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

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