STATE OF NORTH CAROLINA COUNTY OF CUMBERLAND		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	
	)	
	)	97 CRS 47314-15 (Golphin)
v.	)	98 CRS 34832, 35044 (Walters)
	)	01 CRS 65079 (Augustine)
	)	
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	
QUINTEL AUGUSTINE	)	
	)	
Defendants	)	

ORDER GRANTING
MOTIONS FOR APPROPRIATE RELIEF

This case is before the Court on Defendants' claims pursuant to the Racial Justice Act (RJA) that they are entitled to vacatur of their death sentences because race was a significant factor in the prosecution's use of peremptory strikes during jury selection. Defendants have each raised three claims under the original RJA as enacted in 2009. These claims allege RJA violations on the basis of prosecution decisions in North Carolina, Defendants' respective judicial divisions, and Cumberland County. Defendants have also raised one claim each under the amended RJA as enacted in 2012. These claims allege RJA violations on the basis of prosecution decisions in Cumberland County and their individual cases.

The Court convened an evidentiary hearing on October 1, 2012. The hearing concluded on October 11, 2012. Defendants Golphin and Walters waived their right to be present during the proceedings and were not in court during the hearing. Defendant Augustine was present throughout the hearing. Defendants were represented by James E. Ferguson II, of the Mecklenburg County Bar; Malcolm Ray Hunter, Jr., of the Orange County Bar; and Jay H. Ferguson and Cassandra Stubbs of the Durham County Bar. The State was represented by

assistant district attorneys Rob Thompson of the 12th Judicial District, Jonathan Perry of the 20th Judicial District, and Michael Silver of the 21st Judicial District.

After considering the evidence and arguments of counsel, the Court concludes that race was, in fact, a significant factor in the prosecution's use of peremptory strikes during jury selection, and therefore grants Defendants' motions for appropriate relief pursuant to the RJA, vacates their death sentences, and imposes sentences of life imprisonment without possibility of parole.

INTRODUCTION

These cases come before the Court with a tragic history. That history includes the senseless deaths of Roy Gene Turner, Jr., David Hathcock, Edward Lowry, Tracy Lambert, and Susan Moore. The Court has only compassion for the friends and family members devastated by Defendants' crimes.

The Court is called upon to issue a decision today because of the Racial Justice Act, which the North Carolina General Assembly enacted to achieve fairness and equality in the way our state approaches the most serious matter a court can adjudicate: whether the State may execute a prisoner. The legislature resolved that when capital decisions are made, the justice system must do all it can to bring fairness into that determination. The legislature determined that historically and under prior capital law, we have not achieved the fairness for which our system has long strived. The Racial Justice Act is the embodiment of the legislative conclusion that more can be done.

The enterprise proposed by the RJA is a difficult one. When our criminal justice system was formed, African Americans were enslaved. Our system of justice is still healing from the lingering effects of slavery and Jim Crow. In emerging from this painful history, it is more

comfortable to rest on the status quo and to be satisfied with the progress already made. But the RJA calls upon the justice system to do more. The legislature has charged the Court with the challenge of continuing our progress away from the past.

The Court has now heard nearly four weeks' worth of evidence concerning the central issue in these cases: whether race was a significant factor in prosecution decisions to strike African-American venire members in Cumberland County at the time the death penalty was sought and imposed upon Defendants Tilmon Golphin, Christina Walters, and Quintel Augustine. For the reasons detailed in this order, the Court concludes that it was.

This conclusion is based primarily on the words and deeds of the prosecutors involved in Defendants' cases. In the writings of prosecutors long buried in case files and brought to light for the first time in this hearing, the Court finds powerful evidence of race consciousness and race-based decision making. A Cumberland County prosecutor met with law enforcement officers and took notes about the jury pool in Augustine's case. These notes described the relative merits of North Carolina citizens and prospective jurors in racially-charged terms, and constitute unmistakable evidence of the prominent role race played in the State's jury selection strategy.

Another Cumberland County prosecutor, involved in all three Defendants' cases, had previously been found by a trial court to have violated the constitutional prohibition against discrimination in jury selection under *Batson v. Kentucky* by giving a pretextual explanation and incredible reason for her strike of an African-American venire member. Despite her testimony to the contrary, the evidence was overwhelming that this prosecutor relied upon a "cheat sheet" of pat explanations to defeat *Batson* challenges in numerous cases when her disproportionate and discriminatory strikes against African-American venire members were called into question. Her

testimony overall — rife with inconsistencies, frequently contradicted by other evidence, and often facially unbelievable — constituted additional evidence that Cumberland County prosecutors relied upon race in its jury selection practices.

The State overwhelmingly struck African-American venire members in capital cases from Cumberland County, removing African-American venire members purportedly for reasons such as reservations about the death penalty, or connections to the criminal justice system, while accepting comparable white venire members. This disparity was turned on its head in the notorious *Burmeister* and *Wright* capital cases in which the State sought, for tactical reasons, to seat African Americans as jurors. Comparing the prosecution's jury selection in *Burmeister* and *Wright* to Defendants' cases, the Court finds compelling empirical evidence that race, not reservations about the death penalty, not connections to the criminal justice system, but race, drives prosecution decisions about which citizens may participate in one of the most important and visible aspects of democratic government.

The Court's conclusion that race was a significant factor in prosecution decisions to strike jurors in Cumberland County at the time of Defendants' cases is also informed by the history of discrimination in jury selection and the role of unconscious bias in decision-making. The criminal justice system, sadly, is not immune from these distorting influences.

In addition, Defendants' evidence shows that prosecutors across the State, including prosecutors in Cumberland County and in Defendants' own individual cases, frequently exclude African Americans for reasons that are not viewed as disqualifying for other potential jurors. The many examples Defendants presented of disparate treatment of black and non-black venire members is unsurprising in light of prosecutors' history of resistance to efforts to permit greater participation on juries by African Americans. That resistance is exemplified by trainings

sponsored by the North Carolina Conference of District Attorneys where prosecutors learned not to examine their own prejudices and present persuasive cases to a diverse cast of jurors, but to circumvent the constitutional prohibition against race discrimination in jury selection.

Defendants' documentary and anecdotal evidence, their evidence rooted in history and social science research, and the many case examples of discrimination are fully consistent with Defendants' statistical evidence. That evidence shows that in Defendants' cases, in Cumberland County, and in North Carolina as a whole, prosecutors strike African Americans at double the rate they strike other potential jurors. This statistical finding holds true even when controlling for characteristics that are frequently cited by prosecutors as reasons to strike potential jurors, including death penalty views, criminal background, employment, marital status, hardship, and so on.

Significantly, the State's evidence, including testimony from prosecutors, two expert witnesses, and a volume of documents, rather than causing the Court to question Defendants' proof, leads the Court to be more convinced of the strength of Defendants' evidence.

The Court finds no joy in these conclusions. Indeed, the Court cannot overstate the gravity and somber nature of its findings. Nor can the Court overstate the harm to African Americans and to the integrity of the justice system that results from racially discriminatory jury selection practices. *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"); *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005) (explaining that racial discrimination in jury selection harms racial minorities because "prosecutors drawing racial lines in picking juries establish 'state-sponsored group stereotypes rooted in, and reflective of, historical prejudice;'" and further explaining that such discrimination "casts doubt over the

obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial") (internal citations omitted); *State v. Cofield*, 320 N.C. 297, 302 (1987) (explaining that "the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly," and concluding that race discrimination in the selection of jurors "deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice"); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 140 (1994), quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991) (discrimination in jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (discrimination against African Americans in jury selection is "an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others").

Discrimination in jury selection is "at war with our basic concepts of a democratic society and a representative government." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (internal citation omitted). The Court takes hope that acknowledgment of the ugly truth of race discrimination revealed by Defendants' evidence is the first step in creating a system of justice that is free from the pernicious influence of race, a system that truly lives up to our ideal of equal justice under the law.

PROCEDURAL HISTORY: CASES OF INDIVIDUAL DEFENDANTS

On December 1, 1997, **Tilmon Golphin** was indicted for the September 23, 1997 murders of Edward Lowry and David Hathcock. Golphin filed a motion for change of venue. The Court ordered that the jury be selected from Johnston County and bused to Cumberland County for trial. The Honorable Coy E. Brewer, Jr. presided.

On April 29, 1998, Golphin was convicted of two counts of first-degree murder. On May 12, 1998, Golphin was sentenced to death for both murders.

The North Carolina Supreme Court affirmed Golphin's convictions and death sentence, *State v. Golphin*, 352 N.C. 364 (2000), and the United States Supreme Court denied certiorari review. *Golphin v. North Carolina*, 532 U.S. 931 (2001). Golphin unsuccessfully challenged his convictions and death sentences in post-conviction proceedings in state and federal court. *Golphin v. Branker*, 519 F.3d 168 (4th Cir. 2008).

Golphin filed an MAR and discovery motion pursuant to the RJA on August 9, 2010. On May 2, 2011, the State filed an Answer to the RJA MAR. On August 16, 2011, the State moved to dismiss Golphin's RJA MAR.

On December 1, 1998, **Christina Walters** was indicted for the August 17, 1998 murders of Susan Moore and Tracy Lambert. The case was tried in Cumberland County with the Honorable William C. Gore presiding.

On June 30, 2000, Walters was convicted of two counts of first-degree murder. On July 6, 2000, Walters was sentenced to death for both murders.

Post-conviction counsel were appointed and filed a Motion for Appropriate Relief (MAR) on Walters' behalf on June 16, 2004. The MAR remains pending.

Walters filed an MAR and discovery motion pursuant to the RJA on August 9, 2010. On May 2, 2011, the State responded to both motions and urged the Court to deny the RJA MAR without an evidentiary hearing and to deny Walters' request for discovery.

On February 25, 2002, **Quintel Augustine** was indicted for the November 29, 2001 murder of Roy Gene Turner, Jr. in Cumberland County. Augustine filed a motion for change of

venue and the case was transferred to Brunswick County for trial. The Honorable Jack A. Thompson presided.

On October 15, 2002, Augustine was convicted of first-degree murder. On October 22, 2002, Augustine was sentenced to death.

The North Carolina Supreme Court affirmed Augustine's conviction and sentence of death, *State v. Augustine*, 359 N.C. 709 (2005), and the United States Supreme Court denied certiorari review. *Augustine v. North Carolina*, 548 U.S. 925 (2006).

Post-conviction counsel were appointed and filed a Motion for Appropriate Relief (MAR) on Augustine's behalf on April 27, 2007. The MAR remains pending.

Augustine filed an MAR and discovery motion pursuant to the RJA on August 9, 2010. The State responded to Augustine's RJA MAR and discovery motion on May 2, 2011. The State urged the Court to deny Augustine's RJA MAR without an evidentiary hearing and to deny Augustine's discovery request.

PROCEDURAL HISTORY: POST-*ROBINSON* PROCEEDINGS

On May 15, 2012, following the Court's ruling in *State v. Marcus Robinson*, each Defendant filed a Motion for Grant of Sentencing Relief arguing that the evidence that compelled relief for Robinson equally warranted vacatur of Defendants' death sentences. On June 1, 2012, the State responded to Defendants' Motions. The State urged the Court to deny relief summarily or, in the alternative, to order an evidentiary hearing.

On June 11, 2012, this Court scheduled the evidentiary hearing in this case for July 23, 2012.

On July 2, 2012, the Amended RJA was enacted into law.

On July 3, 2012, each Defendant filed an Amendment pursuant to the new statute.

On July 6, 2012, the Court heard motions and arguments of counsel. Defendants' post-conviction attorneys withdrew in order that the attorneys who represented Marcus Robinson could litigate Defendants' RJA claims. James E. Ferguson, II, Jay H. Ferguson, and Malcolm Ray Hunter, Jr. were subsequently appointed as counsel, and Cassandra Stubbs entered an appearance on behalf of Defendants. The Court also granted the State's motion to continue the evidentiary hearing. The Court ordered the evidentiary hearing to commence on October 1, 2012. In its discretion, the Court denied the State's motion to sever and conduct three separate evidentiary hearings.

On August 15, August 31, and September 27, 2012, the Court heard a variety of motions related to discovery. On August 31 and September 27, 2012, the State moved for continuances of the evidentiary hearing. The Court, in its discretion, denied both motions. The State's August 31, 2012 continuance motion was not supported by any affidavit or evidence. A separate order has been prepared regarding the September 27, 2012 continuance motion.

The evidentiary hearing began on October 1, 2012, and concluded on October 11, 2012.

STATUTORY INTERPRETATION OF THE AMENDED RJA

Defendants' amended RJA claims are the first in North Carolina to be decided on the merits. The meaning of the amended RJA's statutory language is a matter of first impression. The Court must therefore interpret the amended RJA provisions at issue.[1]

Principles Of Statutory Interpretation

The cardinal principle of statutory construction is that the intent of the legislature is controlling. *State v. Fulcher*, 294 N.C. 503 (1978). The legislative purpose of a statute, and thus its proper construction, is first ascertained from an examination of the plain words of the statute.

[1] Defendants have also raised original RJA claims which the Court will consider on the merits. With regard to these claims, the Court will apply the statutory interpretation set forth in *Robinson*.

Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209 (1990); *Electric Supply Co. of Durham v. Swain Elec. Co., Inc.*, 328 N.C. 651, 656 (1991). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Diaz v. Division of Soc. Servs.*, 360 N.C. 384, 387 (2006); *State v. Bates*, 348 N.C. 29, 34 (1998); *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 276 (1988).

A statute must be construed so as to give effect to every part of it. It is presumed that the legislature did not intend any of a statute's provisions to be mere surplusage. *State v. Bates, supra*; *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556 (1981). A court has no power or right to strike out words in a statute or to construe them away. *Nance v. Southern Railway*, 149 N.C. 366 (1908).

If there is any ambiguity in a statute, courts must ascertain the legislative intent by examining a number of factors.

> [L]egislative intent is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means . . . . Other indicia considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous interpretations of the same or similar statutes.

In re Banks, 295 N.C. 236, 239-40 (1978) (internal citations and quotations omitted). Statutes should be given a construction which, when practically applied, will tend to suppress the problem that the legislature intended to prevent. *In re Hardy*, 294 N.C. 90 (1978); *State v. Spencer*, 276 N.C. 535 (1970).

The General Assembly would not have passed a law which only recapitulated existing case law or constitutional doctrine. The General Assembly is presumed to be aware of prior case law or precedent when crafting related legislation. *Blackmun v. N.C. Dept. of Corrections*, 343 N.C. 259 (1996); *State v. Davis*, 198 N.C. App. 443, 451-52 (2009).

Meaning Of "Significant Factor"

The first question before the Court concerns the legal standard by which a defendant may obtain relief under the amended RJA. The amended RJA provides that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010. The amended RJA further provides that "[a] finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the death penalty in the defendant's case at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2011(a). One type of evidence relevant to establishing that race was a significant factor in decisions to seek or impose a death sentence is evidence that "race was a significant factor in decisions to exercise peremptory challenges during jury selection." N.C. Gen. Stat. § 15A-2011(d).

The amended RJA does not explicitly define the term "significant factor." It falls to this Court, then, to determine its meaning. In doing so, the Court finds instructive decisions of the North Carolina Supreme Court defining "significant." In different contexts, the Court has held that "significant" means "having or likely to have influence or effect." *State v. Sexton*, 336 N.C. 321, 375 (1994) (interpreting mitigating circumstance contained in N.C. Gen. Stat. Sec. 15A-2000(f)(1)); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101 (1983) (applying definition in worker's compensation case). Therefore, when determining whether race was a "significant factor"

pursuant to the amended RJA, this Court will examine whether race had or likely had an influence or effect on decisions to exercise peremptory strikes during jury selection in capital proceedings.

The Court's application of this standard may include consideration of statistical evidence. *See* N.C. Gen. Stat. § 15A-2011(d) (providing that "[e]vidence relevant to establish a finding that race was a significant factor . . . may include statistical evidence"). When evaluating statistical evidence, the Court will follow the guidance provided by the Federal Judicial Center's *Reference Manual on Scientific Evidence*. *See* David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in Reference Manual on Scientific Evidence* (Federal Judicial Center 3d ed. 2011).

The *Reference Manual on Scientific Evidence* is commonly relied upon by the federal courts in assessing statistical and survey-based evidence. *See, e.g., Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1319, n. 6 (2011); *Atkins v. Virginia*, 536 U.S. 304, 327 (2002) (noting that the manual offers "helpful suggestions to judges called upon to assess the weight and admissibility of survey evidence on a factual issue before a court") (Rehnquist, C.J., dissenting). Ultimately, the Court will consider statistics as one category of evidence among an array informing the overall legal determination of whether race was a significant factor in prosecutorial decisions. *See* N.C. Gen. Stat. § 15A-2011(d) and (e) (permitting evidence including statistics and testimony from individuals involved in the criminal justice system, and providing that statistics alone cannot form the basis of an amended RJA claim).

Admissible Evidence

Amended RJA claims are circumscribed in certain respects. The amended RJA requires defendants to prove race was a significant factor "at the time the death sentence was sought or imposed" and defines that time "as the period from 10 years prior to the commission of the

offense to the date that is two years after the imposition of the death sentence." N.C. Gen. Stat. § 15A-2011(a). The amended RJA also removes the original RJA's freestanding claims based upon statewide or judicial division-wide evidence, and places the focus upon conduct within the county or prosecutorial district. N.C. Gen. Stat. § 15A-2011(c).

These parameters define the nature of amended RJA claims. A defendant may only prevail under the amended RJA if the evidence establishes that race was a significant factor in the prescribed time period and the county or prosecutorial district at issue. When attempting to prove such a claim, however, a defendant may present relevant evidence from both within and outside these statutory parameters. Likewise, the State may present such evidence in rebuttal.

This approach is consistent with the amended RJA's broad language, which provides that relevant evidence "may include statistical evidence . . . or other evidence . . . [or] evidence may include, but is not limited to" testimony of individuals involved in the criminal justice system. N.C. Gen. Stat. § 15A-2011(d).

The Court's approach is also consistent with the rules of evidence. Relevant evidence "means evidence having *any tendency*" to prove a fact at issue. N.C. R. Evid. 401 (emphasis added). Moreover, circumstantial evidence which proves statutorily-operative facts is as competent as direct evidence, and is generally permitted with great latitude. *See State v. Shipman*, 163 S.E. 657, 662-63 (N.C. 1932) (explaining that "great latitude is to be allowed in the reception of circumstantial evidence") (citation omitted); *Helms v. Rea*, 282 N.C. 610, 617 (1973) ("When sufficiently strong, circumstantial evidence is as competent as positive evidence to prove a fact."). In addition, judicially-decided RJA claims do not invoke the evidentiary concerns regarding prejudice or confusion that are typically involved in jury proceedings. *See*

N.C. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . misleading the jury.").

Admitting evidence from a broad period of time beyond the window defined in the amended RJA is additionally consistent with the United States Supreme Court's understanding of the evidence relevant to proving a *Batson* claim. In *Miller-El v. Dretke*, 545 U.S. 231 (2005), the Court acknowledged that "[t]he rub has been the practical difficulty of ferreting out [jury] discrimination in selections discretionary by nature." *Id.* at 238. The Court explained that when evaluating the credibility of a prosecutor's race-neutral *Batson* explanation, it is often necessary to look beyond the immediate circumstances. The Court observed that "[s]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Id.* at 239-40. In *Miller-El* itself, the Court found a *Batson* violation based in part upon evidence that, "for decades leading up to the time this case was tried prosecutors . . . had followed a specific policy of systematically excluding blacks from juries." *Id.* at 263-64.

Finally, accepted statistical practice considers conclusions strengthened where varied sources of information all point in the same direction. *See Reference Manual on Scientific Evidence*, 223 ("Sometimes, several studies, each having different limitations, all point in the same direction . . . . Convergent results support the validity of generalizations.").

In view of the foregoing, the Court concludes that litigants proceeding under the amended RJA may present evidence derived from within the statutory claim's parameters, as well as corroborative evidence outside the time and geographic parameters. The Court finds such evidence helpful to its ultimate determination. To the extent there is any danger of prejudice to

either party or improper consideration of incompetent evidence, the Court will carefully scrutinize all evidence to ensure it is reliable and relevant to the statutory claims.

The Court also finds it necessary to address the State's statutory argument that statistical evidence derived from Cumberland County is not relevant to Augustine's RJA claims because venue for Augustine's trial was moved to Brunswick County and Augustine's sentence of death was imposed in Brunswick County. The amended RJA provides in § 15A-2011(d) that evidence "may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence . . . ." The Court first notes that the plain language of the amended RJA refers to "other evidence" as well as evidence "from the county or prosecutorial district where the defendant was sentenced to death." This is a clear directive that courts are not to limit the evidence to that arising from the district or county where death was imposed. Evidence from the county where death was imposed is of obvious importance and relevance to a claim that there was discrimination in decisions to impose the death penalty. In this instant case, however, Defendants challenge decisions to seek the death penalty, and specifically, decisions by prosecutors to exercise peremptory strikes. Evidence of prosecutorial conduct in Cumberland County is highly relevant to Augustine's RJA jury selection claims because Augustine was prosecuted by Cumberland County district attorneys. For claims alleging jury selection discrimination, the relevant inquiry is about the conduct of the prosecuting county. The State fundamentally concurs with this proposition, as evidenced by the fact that it called Cumberland County prosecutors to testify about strike decisions in Augustine's case, not Brunswick County prosecutors. It would be patently illogical to require statistical evidence from one county and case evidence and testimony from a different one. The Court rejects such an interpretation by the State.

Case-Specific Evidence

The Court must next address whether the amended RJA requires defendants to prove that race was a significant factor in their individual trials. In doing so, the Court first notes that the amended RJA makes three references to proof in a defendant's particular case. Section 15A-2011(a) refers to "decisions to seek or impose the death penalty in the defendant's case at the time the death sentence was sought or imposed," and defines that time as ten years prior to the offense and two years after the death sentence was imposed. Section 15A-2011(f) refers to "decisions to seek or impose the sentence of death in the defendant's case in the county or prosecutorial district at the time the death sentence was sought or imposed." Section 15A-2011(g) refers to "decisions to seek or impose the sentence of death in the defendant's case at the time the death sentence was sought or imposed."

The Court is mindful that the original RJA did not contain any language referring to "in the defendant's case." As such, there must be some meaningful distinction in this regard between the original and amended RJA. The Court is likewise mindful that one potential reading of the language "in the defendant's case" is that the statute requires evidence of discrimination from defendants' individual trials. However, the Court is bound to give effect to every part a statute. It is presumed that the legislature did not intend any of the language in the amended RJA to be mere surplusage. Were the Court to hold that "in the defendant's case" meant that defendants proceeding under the amended RJA must prove race was a significant factor in their individual cases, the legislature's additional references to "in the defendant's case *at the time the death sentence was sought or imposed*" and "in the defendant's case *in the county or prosecutorial district*" would have no independent meaning. The temporal reference is

particularly relevant in view of the broad window permitting evidence from 10 years prior to the offense and two years following imposition of the death sentence.

Therefore, in order to appropriately give effect to all of the language in the amended RJA, the Court holds that "in the defendant's case" does not require proof in the defendant's individual trial. Indeed, the amended RJA does not even use the word "trial." More importantly, a trial-specific requirement would read the temporal and geographic provisions out of the amended RJA by making evidence that satisfied those parameters entirely unnecessary to a claim for relief. This the Court cannot do. Instead, the Court concludes that "in the defendant's case" requires defendants to prove that race was a significant factor within the temporal statutory window and the specified geographic areas. The Court finds that this is a meaningful additional requirement imposed by the amended RJA. Under the original RJA, there were essentially no temporal or geographic limitations on the types of evidence that could support a claim for relief. Accordingly, the Court's interpretation gives effect to all of the language in the amended RJA while at the same time preserving the legislature's clear intent to circumscribe original RJA claims.

In the amended RJA, the Court finds additional textual support for its conclusion that trial-specific proof is not an element of a claim. First, in setting forth the defendant's burden of proof, the amended RJA entirely omits any reference to case-specificity: "The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district." *See* N.C. Gen. Stat. § 15A-2011(c). Second, when the amended RJA does refer to "in the defendant's case," it does so permissively, stating that "[a] finding that race was the basis of the decision to seek or impose a death sentence *may be established* if the court finds that race was a significant factor . . . in the defendant's case." *See*

N.C. Gen. Stat. § 15A-2011(a) (emphasis added). The use of the permissive "may" allows defendants to prove their cases by a variety of means in addition to the case-specific route. Finally, the expansive period of time defined by the amended RJA permits courts to consider statistical evidence that is not connected to an individual case. The foregoing provisions all support the Court's conclusion that the most appropriate reading of "in the defendant's case" is to define it on the basis of the time period and geographic areas set forth in the statute.

Burden Of Proof

Under the amended RJA, it is the defendant's burden to prove by a preponderance of the evidence that race was a significant factor in the prosecutorial decisions at issue. *See* N.C. Gen. Stat. § 15A-2011(c) (placing burden of proving an RJA claim on the defendant); N.C. Gen. Stat. § 15A-2011(f)(1) (requiring that RJA claims be raised "in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes"); N.C. Gen. Stat. § 15A-1420(c)(5) (providing that, if an evidentiary hearing is held on a motion for appropriate relief, "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion").

The plain terms of the amended RJA establish an evidentiary burden shifting process in which defendants bear the burdens of production and persuasion and the State is afforded an opportunity for rebuttal:

> The defendant has the burden of proving that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence.

N.C. Gen. Stat. § 15A-2011(c).

Under this scheme, a defendant's *prima facie* case may include statistical proof, although a defendant's *prima facie* case may not rely upon statistics alone. *See* N.C. Gen. Stat. § 15A-2011(d) and (e) (permitting statistical evidence but providing that such evidence alone is insufficient to establish that race was a significant factor). If a defendant establishes a *prima facie* case that race was a significant factor, it becomes the State's burden of production to actually rebut the defendant's case, or to dispel the inference of discrimination, not merely advance a non-discriminatory explanation. *Compare,* N.C. Gen. Stat. § 15A-2011(c) ("The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence."); *Castaneda v. Partida,* 430 U.S. 482, 498 n. 19 (1977) ("This is not to say, of course, that a simple protestation from a commissioner that racial considerations played no part in the [grand jury] selection would be enough. This kind of testimony has been found insufficient on several occasions."); *with Batson,* 476 U.S. at 96-97 (the State need only advance a race-neutral explanation). Like the defendant, the State may use statistical and other evidence in its rebuttal. *See* N.C. Gen. Stat. § 15A-2011(c). The ultimate burden of persuasion remains with the defendant and, in considering whether the defendant has met this burden, the Court will consider and weigh all of the admissible evidence and the totality of the circumstances.

Evidence Of Intent Is Not Required

The Court must next determine whether, in the context of this burden shifting "significant factor" framework, a defendant must prove intentional discrimination.

The Court first notes that the words intentional, racial animus, or any similar references to calculation or forethought on the part of prosecutors do not appear anywhere in the text of any amended RJA provision. To hold that a defendant cannot prevail under the amended RJA unless

he proves intentional discrimination would read a requirement into the statute that the General Assembly clearly did not place there.[2]

The broad language in the amended RJA confirms that evidence of intent is not required. Section 15A-2010 provides that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was *sought or obtained* on the basis of race." (emphasis added). While the term "sought" invokes intention, the term "obtained" merely refers to a final result which may be reached intentionally or not. Similarly, the ultimate question under § 15A-2010 is whether the death sentence was sought or obtained *on the basis of race*. There is no specificity in the statute as to whether that basis should be intentional or unintentional.

This reasoning is in accord with a basic principle of statutory construction. This Court must presume the General Assembly was aware of the United States Supreme Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *McCleskey v. Kemp*, 481 U.S. 279 (1987), which required the defendant to prove intentional discrimination in the particular case.

This Court must also presume the General Assembly was aware of the explicit invitation in *McCleskey* to legislatures to pass their own remedies to race discrimination in capital cases, including permitting the use of statistics:

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility — or indeed even the right — of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."

McCleskey, 481 U.S. at 319 (citations omitted).

[2] The Court does note, however, that while proof of intent is not required, it is permitted under the amended RJA's provision allowing testimony from witnesses within the criminal justice system. N.C. Gen. Stat. § 15A-2011(d).

This Court holds that the General Assembly was aware of both *Batson* and *McCleskey* when it enacted the amended RJA and therefore did not write the amended RJA as a mere recapitulation of existing constitutional case law. Were this Court to hold that the amended RJA incorporates the same intent requirement found in *Batson* and *McCleskey*, the amended RJA would have no independent meaning or effect. Such a conclusion would directly conflict with the basic canon of statutory construction that courts must presume the legislature did not intend any of its enactments to be mere surplusage. Further, the amended RJA states that "[i]t is the intent of this Article to provide for an amelioration of the death sentence. N.C. Gen. Stat. § 15A-2011(a1). This is direct proof that the legislature intended to do more than simply codify the existing law found in *Batson* and *McCleskey*.

The legislative history of the amended RJA confirms this analysis. In *Robinson*, the Court held that the original RJA does not require proof of intent. The legislature enacted the amended RJA subsequent to the Court's decision in *Robinson*, yet the legislature did not include any additional language regarding intent.

Furthermore, prior to the amended RJA's enactment, the legislature ratified on November 28, 2011, Senate Bill 9, which explicitly inserted an intent requirement into RJA claims. In its preamble, Senate Bill 9 stated that "it is the intent of the General Assembly to clarify the language in Article 101 of Chapter 15A of the General Statutes, to reflect the burden on the defendant to show that the decision makers in the defendant's case acted with discriminatory purpose." Section 1 of Senate Bill 9 further states that "a finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that the State acted with discriminatory purpose in seeking the death penalty or in selecting the jury." Senate Bill 9 never became law because it was vetoed by Governor Beverly E. Perdue on December 14,

2011, and the legislature failed to override. However, the fact that the legislature initially ratified an amendment to the original RJA that spoke directly to the question of intent, and later enacted the amended RJA without any reference to intent whatsoever, is evidence that the legislature's enactment of the amended RJA was not meant to introduce a requirement of purposeful discrimination. The legislature clearly knew how to create such a requirement, as reflected in Senate Bill 9, and it did not do so in the amended RJA.

By permitting capital defendants to prevail under the amended RJA upon a showing that does not require proof of intentional discrimination, the General Assembly adopted a well-established model of proof used in civil rights litigation. Indeed, in allowing a defendant to show that race "was a significant factor in decisions to exercise peremptory challenges," the General Assembly chose language that is directly analogous to the federal statutes that prohibit racial discrimination in employment decisions. Under those federal statutes, the United States Supreme Court held that the plaintiff was not required to prove intentional discrimination. *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977 (1988).

In *Watson,* the Supreme Court held that it was appropriate to use statistical, disparate impact models of proof to challenge discretionary employment practices. "[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson*, 487 U.S. at 987. The Court recognized that this approach was necessary to redress discrimination that may result from unconscious prejudices. *Id.* at 990 ("Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices

would remain"); *see also Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that "result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner").

This rationale applies with particular force in the area of peremptory strikes, where discriminatory striking patterns may be the result of both deliberate and unconscious race discrimination. *See Batson*, 476 U.S. at 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."); *see also* Jeffrey Bellin & Junichi Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1104 (2011) (arguing that attorneys may be not only hesitant to admit racial bias when challenged under *Batson* to justify strikes but may not even be aware of the bias); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007) (finding in controlled experiments that test subjects playing the role of a prosecutor trying a case with an African-American defendant were more likely to challenge prospective African-American jurors and when justifying these judgments they typically focused on race-neutral characteristics and rarely cited race as influential); Anthony Page, Batson*'s Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 180–81 (2005) (arguing that unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes).

Evidence Derived From Prior *Batson* Proceedings

A portion of Defendants' evidentiary presentation includes analyses of supposed race-neutral reasons prosecutors across the state proffered in affidavits for striking African-American venire members. Defendants' evidence attempts to show that prosecutors accepted non-black venire members who possessed the very same characteristics used to justify striking African Americans. In a subset of this evidence, Defendants have advanced as examples of discriminatory treatment peremptory strikes of African Americans that were approved pursuant to *Batson* by the trial judge and in some instances by appellate courts as well. The State has objected to the Court relying on this subset of evidence in Defendants' favor. The State points to the rule prohibiting one superior court judge from overruling another in the same action.

In considering the State's argument, the Court notes that the question under *Batson* is whether the prosecutor has engaged in purposeful discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). In contrast, the question under the amended RJA is whether race was a significant factor in the prosecution's strike decisions. As the Court has explained, this is an entirely different inquiry from *Batson* that does not ask whether there was intentional conduct on the part of the prosecutor. The RJA instead focuses on whether race has been a significant factor over time and place such that prosecutors' strike decisions have had a disparate impact on African-American venire members. The absence of any intent requirement renders the RJA a less onerous standard than *Batson*. Indeed, it could be nothing else. The RJA could not set a higher standard than *Batson* for proving discrimination since the federal constitution establishes minimum protections. Nor could the RJA set the same standard as *Batson*, as the legislature did not intend the RJA to be an empty codification of existing federal law.

Because RJA proceedings operate under a different and less demanding standard of proof than *Batson*, this Court may properly consider instances of overruled *Batson* objections as evidence supporting Defendants' claims. Such consideration is akin to a civil jury that finds an individual liable even though that individual has already been acquitted of a similar criminal charge. Put another way, a prior finding that *Batson* was not violated does not prove race was not a significant factor in the strike decision; it simply proves discrimination was not engaged in purposefully. *See Dowling v. United States*, 493 U.S. 342, 349 (1990) (explaining "that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof").

Accordingly, consideration of overruled *Batson* objections in Defendants' favor does not violate the rule prohibiting one superior court judge from overruling another. This rule provides that "one judge may not modify, overrule, or change *the judgment* of another Superior Court judge previously made in the same action." *See State v. Woolridge*, 357 N.C. 544, 549 (2003) (citation omitted) (emphasis added). In the instances where this Court is evaluating Defendants' evidence derived from overruled *Batson* objections, the Court is thus not revisiting the prior courts' judgment regarding intentional discrimination. Similarly, the law of the case doctrine is inapplicable because it only prevents an issue from being reopened in subsequent proceedings where the same questions are involved. *See Hayes v. Wilmington*, 243 N.C. 525, 536 (1956) (explaining that the law of the case doctrine applies "provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.").

The Court also rests its determination on the Supreme Court of North Carolina's decision in *State v. Bone*, 354 N.C. 1 (2001). In that case, the defendant's own expert testified at trial that the defendant did not suffer from mental retardation. At the close of the sentencing phase, the

jury rejected the mitigating factor that the defendant's mental condition significantly reduced his culpability for the offense. The Supreme Court thus concluded that the defendant's IQ did not affect its proportionality review. However, following the defendant's trial, the General Assembly enacted legislation exempting capital defendants with mental retardation from the death penalty. The Court explained that "[a]t the time of defendant's trial, his counsel had no reason to anticipate that defendant's IQ would have the significance that it has now assumed." As such, the Court held that its ruling did not prejudice the defendant's right to seek post-conviction relief under the new law. *Id.* at 27-28. Likewise, in this case, prior *Batson* adjudications should not prevent Defendants from relitigating instances of prior discrimination under a new and lower legal standard.

The Court further notes that even if the RJA were governed by the same purposeful intent standard as constitutional jury discrimination cases, this Court would be bound by law to consider each individual strike anew upon the introduction of any new evidence bearing on the strike. As the Supreme Court has reiterated in the constitutional context, jury discrimination claims can only be determined in light of all of the evidence. When there is new evidence brought to bear, the reviewing court must necessarily evaluate the charge in light of the new facts. *See Hayes v. Wilmington*, 243 N.C. at 536 (application of the same facts is a requirement for law of the case). Accordingly, to determine whether the State engaged in purposeful discrimination with respect to any specific venire member or case previously adjudicated, the Court must consider any prior judicial *Batson* denial in light of all the new evidence.

In this regard, the Court notes that rarely on direct appeal did defense counsel argue, or the Supreme Court of North Carolina consider, disparate treatment of black and non-black venire members. *Compare State v. Kandies*, 342 N.C. 419, 435 (1996) (declining to consider

defendant's argument that prosecutor passed similarly-situated white jurors and disparate treatment revealed pretext) *with Miller-El*, 545 U.S. at 241 (disparate treatment of similarly-situated black and non-black potential jurors "is evidence tending to prove purposeful discrimination"). Similarly, the Court observes that none of the previous courts that denied *Batson* challenges had the opportunity to consider the data from the MSU Study.

In Defendants' evidence, there are also a number of instances where trial courts sustained *Batson* objections or, while overruling the *Batson* objection, explicitly rejected one or more of the prosecutions' proffered explanations. The Court gives weight to these prior findings of purposeful discrimination. As the Court has explained, *Batson* findings are relevant to the RJA determination because *Batson* involves a higher standard of proof of discrimination than does the RJA.

In considering evidence from prior *Batson* proceedings, or when analyzing Defendants' evidence derived from prosecutors' newly-proffered affidavits, the Court will often focus on a single reason among several provided by the State. The Court adopts this approach because the State's reference to even one pretextual explanation evinces discriminatory intent. This type of "mixed motive" analysis is a well-established practice in identifying the effects of race on seemingly race-neutral decisions. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003) (in order to prevail in a "mixed motive" disparate treatment case, plaintiff must show that, even though other factors may have played a role, race was a "motivating" or "substantial" factor). This approach is also consistent with the United States Supreme Court's jurisprudence under *Batson* and its progeny. *See, e.g., Miller-El*, 545 U.S. 231, 247 n. 6 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one . . . . A *per se* rule that a defendant

cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.").

Finally, the Court recognizes that prosecutors may deny any discriminatory motive. However, consistent with the Supreme Court's decision in *Batson*, this Court finds that a prosecutor may not rebut Defendants' claims "merely by denying that he had a discriminatory motive" or "affirm[ing] [his] good faith in making individual selections." Indeed, accepting these general assertions at face value would render the Equal Protection Clause "but a vain and illusory requirement." 476 U.S. at 98 (internal citations omitted, brackets in original). The Court further notes the unrebutted, credible expert testimony presented by Defendants indicating that individuals are not reliable reporters of the extent to which their decisions are influenced by race. As a consequence, the Court has considered prosecutors' blanket denials of race discrimination as a part of the Court's evaluation of the totality of the evidence. However, the Court awards those denials little credibility or weight.[3]

Prejudice Analysis Is Not Required

The Court must next determine whether the "significant factor" framework requires a defendant to prove that the use of race had an impact upon the outcome of his case or the final composition of his jury.

The Court first notes that the amended RJA does not contain any explicit language indicating that the General Assembly intended to impose any type of prejudice analysis in an RJA proceeding. To hold that a defendant cannot prevail under the amended RJA unless he

[3] *See, e.g.*, Affidavit of Mitchell D. Norton (Smith) ("I have never, with a discriminatory purpose, removed any juror from the trial of any case that I have prosecuted."); Statement of Benjamin R. David (Cummings) ("[A]t no time did race enter into our consideration of who to remove from the jury panel.").

proves an effect upon his case would be to read a requirement into the statute that the General Assembly clearly did not place there.

The language and structure of the amended RJA make it clear that a defendant need not show prejudice in order to establish a claim for relief. Under the MAR statute, even if a defendant shows the existence of the asserted ground for relief, relief must be denied unless prejudice occurred, in accordance with N.C. Gen. Stat. §§ 15A-1443 and 15A-1420(c)(6). The amended RJA, however, dispenses with the prejudice requirement. Pursuant to N.C. Gen. Stat. § 15A-2011(g), "[i]f the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the defendant's case at the time the death sentence was sought or imposed, the court shall order that . . . the death sentence imposed by the judgment shall be vacated."

The General Assembly's determination that individual defendants need not show prejudice under the RJA is consistent with the rule governing constitutional challenges to discrimination in jury pool cases because discrimination against prospective jurors based on race undermines the integrity of the judicial system and our system of democracy. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (explaining that "community participation [in the jury system] is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system").

It is well established that the harm of discrimination in jury selection is not confined to criminal defendants but extends to the citizens wrongfully excluded from jury service and society as a whole. *Miller-El v. Dretke*, 545 U.S. 231, 237-38 (2005); *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *State v. Cofield*, 320 N.C. 297 (1987).

The amended RJA does not require that the defendant show that the prosecutor's decisions resulted in any specific final jury composition. This determination is well-supported by the courts' approach to *Batson* claims. *See Snyder v. Louisiana*, 552 U.S. 472, 477-78 (2008) (recognizing that the federal constitution forbids striking even a single African-American venire member for a discriminatory purpose, regardless of the outcome of the trial); *State v. Robbins*, 319 N.C. 465, 491 (1987) (explaining that "[e]ven a single act of invidious discrimination may form the basis for an equal protection violation"); *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991) (holding that, "striking only one black prospective juror for a discriminatory reason violates a black defendant's equal protection rights, *even when other black jurors are seated* and even when valid reasons are articulated for challenges to other black prospective jurors") (emphasis in original; internal citations omitted).

Therefore, the exclusion of qualified African-American jurors based on race by prosecutors is not remedied in the event that defense counsel engaged in disproportionately striking white jurors. The amended RJA is clear that the exercise of peremptory strikes based in significant part on a juror's race cannot stand, regardless of the composition of the final jury.

Alternate Standards Of Proof

The Court holds that an appropriate evidentiary framework to apply to amended RJA claims is one that focuses on the disparate impact that prosecutors' peremptory strike decisions have on African-American venire members. Implicit in this holding is that the RJA does not require a showing of intentional discrimination, or a showing of impact upon the outcome of the defendant's case or composition of the defendant's jury.

The requirements of the amended RJA may also be satisfied by methods of proof other than disparate impact including disparate treatment models used in employment discrimination cases.

In a "mixed motive" disparate treatment case, the plaintiff may show by direct and circumstantial evidence that race was a "motivating" or "substantial" factor for an adverse employment action, even though other factors contributed. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003). The burden of production then shifts to the employer to prove a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff, that the employer would have taken the same action even in the absence of the plaintiff's race or gender. *Id.* at 94. The amended RJA's "significant factor" language bears similarity to the "motivating factor" concept used in mixed motive cases. Accordingly, under this alternate analysis, a defendant may establish a *prima facie* showing under the RJA by establishing that race was a "motivating" or "substantial" factor in the State's decisions to exercise peremptory strikes, even if other factors contributed to these decisions.

Similarly, in a case alleging that a defendant has engaged in a "pattern or practice" of discrimination, plaintiffs must "establish that racial discrimination was the company's standard operating procedure – the regular rather than the unusual practice." *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (citation omitted). If the plaintiff has established a *prima facie* case, and the defendants have responded to the plaintiff's proof by offering evidence of their own, the fact-finder then must decide whether the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. *Id.* Here, the plaintiff will typically rely on statistical evidence as circumstantial evidence of intent. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977) ("We have repeatedly approved the use of

statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination . . ."). This type of employment discrimination claim is similar to the RJA's provisions permitting defendants to bring claims based on decision-making patterns within counties or prosecutorial districts. Under this alternate analysis, a defendant may establish an RJA violation if there is proof by a preponderance of the evidence that racial discrimination in the use of peremptory strikes in capital cases was prosecutors' standard or regular practice in the county or district.

The Amended RJA Is Not Retroactive

The Court must also address the question of retroactivity. In its pretrial motion for judgment on the pleadings, the State argued that Defendants' claims pursuant to the original RJA should be dismissed because the amended RJA applies retroactively, and under that law, Defendants' original RJA claims are insufficiently supported, insufficiently pled, or legally non-cognizable. The Court must thus decide whether Defendants' originally-filed claims should be analyzed under the 2009 or the 2012 version of the RJA.

In making this decision, the Court will engage in four analyses. The Court will first examine the language and structure of the amended RJA to discern the legislature's intent. The Court will then turn to the constitutional question of whether reading the amended RJA retroactively would impermissibly destroy Defendants' vested rights. Finally, the Court will discuss equitable considerations and constitutional concerns regarding arbitrariness.

Turning first to the language and structure of the amended RJA, while the amended RJA deletes certain provisions of the original RJA, it fails to provide any affirmative statement regarding the original RJA's viability for claims filed pursuant to that version of the law. The word retroactive does not appear in the amended RJA. The legislature simply failed to specify

that the amended RJA applies instead of the original RJA to claims filed under that law. Holding that the amended RJA is retroactive would require this Court to read a requirement into the statute that the legislature did not explicitly place there. This is strong evidence that the amended RJA was not intended to operate retroactively.

In this regard, the Court notes there are several provisions in the amended RJA where the legislature could have but failed to explicitly address retroactivity. In each of these provisions, the legislature failed to provide affirmative guidance on the original RJA's viability for already-filed claims. Section 4 of the amended RJA states that "G.S. 15A-2012 is repealed." Section 6 states that the amended RJA "applies to any postconviction motions for appropriate relief that were filed pursuant to S.L. 2009-464." Section 10 states that the amended RJA "applies to all capital trials held prior to, on or after the effective date of this act and to all capital defendants sentenced to the death penalty prior to, on, or after the effective date of this act." These provisions clearly require application of the amended RJA to motions filed under the 2009 law, but they fail to address whether the amended RJA applies in conjunction with or instead of original RJA. This omission constitutes evidence that the legislature did not intend the amended RJA to be retroactive.

Affirmative language in the statute also indicates that the amended RJA is not retroactive. The amended RJA states that "the intent of this Article [is] to provide for an amelioration of the death sentence." N.C. Gen. Stat. § 15A-2011(a1). An ameliorative statute is by definition one that is less "onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 282, 294 (1977) (contrasting an ameliorative law with an *ex post facto* law, which "must be more onerous than the prior law"). For the amended RJA to be less onerous than prior law, and thus ameliorative as the statute requires, it must permit defendants who filed motions under the original law to

proceed under both versions of the RJA. This is so because the original RJA is more expansive and favorable to defendants than the amended RJA. For example, the original RJA permits causes of action based upon a statewide or judicial division-wide showing, or based upon race-of-victim discrimination, while the amended RJA does not permit those claims. *See* S.L. 2012-136, N.C. Gen. Stat. § 15A-2011.

Sections 6 and 7 of the amended RJA provide further affirmative evidence that it was not intended to operate retroactively. Section 7 states that the amended RJA does not authorize any post-conviction motions in addition to those already filed under Article 89 of Chapter 15A of the General Statutes or the original RJA. Section 6 permitted defendants with pending motions sixty days to amend or modify their original motions. Read together, these provisions indicate that original RJA motions were not nullified by the amended RJA. Defendants were simply permitted to supplement these motions with additional claims under the new law. Such supplementation was necessary in view of the amended RJA's new parameters. *See, e.g.*, N.C. Gen. Stat. § 15A-2011(a) (defining the time period at issue as 10 years prior to the offense and two years after the sentence was imposed). The Court finds this to be a substantial indication that the amended RJA does not retroactively abrogate original RJA claims.

In view of the foregoing statutory analysis, the Court concludes that the amended RJA does not explicitly extinguish, and therefore permits, previously-filed claims to proceed under the law that existed at the time of filing. In reaching this conclusion, the Court acknowledges there are non-frivolous arguments that the amended RJA can be interpreted as retroactive. However, the Court is bound to apply North Carolina law. Under that law, statutes are presumed to operate prospectively unless they are clearly and unambiguously retroactive:

> There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so

> clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action, only that construction will be given it.

Hicks v. Kearney, 189 N.C. 316 (1925) (internal citation and quotations omitted); *see also* N.C. Gen. Stat. § 12-2 ("The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute."); *Lindh v. Murphy*, 521 U.S. 320, 328, n. 4 (1997) (explaining that "cases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.").

The Court cannot conclude that the amended RJA's language is "clear, strong, and imperative" with regard to retroactivity. *See Hicks*, 189 N.C. at 316; *see also State v. West*, 180 N.C. App. 664, 670 (2006) (explaining that "the 'rule of lenity' forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.") (citation omitted). On the contrary, the Court finds persuasive evidence in the amended RJA's language and structure that it was not intended to operate retroactively.

The Court must next consider whether a retroactive construction of the amended RJA would destroy Defendants' vested rights to their original RJA claims. The Supreme Court of North Carolina has explained, "It is especially true that the statute or amendment will be regarded as operating prospectively only . . . where the effect of giving it a retroactive operation would . . . destroy a vested right." *Smith v. Mercer*, 276 N.C. 329, 337 (1970). Indeed, permitting a statute to destroy a vested right retroactively would violate Art. I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. *See*

Perry v. Perry, 80 N.C. App. 169, 173 (1986), citing *Wachovia Bank and Trust Co. v. Andrews*, 264 N.C. 531 (1965).

The Supreme Court of North Carolina has explained that when considering retroactivity, "[t]he proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time [the statute] took effect." *Booker v. Duke Medical Center*, 297 N.C. 458, 467 (1979). Therefore, the question before the Court is whether Defendants' rights to their original RJA claims have vested. In this regard, our state supreme court has repeatedly held that rights vest or accrue at the time of the injury that gives rise to the cause of action. *Id.*; *see also Bolick v. American Barmag Corporation*, 306 N.C. 364, 371 (1982); *Smith v. American & Efird Mills*, 305 N.C. 507, 511 (1982); *Raftery v. Wm. C. Vick Const. Co.*, 291 N.C. 180, 188 (1976); *Smith v. Mercer*, 276 N.C. 329, 338 (1970); *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36 (1921).

The State asserts that a defendant's rights are only vested upon final judgment by a court. However, the cases the State relies upon for this proposition do not apply here. The State first points to *Gardner v. Gardner*, 300 N.C. 715 (1980). In *Gardner*, the defendant sought retroactive application of a statute governing venue for alimony and divorce proceedings. However, the Supreme Court held that while procedural matters such as venue are generally retroactive, the general rule did not apply because the trial court and the Court of Appeals previously affirmed as proper the venue which the plaintiff sought. *Id.* at 718-20. The plaintiff's right to venue in *Gardner* was thus "secured, established, and immune from further legal metamorphosis." *Id.* at 719. The State argues that this holding permits retroactive application of the amended RJA in the absence of a fixed judgment.

However, *Gardner* does not apply here because it involved retroactive application of a procedural statute. In this case, the amended RJA would deny Defendants' substantive rights if applied retroactively. This is so because the original RJA provides substantive rights which the amended RJA does not. The original RJA permits freestanding post-conviction claims based upon statewide and judicial division-wide evidence, race discrimination based on the race of victims in murder cases, and statistical evidence alone. The amended RJA does not permit any of these claims. On this basis, the Court finds the differences between the two laws substantive. There can be no debate that a capital defendant's access to a legal vehicle for exposing geographically-expansive discrimination is a substantial and important right. Furthermore, by narrowing the time period upon which a claim may be based and removing defendants' ability to prevail based upon statistics alone, the amended RJA deprives defendants of procedural avenues in a way that affects their substantive ability to seek relief. *See Lindh v. Murray*, 521 U.S. 320, 327 (1997) (holding that a federal law involved substantive changes because "in its revisions of prior law to change standards of proof and persuasion in a way favorable to a State, the statute goes beyond mere procedure to affect substantive entitlement to relief").

The State also relies upon *Dyer v. Ellington*, 36 S.E. 177 (1900), to support its contention that rights only vest upon final judgment. In *Dyer*, the plaintiff sued town commissioners seeking a statutory penalty for the commissioners' failure to publish a statement of taxes. During the pendency of the suit, the legislature repealed the penalty but left the tax publication requirement intact. *Id.* at 177-78. The Supreme Court permitted the repeal to operate retroactively and held that the plaintiff could not recover the penalty in light of the legislative enactment because the plaintiff had "no vested right to the penalty until judgment." *Id.* at 178.

However, *Dyer* does not apply here because it only involved repeal of a penalty, not repeal of the substance of a statute, as is the case with the amended RJA. Moreover, the Supreme Court in *Dyer* explained that the repealed penalty was "not such a right as is intended to be protected by the act, but is one created by the act." *Id.* In this case, the statewide and judicial division claims repealed by the amended RJA were precisely the systemic blights on our justice system that the legislature intended to protect against. Finally, the Supreme Court noted in *Dyer* that the outcome may have been different in a criminal case. *Id.* ("Whatever doubts we may have as to the propriety of the act or its probable effect, had it related to a criminal prosecution, we are not called on to express.").

The State finally cites *Dunham v. Anders*, 38 S.E. 832 (1901), to show that rights only vest upon final judgment. In *Dunham*, the plaintiff brought suit to recover a penalty from a defendant who illegally served as both a county commissioner and a member of the same county's board of education. The plaintiff obtained a judgment before a justice of the peace and the defendant appealed to the superior court. While the appeal was pending, the legislature repealed the penalty at issue. The Supreme Court held that the repeal could not operate retroactively because the plaintiff had already obtained a judgment and thus "acquired a vested right of property." *Id.* at 834. Like *Dyer*, this case is not controlling here because it involved only the repeal of a penalty, not a substantive statute such as the original RJA.

Accordingly, the Court will not, as the State urges, permit the amended RJA to operate retroactively simply because Defendants have not previously obtained final judgment. Instead, to determine whether retroactivity is appropriate, the Court will determine whether Defendants' original RJA rights vested or accrued by injury prior to enactment of the amended RJA. Indeed, the state supreme court has explained that "in this State a statute will not be given retroactive

effect when such construction would interfere with vested rights, *or* with judgments already entered." *Wilson v. Anderson*, 232 N.C. 212, 221 (1950) (emphasis added).

With regard to the vesting inquiry, the Court first notes that Defendants have presented evidence of prosecutors' race-based conduct and use of peremptory strikes in each of their individual trials. Defendants have also presented the MSU study's examination of capital cases statewide between 1990 and 2010, and additional non-capital cases and capitally-tried cases resulting in life verdicts. All of this evidence arose well before the amended RJA was enacted.

The Court further notes that the foregoing evidence of discrimination became a legally operative claim when the original RJA was enacted in 2009. The original RJA provides that a death sentence shall not be carried out if race was a significant factor in capital case decisions in the county, district, judicial division, or state at the time the death sentence was sought or imposed. S.L. 2009-464, N.C. Gen. Stat. §§ 15A-2010 and 2011.

Indeed, the language of the original RJA indicates an intent on the part of the legislature to vest capital defendants' rights under that statute at the time it was enacted. The original RJA provides that "[n]o person shall be . . . executed pursuant to any judgment that was sought or obtained on the basis of race." S.L. 2009-464, N.C. Gen. Stat. § 15A-2010. The Supreme Court of North Carolina has "viewed such mandatory statutes as legislative enactments of public policy which require the trial court to act, even without a request to do so." *State v. Hucks*, 323 N.C. 574, 579-80 (1988) (holding that the failure to appoint the statutorily-required assistant capital defense counsel is reversible error even in the absence of a request at trial).

Moreover, Defendants established their right to a hearing under the original RJA at the time that they filed their original RJA motions. The original RJA provides that if a defendant states "with particularity how the evidence supports a claim that race was a significant factor . . .

[in] the judicial division, or the State . . . [t]he court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." S.L. 2009-464, N.C. Gen. Stat. §§ 15A-2012(a) and (a)(2). Defendants filed original RJA motions in 2010 in accordance with the statutory deadline. After reviewing Defendants' pleadings, the Court determined – prior to enactment of the amended RJA – that Defendants each pled sufficiently particularized facts and were entitled to a hearing under the standards set forth in the original RJA.

The Court finds Defendants' right to a hearing under the original RJA particularly relevant in view of the contrast between the law governing original RJA motions and all other motions for appropriate relief. As noted above, the original RJA requires a hearing once a defendant presents a particularized pleading. Thus, at the time Defendants filed those motions, they acquired a fixed right to a hearing under the original RJA. *See Rice v. Rice*, 159 N.C. App. 487, 494-95 (2003) ("Vesting occurs when 'the right to the enjoyment of [an interest] either present or future, is not subject to the happening of a condition precedent.'") (citation omitted) (alteration in original); *see also Gardner*, 300 N.C. at 719 (defining a vested interest as "a right which is otherwise secured, established, and immune from further legal metamorphosis"). By contrast, for typical post-conviction motions, the court may decline to hold an evidentiary hearing if it concludes that the claims raise pure questions of law, are insufficiently supported, or are otherwise meritless. *See* N.C. Gen. Stat. §§ 15A-1420(c)(1), (3), and (6). Similarly, North Carolina's statute regarding capital defendants alleging mental retardation provides only that, "[u]pon motion of the defendant, supported by appropriate affidavits, the court *may* order a pretrial hearing to determine if the defendant is mentally retarded." N.C. Gen. Stat. § 15A-2005(c) (emphasis added).

Finally, the Court notes that Defendants moved the evidence from *Robinson* into the record and utilized it as the basis for their statewide and division-wide original RJA claims. On April 20, 2012, prior to the enactment of the amended RJA, this Court issued its order in *Robinson* finding both statewide and division-wide RJA violations.

Based upon each of the foregoing conditions, individually and taken together, the Court concludes that Defendants' original RJA injuries accrued and vested prior to the amended RJA's enactment. As such, the amended RJA cannot be read to retroactively destroy Defendants' vested rights.

The question whether the amended RJA should be read retroactively is also informed by equitable considerations. *See Michael Weinman Associates General Partnership v. Town of Huntersville*, 147 N.C. App. 231 (2001) (recognizing that vested rights to land use are needed to "ensure reasonable certainty, stability, and fairness"); *Langston v. Riffe*, 359 Md. 396 (2000) ("Justice Holmes once remarked with reference to the problem of retroactivity that 'perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions,' and suggested that the criteria which really governed decisions are 'the prevailing views of justice.'"). The Court therefore considers whether Defendants' failure to obtain final judgment on their original RJA claims prior to enactment of the amended RJA is attributable to Defendants or some other factor.

The original RJA was enacted on August 11, 2009. Shortly thereafter, on September 15, 2009, counsel for Defendants met with representatives from the North Carolina Conference of District Attorneys and the Department of Justice. Counsel for Defendants initiated the meeting in an attempt to reach agreement on a streamlined, orderly method for proceeding with the numerous RJA motions filed across the state which shared common factual and legal issues. It is

undisputed that, in the winter of 2009, the district attorneys' representatives informed counsel they would not agree to a consolidated litigation format.

Despite the district attorneys' reluctance, counsel for Defendants continued to search for an efficient, consolidated litigation plan. On August 4, 2010, counsel for Defendants petitioned the Supreme Court of North Carolina for exceptional case designation on behalf of three death-sentenced inmates from three counties: Union, Davie, and Forsyth. Such designation would have allowed for the appointment of a judge and creation of a lead case in which common issues of fact and law would be resolved. The State again opposed the adoption of consolidated litigation and, on December 7, 2010, the state supreme court denied the petition for exceptional case designation.

In the absence of a consolidated format, RJA litigation in Cumberland County moved forward. However, the State repeatedly sought to delay the proceedings. The evidentiary hearing in *Robinson* was originally scheduled by the Court for September 6, 2011, a year after Robinson filed his original RJA motion. Upon the State's requests for additional time to prepare, the Court first delayed the *Robinson* hearing to November 14, 2011, and then again to January 30, 2012, at which time the *Robinson* hearing commenced. During the five-month period of time in which the State sought to delay the *Robinson* hearing, it is undisputed that the Conference of District Attorneys lobbied the legislature to repeal the original RJA.

The Court issued its decision in *Robinson* on April 20, 2012. Three weeks later, on May 15, 2012, Defendants initiated these proceedings by filing motions for entry of judgment based upon the preclusive effect of the Court's findings in *Robinson*. After reviewing the parties' filings, the Court ordered an evidentiary hearing. During this time, it is undisputed that the district attorneys continued to lobby the legislature to repeal the original RJA. The amended

RJA was thereafter enacted on July 2, 2012, and Defendants' hearing was continued once more to October 1, 2012.

The Court also takes note of the manner in which the State chose to proceed during the five additional months the State was afforded to prepare its case in *Robinson*. The State initially argued that it required a continuance in order to review the paper version of data collection instruments produced by the MSU study. However, at the hearing in *Robinson* and this case, the State made no arguments based upon these documents. The State also requested a continuance to permit prosecutors around the state additional time to produce affidavits explaining peremptory strikes against African-American venire members. However, in this case, the State presented no evidence or arguments based upon these additional affidavits. Finally, the Court finds it noteworthy that, in addition to using the five months for trial preparation, the State's representatives engaged in a concerted effort to persuade the legislature to alter the RJA, an effort that ultimately succeeded.

Having reviewed the relevant procedural history of *Robinson* and Defendants' RJA proceedings, the Court concludes that the equities weigh against applying the amended RJA retroactively. The reason Defendants did not proceed to a hearing and judgment prior to enactment of the amended RJA is the State's repeated requests for delay in *Robinson*. In the absence of these requests, *Robinson* would have concluded nearly five months earlier. This additional time would have permitted Defendants to bring their RJA cases to a close well before the amended RJA's enactment.

The Court's decision regarding retroactivity also involves an additional constitutional concern regarding arbitrariness. In enacting the original RJA, the legislature recognized that statewide, system-wide discrimination against African-American venire members in capital cases

is intolerable. In *Robinson*, this Court found precisely this insidious form of discrimination in cases throughout North Carolina between 1990 and 2010. Instead of confronting these findings with concern however, in July 2012, the legislature attempted to ignore them by enacting the amended RJA, which extinguishes at least some capital defendants' ability to pursue statewide claims.

Thus, having provided an opportunity for defendants to present evidence of the systemic use of race in capital jury selection, and having been presented with just such a determination by this Court, the legislature turned away. The Court is concerned that this action introduces an element of arbitrariness into the administration of the death penalty. If read retroactively, the amended RJA would allow Robinson relief from the death penalty on the basis of a statewide claim while denying that same relief to all other similarly-situated death row inmates, including Defendants. Even if the amended RJA is read prospectively, the Court finds that there is still some arbitrariness to the extent that future death row inmates whose juries are selected in a discriminatory system could be executed, while pre-amendment, similarly-situated inmates could not be executed.

The arbitrariness created by the enactment of the amended RJA stands in conflict with the Eighth Amendment to our federal constitution. *See Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) ("Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."); *see also id.* at 242 (explaining that it "would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it . . . is imposed under a procedure that gives room for the play of [racial] prejudices") (Douglas, J., concurring). It conflicts as well with our state constitution. *See State v. Case*, 330 N.C. 161, 163 (1991) (remanding a capital case for a new trial where the district

attorney took action that unconstitutionally rendered the capital sentencing system "irregular, inconsistent and arbitrary"). Accordingly, the Court's decision to apply the amended RJA prospectively is informed by substantial concern that ruling otherwise would introduce unacceptable arbitrariness into the proceedings.

Overall, the Court concludes that the amended RJA cannot be read to destroy retroactively Defendants' vested rights to their original RJA claims. The Court bases its conclusion upon the amended RJA's language and structure, the existence of Defendants' vested rights to their original RJA claims, equitable considerations, and constitutional concerns regarding arbitrariness. Accordingly, in this order, the Court will analyze Defendants' originally-filed RJA claims under the law as enacted in 2009.

Available Relief

The amended RJA requires a single remedy if the court finds that race was a significant factor in the decision to seek or impose the death penalty: the death sentence "shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole." *See* N.C. Gen. Stat. § 15A-2011(g). Thus, if the State does not, or cannot, rebut the defendant's *prima facie* showing, the court must vacate the defendant's sentence of death and impose a sentence of life imprisonment without the possibility of parole. This approach balances the State's interest in the finality of convictions with the greater public interest of ensuring that our system of capital punishment is not tainted by racial bias.

The amended RJA does not violate the *ex post facto* clause because it creates a new right that mitigates the punishment of death by reducing it to a sentence of life without parole. The amended RJA reduces, not increases, the available punishment to the defendant, and therefore

the *ex post facto* clause does not apply. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977); *State v. Pardon*, 272 N.C. 72, 76 (1967).

Statutory Waiver

The amended RJA requires any defendant who files a claim under the law to submit a signed waiver stating "that the defendant knowingly and voluntarily waives any objection to the imposition of a sentence to life imprisonment without parole based upon any common law, statutory law, or the federal or State constitutions that would otherwise require that the defendant be eligible for parole." N.C. Gen. Stat. § 15A-2011(a1). This provision applies only to defendants who have potential claims that would result in a sentence of life with parole.

The provision therefore does not apply to Defendants. None of the Defendants are eligible for a sentence of life imprisonment with the possibility of parole, as their offenses all occurred after October 1, 1994, when the legislature amended the law to forbid parole for such crimes. *See* N.C. Gen. Stat. § 14-17, Laws 1994, (Ex. Sess.), c. 21, § 1. In the alternative, the Court has reviewed the written waivers submitted by Defendants and conducted colloquies in open court regarding Defendants' waivers pursuant to § 15A-2011(a1). The Court finds that Defendants have complied with this provision in all respects.

Having set out the legal framework guiding the Court's decision, the Court now enters the following findings of fact and conclusions of law.[4]

OVERVIEW OF NON-STATISTICAL EVIDENCE

1. Defendants presented a wealth of case, anecdotal, and historical evidence of racial bias in jury selection in Cumberland County and in their individual cases. This evidence included notes from the prosecution's own files documenting race consciousness and race-based

[4] If any finding of fact herein is misidentified as a conclusion of law or any conclusion of law herein is misidentified as a finding of fact, then the item shall be deemed to be whichever it should be. *In re Helms*, 127 N.C. App. 505, 510-11 (1997).

decision-making in jury selection. The documentary and testimonial evidence of former Cumberland County prosecutors showed that race was a critical part of their jury selection strategy. While typically Cumberland County prosecutors disproportionately struck African-American venire members in capital cases, in two special cases, when they believed it was to their tactical advantage to seat African-American jurors, they did so. In these cases, involving white defendants and African-American victims, the prosecution accepted African-American venire members regardless of the presence of characteristics prosecutors commonly cite to justify the strikes of African-American venire members — death penalty reservations and connections to the criminal justice system. Defendants also presented evidence of the history of racial bias and disparate treatment in jury selection in North Carolina and Cumberland County, and expert testimony concerning the impact of unconscious racial bias on decision-making.

2. The State failed to meaningfully rebut this showing. Indeed much of the evidence introduced by the State, including the testimony of former prosecutors, buttressed Defendants' evidence.

Summary Of Defendants' Evidence

3. In their case in chief, Defendants called three lay witnesses, Shelagh R. Kenney, Margaret B. Russ, and Calvin W. Colyer. Kenney is an attorney at the Center for Death Penalty Litigation, and was previously appointed as post-conviction counsel for Augustine. She testified regarding documents she received in post-conviction discovery. Russ and Colyer are both former Cumberland County prosecutors. Russ prosecuted numerous murder and capital cases, including Golphin, Walters, and Augustine. She retired in the fall of 2011, after almost 25 years of service. Colyer prosecuted approximately 180 murder cases, including approximately 50 capital cases and retired in the spring of 2012, after nearly 25 years of service. Along with Russ,

Colyer prosecuted Augustine and Golphin. Both Colyer and Russ testified about their notes, training, and jury selection practices.

4. Defendants introduced testimony of three non-statistical experts as part of their case in chief: (1) Bryan A. Stevenson, a law professor and expert in race and the law; (2) Samuel R. Sommers, a psychology professor and expert in social psychology, research methodology, the influence of race on perception, judgment and decision making, race and the legal system, and race and jury selection; and, (3) Louis A. Trosch, Jr., a district court judge in Mecklenburg County and expert in implicit bias. Defendants introduced the prior testimony of Stevenson, Sommers, and Trosch from the *Robinson* hearing, and then called Stevenson to testify as a live witness in rebuttal.

5. In addition to this testimonial evidence, Defendants introduced scores of exhibits, including the complete voir dire transcripts from North Carolina capital cases, including Defendants' cases and other Cumberland County cases. Defendants also introduced affidavits and statements from Cumberland County prosecutors and other prosecutors statewide, purporting to offer race-neutral reasons for strikes of African Americans.

Summary Of State's Evidence

6. In rebuttal to Defendants' non-statistical showing, the State presented additional live testimony from Colyer and Russ. The State also moved its presentation in *Robinson* into evidence, which included documentary evidence and the testimony of: (1) Christopher Cronin, a political science professor and expert in American Politics; (2) John W. Dickson, another former Cumberland County prosecutor; and (3) multiple former and current judges. Regarding the non-statistical evidence, the Court makes the following finding of fact.

TESTIMONY OF CUMBERLAND COUNTY PROSECUTORS

7. The heart of this evidentiary hearing was the testimony of Cumberland County prosecutors. Russ had prosecuted all three Defendants, and Colyer had prosecuted two of the three, Augustine and Golphin. Colyer, Russ, and Dickson each testified about African-American potential jurors they questioned and struck in Cumberland capital cases. Russ testified about her reasons for striking 10 black venire members in *Walters*. Colyer testified about his exercise of strikes against four black venire members in *Golphin* and against five black venire members in *Augustine*. Dickson testified about the black venire members he struck in *Robinson*, *McNeill*, and the 1995 proceeding in *Meyer*. In their testimony before this Court, Dickson, Russ, and Colyer offered purportedly non-racial reasons for their strikes and steadfastly denied they had ever used a peremptory strike to exclude a potential juror because of race.

8. In view of the fact that Russ and Colyer were present during jury selection proceedings in Defendants' cases and actually made the peremptory strike decisions at issue, the Court has considered their testimony with great care and deliberation. However, as the Court will explain, it is necessary to view Russ and Colyer's denials of racial motivation in context with all of the evidence presented. In the same fashion, the Court will also consider Dickson's testimony in *Robinson*.

Evidence From Calvin Colyer

9. Turning first to Colyer, the Court finds several aspects of his testimony significant: his pretrial investigation principally devoted to African-American potential jurors in *Augustine*; Colyer's very different approach to jury selection and the seating of African Americans in the notorious skinhead murder cases of *Burmeister* and *Wright* from his approach in other capital cases; his explanations for striking African-American potential juror John Murray

in *Golphin*; his introduction at this hearing of additional reasons for strikes or repudiation of reasons previously presented in court; and finally, his disparate treatment of black and non-black venire members in capital cases. These matters are discussed in turn. The Court will first address Colyer's notes from *Augustine*.

Colyer's Race-Based Jury Selection Research And Notes In Augustine

10. Prior to Augustine's trial in 2002, Colyer investigated potential jurors. Due to the high profile nature of the case, venue was changed to Brunswick County. Having never tried a case there, Colyer was generally unfamiliar with that area. Consequently, on more than one occasion, Colyer met with members of the Brunswick County Sheriff's Department (BCSD). He asked questions about different neighborhoods and communities in Brunswick County and sought information about individuals on the jury summons list for Augustine's case. As a result of his meeting with members of the BCSD, Colyer wrote six pages of notes. These notes were introduced as DE98-DE103. Each page of Colyer's notes is titled, "Jury Strikes." The notations on DE98-DE103 consist primarily of negative comments about potential jurors. On the final page, DE103, there is a list of 10 neighborhoods and streets in Brunswick County. These notes are irrefutable evidence that race, and racial stereotypes, played a role in the jury selection process in Augustine's case.[5]

11. Colyer used these "Jury Strikes" notes in jury selection. Colyer testified, in response to a question from the State, that it was "very likely" he would have saved these notes

[5] The Court is concerned that the "Jury Strikes" notes were not produced to defense counsel during the *Robinson* litigation and, at this point, the original notes appear to have been misplaced or destroyed. Specifically, Augustine's post-conviction attorney Shelagh Kenney credibly testified regarding the whereabouts of Colyer's notes. According to Kenney, the notes were in the State's *Augustine* file in 2006. However, the notes were omitted from the materials the State disclosed in its *Robinson* discovery, though the "Jury Strikes" notes were clearly covered by the Court's discovery order. Moreover, Kenney reviewed the State's *Augustine* file again in 2012 in connection with this litigation and determined that Colyer's notes are no longer in the State's file. These facts could easily be construed to support an inference that the State intentionally destroyed the documents. The Court declines to make this finding, however, in light of the judicial testimony discussed below regarding Colyer's excellent reputation for truthfulness and integrity.

and used them during jury selection. Indeed, as Colyer conceded, they were prepared for the purpose of jury selection. The voir dire transcript confirms that the notes were used. On DE100, Colyer wrote an entry for black venire member Mardelle Gore: "Longwood – bad area." Longwood is the second community listed on DE103. During voir dire, Colyer asked Gore a number of questions about the Longwood neighborhood where she lived. Gore explained to Colyer that Longwood was located off Highway 904. In the margin next to Longwood, there is a notation of "904 area." As Colyer acknowledged, the reference to 904 appears to be in a "heavier hand" or different pen from the main body of notes. Based on this evidence, the Court concludes that Colyer used his race-based notes to inform his questions and strike decisions during jury selection.

12. The Court finds it significant that Colyer's "Jury Strikes" notes concern a disproportionate number of African Americans. At the time of Augustine's 2002 trial, African Americans made up approximately 14 percent of the population in Brunswick County. Colyer's "Jury Strikes" notes refer to approximately 70 potential jurors. Utilizing the State's criminal record checks and other public records, Defendants identified the race of approximately 55 of these 70. Of the potential jurors for whom race could be determined, more than 40 percent were African Americans. In addition, nine of the 10 neighborhoods and street designations listed on the "Jury Strikes" notes were all areas inhabited predominantly by African Americans.

13. Colyer's "Jury Strikes" notes identify a number of potential jurors as African Americans. There are references to individuals as "blk" which Colyer admitted meant black. Regarding potential juror Clifton Gore, Colyer wrote, "blk. wino - drugs." Regarding potential juror Shirley McDonald, Colyer noted she lived in Leland, an area he described as, "blk/high drug." Regarding potential juror Tawanda Dudley, Colyer noted she was from a "respectable blk

family" and lived on Snowfield Road. In addition, Colyer noted that Dudley was "ok." There is no reference anywhere in Colyer's notes to any potential juror being white or living in a white area.

14. Colyer indicated that the notes reflected comments and impressions of venire members by the Brunswick County Sherriff's department, not his own. Colyer, conceded however, that terms like "wino" were ones he uses on occasion. Most importantly, Colyer decided which things to write in his notes. The Court finds that it is highly significant that Colyer recorded the race of three prospective black venire members. The State offered no explanation for why Colyer recorded only the race of black venire members as part of his investigation of pretrial investigation of potential jurors.

15. This conclusion is supported by the testimony of Defendants' expert witness Bryan Stevenson. As noted above, Stevenson, a law professor, was admitted as an expert in race and the law. He testified that in his view, there is no reason to include a racial designation unless one believes race is important. Stevenson used Tawanda Dudley as an example: Colyer did not describe Dudley as from "a respectable family," he described her as from a "respectable black family." The use in that context of "black," suggests that it was notable to be from a family that was both black and respectable. Stevenson testified that the preoccupation with race reflected in Colyer's notes was highly suggestive of race consciousness and established that race was a significant factor in Augustine's case.

16. The Court also finds it significant that Colyer's notes reflect disparate treatment of potential jurors based on race. For example, black venire member Clifton Gore is described as "blk. wino – drugs" despite the fact he has no record of alcohol- or drug-related criminal convictions. By contrast, white potential juror Ronald King is described as "drinks – country

boy – ok." Elsewhere, black venire member Jackie Hewett is disparaged as a "thug[]" and, in fact, his criminal record was substantial. However, while Colyer noted white venire member Christopher Ray's similarly extensive criminal record, Ray is described more sympathetically as a "n[e'er] do well."

17. Especially troubling to the Court is that African-American potential jurors who appeared on the "Jury Strikes" notes were condemned simply for living in a predominantly black area perceived to be undesirable, and not on the basis of their own conduct. For example, African-American venire members Shirley McDonald and Mardelle Gore had no record of criminal convictions. Colyer's notes indicated that McDonald and Gore lived in a "blk/high drug" or "bad area." The State struck Gore. McDonald was not questioned during voir dire and the State had no opportunity to strike her. Meanwhile, in contrast, white potential juror Toney Lewis was passed by the State, and Colyer's notes deemed Lewis to be a "fine guy," despite the fact that he was involved in "trafficking marj[uana]" and running a "pot boat" in the early 1980s.

18. Stevenson also discussed the phenomenon whereby neighborhood becomes a proxy for race. He explained the significance of Colyer's notes about African-American communities and striking African-American venire members based on where they live. Housing in many communities in this country, and in Brunswick County, is racially segregated. Some of the neighborhoods Colyer listed on DE103 were close to 100 percent African-American communities. As a consequence of these facts, a potential juror's neighborhood can easily become a proxy for race.

19. Colyer suggested in his testimony that his concern about the neighborhoods listed on DE103 was not that they were black neighborhoods, but they were "neighborhoods where there's high crime rates." The Court does not doubt the sincerity of Colyer's belief that he was

motivated by the race-neutral fact of crime, and not race. However, as Stevenson explained and Colyer's own notes demonstrate, Colyer equated black neighborhoods with crime when he wrote "blk/high drug" and denominated Longwood as a "bad" area. Significantly, the State produced absolutely no evidence that these predominantly black neighborhoods were in fact "high-crime" neighborhoods or upon what exactly such characterizations were based. When potential jurors are excluded because they live in an all-black or nearly all-black community, "neighborhood" as a justification for the strike cannot be disentangled from race. Thus, the concern Colyer's notes evince about black neighborhoods is further evidence that race was a significant factor in Augustine's case.[6]

20. In sum, Colyer recorded negative comments about a disproportionately black group of potential jurors, he made explicit references to the race of African-American citizens, and he disparaged African-American potential jurors on the basis of group characteristics. Colyer did all of this on notes labeled "Jury Strikes" on every page. The "Jury Strikes" notes are powerful evidence that, in the prosecution's view, many African-American citizens summoned for jury duty in Augustine's case had a strike against them before they even entered the courthouse.

Colyer And Dickson's Reliance On Race In *Burmeister* And *Wright*

21. The Court next weighs the jury selection practices of Colyer and Dickson in the capital prosecutions of Malcolm Wright and James Burmeister, two Cumberland County defendants who were sentenced to life. Burmeister and Wright were soldiers stationed at Fort Bragg who belonged to a white supremacist "skinhead" gang. They were tried separately for the

[6] Colyer and Russ also discussed neighborhoods with law enforcement in Golphin's case after venue was transferred to Johnston County. The State attempted to suggest through its questioning of Russ that the purpose of this investigation was to determine which jurors lived too far to commute to the trial in Cumberland County. The answers of Russ, and the record itself, flatly contradict this theory. The Court finds that this is additional evidence that race was a significant factor in Golphin's jury selection and in Cumberland County.

racially-motivated murders of two African-American victims. Colyer, along with Dickson, prosecuted both cases. As background, in the instant cases, the bulk of Colyer's direct examination by the State was devoted to offering purportedly race-neutral reasons for the strike decisions of African-American venire members in the *Augustine* and *Golphin* cases. Colyer repeatedly stressed he did not strike potential jurors because of race. As to the nine black venire members whom Colyer struck in the *Augustine* and *Golphin* cases, Colyer testified that all nine of his strike decisions were motivated by the potential juror's reservations about the death penalty or because the juror or a family member had been charged with a crime.[7] Dickson testified about his strikes in *Robinson*, and similarly denied striking potential black jurors because of race. Like Colyer, Dickson attempted to justify many of his strikes based on venire members' death penalty reservations and involvement in the criminal justice system.

22. The Court further notes that Colyer testified that his approach to voir dire was consistent from case to case and juror to juror. Similarly, Dickson testified there was no difference in his voir dire strategy in cases that resulted in death sentences and those that ended in life verdicts. The Court agrees one would expect any racial disparity in strike rates to remain roughly constant from case to case.

23. Defendants presented empirical evidence about Dickson and Colyer's strike patterns in *Burmeister* and *Wright* that bears on the credibility of their strike explanations in other Cumberland County cases, including *Augustine* and *Golphin.* During cross-examination, Defendants confronted Colyer with his conduct in these cases. The first piece of evidence that the prosecution approached these cases differently from other capital cases was a pretrial motion

[7] There was no testimony about the reasons for the strike of Deardra Holder, who was summoned for jury duty in *Golphin.* Russ conducted jury selection alone that day and questioned and struck Holder. However, in her testimony, Russ merely confirmed the strike and stated that the trial court's denial of defense counsel's *Batson* objection was upheld on appeal.

for a jury consultant by Colyer in *Burmeister*. Colyer testified that this was the only such motion he filed during his career. Colyer argued as grounds for the motion that the "interest of justice requires that the people of the State of North Carolina are entitled to a fair and impartial jury free from racist attitudes and reactionary positions." Colyer was clearly concerned that, in this inter-racial murder case where the victims were two African Americans, racial attitudes could create barriers to a fair and just outcome. The Court credits Stevenson's opinion that the filing of this motion indicates that, in these particular cases, "it was in the interest of the State to protect against those concerns" regarding persons with racist attitudes serving on the *Burmeister* jury.

24. The next factor is the difference in strike rates from other Cumberland capital cases. In *Burmeister*, Colyer and Dickson used nine of 10 strikes to excuse non-black potential jurors. They struck one black venire member and passed eight. In *Wright*, Colyer and Dickson used 10 of 10 strikes against non-black venire members. The State struck not a single black venire member in *Wright*.

25. By contrast, in Cumberland County, between 1994 and 2007, black venire members were 2.6 times more likely than non-blacks to be struck by the State. In Defendants' cases, the strike rate disparity ranges from 2.0 to 3.7. In the 11 capital proceedings in the MSU Study from Cumberland County, there is no case in which the disparity falls below 1.0. Yet, in *Burmeister*, the racial disparity is 0.5, and in *Wright*, a disparity cannot even be calculated because the State struck no black potential jurors. On the basis of statistics alone, *Burmeister* and *Wright* are complete anomalies. They stand in stark contrast to Colyer and Dickson's claim that they approached voir dire the same way in every case.

26. There is more. In *Burmeister*, the prosecution's notes segregated African-American potential jurors by race and created a list of all black jurors accompanied by brief

descriptions. Colyer took similar actions in *Augustine* and *Golphin* by noting the race of black potential jurors in those cases. The Court credits Stevenson's opinion that these actions show that race consciousness was "very important in thinking about jury selection generally."

27. In addition, contrary to their direct examination testimony concerning strikes in *Augustine* and *Golphin*, in *Burmeister* and *Wright*, Colyer and Dickson consistently passed black venire members with significant misgivings about the death penalty and/or involvement with the criminal justice system. In *Burmeister*, Colyer and Dickson passed the following black venire members:

- Henry Williams, whose son had a pending cocaine charge.
- Lorraine Gaines, who said it would be "hard" and "difficult" for her to vote for the death penalty.
- Betty Avery, whose uncle had killed her aunt. Avery's uncle went to prison for that crime. Avery herself had been convicted of DWI. Someone shot out the windows of Avery's car and the police never apprehended anyone. On the death penalty, Avery was asked whether she had any religious, personal, or moral feelings against capital punishment. Citing her religious views, Avery stated, "I don't believe in the death penalty. I'm afraid." Dickson responded, "You don't think you believe in it?" To this, Avery said, "No. I don't believe in it that much." Avery later added that she thought the death penalty was "kind of harsh."

28. It is also significant that, on the jury questionnaires of these venire members, Colyer made notations indicating his awareness and interest in these potential jurors' death penalty views and connections to crime.

29. In *Wright*, Colyer and Dickson similarly passed black venire members who appear to fit the profile of potential jurors commonly struck by the State in Defendants' cases:

- Donald Bryant, whose cousin abused alcohol. Bryant's cousin was a "mean person" when he was drinking and often got into fights. Bryant thought it likely his cousin had gotten into trouble with the law for his violent, drunken behavior.
- Tina Hooper, whose nephew committed a robbery two or three years before. Hooper's nephew went to prison. Hooper was also weak on the death penalty.

> Asked if she had any personal, religious, or moral beliefs against the use of capital punishment, Hooper said, "That's kind of a hard one. I really wouldn't like someone to be killed." Hooper also stated, "I'd rather for a person not to be killed." Later she added, "I would probably want to have life imprisonment if they didn't pull the trigger."

30. Hooper merits additional discussion. In the 1999 *Meyer* case in Cumberland County, Colyer questioned black venire member Kenneth McIver and then struck him because of his reservations about the death penalty. However, McIver's views mirror Hooper's. Just as Hooper leaned against the death penalty, so did McIver. He told Colyer, "Life in prison will probably be a better solution." In the affidavit Colyer submitted in connection with the *Robinson* litigation, Colyer cited McIver's death penalty views as the reason explaining his strike.

31. In two other cases, Colyer again struck black venire members who gave answers that were similar to Hooper's. In the Cumberland County capital case of *McNeill*, Colyer struck black venire member Rodney Berry. Like Hooper, Berry had reservations about the death penalty for non-triggermen. Colyer said in his affidavit he struck Berry because he "could not consider the death penalty for a felony murder conviction." In the 2004 Cumberland County capital case of *Williams*, Colyer struck black venire member Forrester Bazemore.[8] Colyer said he struck Bazemore because he objected to the law permitting a non-killer being subjected to the death penalty. Colyer's acceptance of Hooper in *Wright* therefore undermines his claim that, in all cases, he consistently bases strikes on death penalty reservations, and not on race.

32. The State's disparate decisions to strike McIver in *Meyer*, Berry in *McNeill*, and Bazemore in *Williams* while accepting Hooper in *Wright* are notable for an additional reason. During the litigation in *Robinson*, State expert Katz disagreed with MSU's decision to code these jurors as not having reservations about the death penalty. Katz contended that these jurors'

[8] Incredibly, Forrester Bazemore was called for jury service in two Cumberland County capital cases: *Williams*, and *Parker*, discussed *infra*. In both cases, the State exercised a peremptory strike against him. In *Parker*, the judge found that the strike was racially based, and ordered that Bazemore be seated on the jury.

comments indicated they were in fact reticent about capital punishment and appropriately subject to being struck by the prosecution. The State, with Colyer acting as lead counsel, pressed this position at the *Robinson* hearing through cross-examination of defense expert O'Brien and direct testimony from Katz. The State's insistence that McIver, Berry, and Bazemore should have been struck for their death penalty views provides further evidence that Colyer acted with race consciousness in *Wright* when he accepted black juror Hooper, who held nearly identical views.

33. In *Wright*, there was additional evidence of Colyer's race consciousness. Colyer testified that he sometimes circled information on a jury questionnaire when he thought the information was important. On the jury questionnaire of Arnold Williamson, Colyer circled the fact that Williamson was African American.

34. Based on the Court's review of the evidence and testimony regarding the *Burmeister* and *Wright* cases, it cannot be said that death penalty reservations or connections to crime drove the prosecution's strike decisions in these cases. Rather, the salient fact, the determining fact, could only be race. Quite simply, in *Burmeister* and *Wright*, the State sought to seat black jurors, and Colyer and Dickson made strike decisions accordingly.

Colyer's Reliance On Race In Striking John Murray

35. Colyer testified extensively about his strike of black venire member John Murray in the *Golphin* case. Colyer attempted to rebut Defendants' claim that Colyer asked Murray race-conscious questions, targeted him for particular questions because of his race, and struck him for explicitly race-based reasons. Colyer generally denied these allegations.

36. The record shows that Murray was 30 years old. He was married and he and his wife had two children. Murray worked as an engineer. He had attended the University of North Carolina at Chapel Hill and served in the United States Air Force for four years. He supported

the death penalty. During voir dire, Colyer pursued three lines of questioning in which he asked Murray explicitly race-based questions.

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

- Colyer inquired about an incident involving other venire members whom Murray had overheard talking about the case. Colyer asked, "Could you tell from any speech patterns or words that were used, expressions, ***whether they were majority or minority citizens, black or white, African-American***?" Then when attempting to justify the strike of Murray, Colyer told the trial judge, he deemed Murray objectionable because Murray "attributed to a male and a female ***white*** juror in the courtroom with respect to what he viewed as a challenge to the due process rights of the defendants."

- Colyer singled out Murray for questions about black culture. In particular, Colyer asked Murray, and Murray alone, about his knowledge of black musicians Bob and Ziggy Marley, reggae music, and the former emperor of Ethiopia, Haile Selassie.

These race-conscious aspects of Colyer's treatment of Murray are discussed in turn.

37. As to the first, Colyer admitted that when he asked Murray how he felt "as a young black male," Murray's race was consciously in his mind. No non-black venire members were questioned about how they felt "as white people" about any past experiences. The obvious disparate treatment and race-consciousness in Colyer's voir dire is evidence that race was a significant factor in Colyer's decision to strike Murray.

38. Regarding Colyer's question about whether the jurors Murray overheard were white or black, the record shows the following. During voir dire, Colyer asked Murray if he had previously heard anything about the case. Murray said he had heard something once he got to court, namely two jurors who were seated behind him said the defendants "should never have made it out of the woods." As noted earlier, Colyer inquired about the race of the two jurors who made these comments. Colyer also asked Murray about whether the comments had any

impact. Murray said he did not believe the comments showed much regard for the defendants' due process rights.

39. At this hearing, defense counsel asked Colyer why it had been important for him to ascertain the race of the overheard jurors. Colyer said, he "wanted to see, first of all, if his reaction, the impact that this was having on him as a potential juror." Asked if he had Murray's race in mind when he asked his question about the race of the overheard jurors, Colyer denied that it was. He again claimed he simply "wanted to know what the race of the people were that said this that Mr. Murray heard. I wanted to know what the impact of that was going to be on Mr. Murray."

40. The Court finds Colyer's answers unpersuasive. Colyer testified that the *Golphin* case had nothing to do with race. Consequently, there was no reason why the race of the overheard jurors, as distinct from the content of the overheard remarks, had anything to do with Murray's "reaction" to the overheard comment.

41. Colyer claimed additionally that he made this inquiry in order to assist the trial judge in determining whether anyone else had heard the comment. The Court notes that Colyer attempted to make this same point in the *Robinson* litigation when he cross-examined Stevenson. However, as Stevenson pointed out, nowhere in the *Golphin* transcript is there evidence of any additional effort Colyer made to identify the jurors who made the comment. Certainly, further steps could have been taken, including inquiry by the trial judge or questioning of the jury. Colyer himself acknowledged the "potentially devastating" impact the comment could have had on other venire members, including those who had already been seated before Murray reported the comment. In fact, Colyer requested no additional action, no steps were taken and, as a result,

the Court gives little weight to Colyer's suggestion that he was simply trying to ferret out more information about the overheard jurors.

42. Defense counsel also asked Colyer why, in proffering his reasons for striking Murray, he made a point of designating the race of the juror Murray overheard making the comment. In his testimony before this Court, Colyer said he was "just trying to reflect what Mr. Murray had said." Again, Colyer's explanation does not bear scrutiny. Colyer admitted he was the one who first injected race into the discussion of the other jurors' comments. Murray never suggested race had anything to do with the comments he overheard. Nonetheless, race appears to have been on Colyer's mind as he questioned Murray and explained his strike to the trial judge. The Court finds that Colyer's reliance on Murray's identification of the jurors as white as a reason for striking him reveals race-consciousness and race-based decision-making.

43. The third line of race-based inquiry to which Colyer subjected Murray concerned black culture. Colyer admitted he asked no other potential jurors about Bob and Ziggy Marley or Emperor Selassie. Colyer also admitted there was nothing on Murray's jury questionnaire that would spark any concern about Murray's knowledge of black culture. Nonetheless, Colyer attempted to link his race-based questioning with the *Golphin* defendants' appearance. Defense counsel asked if it was "fair to say" that when Colyer asked questions about the Marleys, "you were thinking about the race of the juror?" Colyer responded:

> No. What I was thinking about was there was information that we had gained, either from Kingstree, South Carolina, or Petersburg, Virginia, that the Golphin brothers had some connection with marijuana, Rastafarians, dreads, that sort of thing, and when they came into court, their hair was pulled back in buns and you could see they had long hair, and I was trying with this juror based upon what he had said about the due process, based upon what he had said about his experiences being — you know, the things he had done in his life to see if he knew anything about these subject matters because I wanted to know if it would impact on him as a juror if they came up. I didn't know if they were going to come up, but he had indicated his contact with law enforcement and I wanted to

> see if there would have been any empathy or any sympathy that he would have felt as a result of his experience, his life background as it related to these two young men who were sitting in court.

44. Colyer admitted there was nothing on Murray's jury questionnaire that would cause concern about the Marleys as compared to white jurors. Pressed again on why he singled out Murray for questions about black culture, Colyer said the following:

> The Golphins' appearance when they came in the courtroom and their hairstyles and his statements about them not having due process and the statements that he attributed to the white jurors about them not coming out of the woods alive and I didn't know, as I said, whether or not anything was going to come up in the case about their background related to marijuana, Rastafarian, their hairstyle, that sort of thing. I was just trying to find out if there was anything that would make him feel sympathy or empathy toward them based upon his experiences and what he had heard jurors say in the courtroom and what he had observed in the courtroom.

45. This explanation is not persuasive. There is no logical or plausible connection between the hairstyles of the defendants, the music of black reggae artists, an African political leader who died in 1975, and the venire member's unremarkable view that a statement calling for the Defendants' death is incompatible with due process.[9]

46. The Court agrees with Defendants' expert Stevenson that, in asking Murray questions about black culture, Colyer was "targeting jurors of color in a way that again reinforces that race is a significant factor." When Murray was questioned about the kind of music he listened to, he was being given a special cultural test designed only for African-American citizens. As Stevenson explained, consciously or not, the prosecutor seemed to be of the view that "if you identify with black music or other aspects of black culture, you're not an acceptable

[9] The Court also notes that Bob Marley was an internationally-acclaimed musician. An album of his music released three years after his death, *Legend*, is reggae's best-selling album and has sold 25 million copies. Marley was inducted into the Rock and Roll Hall of Fame and was given a Grammy Lifetime Achievement Award. Bob Marley's son, Ziggy Marley has won four Grammy Awards. *See* http://en.wikipedia.org/wiki/Bob_Marley and http://en.wikipedia.org/wiki/Ziggy_Marley. There can be little doubt that the Marleys have white and black fans.

juror." The Court is constrained to reject Colyer's explanation for these questions, and concludes that they display race consciousness and racially disparate treatment of Murray.

Colyer also told the trial judge he struck Murray in part because Murray purportedly

> did not refer to the Court with any deferential statement other than saying 'yes' or 'no' in answering your questions when you asked them" and had "a rather militant animus with respect to some of his answers. He elaborated on some things. Other things, he gave very short, what I viewed as sharp answers and also noted that when he spoke to the Court, that he did not defer, at least in his language, to the Court's authority, did not refer to the Court in answering yes, sir or no, sir. Did not address the Court as Your Honor.

47. The Court does not doubt the sincerity of Colyer's concern. Indeed, on Murray's jury questionnaire, Colyer made several notes about Murray's alleged "anger" and his "clipped" and "yes/no" answers. However, the trial judge rejected the suggestion that Murray was not sufficiently deferential, noting that he "did not perceive any conduct of the juror to be less than deferential to the Court." The trial judge added that there was a "substantial degree of clarity and thoughtfulness in the juror's responses."

48. The trial judge who observed Murray clearly rejected the suggestion that this African-American veteran and family man was insufficiently deferential to the white prosecutor and white presiding judge. The Court observes that the demeanor-based reason Colyer gave at trial for his strike of Murray may well reflect unconscious bias rather than any intentional discrimination by Colyer against Murray. *See Batson*, 476 U.S. at 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically.").

49. Finally, with regard to Murray, Colyer offered four reasons for striking this venire member. Murray's father had been convicted of robbery and Murray had been convicted of

DWI. The other reasons are those the Court has discussed: Murray's concern about due process in light of the comments made by other jurors and Murray's purportedly disrespectful manner in voir dire. On Murray's jury questionnaire, Colyer noted his shorthand reasons for striking Murray. He also wrote the phrase "cumulative effect." When asked by the trial court to give reasons for the strike, Colyer began by saying the State was striking Murray because of the "cumulative effect" of several aspects of his voir dire. Colyer used this phrase again at the conclusion of his proffer to the trial judge. The Court finds it significant that the trial court rejected two of the four reasons proffered — cumulatively — for Murray's strike, specifically, the demeanor reason and Murray's due process comments. The fact that fully half of the reasons advanced by the State for Murray's strike were deemed invalid by the trial judge is evidence that race was indeed a significant factor in the strike.

Colyer's Explanation For Striking Black Venire Member Mardelle Gore

50. The Court finds the strike of Mardelle Gore is additional evidence of discrimination in Augustine's case and in Cumberland County. As discussed earlier, Gore's name appears on Colyer's "Jury Strikes" notes. She appeared in Colyer's notes because she lived in a nearly all-black community characterized as a "bad area." In voir dire, Colyer questioned Gore about her neighborhood. Despite strong evidence that Gore was targeted for exclusion from Augustine's jury because of her residence in a black neighborhood, Colyer never told the trial judge he was striking her for that reason. Instead, Colyer offered up a demeanor-based reason largely rejected by the trial court, along with the fact that Gore's daughter had killed her abusive husband and gone to prison.[10]

[10] As discussed below, Colyer accepted non-black venire members who had similar family involvement in the criminal justice system.

51. In the affidavit prepared for this case and in his testimony, Colyer no longer relies upon the discredited demeanor explanation. The Court notes that the State's own expert, Katz, asked prosecutors to provide a written affidavit setting for the explanations for strikes because of potential credibility problems that would arise if explanations varied over time. The Court finds that shifting explanations are themselves a reason to believe the explanation for the strike of Gore was pretextual.[11]

52. Gore herself had no criminal record. She supported the death penalty. Gore was a widow in her 50s and she had raised three children. Gore worked with people suffering from mental and physical disabilities. She went to church and was a regular voter. Based on the evidence presented in this hearing, the Court concludes that the prosecution struck Gore for race-based reasons. Had Gore been summoned for jury duty in the *Burmeister* or *Wright* case, the State would have deemed her an acceptable capital juror.

Colyer's Racially-Disparate Treatment Of Venire Members

53. The credibility of Colyer's proffered explanations for strikes in Cumberland County cases, including *Augustine* and *Golphin*, is further undermined by the Court's comparative juror analysis. In *Robinson* and these proceedings, Defendants alleged numerous instances of disparate treatment. The State had an opportunity in this case to attempt to counter this evidence. With the single exception of John Murray, the State utterly failed to address this aspect of Defendants' evidence. Consequently, evidence that Colyer treated similarly-situated black and non-black venire members differently is unrebutted in the following cases:

[11] Colyer added an additional explanation for the first time in this hearing for Sharon Bryant, a black venire member struck by Colyer in Augustine's case. His new explanation is that he struck her in part because she was concerned about meeting her quota as an Army Reserves recruiter. With respect to John Murray, the black venire member struck in the Golphin, Colyer told the trial judge he struck Murray in part because his manner was not sufficiently deferential. The trial judge rejected this reason and remarked on Murray's 'clarity and thoughtfulness.' In his affidavit, Colyer omitted any mention of this reason.

- In *Augustine*, Colyer struck African-American venire members Ernestine Bryant and Mardelle Gore because they had family members who committed crimes. Bryant's son had been convicted on federal drug charges four or five years before and was sentenced to 14½ years. He was still incarcerated. Gore's daughter had killed her abusive husband six years ago after he threatened to kill her; she served five years in prison in Tennessee and had since been released and was working for Duke University Hospital. Both Gore and Bryant said the problems their children had with the law would not affect their ability to be fair and impartial jurors. The prosecution accepted non-black venire members who also had family members with criminal records. Melody Woods' mother was convicted of assault with a deadly weapon resulting in serious injury when she stabbed Woods' first husband in the back. Gary Lesh's stepson was convicted on drug charges in the mid-1990s, and received a five-year sentence. In addition, Lesh's uncle got into an argument with another man and the confrontation escalated. Both men fired guns. Lesh's uncle's shot killed the other man instantly; her uncle died a few hours later.

- In *Golphin*, Colyer struck African-American venire member Freda Frink in part because Frink had "mixed emotions" about the death penalty. The transcript reveals that Frink stated she would follow the law and consider both possible punishments. Moreover, the prosecutor accepted non-black venire member Alice Stephenson, who expressed conflicting emotions about the death penalty. Stephenson used the same "mixed emotions" phrase Frink had used to describe her feelings about the death penalty.

- In the 2004 case of *State v. Williams*, Colyer struck African-American venire member Teblez Rowe because of her weakness on the death penalty. The transcript reveals that Rowe stated she did not feel the death penalty was "right," but she could still follow the law in that regard. The State accepted non-black venire member Michael Sparks, who, like Rowe, stated that he was against the death penalty but he would nonetheless be able to follow the law.

- In the 2007 case of *State v. Williams*, Colyer struck African-American venire member Wilbert Gentry in part because Gentry had a cousin who was convicted of murder. However, the prosecutor accepted non-black venire member Iris Wellman who had a family member who was convicted of murder and executed in North Carolina.

- In the 1995 case of *State v. McNeill*, Colyer struck African-American venire member Rodney Berry in part because he stated he could not vote for the death penalty for a felony murder conviction. However, the prosecution accepted non-black venire member Anthony Sermarini, who also expressed hesitation about imposing the death penalty in a case of felony murder.

Evidence From Margaret Russ

54. Having reviewed the evidence bearing on Colyer's strike decisions, the Court will turn next to the evidence concerning Russ' strike decisions, credibility and her assertions that she did not take race into account in her jury selection practices. In doing so, the Court will review the following evidence: an utter lack of independent recollection of her strikes and resulting vague testimony concerning her explanations, Russ' denial of misconduct in a case reversed by the Court of Appeals, a similar denial of wrongdoing when she violated *Batson*, Russ' clear reliance on a prosecution training "cheat sheet" to circumvent *Batson*, her false testimony concerning her consultation with counsel for the State, her shifting explanations for strikes of black venire members, and finally, her racially-disparate treatment of black and non-black venire members. These matters are discussed in turn.

Russ' Lack Of Independent Recollection Of Peremptory Strikes

55. The Court will first discuss Russ' lack of any independent or helpful recollection of her own peremptory strikes. In testifying about the 10 black venire members she struck in the *Walters* case, the Court permitted the State great leniency in "refreshing" Russ' recollection. The State presented Russ with highlighted portions of jury selection transcript and thereby effectively led Russ to testify to justifications for the strikes. However, Russ admitted several times that she had no independent memory of particular jurors, her voir dire, or the reasons for her strikes. In view of her total lack of recollection, Russ' explanations for peremptory strikes were nothing more than speculation or opinion based upon the transcript. The Court finds Russ' testimony unpersuasive and unhelpful to the fact-finding process. Had Russ proffered any account of the reasons for her strikes based on personal knowledge, the Court may have awarded that testimony some weight. However, Russ presented the Court with no such evidence.

56. Russ' inability to recall the reasons for her peremptory strikes in *Walters* is underscored by her failure to provide an affidavit in connection with the *Robinson* litigation. Assistant district attorney Charles Scott produced the affidavit explaining the State's strikes in *Walters*. Scott was the second chair attorney in that case and Russ, as lead counsel, was the one who actually conducted the voir dire of potential jurors. Moreover, although Russ was no longer a prosecutor, she was still employed in Fayetteville at the time Scott's affidavit was executed. Despite this, Russ took no part in the preparation of Scott's affidavit. Nor was Russ consulted in connection with the preparation of affidavits for the cases of *Augustine* and *Golphin*, even though Russ was counsel for the State in those cases as well.

57. With respect to all of the 10 strikes at issue in *Walters*, the Court further notes that Russ testified that she exercised a peremptory strike either in light of the "totality of the circumstances" or because of some unspecified nonverbal communication:

- Sylvia Robinson was struck because of "***the totality of the circumstance[s]***.... Everything that... the juror said, the things the juror did, how I viewed her and her ***demeanor*** during that time...."
- Norma Bethea was struck in part because of "the ***general demeanor***, the — the way that every juror conducts themselves is significant to me including, of course, this juror."
- Ellen Gardner was struck in part because she ***seemed uncomfortable*** about the death penalty, ***didn't seem to understand all the questions put to her, the inflection in her voice and the way she answered things.***
- Sally Robinson was struck because the juror ***seemed confused***, equivocal and unable to do what the law required and the "***totality of circumstances***."
- Marilyn Richmond was also struck in view the "***totality of the circumstances***."
- Laretta Dunmore was likewise struck in light of "***the combination of everything***."
- John Reeves was struck in part because he ***seemed confused*** and "***all of his answers and the way he answered things I observed about that, so on and so forth***."
- Jay Whitfield was struck in part because of "***his nonverbal communication, his mannerisms, so on***."

- Calvin Smith was struck in part "***based on observing him and the way he expressed himself.***"
- Sean Richmond was struck in part because of "***his entire voir dire, his entire demeanor, and his entire nonverbal communication.***"

58. The Court is not persuaded by Russ' vague testimony regarding demeanor. The Court further finds that the vague and utterly generic nature of the demeanor explanations Russ provided for Sylvia Robinson, Norma Bethea, Jay Whitfield, Calvin Smith, and Sean Richmond is evidence that they are pre-textual. It was clear to the Court that Russ needed excerpts from jury selection transcripts to refresh her recollection as to the details of each one of the struck black venire members. As Russ acknowledged, demeanor-based reasons are not apparent from the transcript. Her reliance on the transcripts to "refresh" her recollection gives this Court great pause that Russ was actually able to recall the demeanor and non-verbal communication of these black venire members.[12]

59. Certainly, body language and other demeanor reasons may be an appropriate consideration when evaluating the qualifications of a venire member. However, Russ admitted there is no higher incidence of objectionable demeanor among African Americans as compared to whites. In his testimony, Colyer echoed this sentiment. Thus, the frequency with which Russ invoked demeanor reasons for her strikes in *Walters* — and as shall be seen a number of other capital cases — undermines the credibility of Russ' strike explanations.

Russ' Improper Conduct In *State v. Bass*

60. On cross-examination, Defendants questioned Russ about her prosecution of a child sex offense case, *State v. Bass*, 121 N.C. App. 306 (1996). The North Carolina Court of

[12] Russ made handwritten notes in preparation for her testimony after reviewing the pleadings and select sections of the voir dire transcript for the excluded venire members. These notes were introduced into evidence. There is no reference on these notes to demeanor explanations. The Court finds this is additional evidence suggesting the generic demeanor explanations were pre-textual.

Appeals held that Russ' closing argument to the jury was "'calculated to mislead or prejudice the jury.'" *Bass*, 121 N.C. App. at 313. The opinion explains that Russ was aware that the defendant, prior to trial, had sought to offer evidence that the child victim had been sexually abused by her uncle. The defense was seeking to show an alternative source for the child's knowledge of sexual matters. The trial court excluded the defendant's proffered evidence. In closing argument, however, Russ argued the child victim "would know nothing of sexual activity but for defendant's alleged abuse." The appellate court held, "the prosecutor may not properly argue to the jury that the inference would be correct where the prosecutor is aware that the contrary is true." *Id.*

61. In her testimony before this Court, Russ refused to acknowledge wrongdoing in *Bass*. Russ' unwillingness to accept responsibility for her conduct and the judgment of the appellate court undermines Russ' credibility.

Russ' Violation Of *Batson*

62. Defendants additionally questioned Russ in connection with the judicial finding that Russ violated *Batson* in a capital case tried in 1998. In *State v. Parker*, Russ attempted to strike black venire member Forrester Bazemore. Defense counsel objected under *Batson* and the trial judge ultimately sustained the objection and seated Bazemore as a juror. Several aspects of the attempted strike of Bazemore merit attention.

63. The first is that the record shows Russ proffered pretextual reasons for the strike. The trial judge found a *prima facie* showing that the peremptory challenge was exercised on the basis of race and asked Russ to give her reasons for the strike. Russ asserted that her "first concern" was that Bazemore and the defendant were close in age. She then moved to discuss various demeanor-based reasons. The trial judge asked Russ whether she was aware that a non-

black venire member passed by the State had "the very same birthday" as Bazemore. This Court finds in Russ' attempted strike of Bazemore clear disparate treatment of black and non-black venire members.

64. The Court further notes that the trial judge in *Parker* concluded that Russ' proffered reasons for striking Bazemore were pretextual. The trial court noted it "had the opportunity to see, hear and observe the conduct of the examination by the prosecutor as well as the answers provided by Mr. Bazemore. That Mr. Bazemore did appear thoughtful and cautious about his answers."

65. Additionally, the Court finds it significant that, during her testimony in this proceeding, Russ repeatedly and vehemently denied any wrongdoing with regard to the jury selection in *Parker*. Although Russ said over and over again how much she respected the trial court's ruling in sustaining the *Batson* objection, Russ insisted she was not guilty of intentional discrimination, purposeful discrimination, or unlawful conduct. For example, Russ testified she was "trying to pick a jury. At the point we articulated our reasons [for the Bazemore strike], we were genuine. There were things we observed and seen. The conduct was not unlawful."

66. This Court finds, however, given the trial court's rejection of her reasons for the peremptory strike of black venire member Bazemore, Russ' persistent denials that she has ever used race as a factor in exercising a peremptory strike are not credible. Her bald protestations that she has never violated *Batson,* that she still believes she did not ever use race as a factor in exercising peremptory strikes, and that she has never discriminated on the basis of race ring hollow.

67. Russ' unwillingness to acknowledge that the trial court in *Parker* determined that she had intentionally used race as a factor undermines her credibility as a witness. Russ testified

that, despite the trial court's *Batson* ruling, she did not analyze what happened or deem her conduct unlawful. She further offered that, perhaps, she had merely failed to do a good job communicating the State's position to the trial court. Finally, Russ maintained that, despite the trial court's ruling, she still believed she had comported with *Batson*.

Russ' Testimony Regarding *Batson* Training

68. The Court also finds it significant that Russ proffered reasons based on a handout she received at a prosecution training on *Batson*. Specifically, Defendants presented evidence about a statewide prosecutor training conducted by the North Carolina Conference of District Attorneys. The training, *Top Gun II*, was a trial advocacy course. Russ was asked several times whether she had gone to the *Top Gun II* training. Russ did not have a clear recollection, but each time Russ was asked, she became more insistent that she had not attended. Russ' final answer on the subject was, "[M]y recollection is that I did not go to this seminar, the DAs' conference. I was in trial."

69. Records maintained by the North Carolina Bar and admitted as evidence at this hearing contradict Russ' testimony. According to her 1995 CLE Record, Russ reported to the Bar that she had attended *Top Gun II* and she received 25 hours of CLE credit for attendance at this seminar.

70. Among the materials distributed at *Top Gun II* was a one-page handout titled "*Batson* Justifications: Articulating Juror Negatives." Thereafter follows a list of reasons a prosecutor might proffer in response to a *Batson* objection. It is clear from reading the transcript of the *Parker* case that Russ utilized the *Top Gun II* "cheat sheet" in attempting to justify her strike of African-American venire member Bazemore.

71. The "*Batson* Justifications: Articulating Juror Negatives" training sheet lists ten categories of justifications for striking venire members. The categories include in relevant part:

> Age – Young people may lack the experience to avoid being misled or confused by the defense
>
> Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney
>
> Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies
>
> Juror Responses – which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination

72. The explanations Russ offered in Parker track this list, even using some of the identical language from the handout. As already discussed, Russ began her attempted justification of the Bazemore strike by citing Bazemore's age. She then moved to his "body language" and noted that Bazemore "folded his arms," and sat back in his chair. Russ then described Bazemore as "evasive" and "defensive" and said he gave "basically minimal answers."

73. Moreover during the colloquy with the trial judge, Russ used language and unwieldy phrases that leave little doubt that she was reading from the handout. At one point, Russ said, "Judge, just to reiterate, those **three categories** for ***Batson justification*** we would **articulate** is the age, the attitude of the defendant (sic) and the body language." The fact that Russ chose to summarize her explanations as "categories," and then used the precise language for those category titles provided on the handout, rules out coincidence as an explanation. Similarly, it is very convincing evidence that Russ used the title of the handout when addressing the trial judge. Later, Russ referred to "body language and attitude" as "***Batson justifications, articulable reasons*** that the state relied upon." At another point, after the trial judge asked Russ to show him case law concerning demeanor-based reasons, Russ said, "Judge, I have the

summaries here. I don't have the law with me." It is apparent to the Court that the so-called "summaries" included the *Top Gun II* handout and that Russ was unwilling to share that handout with the trial judge.

74. The Court has considered additional cases in which Russ appears to have utilized the demeanor-based reasons listed on the *Top Gun II* handout when striking minority venire members. Russ prosecuted two of Walters' codefendants, Francisco Tirado and Eric Queen, shortly before Walters' trial. In Tirado and Queen's trial, Russ secured two death sentences after striking at least eight minority venire members. In explaining her strike of Amilcar Picart, a potential juror who was Hispanic, Russ cited his body language, in particular his lack of eye contact with the prosecutor, his eye contact with the defendant, and his failure to "give us more than a few words answer." These reasons echo the *Top Gun II* handout's suggestion that a prosecutor cite an undesirable juror's poor eye contact and monosyllabic answers.

75. Shortly after Walters' trial, Russ capitally prosecuted another of Walters' co-defendants, Carlos Frink. Frink was sentenced to life. In jury selection, Russ struck black venire members at a rate 4.6 times higher than she struck non-black venire members. In all, Russ used her strikes to exclude eight African-American potential jurors. In attempting to justify her strike of black venire member Wayne Radcliffe, Russ first focused on Radcliffe's involvement in his church and the fact he printed a newsletter for a local Bible college. First the trial court, and then defense counsel, expressed skepticism about this explanation. Indeed, defense counsel argued Russ had offered "nothing more than a pretext for discrimination." At that point, Russ came forward with an additional reason for striking Radcliffe, namely that he "was nodding" during the voir dire of another juror. Russ said Radcliffe's "body language . . . was also a great concern of ours."

76. The reasons Russ offered in these three cases, and Russ' accompanying verbiage in *Parker* are nearly verbatim renditions of the *Top Gun II* handout. Based on all of the evidence in the record, the Court finds that Russ used the *Top Gun II* handout in a calculated — and largely successful — effort to circumvent *Batson*. The fact that Russ relied on a training handout to avoid *Batson*'s mandate is evidence of Russ' untrustworthiness. In addition, it is evidence of her inclination to discriminate on the basis of race.

77. During the hearing in this matter, defense counsel devoted a substantial amount of time asking Russ to comment on the similarities between her explanations to the trial courts in *Parker*, *Frink*, and *Tirado* and *Queen* and the training handout. Russ undermined her credibility further when, after close questioning on this issue, Russ suggested that the source of her knowledge was not the *Top Gun II* handout, but her experience teaching at Fayetteville Tech. Russ claimed she learned about body language and non-verbal communication from a textbook she used there. Given that Russ parroted language from the handout in at least three capital trials when *Batson* objections were made, this Court is not persuaded by Russ' effort to cover up her obvious reliance on the training materials. The Court finds her testimony regarding this point to be misleading and evasive and concludes that it damages her credibility overall. Indeed, as a general matter, the Court observed that Russ was agreeable and expansive when questioned by counsel for the State and unduly evasive and argumentative when Defendants' attorney cross-examined her.

78. Stevenson testified that, unfortunately, training of prosecutors after *Batson* all too often has emphasized how to avoid a *Batson* violation, rather than how to avoid conscious or unconscious discrimination. The Court credits Stevenson's observation that the handout from

the *Top Gun II* training, utilized by Russ in a number of capital cases, including a number of Walters' capitally-tried codefendants, is a paradigmatic example of this phenomenon.

Russ' Misrepresentations During This Proceeding

79. In evaluating Russ' credibility, the Court also gives significant weight to the fact that Russ gave clearly misleading testimony during the hearing in this matter. Russ' misrepresentations were made in connection with her actions following the sustained *Batson* objection in *Parker*.

80. After the trial judge in *Parker* sustained the *Batson* objection regarding venire member Bazemore, Russ twice objected to defense counsel's strikes of white venire members. Russ lodged her second *Batson* objection when defense counsel moved to strike white venire member Belinda Lynch. The trial judge asked defense counsel to give reasons for the strike, but then overruled the objection, saying, "I may not agree with the statement in *Purkett v. Elem*, but it's the law. I have to call them like I see them."

81. Defendants introduced hand-written notes Russ made during the jury selection in *Parker*. The notes are dated and clearly follow the progression of jury selection. Russ noted the defense strike of Lynch, the State's *Batson* objection, the trial judge's finding of a *prima facie* case and request for defense counsel's reasons, and the trial judge's ultimate ruling, "DENIED + overruled." In the margin immediately to the left of these notations, Russ wrote a coarse epithet, followed by "No chance he'll ever know the law." Russ' testimony concerning the meaning of this note and her consultation with the State's attorneys about this matter gives rise to particular concerns about her credibility.

82. Defendants first asked Russ about the vulgar note late in the afternoon. The State objected, Russ was sent out of the courtroom, and the Court heard argument. The Court deferred

ruling until the next day and recessed proceedings for the evening. The next morning, the Court heard further argument from the State on its objection. Pursuant to this Court's order, Russ was not present in the courtroom during the argument.

83. In the course of his argument, Rob Thompson, counsel for the State, stated, "We have spoken to Ms. Russ . . . about the statement and who it may be in reference to and that kind of thing." Thompson argued to the Court that the statement was not relevant because it "wasn't in reference to the judge." The Court overruled the objection, finding that the evidence was relevant to impeachment of Russ' credibility.

84. Russ returned to the witness stand and Defendants resumed their cross-examination. Defendants asked Russ to whom the vulgar note referred. Russ claimed she wrote the note about the defendant. Russ stated that Parker was cocky, extremely confrontational, extremely belligerent, had pranced around inside the courtroom, and throughout the trial comported himself flamboyantly.

85. After reminding Russ that the subject of the vulgar note came up right before the evening recess, Defendants next asked Russ, "[D]id anybody from the State ask you at that time who this comment was directed to?" Russ stated, "Absolutely not. In fact they specifically told me not to talk to them about it once we left court . . . they said ... I don't want to be offensive to you, but just don't bring this up [and] don't even talk about it [as] we're not going to have any conversation." Russ continued, "They just said as to this issue, we are not trying to be ugly to you or anything but ... we probably don't want to talk about this issue — not sure if we're allow[ed to do so] or not so the safer thing to do is not do it so we didn't talk about it."

86. At that point, defense counsel asked for a recess and this Court again excused Russ from the courtroom, cautioning her not to discuss any of the matters involved in her testimony with anyone.

87. Defense counsel Hunter recounted for the Court a conversation he had with State's attorney Mike Silver. Hunter had asked Silver before court in the morning what Russ had to say concerning the note in her *Parker* file. Silver recounted that Russ had told him the night before that she did not know to whom the note referred and she was going to have to think about it. Silver confirmed those facts to the Court. Thompson reported to the Court that, the night before, he, separately from Silver, also had a very brief conversation with Russ on the subject.

88. Following a break, Defendants stated they had no additional questions for Russ. On redirect, the State attempted, on six occasions, to elicit testimony from Russ acknowledging that she had had conversations with the State's counsel concerning the note. On each occasion, Russ emphatically denied having done so.

89. Indeed, in response to the Court's inquiry, Russ testified,

> What I testified to earlier, Judge, that we were not to talk about it . . . [T]hey specifically wanted to mention before I brought it up in case I did that . . . that they didn't want me to ask them any questions about this and they did not want to say anything to me . . . I think I might have said I'm not sure what I'm suppose[d] to[] be saying and not saying and so one or both of them told me out of an abundance of caution, we were not — none of us in the room were to talk to each other about any of it.

90. The Court finds first that Russ' claim that the note was directed to the defendant is utterly unbelievable. Considering all of the circumstances, the Court finds that Russ' crude comment was directed towards the trial judge. In making this finding, the Court relies upon the following: the note was written during jury selection, presumably before the defendant had much opportunity to prance about the courtroom; the note was written shortly after the trial judge's

ruling that Russ had violated *Batson* by proffering pretextual reasons; the placement of the comment next to notes about the trial judge's subsequent overruling of Russ' *Batson* objection against the defense; the fact that defendant Parker was represented by counsel and made no comments whatsoever during the *Batson* colloquy; the trial judge's statement "it's the law" just before he overruled the objection; and the coupling of the vulgarity with the statement "No chance he'll ever know the law." The Court rejects Russ' elaborate and vociferous testimony to the contrary.

91. The Court additionally finds that Russ' comment concerning the trial judge, her unwillingness, 14 years later, to take responsibility for it, and her preposterous effort to cover up its true meaning severely undercut the credibility of her testimony concerning her "respect" and "reverence" for the trial court's ruling that she violated *Batson*. Rather than respect and reverence, Russ' conduct illustrates a phenomenon described by Defendants' expert Stevenson, namely the history of strong resistance to constitutional requirements of equal participation in jury selection by African Americans.

92. Finally, the Court finds that Russ gave false testimony concerning her conversations with counsel for the State concerning the subject of her vulgar note. Contrary to Russ' vigorous and repeated denials, the record establishes that she spoke with counsel for the State about this matter on two separate occasions: first, when she told Silver she did not remember who was the subject of the note and, second, when she told Thompson the note was not about the trial judge.

93. The Court observes that the question of who was the subject of Russ' crude note is collateral and not determinative of the weighty issues before the Court. At the same time, the fact that Russ gave false testimony is probative of her credibility generally. Just as in the case of

a *Batson* objection, Russ was called to account for her conduct in open court, under the pressure of time, and in a high-stakes case. That she chose not to be candid with the Court casts doubt on all of her testimony, and in particular, her vehement denial that race has ever been a factor in her jury selection. Had Russ simply acknowledged the inappropriate nature of her note and apologized for her misjudgment in writing it, the Court would have credited Russ for her honesty and forthrightness. Russ' decision instead to conjure a misleading explanation is strong evidence that her denials of improper motive are not reliable.

Russ' Shifting Explanations For Striking Black Venire Members

94. The Court has also considered Russ' testimony in the context of the State's defense in *Robinson*. As discussed earlier, the State's expert Katz asked prosecutors in North Carolina to provide race-neutral reasons for strikes. Colyer and Scott prepared affidavits for all of the Cumberland County cases, and Colyer represented the State in court. The State chose not to involve Russ in its defense in *Robinson*. Scott alone prepared the affidavit explaining why the State excluded 10 African-American citizens from the jury in *Walters*. Then in this case, the State called Colyer and Russ as witnesses but did not involve Scott. Moreover, despite the fact that Russ testified that she and Scott consulted each other about potential jurors and strikes, Russ gave explanations for the strikes that diverged significantly from the explanations Scott included in his sworn affidavit. For example, Scott cited no demeanor-based reasons for the 10 strikes of African Americans in *Walters*. In contrast, as to nine of those 10 strikes, Russ advanced body language and mannerisms as justifications. The Court is perplexed by the lack of consistency in the State's defense and in its failure to, in the words of its own expert, "stand behind what — what they're testifying to as to the reason."

95. The strike of black venire member Laretta Dunmore is particularly troubling in this respect. In Scott's affidavit, the stated reason for striking Dunmore was that her brother had a prior robbery conviction for which he had gone to prison and Dunmore "said 'there wasn't a fair trial' for her brother that she was pretty close to." In the *Robinson* litigation, defense counsel unmasked this reason as entirely unsupported by the record. The transcript showed that Dunmore's brother pled guilty and there was no trial, let alone an unfair one. In addition, Dunmore said she believed her brother's case was handled appropriately, and there was nothing about her brother's experience that would affect her ability to be fair and impartial as a juror. In view of the record, this Court concluded in *Robinson* that Scott's characterization of Dunmore's voir dire answers was inaccurate and misleading.

96. Against this backdrop came Russ' testimony about Dunmore. Dunmore was the one black venire member struck by Russ for whom Russ relied entirely on the venire member's answers to questions in voir dire. Russ gave extensive, detailed testimony about Dunmore having taken a paralegal course Russ taught, Russ' inability to remember if she had given Dunmore a low grade, and her desire not to embarrass Dunmore by asking about her mark in the course. Significantly, none of this is featured in Scott's affidavit.

97. The Court declines to credit Russ' newly-minted reason for striking Dunmore. First, Russ testified that she and Scott consulted one another about strikes. Second, Russ claimed that she "made it a practice not to embarrass the students," and she suggested that she struck potential jurors "in each and every one of those times in a trial that I have had a former student." It strains credulity to believe that Scott would have been unaware of Russ' longtime practice of striking former students, if in fact that was her reason for striking Dunmore. Third, the Court is struck by the disparity between the clarity of Russ' recollection of Dunmore and her vague or

nonexistent memory of the other black venire members she struck in *Walters*. Fourth, the Court agrees with one of the principles enunciated in prosecution training materials and admitted into evidence at this hearing, namely that a prosecutor "should articulate all race neutral justifications without delay. Any justifications given in rebuttal to defense arguments or court inquiry will be suspect at best."

98. Based on all of the evidence, including the State's knowledge that credibility of the reason initially proffered for Dunmore's strike had been obliterated, the Court rejects Russ' testimony concerning her strike of Dunmore. The Court finds that variance between the reasons sworn to by Scott in his affidavit and those offered by Russ in her testimony casts doubt on the credibility of both Scott and Russ.

Russ' Racially-Disparate Treatment Of Venire Members

99. The credibility of Russ' proffered explanations for strikes in Defendants' cases is further undermined by the Court's comparative juror analysis. In *Robinson* and these proceedings, Defendants alleged numerous instances of disparate treatment, including in Walters' case. The State had an opportunity in this case to attempt to counter this evidence. In questioning Russ, the State utterly failed to address this aspect of Defendants' evidence. Consequently, evidence that Russ treated similarly-situated black and non-black venire members differently is unrebutted in the following cases:

- In *Walters*, Russ struck African-American venire member Sean Richmond because he "did not feel like he had been a victim even though his car had been broken into at Fort Bragg and his CD player stolen." The record shows that, after his car CD player was stolen, Richmond received a pamphlet for crime victims and a telephone number for counseling at a trauma center. Richmond did not feel so victimized that he needed these services. Moreover, the prosecution passed non-black venire members who, like Richmond, minimized the impact of minor property crimes. Lowell Stevens, when asked about being the victim of a crime, laughed, and explained that he was a military range control officer and felt responsible when a lawn mower was stolen from his equipment yard. Ruth Helm explained that "someone stole our gas

blower out of the garage. I know that is minor, but I assumed you needed to know everything."

- In *Walters*, Russ struck African-American venire members Ellen Gardner and John Reeves in part because they both had family members who were charged or convicted of crimes. Gardner's brother had been convicted of gun and drug charges and received five years on house arrest. The transcript reveals that Gardner was not close to her brother; she believed he was treated fairly; and his experience would not affect her jury service. Reeves' grandson had a pending theft offense in Fayetteville. Reeves stated he did not know much about it, he had discussed the matter with his grandson or his grandson's parents, and there had not been any court proceedings up to that point. Like Gardner, Reeves told Russ that nothing about his grandson's pending theft charge would affect his ability to serve as a juror. Significantly, the State accepted non-black venire member Amelia Smith, whose brother was in jail for a first-degree murder charge at the time of the jury selection proceeding. Smith was in touch with her brother through letters.

- In *Walters*, Russ struck African-American venire members Marilyn Richmond and Jay Whitfield, citing their contacts with gang members. Richmond was objectionable because she "worked with 'wanna be' gang guys" and because she "knew" one of the defendant's accomplices. The State excused Whitfield because he "knew some gang guys from playing basketball." The record shows Richmond was a substance abuse counselor who worked with adolescents, some of whom professed to belong to gangs. The defendant's accomplice was a client at the mental health center where Richmond worked. Although she knew who he was, she had never spoken with him and stated she did not know him personally. Whitfield played pick-up basketball and some of the people he played with talked about being members of a gang. Whitfield had no other contact with these individuals and had never talked directly with them about their potential gang activities. Richmond and Whitfield clearly stated that these limited contacts with possible gang members would not affect their ability to be fair and impartial. Meanwhile, the State accepted non-black venire member Tami Johnson who was good friends with a former gang member. The State also accepted non-black venire member Penny Peace. Peace had a friend from work whose son was involved in a gang and had been sent to a detention center. Peace's son and her friend's son had played ball together in the past. Asked whether this situation would enter into her decision-making and cause her to be unfair, Peace said, "I don't think so."

- In the 2001 case of *State v. Frink*, Russ struck African-American venire member Wayne Radcliffe in part because of his involvement in church and in a local Bible college, as well as his connections to law enforcement officers. While rejecting Radcliffe for his church activities, the State passed a number of non-black venire members who were equally active in their churches. The State also failed to inquire about the church involvement of non-black venire members. Radcliffe's brother-in-law and a close friend worked as guards at a North Carolina penitentiary. The State passed non-black venire members with family members and colleagues who also worked in the prison system.

- In the 1998 case of *State v. Parker*, Russ struck African-American venire member Forrester Bazemore in part because of his age. The State passed John Seymour Sellars, a non-black venire member who had the same birthday as Bazemore.

Evidence From John Dickson

100. The State also presented the testimony of former prosecutor Dickson. In contrast to Colyer and Russ, Dickson acknowledged racial bias as both a historical antecedent and an ongoing challenge. Dickson testified that, when he began his career in 1976, he observed minority individuals being discriminated against by court personnel. Dickson stated that discrimination is still ongoing in one form or another.[13]

101. Dickson also conceded that everyone discriminates and that this discrimination is sometimes unconscious and sometimes purposeful. Dickson testified that a person may not be conscious of his discrimination and may not intend to discriminate, but nonetheless discrimination persists. Dickson admitted that, despite his efforts, he may have engaged in unconscious discrimination in jury selection, because no one can say he has never unconsciously discriminated. Dickson also conceded that a prosecutor's self-report is not the best way to determine whether race was a factor in jury selection.

102. The Court credits Dickson's forthright observations about discrimination in the Cumberland County court system. However, in spite of his recognition of ongoing racial bias, both conscious and unconscious, Dickson denied race could have been a significant factor in his jury selection. As the Court explained in *Robinson*, Dickson's testimony in this regard cannot be credited. Dickson testified that any bias he may have harbored was unconscious. Logically then, there is no way for Dickson to determine whether his bias was significant or not.

[13] Colyer disagreed with Dickson's testimony and testified that, in his tenure as a prosecutor in Cumberland County, he had never seen any discrimination against African Americans in how they "were treated by the court, by the bailiffs, by the State, by the attorneys. I would say no to that."

103. The Court's conclusion in this regard is confirmed through an examination of peremptory strikes Dickson exercised in capital cases. Dickson attempted to explain his disproportionate strikes of black venire members in Cumberland County cases. However, in his testimony, Dickson cited characteristics of black venire members which he found acceptable in non-black venire members he passed in the same case:

- In the 1994 case of *State v. Robinson*, Dickson struck African-American venire member Nelson Johnson because he "said that he would require an eye witness and the defendant being caught on the scene in order for conviction." The transcript reveals that Johnson repeatedly stated his support for the death penalty. When Johnson gave one answer alluding to a higher standard of proof, the prosecutor immediately removed him from the jury without asking any further questions. However, when non-black venire member Cherie Combs indicated she had mixed feelings about voting for the death penalty, the prosecutor asked follow-up questions to permit Combs to clarify her answer. The State then passed Combs.

- In the 1994 case of *State v. Robinson*, the State struck African-American venire member Elliot Troy in part because Troy was charged with public drunkenness. However, the State accepted Cynthia Donavan and James Guy, two non-black venire members with DWI convictions.

- In the 1995 case of *State v. Meyer*, Dickson struck African-American venire member Randy Mouton because he "had financial concerns about serving as a juror and losing money because his child support payments had increased." The State passed non-black venire member Terry Miller who stated he could not give total attention to the case because of his work for the military and dire situation in the Middle East.[14]

104. Finally, in weighing the credibility of Dickson's testimony, the Court has considered that Dickson, along with Colyer, was involved in the prosecutions of *Burmeister* and *Wright*, where the State reversed its normal practice of disproportionately striking black venire members. Dickson's participation in this process, in cases where the State perceived it had

[14] The Court declines to credit as race-neutral the reason for striking Mouton that was offered for the first time in closing argument in the *Robinson* hearing. *See Robinson* HTp. 2545 (asserting there are "not many prosecutors that want somebody on the jury who had to be ordered and has to go to court for child support"). This reason is inconsistent with the sworn affidavit submitted by the State and with the sworn testimony of the prosecutor who actually struck the juror. This newly-minted reason for striking Mouton illustrates how easy it is to rationalize race-based conduct.

something to gain by seating African Americans on the jury, is strong evidence that he took race into account in his jury selection practices in a very considered fashion.

History Of Discrimination And The Role Of Unconscious Bias

105. The testimony of the prosecutors must be weighed in the context of the historical record and social science evidence. Defendants' expert witnesses testified about North Carolina's history regarding jury strikes, and the myriad and insidious ways racial bias influences human decision-making, including jury strike decisions by attorneys of good will.

106. Expert witness Bryan Stevenson placed the Cumberland County prosecutors' jury selection practices in historical context, and testified regarding the continued legacy of those practices for today. Stevenson, an academic who has received numerous prestigious awards, has published in the area of criminal justice and race, including authoring a significant report about jury selection and multiple relevant law review articles. Expert witness Samuel Sommers testified about the scientific and cross-disciplinary evidence demonstrating that race influences decision making at a subconscious level. Sommers has conducted his own original research, which has been published in peer review journals, and has published extensively in the field. Trosch, another expert, testified regarding the role of unconscious bias in the legal system and methods to reduce the bias. Trosch has received and given extensive trainings in implicit bias. The Court found all three experts to be well qualified and concluded that their testimony was highly credible, and of great assistance to the Court.

Historical Evidence And Rational Bias

107. Stevenson first described the historical record regarding jury selection practices in the United States and in North Carolina. For most of this country's history, African Americans were not permitted to serve on juries in the United States. Although much of the nation's earliest

civil rights work was devoted to winning the right of African Americans to serve on juries, the response to these civil rights advances has been defined by resistance. The Civil Rights Act of 1875 made it a crime to exclude people on the basis of race, and in 1880, the United States Supreme Court held in *Strauder v. West Virginia*, 100 U.S. 303 (1879), that the state improperly prohibited African Americans from serving on juries. Despite the new federal law and the Supreme Court's holding in *Strauder*, there was little change. In many jurisdictions, no people of color served on juries. In some states, like North Carolina, there was outrage and even violent resistance to implementing these laws of inclusion. The Wilmington riots of 1898 are one dramatic illustration of the resistance to federal law.

108. Change was slow to come in many states, including North Carolina. In the 1920s, and 1930s, there were no African-American jurors in North Carolina. It was only after the civil rights movement of the 1960s and 1970s, that the need for participation of African Americans in juries was taken seriously. In that period, there were advancements in the area of jury pool compositions, allowing African Americans to be included in jury pools for the first time. It is during this same period that peremptory strikes became relevant to race discrimination. Before that there were very few eligible African Americans to strike.

109. Prosecutors' power to use peremptory strikes increased significantly during this same period. In North Carolina, prosecutors' strikes increased from six to nine in capital cases in 1971, and from nine to the current 14 in 1977. Stevenson noted that the number of strikes available to the State in capital cases in North Carolina is higher than in many other jurisdictions and thus prosecutors who are of a mind to discriminate have greater ability to do so.

110. Although there were meaningful reforms to jury pools, such reforms were lacking in the area of jury selection itself. In *Swain v. Alabama*, 380 U.S. 202 (1965), the Supreme

Court recognized that race discrimination in jury selection was wrong and unconstitutional, but the Court also made the claim almost impossible for a defendant to prove. Subsequently, in *Batson v. Kentucky*, decided in 1986, the Court attempted to make it marginally less difficult to prove race discrimination in the use of peremptory strikes.

111. *Batson*, however, has been plagued by its own barriers to implementation. First, some prosecutors continue to believe that, there is a tactical advantage for the State to limit the number of African Americans on a capital jury. This is based upon a commonly held perception that African Americans are less inclined toward the prosecution in general and the death penalty in particular than members of other ethnic groups. Therefore, the motive to exclude African Americans remains. Second, defense lawyers often have been reluctant to object under *Batson*. Third, as the research on unconscious bias shows, it is very easy for a lawyer accused of a *Batson* violation to summon a race-neutral reason for almost any strike decision even when race was a factor in the exercise of the strike.

112. Stevenson testified about how the history of discrimination is self-perpetuating as prosecutors strike African Americans for reasons rooted in that very history. As a result of the history, racial bias may seep into prosecution strike decisions today, even in the absence of racial animus. It is axiomatic that prosecutors want to win their trials. Prosecutors especially want to win in capital cases, where the crimes are often more heinous, the defendants more culpable, and the justified emotions of the victims' family and the community more raw. This drive to win in capital cases creates an opening where unconscious bias can take hold. *See Turner v. Murray*, 476 U.S. 28, 41 (1986) (Court interprets Eighth Amendment to require heightened protections in capital voir dire because, in the sentencing hearing, there is a "unique opportunity for racial

prejudice to operate, but remain undetected"). Stevenson described this form of bias as "rational bias."

113. The prosecutor may believe, for example, that because crimes against African Americans have historically been prosecuted less vigorously and African Americans have suffered maltreatment at the hands of the police, they are generally less trusting of law enforcement and the prosecution. As well, prosecutors may believe that African Americans who live in high crime neighborhoods have less confidence in prosecutors and police. Thus, as a consequence of the history of discrimination, a prosecutor may rationally believe African Americans are less likely to convict or less likely to impose the death penalty. Similarly, in view of the history of disproportionately high rates of arrest and incarceration of African Americans, prosecutors may rationally believe African Americans may be less favorable jurors for the State. These stereotypes about black citizens — which have some rational basis in our history — may well prevent prosecutors from objectively evaluating potential capital jurors. Instead of assessing potential jurors as individuals, prosecutors may, consciously or unconsciously, rely on these stereotypes.

114. Defendants introduced compelling evidence that Cumberland County prosecutors do in fact strike African-American potential jurors because of the history of prior discrimination. State expert Katz made notes of only one of his conversations with prosecutors about their strikes. That conversation was with counsel for the State, Thompson. Next to notes about the disparate strike rates for black and non-black venire members, Katz wrote, "explain why these disparities exist." Underneath this note, Katz wrote, "past discrimination help[s] explain why blacks are less accepting of law enforcement testimony."

115. In *Burmeister* and *Wright*, the Court finds the operation of rational bias in reverse. There, the prosecution perceived a tactical advantage in seating African-American jurors. In these racially-motivated murder cases, the prosecution appears to have believed that, despite stated misgivings about the death penalty or interactions with the criminal justice system, African Americans would be favorable jurors for the State and might be more inclined than whites to impose the death penalty.

116. The corollary of *Burmeister* and *Wright* is that, in Defendants' cases, where the prosecution did not perceive such an advantage in obtaining black jurors, the State reverted to its normal practice of assuming black jurors will not be friendly toward the State. There is little doubt that this has been, and continues to be, the State's general assumption. Indeed the State presented the expert testimony of Cronin in both the *Robinson* hearing and the instant cases precisely to argue that, in light of the history of discrimination, African Americans generally do not favor the State in criminal cases. The quantitative and qualitative comparisons of the State's treatments of black and non-black venire members throughout Cumberland County and North Carolina show a conclusive record of disparate treatment, even when non-racial characteristics that are concerning to the State are taken into account and removed from the equation. By submitting this group-based stereotype as the defense of jury selection practices, rather than addressing the very specific allegations of disparate treatment in the individual cases, the State failed to rebut the allegations of discrimination and demonstrated the powerful pull of rational bias. The Court is especially troubled by the suggestion that prosecutors may justify the striking of African-American venire members based on the belief that past discrimination may affect their present ability to be fair. That logic would necessarily mean that African Americans, as a group, will continue to be discriminated against in the future. That prospect is unacceptable.

Unconscious Bias

117. Defendants introduced persuasive, and uncontested, evidence of the pervasive and powerful effects of unconscious bias. As Sommers explained, there is general consensus in the scientific community that while explicit and blatant forms of racial bias are generally disapproved and therefore less present and visible than in the past, race continues to have an impact on our thought processes and decision-making, most often as an unconscious process.

118. As a result of the large body of interdisciplinary research, we know that the way people obtain information and judge each other is the result of innate and largely unconscious thought processes. Trosch explained how, often, decisions are made on an unconscious, gut level and then the conscious mind will develop a more rational explanation to justify the decision. People tend to take in information in a way that confirms preexisting opinions, and reject information that does not fit preconceived ideas. In addition, people tend to be overconfident about their ability to make decisions, detect falsehoods, judge non-verbal cues, and underestimate their thinking errors.

119. Unconscious bias affects all of us, including actors in the legal system. When prosecutors evaluate potential jurors, they must quickly decide — often on the basis of the prosecutor's gut feel — whether a particular venire member will be a "good" juror for the State. This is precisely the type of decision and environment likely to be most susceptible to implicit bias. When people are called upon to make quick judgments, they are very likely relying on their own experiences and unconscious biases. It is in these moments of instinctive decision-making that prosecutors, without realizing it, may allow their ideas about race to obscure the actual juror sitting before them.

120. One of the most important features of unconscious bias for the issues at hand is its potential to affect how actors understand their own actions. Sommers described well-established research showing that when people are asked to explain the reasons for decisions that can be shown to have been influenced by considerations of race, they are remarkably good at giving non-discriminatory explanations for their actions. Quite often, people seem genuinely unaware of the influence of race.[15] In one of Sommers' own research studies, he investigated a possible causal relationship between race of the potential juror and decisions to strike the juror. In a controlled experimental setting, using undergraduates, law students and lawyers, he found a statistically significant difference between the use of strikes based on the race of the potential juror when race was the only variable that could influence the strike decision. In addition, he found that the participants in the study rarely acknowledged race as a factor in the strike decision. These results were consistent with the research showing a significant prosecutorial preference for white jurors.

121. The general risk that unconscious biases will contribute to discrimination against African-American venire members is heightened in capital cases. Sentencing decisions in capital cases are uniquely important and subjective. If certain groups are perceived as untrustworthy to make decisions generally, that lack of trust will only increase the motivation to strike from a jury given the increased power and discretion with which capital juries are entrusted. This risk is additionally amplified by the fact that prosecutors feel additional pressure in capital cases to secure convictions.

[15] Sommers also testified that people know that they should not let race influence them, so they are reluctant to admit it even if they are aware of it. People are very motivated to avoid having their conduct evaluated as biased or racist.

122. Turning to the evidence in Cumberland County, we see significant opportunities for unconscious bias to operate in these high pressure capital cases.[16] All three prosecutors stressed that jury selection involves the consideration of intangible factors in an effort to seat jurors favorable to the State's case. Colyer repeatedly stated that, in voir dire, he tried to get a "gut feel" about potential jurors as to "whether or not they were amenable to the State's point of view." He admitted he could not articulate how he arrived at his gut feeling about a particular venire member, but explained that he tried to determine whether he could convince the particular venire member or whether he was "going to be knocking my head up against a wall trying to get them to accept my point of view." Dickson echoed this testimony, saying "But if I'm not comfortable with the juror for whatever reason, I'm not going to leave that juror on." For her part, Russ repeatedly emphasized that she based strike decisions on her overall assessment of the juror's responses and body language.

123. The phenomenon of unconscious bias has particular salience in the context of Defendants' empirical evidence of prosecution jury selection practices in Cumberland County. In *Golphin* and *Augustine*, the prosecution wanted to seat jurors who would be sympathetic to law enforcement victims and more likely to impose the death penalty on a defendant convicted of killing a law enforcement officer. Consequently, the prosecution sought to investigate the summoned jurors before trial and deemed it important that some potential jurors lived in black neighborhoods. Then, at trial, the State seated one all-white jury and one nearly all-white jury. The State disproportionately struck African-American venire members to secure these results. When defense counsel objected to the many strikes of African Americans, Colyer explained his strikes in terms of death penalty reservations and connections to crime.

[16] Colyer testified that the elected district attorney Grannis exerted pressure in Cumberland County to expedite capital cases.

124. The research on unconscious bias helps the Court to make sense of this conduct. The Court has no doubt that Colyer genuinely believes his strikes in *Augustine* and *Golphin* were motivated not by race but by death penalty views and crime connections. The Court has no doubt that Colyer genuinely believes his gut feelings about the black venire members he struck were not influenced by race. However, a volume of social science research and empirical data show otherwise. Quite simply, despite our best efforts, an attorney's feelings of comfort with a particular venire member may be influenced by unconscious prejudices formed in a society with a history of race discrimination.

125. The Court finds the foregoing evidence regarding unconscious bias and the history of discrimination in jury selection and the importance of this history to understanding current issues of race and jury selection to be credible, persuasive, and well-grounded in established social science research methods and case law. Indeed, the State presented no rebuttal evidence or testimony in these areas.

Absence Of Meaningful Training To Combat Bias

126. The Court finds it significant that the Cumberland County District Attorney's Office never undertook any post-*Batson* training that involved examining prejudices. Indeed, post-*Batson* training seminars for prosecutors focused on evading *Batson*. Furthermore, the Cumberland County District Attorney's Office never monitored nor disciplined findings of intentional discrimination in violation of *Batson*.

127. Colyer served in the United States Air Force in the 1970s as a race relations officer and was trained on the effects of personal and institutional racism. Nonetheless, Colyer never took any steps to initiate similar training in his office. He did not take any affirmative steps as an assistant district attorney to ensure that such bias did not affect prosecutorial

decisions in the county. *See* N.C. Gen. Stat. § 15A-2011(c) (explaining that when considering an RJA claim, a court "may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.").

128. It is notable also that the Cumberland County District Attorney's Office did not subject Russ to any discipline or require her to undergo any training as a result of the appellate court's determination that her closing argument in *Bass* had been misleading and improper. Given Colyer's long tenure and senior status in the office, the Court finds it particularly remarkable that he was unaware of the decision in *Bass* and the Court of Appeals' determination that Russ had made an argument that was "calculated to mislead." It is similarly notable that Russ was not subjected to any discipline or required to undergo any training as a result the court's ruling that Russ' exercise of a peremptory strike against black venire member Bazemore violated *Batson*.

129. Overall, Russ and Colyer described an office culture of indifference to the problem of discrimination against African-American citizens in jury selection. The resistance to *Batson* on the part of Cumberland County prosecutors is a monumental stumbling block to progress and change. Only by acknowledging discrimination against African Americans can we expect to create a justice system where all citizens are truly equal under the law.

Conclusions Regarding Prosecutors' Testimony

130. Having considered testimony from Colyer, Russ, and Dickson in conjunction with all of the foregoing evidence, the Court concludes that their denials that they took race into account in Cumberland County capital cases are unpersuasive and not credible. Their contention that they selected capital juries in a race-neutral fashion does not withstand scrutiny and is

severely undercut by all of the evidence to the contrary. The evidence of Colyer's race-conscious "Jury Strikes" notes in *Augustine*, Colyer and Dickson's conduct in the *Burmeister* and *Wright* cases, Russ' use of a prosecutorial "cheat sheet" to respond to *Batson* objections, and the many case examples of disparate treatment by these three prosecutors, together, constitute powerful, substantive evidence that these Cumberland County prosecutors regularly took race into account in capital jury selection and discriminated against African-American citizens.

131. Finally, this Court would be remiss were it to fail to acknowledge the difficulties involved in reaching these determinations. Colyer, Russ, and Dickson each represented the State in Cumberland County for over two decades. During that time — as judges testified in this proceeding — these prosecutors gained reputations for good character and integrity. The Court first notes that its conclusion that unconscious biases likely operated in their strike decisions does not impugn the prosecutors' character. The Court additionally finds that there is no evidence that any of these prosecutors acted with racial animus towards any minority venire member. To the extent that the actions of these prosecutors were informed by purposeful bias, the Court finds that such bias falls within the category of "rational bias," and was motivated by the prosecutors' desire to zealously prosecute the defendants, rather than racial animosity.

TESTIMONY OF FORMER AND CURRENT JUDGES

132. The Court considered the testimony of current and former superior court judges. The State introduced sworn testimony of the judges from the *State v. Robinson* hearing, and also proffered additional testimony by submitting sworn and transcribed statements of the judges. The State designated the judges as lay, rather than expert, witnesses, and accordingly did not produce expert disclosures for the judges.

133. The Honorable E. Lynn Johnson is a retired senior resident superior court judge from Cumberland County. Judge Johnson received a J.D. from the University of North Carolina at Chapel Hill in 1966. Thereafter, Judge Johnson worked for the Federal Bureau of Investigation, as an assistant solicitor in Cumberland and Hoke counties, and in private practice. Judge Johnson was appointed as a resident superior court judge for the 12th Judicial District in 1983. He became the senior resident judge in 1998, and retired in 2011. Judge Johnson presided over the capital trials of Marcus Robinson and Philip Wilkinson, two Cumberland County defendants whose cases were included in the MSU Study.

134. The Honorable William C. Gore, Jr. was a superior court judge in the 13th Judicial District for 17 years. Judge Gore has worked in private practice and also served as the North Carolina Commissioner of Motor Vehicles. Judge Gore received his J.D. from North Carolina Central University in 1977. Judge Gore presided over the capital trial of Defendant Christina Walters.

135. The Honorable Thomas H. Lock is the senior resident superior court judge in the 11th Judicial District. He has served in that position for six years. Judge Lock previously served as the district attorney for Lee, Harnett, and Johnston counties for 16 years. Judge Lock received his J.D. from the University of North Carolina at Chapel Hill in 1981. Judge Lock presided over the capital sentencing hearing of Eugene Williams, a Cumberland County defendant whose case was included in the MSU Study.

136. The Honorable Knox V. Jenkins is a retired senior resident superior court judge. Judge Jenkins served as a superior court judge in the 11th Judicial District for 16 years. Judge Jenkins received a J.D. from the University of North Carolina at Chapel Hill. Before he ascended to the bench, Judge Jenkins worked in private practice for 30 years. Judge Jenkins is

also a veteran of the United States Army. Judge Jenkins presided over the 1999 capital resentencing of Jeffrey Meyer, a Cumberland County defendant whose case was included in the MSU Study.

137. The Honorable Jack A. Thompson was a resident superior court judge for the 12th Judicial District from 1991 until 2010. Judge Thompson received a J.D. from Wake Forest Law School in 1965. Judge Thompson worked as an assistant solicitor in Cumberland and Hoke counties and later served as the district solicitor for four years. At various points prior to becoming a judge, Judge Thompson worked in private practice in Fayetteville. Judge Thompson is also a veteran of the United States Army. Judge Thompson presided over the capital trials of Defendant Quintel Augustine and John McNeil, another Cumberland County defendant whose case was included in the MSU Study.

138. The Honorable Coy E. Brewer, Jr. is a retired superior court judge from Cumberland County. Judge Brewer was a superior court judge in the 12th Judicial District from 1977 to 1998 and was the senior resident superior court judge for the district from 1986 through 1998. Judge Brewer received his J.D. in 1972. After graduating from law school, Judge Brewer worked for Supreme Court Justice Dan Moore for a year and then entered private practice in Wilmington for a year. Judge Brewer then joined the Cumberland County District Attorney's office for two years. Judge Brewer was appointed to the district court bench in 1976, and to the superior court in 1977. Judge Brewer presided over the capital trial of Defendant Tilmon Golphin.

Character Testimony

139. The judges testified regarding the reputations of Cumberland County prosecutors, including Edward Grannis, John Dickson, Margaret Russ, Charles Scott, and Calvin Colyer. The

judges' testimony concerning the reputations of Cumberland prosecutors for various character traits is admitted, in part because defense counsel withdrew its previously lodged objections to character evidence, and in part because Colyer, Russ, Scott, and Dickson have now all testified or submitted sworn evidence.

140. Any previously sustained objections to character evidence are now overruled, in light of the fact that Colyer, Russ, Scott, and Dickson have now all testified or submitted sworn evidence. The Court notes that this is a close call because of the general rule, discussed below, that the State must first show that there is no other source for this evidence before relying upon judicial testimony. The Court suspects that the State could have called other witnesses, such as practicing attorneys, regarding these Cumberland County prosecutors' reputation. Nonetheless, in the absence of a specific objection on this ground, the State was not questioned regarding this possibility. Accordingly, the testimony and proffered evidence of character is now admitted.

141. The Court finds and credits the testimony of the judges with respect to the following character opinions: Judge Gore ("My opinion is that all three of them [Grannis, Russ, and Scott] were very capable prosecutors."); Judge Jenkins (Colyer's reputation for honesty and integrity is that "he exemplifies the best"); Judge Brewer (Colyer was ethical and capable); Judge Thompson (Dickson had a "tremendously good reputation for honesty and integrity, and Russ has an "extremely good reputation" for equal treatment of all races); and Judge Johnson (Dickson had exceptional credibility and Dickson did not have a reputation for racially discriminating against jurors).

142. The Court finds that prosecutors Grannis, Dickson, Russ, Scott, and Colyer all enjoyed good reputations, among the judges who testified, for integrity, truthfulness, and equal treatment of individuals regardless of race.

Opinion Testimony

143. In addition to character testimony, the State sought to introduce two lines of additional testimony from the judges, both calling for opinions: (1) whether race was a significant factor in the State's exercises of peremptory strikes in particular Cumberland County cases over which the judges presided; and (2) speculative testimony about hypothetical rulings given hypothetical situations and hypothetical testimony from the cases over which they presided.[17] The Court sustained Defendants' objections to proffered testimony regarding the "mental processes" of the judges for the capital trials over which they presided and speculation by the judges on how they may have ruled years ago had *Batson* motions been made.

144. As will be explained in greater detail below, the Court sustained these objections because: a) the State failed to demonstrate that the judicial testimony was necessary to prove events from jury selection; b) the proposed lines of questioning invoked the mental processes of judges; c) the proposed lines of questioning conflict with judicial ethical guidelines; d) some of the proposed questioning was speculative; and e) the proposed lines of questioning called for expert opinions and the judges were not designated by the State as experts.

No Showing Of Unique Necessity

145. First, the State bears the burden of showing that the judicial testimony is necessary and that there are no alternative methods of proving the facts in question. *State v. Simpson*, 314 N.C. 359, 372-73 (1985). Here, there is a complete record for each of the capital

[17] The Court also sustained objections to numerous questions seeking to have the witnesses merely read sections from the transcript. For example, the State asked Judge Lock, "does it appear, on page 915, which is the second page of State's Exhibit Number 59, that juror number 6 entered the courtroom and the court said good afternoon, Mrs. Patten" *State v. Robinson*, HTp. 2034. Copies of the transcripts were admitted into evidence and speak for themselves. *See generally*, N.C. Rules of Evidence 1002, 1003; *Dalenko v. Peden General Contractors, Inc,*. 197 N.C. App. 115, 124 (2009). Similarly, there can be no prejudice to the State from these rulings because the actual transcripts were admitted, and the State was free to use them as a basis for any arguments or questioning it thought appropriate.

cases resulting in the death penalty over which Judges Brewer, Gore, Lock, Jenkins, Johnson and Thompson presided, pursuant to N.C. Gen. Stat. §15A-1241(a).[18] This affects the evidentiary value of the judges' proposed testimony:

> Only in the rarest of circumstances should a judge be called upon to give evidence as to matters upon which he has acted in a judicial capacity, and these occasions, we think, should be limited to instances in which there is no other reasonably available way to prove the facts sought to be established. **A record of trial or a judicial hearing speaks for itself as of the time it was made.** It should reflect, as near as may be, exactly what was said and done at the trial or hearing.

State ex rel. Carroll v. Junker, 79 Wash.2d 12, 20-21 (1971), cited in *State v. Simpson*, 314 N.C. 359, 372 (1985); *see also Dalenko v. Peden General Contractors, Inc.*, 197 N.C. App. 115, 124 (2009) (noting that the order in the prior case was final and the matter was complete, and that "any orders entered by Judge Stephens spoke for themselves").

146. The State has not met its burden of demonstrating that the judges' testimony is uniquely necessary to prove any disputed fact. Although the State argued that the judges possessed information relating to events not reflected in the record from their observations about jury selection at capital trials, the testimony of the judges, including the proffers of evidence, do not bear this out. The State failed to show a single instance where the judges had a relevant direct observation that was not reflected in the record, or could not have been proven by other witnesses. The State has not shown that other court personnel, including lawyers for the parties, court reporters, clerks and bailiffs were not similarly able to observe and to testify about jury selection in these cases. The State has made no showing that these judges are "the only witnesses who could testify" about any facts in question, or that the trial transcripts and other

[18] The State urged that this Court should permit the judges to testify regarding the matters over which they presided because this Court previously permitted a district court judge to testify in open court. The district court judge, however, testified regarding events from an unrecorded hearing, and thus is in entirely distinguishable from the instant case.

available evidence are inadequate for purposes of establishing relevant facts. The Court finds that the State has failed to demonstrate the proffered judicial testimony was necessary to prove any disputed factual issue. *Simpson*, 314 N.C. at 372.

Mental Processes

147. The proffered questioning is also properly excluded because it called directly for testimony about the "mental processes" of the judges. *Simpson*, 314 N.C. at 372-73 (describing the "danger" that if permitted to testify, judges "might be subjected to questioning as to the mental processes they employed to reach a particular decision"). It is a "cardinal principle of Anglo-American jurisprudence that a court speaks only through its minutes" and that a presiding judge's testimony regarding his or her mental processes is inadmissible. *Perkins v. LeCureux*, 58 F.3d 214, 220 (6th Cir. 1995); *see also Glenn v. Aiken*, 409 Mass. 699 (1991) (probing the mental processes of a trial judge, that are not apparent on the record of the trial proceedings, is not permissible); *United States v. Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978) ("A judge's statement [at trial] of his mental processes is absolutely unreviewable. The court has no means of observing mental process. . . . The trial judge's statement of his mental process is so impervious to attack that even if he were to come forward today and declare his memorandum misstated his reasons for the mistrial, we could not consider his explanation."); *Washington v. Strickland*, 693 F.2d 1243, 1263 (5th Cir. 1982) (overruled on other grounds) ("It is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a judicial decision."); *Proffitt v. Wainwright*, 685 F.2d 1227, 1255 (11th Cir. 1982) (post-decision statements by a judge about his mental processes should not be used as evidence). According to the United States Supreme Court:

> [T]he testimony of the trial judge given six years after the case has been disposed of, in respect to matters he considered and passed upon, was obviously

> incompetent. . . . A judgment is a solemn record. Parties have the right to rely on it. It should not lightly be disturbed and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.

Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904); *see also U.S. v. Morgan*, 313 U.S. 409, 421-22 (1941) (citing *Fayerweather* for the proposition that judges cannot be subjected to a probe of their mental processes because "such an examination of a judge would be destructive of judicial responsibility").

148. In *Strickland*, an *en banc* reversal of a district court death penalty habeas corpus decision, the Fifth Circuit underscored that "once a judicial opinion is written and filed, we are all as expert in its interpretation as the hand that wrote it. It belongs to us all." 693 F.2d 1243, 1263 (citing *Morrison v. Kimmelman*, 650 F.Supp. 801, 807 (D.N.J. 1986)).

149. In reversing the Fifth Circuit's determination of ineffective assistance of counsel, the United States Supreme Court agreed with the circuit court that "evidence about the *actual process* of decision, if not part of the *record* of the proceeding under review . . . should not be considered in the prejudice determination." *Id.* (emphasis added). Accordingly, the Supreme Court deemed "the trial judge's testimony at the District Court hearing" to be "irrelevant to the prejudice inquiry." *Strickland v. Washington*, 466 U.S. 668, 700 (1984).

Conflict With Ethical Guidelines

150. The judges were asked whether race was a significant factor in jury selection in specific Cumberland County cases. These are determinative legal questions for numerous Cumberland County defendants with pending RJA claims, including, but not limited to, Golphin, Walters, and Augustine. This line of questioning by the State puts judges in the untenable position of having to testify in conflict with their duty under the Judicial Code of Conduct not to comment publicly on pending legal matters. A.O. 10, Canon 3B(9). ("A judge shall not, while

a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness.").

151. The Court notes that Judge Gore stated in his proffered testimony that he was concerned that answering the State's questions presented conflicts with the Judicial Code of Conduct. He nonetheless agreed to answer the State's questions because he was under subpoena. The Court finds as a fact that all of the judges gave testimony only in response to the State's subpoenas. They gave testimony under this circumstance, and without voluntarily offering public statements regarding pending legal matters. None of the judges agreed to serve as expert witnesses for the State.

152. The Court is aware of no previous instance in North Carolina where the State has attempted in post-conviction proceedings to call the presiding trial judge to offer testimony regarding a legal question at issue in the post-conviction proceedings. In Vermont, however, the prosecution did exactly this. The prosecution called the presiding judge as an expert witness to testify in front of a different court that the deficient performance by defense counsel would not have affected the outcome of the trial. *In re Wilkinson* 165 Vt. 183 (1996). The Vermont Supreme Court reversed, based in part upon the mandates of the Code of Judicial Conduct:

> The Code of Judicial Conduct ("CJC") provides further guidance on this issue. Judges are required to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," A.O. 10, Canon 2(A), and to "perform judicial duties without bias or prejudice." A.O. 10, Canon 3B(5). Although we assume that Judge Grussing was not motivated by actual bias, his testimony was unduly prejudicial given its elevated aura of expertise. Moreover, "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness." A.O. 10, Canon 3B(9). Although Judge Grussing's 'comment' was his expert testimony, such testimony is certainly public, and is no more appropriate than the comments expressed in a newspaper editorial or interview. In fact, the testimony is more troubling because it was not only likely to affect the outcome of the proceeding but *the State intended that it do so.*

Id. at 187 (emphasis added).

153. The *Wilkinson* Court held that permitting "judges, clothed in the authority of the office, to testify at post-conviction relief hearings that the criminal trials over which they presided were conducted fairly and resulted in the correct verdict . . . would undermine both the propriety of the judicial office and the fairness of post-conviction relief proceedings." *Id.* The Court agrees.

154. Finally, given that these cases involve a new statute, and are the first of what may be many such post-conviction hearings under the RJA, it is worth considering the systemic consequences should this Court rule that presiding judges can testify regarding their mental processes and give opinions on the final legal question. Either party would be able to issue subpoenas to any judge who has presided over a relevant capital trial, effectively disqualifying a huge swath of the North Carolina trial bench. Indeed, on this record, if this testimony were admitted, the Court does not see a limiting principle that would prevent a party in the future from subpoenaing any judge to give a legal opinion after reviewing a selection of the transcript, even without any connection to the trial. Furthermore, any judge who testifies, and gives an opinion at an RJA hearing, presumably would be excluded from being able to hear any related matters under the RJA. By conforming to precedent, and the applicable North Carolina Judicial Code provisions, this Court avoids these thorny dilemmas.

Speculative Questions

155. The State asked numerous questions about how the trial judges would have responded to hypothetical scenarios. These questions called for speculation and were inadmissible. N.C.R.E. 602, 701.

Not Designated As Experts

156. The questions by the State, whether race was a significant factor, and how the judges would have ruled on various *Batson* hypotheticals, call for opinions based upon specialized knowledge of the law, and thus fall outside of the opinion testimony permitted by Rule of Evidence 701. Although all of the current and former judges questioned are unquestionably qualified to give expert legal opinions under Rule of Evidence 702, the State did not seek such a designation. Accordingly, even if the testimony of judges were otherwise admissible, it would be improper in this instance.

157. Despite these evidentiary and ethical rules, the State urged this Court to admit the judges' testimony regarding their observations and mental processes based upon the language of the amended RJA. The amended section 15A-2011(d), unlike its predecessor, explicitly includes "judicial officials" in the illustrative list of "criminal justice system" individuals from whom sworn testimony may be relevant. Nothing in the amended RJA, however, alters the existing rules of evidence, ethics rule, or body of case law limiting judicial testimony. N.C. Gen. Stat. § 15A-2011. The Court's ruling in this case – that judicial testimony may be admissible in some limited circumstances — is entirely consistent with the language of the amended RJA that the "relevant" evidence "may" include sworn testimony of judicial officials. N.C. Gen. Stat. § 15A-2011(d).

158. For these reasons, the Court sustains Defendants' objections to the judges' testimony as to events they observed which are recorded in the trial transcripts or as to their thought processes as presiding judges in capital cases in Cumberland County. However, because these issues arise under a new statute, this Court reviews the excluded testimony in the alternative.

Weight Of The Testimony

159. The Court has reviewed all of the testimony introduced, and the full offers of proof submitted by the State showing what the judges would have testified to if permitted by the Court. The Court finds that testimony, even if considered by the Court, would not have changed the result in this case.

160. First, the Court credits the testimony of the judges that they lacked specific, independent recollection of the jury selection processes over which they presided. All of the judges testified to long and busy judicial careers, during which they presided over numerous homicide and capital cases. All of the trials were years ago, some more than a decade ago. The value of the judicial testimony is limited by the judges' lack of specific recall of events.

161. The understandable effect of time on memory is another reason why the official record is a superior evidentiary source to the testimony of the judges. For example, Judge Thompson testified regarding a *Batson* violation that he had sustained in a case that was tried in Cumberland County after a change of venue, *State v. McCollum*. He testified that he recalled he had sustained the *Batson* violation *ex mero motu*, and without a defense objection. The transcript of the proceeding reflects that in fact, defense counsel had objected on two occasions pursuant to *Batson*, and that Judge Thompson's finding that the State purposefully discriminated was in response to defense counsel's second *Batson* motion.

162. The Court also finds that the responses of the judges to hypothetical *Batson* scenarios posed by the State are, necessarily, of limited value. The State typically began this line of inquiry by asking the judges to read aloud a highlighted portion of the transcript. The State then asked the judges to imagine there had been a *Batson* challenge, and that the State had proffered an explanation for the strike, related to the portions of the transcript just read aloud.

The State next asked the judges whether they would have sustained *Batson* violations in light of those facts. This line of hypothetical questioning is utterly unrealistic, contrary to the well-established law of *Batson*, and of extremely limited utility. Courts would not typically find a *prima facie* showing, and ask the State to state a race-neutral reason, without facts raising an inference of discrimination. The State did not posit any such facts in their hypothetical. Essentially, the State's questioning amounted to asking the judges whether, in the absence of any facts supporting a *Batson* challenge, the judges would have found a *Batson* violation.

163. For example, when questioning Judge Gore regarding Walters' jury selection, the State did not ask him to consider that the State had used 10 of its 14 peremptory strikes to exclude African-American venire members. Nor did the State ask Judge Gore, or any of the judges, to consider the State's treatment of similarly-situated non-black venire members jurors. Most of the judges had only looked at the portions of the transcripts describing the questioning of African-American venire members. And even in this limited context, the State cherry-picked its examples. The State did not question Judge Gore about Sean Richmond, a venire member excluded by the State in Walter's case, whom this Court had identified previously as an example of disparate treatment.

164. The State was aware of numerous examples from the Cumberland County cases of disparate treatment of black and white venire members from the *Robinson* litigation and order. Yet the State chose not to present the judges with any of these examples when asking about hypothetical *Batson* rulings.[19] The Court finds that this decision by the State skewed and severely undercut any probative value of testimony of the judges regarding *Batson* decisions in Cumberland County.

[19] As discussed *supra*, the State elected not to submit new offers of proof and to rely instead on the proffers submitted in *Robinson*.

165. More broadly, the Court notes that how trial judges would have ruled on *Batson* objections is itself of limited value given the difference between the legal standard under the RJA, whether race was a significant factor, and under *Batson v. Kentucky*, whether the State purposefully discriminated. *C.f.*, *State v. White,* 131 N.C. App. 734, 740 (1998) (finding that "[w]hile race was a certainly a factor" in the State's strike, the Court could not conclude that the strike was "based solely upon race," as required by North Carolina courts interpreting *Batson*).

166. The State additionally asked the judges about whether they would have *ex mero motu* raised *Batson* objections in the cases in which they presided. The value of this testimony is limited by several realities.

167. The current and former judges are highly qualified and greatly respected members of our Bench. It is beyond question that they would at all times seek to enforce the law, fairness, and justice in their courtrooms. Nonetheless, it does not follow that the judges would necessarily intervene in jury selection if race were a significant factor. First and foremost, as discussed above, it is not always immediately apparent or obvious that race is a significant factor. The Court notes — consistent with the testimony of Dickson, and experts Trosch, Stevenson, and Sommers — that we all suffer from unconscious biases. As the Supreme Court explained in *Miller-El*, a detailed examination of the difference in treatment of prospective jurors may be necessary to expose racially disparate questioning. 545 U.S. at 241 ("More powerful than [] bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve."). There is no reason to believe — included in the State's proffer or otherwise — that Courts always have the information necessary to conduct such an investigation.

168. The parties in capital cases, with multiple attorneys and assistants, will often have information and resources unavailable to the judge. Ours is an adversary system: courts rely upon the parties to sharpen and present the necessary evidence. Furthermore, judges may defer to the strategic and tactical decisions of trial counsel in jury selection. With respect to this line of questioning, the Court credits the testimony of Judge Brewer:

> That is a very difficult question to answer because in this case there were very experienced and capable defense attorneys representing the two defendants that I believe had a thorough understanding, at least equal to mine, of the *Batson* case and the basis for which *Bats*on challenges could – could be raised. And because of the quality of the defense attorneys, I would probably have been inclined to defer to their judgment and ***their strategic and tactical judgment*** as to whether they were going to raise *Batson* challenges.

169. Most fundamentally, with respect to all of the judicial opinion testimony regarding the role of race in jury selection in Cumberland County trials, the Court finds that such testimony was limited by the limited sources of information provided to them. None of the judges, for example, was shown the "Jury Strikes" notes from *Augustine*, indicating that Cumberland County prosecutors collected and recorded information about prospective venire members in a Cumberland County case in highly racialized terms. As previously discussed, none of the judges was provided with the arguments of defense counsel, or the findings of this Court, with respect to disparate treatment of black and non-black venire members. None seemed aware of Russ's prior *Batson* violation. None had reviewed the MSU Study, or any of the enormous amount of statistical data. None had heard the testimony of Cumberland County prosecutors regarding the disparate jury selection processes employed in racially charged cases, or the lack of training in avoiding racial bias. The Court heard evidence over a total of four weeks: two and a half weeks in February, all of which was introduced into this record; and one

and a half weeks in October. This constituted a large amount of data and information all available to the Court, and not presented to the testifying trial judges.

170. In sum, the Court appreciates that this is a new statute and the question of whether, and to what extent, judicial testimony is admitted may be an important one. The record in this case demonstrates the high risk of prejudice to the judicial system that would be imposed by permitting parties to subpoena and call presiding judges. It further demonstrates the limited probative value of such testimony, absent the unusual circumstance where a judge may have specific factual knowledge of an issue unreported in a transcript.

STATEWIDE CASE EXAMPLES OF DISCRIMINATION

171. In connection with RJA litigation, prosecutors from around the State, including Cumberland County, prepared affidavits or unsworn statements purporting to offer race-neutral reasons for the strikes of African-American citizens from capital juries.[20] In their post-hearing brief, Defendants presented analyses of many of the prosecutors' proffered reasons. These analyses were based upon the prosecutors' affidavits or statements, the transcripts of jury selection proceedings, and juror questionnaires.

172. In its earlier discussion of Defendants' non-statistical evidence, the Court addressed the several instances of disparate treatment and race-based questioning in Cumberland County cases, including Defendants' individual cases. The Court addresses here examples from elsewhere in the state. After careful review, the Court concludes that the case examples Defendants presented in their brief support a finding that race was both a significant and intentionally-employed factor in the State's exercise of peremptory strikes in North Carolina, in Cumberland County, and in Defendants' individual cases.

[20] The idea for collecting post-hoc *Batson*-style explanations for every struck African-American venire member originated with Joseph Katz, the State's statistical expert.

Exclusion Based Purely On Race

173. It is a rare case when the prosecution admits race was the reason for a peremptory strike. In the following case, the Court finds "exceptionally clear proof" of purposeful discrimination based on race. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987)

- In the 1994 Davie County case of *State v. Gregory*, the prosecution struck African-American venire member Tonya Anderson in part because "***[t]he victim is a black female. That juror is a black female. I left one black person on the jury already.***"

The prosecution's discriminatory intent could not be clearer.

Exclusion Based On Race Or Racial Proxy: African-American Institutions

174. Short of an outright admission — "I struck him because he's black" — the closest articulation of discriminatory intent is to exclude African-American potential jurors because of their association with historically or predominantly black institutions. The Court finds a number of cases where that is precisely what happened:

- In the 1996 Rutherford County case of *State v. Fletcher*, the prosecution attempted to strike African-American venire member Benjamin McKinney because he belonged to the NAACP. The trial court sustained defense counsel's *Batson* objection.
- In the 1992 Guilford County case of *State v. Robinson,* the prosecution struck African-American venire member Lolita Page in part because she was a graduate of North Carolina State A&T University.
- In the 1995 Anson County case of *State v. Prevatte*, the prosecution struck African-American venire member Stanley Webster in part because he attended Shaw University.
- In the 1999 Davie County case of *State v. Al-Bayyinah*, the prosecution struck Laverne Keys in part because she had worked with an African-American lawyer on a black history program at her local library.

175. The Court finds that invocation of membership in an African-American organization or attendance at a predominantly African-American institution constitutes a facially discriminatory explanation for striking African-American venire members. The NAACP, historically black colleges and universities, and formal acknowledgments of black history, were

all born out of our country's history of race discrimination. That prosecutors would rely on African Americans' participation in these institutions as a basis to continue denying their civil rights is deeply troubling to the Court.

Exclusion Based On Race Or Racial Proxy: Race-Based Questioning

176. A prosecutor's questions during jury selection "may support or refute an inference of discriminatory purpose." *Batson*, 476 U.S. at 97. Defendants' expert Stevenson explained the phenomenon of "targeting," whereby African-American potential jurors are scrutinized more carefully and more intensely questioned in order that the prosecutor might find a basis for which to strike the venire member. *Robinson* HTpp. 873-74. In addition to *Golphin* venire member John Murray discussed earlier, the Court finds numerous instances of race-conscious jury selection wherein prosecutors singled out African-American venire members for repetitive and idiosyncratic questions, subjected them to explicitly race-based inquiries, and then, in most instances, struck them based on these racialized inquiries.

- In the 1994 Rowan County case of *State v. Barnes, Blakeney & Chambers*, the prosecution singled out African-American venire member Melody Hall for questions about the impact of race on her decisions as a juror. The prosecutor specifically asked Hall, "Would the people . . . you see every day, ***your black friends***, would you be the subject of criticism if you sat on a jury that found these defendants guilty of something this serious?"

- In the 1994 Brunswick County case of *State v. Cummings*, the prosecution singled out African-American venire member Alfredia Brown for questioning about whether her ability to be fair would be affected by the defendant's race.

- In the 1994 Mecklenburg County case of *State v. Harden*, the prosecution struck African-American venire member Kennith Brown in part because he reported a negative experience with law enforcement in which "he was called 'black' and was hit, pushed and locked up by white law enforcement."

- In the 1995 Transylvania County case of *State v. Sanders*, the prosecution subjected African-American venire member Renita Lytle to a series of increasingly invasive questions about her son's father, where he lived, whether he was working, how long Lytle had been estranged from him, and whether he was "carrying out his

responsibilities for child support." The trial court sustained an objection by defense counsel, who described the questions as "blatantly racist."

- In the 1993 Catawba County case of *State v. Bowie*, the prosecution targeted African-American venire member Johnny Lewis for questioning on the effect of the defendant's race on his decision-making.

- In the 1996 Randolph County case of *State v. Trull*, the prosecutor attempted to strike African-American venire member Rodney Foxx. The trial court sustained defense counsel's *Batson* objection after finding that the prosecution had subjected Foxx to repetitive questioning and "spent noticeably more time conferring" during Foxx's voir dire.

Exclusion Based On Race Or Racial Proxy: Lack Of Intelligence

177. In a number of cases, prosecutors have offered as reasons for striking African Americans that they are not smart, educated, or articulate enough to serve. These explanations evoke the troubling stereotype of African-American inferiority. *See Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (noting that, after slavery, states sought to bar African Americans from jury service because "[t]he colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence").

- In the 2006 Brunswick County case of *State v. Maness*, the prosecution struck African-American venire members Theresa Ann Jackson and Triston Robinson in part because of their intellectual or educational deficiencies. Jackson was found unworthy because, on her jury questionnaire, she twice misspelled her occupation and that of her husband — "fort lift driver" rather than "fork" — and she also misspelled the name of the town where she worked — "Reilgwood" instead of "Riegelwood." Robinson had a 10th grade education.

- In the 2001 Davidson County case of *State v. Watts*, the prosecutor struck African-American venire member Christine Ellison in part because of misspellings and errors on her questionnaire, including her state of birth and occupation.

- In the 1997 Lenoir County case of *State v. Bowman*, the prosecution struck African-American venire member Lee Lawrence in part because she lacked a high school education.

- In the 1999 Forsyth County case of *State v. Thibodeaux*, the prosecutor struck African-American venire member Marcus Miller in part because he "answered questions 'Yeah' 6 times during questioning."

- In the 1994 Davidson County case of *State v. Elliot*, the prosecution struck African-American venire member Lisa Varnum in part because she "responds to a number of direct inquires by nodding her head and making uh-huh responses."

- In the 1995 Bertie County case of *State v. Bond*, the prosecution struck African-American venire member Mary Watson Jones in part because she answered "uh-huh" to a number of questions.

178. Tellingly, in each of these cases, the State passed non-black venire members who had comparable levels of education or made similar spelling errors, or gave identical "yeah" or "uh huh" answers.

Exclusion Based On Race Or Racial Proxy: Demeanor

179. Defendants' evidence shows that prosecutors in North Carolina and Cumberland County have been trained to cite the demeanor of African Americans as reasons for striking them. The prosecutors' characterizations of a number of potential jurors described here are particularly disturbing because they invoke traits stereotypically ascribed to African Americans. *See Batson*, 476 U.S. at 106 (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically."). In addition, characterizations of black venire members like John Murray, who was called for jury duty in *Golphin*, as "antagonistic" or "militant" and insufficiently "deferential" to authority are deeply rooted in the history of violence against African Americans. *See* "People & Events: Lynching in America, PBS American Experience Series: *The Murder of Emmett Till*, available online at http://www. pbs.org/wgbh/amex/till/peopleevents/e_lynch.html (Many victims of lynching between 1880 and 1930 were African Americans "who violated white expectations of black deference, and were deemed 'uppity' or 'insolent.'").

180. In the following cases, the trial court specifically found that the State's demeanor-based explanations were pretextual. This Court gives weight to these rulings and finds that the proffering of pretextual demeanor-based reasons constitutes further evidence of discrimination.

- In the 1991 Robeson County case of *State v. McCollum*, the prosecutor moved to strike African-American venire member DeLois Stewart in part because, in answering questions about the death penalty, she was "evasive and antagonistic." The trial court deemed this demeanor-based reason pretextual.

- In the 1997 Mecklenburg County case of *State v. Fowler*, the prosecutor struck African-American venire member Pamela Collins. The prosecutor initially offered as his reason for striking Collins that her body language, lack of eye contact, laughter, and hesitancy established "physical indications . . . of an insincerity in her answers." The trial court found this reason was neither credible nor race-neutral and rejected all suggestion that Collins was untruthful.

Exclusion Based On Race Or Racial Proxy: Lack Of Community Connection

181. Defendants have presented instances of prosecutors justifying strikes of African-American venire members on the basis that they lacked sufficient ties to the local community. Defendants' evidence shows that these justifications were often not supported by the record. In some instances, the prosecutors accepted non-black venire members who were even less tethered to the community than the excused African Americans. The Court finds from this evidence that the State has misused the notion of community connection to exclude black persons from capital juries. With great concern, the Court further notes that the State's practice in this regard is evocative of a time when African Americans were not considered citizens and full members of the communities in which they lived. *Dred Scott v. Sandford*, 60 U.S. 393, 404-405 (1857); *see also Jones v. Alfred H. Mayer Co.* 392 U.S. 409 (1968) (Civil Rights Act of 1866 applies to housing discrimination by private sellers; purpose of Act was to limit "ability of white citizens to determine who [would] be members of [their] communit[ies]" and to employ "federal authority to deal with 'the white man . . . [who] would invoke the power of local prejudice' against the

Negro") (brackets in original). The cases here show this offensive stereotype persists and is self-perpetuating as it is invoked to exclude African Americans from jury service and thereby deprive them of one of the most salient emblems of citizenship.

- In the 1995 Union County case of *State v. Strickland*, the State struck African-American venire member Leroy Ratliffe in part because he was a native of Anson rather than Union County. However, the State accepted non-black venire members Robert Berner, who was originally from the Midwest, and Albert Ackalitis, a native of New York.

- In the 2002 Rowan County case of *State v. Smith*, the State struck African-American venire member Sandra Connor in part because she had worked in adjoining Davie County for the past 14 years and thus purportedly had "limited ties" to the community. The record shows that the State passed non-black venire member Dana Edwards who did not live in North Carolina until he was an adult, had lived in Rowan County for only four years, and commuted to work in Mecklenburg County every day.

- In the 1993 Iredell County case of *State v. Burke*, the State struck African-American venire member Vanessa Moore in part because she had previously lived in Maryland and Washington, D.C. The record shows that Moore was raised and went to school in North Carolina and had been living in the state for the past eight years, five at her current address. The State passed non-black venire members Scott Tucker, Rita Johnson, Jeffrey Smallwood, and Janis McNemar, all of whom had been born and/or lived for substantial periods of time in other states; three of the four had lived in North Carolina less than four years.

- In the 1996 Richmond County case of *State v. Peterson*, the State struck African-American venire member Carletter Cephas in part because she was originally from Washington, D.C. According to the prosecution, "The murder in this case . . . involved the killing of a woman working in a convenience store in Richmond County. Such murders occur every day in Washington, D.C., but they are very rare in Richmond County. Cephas is a potential juror with big city values that are not a good fit for a small town murder case." The record shows that Cephas had lived in Richmond County for 14 years, as had her father and grandmother and other family members. The prosecutor asked Cephas no questions about her familiarity with Washington D.C. crime generally or daily convenience store murders. In sum, nothing in her voir dire answers suggested Cephas had anything but small town values. Meanwhile, the prosecutor passed non-black venire member William Waterman, who was originally from Los Angeles. The prosecutor passed several other non-black venire members from other states, but did not ask them whether they came from big cities or small towns. Mary Van Nest was born in Massachusetts and lived in Florida before moving to Richmond County. Lee Jenkins was born in Virginia. Patrick Comninaki was an "army brat" who moved around a lot. Patrick

Cullen moved to North Carolina at his mother's insistence after he "got in trouble" in Oregon.

Admissions — No Race-Neutral Reason

182. In a substantial number of cases, the State conceded there were no apparent race-neutral explanations for the strikes against African-American venire members. The State's failure to come forward with a race-neutral explanation for these strikes is strong evidence of intentional discrimination. *See Batson*, 79 U.S. at 97 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.").

- *State v. Jennings*, Walter Curry (Wilson County, 1990)
- *State v. Barrett*, Phyllis Brooks, Felecia Boyce, Nancy Sheffield, Sandra Banks, Marsha Ingram (Northampton County, 1993)
- *State v. Tyler*, Janet Burke, Nellie Fennell, Terry Lee, Barbara Jenkins (Hertford County, 1995)
- *State v. Bond*, Wallace Jones (Bertie County, 1995)
- *State v. Richardson*, Donnell Peoples (Nash County, 1995)
- *State v. Larry*, Tonya Reynolds (Forsyth County, 1995)
- *State v. Williams*, Thomas White (Bertie County, 1996)
- *State v. Anthony*, Angela Meeks (Gaston County, 1999)
- *State v. Duke*, Patrick Odems (Gaston County, 2003)
- *State v. Sherrill*, Dwayne Wright (Mecklenburg County, 2009)

183. Based upon its review of the voir dire transcripts, the Court finds these African-American venire members were qualified to serve as jurors and would have given fair consideration to the evidence and governing law, including the death penalty. The State's failure to explain its exclusion of these 17 African-American citizens, at times after extremely perfunctory questioning, is evidence of discrimination.

184. The Court also finds it significant that the State failed to proffer explanations for strikes of African-American venire members in more than 20 capital proceedings from Districts 16A, 16B, 18, and 28, among others. The State's expert, Joseph Katz, admitted that one potential reason explaining why prosecutors did not respond to his statewide request for race-neutral explanations was that those prosecutors had been using race as a basis for selecting juries. Certainly prosecutors who believed they had not used race as a basis for peremptory strikes had every incentive to respond to Katz in order to assist the State in demonstrating the integrity and race-neutral nature of capital proceedings in North Carolina. Consequently, the Court finds that the failure of a significant number of prosecutors to respond to Katz's survey suggests that those prosecutors may have discriminated on the basis of race in selecting capital juries. At a minimum, the prosecutors who did not respond to Katz's survey evaded Katz's inquiry without providing any reasonable justification for doing so. The Court finds that the failure to respond to Katz's survey is evidence of discrimination on a statewide basis.

Exclusion Based On Gender

185. The State submitted sworn affidavits from a former assistant district attorney in Cumberland County admitting that the prosecution struck African-American venire members on the basis of gender in two cases.

- In the 1999 Sampson County case of *State v. Barden*, the prosecution struck African-American venire member Elizabeth Rich because the State was "looking for strong male jurors."
- In the 2001 Onslow County case of *State v. Sims & Bell*, the prosecutor struck African-American venire member Viola Morrow in part because the State was "looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the Defense as they were taking off every male juror."

186. The Court finds that the stated reason in these two cases reveals an unconstitutional use of peremptory strikes on the basis of gender, in violation of *Batson* and

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

Irrational Reasons For Exclusion: Service In United States Military

187. Prosecutors must give "clear and reasonably specific" explanations of "legitimate sons" for exercising peremptory strikes and these explanations must be "related to the ticular case to be tried." *Batson*, 476 U.S. at 98 n.20. In the cases described below, secutors struck African Americans and then gave irrational explanations having nothing to do h the case.

188. The Court is deeply troubled by the following three instances in which African- rican veterans were rejected for jury duty in capital cases because they served their country the armed forces. There is no rational reason why a military veteran should be considered unworthy for jury service. If these citizens were fit to serve the United States as soldiers, they were certainly fit to serve as jurors.

- In the 1995 Anson County case of *State v. Prevatte*, the prosecution struck African-American venire member Randal Sturdivant in part because he was a veteran of the United States Army.
- In the 1997 Mecklenburg County case of *State v. Fowler*, the prosecution excluded African-American venire member Clarence Stewart from jury service in part because he "served in the Army and was halfway to retirement when he left the Army. Even though the State did not ask about why he left the Army they were concerned about that fact."
- In the 1998 Mecklenburg County case of *State v. Steen*, the prosecution struck African-American venire member Andrew Valentine in part because he "worked as a military police officer in the Army."

189. The Court notes further that, in all three of these cases, the prosecution passed non-black military service veterans.

Irrational Reasons For Exclusion: Religious Faith

190. The Court finds that, in the following cases, African-American potential jurors were struck because of their religious beliefs and church membership. Earlier, in connection with its discussion of Russ' jury selection in the case of Walters' codefendant Carlos Frink, the Court noted the strike of Wayne Radcliffe based on his church membership and status as a deacon. This explanation lacks any rational basis.

- In the 1998 Harnett County case of *State v. Brewington*, the prosecution struck African-American venire member Ursula McLean in part because her favorite TV programs were "religious programs" and she "very frequently" attended church. While rejecting McLean for her religious faith, the State passed 15 non-black venire members who also said they "very frequently" attended church.

- In the 1994 Beaufort County case of *State v. Ball*, the prosecution struck African-American venire member Sheila Driver in part because she wrote on her questionnaire, "My religious background does not stop me from serving and being fair and honest on the jury."

- In the 1997 Buncombe County case of *State v. Davis*, the prosecution struck African-American venire member Wanda Jeter in part because of "a religious consideration," namely that Jeter was "wearing a cross earring in her right ear."

Irrational Reasons For Exclusion: Affiliation With The State

191. The Court has identified a number of cases in which African-American citizens were excluded from capital jury service because of their connections to law enforcement or prosecutorial agencies. Earlier, the Court discussed Russ' excusal of Wayne Radcliffe from the *Frink* jury because he had relatives and friends who worked for the prison system. Given that close association with law enforcement is typically and commonsensically considered a pro-State attribute, this explanation is as mystifying as it is irrational. *See State v. Porter*, 326 N.C. 489, 498 (1990) (State may reasonably seek jurors who are "stable, conservative, mature, ***government oriented***, sympathetic to the plight of the victim, and ***sympathetic to law enforcement crime solving problems and pressures***") (emphasis added, internal citations omitted).

- In the 1991 Rockingham County case of *State v. Rose*, the prosecution struck African-American venire member Sharon Sellars in part because she had friends and relatives in law enforcement: "Sellars indicated her father was a deputy sheriff, and that a State Trooper was a friend."

- In the 1994 Beaufort County case of *State v. Ball*, the prosecution struck African-American venire member Ella Pierce Johnson in part because "her son was a lawyer that was at one time an assistant district attorney but was presently in private practice in Greensboro."

- In the 1997 Wake County case of *State v. Mitchell*, the prosecution struck African-American venire member Ricky Clemons in part because his wife worked at the Attorney General's Office.

- In the 1997 Halifax County case of *State v. Hedgepeth*, the prosecution struck African-American venire member Rochelle Williams in part because her husband worked at the county jail.

192. In each of these cases, the State passed non-black venire members with similar connections to prosecutors or law enforcement officers.

Irrational Reasons For Exclusion: Nonsensical Reasons

193. The Court finds that there are a number of cases in which the proffered explanations simply make no sense. Among the reasons lacking any basis in logic or common sense are excluding an African-American citizen from jury duty because he had not heard the facts of the case, for having a hyphenated name, and for being a fervent UNC alumna. Similarly, as discussed earlier, Sean Richmond was excluded from the Walters' jury because he did not seek crime victim counseling after his car stereo system was stolen. Excluding African-American citizens from jury service for such patently irrational, nonsensical reasons evinces pretext, particularly in light of the fact that, in a number of the examples described here, the State passed non-black venire members with the same traits deemed objectionable in black venire members.

- In the 2002 Washington County case of *State v. Smith*, the State peremptorily struck African-American venire member William Cahoon in part because he "indicated

during voir dire that he had not heard of the crime" and there were "few residents that claimed no knowledge of the brutal crime." In fact, the State passed six non-black venire members who, like Cahoon, said they knew nothing about the crime.

- In the 1998 Harnett County case of *State v. Brewington*, the State struck African-American venire member Belinda Moore-Longmire in part because "her hyphenated last name was circled by one of the prosecutors."

- In the 1998 Wake County case of *State v. Williams*, the State struck African-American venire member Harry Smith in part because he "did not fill out the questionnaire completely." The record shows that the only question Smith omitted was whether any member of his family or any close friend had ever been a defendant in a jury trial. When he was asked about this, Smith informed the prosecutor he had no close friends or family members who had been defendants in a jury trial. While excluding Smith for a simple omission, the State accepted a non-black venire member who answered the same question falsely. Donna Aycock, who was seated as an alternate juror, answered "no" to the question about close friends or family members who had been criminally charged. Aycock admitted on voir dire she was best friends with the wife of a man tried capitally and sentenced to life without parole for a double murder during a robbery.

- In the 1997 Wake County case of *State v. Mann*, the State struck African-American venire member Regina Locke in part because when she was asked which University of North Carolina campus she attended, Locke said UNC-Chapel Hill was "the only one that counts." The prosecution asserted that this response reflected Locke's lack of maturity. The record does not support the prosecutor's supposition. Indeed, Locke's comment elicited light-hearted banter from the trial judge concerning "whatever that institution is in Orange County."

- In the 1992 Cabarrus County case of *State v. McCarver*, the State peremptorily struck African-American venire members Renee Ellis and Charlotte Rucker for mutually exclusive reasons. Ellis was struck in part because she had a small child and consequently, "she would have a greater sense of taking someone else's child away (and thus would be less likely to vote for the death penalty)." Meanwhile, Rucker was struck in part because she had no children, "therefore giving her little life experience and wisdom to draw upon when evaluating the case and determining the appropriate sentence for crimes of this magnitude."

- In the 1991 Robeson County case of *State v. McCollum*, the State struck African-American venire member DeLois Stewart in part because she knew people who worked in the public defender's office. In fact, Stewart worked in the office of the trial court administrator and, as a result, she was familiar with all kinds of judicial employees, including members of the public defender's office and the district attorney's office. The trial court sustained defense counsel's *Batson* objection.

Exclusion Based On Misleading Characterizations Of Voir Dire

194. The Court finds that there are numerous instances where purported race-neutral explanations submitted by the State mischaracterize the voir dire responses of African-American potential jurors.

- In the 1995 Forsyth County case of *State v. Woods*, the State struck African-American venire member Sadie Clement in part because she was "with her child in juvenile court because he was the victim of a molestation." The voir dire transcript does not reveal any instance in which Clement said her child was in juvenile court because he was the victim of a molestation. Rather, the transcript reveals that non-black venire member Neva Martin said her son was molested and the matter was handled in juvenile court. Martin was seated on the jury.

- In the 2006 Rutherford County case of *State v. Garcell*, the State peremptorily struck African-American venire member Tonette Hampton in part because she "stated on voir dire that she had a cousin who had been stabbed and 'nobody did anything.'" This is a misstatement of the facts. The record shows that Hampton said nobody did anything ***to her***, and Hampton expressed no concern about the way law enforcement handled her cousin's stabbing.

- In the 1996 Guilford County case of *State v. Thomas*, the State attempted to strike African-American venire member Quimby Mullins. When the defense objected under *Batson*, the prosecutor claimed he had observed Mullins and another potential juror "come into court, separate themselves from the rest of the jurors, and sit behind the defendant. ... They did not identify themselves [to the bailiff] as jurors. ... They said they're here with [the defendant]. ... [T]hey gave the bailiff some degree of difficulty, eventually he figured out that they were jurors and asked them to go back . . . ." The court then took testimony from the bailiff, who gave a very different story. According to the bailiff, Mullins and another venire member sat in the very back of the courtroom and not right behind the defendant; they were only in the courtroom for a moment before the bailiff approached them; and they told the bailiff they were there for jury duty in a murder trial. After the bailiff informed the prosecution they were potential jurors, Mullins and the other venire member were escorted to the jury room. The trial court disallowed the State's peremptory strike and seated Mullins as a juror.

- In the 1994 Davidson County case of *State v. Elliot*, the State struck African-American venire member Lisa Varnum in part because "[t]here appears to be an indication in the transcript that the juror is having difficulty in hearing." The affidavit points to the transcript showing that the prosecutor asked Varnum, "You can hear me okay, can't you?" In fact, the transcript shows that the prosecutor asked

this question of numerous potential jurors, including non-black venire members passed by the State.

- In the 1997 Forsyth County case of *State v. Moses*, the State struck African-American venire member Broderick Cloud in part because "[t]he juror stated that he may have gone to school with the defendant and played on sports teams with him but that he was not sure." The record shows Cloud said he was not sure but he thought he might have gone to school with the defendant and perhaps knew him through sports. After the trial judge informed Cloud that the defendant was from out of state and did not go to school in Winston-Salem, Cloud affirmed that he did not know the defendant.

- In the 1993 Johnston County case of *State v. DeCastro*, the State struck African-American venire member Harry James in part because "[t]his juror was a sociology major. I feel some sociologists may be more likely to forgive and have sympathy for defendant based upon socioeconomic circumstances." The voir dire transcript shows James had taken some sociology courses in college; however, he never worked as a sociologist. Moreover, James said nothing about "socioeconomic circumstances" and the prosecutor did not ask any questions in this area. Finally, James had served in the United States Army for 17 years, a trait typically considered to make a juror pro-prosecution.

Exclusion Based On Disparate Treatment: Misgivings About The Death Penalty

195. Disparate treatment of black and non-black venire members is clearly probative of racial bias. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination."). The Court finds the following numerous instances when prosecutors throughout North Carolina struck African-American venire members for a purportedly objectionable characteristic but accepted non-black venire members with comparable or even identical traits.

196. One of the most frequently-proffered reasons for excluding African-American citizens from capital juries is reservations about the death penalty. The cases described below confirm, however, what Defendants' statistical evidence shows. These cases also reflect the examples of disparate treatment in Cumberland County cases discussed earlier, Freda Frink in *Golphin*, Teblez Rowe in *Williams* (2004), and Rodney Berry in *McNeill*. Among venire

members who express tepid support for the death penalty, the State is more likely to strike African Americans than other potential jurors. Remarkably, in some instances, the State is even willing to accept non-black venire members challenged for cause for their death penalty views.

- In the 1994 Camden County case of *State v. Cole*, the State struck African-American venire members Alvin Aydlett, Marvin Abbott, and Miles Walston because of their death penalty views. The Court has reviewed the voir dire of these black venire members, and finds no meaningful difference between their death penalty reservations and those of John Carpenter, Paulette Newberry, and Terri Toppings, non-black venire members passed by the State. The Court finds it significant that, as with Aydlett, Abbott, and Walston, the prosecution challenged Carpenter and Toppings for cause based on their misgivings about the death penalty.

- In the 1995 Union County case of *State v. Strickland*, the State struck African-American venire member Leroy Ratliffe in part because he had a "moderate" belief in the death penalty. Yet, the State accepted non-black venire members with comparable views on the death penalty. Marlon Funderburk said his belief in the death penalty was "moderate." Brenda Pressley said her belief in the death penalty was "slight." Donald Glander, when asked to describe his belief in the death penalty as strong, moderate, or slight, said, "I'd have difficulty describing it. I think that, uh, without knowing the circumstances or the facts here may be, I'm not sure I could answer that question. I don't have a strong feeling, you know, about it."

- In the 1999 Sampson County case of *State v. Barden*, the prosecutor struck African-American venire member Lemiel Baggett because, when asked if he could impose the death penalty, Baggett spoke very quietly and said, "'Well, in some cases" and "Yes, I ***think*** so." (emphasis in original). The State accepted several non-black venire members who expressed similar views and gave nearly identical answers to the question of whether they could impose the death penalty. Teresa Birch, who was also soft-spoken, said, "Yes, I ***think*** I could." Joseph Berger said, "I ***guess*** I could. Yes." Betty Blanchard said, "I ***think*** so."

- In the 1996 Johnston County case of *State v. Guevara*, the State struck African-American venire member Gloria Mobley because of her purported reservations about the death penalty. The State passed Mary Matthews, Carolyn Sapp, Edna Pearson, Teresa Bryant, Walda Stone, and Natalie Beck, all of whom were non-black venire members who indicated similar reluctance to impose the death penalty.

- In the 1993 Randolph County case of *State v. Williams*, the State struck African-American venire member Mary Cheek in part because she was "hesitant" on the death penalty." The record shows Cheek had no strong feelings for or against the death penalty and she could consider it depending on the case and the evidence. The State passed non-black venire members Larry Frazier and Julie Humble, both of whom stated they leaned more towards life than the death penalty.

- In the 2006 Randolph County case of *State v. Wilkerson*, the State struck African-American venire member Richard Leonard in part because of his death penalty views. During voir dire, Leonard said, "No strong feelings [regarding the death penalty], but I'm not against it. I don't agree with it, but, I could you know, I mean if it's the law it's just the law, you know." The State passed Pamela Daniels, Rosa Allred, and Fay Reitzel, non-black venire members who expressed thoughts about the death penalty that were virtually identical to Leonard's.

Exclusion Based on Disparate Treatment: Hardship

197. Another frequently-heard reason for striking African Americans is concern about the hardship jury service will cause. The examples described here, as well as the previously-discussed treatment of venire members Sharon Bryant in *Augustine* and Randy Mouton in *Meyer* (1995), illustrate that hardship serves as a convenient, seemingly race-neutral reason to disproportionately exclude African-American citizens from jury service in capital cases. This is consistent with Defendants' statistical evidence showing racial disparities among potential jurors with hardships. In addition, these examples illustrate a practice recently condemned by the United States Supreme Court. In *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Court considered the prosecution's disparate treatment and questioning of black and non-black venire members with hardships. The Court noted that, even when a non-black venire member had obligations that "seem substantially more pressing," the prosecution strived to "elicit assurances that he would be able to serve despite his work and family obligations" and pressed the venire member to "try to make other arrangements as best you could." 552 U.S. at 484.

- In the 1998 Harnett County case of *State v. Brewington*, the State struck African-American venire member Pamela Simon in part because of hardship, namely that she was "divorced, receives no child support, and is the sole financial provider." The record shows that the prosecution passed non-black venire member Barbara Roller, a single mother who was scheduled to have cancer surgery in a few weeks. Roller was concerned about her health as other forms of treatment had failed and this was to be her first surgical operation.

- In the 1997 Sampson County case of *State v. Parker*, the State struck African-American venire member George McNeill in part because he had a fractured bone and blood pressure problems. McNeill had sought a hardship excusal for medical

reasons. The State passed non-black venire member Lois Ivey despite concerns about her fitness to serve because of crippling migraine headaches. Ivey stated, "I don't think it would be fair of me or them to have to sit up here in that excruciating pain."

- In the 1996 Martin County case of *State v. Bonnett*, the State struck African-American venire member Ossie Brown in part because, "as guardian of three grandchildren, [she] expressed concern about caring for her grandchildren during a lengthy capital trial." The record shows Brown's youngest grandchild was 10 years old and all three were in school. Brown never voiced any concern about the length of the trial and she unequivocally stated that her childcare responsibilities would not be a problem. Brown never sought to be excused for hardship. The State accepted Maurice Roberson and John Daniels, two non-black venire members who were highly vocal about the hardship jury service would cause for them. The State also passed Michael Jernigan, Marvin Perry, Rudy Bullock, and Abner Winslow, non-black venire members who had small children at home.

- In the 2006 Rutherford County case of *State v. Garcell*, the State struck African-American venire member Pamela Wilkerson because "she had upcoming appointments with doctors for two of her children. She further stated that her own mother, who babysat her children, was ill and that serving on the jury would be a problem for her." The prosecution's questioning of non-black venire member Lorraine Emory, who had small children and whose husband was out of town, differed markedly from that of Wilkerson. As in *Snyder*, the prosecutor asked Emory leading questions designed to persuade her she could serve on the jury. Further, the prosecution passed non-black venire member John Shepard, despite his plea to be excused from jury service because of work and family responsibilities. Shepard's wife was out of town and consequently, like Wilkerson, Shepard was solely responsible for his children.

- In the 2004 New Hanover County case of *State v. Cummings*, the State struck African-American venire member Letari Thompson in part because of hardship, namely that Thompson had an educational training scheduled. The record shows that Thompson's training was unlikely to create a scheduling problem. The State passed non-black venire members Diane Hufham and Rebecca Council, who, unlike Thompson, specifically asked to be excused from jury service for hardship reasons.

- In the 2006 Randolph County case of *State v. Wilkerson*, the State struck African-American venire member Richard Leonard in part because of concerns that his work responsibilities would prevent him from giving proper attention to jury service. In particular, the prosecution had concerns that Leonard "might possibly be planning to work all night and then show up for jury service." The State passed Kenneth Justice and Melissa Sands, non-black venire members who, like Leonard, said they had substantial work commitments in the evening. Sands worked two jobs every day and had two children at home. Justice told the prosecutor that jury service was going to "put me working at night." The prosecution's response was to suggest that if Justice

he felt himself "getting sleepy and you're not paying attention . . . let us know, I need a break."

Exclusion Based On Disparate Treatment: Criminal Involvement

198. African Americans are frequently excluded from capital juries because they, or their family members or friends, have been involved in the criminal justice system. The case examples described here, along with the examples from Cumberland County discussed earlier — Ellen Gardner, John Reeves, Wilbert Gentry, Ernestine Bryant, Mardelle Gore, and Elliot Troy — demonstrate that it does not matter whether black venire members are merely charged or actually convicted, whether black venire members are perpetrators or victims, or how distant the relationship to a family member or friend with a criminal record. African Americans are often excluded from jury service for the slightest association with crime. In contrast, prosecutors frequently accept non-black venire members with criminal records and comparable or more serious criminal histories. These examples are consistent with Defendants' statistical evidence showing that being black predicts whether or not the State will strike a venire member, even when holding constant or controlling for factors such as involvement in the criminal justice system.

- In the 2001 Onslow County case of *State v. Miller*, the State struck African-American venire members Tyron Pickett, Sean Duckett, and Josephine Chadwick because of their involvement in the criminal justice system. Pickett and Duckett had criminal convictions, the nature of which is not in the record. Chadwick's niece had been charged with a drug offense. The prosecution passed a half dozen non-black venire members with criminal records or friends and family members with criminal histories. Valerie Russell's husband pled guilty to misdemeanor child abuse. Rebecca Amaral's cousin was convicted and had been in prison for 20 years for a sex offense against a child. William Gagnon was convicted of marijuana possession. Harold Fletcher had a DUI conviction. Brian Odum had a prior conviction for possession of drug paraphernalia. Someone in Aaron Parker's family had been charged with a child support violation but the prosecution did not seek to elicit any further information about Parker's connections to the criminal justice system.

- In the 1998 Harnett County case of *State v. Brewington*, the State struck African-American venire member Ursula McLean in part because her aunt had recently been

murdered in Harnett County and the crime remained unsolved. However, on voir dire, McLean expressed no dissatisfaction with the pace or quality of the investigation. In addition, State passed non-black venire members whose family members had also been the victims of homicide: Eugenia Stewart's brother-in-law was killed by a drunk driver and Craig Matthews' second cousin was murdered the week before he was questioned as a potential juror.

- In the 1994 Brunswick County case of *State v. Cummings*, the State struck African-American venire member Alfredia Brown in part because "she had a friend with a drug abuse problem." The State passed non-black venire members Barbara Ruby, Robert Morris, and Janet Coster, all of whom had children or friends with substance abuse problems. The record shows the prosecution displayed little or no interest in learning about these matters when the potential juror in question was not an African American.

- In the 1997 Halifax County case of *State v. Hedgepeth*, the State struck African-American venire member Rochelle Williams in part because her husband had "failed to pay off tickets." The record confirms that William's husband was once arrested for failure to pay speeding tickets. However, the State passed several similarly-situated non-black venire members, including two who had themselves been arrested. Freddie Ezzell had been arrested for failing to pay child support. H.T. Hawkins had been arrested for DWI. Willie Hammack's son had been arrested for DWI and William Massey's brother had been arrested for disorderly conduct. Anthony Hux was passed even though he had testified as a character witness on behalf of a murder defendant.

- In the 1994 Pitt County case of *State v. Wooten*, the State struck African-American venire member Janice Daniels because she was charged with DWI and possession of drug paraphernalia. She initially pled guilty in district court, but then appealed and pled not guilty in superior court. The charges were then dismissed. While rejecting Daniels after she was found ***not guilty*** of criminal charges, the State accepted a non-black venire member who was found ***guilty*** of a similar offense. The State passed William Paramore, who was convicted of DWI.

- In the 2000 Forsyth County case of *State v. White*, the State struck African-American venire member Mark Banks because Banks' wife was a rape victim and the State was purportedly concerned about the impact his wife's experience might have on him. During questioning, Banks indicated the rape occurred before he and his wife were married and it had happened "in the past." The State passed non-black venire member Scott Morgan whose his wife had been robbed and assaulted two years before; the perpetrator had not been apprehended.

- In the 1992 Craven County case of *State v. Reeves*, the State struck African-American venire member Nancy Holland in part because, within the past year, a family member had been involved in a matter requiring contact with the district attorney's office. The transcript shows that the prosecutor asked few questions about this matter, other than to ascertain that the case had been resolved without a trial and

Holland did not go to court about it. The State passed non-black venire member Charles Styron; a couple of years before, the trial prosecutor had personally prosecuted Styron's sister-in-law on a drug charge.

- In the 1997 Forsyth County case of *State v. Moses*, the State struck African-American venire member Broderick Cloud in part because he had a cousin who was murdered six years before. The transcript shows that Cloud did not attend the trial and nothing about his cousin's murder would have prevented him from being a fair juror. The State passed Doris Folds, a non-black prospective juror whose best friend had been murdered seven years earlier. Folds had attended the entire trial of the perpetrator.

- In the 2001 Wake County case of *State v. Garcia*, the State struck African-American venire member Thomas Seawell in part because his son was convicted of conspiracy to traffic in cocaine and served more than a year in federal prison. The prosecution passed non-black venire member David Oakley who had himself been convicted of possession of more than one pound of marijuana; he pled guilty and was given an active sentence. The prosecution also passed non-black venire member Delma Chesney, whose brother was arrested for selling cocaine to a police officer as part of a large, federal undercover operation. Chesney said that her brother "participated in it, and he received a [federal] prison sentence."

Exclusion Based On Disparate Treatment: Connections To Defense

199. Another seemingly race-neutral reason that prosecutors frequently invoke to exclude African Americans from jury duty in capital cases is a connection to defense counsel or defense witnesses. The examples below demonstrate that this reason is not applied equally to black and non-black venire members.

- In the 1995 Union County case of *State v. Strickland*, the State struck African-American venire member Leroy Ratliffe in part because he knew one of the defense attorneys in the case, Harry Crowe. Crowe had done some work for Ratliffe several years before. However, the State accepted non-black venire member Pamela Sanders, who also knew one of the defense attorneys. Sanders knew defense attorney Stephen Goodwin, who was related to the president of the bank where Sanders worked. Sanders also knew Goodwin through their work with the American Cancer Society.

- In the 1999 Craven County case of *State v. Anderson*, the State struck African-American venire member Evelyn Jenkins in part because she worked in the home of the defense attorney's family. The record shows that Jenkins's sister worked for the family and became ill. Jenkins then worked for the family for, at most, three months, 25 years before. She had no direct contact with defense counsel, who was then a child, and she maintained no further contact with the family. The State accepted

non-black venire member Joseph Shellhammer, who retained defense counsel to represent him in a criminal matter 15 or 16 years ago. The State also accepted non-black venire member Richard Nutt, who retained defense counsel to handle a house closing 12 years previously.

- In the 1995 Surry County case of *State v. East*, the State struck African-American venire member Michael Stockton in part because he knew a potential defense witness. The record shows that Stockton had limited contact with the witness a decade before. The State passed non-black venire members Glenn Craddock, Amy Frye, Sarah Gordon, and James Sands, all of whom knew at least one potential defense witness and some of whom had current contact with the witness. Non-black venire members Frye and Sands also had connections to the defendant or his family.

Exclusion Based On Disparate Treatment: Helping Professions

200. Prosecutors sometimes attempt to justify the strikes of African Americans by citing their familiarity or experience with mental health issues, or a background working with children or other helping professions. Prosecutors claim they are concerned about sympathy for the defendant or an inclination to more easily accept evidence in mitigation. This rationale makes sense, except, as the following cases illustrate, this rationale is applied with much greater force to exclude African Americans.

- In the 1998 New Hanover County case of *State v. Taylor*, the State struck African-American venire member Zebora Blanks entirely because of "her employment in the mental health field. The defense relied heavily on mental health witnesses in their trial strategy." According to her voir dire testimony, Blanks had worked in the business administration section at Southeastern Mental Health for five years and dealt with medical and personnel records. Blanks made appointments for the counselors, but was not involved in counseling in any way. Her previous job was a clerical position with the health department. The State passed non-black venire member Vicky Poplin, who had at least as much contact as Blanks did with the mental health field. Poplin had been working as a medical transcriptionist for two years. Poplin's clients were five medical groups. Four of the five groups were made up of psychologists and psychiatrists. Poplin's previous job was with Cape Fear Psychological and Psychiatric Services.

- In the 1994 Beaufort County case of *State v. Ball*, the State struck African-American venire member Ella Pierce Johnson in part because "she was a teacher for a number of years and that she had prior educational experience in the field of psychology." The State passed non-black venire members Carolyn Newcomb McNeill and Mollie Bowen. McNeill and Bowen were both teachers who had studied psychology.

- In the 1995 Forsyth County case of *State v. Woods*, the State struck African-American venire member Sadie Clement in part because she had an elementary education degree and "vast experience in psychology and the development of children." The State passed Holly Coffey, Romaine Hudson, and Mary Joyce, all of whom were non-black venire members who had worked with children and had degrees and/or experience in elementary education and psychology.

- In the 2006 Brunswick County case of *State v. Maness*, the State struck African-American venire members Alveria Bellamy, Sanica Maultsby, and George McLaurin in part because of purported concerns that their experiences with mental health would make them sympathetic to the defendant's mitigation case. Bellamy had a brother with schizophrenia and a grandson with hyperactivity or Attention Deficit Disorder (ADD). Maultsby "worked as a Detox nurse, doing mental health counseling and people on substance abuse." McLaurin worked with at-risk teenage girls who had issues with drugs, alcohol, sex, and pregnancy. The prosecutor passed numerous non-black venire members who had similar experiences or familiarity with mental illness and other matters related to the defendant's mitigating evidence. Elisa Woodard's mother had suffered from depression and sought treatment for that disorder. Charles Stancil's aunt had been sent for treatment at Dorothea Dix Hospital. Michael Hardison had a relative who suffered from depression and his son had friends with ADD. Mary Ganus, who was later seated on the jury, had a daughter who taught students with ADD. Joyce Inman, who was also seated on the jury, had friends with children diagnosed with ADD. Jennifer Forti, another seated juror, worked in a physician's office, had a brother and niece who suffered from ADD, and had herself been treated by a psychologist and prescribed medication for a mental health condition. Deborah Delsorbo studied psychiatric nursing. Kenneth Boren was a nurse who had studied psychology or psychiatry and worked with psychiatrists and psychologists on a weekly basis; Boren had worked with patients who had ADD and he thought he had administered Ritalin during his nursing career.

- In the 1994 Randolph County case of *State v. Kandies*, the State struck African-American venire member Altrea Jinwright in part because "she had done extensive work with three to four year old children, the age of the victim in the case." The voir dire transcript shows that Jinwright had worked for four months at Presbyterian Day Care. While excluding Jinwright for her brief stint as a daycare worker, the State passed non-black venire members who had worked with young children more recently and for substantially longer periods of time. Read Spence taught kindergarten for two years at First Presbyterian Church and worked with four- and five-year-old children. Peggy Arrington served as an elementary school librarian for 21 years. The prosecution also accepted five non-black venire members with children ranging in age from two to five years old.

Exclusion Based On Other Disparate Treatment

201. The cases below, demonstrate that prosecutors throughout North Carolina have treated similarly-situated black and non-black venire members differently with regard to a

variety of seemingly race-neutral characteristics. African Americans may be struck because they served on a jury that deadlocked like John Reeves in *Walters* or because of their age or employment history, while non-black venire members with comparable traits are passed.

- In the 1999 New Hanover County case of *State v. Wiley*, the State peremptorily struck African-American venire member Gail Mayes in part because she was "on a jury that failed to reach a verdict." However, the State passed non-black venire members Arnfelth Bentsen, Walter Simmons, John Youngs, Thomas Houck, and Martin Mathews, all of whom had previously served on a jury. Significantly, the prosecutor asked not one of these non-black venire members whether the previous jury had reached a verdict. Houck was not asked about his jury service at all. The State also passed non-black venire member Stephen Dale who, like Mayes, had served on two prior juries. The prosecutor questioned Dale only about whether his most recent jury had reached a verdict. The State cited as an additional reason for striking Mayes that she had a "short work history." However, the record shows that the State passed Brian Morrison, James Bahen, Leonard Cuthbertson, non-black venire members with similar employment histories.

- In the 1997 Lenoir County case of *State v. Bowman*, the State peremptorily struck African-American venire member Lee Lawrence in part because of her "sporadic employment in the past." The record shows the State passed several non-black venire members with similar work histories. In addition, the prosecution displayed great curiosity about the details of Lawrence's employment history and marked disinterest in the work histories of non-black venire members. Like Lawrence, Sybil Pate had recently started a job; in fact, Pate's new job commenced two months after Lawrence's. David Chambers and Gary Adams had both held a variety of jobs.

- In the 1997 Forsyth County case of *State v. Moses*, the State struck African-American venire member Broderick Cloud in part because he worked for the *Winston-Salem Journal*. Another potential juror, Rene Dyson, also worked for the *Winston-Salem Journal*. Dyson worked in the circulation department while Cloud worked in distribution. Dyson was non-black, and the State passed her.

- In the 1994 Mecklenburg County case of *State v. Harden*, the State peremptorily struck African-American venire member Shannon Smith in part because she was "very young" — 23 years old. The prosecution accepted two non-black venire members who were younger than or the same age as Smith: Michelle Canup and Diamondo Katopodis.

- In the 1994 Davidson County case of *State v. Elliot*, the State struck African-American venire member Kenneth Finger in part because he was not married and had never been married. According to the prosecution, because the victim was two years old, "the State would generally want a trier of the facts who had experience with family and children. A juror with no marital background would not have life experiences that would relate to child abuse and would be a proper juror to excuse

through use of a peremptory challenge." The State passed numerous similarly-situated non-black venire members. Like Finger, Robert Bryant, Martha Sink, and Kristie Fisher were unmarried and had never been married. The State also passed two non-black venire members who were married but had no children: Dawn Johnson and Kristie Oxendine.

- In the 1997 Halifax County case of *State v. Hedgepeth*, the State struck African-American venire member Rochelle Williams in part because she did not have "a lot of community involvement." On her jury questionnaire, Williams answered "no" to questions asking "are you a member of a church?" and "do you belong to any business or social clubs or organizations?" The questionnaire provided to jurors in this case contained five such questions, and Williams answered "no" to all five. However, the State also passed three non-black venire members with identical responses: Anthony Hux, Freddie Ezzell, and Rachel Reid.

Conclusion Of Case Example Evidence

202. The many instances described here — of striking African-American venire members for their association with African-American institutions, asking African-American venire members race-based questions or singling them out for idiosyncratic lines of inquiry, offering irrational and unconstitutional reasons for striking African-American venire members, striking African-American venire members for any or no reason at all, and treating African-American venire members differently from similarly-situated non-black venire members — are significant in that they come from cases tried between 1990 and 2009, from a multitude of prosecutorial districts across North Carolina. The Defendants' evidence is credible and persuasive and corroborates the evidence of discrimination in Cumberland County and in Defendants' individual cases.

STATISTICAL EVIDENCE

203. Defendants' statistical proof is drawn from an exhaustive study of jury selection conducted by lead investigator Barbara O'Brien (O'Brien) and her co-investigator, Catherine Grosso (Grosso), professors at the Michigan State University (MSU) College of Law. The MSU statewide jury selection study (MSU Study) consists of two parts: (1) a complete, unadjusted

study of race and strike decisions for 7,424 venire members drawn from the 173 proceedings for the inmates of North Carolina's death row in 2010; and (2) adjusted, regression studies that analyzed whether alternative explanations impacted the relationship between race and strike decisions. The second part includes regression studies of 100 percent of the venire members from the Cumberland County cases, and a 25 percent random sample drawn from the 7,424 venire member data set.

204. Two expert witnesses, O'Brien and Woodworth, testified for Defendants regarding the methodology, conclusions, and validity of the MSU Study. One expert witness, Katz, testified for the State regarding the same.[21] All three experts are highly qualified. Of the three, O'Brien alone has legal training.

205. O'Brien is an associate professor at the Michigan State University College of Law. She has a law degree and a doctorate degree in social psychology. Before earning her doctorate, she worked as an appellate criminal attorney and as a clerk in the federal courts. She has had substantial training in research methodology and statistics. O'Brien has published multiple legal empirical studies in peer-reviewed articles, including studies applying different statistical methods such as multivariate and logistic regression. The Court accepted O'Brien as an expert in social science research and empirical legal studies.

206. Woodworth is a professor emeritus of statistics and of public health at the University of Iowa. He received a Ph.D. in mathematical statistics and has served as a professor of statistics, actuarial science, and biostatistics. Woodworth has extensive experience with the use of logistic regression and statistics in his applied research in the areas of biostatistics, employment discrimination, and criminal justice. He has published a textbook on biostatistics,

[21] O'Brien and Woodworth testified at both the *Robinson* hearing and the *Golphin, Walters,* and *Augustine* hearing. Their testimony was admitted from *Robinson* as part of Defendants' case in chief. Katz testified only at the *Robinson* hearing. His testimony was admitted as part of the State's case.

and numerous articles in the subject areas of his research. The Court accepted Woodworth as an expert statistician.

207. Katz is retired professor of statistics from Georgia State University College of Business. He earned a Ph.D. in quantitative methods at Louisiana State University, and has taught mathematical theory of probability and statistics as well as general statistical courses. Since 2002, he has worked as an independent consultant on statistical matters in Medicaid fraud cases and in audits for the Internal Revenue Service. Katz previously testified as an expert in cases involving statistical claims of bias in the administration of the death penalty or jury selection, including *McCleskey v. Kemp* and *Horton v. Zant.* The Court accepted Katz as an expert in applied statistics, data analysis, and sampling.

208. As described below in detail, the Court finds the MSU Study to be a valid, highly reliable, statistical study of jury selection practices in capital cases from Cumberland County and North Carolina between 1990 and 2010. The results of the unadjusted study, with remarkable consistency across time and jurisdictions, show that race is highly correlated with strike decisions in Cumberland County and North Carolina. The adjusted, regression results show that none of the explanations for strikes frequently proffered by prosecutors or cited in published opinions, such as death penalty views, criminal backgrounds, or employment, diminish the robust and highly consistent finding that race is predictive of strike decisions in Cumberland County and North Carolina.

209. Although Katz was the State's statistical expert, he gave no opinion as to whether race was a significant factor in the exercise of peremptory challenges in capital cases by prosecutors in North Carolina, the former Second Judicial Division, or Cumberland County at any time. With respect to the unadjusted results, Katz performed calculations of the disparities

in strike rates and reached the same conclusions as O'Brien. Katz conceded that the large disparities essentially satisfied Defendants' prima facie burden and required further investigation. Katz nonetheless testified that he believed the design of the MSU Study to be flawed. For the reasons explained below, this Court rejects this criticism. With respect to the adjusted, regression analyses, Katz testified regarding what he perceived to be problems with the study's variable definitions. The Court does not find these criticisms to have merit.[22]

210. Katz finally testified that for some, but not all, of the jurisdictions, he was able to produce statistical models using O'Brien's data that did not show a statistically significant correlation between race and the exercise of peremptory strikes. Katz himself conceded, however, that these models were not appropriately constructed and are of no explanatory value. Accordingly, the Court awards no weight to these models.

211. Defendants presented evidence within different temporal windows. First, Defendants presented evidence of the discrimination targeted to the precise time of their capital trials. Woodworth testified that he utilized a commonly accepted statistical method to pinpoint the precise relationship between race and the exercise of peremptory strikes at the time of Defendants' trial based on the adjusted and unadjusted data for the entire 20-year study period. The State did not impeach or rebut this testimony in any way. The Court finds Woodworth's technique to be an appropriate way of determining whether race was a significant factor in the year of the Defendants' trials.

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[22] Katz also testified at length regarding the composition of the final seated juries and the strike rates of defense counsel. Katz testified that there was substantial evidence of a correlation between race and the strikes of defense counsel. This evidence could potentially form the basis of an additional claim for relief under the RJA. This Court need not decide, however, whether a defendant may be entitled to relief because of discriminatory actions of defense counsel because Defendants have waived any such claims to relief by not alleging these claims. While this Court permitted Katz to testify regarding the racial composition of final juries, for the reasons the Court has clearly set forth in the statutory construction section of this order, the composition of final juries is not the appropriate inquiry under the statute, and accordingly, the Court awards no probative weight to the testimony regarding seated jurors.

212. Defendants also presented evidence of discrimination within their statutory windows, which are the intervals of time that conform to the definition of "at the time of defendant's trial" as set forth under the amended RJA. These windows span from ten years before the Defendants' crimes and two years after the Defendants' sentencing. Both Woodworth and O'Brien presented analyses for Defendants that included only the cases that fell within these statutory windows. The appropriateness of the statutory window analysis was also not challenged in any way by the State. The Court finds that this technique is an acceptable method of determining whether race was a significant factor in the Defendants' statutory windows.

Statistical Concepts And Definitions

213. The statistical and empirical experts Katz, Woodworth, and O'Brien testified regarding various fundamental statistical concepts and techniques throughout their testimony. Their testimony with respect to these concepts was also consistent with the chapters on statistical evidence in the *Reference Manual on Scientific Evidence, Third Edition*, a resource cited by both parties throughout the litigation. *See* David H. Haye & David A. Freedman, *Reference Guide on Statistics*, 211-302, and Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, 303-358. Before turning to the testimony regarding the experts' analyses, it is useful to set forth some of these basic statistical concepts and techniques.

214. The experts testified regarding "unadjusted" data. Unadjusted data, as the term implies, refers to the raw numbers; here, before they are "adjusted" by regression analysis. The unadjusted numbers were presented in simple totals (i.e., the total numbers of strikes of black and non-black venire members), and simple statistics, such as percentages of black and non-black venire members struck.

215. With respect to these unadjusted statistics, the experts testified regarding various significance tests. Generally, tests of statistical significance attempt to measure the likelihood that observed disparities are due to chance. One measure, called a *p*-value, reflects the probability of observing a disparity of a given magnitude simply by the luck of the draw. The lower the *p*-value, the lower the chance that an observed disparity was due merely to chance. The generally accepted threshold for a finding that is statistically significant is a *p*-value <.05.

216. Another method of expressing statistical significance is the two sigma rule, which measures the number of sigmas (or standard deviations) from the null hypothesis for a particular finding. The null hypothesis in a race-neutral system and for this analysis is a coefficient of zero and represents neutrality. Still another method of expressing statistical significance is specifying the level of confidence in the stated odds ratio through a calculated confidence interval. For example, a 95% confidence interval means there is a 95% probability of the odds ratio falling between the lower confidence limit and upper confidence limit.

217. Statistical significance, however, is necessarily dependent upon the power of the study. A study's power is a function of the sample size, and the strength of the association. A study with a small sample size may lack sufficient power to produce statistically significant results, regardless of the strength of the association. Statistical results from small samples that do not satisfy traditional thresholds of statistical significance may still nonetheless be probative evidence. *See, e.g., Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1353 n.1 (6th Cir. 1992); David Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH.L.REV. 1333, 1343-44 (1986). Conversely, very large studies may have great power, and detect statistically significant results of little practical, or material, significance. Accordingly, the investigator should report the size of the samples, the significance level, and the size of the effect detected.

218. Here, the experts conducted their statistical analyses using two widely accepted statistical software programs, SPSS and SAS.[23] Both of these programs are appropriate for the statistical analyses performed in this litigation.

219. The three experts also performed regression analyses. Simple regression is a statistical procedure used to a investigate relationship between a dependent variable, or outcome variable, and a single independent variable. Here, the independent variable is black, and the dependent variable is being struck. Multiple regression allows the researcher to include multiple variables, and thus disentangle multiple factors that might bear on the outcome. The regression model "controls" for possible alternative explanations by holding all other factors constant. In the instant case, as is described in detail below, the multiple regression models included factors that correlate with strike decisions, such as death penalty reservations and criminal background. A regression model allows researchers to examine whether a correlation remains between black and strike decisions, after taking into account these alternative variables.

220. Regression analysis is widely accepted and utilized in legal cases, and indeed, in our everyday life. Economists, sport analysts, social scientists, advertisers, polling experts, and medical researchers all commonly rely upon regression models. In the courts, regression models are frequently used in such diverse areas of the law as anti-trust cases, tort cases, and discrimination cases. Indeed, "regression analysis is probably the best empirical tool for uncovering discrimination." Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 Geo. L.J. 237, 238 (1996).

221. A logistic regression analysis, as opposed to a linear regression analysis, is appropriate when the outcome of interest is binary – an either/or choice – such as a determination

[23] O'Brien used SPSS and Woodworth and Katz used SAS.

of whether the venire member is to be struck or not struck by the prosecutor. Logistic regression is widely accepted, and is the appropriate method of statistical analysis for the issue before the Court.

222. The result of a logistic regression analysis is an estimate of the influence of each of several explanatory factors on the outcome, stated as an adjusted odds ratio. The odds ratio measures the impact of an explanatory factor and is the amount by which the odds on the outcome are multiplied by the presence of a particular factor.

The MSU Study Design Was Appropriate

223. O'Brien testified, and this Court so finds, that in order to perform a valid study, a researcher must first have a clear research question. O'Brien's research question was validly and appropriately informed and driven by the RJA, to-wit: was race a significant factor in decisions to exercise peremptory challenges by prosecutors in capital cases in North Carolina? O'Brien designed the MSU Study to address this question. The MSU Study examined jury selection in at least one proceeding for each inmate who resided on North Carolina's death row as of July 1, 2010, for a total of 173 proceedings.[24] All but one of these proceedings was tried between 1990 and 2010.

224. The decision to include these 173 capital proceedings by O'Brien and Grosso as the study population is valid and appropriate in light of the following: (1) the population of interest is defined by the RJA such that current death row inmates constitute all of the individuals to which the RJA could possibly provide relief who had peremptory strike information available;

[24] MSU excluded only one capital proceeding from among the inmate's residing on death row as of July 1, 2010. Jeffrey Duke's 2001 trial was not included because the case materials were unavailable. *See State v. Duke*, 360 N.C. 110, 135 (2005) (explaining that Duke received a new trial because "the transcription notes and tapes in defendant's first capital trial were unavailable, thereby preventing preparation of a transcript for appellate review.").

and (2) the case materials necessary to conduct a robust and valid analysis were more likely available and would therefore provide better quality data.

225. The State contested the appropriateness of this study design. Katz testified that, in his opinion, the RJA requires an analysis of all capitally tried cases during a relevant time period and that the selection of the 173 cases was an invalid probability sample. Relying upon information from the MSU researchers related to MSU's separate charging and sentencing study, Katz indicated there were 696 capital trials in North Carolina and 42 in Cumberland County between 1990 and 2010. He opined that the RJA requires an analysis of all capitally-tried cases during a relevant time period, including cases that resulted in life verdicts.

226. According to Katz, the 173 cases in the MSU Study do not constitute a random sample of the total number of capital trials, and therefore one cannot support any inference from the statistical findings of the 173 cases that can be generalized to the entire population of capital trials. While noting that the 696 capital proceedings included trials that resulted in death sentences where the defendant has been executed or removed from death row for some other reason, as well as cases where the defendant received a life sentence or a result less than the death penalty, Katz never offered any explanation to the Court why the strike decisions in these cases would differ from the 173 cases analyzed. As evidenced by notes taken by Katz during a conversation with a Cumberland County prosecutor, Katz originally considered analyzing some of the capital proceedings that were not included in the MSU Study; however, no such results were presented to the Court.

227. The Court is not persuaded by Katz's criticism of the study design and finds that the RJA does not require an analysis of the larger population of all capital trials during a relevant

time period. The Court also rejects the suggestion that the selection of the 173 cases constitutes an invalid sample.

228. However, assuming *arguendo* that the appropriate study population under the RJA is all capitally tried cases during a relevant time period, the Court takes judicial notice of the section of *The Reference Manual on Scientific Evidence* entitled, *Reference Guide on Statistics*. The Court finds, based upon this authority, it is appropriate to generalize and infer statistical findings to a larger population from a subset of the population if the subset is analogous to the larger population. According to the *Reference Guide on Statistics*, the question becomes: "how good is the analogy?" *Id.* at 241.

229. Again, assuming *arguendo* that the appropriate study population under the RJA is all capitally tried cases during a relevant time period, the Court finds that the 173 capital proceedings examined by O'Brien and Grosso are analogous to the larger population of all capitally tried cases and the statistical findings from the 173 proceedings may validly and appropriately be generalized and inferred to the larger population of all capitally tried cases because:

- There is no reason to believe that other capitally tried cases – whether the result was a life sentence or a death sentence that has since been vacated or accomplished – would yield any different results from the current death row inmates since the motivations of the prosecutor are the same at the time the decisions are made to peremptorily challenge venire members;[25]
- The selection of the 173 cases was not a form of "cherry-picking" proceedings that would be more favorable toward one party;
- The State produced no evidence from any prosecutor in North Carolina that suggested their strike decisions or motivations may be different in capitally-tried

[25] O'Brien testified that she was provided by defense counsel with transcripts from a handful of capital cases resulting in life verdicts. She did not rely upon those cases, however, because they were gathered by defense counsel and not pursuant to any scientific sampling protocol. As noted above, the State elected not to conduct any study of capital cases resulting in life verdicts.

cases that either concluded with a result less than a death verdict or ended in a death verdict but the defendant is no longer on death row;[26]

- Cumberland County prosecutors Dickson and Colyer testified that their approach in jury selection was consistent regardless of the outcome of the case. This evidence was not contradicted generally by either the State or Defendants and this Court finds this as a fact;

- Katz offered no theoretical or practical reason why the prosecutorial strike decisions in the larger population of cases would be any different from the strike decisions in the 173 cases which could thus prevent the generalization of the results to the larger population.

230. With respect to Cumberland County, eleven proceedings fell within the study's definition of all capital proceedings between 1990 and 2009 for death row inmates from Cumberland County. This dataset provided sufficient numbers and variability to allow the MSU researchers to analyze the dataset for any possible race effects. In light of this, O'Brien did not need to expand the universe of cases for Cumberland County.

231. O'Brien and Grosso, as part of the study design, separated the study into two sections – one which analyzed the race and strike decisions by prosecutors of qualified venire members and another which looked at more detailed information about individual venire members to examine whether any alternative explanations may factor into the peremptory challenge decisions of prosecutors. The second study section analysis for the statewide data was based upon a random sample of the 7,424 venire members included in the first study part. There was no testimony critiquing this design, and the Court finds this design to be an appropriate one.

The MSU Study Methodology Was Thorough And Transparent

232. For Part I of the MSU Study, O'Brien and Grosso examined all venire members who were subjected to voir dire questioning and not excused for cause by the trial court,

[26] The Court notes the exceptional cases of *Burmeister* and *Wright*, discussed above. Although these cases resulted in life verdicts, and had very different strike patterns, the Court finds that this difference was persuasively demonstrated to be attributable to the difference in overall case strategy for these prosecutions.

including alternates, producing a database of 7,424 venire members. The researchers were meticulous in their data collection and coding processes, producing highly transparent and reliable data.

233. O'Brien and Grosso created an electronic and paper case file for each proceeding in the MSU Study. The case file contains the primary data for every coding decision made as part of the study. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' and clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision. All of this information was provided to the State in discovery.

234. All coding decisions and data entry for the MSU Study were made and completed by staff attorneys at Michigan State University College of Law. The staff attorneys received detailed training on each step of the coding and data entry process and worked under the direct supervision of O'Brien and Grosso. As part of the methodology of the study, O'Brien and Grosso developed data collection instruments (DCIs) which are forms that staff attorneys completed based on a review of the primary documents and transcripts. The DCIs allowed for the systematic coding of the data.

235. For each of the proceedings in the study, the DCIs collected information about the proceeding generally, including the number of peremptory challenges used by each side and the name of the judge and attorneys involved in the proceeding. For each of the venire members in the study, the DCIs collected: basic demographic and procedural information; determination of strike eligibility of each venire member; and race of the venire member and the source of that information. This information, if reliable, is sufficient to conduct an unadjusted study of the peremptory challenges by prosecutors in capital cases.

236. Part II of the MSU Study included coding for additional descriptive information that might bear on the decision of a prosecutor to peremptorily challenge a venire member. After coding for the basic demographic information, strike decision, and race in Part I of the study, the staff attorneys coded more detailed information for a random sample of venire members statewide.

237. The statewide sample of venire members for Part II of the MSU Study was determined by SPSS which randomly selected approximately 25% of the venire members statewide resulting in a group of approximately 1,700 venire members. O'Brien did not subjectively select the venire members for the sample. O'Brien confirmed that the 25% sample constituted an accurate representation of the statewide population of venire members by comparing the racial and gender distributions found in the 25% sample and the statewide population of venire members. This comparison shows that the 25% sample and the statewide population of venire members contain substantially the same distribution of race and gender. Specifically, the statewide population was 16.3% black, 83.6% non-black, and 0.1% missing race information; the 25% sample contained the same percentages. The statewide population was 46.7% male and 53.3% female; the 25% sample was 48.1% male and 51.9% female. O'Brien concluded that the 25% sample is representative of the statewide population of venire members examined by the MSU Study. O'Brien concluded that it is appropriate to draw inferences about the statewide population from the 25% sample.

238. The Court finds that the 25% sample drawn from the statewide data constitutes an accurate representation of the statewide population of venire members and it is appropriate for the researchers to draw inferences about the whole statewide population of venire members from the 25% sample.

239. In addition to the random 25% statewide sample, in Part II, O'Brien and Grosso conducted a descriptive coding study of all 471 venire members in the 11 Cumberland County proceedings in the MSU Study. They coded the additional descriptive information for all 471 venire members from Cumberland County.

240. For the venire members included in either the statewide 25% sample or the Cumberland County study, the DCIs collected information regarding:

- Demographic characteristics (e.g., gender, age, marital status, whether the venire member had children, whether the venire member belonged to a religious organization, education level, military service and employment status of the venire member and the venire member's spouse);
- Prior experiences with the legal system (e.g., prior jury service, experience as a criminal defendant or victim for the venire member and the venire member's close friend or family member, whether the venire member or venire member's close friend or family member worked in law enforcement);
- Attitudes about potentially relevant matters (e.g., ambivalence about the death penalty or skepticism about or greater faith in the credibility of police officers);
- Other potentially relevant descriptive characteristics (e.g., whether jury service would cause a substantial hardship, familiarity with the parties or counsel involved, whether the venire member possessed prior information about the case or had expertise in a field relevant to the case); and
- Any stated bias or difficulty in following applicable law.

241. In determining what data to collect on individual venire members, O'Brien and Grosso relied upon many sources of information including juror questionnaires used in North Carolina capital cases; review of capital jury voir dire transcripts, literature regarding jury selection, *Batson* literature, litigation manuals, treatises on jury selection, review of *Batson* cases, and other studies, specifically including a jury selection study in Philadelphia County, Pennsylvania by Professor David Baldus. The researchers also consulted with Professor

Baldus.[27] O'Brien and Grosso utilized the variables from the Philadelphia County study as a starting point before refining them for the MSU Study. O'Brien and Grosso invited input and participation from prosecutors through Bill Hart from the NC Attorney General's Office but got no response.

242. O'Brien and Grosso took numerous measures and precautions to ensure the accuracy of the coding of the identification of the race of each venire member in the study by implementing a rigorous protocol to produce data in a way that was both reliable and transparent. All of the staff attorneys received a half-day training on the race coding protocol by O'Brien and Grosso, which the Court finds is adequate and appropriate.

243. A venire member's self-report of race was deemed by O'Brien and Grosso to be highly reliable and for 62.3% of the venire members, the study relied upon the venire member's self-report. The race for an additional 6.9% of the venire members in the study was explicitly noted in the trial record through voir dire (of the 6.9%, 6.4% were identified through a court clerk's chart that had been officially made a part of the trial record, and 0.5% were identified through a statement made on the trial record). The Court finds that it is reasonable and appropriate to rely upon these sources of information for the determination of the race of venire members.

244. For the remainder of the venire members (30.6%), O'Brien and Grosso used electronic databases in conjunction with the juror summons lists with addresses to find race information, including the North Carolina Board of Elections website, LexisNexis "Locate a Person (Nationwide) Search Non-regulated," LexisNexis Accurint, and the North Carolina Department of Motor Vehicles online database. The Court finds that it is reasonable and

[27] Professor Baldus passed away on June 13, 2011. *See* http://en.wikipedia.org/wiki/David_C._Baldus.

appropriate to rely upon these public record sources for the determination of the race of venire members.

245. O'Brien and Grosso prepared a strict protocol for use of the websites for race coding by the staff attorneys, which minimized the possibility of researcher bias. Additionally, MSU employed the safeguard of blind coding. Under the blind coding protocol, staff attorneys who searched for venire members' race information on electronic databases were blind to the strike decision whenever possible. This safeguard further minimized any possible researcher bias. The Court finds that these protocols and safeguards enhance the integrity and reliability of the study.

246. O'Brien and Grosso saved an electronic copy of all documents used to make race determinations and these documents were provided to the State, another step that promoted transparency and reliability in the study.

247. The reliability of the electronic database protocol for race coding was confirmed by a self-test performed by O'Brien and Grosso. They independently recoded the race information for 1,897 venire members for whom they had the juror questionnaires reporting race or express designations of race in a voir dire transcript and compared that data to the coding based upon data from electronic database. The two sources produced an exceptionally high match rate. The Court finds the coding of the race of the venire members to be accurate. The MSU Study documented the race information for all but seven of the 7,424 venire members in the study.

248. After the venire members were coded, the staff attorneys transferred the data that had been coded on paper DCIs into a machine-readable format. Reasonable and appropriate

efforts were made to ensure the accuracy of the data transfer, including the use of a software program designed to reject improper entries.

249. O'Brien and Grosso utilized a double coding procedure for the coding of the additional descriptive characteristics for Part II of the study. Under these procedures, two different staff attorneys separately coded descriptive information for each venire member to ensure accuracy and intercoder reliability. Then a senior staff attorney with extensive experience working on the study compared and reviewed their codes for consistency and either corrected errors, or, when necessary, consulted with O'Brien. Any discrepancies in judgment were resolved by O'Brien or Grosso. The Court finds that these rigid precautionary safeguards enhance the reliability and validity of the MSU Study.

250. A coding log was maintained to document coding decisions which involved differences in judgment. All of the staff attorneys had access to the coding log, which enhanced intercoder reliability. The coding log is entitled "Coding Questions and Answers," and is part of the MSU Study.

251. In addition to the coding log, O'Brien and Grosso maintained a document referred to as a "cleaning document." This document sets forth every instance in the study where there was a discrepancy between the two independent staff attorney coders. The coding log and cleaning document were both provided to the State.

252. The documentation by the researchers and coders in the coding log and cleaning document enhanced the MSU Study's consistency, accuracy and transparency. Any third party may review the coding log and cleaning document to examine the coding decisions of the study. The Court finds that the thoroughness of the documentation of the coding decisions and

transparency of all coding decisions are strong indicators to the Court of the MSU Study's reliability, validity and credibility.

Unadjusted Disparities: Statewide Evidence

253. The statewide database of the MSU Study included 7,424 venire members. Of those, 7,402 were eligible to be struck by the State. The study only analyzed the strike patterns for the venire members who were eligible to be struck, and did not include venire members where the State had already exhausted its peremptory challenges. Among strike eligible venire members, 1,212 were black and 6,183 were of other races. The Court finds that it is reasonable and appropriate to employ this methodology.

254. O'Brien testified, without contradiction, to large disparities in strike rates based on race.[28] Across all strike-eligible venire members in the MSU Study, the Court finds that prosecutors statewide struck 52.8% of eligible black venire members, compared to only 25.7% of all other eligible venire members. This difference is statistically significant with a *p*-value <.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in ten trillion. Katz, the state's statistical expert, concurred that the statewide strike ratio disparity was statistically significant.

255. The strike rate ratio is the relative rate of the percentage of black eligible venire members who were peremptorily struck by the State compared to the percentage of other eligible venire members who were struck by the State. The Court finds that the statewide strike rate ratio across all strike-eligible venire members in the MSU Study is 2.05.

[28] The MSU Study reported the data by comparing State strike rates between black venire members and the venire members of all other races. Katz confirmed, and the Court so finds, that the results are comparable when the comparison is between black and white venire members.

256. For all of the peremptory strike rates reported by the MSU Study, the numbers could be inversely reported as acceptance or pass rates. For example, the acceptance rates of eligible black venire members in the MSU Study is 100% - 52.8% = 47.2% and the acceptance rates of non-black venire members is 100% - 25.7% = 74.3%.[29]

257. The Court finds that the average rate per case at which prosecutors in North Carolina struck eligible black venire members is significantly higher than the rate at which they struck other eligible venire members. Of the 166 cases statewide that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members. The strike rate ratio based upon this disparity is 2.26. This difference is statistically significant with a *p*-value <.001. The probability of this disparity occurring in a race-neutral jury selection process is less than one in 10,000,000,000,000,000,000,000,000,000,000. Katz concurred that this disparity is statistically significant.

258. The MSU Study also analyzed the average rate per case at which prosecutors struck eligible black venire members, excluding the venire members whose race was coded from public records. Excluding these venire members, the Court finds that the disparity is substantially the same: prosecutors struck an average of 55.7% of eligible black venire members compared to only 22.1% of all other eligible venire members. This difference is statistically significant with a *p*-value <.001.

259. Woodworth testified, and the Court so finds, that there is a distinction between an odds ratio – or disparity in the use of peremptory strikes based upon race – that is statistically

[29] There were small differences in some of the statewide calculations in the *Robinson* hearing and the *Golphin, Walters,* and *Augustine* hearing based on a limited number of error corrections performed by O'Brien. The updated data was presented at the *Golphin, Walters,* and *Augustine* hearing. O'Brien testified, and the Court so finds, that these new changes did not materially change any of her prior testimony or significantly alter the data in any way.

significant and one that is substantively important. Woodworth testified that, whether an odds ratio has practical or material significance is context dependent. Woodworth explained that, for example, in the public health context, a 1.3 odds ratio – which is a 30% increased risk that a particular environmental exposure will increase the rate of a disease – constitutes a practically significant odds ratio. Applying this standard, Woodworth testified that the odds ratio of roughly 2 found by the MSU Study is "enormous" with respect to practical significance.

260. The statewide disparity in strike rates has been consistent over time, whether viewed over the entire study period, in four five-year periods, or two ten-year periods. Katz concurred that the statistical disparities within each subdivided time period are statistically significant. These disparities are as follows.

Time Period	No. of Cases	Blacks Struck	Non-Blacks Struck	Strike Rate Ratio	Statistical Significance
1990-99	122	55.8%	24.7%	2.26	$p<0.001$
2000-10	44	57.1%	25.1%	2.27	$p<0.001$
1990-94	42	57.3%	25.9%	2.21	$p<0.001$
1995-99	80	55.0%	24.0%	2.29	$p<0.001$
2000-04	29	57.5%	24.9%	2.31	$p<0.001$
2005-10	15	56.4%	25.3%	2.23	$p<0.01$

261. The probabilities that the disparities within each of these time periods occurred in a race-neutral jury selection process are exceedingly small: 1990-99, less than one in one septillion; 2000-10, less than one in ten million; 1990-94, less than one in a million; 1995-99, less than one in ten quadrillion; 2000-04, less than one in 100,000; 2005-10, less than one in 100.

262. O'Brien and Grosso also analyzed the data by prosecutorial districts and again found a strikingly consistent pattern of strike disparities. The Court finds that the average rate per case at which prosecutors in North Carolina struck eligible venire members for each prosecutorial district is as follows:

Prosecutorial District	Number of cases	Black Venire Members	Other Venire Members	Strike Rate Ratio
1	3	47.8%	23.3%	2.1
2	3	59.3%	18.3%	3.2
3A	3	59.7%	18.3%	3.3
3B	3	61.1%	20.4%	3.0
4	6	71.7%	19.0%	3.8
5	5	56.6%	27.0%	2.1
6A	2	47.4%	9.0%	5.3
6B	5	48.6%	17.3%	2.8
7	4	38.3%	17.4%	2.2
8	6	61.6%	21.8%	2.8
9A	1	42.1%	31.0%	1.4
10	10	61.5%	24.9%	2.5
11	12	48.5%	27.6%	1.8
12	11	52.7%	20.5%	2.6
13	4	59.0%	23.2%	2.5
14	1	50.0%	17.9%	2.8
15A	1	60.0%	27.8%	2.2
16A	2	40.9%	31.1%	1.3
16B	5	56.0%	21.4%	2.6
17A	2	62.5%	26.6%	2.3
17B	2	50.0%	25.3%	2.0
18	4	47.0%	23.2%	2.0
19A	3	55.6%	25.4%	2.2
19B	9	69.4%	29.0%	2.4
19C	1	16.7%	22.9%	0.7
19D	1	00.0%	31.8%	0.0
20	7	87.0%	24.0%	3.6
21	13	55.5%	24.5%	2.3
22	8	65.6%	27.4%	2.4
22.1	1	100.0%	22.0%	4.8
23	1	50.0%	31.7%	1.6
25	1	25.0%	33.9%	0.7
26	5	57.8%	27.0%	2.1
27A	7	38.7%	31.5%	1.2
28	9	56.9%	30.4%	1.9
29	5	42.0%	31.9%	1.3

Prosecutors struck black venire members at a higher rate than other venire members in all but three prosecutorial districts: 19C, 19D, and 25. In each of these three districts there was only one case represented in the MSU Study.

263. O'Brien and Grosso also analyzed the data by counties. The Court finds that the average rate per case at which prosecutors in North Carolina struck eligible venire members for each county is as follows:

County	Number of cases	Black Venire Members	Other Venire Members	Strike Rate Ratio
Alamance	1	67.67%	25.71%	2.6
Anson	1	62.50%	13.33%	4.7
Ashe	1	50.00%	31.71%	1.6
Beaufort	1	62.50%	27.03%	2.3
Bertie	2	54.73%	14.17%	3.9
Bladen	1	33.33%	26.32%	1.3
Brunswick	2	72.12%	23.24%	3.1
Buncombe	9	56.88%	30.64%	1.9
Cabarrus	1	50.00%	25.00%	2.0
Camden	1	66.67%	28.21%	2.4
Caswell	1	42.11%	33.33%	1.3
Catawba	1	25.00%	33.87%	0.7
Columbus	1	58.33%	20.00%	2.9
Craven	3	61.11%	20.43%	3.0
Cumberland	11	52.69%	20.48%	2.6
Davidson	3	77.78%	31.33%	2.5
Davie	4	54.17%	24.51%	2.2
Durham	1	50.00%	17.86%	2.8
Forsyth	13	54.17%	24.41%	2.2
Gaston	7	37.31%	31.74%	1.2
Gates	2	38.39%	20.87%	1.8
Guilford	4	45.58%	23.17%	2.0
Halifax	2	47.43%	9.02%	5.3
Harnett	5	42.97%	26.79%	1.6
Hertford	1	50.00%	23.81%	2.1
Hoke	1	36.36%	25.81%	1.4
Iredell	2	87.50%	27.18%	3.2
Johnston	7	52.38%	28.23%	1.9
Lenoir	1	44.40%	28.57%	1.6

Martin	1	88.89%	6.45%	13.8
Mecklenburg	5	56.36%	27.04%	2.1
Montgomery	1	33.33%	32.35%	1.0
Moore	2	25.00%	32.98%	0.8
Nash	1	30.00%	27.78%	1.1
New Hanover	4	54.05%	27.79%	1.9
Northampton	2	41.67%	17.26%	2.4
Onslow	3	69.44%	18.63%	3.7
Pender	1	66.67%	23.68%	2.8
Pitt	3	59.72%	18.26%	3.3
Polk	2	0.00%	33.75%	0.0
Randolph	7	77.38%	27.82%	2.8
Richmond	1	71.43%	20.00%	3.6
Robeson	5	56.00%	21.43%	2.6
Rockingham	2	62.50%	25.68%	2.4
Rowan	3	44.44%	24.69%	1.8
Rutherford	3	70.00%	30.63%	2.3
Sampson	3	73.94%	19.43%	3.8
Scotland	1	45.45%	36.36%	1.3
Stanly	2	100.00%	26.91%	3.7
Stokes	1	0.00%	31.71%	0.0
Surry	1	100.00%	18.92%	5.3
Union	3	91.67%	27.01%	3.4
Wake	10	61.50%	24.88%	2.5
Washington	1	37.50%	18.18%	2.1
Wayne	5	63.92%	20.44%	3.1
Wilson	3	41.11%	13.93%	3.0

Prosecutors struck black venire members at a higher rate than other venire members in all but four counties: Catawba, Moore, Polk and Stokes. This shows a remarkably consistent pattern of strike ratios across counties.

Unadjusted Disparities: Judicial Division Evidence

264. At the time of Golphin's capital trial, Cumberland County was in the Second Judicial Division. Since January 1, 2000, including the time of Walters' and Augustine's trials, Cumberland County has been in the Fourth Judicial Division. The Court finds as fact the

following strike ratios and disparities for the current Fourth Judicial Division, and former Second Judicial Division:

Geographic Area	Time Period	No. of Cases	Blacks Struck	Non-Blacks Struck	Strike Rate Ratio	Statistical Significance
Current Division 4	2000-10	8	62.4%	21.9%	2.84	p<0.001
Former Division 2	1990-99	37	51.5%	25.1%	2.05	p<0.001

265. The probabilities that the disparities within each of these geographic areas occurred in a race-neutral jury selection process are exceedingly small: Current Division Four, less than one in 1,000; Former Division Two, less than one in 100 billion; Cumberland County, less than one in 1,000. Katz concurred that the judicial division disparities are statistically significant.

Unadjusted Disparities: Cumberland County Evidence

266. The Court makes the following findings of facts regarding disparities in Cumberland County.[30] In Cumberland County, 11 proceedings are represented in the MSU Study for nine death row inmates. The State struck 52.7% of qualified black venire members in these Cumberland Cases, but only 20.5% of all other qualified venire members. Cumberland County's strike ratio, 2.57, is higher than the statewide average strike ratio, 2.05.

267. The Court finds that, in every case in Cumberland County, the State peremptorily challenged black venire members at a higher rate than other eligible venire members as set forth below:

[30] Cumberland County and Prosecutorial District 12 constitute the same geographic area and this has been constant during the entire period examined by the MSU Study.

Year	Defendant	Black Venire Members	Other Venire Members	Strike Rate Ratio
2002	Quintel Augustine	100.0%	27.0%	3.70
1995	Richard E. Cagle	28.6%	27.5%	1.04
1998	Tilmon C. Golphin	71.4%	35.8%	1.99
1995	John D. McNeil	60.0%	13.6%	4.40
1995	Jeffrey K. Meyer	41.2%	19.0%	2.16
1999	Jeffrey K. Meyer	50.0%	15.4%	3.25
1994	Marcus Robinson	50.0%	14.3%	3.50
2000	Christina S. Walters	52.6%	14.8%	3.55
1994	Philip E. Wilkinson	40.0%	23.3%	1.71
2005	Eugene J. Williams	38.5%	15.4%	2.50
2007	Eugene J. Williams	47.4%	19.0%	2.49

268. In 10 of the 11 Cumberland County cases, the Court finds that prosecutors struck black jurors at a significantly higher rate than other eligible venire members, with only one case (*State v. Richard E. Cagle*) having almost an equal strike rate. The strike rate ratio and the disparity represented by the strike rate ratio in eight of the 11 cases is higher than the disparity seen in the statewide data of the MSU Study.

Unadjusted Disparities Unique To Each Defendant

269. Defendants presented three groups of statistical analyses tailored to the time of their cases. First, defendants presented the strike ratios for their individual cases: 2.0 (Golphin), 3.6 (Walters), and 3.7 (Augustine). The Court finds that these strike ratios are highly probative evidence, and, standing alone, constitute some evidence of discrimination "in the defendant's case."

270. Second, Defendants presented the county and statewide results of time "smoothing" analyses performed by Woodworth. Time smoothing analyses consider all of the data over a broad period of time, and allow the researcher to examine relationships in the data for

a specific point in time. Woodworth has utilized this time smoothing analysis in the past, has published articles utilizing the analysis in peer reviewed publications and knows of its accepted use by professionals in environmental and medical research. The time smoothing analysis gives a kind of running average of an odds ratio over time, giving other trials closer in time to the point of analysis more weight. It allows the confidence interval to be determined on the exact date of Defendants' trials.

271. The Court finds that the smoothing analysis performed by Woodworth is an accepted and appropriate method of calculating the odds of being struck between black and nonblack venire members for the exact date of Defendants' trials. The Court credits the testimony of Woodworth that this method is a superior statistical method because it allows the researcher to use all of the available data.

272. Third, Defendants presented evidence from the "statutory windows." The statutory window is defined as the period spanning ten years prior to the commission of the offense to two years after the defendant's sentence was imposed. The statutory window analyses limited the data from the MSU study to just those cases that fell within the statutory window for each defendant, and excluded all data from outside the window. The Court finds the statutory window analysis directly relevant to the question whether there was discrimination within this period. The Court notes that this analysis does not include the broader evidence from the surrounding years, data which may be relevant to whether there was discrimination within the statutory window itself. Nonetheless, the analysis is highly relevant and probative of the precise question at issue, and accordingly, the Court affords it significant weight.

Unadjusted Disparities: *State v. Golphin* (1998)

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

274. The smoothing analysis of the unadjusted statewide data reflected an odds ratio above 3.0 for 1998, the time of Golphin's trial. This disparity was also statistically significant. The 95% confidence interval spanned from odds ratios of two and five and excluded the null hypothesis. This is strong evidence that in 1998 race was correlated with prosecutor strike decisions statewide.

275. Similarly, the smoothing analysis of the unadjusted Cumberland County data reflects an odds ratio of approximately 4.0 for 1998, the time of Golphin's trial. This disparity was also statically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 1998 race was correlated with prosecutor strike decisions in Cumberland County.

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

Cumberland study between September 23, 1987 and May 13, 2000.[31] Looking only at those cases, the average rate of the State's strike ratio against black venire members in Cumberland County is 2.29. This difference in strike rates for Cumberland County cases in Golphin's statutory window is statistically significant with a p-value < .01.

Unadjusted Disparities: *State v. Walters* (2000)

277. The strike ratio for strikes against black venire members in Walters's case was 3.6. The State used 10 of its 14 peremptory strikes to remove black venire members. The State struck 10 of the 19 black venire members (52.6%) in Walters' case, and only four of the 27 non-black venire members in Walters' case (14.8%). The difference between the 52.6% strike rate against black venire members and 14.8% strike rate against all other venire members is statistically significant with the *p*-value < .01.

278. The smoothing analysis of the unadjusted statewide data reflected an odds ratio above 3.0 for 2000, the time of Walters' trial. This disparity was also statistically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 2002 race was correlated with prosecutor strike decisions statewide.

279. Similarly, the smoothing analysis of the unadjusted Cumberland County data reflects an odds ratio above 4.0 for 2000, the time of Walters' trial. This disparity was also statistically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 2000 race was correlated with prosecutor strike decisions in Cumberland County.

280. The statutory window analysis is further evidence of disparate treatment of black venire members at the time of Walters' trial. There were eight capital proceedings in the MSU

[31] The jury selection proceedings for Quintel Augustine, Christina Walters, and both Jeffrey Meyer trials, fall outside of Golphin's statutory window and were excluded for the purpose of these analyses.

Cumberland study between August 17, 1998 and July 6, 2002.[32] Looking only at those cases, the average of the State's strike ratio against black venire members in Cumberland County cases is 2.4. This difference is strike rates is statistically significant with a p-value < .01.

281. The raw unadjusted data, whether viewed within the prescribed statutory windows of Defendants' cases or over the entire study period, constitutes powerful evidence that race was a significant factor in the State's exercise of peremptory strikes at the time of Defendants' trials. This evidence weighs very heavily in favor of finding a prima facie case, and finding that race was a significant factor in the State's exercise of peremptory strikes at the time of Defendants' trials.

Unadjusted Disparities: *State v. Augustine* (2002)

282. The strike ratio for strikes against black venire members as compared to all other venire members in Augustine's own case was 3.7. In Augustine's case, the State questioned and struck or passed a total of 42 venire members. Of the 42 venire members for whom the State questioned and either struck or passed, five were black (14%). The State struck all five, or 100 percent, of the eligible black venire members in Augustine's case, passing no black venire members to defense counsel. As a direct result of the State's strikes, the final jury in Augustine's case was all white. If the final jury composition had been representative of this percentage of eligible black venire members, there would have been two black venire members selected for the final jury (including alternates). The Court finds that the reduction of the qualified black venire members from 14% to 0.0% caused an impact on the final composition of Augustine's jury by reducing the number of black jurors from two to zero.

[32] The jury selection for Quintel Augustine and the two trials for Jeffrey Meyer fall outside of Walters' statutory window and were excluded for the purpose of these analyses.

283. The State struck 10 of the other 37 venire members it questioned, or 27% of all other venire members in Augustine's case. The difference between the 100% strike rate against black venire members and 27% strike rate against all other venire members is statistically significant with the p-value < .01.

284. The smoothing analysis of the unadjusted statewide data reflected an odds ratio above 3.0 for 2002, the time of Augustine's trial. This disparity was also statistically significant. The 95% confidence interval spanned from odds ratios of three to six and excluded the null hypothesis. This is strong evidence that in 2002, race was correlated with prosecutor strike decisions statewide.

285. Similarly, the smoothing analysis of the unadjusted Cumberland County data reflects an odds ratio above 4.0 for 2002, the time of Augustine's trial. This disparity was also statically significant. The 95% confidence interval excluded the null hypothesis. This is strong evidence that in 2002 race was correlated with prosecutor strike decisions in Cumberland County.

286. The statutory window analysis is further evidence of disparate treatment of black venire members at the time of Augustine's trial. There were nine capital proceedings in the MSU Cumberland study between November 29, 1991 and October 22, 2004.[33] Looking only at those cases, the State's strike ratio against black venire members in Cumberland County is 2.59. This difference is strike rates is statistically significant with a p-value < .01.

287. O'Brien and Woodworth performed various analyses including Augustine's case as part of Cumberland County. They chose to treat Augustine as part of Cumberland County because they were studying prosecutor strike decisions, and the prosecution office which made

[33] The two jury selections for Jeffrey Meyer fall outside of Augustine's statutory window and were excluded for the purpose of these analyses.

the strike decisions is from Cumberland. The Court finds this analysis to be appropriate. The State urges, based upon the statutory language, only statistical evidence from the county where the defendant was sentenced to death should be admitted. The State contends that because Augustine was sentenced to death in Brunswick County after a change of venue, only Brunswick County data is appropriate. Although the Court rejects this argument, it considers in the alternative the data presented from Brunswick County. The strike ratio for the two Brunswick County capital cases in the MSU study is 3.1. Augustine's own strike ratio is 3.7. Including Augustine with the Brunswick County yields a County strike rate of 3.3.[34] This disparity is strong evidence that race was a significant factor in the State's exercise of peremptory strikes in Brunswick County cases at the time of Augustine's trial.

Controlled Regression Analysis: Statewide Evidence

288. In Part II of the MSU Study, the researchers examined whether the stark disparities in the unadjusted data were affected in any way by other potential factors that correlate with race but that may themselves be race-neutral.

289. The first controlled analysis that the MSU Study performed was a type of cross-tabulation. To explore the relationships between possible explanatory factors and the observed racial disparities, the MSU Study simply removed venire members with a particular characteristic from the 25% random sample data set and then analyzed strike patterns for the remaining venire members. The study identified four explanatory factors to assess using this procedure, removing: (1) venire members with any expressed reservations on the death penalty,

[34] The two Brunswick County capital cases are Daniel Cummings and Darrell Maness. The strike rate ratio for Daniel Cummings is 2.83 (75.00%/26.47%) and the strike rate ratio for Darrell Maness is 3.46 (69.23%/20.00%). The average of the three strike rate ratios, 2.83, 3.46, and 3.70 is 3.33. The Cummings jury selection was in 1994, and falls within Augustine's statutory window. The Maness jury selection was in 2006, and thus falls outside of Augustine's statutory window. Considering only the strike rates for Augustine and Cummings, the Brunswick County strike ratio is 3.27.

(2) unemployed venire members, (3) venire members who had been accused of a crime or had a close relative accused of a crime, (4) venire members who knew any trial participant, and (5) all venire members with any one of the four characteristics. The theory was that if a particular explanatory factor were the true explanation for the observed racial disparity, when venire members with that factor were removed, the collection of remaining venire members would no longer reflect racially disparate strike rates. For example, if venire members' death penalty reservations were the true explanation for the apparent observed relationship between race and strike decision, then removing all venire members who expressed death penalty reservations would cause the racial disparities seen in the unadjusted analysis to disappear for the remaining venire members.

290. These cross-tabulations did not dispel the link between race and prosecutor strike decisions. As shown in the following table, even after each of the foregoing categories of venire members were removed from the 25% statewide sample, disparities in prosecutors' use of peremptory strikes persisted in the remaining sample.

Type of Jurors Removed	**No. of Jurors Removed**	**Blacks Struck**	**Non-Blacks Struck**	**Strike Rate Ratio**	**Statistical Significance**
Death Penalty Reservations	192	42.9%	20.8%	2.1	$p<0.001$
Unemployed	26	48.7%	24.7%	2.0	$p<0.001$
Accused of Crime	399	50.3%	23.6%	2.1	$p<0.001$
Knew Trial Participant	47	53.3%	25.3%	2.1	$p<0.001$
All Four Categories	583	33.9%	17.8%	1.9	$p<0.001$

291. The factors that the MSU Study controlled for in the aforementioned analysis were chosen because, based upon O'Brien's review of *Batson* litigation and the race-neutral

reasons offered by prosecutors during *Batson* arguments at trial, they were commonly considered to make a venire member less attractive to the prosecution. O'Brien reviewed the affidavits provided by prosecutors with purported explanations for strikes of black venire members and found that these explanations were in fact frequently the explanations given by North Carolina prosecutors. The Court finds that these four factors are among the most common and ubiquitous explanations given by prosecutors throughout North Carolina for exercising peremptory strikes of venire members.

292. The Court finds that the disparities in prosecutorial strike rates against eligible black venire members persist at a constant level even when other characteristics the Court might expect to bear on the decision to strike are removed from the equation and these disparities remain stark and significant. The Court finds that the foregoing analysis suggests that those non-racial factors do not explain the racial disparity shown in the unadjusted study.

293. While the MSU analysis is probative and instructive to the Court, this Court is aware that the decision to strike or pass a potential juror can turn on a number of factors in isolation or combination. The MSU researchers also acknowledged this in their study and then appropriately and adequately controlled for the variables and combination of variables through a statistical logistic regression analysis.

294. O'Brien and Grosso, with the use of SPSS statistical software that is accepted as reliable by social scientists and statisticians, developed a fully-controlled logistic regression model based upon carefully and scientifically selected statistically significant and relevant predictor variables that bore on the outcome of interest – the strike decisions by the prosecutors. Out of approximately 65 candidate variables, O'Brien and Grosso, using the SPSS statistical software, identified 13 non-racial variables for inclusion into the fully controlled logistic

regression model. These non-racial variables were selected by the SPSS software program because of their low *p*-value and predictive value. Each of these variables has a very low *p*-value, indicating high statistical significance. The Court finds that each of these 13 variables is a potential alternative explanation for apparent race-based disparities. Further, these factors are highly representative of the explanations given by prosecutors as factors used in their exercise of peremptory strikes.

295. Before building the logistic regression model, O'Brien screened for interactions among variables.[35] Variables "interact" if together the variables demonstrate something beyond the main effect of the variables. If two variables each independently contribute to the risk of the outcome occurring, they would "interact" if the effect of the combination is more than merely additive. After investigation, O'Brien was satisfied that there were no interactions that should be included in the final model. Woodworth independently screened for interactions between race and the candidate variables. He also was satisfied that there were no interactions that should be included in the final model.

296. The predictive non-racial variables the MSU Study identified and the results of the statewide logistic regression analysis, which the Court finds is credible, are as follows.

Variable with description	**Odds Ratio**
Expressed reservation about death penalty	12.41
Not married	1.72
Accused of crime	2.00
Concerned that jury service would cause hardship	2.81
Homemaker	2.31
Works or close other works with police or prosecutor	0.46
Knew defendant	11.03
Knew a witness	0.50
Knew attorney in the case	2.03

[35] O'Brien and Grosso also initially investigated whether a hierarchical model would be necessary. They consulted with a specialist in this area of analysis, and determined that such a model would be neither necessary nor appropriate in this case.

Expressed view that suggests favorable to State	0.13
Attended graduate school	2.62
22 years of age or younger	2.37
Works or close other works as or with defense attorney	2.31

With respect to the foregoing odds ratios, the Court notes that an odds ratio of one represents an even chance of being struck. If the odds ratio is higher than one, the chances of being struck by the State are increased. If the odds ratio is less than one, the chances of being struck by the State are decreased.

297. After fully controlling for the 13 non-racial variables which the Court finds are highly predictive for prosecutorial strike decisions, the race of the venire member is still statistically significant with a *p*-value <.001 and an odds ratio of 2.31, which is similar to the strike rate ratio seen in the unadjusted data. There is a 95% chance that the odds of a black venire member being struck by the State, after controlling for non-racial variables, is between 1.57 and 3.31 times higher than the odds of other venire members being struck. The Court finds that this result is very powerful evidence that race was a significant factor in the exercise of peremptory strikes statewide and is more likely than not the result of intentional discrimination by prosecutors.

298. On cross-examination, O'Brien reviewed early handwritten notes regarding the construction of her model, as well as log files related to the regression models she introduced. These notes and models are consistent with her testimony that she relied upon commonly accepted methods of model building. O'Brien tried multiple different methods of model building, including but not limited to, building a forward conditional "step wise" model, to ensure that the results she observed were robust and stable. The Court finds that the fact that O'Brien used multiple methods and achieved the same, stable results increases the reliability of the study.

299. The appropriateness of O'Brien's model selection was additionally confirmed by the testimony of Woodworth. Woodworth replicated the analysis of the MSU researchers utilizing a different statistical software program, SAS, and achieved the exact same results. SAS is widely accepted as reliable by statisticians. Woodworth, using SAS, independently selected the appropriate explanatory race-neutral variables. He found the most highly explanatory variables matched precisely with the variables which were initially identified by MSU. Woodworth found that some of the less significant variables differed in these models, but these changes made virtually no difference in the odds ratio for black venire members. Woodworth testified and the Court so finds that the ability of the racial disparity to withstand various properly constructed alternative models supports a robust finding that race was a significant factor in prosecutor's use of peremptory strikes.

300. Multiple analyses were conducted by O'Brien, Grosso, and Woodworth to determine if any missing data within the variables skewed the findings of the fully controlled logistic regression model, including a method known as multiple imputation of missing data, which is an accepted standard statistical procedure used to determine whether missing data is affecting statistical findings. Alternative analyses imputed the missing data but did not materially alter the odds ratio relative to black venire members. The missing data did not skew the results found by the researchers and the Court finds that the missing data does not invalidate or bias the MSU findings in any way.

301. In addition to the cross-tabulation tables and the regression models, the MSU researchers performed additional analyses that support a finding that race was a significant factor in the exercise of peremptory strikes. As described in greater detail in separate sections of this Order, many prosecutors in North Carolina provided to Katz explanations for striking black

venire members. Statewide, the most common reasons that prosecutors provided to Katz were that the venire members expressed reservations or ambivalence about the death penalty and that they, or someone close to them, had been accused of a crime. These two reasons were also proffered by Katz as possible race-neutral explanations for the disparities. The MSU researchers had collected data on both of these factors and were able to do an analysis of these two factors by examining the acceptance rates of venire members based upon race within each of the factors. If these factors are motivating prosecutors to exercise their peremptory strikes, as this Court finds that they are, then there should be equivalent strike patterns among races within these individual factors. By way of example, the Court notes that it is entirely reasonable for prosecutors to be motivated to strike venire members who express a reservation about the death penalty; however, one would expect that there would not be a significant difference in the percentage of venire members accepted by the State between black and other eligible venire members who express such reservations.

302. Statewide, among the 191 venire members in the MSU Study who expressed reservations about the death penalty, the State accepted 9.7% of the black venire members but accepted 26.4% of the other venire members. This disparity is statistically significant.

303. In North Carolina, among the 398 venire members in the MSU Study who themselves or a family member or close friend had been accused of a crime, the State accepted 42.1% of the black venire members but accepted 66.7% of the other venire members. This disparity is statistically significant.

304. The Court finds that the racial disparities in prosecutorial strikes seen within these individual variables are compelling evidence of discrimination as there are no valid reasons for the disparities.

Controlled Regression Analysis: Cumberland County

305. O'Brien and Grosso also developed a fully controlled logistic regression model for Cumberland County based upon carefully and scientifically selected statistically significant and relevant predictor variables that bore on the outcome of interest – the strike decisions by the prosecutors. With respect to Cumberland County, the MSU Study analyzed 100% of the venire members in the eleven capital cases. Out of approximately 65 candidate variables, O'Brien and Grosso, using the SPSS statistical software, selected eight non-racial explanatory variables for inclusion into the fully controlled logistic regression model shown on Table 13 of the MSU Study. These factors are highly representative of the explanations given by the Cumberland County prosecutors. Each of these variables has a low *p*-value indicating high statistical significance and is a factor and alternative explanation the Court finds is a practical predictor variable. Only one variable, "leans ambiguous," has a *p*-value > .05, but the Court is satisfied that there is a theoretical and statistically valid purpose for inclusion of this variable in the model; specifically, its marginal significance and its exclusion does not materially change the results.

306. O'Brien testified, and the Court finds as a fact, that the non-racial variables controlled for in the regression analysis of this study population differed from the 25% sample because, in Cumberland County, different non-racial variables had a statistically significant effect in predicting prosecutors' use of peremptory strikes. For example, in Cumberland County, the data reveal that no venire member knew the defendant, thus the Court would not expect this variable to appear in the Cumberland County model.

307. The predictive non-racial variables the MSU Study identified in Cumberland County and the results of the logistic regression analysis, which the Court finds is credible, are as follows.

Variable	Odds Ratio
Expressed reservation about death penalty	24.12
Unemployed	6.76
Accused of crime, or had close family/friend who was	2.21
Concerned that jury service would cause hardship	4.17
Job that involved helping others	2.69
Blue collar job	2.82
Expressed view that suggested bias or trouble following law, but the direction of bias is ambiguous	2.56
22 years of age or younger	4.00

308. After fully controlling for eight variables the Court finds are highly predictive for prosecutorial strike decisions, the race of the venire member is still statistically significant with a *p*-value <.01 and an odds ratio of 2.40, which is similar to the strike rate ratio seen in the unadjusted data. There is a 95% chance that the odds of a black venire member being struck by the State in Cumberland County, after controlling for non-racial variables, is between 1.39 and 4.14 times higher than the odds of other venire members being struck.

309. O'Brien and Grosso also analyzed the Cumberland County data set based on the explanations Cumberland County prosecutors commonly proffered in their affidavits: death penalty reservations, having been accused personally of a crime, or having a close family member or friend who had, and financial hardship.

310. In Cumberland County, among the 72 venire members in the MSU Study who expressed reservations about the death penalty, the State accepted 5.9% of the black venire members but accepted 26.3% of the other venire members. This disparity is statistically significant. Of the 159 venire members in the MSU Study who themselves or a family member

or close friend had been accused of a crime, the State accepted 40.0% of the black venire members but accepted 73.7% of the other venire members. This disparity is also statistically significant. And among the 20 venire members in the MSU Study who expressed that jury service would impose a hardship on them, the State accepted 14.3% of the black venire members but accepted 61.5% of the other venire members. This disparity is also statistically significant.

311. The Court finds that the racial disparities in prosecutorial strikes seen within these individual variables is additional compelling evidence of discrimination.

Controlled Regression Analysis: *State v. Golphin* (1998)

312. As with the unadjusted analyses, Defendants presented adjusted analyses that are specific to the times of trial for each defendant. These analyses include statewide and Cumberland County "time smoothing" analyses, and regression analyses based on data that falls only within each defendant's individual statutory window.

313. Woodworth conducted adjusted time smoothing analyses statewide and in Cumberland County to calculate an odds ratio at the time of Golphin's trial. The odds ratio at the time of Golphin's trial in 1998 for a black venire member being struck by the State in capital cases across North Carolina, after controlling for appropriate factors, is just above two. This finding excludes the null hypothesis and is statistically significant. He performed a similar smoothed, adjusted analysis using the Cumberland County data. This analysis reflected an odds ratio at the time of Golphin's trial of approximately 2, and is also statistically significant.

314. Woodworth and O'Brien each performed a regression analysis including the seven Cumberland County cases that fell within Golphin's statutory window. O'Brien constructed a new model for Golphin using these cases by first screening all of the potential candidate variables to determine which variables to include in the model, and following the same

scientific modeling practices she previously described for the statewide and Cumberland County models. The model was very similar to the full Cumberland County model. Based on this model, O'Brien found that race was a significant factor with an odds ratio of 2.11 and a p-value <.05, even after controlling for other explanatory variables in the model.

315. O'Brien observed significant similarities among the unadjusted and adjusted results for Golphin, and among the results using the full Cumberland County model and Golphin's statutory window model. These similarities gave her additional confidence that the observed relationship between race and prosecutorial strike decisions in Golphin's statutory window was not merely due to chance.

316. Woodworth conducted a logistic regression analysis based exclusively on the data from Cumberland County in Golphin's statutory window, and adjusted for the factors that were identified as significant in the Cumberland County statutory model. The adjusted odds ratio using data in Golphin's statutory window was 2.09, and it was statistically significant.

Controlled Regression Analysis: *State v. Walters* (2000)

317. Woodworth further analyzed the data from Part II of the MSU Study with the same time smoothing analysis that he performed on the unadjusted data. The smoothing allowed him to use all of the data from the full study period to calculate an odds ratio at the time of Walters' trial. The odds ratio at the time of Walters' trial in 2000 for a black venire member being struck by the State in capital cases across North Carolina, after controlling for appropriate factors, is just above five. This finding excludes the null hypothesis and is statistically significant. He performed a similar smoothed, adjusted analysis using the Cumberland County data. This analysis reflected an odds ratio at the time of Walters' trial of approximately 3, is also statistically significant.

318. O'Brien and Woodworth each performed a regression analysis using the eight Cumberland County cases that fell within Walters' statutory window. As with Golphin, O'Brien built a new regression model for Walters. The odds ratio for black venire members being struck for all Cumberland County cases in Walters' statutory window was 2.61, and the p-value <.01.

319. Woodworth also conducted a logistic regression analysis based only on the data from Cumberland County in Walters' statutory window and adjusted for the factors that were identified as significant in the Cumberland County statutory model. The adjusted odds ratio using data in Walters' statutory window is 2.47, and it is statistically significant.

Controlled Regression Analysis: *State v. Augustine* (2002)

320. Woodworth further analyzed the data from Part II of the MSU Study with the same time smoothing analysis that he performed on the unadjusted data. The smoothing allowed him to use all of the data from the full study period to calculate an odds ratio at the time of Augustine's trial. The odds ratio at the time of Augustine's trial in 2002 for a black venire member being struck by the State in capital cases across North Carolina, after controlling for appropriate factors, is just above five. This finding excludes the null hypothesis and is statistically significant. Woodworth performed a similar smoothed, adjusted analysis using the Cumberland County data. This analysis reflected an odds ratio at the time of Augustine's trial of approximately 3.0, and is also statistically significant.

321. O'Brien and Woodworth each performed regression analysis using the nine cases that fell within Augustine's statutory window. As with Golphin and Walters, O'Brien constructed a new model for Augustine. The odds ratio for black venire members of being struck in the regression model for Augustine's statutory window was 2.61, with a p-value <.01.

The 95% confidence interval for the odds ratio was 1.41 to 4.81, indicating that there is a 95% certainty that the true odds ratio lies within this range.

322. Woodworth conducted a logistic regression analysis based only on the data from Cumberland County in Augustine's statutory window and adjusted for the factors that were identified as significant in the Cumberland County statutory model. The adjusted odds ratio using data only in Augustine's statutory window was 2.61, and it was statistically significant.

Convergence and General Observations

323. From the narrow lens of Golphin, Walters, and Augustine' individual cases to the panoramic view afforded by the full statewide study, the disparity in prosecutor strike rates is remarkably consistent. The disparities, in both the unadjusted and adjusted data, are large and striking, and the conclusions of the statistical models are robust.

324. None of the alternate explanations frequently cited by the State explain the disparities in any of the models. O'Brien testified, and this Court finds as fact, that no regression analysis model with any combination of non-racial potential explanatory variables was ever identified that revealed the predictive effect of race to be attributable to any non-racial variable.

325. The Court finds that the magnitude of the effect of race on predicting prosecutorial strikes in the MSU Study is so robust that the inclusion of another variable, even if predictive of outcome, is not likely to not explain the racial disparity.

326. O'Brien testified, and this Court finds as fact, that in North Carolina and Cumberland County, throughout the 20-year study period, being black does predict whether or not the State will strike a venire member, even when holding constant or controlling for non-racial variables that do affect strike decisions. When those predictive, non-racial variables are controlled for, the effect of race upon the State's use of peremptory strikes is not simply a

compound of something that is correlated or associated with race; race affects the State's peremptory strike decisions independent of the other predictive, non-racial factors.

327. The findings of the fully-controlled logistic analysis performed by MSU researchers are consistent with other jury studies that have been completed in the United States, specifically including the Philadelphia County study, which was similar to the MSU Study, a study performed by Mary Rose in Durham, North Carolina, and a study by the *Dallas Morning News* of jury selection in Texas. The Court finds that the similarity of the findings in the MSU Study with other reported jury studies finding racial bias in jury selection lends validity to the MSU Study.

328. In light of all of the statistical evidence presented, the Court finds that the statistical evidence constitutes strong evidence that race was a significant factor in the State's decision to exercise peremptory challenges throughout the State of North Carolina and Cumberland County throughout the full study period, between 1990 and 2010, and at the time of Defendants' trials, and in Defendants' own cases.

Adjusted Analysis Used Appropriate Variables

329. A chief criticism of the State, through their expert Katz, was that the MSU Study failed to appropriately define and include all relevant variables in its analysis. Katz noted that O'Brien and Grosso did not code for variables that could not be captured from the written record in the case. As described below, O'Brien and Grosso created a candidate variable list of 65 factors that could potentially explain strike decisions. The Court finds that the State has presented no credible evidence that the MSU Study failed to consider any non-racial variable that might affect strike decisions and which could correlate with race and provide a non-racial explanation for racial disparities.

330. Woodworth testified and the Court finds that in determining whether variables are statistically appropriate, one must look at the quality of the variable, which is determined by its validity and reliability. Validity means that the variable actually measures what it purports to measure. Reliability means that two different people assessing whether or not a variable is present would most of the time concur. Woodworth testified and the Court so finds that the MSU researchers took appropriate measures to ensure reliability and validity of its variables.

331. O'Brien and Grosso used generally accepted methodology for ensuring reliability and validity for this empirical research and the Court finds the candidate variables and explanatory variables utilized by them are statistically appropriate, reliable and valid.

332. O'Brien and Grosso did not capture in the study non-verbal information that may have been relied upon by prosecutors, such as negative demeanor. For a variable such as negative demeanor to have any impact on the findings of the MSU Study in the adjusted (Part II) analysis, it must correlate both with race and prosecutorial strike decisions. In other words, black venire members must, overall, more frequently display negative demeanors than other venire members. O'Brien presented testimony, and the Court finds as a fact, that there is no evidence to suggest that objectionable demeanor is correlated with race, and thus the absence of the non-verbal information being captured in the study does not affect the findings of the MSU Study.

333. In reviewing the purported race-neutral explanations provided by the prosecutors statewide and from Cumberland County, it is clear that the vast majority of the stated reasons for striking the black venire members appear in the trial record. In the affidavits provided by Cumberland County prosecutors, every purported race-neutral explanation appears in the trial

record.[36] The Court further finds that the MSU Study has collected information on all potential non-racial variables that might bear on the State's decision to exercise peremptory challenges and which could correlate with race and provide a non-racial explanation for the racial disparities found in the unadjusted (Part I) analysis.

334. In his report, Katz further criticized some of the explanatory variables defined and selected by the MSU researchers. O'Brien agreed with Katz, and the Court so finds, that one variable was imprecise initially because it sought information regarding venire members who worked in law enforcement or who had close friends or family members who worked in law enforcement. The definition of "law enforcement" was overly broad. For example, it included prosecutors and public defenders who have the potential for opposing biases. In light of this criticism, O'Brien and Grosso determined it would be appropriate to recode the variable. They used the existing information in the database and recoded the variable into more precise sub-variables, thus remedying this error with the variable. Katz could have done this same recoding but did not. This error did not skew, bias, or invalidate the findings of the MSU Study. Although the recoding created better variables, and thus improved the statewide model slightly, it did not significantly alter the statewide model, nor materially alter the odds ratio for black. The recoding did not affect the Cumberland County model.

335. O'Brien did not agree with Katz's other criticisms of variable definitions, and the State failed to show in any way why any of the other variables were inappropriate. The State did not introduce any recoding or alternative coding, despite the fact that it had the data available to do so. Katz offered no evidence to suggest that recoding any of the variables altered the

[36] The Court notes one qualification to this finding. Dickson testified that, in *Meyer (1995)*, the lack of eye contact exhibited by African-American venire member Tera Farris was one basis on which Dickson exercised a peremptory strike against her; however, Colyer's affidavit failed to mention this.

findings of the MSU Study. The Court finds that the absence of such analysis is an indication of the validity and reliability of the variables

336. The Court rejects the remainder of Katz's criticisms of the variables. The Court further finds that the MSU Study controlled for all significant variables that influence prosecutorial strike decisions. The Court additionally finds that the presence of idiosyncratic reasons for strike decisions by prosecutors do not influence, bias or skew the findings of the MSU Study.

337. O'Brien and Grosso's acceptance of critique of the MSU Study and willingness to correct issues with the study are positive indicators of the validity of the MSU Study and the credibility of the researchers.

338. Finally, the Court notes that established case law in the field of discrimination rejects the approach taken by the State here: namely, to attempt to discredit a regression model by merely suggesting that the model should have included other factors. *See, e.g., Catlett v. Missouri Highway & Transp. Comm'n*, 828 F.2d 1260, 1266 (8th Cir. 1987) ("M]ere conjecture or assertion on [a] defendant's part that some missing factor would explain the existing disparities between men and women generally cannot defeat the inference of discrimination created by [a] plaintiff['s] statistics."). Moreover, even if the State had met this burden, and had pointed to some appropriate variable that was not included, "it is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a [party']s case." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

The MSU Study's Responsiveness To New Information

339. The Court's confidence in the reported results and findings of the MSU study is strengthened by the consistency in the findings over time and the researchers' willingness to

constantly update their work to reflect the most accurate information. As described below, the MSU researchers timely provided the State with all of their underlying data and analyses. The State, through the efforts of their statistician, Katz, and prosecutors around the State identified a number of purported errors. The MSU researchers diligently reviewed every purported error, and when appropriate, made changes to their data and analyses.

340. The MSU researchers initially produced to the State a complete and thorough written report of the jury study, dated July 20, 2011, in the context of the *Robinson* litigation. The State sought, and received, multiple continuances of the evidentiary hearing in that case. In response to new discovery deadlines, the MSU researchers produced updated versions of the same written report on September 29, 2011, and December 15, 2011. The MSU Study included many thousands of coding decisions and data entries into the database which support the analyses by the researchers. Every time the MSU researchers identified any kind of error, in coding, data entry, or otherwise, they updated their database.

341. After the December disclosures by O'Brien, the State, through Katz's report, contended that the database contained some errors. Specifically, Katz identified 20 purported errors with 18 venire members in the database, including only four race-coding errors in the entire data set. This assertion by Katz was made after the State had received all of the DCIs, all of the primary source documents and all database entries from the MSU Study. O'Brien examined each purported error identified by Katz and determined, and the Court so finds, that nine of the 20 purported errors were in fact errors, and 11 were not.

342. In addition to the purported errors identified by Katz, the State provided the defense with numerous affidavits, spreadsheets, or statements from prosecutors throughout the State which intended to state race-neutral reasons for striking black jurors in capital cases. These

documents asserted there were additional errors in the coding by MSU, specifically that there were 35 additional coding errors for 32 venire members.

343. O'Brien examined each purported error identified by prosecutors and determined, and the Court so finds, that 10 of the 35 additional purported errors were in fact errors, and 25 were not. O'Brien testified at the *Robinson* hearing in February that she had updated the database to correct all of the identified errors.

344. O'Brien testified in these hearings that she has continued to update the database when she becomes aware of any errors. In the many months since the *Robinson* hearing, additional prosecutor affidavits were generated from some of the districts that had not complied with Katz's earlier request for reviews of the MSU study. These were provided to O'Brien. Since February 2011, O'Brien has identified, and corrected the database to reflect, a total of five errors. These five errors included one venire member whose strike eligibility was erroneously coded and four venire members whose strike information was erroneously coded. Correcting these errors did not make any significant difference in the models.

345. The Court finds the miniscule number of errors in such a large database to be remarkable and a strong indicator of the validity, reliability and credibility of the MSU Study. This exceptionally low error rate is a reflection of the great degree of care in data collection and coding taken by the MSU researchers. Assuming *arguendo* that all 55 purported errors identified by the State were actual errors, this is such a small error rate that it would not skew or invalidate the findings of the MSU Study.

346. None of the corrections made to the MSU Study since the first version produced to the State in July 2011 has had any significant impact on the racial disparity of strikes by prosecutors in any time period or any geographical region of North Carolina. The consistent

finding in all the models produced by MSU is that race was a significant factor in the prosecutorial strike decisions.

347. O'Brien did further analyses for this Court which she referred to as "shadow coding." This methodology involved incorporating every purported coding error in the manner which the State contends it should have been coded by recoding the data per the State's assertion. This new coding is the shadow coding and while it is not necessarily accurate or true, it gives the State every benefit of the doubt, produces results that are in a light most favorable to the State and skews the results in the favor of the State. The Court notes that Katz could have easily done this analysis but no such analysis was produced by the State or introduced into evidence by the State.

348. The shadow coding also included every instance where a prosecutor indicated there was some non-verbal reason for striking the venire member that did not appear in the written record. For the shadow coding, O'Brien coded the non-verbal behavior as the code "leans defendant" to reflect some bias for the defendant. This allowed O'Brien to incorporate every reason the prosecutors offered for striking a particular black venire member.

349. With the shadow coding analysis, in the statewide fully-controlled logistic regression model shown in Table 12 of the MSU Study, the race of the venire member is still statistically significant with a p-value <.02 and an odds ratio of 1.99. In Cumberland County, in the fully-controlled logistic regression model shown in Table 13 of the MSU Study, the race of the venire member is still statistically significant with a p-value <.02 and an odds ratio of 2.02. Even viewed in a light most favorable to the State, giving the State every benefit of the doubt and skewing the results in its favor, race was still a significant factor in decisions to exercise

peremptory challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases in North Carolina and Cumberland County.

350. The Court finds that adhering to principles of academic excellence and valid scientific quality control, O'Brien and Grosso, corrected errors in their database as they became known to them in order to provide the most accurate and transparent information in their analyses. They were constantly alert and actively searching for any kind of inconsistencies or disputes of coding in the data and they then resolved them in a transparent fashion. These corrections were made after the December 15, 2011, MSU Study report.

351. The Court finds that, based upon the very small number of errors detected by the State, the MSU researchers' adherence to appropriate and strict coding protocol to prevent researcher bias, documentation of coding discrepancy decisions and continued quality control, the Court finds the MSU database to be accurate.

Overall Findings Regarding The MSU Study

352. In addition to the other findings herein, the Court finds the following with respect to the MSU Study:

- An empirical legal study requires researchers to have sufficient knowledge and qualifications in the legal concepts, study design, methodology, data collection and statistical analyses, and O'Brien possesses all of these skills;
- The researchers, O'Brien and Grosso, are competent and qualified researchers to perform an empirical legal study such as the MSU Study;
- O'Brien has the legal training and background which is necessary for an empirical study such as the MSU Study;
- All aspects of the study are well-documented and transparent such that the entire study is replicable by other researchers;
- The thorough documentation of the coding decisions increases the transparency and replicability of the study by other researchers;

- The study was well-designed from inception with a clear, precise and relevant research question;

- The blind race coding minimized researcher bias and resulted in accurate race coding of the venire members;

- The coders and individuals entering the data into the database were well-qualified and well-trained;

- The researchers received no financial remuneration for their work on the study except their normal salary as professors. Their motivation was not financial gain, but rather academic advancement which requires exceptional quality to be accepted by their peers;

- The Court, being in a unique position to judge the credibility of witnesses, and based on the totality of her testimony, finds O'Brien to be competent, qualified, unbiased and credible. The Court further notes that the State conceded in argument, and the Court finds as a fact, that O'Brien was an honest, forthright witness for Defendants; and

- The Court, being in a unique position to judge the credibility of witnesses and based upon the totality of his testimony, finds Woodworth to be competent, qualified, unbiased and credible.

353. Mindful that appellate courts in North Carolina and throughout the United States have used differing standards for statistical significance, the Court finds that each of the statistical analyses from the MSU study set forth below are more than three standard deviations, or sigmas, from the null hypothesis, all of which are statistically significant: the statewide average strike rate disparity over the entire study period; the statewide average strike disparities for eleven, ten, and five year intervals (1990-1999; 2000-2010; 1990-1994; 1995-1999; 2000-2004); the current Fourth Judicial Division average strike rate disparity; the former Second Judicial Division average strike rate disparity; the Cumberland County average strike rate disparity; the Cumberland County average strike rate disparities when limited to data from cases that fall within the statutory windows for Golphin, Walters, and Augustine; and the odds ratio for

a black venire member being struck as shown in the statewide fully-controlled logistic regression model.

354. The Court finds that each of the statistical analyses from the MSU study set forth below are more than two standard deviations, or sigmas, from the null hypothesis, all of which are statistically significant: the statewide average strike rate disparities for the time period from 2005 through 2010; the odds ratio for a black venire member being struck as shown in the Cumberland County logistic regression model; the disparities in average rates of State strikes in Cumberland County when limited to data that falls within the statutory windows for Golphin, Walters, and Augustine; the odds ratios for black venire members of being struck as shown in Cumberland County logistic regression models, with data limited to the statutory windows for Golphin, Walters, and Augustine; the adjusted strike disparities in Golphin's case, shown in the Cumberland County smoothed graph; the adjusted and unadjusted strike disparities in Walters' case; and the adjusted and unadjusted strike disparities in Augustine's case.

355. Another common measure of significance in employment litigation is the EEOC's four-fifths rule. Under this basic rule of thumb, disparate impact will be presumed if the minority's success rate under a challenged employment policy is equal to or less than four-fifths (80%) of the majority's success rate. For example, if the State passed 75% of non-black venire members, the four-fifths threshold would be triggered if the State passed less than 60% of the black venire members (75% x .8 = 60%). *See generally*, Paul Secunda and Jeffrey Hirsch, Mastering *Employment Discrimination Law* 88 (Carolina Academic Press 2010).

356. The four-fifths threshold is satisfied with respect to the disparities observed in every relevant comparison presented from this hearing, to wit: statewide;[37] in the current Fourth

[37] In the statewide patterns aggregated across cases over the entire study period, the State passed 47.2% of the black venire members and 74.3% of the other venire members. The minority's success rate is lower than the four-fifths

Judicial Division;[38] in the former Second Judicial Division;[39] in Cumberland County;[40] in the Cumberland County cases from Golphin's window,[41] Walters' window;[42] and Augustine's window;[43] in Golphin's case,[44] in Walters' case,[45] and in Augustine's case.[46]

Seated Jury Compositions

357. The State presented evidence, through Katz's testimony and report, regarding the racial compositions of seated juries in the capital cases statewide, former Second Judicial Division, current Fourth Judicial Division and in Cumberland County. While the Court permitted Katz to testify to the findings regarding final jury composition over Defendants'

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threshold of 59.4%. In the statewide average of individual cases the entire study period, the State passed 43.9% of the black venire members and 75.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60.2%.

[38] In the current Fourth Judicial Division cases, the State passed 37.6% of the black venire members and 78.1% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 62.5%.

[39] In the former Second Judicial Division cases, the State passed 48.7% of the black venire members and 75% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60%.

[40] In the Cumberland County cases, the State passed 47.3% of the black venire members and 79.5% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 63.6%.

[41] In the Cumberland County cases limited to those within Golphin's window, the State passed 54.8% of the black venire members and 75.6% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 60.5%.

[42] In the Cumberland County cases limited to those within Walters' window, the State passed 53.3% of the black venire members and 76.6% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 61.3%.

[43] In the Cumberland County cases limited to those within Augustine's window the State passed 50.5% of the black venire members and 76.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 61.0%.

[44] In Golphin's case, the State passed 28.6% of the black venire members and 64.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 51.4%.

[45] In Walters' case, the State passed 47.4% of the black venire members and 85.2% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 68.16%.

[46] In Augustine's case, the State passed 0% of the black venire members and 73.0% of the other venire members. The minority's success rate is lower than the four-fifths threshold of 58.4%.

objections pursuant to Rule 401 of the Rules of Evidence, the Court finds that the inquiry under the RJA is whether "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection" and as seen in the conclusions of law below, the appropriate inquiry of the Court is to analyze the decisions to exercise peremptory challenges.[47]

358. If the Court were to consider the evidence of the defense strikes, this would be additional evidence that race is a significant factor in jury selection. The State's evidence showed that just as the discrimination in the decisions to exercise peremptory challenges by prosecutors in capital jury selection statewide, in the former Second Judicial Division, the current Fourth Judicial Division and in Cumberland County, is statistically significant, so is the discrimination by defense attorneys. Defense attorneys have discriminated in the decisions to exercise peremptory challenges in capital cases statewide, in the former Second Judicial Division, the current Fourth Judicial Division and in Cumberland County.

359. The Court additionally finds that the disparate strike patterns by prosecutors set forth in the findings herein are not cured or alleviated by the disparate strikes of white venire members by the defense attorneys. Even with the operation of the dual, competing discrimination between prosecutors and defense attorneys statewide, the Court notes and finds as a fact that of the 173 proceedings, 35 of the proceedings had all-white juries, including *Augustine*, and 38 had juries with only one black venire member, including *Golphin*.[48]

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[47] Katz testified that he informs his forensic work based upon his prior experience and instructions from courts in other cases. In his sole prior jury selection claim case where the allegation was disparate peremptory strikes by the prosecutor against black jurors, the trial judge informed the State, in open court during Katz's testimony, that Katz's analysis of calculating the final jury composition with the inclusion of the defense strikes as opposed to focusing on the strike decisions by the prosecutor was "skewing the figures." Despite this admonition, Katz did the same analysis in this case and the Court finds that examination of the final jury composition is not the appropriate analysis for the RJA.

[48] The following proceedings had all white juries (where no racial minority was seated as a regular juror): Randy Atkins (10.0), Quintel Augustine (11.0), Roger Blakeney (32.0), Paul Brown (48.1), Rayford Burke (53.0), Eric Call (56.1), Eric Call (56.2), Phillip Davis (86.0), Keith East (89.0), Andre Fletcher (95.2), Christopher Goss (116.0),

Katz's Regression Models

360. In a further effort to challenge the validity of the MSU Study, Katz constructed logistic regression models in an effort to see if he could find some combination of variables where the race variable black was not statistically significant. These models are shown in State's Exhibit 44, pp. 457-81. These models were not constructed in an effort to explain the prosecutorial strikes and each model has a warning: "NOT INTENDED AS A MODEL TO EXPLAIN HOW PROSECUTORS EXECUTE THEIR PEREMPTORY STRIKES."

361. The variables and descriptive codes selected by Katz were not made upon any statistical, practical, theoretical or other appropriate basis. In the MSU logistic regression models, each of the included explanatory variables has a low *p*-value indicating statistical significance. In Katz's models, most of the *p*-values are greater than .05 and many are above .50 indicating the variables are in no way predictors or explanatory. The Court finds that the logistic models found in SE44, pp. 458-81 are not appropriate or significant, either practically or statistically.

362. Katz conceded that the sole purpose of the models he developed was to attempt to find a combination of variables to render the black venire member disparity to become statistically insignificant. Katz produced five such constructed models for Cumberland County

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Mitchell Holmes (143.0), Cerron Hooks (144.0), James Jaynes (156.2), Thomas Larry (174.0), Wayne Laws (176.0), Jathiyah al-Bayyinah (220.1), Carl Moseley (223.0), Alexander Polke (243.0), William Raines (252.0), Martin Richardson (255.0), Clinton Rose (269.0), Kenneth Rouse (272.0), Tony Sidden (278.0), Darrell Strickland (293.0), Gary Trull (305.0), Russell Tucker (306.0), Lesley Warren (319.0), George Wilkerson (326.0), James Williams (329.0), Wade Cole (341.0), Ted Prevatte (388.2), Guy LeGrande (690.0), Carl Moseley (786.0), and Andrew Ramseur (999.0). The following proceedings had juries in which only one black juror was chosen: Billy Anderson (6.0), Shawn Bonnett (36.0), James Campbell (59.0), Terrance Campbell (60.0), Frank Chambers (66.0), Daniel Cummings, Jr. (76.0), Paul Cummings (79.0), Johnny Daughtry (82.0), Edward Davis (83.0), James Davis (85.0), Eugene Decastro (87.0), Terrence Elliot (91.0), Danny Frogge (100.1), Ryan Garcell (105.0), Malcolm Geddie Jr. (109.0), Tilmon Golphin (113.0), William Gregory (122.1), William Gregory (122.2), Alden Harden (1270.0), Jim Haselden (131.0), James Jaynes (156.1), Marcus Jones (166.0), Leroy Mann (191.0), John McNeill (205.0), Clifford Miller (211.0), Jathiyah al-Bayyinah (220.2), Jeremy Murrell (228.0), Kenneth Neal (229.0), Michael Reeves (253.0), Christopher Roseboro (270.2), Jamie Smith (281.0), James Watts (320.0), Marvin Williams Jr. (330.0), John Williams Jr. (331.0), Darrell Woods (335.0), Vincent Wooten (336.0), and Jerry Cummings (343.0).

and one such constructed model for a truncated time period for the statewide data. Even though the *p*-value exceeds .05 in each of the models, the Court notes and finds that the odds ratios for a black venire member being struck never fell below one. In the statewide data, the odds ratio was 1.798 and the odds ratios for Cumberland County ranged from a low of 1.38 to a high of 1.6. The Court finds that Katz's inability to produce a model with an odds ratio less than one is an indication of the validity and robustness of the MSU findings.

363. Woodworth testified and the Court so finds that the logistic regression models produced by Katz are no evidence of any systematic features of the voir dire process. The models did not utilize the variables from the MSU report but rather individual descriptive codes, which improperly causes there to be a much greater possibility for chance to account for the strike decision. The Court finds that it is not appropriate social science to construct a logistic regression model without reference to whether the variables are predictors, in order to make the racial disparity become insignificant. While Katz was open and truthful with this Court in explaining his purpose in constructing these models, the lack of appropriate scientific adherence by Katz further adversely reflects upon the credibility of his analysis.

364. Katz performed a cross-tabulation analysis in an attempt to control for explanatory variables. This analysis is detailed in his report. It involves the segregation of data into subgroups based on potential explanatory variables. However, Katz's approach segregated the data on factors that were not explanatory or statistically significant, such as whether a venire member had served on a jury previously, even though no prosecutor ever suggested that prior jury service, standing alone, was a reason for striking a capital juror.

365. According to Woodworth, and this Court so finds, the purpose of a cross-tabulation analysis is to investigate the relationship between one or more factors and an outcome.

There is a danger in using cross-tabulation methods with too many factors because there are too many splits of the data to the point where one is looking not at reliable associations between the factors but rather chance co-occurrences.

366. Woodworth testified, and was not questioned by the State, about his opinion that the extreme cross-tabulation method employed by Katz has not appeared in any peer reviewed publication and would not be accepted because it is not a generally accepted statistical method. Woodworth also testified that the cross-tabulation method produces models that are not reliable because of the problem of overfit. Overfitting exploits chance idiosyncratic features of a dataset by including insignificant factors in a descriptive model.

367. As part of the cross-tabulation method, Katz created a logistic regression model based upon his cross-tabulation analysis. The model had an explicit warning: "The validity of the model fit is questionable." Despite this warning, Katz relied upon the model.

368. Sommers, another defense expert, testified, and the Court finds, that Katz's cross-tabulation method sliced the data so thinly that one cannot ever find anything that is significant statistically. Sommers concurred with Woodworth that this method is not used in peer reviewed literature or published studies.

369. The Court finds that Katz's cross-tabulation analysis, as employed by him, is not generally accepted in the scientific community, that the process segregated the data too thinly for any meaningful analysis including the use of variables that were not predictors and that the regression analyses produced from the cross-tabulation data are not credible, reliable or valid.

370. Katz testified, and the Court so finds, that the cross-tabulation analysis was not for the purpose of explaining why venire members were struck but rather to explain that there are

many possible strike explanations. As such, the probative nature of this analysis is minimal and limited to explain that there are many possible strike explanations.

371. Katz presented no statistical analysis to rebut the MSU Study's findings of statistically significant disparities found statewide, in the former Second Judicial Division and current Fourth Judicial Division and the Court finds that the State has not rebutted these findings in the MSU Study.

Katz's *Batson*-Style Study

372. As discussed above, Katz concluded that the State would need to rebut the statistically significant disparities reflected in the unadjusted data from the MSU Study. Although not a legal expert, Katz attempted to perform an analysis that he referred to as a *Batson* methodology. Katz's plan was to determine the best possible race-neutral reason for the peremptory strikes of every African-American venire member in the 173 cases by asking prosecutors who were actually involved in the selection of jurors to provide those race-neutral reasons; and, if that was not possible, to have district attorneys identify a reviewer who would be best able and available to provide those race-neutral explanations.[49]

373. Katz's *Batson* survey was flawed from the outset by his poor research question. Rather than ask an open-ended question about why prosecutors struck specific venire members, Katz instructed prosecutors to provide him with a "true race-neutral explanation" for the strike. Katz acknowledged and the Court so finds that a determination of whether a prosecutor can articulate a race-neutral reason for a peremptory strike is different from a determination of the true reason for the strike. Throughout his report to this Court dated January 9, 2012, Katz

[49] Although the State repeatedly characterized this project as a "study," Katz himself conceded early on that this endeavor was not a statistical one, and repeatedly refused to call it a study. While Katz quibbled about whether this request to prosecutors was a "survey," or "data collection," or "request for affidavits," the Court finds no material difference between these for the purposes of his testimony in this case and thus refers to the efforts using these terms interchangeably.

indicated that he was seeking the reasons for the peremptory strikes; however, the Court finds that his research question does not seek this information. This research question was decided in consultation with the Attorney General's Office and the Cumberland County District Attorney's office. This inquiry was set up in a way to produce only race-neutral explanations and denials that race was a factor.

374. In the design of the survey, Katz never considered that a prosecutor could have a mixed motive for striking a juror, including a valid race-neutral reason coupled with race. This was another flaw: an appropriate study design would have accounted for the possibility of a prosecutor's mixed motives.

375. Another weakness of Katz's survey was his reliance on self-reported data. The generally accepted standard in the scientific community is that a researcher will not find sufficient information regarding the true influences on decisions by relying upon self-report because much of the influence of race on people's perceptions and judgments is unconscious, and even where the actor may be conscious of a race-based decision, there is a strong psychological motive to deny it and search for other "race-neutral" reasons. Katz's research method is not an accepted way of determining whether race was a significant factor in jury selection method and most likely would not be accepted for a peer review publication.

376. Katz's close work with the State in designing and implementing the survey and the State's participation in giving feedback regarding individual responses further undermines the integrity of the survey. Katz relied upon the assistance of Peg Dorer, director of the North Carolina Conference of District Attorneys, and counsel for the State, Colyer and Thompson, in contacting prosecutorial districts where Katz had unsuccessfully made contact himself.

377. Katz designed a proposed survey instrument to be sent to prosecutors around the state requesting that the trial prosecutor, if available, and if the trial prosecutor was not available, another prosecutor selected by the district attorney, review the capital voir dire and provide a race-neutral reason for the peremptory challenge of each African-American venire member. Katz circulated his survey instrument to Colyer and Thompson for their review and editing assistance.

378. For each prosecutor reviewer, Katz sent an email that included general instructions as well as attachments with 1) a more detailed survey and data collection instructions; 2) a list of all venire members involved in each capital trial in the district with the excluded African-American venire members highlighted; and 3) an excel spreadsheet prepared by Katz in which the prosecutor could provide his or her race-neutral explanations and other information.

379. After sending emails to the prosecutors throughout the state requesting the aforementioned information, Katz received his first response from a prosecutor, Sean Boone, from Alamance County. Boone provided a draft, unsigned affidavit for Katz's review and approval along with a completed spreadsheet with his purported race-neutral reasons. Katz reviewed the draft affidavit, made a correction to it, made further suggestions for changes to Boone and sent these changes and suggestions to Boone.

380. The Court finds that it is suspect for an expert witness to rely upon affidavits in the support of an expert opinion after the same expert is involved in preparing some of the content of the affidavits. This is further evidence of the lack of scientific validity of Katz's work.

381. After making the changes to Boone's affidavit and spreadsheet, Katz circulated Boone's affidavit and spreadsheet review to prosecutors throughout the State. Boone's affidavit and spreadsheet review had listed for each African-American venire member purported race-neutral reasons for the peremptory challenge. The wide circulation of Boone's affidavit with an explanation that it was an example of what was requested and anticipated from prosecutors calls into question the validity of the affidavits received by Katz after that date. No effort was made by Katz to have the reviewers make independent judgments on each peremptory strike blind as to other reviewers. At the time Katz circulated Boone's review and affidavit to the other prosecutors, he had not received many responses from other prosecutors and Boone's review and affidavit were sent to all the prosecutors who had not yet responded.

382. Prior to sending these documents to the prosecutors, Katz spoke with, or attempted to speak with, every prosecutor who was going to provide information about the strikes of African-American potential jurors. However, Katz took no notes of his conversations with any of these prosecutors except his one conversation with Thompson. Despite the fact that Katz intended to rely upon conversations with prosecutors in the formulation of his opinions, he purposely took no notes of these conversations because he did not want to document something in the conversation that he would have to disclose in discovery that would be misleading and then he would have to explain later. This is persuasive to the Court and indicative of and probative for the lack of transparency and scientific validity of Katz's work and opinions.

383. The low response rate is another problem with the Katz survey. As of the time of Katz's testimony in the *Robinson* hearing, Katz had received purported race-neutral explanations for 319 venire members, approximately half of the struck African-American venire members. Of these, approximately half were explanations from prosecutor reviewers who were not involved in

the trial. The responses from prosecutors throughout North Carolina for the statewide database were in no way a randomly selected subgroup of the entire population of African-American venire members.[50] The Court finds that prosecutors' 50% statewide response rate to Katz's survey warns of nonresponse bias. The Court finds in light of this bias that the results of Katz's survey carry minimal persuasive value. In further support of this finding, the Court notes that Katz testified that low survey response rates suggest that the responses may have problems with bias and should be regarded with significant caution.

384. In the period since Katz's testimony in Robinson and the instant hearing, the State continued to collect additional affidavits. These new affidavits are also suspect in light of the fact that they were not generated timely. Furthermore, the State elected, however, not to introduce any of these additional affidavits and thus has abandoned apparently any argument that these constitute rebuttal evidence.[51]

385. The Court notes that, even among the prosecutors who did respond to Katz's survey, some failed to provide such responses in the form of sworn affidavits. Instead, a number of prosecutors provided unsigned, unsworn statements. The Court finds that prosecutors' use of unsigned, unsworn statements introduces further bias to Katz's survey and further diminishes its persuasive value, particularly because Katz specifically asked prosecutors to provide sworn

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[50] According to the *Reference Guide on Statistics*, to which the Court again takes judicial notice, surveys are most reliable when all relevant respondents are surveyed or when a random sample of respondents is surveyed. A convenience sample occurs where the interviewer exercises discretion in selecting a subgroup of all relevant respondents to interview, or where a subgroup of the relevant respondents refuses to participate. Where a subgroup of the relevant respondents refuses to participate, the survey may be tainted by nonresponse bias. This commonly occurs in contexts such as constituents who write their representatives, listeners who call into radio talk shows, interest groups that collect information from their members, or attorneys who choose cases for trial. *Reference Guide on Statistics*, pp. 224-26.

[51] As discussed earlier, the Court has reviewed these new affidavits, along with the previously submitted affidavits, and concluded that they in fact overall constitute evidence that race was a significant factor in jury selection.

affidavits. Katz testified that he requested affidavits from prosecutors in order to obtain reasons that were as accurate and truthful as possible. He wanted the prosecutors to stand behind what they were providing as the reasons for their peremptory strikes. Katz also wanted to conduct his survey in a way where the reasons the prosecutors provided were not going to change from hearing to hearing. Katz wanted to definitively identify the reason for each peremptory strike in order to provide the courts with the best information available for determining whether there is a race-neutral explanation for the disparity in strike rates. In light of the fact that the State's expert recognized the importance of sworn affidavits in identifying potentially truthful explanations for peremptory strikes, the Court finds that prosecutors' use of unsworn statements is additional evidence that intentional discrimination in the selection of capital juries occurred on a statewide basis.

386. The survey results are further undermined by the large number of responses from prosecutors who did not participate in the trial proceedings and based their responses only upon review of the voir dire transcript. Even for prosecutors who participated at trial, the probative value of a post hoc response from a prosecutor several years after trial about why he or she struck a particular juror is limited. *See, e.g., Miller-El*, 545 U.S. at 246 ("it would be difficult to credit the State's new explanation, which reeks of afterthought"). The Court finds the value of post-hoc explanations of strikes by prosecutors who did not participate in the proceedings to be even more limited.[52]

[52] There was evidence at the hearing that the State's own advocates, Colyer and Thompson, had initially objected to the inclusion in the survey of reviews from prosecutors who did not participate in the proceedings. The Court notes Katz's testimony that a prosecutor who provided a race-neutral explanation, but was not present at trial, would be unable to know the actual reasons for the State's exercise of a peremptory strike against a black venire member

387. Katz's opinion that the MSU Study could not be relied upon to explain why prosecutors used their peremptory strikes, based in part upon the prosecutors' responses, is not credible or reliable.

388. Cumberland County prosecutors produced affidavits to Katz providing the purported race-neutral explanations for 100% of the black venire members in the 11 capital proceedings in the MSU Study. While the Cumberland County data collection effort does not suffer the same nonrandom sample infirmity of Katz's statewide database, the reasons for 12 of the 47 black venire members were stated by a prosecutor reviewer who was not present at the trial of the cases, including Robinson's. These responses are speculative and of limited evidentiary value to the Court.

389. Katz testified that he patterned his methodology to rebut MSU's unadjusted findings on *Batson*. He viewed the unadjusted statistical disparity as the first prong of *Batson* and the collection of race-neutral explanations as the second prong of *Batson*. However, setting aside the weakness of Katz's analysis of the second prong, the Court finds that Katz's *Batson* methodology failed because he did not even attempt to consider the third prong of *Batson*, and never considered the totality of the circumstances. Katz did no analysis whatsoever of whether the purported race-neutral reasons were pretextual or whether prosecutors could have had mixed motives for peremptory strikes, including race.

Conclusions Regarding Statistical Evidence

390. Overall, the Court finds that the disparities in strike rates against eligible black venire members compared to others are consistently significant to a very high level of reliability. There is a very small and insignificant chance that the differences observed in the unadjusted data are due to random variation in the data or chance. The Court further finds, consistent with

the expert testimony of O'Brien and Woodworth, that the statistical evidence demonstrates that race was a materially, practically, and statistically significant factor in the exercise of peremptory strikes by prosecutors statewide in North Carolina, in Cumberland County, and in Defendants' individual cases at the time of their trials.

391. Based upon the totality of all the statistical evidence presented at the hearing, the Court finds significant support for the proposition that race was a significant factor in decisions to exercise peremptory challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases in North Carolina, in Cumberland County, and in Defendants' own cases. The Court finds that these conclusions are true whether the data from the full study period is considered, whether the data is focused through "time smoothing" on the precise time of Defendants' trials, or whether only cases that fall within defendants' "statutory windows" are considered.

392. In addition, based upon the totality of statistical evidence presented at the hearing, the Court finds significant evidence that prosecutors have intentionally discriminated against black venire members during jury selection by prosecutors when seeking to impose death sentences statewide, in Cumberland County, and in Defendants' own cases.

CONCLUSIONS OF LAW: AMENDED RJA CLAIMS

393. Having made all relevant and material findings of fact, the Court turns next to conclusions of law. Defendants have each raised an amended RJA claim alleging that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in his or her case and in Cumberland County. The Court reaches the following conclusions:

State v. Tilmon Golphin

394. Under the amended RJA, "at the time the death sentence was sought or imposed" for Golphin is 10 years prior to Golphin's offenses on September 23, 1997, and two years after the imposition of his death sentences on May 12, 1998. This period constitutes Golphin's statutory window.

395. Considering all of the evidence presented, the Court finds Golphin's case in chief established by a preponderance of the evidence a prima facie showing, that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in his case and in Cumberland County, and that race was a significant factor in decisions to seek or impose the death penalty in his case. The Court reaches the same conclusions regarding the existence of a prima facie case when it considers all of the evidence that falls within Golphin's statutory window, and when it considers only the Cumberland County evidence that falls within Golphin's statutory window.

396. The State's evidence failed to rebut Golphin's prima facie showing. However, even if the State's evidence were sufficient in rebuttal, the Court finds that Golphin ultimately carried his burden of persuasion.

397. The Court finds, in light of all of the evidence presented, that Golphin demonstrated race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. The Court finds Golphin has demonstrated that race was a significant factor in decisions to seek or impose the death penalty in his case at the time the death sentence was sought or imposed. Golphin has further demonstrated that race was a significant factor in decisions to seek or impose the death penalty in Cumberland County at the time Golphin's death sentences were sought or imposed.

398. The Court also finds, considering only the evidence presented from within Golphin's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. Considering only the evidence presented from within Golphin's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Golphin's case at the time the death sentence was sought or imposed. In light of the statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Golphin's death sentences were sought or imposed.

399. The Court further finds, considering only the evidence presented from Cumberland County and within Golphin's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentences were sought or imposed. The Court further finds, considering only the evidence from Cumberland County within Golphin's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Golphin's case at the time the death sentence was sought or imposed. Considering the Cumberland County statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Golphin's death sentences were sought or imposed.

State v. Christina Walters

400. For Walters, "at the time the death sentence was sought or imposed" is 10 years prior to her offenses on August 17, 1998, and two years after the imposition of her death sentences on July 6, 2000. This period constitutes Walters' statutory window.

401. Considering all of the evidence presented, the Court finds Walters' case in chief established by a preponderance of the evidence a *prima facie* showing, that, at the time the death

sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in her case and in Cumberland County, and that race was a significant factor in decisions to seek or impose the death penalty in her case. The Court reaches the same conclusions regarding the existence of a *prima facie* case when it considers all of the evidence that falls within Walters' statutory window, and when it considers only the Cumberland County evidence that falls within Walters' statutory window.

402. The State's evidence failed to rebut Walters' *prima facie* showing. However, even if the State's evidence were sufficient in rebuttal, the Court finds that Walters ultimately carried her burden of persuasion.

403. The Court finds, considering all of the evidence presented, Walters demonstrated race was a significant factor in decisions to exercise peremptory challenges during jury selection in her case and in Cumberland County at the time her death sentences were sought or imposed. The Court finds Walters has demonstrated that race was a significant factor in decisions to seek or impose the death penalty in her case at the time the death sentences were sought or imposed. Walters has further demonstrated that race was a significant factor in decisions to seek or impose death in Cumberland County at the time Walters' death sentences were sought or imposed.

404. The Court also finds, considering only the evidence presented from within Walters' statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in her case and in Cumberland County at the time her death sentences were sought or imposed. In light of only the evidence presented from Walters' statutory window, race was a significant factor in decisions to seek or impose the death penalty in Walters' case at the time the death sentences were sought or imposed. Considering the

statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Walters' death sentences were sought or imposed.

405. The Court further finds, considering only the evidence presented from Cumberland County and within Walters' statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in her case and in Cumberland County at the time her death sentences were sought or imposed. The Court further finds, considering only the evidence from Cumberland County within Walters' statutory window, race was a significant factor in decisions to seek or impose the death penalty in Walters' case at the time her death sentences were sought or imposed. Considering the Cumberland County statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Walters' death sentences were sought or imposed.

State v. Quintel Augustine

406. For Augustine, "at the time the death sentence was sought or imposed" is 10 years prior to his offenses on November 29, 2001, and two years after the imposition of his death sentence on October 22, 2002. This period constitutes Augustine's statutory window.

407. Considering all of the evidence presented, the Court finds that Augustine's case in chief established by a preponderance of the evidence a *prima facie* showing, that at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in his case and in Cumberland County, and that race was a significant factor in decisions to seek or impose the death penalty in his case. The Court reaches the same conclusions regarding the existence of a *prima facie* case when it considers all of the evidence that falls within Augustine's statutory window, and when it considers only the Cumberland County evidence that falls within Augustine's statutory window.

408. The State's evidence failed to rebut Augustine's *prima facie* showing. However, even if the State's evidence were sufficient in rebuttal, the Court finds that Augustine ultimately carried his burden of persuasion.

409. The Court finds, in light of all of the evidence presented, Augustine demonstrated race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. The Court finds that Augustine has demonstrated that race was a significant factor in decisions to seek or impose the death penalty in his case at the time the death sentence was sought or imposed. Augustine has further demonstrated that race was a significant factor in decisions to seek or impose death in Cumberland County at the time his death sentence was sought or imposed.

410. The Court also finds, considering only the evidence presented from within Augustine's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. Considering only the evidence presented from Augustine's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Augustine's case at the time the death sentence was sought or imposed. In light of the statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time the Augustine's death sentence was sought or imposed.

411. The Court further finds, considering only the evidence presented from Cumberland County and within Augustine's statutory window, race was a significant factor in decisions to exercise peremptory challenges during jury selection in his case and in Cumberland County at the time his death sentence was sought or imposed. The Court further finds,

considering only the evidence from Cumberland County within Augustine's statutory window, race was a significant factor in decisions to seek or impose the death penalty in Augustine's case at the time the death sentence was sought or imposed. Considering the Cumberland County statutory window evidence alone, race was a significant factor in decisions to seek or impose death in Cumberland County at the time Augustine's death sentence was sought or imposed.

412. Although the Court finds that Cumberland County is the appropriate county under the amended RJA for Augustine's jury discrimination claims, the Court additionally finds Augustine demonstrated that race was a significant factor in decisions to seek or impose death in Brunswick County, where his death sentence was imposed, at the time his death sentence was sought or imposed.

Additional conclusions

413. Although not essential to Defendants' statutory claims in view of the Court's interpretation of the amended RJA, the Court makes the following additional conclusions of law. The Court finds each of the following conclusions to be the appropriate conclusions when all of the evidence is considered as a whole, when only the evidence that falls within each Defendant's statutory window is considered, and when the only evidence considered is that which falls within each Defendant's statutory window and is derived from Cumberland County.

414. Defendants have persuaded the Court that the State's use of race in peremptory strike decisions in each of their cases, and in Cumberland County, was intentional.

415. Race was a significant and intentionally-employed factor in the State's decisions to exercise peremptory strikes in each of Defendants' cases and in Cumberland County at the time the death sentences were sought or imposed.

416. Defendants have proven their claims under the alternative standards of proof known as "mixed motive" disparate treatment and "pattern or practice" discrimination, both of which the Court set forth in detail in the statutory interpretation section of this order.

417. In view of the foregoing, the Court finally concludes, based upon a preponderance of the evidence, that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed in each of their cases and in Cumberland County.

418. The judgments in *Golphin*, *Walters*, and *Augustine* were sought or obtained on the basis of race.

CONCLUSIONS OF LAW: ORIGINAL RJA CLAIMS

419. Although the Court has already found Defendants are entitled to relief under their amended RJA claims, the Court will reach Defendants' original RJA claims as well to ensure a complete record for appellate review.

420. In their originally-filed pleadings, Defendants also raised peremptory strike claims pursuant to the original RJA. These are claims I, II, and III of Defendants' original pleadings. They alleged that, at the time of Defendants' trials, race was a significant factor in the State's decisions to exercise peremptory strikes throughout North Carolina, in the former Second and current Fourth Judicial Divisions, and in Cumberland County.

421. In considering Defendants' original RJA claims, the Court incorporates all of the foregoing findings of fact made in conjunction with Defendants' amended RJA claims. To these facts, the Court will apply the same statutory interpretation set forth in its order in *Robinson*. Unless otherwise indicated, the Court has reached all of its conclusions in view of the totality of the evidence.

422. Defendants' case in chief established by a preponderance of the evidence a *prima facie* showing that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in their cases, in Cumberland County, in the judicial division,[53] and in North Carolina. The Court reaches this conclusion on the basis of the totality of the evidence, and on the basis of Defendants' unadjusted statistical findings standing alone.

423. The State's evidence failed to rebut Defendants' *prima facie* showing. However, even if the State's evidence was sufficient in rebuttal, Defendants ultimately carried their burden of persuading the Court by a preponderance of the evidence that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in their cases, in Cumberland County, in their respective judicial division, and in North Carolina.

424. Although not essential to Defendants' statutory claims in view of the Court's interpretation of the original RJA, the Court makes the following additional conclusions of law.

425. Defendants have persuaded the Court that the State's use of race in peremptory strike decisions in their cases, in Cumberland County, in their respective judicial division, and in North Carolina was intentional.

426. Race was a significant and intentionally-employed factor in the State's decisions to exercise peremptory strikes in each of Defendants' individual trials.

427. Defendants have proven their claims under the alternative standards of proof known as "mixed motive" disparate treatment and "pattern or practice" discrimination, both of

[53] Defendants Walters and Golphin were charged prior to 2000. Therefore, their cases arise out of the Second Judicial Division. Augustine was charged after 2000. Therefore, his case arises out of the Fourth Judicial Division.

which the Court set forth in detail in the statutory interpretation section of this order and the *Robinson* order.

428. In view of the foregoing, the Court finally concludes based upon a preponderance of the evidence that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed. Defendants' judgments were sought or obtained on the basis of race.

NOW, THEREFORE, IT IS ORDERED THAT:

The Court, having determined that Golphin, Walters, and Augustine are entitled to appropriate relief on their RJA jury selection claims, concludes that Defendants are entitled to have their sentences of death vacated, and Golphin, Walters, and Augustine are resentenced to life imprisonment without the possibility of parole.

The Court reserves ruling on the remaining claims raised in Defendants' RJA motions, including all constitutional claims.

This order is hereby entered in open court in the presence of Golphin, Walters, and Augustine, their attorneys, and counsel for the State.

The 13th day of December 2012.

The Honorable Gregory A. Weeks
Senior Resident Superior Court Judge Presiding