STATE OF NORTH CAROLINA
COUNTY OF CUMBERLAND

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 91 CRS 23143

STATE OF NORTH CAROLINA)
)
v.)
)
MARCUS ROBINSON,)
)
Defendant.)

****

MOTION FOR APPROPRIATE RELIEF
PURSUANT TO THE RACIAL JUSTICE ACT

****

Defendant Marcus Robinson, files this Motion for Appropriate Relief pursuant to the Racial Justice Act (RJA), N.C. Gen. Stat. §§ 15A-2010 to 15A-2012, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Art. I, §§ 1, 19, 24, 26, and 27 of the North Carolina Constitution. Under the RJA and constitutional law, Mr. Robinson, who is currently under a sentence of death, is entitled to a sentence of life imprisonment without parole.

INTRODUCTION

1. The evidence set out in this Motion establishes that North Carolina's system of capital punishment is infected with racial discrimination. The comprehensive, scientific study presented here demonstrates that race is an extraordinarily significant factor in capital proceedings. Prosecutors across the state strike eligible black and other racial minority venire members at double the rate they strike eligible white venire members, and individuals who kill whites are punished much more harshly than those who kill blacks or other racial minorities.

2. Moreover, racial minority defendants accused of capital crimes in Cumberland County face significantly higher odds of receiving a death sentence than white defendants.

3. Marcus Robinson is an African-American man, who was tried for first degree murder and sentenced to death in 1994. Mr. Robinson's co-defendant, Roderick Williams, is also an African-American man. Mr. Roderick was not eligible to be tried capitally, because he was 17 years old at the time of the crime. The victim in his case, Erik Tornblom, was a Caucasian man.

4. Additionally, all critical participants in Mr. Robinson's trial were Caucasian men. Although Cumberland County is a very diverse community and has many elected African-American leaders throughout the last 20 years, almost all critical participants in capital litigation have been Caucasian. Despite the fact that the Honorable Gregory

Weeks, an African-American, is a resident judge in Cumberland County and other African-American and Native American judges have held court in Cumberland County since 1990, 14 out of the 15 death verdict cases had white judges. The Honorable E. Lynn Johnson, a Caucasian man, presided over Mr. Robinson's case. Additionally, the number of prosecutors on these 15 cases since 1990 have fluctuated between one and three lawyers per case. There have been a total of 28 prosecutorial positions in these cases, and 25 have been occupied by Caucasian prosecutors. The Honorable John Dixon, at that time an Assistant District Attorney of the Twelfth Judicial District, prosecuted Mr. Robinson's case. There have been 30 defense attorney positions in these cases and 29 out of the 30 have been filled by Caucasians. Mr. Robinson's attorneys, Mr. Randy Gregory and Mr. Edward Brady, were both Caucasian men.

5. Decisions by the prosecution during jury selection indicate that race played a critical factor in Mr. Robinson's trial. The prosecution struck 50% of African-American jurors, while only striking 15% of Non-Black jurors. The strikes used by the prosecution reflect a 35% difference in strike rates as well as approximately a 3 to 1 ratio in strike rate. The final make-up of the trial jury was two African-Americans, one Native American, and nine Caucasians, as well as, two Caucasian alternates.

6. In addition to the race of the defendant, the victim, the prosecutor, the defense attorneys, and the presiding judge, as well as the high strike rate of minorities, the prosecution in Mr. Robinson's case proceeded under the theory that the crime was racially motivated. The prosecution adduced evidence that Mr. Robinson made statements that he was going to "kill himself a whitey." The racial underpinnings of Mr. Robinson's case make it clear that race played a significant role in seeking and securing the death penalty.

PROCEDURAL HISTORY

7. On August 5, 1991, the Cumberland County, North Carolina, Grand Jury indicted Mr. Robinson on one count of first degree murder, one count of first degree kidnapping, one count of robbery with a dangerous weapon, one count of possession of a weapon of mass destruction, one count of felonious larceny, and one count of possession of a stolen vehicle, all crimes were committed on June 21, 1991 against Erik Tornblum.

8. On July 13, 1994, Criminal Session of Cumberland County Superior Court, the Honorable E. Lynn Johnson presiding. On July 14, 1994, Marcus Robinson entered guilty pleas to charges of robbery with a dangerous weapon, first-degree kidnapping, possession of a weapon of mass destruction, larceny of motor vehicle, and possession of a stolen vehicle for the crimes committed against Erik Tornblom. Following a jury trial on the charge of first-degree murder, on August 1, 1994, the jury returned a guilty verdict finding Robinson guilty of first-degree murder under the theories of premeditation and deliberation and felony murder.

9. After a capital sentencing proceeding, the jury recommended a death sentence, and on August 5, 1994, the Superior Court sentenced Robinson to death for first-degree murder as well as to consecutive terms of imprisonment of 40 years for first degree kidnapping, 40 years for robbery with a dangerous weapon, 10 years for felonious larceny, and five years for possession of a weapon of mass destruction. Robinson appealed.

10. On November 3, 1995, the Supreme Court of North Carolina found no error in either the convictions or sentences, *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), cert. denied, 517 U.S. 1197, 116 S.Ct. 1693, 134 L.Ed.2d 793 (1996).

11. By Order filed April 1, 1999, the Superior Court in Cumberland County denied Robinson's post-appeal motion for appropriate relief, in part without a hearing and in part after an evidentiary hearing.

12. On November 1, 1996, Robinson filed a motion for appropriate relief in State Superior Court, and on October 7, 1998, he filed an amended motion for appropriate relief. On January 4 – 6, 1999, with the exception of one claim which had already been denied on the pleadings, the Honorable Jack A. Thompson held an evidentiary hearing on the other claims. On April 1, 1999, the Superior Court filed an order denying all claims. On August 19, 1999, the North Carolina Supreme Court denied certiorari review of that order. *State v. Robinson,* 350 N.C. 847, 539 S.E. 2d 646 (1999).

13. On February 28, 2000, Robinson filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. On June 14, 2000, the State filed its answer and motion for summary judgment. On September 7, 2004, the District Court entered an order granting the State's motion for summary judgment and denied the petition in its entirety without a hearing by, judgment accordingly filed September 14, 2004. On December 14, 2004, the District Court entered a further order denying Robinson's motion to alter or amend judgment. On February 25, 2005, the District Court entered a final order denying a Certificate of Appealability on all claims. Robinson appealed.

14. On April 11, 2005, Robinson filed his preliminary brief in the Fourth Circuit Court of Appeals. On April 28, 2005, the Fourth Circuit entered an order allowing a Certificate of Appealability on two claims. On February 14, 2006, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the District Court's denial. *Robinson v. Polk,* 438 F.3d 350 (4th Cir. 2006). Robinson appealed.

15. On April 7, 2006, Robinson's subsequent petition for rehearing and rehearing *en banc* was denied. *Robinson v. Polk,* 444 F.3d 225 (4th Cir. 2006). On October 30, 2006, the Supreme Court denied Robinson's petition for certiorari review. *Robinson v. Polk,* 127 S.Ct. 514, 75 USLW 3234 (2006).

16. On December 12, 2006, the North Carolina Secretary of Correction issued an Order scheduling Robinson's execution for January 26, 2007.

17. On January 10, 2007, Robinson filed a clemency petition. On January 17, 2007, the Governor held a clemency hearing in the case. The Governor never ruled on Mr. Robinson's petition.

18. On January 16, 2007, Robinson filed a second/successor motion for appropriate relief and a motion for a stay of execution. Robinson sought relief on the grounds of newly discovered evidence relating to his brain development and its impact on his conduct in this case. On January 18, 2007, the State filed its answer and moved for denial on the pleadings of both claims and the motion for stay of execution. On January 19, 2007, the Honorable E. Lynn Johnson denied Robinson's Motion for Appropriate Relief and the Motion for Stay of Execution.

19. Mr. Robinson filed a civil action on January 22, 2007, in Wake County Superior Court hours prior to Mr. Robinson's execution against DOC, et. al, asking for injunctive relief to stay his execution. On January 25, 2007, the Honorable Donald Stephans, Senior Resident Superior Court judge entered an order allowing the Mr. Robinson's motion for preliminary injunction. That injunction staying Mr. Robinson's execution remains in effect to this date.

20. Ancillary proceedings involving Mr. Robinson and Council of State are also pending.

THE RACIAL JUSTICE ACT

21. In enacting the Racial Justice Act (RJA), the North Carolina General Assembly made clear that the law of North Carolina rejects the influence of race discrimination in the administration of the death penalty. In so doing, the General Assembly accepted the challenge issued by the United States Supreme Court in *McCleskey v. Kemp*. Addressing the state legislatures, the *McCleskey* Court ruled that it was the duty of the states "to respond to the will and consequently the moral values of the people" when addressing the difficult and complex issue of racial prejudice in the administration of capital punishment. 481 U.S. 279, 319 (1987).

22. Under the RJA, a capital defendant shall prevail if there is evidence proving that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, *or* the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2012(a)(3) (emphasis added).

23. The RJA identifies three different categories of racial disparities a defendant may present in order to meet the "significant factor" standard. Evidence establishing any one of these categories is sufficient to establish an RJA violation:

(a) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.

(b) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.

(c) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

N.C. Gen. Stat. § 15A-2011(b)(1)-(3).

24. If a defendant is able to "state with particularity how the evidence supports a claim that race was a significant factor" in any of these three categories, the RJA provides that "[t]he court *shall* schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. §§ 15A-2012(a) and (a)(2) (emphasis added).

25. Once the defendant has established a *prima facie* case of significant racial disparities, the State has the opportunity to respond with its own statistical evidence. Because the RJA mandates relief upon a showing of racial disparities in the judicial division or the state, *see* N.C. Gen. Stat. § 15A-2012(a)(3), if the defendant's case is based on a showing of statewide or division-wide discrimination, the State's rebuttal cannot be based simply upon a showing that no disparities occurred in the county or prosecutorial district.

26. If the defendant ultimately proves an RJA violation, the remedy is the imposition of a sentence of life imprisonment without the possibility of parole. N.C. Gen. Stat. § 15A-2012(a)(3); *compare Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (holding that a defendant's conviction will be reversed under the Equal Protection Clause if there is evidence that the State exercised peremptory strikes based on race). Proof of an RJA violation does not entitle the defendant to a new trial or a new sentencing hearing.

27. For the reasons stated below, Mr. Robinson is entitled to relief under the RJA, N.C. Gen. Stat. §§ 15A-2010 to 15A-2012.

STATISTICAL STUDIES

MSU Peremptory Strike Study

28. In support of these claims, Mr. Robinson relies on several statistical studies. The first is an extensive study of capital charging, sentencing, and jury selection in North Carolina conducted in 2009 and 2010 by Catherine Grosso and Barbara O'Brien,

professors at Michigan State University's College of Law (MSU Study).[1] In conducting their study, Professors Grosso and O'Brien collaborated with a statistician named George Woodworth, University of Iowa Professor of Statistics and Actuarial Science. *See* Exhibit 2, Woodworth Affidavit.

29. The MSU Study shows that, statewide for the past two decades, prosecutors have struck qualified black and racial minority[2] venire members at more than twice the rate at which they struck other venire members.[3]

30. The MSU Study also shows that prosecutors are even more race-conscious in cases involving black or racial minority defendants. In those cases, prosecutors struck qualified black and racial minority venire members at an even higher rate.

31. This statistical analysis includes only those venire members found by the court to be legally eligible to serve on a capital jury. In other words, every venire member peremptorily struck by prosecutors had been "death-qualified." Thus, the statistics demonstrate that, across the State of North Carolina, a person of color who could follow the law and was willing to impose the death penalty was more than twice as likely to be struck by prosecutors as a similarly-situated white juror.

32. These findings are consistent with the body of published studies on the use of race and peremptory strikes. Those studies found that in Durham, North Carolina; Philadelphia, Pennsylvania; Dallas County, Texas; and the state of Louisiana, the prosecution strikes venire members of color at a higher rate than white venire members.[4] A study released by the Equal Justice Initiative in June 2010 also demonstrated that across the South—in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee—prosecutors exclude blacks from jury service at disproportionately high rates and use pretextual "race-neutral"

---

[1] All MSU Study data reported in this pleading is attached as Exhibit 1, Grosso-O'Brien Affidavit.

[2] The term "racial minority" includes black, Hispanic, Asian, and Native American persons, as well as persons of more than one race.

[3] Qualified venire members are those venire members who were not removed from the venire for cause or hardship and were thus eligible to serve on the jury.

[4] David C. Baldus, *et al.*, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 1, (2001) (Philadelphia, PA); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County,* 23 LAW & HUM. BEHAV. 695, 698-99 (1999) (Durham County, NC); Steve McGonigle, *et al., Jurors' race a focal point for defense; rival lawyers reject whites at a higher rate,* Dallas Morning News, (Jan. 24, 2006) (Dallas County, TX); Billy M. Turner, *et al.*, *Race and Peremptory Challenges during Voir Dire: Do Prosecution and Defense Agree?,* 14 J. CRIM. JUST. 61, 63 (1986) (Louisiana).

explanations to mask their discrimination.[5] This body of research finding discrimination in jury selection across the country confirms the validity of the MSU Study's finding of racial disparities in North Carolina prosecutors' use of peremptory strikes in capital proceedings.[6]

MSU Charging and Sentencing Study

33. The MSU Study also shows that, statewide from 1990 through 2009, cases that involved white victims were far more likely to result in death sentences than cases that involved no white victims. The MSU Study found that in cases with at least one white victim, a defendant was 2.6 times more likely to be sentenced to death than if the case did not involve a white victim. This finding of racial disparities based on the race of the victim persisted even when other case-related factors, such as statutory aggravating and mitigating circumstances, were taken into account.

34. In short, the race of the victim—regardless of the aggravating or mitigating facts of a crime—is a significant factor in the imposition of death sentences in North Carolina.

Radelet-Pierce Study

35. The results of another recent analysis of race and the death penalty in North Carolina confirm the MSU Study's conclusion that race of the victim is a significant factor in the imposition of the death penalty.

36. Professors Michael L. Radelet of the University of Colorado and Glenn L. Pierce of Northeastern University examined capital sentencing in North Carolina between 1990 and 2007 and found that homicides against white victims were three times more likely to result in a death sentence (Radelet-Pierce Study).[7] The Radelet-Pierce Study determined that 3.9% of homicides against white victims resulted in death sentences, compared with only 1.2% of homicides against black victims.

37. The Radelet-Pierce Study also revealed disparities even after controlling for two statutorily significant factors: first, whether the homicide involved multiple victims, and second, whether the homicide was accompanied by another felony, e.g., robbery

---

[5] The Equal Justice Initiative's report on race discrimination in jury selection can be found online at the following web address: http://www.eji.org (follow "Race and Jury Report" hyperlink; then follow "PDF: Read the Report" hyperlink).

[6] As noted in the *Reference Guide on Statistics*, "convergent results strongly suggest the validity of the generalization" when multiple statistical studies document the same effect. The *Reference Guide on Statistics* can be found online at the following web address: http://ftp.resource.org/courts.gov/fjc/sciam.0.stats.pdf.

[7] All Radelet-Pierce Study data reported in this pleading is attached as Exhibit 3, Radelet Affidavit.

or rape.[8] Controlling for these two factors, the Radelet-Pierce Study showed that, statewide from 1990 to 2007, homicides of white victims faced odds of resulting in a death sentence that were nearly three times higher than other cases.

Other Studies

38. The results of both the Radelet-Pierce Study and the MSU Study are corroborated by numerous prior statistical analyses which have documented race of victim disparities in capital charging and sentencing decisions in North Carolina and other death penalty jurisdictions around the country.

39. For example, in North Carolina, a study of the years 1993 to 1997 was conducted by Isaac Unah, an Associate Professor of Political Science at UNC-Chapel Hill, and John Charles Boger, Dean and Professor of Law at UNC-Chapel Hill's School of Law. The Unah-Boger Study accounted for 33 non-racial factors that may have influenced case outcomes and nonetheless found disparities based on the race of the victim. The Unah-Boger Study analyzed all first degree homicides in which the defendant received a death or life sentence, a total of 402 cases. It also randomly sampled 100 other cases, including homicide cases that resulted in sentences in terms of years. Based on this universe of cases, the Unah-Boger Study found that a defendant's odds of receiving a death sentence are increased 3.5 times if the victim in the case is white.[9]

40. Other studies from North Carolina have reported similar results. In 2000, the CHARLOTTE OBSERVER conducted a study of 10,000 murder arrests in North and South Carolina. This study found that although only 40% of the states' murder victims are white, 66% of the victims in death row cases are white. It also found that black defendants who kill white victims are the defendants most likely to be sentenced to death. The *Observer*'s study found that even though black-on-white murders comprised only 7% of murders between 1987 and 1997, they comprised 26% of all death row cases. Similarly, white-on-white murders comprised 32% of the cases examined but 40% of all death row cases. Eric Frazier and Ames Alexander, *Disparities in death sentences raise concerns about racism*, CHARLOTTE OBSERVER, Sept. 13, 2000, at 1A.

41. A study of North Carolina data from 1977 to 1980 by Samuel R. Gross and Robert Mauro also found racial disparities based on race of the victim. Although defendants

---

[8] *See* N.C. Gen. Stat. § 15A-2000(e)(5) ("The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of" certain specified felonies"); N.C. Gen. Stat. § 15A-2000(e)(11) ("The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons").

[9] The Unah-Boger Study can be found online at the following web address: http://www.common-sense.org/pdfs/NCDeathPenaltyReport2001.pdf.

charged with killing white victims were sentenced to death in 14% of the cases, defendants charged with killing black victims were sentenced to death in only 4% of the cases. Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27, 134 (1984).

42. Early North Carolina studies also documented racial disparities. Researchers Barry Nakell and Kenneth Hardy conducted a study of 600 homicide cases in 1977 and 1978 in North Carolina. They found that "a defendant charged with murder of a white was six times more likely to be convicted than a defendant charged with murdering a nonwhite." BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (Temple University Press 1987).

43. Sociologist Harold Garfinkel documented race of the victim disparities in the 1930s in North Carolina. He found that although there were only 51 cases with white victims and black defendants, 17 of those cases resulted in death sentences, or 31%. In contrast, there were 581 cases with black defendants and black victims and only 15, or 3%, resulted in death. Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949).

44. In 1941, another study found that among 330 murder cases in five North Carolina counties between 1930 and 1940, 32% of all black defendants, but only 13% of white defendants, received death sentences when the victims were white. Moreover, death sentences were imposed in 17.5% of all white victim cases, but only four-tenths of one percent of black victim cases. Guy B. Johnson, *The Negro and Crime*, 217 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 99 (1941).

45. In 1990, the United States General Accounting Office (GAO) reviewed 28 studies of racial disparities in capital punishment from across the country and found that, in 82% of those studies, the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty. The finding that the race of victims affects which defendants live and which die "was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies."[10] These similar results, arrived at by independent studies, demonstrate the reality that the race of the victim matters greatly in determining whether a defendant is sentenced to death.[11]

---

[10] The GAO Study can be found online at the following web address: http://archive.gao.gov/t2pbat11/140845.pdf.

[11] As previously noted, the *Reference Guide on Statistics* states that "convergent results strongly suggest the validity of the generalization" when multiple separate, statistical studies document the same effect.

FACTUAL BACKGROUND

Prosecutorial District History and Background

46. Prosecutorial District 12 is comprised of one county, Cumberland.[12] Cumberland County consists of Fayetteville and several smaller communities including Spring Lake and Hope Mills. Since the reinstatement of the death penalty in 1977, there have been 21 different individuals sentenced to death for capital crimes in Cumberland County. There are presently eight men and one woman on death row for crimes committed in Cumberland County.

47. The United States Census in 2009 estimated that 315,207 people lived in Cumberland County. As of 2008, Cumberland County is 56.1 % white, 37% African-American, 2.1% Asian and 1.6% American-Indian. Those figures are relatively unchanged from the 2000 census which found that Cumberland County's population to be 57.4% white, 36.3% African-American, 2.7% Asian and 2.4% American Indian.[13]

48. While the majority of Cumberland County residents are white, the majority of homicide victims are black. From 1990 through 1999 there were 518 murders in Cumberland County. During this span, 170 of the victims or 33% were white, 324 or 63 % were black. From 2000 through 2009 there were 288 murders in Cumberland County. During this span, 86 or 30% were white while 180 or 63% were black. The rest of the victims were designated as members of other races or their race was unknown.[14]

49. Although seven individuals were sentenced to death for Cumberland County capital offenses before 1990, none of the nine people currently on death row are there for sentences that were imposed before 1990. Marcus Robinson, who was sentenced to death on August 5, 1994, is the Cumberland County inmate who has been death row the longest.[15]

---

[12] Cumberland County and Prosecutorial District 12 will be used interchangeably throughout this pleading.

[13] Information from the United States Census for Cumberland County can be found at http://quickfacts.census.gov/qfd/states/37/37051.html.

[14] The NC Medical Examiner's Office provided electronic data to the Center for Death Penalty Litigation for all homicides in North Carolina from 1980-2009. These data are voluminous and available upon request. For purposes of this Motion, counsel have submitted excerpts from the data pertaining only to District 12 and including the name, age, race, gender, and date of death of each homicide victim.

[15] In fact, there is only one North Carolina inmate who was sentenced to death before 1990.

50. Since 1990 fifteen death sentences have been rendered in Cumberland County cases.[16]

Name of Defendant	Race of Defendant	Race of Victim(s)	Year of Death Sentence	Current Status
Marcus Robinson	B	W	1994	On death row
Philip Wilkinson	W	W, W, W	1994	On death row
Earl Richmond	B	B, B, B	1995	Executed
Richard Cagle	W	W	1995	On death row
Jeff Meyer 1995	W	W, W	1995	Sentence vacated by N.C. Supreme Court
John Davis McNeill	B	B	1995	On death row
Tilmon Golphin	B	W, W	1998	On death row
Kevin Golphin	B	W, W	1998	Juvenile resentenced to LWOP
Jeff Meyer (1999)	W	W, W	1999	On death row
Eric Queen	B	W, W	2000	Defendant committed suicide
Francisco Tirado	O	W, W	2000	N. C. Supreme Court vacated death sentence; juvenile resentenced to LWOP
Christina Walters	NA[17]	W, W	2000	On death row
George Carroll aka Kelly	B	B	2001	Died of natural causes
Quintel Augustine	B	B	2002	On death row
Eugene Williams	B	B, B	2007	On death row

[16] For these purposes, the MSU study considers three cases (Kevin Golphin, Tilmon Golphin and Quintel Augustine) where juries from other counties sentenced the defendant to death. The study counts Jeff Meyer twice since he was sentenced to death in 1995 and again in 1999. The study does not consider Henry McCollum in its Cumberland County findings, whose case is from Robeson County but who was tried and sentenced to death in Cumberland County.

[17] This pleading will use the term "Native American" instead of "Indian". The "NA" will be used as an abbreviation for Native American.

Judicial Division History and Background

51. North Carolina originally had four judicial divisions. Mr. Robinson was convicted and sentenced to death in 1994, in Cumberland County, which was then part of Judicial Division 2. For purposes of this Motion, Judicial Division 2 as constituted before 2000 will be referred to as former Judicial Division 2.

52. There are 35 prisoners currently on death row who were sentenced to death in former Judicial Division 2 between 1990 and 1999.[18] Of the 35 death-sentenced prisoners, just over half, or 18 (51%) were black, 12 (34%) were white, four (11%) were Native American, and one (3%) was Hispanic. Thus, 23 (66%) were minorities and 12 (34%) were white. The vast majority of these defendants, 23 of 35 (66%) were sentenced to death for killing one or more white victims.

	Name of Defendant	**Prosecuting County**	**Year Imposed**	**Race**	**White Victim?**
1.	Henry McCollum	Robeson	1991	B	N
2.	Eddie Robinson	Bladen	1992	B	N
3.	John Burr	Alamance	1993	W	Y
4.	Eugene DeCastro	Johnston	1993	B	Y
5.	Norfolk Best	Columbus	1993	B	Y
6.	Daniel Garner	Robeson	1993	W	N
7.	Johnny Daughtry	Johnston	1993	W	Y
8.	Marcus Robinson	Cumberland	1994	B	Y
9.	Phillip Wilkinson	Cumberland	1994	W	Y
10.	Malcolm Geddie	Johnston	1994	B	N
11.	Daniel Cummings	Brunswick Robeson	1994 1999	NA	Y
12.	Isaac Stroud	Durham	1995	B	N
13.	James Thomas	Wake	1995	B	Y
14.	Richard Cagle	Cumberland	1995	W	Y
15.	Jeffrey Meyer	Cumberland	1995 1999	W	Y
16.	William Morganherring	Wake	1995	B	N
17.	Jerry Hill	Harnett	1995	W	Y
18.	John McNeil	Cumberland	1995	B	N
19.	Davy Stephens	Johnston	1995	W	Y
20.	Eric Murillo	Hoke	1996	W	Y
21.	Robbie Locklear	Robeson	1996	NA	Y
22.	Archie Billings	Caswell	1996	W	Y
23.	Angel Guevara	Johnston	1996	H	Y
24.	Leroy Mann	Wake	1997	B	Y
25.	Marcos Mitchell	Wake	1997	B	Y
26.	Jerry Cummings	Robeson	1997	NA	Y
27.	Jimmie Lawrence	Harnett	1997	B	N
28.	John Williams	Wake	1998	B	N
29.	Allen Holman	Wake	1998	W	Y
30.	Timmy Grooms	Scotland	1998	W	Y

[18] Jeffrey Meyer was sentenced to death in 1995, and obtained relief on appeal. He was resentenced to death in 1999. Daniel Cummings, Jr., was sentenced to death in two counties.

31.	Tilmon Golphin	Cumberland	1998	B	Y
32.	Robert Brewington	Harnett	1998	NA	N
33.	Carlette Parker	Wake	1999	B	Y
34.	Nathaniel Fair	Wake	1999	B	N
35.	David Gainey	Harnett	1999	B	N

CLAIMS FOR RELIEF: PEREMPTORY STRIKES

I. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY STRIKES IN CASES THROUGHOUT NORTH CAROLINA.

53. Mr. Robinson is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(3) because, at the time of his capital trial, race was a significant factor in North Carolina prosecutors' decisions to exercise peremptory strikes during jury selection. *See also Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973) (explaining that "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race"); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding that once a state has created a right, the Fourteenth Amendment requires that state to provide "minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated"); *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (same); *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980) (same). Statistical and other evidence demonstrates that, across the State of North Carolina, race was a significant factor in whom the State chose to exclude from capital juries.

All-White Juries

54. Since our country's earliest days, black American citizens have historically been excluded from participating in civic life through jury service. Slaves were prohibited from serving on a jury even if the defendant was a slave who was charged with a crime against another slave. From North Carolina's inception as a state through the end of the Civil War, blacks were barred from serving on juries by the state constitution itself. The Reconstruction era, from 1868 to 1875, brought a brief period of black jury participation. After Reconstruction ended, however, historical evidence indicates that blacks continued to be excluded from juries in North Carolina. Statutory requirements for jury service in the early 1900s were vague and allowed local officials unlimited discretion to make racially discriminatory judgments about who was qualified to serve. *See* Exhibit 4, Seth Kotch and Robert P. Mosteller, THE RACIAL JUSTICE ACT AND THE LONG STRUGGLE WITH RACE AND THE DEATH PENALTY IN NORTH CAROLINA, 88 N.C. L. Rev. ___, 113, n. 44; 139-43 (forthcoming 2010).

55. While some black persons did begin to serve on juries by the middle of the twentieth century, they remained chronically under-represented in jury pools. In *State v. Price*, 301 N.C 437 (1980), the North Carolina Supreme Court approved an absolute disparity of 14% between the local black population and the black population in the

jury pool. In *State v. Bowman*, 349 N.C. 459 (1998), the Court approved a disparity of nearly 15%.

56. Over the past twenty years, North Carolina prosecutors have continued the tradition of excluding black citizens from juries through the use of the peremptory strike. In today's capital trials, the prosecutor's peremptory strike serves the same discriminatory function as our old constitutional provisions barring black slaves from jury service or vague statutes permitting local officials to exclude black citizens from jury pools.

57. As documented by the MSU Study, 31 of North Carolina's current death row inmates were sentenced to death by all-white juries.[19] The MSU Study has also documented that 38 of North Carolina's current death row inmates were sentenced to death by juries with only one person of color.[20] Taken together, this means that over 40% of

---

[19] Wayne Laws (1985, Davidson County); Clinton Rose (1991, Rockingham County); Kenneth Rouse (1992, Randolph County); Carl Moseley (1992, Forsyth County); Carl Moseley (1993, Stokes County); James Williams (1993, Randolph County); Rayford Burke (1993, Iredell County); Martin Richardson (1993, Union County); Wade Cole (1994, Camden County); Thomas Larry (1995, Forsyth County); Darryl Strickland (1995, Union County); Keith East (1995, Surry County); Tony Sidden (1995, Alexander County); Eric Call (1996, Ashe County); Guy LeGrande (1996, Stanly County); Gary Trull (1996, Randolph County); Russell Tucker (1996, Forsyth County); Roger Blakeney (1997, Union County); Phillip Davis (1997, Buncombe County); Ted Prevatte (1999, Stanly County); Eric Call (1999, Ashe County); Andre Fletcher (1999, Rutherford County); James Jaynes (1999, Polk County); Jathiyah Al-Bayyinah (1999, Davie County); Cerron Hooks (2000, Forsyth County); Paul Brown (2000, Wayne County); Mitchell Holmes (2000, Johnston County); Quintel Augustine (2002, Cumberland County); Alexander Polke (2005, Randolph County); Chris Goss (2005, Ashe County); William Raines (2005, Henderson County); George Wilkerson (2006, Randolph County); Andrew Ramseur (2010, Iredell County).

[20] Michael Reeves (1992, Craven County); Edward Davis (1992, Buncombe County); James Jaynes (1992, Polk County); Nathan Bowie (1993, Catawba County); William Bowie (1993, Catawba County); John Burr (1993, Alamance County); Johnny Daughtry (1993, Johnston County); Randy Atkins (1993, Buncombe County); Eugene DeCastro (1993, Johnston County); James Campbell (1993, Rowan County); Vincent Wooten (1994, Pitt County); Frank Chambers (1994, Rowan County); Daniel Cummings, Jr. (1994, Brunswick); John Elliot (1994, Davidson County); William Gregory (1994, Davie County); Alden Harden (1994, Mecklenburg County); Marvin Williams, Jr. (1995, Wayne County); Danny Frogge (1995, Forsyth County); Malcolm Geddie, Jr. (1994 Johnston County); Darrell Woods (1995, Forsyth County); William Morganherring (1995, Wake County); Kenneth Neal (1996, Rockingham County); James Davis (1996, Buncombe County); Melvin White (1996, Craven County); William Gregory (1996, Davie County); Leroy Mann (1997, Wake County); John Williams, Jr. (1998, Wake County); Tilmon Golphin (1998, Cumberland County); James Morgan (1999, Buncombe County); Carlette Parker (1999, Wake County); Billy Ray Anderson (1999, Craven County); Marcus Jones (2000, Onslow County); Terry Hyatt (2000, Buncombe County); James Watts (2001, Davidson County); Jim Haselden (2001, Stokes County); Clifford Miller (2001, Onslow County); Terrance

the defendants on North Carolina's 159-person death row were sentenced to death by a jury that included either one or zero persons of color.[21]

58. All-white capital juries are therefore a widespread and pervasive phenomenon in North Carolina. The current death row inmates sentenced by all-white or juries with only one person of color had trials that occurred in diverse counties across North Carolina. All-white juries have occurred even in counties with significant black populations, such as Forsyth, Camden, Johnston, and Wayne.

59. The problem of white capital juries in North Carolina spans not only place, but time as well. The oldest case on death row, originating in 1985, had an all-white jury, as did the newest case on death row, which concluded with a death sentence in June of 2010.

Statistical Evidence

60. Statistical evidence also demonstrates that race has been a significant factor in the State's exercise of peremptory strikes statewide over the last twenty years.

61. The MSU Study shows that, at the time of Mr. Robinson's trial in 1994, prosecutors statewide struck qualified black and racial minority citizens from service on death penalty juries at more than twice the rate they struck white citizens.

62. Statewide from 1990 through 1994, the State struck eligible black venire members at an average rate of 57.3% but struck all other venire members at an average rate of only 26.0%.[22] The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

63. Prosecutors have consistently discriminated against black venire members over the past twenty years. Statewide, from 1990 through 2010, prosecutors struck eligible black venire members at an average rate of 55.5% but struck other venire members at an average rate of only 24.8%.[23] The probability of observing a statewide racial

---

Campbell (2002, Pender County); Jathiya Al-Bayyinah (2003, Davie County); John Badgett (2004, Randolph County); Ryan Garcell (2006, Rutherford County); Jeremy Murrell (2006, Forsyth County).

[21] In reaching this conclusion, only the racial composition of the deliberating jury was considered. Black or racial minority alternates were not considered because they did not have an opportunity to participate in capital deliberations.

[22] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 56.19% but struck qualified white venire members at an average rate of only 25.96%. This difference in strike levels is significant at the 0.001 level.

[23] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 54.05% but struck qualified white venire members at an average rate of only 24.48%. This difference in strike levels is significant at the 0.001 level.

disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

64. These disparities cannot be explained away by any suggestion that they resulted from non-racial factors that correlate with venire members' race. In cases with black or other minority defendants, the MSU Study shows that prosecutors are even more race-conscious in their use of peremptory strikes.

65. Specifically, the MSU Study found that in cases with black defendants, from 1990 through 2010, the State struck eligible black venire members at an average rate of 59.9% and struck other eligible venire members at an average rate of 23.1%. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.02.

66. Similarly, in cases with racial minority defendants, from 1990 through 2010, the State struck eligible minority venire members at an average rate of 57.6% and struck eligible white venire members at an average rate of 22.9%. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.02.

II. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY STRIKES IN CASES IN THE JUDICIAL DIVISION.

67. The foregoing evidence and law with respect to statewide disparities in jury selection is incorporated into this claim by reference.

68. Mr. Robinson is entitled to relief under the RJA because, at the time of his capital trial, race was a significant factor in the State's decisions to exercise peremptory strikes during jury selection in the Judicial Division.

69. In former Judicial Division 2, from 1990 through 1999, prosecutors struck qualified black venire members at an average rate of 51.3% but struck qualified non-black venire members at an average rate of only 25.2%.[24] Thus, prosecutors were 2.0 times more likely to strike qualified venire members who were black. The probability of observing a racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

---

[24] In former Judicial Division 2, prosecutors struck qualified racial minority venire members at an average rate of 47.94% but struck qualified white venire members at an average rate of only 24.07%. This difference in strike levels is significant at the 0.001 level.

III. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY STRIKES IN CASES IN THE 12th PROSECUTORIAL DISTRICT.

70. The foregoing evidence and law with respect to statewide and division-wide disparities in jury selection is incorporated into this claim by reference.

71. Mr. Robinson is entitled to relief under the RJA because, at the time of his capital trial, race was a significant factor in the State's decisions to exercise peremptory strikes during jury selection in the 12th Prosecutorial District.

72. There have been consistent concerns about prosecutors' use of peremptory strikes against eligible black venire members in Cumberland County. In 1998, in the capital case of *State v. Maurice Parker*, 96 CRS 4093 the Honorable Jack Hooks found that the prosecutors in Cumberland County had attempted to use a peremptory challenge against a black juror in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and ordered that the juror be seated. Parker was a black man accused of murdering a white man. In a noncapital case, *State v. Roderick Swanson*, 92 CRS 37242, the Honorable Wiley F. Bowen found that the Cumberland County prosecutor had excused two eligible black venire members on the basis of race, and denied the prosecution's attempt to excuse them peremptorily. Swanson was a black man charged with raping a white woman, and Judge Bowen made his ruling after the prosecutor had used all five of his peremptory challenges against black jurors. (Affidavit of Jonathan E. Broun).

73. Batson challenges were raised on direct appeal in numerous capital cases from Cumberland County. Both Kevin and Tilmon Golphin raised the claim in their mutual direct appeal. *State v. Golphin,* 352 N.C. 364, 425-33, 533 S.E.2d 168, 210-15 (2000). Eric Queen and Fransico Tirado also raised Batson challenges in their appeals. *State v. Tirado,* 358 N.C. 551, 567-570, 599 S.E.2d 515, 527 - 529 (2004). A Batson claim was also raised in Quintel Augustine's case. *State v. Augustine*, 359 N.C. 709, 714-716, 616 S.E.2d 515, 521 - 522 (2005) Christina Walters's appellate counsel attempted to raise a claim that her trial counsel failed to adequately present a Batson claim, but the North Carolina Supreme Court defaulted the claim because appellate counsel had not properly assigned it as error. See direct appeal appellant's brief *State v. Christina Waltes*, No. 548A00, North Carolina Supreme Court, pages 78082; *State v. Walters*, 357 N.C. 68, 95, 588 S.E.2d. 344, 360 (2003).

74. The MSU study examined the prosecution's use of peremptory strikes in every capital case involving a Cumberland County inmate who is presently on death row. In Cumberland County, prosecutors struck qualified black venire members at an average rate of 52.3% but struck qualified non-black venire members at an average rate of only 20.8%. Thus, prosecutors were 2.5 times more likely to strike qualified venire members who were black. The probability of observing a racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

75. An examination of the prosecution peremptory strikes since 1990 reveals how consistent this pattern has been over the past twenty years.

Defendant	% Blacks Struck by Prosecution	% Non-Blacks Struck by Prosecution	Difference in Strike Rates	Approximate Ratio in Strike Rate
Quintel Augustine[25]	100%	27%	73%	4:1
Richard Cagle[26]	28.6%	28.2%	.4%	1:1
Tilmon Golphin	71.4%	35,8%	35.6%	2:1
John McNeill	60%	13.6%	46.4%	4:1
Jeff Meyer 1995	43.8%	19.1%	24.7%	2:1
Jeff Meyer 1999	50%	15.4%	34.6%	3:1
Marcus Robinson	50%	14.8%	35.2	3:1
Christina Walters	52.6%	14.8%	37.8%	3.5:1
Philip Wilkinson	33.3%	25.8%	7.5%	1:1
Eugene Williams (2004)	38.5%	15.4%	23.1%	2.5:1
Eugene Williams (2007)	47.4%	19.1%	28.3%	2.5:1

[25] Augustine's final jury, including alternates, was all white.

[26] Richard Cagle is the only defendant presently sentenced to death in Cumberland County in whose case the prosecutors struck eligible black venire members no more than one percent more than other venire members. The judge in that case was the Honorable Gregory Weeks. Judge Weeks is African-American. Cagle is the only case since 1990 in which a death sentence was returned and the presiding judge was non-white. Although, Judge Weeks did preside over Eugene Williams' capital proceeding that resulted in a mistrial. Despite the fact that Judge Weeks is a resident judge in Cumberland County and other African-American and Native American judges have held court in Cumberland County since 1990, 14 out of the 15 death verdict cases had white judges. Although Cumberland County is a very diverse community and has had many elected African-American leaders throughout the last 20 years, for whatever reason all the critical participants in capital litigation have been white. For example, the number of prosecutors on each of these 15 cases has fluctuated between one and three lawyers. There have been a total of 28 prosecutorial positions in these cases, and 25 have been occupied by white prosecutors. Eight times there was a single prosecutor, and every time the prosecutor was white. Once there were two prosecutors and both of the prosecutors were white. Six times there were three prosecutors, and three of those times one of those prosecutors was black. There have been 30 defense attorney positions for these cases and 29 out of the 30 have been filled by whites. Affidavit of Jonathan E. Broun.

Conclusion of Peremptory Strike Claims

76. 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").

77. Both defendants and society are injured by the use of peremptory strikes in a racially-biased manner:

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury . . . but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."
>
> Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial . . . ."

Miller-El v. Dretke, 545 U.S. 231, 237-38 (2005) (internal citations omitted); *see also State v. Cofield*, 320 N.C. 297 (1987) (explaining that "the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice").

78. Mr. Robinson is therefore entitled under the RJA and constitutional law to a sentence of life imprisonment without parole based on evidence of racial disparities in the State's use of peremptory strikes during jury selection in the State of North Carolina, the former 2nd Judicial Division, and Cumberland County.

CLAIMS FOR RELIEF: CHARGING AND SENTENCING DECISIONS

IV. AT THE TIME OF MR. ROBINSON'S TRIAL, AS A RESULT OF THE COMBINED EFFECT OF CHARGING AND SENTENCING DECISIONS, RACE WAS A SIGNIFICANT FACTOR IN THE IMPOSITION OF THE DEATH PENALTY THROUGHOUT NORTH CAROLINA.

79. Mr. Robinson is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(2) because, at the time of his capital trial, death sentences were imposed significantly more frequently as punishment for capital offenses against white victims than as

punishment for capital offenses against victims who were not white. *See also Ham*, 409 U.S. at 526-27; *Wolff*, 418 U.S. at 557; *Clemons*, 494 U.S. at 746; *Hicks*, 447 U.S. at 346-47.

80. A 1995 survey of North Carolina attorneys showed that 40.8% of white attorneys and 35.8% of non-white attorneys reported hearing racist jokes made by other attorneys.[27] This constitutes some evidence that prosecutors make decisions on racially discriminatory bases. *See* N.C. Gen. Stat. § 15A-2001(b) (permitting "other evidence" to prove an RJA claim).

81. However, racially disparate outcomes are not necessarily a product of overt racial animus. This is why the RJA allows the use of statistics to reveal disparities even in the absence of direct evidence of racial bias. *Compare McCleskey*, 481 U.S. at 292 (holding that, to prevail on a federal constitutional claim of racial discrimination in the imposition of the death penalty, a defendant "must prove that decision makers in his case acted with discriminatory purpose") (emphasis in original).

White Victim Disparities

82. The MSU Study found significant disparities as a result of the combined effect of prosecutors' charging decisions and juries' sentencing decisions. The MSU Study shows that, at the time of Mr. Robinson's trial in 1994, death eligible defendants[28] were significantly more likely to receive the death penalty if they were convicted of killing at least one white victim.

83. **1990-1999**: Statewide, from 1990 to 1999, 11.25% of death eligible cases with at least one white victim resulted in death sentences, while only 4.71% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.4 times more likely to result in a death sentence than all other cases.

    (a) Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.5 times higher than the odds faced by all other similarly situated defendants.

    (b) Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.7 times higher than the odds faced by all other similarly situated defendants.

---

[27] This survey was a joint venture commissioned by the North Carolina Bar Association and the North Carolina Association of Black Lawyers. It is entitled, *North Carolina Survey of Attorneys, 1995.*

84. **1990-1994**: Statewide, from 1990 to 1994, 12.14% of death eligible cases with at least one white victim resulted in death sentences, while only 3.90% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 3.1 times more likely to result in a death sentence than all other cases.

    (a) Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.7 times higher than the odds faced by all other similarly situated defendants.

    (b) Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.3 times higher than the odds faced by all other similarly situated defendants.

85. This trend has been consistent over the past two decades. The MSU Study demonstrates that, statewide from 1990 through 2009, death eligible cases with at least one white victim were 2.6 times more likely to result in a death sentence.

86. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, statewide between 1990 and 2009, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 2.1 times higher than the odds faced by all other similarly situated defendants.

87. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, statewide between 1990 and 2009, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.6 times higher than the odds faced by all other similarly situated defendants.

88. Thus, race of the victim disparities cannot be explained away by any suggestion that crimes against white victims are more heinous or death-worthy.

89. The Radelet-Pierce Study confirms the MSU Study's conclusions. The Radelet-Pierce Study demonstrates that, statewide between 1990 and 2007, homicides against white victims were three times more likely to result in a death sentence. Even after accounting for the impact of multiple victims and whether the homicide was accompanied by another felony, the Radelet-Pierce Study found that homicides of white victims were still three times more likely to result in a death sentence.

90. The MSU Study's conclusions about race of victim disparities can also be corroborated by comparing the racial makeup of the overall homicide victim population with the racial makeup of the victims of the people executed in North Carolina. Of the 56 victims of the people executed in North Carolina since 1976,

79% were white and 18% were black. In contrast, 54% of all homicide victims in North Carolina since 1976 were black while 42.3% were white.[29]

91. In other words, in North Carolina capital cases in which defendants have been executed, black victims are vastly under-represented when compared to the proportion of black victims in the overall homicide population. This demonstrates that juries and prosecutors simply do not pursue the death penalty as aggressively in homicide cases involving black victims.

V. AT THE TIME OF MR. ROBINSON'S TRIAL, AS A RESULT OF THE COMBINED EFFECT OF CHARGING AND SENTENCING DECISIONS, RACE WAS A SIGNIFICANT FACTOR IN THE IMPOSITION OF THE DEATH PENALTY IN THE JUDICIAL DIVISION.

92. The foregoing evidence and law with respect to statewide disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

93. In former Judicial Division 2, from 1990 to 1999, 10.54% of death eligible cases with at least one white victim resulted in death sentences, while only 3.25% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 3.2 times more likely to result in a death sentence.

VI. AT THE TIME OF MR. ROBINSON'S TRIAL, AS A RESULT OF THE COMBINED EFFECT OF CHARGING AND SENTENCING DECISIONS, RACE WAS A SIGNIFICANT FACTOR IN THE IMPOSITION OF THE DEATH PENALTY IN THE 12th PROSECUTORIAL DISTRICT.

94. The foregoing evidence and law with respect to statewide and division-wide disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

95. Of the 15 sentences imposed since 1990, nine people currently remain on death row. Ten of the 15 trials where death sentences were rendered involved the deaths of white victims. The other five cases have involved the deaths of blacks. Therefore, even

[29] This data is available in a report produced by UNC-Chapel Hill Political Science Professor Frank R. Baumgartner. Professor Baumgartner's report can be found online at the following web address: http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepencies-NC-homicides-executions.pdf.

though white victims only account for less than 33% of the homicides in the past twenty years, they account for 67% of the death sentences in Cumberland County during that span.

96. The MSU study specifically reviewed death eligible cases from Cumberland County from 1990 through 2009, including every case that received the death penalty and every case that a defendant had a capital trial that went to Issue III or Issue IV of the capital sentencing recommendation form. They identified 42 such cases. Twenty-seven of those cases had at least one white victim, and 15 of the cases had no white victims. In Cumberland County, from 1990 to 2009, prosecutors brought 21.62% of death eligible cases with at least one white victim to capital trials, but brought only 6.98% of death eligible cases without white victims to capital trials. Thus, prosecutors were 3.1 times more likely to bring a case to a capital trial if there was at least one white victim.

97. The MSU study also examined which of the capitally eligible defendants in Cumberland County received the death penalty. In Cumberland County, from 1990 to 2009, 8.01% of death eligible cases with at least one white victim resulted in death sentences, while only 2.33% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 3.44 times more likely to result in a death sentence.

Capital Cases in Cumberland County from 1990-2000

98. Racial disparities in capital cases are very pronounced in Cumberland County from 1990 through the end of the year 2000. It is appropriate to examine these years as a group because there were several changes in North Carolina in 2001 that fundamentally changed the way capital cases were tried in North Carolina. In 2001, the General Assembly gave prosecutors the discretion to try or plead first degree murder cases noncapitally. N.C. Gen. Stat. Section 15A-2004. That year, the legislature also excluded mentally retarded defendants from receiving the death penalty. N.C. Gen. Stat. Section 15A-2005. Also, in 2001, Indigent Defense Services was given the responsibility for appointing counsel in capital cases, and for authorizing the hiring of experts and other defense services. In 2001 there began a fundamental change in the number of death sentences imposed throughout the state. From 1990 through 2000 there were 261 death sentences given, for an average of 23.7 death sentences a year. From 2001 through 2009, there have only been 48 death sentences, an average of 5.3 a year. *See* Affidavit of Jonathan E. Broun.

99. Cumberland County has also shown a sharp decline in the number of death sentences since 2001. From 1990 to 2000, there were 37 cases that reached a capital penalty phase, and 12 that received the death penalty. From 2001 to 2009, there were only 14 cases that reached the penalty phase, and only three of those cases received death sentences.

100. From 1990 through the end of 2000, there were 12 death sentences returned and 10 were for the killings of whites. In other words, 83% of the death sentences during that period were for the killing of whites. One of the cases where a death sentence was rendered where there were black victims was Earl Richmond. In that case, the State presented evidence that Richmond previously killed a white woman. Affidavit of Jonathan E. Broun. Therefore, there is only one case between 1990-2000, in which a defendant was sentenced to death with no evidence that he or she had killed a white person.[30]

101. An examination of cases that reached the penalty phase during this period reveals the following:

	Number of white victim cases	Number of black victim cases	Total numbers	Percent white victim cases	Percent black victim cases
Homicide victims 1990-99	170	324	518	33%	63%
Cases that proceeded to a capital penalty phase 1990-2000	21	9	30	70%	30%

102. Even though white victims accounted for only one third of the homicide victims in Cumberland County during this time, they accounted for more than two-thirds of the cases that reached a penalty phase.

103. The discrepancy between how white and black defendants were treated is also very apparent in the jury's sentencing decisions.

[30] For further statistical discussions, the MSU study and this pleading will assume that Earl Richmond's case did not involve the killing of a white person.

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

104. In other words, defendants convicted of killing white victims were more than twice as likely to receive the death penalty from the jury at a capital sentencing hearing than defendants charged with killing black victims.

105. During this period, there were defendants who got the death penalty for killing white victims whose other demographics made them unlikely to receive the death penalty. From 1990 through 2000 there were two individuals in Cumberland County sentenced to death for killing white victims who were only 17 at the time of their crime. Both of the Cumberland County juveniles who received the death penalty were nonwhite. When *Roper v. Simmons*, 543 U.S. 551 (2005) outlawed the death penalty for the killing of 17 year olds, there were only four seventeen years olds on death row in North Carolina. Also, Christina Walters is on death row for the murders of two white victims. She is one of only four women presently on death row in North Carolina.

Multiple Victim Cases

106. In November of 2009, Cumberland County's senior resident superior court judge, the Honorable E. Lynn Johnson, issued an order concerning the collection of data for the RJA. Order: North Carolina Racial Justice Act, November 17, 2009. In that order, Judge Johnson noted that many death penalty cases in Cumberland County that had received the death penalty involved defendants convicted of multiple killings. He cites the North Carolina Supreme Court's decision in *State v. Wilkinson*, 344 N.C. 198 (1996) for the proposition that the fact that a defendant is a multiple murderer stands as a "heavy" factor against defendant in determining proportionality of the sentence. Ex. 6 Order.

107. It is certainly true that a significant percentage of the death sentences in Cumberland County involve multiple victims. Ten of the fifteen death sentences, or 67%, involve multiple murders. Not every case, however, where defendants are charged with or convicted of multiple first degree murders receives a death sentence in Cumberland County. There are numerous cases involving multiple victims where

the District Attorney's office has offered pleas, or tried the case noncapitally.[31] Juries also do not always return death sentences for defendants convicted of killing multiple persons. An examination of jury sentencing in cases with multiple victims suggests that the race of the victims plays a significant role in determining which of these defendants receive the death sentence.

	Cases reaching penalty phase (1990-2009)	Cases receiving death penalty (1990-2009)	Percentage receiving death
Cases with multiple white victims[32]	14	8	57%
Cases with multiple victims who were not white	10	2	20%
Total cases with multiple victims	25[33]	10	40%

108. Therefore, a defendant facing the death penalty at a capital trial for multiple murders was **2.85 *times more*** likely to receive the death sentence if he was convicted of killing multiple white victims than if he was convicted of killing multiple nonwhite victims.

[31] *State v. Litdell Burkhalter*, 98 CRS 10722(Defendant convicted of three counts of first degree murder, but tried noncapitally); *State v. Woody Magee*, 98 CRS 10715 (Defendant convicted of three counts of first degree murder, but case was tried noncapitally); *State v. Rodney McClain*, 94 CRS 37202 (defendant allowed to plead to two counts of second degree murder, although originally charged with two counts of first degree murder); *State v. Kenneth Swain*, 91 CRS 39053-54 (defendant originally charged with two count of first degree murder; allowed to plead to counts of second degree murder).

[32] This category, multiple white victims, does not include John Flint McNeill and Carlton Johnson. McNeil was convicted of killing two people, one of whom was white, but the other's race was listed as other. Calvin Johnson was convicted of killing three people, one of whom was white, and the other two were black.

[33] John Flint McNeil was convicted of two homicides, but since the victims in his case were of two different races, his case is not include in either cases with multiple white victims or cases with multiple nonwhite victims.

Multiple Victim Cases 1990-2000

109. The discrepancy in how juries sentence defendants convicted of killing multiple victims is even more pronounced in cases decided between 1990-2000.

	Cases reaching penalty phase (1990-2000)	Cases receiving death penalty (1990-2000)	Percentage receiving death
Cases with multiple white victims	10	8	80%
Cases with multiple nonwhite victims	6	1	17%
Total cases with multiple victims	17	9	53%

110. Therefore, a defendant facing the death penalty at a capital trial for multiple murders between 1990 and 2000 was 4.71 times more likely to receive the death sentence if he was convicted of killing multiple white victims than if he was convicted of killing multiple nonwhite victims.

111. From 1990 through 2000, three white defendants (Joseph Bromfield, James Burmeister, and Malcolm Wright) went to a penalty phase for murdering multiple black victims. Burmeister and Wright each received life sentences, even though the State offered evidence in each of their trials tending to show that the victims were specifically targeted and murdered because of the defendants' racist, skinhead views. *State v. Burmeister*, 131 N.C. App. 190, 506 S.E.2d. 278 (1998). Bromfield also received a life sentence after his jury found there were no aggravating circumstances, even though he was convicted of two separate murders. (Affidavit of Jonathan E. Broun).

Race of Defendant Since 2000

112. Since the beginning of 2000, there have been six death sentences imposed in Cumberland County. All six death sentences have given to racial minority defendants as opposed to white defendants. From 2000 through 2009 there were 14 capital trials where the jury reached Issue III or Issue IV of the capital sentencing

recommendation form. In 12 of those cases the defendant was a member of a racial minority. In only two of those cases were the defendants white. The MSU study only considered cases that were tried through 2009. That means 85.71% of all cases that prosecutors have brought to a capital trial since the beginning of 2000 have had racial minority defendants.[34]

VII. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS THROUGHOUT NORTH CAROLINA.

113. The foregoing evidence and law with respect to disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

114. Mr. Robinson is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(2) because, at the time of his capital trial, prosecutors sought death sentences significantly more frequently as punishment for capital offenses against white victims than as punishment for capital offenses against any other race.

White Victim Disparities

115. The statistical results of the MSU Study show that at the time of Mr. Robinson's trial in1994, North Carolina prosecutors were more likely to seek the death penalty in cases with at least one white victim.

116. **1990-1999**: Statewide, for the time period between 1990 and 1999, prosecutors brought 22.44% of death eligible cases with at least one white victim to capital trials, but brought only 11.36% of those cases without white victims to capital trials. Thus, prosecutors were 2.0 times more likely to bring a case to a capital trial if there was at least one white victim.

(a) Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.5 times higher than the odds faced by all other similarly situated defendants.

(b) Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible

---

[34] There have been, however, two capital trials that have began in Cumberland County since the beginning of 2010. Abudullah E. Shareef, who is black, was convicted of first degree murder but sentenced to life by a jury in March of this year. Dexter McRae, whose is also black, capital trial commenced on July 26, 2010.

defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.5 times higher than the odds faced by all other similarly situated defendants.

117. **1990-1994**: Statewide, for the time period between 1990 and 1994, prosecutors brought 24.01% of death eligible cases with at least one white victim to capital trials, but brought only 10.20% of those cases without white victims to capital trials. Thus, prosecutors were 2.4 times more likely to bring a case to a capital trial if there was at least one white victim.

    (a) Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.8 times higher than the odds faced by all other similarly situated defendants.

    (b) Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.6 times higher than the odds faced by all other similarly situated defendants.

118. This trend has been consistent over the past two decades. Statewide from 1990 through 2009, prosecutors were 1.9 times more likely to bring a case to a capital trial if there was at least one white victim.

119. These disparities also persisted in regression models that account for the impact of non-racial statutory aggravating and mitigating circumstances in the cases. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, statewide from 1990 through 2009, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.5 times higher than the odds faced by all other similarly situated defendants.

120. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, statewide from 1990 through 2009, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.6 times higher than the odds faced by all other similarly situated defendants. Thus, the disparities based on race of the victim cannot be explained away by any suggestion that crimes against white victims are more heinous or death-worthy.

VIII. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS IN THE JUDICIAL DIVISION.

121. The foregoing evidence and law with respect to statewide disparities in the State's capital charging decisions is incorporated into this claim by reference.

White Victim Disparities

122. Prosecutors' Decisions to Seek Death at Any Point in the Charging. In former Judicial Division 2, from 1990 to 1999, prosecutors sought the death penalty at some point in the charging process in 68.55% of death eligible cases with at least one white victim. Prosecutors sought the death penalty at some point in the charging process in 55.50% of death eligible cases without white victims. Thus, prosecutors were 1.2 times more likely to seek the death penalty in cases with at least one white victim.

123. Prosecutors' Decisions to Advance to Capital Trial. In former Judicial Division 2, from 1990 to 1999, prosecutors brought 23.25% of death eligible cases with at least one white victim to capital trials, but brought only 9.26% of death eligible cases without white victims to capital trials. Thus, prosecutors were 2.5 times more likely to bring a case to a capital trial if there was at least one white victim.

Racial Minority Defendant/White Victim Disparities

124. Prosecutors' Decisions to Seek Death at Any Point in the Charging. In former Judicial Division 2, from 1990 to 1999, prosecutors sought the death penalty at some point in the charging process in 79.63% of death eligible cases with racial minority defendants and at least one white victim. Prosecutors sought the death penalty at some point in the charging process in 56.73% of all other death eligible cases. Thus, prosecutors were 1.4 times more likely to seek the death penalty in cases with racial minority defendants and at least one white victim.

IX. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS IN THE 12th PROSECUTORIAL DISTRICT.

125. The foregoing evidence and law with respect to statewide and division-wide disparities in the State's capital charging decisions is incorporated into this claim by reference.

White Victim Disparities

126. **Prosecutors' Decisions to Advance to Capital Trial.** In Cumberland County, from 1990 to 2009, prosecutors brought 21.62% of death eligible cases with at least one white victim to capital trials, but brought only 6.98% of death eligible cases without white victims to capital trials. Thus, prosecutors were 3.10 times more likely to bring a case to a capital trial if there was at least one white victim.

Racial Minority Defendant/White Victim Disparities

127. **Prosecutors' Decisions to Seek Death at Any Point in the Charging.** In Prosecutorial District 12, from 1990 to 2009, prosecutors sought the death penalty at some point in the charging process in 94.47% of death eligible cases with racial minority defendants and at least one white victim. Prosecutors sought the death penalty at some point in the charging process in 57.31% of all other death eligible cases. Thus, prosecutors were 1.65 times more likely to seek the death penalty in cases with racial minority defendants and at least one white victim.

X. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN CAPITAL SENTENCING DECISIONS BY JURIES IN THE JUDICIAL DIVISION.

128. The foregoing evidence and law with respect to disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

129. Mr. Robinson is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(2) because, at the time of his capital trial, juries imposed death sentences significantly more frequently as punishment for capital offenses against white victims than as punishment for capital offenses against victims who were not white.

130. The statistical results of the MSU Study show that at the time of Mr. Robinson's trial in 1994, capital juries in the Judicial Division were more likely to impose the death penalty in cases with at least one white victim.

131. In former Judicial Division 2, from 1990 to 1999, juries imposed death sentences in 45.35% of all penalty phase trials with at least one white victim, but only 35.09% of penalty phase trials without white victims. Thus, juries were 1.3 times more likely to sentence a defendant to death if the case had at least one white victim.

XI. AT THE TIME OF MR. ROBINSON'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN CAPITAL SENTENCING DECISIONS BY JURIES IN THE 12th PROSECUTORIAL DISTRICT.

132. The foregoing evidence and law with respect to the fact that race was a significant factor in capital sentencing decisions by juries on a division-wide basis is incorporated into this claim by reference.

Racial Minority Defendant Disparities

133. **Jury Sentencing Decisions.** In Cumberland County, from 1990 to 2009, juries imposed death sentences in 42.31% of all penalty phase trials with racial minority defendants, but only 25.00% of penalty phase trials with white defendants. Thus, juries were 1.69 times more likely to sentence a racial minority defendant to death.

Racial Minority Defendant/White Victim Disparities

134. **Jury Sentencing Decisions.** In Cumberland County, from 1990 to 2009, juries imposed death sentences in 46.15% of all penalty phase trials with racial minority defendants and at least one white victim, but only 31.03% of all other penalty phase trials. Thus, juries were 1.49 times more likely to sentence a defendant to death if the case had a racial minority defendant and at least one white victim.

Conclusion of Charging and Sentencing Claims

135. The RJA addresses discrimination in the application of the death penalty by permitting defendants to demonstrate the existence of racial disparities in capital charging and sentencing decisions through the use of statistical evidence. This approach only makes sense given the historical context. While overtly racist sentiments were openly expressed by all components of our criminal justice system in the historical periods before *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating the death penalty in part due to racial disparities), the concerns that remain today are whether the legacy of those historical prejudices remain in North Carolina practices, procedures, and policies, even though they may not be openly expressed by individual actors. This very real concern has been recognized by the Supreme Court. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) (explaining that "[m]ore subtle, less consciously held racial attitudes could . . . influence a juror's [capital sentencing] decision").

136. In *Rose v. Mitchell*, the Supreme Court explained that although racial discrimination may operate more subtly than in previous times, it remains potent:

> [W]e . . . cannot deny that, 114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our

> society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

443 U.S. 545, 558-59 (1979).

137. As *demonstrated* above, racial disparities in charging and sentencing existed at the time of Mr. Robinson's trial. Although these disparities may be the product of unconscious racism, the legislature has devised a remedy for this discrimination. Mr. Robinson is entitled under the RJA and constitutional law to a sentence of life imprisonment without parole based on this evidence of racial disparities in capital charging and sentencing decisions.

Respectfully submitted this the 5 day of August 2010.

Michael R. Ramos

Geoffery W. Hosford

STATEMENT OF COMPLIANCE WITH
N.C. Gen. Stat. § 15A-1420(a)(1)(c1)

There is a sound legal basis for this motion. This motion is being filed in good faith. Both the District Attorney's Office and trial counsel have been notified of the filing of this motion. The undersigned has in good faith determined that a full review of the trial transcript is not required in order to file this motion.

Respectfully submitted this the 5 day of August 2010.

Michael R. Ramos

Geoffery W. Hosford

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to N.C. Gen. Stat. § 15A-1420(b1)(1), I caused to be served a copy of the foregoing Racial Justice Act Motion, by first class mail upon:

Edwin W. Welch
Special Deputy Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629

Edward Grannis
Office of the District Attorney
117 Dick Street
Post Office Box 363
Fayetteville, NC 28302-0363

This the 5 day of August 2010.

Michael R. Ramos