstantial evidence
  = not know which co-defendant inflicted injury causing death
  = State's witnesses with criminal records
  = etc.

6. Ability to View and Consider Unsavory Facts

- crime scene photos and description

- medical testimony

7. Prior Jury Service

- if served on several criminal juries, other D.A.'s thought he / she was acceptable juror

- search for bad previous experiences that jeopardize this trial

8. Criminal Justice System Experience

- juror, family or friend ever victim, witness or defendant in criminal proceeding?

- if so, was the proceeding fair to those involved?

- if not fair, would you hold that against State in this trial?
  (search of criminal histories of all jurors can be enlightening here)

9. Health and Happiness

- see? hear? set?

- medical condition?

- family / business distractions?

- prolonged trial

10. Review potential witness list

- observe for negative reactions

11. Association with accused or convicted criminals

- prison ministries

- gospel groups

- any other association indicating a juror "soft spot"

12. Unwanted expertise

- legal, law enforcement, medical, criminal technician

- avoid jurors who want to reinvestigate, re-test, etc.

13. Personal information

- marriage and steady job generally mean stability

- type of employment may shed light on juror's sentiments

- place of employment may indicate pressure on juror not to return death verdict

- juror with children in same age group as defendant / victim / witness may be a factor

- return to earlier voir dire area needing attention

14. The State is entitled to a fair trial too!

- remind them, and get a final commitment to follow the law

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

Barbara O'Brien & Catherine M. Grosso

Associate Professors of Law

Revised December 15, 2011

Table of Contents

I. Introduction

This report documents the study design, methodology, analysis, and results for a study on the exercise of peremptory challenges during jury selection in trials of all defendants on death row in North Carolina as of July 1, 2010.[1] The study examined how prosecutors exercised peremptory challenges in capital cases to assess whether potential jurors' race played any role in those decisions. The primary investigators for the study are Barbara O'Brien and Catherine Grosso. Both are associate professors of law at Michigan State University College of Law.

II. Study Design

The North Carolina Racial Justice Act of 2009 specified that a capital defendant could state a claim under the act upon a finding that, "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection."[2] Our goal was to design and conduct a study that would rigorously analyze the role of race in the exercise of peremptory challenges in capital cases so as to evaluate the availability of claims under the act.

This study had two parts: Part 1 coded and analyzed race and strike information for all venire members in the study. Part 2 added coding and analysis of race-neutral descriptive information for a randomly selected sample of venire members. This report presents the methodology, analysis, and results for both parts.

Several earlier jury selection studies informed our study design. The most important among these examined strike decisions over a 17-year period in 317 Philadelphia County, Pennsylvania, capital murder trials.[3]

A. Study Population

This 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.[4] We included proceedings for all current death row inmates to ensure the inclusion of every defendant with a potential claim under the Racial Justice Act. We focused our analysis on defendants with an active death sentence because of the availability of data in such cases. In addition, we were confident that

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[1] A complete list of the defendants included in the study is included in Appendix A.
[2] N.C. Gen. Stat. § 15A-2011 (b) (3) (2011).
[3] David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001).
[4] We were unable to include Jeffrey Duke's 2001 trial because the case materials are unavailable. We included every other proceeding.

the decision making in 173 proceedings would provide a large enough sample for meaningful statistical analysis.

For each proceeding we sought to include every venire member who faced peremptory challenges as part of jury selection. For the purposes of this report a "venire member" includes anyone who was subjected to voir dire questioning and not excused for cause, including alternates.

Each proceeding involved an average of 42.9 strike eligible venire members, producing a database of 7,421 strike decisions. Of these, 3,952 (53.3%) were women, and 3,469 (46.7%) were men. The venire members' racial composition was as follows: white (6,057, 81.6%); black (1,211, 16.3%); Native American (79, 1.1%); Latino (21, 0.3%); mixed race (20, 0.3%); Asian (13, 0.2%); other (11, 0.1%); Pacific Islander (2, 0.03%), and unknown (7, 0.1%).

B. Data Collection

We created an electronic and paper case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision.

C. Overview of Database Development

Staff attorneys completed all coding and data entry at Michigan State University College of Law in East Lansing, Michigan, under the direct supervision of the primary investigators. As set forth more fully below, staff attorneys received detailed training on each step of the coding and data entry process. A total of 12 staff attorneys and 5 law students worked on this project.

i. Development of Data Collection Instruments

Data collection instruments (DCIs) are forms that staff attorneys completed based on the primary documents and transcripts. We used five data collection instruments for coding data in this study: (1) the Defendant Level Data Collection Instrument (D-Level DCI), (2) the Venire Member Level Data Collection Instrument (VM-Level DCI), (3) the Supplemental Venire Member Level Data Collection Instrument (VM-Level Race Coding DCI), (4) the Supplemental Venire Member Descriptives Data Collection Instrument (VM-Level Double Coding DCI), and (5) the Second Supplemental Venire Member Descriptives Data Collection Instrument (VM-Level Supp. DCI).[5] In

[5] These instruments are included in Appendix B. As explained more fully below, supplemental DCIs were sometimes used to allow for double coding of certain information as a way to check the reliability of coding decisions.

Part I of the study, staff attorneys completed the D-Level DCI, questions 1-14 and 24 of the VM-Level DCI, and the VM-Level Race Coding DCI.[6] In Part II of the study, staff attorneys coded the remaining questions in the VM-Level DCI, the VM-Level Double Coding DCI, and the VM-Level Supp. DCI.

The D-Level DCI 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. The data from the D-Level DCI was used only to aid in data cleaning; none of these data was used in any analysis.

Questions 1-14 of the VM-Level DCI documented basic demographic and procedural information specific to each venire member.

Question 5 of the VM-Level DCI required the staff attorney to determine strike eligibility for each potential juror. "Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only. Likewise, if a party had exhausted its peremptory challenges by the time it reached a potential juror, the failure to strike reveals nothing about how that party exercised its discretion. This determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and excludes those when the decision was out of the party's hands.[7]

Question 14 documents the race of the venire member. Staff attorneys completed this question with reference to the VM-Level Race Coding DCI. The VM-Level Race Coding DCI was used to code the race of each venire member, the quality of the match for race coding from public records, and the source of the race information. Details on race coding are provided below.

In Part II of the study, staff attorneys coded Questions 15-23 on the VM-Level DCI for a random sample of venire members. Using juror questionnaires (when available) and jury selection transcripts, staff attorneys coded questions relating to the following: (1) demographic characteristics (e.g., gender, marital status, employment, educational background); (2) prior experiences with the

[6] Before they began coding, each staff attorney met with one or both of the primary investigators for training in North Carolina capital jury selection procedures and in how to work with the case materials. Those instructions are set forth in the Jury Study Coding Protocol in Appendix C.

[7] In one case (Gary Trull), the defense successfully challenged the prosecution's exercise of a peremptory strike against a black venire member (Rodney Foxx) and the court seated him as an alternate juror. Thus, although this venire member ultimately served on the jury, we nevertheless treated him as struck by the prosecution in the analysis.

legal system (e.g., prior jury service, experience as a criminal defendant or victim); and (3) attitudes about potentially relevant matters (e.g., ambivalence about the death penalty[8], skepticism about (or greater faith in) the credibility of police officers). This "descriptive" information was coded on the VM-Level DCI using codes set forth in the Descriptive Characteristics Appendix and the Employment Coding Appendix.[9] As explained below, staff attorneys verified the descriptive coding using the VM-Level Double Coding DCI.

Finally in Part II, the VM-Level Supp. DCI instructed staff attorneys to code additional information for venire members who received a 700 or 800 level descriptive code on Question 23 of the VM-Level DCI. These codes indicated that the venire member had expressed bias or difficulty following the law. The VM-Level Supp. DCI documented whether the grounds for dismissal suggested a more punitive outcome, a less punitive outcome, or neither. This measure was taken after staff attorneys had coded descriptive characteristics for a significant number of the randomly selected sample of venire members, and the utility of a simple measure of the direction of a potential bias became evident. Thus while staff attorneys used detailed codes to capture the precise nature of a venire member's potential bias, this item added an important nuance that had been missing.[10] Staff attorneys revisited the cases of those venire members for whom such a code had been recorded and filled out the additional item. From that point on, they completed the item whenever the issue arose for a venire member.

ii. Race Coding

[8] A court could properly remove for cause a venire member who expressed unwillingness to impose the death penalty under any circumstances under *Lockhart v. McCree,* 476 U.S. 162 (1986), *Witherspoon v. Illinois,* 391 U.S. 510 (1968), and *Witt v. Wainwright,* 470 U.S. 1039 (1985), thus such venire members are not included in our analysis. Sometimes, however, a venire member expressed reservations or ambivalence about the death penalty that fell short of outright opposition. Such a venire member would still be eligible to serve on the jury, but a prosecutor could reasonably base a decision to exercise a peremptory strike on this basis. *See Witherspoon v. Illinois,* 391 U.S. 510, 519-20 (1968). Accordingly, this is one of the many venire member characteristics we included in our analysis.

[9] The Descriptive Characteristics Appendix and the Employment Coding Appendix are included in Appendix B with the data collection instruments.

[10] It bears repeating that due to the RJA's explicit application to strikes, we did not code venire members who were removed for cause. Thus, by definition, every venire member included in the study was eligible to serve. A venire member who refused to abide by the presumption of innocence or who could never vote to impose the death penalty should have been struck for cause and not subject to a peremptory strike. As a result, our designation of various statements or attitudes as "biased" is necessarily based on something more subtle than what would disqualify a potential juror for cause. For instance, a venire member might say that she thinks the death penalty does no good, but that she would be willing to vote for it if justified under the law. Likewise, a venire member might admit that he would have a hard time ignoring the fact of the defendant's arrest, but that he would follow the court's instructions to presume the defendant innocent. In neither case would the venire member likely be removed for cause, but their statements suggest a disposition to see the case in a way that favors one side more than the other. Certainly, attorneys would be reasonable in considering these statements in deciding whether to exercise a strike. For that reason, we coded statements like these as a form of bias, even though they do not rise to the level of bias that renders the venire member unfit to serve.

In order to analyze potential racial disparities in peremptory strikes, it was necessary to identify the race of each venire member. Any potential findings about racial disparities in strike decisions would turn on the accuracy of this coding. Strike information was straightforward in that it could be extracted directly from the transcripts. As explained more fully below, race information was equally straightforward in a good number of cases. But for the cases that required the staff attorneys to look deeper to determine the race of venire members, we implemented a rigorous protocol to produce data in a way that is both reliable and transparent.[11] Staff attorneys recorded race coding in the VM-Level Race Coding DCI.

We obtained information about potential jurors' race from three sources. First, we collected juror questionnaires for many of the venire members in our study. These questionnaires almost always asked the venire member's race, and the vast majority of respondents provided that information. We considered potential venire members' self-reports of race to be highly reliable and were able to get this information from juror questionnaires for 62.3% (4,623/7,421) of the eligible venire members.

For a second group of venire members, race was noted explicitly in the trial record. More than six percent (6.4%, 478/7,421) stated their race on the record in a manner that appears in the voir dire transcript.[12] Similarly, a court clerk's chart noting the race of potential jurors that was officially made part of the trial record or a statement by an attorney on the record provided race information for a smaller percent of the venire members (0.5%, 40/7,421).[13]

Finally, for the remaining 30.6% (2,273/7,421) of venire members, we used electronic databases to find race information and record the race and source of race information in the VM-Level Race Coding DCI. Staff attorneys used the North Carolina State Board of Elections website, LexisNexis "Locate a Person (Nationwide) Search Non-regulated," LexisNexis Accurint, and the North Carolina Department of Motor Vehicles online database. Many of the case files included juror summons lists with addresses, which allowed staff attorneys to match online records to the information about the potential juror with a high level of certainty.

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[11] *See* Appendix D.

[12] In these instances, the judges asked potential jurors to state their race for the record.

[13] Importantly, we did not rely on clerks' or attorneys' observations about potential jurors' race unless incorporated into the record and thus subject to dispute if a party or the court objected to the classification. For instance, we considered reliable an attorney's mention of a potential jurors' race during an argument regarding a *Batson* challenge with the assumption that the other party or the court would challenge that assessment if the attorney was mistaken. In contrast, we did not rely on a clerk's notes about the race of potential jurors on a jury chart unless it was clear that the parties had a chance to review that document and challenge any perceived inaccuracies.

The primary investigators prepared a strict protocol for use of these websites for race coding and trained staff attorneys on that protocol in a half-day session.[14] One objective of this protocol was to minimize the possibility of researcher bias. In addition, staff attorneys who searched for venire members' information on electronic databases were (whenever possible) blind to strike decision.[15]

Throughout this process we instructed staff attorneys to code a venire member's race as "unknown" unless they were able to meet strict criteria ensuring that the person identified in the public record was in fact the venire member and not just someone with the same name.[16] Staff attorneys were not to rely on a record containing information that was not wholly consistent with whatever information we had about a particular venire member. For instance, staff attorneys would not rely on a public record in which the person's middle initial was inconsistent with that of the venire member, unless they were able to document a name change to account for the discrepancy (for instance, a record that indicated that a venire member started using her maiden name as a middle name). If staff attorneys found someone with the same name as the venire member but with a different address, they were to use that record only if they could trace the person's address back to that of the venire member.

Staff attorneys saved an electronic copy of all documents used to make race determinations.[17] The files are organized by proceeding and are available for review.

Because of the importance of the race coding, we conducted a reliability study on this methodology. Staff attorneys and law students coded a second copy of the VM-Level Race Coding

[14] See Appendix D for the protocol used in this process.

[15] Staff attorneys seeking race information from public sources knew about strikes only when they had to turn to the transcript for information to help them find that venire member's race. For instance, venire members often indicated during voir dire precisely where they lived and for how long. For cases lacking a summons list with addresses, this information was useful in public records searches where we lacked direct information about race.

[16] For instance, staff attorneys were instructed to use information such as the venire member's middle name or year of birth to link the venire member to records of someone with the same name. When at all in doubt, staff attorneys were instructed to code the venire member's race as unknown.

[17] For instance, if a staff attorney identified the race of a venire member through the North Carolina Board of Elections website, he or she would save the record with the venire member's race designation (usually as an Adobe Acrobat file but sometimes as a screen shot). If the staff attorney relied upon an address provided in the jury summons list to identify a venire member had moved since the time of the trial, the staff attorney would also save records of the venire member's change of addresses over the years. This information was often available on Lexis-Nexis Locate a Person Database, which allowed the staff attorney to trace the venire member's address from the jury summons list to his or her current address reflected in the North Carolina Board of Elections website. For each step in the process linking current information about each venire member to information recorded at the time of the trial, staff attorneys saved a copy of the electronic record.

DCI using public records for 1,897 venire members for whom we also had juror questionnaires reporting race or express designations of race in a voir dire transcript.[18]

We then compared the data from public records to the presumably more reliable self-reported data in the jury questionnaires. Staff attorneys using public records were unable to determine the venire member's race to the level of reliability required by the study protocol in 242 of 1,897 cases (12.8%).[19] In the remaining 1,655 cases, the race extracted from the public records matched that taken from the presumably more reliable sources for 97.9% of the venire members. This suggests that the method we used is highly reliable.

The methods described in this section allowed us to document race for all but 7 of the 7,421 eligible venire members in our study.[20] In other words, our database includes race information for 99.9% of the eligible venire members. Our coding documented the source from which we identified race information for each venire member.

iii. Coding Race-Neutral Control Variables (Descriptive Information)

Strike and race information allows for analysis of unadjusted strike rates by race. To account for other factors that might bear on the decision to strike, more detailed information about individual venire members must be considered. Thus, in addition to basic demographic information about each eligible venire member, we coded more detailed information for a random sample of venire members.[21]

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[18] The staff attorneys did not have access to the questionnaires or voir dire transcripts when they conducted the public records research.

[19] We instructed staff attorneys to code a venire member's race as unknown unless they could rule out the possibility that the record on which they were relying referred to someone besides the venire member. In cases where we had juror summons lists with addresses, a staff attorney usually had no trouble identifying the venire member from two people with the same name. Lacking specific identifying information, however, staff attorneys were sometimes unable to meet the strict criteria for extracting race. We expected that this method of extracting data on race would lead to a moderate amount of missing data.

In the full study, we expended additional efforts to find the missing data. In most instances, our staff attorneys reviewed transcripts more closely to gather identifying information that allowed them to link the venire members to the appropriate public records. For example, venire members often stated in voir dire where they lived and worked; this additional information often allowed staff attorneys to narrow down among several public records for people with the same name even when we lacked a juror summons list.

Staff attorneys and law students did not expend this level of effort in tracking down race through public record databases solely as part of the reliability check.

[20] We were unable to determine the race of the following seven venire members: Michael Scott (Danny Frogge, 1995); Billy Howard (Danny Frogge, 1995); James F Burgess (James Campbell); Joyce Bradley (Christopher L. Roseboro, 1997); Barbara Ward (Christopher L. Roseboro, 1997); Timothy Walker (Warren, (1995); and Judy Farmer (James E. Jaynes, 1999).

[21] See Appendix E for the protocol used in this process.

Because this process is labor intensive, we started by coding a 15% random sample of venire members from the database to ensure that at any point in the process we would have a valid sample of venire members for analysis.[22] When we finished coding all venire members in the first sample, we drew a second sample of 10% of the remaining venire members. In order to produce the most complete information possible for this case, we then coded each of the 471 venire members from the eleven Cumberland County cases in the study.[23] In total, using the process outlined below, we coded descriptive information for both 1) a randomly selected sample of almost a quarter of the venire members in the database (1,753/7,421)[24] and 2) every venire member from the 11 Cumberland County trials in the study.

Staff attorneys completed either Questions 15-23 on the VM-Level DCI or the VM-Level Double Coding DCI for all of the venire members in the sample using the complete case file, including juror questionnaires (where available) and the transcripts of voir dire proceedings. Staff attorneys used the search function in Adobe Acrobat to search for venire members by name. This allowed them to reliably and efficiently find each instance when a particular venire member answered questions during the jury selection process. Every question in the DCI provided a code for the staff attorney to indicate that the case file did not contain sufficient information on a particular characteristic.

We instituted standard double coding procedures for coding of descriptives. Under these procedures, two different staff attorneys separately coded descriptive information for each venire member to ensure accuracy and intercoder reliability. The first staff attorney filled out the remaining questions on the VM-Level DCI. The second staff attorney repeated the process using a VM-Level Double Coding DCI. 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 the primary investigator.

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[22] We used SPSS random select function to draw the sample.

[23] Those cases include jury selection in the trials of Richard Cagle, Philip Wilkinson, Christina Walters, Marcus Robinson, John McNeill, Tilmon Golphin, Quintel Augustine, Jeffrey Meyer (1995 and 1999), and Eugene Williams (both guilt and penalty trials).

[24] A few of the venire members who were randomly selected to be included in the sample could not be coded due to the poor quality or unavailability of the case materials. The transcript for Wayne Laws was too faded to be made searchable and no venire members were coded for descriptive information. No transcript was available in the more recent case of Michael Ryan.

Questions resolved by the primary investigators typically involved differences in judgment.[25] After a primary investigator resolved the issue, the senior staff attorney documented the proper coding for the issue in the coding log ("Coding Questions and Answer").[26] All of the staff attorneys had access to the coding log and were responsible for reviewing this document regularly to inform themselves about ongoing coding decisions. This system developed a shared expertise and enhanced intercoder reliability. The number of differences in judgment diminished over time due to staff attorney experience with the data collection instruments, the data themselves, and the coding log.

D. Steps for Ensuring Accuracy of Data

This database includes information about 173 proceedings and 7,421 venire members. As noted above, we took several steps to minimize coding errors. We also developed systematic procedures to catch and correct errors in coding and data entry.

A member of the law school's library staff created a Microsoft Access database to allow us to transfer the data that staff attorneys coded on paper DCIs into a machine-readable format. The data entry fields accepted only valid responses in order to minimize errors. For instance, if an item on the DCI allowed for only three possible responses (0 = No, 1 = Yes, and 9 = Unknown), then entering anything other than 0, 1, or 9 would be rejected and the person entering the data would be prompted to re-enter an acceptable value for that question. Although this mechanism could not prevent all data entry errors (e.g., it could not catch a staff attorney's misspelling of a venire member's name), it provided one line of defense against human error.

We used several other methods to catch and correct other errors in coding or data entry. Using the SPSS statistical program, we identified instances where inconsistencies in data indicated possible errors and established a process for review and, where appropriate, correction.[27]

III. Statewide Analysis and Results

This report presents unadjusted racial disparities in prosecutorial strikes, disparities controlling for potentially relevant race-neutral variables one at a time, and disparities that emerge via

[25] For instance, one staff attorney might have coded a venire member who owned his own trucking business as working in the transportation field based on trucking while the other might have coded him as a professional based on business ownership. One of the primary investigators would identify the proper coding and inform the third staff attorney how to resolve it. The third staff attorney would then correct the DCI and note the issue and its resolution on the shared spreadsheet so that staff attorneys would be advised how to deal with this issue when it arose in the future. This helped to ensure consistency across staff attorneys.

[26] See Appendix F.

[27] For example, we identified all instances in which it appeared that a party exercised fewer than the peremptory strikes usually allotted to determine whether there was an error or if the party failed to use all strikes.

fully controlled logistic regression analysis of a randomly selected sample of a quarter of the study population for whom we coded detailed individual level information. It also presents the same analyses specifically for Cumberland County.

Throughout this section, we report the disparities observed as well as a measure of the likelihood that the finding would occur as a result of chance. This measure, called a *p*-value, reflects the probability of observing a disparity of a given magnitude simply by luck of the draw. The lower the *p*-value, the lower the chance that an observed disparity was due merely to chance. The *p*-values for the racial disparities observed in this study are consistently well below the standard scientific benchmarks for reliability.

A. Unadjusted Disparities in Prosecutorial Strike Patterns

The statewide database includes information about 7,421 venire members. Of those, 7,400 (99.7%) were eligible to be struck by the state. We analyzed prosecutorial strike patterns for only those venire members who were eligible to be struck by the state. Among state strike-eligible venire members, the overwhelming majority of cases were either white (6,039, 81.6%) or black (1,208, 16.3%); just 2.0% (153) were other races. As of the writing of this report, we are missing race information for only 7 (0.1%) venire members.

Prosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against all other venire members. Across all strike-eligible venire members in the study, prosecutors struck 52.6% (636/1,208) of eligible black venire members, compared to only 25.7% (1,592/6,185) of all other eligible venire members. This difference is statistically significant, $p < .001$; put differently, there is less than a one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral.[28] (See Table 1.) The average rate per case at which prosecutors struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members.[29] Of the 166 cases that included at least one eligible black venire member, prosecutors struck an average of 56.0% of eligible

[28] Several different chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values, and the results were consistent regardless of the test used.

[29] The analyses presented in Tables 1 and 2 are very similar, but differ in their unit of analysis. Table 1 shows strikes against all venire members in the study, pooled across cases (7,401 strike eligible venire members across 173 cases). Table 2 compares the strike rates calculated per case. Thus, only those cases with at least one eligible black venire member (166) were included, and each case represents one data point. We present both ways of calculating these disparities to demonstrate that the effect is robust and does not depend on which method is used.

black venire members, compared to only 24.8% of all other eligible venire members.[30] This difference is statistically significant, $p < .001$. (See Table 2.)[31]

Disparities were even greater in cases involving black defendants. In cases with non-black defendants, the average strike rate was 51.4% against black venire members and 26.8% against all other venire members.[32] In cases with black defendants, the average strike rate was 60.0% against black venire members and 23.1% against other venire members. (See Table 3.) The difference in the magnitude of the disparity between black and other defendants is significant. In other words, although state strike rates were generally higher against black venire members as compared to all other venire members, the disparity is on average significantly greater in cases with black defendants, at $p < .03$.

The disparities persist if the inquiry is limited to different time periods (see Tables 4-9), or to division (former and current) or district/county (see Table 10).[33] In the current North Carolina Superior Court Division 4, from 2000 to 2010, prosecutors in 8 cases struck qualified black venire members at an average rate of 62.4%, but struck other qualified venire members at an average rate of only 21.9%.[34] This difference in strike levels is significant at the $p < .001$ level. In former Judicial Division 2, from 1990 through 1999, prosecutors in 37 cases struck qualified black venire members at an average rate of 51.5%, but struck qualified non-black venire members at an average rate of only 25.1%. This difference in strike levels is significant at the $p < .001$ level.

B. Ruling out Alternative Explanations of Disparate Strike Patterns based on Venire Members' Personal Characteristics

The unadjusted disparities in strike rates against eligible black venire members compared to others are consistently statistically significant to a very high level of reliability. That means that there is a very small chance that the differences observed are due to random variation in the data or chance. The next step was to determine whether these disparities were affected in any way by factors that

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[30] When we exclude those venire members whose race we coded from public records, the pattern is substantially the same: Of 139 cases, 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, $p < .001$.

[31] The disparities between mean prosecutorial strike rates against eligible black venire members versus those of other races are consistent across time. 57.4% vs. 25.9%, $p < .001$ (1990-94, 42 cases); 54.7 vs. 24.0%, $p < .001$ (1995-1999, 80 cases); 57.2% vs. 25.0%, $p < .001$ (2000-04, 29 cases); and 56.4% vs. 25.4%, $p < .01$ (2005-2010, 15 cases).

[32] Out of 166 cases with black eligible venire members, 90 involved black defendants and 76 involved defendants of other races.

[33] *See infra* for county level analyses.

[34] This study refers to former and current judicial divisions because, on January 1, 2000, North Carolina's judicial divisions were reconstituted from four divisions statewide to eight divisions statewide.

correlate with race but that may themselves be race neutral. For instance, members of certain racial groups might be more likely than others to express dissatisfaction or ambivalence about the death penalty. If such attitudes are represented fairly frequently in the population and if they bear heavily on the decision to strike, an observed disparity in strike rates against different racial groups may be better explained by other factors that tend to be associated (or correlated) with them.

We first controlled for race-neutral variables by analyzing strike disparities within subsets of the study population. For example, we excluded all of the venire members who expressed any ambivalence about the death penalty and then analyzed the strike patterns for the remaining venire members. Because none of the remaining venire members expressed ambivalence about the death penalty, any racial disparity in strike patterns we observed could not be attributable to the possibility that relevant attitudes vary along racial lines. We looked at five different subsets in this manner, removing (1) venire members with any expressed reservations on the death penalty, (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, finally, (5) all venire members with any one of the first four characteristics. The disparities identified through the unadjusted analysis persisted in each and every subset, as seen in Table 11.

The disparities in prosecutorial strike rates against eligible black venire members persist even when other characteristics one might expect to bear on the decision to strike are removed from the equation. Table 11 provides a simple way of comparing apples to apples. However, the decision to strike or pass a potential juror can turn on a number of factors in isolation or combination. In the following section, we provide the results of a fully controlled logistic regression model taking into account a number of potentially relevant factors to examine whether the racial disparities can be explained by some combination of race-neutral factors.

C. Fully Controlled Regression Analysis of the Role of Race in the Exercise of Peremptory Strikes

We were able to collect individual-level descriptive information for a significant portion (1,753/7,421) of all the venire members in the study.[35] The demographic profile of this random

[35] We were unable to collect detailed information about venire members for whom we lacked a questionnaire if they were struck (or less commonly passed) without any discussion during voir dire. We assume that the parties did not bother to engage in the conversation when a venire member said something in his or her questionnaire that obviated the need for further discussion.

sample strongly resembled that of the complete study population.[36] Even after controlling for other factors potentially relevant to jury selection, a black venire member had 2.48 times the odds of being struck by the state as did a venire member of another race.[37] In other words, while many factors one might expect to bear on the likelihood of being struck did matter, none–either alone or in combination—accounts for the disproportionately high strike rates against qualified black venire members. (See Table 12.)

For instance, consider the previous example of ambivalence about the death penalty. In our database of randomly selected venire members, 185 venire members (10.6%) expressed a reservation of some sort about imposing the death penalty.[38] An expression of this sort increased dramatically the odds that the state would strike that venire member relative to someone who did not express a similar sentiment, holding all else constant.[39] Likewise, the odds that the state would strike someone who had previously been accused of a crime were much higher than for someone who had not.[40]

The coding process described above produced close to 100 possible control variables potentially relevant to whether a venire member was struck or passed. The code book in Appendix G provides a complete list of variables in the database. The available control variables are included in this directory. We sought to identify the variables that consistently and reliably predicted whether the

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[36] Of these 1,753 jurors, 1,749 were eligible to be struck by the state. We determined the race of all but two jurors (83.6% non-black (1,465), 16.3% black (286), and 0.1% (2) missing). These percentages mirror those in the full sample (83.6% non-black (6,203), 16.3% black (1,211), and 0.1% missing (7)). The random sample also reflects the relative proportions of men and women: The smaller sample included 51.9% women (910) and 48.1% men (843); the full data set included 53.3% women (3,952) and 46.7% men (3,469).

[37] We used a logistic regression model with the dependent variable that the strike-eligible venire member was struck or passed by the state. A few words are in order about the choice of this model in lieu of a multilevel model. One assumption of logistic regression is that the data are independent. That assumption comes into question in this context, as a party's decision to use one of its strikes is likely to be affected by who else is in the pool. This can present a problem in that it might increase the risk of Type I error; that is, it could increase the chances that the researcher will improperly find a result statistically significant. One way to gauge whether a particular dataset presents such a risk is to look at interclass correlations. If subjects (i.e., venire members) nested within settings (i.e., trials) are in fact more similar to each other than are subjects between settings, the researcher should use a multilevel model. We examined the interclass correlations for the 173 cases in this study and found a negative interclass correlation. That means that venire members within a case were no more alike as to the outcome of interest (struck or passed) than were venire members between cases. In fact, that the interclass correlation was negative suggests that the results of the logistic regression analysis are likely conservative. For this reason, using a multilevel model was unnecessary and a traditional logistic regression model was appropriate. *See* David A. Kenny, Deborah A. Kashy, & Niall Bolger, *Data Analysis in Social Psychology, in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 238 (4th ed. 1998) (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindsey eds.).

[38] Examples of statements we coded as an expression of ambivalence about the death penalty included: "[I]f the defendant is found guilty, ... he does serve life in prison ... I would lean more toward that simply because if there is a crime committed, I don't feel that killing someone is – serves anyone justice ..." (VM White, p. 1,210, Quintel Augustine). "Well, I've said I lean toward the death – against the death penalty. I would still consider it -- it would be hard for me to favor the death penalty in any case, but I'm not saying I would not." (VM Harper, p. 649, Terrence Elliot).

[39] Odds Ratio 11.44, $p < .001$.

[40] Odds Ratio 1.72, $p < .01$.

state would strike or pass a potential juror. The resulting model combines those factors to distinguish venire members based on how objectionable or strike-worthy they were.

Using the Logistic Regression command in SPSS, we started the analysis with a simple model using only the venire member's race[41] and tested each candidate control variable individually and in small groups. This process allowed us to identify the most important control variables for the decision to strike or pass an eligible venire member. This process produced about 25 variables that bore a significant relation (either in isolation or in combination) to the odds of being struck. We then tested these variables in various combinations, both by forcing them into the model and by allowing the computer program to assess which of the candidate variables provided the best fitting model. Through this process, we were able to build a model estimating the effects of various venire member characteristics on strike decisions.

Table 12 presents the final logistic regression model for prosecutorial strike decisions. A venire member is coded "1" if struck by the state, and "0" if strike eligible but not struck. The "Black" variable in Row 2 shows the regression coefficient, the standard error of that estimated coefficient, the odds ratio, the confidence interval for that odds ratio, and the *p*-value for the effect being a black venire member has on the odds of being struck by the state. This model estimates that after controlling for several other race-neutral factors, black venire members face odds of being struck by the state that are 2.48 times those faced by all other venire members. That difference was statistically significant at $p < .001$; put differently, there is less than one in one thousand chance that we would observe a disparity of this magnitude if the jury selection process were actually race neutral.

The results of the logistic regression model are consistent with the unadjusted disparities we observed looking simply at the relative strike rates against black and other venire members. None of the factors we controlled for in the regression analysis eliminated the effect of race in jury selection. While we found many non-racial factors that were highly relevant to the decision to strike, none was so closely associated with race or so frequent that it could serve as an alternative explanation of the racial disparities. Note that throughout the process of building this model, we found no factor or combination of factors that rendered the effect of race non-significant. In other words, the

[41] Including the race variable in this model helps to identify which variables are potentially significant in the complete model independent of race. To get a clearest picture possible, we also tested potential control variables without including race in the model but this did not produce a different list of potential control variables.

statistically significant influence of race on the odds of being struck was robust; its predictive power did not depend on the inclusion or exclusion of any particular variable or variables in the model.[42]

IV. Cumberland County Analyses and Results

Staff attorneys coded descriptive information for each of the strike eligible venire members in the eleven Cumberland County proceedings in our study. Of the 474 venire members, all were eligible to be struck by the state. There were 244 (51.5%) women and 230 (48.5%) men. The venire members' racial composition was as follows: white (329, 69.4%); black (129, 27.2%); Native American (5, 1.1%); Latino (7, 1.5%); mixed race (1, 0.2%); Asian (1, 0.2%); other (1, 0.2%); Pacific Islander (1, 0.2%); and unknown (0, 0%).

Out of 129 strike eligible black venire members, prosecutors struck 48.1% (62/129), compared to only 22.9% of eligible venire members of other races (79/345). This difference is statistically significant at $p < .001$.[43] The picture is similar when one looks at average strike rates: across eleven cases, prosecutors struck eligible black venire members at an average rate of 52.7%, compared to 20.5% against venire members of other races. This difference is statistically significant at $p < .001$. (See Table 10.)

We developed a fully controlled model for Cumberland County using the same procedures described above. (See Table 13.) A venire member's race remained a powerful predictor of prosecutorial strike decisions: an eligible black venire member had more than two-and-a-half times the odds of being struck by the state than a venire member of another race, all else being equal.[44] As in the statewide model, factors such as having previously been accused of a crime or expressing reservations about the death penalty were strong predictors of being struck by the state, but none could account for the effect of race.[45]

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[42] If we were missing data for an individual juror regarding *any* of the variables under analysis, this model excluded that juror from the analysis completely (even though we have data about that juror for some of the other variables). To determine whether exclusion of these cases with missing data skewed the model, we used a method known as multiple imputation. *See* Donald B. Rubin, Multiple Imputation for Nonresponse in Surveys (1987); J.L. Schaefer, Analysis of Incomplete Multivariate Data (1997). This method allows us to use the information we do have about a juror to impute a value for the missing variable, using what we know about other jurors for whom we have complete information on the variable in question. We then conducted another logistic regression analysis using these data (original data supplemented by imputed values for the missing). This model produced estimates that were very close to the estimates presented in Table 12, in which we used only jurors for whom we have complete information.

[43] Several different chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the p-values, and the results were consistent regardless of the test used.

[44] Odds Ratio 2.57, $p < .01$.

[45] Odds Ratio 22.74, $p < .001$ (death penalty reservations); Odds Ratio 2.18, $p < .01$ (self or close friend or family member previously accused of a crime).

V. Summary of Findings

We have documented the strike decisions and race for more than 7,400 potential capital jurors in 173 cases from 1990 to 2010. In every analysis that we performed, race was a significant factor in prosecutorial decisions to exercise peremptory challenges in jury selection in these capital proceedings. Regardless of how one looks at the data, a robust and substantial disparity in the exercise of prosecutorial strikes against black venire members compared to others persists.

A statistically significant disparity persists at a magnitude of more than two to one whether calculated by looking at all strike decisions pooled across cases, or by comparing the mean strike rates for all cases in which a black venire member was eligible to serve.

A statistically significant disparity persists at a magnitude of at least two to one when we exclude any potential juror with one of several potentially objectionable qualities (e.g., reservations about the death penalty not strong enough to warrant removal for cause, prior allegations of criminal conduct, unemployment).

A statistically significant disparity persists at odds of more than two to one in the fully controlled logistic regression model at both the state and county level.

In all but one instance, the effect of race was statistically significant at the level of $p < .001$.[46] Thus, for each of these analyses, the chances that we would see a disparity of that magnitude in a race-neutral jury selection system is less than one in one thousand. The robustness of our findings of racial disparities across a variety of analyses provides powerful evidence that race was a substantial factor in prosecutorial strike decisions statewide in the 173 cases and in the 11 cases in Cumberland County.

[46] The effect of race was significant at $p < .01$ when we limited the analysis to the 15 cases from 2005-2010. Thus, there is less than a one in one hundred chance that we would observe a disparity of that size and magnitude if jury selection in those cases were racially neutral.

TABLE 1
Statewide Prosecutorial Peremptory Strike Patterns over Entire Study Period
(Strikes against venire members aggregated across cases)

		A Black Venire members	B All Other Venire members	C Unknown	D Total
1.	**Passed**	572 (47.4%)	4,593 (74.3%)	3 (42.9%)	5,168 (69.9%)
2.	**Struck**	636 (52.6%)	1,592 (25.7%)	4 (57.1%)	2,232 (30.1%)
3.	**Total**	1,208 (100.0%)	6,185 (100.0%)	7 (100.0%)	7,400 (100.0%)

*Chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at $p < .001$.

TABLE 2
Statewide Average Rates of State Strikes over Entire Study Period
(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**	5.6.0% (*SD* =24.6)	166
2 **Strike Rates Against All Other Qualified Venire Members**	24.8% (*SD*=7.0%)	166

*A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

TABLE 3
Disparities in Strike Patterns by Race of Defendant, Statewide Average Rates of State Strikes over Entire Study Period
(Average of strike rates calculated in individual cases and number of cases averaged)

	Race of Defendant	A Strikes Against	B Average Strike Rate	C Number of Cases Averaged
1.	**Black**	**Black Qualified Venire members**	60.0% (*SD*=30.0%)	90
2.		**All Other Qualified Venire members**	23.1% (*SD*=6.9%)	
3.	**Non-Black**	**Black Qualified Venire members**	51.4% (*SD*=25.8%)	76
4.		**All Other Qualified Venire members**	26.8% (*SD*=6.6%)	

*Analysis of variance (*F*-test) indicates that this difference between the disparities in strike rates by race of defendant is significant at $p < .03$.

TABLE 4
Statewide Average of Rates of State Strikes from 1990 through 1999
(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**	55.6% (*SD*=23.4%)	122
2. **Strike Rates Against All Other Qualified Venire Members**	24.7% (*SD*=6.9%)	122

* A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

TABLE 5
Statewide Average of Rates of State Strikes from 2000 through 2010
(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**	56.9% (*SD*=27.9%)	44
2. **Strike Rates Against All Other Qualified Venire Members**	25.1% (*SD*=7.4%)	44

* A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

TABLE 6
Statewide Average of Rates of State Strikes From 1990 through 1994
(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**	57.4% (*SD*=23.4%)	42
2. **Strike Rates Against All Other Qualified Venire Members**	25.9% (*SD*=5.7%)	42

* A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

TABLE 7
Statewide Average of Rates of State Strikes from 1995 through 1999
(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**	54.7% (*SD*=23.6%)	80
2. **Strike Rates Against All Other Qualified Venire Members**	24.0% (*SD*=7.4%)	80

* A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

TABLE 8
Statewide Average of Rates of State Strikes from 2000 through 2004
(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**	57.2% (*SD*=28.5%)	29
2. **Strike Rates Against All Other Qualified Venire Members**	25.0% (*SD*=7.4%)	29

* A paired-sample t-test indicates that this difference in strike rates is significant at $p < .001$.

TABLE 9
Statewide Average of Rates of State Strikes from 2005 through 2010
(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**	56.4% (*SD*=27.5%)	15
2. **Strike Rates Against All Other Qualified Venire Members**	25.4% (*SD*=7.6%)	15

* A paired-sample t-test indicates that this difference in strike rates is significant at $p < .01$.

TABLE 10
Strike Rates for Division and County
(Average of strike rates calculated in individual cases and number of cases averaged)

	A Current Division 4 (8 cases)**	B Former Division 2 (37 cases)**	C Cumberland County (11 cases)
1. **Strike Rates Against Black Qualified Venire Members**	62.4% (*SD*=19.6%)	51.5% (*SD*=16.8%)	52.7% (*SD*=19.4%)
2. **Strike Rates Against All Other Qualified Venire Members**	21.9% (*SD*=5.7%)	25.1% (*SD*=6.3%)	20.5% (*SD*=7.1%)

* A paired-sample t-test indicates that differences in strike rates for all three columns are significant at $p < .001$.
** This study refers to former and current judicial divisions because, on January 1, 2000, North Carolina's judicial divisions were reconstituted from four divisions statewide to eight divisions statewide.

TABLE 11
Strike Patterns when State-Strike Eligible Venire Members with Potentially Explanatory Variables Removed from Equation

	Variable	A Number of Venire Members Removed from Analyses	B Strike Rates	C Strike Rate Ratio	D *p*-value*
1.	**Death Penalty Reservations**	185	44.5% (Black VMs) vs. 20.8% (All others)	2.1	<.001
2.	**Unemployed Venire Member**	25	49.0% (Black VMs) vs. 24.7% (All others)	2.0	<.001
3.	**Venire Member or Close Other Accused of Crime**	398	50.3% (Black VMs) vs. 23.7% (All others)	2.1	<.001
4.	**Venire Member knew a Trial Participant**	47	53.2% (Black VMs) vs. 25.4% (All others)	2.1	<.001
5.	**Venire Member with Any One of Above Characteristics**	580	39.7% (Black VMs) vs. 19.0% (All others)	2.1	<.001

*Chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fischer's Exact Test, and Linear-by-Linear Association) were used to calculate the *p*-values.

Table 12
Statewide Fully Controlled Logistic Regression Model

	A Variable Name	B Variable Description	C Coefficient	D S.E.	F Odds Ratio	G C.I.	E *p*-value
1.	**Intercept**		-1.714	.137	0.16		< .001
2.	**Black**	**Venire member is black**	**.906**	**0.19**	**2.48**	**1.71, 3.58**	**< .001**
3.	**DP_Reservation:**	Venire member expressed reservations about the death penalty	2.437	0.23	11.44	7.23, 18.09	< .001
4.	**SingleDivorced**	Venire member is not married	.543	0.17	1.72	1.23, 2.41	< .01
5.	**JAccused**	Venire member accused of a crime	.730	0.23	2.07	1.33, 3.24	<.01
6.	**Hardship**	Venire member worried serving would impose a hardship	1.094	0.31	2.99	1.61, 5.54	<.01
7.	**Homemaker**	Venire member is a homemaker	.799	0.32	2.22	1.18, 4.17	<.02
8.	**JLawEnf_all**	Venire member or close other works in law enforcement	-.466	0.19	0.63	0.44, 0.90	<.02
9.	**JKnewD**	Venire member or venire member's immediate family knew the defendant	2.156	0.66	8.63	2.37, 31.41	<.01
10.	**JKnewW**	Venire member knew a witness	-.615	0.25	0.54	0.33, 0.88	<.02
11.	**JKnewAtt**	Venire member knew one of the attorneys in the case	.744	0.25	2.11	1.29, 3.44	<.01
12.	**LeansState**	Venire member expresses view that suggests view favorable to state (e.g., problems with presumption of innocence, right not to testify)	-1.966	0.54	0.14	0.05, 0.40	<.001
13.	**PostCollege**	Venire member went to graduate school	.996	0.27	2.71	1.59, 4.63	<.001
14.	**VeryYoung**	Venire member is 22 or younger.	.920	0.40	2.51	1.14, 5.55	<.03

$R^2 = .32$

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Table 13
Cumberland County Fully Controlled Logistic Regression Model

	A	B	C	D	F	G	E
	Variable Name	**Variable Description**	**Coefficient**	**S.E.**	**Odds Ratio**	**C.I.**	***p*-value**
1.	**Intercept**		-2.93	0.30	~~0.05~~		< .001
2.	**Black**	**Venire member is black**	**0.94**	**0.27**	**2.57**	**1.50, 4.40**	**< .01**
3.	**DP_Reservations**	Venire member expressed reservations about the death penalty	3.12	0.38	~~22.74~~	10.72, 48.26	< .001
4.	**Unemployed**	Venire member is unemployed.	1.88	0.95	6.58	1.02, 42.27	< .05
5.	**Accused_all**	Venire member or close other accused of a crime	0.78	0.27	2.18	1.28, 3.70	<.01
6.	**Hardship**	Venire member worried serving would impose a hardship	1.25	0.60	3.49	1.07, 11.37	<.05
7.	**Helping**	Venire member works in a job that involves helping others	0.99	0.34	2.69	1.38, 5.26	<.01
8.	**Blue_all**	Venire member or close other worked in blue collar job	0.97	0.27	2.64	1.54, 4.50	<.001
9.	**LeansAmbig**	Venire member expresses view that suggests a bias or trouble following law but the direction of that bias is ambiguous	0.94	0.51	2.57	0.94, 7.02	<.10
10.	**VeryYoung**	Venire member is 22 or younger.	1.46	0.56	4.31	1.44, 12.89	<.01

$R^2 = .41$

THE COURT: Madam Clerk, the State has exercised a peremptory challenge as to Jackie Teague. If you'll call us -- or at least advise us of the replacement juror.

THE CLERK: Nelson Johnson.

THE COURT: Madam Clerk, if you'll send for that juror, please, ma'am.

(Prospective juror entered the courtroom.)

THE COURT: Madam Clerk, if you'll call the replacement juror, please, ma'am.

THE CLERK: Nelson Johnson. Mr. Johnson, you're going into seat number fourteen. It's that vacant seat in front of the rail. That's fine. You can come on through there. Just go right over there and sit down.

THE COURT: Have a seat right there, Mr. Johnson. We're having to put you there for the time being. We do have the other thirteen seats already filled, and we're trying to fill the alternate seat for the number two slot.

Do you understand that it would be the duty and responsibility of an alternate to sit in case of the disability or illness of one of our other jurors?

JUROR #14: Yes.

THE COURT: And do you further understand it would be the duty and responsibility of any alternate chosen to listen attentively to the evidence as though he or she were actually going to deliberate?

JUROR #14: Yes.

THE COURT: All right. With that, I'll let Mr. Dickson ask you a few questions.

MR. DICKSON: Thank you, your Honor. Good afternoon, Mr. Johnson. How are you doing?

Mr. Johnson, as Judge Johnson told you, my name is John Dickson. I'm assistant district attorney here in Cumberland County, and I'm the prosecutor here in this particular case. Seated with me is Sergeant Mike Ballard of the Fayetteville Police Department, one of the investigators in this case.

The defendant in this case is charged with the first degree murder of a young man named Erik Tornblom. Erik Tornblom was seventeen years old at the time of his murder. He lived here in Fayetteville with his mother and father. This is his mother, Trudi Tornblom, seated at the end here. And beside her is his father, Richard Tornblom. Erik's -- one of Erik's sisters, Barbara, is seated back there in the corner. He has another sister named Pam Tornblom.

Did you happen to know Erik Tornblom, or know any members of the Tornblom family?

JUROR #14: No, sir.

MR. DICKSON: The defendant in this case is Marcus Robinson. He is the person seated at the left-hand side of

the table across from you. His mother's name is Shirley Burns. He has a brother named Reggie Greene and a sister named Felicia Robinson, that I'm aware of.

There are also some folks seated on the far side of the courtroom here that are related to him or involved with him in some way. Do you know the defendant in this case, sir?

JUROR #14: No, I don't.

MR. DICKSON: To your knowledge, do you know any of the people whose names I called out, or any of the other people on the other side of the courtroom?

JUROR #14: No, sir.

MR. DICKSON: To your knowledge, have you ever seen any of them before?

JUROR #14: No, I haven't.

MR. DICKSON: The defendant is represented in this case by two attorneys. The one closest to me here in the gray coat is Mr. Randy Gregory. Sitting beside him is Mr. Ed Brady.

MR. BRADY: How you doing?

JUROR #14: All right.

MR. DICKSON: Mr. Gregory practices law here with Tony Rand. Mr. Brady practices law with his wife. Do you know either Mr. Brady or Mr. Gregory?

JUROR #14: No, I heard of them. I heard of Tony

Rand, but I don't know him.

MR. DICKSON: Tell me generally how you've heard about Tony Rand.

JUROR #14: Well, through probably a person he have had a case of and on T.V.

MR. DICKSON: Okay. He's involved in politics. You're aware of that?

JUROR #14: Yes, sir.

MR. DICKSON: Is there anything about what you know about Mr. Rand that you think would affect your ability to be fair and impartial if you sat on this case?

JUROR #14: No, sir.

MR. DICKSON: Mr. Johnson, how long have you lived here in Cumberland County?

JUROR #14: Thirty years.

MR. DICKSON: You were born in Lumberton?

JUROR #14: Yes, sir.

MR. DICKSON: But did your family live here in Cumberland?

JUROR #14: Yes, sir. They live in Cumberland.

MR. DICKSON: What part of the county did you grow up in?

JUROR #14: I growed up in Cumberland County.

MR. DICKSON: What part?

JUROR #14: What part? Fayetteville.

MR. DICKSON: Is there a particular neighborhood?

JUROR #14: Oh, down on Murchison Road, University Estates.

MR. DICKSON: Where do you live now? Do you still live in that same area?

JUROR #14: Yes, sir.

MR. DICKSON: Are your mother and father still here?

JUROR #14: Yes, sir.

MR. DICKSON: Okay. What does your father do?

JUROR #14: He's retired, sir.

MR. DICKSON: What did he retire from?

JUROR #14: PWC.

MR. DICKSON: Okay. How long did he work for PWC?

JUROR #14: He was with them fourteen years. Then he went to disability then. And now he's retired.

MR. DICKSON: How about your mother, does she work outside the home?

JUROR #14: Yes, sir. She works at Cape Fear Valley Hospital.

MR. DICKSON: What does she do there.

JUROR #14: She's a housekeeper.

MR. DICKSON: Where did you go to school?

JUROR #14: Pine Forest Senior High.

MR. DICKSON: Did you graduate?

JUROR #14: Yes, sir.

MR. DICKSON: What year did you graduate?

JUROR #14: '82.

MR. DICKSON: What did you do after you got out of high school?

JUROR #14: Well, after I got out of high school, I was working with -- I was working there at the school house when I got out, because I knew the man. I was doing custodial work for him, whatnot.

MR. DICKSON: At Pine Forest?

JUROR #14: Yes, sir.

MR. DICKSON: How long did you work there at Pine Forest?

JUROR #14: About six years.

MR. DICKSON: And did you leave that to go to your present job, or was there something in between?

JUROR #14: Well, I wasn't doing nothing but part-time work at the time.

MR. DICKSON: Okay. Do you work during the summers, too, with the Holiday Inn?

JUROR #14: Yes, sir. It's a full-time job.

MR. DICKSON: Have you ever known anyone who was charged as a criminal defendant with any serious type case, Mr. Johnson, whether it's a drug charge, any kind of breaking and entering, burglary, any kind of serious

assault?

JUROR #14: Yeah, I know a few people.

MR. DICKSON: Any serious type charge. Okay?

JUROR #14: Yeah, I know a few people.

MR. DICKSON: If you would, tell me who you know and a little bit about those incidents. Okay?

JUROR #14: Well, let me see. I got to think back.

MR. DICKSON: Okay.

JUROR #14: Oh, I know somebody that was charged with assault. His name is Lawrence Campbell.

MR. DICKSON: How long ago was that?

JUROR #14: That's been about four years ago.

MR. DICKSON: Okay. Was he a good friend of yours? Or how did you know him?

JUROR #14: Yeah, I went to school with him. He was a friend of mine.

MR. DICKSON: Did you talk with him about the case?

JUROR #14: No. There wasn't nothing to discuss. I mean, he just told me, you know, that that's what -- you know, he hit the guy, something. They got in an argument.

MR. DICKSON: All right. Did he have to come to court?

JUROR #14: Yes.

MR. DICKSON: Do you know what happened in the case?

JUROR #14: He had to pay for the guy's hospitalization and stuff, you know. Had to pay for that.

MR. DICKSON: You indicated you knew some other people that had gotten in trouble too. What kind was it?

JUROR #14: Let's see. I know too many to think about. Let me see. I don't know. That's about it, I can think about at the time.

MR. DICKSON: Okay. Have you ever had any kind of experiences with the court system?

JUROR #14: No, sir.

MR. DICKSON: Not as a witness or anything like that?

JUROR #14: No, sir.

MR. DICKSON: Mr. Johnson, do you understand that this defendant is charged with first degree murder?

JUROR #14: Yes, sir.

MR. DICKSON: Do you have any particular feelings or beliefs about sitting on a jury? And what the jury has to do is decide whether or not he's guilty of that charge.

JUROR #14: Yes, sir. No, I --

MR. DICKSON: Do you have any thoughts or feelings about sitting on a jury and making that kind of decision?

JUROR #14: No, sir. No, I don't have any ideas. I don't. No, I have no -- after you've heard what the case is being about, you know, as far as -- I'm sure I have to

hear what the case is all about before, you know.

MR. DICKSON: Okay. In first degree murder cases, if a jury does find the defendant guilty, the jury also has to decide what punishment he would receive. And under our law, there are two possible punishments. Do you know what those are?

JUROR #14: Death penalty or life in prison.

MR. DICKSON: Okay. Do you have any feelings or beliefs against the death penalty as a punishment?

JUROR #14: No. If they did it and it won't self-defense, just to be killing somebody, then I think they should get death penalty.

MR. DICKSON: Okay. What do you think about life imprisonment as a punishment for first degree murder?

JUROR #14: Well, yes. Well, it could be life in prison. I have no objection about it.

MR. DICKSON: Have you ever given much thought to punishment, either life imprisonment or the death penalty? Have you ever spent any time thinking about that or talking to people about it?

JUROR #14: No. No, I haven't. Let me see. I've never been in a situation where I had to do that before.

MR. DICKSON: Very few people have. It's not something that people do on a regular basis.

Mr. Johnson, do you have any problems reading?

JUROR #14: No, sir, not really.

MR. DICKSON: What kind of grades did you make in school?

JUROR #14: Well, mostly C's.

MR. DICKSON: Okay. But you came along straight through; is that right?

JUROR #14: Yes, sir.

MR. DICKSON: Mr. Johnson, knowing that if you sat in this case that it could be that you had to make a decision about life imprisonment or the death penalty --

JUROR #14: Yes, sir.

MR. DICKSON: -- do you personally think that you could consider the death penalty as a punishment?

JUROR #14: Like I say, depends on what the case come out.

MR. DICKSON: Okay. When I talk about first degree murder, I'm talking about a case that is -- it's got to be one -- let me say this. Are you familiar with the terms premeditated and deliberate?

JUROR #14: Yes, sir.

MR. DICKSON: That's one kind of first degree murder. That's a murder that's sort of planned or thought out. It may be for a very short time period. But at least for some time period it's been planned and thought out. That's one type of first degree murder.

There's another type of first degree murder. It's called felony murder. Now, that's a killing that's done during the course of somebody committing another crime, such as armed robbery. An example would be where somebody goes into a convenience store to rob it, and during the robbery they kill the clerk also. That could be a felony murder. It also could be premeditated and deliberate at the same time. Do you understand that?

JUROR #14: Yes, sir.

MR. DICKSON: So when I'm talking about first degree murder, I'm talking about murder that there's no question of self-defense. There's no question of accident or misadventure.

JUROR #14: Yes, sir.

MR. DICKSON: It's just a cold killing.

JUROR #14: Cold murder.

MR. DICKSON: Okay?

JUROR #14: (Nodding head up and down.)

MR. DICKSON: How do you feel -- or what kind of feelings do you have for life imprisonment for that kind of murder?

JUROR #14: Well, if you take a life you have to give -- I mean, if you take a life for that reason, you need the death penalty I think.

MR. DICKSON: Do you think in -- and that's what

we're talking about when we talk about first degree murder. Those are the kinds of cases. Do you feel that the death penalty is the appropriate punishment in those kinds of cases?

JUROR #14: Yes, sir.

MR. DICKSON: Or that the death penalty is a proper punishment?

JUROR #14: It will make people think twice for that kind of action, taking that kind of action.

MR. DICKSON: Do you feel that in all cases of first degree murder that the death penalty is the proper punishment?

JUROR #14: Just downright cold out murder, robbery, stealing, murder like that?

MR. DICKSON: Well, the types I talked about just a minute ago. Do you think that the death penalty is always the appropriate punishment for that kind of murder?

JUROR #14: Yes. If they prove that he done it beyond a reasonable doubt, yes.

MR. BRADY: I'm sorry, your Honor. I didn't understand what he said.

THE COURT: Mr. Johnson, could you speak a little bit louder for us, please.

JUROR #14: Yeah. If they prove he done it beyond a reasonable doubt and he was there and someone seen him do

it and they caught him on the scene, yes.

MR. DICKSON: Thank you very much, sir. I have no further questions, your Honor.

THE COURT: Mr. Johnson, thank you very much. I'm going to ask you to step to the jury room and just make yourself at home there for a couple moments, please, sir. Thank you very much.

(Juror #14 left the courtroom.)

MR. DICKSON: Your Honor, the State would challenge Mr. Johnson for cause.

THE COURT: I'm going to deny it at this time.

MR. DICKSON: The State would exercise a peremptory.

THE COURT: All right, sir. Ms. Mehan, if you'll ask Mr. Johnson to step back in, please.

(Juror #14 entered the courtroom.)

THE COURT: Mr. Johnson, I want to thank you very much for answering the questions of the State in this case, but for purposes of this trial you've been excused. If you'll report back to the jury pool clerk, she'll give you some further instructions. If you'll exit the courtroom by this door. Thank you, Mr. Johnson.

JUROR #14: Yes, sir.

(Juror #14 left the courtroom.)

THE COURT: Madam Clerk, the State has exercised a

STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 91 CRS 23143

STATE OF NORTH CAROLINA)
)
v.) ORDER GRANTING MOTION
) FOR APPROPRIATE RELIEF
)
MARCUS REYMOND ROBINSON)
Defendant)
)

THIS CAUSE was heard before the undersigned judge presiding, on Robinson's claims that he is entitled to vacatur of his death sentence pursuant to N.C. Gen. Stat. §15A-2010 to 2012, the Racial Justice Act, because race was a significant factor in the prosecution's use of peremptory strikes in North Carolina, the former Second Judicial Division, and Cumberland County at the time of Robinson's 1994 capital trial.

The Court convened an evidentiary hearing on January 30, 2012. That hearing concluded on February 15, 2012. Robinson was present in court with his attorneys 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 Calvin W. Colyer and Robert T. Thompson of the Office of the District Attorney for the 12th District.

After considering the evidence and testimony presented to the Court, and the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law in support of its order finding that race was, in fact, a significant factor in the prosecution's use of peremptory strikes, and thereby granting the Defendant's Motion for Relief Pursuant to the Racial Justice

CLERK OF SUPERIOR COURT
CUMBERLAND COUNTY
SUBMITTED IN COURT ON
4/20/12
BY: Asst. / Deputy Clerk of Superior Court

Act, vacating the death sentence, and imposing a sentence of life imprisonment without possibility of parole.

PART I. PRELIMINARY MATTERS

A. INTRODUCTION

In enacting the Racial Justice Act (RJA), the North Carolina General Assembly made clear that the law of North Carolina rejects the influence of race discrimination in the administration of the death penalty. The RJA represents a landmark reform in North Carolina, a state which has long been a leader in forward-thinking criminal justice policies.

It is a widely-accepted truth that race discrimination has historically had a distorting effect on national and state policy in every aspect of our private and public lives, including education, housing, employment, and criminal justice. Five decades removed from the Civil Rights Act of 1964, in the wake of the election of the first African-American president of the United States, and in the face of persistent claims and some evidence of the continuing effects of racial prejudice in the application of the death penalty, the General Assembly accepted the challenge issued by the United States Supreme Court in *McCleskey v. Kemp*. Addressing the state legislatures, the *McCleskey* Court ruled that it was the duty of the states "to respond to the will and consequently the moral values of the people" when addressing the difficult and complex issue of racial prejudice in the administration of capital punishment. 481 U.S. 279, 319 (1987).

Under the RJA, a capital defendant shall prevail if there is evidence proving 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).

The RJA identifies three different categories of racial disparities a defendant may present in order to meet the "significant factor" standard, any of which, standing alone, is sufficient to establish an RJA violation: evidence that death sentences were sought or imposed more frequently upon defendants of one race than others; evidence that death sentences were sought or imposed more frequently on behalf of victims of one race than others; or evidence that race was a significant factor in decisions to exercise peremptory strikes during jury selection. N.C. Gen. Stat. § 15A-2011(b)(1)-(3). It is the third category, evidence of discrimination in jury selection, that was the subject of the nearly three week long evidentiary hearing held in this case.

In the first case to advance to an evidentiary hearing under the RJA, Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina. The evidence, largely unrebutted by the State, requires relief in his case and should serve as a clear signal of the need for reform in capital jury selection proceedings in the future.

B. PROCEDURAL HISTORY

On August 5, 1991, Marcus Robinson, an African-American, was indicted for the murder of Erik Tornblom. Robinson's capital trial began on July 13, 1994, in the Superior Court of Cumberland County, the Honorable E. Lynn Johnson presiding. Robinson was found guilty of first-degree murder on August 1, 1994, and sentenced to death on August 5, 1994.

The Supreme Court of North Carolina found no prejudicial error in the trial or sentencing hearing. *State v. Robinson*, 342 N.C. 74 (1995). The United States Supreme Court denied review. *Robinson v. North Carolina*, 517 U.S. 1197 (1996).

Robinson's post-conviction appeals in state and federal court were unsuccessful. *See State v. Robinson*, 350 N.C. 847 (1999) (denying review of the denial of motion for appropriate relief); *Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006) (affirming denial of petition for writ of habeas corpus). The United States Supreme Court denied review of the post-conviction proceedings. Robinson v. Polk, 549 U.S. 1003 (2006).

The State thereafter scheduled Robinson's execution for January 26, 2007. Robinson filed a civil action in the Superior Court of Wake County challenging the Department of Correction's lethal injection protocol. On January 25, 2007, the Honorable Donald W. Stephens entered an order staying Robinson's execution. That litigation is ongoing.

On August 10, 2009, North Carolina enacted the RJA, N.C. Gen. Stat. §15A-2010 to 2012. On August 6, 2010, Robinson timely filed a motion for appropriate relief pursuant to the RJA. Robinson supported his RJA motion with evidence of a statistical analysis of jury selection conducted by researchers at the Michigan State University College of Law (hereafter "MSU Study").

Following review of Robinson's RJA motion and the State's answer, this Court ordered an evidentiary hearing on Robinson's claims that race was a significant factor in the State's decisions to exercise peremptory strikes in capital cases throughout North Carolina, in the former Second Judicial Division, and in the 12th District, Cumberland County. The Court scheduled the hearing for September 6, 2011.

On July 7, 2011, this Court directed the Office for Indigent Defense Services to appoint Henderson Hill, Jay H. Ferguson and Malcolm Ray Hunter, Jr., as counsel for Robinson for purposes of conducting the RJA hearing. The Court relieved Geoffrey W. Hosford and Michael R. Ramos, Robinson's post-conviction attorneys, of responsibility for litigation of the RJA

claims. Subsequently, James E. Ferguson, II, was appointed to replace Henderson Hill. Cassandra Stubbs, an attorney serving *pro bono*, also entered notice of appearance on Robinson's behalf.

On September 6, 2011, this Court heard motions by the parties on discovery and scheduling matters, and granted the State's motion to continue the evidentiary hearing. The Court rescheduled the evidentiary hearing for November 14, 2011.

On November 8, 2011, the State filed a Motion to Recuse the undersigned Judge alleging that he was a material witness to the proceeding, and that he had been subpoenaed to testify at the evidentiary hearing in the case. This Court referred the recusal question to the Honorable Quentin T. Sumner and filed a motion to quash the subpoena. Judge Sumner conducted a hearing on November 10, 2011 and found that the undersigned Judge was not a material witness for the State. Judge Sumner denied the State's Motion to Recuse and quashed the State's subpoena.

On November 10, 2011, this Court granted the State's second motion to continue the evidentiary hearing. The Court also entered a discovery order directing the parties to identify expert witnesses and to provide underlying data for all expert witnesses. The Court rescheduled the evidentiary hearing for January 30, 2012.

On December 19, 2011, the Court entered a further discovery order directing the parties to identify lay witnesses and to make additional expert disclosures.

On January 30, 2012, the first day of the hearing, the State requested a continuance for the presentation of its evidence. In its discretion, the Court denied the State's motion for a continuance.

C. WITNESSES AND EVIDENCE PRESENTED

The following witnesses testified on Robinson's behalf:

Barbara O'Brien is an associate professor at the Michigan State University College of Law. O'Brien received a J.D. in 1996 from the University of Colorado School of Law. She worked for two years as an assistant Appellate Defender in Illinois and for three years in a clerkship in the federal district court in the Central District of Illinois. O'Brien earned a Ph.D. in social psychology in 2007 from the University of Michigan. She completed numerous intensive graduate classes on methodology and statistics. O'Brien has designed and conducted experimental and empirical statistical research, applying her legal, methodological and statistical training. She has published at least five legal empirical studies in peer-reviewed articles. She has published peer-reviewed legal studies utilizing complex databases and applying different statistical methods including regression models, multivariate regression, logistic regression, and linear regression. The Court accepted O'Brien as an expert in social science research and empirical legal studies. HTp. 109. Based upon a comprehensive study examining the peremptory strike decisions in North Carolina capital cases, O'Brien concluded that race was a significant factor in the exercise of peremptory challenges in capital cases by prosecutors in North Carolina, the former Second Judicial Division, and Cumberland County at the time of Robinson's trial.

George Woodworth is a professor emeritus of statistics and of public health at the University of Iowa. Woodworth received a Ph.D. in mathematical statistics from the University of Minnesota. Woodworth was employed as an assistant professor of statistics at Stanford University. At the University of Iowa, Woodworth served as a professor of statistics and actuarial science, and had a joint appointment in biostatistics in the College of Public Health.

Woodworth has applied logistic regression and linear models in his applied research in the areas of biostatistics, employment discrimination, and criminal justice. He has published a textbook on biostatistics. He has published numerous studies involving legal empirical analyses of discrimination in charging and sentencing in death penalty cases. He has published studies using a time-varying coefficient in regression models that permits researchers to pinpoint the effect of multiple variables at a particular point in time based on data collected over a larger time span. Woodworth has been previously admitted as an expert statistician by state and federal courts. The Court accepted Woodworth as an expert statistician. HTp. 510. Woodworth testified that race was a significant factor in the exercise of peremptory challenges in capital cases by prosecutors in North Carolina, the former Second Judicial Division, and Cumberland County at the time of Robinson's trial.

Samuel R. Sommers is an associate professor of psychology at Tufts University. Sommers received a Ph.D. in psychology in 2002 from the University of Michigan. He teaches graduate and undergraduate courses on research methods, social psychology, and the intersection between psychology and the legal system. He is a member of the American Psychology-Law Society. Sommers has published several peer-reviewed articles regarding legal decision-making and race. He is currently a member of the editorial boards of three peer-reviewed scientific journals including *Law and Human Behavior*. He has conducted experimental research on race and jury selection in a controlled setting. Sommers has been admitted as an expert in a number of previous cases, including three capital cases, in state and federal courts. The Court accepted Sommers as an expert in social psychology, research methodology, the influence of race on perception, judgment and decision-making, race and the United States legal system, and race and jury selection. HTp. 728. Sommers concurred with the testimony of Woodworth and O'Brien

that race was a significant factor in the exercise of peremptory challenges in capital cases by prosecutors in North Carolina. HTp. 774.

Bryan Stevenson is a professor of law at the New York University School of Law and the director of the Equal Justice Initiative (EJI) in Montgomery, Alabama. Stevenson received a J.D. from Harvard University Law School and a Masters degree in public policy at the John F. Kennedy School of Government focused on the influence of race and poverty in the administration of criminal justice. Stevenson teaches in the areas of criminal justice, Eighth Amendment law, capital punishment law, and criminal procedure. Stevenson has conducted research and published in the areas of race and gender discrimination in jury selection, and racial bias in sentencing in criminal cases. In 2010, Stevenson published a study examining the issue of racial bias in jury selection across the South. Stevenson has been admitted as an expert on race in jury selection in several states. The Court accepted Stevenson as an expert in race and the law. HTp. 845. Stevenson testified that he found dramatic evidence of racial consciousness and racial bias in jury selection in North Carolina capital cases at the time of Robinson's trial. HTp. 894.

The Honorable Louis A. Trosch, Jr., has served as a district court judge in Mecklenburg County since 1999. Trosch received a J.D. from the University of North Carolina at Chapel Hill in 1992. Before becoming a judge, Trosch worked as a public defender in Cumberland County, as a staff attorney at the Children's Law Center in Charlotte, and in private practice in a small law firm. Trosch has participated in intensive trainings on implicit bias and race discrimination sponsored by the Community Building Initiative and the Mecklenburg County Courts, the Casey Family Program, and the National Council of Juvenile and Family Court Judges. He has trained judges, prosecutors, defense attorneys and others in North Carolina, Virginia, Georgia, and

Texas about implicit bias. Trosch has also trained judges, social psychologists and other experts in how to teach about implicit bias. The Court accepted Trosch as an expert in implicit bias in the courtroom and in methods for reducing the effect of implicit bias. HTp. 1023.

The following witnesses testified for the State:

The Honorable John Wyatt Dickson has served as a district court judge in Cumberland County since 1996. Dickson received a J.D. from the University of North Carolina at Chapel Hill in 1976. From 1976 until 1996, when he ascended to the bench, Dickson served as an assistant district attorney in Cumberland County. During his career as a prosecutor, Dickson tried 10 to 15 capital murder cases. He prosecuted the Cumberland County capital cases of John McNeil and Marcus Robinson, as well as the 1995 resentencing of Jeffrey Meyer. The cases of these three defendants were included in the MSU Study.

The Honorable E. Lynn Johnson is a retired senior resident superior court judge from Cumberland County. Johnson received a J.D. from the University of North Carolina at Chapel Hill in 1966. Thereafter, Johnson worked for the Federal Bureau of Investigation, as an assistant solicitor in Cumberland and Hoke County, and in private practice. Johnson was appointed as a superior court judge in 1983. He became the senior resident judge in 1998, and retired in 2011. Johnson presided over Robinson's capital trial and also the capital trial of Philip Wilkinson, another Cumberland County defendant whose case was included in the MSU Study.

The Honorable William Gore, Jr. was a superior court judge in the 13th District for 17 years. Gore has worked in private practice and also served as the North Carolina Commissioner of Motor Vehicles. Gore received his J.D. from North Carolina Central University in 1977. Gore presided over the capital trial of Christina Walters, a Cumberland County defendant whose case was included in the MSU Study.

The Honorable Thomas Lock is the senior resident superior court judge in Johnston County. He has served in that position for six years. Lock previously served as the district attorney for Lee, Harnett, and Johnston County for 16 years. Lock received his J.D. from the University of North Carolina at Chapel Hill in 1981. Lock presided over the capital sentencing hearing of Eugene Williams, a Cumberland County defendant whose case was included in the MSU Study.

The Honorable Knox Jenkins is a retired superior court judge. Jenkins served as a superior court judge in the 11th District for 16 years. Jenkins received a J.D. from the University of North Carolina at Chapel Hill. Before he ascended to the bench, Jenkins worked in private practice for 30 years. Jenkins is also a veteran of the United States Army. Jenkins presided over the 1999 capital resentencing of Jeffrey Meyer, a Cumberland County defendant whose case was included in the MSU Study.

The Honorable Jack A. Thompson was a superior court judge in Cumberland County from 1991 until 2010. Thompson received a J.D. from Wake Forest Law School in 1965. Thompson worked as an assistant solicitor in Cumberland and Hoke County and later served as the district solicitor for four years. At various points prior to becoming a judge, Thompson worked in private practice in Fayetteville. Thompson is also a veteran of the United States Army. Thompson presided over the capital cases of John McNeil and Quintel Augustine, two Cumberland County defendants whose cases were included in the MSU Study.

Joseph Katz retired from Georgia State University College of Business in 2002. Katz earned a Ph.D. in quantitative methods at Louisiana State University. At Georgia State University, he taught the mathematical theory of probability and statistics and general statistical courses and sampling. 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 assisted the Georgia Attorney General in the case of *McCleskey v. Kemp*. In the *McCleskey* litigation, Katz reviewed databases compiled by defense experts, and assessed the reliability and the validity of the data. Katz also assisted the Georgia Attorney General in the case of *Horton v. Zant*, involving a *Swain* challenge to the prosecutor's use of peremptory strikes in a manner to exclude black venire members. Katz has also assisted state agencies in defense of employment discrimination and voting rights claims. Katz has been admitted as a statistical expert in state and federal litigation in approximately 20 cases. The Court accepted Katz as an expert in applied statistics, data analysis, and sampling. HTp. 1728. 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 the time of Robinson's trial.

Christopher Cronin is an Assistant Professor of Political Science at Methodist University in Fayetteville, North Carolina. He has taught at Methodist University for three years. Cronin received his Ph.D. in Political Science from the University of Massachusetts at Amherst in 2009. The Court accepted Cronin as an expert in American Politics. HTpp. 2158, 2236-37. Cronin 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 the time of Robinson's trial.

In rebuttal, Robinson presented additional testimony from Barbara O'Brien and George Woodworth.

In addition, the Court received more than 170 exhibits, including trial transcripts, expert reports and underlying data, scientific research articles, affidavits, and other documentary evidence.

D. EVIDENTIARY RULINGS

1. Robinson's Motion in Limine on Prosecutor Testimony/Affidavits.

Robinson filed a motion *in limine* asking the Court to preclude certain testimony or affidavits from prosecutors who were asked to review capital case transcripts and to provide race-neutral explanations for the prosecutors' use of peremptory strikes to exclude potential African-American venire members. With respect to prosecutors who conducted the jury selection proceedings at issue, Robinson asked the Court to preclude the State from offering as substantive evidence affidavits or testimony from these prosecutors that is merely a recitation of information found in the voir dire transcript. Robinson argued that the original voir dire transcripts examined by the MSU study were in evidence and, pursuant to N.C. R. EVID. 403, the "evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Court overrules Robinson's objection, and finds that the probative value of this evidence is not substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Robinson next asked the Court to preclude the State from presenting any substantive evidence in the form of affidavits or testimony from prosecutors who were not present or involved in the jury selection for the cases they reviewed and from prosecutors who had no independent recollection of information found in the voir dire transcripts. Robinson argued that N.C. R. EVID. 602 bars testimony or affidavits from prosecutors who had no personal knowledge

or first-hand basis for determining what factors the trial prosecutors considered when deciding whether to exercise peremptory strikes.

Robinson argued pursuant to N.C. R. EVID. 701 that prosecutors who reviewed voir dire transcripts but were not present at the trials should be precluded from providing lay opinions about the trial prosecutor's motivations for using peremptory strikes. Finally, Robinson argued that any attempt by transcript-reviewing prosecutors to testify about trial prosecutors' reasons for striking jurors constituted inadmissible hearsay under N.C. R. EVID. 802 and violated Robinson's state and federal constitutional right to confront the witnesses against him.

The Court overrules Robinson's objections regarding the affidavits and testimony of prosecutors who reviewed trial materials but were not present at those trials or have no independent recollection of the proceedings. The Court finds this testimony is a relevant summary of some of the evidence in the transcripts or other supporting materials that may support a factor upon which the prosecutors could have relied in deciding to strike a particular juror. The substance of Robinson's objections are considered as to the weight and value accorded the prosecutors' affidavits and testimony.

In addition to the sworn affidavits, Katz testified that he relied upon unsworn statements by prosecutors regarding the race-neutral explanations. The Court admits all those explanations relied upon by Katz and gives them the weight they are due.

2. Defendant's Motion in Limine on Testimony of State Expert Joseph Katz.

Robinson filed a motion in limine to prohibit certain testimony from Joseph Katz, Ph.D., and to exclude parts of Katz's expert report from evidence on grounds that such evidence is inadmissible pursuant to N.C. R. EVID. 702 and 703.

Katz stated in his report that he sought guidance from prosecutors throughout North Carolina regarding their reasons for striking African-American venire members. He further stated that he asked district attorneys to designate an assistant familiar with the cases and, for each African-American venire member who was struck, to provide a race-neutral explanation, if possible. Calvin W. Colyer and Charles Scott provided purported race-neutral reasons for each strike in the eleven capital cases tried in Cumberland County and included in the MSU Study. Statewide, Katz received responses from a prosecutor in about half of the capital cases and only half of those responses were from the prosecutor who actually tried the case. Katz acknowledged that his statewide data set was "incomplete" and "not a random sample of all State strikes of black venire members over the full body of 173 trials statewide." SE44, Katz report at 37.

Robinson contended that Katz's methodology for determining a "true race-neutral reasons" for prosecutors' peremptory strikes was both unreliable and not based on information that should be reasonably relied upon in the field of statistics and thus was inadmissible pursuant to N.C. R. EVID. 702 and 703. Robinson argued, among other things, that Katz's survey of prosecutors does not comport with basic scientific principles applicable to surveys and that the surveys were structured in a biased manner.

Robinson further contended that Katz's cross-tabulation analysis was misleading, unreliable, and not based on established methodologies that are reasonably relied upon in the field of statistics and thus was inadmissible pursuant to N.C. R. EVID. 702 and 703. Robinson contended that Katz conducted a cross-tabulation analysis in which he mixed "potential explanatory factors" that were shown by the MSU Study to have little or no explanatory value, and then divided the set of venire members into subgroups so small that his cross-tabulation

model lost all power to explain the reasons behind the prosecutors' strikes.

Katz candidly admitted that the "validity of this logistic model is questionable because the explanatory variables fit the underlying data for whether or not the State struck the venire member too well." SE44, Katz report at 29. Katz also acknowledged that race-neutral explanations produced by his cross-tabulation analysis "might not be the true reasons" for the strikes. SE44, Katz Report at 36.

North Carolina has a "three-step inquiry for evaluating the admissibility of expert testimony under Rule 702: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant? *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458 (2004). Robinson did not contest the second prong of the *Howerton* test.

As the proponent of Katz's testimony, the State has the burden of demonstrating the propriety of the testimony under this three-step approach. *Crocker v. Roethling*, 363 N.C. 140, 144 (2009). Determining the reliability of a method of proof is a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. *Howerton*, 358 N.C. at 460. In order to determine whether an expert's area of testimony is considered sufficiently reliable, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. Initially, the court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable. *Id.* at 459.

In the event that precedent does not guide the determination, or if a court is "faced with novel scientific theories, un-established techniques, or compelling new perspectives on otherwise settled theories or techniques," then "nonexclusive 'indices of reliability'" may be used to

answer the question of reliability. *Id.* at 460 (citations omitted).

N.C. R. EVID. 703 provides a different set of factors affecting the admissibility of an expert's opinion. Under Rule 703, an expert may base an opinion on facts or data perceived before the hearing only if it is of a type reasonably relied upon by experts in the field. Any information relied upon by an expert that is not reasonably relied upon by experts in the field is inadmissible. The Supreme Court of North Carolina has held that Rule 703 permits an expert to rely on an out-of-court communication as a basis for an opinion. *State v. Jones*, 322 N.C. 406 (1988).

Robinson argued that Katz does not simply treat the prosecutors' responses as anecdotal evidence to provide him with a starting point for reviewing the MSU Study, but instead compiled the anecdotal evidence into a scientific "study," essentially transforming the statements of multiple prosecutors into an expert opinion.

This Court has substantial concerns about the methodological adequacy of Katz's survey and whether the facts or data surveyed by Katz are of the type reasonably relied upon by experts in the field. Likewise, the Court has substantial concerns about the methodological validity of Katz's cross-tabulation analysis. These concerns are outlined in the Court's Findings of Fact and Conclusions of Law and the Court incorporates them in the weight given to Katz's testimony. This Court has been unable to identify any scientific study or research that utilizes the survey or cross-tabulation methods and techniques Katz purported to use. Nevertheless, because Katz did not claim in his testimony that his survey was a scientific "study," because Katz freely acknowledged the scientific limitations on his use of the collected data, and because this Court has allowed the admission into evidence of the prosecutors' affidavits, the Court overrules Robinson's objections and denies the motion to limit Katz's testimony.

The Court also overrules Robinson's objections as to the admissibility of Katz's cross-tabulation analysis, but will consider the substance of the objections in the weight accorded to that testimony.

3. Robinson's Objections to Testimony of State Expert Christopher Cronin.

Robinson objected to the introduction of Christopher Cronin, Ph.D. as an expert to testify about the correlation of race and political views, particularly concerning African-American views on criminal justice and the death penalty. Robinson argued that Cronin failed to qualify as an expert under N.C. R. EVID. 702. According to Robinson, Cronin had expertise only in teaching political science and, possibly, the interaction between religion and political science, and therefore, was not a suitable expert to testify about the prevalence of certain views of capital punishment and criminal justice among the African-American community.

The Court is satisfied that Cronin's testimony meets the *Howerton* test of reliability such that it may be admitted into evidence. This is not to say that the Court gives significant weight to Cronin's testimony insofar as it attempts to demonstrate that, because studies show a correlation between racial self-identification and ideological views on certain issues, it is reasonable to exclude specific individual venire members of a given race just because people of that race generally tend to hold a certain belief. Indeed, Cronin's ultimate point, as acknowledged in responses to the Court's questioning, is that while there may be a correlation between race and ideological views on some issues, it remains important to examine the specific views of the individuals at issue, as they may or may not comport with the generalized view. The Court overrules Robinson's objections and has considered Cronin's testimony in this order.

4. Defense Motion to Limit the Testimony of Presiding Judges.

Robinson's motion to limit the testimony of current and former superior court judges Johnson, Gore, Lock, Jenkins, and Thompson is granted in part and denied in part. The State sought testimony about these judges' observations of Cumberland County capital trials over which they presided. The Court sustains Robinson's objections to that testimony for the reasons stated below. The State further sought the judges' testimony about how they would have reacted or ruled in hypothetical situations in those capital trials. The Court sustains Robinson's objections to that testimony about their "mental processes" for the reasons stated below. Finally, the Court overrules Robinson's objections to testimony from these judges unrelated to their role as presiding judges over capital trials in Cumberland County, except as otherwise stated during the evidentiary hearing in this case.[1]

This Court finds that for each of the capital cases resulting in the death penalty over which Judges Gore, Lock, Jenkins, Johnson and Thompson presided, there is a complete record pursuant to N.C. Gen. Stat. §15A-1241(a). This affects the evidentiary value of their 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. Except when ruling upon the admissibility of evidence, or on motions, or in making findings and conclusions, or in rendering oral or written memoranda of decisions, a judge need not supply for the record an analysis of the mental processes by which he reached a conclusion either of fact or law. Aside from

[1] The Court sustained objections to questions soliciting Lock's opinion of Dickson and Colyer's reputation for honesty, integrity, and equal treatment without regard to race. These rulings were based on the cumulative nature of the solicited testimony and consistent with the Court's finding, found in another section of this order, that Dickson and Colyer in fact do have a reputation for honesty, integrity, and equal treatment without regard to race.

> matters taken under judicial notice or formal matters omitted through inadvertence or oversight and readily available to all parties, the record for review must be accepted as it was made, as of the time it was made.

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").

In *Simpson*, *supra*, the Supreme Court of North Carolina held that, although a judge may be competent to testify as to some aspects of a proceeding previously held before him, "a judge should not be called as a witness if the rights of the party can be otherwise protected. *E.g.*, Woodward v. City of Waterbury, 113 Conn. 457, 155 A. 825 (1931); State v. Donovan, 129 N.J.L. 378, 30 A.2d 421." State v. Simpson, 314 N.C. at 372-73. Among other problems, the Court cited concerns about subjecting judges to questions about their "mental processes."

In *Simpson*, the defendant sought the testimony of a district court judge on the issue of competency. The judge observed his behavior at the time of the initial appearance. The Court ruled that there were "compelling reasons to uphold the trial judge's refusal to permit the defendant to call" the district court judge as a witness. 314 N.C. at 372. According to the Court:

> *The defendant has made no showing that the District Court Judge and the assistant district attorney were the only witnesses who could testify as to his behavior at the initial appearance.* There were undoubtedly other persons present in the courtroom at the time of the defendant's initial appearance who may have noticed his behavior, including the deputy clerk, the bailiffs, and other attorneys not involved in the case. By calling them, the defendant could have presented evidence of his behavior at the initial appearance, while avoiding the previously cited dangers of having judges and attorneys involved in the case testify as witnesses. Absent a showing that there were no other available witnesses who could testify as to the defendant's behavior during the initial

> appearance, we are unable to say that the trial court erred by refusing to permit the defendant to call these witnesses.

Id., 314 N.C. at 373-74 (emphasis added).

The rule in North Carolina is widely followed. Like North Carolina, Vermont possesses no statutory provision or case law explicitly barring testimony by a trial judge. Nonetheless, in *In re Wilkinson*, the Supreme Court of Vermont held that "basic principles of fairness and due process" suggest that a trial judge's testimony at a post-conviction hearing "was improper." 165 Vt. 183, 186 (1996). While the Court acknowledged that the judge's "role at the original trial does give him the benefit of first-hand knowledge," that same role, coupled with his obligations as the presiding judge, preclude him from testifying "as a neutral and impartial observer of the trial." *Id.*, 165 Vt. at 186-87. In prohibiting "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," the Court declared that "such a practice would undermine both the propriety of the judicial office and the fairness of post-conviction relief proceedings." *Id.*, 165 Vt. at 187.

The Code of Judicial Conduct ("CJC") provides further guidance on this issue. According to the CJC, 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). In *Wilkinson*, the Supreme Court of Vermont held that, while it was unlikely to have been motivated by "actual bias," the trial judge's testimony "was unduly prejudicial given its elevated aura of expertise." *Id.* Moreover, the CJC dictates that "[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). In *Wilkinson*, the Court determined that the trial

judge's expert testimony constituted a "public comment" for the purposes of the CJC, thereby rendering it "no more appropriate than the same comments expressed in a newspaper editorial or interview." *Id.* Indeed, the Court found the testimony to be "*more* troubling" than if the comments had been made in a newspaper editorial or interview, inasmuch as "it was not only likely to affect the outcome of the proceeding but *the State intended that it do so*." *Id.*(emphasis added).

Further undergirding the notion that a trial judge may not comment publicly on a trial over which he presided is "the cardinal principle of Anglo-American jurisprudence that a court speaks only through its minutes." *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"). 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)).

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).

The State cannot meet its heavy burden of demonstrating that the judges' testimony is both uniquely necessary and material. The State speculates that these judges possess information relating to events not reflected in the record from their observations about jury selection at capital trials. The State has not shown that other court personnel, including lawyers for the parties, the court reporter, clerk and bailiffs were not similarly able to observe and to testify about jury selection. The fact that the trial court, in a technical sense, witnesses the actions of potential jurors, the testifying witnesses, the lawyers, and the parties does not transform the trial court into a material witness. *See, e.g., State v. Hampton*, 217 Wis. 2d 614, 620 (Ct. App. 1998)

(trial judge's observation of juror's drowsiness and sleep during criminal trial did not transform him into a material witness).

The RJA does not specifically contemplate that the testimony of presiding superior court judges would be necessary or even relevant evidence, although it does not prohibit it:

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the death penalty. . . may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system . . . .

N.C. Gen. Stat. Sec. 15A-2011(b).

The State has made no showing that these judges are "the only witnesses who could testify" about the facts in question, or that the trial transcripts and other available evidence are inadequate for purposes of establishing those facts.

Finally, the Court has reviewed the offer of proof 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 and, in fact, would not have assisted the Court in its determination of whether race was a significant factor in jury strikes.

For these reasons, the Court sustains the defense objections to the judges' testimony as to events they observed or as to their thought processes as presiding judges in capital cases in Cumberland County.

E. THE STATE'S UNTIMELY THIRD MOTION TO CONTINUE

On January 30, 2012, the State sought a third continuance of the evidentiary hearing, scheduled to begin that same day. HTpp. 12-13. The State asked the Court to grant additional time, at the close of Robinson's evidentiary presentation, to prepare for the presentation of its

own evidence. *Id.* The State contended that it needed more time in order for various prosecutors to provide its expert, Joseph Katz, with "race-neutral" explanations for strikes from their prosecutorial districts. *Id.* at 13.

The State had ample time to prepare for the January 30, 2012 hearing. The Racial Justice Act was passed by the North Carolina General Assembly in 2009 and made clear by its terms that statistical evidence of jury selection proceedings would be relevant evidence in the adjudication of any claims filed under the RJA. The State could have diligently begun its own investigation into the possibility of racial bias after the law was passed in 2009.

The RJA set an August 10, 2010 filing deadline for defendants who had previously been sentenced to death. Robinson complied with the August deadline and on August 6, 2010, filed claims alleging discrimination in jury selection statewide, in former Judicial Division 2, and in Cumberland County. He attached a sworn affidavit by Grosso and O'Brien reporting disparities in the strike ratios by state and county prosecutors. The State certainly could have begun its own investigation into those reported disparities in the summer of 2010.

By the spring of 2011, the State had at its disposal all of the data sources collected by Grosso and O'Brien. In March of 2011, Robinson filed a motion seeking an evidentiary hearing on the *voir dire* discrimination claims alleged in his August 2010 MAR. He attached extensive summary tables, listing by name, race, and strike decision all of the venire members included in the MSU Study. On May 10, 2011, Robinson provided the State with electronic copies of all of the underlying data files from the MSU Study, including voir dire transcripts, jury questionnaires, jury seating charts, and public record documents used to code the race of venire members. 9/6/2011 HTpp. 226-27. These materials were ultimately used by some prosecutors in the late fall of 2011 to draft affidavits, as described below.

The parties participated in three informal status conferences over the summer, held on June 13, 2011, July 28, 2011, and August 17, 2011. The parties discussed discovery and scheduling issues related to Robinson's RJA jury discrimination claims at these conferences. The State was represented at the status conferences by Cumberland County District Attorney William West, Colyer, Thompson, and Assistant Attorney General Jonathan Babb. Babb represented to the Court that he was participating in the Cumberland County litigation at the request of the Cumberland County District Attorney's office, and that he had been working with claims of jury discrimination under the RJA since December 2010 because of his involvement in a Durham County case.[2]

After consulting with all counsel, an evidentiary hearing was scheduled on Robinson's first three RJA claims for September 6, 2011. On July 5, 2011, Robinson provided the State with the statistical analyses and software output used in the regression portions of the MSU Study. 9/6/2011 HTpp. 226-27. Robinson provided the State with a report summarizing the MSU findings on July 20, 2011. *Id.* At the August 17, 2011 status conference, the Court agreed to postpone the September 6, 2011 evidentiary hearing date and hold a scheduling and discovery hearing on the record on that date instead.

The State elected to wait to retain its statistical expert, Joseph Katz, until late July or early August, 2011, approximately one year after Robinson filed his MAR and just weeks before the September evidentiary hearing had been scheduled. HTp. 361. Katz testified at the September 6, 2011 discovery hearing that he had proposed two possible avenues of research: (1) investigation of the accuracy of the MSU study data by sending the cases to local district attorneys for their review; and/or (2) compilation of non-racial explanations for struck black

[2] Babb appeared on behalf of the State at the November 6 and 7, 2011 discovery hearing, but then neither withdrew nor appeared again in the litigation.

venire members by prosecutors. He testified that if he determined that the MSU study data could not be validly analyzed, and the State decided just to respond as it would in a *Batson* challenge, his "role, at that point, would be simply to maybe do some data management or something like that," and that he would not need to provide any statistical analysis. 9/6/2011 HTpp. 157-58. He testified that as of the date of the hearing, September 6, 2011, the State had sent some of the MSU data to prosecutors.[3] *Id.*

Katz estimated that he would need three to four months to complete his analysis and be prepared to testify. 9/6/2011 HTp. 161. He planned to examine the DCIs and review the MSU study while waiting for responses from prosecutors. 9/6/2011 HTp. 181. He anticipated that prosecutors would take two to three months to complete their reviews, and that he would need a month to analyze their reviews. 9/6/2011 HTp. 182. Katz was retired and testified that he would be available to work full time on his work for the Cumberland County prosecutors, and that no financial or other limitations had been placed on his work. 9/6/2011 HT 359. In light of the testimony, the Court ordered that the defense would proceed with its evidence on November 14, 2011, but that either party could ask the Court for more time if it was not prepared to go forward on that date. 9/6/2011 HT 336, 338, 364, 368, 374-375.

On November 11, 2011, the Court granted the State a second continuance of the evidentiary hearing. At the November 11, 2011 hearing on its motion, the State sought additional time in order for prosecutors to provide Katz with race-neutral explanations from their cases. The State assured the Court that it was on track for the original three- to four-month time estimate from early September, and that the State would be prepared if the Court granted an

[3] Defense counsel had subpoenaed Peg Dorer to the hearing to testify about similar data collection efforts that had been initiated by the North Carolina Conference of District Attorneys in 2010. HTpp. 200-06. Dorer was on vacation out of the country and did not appear. *Id.* Defense counsel proffered that Dorer had met with counsel in 2010 and described underway data collection efforts coordinated by the Conference. HTpp. 206.

additional two months for it to gather information. 11/11/2011 HTpp. 4-5. The State explained that Katz had identified respondents in prosecutors' offices, and that he had sent materials to the prosecutors by electronic mail in late September. 11/11/2011 HTpp. 12-14. The State told the Court that after it had worked out some initial email difficulties, it "started to get a tremendous response," and responses were coming back quickly.[4] 11/11/2011 HTp. 13. Over Robinson's strenuous objection, the Court granted the State's motion to continue the hearing for a period of two months. The Court cautioned all of the parties that the new hearing date was a firm date. *Id.* at 41. The evidentiary hearing was continued from November 14, 2011, to January 30, 2012, a period of two and a half months.

The State did not raise the issue of incomplete prosecutor responses again until January 30, 2012, the first day of the evidentiary hearing. Despite the State's predictions from November, Katz had received responses in only slightly more than half of the cases. HTp. 20. The State asked for additional time to attempt to secure reviews of transcripts for outstanding counties. The State suggested that it could secure additional resources from the Conference of District Attorneys so that other reviewers, who did not participate in the trials and were not designated by their offices, could possibly review transcripts for the non-compliant district attorney offices. HTp 3.

The Court denied this third and untimely motion for continuance on the ground that the fault for the incomplete data collection lay with the prosecutors' failures to comply with the requests for review by Katz. The law is clear that a party cannot create the conditions for delay and then use that as a basis for continuance. *See, e.g., State v. Howard*, 158 N.C. App. 226, 229 (N.C. 2003) (no abuse of discretion for denying continuance where defendant was unable to

[4] The State had reached out to prosecutors across North Carolina at a CLE conference to stress the importance of responding to its request for information. 11/11/2011 HTp. 26.

consult with counsel because of his own actions); *State v. Wright*, 708 S.E.2d 112, 119 (N.C.App. 2011) (no abuse of discretion for denying continuance where defense counsel waited until the day of trial to file a motion for scientific testing). Thus, under our law, the State's failure to timely respond to Katz's requests was not an appropriate basis for a third continuance.

Moreover, the State was not prejudiced by the Court's denial of a third continuance. First, the State failed to show that it would have been able to produce any new results with more time. Second, despite the Court's order of December 19, 2011, setting a January 10, 2012 deadline for production of copies of any written statements from potential witnesses, the State continued, throughout the hearing and nearly until the close of evidence, to obtain "final," that is signed and notarized, copies of prosecutor affidavits. Robinson did not object to the admission of these affidavits so long as Robinson had been provided a draft copy prior to the discovery deadline; these were duly admitted. Third, as discussed elsewhere in this Order, the Court found the affidavits presented by the State were, by their nature, limited in evidentiary value.

Finally, even if the district attorneys had offered affidavits for 100% of the excluded African-American venire members, those affidavits still would have suffered from the same infirmities as seen in the other affidavits, as the Court will explain in another section of this order.

PART II. STATUTORY INTERPRETATION OF THE RJA

Because Robinson's RJA case is the first in North Carolina to be decided on the merits, the meaning of the RJA's statutory language is a matter of first impression. As a result, before analyzing Robinson's claims, the Court must interpret the provisions of the RJA that are at issue.[5] In doing so, the Court will apply well-established canons of statutory interpretation.

[5] In this order, the Court will not address the constitutionality of the RJA. The Court has already ruled upon that issue, finding the RJA valid under both the state and federal constitutions. HTp. 1080. In an order issued on

A. 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. *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

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February 24, 2011, in the cases of *State v. Moseley* and *State v. Moses*, the RJA has also been found constitutional by the Superior Court of Forsyth County, the Honorable William Z. Wood, Jr., presiding.

> 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).

This Court will apply the foregoing principles in interpreting the RJA.

B. MEANING OF "SIGNIFICANT FACTOR"

The first question before the Court is the meaning of the legal standard by which a defendant may obtain relief under the RJA.

The 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 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 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-2011(a). One type of evidence relevant to establishing that race was a significant factor in decisions to seek or impose a death sentence in the county, district, division or state is evidence that "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection." N.C. Gen. Stat. § 15A-2011(a)(3).

The RJA does not explicitly define the term "significant factor." It falls to this Court, then, to determine its meaning by applying principles of statutory construction. 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, in the context of the RJA, when determining whether race was a "significant factor," 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.

In applying this standard, the Court will follow the guidance provided by the Federal Judicial Center's *Reference Manual on Scientific Evidence*, which notes the importance of considering both "statistical" and "practical" significance. *See* David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in Reference Manual on Scientific Evidence* 83, 252 (Federal Judicial Center 3d ed. 2011).[6]

With respect to statistical significance, courts commonly apply this test to ensure that the reported observations are unlikely to be explained by mere chance. *Id.* The results of a binomial test of statistical significance can be expressed as a probability. It is also common to express statistical significance in terms of standard deviations. When a result is greater than 1.96 standard deviations (for a "two-sided" test), in a normal distribution or in large samples, it is typically regarded as statistically significant at probability ("p") < .05. In *Castaneda v. Partida*,

[6] 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).

430 U.S. 482, 495-96 n.17 (1977) and *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309 n.4 (1977), the Court described the null hypothesis as "suspect to a social scientist" when statistics from a "large sample" fall more than "two or three deviations" from its suspected value under the null hypothesis. These differences produce *p*-values of five percent and one percent respectively. *See Reference Guide on Statistics, supra*, at 251 n.101. This Court concludes that a defendant who establishes a low probability of 5% or less that his statistical results are due to chance demonstrates "statistical significance" under the RJA.

With respect to practical significance, this Court will look to the four-fifths rule promulgated by the Equal Opportunity Employment Commission:

> [A] common measure of significance in disparate impact cases 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, say that 200 white applicants and 100 black applicants took a qualification test for employment at a given business. Of the 200 white applicants, 100 scored high enough to advance to the next level of consideration (100 out of 200 equals a 50% success rate). Of the 100 black applicants, 25 passed (25 out of 100 equals a 25% success rate). To apply the four-fifths rule in a case where the black applicants are the plaintiffs, one takes four-fifths of the white applicants' success rate, which is 40%: the white applicants' success rate of 50% times 4/5 (or 0.80) which equals 40%. Because the black success rate (25%) is lower than four-fifths of the white success rate (40%), the plaintiffs have met their burden to show a disparate impact under the EEOC's rule.

Paul Secunda and Jeffrey Hirsch, *Mastering Employment Discrimination Law* 88 (Carolina Academic Press 2010).

As applied to the RJA, the four-fifths rule would be used to measure the ratio of the prosecutors' peremptory challenges to qualified white jurors as compared to the ratio of the prosecutors' challenges to qualified black jurors. If the defendant is able to show, by county,

district, division, or state that, as a result of the prosecutors' strikes, the success rates of qualified black venire members in being seated on the jury is four-fifths or less of the success rate of qualified non-black venire members, he has proven a *prima facie* case of a disparity that is practically significant under the RJA.

C. BURDEN OF PROOF

Under the RJA, it is the defendant's burden to prove by a preponderance of the evidence that "race was a significant factor in [decisions to exercise peremptory challenges during jury selection] in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." *See* N.C. Gen. Stat. § 15A-2011(c) (placing burden of proving an RJA claim on the defendant); N.C. Gen. Stat. § 15A-2012(c) (requiring that RJA claims comply with the statutes governing motions for appropriate relief); N.C. Gen. Stat. § 15A-1420(c)(5) (providing that, if an evidentiary hearing is held on an MAR, "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 RJA establish an evidentiary burden shifting process:

> 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, the prosecutorial district, the judicial division, or the State 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, this Court holds that, to establish a *prima facie* case, a defendant may introduce statistical proof of unadjusted data demonstrating significant racial disparities in

prosecutors' peremptory strikes.[7] 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 (d) ("The State may offer evidence in rebuttal of the claims or evidence of the defendant."); *Castaneda,* 430 U.S. at 497; *with Batson,* 476 U.S. at 96-97 (the State need only advance a race-neutral explanation). Like the defendant, the State may use either statistical or 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.

D. 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 in his particular case.

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 RJA provision. To hold that a defendant cannot prevail under the RJA unless he proves intentional discrimination would read a requirement into the statute that the General Assembly clearly did not place there.

The determination that intent plays no role in the RJA's "significant factor" standard is supported by the plain language of the RJA itself. The RJA states that courts *shall* order relief if the defendant proves that race was a significant factor in capital decision-making in the county, district, judicial division or state. N.C. Gen. Stat. § 15A-2012(a)(3). Because of the collective

[7] The unadjusted disparities measure differential race outcomes without regard to other variables that could potentially explain peremptory strikes. The adjusted disparities take into account and control for the impact of those non-racial variables.

nature of the claim, and the multiple prosecutors and prosecutors' offices involved, it would be illogical for any claim based upon an evidentiary showing in a county, district, judicial division or the state to involve proof of intent. This Court therefore holds that a defendant need not prove intentional discrimination to prevail under the RJA.[8]

The Court likewise holds that the plain words of the RJA demonstrate the absence of any requirement to prove race was the basis of the decision to seek or impose a death sentence in a defendant's particular case. In clear and unambiguous terms, the RJA permits showings of patterns of discrimination by county, district, division, and state. The RJA does not require that these showings include additional proof of discrimination in the defendant's particular case. The Court's holding is further supported by the fact that the RJA specifically authorizes the use of statistical evidence as proof in making out a claim. *See* N.C. Gen. Stat. §15A-2011(b). Statistical evidence, by its very nature, focuses on a broad pattern of decisions across numerous cases. Testimony at the hearing in this matter established that statistical significance cannot be obtained without a sufficiently large number of data points, which in this case would be prosecutors' peremptory strike decisions.

The Court's holding that a defendant need not prove intentional discrimination in his particular case 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, 292 (1987), which required the defendant to prove intentional discrimination in the particular case.

[8] The Court does note, however, that while proof of intent is not required, it is permitted under the RJA's provision allowing testimony from witnesses within the criminal justice system. N.C. Gen. Stat. § 15A-2011(b).

This Court must also presume the General Assembly was aware of the explicit invitation in *McCleskey v. Kemp* 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).

This Court holds that the General Assembly was aware of both *Batson* and *McCleskey* when it enacted the RJA and therefore did not write the RJA as a mere recapitulation of existing constitutional case law. Were this Court to hold that the RJA incorporates the same intent and case-specific requirements found in *Batson* and *McCleskey*, the 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.

The legislative history of the RJA confirms this analysis. The General Assembly removed a provision contained in an earlier version of the bill that required a defendant to show "with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek or impose a death sentence *in his or her case*." General Assembly of North Carolina, House Bill 1291 (2007 Session) (emphasis added).[9]

[9] This earlier version of the RJA may be found at the following web address: http://www.ncga.state.nc.us/sessions/2007/bills/ house/html/h1291v1.html.

By permitting capital defendants to prevail under the RJA upon a statistical 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. *See 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).

E. 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 RJA does not contain any 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 RJA unless he 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 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; 15A-1420(c)(6). The RJA, however, dispenses with the prejudice requirement. Pursuant to N.C. Gen. Stat. § 15A-2012(a)(3), "[i]f the court finds that race was a significant factor in decisions to seek or impose the sentence of death . . . 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").

Both defendants and society are injured by the use of peremptory strikes in a racially-biased manner:

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury . . . but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."
>
> Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial . . . ."

Miller-El v. Dretke, 545 U.S. 231, 237-38 (2005) (internal citations omitted); *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (holding that even if there is no showing of actual bias in the tribunal, due process is denied by circumstances that create the likelihood or the appearance of bias); *see also State v. Cofield*, 320 N.C. 297 (1987) (explaining that "the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice").

The RJA does not require that the defendant show that the prosecutor's decisions resulted in any specific final jury composition. In the analogous area of employment law, the Supreme Court squarely rejected the argument that a claim of discrimination can be defeated by reference to the "bottom line." *Connecticut v. Teal*, 457 U.S. 440 (1982). The *Connecticut* plaintiffs had alleged discrimination against African-American applicants for promotions based on the use of a written test which disqualified a disproportionate number of applicants from consideration. *Id.* at 448. The employer argued as a defense that it had engaged in affirmative action by selectively promoting a number of African-American applicants despite the test results, resulting in a "bottom line" of no discriminatory impact on African-Americans in the final promotion numbers, and therefore should not be held liable for disproportionately excluding some African-American applicants from consideration. *Id.* at 447. The Supreme Court emphatically rejected this defense:

> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.
>
> . . .

> The fact remains, however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of ... discrimination."

457 U.S. at 455 (internal cites and quotations omitted)

The determination that a defendant need not demonstrate an impact upon the jury's final racial composition is also 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 engages in remedial strikes of white jurors. The 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.

F. ALTERNATE STANDARDS OF PROOF

The Court holds that an appropriate evidentiary framework to apply to RJA claims is one that focuses upon the disparate impact that prosecutors' peremptory strike decisions have upon 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 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 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 upon 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 upon decision-making patterns within counties, prosecutorial districts, judicial division, or the state. 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 the county, district, division, or state's standard or regular practice.

G. AVAILABLE RELIEF

The 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 in one of the four geographical areas identified by the statute: the death sentence "shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole." *See* N.C. Gen. Stat. § 15A-2012(a)(3). 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 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 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).

PART III. FINDINGS OF FACT

A. STATISTICAL EVIDENCE

1. The Court makes the following findings of fact with respect to the statistical evidence presented:

Overview

2. The heart of Robinson's proof is 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 7,421 venire members drawn from the 173 proceedings for the inmates of North Carolina's death row in 2010; and (2) a regression study of a 25% random sample drawn from the 7,421 venire member data set that analyzed whether alternative explanations impacted the relationship between race and strike decisions. The MSU Study also conducted a regression study of 100% of the venire members from the Cumberland County cases.

3. Two expert witnesses, O'Brien and Woodworth, testified for Robinson regarding the methodology, conclusions, and validity of the MSU Study. One expert witness, Katz, testified for the State regarding the same. All three experts are highly qualified and have published in peer reviewed journals. O'Brien has significant experience in research design, statistics, and empirical studies. Woodworth and Katz are both retired professors in the field of applied statistics. Of the three, O'Brien alone has legal training and she alone was qualified to testify as an expert in empirical legal studies.

4. As described below in detail, the Court finds the MSU Study to be a valid, highly reliable, statistical study of jury selection practices in North Carolina capital cases 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 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 significantly correlated with strike decisions in North Carolina.

5. Katz testified that he believed the design of the MSU Study is flawed. For the reasons explained below, this Court rejects this criticism. With respect to the unadjusted results, Katz testified that he performed calculations of the disparities in strike rates and reached the same conclusions as O'Brien. He testified that he agreed that the large disparities required additional investigation, and essentially satisfied Robinson's *prima facie* burden. 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.

6. Katz 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 Robinson has waived any such claim to relief by not alleging this claim. 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.

7. 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.

8. 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 Robinson's trial based on the adjusted and unadjusted data for the entire twenty year 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 "at the time of the trial."

The MSU Study Design was Appropriate.

9. 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. HTp. 110. 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? HTpp. 109-110, DE6.

10. 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.[10] DE6. All but one of these proceedings was tried between 1990 and 2010. HTp. 115.

11. 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, DE6, pp. 2-3, HTpp. 478-50; and (2) The case materials necessary to conduct a robust and valid analysis were more likely available and would therefore provide better quality data. DE6, pp. 2-3.

12. The State contested the appropriateness of this study design. Katz testified that, in his opinion, the RJA requires an analysis of all the capitally tried cases during a relevant time period and that the selection of the 173 cases was an invalid probability sample. HTpp. 1739, 1742. 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. HTp. 1749. He opined that the RJA requires an analysis of all the capitally tried cases during a relevant time period, including cases that resulted in life verdicts. HTp. 1744. According to Katz, because the 173 cases in the MSU Study do not constitute a random sample of the total number of capital trials, then one cannot support any inference from the statistical findings of the 173 cases that could be generalized to the whole population of capital trials. *Id.* While explaining 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

[10] 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 is not included because the case materials are unavailable.

result less than the death penalty, Katz never offered any explanation to the Court why the strike decisions in these cases would or could differ from the 173 cases analyzed. HTpp. 1743-44. 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; no such results were presented to the Court. DE24.

13. The Court is not persuaded by Katz's criticism of the study design and finds that (i) the RJA does not require an analysis of the larger population of all capital trials during a relevant time period; and (ii) that the selection of the 173 cases does not constitute an invalid sample.

14. 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 that it is appropriate to generalize and infer statistical findings to a larger population from data 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.

15. 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:

(a) 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. HTp. 749;

(b) The selection of the 173 cases was not a form of "cherry-picking" proceedings that would be more favorable toward one party. HTp. 749;

(c) The State produced no evidence from any prosecutor in North Carolina that suggested their strike decisions or motivations may be different in capitally tried cases that either (i) concluded with some result less than a death verdict or (ii) which ended in a death verdict but the defendant is no longer on death row;

(d) John Wyatt Dickson, who prosecuted Robinson, testified at the hearing, that when he prosecuted capital cases, including Robinson's, his approach in jury selection was consistent regardless of the outcome of the case. HTpp. 1197-98, 1203. This evidence was not contradicted by either the State or Robinson and this Court finds this as a fact;

(e) 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. HTpp. 1743-44.

16. 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. HTpp. 111-112. The second study part was based upon a random sample of the 7,421 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

17. 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, including alternates, producing a database of 7,421 venire members. DE6, p. 3. The researchers were meticulous in their data collection and coding processes, producing highly transparent and reliable data.

18. O'Brien and Grosso created an electronic and paper case file for each voir dire 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. DE6, p. 3. All of this information was provided to the State in discovery. HTp. 117.

19. All coding decisions and data entry for the MSU Study were made and completed by staff attorneys at Michigan State University College of Law. DE6, p. 3. 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. DE6, p 3.

20. 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 the

primary documents and transcripts. The DCIs allowed for the systematic coding of the data to articulate precisely what pieces of information the researchers wanted to collect. HTp. 117.

21. 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. DE6, p. 4.

22. For each of the venire members in the study, the DCIs collected: basic demographic and procedural information specific to each venire member; determination of strike eligibility of each venire member; and race of the venire member and the source of information for the determination of race. This information, if reliable, is sufficient to conduct an unadjusted study of the peremptory challenges by prosecutors in capital cases.

23. 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. DE6, p 8.

24. The sample of venire members for Part II of the MSU Study was determined by a statistical software package routinely relied upon and accepted by social scientists as being accurate (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. HTpp. 164-66. 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. HTpp. 166-67; DE3, p. 52.

25. 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. DE3, p. 52; HTpp. 166-167.

26. 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. DE6, p 9.

27. For the venire members included in either the statewide 25% sample or the Cumberland County study, the DCIs collected information regarding:

(a) 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);

(b) 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);

(c) Attitudes about potentially relevant matters (e.g., ambivalence about the death penalty or skepticism about or greater faith in the credibility of police officers);

(d) 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

(e) Any stated bias or difficulty in following applicable law. DE6, p. 5; HTpp. 120-121.

28. The descriptive information collected on the venire members included in Part II of the Cumberland County portions of the MSU Study is documented in the DCIs in DE6, App. B, pp. 5-14.

29. 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. O'Brien and Grosso utilized the variables from the Philadelphia County study as a starting point before refining them for the MSU Study. HTpp. 121-122, 349-353; DE6, p. 2. O'Brien and Grosso had invited input and participation from prosecutors through William P. Hart, Senior Deputy Attorney General, but got no response. HTp. 422.

30. 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. DE6, p. 6. 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. DE6, p. 7.

31. 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 by an attorney on the record). DE6, p. 6. 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.

32. 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. DE6, p. 6 The Court finds that it is reasonable and appropriate to rely upon these public record sources for the determination of the race of venire members.

33. 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. DE6, p. 7. The Court finds that these protocols and safeguards enhance the integrity and reliability of the study.

34. O'Brien and Grosso saved an electronic copy of all documents used to make race determinations and these documents were provided to the State. DE6, p. 7; HTp. 117.

35. O'Brien and Grosso self-tested the reliability of the electronic database protocol for race coding by independently recoding using the electronic database protocol, 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. Upon comparison of the recoding to the self-reported race designations, in those cases where the staff attorneys were able to obtain race information through an electronic database, the information matched the self-reported race information for 97.9% of the venire members. DE6, pp. 7-8 The Court finds the coding of the race of the venire members to be accurate.

36. The MSU Study documented the race information for all but seven of the 7,421 venire members in the study. DE6, p. 8.

37. 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. DE6, p. 10.

38. 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. DE6, p. 9. Any discrepancies in judgment were resolved by O'Brien or Grosso. HTp. 131, 171. The Court finds that these rigid precautionary safeguards enhance the reliability and validity of the MSU Study.

39. 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 Answer," and is part of the MSU Study. DE6, p. 10.

40. 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. HTp. 171. The coding log and cleaning document were both provided to the State. HTp. 171.

41. 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. HTp. 172. 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.

Evidence from the analysis of unadjusted racial disparities (Part I).

42. The statewide database of the MSU Study included 7,421 venire members. Of those, 7,400 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, 6,039 were white, 1,208 were black and 153 were of other races. DE6, p. 11. The Court finds that it is reasonable and appropriate to employ this methodology.

43. The MSU Study reports racial disparities observed in prosecutorial strike decisions as well as a measure of the likelihood that the disparities would occur as a result of chance. This 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. DE6, p. 11. The generally accepted threshold for a finding that is statistically significant is a *p*-value less than 0.05. HTp. 144.

44. Analysis of *p*-value is one method of expressing statistical significance, although there are other methods. 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. 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 *p*-value, two sigma rule and confidence interval analyses are mutually consistent with each other such that all three tests will agree with each other. Generally, a statistically significant finding will be a *p*-value less than 0.05 which is more than two sigmas (or standard deviations) from the null hypothesis of zero and will fall within a 95% confidence interval. A *p*-value less than 0.01 is more than three sigmas (or

standard deviations) from the null hypothesis of zero and will fall within a 99% confidence interval. HTpp. 506, 524, 528-531, 1947.

45. The SPSS software utilized by O'Brien and Grosso generally reports *p*-values to three decimal points such that a *p*-value of <0.001 means that there is less than one in 1,000 chances that the observed disparity was due merely to chance, even though the actual *p*-value may be much smaller than the reported value. HTp. 140.

46. O'Brien testified, without contradiction, to large disparities in strike rates based on race.[11] Across all strike-eligible venire members in the MSU Study, the Court finds that prosecutors statewide struck 52.6% 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 of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in ten trillion. DE3, p. 22. Katz, the state's statistical expert, concurred that this disparity is statistically significant. HTp. 1944.

47. 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. HTp. 140. The Court finds that the statewide strike rate ratio across all strike-eligible venire members in the MSU Study is 2.05 (52.6% ÷ 25.7% = 2.05). DE3, p. 22.

48. 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% - 52.6% = 47.4% and the acceptance rates of non-black venire members is 100% - 25.7% = 74.3%. DE3, p. 23.

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[11] 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 very comparable when the comparison is between black and white venire members. SE44, p. 9, fn. 7.

49. 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 of <0.001. 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. DE3, p. 24 Katz concurred that this disparity is statistically significant. HTp. 1945.

50. 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 of <0.001. DE6, p. 12.

51. 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. HTpp. 149-150.

52. In the 122 cases statewide in the MSU Study from 1990 through 1999, the Court finds that prosecutors struck an average of 55.6% of eligible black venire members, compared to only 24.7% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.25. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in

1,000,000,000,000,000,000,000,000. DE3, p. 26 Katz concurred that this disparity is statistically significant. HTp. 1945.

53. In the 44 cases statewide in the MSU Study from 2000 through 2010, the Court finds that prosecutors struck an average of 56.9% of eligible black venire members, compared to only 25.1% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.27. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in ten million. DE3, p. 27 Katz concurred that this disparity is statistically significant. HTp. 1945.

54. In the 42 cases statewide in the MSU Study from 1990 through 1994, the Court finds that prosecutors struck an average of 57.4% of eligible black venire members, compared to only 25.9% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.22. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in a million. DE3, p. 29. Katz concurred that this disparity is statistically significant. HTp. 1946.

55. In the 80 cases statewide in the MSU Study from 1995 through 1999, the Court finds that prosecutors struck an average of 54.7% of eligible black venire members, compared to only 24.0% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.28. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 10,000,000,000,000,000. DE3, p. 30. Katz concurred that this disparity is statistically significant. HTp. 1946.

56. In the 29 cases statewide in the MSU Study from 2000 through 2004, the Court finds that prosecutors struck an average of 57.2% of eligible black venire members, compared to

only 25.0% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.29. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 100,000. DE3, p. 31. Katz concurred that this disparity is statistically significant. HTp. 1947.

57. In the 15 cases statewide in the MSU Study from 2005 through 2010, the Court finds that prosecutors struck an average of 56.4% of eligible black venire members, compared to only 25.4% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.22. This difference is statistically significant with a *p*-value of <0.01. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 100. DE3, p. 32. Katz concurred that this disparity is statistically significant. HTp. 1947.

58. Woodworth testified that he analyzed the statewide data utilizing a time smoothing analysis which analyzes occurrences over a time continuum. 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. Woodworth testified, and the Court finds that the time smoothing analysis gives a sort 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 Robinson's trial. The unadjusted odds ratio at the time of Robinson's trial statewide was just under four with a 95% confidence interval, showing statistical significance. The Court finds this analysis to be generally accepted in statistics, highly probative for pinpointing the racial disparity at the time and as of the date of Robinson's trial, and finds that the analysis is valid and reliable. DE10, pp. 6, 8; HTpp. 541-544; 546-547. The State presented no contrary statistical

analysis rebutting this time smoothing analysis that found a statistically significant disparity at the time of Robinson's trial.

59. O'Brien and Grosso also analyzed the data by prosecutorial districts. 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	63.0%	17.2%	3.7
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	60.7%	21.8%	2.8
9A	1	42.1%	33.3%	1.3
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	66.7%	25.7%	2.6
16A	2	40.9%	31.1%	1.3
16B	5	56.0%	21.4%	2.6
17A	2	62.5%	25.7%	2.4
17B	2	50.0%	23.9%	2.1
18	4	45.6%	23.2%	2.0
19A	3	55.6%	25.4%	2.2
19B	9	69.4%	28.6%	2.4
19C	1	16.7%	22.9%	0.7
19D	1	0.0%	31.8%	0.0
20	7	87.0%	24.0%	3.6
21	13	54.2%	24.4%	2.2
22	8	65.6%	27.8%	2.4
22.1	1	100.0%	23.8%	4.2

23	1	50.0%	31.4%	1.6
25	1	25.0%	33.9%	0.7
26	5	56.4%	27.0%	2.1
27A	7	37.3%	31.7%	1.2
28	9	56.9%	30.7%	1.9
29	5	42.0%	31.6%	1.3

60. 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. HTpp. 152-154.

61. 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
Northhampton	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

62. Prosecutors struck black venire members at a higher rate than other venire members in all but four counties: Catawba, Moore, Polk and Stokes.

63. At the time of Robinson's trial, Cumberland County was in the Second Judicial Division. Since January 1, 2000, Cumberland County has been and currently is in the Fourth Judicial Division.

64. 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.

65. In the eight cases in the MSU Study from the current Fourth Judicial Division as constituted since January 1, 2000, the Court finds that prosecutors struck an average of 62.4% of eligible black venire members, compared to only 21.9% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.85. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 1,000. DE3, p. 46. Katz concurred that this disparity is statistically significant. HTp. 1949.

66. In the 37 cases in the MSU Study from former Second Judicial Division as constituted from January 1, 1990 through December 21, 1999, the Court finds that prosecutors struck an average of 51.5% of eligible black venire members, compared to only 25.1% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.05. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 100,000,000,000. DE3, p. 46. Katz concurred that this disparity is statistically significant. HTp. 1949.

67. In the 11 cases in the MSU Study from Cumberland County (and Prosecutorial District 12) from January 1, 1990 through July 1, 2010, the Court finds that prosecutors struck an

average of 52.7% of eligible black venire members, compared to only 20.5% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.57. This difference is statistically significant with a *p*-value of <0.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 1,000. DE3, p. 46. Katz concurred that this disparity is statistically significant. HTp. 1949.

68. In Cumberland County, 11 proceedings are represented in the MSU Study for the nine inmates who reside on death row. The Court finds that in every case, the State peremptorily challenged black venire members at a higher rate than other eligible venire members as set forth below:

Defendant	Black Venire Members	Other Venire Members	Strike Rate Ratio
Quintel Augustine	100.0%	27.0%	3.70
Richard E. Cagle	28.6%	27.5%	1.04
Tilmon C. Golphin	71.4%	35.8%	1.99
John D. McNeil	60.0%	13.6%	4.40
Jeffrey K. Meyer	41.2%	19.0%	2.16
Jeffrey K. Meyer	50.0%	15.4%	3.25
Marcus Robinson	50.0%	14.3%	3.50
Christina S. Walters	52.6%	14.8%	3.55
Philip E. Wilkinson	40.0%	23.3%	1.71
Eugene J. Williams	38.5%	15.4%	2.50
Eugene J. Williams	47.4%	19.0%	2.49

69. 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*) being almost an equal strike rate.

70. 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. HTp. 159.

71. Woodworth further analyzed the data from Cumberland County with the same time smoothing analysis that he completed on the unadjusted statewide data. Woodworth testified and the Court so finds as a fact that the odds ratio at the time of Robinson's trial for a black venire member being struck in Cumberland County is about 2.5, with the confidence intervals showing that this finding is statistically significant. DE10, p. 9; HTpp. 547-549.

72. John Wyatt Dickson participated in the jury selection of three capital cases in the MSU Study from Cumberland County: Robinson, John McNeill and Jeffrey Meyer. In the McNeill case, Dickson only participated during a portion of the voir dire. In each of the three cases, the Court finds that black venire members were struck at a significantly higher rate than other eligible venire members, as indicated by the below strike rates that the Court finds are accurate:

Defendant	Black Venire Members	Other Venire Members	Strike Rate Ratio
Marcus Robinson	50.0%	14.3%	3.5
John McNeill	60.0%	13.6%	4.4
Jeffery Meyer	41.2%	19.0%	2.2

73. In the three cases in the MSU Study prosecuted by Dickson, the difference in strike rates is statistically significant with a *p*-value of 0.00124. The probability of this disparity occurring in a race-neutral jury selection process is 1.24 in 1,000. DE3, p. 50.

74. The Court finds that in Robinson's case, the prosecutor used nine peremptory challenges. Four challenges were used to excuse white venire members and five challenges were used to excuse black venire members. Fifty percent of the black venire members were peremptorily excused by the prosecutor (five of 10) while only 14.3% of the other eligible venire members were peremptorily excused by the prosecutor (four of 28). DE4, Cumberland Data.

75. The Court finds that, in Robinson's case, the difference in strike rates is statistically significant with a *p*-value of 0.036. The probability of this disparity occurring in a race-neutral jury selection process is 3.6 in 100. DE3, p. 51.

76. The Court finds that, in Robinson's case, 26.3% of the eligible venire members considered by the State were black (10 of 38). DE4-Cumberland Data. If the final jury composition was representative of this percentage of eligible black venire members, there would have been three black venire members on the final jury. However, after the prosecutor's disparate strikes of black venire members, only 17.2% of the venire members passed to and considered by Robinson were black (five of 29). Robinson then exercised his peremptory challenges in a racially neutral manner resulting in a final seated jury of 16.7% black venire members (two of 12). Including the alternates, 14.3% of the venire members were black (two of 14). DE4-Cumberland Data. The Court finds that the reduction of the qualified black venire members to be considered by the defense from 26.3% to 17.2% was due to the disparate strikes against black venire members by the prosecutor. Further, the Court finds that the reduction of

the qualified black venire members from 26.3% to 17.2% by the prosecution represents a reduction by more than one black venire member causing an impact on the final composition of Robinson's jury by reducing the number of black venire members from three to two. DE4-Cumberland Data.

77. Woodworth further 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 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. HTpp. 531-32. Woodworth further testified and the Court finds that, applying the standard of practical or material significance, the MSU Study's unadjusted data are consistent with an inference that race was a significant factor in prosecutors' use of peremptory strikes in North Carolina at the time of Robinson's trial, in the former Second Judicial Division at the time of Robinson's trial, in Cumberland County at the time of Robinson's trial, and in Robinson's trial itself. HTpp. 551-52.

78. The Court finds that the unadjusted disparities in strike rates against eligible black venire members compared to others are consistently significant to a very high level of reliability and that 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. DE6, p. 12.

79. Based solely upon the unadjusted analysis of the decisions to peremptorily challenge black venire members, the Court finds that race was a materially, practically and statistically 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 between January 1, 1990 and July 1, 2010;

In North Carolina between January 1, 1990 and December 31, 1999;

In North Carolina between January 1, 1990 and December 31, 1994;

In North Carolina at the time of Robinson's trial in 1994;

In former Second Judicial Division between January 1, 1990 and December 31, 1999;

In former Second Judicial Division at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994; and

In Robinson's trial. HTpp. 161-164

80. O'Brien testified that the stark disparities seen in the unadjusted data permit an inference of intentional discrimination by prosecutors. HTp. 164. The Court agrees and finds that the highly consistent, statistically significant showing of disparities in the unadjusted data is sufficiently strong as to permit an inference of intentional discrimination. Based on the unadjusted data alone, the Court so finds that prosecutors in capital cases have intentionally discriminated against black venire members:

In North Carolina between January 1, 1990 and July 1, 2010;

In North Carolina between January 1, 1990 and December 31, 1999;

In North Carolina between January 1, 1990 and December 31, 1994;

In North Carolina at the time of Robinson's trial in 1994;

In former Second Judicial Division between January 1, 1990 and December 31, 1999;

In former Second Judicial Division at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994; and

In Robinson's trial. HTp. 164.

The Controlled Regression Analyses.

81. In Part II of the MSU Study the researchers examined whether the stark disparities in the unadjusted data were affected in any way by factors that correlate with race but that may themselves be race-neutral. DE6, pp. 12-13.

82. 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, (2) unemployed venire members, (3) venire members who were or 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. DE6, p. 13; HTpp. 177-78.

83. These cross-tabulations did not dispel the link between race and prosecutor strike decisions. O'Brien removed from the 25% statewide sample all 185 venire members who expressed reservations about the death penalty. Of the remaining venire members in the 25% sample who did not express any reservations about the death penalty, the MSU Study found that the State struck 44.5% of all black venire members and 20.8% of all other venire members. She thus found that, even if the non-racial variable of death penalty reservations is removed from consideration, prosecutors were still 2.1 times more likely to strike qualified black venire members. The probability of observing a racial disparity of this magnitude in a race-neutral setting is less than 0.001. HTpp. 177-82; DE3, p. 63. The results of these calculations were reported in Table 11 of the MSU Study. DE6, p. 21.

84. The MSU Study removed from the 25% statewide sample every venire member who was unemployed, which amounted to 25 venire members. After analyzing all remaining venire members in the 25% sample who were employed, the MSU Study found that the State struck 49.0% of all black venire members and 24.7% of all other venire members. The study thus found that, even if the non-racial variable of unemployment is removed from consideration, prosecutors were still 2.0 times more likely to strike qualified black venire members. The study found that the probability of observing a racial disparity of this magnitude in a race-neutral setting is less than 0.001. HTpp. 177-82; DE3, p. 63.

85. The MSU Study removed from the 25% statewide sample every venire member who was or had been accused of a crime or was close to another person, i.e. family or friend, who was or had been accused of a crime, which amounted to 398 venire members. After

analyzing all remaining venire members in the 25% sample who were not accused of a crime or who were not close to another person who had been accused of a crime, the MSU Study found that the State struck 50.3% of all black venire members and 23.7% of all other venire members. The study thus found that, even if the non-racial variable of being accused of a crime is removed from consideration, prosecutors were still 2.1 times more likely to strike qualified black venire members. The study found that the probability of observing a racial disparity of this magnitude in a race-neutral setting is less than 0.001. HTpp. 177-82; DE3, p. 63.

86. The MSU Study removed from the 25% statewide sample every venire member who knew a participant in the trial, which amounted to 47 venire members. After analyzing all remaining venire members in the 25% sample who did not know any trial participants, the MSU Study found that the State struck 53.2% of all black venire members and 25.4% of all other venire members. The study thus found that, even if the non-racial variable of knowing a trial participant is removed from consideration, prosecutors were still 2.1 times more likely to strike qualified black venire members. The study found that the probability of observing a racial disparity of this magnitude in a race-neutral setting is less than 0.001. HTpp. 177-82; DE3, p. 63.

87. The MSU Study removed from the 25% statewide sample every venire member who possessed any of the foregoing non-racial characteristics (death penalty reservations; unemployment; accused of a crime or was close to another person, i.e. family or friend, who had been accused of a crime; and knew a trial participant), which amounted to 580 venire members. After analyzing all remaining venire members in the 25% sample who did not possess any of the foregoing non-racial characteristics, the MSU Study found that the State struck 39.7% of all black venire members and 19.0% of all other venire members. The study thus found that, even if

all of the foregoing non-racial characteristics are removed from consideration, prosecutors were still 2.1 times more likely to strike qualified black venire members. The study found that the probability of observing a racial disparity of this magnitude in a race-neutral setting is less than 0.001. HTpp. 177-82; DE3, p. 63.

88. The factors that the MSU Study controlled for in the aforementioned analysis as shown on Table 11 of the MSU Study (DE6, p. 21) 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. HTp. 179. 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 as reflected in State's Exhibit 32.

89. 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. HT p. 183.

While the analysis reflected in Table 11 of the MSU Study 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. DE6, pp. 13-16.

90. A logistic regression analysis allows one to disentangle multiple factors that might bear on the strike decision outcome by controlling for possible factors that correlate with

race to ensure that a factor is not driving the strike decision as opposed to race. The intertwined potential factors are race and non-racial factors that may correlate with race, such as death penalty reservations or unemployment, and which may explain why a prosecutor exercised a peremptory challenge. 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. HTpp. 100; 506.

91. 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 of whether the venire member is to be struck or not struck by the prosecutor. This is a widely accepted and appropriate method of statistical analysis for the issue before the Court. HTpp. 399-40.

92. 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 12 non-racial variables for inclusion into the fully controlled logistic regression model shown on Table 12 of the MSU Study. 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 12 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 as shown in State's Exhibit 32.

HTpp. 183-185, 187, 525; DE6, p. 21. Table 12 of the MSU Study reflects the 12 non-racial variables included in the fully controlled, statewide logistic regression model. DE6, p. 21.

93. The predictive non-racial variables the MSU Study identified and the results of the logistic regression analysis, which the Court finds is credible, are as follows:

(a) The odds of a venire member who expressed a reservation about imposing the death penalty being struck by the State were 11.44 times greater than the odds of a similarly situated venire member who did not express a reservation about the death penalty;

(b) The odds of a venire member who was not married being struck by the State were 1.72 times greater than the odds of a similarly situated venire member who was married;

(c) The odds of a venire member who had been accused of a crime being struck by the State were 2.07 times greater than the odds of a similarly situated venire member who had not accused of a crime;

(d) The odds of a venire member who was worried that serving on the jury would be a hardship being struck by the State were 2.99 times greater than the odds of a similarly situated venire member who was not worried that serving on a jury would be a hardship;

(e) The odds of a venire member who was a homemaker being struck by the State were 2.22 times greater than the odds of a similarly situated venire member who was not a homemaker;

(f) The odds of a venire member who worked in law enforcement or had a close friend or family member who worked in law enforcement[12] being struck by the State were 0.63 times greater than the odds of a similarly situated venire member who had not worked in law enforcement and who did not have a close friend or family member who worked in law enforcement;

(g) The odds of a venire member who knew the defendant being struck by the State were 8.63 times greater than the odds of a similarly situated venire member who did not know the defendant;

(h) The odds of a venire member who knew a witness being struck by the State were 0.54 times greater than the odds of a similarly situated venire member who did not know a witness;

(i) The odds of a venire member who knew one of the attorneys in the case being struck by the State were 2.11 times greater than the odds of a similarly situated venire member who did not know one of the attorneys in the case;

(j) The odds of a venire member who expressed a view that suggested favorability to the State being struck by the State was 0.14 times greater than the odds of a similarly situated venire member who did not express a view that suggested favorability to the State;

(k) The odds of a venire member who went to graduate school being struck by the State were 2.71 times greater than the odds of a similarly situated venire member who did not go to graduate school; and

[12] As set forth in a separate section of this Order, this variable was redefined by O'Brien in her final model presented to the Court based upon valid critique by Katz. The Court finds that even though the variable that appears in this model was imprecise, its inclusion does not invalidate the model as shown by later analysis by O'Brien.

(l) The odds of a venire member who was 22 years of age or younger being struck by the State were 2.51 times greater than the odds of a similarly situated venire member who was over 22 years of age.

HTpp. 194-200; DE3, p. 66.

94. 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. HTp. 199.

95. After fully controlling for the 12 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 of <0.001 and an odds ratio of 2.48, which is similar to the strike rate ratio seen in the unadjusted data. DE6, p. 21; HTp. 199. The probability of observing a racial disparity of this magnitude in a race-neutral jury selection process is 1.34 in 1,000,000. HTp. 203; DE3, p. 66. 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 1.71 and 3.58 times higher than the odds of other venire members being struck. HTp. 206; DE3, p. 66. The Court finds that this result is very powerful evidence that race was a significant factor in the exercise of peremptory strikes and is more likely than not the result of intentional discrimination by prosecutors.

96. 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, did an additional analysis of independently selecting the appropriate explanatory race-neutral variables and found the most highly

explanatory variables matched precisely with the twelve variables in Table 12 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. HTpp. 525-526. 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. HTpp. 527-528.

97. 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. Woodworth testified, and the Court so finds as a fact, that the odds ratio at the time of Robinson's trial for a black venire member being struck by the State, after controlling for appropriate factors, is just above three with the confidence intervals showing this finding is statistically significant. DE10, p. 7; HTpp. 545-546; 2281.

98. 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 findings of Table 12 of the MSU Study in any way. HTp. 202, 402-404; 534-538.

99. 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. DE6, p. 22. These factors are highly representative of the explanations given by the Cumberland County prosecutors in State's Exhibit 32. HTp. 203-209; DE6, p. 22. 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 above 0.05 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. HTpp. 205-06.

100. 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. HTpp. 203-06. 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. DE4-Cumberland Data.

101. 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:

a) The odds of a venire member who expressed a reservation about imposing the death penalty being struck by the State were 22.74 times greater than the odds of a similarly situated venire member who did not express a reservation about the death penalty;

b) The odds of a venire member who was unemployed being struck by the State were 6.58 times greater than the odds of a similarly situated venire member who was employed;

c) The odds of a venire member who had been accused of a crime or had a close friend or family member who had been accused of a crime being struck by the State were 2.18 times greater than the odds of a similarly situated venire member who had not been accused of a crime or who did not have a close friend or family member who had not been accused of a crime;

d) The odds of a venire member who was worried that serving on the jury would be a hardship being struck by the State were 3.49 times greater than the odds of a similarly situated venire member who was not worried that serving on a jury would be a hardship;

e) The odds of a venire member who worked in a job that involved helping others being struck by the State were 2.69 times greater than the odds of a similarly situated venire member who did not work in a job that involved helping others;

f) The odds of a venire member who worked in a blue collar job being struck by the State were 2.64 times greater than the odds of a similarly situated venire member who had not worked in a blue collar job;

g) The odds of a venire member who expressed a view that suggested a bias or trouble following the law, but the direction of that bias was ambiguous, being struck by the

State were 2.57 times greater than the odds of a similarly situated venire member who did not express a view that suggested a bias or trouble following the law which was ambiguous; and

h) The odds of a venire member who was 22 years of age or younger being struck by the State were 4.31 times greater than the odds of a similarly situated venire member who was over 22 years of age.

DE6, p. 22.

102. 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 of <0.01 and an odds ratio of 2.57, which is similar to the strike rate ratio seen in the unadjusted data. DE6, p. 22. 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 1.50 and 4.40 times higher than the odds of other venire members being struck. DE6, p. 22; HTp. 207.

103. Woodworth further analyzed the Cumberland County data from Part II of the study with the same time smoothing analysis that he did on the unadjusted data. Woodworth testified and the Court so finds as a fact that the odds ratio at the time of Robinson's trial for a black venire member being struck in Cumberland County, after controlling for appropriate factors, is approximately 2.5 with the confidence intervals showing the finding is statistically significant. DE10, p. 7; HTpp. 545-546; 2281.

104. O'Brien and Grosso also developed a logistic regression model for the three cases prosecuted by Dickson, including Robinson, based upon carefully and scientifically selected statistically significant and relevant predictor variables that bore on the outcome of interest – the

strike decisions by the prosecutor. Out of approximately 65 candidate variables, O'Brien and Grosso, using the SPSS statistical software, selected three non-racial variables for inclusion into the fully-controlled logistic regression model shown on DE3, p. 68. 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. Further, these factors are highly representative of the explanations given by the Cumberland County prosecutors in State's Exhibit 32. HTp. 203-209; DE6, p. 22.

105. 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 statewide sample and Cumberland data because, in the cases Dickson prosecuted, different non-racial variables had a substantially significant effect in predicting the State's use of peremptory challenges. Also, fewer non-racial variables had statistically significant predictive power in explaining which venire members Dickson would strike than in the statewide and Cumberland County regression analyses because there were fewer observations of peremptory strikes in the analysis of Dickson cases. With fewer observations of peremptory strikes, it is expected that fewer explanatory variables would be statistically significant. HTpp. 213-14.

106. The predictive non-racial variables the MSU Study identified in the three cases prosecuted by Dickson and the results of the logistic regression analysis, which the Court finds is credible, are as follows:

a) The odds of a venire member who expressed a reservation about imposing the death penalty being struck by the State were 19.5 times greater than the odds of a similarly situated venire member who did not express a reservation about the death penalty;

b) The odds of a venire member who worked in a job that involved helping others being struck by the State were 8.3 times greater than the odds of a similarly situated venire member who did not work in a job that involved helping others; and

c) The odds of a venire member who worked in a professional field being struck by the State were 0.068 times greater than the odds of a similarly situated venire member who had not worked in a professional field.

HTp. 214; DE3, p. 68.

107. After fully controlling for three non-racial 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 of <0.036 and with an odds ratio of 3.3, which is similar to the strike rate ratio seen in the unadjusted data from these three cases. DE3, p. 68.

108. O'Brien and Grosso also did a controlled study including only the two cases prosecuted exclusively by Dickson, which are *Meyer* and *Robinson*, and found that black venire members were being struck disproportionately and that the disparity was statistically significant such that a venire member's race was a statistically significant predictor of Dickson's use of peremptory challenges. HTp. 216.

109. 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. HTp. 2353; SE32. These two reasons were also proffered by Katz as possible race-neutral explanations for the disparities. SE44, p. 13. 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. HTp. 2352. 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. HTp. 2352. In Cumberland County, in addition to these two explanations, prosecutors commonly offered an additional explanation based upon the desire to strike venire members when jury service would provide a financial hardship. SE32.

110. 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. DE74, 78. 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. DE76, 78.

111. 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. DE75, 78. Similarly, in Cumberland County, among 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 statistically significant. DE77, 78.

112. In Cumberland County, 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 statistically significant. DE78, 79.

113. 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. HTp. 2352-54.

114. 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 a similar study 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. HTpp. 211-212.

115. 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, could not explain the racial disparity. HTp. 430.

116. 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. HTp. 209

117. O'Brien testified, and this Court finds as fact, that in North Carolina and Cumberland County, 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. HTp. 213.

118. Based upon the controlled study and analysis of the decisions to peremptorily challenge black venire members, the Court finds that race was a materially, practically and statistically 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 between January 1, 1990 and July 1, 2010;

In North Carolina at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994;

In the three cases prosecuted by Dickson; Meyer, McNeill and Robinson; and

In the two cases prosecuted solely by Dickson; Meyer and Robinson. HTpp. 214-216

119. Based upon the controlled study and analysis of the decisions to peremptorily challenge black venire members the Court finds that prosecutors have intentionally discriminated

against black venire members during jury selection by prosecutors when seeking to impose death sentences in capital cases:

In North Carolina between January 1, 1990 and July 1, 2010;

In North Carolina at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994;

In the three cases prosecuted by Dickson; Meyer, McNeill and Robinson; and

In the two cases prosecuted solely by Dickson; Meyer and Robinson.

HTpp. 216-217.

The appropriateness of the variables used in the adjusted analyses.

120. 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. They 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. 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.[13] SE32. 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. HTpp. 283-284.

121. 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.

122. In his report, Katz further criticized some of the explanatory variables defined and selected by the MSU researchers. SE44, pp. 16-24. O'Brien agreed with Katz, and the Court so finds, that one variable (JLawEnf_all) was imprecise 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 too broad. For example it included prosecutors and public defenders who may represent two extremes for potential bias. SE44, p. 19-20. Upon learning of the valid criticism, O'Brien and Grosso, using the existing information in the database, recoded the variable into more precise sub-variables such that the error was corrected. Katz could have done this same recoding but did not. This error did not skew, bias, or invalidate the findings of the MSU Study. HTpp. 2329-32. O'Brien did not agree with Katz's other criticisms. The Court rejects the remainder of Katz's criticisms of the variables found in SE44, pp. 16-24. The Court further finds that the MSU Study

[13] The Court notes one exception to this finding. Dickson testified that, in *State v. 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. HTp. 1150.

controlled for all significant variables that influence prosecutorial strike decisions and the presence of idiosyncratic reasons for strike decisions by prosecutors do not influence, bias or skew the findings of the MSU Study.

123. 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. HTpp. 2281-82. 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. HTpp. 2281-82. Woodworth testified and the Court so finds that the MSU researchers took appropriate measures to ensure reliability and validity of its variables. HTp. 2291

124. 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. HTpp. 2291-92

125. Katz had all of the available underlying source documents and electronic data to recode any variables that he found should be recoded or defined differently. HTp. 1941. Katz offered no evidence to suggest that recoding any of the variables altered the 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.

126. 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.

The MSU Study's responsiveness to new information.

127. 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. The MSU researchers had previously produced to the State two versions of its report, dated July 20, 2011, and September 29, 2011, respectively, in anticipation of hearings starting at previously scheduled terms of court prior to the matter being continued upon motions by the State. On December 19, 2011, this Court entered an order requiring Robinson to produce any amendments to the MSU Study as well as any changes to the underlying data supporting the study to the State by December 30, 2011. The MSU Study, which is a revision of the prior reports, is dated December 15, 2011, and the underlying data was produced to the State in a timely fashion. The December 19, 2011 discovery order further provides that both parties were under a continuing duty to disclose supplemental evidence, analyses, and discoverable information as it may become available after the specified discovery deadlines.

128. The MSU Study included many thousands of coding decisions and data entries into the database which support the analyses by the researchers. HTp. 2319.

129. After disclosure to the State of the database underlying the findings in the MSU Study dated December 15, 2011, 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. HTp. 2320.

130. After learning of the purported errors in the MSU Study database, O'Brien examined each purported error and determined, and the Court so finds, that nine of the 20 purported errors were in fact errors, and 11 were not. DE28.

131. 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. HTpp. 2326-28; DE29.

132. After learning of the purported coding errors in the MSU Study database identified by prosecutors throughout the State, O'Brien examined each purported error and determined, and the Court so finds, that 10 of the 35 additional purported errors were in fact errors, and 25 were not. DE28.

133. 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 were actual errors, this is such a small error rate that it would not skew or invalidate the findings of the MSU Study.

134. None of the corrections made to the MSU Study since the first version produced to the State in July 2011 have 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. HTpp. 427-428.

135. 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. HTpp. 445, 2335-40. 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.

136. 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. HTpp. 282-283

137. 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 of <0.02 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 of <0.02 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. DE71, HTpp. 2336-40.

138. The Court finds that in adherence 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. HTpp. 550-551; 2328

139. 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.

140. Based upon the updated database which includes the best quality data available to the Court, incorporating the corrections based upon all the valid criticism and errors identified by the State, the Court finds that statewide, after fully controlling for twelve non-racial variables the Court finds are highly predictive for prosecutorial strike decisions, the race of the venire member is statistically significant with a p-value of <0.001 and an odds ratio of 2.28, which is similar to the strike rate ratio seen in the unadjusted data. DE70.

141. Based upon the updated database, which includes the best quality data available to the Court, incorporating the corrected coding errors, the Court finds that in Cumberland County, after fully controlling for eight non-racial variables the Court finds are highly predictive for prosecutorial strike decisions, the race of the venire member is statistically significant with a p-

value of <0.01 and an odds ratio of 2.40, which is similar to the strike rate ratio seen in the unadjusted data. DE70.

142. Based upon the controlled study and analysis of the decisions to peremptorily challenge black venire members utilizing the best quality, updated database, the Court finds 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 between January 1, 1990 and July 1, 2010;

In North Carolina at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994;

In the three cases prosecuted by Dickson; Meyer, McNeill and Robinson; and

In the two cases prosecuted solely by Dickson; Meyer and Robinson. HTpp. 214-216.

143. Based upon the controlled study and analysis of the decisions to peremptorily challenge black venire members utilizing the best quality, updated database, the Court finds that prosecutors have intentionally discriminated against black venire members during jury selection by prosecutors when seeking to impose death sentences in capital cases:

In North Carolina between January 1, 1990 and July 1, 2010;

In North Carolina at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994;

In the three cases prosecuted by Dickson; Meyer, McNeill and Robinson; and

In the two cases prosecuted solely by Dickson; Meyer and Robinson. HTpp. 216-217.

Overall findings regarding the MSU Study.

144. The MSU Study was admitted into evidence without objection from the State. HTp. 219. In addition to the other findings herein, the Court finds the following with respect to the MSU Study:

145. 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;

146. The researchers, O'Brien and Grosso, are competent and qualified researchers to perform an empirical legal study such as the MSU Study;

147. O'Brien has the legal training and background which is necessary for an empirical study such as the MSU Study;

148. All aspects of the study are well-documented and transparent such that the entire study is replicable by other researchers;

149. The thorough documentation of the coding decisions increases the transparency and replicability of the study by other researchers;

150. The study was well-designed from inception with a clear, precise and relevant research question;

151. The blind race coding minimized researcher bias and resulted in accurate race coding of the venire members;

152. The coders and individuals entering the data into the database were well-qualified and well-trained;

153. The rigorous double coding of descriptive characteristics in Part II of the study resulted in intercoder reliability and accurate coding for the study;

154. The researchers employed rigorous measures for appropriate quality control;

155. The electronic database utilized for the MSU analyses is accurate, credible and reliable;

156. The variables utilized by the researchers were well-planned, appropriately aggregated from the descriptive coding, reliable and were substantially similar to the explanations provided by prosecutors for striking venire members;

157. The use of logistic regression analysis is appropriate for the inquiry by this Court;

158. In selecting the appropriate statistical models, the researchers followed the canons of proper empirical research in model selection and used generally accepted model building methodology;

159. 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; and

160. 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 its closing statement, and the Court finds as a fact, that O'Brien was an honest, forthright witness for Robinson. HTp. 2541.

161. 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.

162. Mindful that appellate courts in North Carolina and throughout the United States have used differing standards for statistical significance, the Court finds that the statistical

findings in this order all reveal statistical significance utilizing the two sigma rule and the four-fifths rule commonly used in employment discrimination cases.

163. With respect to the sigma analysis, the Court finds that each of the statistical analyses from the MSU Study and MSU researchers set forth below are more than three standard deviations, or sigmas, from the null hypothesis, all of which are statistically significant:

164. The statewide disparity aggregated across cases over the entire study period shown in Table 1, DE6, p. 18; DE3, p. 22; HTp. 1944;

165. The statewide average strike rate disparity over the entire study period shown in Table 2, DE6, p. 18; DE3, p. 24;

166. The statewide average strike rate disparity from 1990 through 1999 shown in Table 4, DE6, p. 19; DE3, p. 26;

167. The statewide average strike rate disparity from 2000 through 2010 shown in Table 5, DE6, p. 19; DE3, p. 27;

168. The statewide average strike rate disparity from 1990 through 1994 shown in Table 6, DE6, p. 19; DE3, p. 29;

169. The statewide average strike rate disparity from 1995 through 1999 shown in Table 7, DE6, p. 19; DE3, p. 30;

170. The statewide average strike rate disparity from 2000 through 2004 shown in Table 8, DE6, p. 20; DE3, p. 31;

171. The statewide average strike rate disparity from 2005 through 2010 shown in Table 9, DE6, p. 20; DE3, p. 32;

172. The current Fourth Judicial Division average strike rate disparity shown in Table 10, DE6, p. 20; DE3, p. 46;

173. The former Second Judicial Division average strike rate disparity shown in Table 10, DE6, p. 20; DE3, p. 46;

174. The Cumberland County average strike rate disparity shown in Table 10, DE6, p. 20; DE3, p. 46;

175. The unadjusted strike rate disparity in Robinson, McNeill and Meyer, the cases prosecuted by John Wyatt Dickson, DE3, p. 50;

176. The statewide strike rate disparities observed when venire members with each of the potential explanatory variables in Table 11 were removed from the equation and when all four potential explanatory variables were removed as shown in Table 11, DE6, p. 21; DE3, p. 63;

177. The statewide strike rate disparity of the venire members who expressed reservations about the death penalty, DE78; HTpp. 2356-57;

178. The statewide strike rate disparity of the venire members who were accused of a crime or had a close friend or family member who had not been accused of a crime, DE78; HTpp. 2356-57;

179. The Cumberland County strike rate disparity of the venire members who were accused of a crime or had a close friend or family member who had been accused of a crime, DE78; HTpp. 2356-57;

180. The odds ratio for a black venire member being struck as shown in the statewide fully-controlled logistic regression model in Table 12, DE6, p. 21; DE3, p. 66;

181. The odds ratio for a black venire member being struck as shown in the Cumberland County fully-controlled logistic regression model in Table 13, DE6, p. 22; DE3, p. 67;

182. The odds ratio for a black venire member being struck as shown in the statewide fully-controlled logistic regression model DE70; and

183. The odds ratio for a black venire member being struck as shown in the Cumberland County fully-controlled logistic regression model in DE70.

184. With respect to the sigma analysis, the Court finds that each of the statistical analyses from the MSU Study and MSU researchers set forth below are more than two standard deviations, or sigmas, from the null hypothesis, all of which are statistically significant:

185. The unadjusted strike rate disparity in Robinson's case, DE3, p. 51;

186. The Cumberland County strike rate disparity of the venire members who expressed reservations about the death penalty, DE78; HTpp. 2356-57; and

187. The Cumberland County strike rate disparity of the venire members who expressed that service on a jury would be a hardship, DE78; HTpp. 2356-57.

188. As the Court has discussed, 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%). The following findings from the MSU Study satisfy the four-fifths rule threshold and trigger the disparate impact presumption for the success, or pass, rate of qualified venire members:

189. In the statewide patterns aggregated across cases over the entire study period shown in Table 1, DE6, p. 18, the State passed 47.4% of the black venire members and 74.3% of

the other venire members. The minority's success rate is lower than the four-fifths threshold of 59.4%;

190. In the statewide average strike rate disparity over the entire study period shown in Table 2, DE6, p. 18, the State passed 44.0% 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%;

191. In the statewide average strike rate disparity from 1990 through 1999 shown in Table 4, DE6, p. 19, the State passed 44.4% of the black venire members and 75.3% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60.2%;

192. In the statewide average strike rate disparity from 2000 through 2010 shown in Table 5, DE6, p. 19, the State passed 43.1% of the black venire members and 74.9% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 59.9%;

193. In the statewide average strike rate disparity from 1990 through 1994 shown in Table 6, DE6, p. 19, the State passed 42.6% of the black venire members and 74.1% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 59.3%;

194. In the statewide average strike rate disparity from 1995 through 1999 shown in Table 7, DE6, p. 19, the State passed 45.3% of the black venire members and 76.0% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60.8%;

195. In the statewide average strike rate disparity from 2000 through 2004 shown in Table 8, DE6, p. 20, the State passed 42.8% of the black venire members and 75.0% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60.0%;

196. In the statewide average strike rate disparity from 2005 through 2010 shown in Table 9, DE6, p. 20, the State passed 43.6% of the black venire members and 74.6% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 59.7%;

197. In the current Fourth Judicial Division average strike rate disparity shown in Table 10, DE6, p. 20, 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%;

198. In the former Second Judicial Division average strike rate disparity shown in Table 10, DE6, p. 20, the State passed 48.5% of the black venire members and 74.3% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 59.4%;

199. In the Cumberland County average strike rate disparity shown in Table 10, DE6, p. 20, the State passed 48.5% of the black venire members and 74.9% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 59.9%; and

200. In Robinson's case, the State passed 50% of the black venire members and 85.7% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 68.6%.

Seated jury compositions.

201. 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. SE44, pp. 38-49; HTpp. 1769-86. While the Court permitted Katz to testify to the findings regarding final jury composition over Robinson's 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.

202. The Court further notes that the State elicited testimony from Katz regarding his experience as an expert witness. Katz testified that he informs his forensic work based upon his prior experience and instructions from courts in other cases. HTp. 1962 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." HTp. 1970. 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.

203. The State's evidence showed, and the Court finds as a fact, 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. SE44, pp. 38-49; HTpp. 1769-86.

204. As set forth above, Robinson has waived any potential claim for relief based upon the discriminatory strike decisions by defense counsel. 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.

205. 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 and 38 had juries with only one black venire member. DE4.[14]

206. While the Court finds that a defendant is not required to provide evidence that his final jury was affected by the disparate strike decisions of the prosecutor, the Court notes that the State presented no evidence to dispute the defense contention and finding, *supra*, that the final composition of Robinson's jury was affected by the disparate strikes by the State. Katz failed to do such an analysis. HTp. 1964.

Katz's regression models.

207. 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. HTp. 1885. These models are shown in SE44, 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

[14] 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), Philip Davis (86.0), Keith East (89.0), Andre Fletcher (95.2), Christopher Goss (116.0), Mitchell Holmes (143.0), Cerron Hooks (144.0), James Jaynes (156.2), Larry Thomas (174.0), Wayne Laws (176.0), Jathiya 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), Malcom 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), Jathiya 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), Jerry Cummings (343.0).

EXPLAIN HOW PROSECUTORS EXECUTE THEIR PEREMPTORY STRIKES." HTp. 1885; SE44, pp. 458-81.

208. The variables and descriptive codes selected by Katz were not made upon any statistical, practical, theoretical or other appropriate basis. HTp. 2346. 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 0.05 and many are above 0.50 indicating the variables are in no way predictors or explanatory. SE44, pp. 458-81. The Court finds that the logistic models found in SE44, pp. 458-81 are not statistically appropriate or significant, either practically or statistically.

209. 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. HTp. 1885. Katz produced five such constructed models for Cumberland County and one such constructed model for a truncated time period for the statewide data. Even though the *p*-value exceeds 0.05 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 (SE44, p. 480) and the odds ratios for Cumberland County ranged from a low of 1.38 (SE44, p. 468) to a high of 1.6 (SE44, p. 464). 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.

210. Woodworth testified and the Court so finds that the logistic regression models in SE44, pp. 458-81 are no evidence of any systematic features of the voir dire process. HTpp. 2271-72. 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. HTpp. 2272-73. 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.

211. Katz performed a cross-tabulation analysis in an attempt to control for explanatory variables. This analysis is detailed in his report. SE44, pp. 25-30. 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. SE32; HTp. 1651.

212. 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. HTp. 2267. 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. HTpp. 2267-68

213. 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. HTp. 2269.

214. 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." SE44, pp. 484-86. Despite this warning, Katz relied upon the model.

215. 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. HTp. 770

216. 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.

217. 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.

218. 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.

Conclusions.

219. Based upon the totality of all the statistical evidence presented at the hearing, the Court finds 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 between January 1, 1990 and July 1, 2010;

In North Carolina at the time of Robinson's trial in 1994;

In former Second Judicial Division between January 1, 1990, and December 31, 1999;

In former Second Judicial Division at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994;

In the three cases prosecuted by Dickson; Meyer, McNeill and Robinson; and

In the two cases prosecuted solely by Dickson; Meyer and Robinson.

220. Based upon the totality of all the evidence presented at the hearing, the Court finds that prosecutors have intentionally discriminated against black venire members during jury selection by prosecutors when seeking to impose death sentences in capital cases:

In North Carolina between January 1, 1990 and July 1, 2010;

In North Carolina at the time of Robinson's trial in 1994;

In former Second Judicial Division between January 1, 1990, and December 31, 1999;

In former Second Judicial Division at the time of Robinson's trial in 1994;

In Cumberland County between 1994 and 2007;

In Cumberland County at the time of Robinson's trial in 1994;

In the three cases prosecuted by Dickson; Meyer, McNeill and Robinson; and

In the two cases prosecuted solely by Dickson; Meyer and Robinson.

B. NON-STATISTICAL EVIDENCE

Overview.

221. Robinson introduced historical, experimental, and case evidence to augment his statistical evidence showing that race was a significant factor in the State's exercise of peremptory strikes. He relied upon the expert testimony of Stevenson, an expert in race and the law; Sommers, an expert in social psychology, research methodology, the influence of race on perception, judgment and decision-making, race and the United States legal system, and race and jury selection; and Trosch, an expert on implicit bias in the courtroom and methods for reducing the impact of implicit bias. Stevenson and Sommers reviewed discovery materials, including materials from North Carolina prosecutor trainings, as well as signed affidavits by excluded venire members and North Carolina attorneys, judges, and prosecutors. Stevenson also reviewed numerous North Carolina capital voir dire transcripts and read published materials about the history of jury service and selection in North Carolina.

222. Robinson also introduced voir dire transcripts from all 173 jury selection proceedings examined by the MSU Study, Defendant's Exhibit 2, as well as other underlying source data for the jury study, including juror questionnaires and clerks' charts, Defendant's Exhibit 67. Robinson introduced voir dire transcripts, court orders, and appellate opinions from other North Carolina capital proceedings, including some cases that were not part of the MSU Study and these are included in Defendant's Exhibit 45. Robinson further relied upon summaries of voir dire transcripts from Defendant's Exhibits 2 and 45 and States Exhibits 32, which he introduced as Defendant's Exhibits 82-96.[15]

[15] The race of each venire member and whether the juror was struck or passed by the State can be found in DE4, the MSU Study's data.

223. The State's non-statistical evidence consisted of the testimony of Cronin, an expert in American Politics, and the lay testimony of former prosecutor Dickson, as well as judges who presided over Cumberland County capital cases: Johnson, Gore, Lock, Jenkins, and Thompson. The State, over Robinson's objection, introduced the testimony of numerous prosecutors in the form of sworn affidavits, compiled together in State's Exhibit 32. In addition, the State relied upon testimony from its statistical expert Katz with respect to a "prosecutor survey" he conducted. Related to this testimony, the State introduced various tables containing prosecutor statements of why African-American venire members were purportedly struck. SE32, SE44, SE48.

224. In addition to his evidence, Robinson relied upon argument, both from closing statements and the hearing and his post-hearing brief, regarding what he described as the differential and discriminatory treatment of identified African-American venire members from various capital cases in North Carolina. The State relied upon its closing argument regarding what it contends was the non-discriminatory treatment of African-American venire members, but did not submit any additional briefing in this regard. The court finds and concludes that the State is unable to justify the demonstrated racial disparities by identifying other legitimate considerations that adequately explain these disparities.

225. The Court finds that the balance of this collective evidence and argument overwhelmingly supports a finding that race was a significant factor in jury selection statewide, in the former Second Judicial Division, and in Cumberland County at the time of Robinson's trial. The role of government sanctioned and enforced racial discrimination against African-Americans in North Carolina during significant historical time periods — Antebellum slavery, post-Reconstruction race codes, Jim Crow, and the pre-*Furman* era — is likely to have

influenced our jury selection procedures and culture in ways that are difficult to parse out scientifically. That history, however, can and should serve as a caution to provide deference to the scientific evidence of discrimination in jury selection.

226. The un-refuted evidence regarding the role of implicit bias in decision-making provides a critical and logical link between the overwhelming statistical evidence of bias against African-American venire members and the undoubtedly sincere protestations of scores of prosecutors that they did not discriminate. As Dickson, the prosecutor who selected the jury in Robinson's case, concedes, we are all subject to the unwelcome influence of our implicit biases. The experimental evidence, which shows both that actors discriminate without knowledge, and then that they unconsciously ascribe non-discriminatory motives to their own actions, is further confirmation of the likelihood that an individual prosecutor could both simultaneously discriminate against African-American venire members and sincerely and in good faith deny such discrimination.

227. The unfortunately high risk that unconscious bias will lead to discrimination in jury selection could be mitigated by thoughtful, careful, and focused trainings. Stevenson, Trosch, and Sommers all testified to their work with training professionals – including those in the criminal justice system – techniques and practices to minimize the role of unconscious bias in their daily work. To date, there is no evidence that North Carolina prosecutors have ever engaged in this kind of important training. Instead of training on how to comply with *Batson v. Kentucky*, and its mandate to stop discrimination in jury selection, North Carolina prosecutors received training in 1995 and 2011 about how to circumvent *Batson.*

228. Close examination of prosecutors' explanations for striking African-American venire members – produced either in *Batson* litigation, or in the form of statements or affidavits

submitted in connection with this litigation – does not rebut Robinson's statistical evidence. Rather, it provides further evidence of discriminatory treatment of African-American venire members. In some instances, prosecutors reviewing the jury selection materials conceded that they could not find a race-neutral explanation for the strike. SE32 (Greene Affidavit; Red Arrow Affidavit; Wolfe Affidavit); SE44 (Weede Statement). In other cases, the prosecutors' explanations do not withstand scrutiny, either because they are contradicted by the record, or because the prosecution did not strike non-black jurors who were similarly situated. There are additional documented instances where the prosecution engaged in targeting, asking different questions of African-American venire members than other venire members, or asked explicitly race-based questions. Unbelievably, in some cases the proffered explanations are not facially race-neutral. Cumulatively, as described below in detail, this evidence weighs heavily in favor of Robinson's claims.

History, Limits of *Batson v. Kentucky*, and Role of Unconscious Bias in Jury Selection.

The history of race and jury selection.

229. Stevenson testified about the history of race discrimination in jury selection in the United States and North Carolina, and the importance of this history to understanding current issues of race and jury selection, as set forth below. HTp 845. The State did not dispute or challenge this history. The Court finds Stevenson to be a credible and extremely knowledgeable witness, and credits and finds persuasive his testimony about the history of race and jury selection.

230. For most of this country's history, African-Americans were not permitted to serve on juries in the United States. HTp 845. Although much of the nation's earliest civil rights work was in the field of African-American access to jury service, the response to these civil rights

advances has been defined by resistance. HTpp. 845-46. 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. HTp 846. In many jurisdictions, no people of color served on juries. And 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. HTp. 846.

231. Change was slow to come in many states, including North Carolina. HTp. 847. In the 1920s, and 1930s, there were no African-American jurors in North Carolina. *Id.* One of the arguments at the time against jury service by African-Americans was that it would lead to more lynchings because of the extreme resistance to the idea by many white citizens. *Id.* It was only after the civil rights movement of the 1960s and 70s that the need for participation of African-Americans in juries was taken seriously. HTp. 848. In that period, there were advancements in the area of jury pool compositions, allowing for the first time African-Americans to be included in jury pools. *Id.* 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. HTp 848.

232. 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 gives prosecutors who are of a mind to discriminate greater ability to do so. HTpp. 905-906.

233. 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. HTp 848. 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. HTp 848.

234. *Batson*, however, was plagued by its own barriers to implementation. First, prosecutors believe that, in most cases, there is a tactical advantage for the State to limit the number of African-Americans on a capital jury because African-Americans are perceived as 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. HTpp 866-68, 870-73. Second, defense lawyers have been reluctant to object under Batson. HTp 861, 869-70. Third, it is very easy for a lawyer accused of a Batson violation to summon a race-neutral reason for almost any strike decision. HTpp. 765, 861-62. Fourth, most people, including legal professionals, are psychologically disinclined to admit to themselves or others that race is a reason for a decision, even when they are aware that race is having an influence. HTpp 732. Fifth, most people, including legal professionals, are not entirely aware of their own ideas and assumptions about race or other social classifications and the effect of those ideas and assumptions on their behavior. HTpp 747-48. Sixth, training of prosecutors after Batson has emphasized how to avoid a Batson violation by providing examples of race-neutral reasons to offer the judge if a strike is challenged, rather than training on how to avoid conscious or

unconscious discrimination. As a consequence, Batson's protections have proven to be more illusory than real. HTpp 761-67, 864-65.

235. Furthermore, prosecutors' resistance to African-Americans as jurors in capital cases is even more intense than in ordinary criminal cases. This resistance stems largely from the fact that the sentencing decision in a capital case is 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 with so much more power and discretion than the typical criminal jury, which decides only guilt. HTp 850. In addition, there is a history of the death penalty being applied in a racially-biased manner. HTpp 850-51. Finally, the death penalty and lynching have a unique history as enforcement mechanisms for racial segregation and white superiority. HTpp 851-52. All of these historical facts combine to make prosecutors extremely concerned about African-Americans on capital juries.

236. This history is important to understand why full service on juries is important to African-Americans, why the courts are perceived as insensitive on these issues, and also why many practitioners – judges and lawyers alike – have been comfortable with a continued history of prosecutors' disproportionate strikes of African-Americans. HTp 849. Post-*Batson* studies of jury selection in the United States show that discrimination against African-Americans remains a significant problem that will not be corrected without a conscious and overt commitment to change. HTp 860. The RJA is North Carolina's commitment to change.

The role of unconscious bias in jury selection.

237. Robinson called three expert witnesses who testified about unconscious bias: Stevenson, Sommers, and Trosch. Stevenson testified, as described above, about the role of individuals' unconscious biases as a barrier to enforcement of *Batson*. Sommers testified about

his own experimental research and the large body of research regarding unconscious bias and decision-making. Trosch testified about the role of unconscious bias in decision-making and his own efforts to conduct trainings and make changes to minimize its role in his courtroom. Collectively, this testimony went largely unchallenged by the State and, as described below, was confirmed by the State's own witnesses. This Court credits the following and finds as facts the testimony described below:

238. Sommers testified that there is an extensive body of research finding that race influences decision making processes at a subconscious level. HTp. 729. Researchers across a number of disciplines have conducted research documenting the ways in which race influences decision- making. *Id.* For example, economists in the field of human behaviors conducted a well-known study of resume reviews. The only difference in the resumes was the name assigned to the resumes. HTp. 730. Some were assigned names traditionally associated as ethnic names. The researchers found that respondents viewed the resumes differently depending upon the name associated. *Id.* 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, often as an unconscious process. HTp.732.

239. Sommers also testified about his own experimental research. HTp. 721-724. In one study, Sommers and a colleague sought to determine whether there was a 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, they 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, they found that the

participants in the study rarely acknowledged race as a factor in the strike decision. These results were consistent with the archival studies showing a significant prosecutorial preference for white jurors. HTpp 741-43. That study has been published in a peer review journal. HTpp 767-68.

240. Sommers explained the importance of research to limitations of the *Batson* framework. There are two psychological assumptions underlying *Batson.* The first assumption is that race can and does have the potential to influence jury peremptory strike decisions. The second assumption is that by asking the attorney who has made the strike to offer a non-discriminatory reason, the court is likely to obtain information that will help it determine whether or not race really played a part in the decision. The scientific literature strongly supports the first assumption. However, the assumption that self-report by the person accused of discrimination will uncover and identify actual discrimination is not supported by the scientific literature. Indeed, the data demonstrate that while race often has an effect on decisions, it is rarely articulated as a reason because people do not want to admit racial bias and in many cases people don't recognize the influence of bias because they are honestly unaware of it. As Sommers testified, it is clear from the body of research that "people are remarkably good at giving you legitimizing race-neutral explanations for the decision they've made [] quite often ... [and] genuinely believing those to be fair assessments of why they made the decisions that they did." HTp. 731. This criticism of *Batson* is supported by the Baldus study in Philadelphia, which looked at prosecutorial capital jury strikes from 1981 through 1997 and found that the *Batson* decision in 1986 had no impact on the use of peremptory strikes against African-Americans. HTpp 745-48.

241. Dickson, the prosecutor in Robinson's trial and the only prosecutor of any case in the MSU Study to take the stand, conceded that everyone discriminates and that this discrimination is sometimes unconscious and sometimes purposeful. HTp1171. Dickson testified that a person may not be conscious of his discrimination and may not intend to discriminate, but nonetheless discrimination persists. HTp 1171. 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. HTp 1172.

242. Trosch also testified about unconscious bias. Trosch's testimony indicated that the United States legal system is not immune from the effects of bias and unconscious racism seen in the population at large. For example, Trosch testified that implicit bias contributed to racial disparities in outcomes in juvenile court. HTp 1024. The Court credits Trosch's testimony, particularly in light of Dickson's concession on cross-examination that minority members were discriminated against by court personnel and that, in one form or another, race discrimination is ongoing. HTp 1181.

243. Trosch explained that the way people obtain information and judge each other is the result of innate and largely unconscious thought processes. 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. HTpp. 1032-35. In addition, people tend to be overconfident about their ability to make decisions, detect falsehoods, judge non-verbal cues, and underestimate their thinking errors. HTp. 1069.

244. There is also 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. In addition, people know that they should not be letting 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. HTpp 731-734. For example, Robinson's prosecutor Dickson agreed that there was racial discrimination in the criminal justice system and elsewhere, admitted that he harbors unconscious bias, but nevertheless denied ever taking race into account in any jury selection. HTpp. 1177-82. However, Dickson conceded that a prosecutor's self-report was not the best way to determine whether race was a factor in jury selection. HTp 1195.

245. Sommers' and Trosch's testimony about the nature of contemporary bias and implicit bias was unrefuted and at points corroborated by the testimony of Dickson. The Court finds the testimony on contemporary bias and implicit bias credible and persuasive.

246. Johnson, Gore, Jenkins, and Thompson all offered testimony about the reputation of various 12th District prosecutors for truthfulness and equal treatment of people regardless of race. This Court credited that testimony and weighed it in the Court's decision in this matter. This testimony is weighed, however, in light of the unrefuted testimony regarding implicit bias. Accordingly, the Court notes that there is no contradiction between this Court's finding that the 12th District Prosecutors are truthful, well respected, and have good reputations for treatment of all individuals and its finding that race was a significant factor in the exercise of peremptory strikes by these same prosecutors.

Post-Hoc, Purportedly Race-Neutral Explanations by Prosecutors.

247. The State attempted to rebut Robinson's evidence by introducing *Batson*-style explanations for various strikes against African-American venire members. As is described

below in more detail, the Court finds that many of these explanations lack probative value, and that on whole, these explanations fail to rebut the statistical and non-statistical evidence introduced by Robinson and actually support a finding that race was a significant factor in the exercise of peremptory strikes. In the following section, the Court identifies numerous examples of purportedly race-neutral explanations advanced by the State that are in fact pretextual.

248. The idea for collecting post-hoc *Batson*-style explanations for every struck African-American venire member originated with Katz, the State's statistical expert. Katz does not have legal training, and was not tendered as an expert in legal studies. Katz concluded that the State would need to rebut the statistically significant disparities reflected in the unadjusted data from the MSU Study. HTp. 1951. As rebuttal, he attempted to perform an analysis that he referred to as a *Batson* methodology. *Id.* 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. HTp. 1569.

249. Although the State characterized this project as a "study," *see, e.g.,* State's Third Motion to Continue, 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," HTp. 1569, or "data collection," HTp. 1572, or "request for affidavits," HTp. 1575, 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.

Ultimately, Katz was able to collect responses from district attorneys for approximately half of the struck African-American venire members included in the MSU Study.

250. 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. HTp. 1574. Throughout his report to this Court dated January 9, 2012 (SE44), Katz indicated that he was seeking the reasons for the peremptory strikes (HTpp. 15, 36); 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. HTp. 1576. This inquiry was set up in a way to produce only race-neutral explanations and denials that race was a factor. HTp. 758.

251. 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. HTpp. 1955-56. This was another flaw: an appropriate study design would have accounted for the possibility of a prosecutor's mixed motives.

252. 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. HTpp. 732, 758.

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. HTpp. 758-59.

253. 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. HTpp. 1575, 1604, 1986.

254. 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. DE54. Katz circulated his survey instrument to Colyer and Thompson for their review and editing assistance. HTp. 1578.

255. For each prosecutor reviewer, Katz sent an email that included general instructions as well as attachments with (i) a more detailed survey and data collection instructions; (ii) a list of all venire members involved in each capital trial in the district with the African-American excluded venire members highlighted; and (iii) an excel spreadsheet prepared by Katz in which the prosecutor could provide his or her race-neutral explanations and other information. DE56, HTpp. 1591-92.

256. 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. HTp. 1597. 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. HTpp. 1598-99; DE57.

257. 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.

258. After making the changes to Boone's affidavit and spreadsheet, Katz circulated Boone's affidavit and spreadsheet review to prosecutors throughout the State. HTp. 1602. Boone's affidavit and spreadsheet review had listed for each African-American venire member purported race-neutral reasons for the peremptory challenge. DE58. The wide circulation of Boone's affidavit with an explanation that it was an example of what was requested (SE59) and anticipated (SE60) 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. HTpp. 1602-03. 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. HTpp. 1602, 1605.

259. 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 jurors. HTp. 1588. However, Katz took no notes of his

conversations with any of these prosecutors except his one conversation with Thompson. HTp. 1637.

260. 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. HTpp. 1637. 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.

261. The low response rate is another problem with the Katz survey. As of the date of the hearing, Katz had received purported race-neutral explanations for 319 venire members, approximately half of the struck African-American venire members. HTp. 1929. Of these, approximately half were explanations from prosecutor reviewers who were not involved in the trial. HTp. 1658. 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. SE44, p. 37; HTp. 1609.

262. 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 refuse to participate. Where a subgroup of the relevant respondents refuse 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.

263. Applying these principles, the Court finds that prosecutors' 50% statewide response rate to Katz's survey warns of non-response 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. HTp. 1611.

264. Katz received no response from several prosecutorial districts with large numbers of prisoners under sentence of death, including Wake County, New Hanover County, and Buncombe County. SE48. The Court finds that the lack of data from these districts further undermines the credibility, reliability, and evidentiary value of Katz's efforts.

265. The Court notes that Katz acknowledged that one potential reason explaining why certain prosecutors did not respond to his request for race-neutral explanations was that those prosecutors had been using race as a basis for selecting juries. HTp. 1609. Katz informed all prosecutors who received his inquiry that their responses would be used in an RJA proceeding on behalf of the State. The Court finds that 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. The Court finds that the failure of 50% 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 50% non-response rate to Katz's survey is evidence of intentional discrimination on a statewide basis.

266. 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 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. HTp. 1661. 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.

267. 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.

268. 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. SE44; DE56. 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. HTpp. 1583-84. Katz testified that, where the trial prosecutor is not available to provide the reasons for exercising a peremptory strike, it may not be possible to determine precisely what the reasons were. Katz testified that an expert in jury selection may be able to address this lack of information by providing an explanation for the peremptory strike that is the best that is available. HTpp. 1804-05. The Court notes that none of the prosecutor reviewers who were not present at trial were tendered by the State as jury selection experts in this proceeding. In view of the testimony of the State's own expert, the Court finds Katz's use of affidavits and statements from prosecutors who did not participate in jury selection to be an additional reason supporting the determination that the results of his survey are not credible.

269. The Court notes with respect to Katz's testimony that it would have assisted his analysis if the State had provided him information about its reasons for exercising peremptory strikes against all of the African-American venire members examined by the MSU Study who were associated with a *Batson* challenge. Katz testified that, despite his request, the State did not provide this information to him. HTp. 1594. The Court finds this to be an additional reason supporting the determination that the results of Katz's survey are not credible.

270. 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.

271. 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.

272. 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. HTpp. 1956-57.

Excluding African-Americans from Jury Service because of Group Beliefs.

273. The State presented testimony from Christopher Cronin, an Assistant Professor of Political Science at Methodist University in Fayetteville, North Carolina. Cronin conducted no research concerning the RJA or Robinson's case. He has no legal training. He has never

published in the areas of race and jury selection in capital cases, race and capital cases, race and the criminal justice system, or the criminal justice system itself. HTpp. 2159-62, 2170.

274. The State argued with regard to the admissibility of Cronin's testimony that the disproportionate strike rate for African-American venire members is due to their death penalty views and not to race. The State argued that the purpose of Cronin's testimony was to show that African-Americans, as a group, disfavor the death penalty. HTpp. 2186-87, 2189-90. Over Robinson's objection, the Court accepted Christopher Cronin as an expert in American Politics and admitted his testimony. HTpp. 2158, 2236-37.

275. Cronin did not examine individual strike decisions made by prosecutors in North Carolina, Cumberland County, or Robinson's case. HTpp. 2170, 2230. Nor did Cronin offer any opinion as to whether race has been a significant factor in prosecutor strike decisions at any time in North Carolina, the former Second Judicial Division, Cumberland County, or in Robinson's case. Rather, Cronin testified about the political opinions and beliefs that are held by African-Americans as a group.

276. Cronin testified that African-Americans tend to be more concerned than other groups about fairness and inequality in the criminal justice system. Cronin also testified that African-Americans are significantly less likely than whites to favor the death penalty. HTpp. 2197-2201.

277. Cronin testified that the fact that, as a group, African-Americans may hold particular views is not an appropriate basis for making decisions about individual African-American venire members. HTp. 2207. Moreover, Cronin acknowledged research studies and publications which attribute the gap between blacks and whites in support for the death penalty

to racial prejudice by whites. That is, racial prejudice may be the key factor in differentiating crime policy views of blacks and whites, including views on the death penalty. HTpp. 2226-28.

278. Cronin acknowledged the history of discrimination against African-Americans and the connection between that history and data showing African-Americans tend to be more concerned about issues of inequality. Cronin agreed that it would be improper for prosecutors to base decisions about individual African-American venire members based on the fact that, as a group, African-Americans tend toward certain beliefs as a result of their history of suffering inequality. Cronin agreed in particular that it would be inappropriate to exclude individual African-Americans from juries because, as a group, African-Americans have suffered a history of violence and police brutality. Cronin also agreed that it would be inappropriate to exclude individual African-Americans from juries because, as a group, African-Americans have been discriminated against in the application of the death penalty. HTpp. 2212-15.

279. The court is especially troubled by the rationale that the State can justify the striking of African-American venire members based upon the belief that past discrimination might affect their present ability to be fair. That logic would necessarily mean that African-Americans, as a group, will continue to be discriminated against in the future. (See Defendant's Exhibits 27 and 28, a note from a telephone conference between Katz and Cumberland County prosecutor Thompson, that past discrimination "helps explain why blacks are less accepting of law enforcement testimony."

280. Cronin testified that "a minority demographic that has a divergent public opinion on . . . capital punishment" is "less likely to be favored by the majority population which is represented by the State," and the "State's interest is to represent that majority population and its intent for laws, punishment, etc." HTp. 2204.

281. The Court rejects Cronin's suggestion that the State's interest is to represent the majority population. To the contrary, the Court believes strongly that "the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction." *State v. Cofield*, 320 N.C. 297, 302 (1987).

282. In his report and testimony, Cronin also offered opinions concerning the MSU Study, which he described as a "fairly well-defined study." Cronin testified that it is difficult to determine whether divergent outcomes are related to race or to culture and ideology. HTpp. 2202-2203. However, Cronin readily admitted that a well-defined study can control for race as a variable and find that race is statistically significant. Cronin's only criticism was that the MSU Study could not conclude that race is the most significant factor.

283. Cronin acknowledged and the Court so finds that one may quantitatively measure race effects through the use of a statistical analysis which controls for extraneous variables and that a well-defined study of this kind gives mathematical value to such a social concept. The RJA does not require Robinson to prove that race is the "the most significant factor" in prosecutor strike decisions. To the contrary, he need prove only that race is "a significant factor." Thus, the Court concurs with Cronin's assessment that it is appropriate to rely upon such studies in determination of statistical significance but rejects Cronin's concern that a statistical analysis cannot identify "the most significant factor" because the statute does not require any such finding.

284. Overall, the Court finds Cronin's testimony to be of limited value. Cronin's training and background have negligible relevance to the issues before the Court. As for the content of his testimony, the Court finds the majority of Cronin's opinions unhelpful in determining whether race is a significant factor in prosecutor strikes of African-American venire

members in North Carolina. However, the Court does find that the State's presentation of Cronin's testimony constitutes some evidence that prosecutors in North Carolina base strike decisions on the beliefs of African-Americans as a group. In turn, the Court finds that this is some evidence that race is a significant factor in prosecutor strike decisions and that prosecutors intentionally discriminate against African-Americans based on generalized perceptions of their views on law enforcement, criminal justice, and the death penalty.

Case Examples of Discrimination.

285. Robinson presented a number of case examples which support a finding that race was a significant factor in the exercise of peremptory strikes in North Carolina. These examples are described in Robinson's Post-Hearing Brief, Defendant's Exhibits 82-96, and the testimony of Robinson's expert, Stevenson. HTpp 872-87. The Court finds that the following examples from capitally tried cases individually and collectively constitute some evidence that race played a role in the exercise of peremptory strikes by North Carolina prosecutors and some evidence of intentional discrimination:

> **Cases in which prosecutors struck African-American venire members because of their membership in an organization or association with an institution that is historically or predominantly African-American.**

286. In the 1996 Rutherford County case of *State v. Fletcher*, the prosecutor attempted to strike African-American venire member Benjamin McKinney because he belonged to the NAACP. *State v. Fletcher* I, Vol. I, Tpp. 98, 107-108. In the 1992 Guilford County case of *State v. Robinson*, the prosecutor struck African-American venire member Lolita Page in part because she was a graduate of North Carolina State A&T University. DE30, *State v. Robinson*,

Vol. I, Tpp. 68-72, 83, 89.[16] The Court finds that invocation of membership in an African-American organization and attendance at a predominantly African-American institution are facially not race-neutral explanations.

Instances when prosecutors in North Carolina and in Cumberland County struck African-American jurors after asking them explicitly race-based questions.

287. In the 1994 Rowan County case of State v. Barnes, Blakeney & Chambers, the prosecutor directed questions about the potential impact of racial bias only to the black venire members, Melody Hall and Chalmers Wilson, and did not ask those questions to non-black venire members. In addition, 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?" State v. Barnes, Blakeney & Chambers, Vol. I, Tp. 340-41, 365-66 (emphasis added).[17]

288. In the 1998 Cumberland County case of State v. Golphin, the prosecutor asked African-American venire member John Murray 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

[16] Although the defendant, Dwight Robinson, raised a *Batson* claim at trial, counsel did not argue at trial that attendance at a historically black college was not a race-neutral explanation, and this issue was not addressed by the North Carolina Supreme Court on direct appeal. *State v. Dwight Robinson*, 336 N.C. 78, 94-95 (1994). Dwight Robinson is currently serving a life sentence.

[17] In *Barnes*, the Supreme Court of North Carolina considered "variation in the number of questions asked or the manner of questioning" and noted that a difference in the manner of questioning "in itself does not necessarily lead to a conclusion that the reasons given by the prosecutor were pretextual." *State v. Barnes*, 345 N.C. 184, 211-12 (1997) (emphasis added). The facts and circumstances of Hall's voir dire may nonetheless constitute evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

disrespected, embarrassed or otherwise not treated appropriately in that situation?" At another point, the prosecutor asked Murray about an incident involving other venire members whom Murray had overheard talking about the case. The prosecutor 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?" State v. Golphin, Vol. J, Tpp. Tpp. 2055, 2073 (emphasis added).[18]

Instances when prosecutors in North Carolina and in Cumberland County have subjected African-American venire members to different questioning during voir dire.

289. Stevenson testified about the practice of "targeting," whereby prosecutors, consciously or otherwise, subjected African-American venire members to different levels of questioning, scrutiny, or investigation than other jurors. HTpp 873-76. The Court credits this testimony, and finds the following three examples of different questioning of African-Americans to fall under this practice.

290. In the 1995 Transylvania County case of State v. Sanders, the prosecutor singled out African-American venire member Renita Lytle for invasive questioning about her son's father and whether he was paying child support. No other venire member was asked such questions by the prosecutor. State v. Sanders, Vol. IV, Tpp. 984-86.

291. In the 1996 Randolph County case of State v. Trull, the prosecutor questioned African-American venire member Rodney Foxx repeatedly about the same topics, and spent a significant amount of time conferring with the prosecution team during Foxx's questioning. No other venire member was subject to such treatment by the prosecutor. DE45.

[18] In *Golphin*, the Supreme Court did not discuss the prosecutor's questions that invoked race. *See State v. Golphin*, 352 N.C. 364 (2000). The facts and circumstances of Murray's voir dire may yet constitute evidence supporting an RJA claim. *See supra* note regarding Murray. While the Supreme Court upheld the trial court's overruling of the *Batson* challenge in *Golphin*, this Court may consider the facts and circumstances of Murray's voir dire as evidence supporting an RJA claim.

292. In the 1998 Cumberland County case of *State v. Golphin*, the prosecutor singled out African-American venire member John Murray by asking him about his familiarity with Haile Selassie, the former emperor of Ethiopia, and musicians Bob Marley and Ziggy Marley. The prosecutor did not ask a single white venire member about these three individuals. *State v. Golphin*, Vol. J, Tpp. 2083-84.

Instances when prosecutors in North Carolina and Cumberland County have struck African-American venire members for patently irrational reasons.

293. In the 1991 Robeson County case of *State v. McCollum*, the prosecutor purportedly moved to strike 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. DE45.

294. In the 1995 Anson County case of *State v. Prevatte*, the prosecutor struck African-American venire member Randal Sturdivant in part because he was a veteran of the United States Army. SE32 (Vlahos Affidavit).

295. In the 1999 Forsyth County case of *State v. Thibodeaux*, the prosecutor struck black venire member Marcus Miller in part because he "answered questions 'Yeah' 6 times during questioning." SE48 (Hall Statement). *State v. Thibodeaux*, Vol. IV, Tpp. 44-54.

296. In the 2000 Cumberland County case of *State v. Walters*, the prosecutor 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." SE32 (Scott Affidavit). 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. State v. Walters, Vol. A, Tpp. 274-75.

297. The reasons offered by prosecutors in these four cases lack any rational basis. The notion that a citizen who has served his country is – by virtue of that fact – unacceptable for jury service is particularly troubling to the Court.

Instances when prosecutors in North Carolina and in Cumberland County have struck African-American venire members for pretextual reasons based on demeanor.

298. In the following four cases, the trial court specifically found purportedly race-neutral explanations from the State regarding a venire member's demeanor to be pretextual. 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. DE45.

299. 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. DE2, State v. Fowler, October 24, 1997 Volume, Tpp. 50-51, 75-77.

300. In the 1998 Cumberland County case of State v. Golphin, the prosecutor struck African-American venire member John 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 . . . ." 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." DE2, *State v. Golphin*, Vol. II, Tpp. 2113, 2014-15.

301. In the 1998 Cumberland County trial of *State v. Parker*, the prosecutor moved to strike black venire member Forrester Bazemore in part because of "he folded his arms and sat back in the chair away," there was "some closing of his eyes and blinking," and the venire member seemed "evasive" and "defensive." The trial judge, in contrast, described Bazemore as "thoughtful and cautious in his answers" and determined to "make sure he understood exactly what question was being posed before he answered." Accordingly, the trial court ruled that the prosecutor's demeanor-based reason for striking Bazemore was pretextual. DE45, *State v. Parker*, Vol. III, Tpp. 445, 450-51, 455.

Differential treatment of African-American venire members.

302. The Court finds the following numerous instances when prosecutors throughout North Carolina have struck African-American venire members for a purportedly objectionable characteristic but accepted non-black venire members with comparable or even identical traits.[19]

[19] The Court notes that, for many of these venire members, the comparable non-struck jurors do not share every characteristic. This approach is consistent with the Supreme Court's jurisprudence under *Batson* and its progeny. *See, e.g., Miller El*, 545 U.S.247 n. 6. ("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."). Furthermore, in some instances, the State proffered both pretextual and other, more plausible race-neutral explanations for some strikes. The Court finds that the reference to even one pretextual explanation is some evidence of discrimination. This is consistent with the mixed motive line of cases discussed previously.

303. The State submitted an affidavit asserting that, in the 1995 Union County case of *State v. Darrell Strickland*, the prosecutor struck black venire member Leroy Ratliffe because Ratliffe knew one of the defense attorneys in the case, was a native of Anson County rather than Union County, and he had a "moderate" belief in the death penalty. SE32 (Perry Affidavit). The State passed non-black venire member Pamela Sanders, who knew one of the defense attorneys through her work with the American Cancer Society and because defense counsel was related to Sanders' boss. The State also passed non-black venire members who were not Union County natives: Robert Berner was originally from the Midwest and Albert Ackalitis was a native of New York. Finally, 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," and 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." DE2, *State v. Strickland*, Tpp. 245 (Funderburk), 254 (Berner), 321 (Ackalitis), 460 (Pressley), 833 (Sanders), 938 (Glander).

304. The State submitted an affidavit asserting that, in the 1999 Sampson County case of *State v. Barden*, the prosecutor struck black 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." SE32 (Butler Affidavit) (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." DE2, State v. Barden, Vol. I, Tpp. 245-49; Vol. 3, Tp. 526 and 538 (Birch), 538-39 and 553 (Baggett), 579 (Berger).

305. The State submitted an affidavit asserting that, in the 1999 Craven County case of *State v. Anderson*, the prosecutor struck black venire member Evelyn Jenkins in part because she worked in the home of the defense attorney's family. SE32 (Hobbs Affidavit). 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. DE2, State v. Anderson, Vol. II, Tpp. 265-66 (Jenkins), Tpp. 456-57 (Shellhammer), Tp. 458 (Nutt).

306. The State submitted an affidavit asserting that, in the 1998 Onslow County case of State v. Hyde, the prosecutor struck black venire member Queen Esther Thompson in part because she had prior contact with defense counsel. SE32 (Maultsby Affidavit). The record shows that, 15 years before, defense counsel represented Thompson's ex-husband in their divorce. The State accepted non-black venire member Jeffrey Watkins, whose present wife had recently retained defense counsel to prepare a prenuptial agreement and, a year before, had represented her in the divorce from her former husband. DE2, State v. Hyde, Vol. II, Tp. 265 (Watkins); Vol. 3, Tp. 517 (Thompson).

307. The State submitted an affidavit asserting that, in the 1995 Surry County case of State v. East, the prosecutor struck African-American venire member Michael Stockton in part

because he knew a potential defense witness. SE32 (Bowman Affidavit). 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 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. DE2, *State v. East*, Vol. I, Tpp. 71-72 (list of defense witnesses); Vol. 3, Tpp. 327 and 356 (Stockton), 403-404 and 407-408 (Frye), 418 (Craddock), 447-49 (Sands), 472-75 (Gordon).

308. The State submitted an affidavit asserting that, in the 1993 Rowan County case of *State v. Campbell*, the prosecutor struck black venire member Shirley Moss in part because she was a teacher. SE32 (King Affidavit). The record shows that the State passed two non-black venire members who were teachers, Patricia Julian and Mary McKee Johnston. DE2, *State v. Campbell*, Vol. I, Tpp. 539 and 547-48 (Johnston); Vol. II, Tpp. 772-74 (Julian), 791 and 793-95 (Moss).

309. The State submitted an affidavit asserting that, in the 2002 Rowan County case of *State v. Smith*, the prosecutor struck black 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. SE32 (King Affidavit). 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. DE2, *State v. Smith*, Vol. III, Tpp. 355-56, 362, and 406 (Connor); 492-93 (Edwards).

310. The State submitted an affidavit asserting that, in the 1995 Anson County case of *State v. Prevatte*, the prosecutor struck black venire member Randal Sturdivant in part because he was a veteran of the United States Army. SE32 (Vlahos Affidavit). The record shows the

State passed non-black venire member Haywood Calvin Newton, a veteran of the United States Air Force. DE2, *State v. Prevatte*, Vol. I, Tp. 207-208 (Sturdivant); Vol. IV, Tpp. 1285-86 (Newton).

311. The State submitted an affidavit asserting that, in the 1993 Iredell County case of *State v. Burke*, the prosecutor struck African-American venire member Vanessa Moore in part because she had previously lived in Maryland and Washington, D.C. SE32 (Red Arrow Affidavit). 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. DE2, *State v. Burke*, Vol. II, Tpp. 284-85 (Moore), 325 (Tucker), 327-28 (Johnson), 333-335 (Smallwood); Vol. IV, Tp. 803 (McNemar).

312. The State submitted an affidavit asserting that, in the 1992 Craven County case of *State v. Reeves*, the State struck black 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. SE32 (Hobbs Affidavit). The transcript shows that the prosecutor asked few questions about this matter, but did ascertain that the case had been resolved without a trial and Holland never came 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. DE2, *State v. Reeves*, Tpp. 223-24 (Styron), Tp. 707 (Holland).

313. The State submitted an unsworn statement asserting that, in the 2000 Forsyth County case of *State v. White*, the State struck black venire member Mark Banks because Banks' wife was a rape victim and the State was concerned about the impact his wife's experience might

have on him. SE48 (Silver Statement). 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. DE2, *State v. White*, Vol. I, Tpp. 107-108 (Banks); DE67 (Morgan's Questionnaire).

314. The State submitted an affidavit asserting that, in the 1996 Johnston County case of *State v. Guevara*, the prosecutor struck black venire member Gloria Mobley because of her purported reservations about the death penalty. SE32 (Jackson Affidavit). 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 reluctance to impose the death penalty except in especially heinous cases. DE2, *State v. Guevara*, Vol. 3, Tp. 541 (Matthews); Vol. 4, Tpp. 630-31 (Sapp); Vol. 7, Tpp. 1317-18 (Bryant); Vol. 9, Tpp. 1697 (Pearson); Vol. 10 Tp. 1924 (Stone), 1990 (Beck).

315. The State submitted an unsworn statement asserting that, in the 1995 Forsyth County case of *State v. Woods*, the prosecutor struck black venire member Sadie Clement in part because she had an elementary education degree and "vast experience in psychology and the development of children." SE48 (Silver Statement). The state passed Holly Coffey, Romaine Hudson, and Mary Joyce, all of whom were non-black venire members with who had worked with children and had degrees and/or experience in elementary education and psychology. DE2, *State v. Woods*, Vol. I, Tpp. 56-59 (Coffey); Tpp. 180, 186-91(Clement); Vol. II, 387-88 (Joyce), Tpp. 512, 515 (Hudson).

316. The State submitted an unsworn statement asserting that, in the 1999 Forsyth County case of *State v. Thibodeaux*, the prosecutor struck black venire member Marcus Miller in part because he "answered questions 'Yeah' 6 times during questioning" and in part because he

appeared to have a prior conviction for impaired driving. SE48 (Hall Statement). The prosecutor accepted non-black venire member Lowell Parker who said "yeah" 10 times. The prosecutor accepted non-black venire member Jack Locicero, who had also been convicted of DWI. DE2, *State v. Thibodeaux*, Vol. IV, Tpp. 44-54 (Parker), Tp. 83 (Locicero).

317. The State submitted an affidavit asserting that, in the 2001 Davidson County case of *State v. Watts*, the prosecutor struck black venire member Christine Ellison in part because of misspellings and errors on her questionnaire. SE32 (Brown Affidavit). The record shows that Ellison misspelled her state of birth and her occupation. The State passed non-black venire members Tammy Alley and John Thomas Reaves who misspelled an adjacent county, a nearby city. DE67.

318. The Court also finds a number of instances when prosecutors in Cumberland County struck black venire members for a purportedly objectionable characteristic but accepted non-black venire members with comparable or even identical traits.

319. The State submitted an affidavit asserting that, in the 2000 Cumberland County case of *State v. Walters*, the prosecutor struck black venire member Jay Whitfield in part because he "knew some gang guys from playing basketball." SE32 (Scott Affidavit). The record shows Whitfield had limited contact with certain individuals during pick-up games and he'd overheard them talking about potential gang activity. The State passed non-black venire member Tami Johnson who had gone through basic training and become friends with a gang member. Johnson also knew people in high school who were in gangs. DE2, *State v. Walters*, Vol. B, Tpp. 250-52 (Whitfield), Vol. C, Tpp. 391-95 (Johnson).

320. The State submitted an affidavit and introduced testimony asserting that, in the 1995 Cumberland County case of *State v. Meyer*, the prosecutor 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." SE32 (Colyer Affidavit); HTp. 1150. 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.[20] DE2, *State v. Meyer* I, Vol. I, Tpp. 101-107 (Mouton), Tpp. 122-23 (Miller).

321. In the 2000 Cumberland County case of *State v. Walters*, the prosecutor 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." SE32 (Scott Affidavit). The record shows that, after his car CD player was stolen, Richmond did not take advantage of counseling services for crime victims. The State passed non-black venire member Lowell Stevens, who, 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. The State also accepted non-black venire member Ruth Helm, who said, "someone stole our gas blower out of the garage. I know that is minor, but I assumed you needed to know everything." DE2, *State v. Walters*, Vol. A, Tpp. 274-75 (Richmond), 407-408 (Helm); Vol. G, Tp. 1265 (Stevens).

322. In the 1998 Cumberland County trial of *State v. Parker*, the prosecutor moved to strike black venire member Forrester Bazemore in part because of his age. The trial court observed that Bazemore had the same birthday as non-black venire member John Seymour Sellars. The trial court ruled that the prosecutor's reason for striking Bazemore was pretextual. DE45, *State v. Parker*, Vol. III, Tpp. 444, 447, 455.

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[20] The Court declines to credit as race-neutral the reason for striking Mouton that was offered for the first time in closing argument at the hearing. *See* 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. The "newly-minted reason" for striking Mouton illustrates the ease with which a person may justify race-based conduct.

323. The State submitted an affidavit asserting that, in the 1998 Cumberland County case of *State v. Golphin*, the prosecutor struck black venire member Freda Frink in part because Frink stated she had mixed emotions about the death penalty. SE32 (Colyer Affidavit). The transcript reveals that Frink stated she would follow the law and consider both possible punishments. Moreover, in the same case, 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 other cases, the same prosecutor accepted non-black venire members Jane Albertson and Sara Johnson, both of whom expressed difficulty with the death penalty. DE2, *State v. Golphin*, Vol. D, Tpp. 652, 679, 681, 683 (Frink); Vol. J, Tpp. 2116, 2165, 2173 (Stephenson); *State v. Wilkinson*, Vol. III, Tpp. 793, 798, 803-804 (Albertson); *State v. Williams* I, Vol. H, Tpp. 1620, 1636-37 (Johnson).

324. The State submitted an affidavit asserting that, in the 2000 Cumberland County case of *State v. Walters*, the prosecutor struck black venire member Ellen Gardner in part because her brother had been convicted of gun and drug charges and received five years house arrest. SE32 (Scott Affidavit). 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. Moreover, 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. DE2, *State v. Walters*, Vol. G, Tpp. 1169, 1185-89 (Gardner); Vol. May 18, 2000, Tpp. 4, 8-9 (Smith).

325. The State submitted an affidavit asserting that, in the 2007 Cumberland County case of *State v. Williams*, the prosecutor struck black venire member Wilbert Gentry in part

because Gentry had a cousin who was convicted of murder and because Gentry said participating in a capital trial would "gnaw" at him. SE32 (Colyer Affidavit). 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. Moreover, in other cases the same prosecutor accepted non-black venire members David Coleman and Ann Marie Starling, both of whom had family members convicted of murder. In addition, the same prosecutor accepted Tabitha McFee and Sara Johnson as jurors, despite the fact that both indicated that serving on a capital jury would weigh on their conscience. DE2, *State v. Williams* II, Vol. 9, Tpp. 1914, 1917-19 (Wellman); *State v. Cagle*, Vol. IV, Tpp. 1065, 1199-1205 (Coleman); *State v. Williams I*, Vol. A, Tp. 164; Vol. B Tpp. 218-21 (Starling), Vol. H, Tpp. 1620, 1636-37 (Johnson); *State v. Augustine*, Vol. F, Tpp. 1291, 1303-06 (McFee).

326. The State submitted an affidavit asserting that, in the 2000 Cumberland County case of *State v. Walters*, the prosecutor struck black venire member Marilyn Richmond in part because she had worked with gang members as a teenage counselor and because her brother served a prison sentence for armed robbery. SE32 (Scott Affidavit). However, the State accepted non-black venire member Tami Johnson who was good friends with a former gang member. DE2, *State v. Walters*, Vol. C, Tpp. 391-95 (Johnson).

327. The State submitted an affidavit asserting that, in the 2004 Cumberland County case of *State v. Williams*, the prosecutor struck black venire member Teblez Rowe because she stated that she did not think the death penalty was right. SE32 (Colyer Affidavit). 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. Moreover, the State accepted non-black venire member Michael Sparks, who, like Rowe, stated that he was against the death penalty but he would still be able to follow

the law. DE2, *State v. Williams* I, Vol. E (Tpp. 908, 1017-19 (Sparks), Tp. 910; Vol. F, Tpp. 1249-56 (Rowe).

328. The State submitted an affidavit asserting that, in the 1995 Cumberland County case of *State v. McNeill*, the prosecutor struck black venire member Linda Montgomery in part because there was an intra-family murder in her family, her son was deceased, and she was unwilling to discuss her son's death and her degree of kinship regarding the intra-family murder. SE32 (Colyer Affidavit). The transcript reveals that the same prosecutor accepted non-black venire member Mary Bissette, who had a relative with criminal involvement but declined to reveal her degree of kinship to that family member. DE2, *State v. McNeill*, Vol. B, Tp. 637; Vol. C. Tpp. 655-57, 690-96 (Montgomery); *State v. Golphin*, Vol. B, Tp. 300, 357-58 (Bissette).

329. The State submitted an affidavit asserting that, in the 2000 Cumberland County case of *State v. Walters*, the prosecution team struck black venire member Calvin Smith in part because he was 74 years of age. SE32 (Scott Affidavit). However, in *Augustine*, which was tried by two of the same prosecutors, the State accepted non-black venire member Harold MacNaught, who was 70 years of age. Moreover, in *Golphin*, which was also tried by two of the same prosecutors, the State accepted non-black venire members Adam Cretini and Larry Raynor, who were 73 and 70 years of age, respectively. DE4.

330. The State submitted an affidavit asserting that, in the 2000 Cumberland County case of *State v. Walters*, the prosecutor struck black venire member Lisa Bender because she felt the death penalty was only appropriate in extreme cases and because she was concerned about the financial hardship jury service would impose. SE32 (Scott Affidavit). However, in *McNeil*, the same prosecutor accepted non-black venire member Martin Lerner, who also felt the death penalty was only appropriate in extreme or drastic cases. In *Golphin*, the same prosecutor

accepted non-black venire member Arnold Davis, who expressed concern that jury service would interfere with his employment search. DE2, *State v. McNeil*, Vol. II, Tpp. 581, 619-21 (Lerner); *State v. Golphin*, Vol. B, Tpp. 300, 305, 427-28 (Davis).

331. The State submitted an affidavit asserting that, in the 1995 Cumberland County case of *State v. McNeil*, the prosecutor struck black venire member Rodney Berry in part because he stated he could not vote for the death penalty for a felony murder conviction. SE32 (Colyer Affidavit). However, in the same case and the case of *Williams I*, Colyer accepted non-black venire members Anthony Sermarini and William Shipman, who also expressed hesitation about imposing the death penalty for felony murder. DE2, *State v. McNeil*, Vol. IV, Tpp. 1014, 1026 (Sermarini); *State v. Williams* I, Vol. A, Tp. 166; Vol. C, Tpp. 485-94 (Shipman).

332. The State submitted an affidavit asserting that, in the 1998 Cumberland County case of *State v. Golphin*, the prosecutor struck black venire member Kenneth Dunston in part because Dunston stated he did not want to decide "no one's life." SE32 (Colyer Affidavit). The transcript reveals that Dunston stated he would be willing to put aside his personal reservations and vote for the death penalty. Moreover, in three other cases, *Wilkinson*, *Augustine*, and *Cagle*, the same prosecutor accepted non-black venire members Jane Albertson, Robin Northam, Tabitha McFee, and Robyn Smith, all of whom, like Dunston, expressed hesitation about sitting in judgment against another person. DE2, *State v. Golphin*, Vol. G, Tpp. 1342, 1431-36 (Dunston); *State v. Wilkinson*, Vol. III, Tpp. 793, 798 (Albertson); *State v. Augustine*, Vol. B, Tpp. 262, 290 (Northam); *State v. Cagle*, Vol. IV, Tpp. 1034, 1085-86 (Smith).

333. The State submitted an affidavit asserting that, in the 2004 Cumberland County case of *State v. Williams*, the prosecutor struck black venire member Mavis Savoy in part because her brother was serving a prison sentence for second-degree murder. SE32 (Colyer

Affidavit). However, in *Cagle*, the same prosecutor accepted non-black venire member David Coleman, whose brother also served a prison sentence for second-degree murder. Coleman's brother was originally charged with first-degree murder. In addition, Coleman's friend was convicted and sentenced to prison for second-degree murder; Coleman testified at his friend's trial as a character witness. DE2, *State v. Cagle*, Vol. IV, Tpp. 1065, 1199-1205 (Coleman).

334. The State submitted an affidavit and introduced testimony asserting that, in the 1994 Cumberland County case of *State v. Robinson*, the prosecutor struck black venire member Elliot Troy in part because Troy was charged with public drunkenness. SE32 (Colyer Affidavit); HTpp. 1130-32. However, the prosecutor accepted Cynthia Donavan and James Guy, two non-black venire members with driving while intoxicated convictions. DE2, *State v. Robinson*, Vol. II, Tpp. 507, 509-11 (Donovan); Vol. III, Tpp. 820, 840 (Guy).

Instances where the prosecutor's characterization of the voir dire answers of African-American jurors was inaccurate or misleading.

335. The Court also finds numerous instances where the purported race-neutral explanations submitted by the state mischaracterize the voir dire response of African-American jurors. The State submitted an unsworn statement asserting that, 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." SE48 (Silver Statement). The transcript of voir dire does not reveal any instance in which Clement stated that her child was in juvenile court because he was the victim of a molestation. The transcript reveals that non-black venire member Neva Martin, who was questioned during same time period as Clement, testified that her son was molested and the matter was handled in juvenile court. Martin was seated on the jury. DE2, *State v. Woods*, Vol. I, Tp. 181.

336. The State submitted an unsworn statement asserting that, in the 1999 Forsyth County case of *State v. Thibodeaux*, the prosecutor struck black venire member Marcus Miller in part because he denied having been convicted of DWI. SE48 (Hall Statement). The transcript shows that the prosecutor asked Miller several questions about a potential DWI conviction. The prosecutor repeatedly acknowledged he was not certain he had the right Marcus Miller and that his "information might not be correct." The record does not support the State's assertion – from a prosecutor who was not present at trial – that Miller falsely claimed not to have been convicted of DWI. DE2, *State v. Thibodeaux*, Vol. IIIB, Tp. 204.

337. The State submitted an unsworn statement asserting that, in the 2000 Forsyth County case of *State v. White*, the State struck African-American venire member Mark Banks because, when asked about his wife's experience as a rape victim, Banks was "very hesitant to talk about the case . . . the State may have been unsure about the venire member's feelings toward law enforcement and the prosecution of the case involving his wife." SE48 (Silver Statement). The record shows Banks was asked about any incident where he had to come to court for any reason. Banks said he had not come to court with his wife because the rape occurred before they were married. There is no evidence of any hesitancy or negative feelings on Banks' part. DE2, *State v. White*, Vol. I, Tpp. 107-108.

338. The State submitted an affidavit asserting that, in the 1990 Wilson County case of *State v. Jennings*, the prosecutor struck African-American venire member Alice Ruffin because she expressed hesitancy about the death penalty. SE32 (Wolfe Affidavit). The record shows that Ruffin was initially confused by the prosecutor's questions. Once she understood that she would be asked to impose the death penalty only after she and the other jurors had found the defendant guilty of first-degree murder beyond a reasonable doubt, she repeatedly and unequivocally

expressed her belief in the death penalty and willingness to follow the law. DE2, *State v. Jennings*, Vol. I, Tpp. 272-83.

339. The State submitted an affidavit asserting that, in the 1996 Johnston County case of *State v. Guevara*, the prosecutor struck African-American venire member Gloria Mobley because Mobley would not impose the death penalty in a case where the defendant was provoked. SE32 (Jackson Affidavit). The record shows that Mobley supported the death penalty except in cases of accident or unintentional murder. She expressed a willingness to follow the law and never spoke of provocation. DE2, *State v. Guevara*, Vol. 8, Tpp. 1476-88.

340. The Court has finds a number of instances in Cumberland County and in Robinson's case where the prosecutor's characterization of the voir dire answers of African-American jurors was inaccurate or misleading.

341. The State submitted an affidavit asserting that, in the 2000 Cumberland County case of *State v. Walters*, the prosecutor struck African-American venire member Laretta Dunmore because she "said her brother in New Jersey had been charged with armed robbery ten (10) or eleven (11) years before and was 'out now'. She said 'there wasn't a fair trial' for her brother that she was pretty close to." SE32 (Scott Affidavit). The record shows that Dunmore's brother pled guilty, there was no trial, she felt his 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. DE2, *State v. Walters*, Vol. B, Tpp. 313-16.

342. The State submitted an affidavit and introduced testimony asserting that, in the 1994 Cumberland County case of *State v. Robinson*, the prosecutor struck black venire member Margie Chase because she expressed reservations about the death penalty. SE32 (Colyer Affidavit); HTp. 1129. The transcript reveals that Chase's initial statement reflecting a death

penalty reservation was based upon a misunderstanding of the law. Once the prosecutor explained the law, Chase no longer expressed any reservations. The prosecutor's statement to the contrary is not supported by the record.

343. The State submitted an affidavit and introduced testimony asserting that, in the 1994 Cumberland County case of *State v. Robinson*, the prosecutor struck black 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." SE32 (Colyer Affidavit); HTp. 1132. 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, in the same case, 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. DE2, *State v. Robinson*, Vol. V, Tpp. 1786, 1794-98 (Johnson); Vol. I, Tpp. 2, 331-32 (Combs).

344. After considering the totality of Robinson's evidence, including the statistically significant disparities in strike decisions by race, the Court finds that these instances of inaccurate or misleading characterizations of answers given by African-American venire members constitute some evidence that reasons offered by prosecutors in Cumberland County and in Robinson's case were neither credible nor race-neutral, and some evidence that race was a significant factor in prosecutor strike decisions.

Instances when the prosecutor relied on improper, unconstitutional reasons for striking African-American venire members other than race, namely gender.

345. The State submitted sworn affidavits by a seasoned prosecutor, Gregory C. Butler, ascribing gender as the motive for strikes in two cases. In the 1999 Sampson County case of *State v. Barden*, the prosecutor struck African-American venire member Elizabeth Rich because the State was "looking for strong male jurors." SE32 (Butler Affidavit). 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." SE32 (Butler Affidavit).

346. 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 some evidence of a willingness to consciously and intentionally base strike decisions on discriminatory reasons, and some evidence that race was a significant factor in prosecutor strike decisions.

Instances when prosecutors in North Carolina were unable to identify race-neutral reasons for striking African-American venire members.

347. In a number of submitted affidavits, the State conceded there were no apparent race-neutral explanations for the strikes against African-American venire members. In the 1990 Wilson County case of *State v. Jennings*, the prosecutor struck African-American venire member Walter Curry. Concerning the reason for the strike, the State offered, "Unknown from available facts, believed to be disinterest in the judicial process." SE32 (Wolfe Affidavit). The Court declines to credit the State's conjecture as to Curry's disinterest and finds that the State has conceded it had no race-neutral reason for striking Curry.

348. In the 1995 Nash County case of *State v. Richardson*, the prosecutor struck African-American venire member Donnell Peoples. The State conceded that the reason for the strike was "[u]known from available facts." SE32 (Wolfe Affidavit).

349. In the 1995 Forsyth County case of *State v. Larry*, the prosecutor struck African-American venire member Tonya Reynolds. The State conceded it was "not able to determine the reason for the strike." SE44 (Weede Statement).

350. In the 2003 Gaston County case of *State v. Duke*, the prosecutor struck African-American venire member Patrick Odems. The State conceded that the trial prosecutor had no independent recollection of Odems and made no notes as to why Odems was struck. SE32 (Red Arrow Affidavit).

351. In the 2009 Mecklenburg County case of *State v. Sherrill*, the prosecutor struck African-American venire member Dwayne Wright. The State conceded that after reviewing the trial transcript and the notes of the assistant district attorney, it was "unable to determine the reasons that the juror was struck." SE32 (Greene Affidavit).

352. Based upon its review of the transcript of voir dire, the Court finds that these African-American venire members were qualified to serve as jurors and would have given fair consideration to the evidence and governing law. DE2, *State v. Jennings*, Vol. 6, Tpp. 1287-94; *State v. Richardson*, Vol. V, Tpp. 802-18; *State v. Larry*, Vol. II, Tpp. 248, 259-60; *State v. Duke*, Tpp. 909-11; *State v. Sherrill*, Vol. VI, Tpp. 1034-36.

353. 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, treating African-American venire members differently from similarly situated non-black venire members, offering irrational and unconstitutional

reasons for striking African-American venire members, and striking African-American venire members for no reason at all – are significant in that they come from cases tried between 1990 and 2009, from a multitude of judicial divisions and prosecutorial districts across North Carolina, including Cumberland County, and including Robinson's case. Robinson's evidence is credible and persuasive and casts doubt on the credibility and reliability of the testimony of Robinson's prosecutor and the prosecutor affidavits reviewed by the State's expert and admitted as substantive evidence.

354. After considering the totality of Robinson's evidence, including the statistically significant disparities in strike decisions by race, the Court finds the evidence that prosecutors strike African-American venire members for their association with African-American institutions, ask African-American venire members race-based questions, treat African-American venire members differently from similarly situated non-black venire members, offer irrational and unconstitutional reasons for striking African-American venire members, and strike African-American venire members for no reason at all establishes that race was a significant factor in prosecutor's decisions to strike African-Americans in North Carolina, in the former Second Division, in Cumberland County, and in Robinson's case from 1990-2009, from 1990-1999, from 1990-1994, and at the time of Robinson's trial in 1994, and also establishes intentional discrimination based on race in these same geographical regions and time periods.

Trainings to minimize the effect of racial biases.

355. As described below in more detail, Trosch, Stevenson, and Sommers all testified regarding the availability of training programs about the nature of contemporary racial bias and how to minimize the effect of that bias. HTpp. 735, 865, 1037. The State did not contest that it had not undertaken such trainings; indeed, in closing argument the State conceded that it might

participate in these kinds of trainings as a result of the RJA litigation, and that such training could be beneficial. The Court finds the following testimony regarding the availability of trainings to be credible and persuasive:

356. Trosch, who participated in such trainings for 10 years or more, testified that there are many things that can be done to reduce the impact of implicit bias or unconscious racism, but they all begin with recognition of the problem. HTp 1037. Prosecutors in North Carolina appear not to have availed themselves of this opportunity. Trosch testified he had never been asked by prosecutors to educate them about implicit bias. HTp 1051.

357. Dickson testified that he himself was aware of the role of implicit bias as a result of trainings, but conceded that those trainings were from after he had left the district attorney's office. In an earlier hearing in this case, the State conceded that Cumberland County had no policy or procedures in place to respond to *Batson* challenges made in cases prosecuted by the district attorney's office. September 6, 2011 HTp. 86.

358. Sommers similarly testified that he had given numerous trainings on how to respond individually and institutionally to unconscious biases to minimize their impact. HTp. 735. He testified that he would be willing to conduct such trainings for prosecutors.

359. Stevenson testified regarding an example where a United States Attorney's office undertook the kinds of proactive steps necessary to change the culture within the office and stop the practice of using peremptory strikes in a racially discriminatory manner. HTpp. 865, 909-10.

360. Robinson presented documentary evidence as well as expert testimony regarding the Conference of District Attorneys' training regarding *Batson* and race discrimination in jury selection. This Court finds that the training regarding race discrimination did not include training intended to teach prosecutors how to avoid discrimination in jury selection, but that the

training was focused on how to avoid a finding of a *Batson* violation in case of an objection by opposing counsel. Robinson presented examples where it is clear that the prosecutors were relying on training materials provided by the Conference to provide race-neutral reasons that were pretextual.

361. Defendant's Exhibit 33 is illustrative. This excerpt of the jury selection in the 1998 Cumberland County case of State v. Parker is an example of a prosecutor relying on training materials to provide "race-neutral" reasons for a peremptory strike against an African-American venire member. The prosecutor told the judge "... just to reiterate, those three categories for Batson justification we would articulate is (sic) the age, the attitude of the defendant (sic) and the body language." These reasons are set out as "justifications" 3, 4, and 5 in the training materials given to prosecutors at a capital case seminar on jury selection in March of 1995. The Court finds that this evidence is circumstantial evidence that race was a significant factor in the exercise of peremptory strikes by prosecutors in North Carolina. *State v. Maurice Ilvanto Parker*, 96 CRS 4093, Vol. III pp. 443-455.

Harm to the Judicial System from the State's Systematic Exclusion of African-American Citizens from Jury Service.

362. While it is undeniable that, in many instances, citizens attempt to avoid jury service or are happy if they are not chosen for jury service, African-Americans who believe or suspect that they have been excluded from service on account of their race feel burdened and victimized by that experience. HTp 890. Thus, the practice of bias and perception of bias is harmful to individual excluded jurors as well as their families and communities. HTp 890. Excluded African-American jurors in North Carolina are harmed by the experience of not being able to serve on a jury because of race and by their realization that there continues to be resistance to participation by people of color on capital juries. HTpp 890-91. Discrimination in

jury selection frustrates the commitment of African-Americans to full participation in civic life. HTp 892. One of the stereotypes particularly offensive to African-American citizens is that they are not interested in seeing criminals brought to justice. HTp 892. African-Americans who have been excluded from jury service on account of race compare their experience to the injustices and humiliations of the Jim Crow era. HTpp 891-92.

363. The fact that race discrimination continues in jury selection in capital cases in North Carolina is further supported by statements by attorneys and judges acknowledging that the practice continues and is visible. HTpp 893-94.

364. In prohibiting disparate treatment of potential jurors based on race, the RJA is consistent with North Carolina's longstanding unwillingness to "tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice." *State v. Cofield*, 320 N.C. 297, 302 (1987). This Court agrees that "[t]o single out blacks and deny them the opportunity to participate as jurors in the administration of justice – even though they are fully qualified – is to put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law." *Id.*

Conclusions Based on Non-Statistical Evidence.

365. The Court finds that all of Robinson's experts – across disciplines and with various expertise – concluded that race was a significant factor in jury selection. The testimony of Stevenson on the history and pattern of discrimination against African-American citizens in jury selection in the United States and North Carolina, and the testimony of Stevenson, Sommers and Trosch on the effect of implicit or unconscious bias on decision-making in the criminal justice system was unrefuted by the State.

366. Robinson's non-statistical evidence amply supports a finding that race has been a significant factor in prosecutor strikes of African-American citizens for two decades. As well, Robinson's case examples in particular show that explanations offered by prosecutors for their strikes of African-Americans are pretextual.

367. Robinson's non-statistical evidence is entirely consistent with the findings of the MSU Study. Both show that African-Americans are victims of race discrimination because of the State's use of its peremptory strikes in capital cases. HTpp 896-97.

368. It is significant that none of the State's experts ruled out that race was a significant factor. Moreover, the prosecutor at Robinson's trial admitted that unconscious racial bias may have influenced his jury selection.

369. The Court notes that Dickson denied that race was a significant factor in the jury selection proceeding in this case. The Court declines to credit this testimony. 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. In addition, experimental research conducted by Sommers and others demonstrates that unconscious racial bias is significant in predicting prosecutor strikes. Finally, the determination of whether race was a significant factor in jury selection at Robinson's trial is a mixed question of law and fact that the Court must make, and Dickson's opinions in this regard are not dispositive.

370. When a number of studies employing different methods across different disciplines all yield similar conclusions, there can be confidence that the conclusion is reliable and accurate. HTp. 773. The Court finds that Robinson's non-statistical evidence, including other archival scientific studies showing the impact of race on jury strike decisions, experimental

literature showing the causal relationship between race and decision-making, and the numerous case examples of discrimination in jury selection are all convergent with the MSU Study.

PART IV. CONCLUSIONS OF LAW

1. This Court, having jurisdiction herein, considers Robinson's first three MAR claims only, including his claims that race was a significant factor in prosecutorial decisions to exercise peremptory challenges during jury selection in Cumberland County, the former Second Judicial Division, and the State of North Carolina at the time Robinson's death sentence was sought by prosecutors or imposed by his jury. Robinson's other claims are held in abeyance, and will not be addressed unless necessary in a future proceeding.

2. The RJA permits Robinson to prove that "race was the basis of the decision to seek or impose [his] death sentence" by showing that "race was a significant factor in decisions to seek or impose the death sentence 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-2011(b).

3. Under the RJA, "statistical or other evidence" is admissible to show that "race was a significant factor in decisions to seek or impose the death penalty." N.C. Gen. Stat. §15A-2011(b). The RJA permits but does not require evidence of intentional discrimination.

4. Robinson may show that race was a significant factor in decisions to seek or impose the sentence of death by proving, "irrespective of statutory factors," that "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection." N.C. Gen. Stat. §15A-2011(b)(3). Racial considerations may be a significant factor in decisions to

exercise peremptory challenges during jury selection even if the racial composition of the final jury does not reflect a racial disparity.

5. Robinson has the initial burden of production, and the burden of persuasion throughout the proceedings. N.C. Gen. Stat. §15A-2011(c) "The defendant has the burden of proving that race was a substantial factor in decisions to seek or impose the death sentence in the county, the prosecutorial district, the judicial division or the State at the time the death sentence was sought or imposed." *Id.* The State may seek to rebut the claims of the defendant by presenting statistical or other evidence, including evidence of "any program the purpose of which is to eliminate race as a factor in seeking or imposing" a sentence of death. *Id.*

6. Robinson must persuade the Court by a preponderance of the evidence. N.C. Gen. Stat. §15A-2012(c) (incorporating the procedures in N.C. Gen. Stat. § 15A-1420 not inconsistent with provisions of the RJA).

7. If this Court finds that "race was a significant factor in decisions to seek or impose the death sentence in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed," Robinson's death sentence "shall be vacated." N.C. Gen. Stat. §15A-2012(a)(3). The RJA does not require Robinson to prove further prejudice. *Id.*

8. The General Assembly intended to apply the RJA as a vehicle to assess whether race was a significant factor in decisions to exercise peremptory strikes in all cases of persons on death row at the time of passage, and to capital trials in the future. This Court concludes that cases of persons on death row constitute the appropriate study population of interest in the evaluation of whether race was a significant factor in the use of peremptory strikes, and that the MSU Study appropriately considered this universe of cases. This Court further concludes that

these 173 capital proceedings selected by MSU are closely analogous in all material respects to the entire set of capital trials conducted between 1990 and 2010, and therefore the results from studying these cases can be generalized.

9. Robinson's experts used widely-accepted statistical methods that allowed them to consider data from over two decades in order to determine whether race was a significant factor in the prosecutors' use of peremptory strikes at the time of Robinson's trial. The Court concludes that this method of focusing on the time of the decisions by prosecutors was both credible and reliable, and that Robinson has established that race was a significant factor in decisions of prosecutors to exercise peremptory strikes in Cumberland County, the former Second Judicial Division, and in the State of North Carolina at the time of Robinson's trial in 1994.

10. The Court further concludes that Robinson has established that race was a significant factor in decisions of prosecutors to exercise peremptory strikes in Cumberland County, the former Second Judicial Division, and in the State of North Carolina from 1990 to 1995, from 1990 to 1999, and from 1990 to 2010.

11. Robinson met his initial burden of production by demonstrating – using unadjusted statistical data standing alone – that race was a significant factor in decisions by prosecutors to exercise peremptory strikes in Cumberland County, the former Second Judicial Division, and in the State of North Carolina at the time of Robinson's trial in 1994.

12. Specifically, Robinson introduced statistical proof of unadjusted data demonstrating significant disparities that established a *prima facie* case under the RJA. Robinson's statistical evidence demonstrated significant and stark disparities in the unadjusted

numbers describing the prosecutors' use of peremptory strikes of black and non-black qualified venire members.

13. In conjunction with Robinson's unadjusted data, this Court has considered all of the anecdotal, experimental, historical, and statistical evidence introduced by Robinson at the evidentiary hearing and concludes that he has also satisfied his initial burden of production in view of that additional evidence. Robinson's statistical proof demonstrated both the practical and statistical significance of race as a factor in decisions by prosecutors to exercise peremptory strikes.

14. The State's evidence in rebuttal was insufficient to rebut Robinson's *prima facie* case that race was a significant factor in decisions by prosecutors to exercise peremptory strikes in Cumberland County, the former Second Judicial Division, or in the State of North Carolina at the time of Robinson's trial in 1994.

15. After considering all of the State's expert testimony, affidavits, and lay witnesses, the Court continues to be persuaded by a preponderance of the evidence that race was a significant factor in decisions by prosecutors to exercise peremptory strikes in Cumberland County, the former Second Judicial Division, and in the State of North Carolina at the time of Robinson's trial in 1994.

16. Assuming *arguendo* that the State's evidence rebutted Robinson's prima facie case, when considering the evidence as a whole, including Robinson's rebuttal evidence, the Court is persuaded by a preponderance of the evidence that race was a significant factor in decisions by prosecutors to exercise peremptory strikes in Cumberland County, the former Second Judicial Division, and in the State of North Carolina at the time of Robinson's trial in 1994.

17. Considering the evidence as a whole, the anecdotal, experimental, historical, and statistical evidence converge in support of the conclusion that race was a significant factor in decisions by prosecutors to exercise peremptory strikes at the time of Robinson's trial in 1994.

18. The State has not alleged the existence of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death. Nor has the State shown that the existence of such a program had any impact upon Robinson's trial.

19. Having considered the totality of the statistical and other evidence presented by the parties, this Court concludes that race was a significant factor in decisions to exercise peremptory challenges during jury selection at the time of Robinson's trial in 1994.

20. Race was a significant factor in prosecutorial decisions to exercise peremptory strikes in capital cases in North Carolina at the time of Robinson's trial in 1994.

21. Race was a significant factor in prosecutorial decisions to exercise peremptory strikes in capital cases in the former Second Judicial Division at the time of Robinson's trial in 1994.

22. Race was a significant factor in prosecutorial decisions to exercise peremptory strikes in capital cases in Cumberland County at the time of Robinson's trial in 1994.

23. Additionally and alternatively, while the RJA does not require any proof in Robinson's specific case, assuming such a requirement and considering the totality of the evidence, the Court concludes that race was a significant factor in prosecutorial decisions to exercise peremptory strikes in Robinson's capital trial.

24. Additionally and alternatively, while the RJA does not require any showing of intentional discrimination, assuming such a requirement and considering the totality of the evidence, the Court concludes that prosecutors intentionally used the race of venire members as a

significant factor in decisions to exercise peremptory strikes in capital cases in North Carolina, the former Second Judicial Division, Cumberland County, and in Robinson's capital trial.

25. Additionally and alternatively, while the RJA does not require a showing of a prejudicial impact on Robinson's final jury, assuming such a requirement and considering the totality of the evidence, the Court concludes that due in part to the prosecutors' disproportionate strikes of qualified African-American venire members, African-Americans were significantly underrepresented in Robinson's jury.

26. This Court concludes that Robinson has proven by a preponderance of the evidence that race was a significant factor in decisions by prosecutors to exercise peremptory strikes in Cumberland County, the former Second Judicial Division, and in the State of North Carolina at the time of Robinson's trial in 1994, applying either a disparate impact analysis, or a disparate treatment analysis, discussed previously in this Order. Robinson has shown a "pattern or practice" of discrimination, and that race was a motivating factor in the prosecutors' use of peremptory challenges.

27. Under a disparate treatment analysis, Robinson must prove prosecutors operated with a discriminatory purpose. The Court concludes that the totality of the circumstances, including the stark and consistent racial disparities in the prosecutors' use of peremptory strikes, the adjusted statistical analyses by MSU that control for non-racial factors, the experimental data, the history of the exclusion of qualified African-American venire members from jury service in North Carolina, the absence of race-neutral explanations by prosecutors for many of the peremptory strikes, the shadow coding by MSU, the disparate treatment of some African-American venire members by prosecutors, the acknowledgement by the former prosecutor

Dickson of his own implicit bias and racial discrimination by other Cumberland County prosecutors, support a conclusion of intentional discrimination.

28. Based on the totality of the evidence, the Court concludes that many of the facially-neutral explanations provided by prosecutors in the form of affidavits or testimony were pretextual or substantively invalid, and evince intentional discrimination in Cumberland County, the former Second Judicial Division, and in the State of North Carolina.

29. Prosecutors intentionally used the race of venire members as a significant factor in decisions to exercise peremptory strikes in capital cases in North Carolina at the time of Robinson's trial in 1994.

30. Prosecutors intentionally used the race of venire members as a significant factor in decisions to exercise peremptory strikes in capital cases in the former Second Judicial Division at the time of Robinson's trial in 1994.

31. Prosecutors intentionally used the race of venire members as a significant factor in decisions to exercise peremptory strikes in capital cases in Cumberland County at the time of Robinson's trial in 1994.

32. The prosecutor intentionally used the race of venire members as a significant factor in his decisions to exercise peremptory strikes in Robinson's capital trial.

33. Race was a significant factor in decisions by the former prosecutor Dickson to exercise peremptory strikes in the capital cases he tried in Cumberland County.

34. Robinson has shown by a preponderance of the evidence that race was a significant factor in decisions to seek or impose the sentence of death in Cumberland County, the former Second Judicial Division, and the State of North Carolina at the time of Robinson's trial in 1994.

35. Robinson's judgment was sought or obtained on the basis of race.

NOW, THEREFORE, IT IS ORDERED THAT:

36. The Court, having determined that Robinson is entitled to appropriate relief as to Claims I, II and III of his RJA motion, concludes that Robinson is entitled to have his sentence of death vacated, and Robinson is resentenced to life imprisonment without the possibility of parole.

37. The Court reserves ruling on the remaining claims raised in Robinson's RJA motion, including all constitutional claims raised by Robinson.

38. This order is hereby entered in open court in the presence of Robinson, his attorneys, and counsel for the State.

The 30th day of April 2012.

The Honorable Gregory A. Weeks
Senior Resident Superior Court Judge Presiding