

NORTH CAROLINA
CUMBERLAND COUNTY

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

_____)	
STATE OF NORTH CAROLINA,)	
)	RACIAL JUSTICE ACT HEARING
)	
vs.)	MASTER INDEX
)	
MARCUS ROBINSON,)	
Defendant.)	
_____)	

Master Index of Racial Justice Act Hearing taken during the January 30, 2012 through February 15, 2012 session of Superior Court before the Honorable Gregory A. Weeks, Judge Presiding.

A P P E A R A N C E S

For the State: Calvin Colyer & Rob Thompson, Assistant District Attorneys, 12th Judicial District; and Jonathan Perry, Assistant District Attorney, 20th Judicial District

For the Defendant: Jay Ferguson & Cassandra Stubbs, Durham County Bar; Malcolm Hunter, Orange County Bar; and James Ferguson, Mecklenburg County Bar Attorneys at Law

 SHANNON RANSOM, sransom1@nc.rr.com
 VERONICA MCCLAIN, verbrptr45@nc.rr.com
 JENNIFER HACK, Jennifer.L.Hack@nccourts.org
 Official Court reporters, (910) 475-3027
 Cumberland County Courthouse
 Fayetteville, North Carolina 28302

INDEX

VOLUME	I	- January 30, 2012	= pages	1 through	190
VOLUME	II	- January 31, 2012	= pages	191 through	451
VOLUME	III	- February 1, 2012	= page	452 through	691
VOLUME	IV	- February 2, 2012	= pages	692 through	949
VOLUME	V	- February 3, 2012	= pages	950 through	1082
VOLUME	VI	- February 6, 2012	= pages	1083 through	1252
VOLUME	VII	- February 7, 2012	= pages	1253 through	1485
VOLUME	VIII	- February 8, 2012	= pages	1486 through	1703
VOLUME	IX	- February 9, 2012	= pages	1704 through	1910
VOLUME	X	- February 10, 2012	= pages	1911 through	2003
VOLUME	XI	- February 13, 2012	= pagex	2004 through	2264
VOLUME	XII	- February 14, 2012	= pages	2265 through	2466
VOLUME	XIII	- February 15, 2012	= pages	2467 through	2638

<u>Page</u>	<u>Miscellaneous</u>
3	Discussion regarding media in the courtroom
11	State's motion to continue
34	State's motion for supplemental discovery
41	Defendant's motion to compel
70	Defendant's motion to limit gruesome photographs
75	Defendant's motion to allow videotaping of public judicial proceedings
81	Defendant's opening statement
693	Discussion regarding affidavits
751	Discussion regarding transcripts
811	Discussion regarding affidavits
936	Discussion regarding affidavits
1072	Defendant rests
1078	State's motion to dismiss
1085	Discussion regarding affidavits
1087	State's opening statement
1214	Discussion regarding affidavits
1232	Defendant's motion in limine regarding Judges' testimony
1565	Motion in limine regarding Dr. Katz's testimony
2242	State rested
2389	Note marked as Court's Exhibit 2
2398	Discussion regarding legal education documents
2412	Discussion regarding binder containing summary materials
2427	Discussion regarding affidavits
2441	Defendant rests surrebuttal
2441	State's closing argument by Mr. Perry
2460	Defendant's closing argument by Mr. Jay Ferguson
2516	Defendant's closing argument by Ms. Stubbs
2534	State's closing argument by Mr. Thompson
2560	State's closing argument by Mr. Colyer
2595	Defendant's closing argument by Mr. James Ferguson

<u>DEFENDANT'S WITNESSES:</u>	<u>PAGE</u>
Barbara O'Brien	Direct, page 95 Cross, page 227 Redirect, page 435 Recross, page 441
George Woodworth	Direct, page 500 Cross, page 554 Redirect, page 644 Recross, page 667
Samuel Sommers (qualifying)	Direct, page 711 Direct, page 728 Cross, page 774 Redirect, page 833
Bryan Stevenson (qualifying)	Direct, page 837 Direct, page 845 Cross, page 897 Redirect, page 996 Recross, page 1002
Louis Trosch	Direct, page 1012 Cross, page 1053 Redirect, page 1068
Joseph Katz (voir dire)	Direct, page 1565
(voir dire)	Cross, page 1654
George Woodworth (surrebuttal)	Direct, page 2267 Cross, page 2283 Redirect, page 2312 Recross, page 2315
Barbara O'Brien (surrebuttal)	Direct, page 2316 Cross, page 2359 Redirect, page 2394

<u>STATE'S WITNESSES:</u>	<u>PAGE</u>
John Wyatt Dickson	Direct, page 1091 Cross, page 1160 Redirect, page 1202 Recross, page 1209
E. Lynn Johnson	Direct, page 1355
William Gore	Direct, page 1498
Thomas Lock	Direct, page 2010
Knox Jenkins	Direct, page 2049
Jack Thompson	Direct, page 2077
Christopher Cronin	Direct, page 2153
(voir dire)	Cross, 2158
(voir dire)	Direct, 2175
(continued)	Direct, page 2193 Cross, page 2205 Redirect, page 2229
Joseph Katz	Direct, page 1707
(voir dire)	Cross, page 1837
(continued)	Direct, page 1843 Cross, page 1934 Redirect, page 1987

DEFENDANT'S EXHIBITS:

- 1, Barbara O'Brien's C.V.: Marked, page 104; Received, page 106
- 2, Flash drive with transcripts of 173 cases: Marked, page 117; Received, page 117
- 3, Printout of PowerPoint: Marked, page 118; Received, page 118
- 4, CD with database from slide: Marked, page 134; Received, page 134; Re-entered, page 217
- 5, Map of NC prosecutorial districts: Marked, page 153; Received, page 156
- 6, Report of O'Brien/Grosso: Marked, page 218; Received, page 219
- 7, Shadow coding document: Marked, page 435; Received, page 441
- 8, Shadow coding document, reran: Marked, page 438; Received, page 441
- 9, Woodworth's resume: Marked, page 501; Received, page 510
- 10, Table 12: Marked, page 523; Received, page 550
- 11, Sommers's curriculum vitae: Marked, page 711; Received, page 768
- 12, Published paper by D. Baldus: Marked, page 738; Received, page 768
- 13, Dallas Morning News write-up: Marked, page 739; Received, page 768
- 14, Article by Mary Rose: Marked, page 740; Received, page 768
- 15, "Race-Based Judgments..." by Dr. Sommers: Marked, page 767; Received, page 768
- 16, DA training material: Marked, page 759; Received, page 768
- 17, DA training material: Marked, page 760; Received, page 768
- 18, Stevenson's resume: Marked, page 838; Received, page 845
- 19, Equal Justice Initiative study: Marked, page 852; Received, page 857
- 20, Batson justifications: Marked, page 863; Not offered
- 21, Excerpt from Capital Case Seminar: Marked, page 863; Received, page 888
- 22, Capital Case Seminar: Marked, page 887; Received, page 888
- 23, Excerpt from State v. Green: Marked, page 870; Received, page 888
- 24, Notes: Marked, page 871; Received, page 888
- 25, Excerpt from State v. Trull: Marked, page 875; Received, page 888

DEFENDANT'S EXHIBITS:(continued)

- 26, Excerpt from State v. Sanders: Marked, page 875;
Received, page 888
- 27, Excerpt from State v. Golphin: Marked, page 877;
Received, page 888
- 28, Excerpt from State v. Golphin: Marked, page 877;
Received, page 888
- 29, Excerpt from State v. Fletcher: Marked, page 882;
Received, page 888
- 30, Excerpt from State v. Robinson: Marked, page 882;
Received, page 888
- 31, Excerpt from State v. Gaines: Marked, page 882;
Received, page 888
- 32, Excerpt from State v. McCollum: Marked, page 882;
Received, page 888
- 33, Excerpt from State v. Parker: Marked, page 886;
Received, page 888
- 34, Excerpt from State v. Williams: Marked, page 886;
Received, page 888
- 35, Statements from lawyers/court personnel: Marked,
page 893; Received, page 895
- 36, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 37, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 38, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 39, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 40, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 41, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 42, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 43, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 44, Affidavit from excluded juror: Marked, page 891;
Received, page 895
- 45, Flash drive with portions of transcripts Stevenson
referred to: Marked, page 951; Received, page 952
- 46, Flash drive: Marked, page 1736; Not offered
- 47, Trosch's PowerPoint: Marked, page 1024; Received,
page 1053
- 48, Bench card analysis form: Marked, page 1045; Received,
page 1053
- 49, Court observation form: Marked, page 1045; Received,
page 1053

DEFENDANT'S EXHIBITS:(continued)

- 50, CD of moon-walking bear and basketball players:
Marked, page 1052; Received, page 1053
- 51, Report from Judge Johnson: Marked, page 1233;
Not offered
- 52, Report from Judge Johnson: Marked, page 1233;
Not offered
- 53-62, Voir Dire Exhibits 1-10, respectively: Marked,
page 1936; Received, page 1936
- 63, Horton v. Zant opinion: Marked, page 1960; Received,
page 2396
- 64, Jury Pool Analysis: Marked, page 1964; Not received
- 65, Horton v. Zant District Court opinion: Marked,
page 1967; Not received
- 66, Statewide adjusted odds ratio: Marked, page 2279;
Received, page 2394
- 67, Jump drive containing source documents: Marked,
page 2317; Received, page 2318
- 68, Chart of potential jurors: Marked, page 2319;
Received, page 2326
- 69, Chart of coding errors: Marked, page 2326; Received,
page 2328
- 70, Tables as of February 11, 2012: Marked, page 2332;
Received, page 2335
- 71, Shadow Tables 1 and 2: Marked, page 2337; Received,
page 2340
- 72, List of cases - Division 2: Marked, page 2344;
Received, page 2345
- 73, List of cases - Division 4: Marked, page 2345;
Received, page 2345
- 74, Graph of pass rates - DP Reservations: Marked,
page 2351; Received, page 2394
- 75, Graph of pass rates - Accused of Crime: Marked,
page 2353; Received, page 2394
- 76, Graph of pass rates - DP Reservations - Cumberland
County: Marked, page 2354; Received, page 2394
- 77, Graph of pass rates - Accused of Crime - Cumberland
County: Marked, page 2355; Received, page 2394
- 78, Cross-tabs: Marked, page 2356; Received, page 2394
- 79, Graph: Marked, page 2355; Received, page 2394
- 80, Flash drive containing three updated databases:
Marked, page 2394; Received, page 2394
- 81, Legal education reports of attorneys - under seal:
Marked, page 2398; Received, page 2411
- 81A, Legal education reports of attorneys - redacted
version: Marked, page 2441; Received, page 2441
- 82, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423

DEFENDANT'S EXHIBITS:(continued)

- 83, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 84, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 85, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 86, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 87, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 88, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 89, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 90, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 91, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 92, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 93, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 94, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 95, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- 96, Summary of previously admitted documents in binder:
Marked, page 2412; Received, page 2423
- Voir Dire 1, Katz's e-mails between himself and prosecutors
throughout the state: Marked, page 1570; Received,
page 1574
- Voir Dire 2, E-mail Katz sent to Mr. Thompson regarding
instructions: Marked, page 1577l; Received, page 1580
- Voir Dire 3, Feedback Katz received from Mr. Colyer and
Mr. Thompson: Marked, page 1580; Received, page 1584
- Voir Dire 4, E-mail from Katz to a Frank Parrish: Marked
page, 1584; Received, page 1595
- Voir Dire 5, E-mails sent between Katz and Sean Boone:
Marked, page 1595; Received, page 1604
- Voir Dire 6, Affidavit, Sean Boone: Marked, page 1596;
Received, page 1604
- Voir Dire 7, Spreadsheet reviewed by Sean Boone: Marked,
page 1601; Received, page 1603
- Voir Dire 8, Katz e-mail regarding incorrect e-mail
addresses: Marked, page 1604; Received, page 1612
- Voir Dire 9, Katz e-mail sent to Rob Thompson and Cal
Colyer just prior to the November hearing: Marked,
page 1604; Received, page 1612

DEFENDANT'S EXHIBITS:(continued)

Voir Dire 10, PowerPoint: Marked, page 1625; Received,
page 1654

Voir Dire 11, Katz's report: Marked, page 1624; Received,
page 1654

STATE'S EXHIBITS:

- 1, DCI of juror Whitaker: Marked, page 263; Received, page 1090
- 2, DCI of juror Bell: Marked, page 263; Received, page 1090
- 3, DCI of juror Frink: Marked, page 263; Received, page 1090
- 4, DCI of juror Berry: Marked, page 263; Received, page 1090
- 5, DCI of juror Montgomery: Marked, page 263; Received, page 1090
- 6, DCI of juror Miller: Marked, page 263; Received, page 1090
- 7, DCI of juror McNeil: Marked, page 263; Received, page 1090
- 8, DCI of juror Whitfield: Marked, page 263; Received, page 1090
- 9, Binder with DCI's: Marked, page 345; Received, page 1090
- 10, July 20, 2011, report of O'Brien/Grosso: Marked, page 409; Received, page 1090
- 11, September 29, 2011, report of O'Brien/Grosso: Marked, page 409; Received, page 1090
- 12, Woodworth's 12/30/11 report: Marked, page 573; Received, page 1090
- 13, Woodworth's 1/29/12 report: Marked, page 573; Received, page 1090
- 14-16, Woodworth's data analysis printouts: Marked, page 612; Received, page 1090
- 17-19, Woodworth's data analysis printouts: Marked, page 638; Received, page 1090
- 20, Supreme Court opinion in State v. Robinson: Marked, page 1113; Received, page 1114
- 21, Handwritten notes - Judge Dickson: Marked, page 1128; Received, page 1128
- 22, Juror questionnaires: Marked, page 1133; Received, page 1134
- 23, Excerpt from transcript regarding Mr. Troy: Marked, page 1134; Received, page 1135
- 24, Supreme Court opinion in State v. McNeill: Marked, page 1143; Received, page 1147
- 25, Supreme Court opinion in State v. Meyer: Marked, page 1151; Received, page 1153
- 26, Newspaper article: Marked, page 1208; Received, page 1210
- 27, Duplicate of Defendant's Exhibit 51: Marked, page 1358; received, pages 1425 & 1443
- 28, Duplicate of Defendant's Exhibit 52: Marked, page 1358; Received, pages 1425 & 1443

STATE'S EXHIBITS: (continued)

- 29, Master index of jury selection: Marked, page 1406;
Received, page 1443
- 30, Transcript, 12, Cumberland, 262 Robinson, comma, Marcus R. Seated, black, 262.0.001: Marked, page 1420;
Received, pages 1422 & 1443
- 31, Transcript of a hearing conducted 11/6/09 by Judge Johnson in three cases that were pending: Marked, page 1433; Received, pages 1442 & 1443
- 32, Affidavits: Marked, page 1457; Received, page 1462
- 33, Part of a transcript already contained in Defendant's Exhibit 2, which contains the jury selection regarding the Walters case, juror number 13: Marked, page 1511; Received, pages 1518 & 1547
- 34, Jury seating chart, State v. Walters, 98 CRS 34832 through 35044: Marked, page 1516; Received, pages 1518 & 1547
- 35, Part of a transcript, State v. Walters regarding juror number 14: Marked, page 1519; Received, page 1547
- 36, Part of a transcript, State v. Walters, regarding juror number 14: Marked, page 1521; Received, page 1547
- 37, Part of a transcript, State v. Walters, regarding juror number 16: Marked, page 1524; Received, page 1547
- 38, Part of a transcript, State v. Walters, regarding juror number 10: Marked, page 1526; Received, page 1547
- 39, Part of a transcript, State v. Walters, regarding juror number 5: Marked, page 1528; Received, page 1547
- 40, Part of a transcript, State v. Walters, regarding juror number 5: Marked, page 1529; Received, page 1547
- 41, Part of a transcript, State v. Walters, regarding juror number 1: Marked, page 1532; Received, page 1547
- 42, Part of a transcript, State v. Walters, regarding juror number 1: Marked, page 1533; Received, page 1547
- 43, Katz's CV: Marked, page 1709; Received, page 1728
- 44, Binder of Katz's report: Marked, page 1729; Received, page 1995
- 45, Report from O'Brien from 12/11/11: Marked, page 1733; Received, page 1995
- 46, Flash drive, PowerPoint with Katz: Marked, page 1736; Received, page 1995
- 47, Printout of PowerPoint: Marked, page 1736; Received, page 1995
- 48, Case review for capital trials: Marked, page 1816; Received, page 1995
- 49, Codes, O'Brien: Marked, page 1832; Received, page 1995
- 50, Table 14: Marked, page 1854; Received, page 1995
- 51, Table 15: Marked, page 1858; Received, page 1995
- 52, Table 16: Marked, page 1861; Received, page 1995

STATE'S EXHIBITS: (continued)

- 53, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Ms. Christine Thomas, juror number 11: Marked, page 2021; received, page 2144
- 54, A copy of part of a trial transcript in State v. Eugene Johnny Williams, juror David Jenkins: Marked, page 2027; Received, page 2144
- 55, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Joanie James: Marked, page 2027; Received, page 2144
- 56, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Judy Jones: Marked, page 2029; Received, page 2144
- 57, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Michael Broadhurst: Marked, page 2030; Received, page 2144
- 58, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Mr. Owens: Marked, page 2032; Received, page 2144
- 59, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Mrs. Patten: Marked, page 2033; Received, page 2144
- 60, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Wilbert Gentry: Marked, page 2034; Received, page 2144
- 61, A copy of part of a trial transcript in State v. Eugene Johnny Williams, Lisa Locklear and Willie Gilmore: Marked, page 2036; Received, page 2144
- 62, Part of jury selection in State v. Jeffrey Karl Meyer, Brenda Stewart: Marked, page 2060; Received, page 2144
- 63, Part of jury selection in State v. Jeffrey Karl Meyer, Kenneth MacGyver: Marked, page 2061; Received, page 2144
- 64, Part of jury selection in State v. Jeffrey Karl Meyer, Lisa Bender: Marked, page 2063; Received, page 2144
- 65, Part of jury selection in State v. Jeffrey Karl Meyer, Mary Crum: Marked, page 2064; Received, page 2144
- 66, Part of jury selection in State v. Jeffrey Karl Meyer, William Wilson: Marked, page 2065; Received, page 2144
- 67, (Not identified)
- 68, Part of jury selection in the State v. John Davis McNeill, Eddie Anderson: Marked, page 2112; Received, page 2144
- 69, Part of jury selection in the State v. John Davis McNeill, Linda Montgomery: Marked, page 2114; Received, page 2144
- 70, Not identified

STATE'S EXHIBITS: (continued)

- 71, Jury chart regarding State v. Quintel Augustine:
Marked, page 2118; Received, page 2144
- 72, Part of jury selection in State v. Quintel Augustine,
Ernestine Bryant: Marked, page 2120; Received, page 2144
- 73, Part of jury selection in State v. Quintel Augustine,
Mardel Gore: Marked, page 2121; Received, page 2144
- 74, Part of jury selection in State v. Quintel Augustine,
Ronald Williams: Marked, page 2121; Received, page 2144
- 75, Part of jury selection in State v. Quintel Augustine,
Sharon Bryant: Marked, page 2123; Received, page 2144
- 76, Part of jury selection in State v. Quintel Augustine,
William Miller: Marked, page 2124; Received, page 2144
- 77, Materials and notes provided by Judge Thompson based
upon his review: Marked, page 2140; Received, page 2144
- 78, Cronin's CV: Marked, page 2157; Received, page 2237
- 79, Cronin's report: Marked, page 2194; Received,
page 2237
- 80, Log files: Marked, page 2299; Received, page 2397
- 81, Log files: Marked, page 2299; Received, page 2397

NORTH CAROLINA
CUMBERLAND COUNTY

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

_____)	
STATE OF NORTH CAROLINA,)	
)	RACIAL JUSTICE ACT HEARING
)	
vs.)	HEARD 1/30/12
)	
MARCUS ROBINSON,)	VOLUME I
Defendant.)	(Pages 1 through 190)
_____)	

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State:

Calvin Colyer, Rob Thompson & Robby Hicks, Assistant District Attorneys, 12th Judicial District; and Jonathan Perry, Assistant District Attorney, 20th Judicial District

For the Defendant:

Jay Ferguson & Cassandra Stubbs, Durham County Bar
Malcolm Hunter, Orange County Bar, and James Ferguson, Mecklenburg County Bar Attorneys at Law

SHANNON RANSOM
Official Court Reporter
Cumberland County Courthouse
Fayetteville, North Carolina 28302
(910) 733-0826 (cell phone)
sransom1@nc.rr.com

DATE REQUESTED: 2/3/12

DATE DELIVERED: 2/16/12

1 (The following proceedings began in open court.
2 The defendant, defense attorneys and state's attorneys were
3 present.)

4 THE COURT: Okay. For purposes of the record,
5 the matter now before the Court is State of North Carolina
6 versus Marcus Reymond or Reymond Robinson, file number is
7 91 CRS 23143. Folks, for purposes of the record, I'm going
8 to ask all counsel if you will stand and identify yourself
9 and who you represent for the benefit of the court
10 reporter. Mr. Colyer.

11 MR. COLYER: Good morning, Your Honor, how are
12 you?

13 THE COURT: Morning, sir.

14 MR. COLYER: Calvin W. Colyer, Assistant District
15 Attorney, 12th Judicial District, Fourth Prosecutorial
16 District, Cumberland County.

17 MR. THOMPSON: Rob Thompson, Cumberland County,
18 district attorney.

19 MR. PERRY: Your Honor, Jonathan Perry. I'm with
20 the Union County District Attorney's Office.

21 THE COURT: Yes, sir.

22 MR. HICKS: Robby Hicks, D.A.'s office.

23 THE COURT: Same for counsel for the defendant,
24 please.

25 MR. JAY FERGUSON: I am Jay Ferguson from the

1 Durham County Bar representing Mr. Robinson.

2 MR. JAMES FERGUSON: James E. Ferguson, II, of
3 the Mecklenburg County Bar representing Marcus Robinson.

4 MR. HUNTER: Malcolm Hunter from the Orange
5 County Bar representing Marcus Robinson.

6 MS. STUBBS: Cassandra Stubbs also from the
7 Durham County Bar also representing Mr. Robinson.

8 THE COURT: Thank you, folks. For the record,
9 the defendant, Mr. Robinson, is present in the courtroom.
10 A couple of administrative matters. As I informed all
11 counsel this morning, the Court had received a number of
12 requests specifically from WRAL T.V. and Mr. Paul
13 Woolverton with the Fayetteville Observer to have cameras
14 in the courtroom for purposes of these proceedings. That
15 was discussed with all counsel. Mr. Robinson was not
16 present at that time. So for purposes of the record, I'm
17 advising him of those requests as well. The state's
18 position, as I understand it, Mr. Colyer, is that the state
19 has no objection to file footage being allowed but does
20 object to the continued presence of cameras in the
21 courtroom beyond that?

22 MR. COLYER: That's correct, Your Honor.

23 THE COURT: Okay. And my understanding is the
24 defendant has no objection or no position. And if you'll
25 state for the record exactly what your position is, that

1 would be helpful.

2 MR. HUNTER: We have no objection, Your Honor.

3 THE COURT: As I indicated, all counsel earlier,
4 in the exercise of my discretion, pursuant to Rule 15,
5 given the fact that we do not have a jury in this case and
6 because the Court recognizes the importance of the matter
7 now before the Court, the request has been allowed.

8 Cameras are now present in the courtroom and are set up,
9 but the state's objection is noted for the record.

10 Last matter is I think I indicated to all counsel
11 in the absence of Mr. Robinson and putting on the record
12 for his purpose at this time, I anticipate that the state's
13 evidence is going to take -- pardon me, defendant's
14 evidence is going to take a week, more or less, and I'm
15 informed that the state's evidence will probably take about
16 that same time period.

17 MR. COLYER: Yes, sir.

18 THE COURT: Given the number of witnesses that I
19 anticipate will be called in this case, given the technical
20 nature of the testimony that I anticipate will be
21 presented, do I have consent from all counsel to enter any
22 ruling out of term, out of county, in camera, in chambers,
23 on vacation, et cetera? Anything on behalf of the state?

24 MR. COLYER: Yes, Your Honor. Respectfully, the
25 state would prefer the Court's ruling be done in a manner

1 and dignity as the hearing is being conducted --

2 THE COURT: Yes, sir.

3 MR. COLYER: -- and that the Court essentially be
4 called back into session for the ruling.

5 THE COURT: That's certainly not unreasonable.
6 It's appropriate. You folks want to be heard?

7 MR. HUNTER: I don't think we have a position,
8 Your Honor. Whatever Your Honor wishes. I'm just -- I'm
9 not --

10 THE COURT: It may -- I'm sorry.

11 MR. HUNTER: That's all.

12 THE COURT: It may not come to that but I
13 anticipate that that possibility exists. As I've also
14 indicated, I'm asking both counsel for the defendant and
15 counsel for the state to submit proposed findings and
16 conclusions for consideration by the Court. Any position
17 in that regard on behalf of the state?

18 MR. COLYER: The state would be glad to try to
19 accommodate the Court.

20 THE COURT: Any position on behalf of the
21 defendant?

22 MR. HUNTER: No. We'll be happy to submit those,
23 Your Honor.

24 THE COURT: Okay. Are we ready to go forward,
25 folks? I knew there was some discussion about needing

1 potentially additional time to set up your equipment. Are
2 we ready to go forward on behalf of the state?

3 MR. THOMPSON: We are not, Judge. I am assisting
4 the defense in setting up some equipment that we can both
5 end up using.

6 THE COURT: Okay.

7 MR. THOMPSON: We will need a little more time to
8 get that set up so we will need -- your next question is
9 how long? 45 minutes to an hour would be appropriate.

10 THE COURT: Okay. All right.

11 MR. COLYER: Judge Weeks, you may not be aware of
12 this but I think both sides have filed some motions and we
13 just wanted to alert you to that.

14 THE COURT: You got copies of the motions, ma'am?

15 MR. COLYER: I have not formally delivered our
16 motions to you. I have given them to the defense. If I
17 could approach?

18 THE COURT: Yes, sir. Give me an opportunity to
19 review --

20 MR. COLYER: Gentlemen, these are copies of what
21 I have given you previously.

22 THE COURT: That will give me an opportunity to
23 review the motions.

24 MR. COLYER: Thank you, sir.

25 THE COURT: Okay.

1 MR. JAY FERGUSON: Approach, Your Honor?

2 THE COURT: Yes, sir. Okay. For the record, the
3 state has handed up a motion to continue and state's motion
4 for supplemental discovery. Those are the two motions on
5 behalf of the state; is that accurate?

6 MR. COLYER: Yes, Your Honor.

7 THE COURT: The defendant has filed a motion to
8 sequester and a motion to bar or limit photos and other
9 gruesome demonstrative evidence as well as a motion to
10 compel; is that accurate?

11 MR. JAY FERGUSON: Yes, Your Honor.

12 THE COURT: All right. Folks, I guess our first
13 order of business, once we do resume the proceedings, is to
14 go forward with these matters.

15 MR. COLYER: Yes, sir.

16 THE COURT: Obviously, we need to deal with the
17 motion to continue before dealing with anything else so
18 we're going to be in recess. It's ten after 10:00, I
19 think. There's a glare on the clock back there. 11:00
20 enough time?

21 MR. THOMPSON: Should be enough time. I'll get
22 word to the Court if that's not enough.

23 MR. JAY FERGUSON: Your Honor, may I make one
24 inquiry of the Court?

25 THE COURT: Yes, sir.

1 MR. JAY FERGUSON: We sent to Your Honor, through
2 Ms. Bloomfield, I believe, defendant's memorandum of law.

3 THE COURT: I've got a copy of that.

4 MR. COLYER: Judge, may I make inquiry with
5 respect to that memorandum and the attached unpublished law
6 review article?

7 THE COURT: I haven't looked. Is there an
8 attached --

9 MR. COLYER: That answers the question.

10 THE COURT: Is there an attached law review
11 article?

12 MR. JAY FERGUSON: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. COLYER: That answers the question, Your
15 Honor. And if I could direct your attention --

16 THE COURT: I'm sorry. There is a draft -- I
17 apologize. A draft "Responding to McCleskey and Defects of
18 Batson." Is that what you're referring to?

19 MR. COLYER: Yes, sir. By Professor Mosteller.

20 THE COURT: Yes, sir.

21 MR. COLYER: If I can direct your attention to
22 paragraph number 11 of your motion to continue. It may
23 short-circuit some of your consideration.

24 THE COURT: Okay.

25 MR. COLYER: Not at this moment.

1 THE COURT: Yes, sir.

2 MR. COLYER: But as you're reading it later.

3 THE COURT: Yes, sir. All right. Anything else?

4 MR. COLYER: Judge, may I ask one other thing?

5 Could we request at this point that on the recess, that if
6 the Court had intentions of reading the law review article,
7 that it defer from doing so until we have a chance to
8 address you on that.

9 THE COURT: I'll be glad -- as a matter of fact
10 -- well, let me give you folks an opportunity to be heard
11 in that respect. You folks want to be heard? He's asking
12 that I defer looking at the law review article until
13 they've had an opportunity to be heard.

14 MR. JAMES FERGUSON: Your Honor, I will say this.
15 We don't know what the real concern is with the Court
16 reading a law review article. We think it's pertinent and
17 may be helpful. We will note that the article has been
18 published since we submitted it to the Court along with our
19 memorandum.

20 THE COURT: Okay.

21 MR. JAMES FERGUSON: We will leave that to the
22 Court's discretion.

23 THE COURT: Okay. All right. Do you mind being
24 more specific as to how the law review article may play in
25 any motions that are pending?

1 MR. COLYER: Yes, Your Honor. One with respect
2 to our motion to continue.

3 THE COURT: Okay.

4 MR. COLYER: And two with respect to the overall
5 outcome of the presentation of evidence and then the
6 Court's consideration. Respectfully, we think that the
7 article itself is propaganda in terms of the Court
8 considering it at this point because it makes the argument
9 basically that we are asking to be considered on with
10 respect to the continuance motion.

11 THE COURT: Not having heard the continuance
12 motion, I understand what the position is, but I am going
13 to defer looking at the article. As a matter of fact, I'm
14 going to separate it at this point in the proceedings from
15 the memorandum itself. And, Madam Clerk, if you'll staple
16 this and hold on to it until I have an opportunity to hear
17 the motion.

18 MR. COLYER: Thank you, Your Honor.

19 THE COURT: Yes, sir. All right. Any other
20 matters, folks?

21 (No response.)

22 THE COURT: We are at ease until 11:00.

23 (Recess taken.)

24 (The following proceedings continued in open
25 court. The defendant, defense attorneys and state's

1 attorneys were present.)

2 THE COURT: Okay. Let the record reflect all
3 counsel are present, the defendant is present. Folks, if
4 you'll bear with me one moment, please. Mr. Robinson, I've
5 exercised my discretion and I directed the bailiffs to
6 remove all shackles from you during all of these
7 proceedings. I'm simply informing you that that depends on
8 your cooperation. Now, if you need an opportunity to
9 confer with your lawyers at any time, you're absolutely
10 entitled to that. Let me know. Counsel wants to be heard
11 in that respect, feel absolutely free to let me know, but
12 I'm going to ask for your cooperation with the bailiffs
13 assigned to this courtroom. Okay. We ready to go forward?

14 MR. COLYER: Yes, Your Honor.

15 THE COURT: Yes, sir.

16 MR. COLYER: Good morning and thank you for
17 hearing us. Judge, I'd like to start off briefly with
18 respect to the motion to continue. Has the Court had an
19 opportunity to read that?

20 THE COURT: I have, yes, sir.

21 MR. COLYER: And, Judge I don't want to belabor
22 the point but one of the reasons for asking you to defer
23 reading the law review article is a criticism of the state
24 at footnote page -- footnote 121 with respect to the
25 incomplete state study. And that's what we are asking here

1 with respect to our motion to continue. I want to direct
2 your attention there to paragraph number 11, that we're not
3 trying to prevent the beginning of the hearing today. In
4 fact, we're prepared to go forward with the hearing in
5 total if the Court tells us to with the exception that we
6 think that the state is being prejudiced by the fact of not
7 having a complete statewide study.

8 And with all due respect to the Court, our
9 position is that we have been under a great deal of time
10 constraints and time pressures and that's due in part to
11 our request because we, in all candidness with the Court,
12 grossly underestimated the amount of time that it was going
13 to take for our reviewers to examine the race neutral
14 reasons for the peremptory strikes that were used against
15 African-American veniremen in the 173 jury selections
16 throughout the state.

17 THE COURT: Okay.

18 MR. COLYER: The Court was kind enough to ask us
19 on two occasions how much time we needed and we tried to
20 give, based upon information that we had, information that
21 Dr. Katz suggested he could work with. We're not
22 criticizing Dr. Katz or his report in any way, but he can
23 only do what is provided for him by the state. And we
24 have, unfortunately, through lack of review and meeting the
25 time table and deadlines that have been set by the Court

1 been able to give him everything he needs to do an adequate
2 report. So what we are asking respectfully is that the
3 hearing go forward with respect to anything the defense
4 wants to put on and then, at the time when it would be the
5 state's opportunity to go forward, to grant us a recess in
6 order to be able to complete the statewide review of the
7 race neutral reasons for exclusion peremptorily of African
8 Americans in the various capital cases.

9 THE COURT: Mr. Colyer, you made reference to
10 reviews being conducted.

11 MR. COLYER: Yes, sir.

12 THE COURT: And for purposes of clarification of
13 the record, my understanding is the parties doing the
14 reviewing are prosecutors throughout the state --

15 MR. COLYER: That's correct, Your Honor.

16 THE COURT: -- in the various offices.

17 MR. COLYER: Yes, sir.

18 THE COURT: Let me be very candid. This matter
19 has been continued twice now.

20 MR. COLYER: Yes, sir.

21 THE COURT: At least it was continued in
22 September. It was continued again if I recall correctly in
23 November. I don't know how to say it except to say it
24 directly. The state's request for a continuance at this
25 time is based on the prosecutors who are conducting the

1 reviews of the cases at issue not completing the
2 information in a timely fashion. So essentially what the
3 state is asking the Court to do is prosecutors delayed in
4 providing information that you contend you need to go
5 forward with the presentation of your evidence, and because
6 of that delay which is caused by the prosecutors's failure
7 to comply with the time requirements, you're asking for a
8 continuance now?

9 MR. COLYER: That's correct, Your Honor. And the
10 -- it's not a continuance of the whole hearing.

11 THE COURT: Yes, sir.

12 MR. COLYER: Just a continuance of our portion of
13 it so that we can try to muster additional resources,
14 whether it's in the prosecutors's offices that have yet to
15 complete their reviews by Mr. Thompson and myself or
16 whomever else we can get to work with respect to the
17 review. As you know, we mentioned to you before, we
18 essentially have two kinds of reviewers. Those folks who
19 were actually first, second or third chair --

20 THE COURT: Yes, sir.

21 MR. COLYER: -- at the jury selection that have
22 gone through and then those folks who are new to the
23 particular jury selection at issue --

24 THE COURT: Yes, sir.

25 MR. COLYER: -- because they either weren't in

1 the office, the people in the office have retired, died,
2 moved onto other things. And I don't know how to say it
3 any other way than we would -- we feel we have a good faith
4 effort to say this -- get additional resources that have
5 not been brought to bear to this point to get this done so
6 that it can be given to Dr. Katz for inclusion in his
7 report. And if it appears that with respect to the law
8 review article I mentioned to you from Professor Mosteller,
9 one of his criticisms in that footnote is that essentially
10 we don't have a statewide study. So how can we criticize
11 the MSU study if our study is not statewide. And we are
12 asking for an opportunity to have a delay after the
13 presentation of the defense evidence for four, six, eight
14 weeks, whatever the Court can allow us to have, so that we
15 can be back at a time when the Court could complete the
16 hearing and make its ruling in accordance with perhaps what
17 the Court's schedule is going to be for the rest of the
18 year.

19 THE COURT: Mr. Thompson.

20 MR. THOMPSON: I will supplement what Mr. Colyer
21 said. Throughout this process, discovery has been going
22 back and forth and we heard at the last hearing a little
23 bit about errors that we have found through our prosecutor
24 reviews and giving those errors to the defense, we've done
25 so through the affidavits. And with each passing day,

1 week, there is another revision made by the defense in
2 their study. Because of the things that have been pointed
3 out to them, the criticisms we have, they are reacting to
4 and fixing as we go, right? Well, in this instance, the
5 criticism that we have been given from the defense through
6 the discovery we have found has been it's not complete.
7 It's not complete. We're kind of being put at a
8 disadvantage because they are able to repair because of the
9 discovery requirements but we are not -- you know, we don't
10 have the ability to force other prosecutors and other
11 things to put off their murder cases and put off their
12 other stuff. So we're seeking kind of a -- the same
13 ability the defense has had to prepare their criticism --
14 their major criticism of ours is its incompleteness to be
15 able to get that fixed.

16 The defendant, his ultimate hope in this case is,
17 according to the statute as it's written now, is to get a
18 life without the possibility of parole result. That's what
19 he is hoping for as a result. There would be absolutely no
20 prejudice to the defendant by delaying just the state's
21 portion to be able to complete that study. Mr. Colyer and
22 I were put in a difficult position when Your Honor said,
23 well, how much time do you need to get 173 capital cases
24 looked at by other prosecutors around the state? And all
25 we can do is guess. Your Honor, that's exactly what we did

1 and we did our best. We have -- I have spoken to the
2 Conference. We have additional resources. We can try to
3 muster an additional wave if we are given the time to
4 finish the study -- to complete our study so we do this the
5 one time and we're given a complete shot to be able to
6 rebut the presumptions and give Dr. Katz all the materials
7 he needs.

8 In addition to this, backing out to additional
9 reasons to continue, Judge, we have continued to receive
10 discovery through the process from the defense. There are
11 some things we'd like to investigate. For instance, on the
12 18th of January, we've got the series of affidavits
13 purported to be from jurors in ten -- ten different jurors
14 in a number of different cases, two of which actually came
15 from the Robinson jury. We would like to investigate
16 those. We've got those a short period of time, so that's
17 actually a subset of the discovery motion this morning.

18 THE COURT: Yes, sir.

19 MR. COLYER: We would like some time to be able
20 to do that. We don't know where these folks are. They
21 appear to be spread out, some in North Carolina -- some --
22 at least one elsewhere. So we would like an opportunity to
23 investigate some of those and just -- we got them on the
24 18th. Those affidavits, some of which were prepared middle
25 of last year, we just got from the defense.

1 And this kind of goes into the motion a little
2 bit to request that information but we have been asked to
3 provide supplemental information from our affiants. What
4 did our affiants look at in order to prepare their
5 affidavits. We are seeking a reciprocal information, in
6 essence, in order to provide that information from the
7 defense about their affiants. Again, we're just asking for
8 what we have been asked to give. We gave that. Although
9 it was not subject to any orders, we gave it willingly and
10 did that up through Saturday of this week, gathering
11 information that was not in our possession. We gathered it
12 and made sure the defense got it this weekend. But that's
13 another reason. We're still talking about discovery. Even
14 the morning we're starting this, there is still discovery
15 to be done.

16 THE COURT: Okay. Now, you're -- I apologize for
17 the interruption.

18 MR. THOMPSON: Yes, sir.

19 THE COURT: But you are now referring to your
20 motion for supplemental discovery?

21 MR. THOMPSON: Yes. Just insofar as it touches
22 into our motion to continue --

23 THE COURT: Yes, sir.

24 MR. THOMPSON: -- it's -- it's -- we feel a
25 little pressured, being pushed a little bit and we're still

1 dealing with discovery issues here because of the
2 monumental scale of this. This is not one county. One
3 county won't be affected by this arguably and we're having
4 to defend an entire state in one hearing and so we are
5 seeking the time to be able to appropriately do so.

6 THE COURT: Folks, help me out here. The
7 discovery order was signed by the Court when?

8 MR. COLYER: Two different orders.

9 THE COURT: Yes, sir. The first one. I
10 apologize.

11 MR. THOMPSON: It was ordered on the 10th of
12 November, 2011, Your Honor.

13 THE COURT: Yes, sir.

14 MR. THOMPSON: The next one was signed on the
15 19th, subject to correction, of December. Subject to
16 correction on that but I believe it was signed on the 19th
17 of December.

18 MR. JAY FERGUSON: That's correct.

19 THE COURT: So we've got the initial discovery
20 order filed or signed by the Court on November 10th of
21 2011.

22 MR. THOMPSON: Yes, sir.

23 THE COURT: Additional order was signed on
24 December 19th of 2011, thereabouts.

25 MR. THOMPSON: Yes, sir.

1 MR. COLYER: Judge, and also just to bring the
2 Court back up to speed. You'll know and probably realize
3 there was a lot of discovery being exchanged --

4 THE COURT: Yes, sir.

5 MR. COLYER: -- back and forth during the summer,
6 September, October.

7 THE COURT: Yes, sir.

8 MR. COLYER: And that order was a memorialization
9 of some additional discovery. So we don't mean to indicate
10 that everybody has had to get discovery since November.
11 It's been ongoing for several months.

12 THE COURT: That was my recollection. I
13 appreciate it.

14 MR. COLYER: Just keeps going essentially.

15 THE COURT: Well, your motion for discovery
16 indicates at this point -- and I'm looking at paragraph
17 six, that at this juncture, given the fact those discovery
18 orders were formally signed back in November and December
19 of 2011, the state now has approximately 80 cases out of
20 158.

21 MR. COLYER: Yeah. And that 158 are warm bodies,
22 Judge.

23 THE COURT: Warm bodies. 173 hearing.

24 MR. COLYER: Yes, sir. Jury selections that we
25 have to be looking at.

1 THE COURT: That's about half.

2 MR. COLYER: Well, according to their critique of
3 us, half isn't good enough. And that -- and if we're
4 having to start when they are saying that, Judge, you
5 shouldn't even consider this because it's only half done,
6 where is the fairness there? Their report has been
7 literally done since August of 2010.

8 THE COURT: Yes, sir.

9 MR. COLYER: After this legislation was passed in
10 2009, efforts were made by the MSU study group to get funds
11 to pay for their study. And then when the motions were
12 filed in August of 2010 as required by the legislation of
13 2009 --

14 THE COURT: Yes, sir.

15 MR. COLYER: -- every one of those RJA MAR's
16 cited the Michigan State study. So essentially it was done
17 for the statewide and has been refined down with respect to
18 divisions, districts and counties, I suppose, as time has
19 gone by. But as Mr. Thompson points out to you,
20 essentially every time we get together and the defense
21 wants to know what's the latest criticism by the state of
22 their study and where their errors are. And we had the
23 discussion last time about at what point do you peg the
24 studies as being -- the databases as being completed and
25 being finished and we are pointing out to the Court that

1 essentially every time we tell them something in discovery
2 that's wrong with the report, they get the opportunity to
3 change it so they come in here this week and say here's our
4 report in its completed fashion with no errors and they
5 look at us and say and yours is only half done. So why
6 should the judge even listen to you guys? We just don't
7 think it's a level playing field, Your Honor, and in all
8 fairness, there is no prejudice to the defendant for this
9 to be postponed for -- a recess period for the state to --

10 THE COURT: Well, I guess my concern is, if
11 during the time that the orders were formally entered by
12 the Court relating to discovery, if during that time
13 period, the reviewers, i.e., the prosecutors conducting the
14 review, had only completed 80 cases and they are now saying
15 because we've only done half of the cases or less that are
16 involved and for that reason we're asking for a
17 continuance, what's the incentive for the prosecutors to go
18 forward in an expeditious matter and complete the review?

19 MR. COLYER: Judge, there may not be any
20 incentive for those folks to do the review but what we're
21 telling you, Mr. Thompson and I are at the point where
22 we've done what we can do for Cumberland County --

23 THE COURT: Yes, sir.

24 MR. COLYER: -- with respect to our study. We've
25 asked the Conference to give us some additional assistance.

1 If we have to end up doing the review of those in other
2 jurisdictions, we're prepared to do that. And we're
3 hopeful that we can solicit the support of the folks who
4 have not completed the task yet to get it done now and if
5 they don't or they can't, we'll do it. I think I mentioned
6 to you at one time before that the repository that was set
7 up down on the third floor by Judge Johnson and yourself
8 with --

9 THE COURT: Yes, sir.

10 MR. COLYER: -- respect to materials, that has
11 been a wonderful thing for us here in Cumberland County to
12 be able to use because, in addition to having the
13 transcript up on the net, we've got hard copies for old
14 folks like me who want to sit down and actually feel the
15 paper and look at it and read it and deal with it. And
16 doing our 11 case review initially for the spreadsheet, it
17 literally took me three weeks to go through those 11
18 cases --

19 THE COURT: Yes, sir.

20 MR. COLYER: -- that was in addition to last fall
21 trying to take some vacation, doing some murder trials and
22 having other office duties. We are talking about folks
23 around the state that are elected D.A.'s that were
24 assistants five, ten, 15, 20 years ago that some of them
25 are the people that are having to review these materials

1 and they've got other things to do. But we are in a
2 position to try to assist them to recruit other folks who
3 have been able from their own jurisdictions to supplement
4 the material, to review it, to get perhaps some of the
5 folks that have already done reviews in other cases to do
6 more reviews of other jurisdictions. So we -- we're not
7 trying to blame anybody for not having done the reviews.
8 Because in some cases, there are -- people are not on staff
9 anymore and they're having to get people to do -- who have
10 other jobs to do those things. But it just -- it just
11 seems prejudicial and unfair at this point to be comparing
12 essentially apples and oranges when there's a remedy that
13 doesn't prejudice the defendant.

14 MR. THOMPSON: Just to supplement one other item,
15 you asked kind of what's our plan. You know, how should we
16 expect to get this done? If Your Honor gives us eight
17 weeks, let's say for example, we would cut that time in
18 half and we would push everybody that has not gotten these
19 80 cases done, get it done. Those that are not done by
20 that -- by that halfway point, we would then, during that
21 halfway point, solicit help. I'm aware of five recently
22 retired senior assistant district attorneys that have
23 offered some help in respect to the RJA. We would ask for
24 their help. Mr. Colyer and I -- I've got enough folks that
25 I know from around the state, we could get those 80 cases

1 reviewed. We would like it to be done in the county. We
2 would like it to be done by those folks and that's our
3 first -- but instead of waiting until a week before and
4 trying to push it, our plan logistically, take the time,
5 cut it in half, give us these by that time. If it's not
6 done, we'll do it ourselves. We might not. That's our
7 plan. Your Honor kind of asked the question a minute ago
8 how should I expect it to be done? We've got a plan to get
9 that done.

10 Our intent originally is to try as best we could
11 just to get prosecutors inside the D.A.'s offices right now
12 -- because some prosecutors who actually tried these cases,
13 they were defense attorneys or judges or in some other
14 position that there would be a question as to whether or
15 not they were the proper person, whether or not there was a
16 conflict or a current judge might feel uncomfortable about
17 actually writing a review on a case. We're going to maybe
18 think outside that box as well and maybe reconsider that
19 position to increase the pool of people who can work on
20 these.

21 The folks that have retired have actually been
22 very willing that we talked to throughout this process to
23 help any way that they can, especially in the cases that
24 they put their blood, sweat and tears in when the time
25 came. They tried that case and they're willing to get back

1 on that horse and keep riding it if they have to. So
2 respectfully we -- I am firmly convinced if given eight
3 weeks, we can get it done.

4 THE COURT: Okay.

5 MR. THOMPSON: Respectfully.

6 THE COURT: Yes, sir. All right, folks.

7 MR. JAMES FERGUSON: May it please the Court,
8 Your Honor, the Court has already correctly recognized that
9 the prosecution or the state in this case has asked for a
10 continuance every single time this case has been set. They
11 asked for one in September saying that they needed more
12 time. They asked for a continuance in November saying that
13 they needed more time. And here we are today ready to
14 start this hearing and, once again, we get this same ole
15 refrain, give us more time.

16 Essentially what they're saying, Your Honor, is
17 that they recognize that they have been unable to refute
18 the statistics and the statistical showing that we have
19 developed. They made a choice as to the kind of study they
20 would do. They made a choice in August of 2010 when this
21 and other cases were filed that they would go the route of
22 talking to district attorneys throughout the state to see
23 if they could muster us some race neutral reasons as to why
24 the statistics that show overwhelmingly that African
25 Americans have been excluded and limited in their

1 participation in the jury service. So they made that
2 choice when they knew that the Michigan State study brought
3 forth powerful statistics to show that this could not be
4 incidental, to show that it was the result of race being a
5 significant factor in jury selection.

6 So what they bring here today is not something
7 new. They acknowledged themselves that they knew about the
8 Michigan study in August of 2010. And here we are now in
9 January, almost February of 2012, and they're saying give
10 us more time. Your Honor, at some point, the Court has to
11 say we're going to have the hearing that we scheduled. And
12 the Court has said that when we come together on January
13 30th of 2012, we are going to hear this case and they are
14 still saying don't hear the case, Judge. Give us some more
15 time and maybe we'll get it figured out. We strenuously
16 oppose this further effort to delay this hearing.

17 I cannot help but note, Your Honor, when this
18 case was continued in November and rescheduled for now, we
19 almost didn't have a Racial Justice Act to hear because
20 there was this maneuvering by the legislature with the
21 cooperation of the prosecutors across the state to repeal
22 the Racial Justice Act. And I cannot help but note that in
23 another eight weeks, we don't know what might happen in
24 that regard. We now have a Racial Justice Act. Its terms
25 are clear. We're ready to meet it. They should be ready

1 to meet it. They've had the same opportunity to do the
2 studies that we did. The 80 cases that they're talking
3 about existed in August of 2010. These are not the 80
4 cases that arose since the Court gave its last continuance.
5 They are here now saying give us more time because our
6 prosecutors, the same ones who have been lobbying the
7 legislature to repeal the Racial Justice Act, somehow have
8 not responded to the questions that they've asked. And
9 they say because our prosecutors haven't done what we asked
10 them to do, we're asking this Court to step in and do for
11 us what the prosecutors haven't done. Give us some more
12 time to get this done.

13 Marcus Robinson is entitled to have his day in
14 court, Your Honor. We come here prepared to have that day
15 in court. We set aside two weeks for this hearing at a
16 time which the Court and counsel have largely agreed it
17 could probably be done in. They are now saying let's don't
18 do it in two weeks. Let's start with the defense case.
19 Let us hear everything the defense has got and then give us
20 eight weeks to figure out how to rebut it. That's
21 essentially what they are saying to the Court. They have
22 given no reasons of anything that has arisen in the interim
23 of the last continuance and this one other than the delay
24 of prosecutors who have indicated their intense desire to
25 see this Act repealed, but they apparently have not brought

1 the same intensity of coming up with facts that they say
2 they need to try to rebut a study which we will contend to
3 the Court is irrebuttable.

4 That's where we are today, Your Honor. We ask
5 the Court to proceed with this hearing today, to proceed
6 with it until its end and then make whatever judgment the
7 Court will make on the basis of the information we have. I
8 cannot help but point out one irony in the prosecutor's
9 position. Within the last week or so -- I think there is a
10 motion pending before the Court right now -- they asked
11 that their case be accelerated. They asked that could
12 their expert be allowed to testify as a part of our case.
13 Now, we resist that for the reasons we will tell the Court
14 when that comes up. But on the one hand they're saying
15 we're ready. We are so ready, we want to put our case on
16 while you are putting yours on. And then today when we
17 come in ready to go forward with this case they say oh, no,
18 we are really not ready. Not only do we not want to put
19 our expert witness on during your case, we don't want to
20 put him on at all during this hearing. We want to put him
21 on eight weeks later after he's had an opportunity to look
22 at everything you had to say and we can figure out whether
23 we've got a case and hopefully we have.

24 That's where we are today, Your Honor. We ask
25 the Court to stop this delay. We ask this Court to proceed

1 with that trial. We are ready. They have indicated before
2 they are ready. They shouldn't be allowed to come in here
3 on the day this trial -- this hearing is to begin and say
4 we thought we were ready but we really aren't. We ask the
5 Court to deny that motion.

6 THE COURT: Anybody else want to be heard?

7 MR. JAMES FERGUSON: Your Honor, may I just --
8 just one -- give me just one moment.

9 THE COURT: Yes, sir.

10 MR. JAMES FERGUSON: Thank you, Your Honor. We
11 made our presentation.

12 MR. COLYER: Judge Weeks, may I address a point
13 Mr. Ferguson raised?

14 THE COURT: Yes, sir.

15 MR. COLYER: With respect to the acceleration --

16 THE COURT: I wasn't aware of that.

17 MR. COLYER: And for good reason. Counsel for
18 the state suggested to the defense that maybe one way to
19 deal with this and to save some money for the state and
20 taxpayers and save some time if we had to go forward with
21 this, as we all anticipated we were going to go forward
22 with it today, was to do the expert testimony one right
23 after the other as opposed to the nonstatistical testimony.

24 THE COURT: Okay.

25 MR. COLYER: In an accommodation to try to save

1 some time for defense experts, state experts and save some
2 cost for the taxpayers of running people back and forth
3 over the next two or three weeks from various places and
4 having folks to have to sit in court potentially for long
5 hours when perhaps they weren't needed, that was an attempt
6 to try to accommodate experts and also to try to save some
7 money. It was not a ruse to try to get the defense to
8 think we were giving up any potential motion for
9 continuance that we had.

10 And, indeed, on Friday afternoon, when we
11 received the defense motion or the defense memorandum of
12 law with respect to our motion to dismiss and we read the
13 motion and then read the article that accompanies it, it
14 brought into sharper focus that what they're saying is you
15 guys aren't ready. You guys don't have a complete
16 statewide study. Footnote 121 with Professor Mosteller
17 says that and he says essentially that is a fatal defect in
18 the state's case, and there's only one way to cure that.
19 They've had the opportunity to cure their defects, and
20 we're asking for the same opportunity and the same
21 treatment, Judge.

22 And we are not trying to put the hearing off. We
23 understand it's going to start today. There's been some
24 argument when the legislature met last fall that because
25 the defendants filed a motion under the old Act, it didn't

1 matter what the legislature did. And then when there was
2 an attempt to change the law, the question was, well, since
3 they've filed, it doesn't matter for those folks who are
4 filed. Then there are folks who say, well, once the
5 hearing starts, it's going to preclude any change in the
6 law from affecting that particular defendant.

7 So those are legal arguments that are to be made
8 and the defense has already made some of those arguments in
9 the newspaper with respect to our efforts previously to
10 deal with this case. And so it seems somewhat ironic that,
11 having made those arguments before, now they stand up and
12 tell the Court that, well, if we don't start today,
13 somebody might pull the rug out from under us and that's
14 not fair. Well, it's not fair to the state either to have
15 to go forward when we know that criticism they are throwing
16 at us before we even start is, despite the best efforts,
17 despite the time that the Court has given us, despite the
18 work of our expert, their chief criticism is we don't have
19 a statewide study. There's a way to cure that, Judge.
20 Thank you.

21 THE COURT: Well, Mr. Colyer, my concern is this.
22 The case has been continued twice to allow you folks the
23 opportunity to complete the study that's part of your
24 rebuttal in this case. Those motions to continue were
25 allowed by the Court based on information and I'm not

1 suggesting anything because I'm confident you folks made a
2 good faith estimate with regard to the time period that
3 would be necessary to complete the study. But the fault in
4 the incomplete study lies, by the information in support of
5 your own motion to continue, with prosecutors who have not
6 complied with your request, to do that which you asked them
7 to do.

8 While it's not entirely on point, 15A-952 deals
9 with, among other things, motions to continue. Deals with
10 the issue of time period that would be involved and I
11 recognize that it's not completely on point but it's
12 analogous in the sense that there are time restraints that
13 are imposed. And there's case law that certainly stands
14 for the proposition where a defendant who moves for a
15 continuance and the basis upon which that defendant moves
16 for a continuance lies with failures of the defendant to do
17 what he or she is supposed to do, then the Court, in the
18 exercise of its discretion, can take that fact into account
19 in denying the motion to continue.

20 And I can't escape the point that the reason that
21 is being offered today in support of your motion to
22 continue is predicated on the fact that prosecutors who
23 have been involved or designated to be involved in
24 providing you with the information that you folks have
25 requested have not done what you've asked them to do. I

1 made it abundantly clear the last time this matter was set
2 for hearing that coming January 30th, we were going forward
3 with this case. I recognize your position now is we're not
4 suggesting that the entire matter be delayed at this point.
5 We're simply asking that our evidence be provided at some
6 later time.

7 Implicit in your comments, Mr. Thompson, is we're
8 asking for eight weeks and if we don't get the information
9 from our fellow prosecutors throughout the state at the end
10 of four weeks, we will do it ourself. That's a position I
11 would have expected to have been taken a while back as
12 opposed to right now.

13 MR. THOMPSON: There would not have been the time
14 between then and now -- we're already working 80 hours a
15 week just on this. There weren't -- unless we just gave up
16 sleep, for Mr. Colyer and I to have done them between then
17 and now would have been impossible. Just want the record
18 to reflect that.

19 THE COURT: Okay. Anybody want to be heard
20 further?

21 MR. JAMES FERGUSON: No, Your Honor.

22 THE COURT: All right. In the discretion of the
23 Court, the state's motion to continue is denied to which
24 the state objects and excepts for the record. The next
25 matter, state's motion for supplemental discovery, Mr.

1 Thompson.

2 MR. THOMPSON: Your Honor, this folds into the
3 defendant's motion to compel. What started I believe was
4 on the 23rd of January, most of our communication is
5 electronic with the defense and most of the discovery is
6 electronic as well. I got an email from the defense
7 requesting what I'm calling supplementary information. I
8 believe it was seven prosecutors -- it was somewhere around
9 that -- in different counties that was laid out in this
10 request this person said in their affidavit they looked at
11 those. We would like a copy of those notes. They laid out
12 the different counties and the people in this email.

13 The state started to draft an email to the
14 defense -- sorry, to those prosecutors, please get us what
15 the judge has ordered and when I typed the judge has
16 ordered, I started thinking about it. Judge has not
17 ordered the materials that they had sought. They have
18 provided it. Everything that's been given to us -- what
19 I'm calling supplemental information, let me define that.
20 The defense provided this massive amount of information
21 originally to the state through copies of transcripts and
22 jury questionnaires and stuff we've been talking about
23 throughout this process. All of those were delivered
24 through this process to the different counties, right? And
25 what the defense had requested, what I'm defining as

1 supplementary information is information that prosecutor
2 affiant looked at in order to produce that affidavit that
3 was not included in this defense material. Does that make
4 sense?

5 THE COURT: I think so.

6 MR. THOMPSON: So if that prosecutor that was
7 doing the affidavits was the prosecutor in the case and he
8 went to a file cabinet that contained original notes, his
9 or her notes, pulled those notes out and looked at them,
10 that supplementary information was supposed to be delivered
11 to the Conference of District Attorneys so it could be
12 delivered to the defense and that was just at our request.
13 So throughout this process, we had delivered all of that
14 electronically in a file called supplementary information
15 and material, something like that, that contained
16 everything that was given to us and we discussed that at an
17 earlier proceeding. I think Your Honor may remember.

18 THE COURT: Yes, sir.

19 MR. THOMPSON: So we get this email about this
20 supplementary information that has not been delivered but
21 that -- the way the state reads all of the orders that took
22 place, the state had not been ordered to give that
23 material. We had just given it because we had it and we
24 thought it was appropriate. We just gave it. But we had
25 not been ordered to do so. So I sent an email back almost

1 contemporaneously with the email I sent out to the
2 prosecutors asking for that information. But I sent one
3 back saying tell me where we are supposed to give you this.
4 And maybe I'm missing something to give the opportunity and
5 the response I think was way off.

6 But my point was we were not ordered to give that
7 material but we offered, all right, we're happy to give
8 this material over. We don't have it but we're going to go
9 seek it and we'll be happy to give that over if you can
10 provide us with reciprocal discovery in your affiants. It
11 was around maybe three or four days before that we received
12 these affidavits I mentioned a few nights ago. These
13 affidavits were from ten jurors, again, different cases,
14 two of which in the Robinson case and just that's all we
15 received in reference to those affidavits. We don't know
16 who drafted the affidavits. We don't know what these
17 affiants were told, shown, what was discussed with them.

18 We also received in that same area of time a
19 little video that had been produced by somebody and thrown
20 up on You Tube from three different folks. So we were
21 seeking, in essence, reciprocal information that they had
22 requested. We hadn't been ordered. They hadn't been
23 ordered. So we're happy to provide that supplemental
24 information if you will make it reciprocal like we've done
25 this pretty much this whole time.

1 The defense forwarded to me a motion to compel.
2 I had already sent out the email requesting that
3 information from prosecutors and I spent through Saturday
4 gathering up the last bits and pieces. Some it came in
5 immediately by email. Some of it we had to hunt down and
6 pull folks out of courtrooms and get it done, but we got it
7 all done by I think it was Saturday we got the last --
8 there was a screw-up with some emails and we finally got
9 that resolved.

10 Well, on the 24th -- they sent the request out
11 the 23rd. On the 24th, after these emails had gotten sent
12 out, the defense, instead of dealing with us any further,
13 they just sent out subpoenas all over the state for these
14 seven or eight prosecutors ordering them to be here, in the
15 state's mind, kind of jerking them around and ordering them
16 to be here producing that material to us this morning in
17 this courtroom.

18 THE COURT: Okay.

19 MR. THOMPSON: We hadn't -- we took issue with
20 that but we dealt with it because we already handed the
21 materials over. So they had been released from their
22 subpoenas and we had dealt with that with the defense. But
23 my request in that order, getting around to the point, is
24 we're asking what amounts to their -- the material they
25 have already been provided to be reciprocal. We would like

1 information and it's listed in my request --

2 THE COURT: Yes, sir.

3 MR. THOMPSON: -- that relates to these affiants.
4 We have been in essence muscled by the defense by subpoenas
5 sent all over the state and folks getting jerked out of the
6 courtroom to get this thing done and jerked out of their
7 lives to have to come here even another time to get that
8 done. We are just requesting that order be made
9 reciprocal.

10 THE COURT: Okay.

11 MR. THOMPSON: Now, they have the ability because
12 our prosecutor reviewers are all employees of the State of
13 North Carolina. We did that by design. They are all
14 prosecutors. And so they had the ability to slap out
15 subpoenas and get all these folks served because they knew
16 where they were. The defense knew where all the folks
17 were, where they worked and found them pretty easily. They
18 sent them all by mail. We are at the disadvantage because
19 we are getting these affidavits blindly. We don't know
20 where these folks are. We don't know how to reach them and
21 we would like the information that was pulled from us to be
22 pulled from the defense. And again, I've listed it
23 clearly.

24 THE COURT: I'm looking at paragraph 11A and B.
25 B deals with current addresses and contact information to

1 the affiants. Paragraph A requests detailed summaries,
2 recordings and/or copies of all materials provided to, read
3 to, discussed with or communicated to the following
4 affiants concerning the preparation of their affidavits and
5 then they are listed.

6 MR. THOMPSON: One of the reasons for that,
7 Judge, is if you look at these affidavits, they all seem to
8 be pretty much prepared by the same person. They all read
9 the same way and they use language that regular folks --
10 good, regular folks would not use. The language in the
11 affidavit was written by somebody ruined enough to be a
12 lawyer and clear enough to be in the affidavit. So it's
13 clear that they're not prepared by affiants themselves.
14 There are a number of folks on here -- there are a number
15 of things we would like to review or look at. Mr. Ferguson
16 actually was the notary on one of these. And the CDPL's
17 investigator --

18 THE COURT: Which Mr. Ferguson?

19 MR. THOMPSON: Sorry. Jay Ferguson was actually
20 the notary on this. So at some point these folks didn't
21 walk into one of their offices and say, here, I prepared an
22 affidavit. Somebody went to a living room and sat down
23 with each of these affiants and gave them the information
24 or talked to them or gave them a speech or talked to them
25 and then prepared an affidavit. We would like that

1 process. We have been ordered to give ours. We would like
2 to have theirs and the information that pertains to it.
3 That's really just the subject of those ten affidavits and
4 there are three jurors who appeared in a film on You Tube
5 that was sent to one of their experts. We would like the
6 same information as it applies to those three folks as
7 well.

8 THE COURT: Okay. Mr. Jay Ferguson.

9 MR. JAY FERGUSON: Yes. Thank you, Your Honor.
10 In order for me to address their supplemental motion for
11 discovery, they brought into discussion our motion to
12 compel.

13 THE COURT: Yes, sir.

14 MR. JAY FERGUSON: So if I could deal with both
15 of them at the same time because they -- that's how they
16 transpired.

17 THE COURT: Yes, sir.

18 MR. JAY FERGUSON: If I could show you, this is
19 the discovery order that was originally entered back in
20 November. And if you recall, we had a two-day discovery
21 hearing September 5th and 6th. It took a couple months to
22 get this order signed but this is from our September
23 hearing. And the state's request from the defendant -- and
24 most of this language is tracked word from word from their
25 motion as the Court ordered it.

1 There are really two types of evidence that this
2 motion for discovery dealt with. All the underlying source
3 data and DCI's, if you recall, from the Michigan State
4 study and then the second was everything with respect to
5 Dr. George Woodworth, who was our statistician. And that
6 was the extent of what the defendant was required to turn
7 over under this discovery order. The reciprocal part of
8 that discovery is seen with respect to Dr. Katz right here
9 in this paragraph five because we're comparing apples and
10 oranges.

11 Their affidavits, what we wanted is really the
12 underlying source data for their study. What happened is
13 Dr. Katz and these prosecutors developed a reviewer
14 instruction sheet and sent it out to all the prosecutors
15 around the state. And in that reviewer instruction sheet,
16 Dr. Katz puts in there that -- telling all these prosecutor
17 reviewers to fill out and answer questions to see if they
18 could come up with race neutral reasons, if possible, for
19 every African-American juror who has been struck. And he
20 says, if you obtain and use additional materials that were
21 not provided by the defendant, such as prosecutor voir dire
22 notes, please send copies of these materials to Peg Dorer
23 so that they can be turned over to the defendant. Dr. Katz
24 had obviously read this motion -- excuse me, this order
25 from the Court where it says subsection G, copies of all

1 studies upon which any state witnesses intend to rely in
2 his or her testimony in the hearing on defendant's RJA
3 motion and the underlying and supporting data for each
4 study. So prosecutors read notes. They then put in an
5 affidavit what they read in that note. They send the
6 affidavit to Dr. Katz in an unexecuted format. They send
7 the executed affidavit to the prosecutors and they are
8 supposed to send the additional materials that they
9 reviewed to Peg Dorer, who is at the Conference of District
10 Attorneys, for them to produce it to the defendant because
11 Dr. Katz fully knows this is his underlying source data.
12 This would be our equivalence of all the transcripts, the
13 jury questionnaires and that 20 gigabytes of information
14 that we turned over I think it was last May -- long, long
15 time ago.

16 We have never, ever objected to the state getting
17 our underlying source data for the state. We wanted their
18 underlying source data for the study. We think we are
19 entitled to it. We think that order requires them to give
20 it to us. That's why I issued subpoenas because we got
21 affidavits back and they did provide some of this
22 underlying material, but then we started seeing all these
23 affidavits from prosecutors. I believe there was eight or
24 nine of them around the state, where they had in their
25 affidavits where they said I reviewed Prosecutor Smith's

1 under -- you know, voir dire notes. But we didn't have
2 those voir dire notes. They didn't come from Peg Dorer.
3 They didn't come from the state. So that's why I issued
4 the subpoena to the prosecutors. I didn't subpoena a
5 single prosecutor to this room. I sent a subpoena duces
6 tecum. I cooperated fully with the state and said just get
7 the materials to Rob Thompson and he'll give them to me and
8 I released every one of them from their subpoenas as soon
9 as the documents got to Rob Thompson.

10 Now, what we don't know is what Peg Dorer has in
11 her control at the Conference of the District Attorneys.
12 She may have a whole bundle of information for us. We just
13 don't know. We've not gotten anything from her. So any
14 prosecutor that followed Dr. Katz's instructions to send
15 the materials to her, we don't have. He obviously sees
16 this as his underlying material that needs to be turned
17 over to the defendant. Now, shifting now to their -- so
18 our motion to compel is for them to provide us with any of
19 the underlying source material for their study that Dr.
20 Katz relied upon. Now, Dr. Katz has relied upon the
21 affidavits. The affidavits have been relying upon the
22 source data.

23 Now, I want to shift gears to their motion for
24 supplemental discovery which was served this morning.
25 There's ten jurors there. These jurors have nothing to do

1 with the MSU study. These jurors have nothing to do with
2 Dr. Woodworth's testimony or his analysis. There is
3 nothing in this order that has anything to do with
4 anecdotal type evidence from witnesses. We see that in the
5 second order of December right there. This is language
6 that the state and the defendant agreed upon as to what
7 level of discovery we were going to provide about witnesses
8 that we intend to call in our case in chief or in rebuttal.
9 And it says a summary of the testimony of each witness,
10 copies of any affidavits and written or recorded statements
11 of the witnesses.

12 Now, we have given copies of these affidavits of
13 these potential witnesses. These affidavits were given to
14 Bryan Stevenson, who is an expert witness, only for the
15 anecdotal purpose of showing the significant harm to
16 African-American jurors who disenfranchise from their
17 rights of citizenship to serve on juries. That's the
18 purpose of these affidavits. Now, they have nothing to do
19 -- they are not underlying source document -- whatever that
20 juror reviewed or my personal notes from interviewing Mr.
21 Radcliff, that's not part and parcel of any type of study.
22 That's the anecdotal witnesses and that's the order that we
23 should be required to comply with and have complied with.

24 THE COURT: Has a summary of the testimony of the
25 affiants been provided to counsel for the state?

1 MR. JAY FERGUSON: The actual affidavits have
2 been provided and that is --

3 THE COURT: So that's your contention you're in
4 compliance with the definition of the order?

5 MR. JAY FERGUSON: Absolutely.

6 THE COURT: Okay.

7 MR. JAY FERGUSON: Unless the Court has any
8 questions, that concludes my argument.

9 THE COURT: All right. Your position essentially
10 is that what they're asking goes outside the scope of
11 either of the discovery orders that were previously entered
12 by the Court?

13 MR. JAY FERGUSON: That's correct. If I can
14 remind the Court, there was a discovery deadline motion --
15 motion for filing discovery -- additional discovery motion
16 back in November and then we all agreed to this language.
17 And I won't go into it but I will tell the Court these
18 affidavits are much more detailed -- much more detailed
19 than the witness summaries we got from the state.

20 THE COURT: Mr. Thompson.

21 MR. THOMPSON: Judge, a couple things. I did not
22 read and still don't read 5G to include the notes that the
23 prosecutors did, but to the extent the Court might, I've
24 already given that information. I've given the
25 supplementary information that they say in this motion to

1 compel. We've already handed it over. That's the
2 information we've been talking about. The information --
3 the supplemental information that was sent to Peg Dorer was
4 all put on a common drive that I have transferred directly
5 and has been up on Dropbox for the defense since I got it.
6 So it's been up there for a while.

7 THE COURT: Okay.

8 MR. THOMPSON: I also confirmed with Peg Dorer --
9 just so the record is clear, I confirmed with Peg Dorer by
10 phone call because we had been trading emails about it,
11 everything you got, you scanned or you put up, if it was
12 already in digital form, you put in that folder; is that
13 right? Yes. Not just Cumberland County? No. That's all
14 the stuff that's in that folder.

15 THE COURT: Okay.

16 MR. THOMPSON: I put the whole folder up there.
17 So the information they requested just apparently was not
18 in that folder or what amounted to most of the
19 conversations I had with prosecutors and passed on,
20 probably about half, was I didn't rely on anything except
21 what was given to me by the Conference which came directly
22 to the defense. So it was a -- they referred to notes and
23 they referred to jury questionnaires but they were in the
24 copies that have been provided by the defense. So for all
25 of those purposes, I want to make sure the record is clear

1 we have provided all that information and it's been up
2 there since we got it and I have kept it up-to-date. It's
3 one of my daily chores in logistics is putting -- making
4 sure all that stuff on Dropbox that they have access to --
5 the defense has access to is complete with all of the stuff
6 that comes in.

7 The state considers -- what the defense is asking
8 you to draw the distinction is, all right, one of our
9 experts is going to rely on these affidavits but he didn't
10 need to know the underlying information so we didn't give
11 him any of that and so we shouldn't have to give it to you
12 guys. Well, it's experts given raw data and experts given
13 raw data. We've complied. We've given all the raw data.
14 We just want theirs. We think it's appropriate. That's
15 the crux of our motion.

16 THE COURT: Any response, Mr. Jay Ferguson?

17 MR. JAY FERGUSON: If he is certifying that we --
18 that he has confirmed with Peg Dorer and we have gotten
19 everything from her, then there is nothing else to compel,
20 if that's the certification from the state.

21 MR. THOMPSON: I certify.

22 MR. JAY FERGUSON: Okay. With respect to our
23 motion to compel, there is nothing to be heard on that at
24 this point. As additional affidavits come in, which I
25 anticipate they will, we would expect the underlying source

1 data.

2 THE COURT: All right. Now, with regard to their
3 request for the information sought by the state in
4 paragraph 11A and B, detailed summaries, I'm not entirely
5 clear on what that's referring to because the summaries, as
6 I understand it, is the information contained within the
7 affidavit itself.

8 MR. JAY FERGUSON: That's correct.

9 MR. THOMPSON: Not exactly, Judge. What I'm
10 looking for is the information that juror was given and I
11 don't know in what form it was given. Could have been a
12 conversation. Could have been, here, look at these other
13 affidavits from these other folks or it could have been
14 just --

15 THE COURT: You're asking for the circumstances
16 under which the affidavit was received.

17 MR. THOMPSON: Exactly. And I don't know what
18 form that was in because we've been given nothing but the
19 raw affidavit so it could have been a conversation. Could
20 have been written form. It could have been watch this
21 movie we prepared. I don't know. So what we're looking
22 for is that information. What were they told --

23 THE COURT: Okay.

24 MR. THOMPSON: -- before this affidavit was
25 drafted for them.

1 MR. COLYER: Your Honor, some of these folks have
2 either said in the movie or the affidavit, I've been told
3 that white folks weren't treated like this.

4 THE COURT: All right.

5 MR. COLYER: Okay. Who told them? I mean what
6 were they told?

7 THE COURT: You made reference to a movie on You
8 Tube?

9 MR. THOMPSON: Yes, sir.

10 THE COURT: Same thing?

11 MR. COLYER: Yes, sir.

12 MR. THOMPSON: Yes.

13 THE COURT: I wasn't aware there was anything on
14 You Tube.

15 MR. THOMPSON: It was given to us and the link
16 was given to us as, well, we provided this to one of our
17 experts. We're ordered to give what we give to our experts
18 to each other.

19 THE COURT: Okay.

20 MR. THOMPSON: So they've been complying with
21 that, as far as I know, beautifully and that was given to
22 one of the experts. Well, if the expert is basing his or
23 her opinion on something that is false, that is
24 manufactured, that is fabricated. I don't know what the
25 underlying data was, whether it's accurate, whether it's

1 appropriate, what information was given, what propaganda.
2 I don't have any idea. I sure would like to see that to
3 see whether or not that may cause that expert to give an
4 opinion based on false information. The old term garbage
5 in, garbage out, I'd like to know what that first set of
6 garbage was, respectfully.

7 THE COURT: Folks, respectfully, the Court is
8 reminding all counsel of Rule 12. Folks, I'm not going to
9 allow counsel or tolerate counsel in characterizing matters
10 before the Court. You're absolutely entitled to make your
11 position known.

12 MR. THOMPSON: It was not my intent to
13 characterize it. It was my intent to say it could -- it
14 could be false. I'm not saying it is and insofar as I
15 mislead the Court, I apologize. We don't know anything
16 about it and if it is bad, we're entitled to know that. If
17 it was great, we are entitled to know that too and because
18 we know nothing, we are entitled to know that.

19 MR. COLYER: Judge, I noticed your eyebrows raise
20 when you heard the word propaganda the second time.
21 Perhaps we should be using the word indoctrination because
22 it's the same thing.

23 THE COURT: Yes.

24 MR. COLYER: I mean it's synonymous.

25 THE COURT: All right. I just want to start us

1 all off on the same note, folks.

2 MR. COLYER: Yes, sir.

3 THE COURT: If I understand correctly, Mr. Jay
4 Ferguson, your position is the affidavits referred to in
5 the state's request for supplemental discovery, paragraph
6 11A and B are materials that were provided to Mr.
7 Stevenson, who is a, quote, unquote, expert witness the
8 state intends to call in this case, and Mr. Stevenson
9 utilized that information in giving some opinion. Is that
10 a fair statement?

11 MR. JAY FERGUSON: That's correct.

12 THE COURT: Why is it you contend they are not
13 entitled to that if that's a basis for any opinion that
14 might be given?

15 MR. JAY FERGUSON: I think I better let Ms.
16 Stubbs address that because she's handling that. She's had
17 more contact with these jurors and prepared to address that
18 with the Court.

19 THE COURT: Okay. Yes, ma'am.

20 MS. STUBBS: I guess, Judge, first I do want to
21 answer your question.

22 THE COURT: Yes, ma'am.

23 MS. STUBBS: To back up for a second, I think a
24 summary of our position is that we have complied with the
25 only order which is to turn over the affidavits. No other

1 witness -- for example, we have an affidavit from a judge
2 from this county. That judge was not required to give us
3 the materials that he reviewed. Both sides have turned
4 over affidavits. Nobody has turned over any other
5 materials. However, in -- because I think this is starting
6 to become a bigger issue and I probably can address it. I
7 will address I think what the state's concern is, which are
8 these ten jurors were jurors who were interviewed by
9 personnel from my office and the CDPL with the exception of
10 one juror, Mr. Radcliff, who was also interviewed by Mr.
11 Ferguson and myself --

12 THE COURT: Mr. Jay Ferguson or --

13 MS. STUBBS: I'm sorry, Mr. Jay Ferguson. I'm
14 pointing to him, Mr. Jay Ferguson. Those jurors were
15 provided in some cases a published opinion and we took a
16 transcript -- excerpts from transcripts and they were shown
17 transcript excerpts from Batson colloquy. Those are the
18 materials. Those are materials that have been disclosed to
19 the state. They have all the materials. There is nothing
20 -- we continue to resist because we think we're right
21 legally but substantively, they're there. That's the
22 entire explanation.

23 THE COURT: Okay.

24 MR. THOMPSON: If I can inquire, because the
25 first I've heard of what they --

1 THE COURT: Yes, sir.

2 MR. THOMPSON: -- what they've given. Are those
3 transcripts, pages, sections separated out where we would
4 be able to look at exactly what was given to that juror
5 somewhere? Because sure, we have the whole transcript but
6 we don't know what pages they were given, what changes were
7 made, if any, to the -- you know, if there were pieces and
8 parts that were separated out of the transcript --

9 THE COURT: Yes, sir.

10 MR. THOMPSON: -- or if they were just given the
11 whole transcript in whole. I'd like to inquire
12 respectfully.

13 MS. STUBBS: I looked to see if I had saved them
14 as separate PDF's in my file and I did not. But they are
15 -- all the documents, the transcripts we have disclosed
16 months and months and months ago, they are searchable and
17 if you just enter the juror's name, you should be able to
18 find the Batson colloquy. These were also jurors, many of
19 whom were the subject of the state's prosecutor reviewers
20 affidavits so you can also probably check those as well.

21 THE COURT: So the information is out there and
22 it's available?

23 MS. STUBBS: Yes, Your Honor.

24 THE COURT: Mr. Thompson.

25 MR. THOMPSON: Can -- for purposes of the motion

1 and whether we are satisfied to put it to rest, can Ms.
2 Stubbs or anyone else on the team certify that no other
3 conversation, no other information, no other video, no
4 other media of any type was shown or discussed with that
5 juror, other than the transcript and the Batson
6 conversation that went along with it?

7 MS. STUBBS: Your Honor, I should amend -- I know
8 with respect to one of the jurors and possibly others, he
9 was shown a copy of the EJI report which the state also
10 has.

11 MR. COLYER: Dr. Stevenson's report?

12 MS. STUBBS: That's Bryan Stevenson's report,
13 Equal Justice Initiative.

14 MR. THOMPSON: They were shown --

15 MS. STUBBS: Mr. Carmen.

16 MR. THOMPSON: Sorry?

17 MS. STUBBS: Sorry. If I could have a copy of
18 your motion. I know that Mr. Carmen, juror number five,
19 was shown that report.

20 MR. THOMPSON: One juror was shown the EJI?

21 MS. STUBBS: And no other materials that I'm
22 aware of.

23 THE COURT: And all of the other jurors were
24 shown or provided with excerpts?

25 MS. STUBBS: Yes. And Mr. Carmen was provided

1 with the excerpt of the transcript. I know at some point
2 -- not during his initial interview but I know at some
3 point he was shown the report so before I certify.

4 MR. THOMPSON: So just so I'm clear the EJI was
5 the Equal Justice Initiative --

6 MS. STUBBS: Yes.

7 MR. THOMPSON: -- that Dr. Stevenson did was
8 shown to a juror and Dr. Stevenson considered that juror's
9 affidavit in his report?

10 MS. STUBBS: No. Dr. Stevenson will consider
11 that affidavit as part of his testimony in this courtroom.
12 He -- that report was completed before that affidavit was
13 obtained from them.

14 MR. THOMPSON: Make sure -- again, this is new,
15 Judge.

16 THE COURT: Yes.

17 MR. THOMPSON: Want to make sure I have a
18 complete understanding of what we're talking about. If Ms.
19 Stubbs is willing to certify no other information was given
20 as such, then the -- our motion or our request is complied
21 with. To that extent, we don't wish to be heard further if
22 she is willing to certify as such.

23 THE COURT: I'm understanding Ms. Stubbs is
24 certifying to those things for purposes of the record.

25 MS. STUBBS: I'm certifying that was my direction

1 and I have no reason to believe otherwise. I wasn't
2 present but, you know, that's --

3 MR. THOMPSON: Well, Judge --

4 MS. STUBBS: To the same extent that the state is
5 certifying for Peg Dorer, I can certify for my staff.

6 MR. THOMPSON: Then we're not satisfied,
7 respectfully, and we ask for that information. I certainly
8 don't mean disrespect Ms. Stubbs. If she wasn't present,
9 she can't -- I don't want to put her in a position to try
10 to certify as such. So respectfully, we are requesting the
11 information.

12 THE COURT: Who was present, Ms. Stubbs? Were
13 there different individuals involved?

14 MS. STUBBS: Yes. There were investigators from
15 my office, the Center for Death Penalty Litigation. They
16 were directly under my supervision.

17 THE COURT: All right.

18 MS. STUBBS: I told them what materials to take.
19 They took those materials and they came back and reported
20 to me. I have no reason to think otherwise.

21 MR. THOMPSON: Can we ask for information if they
22 still -- assuming they still work for the CDPL and the
23 ACLU, can we get that information? We're happy to --

24 THE COURT: Let me propose the following, Mr.
25 Thompson, and see if this meets -- this satisfies the

1 state. I'm going to ask that Ms. Stubbs, on behalf of the
2 defendant, provide the Court with a list of names of all of
3 the individuals who were involved, what their capacity may
4 be, investigator or otherwise, what, if any, instructions
5 they were given by you. My understanding is you were not
6 present at the time the affidavits were taken from any
7 expert; is that correct?

8 MS. STUBBS: That's not correct. Mr. Radcliff,
9 that affidavit was obtained by -- actually --

10 MR. JAY FERGUSON: I obtained Mr. Radcliff's
11 affidavit.

12 THE COURT: Okay. Who was present and the gist
13 of any materials provided or any statements made to any
14 affiant for purposes of in-camera review by the Court.

15 MS. STUBBS: Yes, Your Honor.

16 THE COURT: Is that satisfactory?

17 MR. THOMPSON: Yes, sir. Thank you.

18 THE COURT: After in-camera review, if the Court
19 determines that it's disclosable, I will provide it to
20 counsel for the state. In the event the Court determines
21 that it is not, it will be sealed and made part of the
22 record in this case. Is that agreeable?

23 MR. THOMPSON: Thank you. Yes, sir.

24 THE COURT: State want to be heard -- I mean
25 counsel for defendant want to be heard further?

1 (No response.)

2 THE COURT: Okay.

3 MR. THOMPSON: Judge, just housekeeping wise --

4 THE COURT: Yes, sir.

5 MR. THOMPSON: -- I didn't want to fail to bring
6 it up to the Court. The defense and the state have now
7 dealt with the motion to continue so we are on track. We
8 have talked about the schedule this week. Is the defense
9 taking this week and the state expecting to start next
10 week?

11 THE COURT: Well, my recollection, correct me if
12 I'm wrong --

13 MR. THOMPSON: Yes, sir.

14 THE COURT: -- is we discussed that the last time
15 we were on the record. My indication I believe to all
16 counsel at that point was, based on the estimated length of
17 the defendant's presentation of evidence, if by way of
18 example, we stop late Thursday or Friday, we would hold off
19 for the presentation of the state's evidence to the
20 following Monday.

21 MR. THOMPSON: Yes, sir.

22 THE COURT: Anybody disagree with that?

23 MR. HUNTER: Your Honor, I mean I'm not objecting
24 but my recollection was that I think the state thought they
25 could get local people in --

1 MR. COLYER: We do, Judge.

2 MR. HUNTER: -- if we finished --

3 MR. COLYER: We mentioned --

4 MR. HUNTER: -- up on Friday, that they would
5 have some local people that were available.

6 THE COURT: Your recollection is correct.

7 MR. HUNTER: I'm not pushing for that but that's
8 my recollection.

9 MR. THOMPSON: We can still do that to the extent
10 we have the time.

11 THE COURT: All right.

12 MR. THOMPSON: But mainly I'm dealing with a
13 housekeeping matter. We've been asked -- there are
14 different experts that the defense is bringing in and we
15 have brought in to deal with the statistical testimony on
16 both sides. And to the extent that we wanted to bring Your
17 Honor in on this and to tell the Court -- sorry, tell the
18 defense, what we'd like to do is if the defense finishes,
19 is -- they are intending on calling those statistical
20 people up front as I understand it with some communication
21 with the defense. We are going to have Dr. Katz here for
22 that testimony --

23 THE COURT: Okay.

24 MR. THOMPSON: -- by design as we have all talked
25 about through the process. We then wish to send Dr. Katz

1 home, have him come back for his testimony, assuming we're
2 all ready for it, next Monday. So we can plan on him
3 coming back and any defense witness experts that they wish
4 to have present for Dr. Katz's testimony for rebuttal can
5 come back Monday. If -- I don't know what their plans are
6 but if they intend on having those statistical witnesses
7 present for his testimony, if we can just plan on him being
8 back Monday assuming the defense is finished to be able to
9 do that.

10 THE COURT: All right.

11 MR. THOMPSON: We likely should talk about
12 rebuttal and surrebuttal so we're not bringing him back
13 three times to the extent -- throughout this week I think
14 logistically would be appropriate so we're not putting Katz
15 on next week, finishing out with the state's case and then
16 the defense puts on rebuttal of their stats people and we
17 got to bring Katz back a third time and so on. It gets to
18 be kind of ad nauseam. So respectfully I wanted to bring
19 the defense's position -- attention that we intend on
20 bringing Katz in on Monday for his testimony.

21 MR. JAMES FERGUSON: Well, Your Honor we don't
22 know exactly what position to take because we don't know
23 exactly what he's proposing.

24 THE COURT: Yes, sir.

25 MR. JAMES FERGUSON: We would like to get some

1 clarification on -- of course, bring Dr. Katz in at your
2 leisure. If we know what that is, we'll have our people
3 here but I'm not sure what's supposed to happen after that.

4 MR. THOMPSON: That's -- well, to the extent that
5 the state's case will include Dr. Katz -- the state's case
6 itself, the defense's case then, the state's case will have
7 Dr. Katz on Monday.

8 THE COURT: Well, let me clarify on that.

9 MR. THOMPSON: Yes, sir.

10 THE COURT: Is Dr. Katz going to be the only
11 state's expert witness?

12 MR. THOMPSON: No, sir. In statistical analysis,
13 yes, sir.

14 THE COURT: Okay. And if you're not comfortable
15 in answering the question, that's absolutely okay. Whom
16 else do you intend to call as an expert witness?

17 MR. THOMPSON: Dr. Cronin but that doesn't have
18 anything to do with stats.

19 THE COURT: Okay. Dr. Cronin's expertise is in
20 what?

21 MR. THOMPSON: Political science.

22 THE COURT: Okay.

23 MR. THOMPSON: So in essence, I wanted to kind of
24 maybe start the defense thinking about -- we've even
25 communicated outside of open court -- where it would be all

1 right with the state or we discussed it would be all right
2 with the state to say if they intend on having their people
3 here to hear Katz testimony as Katz is here to hear their
4 testimony, if it would be logistically possible and
5 economical to put on Dr. Katz, put them -- put their
6 experts on out of order in rebuttal and maybe recall Dr.
7 Katz if we put on surrebuttal just to get the stats out of
8 the way to save everybody from traveling back and forth to
9 their respective homes. I'm not saying we need to deal
10 with this now, but to the extent we intend on calling Dr.
11 Katz in our case, it's going to be Monday. To the extent
12 that they need to plan further trips, they should start
13 thinking about whether or not they are interested in
14 calling folks out of order to accommodate all the different
15 folks that need to travel all over the place and the
16 state's expense in doing so. We don't have to resolve that
17 right this second.

18 MR. COLYER: Judge, that's what Mr. James
19 Ferguson was talking about this morning, about us
20 accelerating the testimony.

21 THE COURT: Um-hmm. Yes, sir.

22 MR. JAMES FERGUSON: Your Honor, we've had some
23 preliminary dialog about this very issue. This is the
24 first we fully understand what they are proposing.

25 THE COURT: Yeah.

1 MR. JAMES FERGUSON: I suggest that we have some
2 additional dialog with the state about that. I don't think
3 this is something the Court needs to resolve right now.

4 THE COURT: I was going to ask that you do
5 exactly that. You folks continue to talk about it. If I
6 need to get involved or there is an issue at some point, we
7 can get to that down the road. But I think where we are
8 now, there is, at least on the record, some notice or
9 indication of what it is the state's requesting but if that
10 can be worked out, fine. If not, we will come back and
11 deal with it.

12 MR. COLYER: Judge, and the basic notification is
13 if the defense finishes its case this week, we do not plan
14 to call Dr. Katz --

15 THE COURT: Until Monday.

16 MR. COLYER: -- until Monday --

17 THE COURT: Yes, sir.

18 MR. COLYER: -- unless we get into this
19 accelerated. If the defense finishes its case this week,
20 depending on when it's finished, we indicated to the Court
21 we had some local folks we can do to fill the void.

22 THE COURT: Yeah.

23 MR. COLYER: The Court said, well, it depends on
24 when we finish on Thursday or Friday whether you have to do
25 that.

1 THE COURT: Okay.

2 MR. COLYER: We just want to make sure we are
3 still on the same sheet.

4 THE COURT: We on the same page now?

5 MR. JAMES FERGUSON: Yes, sir. I believe so,
6 Your Honor. We can come back to the Court if we're unable
7 to resolve any differences remaining --

8 THE COURT: Yes, sir.

9 MR. JAMES FERGUSON: -- after we've conferred.

10 THE COURT: All right. Yes. Which is a good
11 segue into the motion to sequester -- defendant's motion to
12 sequester. The motion is asking that all nonexpert
13 statistical witnesses be sequestered.

14 MS. STUBBS: Yes, Your Honor. We were asking
15 pursuant to Rule 615 of the Rules of Evidence that this
16 Court exclude all witnesses with the exception of expert
17 witnesses.

18 THE COURT: Yes, ma'am. All right. You folks
19 want to be heard? It would be reciprocal.

20 MR. COLYER: Yes, sir. Why? Our basic question
21 is why? The folks that have been noticed by the state as
22 our witnesses are prosecutors, judges, experts.

23 THE COURT: Okay.

24 MR. COLYER: I mean what -- what is it that the
25 defense is afraid that one witness is going to say that's

1 going to affect somebody else's testimony? I mean they've
2 got the affidavits. They've got the spreadsheets. They've
3 got the transcripts. They know where the folks are coming
4 from. I mean it just -- it just seems to add one more
5 logistical problem for us in terms of keeping people
6 separated, getting them here, putting them somewhere else
7 and bringing them in. We think in the Court's discretion,
8 it's not necessary. There's not a jury here. It doesn't
9 matter who's in here. I mean we've got the media here
10 that's perhaps going to record this from day to day and
11 week to week. If somebody wanted to sit at home and watch
12 it somewhere, they could probably almost do that by going
13 on the internet and watching WRAL perhaps on their camera
14 if they are going to do that. So why? What's the reason
15 for doing it? And we object to it and obviously if it is
16 granted, we ask that it be reciprocal.

17 THE COURT: Yes, ma'am. What is the reason or
18 basis for the request?

19 MS. STUBBS: Well, Your Honor, as they have
20 indicated, they have a large number of lay witnesses.
21 Those are prosecutors. But we would still prefer that they
22 not watch each other's testimony, watch our lines of
23 cross-examination and use that information to prepare for
24 their testimony.

25 THE COURT: Okay.

1 MR. COLYER: We object.

2 THE COURT: All right. Well, it is a matter in
3 the discretion of the Court. I'm going to allow it. I
4 will work with both sides in terms of it's reciprocal. I
5 will work with both sides in terms of scheduling. We are
6 on the fourth floor. There is space available up here if I
7 understand it correctly for witnesses to be sequestered; is
8 that correct, Lieutenant?

9 LIEUTENANT CAIN: We'll make some arrangements.

10 THE COURT: Okay. All right. So it is allowed
11 and it is reciprocal.

12 MR. THOMPSON: Judge, I wanted to get
13 clarification. In different places judges mean different
14 things. I want to make sure it's clear what our
15 obligations are. Sequester is out of the courtroom
16 obviously. Is also keep them separate from each other or
17 just be ordered -- would it be sufficient for the state to
18 tell them the Court has ordered not to discuss your
19 cross-examination or your -- your information until after
20 each witness has testified?

21 THE COURT: That's a legitimate question.

22 MR. THOMPSON: There are a number of prosecutors,
23 for example, coming from the same district, for example,
24 and I hate to keep them all in separate rooms if they're
25 sitting around waiting. So logistically, I would like to

1 do that.

2 THE COURT: Are you satisfied with the Court
3 simply ordering that no witness is to talk about his or her
4 testimony with any other witness?

5 MS. STUBBS: Yes, Your Honor.

6 THE COURT: Okay. Then that's what I am going to
7 order.

8 MR. THOMPSON: Yes, sir.

9 THE COURT: Folks, the record will reflect that
10 there are two motions in limine still under advisement by
11 the Court. One deals with the state's motion to exclude
12 the testimony of Mr. Stevenson.

13 MR. THOMPSON: Yes, sir.

14 THE COURT: The other deals with the defendant's
15 motion to exclude testimony from any former prosecutors,
16 any judges, any other court personnel on matters outside of
17 the record in any respective case or cases that may be
18 involved. Is that an accurate statement?

19 MR. HUNTER: No, Your Honor, if I may, I think
20 it's just judges. I think we have not objected to the
21 prosecutors.

22 THE COURT: I wanted to clarify it for the
23 record.

24 MR. HUNTER: Prosecutor reviewers. And there is
25 an additional motion in front of Your Honor. I don't know

1 if you listed them all but -- concerning photos.

2 THE COURT: Yes, sir. We're going to come back
3 to that.

4 MR. HUNTER: Okay.

5 THE COURT: I wanted to simply put on the record,
6 because I indicated earlier, we don't have a jury here.
7 The Court is inclined to give wide latitude to both sides
8 in this case in the presentation of evidence. But I am
9 mindful, as I believe I stated on the record the last time
10 we were on the record, of the body of law that prohibits
11 anecdotal matters outside the record in the case,
12 specifically as it may relate to judges or prosecutors that
13 might be called as witnesses in this case. I haven't
14 changed my position, at least in regard to giving latitude
15 to both sides in this case. But I anticipate that at some
16 points in these proceedings, one or both of those issues
17 are likely to be raised and both sides should feel
18 absolutely free to make any objections you think are
19 appropriate or ask to be heard on any matters that may be
20 related to those motions in limine. Is that agreeable to
21 both sides?

22 MR. HUNTER: Yes, Your Honor, agreeable with the
23 defense.

24 MR. COLYER: Yes, sir.

25 THE COURT: All right. It's 12:15. We ready to

1 go?

2 MR. COLYER: You have that motion --

3 THE COURT: Sorry. We got the motion in limine
4 -- it's not entitled that but that's what it is, motion to
5 limit photos or other gruesome demonstrative evidence. The
6 state intend to offer any such evidence?

7 MR. THOMPSON: Yes, sir.

8 THE COURT: For what purpose?

9 MR. THOMPSON: Through prosecution witnesses and
10 judges. The -- lots and lots of talk has gone on about the
11 race of the different folks involved, the victim's race,
12 the defendant's race and in lots of different
13 circumstances, the victim's race is not delineated in any
14 court document. A photograph of the victim -- we have
15 asked that the prosecutors and we have gathered both --
16 sometimes there is a nice picture, in essence a graduation
17 picture of the victim, an identification picture and the
18 identification picture from the autopsy.

19 THE COURT: Yes, sir.

20 MR. THOMPSON: We asked that those things be
21 gathered if they are available, picture from the scene if
22 they are unavailable, a picture of each witness -- I'm
23 sorry, each victim --

24 THE COURT: Okay.

25 MR. THOMPSON: -- in each of the cases that will

1 be discussed. Now, some jurisdictions are not going to be
2 able to bring them. They are unavailable. They don't have
3 the facilities to get them, but in some circumstances we do
4 intend on doing that.

5 THE COURT: Is the sole purpose to establish the
6 identity -- the race, pardon me, of the victim in the case?

7 MR. THOMPSON: It's one of the purposes, not the
8 sole purpose. The other purpose is that the whole crux of
9 the RJA is an argument that numbers alone should be enough.
10 Numbers alone should be enough. The argument states
11 numbers don't do it. These defendants, all of them,
12 received the death penalty based on the acts that they did,
13 period, based on the Court, based on the jury following the
14 law, they've gone up through the appellate courts and back.
15 And it's evidence of what they were convicted of doing,
16 what they did in the photograph and that is the reason they
17 were all put on death row and it's relevant to that end.

18 THE COURT: What does that have to do with the
19 issue before this Court regarding the exercise of
20 peremptory challenges?

21 MR. THOMPSON: It's demonstrative toward the
22 whole goal here and as it relates to both -- the whole
23 general nature of the RJA and as it relates to the race of
24 the victim. Now, as it relates to the courtroom
25 presentation, Judge, we don't intend on parading those

1 pictures around. That would be disrespectful to the
2 victims. We intend on putting them into evidence. And if
3 it means literally putting them in an envelope, showing
4 them in private to the witness so as not to display them,
5 we don't intend on throwing them on the screen, Judge, for
6 it to be published. So it's more of a publication issue
7 they're talking about. We intend to put them in as part of
8 the record in this case. It's one of the things we
9 intended to do from the beginning is create a full and
10 complete record of all the information that would be
11 necessary to go up on appeal.

12 THE COURT: Well, even though this is not
13 encaptioned motion in limine, I'm going to treat it as such
14 and give you folks the opportunity to be heard first.

15 MR. JAMES FERGUSON: Yes, sir.

16 THE COURT: Yes, sir.

17 MR. JAMES FERGUSON: Your Honor, what you just
18 heard from Mr. Thompson is what we suspected --

19 THE COURT: Yes, sir.

20 MR. JAMES FERGUSON: -- which is there is no
21 purpose for these photographs other than to try to inflame
22 somebody and to influence somebody, whether it's Your
23 Honor, whether it's an appellate court or whoever, based on
24 photographs that have no evidentiary purpose in hearing
25 this hearing. The purpose of this hearing, Your Honor, is

1 to determine whether or not race was a significant factor
2 in the exercise of peremptory challenges at the time of Mr.
3 Robinson's trial, whether that's statewide, districtwide or
4 countywide. That's the inquiry that this hearing is going
5 into.

6 Now, we've puzzled as a team what possible
7 purpose could a photograph of the deceased have in
8 determining that issue? We came up with none when we
9 talked about it. And we listened to and we still come up
10 with none. If the identity or the race of the victim is in
11 issue in any of these cases, we have not heard it. The
12 photographs that we've been provided are all photographs of
13 Cumberland County cases. In every single one of those
14 cases, there is no issue as to whether the victim was black
15 or white. There is no issue as to the identity of the
16 victim. There being no issue as to the identity of the
17 victim, then the statement that they are offering these
18 photographs to establish the purpose of the identity of the
19 victim falls to the wayside. That just can't be the
20 reason. It's not an issue. If it was an issue at all,
21 it's not a disputed issue. So there's no reason on that
22 basis to do it. Likewise, there's no issue for a witness
23 who takes the stand as to what is the identity or what is
24 the race of the victim in this case. It's already
25 established. If not, we will be happy to stipulate.

1 THE COURT: Okay.

2 MR. JAMES FERGUSON: There is simply no issue as
3 to identity. And apart from that, no reason has been
4 advanced, other than they say we want to show the
5 circumstances of what happened. Well, of course, they want
6 to do that because they don't have a study to show. They
7 want to show some photographs which prove nothing, Your
8 Honor. That has no probative value in this case. And if
9 it did, if they could muster some probative value, which we
10 haven't heard yet, then certainly the prejudicial value of
11 putting in the photograph that has no relevance to any
12 issue in the case, the probative value would be far
13 outweighed by the prejudice that could result somewhere
14 along the line in putting in photographs that have no
15 purpose. We ask that they be kept out.

16 THE COURT: Okay. Any further argument on behalf
17 of the state, Mr. Thompson?

18 MR. THOMPSON: No, sir. Thank you.

19 THE COURT: Folks, the rules of evidence apply to
20 motions for appropriate relief. I don't see any
21 evidentiary basis for the state being allowed to offer
22 photographs of the alleged victims in this case given the
23 issues that are before the Court. The motion to exclude on
24 behalf of the defendant is allowed to which the defendant
25 -- strike that, the state objects and excepts for the

1 record.

2 MR. COLYER: Your Honor, and if an issue should
3 arise with respect to that, may we ask the Court to
4 revisit --

5 THE COURT: Yes, sir.

6 MR. COLYER: -- that perhaps on an individual
7 basis?

8 THE COURT: Yes, sir. Certainly I'm open to
9 reconsideration if there's a basis for doing that, Mr.
10 Colyer.

11 MR. COLYER: Thank you.

12 THE COURT: All right, folks. It's 11:20 (sic).
13 Ordinarily we would take the lunch recess, as I indicated,
14 that's normally from 1:00 until 2:30. What's your
15 preference? You ready to go forward with the presentation
16 of the defendant's evidence?

17 MR. COLYER: Judge, one other thing I don't think
18 we put on the record. I'm sorry.

19 THE COURT: Yes, sir.

20 MR. COLYER: There was a motion to allow
21 videotaping of public judicial proceedings by the defense.
22 I believe when we were in here earlier this morning --

23 THE COURT: Yes, sir.

24 MR. COLYER: -- you said that you were going to
25 allow that. The state asked to be given a copy of any and

1 all videos --

2 THE COURT: Made by the defendant.

3 MR. COLYER: -- made by the defense.

4 THE COURT: I thought there was agreement on
5 that.

6 MR. COLYER: Yes. I believe the defense said
7 they would agree to put that up so that we can have it, but
8 there was a motion just so we can close it out for your
9 records.

10 THE COURT: Well, that -- if I understand your
11 position correctly, that's a moot issue at this point
12 because -- I apologize.

13 MR. JAMES FERGUSON: I'm sorry, Your Honor. Our
14 preference -- we were a little bit concerned about that.
15 Our preference would be to take the break now and then we
16 can start our case after the break and move forward.

17 THE COURT: Since we're starting about 30, 35
18 minutes early, any objection to coming back at 2:00? Does
19 that pose a problem?

20 MR. JAMES FERGUSON: None at all.

21 THE COURT: Okay. You agree?

22 MR. COLYER: Yes, sir. And the motion -- did you
23 get your answer on mootness?

24 THE COURT: Yeah, I was about to ask that. It's
25 moot, if I understood your position, you will provide them

1 with a copy.

2 MR. HUNTER: We will.

3 THE COURT: All right.

4 MR. COLYER: Thank you.

5 THE COURT: Yes, sir. We're down until 2:00.

6 Thank you.

7 (Lunch recess taken.)

8 (The following proceedings continued in open
9 court. The defendant, defense attorneys, except Mr. James
10 Ferguson, and state's attorneys were present.)

11 MR. COLYER: Judge, you're going to get tired of
12 seeing me pop up.

13 THE COURT: That's okay, Mr. Colyer. Are we
14 waiting for Mr. Ferguson?

15 MR. HUNTER: We are, Your Honor.

16 THE COURT: Okay.

17 MR. COLYER: Judge, we're three minutes early by
18 the clock on your back wall.

19 THE COURT: We are.

20 MR. COLYER: He may have stepped to the rest
21 room.

22 THE COURT: Um-hmm.

23 MR. COLYER: Two things I want to mention if it's
24 all right at this point?

25 THE COURT: Yes, sir.

1 MR. COLYER: Is it all right if Dr. Katz sits
2 here at counsel table --

3 THE COURT: Absolutely.

4 MR. COLYER: -- beside Mr. Jonathan Perry.

5 THE COURT: Absolutely.

6 MR. COLYER: And the other question, Your Honor,
7 we had filed a motion previously, motion to dismiss to
8 which the defense had replied and I believe they also filed
9 a memorandum of law on Friday. Do we need to not argue
10 that now, don't want to delay the proceedings, but get a
11 ruling on the record on our motion to dismiss before we
12 begin?

13 THE COURT: That would probably be appropriate.
14 You folks want to be heard in that respect?

15 MR. JAY FERGUSON: Your Honor, I believe what we
16 had talked about a while back, I think this kind of came up
17 several months ago, is that we thought it would be more
18 appropriate to wait until all the evidence is presented,
19 you have a basis -- because there are some factual
20 assertions in the motions.

21 THE COURT: Well, that's what I thought I
22 recalled. And, frankly, I anticipated that was going to be
23 the position taken by you folks. We will wait until the
24 close of defendant's evidence or all of the evidence,
25 depending on where we are. Is that agreeable?

1 MR. COLYER: Yes, Your Honor. I couldn't
2 remember if we had that on the record or not. We just
3 didn't want it to be construed that we waived our argument.

4 THE COURT: Yes, sir. Well, let the record
5 reflect there is no waiver with regard to the state's
6 motion to dismiss. We're at ease.

7 (Mr. James Ferguson enters the courtroom.)

8 MR. JAMES FERGUSON: Sorry, Judge.

9 THE COURT: We're good.

10 MR. JAMES FERGUSON: Yes, sir. Thank you.

11 THE COURT: Okay. Let the record reflect all
12 counsel are present. The defendant is present. Folks, I
13 was informed by our court reporter during the lunch recess
14 that apparently a request had been made by counsel for
15 defendant for overnight transcripts. I am personally aware
16 that all of our court reporters are and have been for some
17 time backed up. So I'll be glad to give you folks the
18 opportunity to be heard. My understanding is we will have
19 at least two court reporters rotating in because of the
20 length of the hearing but I am reluctant to impose
21 additional burdens on the court reporters with regard to
22 any overnight transcripts without prejudice to your right
23 to be heard.

24 MR. JAY FERGUSON: I don't think we want to be
25 heard, Your Honor. We might want to have an opportunity to

1 talk to her outside of court to see if there is some way we
2 can expedite it, if we can just have a conversation.

3 THE COURT: Yes, sir. And certainly you folks
4 are welcome to be part of that conversation.

5 MR. COLYER: Yes, sir.

6 THE COURT: For the record, Mr. Ferguson, the
7 issue of the state's motion to dismiss was raised just a
8 moment ago.

9 MR. JAMES FERGUSON: Yes, sir.

10 THE COURT: The recollection of co-counsel --
11 your co-counsel was that we had at least tacitly agreed to
12 hold off on that until the evidence was presented in the
13 case and then hear it at that time. The state was
14 concerned about an issue of waiver, and for the record, I
15 put in the record that the state has not waived any matters
16 with regard to the pending motion to dismiss.

17 MR. JAMES FERGUSON: Very well.

18 THE COURT: Okay. All right. We ready to go,
19 folks?

20 MR. JAMES FERGUSON: We're ready, Your Honor.

21 THE COURT: Yes, sir.

22 MR. JAMES FERGUSON: Your Honor, what we would
23 like to do with the Court's permission is to begin our
24 presentation by giving the Court an overview --

25 THE COURT: Yes, sir.

1 MR. JAMES FERGUSON: -- of what our evidence
2 would be. It would be sort of the nature of an opening
3 statement.

4 THE COURT: Okay.

5 MR. JAMES FERGUSON: I have the honor of doing
6 that. What I want to say to you at the outset, Your Honor,
7 is it has been a long time coming but finally change is
8 coming. Change has come through the Racial Justice Act
9 that North Carolina -- the North Carolina legislature
10 enacted in August of 2009. And that change is for the very
11 first time, the legislature of North Carolina put itself on
12 record declaring that no longer could race be a significant
13 factor in the imposition of the death penalty. It is the
14 Racial Justice Act that brings us here today for this
15 hearing. Not only did our legislature make that
16 arrangement by the enactment of that Act, but North
17 Carolina placed itself in a position of leadership for the
18 Nation in dealing with this whole issue of race that has
19 plagued our criminal justice system throughout the country
20 from its inception.

21 And particularly in North Carolina where, from
22 the inception, North Carolina as a state, African Americans
23 were excluded by the constitution from serving on juries.
24 And that exclusion by constitution means carried forth from
25 the state's inception right on up until the end of the

1 Civil War. There was a brief respite during Reconstruction
2 from a period of about 1868 -- 1868 to 1875 and then we
3 reverted to the old ways. And although it was no longer a
4 constitutional provision, mechanisms of kind and character
5 were used to limit African-American participation in jury
6 service right on through the mid-1920's, the mid-20th
7 Century and really on up until the '70's and '80's. The
8 courts were recognizing one way or another that there were
9 serious limitations on participation of a significant
10 segment of the American and North Carolina citizenry in
11 participation in serving on juries.

12 So it is that long history that we have to look
13 at this case against in order to determine just what the
14 Racial Justice Act is, what it provides and how we address
15 the issues that brought it about. Now, I'm quick to say
16 that even -- even getting to the passage of the Act itself
17 was a difficult, torturous path, efforts were made even
18 after the enactment to repeal it, change it, to throw it
19 out and to cling to the old ways of selecting juries in
20 North Carolina.

21 The prosecutorial establishment in North Carolina
22 claims that this would drain resources from them so they
23 couldn't deal with other problems in our criminal justice.
24 They couldn't deal with the robberies and the thieves and
25 others who were violating the law because their resources

1 would be drained defending claims under the Racial Justice
2 Act. We were told that this Act, though on its face
3 intended to benefit the African-American community who had
4 been excluded for so long, that it was being used by white
5 people to benefit white defendants on death row.

6 So a number of things were said back and forth
7 about what this Act was all about and finally it was said
8 that what this Racial Justice Act will do is it will free
9 the heinous killers who are on death row because some of
10 them were convicted, sentenced before a certain period of
11 time and they would get out of prison. And so it became
12 sort of a political football being tossed back and forth
13 about what the Racial Justice Act was all about. But now
14 that the air is clear, I think it's clear, Your Honor, that
15 what this Act is about is simple justice.

16 The Act simply provides that if a defendant who
17 has been convicted under our death penalty statute and
18 sentenced to death, that that defendant -- if that
19 defendant can show that race was a significant factor in
20 three separate ways but only one of which we are concerned
21 with today, are one of the convictions under the scheme,
22 the other the imposition of the death penalty, but
23 pertinent to this case, if a defendant can show that race
24 was a significant factor in the exercise of peremptory
25 strikes at the time of his conviction, then that defendant

1 is entitled to relief under the Racial Justice Act.

2 So in this case, Marcus Robinson was convicted in
3 1994. So the issue then is whether or not we can show that
4 in 1994 the time of his -- at the time of his conviction,
5 race was a significant factor in the use of peremptory
6 strikes at that time. Now, significantly, Your Honor, the
7 Racial Justice Act was North Carolina's response to the
8 Supreme Court McCleskey decision back in 1986 where they
9 filed for -- a statistical showing was made to the Supreme
10 Court and the Supreme Court didn't accept that as a basis
11 for a ruling under the 14th Amendment that the defendant
12 was entitled to relief. What the Court said at that time
13 was there must be a showing of intentional discrimination
14 in the defendant's trial before we can provide any relief.
15 But the Court said further that if there is going to be
16 relief under a statistical showing, such as we've seen here
17 in McCleskey, and one of the experts for the defense
18 testified for the State of Georgia in that case, we're
19 going to pass this on to the states for the state's
20 response to see what the states would do about it.

21 So it was in response to that invitation by the
22 United States Supreme Court that North Carolina took a look
23 at its own situation, its only history, its own past, its
24 own experience with jury selection and it adopted this
25 Racial Justice Act which provided what we said before and

1 the relief provided in that Act is not that killers go
2 free. It is simply that North Carolina, in the face of the
3 showing that race was a significant factor, will change the
4 death sentence to life without parole. That's the judgment
5 that the legislature has made. That's the judgment that
6 withstood the efforts of repeal. That's the judgment of
7 the legislature that we are here about today. So it was a
8 necessary -- not just an appropriate change but a necessary
9 change for the citizens of this state to look at a
10 different way for selecting juries.

11 And what we have done, Your Honor, is we have
12 done what the statute invited defendants to do and that is
13 we have developed statistical evidence to show that for the
14 20-year period from 1990 until 2010, race was a significant
15 factor in the use of peremptory strikes by the prosecutors,
16 not just in Cumberland County but throughout the State of
17 North Carolina. And I say we did what the statute invited
18 us to do because the statute itself, actually unlike the
19 first statute of its kind in Kentucky, but the statute
20 itself says that a defendant can prove discrimination in
21 jury selection through the use of peremptory strikes
22 through statistical evidence. And based upon what the
23 statute said about that, we will in this case present to
24 the Court the top experts in America on statistical
25 analyses of this kind.

1 We have experts who have studied jury selection
2 in North Carolina and they have gone through the capital
3 trials of North Carolina and they have analyzed how
4 peremptory strikes have been used over that 20-year period,
5 which includes the 1994 period when Marcus Robinson was
6 convicted. And so, Your Honor, following that, our experts
7 have examined 7,400 potential capital jurors in 173 cases
8 from 1990 to 1910 (sic). They've done a number of
9 different kinds of analyses, but I can tell you right now
10 that every single analysis that they did demonstrated
11 unequivocally that race was a significant factor statewide,
12 in this district and in this county during that period of
13 time. So no matter how you look at it -- and we'll talk
14 about the difficult ways to look at it, but no matter how
15 you look at it, race has been a persistent factor
16 throughout a 20-year period of time in North Carolina in
17 use of peremptory strikes in capital cases.

18 So I want to invite the Court if I may just to
19 take a look at a map which illustrates this point. And if
20 you'll just look at the board here, you can see that these
21 are the counties where -- the ratio of black strikes among
22 black and nonblack venire members shows that there has been
23 a consistent pattern of race as a significant factor in
24 them. You'll see the -- I'll start with the brighter
25 color, the yellow color and in those counties where you see

1 the yellow coloring in the map, blacks would be stricken
2 1.2 to 1.5 times more than nonblack jurors. Then if you go
3 to the next color, the darker color, the orange color, it's
4 an even higher rate where you see 1.6 to 2 times of blacks
5 would be more likely to be stricken from juries through the
6 use of peremptory challenges than in -- than they would
7 have been if they were nonblack.

8 Then if we go to the next category which is a
9 little darker hue, you see that African Americans were
10 stricken at a rate 2.1 to 2.5. So two and a half times
11 greater likelihood of being stricken from the jury if you
12 were African-American. And this also is the area in which
13 Cumberland County would fall. If I could put it up there,
14 I could show you exactly where Cumberland is. But it's in
15 that area where the rate of blacks being stricken would be
16 2.1 to 2 and a half. Then we go on to the darker colors
17 there and you have 2.6 to 3 and 3 .1 and above in the
18 darkest areas on the map. There is some areas that are
19 shaded white or whatever that there weren't enough capital
20 trials in those counties to be statistically significant.

21 So what this map tells us, Your Honor, is that
22 that prong of the Racial Justice Act that says that you can
23 show that statewide race was a significant factor in jury
24 selection, there it is. This is all over the State of
25 North Carolina in judicial districts and counties we see

1 that race was a significant factor in the selection of
2 juries. And just to show a little more in terms of a
3 couple graphs here, these numbers are based on the raw data
4 without any adjustments being made. So when you look at
5 the adjusted raw data statewide in North Carolina, there
6 was a 50 percent ratio of striking African Americans from
7 juries, and these are jurors who have been death qualified
8 already. There is a 50 percent strike percentage among
9 blacks and then among nonblacks, 24.8.

10 And if you look at the county and the division of
11 Cumberland County and the county itself during this period
12 of time, the strike rate is 52 percent to 20 percent. And
13 if we go to the former division here, which would have been
14 Division Two which is 1990 to 1999, we see the same thing.
15 51.5 percent to 25.1 percent. And you would think that
16 after a change in 2000 to District Four, the current
17 division we have, you would think things have gotten better
18 by now. But you look there and see it's not better but
19 worse, 62 percent African Americans stricken from juries
20 that have already been death qualified compared to 21
21 percent nonwhite (sic).

22 So with this showing, Your Honor, we could stop.
23 We can stop our case right now and will have met the
24 statutory requirement of showing that race was a
25 significant factor in jury selection in North Carolina

1 during that period of time. But our experts didn't stop
2 there. They knew that there would be some questions raised
3 and they felt that they should go on and answer some of
4 those questions and they did. And when they took into
5 account excluded jurors who may have expressed some
6 reservation about the death penalty and they took them out
7 of the study. And when they did that, the race still
8 persisted as a significant factor in the use of peremptory
9 strikes by prosecutors all over the State of North
10 Carolina.

11 And they didn't even stop there. They went
12 further and they excluded unemployed jurors because
13 somebody will say, well, it doesn't matter what race they
14 are. We take them off the jury because they didn't have a
15 job so we excluded -- the experts excluded that group. And
16 when they excluded that group, they got the same result,
17 that race was still a significant factor in the exercise of
18 peremptory strikes by prosecutors. And they even excluded
19 jurors who had been convicted of a crime -- accused of a
20 crime or who had family members who had been accused of a
21 crime, took them out of it. What do we have? Race. Still
22 there, race.

23 And they went further than that and they excluded
24 potential jurors who knew any of the trial participants.
25 Whether it was the judge or prosecutor or defense lawyer or

1 whoever, excluded them as a variable and found out that
2 race was still there. And so they developed a logic
3 regression method which takes into account a number of
4 relevant factors in jury selection and every time, we come
5 back to the same place. Race was a persistent factor and a
6 significant factor in jury selection.

7 So even after they control all of these variables
8 that we talked about, black venire members were still 2.3
9 plus times more likely to be stricken than nonwhite (sic)
10 jurors. So it doesn't matter, Your Honor, in reality how
11 you look at it. We have to come back to the reality that
12 for those 20 years under the study in this Michigan State
13 study that you're going to hear more about, race is -- has
14 been a persistent and significant factor in the use of
15 peremptory strikes in North Carolina.

16 So we will have made our statutorily required
17 statistical showing for a prima facie case and more. And
18 once we do that, Your Honor, we're entitled to relief under
19 the Racial Justice Act unless -- unless the prosecution can
20 rebut the statistical showing that we've made. And I
21 suspect that one reason you heard so much of them crying
22 this morning about the need for additional time is that
23 what we know so far and what we've seen so far, they will
24 not be able to rebut that case. So that leaves us with
25 making the required showing under the Racial Justice Act,

1 that race was a significant factor at the time that Marcus
2 Robinson was convicted and, therefore, we are entitled to
3 relief. That's the change we're talking about because
4 there have been no other such hearings as this where our
5 legislature has said that if you make the statistical
6 showing, you are entitled to relief.

7 Now, while it is important to Marcus Robinson as
8 the defendant in this case -- because I parenthetically,
9 even though we are not required to show it, we can show
10 that Marcus -- at the time of Marcus Robinson's trial
11 itself that race was a significant factor and that blacks
12 were stricken at the time about -- at a strike rate of
13 about three, four and five times more than nonblack jurors.
14 We don't have to show that. The statute doesn't require
15 that.

16 But this case is not just about Marcus Robinson.
17 It's about the citizens of North Carolina. So it's not
18 just Marcus Robinson who is entitled to a fair jury. It's
19 all the citizens of North Carolina. Because as long as we
20 have a system of administration of a capital punishment in
21 this state that allows race to significantly influence it,
22 then we have deprived all of the citizens of fair trials.
23 We have undermined the credibility and the reliability of
24 juries in capital cases and that's something that the North
25 Carolina legislature has said we cannot and we will not

1 tolerate race as a factor. So the showing that we will
2 make to the Court is a showing of powerful statistics as
3 contemplated by the statute.

4 And I want to make it clear, Your Honor, that we
5 are not here to accuse prosecutors of being racists. We
6 don't need to make that case. We don't even want to make
7 that case. But it is important that it be understood and
8 we want to make clear to Your Honor that the validity of
9 this study and the power of this study does not depend on
10 whether or not a given prosecutor in a given case will
11 assert that he or she was not motivated by race. We know
12 from the Batson -- experience of Batson versus Kentucky
13 where the Supreme Court said that where there is a claim
14 that race is a factor in eliminating a particular juror,
15 that if a prosecutor can articulate a nonracial reason for
16 doing that, then that may overcome the claim that race was
17 a factor.

18 So knowing that we're likely to hear in this case
19 prosecutors who will say I didn't take race into account.
20 I had some race neutral reason for doing what I did. We
21 have another expert who will talk to the Court about
22 implicit, unconscious and subconscious bias, and what that
23 expert will tell the Court is that people who are racially
24 motivated in taking actions, prosecutors included, may not
25 even know that race motivated their conduct because race

1 had been so pervasive and so powerful in our society as a
2 whole and in our criminal justice system as well, that our
3 thought patterns are such that sometimes we don't even know
4 we are racially motivated when we take certain actions.
5 And that expert will tell you, Your Honor, that when
6 someone who has been motivated by race, whether they know
7 it or not, is called upon to explain their action, they
8 will almost always give you a nonracial reason for whatever
9 they did. It might even be because they actually believe
10 that. It might be because they understand that even if
11 they recognize that race may have been a factor, you can't
12 admit it because that's not acceptable. No one wants to
13 stand up and say yes, I took a particular action because of
14 race.

15 So we cannot allow statistical showings of the
16 kind that we will present to the Court to be overcome by
17 self-reporting as to whether or not race was a factor
18 because that self-reporting is not something one can rely
19 on. This is not an expert who just thought this up. It's
20 an expert who conducted experiments, an expert with
21 empirical information to be presented to this Court who
22 will explain to you just how that works.

23 So the research will demonstrate that whatever
24 might be said about the reasons for this pattern of race
25 that we see in the 20-year period that we talked about,

1 that the articulation of race neutral reasons does not
2 undermine or undercut it in any way. So you will hear that
3 evidence.

4 So then this case is important because it
5 provides an opportunity for all of us in this courtroom,
6 prosecutors included, to recognize that race for far too
7 long has been a significant factor in jury selection in
8 capital cases and this case provides an opportunity for
9 this Court hearing it as the first case under our Act to
10 provide that relief which the statute compels based upon
11 the evidence which we will bring to the Court.

12 So, Your Honor, that's a thumbnail of what we
13 will present to the Court. And so we come back to where we
14 started and that is that -- that it has been a long time
15 coming but the change has not only come but is overdue.
16 And what we want to do is to take advantage of the
17 opportunity that the legislature has provided, to give life
18 and meaning to that change, to present to you a case under
19 the statute that was virtually designed by the statute to
20 be addressed because we meet fully and even beyond the
21 statutory requirements for a showing that race was a
22 significant factor over that period of time in the
23 selection of jurors -- of juries in capital cases. Once we
24 make that showing, Your Honor, we will come to you and ask
25 you to do only what the law requires and that is to grant

1 relief in accordance with what the statute provides and
2 that relief is the change of a death sentence to life
3 without parole. We thank you for this opportunity to
4 present that.

5 THE COURT: Yes, sir. Are you ready to call your
6 first witness, folks?

7 MR. JAY FERGUSON: Yes, Your Honor.

8 THE COURT: Okay.

9 MR. JAY FERGUSON: Call Dr. O'Brien.

10 THE COURT: Doctor, if you'll come up to the
11 witness stand to my left. The Bible is at the end of the
12 bar, please. If you'll place your left hand on the Bible,
13 raise your right hand, please.

14 BARBARA O'BRIEN, called as a witness herein,
15 having been first duly sworn, was examined and testified as
16 follows:

17 THE COURT: Come around, have a seat in the
18 witness chair. Would you like some water, ma'am?

19 THE WITNESS: Oh, yes, please.

20 THE COURT: Okay. Once you are seated, if you
21 will state and then spell your full name for the court
22 reporter.

23 THE WITNESS: Barbara O'Brien, B-A-R-B-A-R-A, O
24 apostrophe B-R-I-E-N.

25 THE COURT: Thank you, ma'am.

1 THE WITNESS: Thank you.

2 MR. JAY FERGUSON: Your Honor, can you give me
3 one moment? I want to make sure --

4 DIRECT EXAMINATION

5 BY MR. JAY FERGUSON:

6 Q. Did you get some water?

7 A. Yes.

8 Q. Can you tell us how you are employed?

9 A. I am an associate professor at the Michigan State
10 University College of Law.

11 Q. If you would, Dr. O'Brien, could you start with -- can
12 you tell us a little bit about your educational backgrounds
13 and employment since undergraduate school?

14 A. Sure. I attended Bowdoin College where I received a
15 degree in economics in 1993. I then attended the
16 University of Colorado School of Law where I received a
17 J.D. in 1996. After that, I worked for the Illinois Office
18 of the Appellate Defender as assistant defender. I worked
19 there for about two years after which I did a clerkship in
20 the federal district court in Central District of Illinois.
21 I did that for three years. Following that, I worked for a
22 year as an adjunct professor at Cooley Law School -- Thomas
23 Cooley Law School in Lansing, Michigan as well as a
24 contract attorney of the Illinois Office of the Appellate
25 Defender. Following that in 2002, I began a graduate

1 program in social psychology at the University of Michigan.
2 I received my PhD in social psychology in 2007 and that
3 year I started as a professor at the Michigan State
4 University College of Law.

5 Q. Okay. Before we talk about your work at the college
6 of law, tell us what social psychology is.

7 A. Social psychology is the application of scientific
8 principles to study questions relevant to social phenomena
9 so issues like social perception, interaction, group
10 dynamics, decision making, judgment and the like.

11 Q. As part of your social psychological training, did you
12 do any empirical work or empirical studies?

13 A. Yes.

14 Q. Tell us about what -- what that is, first of all.

15 A. Any -- the term empirical is a term that describes
16 using observation of data, something that you can quantify
17 and objectively measure, to answer questions and it can be
18 used in a variety of different -- it's a method that's used
19 across different disciplines.

20 Q. As part of that, did you receive any training in
21 statistics?

22 A. Yes, I did.

23 Q. Tell me what goes into a study. What do you do when
24 you design a study?

25 A. Well, the first step in designing a study is to

1 articulate your research hypothesis, to articulate your
2 research question, figure out what is the question that you
3 are trying to answer. And the next step then is
4 determining what kind of method is most appropriate for the
5 question that you are trying to answer, what kinds of --
6 and that's influenced by what kind of information is
7 available, what -- the nature of the question, the nature
8 of information that bears on that question.

9 Q. In order to do a study, if you design it from its
10 inception to the conclusion, do you need to have expertise
11 in both the design of the study as well as the
12 interpretation of the data?

13 A. Yes. So a social scientist should be trained in
14 methodology. So what is the proper way to conduct the
15 study and different kinds of studies, experimental study,
16 observational study have different -- different ways of
17 doing things. And then the statistics comes in when you're
18 trying to make sense of the information you get from that
19 study. How do you understand the patterns that you see in
20 the data? And they influence each other because you -- you
21 need to have some understanding of the statistical
22 methodology that you would ultimately use in designing your
23 -- in designing your study, how you operationalize your
24 variables, what kind of data you collect. So these two
25 things inform each other.

1 Q. Okay. I would like to separate between the
2 methodology and statistics with respect to your background
3 and your education. What course work have you had or what
4 education have you had specifically with respect to
5 methodology?

6 A. In my graduate training, I took a course specifically
7 on methodology. The issue comes up in all the courses we
8 take in reviewing studies. We talk about the methodology
9 and whether it was flawed or particularly good methodology,
10 but I did take this class specifically in research
11 methodology, the strengths and weaknesses of various kinds
12 of methodologies and the considerations we have to take
13 into account in designing studies depending on the
14 methodology.

15 Q. What training have you had in statistics?

16 A. I took a number of courses in -- I took the year-long
17 graduate level statistics course. I also took a number of
18 classes at -- the University of Michigan has an institution
19 called ICPSR which is a consortium of social scientists and
20 they -- in the summertime, they host -- they hold various
21 courses that faculty and graduate students from around the
22 country would come and either teach or take classes. It's
23 very intensive statistical training classes.

24 Q. How many summers did you do that?

25 A. I believe I took -- I think I did it for three

1 summers.

2 Q. Tell me, if you would, what types of statistics you've
3 had training in because there's various types of
4 statistical studies; is that right?

5 A. That's right.

6 Q. Tell us some of the types you've had training in.

7 A. So I learned methods involving -- basic methods
8 involving comparison of means to determine whether an
9 observed difference between two populations is
10 statistically significant or could -- might be trivial or
11 chance, regression models, multivariate regression,
12 logistic regression, linear regression. I've also taken
13 classes in hierarchal linear modeling and structural
14 equation modeling, so various methods such as that.

15 Q. I won't talk about all of those, but since we're going
16 to be talking about regression later, go ahead and tell us
17 what is a regression study.

18 A. A regression is a statistical method that allows --
19 allows you to disentangle potential factors that might bear
20 on the same outcome. So if you had -- you might look at
21 say the rate of deaths from drowning, for example, and see
22 that it correlates with how much ice cream is consumed by a
23 population. You would want to control for other possible
24 explanations. It allows you to control for those other
25 possible factors that could correlate with it so you can

1 begin to disentangle -- disentangle those factors.

2 Q. Since you used that analogy, what is the factor that
3 would be -- that you would want to control for it?

4 A. You would apply control for temperature. In the
5 summer, people swim more and eat more ice cream. In the
6 regression model if you included temperature would --
7 should tell you that it's not ice cream that's what's
8 associated with the death -- the drowning death so much as
9 the temperature.

10 Q. Have you performed any empirical legal studies?

11 A. Yes, I have.

12 Q. Tell the Court if you would about some of those.

13 A. I looked at -- so some -- I've conducted experiments
14 that -- that are designed to look at different types of
15 judgment -- decision making biases in information
16 processing in a legal context. But I've also done
17 studies -- nonexperimental studies, observational type
18 studies. So, for example, I, with a colleague, put
19 together a database examining collected data about people
20 who are exonerated from death row and people who have --
21 and a sample of people who have been executed to explore
22 any particular -- any differences between these two
23 populations that could tell us something about the
24 phenomena of false convictions.

25 Q. When you do an empirical study in a legal context, do

1 you draw on all of your training -- your legal training,
2 your methodology and your statistics?

3 A. Absolutely.

4 Q. Can you give us an example where you not only relied
5 on your methodology and your statistics but also your legal
6 background?

7 A. By under -- so designing a study, it's not enough just
8 to know how to run the statistical test at the end using
9 the data that you have. You have to have some
10 understanding of the phenomena that you're studying in
11 order to consider possible confounds or other explanations
12 you may be overlooking. So, for example, in looking at a
13 study comparing case factors and how they might differ
14 between, say, exoneration from death row and those that
15 were not exonerated, people who were ultimately executed,
16 you have to have some understanding of the appellate review
17 process, the trial process that led up to that so you can
18 -- you can consider any sorts of -- what are the limits of
19 the inferences you can draw and also helps you consider
20 what kind of variable you should be looking for to control
21 for. Where somebody who is just sort of going -- knew the
22 statistics but didn't know how the system worked wouldn't
23 necessarily know what variables they need to be controlling
24 for.

25 Q. You used a term -- I want to go ahead and explain it.

1 You said confound. Can you tell us what a confounding
2 variable is and if you could relate it back to your ice
3 cream example.

4 A. So a confound is -- with the ice cream example, it
5 would be something that is associated with both the
6 predictor that you're looking at, the factor you're looking
7 at and the outcome you're looking at. And often it's used
8 in terms of perhaps underlying differences in the
9 populations that you need to take into account in order to
10 understand any differences. So there are underlying
11 differences in the two populations you're comparing. You
12 want to be able to take those underlying differences into
13 account in order to fully understand the differences that
14 you observed.

15 Q. Okay. Have any of your empirical legal studies been
16 published in any way?

17 A. Yes, they have.

18 Q. I would like to first talk about any studies that
19 you've performed that have been published in a peer review
20 article.

21 A. Okay.

22 Q. Tell us what a peer reviewed article is.

23 A. A peer reviewed article is when it involves sending
24 the work to reviewers who have expertise in the field and
25 are -- they're qualified to assess whether you've done --

1 you've done a solid study or not or identify any weaknesses
2 or limits to the inferences you can draw from it. And they
3 -- usually in a peer review journal, you usually have two,
4 maybe more outside reviewers who read your paper, examine
5 the work and weigh in on whether this is something that
6 passes muster or if it needs additional work or if it
7 doesn't measure up.

8 Q. Have you prepared a C.V. for the Court?

9 A. Yes, I have.

10 Q. And you provided me with a copy?

11 A. Yes.

12 MR. JAY FERGUSON: Your Honor, may I approach the
13 witness?

14 THE COURT: Yes, sir.

15 MR. JAY FERGUSON: I will mark -- would you
16 prefer the clerk mark this or may I mark this, Your Honor,
17 the exhibits?

18 THE COURT: You may mark it.

19 BY MR. JAY FERGUSON:

20 Q. Dr. O'Brien, I'm showing you what's marked as
21 defendant's exhibit 1. Can you tell us what that is,
22 please?

23 A. This is my -- this is my C.V. or my resume.

24 Q. Will that help us go through and speed the process
25 along about what publications you have been involved with?

1 A. Yes, it would.

2 Q. Okay. Tell us, if you would, which publications you
3 have had that were peer reviewed.

4 A. Okay. I -- there's -- the fourth publication down is
5 a paper I wrote that was published in the Journal of
6 Applied Social Psychology, that was peer reviewed.

7 Q. Hold on one second. What page are you on?

8 A. I'm sorry. I'm on the second -- I'm on the second
9 page.

10 Q. Is that based upon a study that you did?

11 A. Yes, it is.

12 Q. Is this a legal empirical study?

13 A. Yes, it is.

14 Q. Okay. What else?

15 A. The sixth one down, the one that was published --
16 there was a paper I published in the Psychological Public
17 Policy and Law journal in 2009.

18 Q. Okay. Any other peer reviewed publications?

19 A. Yes. I have a paper that I published in the Journal
20 of Empirical Legal Studies and one in the International
21 Commentary on Evidence.

22 Q. Are those the next two down after you skipped one?

23 A. Yes.

24 Q. About how many empirical legal studies have you
25 performed?

1 A. Well, are you referring to the papers that I
2 published?

3 Q. No. Just how many studies have you done?

4 A. Probably five or six.

5 Q. Just -- sorry.

6 A. Go ahead. Yeah.

7 Q. Just some studies spawn more than one paper?

8 A. That's right.

9 Q. And are you also published in nonpeer reviewed
10 publications?

11 A. Yes, I am.

12 Q. What types of publications are those?

13 A. Law reviews and legal journals.

14 MR. JAY FERGUSON: Your Honor, I would move to
15 admit defendant's exhibit number 1 into evidence.

16 THE COURT: Okay.

17 MR. PERRY: No objection.

18 THE COURT: It's admitted without objection.

19 BY MR. JAY FERGUSON:

20 Q. Just so the record is clear, does your C.V. adequately
21 set forth your education, your experience and your
22 publications and presentations?

23 A. Yes, it does.

24 Q. Also indicates you received a research award; is that
25 right?

1 A. Yes.

2 Q. And what is that?

3 A. That was a Walter M. Pillsbury award in 2005. That
4 was an award I won in order to finance my dissertation
5 study so it was given in my department for a graduate
6 student who is pursuing -- who needed money to help finance
7 the studies for her dissertation.

8 Q. Tell us, if you would -- go into a little bit of
9 detail about some of the more significant empirical legal
10 studies that you've done and just give the Court some
11 flavor of what kind of research you've been involved in.

12 A. Okay. Well, I think a good example is the one I
13 referred to earlier, a database that I helped create with a
14 colleague at the University of Michigan Law School in which
15 we coded various factors and information that we could get
16 about cases of people who went to death row and were
17 ultimately exonerated and coded for the same factors cases
18 of individuals who had been sentenced to death and
19 ultimately executed. So the kind of variables we looked at
20 there were length of police investigation, whether it was
21 something where a person was -- a suspect was identified
22 immediately or if it took some time to identify a suspect,
23 trial factors, whether they testified or not, whether there
24 was a guilty plea or not. Some of these cases did actually
25 involve guilty pleas. What kinds of testimony was offered,

1 eyewitness identification, informant testimony. And from
2 that -- that coding, we could look for any patterns because
3 it's a problem that's extremely difficult to study, the
4 problem with false convictions, but using this as a way of
5 being able to assess out any kind of -- any differences in
6 the patterns that we could see in the trial practice and
7 the type of evidence presented.

8 Q. What other studies?

9 A. I am also currently working on a study in using the
10 database -- using that same database that we have updated a
11 little bit to try to estimate the rate of false convictions
12 among death sentence prisoners by using a technique called
13 survival analysis, which is something like a genealogist
14 often uses to examine survival rates of people who have
15 certain diseases. We're using that technique to try to
16 look at exoneration rates, how long -- as a person stays on
17 death row for a certain amount of time, how does the rate
18 of exoneration -- what's the cumulative rate of exoneration
19 after they've been on for a certain amount of time. At
20 what point does it sort of -- do extra years not matter?

21 MR. JAY FERGUSON: Your Honor, at this point we
22 would tender her as an expert in social science research
23 and empirical legal studies.

24 THE COURT: You folks want to be heard as to the
25 tender? Again, I'm sorry, the tender is in social science

1 research --

2 MR. JAY FERGUSON: Social science research and
3 empirical legal studies.

4 THE COURT: State want to be heard?

5 MR. PERRY: No, sir.

6 THE COURT: All right. With that, you may
7 proceed.

8 MR. JAY FERGUSON: Thank you, Your Honor.

9 Q. Dr. O'Brien, have you performed an analysis of
10 peremptory strike patterns in capital cases in North
11 Carolina?

12 A. Yes, I have.

13 Q. What were you investigating?

14 A. I was investigating the -- well, I was investigating
15 whether race was associated with the exercise of peremptory
16 strikes in capital cases in North Carolina.

17 Q. What geographical areas of North Carolina were you
18 looking at?

19 A. It was statewide. I don't believe that every single
20 county had had a case but it was statewide.

21 Q. And how was the study funded?

22 A. We applied for grants from various private
23 foundations.

24 Q. And have you provided all of that funding information
25 to the state as part of the discovery in this case?

1 A. Yes.

2 Q. When did you start this process?

3 A. I believe it was in the -- because it was the summer
4 of 2009, I think around June.

5 Q. Tell us what did you do -- how it started and just go
6 through that process if you would.

7 A. So how I got --

8 Q. Yes.

9 A. How I became involved? A colleague of mine, Professor
10 Catherine Grosso, has some research interest that
11 overlapped with mine and she had been approached about
12 conducting a study of -- a study like this in North
13 Carolina and she approached me to see if I might be
14 interested -- given my backgrounds, she thought it might be
15 something I would be interested in and so I agreed to start
16 working on it.

17 Q. If you could, just walk us through how -- from the
18 inception of the idea to how you implement the study and
19 talk about some of the methodology involved.

20 A. Well, like I said before, the first question is you
21 have to -- you have to have a clear research question, what
22 is the phenomenon you're trying to -- what's the research
23 hypothesis which is informed by the Racial Justice Act
24 which was pending in the legislature at the time. Was race
25 a significant factor in the exercise of peremptory strikes?

1 So that was the research question. The next step is in
2 figuring out, well, what -- what information is available
3 to us to be able to even begin to answer this question
4 because that determines both the type and quality of the
5 study that we can do? So we began investigating what kind
6 of data might be available to us so that we could get the
7 necessary information to make -- to research this question.

8 Q. Is part of the study -- is it a single -- as part of
9 the study design, did you have two sections of the study or
10 two parts of the study?

11 A. That's right.

12 Q. Tell us about that.

13 A. The first question is did -- were the -- was the state
14 exercising peremptory strikes in a -- was there a disparity
15 in the strikes against qualified black venire members
16 compared to venire members of other races. And so the
17 information we would need to do that is who struck -- who
18 was qualified to be struck? Who was available to be
19 struck? Were they -- who struck them? Did they have --
20 were they eligible to be struck by a party? So, for
21 instance, if a person -- if a side had run out of
22 peremptory strikes, that person wouldn't be available to be
23 struck by them, so we were interested in identifying --
24 they have -- when there is a point of discretion, there's a
25 decision point, that was part of it too. Was this person

1 eligible to be struck and by whom, who, if anyone, struck
2 them and their race.

3 Q. You used the term qualified juror. What do you mean
4 by that?

5 A. Not excluded for cause.

6 Q. So if -- does your study -- is anyone that was excused
7 for cause included in your study?

8 A. Not as far as -- not as far as I know. That was -- we
9 deliberately did not include people excluded for cause.

10 Q. Why are cause challenges not included in your study?

11 A. Because a person excluded for cause is not -- there's
12 no strike decision to be made as to them generally.

13 Q. So anyone who didn't believe in the death penalty and
14 got excused for cause is not part of this process?

15 A. Right. If they were excused for cause for any reason,
16 they were not included in the study.

17 Q. And what's the second part of the study?

18 A. The second part of the study is looking at more
19 detailed information about individual jurors to examine
20 whether any alternative explanations -- or what other
21 factors played into the state's decision to strike so that
22 any -- any disparity we might observe, just looking at the
23 raw data, is there an alternative explanation? Like my
24 temperature example with ice cream, is there an alternative
25 explanation that might tend -- that we could -- that we

1 could put into a regression model to see if that tells us
2 anything about what we observed from the raw numbers.

3 Q. Let's talk about the first part of the study first.
4 Tell us the scope of it. How many voir dres were involved
5 and that sort of thing?

6 A. We examined the jury selection process in 173 capital
7 proceedings.

8 Q. How many defendants did that represent?

9 A. I believe it was 158 or 159.

10 Q. Have you prepared a report in this case?

11 A. Yes, I have.

12 Q. Is that number in the report?

13 A. Yes, it is.

14 Q. And if a defendant had two -- for example, had a
15 resentencing -- an original conviction and sentenced to
16 death and then a resentencing, could it be in there twice?

17 A. Yes, because then there's two jury selections to look
18 at.

19 Q. Why did you choose this universe of cases, this 173
20 capital proceedings?

21 A. Okay. So in determining who would constitute our
22 study population, we considered, first of all, who the
23 statute applies to and who's the population of interest
24 under the Racial Justice Act. And also determined what's
25 going to give us -- what kind of information is available

1 to us and what's going to give us the best -- because the
2 study is -- better the quality of information you get, the
3 better the quality of the study. And because the people
4 currently on death row, it's either may be -- they -- it
5 might be easier to get ahold of their transcripts and that
6 kind of -- so that we can code thoroughly in these cases.
7 That's another consideration as well.

8 Q. Is there any reason to believe that cases where a
9 prosecutor struck jurors that ended in a life verdict as
10 opposed to a death verdict, that those cases would be any
11 different?

12 A. I mean that's something we considered -- I would say
13 no and that's something we considered very, very, very
14 carefully in choosing which cases we put into the sample.
15 It's not something that we considered lightly. When your
16 -- so this is -- so when I was talking before about study
17 design and how you have to have some knowledge of the
18 process that's involved, it's not simply enough to know how
19 to analyze the data you get. You have to understand the
20 process. So we thought very hard about would it be a
21 problem to pick cases where you believed the phenomenon
22 you're studying was very different from the cases you
23 weren't studying. And because what we were looking at was
24 not outcome of the case for the jury selection study but
25 rather the individual strike decisions, we thought very

1 hard about whether prosecutors in cases that they're
2 bringing capitally, when they -- before knowing what the
3 outcome is, is there any reason to think that their
4 behavior in the strike decisions is markedly different in
5 those cases than in cases that ended in the death sentence.

6 Q. What time period were you looking at in the study?

7 A. All of the cases span from 1990 to 2010 with
8 proceeding that was '85.

9 Q. Why is the one proceeding from '85 in there?

10 A. Because we defined -- since we defined the study
11 population as -- or the population we were studying is at
12 least one proceeding from everybody currently on death row
13 at the time, at the time we were conducting the study,
14 there was one person who did not have a post-1990 hearing.

15 Q. How many death qualified venire members are in your
16 study?

17 A. I believe it was 7,422 or 21. I'm sorry.

18 Q. All right. And of those, I think you mentioned
19 already that you -- if, for example, a prosecutor had run
20 out of peremptory challenges and could not exercise
21 discretion, you wouldn't include that juror in the study;
22 is that right?

23 A. That's right, because we're looking at the decision
24 point so it would be one -- it's meaningful data if there
25 was an actual decision that could be made.

1 Q. So how many venire members are in the study where the
2 prosecutor had discretion and exercised that discretion in
3 a strike decision?

4 A. I believe it was 7,400 or 7,401.

5 Q. Okay. And that's all -- the specific numbers are in
6 your report?

7 A. Yes.

8 Q. So -- have we gone over the study design, how you
9 thought through the study design?

10 A. I think so.

11 Q. Then what's the next step you did?

12 A. Well, the next -- so -- so you have to design some
13 sort of instrument to collect the information. So we have
14 -- so we collect -- so the data collection involves the
15 source documents -- the underlying source documents, what
16 we can rely on to provide us the information to answer the
17 question we're interested in answering.

18 Q. Okay. What kind of underlying source documents are
19 you referring to?

20 A. We relied on any -- an official court document, such
21 as transcripts, jury questionnaires and in some cases
22 clerk's charts, seating charts. And in some -- in some
23 cases, we did rely on some public records for -- to
24 determine a potential juror's race.

25 MR. JAY FERGUSON: Your Honor, at this point I

1 would move into admission defendant's exhibit 2. I have
2 shared it with opposing counsel. It's the transcript of
3 the 173 cases and voir dires and I don't think there is any
4 objection to that.

5 THE COURT: Okay.

6 MR. PERRY: No objection.

7 THE COURT: Okay.

8 BY MR. JAY FERGUSON:

9 Q. Now, all these underlying source documents, the
10 transcripts, the clerk's notes, voir dire, everything that
11 you had, has that all been turned over to the State of
12 North Carolina?

13 A. Yes, I believe so.

14 Q. So after you -- you've designed the study, you've
15 gathered the data, what's the next step?

16 A. Create a -- create some sort of a form or document in
17 which we can systematically code the data so to articulate
18 precisely what pieces of information we want -- to collect
19 the information.

20 Q. Does that form have a name?

21 A. Yeah. We call it a data collection instrument or a
22 DCI.

23 MR. JAY FERGUSON: Your Honor, if I may approach?

24 THE COURT: Yes, sir.

25 MR. JAY FERGUSON: Your Honor, what I have handed

1 you is defendant's exhibit 3 marked for identification and
2 it's a printout of PowerPoint slides I intend to show as we
3 go through the direct examination and I will be moving for
4 admission into evidence.

5 THE COURT: Okay.

6 BY MR. JAY FERGUSON:

7 Q. Dr. O'Brien, can you see that from where you are?

8 A. Yes, I can.

9 Q. Looking at slide number one, can you tell us what that
10 is? Excuse me.

11 A. That is a copy of our venire member level data
12 collection instrument.

13 Q. And go through, if you could, and tell us the types of
14 information that's on that form.

15 A. So we would assign an I.D. number, just a study I.D.
16 number just for our own ability to keep track of all the
17 piece of -- all the different cases in our study, so that's
18 something that has no external significance. It's the
19 sentencing -- the study I.D. number and also --

20 Q. Before you go further, the study I.D. number, because
21 as we go through this hearing, we're going to be referring
22 to those. Just so everyone is clear, does every juror have
23 a different number?

24 A. Yes.

25 Q. Can you tell us how exactly the numbers are assigned

1 in terms of case number and juror number?

2 A. Okay. So every case has a number and after the
3 decimal will tell us if there was -- if it's -- if there
4 were different proceedings for the same defendant. So if
5 there was 328.1 and 328.2, that would mean the same
6 defendant had two different proceedings. The venire member
7 study identification number, that's item 2, uses that study
8 I.D. number at the front and then assigns a number to that
9 particular juror. So by looking at the venire member I.D.
10 number, you can tell which case it was and then a unique
11 identifier for that venire member.

12 Q. So 328.1.001 would be -- the number one designation
13 for a juror in that defendant's first case?

14 A. Yes.

15 Q. What else is on this DCI?

16 A. Submit the defendant's name just as a way of making
17 sure we know exactly who it belongs to and information --
18 number four is excused for cause. We did not include
19 anyone who was -- who was excused for cause. That was a
20 way for me to make sure that we weren't including anyone
21 excused for cause. Item five is peremptory strike
22 eligibility and this refers to who had the opportunity to
23 pass or strike a particular juror. And then whether the
24 person is struck by the state, by the defense. Eight
25 peremptory strike, source unknown. We didn't have any but

1 just as a way for me to be sure that I could -- make sure
2 that we didn't have any that were missing.

3 Q. So for all 7,400 jurors, you've got the strike
4 information?

5 A. Yes.

6 Q. Looking at slide number two.

7 A. Now we're getting into some information about the
8 individual juror, their name, the outcome, whether they
9 were passed or struck or whether they ended up sitting on
10 the jury, the seat they were called into for questioning,
11 their gender, and basic demographic information like gender
12 and race.

13 Q. Now, does this DCI include information that was only
14 for part two of the study and not for part one of the
15 study?

16 A. That's right. The more --

17 Q. Tell us -- sorry. Go ahead.

18 A. The more juror specific information that we got into
19 such as employment and other kinds of demographic
20 information besides race and gender, that was the second
21 part of this study that I referred to earlier as the study
22 -- the part of the study where we could examine alternative
23 explanations.

24 Q. So tell us where it stops between part one and part
25 two of the study.

1 A. Question 14.

2 Q. So anything from one to 14 is included in part one of
3 the study and that goes through the information you said
4 about the juror that -- who struck them and their race,
5 correct?

6 A. Yes.

7 Q. And gender. All right. Now, in -- now, from 15 on is
8 all for part two of the study?

9 A. That's right.

10 Q. I am looking at slide three. Tell us what kind of
11 information is there.

12 A. Education level, whether they belonged to a religious
13 organization, military service, their employment, their
14 spouse's employment, if applicable. And then also other
15 descriptive characteristics that relate to things they talk
16 about in voir dire, prior experiences with the courts,
17 prior run-ins with the law or attitudes they have that are
18 relevant to the proceedings.

19 Q. How did you decide which variables to put in your
20 study?

21 A. Well, I looked at -- we looked at a lot of literature
22 on jury selection and what kinds of factors are -- that are
23 discussed, say, in litigator's manuals, so what kind of
24 jurors that you might want to -- might be attractive for
25 certain types of cases. There is Batson literature or

1 Batson cases where people talk about -- you know, where
2 they talk about the proper reasons for strikes. And also
3 information -- just the topics that are covered in voir
4 dire and the topics that are covered in a questionnaire are
5 presumably there because they are relevant to whether
6 someone -- whether their fitness or their attractiveness as
7 a juror.

8 Q. Okay. Now, going down, tell us, if you would, what
9 this DCI is and I think we are on slide four.

10 A. Okay. This is the supplemental venire member level
11 data collection instrument. This we used when we did not
12 have self-reported race in the record. If -- so in about
13 two-thirds of the cases, we had -- or about two-thirds of
14 the jurors we had a questionnaire where the jurors
15 self-reported their race and we considered that to be
16 highly reliable that they would accurately state their
17 race. Similarly, in a smaller percentage of the cases,
18 jurors would be asked to state their name and race on the
19 record or it would be discussed on the record as part of a
20 Batson argument. But in instances where we didn't have
21 juror questionnaires or the juror didn't fill out their
22 race on a questionnaire or, for whatever reason, we didn't
23 have that kind of information, we went to some public
24 records that were available in order to determine the
25 venire member's race.

1 Q. I'd like to walk through -- first of all, do you
2 remember about what percentage of the jurors you had to
3 obtain their race outside the record?

4 A. I believe -- I know it's in my report but I believe it
5 was about 30 percent.

6 Q. Okay. And if we could just walk through the process.
7 In looking at this -- I'm going to blow that up a little
8 bit because you just touched on it. Number four, is that
9 the race information?

10 A. Yes, or the source of the race information.

11 Q. Sorry. Source of race information. And it's coded
12 one, two, three and four. Is that in essence the order of
13 priority for you to determine race?

14 A. Well, somewhat. I mean definitely one and two if --
15 are considered highly reliable, that -- I mean presuming if
16 a juror stands up in court and says I am African-American,
17 you're not going to get more reliable than that.

18 Presumably if in a Batson argument one of the attorneys
19 talks about the race from the venire member and there is no
20 objection from the other side, that is very reliable that
21 that is their race. We almost never used number three.

22 Pretty much either used noted on questionnaire, stated on
23 the transcript or number four relied -- where we relied
24 upon public records, but our preference was for one or two.

25 Q. Okay. And number four says BOE website and/or Lexis.

1 What are those?

2 A. Board of election website in North Carolina provides
3 race information about a juror. Lexis is a -- has a people
4 finder database which has address information, various
5 persons with address history, sometimes includes
6 information from the voter registration but sometimes
7 includes race. But with those two things together, we were
8 -- we could -- that would help us determine what a
9 particular venire member's race was.

10 Q. Okay. I would like to walk through -- at a prior
11 hearing with this Court, we went through a lot of the
12 underlying source data that's been turned over. I want to
13 walk through how the data is stored and what's maintained
14 so that anyone outside of you could come and look at this
15 data and do the same thing that you did, okay?

16 A. Okay.

17 Q. So what is this that we see in slide six?

18 A. So this is a portion of the file directory of the
19 source doc from a portion of the cases in the study.

20 Q. And these -- and is that the 239 Peterson, is that the
21 defendant number --

22 A. That's right.

23 Q. The voir dire number?

24 A. That's right.

25 Q. I think we see Roseboro 270.1 and 270.2. Is that an

1 indication he had two voir dires, two trials?

2 A. Yes.

3 Q. If we click -- who is 262?

4 A. Marcus Robinson.

5 Q. If we clicked on that, what would we see? It's
6 subfolders?

7 A. That's right.

8 Q. What are in the subfolders?

9 A. The one labeled 262 Robinson GQ's (sic), those would
10 be the jury questionnaires that we had for the case. And
11 the one that's 262 Robinson T, that would be the
12 transcript.

13 Q. If we clicked on the juror questionnaires, what is in
14 that folder?

15 A. This is -- these are the juror questionnaires, a PDF
16 of the juror questionnaires with race information.

17 Q. What's the purpose of maintaining all of this data?

18 A. Transparency.

19 Q. Tell me about that.

20 A. Well, we knew that it's -- well, the quality of the
21 data. We wanted to have very good quality data and because
22 the ultimate question here is whether race played a role in
23 strike decisions, it was important to have very reliable
24 information about race, and in part of making sure it's
25 reliable, we took various measures to ensure reliability of

1 that coding. And by saving the -- you know, by having
2 these documents available, any question about whether we
3 misclassified a juror could be easily checked.

4 Q. Okay. So if we click on juror questionnaires, what is
5 that?

6 A. So this is an example of a juror questionnaire we
7 would have used where the juror gives some information
8 about herself including her race and gender.

9 Q. And I believe that's slide nine. Slide ten, what is
10 that?

11 A. That's the directory.

12 Q. Back there now if we click on the transcript, what do
13 we see there?

14 A. You see a PDF of the transcript of the jury selection
15 in this case.

16 Q. Okay. And if we click on that, what is that?

17 A. That's a -- that's the first page of the transcript of
18 jury selection.

19 Q. Who is -- who does it indicate as the prosecutor at
20 the trial of Marcus Robinson?

21 A. It appears to be John Dickson.

22 Q. Now, tell me if you would what this is.

23 A. So this is a -- this is another portion of the
24 directory.

25 Q. Is this at the very beginning, Allen?

1 A. That's right. That's the first case.

2 Q. Now, what I would like to do is walk through -- like
3 Mr. Robinson's case, you had juror questionnaires; is that
4 right?

5 A. Yes.

6 Q. In some cases, you didn't have juror questionnaires?

7 A. That's right.

8 Q. Then you relied on public records?

9 A. Yes.

10 Q. Let's click on Mr. Allen and go to his juror -- what
11 is that on slide 14?

12 A. Again, this is a directory of the kind of materials
13 that we had so we had a few juror questionnaires and they
14 would be in the 2 Allen JQ's folder but for those -- those
15 jurors for whom we did not have a juror questionnaire, we
16 did a public records race coding and we would save the
17 documents we relied on -- my coders were instructed to save
18 the documents we relied on into the race coding folder.

19 Q. So if we open up the race coding folder, what do we
20 see there?

21 A. That's -- there is a folder for each venire member for
22 whom we -- for whom we sought public records.

23 Q. All right. Let's go to the top juror there, Mr.
24 Abbott. If you open up Mr. Abbott's folder, what do we see
25 in slide number 16?

1 A. We see some documents that would be the record -- they
2 are the records of the documents we relied on for race
3 coding.

4 Q. I want to click on one, the voter information, and
5 looking at slide 17, tell us what you see.

6 A. Okay. So this is a -- looks like a screen shot of the
7 board of elections website records for this potential juror
8 and it indicates his race.

9 Q. Okay. Is that the information referred to there?

10 A. Yes, it is.

11 Q. Now, what does it state that Mr. Abbott's address is
12 there at the board of elections?

13 A. 88 Clayola Drive.

14 Q. Now, how would you know if that's the correct Mr.
15 Abbott?

16 A. We would -- we did not just presume it was the correct
17 Mr. Abbott. It could be somebody with the same name but
18 not necessarily our venire member, so we would try to match
19 the other information we had about this juror so, for
20 example, if we had the juror's address --

21 Q. Hold on one second. We'll go there.

22 A. Okay.

23 Q. Next slide, what is that document, slide 18?

24 A. This looks like a summons list.

25 Q. Who is that that's highlighted in red?

1 A. That's the juror whose record we just saw.

2 Q. And the address there is different than the address we
3 just saw; is that right?

4 A. That's right.

5 Q. So what do you do at that point?

6 A. Okay. So we wouldn't then -- then we would
7 investigate further to see if that -- because people move.
8 The trial had occurred awhile ago, might not be at the same
9 address. So, therefore, we would try to find information
10 that this person had this address and later -- but also is
11 currently living at the address listed in the board of
12 elections website.

13 Q. Tell me what this slide 19 is.

14 A. This is a page from the LexisNexis database people
15 finder in which it shows the two addresses that this person
16 has and one is a P.O. box that matches the juror summons
17 list. The other address, the residential address, matches
18 what's on the board of elections website.

19 Q. And any -- so at that point, did you feel confident
20 that you could race code that juror?

21 A. Yes.

22 Q. And everything about that process is saved so that the
23 state can review it?

24 A. It should be, the best of my knowledge.

25 Q. Now, after you get all of the race coding and the

1 coding down through question 14, what do you do?

2 A. The -- the information from the data collection
3 instrument that was coded by my code -- that was entered by
4 my coders would then now be entered into a database -- a
5 computer database.

6 Q. Okay. Let's talk about that process because you've
7 got the underlying -- you've got the source documents.

8 A. Um-hmm.

9 Q. And then you put it into a database, right?

10 A. Yeah.

11 Q. Tell us how that's done.

12 A. We had an Access database -- Microsoft Access database
13 in which a person would take the information from the paper
14 DCI and put it into this Microsoft Access database which we
15 would then -- we could then put into a program that we
16 could use to do statistical analysis.

17 Q. Did the person who coded whether the juror was struck
18 know the race of the juror?

19 A. Oh, that's right. Whenever we use public records
20 document -- the reason we have a separate form for public
21 records is the person who did the public records search did
22 not know whether the person was struck or not. So they
23 didn't know if there was a close call. They wouldn't know
24 if the person had been struck or passed.

25 Q. I want to go back. The supplemental DCI that we

1 referred to, I believe it's slide four, you obviously had
2 race on the other DCI; is that correct?

3 A. Yes. If -- the race came from a questionnaire or the
4 transcript, there is no ambiguity so --

5 Q. But why is it important for the person who's coding
6 the strike decision not know the race of the juror?

7 A. It's just good practice to be extra prudent to ensure
8 that if somebody -- I have no reason to suspect anyone was
9 but if someone was of a mind to -- or, you know, maybe
10 unconsciously if they knew the person was struck and they
11 had to make a judgment call about whether the person --
12 what the person's race was. I didn't want any -- I didn't
13 want that even in the back of their mind when they were
14 making a judgment as to -- as to race. They had a very
15 strict protocol to follow. There wasn't that much judgment
16 involved. I mean they had a strict protocol to follow but
17 it was an extra precaution we felt worth taking.

18 Q. Who set this protocol?

19 A. I did along with my colleague Catherine Grosso.

20 Q. Who trained these coders?

21 A. We did.

22 Q. If there was ever a coding decision where there was
23 some ambiguity and a decision needed to be made about that
24 coding decision, who made that call?

25 A. One of us did.

1 Q. Were you able to determine -- first of all, when you
2 talk about that strike decision, the person who made the
3 strike decision coding being different from the person --
4 not knowing the race of the juror, does that have a name?

5 A. Oh, it was actually the other way around.

6 Q. Sorry.

7 A. The person who was using public records to code the
8 race wouldn't know the strike.

9 Q. Okay.

10 A. It's sort of a blind coding.

11 Q. Okay. Were you able to determine the race of the
12 7,421 jurors?

13 A. All but six I believe.

14 Q. Now, for this about 30 percent that you indicated that
15 you had to do by looking at public records, did you do any
16 analysis of that subset to determine its reliability and
17 accuracy?

18 A. Yes. We did a reliability test by having -- using our
19 protocol to code race from public record documents in a --
20 in some cases where we actually did have questionnaires or
21 transcript information about race to see how consistent
22 they were and what we found was that they were very
23 consistent. I think about 98 percent reliability, a good
24 consistency between what my coders found using this process
25 to find race from public records when we compared it to the

1 presumably higher quality or high -- higher -- very
2 reliable, indisputably reliable information that we got
3 from questionnaires and transcripts. And that confirmed
4 this was a good procedure to use. It was a reliable
5 procedure to use to get race.

6 Q. With respect to the coders, can you tell the Court
7 what the educational -- well, let me back up. What was the
8 educational level of the coders that you used for this
9 project?

10 A. They are all J.D.'s. They were all lawyers.

11 THE COURT: I'm sorry.

12 THE WITNESS: They were all J.D.'s.

13 THE COURT: Okay.

14 BY MR. JAY FERGUSON:

15 Q. Now, looking at slide 20, can you tell me what that
16 is?

17 A. These are three different Excel sheets that would be
18 the databases, the different -- the databases from the
19 study.

20 Q. Okay. And have those all been provided in discovery?

21 A. Yes.

22 MR. JAY FERGUSON: Your Honor, if I could
23 approach?

24 THE COURT: Yes, sir.

25 BY MR. JAY FERGUSON:

1 Q. Let me show you what's marked defendant's exhibit 4
2 and ask if you can identify that?

3 A. This is a CD that contains the databases referred to
4 on that slide.

5 Q. Okay. Is that what we see on the screen there, those
6 three databases?

7 A. Yes.

8 MR. JAY FERGUSON: I move admission of
9 defendant's exhibit 4 into evidence.

10 MR. PERRY: No objection, Your Honor.

11 THE COURT: Without objection, it's admitted.

12 BY MR. JAY FERGUSON:

13 Q. Would you explain what those three databases are.

14 A. So these three -- these are three Excel sheets that
15 contain the data, all the data from the jury selection from
16 the 11 cases from Cumberland County that were included in
17 our study, that's Cumberland data. The second -- the North
18 Carolina jury selection study database is all of -- all
19 7,421 or 22 jurors that were in our study. And then the
20 third, the random sample, that contains just those jurors
21 that were selected randomly to be coded at a more -- at a
22 finer level, a more detailed level.

23 Q. Now, is everything included in the NC jury selection
24 database?

25 A. Yes.

1 Q. So the other two are subsets of that main database?

2 A. Right. You -- the middle one contains everything and
3 the other two are simply just databases where I just
4 selected cases just for ease of use.

5 Q. I'm not sure if I have asked you this. If I have, I
6 apologize. You did part one of the study, which is just
7 the limited information, the strike decision information,
8 and then you did part two which is a more detailed
9 including variables. But you also did something different
10 for Cumberland County, didn't you?

11 A. That's right.

12 Q. Tell us about that.

13 A. In Cumberland, we did not -- we did that detailed
14 descriptive level coding for every -- for all the jurors in
15 the 11 cases from Cumberland County.

16 Q. So now you've designed the study. You've collected
17 the data and you've got all the data in the database.
18 Let's click on the state database. If I open up that
19 document, is this what I see in slide 21?

20 A. Yes.

21 Q. Is this the information you have had, columns A
22 through H, to do the first part of the study?

23 A. Yes. That would be -- that would be the information
24 we used in order to calculate the strike -- the strike
25 rates -- the relative strike rates.

1 Q. All right. And so for this part of the study, did you
2 analyze that on a statewide basis?

3 A. Yes, I did.

4 Q. Let me show you what's slide 22 and ask if you can
5 identify that?

6 A. This is a table showing the strike rates by passed,
7 struck and by black venire members, venire members of other
8 races and then the seven for whom we lacked race
9 information.

10 Q. Since we're going to see a lot of these tables, if you
11 will just walk us through the rows and columns and tell us
12 what we're looking at there.

13 A. Okay. So row one is passed. That means that the --
14 these are all eligible -- they are all strike eligible
15 jurors to the state. All the jurors reflected in that
16 table were eligible to be struck by the state. So row one
17 is who was passed. And so you can look under the columns,
18 A are the black venire members that were eligible to be
19 struck by the state. B are venire members of other races
20 and then C is unknown and then total. And that tells you
21 how many though struck -- or how many they passed relative
22 to how many they could have -- they had available to them.
23 And then two is just -- row two, struck, is just the flip
24 of that. Well, who of the jurors in those different
25 categories, black versus all others versus unknown, how

1 many they struck.

2 Q. So I want to make sure I'm clear. If the passed rate
3 is they accepted 47.4 percent of the African-American
4 jurors and -- but accepted 74.3 percent of all the other
5 jurors; is that right?

6 A. That's right.

7 Q. Now, down at the bottom, you've got some indication of
8 CHI-square test. Tell us about that.

9 A. So that's a statistical test which can tell you
10 whether -- it's a test of independence and it can just tell
11 you whether these -- that the patterns you're observing, if
12 they are independent of the categories. So if -- if -- for
13 example, if you had picked blue shirt versus all others,
14 assuming that has no relation to whether someone is struck
15 or not, you would see them evenly -- you would see this
16 group evenly distributed across the different cells
17 according to their representation of population. So if,
18 you know, having a blue shirt on at voir dire has no
19 bearing on whether you were struck, then you would expect
20 that people with blue shirts would be passed at the same
21 rate as people who didn't have blue shirts and people who
22 were struck with blue shirts would be struck at the same
23 rate as people who didn't have blue shirts were struck. So
24 that tells you whether there's potential assimilation there
25 between those variables, race and strike decision.

1 Q. Within the parentheses there, the Pearson CHI-square
2 all the way through the linear-by-linear association, are
3 those types of CHI-square tests?

4 A. Right. They are different -- they are nonparametric
5 tests of independence.

6 Q. You have to tell us what that means.

7 A. They are just different ways, different statistical
8 tests, different ways of calculating whether or not
9 something -- the difference you observe -- the pattern you
10 observe is statistically significant or if it's something
11 you can't rule out, if it's just some sort of chaff, just
12 noise in the pattern. And different tests are more
13 appropriate whether -- you know, some tests are designed
14 because they are particularly good for people who want to
15 be extra conservative in their statistical tests or they
16 have very small cell sizes. But the statistical program I
17 run just runs them all and gives me the results for all of
18 them.

19 Q. What statistical program is that?

20 A. I use SPSS.

21 Q. What is that?

22 A. I believe it stands for statistical --

23 Q. Statistical package for social science?

24 A. -- social science, yes, that's right.

25 Q. And what is that? Tell us what it is.

1 A. It's software that you can use to perform all
2 different kinds of statistical analysis.

3 Q. Is it software that people in the social science and
4 people who do empirical studies rely upon?

5 A. Yes. There's different kinds of software packages and
6 some people have different personal preferences. Some
7 people like Microsoft Word. Some people like Word Perfect,
8 but it's a very commonly used program.

9 Q. And then it says differences in strike rates are
10 significant at P is less than .001. What is -- tell us
11 what that P is less than .001 means.

12 A. That the -- P value is, is -- so that's some test
13 indicator of whether the difference you observe from
14 looking at these data, looking at these patterns maybe
15 could just be due to chance or noise. And this tells us
16 sort of what's the chances that we would see a disparity of
17 this magnitude if there really wasn't a relationship. It
18 was just due to noise, just happens to be just due to some
19 fluke about the cases we were looking at, the instances we
20 were looking at.

21 Q. Does this tell us what the probability of this
22 disparity we would see occurring in a random, race neutral
23 jury selection process?

24 A. All right. So if race was unassociated with strike
25 decision, the chances of observing a pattern like this

1 would be less than one in a thousand.

2 Q. When you say one in a thousand, does your software
3 package cut it off at that point?

4 A. Well, it will tell you the precise calculation but
5 just to be conservative, most people in the field would
6 just say after three decimals, it's -- you know, once you
7 get to three decimals, you don't really look at the precise
8 calculation. It might be much, much smaller than what it
9 calculates it.

10 Q. But your software can calculate the precise odds of
11 this -- probability of this occurring in a race neutral
12 jury selection process, can't it?

13 A. That's right.

14 Q. First, let's look at the strike ratio. Tell us what
15 that is.

16 A. So it's -- so these now say 2.05. That's the ratio of
17 the percentage of black eligible jurors who were struck by
18 the state compared to the rate -- or the percentage of
19 nonblack eligible jurors who were struck by the state. So
20 it looks at the relative rates.

21 Q. So is strike rate ratio a term that we're going to be
22 talking about a lot today and tomorrow?

23 A. Yes, it is.

24 Q. And, now, did I ask you to calculate the precise
25 probability of this occurring in a race neutral setting?

1 A. Yes, you did.

2 Q. And what are those numbers?

3 A. So if I -- so I reported less than one in a thousand
4 but if I -- the statistical program will tell me precisely
5 what P value calculates and it looks like it's less than
6 one in ten trillion is what the package tells us -- the
7 statistical program tells us.

8 Q. Now, one more thing. Up at the top, right there,
9 strikes against -- do you see it?

10 A. Um-hmm.

11 Q. What do you mean by aggravated across cases?

12 A. So looking at it this way, I just took -- so out of
13 all 7,400 or so eligible -- strike eligible jurors, just --
14 just looked at them all together. I didn't -- so they are
15 all pooled into -- so you see how -- they're not separated
16 by cases. These are all pooled together so we're looking
17 at all of them.

18 Q. Did you look at it another way?

19 A. Yeah. So --

20 Q. Sorry. Before we get there, tell us what slide 23 is.

21 A. This is a graph that depicts the relative strike
22 patterns by race.

23 Q. And that -- it indicates there table one; is that
24 right?

25 A. Right. That's a visual -- that's a visual -- that's a

1 graphic that depicts the information in table one.

2 Q. All right. And did you look at the data along pooled
3 cases?

4 A. Yes. So if you look at -- so the way I had done it in
5 table one, a case that supposedly had two defendants and so
6 there were more strike decisions, so that would be
7 represented more than a case where there was one defendant
8 so there weren't as many strike decisions so just lets you
9 have all the strike decisions. Now, looking at it this
10 way, you look at each case. I calculated a strike rate for
11 each case -- each case in the study and so each case counts
12 one -- counts one. That's why there is this -- the number
13 is smaller than there was in the last.

14 Q. Where it says number of cases 166 over here --

15 A. Yes.

16 Q. -- why is that when there was 173 cases in the study?

17 A. There were seven where there were no strike
18 eligible black jurors and, therefore, there is no -- there
19 could be a strike rate. It was -- there weren't -- there's
20 nothing in the denominator. There were no black jurors --
21 eligible jurors to be struck in those cases.

22 Q. And by looking at the calculations along the pooled
23 cases and average of that, did you calculate a strike rate
24 ratio?

25 A. Yes, I did.

1 Q. What is the strike ratio analyzing the data in this
2 fashion?

3 A. 2.26.

4 Q. And you've got it reported there as P is less than
5 .001 again; is that right?

6 A. Yes.

7 Q. Did you calculate the actual probability of this
8 occurring in a random, race neutral jury selection process?

9 A. Yes, I did.

10 Q. And what is that?

11 A. It's -- I actually don't know what that number is.
12 It's one in a very, very large number.

13 Q. And that was calculated by your computer?

14 A. That's right. The statistical program produced that.

15 Q. And if you could tell us what this is on slide 25.

16 A. This is a graphical depiction of the information that
17 was in the previous slide, so it's a bar graph showing the
18 relative strike rates.

19 Q. Now, for table one and two that we just looked at,
20 what time period were we looking at?

21 A. The whole time period in the study so the -- basically
22 1990 to 2010.

23 Q. And this was all statewide obviously?

24 A. Yes, it was.

25 Q. And did you look at the data in smaller time

1 increments?

2 A. Yes, I did.

3 Q. I'm showing you slide 26. If you can tell us what
4 that is.

5 A. So this is -- this is the same kind of table that was
6 shown before so it shows strike rates by case but it's
7 limited to the time period from 1990 to 1999.

8 Q. One thing I failed to point out is what is this number
9 there, the SD equals?

10 A. That's a standard deviation and that's something that
11 would be used -- it's standard -- it's typical to report
12 that or it's generally our practice to report that so that
13 if somebody who wants to check the work to see if --
14 somebody else who wants to see if the statistical
15 significance is what I say it is, that would be part of
16 what they would use to determine -- to check my work.

17 Q. How many cases were included between 1990 to 1999?

18 A. 122.

19 Q. Did you run the significance test on this?

20 A. Yes, I did.

21 Q. What's it reported at?

22 A. Less than .001.

23 Q. Just generally -- I always hate general rules. What's
24 the general rule of thumb for statistical significance?

25 A. It generally less than .05.

1 Q. And what's the strike rate ratio of the strike rates
2 1990 through 1999?

3 A. 2.25.

4 Q. And did you calculate the probability of this
5 disparity occurring in a race neutral selection process?

6 A. Yes. The P was less than one and again, I apologize.
7 I don't actually know what number that is. It's extremely
8 large.

9 Q. And did you look at the data from 2000 to 2010?

10 A. Yes, I did.

11 Q. And is that reflected in table five?

12 A. Yes.

13 Q. Slide 27?

14 A. Yes.

15 Q. How many cases in that time period?

16 A. 44.

17 Q. What's the P value there?

18 A. Less than .001.

19 Q. What's the strike rate ratio during this time period?

20 A. 2.27.

21 Q. And did you analyze the probability of this disparity
22 occurring in a race neutral selection process?

23 A. Yeah. That number I can handle. It's less than one
24 in ten million.

25 Q. Okay. And what is shown in the slide, slide 28?

1 A. This graph just depicts the numbers that were in the
2 previous table showing the relative strike rates and pass
3 rates -- or, I'm sorry, the strike and pass rates for those
4 two time periods.

5 Q. Now, this is not the pass rates. These are strike
6 rates?

7 A. Strike rates. I'm sorry. Yes, strike rates.

8 Q. The pass rates would simply be the inverse of this; is
9 that right?

10 A. They would just be 100 percent minus those numbers.

11 Q. Okay. So the record is clear, let me -- let's
12 calculate what the pass rate would be for the period of
13 time 1990 to 1999 for African-American jurors? Can you do
14 that?

15 A. Yeah.

16 Q. Okay.

17 A. That is -- I guess that would be --

18 THE COURT: 44.4.

19 THE WITNESS: 44.4.

20 BY MR. JAY FERGUSON:

21 Q. Thank you. And the white -- excuse me, nonblack
22 jurors?

23 A. 75.3.

24 Q. Thank you. Did you look at different time periods?

25 A. Yeah.

1 Q. Smaller time periods?

2 A. Five-year time periods, yes.

3 Q. Tell us what table six represents.

4 A. This is the statewide average rates of state strikes
5 from 1990 to '94.

6 Q. How many cases in this time period?

7 A. 42.

8 Q. I'm sorry. What's the P value?

9 A. Less than .001.

10 Q. And what's the strike rate ratio during this smaller
11 five-year time period?

12 A. 2.22.

13 Q. And did you calculate the probability of that
14 occurring?

15 A. Yes, less than one in a billion.

16 Q. What about the next five-year time period shown in
17 table seven? Can you tell us how many cases were in that
18 time period?

19 A. In this time period, there were 80 cases.

20 Q. And what is the significance of that?

21 A. P is less than .001.

22 Q. And what's the disparity -- the strike rate ratio
23 there?

24 A. 2.28.

25 Q. And did you calculate the probability of that

1 disparity occurring in a race neutral selection process?

2 A. Less than -- looks like at least a trillion -- one in
3 a trillion.

4 Q. Okay. Table eight, what time period is that?

5 A. 2000 to 2004.

6 Q. How many cases were averaged during that time period?

7 A. 29.

8 Q. And what's the significance of the disparity we see
9 between the strike rates against black qualified venire
10 members and all other qualified venire members during that
11 time period?

12 A. I'm sorry. Can you repeat the question.

13 Q. What's the probability that we see this disparity?

14 A. Less than one in a thousand.

15 Q. What's the strike rate ratio between black qualified
16 venire members and all others?

17 A. 2.29.

18 Q. What does that tell us -- what does the 2.29 tell us?

19 A. That the ratio -- the strike rates against qualified
20 black venire members, the ratio of the strikes against them
21 compared to all others is 2.29.

22 Q. And what's the probability of this disparity occurring
23 in a race neutral selection process?

24 A. The exact P value was calculated at less than one in a
25 hundred thousand.

1 Q. And did you continue to analyze it from 2005 to 2010?

2 A. Yes.

3 Q. What -- how many cases in that time period?

4 A. 15.

5 Q. And what's the P value there?

6 A. Less than .01.

7 Q. And what's the strike rate ratio observed during the
8 time period of 2005 through 2010 comparing black qualified
9 venire members to all others?

10 A. 2.22.

11 Q. And what's that probability?

12 A. Less than one in a hundred.

13 Q. Is that the actual probability there at the bottom, P
14 equals .002?

15 A. Well, that is the probability that the -- that was
16 calculated for the P.

17 Q. Okay. Let me show you what's marked as slide 33 of
18 exhibit 4, what is that?

19 A. This is a graph that depicts the information that was
20 in the last four tables showing the relative strike rates
21 over those four time -- four five-year time periods.

22 Q. And slide 34?

23 A. This is a line graph showing how those -- the relative
24 strike rates at those four -- for those four time periods.

25 Q. What's significant about that to you?

1 A. Well, this suggests that this isn't something that
2 changed -- that has changed or varied significantly over
3 time, that whatever -- that the disparity in strike rates
4 is something that's been consistent over time -- time
5 period of our study.

6 Q. Now, everything we've looked at so far is statewide
7 analysis; is that right?

8 A. Yes.

9 Q. Did you look at it by prosecutorial districts?

10 A. Yes, I did.

11 Q. Let me show you slide 35 and ask you what that is?

12 A. This is a graph that depicts the relative strike rates
13 across prosecutorial districts one through seven.

14 Q. Okay. And down there where it says N equals, what is
15 that?

16 A. How many cases in the study were in this particular
17 district.

18 Q. And then does it have the strike rates against black
19 venire members and all other venire members?

20 A. Yes, that and the strike ratio.

21 Q. Are -- is there any district in districts one through
22 seven as shown on that slide that did not have a disparity
23 between black venire members and all others?

24 A. No, none that were less than 2.1.

25 Q. Looking at prosecutorial districts eight through 16A

1 on the slide 36, I'll ask you the same question. Are there
2 any districts shown on that slide that don't have a
3 disparity between the strikes against African-Americans?

4 A. That's correct, they are all -- there is a disparity
5 in all of them.

6 Q. Showing you slide 37, what prosecutorial districts are
7 represented in that slide?

8 A. 16B to 20.

9 Q. And we see -- first looking at 19D, what does that
10 represent?

11 A. There's one case in 19D and it appears that there were
12 no eligible black jurors to be struck.

13 Q. Okay. And I think for the first time we see something
14 different in 19C. What is that?

15 A. In 19C, the black potential jurors were struck at a
16 lower rate than nonblack potential jurors, .7.

17 Q. Now, looking at districts 21 through 29, what do we
18 see?

19 A. You see disparities where you see that the rate of
20 strikes against qualified black jurors compared to all
21 others is greater than one in all but one, in District 25.

22 Q. Let me go back. I forgot one thing two slides before.
23 I can't see that slide number. Slide 36. Looking at the
24 12th District, what does that show? What's the N on the
25 12th district?

1 A. There's 11 cases.

2 Q. And what's the percentage of strikes against
3 African-Americans?

4 A. 52.7.

5 Q. And what's the percentage of strikes against all other
6 venire members?

7 A. 20.5.

8 Q. And what is the strike ratio in the 12th District?

9 A. 2.6.

10 Q. Is it your understanding the 12th District is
11 Cumberland County?

12 A. Yes. That's my understanding.

13 Q. Now, going back -- I believe we were here and this
14 shows one district that does not have a disparity?

15 A. Well, yeah, there's a disparity other direction.

16 Q. Sorry.

17 THE COURT: 19C and 25.

18 MR. JAY FERGUSON: Sorry.

19 THE COURT: 19C and 25, no disparity reflected.

20 Ma'am, you need a break?

21 COURT REPORTER: Um-hmm.

22 THE COURT: This would be a good point for us to
23 take a break for the court reporter. We'll be at ease
24 until -- let me give until five after. I recognize it's
25 close to 4:00 but five after 4:00.

1 (Recess taken.)

2 (The following proceedings continued in open
3 court. The defendant, defense attorneys and state's
4 attorneys were present.)

5 THE COURT: Okay. I believe all counsel are
6 present. The defendant is present. You ready to continue,
7 Mr. Ferguson?

8 MR. JAY FERGUSON: Yes, Your Honor. May I
9 approach the witness?

10 THE COURT: Yes, sir.

11 BY MR. JAY FERGUSON:

12 Q. Professor O'Brien, if I can show you what's been
13 marked as defendant's exhibit 5 and ask if you can identify
14 that?

15 A. Yes. That's a map of North Carolina prosecutorial
16 districts and it's color coded to reflect the ratio of
17 strike rates against qualified black venire members and two
18 qualified nonblack venire members.

19 Q. Is it a replica of what's on the slide on the screen?

20 A. Yes, it appears to be.

21 Q. I would like you, since you're referring to that and I
22 can go back on the slides -- the districts in the white,
23 the 19C, 19D and 25, do you see those?

24 A. Yes.

25 Q. Those are represented as what? What does that mean?

1 A. That means that there is a -- you know, no disparity
2 or ratio of 1.1 to 1 or lower.

3 Q. Okay.

4 (Interruption by the reporter.)

5 Q. Looking at slide 37 in District 19D, what's the N
6 there? Does N equal one?

7 A. Yes, one case.

8 Q. And in 19C?

9 A. Yes, one case.

10 Q. In District 25?

11 A. One case.

12 Q. So in looking at defendant's exhibit 5, is it fair to
13 say that the only time we see a district without a black
14 juror disparity is when there's only one case?

15 A. Yes.

16 Q. And every other district where there's more than one
17 case, we see a disparity of strikes against
18 African-American jurors?

19 A. Yes.

20 Q. Did you also analyze the data by county?

21 A. Yes, I did.

22 Q. Let me show you what's slide 40 of exhibit 4, ask if
23 you can identify that?

24 A. This is a bar graph depicting these relative strike
25 rates by counties.

1 Q. In the first ten counties alphabetically from Alamance
2 to Camden where there was someone on death row, is there
3 any county where there is not a disparity between black --
4 disparity between strikes against African-American venire
5 members as opposed to others?

6 A. No, there is none.

7 Q. What about slide 41, the ten counties between Caswell
8 and Gaston?

9 A. It appears that there's one.

10 Q. What county is that?

11 A. Is it Catawba?

12 Q. Catawba. And what's the N number? How many cases in
13 that?

14 A. There was one case.

15 Q. What about the ten counties between Gates and Martin
16 alphabetically, any counties there without a disparity in
17 strike patterns?

18 A. No.

19 Q. That's slide 42. Now, slide 43, from Mecklenburg to
20 Polk, in those ten counties, do we see any counties without
21 a higher strike rate against African-Americans?

22 A. In Moore County.

23 Q. I believe in Polk, what does that show?

24 A. Polk does not show a disparity.

25 Q. And then what about the ten counties alphabetically

1 between Randolph and Stokes County?

2 A. Just Stokes County.

3 Q. Let me go back. In -- sorry. In Stokes County, how
4 many cases are in that county?

5 A. One.

6 Q. And all the others, there's a disparity between
7 strikes against African-Americans?

8 A. That's right.

9 Q. And I believe this is the final slide, slide 45, six
10 counties between Surry and Wilson, are there any counties
11 where there's not a higher strike rate against
12 African-American jurors who are qualified to sit and serve?

13 A. No, there are none.

14 MR. JAY FERGUSON: Your Honor, at this time I
15 would move for admission of defendant's exhibit 5 into
16 evidence.

17 MR. PERRY: No objection, Your Honor.

18 THE COURT: Without objection, defendant's 5 is
19 admitted.

20 BY MR. JAY FERGUSON:

21 Q. Let me show you what is slide 46 of defendant's
22 exhibit 4. What is that?

23 A. These show the strike rates for current division four
24 and former division two and the relative strike rates in
25 Cumberland County -- in the cases from Cumberland County.

1 Q. First of all, why do we have two different divisions
2 up there on this chart?

3 A. Because in -- from what I understand it, the judicial
4 divisions were further divided in 2000.

5 Q. And in 1994, at the time of Marcus Robinson's trial,
6 which division would Cumberland County be in?

7 A. Division two I believe.

8 Q. And is that indicated about the split down at the
9 double asterisk at the bottom?

10 A. Yes, that's right.

11 Q. This chart is like the others showing the strike rate
12 disparity; is that correct?

13 A. Yes, it is.

14 Q. And what does it show that the strike rate ratios are,
15 first, with current division four between that time period?

16 A. 2.85.

17 Q. And with respect to former division two from 1990 to
18 1999, what's that strike rate ratio?

19 A. 2.05.

20 Q. And in Cumberland County, for the 11 cases for
21 Cumberland County, what's the strike rate ratio?

22 A. 2.57.

23 Q. And did you calculate the probability -- again, the
24 reported probably is what?

25 A. P is less than .001.

1 Q. And did you calculate the actual probability with your
2 statistical software?

3 A. Yes, I did.

4 Q. And is it reflected as A, B and C on the slide?

5 A. Yes.

6 Q. And for each one -- for A and B, it's much higher than
7 one in 1,000, isn't it?

8 A. Yes.

9 Q. And let me show you slide -- sorry, 47, what does
10 slide 47 depict?

11 A. This graph depicts the relative strike rates that were
12 in the former -- previous table.

13 Q. I won't ask you any more than that. Let me show you
14 slide 48. What does that depict?

15 A. These are the strike rates for each of the cases --
16 the relative strike rates against qualified black jurors
17 and qualified jurors of other races for the cases in our
18 sample -- in our study from Cumberland County.

19 Q. Are there any cases where the strikes against African
20 Americans are lower than the strikes against other members?

21 A. No, it doesn't appear that any are lower.

22 Q. Let me show you slide 49 and ask if you can identify
23 that?

24 A. These are the ratios of strikes against qualified
25 black jurors and -- ratio of the strike rate against

1 qualified black jurors to the strike rate against qualified
2 nonblack jurors, the ratios for each of the Cumberland
3 County cases.

4 Q. Now, if there's no strike disparity -- if a prosecutor
5 strikes African-Americans and others at the same rate,
6 what's that strike rate ratio?

7 A. One.

8 Q. And is that depicted on slide 49 now?

9 A. Yes.

10 Q. And what is about the average statewide strike
11 disparity based upon table one of your study that we talked
12 about previously?

13 A. It's 2.

14 Q. Of the 11 jury voir dires in capital cases in
15 Cumberland County, how many of those -- let me start that
16 over. Of the 11 jury voir dires in Cumberland County, how
17 many of those cases' strike ratios exceed the statewide
18 average?

19 A. It appears to be about five.

20 Q. That are more than 2.0?

21 A. I'm sorry. Yes. Eight.

22 Q. Okay. Let me show you what is slide 50 and ask if you
23 can identify that, please.

24 A. These are the relative strike rates for the three
25 cases in our study that were prosecuted by Prosecutor

1 Dickson.

2 Q. And who are those defendants?

3 A. Marcus Robinson, John McNeill and Jeffrey Meyer.

4 Q. And does it indicate the strike rates against
5 African-American jurors nonblack venire members and also
6 the strike rate ratios?

7 A. Yes, it does.

8 Q. And did you calculate the probability of that
9 occurring in a race neutral random jury selection process?

10 A. Yes. The exact P value would be 1.25 -- about 1.25 in
11 a thousand.

12 Q. Now, there was -- just to be clear, in one of the
13 cases, Mr. McNeill's, there were two prosecutors; is that
14 right?

15 A. I believe so.

16 Q. And Mr. Dickson left for some period of time and came
17 back during the voir dire?

18 A. Yeah, as I recall.

19 Q. Did you also do a statistical analysis of just Mr.
20 Robinson and Mr. Meyer's case?

21 A. Yes.

22 Q. And we'll talk about that, but these were the three
23 where Mr. Dickson was counsel of record?

24 A. Yes.

25 Q. Did you also look at the strike rate for Mr.

1 Robinson's trial?

2 A. Yes, I did.

3 Q. And tell us about that.

4 A. Eligible or qualified black jurors were struck by the
5 state at the rate of 50 percent and the state struck
6 qualified nonblack potential jurors at a rate of 14.3
7 percent.

8 Q. So what's the strike rate ratio for Mr. Robinson's
9 trial?

10 A. 3.5.

11 Q. And, again, no strike disparity is 1.0, right?

12 A. That's correct.

13 Q. Now, Dr. O'Brien, I want to talk about your opinions
14 based on this portion of the study. I use the term
15 unadjusted. Is that the correct term for this type of
16 study?

17 A. Yes.

18 Q. Tell us what I mean by that.

19 A. Unadjusted numbers means that they are the strike
20 rates. So we look at the number of qualified black jurors
21 so people -- of black jurors available to be struck as a
22 denominator. The numerator is the number struck. And then
23 the same for nonblack venire members. So it's just looking
24 at strike rates by race.

25 Q. Based upon this analysis that we've talked about up to

1 this point, this unadjusted analysis, do you have an
2 opinion as to whether race was a significant factor in the
3 state's decisions to exercise peremptory challenges when
4 seeking to impose death penalties in North Carolina between
5 1990 and August of 2010?

6 A. Yes, I did.

7 Q. What is that opinion?

8 A. It's my opinion that race was a significant factor in
9 the decision to exercise peremptory strikes in that period.

10 Q. And based upon this analysis, do you have an opinion
11 as to whether race was a significant factor in the state's
12 decisions to exercise peremptory challenges when seeking to
13 impose death penalties in North Carolina between 1990 and
14 1994?

15 A. Yes. It's my opinion that it was a significant
16 factor.

17 Q. Based upon this analysis, do you have an opinion as to
18 whether race was a significant factor in the state's
19 decisions to exercise peremptory challenges when seeking to
20 impose death penalties in North Carolina between 1990 and
21 1999?

22 A. Yes. It's my opinion that it was a significant
23 factor.

24 Q. Based upon this analysis, do you have an opinion as to
25 whether race was a significant factor in the state's

1 decisions to exercise peremptory challenges when seeking to
2 impose death penalties in North Carolina at the time of
3 Marcus Robinson's trial in 1994?

4 A. Yes. It's my opinion that race was a significant
5 factor.

6 Q. Based upon this analysis, do you have an opinion as to
7 whether race was a significant factor in the state's
8 decisions to exercise peremptory challenges when seeking to
9 impose death penalties in former judicial division two
10 between 1990 and 1999?

11 A. Yes. My opinion is that it was a significant factor.

12 Q. Based upon this analysis, do you have an opinion as to
13 whether race was a significant factor in the state's
14 decisions to exercise peremptory challenges when seeking to
15 impose death penalties in former judicial division two at
16 the time of Marcus Robinson's trial in 1994?

17 A. Yes, I think it was a significant factor.

18 Q. Based upon this analysis, do you have an opinion as to
19 whether race was a significant factor in the state's
20 decision to exercise peremptory challenges in seeking to
21 impose death penalties in Cumberland County between 1994
22 and 2007?

23 A. Yes, I think it was a significant factor.

24 Q. Based upon this analysis, do you have an opinion as to
25 whether race was a significant factor in the state's

1 decisions to exercise peremptory challenges when seeking to
2 impose death penalties in Cumberland County at the time of
3 -- at the time of Marcus Robinson's trial in 1994?

4 A. Yes, I think it was a significant factor.

5 Q. Do you have an opinion as to whether these disparities
6 seen at the state, division and county level support an
7 inference of intentional discrimination by prosecutors in
8 their decisions to exercise peremptory challenges of black
9 jurors at the time of Marcus Robinson's trial in 1994?

10 A. Yes, I believe they are consistent with that.

11 Q. Now, with respect -- is this it with respect to part
12 one of the study, unadjusted study?

13 A. I believe so.

14 Q. Then tell us about what you did at this point with
15 part two of the study?

16 A. In part two of the study, we collected information
17 about other variables that might bear on the decision to
18 exercise a peremptory strike against a potential juror.

19 Q. Did you do that for every 7,400 jurors?

20 A. No, we did not. We did it for a random sample of
21 about 25 percent.

22 Q. Why would you do this? Why do you do this additional
23 analysis to begin with?

24 A. Well, the disparities are quite large. However, there
25 is always the possibility that some other factor that's

1 correlated or associated with both race and outcome in a
2 decision to strike were at play. We wanted to examine the
3 possibility that there -- that some factor like that that
4 makes it more likely a juror would be struck but also tends
5 to be more prevalent of -- of black potential jurors than
6 nonblack potential jurors, whether that might explain the
7 disparity.

8 Q. And did you do the -- an analysis for Cumberland
9 County as well?

10 A. Yes, I did.

11 Q. I believe you've already said you didn't do any
12 sampling in Cumberland County; is that right?

13 A. No. We -- we sought to code the entire -- the entire
14 population of the strike eligible jurors.

15 THE COURT: For purposes of clarification, the 25
16 percent sampling that you just referred to, that was done
17 statewide?

18 THE WITNESS: Yes, it was.

19 THE COURT: And with regard to Cumberland County,
20 it wasn't a sample, it was all of the cases involved in
21 Cumberland County?

22 THE WITNESS: That's right, all 11 cases.

23 BY MR. JAY FERGUSON:

24 Q. To be clear, the 25 percent, was that by case or by
25 venire member?

1 A. Oh, no. I'm sorry. It was by venire member so
2 Cumberland County, it was all venire members from all 11
3 cases. The 25 percent random sample was statewide of all
4 potential jurors.

5 Q. How did you choose this 25 percent sample?

6 A. Well, it would provide us with a lot of information so
7 it would be about 1,700 potential jurors which should be
8 more than adequate to detect -- to be able to do the kind
9 of statistical analysis that we wanted to do.

10 Q. But how did you -- how did you decide which 25 percent
11 got into your sample?

12 A. I used a function on my SPSS statistical program which
13 just randomly selected the cases. So I did not pick which
14 jurors that we were -- would be included in the sample.
15 The computer picked them at random.

16 Q. Was there any subjectivity at all in making that
17 determination?

18 A. Not at all.

19 Q. After you got the sample chosen, do you then compare
20 it to the overall population to see if it's representative?

21 A. Yes.

22 Q. All right. Let me show you slide 52 and ask if you
23 can identify that?

24 A. So the sample was chosen randomly so we would have no
25 reason to think that it wouldn't be representative of the

1 statewide population, one way to check that is to look at
2 some -- how the profile, the random sample we chose
3 compares to the profile of the statewide population on the
4 factors that we already had information about for
5 statewide. So it appears that the random -- the percentage
6 of black potential jurors in the random sample was the same
7 as in the statewide population and that it was roughly the
8 same as to gender distribution.

9 Q. As a status -- excuse me, as a social scientist and
10 someone who does these types of studies, what did you take
11 from that?

12 A. That this random sample of 25 percent of the -- of the
13 studied population was a representative sample and,
14 therefore, we could draw inferences from it about the whole
15 statewide population.

16 Q. Let me show you slide 53 and I think we've seen this
17 before, haven't we?

18 A. Yes.

19 Q. This the same DCI we saw earlier?

20 A. That's right. That's the venire member level DCI.

21 Q. I would like to spend some time going through some of
22 the variables, not all of them, but just to give the Court
23 some idea of the types of information you captured in your
24 DCI's. The -- looking at slide 54, can you tell us what
25 that is?

1 A. That's a supplemental venire member descriptive data
2 collection instrument.

3 Q. And is that the second page of that?

4 A. Yes.

5 Q. If you could, there is two categories I want to talk
6 with you about, the employment -- let's see, employment
7 there; is that correct?

8 A. Yes.

9 Q. And then you've got descriptive characteristics,
10 right?

11 A. Yes.

12 Q. Then you've got a bunch of just spaces. What is that?

13 A. That was a place where coders could input numeric
14 codes that corresponded with different descriptive
15 characteristics that might apply to a juror.

16 Q. Let me start with employment. Did you have -- what is
17 this document, slide 56?

18 A. This is the revised employment coding appendix that
19 was given to coders. This told them which numeric codes
20 corresponded with the different professions.

21 Q. The coders made the decision based upon employment and
22 gave it -- assigned it a number; is that correct --

23 A. Yes.

24 Q. -- in the database? And is that your entire
25 employment coding appendix?

1 A. That's right.

2 Q. Did you also have an appendix for descriptive
3 characteristics?

4 A. Yes.

5 Q. Tell us just some of the characteristics you're
6 talking about.

7 A. So for starting at the top, the 100 codes refer to
8 hardship and so these would apply to a juror who wasn't --
9 someone who was excused for cause based on hardship would
10 obviously not be in our study but they would be used when
11 somebody would express a concern about some hardship that
12 would be caused by service on the jury. They weren't
13 excused for cause but it was still something that they
14 expressed concern about.

15 Q. What are some of the others?

16 A. So there's -- within hardship?

17 Q. No, some of the other characteristics that you coded
18 for.

19 A. Okay. So the 200 codes refer to prior jury service.
20 The 300 codes applied when a juror talked about themselves
21 or a close other as having been victimized -- been a victim
22 of a crime. 400 codes refer to -- applied when a juror or
23 close other had previously been involved -- accused of
24 being involved in criminal activity.

25 Q. Okay. And are all of the codings reflected on either

1 slide 57 or the second page of that, slide 58?

2 A. That's right. Those are all the descriptive codes.

3 Q. All right. And are these the same coders that coded
4 -- that you talked about previously all being law
5 graduates?

6 A. That's right.

7 Q. And you supervised their process?

8 A. Yes, very closely.

9 Q. How many coders coded each juror?

10 A. So each venire member who was part of the random
11 sample or in Cumberland was coded by two -- two coders
12 independent of each other.

13 Q. What would happen if one coder said one thing and
14 another coder said another thing?

15 A. That's precisely why we wanted to have this process of
16 double coding so that we could ensure reliability across
17 coding so that how a particular venire member was coded
18 wouldn't depend on who happened to get -- who their coder
19 happened to be. And it also -- so if there was a
20 disagreement between coders, I had a third person who
21 compared every -- their coding of each juror to identify
22 any discrepancies in the coding decisions that they made.
23 Any discrepancies were put into a coding -- a cleaning
24 document in which I would review the discrepancy so -- the
25 description of the discrepancy and then I would sign off on

1 the proper coding.

2 Q. Let me show you slide 59 and ask if you can identify
3 that?

4 A. So this is an example from our cleaning doc. It's
5 actually from the cleaning doc and it shows that two --
6 those were two independent coders had given -- had given
7 different employment codes for the same juror. And the
8 third person, the one who compared the two DCI's to detect
9 any discrepancies would tell me what the issue is. What
10 was the -- so what was this person's job, what did they say
11 their job was and then give me an opinion about how to
12 resolve it and then I would sign off on it. And if I
13 agreed, I would say there's my initials, I said okay,
14 meaning I agreed that that was the right code that the
15 third person said he thought was the right code. And if I
16 disagreed, I said no, that's not the proper code. So I
17 signed off on every discrepancy.

18 Q. Whose ultimate decision was it if there was any
19 discrepancy?

20 A. Mine.

21 Q. In that cleaning document, it has been given to the
22 state; is that correct?

23 A. Yes, I believe it has.

24 Q. So any time there was any discrepancy between your two
25 coders, the state has that in their possession?

1 A. Yes.

2 Q. Why do you go to such trouble?

3 A. Well, I -- so where coding is detailed pieces of
4 information about these coders -- about these individual
5 venire members and to see whether they bear on the decision
6 to strike so we want to be as accurate as possible. But
7 also as consistent as possible on how we code. Because
8 what's important is -- accuracy is extremely important but
9 to the extent that there might be a judgment call about how
10 you classify a particular profession, the important thing
11 is that we're coding consistently so that any sort of --
12 any kind of judgment call on how a particular category is
13 coded wouldn't -- wouldn't skew the -- skew the results in
14 any way or skew the analysis in any way. So the consistent
15 -- it's for consistency. It's also for transparency so
16 that our decision making can be examined by somebody
17 outside the study, and I believe it enhances accuracy as
18 well.

19 Q. Let me show you what's marked as slide 60 of
20 defendant's exhibit 4. What is that?

21 A. That's the first page of our code book.

22 Q. What is a code book?

23 A. Well, code book is -- this was a list of the variables
24 in our database.

25 Q. I am going to enlarge it a little bit so we can see

1 it.

2 A. Okay. It's a list of all the variables that were in
3 our database with information -- so the name of the
4 variable, where the information we used to create this
5 variable or code this variable came from in the DCI, what
6 was the original variable number in the Access database and
7 then what -- if it was a recode of a -- of a raw variable,
8 it gives a syntax which is the computer -- basically what
9 -- the recoding directions to the computer to show that
10 when we recoded it, this is how we recoded it. These are
11 the conditions that apply.

12 Q. Let me stop you one second. Let's talk about recoding
13 because the codes that -- data entry people put all the
14 codes into the computer system; is that right?

15 A. That's right.

16 Q. And it creates that large database we've seen?

17 A. Yes.

18 Q. Then you go back in and do recodes?

19 A. Yes, I did.

20 Q. What is a recode?

21 A. A recode is a way to take the raw datapoint and to
22 create a new variable from it that is -- that you can use
23 in the analysis. So it might be a way of combining various
24 characteristics together or creating a variable that's more
25 useful in the analysis so --

1 Q. Let me interrupt one second. Let me show you. We've
2 got one here called senior. Is that a recode?

3 A. Yes.

4 Q. Okay. Tell us what senior is.

5 A. So --

6 Q. What this shows.

7 A. Okay. So we have the ages for many of the jurors but
8 because it might be -- so age might bear on the decision to
9 strike or not. So jurors of certain ages might be more or
10 less attractive to a prosecutor. But if you put in age,
11 you might be -- just as a continuance variable, it may not
12 really capture -- it may not be so much a prosecutor
13 distinguishing between a 40-year-old and a 41-year-old or a
14 42-year-old. It may be more meaningful to think about it
15 in terms of a different category so young or senior or very
16 young. So I would take the variable, age, whatever the age
17 is, and recode it into senior, which is a 01 variable. So
18 if senior equals zero, it means that the person was less
19 than 65, younger than 65. If senior equals one, they were
20 older than 65. So that's the computer -- that's the syntax
21 I used to create the recoded variable.

22 Q. Did you do a lot of these recodes?

23 A. Yes.

24 Q. And all of those recodes are in your code book; is
25 that correct?

1 A. Yes, they are.

2 Q. And your code book has been made part of your report?

3 A. Yes.

4 Q. And it's been given to the state?

5 A. Yes.

6 Q. Now, let me -- let's talk about what happens when
7 you've entered all the data. You've done all of your
8 coding. What do you do at that point?

9 A. Then I start to look at the data and I -- I look at
10 what kinds of variables are frequent, what characteristics
11 -- I call them variables but they are reflecting these
12 characteristics, what things are relatively frequent in the
13 sample, which are relatively rare, just to get a sense of
14 just sort of how these characteristics -- so we decide what
15 data -- what information to collect based on our best
16 information about how people exercise strike decisions and
17 also what is thought important enough to ask about on a
18 questionnaire or in voir dire. But then we want to look
19 and see is this particular variable even ever showing up?
20 I mean is this something that even happens frequently or is
21 it something that's extremely common and then also to look
22 at how it might relate to strikes. Is this the type of
23 variable that seems to have some association with strikes,
24 just looking at those -- at those raw associations.

25 Q. So after you do that, what's your next step?

1 A. So I look at -- so this -- so after I explore the data
2 and get a sense of -- I might do more recodes at that
3 point. I might decide that I -- that one recode is not --
4 is never showing up, for example. I may want to broaden
5 the category that I'm looking at that's more useful or I
6 might decide that perhaps it needs further narrowing. Now,
7 in recoding, the original variables don't go away. The raw
8 information is always there. So it doesn't replace the
9 original variable. It's just a new variable that's
10 creating efficiency. So that process of recoding is -- is
11 part of the process of exploring -- comes about from
12 exploring the data as well. The next step I look at is how
13 does it relate to strikes because I'm interested in things
14 that predict strikes and also to think about the kinds of
15 variables that I want to be sure to control for and in any
16 model that predicts strike behavior.

17 Q. With hardship, I want to go back and you mentioned
18 hardship earlier. Is that a recode?

19 A. The variable hardship?

20 Q. Yes.

21 A. Yes, it is.

22 Q. Tell us about that and why you recoded hardship.

23 A. So there were -- it was a general category for
24 hardship, the one I described earlier where a juror
25 expresses concern or worry that it's going to be hardship

1 to serve, but there's different kinds of hardships.
2 Somebody who would be concerned that they have small
3 children at home or an elderly parent. Somebody else might
4 be concerned because of their job. They are worried about
5 consequences of their job. So in coding, if we have that
6 information -- that more precise information is available
7 to us, I would have -- my coders would code that. But if
8 they all work in the same direction, they all have the same
9 effect -- for example, if all of them make it more likely a
10 person would be struck, then it doesn't make sense to
11 separate them out. It makes sense to group them together.
12 If one made it more likely to be struck and one made it
13 less likely, then you would not want to put them together
14 because they would mask each other's effect. So by coding
15 precisely but then looking at these variables if you make
16 decisions about whether they should be -- you do need to
17 draw the distinction and have finer levels of different
18 kinds of hardship or if they all predict or all associated
19 with strike or not being struck, as the case might be, then
20 it makes sense to recode them into a single variable.

21 Q. Now, let me show you slide 63 which is table 11 and
22 tell us what that is.

23 A. This is a table that shows the -- so for this -- these
24 aren't case level strike rates. These are like the first
25 table we showed where the jurors are aggregated across

1 cases where I excluded from the comparison -- from the
2 analysis any juror or any potential juror who had any of
3 these characteristics. So if a juror had a code reflecting
4 that they had expressed death penalty reservations, they
5 were not included in this. And this is a way of -- it's a
6 simple way of controlling for that factor because -- so,
7 for instance, if death penalty reservations is really
8 what's driving the disparity, if you take out every single
9 person who expressed death penalty reservations, then you
10 would -- if that's what was truly driving disparity, then
11 you would see -- you wouldn't see disparity between black
12 venire members and nonblack venire members.

13 Q. When you took out -- first of all, how many people did
14 you take out of the sample because of death penalty
15 reservations?

16 A. So from the statewide?

17 Q. Yes.

18 A. From the statewide sample, there were 185 that had
19 been coded as having death penalty reservations. We
20 removed them.

21 Q. And the column B there indicates strike rates against
22 the black venire members as opposed to others?

23 A. That's right. So you see that the strike rates did
24 overall drop when those jurors were removed but the ratio
25 remained the same, that black jurors -- eligible black

1 jurors were still being struck at more than twice the rate
2 as eligible nonblack jurors.

3 Q. You say it went down. Why is that?

4 A. Well, as logic would suggest and as our data showed,
5 expressing -- a person who expresses a death penalty
6 reservation is more likely to get struck by the state. So
7 the people who don't express death penalty reservations, we
8 would expect that they would be struck at a lower rate and
9 indeed they were.

10 Q. What about row two?

11 A. I did the same analysis by excluding any juror who
12 indicated that they were unemployed.

13 Q. Why did you choose these categories?

14 A. Well, these seem to be reasons that I often saw in
15 Batson litigation that were when race neutral reasons were
16 proffered in step two, that they seem to be kind of obvious
17 candidates for what might make the potential juror less
18 attractive as a juror for the state.

19 Q. How many venire members were excluded from your
20 analysis based upon -- not your analysis. Let me strike
21 that. How many jurors were excluded for your purpose in
22 table 11 based upon unemployment?

23 A. 25.

24 Q. Does that indicate the strike rates?

25 A. That's right.

1 Q. And the strike ratio is what?

2 A. 2.0.

3 Q. In number -- excuse me, row three, what does that
4 show?

5 A. I did the same thing for a juror if they themselves or
6 a close other or close friend or family member had been
7 accused of criminal activity.

8 Q. And how many people were removed?

9 A. 398.

10 Q. Column B shows the strike rates?

11 A. That's right.

12 Q. And the strike rate ratio is about the same?

13 A. Yes, 2.1.

14 Q. What about column four -- excuse me, row four?

15 A. If a venire member said that they knew a trial
16 participant or they knew a defendant or they knew a witness
17 or an attorney, we would have excluded them.

18 Q. And how many people were excluded?

19 A. 47.

20 Q. And strike rates and strike rate ratio is shown?

21 A. That's right, 2.1.

22 Q. Now, row five, what is that?

23 A. So in this instance, I removed anybody who had any of
24 the above characteristics. So for the first four rows, it
25 was one at a time. So I excluded anyone who had death

1 penalty reservations but left everybody else in. Row two,
2 I excluded everyone who was unemployed and left everybody
3 else in. So row five reflects the relative rates when I've
4 excluded any venire member who has any of those
5 characteristics. So all the people left lacked those
6 characteristics according to our code.

7 Q. And the strike rates went down, didn't they?

8 A. That's right.

9 Q. Why is that?

10 A. Well, it appears that jurors who lacked these
11 characteristics would -- they are less likely to get
12 struck. It seems that they would be more attractive jurors
13 for the state and so the overall rates do go down.

14 Q. But even after you take out all the jurors who have
15 death penalty reservations, who are unemployed, who
16 themselves, close friend or family member had been accused
17 of a crime or knew a trial participant, the strike rate was
18 still 2.1?

19 A. That's right.

20 THE COURT: May I interrupt for just a moment?

21 MR. JAY FERGUSON: Yes.

22 THE COURT: Simply because I want to make sure
23 I'm following, the column on the left, the variables --

24 THE WITNESS: Yes.

25 THE COURT: -- all of those are arguably

1 alternative explanations which might bear on matters
2 related to both strike rates and strike ratios?

3 THE WITNESS: That's correct. That's why we
4 chose them.

5 THE COURT: And all of those falling in the
6 various categories under variables were removed for
7 purposes of trying to determine whether the strike rate
8 ratio was changed in any respect.

9 THE WITNESS: That's right.

10 THE COURT: Go ahead.

11 BY MR. JAY FERGUSON:

12 Q. Finally, column D, what's the P value for each of
13 these analyses?

14 A. Less than one in a thousand.

15 Q. And what does table -- excuse me, slide 64 show?

16 A. This is a graphical depiction of the strike rates that
17 were in the previous table.

18 Q. And slide 65?

19 A. This is a line graph showing the strike rates against
20 qualified black jurors compared to all other qualified
21 jurors when these various factors are taken out of the
22 equation.

23 Q. And just to be clear, this is not a fully controlled
24 regression analysis?

25 A. No, it's not.

1 Q. This is simply you removed these people from this
2 analysis for this purpose?

3 A. That's correct.

4 Q. What does that -- what does that show you?

5 A. This suggests that these particular factors don't
6 explain the disparity because when they are removed from
7 the equation, the disparity is -- stays at about 2, 2.1.

8 Q. All right. We've mentioned regression earlier. Just
9 walk us through the process of how you build a model, what
10 -- how regression affects this analysis and what you did
11 here?

12 A. So the -- well, the first steps in building a
13 regression model is to look at -- as I said before, you
14 want to look at the relation between -- any potential
15 relation between the -- a variable -- a predictor variable
16 and the outcome of interest, in this case, a state strike
17 decision and also the relation between that potential
18 predictor variable and race because that was the -- I mean
19 that was the research question here, whether race has a
20 significant relation to strike decisions. So one of the
21 first things I do is simply just go down the list of my
22 control -- of my -- I call them candidate control
23 variables. I don't know if they should be in a fully
24 controlled model yet but they are candidates. They might
25 bear on the decision to strike. And I look do they predict

1 strike decisions -- state strike decisions and control for
2 race and say if I -- if I control for race and then include
3 this variable, one by one, does it tell me anything about
4 whether or not a person would be struck?

5 Q. Couple things that you mentioned. You used the term
6 predictor variables; is that right?

7 A. Yes.

8 Q. And I believe the judge used the term explanatory
9 variable.

10 A. They're synonymous. A predictor variable is another
11 word for something -- explanatory variable or a control
12 variable.

13 THE COURT: Independent.

14 THE WITNESS: Independent variable. That's
15 right. That's what I was looking for.

16 THE COURT: Yes, ma'am.

17 BY MR. JAY FERGUSON:

18 Q. Now, what -- what does it mean to control for a
19 variable, control for anything?

20 A. Well, you control for a variable in a regression, it
21 allows -- it allows you to sort of -- to separate out how
22 -- how much information this variable can tell you about --
23 how much variance in the outcome it explains. And when --
24 and you can separate them in such a way so that when you're
25 interpreting one variable, you're holding the other

1 constant. So in my ice cream example -- ice cream and
2 drowning example, if you put in temperature, you would say
3 independent -- if you put temperature and ice cream
4 consumption as predictors in drowning deaths as your
5 outcome variable, any -- any regression coefficient or any
6 information you got about ice cream would be holding
7 temperature constant. So if we hold temperature constant,
8 does this tell us anything? Controlling for temperature,
9 does ice cream tell us anything? You would expect it
10 would.

11 Q. You also used the term candidate variabilities. You
12 explained that. You may have said this and I may have
13 missed it. How many total candidate variables did you
14 have?

15 A. I think about 65.

16 Q. So you start with these possible predictor variables,
17 65 or so candidate variables. What do you do with that?

18 A. So as I go through and see if these predictor
19 variables, these candidate variables have any bearing on
20 the decision to strike both independent -- both on their
21 own and controlling for race and I start to get a sense of
22 which variables do seem to have predictive power and they
23 tell us something important about whether or not a person's
24 odds of being struck. Now, some of the variables, because
25 I am -- part of building a model is trying to figure out

1 how broadly or narrowly to do a recode. So I might have --
2 so, for example, in the 400 codes of accused of a crime, I
3 can code it very broadly and say a juror themselves or any
4 close other accused of a crime or just the juror themselves
5 is accused of a crime or not the juror but a family member
6 is accused of a crime. There's different ways to divide it
7 up. And they might all, if separately, predict the strike
8 outcome, that people who have this variable are more likely
9 to be struck, but they don't -- they may overlap so much
10 that they don't independently really contribute much
11 information. That if you put all three in the model, they
12 don't all three belong there. So that part of the process
13 is figuring out which of these is the most explanatory. So
14 if you have a variable that's defined way too broadly, you
15 might find when you put it in the model with the more
16 narrowly defined one, the narrowly defined one will come
17 back a statistically significantly predictor of the outcome
18 and the broader one doesn't really contribute much else or
19 it might be that the broader one is the better variable.
20 It has more predictive power. That's part of the process
21 too. So, for example, the accused of a crime variable, I'd
22 want to see -- I might see each of them in their own being
23 predictive but not know which one, if all -- you know, if
24 all of them belong in the model or if the broader one is
25 better or the narrower one is better and then so I would do

1 that then. That next process is I would let the computer
2 pick which one of the three, the broad one or the more
3 narrowly defined one, if those -- let the computer decide
4 which one has the most predictive power.

5 Q. You started with 65 and then you found out which ones
6 bore a relationship and had predictive power; is that
7 right?

8 A. Yes.

9 Q. How many did you find had some significant
10 relationship to strike patterns -- strike predictability?

11 A. On their own? On their own?

12 Q. Yes.

13 A. So just in isolation, I would say a couple dozen.

14 Q. Okay. So when you figure out a couple dozen have
15 predictive power and predictive strikes by the state's
16 prosecutors, what do you do at that point?

17 A. Well, that's when I start to think about if they are
18 redundant with each other. If that's the -- that's when I
19 begin that narrowing process. If you have several
20 variables that are recodes and base -- they have a lot of
21 overlapping information, I would then proceed to figure out
22 whether these are independently contributing information or
23 if they are just -- there's so much redundancy that they
24 don't both belong in the model.

25 MR. JAY FERGUSON: Okay. Can I have one minute,

1 Your Honor?

2 THE COURT: Yes, sir.

3 MR. JAY FERGUSON: Your Honor, I'm not sure what
4 time the Court intends to close for the day.

5 THE COURT: Right at 5:00.

6 MR. JAY FERGUSON: Okay.

7 THE COURT: Is this a good point for you folks to
8 stop?

9 MR. JAY FERGUSON: It is a good point or I can
10 keep going but I will be in the middle of a model.

11 THE COURT: Rather than interrupt, we've only got
12 about five minutes so we'll stop at this point if that's
13 agreeable. Do you folks have any objections to that?

14 MR. THOMPSON: No, sir.

15 MR. PERRY: No, sir.

16 THE COURT: Thank you. You may step down, Ms.
17 O'Brien. Thank you, ma'am.

18 (Witness leaves the stand.)

19 THE COURT: Scheduling, folks, 9:30 tomorrow
20 morning? I don't know if folks are commuting back and
21 forth but is that agreeable with everybody?

22 MR. THOMPSON: Yes, sir.

23 MR. HUNTER: That's fine.

24 MR. JAY FERGUSON: That's fine.

25 THE COURT: All right. Thank you. We'll see you

1 at 9:30 tomorrow morning. We're at ease.

2 MR. JAY FERGUSON: Thank you, Judge.

3 THE COURT: We stand up on Monday morning and we
4 sit down on Friday so we're good to go. We're at ease.

5 (The hearing adjourned at 4:52 p.m., Monday,
6 January 30, 2012, and reconvened at 9:30 a.m., Tuesday,
7 January 31, 2012.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

STATE OF NORTH CAROLINA)

COUNTY OF CUMBERLAND)

I, SHANNON RANSOM, CSR, RPR, the officer before whom the foregoing proceedings were taken, do hereby certify that said transcript is a true, correct and complete verbatim transcript of said proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of this action.

This 16th day of February, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

NORTH CAROLINA
CUMBERLAND COUNTY

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

STATE OF NORTH CAROLINA,)
)
)
vs.)
)
MARCUS REYMOND ROBINSON,)

)

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

I certify that the transcript of the Racial Justice Act hearing held January 30, 2012, Volume I, consisting of pages 1 through 190, was delivered on February 16, 2012, by emailing the electronically-signed PDF transcript and by delivering a CD-ROM containing the PDF transcript to Judge Gregory A. Weeks, Superior Court Judge; Ms. Bel Lewis and Mr. Rob Thompson, district attorney's office; and Mr. Jay Ferguson, defendant's attorney. I further certify that the transcript was ordered on February 3, 2012

This 16th day of February, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

NORTH CAROLINA
CUMBERLAND COUNTY

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

_____)	
STATE OF NORTH CAROLINA,)	
)	RACIAL JUSTICE ACT HEARING
)	
vs.)	HEARD 1/31/12
)	
MARCUS ROBINSON,)	VOLUME II
Defendant.)	(Pages 191 through 451)
_____)	

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: Calvin Colyer & Rob Thompson,
Assistant District Attorneys,
12th Judicial District; and
Jonathan Perry, Assistant District
Attorney, 20th Judicial District

For the Defendant: Jay Ferguson & Cassandra Stubbs,
Durham County Bar
Malcolm Hunter, Orange County Bar, and
James Ferguson, Mecklenburg County Bar
Attorneys at Law

SHANNON RANSOM
Official Court Reporter
Cumberland County Courthouse
Fayetteville, North Carolina 28302
(910) 733-0826 (cell phone)
sransom1@nc.rr.com

DATE REQUESTED: 2/3/12

DATE DELIVERED: 2/16/12

1 (The following proceedings began in open court.
2 The defendant, defense attorneys and state's attorneys were
3 present.)

4 THE COURT: You folks need a few more moments to
5 set up or we ready to go?

6 MR. HUNTER: Yes. If we could have a few more
7 moments, that would be helpful.

8 THE COURT: Yes, sir.

9 (Court was at ease.)

10 THE COURT: You ready?

11 MR. HUNTER: Your Honor, we are. Thank you very
12 much.

13 THE COURT: Yes, sir. Ma'am, if you will please
14 retake the stand, Dr. O'Brien.

15 MR. COLYER: Judge Weeks, one other thing that
16 came to my attention before Dr. O'Brien comes back to the
17 stand. Yesterday the defense made an opening statement.

18 THE COURT: Yes, sir.

19 MR. COLYER: And the Court did not inquire of the
20 state if we wished to make one at that time. We would have
21 exercised our right to reserve making an opening and we may
22 or may not make one at the time of our presentation.

23 THE COURT: Let me apologize. I assumed that the
24 state would make an opening statement prior to the
25 presentation of its evidence. It turns out I was correct

1 but that's always a dangerous thing. I apologize.

2 MR. COLYER: We may or may not, Judge. I just
3 wanted that on the record in case we change our mind.

4 THE COURT: Your right is certainly reserved to
5 make any opening statement.

6 MR. COLYER: Yes, sir.

7 THE COURT: Yes, sir. Thank you. Doctor, if
8 you'll retake the stand, please, ma'am, and remain under
9 oath. Would you like some water?

10 THE WITNESS: I think I got some. Thanks.

11 (Witness resumes the stand.)

12 THE COURT: Okay. Mr. Ferguson.

13 MR. JAY FERGUSON: May I proceed?

14 THE COURT: Yes, sir.

15 MR. JAY FERGUSON: Thank you, Your Honor. I'm
16 sorry. If you could give me one second.

17 BY MR. JAY FERGUSON:

18 Q. Dr. O'Brien, if I could, I would like to go back and
19 talk about one thing that we discussed yesterday, slide 59.
20 Slide 59 of defendant's exhibit 4, I believe you indicated
21 that was part and parcel of your cleaning document; is that
22 right?

23 A. Yes.

24 Q. And I don't want to go through everything we talked
25 about yesterday but with respect to when there is a

1 disagreement between coders, you indicate a third coder
2 would make a recommendation and then you would make a final
3 decision; is that right?

4 A. That's right.

5 Q. When you made that final decision, did you rely just
6 on what's there within the coding document?

7 A. If -- in a case like this where it's saying this is
8 the person's profession and these are the two codes. I
9 would, but if it was something that had -- required -- that
10 was a judgment call as to an exchange in the transcript, I
11 would then go to the transcript myself and read the
12 pertinent part and make the decision.

13 Q. Okay. Now, I think when we left off yesterday, we
14 were talking about how you build an appropriate model and
15 what you had talked about the candidate variables -- excuse
16 me, the variables went from 65 and then you got a couple
17 dozen candidate variables?

18 A. That's right.

19 Q. What -- how do you determine which candidate variables
20 go into the model and specifically if you could tell us
21 about what statistical level or parameters you set to make
22 them go into the model?

23 A. Okay. Well, in the early stages of building the
24 model, I want to err on the side of caution and not rule
25 out a candidate variable until I am convinced that it

1 really has nothing useful to tell us. However -- so if I
2 consistently see a particular candidate variable coming in
3 with a very high level of significance, meaning, you know,
4 .5 or .3 and it's -- then I can be confident that this is
5 not an important variable. This is something that doesn't
6 tell us much about the outcome of this interest, whether
7 someone was struck or not. However, if a variable was
8 sometimes -- depending on what combination of variables, if
9 it came in at say .2, I wouldn't let go of it just yet
10 because I don't want to prematurely rule out a possible
11 explanatory variable until I can be sure that this is not a
12 useful variable. So that's part of the process of -- so
13 that's why I went from -- gradually the number of candidate
14 variables goes down as I can -- I can see how the variable
15 operates along with other variables. And if something is
16 consistently not statistically significant, then I can be
17 pretty sure that this is not a variable that belongs in my
18 model.

19 Q. And I want to be clear on something. Point -- I think
20 you testified earlier .05 is sort of the general rule of
21 thumb for statistical significance; is that right?

22 A. That's right.

23 Q. So when you're saying .3, you're saying point three
24 zero?

25 A. That's exactly right. And also I mean this is one of

1 those areas where there can be a judgment call by the
2 researcher and the important thing is just to be
3 transparent that you made the judgment call. Sometimes you
4 might leave the variable in even if it's at less than .10,
5 which we would call marginally significant, and just if
6 there's a theoretical reason to keep it in the model. If
7 it tells you if you want to know what potential effect this
8 particular variable has, so that's -- that's a judgment
9 call a researcher might make and the important thing is to
10 just in reporting the results, the model is to be
11 transparent what the significance level is.

12 Q. And did you find as a social scientist and with your
13 experience in legal -- your legal background as well as
14 your social psychology background, build what you
15 determined to be a sufficient model as a predicting model
16 for North Carolina?

17 A. Yes.

18 Q. Okay. And is that shown as table 12 in your report?

19 A. Yes, it is.

20 Q. Let me ask you to identify slide number 67 -- sorry,
21 66 of defendant's exhibit 4, what is that?

22 A. This table shows the variables that were included in
23 the logistic regression model for the statewide 25 percent
24 -- 25 percent of the statewide sample. It lists the
25 variables that are included, a description of the

1 variables, the regression coefficient, the standard error,
2 the odds ratio, the confidence interval for that odds ratio
3 and the P value which has a statistical significance.

4 Q. With respect to column A, if you could just tell us
5 what each of those variables mean and so we will know what
6 they are.

7 A. Okay. The first -- line one is intercept and that's
8 the average risk of being struck, holding all the other
9 variables at constant or at zero. So -- so the intercept
10 tells you that what is this -- a person who doesn't have
11 any of these characteristics, what are their chance of
12 being struck and their odds are .16. So their odds are --
13 the chances of them being struck are .16. So that's a
14 starting point. The second variable is black. One -- so
15 it's black or not black. That's a comparison. Death
16 penalty reservations was based on our coding of the -- of
17 the voir dire and that indicates that a person expressed
18 some reservation about the death penalty, obviously short
19 of being disqualified for cause because if someone was --
20 was so against the death penalty, they were excluded for
21 cause and they wouldn't be -- they wouldn't be in our
22 study. So it's some reservation or ambivalence about the
23 death penalty in general. Single divorced is the person is
24 not married. J accused is that venire member themselves has
25 at some point been accused of a crime. Hardship, that the

1 venire member worried or expressed some concern that
2 serving would impose more than just an inconvenience but
3 some sort of hardship. Homemaker, the venire member is a
4 homemaker. J law enforcement all, that the venire member
5 or close other works in law enforcement. J knew D, the
6 venire member or a venire member's immediate family knew in
7 some way the defendant or had some familiarity with the
8 defendant personally. J knew witness, that the venire
9 member knew what somebody -- one of the potential witnesses
10 in the case. J knew attorney, the venire member knew one
11 of the attorneys in the case. Lean state was a recoded
12 variable. Actually several -- most of them are, that the
13 venire member expresses some view -- makes some statement
14 that suggests that they have beliefs or opinions that tend
15 to favor the state. Post college, that the venire member
16 did some graduate work, went to graduate school beyond
17 college. And very young, a venire member is 22 years old
18 or younger.

19 Q. Okay. For each of the variables now, could you tell
20 us did those variables have some explanatory value and
21 which way? Did it cause the state more likely to strike a
22 juror or less likely to strike a juror and tell us which
23 column you're referring to to make that determination.

24 A. Okay. So I will -- I will refer to column F which is
25 the odds ratio. This tells you what the presence of this

1 factor tells you about the odds that the state would strike
2 a particular venire member with this particular
3 characteristic.

4 Q. As opposed to what?

5 A. The absence of this characteristic. So for black, row
6 two, column G -- column F, the odds ratio of a person who
7 was black as opposed to not black is 2.48, which is very
8 close to the unadjusted disparity you saw. Death penalty
9 reservation, the person who expressed a reservation about
10 the death penalty or some ambivalence about it, had an odds
11 ratio of 11.44 in that the odds of getting struck by the
12 state are not surprisingly much higher than the absence of
13 expressing that reservation. Single or divorced people
14 were more likely to be struck. Their odds were 1.72. 172
15 percent of chance of being -- so it's 1.72. An odds ratio
16 of one would be even odds. That doesn't make a difference,
17 so this is 1.72. A juror member who had previously been
18 accused of a crime had 2.07 times the odds of being struck
19 by the state. If they expressed concern that service would
20 impose a great hardship on them, their odds were 2.99,
21 increased the odds of being struck. Homemakers had odds of
22 2.22 of being struck. A venire member who themselves or if
23 they had a close other who worked in law enforcement had
24 lower odds of being struck. So they were .63 to one, so
25 they were less likely to be struck. A venire member or if

1 the venire member's family member knew the defendant, they
2 had increased odds of being struck, 8.63. If they knew a
3 witness, it was lower, .54, so they have lower odds of
4 being struck. Knowing the attorney -- one of the attorneys
5 increased the odds of being struck, 2.11. And a juror who
6 expressed some view that suggested they favored the state
7 or that they had views that would be -- tends to favor the
8 state or the prosecution had lower odds of being struck,
9 .14. Venire members who had gone to graduate school were
10 more likely to be struck, 2.71. And jurors who were very
11 young, 22 or younger, had odds of 2.51.

12 Q. Seeing the results of this model, how does that
13 compare to just your general legal training? Does anything
14 in here surprise you?

15 A. Well, many of the variables that I would have expected
16 or my own experience observing jury selections and reading
17 transcription of jury selections and reading Batson
18 opinions, for instance, would tell me is that that -- many
19 of these variables are exactly what I would expect that
20 death penalty reservations would increase the odds of being
21 struck in a capital case or having previously been
22 convicted of a crime would increase the odds. Knowing the
23 defendant would increase the odds. I'd expect that some
24 relationship with law enforcement would decrease the odds
25 somewhat and perhaps make a juror more attractive to the

1 state and certainly lean state. I would expect that that
2 would decrease the odds that the state would strike you.

3 Q. Okay. Now, were you able to capture all of these
4 variables for all 1700 jurors in the sample?

5 A. No. We were missing information on some.

6 Q. And what happens when, for example -- let's pick a
7 variable. Number 14 is based on age. If you have a juror
8 in this 25 percent sample that you didn't know their age,
9 what happens to that juror in this model?

10 A. They are dropped from the model. They do not -- their
11 -- that person is just not -- is just dropped from the
12 analysis completely. So they're -- it's not they are
13 considered for the other variables. They are dropped all
14 together.

15 Q. Did you do -- is there any statistical analysis that
16 can be done to help you when there is missing data?

17 A. Sure. The concern with missing data is that it's not
18 missing at random. That there is something -- that certain
19 types of people are the kinds that you would be more likely
20 to be missing data on, and missing at random is not a
21 problem. It's -- the concern is that you're missing in a
22 way that's skewing or systematically biasing who is left in
23 your sample. So this is -- this is a very common issue
24 that social scientists deal with. So one very commonly
25 used method is called multiple imputation where you use the

1 information you have about the other -- about the juror or
2 about the data point rate, the juror in this case. The
3 other information and the computer uses a logistic
4 regression to sort of predict or impute a value for the
5 missing data point for -- based on the other information.
6 And what that tells you is -- we're not relying on that in
7 this. This is not -- this does not reflect the imputed
8 data. But what the imputation process can tell you is if
9 your data are skewed in some way by the missing data. So
10 the computer imputes a value and then you run the model
11 again and see do the patterns change? Do you see -- does
12 it affect the way the other variables come in, and if it
13 doesn't -- if you have the same pattern -- roughly the same
14 pattern you see, then that tells you that your data are
15 missing at random.

16 Q. When you ran them off an imputation model, what
17 happened to the odds ratio for black venire member?

18 A. I believe it stayed -- it was -- it was maybe slightly
19 higher. I don't believe significantly higher but it didn't
20 go down.

21 Q. What does that tell you if the multiple imputation
22 analysis is similar to your regular model?

23 A. Well, that's strong evidence that the extent to which
24 we're missing data, we're missing at random and, therefore,
25 the -- that the sample that we're testing isn't skewed in

1 some way by the cases we're dropping.

2 Q. And finally, column E has the P value. What's the P
3 value for being a black venire member?

4 A. It's less than .001.

5 Q. And, again, did I ask you to calculate the actual P
6 value?

7 A. Yes, you did.

8 Q. And is that shown there on the bottom of slide 66?

9 A. Yes. It's less than one in a hundred thousand or one
10 -- it calculated it as 1.34 in a million.

11 Q. What does that tell us overall about the strength of
12 the finding of venire member being black is an explanatory
13 variable for being stricken?

14 A. It's very strong evidence. This model -- based on
15 this model, with the P value at less than .001, we can
16 suggest that black is a significant predictor of state
17 prosecutorial strike decisions even when controlling for
18 all the other variables in our model.

19 Q. Did you also do the same type of analysis for
20 Cumberland County?

21 A. Yes, I did.

22 Q. And in Cumberland County, I believe you already
23 testified, you didn't do any sampling; is that correct?

24 A. That's right.

25 Q. All 100 percent of the jurors in the 11 cases were

1 coded?

2 A. Yes.

3 Q. Let me show you what is slide 67 of defendant's
4 exhibit 4 and ask if you can identify that, please?

5 A. That's the logistic progression -- the results of the
6 logistic regression model for the venire members in
7 Cumberland County.

8 Q. Now, with respect to column A, the variables, can you
9 tell us which ones are different in this model as opposed
10 to the last one and explain what those are?

11 A. Okay. Unemployed was a significant predictor in that
12 it increased the odds of being struck by the state in
13 Cumberland County. That did not come in as a significant
14 predictor in the statewide model. Accused all instead of
15 juror accused -- so this is an example I think I discussed
16 yesterday so how you can code something more broadly or you
17 can code it more narrowly, and independently they are both
18 -- just the juror themselves accused or juror or close
19 other accused, they do predict strikes. In Cumberland,
20 accused all was a better variable. It had more explanatory
21 power than juror accused so in this case, instead of juror
22 being accused, accused all came into the model. Helping
23 profession which was a recode based on employment where a
24 juror worked in a job which involved helping others such as
25 social worker, teacher, nurse, something along those lines,

1 that was a predictor of being struck by the state. Blue
2 all, that a juror -- a venire member or close other worked
3 a blue collar job. It's a recode based on employment was a
4 predictor of being struck. And here, leans ambiguous
5 instead of leans state came in. And leans ambiguous meant
6 that the juror expressed some view that suggested a bias or
7 trouble following the law but we couldn't confidently code
8 which direction it went in.

9 Q. Okay. And looking back at table 12 on the prior
10 slide, all of the P values there, what's the highest P
11 value?

12 A. Less than .03.

13 Q. And that's down at the bottom for very young?

14 A. That's right.

15 Q. And then looking at slide 13, I see that you have .05
16 and a .10; is that right?

17 A. Right. So generally the cut-off is less than .05. I
18 decided that even though leans ambiguous was less than .10,
19 I thought it was justifiable to put it in the model as
20 marginally significant because it's theoretically
21 important. It -- I think it's useful information. If you
22 take that out of the model, if you run the model without
23 leans ambiguous in it, the results are very similar.
24 Whether it -- whether that variable is kept in the model or
25 not doesn't change the rest of the variable's significance

1 in any way.

2 Q. And I failed to point out what column GCI means. Can
3 you explain that for us, please?

4 A. So that reference to confidence interval. Because
5 these are estimates -- we're estimating the odds ratio, the
6 confidence interval tells you what is -- it's like -- it's
7 really an extension of the P value or the probability that
8 we can be, say, 95 percent sure that the confidence
9 interval is between, say for blacks, 1.5 to 4.4 because it
10 is an estimate and that gives us a range of how -- that
11 gives us -- that gives us a range of the estimate.

12 Q. Let me go back and look at slide 12 and, for example,
13 for black, what's the confidence interval there?

14 A. 1.71 to 3.58.

15 Q. So that tells us then that there is a 95 percent
16 chance that the odds ratio is between 1.71 and 3.58?

17 A. Right. That tells us that there is a 95 percent
18 chance that the odds -- that we have an odds ratio
19 somewhere in that range that -- it's just an extrapolation
20 from the P value and the odds ratio you calculate.

21 Q. And then am I correct in assuming that two and a half
22 percent -- there's a two and a half percent chance that it
23 would be above 3.58 and two and a half percent chance below
24 1.71?

25 A. That's right because the P value of .05, five percent,

1 is split so it would -- there's a chance it's either higher
2 or lower.

3 Q. Now, back to table 13, in Cumberland County, what's
4 the confident interval for black venire member?

5 A. 1.5 to 4.4.

6 Q. And again that's the 95 percent range?

7 A. That's right.

8 Q. So the .10 is the only one that doesn't -- I mean,
9 excuse me, that one straddles. Can you explain the
10 significance of that?

11 A. So even odds is one to one. If you have an odds ratio
12 that's one or close to one, that tells you that this
13 variable doesn't really tell you anything about the
14 likelihood that a person would be struck. So if we had the
15 color of the person's shirt, blue shirt or not, in there,
16 we would expect to see an odds ratio of one or so because
17 we wouldn't -- I would presume that that wouldn't predict
18 whether someone was struck or not. And the odds ratio, it
19 spans -- if it's not specifically significant, where here
20 it's marginally significant, it will span one. But we
21 can't be 95 percent certain that the true odds ratio isn't
22 one because here it goes from .947 to .02.

23 Q. Is that likewise why this one that's at .05, the
24 confidence interval almost touches one?

25 A. Yeah.

1 Q. And if it touched one, that would be a P value
2 absolutely equalling .05, wouldn't it?

3 A. I think so. I -- I have to think about the math
4 behind that.

5 Q. Okay.

6 A. It would tell you that it can't be --

7 Q. We'll go on to another question.

8 A. Appreciate that.

9 Q. When you get models that you think are statistically
10 and -- statistically significant and scientifically valid,
11 do you then, as a social scientist, try to challenge those
12 models in any way?

13 A. Well, part of -- part of building the model -- I mean
14 depends on your research question. So in this case, the
15 research question is does race predict strikes? And what
16 determines whether something comes into the model is, does
17 it predict strike? So that's the criteria for something
18 that comes into the model. However, if the question is,
19 does a particular -- another predictor predict the outcome,
20 even controlling for those things, if you -- if something
21 is a significant predictor and you include it in the model
22 and it explains away the effect of race, that would be --
23 that is something I would look for. So the criteria for
24 something coming into the model is whether it predicts the
25 strike outcome. It's not whether it affects the P value of

1 race. However, if something significant comes into the
2 model and makes the race effect go away, then that would be
3 -- that would suggest that you can't rule out an
4 alternative explanation for race.

5 Q. Did you ever run any model that had variables that
6 predicted the outcome that caused the race of -- race of
7 venire member effect to go away?

8 A. No, I did not. There were no instances where any
9 models had even approached significance, which is why
10 earlier I said that, you know, I was conservative. I
11 didn't want to rule out potential explanatory variables
12 even if they weren't significant. If they were kind of
13 close to it, I wouldn't want to rule them out just yet.
14 There weren't any variables that approached significance
15 that, when included in the model, made the race effect drop
16 out of significant.

17 Q. So if you saw a model with P values over here, say, of
18 less than .5, for example, would you expect to see a model
19 with a P value of .50?

20 A. The only reason you would include that in your model
21 is if you had a theoretical reason to do so. So you
22 wouldn't include a variable in your model that had such a
23 -- that was not even close to statistically significant
24 unless you had a good theoretical reason. So, for example,
25 if you wanted to say this doesn't matter and I want to show

1 you why I think it doesn't matter -- but otherwise, unless
2 there's a theoretical reason to keep it in the model, then
3 you wouldn't keep it in it unless it was -- again, you
4 could quibble with whether it should be .05 or .10 but you
5 wouldn't keep something in that was higher than that unless
6 you had a theoretical reason for that.

7 Q. In making that determination, is that where you draw
8 on your legal training and your methodological training?

9 A. Yes.

10 Q. Are you familiar with other published studies about
11 jury selection bias around the country?

12 A. Yes, there are a few.

13 Q. Can you just name some for the Court?

14 A. There was one -- there was a study done in
15 Philadelphia by David Baldus and colleagues that looked at
16 very similar -- was a very similar study.

17 Q. And not exactly, but generally, how did your results
18 compare to those results?

19 A. They were -- they were very consistent. The -- they
20 found that race predicted strike outcome and many of the
21 variables that we found to be significant predictors such
22 as death penalty reservations and other certain demographic
23 or occupational variables were fairly consistent, not
24 exactly the same variables because part of what variables
25 come into the model depends on the frequency of those

1 characteristics in the population. But -- but largely
2 consistent.

3 Q. What other studies are you familiar with?

4 A. I am familiar with a study that Mary Rose conducted in
5 North Carolina, and I believe she found a disparity -- a
6 racial disparity in jury selection in North Carolina
7 courts.

8 Q. Any others?

9 A. There was a study conducted by the Dallas Morning News
10 where they looked at race in jury selection and were able
11 to control for some of the same variables that we looked
12 at, such as death penalty reservations or I think, I
13 believe, if my memory serves, prior criminal -- prior
14 criminal history and found similar patterns.

15 Q. As a researcher, why do you compare your findings with
16 other studies?

17 A. Well, if I found something that didn't make sense
18 theoretically, right, so -- or was inconsistent with other
19 researchers' findings, I would want to go back and see if I
20 did something wrong. So if I found out, for example, that
21 death penalty reservations reduced the odds of being struck
22 by the state, that would be a red flag that there was a
23 problem with my data because I would want to go back and
24 check that, because it just -- that wouldn't make sense or
25 that somehow being accused of a crime in the past decreased

1 the odds of being struck or if I found something that just
2 was inconsistent with what other researchers had found,
3 that would cause me to go back and look very carefully at
4 what I had done to be sure that I hadn't made a mistake. I
5 mean it could very well be that we might see a different
6 pattern but I would want to be doubly sure in that case.

7 Q. Well, in this context, what does convergence mean?

8 A. Well, convergence -- you are referring to convergent
9 validity?

10 Q. Yes.

11 A. So every study has limitations. Every study -- every
12 methodology has limitations and convergent validity is a
13 way of triangulating to draw inferences. So, for another
14 study that I looked at, was some experimental -- I looked
15 at experimental work looking at how different -- people who
16 look at jurors with the same qualifications but with, say,
17 different races, whether that affects the decision to
18 strike. The great thing about experiments is you have
19 control over causation. You see an effect, you know
20 everything is the same except this one thing you changed.
21 If you see a difference, that's what causes it. But you
22 don't have issues about external validity. You go, well,
23 it's artificial. You know, are people taken seriously?
24 Now, in studies like this, the observational studies, the
25 argument is always correlation doesn't necessarily prove

1 causation. But you have real world data. When you see
2 consistent results from different methods, that's strong
3 evidence that of -- that what you are observing is not due
4 to some limitation of your methodology. So if you --
5 particularly when you combine experimental work and
6 observational work and if they point in the same direction,
7 that's very strong evidence that you're observing something
8 -- you're detecting a real pattern. It's not just chance
9 or fluke. And also it's strong evidence for causation,
10 that race is causing this strike. It's not something
11 that's co-occurring with the strike decision.

12 Q. What do the findings of table 12 and table 13 tell you
13 about North Carolina and Cumberland County?

14 A. Well, it tells me that black -- being black does
15 predict whether or not the state will strike a potential
16 juror even when holding constant or controlling for these
17 other variables that do explain strike decisions but are --
18 that do matter in strike decisions. But when you control
19 for those, you still see the effect which tells us that the
20 effect of race is not simply a compound of something that's
21 correlated or associated with but it's independent of these
22 other factors.

23 Q. Now, one more slide here. Can you tell us what slide
24 68 is?

25 A. This is the output from my statistical program. I did

1 a regression analysis -- similar type of regression
2 analysis in the three death sentence cases that prosecutor
3 Dickson -- that Mr. Dickson prosecuted.

4 Q. And there were how many variables in that regression
5 analysis?

6 A. Four came in as statistically significant.

7 Q. And those are what?

8 A. Race with an odds ratio of 3.3; death penalty
9 reservations, odds ratio of 19.5; that the venire member
10 was in a helping profession, 8.3 odds ratio; and that the
11 juror or the potential juror had a professional or type of
12 occupation and that the odds ratio there was .068. And if
13 you note, there's fewer variables in this model because
14 there are fewer observations. With fewer observations, you
15 would expect fewer explanatory variables to be
16 statistically significant.

17 Q. And that also shows the lower and upper 95 percent
18 confidence interval, doesn't it?

19 A. Yes, it does.

20 Q. Now, Professor O'Brien, based upon your controlled
21 study, this part two study, okay, I'm going to ask you a
22 series of questions based on your controlled study. Do you
23 have an opinion as to whether race was a significant factor
24 in the state's decision to exercise peremptory challenges
25 when seeking to impose death penalties in North Carolina

1 between 1990 and August 2010?

2 A. Yes. My opinion is that it was a significant factor.

3 Q. Do you have an opinion based upon this controlled
4 study as to whether race was a significant factor in the
5 state's decisions to exercise peremptory challenges when
6 seeking to impose death penalties in North Carolina at the
7 time of Marcus Robinson's trial in 1994?

8 A. Yes. I think it was a significant factor.

9 Q. Based upon this controlled study, do you have an
10 opinion as to whether race was a significant factor in the
11 state's decisions to exercise peremptory challenges when
12 seeking to impose death penalties in Cumberland County
13 between 1994 and 2007?

14 A. Yes, I think it was a significant factor.

15 Q. Based upon your controlled study, do you have an
16 opinion as to whether race was a significant factor in the
17 state's decisions to exercise peremptory challenges when
18 seeking to impose death penalties in the three cases
19 prosecuted by John Dickson?

20 A. Yes. I think it was a significant factor.

21 Q. Based upon your controlled study, do you have an
22 opinion as to whether race was a significant factor in the
23 state's decisions to exercise peremptory challenges when
24 seeking to impose death penalties in Cumberland County at
25 the time of Marcus Robinson's trial in 1994?

1 A. Yes, I think it was a significant factor.

2 Q. Now, previously I think you testified there was a case
3 involving John Dickson where he did a part of the jury
4 selection; is that correct?

5 A. Yes.

6 Q. And then someone else -- I believe Mr. Colyer, did
7 part of the jury selection?

8 A. Yes.

9 Q. Did you also do a regression analysis just on the two
10 cases that solely involved Mr. Dickson?

11 A. Yes, I did.

12 Q. And was that statistically significant for black
13 venire members being stricken?

14 A. Yes, as I recall, it was.

15 Q. And you provided that model to the state?

16 A. Yes, I believe so.

17 Q. So whether you include the three involving Mr. Dickson
18 or just the two that solely involved Mr. Dickson, black
19 venire member effect was there statistically significant?

20 A. Yes.

21 Q. Now, based upon your controlled study, do you have an
22 opinion as to whether these disparities seen at the state
23 and county level support an inference of intentional
24 discrimination by prosecutors in their decisions to
25 exercise peremptory challenges of black jurors at the time

1 of Marcus Robinson's trial in 1994?

2 A. Yes, I believe they do support an inference.

3 MR. JAY FERGUSON: Your Honor, at this time, I
4 would move for admission into evidence defendant's exhibit
5 4, slides 1 through 68.

6 THE COURT: Do you want to be heard as to the
7 tender?

8 MR. PERRY: No objection, Your Honor.

9 THE COURT: Without objection, they are admitted.

10 MR. JAY FERGUSON: May I approach the witness,
11 Your Honor?

12 THE COURT: Yes, sir.

13 MR. JAY FERGUSON: Sorry, Your Honor. I
14 misspoke. The PowerPoint slide is defendant's exhibit 3,
15 slides 1 through 68.

16 THE COURT: Defendant's exhibit 3, yes, sir.

17 BY MR. JAY FERGUSON:

18 Q. Now, Dr. O'Brien, as I was referring to -- going
19 through the PowerPoint slides, I repeatedly said
20 defendant's exhibit 4. Do you know that I was referring to
21 defendant's exhibit 3, the PowerPoint?

22 A. Oh, yes, I do.

23 MR. JAY FERGUSON: May I approach?

24 THE COURT: Yes, sir.

25 BY MR. JAY FERGUSON:

1 Q. Dr. O'Brien, let me show you what's marked as
2 defendant's exhibit 6 and ask if you can identify that?

3 A. This is a copy of the report that Professor Grosso and
4 I wrote dated December 15, 2011.

5 Q. Does this report contain the findings that you've just
6 referred to here?

7 A. Yes, except for the last few tables.

8 Q. Okay. I want to make sure -- I'm not going to go
9 through this whole report but I want to make sure your
10 study population is explained in this report; is that
11 correct?

12 A. Yes, it is.

13 Q. And the overview of the database, how it was
14 collected, how it was coded is included in the report?

15 A. Yes.

16 Q. You included how you ensured for data accuracy, didn't
17 you?

18 A. Yes.

19 Q. And it has your state -- statewide analysis, both
20 unadjusted and controlled, doesn't it?

21 A. Yes, it does.

22 Q. It has appendices to the report, doesn't it?

23 A. Yes.

24 Q. If I could, before I get the appendices, if you could
25 turn to page 18 of the report.

1 A. Okay.

2 Q. Now, I showed some of these tables to the Court in the
3 PowerPoint. Are these the same tables?

4 A. I believe so, yes.

5 Q. And then appendix A has a list of the 173 cases
6 involved in the study?

7 A. Yes.

8 Q. And you have provided the state with -- as appendices
9 and as part of this report your coding information and your
10 code book?

11 A. Yes.

12 MR. JAY FERGUSON: Your Honor, I would move at
13 this time for admission of defendant's exhibit 6 into
14 evidence.

15 MR. PERRY: No objection, Your Honor.

16 THE COURT: All right. It's admitted without
17 objection.

18 BY MR. JAY FERGUSON:

19 Q. Now, this is not the first draft of the report you've
20 done; is that right?

21 A. No.

22 Q. I believe you provided one to us in July; is that
23 correct?

24 A. That's right. As I recall, early July of last year.

25 Q. And then a second report in September. I think we had

1 a September 30th deadline for disclosing things to the
2 state; is that right?

3 A. Yes.

4 Q. So this is your third version?

5 A. Yes, it is.

6 Q. I would like for you to tell us a little bit about
7 when you have this massive database, how it kind of -- how
8 you go about cleaning it and correcting errors, that sort
9 of thing, and tell us what's changed from the July database
10 and report to today.

11 A. Okay.

12 Q. Not to today, to December 15th?

13 A. Okay. I don't -- I won't be able to speak to every
14 single change.

15 Q. That's fine.

16 A. But generally about the type of changes we made. So
17 this is a very big database. It has thousands of data
18 points in it and we were extremely careful in ensuring that
19 we had very accurate coding but inevitably, in any study,
20 particularly a study with thousands of data points because
21 thousands of individual jurors but also lots of information
22 coded about each, you're going to have errors. And so
23 because we want to produce as accurate data as possible,
24 when we learned of an error, we corrected it. And so we
25 have made some changes to the database over time that were

1 reflected in these three versions of the report. When we
2 have additional information, we wanted to include that. If
3 we found an error that we corrected, we would make the
4 appropriate change. So an example of where we added
5 information is we realized that the same way that we got
6 race information from board of elections records, we could
7 get age as well. If we had a lot of missing data on age
8 and my -- when I -- when I was first building the model, I
9 noticed that age mattered in strike selection but because
10 we were missing so much, it was dropping out of the model
11 and it was something we thought, well, we can correct this.
12 We can collect data on age in the same way we got race
13 using our board of elections and LexisNexis records. So
14 that was one of the changes we made. We updated the age
15 variable and then, as I expected, age came into the model
16 as a significant predictor.

17 Q. Is everything that we've reported to the Court as of
18 today and as of now based upon your database as it existed
19 on December 15, 2011?

20 A. That's right. So any changes we have made since then
21 -- so any -- any of the errors that we have caught since
22 then, there haven't been too many, but any of the ones we
23 caught, they aren't reflected in this. So this is -- this
24 report is based on the data set that was turned over in
25 early December or mid-December.

1 Q. And I believe the Court imposed a cut-off date that
2 was -- you were required to sort of freeze your database to
3 turn it over to the state?

4 A. That's right. That at some point you have to say this
5 is the -- this is the final database. I mean we're
6 certainly monitoring any errors that we catch that I am --
7 I am using that original database.

8 Q. Between your preliminary report in July and the change
9 to the age and then your report of December 15th, with all
10 the changes that you made, tell the Court what significance
11 that had on the race effect found in tables 11, 12 and 13
12 of your study.

13 A. They had no -- no meaningful -- they had no meaningful
14 impact on race. So, for example, adding age information or
15 including age in the model in the last generation of the
16 report did not -- it will change things at the decimal
17 level but it didn't change -- the odds ratio is roughly the
18 same. The -- that effect is extremely stable.

19 Q. Now, since December 15th, I believe the state has
20 filed some reports and there's been some -- you've caught a
21 few errors; is that correct?

22 A. Yes.

23 Q. Can you tell the Court about that?

24 A. So there were some -- there were a few race coding
25 errors that were caught by the state and so we have -- so

1 we've changed any errors we had on race. I don't believe
2 there was more than a few and there were some differences
3 in how certain descriptive characteristics were
4 characterized. So at some of the state -- the state
5 affidavits that I reviewed mentioned for certain jurors
6 that they had expressed death penalty reservations that --
7 and so I checked those against how we had coded them. We
8 were largely consistent. To the extent we weren't
9 consistent, where a prosecutor cited -- again, death
10 penalty reservations was the most commonly cited one. To
11 the extent there was a discrepancy that we hadn't coded
12 someone having death penalty reservations but they cited
13 that, I created a recoded variable, a different version of
14 the variable where I would say -- without calling these
15 errors because according to our -- some of them --
16 according to our coding protocol were coded correctly under
17 our coding protocol. But to be conservative, I recoded
18 those defendant -- or those venire members as having had
19 death penalty reservations to create a new variable where I
20 changed death penalty reservation coding to reflect the
21 state's assertion in the affidavit and then reran the model
22 to see if it made a difference. And the effect of race in
23 those cases was still at about two. It would drag down a
24 little bit because they only examined -- I only got
25 information about the black jurors who were struck so I

1 only changed it as to black struck jurors because those are
2 the only ones pointed out to me. So I would expect that
3 would drive down race effect a little bit but it was still
4 slightly over two.

5 Q. Is there any -- knowing all the changes you've made
6 since September -- excuse me, since July to today, is there
7 any material effect on race from your findings in tables 11
8 through 13?

9 A. No, there hasn't been.

10 Q. Previously I asked you, you know, how was this case --
11 how was this study funded and you -- you indicated I
12 believe some nonprofit foundations and I want to go into
13 that a little bit so the Court has a clearer picture of who
14 paid for the study and if you could just tell the Court
15 some of those foundations and nonprofits.

16 A. Okay.

17 Q. And about how much if you recall.

18 A. Okay. And my memory is a little -- isn't great on
19 this but we started out with a hundred thousand dollars
20 from CDPL.

21 Q. What is CDPL?

22 A. Sorry. Center for Death Penalty Litigation to get the
23 study rolling, so received 100,000 from CDPL. And we also
24 applied and received grants from a number of private
25 foundations such as Open Society Institute, Butler

1 Foundation. I know they're in the report but I just -- I
2 don't remember specifically the other foundations. I think
3 perhaps Tides Foundation.

4 THE COURT: I'm sorry?

5 THE WITNESS: Perhaps Tides Foundation was one.

6 THE COURT: Okay.

7 MR. HUNTER: It's not Tye's foundation, Your
8 Honor.

9 THE COURT: Yes, sir.

10 BY MR. JAY FERGUSON:

11 Q. But whatever those foundations are, the state has
12 access to that?

13 A. Yes.

14 Q. About how much money has been raised for the study?
15 When I say study, that includes the whole charging and
16 sentencing aspect that's being litigated in other counties;
17 is that correct?

18 A. Yes, it's both.

19 Q. About how much?

20 A. I think it was about 600,000.

21 Q. And did any of that money from CDPL and from the
22 private foundations come from the taxpayers of North
23 Carolina?

24 A. I don't believe so.

25 Q. And did you -- who was the money paid to?

1 A. It went to the Michigan State University College of
2 Law.

3 Q. Where did the money go? How was it spent generally?

4 A. It was spent primarily on labor cost, to pay for my
5 coders to do their job, equipment, scanners, computer
6 equipment, anything we needed for data collection.

7 Primarily it was labor cost.

8 Q. Are you a salaried employee at Michigan State?

9 A. Yes, I am.

10 Q. Can you tell the Court how much money you personally
11 received from these foundations and nonprofits for doing
12 the study?

13 A. Zero.

14 MR. JAY FERGUSON: That's all the questions I
15 have, Your Honor. Thank you.

16 THE COURT: Any cross-examination and, if so, who
17 will be doing the cross-examination?

18 MR. PERRY: That will be me, Your Honor.

19 THE COURT: I apologize. For the record, if you
20 will state your name again.

21 MR. PERRY: Yes, sir. Jonathan Perry from the
22 Union County District Attorney.

23 THE COURT: Yes, sir. You may go forward with
24 your cross.

25 MR. PERRY: Thank you, Your Honor.

CROSS-EXAMINATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BY MR. PERRY:

Q. Let's see. Professor O'Brien, let me just start with something Mr. Ferguson asked you. You said you didn't receive any money?

A. Personally, I did not.

Q. Okay. Now, I'm going to go back to your economics days. Did you get any utility out of doing this study?

A. It's great research.

Q. Um-hmm.

A. And as a professor, it's good to have good research projects.

Q. Sure. I mean it gives you some ammunition in the fight for tenure and advancement and all that kind of stuff; is that correct?

A. Right. I am expected to do research and write papers.

Q. This fits in with research you've done before on different topics?

A. Yeah.

Q. And let me go back and I want to ask you a couple more specific questions about some of the things you did in the study. Going back to the sampling issues, who was it that actually decided what sample was to be taken?

A. For the study population?

Q. Yes, ma'am.

1 A. You mean the 173 cases?

2 Q. Um-hmm.

3 A. It was something that Professor Grosso and I
4 considered and we did discuss this with the attorneys at
5 CDPL.

6 Q. Okay. Was that anything that professor -- or Dr.
7 Woodworth -- did y'all have any discussion with him as far
8 as the identification of the samples?

9 A. I believe so. I believe we consulted with him on a
10 number of issues.

11 Q. Okay. And just while I'm asking, he was a consultant
12 that you guys used to sort of come up with the research
13 design and those kinds of things?

14 A. We did consult with him to lend statistical analysis
15 issues, yes.

16 Q. Okay. So for the sample selection, it was Professor
17 Grosso and you and some attorneys from CDPL?

18 A. We did discuss it with them, yes.

19 Q. What was that rationale for that particular 173 case
20 selection?

21 A. That they are currently inmates on death row at the
22 time of the study.

23 Q. When you and Professor Grosso and the attorneys were
24 having this discussion, and I think you addressed some of
25 this yesterday, but did you consider including the other

1 capital trials that were going on?

2 A. Other.

3 Q. In other words, folks who didn't end up on death row?

4 A. We -- we talked about -- yeah, we talked about that.

5 We considered the issue a generalized ability to consider

6 the question of what was the population primarily of

7 interest and what are any potential issues as to

8 generalized ability to the extent that it's necessary to

9 generalize beyond these cases.

10 Q. Um-hmm.

11 A. We did consider that, yes.

12 Q. Was that a discussion that you and Professor Grosso

13 had or was that something the attorneys were involved in or

14 is that just mainly the two of you?

15 A. Well, we -- primarily when we discussed it with the

16 attorneys, it had a lot to do with the availability of

17 information. At the time, it wasn't clear to us, because

18 the quality of the study does depend on the quality of the

19 information we got, so we did discuss with them the

20 feasibility of getting the information we needed.

21 Q. As an empirical legal expert, which, you know, the

22 defense has talked about, had you ever done any empirical

23 legal studies from North Carolina databases?

24 A. No, I haven't.

25 Q. So this was your first experience with collecting data

1 from North Carolina?

2 A. That's right.

3 Q. So that helped to talk to them about what information
4 was available?

5 A. Yes.

6 THE COURT: Mr. Perry, for purposes of
7 clarification, when you're referring to other cases, you
8 are referring to other cases where defendants were charged
9 capitally but no death sentence was imposed.

10 MR. PERRY: Yeah. Let me clarify that, Judge.

11 THE COURT: Yes, sir.

12 BY MR. PERRY:

13 Q. Just to be clear, that is what we're talking about
14 because with this part of the study, it's a little
15 different from the charging and sentencing study, correct?

16 A. Absolutely, because the outcome of interest -- the
17 outcome of interest is different so it's different
18 considerations.

19 Q. And in terms of the charging and sentencing study, the
20 population was different as well, correct?

21 A. Yes.

22 Q. And the population for the charging and sentencing
23 study actually included what types of cases?

24 A. It includes cases where defendants got death, had a
25 penalty trial that didn't get death or got life and cases

1 that were death eligible so could have been charged
2 capitally but weren't.

3 Q. Okay. So much broader than the jury selection study?

4 A. Right, because there the outcome of interest is what
5 was -- did the person get charged capitally and also, if
6 so, what was the sentence given. So because the outcome of
7 interest was different, we had -- we would want to include
8 those different types of cases.

9 Q. Okay. And now for the -- in going back to the sample
10 for the jury selection study, with the 173 folks on death
11 row, that's not a random sample, correct?

12 A. It's not a random sample of capital cases.

13 Q. Right. Okay. Why is that true? Why is it not a
14 random sample of capital cases?

15 A. Because it doesn't include cases where people got a
16 death sentence and were executed or got a death sentence
17 and had it reversed on appeal or had a penalty trial but
18 got a life sentence.

19 Q. Okay. So it didn't include executed defendants?

20 A. That's right.

21 Q. And it didn't include others removed from death row
22 for various other reasons?

23 A. That's right.

24 Q. Now, the 173 cases and trials or proceedings, is that
25 what you considered to be relevant for RJA purposes? Did

1 y'all talk about that specifically?

2 A. Well, so part of the study design was considering what
3 -- what does the RJA apply to? What's the population of
4 interest under the RJA? That was part of the
5 consideration.

6 Q. And now, had you had any experience or familiarity
7 with the RJA before becoming involved with this study?

8 A. No. I became involved in the study right before its
9 passage.

10 Q. So again that was something specific to North Carolina
11 that you didn't have any prior experience with, correct?

12 A. Right.

13 Q. All right. And you said you considered carefully
14 whether to include cases where the outcome was a life
15 sentence but those were not included?

16 A. We considered whether or not having those -- if there
17 was any problems -- if there was anything about including
18 these 173 cases that would give us a skewed picture of the
19 jury selection process.

20 Q. Okay. And the rationale for that -- I want to make
21 sure I understand correctly -- was the behavior of the
22 prosecutors was equivalent in the one subset of cases where
23 life sentences were received and the other subset where
24 folks ended up on death row?

25 A. Well, that they were -- yeah, that they were -- that

1 there was no reason to think that it was -- that they were
2 different enough in those cases that it would skew the
3 results, that they are not markedly different. So the
4 example in the charge and sentencing study, if what you
5 want to know is, did they get death or life, then you have
6 to include death and life cases. In this instance, the
7 question is, are there any reasons to think that cases
8 where somebody got life or got death and were later
9 executed or got death and were later released from death
10 row and sent into -- or got a lesser sentence, is there any
11 reason to think that jury selection in those cases would be
12 systematically different in such a way that this -- that
13 this population is a skewed sample. And then the other
14 question is, does -- what is the population of interest,
15 right? If these are the cases we care about, if these 173
16 cases are the population of interest, then that's not a
17 problem. But to the extent we want to be able to
18 generalize, is there any theoretical reason or practical
19 reason to think there is a marked difference in strike
20 patterns because they are all capital, right? So we did
21 think about that quite carefully.

22 Q. Okay. I mean because part of your focus was on the
23 decision points in the capital litigation process. This is
24 a subset of that, right, the jury selection part of it?

25 A. Well, and charging and sentencing study. But in this

1 study, the outcome of interest is strike decision.

2 Q. Right. But what I'm saying is you considered the
3 decision making process as far as the jury selection
4 process?

5 A. Well, we considered whether the types of cases that
6 ultimately ended in death would have a different kind of --
7 whether there would be any -- would prosecutorial behavior
8 be different in those cases than in cases where they didn't
9 get a death sentence or where they got a death sentence and
10 the person then was executed or those other examples.

11 Q. Do you know offhand or have a rough estimate of how
12 many cases were talked about that weren't included? In
13 other words, for your time frame, from 1990 to 2010, do you
14 have any idea or recollection about how many cases that
15 North Carolina had executed folks? In other words, how
16 many people were missing?

17 A. Well, I don't recall off the top of my head how many
18 in each category. I believe -- and I think it was about
19 350 capital cases that ended in the death sentence. I
20 don't know what percentage of those ended in execution or
21 natural death or removal from death row and that perhaps
22 about 300, 350 ended in life.

23 Q. But, again, there was no theoretical reasons to
24 exclude those. It's more a practical reason, correct?

25 A. Yes. We -- it was a judgment sampling.

1 Q. And the same for the other cases, I mean not just the
2 folks who ended up executed but the folks who came off
3 death row for other reasons?

4 A. That's correct.

5 Q. Again, practical consideration, not theoretical
6 consideration?

7 A. Right. So it was a practical consideration with --
8 mindful of the potential consequences of it. That's right.

9 Q. No theoretical reason to exclude those cases from
10 inclusion in the model?

11 A. Well, there might be a legal reason but the legal --
12 it's more of a legal question of what the population of
13 interest is.

14 Q. What do you mean by that?

15 A. Well, whether under the RJA, if the RJA applies to the
16 -- I think it -- you can think about it in terms of what's
17 the population of interest under the RJA. Are they people
18 who can avail themselves to it or is it all capital trials?

19 Q. And that's a good point I wanted to ask you about
20 because we're talking about two different things in one
21 way. We're talking about sort of RJA related cases and
22 then we're talking about the universe of cases if you were
23 interested in understanding prosecutorial behavior in
24 strike decisions, correct?

25 A. In capital cases, that's right.

1 Q. And those were actually two different -- two different
2 populations?

3 A. Yes.

4 Q. Okay. Let me ask you another question about the --
5 sort of the framework of what we're looking at. What did
6 you think the relevant time period was for the study?

7 A. Primarily 1990 to 2010.

8 Q. Um-hmm.

9 A. Because we define the population as -- we define our
10 population in studies as at least one proceeding from every
11 current death row inmate, that meant there was one case
12 that preceded -- that did not -- that was 1985 I think.

13 Q. Okay.

14 A. But everything else was 1990 to 2010.

15 Q. So all but one was within that 20-year period of time?

16 A. That's right.

17 Q. And again that was more RJA based determination than
18 anything else. In other words, it was those 173 cases who
19 are on death row and who are still on death row, right?

20 A. Right.

21 Q. What do you think is the proper time period for the
22 Marcus Robinson case?

23 A. I would say -- well, I don't quite understand when you
24 say what's the proper time period.

25 Q. Again let me clarify. If -- your study is to try to

1 identify what's going on when prosecutor strike jurors,
2 right?

3 A. Um-hmm.

4 Q. So let me use some methodological stuff. If you're
5 doing a cross-sectional analysis of what's going on, what's
6 the appropriate time frame if you want to take a
7 cross-sectional analysis of Marcus Robinson?

8 A. Well, I'm not -- I'm not sure -- I'm still not sure I
9 understand. I mean part of what you look at is how much
10 variability there is over time and whether it's something
11 that, you know, you have differences in trend -- if you
12 have a trend over time or the strike rates go up or down or
13 if they're all over the place, that's something you
14 consider. So the more consistent -- you have very
15 consistent patterns that don't change much over time, you
16 might -- or how many cases occur around -- so I'm not sure
17 exactly how to answer that question. I don't know if
18 you're asking me a legal question or a methodological
19 question.

20 Q. What would the difference between the two be?

21 A. Well, I think there is a legal question for the judge
22 to figure out is, what is the -- what does at the time of
23 the defendant's trial mean under the statute. As far as
24 methodologically, some of it depends on just how many
25 cases. You can't -- if you chop something up into data

1 that's small enough, you don't have data points. So part
2 of the question is how many -- do you have enough
3 information points to say something meaningful about a time
4 period and --

5 Q. Well, let me put it in that sort of term or phrase.
6 How many information points do you think would give you a
7 good picture of what was going on around the time of Marcus
8 Robinson's case?

9 A. You mean how many -- like how many cases?

10 Q. Um-hmm.

11 A. I have to think about that. So part of it depends on
12 the magnitude of the effect too so the subtler the effect
13 -- so if you have a very subtle disparity, you would need
14 more information to see that it's significantly
15 significant, that it's not due to chance. In this
16 instance, we have a magnitude of a very -- statistically a
17 very big disparity. So I would think that, you know, a few
18 years around that time period would probably give you
19 enough information given the disparity that we observed.

20 Q. And you say a few years around -- you're talking
21 before, after and -- I mean, on both sides of Marcus
22 Robinson's trial? Does that matter? I mean would it be
23 before or after?

24 A. I -- I don't necessarily know if it matters whether
25 its's evenly distributed before and after, if the time

1 period includes it. It's -- sorry, so I think it has to
2 include it but I think as long as you have enough data
3 points and you have a sufficiently -- you have an effect of
4 sufficient magnitude, then -- and part is, you know, the
5 statistics will tell you, right, if you're getting -- if
6 you have enough power and you -- if you don't have enough
7 power, you may not get a P value that's less than .05 so it
8 becomes kind of moot when you have enough observations to
9 build a model that gives you P values and gives you
10 theoretically sensible predictors that makes sense. Then
11 you have enough. Then you have enough power.

12 Q. Sure. I mean the more observations you have, the
13 better off your analysis is, right?

14 A. Yeah. But it matters less when the magnitude of your
15 effect is large. So when you have a -- when you have very
16 subtle effects, if you were talking about a few percentage
17 points difference, then you do need a lot of power because
18 you just don't -- you don't know if it's just random noise.
19 The larger the magnitude of the effects, the less power you
20 need to say with certainty that this is not due to just
21 random noise. We just happened to pick these cases and,
22 you know, if we had a larger sample, we would not see this
23 pattern.

24 Q. Sure. So you would say it was the combination, the
25 magnitude and number of observations?

1 A. That's the -- yeah, I mean that's the topology.

2 Q. Right. And did you talk to anybody else about what
3 the relevant time frame might be? You said you had
4 discussions about the population. Did y'all have similar
5 discussions about the time period?

6 A. Well, because we collected the data for these 173
7 cases in that 20 plus one year time period, once you've got
8 that information, you can slice it up any way you want,
9 right. So that's -- once you have the information, if
10 later on, say, your expert wants to look at a different
11 time period and they have my data set, they can do that.
12 So that's something -- you just want to make sure you cover
13 your bases and get enough information so that if someone
14 says, well, I want to look at it this year, can you do
15 that. Our data isn't limited -- they aren't limited in
16 that way.

17 Q. Right. Okay. Was there any discussion -- and again
18 this is going back to the legal question, not necessarily
19 the methodological question. Was there any discussion
20 about what the legislature might have intended as far as
21 the RJA in terms of time frame?

22 A. There might have been. I don't specifically recall
23 that though.

24 Q. Nothing that jumps out?

25 A. I just don't have any recollection of that in

1 particular.

2 Q. Is it fair to say that was not an important
3 consideration?

4 A. I -- no, I don't think it's fair to say. I don't
5 recall. I don't recall that specific discussion.

6 Q. Okay. Did y'all ask? I mean was that something
7 necessarily you were interested in?

8 A. I'm not sure exactly what you mean by what the
9 legislature intended as opposed to just trying to interpret
10 what the statute requires.

11 Q. I guess what I'm asking is, when you had the meeting
12 with the folks from CDPL, did you use them as resources to
13 ask about, you know, what the heck is the RJA case
14 actually?

15 A. Oh, sure. In trying -- so like I said yesterday, part
16 of what I try to bring to the table is what forms
17 methodology is also some understanding of the legal issue
18 so I definitely would -- I would definitely talk to them
19 about the law in North Carolina to better understand that.

20 Q. Right. So, again, it wasn't something you were
21 necessarily familiar with?

22 A. Not specifically, no. It was a brand new statute.

23 Q. Everybody was learning it?

24 A. Everybody was learning it, right.

25 Q. Let me ask you some questions about some of the main

1 things you were talking about. You were talking about jury
2 selection rates?

3 A. Right.

4 Q. Were there any selection rates calculated for the
5 defense?

6 A. Yeah. Those numbers are -- those numbers are in my
7 database.

8 Q. Those are in your report?

9 A. No. They are not in my report.

10 Q. Okay. But they are in the database?

11 A. They are.

12 Q. Okay. Do you know what the selection rate of black
13 jurors by defense attorneys was?

14 A. I don't recall it off the top of my head but I do
15 recall -- I did recall looking at those, yes.

16 Q. Okay.

17 A. And they were lower -- they were lower compared to
18 non-black counterparts, yes.

19 Q. The selection rates?

20 A. When you say selection rates, just to make sure we're
21 using the same terminology --

22 Q. Yeah.

23 A. -- I mean the relative strike rate. So how many you
24 struck compared to how many you could have struck, is that
25 what you mean?

1 Q. Just to be really clear --

2 A. Okay.

3 Q. -- when I say selection, I'm more talking about
4 retention rates really.

5 A. Seated rates.

6 Q. Seated rates.

7 A. Okay.

8 Q. Did y'all calculate or look at the seated rates?

9 A. Yeah.

10 Q. Okay. And is that in your report?

11 A. Unh-unh.

12 Q. Is that in the database?

13 A. Yes, it is.

14 Q. Do you know what the seated rates were for black
15 jurors?

16 A. I believe as I recall -- and I apologize. I don't
17 have these numbers on the tip of my fingers. I believe
18 they were that the seated rates were roughly comparable to
19 their -- their representation in the population of
20 potential jurors.

21 Q. Okay.

22 A. That they weren't significantly different.

23 Q. So the seated rates were comparable?

24 A. I think they were slightly lower but I don't believe
25 they were significantly lower.

1 Q. But now the prosecutors strike rates exhibited a
2 disparity, correct?

3 A. That's correct.

4 Q. In other words, more black jurors were struck than
5 white jurors?

6 A. Yes.

7 Q. So if it -- if the seated rates ended up about the
8 same, as part of your data, did it show that actually
9 defense attorneys struck more white jurors than black
10 jurors?

11 A. Yes.

12 Q. So again that's in the database?

13 A. It is absolutely in the database.

14 Q. But not in the report?

15 A. That's right.

16 Q. And I believe Mr. Ferguson asked you about some of the
17 other studies you had looked at or at the very end of his
18 questioning was asking about other studies that had
19 attempted to do similar things. You had said -- I think
20 you were familiar with studies done like this by David
21 Baldus?

22 A. That's correct.

23 Q. And then another study -- I didn't catch it. I think
24 you said Mary Rose?

25 A. That's right. I think she did a study -- I can't

1 quite recall when it was published where she observed some
2 noncapital murders trials in North Carolina.

3 Q. Noncapital?

4 A. Noncapital.

5 Q. Noncap. Do you recall about when that was just
6 roughly?

7 A. I don't. I think maybe 2005 but don't rely on that.

8 Q. This -- this decade?

9 A. It was, yeah -- well, last decade.

10 Q. Last decade now. And then was the study done here in
11 North Carolina?

12 A. Yes.

13 Q. Do you know where it was, statewide or --

14 A. I believe it was in one county.

15 Q. One county. Were you familiar or do you recall what
16 the seated rates were in those studies?

17 A. No, I don't.

18 Q. Why didn't -- why didn't you calculate as part of your
19 final report the defense selection rates?

20 A. Because the question that I was asked to investigate
21 in this report was prosecutorial strike rates in these
22 cases.

23 Q. So again, it's sort of driven by your research
24 question?

25 A. Yes.

1 Q. Did -- and I may have missed this. Did you note in
2 any way jurors who had been moved to be struck for cause?

3 A. No. We -- I would like to do that sometime in the
4 future. I think that would be another interesting research
5 question.

6 Q. So we could call it attempted -- attempted strikes for
7 cause, right? That's what I'm asking.

8 A. Sorry. Maybe I didn't follow your question. What do
9 you mean by attempted strikes?

10 Q. So if the state stood up and said I move to strike
11 juror X for cause and that was denied?

12 A. And then they struck them peremptorily.

13 Q. Well, I mean did y'all identify the first part of
14 that?

15 A. No.

16 Q. But the second part?

17 A. If -- whether they were struck or not.

18 Q. Because that was part -- I mean that was the
19 peremptory challenge, right?

20 A. Exactly.

21 Q. So you got that?

22 A. Yes.

23 Q. But you don't have the attempted strike for cause in
24 your model?

25 A. No.

1 Q. But you did collect some of the data for the strikes
2 for cause, correct?

3 A. When we first started this, we thought we might be
4 able to do that as well. But it became clear early on that
5 we would not have enough time and resources to do that.
6 And so we very quickly limited our -- very early on in the
7 process said -- I mean the research question is the
8 exercise of peremptory strikes.

9 Q. Right.

10 A. We wouldn't have the luxury of looking at that at this
11 time. It's on the DCI where I say was this person excused
12 for cause and became a good way to help me clean to make
13 sure that people weren't -- if a coder accidentally put
14 someone in struck for cause, that would be another way for
15 me to check -- check their work.

16 Q. So again sort of a more practicable consideration is
17 time frame?

18 A. Well, and the research question is strike rates and
19 not removal for cause. That would be an interesting
20 research question but a different one.

21 Q. What time frame were y'all working with?

22 A. You mean --

23 Q. Did you know what your sort of target date was to get,
24 you know, at least a rough draft or a rough picture of this
25 stuff all put together?

1 A. So the deadline for litigants to file under the RJA
2 was in August of 2010 and so we sought to code the strike
3 and race information in order to calculate the strike rates
4 -- the raw unadjusted strike rates for all of those cases
5 so that if there was evidence of a disparity, that would be
6 available to potential claimants.

7 Q. So that was kind of determined by the legal necessity
8 at work?

9 A. Yes, it was.

10 Q. And just so I'm clear, in the calculation of the
11 selection disparity, you didn't include the jurors who were
12 not eligible to be struck by the state, correct?

13 A. That's right.

14 Q. And why was that?

15 A. Because the question is about strike decisions and so
16 if a person was not eligible to be struck -- because there
17 weren't that many instances of it. I think maybe 20 out of
18 over 7400 that say the state had run out of peremptories.
19 There is no decision point there. There's no decision to
20 be made so there's nothing -- there's no information there.

21 Q. Doesn't add information to the model, right?

22 A. Right. Because it doesn't tell us anything about the
23 exercise of strikes.

24 Q. But those were included in the raw disparities,
25 correct?

1 A. No.

2 Q. They were not?

3 A. Well -- no, no, no, they were not.

4 Q. Okay. In going back to the attempt to get at what the
5 prosecutor was doing, the example, Rodney Foxx --

6 A. Right.

7 Q. -- the attempted strike, that was included because?

8 A. Because the -- the prosecutor struck and the juror was
9 ultimately seated as a result of a successful Batson
10 challenge. But because the question is whether the
11 prosecutor struck or not, that is -- the outcome of
12 interest is struck -- is the strike decision.

13 Q. So the attempt conveys as much information to you as
14 the actual strike would?

15 A. For that question because -- well, that's the outcome
16 of interest, were they struck or not?

17 Q. Right. Now, the next thing you did in your report was
18 to try to control for other factors, right, other things
19 that might explain what's going on with all these strike
20 decisions?

21 A. Yes.

22 Q. And you tried to identify factors that might be
23 correlated with race, correct?

24 A. Well, we tried to identify any factors that we thought
25 could potentially be correlated with strike decision. So

1 any -- so any factor that we thought might predict a strike
2 decision and what that conservative -- not only tells us a
3 little bit more about strike decisions but also to the
4 extent any of them were correlated with race, their
5 potential alternative explanations for the racial disparity
6 we observed.

7 Q. Yeah. Let me focus in just -- did you try to identify
8 factors that were correlated with race? I guess that's
9 what I'm asking.

10 THE COURT: And again I apologize for the
11 interruption, but for purposes of clarification, you are
12 referring to other alternative explanatory variables that
13 were considered?

14 MR. PERRY: Yeah. And this is more -- this is
15 more of a right after the bat looking at this, Your Honor.

16 THE COURT: Yes, sir.

17 MR. PERRY: What I'm asking about is --

18 THE COURT: Yes, sir. Go ahead.

19 MR. PERRY: Well, that's -- based on the
20 disparity --

21 THE COURT: Yes, sir.

22 MR. PERRY: -- in and of themselves --

23 THE COURT: Okay.

24 MR. PERRY: -- would you look for some readily
25 apparent correlated factor that might be at play?

1 A. Sure.

2 Q. So if -- and let me give you an example. So, for
3 example, the opposition to the death penalty on the part of
4 potential black jurors.

5 A. Yes.

6 Q. Is that -- is that something you consider?

7 A. Absolutely because it's -- it's very relevant to
8 strike outcome and there is evidence to suggest it
9 correlates with race.

10 Q. Sure. I mean you've got the death penalty reservation
11 variable in your model?

12 A. Yes.

13 Q. That's part of what that's trying to capture?

14 A. Absolutely. That's what it is trying to capture,
15 right.

16 Q. Were you familiar with sort of the prevalence of
17 opposition to the death penalty on the part of potential
18 black jurors in North Carolina?

19 A. Yes.

20 Q. Do you know roughly what it is?

21 A. I believe it's about two to one, isn't it? I -- I
22 recall it from Dr. Katz's report.

23 Q. That's something you looked at?

24 A. Oh, absolutely. We would not -- I mean that's clearly
25 important information in predicting strike decisions. Of

1 course, we would include it. It comes into every model I
2 ran.

3 Q. And since you brought it up, you've had a chance to
4 look at Dr. Katz's report, correct?

5 A. Yes.

6 Q. So one of the other things that could be correlated
7 with race, what about the higher imprisonment rate?

8 A. Right.

9 Q. Or the higher probation rate?

10 A. Sure.

11 Q. Those are things you considered as well?

12 A. Well, clearly. I mean they are in the model.

13 Q. They are incorporated into your model?

14 A. Absolutely.

15 Q. So they could fairly bear on the same outcome. In
16 other words, they could also impact the strike?

17 A. Right, and they do.

18 Q. Now, and you made -- and I am going to skip tracks
19 here. I'll ask you a couple questions about the data
20 collection instruments.

21 A. Okay.

22 Q. Because the goal of research is to get good quality
23 data.

24 A. Yes.

25 Q. Right. I mean if you don't have good quality data,

1 isn't it fair to say that your, sort of, results and the
2 implications from your results won't be good if you don't
3 have good quality data?

4 A. Yeah. I mean the quality of the data is extremely
5 important. If you have poor quality data, you -- doesn't
6 mean that the results are -- the outcome -- the differences
7 that you observe are meaningless but you would want to take
8 that into account in any inferences you drew.

9 Q. I mean you want to address shortcomings in the data
10 you collected?

11 A. Generally, sure.

12 Q. And I think we mentioned this a little bit but can you
13 tell the Court exactly where the information in the DCI's
14 came from?

15 A. They came from transcripts, juror questionnaires and,
16 well, race can often -- in some cases, came from public
17 records and age in some cases came from public records.
18 But we relied on information that was in -- that were in
19 documents that were a part of the records, with those
20 exceptions of the public records we relied on.

21 Q. Right. Some of the slides had the pictures of the
22 board of elections website?

23 A. Um-hmm.

24 Q. And then the Lexis, I think, people looker-up thing,
25 whatever you call it?

1 A. Yes.

2 Q. So y'all used those?

3 A. Yes, for race and age.

4 Q. Right.

5 A. But not for anything else.

6 Q. Right. It's pretty limited?

7 A. It's limited to things that were part of the record.

8 Q. And those were the only sources used?

9 A. Yeah, I believe so, transcripts, questionnaires.

10 Sometimes for strike information, we would look to the
11 clerk's chart, but generally we would verify it against the
12 transcripts. So those were our primary sources of
13 information.

14 Q. So the transcript was kind of the cornerstone --

15 A. Of the descriptive coding, yes.

16 Q. Did -- maybe I should say while I -- I'm not sure if
17 it was addressed or not, but did you use any information
18 from the charging and sentencing study to supplement what
19 was in the DCI's?

20 A. Only some case level variables such as district, the
21 dates and some basic demographic information about, you
22 know, the defendant's race, the victim's race but not about
23 the jurors -- not about the individual jurors.

24 Q. So just sort of the identification information really?

25 A. Basic case level information.

1 Q. And we talked a little bit about the guidelines you
2 gave to the coders, called them protocols, right?

3 A. Right.

4 Q. Sort of the rules to follow when you're filling these
5 forms out?

6 A. Yes.

7 Q. Sort of the heuristics you use when looking at the
8 transcripts and moving those from whatever is on the
9 transcript to the DCI?

10 A. I wouldn't call them heuristics. It was a protocol.
11 I wouldn't call them rules of thumb so much as --

12 Q. Right. And I'm not trying to denigrate them. Clearly
13 y'all have done a lot of work here about laying out how to
14 classify this because that was important, correct?

15 A. It was.

16 Q. Because that's what's on my mind next. The coders
17 that were selected to do this work, I think you mentioned
18 some of them were law students, correct?

19 A. No. They were lawyers.

20 Q. They were lawyers?

21 A. Yes.

22 Q. So there weren't any law students?

23 A. No, none of the coding from the database came from law
24 students or nonlawyers.

25 Q. So the transcripts weren't reviewed by law students.

1 They were attorneys?

2 A. Yes, they were.

3 Q. How were they selected?

4 A. We interviewed them. They applied. We got a notice
5 for the job through our career services office and I
6 interviewed them and we hired the people we thought would
7 be the most careful and attentive to detail and
8 responsible.

9 Q. Kind of like an alumni database or something like
10 that?

11 A. We primarily hired MSU law grads. We had one -- we
12 have one coder now who is a Cooley grad but for the jury
13 selection, I think the rest were all MSU law grads, some of
14 whom I knew from having been their professor.

15 Q. Okay. I think you said you had five?

16 A. I think there were about nine total, not at any one
17 time but --

18 Q. Okay. And y'all actually had an interview process?

19 A. Yeah, I would meet and interview them.

20 Q. What were y'all looking for in the interview process?

21 A. We wanted people who could be careful, responsible,
22 detailed, follow instructions.

23 Q. Did y'all look for any particular qualifications or
24 experience beyond that, I mean, beyond being reliable sort
25 of coders?

1 A. Well, they had to be lawyers or have J.D.'s.

2 Q. Right.

3 A. And, you know, I would look at were they good
4 students. If they were students that I knew, were they
5 people that I found to be reliable and detail oriented and
6 hardworking.

7 Q. Were most of them former students?

8 A. I don't know if most of them were. Maybe -- maybe
9 half.

10 Q. Half?

11 A. Yeah.

12 Q. I mean because at least you knew sort of about their
13 work quality from having them as students, correct?

14 A. Sure.

15 Q. And even beyond that, in interviewing them and being
16 careful about who you selected, you had procedures built
17 into the process that sort of ensure consistency in the
18 coding, correct?

19 A. Yes.

20 Q. Some of the double coding procedures that you had?

21 A. Yes.

22 Q. All right. And how many of those did you have?

23 A. How many of those --

24 Q. How many places did you build in sort of little
25 safeguards to make sure the coding was consistent?

1 A. Well, the primary means of ensuring consistency was
2 this double coding procedure that you referred to.

3 Q. Um-hmm.

4 A. And then my -- my supervision of any resolution of the
5 discrepancies.

6 Q. Okay. Were -- was it just sort of a two level deal?
7 In other words, the lawyers were working on the coding and
8 then you were reviewing what they had if there was a
9 discrepancy?

10 A. Yes, I believe so.

11 Q. There weren't any people in between? That's what I'm
12 asking?

13 A. Can you give me an example of what you mean.

14 Q. Was there a middle management?

15 A. Well, the third coder would be the person who reviewed
16 -- or compared -- not third coder but the reviewer was --
17 that would be -- he would be the person who would report
18 the discrepancy to me but otherwise, no.

19 Q. Okay. But you did personally supervise and personally
20 resolve any conflicts or issues that came up with the data?

21 A. Yes.

22 Q. Did Professor Grosso have anything to do with that?

23 A. I -- she was involved in -- she was available to
24 answer questions. I don't know if she ever -- I -- I think
25 I was around to resolve all of them. She was available.

1 She was qualified to resolve any discrepancies. I don't
2 recall that she actually ever did. I think I was --
3 because I could -- it was all on the computer so I could do
4 it even if I was away.

5 Q. You were the one who was nervous about whether or not
6 the computer would crash and something would happen to the
7 data?

8 A. No. We -- we took a lot of precautions.

9 Q. What was the division of labor between you and
10 Professor Grosso? How did y'all sort of divvy out who was
11 going to do what?

12 A. Well, we -- we worked very, very closely together and
13 we are both very involved in every aspect of both the jury
14 study and charge and sentencing study. Now, my -- I tended
15 to do more of the sort of day to day on the jury study,
16 this kind of thing, where she would tend to do more of the
17 day to day on the charge and sentencing. But there isn't a
18 day that goes by where we weren't consulting with each
19 other or talking to each other. I might, if I had a
20 discrepancy I wasn't sure how to resolve, I might talk to
21 her about it -- I might have talked to her about it. So we
22 were both -- we were both very closely involved.

23 Q. Okay. But sort of -- as a division of labor, she did
24 more of the charging and sentencing study?

25 A. More of the day-to-day responsibility.

1 Q. Was it the same coders or some folks who were looking
2 at both of those studies?

3 A. No. We had -- for charging and sentencing, we had a
4 staff in North Carolina who had an office in North Carolina
5 that we supervised them remotely but our jury -- jury
6 coders were all in Michigan working in Michigan State
7 University College of Law.

8 Q. Okay. So literally under your supervision?

9 A. Yes.

10 Q. Okay. And you indicated yesterday that you were
11 interested in things that predict strikes and you talked
12 about that this morning?

13 A. Yes.

14 Q. That's what you were trying to look at. And the DCI's
15 or the variables you selected should capture those things,
16 those factors?

17 A. Yes, to the extent it was information we could get
18 from the records --

19 Q. Okay.

20 A. -- it did. But that was our -- that was our
21 objective.

22 Q. Now, at some point, you did the random selection of
23 the DCI's, came up with a sample, in other words, the 25
24 percent sample to look at?

25 A. We did a random sample of the venire members in the

1 larger study.

2 Q. And then created the DCI's for those particular venire
3 members?

4 A. And completed those DCI's, yes.

5 Q. Do you recall about when that was done? Was that
6 early on or --

7 A. That -- the first task was getting all 7,400 or so
8 jurors coded on race and strike information in order to
9 calculate the unadjusted disparity. When that was done --
10 early on, it became clear that, like I said, we couldn't --
11 we couldn't -- cause would have been interesting but we
12 weren't going to have the researchers to do that and,
13 likewise, with any sort of descriptive information. I
14 wanted to make sure when we did the descriptive information
15 that we could do it this very painstaking, careful way.
16 And so we did that after we had completed the coding of all
17 7,400 or so venire members on race and strike information.
18 So I think it was maybe early spring of 2011 -- no, I think
19 fall of 2010 that we started -- started that process.

20 Q. Okay.

21 A. It's kind of a blur but --

22 Q. When did y'all start working on the Cumberland County
23 DCI's?

24 A. So Cumberland was represented in the 25 percent
25 sample.

1 Q. Right.

2 A. So they are represented in the statewide sample for
3 the descriptives and I believe that was this spring of 2011
4 when we -- and I apologize that I don't remember precisely
5 but I believe it was -- it was after we finished the 25
6 percent sample that we moved into Cumberland County to try
7 to code all of those jurors that we could.

8 Q. That was just preparing for the litigation?

9 A. That's right.

10 Q. And at that point, was Cumberland just the first one
11 you looked at? Have you looked at other ones?

12 A. We have not done that complete descriptive coding in
13 any other county.

14 Q. So as of now, none of the other counties have been
15 completed?

16 A. So as of now, we have only the 25 percent sample from
17 the other counties. I would be happy to do more but it's
18 expensive.

19 Q. Right. And time consuming?

20 A. Well, yes, because of the labor cost involved.

21 Q. And I want to make sure I understand. Do you recall
22 roughly about how long it took to get those done, the
23 DCI's.

24 A. From the descriptive coding?

25 Q. Yeah.

1 A. Several months. It is labor intensive to do the
2 double coding. It would go a lot quicker if we just had
3 one person coding and we didn't do the check. That is
4 another level of complexity.

5 Q. And the same people who did the codings for the random
6 sampling, those were the same folks who did it from
7 Cumberland County?

8 A. I mean there was some turnover but there was
9 consistency in the staff as well.

10 MR. PERRY: May I approach, Judge?

11 THE COURT: Yes, sir. You okay, ma'am?

12 THE WITNESS: Yeah. Oh.

13 COURT REPORTER: (Nodding head.)

14 MR. PERRY: May I approach, Judge?

15 THE COURT: Yes, sir.

16 MR. PERRY: Your Honor, I've marked eight
17 individually. I got copies. They kind of look the same so
18 they are hard to keep straight.

19 THE COURT: Thank you, sir.

20 BY MR. PERRY:

21 Q. Let's see. And, Professor O'Brien, I'm going to hand
22 you what I've marked for identification purposes with
23 numbers 1 through 8 --

24 A. Okay.

25 Q. -- some material there. And a copy for the clerk as

1 well. Can you tell me, ma'am, what those eight numbered
2 exhibits are?

3 A. They are venire member level data collection
4 instruments from different cases. They seem to be -- if I
5 recall, they look like they are all from Cumberland County.

6 Q. Okay. If you want to take a minute to look at them.

7 A. Oh, sure.

8 Q. My intent was to hand up eight from Cumberland County.

9 A. That's -- as I recall the case names, that's what it
10 appears to be.

11 Q. Those are the data collection instruments, the actual
12 DCI's from the studies, correct?

13 A. Yes.

14 Q. I would like to direct your attention to what I have
15 marked for identification purposes as state's exhibit
16 number 1.

17 A. Okay.

18 Q. If you can take a look at that, can you tell me what
19 that is?

20 A. This is a DCI completed in Marcus Robinson's case for
21 a venire member, Tandra Whitaker.

22 Q. Just so the Court's clear, can you show where you see
23 the name of venire member?

24 A. It's on page two.

25 Q. That's on the second page, right?

1 A. That's right.

2 Q. And some of the information on this DCI are the things
3 that we talked about yesterday and this morning, correct?

4 A. Yes.

5 Q. Was the information collected identified the case
6 involved, whether or not the venire member was excused for
7 cause, those kinds of factors, right?

8 A. That's right.

9 Q. Okay. And when I was asking you earlier about the
10 identification of folks excused for cause, that is captured
11 on there -- on the first page, correct?

12 A. Right. The question four says excused for cause and
13 this is circled no.

14 Q. Okay. And then the second -- or not second. Let me
15 get the exact number, number five there, that's the
16 peremptory strike eligibility?

17 A. Right.

18 Q. And that's where you identified who could actually
19 strike that particular juror, correct?

20 A. Yes.

21 Q. Now, if you look -- and I'll ask you just to flip to
22 the second page to number ten, you can tell what happened
23 to this jury member, correct?

24 A. That's right.

25 Q. Potential juror?

1 A. That's right.

2 Q. And for this particular juror, what was her eventual
3 status?

4 A. Neither seated on the jury nor selected as an
5 alternate.

6 Q. And y'all had some detail in there about what
7 particular seat this juror was potentially eligible to sit
8 in the jury pool on, correct?

9 A. Well, what seat they were called to sit in in jury
10 selection.

11 Q. And that was noted right there on the DCI?

12 A. That's right. We didn't have very good luck with that
13 particular item. It was something that it wasn't always
14 clear from the record what the seat was but we recorded it
15 when we had it.

16 Q. Was that something from the -- you mentioned earlier
17 getting the information from the clerk's diagrams?

18 A. Right.

19 Q. Is that somewhere where you look for that kind of
20 information from?

21 A. That's right or if it was mentioned in the transcript.

22 Q. Specifically?

23 A. Right.

24 Q. All right. And going down that same page, you have a
25 place where the venire member's race is indicated, correct?

1 A. That's right.

2 Q. And this one has an indication that this venire member
3 was coded as black or African-American, correct?

4 A. Yes.

5 Q. And you've got an age category as well?

6 A. Right.

7 Q. And the age for this particular juror was noted as
8 what?

9 A. 22. Was originally unknown so it was coded 99 and
10 then it was one that we got more information on. So
11 sometimes the questionnaires were a really good source of
12 age information and sometimes a case might be coded before
13 we got the questionnaires and then the questionnaires, if
14 they came in, we would supplement with the additional
15 information we received.

16 Q. So if you had gaps in the information on the DCI's,
17 you used those to supplement what was missing?

18 A. That's right. Whenever we had better information, we
19 would want to incorporate that.

20 Q. Okay. And then it's got a couple of the other
21 categories and these are the variables, correct? So 16,
22 marital status; 17, whether or not somebody had children?

23 A. Um-hmm.

24 Q. Those were the variables that were captured in your
25 study. If you go to category or number 19 where it says

1 education --

2 A. That's right.

3 Q. -- is that another example of updating? Is that what
4 happened there maybe?

5 A. Right.

6 Q. So can you tell the Court what happened there? This
7 is an example.

8 A. Well, what probably happened, my guess -- I would have
9 to check the cleaning doc to be sure -- is that there was a
10 discrepancy and I resolved it as seven and that's why --
11 the person who was in charge of doing the reliability
12 checks, I was instructed to go and change the DCI -- this
13 DCI to reflect the resolution of the issue.

14 Q. Okay. And just to be fair in the cleaning document,
15 you actually have -- something like this happens and then
16 you've got a worksheet with a notation as to exactly what
17 you did and why, correct?

18 A. That's right.

19 Q. Now, if you look at number 21 and 22?

20 A. Right.

21 Q. Those deal with the employment categories?

22 A. Yes.

23 Q. And when you look at that, those two categories,
24 number 21 and 22, they have numbers there?

25 A. That's right.

1 Q. So those numbers are actually tied into some other
2 group of subcategories, correct?

3 A. Right, a coding appendix.

4 Q. And y'all have had a specified list of codes with
5 examples and subcategories of different types of
6 employment, right?

7 A. Yes.

8 Q. Now, number 23, I believe we heard about this a little
9 bit yesterday, the descriptive characteristics. On the DCI
10 here, can you explain to the Court exactly what that
11 particular variable was trying to capture?

12 A. This is -- the descriptive characteristics are other
13 types of things that people talk about in voir dire or
14 asked about on the questionnaire that aren't captured by
15 the previous questions but that information that could
16 potentially be relevant to strike decision.

17 Q. Okay. And now for this particular juror, what code is
18 there?

19 A. This has 8888 and I recall reviewing this after
20 reviewing Professor Katz's report and I agreed this was an
21 error.

22 Q. Okay. And, again, I mean this is not anything really
23 fancy. If something was to be corrected, you marked it out
24 and put the correction in the DCI?

25 A. Oh, correct. But this is not an error that we caught.

1 This is an error that I concur with Dr. Katz that this was
2 an error.

3 Q. Can you explain to the Court what you mean? I think
4 you and Dr. Katz might know what you're talking about but
5 just to be clear.

6 A. Okay. Sorry. So in Dr. Katz's report there was some
7 references to jurors for whom we had not coded as having
8 death penalty reservations but where the prosecutor cited
9 that there was and I reviewed all of them and there were a
10 few instances where I thought that under our protocol that
11 person should have been coded that way. And that would be
12 reflected in the shadow coding I did or that recode I did
13 so that I could then recode this person as having death
14 penalty reservations. So correct it and then run the model
15 again to see -- not just her but also any -- any instance
16 where the state said this person had this characteristic
17 but we didn't have that, I would, for purposes of the
18 recode, change it to reflect that. Not in all -- in all
19 instances did I agree the coding was erroneous. This is
20 one that I do agree. This was an error that we didn't
21 catch.

22 Q. On that note, just to be clear, there was some
23 difference in judgment as far as some of these descriptive
24 characteristics, correct?

25 A. That's right. And so that's why I, you know -- within

1 the coding protocol, we try to be consistent, try to
2 operationalize the variable the way that makes as much
3 sense as possible. But to be conservative, I -- even if
4 something was consistent with our coding or consistent with
5 our coding protocol, when I did the recodes, I would error
6 -- I would use the state's characterization to see if
7 differences in how we operationalize this variable could
8 explain -- could explain the outcome. Not in all cases --
9 in all cases, I don't agree that our coding was erroneous
10 under our protocol and our protocol applies to both black
11 and white jurors struck and not struck so it's not specific
12 to one particular race. But that was part of how I used
13 the information Dr. Katz provided because I wanted to check
14 our work.

15 Q. I want to be sure because you said something about
16 protocol didn't distinguish between potential venire
17 members of one race or the other. What do you mean by
18 that?

19 A. So our -- the instructions of what would constitute --
20 or would qualify or warrant a code that reflected death
21 penalty reservations, it's the same -- it's the same
22 standard. I mean, we wouldn't -- the coders wouldn't use a
23 different standard for black venire members and white
24 venire members because the important thing is there are
25 going to be differences in judgment about how a particular

1 code -- whether a particular code might apply, and one of
2 the really important checks on that is just to make sure
3 you apply it consistently. So to the extent there is error
4 or noise, that it's not skewed -- it's not skewing the
5 analysis in any way.

6 Q. And that -- I mean that's the rationale for having
7 those very explicit protocols to go through?

8 A. Yes.

9 Q. To minimize any kind of difference in interpretation?

10 A. Right. And, you know, the thousands of venire
11 members, there's going to be a few that slip through.

12 Q. Right, sure. Okay. Now, the coder's name is
13 indicated at the bottom so you know who did it and when
14 they did it?

15 A. Yes.

16 Q. It's got that?

17 A. Yes.

18 Q. And if you flip back to the supplemental descriptive
19 DCI --

20 A. Right.

21 Q. -- can you tell the Court what exactly that was set up
22 to capture? What was the purpose of that additional DCI?

23 A. So this juror -- you see here this supplemental -- the
24 race coding one, the page -- the last page?

25 Q. No. The one before that.

1 A. Oh, okay.

2 Q. The descriptives.

3 A. Oh, okay.

4 Q. Yes, ma'am.

5 A. So this would be a DCI that the second coder would do
6 independent of the first to code the same information so
7 that we could -- this is what we would -- this is what the
8 third coder would use to compare with the other DCI to look
9 for discrepancies.

10 Q. So that was part of sort of the double check process?

11 A. Yes.

12 Q. So that was a different coder. Let me ask you, the
13 case that this particular DCI involves is Marcus Robinson?

14 A. Yes, it is.

15 Q. For this particular case?

16 A. Yes.

17 Q. And the last sort of component of what I handed up to
18 you, the purpose of that?

19 A. This -- this is a supplemental venire member data
20 collection instrument. This is what we use to collect race
21 information when we didn't have questionnaires or
22 transcripts. So looking at the data on this and the fact
23 that it indicates that the race is unknown, I know we had a
24 questionnaire in this case. It means we got that
25 questionnaire after the DCI. So the database would reflect

1 that the basis for the coding for race was questionnaire,
2 but when this -- but this was filled out before we would
3 have the questionnaire. So we would always update based on
4 the best information we had available. So in some cases we
5 had a questionnaire and some cases we don't. If we got
6 questionnaires, of course, we would use that information
7 and update our information.

8 Q. Yeah. I mean if you had better -- or information at
9 all, you would use that to put it in the database?

10 A. Well, depending on what the information was. I mean
11 -- but if it was the type of information that we were
12 considering -- we had been missing it and now -- it was
13 kind of a source data that we were considering and we were
14 missing it and then we got it, yes, we would. My coders
15 were instructed to always update when we received that new
16 -- those new materials.

17 Q. Is hypothetically speaking, if some clerk found some
18 box in some office that had been missing with a lot of
19 information that was helpful or transcripts even, y'all
20 would take it and update all this information?

21 A. Right. It really -- I mean transcripts we were -- we
22 had good transcripts. We had almost complete transcript
23 information. There was a few transcripts we were missing
24 -- there was some gaps in it. There was one transcript
25 that was illegible but the only instances where -- the only

1 kind of information that we were missing in a significant
2 minority cases were the questionnaires.

3 Q. The questionnaires?

4 A. Right.

5 THE COURT: Mr. Perry, this will probably be a
6 good point to take our mid-morning recess. Thank you,
7 ma'am. You can step down.

8 THE WITNESS: Thank you. Should I leave these
9 here?

10 THE COURT: Yes, if you will. Folks, we will be
11 at ease until 11:40 by the clock on the back wall. Thank
12 you, ma'am.

13 THE WITNESS: Thank you.

14 (Recess taken.)

15 (The following proceedings continued in open
16 court. The defendant, defense attorneys and state's
17 attorneys were present.)

18 THE COURT: Okay. We're a little bit early but
19 we have all parties present in the courtroom. The
20 defendant is present. Mr. Perry, if you could continue
21 with your cross-examination.

22 MR. PERRY: If you'll give me a minute or two.

23 THE COURT: Yes, sir. I apologize.

24 MR. PERRY: It won't take but a second.

25 THE COURT: Take your time, sir. You okay on

1 water, ma'am?

2 THE WITNESS: Yes, sir.

3 (Court was at ease.)

4 MR. PERRY: Your Honor, the state's ready
5 whenever the Court is.

6 THE COURT: Yes, sir.

7 MR. PERRY: Thank you, Judge.

8 Q. And, Professor O'Brien, if we can go back to the DCI
9 on page three of three --

10 THE COURT: And again, we're talking about number
11 1?

12 MR. PERRY: Yes, sir.

13 THE COURT: Marcus Robinson.

14 MR. PERRY: Exhibit number 1, Your Honor.

15 THE COURT: Yes, sir.

16 MR. PERRY: And that would be venire level DCI.

17 THE COURT: Yes, sir.

18 MR. PERRY: And that's why I labeled them
19 individually. There's a lot --

20 THE COURT: I appreciate that. Thank you, sir.

21 BY MR. PERRY:

22 Q. And, Professor O'Brien, going back -- I didn't ask you
23 about all of these but you also included some sort of
24 affiliation variables. In other words, number 18 on that
25 page asks about religious, organizational affiliations?

1 A. Yes.

2 Q. Is that as specific as you got about the religious
3 affiliation?

4 A. Yes, it was.

5 Q. Did y'all consider at any point looking at the
6 information from the jury questionnaires regarding the
7 religious affiliation?

8 A. Well, we did get our information for question 18 often
9 from the questionnaire but we did not code any more detail
10 than that. We did not code denomination or anything like
11 that.

12 Q. And that was my question. So denomination would not
13 be included in the database?

14 A. No, it wouldn't.

15 Q. Okay. All right. And then number 20, military
16 affiliation?

17 A. Yes.

18 Q. That was sort of a yes or no?

19 A. We also had an occupational variable for current
20 members of the military to distinguish between enlisted and
21 officers.

22 Q. Okay. And for this -- for example, this particular
23 DCI for number 20, it looks like you've got two choices
24 circled or is that another example of a correction that was
25 made?

1 A. An update. Most likely it was an update. I should
2 note that our DCI's, the final word is what's in the
3 database.

4 Q. Um-hmm.

5 A. But I did instruct my coders to also make the
6 corrections on the paper DCI but what I would rely on is
7 what's in the database. So what -- what looks like what
8 happened here is that we were lacking information and then
9 got the information and then it was updated on the paper
10 DCI.

11 Q. So, for example, it may have come off the jury
12 questionnaire?

13 A. We may have gotten the jury questionnaires and then
14 updated our information.

15 Q. Okay. And then who -- you said trust the database or
16 the Excel or Access database, whichever format you used?

17 A. Right.

18 Q. Who actually typed this information from these DCI's
19 into Excel or Access?

20 A. My coders did.

21 Q. Your coders did?

22 A. Right. They -- they -- usually one of them was
23 assigned to data entry on a particular day and others were
24 coding but they were all -- they were trained to do both.

25 Q. Again, y'all had some training where you showed them

1 how to do these things?

2 A. Yes.

3 Q. Okay. Now, looking over the DCI -- and I'm referring
4 to just these, can you tell from the information from this
5 survey or this instrument why this particular juror was
6 struck?

7 A. Well, what we coded were the presence or absence of
8 characteristics to see if they were associated or predicted
9 strikes. So what they tell us about -- what is reflected
10 from this DCI is whether these characteristics are present
11 or not.

12 Q. Okay.

13 A. Which then you put into a model to see if it predicts
14 strike outcome, so I think there's a subtle distinction
15 there.

16 Q. Okay. So -- so you can't tell from looking at the DCI
17 why the juror was struck?

18 A. Well, I can tell from looking at the DCI except the
19 fact of the error that I talked to you earlier --

20 Q. Right.

21 A. -- what characteristics this juror had that we were --
22 that were on the record -- that the characteristics that
23 were something that you could verify from the record that
24 we had, that this juror possessed, whatever characteristics
25 she possessed.

1 Q. Okay. So are you saying that from just looking at the
2 DCI, you can't tell why this particular juror was struck in
3 this particular case?

4 A. No.

5 Q. Okay. And I may have missed this too. Is there a
6 place on here where it indicates how many strikes were left
7 for the state when they exercised their strike against this
8 particular juror?

9 A. No.

10 Q. Can you tell how many strikes the defense has left?

11 A. No.

12 Q. Did y'all talk about incorporating that at some point?

13 A. Right. So strike order is something that might affect
14 the strike decision. So I could see that as something that
15 might bear on the decision to strike. How a prosecutor or
16 any litigant would behave, they might -- if they only have
17 a few strikes left, they might be choosier. They might use
18 them differently. However, that only matters in terms of
19 this research question if -- it's not just correlated or
20 has some relationship with strike outcome but also with
21 race. So for that to -- so for that to be something that
22 would be critical to include in the model, we would have to
23 have some reason to believe that blacks -- black potential
24 jurors were systematically called in a different order from
25 nonblack potential jurors. So it's not just that it's

1 possibly related to outcome but it also has to be something
2 that would be related to race. And I -- I could think of
3 no reason why the order of who ends up in the jury box
4 would not be random as to race. That was -- that would be
5 a very time consuming thing to code so it might tell us
6 something about strike decisions, but it would be very time
7 consuming and it wouldn't really enhance our understanding
8 of the question about race.

9 Q. But you don't think incorporating the strike order
10 would tell you more about why a prosecutor strikes a
11 potential juror?

12 A. Yeah. I think it would be informative as to strike
13 outcome but there's a trade-off there and it would be a
14 very difficult variable to code for. And that's something
15 that if we had reason to believe that it wasn't random as
16 to race, then it would be -- then there would be a
17 different way there -- that it would be important to catch
18 that information even though it would be a very difficult
19 one to capture. But because it was something we felt very
20 confident would be random as to race, it doesn't undermine
21 the ability of the model not to include it. It can't
22 account for race.

23 Q. I'm sorry?

24 A. It cannot account for race as long as the process is
25 random as to race, the order of how people get called into

1 the box.

2 Q. Okay. Let me ask another question about it. Is there
3 anywhere on this DCI where you captured any nonverbal --

4 A. No.

5 Q. -- behaviors on the part of the juror?

6 A. No.

7 Q. So, for example, if a juror, when he heard his name or
8 she heard her name -- I know we never hear this in real
9 court cases -- sighed real big and said dang when they
10 heard their name called out to come up to the box, that
11 would not be on the DCI?

12 A. No. That's not something we can reliably capture from
13 the written record. However, I should note that I did see
14 that reason come up in the affidavits I reviewed is that I
15 think I've gotten affidavits that covered about 73 or 74 of
16 the cases. And my shadow coding that I explained earlier
17 where I'd say, okay, regardless of some errors, I can see
18 and others I don't. But regardless of whether it was an
19 error under our coding protocol, I would shadow code it. I
20 would create a recode that reflected the state's assertions
21 regardless of whether it qualified under our protocol. So
22 those instances where demeanor was cited that suggested a
23 bias against the state, I recoded the leans defendant
24 variable to reflect that to see if that could account for
25 it, because again demeanor, while I clearly see the

1 relationship between demeanor and outcome, for it to
2 undermine the racial findings, it would have -- bad
3 demeanor would have to be correlated with race, so on
4 average, it would be the black jurors who showed this
5 unattract -- this kind of demeanor -- this objectionable
6 demeanor significantly more often than non-black jurors.
7 So, again, because it's something that would be correlated
8 with outcome very likely but not with race, we did not see
9 that as a flaw in the model because we couldn't include it.
10 But to the extent your affidavits reflected it, I did try
11 to incorporate that in my shadow coding and it did not make
12 the race effect go away.

13 Q. Okay. Again that was a judgment?

14 A. In what way?

15 Q. As far as whether or not it's correlated with race,
16 right?

17 A. Well, it's not a judgment to say that for it to
18 undermine the race effect, it would have to be correlated
19 with race.

20 Q. No. My question is -- my question is your assumption
21 is that nonverbal behavior is not correlated with race?

22 A. I see no evidence that it is and it would have to be
23 very highly correlated with race in order to -- if we could
24 have perfect demeanor coding for it to make the race effect
25 go away, it would have to be highly correlated with race.

1 A modest correlation, bad demeanor, a modest correlation
2 wouldn't -- wouldn't -- including that in the model
3 wouldn't explain the race effect. It would have to be a
4 very strong correlation and I have no reason to think
5 that's so --

6 Q. But again that's your judgment?

7 A. That's right.

8 Q. Right. Okay. Fair enough. Now, in -- just to be
9 clear, if you look at this particular DCI, this is for the
10 Marcus Robinson case?

11 A. Yes.

12 Q. In the list of characteristics or the list of factors
13 that are included on the DCI, is there anyplace where
14 particular types of evidence or some kind of description of
15 the crime or what's being tried is incorporated in your
16 information?

17 A. Well, they are all capital murder.

18 Q. Um-hmm.

19 A. But as far as case specific, whether it was in the
20 manner of killing or something along those lines, no, not
21 in this -- not in this DCI.

22 Q. Okay. So in other words, as far as evidence or type
23 of case involved, there is no way to reflect whether or not
24 this was a rape and then a killing or somebody getting
25 burned in a house fire --

1 A. Um-hmm.

2 Q. -- or any way to differentiate based on that?

3 A. No, not directly. To the extent it might bear on a
4 particular venire member's feelings about the case, it
5 could be -- it could be reflected that way. So it -- again
6 what we're looking at is the venire member characteristics.
7 To the extent that a case characteristic might bear on the
8 venire member's attitudes and that was reflected in the
9 transcript, we would -- we tried to capture that. So, for
10 instance, if the juror -- if it was a case involving a
11 small child and the juror said yeah, well, it might be hard
12 -- would this be hard for you? There's a little child
13 involved. Yeah, that would be hard. We might code that as
14 an emotional difficulty. Or if a juror said I -- something
15 about this case, I'm having a hard time with this. So
16 there were some opportunities to code that way because,
17 again, the question is what is the venire member
18 characteristics. To the extent the case characteristics
19 might bear on those, to the extent we could capture that,
20 we did try to. Now, again, we have this issue of
21 correlation, that to the extent it's truly a unique case
22 characteristic, there's no reason to think that that would
23 correlate with race. So if a defendant had a child the
24 same age of the defendant or the venire member has a child
25 the same age of the defendant, that might bear on the

1 decision to strike but there is no reason to think that
2 systematically across cases, that's more likely to be the
3 case in black jurors versus non-black jurors. So long
4 answer to your question.

5 Q. No. That's fine. Because what I was wanting to ask
6 you about was -- I mean theoretically, you agree that there
7 might be something in the evidence that affects whether or
8 not a particular juror is struck by the state?

9 A. Sure, yes.

10 Q. Specifically evidence like we were talking about with
11 the example of a juror having a small child?

12 A. That's right.

13 Q. So in your DCI, in your model, your contention is that
14 that might be true but unless it's correlated with race, it
15 doesn't matter.

16 A. Well, to some extent, we did capture that to the
17 extent it rose to the level of the juror expressing a --
18 expressing some difficulty in serving on the case. So we
19 had some -- so and certainly knowing the defendant, any --
20 they went to high school with the defendant or they went to
21 high school with the defendant's brother, we coded that and
22 that was a significant predictor that increased the
23 likelihood of being struck. And if the juror expressed
24 either some emotional difficulty based on the manner of the
25 case or if they expressed some sort of concern, difficulty

1 about the case, we did capture that. But as far as
2 something short of that, we didn't capture that. But
3 again, for that to matter, it would have to bear on both
4 the outcome and be correlated with race. I'm just stating
5 that just as -- trying to describe in what instance that
6 would -- that undermine the validity of the model.

7 Q. Fair enough. Now, just to go back because I want to
8 be clear, right before we took the break by going back to
9 the descriptive characteristics factor for number 23, you
10 said originally this was coded 9999 --

11 A. Yes.

12 Q. -- on the DCI as an unknown response?

13 A. Yeah. Yes. That may have been either because we
14 didn't have the information when it was originally coded
15 for strike and race information or it might have been
16 because the juror wasn't included in that 25 percent sample
17 and that was a way to indicate this person wasn't coded for
18 descriptive information. And then later when we coded --
19 we had a chance to code all of Cumberland County, that
20 would be -- it would be changed to reflect that. So that
21 would explain why it went from 9999 to 8888.

22 Q. I want to make sure I'm understanding you correctly.
23 You're saying it changed based on the fact that it was done
24 for Cumberland County?

25 A. Well, 9999 means we don't have information.

1 Q. Right.

2 A. But that could mean because we just haven't coded it.
3 If this particular venire member was not in our 25 percent
4 sample, she wouldn't -- we wouldn't have coded her for
5 discrepancies. We only coded those 25 percent. When the
6 coders completed the 25 percent, then they went and they
7 completed to do full coding in Cumberland County.

8 Q. So the default was to put the unknown code in?

9 A. Well, because 9999 tells me either we are lacking
10 information or we didn't code this person. It's a way of
11 -- it's another way to check to make sure that this person
12 isn't somebody we -- this person doesn't have information
13 as to these characteristics that we want to include in our
14 study. And the 8888, which I agree was a mistake here,
15 tells me that the person was reviewed and none of the
16 characteristics applied. So that's how I can tell when we
17 have nothing coded for descriptives, is it because we
18 didn't look or is it because we looked and nothing applied.

19 Q. Okay. That's the way you kept up with the difference
20 between the two -- the two situations?

21 A. Right.

22 Q. I just want to make sure I understood that correctly.

23 A. Yes.

24 Q. When the 8888 code, the no factors apply code, was put
25 into this DCI, that means that no factors apply, correct?

1 A. Um-hmm, yes.

2 Q. So now did you go back and review the transcripts for
3 just cases where there were divergences of opinion on the
4 coding or did you go back and look at all of them? Have
5 you looked at all of them for Cumberland County?

6 A. No.

7 Q. To what extent did you review these is what I'm
8 asking?

9 A. I reviewed the transcripts or whatever the material I
10 would need to make a judgment in cases where my coders
11 flagged -- where my reliability checker flagged a
12 discrepancy and in any cases since the filing of our
13 December report that your team has brought to my attention
14 as a potential discrepancy.

15 Q. Okay. But now the -- this of the -- in number 23 for
16 this DCI, that was not from the state affidavits?

17 A. No.

18 Q. That was prior to -- that was y'all's own internal
19 cleaning process and review and all that?

20 A. That's right. The materials I've gotten from your
21 team have come since the -- since these DCI's were turned
22 over to you.

23 Q. And that was totally database driven. In other words,
24 there weren't any affidavits added factors on the DCI's,
25 correct? In other words, y'all didn't go back and initial

1 these a third time and put affidavits related correction
2 or --

3 A. We will. When I -- when I concur -- if you actually
4 -- if you identify an error, then that is something that --
5 I mean just -- it's only been a few -- this has all been
6 happening pretty recently --

7 Q. Sure.

8 A. So we haven't had a chance to do it yet but that is
9 definitely something we will do and what my coder will do
10 is go and correct the paper DCI and then correct it in the
11 database to reflect the updated information that didn't
12 catch our mistakes.

13 Q. Again, you got to go review all of these to make sure
14 they match up?

15 THE COURT: I apologize. Can you clarify what
16 you mean by all of these?

17 MR. PERRY: The state affidavit suggested
18 corrections.

19 THE COURT: It would be helpful for purposes of
20 the record -- how many affidavits are we talking about
21 where potential errors or potential corrections might be
22 applicable?

23 MR. PERRY: I can ask the witness that, Your
24 Honor.

25 THE COURT: Yes, sir.

1 MR. PERRY: I don't know offhand.

2 Q. Have you had a chance to look and see how many DCI's
3 are impacted by the affidavits that have been submitted?

4 A. I believe there have been some affidavits submitted in
5 the last few days but I haven't reviewed those. The last
6 batch that I reviewed were as of, I think, January 25th and
7 what I did was to compare -- so the first place I started
8 was with Dr. Katz's report and those discrepancies that
9 were identified. But since then, I reviewed the
10 affidavits, which they don't necessarily identify
11 discrepancies. They just give the asserted reason for the
12 strike.

13 Q. Right.

14 A. And I've gone through those to see -- for those who
15 have been coded descriptively -- not the ones that were in
16 either our 25 percent sample or in Cumberland because
17 there's nothing to compare it to, we haven't done the
18 descriptive coding for those -- to see if our coding was
19 consistent with the asserted reason. So if the prosecutor
20 in the affidavit says I struck this juror because they were
21 ambivalent about the death penalty or they weren't strong
22 about the death penalty, I would go and look to see -- and
23 I didn't check the paper DCI. I worked from the database
24 because that's much easier than looking through piles of
25 paper and then look and say, well, did he code this person

1 as having death penalty reservations? And we found in the
2 vast majority of the affidavits I reviewed for only those
3 jurors who we had done in full coding that we were
4 consistent. That if the asserted reason for the strike was
5 death penalty reservations, we coded that person as having
6 death penalty reservations or because her sister had been
7 put in jail for a crime. I would make sure that that -- to
8 the extent there were discrepancies, I would then look to
9 see if it was our error or if it was a difference in
10 judgment as to the protocol. And that's where the shadow
11 coding comes in. The shadow coding where I did a recode,
12 those are recoded to reflect the state's assertions. They
13 are not necessarily my judgment. They are not necessarily
14 consistent with our protocol but they are just to be
15 conservative. They reflect the assertions of the state.
16 So while what the juror said in the transcript would not
17 have qualified for a death penalty reservation code under
18 our protocol, if it was asserted in the affidavit, I would
19 change that to reflect that. There weren't that many
20 instances where there was a disagreement. Most -- vast
21 majority of the time, the asserted reasons were reflected
22 in our coding.

23 THE COURT: Okay.

24 THE WITNESS: Then I reran the analysis
25 restricted just to the cases that had been reviewed -- I

1 think there were 73 or 74 -- to see if that could explain
2 the race effect. And what I found is that it drove down
3 the effect a little because the only -- the only reviews
4 are of the black struck jurors so I would expect that it
5 would make the effect go down a bit but it still was at two
6 or above.

7 THE COURT: Okay.

8 BY MR. PERRY:

9 Q. Okay. And let me use this one for an example. So if
10 we look at this descriptive characteristic coding here,
11 which is 8888, no factors apply, if you went to the
12 transcript and you read through the transcript -- I mean
13 that's how you would do it. You would see if you agree
14 with what the affidavit submitted by the prosecutor
15 asserted, right?

16 A. Yes.

17 Q. So in this case, if you went to the -- and you've
18 looked at all these affidavits?

19 A. Well, up until I think --

20 Q. For Cumberland County -- for Cumberland County.

21 A. Yes. I believe anything that was provided as of
22 January 25th I reviewed.

23 Q. And those included Cumberland County?

24 A. Yes.

25 Q. Okay. So for Ms. Whitaker -- and I'm going to look at

1 my notes too. I know you don't have them. This is in the
2 transcript and this is in the affidavit.

3 A. Yes.

4 Q. Said the prosecutor has indicated that at page 371 on
5 the transcript, the juror says, quote, It's hard to say now
6 if I could vote for the death penalty. And then a little
7 later at page 373, 374, she says she favors life. Then at
8 page 376, she says, I wouldn't want to be on a case where I
9 had to have a say if someone died.

10 A. Yes.

11 Q. Now, would that be an example of one where you would
12 update this coding? I mean how would that fit in?

13 A. I concur that that should have been coded as a death
14 penalty reservation.

15 Q. So that's an example of one where there would be a
16 change based on the review?

17 A. I will instruct my coders to change this. However, I
18 don't have to agree -- in this case I do agree.

19 Q. Right.

20 A. And I'm mad at my coders for missing it. But I -- for
21 the shadow coding when I recoded it, I actually -- it
22 didn't depend on whether I agreed with it or not. There
23 was some that I definitely -- that they did not fit within
24 our protocol. So I can't call them coding -- I wouldn't
25 call them coding errors. But when I did the recode to see

1 if it made a difference, my judgment didn't matter there.
2 I just took the assertion at face value. Same with
3 demeanor, if they said, well, the person looked at me like
4 he didn't want to be there. I'd say, okay, how can I
5 reflect that? I will say I will treat this as if they had
6 expressed a bias against the state and I will code that
7 leans defendant variable is present. So to be clear, there
8 are errors -- there are some not -- I haven't identified
9 too many that I would call errors, very few, but there are
10 some. But for the recoding, it was not dependent on my
11 agreement that it was an error or not.

12 Q. Just to be fair, what you did was, based on the
13 affidavits submitted so far by the state, you gave them the
14 benefit of the doubt in the shadow coding. That's what you
15 did?

16 A. That's correct.

17 Q. That's a fair characterization?

18 A. I -- even if I -- even if what I read in the
19 transcript wouldn't constitute a death penalty reservation
20 or a coding -- I should be clear, there weren't that many
21 instances. Our coding -- we generally, if -- because a
22 person who expresses strong reservations about the death
23 penalty is likely to be excluded for cause, this coding is
24 going to apply on people who are not emphatically opposed
25 to the death penalty but express reservations or

1 ambivalence about it. So in those instances where our
2 coding did disagree, in the shadow coding, I did just defer
3 to the asserted reason of the state.

4 Q. Okay. I just want to make sure we're on the same page
5 as far as what we are talking about.

6 A. Sure.

7 Q. Let me direct you to state's exhibit number 2. Now,
8 this is another data collection instrument, another DCI,
9 again from Cumberland County.

10 A. Okay.

11 Q. If you can tell the Court what venire member that DCI
12 collects information?

13 A. Okay. So this is from Richard Cagle's case and the
14 juror is William Bell.

15 Q. Now, as far as the identification, does it have
16 anything directly on here as far as the date of the case or
17 do you have to get that from the other -- to sort of tie in
18 by implication numbers?

19 A. That's right. Those were some of the information --
20 that's some of the information I imported from charging and
21 sentencing to avoid duplication of efforts.

22 Q. It made it easier to keep up with all the information?

23 A. Correct, that's right.

24 Q. All right. Now, if you look on the first page, it's
25 got the exact same information as far as the categories,

1 correct?

2 A. Yes.

3 Q. Again, all these DCI's are the same. If you go to
4 page three of three, under employment information, it looks
5 like it's got some marks. Can you sort of explain to the
6 Court what happened, at least as far as you can tell, from
7 looking at it in that category?

8 A. This looks like an instance when -- again, because
9 this is Cumberland County, what likely happened is that
10 this was a case where they didn't code this person's
11 descriptive's information if they weren't in the 25 percent
12 random sample but then when we completed that and we went
13 back and did everyone from Cumberland County. That's why
14 that would be 99 there.

15 Q. Okay.

16 A. So that was so that I could be sure that if it -- that
17 the reason we don't have it is because we didn't look or
18 because we don't have it. It's a way of me making sure I
19 can keep track of instances where -- it's not so much
20 relevant with employment but certainly with other factors.
21 I don't want to infer we may not have information or it
22 could be that the characteristic isn't present and that
23 helps me keep track of which -- which is which.

24 Q. Sort of like what you explained with the descriptive
25 characteristics?

1 A. It's exactly the same, yes.

2 Q. Now, for the descriptive characteristics in line 23
3 there, can you explain to us what we see there. We see a
4 9999 code so it was unknown?

5 A. Yes. That's right.

6 Q. And then you've got two entries and a little notation?

7 A. Yes. The coder entered code 410 and noted it was from
8 the questionnaire and a code 300 and these codes came from
9 a descriptive characteristic appendix that was like the
10 employment characteristic appendix.

11 Q. Do you recall what those two codes are offhand?

12 A. I know that 410 involved having been accused of a
13 crime. 300 I think was victim or prior -- no. I think it
14 was a family member or self had been the victim of a crime.

15 Q. I'm not trying to test your memory here.

16 A. Some of these codes I know real well. Others --

17 Q. 410, juror accused of criminal activity, does that
18 sound right?

19 A. Yes.

20 Q. Okay. And then 300, juror slash family, friend victim
21 of crime?

22 A. That's right.

23 Q. Okay. So that was updated and it was marked on here
24 that that information came from the questionnaire?

25 A. Yes.

1 Q. Okay. All right. Now, and just to make sure I'm
2 clear, these notes down here where people date it, is that
3 some of your going back and checking or were they supposed
4 to initial there?

5 A. They -- my coders would often date when they would
6 make a change on it and help them keep track of -- again, I
7 just want to emphasize that the data collection instruments
8 were inputted into a computer database and that's what I
9 would work from. I very, very rarely pulled out the paper
10 DCI's.

11 Q. The actual --

12 A. Right. This was more for them to keep track of who
13 had done what and when they had done it.

14 Q. Again, this was a Cumberland County case and so there
15 was an affidavit submitted?

16 A. Yes.

17 Q. Again, I don't know if you recall anything offhand.
18 Do you recall anything about this juror and an affidavit
19 submitted in this particular case?

20 A. I'm sorry. I don't recall -- I know I reviewed it but
21 I don't remember exactly what was said.

22 Q. Okay. Again, I'm going to read because I'm like you.
23 I can't remember all this stuff and I haven't even worked
24 on it so --

25 A. Please. I would appreciate that.

1 Q. We will both look at it. But on the affidavit what
2 was noted as was provided by the state that was William
3 Bell was a no-show for the seat?

4 A. Okay.

5 Q. And then whoever reviewed -- I think it was Mr. Colyer
6 -- indicated that when he was called, he took a peremptory
7 to keep jury selection continuing. Both defense attorneys
8 and the judge agreed. Now, my question is -- now, whether
9 or not that's right or wrong, when you go back and review
10 it, where would you put that on the DCI in terms of a
11 variable or a factor?

12 A. Could you point to a specific part of that -- or read
13 it to me again, please.

14 Q. Not showing up.

15 A. Not showing up.

16 Q. Um-hmm.

17 A. That's one that would not be captured in the DCI in
18 any way.

19 Q. Okay. I mean it's something that's --

20 A. That's right.

21 Q. -- outside of the universe of what we're trying to
22 look at?

23 A. That's right.

24 Q. But, again, your rationale would be that's not
25 necessarily correlated with race so it shouldn't matter?

1 A. It's not something we can necessarily -- it's not
2 something we can -- it's not the type of information that's
3 always going to be obtainable from a transcript. It wasn't
4 the type of thing that was typically covered in voir dire
5 or in questionnaires. And for it to undermine race -- the
6 race finding, it would have to be correlated -- something
7 like that would have to be correlated with race.

8 Q. Okay. But clear -- again, assuming that I'm giving
9 you the correct information from the affidavit --

10 A. Right.

11 Q. -- that would explain in this case why that juror was
12 struck, correct?

13 A. It's a -- I mean we are coding for the presence or
14 absence of factors. That characteristic -- that fact is
15 true or is present and our coding doesn't reflect that, but
16 we code for presence or absence of factors.

17 Q. Okay. Now, for this case on review when you look at
18 that, would that result in this juror's observational
19 information being dropped?

20 A. I don't follow.

21 Q. In other words, you've acknowledged that there is a
22 reason for this strike that's not on the DCI. Would you
23 then drop them from the database?

24 A. No.

25 Q. How would you treat it? That's what I'm asking.

1 A. I'm sorry. I just want to clarify. I'm not
2 acknowledging a reason for the strike because I'm not
3 purporting to be coding the reason for the strike. I am
4 coding the presence or absence of factors. This is an
5 instance where there was some information that isn't
6 captured by our study. But -- so and that's -- but that's
7 not the same thing as having -- missing information in the
8 sense of a variable where we are actually collecting data
9 on it and we are missing information where we might end up
10 having to drop that in the analysis if that factor comes
11 into the model.

12 Q. Let me rephrase that. You think it's appropriate to
13 keep this in the database?

14 A. I do.

15 Q. Knowing that?

16 A. I do.

17 Q. Okay. That's what I want to be clear about.

18 A. Um-hmm.

19 Q. Now, if I could direct you to exhibit number 3 and
20 again, if you can just tell the Court which case that was
21 from and which juror that involved.

22 A. Tilmon Golphin and the juror is Freda Frink.

23 Q. All right. Again, the same kind of information,
24 flipping back to page three in the descriptive
25 characteristics.

1 A. Okay.

2 Q. Can you tell the Court or explain to the Court all the
3 notations there?

4 A. Well, can you point me to something in particular?

5 Q. Sure. Start with 2027.

6 A. 20 --

7 Q. The very first one. First descriptive code that's
8 listed on --

9 A. 1111, 1111, which as I recall was the person had
10 information about the case -- remembered information that
11 -- I believe from -- that she read.

12 Q. Okay. And now the -- what I'm getting at is the
13 notation to the side of that there, looks like Q plus
14 something, do you have any idea -- again is that supposed
15 to be an indication where they got that information from?

16 A. I don't know. They -- this is not something that
17 would be entered into the database. The 1111 would be
18 entered into the database but because it was the database I
19 relied on, if the coders made notes on the side to help
20 them, for example, the source of the information, they
21 could do that. It wouldn't be entered into the database
22 but because I relied on what was entered into the database
23 I didn't review these notations.

24 Q. Okay. There was a problem it looks like in the third
25 one down, the 2029 they noted something about a summons to

1 go to court for threatening someone. I mean that was fine
2 for them to write little annotations?

3 A. That's fine.

4 Q. That would help them sort of figure out what was going
5 on?

6 A. That's right but the notes wouldn't necessarily go --
7 I mean there is no place in the database to enter notes
8 like that. It might be something that they wrote so that
9 they could come and ask me a question.

10 Q. Okay. Now -- and again, this is something that was
11 included in the Cumberland County pool, right, so that all
12 the jurors who were part of the Cumberland County study --

13 A. Yes.

14 Q. Again, this is one of the affidavits that was
15 submitted and I'm going to just read this to you, again,
16 sort of posing this to you.

17 A. Okay.

18 Q. So it looks like when the prosecutor reviewer went
19 through and reviewed the transcript, it was noted at page
20 659 that the juror said she had mixed emotions about
21 punishment and stuff. I mean that sounds like 1200 maybe?

22 A. That's right.

23 Q. Death penalty reservations?

24 A. Yes.

25 Q. Page 671 said she had been charged with communicating

1 threats, which I mean your coder has that?

2 A. Yes.

3 Q. Has that noted. In fact, that's code 410, correct?

4 A. That's right, although if there was another charge,
5 they wouldn't code 410. They weren't supposed to code it
6 twice. So the notations on the side may not be -- I'm
7 sorry. I'll let you go on.

8 Q. Sure. Going back to the review, the next thing is on
9 page 675 at least according to the affidavit where it says
10 the juror said she had mixed emotions about capital
11 punishment except when it comes to children and stuff like
12 that. Also said she didn't know whether her objections
13 were religious or moral. So again that all seems like it
14 supports the 1200 code?

15 A. Yes.

16 Q. All right. Again, dealing with punishment might
17 affect her view on guilt or innocence. Would that be more
18 of the general sort of difficulty following the law code
19 maybe?

20 A. I would need to know the whole -- the whole of what
21 she said.

22 Q. So that would be an example of when you would go back
23 to the transcript and try to see to what extent you agreed
24 with whether or not the affidavit, you know, had gotten all
25 the necessary information or quotes out of it?

1 A. Well, could you -- could you read me that quote again?

2 Q. Yeah, sure. And this -- this just says dealing with
3 punishment might affect her view on guilt or innocence.

4 A. Right. So the question is then whether that would be
5 covered by 1200?

6 Q. Just when you ran across something like that, you
7 would go back and review the transcript yourself. That's
8 what I'm asking, when it was sort of a general -- you know,
9 because not all the time would a prosecutor give you a
10 reason that matched up with your codes, correct?

11 A. That's right.

12 Q. So that would be something where maybe you would go
13 back to the transcript and look?

14 A. So in that instance I guess the question is, does that
15 fall under 1200 or is there another code that we needed?
16 So I -- think about that for a minute. I think that one
17 would tend to fall under -- I think that one was covered by
18 the 1200 code.

19 Q. 1200?

20 A. I agree if it was -- if it didn't appear to be covered
21 under that code, then I would want to make sure that we
22 weren't missing a code.

23 Q. And then obviously that code -- you would expect you
24 said theoretically that death penalty reservations should
25 have some kind of impact on whether or not somebody is

1 struck, correct?

2 A. I would -- I would expect that and that is indeed what
3 we found.

4 Q. Right. Did y'all have a discussion about sort of the
5 parameters of what comes underneath having death penalty
6 reservations?

7 A. Yes. That is something that Catherine Grosso and I
8 did discuss and it -- so starting off, it's clearly got to
9 be something less than all out opposition because then it's
10 not -- we're not including people struck for cause. So the
11 question of where you draw the line, how much ambivalence
12 the person has to express, so the line there has to be
13 something short of a person saying I would always give
14 death or I'm a hundred percent -- I would always give death
15 because that person would always be excluded for cause. A
16 person who says I wouldn't give it in every case wouldn't
17 fall under that because if they didn't say that, they would
18 be excluded for cause on the other -- from the other
19 direction. So something that showed that the person was --
20 had some ambivalence about the death penalty in general
21 that they could apply the law but they don't necessarily
22 think the law does any good or it might be really hard for
23 them. So yeah, we discussed that because -- to figure out
24 where that line was.

25 Q. Okay. Fair enough. And let me -- the last thing or

1 almost the last thing in here, according to the reviewer on
2 page 686, this juror said her fiance was shot and killed by
3 an older person who got no time for it. All right. So I
4 mean that sounds like code 320?

5 A. Yes.

6 Q. Which y'all have on the transcript?

7 A. Yes.

8 Q. Now, the prosecutor goes on to say that none of that
9 had been mentioned in her juror questionnaire?

10 A. Is that what it says in the affidavit?

11 Q. That's what the affidavit says.

12 A. Okay.

13 Q. All right. So now my question is, is there anything
14 on the DCI that captures evasiveness?

15 A. So you mean discrepancies between information provided
16 in the questionnaire and what is stated in voir dire?

17 Q. Um-hmm.

18 A. No.

19 Q. Okay. So again that would be an example of something
20 not contained in the DCI that would be relevant to the
21 prosecutor's decision to strike?

22 A. So it's -- so we would capture the underlying
23 information of the factors but no, we didn't -- we didn't
24 code for discrepancies for omissions on the
25 questionnaire --

1 Q. Okay.

2 A. -- as a separate variable. No, we didn't -- we didn't
3 code for that.

4 Q. Was there any way -- if somebody was being dishonest
5 or evasive in the questioning, is there anywhere on the DCI
6 where you could code that information at all?

7 A. Can you give me an example?

8 Q. Sure. If a prosecutor -- if I'm a prosecutor and I'm
9 asking you what color your shirt is and you say yellow,
10 clearly you're not telling the truth.

11 A. And that's all that's said about it?

12 Q. Yeah.

13 A. No.

14 Q. So, again, what I'm getting at is there's no variable
15 for evasiveness or failure to disclose or anything like
16 that?

17 A. No.

18 Q. I just wanted to make sure I didn't miss it. Now, if
19 I can get you to look at number 4, that's the next DCI.
20 Can you tell the Court which case and number that applies
21 to?

22 A. John McNeill and the juror is Rodney Berry.

23 Q. All right. Now, for Mr. Berry, if you go back to page
24 three and the descriptive characteristics, can you tell the
25 Court which descriptive characteristics are there or what's

1 indicated there?

2 A. 410, which is that the juror had, I guess, previously
3 been accused of a crime, and 310 is crossed out. I would
4 have to see what was in the database. I would assume that
5 meant that that's not reflected in the database but, again,
6 the final word is the database.

7 Q. Right. I mean this is -- again, this is just what the
8 coders are using --

9 A. Right.

10 Q. -- to put information into the database?

11 A. That's correct.

12 Q. So, again, this is something that an affidavit was
13 submitted on and the affidavit says that the juror, at
14 least on page 1128 to 1131 in the transcript, said at some
15 point during the process that he could not consider a vote
16 for the death penalty for a felony murder type situation.
17 All right. Now, assuming the prosecutor is right and this
18 case involved felony murder, is there a way that the DCI
19 would capture that?

20 A. Okay. Well, that is one -- okay. So there's two
21 issues here.

22 Q. Um-hmm.

23 A. One is there is a discrepancy so it sounds like the
24 prosecutor is asserting a reason that would be the 1200
25 code or the death penalty reservation code. So that is one

1 where in reviewing, I changed that or I did change it to --
2 in the shadow code which is independent of my own judgment.
3 As far as where I take the prosecutor's assertions and code
4 it that way to see if it changes -- if it can account for
5 this effect. The other issue then is, was it properly
6 coded. So I would go and I would review the whole colloquy
7 on that issue. I mean everything that the juror had to say
8 about this particular issue, I would review it or I did
9 review it to see whether it was coded wrong under our
10 protocol or whether it was properly coded under our
11 protocol.

12 Q. Okay. So I mean specifically for that example,
13 assuming that's correct and the juror said I can't do
14 felony murder, that would fall under death penalty
15 reservation?

16 A. Well, I can't make a judgment on that without having
17 the whole -- all of what he said.

18 Q. Because again you have to go back to the transcript
19 and read?

20 A. Yes. I have to go back to the transcript. A
21 statement out of context can mean -- so, for instance, I
22 recall one case where a woman said she had real problems
23 with the death penalty and then -- it was then clarified
24 that she thought the death penalty was available for rape.
25 And once they cleared that up, she said, oh, no, then I

1 have no problems with it. So if you just say I have real
2 problems with the death penalty on its own, it would look
3 like a slam dunk 1200 code.

4 Q. Sure.

5 A. So I would want to see is there a misunderstanding
6 about -- in the juror just needs -- something needs to be
7 clarified. So I would never code based on just a -- I mean
8 if there was a discrepancy or if there was a question, I
9 would want to get as much information as possible because
10 the context matters a lot.

11 Q. And just sort of a random place to ask you but how
12 many of these transcript reviews do you think you've done
13 as you've been going through this?

14 A. Very many. But I couldn't even -- I couldn't
15 estimate. A lot. I mean any close cases, that's part of
16 why we have the double coding because if people aren't
17 reaching agreement on it, then that suggests it's a close
18 case. Sometimes they just make mistakes.

19 Q. Right.

20 A. That does happen and having two coders is a good way
21 to catch it, not always but it's a good way to catch that.
22 So I can't answer that. I don't recall.

23 Q. I wasn't fishing for -- but you read a good number of
24 these transcripts to look for that kind of thing?

25 A. Yes, I think I have.

1 Q. Did you find that sort of your appraisal of what was
2 going on when you were asked to look at these transcripts
3 matched up with what your coders had done?

4 A. Well --

5 Q. In other words, did you read a lot of things and say
6 yeah, I think my coder has got it pretty much right? Not
7 with the affidavits. I'm talking about before the
8 affidavits.

9 A. Well, recall it wasn't brought to my attention unless
10 there was a discrepancy.

11 Q. Right.

12 A. So there was necessarily a disagreement between coders
13 on some point. Sometimes it was a matter of what type of
14 death penalty reservation, whether it was the catch-all
15 1200 or if it was specifically moral. So the ones that --
16 the only ones that would be brought to my attention were
17 when there was a discrepancy so there would be necessarily
18 somebody who I disagreed with that --

19 Q. Right.

20 A. -- in any instance, that was brought to my attention.

21 Q. I want to make sure I understand right. So the only
22 ones where you reviewed the coding really is either in the
23 case of discrepancies or now, in cases where the state has
24 submitted an affidavit?

25 A. Well, I should add that when we started this process

1 and we were -- when we were beginning the coding process,
2 they would come to me with questions. So it wouldn't
3 necessarily be discrepancy but if there was something they
4 couldn't answer, they would ask me how -- how does this fit
5 under the protocol. And for a particularly, it really --
6 it came up a lot with employment. So you have somebody who
7 owns a trucking business. Do they code them as somebody
8 who is in the transportation business or do they code them
9 as a professional business owner. So they would often ask
10 me what do I code this as so it wouldn't even reach the
11 point of a discrepancy. They would ask me and they were
12 instructed to keep track of that in a coding log as well
13 just to provide for guidance for other coders that come
14 along to ensure consistency.

15 Q. Well, I was going to ask, you all had a coding log
16 where you noted some of the issues, I guess, just so the
17 other folks could look at maybe right off the bat to see if
18 they got their question answered as they were going through
19 it?

20 A. That's right. Because there's -- I agree, there are
21 some close calls here and there are some points where
22 reasonable minds could differ on how precisely we would
23 define a category. And we did the best we could to be as
24 accurate as possible but to the extent that there is error
25 or to the extent that there is disagreement as to how we

1 characterize the category, the important thing is
2 consistency so that the coding would apply -- the same rule
3 would apply to people of all races or whether they were
4 struck or not and to avoid systematically skewing the study
5 in any way.

6 Q. Okay. Was there -- it's in the report, the coding
7 log.

8 A. Yes.

9 Q. It didn't look like it was that long. I mean is that
10 all of the -- did you pick and choose that or was that
11 pretty much everything that was included in it?

12 A. That was when there was something that came up that I
13 would resolve and they thought it would be -- it would be
14 illustrative. It might come up again. It didn't code
15 every discrepancy in the cleaning doc. As the cleaning doc
16 of all -- as we got through more, that also informs the
17 coders, if they had a question, they could look back to
18 previous entries to see how I had resolved similar issues.
19 So I think you have to read the coding log and the cleaning
20 doc in tandem. But when there was a category -- so, for
21 example, like you own a trucking business. I made a call
22 there that that's a professional. And so that's something
23 that's expected would occur, the same type of issue we
24 would expect come up, put that in the coding log.

25 Q. You may not know this but are you aware if a coding

1 log was included in the exhibits that were handed up
2 yesterday?

3 A. I know that the coding log is part of the report.

4 Q. Okay. So that's included?

5 A. Yes.

6 Q. And then your cleaning log, which is separate, right,
7 that's the Excel spreadsheet?

8 A. Yes.

9 Q. Was that included as far as you know?

10 A. I believe it was disclosed to the state.

11 Q. Right.

12 A. I believe -- I don't recall that it was entered into
13 evidence --

14 Q. Okay.

15 A. -- except the demonstrative.

16 Q. Right.

17 A. The example.

18 Q. Okay.

19 MR. PERRY: Could I have a moment, Your Honor?

20 THE COURT: Yes, sir.

21 MR. PERRY: Thank you, Your Honor.

22 THE COURT: Yes, sir.

23 MR. PERRY: Sorry, Judge. I was looking at some
24 notes and I wanted to make sure with Mr. Colyer that when I
25 was referring to page numbers, those were actually the

1 transcript pages --

2 THE COURT: Yes, sir.

3 MR. PERRY: -- because I know we're looking at a
4 number of materials here.

5 Q. All right. I think we were going to the next DCI,
6 Professor O'Brien. That would be number 5 -- what I've
7 marked as number 5.

8 A. So this is from John McNeill's case and the potential
9 juror is Linda Montgomery.

10 Q. Right. And, again, going back to page three, the
11 descriptive characteristics, can you explain to us what
12 we've got in terms of descriptive characteristics for that
13 potential juror. Again, I can give you the codes.

14 A. I would appreciate that. They are good coders but
15 they don't have very good handwriting.

16 Q. I just want to make sure if I'm understanding right.
17 It looks like somebody maybe made a change just within a
18 code to the first one?

19 A. That's right.

20 Q. So it looks like that one was maybe 320 I think. It
21 was family or friend victim of a crime. And then 620, now
22 they've got that one marked out so that was not put into
23 the spreadsheet because it was taken off, correct?

24 A. I have to look at the spreadsheet. That's what I rely
25 on when I check the coding.

1 Q. When you check, did you actually cross stuff out or,
2 again, was this the coders that were doing that?

3 A. No. I did not work -- I did not use this -- I mean I
4 would use what was inputted into the database. And I
5 instructed my coders just -- just, you know, to be extra
6 careful that when they made a change, they should make a
7 note of it on the spreadsheet but the final word is what's
8 in the database.

9 Q. Okay. And then for variable 2029, that third
10 characteristic you've listed as 420?

11 A. Yes.

12 Q. -- which is family or friend accused of criminal
13 activity?

14 A. Yes.

15 Q. And then it looks like over to the right there there
16 is a --

17 A. 110.

18 Q. -- 110 maybe? And then above that maybe an 1112
19 initially and that was changed?

20 A. That's right.

21 Q. So that's -- you've got a number of characteristics
22 there?

23 A. Yes. It seems so.

24 Q. Right. So the 320, the 420 and the 110, looks like
25 those were the ones that were actually entered in?

1 A. I'd have to see what's in the database.

2 Q. Right.

3 A. That's what I would check it against.

4 Q. Okay. And then, again, if you go to the reviewer who
5 looked at this case and who did a summary, you know, they
6 know at some point in the transcript -- I believe if I'm
7 right now, this is page 640 to 649 of the trial transcript
8 that there was some notice of physical problems with
9 migraines and headaches. That's not -- that's not coded
10 within those three categories, correct?

11 A. I have to look at my descriptive coding index so --

12 Q. Did you have a variable for physical discomfort or
13 something like that included in your -- in your list of
14 factors?

15 A. If a juror stated that some physical problem would
16 cause them -- they were concerned it would be a hardship to
17 serve?

18 Q. Um-hmm.

19 A. That would be I believe under the 100 level variables.

20 Q. That was the hardship category?

21 A. But it would have to be something more than an
22 inconvenience because everybody is inconvenient -- I mean
23 many people are inconvenienced by jury service.

24 Q. Sure.

25 A. So if it rose to the level of they were expressing

1 concern that this would be a hardship, that would -- it
2 would fall under one of the 100 codes.

3 Q. Okay. And do you recall any mention in the coding log
4 of, you know, what constitutes a hardship? Was that one of
5 the ones where there was a lot of questions about it one
6 way or the other, do you remember?

7 A. I recall there was some.

8 Q. There were a couple?

9 A. Yeah, I believe -- yes, I believe there were some.

10 Q. Okay. And in the training, did y'all talk about these
11 codes and sort of the spectrums and how to list them for
12 the training sessions you had with the coders?

13 A. Yes, yes. We talked about the various codes and that
14 was also something that as we were going -- I didn't just
15 train them and then that was it. As issues arose, it was
16 something that as an issue that I hadn't perhaps
17 anticipated would come up and then either the coders would
18 bring it to my attention or it would be flagged through a
19 discrepancy in the coding, that is something that I would
20 continue training them on. But I didn't anticipate
21 every --

22 Q. Sure.

23 A. -- every coding issue so it was something that was a
24 process.

25 Q. Did y'all have like weekly meetings or some systematic

1 way to sort of share information about what was going on?

2 A. I was in almost daily contact with my coders and we
3 communicated through -- so they would come to me with
4 questions. They worked in the building.

5 Q. Um-hmm.

6 A. And the code -- the cleaning doc was continuously
7 updated. Sometimes I fell a little bit behind but it was a
8 pretty regular process that I would review it and bring it
9 up to date. They wouldn't enter the data until I had
10 signed off on the cleaning doc for that case.

11 Q. Okay. So the DCI information didn't make it to the
12 spreadsheet until you signed off on it?

13 A. If I had resolved any pending coding issues in the
14 cleaning doc for that case -- because I didn't want to
15 enter it and then have to go back and change it.

16 Q. Yes.

17 A. So I would try to do that -- I would try to do that
18 very regularly. I didn't want to fall behind in it. It's
19 kind of labor intensive. But they would wait before they
20 would enter a DCI until I had signed off on any
21 discrepancies that existed between the two so that by the
22 time they were entering the DCI, the two DCI's would have
23 been reconciled.

24 Q. But they actually did the data entry?

25 A. Yes.

1 Q. And just going back, it looks like the affidavit that
2 was submitted and reviewed in the case said that a family
3 member had killed another family member at some point so
4 that would -- I mean it sounds like offhand that would fall
5 under that code 320?

6 A. Yes.

7 Q. In other words, family/friend victim of crime code?

8 A. Yes.

9 Q. And then also code 420, the family/friend accused of
10 criminal activity?

11 A. Yes. That would fall under that code.

12 Q. So when the same -- if a fact or something was
13 elicited during jury selection and it -- it could possibly
14 fall under multiple codes, did the coders put it in all of
15 the categories where it was relevant or possible to put it
16 in?

17 A. It depended on the code. So for that one, you have
18 one family member is the victim. One family member is
19 accused of perpetrating the crime. They would get both
20 codes.

21 Q. Okay.

22 A. Sometimes a code was exclusive of other codes. So for
23 example the 1200 codes for death penalty reservations, that
24 was -- so there was another set of codes for would have
25 difficulty following the law and that expressly excluded

1 death penalty reservations. That got its own category. So
2 if a person said I just would have a really hard time
3 imposing the death penalty, they would be coded under the
4 1200. They wouldn't also receive a code for failure to
5 follow instructions unless it was something else they said.
6 So it would depend on the codes, whether they were --
7 whether -- how that applied.

8 Q. Go back -- so for our example, with the previous juror
9 who had an issue with the felony murder theory, how would
10 you code them then? Here they were coded a certain way but
11 is that one where they are exclusive in terms of maybe you
12 could code it death penalty reservations but then maybe you
13 could code it as difficulty following the law as well?

14 A. Well, I don't want to say how that -- I need to read
15 the whole passage to say whether that person should have
16 gotten a 1200 code. But if a person said -- has a problem
17 with some aspect of the death penalty, enough to qualify
18 them for a 1200 code, that wouldn't be also a basis for
19 getting an 800 code, which is what applied to those
20 circumstances. So if a person said I have a hard time with
21 the death penalty and they also said and I need DNA
22 evidence to convict, that would warrant -- that might
23 warrant an 800 code. It might because it's separate. But
24 if it -- I don't want to speak about that particular
25 statement without having context of the whole -- of the

1 whole conversation.

2 Q. Okay. And really what I'm getting -- I don't want to
3 tie you down to some hypothetical but what I'm asking is,
4 in a case where there is a factor that could go in two
5 categories like this example and they are not really
6 exclusive categories, what would the coders do in that
7 case?

8 A. That totally depends. I have to know what the precise
9 facts were, if they were independent or if they fell under
10 the same code.

11 Q. Was the double coding procedure supposed to catch that
12 or how would you ever know that that was the case?

13 A. Actually that is the type of situation to double code
14 -- double coding process got. They -- so if a person wrote
15 -- said I have a hard time with the death penalty and I
16 don't know if I can follow instructions and if a coder gave
17 that person a code -- I think it was 860 that says can't --
18 would have difficulty following instructions, then that's
19 the kind of discrepancy that I would resolve. I would read
20 what was said to see if there was something independent or
21 if the coder was erroneously coding what should have been a
22 1200 code as an 800 code.

23 Q. Okay. So if I understand you correctly, in some case
24 where coder A looks at a transcript and sees three factors
25 and coder B looks at a transcript and sees four factors,

1 having one more descriptive characteristic listed, that
2 would qualify as a discrepancy?

3 A. Yes, it would.

4 Q. So that would flag you to look at it?

5 A. Yes, it would.

6 Q. Okay. And then going back to this -- this example
7 with this particular -- particular juror, again, is there
8 -- there's no other way to capture in this DCI when people
9 aren't really being forthcoming when they are asked
10 questions, correct.

11 A. Can you give me an example?

12 Q. Nonresponse, for example. In other words, were your
13 coders able to look at folks who were asked questions and
14 just didn't answer them? Is there a way to put that as a
15 factor into the DCI?

16 A. Well, it depends -- it would depend on what you mean
17 by not answer. Sometimes during voir dire, the judge will
18 say is there anyone here who knows one of the parties? We
19 would take a nonresponse there as no so that --

20 Q. Let me be more specific. So if asked directly about
21 something and then that was followed by just not answering
22 what was asked --

23 A. Can you give me an example? You mean like when they
24 don't answer the question they are being asked or they just
25 get stone faced.

1 Q. Sure. If I'm a prosecutor and you're a prospective
2 juror and I say, well -- we'll use Mr. Montgomery as an
3 example, you said something about having a family or friend
4 who was the victim of a crime. So I mean that's coded.

5 A. Yes.

6 Q. That's in the transcript. That's coded. But she
7 wouldn't talk about anything else when asked, you know,
8 what happened, when was this?

9 A. Can you tell me exactly what was said? I'm sorry. I
10 don't -- because if it matters, there's ways of not
11 answering a question that could be simply a person who
12 fails to follow up or a person who refuses to answer. So I
13 would just need more specific --

14 Q. And that's my question. How would you -- how did you
15 instruct your coders to deal with that situation?

16 A. Which one?

17 Q. The fact where you have to decide how people are or
18 are not answering questions?

19 A. Well, we coded their answers so any information -- so
20 any information that they conveyed in their answers or if
21 their silence indicated something wasn't present, so
22 anybody here who has this -- knows one of the witnesses,
23 raise your hand, their failure to raise their hand would be
24 taken as that they don't. But that's -- so I -- I'm not
25 trying to be difficult. I just don't know quite how to

1 answer that without something more specific.

2 Q. Did your coders ever come to you and say, hey, I'm not
3 really sure how to interpret what this juror is talking
4 about because he's not really answering any questions?

5 THE COURT: Well, I think that's part of the --
6 at least the difficulty I'm having. If, for example, a
7 transcript reflected a prosecutor asked a juror the
8 question and the transcript then reflected that the juror
9 did not respond, is that the situation you're talking
10 about?

11 MR. PERRY: Not just like silence.

12 THE COURT: Okay.

13 MR. PERRY: But, hey, you know, when did you get
14 your shirt and they say, well, I went shopping yesterday.
15 So they answer but they don't really give an answer to what
16 is being asked.

17 THE COURT: Okay. Do you understand the
18 question?

19 BY MR. PERRY:

20 Q. Does that make sense?

21 A. I think so. Let me think for a minute. I don't
22 recall that particular issue coming up. I don't recall
23 them coming to me to talk about that issue or seeing it.
24 That doesn't mean that if I saw a portion of the transcript
25 where that happened, that it might -- my memory might -- I

1 might remember something but offhand, I don't recall that
2 particular issue coming up where a juror was being -- where
3 they came to me and said this juror is being evasive or
4 can't answer the question or is refusing to answer the
5 question. I don't recall an instance where that issue --
6 that that came up.

7 Q. Okay. And that -- from the perspective of having the
8 coders ask you about it, right, when you say I don't recall
9 that coming up, you mean from the perspective of the coders
10 coming to ask you about it?

11 A. No. Usually they would come and say this is what the
12 person said and I'm not sure how to code this. That's
13 usually the context in which something came up so it may
14 have come up in that way but not specifically framed that
15 way.

16 Q. What I'm asking about is if you've read transcripts
17 and you probably seen there are jurors who responded not
18 totally nonsensical but not really getting at what's being
19 asked or answering something that they wanted to answer?

20 A. Well, we would -- we would base our coding on -- on
21 what they said in terms of -- and I found that there were
22 definitely instances -- I mean this is very common. This
23 is a very complex area of the law where they didn't
24 understand the question and there was follow-up questions.

25 Q. Um-hmm.

1 A. I saw that happen quite a bit or a person needed
2 something clarified for them or didn't understand the
3 question.

4 Q. The juror?

5 A. That's correct.

6 Q. Right. Okay. Now, let me get you to look at number
7 6. Again, if you just tell the Court which juror that
8 involved.

9 A. Jeffrey Meyer and venire member is Hannah Miller.

10 Q. Um-hmm. And again, same kind of information, if you
11 flip back to the descriptive characteristic section --

12 A. Yes.

13 Q. -- looks like there were a couple listed there?

14 A. Yes.

15 Q. Again, do you recall those numbers offhand? I can
16 give them to you.

17 A. Looks like a 1200, a 1220, 420, 320 and a 780 and then
18 something is crossed out so that must have been either an
19 error that somebody miswrote and crossed out or was a
20 discrepancy I caught and said it didn't belong.

21 Q. And something was changed?

22 A. That's correct.

23 Q. And the difference between 1200 and 1220 those are --
24 1220 is death penalty reservations?

25 A. Yes, general, nonspecified death penalty reservations.

1 1220 is some sort of specified death penalty reservations.
2 Without looking at the appendix, I don't recall precisely
3 the basis.

4 Q. So that was an example where you have specific
5 subcategories where you identified more specifically what
6 the nature of the death penalty reservation was; is that
7 right?

8 A. Yes.

9 Q. Now, on the affidavit, the prosecutor -- I'm hoping
10 I've got the right number. The page here says on 760 the
11 juror says I'm against the death penalty. Something clear
12 like that, again, that would fall under 1220?

13 A. It was coded as 1220.

14 Q. Right.

15 A. So I -- yes.

16 Q. So that would --

17 A. Well, in that case, I mean, it was coded that way. If
18 it wasn't, I would want to read the whole thing before I
19 would say it should have been.

20 Q. Right. In this case it was 1220 and the prosecutor
21 put down the reason that they recalled?

22 A. That's right.

23 Q. So it looks like that matched up?

24 A. Yes.

25 Q. And then there is another notation that this

1 particular juror had a nephew on death row in Pennsylvania.
2 Said she was against the death penalty again. Said I would
3 say life rather than the death penalty. I'm against the
4 death penalty, never vote for it. Again all those -- does
5 that all sound like how you would characterize somebody as
6 having reservations about the death penalty?

7 A. That -- it appears this was correctly coded that way,
8 yes.

9 Q. I mean it's not just one. There is a couple examples
10 of the same sort of characteristic about a reservation
11 about the death penalty?

12 A. It appears to be, so yes, without having it in front
13 of me.

14 Q. Okay. Yeah, fair enough. Fair enough. And, again,
15 looking at the transcript, there was a challenge for cause
16 that was denied. Again, if you look at the transcript and
17 you're taking my word for it but you can look at the
18 transcript and see that there was a challenge for cause
19 that was denied but the DCI does not capture that, correct?

20 A. No, it does not capture a challenge for cause.

21 Q. Okay. And I asked you about that earlier when we
22 talked about what was captured and not captured?

23 A. That's right. That's right.

24 Q. And then going back to the first page, number four,
25 we've got excused for cause but not an attempted strike or

1 anything like that?

2 A. That's right.

3 Q. Let me get you to flip back to the last page on this
4 one, that would be the second supplemental.

5 A. Yes.

6 Q. So for the 7 or 800 codes, they had to -- again this
7 is an example where y'all tried to be more specific,
8 correct?

9 A. Well, the 700 and 800 codes are designed to capture
10 attitudes or -- attitudes in general or attitudes
11 specifically about the law. And what we found as we were
12 into this process was that they weren't doing a great job
13 discriminating between the direction of the bias.

14 Q. Um-hmm.

15 A. That a person who said I require proof beyond a shadow
16 of a doubt, right, that a person who said -- even after
17 they're told, oh, no, it's just reasonable doubt and they
18 say no, I have to have shadow of a doubt would be coded the
19 same as someone who said, well, I assume if they're here,
20 they must have done something. So this allowed us to go
21 back and review each of those cases where somebody got that
22 800 or 700 code to be able to capture the direction that it
23 needs so that we could -- we could better discriminate --
24 to enhance a predictive power of those codes.

25 Q. Okay. So sort of like in some of the other -- like

1 the employment variable was entered 99 for the
2 characteristics and you said it was 9999, that was just a
3 way to get you to go look at it basically?

4 A. Not exactly. It was something that came up later that
5 when -- when we decided that there was fair criticism of
6 those codes, that they were -- that they could have the
7 potential to wash each other out, right, but if you have
8 some -- if you have people who are expressing biases but
9 they go in the opposite direction, it's not going to tell
10 you much about strike behavior. So this was our way to go
11 back and to add a code that would allow us to put that in
12 context so that we would know when a person got this I
13 can't follow instructions code, is it they can't follow
14 instructions because they want it to be easier for the
15 state or they want to make the state's job harder?

16 Q. So that was something you would decide or the coders
17 would decide? Like using this one for example, number
18 five, choice two is circled, correct?

19 A. Yes.

20 Q. Choice two said what?

21 A. The venire member said something to suggest a tendency
22 towards a less punitive outcome, meaning either they're
23 leaning -- whatever they said seemed like it would make
24 them more biased in terms of either an acquittal or not
25 giving the death penalty.

1 Q. Okay. So I mean just in plain English?

2 A. Leans defendant. That whatever their bias statement
3 was, it suggested something that leans towards the
4 defendant's favor.

5 Q. And that was a determination you made, not the coders?

6 A. That is a determination that I made with the coders.
7 So they would -- that was a determination I supervised. I
8 identified all the cases where there was a 7 or 800 code
9 and they made that determination with input from me.

10 Q. Was that a different process than the discrepancies
11 resolution?

12 A. Yes. Yes. This did not have the double coding.

13 Q. Okay.

14 A. It's usually -- it wasn't a hard one in the sense that
15 if somebody said something to warrant an 800 code or 700
16 code, it was -- if they said something strong enough to
17 warrant that code, it was usually pretty clear which way it
18 favored. But when somebody said something and then they
19 said, well, don't tell us which way you're leaning, they
20 were instructed to code ambiguous if we couldn't be sure or
21 if they said one that went one way and one went the other,
22 it was coded as ambiguous.

23 Q. So I mean -- so this wasn't in the coding log then,
24 right, because this was a determination you made?

25 A. I'm sorry. I don't follow.

1 Q. This wasn't -- there was no coding log for this
2 because you did this, not the coders, right?

3 A. No. The coders did this. I supervised them.

4 Q. Okay. Were there many entries in the coding log as
5 far as here are examples of how you resolve these issues or
6 how you identify the directions of bias?

7 A. I don't specifically recall if there were.

8 THE COURT: This a good point for us to stop for
9 lunch?

10 MR. PERRY: Oh, sure.

11 THE COURT: Thank you, Doctor. You may step
12 down.

13 THE WITNESS: May I leave the exhibits here?

14 THE COURT: Yes, ma'am, if you would, please.
15 Okay. We're going to be at least until 2:30. Any issues
16 in that regard?

17 MR. JAY FERGUSON: No.

18 THE COURT: Thank you. We'll see you at 2:30

19 (Lunch recess taken.)

20 (The following proceedings continued in open
21 court. The defendant, defense attorneys and state's
22 attorneys were present.)

23 THE COURT: Let the record reflect all counsel
24 are present, the defendant is present. Folks, before we
25 continue with the cross-examination of Dr. O'Brien, let me

1 inform all counsel that I've spoken with our court
2 reporters or our current court reporters. I'm informed
3 that other members of the court reporting will be
4 continuing in and filtering in the case from time to time.
5 I've expressed my desire that, although I know they are
6 overworked and they have matters that they are currently
7 working on, but they do the absolute best they can to
8 provide all of us with transcripts as quickly as possible.
9 So I anticipate that they will be coming in as quickly as
10 humanly possible to you folks. Yes, sir, you ready to go?

11 MR. PERRY: Yes.

12 MR. COLYER: Judge, may I step out and retrieve
13 something from the copier?

14 THE COURT: Yes, sir. We'll be at ease.

15 MR. COLYER: No, no. I just wanted to have
16 permission to do that.

17 THE COURT: Yes, sir.

18 MR. COLYER: I don't want to hold anything up.

19 THE COURT: Thank you, Mr. Colyer. Mr. Perry,
20 you ready to go forward?

21 MR. PERRY: Yes, sir.

22 Q. And if I could, Mr. Professor O'Brien, I think I was
23 on number 7 -- state's exhibit number 7. I can't remember.
24 I think you gave the information on the juror but can you
25 give it to us again?

1 A. Sure. This is a DCI from Philip Wilkinson's case and
2 the venire member is Alfred McNeil.

3 Q. Okay. And on the first place it looks like this juror
4 was not excused for cause; is that correct?

5 A. Yes.

6 Q. And he was challenged by the state or struck by the
7 state, right?

8 A. Yes.

9 Q. Okay. If you go back again to the third page of the
10 employment information, again, like we were talking about
11 earlier, looks like there was a correction made in there at
12 some point?

13 A. Yes.

14 Q. I don't know if I -- I think I left this out. There's
15 also a category for spouse's employment too, correct?

16 A. Yes.

17 Q. Again, even though it's a spouse, y'all got the data
18 or the information about the spouse's employment from the
19 same data sources, correct?

20 A. Yes.

21 Q. And then for descriptive characteristics, what
22 descriptive characteristics are indicated there?

23 A. 410 and 610.

24 Q. And do you recall what 410 and 610 are offhand by any
25 chance?

1 A. I recall that 410 refers to the juror having been
2 accused of a crime.

3 Q. Right.

4 A. And 610 I believe refers to knowledge or having a
5 family or close friend in law enforcement.

6 Q. Yeah. So 610, juror worked in law enforcement?

7 A. Yes.

8 Q. Okay. All right. And let me just ask you a question,
9 again, based on the affidavits that have been submitted, it
10 looks like what's indicated for the review of Alfred
11 McNeil, according to the prosecutor, you looked at -- he
12 had a conviction from a previous crime in 1979 so that
13 would fall under the 410 category, correct?

14 A. Yes, it would.

15 Q. Then it looks like he actually stated on the record at
16 some point he spent two years in the department of
17 corrections, so that would fall under the same 410
18 category, correct?

19 A. He said so as an inmate?

20 Q. Yes, ma'am.

21 A. Yes.

22 Q. I mean if he -- if they give elaborated information or
23 they characterize their experiences, that's all in the
24 category 410, right?

25 A. Category 410?

1 Q. Um-hmm.

2 A. Could you explain?

3 Q. So my question is it doesn't really matter if he said
4 I was in DOC for two years or if he waxed eloquently for
5 three pages or four pages about his experience?

6 A. If the only information conveyed -- if he didn't --
7 you would code -- if he said additional things that we
8 could code, we would code that so we would just code for
9 whatever information he gave.

10 Q. So again, there was no difference, he was either -- he
11 either falls under that category or he doesn't? That's
12 what I'm getting at.

13 A. I suppose so. I -- based on that example, if --

14 Q. Right. Assuming the example that you and I are both
15 looking at from the reviewer, if that's correct, then that
16 seems to make sense, right?

17 A. So if all -- if everything he said just gave rise to a
18 410 code, then he would just be coded as 410.

19 Q. As 410. Okay. And then I think for the 610 category,
20 we've got juror worked in law enforcement. From the
21 review -- if you look at the review, sometimes if there's
22 extra information or conflicting information that the
23 prosecutor provided in the affidavit, that's when you go
24 back and do the transcript review and sort of make a
25 calculation?

1 A. If information provided -- or so if some -- some
2 information was asserted in the affidavit that might have
3 been captured by one of our codes and wasn't?

4 Q. Um-hmm.

5 A. Then I would go back and review that.

6 Q. Okay. And if there was a -- again, going back to one
7 of the examples we talked about this morning, if there was
8 a reason or a rationale or an observation of a fact in the
9 transcript -- for example, in this case, if there was a
10 statement by the juror -- or potential juror that he had
11 been a drug addict for a number of years, so -- so that's
12 on the record, is it necessarily one of the variables that
13 had been selected, do you recall?

14 A. I don't believe that the fact of addiction or drugs,
15 that we don't have a precise code for that. We would have
16 a code for -- if they said they were arrested for it, we
17 might code for that. We did code for that under the 400
18 category.

19 Q. Right.

20 A. But we did not have a separate code that captured
21 addiction.

22 Q. Okay. When you were going back and looking at these
23 codings, you did a number of recodes. You talked about
24 that in your testimony?

25 A. Yes.

1 Q. Is it -- when you say recoded, is that more combining
2 or disentangling categories of the same variable or would
3 you, if you looked at this for example, maybe add a
4 completely new variable to your analysis? Did you ever add
5 variables after the fact when you were going through them?

6 A. Well, generally the recodes that I discussed earlier
7 to account for discrepancies between what our coding
8 reflected and what was asserted, usually the asserted
9 reasons would fall under some category we already had, so
10 for instance, death penalty reservations. So what I would
11 create would be a recode -- a new death penalty
12 reservations variable that was identical to the original
13 one and then change it only for those for whom there was a
14 discrepancy where the assertion was that this person
15 expressed death penalty reservations and we hadn't coded
16 that person that way. The only instance -- well, some of
17 the demeanor stuff that came up -- and demeanor came up a
18 few times in the affidavits where we wouldn't have a code
19 to capture it. I tried to do the best I could with the
20 leans defendant saying that it would be -- the most
21 comparable variable would be articulating a bias against
22 the state. There's also -- we could go back and also
23 recode to pick apart if a particular variable was defined
24 too broadly.

25 Q. Um-hmm.

1 A. And I believe we disclosed one recode we did on law
2 enforcement.

3 Q. Right. The one we discussed, right?

4 A. So that would be an instance where we would go --
5 where we went back to disentangle a code that was arguably
6 too broad.

7 Q. Okay. Well, and the reason I'm asking partly is
8 because -- so, for example, in the McNeill juror's case, if
9 a prosecutor gives you a reason, this previous drug
10 addiction as being an issue or a factor for the strike and
11 you don't have an explicit category or a category you think
12 you can shoehorn it into, how do you address that?

13 A. Well, that one might have been covered under the --
14 under the prior accusation of a crime. If that -- if that
15 covered it, then I would have thought -- I would have
16 considered that satisfied. But if there was some asserted
17 reason that did not fall into a particular category, I did
18 not make up a new variable for that.

19 Q. Okay. What did you do with it then?

20 A. I --

21 Q. Or what would you do with it? I guess I could ask
22 prospectively.

23 A. If it didn't fall -- if I couldn't classify it as a
24 bias, so then I could use leans defendant as a recode or
25 one of the other variables, I didn't recode for it.

1 Q. Okay. Is it fair to say -- what I'm hearing you say
2 is that leans defendant and leans state are to a certain
3 extent catch-all categories for an unidentified bias? Is
4 that fair or how would you --

5 A. Well, the way if I were thinking about if I could code
6 demeanor, what would that represent? If a person is acting
7 hostile, say, to the prosecutor during the questioning, I
8 think the -- if I -- if I could code that based on the
9 information in the transcript, I would have coded that
10 under some -- as some sort of a bias. I think that's the
11 thing that captures it most closely. Would seem to be
12 that's what would be the concern, a person who has bad
13 demeanor is the reason they would be objectionable as a
14 juror, not because of their posture but because they
15 conveyed some sort of hostility or bias. So I think that
16 would be the best one to capture it but if it's something
17 that's very specific that didn't fall under any particular
18 category, then I wouldn't have a code for that.

19 Q. Okay. And just in general -- I know you gave your
20 coders instructions?

21 A. Yes.

22 Q. How did you tell them to approach reading the
23 transcripts for all these reviews?

24 A. Could you be more specific?

25 Q. What instructions -- when you gave them copies of the

1 transcripts, what did you tell them?

2 A. I have a descriptive coding protocol that they read
3 that I believe was attached as an appendix to the report.

4 Q. To your report?

5 A. That's right. That was -- so those were the written
6 instructions that they were given.

7 Q. Did y'all have a discussion about them?

8 A. Yes. That would be part of the training.

9 Q. Did you give them any guidance for how to approach the
10 transcript?

11 A. When you say approach, could you be more specific?

12 Q. Read.

13 A. How to read it?

14 Q. Um-hmm.

15 A. But again, other than the descriptive level coding
16 protocol, I'm not sure what you mean by how they would read
17 it.

18 Q. I guess what I'm asking is, when you gave them the
19 transcript and protocol, is that all you did?

20 A. Oh, no. We would -- we worked through some examples
21 and talked about the various types of codes that might come
22 up frequently or that they may have questions about and
23 that one point that I emphasized was that in coding this
24 information, remember that because these are all people who
25 were not struck for cause, they don't have to wait -- they

1 don't -- for a particular characteristic to be present, it
2 does not have to be present to such a degree that it would
3 make the person unfit to serve because we had already -- we
4 are only looking at people who had survived cause so to
5 make them appreciate the fact that these are some subtle --
6 that we are necessarily dealing with some more subtle
7 issues because the people who were very adamant I could
8 never impose the death penalty presumably wouldn't have
9 survived cause, at least most of the time they didn't.

10 MR. PERRY: Okay. May I approach, Your Honor?

11 THE COURT: Yes, sir.

12 MR. PERRY: Judge, I've given a copy of this
13 exhibit to the defense.

14 THE COURT: Okay.

15 MR. PERRY: It's one bulky marked exhibit.

16 THE COURT: What is that exhibit number, Mr.
17 Perry?

18 MR. PERRY: 9 is what I have. If I may approach,
19 Judge?

20 THE COURT: Yes, sir. Thank you. Now, is this
21 for the Court or the purposes to give it to the witness?

22 MR. PERRY: I show it to the Court before I show
23 the witness.

24 Q. Ma'am, if you could look at what I have marked as
25 state's exhibit number 9 and tell me what that is or

1 appears to be.

2 A. This is a binder and it's labeled DCI's.

3 Q. Take a minute and just look through it.

4 A. Okay.

5 Q. And just to give you a little context, ma'am, does
6 that look like all the Cumberland County DCI's that were
7 collected for the study.

8 A. Well, no. It looks like there are DCI's from every
9 case but not all the DCI's. Did you mean all the DCI's
10 from Cumberland County?

11 Q. Well, all the -- let me start -- the post-it notes, if
12 you'll look at just one of the post-it notes, doesn't
13 matter which one.

14 A. Okay.

15 Q. Can you tell us what one of those post-it notes has?

16 A. One says William Bell. Another one says Rodney Berry.

17 Q. Does it look like there are about seven or eight
18 post-it notes that are in there?

19 MR. JAY FERGUSON: Your Honor, may I approach the
20 witness to see what he's looking at?

21 THE COURT: Yes, sir. Mr. Perry, if you need to
22 come on up, come on up.

23 MR. JAY FERGUSON: Just want to know what the
24 post-it notes are referencing.

25 BY MR. PERRY:

1 Q. Just to circumvent a little bit of the confusion
2 maybe, does it appear that all of these places that I have
3 marked are DCI's for the jurors I asked you about this
4 morning?

5 A. Yes. I believe that to be -- these are the ones -- at
6 least some of them are the ones that we covered this
7 morning.

8 THE COURT: Mr. Perry, for purposes of the
9 record, you previously marked a number of exhibits 1
10 through 8.

11 MR. PERRY: Yes, sir.

12 THE COURT: Does the binder correlate with those
13 exhibits?

14 MR. PERRY: Judge, that would include all of
15 them. So what I have marked as 1 through 8 are also
16 included in number 9.

17 THE COURT: Okay.

18 BY MR. PERRY:

19 Q. That's why I did it like that. I just wanted to be
20 clear. Does it look like there are about 62 DCI's in
21 there?

22 A. I can't really tell.

23 MR. JAY FERGUSON: May I confer with counsel?

24 THE COURT: Yes, sir.

25 BY MR. PERRY:

1 Q. Just to cut to the chase, does it look like those are
2 the DCI's for the black jurors that you looked at as part
3 of your study?

4 A. I think so. Does look like that, yes.

5 Q. That were struck. Let me be really specific.

6 A. That were struck.

7 Q. All right. Now, after that, that's the only question
8 I am going to ask you about that at this point, okay?

9 A. Okay.

10 Q. All right. And let me move on -- so, again, all the
11 DCI's were collected, coded. You resolved any conflicts or
12 discrepancies and then looked at the database, right?

13 A. Pardon?

14 Q. Then looked at the database or the worksheet that had
15 been compiled from that information?

16 A. So I did my analysis from that, from the database,
17 yes.

18 Q. I'm going to actually back up to sort of the research
19 question identification. We talked earlier about the
20 potential control variables?

21 A. Yes.

22 Q. So the identification of what explanatory factors you
23 might be interested in taking a look at?

24 A. Yes.

25 Q. And I think your report says there were maybe a

1 hundred that were considered?

2 A. I think -- I think it was about 65 or so.

3 Q. Okay. Was there some initial narrowing down process
4 that you went through?

5 A. Yes.

6 Q. Okay. Where did you start? In other words, what kind
7 of things -- you mentioned earlier some things you looked
8 at but how did you start to inquire about what variables
9 might be candidates to be explanatory?

10 A. Wow, I would look at them to see -- I would look at
11 them in isolation in terms of sort of their frequency so --

12 Q. Let me -- let me clarify because what I'm asking is
13 before you did any of the actual data collection, in other
14 words, when you were thinking about what to use to
15 construct the data collection instruments?

16 A. I understand.

17 Q. How did you come up with those -- those variables?

18 A. Well, I look -- I drew on the kind of information that
19 are collected in juror questionnaires, that are typically
20 collected, employment, demographic information, prior jury
21 service, the kinds of topics that are often covered in voir
22 dire. So those are presumably the kinds of things that --
23 those are good candidates because they are the things that
24 are asked of jurors and they are talked about in voir dire,
25 then they potentially bear on the decision to strike or

1 not.

2 Q. So I mean the assumption is if there is something that
3 people talk about, then that might indicate they matter one
4 way or the other?

5 A. It might.

6 Q. Was it just you or was that something that you and
7 Professor Grosso did together or who was -- who went to the
8 variables and identified the relevant or the likely
9 candidates?

10 A. This was something -- the DCI was something Professor
11 Grosso and I worked on and revised, trying to think about
12 if there is anything we were missing because it's a lot
13 easier to code for something that doesn't end up being
14 important than to go back and code for something that might
15 have -- might have mattered and you didn't capture. So
16 that was an important part of the process.

17 Q. Was it just the two of y'all that discussed how to
18 construct the DCI or were there some other folks that you
19 talked to?

20 A. No. We also consulted with David Baldus who had
21 conducted a study like this in Pennsylvania.

22 Q. Okay. Y'all looked specifically at that study?

23 A. Yes, we did.

24 Q. There was a study you referenced explicitly in the
25 report. Is that the one you're talking about?

1 A. Yes.

2 Q. Okay. So you looked at that. Did you use a lot of
3 the same material from that particular study? In other
4 words, did you use some of those same variables?

5 A. Yes.

6 Q. Okay. Were there many that you added?

7 A. Wow, I don't -- I don't recall specifically. We -- we
8 refined those -- the coding variables in ways that -- I
9 have to think for a second because this was -- feels like a
10 really long time ago. Well, I don't recall if we added any
11 variables. I know we started with, say, their -- his
12 descriptives appendix and the employment appendix. I know
13 there were some instances where we might have collapsed
14 some categories but I -- I just don't remember precisely
15 what -- what we added and what we took out. That was our
16 starting point.

17 Q. Okay. And that's what I'm getting at. So that was
18 sort of the starting point?

19 A. Yes.

20 Q. Okay. All right. And after you reviewed that study,
21 did you think that most of those variables accurately
22 captured the information that they were supposed to? In
23 other words, did they seem like they were well defined
24 based on your sort of appraisal of the study?

25 A. I think it was a good study. I'm not sure what you're

1 asking as far as the variables. Could you perhaps --

2 Q. Let me start generally. Did you like his variables?

3 A. I -- yeah, they were -- yes, they were -- that was a
4 good starting point for us.

5 Q. Was it just the particular variables he had picked or
6 the way he defined them? What was good about his study
7 that y'all borrowed for yours?

8 A. Well, it was -- the important thing about the DCI was
9 that we capture the information that was available to us
10 from the materials we had and err on the side of including
11 something even if -- so I mean there are things we
12 collected data on that didn't end up mattering. It didn't
13 really bear on the strike. So the goal was to be -- to
14 create something that could capture as much as possible and
15 you could always find ones you think maybe could have done
16 a better job at that and got too picky. But that was --
17 that was the goal and I think his study did a good job at
18 that so it was a really good place for to us start working
19 from.

20 Q. And going beyond that particular study, I mean clearly
21 that was influential. Y'all took a look at that. Did you
22 look through the jury selection literature, you know, how
23 to pick a jury and that kind of stuff just in general?

24 A. Yeah.

25 MR. JAY FERGUSON: Objection as to form.

1 THE COURT: Well, I'm not sure exactly -- do you
2 understand the question, Doctor?

3 THE WITNESS: Well, could I have some
4 clarification?

5 BY MR. PERRY:

6 Q. Yeah. Let me use your words because I think yesterday
7 you mentioned something about reviewing the literature on
8 jury selection or litigation manual or something like that.
9 Could you clarify for me what you looked at when you said
10 litigation manual?

11 A. So there is some treatises on jury selection that you
12 can find on Westlaw that talk about -- that advise
13 practitioners on the kinds of factors to get information
14 about. That is one source. And also I had -- I viewed a
15 lot of jury selections.

16 Q. I was going to ask you about that too. So you --
17 you've actually watched -- you're talking about live,
18 recorded or taped or --

19 A. So I was a clerk in a trial court for three years.

20 Q. That was in Illinois?

21 A. Yes.

22 Q. That was for a judge?

23 A. It was -- yes.

24 Q. And I believe, if I remember correctly, you also
25 reviewed the jury questionnaires?

1 A. Yes. They are not identical, different places have
2 different -- ask slightly different questions, but they
3 cover largely the same ground so there's not that much -- I
4 didn't find -- they covered -- they tended to cover pretty
5 much the same ground so that was one way to get a sense of
6 what kinds of factors might matter.

7 Q. Okay. Did you have an approach? In other words, you
8 didn't have all the factors that were on the jury
9 questionnaire and the DCI, did you?

10 A. Can you give me an example?

11 Q. Of a jury questionnaire factor that was listed?

12 A. That was --

13 Q. Say, for example, religious denomination I asked you
14 earlier today --

15 A. That's right.

16 Q. -- a lot of the North Carolina ones will ask for a
17 self-identification on religious denomination.

18 A. That's right. We did not have that.

19 Q. Was there any particular reason why or why not? How
20 did you decide what to keep and what to not include or what
21 to collapse and what to expand?

22 A. Well, the collapsing and expanding -- you mean at the
23 outset or the analysis part?

24 Q. Outset. Outset.

25 A. So -- I have to think for a second about this process

1 -- so there was -- so what denomination someone is,
2 sometimes it's asked and sometimes it's not.

3 Q. Um-hmm.

4 A. And part of the judgment is deciding is this going to
5 be -- if this is something we can't reliably get
6 information on and if we -- and there's not a strong reason
7 to suggest that it's an important control variable, then
8 there's a judgment call there that we would go for the more
9 general rather than the more precise. And I don't remember
10 specifically the decision making as to religion but that's
11 looking back on it -- that's what I would have -- that's
12 how I would resolved that.

13 Q. So the idea of being a more specific denomination
14 wouldn't add as far as explanatory power to your model?

15 A. Well, it might except that I had to take into account
16 the fact that -- that level of precision might not be
17 readily available in a lot of cases so that some jury
18 questionnaires might ask specific denomination and others
19 wouldn't. So then the question becomes -- not just with
20 this -- sometimes it's something very, very, very easy to
21 get ahold of, then there's no -- some information is very
22 easy to get ahold of. You might as well just include it on
23 the DCI. But if it's something that we can't be sure
24 you're going to have -- be able to get -- get this precise
25 data across a lot of cases, then you have to weigh how much

1 effort is this worth to narrow this down? How much -- how
2 important is it to be more precise than this person who
3 practices a religion or belongs to a religious organization
4 versus whether they are Methodist or Baptist or Jewish.

5 Q. So for that one there's a little more difficulty in
6 sort of verifying availability. No board of religious
7 affiliation like the board of elections where you could
8 verify things?

9 A. That's right.

10 Q. All right. Let me do this -- I am going to direct you
11 back to the last DCI, number 8. And if you would tell us
12 just briefly again which DCI -- what juror we're looking
13 at.

14 A. This is from Christina Walters's case and the juror's
15 name is Jay Whitfield.

16 Q. All right. Now, I was wanting to ask you -- I know we
17 talked about it I think briefly this morning. I can't
18 remember -- I think it was maybe Mr. Ferguson, the question
19 about age. So for this variable for age, what about age
20 made it a good candidate to be an explanatory variable?

21 A. I had read that often trial attorneys have their
22 theories about age, that senior folks or younger folks may
23 be more or less desirable. So that was one piece that we
24 could capture; that variable we sought to. It ended up
25 being explanatory so it was a good call.

1 Q. Okay. And did you have a theory as to what about age?
2 Which direction the bias may go, let me ask it like that?
3 Because you can define age as a continuous variable, right?
4 You said that this morning?

5 A. That's right.

6 Q. Or you can do it as category?

7 A. That's right.

8 Q. Is there any value one way or the other?

9 A. So I had read some sources and people have different
10 theories -- attorneys have different theories about who
11 makes a good juror. But I had seen -- it seems like age is
12 one of those things that comes up that people seem to have
13 theories about whether young jurors or old jurors make good
14 jurors. I know that I had seen age often cited in Batson
15 cases as a reason for a strike. I know that in -- that it
16 came up in the McMahon tapes out of Philadelphia which were
17 training tapes for prosecutors that younger jurors were not
18 seen as quite as attractive. But by -- by cover -- by
19 trying to get that information as precisely as possible, if
20 an alternative theory comes up, we can test that. So we
21 didn't have to have a hypothesis that young makes someone
22 more likely to be struck versus old. We have the data to
23 test however you want to break it down.

24 Q. So that might be an example where you might want to
25 engage in the recoding process?

1 A. And that we did, yes.

2 Q. Right. In the end model?

3 A. Um-hmm.

4 Q. Now, for this particular juror, does it indicate his
5 age on here?

6 A. This says he's 21.

7 Q. Now, if you look back, line 23, his descriptive
8 characteristics, is there anything listed there?

9 A. 1111.

10 Q. Do you recall what that is offhand?

11 A. That is that the juror read something -- recalled
12 reading something -- information about the case.

13 Q. Now, is that -- is that a pretty broad category?

14 A. Well, the coders were instructed not simply to code it
15 as present if the person said I remember reading about it
16 in the paper, if they didn't remember what they read,
17 because somebody might remember seeing a headline about a
18 case but -- so they were coded (sic) to code this factor as
19 present only if the person remembered something that they
20 read, that they just didn't remember the fact of reading
21 it, that they remembered what they read.

22 Q. Okay. And let me ask you, again going to some of
23 these affidavits that have been submitted for these cases,
24 the affidavit in this case indicates that the prosecutor
25 became aware that this particular juror knew some gang

1 members from playing basketball with them. The case
2 involved a gang member. Now, would that fit into this 1111
3 classification?

4 A. No, it would not.

5 Q. It would not?

6 A. No.

7 Q. Okay. Is there a classification that that would be
8 better suited for?

9 A. If the juror said that they had some sort of expertise
10 about a topic, an important issue in the case, there was a
11 code for that, but that seems slightly different from what
12 you're presenting.

13 Q. Right. Right. Yeah. So this is not a mechanical
14 murder, say there's such a thing, and this guy is a
15 mechanic. That's a little bit different?

16 A. Yes.

17 Q. That's what you are saying and that's what I'm asking?

18 A. Yes. If the issue was something that, you know, was
19 going to be a lot of evidence about how gangs worked or
20 something and he said I know a lot about gangs, then we
21 would have coded that person as having expertise. But that
22 would be the closest variable I think that would capture
23 that. Obviously if he knew some participant in the crime
24 at issue, that would be coded as having known a witness or
25 having known the defendant.

1 Q. Like an actual person?

2 A. Right.

3 Q. Okay. Now, let me ask you about some of these other
4 variables and let me start with the Cumberland County model
5 because what you did -- after you went through this process
6 of identifying these explanatory variables, you generated
7 two models?

8 A. Yes.

9 Q. Statewide model and Cumberland County model?

10 A. Yes.

11 Q. With the Cumberland County model, for employment, was
12 that one that you got from Baldus's Philadelphia study?
13 What about unemployment made you think it would be a good
14 explanatory variable or did you have any idea at all before
15 you ran the numbers and saw that it was an explanatory
16 variable?

17 A. So a couple things went into that. One is that
18 unemployment is something that I have seen asserted in
19 Batson cases often as -- that's often proffered as a reason
20 for a strike. I don't remember specifically if that was in
21 the model reported in Baldus's paper, but also it was one
22 of many different kinds of employment recodes that we had.
23 So we looked at different -- different occupational
24 categories, not just unemployment.

25 Q. Okay. And for the unemployment variable it's binary,

1 right, either you're employed or you're not?

2 A. Yes.

3 Q. So in this definition of this variable, there is no
4 distinction between somebody who gets fired tomorrow or who
5 got fired yesterday -- get my time frame right -- or
6 someone who has been unemployed for six month or a year?

7 A. No.

8 Q. So it would be the same?

9 A. They would have to be unemployed -- we had categories
10 for, say, not working due to disability. So they would
11 have to be unemployed in that they lost their job.

12 Q. So you had a little more specificity as to maybe the
13 circumstances of unemployment or --

14 A. Well, we had a different category for a person who was
15 not working due to disability just like we had another
16 category for a person didn't worked due to retirement.

17 Q. Okay. Again, that was laid out in one of those
18 protocols?

19 A. It's in the descriptive coding appendix or the
20 employment appendix.

21 Q. Okay. So they could just look at that if they needed
22 further guidance on how to subcategorize?

23 A. Yes.

24 Q. Let me ask you about the variable accused all. Again,
25 in one of the Cumberland County, that is?

1 A. Yes.

2 Q. If you go to that, the description variable has a
3 description of victim -- venire member or a close other has
4 been accused of criminal wrongdoing?

5 A. Yes.

6 Q. So you would get that if it was present from the
7 transcript, that would be from whether or not the juror
8 mentioned that they were accused or somebody they knew was
9 accused, right?

10 A. If they -- if it was in the record, yes.

11 Q. Okay. Now, how would you -- how would it be coded if
12 somebody had gotten a speeding ticket two months ago in
13 front of the courthouse?

14 A. Well, a speeding ticket wouldn't fall under that.

15 Q. Why not?

16 A. That -- we drew the line at some civil infractions
17 like that. A speeding ticket wouldn't have gotten a -- if
18 a person said -- if they said have you ever had any
19 problems with the law and they said, well, I got a speeding
20 ticket, they wouldn't get a 400 code.

21 Q. Okay. And that's in the protocol?

22 A. Well, it should be. At least it would be somewhere in
23 the coding doc or it would be in the coding log I think or
24 unless it just never came up. I would assume it's
25 somewhere in there.

1 Q. Okay. Maybe that's a bad example. Somebody who had
2 been convicted of breaking and entering, they would be
3 coded as having been accused all, right?

4 A. They would be coded as having been accused of a crime
5 which would then form the basis -- which would then be fed
6 into the recodes that I did based on that variable.

7 Q. Now, somebody who had been accused of attempted murder
8 would fall under the same category and same code, correct?

9 A. That's right. It does not distinguish.

10 Q. And, again, the way this particular variable is
11 categorized, it would be the same as if it was a juror or a
12 close other, correct?

13 A. Well, it was coded more precisely than that and then
14 part of the recoding process, I would recode it into the
15 juror themselves was -- I recoded it as the juror
16 themselves were accused.

17 Q. Um-hmm.

18 A. A juror or close other was accused or just close other
19 to try to -- that helps me understand how broadly or
20 narrowly I defined that category. If -- if it's too broad
21 or too narrow, that's -- that's a way to -- but the raw
22 code there does distinguish among those different
23 situations.

24 Q. Okay. So for that one specifically, there is a little
25 more detail where they can look at the subcategories?

1 A. In terms of who was accused, yes.

2 Q. That was recoded to be this broader category for the
3 model's purposes?

4 A. Well, it was recoded into several different variables
5 so that I could -- I could -- I could use that to figure
6 out whether -- what was the proper variable. If you code
7 something so broadly, it doesn't capture -- it's so broad,
8 it doesn't really capture something and you need a more
9 precise variable, then that's their -- that's part of
10 building the model is figuring out if they are contributing
11 independently of each other, they are operating
12 differently. So, for example, if prosecutors don't care if
13 your family member was accused of a crime but they care if
14 you were accused of a crime, I can find that out by
15 recoding that into these different variables and seeing if
16 they -- if one comes into the model and the other one
17 doesn't, that tells me something about what's going on,
18 that I need to use this narrower -- more narrowly coded
19 variable. If they all kind of point in the same direction,
20 then it's appropriate to group them together.

21 Q. Okay. So for Cumberland County -- and correct me if
22 I'm wrong, it was the broader variable that was more
23 appropriate?

24 A. Yes.

25 Q. Not the narrower one?

1 A. Yes. The narrower one would come in. It was
2 predicted. But when I included both in the model, the
3 broader category was slightly more powerful. It explained
4 more variance. You wouldn't put both of them in the model
5 because there's so much overlap between them that they
6 don't independently tell you something. But if I -- if I
7 didn't have the accused-all variable and I just had the
8 juror themselves was accused, it would have come in -- it
9 would come in the model as significant. It's just that the
10 accused-all variable was slightly better, explained
11 slightly more so that's why in the -- that's why that's in
12 the model there.

13 Q. So for Cumberland County for those accused-all
14 variables then, are two people both in the same category?
15 In other words, our person who was convicted of breaking
16 and entering and our person who was charged or whatever
17 with attempted murder, they are both included in the same
18 category?

19 A. Yes.

20 Q. Okay. Now, and I'm just going to go down the line
21 because I want to ask you about all the variables that are
22 included. Hardship.

23 A. Yes.

24 Q. Hardship was included in the Cumberland County model.
25 So that explains, according to your model, why jurors were

1 struck?

2 A. It tells us something that -- about how prosecutors
3 exercise their strikes. That information, it contributes
4 meaningfully to the model. It's a useful factor in trying
5 to predict strike behavior.

6 Q. Okay. That was another one where you had some
7 subcategories?

8 A. Yes.

9 Q. Okay. For the hardship as in the Cumberland County
10 model, was that one where you went from subcategories and
11 narrow to broad or vice versa?

12 A. In that instance, I looked at the relation among the
13 raw variables so the original -- the codes, whether 110,
14 120, to see if they predicted in the same direction or to
15 see if they were working -- the big fear is, right, the
16 thing I don't want to have happen is have one type of
17 hardship makes you more attractive as a juror to the state.
18 Another type of hardship makes you less attractive. So if
19 you lump them together, it looks like this variable doesn't
20 matter when it actually really might. In that instance,
21 there was no evidence that they didn't work in the same
22 direction and so it made sense to lump them together. But
23 the raw data are still there so you or -- you or anyone
24 looking at the database could recode it in a way that
25 seemed more meaningful to see if that -- parceling out that

1 out that is a meaning -- will enhance the power of the
2 model.

3 Q. Okay. So for these purposes -- for the Cumberland
4 County model purposes, hardship is just a broad category?

5 A. It is.

6 Q. So there could be -- I mean I think you just suggested
7 there could be times where hardship might work in favor of
8 the state and might work in favor of the defense?

9 A. I looked at it and it didn't appear.

10 Q. Did you have the subcategories all broken out?

11 A. Well, I have the raw data so I know that a 120 was
12 coded or 130 was coded. So when I recode, those data stay.
13 They recode into a new variable. I don't alter the
14 underlying variable so that anybody who wants to try to
15 replicate my work or to group variables in different ways
16 can do so.

17 Q. Okay. All right. Well -- and let me ask you the
18 question about the helping, this helping variable?

19 A. So I've heard that -- go ahead. I'm sorry. I will
20 let you ask the question.

21 Q. Well, no, I kind of want to know what was your theory?
22 Why did you include it in the first place and then --

23 A. So I've heard that -- that sometimes I've read that
24 and heard just from hanging around the courthouse that
25 there's theories about different professions making better

1 or worse jurors. So I've heard theories about social
2 workers and teachers maybe being perhaps too sympathetic or
3 nurses being too concerned about saving lives and they may
4 be uncomfortable passing judgment. So it's a recode based
5 on the -- on the employment codes that allows me to, just a
6 different way to group it together. So you take some codes
7 in the professional category and then some for the service
8 category, and in Cumberland, it was a predictor.

9 Q. Okay. Make sure I'm understanding this right, that
10 was one where you went from a bunch of narrow
11 classifications to a broad category?

12 A. Yes.

13 Q. Okay. Now, is that one -- we talked earlier about
14 possible correlations between variables and race. Is that
15 one where there would be a correlation between somebody's
16 race --

17 A. Well --

18 Q. -- and the variable? In other words, is there a
19 relationship between race and whether or not they are in
20 the helping profession?

21 A. I -- I don't recall there was any correlation in my
22 data. I don't recall specifically. I'd have to -- I'd
23 have to check but because black is in the model, it's
24 controlling for race. All right. So even if there -- so I
25 don't recall if I -- if there was a correlation between

1 that variable and race.

2 Q. Um-hmm.

3 A. But the -- but because it's included in the model
4 along with race, it would account for any correlation that
5 could -- might explain --

6 Q. Okay.

7 A. -- the outcome.

8 Q. Well, let me ask you about blue all, blue collar?

9 A. Right.

10 Q. In all these -- all variables are abrogations,
11 correct?

12 A. Right. The all refers to the spouse or the -- so as a
13 recode, that would capture whether the juror themselves or
14 their spouse, if applicable, had this -- fell in this
15 category.

16 Q. And on the DCI's, the ones we looked at, for example,
17 were the categories for the venire member's employment and
18 for the spouse's employment?

19 A. Yes.

20 Q. So I guess y'all came up with a protocol that
21 identified which professions were blue collar and which
22 were white collar?

23 A. No. We coded -- so in the recode?

24 Q. Um-hmm.

25 A. Yeah, so the coders were to code as specifically as

1 possible under the coding appendix and then in recoding
2 that into blue collar, that was mine -- I made a judgment
3 about which variables to include in that -- in that recode.

4 Q. So it kind of went from a bunch of categories to two
5 -- I mean white collar, blue collar, are those two
6 categories?

7 A. So these variables are all binary so it's all either
8 blue collar or not blue collar.

9 Q. So either/or?

10 A. Right.

11 Q. What were some of the examples of blue collar jobs
12 that y'all identified in your study?

13 A. I -- I can answer that faster if I can refer to my
14 coding log so I can see the precise syntax that I wrote.

15 Q. It's been a while.

16 A. Well, there's many, many, many different --

17 MR. PERRY: May I approach, Your Honor?

18 THE COURT: Yes, sir.

19 BY MR. PERRY:

20 Q. And do you have a copy of your report up there?

21 A. I do.

22 Q. I've got a copy of it.

23 A. Okay. I forgot I had it. Okay. Let me look at --
24 okay.

25 Q. So in the coding syntax there --

1 A. Yes.

2 Q. -- and in that would be the next to the end block in
3 the blue collar row there. Can you explain what that
4 syntax is?

5 A. Are you looking on page one of the coding log, line
6 14?

7 Q. Yeah.

8 A. Okay. Blue collar we recoded employment, system
9 missing equal system missing just so that we could keep
10 track of which -- for which jurors we were missing that
11 information. 44, 45 and 46 were coded as blue collar.
12 Code 60 through 72 and everything else is zero.

13 Q. Okay. So there were a couple of those subcategories
14 but not as many?

15 A. As --

16 Q. In other words, there were more that were not blue
17 collar than were blue collar?

18 A. More venire members or more categories?

19 Q. Categories.

20 A. Yes.

21 Q. Now, how did y'all come up with the breakdown between
22 blue collar and nonblue collar?

23 A. Well, I just used my judgment and that's why I left
24 the raw variables in there so if anybody wanted to
25 reconsider that, if I had reason to think that I had

1 omitted a category or I had wrongfully included a category,
2 I could either recode this variable or create a new one.

3 Q. Okay.

4 A. There's some judgment involved.

5 Q. Okay. But that was -- you were going back to the
6 division of labor, that was something you worked on, not
7 Professor Grosso?

8 A. Oh, no. We worked on -- we worked very closely
9 together on this study.

10 Q. Through -- I mean -- and especially through this part
11 like a discussion of how to actually specify these
12 variables. That's something y'all worked on pretty close
13 together?

14 A. I consulted with her very frequently about -- and also
15 to think if there were categories I may have overlooked.
16 Is there some other way that we could -- some other
17 category that we could put -- put these different component
18 parts to -- into a particular category that I might have
19 overlooked. That -- by keeping the raw data in there, you
20 can always go and redefine and create a new variable based
21 on a different way of categorizing it because, I mean,
22 there's judgment involved in this.

23 Q. Right. Okay. Let me ask you about that because the
24 next one I was going to ask you about is the leans
25 ambiguous variable?

1 A. Yes.

2 Q. And in the coding, you've got the description here, if
3 I could find it.

4 A. Are you still in the code book?

5 Q. Yes, ma'am, um-hmm. Can you tell us how you came up
6 with this category?

7 A. This was one of the recodes that we did that I
8 mentioned earlier where we had coded the 7 or 800 level
9 variables that were supposed to capture either views that
10 might be contrary to law or particular biases and realized
11 that they weren't perhaps discriminating in the way we
12 wanted. So this was our effort to -- we created these
13 variables in an effort to categorize the direction of the
14 -- of the statement. And to be conservative, I had --
15 leans ambiguous means that the person said something but it
16 was not clear which way it went. So if someone says yeah,
17 well, I have a problem with it -- with the burden of proof,
18 then they say, okay, stop, don't go any further. I don't
19 know if they think it should be beyond a shadow of a doubt
20 or if they think the defendant should have the duty to
21 prove his innocence. So I wouldn't want to presume that it
22 went one way or the other. That would be leans ambiguous.

23 Q. Does that sounds like an example of what I was asking
24 you about earlier, maybe not in such a good way but when I
25 said jurors are nonresponsive sometimes to the questions

1 you ask?

2 A. Well, sometimes -- I think it came up a lot where
3 somebody started to go down the road and the judge or the
4 prosecutor would say, okay, don't go any further because
5 they don't want them to say something in front of the other
6 jurors. That -- as I recall, that tended to be when this
7 came up where they would start to say something and it was
8 clear they were going to say something that was -- perhaps
9 they didn't want them to say that in front of the other
10 jurors.

11 Q. Okay. But so many -- I'm just going to ask you. So
12 from the transcript, there was enough there, the judge or
13 whoever could tell they needed to cut them off but you
14 couldn't figure out which way the bias was going based on
15 what they said?

16 A. Well, I often had a hunch. Often I could -- I could
17 guess but I would base it on what was explicitly stated and
18 I did not use my own intuition about where I think this
19 person was headed. I would code based on what they
20 actually said. And as I found, leans ambig actually did
21 predict state strike -- I'm sorry, predicted negatively
22 state strike, I think, in the statewide model which
23 suggests that it was probably in the direction towards the
24 state, but I don't want to presume that unless I have
25 something I can actually -- they actually said that I can

1 code it based on.

2 Q. Okay. And that was a recode?

3 A. Yes.

4 Q. So that went from something that was specific to
5 something broad, correct?

6 A. Yes.

7 Q. Am I understanding that right? And these other
8 categories, 98 -- was 98 -- what were the categories that
9 were combined to come up with leans ambiguous?

10 A. So leans was the raw variable here.

11 Q. Um-hmm.

12 A. And they were to give a code of either one, two or
13 three. So one is a tendency toward a more punitive
14 outcome, so something that favors the state. Two is a
15 tendency toward a less punitive outcome and three was
16 ambiguous or conflicting comments. They said a couple
17 things and you couldn't really tell. And then those
18 answers were recoded into leans ambig, leans defense, leans
19 state. If you look in row 101, that gives you the recode
20 syntax for leans state and it's basically the same thing
21 for leans ambig, leans defense but based on different raw
22 codes. So if they state this -- if the -- if leans is
23 coded as one, then they would be coded as leans state
24 equals one on all zero or missing. If it was missing, we
25 wanted to make sure we preserved that. We didn't code

1 something as not present if it was in fact missing data and
2 then the same procedure for the other two.

3 Q. So that actually went from something broad to
4 something specific really?

5 A. How so?

6 Q. Went from one category to three.

7 A. Well, the leans is just a -- that's just the raw data.
8 Those are just the codes. There's nothing -- just looking
9 at a code one -- so leans equals one, leans equals two,
10 leans equal three, that doesn't tell you anything. That's
11 the basis for the recode to put it into a meaningful
12 variable.

13 Q. So all the leans -- all the folks who had a leans
14 checkmark, they then went into one of the other three
15 categories, either state, defense or ambiguous, right?

16 A. Yes.

17 Q. Okay. So it went from something broad to something
18 more specific? You characterize their lean, either state,
19 defense or ambiguous?

20 A. Well, they didn't get a leans code unless they had a 7
21 or 800 code that triggered it and then that -- sort of like
22 race -- so with race, you have different categories but the
23 categories themselves don't tell you anything. So one is
24 white. Two is black. Three I think was Latino. And then
25 to have a variable that makes sense to use in a model, then

1 -- then you could recode it into a number of different
2 variables and then this is the same kind of thing. But I
3 wouldn't -- doesn't necessarily become narrow or broad.
4 It's just a way of making it into a variable that you can
5 make sense of in a model.

6 Q. It was more specific, right?

7 A. More specific?

8 Q. Um-hmm.

9 A. What is?

10 Q. When you recode, that's more specific. When you go
11 from lean and then you specify the direction of the lean,
12 that's more specific, right?

13 A. Well, leans just -- leans equals one or it equals two
14 or it equals three.

15 Q. Um-hmm.

16 A. In that variable -- what that variable means is
17 depends on whether it's one, two or three.

18 THE COURT: I think the answers is leans in and
19 of itself doesn't tell us anything.

20 MR. PERRY: Right. That's what I'm getting at.
21 That's more broad.

22 THE COURT: Right.

23 BY MR. PERRY:

24 Q. And that was -- I was a little ambiguous in my
25 question but I can be a little more specific with the next

1 one because the last one is this very young variable?

2 A. Yes.

3 Q. So that's a little more -- that's a little more easy
4 to talk about --

5 A. Yes.

6 Q. -- or easy to sort of get. But, again, you had age in
7 the model?

8 A. Yes.

9 Q. And for Cumberland County, you did a recode that ended
10 with a subcategory of very young?

11 A. Yes. I did a number of age recodes.

12 Q. And was that very young seemed to explain stuff for
13 that segment of the age population and at some point there
14 was a cut-off from the rest of the folks in terms of age
15 didn't matter or can you tell us why that -- you looked at
16 the raw data so how did you determine where that cut-off
17 for very young was?

18 A. I tried different cut-offs so I have young, 25 or
19 younger. I have very young, 22 or younger. So, again,
20 that's another example of trying to figure out how narrow
21 or broad you want the category to be. I had senior. I
22 don't recall if I had very senior. I don't think I did.
23 That -- that -- so by keeping the raw data in there, the
24 age and being able to recode it into different categories,
25 it leaves open the option of defining it differently. And

1 in very young was more explanatory than young, and senior,
2 I did not find to be explanatory.

3 Q. Okay. Now, actually that was in both the statewide
4 and the Cumberland County models, correct?

5 A. Yes.

6 Q. Now I wanted to ask you some questions about the
7 statewide model too as well. The same rationale or the
8 same way that very young mattered in Cumberland County, you
9 found that to be true in the statewide model?

10 A. Yes, I believe so. I don't remember the precise odds
11 ratios but I believe they both increased -- they increased
12 the risk of being struck in both.

13 Q. Right. That's the stuff that now we're talking about
14 table 12 in your report, correct?

15 A. Sure. Yes.

16 Q. So to look at table 12, you've got very young down
17 there at the bottom and then all the results that came from
18 looking at that variable. Now, in this -- in the statewide
19 model, you have leans state --

20 A. Yes.

21 Q. -- as a variable?

22 A. Yes.

23 Q. Okay. So that was actually present statewide but not
24 present Cumberland County?

25 A. Right. In Cumberland County, leans ambiguous came in

1 whereas leans state was a -- was a more powerful variable
2 in the statewide model.

3 Q. Okay. How would you explain that leans state is
4 present in the statewide model but leans ambiguous is
5 present in the Cumberland County model?

6 A. It may have to do -- it often has to do with just how
7 frequent something is in a database.

8 Q. Um-hmm.

9 A. If something is very rare, then it may be that it's
10 extremely -- that it's -- when it's present, it's highly
11 predictive of a strike decision but it's so infrequently
12 present that it doesn't come into a model because it
13 doesn't -- it doesn't add meaningful information because
14 it's so rare. So sometimes what comes into a model, it's
15 not that state -- leans state wasn't correlated with
16 strikes but leans ambiguous was a more powerful predictor.
17 They could both come in theoretically. So it depends not
18 just on how -- so it's not just how many it correlates with
19 outcome. It has to be frequent enough in the population to
20 -- for us to get any information about it. So there could
21 be some particular characteristic that is extremely
22 unattractive to prosecutors but it very rarely occurs.
23 It's not going to tell us much about the prosecutorial
24 behavior. If it didn't occur frequently, it wouldn't tell
25 us something. So that's why you would -- part of it is why

1 you might see differences between the two models has to do
2 perhaps with differences in jury selection strategies
3 between the areas and also the cases that are in this but
4 also just how frequent the variable shows up in the
5 population or a particular characteristic shows up.

6 Q. So if I'm understanding you correctly, you're saying
7 there could be in Cumberland County one instance of some
8 factor that explains everything about why a juror was
9 struck?

10 A. Like they didn't show up, right.

11 Q. Right. That explains that but then it's not going to
12 be in the statewide model as an explanatory factor because
13 it only showed up one time?

14 A. It wouldn't come in -- if it just shows up once, it's
15 not going to come into a model. It has to come in with
16 some frequency that we know that we can say something about
17 it's this factor because we see it across a number of
18 different cases and it predicts that strike outcome. You
19 can't really use it for anything but just the one instance
20 so we wouldn't expect something that occurs in one -- for
21 one juror to -- to come into a model.

22 Q. Because it's a case kind of in and of itself?

23 A. Well, it just doesn't -- it just doesn't add any
24 information about the strike decisions in -- in that -- it
25 doesn't tell you anything about the strike decisions in

1 that population because if it's not present or if it's only
2 present very infrequently, we can't really get much
3 information from that.

4 Q. Let me make sure I understand you correctly. You're
5 saying you can't use that to predict strike decisions in
6 the remainder of the population?

7 A. Well, you can't -- it's not going to come into a
8 statistical model because what -- and I think Dr. Woodworth
9 will be able to explain this better than I can. But part
10 of what comes into a statistical model is that it explains
11 variance that you have some people are struck. Some people
12 aren't. Some people have those characteristics. Some
13 people don't. So there has to be some -- that's why you
14 need sufficient amount of power -- you need a sufficient
15 number of observations to have a statistical model because
16 you need enough instances of that information to be able to
17 detect a pattern. So one -- you may have a jury -- one
18 juror who has a very, very undesirable characteristic but
19 there's nothing from that to detect a pattern. You have
20 multiple jurors who have that characteristic and they all
21 get struck or a high percentage of them get struck, now you
22 can say something about that characteristic.

23 Q. Okay. Is that why -- because if you look at the
24 variables in table 12 and the variables in table 13, there
25 are a number of differences?

1 A. Yes. There's some.

2 Q. Now, there are some -- there are some variables that
3 are present in both models? In other words, there are some
4 things that were very explanatory in Cumberland County that
5 also appeared in the statewide model, correct?

6 A. Yes.

7 Q. So the overlapping explanations or things that stay
8 true from Cumberland County to the statewide model are
9 what?

10 A. Well, race and death penalty reservations. And, well,
11 we had juror accused of a crime in statewide whereas juror,
12 close other accused of a crime in the Cumberland model, so
13 there's overlap there. That's not exactly the same.
14 Hardship was a predictor in both.

15 Q. Um-hmm.

16 A. Not helping, not blue collar all. We have a
17 difference between leans state came into the statewide
18 model and not in Cumberland where it was leans ambiguous.

19 Q. Right.

20 A. And they both had very young as predictors of strike,
21 that they are more likely to be struck. And then there is
22 a few other variables that came into the statewide model
23 that did not come in in the Cumberland County model.

24 Q. Now, let me ask you a question about some of those in
25 particular. Looks like variables eight, nine, ten, 11, the

1 variables that indicate knowledge that a juror has of
2 particular kinds of people, law enforcement, defendant,
3 witness, attorney?

4 A. Yeah.

5 Q. So those were all present in the statewide model?

6 A. Yes.

7 Q. But not present in the Cumberland County model?

8 A. Yes. They do show an association in Cumberland but
9 because they tend to be fairly infrequent, we can't be
10 sure. They don't -- they are not statistically
11 significant. We can't be sure if it's just due to chance.

12 Q. Um-hmm.

13 A. There are -- particularly J knew defendant, I mean
14 that's -- if somebody said I went to high school with the
15 defendant, that's a pretty rare occurrence compared to
16 other descriptives we have but it's highly predictive. So
17 when you have a smaller sample like you do in Cumberland
18 where even though we coded all 11 cases, it was I think 474
19 venire members, I believe that was extremely rare. And so
20 while a high percentage of those jurors were struck if I
21 recall, it wouldn't come into the model for the reasons I
22 just explained. It has to be frequent enough. It's not
23 just enough that it correlate to the outcome. It has to be
24 frequent enough to say this isn't due to chance because
25 that's what the statistical test is. Is this something --

1 is this pattern something real or is it just noise?

2 Q. So it looks like there may be some underlying
3 characteristics that determine whether or not the variables
4 pop up?

5 A. I'm sorry?

6 Q. In other words, is there something about Cumberland
7 County that makes it true that those don't appear?

8 A. Well, I think part of it is it's a smaller sample,
9 right, it's a smaller group that we're looking at. There's
10 fewer observations. And it's a relatively rare observation
11 anyway. So, for example, J knew defendant was rare. It
12 also could be something that is particular to the
13 population in a particular place, how frequent certain
14 employments -- for example, different kinds of employment
15 or education, that might be something that might vary. And
16 also it could be that the prosecutors in one part of the
17 state have different theories or different preferences for
18 their jurors or they have case specific variables that you
19 mentioned before. If they -- they may be different in
20 Cumberland County, the 11 cases than the other cases. So
21 there's -- those are the kinds of factors that would
22 explain why you don't see an identical model in the
23 statewide versus the countywide.

24 Q. Could have been something as simple as population?

25 A. Right, how frequent -- that would relate to the

1 frequency of how -- how present the variable is.

2 Q. Well, I mean population -- smaller counties, people
3 know more people. Fayetteville is a little bit bigger.
4 Maybe people don't know each other?

5 A. So you're talking about the defendant knowing -- or
6 the juror knowing some party?

7 Q. Yeah. Because it looks like -- it looks like that in
8 the statewide model, it's important in that prosecutors
9 strike people when folks know people involved in different
10 contexts. And let me ask you just to be clear. For number
11 eight, this juror knows all law enforcement. The
12 definition for that you've got in your coding book -- how
13 is that variable defined?

14 A. Give me a moment, please.

15 Q. Um-hmm, sure.

16 A. Venire member or close other works in law enforcement.

17 Q. Was that -- is there a bigger or more specific
18 breakdown of that or is that as specific as it gets?

19 A. I will look at it on the coding appendix. Juror
20 friend/family has worked in law enforcement such as judges,
21 prosecutors, public defenders, private criminal defense
22 attorneys, detectives and security or prison guards.

23 Q. Pretty broad variable, right?

24 A. I agree. That one is broad. That's one of the ones
25 that we went back and tried to break down into different

1 kinds of law enforcement.

2 Q. So that variable in particular for the statewide
3 model, if there is a juror who knows me as a prosecutor and
4 a juror who knows Mr. Ferguson as a defense attorney, that
5 juror is going to be coded the same way in that variable,
6 correct?

7 A. Well, just to be clear that the juror knowing a party
8 -- if you're talking about a case that you're working on,
9 that would be coded under the 900 codes and that's
10 different than the 600 codes because for the juror having
11 themselves or close others working in law enforcement, I
12 mean that means close others, like a close friend or a
13 family member, whereas with they know a party in the case,
14 you know, or an attorney in the case, that might be a less
15 familiar, wouldn't have to be a close friend, could be that
16 it's somebody you go to church with or you went to high
17 school with a long time ago. So -- so they are slightly --
18 so the juror knowing an attorney in the case would be
19 slightly -- or a witness in the case would be slightly --
20 or would take less of a relationship to trigger than one
21 than this one -- than the juror law enforcement all.

22 Q. Is that an example of where we talked about earlier,
23 the sort of exclusivity of the categories? If you fit in
24 one, you would not fit in the other? If somebody knew Mr.
25 Ferguson and myself on the street, we are not attorneys

1 trying a particular case this venire member is being called
2 to the box to be asked about. That would be different than
3 if we were the attorneys involved in the case?

4 A. That's right.

5 Q. Right. And that's what's reflected in the statewide
6 model, correct, in number 11?

7 A. The close other?

8 Q. The juror knew attorney, for my specific example, that
9 would be your -- your number 11 variable in the statewide
10 because that would be attorneys involved in the actual
11 case, correct?

12 A. Yes.

13 Q. Okay. So, again, they are supposed to be exclusive.
14 If they're coded correctly, that would distinguish between
15 that situation and somebody who is being interviewed by the
16 two attorneys in the case?

17 A. That was -- I'm sorry. Could you repeat that?

18 Q. So if somebody is in the box and they just know the
19 two of us from walking down the street, that's different
20 from knowing the two of us sitting here at these tables
21 asking questions?

22 A. So the fact that you know somebody who happens to be a
23 cop, that that would not trigger that code -- that would
24 not fall into that code -- if you knew a cop -- sorry, a
25 police officer who's going to be a witness in the case,

1 then that would be that you knew a witness. If your spouse
2 was a police officer and you knew one of the witnesses in
3 the case who was a police officer, you would get both codes
4 because both would be present.

5 Q. You would get both codes?

6 A. If you -- that's right.

7 Q. So they're not supposed to be exclusive?

8 A. Well, they would apply if -- they would apply if both
9 -- if both were true. So if my -- if a juror has a husband
10 who's a police officer and also knows from high school a
11 police officer that's a witness in the case, then that
12 would justify receiving both the close other as a police
13 officer or law enforcement officer and knows a witness in
14 the case.

15 Q. Okay. So, again, you can code one particular fact
16 into multiple factors?

17 A. You can. If you can give me more -- so in the example
18 I just gave --

19 Q. Right?

20 A. -- that would -- that would get both codes.

21 Q. Right. So you've got two codes but that's based on
22 one fact?

23 A. Oh, I'm sorry. In the example I gave, the juror's
24 husband is a police officer and she also happens to know a
25 police officer in the case -- who's a witness in the case,

1 not the same person.

2 Q. So that would be two and they would be distinct?

3 A. Yes.

4 Q. Okay. All right. Now, when you're looking at --

5 THE COURT: Mr. Perry, this is a good point for
6 us to take a break.

7 MR. PERRY: Okay.

8 THE COURT: I apologize. I've got a call on an
9 unrelated matter coming in in five minutes. We're going to
10 take a recess until 4:00. Thank you, ma'am. You may step
11 down.

12 (Recess taken.)

13 (The following proceedings continued in open
14 court. The defendant, defense attorneys and state's
15 attorneys, except Mr. Colyer, were present.)

16 THE COURT: Okay. All counsel are present, the
17 -- I'm sorry. We're missing Mr. Colyer.

18 MR. THOMPSON: May we have a second.

19 THE COURT: Yes, sir. We'll be at ease.

20 (Court was at ease. Mr. Colyer enters the
21 courtroom.)

22 THE COURT: Okay. All counsel is present. The
23 defendant is present. Mr. Perry.

24 MR. PERRY: Thank you, Your honor.

25 THE COURT: Yes, sir.

1 BY MR. PERRY:

2 Q. Professor O'Brien, let me ask you a couple questions
3 going back to where some of this information came from.
4 You've done some research in this area. Empirical legal
5 study, that's your area of research; is that correct?

6 A. Yes, it is.

7 Q. Okay. I think when Mr. Ferguson was going through
8 your C.V., you had a couple papers that were identified as
9 peer reviewed?

10 A. Yes, some of them were.

11 Q. Some of them. That's right. The peer reviewed
12 articles -- have you got a copy up there of defendant's
13 exhibit 1 that you can look at?

14 MR. JAY FERGUSON: It's on the table. May I
15 approach, Your Honor?

16 THE COURT: Yes, sir.

17 THE WITNESS: Thank you.

18 BY MR. PERRY:

19 Q. Just looking at the second page where you've got the
20 publications and manuscripts and all that material listing,
21 I want to make sure I got the peer review ones right. One
22 of them was the 2010 article, that was "The Shield of
23 Defense or the Sword of Prosecution," that was a peer
24 reviewed, correct?

25 A. Yes.

1 Q. I think the next one is the "Prime Suspect" article?

2 A. Yes.

3 Q. That was peer reviewed. And then the Frequency --

4 (Interruption by the reporter.)

5 Q. Sorry. "Frequency and Predictors of False
6 Conviction," that was another one of your peer reviewed
7 ones?

8 A. Yes.

9 Q. And then I think the last one I have is the "Jury
10 Nullification Instructions"? That was the last one?

11 A. Yes.

12 Q. Now, were all of those submitted and accepted or did
13 you have to revise and resubmit or do you recall?

14 A. I believe all required some revision. That's -- so
15 eventually all were accepted but it's rare to get a paper
16 accepted without a revised and resubmit.

17 Q. Sure. Now, in the articles there, the peer reviewed
18 articles, do any of those involve the compilation of data
19 sets?

20 A. Well, I was involved in the collection of data and the
21 study design in all but the second to last one where you
22 see on the second to last author, I had less of a role in
23 that one.

24 Q. Okay. And let me be clear, there were data sets
25 involved in all of these papers?

1 A. Yes.

2 Q. Okay. Did any of these papers involve data sets like
3 this particular data set? In other words, it doesn't look
4 like it but I don't want to assume. Do any of these papers
5 involve looking at jury selection issues?

6 A. No, none of these papers involve looking at jury
7 selection.

8 Q. Okay. Like I say, I wanted to make sure I wasn't
9 assuming. But you have completed you said I think five or
10 six empirical studies?

11 A. Yes, I have completed several empirical studies.

12 Q. And I think the five or six that we talked about
13 yesterday -- Mr. Ferguson asked you about yesterday, is
14 this included as one of those?

15 A. Well, I just want to be clear why I'm kind of fuzzy on
16 the numbers is that sometimes -- for example, on my
17 dissertation I ran four experiments and I published two
18 papers based on those, so I don't know if you would call
19 those four studies or one study or --

20 Q. That's really why I'm asking you about data sets.

21 A. Okay.

22 Q. So in terms of data sets that you were involved in
23 compiling, how many of those have you done independently,
24 not the spinoff paper type thing but the actual data sets?

25 A. Well, so if I ran four experiments, there would be

1 four data sets. So there were four data sets for my
2 dissertation. There were -- I think there were two data
3 sets in the Journal of Applied Social Psychology study.
4 I'm sorry. I just don't remember exactly.

5 Q. Um-hmm.

6 A. The Grosso-O'Brien paper in empirical legal studies,
7 that was one data set. I'm sorry, I don't recall for the
8 Kerr, Boster, Callen et al. paper how many -- I believe
9 there was one -- I think there were two experiments
10 involved in that paper so each experiment would have its
11 own data set.

12 Q. Okay. Now, were these all different bodies of data,
13 in other words, or was it one collection of data that you
14 sort of did different things with?

15 A. So an experiment would stand alone?

16 Q. Um-hmm.

17 A. And for observational data, nonexperimental types of
18 data sets, so the data set that we used in the empirical
19 legal studies paper, my colleague, Sam Gross, and I have
20 since supplemented that data set with new information too
21 and we're working on another paper from the same data set.
22 So it works differently depending on whether you are using
23 observational data set or existing data that you're
24 compiling or if you're doing an experiment.

25 Q. Okay. So -- and let me make sure, that one is the

1 "Frequency and Predictors of False Conviction" paper? Is
2 that the one?

3 A. Yes.

4 Q. And I'm guessing from the new data in the title, there
5 was some new data that y'all worked out?

6 A. Yes. We created the data set.

7 Q. Okay. Now, as far as things you did after you got out
8 of school, you said as far as your legal experience, you
9 started with the office of the state appellate defender?

10 A. That's right.

11 Q. What did you do for the state appellate defender?

12 A. Was an assistant appellate defender so I was the
13 appellate attorney for indigent defendants who had been
14 convicted and appealing or if it was a rare case of a state
15 appeal, I would -- I had -- I might have had a case, but
16 generally it was people who had been convicted and were
17 appealing their sentences and were indigent.

18 Q. Okay. And that's the first thing you did out of law
19 school, did I read that right, correct?

20 A. Yes.

21 Q. You did that for a couple years?

22 A. Yeah -- yes.

23 Q. Did that involve a lot of courtroom work?

24 A. No, not a lot. It was an appellate practice so I did
25 do oral arguments but it was not trial.

1 Q. Okay. Now, have you ever selected a jury?

2 A. I did. While I was waiting for my bar results, I
3 volunteered at the public defender's office in Champaign
4 County and I did conduct a jury trial and selected a jury.

5 Q. That's in Illinois, right?

6 A. That is in Illinois. I'm sorry.

7 Q. All right. But you said beyond just selecting one
8 jury, you've actually observed other voir dires, right?

9 A. Yes.

10 Q. Capital, noncapital, what kind of jury selections have
11 you observed?

12 A. So when I was a clerk in federal district court I was
13 -- since I was clerking in trial court, I observed many
14 trials there of various natures. There were no capital
15 trials that I observed in that court.

16 Q. Have you ever watched a capital trial?

17 A. I have never personally watched a capital trial, no.

18 Q. Okay. You never picked a jury in a capital trial?

19 A. No, I have not.

20 Q. And let me go back because I think you mentioned
21 something right when we first started talking a minute ago.
22 What's the difference between experimental and
23 nonexperimental studies?

24 A. An experimental study is a way of controlling for --
25 it allows you, if designed properly, to identify cause --

1 causal influences. So in an experiment, you could control
2 everything except the thing that you're looking at, the
3 thing you're manipulating. So you might give two groups of
4 randomly selected people same sets of information and just
5 change one part of it to see if it influences how they --
6 what kind of decision they make or about how they perceive
7 it. So it allows for -- it allows you to control for
8 enough factors that you can say something definitive about
9 causation.

10 Q. Um-hmm.

11 A. And the limits are the external validity, that idea
12 that it's an artificial situation. So every method has its
13 strength -- has its limitations and has its strengths.

14 Q. So experimental sort of the laboratory type
15 experiment --

16 A. Yes.

17 Q. -- we think of when we think of laboratory type
18 experiments?

19 A. Generally, yes.

20 Q. As far as quasi-experimental and nonexperimental,
21 what's the difference between those two things?

22 A. Well, sometimes you might have a natural experiment
23 where a -- particularly in a situation where maybe you
24 would be unable or be unethical to manipulate something, a
25 researcher might use something that happens to collect data

1 to see how this event might change -- how it might bear on
2 some things. So a natural disaster or some sort of
3 tragedy, a researcher -- that might be considered
4 quasi-experimental where the -- it's not entirely
5 experimental because you're not -- you're not doing the
6 manipulation of the conditions or you're not -- but it's --
7 it allows for the researcher to construct -- construct some
8 sort of study that uses some event that happens. So that's
9 one way -- I mean so it's kind of broad. That's one thing
10 that comes to mind when I think of quasi-experimental.

11 Q. And correct me if I'm wrong but observational and
12 nonexperimental, same thing?

13 A. Yes. So an observational study meaning -- of course,
14 you observed an experiment too but when I talk about an
15 observational study where you're observing existing data,
16 you're not manipulating something but you're observing --
17 you're observing something that happens and so you don't
18 have that kind of control.

19 Q. Sort of taking the events as they are --

20 A. Yes.

21 Q. -- for lack of a better word?

22 A. Well, you're observing existing data. You're not
23 creating the data.

24 Q. And I want to ask you about something I think we
25 talked about yesterday afternoon using an example, if I

1 wrote it down right, ice cream and drowning and that was an
2 illustration of the difference between correlation and
3 causality?

4 A. Well, it's an example of how a regression can allow
5 you to -- about the caution that you have to take in
6 interpreting associations, that causation -- or correlation
7 does not necessarily equal causation.

8 Q. Um-hmm.

9 A. And so a person who observed a correlation between ice
10 cream consumption and drowning deaths, if they inferred
11 causation there, they -- a regression analysis would allow
12 you to control for other possible explanatory value --
13 explanatory -- or other explanations of why you -- so it
14 would allow you to see there's something -- there's some
15 third variable that correlates with both that might be
16 driving this. It gets you closer to causation or at least
17 lets you rule out alternative explanations or, in that
18 case, not rule it out, find out that you -- that there is
19 an alternative explanation.

20 Q. Now, in the example of ice cream and drowning, you
21 wouldn't use a logistic regression model, would you?

22 A. No. I would use a linear regression.

23 Q. Why is that?

24 A. Because drowning deaths is a continuous variable, not
25 a binary variable, and the difference between logistic and

1 linear regression is that you use it -- you use one or the
2 other, depending on the nature of your outcome variable.
3 So if you have a binary outcome such as struck or not
4 struck, then it's appropriate to use a logistic regression.
5 If you are looking at a continuous variable, like rate of
6 drowning deaths or, say, income or something along those
7 lines, then it would be appropriate to use linear
8 regression.

9 Q. So linear -- excuse me, logistics regression, that's
10 the right approach for this jury selection study, correct?

11 A. Because the outcome interest is a binary, zero-one,
12 yes-no, struck-not. Yes.

13 Q. Just in plain English, it's an either/or?

14 A. Yes.

15 Q. That's what you're looking at, either/or?

16 A. That's right.

17 Q. Did you consider using multiple regression for your
18 study?

19 A. I did use multiple regression.

20 Q. Okay.

21 A. I used multiple regression that I controlled for
22 multiple variables.

23 Q. Okay. And when I say multiple regression, that could
24 include a lot of thing, right, in terms of linear,
25 logistic, other types of regression, right?

1 A. Well, I did not -- I never -- I didn't consider a
2 linear regression because the outcome of interest is binary
3 so that wouldn't have been -- often if you do either, I
4 mean the logistic is appropriate for a zero-one outcome
5 variable, like we have struck or not struck. Linear would
6 get you close but it wouldn't be as precise or it often --
7 there is a right one to use depending on the outcome of
8 interest and in this case, it's logistic.

9 Q. Okay. So that's why you wouldn't use linear
10 regression for this one?

11 A. No, logistic.

12 Q. Logistic?

13 A. Yes.

14 Q. That's why you wouldn't use linear regression?

15 A. That's right.

16 Q. Okay. All right. Regardless of what kind of
17 regression you use, sometimes you have issues with missing
18 data?

19 A. Yes.

20 Q. I think Mr. Ferguson asked you about that. In your
21 report, you admit there were some cases of information
22 where you just didn't have any information one way or the
23 other; is that correct?

24 A. Yes, particularly as the education variable.

25 Q. The education variable?

1 A. That's right.

2 Q. Do you have any idea why in particular that one was
3 difficult to get information on?

4 A. Because I think it had to do with the nature of
5 people's responses weren't very precise often. Somebody
6 might ask -- they might say, well, I went, you know -- I
7 went here to this school but not say whether they finished
8 or not say whether they had a degree or so it was one that
9 I found that it was often didn't have the kind of precision
10 that we could code it. But when we did have it, it was --
11 it was predictive, but due to the level of missing data, I
12 also looked at the model without it in there to see if it
13 made an effect -- had an effect on anything. And it
14 didn't. It didn't bear on race in any way. So it comes in
15 the model because even with the missing data, it does tend
16 to -- it does have some predictive power. But removing it
17 from the model, which then brings in all those cases that
18 were missing, doesn't affect whether -- doesn't make a
19 significant difference as to the race effect.

20 Q. So you compared it with and without?

21 A. Yes.

22 Q. You also used imputation that deals with missing
23 values?

24 A. Well, to be clear, my data -- my analysis is not based
25 on anything imputed. So the data that our regression --

1 that these regressional results -- the results we are
2 recording are based on the data we had, not on imputed
3 data. What the multiple imputation does is it gives you
4 some assurance that your data aren't missing in a skewed
5 way. If your data are missing at random, then it's fine.
6 If, for example, the reason you are missing the data about
7 a particular variable has something to do with the quality
8 -- something to do with some characteristic of the person,
9 then it could skew -- it could skew the outcome. So
10 running the multiple imputation procedure allows us to get
11 a sense maybe if that's the case, if our data are not
12 missing at random and, therefore, we're getting a skewed
13 sample. So the multiple imputation -- by running that and
14 seeing that the odds ratios are very, very close to what
15 they are without the imputed data is assurance that the
16 data are not skewed by the missing data.

17 Q. So I mean the effect of the missing data really wasn't
18 much at all. In other words, there wasn't much affect for
19 the missing data?

20 A. It didn't skew the sample in a way. It was missing at
21 random.

22 Q. Okay. And just to be clear, when you say missing at
23 random, that's based on the imputation that you did?

24 A. Yes.

25 Q. So that was a result of an analysis?

1 A. That's right. So this is a very standard statistical
2 procedure used to determine whether you have a problem with
3 missing data -- missing data is a problem and what a
4 problem would mean is you would have to -- it would mean
5 you have to -- you may have a problem with interpreting for
6 the inferences you can draw from the model. So if --
7 suppose that the -- you were -- we had great information on
8 people who went to college but the people we were missing
9 information on are the ones who never graduated. Then it
10 wouldn't be missing at random. And in this -- in this
11 instance, particularly if that was somehow correlated with
12 race, then that could -- that could be a problem for what
13 inferences we can draw from the model or the validity of
14 the model. Multiple imputation is a way of testing if that
15 might be true.

16 Q. Okay. So is imputation different from just recoding
17 the missing values?

18 A. Well, multiple imputation is a method -- it's a
19 technique that the -- there's a -- something my statistical
20 program -- my SBS program can do, and what it does is --
21 and, again, I think that Professor Woodworth will be able
22 to explain maybe the nuts and bolts of this a little bit
23 better, but it uses a logistic regression to predict the
24 values of the missing data from the other information about
25 that venire member and it does this a number of times, five

1 times, and then it pools them, takes a -- takes an average
2 -- that sort of doing this procedure five times, takes an
3 average and then you -- then running the model -- the
4 logistic regression model in those -- in that data set with
5 the missing data that's been imputed from the -- so I don't
6 make a decision. I don't say I think this should be
7 present or not present. It's something the computer does.
8 Then I look to see, well, is this changing the pattern as a
9 result. And, of course, you know, it changes the decimal
10 level because your -- you would expect that, but it didn't
11 change -- it didn't have any effect on the race. It didn't
12 -- it didn't make the effect of race any lower at all and
13 it didn't suggest any of the other variables that were
14 affected by that.

15 Q. Okay. So I mean that's a -- that's a better way of
16 dealing with that issue than just recoding in some
17 particular way?

18 A. To be clear, recoding has nothing to do with missing
19 data.

20 Q. Um-hmm.

21 A. Recoding is simply a way of -- it's simply a way of
22 taking the raw data and putting it into a form that's
23 meaningful in different ways, and it doesn't change the
24 underlying data. It's not replacing the raw data. And
25 recoding in one way doesn't preclude recoding it in a

1 different way, broader or narrower, and so it has nothing
2 to do with missing data.

3 Q. Well, as far as filling in the blanks, let's call it
4 that, because that's different from what we're talking
5 about when we say recoding?

6 A. Recoding -- recoding has nothing to do with that.

7 Q. Right, that's what I'm saying.

8 A. That's right.

9 Q. So in terms of filling in the blanks, multiple
10 imputation, are you saying it makes more sense than just
11 coding -- than just entering values in some kind of default
12 -- default way?

13 A. Well, there are times when -- when it would be
14 appropriate to -- to deal with missing data by recoding it
15 as present or absence. It's not what I did in this case.
16 I did not fill in the missing data. I used multiple
17 imputation as a way to see if there's a -- that missing
18 data is missing in such a way that undermines the study.
19 That if -- to test whether it's missing at random or if
20 it's missing in some sort of systematic way.

21 Q. So the use of the coding for unknown, like we were
22 talking about with the DCI's earlier, you would just leave
23 it as coded unknown instead of putting some other sort of
24 default value in?

25 A. No. If it was unknown, it was unknown. I did not --

1 I did not code an unknown as not present. I did not
2 presume that the absence of a variable -- that our absence
3 of information about a variable meant that it wasn't
4 present. That person with that missing data, if that was
5 -- if they were missing on that variable, that was in the
6 model, they would be dropped. I didn't -- so missing
7 doesn't equal not present.

8 Q. Okay. So not present is distinct from unknown?

9 A. That's exactly right.

10 Q. Okay. All right. Now, you said you believe it's
11 important to have some understanding of the phenomena you
12 study because you want to identify confounds, right, or
13 some other factors that are at play of what you're looking
14 at, correct?

15 A. Yes.

16 Q. And I think you said yesterday it's a problem to know
17 statistics but not the system, right, in terms of whatever
18 system that you're looking at to try to understand?

19 A. It can be -- when you're designing a study -- so I
20 would not be qualified to design a study on whether a
21 diabetes treatment is effective or not. If somebody gave
22 me the data from that, I could do the statistics on it and
23 tell you whether the effect -- I mean depending on the
24 method that was used. I couldn't do all kinds of methods
25 but I could run a statistical test on it. But in designing

1 a study, I wouldn't be competent to do that. So I think
2 that -- so yes, I think it's important to have an
3 understanding of the system -- the phenomena that you're
4 studying in designing the study.

5 Q. I mean it helps you better deal with the research
6 question, is that fair?

7 A. Well, it helps you design a study in a way that's
8 going to give you the best chance of getting in -- of
9 answering the research question, yes.

10 Q. Now, the tables and the data that were displayed on
11 the PowerPoints from the defense exhibits yesterday when we
12 went through them, that was from your research, your
13 report, correct?

14 A. The tables, ten, 11, 12, those?

15 Q. Right, the ones up on the screen.

16 A. Yes.

17 Q. And that was from a report from December, correct?

18 A. That's right.

19 Q. Okay. Now, how many versions of the report are there?

20 A. I believe there are three.

21 Q. Okay. And have you got defendant's exhibit 6 up there
22 with you still?

23 A. Yes, I do.

24 MR. PERRY: May I approach, Judge?

25 THE COURT: Yes, sir.

1 MR. PERRY: If I may approach, Your Honor?

2 THE COURT: Yes, sir.

3 BY MR. PERRY:

4 Q. I'm going to hand you -- I believe I'm up to state's
5 exhibits 10 and 11, Professor. Can you tell me what those
6 are?

7 A. State's exhibit 10 is a copy of the report that
8 Professor Grosso and I submitted dated July 20, 2011. And
9 state's exhibit 11 is a copy of that report -- a revised
10 copy of that report that was submitted -- or dated
11 September 29, 2011.

12 Q. Okay. I think the defendant's --

13 THE COURT: I apologize for the interruption. I
14 don't have that copy. I've got two copies of the revised
15 September 15, 2011 version.

16 MR. PERRY: Okay. Approach, Judge?

17 THE COURT: Yes, sir.

18 MR. PERRY: I think I picked up the wrong one by
19 mistake.

20 THE COURT: You want this one back, Mr. Perry?

21 MR. PERRY: Yes, sir.

22 THE COURT: I've got a copy of that.

23 MR. PERRY: Okay.

24 THE COURT: I've got July 20th, got that one.

25 MR. PERRY: Okay.

1 THE COURT: September 29th and the defendant's
2 exhibit 6, which is the revised, pardon me -- long day,
3 December 15, 2011 copy.

4 MR. PERRY: Okay. I think we're all on the same
5 three pages.

6 THE COURT: Yes, sir.

7 BY MR. PERRY:

8 Q. All right. Professor, there were three versions of
9 the report?

10 A. Yes.

11 Q. Okay. Now, if you look -- and what I'd like to direct
12 your attention to are the tables at the back, some of which
13 we put up on the screen yesterday.

14 A. Okay.

15 Q. And that would be tables 12 and 13 and if I can get
16 you to look at the July report first.

17 A. Okay.

18 Q. Now, as far as the report itself, there's not a whole
19 lot of difference. In other words, I mean the format is
20 the same, the sections are the same, all that stuff is the
21 same, correct?

22 A. They are largely the same.

23 Q. Okay. What -- what is the difference between the July
24 report and the September report?

25 A. So it was updated, it was revised to reflect any

1 errors in coding that we captured.

2 Q. Okay. So July to September, that -- that one was
3 errors and coding issues, is that a fair way to
4 characterize it?

5 A. I think so. I can't remember exactly what we changed
6 but I -- as I recall, we changed it to reflect the -- any
7 errors that -- any revised coding that we did but I might
8 -- I don't remember specifically.

9 Q. Okay. If you look on page or tables 12 and 13 for the
10 July report --

11 A. Sure.

12 Q. -- and it's like the model that we went through from
13 the December report earlier, correct?

14 A. Yes.

15 Q. And there are a number of variables listed. If we can
16 start with the statewide. Looks like about the same
17 variables that are listed for table 12. Can you tell me
18 how table 12 changed from July to September for the
19 statewide model?

20 A. Well, one -- so there are a number of consistencies.
21 We -- let me make sure I'm looking at the right one. This
22 is July. Okay. This doesn't have very young in it. So
23 this was before we went back and supplemented our age
24 coding using the boards of elections.

25 Q. Okay.

1 A. So we were missing quite a few in age so it doesn't
2 come into the model. It looked, based on just looking at
3 the correlation between -- or the relation between age and
4 strike outcome that it was potentially an important
5 variable and, therefore, we should put some effort into
6 tracking this down to include it in the model to see if it
7 can explain any further variance.

8 Q. Okay. Now, at that point in July, did you run your
9 imputation analysis?

10 A. Let me see. I don't recall when I ran that. I don't
11 remember if I ran it for July or if that was something that
12 was added in September.

13 Q. Okay. But the variables themselves, looks like we've
14 got 13 and 13 for the statewide and the variables were the
15 same. Now, did the coefficients change much, if at all,
16 for the statewide between July and September?

17 A. Well, I don't remember all of them. I know that black
18 was 2.37 and I think it was pretty close to what it was in
19 the December and -- but I don't believe -- I don't know
20 precisely which ones changed. I don't think -- they didn't
21 flip direction or anything like that. Something didn't go
22 from being a predictor of strikes to a predictor of not
23 being struck.

24 Q. Well, let's look at them. Let's look at table 12 of
25 the July report and you've got a coefficient one odds

1 ratio. In fact, let's look at the odds ratio --

2 A. Okay.

3 Q. -- of black and you've got 2.37, right?

4 A. Yes.

5 Q. Now, like I said, if you go to September, what's the
6 odds ratio there?

7 A. Okay. September, the odds ratio in the statewide,
8 2.39.

9 Q. Okay. And then if you go to the December report,
10 again table 12, for the variable black, you've got a
11 different odds ratio, correct?

12 A. 2.48.

13 Q. Okay. So -- and let me be clear, so the difference
14 between July and September was some of the coding errors
15 were fixed and some of the data cleaned up; is that right?

16 A. Yes.

17 Q. Okay. Now, from September to December, what was the
18 difference?

19 A. Would have been the same kinds of things. Any error
20 we caught that we would change, make the appropriate
21 correction or any additional information we had, but I
22 don't remember precisely what were the changes for the
23 September and the December report but they were largely
24 just cleanup so I -- correcting errors that we discovered.

25 Q. Okay. Now, if you go back to the July, table 12 --

1 A. Yes.

2 Q. -- the death penalty reservations variable, that's got
3 an odds ratio calculated for that report, correct?

4 A. Yes, 10.08.

5 Q. All right. Now, what's the same odds ratio for the
6 same variable in the September report?

7 A. 10.18.

8 Q. Okay. And then for the December report?

9 A. 11.44.

10 Q. Okay. So I mean there was a little -- a little change
11 in the odds ratio between July and December for death
12 penalty reservations, correct?

13 A. Yes.

14 Q. And I think that was one where y'all had gone back and
15 engaged in sort of that review process?

16 A. Well, for the December report, that was before we had
17 -- we -- so it's a big database, and if we catch an error,
18 we change it. But at that point, we hadn't gotten the
19 report -- the affidavits -- or I hadn't reviewed the
20 affidavits so I hadn't incorporated the -- any of the
21 reviews -- any of the information or any of the shadow
22 coding in this.

23 Q. Okay. So would the difference between September and
24 December be the shadow coding then?

25 A. Pardon?

1 Q. Would the difference between September and December be
2 the shadow coding?

3 A. No. There was no shadow coding until I reviewed Dr.
4 Katz's report and then the affidavits that were provided to
5 me so that's more recent.

6 Q. Okay. So that would be after the December report?

7 A. That's right.

8 Q. Okay. So just to be clear, the difference between the
9 December and September reports was more of the same kind of
10 data cleaning and resolving of issues that had been
11 spotted, correct?

12 A. Yes, as I recall.

13 Q. Okay. Now, if you go back -- and I don't want to be
14 -- having you flip all the time. If you will just keep
15 tables 12 and 13 kind of open. If you look in the July
16 report, if you go down to leans state, for that variable,
17 you've got an odds ratio calculated as well, right?

18 A. Yes.

19 Q. What is that.

20 A. .14.

21 Q. And for the September report, you've got another odds
22 ratio?

23 A. Yes.

24 Q. What is that?

25 A. .14.

1 Q. And for December?

2 A. I think that was .14 too.

3 Q. Right. So some of these things changed and some of
4 them didn't?

5 A. That's right.

6 Q. Now, if you look, as you pointed out, for table 12,
7 from July to September to December, what changed in terms
8 of the variables included was the very young variables
9 added, correct?

10 A. Yes.

11 Q. Other than that, the variables themselves stayed the
12 same?

13 A. Yes, I think that's right. It seems to be right, that
14 we added the very young variable.

15 Q. Okay. Now, if you go back to the July report, you
16 look at table 13. So this is the Cumberland County model
17 and, again, correct me if I'm wrong, but the difference in
18 terms of what was in the data between July and September
19 came from that same sort of cleaning of the information,
20 correct?

21 A. Yes.

22 Q. Okay. So the difference between the models in table
23 13 between the July report and the September report are
24 what?

25 A. Okay. Sorry. September and July?

1 Q. July and September.

2 A. Okay.

3 Q. And just in general, did the variables change much?

4 A. Okay. Yes. There was a difference in some of these
5 variables so there was some variables that came in that I
6 put in the model in the July that were marginally
7 significant and they are not in the more recent reports.

8 Q. So, for example, in the Cumberland model in July,
9 you've got some variables that aren't in the September
10 version, right, so that would be female and then the
11 variable J vic and then the variable legal all, right?
12 Those are in July but then in the September model, they
13 actually drop out, right?

14 A. Well, in my judgment I -- I -- the question of leaving
15 a marginally significant predictor in a model, there is
16 some judgment involved in that. I think it's defensible to
17 leave them in there. I leave -- I left it in for leans
18 ambiguous because I thought that was theoretically
19 important enough that I would keep it in there. But again,
20 the other explanatory variables, because the effect of race
21 is consistent regardless of whether they are in or not,
22 then it's just the judgment call as to whether it enhances
23 the model to keep them in or take them out and I think
24 reasonable minds can differ on whether I should keep a
25 marginally significant predictor in or not.

1 Q. When you say enhance the model, what do you mean?

2 A. Well, you don't want to leave information in a model
3 that doesn't really tell you anything about the outcome of
4 interest and then it's just noise. So generally the cutoff
5 for statistical significance is less than .05 but sometimes
6 if -- that's somewhat of an arbitrary cutoff, .05. It's
7 defensible to keep something in the model at less than .10.
8 In either case, it didn't matter -- it didn't -- the
9 significance of the race effect of black didn't turn in any
10 way on whether these variables come into the model or not.
11 So it's not as if I -- if they are in the model at less
12 than .10, black is no longer significant, but if I take
13 them out, it is. So there's some judgment there and I --
14 and researchers might differ on that and I obviously
15 changed my mind about that. But in no way did the -- did
16 the black odds ratio, the significance of that, turn on the
17 presence or absence of these variables in the model.

18 Q. And the same -- I mean you can say the same thing for
19 death penalty reservations too, correct?

20 A. Pardon?

21 Q. You say the same thing for death penalty reservations?

22 A. Well, death penalty reservations was always
23 significant.

24 Q. Right.

25 A. There was never -- it never doesn't come in.

1 Q. Right. And for Cumberland County, you could say the
2 same thing about hardship too, right?

3 A. Well, let me see here. This is September. I have it
4 .10. Well, hardship, when I took out those marginal
5 variables -- those marginally significant variables,
6 helping went from marginally significant at less than .10
7 to statistically significant at less than .05. So that's
8 an example of where an inclusion or the exclusion of
9 certain variables can affect how other variables -- whether
10 they are statistically significant or not and so hardship
11 is one of those variables that did change. The effect was
12 still in the same direction, I mean it still increased the
13 odds of being struck, but whether it was statistically
14 significant or not did -- was effected by whether other
15 variables were in the model with it.

16 Q. So you've got some interaction between the variables?

17 A. Well, it's not precisely an interaction but because
18 you interpret these results -- you interpret these
19 coefficients as controlling for all other things and so by
20 including something in the model that may have some
21 correlation with that variable -- or it can change -- it
22 can change the -- whether it's statistically significant or
23 not. Part of it is too the more variables you include in a
24 model, the more power you need so it could also just be a
25 question of by having more explanatory variables, the same

1 number of data points are -- the power is reduced. So in
2 effect would not be statistically significant because you
3 lack the power. When you remove those variables, you have
4 more power to examine the variables that are in the
5 equation. I can't say from looking at this if that's what
6 drove hardship to go from less than .10 to less than .05
7 but that would be one explanation.

8 Q. So there's some correlation going on between these
9 variables?

10 A. Well, not necessarily. Again, it could be driven
11 simply by a power issue.

12 Q. And now the other thing is the unemployed variable.
13 If you look in the July report in table 13, unemployed is
14 not in there at all but then in September and December, you
15 have unemployed as a significant variable?

16 A. Yes.

17 Q. Do you have any idea why that became significant?

18 A. That could be -- and, again, I don't have any specific
19 recollection of this but there is a number of explanations
20 for why that might be. It could be that we had more --
21 that part of our updated coding in the cleaning process,
22 that we got some information that supplemented the
23 information we had about this. That could be it. It could
24 be an issue of power, the same type of thing with hardship
25 where hardship went from marginally significant to

1 significant. But it could also be an issue of power that
2 drives something from not statistically significant --
3 maybe if it was .11, it wouldn't be in the model but then
4 by dropping those other variables, that enhances the power
5 and it comes in at a statistically significant level.

6 Q. Okay. Now, do you have any newer versions of the
7 model?

8 A. Everything I'm testifying here today -- so these
9 tables and the -- the things I'm testifying to, with the
10 exception of the shadow coding I referred to, I am working
11 from the December database with the understanding -- my
12 understanding was at some point, we can constantly be
13 tweaking or updating, but at some point, we all want to be
14 working from the same database. So -- so these are -- so
15 the December model is in -- the models I'm testifying to
16 are based on the December database and then when I'm
17 referring to the recodes or the shadow codes, those are
18 analyses I've taken since then just to see if they call
19 into question these models.

20 Q. Okay. If you get a new or updated or missing
21 information, you're going to update your models, correct?

22 A. Well, I'm going to update my database, absolutely.

23 Q. Your database.

24 A. Right. I'm not going to ignore information. If I
25 made an error, I'm going to correct it.

1 Q. Okay. Now, why didn't you ask prosecutors involved in
2 these cases what their explanations were?

3 A. Do you mean specifically contact the prosecutors in
4 these particular cases or prosecutors in general.

5 Q. Either?

6 A. Well, we did have a conversation at one point with
7 Bill Hart about the study -- studies that we were
8 undertaking and expressed a desire to -- you know, we would
9 take information from anybody who would give it to us. We
10 wanted to base the study -- the coding on objective
11 information. So if there were materials that we could
12 objectively -- objective materials that we could rely on,
13 we were more than happy to take them. That didn't come to
14 anything. We never -- we never heard back. Now, as far as
15 asking prosecutors in particular cases why they struck
16 someone, no. What I -- what we were coding for was the
17 presence or absence of characteristics to see if -- because
18 presumably the prosecutor's reasons -- I mean I have no
19 reason to think the prosecutor's reasons don't have -- I
20 mean they're based on objective facts and reality so we're
21 coding for the presence or absence of these
22 characteristics. And based on the affidavits I have
23 received, it -- we had remarkable consistency between the
24 reasons the prosecutors -- the facts the prosecutors stated
25 were present and those that we coded as being present.

1 Q. Well, and now beyond just asking prosecutors, you had
2 a number of cases where there were Batson challenges,
3 correct?

4 A. There were some, yes.

5 Q. Okay. So you identified those in your study? I mean
6 those were identified within the database in some way?

7 A. Do you mean do I have a variable that's a Batson
8 challenge or not?

9 Q. Yeah.

10 A. No.

11 Q. So there's no way to identify in your database if a
12 case involved -- or a juror strike involved a Batson
13 challenge?

14 A. No. We would code -- we could -- if it reached the
15 stage in the Batson test where if a prosecutor was giving a
16 reason, you know, because he or she volunteered to give a
17 reason or was asked to give a reason, that would be part of
18 the information we would use to code. But we were coding
19 for the presence or absence of characteristics. We did not
20 separately code for whether there was a Batson challenge or
21 whether -- and what the outcome was.

22 Q. So the offered explanation by the prosecutors in those
23 strikes where there were Batson challenges, that's included
24 because it was picked up by the coders and put in the
25 database?

1 A. Well, if a prosecutor said I am -- the reason we're
2 striking this juror is because her brother was accused of a
3 crime -- I don't recall any instances where that wasn't --
4 there wasn't a factual basis for that. If it was a
5 variable we weren't coding for, then no, we didn't capture
6 it. But that was part of the -- if the prosecutor said
7 something on the record and this fact exists, that was
8 definitely part of the facts we drew on in coding our
9 descriptive information.

10 Q. Okay. But if there was a Batson challenge and it was
11 denied by the judge and there was some other reason that
12 was not able to be coded, that was just left out of the --

13 A. Can you give me an example?

14 Q. Well, say -- I don't know. Pick one of the ones that
15 we talked about this morning from the DCI's. If there was
16 a Batson challenge and the judge said, yes, I agree that
17 because felony murder is an issue for this juror, then
18 that's fine.

19 A. Well, I think that you might be confounding a few
20 things that -- if you were coding for the presence or
21 absence of a characteristic, not whether a judge said this
22 was a reason or proffering this was a reason. We coded for
23 the underlying fact and because the -- the prosecutors are
24 basing their reasons on some objective fact. I can't think
25 of a situation. I can't recall a situation where the

1 prosecutor asserted some reason we could code for that was
2 simply -- where there was no basis in the record. There
3 would be some -- something there we could look at.

4 Q. So you're saying all of the Batson challenges -- in
5 other words, what I'm saying is if a Batson challenge
6 suggested a characteristic that was not present in your
7 model --

8 A. I'm sorry. Can I interrupt for a second? Do you need
9 me to still keep these open?

10 Q. No.

11 A. Okay. Thanks.

12 Q. So if there was a characteristic that came out of a
13 Batson challenge not in your model, did you ignore that or
14 incorporate it?

15 A. That's what I'd like you to give me an example of.

16 Q. Well, I hadn't looked at all these individual
17 observations. I'm asking what your protocol was for that
18 situation?

19 A. If a factor -- we didn't -- if there was a factor
20 present that we could code for, we coded for. If there was
21 -- if the prosecutor said -- and this never happened, but
22 if the prosecutor said I struck this person because they
23 had a blue shirt, we would not code this person had a blue
24 shirt because we never had a variable for it. But if there
25 was a factor asserted that was something we had a variable

1 to capture that and it was based on something in the
2 record, which as I recall I don't recall any situations
3 where that -- well, if there was a basis for it in the
4 record and if it fell within one of our categories, of
5 course, we coded for that.

6 Q. Okay. So your opinion, after looking at all this data
7 and running the analyses is that this disparity in
8 selection rates is due to race being a significant factor
9 in jury selection?

10 A. I think that the data showed that race is a
11 significant factor in jury selection.

12 Q. And your models, the models in tables 12 and 13, those
13 are your models for the State of North Carolina and
14 Cumberland County?

15 A. Those are -- right, those are the models I created for
16 the statewide -- the statewide and Cumberland County to --
17 to examine the predictors based on the information we had
18 of strike decisions by prosecutors, yes.

19 Q. Okay. So you're comfortable with those models?

20 A. Yes, I am.

21 MR. PERRY: Okay. May I have a moment, Your
22 Honor?

23 THE COURT: Yes, sir.

24 MR. THOMPSON: Thank you, Your Honor.

25 THE COURT: Yes, sir.

1 MR. PERRY: Thank you, Your Honor. I just wanted
2 to make sure before we wrapped up our cross here.

3 THE COURT: Sure.

4 MR. PERRY: I did have just a couple of short
5 follow-ups.

6 Q. Professor O'Brien, just one immediate thing that we
7 were talking about here a second ago. If you add more
8 information because of additional information given from
9 this point out, what does that do to your model that you're
10 testifying to today?

11 A. Could you be more specific?

12 Q. Sure. If you get information in and it's a situation
13 where you go from -- like you did in July to September,
14 September to December and you have variables drop in and
15 drop out, what does that do to your model that you're
16 testifying to from your December report?

17 A. Well, I don't know. I don't know. It would depend on
18 what in that new information was --

19 Q. Let me ask it in general. I'm not asking you
20 specifically. I'm not asking you to forecast what variable
21 might drop in or out. But in terms of your model itself,
22 does that mean your December model was invalid?

23 A. My December model, no.

24 Q. Sure.

25 A. No, I don't think so. I mean there may be -- a

1 different expert might have a different opinion about the
2 inclusion of a marginal variable or not but the ultimate
3 research question here is does race have -- is race a
4 significant predictor of strikes. And, if anything, all
5 these different iterations of the model show how remarkably
6 consistent that effect is. So if this was a statute about
7 whether hard -- if this was a study about whether hardship
8 predicted strikes, then I would be concerned that sometimes
9 it comes in and sometimes it doesn't.

10 Q. Um-hmm.

11 A. But the primary research question is, does the
12 inclusion or the exclusion of these variables -- so if
13 another researcher thinks you should keep them in at less
14 than .10 and not exclude them simply because they are less
15 than .05, two researchers might disagree on that, but the
16 bottom line is it doesn't make a difference to the race
17 effect. It is remarkably consistent at around 2.4, very
18 consistent with the unadjusted numbers as well.

19 Q. Okay.

20 A. So whatever new information came, for it to undermine
21 the race effect, it would have to be very, very, very
22 highly -- not only highly correlated with race but very
23 frequent, not a rare occurrence, very highly correlated
24 with race and very highly correlated with outcome and
25 something that -- and yet this is something that we had

1 missed up until this point or we had wrong information.
2 The consistency of this as to the race variables and some
3 of the other more obviously theoretical important
4 variables, such as death penalty reservations, suggest that
5 whether some variables come in or out of the margins, this
6 is a remarkably stable model.

7 Q. Okay. And just to clarify, so it's not just race
8 that's remarkably consistent, it's also some of the other
9 explanatory variables like death penalty reservations?

10 A. That's right. In fact, if it wasn't, I'd be worried
11 that there was something wrong with our coding and data
12 collection.

13 Q. Right. And just so I understand, how does your model
14 do any better in explanatory terms than just looking at the
15 simple disparities?

16 A. Well, the simple disparities are striking because of
17 their magnitude. So the bigger the magnitude -- if you
18 were talking about a ten percent difference, now that would
19 be something that would be relevant if you were placing
20 odds in Las Vegas but when you're talking -- at the same
21 time, you might think, well, there might be some other
22 explanation here that's at work. So by starting with a
23 disparity of about two and a half or 2.41 makes it less
24 likely that some other variable could explain that
25 disparity. But it's -- to be thorough, we did try. We did

1 code as best the information as we possibly could to see if
2 perhaps that very big disparity could be explained by some
3 other factor and we were unable to identify a factor that
4 -- that could do so.

5 Q. So you're satisfied that you've included all the
6 appropriate explanatory factors in these models?

7 A. Well, if you're asking me if there's other variables
8 that also predict strikes that we didn't include that we
9 could -- say demeanor, for example, I -- if we had a way to
10 code demeanor, I wouldn't be surprised at all if that
11 predicted strike. But given the consistency of the race
12 effect, I'm very confident that that inclusion of another
13 predictor, even if it was predictive of the outcome, would
14 not explain away the race effect.

15 Q. So, for example, socioeconomic status, that's not
16 included?

17 A. So if prosecutors -- so could you flesh that out a
18 little bit.

19 Q. Sure. Income level.

20 A. So you mean like people of lower income versus higher
21 income?

22 Q. Sure.

23 A. So, for instance, if prosecutors were more likely to
24 strike poor people and poor people also happen to be black,
25 that would explain the race effect only if it were frequent

1 and highly correlated -- not just correlated with race,
2 right, not just that you see some average differences here
3 but highly correlated with race, highly predictive of
4 outcome and also highly frequent enough. Given -- given
5 the magnitude of the disparity, it would take a very -- it
6 would take a very powerful variable that we were
7 overlooking to -- to provide an alternative explanation of
8 race.

9 Q. And let me back up. Just on a couple of technical
10 things just to make sure I understood correctly. We were
11 talking about earlier of the double coding of the DCI's.
12 How many of the DCI's were double coded.

13 A. The DCI's were double coded for all of the jurors in
14 the random 25 percent sample and all of the jurors who were
15 in Cumberland County.

16 Q. So none of the other ones were. It was just the
17 random sample plus the Cumberland County because all the
18 Cumberland County jurors were included?

19 A. The double coding was done for every single venire
20 member who was -- for whom we did that descriptive level
21 coding, that more detailed level of individual
22 characteristics.

23 Q. And as far as the data or the information that you got
24 the data from itself, who actually gathered the materials?
25 Who had gathered the transcripts and all those things that

1 you looked at for your study?

2 A. So a number of different sources. We had people who
3 were working with the charging and sentencing study, we had
4 people who went to the courthouses and collected whatever
5 information they could get from the court files about those
6 cases and we also received the -- generally the transcripts
7 were not there but we got transcripts from -- often from
8 defense attorneys.

9 Q. Okay. So those -- those folks who went to the
10 courthouses, those were not the coder folks up at the law
11 school, right?

12 A. They were in North Carolina, so they were the ones who
13 were employed down here so the -- most of the charging and
14 sentencing -- the charge and sentencing coding was out of
15 an office here or in Carrboro and -- but while they were
16 collecting the case files for charging and sentencing, they
17 also collected -- they also shared that -- we also took
18 that information for the cases in the jury selection study
19 and then we supplemented that with information -- with
20 PDF's of transcripts from defense attorneys.

21 Q. Okay. And the coders -- just to be clear, they were
22 law school graduates?

23 A. The coders were all J.D.'s.

24 Q. Okay. So they had passed the bar?

25 A. Well, often -- some of them were waiting for their bar

1 results. I think they have all passed since then. They
2 had graduated from law school.

3 Q. My question is they weren't practicing attorneys?
4 They were students who were taking the bar or on their way
5 to taking the bar?

6 A. That's right. We benefited from the tough legal
7 market with good talent.

8 MR. PERRY: May I have a moment, Your Honor?

9 THE COURT: Yes, sir.

10 BY MR. PERRY:

11 Q. And on that note, Professor, after the bar results
12 came in, I think I asked you earlier, but there was some
13 turnover among the coders?

14 A. Right.

15 Q. Was there much to it?

16 A. Well, we -- as they found permanent employment, I
17 encouraged them to accept that and so there was some
18 turnover there. We were glad to see them land good jobs.

19 Q. Sure. And in your core group of coders, there was
20 about five or six people?

21 A. I have a couple of coders who we had pretty much
22 through the duration and most of the time we had -- when we
23 were doing the descriptive coding, I think we always had at
24 least three so that we could do the two independent coders
25 plus the reviewer.

1 Q. So that was the minimum?

2 A. For the descriptive coding. At that point, we made
3 sure we always had at least three for that.

4 Q. Okay. Did y'all come down to North Carolina -- I
5 think you mentioned that Professor Grosso approached you
6 about doing this study?

7 A. Yes.

8 Q. Did you all come to North Carolina to meet with people
9 and get all this started?

10 A. Yes.

11 Q. Who did you meet with?

12 A. I met with some attorneys at the Center For Death
13 Penalty Litigation.

14 Q. Who was that?

15 A. I met with many of the counsel at this table.

16 Q. Did they give you any of the materials we talked about
17 earlier, like jury selection, litigation manuals, anything
18 like that?

19 A. No, not those. They -- they were a source of -- the
20 primary source so they would send me transcripts, for
21 example.

22 Q. Did you all consult with them just in general about
23 how the North Carolina process worked being from out of
24 state?

25 A. Right. So the first thing I did when starting this

1 was I had to understand how you picked a jury here so I
2 could understand -- different places do it differently.
3 Some places you take turns who goes first so I didn't know
4 how many peremptories you had so I read the statute. What
5 I tell my students to do, first thing you do is read the
6 statute and made sure that I understood it so I did talk to
7 some CDPL attorneys to make sure that I understood just the
8 process because I would need to be able to understand
9 strike and strike eligibility.

10 MR. PERRY: I believe that's all the questions
11 I've got.

12 THE COURT: Thank you, sir.

13 MR. JAY FERGUSON: Your Honor, I've got a very
14 brief redirect that I can get done in five minutes.

15 THE COURT: You okay, ma'am?

16 COURT REPORTER: (Nodding head.)

17 MR. JAY FERGUSON: Your Honor, may I approach?

18 THE COURT: Yes, sir.

19 REDIRECT EXAMINATION

20 BY MR. JAY FERGUSON:

21 Q. Professor O'Brien, let me show you what is marked as
22 defense's exhibit 7.

23 MR. JAY FERGUSON: And I'm going to lead a little
24 bit, Judge, just in the interest of time. If I get too
25 much, please stop me.

1 THE COURT: Yes, sir.

2 BY MR. JAY FERGUSON:

3 Q. What is this document?

4 A. I believe this document shows the shadow coding I
5 referred to earlier.

6 Q. And is this indicative of every time -- well, how --
7 first of all, how many cases have you reviewed -- how many
8 affidavits and how many cases?

9 A. So I reviewed up until -- so what I received last
10 week, I think it covered -- 74 cases had -- had -- the
11 reviews had been returned from prosecutors in 74 cases.

12 Q. And these are affidavits from prosecutors giving their
13 supposed race neutral reasons for striking jurors; is that
14 right?

15 A. Yes.

16 Q. And did you read all those affidavits?

17 A. I did and -- but I looked to see if the juror they
18 were addressing was in our descriptive sample.

19 Q. Okay.

20 A. So I -- unless it was an issue of race or strike,
21 which was -- actually Professor Katz pointed out earlier
22 but the affidavits are really dealing with reasons. So I
23 would look then to see was this person they're talking
24 about -- they only reviewed the black strikes, the people
25 who were struck who were black so then I looked to see if

1 they were in -- either in Cumberland or our random sample
2 so that I could look at our coding for that person to see
3 if it was consistent with the reasons.

4 Q. And if there was a difference between your coding and
5 what the prosecutor said, for example, for death penalty
6 reservations, what did you do?

7 A. For the shadow codes? So I looked to see if I agreed
8 with the error because I would want to make a note of it so
9 that we could correct it in the database. But regardless
10 of whether I concurred under our coding protocol, I created
11 where it says DP2.

12 Q. Yes.

13 A. And that was a recode from our death penalty
14 observations so I copied in that information and then I
15 would change it to reflect what the prosecutor asserted so
16 if they said this person expressed reservations about the
17 death penalty and we hadn't coded that as a death penalty
18 reservation, I just took -- I just took that at face value
19 and DP2 would reflect that.

20 Q. So for the first juror, you had as no death penalty
21 reservation -- that wasn't the one they said for that
22 juror, was it? What's the difference in the first juror?
23 It's on the second page, yes. Leans defendant?

24 A. Right.

25 Q. So that would be your code there?

1 A. Trying to --

2 Q. And that shows the difference?

3 A. Yeah. So that's an example of where the asserted
4 reason seemed to fall under some -- some vibe I guess the
5 prosecutor might have gotten or demeanor that suggested
6 bias and I thought that the best variable to capture that
7 would be in leans def. So leans def two shows that
8 although they hadn't been coded originally as a leans
9 defendant, the recode -- the shadow code, leans def two,
10 was changed to reflect that asserted reason.

11 Q. Does this represent the entirety in the differences in
12 your coding as compared to what the state said in all those
13 74 affidavits?

14 A. That's right.

15 Q. This is it?

16 A. This is it. We were remarkably consistent.

17 Q. And in all of these cases, you gave the state the
18 benefit of the doubt and did a further analysis?

19 A. I did. I reran the analysis using the recoded
20 variables to reflect those asserted reasons.

21 Q. And is that shown on number -- defendant's exhibit 8?

22 A. Yes, it is.

23 Q. And if you could tell us -- just explain the odds
24 ratio and why it says black two there?

25 A. When I first started doing it, I thought we might have

1 some discrepancies as to race so -- we really didn't but I
2 had created that thinking that we might but I don't think
3 there were any -- I don't think there were more than a
4 couple instances. So that would reflect that.

5 Q. So the DP2 is the shadow code of death penalty
6 reservations?

7 A. That's right. So I would -- for those black jurors
8 who were struck, only those black jurors who were struck
9 that they asserted death penalty reservations was the
10 reason, I would make sure that our coding of death penalty
11 reservations reflected that.

12 Q. Your shadow coding?

13 A. That's right.

14 Q. So even taking into account the state's -- every
15 single explanation that you have today, what's the odds
16 ratio that's shown on this analysis?

17 A. 2.035.

18 Q. And is this analysis of the entire state database or
19 just the 74 cases that you had race based explanations for?

20 A. I only included it for cases that they had a chance to
21 review.

22 Q. So this is the 74 cases?

23 A. That's right.

24 Q. Including their explanations?

25 A. Yes.

1 Q. Now, it went down a little bit on the odds ratio, and
2 can you tell us what in your opinion would have happened
3 had they coded -- had they been asked to give the race
4 neutral reasons for the white jurors if it would have had
5 any effect on this odds ratio?

6 A. Some of the judgment calls where they said that it was
7 a death penalty reservation which didn't fall within our
8 protocols so we hadn't coded it that way would apply
9 equally to some white jurors. So because we only changed
10 it for the black jurors, it's explaining a little bit more
11 the variance for the struck black jurors. Now, my opinion
12 is and I -- if we -- unless it was only the black jurors
13 who fell in this sort of -- you know, in this gray area
14 where they disagreed with the characterization, unless it's
15 only black jurors who fell in that, there were no white
16 jurors who should have -- who would have been coded that
17 way had I used the state's conception, then this is
18 conservative. Because some white jurors who we did not
19 code as death penalty reservations would have fallen in
20 there as well, so this is conservative.

21 MR. JAY FERGUSON: Your Honor, I would move
22 admission of defendant's exhibits 7 and 8 into evidence.

23 THE COURT: Mr. Perry?

24 MR. PERRY: No objection, Your Honor.

25 THE COURT: Without objection, defendant's 7 and

1 8 are admitted.

2 MR. JAY FERGUSON: That's all, Your Honor. Thank
3 you.

4 THE COURT: Any additional matters based on
5 redirect?

6 MR. PERRY: Your Honor, I have a question or two.

7 THE COURT: Yes, sir. Let me ask a question if I
8 may --

9 MR. PERRY: Yes, sir.

10 THE COURT: -- because I'm intruding on other
11 folks. Is the goal to get Dr. O'Brien released today?

12 MR. JAY FERGUSON: That was our goal, yes.

13 THE COURT: Go ahead. I apologize. Go ahead.

14 MR. PERRY: Thank you, Your Honor.

15 RE-CROSS-EXAMINATION

16 BY MR. PERRY:

17 Q. If I could, Professor O'Brien, if you look on the
18 result section there.

19 MR. JAY FERGUSON: Approach. She doesn't have a
20 copy.

21 THE WITNESS: Thank you.

22 BY MR. PERRY:

23 Q. For the value -- for the P value here for black,
24 what's the value that you've got?

25 A. It's less than .03, .022.

1 Q. And how does that compare with the P value you
2 calculated from your December 12 report?

3 A. It is higher. It's a smaller sample because I only
4 used the substantive cases for which you have reviewed.

5 Q. Sure. How much higher is it?

6 A. Well, it's still significantly significant but I
7 believe I reported it as less than .001 and this is less
8 than .03.

9 Q. So it changed a pretty good bit; is that fair to say?

10 A. Right. I mean the P value turned a lot on the sample
11 side.

12 Q. If you would look on the second page of defendant's
13 exhibit 8, just to be clear, this is another set of results
14 and the change in the model from the first page results is
15 what, just so I understand correctly what you did? So in
16 addition to reviewing the affidavits and incorporating that
17 information, on the second page, you've got a second set of
18 results and that's due to a change in what? Is that
19 because of this post-college variable?

20 A. Just give me one second.

21 Q. Sure.

22 THE COURT: You talking about page two of exhibit
23 8?

24 MR. PERRY: Yes, sir.

25 THE COURT: Yes, sir.

1 THE WITNESS: That's right. I took out --
2 because our sample is a lot smaller because we're dealing
3 with 74 cases instead of 173, I wanted to see that -- once
4 you get a smaller sample, you have -- missing data, meaning
5 you're dropping these cases and it can -- has a bigger
6 impact, so I just wanted to run the same model by taking
7 that post-college out to see what happened just to -- just
8 to see what, if anything, changed because then it adds in
9 those cases for which we're missing on that variable.

10 Q. Okay. So the difference between this model where we
11 have -- I'm referring to the model on page one of
12 defendant's exhibit 8. The difference between this model
13 and the model in your December 15 report is the
14 incorporation of the information from the affidavits that
15 were reviewed provided; is that correct?

16 A. Well, I wouldn't -- I don't mean to quibble but it
17 wasn't the incorporation of the information in the sense
18 that it isn't like the other iterations of the report where
19 we found errors and corrected them. This is the model run
20 with just the asserted reasons taken at face value. So
21 it's not a correction of errors necessarily -- well,
22 although I agree that you did catch some errors. But this
23 is not based on correction of errors. This is based on
24 taking just the -- just the reasons for the stricken black
25 jurors and nobody else at face value and changing those

1 codes when our codes were not consistent with it.

2 Q. Okay. So in your opinion, this is not the correct
3 model?

4 A. This is an extremely conservative model.

5 Q. Um-hmm.

6 A. It is not the best model because the best model would
7 -- if we wanted to change the categorization of where you
8 draw the line in death penalty reservations, then we should
9 review white jurors as well to see if any of them who
10 hadn't been coded as having death penalty reservations
11 would also fall in this category. Then it would be just a
12 question of, okay, we've defined this variable differently
13 but you would do it for the whole -- you would have to look
14 at all the jurors, not just the black jurors who were
15 struck.

16 Q. That would improve your model's explanatory power
17 maybe?

18 A. Well, not necessarily. It depends on -- I mean there
19 is a judgment call there as to whether -- you have -- if
20 your variable is too broadly defined -- if death penalty
21 reservation is defined so broadly that it includes anybody
22 who doesn't say I always want to give the death penalty,
23 then it's going to be too broad. It's not going -- it's
24 not going to have any predictive power. If you define it
25 too narrowly, you won't capture -- you won't capture some

1 of the information that you can get from it. But -- so the
2 question of where you draw the line, regardless of whether
3 you should draw it slightly here or a little bit over here,
4 you want to make sure that you're applying that same
5 protocol to all the jurors in the study, not just black
6 stricken jurors but also nonstricken jurors and also white
7 jurors who were struck and not struck. So this is based on
8 a very sort of select -- they talk about skewing -- things
9 that can skew your sample. This is the product of a very
10 -- of a skewed process but it's skewed in the state's -- in
11 favor of -- conservative in favor of the state by taking it
12 at face value and only applying it to the black stricken
13 jurors. And I do that because if I do that and I still see
14 an odds ratio -- here I get about two, then that's further
15 evidence that this -- that this race effect is not due to
16 some differences in our opinion about how we should have
17 coded death penalty reservations, that it's not explained
18 by that.

19 Q. Professor, let me ask you one last question here,
20 going back to our discussion, table 13, and I'm going to
21 use that as an example earlier, when we went from July to
22 September, table 13 changed because of some changes that
23 were made, wouldn't the addition of this, you know, sort of
24 supplemental information result in changes if you reran
25 this model? In other words, is there the possibility that

1 you have some variables dropping in or dropping out?

2 THE COURT: I apologize. When you refer to this
3 model, what exhibit are you referring to?

4 MR. PERRY: Defendant's page one, exhibit 8.

5 THE COURT: Yes, sir.

6 THE WITNESS: Oh, are you asking if I did the
7 same kind of shadow coding in Cumberland County?

8 BY MR. PERRY:

9 Q. No. Just using that as an example where we had models
10 -- variables drop in and out when things changed, are you
11 saying this is a result and variables are not going to drop
12 in and out because you've changed the values in the
13 conservative sense, giving the state the benefit of the
14 doubt?

15 A. So if you're not asking me if doing the same kind of
16 shadow coding in Cumberland -- I don't quite understand.

17 Q. In other words, you're saying this is the model, you
18 ran it, nothing changed other than some of these odds
19 ratios and the significance of the variables?

20 A. It was largely consistent. I don't see it -- there's
21 black changes as I would expect. Right. It goes down a
22 little bit but it still is 2 -- at least 2 and
23 statistically significant. So I'm not sure how that
24 pertains to Cumberland, the specific model?

25 Q. I was using that as an example. Nothing specific

1 about Cumberland.

2 A. Okay.

3 Q. In other words, as in the Cumberland example, when
4 things change, variables drop in and out. You're saying
5 that did not happen in this case?

6 A. I think some things -- well, you see some things are
7 no longer -- are not statistically significant. I'm just
8 recording the same model with those changes.

9 Q. Okay.

10 A. But I will -- so, for example, single/divorced is not
11 statistically significant in the revised model which is on
12 a smaller subset, so if I was creating a model based on
13 this subset of cases using shadow codes, I would not
14 include single/divorced in the model. I left that in there
15 just for transparency so you can see all the ways in which
16 the models changed.

17 Q. So single/divorced would drop out as a variable?

18 A. If I were limiting my analysis to these cases in this
19 sample and using the shadow codes, that would no longer
20 come into the model.

21 Q. Okay. And are there other ones where that would be
22 the case?

23 A. Sure. You can look down the significance column and
24 you see a number that no longer are -- are not
25 statistically significant. We're dealing with a much

1 smaller sample.

2 Q. Sure. And which ones would those include?

3 A. Very young, juror knew witness, juror knew defendant.

4 That -- the fact that that significance there is .999

5 suggests that there probably weren't anybody -- there

6 probably wasn't anybody left in the sample with that

7 characteristic. J knew attorney is at .22.

8 Single/divorced is at .486. What I might do if I was

9 looking at this is I might look at ways of grouping some of

10 these variables together so perhaps -- that's why I have a

11 variable called juror knew a party. That way I could

12 aggregate if there's very few instances of each, that might

13 be something I might look at to see if the broader category

14 might be -- might be helpful.

15 Q. So you will do some recoding like we discussed

16 earlier?

17 A. All my recodes are in the coding book. I mean they

18 are --

19 Q. No. I'm asking -- you're saying prospectively that's

20 what you would do. I'm asking you would recode some stuff?

21 A. If I thought of something new but that one I just

22 mentioned as something that I had already done.

23 MR. PERRY: That's all the questions I have.

24 THE COURT: All right. Folks, let me ask this

25 formally for purposes of the record because, given the

1 response of counsel for defendant, it appears clear Dr.
2 O'Brien is going to be leaving the jurisdiction. Any
3 objection by counsel for the state to her being released?

4 MR. COLYER: No, sir.

5 MR. THOMPSON: No, sir.

6 MR. PERRY: No, sir.

7 THE COURT: Let the record so show. Anything
8 else, folks?

9 MR. JAY FERGUSON: No, Your Honor.

10 MR. HUNTER: No, Your Honor.

11 MR. JAY FERGUSON: Thank you for accommodating
12 us.

13 THE COURT: Thank you, folks. Thank you, Dr.
14 O'Brien. You're released from your subpoena. You're free
15 to go.

16 THE WITNESS: Thank you.

17 (Witness leaves the stand.)

18 MR. JAY FERGUSON: May I make sure we get the
19 exhibits?

20 THE COURT: Madam Court Reporter, Madam Clerk and
21 bailiffs, thank you all very much for staying. We're at
22 ease until 9:30 tomorrow morning.

23 (The trial adjourned at 5:25 p.m., Tuesday,
24 January 31, 2012, and reconvened at 9:30 a.m. Wednesday,
25 February 1, 2012. Court Reporter Veronica McClain took the

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

proceedings on February 1, 2012.)

CERTIFICATE

STATE OF NORTH CAROLINA)

COUNTY OF CUMBERLAND)

I, SHANNON RANSOM, CSR, RPR, the officer before whom the foregoing proceedings were taken, do hereby certify that said transcript is a true, correct and complete verbatim transcript of said proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of this action.

This 16th day of February, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

NORTH CAROLINA
CUMBERLAND COUNTY

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

STATE OF NORTH CAROLINA,)
)
)
vs.)
)
MARCUS REYMOND ROBINSON,)

)

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

I certify that the transcript of the Racial Justice Act hearing held January 31, 2012, Volume II, consisting of pages 191 through 451, was delivered on February 16, 2012, by emailing the electronically-signed PDF transcript and by delivering a CD-ROM containing the PDF transcript to Judge Gregory A. Weeks, Superior Court Judge; Ms. Bel Lewis and Mr. Rob Thompson, district attorney's office; and Mr. Jay Ferguson, defendant's attorney. I further certify that the transcript was ordered on February 3, 2012.

This 16th day of January, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

1	STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
2		SUPERIOR COURT DIVISION
3	COUNTY OF CUMBERLAND	FILE NO. 91 CRS 23143

6	STATE OF NORTH CAROLINA]	
7]	
8]	RACIAL JUSTICE ACT HEARING
9	vs.]	
10]	DAY HEARD 02/01/12
11	ROBINSON, Marcus,]	
12	Defendant.]	Vol. III OF XVIII
13]	[Pages 452 through 691]

15 The above-captioned case coming on for hearing at the January
 16 30, 2012, Criminal Session of the Superior Court of
 17 Cumberland County, Fayetteville, North Carolina, before the
 18 Honorable Gregory A. Weeks, Judge Presiding, the following
 19 proceedings were had, to wit:

22 **A P P E A R A N C E S**

24 **FOR THE STATE:** Calvin Colyer & Rob Thompson,
 25 Assistant District Attorneys, 12th
 26 Judicial District; and, Jonathan Perry,
 27 Assistant District Attorney, 20th
 28 Judicial District

30 **FOR THE DEFENDANT:** Jay Ferguson & Cassandra Stubbs, Durham
 31 County Bar; Malcom Hunter, Orange County
 32 Bar; and, James Ferguson, Mecklenburg
 33 County Bar, Attorneys at Law

36 **VERONICA E. McCLAIN**
 37 *Official Court Reporters*
 38 *Cumberland County Courthouse*
 39 *P.O. Box 363*
 40 *Fayetteville, North Carolina 28302*
 41 *(910) 308-0517 (cell phone)*
 42 *Verbrprtr45@nc.rr.com*

44
 45 **DATE REQUESTED: 02/03/12** **DATE DELIVERED: 02/18/12**

1 [COURT REPORTER NOTE: The Master Index will be submitted in
2 a volume all of its own, entitled Master Index.]

3 [The hearing reconvened at 9:30 a.m., February 1, 2012, with
4 all pertinent parties present prior to the recess once again
5 present, to include the defendant, but with the exception of
6 the court reporter. Ms. Veronica McClain replaced Ms.
7 Shannon Ransom as the official court reporter.]

8 THE COURT: Good morning, folks.
9 [General good morning by counsel for both parties.]

10 THE COURT: Okay. Let the record
11 reflect all counsel are present.

12 Mr. Colyer, any matters we need to deal with?

13 MR. COLYER: Good morning, Your Honor.
14 Yes, sir, please, if we could. Judge, just a couple of sort
15 of housekeeping things before we start this morning.

16 THE COURT: Yes, sir.

17 MR. COLYER: Earlier in the week, the
18 Court allowed the State's motion with respect to disclosure
19 of information for affidavits of the defendant's jurors.

20 THE COURT: Yes, sir.

21 MR. COLYER: And we were wondering if
22 we might get some idea of when that material will be
23 forthcoming because I believe one of their witnesses may --
24 based upon the information we have to date -- may be
25 referring to those affidavits in his testimony.

February 01, 2012

1 THE COURT: Okay.

2 MS. STUBBS: Your Honor, I have
3 prepared a list. As I understood the Court's ruling, I
4 prepared a list of the people who interviewed for those
5 affidavits and confirmed with all those people that the
6 materials that were shown were indeed just the transcripts
7 and the EJI report; and, I'm -- I can print that statement
8 and submit it to the Court. My understanding was there --
9 that -- that that was what we needed to do to comply with the
10 Court's order.

11 MR. COLYER: And I believe Mr. Thompson
12 had -- and I'll let him speak for himself; but, I believe he
13 had also mentioned something about needing information that
14 was discussed with respect to the ----

15 THE COURT: Okay. Let me ----

16 MR. COLYER: [Indiscernible.]

17 THE COURT: Let me find the actual
18 motion itself.

19 MR. THOMPSON: And, if I could seek
20 clarification, Judge, earlier, when we weren't sure what
21 information they were -- that was disclosed -- I'm sorry --
22 when the defense, you know, seemed to be not really clear as
23 to what was disclosed, they said one juror had been shown the
24 EJI. I wanted to see if more than one juror -- I'm sorry --
25 more than one of these juror affiants was shown the -- was it

1 all of them, one of them, six of them. If I can get some
2 clarification as to that.

3 THE COURT: Okay. Let me -- we're
4 talking about the State's motion for supplemental discovery?

5 MR. THOMPSON: Yes, sir.

6 MR. COLYER: Yes, sir.

7 THE COURT: Okay; and, more
8 specifically, looking at paragraph 4, January 18th, 2012, the
9 defense delivered to the State discovery that included 10
10 purported affidavits from jurors in North Carolina death
11 penalty cases, including Mr. Robinson's. The State is
12 seeking reciprocal supplementary materials from the defense
13 whether or not those things are in the possession of the
14 defense; and, paragraph (a), I think, is where we are --
15 detailed summaries, recordings and/or copies of all materials
16 provided to them, to discuss with or communicated to the
17 following affiants concerning the preparation of the
18 affidavits involved, and that would include the folks listed.

19 MR. THOMPSON: Yes, sir.

20 THE COURT: All right. Ma'am?

21 MS. STUBBS: Judge, I have prepared
22 that statement; and after the break, I can print it and give
23 it to -- to both sides. It -- it indicates, I think,
24 specifically, the questions that Mr. Thompson had, which
25 jurors were given the EJI report.

1 THE COURT: Okay. Are you asking for
2 anything beyond that, Mr. Thompson?

3 MR. THOMPSON: No, sir. Judge, the same
4 request, we just -- we'd like that -- we'd like to have that
5 just for -- in -- sometime before the witness -- the expert
6 that'll be testifying -- partially depending on those
7 affidavits, will be testifying. I'd hate to diagram that
8 sentence, but I -- I think I -- I think it's pretty clear to
9 the Court -- before that person testifies, we'd -- we'd like
10 those in sufficient time to look at that material, so we can
11 appropriately affect our cross.

12 THE COURT: Well ----

13 MR. COLYER: Your Honor, I'm not trying
14 to eavesdrop, but I believe I heard Mr. Ferguson tell Ms.
15 Stubbs that that might be tomorrow before that witness
16 testifies.

17 MS. STUBBS: Judge -- Judge, that's --
18 that's -- I have the statement. It's prepared. I just need
19 to print it, which I'll do at the break. The witness is
20 going to be testifying tomorrow.

21 MR. THOMPSON: Then, that'll be plenty of
22 time.

23 THE COURT: Why don't we take it one
24 step at a time. If you will, do that, ma'am. Provide that
25 to counsel for the State. If you folks want to be heard

1 further of the issue, we can take it up then.

2 MR. COLYER: All right. Thank you.

3 MR. THOMPSON: Thank you, Judge.

4 THE COURT: Okay.

5 MR. COLYER: And one other question
6 that we had -- and this relates to our testimony next week,
7 Your Honor, ----

8 THE COURT: Yes, sir.

9 MR. COLYER: ---- in terms of
10 witnesses. Yesterday, Doctor O'Brien testified about the
11 receipts -- the receipt of affidavits from the State
12 prosecutors, that we received, turned over to the defense and
13 the defense turned over to her.

14 THE COURT: Yes, sir.

15 MR. COLYER: And then she testified
16 about a -- not a change to her report or her opinion
17 necessarily, but the shadow -- I forget the term that she
18 used -- shadow coding ----

19 THE COURT: Yes, sir.

20 MR. COLYER: ---- that she did with
21 respect -- thank you, Rob -- that she did with respect to
22 those affidavits; and, then, there were two exhibits, Defense
23 Exhibits 7 and 8, that were presented into evidence based
24 upon that shadow coding and based upon the affidavits. The
25 question that we have, that we raised earlier, was how to

1 deal with those affidavits of the State prosecutors; and, we
2 had asked the Court to give us some guidance, please, sir,
3 with respect to whether or not -- based upon the use of those
4 affidavits as a basis of testimony by an expert and, now, the
5 defense expert and, ultimately, our expert, Doctor Katz,
6 whether or not we could get those affidavits in through those
7 persons who testified ----

8 THE COURT: Without bringing the ----

9 MR. COLYER: Without bringing the
10 individual.

11 THE COURT: Yes, sir.

12 MR. COLYER: And the reason we need to
13 know, Judge, is, obviously, there's a potential for a number
14 of Assistant DAs and elected DAs around the state to be
15 brought down here; and, we're kind of in an elastic, dynamic
16 situation as to when to get them here or when not.

17 THE COURT: Okay.

18 MR. COLYER: Our question to the Court
19 this morning is if you could forecast for us whether or not,
20 based upon what has happened so far and what we anticipate
21 will happen next week -- whether or not we need to start
22 lining up those individuals to come down to authenticate
23 their affidavits. Now, I will tell the Court that we have
24 been in contact with them. I cannot tell the Court that we
25 have subpoenaed every one of them, but we have talked about

1 cooperative efforts with them; and, they're going to do that
2 to the best of their ability; and, Mr. Thompson's been in
3 charge of our logistics, so I'll defer to him; but, we're
4 asking, at this point, whether or not we have to bring those
5 folks down here to further get the affidavits that have been
6 provided to both experts on both sides of the case into the
7 evidence that is accepted in this case.

8 THE COURT: What's the position of
9 counsel for the defendant on that issue?

10 MR. HUNTER: Let me say a couple of
11 things. I think that the opportunity to introduce these what
12 -- what have been called affidavits through our witness is
13 over. Our witness is gone; but, I assume Doctor Katz is
14 going to testify ----

15 THE COURT: Yes, sir.

16 MR. HUNTER: ---- and this forms a
17 basis for his report and that they would be ----

18 THE COURT: Admissible.

19 MR. HUNTER: ---- admissible. I -- I
20 would just say they're -- what we got aren't affidavits. I
21 mean, most of them are not signed and not executed on their
22 -- their -- you know, they're statements. They're still
23 admissible, I think, as supporting Doctor Katz' reports.

24 THE COURT: Yes, sir.

25 MR. HUNTER: But ----

1 MR. COLYER: Excuse me. Because of
2 format, they'd -- they'd be somewhat different. The
3 information is the same. I don't know that the actual signed
4 affidavits have necessarily been scanned and sent, but ----

5 THE COURT: Okay.

6 MR. COLYER: ---- and I'll have to
7 defer to Mr. Thompson on that, but the information is the
8 same; and, respectfully, we -- we have not tried to introduce
9 any evidence in the defense case; but, just for guidance, if
10 they don't have any objection with respect to the
11 introduction of our ex -- our exhibits -- excuse me -- in
12 their case, we would be glad to do that; and, we did not do
13 it with Doctor O'Brien yesterday as to the -- the affidavits
14 because, frankly, as Mr. Hunter's just pointed out, we don't
15 know what format she saw them in. So, if we show her an
16 affidavit and have her have to sit and read ad nauseam to
17 make sure that what she got in the affidavit was the same
18 thing that was delivered in the spreadsheet and delivered in
19 the scanned message ----

20 THE COURT: Well, the real issue here,
21 if I'm understanding correctly, is -- the question now before
22 the Court -- and I'm posing that both to counsel for the
23 defendant, as well as to the Court -- if I understand where
24 we are -- is whether there's a need to bring the affiants
25 personally into the courtroom for next week or are we agreed

February 01, 2012

1 that, based on the testimony that's already been presented
2 and is anticipated to be presented, the affidavits will come
3 in as a basis for somebody's opinion.

4 MR. COLYER: Yes, and we will try to do
5 that through Doctor Katz.

6 THE COURT: Okay.

7 MR. THOMPSON: And I could give you, Your
8 Honor, the logistics and -- of the way that the affidavits
9 were done is -- because we were pushed on time, as we've
10 talked about a number of times, the -- in -- in large part,
11 the word document, the actual computer document, where the
12 affidavit was prepared, was sent to me electronically. I've
13 converted that to a PDF and put that in a number of different
14 folders tracking when we got them, but -- and then they
15 followed-up with an actual physical ----

16 THE COURT: Yes, sir.

17 MR. THOMPSON: ---- signed, original
18 affidavit in case that became necessary. So, we have built a
19 folder ----

20 THE COURT: Okay.

21 MR. THOMPSON: ---- of -- from each
22 county and organized it. So, if we called those 35 folks,
23 give or take, or any number of them, we would be able to pull
24 a folder and go with that person; and, the basics of their
25 testimony would simply be what's in the affidavit. So, I

1 didn't want to get 35 folks or so ----

2 THE COURT: Yes, sir.

3 MR. THOMPSON: ---- organized and here
4 and ruin 35 different court sessions around the State if Your
5 Honor was inclined to get those in otherwise. So, this was
6 really more of a logistics question, 'cause we've got folks
7 that are -- all of which, we -- we've not -- we haven't
8 subpoenaed any of them. They've all just agreed, through
9 their electeds, to cooperate with the Court and ----

10 MR. COLYER: And, Judge, in all
11 fairness to the defense here, we realize there is a
12 difference perhaps between some of the affidavits that were
13 received by the discovery cutoff and some of those that have
14 been received after the date of the discovery cutoff ----

15 THE COURT: Okay.

16 MR. COLYER: ---- and, then, those that
17 have been received after the date of Doctor O'Brien's shadow
18 opinion, if any. I'm not sure that they're in those
19 categories; and, to the extent that there's an objection to
20 the matters that did not reach the defense by the cutoff
21 date, we're prepared to deal with that separately as,
22 perhaps, a proffer, if they have an objection to those
23 affidavits. Now, my understanding is Doctor O'Brien's shadow
24 ----

25 THE COURT: Coding.

1 MR. COLYER: ---- coding -- thank you.
2 I've got a block on that this morning for some reason, Judge
3 -- was done up till January 25th. So, we could use that as
4 kind of our bright line. Between January 10th and January
5 25th, those would have been, quote, late for discovery, but
6 we will try to deal with that separately.

7 THE COURT: Okay.

8 MR. THOMPSON: The -- the State would be
9 able to -- the way the testimony came out yesterday is, I
10 believe, there's 74 affidavits that -- that Doctor O'Brien
11 considered in -- in her final analysis in shadow coding. To
12 the extent that -- the defense, I believe, had a list of
13 those affidavits and actually showed her -- if memory serves
14 -- I can work with the defense in -- during a break, after
15 court -- with our bundle, give them the time to tell me which
16 ones, pull the ones that -- that were not included in those
17 74 and literally be able to hand the Court a small binder
18 including what -- the original affidavits that are the same
19 as the materials that she looked -- other than the signature,
20 or I can just print the ones without the signature, either
21 way the Court would want me to do it. I can -- I've got all
22 the different versions. I've got both the electronic version
23 that I suspect they were -- they gave to her, because that's
24 what we gave to them.

25 THE COURT: Okay.

February 01, 2012

1 MR. THOMPSON: So, I can present it to
2 Your Honor any way Your Honor wishes it to be; and, I'd just
3 like the Court's guidance, 'cause we've got all of these
4 folks waiting for that; and, I'd like to tell them sooner
5 rather than later, so they can get on about the State's
6 business.

7 THE COURT: Okay. What's your
8 position, Mr. Hunter?

9 MR. HUNTER: Well, I -- I just want to
10 clarify. I mean, I -- I -- we anticipate Doctor Katz is
11 going to testify.

12 THE COURT: Yes, sir.

13 MR. HUNTER: It's obvious, in his
14 report, that he's relied to some extent on these affidavits.

15 THE COURT: Yes, sir.

16 MR. HUNTER: And -- and we -- we think
17 they would be admissible as a basis for his testimony ----

18 THE COURT: Yes, sir.

19 MR. HUNTER: ---- not as substantive
20 evidence. I -- I'm not sure we're disagreeing about that;
21 but, if they want the contents of these affidavits in as
22 substantive evidence, then they need to bring witnesses in.

23 THE COURT: Yes, sir.

24 MR. HUNTER: And, if those -- if the
25 Court finds that those witnesses have anything admissible or

1 relevant to say, then we get to cross-examine them. So,
2 we're -- we're not conceding that it's admissible as
3 substantive evidence; but, I think, because it's something
4 Doctor Katz has already relied on, some of them, in his
5 report, we're not going to complain about those affidavits or
6 reports, or whatever you want to call them, coming in, in
7 that manner.

8 THE COURT: Okay.

9 MR. HUNTER: But, they're not
10 substantive evidence. If they want substantive evidence,
11 then they do need to call the DAs and then they'll be
12 witnesses and then we'll cross-examine them; and, so, in
13 other words, we don't agree that they are -- they are any
14 proof of the truth of whatever is said and ----

15 THE COURT: I understand. They're
16 matters relied upon in the formulation of opinions by
17 whoever's giving an opinion on that basis.

18 MR. HUNTER: Right.

19 MR. JAY FERGUSON: Just one moment, Your
20 Honor.

21 THE COURT: Okay.

22 [Pause.]

23 MR. HUNTER: And we're certainly not
24 contesting that whoever they say prepared it prepared it.
25 So, as to the authenticity questions, we don't have a problem

1 with that.

2 THE COURT: Okay.

3 MR. HUNTER: It's just that, you know,
4 it -- it's not -- it's not substantive evidence.

5 MR. THOMPSON: One other small point of
6 clarification, there's a difference between what Doctor Katz
7 relied on, the number of folks that Doctor Katz relied on,
8 and what Doctor O'Brien relied on. Are we -- are we talking
9 about the 74, or are we talking about the smaller amount that
10 was done by the 10th of January.

11 THE COURT: By whom?

12 MR. THOMPSON: In essence, the -- the
13 affidavits that Doctor Katz relied on will be a smaller
14 number of affidavits than the 74 that ----

15 THE COURT: Well, folks, if I
16 understood Doctor O'Brien's testimony yesterday, she
17 considered the matters set out purportedly in 74 affidavits
18 that were provided to her on the substance of those
19 affidavits ----

20 MR. HUNTER: I don't think it's 74
21 affidavits. I think it's 74 cases. Some of the affidavits
22 have ----

23 THE COURT: I apologize. 74 cases,
24 yes sir.

25 MR. THOMPSON: I have those in one folder

February 01, 2012

1 that the defense has had access to since the 25th of January.
2 I just wanted to make sure I knew which -- which folder, and
3 I also want to know what form Your Honor -- the defense -- I
4 don't care what form it is. If they want us to prepare a
5 binder containing the originals of what they've been given or
6 if they want it to contain just printouts of what they were
7 given.

8 THE COURT: By way of suggestion ----

9 MR. THOMPSON: Yes, sir.

10 THE COURT: ---- do it in any -- in
11 all formats you have it in.

12 MR. THOMPSON: Yes, sir.

13 THE COURT: ---- so that they have an
14 opportunity to compare what they may have received ----

15 MR. HUNTER: Yeah.

16 THE COURT: ---- along with the format
17 in which you received the information to make a determination
18 as to whether or not we're talking about essentially the same
19 information being provided.

20 MR. THOMPSON: Yes, sir.

21 THE COURT: Secondarily to that, let
22 me suggest that you talk with counsel for the defendant about
23 -- my inclination is as follows: If there is agreement about
24 what comes in and whether it comes in for purposes of matters
25 relied upon in the formulation of an opinion, if there's any

1 issue on the part of the State about, well, we want some
2 matters considered for substantive purposes, we can deal with
3 that later; but, let's find agreement where an agreement can
4 be reached and then go from there, if that's satisfactory. I
5 think, in terms of your planning, Mr. Colyer, Mr. Thompson,
6 what I'm hearing here is that there is, at a minimum, no
7 demand by counsel for the defendant that all of those folks
8 come to court. It may be that they don't have any objection
9 to all of them being excluded and the documents being relied
10 on in the context of being affidavits relied upon.

11 MR. COLYER: Yes, sir.

12 THE COURT: Fair statement?

13 MR. HUNTER: Yes, relied upon by their
14 ex -- and we don't have a ----

15 THE COURT: Yes, sir.

16 MR. HUNTER: To answer your question of
17 -- we don't a pro -- I assume Doctor Katz has also looked at
18 the later affidavits that have come in, and we -- I -- we
19 don't have a problem, I don't think, with Doctor Katz relying
20 on all of those, even though that wasn't in his
21 [indiscernible]. So, I mean, I think the gist -- we
22 understand the gist of it; and, whether there's 10 more
23 really doesn't -- we don't think, makes any difference; and,
24 so, we're fine with Doctor Katz testifying as Doctor O'Brien
25 testified, about all of them, and -- and what conclusions he

1 draws from that larger group. I think that's fine with us,
2 and we're fine with those coming in as explaining -- or, part
3 of the basis for his expert opinion.

4 THE COURT: Yes, sir; and, if that's
5 satisfactory, then we don't have an issue.

6 MR. HUNTER: You know, we may have
7 other complaints.

8 THE COURT: Yes, sir.

9 MR. HUNTER: But, as to this ----

10 MR. COLYER: We appreciate the guidance
11 from both the Court ----

12 THE COURT: Yes, sir.

13 MR. COLYER: ---- and the defense; and,
14 we'll discuss how that might impact on what we were planning
15 to do ----

16 THE COURT: Okay.

17 MR. COLYER: ---- or thought we might
18 do. Mr. Thompson has one other matter.

19 THE COURT: Well, let me also add --
20 before giving Mr. Thompson the opportunity to be heard
21 further -- let me also add, if there is a question about a
22 need for a witness and time being a factor, I'll accommodate
23 you.

24 MR. COLYER: We understand, Judge. We
25 appreciate that.

1 THE COURT: Yes, sir. I'll
2 accommodate you.

3 MR. THOMPSON: That -- that actually is
4 the perfect segue into our next -- into our next issue.

5 THE COURT: Yes, sir.

6 MR. THOMPSON: Obviously, the -- whether
7 we call these affiants would tremendously affect our schedule
8 and, therefore, the defense's schedule on rebuttal. So, I've
9 briefly discussed with Ms. Stubbs this morning and told her
10 we'd like to discuss it this morning -- we need to make a
11 final decision on whether or not to call these affiants,
12 whether or not it'll be necessary ----

13 THE COURT: Okay.

14 MR. THOMPSON: But, once we've done that,
15 assuming we're not going to call these affiants, our intent,
16 we have stated earlier, was to call Doctor Katz this coming
17 Monday. We -- we'd like to change that ----

18 THE COURT: Okay.

19 MR. THOMPSON: ---- to Wednesday. Mr.
20 Perry has obligations on Tuesday night in his home county;
21 and, he's going to, after those obligations, travel back to
22 Cumberland County to do that direct examination. For
23 planning purposes, I want to make sure -- I don't know what
24 their -- if they're having -- going to have somebody here
25 before Katz or be prepared after Katz for their case; but, we

1 expect -- the defense is expected to, as of early this
2 morning, finish their case mid-day Friday -- is what they --
3 what they anticipated to us. If -- if that's the case, we
4 may get through a great deal of our evidence and may be
5 finishing up as early as Wednesday or whenever Katz gets
6 finished Wednesday or Thursday ----

7 THE COURT: All right.

8 MR. THOMPSON: ---- so they can
9 accommodate their schedules for their rebuttal, whoever they
10 plan on calling. I know they -- they likely have people
11 traveling and whatnot. We wanted to tell them, A., we'd like
12 to -- maybe, we might need -- depending on when they do quit
13 on their case and depending on when we get started and how
14 long it takes, we may need some time between the rest of our
15 case, if we finish, and Doctor Katz. We -- in essence, would
16 like to call him Wednesday morning, regardless of what's been
17 done ----

18 THE COURT: For clarification ----

19 MR. THOMPSON: Yes, sir.

20 THE COURT: ---- you have other
21 witnesses you're planning on calling Monday ----

22 MR. THOMPSON: Yes, sir.

23 THE COURT: ---- and Tuesday?

24 MR. THOMPSON: We do.

25 THE COURT: All right. That's what I

February 01, 2012

1 needed to clarify.

2 MR. THOMPSON: Yes, sir; but, just in
3 case there is a gap, in case things move a lot quicker than
4 the defense anticipates and we anticipate, if we finish
5 Tuesday afternoon ----

6 THE COURT: Yes, sir.

7 MR. THOMPSON: ---- we'd like to take
8 that half a day, so we'd know when to call both these two
9 gentlemen in for Doctor Katz' direct.

10 THE COURT: Okay. Yes, sir.

11 MR. COLYER: And, Judge -- and, in
12 light of our discussion this morning about the affiants, that
13 could impact on whether we stop or whether we go further;
14 and, we'll try to give you some guidance ----

15 THE COURT: Okay.

16 MR. COLYER: ---- as the week
17 progresses, so that we don't stop and leave you hanging.

18 THE COURT: Yes, sir. I appreciate
19 the heads up and the information.

20 You folks have any response to that?

21 MR. HUNTER: Two things, one, as a
22 matter of information, Doctor Woodworth, who's our
23 statistical expert, who's the next witness today, is the only
24 witness we have planned for today. So, we may have -- you
25 know, depending on the cross, we may have a gap today ----

1 THE COURT: Yes, sir.

2 MR. HUNTER: ---- and then we'll be --
3 we'll be ready to start with new experts tomorrow morning.

4 THE COURT: Okay. Folks, I've
5 indicated, I believe, in some of the preliminary matters, my
6 objective is to give both sides a full and fair opportunity
7 to be heard. If we have some downtime in that regard, that's
8 not a problem. My goal is to make sure both sides have ample
9 opportunity to present their cases on the issues involved.

10 MR. COLYER: Judge, you've said that
11 all longer, and we appreciate it. It makes our job easier,
12 and we know that's been your history and practice all the
13 time that we've been in front of you. We appreciate it.

14 THE COURT: Thank you, folks. Thank
15 you. Okay.

16 MR. HUNTER: Just -- just to give the
17 Court and opposing counsel more information -- I think they
18 already know this, but we have three witnesses scheduled for
19 Thursday.

20 THE COURT: Okay.

21 MR. HUNTER: And, so, if we finish them
22 on Thursday, we're done.

23 THE COURT: Okay.

24 MR. HUNTER: If -- if it -- we
25 anticipate it will probably bleed over into Friday morning;

February 01, 2012

1 and, my question was are you all going to be ready or
2 inclined to start your case when we stop; or, would you
3 rather start on Monday; or, what's your -- just so we can
4 plan to -- for our own crosses and so forth.

5 MR. COLYER: Actually, it would be
6 easier for us if we started on Monday.

7 THE COURT: Okay.

8 MR. COLYER: That could affect our
9 schedule for next week, however; and ----

10 THE COURT: Okay.

11 MR. COLYER: ---- I guess, if we had
12 our druthers, we'd rather just stop this week, clean house,
13 sit down and regroup and start on Monday morning, if that's
14 not going to cause a problem; and, it sounds like, at most,
15 what we might be losing is the day on Friday.

16 THE COURT: Yes, sir. That won't --
17 I've got stuff piling up downstairs, so it'll give me an
18 opportunity to catch up with other matters.

19 MR. COLYER: Judge, that kind of plays
20 into that question we asked you a few weeks ago about the CLE
21 this Friday ----

22 THE COURT: Yes, sir.

23 MR. COLYER: ---- that's going to be
24 presented here.

25 THE COURT: And I appreciate you

February 01, 2012

1 bringing that to our attention because we need to talk about
2 that. There is a -- the Chief District Court Judge and I
3 have scheduled a CLE for Friday afternoon, and I'm trying to
4 recall the time.

5 MR. COLYER: Judge, I believe it starts
6 at 11:00 for a lunch hour, for a couple of hour, 2 or 3
7 hours.

8 THE COURT: Yes, sir; and, we've got
9 the Chief Justice coming down, as I understand it, for that
10 CLE. So, the information I'm now hearing ties into us being
11 able to go forward and everybody involved being able to
12 participate.

13 MR. HUNTER: It sounds like a lot
14 depends on how many of these fact witnesses the State is
15 thinking and -- and let's just -- once they decide that, if
16 they decide maybe they do need to call the DAs, or some of
17 the DAs -- and I don't know what the deal is with the judges
18 still -- but, I just -- I -- we would very much like to be
19 able to finish next week, if we can, 'cause we've carved this
20 time out for lawyers and experts and ----

21 THE COURT: Yes, sir.

22 MR. HUNTER: ---- so, it -- I don't
23 want to do anything this week that we're going to have to pay
24 for ----

25 THE COURT: Down the road.

1 MR. HUNTER: ---- later; and, I bet
2 you have other things you've got to do too. So, I just want
3 to be mindful of that. If we're not going to -- depending on
4 how many fact witnesses -- I mean, I'm not -- that you think
5 you have and how long you think your evidence will be, if you
6 don't think that's going to be an issue for next week, then I
7 think we're going to be fine with stopping on Thursday or
8 Friday or whenever -- whenever we're done with our ----

9 THE COURT: And, if need be, we can
10 adjust the Court schedule. Rather than starting -- I don't
11 know if any of the folks are coming from out of town; but, if
12 we need to, we can start at 9:00. We can adjust the breaks
13 and the lunch hour to accommodate all of the competing
14 interests involved.

15 MR. COLYER: Judge, if I might add
16 something. We -- you know, we mentioned we have some local
17 witnesses ----

18 THE COURT: Yes, sir.

19 MR. COLYER: If we finish tomorrow --
20 let's say the defense rests tomorrow afternoon -- we could go
21 ahead and try to call a witness or two on Friday morning.

22 THE COURT: Okay.

23 MR. COLYER: If the Court still wants
24 to stop at eleven o'clock or twelve o'clock or whatever, or
25 keep going during the day, we'll be glad to try to

1 accommodate the Court and the defense with witnesses on
2 Friday. We just need to know that ----

3 THE COURT: By tomorrow?

4 MR. COLYER: Well, we need to know, if
5 we finish tomorrow, we're expected to start on Friday; if we
6 don't finish tomorrow and bleed into Friday, we'd like to
7 just go ahead and call it a day on Friday and start on
8 Monday.

9 THE COURT: I think everybody's
10 position is now clear on the record.

11 MR. COLYER: Yes, sir.

12 MR. HUNTER: And either one is fine
13 with us.

14 THE COURT: Okay.

15 MR. THOMPSON: And, not to belabor this,
16 Judge, I have one other item that's come up. We actually
17 talk after court and before court, so these -- these things
18 come up. We'd like to make this as smooth as we can. I
19 wanted clarification for the Court's order. There was a
20 motion to sequester the State's witnesses made by the
21 defense, and we asked that it be made reciprocal to the
22 extent -- the defense's argument was, when we objected, that
23 the -- all the -- they didn't want one judge, one prosecutor,
24 hearing the cross of the guy before him because their lines
25 of cross-examination were going to be similar. I didn't hear

1 Your Honor -- and maybe I just missed it; but, I didn't hear
2 whether Your Honor applied that reciprocal ----

3 THE COURT: That's what I'm looking
4 for now.

5 MR. THOMPSON: ---- to Sommers and
6 Stevenson and Trosch, all of which are -- are similarly
7 situated ----

8 THE COURT: Well ----

9 MR. THOMPSON: ---- and their cross-
10 examinations will have some great similarity in their lines
11 of questions. So, the same concept applies. So, I -- to the
12 extent -- I don't know them. I don't know if they're here.

13 THE COURT: Okay.

14 MR. THOMPSON: There are lots of folks in
15 the courtroom; and, to the extent that their argument was
16 similar lines of questioning on cross would put them at a
17 disadvantage on our witnesses, we'd ask that that be applied
18 to those three witnesses, to the extent that they're here or
19 they plan to be here before their testimony.

20 THE COURT: Well, paragraph 3 of the
21 defendant's motion to sequester, in pertinent part, reads the
22 defendant is not seeking to sequester expert witnesses from
23 the hearing as their presence will be necessary to assist
24 counsel and to be in a position to rebut the other party's
25 evidence. That's what I recalled about the motion.

February 01, 2012

1 MR. THOMPSON: But ----

2 MS. STUBBS: Yes, Your Honor; and, for
3 example, we do not object to Doctor Katz who's been present
4 throughout the hearing. We don't object to any experts for
5 the State being present, and expect our experts to be present
6 throughout the testimony.

7 MR. THOMPSON: Respectfully, though,
8 they're calling these witnesses and then we're crossing these
9 witnesses. The other witnesses, not on the witness stand,
10 would not be present to then later critique our witnesses
11 because there are other witnesses being put on the witness
12 stand -- plus -- so, that logistically ----

13 THE COURT: I apologize.

14 MR. THOMPSON: ---- doesn't make sense.

15 THE COURT: That -- that -- that ----

16 MR. THOMPSON: I lost you?

17 THE COURT: Yes, sir.

18 MR. THOMPSON: Got'cha.

19 THE COURT: Yes, sir.

20 MR. THOMPSON: I lost me too there, I
21 think. The concept of a defense witness being present in the
22 courtroom ----

23 THE COURT: Are we talking about all
24 defense witnesses, including experts? Who are we talking
25 about?

1 MR. THOMPSON: Yes, sir. Those -- those
2 three witnesses that -- those three expert witnesses, Trosch,
3 Stevenson and Sommers -- are the three witnesses who are
4 expected tomorrow.

5 THE COURT: Okay.

6 MR. THOMPSON: Now, the defense could not
7 reasonably say -- if they're putting Sommers on, for example,
8 first, that Stevenson and Trosch would be here during
9 Sommers' testimony to help later with -- with their case.
10 Does that make sense? It's their own testimony.

11 THE COURT: Okay.

12 MR. THOMPSON: It's their own direct
13 examination.

14 THE COURT: Okay.

15 MR. THOMPSON: They're being put on for
16 the defense. We have no objection for them to be present if
17 the State calls a witness after they've testified; but, to
18 hear each other's cross-examination would put the State at a
19 disadvantage similar to the disadvantage the defense alleged
20 in the lines of cross-examination that will be used by the
21 State. So, they could really claim -- unless I'm missing
22 something, they can claim no reason to have them present
23 other than to hear each other's direct and to hear each
24 other's cross-examinations.

25 THE COURT: Well, let me make sure I'm

1 following -- and, I apologize. It's me. Even though their
2 request -- their motion for sequestration, by its very terms,
3 does not apply to expert witnesses from either side
4 ----

5 MR. THOMPSON: Yes, sir.

6 THE COURT: ---- your position is
7 that, if I'm understanding you correctly, during the
8 presentation of their case ----

9 MR. THOMPSON: Yes, sir.

10 THE COURT: ---- to allow their
11 experts to be present in the courtroom while other experts
12 are testifying ----

13 MR. THOMPSON: Yes, sir.

14 THE COURT: ---- is fundamentally
15 unfair?

16 MR. THOMPSON: Yes, sir.

17 THE COURT: All right.

18 MR. THOMPSON: While their -- while their
19 experts are on the witness stand -- if they're here now, we
20 don't have any objection -- but, there are three witnesses --
21 there are three expert witnesses who are going to be
22 testifying to substantially similar concepts; and, as I
23 understand, the materials that have been presented on their
24 testimony and ----

25 THE COURT: So, what you're asking me

1 to do is ----

2 MR. THOMPSON: Extend that motion to
3 sequester to include those three expert witnesses because of
4 the reasons I've just laid out.

5 THE COURT: All right.

6 MR. THOMPSON: It wasn't made clear, when
7 the Court ruled -- you just said let's make it reciprocal;
8 and, we didn't get into the weeds in it. So, respectfully,
9 you know me -- I'm going to get into the weeds.

10 THE COURT: Yes, sir; and, I
11 apologize; but, I thought I read, in the record, the gist of
12 their motion.

13 MR. COLYER: You did, sir.

14 MS. STUBBS: You did, Your Honor.

15 MR. COLYER: You did.

16 THE COURT: Okay.

17 MR. COLYER: What we're -- we're just
18 asking that the rationale for keeping out judges and
19 prosecutors ----

20 THE COURT: Yes, sir.

21 MR. COLYER: ---- from hearing the
22 testimony of other judges and prosecutors ----

23 THE COURT: Okay.

24 MR. COLYER: ---- that was applied to
25 us be applied to these three witnesses who are going to talk

1 about concepts such as implicit racism and -- well -- and
2 with respect to the reasons offered by prosecutors for Batson
3 challenges -- and it's not so much their testimony; it's the
4 -- as I understood it, the defense didn't want the
5 prosecutors and judges, if they testified, to hear each
6 other, as well as their line of questioning from the defense;
7 and, we're -- we're asking for the line of questioning from
8 the State be applied to their experts the same as their line
9 of cross as applied to judges and prosecutors -- from keeping
10 them out.

11 THE COURT: Yes, sir.

12 MS. STUBBS: Your Honor, we would
13 object to differentiating among our expert witnesses. The --
14 that's why we made this motion explicitly to -- to apply to
15 lay witnesses who are -- who are were going to be testifying
16 about their opinions and their observations as opposed to
17 experts who should and do appropriately consider the opinions
18 of other experts. It's completely appropriate for our
19 experts to be here and hear the testimony, both direct and
20 cross-examination, about -- about related fields. As they've
21 indicated, there is overlap in the -- in their area of
22 expertise, although -- although, all three will -- will
23 testify to distinct issues as well. I -- we've made no move
24 to exclude any expert that the State wishes. We would ask
25 that the Court just stand by that original order.

February 01, 2012

1 THE COURT: Okay.

2 MR. THOMPSON: And we're drawing a
3 distinction between the statistical folks, and we don't have
4 any objection -- Woodworth has been present -- if I -- I
5 recognize him from the last hearing -- for most of the
6 testimony, if memory serves. So ----

7 THE COURT: Yes, sir.

8 MR. THOMPSON: ---- we're making --
9 we're drawing a distinction because of the -- the analysis
10 and the rationale the defense wanted to exclude our
11 witnesses; and, to the extent that they're lay-witnesses,
12 judges and longtime prosecutors, they're -- they're not
13 testifying technically as experts, but they're also
14 professionals and -- to that extent. So, the same rationale
15 is clear on both sides. So, we -- we just ask that -- that
16 -- on those three witnesses, that -- that it be made
17 reciprocal.

18 THE COURT: Well, it really isn't
19 reciprocal. What you're really doing is saying we've got our
20 motion to sequester for the following reasons.

21 MR. THOMPSON: Yes, sir.

22 THE COURT: Okay. So, -- I mean, it's
23 -- it's ----

24 MR. THOMPSON: Well, it's reciprocal with
25 respect that -- that they've asked that our witnesses be

1 sequestered because of their cross-examination. That's why I
2 referred to it that way.

3 THE COURT: Okay.

4 MR. THOMPSON: And -- and we're asking
5 that -- that those three witnesses be done the same way for
6 the same reasons.

7 THE COURT: All right. You've named
8 three individuals.

9 MR. THOMPSON: Yes, sir.

10 THE COURT: That would be Mr. ----

11 MR. THOMPSON: Stevenson ----

12 THE COURT: ---- Stevens -- Stevenson.

13 I apologize.

14 MR. THOMPSON: Yes, sir. Mr. Sommers

15 ----

16 THE COURT: And Mr. Sommers ----

17 MR. THOMPSON: ---- and ----

18 THE COURT: ---- for my information,

19 will be testifying in what area, ma'am?

20 MS. STUBBS: In the area of implicit

21 bias.

22 THE COURT: Okay. Mr. Stevenson?

23 MS. STUBBS: He will be testifying as

24 an expert in race and the law.

25 THE COURT: Okay.

1 MR. THOMPSON: And it was Judge Trosch,
2 if I have that pronounced correctly, Trosch?

3 MS. STUBBS: Judge Trosch, yes.

4 THE COURT: And Mr. Trosch will be
5 testifying -- or, Judge Trosch will be testifying in what
6 area?

7 MS. STUBBS: I -- also on the topic of
8 implicit bias, but as a -- as it relates to the courtroom.
9 Doctor Sommers is a ----

10 THE COURT: Okay. All right.

11 MS. STUBBS: ---- scientist.

12 THE COURT: Well, I understand the
13 position. I am inclined to allow the State's motion as to
14 those three witnesses. I have to state, for the record, that
15 traditionally, folks, it's been the practice, for as long as
16 I've been practicing law, that experts are in the courtroom;
17 but I understand the basis for the motion; and, simply out of
18 an abundance of caution -- because we've got Judge Trosch,
19 who, in some respects is -- even though he's been called for
20 an entirely different process -- falls, at least arguably,
21 into the same category. Now, if you folks want to be heard
22 further, I'll be glad to hear from you.

23 MR. JAMES FERGUSUON: Your Honor, I think
24 we do. I think there is some confusion here that ----

25 THE COURT: There is.

1 MR. JAMES FERGUSUON: ---- we need to clear
2 up.

3 THE COURT: Yes, sir.

4 MR. JAMES FERGUSUON: I want to be clear as
5 to why we made our motion to sequester ----

6 THE COURT: Yes, sir.

7 MR. JAMES FERGUSUON: ---- their factual
8 witnesses.

9 THE COURT: Okay.

10 MR. JAMES FERGUSUON: They have factual
11 witnesses who will testify as to the factual matters that
12 they have observed in their courtrooms and their experience,
13 whatever it is. They're not testifying as expert witnesses.

14 THE COURT: Yes, sir.

15 MR. JAMES FERGUSUON: They've already
16 conceded that. So, to conflate what's taking place with
17 those witnesses with what our position is in this case is to
18 add fuel to a fire of confusion. What we're talking about
19 here are expert witnesses in every sense of the word.

20 THE COURT: Okay.

21 MR. JAMES FERGUSUON: They will not be
22 testifying -- they cannot educate each other about fact in
23 the case. They have already formed their opinions. They --
24 they've already got reports on what they're going to say.
25 So, there is not the same opportunity and not the same

1 dynamic for our witnesses to be educated from each other.
2 They have their opinions. They know -- they've got our
3 forecast of what they're going to say. So, this is not a
4 situation where witnesses will come into court, have the
5 opportunity to listen to what another witness has said and
6 then tailor their testimony to fit them. If they did that,
7 then they can tear them apart ----

8 THE COURT: On cross.

9 MR. JAMES FERGUSON: ---- on cross because
10 they've got the reports. So, the purpose of the rule ----

11 THE COURT: Yes, sir.

12 MR. JAMES FERGUSON: ---- is not the same
13 in these two circumstances. Now, as Your Honor has
14 recognized, experts serve a function very different from lay-
15 witnesses. Lay-witnesses come into court. They give their
16 testimony based on whatever facts they present, and that's
17 it. They have no roll, generally speaking, of consulting and
18 advising with counsel. Experts do that all the time, and we
19 will be relying on these experts to do the same with us.
20 They've offered no reason why these experts are to be treated
21 differently from any other expert that's called into the
22 courtroom. We have not attempted to sequester any of their
23 expert witnesses. So, when we talk about reciprocity, it
24 would be reciprocal if they can have their experts not
25 sequestered, and we can have our experts not sequestered, not

1 be allowed to pick and choose from our experts which ones we
2 think we don't want sequestered and which ones we do want
3 sequestered. There's no difference in the crossing of the
4 experts. So, I understand the Court's concerns about being
5 very cautious about this; but, in this instance, there's
6 nothing to be cautious about. All we're talking about are
7 experts who are traditionally in the courtroom -- being in
8 the courtroom -- and no arguments or reasons having been
9 advanced to change that other than we have some experts who
10 testify to some things that may be similar in subject.

11 THE COURT: Yes, sir.

12 MR. JAMES FERGUSON: So, we ask the Court
13 to rethink this and not allow them to make what appears to be
14 a fairly level playing field unlevel by their being able to
15 pick which experts they want in the courtroom, which ones
16 they don't want.

17 THE COURT: Okay.

18 MR. JAMES FERGUSON: We don't want to get
19 into that.

20 THE COURT: Okay.

21 MR. JAMES FERGUSON: We think all experts
22 should be in the courtroom. That's what I wanted to say, and
23 that's all we said; and, there was no objection to it. They
24 had their objection to it as a general matter -- matter not
25 [indiscernible] -- so, we would ask the Court to just stay

1 with that.

2 THE COURT: Okay.

3 MR. HUNTER: If I can, let me just make
4 a couple of more points. Doctor Sommers has been
5 sequestered, although I did send him a 5-word summary of
6 Barbara O'Brien's testimony, but I did -- with no details;
7 and, I sent him a copy of the article that was in the
8 Fayetteville Observer; but, he's not been here. He's coming
9 tonight. He's going to testify, and then he's going to
10 leave. So, there's -- there's nothing to sequester about
11 Doctor Sommers. Lou Trosch, Judge Trosch, from Charlotte,
12 did want to hear Doctors -- their -- their testimony is, in
13 many ways, complementary and fits together. Judge Trosch did
14 want to hear Doctor Sommers' testimony. Doctor Sommers sets
15 the ground for a lot of Judge Trosch's testimony. So, we
16 would be, we think, disadvantaged by not having Judge Trosch
17 get to listen to it; and, I can't imagine that the line of --
18 you know, so we have plans for Sommers and Trosch to fit
19 together. As far as Stevenson, we don't -- if they want to
20 sequester Mr. Stevenson, that -- we don't -- we don't care;
21 but, I think, as to Trosch and Sommers, they do fit together.
22 As to Sommers, he's already effectively sequestered; and, so,
23 our only request would be that Judge Trosch be able to be
24 here, hear Judge [sic] Sommers' testimony and -- and -- and,
25 then, he would testify. I mean, there's some possibility he

1 would testify, I guess, after Stevenson, but ----

2 THE COURT: Your next witness ----

3 MS. STUBBS: And ----

4 THE COURT: And I apologize. Your
5 next witness is going to be Doctor Woodworth?

6 MR. HUNTER: Doc -- yes, and ----

7 THE COURT: All right.

8 MR. HUNTER: And, then, our next
9 witness on tomorrow morning is Doctor Sommers. He's not
10 here. He's not going to be here. We haven't sent him any
11 copies of any transcripts ----

12 THE COURT: Okay.

13 MR. HUNTER: ---- or anything else.
14 So, really, the -- and -- and I know you -- you're examining
15 Stevens, so -- Stevenson, so you may have -- I may have given
16 something away you didn't want me to, so I'll ----

17 [General laughter.]

18 MR. HUNTER: I'll let you speak.

19 MS. STUBBS: Well, I was just going to
20 direct the Court's attention to the rule itself, which talks
21 -- it's Rule 615 ----

22 THE COURT: Yes, ma'am.

23 MS. STUBBS: ---- exclusion of
24 witnesses. Sub (3) talks about a person whose presence is
25 shown by a party to be essential to the presentation of the

1 cause.

2 THE COURT: Yes, ma'am.

3 MS. STUBBS: And the commentary notes
4 of this rule, of course, is based on the federal rule -- and
5 that that is intended to include an expert listening to
6 another person's testimony; and, this is ----

7 THE COURT: Well ----

8 MS. STUBBS: ---- this is standard
9 practice in all -- I'm not sure whether I need to ask Mr.
10 Stevenson a question about the testimony of Doctor Sommers,
11 but -- but I hate to foreclose that because of some argument
12 that they might be able to forecast his line of cross-
13 examination. This is -- this is -- they have a number of
14 other witnesses who they've tendered as experts besides
15 Doctor Katz. We've not moved to sequester any of them.
16 They've got -- Bill Hart is welcome to come down and sit in
17 the jury box and hear every -- every question asked of
18 everyone. Anyone who they've tendered as an expert, we do
19 not object. This -- this is absolutely standard, and it's
20 for good reason. We ask experts to comment on the testimony
21 of other experts that are a part of our case.

22 MR. THOMPSON: I have a suggestion,
23 middle-ground.

24 THE COURT: Okay.

25 MR. THOMPSON: This is unusual because

1 this is an unusual case. So, let's just kind of -- this is
2 not -- this isn't a B&E we're trying. Respectfully, this is
3 a very complicated issue, and it has lots going on. If their
4 rationale is -- includes now that they want to hear the
5 testimony; that is, the direct examination of each other, we
6 don't have any objection as long as, once direct examination
7 is done, they step out; and, that -- that actually -- that
8 deals with their issues. It helps our issues. Everybody
9 should be happy with that, unless there's not a genuine
10 argument being made. I expect that is a genuine argument.
11 I'm happy for them to hear the direct of each other. It's
12 the crosses that we're obviously concerned about.

13 MS. STUBBS: We ----

14 THE COURT: Bear with me one second.

15 MS. STUBBS: Yes -- yes, Your Honor.

16 THE COURT: Folks, what I'm hearing is
17 that the folks involved are not present today. It's not an
18 issue that's going to arise today. Correct?

19 [There were no responses from counsel for either side.]

20 THE COURT: We're going to go forward
21 with the testimony of Doctor Woodworth. I'm familiar with
22 Rule 615. I'm familiar with the general practice. What I
23 would like to do is look at some of the case law under the
24 federal rule to see the guidance that I'm looking for. I
25 expect to find it under the commentary of the federal rule as

1 opposed to the State rule. I'm going to look at that. I'm
2 going to take the matter under advisement. Let me be direct.
3 Folks, you know my practice. I believe in being upfront and
4 direct. I have gleaned that the State's real position here
5 is, Judge, we don't want them to hear our cross-examination.
6 That's really where we are, correct?

7 MR. THOMPSON: Yes, sir.

8 THE COURT: All right. So, I want to
9 look at the case law. We'll be at ease.

10 MR. COLYER: Judge ----

11 THE COURT: Do you want to make any
12 addition argument, ma'am -- and, I'm going to give you the
13 opportunity, but Ms. Stubbs was standing up first.

14 MR. COLYER: Yes, sir.

15 THE COURT: Okay; and, we'll come
16 back, Mr. Colyer. Yes, ma'am.

17 MS. STUBBS: I -- I was just going to
18 point out that I expect that they -- that the State intends
19 to have evidence come out through the process of cross-
20 examination.

21 THE COURT: Yes, ma'am.

22 MS. STUBBS: And, so, if that's the
23 assumption, then our experts should be able to comment on
24 that.

25 THE COURT: Yes, ma'am.

1 Yes, sir, Mr. Colyer?

2 MR. COLYER: In light of what Mr. James
3 Ferguson said with respect to the rationale for the
4 sequestration, I would note that the persons who are going to
5 testify, that are being potentially called as judges and
6 prosecutors ----

7 THE COURT: Mmm-hmm [nodding head in
8 the affirmative].

9 MR. COLYER: ---- both in individual
10 cases and, if we get to the affidavit question, those folks
11 are not testifying about the same thing. For example,
12 they're not going to testify about observing somebody
13 breaking into a house and they're all observation and -- in a
14 position to make observations to testify about that. They're
15 talking about individual cases in which they were involved,
16 with the exception of one or two witnesses, like Mr. Dixon
17 the Judge Johnson, for example; but, the other judges dealt
18 with other cases; and, the prosecutors would be dealing with
19 other cases if they were to testify.

20 THE COURT: Yes, sir.

21 MR. COLYER: So, it's not as if it's a
22 repetitive-type thing or a reinforcement-type thing as to a
23 particular situation or set of facts. It's different cases,
24 and that's why we objected originally with respect to taking
25 the judges and prosecutors out and treating them as lay-

1 witnesses when they're being called as professionals in their
2 professional capacities.

3 THE COURT: Yes, sir.

4 MS. STUBBS: Well, Your Honor, I think
5 we've now come to the crux of the matter; which is, that the
6 State is seeking to have their cake and eat it too. They
7 don't -- they didn't designate them as experts. They didn't
8 produce reports. They didn't go through any of the
9 requirements designating them as experts, but they're asking
10 this Court to treat them like experts -- for the benefit of
11 the rule.

12 THE COURT: Okay.

13 MR. HUNTER: [Standing.]

14 THE COURT: Yes, sir, Mr. Hunter?

15 MR. HUNTER: And I -- I want Your Honor
16 to remember the characterization of these judges' testimony;
17 which is, that they will only be testifying about what
18 happened in those trials, and there's no overlap in their
19 testimony; because, the impression I get is that, at least,
20 what they're going to be trying to do is having some
21 generalized vouching for the prosecutors that will be general
22 across all of the -- all of the judges; but, I may be
23 mistaken about that, but ----

24 THE COURT: Yes, sir.

25 MR. COLYER: I think ----

1 MR. HUNTER: So, I think -- so, I think
2 it's not true that their testimony doesn't touch on each
3 other in -- in at least that respect.

4 MR. COLYER: Thank you for pointing
5 that out, Mr. Hunter. You're absolutely correct to the
6 extent that I have misspoken with respect to that. I
7 appreciate the correction, and that would be a difference
8 potentially ----

9 THE COURT: Yes, sir.

10 MR. COLYER: ---- that I did not point
11 out to the Court.

12 THE COURT: Okay.

13 MR. COLYER: Thank you.

14 THE COURT: All right. Anyone else
15 want to be heard?

16 [There were no responses from counsel for either side.]

17 THE COURT: All right. I'm not going
18 to make any ruling at this point. I'm taking the matter
19 under advisement. I'm going to look at the applicable
20 statutory provisions, both state and federal, and the case
21 law. I'll make a decision by the end of the day, folks. Is
22 that agreeable?

23 MR. COLYER: Yes, sir.

24 MS. STUBBS: [Nodding head in the
25 affirmative.]

1 MR. COLYER: Thank you, Your Honor.

2 THE COURT: Thank you, folks.

3 Ms. Stubbs?

4 MS. STUBBS: Yes, Your Honor. I --

5 just to be candid with the Court, there is an attorney in the

6 courtroom who is from Brian Stevenson's office who will be --

7 who is one of the experts who the State is seeking to

8 sequester. That -- the only testimony that's happening today

9 is ----

10 MR. COLYER: No objection, Your Honor.

11 MS. STUBBS: Okay.

12 MR. COLYER: No objection.

13 THE COURT: All right; and, for

14 purposes of the record, can we identify that attorney?

15 MS. STUBBS: I -- I think -- I'll have

16 to let him identify himself, Your Honor.

17 THE COURT: If you would, please.

18 SPECTATOR: [Standing.] My name is

19 Ryan Becker.

20 THE COURT: Thank you, Mr. Beck -- is

21 it B-E-C-K-E-R?

22 SPECTATOR: Yes, sir.

23 THE COURT: Thank you, Mr. Becker;

24 and, Brian is B-R-I or B-R-Y?

25 SPECTATOR: No. My first name is

1 Ryan, R-Y-A-N.

2 THE COURT: Ryan. I apologize. All
3 right. Thank you, sir.

4 SPECTATOR: [Reseating himself.]

5 THE COURT: All right. You ready to
6 call your next witness, ma'am?

7 MS. STUBBS: Yes, Your Honor.

8 THE COURT: Yes, ma'am.

9 MS. STUBBS: The defense calls Doctor
10 George Woodworth.

11 THE COURT: Okay. If you will, come
12 up and be sworn, please, sir.

13 [The witness approached and was sworn.]

14 THE COURT: Good morning, sir. If you
15 will, come around to the witness stand.

16 THE WITNESS: Thank you.

17 [The witness seated himself in the witness stand.]

18 THE COURT: Would you like some water?

19 THE WITNESS: Yes, please.

20 THE COURT: All right.

21 [Pause.]

22 THE WITNESS: Thank you.

23 THE COURT: Once you're seated, sir,
24 if you will, state and then spell both first and last name
25 for the benefit of the court reporter.

February 01, 2012

1 THE WITNESS: George Woodworth, W-O-O-D-
2 W-O-R-T-H.

3 THE COURT: Thank you, sir.

4 Yes, ma'am.

5 **GEORGE WOODWORTH, having been first duly sworn, was called as**
6 **a witness by the defense and testified as follows on DIRECT**
7 **EXAMINATION conducted by MS. CASSANDRA STUBBS:**

8 Q. Doctor Woodworth, could you begin by telling us
9 what you do currently, your job?

10 A. I'm retired, professor emeritus of statistics and
11 of -- of public health from -- at the University of Iowa.

12 Q. And, Doctor Woodworth, could you tell us about your
13 educational background.

14 A. I have an undergraduate degree in Mathematics from
15 Carleton College in Minnesota. I have a PhD in Mathematical
16 Statistics from the University of Minnesota at Minneapolis.

17 Q. And can you tell us about your professional
18 history, your -- your career?

19 A. I -- my first professional employment was as an
20 instructor at the University of Minnesota while I was
21 completing my dissertation. Then, I was employed as an
22 assistant professor of statistics at Stanford University, and
23 that was 4 years. I spent a year teaching in Sweden at the
24 Lund Institute of Technology. My rank there was the
25 equivalent of an assistant professor, and my -- the job from

February 01, 2012

1 which I retired was, at the end of my career, professor of
2 statistics and actuarial science; and, I had a joint
3 appointment in biostatistics in the College of Public Health.

4 THE COURT: Doctor, if you would, if
5 you'll spell the institute -- in Sweden, was it?

6 THE WITNESS: It's Lund, L-U-N-D.

7 THE COURT: Thank you, sir.

8 Yes, ma'am.

9 Q. And, Doctor Woodworth, what did your
10 responsibilities in these different teaching positions
11 entail?

12 A. Teaching research and service.

13 Q. And, Doctor Woodworth, have you published any
14 articles in the field of statistics?

15 A. Yes.

16 MS. STUBBS: Your Honor, permission to
17 approach?

18 THE COURT: Yes, ma'am.

19 [Pause.]

20 MS. STUBBS: [Handing documents to the
21 Court and to the witness.]

22 THE COURT: Thank you, ma'am.

23 Q. Doctor Woodworth, I've handed you what's been
24 marked for identification as Defendant's Exhibit 9?

25 A. Yes.

1 Q. This is a copy of your resume?

2 A. Yes, it is.

3 Q. And will this help you review your publications?

4 A. Yes, it will.

5 Q. On the second page, it appears to list
6 dissertations supervised. What -- what is this one?

7 A. Those are my students who received a PhD under my
8 direction.

9 Q. And, then, on page 3, it says publications; and,
10 underneath that, it says refereed publications. What does
11 refereed publications refer to?

12 A. Refereed -- excuse me. Refereed means that the
13 papers have been reviewed and critiqued in a double-blind
14 fashion by typically two of my peers in the profession.

15 Q. And is that true of law review articles as well?

16 A. That is not true of law review. It's a bit of a
17 stretch to include them here. Law review articles are edited
18 as -- by law students with consultation from law faculty.

19 Q. And, Doctor Woodworth, could I ask you to identify,
20 on your resume, your publications that involve the use of
21 regression analyses?

22 A. Yes.

23 Q. And are those highlighted in yellow?

24 A. Yes, they are.

25 Q. Doctor Woodworth, beginning with number 9, could

1 you just go through and briefly describe what these studies
2 were about?

3 A. Would you like me to read the title?

4 Q. Sure?

5 A. The first one is with -- the first one is a joint
6 work, and the title is Identifying Comparatively Excessive
7 Sentence of Death: A Qualitive -- Quantitative Approach. It
8 appeared in the Stanford Law Review in 1980.

9 Q. What -- what did that paper involve?

10 A. That was a reanalysis of data on the -- on capital
11 punishment in California using a dataset collected by the
12 staff at the Stanford Law Review.

13 Q. And, then, paper number 11; and, actually, you
14 don't need to read the full title for each of these, just
15 identify what the paper was about.

16 A. It's about -- it's about the capital charging and
17 sentencing system in Georgia; and, that was published in a --
18 in a peer-reviewed journal; and, it was about looking at the
19 factors that influenced capital -- the capital sentencing, in
20 this case, in Georgia.

21 Q. So, in other words, a dataset that ----

22 A. Yes.

23 Q. ---- you performed analyses of?

24 A. Yes.

25 Q. And, did those analyses include the regression

1 technique?

2 A. Yes.

3 Q. Now, turning to article number 21, the one about
4 Environmental Factors in Adoptee Antisocial Personalities?

5 A. Yes.

6 Q. What was that paper about?

7 A. That was about genetic and environmental risk
8 factors, as it says, for antisocial personality. That was a
9 -- a study of adoptees so that we could disentangle genetic
10 from -- we could -- so that the genetic factors came from the
11 birth parents and the -- and the environmental factors came
12 from their adoptive parents. It's a typical way of doing
13 research to disentangle genetic and environmental influences;
14 in this case, in antisocial personality.

15 Q. And what were the statistical methods that you used
16 in that paper, if you recall?

17 A. Regression and -- and general linear models.

18 Q. Turning now to 32, the paper entitled Multivariate
19 Predictors of Success with Cochlear Implants ----

20 A. Yes.

21 Q. Is that also a study of regression -- using
22 regression?

23 A. Yes, it is.

24 Q. What was the subject matter there generally?

25 A. This was from the time that I was a senior

1 statistician on the Iowa cochlear implant projects; and, we
2 did -- there are a number of publications that came from that
3 project. This particular one used logistic regression to
4 identify pre-implant characteristics of the patients that
5 would forecast the success that the patient would have with
6 the implant.

7 Q. And, now, turning to number 36, the Interpersonal
8 Variables in the Prediction of Alcoholism, what was that
9 paper about?

10 A. That paper is very similar to the previous one with
11 Remi Cadoret, the principal investigator; and, it has to do
12 with factors that predict alcoholism; and, in this case,
13 again, it's looking for genetic and environmental
14 interactions; and, it uses regression methods to disentangle
15 the effects of those two types of factors.

16 Q. Now, turning to page 6, number 55, Racial
17 Discrimination and the Death Penalty in the Post-Furman Era,
18 recent findings from Philadelphia?

19 A. That study used logistic regression as well.

20 Q. Doctor Woodworth, you referred to -- now, to
21 logistic regression. What -- what is logistic regression?

22 A. Logistic regression is a method used to analyze the
23 binary outcome; in other words, a -- an outcome that's either
24 one way or the other; such as, a capital sentence or life
25 without parole, for instance; or, striking or passing a -- a

1 venire member.

2 Q. Now ----

3 A. In logistic re ----

4 Q. I'm sorry. Excuse me, Doctor.

5 A. In logistic regression, the result is an estimate
6 of the influence of each of several explanatory factors on
7 the outcome. The -- that influence is reported in a table
8 that's derived by the software which shows -- the most
9 interpretable thing that it produces is called an adjusted
10 odds ratio; which is, the amount by which the odds on the --
11 the odds on one outcome -- identified arbitrarily as the
12 adverse outcome -- where it measured -- it -- it -- the odds
13 ratio is the amount by which the odds on the adverse outcome
14 are multiplied by the presence of a particular factor.

15 Q. Now, Doctor Woodworth, turning to page 7, the next
16 article that I believe you identified as 61, The use of
17 Peremptory Challenges in Capital Murder Trials: A legal and
18 Empirical Analysis?

19 A. That -- that was a very large study of -- of voir
20 dire in Philadelphia, and it examined many of the same issues
21 that -- that Doctor O'Brien and Grosso examined.

22 Q. And -- and were you the statistician involved in
23 that study?

24 A. I was one of several on -- more of the technical
25 methodologists, and other members on the team also were

1 skilled statisticians in social sciences.

2 Q. All right. Now, turning to number 68,
3 Arbitrariness and Discrimination in the Administration of the
4 Death Penalty: A Legal Empirical Analysis of the Nebraska
5 Experience?

6 A. Yes.

7 Q. What was the dataset for that paper?

8 A. The dataset was collected in Nebraska. It was the
9 characteristics of the crime, the victim and the perpetrator;
10 and, these characteristics were used to try to identify the
11 factors that predicted the -- a -- a death sentence rather
12 than a term of years or a lesser sentence.

13 Q. Now, turning to 70, Hierarchical Models for
14 Employment Decisions?

15 A. Is a study again of a binary outcome. In this
16 case, we were studying involuntary termination, termination
17 in the sense of losing a job in -- in employment decisions;
18 and, the motivation for this study was the necessity to
19 analyze that kind of decision and determine what factors
20 influenced it when the observations were over a period of
21 several years.

22 Q. And, in that paper, was that -- did you use
23 regression in that paper?

24 A. Yes. It -- it's, at base, a form of logistic
25 regression with what's called a time-varying coefficient.

1 Q. And, now, turning to page 8, article 71, Expert
2 testimony supporting post-sentence civil incarceration of
3 violent sexual offenders, what does that paper involve?

4 A. That was -- that was an analysis of the practice of
5 using what was styled an actuarial method to predict future
6 violence among sexual offenders who had completed their
7 sentence.

8 Q. And article 75?

9 A. And -- if I can add a footnote to that -- and the
10 method we used was logistic regression.

11 MS. STUBBS: Thank you, Doctor
12 Woodworth.

13 Q. With respect to article 75, what did that article
14 involve, and what was -- what method did you use there?

15 A. That was looking at the effect of age on control of
16 speech articulators, lips, tongue and vocal cords; and, it
17 made use of a technique very similar to the one developed in
18 the Kadane and Woodworth paper that we went over earlier.

19 Q. The next section of your resume is entitled books
20 and chapters. Could you describe for us articles 81 and 82
21 -- or, I guess, chapters 81 and 82 and what those involve?

22 A. These were in the area of biomechanics, as you can
23 tell from the titles of the journals. The biomechanics has
24 to do with treating the human body and -- and, in the case of
25 Doctor Hay, analyzing athletic performance using the methods

1 of physics and mechanics; and, the -- both of these papers
2 involve re -- involve regression to identify which components
3 -- which inputs from the athlete contributed to the
4 performance.

5 Q. And, now, turning to page 9, the entry there, 85,
6 at the top of the page?

7 A. Yes.

8 Q. And what is that publication?

9 A. Well, that is the -- the -- as it says, a legal and
10 empirical analysis. Empirical means using observations to
11 analyze a system; and, I daresay the Court understands what a
12 legal analysis is. This is the book that was produced to
13 give a full account of the Georgia charging and sentencing
14 system -- Georgia charging and sentencing study.

15 Q. And, Doctor Woodworth, in addition to those books
16 listed there, have you also authored a textbook?

17 A. I have.

18 Q. And what's your textbook entitled?

19 A. Biostatistics, a Bayesian Introduction.

20 Q. And is this a copy of your textbook [displaying a
21 book to the witness], Doctor Woodworth?

22 A. Yes, it is.

23 Q. And who uses this textbook?

24 A. I do and ----

25 [General laughter.]

1 Q. Who's ----

2 A. It's been -- it's been adopted at other
3 universities as well. I use it in a -- as the first
4 statistics course for the students who are planning to major
5 in biology and -- and/or are majoring in premed.

6 Q. And, Doctor Woodworth, have you been admitted as an
7 expert in a court of law before?

8 A. Yes, I have.

9 Q. And do you know approximately how many times?

10 A. Ten, twelve.

11 Q. And do you know if those cases have been state
12 cases or federal cases, or both?

13 A. There have been both, but they're mostly federal.

14 MS. STUBBS: Your Honor, at this time,
15 the defense would move for the admission of Defendant's
16 Exhibit 9, the CV of Doctor Woodworth.

17 THE COURT: Any objection?

18 MR. PERRY: No objection, Your Honor.

19 THE COURT: It's admitted without
20 objection.

21 MS. STUBBS: And, at this time, the
22 defense would tender Doctor Woodworth as an expert
23 statistician.

24 MR. PERRY: No objection, Your Honor.

25 THE COURT: Yes, ma'am. You may

1 proceed.

2 Q. Doctor Woodworth, I'd like to ask you some
3 questions about the Michigan State study. I'm going to refer
4 to that as the MSU study this morning.

5 A. Okay.

6 Q. How did you first become involved in the study?

7 A. I -- my initial involvement and my involvement
8 throughout the nuts and bolts of the -- the venire study was
9 fairly peripheral. I had a closer involvement with the
10 charging and sentencing study. My involvement began in the
11 planning stages of both studies, and it arose through my
12 nearly 3-decade research, partnership with David Baldus.
13 Professor Baldus was -- was a consultant on that study as
14 well, a methodological consultant, to the very able,
15 principal investigators in those two studies. I had regular,
16 weekly meetings with Professor Baldus on the projects that we
17 were working on; and, as I recall, at the end of those
18 meetings, he'd ask me a few questions that he couldn't handle
19 from the principal investigators in the -- in the North
20 Carolina study.

21 Q. You -- you said that ----

22 THE COURT: I'm sorry. For
23 clarification, the North Carolina study is the same ----

24 THE WITNESS: I'm sorry. The MSU study.

25 THE COURT: ---- as the MSU study?

1 Okay.

2 THE WITNESS: Sorry, Your Honor.

3 Q. Well -- and just for -- for additional
4 clarification, Doctor Woodworth, you referred to charging and
5 sentencing. Were there two distinct MSU studies done in
6 North Carolina?

7 A. Yes. They had different principal investigators,
8 although each worked with the other.

9 Q. And -- and you've been here for Doctor O'Brien's
10 testimony?

11 A. Yes, I have.

12 Q. And -- and that testimony and the focus of your
13 testimony today is on the peremptory strike study?

14 A. Exactly.

15 Q. But -- but, when you were testifying about
16 answering questions initially, did those arise in the context
17 of the charging and sentencing study or -- or mainly the
18 peremptory strike study?

19 A. More often, the charging and sentencing study.

20 Q. And -- and what, if anything, did you consult on,
21 that you recall, initially on the peremptory strike study?
22 What -- what topics?

23 A. Well, I was consulted on what's called power
24 analysis; which is, a method of assessing whether the sample
25 is large enough to give precise enough estimates to answer

1 the research question; and, that was -- that was -- that was
2 it.

3 Q. And is there any reason why you consulted less on
4 the peremptory strike study than the charging and sentencing
5 study initially?

6 A. Professor O'Brien is a very able statistician.
7 She's had -- she has -- she's had extensive training in
8 social science research. She is an excellent statistical
9 analyst. I'm not saying that the other investigators on this
10 project are also not very skilled, but I'm not sure she
11 wanted my -- me to put my or in on what she was doing; but,
12 she asked me -- I was consulted in the middle of the study as
13 to whether it was necessary to do a technique called
14 hierarchal modeling. She had taken advice from a social
15 science methodology expert who opined that it wasn't; and, I
16 did an analysis on my own and also opined that it wasn't
17 necessary; and, that was pretty much it, a couple of very
18 technical questions; and, the rest, I had very little to do
19 with.

20 Q. And, then, Doctor Woodworth, at -- at our request,
21 did you review the dataset and the report and findings ----

22 A. Yes, I did.

23 Q. ---- of Doctor O'Brien? I'd like to start with the
24 quality of the data. Could you comment on the quality of the
25 data collection and the ultimate dataset in this study?

1 A. Well, let's start with the sampling design. The --
2 and, here, I'm referring to the sample from the study
3 population which was the 173 cases that are currently on
4 death row -- were currently, at the time, on death row. The
5 sampling from that study population was absolutely correct.
6 It was a probability sample -- or, sometimes popularly called
7 a scientific sample, and it was flawless. There was --
8 often, in a study like this, you find that you simply can't
9 -- data -- can't obtain adequate data on one of the venire
10 members, so -- that you've included in your sample; and, the
11 practice is, for some social scientists, just to go on to the
12 next person on the list; but, that didn't happen in this
13 study. This was perfect as far as sampling is concerned.

14 Q. And, then, what about the data itself, the
15 completeness of the data, the data collection methods used
16 -----

17 A. The data-collection instrument was -- I -- I am not
18 an expert on writing questions in a data-collection
19 instrument. I understand that it was done by subject-matter
20 experts; and -- and, from my point of view, it appears to be
21 -- the -- the que -- the -- the data-collection instrument is
22 well designed. It's -- it's as good as any I've seen,
23 including those from the Census Bureau in the sense of not
24 telegraphing what the right answer, quote, unquote, is to
25 fill in, in the blanks -- people filling it in, not -- not

1 the respondents, it's -- in a usual questionnaire, but JDs
2 who were in a position to do a fairly reliable reading of a
3 record.

4 Q. And, Doctor Woodworth, earlier, when we were going
5 through your credentials, you mentioned that you worked on a
6 venire study of Pennsylvania. Could you compare the dataset
7 that you were able to obtain in that to the data study -- to
8 the -- to the dataset of North Carolina death-row inmates?

9 A. The -- yes. Not -- I'm not meaning to knock
10 another study that I was involved with and one that was done
11 by a very able team, but that was in a different era, before
12 Internet, before the ability to look up somebody's address
13 and residence history online. So, the principal difference
14 there is -- is the lack of that kind of data at that time.
15 The result is that it was much more difficult in that study
16 to get reliable data on the race of a venire member. We had
17 a very mul -- we had a multistage scheme for doing that;
18 where, as I -- I believe, with -- it would be fair to say
19 that there was maybe a three-step process in the North
20 Carolina -- in the MSU study to identify race of a venire
21 member; and, there are only six or seven, if I remember the
22 testimony correctly, out of 7,000 whose race could not be
23 determined reliably. In contrast, in the -- in the
24 Pennsylvania -- Philadelphia study, if I recall correctly,
25 the race was identified in court records, either the Criers'

1 list or the voir dire questioning, in only about 30 percent
2 of the cases. Then, the next tier of research was to go to
3 the -- to -- to use the venire member's name and address and
4 to try to locate them in voter registration lists and
5 driver's license lists in hopes that the -- that the race
6 would be identified there. If there were multiple hits, then
7 we didn't know what the race was. If -- if there were no
8 hits, then the next stage, there -- I'm skipping some stages;
9 but, the very last resort was to locate the venire member's
10 last address in a census block group and see what the
11 proportion of blacks in that block group was. Now, in
12 Philadelphia, there are areas where the block group might be
13 90 percent black; and, in which case, we'd have a 90-percent
14 certainty of the race of the venire member. So, that data,
15 as you can easily see, was much less reliable with respect to
16 the identification of race.

17 THE COURT: Doctor, for purposes of
18 clarification, if I'm understanding you correctly, the
19 difference between the MSU study and the Philadelphia study
20 was the former was more complete and the information more
21 reliable?

22 THE WITNESS: Exactly.

23 THE COURT: All right.

24 THE WITNESS: In a nutshell.

25 THE COURT: All right. Go ahead,

1 ma'am.

2 Q. Doctor Woodworth, you heard Doctor O'Brien testify
3 about the double-blind coding. Is that important?

4 A. Yes, it is. That's to avoid -- well, double-blind
5 -- let's see -- would it have been double-blind? Double-
6 blind would mean the decoders were ----

7 Q. I'm sorry.

8 A. Single-blind.

9 Q. I misspoke. The blinds coding -- yes.

10 A. Single-blind means that the -- in a medical study,
11 it would mean that the -- that the individual physician who
12 is assessing whether or not there's been remission in the
13 patient's symptoms was not aware of whether the patient was
14 getting the treatment or the control. So, the purpose of
15 that is to avoid the introduction of bias into judgment
16 calls. In the case -- and that same rationale applies in the
17 Michigan State University School of Law study; and, that is,
18 that the -- the person reading the record would have been
19 blind as to the outcome, in this case, the race.

20 THE COURT: Okay.

21 A. Not the outcome -- one of the important factors.

22 Q. Now, turning to the issue of the study population,
23 Doctor Woodworth, who's qualified to make a decision about
24 the appropriateness of the study population?

25 A. There are two issues here. One is was the sampling

1 from the study population done correctly; and, the answer to
2 that is an overwhelming yes. The second one is called
3 generalization from the study population to some larger
4 population, if required; and, I'm not conceding -- 'cause
5 this is a point of law rather than a point of statistics.
6 I'm not conceding that there's any necessity to go beyond the
7 study population, mainly the cases on death row. That's not
8 my department; but, I can say, in general, that to gen --
9 that -- the act of generalizing from a study population to a
10 larger population from which the study population was not
11 necessarily randomly sampled is very common, particularly in
12 a clinical research. In a clinical trial of a drug, a new
13 device or a new intervention of some sort is typically -- the
14 study population is almost invariably the patients of the
15 participating physicians in the study. So, that would be
16 maybe 20 medical practices, perhaps, distributed around the
17 country; but, that's definitely not a random sample of the
18 patient population. Yet, the findings in such a study are
19 generalized explicitly and certainly implicitly by the FDA in
20 approving the treatment on the basis of the study on the
21 grounds of expert judgment. The generalization to other
22 humans is made by a knowledge of human physiology and the
23 variation in that physiology between ethnic groups, say. So,
24 to -- to apply that in the present case, whether or not these
25 results, if, in law, they need to be generalized to all

February 01, 2012

1 capital voir dires -- if they need to be so generalized, the
2 people to do it are the subject-matter experts, people who
3 are -- I shouldn't -- I should perhaps broaden that and say
4 people who are intimately familiar with the voir dire system
5 in this study.

6 Q. And, when you referred to generalizing to the -- to
7 the broader population with respect to the study, what --
8 what are you referring to?

9 A. Well, again [striking microphone] -- oops, pardon
10 me. Again, if I could revert to the medical analogy, if a
11 particular new drug is significantly better than the control
12 in a clinical trial, then the generalization is that it will
13 also work better in the population of future patients that
14 would be -- for whom that drug would be appropriate. So,
15 here, the generalization is the -- the pattern and practice,
16 if you like, that we observe in this subset of capital voir
17 dires is also likely to have occurred in other voir dires;
18 and, I could suggest that one of the reasons might be that,
19 in those voir dires that are not included, there was --
20 could, in principle, have been no knowledge of the outcome
21 and no knowledge that the defendant would still be in -- on
22 death row at the time of the study; but, that's -- I'm
23 stepping outside my area of expertise there.

24 Q. Doctor Woodworth, now, turning to the findings of
25 the MSU study, I'd like to turn to the unadjusted findings.

1 A. The unadjusted findings were a roughly twofold
2 increase -- twofold or more increase in the odds of being
3 struck for black venire members compared to non-black venire
4 members; and, this held up statewide in -- and in counties --
5 in particular, in Cumberland County.

6 Q. And is it typical in a -- in a statistical study to
7 -- to report unadjusted numbers, raw numbers like this?

8 A. Yeah. I could -- I could sort of roughly describe
9 that it's the scientific prima facie case. It's the sort of
10 thing you'd put in the reasons for doing the study, that we
11 observed this prima facie evidence that there's something in
12 need of explanation, and then we explore it to verify that we
13 can understand what's going on.

14 Q. And, Doctor Woodworth, in your opinion, did Doctor
15 O'Brien use appropriate test statistics to look at the
16 relationship of those disparities?

17 A. Absolutely.

18 Q. And what were those test statistics, if you recall?

19 A. She used chi-squared, which is the standard; and,
20 another technique that's available is Fisher's exact, but she
21 wouldn't have needed that because her sample -- her n's were
22 so large.

23 Q. And, now, I'd like to turn to the adjusted results
24 -- and, actually -- perhaps, Doctor Woodworth, you could just
25 explain to us what -- what -- what do we mean when we say

1 unadjusted and adjusted?

2 A. The unadjusted -- let me talk about -- let me just
3 talk about the risk ratio to make it simple. So, the
4 unadjusted risk ratio would be just looking at black venire
5 members and non-black and taking the ratio of the race --
6 strike rates in those two groups, without taking into account
7 any other factors.

8 MS. STUBBS: Your Honor, may I approach
9 the witness?

10 THE COURT: Yes, ma'am.

11 [Pause.]

12 MS. STUBBS: [Handing an exhibit to the
13 witness.]

14 THE WITNESS: Thank you.

15 MR. JAMES FERGUSON: Your Honor, with the
16 Court's permission, may I darken this part of the courtroom?

17 THE COURT: Yes, sir.

18 [Pause.]

19 THE COURT: Is everyone able to see?

20 [There were no responses.]

21 THE WITNESS: Okay. If I use the
22 pointer, Your Honor?

23 THE COURT: Yes, sir.

24 Q. Doctor Woodworth, you explained for us, a little
25 bit earlier, generally how -- what logistic regression

1 involves. Could you use this ----

2 THE WITNESS: Can you focus it?

3 [Pause.]

4 THE COURT: Folks, for the record,
5 this is table 12. This particular exhibit is already part of
6 another exhibit; is that correct?

7 THE WITNESS: Yes. Yes, it is.

8 Can you just fix the focus on the projector?

9 MS. STUBBS: I -- I -- I'm not sure
10 that we can focus it any more.

11 THE WITNESS: Let's not -- let's not
12 slow the proceedings then.

13 MR. JAY FERGUSON: One second, Your Honor.

14 [Pause.]

15 MR. JAY FERGUSON: I think that's the best
16 we're going to get.

17 THE COURT: For the record and for the
18 benefit of the court reporter, this is table 12, previously
19 identified as the Statewide Fully Controlled Logistic
20 Regression Model and utilizing the testimony of Doctor
21 O'Brien; is that correct?

22 MS. STUBBS: Yes, Your Honor.

23 THE COURT: It's a part of an exhibit
24 already introduced in the case.

25 MS. STUBBS: That -- yes.

1 THE COURT: Okay.

2 Q. And, Doctor Woodworth, just for the record, I
3 handed you what's been marked as Defendant's Exhibit 10?

4 A. Yes.

5 Q. All right; and -- and does that first slide match
6 the -- the table here on the projection screen?

7 A. Yes.

8 THE WITNESS: Is this thing on [holding
9 up a news media microphone]?

10 BAILIFF: That's for the news cast.

11 THE WITNESS: It is? Oh, I'm sorry.

12 Sorry to Mr. News Cast.

13 [General laughter.]

14 THE WITNESS: Am I still coming through?

15 THE COURT: Do you folks have a -- do
16 you need a pointer, Doctor?

17 THE WITNESS: I've got it.

18 THE COURT: Okay.

19 Q. Now, Doctor Woodworth, would you just walk us
20 through this table and -- and explain what an output of a --
21 what a regression table shows?

22 A. Okay. Over here [pointing], we see a list. Lines
23 2 through 14 are a list of the explanatory variables that are
24 -- that -- that -- these are the variables that -- that
25 explain, to some extent, the outcome of the -- of the voir

1 dire, i.e., whether struck or passed. Skipping down to 3
2 through 14, those 12 factors are not -- are -- are nonracial.
3 They all refer to facts that came out in -- that -- that --
4 facts that were coded on the DCI and most of which came out
5 in the -- in the questionnaire or in a voir dire. The first
6 one is the most powerful variable, which is pretty much
7 ubiquitous; and, that is whether or not the venire member had
8 expressed reservations against the death penalty. The next
9 most powerful variable is whether or not the jury knew the
10 defendant; and, then, the others are -- have more or less
11 explanatory power. The impact of that factor is measured by
12 the odds ratio; and, the odds ratios is the amount by which
13 this initial odds -- now, that's the odds on being struck --
14 for a venire member who possesses none of these
15 characteristics, so non-black, no reservations, married,
16 never accused of a crime, and so on, somebody who's in the
17 baseline category; and, then, each of these odds ratios
18 multiplies the base odds if that -- if the factor that -- to
19 which that odds ratio belongs is present. So having
20 reservations, as you can see, multiplies the odds on being
21 struck by a factor of 11. So, instead of having -- this is
22 basically 8 -- 8 to 1 odds against -- sorry -- 6 to 1 odds
23 against being struck as a baseline; but, if you multiply that
24 by 11, it becomes something like, what, 1.6 -- 1.8 to 1.

25 Q. And, then, Doctor Woodworth, what if a particular

February 01, 2012

1 juror was black, had DP_Reservations and was single or
2 divorce, for example, the first three ----

3 A. Well, you just multiply -- start with the base, and
4 then you multiply.

5 Q. All right. Now, this is -- as the Court has
6 already identified, this is -- this is table 12, which was
7 introduced through Doctor O'Brien's testimony. Did you --
8 were you able to re-create this table using your own
9 analysis?

10 A. Yes.

11 Q. And -- sorry. Go ahead.

12 A. Go ahead. Finish your question.

13 Q. All right. Doctor Woodworth, what statistical
14 software program do you use?

15 A. I use the Statistical Analysis System or SAS. So,
16 I'm going to refer to it as SAS hereafter; and, it is
17 probably the flagship software package for non-social
18 scientists. So, that would be in medicine, engineering and
19 so on. Professor O'Brien uses an equally well-written piece
20 of software called SPSS. It's mainly the front-end that's
21 the difference between them, as opposed to the innards; and,
22 that's demonstrated by the fact that I got exactly these same
23 numbers to as many decimal places as Professor O'Brien did.

24 Q. And, then, in addition to re-creating her model,
25 what other kind of analyses did you -- do you use logistic

1 regression?

2 A. Well, I also -- as Professor O'Brien testified, her
3 -- what did I do? As Professor O'Brien testified, she
4 started with a list of 64 candidate variables -- with a list
5 of 64 candidate variables and ran what's called a model
6 specification procedure; which is, to say model specification
7 is the process of selecting the variables, the explanatory
8 variables, to include in the model. So, she had a way that
9 combined step -- they combined the statistical method that I
10 use plus some -- some additional criteria that she thought --
11 which were valid. I just didn't do them myself; and, the
12 result is I got -- as far as the highly explanatory variables
13 are concerned, I got exactly the same -- what she did;
14 different a little bit on the margin. I picked up some she
15 didn't. She picked up some I didn't; but, the important
16 point is that the race of victim odds ratio hardly changed
17 between my effort and hers.

18 THE COURT: I'm sorry. You said
19 victim odds ration?

20 THE WITNESS: I'm sorry, Your Honor.
21 I'm thinking I'm in a ----

22 THE COURT: Yes, sir.

23 THE WITNESS: ---- different --
24 different trial.

25 A. The race of venire member effect hardly changed at

1 all.

2 Q. So, Doctor Woodworth, you just test -- I'd like you
3 to turn to the next page, slide 2 in Defendant's Exhibit 10.
4 [Pause.]

5 Q. And that should be -- that slide is entitled
6 Candidate Variables.

7 A. Yes, I have it.

8 Q. Are -- are those the variables that you're
9 referring to when you -- when you said you went back to the
10 explanatory variables?

11 A. Yes. These are the -- the famous recodes that
12 Professor O'Brien was talking about yesterday; and, they
13 involve looking at the underlying facts and grouping them
14 into meaningful -- meaningful -- meaningful constructs in the
15 case of being in a helping profession as opposed to
16 separating out nurses and social workers and so on. It's
17 separate explanatory variables. Again, we see the -- the
18 DP_Reservations that turns out to be [indiscernible] there;
19 and, that, again, is a -- represents a number of -- of
20 different kinds of ways of expressing reservations; but, what
21 they all have in common is their reservations are expressed.
22 Q. And, Doctor Woodworth, you've -- you testified
23 that, using these candidate variables, you -- you built a
24 couple of models. Did that help you reach a conclusion about
25 the robustness of Doctor O'Brien's model?

1 A. Yes, I did. It -- it is -- it -- it stands up to
2 alternate ways of doing the model specification.

3 Q. And is that a usual way to test the -- the
4 robustness of a model?

5 A. One of many, looking for a variable that should
6 have been put in and weren't, and vice versa.

7 Q. And, now, I'd like to direct our attention to the
8 next slide, which would be slide 3. It's entitled MSU Jury
9 Study, Table 13; and, again, this is a slide that was
10 admitted yesterday. Could you -- could you interpret for us
11 the statistical significance and what columns on this chart
12 -- this one refers to Cumberland County.

13 A. Mmm-hmm [nodding head in the affirmative]. There
14 are two ways -- actually, three ways of identifying when the
15 result is going to be called statistically significant. The
16 first is the famous Two-Sigma Rule; and, we see that here.
17 This [pointing] is the coefficient. In a race-neutral
18 system, the coefficient would theoretically be zero; and,
19 that would be what we call the null, N-U-L-L, hypothesis.
20 The -- the -- this standard [pointing] -- is labeled the
21 standard error. Standard error is -- standard deviation is
22 sigma. They all refer to the same concept. There's some
23 nuanced differences between them, but they're all sigma's and
24 they're all standard deviations; and, if we express -- re-
25 express the coefficient and standard areas -- standard

1 deviation units, it comes out about -- well, let's see.

2 That's about 3 into 90. So, it'd come out about 3 plus sigma

3 -- 3 plus standard deviations.

4 [A bailiff conferred with the Court.]

5 THE COURT: Ms. Stubbs, I apologize.

6 We're going to be taking a recess in about 10 or 15 minutes,

7 but we've got some issue with regard to some of the recording

8 equipment, the microphone.

9 MADAM COURT REPORTER: I can fix his

10 [pointing to the witness].

11 THE COURT: Okay. So, if you will,

12 bear with us for 1 second.

13 Yes, ma'am.

14 [Madam Court Reporter fixed the witness' microphone.]

15 THE WITNESS: I just have to get near

16 something and I'll destroy it.

17 [Pause.]

18 THE COURT: You ready?

19 MADAM COURT REPORTER: Mmm-hmm [nodding head

20 in the affirmative].

21 THE COURT: Yes, ma'am.

22 Q. I -- Doctor Woodworth, I believe you were

23 testifying about the number of standard ----

24 A. Sigma's, yes. So, this one is about three sigma's

25 -- three or more. The other way to identify significance is

1 the sub -- p-value; which is, the probability of getting a
2 coefficient this many sigma's away from neutrality by -- in a
3 -- in a race-neutral voir dire system; and, finally, the -- a
4 third way of seeing it is in what's called the competence
5 interval. I -- popularly known as the margins of error. So,
6 this says we're 95 percent confident that the true -- sorry.
7 This is on the odds ratio. That -- we're 95 percent
8 confident that the true odds ratio is somewhere in that
9 range; and, again, the significance lies in the fact that
10 this rules out neutrality. Now, neutrality for the
11 coefficient is zero and neutrality for the odds ratio is one.
12 An odds ratio of one means the strike rate for the black
13 venire members would equal the -- one of -- the denominator,
14 which is the non-white. So, if the odds ratio is one, then
15 -- then, your -- you've demonstrated neutrality; and, here,
16 we've ruled out neutrality by 50 percent at the low end of
17 the range, so ----

18 Q. So, Doctor Woodworth, then, the three standard
19 tests that you've identified as significant, all three of
20 those indicate, for table 13, that the results were
21 significant?

22 A. Yeah. They're -- they're mutually consistent with
23 each other. The number of sigma's gives you more information
24 than the p-value. A p-value less than .05 or greater than
25 .05 is not as informative as knowing this information; and,

1 it's also not as informative as knowing the confidence
2 interval, but they all say significant or non-significant.

3 Q. And, now, I'd like you to turn back to page 1 of
4 Defendant's Exhibit 10, which was the table 12 from the MSU
5 study; and, let us know whether the test of significance
6 indicates that that odds ratio was significant?

7 A. Yeah. Well, we go to the coefficient. Twenty-
8 three goes into that 10 times. .23 goes into that 10 times,
9 so the ----

10 Q. Doctor Woodworth, I'd like to direct your attention
11 to ----

12 A. Oh, the line ----

13 Q. ---- the black ----

14 A. Sorry. .2 goes into .9 about, what, four and a
15 half times, so that would be four and a half standard
16 deviations. The confidence interval rules out odds ratio
17 smaller than 1.7. So, it easily rules out neutrality, which
18 would be an odds ratio of 1. The p-value is well below .05,
19 which would correspond to the Two-Sigma Rule, so -- and I'm
20 not saying these are either or tests. These all -- all of
21 these three methods will agree with each other. They'd
22 either all say significant or -- or, they'll all say
23 insignificant.

24 Q. Now, Doctor Woodworth, in addition to statistically
25 significant, I'd like for you to comment on the meaning of

1 the magnitude of that statement, the odds ratio observed here
2 for -- in the statewide study?

3 A. Yeah; and, that's an important distinction.
4 Significant simply means detectable. It -- the fact that
5 something is significant doesn't reflect whether it's just
6 barely above noise level or substantial. So, we distinguish
7 between being statistically significant and substantively
8 important. I guess the word would be material in this
9 context; but, the -- the distinction is called significance
10 versus importance in teaching statistics. Here, we have a --
11 so -- so what -- what -- how big does an odds ratio have to
12 be to be important? Well, of course it depends on the
13 context; but, in public health, it's -- the number I see
14 generally coded is somewhere around point -- 1.3 or above,
15 meaning a 30-percent increased risk that a particular
16 environmental exposure will increase the rate of some disease
17 by 30 percent. So, an odds ratio 2.48 would be a 148 percent
18 increase, not just a 30 percent increase. So, by that
19 standard, it's enormous; and, just as a practical matter, the
20 statement the black venire member -- black venire members --
21 all these other things being held equal -- have a 2 and a
22 half times greater risk of being struck.

23 Q. Now, Doctor Woodworth, you've testified this
24 morning about these results of logistic regression models.
25 Are these -- are these standard and commonly accepted models?

1 A. Oh, yes.

2 Q. And -- and, again, you've published extensively
3 using these techniques?

4 A. Published. I've written software. Yeah.

5 Q. Now, Doctor Woodworth, I'd like to ask you about
6 missing data. In studies, the issue of missing information,
7 is that common? Is that rare, in your experience?

8 A. It's common even in -- even in a double-blind,
9 placebo-controlled clinical trial, there's going to be
10 missing data. Any -- and -- and the missing data occurs when
11 patients just don't show up for a follow-up for example.
12 There are standard ways of dealing with missing information.
13 The one that's -- that's state-of-the-art or the most widely
14 accepted is called multiple imputation; and, Professor
15 O'Brien raised that last time; and, it involves basically
16 creating five or six, or however many you want, proposed
17 actual -- what the dataset would look like if you had all of
18 the information, and those proposals are ----

19 Q. I'm sorry to interrupt you. Doctor Woodworth,
20 before you get into multiple imputation, what -- what --
21 what's another technique used to address the issue of missing
22 data?

23 A. The -- the one that's the default in statistical
24 software is listwise deletion. That means any -- I -- I'll
25 particularize it to this study -- any venire member who is

1 missing any information that goes into this model will simply
2 be taken out of the analysis entirely, even though the other
3 11 pieces of information are present. So, we lose that
4 entire string of information just because there's one hole;
5 and, that's called listwise deletion. Listwise is one word.

6 Q. And, now, Doctor Woodworth, I'd like to direct your
7 attention to the next slide. It should be slide 4 of
8 Defendant's Exhibit 10.

9 A. Yeah. This is a schematic of how multiple
10 imputation works; and, up at the top, I have a representation
11 of the 25 percent random sample database; and, this first
12 column is labeled StSt, which stands for StrikeState; and, an
13 X represents a 1 or a zero. 1 means struck, zero meaning not
14 struck. The second column is Bvm, which stands for black
15 venire member. Again 1 means yes, zero means no; and, the X
16 just means we've got an observation there. We know what that
17 is. Over here [pointing], we have three of the 64 factors
18 that were used in this investigation. This might be
19 DP_Reservations. This one might be single or divorced and so
20 on. Okay. So, this is just -- schematic representation;
21 and, then, a question mark -- an X, again, means we know that
22 fact for that venire member; and, a question mark means we
23 don't know that fact for that venire member. We don't know
24 whether that's present or absent. So, what -- the first step
25 in a multiple imputation of this type, where everything's

1 binary, is to come up with an equation -- a logistic
2 regression equation to predict column A using columns B and C
3 -- a little more complicated than that. We have to come up
4 with two equations, one for predicting A from B -- three
5 equations -- one for predicting A from B, one for predicting
6 it from C, and one for predicting it from both. So, here's
7 an instance where we have B and C to help us fill in A.
8 Here's an instance where we only have C to fill in a code.
9 So, we do that -- now, you can imagine what that looks like.
10 In table 12, there were 12 nonracial variables there, so
11 we've got 12 -- a minimum of 12 different logistic regression
12 models to fill in missing data with; and, each of those 12
13 models as sub-models, depending on what exact -- what pattern
14 of variables are available for that prediction. Okay. So,
15 we find those models -- and I've written noise in there to
16 reflect the fact that the logistic regression is what's
17 called a probabilistic predictor. Unlike a regression
18 equation that's used, say, to try to predict a salary for
19 another factor, there, you get a dollar amount of prediction;
20 but, in logistic regression, you just get a rate, a
21 probability as a prediction. So, a particular model might
22 say, for this combination of factors -- people with this
23 combination of factors face a 90-percent strike rate; or,
24 people with this combination of factors are 90 percent -- 90
25 percent of the people with a particular combination of

1 factors have expressed reservations about the death penalty.
2 So, in order to use that kind of a probabilistic prediction
3 to fill in the data, we have to electronically construct a
4 bias coin toss, which comes up heads 90 percent of the time
5 in tables, 10 percent of the time. Then, we toss that coin.
6 Every time we see a missing observation for expressing
7 reservations, we go and find the model. We plug in these --
8 this other information into the model and get the
9 probabilistic prediction which might be .9 or .3 or whatever.
10 It depends on the facts of the case -- of the venire member.
11 We use that equation to fill in this number with -- with a --
12 with a zero or a 1; and, now, sometimes it's going to be a
13 zero; sometimes it's going to be a 1; and, that's what these
14 five different replications represent. They're going to have
15 different fill-ins because of the uncertainty of how to fill
16 it in. If we're 90 percent certain of what it is, we're
17 going to fill it in mostly with 1's, but sometimes with zeros
18 to keep us honest, so that we take into account the fact that
19 there's some uncertainty as to what actually belongs in that
20 data slot. So, now, we have complete datasets. Now,
21 remember, this one had about 1,100 after deletion; and, these
22 have about 1,700. So, we're -- we run our logistic
23 regression -- so, we run table 12 on each of these filled in
24 datasets and get the odds ratio for black venire member and
25 the standard error for each one of these. Now, these are

1 going to differ a little bit because the data differs a
2 little bit in each replication of the dataset. So, to get
3 the -- so, what we do is average -- now, again, it's not just
4 a simple, straight average, but it's -- average is a good
5 enough word to use here. So, we get the average of these
6 hypothetical odds ratios from these repl -- from these
7 hypothetical fill-ins of the data. We take -- again, we
8 combine the standard errors into a -- sort of an average
9 standard error; and, then, there's another source of
10 uncertainty. The standard error reflects sampling
11 uncertainty, the fact that the sample isn't the population.
12 So, that's the standard error; but, we've got another source
13 of uncertainty with missing data, and that's what those
14 missing values really are -- is uncertain; and, that second
15 kind of uncertainty is what's producing the variation across
16 these different fill-ins of the dataset. So, we compute the
17 variation among those and add that to the standard error to
18 get a total error, combining sampling uncertainty and
19 uncertainty due to missing observations; and, that's the
20 final report of such an analysis.

21 Q. Doctor Woodworth, did you use this process with the
22 MSU study?

23 A. Yes, I did.

24 Q. And what did you get when -- what did you find when
25 you did that?

1 A. I got essentially the same odds ratio for black.
2 Some of the other odds ratios changed a bit, but not the one
3 for black venire member.

4 Q. And what's the significance of that finding?

5 A. Again, the -- Professor O'Brien's analysis is not
6 biased. It's not -- it's not materially changed by the
7 missing data. There was actually an increase in the odds
8 ratio -- not due to the effects of filling in the unknown --
9 the missing values, but due to the effects of having 600 more
10 observations.

11 Q. And is multiple imputation -- is this an accepted
12 technique?

13 A. It's a standard. It's the industry standard.

14 Q. And, in fact, the ability to run multiple
15 imputation, is that built into SAS?

16 A. It's built into SAS. It's built into SPSS.

17 Q. Now, I'd like to ask you about your time varying
18 used with regression.

19 A. Okay.

20 Q. If we could turn to the next slide?

21 A. Now, let -- what ----

22 Q. I mean ----

23 A. Can we just dwell on this for a minute?

24 Q. Yes, sir.

25 A. Okay.

1 Q. Let's go back to multiple imputation.

2 A. Here is the -- here's the -- the logistic
3 regression coefficient for the original data, 1,100. Here's
4 the -- the average logistic regression coefficient for five
5 imputations of -- of -- resulting in datasets of 1,700.
6 Hardly any change, goes from .9 to 1, to 1.0. Odds ratio
7 goes up a little bit, but both of these are well within each
8 other's standard deviation. Hardly any movement at all for
9 DP_Reservations because that is so well ascertained. There
10 are only 36 missing values. When we get down to here, to
11 these extensively missing pieces of information, we -- we get
12 a different picture; and, that's not -- not because we're
13 distorting it by the imputation. It's because the -- it's --
14 it's because of the adjusting effects of the other variables
15 in the model.

16 Q. And, Doctor Woodworth, can you tell, from looking
17 at this table, what variables were missing the most or
18 contributing the most ----

19 A. Yeah. The most -- most missing -- and Professor
20 O'Brien pointed this out last time -- is the education
21 variable, and that's the one that is clearly most affected by
22 this addition of new -- the -- the large samples. So -- you
23 notice all of these look a bit different. They're both in
24 the same direction, and they're both within one sigma of each
25 other.

1 Q. All right. Now, Doctor Woodworth, I think we're
2 ready to go to your time ----

3 THE COURT: We're moving into a new
4 area?

5 MS. STUBBS: Yes.

6 THE COURT: This is a good point for
7 us to take a break for purposes of the court reporter.

8 Thank you, sir. You may step down.

9 THE WITNESS: Thank you, sir.

10 THE COURT: We're going to be at ease
11 until 15 till by the clock on the back wall. We're at ease.
12 [The hearing recessed at 11:24 a.m. and reconvened at 11:45
13 a.m., February 1, 2012, with all pertinent parties present
14 prior to the recess once again present, to include the
15 defendant, and the witness on the witness stand.]

16 THE COURT: Let the record reflect all
17 counsel are present. The defendant is present. Folks, at
18 the outset this morning, I believe I indicated, prior to
19 beginning the testimony of Doctor Woodworth, that all counsel
20 were present. Let me clarify, for the record, the defendant
21 was also present at that time and has been throughout the
22 balance.

23 Yes, ma'am. Ready when you are.

24 MS. STUBBS: Your Honor, we just need a
25 minute to get the technology working here.

February 01, 2012

1 THE COURT: Yes, ma'am.

2 [Pause.]

3 MS. STUBBS: Thank you, Your Honor.

4 THE COURT: Yes, ma'am. Ready when
5 you are.

6 **DIRECT EXAMINATION continued conducted by MS. CASSANDRA**

7 **STUBBS:**

8 Q. Doctor Woodworth, before our break, you had just
9 started to identify what time varying logistic regression --
10 what -- what does that mean?

11 A. Yes. Here is a graph of the first such analysis --
12 of the initial such analysis that I included in my report;
13 and, I'll use that to explain what's going on. On the --
14 what's plotted in this central line here is the odds ratio
15 over time. To give an idea of how well it's tracking the
16 actual data, I have done odds ratios in 5-year intervals.
17 The vertical bar -- the -- the green dot is an observed odds
18 ratio. It's not an estimate. It's what actually happened in
19 the data. So, that's raw data; and, the vertical bar is the
20 confidence interval around that, the margin of error; and,
21 the range bar, horizontally, is the range of dates of the
22 voir dieres that went into that green dot. The vertical red
23 line is the date of the defendant's trial and -- the
24 sentenced date -- excuse me; and, so, finally, let's look at
25 this -- or -- and the upper and lower dotted curves are the

February 01, 2012

1 95 percent confidence bands for the curvy line. The -- so,
2 the advantage -- the purpose of doing the smooth as opposed
3 to these stair step -- the stair-step rendition is to -- to
4 get smooth transitions between these 5-year periods; and, you
5 can think of this smooth as a sort of running average,
6 sliding across time. It's a little more -- there's some
7 nuances to that; but, basically, it's -- the -- the height of
8 the curve here is based on experience around that or about
9 the range that I'm swinging the pointer over. So, this point
10 over here -- point here on the curve would be based on cases
11 in about this range; but, again, every case influences every
12 one of those estimates to some extent.

13 Q. And -- and, before you get more into this
14 particular slide, Doctor Woodworth, generally, this technique
15 of -- of smoothing, is this a technique that you're published
16 in?

17 A. Yes.

18 Q. And what's the general purpose of this technique?

19 A. The general purpose of this technique is to analyze
20 occurrences over a continuum. So, in this case, we've got
21 strikes going on over time -- or, venire -- voir dires going
22 on over time. It's also used in environmental statistics to
23 look at the impact of multiple point sources of collusion on
24 air quality, like the amount of sulfur dioxide in the air --
25 would be -- it's presumably smooth with maybe higher

1 concentrations around the point sources, but it's not either
2 there or not there. So, this kind of technique is used to
3 take the emissions from the point sources and compute how
4 it's spread over geographically -- exactly the same technique
5 -- except adapted for two dimensional. This has also been
6 used in -- in survival analysis in medicine. There's a
7 publication by a statistician working for the Mayo Clinic
8 that uses this to analyze survival. So, again, we've got
9 things going on over time, namely deaths; and, we presume the
10 rate isn't constant. We let the data tell us how it varies.
11 That's what I'm doing here.

12 Q. And, Doctor Woodworth, you earlier testified that
13 you published two papers looking at -- at smoothing and --
14 over time in employment discrimination cases. Were -- were
15 those papers in peer-reviewed journals?

16 A. Yes.

17 Q. All right. So, now, turning -- turning to this
18 slide, it says Statewide Unadjusted Odds Ratio. What -- what
19 is an unadjusted odds ratio?

20 A. Well, there's no attempt to control for those 12
21 nonracial factors in this analysis.

22 Q. And what ----

23 A. It's just the straight-up black venire members
24 divided by white venire members.

25 Q. And what does this slide tell us with respect to

1 Marcus Robinson about the odds ratio?

2 A. The odds rat -- the odds ratio in the time period
3 near Marcus Robinson is about just under four, three point
4 something; and, this is unadjusted; and, this is consistent
5 with the average of the 5-year period including Marcus
6 Robinson; and, it's, as you can see, consistent with pretty
7 much all of the odds ratios we observed, which is reflected
8 in this curve which shows the trend over time.

9 Q. And do you see consistency or dramatic change here?

10 A. No. No. Not at all. By the way, this would be
11 the confidence interval from here to here [pointing], the
12 confidence interval on the estimate at the exact date of
13 Marcus Robinson's sentence. It has the same interpretation
14 as these confidence intervals. We're 95 percent certain that
15 the truth is somewhere in that range.

16 Q. And -- and I think -- believe you answered not at
17 all to my question. Is that not at all consistent or not at
18 all changed -- that you observed ----

19 A. Not at all changed is the thrust of what I was
20 saying because we see consistency with the 5-year average,
21 consistency with other time periods; and, that -- that's what
22 I meant.

23 Q. Now, turning to the next slide, can you describe
24 for us what this slide depicts?

25 A. This is the -- the same data -- well, not the same

1 data. The other one was based on all venire members because
2 we didn't have to adjust, and this one is based on a 25-
3 percent sample; and, that's the reason that the confidence
4 levels are wider, because they're based on one-quarter of the
5 data. As -- as a rule of thumb, if you quadruple the sample
6 slice, you doubled the precision; you cut the error bars in
7 half, as a rule of thumb. So, here, we -- again, we get the
8 5-year av -- adjusted average; and, that was done by fitting
9 the same -- they -- they -- re-computing table 12, but
10 letting -- having four variables for black specific to each
11 of the four time periods. So, that -- each of those
12 estimates uses the entire data series, but focuses on a
13 particular period; and, then, here's the smooth transition.
14 Here, you'll notice the smooth is less impressed by these
15 deviations because the error bars are so wide and it doesn't
16 attempt to make these larger excursions because it doesn't
17 think they're well established. I speak of the software as
18 if it had a brain, of course; but, it's -- it's pure
19 algorithmic calculation. Okay. So, what we see in Marcus
20 Robinson is, again, about what we were getting with every
21 other analysis, just above 2.5, in that range, 2.3, 2.4, 2.5,
22 as the odds ratio. Here is the 5-year average, about the
23 same. There seems to be some belief by the -- by the
24 software that there was a higher risk for blacks in this
25 period, but the point is we're talking about Marcus Robinson;

February 01, 2012

1 and, everything points to the same place for him. Here's the
2 confidence interval. You notice you get a sharper -- a
3 narrower confidence interval when you smooth because you're
4 bringing in a wider range of data. Data is coming in from
5 roughly -- the data that has an impact is from about here
6 back to here.

7 Q. And, Doctor Woodworth, when you were reading those
8 odds ratios, could you explain the scale to us that's
9 recorded there?

10 A. Yeah. I apologize. I had to use what's called a
11 log scale, L-O-G; and, it -- on the log scale, equal -- equal
12 powers of 10 occupy the same interval. So, here's one to two
13 -- is the same length as 10 to 20; but, I've -- I've
14 denominated this axis using the actual odds ratio rather than
15 the log [indiscernible]. Okay.

16 Q. So -- so, if you could, just identify again for us
17 what -- was was -- at the time of Marcus Robinson's sentence
18 date ----

19 A. Right there.

20 Q. ---- what does that show the odds ratio is?

21 A. Just under -- between 2 and a half and 3.

22 Q. Doctor Woodworth, the next slide in Defendant's
23 Exhibit 10 is labeled the influence of other cases. Could
24 you explain to us what this slide shows?

25 A. Yeah. This shows the -- in the previous graph, the

1 -- the odds ratio at Marcus Robinson's sentencing date
2 depends principally -- well, a rule of thumb is -- these are
3 correlations, and a correlation above -- below .3 is pretty
4 negligible; counts for 10 percent of variation. So, just as
5 a rough rule of thumb, we can say what has an influence --
6 what has a major influence on Marcus Robinson's estimate runs
7 from about here, say 1999, and -- back to the beginning of
8 the data series.

9 Q. Excuse me. The next -- if you could, turn to the
10 next slide. It's identified as Cumberland Unadjusted Odds
11 Ratio?

12 A. Yes, same as my first slide, but restricted to the
13 cases in Cumberland. Again, I have added the observed odds
14 ratios for each of the individual cases here; and, this one
15 is actually -- I think, 66 or something is where it actually
16 goes -- because that's a case where the odds ratio -- the
17 adjusted odds ratio couldn't be ascertained very accurately
18 because of what's called multicollinearity. So, I've -- I've
19 drawn it as being up there in the stratosphere somewhere.
20 The -- and it's error bars would be enormous. The error bar
21 would run from there -- from, actually, down there, clear up
22 to 800, I think. So, that point is basically not providing
23 any information at all. That's what we would call an
24 uninformative observation. It's uninformative about the
25 contrast between black and non-black venire members because

1 of the anomalous distribution of those two categories; but --
2 so, again, here's the point estimate based on the aggregate
3 of these. So, I took all of these cases -- you can count
4 them on your own time -- let's see -- one, two, three four,
5 five, six, seven, eight -- those are eight voir dires. I
6 think one of those may be two that's attributed to the same
7 date; and, the -- this is the -- this is the adjusted odds
8 ratio computed from the 25 percent samp -- well, no, this is
9 Cumberland. It's a hundred percent. Computed from a hundred
10 person sample of venire members; and, those voir dires.
11 Here's Marcus Robinson. He's right -- he's the earliest case
12 in Cumberland County that's still on death row; and, here's
13 the confidence interval. Here's the smoothed estimate, and
14 here's the confidence interval from here to here; and, it
15 rules out the null hypothesis. Additionally, it looks like
16 Marcus Robinson is higher than the trend of other cases at
17 that time period.

18 Q. Now, Doctor Woodworth, if you could, turn to the
19 slide labeled Cumberland Adjusted Odds Ratio. What's the
20 difference between this slide and the previous one?

21 A. Yes. I made several misstatements in that one.
22 Let me go back and rewind. That was the unadjusted, so
23 there's no adjustment going on here. This is just the black
24 venire member versus non-black. Okay; and, this is -- so,
25 this is the raw data. Now, if we can go to the adjusted, we

1 see that -- pretty much the same picture, and the 5-year
2 average here is just above three, pretty consistent with what
3 Professor O'Brien reported, as I recall; and, the -- the est
4 -- the adjusted odds ratio of Marcus Robinson is about 2.5,
5 smoothed -- about 2.5; and, it's -- that adjusted is adjusted
6 both for the 12 -- the non-racial factors that were in table
7 13; and, the -- and, then, it's further smoothed to reflect
8 what was happening in the time period around that point.

9 Q. So, in other words, Doctor Woodworth, when you
10 smoothed for time, to look at the role of time -- the role of
11 other cases in -- over time, that actually reduces the odds
12 ratio in Mr. Robinson's case?

13 A. It -- well, it reduces it from the 5-year average;
14 and, this is -- these are unadjusted odds ratios. These --
15 this is not Marcus Robinson's adjusted odds ratios. So, both
16 the adjustment and the smoothing is what is bringing it down.

17 Q. And, then, it's still above 2?

18 A. Oh, yeah. It's above 2, and it's significant
19 because the lower-end point of the margin of error is above
20 the null hypothesis. You may remember that this line
21 represents neutrality in the strike rates of black and non-
22 black venire members.

23 Q. And, then, finally, Doctor Woodworth, if you could,
24 turn to the last slide of Defendant's Exhibit 10.

25 A. This -- this is, again, the influence diagram

1 indicating that only about one, two, three, four, five, six,
2 seven, eight cases actually have made a contribution to the
3 smoothed estimate for Marcus Robinson; and, they're close in
4 time. They're all -- well, that's, what, about -- about
5 right there, which would be mid-2008 -- so, from the
6 beginning of the data series to 2008 -- sorry. From this
7 point over to 2008 are the cases that went into -- that had
8 substantial contribution to the smoothed odds ratio in the
9 Marcus Robinson time period.

10 MS. STUBBS: Your Honor, at this time,
11 we would move for the admission of Defendant's Exhibit 10.

12 MR. PERRY: Your Honor, that was the
13 set of slides, and I have no objection to that, Your Honor.

14 THE COURT: Without objection -- do
15 you have a marked copy now, a copy of the documents? Are you
16 going to utilize that again with the witness, ma'am?

17 MS. STUBBS: No, Your Honor.

18 THE COURT: Okay. Without objection,
19 Defendant's 10 is admitted. For the record, ma'am, I --
20 well, let me simply ask the question. Has Defendant's 9, the
21 CV, been offered?

22 MS. STUBBS: It -- it's been offered,
23 Your Honor.

24 Q. Doctor Woodworth, you heard Doctor O'Brien testify
25 yesterday -- yesterday as to changes in her model over time?

1 A. Yes.

2 Q. Can you comment on that -- I mean, on updating a
3 model and on that practice?

4 A. Well, it reflects the continuous quality control
5 that Professor O'Brien and her colleagues exercised in that
6 case. They were constantly alert and actively searching for
7 any kind of an inconsistency or dispute of coding in the
8 model and trying to resolve it in a transparent way.

9 Transparency is -- is one of the keys to the credibility of
10 scientific research, that -- you data's out in public. Your
11 methodology is out in public. Your instrumentation -- in
12 this case, the DCI -- is out in the public; and, others can
13 reanalyze your data or they can attempt to replicate your
14 study. So, the -- it's this quest for transparency and quest
15 for the highest quality data that has produced these, as it
16 happens, immaterial changes in the results of the analysis
17 due to corrections of the dataset -- or, the discovery of new
18 -- of new sources for -- for missing information.

19 Q. Now, Doctor Woodworth, I'd like to ask you about
20 your opinions in this case. If we defined the term
21 significant to mean practical significance or material
22 significance ----

23 A. Yes.

24 Q. Is it your opinion that the unadjusted data of
25 strike disparities across North Carolina are consistent with

1 an inference that race was a significant factor in
2 prosecutors exercising peremptory strikes in North Carolina
3 at the time of Marcus Robinson's trial in 1994?

4 A. They are consistent with that theory, yes.

5 Q. And is it your opinion that the unadjusted data of
6 strike disparity across North Carolina are consistent with an
7 inference that race was a significant factor in prosecutorial
8 exercise of peremptory strikes in judicial -- former Judicial
9 Division II at the time of Marcus Robinson's trial in 1994?

10 A. Yes. The analyses are consistent with that theory.

11 Q. And is it your opinion that the unadjusted data of
12 strike disparities from Cumberland County are consistent with
13 an inference that race was a significant factor in
14 prosecutors exercising peremptory strikes ----

15 A. Yes.

16 Q. ---- in Cumberland County?

17 A. Yes.

18 Q. And is it your opinion that the unadjusted data of
19 strike disparities in Marcus Robinson's case are consistent
20 with an inference that race was a significant factor in
21 exercising peremptory strikes in Marcus Robinson's trial in
22 1994?

23 A. Yes. They are consistent with that theory.

24 Q. And, now, based upon all of the combined evidence,
25 including the adjusted statistical analyses of Doctor O'Brien

1 and yourself, as well as the unadjusted data, does this
2 evidence support a finding that race was a significant factor
3 in exercise of peremptory strikes statewide in North Carolina
4 at the time of Marcus Robinson's trial?

5 A. Yes, it does, in my opinion.

6 Q. And is it your opinion that that same evidence
7 supports a finding that race was a significant factor in the
8 exercise of peremptory strikes in Cumberland County at the
9 time of Marcus Robinson's trial?

10 A. Yes.

11 Q. And is it your opinion that the combined evidence
12 -- again, that is adjusted and unadjusted data and evidence
13 -- leaves an inference of intentional discrimination in
14 exercise of peremptory strikes across the State of North
15 Carolina at the time of Marcus Robinson's trial in 1994?

16 A. Yes. I agree that it raises the inference.

17 Q. And does it also raise that same inference of
18 intentional discrimination in Cumberland County at the time
19 of Marcus Robinson's trial in 1994?

20 A. I agree.

21 Q. And, Doctor Woodworth, if we define statistical as
22 statistically significant, do you hold the same opinions
23 regarding the inference made in court of the adjusted and
24 unadjusted data?

25 A. Yes.

1 Q. All right. If we define statistical as
2 statistically significant, do you hold the same ----

3 A. I understood that to be the thrust of your previous
4 question.

5 Q. Oh, I'm sorry. I -- I -- I misspoke. If we define
6 significant as statistically significant -- I apologize for
7 the confusion there -- do you hold the same opinion? I'm --
8 I'm just correcting my own error in the question there,
9 Doctor Woodworth.

10 A. Is this the same as the previous ----

11 Q. Yes.

12 A. ---- question? Yes. I -- I agree.

13 MS. STUBBS: Thank you, Doctor
14 Woodworth.

15 THE COURT: Mr. Perry?

16 MR. PERRY: Thank you, Your Honor.

17 Yes, sir.

18 **CROSS-EXAMINATION was conducted by MR. JONATHAN PERRY:**

19 Q. Doctor Woodworth, on that note, can you explain to
20 the Court what the difference is between practical and
21 statistical significance?

22 A. That's exactly what I was talking about. That's
23 the last -- the thrust of the last few questions that we
24 talked about.

25 Q. Sure. Could you -- could you paint us a

1 distinction between the two, just in one sentence?

2 A. Statistical significance means the end effect is
3 detectable. It says essentially nothing about the size of
4 the effect. The size of the effect is judged by, first, the
5 estimate of the effect; namely, for example, an odds ratio of
6 2 and a half; and, by the confidence interval, which rules
7 out immaterial effects.

8 Q. Okay; and, I want to make sure I understand you
9 right. So, statistical significance, in your mind, means
10 detectable?

11 A. That's right.

12 Q. Okay; and, then, practical significance, I think
13 you said, was a matter of ----

14 A. It's material.

15 Q. A matter of ----

16 A. Not enough to be important -- large enough to be -- to
17 be -- to have an impact, to be something that needs to be
18 dealt with.

19 Q. And by something that needs to be dealt with, what
20 do you mean by that?

21 A. Well, if we were talking in -- about epidemiology
22 -- which is my favorite thing to talk about it -- would mean
23 that we have evidence that there's a public-health problem
24 that requires some sort of intervention. I give you, for
25 example, the surgeon general's smoking and -- environmental

1 tobacco smoke study, in which -- and -- an increased risk of
2 30 percent, roughly, was enough to trigger regulation, to
3 trigger ordinances in municipalities about smoking being
4 banded in public spaces. So, that's what I mean, important
5 enough, something that's big enough to be important; and,
6 important means to be worthy of further attention.

7 Q. Right. So, somebody ought to do something about
8 it?

9 A. Well, that's a legal opinion and beyond my area of
10 competence.

11 Q. I just want to make sure I'm not misstating ----

12 A. I'm just giving you some examples of what
13 importance has meant in epidemiology and in public health.

14 Q. And, that -- that's your -- would you say that's
15 your main research focus, being public-health issues,
16 epidemiology issues?

17 A. Me?

18 Q. Yes, sir.

19 A. No, not at all. I -- my -- I have two threads in
20 my research program; and, one is in clinical medicine; and --
21 clinical trials mainly; and, the other one is in statistical
22 analysis of the possibility of discrimination in employment
23 and in capital sentencing. My biological side is reflected
24 in the textbook, which is although sufficiently general to be
25 read by -- to be read usefully by others -- but, no, it's not

1 confined to epidemiology. In fact, the only epidemiology
2 I've done has been the papers with Remi Cadoret on
3 gene/environment interaction.

4 Q. And the only reason I ask that -- you've got a
5 number of areas of research interests, correct, sir?

6 A. Primarily two.

7 Q. And one of them being the analysis of cases like
8 this, where there are discrimination claims or some kind of
9 research question involving discrimination for the capital
10 litigation process, correct?

11 A. No. I've done it for employment as well.

12 Q. And employment?

13 A. [Nodding head in the affirmative.]

14 Q. And just -- I don't want to go back through
15 everything on your CV, but you've done this kind of work for
16 a -- for a number of years, correct?

17 A. Yes.

18 Q. In fact, you worked on a similar line of cases in
19 Georgia, the McCluskey case?

20 A. Yes. I did an analysis that was used in the
21 McCluskey challenge, and the same analysis went to the
22 appellate court's and, then, just to the Supreme Court, but I
23 -- if that's what you mean by a series of cases, yes.

24 Q. Yes, sir. Yeah -- [indiscernible] ----

25 A. To me, it was one case.

1 Q. Now, is that -- when those cases came about, was --
2 was that where you became acquainted with David Baldus,
3 Professor Baldus; and, did -- did you all know each other
4 earlier than that?

5 A. No. We met earlier.

6 Q. Okay.

7 A. It's reflected in my CV of papers we published
8 prior to the Georgia charging and sentencing study.

9 Q. And you all have had a long research relationship?
10 In other words, you all have worked on these issues together
11 for a number of years, correct?

12 A. Yes, indeed.

13 Q. Okay; and, usually, when you're working with
14 Professor Baldus -- and, in this study, it sounds like you
15 all had some kind of division of labor. In other words, you
16 worked on certain aspects of the research, and he worked on
17 -- on different aspects; is that correct?

18 A. This was -- ours was a -- a genuine collaboration.
19 I managed to have a few ideas that informed his thinking
20 about empirical, legal research, some of the concepts that he
21 has adopted in subsequent research. Like, salient features
22 analysis were originally my idea, and he -- he has had an
23 influence on the way I think about statistics. So, it is a
24 genuine collaboration. It is not a division of labor. I
25 have some skills that he doesn't like doing, technical

1 statistical analyses; and, Lord knows, he has some skills
2 that I don't have; but, we're collaborators.

3 Q. Okay; and, when you were working on the McCluskey
4 case dataset, what types of models did you use in that
5 litigation?

6 A. Logistic regression.

7 Q. Okay.

8 A. And the odd -- linear regression. At the time,
9 logistic regression was not well known among your brethren
10 and the law, and we needed to buttress it with some linear
11 regression as well.

12 Q. And that was the rationale for the use of it --
13 people in the law didn't understand it? Is that what you're
14 trying to say?

15 A. Basically.

16 Q. Okay. All right. Now -- and -- and, just so I'm
17 clear, about what timeframe were you working on those --
18 those issues with the McCluskey case?

19 A. I believe the publication date is '84, and I think
20 we must have started working on it around '81 or '2. I would
21 have to go back and refresh my memory from -- from notes and
22 files.

23 Q. Sure. Now, that model -- when you constructed that
24 model, there were a -- a large number of variables involved,
25 correct?

1 A. There are always a large number of variables. So,
2 in that case, yes. There was a large list of -- of factors
3 which might conceivably be non-racial and explain the racial
4 effects.

5 Q. And, in fact, you all had about 230-or-so variables
6 that -- that were included as -- as potential control
7 variables? Does that sound about right?

8 A. Yeah. That's about right.

9 Q. And it was a -- a linear regression model that you
10 used for the -- for the main results, correct?

11 A. No. We did logistic -- we presented logistic in --
12 in the McCluskey hearing.

13 Q. That was what was presented to the Court in other
14 words?

15 A. [Nodding head in the affirmative.]

16 Q. Now, in the McCluskey case, in that dataset, what
17 would have happened if you had used logistic regression to
18 try to look at that?

19 A. We did use logistic regression.

20 Q. So, what happened when you used that logistic
21 regression for the results of using logistic regression ----

22 THE COURT: Can you clarify your
23 question, sir?

24 MR. PERRY: Yes, sir.

25 Q. What were the results of your model in contrast to

1 the use of linear regression when you used logistic
2 regression -- if I can put it like that?

3 A. There was a significant increased risk of the --
4 the death penalty as opposed to a lessors sentence ----

5 Q. And which ----

6 A. ---- for case -- for -- for defendants whose --
7 whose -- one -- at least one of his victims was white.

8 Q. Okay. Did you have any convergence issues in the
9 usage of the logistics regression model?

10 A. Well, everybody has convergence issues ----

11 Q. Sure.

12 A. ---- in logistic regression. We're not alone, no.

13 Q. And, just to be clear, for the Court's edification
14 and for mine as well, so we're on the same page, can you --
15 can you explain a little bit about -- when I'm asking you
16 about convergence issues, what am I alluding to? What am I
17 asking you about?

18 A. Well, you're misspeaking to some extent.

19 Convergence is -- the tech -- technical term for it is the
20 existence of a separating hyperplane; and, it simply means
21 there's a combination of explanatory variables such that all
22 of the -- this is really nerdy. Do you -- you really want to
23 hear this? If you grab all of the data in 200-dimensional
24 space, then there exists the linear combination of control
25 variables that slices through the space such that all of the

1 black cases are on one side and all of the white cases are on
2 the other side. So, this is simply a symptom of over-
3 fitting. You don't have enough observations to identify the
4 effect of that particular area.

5 Q. And, just to -- just to clarify, when you say over-
6 fitting, how would you tell a student in one of your classes
7 here's what over-fitting means -- just kind of in plain
8 English?

9 Q. Over-fitting means including predictive factors or
10 explanatory factors in a model which are unlikely to be
11 replicable. In other words, including unreliable components
12 if your model.

13 Q. So, I think we've talked about noise before in
14 referring to incorporating some kind of variable that has --
15 has noise -- is that what you mean?

16 A. When I say noise, there are two different uses of
17 it in regression. One of them is what's called residual
18 uncertainty; that is, that which cannot -- that which is not
19 predicted by the explanatory variable. That's residual
20 noise; and, the other sense of noise is that, if you try too
21 hard to perfectly explain what happened in your training
22 data, that is the data used to construct the model, you may
23 simply be explaining chance co-occurrences.

24 Q. Okay.

25 A. So, noise means either unaccounted variation or

1 chance co-occurrences, and it depends on the context in which
2 I'm using the term.

3 Q. Right. Okay; and, let me ask you a question -- I
4 -- I don't want to get -- I don't want to bore everyone here
5 with the -- the real details of that, but I do want to ask
6 you -- because you mentioned something earlier in response to
7 the defense attorney's question about the handling of missing
8 information -- I think she asked you some questions about
9 different ways you can handle missing information; and, there
10 -- there are different ways that you can do that, correct?

11 A. Yes. I said so.

12 Q. Okay; and, for McCluskey, what was the approach in
13 handling the missing information at that point; or, how did
14 you all approach that ----

15 A. The state of the technology then was not what it is
16 now.

17 Q. Would it be fair ----

18 A. The cases are not comparable.

19 Q. Sure. Well, to be fair, we didn't have the
20 computing power we have today, right?

21 A. We didn't even have the theoretical power we have
22 today.

23 Q. What do you mean by that?

24 A. The development of multiple imputation, the
25 development of -- of -- Markov chain Monte Carlo for doing

1 massive calculations like that.

2 Q. Sure.

3 A. We did not have the technology or the theory to do
4 it as well as it has been done in this case. So, I repeat,
5 the analyses are not comparable. One is not the standard for
6 the other.

7 Q. Okay. I -- I don't think I was asking you that.
8 What I was asking you was it's the same issue; in other
9 words, you've got to address missing information in this case
10 just as you had to do in McCluskey, correct?

11 A. That's right.

12 Q. Okay. Now -- and your -- and your answer to my
13 question was now we have different theoretical approaches; in
14 other words, you can utilize technology and doing Markov
15 chains and things like that; and, that's what you did in this
16 analysis, correct?

17 A. I did not say different theoretical approaches. I
18 said we had a theoretical approach now?

19 Q. Okay; and, they were different ----

20 A. At the time -- we now have a theoretical approach
21 to missing information, the EM algorithm, Markov chain Monte
22 Carlo conditioning on the observed data. All of that's been
23 developed, in the context of logistic regression, well after
24 McCluskey. In McCluskey, we had to use such things as mean
25 imputation, where you fill in with the average for that

1 variable; worst-case imputation, and things like that; ad
2 hoc, seat-of-the-pants methodology, to try to determine
3 whether or not the analysis was robust to the way that you
4 dealt with missing observations.

5 Q. So, these -- the methodology has, in your
6 estimation, improved tremendously since then?

7 A. By the development of a theoretical approach.

8 Q. Okay. Now, if -- well, let me ask you this. Going
9 back to the -- the jury selection study, just in general, if
10 you -- if you have a problem with information, if you have
11 missing information, is -- I believe you said what you
12 usually do is drop the observations; in other words, if one
13 of the factors is missing for a particular observation, the
14 standard practice is to drop that observation from the
15 dataset you're looking at, correct?

16 A. Are you using you in a sense of one -- or, a
17 statistician, or me? You said what you do is. Do you mean
18 me?

19 Q. No. Just generally.

20 A. Generally, what ----

21 Q. Yes, sir.

22 A. What is generally done in the profession? The
23 general rule in the profession for careful analysts is to
24 verify that your analysis is not sensitive to various
25 departures from the textbook idea. One of those departures

1 being missing data; so, in this day and age with the
2 availability of multiple imputation, a social science study
3 that didn't attempt it I think would probably be criticized
4 by the peer reviewers for that article. That's my guess.
5 You'd have to ask someone in the social scientist -- sciences
6 if that's actually true. I have -- certainly, if I were
7 critiquing such an article, I would say why didn't you use
8 this easily available technique for dealing with your missing
9 information. So, I'm answering -- your question was what is
10 the practice in the field; and, I'm telling you what is the
11 best practice in the field, what is the default for the
12 software -- so, what a freshman or a sophomore sociology
13 student might do is just let the software decide which is to
14 toss out the observations that have any missing data; but,
15 any kind of knowledgeable social science or any other kind of
16 researcher faced with a nontrivial amount of missing
17 observations would do multiple imputation.

18 Q. Okay; and -- and I didn't -- I don't know if
19 there's a difference, but is there a difference between the
20 general approach and what you would do? In other words, is
21 -- the approach of multiple imputation, is that what you
22 would do?

23 A. Multiple imputation has an analog in the kind of
24 statistics that I favor theoretically, and I tried that same
25 approach and -- but, what's generally the case is that

1 multiple imputation gives materially the same analysis as
2 what I'm talking about are Bayesian techniques.

3 Q. You ----

4 A. So, I don't -- I don't find a meaningful
5 distinction between which particular approach to conditional
6 probability-based imputation -- which is what they both are.
7 I don't see any material differences between the way it's
8 done in SAS or SPSS or in the kind of specialized software
9 that's used in Bayesian analysis, so no.

10 Q. Okay. All right; and, let me go back just to some
11 of the broader ----

12 A. So, yes. Excuse me. Yes, that's the way I do it.

13 Q. I understand. That's fine. You individually?

14 A. Yeah. I've demonstrated that. I did it in this
15 case.

16 Q. Right; and, now, I want to go back just to some of
17 the broader questions. I know she asked you a couple of
18 these; but, in terms of the sampling for this particular
19 study, you had mentioned earlier, I think, something about
20 the -- the relevant population to consider and then the
21 appropriateness of the sample that was taken.

22 A. I don't believe I used the word relevant. I
23 believe -- I believe I used the word study population.

24 Q. Okay; and, to your -- to your knowledge, was that
25 something that had already been decided when Professor

1 O'Brien came to talk to you about getting involved in this
2 project? In other words, did you have any input into how the
3 population was determined?

4 A. I think, if you were following my testimony,
5 Professor O'Brien did not approach me about getting involved
6 in this. It was ----

7 Q. Well, if you could clarify ----

8 A. It was ----

9 Q. ---- how did -- how did you get involved in ----

10 A. Well, slid in sideways through my research
11 collaboration with Professor Baldus.

12 Q. And, so, the connection really was they had
13 approached Professor Baldus and asked him questions, and
14 that's how you became involved? Is that ----

15 A. They had occasional questions for him.

16 Q. And, now, in terms of this particular project, was
17 there some kind of division of labor between you and
18 Professor O'Brien and Professor Grosso?

19 A. I was not part of the project. I was brought in to
20 review the project.

21 Q. Okay. So, in -- in terms of your involvement, it
22 was really more of an after the ----

23 A. If I could just ask for clarification, when -- when
24 we're talking about the project, we mean the venire study?

25 Q. Yes, sir. Yes, sir. Separate from the charging

1 and sentencing.

2 A. Yes. Okay.

3 Q. When did you first become involved with the jury
4 selection study? Do you recall?

5 A. I -- I -- I went over the timeline. Again, I said
6 before -- it may have been in the very early stages of the
7 data -- no. It must have been before the data collection.
8 There may have been a pilot sample on-hand at that time. I
9 did these power calculations to give them standard,
10 statistical guidance on the adequacy of their proposed
11 sample. So, I didn't tell them what sample size to use.
12 That's their decision.

13 Q. Okay; and ----

14 A. That's -- and that's the last participation in the
15 ongoing work of the project until I was asked to critique the
16 project for -- for this trial.

17 Q. Okay; and, when did you do that? When did the
18 critique process start?

19 A. I think my billing has been submitted to the state.
20 I -- if you want to show it to me, I'll be glad to provide
21 you with the dates.

22 Q. Do you recall, just roughly offhand, was it last
23 year?

24 A. I [indiscernible] -- I don't recall precisely
25 enough that I don't need to have my memory refreshed.

1 Q. Sure; and, my only -- my only question really is
2 how long have you been working with the results that they
3 provided you in order to do your conclusions?

4 A. I think probably since -- well, it was -- it was
5 sometime in the last half of 2011 that it really got intense.

6 Q. Okay. Now, did they ask you anything in
7 particular? In other words, did they ask you to look at
8 anything in particular or just kind of look at -- at
9 everything they did and how they approached it, or ----

10 A. They expressed some concerns of areas of -- that
11 might affect the robustness of their findings in areas in
12 which I was the best person to do the investigation, and that
13 includes the time aspects and the missing information aspect.

14 Q. Okay. Did they have some reason -- you said they
15 had a -- a reason for a concern about the time. What was the
16 issue of concern with the time -- that they expressed to you?

17 A. I -- I believe that should be familiar to you from
18 the previous hearing that was, as I understand it -- and this
19 is a matter of law, which I would prefer not to get into, but
20 I understand there's something in the statute which the State
21 suggested might limit it to a shorter time period, around Mr.
22 Robinson's sentencing date. This is a matter of law.
23 Everything I've said on that topic is a lay-opinion.

24 Q. Sure; and -- and I'm not trying to get you to offer
25 us a legal opinion. For the analysis that you did, that

1 covered the entire time range of the study, correct?

2 A. [Nodding head in the affirmative.]

3 Q. Okay. So, you used the data that they provided you
4 from 1990 to 2010?

5 A. That's right.

6 Q. That was the underlying data for the slides that
7 showed the unadjusted and the adjusted odds ratio smoothing
8 process for the statewide and Cumberland County models,
9 right?

10 A. That was a proof -- at that time, it was a proof of
11 concept that this could be done ----

12 Q. And ----

13 A. ---- so that it was possible to have a focused
14 estimate at a given point in time ----

15 Q. Sure.

16 A. ---- and, yet, not give up the informative power of
17 the entire dataset.

18 Q. And what do you mean by proof of concept?

19 A. Proof of concept means to demonstrate that
20 something in principle is possible, but the details need to
21 be refined. The particular detail that I didn't refine at
22 the time of the previous hearing was adjusting for the 12 or
23 so explanatory factors ----

24 Q. Okay.

25 A. ---- non-racial factors.

1 Q. So, when you say proof of concept, that was sort of
2 a rough draft and now it's been updated and you've
3 incorporated the modeling ----

4 A. If you like, yeah.

5 Q. Is that fair?

6 A. Yes.

7 Q. Okay. Now, on the -- was there anything else in
8 the critique other than the imputation issues and the
9 construction of these confidence intervals over time through
10 the odds ratios that you did?

11 A. Well, if you will, hand me up a copy of my report.
12 I'll be glad to go through it with you.

13 MR. PERRY: Sure. May I approach,
14 Your Honor?

15 THE COURT: Yes, sir.

16 MR. PERRY: Madam Clerk, I want to
17 make sure I'm correct. Are we on number 12?

18 MADAM CLERK: Yes.

19 MR. PERRY: And, Your Honor, if you'll
20 give me one second, I'll hand up a copy to you. I think the
21 defense has a copy already.

22 THE COURT: Okay.

23 MS. STUBBS: We don't have a copy.

24 [Counsel conferred.]

25 MR. PERRY: May I approach, Your

1 Honor?

2 THE COURT: Yes, sir.

3 [Pause.]

4 THE COURT: Thank you, sir [retrieving
5 the exhibit from Mr. Perry].

6 MR. PERRY: Yes, sir. Those are just
7 copies.

8 Q. Doctor Woodworth, I'm going to hand you what I've
9 marked for identification purposes as State's Exhibits 12 and
10 13 [handing the exhibits to the witness]. Take a moment to
11 look at those. Can you tell me what State's Exhibit Number
12 12 is?

13 A. Number 12 is the report I submitted dated December
14 30th.

15 Q. And State's Exhibit Number 13?

16 A. Is a revision of that dated January the 29th.

17 Q. And those reports, that was the basis -- in fact,
18 that's where some of the material in Defendant's Exhibit
19 Number 10 -- in other words, the PowerPoint slides -- that's
20 where some of that material directly came from, correct?

21 A. Yes, sir.

22 Q. And, in your report -- and what I'll do is I'll
23 refer to State's Exhibit Number 13. That's the January 29th
24 report.

25 A. Yes, sir.

1 Q. In that report, that's where you address some of
2 the issues that -- that we've just talked about, the multiple
3 imputation -- in other words, how you dealt with the -- the
4 issue of missing information?

5 A. No. That's present in the December 30th as well.

6 Q. Right.

7 A. The -- the -- if you're asking me what's the
8 difference, it's that, in -- December 30th, I just had a
9 senior moment and left very young out of the model, so I
10 reran it.

11 Q. So, the only difference between 12 and 13 -- in
12 other words, the revision -- was just the inclusion of that
13 additional variable because it was left out, correct?

14 A. No. The revision also involves responding to an
15 analysis in Doctor Katz' -- no. That's not in here either,
16 is it? This is just -- that's -- that's the revision.
17 That's right.

18 Q. Okay. So, just -- so we're on the same page, the
19 -- the revision incorporated the variable very young that had
20 been left out previously?

21 A. I believe that's the only revision. If you'll give
22 me just a moment, I'll check all of the other ----

23 Q. Sure.

24 A. ---- figures just to verify.

25 [Pause.]

1 A. I believe that is the only change.

2 Q. Okay; and, again, that was an update. As far as
3 the -- the problems you tried to tackle, the reports are the
4 same?

5 A. Yes.

6 Q. As far as the big picture stuff, they were the same
7 -- the same report?

8 A. Yup.

9 Q. Okay; and, if I can, let me -- let me go back,
10 because I do want to ask you another question about the
11 sampling process. When you said earlier that the sample was
12 perfect ----

13 A. I didn't say the sample was perfect. I said the
14 sampling was perfect. Sampling is a verb.

15 Q. A process?

16 A. Yes.

17 Q. Okay. So, the reason that was well done -- what
18 made that a properly done sampling?

19 A. A complete sampling frame.

20 Q. And what do you mean by that?

21 A. Sampling frame is a list of the population to be
22 sampled from. Second was the use of random digits to sort
23 the data into the order in which the sample will be drawn.

24 Q. So, in other words, to put it into the context of
25 this particular study, the 173 proceedings that were -- that

1 was the population, correct?

2 A. Yup.

3 Q. Those were identified numbers 1 through 73, and
4 then a sample was made ----

5 A. No. You ----

6 Q. ---- those 173 numbers?

7 A. No. No. The venire members numbering some 7,000
8 plus were numbered, and their numbers comprised the -- the
9 number assigned to the case and a number assigned to the
10 venire member. So, if the case number was 23, then the
11 venire numbers would be numbered -- venire members would be
12 number 23.001, .002 and so on. That's the sampling frame,
13 7,000 or so names of venire members.

14 Q. Okay. Did you actually do that, or you just --
15 they did it and you reviewed it; is that correct?

16 A. Professor O'Brien is perfectly competent to do that
17 kind of -- she did it with the randomization capabilities of
18 SPSS.

19 Q. You didn't replicate her or anything like that; you
20 just looked at what she did and the process was good?

21 A. Can't replicate a randomization. By its very
22 nature, it's going to be different every time.

23 Q. Right. All right; and, let me ask you another
24 couple of questions here -- because you also offered an
25 opinion about the robustness of -- of the way they modeled?

1 A. Yes.

2 Q. And your opinion was that it was a very robust
3 model? In other words, they used good approaches?

4 A. That -- those two words are -- are not the same.
5 Good and robust are not the same. Good means -- and I don't
6 think good is a term that would be used here. It would be
7 appropriate or well specified. The word robustness means
8 simply that it is -- that various different approaches to the
9 analysis give substantially the same results. In other
10 words, it's not sensitive to methodology. There's another
11 meaning of robustness, and that is that it's not sensitive to
12 changing a small amount of data, if you dropped a few cases
13 or change the data in a few cases. An analysis is robust if
14 that doesn't change the principal findings.

15 Q. Okay; and, so that -- in the way you just described
16 it, that's sort of a sensitivity analysis?

17 A. Yeah.

18 Q. Okay.

19 A. The -- the terms are -- have a wide area of
20 overlap, yeah.

21 Q. Okay; and, I want to make sure I understand the --
22 the multiple imputation approach -- I think, when you were
23 going through the description of how that worked, going back
24 to the slides, there was a diagram or what was labeled a
25 flowchart, this multiple imputation flowchart ----

1 A. [Nodding head in the affirmative.]

2 Q. I think, when you were discussing it, you said
3 average is a good enough word to use here. I mean, as far as
4 the way ----

5 A. Well, it's going to be the average of the betas not
6 the average of the odds ratios.

7 Q. And can you tell us specifically what that means,
8 again, just in sort of plain English?

9 A. Can you get that slide back up for logistic
10 regression.

11 [Pause.]

12 A. Or, if you can just show me that ----

13 THE WITNESS: Your Honor, could I borrow
14 the report back?

15 THE COURT: Are we talking ----

16 [The projector was started, showing the flowcharts.]

17 THE WITNESS: Back -- go back, back,
18 back, back.

19 THE COURT: There it is.

20 THE WITNESS: Forward, whatever, the one
21 just before this. That one. No. That one was good.

22 MS. STUBBS: You want the ----

23 THE WITNESS: I want the one with the
24 betas on it.

25 [Pause.]

1 THE WITNESS: This is going to look
2 interesting on the record.

3 [Pause.]

4 THE WITNESS: See where it -- see where
5 it says estimate?

6 MR. PERRY: Okay.

7 THE WITNESS: That's the logarithm of
8 the odds ratio.

9 MR. PERRY: Okay.

10 THE WITNESS: And those are the things
11 that have a normal distribution, so they can be averaged.

12 MR. PERRY: Okay.

13 THE WITNESS: The odds ratios have a log
14 normal distribution which is highly skewed and averaging is
15 not appropriate for them.

16 Q. All right. I just want to make sure I heard you --
17 heard you. I didn't want to mischaracterize. All right.

18 Now, going back to the report that was issued -- or, written
19 -- I'm sorry -- and updated, the purpose of the report ----

20 THE COURT: I'm sorry. Are we talking
21 about number 12, number 13 or both?

22 MR. PERRY: Number 13, Your Honor.

23 THE COURT: Thank you, sir.

24 MR. PERRY: And I'll just -- I'll
25 refer to it as the revised report if I forget to say the

1 specific number.

2 THE COURT: Yes, sir.

3 Q. For the revised report, was that -- you said, I
4 think, something -- you just left out the variable; it wasn't
5 that ----

6 A. It was just a pure senior moment. I just ----

7 Q. Okay.

8 A. I just overlooked it.

9 Q. Sure. Sure; and, going to the odds ratios
10 themselves, I believe you described the -- the purpose of
11 doing these odds ratios is what? When you're looking at this
12 smoothing, what is the purpose of doing a smoothing? What's
13 done?

14 A. Oh, to -- the purpose of smoothing is to get an
15 estimate specific to a -- one date -- okay -- and still use,
16 as much as we can, the entire dataset; but, by the nature of
17 the process, it doesn't rely equally on all of the cases in
18 the analysis. Since it's trying to produce the most valid
19 estimate at a given point in time, it's going to pay the most
20 attention to nearby in time cases.

21 Q. Mmm-hmm [nodding head in the affirmative].

22 A. So, the purpose of the smoothing -- the primary
23 purpose is to give you a point est -- an estimate that's
24 specific to a case, to the time at which a case was
25 sentenced.

1 Q. If -- if -- if I said is that somewhat akin to a
2 moving average, would that be fair?

3 A. It's closely related to the moving average. If you
4 -- if you know what I mean by a win -- a moving window --
5 that influence diagram can be crudely interpreted as the
6 window that's sliding along to do the average.

7 Q. And what do you -- can you tell me a little bit
8 more about that? When -- when you describe it in that
9 fashion, what is that?

10 A. Well, the most -- the most popular smoothing method
11 that -- that was used and is still used in things like trends
12 in -- in the stock market is what's called the exponentially
13 weighted moving average; which means, at each time point,
14 your average time points may be 10 periods before and after;
15 but, you don't give them equal weight; and, a weighted
16 average is the sum of the weights times the observation ----

17 Q. Right.

18 A. ---- divided by the sum of the weights. So, in an
19 exponentially weighted average, the weights fall off
20 exponentially away from the time and focus; and, that's --
21 that's a very, very old technique; and, yes, this is like
22 that, but it's based on the conditional probability of the
23 odds ratios as a -- what's called a Gaussian process. The
24 Gaussian process model, where the odds ratios are not only
25 the time bearing series -- if you want -- if you want the

1 full nerd Monte on that, it's -- it's an integrated -- it --
2 it's a -- it's a doubly integrated white noise process, and
3 it is self-weighting. I don't have to tell it try to compute
4 the weight. It's self-weighting.

5 Q. Okay.

6 A. So, there's only one decision that has to be made,
7 and that's what's called the smoothness parameter.
8 Everything else is automatic.

9 Q. And -- and let me ask you about that. When you're
10 -- when you're saying there's one decision to be made that
11 involves the smoothest parameter, what do you mean by that?

12 A. I -- I express a range -- plausible range of values
13 for the smoothness, and the smoothness is how fast the series
14 changes. So, again, if you want the full nerd Monte, it's
15 the variance in the second derivative.

16 Q. Okay.

17 A. And, in -- in many cases, the data will tell you
18 what's the right smoothness; and, in this case, it did. I
19 ran it -- I ran it with several different distributions of
20 possible smoothness levels, and I got pretty much the same
21 results. They might change a little bit in terms of the
22 appearance of the graph, but it didn't change at all at
23 Marcus Robinson's point.

24 Q. And let me ask you about that. When you say the
25 data itself tells you, can you elaborate ----

1 A. Tell you how smooth it is.

2 Q. How does it do that? How does it translate the
3 data into some ----

4 A. It tells you that by the fact that -- that curves
5 of a certain smoothness have greater likelihood --
6 theoretical curves of greater smoothness -- of a given
7 smoothness have greater likelihood of accounting for the data
8 than curves that -- that are either rougher or smooth.

9 Q. So, that's something that is generated not
10 something that's -- that's chosen by the person looking at
11 [indiscernible], correct?

12 A. What did that refer to?

13 Q. The smoothing ----

14 A. Parameter?

15 Q. Right, the parameter.

16 A. In this case, yeah. It was -- we call it
17 identified -- whether it's -- a parameter's identified by the
18 data or not; and, this one was reasonably well identified by
19 the data.

20 Q. So, there weren't any issues with -- with it being
21 identified in this -- in this analysis that you did?

22 A. You know, out on the periphery, where we had sparse
23 data, a curve would -- is more uncertain, and you can see
24 that by the width of the standard error bars.

25 Q. As the confidence intervals, is that ----

1 A. Yeah. The confidence intervals, 2 sigma. So --
2 but, when you get into the interior, where the data is dense,
3 then it just doesn't matter. At the Marcus Robinson date,
4 all kinds of degrees of smoothness produce pretty much the
5 same answer.

6 Q. Right. I mean, because there's more -- as you have
7 more observations, you have a more precise sort of estimate;
8 is that correct?

9 A. Because the observation -- when you have a dense
10 set of close-by observations, then there's pretty much a
11 consensus as to what the odds ratio was around that time
12 point.

13 Q. And if I could ----

14 A. When you're out in the periphery, where the data's
15 sparse, there's not a consensus.

16 Q. Right; and, I was going to ask you -- I don't know
17 if you can see this [holding up a document]. You probably
18 remember the one side that we went over -- and this is from
19 Defendant's Exhibit Number 10.

20 A. Yeah. Is that the raw -- unadjusted?

21 Q. Yeah. It was the Cumberland unadjusted odds ratio.
22 That was just where you were illustrating the impact of this
23 one sort of outlier.

24 A. No. I wasn't illustrating the impact of that at
25 all. In fact, you can see that it doesn't have a -- doesn't

1 have a substantial influence. The curve doesn't attempt to
2 follow that point because the error bars on that point are
3 basically zero to infinity. It's zero to 800 and something.

4 Q. So, the model actually does adjust for the fact
5 that there was something going on with that particular
6 observation?

7 A. It pays some attention to it, but it's not -- it's
8 not sucked into it; and, that's one of the reasons you
9 smooth. The smoothness is trying to balance fidelity to the
10 data and precision of the estimate. Now, that point -- at
11 that point, the estimate is like -- I think I said 66 with a
12 confidence interval of zero to virtually infinity. So, that
13 has no precision whatever.

14 Q. Okay; and, I think you said -- as you can see on
15 the graph here, if you put in the bar at the bottom with the
16 number of observations, as the observations drop off, your
17 interval expands?

18 A. If -- that's right. It's called a barcode plot.

19 Q. I'm sorry.

20 A. It's called a barcode plot, barcode plot.

21 Q. Barcode plot. Now, going to the Exhibit Number 13,
22 which would be the revised report from January the 29th ----

23 A. Yes, sir.

24 Q. ---- in your opinion, you said, overall, that what
25 you were looking at was the effect of missing information;

1 and, you analyzed that using this multiple imputation method
2 of analysis, correct?

3 A. I was looking at the -- the robustness of the
4 analysis to ----

5 THE COURT: Are you referring to
6 paragraph 1 as denominated on Number 13?

7 MR. PERRY: Yes, sir.

8 THE COURT: Okay.

9 A. Paragraph 1?

10 Q. Yes, sir.

11 THE COURT: Yes, sir.

12 [Pause.]

13 Q. So, in other words, your opinion was this was not
14 substantially [inaudible] -- without complete information?

15 A. Yeah.

16 Q. That was your ----

17 A. Yeah. That's my -- that's my story, and I'm going
18 to stick by it.

19 Q. And, in the second paragraph, second sentence --
20 well, actually, third sentence -- it says if data are missing
21 at random this technique will produce valid parameter
22 estimates. So, as part of your analysis, did you try to
23 assess whether or not there were any issues with data and its
24 random nature of being present or not present?

25 A. Yeah. I'm going to correct myself there. That is

1 a misstatement. It is if data are missing conditionally at
2 random. It's called MCA -- or, MCAR; and, that means not
3 that they're random across-the-board. That means that, at --
4 given the known data, the missing data are missing at random.
5 So, if you could, look at a particular imputation -- might be
6 very young, impute it for a SingleDivorced -- a -- a -- a
7 SingleDivorced person who does not have DP_Reservations and
8 you need to impute whether or not that person is very young
9 -- we're saying that whether or not that data's missing for
10 that kind of person is random, not whether its random across-
11 the-board, but random for the kind of person with the
12 characteristics we know about that person.

13 Q. Okay.

14 A. I repeat, that's MC -- I'm sorry. That's M -- I'm
15 sorry. MCAR is missing completely at random. So, this would
16 be missing -- conditionally missing at random is the term
17 there.

18 Q. And ----

19 A. Conditional means given something.

20 Q. Right; and, I want to make sure I understand the
21 difference between conditionally missing at random and
22 missing ----

23 A. Missing at random says that if we looked at missing
24 -- missing completely at random, that's what MCAR means, by
25 the way -- is -- means that -- well, it -- it would mean

1 something like this -- somebody just took -- took a dart and
2 threw it at the data table and wiped out the places where the
3 dart had -- in other words, missing completely at random or
4 missing at random, as it's sometimes abbreviated, simply
5 means missing for reasons unrelated to the facts of a case.

6 Q. Okay.

7 A. Okay? Now, a missing -- conditionally missing at
8 random means the missing -- the part missing may depend upon
9 the facts of the case, but it depends upon them in the
10 following way: Very young is missing at random within -- for
11 a particular venire member, it's missing at random for the
12 people with the same facts, the same known facts as other
13 venire members.

14 THE COURT: Mr. Perry, we're going to

15 ----

16 Q. [Indiscernible.]

17 THE COURT: I apologize.

18 MR. PERRY: Yes, sir.

19 THE COURT: We're going to stop at
20 this point. Folks, ordinarily, we take a recess until 2:30.
21 I don't know whatever any travel plans might be involved for
22 the witness ----

23 THE WITNESS: I'm good, Your Honor.

24 THE COURT: You're good. Okay. 2:30,
25 okay. We'll take the usual recess, then. Thank you, folks.

February 01, 2012

1 Thank you, sir. You may step down.

2 [The hearing recessed at 1:00 p.m. and reconvened at 2:29
3 p.m., February 1, 2012, with all pertinent parties present
4 prior to the recess once again present, to include the
5 defendant.]

6 THE COURT: Okay. Let the record
7 reflect all counsel are present. The defendant is present.
8 Folks, before we go forward, let me back up, if I may, and
9 address the issue that was raised earlier today by counsel
10 for the State regarding ----

11 MADAM COURT REPORTER: Microphone.

12 THE COURT: Pardon me. Regarding ----
13 [Mr. Colyer stood.]

14 THE COURT: Yes, sir.

15 MR. COLYER: Would you prefer to do
16 that after Doctor Woodworth is finished, because we may have
17 a couple of other matters to talk about. It might be ----

18 THE COURT: I'll be glad to do that.
19 We can hold off. I simply wanted to alert you folks at this
20 point that I've got some case law that bears on the issue as
21 -- and I want to deal with it as expeditiously as possible,
22 but I understand Doctor Woodworth has travel arrangements and
23 we've got a couple of other issues we can probably deal with,
24 so I don't mind holding off.

25 MR. COLYER: We've been talking a

February 01, 2012

1 little bit. We've -- we've got some other things to talk
2 about, but ----

3 THE COURT: Okay.

4 MR. COLYER: Let's just wait ----

5 THE COURT: That -- that's absolutely
6 okay.

7 MR. COLYER: Yes, sir.

8 THE COURT: All right. You ready to
9 go forward, ma'am?

10 MS. STUBBS: Yes. I believe it's the
11 State's witness ----

12 MR. COLYER: Mr. Perry's still on
13 cross, Your Honor.

14 THE COURT: I -- I apologize. Mr.
15 Perry.

16 MR. PERRY: We kind of lost where we
17 were, Judge.

18 THE COURT: Well, I stay in a state of
19 per -- perpetual confusion.

20 [General laughter.]

21 THE COURT: You can ask many folks in
22 the courthouse. Go ahead.

23 MR. PERRY: Thank you, Your Honor.

24 **CROSS-EXAMINATION continued conducted by MR. JONATHAN PERRY:**

25 Q. And, on that note, Doctor Woodworth, I want to make

February 01, 2012

1 sure that I -- I'm understanding. Some of what we talked
2 about earlier was to what extent variables impact logistic
3 regression models when you run it; and, let me tell you a
4 little bit more about what I'm talking about. Let me ask you
5 a question. What's the effect of -- if you have no variables
6 that have any explanatory power -- in other words, they don't
7 predict anything in what you're interested in looking at --
8 if you run the logistic regression model, what happens? What
9 does that do? What's the result?

10 A. Your premise was if you have variables that don't
11 have any explanatory -- define how?

12 Q. If you had 10 variables, for some reason, that you
13 put into the model with data; you didn't have any missing
14 information issues; you just had variables that didn't
15 explain anything ----

16 A. Are you talking about actually have no effect on
17 prosecutors' strike decisions ----

18 Q. Well, I just ----

19 A. ---- or, do you mean don't work to predict in the
20 data we're looking at?

21 Q. Well, I just mean in general, like the -- in the
22 mechanics of how the logistic regression was run through the
23 computer program that you're using, whether it be SAS or
24 SPSS, what would the result look like, in other words?

25 A. If -- if a variable doesn't have any explanatory

1 power, then it will either not enter the regression or enter
2 with an insignificant p-value, i.e., a p-value substantially
3 bigger than a .05.

4 Q. Okay. So, I mean, one indicator that you have --
5 non-explanatory variables would be an extremely high p-value?

6 A. There are two reasons for a p-value like that. One
7 of them is you've got a variable that is highly collinear of
8 another; which means that both variables are highly
9 correlated and they both have some explanatory power. If you
10 put them both in the model, then they will both be
11 significant, and they will both have very large standard
12 errors. So, there are two reasons for having a small p-
13 value. One is no explanatory power, and the other is
14 competing with another variable because they both overlap in
15 the area they cover.

16 Q. So, in sort of plain terms, the information is sort
17 of -- sort of masked individually because they're overlapping
18 in terms of the information they provide?

19 A. Yes.

20 Q. Okay. Now, on the other end of that -- and -- and
21 let me ask you this way. Hypothetically speaking -- 'cause I
22 -- I want to make sure we're on the same page. If you had a
23 situation in which you had job applicants who were applying
24 for a job -- so that would be a binary outcome, whether or
25 not they got hired. So, hired yes, hired no. Okay. So,

1 that would be the same sort of setup in terms of what we're
2 looking at in this study, at least so far as what we're
3 looking at is a -- a binary outcome. So, in that case,
4 logistic regression would be the appropriate regression model
5 to use, correct?

6 A. [No response.]

7 Q. And I mean in general for a -- for a binary outcome
8 variable.

9 A. Some form of logistic regression would be
10 appropriate, yes.

11 Q. Okay. Now, if -- if the example were job
12 applicants applying for a job and it was a case in which
13 somebody -- an employer was hiring for an accountant --
14 you've done research on employment discrimination, correct?

15 A. Yes.

16 Q. All right. So, if -- if an accounting firm was
17 hiring for accountants and of a hundred applicants, 50 CPAs
18 applied for 50 positions and 50 CPAs end up getting hired for
19 those 50 positions, what would the logistic regression model
20 do in that case? In other words, how would it decipher the
21 information provided in that sort of simple scenario?

22 A. Fifty applicants and they're all hired, there's no
23 way to determine what the reasons for the hire were.

24 Q. Okay. What -- what would the model do? That's
25 what I'm asking. In other words, how would -- how would the

1 running of the model indicate to you that there was a
2 problem?

3 A. The model -- there's no problem there. The model
4 would tell you what's happening in the data; and, what's
5 happening in the data is a hundred percent of applicants are
6 hired. It is impossible in principle to determine why they
7 were hired.

8 Q. Okay. Well -- and maybe I should clarify my
9 scenario. So, if the 50 applicants were CPAs, for example
10 ----

11 A. Yeah.

12 Q. ---- and 50 weren't and 50 that were hired ----

13 A. So, you have 100 applicants?

14 Q. Right. I'm sorry. A hundred applicants.

15 A. If 50 were CPAs, the other 50 were not and the CPAs
16 got hired ----

17 Q. Yes.

18 A. It'll pick up CPA as the reason for the hiring.

19 Q. And that -- in that scenario, would the presence --
20 or, would the variable CPA be a perfect predictive variable
21 in that case?

22 A. Yes.

23 Q. Now, how would the model translate the presence of
24 a perfectly predictive variable in terms of -- of what it
25 could tell you about what was going on?

1 A. Well, it would -- it produces a singularity in the
2 inverse of the covariant of the -- of the [indiscernible] for
3 estimating the data of that, so the betas will be
4 undetermined in that case.

5 Q. So, you would have matrix invertability [phonetic]
6 issues, correct?

7 A. Exactly.

8 Q. Okay. So, in that case, the model really has
9 problems -- and we're talking mathematically -- you can't
10 invert the matrix, so you can't make the regression run?

11 A. Let -- let's put it in lay-terms.

12 Q. Sure.

13 A. You -- you have a variable that perfectly predicts
14 the hires ----

15 Q. And part of the reason I'm asking you about this, I
16 want to make sure I understand -- is that an example of the
17 convergence or non-convergence issue that we were sort of
18 talking about this morning?

19 A. That's one way that you can get that kind of -- of
20 a behavior, yeah.

21 Q. Okay. Is another way to talk about that -- that
22 phenomena, again, in our hypothetical scenario, over-fitting
23 in terms of what the variable does?

24 A. Well, that's not over-fitting because, in your
25 hypothetical, the evidence is overwhelming, but ----

1 Q. What -- and, just so everybody's clear, what does
2 over-fitting mean in the context of what -- of the real model
3 that we're talking about here?

4 A. Exploiting, chance, co-occurrences. That's too big
5 to be a coincidence.

6 Q. Okay. So, in other words, that fact, that it
7 perfectly predicts what's going on, is just -- the fact that
8 it's perfect means that, by definition, it can't be
9 attributable to chances; is that fair?

10 A. No. That's not fair.

11 Q. Okay. Why not?

12 A. That -- the analysis just is describing what
13 happened in this particular case. It has a low probability,
14 but not a zero probability for change. So, yeah, you're
15 right. P-value would be very small.

16 Q. Okay; and -- so, I guess, to be fair, that's more
17 of an explanatory approach to -- to figuring out what's going
18 on in our little, hypothetical scenario?

19 A. Yes.

20 Q. Is the -- is there a way that you can deal with
21 that, if you have a scenario like that? If you had a
22 modeling like that, what would your approach be? I shouldn't
23 say model. I should say if you had a situation like that,
24 how would you approach that problem?

25 A. I would simply describe what had happened.

1 Q. Would it be something where transforming the binary
2 variable into some kind of multi-categorical variable would
3 help or hurt; or, would that make any difference?

4 A. Give me an example.

5 Q. Instead of CPA, if you had a CPA with a lot of
6 experience, a CPA with a little bit of experience, so you had
7 some subcategories of CPA?

8 A. Well, not in your hypothetical, which is something
9 I've never seen in 30 years or more experience; but, in your
10 hypothetical, no, it wouldn't make any difference.

11 Q. And why is that?

12 A. CPA -- every one of those subcategories is also a
13 variable.

14 Q. So, just because it's -- it's a subset of the CPA
15 designation, it wouldn't make any difference in terms of the
16 model and its explanatory [indiscernible] ----

17 A. So, you're suggesting breaking that into three
18 dummy variables and entering them separately?

19 Q. Sure.

20 MS. STUBBS: Your Honor, I apologize
21 for the interruption. With the blower, we can't hear Doctor
22 Woodworth.

23 Doctor Woodworth, could you speak a little
24 more into the microphone?

25 THE WITNESS: Oh, I'm -- I'm sorry.

1 Sorry.

2 MR. JAMES FERGUSON: Thank you, Your
3 Honor.

4 THE WITNESS: Excuse me.

5 A. Well, let's think of it this -- that's not the way
6 I'd do it. If I wanted to look for other explanations, I
7 would put experience separately.

8 Q. Code that as a completely separate variable?

9 A. Yeah.

10 Q. And I shouldn't say code, but you would include a
11 completely separate variable?

12 A. Sure.

13 Q. Would that -- and it would that do anything one way
14 or the other to the model as far as its results, adding an
15 additional variable to somehow create subcategories or create
16 more variables with -- with different explanatory ----

17 A. Oh, not in your hypothetical, but your hypothetical
18 is so unrealistic that I have trouble thinking about it.

19 Q. Sure. Well, that's -- I like hypotheticals 'cause,
20 that way, I can understand, sort of, what we're talking
21 about; but, you said, in your research, you had not seen some
22 -- you had not seen -- what aspect of that ----

23 A. In my practice.

24 Q. In your practice. So -- and -- and, most things,
25 in the real world, are not set up to be that -- that way. In

1 other words, there are not many situations in which variables
2 are perfectly explanatory? Is that what you're saying?

3 A. Yes.

4 Q. I just want to make sure I understand which part
5 you had never seen in your 30 years of practice; but, that --
6 that's what you're referring to, correct?

7 A. [Nodding head in the affirmative.]

8 Q. Now, let me back up and -- just one of the things
9 from the earlier testimony -- when we talked about the random
10 sample, I believe you said that we couldn't replicate it. In
11 other words, there -- there wasn't a way to replicate the --
12 the random sample for the potential juror -- potential jury
13 members.

14 A. I didn't -- wait.

15 Q. Well, let me ask you like this. Is there a way to
16 replicate random samples?

17 A. Of course. Somebody else could have done the
18 study.

19 Q. Okay. Is there a way to ----

20 A. But there's no way to regenerate the random sample.

21 Q. Sure; and, I don't want to quip about -- of course,
22 by definition, you can't replicate a random sample ----

23 A. Mmm-hmm [nodding head in the affirmative].

24 Q. ---- correct?

25 A. That's right.

1 Q. Is there a way to audit a random sample that has
2 been generated or to follow the tracks of a random sample
3 that's been generated?

4 A. You're going to have to explain what you're talking
5 about.

6 Q. Just, in your work, have you ever provided somebody
7 else with evidence of how you generated your random samples,
8 in some of your other work?

9 A. The only -- you -- well, yes, of course.

10 Q. How did you ----

11 A. You provide them with a code that generated the
12 sampling, and the seed is a random number generator.

13 Q. All right. So, there's some kind of key that you
14 can give them that'll let them see exactly how your random
15 sample is generated?

16 A. Of course.

17 Q. Okay. I mean, is that something that is usually
18 done when you're providing your results from data analyses to
19 other researchers, in terms of replicating?

20 A. No.

21 Q. No.

22 A. The only time I'm required to do it is in a
23 clinical trial.

24 Q. And why is that?

25 A. Why is that?

1 Q. Yes, sir.

2 A. To verify that randomization was done. They're a
3 lot stricter in clinical trials.

4 Q. So, that goes to the -- I think we talked earlier
5 about the transparency ----

6 A. Yeah.

7 Q. ---- as far as what you're actually doing, that's
8 why it's important for clinical trials?

9 A. I'm sorry. I'm not quite following this line of
10 questioning. Are you suggesting that the fact that a seed
11 was not produce is somehow not being transparent?

12 Q. No. I'm asking if that's ----

13 A. [Speaking over Mr. Perry] -- randomly seeded the
14 random number generator.

15 Q. Right. That's what I'm asking, if that's why they
16 require it in clinical trials. In other words, for clinical
17 trials, transparency is important so they require the
18 provision of that seed that's used to generate your random
19 sample.

20 A. I don't think it's really -- has any bearing on the
21 -- the probative value of the clinical trial as long as you
22 provide the software. The seed is usually, as a matter of
23 courtesy, sent to the third-party, like Quintiles locally,
24 that packages the doses.

25 Q. Right. Again, just as a transparency insurance?

1 A. Transparency, the word never enters; it's a matter
2 of professional courtesy, if nothing else. I'm sending this
3 to statisticians who can look at my code and see that the
4 randomization was done properly.

5 Q. Oh, okay. Okay; and, let me move on. I -- again,
6 we've talked about sort of the process and some of the ways
7 you interpreted things. The -- the report -- and I'm
8 referring to State's Exhibit Number 13. That's the revised
9 report. If you look, the first table -- this is on page 2 of
10 State's Exhibit 13.

11 A. Page 2 of 13?

12 Q. Yes, sir. That table was done to -- to coincide or
13 rep -- or, show what was going on in table 12 in the jury
14 selection study; is that correct?

15 A. What do you mean by to show what was going on?

16 Q. Well, let me rephrase that. Where did the table on
17 page 2 come from?

18 A. The columns -- the one, two, three, four columns,
19 not counting the row stubs, are -- are table 12 of Professor
20 O'Brian's report.

21 Q. Okay. Now, was -- was this the table you actually
22 ran, or was that something that just came ----

23 A. I reran it.

24 Q. Okay; and, this was a revised report. So, the
25 rerunning incorporated the -- the left out ----

1 A. The very young.

2 Q. The very young variable?

3 A. Mmm-hmm [nodding head in the affirmative].

4 Q. Okay. Now, if you go to the original data and
5 multiply imputed data at the top of that table on page 2 ----

6 A. Yeah, the multiply imputed data, I'm looking at it.

7 Q. Yes, sir.

8 A. Now, you're talking about the previous report? Are
9 you talking about Exhibit 12 or 13?

10 Q. Exhibit 13. I will just stick with Exhibit 13.

11 A. Okay.

12 Q. Just to, I guess, sort of -- on the confusion.

13 A. Okeydoke [phonetic].

14 Q. For page 2 ----

15 A. Mmm-hmm [nodding head in the affirmative].

16 Q. ---- the N's, you've got 1122 for the original
17 data, and then 1746 for the imputed data.

18 A. Mmm-hmm [nodding head in the affirmative].

19 Q. That -- the different -- can you explain, just so
20 I'm clear, what -- the difference of where that additional
21 amount of information comes from when you go from the
22 original data to the imputed?

23 A. To the -- from the listwise deletion.

24 Q. Okay. So, the difference between the original data
25 is number of observations, 1122; and, the imputed data,

1 observations 700 -- or, 1746, that just shows that the N went
2 up by the number of observations you were able to impute the
3 data into; is that correct?

4 A. Yes.

5 Q. Okay. Now, if you go back to page 1, I just want
6 to make sure I'm clear. In the second section, first
7 paragraph, it says -- again, this is the -- this is the
8 analysis report in table 12 of the report as well as the
9 multiple imputation analysis. Doctor O'Brien's report did
10 not include the imputed data ----

11 A. Analysis.

12 Q. ---- to your knowledge, correct? Her -- her report
13 didn't include your impu -- imputations, correct?

14 A. Didn't include the imputed data analysis; is that
15 what you're asking?

16 Q. Yes, sir.

17 A. No, it did not.

18 Q. Okay. So, these -- these results from your report
19 are actually different from what is in Doctor O'Brien's
20 report, correct?

21 A. I'm sorry. What -- what differences did you
22 detect?

23 Q. No. I'm just asking. In other words, you did this
24 ----

25 A. Which part of this report are you stating is

1 different?

2 A. No. I'm asking if this table is different from
3 what Doctor O'Brien did in her report.

4 THE COURT: I'm sorry. Do you have a
5 copy of the report ----

6 THE WITNESS: May I see the original
7 report?

8 THE COURT: ---- that you're referring
9 to?

10 MR. PERRY: I would -- Defendant's
11 Exhibit Number 6 is still up there, but that's -- that's what
12 I was referring to.

13 THE COURT: Okay.

14 MR. PERRY: It might be in front of
15 Doctor Woodworth. May I approach?

16 [Pause.]

17 THE WITNESS: I don't see it on the
18 table there.

19 [Pause.]

20 THE COURT: If you will, point to what
21 it is you're referring to ----

22 MR. PERRY: Sure.

23 THE COURT: ---- for the benefit of
24 the witness, Mr. Perry.

25 MR. PERRY: And, now, here's the other

1 copy.

2 THE COURT: Okay.

3 THE WITNESS: Thank you, Your Honor.

4 THE COURT: Yes, sir.

5 Q. And, Doctor Woodworth, if I may, I'll -- I'll show
6 you where I'm looking here.

7 [Pause.]

8 Q. If I can find it. She's got a table 12 in her
9 report.

10 A. Mmm-hmm [nodding head in the affirmative]. Yes,
11 sir. All right.

12 Q. Now, is the table 12 that she's got in her report
13 -- that -- that reflects -- or, that does not reflect the
14 imputed data that you ran your analysis with, correct?

15 A. Give me a moment, please.

16 Q. Sure.

17 [Pause.]

18 A. All right. I understand you to ask me is are my --
19 is my report different from hers; and, the answer has two
20 parts. First, my calculation on the -- on the right, where
21 it says original data, is identical to hers in table 12.

22 Q. Okay.

23 A. So, to that extent, we got exactly the same
24 results. So ----

25 Q. Okay; and, that's what I wanted to be clear about.

February 01, 2012

1 So, that first -- that first column right there with original
2 data, that is a -- a cut and paste of her table 12, correct?

3 A. No, sir. It's a -- rerun originally by me with a
4 difference software.

5 Q. I'm sorry. Can you repeat that? You reran ----

6 A. I reran it with my own software, with SAS rather
7 than SPSS.

8 Q. Okay. Are the results the same?

9 A. As far as I can tell, they're the same to as many
10 decimal places -- are recorded.

11 Q. Okay.

12 A. Hers are rounded to 3, and mine are rounded to 4.

13 So ----

14 Q. But it looks like the -- the coefficients and the
15 estimates and the standard errors, p-values, all that looks
16 the same?

17 A. Does to me.

18 Q. Okay. So, you got consistent results with her --
19 her table 12 analysis?

20 A. Yes. That's -- that's indeed correct 'cause we
21 used the same data ----

22 Q. Okay.

23 A. -- and the same procedure.

24 Q. All right. Now, the first page of your report, on
25 the second section, first paragraph, last sentence, has a --

1 has a number of 11 -- 1153 venire members?

2 A. Yeah. I -- that in fact is clearly a typographical
3 error, as you said -- although, I didn't cut-and-paste the
4 computer output. I did reread the rest of the report; and,
5 I apologize for not correcting those figures.

6 Q. Okay.

7 A. They should reflect the N's at the top of page 2.

8 Q. Okay. So -- and that's why I wanted to be sure I
9 was understanding. So, the -- the original data, that's what
10 you ran, and that was with the N of 1122, so that the N of
11 1153 is just a typo on the first page?

12 A. Yes. If I could just put this -- get this
13 [indiscernible] -- and the State's Exhibit 13, paragraph
14 number 2, the number 1153 should be 1122; and, the number
15 1752 should be 1746.

16 Q. Okay. All right; but, again, the difference
17 between the 1122 and 1746 were just those imputed -- imputed
18 observations -- or, the imputed information that went towards
19 those observations?

20 A. Yes.

21 Q. Okay. All right. Okay; and, the -- the purpose of
22 this -- and, when I say this, I'm referring in State's
23 Exhibit Number 13, to figure 3.1. The purpose of that
24 analysis, that -- that's to get a confidence interval with an
25 odds ratio at the time of the defendant's sentencing; that's

1 -- is that correct?

2 A. Yes.

3 Q. Okay; and, again, the difference between the
4 unadjusted and adjusted is just the presence and absence of
5 the control variables?

6 A. Yes.

7 Q. Okay. All right. So, the unadjusted, that's just
8 the simple odds ratios, no controls whatsoever?

9 A. Yes.

10 Q. All right; and, if I can get you to look to the
11 next page; that would be page 5, 3.2?

12 A. Yes, sir.

13 Q. So, the adjusted odds ratio -- and I think you may
14 have mentioned this, but there's a point estimate there for
15 Marcus Robinson, correct?

16 A. It's the intersection between the solid curve and
17 the vertical line which is actually red in the original.

18 Q. Okay; and, on those slides earlier, those were --
19 that was marked in a vertical bar in red, correct -- from
20 this morning?

21 A. Correct.

22 Q. Okay.

23 A. And I see, on page 4, I have read off that value.
24 I read it as 2.9.

25 Q. Okay; and, again, that's the point estimate of the

1 odds ratio for Marcus Robinson at that point in time,
2 correct?

3 A. Yes, sir.

4 Q. All right. So, the -- the table where you ran your
5 data, in table 2.1, the left side, where you used the
6 original data ----

7 A. Yes.

8 Q. ---- that included the variables that were in the
9 jury selection report, correct?

10 A. Yes.

11 Q. All right; and, I think -- I think I asked you
12 before lunch; but, you did this analysis after -- after the
13 report done by Professor O'Brien? Do you recall when you
14 actually ran the analysis?

15 A. These analyses?

16 Q. Yes, sir.

17 A. I ran them all in December.

18 Q. In December?

19 A. Mmm-hmm [nodding head in the affirmative].

20 Q. And the confusion was -- and this is going back to
21 the first page ----

22 A. Yes, sir.

23 Q. ---- that there was a disparity between strike
24 rates of black and non-black venire members, correct?

25 A. Yes.

1 Q. And, I think -- and your conclusion was -- another
2 observation was that was somewhat understated in your
3 opinion?

4 [Pause.]

5 THE COURT: Can you point to what
6 you're referring to on page 1?

7 MR. PERRY: Yes, sir. The last
8 sentence, Your Honor.

9 THE COURT: Paragraph 1, 2?

10 MR. PERRY: Paragraph -- or, section
11 2, paragraph 3, which is the last sentence.

12 THE COURT: Okay.

13 A. Yes. You're asking me [indiscernible] that
14 statement?

15 Q. Yes, sir. I just want to make it clear. In other
16 words, when you say the standard analysis ----

17 A. I'm referring to table 12.

18 Q. To table 12?

19 A. I should have said the constant odds ratio ----

20 Q. Okay.

21 A. ---- analysis.

22 Q. Okay. Now, in terms of performing this analysis,
23 did you provide copies of programs and the SAS outputs and
24 the coding logs and that sort of thing to the State?

25 A. Yes. That was produced also on December the 30th.

February 01, 2012

1 Q. Okay.

2 MR. PERRY: May I approach, Your
3 Honor?

4 THE COURT: Yes, sir.

5 [Pause.]

6 MR. PERRY: May I approach, Judge?

7 THE COURT: Yes, sir.

8 [Pause.]

9 MR. PERRY: [Handing document to the
10 Court.]

11 THE COURT: Thank you, sir.

12 MR. PERRY: Yes, sir.

13 Q. Professor Woodworth, I've got them paper clipped
14 together; but, I'm going to hand you what I marked for
15 identification purposes [handing the exhibits to the witness]

16 ----

17 A. Thank you, Mr. Perry.

18 Q. Yes, sir -- as State's Exhibits 14, 15 and 16. You
19 -- and I'll give you a minute. If you can, just look at
20 those.

21 A. [Nodding head in the affirmative.]

22 [Pause.]

23 A. Mmm-hmm [nodding head in the affirmative].

24 Q. All right. Now, Doctor Woodworth, if you could --
25 and let me get you to start with State's Exhibit Number 14.

1 Can you tell the Court just in general what that is?

2 A. This is setting up the -- the difficult thing of
3 this smoothing analysis is that I had to use the combined
4 effects. It's called a LOGIT, the combined effect of the
5 non-racial factors; and, as I look at this today, I see that
6 I left out the least significant variables in the regression
7 to make it -- to make it simpler; and, the method that I used
8 was to compute the probability of being struck for a non --
9 non-black venire member using -- in two different
10 [indiscernible]. One is if all of the information is
11 available, and the other one is if only part of the
12 information is available; anyways, the difference between
13 postcollege and not.

14 Q. And let me ask you, just in general, the State's
15 Exhibit Number 14, is that the SAS coding log that you
16 generated -- just in general ----

17 A. It's either the log or the program listing.

18 Q. And, then, State's Exhibit Number 15 -- and I
19 should be more specific. Is State's Exhibit Number 14 the
20 SAS coding log for the statewide model -- and I should say
21 program actually.

22 A. You can see that, from the lack of the -- if it
23 were on the Cumberland data, I would have read it from a
24 different data file.

25 Q. Right. So, this is the statewide?

1 A. Yes.

2 Q. And just -- I know it's kind of hard to see. It's
3 not -- it's not anything written or printed very clearly;
4 but, right there, in the output, you can see -- it looks like
5 state E-L-I-G.

6 A. Yeah. That means the State eligible ----

7 Q. Okay. So, that ----

8 A. ---- of the -- of the 25 percent sample.

9 Q. Okay. So, that's the statewide model, and that's
10 the ----

11 A. Mmm-hmm [nodding head in the affirmative].

12 Q. ---- model that's -- that's in table 12, correct?

13 A. Yes, sir.

14 Q. Okay; and, you can see above that, sort of -- sort
15 of towards the top of the page there -- it says table 12, V-
16 A-R-S; and, that's the list of variables that were included;
17 is that correct?

18 A. In my analysis; and, you can see that those are the
19 non-racial variables; and, you can also see that I have
20 postcollege separately; and, you can also see that very young
21 is not included.

22 Q. Okay.

23 A. And that is to give me more observations to work
24 with.

25 Q. Okay. So, very young is not included in this --

1 this model that you ran ----

2 A. No.

3 Q. ---- at least on the SAS output, correct?

4 A. That was not involved in the time-varying analysis.

5 Q. Okay; and, just, while we're talking about the
6 exhibits themselves, Number 15, is that also the statewide
7 model?

8 A. You can tell from the -- if you see STATEELIG as
9 the dataset, that is the statewide 25 percent sample with the
10 individuals who are not state strike eligible removed.

11 Q. Okay. Is that -- is -- can -- do you call it a
12 log? Is that what you call that particular printout?

13 A. This is called the log, and this is -- I think this
14 is the code, the source code.

15 Q. Okay.

16 THE COURT: I'm sorry. That would be
17 14?

18 THE WITNESS: 14 is the source code --
19 it looks like it.

20 MR. PERRY: Okay.

21 THE WITNESS: And this is the log ----

22 MR. PERRY: Number 15 is the log?

23 THE WITNESS: ---- which keeps a record
24 of every command that was entered; and, Number 16 is the
25 output; and, that's called a list file.

1 Q. Okay; and, Number 16, that's the output for the --
2 again, the statewide model?

3 A. Yeah. That's the -- the listing of the output.

4 Q. Okay; and, the output, right there, at the top, in
5 the left-hand corner, again, that's just a list of the
6 variables that were included in the model that was -- that
7 was run, correct?

8 A. That's right.

9 Q. Okay. All right; and, I want to make sure that I'm
10 understanding correctly. When you did your analysis and did
11 the imputation, the imputation did include the very young
12 variable, correct?

13 A. That's right.

14 Q. Okay.

15 A. So, there is that small variation between these
16 analyses.

17 Q. Okay. So, in the SAS output that we're looking at,
18 very young is not included?

19 A. In the SAS analysis that we're looking at, I did
20 not include that variable.

21 Q. Okay. Now, for the very young variable, is it
22 possible -- or, can you impute the same way you did for
23 postcollege? I mean, is there anything -- is there any ----

24 A. I could have done it. This was -- I didn't think
25 -- I thought it had such a small contribution to the model

1 that I could -- I could do it this way and make my life a
2 little easier.

3 Q. Okay.

4 A. I can easily rerun it with that included.

5 Q. Okay. Well -- and -- and, when you were looking at
6 -- at what variables to impute, if you go back to State's
7 Exhibit Number 13, your report and your table 12, where
8 you've got N missing -- I think you identified earlier that
9 -- that very young had 79 missing observations; so, in other
10 words, there were 79 places where you could impute a value?

11 A. Yes. I wonder if I could just clarify a point here
12 in that I'm not using imputation in 14, 15 and 16.

13 Q. Okay. So, there -- there's no imputation in ----

14 A. No.

15 Q. Okay.

16 A. No. There is two different ways of computing the
17 predicted probability that a non-white will be struck.
18 That's pHatStk, down at the bottom of the first page of
19 Exhibit 14.

20 Q. All right. So, when you look at Defendant's
21 Exhibit Number 6, that would be the jury selection study from
22 December and the table 12 that we had looked at a second ago
23 ----

24 A. Yeah.

25 Q. ---- did your -- did your models that you ran --

1 did they include the variables that Professor O'Brien had in
2 her -- her final report? Is it the same variables?

3 A. It doesn't look like it. I think what I was doing
4 here was using one of my models. Let me just look at this
5 and refresh ----

6 Q. Sure.

7 A. ---- my memory.

8 [Pause.]

9 A. This has DP_Reservation, SingleDivorced, JAccused,
10 Hardship, Homemaker -- so far, they're all the same. Yeah,
11 the only -- the only difference here is very young.

12 Q. Okay. So, for -- in table 12, in the jury
13 selection report, they do have very young included; whereas,
14 you've got it excluded in the model you ran, correct?

15 A. That's correct, yes.

16 Q. Okay. So, if you go back to the report you give,
17 the Exhibit Number 13 -- State's Exhibit Number 13, if you
18 look at page 5, the statewide adjusted odds ratio in figure
19 3.2 ----

20 A. Yeah.

21 Q. ---- does that confidence interval -- that -- that
22 smoothing analysis that you did, is that based on your
23 running of the model, or is that based on the older data that
24 you had?

25 A. That's from the exhibits you just handed me, 14

1 ----

2 Q. Okay.

3 A. ---- 15 and 16. So, it does not -- it does not
4 include very young.

5 Q. Okay.

6 A. But I can easily run that.

7 Q. Okay; but, just to be clear, figure 3.2 is -- is
8 not the same model as what you collected in table 12 in the
9 O'Brien report? Isn't not based on the same underlying data?

10 A. It's based on the -- it's based on the cases that
11 have all of the variables listed on the first page of Exhibit
12 14. If you look at that first logit, about -- just below the
13 middle of the page ----

14 Q. Mmm-hmm [nodding head in the affirmative].

15 A. If you would just read down that list, it goes from
16 DP_Reservations to LeansState.

17 Q. Mmm-hmm [nodding head in the affirmative].

18 A. Okay? This model covers all the cases which have
19 all of those variables present. Now, we can probably get a
20 case count from the logistic regression output; and, that
21 would be in the output page; and, it says -- the first
22 regression -- and this is on the front page of State's
23 Exhibit 16.

24 Q. Mmm-hmm [nodding head in the affirmative].

25 A. It says the number of variables used was 1219 plus

1 530, which is 1749.

2 Q. Right.

3 A. So, that's essentially all of the sample.

4 Q. So, in -- what we're -- what we're looking at, in
5 State's Exhibit Number 16, in the output that you've got
6 there, is that you've got the 1749 observations in that
7 model, correct?

8 A. Correct.

9 Q. All right. So -- which is different from what's in
10 the table 2.1 in your report?

11 A. Yes. That's right. Those are not -- those are not
12 based on the same data.

13 Q. Okay.

14 A. Although, the -- the effect of black venire member
15 is pretty much the same in all of the analyses we run.

16 Q. Okay. If we go back to State's Exhibit Number 14
17 ----

18 A. Yes, sir.

19 Q. If I can direct your attention -- these pages
20 aren't numbered, but it's the next to the last page -- the
21 next to the last page. I know it's small, but if you can see
22 that. It's the next to the last page, towards the top. It
23 looks like there's some notation, PROC MCMC ----

24 A. Yes. That stands for Markov Chain Monte Carlo.

25 Q. Okay; and, that's what we have mentioned -- or,

1 I've asked you briefly about before lunch, correct?

2 A. Yes.

3 Q. Okay; and, if you look in that -- not really a
4 paragraph, but the second sort of paragraph, can you tell the
5 Court what those are? In other words, what is that -- what
6 does that text indicate? What does that show is happening in
7 the model?

8 A. Could you read me the first word in the line that
9 ----

10 Q. Sure.

11 A. ---- you're asking me about there?

12 Q. Prior ----

13 A. Prior ----

14 Q. ---- tau ----

15 A. ---- tau ----

16 Q. Correct?

17 A. Yes, sir. That is the smoothness parameter.

18 Q. Okay. So, are those the specifications of prior
19 distributions?

20 A. Yes, sir.

21 Q. Okay. Can you explain to the Court what an -- and
22 to me -- exactly what a -- specifying prior distributions
23 means?

24 A. It means -- this analysis is formally based --
25 meaning that it follows -- it uses base technology that -- it

1 is the equivalent -- I -- I -- it's the equivalent of what's
2 called penalized regression. The -- the only -- the only
3 penal -- it's like a penalized regression, or the smoothness
4 penalty; and, the -- the smoothness penalty in penalized
5 regression is sometimes called the ridge parameter; and
6 that's what gamma is. It serves that same -- well, it
7 controls the variance of the second derivative of the smooth
8 curve; and, I -- I set it at a certain level here, but I --
9 this is one of many runs. I tried different -- now, this is
10 -- yes. So, I'm putting some constraints on the ridge
11 parameter or the smoothness parameter.

12 Q. And, again, the smoothness parameter that we
13 briefly mentioned earlier today in the testimony before
14 lunch, Doctor; is that correct?

15 A. That's right.

16 Q. Okay. So, this is -- this is something -- when you
17 specify these prior distributions, that's necessary to do
18 Bayesian analysis?

19 A. Well, this is -- these -- that one is a -- sort of
20 a penalty function. It keeps the analysis smooth. The other
21 priors are -- are non-informative. They impose essentially
22 no restrictions on the parameters ----

23 Q. Okay.

24 A. ---- basically flat from minus to plus infinite.

25 Q. Okay. So, the specified distributions there --

1 right there, at the start, they actually do impose some --
2 some constraints?

3 A. That's -- that's where constraint is required.

4 Q. And, now -- and I think you said you selected them.
5 How did you select those particular ----

6 A. I selected a grid of them and got essentially the
7 same results.

8 Q. Okay; and ----

9 A. As I reported, one in the middle.

10 Q. Okay. Is that ----

11 A. Not too smooth, not too rough.

12 Q. Was that something that the program could generate,
13 or was that something you had to pick?

14 A. I go in there and -- and replace the parameters in
15 the prior distribution for tau, the smoothness parameter and
16 -- and rerun this whole thing.

17 Q. Okay. Is that part of what this notation is, where
18 you see a block that's got a lot of deltas with numbers ----

19 A. Well, no. That is ----

20 Q. ---- with coefficients?

21 A. The del -- the B's are the basis functions.

22 Q. Okay.

23 A. And the deltas are -- the deltas are the
24 coefficients of those basis functions. If you read my paper,
25 you'll discover that the deltas are IID after a certain

1 series of trans -- matrix transformations. So, I can give
2 them a common prior. This is equivalent -- in conventional
3 terms, this would be -- this would be equivalent to a -- a
4 variance components model. The deltas -- the deltas are
5 random parameters, and the B's are basis functions for the
6 curve.

7 Q. Okay. Now -- and, again, that -- that's not
8 something you -- you specify, correct? In other words, you
9 don't -- you don't exercise as much judgment ----

10 A. No. The ----

11 Q. ---- or, you don't exercise judgment like you do
12 with the prior distributions ----

13 A. The basis functions are agreeance [phonetic]
14 functions of a certain matrix; and, I did restrict it to --
15 enough to account for 99 percent of the -- of the total trace
16 of the -- of the variance matrix -- of the -- the wiggly --
17 the prior wiggly line.

18 Q. Okay; and, it's got -- you start with -- in the
19 code, delta 1 and it runs up to delta 33?

20 A. Yes, sir.

21 Q. Is there a particular reason why there's 33?

22 A. Well, I -- I think, if you probably look at where
23 I'm computing basis functions, you will see that I -- yeah.
24 If you look at -- well, I think, in this case, I just took
25 all of them; but, usually, if you look on page -- gosh --

1 sorry about not numbering these pages. One, two, three,
2 four. Look on page 4.

3 Q. Four, okay.

4 A. The selection of the numbered basis functions is --
5 where it says -- the line that says articles 33, about two-
6 thirds of the way down ----

7 Q. Okay.

8 A. That's -- that's where -- my usual criterion is
9 that, if the cumulative -- if -- well, CUMVAL is the
10 cumulative [indiscernible] values list -- the covariance
11 matrix, the prior distribution of the -- of the curve; and, I
12 -- as you can see, I was usually selecting enough basis
13 functions to account for 99.99 percent of the total variance.

14 Q. And you can see ----

15 A. Here -- here, I think I just told it to take all of
16 them -- is what I think I did there.

17 Q. Okay.

18 A. But I can go back and verify that.

19 Q. All right. All right; and -- and, going back to
20 the next to the last page, when we were looking at the prior
21 distributions ----

22 A. Yes, sir.

23 Q. You've got the -- at the very bottom of the page
24 here, you've got $\text{logit} = \gamma + \beta$, and then you've got
25 something that's written sr_2 , then there's an sr_3 , sr_4 .

1 A. Did you say you're on the last page?

2 Q. Next to last.

3 A. Oh, next to last.

4 Q. Next to last, towards the bottom; yes, sir.

5 THE COURT: The same page we were
6 previously on.

7 MR. PERRY: That's correct.

8 THE COURT: Below the delta.

9 A. Okay. Now, ask me again.

10 Q. The sr's in that logit marked equation, what is
11 that?

12 A. Well, I took the -- okay. I took the logistic
13 regressions on the first page ----

14 Q. Mmm-hmm [nodding head in the affirmative].

15 A. ---- and I took the pHat's -- I took out the black
16 from these equations, so I was just getting probabilistic
17 predictions for the non-black venire members.

18 Q. Right; and, just to be clear, the pHat's are ----

19 A. The ----

20 Q. ---- the predicted values for ----

21 A. Non-black -- non-black venire members.

22 Q. Right.

23 A. As a function of these variables.

24 Q. Mmm-hmm [nodding head in the affirmative].

25 A. And I used -- I used -- I used either the pHat that

1 stopped at LeansState -- if I was missing postcollege; but, I
2 used the one that uses all the data in the cases ----

3 Q. Mmm-hmm [nodding head in the affirmative].

4 A. ---- where I had postcollege. Okay; and, then, I
5 sorted -- then, I sort the data on that and broke it up into
6 bins; and, you can see the bins on the second page, maybe
7 nine lines from the top, where it says StRisk ----

8 Q. Right.

9 A. And that's where I am producing a five-level -- a
10 five-level category -- category -- five-level categorical
11 variable that represents bins of increasing risk of being
12 struck based on non-racial variables.

13 Q. Okay. So -- and just to make sure -- so, that was
14 a -- sort of a five-level level of risk?

15 A. Five levels of risk based on non-racial factors
16 with -- in -- where the weights of those factors are
17 determined by the logistic regression.

18 Q. Okay.

19 A. And ----

20 THE COURT: One second, Mr. Perry.

21 MR. PERRY: Yes, sir.

22 THE COURT: Doctor, [handing the
23 witness a cup of water.]

24 THE WITNESS: Thank you, sir.

25 THE COURT: Yes, sir.

1 A. And, so, I did, in a sense, use a form of
2 imputation. In the cases where I didn't have postcollege, I
3 imputed what it's logit would be using the other variables.
4 I was imputing the logits for -- in those cases.

5 Q. Okay. So ----

6 A. Technically, you're right.

7 Q. All right. So, the strike risk here, that's based
8 on that -- what you referred to as the five-bin categories
9 that you calculated?

10 A. Yes, sir. Yes, sir.

11 Q. All right. Now ----

12 A. So, I'm treating that as a category for a variable.

13 Q. All right. So, why -- why did you -- why'd you do
14 that? In other words ----

15 A. Well, because, otherwise, it would have required
16 probably a better part of a day to run these models if I put
17 in each of the component variables in here.

18 Q. Okay.

19 A. So, I did it to get an idea -- there -- there is --
20 there's some evidence way back -- there's a paper a long time
21 ago -- and I can't cite it for you, but -- that -- dividing a
22 continuum into five categories captures a very high
23 percentage of information; and, I was going on that.

24 Q. Okay. Kind of a standard way to approach it?

25 A. It is.

1 Q. Why did you do that at all? Why separate them into
2 the ----

3 A. Categories?

4 Q. Yes, sir.

5 A. Oh, instead of using it as a continuance ----

6 Q. Yes, sir.

7 A. I didn't want to assume it was linear.

8 Q. Didn't want to assume what?

9 A. It was linear.

10 Q. Okay.

11 A. I just wanted a more flexible ----

12 MS. STUBBS: Doctor Woodworth, if you
13 lean forward ----

14 THE COURT: If you would, lean forward
15 into the microphone.

16 THE WITNESS: Oh, I'm so sorry. I'm
17 getting too relaxed. You're lulling me into a sense of
18 security.

19 [General laughter.]

20 A. Okay.

21 Q. Yeah; and, I think what I wanted to make sure I
22 understood was -- so, you didn't want to assume linearity.
23 Why -- why or why not?

24 A. Well, if I -- if I didn't have to, why bother. I
25 could examine the coefficients and see if they really are

1 linear. I'm not sure I reported them.

2 Q. Okay.

3 A. I thought it would be a more robust analysis, less
4 prone to being -- to being critiqued, but it didn't seem
5 [indiscernible].

6 Q. Okay. So, that -- that, in and of itself, that's
7 not -- that's not really a way to check the robustness, but
8 it's -- or, is it?

9 A. It produces a more -- if there are more degrees of
10 freedom in the predictor, it's going to fit better, you know.
11 That's just algebra.

12 Q. Okay. Right. So, [indiscernible] robustness -- a
13 measure of robustness is more of a way to ensure robustness?

14 A. Yeah.

15 Q. All right. Now, if I could, direct your attention
16 to State's Exhibit Number 15.

17 A. Yes, sir.

18 Q. I think what's we referred to as the -- the log,
19 correct?

20 A. That's the log.

21 Q. And, again, it seems like none of these programs
22 page -- or, allow you to page number your output; but, if you
23 count back one, two, three, four, five, six, seven, eight,
24 nine -- to the tenth page, where, up at the top, it's got the
25 -- or, it's got a listing of deltas ----

1 A. The tenth?

2 Q. Yes, sir. Up at the very top, it says $1\alpha = \alpha_1$
3 + α_2 .

4 A. And, clearly, I'm on the wrong page. What's the
5 running line number?

6 Q. 584 [sic].

7 [Pause.]

8 A. Okay.

9 MR. PERRY: And, Your Honor, that's at
10 the very bottom.

11 THE COURT: Yes, sir.

12 A. I have it. It just says run.

13 Q. And, again, at outside -- or, not outside line.
14 I'm sorry. At the coding line 561, where you've got $\logit =$
15 γ and then the betas and the strike risks ----

16 A. Yes, sir.

17 Q. That's the same thing we were looking at just a
18 second ago, correct?

19 A. Yes, sir.

20 Q. All right. In other words, those -- that -- those
21 indicate the five different subcategories of the strike risks
22 that you have previously identified?

23 A. Yes, sir.

24 Q. All right. Then ----

25 A. The betas are the -- are the -- they would be the

1 log odds ratios associated with being in that risk category.

2 Q. Okay.

3 A. The interpretation of these.

4 Q. Then there's -- it looks like there's a notation
5 right below that in the paragraph.

6 A. P.

7 Q. And it looks like there's some indication of
8 significant autocorrelation?

9 A. Oh, yes. That's in the sampler.

10 Q. Right. Do you recall what -- what about the
11 analysis at that point was causing an autocorrelation?

12 A. That is a technical issue in -- in the random log
13 sampling which SAS uses.

14 Q. Okay.

15 A. Other samplers don't suffer from quite that same
16 problem; which means, you have to run more replications to
17 get the same accuracy.

18 Q. Okay.

19 A. It's not bias. It's just a -- slows the
20 convergence of the Markov chain.

21 Q. Okay; and, is that what follows in the coding?

22 A. Yeah. You notice I run 5,000 samples -- 5,000
23 replications of the chain.

24 Q. All right; and, then, if I could refer you to
25 State's Exhibit Number 16?

1 A. Yes, sir.

2 Q. State's Exhibits 14 and 15, those were -- those
3 were the codings and the logs with the output -- in other
4 words, the analysis generated, that's really displayed or
5 captured in on State's Exhibit Number 16, correct?

6 A. That is a dump of the output. That's what came out
7 of the computer.

8 Q. Okay. Is that what you used to construct the table
9 that was in your final report -- or, your January report?

10 A. Well, that report computing the -- the log odds
11 ratio. So, I had to grab the sampler output and multiply the
12 deltas by the basis functions to get the log odds; and, it's
13 probably reflected in the source code here somewhere.

14 Q. Okay.

15 A. Do you want me to track that down?

16 Q. Well, if you can -- just so I'm clear ----

17 A. There it is. It's on the third page in on the --
18 on the listing. In fact, we're still in the list file.
19 That's Exhibit 15.

20 Q. Okay.

21 A. Down there in line 850.

22 Q. Line 850?

23 A. No. That's not right. I'm sorry. I misspoke.

24 Where did I get that?

25 [Pause.]

1 A. See, that -- what those are, are the log odds
2 ratios for the venire members, individual venire member; and,
3 what I'm on is log odds ratios at individual time points.
4 So, I have to create a table where I have a grid of time
5 points and -- and then plug into the -- plug into the same
6 equation ----

7 Q. Mmm-hmm [nodding head in the affirmative].

8 A. ---- but with the sampler output; and, I can't, at
9 the moment, spot where I do that; and, then, I run that
10 through proc means to get the average -- the posterior mean
11 of the sampler at each time point. Is that clear enough?

12 Q. Yes, sir. That's the process you went through to
13 get that?

14 A. To get that graph.

15 Q. To get the graph that's in the -- in the ----

16 A. It's derived from the 5,000 replications in the
17 sampler output.

18 Q. Okay. All right; and, just to be clear, the model
19 that's in the report in State's Exhibit Number 13, that's not
20 what's in table 12 in the juror -- jury selection report,
21 correct, because of the ----

22 A. Too many exhibit numbers. Walk me through it
23 slowly.

24 Q. In the jury selection report -- Defendant's 6.

25 A. Defendant's 6.

1 THE COURT: Table 12?

2 MR. PERRY: Yes, sir.

3 THE COURT: Okay.

4 A. Okay. All right. Here's Defendant's 6.

5 THE COURT: Page 21.

6 A. All right. Now, you asked me to compare that to
7 something?

8 Q. Yes, sir. I just want to make sure I understand
9 the table in Professor O'Brien's report and the figures in
10 your report ----

11 A. Yes, sir.

12 Q. ---- 3.1 and 3.2 ----

13 A. Yeah.

14 Q. ---- those are -- those are not the same? In other
15 words, those aren't based on the same model, correct?

16 A. Figure ----

17 Q. It really is 3.2 because it's the adjusted odds
18 ratio table that you've got ----

19 A. When you say they're not based on the same model,
20 you're referring to the absence of very young?

21 Q. Yes, sir.

22 A. Yes, sir. That's correct.

23 Q. Okay.

24 A. And it might change a little bit if I -- when I
25 rerun it with young in it.

1 Q. Okay. Now, in -- and I -- this will be a little
2 quicker, but I did want to ask you a couple of questions
3 about the Cumberland County model as well.

4 A. Yes, sir.

5 MR. PERRY: May I approach, Your
6 Honor?

7 THE COURT: Yes, sir. Are we through
8 with 13, 4 -- strike that -- 14, 15 and 16 ----

9 MR. PERRY: Well, I think ----

10 THE COURT: ---- for our purposes
11 right now?

12 MR. PERRY: Well, let me do this, Your
13 Honor. Let me ask one more thing; and, that way, I think we
14 can put those to the side.

15 THE COURT: Yes, sir.

16 Q. Doctor Woodworth, if I can direct you -- and this
17 will be going back to State's Exhibit Number 14 ----

18 A. Yes, sir.

19 Q. ---- on the next to the last page that we were
20 talking about with the prior distribution specifications ----

21 A. Yup.

22 Q. ---- where you've got your deltas -- if you look
23 here, it looks like it runs from delta1 all the way to
24 delta33?

25 A. Yeah.

1 Q. It looks like there's a delta20 that appears twice.
2 Is that -- is that an error? It looks like they run
3 sequentially but for that one.

4 A. Oh, my gosh. Let's see. I'm not seeing what
5 you're seeing. Oh ----

6 THE COURT: Okay. You're -- go ahead,
7 sir.

8 A. That should have been a 30. Well, fortunately,
9 that's a minor basis function.

10 Q. I just wanted to make sure. That was a
11 misspecification not a different judgment or some particular
12 reason ----

13 A. No. That's a genuine blunder.

14 Q. Okay.

15 A. I -- my -- my feeling is that it's not going to
16 make any difference because that particular basis function is
17 -- has very low [indiscernible]; but, I will go and rerun
18 this and send this up in a report.

19 Q. Okay.

20 MR. PERRY: Judge, now, I think -- I
21 just wanted to make sure I got all that stuff.

22 THE COURT: Yes, sir.

23 MR. PERRY: Because it is a lot of
24 paper to sort of shuffle around.

25 THE COURT: Yes, sir. Thank you.

1 MR. PERRY: Now, if I may approach?

2 THE COURT: Yes, sir.

3 [Pause.]

4 THE COURT: You okay, ma'am? You need

5 a ----

6 MADAM COURT REPORTER: [Nodding head in the
7 affirmative.]

8 [Pause.]

9 MR. PERRY: May I approach?

10 THE COURT: Yes, sir.

11 [Pause.]

12 THE COURT: [Retrieving document from
13 Mr. Perry], thank you.

14 MR. PERRY: Yes, sir.

15 THE WITNESS: Now, here's copies right
16 here. Your Honor, are these your copies, Your Honor?

17 THE COURT: Those are the clerk's
18 copies [retrieving exhibits from the witness].

19 THE WITNESS: The clerk's copies.

20 Q. Doctor Woodworth, I'm going to hand you, over here,
21 so we don't get them mixed up, State's Exhibits 17, 18 and 19
22 [handing the exhibits to the witness]. Just take a minute
23 and look at those.

24 A. I've got ----

25 [Pause.]

1 Q. Doctor Woodworth, let me ask you this. What I
2 attempted to do is hand you up the same three types of things
3 for the Cumberland County model ----

4 A. Yes, sir.

5 Q. ---- starting with State's Exhibit Number 17.

6 A. Yes, sir.

7 Q. Does that look like the same sort of SAS output for
8 ----

9 A. It's ----

10 Q. ---- the Cumberland County model?

11 A. It's the same procedure, yes ----

12 Q. Okay.

13 A. ---- with different variables and different data.

14 Q. So, just to make sure we're all on the same page,
15 number 17 would be the SAS program, correct?

16 A. Program -- SAS code.

17 Q. Okay.

18 A. And 18 is the log.

19 Q. Okay.

20 A. And 19 is the list.

21 Q. Is the list. Okay. All right. Now, going to
22 State's Exhibit Number 17, up there at the top, in the corner
23 here, it's got the same listing of the variables that were
24 included in the analysis, correct?

25 A. Yes, sir.

1 Q. And what -- what variables do you have included in
2 there?

3 A. Well, not the same ones as Professor O'Brien's.
4 So, this must have been my model. Yeah. I believe this was
5 one of my -- my models rather than hers.

6 Q. How do you know that?

7 A. Well, it's a different variable list.

8 Q. Okay. So, the -- the variables that are included
9 in this program are different from the variables that
10 Professor O'Brien used?

11 A. There's some overlap.

12 Q. Now, as far as the -- the program itself, it's laid
13 out the same way that the statewide model was on the second
14 page?

15 A. Yes, sir.

16 Q. Up at the top?

17 A. [Nodding head in the affirmative.]

18 Q. Where it's got SET CumberlandSE ----

19 A. Yeah. That means Cumberland state eligible.

20 Q. Okay. Is -- is that next collection a coding ----

21 A. Mmm-hmm [nodding head in the affirmative].

22 Q. ---- imputation of the very young variable?

23 A. It's the imputation of a logit, and the very young
24 is missing, yes.

25 Q. Okay; and, can you explain to the Court why -- why

1 was that imputation done?

2 A. Because they're cases which were missing very
3 young.

4 Q. Okay. So, that imputation was done to give more
5 observations?

6 A. Yes, sir.

7 Q. Can -- can you tell how many observations were
8 missing?

9 A. Not from this, no.

10 Q. That was in your report, again, going back to
11 State's Exhibit Number 13, correct, the number of missing
12 observations?

13 A. Well, I can deduce it from the log -- I can deduce
14 it from the output file.

15 Q. And that was State's Exhibit Number 19, right?

16 A. Yes, sir. Let's see. In the one without very
17 young, there are 4,000 -- 468 used ----

18 Q. And that's ----

19 A. ---- and 474 total read.

20 Q. That's up here at the -- sort of the left, up at
21 the top, where it says 468, and then it's got number of
22 observations uses?

23 A. Yes.

24 Q. Is that where it shows that?

25 A. Yes, sir.

1 Q. Okay.

2 A. And, then, if I go to the second logistic which has
3 very young in it, it has 447.

4 Q. And that's also shown on the list, right, State's
5 Exhibit Number 19?

6 A. The list?

7 Q. Fifth page -- fifth page into it?

8 A. That's -- that's what I'm looking at.

9 Q. Yes, sir.

10 A. Yes, sir.

11 Q. And, then, right below that, where it indicates the
12 447 observations used, it's got a note that says 27
13 observations were deleted?

14 A. That's right.

15 Q. So, there was -- there were 27 observations taken
16 out because they had missing information?

17 A. That's the listwise deletion I referred to earlier.

18 Q. Okay. That's where it shows up in the list or the
19 output?

20 A. That's how you know it's happened, yes.

21 Q. All right. Going back to State's Exhibit Number 17

22 ----

23 A. Yes, sir.

24 Q. If you go to the next to the last page ----

25 A. Next to the last.

1 Q. Yes, sir.

2 A. Okay.

3 Q. The -- the notation up there -- from the top of the
4 page, about -- it looks like three paragraphs in, is that the
5 same sort of specification of prior distributions that was
6 done -- that's the same thing that was done for the statewide
7 model; is that correct?

8 A. Yup. Mmm-hmm [nodding head in the affirmative].

9 Q. Okay. So, where did you get those particular
10 specifications from?

11 A. Oh, I did -- I did a series and -- specifications
12 around this level produced a model that -- it was a pretty
13 wide range of prior distributions that produced the same
14 results, and others produced models that were basically just
15 following the data and therefore were -- or, models that were
16 totally flat ----

17 Q. Okay.

18 A. ---- or, not paying attention to variations over
19 time.

20 Q. And, then, below that, it looks like you did -- or,
21 engaged in the same sort of five-tier strike risk
22 specifications; is that correct?

23 A. Yes.

24 Q. Okay.

25 THE COURT: Mr. Perry, I apologize.

February 01, 2012

1 MR. PERRY: Yes, sir.

2 THE COURT: This is a good point for
3 us to take a brief recess. We'll be at ease until four
4 o'clock, and we'll go from there.

5 Thank you, Doctor. You may step down.

6 THE WITNESS: Thank you.

7 [The witness withdrew to the spectator area.]

8 [The hearing recessed at 3:40 p.m. and reconvened at 3:59
9 p.m., February 1, 2012, with all pertinent parties present
10 prior to the recess once again present, to include the
11 defendant, and with the exception of Mr. Rob Thompson.]

12 THE COURT: We ready to go?

13 [There were no responses from counsel for either side.]

14 THE COURT: All right. For purposes
15 of the record, all counsel are present with the exception of
16 Mr. Thompson. It's my understanding the State is agreeable
17 to going forward?

18 MR. COLYER: Yes, sir.

19 THE COURT: All right. Thank you, Mr.
20 Colyer.

21 Mr. Perry?

22 MR. PERRY: Thank you, Your Honor.

23 THE COURT: Yes, sir.

24 **CROSS-EXAMINATION continued conducted by MR. JONATHAN PERRY:**

25 Q. Let's see -- and, Doctor Woodworth, if I could

February 01, 2012

1 direct you to the list output -- that's State's Exhibit
2 Number 19, again, for the Cumberland County model.

3 A. Yes, sir.

4 Q. I think we may have -- we may have addressed this
5 earlier with the statewide; but, in -- in Number 19, does it
6 show the calculation for the odds ratio for Marcus Robinson
7 at some point in that list of output?

8 A. You mean the time varying odds ratio?

9 Q. Yes, sir.

10 A. Well -- well, it just shows -- you're talking about
11 19. It shows it on the last page ----

12 Q. And you're referring to ----

13 A. This is 19.

14 Q. ---- here -- it's not really the middle, but where
15 the dates start ----

16 A. Yes.

17 Q. ---- you've got SENTDATE, I guess that's sentence
18 date; is that correct?

19 A. Yes, sir.

20 Q. Okay. That first sentence date, August 5th, 1994
21 ----

22 A. Yes, sir.

23 Q. ---- does that give you the confidence interval
24 parameters or the -- the upper and lower bounds of the
25 confidence interval?

1 A. Yes, sir.

2 Q. And -- and what do those do?

3 A. 1.06 to 5.40.

4 Q. Okay; and, the OR notation, is that the -- is that
5 the point estimate? In other words, is that 2.479 -- is that
6 the point estimate of the -----

7 A. Oh, yes, it is.

8 Q. Okay. So, those numbers -- in other words, that
9 point estimate and that upper and lower bound, that's what's
10 displayed going back to State's Exhibit Number 13?

11 A. Should be.

12 Q. In figure 3.4, the adjusted odds ratio, correct?

13 A. Should be.

14 Q. Okay; and, again, earlier, in the PowerPoint
15 presentations from the defense counsel, there were a number
16 of little sort of cross marks there. That shows specifically
17 where Marcus Robinson is, or that's -- can you tell me what
18 the difference between that and the data I think is Marcus
19 Robinson's observational point is?

20 A. Well, the -- if you see the column called ORcl,
21 that I -- that's the odds ratio that's plotted in the red
22 dot, the lighter, gray dot, to the extreme left that
23 corresponds to Marcus Robinson.

24 Q. Okay. So, his -- his odds ratio is right there in
25 the left corner of the ----

1 A. Yes.

2 Q. Okay. All right.

3 A. You see I misspoke about how big that outlier is.
4 It's really 51 million.

5 Q. That's -- that's the point that I was asking about
6 before the lunch break -- is that ----

7 A. Yup.

8 Q. Okay; and, just to be clear, all those numbers
9 indicate, right there, in that -- that last page of State's
10 Exhibit 19 -- those are all the point estimates and the
11 competence intervals around them, correct?

12 A. I'm sorry. You're talking about the dots?

13 Q. Yes, sir. So, in other words ----

14 A. Yes. Oh, yes, in the printout. Yes.

15 Q. Yeah. Those matchup with the point estimates and
16 then the confidence intervals, the upper and the lower ----

17 A. That's right.

18 Q. Okay.

19 A. And ----

20 Q. And, then, just to the right, where it -- where it
21 has the lower confidence level and the upper confidence
22 limit, you've got some other notations, ORc1, LCLc1 ----

23 A. Those are the lower and upper confidence limits for
24 the -- for those estimates.

25 Q. Okay. So, on the -- on the diagram, what would

1 that be on the diagram? In other words, what would that be

2 ----

3 A. They're not on the diagram.

4 Q. Okay. Why ----

5 A. Just the point estimate.

6 Q. Okay. So, for example, the 0.737 ----

7 A. Mmm-hmm [nodding head in the affirmative].

8 Q. ---- that's the point estimate for the lower
9 confidence limit?

10 A. Yes, sir.

11 Q. But that's not on the ----

12 A. No, it's not. That would have made it too fussy.

13 Q. Doctor, I want to make sure I understand. When you
14 say fussy, you mean too -- too big for the display; or, what
15 do you mean by that?

16 A. It would just be a lot of vertical lines; and, what
17 I'm demonstrating here is how the smooth tracks the data.

18 Q. Okay. Going back to the statewide, that was also
19 indicated on the statewide model as well, right? In other
20 words, if we went back to the statewide printouts, there's
21 that same list at the back that shows the point estimates and
22 the upper and lower confidence intervals, correct?

23 A. Yes.

24 Q. Now -- and I just want to be clear about the
25 Cumberland County material, which is the 17 and 18 and 19

1 exhibits ----

2 A. Yes.

3 Q. That -- that was a model that you ran, correct?

4 A. I'm sorry. What -- what are you referring to?

5 Q. The Cumberland County model.

6 A. The choice of control groups, is that what you're
7 asking me about?

8 Q. Yes. Yes, sir. Yes, sir.

9 A. Yes. As it turns out, that was an earlier version
10 of Doctor O'Brien's work. I was working from the wrong
11 document when I did this.

12 Q. Now, was that -- when you say Doctor O'Brien's
13 work, in other -- was that her choice of variables, or was
14 that a choice that you made or that you identified?

15 A. I -- I need to look at my notes before I could
16 answer that. Suffice it to say, it's not the current model.

17 Q. Okay. So, you're not sure if those were actually
18 variables you decided to put in the model or if that was just
19 an earlier version ----

20 A. There are only two ways it could have been in
21 there. One was if there were an earlier version. I simply
22 consulted the wrong reference; or, they're one of the models
23 that I fit in the process of independently developing a
24 model.

25 Q. Okay. At some point -- I was going to ask you that

1 next. Did you do any kind of independent analysis to see,
2 you know, in your own estimation, what variables were and
3 were not explanatory or what model seemed appropriate or ----

4 A. I explained that in my direct, and I can repeat it
5 briefly for you; that I ran -- I started with a list of 64
6 candidate variables, the recodes; and, I ran them through
7 logistic regression with black venire member entered first.
8 So, I'd force that in and then step in the others and used a
9 -- I believe .1 or .2 [indiscernible] to enter -- I think .1;
10 and, then, I allowed the non-racial variables to step in
11 first; and, then, forced black and -- and the two lists have
12 the -- the powerful variables on all three of our models
13 overlapped in those lists, but they differed in margin in the
14 less explanatory variable. The important point was that the
15 odds ratio and logistic regression coefficients for black
16 venire member didn't change materially among the three
17 different approaches to specifying the model.

18 Q. Okay. So, at least in the way you ran the model,
19 it seems -- seems stable?

20 A. Stable, yes.

21 Q. Right. Okay. All right. Now, is -- did you talk
22 to Professor O'Brien about the -- the modeling that you
23 engaged in? Was that -- did you all compare notes at some
24 point, what she was doing, what you were doing?

25 A. I gave her a report.

1 Q. Okay; but, you all didn't have any kind of actual
2 discussions about the different things that you had done in
3 terms of the model?

4 A. I remember briefly discussing one variable.

5 Q. But no extensive discussion about ----

6 A. No.

7 Q. ---- here -- here's my, you know, couple of models,
8 and here -- here's what I think?

9 A. Well, I thought I'd done a pretty good job of
10 confirming her work. So, I didn't -- I didn't see a huge
11 contradiction between -- I didn't see any contradiction
12 between the findings and recordings.

13 Q. Okay; and, I want to ask you about -- about that.
14 In terms of sort of evaluating how good these models are,
15 earlier I had asked you about -- you know, a sort of
16 hypothetical example of an employment position. Just in
17 general, how good is logistic regression in dealing with
18 small numbers of highly explanatory variables?

19 A. Small numbers of highly explanatory?

20 Q. Well -- and, I guess -- and let me clarify that to
21 be fair. When you have variables that are highly explanatory
22 but appear here and there -- in other words, instead of
23 having a variable that is explanatory -- and going back to
24 our employment decision, you know, 50 out of a hundred cases
25 or 50 out of 50 cases, it's more like two or three cases out

1 of 50, but you have ----

2 A. I think ----

3 Q. ---- five or six variables where they really
4 explain those, you know, two or three things ----

5 A. I think I understand your question. You're asking
6 me suppose that there is a variable that occurs rarely -- I
7 think you said maybe five times in the whole dataset ----

8 Q. Yes, sir.

9 A. And every time it occurs, one decision or the other
10 was made ----

11 Q. Sure.

12 A. I understand that to be what you meant; and, if it
13 -- if it's only five -- if it happened in -- I -- I don't
14 know where the cutoff would be; but, the criterion would be
15 is it significant; and, if you have five cases like that,
16 it's starting to look like chance co-occurrence. I -- I
17 doubt that it would represent a significant association. So,
18 I'm guided by whether it's significant or not.

19 Q. Okay; and, I guess, going back to the employment
20 example, if you had those 50 job openings and you had two
21 people who were related to the person hiring, two people who
22 went to the same school as the person hiring, two people who
23 had perfect scores on whatever tests CPAs take -- you know,
24 how would logistic regression deal with that sort of
25 scenario? In other words, you've got three different

1 variables with two people apiece, all of which -- or, the
2 majority of which explains the hiring decision that the
3 employer makes -- is [sic] logistic regression numbers really
4 the best way to try to model that -- that type of situation?

5 A. There is no reliable way to determine whether such
6 factors really have an impact -- the system would impact or
7 not. It's an impossible question to answer.

8 Q. Why is that? Why is that?

9 A. Because they're not significant.

10 Q. So, even though they're perfectly explanatory in
11 the sense of the sort of everyday usage of the term, they
12 wouldn't be statistically significant?

13 A. Oh, you have no evidence that they're every-day
14 important. All you have is what happened in a handful of
15 cases. So, that's -- that's not evidence that they're
16 important. That's just evidence that they happened in those
17 cases.

18 Q. Okay. So, the logistic regression model would not
19 treat those as statistically significant?

20 [Pause.]

21 A. Unless we had a real theory -- unless we have some
22 kind of -- some reason to believe that those were
23 [indiscernible] -- I saw that in an insulin experiment, like
24 Banting and Best demonstrated that insulin worked on one
25 girl; but, you know, they had a theory of why it was working,

1 a biological mechanism. In the case that you're talking
2 about, there's no reason to think that that particular
3 combination of things will ever occur again; and, there's no
4 reason to think that those were the reasons -- when you have
5 a list of 64 possible reasons, you need evidence. The
6 category -- the type of evidence that is contemplated, as I
7 understand it, speaking as a lay-person ----

8 Q. Mmm-hmm [nodding head in the affirmative].

9 A. ---- in this kind of act -- in this kind of hearing
10 is statistical evidence. Statistical evidence is evidence
11 which is reliable by statistical criterion; which means, not
12 due to chance co-occurrences.

13 Q. And, just to make sure I'm understanding the
14 distinction, again, statistical evidence is something that
15 will show up if it appears in a large number of cases; but,
16 if it was only present in a small number of cases, it would
17 not show up?

18 A. That's what we call anecdotal.

19 Q. Right.

20 A. I'm not -- I don't believe that statistical
21 encompasses anecdotal.

22 Q. And what do you mean by that?

23 A. I don't believe that anecdotal evidence is
24 considered to be a reliable statistical method.

25 Q. Sure. Well, I mean ----

1 A. We're talking about reliable inference here, not
2 anecdotal evidence.

3 Q. So, what you're saying is anecdotal and statistical
4 are in two different ----

5 A. Might make a good story, but that's not what I'm
6 testifying about.

7 Q. Sure. Would it make a good explanation sometimes?

8 A. With other evidence.

9 Q. Right. I mean something to -- something to confirm
10 it, not just an assertion. I think, as you mentioned, you
11 had to have some theoretical reason to think that something
12 might be explanatory one way or the other.

13 A. If it occurs in a few cases; and, the example I
14 gave you with the Banting, Best experiment with insulin --
15 they did it on one dog and one little girl.

16 Q. Mmm-hmm [nodding head in the affirmative].

17 A. If I were doing an experiment on rainmaking, I
18 would require a vast deal of more evidence than that.

19 Q. What are you saying? I'm sorry. Rainmaking?

20 A. Yeah.

21 Q. What -- what do you mean?

22 A. Well, there used to be experiments being done under
23 government sponsorship trying to increase rainfall by
24 dropping silver nitrate crystals into the clouds.

25 Q. Right.

1 A. Famously difficult to see a signal in that data.

2 Q. Right; and -- and let me ask you a question about
3 the ability to decipher signals. In the hypothetical example
4 that we were talking about in the employment context, would
5 multiple-linear regression be able to tease out some of the
6 impacts of the -- the explanatory power of those variables
7 that only appear here and there or in small quantities?

8 A. Well, their ability to do it will grow as small
9 grows.

10 Q. Sure.

11 A. Okay; and, it would -- it's very context depend --
12 I don't think five would do it.

13 [Pause.]

14 A. Sorry. Is -- is there more to your question?

15 Q. Well, let me rephrase it. In the case of a number
16 of individually explanatory variables, which is the better
17 tool, logistic or linear regression?

18 A. Logistic is the method you should use with a binary
19 outcome, and linear is what you should use with a continuous
20 outcome.

21 Q. Mmm-hmm [nodding head in the affirmative].

22 A. Which is better? They're -- they're incomparable.
23 They're in different -- they're used in different situations.

24 Q. Could you use both?

25 A. You could do it. It would be -- if you want to use

1 regression-like methods on binary outcomes, you should be
2 doing discriminative analysis not linear regression; but, no,
3 I would never do it; and, there are technical reasons for not
4 doing it. The primary one is that, in logistic regression,
5 the cases don't get equal weight. Their weight is PQ , if you
6 understand what I'm talking about.

7 Q. Mmm-hmm [nodding head in the affirmative].

8 A. Whereas, if you do it linearly, then every
9 observation gets the same weight. So, it is inefficient --
10 logistic -- linear regression is inefficient. It's not as
11 good as capturing the signal. I'll grant you, if there's a
12 big signal, either way will get it, but logistic is the one
13 you should use.

14 Q. And you -- when you say the one you should use, you
15 base that on your opinion that what is true?

16 A. I'm sorry? I base it on the fact that you're
17 working with a binary outcome.

18 Q. So, it's just -- in your opinion, it's just the
19 choice of the outcome variable that determines the tool of
20 regression -- or, the type of regression that you ----

21 A. Yes, of course.

22 Q. So, even though it's possible to use other ----

23 A. Linear regression produces negative estimates.

24 What sense do they make in a binary outcome? Produces
25 estimates between zero and 1.

1 Q. So, you don't see any reason or usage at all for
2 linear regression?

3 A. No. It's a blunt instrument. It's inefficient.

4 Q. Have you used multiple-linear regression before for
5 ----

6 A. I did in McCluskey.

7 Q. Okay. So, for -- for that case, for dichotomous
8 outcome variables, it was used?

9 A. Yeah. Wouldn't do it again.

10 Q. Okay. Again, because of what we talked about
11 earlier, the advancement in the theoretic approaches?

12 A. And the advancement of the understanding of courts
13 of logistic regression.

14 Q. And the ability of what?

15 A. The courts to understand logistic regression.

16 Q. Oh. So, the reception of the -- of the people
17 listening to -- to the discussions about it?

18 A. Yeah.

19 Q. Okay. Now -- and -- and just a general question,
20 regardless of whether or not you use logistic or linear
21 regression, the -- the accuracy or the ability of that model
22 to work depends on the data going into it, correct?

23 A. That's such a broad statement, I don't know how to
24 respond.

25 Q. What -- what I'm asking is if you don't have well-

1 defined variables, you have problems when you run a
2 regression analysis?

3 A. Are we -- are we back to missing information again?

4 Q. No, sir. Just broadly defined variables. So, if
5 we go back to the example in the employment context, if you
6 just have qualified as a variable, instead of breaking it
7 into tiers, like you did with the -- you know, some of the
8 things you did?

9 A. Oh, that has no ab -- that has no bearing whatever
10 on the validity of the logistic regression. That's a
11 substantive question which the subject-matter experts --
12 namely, people who are experts on -- on criminal justice --
13 can debate; but, it's -- the coding of the variables is
14 simply not anything I'm qualified -- or, any statistician
15 with my kind of training is qualified ----

16 Q. Right.

17 A. ---- to have an opinion about.

18 Q. Right; and, I think you testified that you didn't
19 have anything to do with the creation of these variables?

20 A. Yeah. That's right.

21 Q. Okay. Did you -- in McCluskey, was that something
22 that Professor Baldus did? Did you participate ----

23 A. Baldus and Polaski. They're both lawyers.

24 Q. Okay. So, again, you did the statistical work in
25 McCluskey, not the variable definition or specification work?

1 A. Well, I -- I think I've described our -- our
2 collaborative relationship earlier; and, I would say it
3 again, that there are many techniques that were used in
4 McCluskey, some of them cross-tabular, some of them
5 regression-based. I had -- I had suggested some of the
6 cross-tabular methods, in particular, the one called saline-
7 features analysis, which enables fairly deep case managing.
8 None of those are relevant in this case.

9 Q. Why is that?

10 A. Well -- why is that? Well, first of all, we're
11 talking about capital -- we're talking about a capital
12 sentence rather than being seated on a jury. Secondly, there
13 are many more factors, statutory aggravating, statutory
14 mitigating, legitimate factors, the relative strength of the
15 victim and the perpetrator. As you pointed out, we had
16 started out with a list of over a hundred variables. There
17 were some variables that were statutorily required in the
18 law. So, it's just not -- it's -- they're not comparable.
19 We're not arguing McCluskey here. We're looking at a simpler
20 system with a simpler list of possible explanations for
21 what's going on.

22 Q. Right; and, I don't want to dwell on McCluskey.
23 Just going back to the -- the analysis you ran in your report
24 here, I think we had mentioned earlier there was a method
25 where you could increase the robustness of -- of your

1 results. Did you run tests or check for the robustness of
2 the modeling that you produced? In other words, did you do
3 any kind of sensitivity analysis for the statewide and the
4 Cumberland County adjusted odds ratios where you did the
5 smoothing?

6 A. Apart from different ways of selecting variables?

7 Q. Yes, sir.

8 A. What did you have in mind? Can you give me an
9 example?

10 Q. No. I'm just asking if you did any sort of
11 sensitivity analysis to see how sensitive your estimates of
12 these confidence intervals for these odds ratios were?

13 A. Are we speaking of Professor O'Brien's models and
14 did I test the robustness and sensitivity of those?

15 Q. Yes, sir.

16 A. Yes, I did; and, I've described the methods.

17 Q. And that's reflected in these SAS outputs that were
18 marked as exhibits, or is that something separate?

19 A. These, we're looking at the time varying. They --
20 they could be regarded as investigating the stability of the
21 race of -- of the venire member effect over time, yes. In
22 that sense, they're sensitive; but, I also looked at the -- I
23 also, as I say, tried two different -- two different methods
24 of entering data.

25 Q. Did you look at any other point estimates other

1 than Marcus Robinson's? In other words, did you use any
2 other observation as an anchor to see what would happen other
3 than Marcus Robinson's?

4 A. No.

5 Q. So, Mr. Robinson's case was the only anchor that
6 was used for the statewide and the Cumberland County
7 intervals that you calculated?

8 A. Yes.

9 Q. As far as just additional tests of sensitivity in
10 your modeling, did you try to see -- or, I guess, I think you
11 -- I think you mentioned some of them; but, the methods that
12 you used to detect what variables were and were not
13 significant -- did you do a number of -- of iterations to see
14 what combinations would or would not affect race and the
15 significance in the models?

16 A. Yes; and, I think I've provided those runs in
17 discovery on the 30th.

18 Q. Were you able to find any models, either
19 combinations or particular sets of variables, that resulted
20 in race not being a significant factor in the strike
21 decision?

22 A. No. I never found that.

23 Q. Now, was that something you -- I think you had
24 mentioned earlier there was some -- you ran a model just on
25 your own, independently. Did Professor O'Brien ever ask you

1 to run through and see if you could find any combinations of
2 variables that would result in race being non-significant?

3 A. No. I've never received any instructions whatever
4 from Professor O'Brien about how to do my job as an expert.

5 Q. And are you aware of any combinations or particular
6 selections of variables that would result in race not being a
7 significant factor in the strike decisions?

8 A. Not at this moment -- I'm not aware of any, except
9 for probably -- except for Professor Katz' views.

10 Q. Have you had a chance to review Professor Katz'
11 report?

12 A. I've looked at it, yeah.

13 Q. Okay; and, now, you all traded information ----

14 A. He gave me ----

15 Q. ---- like, your SAS outputs just so you could see
16 what each other was doing, correct?

17 A. I saw what he did, yeah.

18 Q. Right.

19 MR. PERRY: May I have a moment, Your
20 Honor?

21 THE COURT: Yes, sir.

22 [Pause.]

23 MR. PERRY: Your Honor, I think that's
24 all the questions I have at this time.

25 THE WITNESS: Okay. Any redirect?

February 01, 2012

1 MS. STUBBS: Yes, Your Honor. Could I
2 just have one moment?

3 THE COURT: Yes, ma'am.
4 [Pause.]

5 MS. STUBBS: Your Honor ----

6 THE COURT: Yes, ma'am, ready when you
7 are.

8 MS. STUBBS: I'm sorry, Your Honor.

9 THE COURT: I'm sorry. We're ready
10 when you are. I apologize.

11 MS. STUBBS: Thank you, Judge.

12 **REDIRECT EXAMINATION was conducted by MS. CASSANDRA STUBBS:**

13 Q. Doctor Woodworth, I'm going to ask you some
14 questions about the exhibits that the State introduced -- or,
15 handed to you, I guess, Exhibits 12 and 13.

16 A. Yes.

17 Q. These are expert reports from December 30th and
18 January 29th.

19 A. That's right.

20 Q. And, if I understand your testimony, the difference
21 between these two tables was the inclusion in one of very
22 young?

23 A. That's right.

24 Q. All right; and, what happened to the odds ratio for
25 black when you included it in State's Exhibit 13? When you

1 included the very young variable?

2 A. Changed in the second decimal place.

3 Q. So, for the record, could you please read what
4 those two odds ratios are in -- in their complete form?

5 A. I'll round it two figures -- 'cause that's where
6 they differ -- 2.46 for one and 2.48 for the other.

7 Q. And -- and, then, what happened to the p-value for
8 the black odds ratio with and without very young? What were
9 the p-values there?

10 A. Well, to -- to the fourth decimal place, they
11 didn't change.

12 Q. So, how would you describe the impact of including
13 very young on the odds ratio between the two tables?

14 A. Well, it's the usual effect of losing observations
15 that increase the standard deviation. It went from .185 to
16 .187. That's exactly what you'd expect; but, apart from
17 that, it doesn't seem to have had any other affect.

18 Q. And the prosecution asked you about the fact that
19 this same variable, very young, which you did include in your
20 multiple-imputation table and in your report, which was dated
21 January 29th -- the odds -- that was not included in your
22 smoothing analysis; is that right?

23 A. That's correct.

24 Q. And -- but you testified that you could easily do
25 that analysis to include very young?

1 A. Yes.

2 Q. All right. Now, Doctor Woodworth, I just want to
3 clear up the confusion that I interjected earlier. If -- if
4 -- I asked you a series of questions about if we defined the
5 term significant to include material and practical
6 significance. To be clear, if we define significant as
7 statistically significant, do you hold the same opinions
8 regarding the inference and the import of the adjusted and
9 unadjusted data?

10 A. Can you repeat those conclusions?

11 Q. Yes. I had asked you if it was your opinion that
12 the combined evidence, including the adjusted statistical and
13 unadjusted -- analyses and the unadjusted data raised an
14 inference of intentional discrimination in the exercise of
15 peremptory strikes in North Carolina and Cumberland County;
16 and -- and, then, I asked -- or, I wanted to ask you, if we
17 defined the term significant to include statistically
18 significant, whether -- what your opinion was?

19 A. Yes. I believe it raises the inference.

20 MS. STUBBS: Thank you, Doctor
21 Woodworth.

22 THE COURT: Anything else?

23 MS. STUBBS: No, Your Honor.

24 THE COURT: Mr. Perry?

25 MR. PERRY: Just briefly.

1 THE COURT: Yes, sir.

2 **RE-CROSS-EXAMINATION was conducted by MR. JONATHAN PERRY:**

3 Q. Doctor Woodworth, the opinion you have of the
4 inference, is that -- that's based on the analysis that you
5 ran for State's Exhibit 13, that January 29th report,
6 correct? In other words, that's based on the non-updated
7 analysis?

8 A. Yes, which is hardly changed from the corrected
9 version of it. Yes. It's based on that.

10 MR. PERRY: That's all I have, Your
11 Honor.

12 THE COURT: Okay. Folks, may the
13 witness be released?

14 MR. PERRY: That's fine with the
15 State, Your Honor.

16 MS. STUBBS: Yes, Your Honor.

17 THE COURT: Thank you, sir.

18 THE WITNESS: You're welcome.

19 THE COURT: You're free to go, sir.
20 Thank you, sir.

21 THE WITNESS: You're welcome.

22 [The witness withdrew to the spectator area.]

23 THE COURT: Okay. Do you have another
24 witness? Mr. Colyer, you indicated there were some other
25 matters. Is this an appropriate time to take those other

1 matters up?

2 MR. COLYER: Yes. I believe the
3 defense indicated, earlier today, that when Doctor Woodworth
4 ----

5 THE COURT: That's what I thought.

6 MR. COLYER: ---- Woodworth finished
7 this afternoon, they would be stopping and ----

8 THE COURT: Okay.

9 MR. COLYER: You had wanted to address
10 us with respect to your decision about ----

11 THE COURT: Well, I looked -- at
12 lunchtime -- initially, at 15A-1225. Let me begin by stating
13 the obvious. The rule in 1225, as all of us know, is that
14 issues relating to 615 are discretionary with the Court.
15 After looking at that and looking at the commentary to see if
16 I could find any information there, I found the following.
17 Let me go to my notes. Well, it would be helpful, at this
18 point, Judge Trosch, Mr. Stevenson -- both are being called
19 as expert witnesses; is that correct?

20 MS. STUBBS: Yes, Your Honor.

21 MR. JAY FERGUSON: Yes, sir.

22 THE COURT: In what area -- what is
23 their area of expertise that they'll be testifying in?

24 MR. HUNTER: Implicit bias, unconscious
25 racism. I would say Doctor Sommers is a more general expert

1 in that area. Judge Trosch has been a trainer in that area
2 about how to avoid implicit bias or reduce it in the
3 courtroom. So, he's in a more limited area of expertise.

4 THE COURT: So, same area, one more
5 general; the other more specific?

6 MR. HUNTER: That's right; and, that's
7 why we wanted Judge Trosch to follow -- perhaps not
8 immediately because of other scheduling issues, but after --
9 we intend to put Professor Sommers on first tomorrow and then
10 Judge Trosch to follow Professor Sommers, to sort of build on
11 it.

12 THE COURT: All right.

13 MR. COLYER: The defense has given us
14 some copies of PowerPoint slides with respect to Judge
15 Trosch. Did I understand that his testament is with respect
16 to remedial actions in court, what courts can -- can do ----

17 MR. HUNTER: No, remedial -- remedial
18 actions that court officials can do to help reduce their own
19 implicit bias.

20 MR. COLYER: And what relevance,
21 respectfully, would that have at this point, in this inquiry,
22 with respect to the defense evidence so far?

23 THE COURT: Mr. Hunter?

24 MR. HUNTER: Well, I thought we were
25 talking about scheduling, but I'll be happy to talk about the

1 relevance. I -- I -- I think part of -- part of what his
2 testimony is going to be is to illustrate how -- not only
3 that implicit bias exists, but how one can do things to
4 reduce the effect of implicit bias on decisions we make in
5 court; and, I think our -- the implication of our testimony
6 is going to be here is an example of a North Carolina court
7 official who knows about this area, has studied it, has taken
8 steps to reduce the effect of implicit bias ----

9 THE COURT: Okay.

10 MR. HUNTER: ---- in his decisions;
11 and, we believe the evidence will show that the prosecutors
12 have not taken those steps.

13 THE COURT: All right. Well, setting
14 aside -- I understand your position.

15 MR. COLYER: And -- and I'm sorry. I'm
16 not trying to raise ----

17 THE COURT: Yes, sir.

18 MR. COLYER: ---- something that we've
19 not talked about. I appreciate that explanation; and, at
20 this point, I'm not saying anything further with respect to
21 his testimony. I -- let's just deal with it in the context
22 in which it is now before the Court.

23 THE COURT: Yes, sir. That -- that's
24 exactly what I was going to suggest.

25 MR. COLYER: Thank you.

1 THE COURT: Folks, I found -- I didn't
2 have an awful lot of time, but I found the following case,
3 State versus Jackson, 309 NC 26. It's a 1983 case. Among
4 other things, in the decision -- the issue raised in Jackson
5 was a motion to sequester. The Court, in dealing with the
6 issue, used the following language, which I found to be
7 helpful, the separation of witnesses is not founded on the
8 idea of keeping the witnesses from intercourse -- not my
9 word; their word ----

10 [General laughter.]

11 THE COURT: ---- with each other.
12 That would be a vain attempt. The expectation is not to
13 prevent the fabrication of false stories. The purpose of the
14 rule is to separate witnesses for purposes of cross-
15 examination. One of the points that was raised in the case
16 dealt with two defendants who were testifying against the
17 defendant on trial. Both of whom had been -- pardon me --
18 placed in the same cellblock for an extended period of time
19 prior to the trial. Both of whom had given statements prior
20 to the trial. The upshot of the Court's decision was, folks,
21 if the objective, under the rule, is not to prevent
22 fabrication, not to prevent the opportunity to collude on
23 false testimony, but to preserve the right to elicit
24 potential matters relating to impeachment or credibility, the
25 vehicle for that is through cross-examination. So, what we

1 have here, if I'm understanding correctly, are two witness
2 the State [sic] intends to call, essentially the same area,
3 one general and one more specific.

4 MR. HUNTER: Yes.

5 THE COURT: The summaries of their
6 testimonies, either in the form of written summaries or
7 provision of -- you alluded to something -- a PowerPoint?

8 MR. HUNTER: Yeah, PowerPoints, Your
9 Honor.

10 THE COURT: Having been provided to
11 the State -- the State's on notice as to what their testimony
12 is going to be.

13 MR. COLYER: Yes, sir. We acknowledge
14 that.

15 THE COURT: Okay. Given the fact that
16 the State has a mechanism for impeachment by virtue of
17 provision of that information -- also taking into account
18 State versus Gay -- I remember Gay because I was the trial
19 judge -- one of the issues there dealt almost with the
20 identical issue; the difference being the defendant filed a
21 motion to sequester, and then the defendant later wanted to
22 change who was impacted by that motion for sequestration.
23 The Court held the judge properly said, no, you're the one
24 who made the motion; everybody agreed; everybody had an
25 opportunity to be heard on the motion; once it is ruled upon,

February 01, 2012

1 the Court is proper in saying we're going to abide by the
2 original conditions since everybody had an opportunity to be
3 heard; we're not going to change who's impacted by the motion
4 in midstream. So, that's where I'm coming down. It was
5 their motion for sequestration. Each side had an opportunity
6 to be heard about which witnesses would be included in that
7 motion and which witnesses would be excluded by that motion.
8 There seemed to be -- and I believe the record reflects that
9 there was agreement that it would not affect expert
10 witnesses. That having been the ruling of the Court, I'm not
11 going to deviate from that now for the reasons that I've
12 already given. So, the motion to exclude -- pardon me ---
13 sequester Judge Trosch and Mr. Stevenson is denied; to which,
14 the State objects and excepts for the record. It was made
15 reciprocal -- but the class of folks involved is not going to
16 change.

17 MR. COLYER: Yes, sir. Thank you.

18 THE COURT: We're following the ruling
19 that I made. Anybody want to be heard further?

20 [There were no responses from counsel for either side.]

21 THE COURT: Okay. Mr. Colyer, I
22 thought you indicated there were some other matters we needed
23 to talk about?

24 MR. COLYER: Yes. Earlier, Your Honor,
25 I believe Mr. Thompson and Ms. Stubbs were talking about the

1 exchange of information, so I -- I'll let him deal with that;
2 and, I've got an update with respect to witness availability
3 -- as we were talking about earlier this morning -- for
4 Friday of potential State's witnesses.

5 THE COURT: Yes, sir.

6 MR. COLYER: Judge Johnson, as you may
7 or may not know, is out of town attending to his daughter's
8 family and helping her. She had some surgery.

9 THE COURT: I was not aware of that.

10 MR. COLYER: Yes, sir; and, so, he's
11 been -- he and his wife have been out of town dealing with
12 that this week.

13 THE COURT: Okay.

14 MR. COLYER: And I spoke with him at
15 lunchtime today. He is coming back to town briefly this week
16 to take care of some personal matters and will not be here
17 for any lengthy period of time this week. He's heading back
18 to his daughter's home ----

19 THE COURT: Yes, sir.

20 MR. COLYER: ---- to continue to assist
21 her. She's doing well.

22 THE COURT: Okay.

23 MR. COLYER: She's making good
24 progress. He said that she's farther along than they had
25 anticipated -- had some surgery and she's doing well; but, he

1 asked if he could kind of beg off for this week --
2 especially, when I mentioned that we were going to try to do
3 something potentially Friday morning ----

4 THE COURT: Yes, sir.

5 MR. COLYER: So, if -- if we get into
6 Friday morning, we're still ready to go with another witness,
7 at this point; but, after that witness, we'd like to avail
8 ourselves of your kind offer to stop at midday.

9 THE COURT: Okay; and, certainly, we
10 will accommodate you in that regard.

11 MR. COLYER: Unless we could -- we need
12 to keep going with that witness -- I guess wanted to saying
13 that we'll only have one person on Friday we'll start with;
14 and, with your permission, we'll follow-up with other folks
15 on Monday.

16 THE COURT: Okay. Yes, sir.

17 MR. COLYER: Thank you.

18 THE COURT: Mr. Thompson, any other
19 matters?

20 MR. THOMPSON: Judge, I was getting --
21 getting reminded about what we're dealing with, with the
22 affidavits, the -- I'm sorry -- the underlying information in
23 the defense juror affidavits that -- has that been -- we had
24 a brief conversation with Ms. Stubbs. Has that been provided
25 to the Court?

February 01, 2012

1 THE COURT: It was handed up. It's in
2 the possession of the clerk. I have not had an opportunity
3 to look at it at this point. I'll do that this evening.

4 MR. THOMPSON: Okay. She -- she gave me
5 some preliminary information; but, again, I wasn't a hundred
6 percent clear what Your Honor ordered; you know, just in
7 logistics -- because it's going to come up tomorrow ----

8 THE COURT: Yes, sir.

9 MR. THOMPSON: ---- I wanted to try to
10 push this in the right direction.

11 THE COURT: All right.

12 MR. THOMPSON: We had asked for
13 information as it relates to who prepared the affidavits.

14 THE COURT: Let me find your motion so
15 I can make sure I'm doing what I'm supposed to be doing this
16 evening.

17 [Pause.]

18 MR. THOMPSON: The motion requests any
19 information given to the folks in conversation, that kind of
20 thing, the summary of the conversation. I'll have to pull it
21 up, Judge.

22 THE COURT: I've got them up here
23 somewhere.

24 MS. STUBBS: Your Honor, I can ----

25 THE COURT: Yes, ma'am.

1 MS. STUBBS: Your Honor, it asks for
2 detailed summaries, recordings and/or copies of all materials
3 provided to, read to, discussed with or communicated to the
4 following affiants concerning the preparation of their
5 affidavits.

6 THE COURT: And, my recollection, you
7 gave some initial response on the record.

8 MS. STUBBS: Yes, Your Honor; and ----

9 THE COURT: If you will, restate that
10 for me. That would be helpful.

11 MS. STUBBS: Yes. I said, on the
12 record, that these jurors were provided with excerpts of
13 their transcripts and some -- or, the -- or, the Batson
14 colloquy that they were -- they were the materials from the
15 records that had been previously provided to the State.

16 THE COURT: Okay.

17 MS. STUBBS: But I -- and, then, I also
18 identified the EJI report which I knew, at that time, had
19 been provided to one juror; and, just so everyone's on the
20 same page, I communicated to Mr. Thompson that the substance
21 of what is in the sealed document, which is -- that there
22 were two other jurors who were also provided with that report
23 ----

24 THE COURT: Okay.

25 MS. STUBBS: And the information under

1 seal, that I did not disclose to Mr. Thompson, is the names
2 of the staff of our -- essentially, our work product about
3 who went and did these interviews.

4 THE COURT: Okay; and, that
5 information is included in the information under seal?

6 MS. STUBBS: Yes, Your Honor.

7 THE COURT: Okay. Just wanted to
8 clarify that for the record.

9 MS. STUBBS: And, then, I think, just
10 to bring us all up to speed -- then, after I had communicated
11 that information, Mr. Thompson then asked me for who prepared
12 the affidavits. I indicated that I believe that that's a new
13 issue. We've never -- no one's ever given us who's prepared
14 any affidavits for any of the State materials that, if they
15 were now seeking that, we would want to be heard on that.

16 THE COURT: Okay.

17 MR. THOMPSON: Well, the short answer is
18 the affiants prepared their own affidavits and signed them.
19 Now -- so -- for the State -- I'm sorry -- the State
20 affidavits. So, that's -- I'm sorry -- a pretty simple
21 response from the State; but, if -- I think maybe it's a
22 better idea, if it's all right with the Court, look at what
23 they've given you, and then we can talk about it in the
24 morning ----

25 THE COURT: Yes, sir.

1 MR. THOMPSON: But, there may be some
2 logical, huge holes in -- the -- the -- I guess, fodder for
3 cross-examination; but, we -- I guess we can talk about it in
4 the morning -- is the short answer -- after Your Honor's had
5 a chance -- chance to take a look at it.

6 THE COURT: That ----

7 MR. COLYER: Judge -- and, also, for
8 your purposes, I think -- and this is just a total guesstimate
9 -- that what you have may be relevant to Mr. Stevenson and
10 not necessarily Doctor Sommers or Judge Trosch.

11 THE COURT: Yeah.

12 MR. COLYER: I think. I don't know
13 about that. They may have some other response on that.
14 Based upon what they gave us in discovery with respect to
15 supplemental material, there ----

16 THE COURT: Well, let's make the
17 record as complete as we can. In addition to the PowerPoint
18 materials that you've referred to -- and I think that related
19 solely to Judge Trosch -- were summaries as to their proposed
20 testimony provided?

21 MR. HUNTER: Yes.

22 MR. COLYER: Yes, sir. We have those.

23 THE COURT: I just wanted to make sure
24 that was in the record.

25 MR. THOMPSON: Yes, sir. Yes, sir; and,

1 if I could have just about 30 seconds, sir?

2 THE COURT: Yes, sir.

3 [Pause.]

4 THE COURT: Because that will
5 certainly be consistent with the order of the Court regarding
6 that, expert witnesses.

7 [Pause.]

8 MR. THOMPSON: Judge, we told you we'd
9 get back to the Court and to counsel for logistical reasons
10 as it relates to the affiants that the State has. We do
11 intend to call the State affiants as witnesses in this case.
12 I'd like ----

13 THE COURT: You do or do not?

14 MR. THOMPSON: We do, unless there is a
15 stipulation that -- and I'll probably -- the -- the defense
16 -- that they will not give -- that they would be admissible
17 for substantive purposes. They've indicated clearly that
18 they -- they'd be opposed to that; but, based on that, just
19 so the defense knows, so they can do planning accordingly
20 ----

21 THE COURT: Okay.

22 MR. THOMPSON: ---- we do intend on
23 calling each of those State affiants as witnesses ----

24 THE COURT: Okay.

25 MR. THOMPSON: --- substantially, I

1 think, lengthens the hearing -- I want to make sure everybody
2 can plan accordingly.

3 THE COURT: Okay.

4 MR. THOMPSON: And nothing else from the
5 State as far as I -- as far as I know for today's purposes.

6 THE COURT: Okay. Mr. Thompson, if
7 you would, be more specific as to why you contend information
8 relating to the circumstances under which the affidavits were
9 given, who was involved -- or, any other basis for your
10 requesting that information; but, how you contend that's
11 admissible -- I'm assuming -- dangerous statement -- that
12 your argument is that it goes to the issue of credibility,
13 impeachment one way or another, may establish bias?

14 MR. THOMPSON: I want to make sure I'm
15 understand Your Honor's question. Are we talking about the
16 juror affidavits from the defense?

17 THE COURT: Juror affidavits. I
18 apologize. I should have been clearer.

19 MR. THOMPSON: Sorry. I like to make
20 sure ----

21 THE COURT: Yes, sir.

22 MR. THOMPSON: ---- I know what I'm
23 talking about, Judge.

24 THE COURT: Yes, sir.

25 MR. THOMPSON: Judge, the -- those

1 affidavits were provided to us; and, as I understand the
2 reason they were provided to us, it was under the discovery
3 requirement that the information that was provided to their
4 experts be given to us, the raw data, in essence, that their
5 experts were relying on to form their opinion.

6 THE COURT: Okay. Now, when you say
7 their experts, we're talking about ----

8 MR. THOMPSON: Stevenson, in this case.

9 THE COURT: All right. Yes, sir.

10 MR. THOMPSON: If Stevenson relied on raw
11 data, that was provided by the defense -- I'm trying to make
12 sense of this in my head. It's kind of swimming. If
13 Stevenson relied on raw data, we -- we feel like we should be
14 entitled to where that raw data came from, is that raw data
15 -- the origin of that raw data. It's not -- if you just hand
16 me -- hand a piece of paper and say he -- he -- he -- he
17 depended on this piece of paper, we should know where that
18 piece of paper came from. What -- what is that that -- the
19 raw data doesn't mean anything unless we know the
20 circumstances in which that raw -- that raw data was created
21 and, therefore, whether that raw data was reliable. Does
22 that make sense? Is -- where did the raw data come from that
23 this expert witness relied on to give his expert testimony.
24 We were given just the pieces of paper, no explanation of
25 where they came from, what was done to prepare them, who

1 prepared them, who drafted them, what information was given
2 to the affiants before they were drafted.

3 THE COURT: When you're referring to
4 raw data, you're referring to the affidavits?

5 MR. THOMPSON: Yes, sir. Those -- just
6 those ----

7 THE COURT: Juror affidavits.

8 MR. THOMPSON: Juror affidavits, yes,
9 sir.

10 THE COURT: Yes, sir.

11 MR. THOMPSON: And it seems that it would
12 -- if you give us just the actual pieces of paper, they're --
13 they're meaningless pieces of paper unless we are given the
14 information that -- that created them, that caused them to be
15 created. People did not walk off the street, walk into their
16 offices and hand them these affidavits.

17 THE COURT: Okay.

18 MR. THOMPSON: It's clear they were all
19 prepared either by the same person or from the same form.
20 They all followed the same patterns and whatnot, and these
21 are 10 people that likely had ----

22 THE COURT: Well, I guess what my
23 question is -- and I apologize for interrupting.

24 MR. THOMPSON: Yes, sir.

25 THE COURT: My question is how would

1 that impact on any cross-examine of the experts in terms of
2 their opinion?

3 MR. THOMPSON: Well, I got in trouble
4 earlier this week when I used this phrase -- let me explain
5 it. The theory -- I was taught garbage in, garbage out ----

6 THE COURT: Okay.

7 MR. THOMPSON: ---- is the question --
8 and, if -- if an expert relied on good information and formed
9 an opinion, that's -- that's -- it actually tends to lend
10 credibility to that expert's testimony. If an expert had
11 pretty sorry information, then it would certainly be
12 appropriate to bring that out during cross-examination, that
13 your opinion's based on sorry information.

14 THE COURT: But the information
15 itself, that will be utilized for the basis of any opinion,
16 would be in the contents of the affidavit.

17 MR. THOMPSON: The contents of the
18 affidavit -- but, the contents of the affidavit are
19 meaningless unless we know how those contents became -- how
20 those contents were created.

21 MR. COLYER: [Standing.]

22 THE COURT: Mr. Colyer's ----

23 MR. COLYER: Judge, if I -- we've been
24 talking about substantive evidence with respect to our
25 affidavits.

1 THE COURT: Yes, sir.

2 MR. COLYER: And, basically, what it
3 appears to us is the experts will use these affidavits ----

4 THE COURT: Okay.

5 MR. COLYER: ---- as the basis of their
6 opinion, and the substance of what the affidavits say will be
7 ----

8 THE COURT: Okay.

9 MR. COLYER: ---- presented in court in
10 furtherance of their opinion.

11 THE COURT: Okay.

12 MR. COLYER: Mr. Stevenson, if I'm
13 correct -- if he's the person who's going to use these, has
14 produced, from his institution, a document that had been
15 given to us previously with respect to discovery, where
16 jurors in other cases, in other states, have presented
17 vignettes, so to speak, in his publication with respect to
18 their experience.

19 THE COURT: Okay.

20 MR. COLYER: And it appears to us that
21 that may be what the defense is trying to do hear with
22 respect to these North Carolina cases, to make them -- we --
23 we complained at one point earlier about Doctor -- Mr.
24 Stevenson's material didn't include anything from North
25 Carolina ----

1 THE COURT: Yes, sir.

2 MR. COLYER: ---- because it dealt with
3 the South, quote, unquote; and, we were told that, well,
4 perhaps he will have some material from North Carolina and
5 make it germane and relevant to this inquiry. We think
6 that's how it's going to be done with respect to perhaps
7 these 10 jurors; but, it would then be used in a similar way
8 to the information that's contained in Mr. Stevenson's
9 pamphlet; and, unless he has some information that we don't
10 have, which he may very well, we don't have the ability to
11 question him about the affidavit contents other than what it
12 says on its face.

13 THE COURT: Okay.

14 MR. COLYER: And we think that he's
15 going to say to the Court -- and, as further bolstering of my
16 opinion that the State uses pretextual Batson reasons, let me
17 tell you what these jurors said about their experience and
18 how -- tell what the jurors said; and, then, the Court has
19 what he says the jurors said in their affidavit bolstering
20 his opinion about pretextual Batson excuses or explanations
21 by prosecutors ----

22 THE COURT: Well ----

23 MR. COLYER: ---- we don't have the
24 ability to test what he's using as his basis.

25 THE COURT: Okay.

1 MR. THOMPSON: There's a body of law that
2 deals with the self-serving nature of affidavits coming in
3 during an expert's testimony, and it's -- the concept that
4 we're talking about is similar to that. Unless we can get
5 some real meaningful information about how they were created,
6 it's ----

7 THE COURT: One of the difficulties
8 that I'm having -- and I don't mind admitting that candidly
9 -- is I don't have access, at this point, to the summary.
10 So, I don't know, at this point, the gist of what Doctor
11 Stevenson and Mr. Sommers will be testifying to; which, to
12 some degree explains why I'm asking the questions I'm asking.

13 MR. THOMPSON: Yes, sir.

14 THE COURT: Folks, let me ask you
15 directly. Is the testimony of such a nature that it -- let
16 me be careful about how I phrase this. I've read the line of
17 cases. I'm familiar with the history from Swain all the way
18 up and, before Swain, Strauder. Are we talking about
19 testimony that basically deals with some of the issues raised
20 in that case about impact not only on the -- a defendant in a
21 case, but also on the community that may be impacted based on
22 disparate impact? Is that where we're going?

23 MS. STUBBS: Yes, Your Honor. These
24 affidavits do go to the issue of harm ----

25 THE COURT: That's what I thought.

1 MS. STUBBS: And -- and I should just
2 -- just for the record, let me be clear. These are not
3 affidavits of jurors. These are affidavits of excluded
4 venire members who were not -- did not actually ----

5 THE COURT: So, this would be evidence
6 showing harm to the effected community?

7 MR. COLYER: That was my misuse of the
8 term juror. I apologize.

9 THE COURT: Okay.

10 MR. THOMPSON: I used the same term, but
11 they were -- they were jurors with respect to this courtroom,
12 that we talked about, excluded and not excluded.

13 MS. STUBBS: But -- but, Your Honor,
14 the issue with affidavits is exactly the same; in that, we
15 have -- we've given affidavits to our expert, Doctor Stevens
16 -- or, Mr. Stevenson, who -- who will testify about them and
17 will base his testimony; and, we've made -- will be moved
18 into evidence on the ground that they -- that are evidence
19 that he relied. Should we wish to have them admitted as
20 substantive evidence, we would call these jurors -- we ----

21 THE COURT: Yes, ma'am.

22 MS. STUBBS: --- these excluded venire
23 members.

24 THE COURT: Yes, ma'am.

25 MS. STUBBS: We would disclose them as

1 potential witnesses. I -- I -- I really don't under -- we --
2 we've already -- at a -- in order to try to move the ball
3 forward, we've already disclosed all the information about
4 how we got the affidavits, who -- that we -- that we went to
5 them, that they were employees from my office, The Center for
6 Death Penalty, that they were -- that they were interviewed
7 and then affidavits were prepared. We've given them the
8 affidavits. I -- I -- I -- honestly, I think that we've bent
9 over backwards to try to give them all the information
10 necessary for this hearing.

11 THE COURT: All right. May I have
12 copies of the affidavits, as well as copies of the summaries,
13 folks, for purposes of my consideration?

14 MS. STUBBS: We can bring those --
15 provide those in the morning, Your Honor.

16 THE COURT: That -- that'll work.
17 Anything else, folks?

18 MR. COLYER: Judge, I have copies of
19 those affidavits here in court, but I've marked on mine. I
20 don't want to give those to you, but I -- I'll probably ----

21 THE COURT: I'm normally here ----

22 MR. COLYER: We can bring them up on
23 the computer and print them right here before we leave today
24 ----

25 THE COURT: Okay. All right.

February 01, 2012

1 MR. COLYER: ---- to expedite the
2 matter.

3 [Pause.]

4 MR. THOMPSON: Judge, I have them here in
5 one file.

6 THE COURT: I think they're in the
7 process of assembling ----

8 MR. THOMPSON: Oh, have you got them?

9 [Pause.]

10 MR. THOMPSON: It's about 20 -- what I
11 have -- I have one combined PDF. It's about 20 pages long.
12 It contains all of the affidavits.

13 MS. STUBBS: Your Honor, may I
14 approach?

15 THE COURT: Yes, ma'am.

16 [Counsel conferred.]

17 MS. STUBBS: [Handing documents to the
18 Court.]

19 THE COURT: Thank you ma'am.

20 Okay. Anything else, folks?

21 MR. JAY FERGUSON: The summaries?

22 THE COURT: Summaries?

23 MR. JAY FERGUSON: We will get you the
24 summaries in the morning, if that's okay.

25 THE COURT: That's fine.

1 MR. COLYER: Judge, the only reason we
2 mention this now is because the defense has indicated,
3 earlier today, that they anticipate -- we're going to hear
4 their experts tomorrow and we -- we didn't want to spring
5 this on you in the morning ----

6 THE COURT: I appreciate that.

7 MR. COLYER: ---- at the last minute
8 ----

9 THE COURT: Yes, sir.

10 MR. COLYER: ---- so that we didn't
11 spillover on your time.

12 THE COURT: I appreciate that.

13 Okay. All right. Have a good evening, folks.

14 MR. JAY FERGUSON: Thank you, Your Honor.

15 THE COURT: See you tomorrow morning
16 at 9:30

17 MR. HUNTER: Thank you, sir.

18 [The hearing recessed at 4:45 p.m., February 1, 2011.]

19 **[END OF PAGE]**

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

vs.

MARCUS ROBINSON,
 Defendant

RACIAL JUSTICE ACT HEARING

Heard February 10, 2012

**VOLUME X of XIII
 (Pages 1911 through 2003)**

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: CALVIN W. COLYER & ROB THOMPSON
 12th Judicial District
 JONATHAN W. PERRY, 20th Judicial District
 Assistant District Attorneys
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302

For the Defendant: MALCOLM R. HUNTER, JR. & JAY H. FERGUSON
 JAMES E. FERGUSON, II, & CASSANDRA STUBBS
 Attorneys at Law
 119 East Main Street
 Durham, North Carolina 27701

JENNIFER L. HACK, RPR
 Official Court Reporter
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302
 jennifer.l.hack@nccourts.org

DATE REQUESTED: 02/03/12

DATE DELIVERED: 02/29/12

1 (The following proceedings began in open court on
2 Friday, February 10, 2012, at 8:56 a.m. The defendant, Mr.
3 Hunter, Mr. Jay Ferguson, Mr. James Ferguson, Ms. Stubbs, Mr.
4 Colyer, Mr. Thompson, and Mr. Perry were present.)

5 (REPORTER'S NOTE: The Master Index will be
6 submitted in a separate volume entitled Master Index.)

7 THE COURT: Let the record reflect all counsel are
8 present. The defendant is present.

9 Folks, I keep getting different versions of the
10 schedule, so let's talk for just a brief moment about the
11 possibility of completing Dr. Katz's testimony and whether
12 that's possible. Schedule finalized apparently is that the CLE
13 is going to start at 11:00 o'clock this morning. It's not clear
14 from the program how much time is going to be involved in the
15 luncheon, when the program is going to start. The point that
16 I'm attempting to make is getting your input into where we are
17 on Dr. Katz. I don't want to do anything that's going to limit
18 cross-examination. I don't want to do anything that's going to
19 impact on folks' schedules otherwise. So if you folks will talk
20 about what it is -- is it possible, do you think, recognizing
21 that Mr. Perry still has some additional questions on direct, to
22 complete the cross?

23 MR. JAY FERGUSON: By 11:00?

24 THE COURT: No. I am willing to work with the
25 time schedule. I am willing to work with that.

1 MR. THOMPSON: The purpose of the State -- the one
2 thing we do want to accomplish is to send these two gentlemen
3 home, and I think I made that clear yesterday.

4 THE COURT: You did. You did. Let me put it in a
5 different way. Is it your desire to go forward even if I don't
6 make this, which is not a problem for me -- which is not a
7 problem for me. I am willing to stay until we complete your
8 cross-examination if that doesn't interfere with anybody's
9 plans.

10 MR. JAY FERGUSON: It doesn't interfere with ours.
11 I think it's the State who has the plans for the CLE.

12 MR. THOMPSON: No, we actually do not.

13 MR. COLYER: We talked about that three weeks ago,
14 and you said we couldn't go, so we didn't make any plans. We
15 were just trying to work with your schedule in terms of your
16 participation.

17 THE COURT: They're not registered.

18 MR. JAY FERGUSON: But you have a commitment
19 there.

20 THE COURT: Well, I can -- I can deal with that.
21 I can deal with that.

22 MR. JAY FERGUSON: Well, we will certainly work
23 around whatever we need to do. I suspect after Mr. Perry
24 finishes that I will have about three hours of cross-examination
25 but that is an absolute guess.

1 THE COURT: I understand. None of us knows how it
2 is going to work out until we get there.

3 MR. JAY FERGUSON: I thought the voir dire would
4 have taken about an hour, though, so if that gives you any
5 indication.

6 THE COURT: All right. Are we in agreement that
7 whatever time it takes, we're going to go forward?

8 MR. THOMPSON: I think everybody is on that same
9 page, Judge.

10 THE COURT: We're all in agreement on that. Okay.
11 Then we're good to go.

12 MR. THOMPSON: Now, as far as scheduling goes, we
13 have Lock, Brewer, Cronin, Jenkins, and Thompson in that order
14 left. We suspect that Lock, Brewer, Jenkins, and Thompson to be
15 very similar --

16 THE COURT: Yes, sir.

17 MR. THOMPSON: -- to the testimony of Gore, I
18 guess. Cronin, we have nothing to draw from, but we are
19 guessing that's going to be an hour or less total on direct.
20 That's actually adjusting -- doubling the time I think it would
21 be, but -- so we're actually, if things move smoothly, again, we
22 expect to be finished Monday for scheduling purposes.

23 THE COURT: Okay.

24 MR. THOMPSON: And after Thompson, we'll be
25 finished.

1 THE COURT: All right. Well, the immediate
2 concern, if I understand correctly, is simply whether or not we
3 can complete the testimony of Dr. Katz for our purposes today.

4 MR. THOMPSON: Yes, sir. But while we were
5 talking about scheduling, I figured I'd throw that out.

6 MR. COLYER: That takes us to another step, Your
7 Honor. We want to advise the Court of, respectfully. Mr.
8 Perry, who has been doing the direct and the cross-examination
9 of the statistical experts, is unavailable next Wednesday
10 because of a prior commitment with respect to a family member
11 that needs some medical attention that he's involved in.

12 THE COURT: Okay.

13 MR. COLYER: So we wanted to give the defense --
14 they asked yesterday about when we thought we were going to
15 finish. We tried as best we could to give them an estimate so
16 they can have their folks in place if they are going to move
17 them back, fly them around, whatever, but we would ask, please,
18 that next Wednesday, if it is at all possible for scheduling,
19 not to put on Dr. O'Brien or Dr. Woodworth --

20 THE COURT: In his absence.

21 MR. COLYER: -- in his absence so he can be
22 present for their examination and cross. I don't know when they
23 had planned to do that, but we wanted to give them some
24 indication that if it is at all possible, we'd like to work
25 around that schedule.

1 MR. THOMPSON: And I hadn't brought this up even
2 to my team yet. I have had a loss in my extended family.

3 THE COURT: I'm sorry.

4 MR. THOMPSON: I appreciate that, Judge. I expect
5 the funeral arrangements -- it was actually yesterday afternoon
6 that Mr. Oliver (phonetic) passed and as of this morning, I'm
7 not made aware of any of the arrangements. I don't know if they
8 will be this weekend or next week. There will be a time that I
9 will be stepping out. If that's during the testimony of Dr.
10 Woodworth or another expert, then that should not delay the
11 court proceedings at all, but because I don't know the
12 arrangements, I can't tell Your Honor when that may interfere,
13 but I wanted to lay that out.

14 MR. COLYER: As best we can, Your Honor, we will
15 work in Mr. Thompson's absence. We just wanted you to know that
16 he might be excused for a period of time next week.

17 MR. HUNTER: Your Honor, it sounds to me just like
18 sort of summing up that we are going to finish with Dr. Katz
19 today.

20 THE COURT: Yes, sir.

21 MR. HUNTER: And then I think the State -- it
22 sounds like maybe the State can finish on Monday.

23 MR. COLYER: We are certainly hoping, yes, sir.

24 MR. HUNTER: And if that happens, I think we can
25 finish on Tuesday. I think we can get our people --

1 MR. COLYER: And do you think that -- when you say
2 you will finish, that would be if you're calling expert folks,
3 that would allow Mr. Perry an opportunity to finish with them on
4 Tuesday?

5 MR. HUNTER: Yes, if Mr. Perry doesn't take any
6 longer crossing than we take redirecting then I think we can get
7 done.

8 MR. COLYER: With all due respect to our experts,
9 yesterday you think I was kidding when I was talking about a
10 half-hour worth of questions, but our questions sometimes
11 generate longer answers than we anticipate, and I am not being
12 disrespectful to anybody but, yeah, that's our --

13 MR. HUNTER: So we expect the, you know, our
14 redirect to be a real redirect. We're not reploting land we've
15 already plowed. We expect the recross to be focussed on the
16 redirect, and if that all happens, I think we'll finish our
17 evidence on Tuesday.

18 MR. COLYER: And if we do not, Your Honor, if Mr.
19 Perry is here and we don't get to that point, may we ask for a
20 recess in his absence for Wednesday. I know it's bad if we have
21 to take an expert over that down time, but we'll try our best to
22 complete our task so that we can accommodate his schedule as
23 well as the defense schedule on Tuesday if that's where we're
24 headed.

25 THE COURT: It sounds like it's workable, but then

1 things happen. I will accommodate whatever needs to be
2 accommodated to make sure both sides have the opportunity to do
3 what they need to do.

4 MR. THOMPSON: Thank you. And while we're on
5 this, Judge, we've all kind of played nicely together as far as
6 who we're going to call, what order we're going to call them in,
7 and that kind of stuff. I want to ask the defense if you guys
8 know who you're going to call in rebuttal. You've notified us
9 of a number of rebuttal witnesses. Call all of them, some of
10 them, none of them so we can be properly prepared.

11 MR. COLYER: We're not asking right this minute,
12 but if you could let us know later today.

13 MS. STUBBS: We can let you know right now. We
14 are planning to call Dr. O'Brien and George Woodworth.

15 MR. COLYER: That's very helpful. Thank you.

16 THE COURT: Thank you, folks.

17 Dr. Katz, good morning. If you would come back to the
18 witness stand, please, sir. Would you like some water?

19 THE WITNESS: I've got some. Thank you very much.

20 THE COURT: Okay. Mr. Perry.

21 MR. PERRY: Thank you, Your Honor.

22 Judge, just before we start, I just wanted to make the
23 Court aware I gave Mr. Ferguson a copy of some notes that I'm
24 going to ask the witness to refer to. I wasn't necessarily
25 going to mark them as an exhibit. They are more just to speed

1 it up a little bit.

2 THE COURT: Whose notes are they, Mr. Perry?

3 MR. PERRY: Dr. Katz's notes.

4 THE COURT: Any objection to that process, Mr. Jay
5 Ferguson?

6 MR. JAY FERGUSON: No, Your Honor.

7 THE COURT: Okay. Yes, sir, Mr. Perry.

8 MR. PERRY: If I can approach, I have a copy for
9 Your Honor, too.

10 THE COURT: Yes, sir. I appreciate it.

11 DIRECT EXAMINATION (Cont'd)

12 BY MR. PERRY:

13 Q All right. Dr. Katz, if I could direct your attention
14 back, this is page 53 out of State's Exhibit 47 that's displayed
15 on the screen. I had just started to ask you questions about
16 this, but just to take us back, the table 18 that's up on the
17 screen -- what is that?

18 A Table 18 is a table I prepared based upon the reasons
19 for strikes that were given in the reports or affidavits from
20 prosecutors for the 62 black venire members that were struck by
21 the State for the 11 Cumberland County trials.

22 Q Okay. So -- and a copy of this is actually in your
23 final report, right?

24 A Yes, it is. It is table 18 in my final report.

25 Q Okay. Now, as a result of the review process that you

1 did, what was your analysis or what were your observations?

2 A Well, I did several basic analyses of the reviews. My
3 first analysis was looking at the percentage of the black venire
4 members that had indications in the review that the venire
5 member was struck based in whole or in part on a death penalty
6 issue and, basically, I would read the review and if it said
7 something related to a death penalty issue, I would count it as
8 an occurrence. If it didn't, I would count it as a
9 nonoccurrence. And based upon my count, I found that there were
10 36 venire members who were struck in whole or in part in the
11 Cumberland County trials out of the 62 based upon death penalty
12 issues.

13 Q Okay.

14 A And that's 58.1 percent. I did a second analysis,
15 again, a very basic summary-type analysis where I would identify
16 whether or not there was indication of some criminal background
17 issue either related to the venire member or a family member or
18 a friend that was described in whole or in part as the reason
19 for that venire member being struck, and based upon my count, I
20 found that 28 of the 62 venire members were struck in whole or
21 in part based upon a criminal background issue, which is
22 45.2 percent.

23 Q Now, how did that compare with the variables in the
24 defense -- in the defense study by Professor O'Brien?

25 A Okay. In terms of the death penalty issue, Dr. O'Brien

1 defined DP_Reservations, and she had in her study 30 of the
2 venire members credited with the variable DP_Reservations. My
3 count was 36. As to the criminal background issue, I compared
4 the 28 that I found based upon the reviewers to the number
5 credited with the variable Accused_All, which seemed the most
6 appropriate comparison, and my recollection is that in Dr.
7 O'Brien's study, 36 of the venire members were credited with the
8 variable Accused_All compared to only 28 venire members that had
9 criminal background issues as part of the review.

10 Q Okay. Now, what additional analysis did you do or did
11 you look for other factors in particular when you were going
12 through and looking at these reviews?

13 A Yes. I was trying to get some sense as to what might be
14 the underlying reasons why black venire members might be struck
15 more frequently than white venire members or non-black venire
16 members, and I did identify another factor that appeared in this
17 data set which I call a financial strength factor in that I
18 found seven venire members who were struck in whole or in part
19 based upon financial issues.

20 THE COURT: That was how many, Dr. Katz? Seven?

21 THE WITNESS: Seven. And that's according to what
22 was provided in the review.

23 BY MR. PERRY:

24 Q And just a little more clarification. When you say
25 financial strength, can you just tell us sort of exactly or give

1 us an example of what you're talking about?

2 A I think there was one venire member who, quoting the
3 review, was going to have to go to his regular job, which was
4 working at night, and so he would have to work at night and do
5 his regular job and then go to the trial during the day.

6 Q Okay. So that would have fallen --

7 A Because he didn't have the opportunity to, as I
8 inferred, to basically just take that time off and not do his
9 regular job.

10 Q Okay. Now, did you do any further or -- what
11 additional analysis did you do beyond looking at those three
12 specific factors?

13 A I did one other analysis, which was I noticed there
14 seemed to be a diversity, a variety of different reasons given
15 out of the 62 reviews, so I did a compilation of those that I
16 found and made a list of those.

17 Q Okay. And if I can direct your attention to page 55
18 out of State's Exhibit 47. You just mentioned a compilation of
19 reasons. Is that the list of the reasons that you compiled as
20 displayed up there on the screen?

21 A Yes. It looks like it; although, I can't read it all
22 that well.

23 Q Okay. And were those -- were those individualized or
24 why did you put those in that table?

25 A Because it appeared to me that there are a diversity of

1 reasons why venire members would be struck and reasons that one
2 might not even think of in trying to do a study but sort of just
3 come up as the venire member is interviewed. So it -- it
4 suggested to me that in terms of coming up with a model that
5 explains everything and has just a few variables that purports
6 to identify the reasons why venire members are struck, that may
7 not be an appropriate approach given what I'm noticing in that
8 there are a diversity of reasons.

9 Q All right. And can you give us -- it is displayed, but
10 can you give us some examples? Can you see that?

11 A Not that well.

12 MR. PERRY: May I approach, Your Honor.

13 THE COURT: Yes, sir.

14 THE WITNESS: Thank you.

15 MR. PERRY: Yes, sir.

16 BY MR. PERRY:

17 Q Dr. Katz, what I was asking you is if you can give us
18 an example of something in your compiled list that seemed to be
19 different from the way things were categorized in Professor
20 O'Brien's report or explain some reasons why you included these
21 particular examples?

22 A Okay. Well, one -- we can start with number one, Freda
23 Frink, was close to a homicide victim and that an older person
24 who got no jail time had killed her fiance 10 or 11 years ago.
25 This reason is related to being a victim or part of the family

1 of or close person to a victim, and that wasn't part of the
2 variables that were used in the logistic regression model for
3 Cumberland County. It didn't account for any issues that might
4 arise based upon someone being a victim.

5 Marilyn Richmond had a BA degree in psychology and
6 worked as a teenage drug counselor, and she worked with, in
7 quotes, wanna be gang guys. And this venire member was
8 considered for the trial of Christina Walters, which was, as I
9 understand it, a gang-related killing.

10 Then number three, William Bell, did not show up when
11 called as a replacement juror, and so he was struck by the
12 State.

13 Number four, Deadra Holder, and her younger sister were
14 in the same age range and about the same ages, 22 and 18, as the
15 two defendant brothers, Tilmon and Kevin Golphin.

16 Number five, Tera L. Farris, initially said she had a
17 friend charged with arson but then said it was larceny from May,
18 1995 incident.

19 Number six, Jay Whitfield, was 21 years old and knew
20 some gang guys from playing basketball. The trial of Christina
21 Walters was, again, a gang-related killing.

22 Number seven, Sean Richmond, did not feel like he had
23 been a victim even though his car had been broken into at Fort
24 Bragg and his CD player stolen.

25 Number eight, Rodricus Owens, didn't like being in the

1 role of an alternate juror.

2 Number 9, John Reeves, had been a juror in a federal
3 bank robbery case in 1996, and that resulted in a hung jury.
4 Dr. O'Brien did have a descriptive element for hung jury, but it
5 wasn't included as part of the logistic regression for
6 Cumberland County.

7 Number 10, Nelson Johnson, would require an eyewitness
8 and the defendant being caught on the scene in order for
9 conviction.

10 Number 11, Sylvia Robinson, didn't feel comfortable
11 judging other people.

12 Number 12, Linda Montgomery, had a physical problem
13 with migraine headaches as well as anxiety and stress problems
14 for which she took medication. Moreover, her questionnaire
15 indicated that she had a deceased 23-year-old son, but she
16 wouldn't talk about him or the case involving the deceased
17 family member nor the killer involved in the 1990 case.

18 Number 13, Sallie Robinson, said she could possibly,
19 that's in quotations, consider both punishments but she would
20 have to be convinced, in quotes, beyond a doubt.

21 Number 14, Norma Bethea, had knee surgery and couldn't
22 sit for too long. She said she had to move around every two
23 hours or so and couldn't sit for five to six hours.

24 And number 15, Christine Thomas, complained of medical
25 problems and the stress caused by them and the trial but a

1 medical hardship was denied.

2 Q Okay. So now all those 15 together, the reason for the
3 inclusion in your table, just to be clear, was what?

4 A It shows diversity of specific reasons why the venire
5 member was struck in whole or in part according to the reviewers
6 which makes me think that a model that tries to explain or
7 control for all these factors would be very difficult to
8 produce.

9 Q Okay. And now, Dr. Katz, if I can direct your
10 attention -- this would be page 56 of State's Exhibit Number 47.
11 This is table 19, and this is just the first part of table 19,
12 but can you clarify for the Court exactly what's included in
13 table 19, your final report?

14 A Yes. Table 19 is similar to table 18 in that I tried to
15 produce a table that provided the reasons for strike for all
16 venire members who were struck by the State out of the 173
17 trials. As of the time that this table was prepared, around
18 January 9th or 10th, there were 636 black venire members struck
19 by the State according to my count, and I had reasons for the
20 strike for 246 of them. So in cases where the venire member
21 didn't have a reason, those -- the place where I had reasons for
22 strike would be left blank.

23 Q And just to be clear, again, like the previous table,
24 the information in the table came from the affidavits that were
25 submitted by the prosecutors, correct?

1 A Well, the affidavits or other reports that were
2 submitted by the prosecutors, yes.

3 Q All right. Now, from what you did receive from the
4 statewide reviews or responses, did you have any observations or
5 were you able to make any analysis out of those responses?

6 A The problem is that my methodology required that I get
7 reviews for all 636 to be more consistent with the way a *Batson*
8 challenge would be handled. Plus I had no guarantees that the
9 way these reviews came in would constitute a random sample so
10 that I could do something to project the information from the
11 246 to the 636. So I'm very limited in what I can do in terms
12 of providing accurate statistical probability-type information
13 about these cases. I did go ahead and do counts for percentage
14 of death penalty issues and percentage of reviews that had
15 indications of criminal background for the juror or family
16 member or close person similar to what I did for Cumberland
17 County but, again, it's not -- it's not necessarily
18 representative of what that answer would be if we had either had
19 random sample or had completed all the reviews statewide. But
20 just in terms of those numbers, based upon the 246 --

21 MR. JAY FERGUSON: I object at this point
22 especially in light of his most recent comments. I'd like to
23 renew my motion in limine based on the lack of scientific
24 validity to this analysis based upon Rules 701 and 702.

25 THE COURT: Yes, sir. It is deemed renewed in apt

1 time and, again, for purpose of the preservation in the record,
2 your objection is overruled. Exceptions are noted for the
3 record.

4 Folks, ultimately, it is going to be my responsibility
5 to decide the issues that are involved in your motion.

6 So go ahead, sir.

7 THE WITNESS: All right. Thank you, Your Honor.

8 BY MR. PERRY:

9 Q And just, Dr. Katz, again, from what you did receive,
10 can you explain what you got?

11 A From what I did receive as of January 10th, there were
12 246 reviewed -- venire member strikes reviewed. In terms of the
13 death penalty issue, I counted 135 out of 246 or 54.9 percent.
14 In terms of the criminal background issue, there were 93 out of
15 246 or 37.8 percent of the reviews.

16 THE COURT: And that represents the reviews
17 received?

18 THE WITNESS: Received out of the 246, yes.

19 BY MR. PERRY:

20 Q And just to be clear, that was 246 out of 636, right?

21 A Yes, 246 out of 636. Yes.

22 THE COURT: Yes, sir.

23 BY MR. PERRY:

24 Q And were there any other analyses that you did in terms
25 of your reviews, Dr. Katz?

1 A Well, I continued to get reviews after January 10th, and
2 as I got those reviews, I updated the database, so I have a
3 current count of the number of reviews that I've received with a
4 current percentage of cases that indicate a death penalty issue
5 or a criminal background issue. Out of the -- well, now,
6 there's one other black venire member that was identified, so
7 there's a total of 637 black venire members that were struck by
8 the State, and that number has tended to fluctuate a little bit
9 as more information came in. Of the 637 cases, 319 have been
10 reviewed, and 318 have not been reviewed, so it's about
11 50 percent at this point. In terms of the death penalty issue,
12 I counted 170 --

13 THE COURT: I apologize for the interruption.
14 These are matters that relate to discovery that was provided
15 after the cutoff date?

16 MR. PERRY: Yes, sir. That would be post-January,
17 I think.

18 THE COURT: Do you folks want to be heard?

19 MR. THOMPSON: And just because I am familiar with
20 this, Dr. Katz has been given what he has been -- what he is
21 referring to after the cutoff date stopped 1/25, January 25th.

22 THE COURT: Okay.

23 MR. THOMPSON: And as it relates to the testimony
24 of Dr. O'Brien, they had access to the same, and she actually
25 had testified that she had taken --

1 THE COURT: That is my recollection. Yes, sir.
2 That is my recollection. I wanted to give you folks the
3 opportunity to be heard on that.

4 MR. JAY FERGUSON: No, I think --

5 THE COURT: There is already evidence offered by
6 the defendant as to that.

7 MR. JAY FERGUSON: No, Your Honor.

8 THE COURT: All right. And you may continue, Mr.
9 Perry.

10 MR. PERRY: And, Your Honor, let me clarify.

11 THE WITNESS: Yeah, that's not quite accurate in
12 terms of what these numbers are representing. This is my count
13 as of February 6th. So I think there may be an additional case
14 or two that were added relative to what -- I don't know if that
15 has been provided through discovery or not.

16 THE COURT: I appreciate that, Dr. Katz.

17 MR. THOMPSON: Can I have a second, Judge.

18 THE COURT: Yes, sir.

19 (There was a pause in the proceedings.)

20 MR. PERRY: Judge, just so the defense is aware, I
21 am not asking specific additional questions. I just want the
22 Court to understand that we are getting additional reviews.

23 THE COURT: All right.

24 MR. PERRY: We don't have a long, detailed list of
25 specific questions about these additional materials.

1 MR. JAY FERGUSON: We don't object, but, Your
2 Honor, I want -- there may be -- when we put on rebuttal, we
3 sort of stopped at January 25th, so there may be a little
4 discrepancy in our numbers just so long as the Court and State
5 knows that.

6 THE COURT: Okay.

7 MR. COLYER: Judge, if there's any discrepancy in
8 terms of what they've received, obviously, we will make sure
9 that before their expert has to testify they have gotten them,
10 and I trust that with the electronic correspondence, they have
11 gotten it, but we'll let them tell us.

12 MR. THOMPSON: One more clarification, Judge. I
13 have only received one after the 25th and because I had actually
14 named the file and kind of laid the cut off at 1/25, I hadn't
15 sent anybody anything, so I am not sure where they are coming
16 from. I want to make sure I get copies and put them --

17 THE COURT: When you say you're not sure where
18 they're coming from, you're referring to the additional
19 materials Dr. Katz just referred to?

20 MR. THOMPSON: After the 25th because some folks
21 have been sending stuff straight to Katz, and so I want to make
22 sure that that's clear kind of as part of the record that --

23 THE COURT: Okay.

24 MR. THOMPSON: -- I received one from Mr. Boone
25 outside the 25th, and I didn't turn it over, I haven't even read

1 it because we just kind of said cutting it off.

2 THE COURT: Okay.

3 MR. THOMPSON: But we'll figure this out.

4 THE COURT: Well, apparently, Dr. Katz has
5 referred to materials that may have been sent directly to him
6 past that date.

7 MR. THOMPSON: Yes, sir. Yes, sir.

8 THE COURT: Is that accurate, sir?

9 THE WITNESS: Yes, and it's the trial of Isaac
10 Stroud, which was reviewed by Mr. Boone.

11 THE COURT: Okay.

12 MR. THOMPSON: Judge, that may be the one that
13 we're talking about, but I have it but didn't include it because
14 I hadn't read it and it came after where I kind of had marked
15 the line and actually named the file that I had given them
16 access to, final affidavit, final, and so it's actually sitting
17 on my common drive just not included yet because we didn't -- we
18 hadn't sent it. We got it after what I considered our cutoff
19 date.

20 MR. JAY FERGUSON: We would object to that, Your
21 Honor. We haven't seen that at all.

22 THE COURT: All right. Then, again, that relates
23 to what case, Dr. Katz?

24 THE WITNESS: The case of Isaac Stroud, a Durham
25 County case.

1 THE COURT: The reviewer was Mr. Boone?

2 THE WITNESS: Mr. Boone, yes.

3 THE COURT: And that's in Durham County?

4 THE WITNESS: Yes.

5 THE COURT: That matter will not be considered and
6 no testimony will be allowed as to that.

7 MR. THOMPSON: Yes, sir.

8 BY MR. PERRY:

9 Q And just one final -- that's not included in the final
10 report materials; is that correct?

11 A No. The final report materials just go up to
12 January 10th.

13 MR. PERRY: Okay. May I have a moment, Your
14 Honor.

15 THE COURT: Yes, sir.

16 (There was a pause in the proceedings.)

17 MR. PERRY: Your Honor, I believe that's all the
18 questions the State has for direct.

19 THE COURT: Thank you, Mr. Perry.

20 MR. PERRY: Yes, sir.

21 THE COURT: Okay. Mr. Ferguson, are you ready to
22 go forward, sir?

23 MR. JAY FERGUSON: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. JAY FERGUSON: I'm going to -- if you give me

1 30 seconds to set up a few things, I will appreciate it, Your
2 Honor.

3 THE COURT: I certainly will.

4 (There was a pause in the proceedings.)

5 MR. PERRY: May I proceed, Your Honor.

6 THE COURT: Yes, sir.

7 CROSS-EXAMINATION

8 BY MR. JAY FERGUSON:

9 Q Dr. Katz, good morning.

10 A Good morning.

11 Q Did you prepare a report for this Court?

12 A Yes.

13 Q And that's the report that we've been referring to and
14 is marked as State's Exhibit 44?

15 A Yes.

16 Q And I know that we've talked before in this hearing
17 during a voir dire examination; is that correct?

18 A Yes.

19 MR. JAY FERGUSON: Your Honor, I would move at
20 this point to admit all of the evidence that came out in voir
21 dire as substantive evidence for cross-examination purpose of
22 Dr. Katz.

23 THE COURT: You folks want to be heard?

24 MR. THOMPSON: No objection from the State.

25 THE COURT: Without objection, it's admitted as

1 substantive evidence for purposes of cross-examination.

2 MR. JAY FERGUSON: And with respect to our voir
3 dire exhibits, I would move for admission of voir dire exhibits
4 1 through 9 -- excuse me, 1 through 10, and have them marked as
5 defendant's exhibits with our last sequential number.

6 THE COURT: What would be the corresponding
7 numbers of the voir dire exhibits? What was the last number of
8 the defendant's exhibit?

9 THE CLERK: Fifty-two.

10 THE COURT: All right. So --

11 MR. THOMPSON: Before we go further, Judge, may I
12 have just a second.

13 THE COURT: Yes, sir.

14 MR. THOMPSON: May we take a second to look at
15 those.

16 THE COURT: Yes, sir.

17 MR. THOMPSON: Do we have those pulled somewhere?

18 MR. HUNTER: Your Honor, I am going to bring the
19 audio recorder to the witness.

20 THE COURT: Yes, sir.

21 (There was a pause in the proceedings.)

22 MR. THOMPSON: No objection so far, Judge. We're
23 just --

24 THE COURT: Yes, sir.

25 (There was a pause in the proceedings.)

1 MR. THOMPSON: No objection, Judge.

2 THE COURT: Okay. Then without objection,
3 defendant's voir dire exhibits 1 through 10 are now being marked
4 and received for substantive purpose as Defendant's Exhibits 53
5 through 63. Is that correct, folks?

6 MR. THOMPSON: Yes, sir.

7 MR. JAY FERGUSON: I am sorry, 53 through 62. We
8 are not moving into evidence defendant's voir dire exhibit 11.

9 THE COURT: Okay. All right. So it is 53 through
10 62. I apologize.

11 (There was a pause in the proceedings.)

12 MR. JAY FERGUSON: May I proceed, Your Honor.

13 THE COURT: Yes, sir.

14 BY MR. JAY FERGUSON:

15 Q Now, Dr. Katz, the report that you prepared for this
16 Court is a compilation of all of your work and critique of the
17 MSU study; is that right?

18 A I did a lot of work. I wouldn't say it's all my work.
19 It's what I thought were the important elements of my work for
20 the MSU study.

21 Q Fair for all of us in this courtroom to assume that any
22 important opinions that you have related to this case would be
23 contained in your report. Is that fair?

24 A Yes.

25 Q And a lot of discovery has been provided to us, the

1 defense, including your e-mails that were just introduced into
2 evidence; is that right?

3 A Yes.

4 Q And the order required you to produce all of your
5 recordations in this case to the defense; is that correct?

6 A Yes.

7 Q And as we went through your background, I noticed --
8 and we'll get into your background later, but you're tendered as
9 an expert in statistics and methodology and sampling; is that
10 right?

11 A Yes.

12 Q You've got no legal training; is that right?

13 A Yes, that's correct.

14 Q So as we go through the cross-examination today, I'd
15 really like for you to let me know if you're giving a
16 statistical opinion or an interpretation of the statute. Is
17 that fair?

18 A Yes.

19 Q Okay. When -- do you recall the discovery hearing back
20 in September that we had in this case?

21 A Yes.

22 Q And one of the things that you had requested of the
23 State was all of the data collection instruments for all 7400
24 jurors; is that correct?

25 A Yes.

1 Q And you needed those data collection instruments,
2 obviously, so that the State could examine them and see if there
3 was any coding errors in the MSU study; is that right?

4 A No.

5 Q You needed the data collection instruments for what
6 purpose?

7 A Several purposes. One was to the extent that someone
8 was going to need to verify the information that was collected
9 by Dr. O'Brien. That person wasn't going to be myself. It
10 would have to be some entity either interns to verify the
11 codings for the racial identifications or other people who have
12 the ability to look at the codings for the DCI and determine if
13 they were appropriate such as prosecutor experts. So it just
14 gives me a general bulk of the information that allows reviewers
15 on my part on my side to be able to look at what has been
16 collected.

17 I also noticed -- and usually this happens -- is
18 there's additional information on these DCIs that weren't part
19 of the database initially. For example, on the racial
20 identifications, there would be reasons as to why the person who
21 made the identification would conclude that that was an
22 appropriate identification, and those reasons weren't part of
23 the ones that were listed on the options. It would be written
24 out. So there were things to review that came from the DCI that
25 wouldn't necessarily be in the database.

1 Q You're referring now to -- I believe an exhibit was
2 shown where there were handwritten notes of the code so that
3 someone could come back in a transparent effort to see what was
4 done and what the coders' thought processes were; is that
5 correct?

6 A Well, I don't know what the purpose was, but there were
7 handwritten notes that would tend to give the reasons why the
8 coder was selecting the code that was ultimately selected, and
9 that would require someone -- if I'd had the resources to do
10 those reviews, that would allow an intern or someone to go
11 through those DCIs and make those comparisons and tests to
12 verify if the codings for the racial identifications were
13 appropriate or not.

14 Q And all of those DCIs were made available to the
15 prosecutor reviewers; is that correct?

16 A I believe so. They were all put on the site -- the
17 computer, the ALC computer by Peg Dorer so that all the
18 reviewers would have access to the DCIs.

19 Q And you requested the reviewers to access the DCIs and
20 check and verify the information within them, didn't you?

21 A I didn't ask the reviewers to do that.

22 Q Have you asked anybody to review those DCIs that cost
23 the State about \$10,000 to obtain?

24 A Yes.

25 Q And who did that, if anyone?

1 A No one did that.

2 Q Who did you ask -- I'm sorry. Go ahead.

3 A One of the things I wanted to do was determine whether
4 the coding for the racial identifications was reliable or not
5 given it's very important in this case to get an accurate
6 measure of what the disparities are. And there was a time
7 when -- and this was a discovery hearing. I thought there would
8 be a lot more resources available to do the kinds of research
9 that I wanted to do and it turned out there wasn't. But there
10 was an opportunity -- I believe Forsyth County had interns or
11 people that could have been made available to do these reviews,
12 and I tried to see if I couldn't secure some of those resources
13 so that we could do the best possible review on the racial
14 identifications, but that never was provided.

15 Q There are companies that exist that you can give these
16 DCIs to and they can do that analysis, aren't there?

17 A Yes.

18 Q And statisticians routinely use these companies to
19 verify the accuracy of underlying data, underlying source
20 documents; is that correct?

21 A I would think so, yes.

22 Q You also had at your disposal all of the voir dire
23 transcripts of the 173 cases; is that correct?

24 A Of the trials, yes.

25 Q That's what I mean. The jury selection portion of the

1 trials?

2 A Yes. No, not necessarily all 173. I think there were a
3 few that were missing, but I think we've ultimately gotten to
4 the 173 trials.

5 Q I believe there were two -- about two that were
6 missing. Is that a fair statement? Something -- it is not a
7 large number?

8 A It is not a large number. That's correct.

9 Q And for every single one of the 7,420-some jurors, you
10 had verification of how MSU coded the race of that juror, didn't
11 you?

12 A Yes, I believe so.

13 Q And, for example, if they had to go to a public
14 document like LexisNexis, you had at your disposal exactly how
15 they came to that conclusion?

16 A Yes. All that was provided.

17 Q And then you also had at your disposal all of the
18 databases -- when I say databases, I refer to the Excel
19 spreadsheets and the SPSS databases where all the coded
20 information had been inputted into the computer system?

21 A That's my understanding, yes.

22 Q You also had at your disposal the code book used by
23 Michigan State University that defined their coding process?

24 A Yes.

25 Q And to the best of your knowledge, everything that was

1 ordered from the defense at that September discovery hearing has
2 been provided to you. Is that a fair statement?

3 A Yes, to the best of my knowledge.

4 Q And I believe you've already testified that you had
5 requested information from the State to do what you felt was
6 scientifically appropriate and as to get all the *Batson*
7 information. You requested that from the State, and that was
8 not provided.

9 A That's -- the *Batson* information for the 173 trials,
10 yes. It wasn't provided.

11 Q All right. I'd like to spend a few minutes talking
12 about I think what we agree upon, okay, before we get to what we
13 disagree on.

14 A Okay.

15 Q Because we went through some of the slides --

16 MR. JAY FERGUSON: May I approach.

17 THE COURT: Yes, sir. Do you need the light
18 dimmed?

19 MR. JAY FERGUSON: I don't think so.

20 THE COURT: Okay.

21 BY MR. JAY FERGUSON:

22 Q You were present, Dr. Katz, when we went through the
23 PowerPoint presentation and what is in paper format as
24 Defendant's Exhibit 3 -- is that right -- with Dr. O'Brien?

25 A Yes.

1 MR. JAY FERGUSON: May I have that exhibit. I am
2 going to show it since I only have one copy for everybody to
3 look at.

4 BY MR. JAY FERGUSON:

5 Q Let me start with table 1 of the Michigan State
6 University study.

7 THE COURT: What is the exhibit number again, sir?

8 MR. JAY FERGUSON: It's Defendant's Exhibit 3.

9 THE COURT: Three. That's what I thought.

10 (There was a pause in the proceedings.)

11 BY MR. JAY FERGUSON:

12 Q Can you see table 1 of Defendant's Exhibit 3, which is
13 slide number -- page number 22.

14 THE COURT: We're looking for our copy.

15 MR. JAY FERGUSON: I'm sorry.

16 (There was a pause in the proceedings.)

17 BY MR. JAY FERGUSON:

18 Q Can you see that, Dr. Katz?

19 A Yes.

20 Q What I want to talk about before we get to any of the
21 adjusted analysis, any of the controlled analysis, are the
22 unadjusted showings in the Michigan State study, okay?

23 A Okay.

24 Q Now, this first table is from the unadjusted data; is
25 that correct?

1 A Yes.

2 Q And I believe you had a very similar table in your
3 presentation for the Court; is that right?

4 A Right. There's small differences in the two tables.

5 Q Just the 22 jurors; is that right?

6 A Right. Twenty-one additional jurors were added to my
7 study, and there was one switch of the ultimate disposition of
8 Mr. Rodney Foxx.

9 Q With respect to table 1, would you agree that there's
10 statistically different strike patterns between black and
11 non-black jurors?

12 A Yes.

13 Q And would you agree that the probability of this strike
14 pattern occurring is more than three standard deviations from
15 the mean?

16 A Yes.

17 Q And would you agree that the probability of the strike
18 pattern occurring in a race-neutral random jury selection
19 process is statistically significant?

20 A Yes.

21 Q Let me move to table 2. And this is what -- you've
22 described the difference between aggregate and average. This is
23 the same data but with an average of the cases throughout the
24 State of North Carolina. Do you recognize table 2?

25 A Yes.

1 Q And is it your opinion that the disparity in strike
2 patterns between black venire members and all other venire
3 members is statistically significant?

4 A Yes.

5 Q And do you agree that the probability of this disparity
6 occurring in a race-neutral random jury selection process is
7 statistically significant?

8 A Yes.

9 Q Let me show you what's marked as table 4. Do you
10 recognize that?

11 A Yes.

12 Q Would you agree that the racial rational -- well, let
13 me back up. Is there a racial disparity in the strike patterns?

14 A Yes.

15 Q Would you agree that the probability of the disparity
16 occurring as shown on table 4 in a race-neutral jury selection
17 process that's random is statistically significant?

18 A Yes.

19 Q Table 5. Is there a disparity in the strike pattern
20 between black venire members and all others?

21 A Yes.

22 Q And would you agree that the probability of this
23 disparity occurring in a race-neutral random jury selection
24 process is statistically significant?

25 A Yes.

1 Q Table 6. Do you recognize table 6? I'm sorry. Page
2 29 of Defendant's Exhibit 3.

3 THE COURT: Thank you, sir.

4 BY MR. JAY FERGUSON:

5 Q Do you recognize this, Dr. Katz?

6 A Yes.

7 Q Is there a disparity in the strike patterns by
8 prosecutors between black venire members and all others?

9 A Yes.

10 Q Is it your opinion that the probability of this
11 disparity occurring in a race-neutral random jury selection
12 process is statistically significant?

13 A Yes.

14 Q Let me show you what is slide 30 of Defendant's
15 Exhibit 3 and ask if you can identify this document.

16 A Yes.

17 Q And does this show a strike disparity between black
18 venire members and all others?

19 A Yes.

20 Q And would you agree that the probability of the
21 disparity occurring as shown on table 7 in a race-neutral random
22 jury selection process is statistically significant?

23 A Yes.

24 Q And would you also agree that any time in any of these
25 charts that we see p is less than .001, it is more than three

1 standard deviations from the mean?

2 A Yes, more than three standard deviations from zero.

3 Q Zero. And zero means the null hypothesis?

4 A Right, for the difference.

5 Q Let me show you page 31 of Defendant's Exhibit 3, table
6 8 and ask if you can identify that.

7 A Yes.

8 Q And is there a racial disparity between the black and
9 other venire members?

10 A Yes.

11 Q Would you agree with me that the probability of this
12 disparity occurring in a race-neutral random jury selection
13 process is statistically significant?

14 A Yes.

15 Q Showing you page 32 of Defendant's Exhibit 3, table 9
16 of the MSU study. Is there a disparity between the strikes
17 between black and other venire members?

18 A Yes.

19 Q And would you agree with me that the probability of
20 this disparity occurring in a race-neutral random jury selection
21 process is statistically significant?

22 A Yes.

23 Q And this one is that p is less than .01; is that
24 correct?

25 A Let me back up a minute. Yes.

1 Q And p is less than .01 is still more than three
2 standard deviations from the null hypothesis?

3 A From zero?

4 Q Yes.

5 A Yes.

6 Q Let me show you what is slide 52 of Defendant's Exhibit
7 3. And I'll just say there's been some confusion I think in the
8 court about sampling issues. In your report -- slide 52 refers
9 to the 25 percent sample chosen and selected by the SPSS
10 database by the Michigan State University study; is that
11 correct?

12 A If you're referring to the 25 percent sample --

13 Q Correct.

14 A -- that's how it was categorized or described in the
15 report.

16 Q And in your report, you don't take issue with respect
17 to the 25 percent random sample, do you?

18 A No.

19 Q Okay. The sampling issue you're referring to is an
20 issue that you contend from the inception of the 173 cases is an
21 improper sample. Is that a fair statement?

22 A The 173 trials do not constitute a random sample from
23 all capital trials over that time period.

24 Q Okay. And we will get to that. I want to make clear
25 for the Court that which sampling issue --

1 A All right.

2 Q -- that you have an issue with. Is that a fair
3 statement?

4 A Yes.

5 Q You don't have an issue with the 25 percent sample,
6 correct?

7 A No.

8 Q You've got an issue with the 173 cases?

9 A As a sample from a larger body of trials.

10 Q I think I've shown you all of the unadjusted tables. I
11 thought there was one more. Let me show you table 10. Table 10
12 are the strike rates for the judicial division and county; is
13 that right?

14 A Yes.

15 Q And in each of the three columns, there's a strike
16 disparity between black jurors and non-black jurors. Is that a
17 fair statement?

18 A Yes.

19 Q And would you agree that in each of the three
20 jurisdictions shown in columns A, B, and C, the probability of
21 that disparity occurring in a race-neutral random jury selection
22 process is statistically significant?

23 A Yes.

24 Q And would you agree that in each of the columns A, B,
25 and C, the probability of that -- strike that question again.

1 Would you agree with me that the -- that in each column, A, B,
2 and C, the disparity and the probability of that disparity
3 occurring is more than three standard deviations from zero. And
4 it might help if I show that.

5 A Let me check with my notes.

6 Q Okay.

7 A Yes.

8 Q So we're in agreement that all of the unadjusted
9 numbers in the Michigan State study in tables 1 through 10 are
10 statistically significant?

11 A The difference in strike rates, yes.

12 Q Okay.

13 A For the State.

14 Q And when you began your study -- and I don't -- I say
15 study. I will use the term you want me to use, and I'm not sure
16 what that is with respect to your analysis. What -- do you want
17 me to call it a study, a survey, data collection? What would
18 you prefer?

19 A It -- I did several functions in my role as an expert.
20 One was to review the study by the Michigan State University
21 researchers and Dr. Woodworth. And the second part was to
22 collect information from the reviewers, these affidavits, to
23 provide the explanations for strikes for the -- for all the
24 black venire members that had been struck by the State over the
25 173 trials.

1 THE COURT: I'm sorry. The first thing that you
2 did? I missed that, Dr. Katz.

3 THE WITNESS: I looked at the Michigan State
4 University study --

5 THE COURT: Okay.

6 THE WITNESS: -- and reviewed that.

7 MR. JAY FERGUSON: May I proceed, Your Honor.

8 THE COURT: Yes, sir.

9 BY MR. JAY FERGUSON:

10 Q First, you reviewed the Michigan State study; is that
11 right?

12 A Yes.

13 Q And you saw these unadjusted numbers?

14 A Yes.

15 Q And at that point as a statistician, you realized they
16 were statistically significant, and you needed to come up with a
17 methodology of rebutting those statistics. Isn't that a fair
18 statement?

19 A Yes.

20 Q And your efforts to rebut the showing of the
21 statistical significance in the unadjusted data was to perform
22 this *Batson* methodology; is that right?

23 A Yes.

24 Q Just to send question -- to send instructions to
25 prosecutors to have them explain race-neutral explanations, if

1 possible, for all 636 African-American jurors struck by the
2 State?

3 A Yes.

4 Q Let me ask you: If you were doing a study to determine
5 if smoking caused cancer, would you send a questionnaire to the
6 CEOs of the cigarette manufacturers to ask them if they could
7 come up with some reasons other than smoking for all the lung
8 cancer received?

9 MR. THOMPSON: Objection.

10 THE COURT: Overruled.

11 THE WITNESS: If they could testify that it
12 didn't -- and I think there was some testimony at hearings where
13 they did do that, which caused a lot of problems for them, then
14 that may be something that would be appropriate. If they had to
15 do it as testimony in an affidavit -- the purpose of having
16 these explanations come in the form of testimony or an affidavit
17 is the prosecutors who should be very familiar with testimony
18 and what it means, need to respect whatever race-neutral reasons
19 they provide so that it is the best and most accurate and
20 something that they can face cross-examination on. So it's not
21 really a similar comparison, as I see it.

22 BY MR. JAY FERGUSON:

23 Q That raises a few questions. Testimony. You've said
24 that -- we all know the CEOs in the tobacco companies were
25 summoned to Congress by subpoena --

1 A Yes.

2 Q -- to testify --

3 A Yes.

4 Q -- under oath.

5 A Yes.

6 Q There was no compulsion of the prosecutors to respond
7 to your request, was there?

8 A Right.

9 Q And you weren't asking -- and I know we've gone over
10 this before in the voir dire, but you were not asking the
11 prosecutors to state the reasons for their strikes but rather
12 you were asking them to state race-neutral reasons, if possible,
13 race-neutral explanations, if possible; is that correct?

14 A In my understanding of what I was asking for, it was the
15 reasons for the strike. I may have not worded it as well as I
16 should have, but I think the prosecutors understood that if they
17 were going to testify to the information that they provided,
18 that it wasn't something where the wording that I sent them is
19 going to sort of be their defense where they say, Oh, I thought
20 I had to do this. And I didn't ask for these explanations in
21 the context of force yourself to come up with something. If I
22 was asked -- and some of the prosecutors had indicated to me
23 that, well, they don't know what the prosecutor was thinking if
24 they were reviewing a case that wasn't one that they actually
25 struck. And I said, well, that's part of what you will put in

1 your affidavit. Explain what your, as an expert, where you
2 stand and provide the best explanation you can for the strike
3 because if we're going to try to understand the pattern of
4 reasons for why black venire members are struck, we need to
5 collect the data first from somewhere. They're in the --
6 they're kind of scattered through the transcripts. There's
7 notes. There's other materials. But we need an expert who
8 knows jury selection, who knows what these reasons can be, to
9 ferret out this information and provide it in a form where we
10 can rely on it.

11 Q And you felt, as I understood the testimony on direct
12 examination, through September, you were wrestling with which
13 methodology to use. Do we look at logistic regression analysis,
14 or do we do this *Batson* methodology. Is that a fair statement?

15 A Not really. Very early on, it occurred to me that there
16 is a lot of information out there about why prosecutors strike
17 venire members. This isn't something that is not understood
18 very well. There's rules of thumb that prosecutors follow that
19 they're knowledgeable about based upon their experience as to
20 why they would strike someone, and it just seemed to me that it
21 just was more direct to try and identify what those reasons are
22 and compile them for all 636 black venire members and then let
23 the Court review that and come to whatever decision is
24 appropriate. It wasn't that I was struggling between them. I
25 pretty much concluded early on that this was something that

1 needed to be done, but in addition, there could have been other
2 analyses that I would do, and that's why I still needed to
3 determine the accuracy and the reliability of the Michigan State
4 University data.

5 Q And, ultimately, you decided that the best methodology
6 for making the determination for this Court is to ask the
7 prosecutors to state race-neutral reasons, race-neutral
8 explanations, if possible?

9 A To ask -- well, the best prosecutor available to
10 provide, through an affidavit, the explanation, yes. I
11 determined in my mind that seemed to me the best way to explain
12 the disparity in strike rates.

13 Q You've been involved in employment discrimination
14 cases, haven't you?

15 A Yes.

16 Q Are you familiar with the term mixed motive.

17 A Mixed motive? No.

18 Q I will represent to you that in employment
19 discrimination cases there is this concept that you can have a
20 valid reason for firing someone but there can be a mixed motive
21 of gender, age, or race or some other recognized protected
22 class. Does that ring a bell to you in employment
23 discrimination cases?

24 A I understand what you're saying, but that's not
25 something that, you know, I've researched.

1 Q It's not something that you considered when a
2 prosecutor gave you a reason or explanation, you never
3 considered if there was another mixed motive in that strike, did
4 you?

5 A No. I didn't think that under testimony that -- that I
6 would get other than their best race-neutral reason or reason
7 for the strike.

8 Q Because you only asked for race-neutral reasons,
9 correct?

10 A Yes. I asked for race-neutral reasons thinking I was
11 asking for just the reasons and not -- I did not expect any
12 prosecutor to state in an affidavit that the reason they struck
13 the black venire member was because the venire member was black.

14 Q You didn't expect that, but I want it clear you didn't
15 ask that, did you?

16 A I thought I was asking for the, as you put it, the
17 reason for the strike. This nonracial explanation is a term
18 that gets thrown around in *Batson* and I -- that's what I used.
19 It wasn't an attempt to keep the prosecutors from saying, no,
20 yeah, the reason I struck that person was because the venire
21 member was black. They could do that if that's what they want
22 to testify to. That's what I would use. I didn't limit that,
23 but I was expecting I would get the prosecutor to provide the
24 reasons as they would under conditions of a trial where they're
25 called to explain their strikes after being challenged under

1 *Batson*.

2 Q And, likewise, when you got these explanations, for
3 example, if a prosecutor said, I struck this juror because he
4 was young, you didn't look at the transcripts that were
5 available to you to determine if there were jurors in that same
6 case the same age who were white who were accepted by the State,
7 did you?

8 A No, I didn't.

9 Q You haven't looked at a single explanation provided by
10 any prosecutor in North Carolina to determine the accuracy of
11 that statement, have you?

12 A I looked at things unrelated to the accuracy of the
13 explanation because I'm not in a position to judge that one way
14 or the other. I did look at issues of mis- -- miswriting where
15 an affidavit would talk about one venire member and in the
16 middle of the description would, for some reason, call that
17 venire member a different name. Those kinds of errors I could
18 detect and I would report back to the prosecutor reviewer to ask
19 them to consider that in whether they, you know -- and just sort
20 of a minor mistake. There were also cases where prosecutors
21 would identify cases incorrectly as *Batson* or not *Batson*
22 according to what I thought I knew was the correct answer, and I
23 would ask them to look at that again and decide if that's really
24 what they wanted.

25 Q And, in fact, one prosecutor, Greg Butler, sent you

1 explanations for African-American jurors in a case and it was
2 the totally wrong case, wasn't it?

3 A I don't believe that was Greg Butler. It was another
4 reviewer.

5 Q Okay. I'm sorry. But another reviewer did that?

6 A Yes.

7 Q I noticed when you were going through your
8 qualifications, you went detail by detail about all of the cases
9 you had testified in, the appellate history of those cases, the
10 fact that your name was cited by Justice Kennedy in the Supreme
11 Court. Do you recall all that testimony?

12 A Yes.

13 Q And especially with respect to the district litigation,
14 congressional district litigation -- voting rights cases. Is
15 that how I should say it?

16 A Okay. That's -- yes.

17 Q And you talked about it going up on appeal and coming
18 back down and going back up on appeal. Do you recall all that?

19 A Yes.

20 Q Do you recall mentioning what happened to the case of
21 *Jimmy Lee Horton v. Kemp* on appeal?

22 A Yes.

23 Q You didn't tell the Court about that, did you?

24 A I -- I probably didn't.

25 Q Okay. And Jimmy Lee Horton case is the only case where

1 you have testified as an expert witness with respect to jury
2 selection issues, isn't it?

3 A Yes.

4 Q And in that case, the prosecutor, Mr. Briley, as you
5 referred before, was accused of striking African-American jurors
6 from cases; is that right?

7 A From trials, yes.

8 Q From trials?

9 A Yes.

10 Q And you were hired by the government to come in and
11 review the statistics of the plaintiff, the petitioner,
12 Mr. Horton?

13 A Yes.

14 Q And do whatever analyses you wanted to do; is that
15 correct?

16 A Yes.

17 Q Have you reviewed the opinion in the Jimmy Lee Horton
18 case on appeal?

19 A The Eleventh Circuit Court of Appeals' opinion?

20 Q Yes.

21 A Yes.

22 MR. JAY FERGUSON: Madam Clerk -- oh, you changed.
23 What number are we up to? Sixty-three?

24 THE CLERK: Yes.

25 BY MR. JAY FERGUSON:

1 Q Let me show you what's marked as Defendant's
2 Exhibit 63, please. Is that the case of *Jimmy Lee Horton v.*
3 *Walter Zant*?

4 A Yes.

5 Q And I have highlighted in yellow starting on page 7
6 most of the *Horton* -- most of the *Horton* opinion that relates to
7 your testimony, okay? I'll just direct everyone's attention to
8 that. And in Mr. Horton's case at trial or at the hearing on
9 the habeas corpus petition, the petitioner only presented
10 unadjusted numbers just like we've just said we all agreed to;
11 is that correct?

12 A Yes.

13 Q There was no controlled analysis whatsoever, correct?

14 A Correct.

15 Q And then one of the analyses -- I'll direct your
16 attention down to -- well, first of all, did you just -- in that
17 study, did you just ask Mr. Briley, the prosecutor, to give
18 reasons for all those strikes?

19 A Mr. Briley did not -- he stated that he didn't have his
20 notes as to why he struck jurors. That was not my role. I
21 wasn't hired to do that. The attorney for the Attorney
22 General's Office who was representing the respondent was in
23 charge of deciding how to do the case. I was given the jury
24 strike information. I was trying to understand what the
25 standard of review was based upon *Swain v. Alabama*, and that's

1 what guided my analysis. The information that the Eleventh
2 Circuit wanted was more detailed information regarding the
3 explanation of the disparity that was produced sort of like what
4 would have been or what I perceived as required here, and I
5 wasn't aware that that was how the case was going to be
6 reviewed. The attorneys for the State of Georgia didn't
7 indicate to me that that's something that I needed to follow up,
8 so I did my part, and I believe the Eleventh Circuit, the three
9 judge panel, did say my analysis was helpful, but it didn't go
10 far enough to satisfy them in terms of the disparities.

11 Q And in the *Horton* case, the issue was the prosecutor
12 strike decisions; is that correct?

13 A Yes.

14 Q It had nothing to do with the final composition of the
15 juries, did it?

16 A Yes.

17 Q Is that correct?

18 THE COURT: I am sorry. For clarification, you
19 said yes. Is that yes, your -- rephrase your question.

20 BY MR. JAY FERGUSON:

21 Q Is it correct that in *Horton*, the only issue was the
22 prosecutor strike decision?

23 A Well, the prosecutor strike decision in such a manner to
24 virtually exclude blacks from serving on juries. I believe
25 there's -- the part about being on juries is part of, as I

1 recall, *Swain v. Alabama*, which was a standard as I understand
2 it. Not trying to be legal or anything but based upon the case
3 and what I knew at that time, that was the standard before
4 *Batson* where now there's a more immediate requirement for
5 prosecutors to explain strikes.

6 Q I'd like to look at what the Eleventh Circuit said
7 about similar cases to Jimmy Lee Horton. At the bottom of page
8 8, the right column down at the bottom. Do you see where it
9 says, The State argues -- do you see that sentence?

10 A Yes.

11 Q It says, The State argues, however, that Mr. Briley
12 employed, quote, racially neutral selection procedures, end
13 quote, that, unfortunately, had a disparate impact on black
14 venire members. In evaluating Mr. Briley's rebuttal, it is
15 appropriate to keep in mind that testimony from the alleged
16 discriminators should be viewed with a great deal of judicial
17 scrutiny. Is that what the Eleventh Circuit said?

18 A Yes.

19 Q And as a forensic statistician who follows his cases,
20 you inform your future opinions based upon what you've been told
21 by other courts, don't you?

22 A Yes.

23 Q And you had the Eleventh Circuit tell you you've got to
24 look at race-neutral explanations by prosecutors with great
25 scrutiny.

1 A Yes.

2 Q But you're testifying at this Court that the best
3 method is to ask the prosecutors exactly what the Eleventh
4 Circuit told you you should be cautious about?

5 A They didn't say don't ask the prosecutors to provide
6 explanations. They said review with a great deal of scrutiny,
7 and that's part of what I built into my data collection effort
8 was to get the reviewers to provide testimony, and there are
9 transcripts and all the materials that they used available for
10 ultimate judicial review about whether those reasons are
11 appropriate or not. But I still believe that prosecutors are
12 going to be the best source of getting to the correct and best
13 reason as to why venire members were struck.

14 Q Can you read the next sentence in that opinion for the
15 record, please.

16 A Moreover, protestations of innocence and blanket denials
17 of bad faith intentions are inadequate.

18 Q I noticed in your presentation that you had many, many,
19 many slides about the final jury composition; is that right?

20 A Yes. I had -- I took the ten different breakdowns that
21 were reported in Dr. O'Brien's report and expanded on the rates
22 to include both the rate at which the defense struck venire
23 members by race and the seated rates by race.

24 Q And you had it for the statewide numbers; is that
25 correct?

1 A Yes.

2 Q You had it for the Cumberland County, didn't you?

3 A Yes.

4 Q Why didn't you tell the Court the results of Marcus
5 Robinson's trial?

6 A I don't know offhand what those results are.

7 Q You didn't look to see if the prosecution striking
8 three-and-a-half times the rate black jurors as opposed to
9 non-black jurors affected Mr. Robinson's trial?

10 A I didn't look at that, no.

11 Q Well, let's take a look.

12 MR. JAY FERGUSON: May I approach, Your Honor.

13 THE COURT: Yes, sir.

14 MR. JAY FERGUSON: What number are we up to? Oh,
15 you changed again.

16 THE CLERK: Sixty-four.

17 BY MR. JAY FERGUSON:

18 Q Can you tell me just right off what percentage that one
19 juror represents in a 12-juror panel? One divided by 12.

20 A I know. It is -- that's a tough question.

21 Q Is it 8.33 percent?

22 A That sounds right, 8.33 percent.

23 Q Showing you Defendant's Exhibit 64, Dr. Katz, is an
24 analysis of how the jury pool changed at different strike
25 decisions, okay?

1 A Okay.

2 Q Do you have any information -- and this is all data
3 that's been produced to the Court in the database; is that
4 right?

5 A It should be, yes.

6 Q And it indicates that qualified black venire members
7 considered by the State before their strike decision but after
8 the cause challenges composed 26.3 percent of the jury. Is that
9 what this graph shows?

10 A That's what the graph states, yes.

11 Q And we'll put in evidence in rebuttal to firm up these
12 numbers.

13 A All right.

14 Q If -- if after the State's strike decision it goes from
15 26.3 percent down to 17.2 percent, would you agree with me that
16 that's more than 8.33 percent?

17 A The difference?

18 Q Yes.

19 A Slightly more.

20 Q Okay. And if you decrease the pool so that the
21 composition of the pool changes after the strike decision --
22 excuse me, from before the strike decision by the prosecution to
23 after the strike decision by the prosecution, if there's a
24 significant change, it can affect the outcome of the jury?

25 A I don't understand your question.

1 Q Okay. Well, let's keep going, and I think we can come
2 back to it. It appears that 17.2 percent of the venire members
3 were passed to the defense.

4 THE COURT: For clarification --
5 BY MR. JAY FERGUSON:

6 Q Sorry -- 17.2 percent of the venire members passed to
7 the defense were African-American, okay?

8 A Okay.

9 Q Assume that figure is accurate for me.

10 A All right.

11 Q And then the figure after the defense strikes is
12 16.7 percent excluding the alternates, so just the panel of 12.

13 A Okay. So that's two out of 12 or --

14 Q Right.

15 A Black jurors. Okay.

16 Q And so it appears that the defense did not -- that the
17 defense struck proportionately. In other words, the defense did
18 not alter the trajectory of the strike -- let me start that
19 question again. If the percentage of black venire members
20 passed to defense is the same or very similar to the seated
21 jurors, it would reason that the defense struck at a racially
22 neutral proportion.

23 A It'd be easier for me to answer based upon the actual
24 counts rather than the percentages. It looks like -- yeah, I
25 would like to see the actual counts as to how many were in each

1 of the pools, and that would help me answer that question.

2 Q Okay. But it's fair to say for this Court that you did
3 not do that analysis?

4 A I did not do this analysis, no.

5 MR. JAY FERGUSON: Sixty-five, Madam Clerk?

6 THE CLERK: Yes, sir.

7 MR. JAY FERGUSON: Your Honor, I have misplaced a
8 copy. I am just going to -- if I can just show a couple pages.

9 THE COURT: Yes, sir.

10 BY MR. JAY FERGUSON:

11 Q Let me show you what's marked as Defendant's Exhibit 65
12 and ask if you can identify that document.

13 A That's the district court opinion in the Jimmy Lee
14 Horton case.

15 Q Do you generally recall your testimony -- not verbatim,
16 but do you generally recall your testimony in the Jimmy Lee
17 Horton case?

18 A Very generally.

19 Q Okay. Let me show you -- if you'll turn to page 133,
20 which is I think the page before the tab, I mean, by my marking
21 down at the bottom. If you'll just read from line 17 to 25 just
22 to yourself. So why don't you read from there to the next page,
23 and then I am going to ask you some questions about that.

24 MR. COLYER: Jay Ferguson, excuse me, what was
25 that exhibit? Okay. Thank you.

1 (There was a pause in the proceedings.)

2 BY MR. JAY FERGUSON:

3 Q And if you just read through line 20 on 134, I am going
4 to ask you a couple questions about that.

5 A All right.

6 Q All right. So beginning at line 17, you -- it's clear
7 that you did an analysis of the racial composition and
8 disposition of the jury venire; is that right?

9 A Yes.

10 Q And what you were looking at is exactly the same thing
11 that you presented in all those slides yesterday about the
12 seated jurors; is that right?

13 A I don't recall exactly what I provided in slides for
14 that case.

15 Q But that was the analysis you were doing. I'm not
16 saying the exact slides. It's the same analysis. You were
17 trying to show the effect of Mr. Briley's strikes on the final
18 jury composition and the defense strikes.

19 A I think the point I was making was going back to the
20 language in *Swain v. Alabama* about where the prosecutor strikes
21 tended to be done in a way to exclude over lots of trials blacks
22 from serving on juries, and so what I did in my analysis was
23 look at those black venire members who hadn't been struck and
24 passed by Mr. Briley and came up with counts. I believe that's
25 generally how I approached at least one of my analyses.

1 Q Okay. And I showed that just to let you get the frame
2 of reference. And then the next page, page 134 of Defendant's
3 Exhibit -- is it 65? I'm sorry. Page 134 of Defendant's
4 Exhibit 65, and I am just going to read from line 2 -- this is
5 your testimony, isn't it?

6 A I believe so. Let me -- yes. I am a witness.

7 Q I am sorry. I didn't hear what you said.

8 A I had to check to see. I am a witness.

9 Q Okay.

10 A Do you want me to read line 2?

11 Q No. I am going to read it, but I wanted you to get to
12 where we are.

13 A All right.

14 Q You testified: And then I give the count or the number
15 that was struck by the defense attorneys. You talked about the
16 State strikes. Then I'd give the count or the number that was
17 struck by the defense attorneys, the numbers of jurors by race,
18 the numbers of alternate jurors, and then the grand totals, and
19 the percent is the percent of total that is relevant to that
20 race. For example, 35.3 percent blacks were in -- and then the
21 Court interrupts. Wait a minute. You've thrown in the strikes
22 of the defense attorneys. Is that right?

23 A Yes.

24 Q And then you say, Yes.

25 And the Court says, What is the relevance of that,

1 please.

2 And Ms. Smith -- Ms. Smith was the attorney general who
3 handled the case along with Ms. Westmoreland; is that right? Do
4 you recall that?

5 A Yes.

6 THE COURT REPORTER: I'm sorry. Along with?

7 MR. JAY FERGUSON: Westmoreland, one word.

8 THE COURT REPORTER: Thank you.

9 BY MR. JAY FERGUSON:

10 Q Ms. Smith said, Your Honor, we are trying to show that
11 the integration of the defense strikes ultimately operated on
12 the number of jurors who actually served in this case. And what
13 does the Court tell everyone at that point?

14 A The Court says, That's not what we're here about. We
15 are here about strikes. You are skewing the figures.

16 Q You were present when the Court told you you were
17 skewing the figures by putting in final jury compositions,
18 correct?

19 A I was testifying, yes.

20 Q But yet you come into this court with the same
21 analysis, again, skewing the figures?

22 A The district court denied Mr. Horton on this issue.

23 Q What did the Eleventh Circuit do?

24 A The Eleventh Circuit -- well, I'm referring to your
25 statement by the court at that point in the hearing. Apparently

1 after the hearing was over, after due consideration, the court
2 decided to deny the appeal on this issue. So I don't know what
3 the court's thinking was ultimately, but it did end up in not
4 granting Mr. Horton relief based upon this issue. The Eleventh
5 Circuit Court of Appeals did reverse the decision, and it did
6 state that my analysis was helpful for as far as it went, but
7 they had other concerns based upon the disparities in strike
8 rates.

9 Q And I think I've asked you this, but the Eleventh
10 Circuit found that *Swain* violation based solely on unadjusted
11 numbers, correct?

12 A Yes. I would think that was their thinking, and it
13 wasn't explained through transcripts and notes and other
14 materials that Mr. Briley needed to provide to the Eleventh
15 Circuit to help explain why black venire members were struck at
16 higher rates.

17 Q Now, I saw you -- when Dr. O'Brien and Dr. Woodworth
18 were testifying, you were seated right there beside Mr. Perry,
19 correct?

20 A Yes.

21 Q And I saw you taking notes, didn't I?

22 A Yes.

23 Q And I saw you passing notes to Mr. Perry throughout the
24 process, didn't I?

25 A Occasionally, yes.

1 Q At that point, you're part of the team of the
2 prosecution in this court, aren't you?

3 A What I am is the person who knows the most about the MSU
4 study and Dr. O'Brien and Professor Grosso's report, and I'm
5 providing support to Mr. Perry regarding his information so that
6 he can effectively cross-examine your witnesses.

7 Q Were you worried that he might misinterpret your notes
8 that you wrote down and handed to him?

9 A Yes.

10 Q But yet you still did that and handed it to him, didn't
11 you?

12 A I gave him notes after careful consideration and notes
13 are not -- it would be maybe in the form of a question or some
14 few words to try and help him focus on an area that I think he
15 was straying from. So it's not that I generally take good
16 notes. It's simply the means I have to provide him with, you
17 know, some additional help.

18 THE COURT: Mr. Jay Ferguson, if you will bear
19 with me one second.

20 Are you okay, ma'am?

21 THE COURT REPORTER: Uh-huh.

22 THE COURT: Okay. Go ahead, sir.

23 BY MR. JAY FERGUSON:

24 Q Again, today you referred to comments that prosecutors
25 had made to you and things that you had told prosecutors. You

1 recall that testimony?

2 A Today I did that?

3 Q Yes.

4 A Oh, yes.

5 Q All right. And as we've established in the voir dire
6 that you didn't take notes of those conversations for fear of
7 confusing the defense team. Is that a fair assessment?

8 A I didn't take notes because I didn't see the need, for
9 my purposes, to have notes of these conversations in that I
10 didn't see how I was going to use that information in any way to
11 rely on it as part of my report, as part of the information that
12 I would use to decide on whether -- or decide on the accuracy of
13 the data from the Michigan State University study. It was
14 something that if I tried to take notes while talking on the
15 phone, I'm not going to concentrate on the conversation, I'm not
16 going to concentrate on the notes, and as you note the discovery
17 order was for every recordation, so if I put down some
18 information that's misleading because I'm not able to capture it
19 correctly, then I need to turn it over, but it's not something
20 I'm going to use. It's just something that is going to be
21 misleading. And I made the decision that the type of materials
22 I'm going to rely on will be information that these DAs and
23 prosecutor reviewers provide me in the format of e-mails or
24 reports or documents or electronic spreadsheets but things that
25 they have a chance to provide that I can then think about and

1 look at and possibly even reference if that's something that,
2 you know, that would come up. These phone conversations, to me,
3 didn't seem like it would be something that I could come to
4 court and say, Well, I -- the reason I did that was because I
5 had a phone conversation with someone with my incomplete notes
6 and it's dated such and such.

7 Q I may be confused, Dr. Katz, but I distinctly -- my
8 recollection is that you said you talked to prosecutors orally
9 and that based upon some of that feedback, you made conclusions
10 in this case. Is that wrong?

11 A The feedback that was the most helpful was the feedback
12 on the reviews, things that were presented to me in documents.
13 Probably the best feedback I got on --

14 THE COURT: Okay. I apologize for the
15 interruption, but if you'll listen to the question. Initially,
16 the question calls for a yes or no answer. Then you may
17 explain.

18 THE WITNESS: I'm sorry, Your Honor.

19 BY MR. JAY FERGUSON:

20 Q My recollection of your testimony previously is that
21 you testified that you had relied on feedback including oral
22 feedback from prosecutors in the formulation of some opinion in
23 this case?

24 A Yes.

25 Q Is that correct?

1 A Yes.

2 Q Okay.

3 THE COURT: I apologize. Now if you feel an
4 explanation is necessary, you're entitled to explain.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: Yes, sir.

7 THE WITNESS: The best information I got from oral
8 feedback was very early on when I talked to Mr. Colyer and Mr.
9 Thompson, which I did take notes on. And what they told me
10 totally changed my perspective of what jury selection involves
11 from the prosecutor's perspective even though what they were
12 telling me were probably very basic information. In talking to
13 reviewers throughout the State or prosecutors throughout the
14 State, they pretty much confirmed the kinds of things that Mr.
15 Thompson and Mr. Colyer told me initially, and they weren't
16 revealing new things. They were pretty much all saying
17 consistent things so, yes, I'm relying on their information, but
18 I'm getting confirmation throughout this process about what
19 prosecutors do in terms of their jury strikes. But in terms of
20 what I would ultimately want to rely on in terms of making a
21 decision about whether or not the Michigan State University
22 study data is reliable would be on reviews on actual
23 race-neutral reasons that I can get my hands on, and those I
24 thought initially were going to come from the *Batson* cases but
25 barring that, I pretty much waited until I got reviews and other

1 feedback about the Michigan State University study which I asked
2 for from the reviewers to get to the point where I felt like I
3 understood a lot better as to how the process works.

4 Q I am just going to ask you point-black, Dr. Katz: Do
5 you think it's fair to Mr. Robinson and this Court to rely on
6 your expert opinion that is at least partially based upon phone
7 conversations where you purposefully took no notes so that Mr.
8 Robinson's lawyers could not review them?

9 A Do I think it's fair?

10 Q Yes.

11 A Yes.

12 MR. JAY FERGUSON: Can I have just a moment, Your
13 Honor.

14 THE COURT: Yes, sir.

15 (There was a pause in the proceedings.)

16 MR. JAY FERGUSON: I will just come back to that
17 in a minute. We have other things we can explore.

18 THE COURT: Yes, sir.

19 BY MR. JAY FERGUSON:

20 Q Dr. Katz, have you sent a bill to the State of North
21 Carolina for the month of January yet?

22 A Yes.

23 Q How much was that bill for in January?

24 A I don't recall exactly but somewhere around 20-something
25 thousand.

1 Q And through -- I am only asking you questions about the
2 work you've done in this case not the Forsyth County litigation,
3 okay?

4 A Okay.

5 Q Through the end of December from when you were hired in
6 the summer through the end of December, can you tell the Court
7 how much you've charged the State of North Carolina for your
8 services?

9 A I can't tell you exactly. It's a lot.

10 Q If I told you it was 74,000-and-some-change, would you
11 disagree with that figure?

12 A No. That's probably in the ballpark.

13 Q So it's fair to say at this point your data collection
14 efforts and your review of the Michigan State study has cost the
15 State around \$100,000?

16 A Yes.

17 Q Let me show you what's marked as Defense Exhibit 24.
18 Is this some of the notes that -- I'm showing you Defense
19 Exhibit 24. Is this notes of your phone conference with Rob
20 Thompson?

21 A Yes.

22 Q And this is your handwriting?

23 A Yes.

24 Q Let me show you the second page of Defense Exhibit 24.
25 And are these also your notes?

1 A Yes.

2 Q And third page, that looks like the same handwriting.
3 I wasn't sure if the second and third page was your notes. Are
4 those your notes also?

5 A Yes.

6 Q Let's go back -- and I believe you've indicated that
7 the information that Mr. Thompson gave you is similar to what
8 other prosecutors told you in these unrecorded phone
9 conversations; is that correct?

10 A Yes, I said that.

11 Q And some of them I just don't understand. Few bright
12 lines. What does that mean?

13 A I don't know. I think that's something that Mr. Colyer
14 told me.

15 Q Was Mr. Colyer on this phone conversation as well?

16 A I don't know. I don't think so.

17 Q Okay. No sociologist. What does that refer to?

18 A Mr. Thompson doesn't think sociologists tend to be good
19 jurors for the State, as I understand it.

20 Q I just don't understand -- what is that? It says no or
21 something? I don't know what that word is.

22 A No worked in Orange County.

23 Q What is that?

24 A I'm not sure.

25 Q What about the next one? Women over 50 tend to be

1 sympathetic.

2 A I think that's probably something I heard and recorded.

3 Q And that's something that Mr. Thompson told you,
4 correct?

5 A Yeah.

6 Q That's not something you independently thought of?

7 A That wouldn't -- anything on this thing is not something
8 that I would have thought of. I may have known a little bit of
9 it, but I was trying to get information from Mr. Thompson and
10 record it.

11 Q Okay. And I read this note -- my interpretation of
12 this note -- we will see if there's some confusion -- that the
13 State tends to strike women over 50 because they tend to be
14 sympathetic in death cases. Is that a fair reading of that?

15 A That may be a fair reading. I'm not sure I fairly
16 represented what Mr. Thompson told me.

17 Q Well, prosecutors around the State said they would take
18 into account age, didn't they?

19 A I didn't ask about age specifically.

20 Q Well, did prosecutors around the State say they took
21 into account gender?

22 A My questions to prosecutors around the State weren't to
23 ask about specific items but just general -- in terms of the
24 phone conversations, it would be more general kinds of
25 information. I don't recall if they said something about age or

1 gender.

2 Q Okay. Do you recall the affidavit from Greg Butler
3 where he specifically said, No, I didn't strike this woman
4 because she was black. I struck her because she was a woman.
5 Do you recall that affidavit?

6 A No.

7 Q Okay. We'll look at it maybe after the break.

8 A All right.

9 Q Relation to victim, female and male victim. What does
10 that mean?

11 A I don't know.

12 Q Okay. And if you don't know what these mean, that is
13 fine. That's fair. Body language. What does that mean?

14 A That part is information that isn't picked up by the
15 transcript that prosecutors look at to decide if the venire
16 member is being candid concerning their answers.

17 Q All right. And, in fact, you -- in all the
18 explanations, you said you compiled a tally of the explanations
19 in Cumberland County. Do you recall that testimony?

20 A In the 62 strikes, yes.

21 Q And of those 62 strikes, tell the Court how many of
22 those explanations said that the reason they struck that juror
23 was for any reason that's not included in the transcript.

24 A I don't know -- I didn't review the reasons relative to
25 transcripts, so I don't know the answer.

1 Q So if the Court were to review every reason from
2 Cumberland County and saw that zero -- zero of the jurors were
3 excluded for something that was not in the transcript, what
4 would that mean to you?

5 A It would mean that the transcript provided the
6 information for the reviewers.

7 Q Thank you. Going to page 2 -- that got cut off at the
8 top in the scan. Do you see that at the very top?

9 A Yes.

10 Q Do you know what that says? I just can't read it, and
11 if you don't know, that's fine.

12 A I think it says, Very preliminary.

13 Q Okay.

14 A This would be notes that I took probably in August, very
15 early, to -- trying to set out some of the -- my understanding
16 of what some of the issues might be.

17 Q Okay. And on the first page of Defendant's Exhibit 24,
18 it has a date of the phone conversation of August 24th; is that
19 right?

20 A Yeah.

21 Q Do you know whether this second page that's on the
22 screen now was from the same conversation?

23 A No, I don't know.

24 Q I want to -- you acknowledge very early in the process
25 that the strike rate is approximately two-to-one black venire

1 members -- to here you indicate white; is that correct?

2 A I believe that's what was in the report.

3 Q And then you knew from August that you were going to
4 have to come up with a plan to explain why these differences
5 exist. Is that a fair statement?

6 A Well, if these differences are accurate, then I would
7 need to explain it, yes.

8 Q Fair enough. And this is a little hard to read. I
9 might -- to be fair to you, let me hand that to you, see if you
10 can see what that says, that part over at the right. Do you see
11 where I'm pointing here?

12 A Past discrimination; help explain why black are
13 accepted -- are less accepted of law enforcement.

14 Q Is that something -- I am sorry. Are you finished?

15 A I'm not sure I am reading this right. Oh, past
16 discrimination; help explain why black are less accepting of law
17 enforcement testimony.

18 Q Is that something that Mr. Thompson told you, or is
19 that your independent thought?

20 A I'm not sure which, if either. I don't know what I'm
21 referring to at this point.

22 Q All right.

23 THE COURT: This may be a good point to take a
24 break.

25 MR. JAY FERGUSON: Okay. Thank you, Judge.

1 THE COURT: Thank you, Dr. Katz. You may step
2 down, sir.

3 We're going to take -- fifteen minutes okay, folks? Is
4 that enough time?

5 MR. JAY FERGUSON: Yes, sir.

6 THE COURT: Ms. Stubbs?

7 MS. STUBBS: No, 15 is fine.

8 THE COURT: Fifteen is fine. Twenty after by the
9 clock on the back wall. Thank you.

10 (Whereupon, a recess was held from 11:01 a.m.
11 until 11:22 a.m.)

12 (The following proceedings continued in open
13 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
14 Ferguson, Ms. Stubbs, Mr. Colyer, Mr. Thompson, and Mr. Perry
15 were present.)

16 THE COURT: Okay. Let the record reflect all
17 counsel are present. The defendant is present.

18 Mr. Jay Ferguson, you may continue with your cross,
19 sir.

20 MR. JAY FERGUSON: Yes. Thank you, Your Honor.

21 THE COURT: Yes, sir.

22 MR. JAY FERGUSON: I'd like to move into evidence
23 Defendant's Exhibit 24, which are those notes. I don't think
24 they've been admitted yet.

25 MR. COLYER: I thought they had been.

1 THE COURT: My recollection is they had.

2 MR. JAY FERGUSON: They came in -- I'm sorry.
3 They came in only for the limited basis to explain the -- I am
4 sorry. Let me back up. It came in through Bryan Stevenson as
5 part of the formulation of his opinion. I'm asking now it be
6 admitted for substantive evidence.

7 THE COURT: Okay. All right. Any objection?

8 MR. THOMPSON: No, sir.

9 THE COURT: It's Defendant's 24. Without
10 objection, they're admitted.

11 MR. JAY FERGUSON: Thank you, Your Honor.

12 THE COURT: Yes, sir.

13 BY MR. JAY FERGUSON:

14 Q Dr. Katz, I am going to show you what's marked as
15 State's Exhibit 48 and -- okay. This is the last page of
16 State's Exhibit 48.

17 MR. JAY FERGUSON: Can everyone see that?

18 THE COURT: Yes, sir.

19 BY MR. JAY FERGUSON:

20 Q Do you recall this exhibit?

21 A Yes.

22 Q And this is where you are indicating you've got every
23 one of the 173 voir dieres or cases listed; is that correct?

24 A Yes.

25 Q And then you indicate the number of black venire

1 members struck by the State?

2 A Yes.

3 Q And review prosecutor and review prosecutor
4 outstanding. As I understand it, the review prosecutor received
5 means we have affidavits from each of those -- I am sorry --

6 A Affidavits or reports --

7 Q Okay.

8 A -- from each of those, yes.

9 Q We have some written correspondence from each of these
10 reviewers just as they said they were going to do; is that
11 correct?

12 A Yes.

13 Q And then you have review prosecutor outstanding and,
14 for example, in case study ID 282, I take it that ADA Tom Anglim
15 had agreed to do a review; is that right?

16 A Yes.

17 Q And I take it by this State's Exhibit 48 you never
18 received anything from Mr. Anglim.

19 A No, I have not.

20 Q And then I see, for example, Wake County, there's
21 nobody listed for all those -- one, two, three, four, five, six,
22 seven, eight, nine -- ten cases?

23 A That's correct.

24 Q Does that mean that Wake County never agreed to send
25 anything to you?

1 A I never received any information from the DA in Wake
2 County providing me with reviewers.

3 Q Did you ever talk to Mr. Colon Willoughby?

4 A I don't recall. I don't think I did, but I know I
5 e-mailed him so -- I don't recall. But I didn't get any
6 reviewers from him.

7 Q Actually, you e-mailed him several times, didn't you?

8 A I e-mailed several times, and I asked the attorneys, Mr.
9 Thompson and Mr. Colyer, to take over the process of securing
10 reviewers in cases where I was unsuccessful. And I believe Peg
11 Dorer also was asked to try to get the reviewers for the
12 counties that had not yet committed to do the reviews.

13 Q And it's fair to say, isn't it, Dr. Katz, that as a
14 result of not completing your *Batson* methodology, you have no
15 statistical analysis to present to this Court today; is that
16 correct?

17 A I have a complete analysis and the completed reviews for
18 Cumberland County. I don't have that for the statewide.

19 Q And you don't have that for the district-wide -- excuse
20 me, the division-wide either, do you?

21 A If the division-wide counts other counties than
22 Cumberland, then I am not familiar with that and won't have that
23 either.

24 MR. JAY FERGUSON: I don't have any further
25 questions, Your Honor.

1 THE COURT: Okay. Any redirect, Mr. Perry?

2 MR. PERRY: Yes. And if I may have a moment, Your
3 Honor. It may help to streamline some stuff.

4 THE COURT: Yes, sir.

5 (There was a pause in the proceedings.)

6 MR. PERRY: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 REDIRECT EXAMINATION

9 BY MR. PERRY:

10 Q And, Dr. Katz, let me just -- I want to go back and ask
11 you to clarify a couple things. Earlier when Mr. Ferguson was
12 asking you questions about the information you received on the
13 *Batson* challenge cases, just to be clear, can you tell us again
14 in terms of responses and information on *Batson* challenges, can
15 you tell us what you got from Cumberland and from the statewide
16 where you had sent requests out for everybody else? In other
17 words, for Cumberland County, you got all the cases that were
18 *Batson* involved identified, correct?

19 A Yes. I have the reviews for all 62 cases where the
20 black venire member was struck for Cumberland County and that
21 includes, I believe, four *Batson* cases.

22 Q Okay. And then just to clarify, for the rest of the
23 reviews that you were asking for, did you get some information
24 on the *Batson* challenges or none? Again, can you just clarify
25 exactly what you got in terms of *Batson*-related information out

1 of those reviews?

2 A For each of the reviews, I asked the reviewer to provide
3 information regarding whether or not there was a *Batson*
4 challenge and also whether or not the State had moved to strike
5 the venire member for cause.

6 Q Okay.

7 A So only in terms of those people who submitted reviews
8 would I have the *Batson* cases or the motion to strike for cause
9 cases.

10 Q So the reviews you got, you do have the *Batson*
11 information contained within those responses?

12 A Yes.

13 THE COURT: Well, for clarification, does that --
14 how many cases did you receive responses when those issues were
15 involved?

16 THE WITNESS: Out of the 173 trials -- it's in my
17 report.

18 THE COURT: Not counting any of the Cumberland
19 County cases. If I understood that correctly, you reviewed all
20 62 challenges as to black venire members in the Cumberland
21 County cases?

22 THE WITNESS: Yes.

23 THE COURT: Four of those were implicated *Batson*
24 issues?

25 THE WITNESS: Yes, Your Honor.

1 THE COURT: Okay.

2 THE WITNESS: Then according to my table 17 --

3 THE COURT: Okay.

4 THE WITNESS: I don't have the count, but those
5 indicate which reviewers had provided their reviews as of
6 January 10th, and to the extent that there were *Batson* cases as
7 part of those reviews, I would have those.

8 THE COURT: Okay.

9 THE WITNESS: The cases that weren't reviewed at
10 that time, I do not have the *Batson* challenge cases for them.

11 BY MR. PERRY:

12 Q Okay. And that's what I want to clarify. So that is
13 in table 17, the list of the cases that involve *Batson* where you
14 got reviews turned in?

15 A Yes.

16 Q Okay. Let's see. And then, Dr. Katz, I think earlier
17 Mr. Ferguson had asked you in what he marked as Defendant's
18 Exhibit Number 63 -- and that would be the *Horton v. Walter*
19 *Zant*, the Eleventh Circuit Court of Appeals opinion. He had
20 asked you about some of the work you had done and some of the
21 testimony that you had offered in that case; is that correct?

22 A Yes.

23 Q Okay. And have you got a copy of that in front of you?

24 A Yes, I do.

25 Q If I could direct your attention to page 9. See the

1 part at the top of page 9 that was highlighted in the defense
2 exhibit there?

3 A Yes, I do.

4 Q Okay. And that same paragraph, do you see a little
5 closer to the end of paragraph -- I think it's paragraph 1 on
6 that page, a sentence that starts, Under our standard of review?

7 A Yes, I do.

8 Q Can you read the -- that sentence and the remainder of
9 that paragraph for me, please.

10 A Yes. Under our standard of review, the State has not
11 made a sufficient showing. The only testimony comes from
12 Mr. Briley. His answers are devoid of any specifics. The State
13 did not place into the record any voir dire excerpts or
14 testimony from any of Mr. Briley's assistants explaining the
15 strike pattern. The burden of proof is on the State, and the
16 State has failed to carry it.

17 Q All right. And the reason I am asking you about -- to
18 build on what Mr. Ferguson was asking you about -- excerpts from
19 this opinion, as part of the approach you took from this study,
20 did the work you do involved with this case sort of inform how
21 you approach these problems?

22 A Yes. I recalled that part of the opinion from the
23 Eleventh Circuit about information about trial transcripts and
24 being specific about reasons for the strike, and so that helped
25 me in formulating a plan for how to deal with the issues in this

1 case.

2 MR. PERRY: May I approach, Your Honor.

3 THE COURT: Yes, sir.

4 BY MR. PERRY:

5 Q And I think this is Defense Exhibit Number 3. It is
6 just the copy of the PowerPoint slides that were introduced
7 earlier. Dr. Katz, I am going to hand you Defense Exhibit 3.
8 Earlier, Mr. Ferguson was asking you a couple of questions about
9 some of the tables in this exhibit. Do you recall that?

10 A Yes.

11 Q I just wanted to ask you a question or two to clarify.
12 And I guess what I'll look at is just the table 1 part of this
13 exhibit, which is I believe page 22 in this exhibit.

14 THE COURT: Okay.

15 BY MR. PERRY:

16 Q I am going to hand you that, Dr. Katz. And, again,
17 just as a matter of clarification, Mr. Ferguson asked you about
18 the disparities, correct?

19 A Yes, he did.

20 Q And in terms of the statistical significance of those
21 disparities, he asked you about the probability of these
22 disparities occurring in a selection process?

23 A Yes.

24 Q I just want to make sure we understand when he asked
25 you about that, was it a random selection process or a

1 race-neutral process because --

2 A What I heard from him was a race-neutral random
3 selection process.

4 Q Okay. All right. So -- and that's -- you answered the
5 question in that way, correct?

6 A Yes.

7 Q Okay. And the other clarification not necessarily
8 involved with this table that I wanted to ask you about -- in
9 terms of the sampling and your opinion on the sampling that was
10 done by the defense --

11 A Yes.

12 Q That was the sampling regarding the 25 percent taken
13 from the 7,400 venire members, correct?

14 A Yes.

15 Q Okay.

16 MR. PERRY: May I have a moment, Your Honor.

17 THE COURT: Yes, sir.

18 (There was a pause in the proceedings.)

19 MR. PERRY: Thank you, Your Honor.

20 BY MR. PERRY:

21 Q And just one final clarification. I think Mr. Ferguson
22 asked you this as well, but I want to make sure that we're all
23 clear, and he asked you just in the basic way. So your concern
24 in terms of the sampling that was done by Professor O'Brien came
25 from the fact that the 173 trials was not a random sample; is

1 that correct?

2 A Not a random sample from a larger body of capital
3 trials.

4 Q Okay. So --

5 A Yes.

6 Q -- based on that, though you disagree with them on
7 that, the fact that they took the 25 percent sample from the
8 7,400 members of those 173 trials was done correctly given that
9 they used the 173 as the starting point for the population?

10 A Yes.

11 (There was a pause in the proceedings.)

12 MR. PERRY: Thank you, Your Honor. And I think
13 that's all the questions I've got on redirect.

14 THE COURT: Yes, sir.

15 MR. PERRY: I think the only thing I would do --
16 and I forgot to do this but after talking to Mr. Colyer and Mr.
17 Thompson, I didn't move to introduce our exhibits that I had
18 introduced, so I would move to do that. I have understood they
19 have been doing that kind of at the end of the day at some
20 points.

21 THE COURT: Okay. Which, do the record show, have
22 not been admitted, ma'am?

23 THE CLERK: Forty-four through 52.

24 THE COURT: Forty-four through 52 are now being
25 offered?

1 MR. PERRY: Yes, sir. And I don't know if they
2 still have an objection to 49 or not.

3 THE COURT: The objection, I'm assuming, remaining
4 the same?

5 MR. JAY FERGUSON: Yes. Can I have just a moment
6 because I think I have a specific objection.

7 Are you finished otherwise?

8 MR. PERRY: Yes, sir.

9 THE COURT: Okay. Yes, sir.

10 (There was a pause in the proceedings.)

11 MR. JAY FERGUSON: May I proceed, Your Honor.

12 THE COURT: Yes.

13 MR. JAY FERGUSON: We would object to any of these
14 exhibits that are part and parcel of his report as well as his
15 report.

16 THE COURT: I apologize.

17 MR. JAY FERGUSON: We would object to any exhibits
18 that are part and parcel of his report like the table 14 sheet,
19 which is Exhibit 50, Exhibit 51, Exhibit 52 and, of course, the
20 report itself.

21 THE COURT: And that exhibit number is --

22 MR. JAY FERGUSON: Forty-four.

23 THE COURT: Forty-four. Yes, sir.

24 MR. JAY FERGUSON: And I simply reincorporate the
25 argument set forth in our motion in limine with respect to Dr.

1 Katz specifically relying upon Rules 701, 702 and 703 of the
2 Rules of Evidence, the confrontation clauses of the North
3 Carolina and federal constitution. Don't wish to be heard.

4 THE COURT: Yes, sir. That objection is, again,
5 noted, deemed renewed in apt time. It's overruled; exception is
6 noted for the record.

7 As to the other exhibits, specifically 44, 50, 51, and
8 52, it is my understanding that that is based on the fact that
9 they are already part of the record in terms of being in that
10 report?

11 MR. JAY FERGUSON: That's correct, as well as
12 State's Exhibit 47, which also has information in it from the
13 report.

14 THE COURT: Yes, sir.

15 MR. JAY FERGUSON: Same basis.

16 THE COURT: That's 47?

17 MR. JAY FERGUSON: Forty-seven, yes. Thank you.

18 THE COURT: Again, the objection is renewed in apt
19 time. It's overruled; exception is noted for the record. I
20 understand the basis. My recollection, folks, is that any
21 matters that deal with evidentiary issues are to be resolved by
22 the Court. Is that consistent with what other folks recall? I
23 know specifically it related to the affidavits.

24 MR. COLYER: Yes.

25 THE COURT: But as a matter of law, my

1 responsibility under the MAR statute is to determine matters
2 related to admissibility. Rules of evidence apply otherwise.

3 MR. COLYER: Yes. We think you've done that at
4 this point based on your rulings. Yes, sir.

5 THE COURT: So with that understanding.

6 MR. HUNTER: Yes, sir.

7 THE COURT: All right. Is there any need to have
8 individual exhibits that are already part of the report offered
9 at this time?

10 MR. COLYER: Judge, we are just trying to be
11 consistent with the use of the slides and --

12 THE COURT: Okay.

13 MR. COLYER: -- just so you have it all. We would
14 argue it is easier that way in case you need to refer back to
15 something.

16 THE COURT: Even though it is duplicative and I
17 understand the basis, the objection is overruled; exception is
18 noted for the record consistent with what I said a few moments
19 ago in terms of my responsibility to decide matters related to
20 admissibility of evidence.

21 Mr. Hunter, anything?

22 MR. HUNTER: No, Your Honor. Thank you.

23 THE COURT: Saw you inching up.

24 MR. HUNTER: No. No. Just stretching.

25 THE COURT: Yes, sir. All right. Now as far as

1 Dr. Katz is concerned, is he being -- is where we are him being
2 released from his subpoena for all purposes, or do you intend to
3 have him back next week?

4 MR. THOMPSON: There is a question of whether we
5 intend to have him back next week. We believe we'd like to have
6 him back for Tuesday, and I think we are going to make every
7 effort -- and I spoke to Ms. Stubbs about this during the break
8 a little bit -- to finish all of our stuff on Monday, we can
9 jump in on Tuesday, and they think that they can finish both
10 O'Brien and Woodworth on Tuesday, and I think we can finish with
11 them as well if --

12 THE COURT: All right.

13 MR. COLYER: We would like him not to be released
14 at this point but just conditionally excused subject to recall.

15 THE COURT: Yes, sir. Yes, sir.

16 Thank you, Dr. Katz. You may step down.

17 Do y'all want to be heard?

18 MR. JAY FERGUSON: No, Your Honor. I likewise
19 have some exhibits I probably should --

20 THE COURT: Yes, sir.

21 MR. JAY FERGUSON: -- move in now while we address
22 it.

23 THE COURT: Yes, sir.

24 MR. JAY FERGUSON: Can I confer with the clerk?

25 THE COURT: Yes, sir.

1 (There was a pause in the proceedings.)

2 MR. HUNTER: Your Honor, I guess I just have an
3 inquiry. Is the State contemplating they would offer evidence
4 after we finish our surrebuttal?

5 MR. COLYER: We don't know. Just reserving our
6 right to do that -- not anticipating it but trying to keep our
7 options open.

8 MR. HUNTER: I guess my question: Is there a
9 right?

10 MR. COLYER: To the extent we have one.

11 THE COURT: I apologize.

12 MR. JAMES FERGUSON: I think they want to preserve
13 it if they've got it. They don't have a right to preserve it.

14 MR. THOMPSON: I think it would be up to Your
15 Honor, respectfully.

16 THE COURT: Yes, sir, and since we're not at the
17 point yet where any decision regarding him or any other
18 witnesses being called after the defendant's surrebuttal
19 evidence, I'm not in a position to do anything until I see where
20 we are.

21 MR. THOMPSON: Not quite ripe yet.

22 THE COURT: Yes, sir.

23 MR. COLYER: I don't mean to imply that we have
24 the right, Your Honor, just to the extent that we have the,
25 quote, unquote, right or the opportunity, we'd like not to waive

1 that without some further guidance from the Court.

2 THE COURT: Yes, sir.

3 MR. THOMPSON: But there are no plans for that as
4 we know of right now, to answer your questions and counsel's.

5 THE COURT: Okay. And there's no ruling
6 forthcoming from the Court for that reason because we haven't
7 reached that point yet.

8 MR. THOMPSON: Yes, sir. I understand.

9 THE COURT: But I know -- I understand where we
10 are.

11 MR. JAMES FERGUSON: Yes, sir.

12 THE COURT: Yes, sir. I understand where we are.

13 MR. JAMES FERGUSON: We don't want to waive our
14 right to object.

15 THE COURT: Absolutely. Absolutely. All right.
16 I will say this for the record: If you look at the statute, the
17 burden of proof is on the defendant initially to prove by a
18 preponderance of the evidence or at least to establish a prima
19 facie case as to the claims involved. If that's done, burden
20 shifts to the State to rebut that evidence.

21 MR. THOMPSON: There's a question on that legally,
22 Judge, if you look at the RJA statute. We're not there yet, but
23 the RJA statute indicates that the burden is on the defendant,
24 period and --

25 THE COURT: I am talking about the prima facie

1 showing, sir. I apologize.

2 MR. THOMPSON: Oh, yes. I thought you were
3 talking about the overall --

4 THE COURT: Yes. Prima facie showing. But I hear
5 you.

6 MR. THOMPSON: Yes, sir.

7 THE COURT: Okay. Anything else, folks, that we
8 need to deal with now?

9 MR. THOMPSON: Judge, Ms. Stubbs and I have been
10 working on these affidavits and them allowing us to swap out the
11 originals. I have been looking in my office for a set of three
12 coming from Karen Hobbs, and I haven't -- I don't -- I haven't
13 received them in my possession yet. They may be floating in my
14 office somewhere. I am happy to work with her after court
15 breaks down if she's inclined if I have them; otherwise, I'd
16 like to do them on Monday. I'd like to do it the one time, but
17 I will defer to her judgment, and I'm available today for as
18 long as it would take to get that resolved if it has to be done
19 today.

20 MS. STUBBS: Your Honor, I was going to ask for
21 permission to be absent on Monday morning. I have spoken with
22 Mr. Robinson and other members of the defense team. I will be
23 working on this case in another capacity. So that would not be
24 a -- so I was hoping we could do the affidavits this afternoon,
25 but if the State is not prepared, then perhaps we can do them

1 Monday afternoon.

2 THE COURT: Is that agreeable?

3 MR. THOMPSON: I'm sure we can figure that out,
4 Judge, yes, sir.

5 THE COURT: For the record, Mr. Robinson, Ms.
6 Stubbs has indicated that she is going to be otherwise working
7 on your case but will not be present in court on Monday. That's
8 been discussed with you?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And you consent to that, sir?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Okay. Let the record so show.

13 All right. Anything else, folks?

14 You had your proffer?

15 MR. JAY FERGUSON: No. The Exhibit 63, 64, and
16 65, I am not moving into admission. One was the *Horton* opinion,
17 which is 63. I don't think it needs to be in evidence and there
18 was the testimony that I got in that I wanted. The other was
19 the Exhibit 64 that I don't think I've laid the proper
20 foundation for yet.

21 THE COURT: Yes, sir. Thank you, sir.

22 MR. JAY FERGUSON: But I will come back to that
23 one.

24 THE COURT: Yes, sir. All right. Anything else?

25 MR. THOMPSON: Nothing from the State, Your Honor.

1 Thank you.

2 THE COURT: Nine o'clock Monday morning? I
3 recognize some folks are coming from out of town.

4 MR. COLYER: Judge, we had to notify some folks
5 yesterday, and we told them to be in our office at 9:15
6 anticipating a 9:30 start. I'm sorry.

7 THE COURT: We'll work with that. That's okay.

8 MR. COLYER: We were just trying to give them an
9 idea --

10 THE COURT: Yes, sir. So we will start at 9:30.

11 MR. COLYER: Thank you.

12 THE COURT: Thank you, folks. Have a good
13 weekend.

14 (Whereupon, the Court adjourned at 11:50 a.m.,
15 Friday, February 10, 2012, until Monday, February 13, 2012, at
16 9:30 a.m.)

17 (REPORTER'S NOTE: Ms. Jennifer Hack was replaced
18 by Ms. Veronica McClain.)

19

20

21

22

23

24

25

C E R T I F I C A T E

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

I, Jennifer L. Hack, RPR, the officer before whom the foregoing proceeding was taken, do hereby certify that said hearing, Pages 1911 through 2003, inclusive, is a true, correct, and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

This 29th day of February, 2012.



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

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

vs.

MARCUS ROBINSON,
Defendant

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

This is to certify that the transcript of the proceedings in the above-captioned case, as ordered on the 3rd day of February, 2012, being 93 pages in Volume X of XIII, was delivered electronically and by U.S. Mail to counsel listed below on the 29th day of February, 2012.

THE HONORABLE GREGORY A. WEEKS
Superior Court Judge

ROBERT THOMPSON
Assistant District Attorney
BEL LEWIS, Legal Assistant
Cumberland County Courthouse
P.O. Box 363
Fayetteville, North Carolina 28302
On behalf of the State

JAY H. FERGUSON
Attorney at Law
119 East Main Street
Durham, North Carolina 27701
On behalf of the Defendant



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

1	STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
2		SUPERIOR COURT DIVISION
3	COUNTY OF CUMBERLAND	FILE NO. 91 CRS 23143

6	STATE OF NORTH CAROLINA]	
7]	
8]	RACIAL JUSTICE ACT HEARING
9	vs.]	
10]	DAY HEARD 02/13/12
11	ROBINSON, Marcus,]	
12	Defendant.]	Vol. XI OF XIII
13]	[Pages 2004 through 2264]

15 The above-captioned case coming on for hearing at the January
 16 30, 2012, Criminal Session of the Superior Court of
 17 Cumberland County, Fayetteville, North Carolina, before the
 18 Honorable Gregory A. Weeks, Judge Presiding, the following
 19 proceedings were had, to wit:

22 **A P P E A R A N C E S**

24 **FOR THE STATE:** Calvin Colyer & Rob Thompson,
 25 Assistant District Attorneys, 12th
 26 Judicial District; and, Jonathan Perry,
 27 Assistant District Attorney, 20th
 28 Judicial District

30 **FOR THE DEFENDANT:** Jay Ferguson & Cassandra Stubbs, Durham
 31 County Bar; Malcom Hunter, Orange County
 32 Bar; and, James Ferguson, Mecklenburg
 33 County Bar, Attorneys at Law

36 **VERONICA E. McCLAIN**
 37 *Official Court Reporters*
 38 *Cumberland County Courthouse*
 39 *P.O. Box 363*
 40 *Fayetteville, North Carolina 28302*
 41 *(910) 308-0517 (cell phone)*
 42 *Verbrprtr45@nc.rr.com*

44
 45 **DATE REQUESTED: 02/03/12** **DATE DELIVERED: 02/29/12**

1 [COURT REPORTER NOTE: The Master Index will be submitted in
2 a volume all of its own, entitled Master Index.]

3 [The hearing reconvened at 9:30 a.m., February 13, 2012, with
4 all pertinent parties present prior to the recess once again
5 present, to include the defendant, but with the exception of
6 Mr. Colyer, Ms. Stubbs, and the court reporter. Ms. Veronica
7 McClain replaced Ms. Jennifer Hack as the official court
8 reporter.]

9 THE COURT: Good morning, again,
10 folks. For the record -- for the record, we're awaiting Mr.
11 Colyer; and, is there anyone else we're waiting for, Mr.
12 Thompson?

13 MR. THOMPSON: We may be waiting for
14 Judge Lock and Jenkins. They had to turn around shortly
15 after they were on their way. They're coming together. They
16 ETA'd that -- any time now. So ----

17 THE COURT: Okay.

18 MR. THOMPSON: ---- they may -- I haven't
19 heard if they've gotten here yet.

20 THE COURT: We'll -- we'll be at ease.

21 [The hearing recessed at 9:31 a.m. and reconvened at 9:35
22 a.m., February 13, 2012, with all pertinent parties present
23 prior to the recess once again present, to include the
24 defendant and Mr. Colyer.]

25 MR. THOMPSON: Judge, please the Court, I

February 13, 2012

1 believe we're ready to go forward.

2 THE COURT: Okay.

3 MR. THOMPSON: We have one preliminary
4 matter. Judge Brewer was going to be one of our witnesses
5 today, and I e-mailed counsel on Friday. He has a conflict
6 with today. He's been here two other times anticipating
7 testifying and the scheduling broke down in here. So, in
8 essence, we have agreed -- and I want to put on the record --
9 we've agreed with the defense, and the defense had agreed to
10 us -- with us to deal with Judge Brewer's testimony entirely
11 on the offer of proof. In essence, it's really only been
12 direct examination up to this point anyway; and, so, we can
13 keep things moving. So, I wanted to kind of ----

14 THE COURT: Let me make sure I'm
15 understanding, because you're referring to the offer of
16 proof. Can you explain what you mean by that for purposes of
17 the record?

18 MR. THOMPSON: In essence, what we have
19 talked about is having Judge Brewer, along with all the other
20 judges that have been stopped from testifying in certain
21 parts of their direct examination -- to doing that offer of
22 proof in -- in the form of a deposition hearing.

23 THE COURT: Okay.

24 MR. THOMPSON: In essence -- so, we'll be
25 doing his entirely by deposition, so we keep moving. He has

February 13, 2012

1 a conflict out of county today, obviously, as a practicing
2 attorney. It was a Wake County case that he had to deal
3 with.

4 THE COURT: Okay.

5 MR. THOMPSON: So, I contacted counsel.
6 They said we're -- they were fine with doing it that way. I
7 wanted to put that on record.

8 THE COURT: Okay; and, for the record,
9 my understanding is all parties have agreed to that process.

10 MR. HUNTER: We've agreed, Your Honor.
11 Of course, there are some parts of Judge Brewer's testimony
12 that would be admissible. So -- you know, that I -- if the
13 State wants to do it this way, it's fine with us.

14 MR. COLYER: Judge, we can also check
15 with him to see -- if he gets back later this afternoon.
16 We'll be glad to follow the procedure we've been following.
17 We just didn't want to hold up ----

18 THE COURT: Yes, sir.

19 MR. COLYER: ---- our -- our ceasing
20 evidence and the defense beginning their next portion ----

21 THE COURT: Okay.

22 MR. COLYER: ---- because of the out-
23 of-state witnesses; but, if he's available, we'll try to get
24 him in. If not, we'll -- if we could follow that other
25 procedure, then that will keep us from having to delay the

1 proceedings.

2 THE COURT: Yes, sir. All right.

3 Thank you, folks. Let the record reflect all counsel are
4 present. The defendant is present.

5 Are you ready to proceed, Mr. Thompson, Mr.
6 Colyer?

7 MR. THOMPSON: Yes, sir. We're ----

8 MR. COLYER: If I could step out and
9 get our witness, Your Honor?

10 THE COURT: Yes, sir.

11 [Mr. Colyer departed the courtroom.]

12 [Pause.]

13 [The Court conferred with Madam Clerk.]

14 [Pause.]

15 [Mr. Colyer and the witness entered the courtroom.]

16 THE COURT: Good morning, sir.

17 MR. THOMPSON: Please the Court, Your
18 Honor, the State calls Judge Thomas Lock.

19 THE COURT: Sir, if you will, place
20 your left hand on the Bible at the end of the bar over there.
21 That's it. Raise your right hand, please.

22 [The witness did as directed and was sworn.]

23 THE COURT: Would you like some water,
24 sir?

25 THE WITNESS: Yes, sir. Thank you very

February 13, 2012

1 much, Your Honor.

2 THE COURT: While I'm getting that,
3 and once you're seated, if you will state and then spell
4 first and last name for the record.

5 THE WITNESS: All right. It's Thomas H.
6 Lock; T-H-O-M-A-S, H., L-O-C-K.

7 MR. HUNTER: I apologize for
8 interrupting. I'm just going to go put our little recorder
9 up there.

10 THE COURT: Yes, sir.

11 [Pause.]

12 THE COURT: Judge Lock, let me state,
13 from the outset, there's some matters I anticipate which will
14 -- will be gone into by way of direct examination. I have
15 already made rulings in that respect. When it comes time for
16 that anticipated line of testimony, if you will, bear with
17 us.

18 THE WITNESS: Yes, sir.

19 THE COURT: If you will, allow counsel
20 for the defendant the opportunity to object before giving any
21 answers, so I can rule on the objection, please, sir.

22 THE WITNESS: Yes, sir.

23 THE COURT: All right. Thank you,
24 sir.

25 Yes, sir.

1 MR. THOMPSON: Thank you, Your Honor.

2 **THOMAS LOCK, having been first duly sworn, was called as a**
3 **witness by the State and testified as follows on DIRECT**
4 **EXAMINATION conducted by MR. ROB THOMPSON:**

5 Q. Good morning, Judge. How are you?

6 A. Good morning. Very well. Hope you are.

7 Q. Please state your occupation for the Court.

8 A. I'm the Senior Resident Superior Court Judge for
9 Judicial District 11B ----

10 Q. How long ----

11 A. ---- which is Johnston County.

12 Q. Yes, sir. How long have you been a Superior Court
13 Judge?

14 A. I'm in my sixth year.

15 Q. We're going to go back and get some of your
16 background first, if it's all right, Judge. From -- where
17 did you graduate high school, sir?

18 A. Smithfield-Selma Senior High School.

19 Q. From there, where did you go?

20 A. I attended undergraduate school at the University
21 of North Carolina at Chapel Hill, graduated in 1978; entered
22 law school at UNC Chapel Hill that fall. I graduated from
23 law school in 1981.

24 Q. When you became an attorney, where -- where did you
25 start practicing?

1 A. I was admitted to the bar that -- that summer and
2 started practicing as an Assistant DA in the 11th
3 Prosecutorial District; which, at that time, was comprised of
4 Johnston, Harnett and Lee counties.

5 Q. How long did you work as an Assistant DA in that
6 district?

7 A. About 2 and a half years.

8 Q. From there, where did you go?

9 A. I entered private practice in Johnston County. I
10 practiced for about a year and a half with the firm, at that
11 time, of Lucas, Brown and Lock. Bob Lucas, who still
12 practices in Selma, was the senior partner in the firm; and,
13 after about a year and a half, I entered law practice on my
14 own and engaged in a general solo practice in Smithfield
15 through the end of 1990.

16 Q. Now, go back a little bit. When you were an
17 Assistant DA during that first 2 and a half years, what were
18 your normal duties in that office?

19 A. Like most Assistant DAs, I started out prosecuting
20 in the district courts. There were only five Assistant DAs
21 in the district at that time. Turnover was pretty high.
22 Within about 6 months, I was the senior person on the staff.
23 So, I prosecuted Superior Court in all three counties.
24 That's what I did primarily for the rest of the time I was
25 there.

1 Q. The type of cases you handled during that 2 and a
2 half years, can you give us the general range of ----

3 A. Oh, sure. Ran the gamut from misdemeanor appeals
4 on up through first-degree murder.

5 Q. Those -- some of those first-degree murders, did
6 you try both capital and non-capital cases during that first
7 time at the DA's Office?

8 A. There were no capital cases prosecuted in the 11th
9 District during the time I was an Assistant DA.

10 Q. Okay. Now, moving on to your time in private
11 practice, both the year and a half that you were out with the
12 firm and then the time you spent by yourself -- practicing by
13 yourself, what kind of practice did you engage in during that
14 time?

15 A. It was a general practice. I did a fair amount of
16 personal injury, a fair amount of real estate. Like most
17 general practitioners, at that time, I'd write a few wills
18 and handle a few uncontested divorces. I really did not do
19 much contested domestic work, and did a fair amount of
20 criminal. I would say probably 40 to 50 percent of my
21 practice was criminal defense.

22 Q. Can you give us an idea of the type of criminal
23 defense you engaged in during that time -- of all of those
24 periods, the year and a half with the firm and the time by
25 yourself in private practice?

1 A. Sure. It was -- the time was probably split evenly
2 between District Court practice and Superior Court practice.
3 I did a lot of DWI defense work and then handled a fair
4 amount of traffic tickets and then, of course, also handled a
5 significant number of cases in the Superior Courts, both
6 court-appointed -- we did not have a public defender in that
7 district, so I did a lot of court-appointed work and a fair
8 number of privately retained cases.

9 Q. Did you handle any homicide cases during that time
10 as a criminal defense attorney?

11 A. I did.

12 Q. Were any of those cases capital in nature?

13 A. Only one. I had been appointed to handle the case
14 of State versus Howell. I think his first name was Frankie
15 Howell. That was still pending when I was elected District
16 Attorney. So, of course, I had to withdraw, and he was
17 appointed other counsel, and the case was tried and
18 prosecuted by the Attorney General's Office after I became DA
19 because I would have had an obvious conflict.

20 Q. Which is a perfect segue into my next question.
21 When did you become the elected DA?

22 A. All right. I was elected in 1990 and took office
23 the first day of 1991.

24 Q. How long were you the elected DA of that district?

25 A. Exactly 16 years.

1 Q. During those 16 years, did your office -- or, did
2 you personally engage in the trial of capital cases?

3 A. Yes, sir, both.

4 Q. Can you give the Court an idea, during that time,
5 as the elected DA, how many capital murder cases you yourself
6 took some courtroom part in? An estimate would be fine.

7 A. Yes. I probably played -- took some part in most
8 all of them. It may have just been appearing in motions
9 pretrial. I probably appeared as counsel -- as trial counsel
10 in 75 to 80 percent of them. So, the total number that I may
11 have prosecuted was probably around 20.

12 Q. During -- again, your estimate -- during those --
13 how many of those 20 did you take part in some part of jury
14 selection -- as far as how many of those went to trial and
15 select a jury on -- and that you took part in selecting a
16 jury?

17 A. Yes. I selected the jury myself in all of them
18 except one, and that was the very first one.

19 Q. All right. After that 16 years, what position did
20 you hold?

21 A. The position I hold now.

22 Q. When -- when did that take place?

23 A. I was elected to the office in 2006 and took the
24 oath of office the first day of 2007.

25 Q. During your time as a Superior Court Judge in that

1 district or in North Carolina in general, have you had
2 occasion to preside over capital murder cases?

3 A. Yes, sir.

4 Q. Could you give the Court an estimate of how many
5 capital murder cases that you've presided over during your
6 time as a Superior Court Judge?

7 A. And you say presided over, you mean over trial ----

8 Q. Yes, sir. I'm sorry.

9 A. ---- and not just pretrial matters?

10 Q. Yes, sir, over trials.

11 A. I can tell you the exact number. It's four.

12 Q. Do you know how many of those four resulted in a
13 sentence of death being handed down by the Court and the
14 jury?

15 A. Yes, sir, two.

16 Q. Do you recall those two cases?

17 A. I do. One was in -- here in Cumberland County,
18 State versus Eugene Johnny Williams, and the other was in
19 Johnston County, State versus Jamal Bacote.

20 Q. During your tenure ----

21 THE COURT: I -- pardon the
22 interruption.

23 MR. THOMPSON: Yes, sir.

24 THE COURT: Can you spell the first
25 and last name of the defendant in the Johnston County case,

1 Jamal Bacote, for the record?

2 THE WITNESS: I'll do my very best, Your
3 Honor. I think Jamal is J-A-M-A-L; and, Bacote is B-A-C-O-T-
4 E, I believe.

5 MR. THOMPSON: According to my records,
6 Judge, that is the correct spelling.

7 THE COURT: Okay. All right. Thank
8 you. We just needed that for the ----

9 MR. THOMPSON: It's number 13.

10 THE COURT: ---- for the court
11 reporter.

12 MR. THOMPSON: Yes, sir. It's number 13
13 in the MSU study.

14 THE COURT: Yes, sir.

15 Q. Judge, during your time as a Superior Court Judge,
16 when you presided over criminal trials, did you have
17 occasion, during any criminal trial, to hear and rule on
18 Batson cases -- on Batson challenges by the defense?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Sustained. The State's
21 objection and exception are noted for the record.

22 MR. THOMPSON: Thank you, Your Honor.

23 Q. Did you, Judge, during your time as a Superior
24 Court Judge, have any habits in how you dealt with Batson
25 challenges that were made before you in, first of all, just

1 criminal cases that did not involve capital murder?

2 MR. HUNTER: Objection, Your Honor.

3 THE COURT: The Objection is
4 sustained. The State's objection and exception to the ruling
5 are noted for the record.

6 Q. Did you, Judge, during your time as Superior Court
7 Judge, have any procedures put in place that you, yourself,
8 did when you presided over a capital jury selection in
9 dealing with Batson challenges?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Objection is sustained.
12 The State's objection and exception to the ruling are noted
13 for the record.

14 Q. Before your testimony today, you were -- you were
15 contacted by the DA's Office, by myself and Mr. Colyer; is
16 that correct?

17 A. Yes, sir.

18 Q. Did you have occasion to sit down with me or Mr.
19 Colyer on any occasions before your testimony today?

20 A. Yes, sir.

21 Q. To give you an idea of the kind of questions we'd
22 be asking on direct examination?

23 A. Yes, sir.

24 Q. Did we provide you materials in order to give you
25 some materials to prepare your testimony?

1 A. Yes, sir.

2 Q. Do you recall what those materials were?

3 A. I do. You provided me with the transcript from the
4 jury selection in the case of State versus Eugene Johnny
5 Williams. You also provide me with a one or two page,
6 typewritten document which listed the names of the jurors
7 against whom the State had exercised peremptory challenges
8 and a summary of those jurors' comments or responses to some
9 questions during voir dire; and, if I recall correctly, you
10 had also marked, with yellow Post-it notes, with page
11 numbers, the portions of the transcripts relating to those
12 particular jurors.

13 Q. The transcript that we provided you, was it broken
14 up into pieces of transcript or was it the entire transcript
15 of jury selection?

16 A. I had the entire transcript. The jury selection
17 was five, very thick, loose-leaf volumes.

18 Q. Did you have an opportunity to review those
19 materials before your testimony?

20 A. I did.

21 Q. Based on your observations as -- as the trial judge
22 during the Eugene Johnny Williams case, that is 01 CRS 63278,
23 Cumberland County, did you observe that race was a
24 significant factor in the exercise of any peremptory strikes
25 against any black jurors in that case?

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: Sustained. The State's
3 objection and exception to the ruling of the Court are noted
4 for the record.

5 Q. Judge, based on your experience as the trial -- as
6 the trial court in Eugene Johnny Williams, did the State
7 racially discriminate in the exercise of any peremptory
8 strike against any black juror in that case?

9 MR. HUNTER: Objection, Your Honor.

10 THE COURT: Objection is sustained.
11 The State's objection and exception are noted for the record.

12 Q. As -- through your review of those materials,
13 Judge, did you find any Batson challenges made during the
14 John -- Eugene Johnny Williams case?

15 MR. HUNTER: Objection.

16 THE COURT: Objection is sustained.
17 The State's objection and exception are noted for the record.

18 Q. As the trial judge in Eugene Johnny Williams, would
19 you have raised a Batson objection ex mero motu or on your
20 motion had you observed the State exercise a peremptory
21 strike against a black juror based on race?

22 MR. HUNTER: Objection.

23 THE COURT: Objection is sustained.
24 The State's objection and exception are noted for the record.

25 Q. As the trial judge, if you would observ -- if you

1 would have observed the State's exercise of a peremptory
2 strike against a black juror based on race and the defense
3 had not raised a Batson objection, would you have ex --
4 intervened ex mero motu or on your own to correct the
5 situation by denying the State's peremptory strike and
6 sustaining your own Batson objection?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Objection is sustained.

9 The State's objection and exception to the ruling are noted
10 for the record.

11 [Mr. James Ferguson's cell phone rang.]

12 MR. JAMES FERGUSUON: I apologize, Your
13 Honor.

14 THE COURT: Yes, sir.

15 MR. JAMES FERGUSUON: I didn't realize it
16 was on.

17 THE COURT: Yes, sir.

18 MR. THOMPSON: May I approach, Your
19 Honor?

20 THE COURT: Yes, sir.

21 [Pause.]

22 THE COURT: What's the number, Mr.
23 Thompson?

24 MR. THOMPSON: 53, Your Honor.

25 THE COURT: Thank you, sir.

1 [Pause.]

2 MR. THOMPSON: May I approach?

3 THE COURT: Yes, sir.

4 [Pause.]

5 MR. THOMPSON: This is a clean copy for
6 Your Honor [handing the exhibit to the Court].

7 THE COURT: Thank you, sir.

8 Q. Judge, I'm showing you what's been marked for
9 purposes of identification as State's Exhibit Number 53
10 [handing the exhibit to the witness].

11 MR. THOMPSON: And I'll let the Court
12 know -- and counsel -- that, for simplicity's sake -- I'm
13 trying to get a little better at this -- we have put the
14 cover page of the first trial transcript page on the front of
15 all of these, mainly just to identify the case; but, the --
16 the heading at the top, marked trial transcript, may list
17 Volume I, but it actually may have been Volume III. This is
18 mainly just for -- to list the ----

19 THE COURT: For identification
20 purposes?

21 MR. THOMPSON: Yes, sir. Just to
22 identify which case it came from. We've got a good number of
23 these transcripts to go through, and I wanted to make it
24 simple for everybody, including myself, of course.

25 THE COURT: Okay.

1 Q. Judge, does -- I'm sorry. Judge Lock, does State's
2 Exhibit Number 53 appear to be a copy of part of a trial
3 transcript in the Eugene Johnny Williams?

4 MR. HUNTER: Objection, Your Honor.

5 THE COURT: The objection is
6 sustained. The State's objection and exception to the ruling
7 of the Court are noted for the record.

8 Q. Does -- does State's Exhibit Number 53 appear to
9 have the jury selection including Mr. -- first, the -- Ms.
10 Christine Thomas -- of jury selection of juror -- during the
11 Eugene Johnny Williams jury selection?

12 MR. HUNTER: Objection.

13 THE COURT: The objection is
14 sustained. The State's objection and exception to the ruling
15 are noted for the record.

16 Q. Does it appear on the second page, page 238, that
17 Ms. Thomas is identified -- called by the Court and
18 identified as Ms. Thomas -- as juror number 11.

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Objection is sustained.
21 The State's objection and exception are noted for the record.

22 Q. On page 239, you'll see a highlighted portion,
23 Judge Lock, that juror number 11 first says I've thought
24 about it, and I prefer the death penalty; and, then, halfway
25 down -- a little further -- halfway down the page, says ----

1 THE COURT: Rephrase your question,
2 Mr. Thompson.

3 MR. THOMPSON: I'm sorry. Pardon me.

4 Q. Does it appear, on page 239, that juror number 11
5 says yes, I thought about it ----

6 THE COURT: As to what the juror said,
7 the objection is sustained. You can ask whether a response
8 was given by the juror, and I anticipate there's going to be
9 an objection on the basis of the record speaks for itself.

10 MR. THOMPSON: Yes, sir.

11 Q. Does it appear that the Court is questioning juror
12 number 11, asking the Court -- have you been able to give it
13 -- that some thought; would you mind sharing with us what
14 your views are on that question; and, the juror responded
15 yes, I thought about it and I prefer the death penalty.

16 MR. HUNTER: Objection, Your Honor;
17 and, I -- and I -- I object to the form of these questions.
18 The transcript's already in evidence.

19 THE COURT: It is, Mr. Thompson. The
20 objection is sustained. The mo -- well, we don't have a
21 jury. So, the motion to strike -- the objection is
22 sustained. The State's objection and exception to the ruling
23 of the Court are noted for the record.

24 Q. Judge Lock, can you thumb through State's Exhibit
25 Number 53 and review the highlighted portions of State's 53?

1 A. Yes, sir.

2 Q. Let me know when you've had a chance to do that.

3 [Pause.]

4 A. Yes, sir.

5 Q. Does -- does it appear, during -- on page 239, that
6 there is some conversation between juror number 11 and Mr.
7 Colyer?

8 MR. HUNTER: Objection, Your Honor.

9 THE COURT: Sustained. The State's
10 objection and exception are noted for the record.

11 Q. Does it appear that -- I'm sorry. Who was -- who
12 was trial counsel, if you remember, Judge Lock?

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Well, that's a historical
15 fact. The record speaks for itself. The objection is
16 sustained.

17 Q. Does it appear, on the front of -- page -- I'm
18 sorry. The first page ----

19 THE COURT: Mr. Thompson, I forgot to
20 -- I didn't have an opportunity to note your objection and
21 exception.

22 MR. THOMPSON: Thank you, Your Honor,
23 please.

24 THE COURT: Yes, sir. Yes, sir.

25 MR. THOMPSON: Did you note that now,

February 13, 2012

1 Judge?

2 THE COURT: I did.

3 MR. THOMPSON: Thank you, Judge.

4 THE COURT: Yes, sir.

5 Q. Does it appear, on the front page of the trial
6 transcript, 53, that Cal Colyer was the Assistant DA that
7 prosecuted that case?

8 MR. HUNTER: Objection, Your Honor.

9 THE COURT: Objection is sustained.

10 The State's objection and exception to the ruling are noted
11 for the record.

12 Q. Does it appear that John Britt and Mike Howell were
13 the -- the defense attorneys in that case?

14 MR. HUNTER: Objection, Your Honor.

15 THE COURT: Objection is sustained.

16 The State's objection and exception are noted for the record.

17 Q. Does it appear, as well, on the front page, that
18 they worked for the Office of the Capital Defender?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Objection is sustained.

21 The State's objection and exception to the ruling are noted
22 for the record.

23 Q. Does it appear, on page 239 and 240, that the juror
24 number 11 indicates that she is against the death penalty?

25 MR. HUNTER: Objection, Your Honor.

1 THE COURT: Sustained. The State's
2 objection and exception to the ruling are noted for the
3 record.

4 Q. And, then, if you would, flip to page 254, Judge
5 Lock -- of page -- I'm sorry -- of Exhibit Number 53, does it
6 appear that juror number 11 indicates to Mr. Colyer that she
7 has some health considerations that causes her some
8 discomfort?

9 THE COURT: Rephrase your question.
10 The objection is sustained to the form of the question, as
11 well as the matter being inquired into. The record speaks
12 for itself. The State's objection and exception are noted
13 for the record.

14 [Pause.]

15 MR. THOMPSON: May I approach?

16 THE COURT: Yes, sir.

17 [Pause.]

18 MR. THOMPSON: Judge, clean copy for you,
19 number 54 [handing the exhibit to the Court].

20 THE COURT: Thank you, sir.

21 MR. THOMPSON: And, Judge [handing the
22 exhibit to the witness].

23 [Pause.]

24 MR. THOMPSON: Your Honor, based on the
25 Court's ruling, we're going to identify a number of exhibits

1 ----

2 THE COURT: Yes, sir.

3 MR. THOMPSON: ---- the best we can.

4 THE COURT: Okay. Do you want to go
5 ahead and identify State's 54 for purposes of the record at
6 this time?

7 MR. THOMPSON: Yes.

8 Q. Does it appear that -- Judge Lock, that State's
9 Exhibit Number 54 -- does it appear, Judge Lock, that State's
10 Exhibit Number 54 appears to be a part of a trial transcript
11 of the Eugene Johnny Williams case?

12 MR. HUNTER: Objection, Your Honor.

13 THE COURT: Well, I'll allow a yes or
14 no on that.

15 Judge Lock, you may answer, sir.

16 A. Yes, sir.

17 MR. THOMPSON: May I approach [handing an
18 exhibit to the Court]. That's a clean copy of 55, Judge.

19 THE COURT: Yes, sir.

20 MR. THOMPSON: [Handing the exhibit to
21 the witness.] Does it appear that -- first of all, State's
22 Exhibit Number 54 deals with juror David Jenkins.

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Sustained. The State's
25 objection and exception are noted for the record.

February 13, 2012

1 MR. THOMPSON: May I approach?

2 THE COURT: Yes, sir.

3 MR. THOMPSON: 55.

4 THE COURT: Folks, for -- for purposes
5 of the record, so there's clarity in the record, Mr. Thompson
6 ----

7 MR. THOMPSON: Yes, sir.

8 THE COURT: ---- my understanding --
9 and Mr. Colyer -- that, at this juncture, you're attempting
10 to introduce portions of transcripts?

11 MR. THOMPSON: Yes, sir.

12 MR. COLYER: That's correct.

13 THE COURT: And that's the basis upon
14 which I'm allowing the witness to answer yes or no as to what
15 trial is involved.

16 MR. THOMPSON: Yes, sir.

17 THE COURT: Yes, sir. 55, is that
18 where we are, Mr. Thompson?

19 MR. THOMPSON: Yes, sir. We are.

20 THE COURT: Okay.

21 Q. Does it appear that State's Exhibit Number 55 -- if
22 you review the highlighted portion on page 688 -- refers to
23 the testimony -- or, partial transcript of Joanie James?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Rephrase your question.

1 The objection is sustained.

2 Q. Does it appear that State's Exhibit Number 55 is a
3 partial transcript of Eugene Johnny Williams jury selection
4 and contains a partial transcript of Joanie James' jury
5 selection?

6 THE COURT: Your objection is noted
7 for the record, Mr. Thompson, so that it's -- I mean, Mr.
8 Hunter -- I apologize. It's preserved for the record.

9 You may answer yes or no.

10 A. Yes, it does.

11 MR. HUNTER: Motion to strike, Your
12 Honor.

13 THE COURT: Motion to strike is
14 allowed -- strike that -- is noted for the record. It's
15 overruled. Your objection and exception are noted for the
16 record.

17 MR. THOMPSON: May I approach?

18 THE COURT: Yes, sir.

19 MR. THOMPSON: 56, Judge [handing the
20 exhibit to the Court].

21 THE COURT: Okay.

22 Q. And 56, Judge [handing the exhibit to the witness].
23 [Pause.]

24 Q. I'm showing you now what's been marked for purposes
25 of identification State's Exhibit Number 56. Does State's

1 Exhibit Number 56 appear to be jury selection -- part of a
2 jury selection transcript of Johnny Eugene Williams and
3 appear to contain a partial transcript of the jury selection
4 of Judy Jones?

5 MR. HUNTER: Objection, Your Honor.

6 THE COURT: Objection is noted. It's
7 overruled. Exception is noted for the record.

8 You may answer yes or no, sir.

9 A. Yes, sir.

10 MR. HUNTER: Motion to strike, Your
11 Honor.

12 THE COURT: Motion to strike is
13 denied. The defendant's objection and exception are noted
14 for the record.

15 MR. THOMPSON: May I approach?

16 [Pause.]

17 MR. THOMPSON: May I approach?

18 THE COURT: Yes, sir.

19 MR. THOMPSON: Clean copy, Your Honor,
20 for 57 [handing the exhibit to the Court].

21 THE COURT: Okay.

22 Q. Judge Lock, I'm showing you what's been marked for
23 purp -- purposes of identification as State's Exhibit Number
24 57 [handing the exhibit to the witness]. Does State's
25 Exhibit Number 57 appear to be a partial transcript of jury

1 selection -- Eugene Johnny Williams ----

2 [Madam Clerk conferred with the Court.]

3 THE COURT: One second. Do you have
4 two 57's?

5 [Madam Clerk conferred with the Court.]

6 THE COURT: Okay. All right.

7 MR. THOMPSON: We good?

8 THE COURT: Yes, sir. I think so.

9 MR. THOMPSON: I need to start that
10 question over. I'm sorry, Judge.

11 THE COURT: It's my fault.

12 Q. Does State's Exhibit Number 57, Judge Lock, appear
13 to be the jury selection transcript of Eugene Johnny Williams
14 and appear to be a partial transcript of jury selection of
15 juror Michael Broadhurst?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: The objection to the form
18 of the question is sustained. The State's objection and
19 exception are noted for the record.

20 Q. Judge -- I'm sorry -- Judge Lock, does State's
21 Exhibit Number 57 appear to be a trial transcript of Eugene
22 Johnny Williams and the partial transcript of jury selection
23 of Michael Broadhurst?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: The objection to the form

1 of the question is sustained. The State's objection and
2 exception are noted for the record.

3 Judge Lock, you may answer whether or not it
4 appears to be a portion of the jury proceedings or the
5 partial transcript of the Eugene Williams matter. Yes, sir.

6 A. Yes, sir. It does.

7 MR. HUNTER: Motion to strike.

8 THE COURT: The motion to strike is
9 denied. Objection and exception are noted for the record.

10 [Pause.]

11 MR. THOMPSON: May I approach?

12 THE COURT: Yes, sir.

13 [Pause.]

14 MR. THOMPSON: 58 [handing the exhibit to
15 the Court].

16 THE COURT: Yes, sir.

17 Q. Judge Lock, I'm showing you what's been marked for
18 purposes of identification as State's Exhibit Number 58
19 [handing the exhibit to the witness].

20 [Pause.]

21 Q. Have you had a chance to take a look at State's 58?

22 [Pause.]

23 A. Yes, sir.

24 Q. Does State's Exhibit Number 58 appear to be a
25 partial trial transcript of Eugene Johnny Williams involving

1 jury selection?

2 MR. HUNTER: Objection, Your Honor.

3 THE COURT: Objection is noted. It's
4 overruled. Exception is noted for the record.

5 You may answer yes or no, sir.

6 A. Yes, sir, it does.

7 Q. On line 22, on page ----

8 MR. HUNTER: Motion to strike, Your
9 Honor.

10 THE COURT: The motion is denied.
11 Exception is noted for the record.

12 Q. On line 22 of page 2003, does it appear that the
13 bailiff and Mr. Owens entered the courtroom?

14 MR. HUNTER: Objection, Your Honor.

15 THE COURT: Sustained. The State's
16 objection and exception are noted for the record.

17 MR. THOMPSON: May I approach, Your
18 Honor?

19 THE COURT: Yes, sir. 59?

20 MR. THOMPSON: Yes, sir [handing the
21 exhibit to the Court].

22 Q. Judge Lock, I'm showing you what's been marked for
23 purposes of identification as State's Exhibit Number 59
24 [handing the exhibit to the witness]. Does State's Exhibit
25 Number 59 appear to be a partial transcript of the jury

1 selection in Eugene Johnny Williams?

2 MR. HUNTER: Objection, Your Honor.

3 THE COURT: It's overruled. Exception
4 is noted for the record.

5 You may answer yes or no, sir.

6 A. Yes, sir, it does.

7 MR. HUNTER: Motion to strike, Your
8 Honor.

9 THE COURT: The motion is denied.
10 Objection and exception to the ruling are noted for the
11 record.

12 Q. Does it appear, on page 915, which is the second
13 page of State's Exhibit Number 59, that juror number 6
14 entered the courtroom and the court said good afternoon, Mrs.
15 Patten?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: The objection is
18 sustained. The State's objection and exception are noted for
19 the record.

20 [Pause.]

21 MR. THOMPSON: May I approach, Your
22 Honor?

23 THE COURT: Yes, sir.

24 [Pause.]

25 MR. THOMPSON: 60 [handing the exhibit to

1 the Court].

2 THE COURT: All right. Thank you.

3 Q. Judge Lock, I'm showing you what's been marked for
4 purpose of identification as State's Exhibit Number 60
5 [handing the exhibit to the witness]. Does State's Exhibit
6 Number 60 appear to be the -- a partial transcript of the
7 Eugene Johnny Williams jury selection?

8 MR. HUNTER: Objection, Your Honor.

9 THE COURT: Objection's overruled.
10 The defendant's objection and exception are noted for the
11 record.

12 You may answer yes or no, sir.

13 A. Yes, sir.

14 MR. HUNTER: Motion to strike, Your
15 Honor.

16 THE COURT: The motion is denied.
17 Objection and exception to the ruling are noted for the
18 record.

19 Q. Does it appear that State's Exhibit Number 60, the
20 second page of it, page 1860 of the transcript, begins with
21 the jury selection of Mr. Gentry; that's Wilbert Gentry.

22 MR. HUNTER: Objection, Your Honor.

23 THE COURT: The objection is
24 sustained. The State's objection and exception are noted for
25 the record.

1 MR. THOMPSON: Thank you, Your Honor.

2 THE COURT: Yes, sir.

3 MR. THOMPSON: Is this the last one?

4 MR. COLYER: Yes, sir.

5 [Pause.]

6 MR. THOMPSON: May I approach?

7 THE COURT: Yes, sir.

8 MR. THOMPSON: 61 [handing the exhibit to
9 the Court].

10 THE COURT: Okay.

11 Q. And, Judge Lock, I'm showing you what's been marked
12 for purposes of identification as State's Exhibit Number 61
13 [handing the exhibit to the witness]. Does State's Exhibit
14 Number 61 appear to be a partial transcript of jury selection
15 in Eugene Johnny Williams?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: Objection is noted. It's
18 overruled. Exception is noted for the record.

19 You may answer yes or no, sir.

20 A. Yes, sir.

21 MR. HUNTER: Motion to strike, Your
22 Honor.

23 THE COURT: Motion is denied.

24 Defendant's objection and exception are noted for the record.

25 Q. Does it appear on page 2 of State's Exhibit Number

1 61, line 7 and 8, that the clerk called seat 7, Lisa
2 Locklear, and seat 12, Willie Gilmore?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 The State's objection and exception are noted for the record.

6 MR. THOMPSON: May I have just a moment,
7 Judge?

8 THE COURT: Yes, sir.

9 [Pause.]

10 Q. Judge Lock, getting back to the Eugene Johnny
11 Williams case, the -- do you recall when you received the
12 case, when you were presiding over the case, what the
13 procedure -- or, posture of Eugene Johnny Williams was at
14 that time?

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Sustained. The State's
17 objection and exception are noted for the record.

18 Q. Do you recall, Judge, whether or not the defendant

19 ----

20 MR. THOMPSON: May I have a second?

21 THE COURT: Yes, sir.

22 [Pause.]

23 THE COURT: Folks, I may have hit the
24 wrong button up here on this mechanism on the bench. I need
25 some technical help. It says the judge overrides courtroom

1 image and audio on. Is that what it's supposed to say?

2 MR. THOMPSON: You're talking about the
3 Creston?

4 THE COURT: Yes, sir.

5 MR. THOMPSON: That's an override button.
6 In essence, that's an easy button for judges if we had a jury
7 here, for example ----

8 THE COURT: That's what I thought.

9 MR. THOMPSON: ---- you -- you would be
10 able to push a button and stop the Nomad.

11 THE COURT: That's what I thought, but
12 I wanted to make sure I didn't do anything that would impact
13 on the record.

14 MR. THOMPSON: No, sir. No, sir.

15 THE COURT: Okay.

16 MR. THOMPSON: Have just a second?

17 THE COURT: Yes, sir.

18 [Pause.]

19 Q. In -- in the case of Eugene Johnny Williams, as it
20 came to you as the trial judge, was it just the sentencing of
21 Eugene Johnny Williams because he had previously been
22 convicted of first-degree murder?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Objection is sustained.

25 The State's objection and exception are noted for the record.

February 13, 2012

1 Q. And, when you did Eugene Johnny Williams, that was
2 April 9th of 2007 -- was that the beginning of that hearing?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 The State's objection and exception are noted for the record.

6 Q. To your knowledge, was Eugene Johnny Williams
7 previously convicted in 2004 in front of the Honorable
8 Gregory Weeks of first-degree murder and then we did the
9 sentencing with you in 2007?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: The objection is
12 sustained. The State's objection and exception are noted for
13 the record.

14 [Pause.]

15 Q. Judge Lock, during your tenure as a Superior Court
16 Judge or as a District Attorney, did you ever have occasion
17 to -- to know John Dixon with the Cumberland County District
18 Attorney's Office?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: To the form of the
21 question, the objection is sustained.

22 Q. During your tenure, whether or not you did --
23 during your -- your time as an attorney, were you a member of
24 this judicial district for a sufficient length of time to
25 have formed an opinion as to the reputation of John Dixon for

1 honesty and integrity?

2 MR. HUNTER: Objection, Your Honor.

3 THE COURT: All right. Mr. Hunter,
4 let me give you the opportunity to be heard because we're --
5 we're -- I mean, the pertinent character trait is the basis
6 for a general objection. Mr. Hunter, I need that for
7 purposes of the record, sir.

8 MR. HUNTER: I -- I don't need to be
9 heard, Your Honor.

10 THE COURT: Okay. The objection is
11 sustained. The State's objection and exception are noted for
12 the record.

13 Q. Did you have an occasion, during your tenure as an
14 attorney in this judicial district, during the time that you
15 were a judge, Assistant DA, DA or in private practice -- did
16 you have the opportunity to -- to learn of the reputation and
17 opinion -- I'm sorry -- the reputation of Cal Colyer for
18 honesty and integrity?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: The objection is
21 sustained. The State's objection and exception are noted for
22 the record.

23 Q. During your time as an attorney and a judge in this
24 judicial district, did you have an opportunity -- sufficient
25 length of time in this community to form an opinion about Col

1 Cal -- Cal Colyer's pertinent character trait of competence
2 as a prosecutor?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 The State's objection and exception are noted for the record.

6 Q. During the time you have been in this judicial
7 district, sir, did you -- have you had an opportunity to
8 learn of the reputation of Mr. Colyer for the pertinent
9 character trait of equal treatment of all races as a juror --
10 as a jurist -- as a prosecutor?

11 MR. HUNTER: Objection, Your Honor.

12 THE COURT: The objection is
13 sustained. The State's objection and exception are noted for
14 the record.

15 Q. Judge Lock, were you familiar with the attorneys in
16 this case, John Britt and Mike Howell, before this case took
17 place?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: Well, the objection -- can
20 you answer the question yes or no, Judge Lock?

21 [Pause.]

22 THE WITNESS: I don't know that I can.

23 THE COURT: Well ----

24 THE WITNESS: I believe I had met them.

25 I -- I'm not sure either had appeared before me.

1 THE COURT: Okay. The objection is
2 sustained. The State's objection and exception are noted for
3 the record.

4 Thank you, sir.

5 Q. Did you become familiar with John Britt and Mike
6 Howell since the Eugene Johnny Williams case?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Sustained. The State's
9 objection and exception are noted for the record.

10 Q. Did Mike Howell and John Britt ever try anything
11 else in front of you after Eugene Johnny Williams?

12 MR. HUNTER: Objection, Your Honor.

13 THE COURT: Objection is sustained.
14 The State's objection and exception are noted for the record.

15 MR. THOMPSON: Have just a moment, Judge?

16 THE COURT: Yes, sir.

17 [Pause.]

18 MR. THOMPSON: Your Honor, of course,
19 reserving all of the State's objections ----

20 THE COURT: Yes, sir.

21 MR. THOMPSON: ---- we have no further
22 questions for this witness as it goes -- as it appears today,
23 reserving our right, as we've done before, to thoroughly
24 direct examine him under the Court's ruling, that we also
25 have objected to, for the offer of proof.

1 THE COURT: Okay. Let -- let me
2 clarify.

3 MR. THOMPSON: Yes, sir.

4 THE COURT: I thought there was
5 agreement as to the methodology of making your offer of
6 proof?

7 MR. THOMPSON: There was, Judge. I'm
8 just making sure it's preserved as we go ----

9 THE COURT: Okay.

10 MR. THOMPSON: There's no -- there's no
11 different position for this witness than any of the others
12 that we've gone through.

13 THE COURT: Yes, sir.

14 MR. THOMPSON: Just out of caution.

15 THE COURT: For purposes of the record
16 ----

17 MR. THOMPSON: Yes, sir.

18 THE COURT: ---- the agreement, again,
19 as I understand it, is Judge Lock, as well as the other folks
20 involved in my ruling, depositions will be taken.

21 MR. THOMPSON: Yes, sir.

22 THE COURT: Okay. I just wanted to
23 clarify it for the record.

24 MR. THOMPSON: I'm sorry. Insofar as --
25 it's in agreement as in -- it has to be in writing, and we're

1 going to be doing it later, but we object to ----

2 THE COURT: Yes, sir.

3 MR. THOMPSON: ---- to that form as we
4 did originally ----

5 THE COURT: Okay.

6 MR. THOMPSON: ---- and as we have ----

7 THE COURT: Well, in ----

8 MR. THOMPSON: Just want to make sure
9 that's preserved.

10 THE COURT: ---- in terms of
11 preserving your record, absolutely.

12 MR. THOMPSON: Yes, sir.

13 THE COURT: Yes, sir. You're entitled
14 to do that.

15 MR. THOMPSON: Yeah. That's -- that's
16 the -- the intent -- what I'm saying now, Judge.

17 THE COURT: Yes, sir.

18 MR. THOMPSON: Thank you. Then, based on
19 those reservations ----

20 THE COURT: Okay.

21 MR. THOMPSON: ---- we have no further
22 questions of Judge Lock.

23 THE COURT: Any questions for the
24 witness?

25 MR. HUNTER: May I have just a moment,

February 13, 2012

1 Your Honor?

2 THE COURT: Yes, sir.

3 [Pause.]

4 THE COURT: You okay on water, Judge?

5 You've got some.

6 THE WITNESS: Yes, sir, Your Honor.

7 [Pause.]

8 MR. HUNTER: Your Honor, we're not
9 going to have any -- any questions for Judge Lock. I would
10 like to clarify -- but -- and not to make too big a deal
11 about it -- but, I don't believe these are really depositions
12 that the State is proposing. They're just ----

13 THE COURT: Well ----

14 MR. HUNTER: They're going to get this
15 in through a question and answer format.

16 THE COURT: Yes, sir.

17 MR. HUNTER: And I think they said they
18 wanted to have it recorded by a -- you know, a ----

19 THE COURT: Well, that was the
20 language on my part.

21 MR. HUNTER: Yeah.

22 THE COURT: And I apologize, because
23 the proffer, as I understood it -- or, is -- the plan, as I
24 understood it, was to do it in the form of. It is not a true
25 deposition.

1 MR. HUNTER: Right. We -- we don't
2 have any position one way or the other on how they do it.

3 THE COURT: On how they do it.

4 MR. HUNTER: Right.

5 THE COURT: Yes, sir, and I apologize
6 for the loose language.

7 MR. COLYER: Judge, I think we may have
8 used the term quasi deposition.

9 THE COURT: Yes, sir.

10 MR. COLYER: Just one side will be
11 represented. The witness will still be under ----

12 THE COURT: Yes, sir.

13 MR. COLYER: ---- placed under oath.

14 THE COURT: Yes, sir.

15 MR. COLYER: And it will be recorded by
16 a court reporter.

17 THE COURT: And that does need
18 clarification for purposes of the record. So, I appreciate
19 that. Thank you.

20 MR. THOMPSON: That was my loose term,
21 Judge; and, insofar as I continue to use it, that's -- my
22 intent is to -- is -- that's what I mean is this quasi --
23 quasi deposition.

24 THE COURT: It's the format chosen for
25 your purposes of perfecting your record ----

1 MR. THOMPSON: Yes, sir.

2 THE COURT: ---- on appeal.

3 MR. THOMPSON: Yes, sir.

4 THE COURT: Bottom line; and, any
5 disagreement as to that?

6 MR. HUNTER: No, Your Honor.

7 THE COURT: All right. Thank you, Mr.
8 Hunter.

9 May the witness be released at least for our
10 purposes right now?

11 MR. THOMPSON: No objection to that,
12 Judge.

13 THE COURT: All right.

14 MR. THOMPSON: Thank you.

15 THE COURT: Any objection, folks?

16 MR. HUNTER: No, Your Honor.

17 THE COURT: All right. Thank you,
18 sir.

19 THE WITNESS: Thank you.

20 MR. COLYER: May I step out and get our
21 next witness, please, Your Honor?

22 THE COURT: Yes, sir.

23 [The witness and Mr. Colyer departed the courtroom.]

24 [Pause.]

25 MR. THOMPSON: Madam Clerk, what's our

1 next number?

2 MADAM CLERK: 62.

3 MR. THOMPSON: Thank you, ma'am.

4 [Pause.]

5 [Mr. Colyer and the next witness, Judge Jenkins, entered the
6 courtroom.]

7 MR. THOMPSON: 62?

8 MADAM COURT REPORTER: Yes.

9 MADAM CLERK: Yes.

10 MR. THOMPSON: Thank you.

11 THE COURT: Good morning, sir.

12 THE WITNESS: Good morning, sir.

13 THE COURT: If you will, place your
14 left hand on the Bible. Raise your right hand, please.

15 [The witness did as directed and was sworn.]

16 THE COURT: If you will, come around
17 and have a seat, sir.

18 THE WITNESS: All right [approaching].

19 THE COURT: Would you like some water?

20 THE WITNESS: All right.

21 THE COURT: Okay.

22 THE WITNESS: Good morning [retrieving a
23 cup of water from the Court].

24 THE COURT: Good morning. Once you're
25 seated, sir, if you will, state first and last name; and,

1 then, if you will, spell both for the record, please.

2 THE WITNESS: All right [seating himself
3 in the witness stand]. My name is Knox, K-N-O-X, Jenkins.

4 THE COURT: And the last name is
5 spelled?

6 THE WITNESS: J-E-N-K-I-N-S.

7 THE COURT: Thank you, sir.

8 Okay. Mr. Thompson, Mr. Colyer?

9 MR. THOMPSON: Thank you, Your Honor.

10 THE COURT: Yes, sir.

11 **KNOX JENKINS, having been first duly sworn, was called as a**

12 **witness by the State and testified as follows on DIRECT**

13 **EXAMINATION conducted by MR. ROB THOMPSON:**

14 Q. Good morning, Judge. How are you?

15 A. Good morning, sir.

16 Q. Let's go back a little bit. Where did you graduate

17 -- where did you graduate high school, sir?

18 A. Goldsboro High School.

19 Q. And, from high school, where did you go from there?

20 A. To Fort Jackson, South Carolina, for basic

21 training.

22 Q. How long were you in the military?

23 A. Two years.

24 Q. Once you ended -- and what did you do in the

25 military, sir?

1 A. Well, I was stationed in Korea for a good portion
2 of that 2 years and -- with the 7th Infantry Division. We
3 were on the 38th Parallel. We were quartered in tents, on
4 the ground. The back of a truck was a real good place to
5 sleep. So, it -- it was -- it was different.

6 Q. Did you decide, at some point, that you may want to
7 further your education after that experience?

8 A. When I first got off the bus at Fort Jackson, South
9 Carolina, and I was instructed to keep my left feet, with an
10 S, in place, I decided the best thing for me to do is use the
11 GI Bill and further my education.

12 Q. Did you do so?

13 A. Yes, sir.

14 Q. How did you do so?

15 A. Well, I entered the University of North Carolina.
16 I had been there for 1 year. I was there 1 year out of high
17 school.

18 Q. Yes, sir.

19 A. And, for a number of reasons, primarily finances

20 -----

21 Q. Did you complete -----

22 A. ----- I dropped out and went in the service.

23 Q. Got you. Yes, sir. Did you complete your
24 undergraduate degree at UNC?

25 A. Yes, I did.

1 Q. After that, where did you go? What did you do?

2 A. UNC law school.

3 Q. Did you complete law school, sir?

4 A. Yes, sir.

5 Q. After you went to law school -- became an attorney,
6 what was your first duty assignment; or, where were you first
7 an attorney?

8 A. In Smithfield.

9 Q. What did -- what kind of law did you practice at
10 that time? How were you employed?

11 A. It was trial practice -- primarily personal injury
12 type cases; but, then, the Gideon decision came out; and,
13 that's when you represented clients for no pay. Now, really,
14 the legislature had -- did not have the funds, at that time,
15 to pay court-appointed attorneys; and, the legislature met
16 during alternate years, so you got a lot of -- a young lawyer
17 got a lot of experience with no pay.

18 Q. Yes, sir.

19 A. And I was one of them.

20 Q. How long -- now, were you in private practice at
21 that time?

22 A. I -- I was -- yes.

23 Q. And how long were you in private practice in total?

24 A. Thirty years.

25 Q. At some point, did you leave private practice?

1 A. Yes, sir.

2 Q. And, now, before we go on to what you did after you
3 left private practice, during your private practice, during
4 those entire 30 years, give us an idea of the type of law
5 that you practiced and if any of that law involved criminal
6 law.

7 A. The first 10 years, I would say that probably
8 three-fourths of my practice was criminal law, including
9 capital cases and cases in the United States District Courts
10 -- actually, in three or four states.

11 Q. Did you, during -- during your time as an attorney,
12 did you have a capital practice during that time?

13 A. Did I represent defendant's charged with capital
14 offenses?

15 Q. Yes, sir.

16 A. Yes, I did.

17 Q. To your knowledge and to your memory, during that
18 time as -- as a private practitioner, during those 30 years,
19 how many of those capital murder cases went to trial, if you
20 -- if you can tell me -- that you took part in?

21 A. At least 12 or more to a jury verdict.

22 Q. Okay. To your knowledge, did any of those 12
23 receive a sentence of death?

24 A. One defendant was sentenced to death, and that was
25 the State versus Boykin, that's cited now for pretrial

1 publicity.

2 Q. Yes, sir.

3 A. She was sentenced to death, but then the appellate
4 courts vitiated out -- death penalty as it was written at
5 that time, and that was commuted over to life. So, she
6 received a life sentence.

7 Q. Now, once you left private practice, what was your
8 occupation?

9 A. Well, Superior Court Judge.

10 Q. During your tenure as Superior Court Judge -- I'm
11 sorry. Where were you Superior Court Judge? Where was your
12 county of residence?

13 A. Johnston County.

14 Q. How long were you a Superior Court Judge?

15 A. Well, I had to retire after 16 years because of
16 age.

17 Q. Yes, sir.

18 A. And I was the judge that upheld the
19 constitutionality of mandatory retirement.

20 [General laughter.]

21 A. Well, I don't know if that's a sign of lack of -- I
22 don't know. I was -- I ruled against myself. I was holding
23 court in -- in Wake County, and that case was assigned to me.
24 A Supreme Court Justice and a Court of Appeals Judge
25 challenged mandatory retirement being age discrimination, and

1 I heard that matter and, again, ruled against myself, among
2 others.

3 Q. Now -- so, you were a Superior Court Judge for 16
4 years until mandatory retirement; is that correct?

5 A. That's correct. Then, I held some courts as an
6 emergency judge.

7 Q. Okay. During all of your tenure as a Superior
8 Court Judge, both a regular Superior Court Judge and as an
9 emergency judge, have you had occasion to sit and preside
10 over capital murder cases?

11 A. Several.

12 Q. To your knowledge, would you be able to estimate
13 the number of those cases during your tenure as a Superior
14 Court Judge at any time -- the number of capital murder cases
15 that were tried in your courtroom?

16 A. Well, that would include -- well, I was sworn in on
17 Tuesday. The following Monday, I began jury selection in Lee
18 County in a capital murder case that was a heinous crime that
19 ----

20 MR. HUNTER: Objection, Your Honor.

21 THE COURT: Objection is sustained.

22 A. The -- it created a lot of publicity. I'd been a
23 judge for 4 days.

24 Q. Yes, sir. Yes, sir. Would you be able to estimate
25 the number of capital murder cases that you had -- that you

1 had presided over -- trials of capital murder cases?

2 A. Six or more.

3 Q. Do you recall if any of those capital murder cases
4 that you presided over the trial of -- if any of those
5 defendants received a sentence of death?

6 A. Yes.

7 Q. Do you recall how many of those cases received the
8 death sentence -- if you recall?

9 A. Four or five.

10 Q. Did you preside, Judge, over the Jeffrey Carl Meyer
11 -- and ----

12 MR. THOMPSON: May I have a second?

13 THE COURT: Yes, sir.

14 [Pause.]

15 Q. Judge Jenkins, did you preside over the Jeffrey
16 Carl Meyer case January -- beginning January 14th, 1999, in
17 Superior Court in Cumberland County?

18 A. Yes, I did.

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: The objection is
21 sustained.

22 And I apologize, Judge Jenkins. The Court's
23 made certain rulings, and there's an anticipated line of
24 questioning that I think is where we're about to get into.
25 So, if you will, bear with me, sir. If you will, allow,

February 13, 2012

1 after a question is asked, the opportunity for counsel for
2 the defendant ----

3 THE WITNESS: Okay.

4 THE COURT: ---- to object so I can
5 rule, sir.

6 THE WITNESS: All right.

7 THE COURT: Thank you, sir.

8 Q. Now ----

9 THE COURT: For the record, the
10 objection is sustained. The State's objection and exception
11 are noted for the record, so your issues are preserved, sir.

12 MR. THOMPSON: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 Q. Now, Judge, to your knowledge, Jeffrey Carl Meyer,
15 this -- this proceeding was -- was sentencing only; is that
16 correct?

17 MR. HUNTER: Objection, Your Honor.

18 THE COURT: Objection is sustained.

19 The State's objection and exception are noted for the record.

20 Q. To your knowledge, Judge, was Jeffrey Carl Meyer
21 tried twice before and those cases overturned and -- or,
22 either -- having to be retried; and, the case before you was
23 just on Jeffrey Carl Meyer's sentencing question of life
24 without parole or death?

25 MR. HUNTER: Objection, Your Honor.

February 13, 2012

1 THE COURT: The objection is
2 sustained. The State's objection and exception are noted for
3 the record.

4 MR. THOMPSON: May I approach, Your
5 Honor?

6 THE COURT: Yes, sir.

7 THE WITNESS: Yes, sir.

8 [General laughter.]

9 THE WITNESS: Well, I got a little
10 confused there. Withdraw ----

11 [General laughter.]

12 THE WITNESS: I'll withdraw that.

13 [General laughter.]

14 THE WITNESS: I'll let you do it
15 [speaking to the Court].

16 [General laughter.]

17 THE COURT: All right. I appreciate
18 it.

19 THE WITNESS: All right.

20 THE COURT: I understand, sir.

21 MR. THOMPSON: Old habits die hard,
22 Judge.

23 THE WITNESS: Go ahead.

24 Q. Let me actually back up just a little bit. A
25 couple other questions, you've been contacted by the State;

February 13, 2012

1 that -- that is, by Mr. Colyer and myself, before your
2 testimony; is that correct?

3 A. Yes, sir.

4 Q. Have we sat down on a couple of occasions and
5 discussed what we expected to ask you on direct examination
6 during this case?

7 A. Yes, sir.

8 Q. Did we provide you with materials in order to
9 prepare your testimony for today?

10 A. Yes, sir.

11 Q. Do you recall the things that were provided to you
12 to prepare your testimony today?

13 [Pause.]

14 A. I -- the transcript, the entire transcript, was
15 provided; and, that's out in my car. I didn't bring that.

16 There were three volumes, over a thousand pages, so if ----

17 Q. Now, did we give you bits and pieces of the Carl --
18 I'm sorry -- the Jeffrey Carl Meyer transcript, the jury
19 selection, or all of jury selection, to your knowledge?

20 A. Yes, you did.

21 Q. All of jury selection or pieces of it?

22 A. Well, just part -- parts of it.

23 Q. Did we give you any indication of the jurors that
24 we may be discussing during direct examination that -- the
25 individual jurors during the Meyer case that we may be

1 talking to you about?

2 [Pause.]

3 Q. Did we give you the names of the jurors ----

4 A. Yes.

5 Q. ---- that we were going to be talking about?

6 A. Yes.

7 Q. In what form did we give that to you?

8 A. Typewritten form.

9 Q. Okay. Did you have an opportunity to review those
10 transcripts of the jury selection in Jeffrey Carl Meyer?

11 A. Yes, I did.

12 Q. How did you do so, and what was your -- kind of
13 your process?

14 A. Well, the jury selection process was the primary
15 concern?

16 Q. Yes, sir.

17 A. And I had the transcript, and I did in fact go
18 through the jury selection process from -- it was several
19 hundred pages.

20 Q. Yes, sir.

21 MR. THOMPSON: May I approach ----

22 A. I did -- I did that several months ago and then
23 again recently.

24 Q. Okay.

25 THE COURT: Yes, sir. You may.

1 [Pause.]

2 MR. THOMPSON: May I approach?

3 THE COURT: Yes, sir.

4 THE WITNESS: Yeah.

5 [General laughter.]

6 THE WITNESS: I keep -- I -- I'm ----

7 MR. THOMPSON: Old habits die hard,
8 Judge.

9 THE COURT: I think that's the perfect
10 illustration of a point that's already been made for the
11 record. Yes, sir.

12 THE WITNESS: Well ----

13 THE COURT: Thank you, Judge Jenkins.

14 THE WITNESS: This setting is just
15 unusual.

16 THE COURT: It is, sir. It is, sir.

17 Q. Now, Judge, I'm showing you what's been marked --
18 or, I'm handing you what's been marked for purposes of
19 identification as State's Exhibit Number 62 [handing the
20 exhibit to the witness]. Does it appear that State's Exhibit
21 Number 62 is part of jury selection in the Jeffrey Carl Meyer
22 case?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Well, you may answer yes
25 or no, sir.

1 The objection ----

2 A. Yes, it does.

3 THE COURT: ---- is -- I apologize.

4 The objection is noted for the record. It's overruled.

5 Exception is noted for the record.

6 Motion to strike, Mr. Hunter?

7 MR. HUNTER: Yes, motion to strike.

8 THE COURT: All right. Motion to
9 strike is denied. Exception is noted on behalf of the
10 defendant.

11 Q. Does it appear that State's Exhibit Number 62,
12 Judge, contains a portion of jury selection involving Brenda
13 Stewart, her name appearing on page -- on the second page of
14 State's Exhibit Number 62?

15 MR. HUNTER: Objection.

16 THE COURT: Objection is sustained.

17 The State's objection and exception are noted for the record.

18 MR. THOMPSON: Thank you. Approach,
19 Judge?

20 THE COURT: Yes, sir.

21 [Pause.]

22 THE COURT: 63?

23 MR. THOMPSON: Yes, sir [handing the
24 exhibit to the Court].

25 THE COURT: Thank you, sir.

1 MR. THOMPSON: Thank you, Your Honor.

2 Q. Judge Jenkins, I'm showing you what's been marked
3 for purposes of identification as State's Exhibit Number 63
4 [handing the exhibit to the witness]. Does State's Exhibit
5 Number 63 appear to be part of -- a transcript that is part
6 of jury selection in the Jeffrey Carl Meyer case?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Objection is noted. It's
9 overruled. Exception's noted for the record.

10 You may answer yes or no, sir.

11 [Pause.]

12 THE COURT: Judge Jenkins, you may
13 answer yes or no.

14 A. Yes.

15 MR. HUNTER: Motion to strike, Your
16 Honor.

17 THE COURT: Motion to strike is
18 denied. Objection and exception, on behalf of the defendant,
19 are noted for the record.

20 Q. Does it appear -- State's Exhibit Number 63 appear
21 to be that jury selection transcript that -- part of that
22 transcript that deals with Kenneth MacGyver as a juror?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Objection is sustained.

25 The State's objection and exception are noted for the record.

1 [Pause.]

2 MR. THOMPSON: May I approach?

3 THE COURT: Yes, sir. 64?

4 MR. THOMPSON: Yes, sir.

5 THE COURT: Okay.

6 [Pause.]

7 [Mr. Thompson handed an exhibit to the Court.]

8 THE COURT: Thank you, sir.

9 MR. THOMPSON: Thank you, Your Honor.

10 Q. Judge Jenkins, I'm showing you what's been marked
11 for purposes of identification as State's Exhibit Number 64
12 [handing the exhibit to the witness]. Does State's Exhibit
13 Number 64 appear to be a part of a trial transcript of
14 Jeffrey Carl Meyer?

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Objection is noted. It's
17 overruled. Exception is noted on behalf of the defendant.
18 You may answer yes or no, sir.

19 A. Yes.

20 MR. HUNTER: Motion to strike, Your
21 Honor.

22 THE COURT: Motion is denied. Except
23 are -- is made -- pardon me -- for the record, objection and
24 exception.

25 Q. Does it appear, Judge Jenkins, that State's Exhibit

1 Number 64 appears to contain the jury selection transcript
2 that contains the jury selection of Lisa Bender?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 The State's objection and exception are noted for the record.

6 MR. THOMPSON: Thank you, Judge.

7 THE COURT: Yes, sir.

8 THE WITNESS: You -- well, do you want
9 me to ----

10 THE COURT: All right. You can't
11 answer that, sir.

12 MR. THOMPSON: May I approach?

13 THE WITNESS: Yes.

14 [General laughter.]

15 THE COURT: Yes, sir, you may.

16 THE WITNESS: Well, I keep saying that.
17 I don't know ----

18 MR. THOMPSON: I'd like the Court's and
19 the witness' permission if that's all right.

20 [General laughter.]

21 THE COURT: Yes, sir. 65?

22 MR. THOMPSON: Yes, sir [handing the
23 exhibit to the Court].

24 THE COURT: Okay.

25 Q. Judge Jenkins, I'm showing you what's been marked

1 for purposes of identification as State's Exhibit Number 65
2 [handing the exhibit to the witness]. Does State's Exhibit
3 Number 65 appear to be a partial jury selection transcript of
4 Jeffrey Carl Meyer?

5 A. Yes.

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: Objection is noted.

8 MR. HUNTER: And motion to strike.

9 THE COURT: The motion to strike is
10 denied. The answer's already of record.

11 Go ahead, sir.

12 Q. Does jury selection -- I'm sorry. Does State's
13 Exhibit Number 65 appear to be the jury selection that
14 involved Mary Crum, C-R-U-M?

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Objection is sustained.

17 The State's objection and exception are noted for the record.

18 MR. THOMPSON: May I approach with the
19 last transcript, Judge?

20 THE COURT: Yes, sir.

21 THE WITNESS: Yes.

22 [Pause.]

23 MR. THOMPSON: [Handing an exhibit to the
24 Court.]

25 THE COURT: Thank you, sir.

1 Q. And, finally, Judge Jenkins, I'm showing you what's
2 been marked for purposes of identification as State's Exhibit
3 Number 66 [handing the exhibit to the witness]. Does State's
4 Exhibit Number 66 appear to you to be a jury transcript --
5 or, part of a transcript of the jury selection in Jeffrey
6 Carl Meyers?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: The objection is
9 overruled. Exception is noted for the record.

10 You may answer yes or no, sir.

11 A. Yes, sir.

12 MR. HUNTER: Motion to strike.

13 THE COURT: Motion to strike is
14 denied. The defendant's objection and exception are noted
15 for the record.

16 Q. Does State's Exhibit Number 66, Judge Jenkins,
17 appear to contain the jury selection of a William Wilson?

18 MR. HUNTER: Objection.

19 THE COURT: Objection is sustained.
20 The State's objection and exception are noted for the record.

21 MR. THOMPSON: Have just a second, Judge?

22 THE COURT: Yes, sir.

23 [Pause.]

24 Q. We're going to back up a little bit, Judge, if
25 that's all right -- Judge Jenkins. We've talked about high

1 school and when you started practicing law and that kind of
2 stuff. What year, first of all, did you graduate high
3 school?

4 A. 1953.

5 Q. And what year did you start practicing law?

6 A. 1962.

7 Q. And, if you did 30 years as a pri -- in -- in
8 essence, in private practice, would that put you on the bench
9 around 2000 -- I'm sorry -- about 1993, give or take?

10 A. Yes.

11 Q. When -- and you talked about your retirement. I
12 believe it was 16 years later. Can you give us an idea how
13 that was -- how -- or, what year that was so I don't have to
14 hurt myself doing the math?

15 A. You figure it out.

16 [General laughter.]

17 Q. Approximately 2009?

18 A. I think that's right.

19 Q. Okay. They promised me, when I went to law school,
20 there wouldn't be any math, Judge, so -- now, have you had a
21 status of emergency judge since 2009, in your retirement?

22 A. Yes, I have.

23 Q. How much retirement -- I'm sorry. How much
24 emergency work have you done during that -- during the time
25 since you retired?

1 A. Very little.

2 Q. What types of -- have you done any serious cases
3 during that time?

4 [Pause.]

5 A. I -- I honestly don't recall any, and then the --
6 you have the budget crisis and -- so ----

7 Q. Yes, sir.

8 A. And I'm on the second tier of emergency judges
9 because of the age factor, so it's rarely that -- that I
10 would be -- it was a rare -- rarity that I was called. I
11 ----

12 Q. So, is it safe to say that all the capital murder
13 cases that you did do were as a regular Superior Court Judge;
14 is that correct?

15 A. Yes, sir.

16 Q. When you be -- became and were a Superior Court
17 Judge, were you familiar with the Batson rule?

18 A. Yes.

19 MR. HUNTER: Objection.

20 THE COURT: I apologize.

21 THE WITNESS: I'm ----

22 THE COURT: If you'll -- the objection
23 is sustained.

24 MR. HUNTER: And motion to strike.

25 THE COURT: The motion to strike, for

1 purposes of the record, is allowed; and, Judge Jenkins, if
2 you will, allow an opportunity for counsel for the defendant
3 to object so I can rule, sir.

4 THE WITNESS: All right.

5 THE COURT: I appreciate it, sir.
6 Thank you, sir.

7 Q. Did you, yourself, as a Superior Court Judge, have
8 occasion to handle Batson challenges in criminal cases,
9 including capital murder cases?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Objection is sustained.

12 The State's objection and exception are noted for the record.

13 Q. Based on your observations as a trial judge, Judge
14 Jenkins, did you observe that race was a significant factor
15 in the exercise of any peremptory strikes against any black
16 jurors in the State of North Carolina versus Jeffrey Carl
17 Meyer?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: Objection is sustained.

20 The State's objection and exception are noted for the record.

21 MR. THOMPSON: Thank you, Your Honor.

22 Q. Based on your observations as a trial judge, Judge
23 Jenkins, did you -- did the State racially discriminate in
24 the exercise of any peremptory chal -- in any -- any
25 peremptory strike against any black juror?

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: The objection is
3 sustained. The State's objection and exception are noted for
4 the record.

5 Q. As the trial judge of -- in State of North Carolina
6 versus Jeffrey Carl Meyer, would you have raised a Batson
7 objection ex mero motu or on your own motion had you observed
8 the State exercise a peremptory strike against a black juror
9 based on race?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Objection is sustained.
12 The State's objection and exception to the ruling are noted
13 for the record.

14 MR. THOMPSON: Have a second, Judge?

15 THE COURT: Yes, sir.

16 [Pause.]

17 Q. As the trial judge, Judge Jenkins, as the trial
18 judge in Jeffrey Carl Meyer, if you would have observed the
19 State's exercise of a peremptory strike against a black juror
20 based on race and the defense had not raised a Batson
21 objection, would you have intervened ex mero motu or on your
22 own motion to correct the situation by denying the State's
23 peremptory strike and sustaining your own Batson objection?

24 MR. HUNTER: Objection.

25 THE COURT: Objection is sustained.

February 13, 2012

1 The State's objection and exception to the ruling are noted
2 for the record.

3 Q. Have you been a member, Judge, of this judicial
4 district long enough to have become familiar with the
5 reputation of Cal Colyer for the pertinent character trait of
6 honesty and integrity?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Objection is sustained.

9 The State's objection and exception are noted for the record.

10 Q. Have you been a member of this judicial district
11 for a sufficient length of time to have had an opportunity to
12 learn Mr. Colyer's reputation in this community for the
13 pertinent character trait for competence as a prosecutor?

14 MR. HUNTER: Objection, Your Honor.

15 THE COURT: Objection is sustained.

16 The State's objection and exception are noted for the record.

17 Q. Have you been a member of this judicial district
18 for a sufficient length of time to have formed an opinion --
19 or -- and have learned the reputation of Cal Colyer for the
20 pertinent character trait equally treating all races of
21 jurors?

22 MR. HUNTER: Objection, Your Honor.

23 THE COURT: Objection is sustained.

24 The State's objection and exception are noted for the record.

25 Q. Were you familiar with the two attorneys in the

1 case of Jeffrey Carl Meyer; that would be John Britt and
2 Jonathan Brown?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Sustained. State's
5 objection and exception are noted for the record.

6 MR. THOMPSON: May I have just a moment,
7 Judge?

8 THE COURT: Yes, sir.

9 [Pause.]

10 Q. And, Judge, one final question, I believe. Judge
11 Jenkins, do you recall whether Jeffrey Carl Meyer contained
12 any Batson challenges at all during the jury selection?

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Objection is sustained.

15 The State's objection and exception to the ruling are noted
16 for the record.

17 MR. THOMPSON: Your Honor, reserving all
18 of the objections the State's earlier made ----

19 THE COURT: Yes, sir.

20 MR. THOMPSON: ---- the objection to the
21 process ----

22 THE COURT: Yes, sir.

23 MR. THOMPSON: ---- and understanding the
24 Court's ruling, we have no further questions of this witness.
25 Thank you.

February 13, 2012

1 THE COURT: All right. Any questions
2 on behalf of the defendant?

3 MR. HUNTER: No. No, Your Honor.
4 Thank you very much, Judge Jenkins.

5 THE WITNESS: Yes, sir.

6 THE COURT: Mr. -- pardon me. Mr.
7 Colyer, Mr. Thompson, my understanding is that, for our
8 purposes right now, Judge Jenkins is being released without
9 prejudice to your right with regard to any subsequent
10 matters?

11 MR. THOMPSON: That's correct, Judge.

12 THE COURT: I'm struggling to phrase
13 it appropriately.

14 [General laughter.]

15 MR. THOMPSON: Yes, sir.

16 THE COURT: Thank you, Judge Jenkins.

17 THE WITNESS: All right.

18 THE COURT: Thank you, sir.

19 [The witness withdrew from the courtroom.]

20 THE COURT: Okay. The next witness
21 will be whom, Mr. Thompson, Mr. Colyer?

22 MR. COLYER: Judge Thompson, Your
23 Honor. If we could have just a moment to switch around and
24 get some things in place.

25 THE COURT: Yes, sir. As a matter of

February 13, 2012

1 fact, I was going to suggest this might be a good point for
2 us to take a short break ----

3 MR. COLYER: Yes, sir.

4 THE COURT: ---- for the court
5 reporter.

6 [Pause.]

7 THE COURT: Bear with me one second.
8 Before you leave, Mr. Thompson ----

9 MR. THOMPSON: Yes, sir.

10 THE COURT: ---- the schedule for
11 today, remaining witnesses, Judge Thompson -- I recognize
12 we're still up in the air as far as Judge Gore [sic] is
13 concerned.

14 MR. COLYER: Yes, sir; and, Doctor
15 Cronin.

16 THE COURT: And Doctor Cronin.

17 MR. COLYER: Yes, sir.

18 MR. THOMPSON: And then ----

19 THE COURT: That's what I wanted to
20 find out.

21 MR. THOMPSON: ---- that will end the
22 State's case.

23 THE COURT: Okay. That's what I was
24 trying to find out. Thank you.

25 MR. COLYER: We'll check back again

1 with Judge Brewer and ----

2 THE COURT: Yes, sir.

3 MR. COLYER: ---- likely, later on this
4 morning, and see where -- where we are ----

5 THE COURT: Okay.

6 MR. COLYER: ---- and let you know.

7 THE COURT: All right. Fifteen --
8 twenty minutes -- fifteen minutes?

9 MADAM COURT REPORTER: Ten -- ten's fine.

10 THE COURT: All right. Why don't we
11 take 15, 15 minutes.

12 [The hearing recessed at 10:50 a.m. and reconvened at 11:08
13 a.m., February 13, 2012, with all pertinent parties present
14 prior to the recess once again present, to include the
15 defendant, and with the exception of Mr. Thompson.]

16 THE COURT: For the record, all of the
17 attorneys -- let me clarify. I've mentioned twice this
18 morning that all counsel were present. The record will
19 reflect that all parties, including the Court, were informed
20 on the record, last week, that Ms. Stubbs would not be
21 present for today's proceedings. The Court inquired of Mr.
22 Robinson whether he consented to going forward in Ms. Stubbs'
23 absence. He indicated that he did, if I understood
24 correctly. Is that still correct, sir?

25 THE DEFENDANT: Yes, sir.

February 13, 2012

1 THE COURT: All right. So, let the
2 record reflect Mr. Hunter, Mr. James Ferguson, Mr. Jay
3 Ferguson are here on behalf of the defendant. The defendant
4 is present. Mr. Colyer, you're here on behalf of the State,
5 by yourself at this point. Mr. Thompson has stepped outside,
6 as I understand it, to get the next witness.

7 MR. COLYER: That's correct, Your
8 Honor.

9 THE COURT: All right. Any other
10 matters we need to put in the record in that regard, folks?

11 MR. COLYER: No, sir.

12 THE COURT: Okay. All right. So,
13 we're waiting on our next witness; and, that would be whom,
14 sir?

15 MR. COLYER: The Honorable Jack A.
16 Thompson.

17 THE COURT: Yes, sir. Okay.
18 [Pause.]

19 [Mr. Rob Thompson and the witness, Judge Jack Thompson,
20 entered the courtroom.]

21 THE COURT: Good morning, sir.

22 THE WITNESS: Good morning.

23 MR. COLYER: Your Honor, the State
24 would call the Honorable Jack A. Thompson.

25 THE COURT: Sir, if you will, place

1 your left hand on the Bible, and raise your right hand
2 please.

3 [The witness did as directed and was sworn.]

4 THE COURT: If you will, come around
5 and have a seat in the witness chair. Would you like some
6 water, sir?

7 THE WITNESS: Yes, please [approaching].

8 THE COURT: Okay. While I'm getting
9 that, once you're seated, if you will, please state and then
10 spell first and last name for the benefit of the record.

11 [The witness seated himself in the witness stand.]

12 THE WITNESS: My name is Jack Thompson,
13 J-A-C-K, T-H-O-M-P-S-O-N.

14 THE COURT: Thank you, sir. Here's
15 your water.

16 [Pause.]

17 THE WITNESS: Thank you [retrieving a
18 cup of water from the Court].

19 THE COURT: Yes, sir.

20 Yes, sir.

21 **JACK A. THOMPSON, having been first duly sworn, was called as**
22 **a witness by the State and testified as follows on DIRECT**
23 **EXAMINATION conducted by MR. CALVIN COLYER:**

24 Q. Good morning, sir. How are you?

25 A. Good morning.

February 13, 2012

1 Q. Judge, I -- when I refer to you as Judge, I'll try
2 to refer to you by your last name, so we don't get confused
3 with whether I'm talking to Judge Weeks or to Judge Thompson;
4 and, before we do that, a moment of housekeeping. This young
5 man seated next to me here, do you know him, Judge?

6 A. Very well.

7 Q. And could you state, for the record, sir, what your
8 relationship is to Rob Thompson, the -- one of the Assistant
9 DA's in this case representing the State?

10 A. I am his father.

11 Q. Judge Thompson, as best we can, I will be handling
12 your direct examination and, with the exhibits, Assistant DA
13 Rob Thompson may be doing some marking and some handing of
14 paperwork back and forth; but, for the record, I'll be asking
15 you questions, if that's all right, sir.

16 A. Yes.

17 THE COURT: Mr. Colyer, before you get
18 into that, if you will, bear with me.

19 MR. COLYER: Yes, sir.

20 THE COURT: Judge Thompson, the Court
21 has made several rulings in this case, and I'm going to ask
22 for your assistance. When we get into those line -- that
23 line of questioning, if you will, refrain from answering
24 until counsel for the defendant has had an opportunity to
25 note any objections and I can rule on any objections that are

1 made. I'd appreciate that very much, sir.

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: All right. Thank you,
4 sir.

5 Yes, sir, Mr. Colyer?

6 MR. COLYER: Thank you, Your Honor.

7 Judge Thompson, as I go through those
8 questions, I'll try to alert the Court that I'm heading that
9 way so that that will be a cue to you also that the judge may
10 need to intervene and make some rulings.

11 THE WITNESS: All right.

12 MR. COLYER: Thank you.

13 Q. Sir, where are you from originally?

14 A. Born and raised in Fayetteville.

15 Q. Where'd you go to high school?

16 A. Fayetteville High School.

17 Q. And, if you don't mind me asking, when did you
18 finish high school, sir?

19 A. 1959.

20 Q. After graduating high school, what did you do by
21 way of education and/or work experience?

22 A. I went to Wake Forest, undergraduate in law school,
23 graduated in 1965.

24 Q. And, upon your graduation in 1965, were you
25 licensed to practice law here in the State of North Carolina?

1 A. Yes, I was.

2 Q. Upon your graduation from law school in 1965, at
3 Wake Forest, what type of work experience did you begin then,
4 sir?

5 A. For a 60-day period of time, before I went into the
6 Army -- I was due to go in the Army -- I was the -- an
7 Assistant District Solicitor here in this county; was in the
8 Army for 2 years, MPs. I spent a short period of time at
9 Fort Bragg. That was supposed to be my permanent assignment;
10 spent 1 year in Vietnam; and, then, I was discharged and
11 returned to Fayetteville.

12 Q. All right, sir. Let me take you back to the 60
13 days after graduating law school at Wake Forest. For whom
14 did you work as an Assistant District Solicitor at that time?

15 A. Lester Carter.

16 Q. And what type work did you do during that 60-day
17 period, Judge Thompson?

18 A. I was his assistant in Superior Court and --
19 prosecuting the criminal docket.

20 Q. Were there other Assistant Solicitors at that time,
21 in 1965?

22 A. No. That was it.

23 Q. You were the office, I take it, you and Solicitor
24 Carter?

25 A. That's correct.

1 Q. At the -- during the time of that 60-day period,
2 did you have a chance to participate in any jury trials?

3 A. That's where I first tried criminal cases,
4 prosecuting criminal cases; and, the training consisted of
5 going into court and trying them.

6 Q. All right, sir. After that 60-day period, you
7 indicated that you went onto active duty?

8 A. Yes.

9 Q. And what was your rank upon entry, and what was
10 your job? You could probably give us the MOS, but just tell
11 us in words what you did. It might mean more to us.

12 A. I went in as a Second Lieutenant, went briefly to
13 Fort Gordon for training, MP officer basic, came back to Fort
14 Bragg, which was my permanent duty station. I was a platoon
15 leader. We did general mil -- police-type duties here --
16 Fort Bragg reservation; duty officer quite often, which meant
17 we were on for 24 hours and were in charge of all the MPs on
18 post. I think I've answered -- and -- well, from there, for
19 a short period of time, I was the assistant confinement
20 officer for the stockade and ----

21 Q. Here at Fort Bragg?

22 A. Here at Fort Bragg, which consisted of a Captain
23 and myself. We were the two officers in charge of the
24 stockade.

25 Q. How big of a facility did you and the officer have

1 to manage?

2 A. There were probably -- would hold about --
3 approximately a hundred people.

4 Q. And, after that period of time here at Fort Bragg
5 -- which lasted about how long?

6 A. It lasted -- I arrived here from the -- Fort Gordon
7 in December '65. I received my orders to report to Fort
8 Lewis, Washington, April 1st, April Fools' Day, of '66. I
9 spent 3 months in Washington state. We -- they were forming
10 a security company, and we were -- and then we went over as a
11 company to -- to Vietnam.

12 Q. And you arrived in country, in Southeast Asia, in
13 Vietnam, in 1966?

14 A. In '66.

15 Q. And did you spend 12 months in the theater there?

16 A. 365 days, yes.

17 Q. Where were you stationed, sir, if you can say?

18 A. In Saigon, primarily in Tonsenu [phonetic]. We
19 had the total law-enforcement duties for the -- all of
20 Saigon.

21 Q. I take it that the time period '65, '66 was
22 beginning to build up to the Vietnam war in Southeast Asia?

23 A. When I went over, that's when President Johnson
24 sent just about everybody over.

25 Q. Yes, sir.

1 A. It was a big buildup in Vietnam at that time. The
2 -- the year -- 6 months after I left Vietnam, the Tet
3 Offensive took place.

4 Q. So, you were in country from 1966 into 1967?

5 A. And arrived back here in the latter part of August
6 of '67.

7 Q. All right, sir. When you came back to the United
8 States, were you still on active duty or did you ETS or ----

9 A. I was ----

10 Q. ---- terminate your service?

11 A. ---- discharged when I -- soon as I arrived.

12 Q. And, when you came back, what was your rank?

13 A. First Lieutenant.

14 Q. Now, sir, after your tenure in the United States
15 Army, what type work did you do?

16 A. I became an associate with the law firm in which my
17 brother was a partner for a -- from August until the
18 Christmas holidays. Doran Berry was the District Solicitor
19 at that time. He called me and needed an assistant, so I
20 decided to join him. I spent about a year and 3 or 4 months
21 as his only assistant, his full-time assistant, because the
22 law had changed. Then, you had -- you could have a full-time
23 assistant.

24 Q. Now, sir, in the fall of 1967, when you practiced
25 with your brother, Larry, what type of law did you practice

1 with him?

2 A. A little of everything, domestic, criminal defense,
3 office-type practice, but primary -- and personal injury,
4 plaintiff's work, just a general -- very general practice of
5 law.

6 Q. And, then, when you became the Assistant District
7 Solicitor under District Solicitor Doran Berry, what type
8 work did you do for Mr. Berry?

9 A. I did all -- basically, all the in-office work
10 because he was still in a part-time basis. So, as soon as we
11 were out-of-court, he was back in his office. I prepared the
12 indictments. I prepared -- did all the calendars, set up
13 files, did prep work for cases that were pending trial and
14 ----

15 Q. And ----

16 A. ---- and I tried a lot of cases.

17 Q. And, on those cases that you -- or, those cases
18 that you tried during that period of time, did you try any
19 homicide cases or any capital cases?

20 A. During that period of time, I'm not -- I can't
21 recall if I did or not. I -- I'm sure I tried some homicide
22 cases during that period of time; and, of course, it was
23 under a different law at that time.

24 Q. Yes, sir.

25 A. And the -- any first-degree murder case was

1 basically considered capital or -- and there were other
2 offenses that were also capital.

3 Q. Yes, sir.

4 A. I -- but my best recollection is I may have tried a
5 few during -- while I was working as his assistant.

6 Q. Now, did there come a time when you succeeded Mr.
7 Berry to the office that he held?

8 A. Yeah. I was briefly in private -- I went back to
9 private practice for a brief period of time, for a number of
10 months and then ----

11 Q. What year was that, Judge Thompson, roughly?

12 A. '68 to -- latter part of '68, I -- I believe it
13 was.

14 Q. Was that back into Larry's firm, your brother's
15 firm?

16 A. That's correct. I went in as a partner this time
17 instead of an associate for a short period of time. Doran
18 Berry decided to run for Congress, so I decided to run for
19 his job and was elected; and, I received the nomination in
20 May of 1970.

21 Q. Yes, sir; and, were you subsequently elected as the
22 District Solicitor?

23 A. Yes; and, Mr. Berry wanted to go ahead and resign
24 so he could run for Congress, and so I took over September 1
25 -- took over early. The governor appointed me for that short

1 period of time before my term started.

2 Q. Yes, sir. What kind of a staff did you have when
3 you became the Appointed District Solicitor before your
4 election became effective?

5 A. That was a transition period where we -- where we
6 went from the various court systems. You had the city, the
7 county courts. You had -- that were manned by different
8 people -- to the unified system; and, we took over the total
9 unified system of all of the courts in '7 and -- '71, 1971.

10 Q. All right, sir; and, for how long did you serve as
11 the District Solicitor?

12 A. A little over 4 years.

13 Q. During that time period as the District Solicitor,
14 did you continue to try cases?

15 A. Yes.

16 Q. And did you try a capital case?

17 A. Yes.

18 Q. During that time period, do you recall any cases
19 wherein, as the District Solicitor, a case that you tried,
20 there was a death penalty decision?

21 A. There were several that I can recall offhand. The
22 first one was the first capital verdict that had been
23 rendered in Cumberland County in 25 years; and, right now, I
24 can't remember the name of it. I remember some of the facts.

25 Q. Were you assisted by anyone, or were you the --

1 representing the State alone in those cases?

2 A. Generally, I tried them by myself.

3 Q. So, you were responsible for the jury selection as
4 well as the presentation of evidence?

5 A. Yes, sir.

6 Q. During that time period, did you have some
7 Assistant District Solicitors that worked for you?

8 A. Yes, I did.

9 Q. And do you recall any of them by name?

10 A. Edwin Lynn Johnson was one. I recruited him out of
11 the FBI. Ed Grannis, he was probably my first or second hire
12 when I took over. Dan Perry was an Assistant. Robert Paige
13 -- they were the initial ----

14 Q. Did Mr. Grannis ----

15 A. ---- Assistants.

16 Q. ---- also go to Wake Forest for law school?

17 A. Yes. He was ----

18 Q. Did he serve some time on active duty?

19 A. Yes, and he spent some time in Vietnam also.

20 Q. Was he a JAG officer; do you know?

21 A. He was -- he was not a JAG officer, but he was
22 assigned to, I think, the JAG Office.

23 Q. And was it after that -- his tenure in Vietnam that
24 he came back here and went to work for you as an Assistant

25 ----

1 A. Yes.

2 Q. ---- District Solicitor? At some point, while you
3 were the District Solicitor, did the title change?

4 A. Yes.

5 Q. Do you recall was that with the unification of the
6 court system in '71 or shortly thereafter?

7 A. It -- when I was elected, I -- I wrote all of the
8 elected DA's in the State and told them that the -- or, my
9 point of view relative to the name District Solicitor. Most
10 people didn't understand what that was. When I was running
11 for office, I would walk into a place of business and say --
12 asking if they'd vote for me as District Solicitor, and they
13 would say, yeah, I'll be glad to vote for you, but what is --
14 what is a District Solicitor; and, that sort of got the ball
15 rolling and -- and, so, initially, after -- after a year,
16 they allowed us to use the term District Attorney, and then
17 they changed the Constitution to make it official.

18 Q. All right, sir. So, that was during your tenure?

19 A. That was during my tenure.

20 Q. Did there come a time, Judge Thompson, when you
21 decided to leave the office of the District Attorney and
22 return to private practice?

23 A. Yes, sir.

24 Q. And when did you do that, sir?

25 A. At the end of my term.

1 Q. And, while you were serving as the Elected DA --
2 you mentioned that, on one occasion, you had gotten the first
3 death penalty here in 25 years, in Cumberland County. Did
4 you continue to practice as the District Attorney and do jury
5 selection with respect to homicide and capital cases during
6 that time period?

7 A. Yes, sir. I tried a -- a number of homicide cases
8 and ----

9 Q. When you left the District Attorney's Office, what
10 year was that; and, to what type practice did you go back to?

11 A. '70 -- January '75, I returned to private practice;
12 and -- and, there again, I was sort of in a general practice
13 to begin with, did criminal defense work, did civil
14 litigation, personal injury-type actions and general office
15 practice.

16 Q. Who succeeded you as the District Attorney?

17 A. Mr. Grannis.

18 Q. And, when you went to private practice, did you go
19 into the firm, again, where you had been a partner before you
20 became the District Solicitor and the Elected District
21 Attorney?

22 A. Yes, sir.

23 Q. And, in that practice, did you have occasion to be
24 involved in criminal as well as civil practice?

25 A. Yes.

1 Q. Did you pick criminal juries from the defense side
2 at that time?

3 A. Yes, I did.

4 Q. Did you represent any defendants who were charged
5 with capital-type offenses?

6 A. And what comes to mind -- at least one -- was a
7 privately -- I was not on the appointed list, chose not to
8 voluntarily sign-up for that. I was retained to represent a
9 person charged with a capital offense and -- of murder. We
10 did not try it. We ended up not trying it as a capital
11 offense. I negotiated with the assistant at that time to --
12 to try it as non-capital. The presiding judge consented to
13 it, and we tried it non-capital.

14 Q. Do you recall approximately what year that would
15 have been?

16 A. Probably early '80's. I'm -- I'm guessing.

17 Q. Were you in private practice when Batson versus
18 Kentucky became the law in the United States?

19 A. Yeah, I think so. If ----

20 Q. And the firm that you went into from the District
21 Attorney's Office, how long did you stay with that firm; and,
22 did you move into another defense firm over the years?

23 A. I joined the Gerald Beaver firm. I'm not sure of
24 the date. '80 -- I'm thinking '84 or '85. I'm not quite
25 sure.

1 Q. What type practice did you do there, Judge
2 Thompson?

3 A. There, again, I started out doing sort of a general
4 practice and doing a little criminal defense work and civil
5 litigation of very -- more general civil litigation than
6 personal injury. Mr. Beaver and Billy Richardson did a lot
7 of the criminal defense work, so there wasn't a need for
8 three of us doing it.

9 Q. Yes, sir.

10 A. But I -- I still enjoyed litigation in both the
11 criminal and civil, so I continued doing it.

12 Q. And did there come a time, during that private
13 practice tenure, when you became a Superior Court Judge?

14 A. January of 1991.

15 Q. So, would it be correct to say that, from 1975 to
16 1991, approximately 16 years, you were involved in the
17 private practice of law both dealing with criminal and civil
18 matters in two different law firms?

19 A. Yes, sir.

20 Q. In 1991, how did you become a Superior Court Judge?

21 A. Judge D.B. Herring decided to -- he was going to
22 retire. He was kind enough to notify me, and he encouraged
23 me. I sought the support of the Bar, received it -- the
24 majority of the Bar. When he announced he was going to
25 retire, he also endorsed me; and, I announced that I was

1 running for Superior Court Judge. It did -- it did give me a
2 leg up to run. With his backing, I had no opposition and
3 have since had no opposition in the two other terms that I've
4 ran subsequent to that.

5 Q. And did Judge Herring serve till the end of the --
6 the calendar year of the year that he announced?

7 A. Yes.

8 Q. And, so, you were elected ----

9 A. For his next term.

10 Q. ---- the general election and served the beginning
11 of the next term which became your first full term?

12 A. Yes, sir.

13 Q. All right, sir; and, then, you were elected two
14 more times after that?

15 A. Yes, sir.

16 Q. When did you retire from that position, sir?

17 A. July of 2010.

18 Q. So, served almost 20 years -- I guess about 19 ----

19 A. Nineteen and a half years.

20 Q. All right, sir. Now, sir, during your tenure as a
21 Superior Court Judge, where did you serve? Where was your
22 home -- home office?

23 A. Here, in -- in Fayetteville.

24 Q. So, that would be the 12th Judicial District at
25 that time?

1 A. Yes.

2 Q. All right, sir; and, during your tenure, did the
3 division in which the 12th Judicial District was located
4 change?

5 A. Yes. We started out with 18 counties, where we
6 rotated through; and, they cut it in half, into nine
7 counties.

8 Q. Now, sir, just in general -- I'm not talking about
9 any facts or any particulars of any of the cases. During
10 your 19 and a half years as a Superior Court Judge, do you
11 know approximately how many capital cases you tried?

12 A. I don't know the exact number. Some years ago, I
13 -- just out of curiosity, I had added them up, what was --
14 what I had tried as capitally qualified cases; and, so, my
15 best estimate would be 25 to 30 capital cases I've -- or,
16 capital qualified cases.

17 Q. And did some of those capitally qualified jury
18 trials result in the recommendation of the death penalty by a
19 jury?

20 A. Yes, sir. There -- there were at least seven death
21 recommendation verdicts.

22 Q. And, just in an effort to save some time and not
23 tax your recollection here -- if I mention some of the
24 counties in which you served as a Superior Court Judge and
25 picked a capital jury -- if I name some of those, would you

1 tell me if I'm including things erroneously or would it
2 include cases from Wake County ----

3 A. Yes, sir.

4 Q. Robeson County?

5 A. Yes, sir.

6 Q. Richmond, Durham ----

7 A. Yes, sir. Yes, sir.

8 Q. Brunswick, Cumberland, Johnston; and, can you think
9 of any others that I might have left off?

10 A. I think that that was it.

11 Q. Okay, sir. Now, there are a couple of cases that
12 I'd like to ask you about particularly from Cumberland
13 County, here, that resulted in death verdicts; but, there
14 were other cases that you tried here, in Cumberland County,
15 where there either was a recommendation of life, the jury
16 hung as to punishment and life was awarded, or there was a
17 conviction of something less than first-degree; is that
18 correct?

19 A. Yes, sir.

20 Q. With respect to the cases that you tried that
21 originated in Cumberland County, do you recall that there
22 were two cases where death penalties were recommend --
23 recommended by the jury from Cumberland County cases?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: The objection -- pardon

1 me. The objection is sustained. The State's objection and
2 exception are noted for the record.

3 Q. And, Judge Thompson, do you recall that there was a
4 case that was transferred from Robeson County, that was
5 physically tried here on retrial from Robeson County in
6 Cumberland County, where there was a death penalty
7 recommendation -- that particular case of State versus
8 McCullum, that did not originate in Cumberland County, but
9 was tried here to a Cumberland County jury?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Objection is sustained.

12 The State's objection and exception are noted for the record.

13 Q. Now, sir, just going back for a moment, with
14 respect to your service as a Superior Court Judge, did you
15 receive training with respect to the state -- or, from the
16 state, in some capacity, with respect to Batson versus
17 Kentucky?

18 A. Yes, sir.

19 MR. HUNTER: Objection, Your Honor.

20 Move to strike.

21 THE COURT: Okay.

22 MR. COLYER: Judge, I may just ask a
23 couple of background questions ----

24 THE COURT: Yes, sir.

25 MR. COLYER: ---- that won't solicit

1 any particular information.

2 THE COURT: Well, that's where I
3 anticipated you were going.

4 Mr. Hunter, the objection is overruled as to
5 whether or not any training was received. Your exception is
6 noted for the record.

7 Yes, sir.

8 Q. And, Judge Thompson, would some of that training
9 have been conducted by members of the faculty at -- from the
10 Institute of Government in Chapel Hill, North Carolina?

11 MR. HUNTER: Objection, Your Honor.

12 THE COURT: Okay. The objection's
13 noted. Exception is noted for the record.

14 You may answer yes or no, sir.

15 A. Yes.

16 Q. And, sir ----

17 MR. HUNTER: Motion to strike, Your
18 Honor.

19 THE COURT: Motion to strike is
20 denied. Objection and exception are noted for the record.

21 Q. And, Judge Thompson, did you present to the State
22 some material that you had generated and/or reviewed in
23 preparation for your potential testimony here as a witness?

24 A. Yes.

25 Q. Did that material that you gave us copies of --

1 were you made aware that we had given that material to the
2 defense through the discovery process?

3 A. Yes.

4 Q. Would it be correct to say that the material that
5 you gave us consisted of some handwritten notes that you had
6 made as well as -- as well as -- excuse me -- copies of slip
7 opinions, copies of handouts, perhaps, in some cases, copies
8 of some transcripts that you had with respect to the other
9 cases that you had tried relative to capital punishment here
10 in North Carolina?

11 A. Yes, it was. It -- it was very rough notes that I
12 -- while I was reading some of the decisions -- or just
13 trying to recall some of the facts and some of the issues
14 involved in the case, I took some notes. Some of the
15 terminology -- keep in mind, I've been retired for -- since
16 July of 2010. You start forgetting the terminology ----

17 Q. Yes, sir.

18 A. ---- when you're not using it. Just to -- to
19 refresh my recollection as to the proper terminology of
20 different things.

21 Q. And, based upon that -- what you just said, with
22 respect to your retirement in July of 2010, are you really
23 retired, or did you seek any type of retirement status in
24 relation to the bench?

25 A. I am really retired.

1 [General laughter.]

2 Q. Okay. Now, Judge Thompson, in dealing with the
3 subpoena that you received here to participate in this
4 hearing -- I guess you received a couple of subpoenas ----

5 A. Yes.

6 Q. ---- over the last several months. Were you
7 presented with some material by the State for your review in
8 terms of preparation for your testimony here?

9 A. Yes. One -- one of the things I can recall is your
10 aff -- a copy of your affidavit.

11 Q. Yes, sir. Were you also given some copies of trial
12 jury selection transcriptions in the two cases related to
13 Cumberland County?

14 A. Yes.

15 Q. Which you were the trial judge?

16 A. That's correct.

17 Q. And ----

18 THE COURT: I'm sorry. For
19 clarification, was that complete or partial?

20 MR. COLYER: That's what I'm going to
21 follow up, Judge.

22 THE COURT: Yes, sir.

23 Q. And, Judge Thompson, do you recall whether those
24 were partial transcripts or were they the entirety of the
25 jury selection in those two cases?

1 A. I think one of them was just the jury selection,
2 and then there was another one that was the total transcript.

3 Q. Okay. So, you got the full jury selection in one
4 case but not the substantive portion of the trial ----

5 A. Right.

6 Q. ---- is that correct; and, then, in the other, you
7 got the entirety of the jury selection, plus the substantive
8 portion of the trial?

9 A. I believe that's true.

10 Q. All right, sir; and, just for the record, sir, did
11 we give you the jury selection transcripts for the cases of
12 State of North Carolina versus John Davis McNeil and the
13 State of North Carolina versus Quintel Augustine?

14 A. Yes.

15 Q. And were you the trial judge in those two cases?

16 A. Yes.

17 Q. Judge Thompson, this next series of questions I'm
18 going to ask you may generate some objections so, if you
19 would, defer to Judge Weeks for his ruling before you answer
20 it, if you're allowed to answer it. With respect to the case
21 of Batson versus Kentucky, were you made familiar and did you
22 learn, based upon your tenure as a Superior Court Judge --
23 become familiar with the rules on the Batson case?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Objection is sustained.

February 13, 2012

1 The State's objection and exception are noted for the record.

2 Q. And, in your tenure as a Superior Court Judge,
3 whether we're talking about capital matters, noncapital
4 matters or other felony matters, did you have made, in front
5 of you, by defense counsel, challenges in cases which you
6 were trying that related to Batson over the years?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Objection is sustained.

9 The State's objection and exception are noted for the record.

10 Q. As a trial judge, in capital cases in North
11 Carolina, in the 15 to 30 that you tried as a trial judge,
12 did you hear Batson challenges that were raised in some of
13 those capital cases?

14 MR. HUNTER: Objection, Your Honor.

15 THE COURT: Objection is sustained.

16 The State's objection and exception are noted for the record.

17 Q. And, sir, in general, with respect to whether we're
18 talking about capital or noncapital cases, as a trial judge,
19 if you saw Batson violations that were occurring but that
20 were not objected to by defense counsel, was it your practice
21 to step in and object and rule on motions that you raised
22 yourself with respect to Batson, if it became necessary?

23 MR. HUNTER: Objection.

24 THE COURT: The objection is

25 sustained. The State's objection and exception are noted for

1 the record.

2 Q. Now, Judge Thompson, I'd like to ask you some
3 general questions about the two cases that I mentioned to
4 you, State versus John Davis McNeil and State versus Quintel
5 Augustine; again, there may be some objections that will be
6 imposed between these questions. Starting with the State of
7 North Carolina versus John Davis McNeil, do you recall that
8 that was tried here in Cumberland County in 1995?

9 MR. HUNTER: Objection, Your Honor.

10 THE COURT: Objection is sustained.

11 The State's objection and exception are noted for the record.

12 MR. COLYER: Judge, with your
13 permission, I will -- I know that there may be an objection
14 to the form of some of these -- I would ask some leave to
15 lead, so that I may get through this and we can get the
16 objections noted and move on.

17 THE COURT: Yes, sir, Mr. Colyer.

18 Q. Judge Thompson, do you recall that the State of
19 North Carolina was represented during the jury selection in
20 that case by John Dixon and by myself?

21 MR. HUNTER: Objection, Your Honor.

22 THE COURT: Objection is sustained.

23 The State's objection and exception are noted for the record.

24 Q. And do you recall that, in that particular case,
25 Mr. Dixon was the Assistant DA that participated in the

1 presentation of evidence without any assistance from myself
2 or anyone else?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 The State's objection and exception are noted for the record.

6 Q. Do you recall, in that case, sir, that the defense
7 was represented by Paul Herzog and George Franks?

8 MR. HUNTER: Objection, Your Honor.

9 THE COURT: Objection is sustained.

10 The State's objection and exception are noted for the record.

11 Q. Do you recall whether, in that case, sir, there
12 were any Batson challenges raised?

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Objection is sustained.

15 The State's objection and exception are noted for the record.

16 Q. Do you recall whether or not there were any
17 challenges for cause to any particular jurors that were
18 denied?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Objection is sustained.

21 The State's objection and exception are noted for the record.

22 Q. Now, sir, moving onto the case of the State of
23 North Carolina versus Quintel Augustine for some general
24 background questions, do you recall that that case arose here
25 in Cumberland County, but was transferred for trial on a

February 13, 2012

1 change of venue motion by the defense to Brunswick County
2 where the jury was selected and the case was tried?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 The State's objection and exception are noted for the record.

6 Q. Do you recall that the trial counsel for that case
7 were the Honorable Ed Grannis, Margaret Russ and myself for
8 the State?

9 MR. HUNTER: Objection, Your Honor.

10 THE COURT: Objection is sustained.

11 The State's objection and exception are noted for the record.

12 Q. And do you recall that, primarily, I was the trial
13 counsel with respect to jury selection and was assisted by
14 Ms. Russ?

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Objection is sustained.

17 The State's objection and exception are noted for the record.

18 Q. Do you recall that the defendant, Mr. Quintel
19 Augustine, was represented by Mr. James Parish and Mr. Harold
20 Carlin?

21 MR. HUNTER: Objection, Your Honor.

22 THE COURT: Objection is sustained.

23 The State's objection and exception are noted for the record.

24 Q. And do you recall that there were two Batson
25 challenges which were raised by the defense with respect to

1 two of the jurors who were questioned and were attempted to
2 be peremptorily excused by the State?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 The State's objection and exception are noted for the record.

6 Q. Judge Thompson, I'm going to ask you a series of
7 four questions with respect to each of those cases; and,
8 again, there may be the necessity for an imposition of
9 objections. Judge Thompson, based upon your observations as
10 the trial judge in the case of State of North Carolina versus
11 John Davis McNeil, did you observe that race was a
12 significant factor in the exercise of any peremptory strikes
13 against any black jurors in that case?

14 MR. HUNTER: Objection.

15 THE COURT: Objection is sustained.

16 The State's objection and exception are noted for the record.

17 Q. Based upon your observations as the trial judge in
18 the case of State of North Carolina versus John Davis McNeil,
19 did the State racially discriminate in the exercise of any
20 peremptory strike against any black juror?

21 MR. HUNTER: Objection, Your Honor.

22 THE COURT: Objection is sustained.

23 The State's objection and exception are noted for the record.

24 Q. In the case of State of North Carolina versus John
25 Davis McNeil, as the trial judge, would you have raised a

1 Batson objection ex mero motu or on your own motion had you
2 observed the State exercise a peremptory strike against a
3 black juror based upon race that was not otherwise objected
4 to by counsel?

5 MR. HUNTER: Objection.

6 THE COURT: Objection is sustained.

7 The State's objection and exception are noted for the record.

8 Q. And, Judge Thompson, as the trial judge, in the
9 case of State of North Carolina versus John Davis McNeil, if
10 you would have observed the State exercise a peremptory
11 strike against a black juror based upon race and the State
12 [sic] had not raised a Batson objection, would you have
13 intervened ex mero motu or on your own motion to correct the
14 situation by denying the State's peremptory strike and
15 sustaining your own Batson objection?

16 THE COURT: Mr. Colyer, I believe you
17 indicated if the State had raised a Batson motion.

18 MR. COLYER: Well, thank you, Judge.

19 THE COURT: Yes, sir.

20 MR. COLYER: I will back up and ----

21 THE COURT: All right.

22 MR. COLYER: ---- and rephrase that.

23 THE COURT: Yes, sir.

24 Q. As the trial judge, Judge Thompson, in the State of
25 North Carolina versus John Davis McNeil, if you would have

1 observed the State exercise a peremptory strike against a
2 black juror based upon race and the defense had not raised a
3 Batson objection, would you have intervened ex mero motu or
4 on your own motion to correct the situation by denying the
5 State's peremptory strike and sustaining your own Batson
6 objection?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Objection is sustained.

9 The State's objection and exception are noted for the record.

10 Q. And, Judge Thompson, as an aside, separate and
11 apart from these two cases, when you tried the case of State
12 of North Carolina McCallum, that we referred to --
13 transferred from Robeson County here to Cumberland County,
14 did you have an opportunity to rule on some Batson challenges
15 that were raised both by the defense and with respect to some
16 of your own observations during that case?

17 MR. HUNTER: Objection, Your Honor.

18 THE COURT: Objection is sustained.

19 The State's objection and exception are noted for the record.

20 Q. And, during the course of that case of State versus
21 McCullum, were there corrective measures that you took as the
22 trial judge based either upon objections by the defense or
23 observations that you made with respect to that case which
24 resulted in the entry of an order dealing with jury
25 selection?

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: Objection is sustained.

3 The State's objection -- pardon me -- and exception are noted
4 for the record.

5 Q. Now, Judge Thompson, if you'll bear with me, I'd
6 like to ask some questions ----

7 THE COURT: Judge Weeks, I'm going to
8 move on to the Augustine case.

9 THE COURT: Yes, sir.

10 Q. Now, Judge Thompson, based upon your observations
11 as the trial judge in the case of State of North Carolina
12 versus Quintel Augustine, did you observe that race was a
13 significant factor in the exercise of any peremptory strikes
14 against any black jurors in the State of North Carolina
15 versus Augustine?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: Objection is sustained.

18 The State's objection and exception are noted for the record.

19 Q. Judge Thompson, based upon your observations as the
20 trial judge in the case of State of North Carolina versus
21 Quintel Augustine, did the State racially discriminate in the
22 exercise of any peremptory strike against any black juror?

23 MR. HUNTER: Objection.

24 THE COURT: Objection is sustained.

25 The State's objection and exception are noted for the record.

February 13, 2012

1 Q. Judge Thompson, with respect to the State of North
2 Carolina versus Quintel Augustine, where you served as the
3 trial judge, would you have raised a Batson objection ex mero
4 motu, on your own motion, had you observed the State exercise
5 a peremptory strike against a black juror based upon race
6 that was not otherwise brought to your attention by defense
7 counsel?

8 MR. HUNTER: Objection.

9 THE COURT: Objection is sustained.

10 The State's objection and exception are noted for the record.

11 Q. And, Judge Thompson, as the trial judge in the case
12 of State of North Carolina versus Quintel Augustine, if you
13 would have observed the State exercise a peremptory strike
14 against a black juror based upon race and the defense had not
15 raised a Batson objection, would you have intervened ex mero
16 motu or on your own motion to correct the situation by
17 denying the State's peremptory strike and sustaining your own
18 Batson objection?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Objection is sustained.

21 The State's objection and exception are noted for the record.

22 Q. And, Judge Thompson, with respect to the Quintel
23 Augustine case, do you recall that there were two Batson
24 challenges which were raised by James Parish with respect to
25 the exercise of a peremptory challenge exercised by the State

1 against two of the jurors?

2 MR. HUNTER: Objection.

3 THE COURT: Objection is sustained.

4 The State's objection and exception are noted for the record.

5 Q. And, for the record, sir, do you recall that one of
6 those, the Court determined that there was not a prima facie
7 showing with respect to the Batson challenge?

8 MR. HUNTER: Objection.

9 THE COURT: Objection is sustained.

10 The State's objection and exception are noted for the record.

11 Q. And do you recall that with respect to the other,
12 sir, you conducted a Batson hearing where all three issues
13 under the Batson challenge were examined and the Court made
14 the conclusion that race was not a significant factor and the
15 State had not exercised a peremptory challenge in a racially
16 discriminatory manner against a particular juror?

17 MR. HUNTER: Objection.

18 THE COURT: Objection is sustained.

19 The State's objection and exception are noted for the record.

20 Q. Judge Thompson, I want to inform you that we're
21 going to move into some documents now; and, again, Judge
22 Weeks is going to be asked to rule on some preliminary
23 questions.

24 MR. COLYER: And, I'll try to do this
25 as quickly as we can, Your Honor.

1 THE COURT: Thank you, Mr. Colyer.

2 MR. COLYER: And if I might just move
3 all of these up there so I don't have to keep running back
4 and forth.

5 THE COURT: Yes, sir.

6 MR. COLYER: If I might have leave to
7 stand here and deal with this.

8 THE COURT: Yes, sir.

9 [Pause.]

10 Q. Judge Thompson, the first matter I'm going to hand
11 you is marked as State's Exhibit Number 70.

12 [Madam clerk conferred with the Court.]

13 THE COURT: Is it 70 or ----

14 MR. COLYER: Seven zero; is that
15 correct?

16 [Madam clerk conferred with the Court.]

17 MR. COLYER: Oh, you're right.

18 THE COURT: You skipped one.

19 MR. COLYER: I -- we skipped -- well, I
20 -- I'm sorry. I was on Augustine, and I went right to that.
21 Let -- let me back up, Judge, if I could.

22 THE COURT: Okay.

23 MR. COLYER: It might make it easier
24 for ----

25 THE COURT: Yes, sir.

1 MR. COLYER: ---- our purposes here. I
2 grabbed the wrong stack, and so -- Mr. Hunter, if you will,
3 just hang onto that one.

4 MR. HUNTER: Sure.

5 MR. COLYER: We'll come back to it in a
6 minute, sir.

7 And, Judge Thompson, if you will, just lay
8 that aside. I'll -- I'll direct your attention back to that
9 in a moment. Okay.

10 Thank you for correcting me, Ms. Bain. I
11 appreciate that.

12 Q. With respect to the case of State versus John Davis
13 McNeil, I'm going to hand you, Judge, what's marked for
14 identification as State's Exhibit Number 67 [handing the
15 exhibit to the witness].

16 THE COURT: 68?

17 MR. COLYER: Okay. Well ----
18 [Counsel conferred.]

19 MR. HUNTER: 68.

20 THE COURT: That -- that's what
21 appears to be the consensus.

22 MR. COLYER: Yes, sir, and I'll make
23 that correction.

24 THE COURT: Yes, sir.

25 MR. COLYER: Excuse me.

1 [Pause.]

2 MR. COLYER: This one will be easy. I
3 can do that one with pen and ink.

4 THE COURT: Yes, sir.

5 MR. COLYER: Okay.

6 [Pause.]

7 [Counsel conferred.]

8 Q. Judge Thompson, do you recognize State's Exhibit
9 Number 68 [handing the exhibit to the witness] ----

10 A. Yes, sir.

11 Q. ---- as being a transcript from the case of John
12 Davis McNeil that deals with the juror Eddie Anderson?

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Well, as to the
15 identification, the objection is overruled. Exception is
16 noted for the record. Motion to strike -- well, we haven't
17 had the answer yet. I'm sorry.

18 You may answer yes or no, sir.

19 THE WITNESS: Let me have just 1 minute,
20 Your Honor.

21 THE COURT: Yes, sir.

22 [Pause.]

23 A. You said Eddie Anderson ----

24 Q. Yes ----

25 A. Eddie Anderson?

1 Q. Yes, sir. If I could, direct your attention to
2 page 91, Judge.

3 A. It does ----

4 Q. Okay.

5 A. It is the transcript of -- appears to be the
6 transcript of -- concerning Eddie Anderson.

7 Q. And, Judge ----

8 MR. HUNTER: Motion to strike.

9 THE COURT: The motion to strike as to
10 the name of the juror is allowed. For purposes -- and let me
11 clarify for the record. The parties have agreed that a
12 procedure will be utilize wherein the State will be allowed
13 to conduct an examination. It has been referred to as a
14 quasi ----

15 MR. COLYER: Deposition.

16 THE COURT: ---- deposition type
17 examination so that the record is absolutely clear about what
18 answers would be given as to certain witnesses so that the
19 issues are preserved for appellate review. So, for the
20 purpose of identification at this point, this -- and to
21 clarify -- correct me if I'm wrong. This is a complete or
22 partial transcript of jury selection matter relating to the
23 John Davis McNeil case, correct?

24 MR. COLYER: It is a partial
25 transcript, Your Honor; and, my next question was going to

1 deal with pages 91 through 67 [sic] ----

2 THE COURT: Okay.

3 MR. COLYER: ---- just for
4 identification.

5 THE COURT: So, you may answer yes or
6 no, sir, whether or not it's a partial transcript of the jury
7 selection process or -- in the John Davis McNeil case, sir?

8 A. Yes.

9 MR. HUNTER: Motion to strike.

10 THE COURT: Motion to strike is
11 denied. The exception is noted for the record.

12 Q. Judge Thompson, do you recall that, in the jury
13 selection process, that Mr. John Dixon actually questioned
14 and/or eventually struck Mr. Anderson?

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Objection is sustained.

17 The State's objection and exception are noted for the record.

18 Q. Judge Thompson, I'm going to hand you our next
19 exhibit which is marked for identification as State's Exhibit
20 Number 69 [handing the exhibit to the witness].

21 [Mr. Colyer handed an exhibit to the Court.]

22 THE COURT: Thank you, sir.

23 Q. And ask you, sir, does this appear to be a
24 transcript or a portion of the trial transcript with respect
25 to jury selection from pages 637 up to 696 dealing with the

1 juror Linda Montgomery?

2 MR. HUNTER: Objection, Your Honor.

3 THE COURT: Objection is sustained.

4 The record speaks for itself.

5 You may rephrase your question, Mr. Colyer.

6 MR. COLYER: Judge, I'm just asking it
7 for purposes of identification. I'm not going to ask any
8 follow-up questions.

9 THE COURT: Okay. All right. I
10 apologize.

11 You may answer, sir, yes or no.

12 A. It appears to be a partial transcript of Ms.
13 Montgomery.

14 MR. HUNTER: Motion to strike, Your
15 Honor.

16 THE COURT: Motion to strike is
17 denied. Exception is noted for the record.

18 Q. Sir, I'm now going to hand you what's marked for
19 identification as State's Exhibit Number 70 [handing the
20 exhibit to the witness].

21 THE COURT: A different one?

22 MR. COLYER: I'm going to renumber it,
23 yes, sir.

24 THE COURT: Yes, sir.

25 MR. COLYER: Because I messed up the

1 numbers. I'll correct that.

2 THE COURT: All right. Yes, sir.

3 [Pause.]

4 Q. Judge Thompson, I'll ask you if this [handing the
5 exhibit to the witness] appears to be a transcript from the
6 -- a portion of the transcript in the jury selection of John
7 Davis McNeil that deals with pages number 1115 through 1130,
8 dealing with the juror Mr. Rodney Berry?

9 MR. HUNTER: Objection, Your Honor.

10 THE COURT: Objection is noted. It's
11 overruled. Exception is noted for the record. It's being
12 offered only, at this point, for purposes of identification,
13 if I understand correctly.

14 MR. COLYER: That's correct, Your
15 Honor.

16 THE COURT: And you may answer, sir.

17 A. Yes.

18 Q. And this next question is ----

19 MR. HUNTER: Motion to strike, Your
20 Honor.

21 THE COURT: Motion to strike is
22 denied. The defendant's objection and exception are noted
23 for the record.

24 MR. COLYER: The State's objection and
25 exception ----

1 THE COURT: You're -----

2 MR. COLYER: We'll -- we'll ----

3 THE COURT: I already noted that.

4 MR. COLYER: Well, Yes, sir. Got'cha;
5 and, this next question is substantive in nature.

6 THE COURT: Okay.

7 Q. Judge Thompson, do you recall that, with respect to
8 the two jurors that I just mentioned to you, Linda Montgomery
9 and Rodney Berry, that Mr. Dixon was not present in the
10 courtroom and that I was the individual representing the
11 State who made those peremptory strikes against those black
12 jurors?

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Objection is sustained.

15 The State's objection and exception are noted for the record.
16 We already have the testimony of Judge Dixon on record.

17 MR. COLYER: Yes, sir.

18 Now, Judge, with your permission, if -- Judge
19 Weeks, if I could correct my error here on the State's
20 exhibit numbers.

21 THE COURT: This is going to be 71,
22 sir?

23 MR. COLYER: It will, Your Honor.

24 THE COURT: Okay.

25 [Pause.]

1 MR. COLYER: And I'll -- I'll go back
2 and identify that again for the record.

3 THE COURT: Okay.
4 [Pause.]

5 MR. COLYER: Thank you, Judge Weeks. I
6 think I have those corrected. If I misstate, I'd appreciate
7 it if you'd bring it to my attention.

8 THE COURT: Yes, sir.

9 Q. Judge Thompson, I'm going to hand back to you now
10 that exhibit that I erroneously marked earlier as State's
11 Exhibit Number 70. I believe it's now State's Exhibit 71.

12 MR. COLYER: Is that correct, Ms. Bain?

13 MADAM CLERK: Yes, sir.

14 MR. COLYER: And, Mr. Hunter, I think
15 I've given you a copy -- or, Mr. Thompson ----

16 MR. HUNTER: The jury chart?

17 MR. COLYER: Yes, sir.

18 Q. And, for the record, Judge Thompson, do you
19 recognize this to be a jury seating chart that was kept by
20 Ms. Tammy Wojtal who was a clerk from Cumberland County that
21 accompanied you to assist as the courtroom clerk in the case
22 tried in Brunswick County -- Brunswick County of State of
23 North Carolina versus Quintel Augustine?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Objection is noted. It's

1 for identification purposes only. Exception is noted by the
2 defendant for purposes of the record.

3 Q. And, Judge Thompson, does this appear to be a
4 typewritten jury seat, as well -- consisting of two pages --
5 a typewritten jury seating chart, keeping up with the
6 challenges for cause by the State and by the defense, as well
7 as the two pages of jury panels to which the jury venire was
8 broken down into?

9 MR. HUNTER: Objection, Your Honor.

10 THE COURT: Objection is sustained.
11 The State's objection and exception are noted for the record.

12 MR. COLYER: And, Judge Weeks, for the
13 record, I will indicate that I believe this came from the
14 third floor repository here in the Cumberland County Clerks'
15 Office.

16 THE COURT: Yes, sir.

17 MR. COLYER: And it contains a page on
18 the front that apparently was placed on it by the clerks'
19 office which is actually the first page of the exhibit
20 dealing with the count as it relates to the number of State
21 strikes, and I -- I just left it all as one exhibit. I don't
22 think -- other than it being marked with a sticker -- that
23 Judge Thompson might not know about that.

24 THE COURT: Okay. Folks, do you want
25 to be heard in that respect?

1 MR. HUNTER: No, Your Honor.

2 THE COURT: All right. Thank you, Mr.
3 Colyer.

4 MR. COLYER: Okay, sir.

5 Q. Judge Thompson, if I might, I'd like to hand you
6 now what's marked for identification -- if I did this
7 correctly -- as State's Exhibit Number 72 [handing the
8 exhibit to the witness and retrieving the previous exhibit].

9 MR. COLYER: Thank you, sir.

10 Q. And I'll ask you, sir, does this appear to be a
11 portion of the jury selection trial transcript of the case of
12 State of North Carolina versus Quintel Martinez Augustine,
13 from pages 107 through 191 dealing with Ms. Ernestine Bryant
14 as the juror.

15 THE COURT: I don't have a copy of
16 that.

17 MR. COLYER: Oh, I'm sorry. Excuse me
18 [handing the exhibit to the Court].

19 THE COURT: Thank you, sir.

20 All right.

21 MR. HUNTER: Objection, Your Honor.

22 THE COURT: Objection's noted for the
23 record. It's overruled. Exception is noted on behalf of the
24 defendant.

25 You may answer yes or no only, sir.

1 A. Yes.

2 MR. HUNTER: Motion to strike, Your
3 Honor.

4 THE COURT: Motion to strike is
5 denied. The defendant's objection and exception are noted
6 for the record.

7 MR. COLYER: You can place that aside,
8 Judge Thompson.
9 [Pause.]

10 Q. Okay. Sir, now I'm going to hand you what's marked
11 for identification as State's Exhibit Number 73 [handing the
12 exhibit to the witness] and ask you, sir, does this appear to
13 be a trial transcript portion of State of North Carolina
14 versus Quintel Martinez Augustine, pages 909 through and
15 including 932, dealing with a juror Ms. Bardel Gore?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: Objection is noted for the
18 record. It's overruled. Exception is noted to the ruling on
19 behalf of the defendant.

20 You may answer yes or no, sir.

21 A. Yes.

22 MR. HUNTER: Motion to strike, Your
23 Honor.

24 THE COURT: Motion to strike is
25 denied. Exception is noted to the ruling.

1 Q. Judge Thompson, I'm going to hand you what's marked
2 for identification as State's Exhibit Number 74 [handing the
3 exhibit to the witness].

4 [Pause.]

5 Q. Ask you, sir, if this is a portion of the trial
6 transcript in State of North Carolina versus Quintel Martinez
7 Augustine, page numbers 844 to 847, dealing with the juror

8 ----

9 THE COURT: That's 847 or 874, Mr.
10 Colyer?

11 MR. COLYER: 874. Thank you, Your
12 Honor ----

13 THE COURT: Yes, sir.

14 MR. COLYER: ---- for that correction.

15 Q. Dealing with juror Mr. Ronald Williams?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: Objection is noted.
18 Overruled. Exception is noted.

19 You may answer yes or no, sir.

20 [Pause.]

21 A. I'm searching for his name.

22 Q. Judge -- Judge Thompson, if you will, look at page
23 844, in the middle of the page, I believe the last name
24 referred to here is Williams, with the gentleman's name
25 referred to on the seating chart would be Ronald Williams.

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: Well, the objection to the
3 commentary is sustained. The witness is in the process of
4 reviewing the document.

5 [Pause.]

6 A. Okay. Yes.

7 MR. HUNTER: Motion to strike, Your
8 Honor.

9 THE COURT: Motion to strike is
10 denied. Object -- objection, pardon me, and exception are
11 noted for the record.

12 MR. COLYER: Thank you, Judge Thompson.

13 [Pause.]

14 Q. Judge Thompson, I'm going to hand you what's marked
15 for identification now as State's Exhibit Number 75 [handing
16 the exhibit to the witness] and ask you, sir, does this
17 appear to be a portion of the trial transcript with respect
18 to jury selection in the case of State of North Carolina
19 versus Quintel Martinez Augustine dealing with pages numbered
20 197 through 235, as it relates to the juror Sharon Bryant?

21 MR. HUNTER: Objection, Your Honor.

22 THE COURT: Objection is noted for the
23 record. It's overruled. Exception is noted for the record.

24 Q. And, Judge Thompson, if I might direct your
25 attention to page number 197 ----

1 A. I have it.

2 Q. --- line 4, dealing with Ms. Bryant by name, does
3 that appear to ----

4 A. My answer would be yes.

5 Q. All right, sir.

6 MR. HUNTER: Motion to strike, Your
7 Honor.

8 THE COURT: Motion to strike is
9 denied. The defendant's objection and exception are noted
10 for the record.

11 Q. And, finally, Judge Thompson, with respect to the
12 transcripts ----

13 MR. COLYER: If I could, Judge Weeks,
14 hand him State's Exhibit Number 76 [handing the exhibit to
15 the witness].

16 Q. Judge Thompson, does this appear to be a portion of
17 the trial and jury selection transcript in the case of North
18 Carolina Quintel Martinez Augustine dealing with page numbers
19 1511 through and including 1527 as it relates to the juror
20 Mr. William Miller; and, I would direct your attention to
21 page ----

22 A. I can answer that.

23 MR. HUNTER: Your Honor, I am
24 objecting. I'm not quite sure whether he's finished with the
25 question or not.

1 MR. COLYER: I was looking for the page
2 number, Your Honor.

3 MR. HUNTER: Yeah.

4 THE COURT: Okay.

5 MR. COLYER: I'm sorry. I had not
6 finished my full thought; but, that's the only thing I was
7 looking for was directing the witness to the page with his
8 name on it.

9 [Pause.]

10 Q. And, again, I may have to direct your attention,
11 sir, back to State's Number 71 and page number 1511.

12 A. My answer would be yes.

13 MR. HUNTER: Mo -- motion to strike,
14 Your Honor.

15 THE COURT: Motion to strike is
16 denied. Objection and exception are noted for the record.

17 MR. COLYER: Thank you, Judge Thompson
18 and Judge Weeks.

19 THE COURT: Yes, sir.

20 [Pause.]

21 MR. COLYER: Judge, if I might have
22 just a moment ----

23 THE COURT: Yes, sir.

24 MR. COLYER: ---- Judge Weeks?

25 [Pause.]

1 Q. Judge Thompson, with respect to the two sets of
2 defense attorneys in State versus McNeil and State versus
3 Augustine, the cases about which I've been asking you, you --
4 are you familiar with and were you familiar with, at the time
5 of those respective trials, the defense attorneys involved in
6 those cases, Mr. Herzog and Mr. Franks on Davis [sic] and Mr.
7 Parish and Mr. Carlin on Augustine?

8 MR. HUNTER: Objection.

9 THE COURT: Well, he can answer yes or
10 no.

11 A. Yes.

12 THE COURT: The objection's overruled.

13 MR. HUNTER: Exception ----

14 THE COURT: Exception's noted for the
15 record. Motion to strike is denied. Exception is noted for
16 the record.

17 Q. With respect to the attorney's on the Davis [sic]
18 case, Mr. Herzog and Mr. Franks, did you consider them to be
19 competent lawyers with background and experience making them
20 worthy of being appointed as defense counsel for Mr. McNeil?

21 MR. HUNTER: Objection, Your Honor.

22 THE COURT: Objection is sustained.

23 The State's objection and exception are noted for the record.

24 Q. With respect to Mr. Parish and Mr. Carlin on the
25 Augustine case, were you familiar with their competence as

1 criminal defense attorneys and their abilities to represent
2 effectively and zealously clients that they were assigned who
3 were charged with capital offenses?

4 MR. HUNTER: Objection, Your Honor.

5 THE COURT: You may answer yes or no,
6 sir.

7 The objection is overruled. Exception is
8 noted for the record.

9 A. Yes, I certainly was.

10 MR. HUNTER: Motion to strike, Your
11 Honor.

12 THE COURT: Motion is denied. The
13 defendant's exception is noted for the record.

14 Q. And, Judge Thompson, I apologize for having to ask
15 you these questions in this form, and I've tried to take as
16 much personality out of it as I can as I ask you these
17 questions -- have you been a practicing or judicial member of
18 this judicial district that included Cumberland County for a
19 sufficient amount of time whereupon you had the opportunity
20 to learn of counsel for the State -- primarily, I'm referring
21 to myself and Buntie Russ, during the selection of the jury
22 in the Quintel Augustine case?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Give me one second. If
25 you will, repeat your question. Mr. Colyer.

1 MR. COLYER: Yes, sir.

2 Q. Have you been practicing for a sufficient amount of
3 time as a member of this judicial district that included
4 Cumberland County such that you had an opportunity to learn
5 my and Ms. Russ' reputation in our communities for the
6 pertinent character traits of character and integrity?

7 A. I have.

8 MR. HUNTER: Objection, Your Honor.

9 THE COURT: Objection -- folks, if you
10 will, bear with me for just one second. I went back this
11 weekend, given the fact that there had been an objection made
12 by counsel for the defendant, primarily on the grounds of Mr.
13 Colyer appearing as both a witness and an advocate in the
14 case. I went back simply to review the applicable law and
15 the revised rules of professional responsibility. Common
16 law, as I understanding it, is basically that there is no
17 general prohibition. That is being revised to a great extent
18 by case law for reasons that are essentially set out in the
19 rules for professional responsibility. It deals with matters
20 -- and I'm specifically refer -- referring to rule 3.7(a)(3);
21 and, I was looking for it just now; and, so that the record's
22 clear, as I understand the applicable provisions, if it deals
23 with a matter where there would result arguably a substantial
24 prejudice to the party -- in this case, the State -- with
25 guidelines as set out in the rules, it's permissible; and --

1 and, that is in large part so that the record reflects what
2 my reasoning is, the reason upon which I ruled as I did.
3 Now, you're getting into matters -- and -- and that's why I
4 asked you to repeat the question, Mr. Colyer.

5 MR. COLYER: Yes, sir.

6 THE COURT: Do you want to be heard,
7 Mr. Hunter, Mr. Ferguson -- Jay Ferguson or James Ferguson.

8 MR. HUNTER: No, Your Honor. I think
9 we've already argued this point.

10 THE COURT: Yes, sir. Okay. Bear
11 with me, Mr. Colyer. Repeat your question one more time, if
12 you will, please, sir.

13 MR. COLYER: Sure.

14 Q. Judge Thompson, have you been a practicing or
15 judicial member of this judicial district that included
16 Cumberland County for a sufficient time to have had an
17 opportunity to learn ----

18 MR. COLYER: I'll break it down ----

19 THE COURT: Yes, sir.

20 MR. COLYER: ---- so it's not a
21 compound ----

22 THE COURT: Okay.

23 Q. ---- the reputation in this community for Margaret
24 Buntie Russ for the pertinent character trait of honesty and
25 integrity.

1 THE COURT: The objection is
2 sustained. The State's objection and exception are noted for
3 the record.

4 Q. Have you been a practicing or judicial member of
5 this judicial district that included Cumberland County for a
6 sufficient time to have had an opportunity to learn the
7 reputation in that community for the pertinent character
8 trait of honesty and integrity of myself?

9 MR. HUNTER: Objection.

10 THE COURT: Objection is sustained.
11 The State's objection and exception are noted for the record.

12 Q. Have -- have you been a practicing or judicial
13 member of the judicial district that included Cumberland
14 County for a suffic -- sufficient period of time to have had
15 an opportunity to learn the reputation in that community for
16 the pertinent character trait of honesty and integrity of the
17 Honorable John Wyatt Dixon?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: All right. Judge Dixon
20 has testified as a witness at this case.

21 MR. COLYER: Yes, sir.

22 THE COURT: Objection is -- goes to
23 matters relating to credibility under Rule 611; is that
24 correct ----

25 MR. COLYER: Yes, and I'll ----

1 THE COURT: ---- generally?

2 MR. COLYER: I'll ask a specific
3 question.

4 THE COURT: If you would please, sir.

5 MR. COLYER: Yes, sir.

6 THE COURT: All right.

7 Q. Sir, have you had an opportunity as a practicing
8 member of this community, as a lawyer and as a judicial of
9 this community, as a judge, in this judicial district that
10 includes Cumberland County for a sufficient period of time
11 based upon your own observations and the character and
12 reputation of the individual in the community to learn John
13 Wyatt Dixon's reputation in this community for the pertinent
14 character trait of credibility, honesty and integrity as a
15 prosecutor?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: Overruled.

18 You may answer, sir.

19 Your exception is noted for the record.

20 A. Yes. I certainly have tried a number of cases -- I
21 -- I don't know how have many cases -- when he was
22 prosecuting and I was on the bench. So, I'm quite familiar
23 with his abilities and his character.

24 MR. HUNTER: Motion to strike, Your
25 Honor.

1 MR. COLYER: Motion to strike is
2 denied. The exception is noted for the record.

3 Q. And, specifically, do you have an opinion with
4 respect to his character and reputation for the specific
5 character trait of credibility and honesty?

6 A. He has a ----

7 MR. HUNTER: Objection, Your Honor.

8 A. ---- extremely ----

9 THE COURT: Your objection is noted,
10 Mr. Hunter; and, it's overruled, sir. Exception is noted for
11 the record. The question was asked, again, if I understand
12 correctly, because the response didn't address it.

13 MR. COLYER: Yes, sir.

14 THE COURT: All right; and, I
15 apologize. You may answer, sir.

16 A. To my knowledge, he has always had a tremendously
17 good reputation for honesty and integrity in all of the
18 dealings that I've had with him or other lawyers had with
19 him. His credibility was never questioned in day-to-day
20 dealings or trials. I tried some cases against him as a
21 defense attorney. Right now, I can't remember what they
22 were; but, the question of honesty and integrity was never --
23 never a factor.

24 Q. Sir, I'm going to change ----

25 MR. HUNTER: Motion to strike, Your

1 Honor.

2 THE COURT: Motion to strike is
3 denied. Exception is noted for the record.

4 MR. COLYER: I'm going to change the
5 form of this next question again to relate back to the three
6 prosecutors involved in -- in these two cases, Your Honor,
7 just for the Court's information.

8 Q. Judge Thompson, have you been a practicing member
9 of the district and a judicial member of the district as a
10 judge that included Cumberland County for a sufficient amount
11 of time to have had an opportunity to learn the reputation in
12 this community for the pertinent character trait of equal
13 treatment of all races of -- during jury selection by Mr.
14 John Wyatt Dixon?

15 A. Yes.

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: Okay. Do you want to be
18 heard further, Mr. Hunter?

19 MR. HUNTER: No, Your Honor.

20 THE COURT: Okay. Objection is
21 overruled. Exception's noted -- pardon me -- noted for the
22 record.

23 Yes, sir. You may answer, sir.

24 A. My answer is yes, I have -- I do know his
25 reputation concerning that.

1 Q. What is that, sir?

2 MR. HUNTER: Motion to strike, Your
3 Honor.

4 THE COURT: Motion to strike is
5 denied. Exception's noted for the record.

6 A. There was never a question relative to that issue
7 or factor concerning any bias or prejudice on his part. He
8 -- every case I was ever dealt with -- dealt with him in as a
9 defense lawyer and a trial judge, he was -- he followed the
10 rules right down the -- right down the path, like he was
11 supposed to.

12 MR. HUNTER: Motion to strike, Your
13 Honor.

14 THE COURT: Motion to strike is
15 denied. Objection and exception are noted for the record.

16 Q. Judge Thompson, have you been a practicing member
17 or a member of the judicial -- a judicial member of this
18 judicial district that included Cumberland County for a
19 sufficient period of time and have you had an opportunity to
20 make observations with respect to jury selection that was
21 conducted by myself such that you are aware of the reputation
22 that I have in this community for the pertinent character
23 trait of equal treatment of all races of jurors during jury
24 selection?

25 A. Yes.

1 MR. HUNTER: Objection.

2 THE COURT: Objection is noted for the
3 record. It's overruled.

4 You may answer, sir.

5 A. Yes, I have; and, your reputation in the com -- in
6 this community could not be any higher in that respect and
7 all respects as a trial attorney. You're ----

8 MR. HUNTER: Motion. Oh, I'm sorry.

9 A. Your qualities of honesty and integrity are not
10 surpassed by anyone, and that has made the trial of cases in
11 which you were involved much smoother to try; and, I think
12 almost all defense attorneys who have dealt with you, in my
13 presence as a trial judge, felt that way; and, if you made a
14 statement of a fact, it -- it was never questioned by either
15 the trial -- the bench or the lawyers involved.

16 MR. COLYER: Thank you, Your Honor.

17 MR. HUNTER: Motion to strike, Your
18 Honor.

19 THE COURT: The motion is denied.
20 Objection and exception are noted for the record.

21 MR. COLYER: And I have one other
22 question, Your Honor, while I finish this series.

23 THE COURT: Yes, sir.

24 Q. Judge Thompson, have you been a practicing member
25 of the local bar or a judicial member of the judicial

1 district that included Cumberland County for a sufficient
2 period of time and based upon your observations have had an
3 opportunity to learn or know the reputation in this community
4 for the pertinent character trait of equal treatment of all
5 races with respect to jury selection of Margaret Buntie Russ?

6 A. Yes.

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Objection is noted for the
9 record. It's overruled.

10 MR. HUNTER: Motion to strike.

11 THE COURT: Yes, sir. Motion to
12 strike is denied. Exception is noted for the record.

13 Go ahead, Mr. Colyer.

14 MR. COLYER: That was my question, Your
15 Honor.

16 THE COURT: Okay. That's what I
17 thought, but I wanted to make sure.

18 MR. COLYER: Yes, sir.

19 Q. And what is that ----

20 A. She has the ----

21 MR. HUNTER: Objection to the question,
22 Your Honor.

23 THE COURT: The objection is noted.
24 It's overruled, and exception is noted for the record.

25 [Pause.]

1 THE COURT: You may answer, sir.

2 A. She ----

3 THE WITNESS: Thank you, Your Honor. I
4 was trying to -- to remember where we were. The -- there's
5 been so many objections ----

6 Q. Sir, we were dealing with the issue of ----

7 A I understand.

8 Q. ---- equal treatment of races in jury selection by
9 Ms. Russ.

10 A. That has never been a factor, and she has the
11 reputation -- extremely good reputation for that and -- in
12 matters that I've dealt with her in trials -- that I'm aware
13 of, whether I was the trial judge or whether there were other
14 trial judges involved -- she has an extremely good reputation
15 for following the rules and -- and the -- not allowing -- not
16 having any -- as far as personal prejudice that would affect
17 the trial of a case.

18 MR. COLYER: Thank you, sir.

19 MR. HUNTER: Motion to strike, Your
20 Honor.

21 THE COURT: Motion to strike is
22 denied. Objection and exception are noted for the record.

23 Q. And, Judge Thompson, with respect to the case of
24 the State of North Carolina versus John Davis McNeil, the
25 three jurors that I asked you about in relation to the trial

1 transcripts, did you -- at the time of your questioning with
2 respect to those transcripts, based upon your review, did you
3 recognize Mr. Eddie Anderson's name, Mr. Rodney Berry's name
4 or Ms. Linda Montgomery's name as the names of the three
5 jurors that were peremptorily struck by the State in that
6 case as -- represented as black jurors?

7 MR. HUNTER: Objection.

8 THE COURT: The objection is
9 sustained. The State's objection and exception are noted for
10 the record.

11 Q. Sir, with respect to the case of State of North
12 Carolina versus Quintel Martez [sic] Augustine, based upon
13 your preparation and your review of the trial transcripts,
14 did you recognize the names of Ernestine Bryant, Bardel Gore,
15 Ronald Williams, William Miller and Sharon Bryant as being
16 the names of the five peremptorily struck black jurors in
17 that case?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: The objection is
20 sustained. The State's objection and exception are noted for
21 the record.

22 Q. And, sir, during your review of the trial
23 transcripts in relation to each of those eight jurors, three
24 in State of North Carolina versus John Davis McNeil and five
25 in the State of North Carolina versus Quintel Martinez

1 Augustine, do you recall having read reasons in the
2 transcript based upon answers of questions by the State which
3 would have resulted in a peremptory strike that would not
4 have involved the fact of their race but would have been
5 race-neutral?

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: The objection is
8 sustained. The State's objection and exception are noted for
9 the record.

10 MR. COLYER: Judge, if I could have
11 just a moment -- Judge Weeks, I think that might be the
12 conclusion of my questions of Judge Thompson.

13 THE COURT: Yes, sir.

14 [Pause.]

15 THE COURT: Do you need some more
16 water, sir?

17 THE WITNESS: No. I'm doing fine.
18 Thank you, Your Honor.

19 MR. COLYER: Your Honor, may I
20 approach, Mr. Hunter?

21 THE COURT: Yes, sir.

22 [Pause.]

23 MR. COLYER: Judge, may I approach,
24 Judge Thompson?

25 THE COURT: Yes, sir.

1 [Pause.]

2 MR. COLYER: Can I have another
3 sticker, please, ma'am [retrieving State's exhibit stickers
4 from Madam Court Reporter]? Thanks you.

5 [Pause.]

6 MR. COLYER: 77?

7 MADAM CLERK: 77.

8 [Pause.]

9 Q. Judge Thompson, I'm going to represent to you that,
10 previously, we turned over copies to the defense of the
11 material that you gave to us in relation to your preparation
12 here.

13 MR. COLYER: Judge, I apologize. I
14 don't have copies of that. Judge Thompson has indicated
15 earlier what it was that he gave us, and I'd just like to
16 have this identified for the record.

17 THE COURT: Yes, sir.

18 Q. Sir, I'm going to hand you your notebook in case
19 you need to compare any of these documents; and, I will tell
20 you that I have removed your handwritten notes and made them
21 the first three pages of the exhibit that's now marked for
22 identification as State's Exhibit 77 and all the other pages
23 of the exhibit are as they were copied from your notebook,
24 those typed portions. Would you take just a moment, sir, to
25 look at that [handing the exhibit to the witness] and see if

1 we have included in State's Exhibit 77 the material that you
2 gave us based upon your review of your experience as a trial
3 judge dealing with capital cases for our information.

4 [Pause.]

5 MR. HUNTER: I am going to object to
6 the question, Your Honor.

7 THE COURT: Yes, sir. Well, my
8 understanding -- and correct me if I'm wrong -- while Judge
9 Thompson is reviewing those materials -- this is being -- the
10 State is offering these materials as a part of its offer of
11 proof?

12 MR. COLYER: It is, Judge; and, just to
13 ----

14 THE COURT: Okay.

15 MR. COLYER: ---- because we had given
16 it to the defense ----

17 THE COURT: Yes, sir.

18 MR. COLYER: ---- as part of the
19 discovery and it was material that Judge Thompson relied upon
20 in terms of his preparation for testimony here ----

21 THE COURT: Yes, sir.

22 MR. COLYER: ---- just to close the
23 loop so to speak and -- and show what this exhibit ----

24 THE COURT: Yes, sir.

25 MR. COLYER: ---- what his preparation

1 material included.

2 THE COURT: The objection is
3 essentially on the same grounds, Mr. ----

4 MR. HUNTER: Yes, Your Honor.

5 THE COURT: ---- Hunter, Mr. Jay --
6 James Ferguson, Jay Ferguson -- the objection is sustained.
7 It's being received for purposes of the State's offer of
8 proof in this case.

9 A. It appears to be copies of my notebook, very
10 loosely note -- noted notes so -- to assist me in any
11 testimony. I had no idea what I was going to be asked ----

12 Q. Yes, sir.

13 A. ---- when I came here, so I was trying to refresh
14 my recollection as to what ----

15 Q. And, for the record, State's Exhibit 77 is the
16 material that you put together based upon your preparation
17 and gave to the State; is that correct?

18 A. Yes.

19 Q. And, earlier ----

20 A. I didn't put it together for that reason. I -- I
21 put it together to help me ----

22 Q. Yes, sir.

23 A. ---- be a little more aware of the particular cases
24 I was involved in.

25 MR. HUNTER: Objection, as to that,

February 13, 2012

1 Your Honor.

2 THE COURT: The -- the objection is
3 sustained.

4 Q. And, earlier, I believe I asked you, for the
5 record, if we, the State, gave you some information for your
6 preparation; and, I believe you said you had a copy of an
7 affidavit that I had prepared, as well as the trial
8 transcript, the jury selection, for both cases and, in
9 addition, one of the two cases, you had the trial transcript
10 for the substantive evidence that was presented at the trial;
11 is that correct?

12 A. That's correct. You gave me -- I was given a disk.

13 Q. A disk.

14 MR. COLYER: Judge, at this time, the
15 State would move to introduce for purposes of the record all
16 of the materials that we have been referring to this morning
17 with Judge Lock, Judge Jenkins and now Judge Thompson. I
18 think it goes back to number 50 ----

19 MADAM CLERK: Three.

20 MR. COLYER: ---- 53 up through ----

21 THE COURT: That would be 53 through
22 77?

23 MR. COLYER: Yes, sir.

24 THE COURT: Okay; and, again, this is
25 being offered as part of the State's offer of proof in this

1 case.

2 MR. COLYER: That's correct, Your
3 Honor.

4 THE COURT: It's received for that
5 purpose. Objection previously made -- objection previously
6 made deemed renewed in apt time. They're sustained for
7 purposes of them being admitted for substantive purposes.
8 They're part of the State's offer of proof in this case. The
9 defendant objects and excepts for the record.

10 MR. HUNTER: Thank you, Your Honor.

11 THE COURT: Yes, sir.

12 MR. COLYER: And, with that, Your
13 Honor, that's all the questions that I have at this time.

14 Thank you, Judge Thompson, for your time.

15 Thank you, Judge Weeks.

16 THE COURT: Any questions, Mr. Hunter?

17 MR. HUNTER: Just one little minute,
18 Your Honor.

19 THE COURT: Yes, sir. Yes, sir.

20 [Pause.]

21 MR. HUNTER: No, Your Honor. No
22 questions. Thank you, Judge.

23 THE COURT: Same reservations as to
24 Judge Thompson, released for our purposes right now?

25 MR. COLYER: Yes, Your Honor, please.

1 THE COURT: Okay. Thank you, sir.
2 You're -- you're free to go. Thank you, sir.

3 THE WITNESS: Your Honor, I have one
4 question. May I address the Court?

5 THE COURT: Yes, sir.

6 THE WITNESS: I'm not sure of the
7 procedure for the proffer. Does that take place at a
8 subsequent time?

9 THE COURT: We're -- we're in the
10 process of attempting to work that out. One of the things
11 that I understand is being taken into account are the
12 schedules of the various folks involved. I don't have that
13 information. I'm confident Mr. Colyer and Mr. Rob Thompson
14 are in the process of attempting to work that out. So, I
15 guess your -- your question is best directed to them because,
16 if you've got plans, they probably need to know about those
17 plans, sir.

18 THE WITNESS: They will be the only ones
19 present for the taking of the proffer?

20 THE COURT: That's -- that's my
21 understanding.

22 THE WITNESS: And the petitioners will
23 not be present?

24 THE COURT: That's my understanding.
25 That's the process that has been agreed upon and -- and

1 correct me if I'm wrong. My understanding is that's largely
2 because of the nature of the [indiscernible], so to speak,
3 the offer of proof ----

4 MR. HUNTER: We -- we really -- however
5 the State wants to make their offer, they can do it in
6 writing. They can do it ----

7 THE COURT: Any way they want to.

8 MR. HUNTER: ---- any way they want.

9 MR. COLYER: And, Your Honor ----

10 THE COURT: That's my understanding,
11 sir.

12 MR. THOMPSON: Your Honor, just for the
13 record, we -- we have objected to having to do it by that, so
14 I wanted just to clarify. Your Honor has used the word
15 agreement, and I want to make sure it was clear for the
16 record we have objected to doing the offer of proof in
17 writing. We argued at length, honestly, a number of times
18 about doing that as live testimony. So, to the extent that
19 the agreement is based on the Court's ruling -- after the
20 Court's ruling -- you have -- you have ruled has to be done
21 in writing, that is the way we're going to do it. I wanted
22 to make sure the record was clear that the State has not --
23 the State has not agreed ----

24 THE COURT: Well, let -- let -- let's
25 back up and -- and talk about that for ----

1 MR. THOMPSON: Yes, sir.

2 THE COURT: ---- for a moment. What -
3 -- what's your position on that, folks, in terms of how it's
4 being characterized now?

5 MR. HUNTER: Your Honor, as -- as I
6 understand, you decided, for the same reasons that they
7 couldn't present live testimony, it was not appropriate for
8 them to present live ----

9 THE COURT: That ----

10 MR. HUNTER: ---- public ----

11 THE COURT: That was my recollection
12 and ----

13 MR. HUNTER: ---- offer of proof.

14 THE COURT: ---- and that's ----

15 [The Court and Mr. Hunter spoke over one another.]

16 MR. HUNTER: And, so, how -- but how
17 they would make the offer of proof ----

18 THE COURT: Yes, sir.

19 MR. HUNTER: ---- other than that ----

20 THE COURT: Yes, sir.

21 MR. THOMPSON: That's -- that's ----

22 MR. HUNTER: ---- it was up to them.

23 MR. THOMPSON: That's the clarification
24 I'm making, Judge.

25 THE COURT: Okay.

1 MR. THOMPSON: Your Honor ----

2 THE COURT: Okay.

3 MR. THOMPSON: ---- has ruled, over our
4 objection, that that offer of proof be required to be in
5 writing. Our objection was that it not be live, that it be
6 in writing. Insofar as Your Honor has ruled that it be in
7 writing, yes, we have decided ----

8 THE COURT: Okay.

9 MR. THOMPSON: ---- and agreed to do that
10 process by quasi deposition.

11 THE COURT: We're ----

12 MR. THOMPSON: I just wanted to make sure
13 that the record was clear that ----

14 THE COURT: I appreciate that. We're
15 ----

16 MR. THOMPSON: Yes, sir.

17 THE COURT: We're all on the same
18 page. I just wanted clarification for purposes of the
19 record.

20 MR. THOMPSON: Yes, sir.

21 MR. COLYER: And, to answer Judge
22 Thompson's question, Your Honor, we do anticipate there will
23 be a -- a preservation mode by way of a court reporter. So,
24 it would be a representative of the State, Judge Thompson and
25 the court reporter, so that it would be preserved in writing

1 as his words as opposed to us doing a synopsis or something
2 like that.

3 THE COURT: Yes, sir. Yes, sir. So,
4 I'm not sure that any of us have answered your question, sir.

5 THE WITNESS: I think my question's been
6 answered.

7 THE COURT: Okay. All right.

8 MR. COLYER: And may Judge Thompson now
9 be excused, Your Honor?

10 THE COURT: Absolutely. Thank you,
11 sir.

12 THE WITNESS: Thank you, Your Honor.

13 MR. COLYER: Thank you, sir.

14 [The witness departed the courtroom.]

15 MR. COLYER: Judge, may -- if I could
16 have a moment to get these out of the way.

17 THE COURT: Yes, sir.

18 MR. THOMPSON: Your Honor, a question of
19 timing, our next witness will be our last witness ----

20 THE COURT: Okay.

21 MR. THOMPSON: ---- Doctor Cronin. He is
22 available and -- in a -- in a room in our office.

23 THE COURT: Okay.

24 MR. THOMPSON: I expect his direct
25 testimony to last in the neighborhood of a half an hour.

February 13, 2012

1 Obviously, I have no expectation on cross; but, would Your
2 Honor want to go forward now or take a break, come back
3 earlier?

4 THE COURT: Folks?

5 MR. JAMES FERGUSON: It doesn't matter. We're
6 satisfied any way the Court and counsel wish to do.

7 THE COURT: All right. Let's go --
8 you okay, ma'am? Do you need a short break?

9 MADAM COURT REPORTER: No, thank you.

10 THE COURT: All right. It's 25 to
11 1:00. Let's go forward.

12 MR. COLYER: Judge and -- for the
13 record, I'm handing to Ms. Bain State's Exhibit 68 through 77
14 that Judge Johnson referred to in his testimony.

15 THE COURT: Okay.

16 [Pause.]

17 MR. THOMPSON: Your Honor, what ----

18 MR. JAMES FERGUSON: Your Honor -- I'm sorry.
19 I assume, if they do go forward with direct ----

20 THE COURT: We -- we'll ----

21 MR. JAMES FERGUSON: ---- a half hour, 45
22 minutes, then we will have a lunch break?

23 THE COURT: Well -- I mean, the
24 suggestion -- so that we can minimize disruption -- we can go
25 ahead and take a short lunch break now, come back and go

1 forward, complete everything and be done.

2 MR. THOMPSON: I don't have a preference.

3 I just -- I know that it's ----

4 THE COURT: All right. Do you all

5 want to be heard on that ----

6 [The Court and Mr. Thompson were speaking over each other.]

7 MR. THOMPSON: [Indiscernible] -- 25 to

8 1:00 ----

9 THE COURT: ---- Mr. Hunter, Mr. James

10 Ferguson and Jay Ferguson?

11 MR. JAMES FERGUSON: Well, I think the only

12 position we take, Your Honor -- I mean, we assume that, if

13 we're close in the time parameters that we talked about, we

14 would finish that witness today ----

15 THE COURT: Yes, sir.

16 MR. JAMES FERGUSON: ---- either way.

17 THE COURT: Yes, sir.

18 MR. JAMES FERGUSON: And we had planned our

19 rebuttal evidence for tomorrow.

20 THE COURT: Yes, sir.

21 MR. JAMES FERGUSON: So, we don't have a

22 witness ----

23 THE COURT: And I anticipated that.

24 MR. JAMES FERGUSON: ---- available this

25 afternoon.

1 THE COURT: And we will certainly
2 accommodate you on -- in that regard.

3 MR. JAMES FERGUSON: Yes, sir.

4 THE COURT: We'll start tomorrow
5 morning.

6 MR. JAMES FERGUSON: Yes, sir. I just wanted
7 to be clear we didn't have a witness ready to go this
8 afternoon.

9 THE COURT: All right.

10 MR. JAMES FERGUSON: So, the time -- this
11 witness' testimony will take, at the most, a couple of hours.

12 MR. THOMPSON: Depending on the length of
13 cross.

14 MR. JAMES FERGUSON: It all depends on cross.
15 It won't be more than a couple of hours.

16 MR. COLYER: I'll be glad to go get
17 Doctor Cronin so we can start now, if it's agreeable with
18 everyone.

19 THE COURT: Okay. Yes, sir. Okay.

20 [Mr. Colyer departed the courtroom.]

21 [Pause.]

22 [Mr. Colyer and the witness entered the courtroom.]

23 MR. THOMPSON: Your Honor, please the
24 Court, the State of North Carolina calls Doctor Christopher
25 Cronin.

1 THE COURT: All right. If you will
2 raise your right hand, please.

3 [The witness did as directed and was sworn.]

4 THE COURT: If you will, come around
5 and have a seat.

6 [The witness approached.]

7 THE COURT: Would you like some water,
8 sir?

9 THE WITNESS: I'm good, actually. Thank
10 you.

11 THE COURT: Okay.

12 MR. THOMPSON: Madam Clerk, we're at 78
13 -- is the next number ----

14 MADAM CLERK: Yes, sir.

15 MR. THOMPSON: ---- is that correct?

16 THE COURT: Once you're seated, sir,
17 if you will, state and then spell both first and last name
18 for the court reporter.

19 [The witness seated himself in the witness stand.]

20 THE WITNESS: Sure. Christopher Cronin,
21 C-H-R-I-S-T-O-P-H-E-R, C-R-O-N-I-N.

22 THE COURT: Thank you, sir.

23 MR. THOMPSON: May I have a second,
24 Judge?

25 THE COURT: Yes, sir.

February 13, 2012

1 [Pause.]

2 **CHRISTOPHER CRONIN, having been first duly sworn, was called**
3 **as a witness by the State and testified as follows on DIRECT**
4 **EXAMINATION conducted by MR. ROB THOMPSON:**

5 Q. Doctor Cronin, how are you employed, sir?

6 A. Say again.

7 Q. How are you employed sir?

8 A. I'm an Assistant Professor at Methodist University.

9 Q. How long have you been so employed?

10 A. Three and a half years there.

11 Q. Well, let's back up. What year did you graduate
12 high school, sir?

13 A. 1997.

14 Q. Where'd you go from there, sir?

15 A. I went to St. Michael's College in Burlington,
16 Vermont, for undergrad and graduated there 2001.

17 Q. What kind of degree did you have in 2001 from that
18 -- from that ----

19 A. Political Science and Economics.

20 Q. And where did you go from there, sir?

21 A. I went to grad school at the University of
22 Massachusetts in Amherst.

23 Q. When did you start there, sir?

24 A. The year 2002.

25 Q. Did you complete a program at the University of

February 13, 2012

1 Massachusetts?

2 A. I did indeed, yes, with a PhD and graduated,
3 finally, in 2009, though I was already employed by Methodist
4 at that point.

5 Q. Okay. What did you received a PhD in, in 2009?

6 A. Political Science, specifically American Politics.

7 Q. Did you -- have you taught in other places since
8 you've gotten your PhD and during your time in your PhD
9 program?

10 A. I sure have. I taught a few places as an Adjunct,
11 Greenfield Community College, Eastern Connecticut State
12 University, some at U-Mass while I was a grad student there.

13 THE COURT: May I interrupt? Did I
14 understand your PhD was in Political Science primarily
15 American Politics?

16 THE WITNESS: Yes, sir.

17 THE COURT: Okay. Yes, sir.

18 Q. Now, while we're there, let's -- let's describe
19 exactly what that is, Political Science with a concentration,
20 if you will, in American Politics. Can you describe what --
21 what exactly that means?

22 A. Sure. There's -- there's a few different pieces of
23 Political Science. There's American, Comparative,
24 International Relations, Political Theory; and, some places,
25 Constitutional Law is a separate piece; and, generally, you

1 have to specialize in at least two of those, take some
2 comprehensive exams, eventually write a dissertation in one
3 of those fields.

4 Q. And your chosen field?

5 A. American -- I also -- I took my exams in
6 Comparative, but my PhD's in American Politics.

7 Q. What kind of things are kind of covered under the
8 umbrella that's American Politics in the Political Science
9 arena?

10 A. Depending on the school of thought, there's
11 Historical Development, how the system developed from the
12 Constitutional era. There is Basic Political Ideology, how
13 people come to their political decisions. There is Voting
14 Behavior and, then, some more specific stuff depending on how
15 you specialize.

16 Q. And what kind of thing -- what kind of things make
17 up kind of the body of knowledge that would -- where would
18 you get your body of knowledge when it comes to -- to the
19 items that you've just described?

20 A. Sure. Political Science is a Social Science, so
21 some of it is field research. Some of it is historical in
22 nature. Some of it is survey data, interview data; and, as a
23 discipline, we draw from some of our own methodology, but
24 also from sociology, economics, history.

25 MR. THOMPSON: May I approach the

February 13, 2012

1 witness, Judge?

2 THE COURT: Yes, sir.

3 [Pause.]

4 MR. THOMPSON: 78, Your Honor, that's
5 your copy [handing the exhibit to the Court].

6 THE COURT: CV?

7 MR. THOMPSON: Yes, sir.

8 Q. Doctor, I'm showing you what's been marked for
9 purposes of identification as State's Exhibit Number 78
10 [handing the exhibit to the witness]. Are you familiar with
11 State's 78?

12 A. I am.

13 Q. What is State's Exhibit Number 78?

14 A. This is my resume or CV.

15 Q. Did you preparation this resume in preparation for
16 your testimony today?

17 A. I did.

18 Q. Does it contain some of your teaching experience
19 and education that you've already testified about?

20 A. Yes, sir.

21 Q. Does it also contain, on page 2, the research and
22 professional contributions you've made?

23 A. Yes.

24 MR. THOMPSON: Could I have just a
25 moment, Judge?

1 THE COURT: Yes, sir.

2 [Pause.]

3 MR. THOMPSON: Please the Court, the
4 state would tender Doctor Cronin as an expert in American
5 Politics.

6 THE COURT: Okay. Folks?

7 MR. JAMES FERGUSON: If Your Honor please, we'd
8 like to voir dire this witness.

9 THE COURT: Yes, sir.

10 MR. JAMES FERGUSON: The tender is as a --
11 suggesting -- the field -- it would be helpful to the Court
12 ----

13 THE COURT: Yes, sir.

14 [Pause.]

15 **VOIR DIRE EXAMINATION was conducted by MR. JAMES FERGUSON:**

16 Q. Doctor Cronin, I -- I have a copy of your resume,
17 which has been admitted -- I believe -- as State's Exhibit
18 Number 78. Do you have that in front of you, sir?

19 A. Yes, sir.

20 Q. Now, may I assume that this resume includes all of
21 the information about your background and your experience,
22 that you consider to be significant for your purposes in
23 being here today; is that correct?

24 A. Yes, sir.

25 Q. And, if I look at this correctly, you have one page

1 -- page 1 of your resume deals primarily with your education
2 -- educational background and teaching experience; is that
3 correct?

4 A. True.

5 Q. And the second page contains a list of your
6 research and professional contributions?

7 A. Yes.

8 Q. Do you have any additional research or professional
9 contributions that are not listed here?

10 A. No.

11 Q. You understand, don't -- don't you, Doctor Cronin,
12 that this case involves the North Carolina Racial Justice
13 Act?

14 A. I do.

15 Q. Prior to your involvement in this case, had you
16 done any research concerning the Racial Justice Act?

17 A. No.

18 Q. Then, let me just understand a few things here. I
19 take it you've read Racial Justice Act?

20 A. Yes.

21 Q. Apart from reading the Racial Justice Act, did you
22 do any further research on the Racial Justice Act?

23 A. Yes, as requested by the prosecution.

24 Q. And we'll come to that. Have you ever published
25 anything yourself on race and jury selection in capital

1 cases?

2 A. No, sir.

3 Q. Have you ever published on race and capital cases
4 generally speaking, not just selecting a -- jury selection?

5 A. No, sir.

6 Q. Have you ever published on race and the Criminal
7 Justice system?

8 A. No.

9 Q. Have you ever published on the Criminal Justice
10 system?

11 A. Not specifically, no.

12 Q. Have you ever published on race in general?

13 A. I have dealt with race in some of the publications,
14 but not as the main topic, no.

15 Q. Which publications did you deal with race ----

16 A. My dissertation -- I eventually came -- was
17 published -- dealt with the Social Gospel Movement in
18 American Politics and there's a racial [indiscernible] to
19 that.

20 THE COURT: I'm sorry. That was
21 Social Gospel ----

22 THE WITNESS: Social Gospel, it's a
23 religious movement.

24 THE COURT: Okay.

25 Q. And -- what specifically on race did you publish

1 on?

2 A. As -- as it related to religion in early 20th
3 Century American.

4 Q. Race and religion?

5 A. Yes.

6 Q. And that was the extent of your treatment of race,
7 in your dissertation; is that correct?

8 A. Correct.

9 Q. Have you -- have you done any publishing on
10 statistical methodology?

11 A. I have used some statistics in my research, yes,
12 but ----

13 THE COURT: Sir?

14 A. ---- but I -- I used some statistics in my
15 research, I'm not published on the topic of statistical
16 analysis.

17 Q. And have you had training in statistical analysis?

18 A. Yes.

19 Q. And tell me what that training is.

20 A. As part of a PhD program, a couple methodology
21 courses that teach quantitative methodology, how to conduct,
22 how to understand statistics significance.

23 Q. And maybe you answered this -- have you published
24 on statistical methodology?

25 A. No.

1 Q. And, in the methodology that you -- the couple of
2 courses that you took, did you deal with the statistical
3 method of regression and statistical analysis?

4 A. Yes, sir. I -- I teach that as well?

5 Q. Sir?

6 A. I teacher that as well. I teach a methodology
7 course.

8 Q. Now, what about empirical studies, have you
9 yourself done any empirical studies?

10 A. Mostly secondary analysis.

11 Q. And, when you say secondary, you mean, by that, you
12 have read some empirical studies?

13 A. Other peoples' primary research, right.

14 Q. But you have not done any yourself; is that
15 correct?

16 A. I've done some interviews, but that's not the bulk
17 of what I've done, no.

18 Q. Yes, sir; and, you haven't got any legal training,
19 have you?

20 A. No.

21 Q. And you haven't done any training as it relates to
22 Criminal Justice, I take it?

23 A. No.

24 Q. And you haven't done any training as it relates to
25 race in Criminal Justice -- I take it; is that correct?

1 A. No.

2 Q. You're saying no you have not done ----

3 A. No, I have not done.

4 Q. What was it you were asked to do in this case,
5 Professor?

6 A. I was asked to give a background about race and
7 political ideology as it relates, most specifically, to
8 capital punishment.

9 Q. You were asked to give a background on that?

10 A. Yeah. Do some research -- essentially, literature
11 review, find out what the discipline has to say about race as
12 it relates to death penalty and political ideology in
13 general.

14 Q. When were you asked to do it?

15 A. I believe I was first contacted end of October,
16 November, sometime around there.

17 Q. Do you know how it is you happened to be called
18 upon to do it?

19 A. I believe they contacted the chair of my department
20 who doesn't do much active research, so he pointed them in my
21 direction.

22 Q. I'm sorry. Based on your active research?

23 A. Right. I actively do research, and my -- the chair
24 of my department does a little more administrative matters.
25 He still teaches, but he doesn't research as often. Plus, I

February 13, 2012

1 think I would be interested.

2 Q. If I understand that, then, he pointed them in your
3 direction because you do research, but not because of any
4 particular topic you've done research on; is that right?

5 A. Aside from the fact that I'm the American -- at
6 Methodist, that I teach the American Political Science
7 courses.

8 Q. Let me review with you just for a moment your
9 publications and research.

10 A. Sure.

11 Q. On page 2 of your resume -- Exhibit 78 -- I'm
12 counting one, two three, four, five, six, seven, eight, nine,
13 ten -- eleven references here on the research and
14 professional contributions; is that correct?

15 A. Yes.

16 Q. And, apart from the one you've already mentioned,
17 regarding the social gospel article that you did, none of
18 these publications have any direct bearing on any issues in
19 this case, does it?

20 A. That's correct.

21 Q. Now, there's one publication here -- I'll look for
22 -- the one, two, three, four -- the third -- the fourth one
23 down, Current Issues in Justice and Politics, where would
24 that publication from?

25 A. That's from the University at Southern Utah.

1 Q. And you're on the board of that publication?

2 A. That's right.

3 Q. And you've been on the board since June of 2009?

4 A. Yes.

5 Q. On the Editorial [inaudible] ----

6 A. Yes.

7 Q. Could that be -- the titling, could that be an
8 error in that title? You say Current Issues in Justice and
9 Politics. I looked for that and didn't find a publication
10 called Current Issues ----

11 A. You might be right. That might be critical instead
12 of current. That might be an error.

13 Q. I'm sorry?

14 A. Critical -- it may be critical.

15 Q. Oh, the current may be ----

16 A. Might -- might be critical, yes, sir.

17 Q. Now, then -- so, do I understand you've done some
18 general research in -- at the request of the prosecution
19 regarding race and the death penalty; is that correct?

20 A. Yes, sir.

21 Q. You haven't done any research specifically directed
22 to jury selection in capital punishment -- in death penalty
23 cases in North Carolina, have you?

24 A. I have not.

25 Q. You haven't done any research on jury selection and

1 capital cases in general, have you?

2 A. I have not.

3 Q. So, you are here then to offer the benefit of what
4 -- or, whatever benefit that would be -- in your research on
5 the death penalty and race in general; is that correct?

6 A. Yes, and ideology in general.

7 Q. Yes, sir.

8 MR. JAMES FERGUSON: Your Honor, please, I -- I
9 submit there is not an area of expertise that would fit under
10 Rule 702.

11 THE COURT: That's what I'm looking
12 at; and, I mean absolutely no disrespect to the witness.

13 THE WITNESS: Yes, sir.

14 THE COURT: When I understood that the
15 area of expertise was American Politics, I flipped to page 2
16 of the CV.

17 THE WITNESS: Yes, sir.

18 THE COURT: The question that may help
19 us out in terms of expediting the procedure -- and I'm not
20 attempting to cut you off -- written report by the witness?

21 MR. THOMPSON: Yes, sir.

22 THE COURT: May I see the written
23 report?

24 MR. THOMPSON: Yes, sir.

25 THE COURT: It's now five minutes till

1 1:00. What I propose is as follows. Let me review the
2 written report. I'm -- dangerous thing -- assuming that any
3 opinions or conclusions would be contained in the written
4 report?

5 MR. THOMPSON: Yes, sir.

6 THE COURT: Okay. All right. Do you
7 all have any objection to my reviewing these materials?

8 MR. JAMES FERGUSON: Not at all, Your Honor.
9 We would encourage you to do it.

10 THE COURT: Okay. All right.

11 Thank you, sir. You may step down for the
12 moment.

13 [The witness withdrew to the spectator area.]

14 THE COURT: We're going to take the
15 lunch recess. Two o'clock okay, folks?

16 MR. THOMPSON: Will I be given an
17 opportunity to ----

18 THE COURT: Oh, absolutely.

19 MR. THOMPSON: ---- voir dire?

20 THE COURT: But I want to put it in
21 context after I read the report.

22 MR. THOMPSON: Yes, sir.

23 THE COURT: And I thought I said, at
24 the outset, I'm going to give you the opportunity to be
25 heard.

1 MR. THOMPSON: I wanted to make sure of
2 that, Judge. I just heard his side of voir dire. I hadn't
3 got ----

4 THE COURT: No. No. No, sir. I'm
5 going to give you the opportunity to do that; but, for
6 purposes of me understanding what may be developed on voir
7 dire ----

8 MR. THOMPSON: Yes, sir.

9 THE COURT: ---- by you ----

10 MR. THOMPSON: Yes, sir.

11 THE COURT: ---- this will be helpful
12 to the Court.

13 MR. THOMPSON: It would be, Judge.

14 THE COURT: Okay. All right. So, two
15 o'clock, folks. Thank you. We're down till then
16 [The hearing recessed at 12:55 p.m. and reconvened at 2:00
17 p.m., February 13, 2012, with all pertinent parties present
18 prior to the recess once again present, to include the
19 defendant.]

20 THE COURT: Okay. Let the record
21 reflect all counsel are present. The defendant is present.
22 More specifically, Ms. Stubbs is now present in the
23 courtroom; and, again, good afternoon, Ma'am.

24 MR. THOMPSON: We dealt with her absence
25 on Friday; did we not?

February 13, 2012

1 THE COURT: We did, and we dealt with
2 it again this morning. Okay.

3 MR. JAMES FERGUSON: If Your Honor, please,
4 with the Court's permission, I have just a couple other
5 questions that I wanted to ask.

6 THE COURT: Absolutely.

7 THE COURT: Mr. Cronin, if you would,
8 come up and retake the witness stand, sir. You remain under
9 oath.

10 [The witness approached.]

11 THE COURT: Would you like some water,
12 sir?

13 THE WITNESS: I'm good. Thanks.

14 [The witness seated himself in the witness stand.]

15 THE COURT: Okay. Yes, sir, Mr.
16 Ferguson.

17 MR. JAMES FERGUSON: Thank you, Your Honor.

18 **VOIR DIRE EXAMINATION continued conducted by MR. JAMES**

19 **FERGUSON:**

20 Q. Doctor Cronin, you told me that you reviewed the
21 Racial Justice Act; is that correct?

22 A. Correct.

23 Q. What are the -- apart from the articles that are
24 referenced in your report, what materials were you given
25 relative to this particular case, Marcus Robinson's case, if

February 13, 2012

1 any?

2 A. Nothing specific to his case other than, as a
3 secondary point of research, looking into the funding for the
4 Michigan state report.

5 Q. Yes, sir. I'll come to that in a moment.

6 A. okay.

7 Q. But you weren't provided any transcript of his
8 trial, were you?

9 A. I believe there was an option for that to be made
10 available to me. I did not look at it.

11 Q. You didn't consult that?

12 A. Right.

13 Q. You didn't get any excerpts of any material about
14 what particular jurors said during the jury selection
15 process, did you?

16 A. I did not.

17 Q. So, just so I'm sure then -- clear then -- you were
18 asked to generally research race and the death penalty and to
19 report back, I suppose, to the prosecution, the results of
20 your study; is that correct?

21 A. Correct.

22 Q. And you then read some articles concerning race and
23 -- and the death penalty; is that right?

24 A. Yes.

25 Q. And, looking at your report, am I correct that your

1 report is essentially a summary of some of the literature
2 that you read; is that correct?

3 A. I would characterize it as a sum of what the
4 majority of discipline has to say on these few topics as
5 relates to ideology in general, as relates to partisanship,
6 as it relates to race and the death penalty, yes.

7 Q. Yes, sir; and -- and what I'm trying to be clear
8 about -- you -- you -- your -- your report, your expert
9 report, consists of seven topic areas ----

10 A. Right.

11 Q. ---- right; and, in each one of these topic areas,
12 you, after doing sort of a survey of what the literature had
13 to say about them, then you wrote --you wrote -- well, the
14 first thing is Political Science as a Discipline. You
15 explained what -- what that was; is that right?

16 A. Yes.

17 Q. And, then, you had a section on Basic Ideology and
18 Race in America; and, that was a summary, so to speak, of the
19 literature you read on the topic of Basic Ideology and Race
20 in America; isn't that right?

21 A. Yes.

22 Q. And, with the third topic here, Partisanship, you
23 read some literature about that and you summarized what you
24 read about that, in -- in item 3; isn't that -- isn't that
25 true?

1 A. Yes, sir.

2 Q. And I won't go down each one of them, but that's
3 what you did in each one of the seven topics that you
4 referenced here in your report; is that correct?

5 A. Yes.

6 Q. So, essentially, although it's topic related, as
7 you've just said, you provided the prosecution with a -- a
8 survey of what some of the literature said; isn't that right?

9 A. Sure. Yes.

10 Q. And you just got -- give a sampling of the various
11 literature that was there; isn't that true?

12 A. Yes. Yes.

13 Q. You didn't offer any summary of how any of this
14 literature affected jury selection in Marcus Robinson's case?

15 A. That's correct.

16 Q. So, if we wanted to know what the literature says,
17 then your paper tells us what some of the literature says?

18 A. I believe so.

19 Q. Yes, sir. Now, you've told us that you had been
20 contacted by the chair of your department; is that correct?

21 A. Yes.

22 Q. Did you know any of the folks on this side of the
23 table before that?

24 A. No.

25 Q. Mr. Thompson or Mr. Colyer?

1 A. No.

2 Q. Anybody with the DAs office?

3 A. No.

4 Q. What about your chair of the department? Did he
5 know of some of these folks?

6 A. Not to my knowledge. I don't think so.

7 Q. You may have answered this already, but let me just
8 be sure about it. You have never done this type of survey
9 before for anything in the Criminal Justice system, correct?

10 A. That's correct.

11 Q. And not on jury selection or -- race and the death
12 -- you've not done this kind of survey before?

13 A. That's correct.

14 Q. I -- your resume didn't speak to this one way or
15 the other, but have you ever appeared in a court to testify
16 as an expert?

17 A. No.

18 Q. So, this is your first foray with the court ----

19 A. Yes, sir ----

20 Q. ---- is that correct?

21 A. Yes.

22 Q. And did you charge these folks something for your
23 services?

24 A. I believe I will be paid, yes, sir.

25 Q. Yes, sir; and, what -- what will you be paid,

1 Doctor Cronin?

2 A. I think the rate is \$200 an hour for the research
3 hours put in.

4 Q. And how much time have you put into it?

5 A. Recent tally, 8, 9 10 hours, somewhere in that
6 range.

7 Q. Yes, sir.

8 A. Yes.

9 Q. And you've done this survey, but you don't hold
10 yourself out as an expert on race and jury selection?

11 A. Not that specifically, no, sir.

12 Q. And I suppose -- I don't know -- does -- does one
13 survey -- I don't know how you all do things [indiscernible],
14 so I -- if you do one survey, does that -- do you then
15 qualify or think of yourself as an expert in the area you do
16 the survey on?

17 A. I think of myself as an expert in surveying the
18 research of Political Science. So, insofar as I -- I
19 understand the discipline. I mean, I could go on ad nauseam
20 for more and more sources. It's -- if it's a conventionally
21 held piece of Political Science -- was that -- I think I'm
22 expert enough to -- to offer the sources to indicate that.

23 Q. Certainly. So, you're -- you're an expert in
24 Political Science research?

25 A. Yes.

1 Q. And that's what you bring to this case; is that
2 right?

3 A. I -- I hope so.

4 Q. Yes, sir.

5 MR. JAMES FERGUSON: That -- that's all I have.

6 THE COURT: Okay. Any questions by
7 the State on voir dire?

8 MR. THOMPSON: Yes, Judge.

9 THE COURT: Yes, sir.

10 **VOIR DIRE EXAMINATION was conducted by MR. ROB THOMPSON:**

11 Q. When you were called by the State of North Carolina
12 and you met with myself and Mr. Colyer in reference to -- to
13 this case, we had a request of you; is that correct?

14 A. Yes.

15 Q. What did we -- what we -- what did we request of
16 you?

17 A. You requested I present a report summarizing what
18 Political Science had to say about race and ideology and how
19 it might pertain to the death penalty through -- through my
20 research.

21 Q. Did we explain the context in which you would be
22 testifying as far as it would be in a hearing involving the
23 Racial Justice Act?

24 A. Yes.

25 Q. Did we discuss with you studies that had been done,

February 13, 2012

1 statistical studies that may or may not have been discussed
2 during this Racial Justice Act here?

3 A. Yes.

4 Q. Did we use the term explanatory factors or some
5 other type paraphrase of that phrase?

6 A. Yes.

7 Q. What kind of things -- when you went about your
8 job, going about the task that we had -- we had asked you to
9 perform, how did you go about doing that?

10 A. Well, initially, I just -- I went about it through
11 some academic search engines, which is my standard beginning,
12 seeing what pops up, what's most recent. If I recognize some
13 of the names, see what their references are. I contacted a
14 few colleagues, a former dissertation advisor who was in the
15 Justice Department, to see if he had any ideas. So, just
16 sort of spread out and see what I could find. I used the
17 reference librarian.

18 Q. Did you have difficulty in finding any Political
19 Science data research, resources on the topic we asked you to
20 look at?

21 A. No.

22 Q. Did you, first -- when you first -- had our
23 conversation in reference to what we had asked of you, did
24 you think you would have some problems?

25 A. No.

February 13, 2012

1 Q. Why is that?

2 A. This is one of the few -- few constants in
3 Political Science, when we talk about demographics; and, that
4 is, some of the -- the concepts included in my report are
5 long-standing for dec -- decades and for the foreseeable
6 future are pretty uncontended concepts in Political Science.

7 Q. Are we -- does part of your research and part of
8 how you went about this duty that we asked you to perform,
9 looking at the opinions, attitudes and beliefs -- beliefs
10 that different demographic groups have about different things
11 in American Politics?

12 A. Yes, indeed.

13 Q. And, in your report, did you start pretty broad and
14 then narrow down the death penalty?

15 A. Yeah. That's typically my approach, and that is
16 what I did.

17 Q. So, is it sufficient to say -- let's see -- you
18 started, in your report, with basic ideology and race in
19 America; is that right?

20 A. Yes.

21 Q. You discussed partisanship?

22 A. Yes.

23 Q. How does that relate to the -- the ----

24 THE COURT: Well, we're getting into
25 the gist of the testimony at this point, and I've got the

1 report of the witness now before the Court.

2 MR. THOMPSON: Yes, sir.

3 THE COURT: So, this -- this -- if I
4 understand correctly, where we are is there is an objection
5 premised on 702.

6 MR. JAMES FERGUSON: Yes, sir.

7 MR. THOMPSON: What -- what it's actually
8 relevant to, Judge, is 702(a)(3). One of the issues is can
9 we get down to how it relates to this case.

10 THE COURT: Well, it -- let me -- let
11 me -- if I may ----

12 MR. THOMPSON: Please.

13 THE COURT: ---- direct your attention
14 to 702(a).

15 MR. THOMPSON: Yes, sir.

16 THE COURT: If scientific technical or
17 other specialized knowledge will assist the trier of fact to
18 understand the evidence or to determine a fact in issue with
19 which the witness is qualified, et. cetera; and, then, we get
20 down into subsections (a)(1), (a)(2) and (a)(3).

21 MR. THOMPSON: Yes, sir.

22 THE COURT: Yes, sir.

23 MR. THOMPSON: Thank you, Your Honor.

24 THE COURT: Okay.

25 Q. Now, did you have any trouble finding sources?

1 A. No, sir.

2 Q. Did you list the sources you found ----

3 A. I listed ----

4 Q. ---- when you prepared your report?

5 A. Yes.

6 Q. The sources that you relied on, do you know how
7 they did their general studies and -- that -- that brought
8 the conclusion to the publication that you relied on?

9 A. There are various methodologies involved. A few of
10 them are survey research. Some of them are interview
11 research. Some of it is cultural [indiscernible], sort of
12 being around and observations; but, it's sort of a wide range
13 of methodology.

14 Q. Let's talk about survey research. Is that normally
15 used in your line of work in Political Science?

16 A. Very common.

17 Q. How is it used especially with ideology and trying
18 to understand public opinion as it relates to policy
19 decisions. So, respondents are given surveys with sort of
20 scales to rate how they feel, what they think about policy,
21 how they self-identify.

22 Q. Do politician use surveys?

23 A. I believe so, yes.

24 [General laughter.]

25 MR. THOMPSON: Maybe not a great example

February 13, 2012

1 here, Judge.

2 THE COURT: No -- no comment, Mr.

3 Thompson.

4 Q. You -- you cited a study by MSU in here; is that
5 correct, in your report?

6 A. Yes. Yes.

7 Q. That a study done by O'Brien, Barbara O'Brien, and
8 Catherine Grosso, 2011, the report on the jury selection
9 study, Michigan State University College of Law?

10 A. Correct.

11 Q. Was that study brought to your attention by us, if
12 you remember?

13 A. Yeah. I believe so.

14 Q. Now ----

15 MR. THOMPSON: Can I have a second?

16 THE COURT: Yes, sir.

17 MR. THOMPSON: For purposes of voir dire,
18 Judge, we don't have any further questions. I suspect there
19 might be some argument coming, but ----

20 THE COURT: Absolutely.

21 MR. THOMPSON: And I'd like an
22 opportunity to be heard.

23 THE COURT: Yes, sir.

24 MR. THOMPSON: For voir dire purposes --
25 unless something comes up, the argument -- we'd like to

1 reopen if something else happens; but, right now, I think we
2 ----

3 THE COURT: Mr. Ferguson?

4 MR. JAMES FERGUSON: If I may just ask one --
5 one other ----

6 THE COURT: Yes, sir.

7 MR. JAMES FERGUSON: I shouldn't say one, but
8 -- one other thing.

9 **VOIR DIRE EXAMINATION was conducted by MR. JAMES FERGUSON:**

10 Q. You just heard prosecution counsel mention the MSU
11 study -- he said was brought to you attention; is that
12 correct?

13 A. Correct.

14 Q. What were you asked to do in relation to the
15 Michigan State University study.

16 A. Initially, it was brought to my attention as one of
17 the pieces of research that is important to the case .
18 Later, I was asked to look into how the study was funded.

19 Q. How it was funded?

20 A. Right.

21 Q. Yes, sir. You don't -- you weren't asked to do
22 that as a part of your expertise as a researcher, were you?

23 A. I -- I think the request there was to -- to see if
24 there were overt political backing to that study.

25 Q. They asked you to do that?

1 A. Other than that, were you asked to do anything with
2 reference to the Michigan State University study?

3 A. No, sir.

4 Q. And you didn't do anything in relation to it other
5 than that; is that correct?

6 A. True.

7 MR. JAMES FERGUSON: Yes, sir. That's all.

8 THE COURT: Anything else?

9 MR. THOMPSON: Nothing on voir dire,
10 Judge.

11 THE COURT: If you will, bear with me.
12 I just need some clarification. I'm looking at page 7, sir,
13 the second full sentence on -- in the paragraph at the top;
14 and, this is -- correct me if I'm wrong -- in reference to
15 the MSU study -- the potential danger with such analysis --
16 referring to the MSU study -- is to make the logical leap
17 from race as statistically significant to race as most
18 significant in the mind and actions of the particular member
19 of the legal process. Did I read that correctly?

20 THE WITNESS: You read it correctly,
21 sir.

22 THE COURT: All right; and, the
23 following sentences -- given the cultural and political
24 dynamics discussed above, the race of a potential juror may
25 simply be a -- and I'm reading it the way it is -- be a

1 variable indicates a larger political ideology. Did I read
2 the correctly?

3 THE WITNESS: Yes, sir.

4 THE COURT: And the last sentence in
5 that paragraph, because of this, it's important to examine
6 individual actions and legal reasoning behind each particular
7 decision. Did I read that correctly?

8 THE WITNESS: You did, sir.

9 THE COURT: Okay; and, that is the
10 upshot of any conclusion that you've got?

11 THE WITNESS: I imagine so.

12 THE COURT: Okay. Anything else?

13 MR. JAMES FERGUSON: I've answered all -- I
14 mean, I've asked all my questions, Judge.

15 THE COURT: Okay.

16 MR. JAMES FERGUSON: I'd like to talk to the
17 Court about it for a minute.

18 THE COURT: All right. Yes, sir.
19 Absolutely.

20 MR. JAMES FERGUSON: Well, Your Honor, insofar
21 as 702 is concerned ----

22 THE COURT: Yes, sir.

23 MR. JAMES FERGUSON: ---- if you examine it,
24 then, based on what the witness has said, he did what the
25 prosecution asked him to do; but, he doesn't bring any

1 scientific technical or other specialized knowledge to the
2 case other than his abilities as a researcher, which I
3 certainly don't question; and, in terms of assisting the
4 trier of the facts in the case, it -- he doesn't bring
5 anything to the understanding of the evidence or in
6 determining a particular fact in issue. That's just not
7 present. So, in order to have something to bring to this
8 case, they need to be -- to be qualified by knowledge --
9 which he has lots of knowledge in research, but it doesn't
10 bring a particular knowledge of anything that is at issue in
11 this case. Skill, he's obviously a skilled researcher, but
12 that skill doesn't translate to anything that would assist a
13 trier of fact in this case. Experience, he has experience in
14 teaching Political Science and he's written several articles
15 basically on religion and Political Science. So, here's a
16 witness who has some -- some expertise in a subject that has
17 no bearing on this case; and, the prosecution, for whatever
18 reason, is trying to elevate his considerable research skills
19 to something that applies to this case, and it doesn't.

20 THE COURT: Okay.

21 MR. JAMES FERGUSON: So, he does -- he just
22 doesn't qualify under 702; and, I think it's interesting to
23 note what the State said they were going to call him for.
24 They said they offered him as an expert in American Politics.
25 That's what they said.

1 THE COURT: Yes, sir.

2 MR. JAMES FERGUSON: And we've talked to the
3 witness, and he's told us that he does research. So, I'm
4 suggesting to the Court, strongly, to -- that he doesn't
5 really qualify under 702. Of course, it's up to Your Honor
6 how to receive that; but, I -- I -- our position is that he
7 doesn't qualify; or, if -- if he -- if the Court chooses to
8 -- to let his testimony in, then we certainly will come back
9 to the Court and talk about the weight to be given to that
10 testimony.

11 THE COURT: Yes, sir.

12 MR. JAMES FERGUSON: Yes, sir.

13 THE COURT: Mr. Thompson.

14 MR. THOMPSON: With all due respect,
15 Judge ----

16 THE COURT: Yes, sir.

17 MR. THOMPSON: ---- I'm not sure why this
18 is unclear, but I, for the record, will spell it out. The --
19 the defense presented evidence that there is a statistical
20 difference between the way black jurors are chosen by the
21 prosecutors.

22 THE COURT: Yes, sir.

23 MR. THOMPSON: And then presented
24 evidence that -- and, during the study, said we looked at a
25 lot of factors, but we couldn't explain it, so it must be

1 race. That's kind of the nutshelling [phonetic] the larger
2 study of the MSU. We looked at all these things. We
3 couldn't figure out anything else other than race. That's
4 all we were left with. Then, they put on witnesses that
5 said, oh, yeah, there's this other thing that's called
6 unconscious racist. So, it must be because the prosecutors
7 dis -- disparity -- tried to explain the disparity by saying
8 we -- that white people gen -- generally tend to prefer white
9 people; and, so, we would kick black people more often from a
10 jury, just kind of the -- the logical argument that they're
11 making and given from the testimony. That's -- the reality
12 of it is -- and what we're trying to present is explanatory
13 factors. As testified by Doctor O'Brien, that there is a
14 correlation between -- that black jurors tend to be against
15 the death penalty in larger numbers than the white jurors are
16 kicked, which would fall exactly in line to the evidence that
17 we presented, that prosecutors are -- there -- there is a
18 disparity between the races and the -- the peremptory
19 challenge. There's also disparity by the defense in that
20 window of people that -- you get beyond cause, but they're
21 hesitant about the death penalty or they're pro death
22 penalty, pushing for the death penalty, would lean for the
23 death penalty; and, in large amounts, at an aggregate level,
24 could be explained in part by their backgrounds, that we
25 would expect larger numbers of white jurors to say I'm for

1 the death penalty, because the polling data says, generally,
2 more often, white people -- the white folks polled would be
3 for the death penalty, would be stronger for the death
4 penalty, would be a proponent of the death penalty, and those
5 are jurors the defense would not like to have on a jury
6 involving capital punishment. So, it is unclear to me why,
7 each time we put a witness on the stand, they shrug their
8 shoulders. It's because they want to stop at numbers,
9 numbers, numbers, numbers; that's it; just stop as soon as
10 you look at that. Explanatory factors explain. They toll --
11 they tell the rest of this story. Numbers cause a question
12 to be asked, and this is one potential explanatory answer to
13 the question. It is certainly relevant in what we're talking
14 about. It would certainly be -- it would assist the trier of
15 fact; that is, Your Honor; and, we were told, from the
16 beginning, let's try the case. You try the case. You try
17 the case -- because you're the one person that gets to hear
18 all this, and you're the one person that gets to decide all
19 of this; and, to -- to tell us, before we begin, not even
20 consider it, would rob the State of some of the evidence that
21 we've elected to present to explain this dispar -- this
22 disparity we've been accused of, and the explanation that
23 they have jumped to and concluded to, it would rob us of the
24 right to a -- to defend ourselves in that -- in the
25 examination that the MSU study has chosen to assume, percent

1 respectfully. So, we're asking you to deny the defendant's
2 motion.

3 THE COURT: Okay. Anything further,
4 Mr. Ferguson?

5 MR. HUNTER: Your Honor, I -- I'll just
6 say this. I don't want to belabor this point, but it is
7 interesting that the State initially has taken the position
8 what's race got to do with it and said race has nothing to do
9 with it. Now, they seem to be suggesting that, well, race
10 does have something to do with it; and, this witness is
11 telling us how race has something to do with it; and, the
12 something to do with it is that -- I think what he's saying
13 now is that black folks don't like the death penalty as much
14 as white folks do and, therefore, the prosecution is somehow
15 justified in coming up with a kind of stark, glaring,
16 stunning statistics that are shown in the Michigan State
17 University study. So, they seem to be trying to have it both
18 ways. When it's convenient, race has nothing to do with it;
19 but, if they've got a witness who'll give them a little bit
20 of race, then they say that witness ought to be allowed to
21 testify. That -- that's what it seems like, Your Honor. So
22 -- and -- and we're not trying to keep their witnesses on the
23 stand because they called them -- off the stand -- because
24 they called them. We're doing our job as lawyers
25 representing Mr. Robinson to -- to make sure, to the extent

1 that we can, that the witnesses who testify, testify within
2 the rules; and, we raised the rule; and, in the comments
3 we've just heard, there actually was no reference to the
4 rule.

5 THE COURT: Well ----

6 MR. COLYER: Judge Weeks ----

7 THE COURT: Yes, sir, Mr. Colyer.

8 MR. COLYER: ---- the rule speaks for
9 itself, and you can apply the rules of what we're talking
10 about here; and, he does have information that he brings to
11 this decision-making process that is expert in its opinion
12 and in its scope that the Court doesn't necessarily have with
13 respect to the survey of the material that he has presented
14 and his conclusions in each one of those subsections based
15 upon his review as it relates to the -- the end question that
16 you mentioned; and, with all due respect to Mr. James
17 Ferguson, what we're talking about here and what we have been
18 talking about is -- is not an explanation based on race. It
19 has never been an explanation based on race. It is an
20 explanation based upon attitudes, opinions and beliefs of the
21 folks who comprise the jury venire, some of whom are white,
22 some of whom are black. We are not trying to justify numbers
23 based on race. What we are trying to do is to explain, as we
24 have through our expert opinion of Doctor Katz and as we're
25 attempting to supplement with the expert opinion of Doctor

1 Cronin, that the -- the reasons people are taken off of jury
2 selection is not because of their race; it's because of their
3 attitudes, their opinions and their beliefs that are
4 reflected in their answers that may be influenced upon their
5 cultural, their ethnic or their racial background, their
6 ideology as people; and, it is a combination of those things,
7 respectfully, Your Honor, that make all of us who we are.
8 When we come into the courtroom and we're asked questions by
9 the judge and by the prosecutor or by the defense attorneys,
10 we give answers based upon our background, our attitudes, our
11 opinions, our beliefs and that's what is central to this.
12 One way to assess what the State has been talking about with
13 respect to explanatory valuables is to explain it in the
14 context of contemporary American Politics and how the
15 ideologies of various groups might affect the formation of
16 their opinions or attitudes and beliefs as it relates to
17 questions like law and order, like punishment, like capital
18 punishment in particular; and, we contend that the
19 information that we present through Doctor Cronin supplements
20 the information that we have presented through Doctor Katz
21 and it is informative to the trier of fact, the Court, with
22 respect to understanding what the State says is its defense.
23 Again, as we have said all along, you're the trier of fact.
24 You determine how much weight to be given any of the
25 evidence; but, respectfully, Judge, we think that our

February 13, 2012

1 evidence is admissible for your consideration. The extent to
2 which you consider it, the weight you give it, is not for any
3 of us to tell you. That's based upon your intelligence, your
4 knowledge, your experience and how you filter the information
5 that comes through here to you as the judge and as the trier
6 of fact. We would ask that Doctor Cronin be, one, recognized
7 as an expert on American Politics and he be allowed to
8 express an opinion consistent with that expertise, sir.

9 THE COURT: Okay. Anybody want to be
10 heard further?

11 [There were no responses from counsel for either side.]

12 THE COURT: Mr. Colyer, I understand
13 your argument. Mr. Thompson, I understand your position.
14 I've stated numerous times -- and it's been -- I've been
15 reminded on numerous occasions -- that I've indicated it's my
16 objective, it's my goal, to allow both sides a full, fair
17 opportunity to be heard, within the rules of evidence. I
18 can't ignore my responsibility to apply the rules of evidence
19 in the case. I am looking at a number of factors in making
20 the decision that I'm about to make. One is the fact that
21 the witness has been tendered in the area of American
22 Politics. I understand the reasons that you've asserted for
23 purposes of the record in that respect as -- based on your
24 contention that it bears on issues to be decided by the
25 Court. The upshot of his testimony -- and as he's indicated

1 in response to my questions -- was to tell the Court that
2 it's important to examine the individual actions and legal
3 reasoning behind each particular decision. I know that. I
4 know that is intimately involved in the issues that are now
5 before the Court. I don't think the witness' testimony
6 passes the test of 720, in my view, in that respect, for the
7 reasons that were asserted by counsel for the defendant in
8 this case; and, since that determination is based on the
9 rules of evidence and what I understand his testimony is to
10 be, the objection is sustained. Counsel for the State's
11 objection and exception to the ruling of the Court are noted
12 for the record.

13 MR. THOMPSON: We'd like to make an offer
14 of proof.

15 THE COURT: Absolutely entitled to do
16 that. I've indicated all along that I'm not going to prevent
17 anybody from making their record in this case.

18 Do you folks want to be heard?

19 [Pause.]

20 THE COURT: Do you folks want to be
21 heard?

22 MR. JAMES FERGUSON: Your Honor, I -- I
23 understand they're entitled to make their offer of proof.

24 THE COURT: Yes, sir.

25 MR. JAMES FERGUSON: And I -- I -- I assume, in

1 doing so, we would have an opportunity to probe that offer.

2 THE COURT: Absolutely.

3 MR. JAMES FERGUSON: After we've heard from
4 them. I would submit we want to be heard again after that.

5 THE COURT: Okay. Yes, sir.

6 MR. JAMES FERGUSON: Thank you.

7 THE COURT: All right. Mr. Thompson,
8 are you conducting the examination?

9 MR. THOMPSON: I will be, Judge, insofar
10 as -- Your Honor, as we object -- I want to make sure the
11 exception's noted.

12 THE COURT: I've -- I've already put
13 it in, as is my practice. Yes, sir. Go ahead, sir.

14 MR. THOMPSON: Thank you, Your Honor.

15 **DIRECT EXAMINATION continued conducted by MR. ROB THOMPSON:**

16 Q. Doctor Cronin, you had a conversation with myself
17 and Doctor -- I'm sorry -- and -- and Mr. Colyer in my office
18 a number of months ago; is that correct?

19 A. Yes.

20 Q. Tell us what that conversation was about.

21 A. It was about my involvement in this case and hoping
22 to get some Political Science expertise into some
23 ideological, partisan and background as it relates to the
24 death penalty.

25 Q. How did you go about that research?

1 A. I began with some of my methodological training,
2 went through some academic search engines, looked to what I
3 could find as relevant research, which there is -- there's a
4 lot of it. It's not a contended concept in Political Science
5 -- and -- and chose some of the most representative of that
6 -- that research.

7 Q. Did you -- once you finished your research, did you
8 cause a report to be done?

9 A. Yes, sir.

10 Q. Did you prepare that report and forward it to us?

11 A. Yes.

12 Q. I'll represent to you, sir, that we have forwarded
13 this to the Court, actually, now and to the defense.

14 MR. THOMPSON: May I approach, Your
15 Honor?

16 THE COURT: Yes, sir; and, I've got my
17 copy.

18 MR. THOMPSON: Thank you, Your Honor.

19 THE COURT: 79?

20 MR. THOMPSON: Yes, sir.

21 THE COURT: Okay.

22 Q. Sir, I'm showing you what's been marked, Doctor
23 Cronin, for purposes of identification as State's Exhibit
24 Number 79 [handing the exhibit to the witness]. Can you take
25 a look through 79, and I'll have a couple of questions in

1 just a second.

2 [Pause.]

3 Q. Have you had a chance to take a look at State's
4 Number 79?

5 A. I have.

6 Q. Do you recognize State's 79?

7 A. I do.

8 Q. What is State's Exhibit 79?

9 A. This is the report that I submitted to you.

10 Q. Using your -- your report as a guide, can you walk
11 us through Political Science as a discipline?

12 A. Sure. It is a discipline that really grew up in
13 the 20th Century, born out of history and -- and social
14 science in general, a wide range of mythologies, but seeks to
15 understand power, applying some understanding of majority and
16 minority power and explaining how change happens.

17 Q. What kind of folks use Political Science as tools
18 of their trade?

19 A. Well, ideally, politicians especially, anybody in a
20 representative position and social scientists in general.

21 Q. You studied -- or, you included a section in your
22 report Basic Ideology and Race in America. Tell us about
23 that.

24 A. This is a section surveying what this particular
25 minority demographic of black Americans -- how that falls and

1 fits into American Ideology as a whole.

2 Q. How did you go -- how did you determine what your
3 results or your opinions are as it relates to that issue?

4 A. Well, the -- the first stop in the research -- in
5 this -- for most of us political scientists are survey data,
6 the National Election survey data that's been collected --
7 has a lot of longitudinal validities. It's been done for
8 decades. So, that was my first stop and, then, then the
9 literature in general.

10 Q. Are those the kinds of -- is that the kind of data
11 that's generally relied on by politicians, by political
12 scientists in your field?

13 A. Especially political scientists and sometimes
14 politicians.

15 Q. What -- and what were the results that you found in
16 just basic ideology, race in America, with a -- with a
17 demographic that we asked you to discuss based on the MSU
18 study of blacks in the United States?

19 A. The minority demographic of black Americans tends
20 to scale more liberal on various -- especially on an
21 aggregate level -- sometimes self-identification for
22 Americans is hard. People like to lump themselves as all
23 moderates; but, especially, when we add up the particular
24 policy positions, we find black Americans tend be more
25 liberal than other demographics and more liberal than white

1 Americans, the majority of the population.

2 Q. How about partisanship?

3 A. Partisanship's a little clearer because that's a
4 simple D or R response and that has been more clear over the
5 past few decades as to black Americans identify much more
6 strongly with the Democratic Party as a whole than the
7 majority of the population.

8 Q. Did you study particular -- did you drill it down,
9 in essence -- when you did this report, at our request, did
10 you drill it down further throughout other issues that relate
11 to politics in the United States?

12 A. Sure. First addressing the overall ideology, it's
13 not quite so simple to say every black American is liberal,
14 but the categories in which that overall ideology is skewed
15 the most -- tend to be issues of inequality or what quality
16 means.

17 THE COURT: I'm sorry?

18 A. Tends to be in -- in issues of inequality,
19 addressing inequality, what the government should do to
20 address inequality, how to define equal opportunity in
21 American and also in terms of criminal justice.

22 Q. Discuss with us, if you will, what your findings
23 were as relates to the demographic of black Americans as it
24 relates to criminal justice, law enforcement and those
25 general areas -- as far as, were you able to find that and

1 how were you able to find it?

2 A. Right. Through a -- through the general literature
3 review there, there's a number of studies, survey research,
4 some [indiscernible] showing that black Americans have
5 hysterical sense of unfairness in how the laws have been
6 applied to them as a minority population, are less trusting
7 of the criminal justice system in general.

8 Q. How about law enforcement?

9 A. Yes, and -- and less -- less trusting of police
10 officers and in sentencing being administered in a fair
11 manner.

12 Q. Did you drill it down further to specific aggregate
13 opinions of black Americans as it relates to the death
14 penalty?

15 A. I did, and this is -- this is the clearest
16 ideological division between black Americans as a minority
17 population and majority population -- the -- the gap between
18 public opinion is -- is largest in this subcategory of public
19 policy in that black Americans do not favor the death penalty
20 as much as white Americans or other minority demographics.

21 Q. How did you -- how did you form this opinion?

22 A. Through the survey data that's available and the --
23 the other secondary research done.

24 Q. Tell us about this survey data. Where -- where
25 does that come from?

1 A. Well, in particular, the -- the most trustworthy --
2 the National Election survey data, that's administered every
3 year to -- to thousands of Americans to establish some
4 statistical significance.

5 Q. Are you familiar with their methodology?

6 A. Yeah.

7 Q. And is it -- the kind of methodology they use --
8 normally used in your field?

9 A. It is. It's a standard, as it's been noted for --
10 for decades now.

11 Q. Do the people that depend on this kind of research
12 depend on those surveys through the normal course of their
13 business?

14 A. Yes.

15 [Pause.]

16 Q. Again, in -- in the section of your report, page 5,
17 Ideology as it relates to the death penalty, you -- you sort
18 -- you named a couple of sources starting with footnote
19 number 10, Steven Cohn and Steven Bar -- Barkan and William
20 Haltman, 1991. Are you -- do you remember this -- that paper
21 that you cited?

22 A. Yes.

23 Q. Can you tell us about that a little bit?

24 A. It -- it's one of many discussing this topic, but
25 it is one of the more most cited. As political scientists

1 research, we cite -- we keep count of that. The more you get
2 cited, the more trustworthy your research is; and, this is a
3 fairly well cited piece of research.

4 Q. And footnote number 11, J.A. Arthur, a paper from
5 1998, Racial attitudes and opinions about capital punishment:
6 Preliminary findings, that was in the International Journal
7 of Comparative and applied Criminal Justice, can you tell us
8 about that a little bit?

9 A. Again, another report that -- published article
10 that is well cited and pretty clear. That's a large part of
11 why it's -- it's well cited.

12 Q. And the same question as it relates to number 12 --
13 I'm sorry -- head -- footnote number 12, as it relates to a
14 2004 paper?

15 A. The -- yes, the same -- same response. Very well
16 cited article.

17 Q. Footnote number 13, again, now on page 6 of your
18 report, first full paragraph, you've cited footnote number
19 13, R.M. Bohm, B-O-H-M, 1991, and a paper. Can you discuss
20 that?

21 A. Sure. It's a paper I remember citing back when I
22 had to take my comprehensive exams for my PhD, and it's since
23 been cited often as a good, clear example of the death
24 penalty opinion differences.

25 Q. Is it noted, in footnote 13, what the source of

1 Doctor Bohm's, Mr. Bohm's, research was?

2 A. Yes. It's a -- it's a publication called death
3 penalty in America, current research.

4 Q. Okay. Did it examine the gallop polls?

5 A. It did.

6 Q. What are the gallop polls?

7 A. Gallop polls is a national polling organization
8 that seeks objective polling data.

9 Q. Did you use some of that polling data or some --
10 about the gallop polls in order to accomplish this research?

11 A. I -- I generally keep abreast of gallop polls, so
12 -- it's a background source, yes.

13 [Pause.]

14 Q. Did you compare, during your research -- you
15 indicated that there was a large gap between black -- how
16 black Americans feel about the death penalty and how white
17 Americans feel and other minorities feel about the death
18 penalty. Can you give as much detail as you have about how
19 far that -- how large that gap is or where that came from?

20 A. It depends on the study. Some are as narrow as
21 looking at college student opinions. Some are as wide as NES
22 data looking nationwide. The largest gaps can range to 20
23 percent, some as small as 15 percent, but it's a pretty
24 consistent gap, and those -- those numbers are not big in
25 some arenas; but, in politics, that's -- that's a big gap.

February 13, 2012

1 MR. THOMPSON: May I have just a moment,
2 Judge?

3 THE COURT: Yes, sir.
4 [Pause.]

5 Q. In section 7 of your report, starting on the bottom
6 of page 6 -- it's entitled Challenging Social Science:
7 Racism -- can you discuss your -- can you discuss that
8 section, please?

9 A. Sure. I just addressed the difficulties of
10 studying racism from a social science point of view, the
11 different ways you can come at racism as a topic, the
12 difficulties in finding racism as a cause versus other
13 factors. It's a challenging social science topic, as it's
14 created, as it's re-created, to cultural experience. So, we
15 -- we have various ways to approach it. Sometimes
16 statistical, sometimes sociological, but there's a lot of
17 debate as -- as to -- to what racism -- what race is to begin
18 with. So, studying racism is challenging.

19 Q. What are some of the challenges as it relates to
20 using statistical evidence to form opinions as it relates to
21 race and race reasoning behind decisions?

22 A. Well, for me, a very broad Political Science point
23 of view. Any minority demographic, when it has a divergent
24 policy decision from a majority demographic, is going to
25 present -- I think the challenges we see we're dealing with

1 in this case. So, whether it's race or income, whatever the
2 -- whatever describes that minority demographic -- so, it
3 shouldn't be surprising to see divergent outcomes when we
4 have divergent public policy decisions and opinions, and it
5 is difficult to tell if it is skin tone or with a larger
6 concept of races or whether it is simply a minority
7 demographic cultural decision ideology. It's difficult to
8 pin that down.

9 Q. Now, page 7, the -- that first paragraph, couple of
10 lines up, where it says given the cultural and political
11 dynamics discussed above, the race of a potential juror may
12 simply be a variable, is there a missing word there? Is it
13 ----

14 A. You're correct. There should be a that or some
15 ----

16 Q. In between ----

17 A. ---- some other grammar there, yes.

18 [Pause.]

19 Q. Can you read those last three sentences of that
20 paragraph and explain those, please?

21 A. Beginning with the potential danger?

22 Q. Yes, sir.

23 A. The potential danger with such analysis is to make
24 the logical leap from race as statistically significant to
25 race as most significant in the mind and actions of the

1 particular member of the legal process. Given the cultural
2 and political dynamics discussed above, the race of a
3 potential juror may simply be a variable -- my addition --
4 that indicates a larger political ideology. Because of this,
5 it is important to examine the individual actions and legal
6 reasoning behind each particular decision.

7 Q. Can you expand on that?

8 A. Certainly. Again, dealing with a minority
9 demographic that has a divergent public opinion on that --
10 here, this case happens to be capital punishment -- it
11 strikes me that it is important to look at the factors
12 involved in the individual decisions that eliminate a juror,
13 though I'm not a jury selection specialist, but in a -- from
14 a general Political Science point of view, race as a variable
15 is one of the variables and may simply indicate a minority
16 population that has a cultural and political ideology that
17 would make it less likely to be favored by the majority
18 population which is represented by the State, and the State's
19 interest is to represent that majority population and its
20 intent for laws, punishment et. cetera. So, race as a -- a
21 possible variable is an important variable, but it is -- it
22 is sometimes simply a placeholder for a minority populations'
23 divergent political opinions.

24 MR. THOMPSON: No further questions,
25 Judge. Thank you.

February 13, 2012

1 THE COURT: Okay. Any cross-
2 examination?

3 MR. JAMES FERGUSON: Yes, Your Honor. I would
4 like ----

5 THE COURT: Yes, sir.

6 MR. JAMES FERGUSON: ---- just a few questions.

7 **CROSS-EXAMINATION was conducted by MR. JAMES FERGUSON:**

8 Q. Going to your report ----

9 A. Yes, sir.

10 Q. ---- Doctor Cronin -- and I want to look at page --
11 I think it must be page 1; and, under section 2, where you --
12 the topic is Basic Ideology and Race in American, the second
13 sentence there says as a general rule, black Americans are
14 more politically liberal than other racial groups. Did I
15 read that correctly?

16 A. You did.

17 Q. And the next sentence says there are many
18 exceptions, and depending on the particular issue, some
19 divergent ideological scoring. That's what you said in your
20 report?

21 A. Yes, sir.

22 Q. Now, when you say many exceptions, are there any
23 particulars there or does this just kind of run the gamut of
24 all kinds of exceptions to that general rule about black
25 people being more liberal?

February 13, 2012

1 A. I think, on the individual level, it runs the
2 gamut. There are plenty of black Americans that would score
3 conservative on any number of issues. As a -- as a whole --
4 as a whole, let me go policy by policy -- certain social
5 public policy, political issues, we do not see black
6 Americans scoring more liberal than white Americans.

7 Q. Yes, sir. So, would you agree that because there's
8 so many exceptions, it might be unfair, in certain contexts,
9 at least, to base one's decision about a black person's
10 ability to reach fair decisions on this broad label that
11 black people are more liberal? You would agree with that,
12 wouldn't you?

13 A. Sure.

14 Q. And it wouldn't be right, in your view, would it,
15 for the prosecution to select jurors on the basis of whether
16 they're black and therefore more liberal than whites?

17 A. I think that would be a hard contention -- I -- I
18 think that would be a wrong decision.

19 Q. It would be wrong to do that, wouldn't it?

20 A. Yes.

21 Q. So, on the fact that -- that, in some surveys,
22 black Americans come out more liberal in some ways than white
23 Americans, you wouldn't recommend to the prosecution or
24 anybody else that they use that as a basis for jury
25 selection?

1 A. That would -- exactly. That would be a bad basis
2 of decision.

3 Q. For example, they might have missed out on Clarence
4 Thomas if they'd went that liberal; isn't that right, who,
5 generally, I think, self-identifies conservative?

6 A. It could --- it could endanger his candidacy if
7 that was the mode of decision-making.

8 Q. Yes. They might eliminate -- they might not -- you
9 know, it might eliminate Hermon Cane from the jury. He
10 describes himself as being conservative.

11 A. He is a conservative black American, yes, sir.

12 Q. Yes, sir; and, there are many others.

13 A. Yes.

14 Q. So, as a social scientist and a political
15 scientist, you know, of course, that all black Americans
16 don't think alike; is that right?

17 A. That's true.

18 Q. We've got some liberal, some not so liberal, some
19 conservative, even some more conservative; isn't that right?

20 A. That's correct.

21 Q. So, by doing your study, you weren't suggesting to
22 the prosecution that you can -- that you can explain these
23 racial disparities by the fact that some large percentage of
24 African-Americans self-identify as liberals?

25 A. I was not -- I was not presenting a case that the

1 prosecution should base decisions on race or even in
2 understanding of the race's particular -- or, a general
3 ideology ----

4 Q. Yes, sir. All right. You were just telling them
5 what the literature said about it?

6 A. That's right.

7 Q. As a matter of fact, the same survey you used to --
8 to -- to state that the majority of black Americans are
9 liberal tells you that the majority of white Americans are
10 liberal; isn't that correct?

11 A. Depending on the questions, yes.

12 Q. Yes, sir.

13 A. But ----

14 Q. Well, I -- I'm -- if you look on page 2 -- and I'm
15 looking at the last sentence of the para -- the paragraph
16 that carries over from page 1; and, it says approximately 36
17 percent of white Americans claim to be conservative, while
18 only 16 percent of black Americans identify as such; isn't
19 that right?

20 A. That's right.

21 Q. So, if 36 percent of white Americans claim to be
22 conservative, then that means that 64 percent of white
23 Americans claim to be something other than conservative;
24 isn't that right?

25 A. It's a seven-point scale. So, in the middle would

1 be moderate, then we've got somewhat liberal, very ----

2 Q. Yes, sir.

3 A. So, would be something other than conservative.

4 Q. All right. So, if you used a liberal conservative
5 divide to make decisions about jury selection, you'd take off
6 a lot of white folks, too, wouldn't you?

7 A. I suppose so.

8 Q. Yes, sir; and, then you go on to say that you
9 cannot say that black Americans are consistently liberal on
10 an issue-by-issue basis. You can't say that, can you?

11 A. Right.

12 Q. So, if you were going to base jury selection on
13 jury -- I'm sorry. If you were going to base explanations of
14 blacks being stricken from juries on -- even on the basis of
15 ideology, you'd have to know what a particular juror thought
16 about the issues before that juror in that case; isn't that
17 right?

18 A. If -- if I'm going to attempt to explain why a
19 particular juror was kicked off, I'd imagine you'd have to
20 look at those particular decisions, yes.

21 Q. Yes, sir; and, then, if we go to the partisan --
22 entitled Partisanship section of your report, basically that
23 tells us that more black Americans -- that black Americans
24 tend to -- to vote -- or, identify democratic than
25 republican; isn't that right?

1 A. Yes, sir.

2 Q. You wouldn't use that as a basis for saying black
3 folks ought not serve on a jury because they're Democrats,
4 would you?

5 A. No, sir.

6 Q. And you wouldn't apply that to determine what black
7 folks think about the death penalty?

8 A. Insofar as Democrats tend to favor [indiscernible]
9 -- capital punishment more than Republicans, you might infer
10 something, but it's not conclusive.

11 Q. Yes, sir. That's because Democrats are very
12 conservative ----

13 A. They are.

14 Q. So, you can't make these broad assumptions about
15 whether this particular group or that particular group would
16 be able to vote for -- would vote for the death penalty in a
17 case; isn't that true?

18 A. I think you can make generalizations, but to make
19 assumptions, that would be dangerous.

20 Q. Yes, sir; and, to act on the basis of
21 generalizations could also be dangerous; isn't that true?

22 A. Probably.

23 Q. And you also indicated a couple of other things
24 about the survey. If we go to the first [sic] full paragraph
25 on page 3 and look at the third sentence there -- beginning

1 with the third sentence -- where you say, for instance,
2 research finds that, increasing, in America, there is a
3 direct correlation between a city's political leanings and
4 its racial makeup. The whiter a city is, the more
5 conservative and Republican its residents. Cities with high
6 black American population populations rank clearly as the
7 most liberal and Democratic; and, while that may be a trend,
8 there may be exceptions to that; isn't that true?

9 A. Sure. As social science -- trend -- that's --
10 that's -- that's a significant majority ----

11 Q. Yes, sir.

12 A. ---- of the findings, but there are exceptions.

13 Q. Yes, sir; but, nobody would tell you that Chapel
14 Hill -- are you familiar with Chapel Hill?

15 A. Yes.

16 Q. Nobody would tell you that Chapel Hill was
17 Republican and conservative?

18 A. No.

19 Q. But they would tell you that it's mostly white
20 folks?

21 A. They would.

22 Q. So, you can't just look at the city and decide
23 which way folks think, how they vote, what they're going to
24 do; isn't that right?

25 A. You can generalize, but there are exceptions.

1 Q. Yes, sir; and, if we go on then to category number
2 4, which is Ideology: Inequality, you cite an instance where
3 blacks are conservative on some issues; and, you cite gay
4 marriage ----

5 A. Indeed.

6 Q. ---- isn't that right?

7 A. Yes.

8 Q. And you mention that much of what accounts for an
9 overall trend toward liberal ideology among black Americans is
10 found in public policies that address inequality; is that
11 correct?

12 A. Yes, sir.

13 Q. And to the extent that history factors into it, you
14 would expect black people to be more liberal on issues
15 involving inequality ----

16 A. Yes.

17 Q. ---- based on the history of the absence of
18 inequality in our society with black people for so long ----

19 A. Absolutely.

20 Q. ---- isn't that true?

21 A. That's true.

22 Q. And you wouldn't keep -- you wouldn't recommend or
23 support keeping black folks off juries because they try to
24 address inequality, would you?

25 A. I would not support that.

1 Q. And it wouldn't be right for the prosecution to
2 base its decisions on black folks being in favor of equality
3 when they've suffered inequality for long years of history;
4 isn't that right?

5 A. That would be -- yes.

6 Q. Yes, sir; and, we -- we go on to number 5, Ideology
7 and law enforcement. I think you say that some studies show
8 that minorities hold less favorable views of police action
9 and sentencing in general; isn't that right?

10 A. In general.

11 Q. Yes, sir; and, there again, history comes into it,
12 doesn't it?

13 A. Yes.

14 Q. And you would agree and acknowledge that
15 historically there has been at least a perception that --
16 that -- of -- of -- on -- on the part of black people that
17 they have not always been treated fair by the police ----

18 A. Yes, sir.

19 Q. ---- isn't that true?

20 A. That is true.

21 Q. And there's a perception that black people are more
22 likely to be the victims of police brutality than other
23 racial groups; isn't that true?

24 A. That's true.

25 Q. And, to the extent that these perceptions may be

1 factual based, you would not -- I'm sorry -- you wouldn't
2 strike black people from the jury because they're attempting
3 to address a problem -- mistreatment or in -- unequal
4 treatment by the police, would you?

5 A. That question confused me a little. I'm sorry.
6 Could you ----

7 Q. And I'm sorry.

8 A. ---- please restate it?

9 Q. It probably was confusing. You wouldn't keep black
10 people off of a jury just because of a history of police
11 brutality and their feelings that that ought not to take
12 place?

13 A. If I have the power to select juries, I would not
14 keep black people off juries because they've suffered a
15 history of violence and police brutality, no, sir.

16 Q. Yes, sir; and, finally, we come to the death
17 penalty, which is your number 6. I want to talk about that
18 for a moment. You state that black Americans are
19 significantly more likely to oppose the death penalty than
20 other racial groups; isn't that true?

21 A. True.

22 Q. I suppose if you have a little bit of history tied
23 up in that too, don't we?

24 A. I imagine so.

25 Q. Particularly in the south, if you're looking for

1 statistics, you find that the death penalty has operated more
2 to the detriment of blacks as a group than other racial
3 groups; isn't that true?

4 A. Many more black Americans have been put to death
5 than other racial groups.

6 Q. Yes, sir; and, there again, I take it you wouldn't
7 support keeping black people off of juries because more black
8 people have gotten the death penalty than any other racial
9 group?

10 A. That would not be a reason I would use, no.

11 Q. Yes, sir; and, taking that a step further, I just
12 wanted to ask you a few other questions about that. Were you
13 told by the prosecution -- well, I'm sorry. You read -- you
14 familiarized yourself with the Michigan State University
15 study, didn't you?

16 A. Yes, sir.

17 Q. And you saw that that study concluded that
18 statewide, district-wide and countywide, that a black person
19 was more than 2.3 times more likely to be excluded from a
20 capital jury than white people?

21 A. I did.

22 Q. Is that correct?

23 A. Yes.

24 Q. All right. You haven't looked behind that to see
25 what the reasons might be for that?

1 A. I've not done any research specific to that, no.

2 Q. Did the prosecution tell you that the point at
3 which the peremptory strikes on capital jurors were exercised
4 in the studies would have been the point at which the jury
5 had been death qualified? You can tell me if you don't know
6 what I mean by death qualified.

7 A. I -- I can infer, but you might as well tell me,
8 please.

9 Q. Well, let -- let's [indiscernible] -- and you've
10 told me you're not that familiar with the process, so I want
11 to tell you a little bit about it so you can answer that
12 question. If I'm wrong, they'll point it out. In getting
13 pools of black people -- I'm sorry -- of jurors, of potential
14 jurors, in capital cases, the jurors are asked about whether
15 or not they can consider the death penalty as punishment in
16 the case. Are you with me so far?

17 A. I got you.

18 Q. All right. So, to the extent that a juror says he
19 or she can consider the death penalty in a case, they sort of
20 pass that first threshold as to whether they can consider the
21 death penalty or whether your views against the death penalty
22 are so strong that you just can't consider the death penalty.

23 A. Okay.

24 MR. COLYER: Object to the form of the
25 question, Your Honor. That misstates the law with respect to

1 capital jury selection in terms of qualifying a juror.

2 THE COURT: All right. Rephrase your
3 question, if you will, Mr. Ferguson.

4 MR. JAMES FERGUSON: Certainly, Your Honor.

5 Q. Let me just -- let me just actually move to this.
6 Among a group of people, potential jurors -- I'm giving you
7 this hypothetical.

8 A. Okay.

9 Q. Among a group of jurors who've all been asked
10 whether or not they could consider the death penalty, other
11 things being equal, would you expect a stark disparity
12 between the numbers of blacks and whites who have said that
13 they can consider the death penalty as ----

14 MR. COLYER: Objection.

15 Q. ---- [indiscernible] ----

16 THE COURT: Do you want to be heard,
17 Mr. Colyer, for the record?

18 MR. COLYER: Yes, Your Honor.

19 THE COURT: Yes, sir.

20 MR. COLYER: That misstates with
21 respect to both jury selection and what qualifies a person
22 for a peremptory strike or a challenge for cause and it is a
23 basic, fallacious assumption with respect to who is qualified
24 for jury selection.

25 MR. JAMES FERGUSON: Your Honor, I wasn't

1 trying to ask all of the questions about ----

2 THE COURT: Yes. I understand that.

3 MR. JAMES FERGUSON: I said other things equal.

4 THE COURT: Okay.

5 MR. COLYER: It's a misleading
6 question, Your Honor.

7 THE COURT: I understand your
8 objection, and I'm going to ask that the question be
9 rephrased. [Indiscernible.] Your objection is sustained to
10 the form of the question.

11 Go ahead, Mr. Ferguson.

12 MR. JAMES FERGUSON: I'm sorry, Your Honor?

13 THE COURT: You may rephrase your
14 question, sir.

15 MR. JAMES FERGUSON: Yes, sir.

16 Q. Well, other things being equal, Doctor Cronin,
17 would you expect that, in a group of people who have similar
18 or near equal views about the death penalty, that blacks
19 would be eliminated 2 to 2 and a half times more quickly than
20 whites -- other things being equal?

21 MR. COLYER: Objection. It's an
22 improper hypothetical question.

23 THE COURT: All right.

24 MR. JAMES FERGUSON: Your Honor, he -- he'll
25 have an opportunity to ask questions.

1 THE COURT: All right. Let's -- let's
2 step back, take a deep breath, take a moment. The objection
3 is sustained to the form of the question. You may rephrase
4 or ask other questions ----

5 MR. JAMES FERGUSON: Thank you, Your Honor.

6 THE COURT: Yes, sir.

7 Q. Well based on your survey of the literature, as you
8 have done, you don't have any explanation to offer as to why
9 blacks were stricken from juries during a 20-year period of
10 time at a rate of 2 to 2 and a half times more than whites by
11 a peremptory strike by the prosecutors?

12 MR. COLYER: Objection.

13 THE COURT: Well, it's an open-ended
14 question.

15 Can you answer the question?

16 THE WITNESS: Perhaps what I can offer,
17 as a political scientist, is there is a long-term Democratic
18 problem dealing with minority demographics versus majority
19 demographics; and, I imagine that problem, which is -- we do
20 not have a very satisfactory solution to at this point in 200
21 and some years with trying democracy -- I imagine that
22 problem exists with jury selection. As to how the problem of
23 a demographic that has different policy views plays out in
24 the specifics of jury selection, I'm probably not familiar
25 enough with that process to answer that.

1 THE COURT: Do you want to heard
2 further, Mr. Colyer?

3 MR. COLYER: No, sir.

4 THE COURT: Okay. All right.

5 MR. JAMES FERGUSON: Your Honor, I ----

6 THE COURT: Yes, sir.

7 MR. JAMES FERGUSON: ---- may we interrupt my
8 cross at this point? Could we take our afternoon break?

9 THE COURT: Yes, sir. I think it's
10 appropriate.

11 MR. JAMES FERGUSON: Yes, sir.

12 THE COURT: 15 minutes enough time,
13 folks, or do you need longer?

14 MR. JAMES FERGUSON: Your Honor, could we have
15 about 20 minutes?

16 THE COURT: Yes, sir. Absolutely.
17 We're at ease.

18 [The hearing recessed at 3:10 p.m. and reconvened at 3:30
19 p.m., February 13, 2012, with all pertinent parties present
20 prior to the recess once again present, to include the
21 defendant.]

22 THE COURT: Let the record reflect all
23 counsel are present.

24 Doctor Cronin, if you would, take the witness
25 stand, please, sir.

February 13, 2012

1 [The witness approached and seated himself in the witness
2 stand.]

3 THE COURT: Thank you, sir.

4 [Pause.]

5 THE COURT: Yes, sir. Ready when you
6 are.

7 MR. JAMES FERGUSON: Thank you, Your Honor.

8 THE COURT: Yes, sir.

9 **CROSS-EXAMINATION continued conducted by MR. JAMES FERGUSON:**

10 Q. Doctor Cronin, let's go back for a moment to how
11 some of the ideological findings that you made might factor
12 into what we're doing here. Insofar as your survey shows
13 there are certain demographic factors that may apply to a
14 given racial group and, in this case, jurors -- black
15 members. If a prosecutor wanted to know the specifics of
16 some of these demographic findings, for example, whether a
17 given juror was conservative -- identified himself as
18 conservative or liberal, he could simply ask that question,
19 couldn't he, the prosecutor?

20 A. I suppose so.

21 Q. I mean, a lot of these surveys are based on self-
22 reporting?

23 A. Yes.

24 Q. So, one way you could find out information about a
25 person's views is to ask that person?

1 A. Yes.

2 Q. You -- you under -- you agree with that?

3 A. Yes.

4 Q. They could ask them how they feel about police
5 brutality, for example -- ask that, how they feel about the
6 tax system, they could ask that; is that -- is that correct?

7 A. True.

8 Q. Any -- any -- any any particular demographic factor
9 that the prosecutor felt was important in his or her
10 decision-making is something that they could find out from
11 the jurors views in a particular case?

12 A. I suppose so.

13 Q. And that would be true whether the juror was black
14 or white; do you agree with that?

15 A. I think so.

16 Q. Yes, sir; and, I take it that that's part of what
17 your reasoning was in saying that you have to look at
18 individual factors sometimes in order to get a full picture;
19 is that right?

20 A. True.

21 Q. And you've already told us you didn't look at the
22 voir dire of the transcript of jury selection in this case.

23 A. That's right.

24 Q. But, if you had looked at it, you would want to
25 look for what questions were asked of the potential jurors

1 about their views on the death penalty for example; is that
2 right?

3 A. If -- if I was trying to understand how the jury
4 was selected, I would certainly want to look at specific
5 questions.

6 Q. Yes, sir; and, you'd want to know -- you'd want to
7 look at what the jury selection said about the jurors or
8 potential jurors' views on certain aspects of politics, for
9 example?

10 A. I don't know how much that's done, but that sounds
11 logical to me.

12 Q. Yes, sir. You might ask them how they feel about
13 the welfare system or the tax system or questions along that
14 line to find out where they stand in the particular case?

15 [Pause.]

16 Q. Would you agree with that?

17 A. Sure.

18 Q. And if there were no questions in the transcript
19 about the matters that would inform the prosecutor about the
20 jurors' views on issues of importance in determining their
21 political views or economic views or sociologic views,
22 whatever those views are that would inform you about the
23 individual juror -- if a jurors questions were not there,
24 then you wouldn't expect that those would be things that
25 would drive the jury selection; is that correct?

1 A. I -- I think I agree in the sense, though, it -- if
2 you're taking an individual jury -- juror member and you give
3 me the questions asked ----

4 Q. Yes, sir.

5 A. ---- that does sound like -- that's -- that's how I
6 would go about it, looking at the individual answers to
7 questions.

8 Q. Yes, sir; and, would you expect there to be some
9 relative parroting between the questions that were asked of
10 white jurors and the questions asked of black jurors?

11 A. I'm not sure -- I -- I guess so.

12 Q. Yes, sir. You mentioned the MSU study that you had
13 looked at and, I think, in your report, said that you have to
14 be careful with that kind of stuff; am I correct about that?

15 A. You're right.

16 Q. But you also said that race was viewed as a
17 variable in that study.

18 A. It is.

19 Q. And you're familiar with studies such as the MSU
20 study that controls for certain variables in a case ----

21 A. Yes.

22 Q. ---- are you not? Okay; and, one reason you
23 control for these variables is to find out whether that
24 particular variable is what's driving the result or whether
25 something else is; isn't that correct?

1 A. That's ideal.

2 Q. Yes; and, of course, race is a variable that --
3 that can be controlled for in some studies; isn't that true?

4 A. In some studies, yes.

5 Q. Yes, sir; and, of course, you know, from looking at
6 the Michigan State study, that race was controlled as a
7 variable within that study?

8 A. They -- that is the way they designed it, yes.

9 Q. Yes, sir; and, if you were designing a study to try
10 to determine the significance of race in a particular arena,
11 a particular study, then you would control for race, wouldn't
12 you?

13 A. You would attempt to touch on it.

14 Q. Yes, sir; and, that's what was done in this case;
15 isn't that correct?

16 A. That's correct.

17 Q. And you don't have any problem with the design of
18 that study insofar as it addressed race as a variable?

19 A. It's a fairly well-designed study, yes.

20 Q. Yes, sir. I wanted just to ask you a few questions
21 about some of the sources that you refer to your report; and,
22 you listed a number of them, but let me just start with a
23 study you cited which is called The Racial Divide in Support
24 for the Death Penalty, does white racism matter -- let me
25 just see where I can find that for you to your report.

February 13, 2012

1 [Pause.]

2 Q. Give me just a second.

3 A. That's in my bibliography. I don't think that
4 specifically footnotes, so you're not going to ----

5 Q. Oh, it's in the bibliography.

6 A. Right.

7 Q. Yes. Okay. I don't know whether you have that --
8 you don't have that up there with you, do you?

9 A. That's -- no, sir. Have on me, no.

10 Q. Okay. I have it here. I just wanted ----

11 A. Okay.

12 Q. ---- to call your attention to one or two things,
13 if I may. I think I can let you ----

14 [Pause.]

15 Q. Well, let me see if this will -- on page 1293 of
16 that -- and I know you don't have it in front of you right
17 now -- I'll hand it up to you if you need it. The study says
18 clearly -- I'm sorry -- says clearly the results of the
19 current study and those of others suggest that there are
20 divisions of support for the death penalty among whites. Do
21 you recall that?

22 A. Yes.

23 Q. Nonracist whites are less likely to support capital
24 punishment than racist whites. Do -- do you recall that?

25 A. I do recall that phrase.

February 13, 2012

1 Q. And went on to say, indeed, Barkan and Cohn report
2 that only a slim majority of nonracist whites, 56.5 percent,
3 support the death penalty. Do you recall that?

4 A. I don't recall that, but that's in keeping with
5 their study.

6 Q. Yes, sir; and, that would indicate that, if you
7 took out racist whites, then the divide between attitudes or
8 opinions about the death penalty between blacks and whites,
9 without the racist part of it, would be much closer; is that
10 current?

11 A. Their study definitely suggests that.

12 Q. Yes, sir; and, that same article concluded it is
13 clear that capital punishment cannot be considered as a race-
14 neutral public policy because white racism is inextricably
15 involved in differential public support for the death
16 penalty.

17 A. That is that particular study's conclusion, yes.

18 Q. Yes, sir; and, likewise, in the study of Taste for
19 Punishment or the article of Taste for Punishment which you
20 cited, on page 157, it notes that a study suggests that anti-
21 black, racial prejudice may be a key factor in
22 differentiating the crime policy views of blacks and whites;
23 and, on page 171, it notes the most consist -- consistent
24 predictor of criminal justice policy attitudes is in fact a
25 form of racial prejudice. Do you recall that in that

1 article?

2 A. I don't recall those specific words, but each of --
3 not each of these -- many of these individual studies, though
4 they agree on the -- the -- what I pulled for them is what
5 they agree in general. Each of them offer up various
6 arguments as to what accounts for the divide; and, this is --
7 in this case, that is their argument.

8 Q. Yes, sir; and, you had several of them -- several
9 of them that you have read and the one that I'm reading now
10 from Punitive Attitudes toward Criminals, page 293, it -- it
11 notes -- and I'll quote -- different -- differing levels of
12 prejudices have a very large effect upon punitives
13 [phonetic]. Do you recall that?

14 A. Yes, sir.

15 Q. Yes, sir; and, when we come to race, politics and
16 the process of capital punishment in the south, an article by
17 Isaac Unah and John Charles Boger, they note, on page 17,
18 there is a stark difference in death sentencing rates between
19 white and nonwhite victim cases. The rate for white victim
20 cases, 3.4 percent, is more than twice the rate for nonwhite
21 victim cases; and, the highest death sentencing rate occurs
22 where a nonwhite kills a white. Do you recall ----

23 A. I do.

24 Q. ---- reading that -- that article; and, on page 21,
25 they note the odds -- the odds are eight times greater that a

1 nonwhite defendant who murders a white victim will receive
2 capital punishment than a white defendant who murders a
3 nonwhite, even after accounting for aggravating and
4 mitigating circumstances. Do you recall that?

5 A. I recall that.

6 Q. Yes, sir; and, on page 24, they state, under the
7 U.S. Constitution and under several state statutes, only
8 legal factors should influence capital prosecution and
9 sentencing. After analyzing capital sentencing data in North
10 Carolina for murders committed from 1993 to 1997, we conclude
11 that this ideal is hardly the case. Beyond legitimate
12 aggravating and mitigating circumstances, several
13 illegitimate factors duly influence the decision to sentence
14 defendants to death. Do you recall that?

15 A. I recall that.

16 Q. Yes, sir; and, if race is a significant factor in
17 the selection of juries in -- in capital cases, even if it is
18 not the most significant factor, you would agree, wouldn't
19 you, that it is an improper factor?

20 A. Yes.

21 MR. JAMES FERGUSON: Thank you, sir. That's
22 all my questions.

23 THE COURT: Any redirect?

24 MR. THOMPSON: Yes, sir.

25 **REDIRECT EXAMINATION was conducted by MR. ROB THOMPSON:**

February 13, 2012

1 Q. Was your research in this case, on this issue,
2 designed to explain an individual strike or explain on an
3 aggregate scale the statistical difference between the
4 strikes?

5 A. My -- my goal was to look in generalities and on
6 the aggregate level.

7 Q. Would it be fair to say that the important thing
8 about each individual strike would be the answers that come
9 out of the juror's mouth?

10 A. Yes.

11 MR. THOMPSON: Nothing further. Thank
12 you.

13 THE COURT: Okay. Anything further,
14 Mr. Ferguson?

15 MR. JAMES FERGUSON: No, sir, Your Honor.

16 THE COURT: Okay. Folks, may the
17 witness be released?

18 MR. THOMPSON: The State has no objection
19 as to such, Judge.

20 THE COURT: Mr. Colyer?

21 MR. COLYER: No, sir.

22 THE COURT: All right. Mr. Ferguson?

23 MR. JAMES FERGUSON: Yes, Your Honor. I --
24 this -- this was their proffer ----

25 THE COURT: Yes, sir.

1 MR. JAMES FERGUSON: ---- of this witness; and,
2 of course, we couldn't know all that would be proffered and
3 all that was going to be said until we did the full ----

4 THE COURT: Yes, sir.

5 MR. JAMES FERGUSON: ---- examination. So, in
6 -- in -- in light of that, Your Honor, we have two views on
7 the matter that we would share with the Court.

8 THE COURT: Okay.

9 MR. JAMES FERGUSON: One is that, while we feel
10 that the expertise tendered does not fully meet the standards
11 of the statute, that, even if this proper had been made as
12 substantive evidence in the case, that it wouldn't take the
13 prosecution's case anywhere because [indiscernible] race for
14 all the reasons we've set forth. So, to the extent that the
15 Court might consider, in light of the 40 -- proffer, we don't
16 have a real problem with that because we think the substance
17 of the testimony is [indiscernible] ----

18 MR. THOMPSON: Judge, can I get kind of a
19 procedural frame for what we're talking about really, right
20 here?

21 THE COURT: Well ----

22 MR. THOMPSON: Respectfully, I -- I'm
23 trying to ----

24 THE COURT: I'm -- Yes, sir.

25 MR. THOMPSON: ---- trying to figure out

1 where we are.

2 THE COURT: All right. Objection was
3 made ----

4 MR. THOMPSON: Yes, sir.

5 THE COURT: ---- under 702.

6 MR. THOMPSON: Yes, sir.

7 THE COURT: I sustained the objection.

8 MR. THOMPSON: Yes, sir.

9 THE COURT: The State, as it's
10 absolutely entitled to, made an offer of proof.

11 MR. THOMPSON: Yes, sir.

12 THE COURT: That's chronologically, I
13 think, where we are.

14 MR. THOMPSON: Right.

15 THE COURT: What I'm hearing now --
16 and correct me if I'm wrong -- is, if the Court were to
17 reconsider that ruling, the position of counsel for defendant
18 would go to weight not to admissibility.

19 MR. JAMES FERGUSON: I'm sorry. Yes, sir. It
20 would go to the weight. Yes. I say that in light of -- I
21 assume part of the proffered by the prosecution was to -- to
22 ask the Court to reconsider it ----

23 THE COURT: That -- that was my
24 understanding as well.

25 MR. JAMES FERGUSON: Yes, sir.

1 THE COURT: That's my understanding as
2 well.

3 MR. JAMES FERGUSON: So, just in terms of the
4 record, we think that, if it was considered, that the weight
5 of the substantive ----

6 THE COURT: Okay.

7 MR. JAMES FERGUSON: ---- [indiscernible] ----

8 MR. THOMPSON: Just to keep me straight,
9 Judge, would it be all right if we let the State make our
10 argument before they start fighting about what my argument
11 is. I'm just, you know ----

12 MR. JAMES FERGUSON: I'm sorry.

13 MR. THOMPSON: ---- trying to keep up
14 with current events and where we are; and, it throws a simple
15 man like myself to -- to do that.

16 THE COURT: Well, Mr. Thompson, any
17 time I hear those words, I'm just a simple man, I kind of
18 step back a little bit because I'm not sure what's coming;
19 but, I -- absolutely, you're entitled to be heard ----

20 MR. THOMPSON: That's -- I'd appreciate
21 ----

22 THE COURT: ---- about the Court's
23 reconsideration, sir. Yes, sir.

24 MR. THOMPSON: We had -- we -- we have laid
25 our foundation. We've laid our offer of proof.

1 THE COURT: Yes, sir.

2 MR. THOMPSON: It's -- it's my habit,
3 after being talked to a number of times by a person I admire
4 a great deal, not to argue after a ruling's been made. So,
5 we respectfully object to the ruling. We except to it, as
6 you've already noted; and, we'd like to move on. So, we --
7 we'd love you to reconsider if Your Honor is considering
8 reconsidering.

9 [General laughter.]

10 MR. THOMPSON: But until Your Honor
11 invites me to argue about something, you know, I -- that's
12 already been ruled on respectfully. So, we would like to
13 leave Doctor Cronin.

14 THE COURT: All right.

15 MR. THOMPSON: And -- unless anybody else
16 wants another shot at him or any other reason why we ----

17 THE COURT: Well, certainly, he
18 doesn't need to be sitting here while we're dealing with the
19 issue. So, if -- if everybody's in agreement -- thank you,
20 Doctor Cronin.

21 MR. THOMPSON: Yes, sir. Thank you.

22 THE WITNESS: Thank you.

23 [Pause.]

24 MR. THOMPSON: And I would -- we do have
25 a number of things we'd like to tender when -- either in the

1 offer of proof or if Your Honor is going to reconsider for
2 substantive evidence, then State's Exhibit Number 78, 79 --
3 we have tendered and authenticated through Doctor Cronin.

4 THE COURT: All right. So, for
5 purposes of clarification, did I understand that we've got
6 some procedural matters, among them which is your argument
7 for reconsideration?

8 MR. THOMPSON: Judge, if you're offering
9 to -- to ----

10 THE COURT: No. I'm not offering.
11 I'm trying to find out what your position is, Mr. Thompson.

12 MR. THOMPSON: Mr. Ferguson started this,
13 Judge.

14 [General laughter.]

15 MR. JAY FERGUSON: Mr. James Ferguson.

16 MR. THOMPSON: James Ferguson.

17 THE COURT: Jay Ferguson wants that
18 noted for the record. Let the record so show. Yes, sir. Go
19 ahead.

20 MR. THOMPSON: If Your Honor lets me know
21 we're -- we're arguing about that, I'd like to be heard.

22 THE COURT: Yes, sir.

23 MR. THOMPSON: Until that point comes, I
24 don't have anything I'd like to request other than we do have
25 some procedural things to take care of ----

1 THE COURT: Absolutely.

2 MR. THOMPSON: ---- at the end of this
3 testimony.

4 THE COURT: Thank you, sir. You're
5 free to go.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: I appreciate it.

8 [The witness withdrew to the spectator area.]

9 MR. COLYER: If I could approach, Your
10 Honor?

11 THE COURT: Yes, sir, Mr. Colyer.

12 [Pause.]

13 [Mr. Colyer departed the courtroom.]

14 MR. THOMPSON: Now, are 78 and 79
15 accepted by the Court for our offer of proof?

16 THE COURT: Okay. 79 would be Doctor
17 Cronin's report.

18 MR. THOMPSON: Yes, sir.

19 THE COURT: All right. 78 would be
20 his CV?

21 MR. THOMPSON: Yes, sir.

22 THE COURT: The State is now moving
23 for reconsideration as to those items for the record?

24 MR. THOMPSON: Yes, sir.

25 THE COURT: Fair statement?

1 MR. THOMPSON: Fair enough.

2 THE COURT: Okay. Okay. Do you folks
3 want to be heard further?

4 MR. JAMES FERGUSON: Nothing further than what
5 we've said, Your Honor ----

6 THE COURT: Okay. All right.

7 MR. JAMES FERGUSON: ---- in our examination.

8 THE COURT: 78 and 79 are admitted. I
9 agree with you folks. Having had the full opportunity to
10 hear the testimony, I believe it does go to the issue of
11 weight. So, it's in.

12 MR. THOMPSON: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 MR. THOMPSON: Before we go too much
15 further, Judge, I'd like for Mr. Colyer to return. He
16 stepped out to make sure Doctor Cronin was taken care of.

17 THE COURT: We may need to take a
18 short break.

19 MS. STUBBS: Thank you, Judge.

20 THE COURT: Yes, ma'am.

21 THE COURT: We -- we may need to take
22 a short break.

23 MR. THOMPSON: We're fine with that,
24 Judge.

25 THE COURT: Okay.

1 MR. THOMPSON: Good time for it.

2 THE COURT: Okay; and, I'm not cutting
3 you off. We'll come back to it in a few minutes, Mr.
4 Thompson.

5 MR. THOMPSON: I'm perfect, Judge.

6 THE COURT: Okay. All right.

7 [The hearing recessed at 3:49 p.m. and reconvened at 4:01
8 p.m., February 13, 2012, with all pertinent parties present
9 prior to the recess once again present, to include the
10 defendant, and with the exception of Mr. Colyer and Ms.
11 Stubbs.]

12 THE COURT: We're -- we're still on
13 the record. All of defense counsel are present. Can you
14 give us a hint, Mr. Thompson -- my understanding is the
15 State's about to wrap up.

16 MR. THOMPSON: Yes, sir.

17 THE COURT: Okay.

18 MR. THOMPSON: We wanted to make sure
19 Doctor Cronin didn't get lost in the catacombs back here.

20 THE COURT: Yes, sir.

21 MR. THOMPSON: Respectfully, counsel has
22 been kind of become familiar with -- probably found a couple
23 of folks back there in their time here; but, we've got some
24 business that I'd like some adult supervision on before ----

25 THE COURT: Okay.

February 13, 2012

1 MR. THOMPSON: ---- we go too much
2 further.

3 THE COURT: We're at your disposal.
4 Once Mr. Colyer gets back and Ms. Stubbs gets back, I think
5 that's the real [indiscernible] ----

6 MR. THOMPSON: Yes, sir.

7 THE COURT: ---- question here.

8 MR. THOMPSON: Yes, sir.

9 THE COURT: So, we're ----

10 MR. THOMPSON: And that outranks me,
11 Judge, respectfully. So ----

12 THE COURT: All right. We're -- we're
13 at ease.

14 MR. THOMPSON: Thank you, Your Honor.

15 [Pause.]

16 [Mr. Colyer and Ms. Stubbs entered the courtroom.]

17 THE COURT: Okay. Let the record
18 reflect all counsel are present. The defendant is present.

19 Mr. Colyer?

20 MR. COLYER: Your Honor, during the
21 break -- thank you for that opportunity. We checked with the
22 clerk to make sure that the exhibits that we had referred to
23 last week were all moved into evidence. I believe they were.
24 Today, we checked with Ms. Bain again. I believe 7 -- 53
25 through 79 have all been admitted either for an offer of

1 proof or offered as substantive evidence in this particular
2 case.

3 THE COURT: And, Madam Clerk, for the
4 record, is that what your chart shows?

5 MADAM CLERK: Yes, sir.

6 THE COURT: Okay.

7 MR. COLYER: And, if there is anything
8 we've forgotten, Madam Clerk, if you will, let us know.
9 We'll be glad to address that.

10 MADAM CLERK: Got it.

11 MR. COLYER: Judge, at this point, we
12 would, again, for purposes of the record, in as much as
13 originally the RJA which was filed in August of 2010 was
14 filed by Mike Ramos and Jeffrey Hosford ----

15 THE COURT: Yes, sir.

16 MR. COLYER: ---- and they were
17 subsequently allowed to withdraw, I believe, and IDS
18 appointed present counsel ----

19 THE COURT: Okay.

20 MR. COLYER: We wanted to make sure
21 that, for the record, that, inasmuch as Mr. Ramos and Mr.
22 Hosford had filed the original pleadings and the certificates
23 in this matter, that the present counsel have adopted the
24 pleadings and certificates as their own for purposes of this
25 and the basis of the hearing; and, would that be a correct

February 13, 2012

1 position so far as the State understands where we are on the
2 pleadings and where we are today in the argument; and, we
3 ----

4 MR. HUNTER: I don't know the answer to
5 that, but I'd be glad to look at the pleadings and then give
6 you an answer.

7 MR. COLYER: Well, we would ask, for
8 purposes of this hearing, that the Court inquire with respect
9 to present counsel whether they are accepting, adopting the
10 pleadings and certificates that were filed previously in 2010
11 by counsel because I don't think the pleadings have been
12 modified since then. There have been additional motions
13 which have been filed and that sort of thing, but I think the
14 original pleadings are the same; and, we just wanted, for the
15 record, it stated that they had been adopted by present
16 counsel.

17 THE COURT: Okay.

18 MR. COLYER: In case they thought they
19 needed to add or change anything at this point.

20 THE COURT: Okay. All right. Folks,
21 let me give you the opportunity to take whatever time you
22 feels is appropriate or you need before you respond to that;
23 but, what Mr. Colyer has indicated, we need to clarify that
24 for the record. So, is tomorrow morning okay, folks?

25 MR. HUNTER: Sure.

1 THE COURT: All right. Mr. Colyer?

2 MR. COLYER: Sure. That's fine, Judge.

3 THE COURT: Okay.

4 MR. COLYER: We just want it, at some
5 point ---

6 THE COURT: Absolutely.

7 MR. COLYER: ---- so it would be clear
8 and we'd all know where we're going.

9 THE COURT: Absolutely.

10 MR. COLYER: And, with that, without
11 further argument, we would again ask that, in apt time, we
12 renew our motion for dismissal ----

13 THE COURT: Yes, sir.

14 MR. COLYER: ---- without further
15 argument.

16 THE COURT: Okay.

17 MR. COLYER: And that's -- that's the
18 presentation of our evidence.

19 THE COURT: All right; and, in that
20 regard, if you're not comfortable responding right now,
21 that's absolutely okay. I'll give you the same consideration
22 ----

23 MR. COLYER: Yes, sir.

24 THE COURT: ---- on constitutional
25 grounds, all grounds ----

1 MR. COLYER: All grounds.

2 THE COURT: ---- previously asserted?

3 MR. COLYER: Constitutional, statutory

4 ----

5 THE COURT: Okay.

6 MR. COLYER: ---- evidentiary proofs,
7 everything -- we're renewing all of our motions with respect
8 to dismissal.

9 THE COURT: Okay. All right. Folks,
10 do you want to be heard?

11 MR. JAMES FERGUSON: No, Your Honor. We -- we
12 don't need to be heard at this time.

13 THE COURT: All right. Motion being
14 renewed in apt time, specifically, the State's motion to
15 dismiss based on all grounds asserted, is denied; to which,
16 the State objects and excepts for the record.

17 MR. COLYER: Thank you, Your Honor.

18 THE COURT: So, your issue is
19 preserved.

20 MR. COLYER: And that's our evidence
21 for the afternoon, Your Honor, and for our portion of the
22 case.

23 THE COURT: All right. Thank you,
24 folks.

25 MR. COLYER: Yes, sir.

1 THE COURT: My understanding is you'll
2 be ready to go forward tomorrow morning?

3 MR. JAMES FERGUSON: Yes, Your Honor.

4 THE COURT: Okay. Do you have a
5 preference, folks, 9:00 or 9:30. Whatever your preference
6 is, is fine with me. 9:30 is what we have been starting at.

7 MS. STUBBS: 9:30.

8 THE COURT: Okay.

9 MS. STUBBS: Your -- Your Honor, I just
10 wanted to address the issue of affidavits because we have --
11 we've continued to hold that issue -- so, I wanted to make
12 sure that they didn't come in without our -- our cited
13 objections.

14 THE COURT: Yes, ma'am.

15 MS. STUBBS: I know know they've been
16 handed to the clerk.

17 THE COURT: Yes, ma'am.

18 MS. STUBBS: And it sounds like they've
19 now been moved into evidence. We've -- we've provided the
20 State with a motion. We have a written motion that is the
21 same basis that I had orally stated on the record for our
22 objections to most of those prosecutor affidavits; and, then,
23 we are prepared to also submit -- we're just waiting -- we --
24 we don't yet actually have all of them because they're kind
25 of an on-going work in progress from the State.

February 13, 2012

1 THE COURT: Okay.

2 MS. STUBBS: But, I believe that, by
3 tomorrow, I think, I will have all of them, and then I'm
4 going to also submit a detailed chart of all of our
5 objections to each one.

6 THE COURT: Well, I was going to -- I
7 didn't mean to cut you off. I'm sorry; but, I was going to
8 ask for that because I believe the record reflects that the
9 affidavits -- being objected to as to certain grounds; but,
10 there's also specific objections predicated on the Rules of
11 Evidence.

12 MS. STUBBS: That's right, Your Honor.

13 THE COURT: And that's the chart
14 you're referring to now ----

15 MS. STUBBS: Yes. Yes.

16 THE COURT: ---- in addition to the
17 other grounds already asserted?

18 MS. STUBBS: Yes.

19 THE COURT: Okay.

20 MS. STUBBS: And -- and, in many
21 places, there are -- basically, the mechanism that the State
22 and I have worked -- that we've worked out with the State was
23 that the State is going to move in their -- their -- the --
24 the full copies of the affidavits ----

25 THE COURT: Yes, ma'am.

1 MS. STUBBS: We are then going to
2 submit affidavits with the chart that outlines our
3 objections. I've -- I've shown the -- the almost finished
4 chart to the State and, then, it corresponds to highlighted
5 portions. So, for example, if we object that it's -- there's
6 no foundation and that that -- there -- it's -- the
7 highlighted portion of the affidavit is -- is there; and, I
8 -- and I think we've all agreed that -- that we can just move
9 all of that in and Your Honor can -- can review it, and we
10 don't need to be heard further on ----

11 THE COURT: Well, that's my
12 understanding as to how we would handle ----

13 MR. THOMPSON: Yes.

14 MR. COLYER: Judge, our motion --
15 excuse me -- to introduce the affidavits exhibit were with
16 that in mind. We weren't trying to get around ----

17 THE COURT: Yes, sir.

18 MR. COLYER: ---- the agreement that we
19 had with Ms. Stubbs. We just wanted to make sure that all
20 the stuff that we had, we had moved it in subject to whatever
21 agreement we had; and ----

22 THE COURT: Yeah.

23 MR. COLYER: ---- we -- we concur with
24 Ms. Stubbs, that she is working on the objection and working
25 on the list.

1 THE COURT: Okay.

2 MR. COLYER: We're working with her on
3 that, and we're not trying to shortchange her in any way.

4 THE COURT: No.

5 MR. COLYER: We just wanted to get shut
6 -- of what we had and put it in the proper ----

7 THE COURT: Well, is it a fair
8 statement to say that the affidavits have come in subject to
9 the agreement, subject to rulings by the Court?

10 MR. THOMPSON: Yes, sir.

11 MS. STUBBS: Yes.

12 THE COURT: And that's where we are?

13 MR. THOMPSON: Yes.

14 MS. STUBBS: Yes.

15 THE COURT: All right.

16 MR. THOMPSON: And, just so the record
17 reflects -- I've discussed this with Ms. Stubbs -- we've
18 talked about replacing the original affidavits that were
19 originally put in evidence as State's Exhibit Number 32 --
20 with a copy of all those affidavits with the defense's
21 consent. I have one more to go to get that completed. We're
22 waiting on a FedEx tomorrow morning. Hopefully we'll receive
23 it. I now have put -- placed both in evidence wrapped up
24 together in State's Exhibit Number 32. I've gone over with
25 Ms. Stubbs each copy that's in the copies of the affidavits

February 13, 2012

1 to make sure there is an original that reflects -- so they're
2 exactly the same in respect they contain all the same
3 matters.

4 THE COURT: Okay.

5 MR. THOMPSON: And we'll do that one last
6 thing. I have reviewed the nature -- the general nature of
7 her specific allegations of -- of the violation of the rule
8 of evidence within those -- we're not going to spend but a
9 couple of minutes on that.

10 THE COURT: Okay.

11 MR. THOMPSON: And that'll be more of a
12 Judge, you know, weight not admissibility kind of argument,
13 and we'll shut it down there. We're not going to be going on
14 for hours about that. We might go on a little further about
15 the general nature of don't -- don't listen to this whole
16 group, don't -- don't consider this whole group. We might
17 fight a little bit further about that, but ----

18 THE COURT: Okay.

19 MR. THOMPSON: ---- we're -- we're just
20 about finished with -- with that kind of ----

21 THE COURT: Well, it may be premature
22 for me to ask it at this point, but I'm going to ask it
23 anyway. Is at least part of the basis for objection to the
24 affidavits the fact that there outside discovery deadlines,
25 Ms. Stubbs?

1 MS. STUBBS: No, Your Honor.

2 THE COURT: All right. I just wanted
3 to clarify. All right.

4 MR. THOMPSON: While I'm standing, Judge,
5 actually, the reason I originally stood up dealt with more
6 logistics. Tomorrow we expect that, pursuant to the forecast
7 given by the defense, the two experts, Woodworth and O'Brien
8 tomorrow. Mr. Perry's coming back for those. Doctor Katz is
9 not coming back for those.

10 THE COURT: Okay.

11 MR. THOMPSON: Do we -- what should we
12 expect to do tomorrow? We should -- and that's mainly asking
13 for a forecast from the defense on timing; and, Your -- is
14 Your Honor accepting closing arguments, and when are we doing
15 those?

16 THE COURT: I -- I think both sides
17 are entitled to be heard in argument.

18 MR. THOMPSON: Wanted to make sure of
19 that ----

20 THE COURT: Yeah.

21 MR. THOMPSON: ---- before I prepared
22 one, Judge, respectfully. Are you going to allow both Mr.
23 Colyer and I to be heard?

24 THE COURT: Well, let's -- let's talk
25 about what the respective positions on that may be.

1 MR. THOMPSON: And, in essence, wrapped
2 up in this, how long they expect their rebuttal to take, so
3 we can try to plan timing for -- for those things.

4 THE COURT: Okay.

5 MR. THOMPSON: That's kind of where I was
6 going with that.

7 THE COURT: all right. Well -- and --
8 and I'm not trying to intrude. If you're not comfortable
9 responding, feel free to let me know. There was some
10 indication yest -- last week -- pardon me -- that there had
11 been a death of a family member.

12 MR. THOMPSON: That's not anymore an
13 issue as far as my schedule goes, but thank you.

14 THE COURT: Okay. I just wanted to
15 check into that so that you could be accommodated ----

16 MR. THOMPSON: I appreciate that. The
17 service was yesterday, Your Honor.

18 THE COURT: Okay. All right. Mr.
19 Ferguson?

20 MR. JAMES FERGUSON: Yes, Your Honor. We too
21 were -- I appreciate the Court's observation that both sides
22 should have an opportunity to give the Court a closing
23 argument.

24 THE COURT: Yes, sir.

25 MR. JAMES FERGUSON: And what we have assumed

1 on this side is that if we can come up with a time period
2 that it will be left to the teams on each side to decide how
3 to do it and how many counsel et. cetera.

4 THE COURT: Okay.

5 MR. JAMES FERGUSON: And we can do what we have
6 to do in about an hour and a half.

7 THE COURT: Tomorrow?

8 MR. JAMES FERGUSON: We could do it tomorrow.

9 Now ----

10 MS. STUBBS: No.

11 THE COURT: No. I'm not talking about
12 -- I apologize. Only ----

13 MR. JAMES FERGUSON: Oh, yeah. I'm sorry. I
14 was talking about closing argument.

15 THE COURT: Yes, sir. I just needed
16 to clarify ----

17 MR. JAMES FERGUSON: We'll take some time in
18 the morning. I don't know exactly how long we're going to
19 be.

20 MS. STUBBS: So, I think we expect
21 Doctor Woodward to go first in the morning. I think that --
22 his direct will be between half an hour and perhaps, at most,
23 an hour. So, then, depending on cross ----

24 THE COURT: Okay.

25 MS. STUBBS: And Doctor O'Brien also an

1 hour or less.

2 THE COURT: So, for purposes of
3 argument, we're talking about some -- obviously, sometime
4 beyond that; and, I guess that's what I'm asking now. Is it
5 your preference, folks, that everybody as an opportunity to
6 have input, to set that off for -- there were some issues
7 with regard to Wednesday; and, I'm trying to recall what they
8 was were.

9 MR. THOMPSON: It was Jonathan Perry,
10 Judge.

11 THE COURT: Okay. His unavailability,
12 which should not -- and correct me if I'm wrong -- should not
13 impact on closing argument.

14 MR. THOMPSON: It should not as far as --
15 we'd like Mr. Perry to have an opportunity to be heard if he
16 -- if the scheduling is going to allow it.

17 THE COURT: Okay.

18 MR. THOMPSON: He is ob -- his expertise
19 obviously in the statistical part ----

20 THE COURT: He won't be available
21 Wednesday, so that ----

22 MR. THOMPSON: Wednesday.

23 THE COURT: We're talking about
24 Thursday or Friday.

25 MR. THOMPSON: Well, not necessarily. If

1 -- if it means -- if everybody is agree -- in agreement that
2 we can only do this on Wednesday, then we're prepared to deal
3 with that.

4 THE COURT: Okay.

5 MR. THOMPSON: We would love to have Mr.
6 Perry be heard, but we're prepared to deal with it otherwise
7 if -- if we have to.

8 THE COURT: Okay; and, I'm -- I'm
9 asking these questions so that everybody has an opportunity
10 to think about it and have input into when the arguments
11 would be held.

12 MR. THOMPSON: Yes, sir.

13 THE COURT: Now, I'm also hearing from
14 Mr. Ferguson that the request is that you folks decide who
15 and how many ----

16 MR. JAMES FERGUSON: Yes, sir.

17 THE COURT: Same thing applies to you
18 folks, who and how many. Any input from the State on that,
19 any ----

20 MR. COLYER: We're -- we're content
21 with that. Your Honor, if you'll give us a forecast of how
22 much time you will allow, we'll be glad to tell you how we'd
23 -- how we'd like to divide it up and how many arguments
24 within that allowed time period. If the Court has some
25 objection to that, we'd certainly be in a position to try to

1 retool, but we're not looking, at this point, to tell you how
2 many or how long.

3 THE COURT: Okay.

4 MR. COLYER: We'd like some guidance
5 from the Court and what you'd like to hear in terms closing
6 ----

7 THE COURT: I subscribe to the
8 [indiscernible], but I'm not imposing that on anybody.

9 MR. THOMPSON: Yes, sir.

10 THE COURT: I -- I'm not imposing that
11 on anybody.

12 MR. JAMES FERGUSON: And we're -- we're
13 thinking through how we want to do it.

14 THE COURT: Okay.

15 MR. JAMES FERGUSON: There's several different
16 parts, and we'll work it within whatever time ----

17 THE COURT: Okay.

18 MR. JAMES FERGUSON: ---- period the Court
19 gives us.

20 THE COURT: All right.

21 MR. JAMES FERGUSON: We may, in this case,
22 decide [indiscernible] ----

23 THE COURT: Okay.

24 MR. JAMES FERGUSON: It would be ----

25 THE COURT: My inclination is to let

1 you folks argue for as long as you want, both sides. My
2 inclination is not to impose a time limit on counsel, to let
3 you folks argue -- I recognize the importance of this case,
4 as I'm confident everyone else in the room does. So, I'm
5 inclined to give you folks latitude.

6 MR. JAMES FERGUSON: We appreciate that, Your
7 Honor. The only thing I would like to clarify is we are
8 assuming on this side as the party with the burden of proof
9 ----

10 THE COURT: Yes, sir.

11 MR. JAMES FERGUSON: ---- that we would be able
12 to open and close.

13 THE COURT: Yes, sir.

14 MR. JAMES FERGUSON: We would like to have the
15 opportunity ----

16 THE COURT: Well, I say yes because
17 that's the normal course of events; but, if you folks want to
18 be heard -- they've got the burden of proof. Their position
19 is they're entitled to open and close. Do you want to be
20 heard, or do you want to reserve any hearing on -- on that?

21 MR. COLYER: We're content to follow
22 the rules as you set them down and ----

23 THE COURT: Okay.

24 MR. COLYER: ---- just like a regular
25 criminal trial, understanding that they have the burden of

1 proof and we've presented some evidence ----

2 THE COURT: Yes, sir.

3 MR. COLYER: We understand where we
4 are.

5 THE COURT: Yes, sir.

6 MR. COLYER: We'd just like, if we
7 could, to get a forecast of when we might start ----

8 THE COURT: Yes, sir.

9 MR. COLYER: ---- because, since Mr.
10 Perry can't be here on Wednesday, if it were possible for us
11 to get, say, his portion of the argument done tomorrow
12 afternoon, before he leaves ----

13 THE COURT: All right.

14 MR. COLYER: ---- and then we could
15 finish on Wednesday whatever ----

16 THE COURT: Okay.

17 MR. COLYER: ---- the defense schedule
18 was. If -- if Mr. Kerry is going to be allowed to
19 participate and we don't get his in tomorrow, obviously, we'd
20 be asking, subject to his availability -- don't know what
21 Wednesday's going to take -- have in store for him ----

22 THE COURT: Yes, sir.

23 MR. COLYER: ---- but, subject to his
24 availability, Thursday; and, obviously, we don't want to drag
25 this out ----

1 THE COURT: I understand.

2 MR. COLYER: ---- but we would like to
3 you have the benefit of his expertise for our argument as to
4 the statistical ----

5 THE COURT: Well, from the projected
6 schedule, it sounds like it's doable to allow him to be heard
7 out of order, tomorrow afternoon.

8 MR. JAMES FERGUSON: Yes, sir, Your Honor.

9 THE COURT: I'm hearing from -- or, at
10 least I think I'm hearing from the other side there's no
11 objection to that.

12 MR. JAMES FERGUSON: No objection.

13 THE COURT: So, we can tentatively, at
14 least, plan on going forward upon the conclusion of any
15 surrebuttal evidence by the defendant with his argument. Do
16 you folks want to go forward with your arguments tomorrow
17 afternoon as well if time permits?

18 MR. COLYER: Judge, we'll -- we'll fit
19 in however the defense -- if they want to sandwich us, we'll
20 -- we'll step back. If they want to forego their opening
21 arguments and want us -- we -- we'll be prepared to follow
22 right on ----

23 THE COURT: Okay.

24 MR. COLYER: ---- whatever the Court
25 allows.

1 MR. JAMES FERGUSON: In fairness, Judge, to
2 everybody concerned, we would be willing to agree to Mr.
3 Perry being heard out of turn -- out of order due -- due to
4 his scheduling issues.

5 THE COURT: Yes, sir.

6 MR. JAMES FERGUSON: We're going to ask to --
7 the remainder of the argument, we would prefer that it be
8 done in order, that we open and -- we -- we're going to
9 sandwich them.

10 THE COURT: Okay. All right; and,
11 I'm not belaboring this hopefully; but, by way of example
12 ----

13 MR. JAMES FERGUSON: Yes, sir.

14 THE COURT: ---- if we conclude the
15 evidence say mid-day tomorrow, Mr. Perry would then go out of
16 order to accommodate his schedule.

17 MR. JAMES FERGUSON: If need be. It may be, if
18 we do that tomorrow, we might be able to -- he'll be -- he
19 can go tomorrow, Your Honor ----

20 THE COURT: All right.

21 MR. JAMES FERGUSON: ---- and then we finish
22 ----

23 THE COURT: But, arguably that
24 imposes, at least implicitly, some time constraints. If, for
25 example, we've got 3 hours left for argument and we've got an

1 opening by Counsel for defendant followed by the argument of
2 the State and then closings by the defendant, I don't want to
3 arbitrarily or artificially put any time constraints on
4 counsel.

5 MR. JAMES FERGUSON: And we appreciate that,
6 Your Honor; and -- and -- and I -- I think, for our side of
7 the table, what we would propose and agree to would be --
8 assuming we finish sometime tomorrow, noon or shortly
9 thereafter ----

10 THE COURT: Okay.

11 MR. JAMES FERGUSON: ---- to let them go ahead
12 and call Mr. Perry out of order to present his argument.

13 THE COURT: Then start Thursday
14 morning ----

15 MR. JAMES FERGUSON: ---- and then start
16 Wednesday morning ----

17 THE COURT: Yes, sir. Wednesday
18 morning.

19 MR. JAMES FERGUSON: Wednesday morning.

20 THE COURT: Yes, sir. That's ----

21 MR. JAMES FERGUSON: And then we go in the
22 order that we had anticipated.

23 THE COURT: Okay. That's -- that --
24 that seems to me to make sense.

25 MR. JAMES FERGUSON: Yes, sir.

1 THE COURT: Is that agreeable?

2 MR. COLYER: That's agreeable with us,
3 Judge.

4 MR. THOMPSON: Yes, sir.

5 THE COURT: Okay.

6 MR. THOMPSON: Yes, sir.

7 THE COURT: All right.

8 MR. COLYER: Thank you.

9 THE COURT: I appreciate it, folks.

10 MR. JAMES FERGUSON: Thank you, Your Honor.

11 THE COURT: Okay.

12 MR. JAY FERGUSON: I have one small issue

13 ----

14 THE COURT: Yes, sir.

15 MR. JAY FERGUSON: ---- if we could clarify
16 it and clear it up. We -- tomorrow, we need -- we intend to
17 move into evidence the CLE records that I've obtained from
18 the State Bar, from the prosecutors from Cumberland County.

19 THE COURT: Okay.

20 MR. JAY FERGUSON: And the State has agreed
21 to stipulate as to their authenticity, but not ask to the
22 relevance and admissibility. Is that correct?

23 THE COURT: Okay.

24 MR. THOMPSON: It's the -- it's the
25 timing of them. That's one objection. They were gathered by

February 13, 2012

1 the defense. According to the letter -- I want to say it was
2 November, but I'm trying to pull that up now.

3 MR. JAY FERGUSON: Mid-November, that's
4 correct.

5 MR. THOMPSON: November 15th, if memory
6 serves. It may or may not, but we got them this week. The
7 relevance of them, and there are [sic] personal information
8 that could cause potential danger ----

9 THE COURT: We -- we could redact
10 anything that's a concern, if that's the concern.

11 MR. THOMPSON: But we -- so, we've got a
12 number of attacks on them ----

13 THE COURT: Okay.

14 MR. THOMPSON: ---- this information --
15 that they were not provided to us until an e-mail this
16 weekend.

17 THE COURT: Okay.

18 MR. THOMPSON: And that's first and
19 foremost one of the issues we have, then, again, relevance
20 and then there's some issues ----

21 THE COURT: I'm not -- obviously, both
22 sides are entitled to be heard, so I'm not ruling on that at
23 this point; but, I understand where we are.

24 MR. JAY FERGUSON: I just want a stipulation
25 as to the authenticity so someone from the State Bureau --

1 State Bar is not down here tomorrow.

2 THE COURT: Okay.

3 MR. JAY FERGUSON: That's all I'm asking.

4 MR. THOMPSON: We ----

5 MR. COLYER: We're not -- we're not
6 going to attempt to ----

7 MR. THOMPSON: We don't have any issue on
8 that.

9 THE COURT: Okay. All right

10 MR. COLYER: And -- and, also, just for
11 their planning purposes, part of our objection deals with the
12 -- the population that they've included in that -- the number
13 of persons that they're looking to get the CLE in evidence
14 ----

15 THE COURT: Okay.

16 MR. COLYER: As I understand it, there
17 may be a number of people from the District Attorney's Office
18 that did not have cases that were in the study. So, just to
19 ----

20 THE COURT: Okay.

21 MR. COLYER: On that relevance grounds,
22 as well as, perhaps, some others, but just to give them a
23 heads-up ----

24 THE COURT: Okay.

25 MR. COLYER: ---- because I -- I

1 haven't seen the e-mail. Mr. Thompson told me about it
2 earlier today, but I believe it includes persons that perhaps
3 tried some cases capitally that either resulted in a non-
4 capital result, resulted in a person getting the death
5 penalty who is now deceased from, as I understand it, natural
6 causes and was not included in the study, just that sort of
7 thing.

8 THE COURT: Okay.

9 MR. COLYER: The relevance ----

10 THE COURT: Well, I appreciate the
11 heads-up.

12 MR. COLYER: Yes, sir.

13 THE COURT: All right. Mr. Hunter?

14 MR. HUNTER: It may be that we should
15 just talk at the end of court today, and I think we're only
16 interested in people who have -- who tried capital cases in
17 Cumberland County. That's our -- that's our point about
18 that.

19 THE COURT: Okay.

20 MR. HUNTER: So, as to anybody else, I
21 -- I think, you know, just -- we got everything and so -- but
22 we're happy to narrow it if that makes a difference.

23 MR. COLYER: Well, that -- that -- we
24 appreciate that, and it may address our other concerns. It
25 may not, but things like Bar numbers, addresses, telephone

1 numbers.

2 THE COURT: Yeah, all -- anything that
3 -- a personal nature or otherwise subject to being redacted,
4 we can talk about that if we get to that point.

5 MR. COLYER: Yes, sir.

6 THE COURT: All right. Anything else,
7 folks?

8 [There were no responses by counsel for either side.]

9 THE COURT: Have a good evening,
10 folks.

11 [The hearing recessed at 4:19 p.m., February 13, 2012]

12 [END OF PAGE]

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

vs.

MARCUS ROBINSON,
 Defendant

RACIAL JUSTICE ACT HEARING

Heard February 14, 2012

**VOLUME XII of XIII
 (Pages 2265 through 2466)**

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: CALVIN W. COLYER & ROB THOMPSON
 12th Judicial District
 JONATHAN W. PERRY, 20th Judicial District
 Assistant District Attorneys
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302

For the Defendant: MALCOLM R. HUNTER, JR. & JAY H. FERGUSON
 JAMES E. FERGUSON, II, & CASSANDRA STUBBS
 Attorneys at Law
 119 East Main Street
 Durham, North Carolina 27701

JENNIFER L. HACK, RPR
 Official Court Reporter
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302
 jennifer.l.hack@nccourts.org

DATE REQUESTED: 02/03/12

DATE DELIVERED: 03/05/12

1 (The following proceedings began in open court on
2 Tuesday, February 14, 2012, at 9:32 a.m. The defendant, Mr.
3 Hunter, Mr. Jay Ferguson, Mr. James Ferguson, Ms. Stubbs, Mr.
4 Colyer, Mr. Thompson, and Mr. Perry were present.)

5 (REPORTER'S NOTE: The Master Index will be
6 submitted in a separate volume entitled Master Index.)

7 THE COURT: Okay. Let the record reflect all
8 counsel are present. The defendant is present. We're about to
9 begin, if I understand correctly, the -- I guess surrebuttal
10 evidence offered by the defendant in this case.

11 Are you ready to go forward, folks?

12 MS. STUBBS: Yes, Your Honor.

13 THE COURT: Yes, ma'am.

14 MS. STUBBS: Your Honor, we would call Dr.
15 Woodworth to the stand again.

16 THE COURT: Dr. Woodworth, you've previously been
17 sworn, sir, and you remain under oath. Good morning, sir.
18 Would you like some water?

19 THE WITNESS: Yes, please.

20 THE COURT: For the benefit of the court reporter,
21 if you will state and spell first and last name, please, sir.

22 THE WITNESS: George Woodworth, W-o-o-d-w-o-r-t-h.

23 THE COURT: Thank you, sir.

24 Yes, ma'am.

25 GEORGE WOODWORTH, called as a witness herein,

1 having been previously first duly sworn, was examined and
2 testified as follows:

3 DIRECT EXAMINATION

4 BY MS. STUBBS:

5 Q Good morning, Dr. Woodworth.

6 A Good morning.

7 Q I wanted to start this morning by asking you a few
8 questions about the report from Dr. Katz who testified last
9 week.

10 A Okay.

11 Q Have you had an opportunity to review that report?

12 A Yes, I have.

13 Q Okay. Let's start with Dr. Katz's cross-tab analysis.
14 Can you explain for the Court, first, what the general purpose
15 of a cross-tab analysis is?

16 A The general purpose of a cross-tab done properly is to
17 investigate the relationship between one or more factors and an
18 outcome.

19 Q And is there a danger in using too many factors?

20 A Yes.

21 Q And what is that?

22 A The danger is that if the cross-tabulation is carried
23 too far, i.e. by introducing too many splits on factors, then
24 you will get to a point where you're no longer looking at
25 reliable associations and you're starting to explore chance

1 co-occurrences.

2 THE COURT: Chance --

3 THE WITNESS: Co-occurrences, factors.

4 THE COURT: Thank you, sir.

5 BY MS. STUBBS:

6 Q And, in your opinion, did that happen with Dr. Katz's
7 analysis in this case?

8 A Yes, I do think so.

9 Q Would it -- the cross-tabulation that Dr. Katz produced
10 in this case, would that -- have you ever seen anything like
11 that in a published peer-review journal?

12 A I have never seen anything like that published. I have
13 never seen anything like that submitted.

14 Q Do you think there's any chance it would be accepted in
15 a peer-review publication?

16 A I can't imagine any circumstances under which it would
17 be accepted.

18 Q And when used in this way, so that there are so many
19 factors analyzed as part of a cross-tab, do you think that's an
20 acceptable means of controlling?

21 A No, it's not a generally accepted method, not carrying
22 it to that extent.

23 Q Now, Dr. Woodworth, I'd like to ask you about the
24 concept generally of overfit. Can you explain for us what that
25 principle means?

1 A Generally speaking, overfitting occurs in selecting
2 factors to be used to make an account of what's happening in the
3 system or to predict the disposition of cases in the future. So
4 an overfitting occurs in such a process of selecting factors to
5 be used, and overfitting means the insignificant factors are
6 starting to be included in the predictive or descriptive model
7 that is being constructed. So it's the same thing I said
8 before. It's exploiting the chance idiosyncratic features of
9 the dataset you're building the model on, and in such a
10 situation, you can't expect that model to reflect what's going
11 on in the larger population if you're working from a sample.

12 Q And generally if a statistician considered a model to
13 have the problem of overfit, would it be considered a reliable
14 model?

15 A No.

16 Q What do the terms signal and noise mean in this
17 context?

18 A Well, signal and noise are metaphors for the concepts
19 we've been talking about. Signal, in a statistical context,
20 would be a reliably identified feature of some system, for
21 example, capital voir dire. And noise would be combinations or
22 factors that occur uniquely perhaps or a small number of times
23 and don't really reflect any kind of systematic pattern or
24 practice.

25 Q And what's the relationship between that and overfit?

1 A Overfit means treating noise as if it were a signal.

2 Q And how do you avoid overfitting?

3 A There are various ways of doing it, various ways of
4 ensuring that the factors included in a model are doing their
5 job, i.e., are reliable and are likely to produce a model that
6 applies -- that reliably describes the process that's being
7 analyzed as opposed to being influenced by random chance. The
8 principle method of doing that is to select factors that are
9 significant at a certain level. Now, it doesn't have to be the
10 conventional .05, but there has to be some kind of control to
11 rule out noise factors.

12 Q And, Dr. Woodworth, when you say the conventional .05,
13 are you referring to the p-value then?

14 A Yes, I am.

15 Q And, in your opinion, was overfitting a problem with
16 the MSU study?

17 A No.

18 Q Now I'd like to turn to Dr. Katz's regression analyses.

19 A Okay.

20 Q And starting first with the regression analysis he did
21 of Cumberland County, he had provided six examples in his
22 report.

23 MS. STUBBS: Your Honor, may I stand up.

24 THE COURT: Yes, ma'am.

25 BY MS. STUBBS:

1 Q Dr. Woodworth --

2 A Yes.

3 Q -- I've handed you -- let me see if I can zoom in a
4 little bit. I have handed you an excerpt from State's
5 Exhibit 44. This is page 458, and it's entitled, Logistic
6 Regression, Cumberland County, Example One, Coefficient of Race
7 Variable (Black) Not Statistically Significant Not Intended as a
8 Model to Explain How Prosecutors Execute Their Peremptory
9 Strikes.

10 Can you first comment on that -- on the title of the --
11 of this logistic regression model?

12 A I believe it speaks for itself that this is not a model
13 that was constructed using precautions against overfitting.

14 Q And why do you say that?

15 A Well, first of all, it's stated in the title and,
16 secondly, if we look on page DA-459, then we see in the column
17 labeled Pr greater than ChiSq -- C-h-i-S-q. In that column, we
18 see very few variables that are actually significant even at the
19 10 or 15 percent level.

20 Q So in other words, Dr. Woodworth, is that column -- is
21 that referring to p values?

22 A Yes. Those are commonly called p values, right.

23 Q And so what's the importance of the fact that many of
24 those p values are over .05?

25 A That means there is no evidence whatever that this model

1 reflects any systematic features of the voir dire process.

2 Q Have you ever seen anyone report a model like this with
3 this kind of -- with these kind of p values in it?

4 A No, with the exception of models that include statutory
5 factors that must be considered influential but apart from that,
6 there's a theoretical reason for a variable, and it's customary
7 to keep it in even if it is insignificant.

8 Q And looking at the variables in this model, do you
9 notice anything about those variables?

10 A Well, yes. These are actually not variables. These are
11 individual codes in Professor O'Brien's code book from which she
12 constructed meaningful variables.

13 Q And why is that difference significant?

14 A Well, because if one works with individual codes, there
15 will actually be very few instances of that code in the dataset,
16 and that means there is a much greater possibility for chance to
17 account for any predictive power, the fact of that code and,
18 secondly, even if it -- and, secondly, it may make that code
19 appear to be much more explanatory than it would be in the -- in
20 an examination of the process over a longer time.

21 Q Now, going back to the purpose of this, to this model
22 and the title, Dr. Katz testified that he was attempting to
23 build a model where black was not statistically significant. In
24 your experience, is that an appropriate purpose for model
25 building?

1 A No. No. It's not the way it's done in social science.
2 One tries to develop variables that have some coherence and face
3 validity without reference to whether they predict or not and
4 then see the extent to which they predict. So it is sort of
5 like doing a double-blind experiment where you don't try to
6 stack the deck to get the results that you want.

7 Q And, Dr. Woodworth, again, turning back to these high p
8 values, was this problem of including p values over .05 or over
9 .10, is that a problem that you saw in the MSU study?

10 A No.

11 Q I'd now like to turn to another model. This model is
12 also included in the report marked as State's Exhibit 44 --

13 A That's right.

14 Q -- and begins on page DA-483.

15 A I have it.

16 Q This model -- well, first, can you describe for us the
17 StrikeState model. It says that that's the response variable.
18 What does that variable correspond to?

19 A StrikeState is the variable that indicates whether or
20 not the venire member was struck by the State.

21 Q And how is that constructed?

22 A Well, StrikeState is not a constructed variable. It's
23 from the record. Are you thinking perhaps about the
24 StrikeGroup?

25 Q StrikeGroup. Yes. I am sorry. Thank you, Dr.

1 Woodworth. Can you explain for us how StrikeGroup was
2 constructed?

3 A StrikeGroup was constructed by a strange and unique very
4 high-dimensional cross-tabulation in which the individual
5 descriptives codes, of which I understand there's 60-plus, were
6 used to break the data down into -- break the data -- sorry.
7 The venire members were broken down according to what employment
8 they had, what -- I forget the other two variables but they were
9 employment and -- can you refresh my memory on this?

10 Q Yes.

11 MS. STUBBS: Your Honor, may I approach.

12 THE COURT: The previous exhibit, Dr. Woodworth,
13 page 2. Is that what we're talking about?

14 MS. STUBBS: No, Your Honor. May I approach.

15 THE COURT: Yes, ma'am. Absolutely.

16 THE WITNESS: I'm looking at DA-120, which is
17 Exhibit 1.

18 THE COURT: It's DA-120, sir?

19 THE WITNESS: Yes, sir.

20 THE COURT: Okay.

21 THE WITNESS: And we see there that the
22 cross-tabulation was based on employment, marital status,
23 education, and whatever combination of descriptive codes were
24 present. So, for example, for observation eight, you see
25 employment status ten; marital one; education three. And this

1 particular venire member had descriptives 800 and 120, and as we
2 can see, there's only one person with that unique combination.
3 So Dr. Katz broke the venire members down in the 25 percent
4 sample using this scheme. And then the variable that you asked
5 about called StrikeGroup is a -- consists of all venire members
6 who were in a category that was entirely struck.

7 THE COURT: Yes, sir.

8 THE WITNESS: That's been testified to before.

9 BY MS. STUBBS:

10 Q And that was the cross-tabulation approach that you
11 testified about --

12 A That is what I was referencing, yes.

13 Q -- earlier this morning. So what happens when you
14 create this kind of composite variable in terms of being able to
15 interpret the findings?

16 A Oh, it's utterly uninterpretable, and it also has no
17 validity beyond the -- it has no validity because it cannot, in
18 principle, generalize even to the remaining 75 percent of the
19 population. And I would -- it is entirely circular. This is
20 artificial conglomeration of categories designed to essentially
21 be a proxy for being struck. It 's an almost perfect proxy
22 constructed by reference to the thing to be explained, namely,
23 being struck. So we're constructing an explanatory variable by
24 artificially building a highly uninterpretable, unintuitive
25 complicated mishmash of categories solely on the basis that that

1 particular category has nothing but strikes in it.

2 Q And so, Dr. Woodworth, this model attempts to use
3 StrikeGroup to predict StrikeState. Did I get that right?

4 A That's right.

5 Q And is there anyone in the StrikeGroup who is, by
6 definition, not struck?

7 A No.

8 Q So is it surprising, then, that we would find a high
9 correlation between if everyone --

10 A No, it --

11 THE COURT: Folks are having difficulty with the
12 ventilation. If you can keep your voice up and repeat your
13 question, please, ma'am.

14 BY MS. STUBBS:

15 Q Is it surprising, then, that StrikeGroup predicts
16 strike outcomes?

17 A No, it's not surprising that being struck predicts being
18 struck. Essentially, StrikeGroup is a proxy for being struck.
19 It's a circular argument.

20 Q In your opinion, does this model tell us anything
21 meaningful at all?

22 A Nothing whatever.

23 Q Now, Dr. Woodworth, if you would turn to the second
24 page -- it's marked DA-484 of -- this is still State's
25 Exhibit 44.

1 A I see it.

2 Q Can you tell us what that R-Square is there?

3 A R-Square is -- the R-Square we're familiar with is from
4 linear regression, and it is usually styled to proportionate
5 variance explain -- the proportionate of the variance of the
6 dependent variable explained by the model. In logistic
7 regression, it is not computed that way, and it doesn't have
8 that interpretation. It is, to me, a rather arbitrary measure
9 of how the extent to which the variables in the model predict
10 the outcome. So 1.00 is perfect prediction and zero is random
11 prediction so that -- whatever R-Squared means, it purports to
12 mean how well the model predicts. Anybody who's read social
13 science research, done it, consulted in social science research
14 would be flabbergasted to see an R-Squared there. It is just
15 not the kind of predictability that you see in complicated
16 discretionary systems. So that is -- that, by itself -- the
17 success of this model is an indication that there's some monkey
18 business behind it, to use a technical term.

19 Q And what about the odds ratio that's reported?

20 A The odds ratio is reported on the next page.

21 Q For the record, this is DA-485.

22 A Well, the odds ratios are infinity or negative -- sorry,
23 infinity or zero and that reflects -- the infinity means if
24 you're in the StrikeGroup then the odds are 100 to zero that
25 you'll be struck, so that ratio is infinite. It is just a

1 technical matter. And if you're in the PassGroup, which is the
2 mirror image -- not the mirror image but it's those categories
3 in which there were no strikes. And in that group, everybody is
4 passed and, therefore, the strike rate is zero over 100, strike
5 ratio is zero over 100. The odds are zero over 100.

6 Q And these problems, the very high odds ratio, the very
7 high R value, are those problems that you saw with the MSU --

8 A No. No. There was some large -- there were some
9 variables that predicted most of the observations but
10 significantly and they had largest odds ratios but nothing like
11 this, nothing like zero, one, like we are getting here.

12 Q Now, Dr. Woodworth, I'd like to ask you to go back to
13 an issue that you testified about last week or, actually, two
14 weeks ago now, when you testified about time smoothing. Do you
15 recall that testimony?

16 A Yes.

17 Q And you testified that with respect to the statewide
18 adjusted time smoothing, you had made an error. Do you remember
19 that?

20 A Yes. I'd like to thank the State for finding that
21 error. It was a blunder, a typo, and it did somewhat affect the
22 graph, although not substantively.

23 MS. STUBBS: All right. Your Honor, may I
24 approach.

25 THE COURT: Yes, ma'am.

1 BY MS. STUBBS:

2 Q And, Dr. Woodworth, I've handed you a copy of what's
3 been marked as Defendant's Exhibit 66.

4 A Yes.

5 Q What is this?

6 A It's the statewide adjusted odds ratio recomputed
7 correcting -- correcting errors identified by the State and also
8 correcting another typo in my code that they didn't find. This
9 shows the curved solid line in between the two -- the dashed and
10 the dotted lines --

11 Q Actually, before you get into interpreting it, one of
12 the questions that the State had for you was whether you had
13 included the variable VeryYoung?

14 A Yes, and that's included here.

15 Q And then just to be clear, the State had identified a
16 delta 30 that --

17 A It was -- yes. It was in the equation that represents
18 this curve as a regression and --

19 Q And that error has been -- is the one that's been --

20 A Cut and paste error, yeah, and then there was another
21 one, had a wrong sign in another part of the code. So having
22 cleaned all of those up and I read it pretty carefully this
23 time, this is -- this is the corrected version of that figure.

24 Q Okay. And now I didn't mean to interrupt you. Can you
25 explain what this graph shows us?

1 A The graph shows several things. One is the five-year
2 averages, the green dots with confidence intervals and range
3 bars, and the vertical red line is the date of Marcus Robinson's
4 sentence, and the black curve in between the dotted lines is the
5 adjusted odds ratio. It's the smoothed adjusted odds ratio
6 representing a smooth transition between the five-year time
7 periods.

8 Q And so why are the dotted lines closer in this period
9 here around the red line and farther apart --

10 A Okay. You're indicating the years between -- let's see.
11 That would be -- that would be '94 roughly. Is that what you're
12 indicating?

13 Q Yeah, that period --

14 A Ninety-three to about '95 or six is what you were
15 gesturing at; is that right?

16 Q Yes.

17 A All right. So in there, the barcode graph at the bottom
18 indicates the dates of the sentences in the 172 cases, and the
19 data is much denser in that region, and that's why the standard
20 error bands, those dotted lines called the standard -- sorry,
21 the confidence bands around the estimated curve get narrower
22 there because we've got more to go on.

23 Q And so using all of the data from the MSU study over
24 this entire 20-year period, were you able to calculate in this
25 revised model -- were you able to calculate an odds ratio for

1 the time of Marcus Robinson's trial in 1994?

2 A Yes. And if memory serves in my previous testimony, the
3 smoothed estimate, which pays attention to data not far from
4 Marcus Robinson's date, was 2.93, I think it was, and the
5 revised is 3.01, so my blunders didn't really affect it, and
6 that doesn't surprise me because there's so much data there.

7 Q All right. Now, Dr. Woodworth, the last topic that I'd
8 like to ask you about this morning is the concept of a
9 well-defined variable.

10 A Yes.

11 Q Did you listen to portions of Dr. Katz's testimony on
12 an audiotape?

13 A Yes, I did.

14 Q And did you listen to the portion where Dr. Katz
15 referred to a perfect variable and well-defined variables?

16 A Yes, I did.

17 Q Before I ask you about his discussion, first, can you
18 just tell us in your opinion what a well-defined variable is?

19 A Well, the short answer is a well-defined variable is
20 what Professor O'Brien produced. The longer answer is that we
21 actually don't use well-defined. We use the terms validity and
22 reliability to characterize the quality of a variable. Validity
23 means that it actually measures what it purports to measure.
24 So, for example, a variable DP_Reservation is valid if it
25 actually captures which venire members had expressed DP

1 reservation. So that's validity. So, in short, validity means
2 the name of the variable tells you what it actually is
3 measuring.

4 The concept of reliability means that two different
5 people assessing whether or not that variable is present would
6 most of the time come to the same answer. Reliability is
7 measured various ways. One is by having multiple coders look at
8 the record, and the other way is to compare it against the gold
9 standard, which is probably not feasible in this case.
10 Well-defined, then, would be a variable in which steps have been
11 actively taken to ensure that it validly reflects what it says
12 it reflects and it is reliably ascertained.

13 Q Now, in the field of statistics, have you ever heard of
14 a concept of a perfect variable? Is that a term that has
15 meaning in the field of statistics?

16 A Like a perfect storm? Yeah. No, I have never heard
17 that word used, but I think I understand what he meant.

18 Q And, well, have you ever seen a perfect variable based
19 on this understanding in your experience in any applied context?

20 A Well, let me say what my understanding of what Dr. Katz
21 meant by the term. He -- from his testimony, I gather that what
22 he meant was a variable which if a factor, which, if present,
23 guarantees being struck and which, if absent, guarantees not
24 being struck. I don't think there's any such variable. I don't
25 think any such variable exists, certainly not in a complicated

1 discretionary system like this. And to call it perfect sets it
2 up as some sort of standard the other variables should aspire
3 to, and I think that's absolutely wrong. I give you, for
4 example, risk factors for heart attack, right? Age, smoking,
5 diabetes, first-degree relative. All of those increase the
6 risk, but none of them says, This guy's gonna get a heart attack
7 and this guy isn't. It just doesn't happen that way.

8 MS. STUBBS: Thank you, Dr. Woodworth.

9 THE COURT: Mr. Perry, any cross-examination, sir?

10 MR. PERRY: Yes, Your Honor.

11 THE COURT: Yes, sir.

12 CROSS-EXAMINATION

13 BY MR. PERRY:

14 Q Dr. Woodworth, did you ever use a map to get anywhere?

15 THE COURT: I am sorry. Didn't hear you. If
16 you'll remove the other -- thank you, sir.

17 MR. PERRY: Yes, sir.

18 BY MR. PERRY:

19 Q Dr. Woodworth, do you ever use a map to get anywhere?

20 A A map?

21 Q Yes, sir.

22 A Of course. GPS more often but, yeah.

23 Q Technology, right. Now, you were talking about
24 overfitting. I believe that's one of the first things that you
25 were asked about. Would a map that shows a lot of twists and

1 turns be an example of overfitting?

2 A I reject your analogy.

3 Q Tell me why you reject that.

4 A Well, a map is a model of the road system, and it can
5 be -- the accuracy of that map can be verified by what they call
6 ground truth. You can go out and actually verify that that map
7 represents what it purports to represent. No such verification
8 is possible using the techniques Dr. Katz used to, if you like,
9 create his map of the 25 percent sample. He doesn't even claim
10 to map the population that sample represents, validly
11 represents. So, I repeat, I reject the analogy.

12 Q All right. Well, let me ask you another question. Let
13 me go down the line sort of with the same order you were asked
14 about stuff. So you said with the cross-tabulation approach as
15 Dr. Katz used, there was a danger in using too many factors; is
16 that correct?

17 A Yes. I think that's probably a fair paraphrase.

18 Q That's your opinion? Well, I can ask it like that. Is
19 that your opinion that that's one of the dangers of using that
20 method?

21 A Yes.

22 Q And I think if I understood you correctly, you said
23 that that is because if you use too many factors, that raises
24 the spectrum of chance co-occurrences --

25 A Exactly.

1 Q -- instead of too much explanation or explanation from
2 factors; is that correct?

3 A I'm sorry. I didn't understand that last bit that you
4 said there. Too much explanation? Would you parse that for me,
5 please.

6 Q Right. So the issue is, with cross-tabulation, it
7 raises the chance of co-occurrences that are random. Is that
8 what you're saying?

9 A Random or idiosyncratic.

10 Q And by idiosyncratic, what do you mean?

11 A Found in this sample and not generally as strong an
12 association in the larger picture.

13 Q Okay. So now in your, I guess, explanation or
14 definition of idiosyncratic, does that not equal explanatory?

15 A Okay. Explanatory is not a word of praise. Explanatory
16 simply means those variables that are picked for your analysis
17 to try to account for the outcomes, okay? Now, you are making a
18 distinction between explanatory and what?

19 Q No. My question is: With your definition of
20 idiosyncratic, does that mean only occurring infrequently or
21 does that mean nonexplanatory?

22 A Not reliably explanatory, not demonstrably reliable is
23 what --

24 Q By demonstrably reliable, what do you mean?

25 A Significant, to start.

1 Q So present in larger numbers maybe?

2 A Present in larger numbers helps, yes. That doesn't
3 guarantee significance.

4 Q Another way -- and correct me if I am wrong, but I
5 think you said that they were systematically present. Is that
6 another way to say that?

7 A Well, I'm saying that an association is systemic in a
8 sense that it's not -- that it occurs not just in the sample --

9 Q Uh-huh.

10 A -- but also in the process that the sample represents.

11 Q Okay. And let me ask you another question about
12 definitional-type stuff. You said, I think, noise was
13 nonsystematic patterns, correct?

14 A That's a metaphor.

15 Q Well, explain to me what you mean by that.

16 A A nonsystematic pattern, if I had to expand on what I
17 meant by that, would be the pattern which has been reliably
18 identified. That's a systematic pattern. And a nonsystematic
19 pattern is when --

20 Q By reliably identified, what do you mean?

21 A Significant, for starters.

22 Q In terms of statistical significance, in other words?

23 A There are various ways of investigating reliability.
24 Significance is the threshold you got to get over first.

25 Q What are some of the other ways?

1 A Some of the other ways?

2 Q Uh-huh. Yes, sir.

3 A The other ways that can be -- that are relevant in this
4 context would be methods of not only looking at significance but
5 whether or not the variable actually improves -- the addition of
6 the variable actually improves the prediction, but you have to
7 have significance and prediction.

8 Q So both of those?

9 A Uh-huh. Let me amend that statement. The -- the
10 statistic is called Cp -- that is capital C, lower case p --
11 method, and it compares the predictive increment provided by an
12 explanatory variable with the predictive -- with the predictive
13 increment you would get by chance, subtly different from
14 significance.

15 Q Let me ask you another question, not so much a
16 definition, but I think you said that overfitting was not a
17 problem with the MSU study, right?

18 A That's correct.

19 Q And that's true because -- what makes overfitting not a
20 problem with the MSU study?

21 A For all of the reasons that I went through in my direct
22 this morning. One of them being that there was an effort to
23 follow the canons of proper empirical research in model
24 selection. Professor O'Brien used generally accepted model
25 building methodology unlike Dr. Katz's efforts.

1 Q So is it fair to say that the MSU study did not have a
2 problem with incorporating idiosyncratic factors into the model
3 in the way you talked about that kind of term?

4 A Yes. That's what I testified to.

5 Q And you said that -- and I am going to move on sort of
6 to the next segment of what you testified to earlier. So, Dr.
7 Katz, you said in his regression analysis, those were not
8 constructed with precautions against overfitting?

9 A Yes, sir.

10 Q Is that correct?

11 A Yes, sir.

12 Q And I think you characterized some of the descriptives
13 that were included in his model is not variables but codes?

14 A That's right.

15 Q And the reason that those are not variables and are
16 codes is because why?

17 A That was their purpose in constructing the DCI. One
18 has, generally speaking, concepts in mind that one would like to
19 capture or features that one would like to capture, but to make
20 the task more reliable for the coders, one breaks it down. One
21 provides examples and instances and specific subcategories of
22 the actual variable one is planning to construct out of those
23 codes. For example, if the concept is elevated temperature in a
24 child, say, okay. Well, you can say the code is the number
25 written down by the nurse, and it could be 100 or 101 or 102 or

1 103 and so on up. So those are the codes. Now, can you imagine
2 somebody doing a medical study in which the explanatory
3 variables were temperatures of 101? Okay. That's one
4 explanatory variable. Another one is temperature of 102.
5 That's -- that would be laughed out of the grand rounds if you
6 tried to present something like that.

7 What one is looking for is at a higher level. One is
8 looking for something that captures the feature not the subcodes
9 provided for the convenience of the coders to ensure reliability
10 of coding.

11 Q And so on that note, you've had a chance to review
12 Professor O'Brien's study, correct?

13 A Yes, I have.

14 Q You looked at the variables and the breakdowns like you
15 were referring to, the different levels of codes for each
16 particular variable?

17 A I have read the DCI.

18 Q So now, in your example, the difference in temperature
19 between 101 and 102, that would be equivalent to one of the
20 subcategories in the 700 codes, for example?

21 A Yeah.

22 Q So the improper thing to do would be to count those
23 subcategories individually?

24 A Yes. That would be absurd.

25 Q So how do you determine what the proper level of

1 aggregation is?

2 A Expertise.

3 Q And so that's based on the researcher's discretion?

4 A That would be a minor part of it. The major part would
5 be -- would be the experience of the researcher, the -- what is
6 found in the literature, what the law says -- takes an expert.

7 Q Sure. But you're saying in Professor O'Brien's study,
8 she's got it nailed down in terms of the way she's done the
9 subcategories from those descriptive characteristics for
10 example?

11 A Well, Mr. Perry, I have not been qualified as a social
12 science researcher.

13 Q Sure. I am just asking your opinion as Dr. Woodworth.

14 A My opinion is that Professor O'Brien and Professor
15 Grosso and Mr. Baldus between them maybe 40, 50 years of
16 experience doing empirical research in areas like this. They're
17 trained as attorneys. They know how to interpret what the
18 law -- what would be meaningful under the law as a factor. And
19 I don't ask them how to do statistics, and they don't ask me how
20 to code variables.

21 Q Sure. And the reason I am asking is, in your example
22 of the temperatures of 101 and 102, you equated that to the
23 subcategories of descriptive characteristics, for example?

24 A Yes. That's right, sir.

25 Q So can you really equate those two things if you're not

1 sure about whether or not those subcategories are correct or
2 theoretically appropriate?

3 A Yes, I can.

4 Q You can?

5 A Yes, I can, and I just did.

6 Q And let me clarify. I think you said that these
7 variables were good quality variables at some point, right?

8 THE COURT: I am sorry. What variables are we
9 referring to?

10 MR. PERRY: The O'Brien study variables.

11 THE COURT: Okay. Yes, sir.

12 THE WITNESS: I don't recall ever saying quality,
13 good quality.

14 BY MR. PERRY:

15 Q Actually, I apologize because I don't think you said
16 exactly that. I think you said -- and correct me if I'm
17 wrong -- in your opinion that what Professor O'Brien did was
18 well-defined variables; is that correct?

19 A Yes, sir. I did say that, and I stand by that
20 statement.

21 Q Okay. And that's on the basis of their validity and
22 reliability, correct?

23 A My opinion is based upon their protocol, their multiple
24 coding, and their knowledge in the subject matter area. I
25 concede what they were doing to ensure reliability and validity.

1 That is the basis of my opinion. A better way to perhaps state
2 my opinion is that I observed Professors O'Brien and Grosso
3 using generally accepted methodology for ensuring reliability
4 and validity in empirical research.

5 Q Let me clarify. When you're talking about the
6 generally accepted practices, in terms of reliability, you're
7 referring to the double-coding and the multiple people looking
8 at the same variables and coming to the same result; is that
9 correct?

10 A Yes, sir.

11 Q That's what --

12 A Those were examples that I gave of how reliability is --

13 Q Right. That's reliability, correct?

14 A That is one form of reliability. That is called
15 interrater reliability.

16 Q Let me go back because I want to make sure I do get
17 correctly the description. In terms of validity of a variable,
18 you said if a variable is valid or has good validity, it
19 measures what it purports to measure, correct?

20 A Again -- yes. That is the general concept of validity.
21 Yes, sir.

22 Q Okay. I'm going to skip around a little bit. I want
23 to go back again to the logistic regression examples.

24 A Yes, sir.

25 Q Dr. Katz's examples.

1 A Okay.

2 Q You were talking about something that you referred to
3 as composite variables?

4 A Yes, sir.

5 THE COURT: I'm sorry?

6 MR. PERRY: Composite variables.

7 THE COURT: Okay.

8 BY MR. PERRY:

9 Q And I want to make sure I've got the terms right. And
10 your description of a composite variable in terms of what Dr.
11 Katz did would be what, Dr. Woodworth?

12 A Well, I think if my memory serves me that Dr. Katz
13 himself said that his striking variable was a -- I don't know if
14 he used the word composite but it consisted of a large number of
15 interactions and known factors. So I mean what he meant when he
16 said that, that he constructed the variable by sweeping a lot of
17 different interactions into one composite.

18 Q So to be clear, when we're talking about composite
19 variables, we are talking about these interaction effects?

20 A No, it's not an interaction effect. It's a combination
21 of interaction effects. Sweeping them all into one variable
22 doesn't mean it's equivalent to putting individual interactions
23 in the model. If he made that -- if -- I don't believe Dr. Katz
24 made that statement. If the interactions were entered one at a
25 time -- that would be a thousand interactions in the model, by

1 the way -- they would enter with different regression
2 coefficients whereas if they're put in this one composite
3 variable, they're all entered with the same regression
4 coefficient. So this is actually not a model with a lot of
5 interactions in it. It is not correct to describe it as having
6 a lot of interactions. It is correct to describe StrikeGroup as
7 being constructed by arbitrarily sweeping some of the
8 interactions into that group and some of them into the other
9 group.

10 Q By arbitrary, you mean the exercise of judgment by Dr.
11 Katz?

12 A No, it was not an exercise of judgment. It was entirely
13 based on whether or not the interaction was always associated
14 with a strike. It is an entirely algorithmic process. There
15 was no judgment exercised whatever at any point in that process.

16 Q Well, let me switch tracks. Let me ask you about the
17 smoothing analysis where you updated some --

18 A Yes, sir.

19 Q -- things. And, again, this is Defendant's Exhibit
20 Number 66. Just so I'm clear, what dataset or what database was
21 this based on?

22 A This is based on the 25 percent sample statewide, and if
23 you examine my code, you will discover that I -- the way I did
24 the adjustment was to construct regression models for predicting
25 StrikeState and computing the predicted probability of a strike

1 for a white venire member using that model. Same process I used
2 last time. And I grouped those into six categories.

3 Q Okay. So -- and on that note, let me clarify. So this
4 is actually based on new coding, correct?

5 A I'm sorry. It's based on correcting a couple of typos
6 in existing coding.

7 Q Okay. Well, in the previous --

8 A Oh, and also in a more detailed way of classifying the
9 venire members into six categories.

10 Q Right. Because in the previous version, you actually
11 had five categories, right?

12 A Uh-huh. I did six, and the method I used enabled me to
13 use all of the sample rather than -- all but about ten is what I
14 was able to use.

15 Q Okay. And so this --

16 A So this is best evidence compared to my previous one.

17 Q So it's been updated?

18 A Yes, sir.

19 Q Okay. This also does not include any imputation, does
20 it?

21 A No, sir. No imputation.

22 Q So in the previous iteration of this calculation, we
23 have five strike group categories and we had imputed values for
24 some of those missing observations.

25 A No, sir. There was no imputation. I used different

1 logistic regressions to place venire members in those five
2 categories. So if a venire member was missing two -- two
3 factors, I constructed a regression based on all but those two
4 factors to place that venire member in one of the six
5 categories. No imputation was done.

6 Q Okay. And why didn't you do imputation this time as
7 you did previously?

8 A I didn't do it previously either. I did exactly the
9 same method just I did more -- did more -- in the previous
10 method, I did two logistic regressions, one with and one without
11 VeryYoung -- one with and one without that education variable,
12 PostCollege, so that I picked up more venire members. We lose
13 about 500 if we include PostCollege, so I picked up another 500,
14 made my evidence better. This time, I did -- there were about
15 20 different combinations -- no. More like 12 different
16 combination of missing variables. I ran a logistic regression
17 for each of those combinations. And for a venire member with a
18 particular combination, I used that equation to put that venire
19 member in one of the six strike risk categories.

20 Q And let me understand. You said to make your evidence
21 better. What do you mean by that?

22 A I used all the data.

23 Q So the incorporation of more observations is what you
24 mean by made your evidence better?

25 A Yep. Yes, sir.

1 Q And now just so I'm clear, you know the database that
2 this was based on in terms of what date your information came
3 from?

4 A That's the December database.

5 Q This is the December database?

6 A Yes, sir.

7 Q Okay. And you said you ran a number of additional
8 regression analyses, correct?

9 A What are you referring to?

10 Q When you did your additional -- in the output, the SAS
11 log file which you sent to the State, you had done a number of
12 additional regression analysis, correct?

13 A Can you -- are you referring to this, or are we on a
14 different topic?

15 Q No, both. I mean, for that, you ran some different or
16 adjusted regression analysis, correct?

17 A Yes.

18 MR. PERRY: May I approach, Your Honor.

19 THE COURT: Yes, sir.

20 MR. PERRY: And Madam Clerk, what is the State
21 exhibit number we're on to make sure I mark it right.

22 THE CLERK: Eighty.

23 (There was a pause in the proceedings.)

24 MR. PERRY: May I approach, Your Honor.

25 THE COURT: Yes, sir.

1 BY MR. PERRY:

2 Q Dr. Woodworth, I am going to hand you what I have
3 marked for identification purposes as State's Exhibit Number 80.

4 A Thank you, Mr. Perry.

5 Q Yes, sir. And I will just give you a minute to look at
6 it. I know it's a lot of pages.

7 THE COURT: Dr. Woodworth, do you need a few
8 minutes to look through the exhibit, sir?

9 THE WITNESS: No, Your Honor. I'm familiar with
10 these.

11 THE COURT: Okay.

12 THE WITNESS: Mr. Perry, do you have the log files
13 with them?

14 MR. PERRY: Yes, sir.

15 May I approach, Your Honor.

16 THE COURT: Yes, sir.

17 THE WITNESS: I would like to refer to that.

18 MR. PERRY: Your Honor, I will mark this one
19 separately.

20 THE COURT: Okay. This will be 81, sir?

21 MR. PERRY: Yes, sir.

22 THE COURT: Okay.

23 MR. PERRY: May I approach, Your Honor.

24 THE COURT: Yes, sir.

25 BY MR. PERRY:

1 Q Dr. Woodworth, I am going to hand you what I have
2 marked as State's Exhibit Number 81. That should be what you
3 asked for.

4 A That's it.

5 (There was a pause in the proceedings.)

6 THE WITNESS: Okay.

7 MR. PERRY: Your Honor, let me make sure I have
8 marked mine correctly so I don't refer to the wrong exhibits.

9 BY MR. PERRY:

10 Q Dr. Woodworth, with what we marked State's Exhibit
11 Number 80 --

12 A Yes, sir.

13 Q -- can we call that the SAS output?

14 A That's the lst, the lst file.

15 THE COURT: I am sorry. Lst file?

16 THE WITNESS: Lst.

17 THE COURT: Okay.

18 BY MR. PERRY:

19 Q So we can call that the output?

20 A You can call it the output. That's l-s-t.

21 Q And then State's Exhibit Number 81.

22 A Is the log file, l-o-g.

23 Q And if I can, let me direct your attention to the --
24 well, just go with the lst file.

25 A Uh-huh.

1 Q And just to be clear, this shows the results here of
2 the model after you ran it, correct?

3 A Yes.

4 Q And to be clear, Defense Exhibit Number 66, that's
5 what -- this model is used to generate these results, correct?

6 A This algorithm.

7 Q Right.

8 A Okay.

9 Q So, in other words, these match up, right?

10 A The -- what's the exhibit number?

11 MS. STUBBS: Sixty-six.

12 THE WITNESS: Exhibit 66 is the model. The 1st
13 file is the output, and the log file shows the algorithm. There
14 are many regression analyses in the algorithm, but they
15 themselves do not constitute final model, and I will be
16 delighted to go through it with you.

17 BY MR. PERRY:

18 Q Sure. Well -- and there's a lot of paper here so we
19 won't go through everything, but I did want to ask you a couple
20 questions. Just so everybody can see kind of what I'm doing --
21 and, Dr. Woodworth, correct me if I'm wrong, but it's got little
22 page numbers here to the right every time you start a new model
23 or a new analysis, correct?

24 A Excuse me? We are -- you're showing me Exhibit 80.

25 Q Eighty. That's correct.

1 A And you're pointing to the date stamp; is that correct?

2 Q Yes, sir.

3 A Okay.

4 Q And to the right of that, there's a little number. For
5 example, up at the top, it has one, right?

6 A Yeah. That -- those are the screen number when this
7 appears on the screen, so that would be -- well, basically, what
8 they are are places where there would be a new page feed if we
9 were talking about a printer. So you can think of these as
10 pages that are displayed on the screen.

11 Q Sure. And the reason I point that out is just so we
12 all can sort of follow along since they don't have actual page
13 numbers on it. And here on page 1, the results of the variable
14 list as shown, if you look to the bottom of the list, in other
15 words, under the list of the variable names, it's actually got
16 VARLIST number one, observation pattern, correct?

17 A Yes, sir.

18 Q And all those ones indicate the presence of all the
19 variables in this particular model; am I correct?

20 A Yes, sir.

21 Q And then to the right of that, you see the number 1122?

22 A Yes, sir.

23 Q What does that indicate?

24 A The number of observations with that pattern.

25 Q Okay. So this is actually based on table 12, correct?

1 A It's based on the variable list as the very top of the
2 first page of Exhibit 80.

3 Q And so if for -- going to the next example here in a
4 second. If there was a zero instead of a one in one of those
5 places, that would actually indicate that the variable is not
6 included in whatever model analysis is done?

7 A Yes. And the first instance of that would be on the
8 second physical page of Exhibit 80 at the very bottom.

9 Q In fact, in that case, which variable is not included?

10 A I presume SingleDivorced. I'd have to actually count --
11 yes, SingleDivorced.

12 Q And let me direct your attention on that second
13 physical page there where you've got your first model -- and I
14 am going to point to it just to be clear. Right here.

15 A That would be second physical page of State's
16 Exhibit 80, yes, sir.

17 Q Yes, sir. Can you explain to us what those results
18 show? And what I mean is: What model is that showing the
19 coefficient estimates and the --

20 A Well, that's the -- that's the full model.

21 Q Okay. Now, when you ran or -- actually, let me --

22 A That is -- we need to distinguish how many models here.
23 This is a statewide logistic regression model with a constant
24 coefficient for black run on the 12 variables apart from black
25 that are in Professor O'Brien's table 12.

1 Q Okay. And you're referring to table 12 from her
2 December report, correct?

3 A Yes, sir.

4 Q Did you check to see if these things match up with her
5 table 12?

6 A Well, yeah. I think so, yes.

7 MR. PERRY: May I approach, Your Honor.

8 THE COURT: Yes, sir.

9 BY MR. PERRY:

10 Q Dr. Woodworth, I am going to hand you what was marked
11 as, if I remember correctly, Defendant's Exhibit Number 6. I
12 guess, just for the record, can you tell us what that is?

13 A It's the MSU report.

14 Q So that's got a copy of table 12 in it, correct?

15 A Yeah. Yes.

16 Q Turn to table 12 in it for us.

17 A Yes.

18 Q If you look at table 12 in Defendant's Exhibit
19 Number 6 --

20 A Yes, sir.

21 Q -- does it give an intercept there for Dr. O'Brien's
22 model?

23 A I do.

24 Q What is that?

25 A Well, it's different, but the black coefficient is the

1 same, and if I go down, DP_Reservations are the same,
2 SingleDivorced is the same, Homemaker is the same. If you see a
3 difference there, you're going to have to call my attention to
4 it.

5 Q Well, actually, the only thing I was looking at was the
6 intercept term.

7 A Well, the intercept actually doesn't -- I don't know why
8 they're different. We use different software.

9 Q When you say software --

10 A Would you like my -- I don't know where they're
11 different. You're going to have to ask Professor O'Brien, but I
12 ran logistic regression in SAS. She ran it in SPSS. I don't
13 know whether she cut and pasted or what. This is the dump from
14 SAS. It got the same betas for everything else, so I am
15 confident that this is right. The small difference between
16 the -- now, remember, all I'm using this for is to take the
17 nonracial part of this model, compute what's called the logit,
18 okay, rank order the data on the logit, and divide it into six
19 categories. Intercept hardly matters.

20 Q Well, let me ask you a question about that because you
21 did -- as you indicated earlier, in the previous version of the
22 model, you had five strike group categories or subcategories,
23 correct?

24 A Yes.

25 Q Okay. If you flip -- and I'm going to use those little

1 page numbers or screen numbers. If you flip to page 34, again,
2 that's with the little 34 right here on the page --

3 A I'm there.

4 Q Is this where it starts the analysis using the six
5 levels of strike risks?

6 A No. It started a little earlier but close enough.

7 Q Okay. And now explain or -- let me make sure I
8 understand. So the difference between using five subcategories
9 and six categories came from what? What changed between the two
10 versions where you went from five to six?

11 A It, to some extent, was arbitrary. Five or six probably
12 wouldn't have made much difference. I chose six.

13 Q Why did you choose six?

14 A Well, if -- my thinking was that that gives me about
15 50 -- if I remember correctly, it gives me about 50 black venire
16 members in each of those six categories. Yeah, 47.

17 Q Okay.

18 A So that would give me roughly equal precision for
19 estimating within those categories.

20 Q So the rationale was for the inclusion of more
21 observations, and I think you said that earlier, correct?

22 A That was the rationale for doing the more extensively
23 subdivided computation of the category membership.

24 Q Okay.

25 A That is not the reason for dividing it into six.

1 Q Okay. What was the reason for dividing it into six?

2 A I just said it. That it gave me what I considered to be
3 an adequate number of black venire members in each of the six
4 categories, namely 47 in all, but 1 and 49 in the last.

5 Q Okay. And let me direct your attention to page 62,
6 again, the small screen capture page 62.

7 A Okey-doke. I'm having a convergence problem. Here we
8 go. All right. I'm there.

9 Q I just want to make sure I understand. So this is
10 where you start to do some of the analysis just like you did
11 before using the Markov chain, the Monte Carlo --

12 A Yes. That is the MCMC -- mother-C-mother-C -- procedure
13 in SAS.

14 Q And then the number of observations used for this
15 analysis is shown to the right and below the MCMC procedure
16 code, correct?

17 A That's right.

18 Q Okay. And how many is that?

19 A Oh, these are aggregated data.

20 Q Okay. And what is this actually based on? In other
21 words, which variable list are we using here?

22 A The six categories.

23 Q Okay. So this is, based on that variable list, 15
24 that's been used on the last couple pages or this is something
25 totally different?

1 A The variables in this are time, race of venire member,
2 and strike risk.

3 Q And are those -- well, let me ask you this: You've got
4 another note right above that. Again, we're talking about basis
5 functions here. The number of basis functions you used in this
6 analysis was different from the previous analysis, correct?

7 A May have been 31 versus 33. I don't recall. I have a
8 criterion of wanting to include a high fraction of the variance
9 explained by the basis functions.

10 Q So here --

11 A So it was an algorithmic selection.

12 Q So here there were 25 as opposed to the earlier model,
13 correct, which was 31 and 33?

14 A I'm sorry. Where do you see 25?

15 Q If you look on the page 62.

16 A Oh, that's a typo. If you look on page 62 where it
17 lists the deltas --

18 Q Uh-huh.

19 A -- goes down to 33.

20 Q Okay.

21 A That's the number of basis functions.

22 Q So it's not the 25 basis functions? It's the 33?

23 A No. I am sorry. That was a sheer typo.

24 Q Okay. Now let me ask you to look at page 63, which is
25 just one more physical page over so one more physical page.

1 A Yes. I'm there.

2 Q The iterations that you ran -- and I am looking right
3 here --

4 A 100,000.

5 Q And I think in the earlier version, you ran 200,000,
6 correct?

7 A Yes, sir.

8 Q Why did you go from 200,000 to 100,000?

9 A This one took me all night.

10 Q So there was some time considerations?

11 A That's it.

12 Q The other one took a lot longer?

13 A Yes.

14 Q And then if you can flip over one more page -- this is
15 page 65 on the screen page numbering.

16 A Yes, sir.

17 Q Again, like the previous report, you've got a list here
18 which shows and includes Marcus Robinson, correct?

19 A Yes, sir.

20 Q And that's the 11 August 1994 estimates and limits,
21 confidence limits or confidence intervals?

22 A Yes, sir.

23 Q And then you've got some things down here at the
24 bottom, very bottom of the list: 5 May '94, 1 January 1990, 1
25 January 2015. What is that?

1 A Oh, those are just drawing the horizontal and vertical
2 lines.

3 Q Okay. So those are just the line designations --

4 A Yes.

5 Q -- or axes designations?

6 A Well, they're not the axes. They're -- the line at one,
7 which indicates increased risk, and the line at Marcus
8 Robinson's date.

9 Q Okay. Now, the last thing I wanted to ask you about --
10 and I won't direct you to any specific page -- but you chose
11 different levels or different scales. You used 10, 100, and
12 1,000.

13 A For the scale parameter of the prior distribution of the
14 smoothness parameter, yes, sir.

15 Q Okay. And the reason for using those three different
16 parameters was what?

17 A That's what's called a sensitivity analysis --

18 Q Uh-huh.

19 A -- and that is considered good and standard practice in
20 an analysis in which the results could be influenced by one of
21 the settings for the analysis. So I ran a wide range of that,
22 that particular setting. It's like a knob you set, say, on the
23 washing machine like gentle or heavy duty. And so I set that
24 knob in three positions and ran the analysis and got essentially
25 the same odds ratio at the time of Marcus Robinson's sentence.

1 Q All right. And just -- and this is sort of a summary
2 question. I think earlier when you testified, you indicated
3 that you ran a number of these regressions. Is that what we see
4 starting sort of on the first page and then going all the way
5 through --

6 A Well, I can -- excuse me. Finish your question.

7 Q Well, I was just going to ask you the difference, it
8 looks like -- and correct me if I'm wrong -- are the different
9 variables that are included and not included, and it looks like
10 in a lot of them, you removed SingleDivorced, Homemaker, and
11 PostCollege or various combinations of those three in
12 particular.

13 A Okay. If I could direct your attention to the log file.

14 Q Okay. That's State's Exhibit Number 81, correct?

15 A Yes, sir.

16 Q All right.

17 A If you will look in line 26 -- sorry, 16 -- you will see
18 that I am creating a variable called OBSPAT, which means
19 observed pattern, which indicates the pattern of variables that
20 are present in some subset of the sample. And then you will
21 observe, starting in line 55, this is a, what's called a macro,
22 m-a-c-r-o, and what it does is compute phat -- that p-h-a-t is
23 not pronounced fat (phonetic) but P-hat (phonetic). Phat is the
24 predicted probability of strike. Now, what this phat's routine
25 does is take a particular observed -- a pattern of observed

1 values and computes the probability that a white venire member
2 would be struck.

3 And then if you'll look down at line 76, it says macro
4 logit, so that's another macro. A macro is simply a
5 self-written procedure. And what that does is do all the
6 bookkeeping and running all of these different logistic
7 regressions to produce the phat or predicted probability value,
8 and then in that, you'll observe that if you observe in line 71,
9 it's -- it goes through the list of venire members in the
10 sample, and if the -- that venire member's pattern of observed
11 data matches the pattern of observed data for the logistic
12 regression, then that predicted value is used for that venire
13 member.

14 So to put it in a nutshell, what all of this code is
15 doing is getting the best available estimate of what the white
16 venire member strike rate is tailored to the data pattern
17 available in each individual venire member. So all of these
18 regressions were not anything I did -- they're simply run
19 algorithmically, and they are driven by what's available in the
20 dataset, so they are not driven by any decision that I made.

21 Q Well, they're generated by the macros, right?

22 A They are generated by the macros, and I wrote the
23 macros, but it's entirely transparent what I did here, and it is
24 readable from the code.

25 Q By that, you mean we can look at the pages and see

1 exactly what you did?

2 A You can see exactly what I did, yes. And the output
3 just reports the regression equation that was used to assess the
4 strike risk level for each venire member.

5 Q And let me ask you -- because this is all statewide
6 that we are talking about, correct?

7 A This is the statewide model.

8 Q There was no Cumberland County model or update or
9 anything like that that you ran when you were doing this,
10 correct?

11 A No.

12 Q Any particular reason why not?

13 A Time.

14 MR. PERRY: May I have a moment, Your Honor.

15 THE COURT: Yes, sir.

16 (There was a pause in the proceedings.)

17 MR. PERRY: I believe that's all the questions I
18 have for the witness, Your Honor.

19 THE COURT: Any redirect, ma'am?

20 MS. STUBBS: Yes, Your Honor.

21 THE COURT: Yes, ma'am.

22 REDIRECT EXAMINATION

23 BY MS. STUBBS:

24 Q Dr. Woodworth, I just wanted to go back first to the
25 discrepancy that the State questioned you about with respect to

1 the table 12 --

2 A Yes.

3 Q -- and your result. So if you turn to State's
4 Exhibit 80, page 2, second physical page.

5 A Yes, ma'am.

6 Q The intercept there -- can you read for us what your
7 estimate of the intercept is?

8 A Negative 1.8152.

9 Q So if you rounded that to three decimal points, that
10 would be negative .815; is that right?

11 A Yes.

12 Q And what was the coefficient that reported in table 12?
13 Do you have that still in front of you?

14 A Seven-one -- 1.714.

15 Q So it appears that there's -- the State was questioning
16 you about the difference between negative .18 and negative .17;
17 is that right?

18 A Yes.

19 MS. STUBBS: Actually, Your Honor, can we take a
20 brief break? I just want to prepare a few exhibits.

21 THE COURT: Yes, ma'am. Yes, ma'am.

22 Thank you, Dr. Woodworth. You may step down, sir.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: About 20 minutes?

25 MS. STUBBS: That would be fine. Thank you.

1 THE COURT: And for purposes of clarification,
2 we've got Dr. Woodworth to be followed by Dr. O'Brien?

3 MS. STUBBS: Yes, Your Honor.

4 THE COURT: Okay. Thank you, sir. We're at ease.

5 (Whereupon, a recess was held from 10:57 a.m.
6 until 11:20 a.m.)

7 (The following proceedings continued in open
8 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
9 Ferguson, Ms. Stubbs, Mr. Colyer, Mr. Thompson, and Mr. Perry
10 were present.)

11 THE COURT: Okay. Let the record reflect all
12 counsel are present. The defendant is present.

13 Are you ready to go forward?

14 MS. STUBBS: Yes, Your Honor.

15 THE COURT: Yes, ma'am.

16 BY MS. STUBBS:

17 Q Dr. Woodworth, before the break, you testified that you
18 did the -- you redid this smoothing analysis for the statewide
19 adjusted?

20 A Yes.

21 Q And that was to correct errors --

22 A Yes.

23 Q -- that came out during your testimony a couple of
24 weeks ago. Did you have similar errors in the Cumberland County
25 smoothing analysis?

1 A No.

2 Q So is there any need for you to redo your Cumberland
3 County smoothing analysis?

4 A No. Not on that basis, no.

5 MS. STUBBS: We have no further questions for Dr.
6 Woodworth, Your Honor.

7 THE COURT: Okay. Mr. Perry, anything else?

8 MR. PERRY: Just one.

9 RECROSS-EXAMINATION

10 BY MR. PERRY:

11 Q Dr. Woodworth, the Cumberland County data was based on
12 which version of the final report from Professor O'Brien?

13 THE COURT: I'm sorry, sir. Speak up.

14 MR. PERRY: Yeah, I'm sorry.

15 BY MR. PERRY:

16 Q The Cumberland County model that you ran -- that was
17 based on which version of Professor O'Brien's report? Do you
18 recall?

19 A I don't recall. I presume December. My laptop is
20 across the room, so I can't check it.

21 MR. PERRY: That's all the questions I have, Your
22 Honor.

23 THE COURT: All right. May the witness be
24 released, folks.

25 MS. STUBBS: Yes.

1 MR. THOMPSON: No objection.

2 THE COURT: Thank you.

3 Okay. Are you ready to call your next witness, ma'am?

4 MR. JAY FERGUSON: Yes, Your Honor. We'd call
5 Professor O'Brien.

6 THE COURT: Or sir. I apologize.

7 MR. JAY FERGUSON: That's okay. I've been called
8 worse.

9 THE COURT: Dr. O'Brien, you previously have been
10 sworn and remain under oath. Would you like some water?

11 THE WITNESS: Yes, please.

12 THE COURT: I don't know if our present court
13 reporter was in the courtroom. If you'll state and spell first
14 and last name for her benefit.

15 THE WITNESS: Yes. Barbara, B-a-r-b-a-r-a,
16 O'Brien, O-apostrophe-B-r-i-e-n.

17 THE COURT: Thank you, ma'am.

18 Yes, sir.

19 MR. JAY FERGUSON: Thank you, Your Honor.

20 DIRECT EXAMINATION

21 BY MR. JAY FERGUSON:

22 Q Professor O'Brien, I believe the first time you
23 testified, we introduced into evidence all of the jury
24 transcripts -- excuse me, the jury voir dices. Do you recall
25 that?

1 A Yes.

2 Q While you were gone, the State then introduced all the
3 data collection instruments. Now what I'd like to do is hand
4 you what's marked as Defendant's Exhibit 67 and ask if you can
5 identify that.

6 MR. JAY FERGUSON: May I approach.

7 THE COURT: Yes, sir.

8 THE WITNESS: Yes. This is a jump drive that has
9 all of the underlying source documents that we used in the
10 study.

11 BY MR. JAY FERGUSON:

12 Q So that would include the jury questionnaires and
13 everything else you relied upon?

14 A Yes.

15 MR. JAY FERGUSON: Your Honor, I would move for
16 the admission of Defendant's Exhibit 67 into evidence, and I
17 will tell the Court -- Mr. Thompson and I discussed it. He
18 would like to review the flash drive overnight. So if we could
19 possibly have it admitted conditioned upon him having no
20 objections tomorrow. It's a lot of data.

21 THE COURT: Mr. Thompson, what's being proposed,
22 as I understand it, is it will be admitted conditionally subject
23 to your right to coming in and being heard on any objections you
24 might have.

25 MR. THOMPSON: That is correct, Judge, and I don't

1 expect any surprises, Judge, but I think to be thorough -- there
2 are 22 gigs worth of materials on that thumb drive, and I just
3 need to glance through them. Now, with -- at some point this
4 morning or this afternoon -- it is going to take quite a bit of
5 time. What I want to actually do is copy State's 67, assuming
6 my computer still has room left over, so I can make the
7 side-by-side comparison, so I may need leave with the clerk to
8 do that sometime in court today with the Court's permission.

9 THE COURT: Okay. We can accommodate you in that
10 respect. At this point, it's admitted conditionally subject to
11 the State's right to be heard as to any objections or any
12 asserted grounds for nonadmissibility.

13 MR. THOMPSON: Thank you, Your Honor.

14 MR. JAY FERGUSON: Your Honor, may I retrieve the
15 thumb drive now and have Mr. Thompson start the process of
16 transferring the documents?

17 THE COURT: Absolutely. Absolutely.

18 BY MR. JAY FERGUSON:

19 Q Professor O'Brien, have you had an opportunity to
20 review Dr. Joseph Katz's report --

21 A Yes, I have.

22 Q -- that was introduced into evidence in this case?

23 A Yes, I have.

24 Q Within that report, is it fair to say that he found a
25 few what he contended were coding errors?

1 A Yes.

2 Q And have you reviewed each and every one of those
3 purported coding errors?

4 A Yes, I have.

5 Q And have you taken the time to show the Court the
6 reconciliation of each purported coding error by the State?

7 A Yes.

8 MR. JAY FERGUSON: Your Honor, may I approach the
9 witness.

10 THE COURT: Yes, sir.

11 MR. JAY FERGUSON: And, actually, Your Honor, I am
12 going to be doing a lot of documents. Can I just stand here?

13 THE COURT: Absolutely.

14 BY MR. JAY FERGUSON:

15 Q Let me show you what's marked as Defendant's Exhibit 68
16 and ask if you can identify that document, please.

17 A This is a chart that lists all of the potential jurors
18 identified in Dr. Katz's report that -- for who our coding did
19 not reflect the reasons asserted in the affidavits as to the
20 reasons for their strikes.

21 Q Can you tell us, please -- do you have an estimate of
22 how many coding decisions were or -- how many coding inputs were
23 into your entire database?

24 A Many, many, many thousands.

25 Q And does -- is this Defendant's Exhibit 68 the totality

1 of each purported coding error according to Dr. Katz?

2 A Yes.

3 THE COURT: For purposes of clarification in the
4 record, I am looking at what has been marked as Defendant's
5 Exhibit 68. I want to make sure I am understanding Dr.
6 O'Brien's testimony. There appears to be, if my count is
7 correct, 18 purported -- pardon me, 18 purported coding errors
8 according to Dr. Katz's report; is that correct?

9 THE WITNESS: I think so, yes.

10 THE COURT: All right.

11 BY MR. JAY FERGUSON:

12 Q And I am not going to ask you to go through each one
13 but could you just maybe take the first couple and explain what
14 you did and what this exhibit shows?

15 A May I make a correction.

16 Q Sure.

17 A Actually, Your Honor, there were two jurors for whom
18 they asserted two errors, so it would be a total of 20 asserted
19 errors.

20 THE COURT: Twenty including two for one venire
21 member?

22 THE WITNESS: That is right. There were two
23 venire members for whom they asserted that I had two coding
24 errors.

25 THE COURT: I understand. Yes, ma'am.

1 BY MR. JAY FERGUSON:

2 Q So if we can start, Professor O'Brien, with this top
3 one, study ID number 209.2 and explain just what that row tells
4 us.

5 A That is -- that tells us the case that had been reviewed
6 and the venire member for whom our coding -- the State asserted
7 our coding did not reflect characteristics that bore on the
8 State's decision to strike.

9 Q And can you explain this column that says nature of
10 discrepancy?

11 A So if you look on the first row for that first venire
12 member, it says, Report asserts she should have been coded as
13 having hardship and death penalty reservation. So this is a
14 juror for whom we had not coded as having a hardship and had not
15 coded as having death penalty reservations, but the reasons
16 offered for the strike refer to those two characteristics as
17 reason for a strike.

18 Q When you say reason for the strike, is that a reason in
19 the affidavit of the prosecutors or some type of writing by the
20 prosecutors then relied on by Dr. Katz?

21 A Yes.

22 Q And when -- so this is a reported assert -- a report
23 asserting that something was an error. What did you do at that
24 point?

25 A We went to -- back to the source materials, the

1 transcripts of the voir dire exchange between the venire member
2 at issue and the prosecutors in their questionnaire, if
3 relevant, to see if it was, in fact, a coding error or if it was
4 consistent with our coding protocol.

5 Q And on this first juror, 209.2.026, is this one of the
6 ones where there were two asserting coding errors?

7 A Yes.

8 Q And then how did you resolve that?

9 A I reviewed -- I reviewed the exchange between this
10 venire member and the prosecution and -- and any voir dire with
11 this venire member, so that would include with the court at the
12 beginning of the voir dire process to see what the basis was for
13 the assertion that she had these characteristics and then
14 assessed whether it was proper under our coding protocol and
15 determined in this case that she was properly coded as having
16 neither of these characteristics.

17 Q So if it's not highlighted in yellow there, does
18 that -- it says neither is an error. Is that your assertion
19 that you believe your coding is accurate and is it fair to say
20 then Dr. Katz just disagrees with that assertion?

21 A That is right. That's an area of disagreement between
22 how we -- the factors we found to describe the particular juror
23 and what is asserted in Dr. Katz's report.

24 Q Okay. The next item down I see is highlighted in
25 yellow. Can you tell us what the nature of discrepancy was and

1 how that was resolved?

2 A So in this case, the reason asserted for the potential
3 juror strike was that he was concerned about suffering some sort
4 of a hardship by serving short of being -- short of justifying
5 striking him for cause, removing him for cause. After reviewing
6 the exchange in the transcript between this juror and on voir
7 dire, I concurred that the hardship was a fair -- that this
8 person should have been coded as having a hardship. Some of
9 these questions are close, but when in doubt, I would -- I
10 thought it was close enough.

11 Q Okay. And down near the bottom, I believe -- so each
12 time there is a yellow highlighting, that's an error that you
13 have now corrected in your database?

14 A Yes.

15 Q And there seems to be several, I think, six here at the
16 bottom; is that right?

17 A Yes.

18 Q Tell us just generally about those.

19 A So these errors dealt with either a juror who we had
20 omitted from the database who was actually a State strike and
21 should have been included in our database, so those jurors were
22 added to the database. And the bottom three there were -- had
23 race coding errors so that we had -- it was either a data entry
24 error -- in most cases, I think -- actually, in all three cases,
25 I think it was a data entry error that they should have been

1 coded a different race.

2 Q In a database with many thousand entries, is it
3 uncommon to have a handful of errors?

4 A Usually more than a handful.

5 MR. JAY FERGUSON: Your Honor, I would move for
6 the admission of Defendant's Exhibit 68 into evidence, please.

7 THE COURT: All right. Do you want to be heard,
8 folks?

9 MR. THOMPSON: No, sir.

10 MR. PERRY: Your Honor, I might object to that
11 just because I am not clear as to when this was done as far as
12 when she actually did this.

13 MR. JAY FERGUSON: Okay. I will ask that.

14 THE COURT: Well, okay. Go ahead and clarify for
15 the record. I am not sure that it is -- I mean, does the timing
16 of it matter?

17 MR. PERRY: Yeah, depending on when -- if it was
18 done after these deadlines, I would object to it. That is why I
19 want to make sure I am clear as to when this analysis was
20 actually going on.

21 THE COURT: Okay. Am I understanding correctly
22 you're offering this for purpose of impeachment as to Dr. Katz's
23 report or for purposes of clarification?

24 MR. JAY FERGUSON: Impeachment and just true
25 rebuttal. He has now testified. It is our intention to correct

1 everything that was said.

2 THE COURT: You all have been provided with a copy
3 of the document?

4 MR. PERRY: Yes.

5 THE COURT: Do you want to establish a time frame
6 for the record? Mr. Perry is entitled to have that in the
7 record.

8 MR. PERRY: Yes. And that's all I am seeking.

9 THE COURT: Yes, sir. Yes, sir.

10 BY MR. JAY FERGUSON:

11 Q Professor O'Brien, do you recall when you provided this
12 document to me?

13 A It was this week -- past weekend.

14 Q And was it your intention to wait until the defense had
15 presented Dr. Katz's testimony to make sure you captured every
16 single error --

17 A Yes.

18 Q -- to include in this document?

19 A Yes. I wanted to have the most up to -- so this
20 isn't -- these errors and this checking has been occurring all
21 along as new information comes to -- so I believe when I was
22 here two weeks ago, I testified about one of these jurors that I
23 agreed it was an error in the coding. So the process of
24 correcting the errors has been as I get new information, I check
25 it and correct if necessary.

1 THE COURT: Okay. Mr. Perry, do you want to be
2 heard? Mr. Thompson? Mr. Colyer? Any objection?

3 MR. COLYER: No, Your Honor. We just wanted to
4 establish that for the record.

5 THE COURT: Absolutely. Yes, sir. Without
6 objection, Defendant's Exhibit 68 is admitted.

7 MR. JAY FERGUSON: Your Honor, approach the
8 witness.

9 THE COURT: Yes, sir.

10 MR. JAY FERGUSON: And, Your Honor, just so the
11 clerk knows, I had to put the exhibit sticker 69 on the back,
12 but I wrote on the bottom right in handwriting.

13 BY MR. JAY FERGUSON:

14 Q Let me show you what's been marked as Defendant's
15 Exhibit 69 and ask if you can identify that, Professor O'Brien.

16 A This is a chart that is similar to the one we just
17 discussed but it reflects coding errors and just -- or coding
18 disputes that were brought to my attention after Dr. Katz's
19 report so based on the affidavits and spreadsheets and the like
20 that I reviewed after Dr. Katz's report.

21 Q Let me break that down. Since Dr. Katz filed his
22 report on January 9th, 2012, additional documents have come from
23 the State for us to review?

24 A Yes.

25 Q These were affidavits from prosecutors, correct?

1 A Yes.

2 Q Also just hand- -- not handwritten, excuse me. Typed,
3 unsigned statements?

4 A Yes.

5 Q Spreadsheets from prosecutors that the State has
6 purported reasons for the strikes?

7 A Yes.

8 Q And any kind of discrepancy in the codings?

9 A Yes.

10 Q And so this -- these are additional coding
11 discrepancies that were not included in Dr. Katz's report?

12 A That's right.

13 Q Is it your intention with this exhibit to show the
14 Court every single coding discrepancy that has been brought to
15 your attention as of today's date?

16 A As of when I last reviewed the affidavits.

17 Q Which was when?

18 A Which was, I believe -- so this was the basis of the
19 shadow, so these discrepancies are the basis of the shadow
20 coding that I testified before.

21 Q Okay.

22 A So before the start of the hearing.

23 Q Okay. So these were all of the affidavits and
24 spreadsheets that you had just prior to the hearing?

25 A Yes.

1 Q Now if I can ask you: Is this the same format? Is
2 there anything different about this format?

3 A No, I don't think so.

4 Q Okay. And now with the introduction of Defendant's
5 Exhibit 69, that will be all that -- all the coding
6 discrepancies either made available to you in Dr. Katz's report
7 or via affidavit, spreadsheet, or statement by prosecutors
8 around the State just prior to this hearing?

9 A That's right.

10 MR. JAY FERGUSON: Your Honor, I'd move
11 Defendant's Exhibit 69 into evidence.

12 THE COURT: Counsel for the State want to be
13 heard?

14 MR. COLYER: No, sir.

15 THE COURT: All right. Without objection, it's
16 admitted.

17 BY MR. JAY FERGUSON:

18 Q When you do a study outside of litigation -- in other
19 words, just an empirical legal study -- and errors are found,
20 what do you do to your database?

21 A You check to see if it truly is an error, and if it is,
22 you correct it.

23 Q And have you made those corrections to your database in
24 this case since the December 15th cutoff?

25 A Yes, I have.

1 Q Now, do you recall in Dr. Katz's report, he had a
2 criticism about one of your variables. I believe it was juror
3 knew law enforcement.

4 A Yes.

5 Q Can you tell us what that variable is and your opinion
6 of his criticism?

7 A The variable was a 600 variable that was to apply when
8 the juror themselves had or did work in law enforcement or close
9 family or family member or a close friend, and the problem that
10 was asserted about this variable is that it was too broad
11 because it was defined broadly to include police, prosecutors,
12 defense attorneys, prison guards. I thought that was a fair
13 criticism because it was -- some precision was lost in that,
14 that if a person had a 600 code of some sort, you couldn't tell
15 from looking at that code whether they were married to a public
16 defender or they were married to the chief of police, for
17 instance, and that might cut differently in a decision to
18 strike.

19 Q Of all the other criticisms of his variables, did you
20 share that belief that his criticisms were fair or accurate?

21 A I am sorry. Could you rephrase that?

22 Q You've indicated you thought that was a fair criticism
23 with respect to this one variable; is that right?

24 A Yes, I do.

25 Q What about his criticisms of all the other variables?

1 A No, I don't agree with the others.

2 Q Since you heard that criticism about the juror knowing
3 law enforcement, what did you do to your database?

4 A I revisited -- well, I had my attorneys who were acting
5 as coders revisit everybody in the 25 percent sample who had
6 some sort of a 600 code -- 600, 610, 620, 630 -- to see what the
7 basis of the -- what was the basis of them getting the 600 code
8 and to indicate whether -- what was the profession of the person
9 at issue, which I used then to recode into a more precise
10 variable -- police prosecutor, department of corrections, DOC,
11 or defense or other, say, if it was a judge -- to see if we were
12 missing something because if you had two things working at
13 opposite -- so if you had defense maybe more likely to get
14 struck, your brother was a defense attorney or your brother was
15 a cop make you less likely to get struck, you could see if you
16 lump these together that they would wash each other out if they
17 were present and equal frequency. So by making it more precise,
18 I could see if that was, indeed, a problem.

19 Q Is this something Dr. Katz could have done with the
20 data he had available to him?

21 A Using the source data that we provided. That's what I
22 used or that's what my coders used. We went back to the
23 transcripts and the questionnaires to see what the basis was for
24 the code.

25 Q Is this something that any statistician could have done

1 had they been so inclined to do so if they had this underlying
2 source document?

3 A Absolutely.

4 Q Based upon this new coding, the more precise coding,
5 are you satisfied, based upon your expertise, that the recoding
6 of this variable cured the issue raised by Dr. Katz in his
7 report?

8 A That's right. Well, it convinced me that it wasn't a
9 problem at all. It actually was enhanced, I think. I think it
10 enhanced the model because it turned out that police prosecutor,
11 so somebody who themselves are close other -- worked in a
12 prosecutor's office or a police department, that that was a
13 better predictor. It was a more precise predictor of State
14 strike, it was a negative predictor, made it less likely to be
15 struck {sic.}, and that the other variables weren't so good,
16 and they just kind of added noise. So it ended up -- so it
17 created a more precise variable, so it was, indeed, an
18 improvement, but it didn't affect any of the other estimates in
19 the model.

20 Q Now, did you -- so in the database since December 15th
21 when the Court had a cutoff, you've made the highlighted yellow
22 issues from the coding discrepancy sheet; is that correct?

23 A Yes.

24 Q And you have recoded this juror knows law enforcement
25 variable; is that right?

1 A Yes.

2 Q Now, did you rerun all of your tables that were
3 included in your MSU College of Law jury selection study report
4 based upon this new dataset?

5 A Yes, I did.

6 MR. JAY FERGUSON: May I approach, Your Honor.

7 THE COURT: Yes, sir.

8 BY MR. JAY FERGUSON:

9 Q Professor O'Brien, let me show you what is marked as
10 Defendant's Exhibit 70 and ask if you can identify that, please.

11 A These are the tables that are -- essentially, the same
12 tables that we presented in our report using the data updated as
13 of February 11th, 2012, so with these additions.

14 Q And I don't intend to go through all of them but tables
15 1 through 10 are all based upon the unadjusted numbers; is that
16 correct?

17 A Yes, they are.

18 Q So that juror knows law enforcement would have nothing
19 to do with those?

20 A No, that wouldn't affect it at all.

21 Q But the coding issues with respect to a missing juror
22 or the race of that juror would have some impact on tables 1
23 through 11?

24 A That's exactly right.

25 Q Can you state for the Court whether now, with the most

1 updated database including every single error caught by the
2 State of North Carolina and put into your new and improved
3 database, if any of the changes in tables 1 through 10 are
4 significant?

5 A Not at all. Any changes, I believe, tended to be just
6 at the decimal level or close to that.

7 Q Now if I can turn your attention to table 12 -- it's on
8 page 4 of this exhibit -- and ask if you can tell me what that
9 is?

10 A Table 12 is the statewide fully controlled logistic
11 regression model using the 25 percent random sample with the
12 updated corrected database and the revised law enforcement
13 variable.

14 Q Looking at line 8 -- row 8, excuse me. What is that?

15 A That is -- that variable, PolicePros is -- came in the
16 model instead of the more general juror law enforcement all that
17 was in the last model we presented. This model was more
18 precise. It was a better predictor and, therefore, it came into
19 the model instead of law enforcement all, and it applies when a
20 venire member or a close family member or close friend works for
21 a police department or in the prosecutor's office.

22 Q And what happened, if anything, to the odds ratio for
23 venire member being black?

24 A I -- do you mind if I refer to the --

25 Q That is fine. You've got it there.

1 A I can look at this. It went from 2.48 to 2.28.

2 Q What is the p-value for this new table 12?

3 A Less than .001.

4 Q Still statistically significant?

5 A Very much so.

6 Q And then on table 13, we don't see that new variable,
7 do we?

8 A No. I need to add that we did not have time to do that
9 finer level recoding for all of the Cumberland County jurors.
10 Those who were in the 25 percent sample, of course they were,
11 but we did not have time to revisit and recode anyone in
12 Cumberland County, so I did not use that more precise variable
13 in this model.

14 Q Okay. And while I'm thinking about it, if you'll turn
15 back to table 12 in the Defendant's Exhibit 6, table 12, I just
16 want to ask you one question about that intercept. Are you
17 there?

18 A Yes.

19 Q These models that we see here -- is this something that
20 the computer generates, or is this a retyped version from the
21 computer model?

22 A I retyped them to make them more -- to make them look
23 nicer.

24 Q And were you here when Dr. Woodworth was testifying?

25 A Yes.

1 Q And Mr. Perry asked him, Well, the intercept is really
2 negative 1.8 not negative 1.7?

3 A That's right.

4 Q And did you sit out there and look and redo the
5 analysis?

6 A Yes.

7 Q What's the actual intercept?

8 A It's the one that Dr. Woodworth stated. This is a typo.

9 Q All right. Thank you. So table 13, the number -- I
10 will just ask you: With the most updated database including all
11 errors that have been captured by the State, is venire member
12 being black still statistically significant in Cumberland
13 County?

14 A Yes, it is.

15 Q At what level?

16 A Less than .01.

17 MR. JAY FERGUSON: Your Honor, I would move
18 Defendant's Exhibit 70 into evidence.

19 THE COURT: All right. Do you folks want to be
20 heard?

21 MR. PERRY: No objection.

22 THE COURT: Without objection, Defendant's 70 is
23 admitted in evidence.

24 BY MR. JAY FERGUSON:

25 Q You testified a couple weeks ago about shadow coding.

1 You just referenced to it a minute ago; is that right?

2 A Yes.

3 Q And did you do further shadow coding analysis?

4 A Yes.

5 Q And shadow coding, as I understand it, you took every
6 single time any prosecutor in the State of North Carolina said,
7 This juror should have been coded this way, you assumed that
8 that was accurate; is that right?

9 A Right. And I should note that, in most instances --
10 there were a few instances where Dr. Katz's report -- he
11 compared the reasons to my coding. There were a few instances
12 in the prosecutors' materials that I reviewed where they looked
13 at the codes, but often the reasons were asserted not in
14 relation to our codes. So I would look at the reasons to see
15 which code they best fit, and normally, it was very easy to do
16 so. They would say, I struck this juror because she expressed
17 reservations about the death penalty. So I knew that what they
18 were -- and if we hadn't coded death penalty reservations as
19 present, then I would change it.

20 Q And did you produce to me and to the State shadow table
21 1 and shadow table 2?

22 A Yes.

23 MR. JAY FERGUSON: May I approach.

24 THE COURT: Yes, sir.

25 BY MR. JAY FERGUSON:

1 Q Let me show you what's marked as Defendant's Exhibit 71
2 and ask if you can identify that please.

3 A This is the same model, the 25 percent sample regression
4 model that was presented in table 12 of the report using the
5 recoded -- the shadow variables where the coding is disputed and
6 it is recoded to reflect the assertions of the prosecutors. And
7 it's rerun in only those cases for which -- that I had received
8 reviews. So the cases that had not -- that the State hadn't
9 received the reviews are not included in this. It is only run
10 on the -- that portion that had reviews.

11 Q Okay. Let me show you table number 1. Assuming that
12 every single coding decision should have been coded as the State
13 said it should be coded, can you tell this Court whether being
14 black was statistically significant for a venire member being
15 struck by the State of North Carolina?

16 A Yes, it was.

17 Q And what's the odds ratio of that?

18 A 1.99.

19 Q Now just a little bit from the prior model; is that
20 right?

21 A Yes. Right.

22 Q Why is that?

23 A Well, when the State reviewed, they only reviewed -- or
24 they only provided the reasons for the strikes of the black
25 potential jurors, so there was no comparable review of white

1 jurors. So they -- by changing the codes to reflect their
2 asserted reasons, we're necessarily explaining more of those
3 black strikes with those asserted reasons, but we're not doing
4 the same kind of revisiting of the white jurors who -- or the
5 nonblack jurors who were coded. So if the issue is that we --
6 our definition of this variable death penalty reservations was
7 too narrow, that we were excluding too many people who were on
8 the fence and that we should -- our coding should have covered
9 them, this will be corrected or revised to reflect the extent to
10 which that applied to black jurors, but presumably, there's some
11 white jurors who we hadn't coded as having death penalty
12 reservations who would also have fallen in this category. So we
13 are sort of -- you are sort of skewing it because -- well, you
14 are skewing it by only changing these explanatory variables for
15 the jurors that were -- black jurors that were struck. So you
16 would -- it, just by definition, has to reduce the estimate for
17 black.

18 Q Is it skewing it in a light more favorable to the State
19 or in a light less favorable to the State?

20 A Assuming that if only -- if their more expanded -- the
21 way they have operationalized death penalty reservations or the
22 way that they conceive of death penalty reservations, assuming
23 that to the extent our -- the way we define the variable doesn't
24 line up with how they define the variable -- if it only
25 applied -- if only applied in situations with black jurors, then

1 this would be accurate. If it applies to any white jurors, it
2 would be conservative but in no way can it be skewed toward the
3 defense.

4 Q And is it fair to say that with shadow table 1 in
5 State's Exhibit 71 that this is the statewide fully controlled
6 logistic regression model in a light most favorable to the State
7 assuming that all of the State's assertions with respect to the
8 coding is accurate?

9 A That's right. To the extent that I could reflect that
10 which in -- in -- there were -- in a vast majority of instances
11 that I recall reviewing, there was some category -- there was
12 some variable we had which captured what they had said with only
13 a few exceptions.

14 Q And I believe you've already said if there was not a
15 category and the State felt like they said something that made
16 them lean toward the defendant, how did you code that?

17 A That's right. So I used leans defense two as sort of
18 the catchall. So if the assertion was this person wouldn't make
19 eye contact or this person seemed hostile, I would code that
20 person as if they had expressed verbally a bias against the
21 State.

22 Q Let me show you shadow table 2 from Defendant's
23 Exhibit 71 and ask if you can identify that.

24 A In this model, I did the same procedure. This is the
25 same procedure using a Cumberland County model in which I

1 created new variables that were -- would reflect the asserted
2 reasons given by the State for the strikes of the jurors in
3 Cumberland County.

4 Q And can you tell us what the finding there is with
5 respect to venire member being black?

6 A The odds ratio is 2.02.

7 Q And the significance?

8 A Less than .02.

9 Q Is it fair to say that this shadow table 2 is the
10 Cumberland County fully controlled logistic regression model in
11 a light most favorable to the State assuming all of the State's
12 assertions with respect to coding is included?

13 A Yes, I believe so, to the best I could do.

14 MR. JAY FERGUSON: Your Honor, I'd move
15 Defendant's Exhibit 71 into evidence.

16 MR. PERRY: No objection, Your Honor.

17 THE COURT: Without objection, it's admitted.

18 MR. JAY FERGUSON: Your Honor, I don't have this
19 marked as -- it's State's Exhibit 47, page 39.

20 THE COURT: I am sorry?

21 MR. JAY FERGUSON: It is from the State's
22 Exhibit 47, which was their PowerPoint presentation, slide or
23 page 39.

24 THE COURT: Thank you, sir.

25 BY MR. JAY FERGUSON:

1 Q Okay. Professor O'Brien, can you see this?

2 A Yes.

3 Q Dr. Katz testified about this table, and I believe it
4 was included in his report. Do you recall that?

5 A I do recall seeing this table, yes.

6 Q I want to ask you a little bit about -- and I will
7 represent to you that essentially -- the record will speak for
8 itself, but essentially, Dr. Katz testified that what we're
9 looking for -- and I'm showing you the column, struck by
10 State -- is that a variable is really good if it has a real high
11 strike rate by the State and a real low strike rate by the
12 defense, and I think you heard some discussion about perfect
13 variable this morning, didn't you?

14 A Yes.

15 Q I'll ask you, as a social scientist and in experience
16 doing empirical legal studies, is that an accurate assessment of
17 a variable?

18 A Well, it's often true of variables that would be
19 statistically significant in the sense that if you have
20 something that is highly predictive of State strikes, I would
21 expect it to come into the model as statistically significant,
22 but that's not -- I mean, as a statistical statement, I don't
23 agree.

24 Q If the inquiry by this Court is to determine whether
25 the peremptory strikes by the State constitute a cognizable

1 claim under Racial Justice Act, would we need to look at the
2 column struck by defense or column seated?

3 A No, I don't believe so. I think it's about what -- I
4 mean, what our model predicts is what would cause the State --
5 the State to strike.

6 Q Okay. And in terms of struck by the State, do you
7 recall the approximate percentage of venire members struck by
8 the State in total?

9 A I believe they struck about 30 percent.

10 Q So if I'm looking at, for example, death penalty
11 reservations, it indicates 78.38 percent. Would it be fair to
12 compare that 78 percent to the 30 to see if it's significant?

13 A That's one way to think about it, right. That it's --
14 that that's -- if they're striking somebody with a particular
15 characteristic at a much higher rate than they are with people
16 without that characteristic, I would expect that characteristic
17 to be statistically significant particularly if it's frequent
18 enough.

19 Q And that's regardless of what the defense does, isn't
20 it?

21 A That's exactly right because some variables might
22 increase strikes for both sides. A hardship might be likely to
23 make the State more likely to strike and also make the defense
24 more likely to strike.

25 Q Now I want to just clarify one thing. And to be fair

1 to Dr. Katz, I think he was clearer about this in his report
2 than he was in his oral testimony. This struck by the defense
3 is 8.11 percent, and at least what I heard him indicate to the
4 Court was that the defense struck 8 percent of the venire
5 members that were passed to them who had death penalty
6 reservations. That is not exactly accurate, is it?

7 A I don't think so. I think that he's using the wrong
8 denominator.

9 Q To calculate the percentage of venire members struck by
10 the defense with death penalty reservations, would that formula
11 be 185 minus 145 and then you divide 15 by that number?

12 A Yes, I believe so.

13 Q And what he's done here is divided 15 by the total
14 number of venire members and come up with 8 percent?

15 A Yes.

16 Q Okay. For example, here, venire member being a
17 homemaker, that was only 36.47 percent; is that right?

18 A Struck by the State, yes.

19 Q But if there's a large enough number, 85, it can be
20 significant?

21 A That's right because what significance means is that
22 whatever disparity you observe, meaning here would be the
23 difference between 36.47 and about 30 percent, is that due to
24 just random chance or that's -- and that's what statistical
25 significance tells you, that you can be confident that this

1 isn't just due to noise, that you're not overinterpreting what's
2 just noise.

3 Q One more point on struck by defense: Does the State
4 and the defense strike about the same percentage of jurors that
5 are passed to them or that they have a chance to select?

6 A Not -- no. In our data -- in our dataset, it appears
7 that the defense strikes at a much higher rate than the State
8 does.

9 Q Do you recall about what that percentage was?

10 A I believe it was about 50 percent.

11 Q So if you want to do that same comparison to defense
12 strikes, you wouldn't compare it to the State percentages, you
13 would compare it to about the 50 percent?

14 A That's right.

15 Q Okay. I just want to hand you two exhibits very
16 quickly to get this in the record. If I can hand you 72 and 73.

17 MR. JAY FERGUSON: So this is 72, Your Honor, and
18 this is 73.

19 THE COURT: Thank you.

20 BY MR. JAY FERGUSON:

21 Q Can you tell us what Defendant's Exhibit 72 and 73 are?

22 A Exhibit 72 is a list of the cases in our study that were
23 in former division two.

24 Q Which includes Cumberland County or --

25 A Yes.

1 Q Or included Cumberland County back then?

2 A Yes.

3 Q And what is the next exhibit number and what is it?

4 A Defendant's Exhibit 73 is a list of the cases from
5 current division four that are in our study.

6 MR. JAY FERGUSON: I'd move for admission of
7 Defendant's Exhibits 72 and 73 into evidence.

8 MR. THOMPSON: May we have a second, Judge.

9 THE COURT: Yes, sir.

10 (There was a pause in the proceedings.)

11 MR. THOMPSON: No objection. Thank you, Judge.

12 THE COURT: Without objection, Defendant's
13 Exhibit 72 and 73 are admitted.

14 BY MR. JAY FERGUSON:

15 Q Professor O'Brien, did you look at the so-called
16 logistic regression analyses done by Dr. Katz in this case?

17 A Yes, I did.

18 Q I'd like to show you one of those. I believe Dr.
19 Woodworth testified about it. I'm referring to the analysis
20 beginning on page DA-458 of State's Exhibit 44. Now, I am
21 showing you specifically page DA-459, and I'll just ask you:
22 Have you ever seen, in your research, a statistical model like
23 this?

24 A No.

25 Q Just tell us, from your perspective, what is wrong with

1 this model?

2 A There doesn't seem to be any -- any generally accepted
3 criteria for why certain variables are included or excluded,
4 either theoretical or statistical. So you would -- generally,
5 you leave a variable in the model because it tells you something
6 useful about the thing you're trying to predict, and so -- and
7 it's statistically significant. There are reasons you might
8 include a variable that's not statistically significant in a
9 model, but then you have a theoretical reason for doing so. I
10 believe the example Dr. Woodworth gave is if you were -- you
11 know, certain statutory aggravating factors in a model, if you
12 wanted to show what, if any, effect they had. If you wanted to
13 show that something didn't matter, you might include it, but
14 there'd be some theoretical reason to include something that
15 doesn't tell you anything meaningful about the outcome of
16 interest.

17 Q Is it common to see models with p-values of .85 and
18 .73?

19 A Not unless there's a theoretical reason. If your point
20 is it doesn't matter, you want to include it to show it doesn't
21 matter, but no other reason than that.

22 Q And this model has a warning at the top that says, Not
23 intended as a model to explain how prosecutors execute their
24 peremptory strikes. Do you see that?

25 A Yes.

1 Q Do any of your models have any such warning?

2 A No.

3 Q Now, with respect to some of the variables, I want to
4 show you -- that are included. For example, employment,
5 variables 10 and 14, for example, and I will show you the
6 employment coding index from your study, which is Defendant's
7 Exhibit 45, and I'll just lay that beside it so we can see what
8 those variables are. What's wrong with including 10 and 14 in
9 this model together?

10 A So 10 is an unspecified professional variable when -- it
11 was coded when a person had a management, professional or
12 related occupation that wasn't captured by one of the
13 subcategories. Fourteen is life, physical, and social science.
14 If they both were independently predictive of the outcome, then
15 it would be appropriate to include them, but if they told you
16 something different and useful about predicting the outcome,
17 then it would make sense. In this model, there's -- there's no
18 theoretical reason to include those two as opposed to the other
19 subcategories unless there was statistical significance which
20 there's not even close.

21 Q Did you see any rhyme or reason for the inclusion of
22 only those certain employment variables 10, 14, 41, 44, 60, and
23 83?

24 A No. Including those variables in the model doesn't tell
25 you any more about whether someone is going to get struck than

1 including any of the other employment variables. There doesn't
2 seem to be any theoretical cohesion there.

3 Q I am going to go back to an analogy that came up on
4 cross-examination of Dr. Woodworth where if you were doing an
5 epidemiological study or something of that nature and you had
6 temperature rates of children at 98, 99, 100, 101, 102, and 103,
7 what would that be the equivalent of doing with respect to those
8 variables?

9 A That would be like including 98 and 102 and 103.5 all in
10 the model.

11 Q Without any basis?

12 A That's right. So you would -- I mean, part of the
13 reason you would have your coders collect precise information
14 is -- and not because it's easier to ensure consistency because
15 then they are coding and providing these more precise
16 measurements but also then if later you have reason to think
17 that there is something that happens at 102 that's fundamentally
18 different from what happens at 101, you have, then, the raw data
19 in which to examine that. It is harder to go -- with the law
20 enforcement variable, I learned the hard way. It's harder to go
21 from too broad to narrow, but if you start with these precise
22 codes, then that gives you flexibility if there's some variable
23 you thought you hadn't -- somebody would suggest, well, maybe
24 this is the reason. You would have the raw data, then, to be
25 able to code for that and so -- but you wouldn't just randomly

1 say, well, 97, 100, 101.3. There would be no reason to do that.

2 Q But would it be appropriate in your statement to recode
3 102 to 105 as very high and 101 down to 100 as moderately high,
4 something of that nature?

5 A That's right, or you might -- and recode 100 to on up as
6 high but then decide that that's too -- or want to see if you
7 need to be more precise, 102 to 105. So like what we did with
8 young and very young. Young is 25 and under. Very young is 22
9 and under. That -- by recording age precisely, it gives you
10 that ability so that -- and then if somebody's questioning how
11 you did it, they can recode it themselves and see if that
12 distinction matters.

13 Q And with respect to the employment variable, you
14 recoded certain employment variables into -- helping is an
15 example, right?

16 A That's right. So sometimes if you're thinking about the
17 kinds of jobs people have, maybe they would go across different
18 coding categories. Some from ten and some from the forties
19 might make a coherent variable, and that gives you the
20 flexibility to do that.

21 Q Were you present for Dr. Cronin's testimony?

22 A Yes, I was.

23 Q Did you hear his testimony about death penalty
24 reservations and there being a racial divide in belief in the
25 death penalty?

1 A Yes.

2 Q What do you think about that?

3 A I think that that's supported by the data, and I don't
4 dispute that at all.

5 Q So as a social scientist with expert in the legal
6 field, did you take that into account when you did this study?

7 A Well, of course.

8 Q What do you do?

9 A We code based on what the person says that -- that's the
10 basis of information that one would rely on. I believe Dr.
11 Cronin testified that this information is useful for drawing
12 generalizations, but at the individual level, it's more precise.
13 If you want to make -- if you want to make -- draw inferences
14 about what the individual thinks, you don't rely on the general
15 data, you rely on the specific data, and that's what we relied
16 on, that if a person -- what they said in voir dire, what they
17 wrote in their questionnaire, that was the basis for coding
18 whether or not they had death penalty reservations.

19 Q Now, within the dataset that's been produced to the
20 State and they've had for quite sometime, can you go in and look
21 at the individual variables and look at the racial divide within
22 those variables?

23 A Yes.

24 Q Do you recall table 11 that we went through a couple
25 weeks ago in your table?

1 A Yes.

2 Q Excuse me, in your study, where you took out everybody
3 with death penalty reservations and the ratio was still 2.1?

4 A Yes.

5 Q You took out everybody who had a family member or close
6 friend who was accused of a crime and the ratio was still 2.1?

7 A Yes.

8 Q Can you then do a finer analysis and look at the racial
9 composition of the accepted jurors within those variables?

10 A Well, it's -- it's not really -- it is not even finer.
11 It is just another way of looking at it.

12 Q Okay.

13 A Yes. You can -- you can look at either strike rates or
14 pass rates. They give you the same basic information.

15 Q And did I ask you to do that for this Court today?

16 A Yes.

17 Q Let me show you what is marked as Defendant's
18 Exhibit 74.

19 MR. JAY FERGUSON: May I approach.

20 THE COURT: Yes, sir.

21 BY MR. JAY FERGUSON:

22 Q Can you identify that document, please.

23 A This is a bar graph showing the pass rates, so
24 prosecutorial pass rates, among the people in our study in the
25 random sample who were -- who expressed -- who we had coded as

1 having expressed death penalty reservations.

2 Q Can you tell us whether -- you've heard Dr. Katz's
3 testimony; is that right?

4 A Yes.

5 Q It's been recorded, and you've been able to review it?

6 A Yes, I have.

7 Q And you've seen his report?

8 A Yes.

9 Q And at least a portion of his report indicates it's the
10 death penalty reservations that's to account for some of the
11 strike disparity. Is that a fair assessment?

12 A I mean.

13 Q Summary?

14 A Yeah, and that's true. It does account for some of the
15 disparity. Absolutely. It's a very highly significant
16 predictor as -- I would be worried if it hadn't come out that
17 way.

18 Q But within the population of venire members who have a
19 death penalty reservation, would there be any reason to see a
20 racial disparity among those people?

21 A Oh, no, if what's driving the strike decisions is a
22 person's expressions of death penalty reservations, we would
23 expect that among people who express death penalty reservations,
24 there would be equivalent strike patterns.

25 Q Can you tell the Court on a statewide basis what

1 percentage of black venire members with death penalty
2 reservations the State found acceptable?

3 A 9.7 percent.

4 Q Can you tell the Court with respect to all other venire
5 members with death penalty reservations what percentage the
6 State found acceptable to them?

7 A 26.4.

8 Q Did you do the same analysis for venire members accused
9 of a crime or that has a family or close friend accused of a
10 crime?

11 A Yes, I did.

12 Q And what exhibit number is that, please.

13 A Seventy-five.

14 Q Showing you what's marked as Defendant's Exhibit 75.
15 Can you explain what we see there?

16 A It appears that for venire members who we coded as
17 having been accused of a crime, prosecutors accepted or
18 passed -- didn't strike -- 66.7 percent of the nonblack venire
19 members compared to 42.1 percent of the black venire members.

20 Q Showing you what's marked as Defendant's Exhibit 76.
21 If you would review that document, please. Now, before -- I am
22 sorry. Before we get to 76, there were really two issues that
23 Dr. Katz referred to with respect to the statewide database.
24 That was death penalty reservations and jurors who were accused
25 of a crime or had a family or close friend accused of a crime;

1 is that right?

2 A As I recall.

3 Q And with respect to the Cumberland County, he found
4 that there were really three explanations for the strikes; is
5 that right?

6 A Yes.

7 Q Okay. Let me go through the three explanations of the
8 Cumberland strikes and let's take a look. What number exhibit
9 did I just hand you, please.

10 A Seventy-six.

11 Q Now, if you can look at Exhibit 76. Is this the same
12 type of analysis you testified with respect to Exhibit 74 but
13 within the Cumberland County database?

14 A Yes.

15 Q And can you tell the Court what percentage of black
16 venire members who had death penalty reservations the Cumberland
17 County prosecutors found acceptable?

18 A 5.9.

19 Q And can you tell the Court what percentage of all other
20 venire members who had death penalty reservations the Cumberland
21 County prosecutors found acceptable for their capital cases in
22 this study?

23 A 26.3.

24 Q Is there any reason we should see a racial divide
25 within this subcategory in Cumberland County?

1 A No.

2 Q Let me show you what's marked as Defendant's Exhibit 77
3 and ask if you can identify that document.

4 A So this graph is -- shows the relative pass rates of
5 people in Cumberland County who we had coded as they themselves
6 having been accused of a crime or if a family or close friend
7 had been accused of a crime.

8 Q I am sorry. I handed you the wrong one. Defendant's
9 Exhibit 77; is that correct?

10 A Yes.

11 Q All right. And can you tell us the percentages within
12 this category?

13 A The State passed 73.7 percent of nonblack venire members
14 with that coding compared to only 40 percent of black venire
15 members.

16 Q I am going to go out of order -- I realize that, Madam
17 Clerk.

18 Showing you Defendant's Exhibit 79. Can you tell us,
19 again, what the hardship category was within your study?

20 A You want me to describe what the coding was?

21 Q Yes. Yes.

22 A So a person who expressed concern that serving on this
23 jury would impose a severe hardship on them but who, obviously,
24 weren't excused for cause on that, that was a significant
25 predictor of State strike.

1 Q Can you tell the Court, looking at the Cumberland
2 County data, what percentage of black venire members that had
3 this hardship coding were found acceptable by prosecutors in
4 Cumberland County in their capital cases.

5 A Of nonblack?

6 Q Of black?

7 A 14.3.

8 Q And what percentage of venire members with this
9 hardship coding did the prosecutors find acceptable in
10 Cumberland County of the other jurors?

11 A 61.5.

12 Q Did I also ask you to look to see if the racial
13 disparities in exhibit -- I am sorry. Let me get the numbers
14 right.

15 MR. JAY FERGUSON: May I approach, Your Honor.

16 THE COURT: Yes, sir.

17 BY MR. JAY FERGUSON:

18 Q Did I ask you to look to see whether the racial
19 disparities in Exhibits 79, 77, 76, 75, 74 were statistically
20 significant?

21 A Yes, you did.

22 Q And did you do that analysis?

23 A Yes, I did.

24 Q Let me show you what's marked as Defendant's
25 Exhibit 78. Tell me what that is, please.

1 A These are the cross-tabs that I ran that provided the
2 data for those bar graphs and the Chi-squared tests that were
3 run to see if the differences or to test whether the differences
4 observed were statistically significant.

5 Q And were each and every one of those findings in the
6 exhibits that I've just mentioned statistically significant?

7 A Yes.

8 Q And the Chi-squared test -- tell us what that is.

9 A So a Chi-squared test is a test of statistical
10 significance you do when you have -- when you're looking at two
11 or when you're look at comparing categorical data. It's a test
12 of independence. The idea is that if being black was
13 independent of whether you're struck, it is not -- you'd expect
14 to see the people distributed in these cells according to their
15 representation. So if 10 percent of the venire is black, then
16 if black has nothing to do with strike, then you would expect to
17 see black represented proportionately. And the Chi-squared
18 test -- there's actually a number of different tests that the
19 computer runs, tests whether those differences that you observed
20 were statistically significant.

21 Q And I believe you testified that you have reviewed the
22 testimony of Dr. Katz; is that correct?

23 A Yes, I have.

24 Q You've heard the testimony of Dr. Cronin. Was there
25 anything about Dr. Katz's testimony or Dr. Cronin's testimony

1 that caused you to change any of your opinions that you have
2 previously stated to this Court with respect to whether race was
3 a significant factor in the exercise of peremptory challenges by
4 prosecutors in North Carolina?

5 A No.

6 Q Same question with respect to Cumberland County. Was
7 there anything about Dr. Katz's or Dr. Cronin's testimony that
8 caused you to change any of your opinions that you stated
9 previously to this Court with respect to whether race was a
10 significant factor in the exercise of peremptory challenges by
11 prosecutors in Cumberland County?

12 A No.

13 Q Same question with respect to judicial division --
14 former judicial division two. Was there anything about Dr.
15 Katz's or Dr. Cronin's testimony that caused you to change any
16 of your opinions that you previously stated to this Court with
17 respect to whether race was a significant factor in the exercise
18 of peremptory challenges by prosecutors in former judicial
19 division two at the time of Marcus Robinson's trial?

20 A No, there wasn't.

21 Q Did you ever hear Dr. Katz tell this Court that he
22 believed that race was not a significant factor in the exercise
23 of peremptory challenges by prosecutors in the State of North
24 Carolina?

25 A No, I don't recall him ever saying that.

1 MR. JAY FERGUSON: Thank you. One moment.

2 THE COURT: Yes, sir.

3 (There was a pause in the proceedings.)

4 MR. JAY FERGUSON: That's all the questions I
5 have.

6 THE COURT: Mr. Perry?

7 MR. PERRY: Thank you, Your Honor.

8 THE WITNESS: Excuse me. Before we continue, may
9 I have some more water.

10 THE COURT: Yes, ma'am.

11 (There was a pause in the proceedings.)

12 THE COURT: Yes, sir. Mr. Perry?

13 MR. PERRY: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. PERRY:

16 Q Now, Professor O'Brien, I want to make sure I
17 understand correctly the last series of questions that Mr.
18 Ferguson asked you involved whether or not your opinion had
19 changed as you reviewed the testimony from Dr. Katz -- and I am
20 going to have to rely on you completely because I was not here
21 for Dr. Cronin, that testimony. You've heard both of those
22 testimonies and reviewed their materials and formed your opinion
23 as to whether or not your opinion has changed based on what
24 they've said, correct?

25 A I have listened to the testimony of both, and I reviewed

1 Dr. Katz's report. I didn't read Dr. Cronin's report, but my
2 opinion hasn't changed based on anything in those materials.

3 Q Right. So nothing you've heard so far has changed your
4 opinion?

5 A No.

6 Q Okay. Let me -- I guess let me ask it like this. I
7 think -- I guess two weeks ago now when we started this hearing
8 and I asked you questions, I had asked about previous versions
9 of the models -- of the model -- yeah, models, for Cumberland
10 County and for the State that you put together. And I think I
11 asked you about your initial model, which was from July of last
12 year, correct?

13 A Yes.

14 Q And then we talked about a subsequent model that was
15 encapsulated in a report from September?

16 A Yes.

17 Q And then we talked about the final report, which was
18 December?

19 A Yes.

20 Q Correct? And let me make sure I am caught up. Today,
21 we have talked about two models, two additional models, correct?

22 A Yes.

23 Q Okay. And just so we're clear --

24 A Well, two additional sets of models between Cumberland
25 and State.

1 Q That's right. And I am going to try to keep them
2 straight as far as State and Cumberland County. The new model
3 or the first new set of models including statewide and
4 Cumberland County estimated values and coefficients and odd
5 ratios and that sort of thing, incorporate what the defense
6 marked -- if I can find my copies of them -- as Exhibit
7 Number 68 and 69. And not to get into the numbers too much but
8 these represent the materials from Dr. Katz's report and from
9 your own review of the affidavits provided by the prosecutors,
10 correct?

11 A That is right. And also -- and I didn't mention this on
12 direct but just to clarify, there was I believe State's
13 Exhibit 48 or 49 that was offered last week that noted that
14 there was one -- there was, I think, three people for whom the
15 shadow coding should have reflected something that it didn't, so
16 it incorporates those corrections as well.

17 Q The corrections from 49?

18 A Yes. If I remember the exhibit number correctly, yes.

19 Q Okay. And let's call it those three things, those are
20 all incorporated in Defendant's Exhibit Number 70, correct?

21 A Yes. Yes.

22 Q Tables 12 and 13?

23 A Actually, no. Those -- I'm sorry. Let me clarify.
24 Those three things from that exhibit were not errors in the
25 sense -- they are errors that I've -- that I concur with and

1 have changed the coding for but rather there were -- according
2 to the way I have done the shadow coding, which was taking all
3 the State's assertions at face value without reconciling it with
4 our protocol or the source materials and reflecting -- having
5 the shadow coding reflect that. So none of those three was an
6 error that's reflected in the yellow here.

7 Q Okay. And let me make sure -- to distinguish between
8 Defendant's Exhibit Number 70 and Defendant's Exhibit Number 71,
9 Defendant's Exhibit Number 71, that would be the shadow coding?

10 A Yes.

11 Q So giving the State the benefit of the doubt, correct?

12 A Yes.

13 Q Okay. All right. Now, as far as these updated models
14 go, again, I want to make sure that we're on the same page. One
15 of the first things that Mr. Ferguson asked you was the number
16 of submitted coding errors or asserted errors that we're looking
17 at here. And I think the answer from you was this was about 20
18 asserted errors. Does that sound right?

19 A Yes.

20 Q So in the shadow coding models that you ran, that gives
21 the benefit of the doubt to the State for those 20 asserted
22 coding errors; is that correct?

23 A It should, although, I did make that error last time
24 that you caught, and so that's my goal or that's --

25 Q That is what it is supposed to represent?

1 A That's right.

2 Q And then in Defendant's Exhibit Number 70, this is sort
3 of the reconciled version of the model? In other words, this is
4 where, as you indicated earlier, you went through in yellow
5 where you made what you considered to be appropriate changes.
6 Those are incorporated in this model?

7 A Yes. They're reflected in that model.

8 Q Okay. Now -- and let me ask you a question about the
9 two defense exhibits where you reviewed these discrepancies and
10 checked to see if they matched with your coding protocols. Let
11 me start with Defense Exhibit Number 7 -- 68. And this is a
12 list of the asserted coding errors from Dr. Katz's report,
13 correct?

14 A Yes.

15 Q All right. So the items in yellow or the assertions
16 that are marked in the resolution column by yellow, those were
17 the ones that have been changed to reflect what was asserted by
18 Dr. Katz?

19 A Well, yes, they were -- I would -- I had revisited the
20 source materials and reviewed them myself, and if I concurred or
21 thought it was pretty close, I might -- or, generally, if I
22 concurred, I would change the coding to reflect that.

23 Q So to be clear -- and I think Mr. Ferguson asked you,
24 but I want to make sure that I'm understanding correctly. For
25 Lisa Bender, which is venire member study ID 209.2.026 --

1 A Yes.

2 Q -- the first row up there. The resolution was that
3 neither of the assertions was an error?

4 A That our coding -- that it was coded properly under our
5 coding protocol. That's right.

6 Q Okay. And I think you had mentioned that you had some
7 of your coders go back and do this?

8 A No, I did this.

9 Q You did all these?

10 A Yeah. Yes, I did.

11 Q So all these places where it is marked not an error or
12 if there are multiple neither-an-error, those are all decisions
13 that you made, correct?

14 A Yes.

15 Q Now, going to Defense Exhibit Number 69, again, this is
16 just from a review of the affidavits provided by the
17 prosecutors?

18 A Affidavits, spreadsheets -- anything provided that
19 asserted reasons.

20 Q Okay. And then all these together aggregate to about
21 20 errors, correct?

22 A Hold on one sec, please.

23 Q Sure.

24 A I think it's about 18 because Tandra Whitaker is
25 represented twice here because she was both in Cumberland County

1 and in the random sample.

2 Q Yes. Not double counting those folks because that'd be
3 the same person.

4 A That's right.

5 Q Okay. If you look at these -- and I think you
6 testified to this. I just, again, want to make sure. In the
7 Defendant's Exhibit 69, which the review of the affidavits and
8 the resolution of the discrepancies noted there, the affidavits
9 provided did not actually mention any of the variables
10 themselves, correct?

11 A I believe there might have been one where the prosecutor
12 who had reviewed it had made a comment that this person had this
13 characteristic and the coding doesn't reflect it, but my
14 recollection is that maybe there was one -- most of them, the
15 vast majority of them were assertions, This is why I struck this
16 person.

17 Q Okay. So they asserted things, but they didn't put it
18 in the context of the variables that you had set up?

19 A That's right.

20 Q And then, again, as far as the resolution for this
21 review of the affidavits, that was something you did
22 individually, or that was something that other folks
23 participated in as well?

24 A I am sorry. Could you repeat that?

25 Q Did you do the reviews and the resolution completely?

1 A Yes, I did.

2 Q Just like the other ones?

3 A Yes.

4 Q And so --

5 A Well, I should note when I first learned -- when we
6 first received Dr. Katz's report and there was assertions about
7 racial coding errors or race coding errors, I did have one of my
8 coders look at that initially.

9 Q So just for the race coding itself?

10 A That's right. Ultimately, any -- but ultimately I
11 looked at all of these with the exception of -- well, with a
12 race coding, the ones where they had disagreed that it was an
13 error, they provided me with the source documents to say, This
14 is why we believed that our race coding is correct. So I
15 reviewed those, yes.

16 Q So you are talking about it was provided in the
17 affidavits, or you're talking about your coders provided it?
18 When you said the underlying transcripts or underlying
19 materials --

20 A That's what we had. Our source docs that are part of
21 the -- that are on that jump drive.

22 Q Okay. So, again, those two or these two documents,
23 those are the basis for the model that is run in Defendant's
24 Exhibit Number 70, and then, basically, Defendant's Exhibit
25 Number 71, the shadow coding, that will be like making all of

1 these boxes yellow, again, just in giving the State the benefit
2 of the doubt, correct?

3 A Yes.

4 Q Now --

5 A Also but just to clarify --

6 Q Yeah.

7 A The updated tables -- well, 1 through 10, only -- those
8 would only change as to race or strike errors, but with tables
9 12 and 13 or table 12, that wasn't just the corrections of the
10 errors that I concurred were errors but also the -- when we
11 refined the law enforcement variable.

12 Q Okay.

13 A So that's one other change.

14 Q Okay. And let me ask you a question about that because
15 I want to make sure I understand. For variable number 8 -- and
16 this is in the statewide model. This is the new -- the new or
17 the recoding of a previous variable and that came from a
18 combination or a finer splitting of the previous variable which
19 was on the previous report? In other words, you took some
20 categories out, correct?

21 A Well, let me be clear. The problem that -- the reason
22 that I agree that this was a valid criticism was that our
23 underlying coding was not precise enough, and it's always better
24 to have more precision and then you can group things together.
25 If you code something too generally, then to get more precision

1 later, you have to go back, revisit the underlying source docs,
2 and recode it. If you have the really finely tuned variables,
3 then you can recode into different categories. You have that
4 there. What we had -- what I had done or what we had done that
5 was -- that Dr. Katz pointed out and that he objected to was we
6 had this law enforcement category that didn't distinguish
7 between types of law enforcement. It would lump public
8 defenders in with police officers. So I had my coders go back
9 to everybody who had one of these 600 codes and -- because the
10 600 codes distinguish whether it was yourself -- whether it was
11 you who was the officer or whether it was your spouse or whether
12 it was your daughter. So we didn't have the ability to
13 distinguish based on those codes what kind of law enforcement
14 officer it was, so that's why I had my coders go back and review
15 the source materials for all of these people to tell me what was
16 the nature -- not just the nature of the relationship but also
17 what was the -- what kind of law enforcement job was it.

18 Q So you were here earlier when Dr. Woodworth testified?

19 A Yes.

20 Q And I think his testimony or his explanation of what
21 makes a good variable is whether or not it purports to measure
22 what it's supposed to measure?

23 A Well, that's -- that's one thing, right, that you don't
24 want a category that's -- you don't want to have a variable
25 that's so broad that if you define it so broadly that you don't

1 capture a meaningful distinction, and you don't want -- and if
2 it's too narrow -- if it captures something that's just so
3 idiosyncratic that it doesn't really tell you much about the
4 decision to strike. The nice thing about if they're too narrow
5 is you can combine things. I think age is a good example. Does
6 it really matter whether someone's 22 or 23 or 24? It's
7 probably more about are they young, are they middle-aged, are
8 they old? So, yeah, there's always -- so the way you
9 operationalize a variable, you want it to be broad enough to
10 capture the essence of this factor that you're trying to capture
11 but not so overly broad that you capture a lot of noise.

12 Q Now, let me ask you this because Dr. Woodworth used the
13 word idiosyncratic, too. When you say idiosyncratic, what do
14 you mean by that?

15 A Well, if it's something that's -- if you have a variable
16 that is very, very rare and just happens to be associated with
17 strikes or not strike, it can make it look like this variable
18 matters in strike decisions. So suppose we had coded for
19 whether a person wore a bright fuchsia shirt and there was, you
20 know, out of thousands of people, there was only three people
21 who did, and they all happened to get struck. If you include
22 that, you could just look at that and think, Well, wearing a
23 fuchsia shirt predicts whether you're struck or not. But the
24 model would very likely not come back as statistically
25 significant because there are not enough observations to be sure

1 that this isn't just idiosyncratic. If you measured blue shirt,
2 for example, and supposed you had 15 percent of people wearing
3 blue shirts and you see they are overwhelmingly struck -- I
4 wouldn't expect to this happen, of course -- but then it would
5 be a statistically significant predictor. We wouldn't expect
6 that to happen because the more observations you have, you
7 wouldn't expect it to predict strikes unless it really did
8 matter. So that's what I mean by idiosyncratic.

9 Q And let me paraphrase and make sure. So by
10 idiosyncratic, you mean rarely occurring or occurring only
11 sporadically, here and there?

12 A Well, that's part of it. I mean, also, just something
13 that just happens to co-occur with the outcome of interest but
14 the -- what statistical significance testing does is it measures
15 or it estimates whether -- part of what tells you whether it's
16 idiosyncratic or it really is some meaningful nonchance
17 co-occurrence, part of what goes into that is you have to have a
18 certain number of observations before you can say anything
19 meaningful about it. Otherwise, you would just chock it up to a
20 coincidence. If it happens -- so part of what goes into
21 statistical significance is does this -- how sure are we this
22 isn't just a coincidence? And how sure you are is both a
23 measure of how strongly associated it is with the outcome but
24 also how often it occurs so you can really test the hypothesis
25 of whether it matters.

1 Q And you heard Dr. Katz's testimony -- I think listened
2 to it?

3 A I did.

4 Q Do you recall the hung juror example he cited where
5 there were two hung jurors that were both struck?

6 A Yes.

7 Q So in the way we are talking about idiosyncratic, both
8 of those jurors, even though they were struck and that had that
9 factor, being on a hung jury, that would not be statistically
10 significant?

11 A It didn't come in as statistically significant in the
12 model. It may be. I wouldn't be -- that is one of the reasons
13 we coded for it because it seems like something that could
14 matter, and it could be the type of thing that when it does
15 occur, it is highly predictive, but it doesn't tell us much in
16 our model about the decision to strike or not because it just
17 doesn't occur often enough or didn't occur often enough to
18 meaning -- to tell us something meaningful about the decision to
19 strike.

20 Q But, I mean, from a theoretical perspective, somebody
21 like that with an experience of being on a hung jury, that would
22 be theoretically distinct from somebody wearing a fuchsia shirt?

23 A That's right.

24 Q Let me ask you a question -- and going back to sort of
25 the specifics of the model. If you look on your Defense Exhibit

1 Number 71. That is the shadow coding model. I think Mr.
2 Ferguson asked you specifically about the odds ratio,
3 coefficient, and the p-value. Now, if you compare the shadow
4 coding model to Defendant's Exhibit Number 70 -- and I guess
5 correct me if you don't like this, but can we call this the
6 resolution model maybe?

7 A That's fine.

8 Q That will be shorter than me trying to remember the
9 number.

10 A That's fine.

11 Q The difference between the shadow coding model and the
12 resolution model in terms of the statewide logistic regression,
13 when you look at the variable black, you see in terms of the
14 coefficient, the odds ratio, that when you go from the shadow
15 coding to the resolution model, both of those actually increase,
16 correct? In other words, in the shadow coding model, the
17 coefficient .687 actually increases when you go to the
18 resolution model?

19 A That's right. The estimate of the effect of being black
20 on being struck is higher in the resolution model than in the
21 shadow coding model for the reasons I explained earlier.

22 Q Right. And that's also true for the odds ratio,
23 correct?

24 A That's right because they're basically -- one is a
25 function of the other.

1 Q Right. So one goes up, one goes down, the other goes
2 up, the other goes down?

3 A Yes. That's my understanding.

4 Q Now, if you compare those two to your December report
5 model, in terms of the coefficient/odds ratio, what happened?

6 A Okay.

7 Q And that's Defendant's Exhibit Number 6.

8 A Okay. I just need --

9 Q I am not sure where it is, but that's the exhibit
10 number.

11 A I know how to find it. It will just take me a second.

12 Q Sure.

13 (There was a pause in the proceedings.)

14 A Okay. Can you ask that question again, please.

15 Q Yes, ma'am. From the resolution model to the December
16 model in terms of the coefficient and the odds ratio, how did
17 those change?

18 A It went down with the resolution model.

19 Q So in other words, in terms of the odds ratio, it was
20 actually, what? More likely or less likely?

21 A So it went from 2.48 to an estimate of 2.28.

22 Q So that means what?

23 A That means that when we included the shadow codes -- I
24 am sorry. Not the shadow codes. But when we corrected the
25 errors in coding of black venire members, struck black venire

1 members, it explained some more of the variance in those strikes
2 so -- because if you don't do it for anybody else, if you just
3 do it for the black venire members who were struck, it will
4 necessarily drive down that odds ratio.

5 Q All right. Let me ask you a question about some of the
6 other things that weren't looked at. In other words, I think we
7 were talking earlier -- Mr. Ferguson was asking you earlier
8 about, you know, what you didn't look at. Again, you were
9 discussing the odds ratio and how it would sort of, by
10 definition, go down?

11 A Yes.

12 Q One thing that was not looked at was revisiting white
13 jurors, correct?

14 A I don't understand what you mean, "not looked at."

15 Q Well, in other words, no adjustments were made. These
16 did not include any of the white jurors?

17 A None of the reviews I got regarding descriptive codes --

18 Q Right.

19 A -- related to any white jurors.

20 Q So those were just not included?

21 A I didn't see any reviews of those, no.

22 Q Right. Okay.

23 A So no changes were made except when there was a race
24 coding error, of course, we changed that. I think there was one
25 person coded as black that should have been white, but none of

1 these descriptive codes were changed for the white jurors.

2 Q So just an overall code whether or not they were white,
3 black, or Indian or whatever category they would have gone into?

4 A That's right.

5 Q And let me make sure I understand because, again, I was
6 not here for the testimony of Dr. Cronin, but I think you said
7 you agreed completely with what he said or, Supported by the
8 data, don't dispute it at all -- I think you were referring to
9 DP_Reservations in terms of the black venire members that were
10 included? I just want to -- I want to understand because,
11 again, I wasn't here, what exactly that Dr. Cronin said that
12 you're agreeing with.

13 MR. JAY FERGUSON: I object to the form of the
14 question, Your Honor, since it was sort of one question that
15 bled into another one. I would ask the Court to have him
16 rephrase that.

17 THE COURT: Do you understand the question, first
18 of all, Dr. O'Brien?

19 THE WITNESS: Well, I would prefer if he clarified
20 to make sure that I do.

21 THE COURT: If you will please rephrase that.

22 MR. PERRY: And, again, Your Honor, my --

23 THE COURT: I understand you are at somewhat of a
24 disadvantage, sir.

25 BY MR. PERRY:

1 Q When you said, Supported by the data, don't dispute at
2 all, what were you referring to?

3 A He presented testimony regarding demographic differences
4 in support of the death penalty. I don't -- that's not my area
5 of expertise. I am not a political scientist or a sociologist;
6 however, that's -- that doesn't surprise me, and I think I've
7 read that, that, in general, that blacks tend to or -- in
8 general, they have higher levels of disapproval for the death
9 penalty -- or I should say that whites, on average, are more
10 likely to support the death penalty than blacks.

11 Q And that's a relative comparison?

12 A That's right.

13 Q And here's what I wanted to ask you about because I
14 think before Mr. Ferguson asked you about Dr. Cronin's study,
15 you made an observation about those white jurors that had not
16 been reviewed in terms of their characteristic or their DP
17 reservations. In other words, I think you said, Assuming that
18 the variable definitions are the same, that the DP reservations
19 for the nonrevisited white jurors would be equivalent?

20 A Well, let me just tell you -- let me just try to
21 clarify. If -- so there were some instances -- so, for example,
22 when I was here last, you pointed out Tandra Whitaker. I
23 believe that was just a coding error. I just think our coder
24 made a mistake. Under our protocol, she should have been coded
25 as having death penalty reservations. The shadow -- as far as

1 the shadow coding -- are we talking about shadow coding or the
2 disputed coding?

3 Q Well, what I want to make sure I understand correctly
4 is you said assuming that white jurors who have this
5 characteristic are the same as the black jurors that have been
6 reviewed -- that's the part I'm asking you to clarify.

7 A Well, what I'm saying is assuming -- if we made
8 errors -- and this is -- so just to get back to the point, the
9 reason that we have a protocol and we have double coders is to
10 ensure consistency. So to the extent we make an error, it's not
11 systematic to the extent we perhaps operationalize death penalty
12 reservations slightly differently than somebody criticizing our
13 study would, that to the extent there is some error there or
14 difference of opinion that -- that would apply. We didn't code
15 black potential jurors differently than white potential jurors,
16 that the same protocol was used. So if we were making some
17 errors or in -- or in your opinion, making errors as to black
18 potential jurors, then presumably, there would be some white
19 potential jurors that we should have coded as death penalty
20 reservations and didn't.

21 Q And that is what I want to clarify. So is the
22 assumption that the distribution of white venire members is the
23 same as the distribution of black venire members in terms of
24 their attitudes towards the death penalty?

25 A Not exactly. The assumption is that the distribution of

1 errors would be the same.

2 Q So that --

3 A So that -- and I don't -- and I don't know because the
4 -- the -- the expert opinion on average differences of opinion
5 -- I don't know if you were to fine tune it and get to these
6 more on-the-fence type of cases, which is where these would
7 apply, I don't know. Maybe at that point the racial disparity
8 goes away. Maybe when we are talking about -- maybe it is
9 driven by people with very strong views. But assuming it is a
10 consistent different that people who are kind of on-the-fence
11 about the death penalty or not sure about it versus vehemently
12 opposed, assuming that the relative proportions by race are the
13 same -- which is a big assumption but just assuming for our
14 purposes that it is -- then what I'm assuming is to the extent
15 we may have made an error or defined our variable too narrowly
16 or too broadly in someone else's opinion, that that would be
17 distributed across the races evenly in proportion to their
18 representation. So it's not that I would expect that for -- if
19 we made the mistake with five black jurors, we would make it
20 with five white jurors but that it would be proportional to
21 their representation, how they're distributed within this
22 characteristic. Right. So if -- so suppose you had a variable
23 where, say, that blacks were much -- way overrepresented
24 compared to whites and we made an error in how we coded it and
25 then we went back and recoded it, you might find that there

1 would be more blacks included in the recode than whites, but it
2 should be proportionate to whatever their representation was
3 before that.

4 Q Okay. And, again, given -- and this is what I'm
5 getting to -- you probably see this now -- that you're agreeing
6 with Dr. Cronin's statement that the underlying distribution
7 attitudes are different from one race or one designation to the
8 other?

9 A I have no reason to dispute that and, in fact, in our
10 own data, we do see that -- that the black jurors were -- it was
11 still a relatively rare occurrence, I presume because they had
12 already gone through the death qualification procedure but, yes,
13 it was -- there was a higher representation of death penalties
14 expressed among the black potential jurors compared to others.
15 So that's consistent. I have no reason to dispute that.

16 Q Okay. And let me ask you a question about sort of the
17 presentation of these disparities. I think these were Defense
18 Exhibits 74, 75, 76, 77, and 79, again, just the, you know, the
19 two element charts here.

20 A Uh-huh.

21 Q I want to make sure I understand correctly something
22 else that was also identified by the defense, and I don't think
23 this was marked as an actual exhibit. This was just a table 12.

24 A That's right.

25 Q Do you still have that there?

1 A Yes, I do.

2 Q That was from Dr. Katz's report not yours?

3 A Yes.

4 Q The difference between this table 12 and these Defense
5 Exhibits 74, 75, 76, 77, 79, these are in terms of prosecutor
6 passage rates, correct? In other words, acceptance rates?

7 A Right. These bar graphs show passage rates or
8 acceptance rates.

9 Q So if you look at the Defendant's Exhibit 79 and you
10 got the passage rate for hardship identified venire members?

11 A Yes.

12 Q And you looked at this defendant's exhibit for table
13 12, these numbers are different, correct?

14 A I will just need a moment.

15 Q Sure.

16 (There was a pause in the proceedings.)

17 A Well, table 12 is statewide, and I was looking at
18 Defense Exhibit 79. Did you mean for me to look at -- I don't
19 have -- I don't have this bar chart for the statewide. So
20 they're comparable. I think -- so the State strike rate for
21 people with the hardship is 43.42, and it looks like in
22 Cumberland County, it was 38.5, so looks like the phenomenon
23 operates the same statewide and in Cumberland County, but
24 they're not exactly the same.

25 Q And part of the reason I am asking you this -- I want

1 to make sure I understand correctly because you said you thought
2 Dr. Katz had an issue with the denominator he used as far as the
3 percentage rates?

4 A It looks that way to me.

5 Q Can you explain why you think that's the case, again,
6 using the table 12 as an example?

7 A Okay. Well, so if you want to look at passage or strike
8 rates, it seems like you should be comparing numbers struck to
9 the number you had the opportunity to strike.

10 Q Uh-huh.

11 A And because of how North Carolina -- my understanding of
12 North Carolina law conducting -- how voir dire is conducted,
13 that unless the State has run out of peremptory strikes, that
14 the State almost always -- if the State strikes somebody, then
15 they're done. The defense doesn't have a chance to pass or
16 strike. So unless I'm misunderstanding his math, it looks like
17 what he's doing is taking, for the defense strikes, taking the
18 number of those venire members coded with a particular
19 characteristic who were struck compared to all the venire
20 members in the database with that characteristic. But if you
21 want to look at defense strike rates -- to whatever extent
22 that's relevant, if you wanted to look at defense strike rates,
23 you should look at how many they struck as compared to how many
24 they could have struck.

25 Q Potential strikes, right?

1 A Right.

2 Q Which I think in part of your report, you mention that,
3 right, because if you listen to Dr. Katz's testimony, you recall
4 at some point he included 20 venire members that were not
5 included in your final report?

6 A That's right. If a -- so if the State -- and there was
7 a few instances where the State had apparently run out of
8 peremptory strikes and there was no strike decision to be made
9 in that instance, so that would not be included as a valid
10 decision point to examine.

11 Q Okay. Can I ask it this way: Are y'all in agreement
12 as far as the way those folks were treated? Does that make
13 sense? Using those 20 folks as an example and in your looking
14 at his numbers here?

15 A Am I in agreement with Dr. Katz?

16 Q As far as who should be counted? In other words, it
17 should be potential strikes.

18 A Well, I think he included them. I don't think you
19 should include them.

20 Q You don't think?

21 A No. I think the question is how many did you strike out
22 of how many you could have struck.

23 Q Okay. Well, let me clarify, then, because -- and let's
24 use DP reservations as an example. If you look at table 12,
25 you've got 185 venire members who were coded with that

1 characteristic, correct?

2 A Yes.

3 Q So the number of those folks struck by the State would
4 be 145?

5 A Yes.

6 Q And that strike rate would be calculated by the 145
7 over 185?

8 A Assuming all 185 were strike eligible by the State and
9 considering that the vast majority were.

10 Q And by strike eligible, we just mean the State had a
11 strike left to exercise against those folks?

12 A Yes. Yes.

13 Q And then going to the number of venire members coded as
14 struck by the defense, the 15 would actually be the numerator,
15 and the denominator, if I am understanding you correctly, should
16 be the difference between 145 and 185, correct?

17 A Yes.

18 Q Which would be, if everybody's math -- and I mean me by
19 everybody -- that should be 15 over 40?

20 A Yes.

21 Q And then whoever is left over obviously goes in the
22 remaining category, correct?

23 A That's right.

24 Q And, again, with the same assumption that the defense
25 has strikes left to exercise?

1 A That's exactly right. And I don't know in these 15
2 instances -- well, no, they must have had a strike left for the
3 15, but as far as the denominator, that's -- that's what that
4 would turn on.

5 Q But that's -- again, I just want to identify what
6 you're saying is the issue with the proper denominator to be
7 included.

8 A Yes.

9 Q Now let me ask you a broader question: Using these
10 table 12 categories as an example -- I think you indicated
11 earlier when Mr. Ferguson was asking you questions about these
12 percentages -- in other words, what information does it convey
13 to you, assuming these percentages were calculated correctly,
14 about these variables? Do you think that these percentages
15 would give you any information about -- let's use the terms we
16 used this morning -- the validity of these variables? So, in
17 other words, let's use death penalty reservations as an example.
18 Is there any way that these percentages should look based on the
19 way your DP reservations variable has been constructed?

20 A Yes. And that's -- it's not just based on comparing the
21 rates. That's also true for how it -- like I said earlier, you
22 know, had death penalty reservations not been statistically
23 significant, I would have worried that we had coded it wrong or
24 there was some other problem. Other variables -- we collect
25 data on things we think might theoretically be important may or

1 may not ultimately be important. Things can surprise you. But,
2 I mean, so in this -- in the same vein, you would expect, if I
3 would have predicted -- I think we all predicted death penalty
4 reservations would be a strong predictor of State strikes, and
5 it was, and so if I were to look at the raw numbers and, you
6 know, I do look at the raw numbers, see, yeah, they struck
7 people with these reservations, death penalty reservations, at a
8 higher rate than people without that characteristic.

9 Q So as far as the revelation of bias, using DP
10 reservations as an example, if the percentage struck by the
11 State is pretty high, that would give you an indication of the
12 direction of the bias, correct?

13 A Yes, as would any of the statistical models or tests we
14 presented.

15 Q So for some of these variables where it's not
16 particularly weighted to one category or the other -- use, for
17 example, again, assuming these are calculated in the ballpark
18 correctly, hardship or homemaker or single divorced, and you
19 have sort of equal chances of being struck by the State, struck
20 by the defense, or seated, what information does that convey to
21 you?

22 A Well, the last two pieces don't -- the last two pieces
23 of what you're saying as far as the likelihood of being struck
24 by the defense whether they're seated, that -- the model is not
25 looking -- the predictor -- the output we're predicting, the

1 outcome we're predicting is whether the State strikes. If
2 you're asking me theoretically would I expect them always to
3 work opposite, just theoretically, shouldn't a person who has --
4 shouldn't a characteristic that the State finds objectionable,
5 by definition, be a characteristic the defense finds attractive.

6 Q Uh-huh.

7 A Sometimes, absolutely. I would expect to see higher
8 rates of strikes against death penalty reservation holding
9 people than people without it but with the two caveats, right?
10 That's not always the case. Not all variables are going to work
11 that way. Why would hardship make a person more likely to get
12 struck by the State? Well, perhaps the State is worried the
13 person won't be paying attention, that their mind would be
14 elsewhere. That factor -- wouldn't surprise me at all if that
15 factor predicted defense strikes as well. So they don't always
16 have to be negatively correlated. It also could be that the
17 person who has this objectionable category, characteristic, but
18 gets passed anyway may have some other characteristic that the
19 defense wouldn't want and, therefore, the State can recognize
20 that, passes them, and lets the defense use a strike. So I
21 would be concerned if I saw that death penalty reservation
22 predicted defense strikes and didn't predict State strikes, of
23 course. It would make me question how I operationalized and
24 coded my variables. But there's -- all that does is it raises a
25 question that I would -- if I saw something that seems

1 anomalous, I would think about it, but there's no hard and fast
2 rule that inclusion of the variable means it has to both
3 predict -- if it predicts positively one way, it has to predict
4 negatively the other.

5 Q Let me make sure --

6 THE COURT: Mr. Perry, I apologize for the
7 interruption. I am, at this point, simply looking for
8 information and my purpose is not to constrain cross-examination
9 in any way or any redirect. It is now almost 1:00 o'clock. Is
10 this an appropriate point for us to stop for a brief lunch
11 recess, folks? I recognize travel plans may be a factor. That
12 is why I am raising it now.

13 MR. PERRY: Judge, if you'll give me a minute to
14 consult. I don't think I have much more. If I can ask --

15 THE COURT: Okay.

16 MR. PERRY: -- Mr. Thompson and Mr. Colyer.

17 THE COURT: Yes, sir. And in no way am I trying
18 to inhibit your cross-examination, sir.

19 MR. PERRY: Yes, sir.

20 (There was a pause in the proceedings.)

21 MR. PERRY: Your Honor, I think I can probably
22 finish my part in just a couple minutes.

23 THE COURT: Yes, sir. Let's go forward.

24 MR. PERRY: Thank you, Your Honor.

25 BY MR. PERRY:

1 Q And, Dr. O'Brien, I was getting ready to quote your
2 code researcher, Dr. Woodworth. I believe he referred to this
3 as a complicated discretionary system. Is that what you're
4 describing in terms of the way you just talked about this
5 process?

6 A I concur that it's complex, and that's why you need a
7 lot of observations from which to discern what's noise and
8 what's a consistent predictor.

9 MR. PERRY: May I have a moment, Your Honor.

10 THE COURT: Yes, sir.

11 (There was a pause in the proceedings.)

12 MR. PERRY: I believe that's all the questions I
13 have, Your Honor.

14 THE COURT: Okay. Any redirect?

15 MR. JAY FERGUSON: Your Honor, I will have very
16 brief redirect, but I would sincerely appreciate the lunch hour
17 to make sure we have all of our bases covered.

18 THE COURT: Okay. One hour okay, folks?

19 MR. JAY FERGUSON: Yes, sir.

20 THE COURT: Okay. Thank you, Dr. O'Brien. You
21 may step down, ma'am.

22 We'll be at ease until 2:00 o'clock.

23 And, Mr. Perry, if you -- if there are additional
24 matters you feel you need to go into, feel free.

25 There's one matter we need to put on the record, so if

1 you'll bear with me. Initially, may I see all counsel at the
2 bench, and I am going to put this on the record in a moment.

3 (Whereupon, a bench conference was held off the
4 record.)

5 THE COURT: All right. With all counsel being
6 present, with the defendant being present, the reason I asked
7 initially for a bench conference was to apprise counsel of a
8 matter that I feel obligated to put on the record. There's been
9 a request by the lieutenant who is in charge of the bailiffs
10 involved in these proceedings asking the Court to caution the
11 defense and those in contact with the defendant to use extreme
12 caution when placing any items that may be within the reach of
13 Mr. Robinson. It's clear from the communication, as I
14 understand it, that no one is being accused of anything at this
15 point improper, but it was noted that there was an item in Mr.
16 Robinson's possession that gave rise to concern on the part of
17 the bailiffs. So, again, no one is being accused of anything in
18 any respect and no indication, as far as I'm aware, is being
19 made that anything improper took place. It's a cautionary
20 measure as a precautionary measure, as I understand it.

21 It's my intent to mark the exhibit as a Court's
22 Exhibit 2, I believe is the number, and place that in the
23 record.

24 Counsel for the State want to be heard? Counsel for
25 the defendant want to be heard?

1 MR. THOMPSON: No, sir.

2 THE DEFENDANT: I would like to be heard, Your
3 Honor.

4 THE COURT: Mr. Robinson, let me make a suggestion
5 to you, sir. If you want to be heard, I will give you a
6 opportunity, but let me suggest you may want to consult with
7 your attorneys before doing that.

8 (There was a pause in the proceedings.)

9 THE DEFENDANT: Your Honor, I just want it to be
10 known because of the way this was just handled when it could
11 have been handled better that I came here -- I came here in
12 September --

13 THE COURT: Yes, sir.

14 THE DEFENDANT: -- last year. I was brought
15 some -- that jacket and some clothes to go to court in.

16 THE COURT: Okay.

17 THE DEFENDANT: I have no access to that card. It
18 was in there. I never took it out. I never told nobody. I
19 never -- I'm not going anywhere. Everywhere I go, I'm with
20 officers. I just did -- the only reason I wanted to address it
21 because I don't want it seeming like -- and the indication is is
22 like I'm stealing or something from my attorneys. I don't know
23 why they couldn't address my attorneys or they couldn't ask me
24 about it, but it's like they trying -- because they have the
25 media in here, they trying to assault my character or assault my

1 person --

2 THE COURT: Yes, sir.

3 THE DEFENDANT: -- my credibility because this is
4 already a high profile case and anything that happens, they want
5 to look negligible (phonetic) on me, and that's why I wanted to
6 explain. That's not what happened. I didn't take anything from
7 them. They didn't give anything to me.

8 THE COURT: Okay. I want to make it absolutely
9 clear you're entitled to be heard, and you're entitled to
10 explain, and for clarification purposes in the record -- you
11 correct me if I am wrong in any respect. My understanding is
12 that at some point while you were here in the custody of the
13 local authorities, the sheriff's department, clothing was
14 brought up to you?

15 THE DEFENDANT: Uh-huh.

16 THE COURT: Family member, friend, or by whom? Do
17 you know?

18 THE DEFENDANT: I just know it was clothes.

19 THE COURT: Okay. And your position is that you
20 didn't take anything from anybody?

21 THE DEFENDANT: No, and they didn't give me
22 anything.

23 THE COURT: And no one gave you anything?

24 THE DEFENDANT: Exactly.

25 THE COURT: Anything else you want to say, Mr.

1 Robinson?

2 THE DEFENDANT: I just wanted to clear that up
3 because it could have been handled better.

4 THE COURT: Well, and again, and I appreciate what
5 you're saying, and I am adamant about giving folks the
6 opportunity to be heard because folks are entitled to that.

7 THE DEFENDANT: You're right.

8 THE COURT: I want to reemphasize what I said
9 earlier. The information that's been provided to the Court in
10 no way suggests that anything inappropriate or improper has been
11 done. As I read the letter or the note, it indicates concern
12 about potential or possible security issues, and that's the
13 reason I was obligated to put that on the record.

14 Any other matters you want to address, Mr. Robinson?

15 THE DEFENDANT: No. Thank you, Your Honor.

16 THE COURT: Anything further for the State?

17 MR. THOMPSON: No, sir.

18 THE COURT: Anything further for counsel for the
19 defendant?

20 MR. JAY FERGUSON: No, Your Honor.

21 MR. JAMES FERGUSON: No, Your Honor.

22 THE COURT: We'll see you at 2:00 o'clock, folks.

23 (Whereupon, a recess was held from 1:07 p.m. until
24 2:02 p.m.)

25 (The following proceedings continued in open

1 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
2 Ferguson, Ms. Stubbs, Mr. Colyer, Mr. Thompson, and Mr. Perry
3 were present.)

4 THE COURT: Okay. Let the record reflect all
5 counsel are present. The defendant is present.

6 You folks need a few moments, or are you ready?

7 MR. THOMPSON: Judge, logistics.

8 THE COURT: Yes, sir.

9 MR. THOMPSON: We're asking the Court permission
10 to do this. I suspect we are kind of at the tail end of Dr.
11 O'Brien or toward it, and I suspect as well there might be some
12 motions and some preliminary stuff just after that, and then it
13 will be the, according to what we talked about yesterday, time
14 for us to be able to argue. We want a half-hour before argument
15 at some point.

16 THE COURT: For clarification, you're referring to
17 the plural, us to argue. My understanding was it was going to
18 be Mr. Perry.

19 MR. THOMPSON: Just Mr. Perry. And my
20 understanding of how we are going to do this is Mr. Perry --
21 because the other side has agreed to graciously kind of let him
22 go forward because of his schedule and tomorrow morning start
23 with the defense and then the State and then the defense again.
24 So at some point, in essence, we will be asking for a half-hour
25 before Mr. Perry's argument. I want to let Your Honor know

1 that. So whenever that half-hour is, you let us know.

2 THE COURT: All right.

3 MR. JAY FERGUSON: May I proceed, Your Honor.

4 THE COURT: Yes, sir.

5 MR. JAY FERGUSON: May I place the audio
6 recorder --

7 THE COURT: Yes, sir.

8 REDIRECT EXAMINATION

9 BY MR. JAY FERGUSON:

10 Q And, Professor O'Brien, let me show you what's marked
11 as Defense Exhibit 80 and ask if you can identify that?

12 A This is a flash drive that contains the three updated
13 databases.

14 Q And those were updated as of what date?

15 A February 11th, 2012.

16 Q And that's what your -- the new tables 1 through 13,
17 exhibit -- Defendant's Exhibit 70 is based upon?

18 A Yes, it is.

19 MR. JAY FERGUSON: Your Honor, at this time, I
20 would move for admission into evidence Defendant's Exhibits 66,
21 which is Dr. Woodworth's time smoothing statewide odds ratio
22 chart as well as Exhibit 72 through 80.

23 THE COURT: Okay. Do you folks want to be heard?

24 MR. PERRY: No objection.

25 THE COURT: Without objection, they're admitted.

1 MR. JAY FERGUSON: With respect to Exhibit 63,
2 that was the legal opinion of *Horton v. Zant* that I
3 cross-examined Dr. Katz with. I had originally not moved for
4 admission of that into evidence but I am at this time.

5 THE COURT: Do you want to be heard?

6 MR. THOMPSON: Can I have a second, Judge.

7 THE COURT: Yes, sir. And for clarity in the
8 record, that's a Georgia case, Eleventh Circuit?

9 MR. JAY FERGUSON: Yes.

10 MR. THOMPSON: For what purpose, Judge?

11 THE COURT: Impeachment, I'm assuming.

12 MR. JAY FERGUSON: Yes.

13 MR. THOMPSON: And the nature of that evidence is
14 an opinion but is the -- is the way that evidence looked at
15 limited because it being extrinsic evidence of material of a
16 nonmaterial fact, so it may not be admissible for substantive
17 purposes but it is an opinion so the nature of it is a little
18 odd.

19 THE COURT: That's why I asked the question, and
20 the response I got was for impeachment purposes.

21 MR. THOMPSON: I didn't hear that. Sorry, Judge.

22 MR. JAY FERGUSON: For impeachment.

23 MR. THOMPSON: For that limited purpose, Judge,
24 respectfully, we'd object and don't wish to be heard.

25 THE COURT: Okay. All right. Objection is noted

1 for the record, Mr. Thompson. It is overruled. Exception is
2 noted so your issue is preserved. It's admitted for the purpose
3 of impeachment.

4 MR. JAY FERGUSON: And I believe, just to confirm
5 with the clerk, that we have admitted all exhibits except 64 and
6 65; is that correct?

7 THE CLERK: And 66.

8 MR. JAY FERGUSON: I just moved for admission of
9 66.

10 THE CLERK: Then everything is in but those two.

11 MR. JAY FERGUSON: I have no further questions of
12 Professor O'Brien, Your Honor.

13 THE COURT: Okay. Mr. Perry, any additional
14 cross-examination?

15 MR. PERRY: I don't think I have any questions,
16 Judge. I just want to make sure -- I was going to move to
17 introduce the SAS outputs from defense or Dr. Woodworth earlier,
18 but I don't think I have any further questions for Professor
19 O'Brien.

20 THE COURT: Do you recall what exhibit numbers we
21 are talking about?

22 MR. PERRY: Eighty and 81, I believe.

23 THE COURT: Those are the two that have not been
24 offered at this point based on my records. So you're offering
25 them?

1 MR. PERRY: Yes, sir.

2 THE COURT: Counsel for defendant want to be
3 heard?

4 MS. STUBBS: No, Your Honor.

5 THE COURT: All right. They're admitted. That's
6 80 and 81.

7 MR. PERRY: Yes, sir.

8 THE COURT: Okay. Yes, sir.

9 MR. PERRY: And I don't think I have any further
10 questions.

11 THE COURT: May the witness be released, folks.

12 MR. THOMPSON: No objection from the State as to
13 that.

14 THE COURT: Mr. Ferguson?

15 MR. JAY FERGUSON: No, Your Honor. No objection.

16 THE COURT: Okay. Thank you, ma'am.

17 All right. Any further surrebuttal evidence offered by
18 the defendant?

19 MR. JAY FERGUSON: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. JAY FERGUSON: We are up to 81; is that
22 correct?

23 THE CLERK: Eighty-two.

24 THE COURT: That would be the next number?

25 THE CLERK: Defense is number 81.

1 MR. JAY FERGUSON: Thank you.

2 MR. HUNTER: Jay, that's 81?

3 MR. JAY FERGUSON: May I approach, Your Honor.

4 THE COURT: Yes, sir.

5 MR. JAY FERGUSON: Your Honor, the authenticity of
6 this document has been stipulated to by the State. We would
7 move for admission into evidence the Defendant's Exhibit 81. I
8 understand the State has some objections.

9 THE COURT: Okay. And for the record, so that
10 it's identified in the record, it purports to be legal education
11 history reports for the named attorneys; is that correct?

12 MR. JAY FERGUSON: That's correct, Your Honor.

13 THE COURT: Mr. Colyer?

14 MR. COLYER: Your Honor, we have a couple of
15 objections. The first one is with respect to Mr. West and
16 Mr. Hicks.

17 THE COURT: Okay.

18 MR. COLYER: I believe Mr. West and Mr. Hicks were
19 involved during this study period, portions of the study period,
20 with jury selection related to capital cases none of which are
21 in this study because they were not involved in any capital case
22 wherein someone on death row was there as of July the 1st of
23 2010. Mr. Hicks was involved in the case of George Carroll, who
24 was, at one time, on death row, but he died while living on
25 death row as a result of, as I understand it, natural causes, so

1 he was not -- his case is not included in the study.

2 THE COURT: All right.

3 MR. COLYER: Mr. West was involved as second chair
4 in some capital, quote, unquote, cases during the decade of the
5 2000 to 2010 time period but not with any that resulted in a
6 death penalty.

7 THE COURT: Okay.

8 MR. COLYER: So those results would have been
9 either noncapital, less than first, or acquittal.

10 THE COURT: And not subject to the Michigan State
11 study?

12 MR. COLYER: Correct. Not subject to the Michigan
13 State jury selection study --

14 THE COURT: Thank you for the clarification.

15 MR. COLYER: -- which we are litigating here. So
16 we would object to anything with respect to those two attorneys
17 being included in this exhibit because it is irrelevant based
18 upon their own sampling.

19 THE COURT: All right. Do you folks want to be
20 heard as to that objection, specifically, as it relates to
21 Mr. West and Mr. Hicks?

22 MR. THOMPSON: We have some more objections,
23 Judge.

24 MR. COLYER: Yes, sir, and I will be glad to --

25 THE COURT: Same category or different?

1 MR. COLYER: Different.

2 THE COURT: If you don't mind, it is easier for me
3 to deal with them by category.

4 MR. COLYER: I think we mentioned to you also,
5 Judge, some concerns dealing with personal information which has
6 not been redacted at this point specifically dealing with bar
7 numbers and/or mailing addresses, some of which it appears are
8 residential addresses as opposed to necessarily business
9 addresses. So we would object that they haven't been
10 redacted --

11 THE COURT: Okay.

12 MR. COLYER: -- in that regard. If I understand
13 why this is being offered, it's related to a defense exhibit
14 that dealt with CLEs that they received some information from
15 the Conference of District Attorneys and then, thereafter, their
16 PowerPoint demonstration had one or two slides that may be
17 related to defense exhibits dealing with capital --

18 THE COURT: Jury selection.

19 MR. COLYER: Capital case jury selection and, in
20 particular, one dealing with some *Batson* information. So to the
21 extent that this -- these documents exceed those particular
22 limitations, we would object to the entry of the documents in
23 that regard.

24 THE COURT: Well, I guess the easiest way to deal
25 with that is to ask the proponent the purpose for which it is

1 being offered.

2 MR. JAY FERGUSON: Could I quickly address the
3 first two objections -- get that out of the way?

4 THE COURT: Yes, sir. Yes, sir.

5 MR. JAY FERGUSON: The first objection is based
6 upon Mr. Hicks and Mr. West being cleared. We don't have any
7 objection to --

8 THE COURT: So any information as to them can be
9 redacted?

10 MR. JAY FERGUSON: Correct. The second objection,
11 the bar numbers and mailing addresses, that is all public
12 record. You can go online, and you can get the exact same
13 information. This was just obtained by a public records
14 request, but with that said, I have -- we have no objection to
15 redacting that if that is what they desire to do.

16 THE COURT: Okay.

17 MR. JAY FERGUSON: The evidence is really twofold.
18 One is exactly what Mr. Colyer has indicated. We will be
19 able -- this is just one very small link in a chain of evidence.
20 You've seen evidence that -- there was a top gun exhibit of
21 *Batson* justifications, top ten -- it was given at a top gun
22 trial advocacy class, and it was in the summer of 1995, and if
23 you will notice, Ms. Buntie Russ attended that conference, and
24 we've got the CLE records for that. And then later in closing,
25 you're going to hear arguments and going through transcripts

1 which are in evidence to show that as she was giving a *Batson* --
2 giving *Batson* excuses, she was going down that list, and she had
3 attended that seminar, I believe, three years prior,
4 thereabouts.

5 THE COURT: Okay.

6 MR. JAY FERGUSON: So this is just one small link
7 to show that there was a conference, we got the materials from
8 the DAs conference that had these justifications, and then we've
9 got excuses given by Ms. Russ, and then here is the link showing
10 that Ms. Russ actually attended that conference.

11 THE COURT: Okay.

12 MR. JAY FERGUSON: It's also just relevant, and
13 the Court can decide what weight to give this relevance.
14 There's no indication for any of these prosecutors for any kind
15 of implicit bias training, any implicit bias conferences which
16 has been testified to by Judge Dickson. Remember, it's not just
17 the MSU study that we've presented to this Court. It's much,
18 much more than that and this, again, is one small piece of the
19 puzzle.

20 THE COURT: Okay.

21 MR. COLYER: Judge, I believe Judge Dickson was
22 talking about training he had from Judge Trosch after he became
23 a judge. I don't recall him saying anything about getting
24 anything directly from, quote, unquote, CLEs. And, obviously,
25 you can look at the exhibit here with respect to Judge Dickson

1 and see what time period it covers. So the -- whatever
2 information he had versus district attorneys' conferences -- it
3 looks like the last one here from the DAs was in 1995, and then
4 there were some AOC stuff and some Cumberland County District
5 Court material. So I'm not sure, with respect to implicit bias
6 as it relates to the other record -- I mean, they -- as we said
7 before, they are what they are and they speak for themselves,
8 but with respect to Ms. Russ, in particular -- and if I
9 understood what Mr. Jay Ferguson said, the top gun school
10 wherein the exhibit he was referring to comes from was listed on
11 her page 2, and there is a top gun two trial advocacy course
12 listed there. There is no break out with respect to the
13 information that was contained in there. Now, I've not been to
14 a top gun school, so I can't speak for this with respect to
15 authenticity. Perhaps Mr. Thompson can. But as you'll see in
16 the summer conferences, there are and have been for a number of
17 years many shred out sessions that you go to, and you have the
18 option of going to different shred out sections that might be
19 two, one day and two the next day that are either related to one
20 another or they're totally different subject matters. And I
21 notice that there is no break out here to say what it was that
22 was attended, and so for the defense to necessarily imply that
23 since they have an exhibit that they made from something from
24 the conference of DAs, that to assume that everyone who went to
25 a particular conference, whether it was a top gun or a summer

1 session or a fall session, necessarily got that training, I
2 think is overreaching because --

3 THE COURT: Well, did I misunderstand? I thought
4 the -- at least as it relates to Ms. Russ, the defense is
5 attempting to show circumstantially that she attended the
6 conference as reflected on page 2 of the history report.

7 MR. COLYER: The course number 1468 that refers to
8 top gun trial advocacy.

9 THE COURT: Yes, sir.

10 MR. COLYER: That is the one that Mr. Ferguson
11 said that that particular exhibit was drawn from.

12 THE COURT: Okay.

13 MR. COLYER: And what I'm saying -- I can't speak
14 to the top gun, so I'm not saying that. But I know in the fall
15 and summer conferences in recent years, there have been a
16 variety of subjects which have been offered.

17 THE COURT: Okay.

18 MR. COLYER: And you could not attend every
19 session because you were limited to 12 hours plus your ethics
20 and plus your drug and alcohol that was part of the subject.

21 THE COURT: Yes, sir.

22 MR. COLYER: So on any given morning, there might
23 be four different -- and I don't know what they call them.
24 Let's call them shred outs.

25 THE COURT: I am familiar with it. We have the

1 same concept in the Superior Court Judges' Conference. There
2 are optional classes that you can attend.

3 MR. COLYER: Yes. You have to attend to get the
4 credit, but you get to pick which session you attend or what
5 subject matter.

6 THE COURT: Yes, sir.

7 MR. COLYER: So as it relates to the summer
8 conference or the fall conference, there is no delineation with
9 respect to this particular exhibit as to what the subject matter
10 was that the individual attended was exposed to. And as I said,
11 I don't know how they did it with top gun because I never went
12 to a top gun, so I don't know if they had additional shred outs
13 within the time period or if everybody went to every class. If
14 that was the case, then, obviously, we don't have any objection
15 to that, but I can't tell from looking at this.

16 THE COURT: Well, they're attempting to show that
17 circumstantially. If material, which was a part of that program
18 was later utilized or arguably utilized, that gives rise
19 circumstantially to an inference --

20 MR. COLYER: And I agree with that, Your Honor. I
21 understand what they said.

22 THE COURT: Yes, sir.

23 MR. THOMPSON: And, respectfully, they can argue
24 that anyway --

25 THE COURT: Yes, sir.

1 MR. THOMPSON: -- you know, based on the argument,
2 and that covers one page of this exhibit, that it's arguably
3 maybe relevant to a circumstantial point. But the rest of the
4 exhibit, I haven't heard anything that says it's relevant, and
5 Mr. Colyer is correct. You got three or four breakout groups.
6 They don't take attendance. I have taught these things before,
7 and you don't mark down -- there is no way to delineate who has
8 been in what class. So there would be very limited relevance to
9 it and other than the one page maybe circumstantially, Your
10 Honor, so --

11 THE COURT: Okay. All right. Let me back up.

12 MR. COLYER: Unless -- there are other motions, I
13 mean, other portions of that I haven't looked at with other
14 folks that went to top gun who would be included. Obviously, we
15 wouldn't have any objection to that being included for the
16 circumstantial argument that they want to make, but Mr. West and
17 Mr. Hicks are out.

18 THE COURT: Yes, they're out.

19 MR. COLYER: And then the other folks that are in,
20 I would suggest that perhaps the way to approach it would be
21 look and see who in that other group attended the top gun unless
22 the defense can go back and relate to one or both of the
23 exhibits that some of that was presented at one of the courses
24 which, again, circumstantially could be argued, but I understood
25 him to say when he had those exhibits, he was talking about July

1 of '95 at a top gun. And I don't know if both of those exhibits
2 related to that one class or that one session of CLEs called top
3 gun, but in flipping through this, I at no time see where
4 anybody else -- Mr. Dickson, Mr. Grannis, myself, Mr. Charles
5 Scott, had been to that type of class.

6 THE COURT: All right.

7 MR. COLYER: So I see what they are saying about
8 relevance with respect to that and the circumstantial evidence,
9 but I don't think it applies to everybody, and there's a lot of
10 material here that is irrelevant, we contend.

11 THE COURT: Okay. Any further argument?

12 MR. JAY FERGUSON: Your Honor, I think all of
13 their arguments are great as to the weight this Court should
14 give them, but I did make an argument with respect to all of it
15 coming in, and that is the absence of CLE training. I think
16 that's relevant as well.

17 THE COURT: I understand.

18 MR. JAY FERGUSON: That is all I wish to say.

19 MR. THOMPSON: Let me respond to that, if I can,
20 the absence of CLE training. If you see -- do you have a copy,
21 Judge? I want to make sure --

22 THE COURT: Yes, sir.

23 MR. THOMPSON: -- I am pointing out something you
24 have a copy of. Now, summer conference, conference of Superior
25 Court or conference --

1 THE COURT: Who are we looking under?

2 MR. THOMPSON: Just pick one. Let's go with
3 Mr. Grannis, page 1.

4 THE COURT: All right. Let me find him.

5 MR. THOMPSON: He's about couple pages down, three
6 or four or five pages down.

7 MR. COLYER: Judge, looks like it's maybe the
8 fifth page of the exhibit.

9 THE COURT: Yes, sir. Yes, sir.

10 MR. THOMPSON: At the top, fall conference of
11 North Carolina district attorney, fall conference -- other
12 things. There are no agendas as to all these break out
13 sessions, and Your Honor knows how these work. I suspect the
14 judges' conference works the same where you have, all right, you
15 got a DWI class other here, capital class other here, and some
16 ethics over here. This exhibit has no relevance whatsoever as
17 to the lack of training on implicit racism, which I think is the
18 argument of Mr. Ferguson was because there's no information
19 whatsoever about what the agendas were, what was on -- what was
20 offered at any of those training.

21 Now, they -- I'd like to put on record the defense, at
22 a public records request if memory serves or subpoena, had
23 requested from the Conference of District Attorneys early on in
24 discovery copies of jury selection, training, and I believe
25 either a box or two boxes -- I am sorry I can't remember

1 which -- were gathered by Peg Dorer. I suspect agendas would be
2 in there and the syllabuses -- if that's a word -- would be
3 included in there, none of which have been presented. It's
4 just -- so it doesn't -- to address that point, this document
5 has absolutely nothing to do with and doesn't address one way or
6 the other a lack of any training either, respectfully, Judge.

7 THE COURT: Okay.

8 MR. THOMPSON: So I just wanted to make sure that
9 was clear.

10 THE COURT: Well, I mean, make your record. I
11 mean, that is what it's all about. Both sides are entitled to
12 make their record, so I don't have a problem with that.

13 Anybody want to be heard further?

14 MR. JAY FERGUSON: No, Your Honor.

15 THE COURT: Okay. By way of clarity in the
16 record, defense has agreed to redact information although the
17 position is it is public information otherwise relating to any
18 bar numbers, any addresses; is that correct?

19 MR. JAY FERGUSON: That's correct.

20 THE COURT: Okay. And there was something else.
21 The agreement, as I understand it, or the concession by counsel
22 for the defendant is that matters relating to Mr. William West
23 and Mr. Hicks would not be appropriate for the Court to
24 consider.

25 MR. JAY FERGUSON: I am not saying it wouldn't be

1 appropriate, but we've agreed to take it out.

2 THE COURT: Language is the key. You've agreed
3 that it will be taken out.

4 MR. JAY FERGUSON: Yes, Your Honor.

5 THE COURT: So that deals with that issue. So
6 where we are now goes to the remaining portions of the document,
7 and I have heard the objections, essentially, on grounds of
8 relevance or lack of any meaningful information, which is
9 another way of saying it's not relevant. That's overruled.
10 Exception is noted for the record. We'll need to redact the
11 copy that goes into the court record.

12 MR. JAY FERGUSON: I can do that now as Mr. Hunter
13 addresses our next exhibit.

14 MR. THOMPSON: May I suggest their redactions and
15 redactions --

16 THE COURT: Yes, sir. I know what you're saying.
17 Make sure it's not discernable.

18 MR. THOMPSON: I am a bit of a geek. We all know
19 this. Everybody in this room knows this. If it can be redacted
20 digitally and then reprinted --

21 THE COURT: That is the safest way to do it.

22 MR. THOMPSON: -- so it can't be tampered with by
23 somebody that gets -- scratches or looks or does -- lots of ways
24 to get around that.

25 THE COURT: Yes, sir.

1 MR. THOMPSON: I am happy to help if there is a
2 way I can help.

3 THE COURT: I am confident you folks can work that
4 out.

5 MR. JAY FERGUSON: I can do that in my office. I
6 don't have the version of Adobe on my laptop to do that. If you
7 can do that, that'll be fine.

8 (There was a pause in the proceedings.)

9 THE COURT: All right. I am going to direct that
10 the copy with the stamp on it be placed in the record under seal
11 unredacted.

12 MR. THOMPSON: Yes, Your Honor. I'm happy --

13 THE COURT: And we will put in a redacted copy
14 marked 81A, if that's agreeable.

15 MR. THOMPSON: That would be fine with the State,
16 and I am happy for that to come in tomorrow to give them time
17 to --

18 THE COURT: Subject to the ruling of the Court,
19 81A will be part of the record. The unredacted copy will be
20 under seal made in the record for appellate review.

21 MR. JAY FERGUSON: Thank you, Judge.

22 THE COURT: Okay. Who had the next argument?

23 MR. HUNTER: Yes, Your Honor. We have some
24 exhibits I'll --

25 THE COURT: Does this deal with the affidavits?

1 MR. HUNTER: This does concern -- although the
2 affidavits, I guess, haven't been introduced yet or -- I don't
3 know where we are. This isn't the -- this is sort of
4 impeachment of affidavits, Your Honor.

5 THE COURT: Okay. And I apologize. I was loose
6 with my language.

7 MR. HUNTER: So I -- I've got -- and the State has
8 just seen this. This is an unusual exhibit, Your Honor.
9 Everything in here is already in evidence. There is nothing in
10 here that isn't already in evidence, but I have gathered it in
11 summary, and I'll just go through one as an example. And this
12 is the case of *State v. Augustine*. It concerns black juror
13 Ernestine Bryant, and then there's an affidavit in the first
14 section, which just happens to be an affidavit that Mr. Colyer
15 did about that witness. And then there is the pertinent -- what
16 we say are the pertinent parts of the transcript that concern
17 that juror and what happened to that juror in this case, and
18 then after that are white jurors and what happened to them in
19 their case. And we have -- I would say I've got about 15
20 examples here. They are just illustrative. I am going to argue
21 about them in my argument. I'm not sure we need to put this in
22 evidence, Your Honor, frankly, but we wanted to give the State a
23 little notice.

24 THE COURT: Yes, sir.

25 MR. HUNTER: So we have some notice. So that is

1 what these exhibits are. They have just seen them so I'm --
2 they may want to, you know, have a conditional objection and
3 look and make sure they are what I've represented them to be,
4 but I am representing everything in here is already in evidence.
5 I have just organized it in a way that will make it easier for
6 the Court and the State to follow the argument.

7 THE COURT: All right. Do you folks want an
8 opportunity to look at them before we go forward?

9 MR. THOMPSON: I think we are ready to be heard as
10 to our objection, Judge. Would be very similar to the defense
11 objection. The transcript speaks for themselves and the
12 limitations placed on all the State's transcripts that were put
13 in, as I understand it, limited to the State's offer of proof.
14 If I understand the Court's earlier rulings in reference to our
15 tendering those transcripts through our judges that they were --
16 all those copies of transcripts that we did for the same reason
17 to kind of point out the various points. We'd ask for the same
18 limitation to be given to the defense exhibits.

19 THE COURT: Okay. Let me make sure I'm
20 understanding. You're offering them essentially -- and I am
21 paraphrasing this. If I am misstating it, let me know -- of
22 summary of matters in evidence for purposes of the Court's
23 consideration.

24 MR. HUNTER: That's correct, Your Honor.

25 THE COURT: All right. That's what I thought I

1 was understanding, but I wanted to make sure. All right.

2 MR. HUNTER: In other words, there's no argument.
3 There's no argument in here. It is strictly portions of the
4 transcript.

5 THE COURT: Okay.

6 MR. THOMPSON: And, again, we're not alleging
7 there is, Judge. They didn't try to sneak in any kind of stuff
8 in there. We are not trying to imply that. It is just -- they
9 have gathered them, they have organized them, and insofar as
10 they might help the Court or the later courts take a look at
11 them and not have to wade through all the transcripts on this
12 just like we've done.

13 THE COURT: Yes, sir.

14 MR. THOMPSON: That's --

15 THE COURT: That's the point I was about to make.
16 Hadn't that already been done by counsel for the State in terms
17 of the offers of proof in this case?

18 MR. THOMPSON: It has been, but they were limited
19 to the offer of proof. We are just asking for the same
20 limitations to be placed on the defense.

21 THE COURT: All right.

22 MR. THOMPSON: Their objection was they speak for
23 themselves, so we're alleging that -- in essence, making the
24 counterargument.

25 THE COURT: I don't have a problem treating folks

1 the same way. That's my objective. And if they are being
2 offered for purposes of focusing the Court on matters of record
3 in this case in evidence in this case, I'm hearing they don't
4 have an objection for that purpose. Is that accurate?

5 MR. COLYER: And, Judge, these are on a thumb
6 drive. They're not necessarily something that has been brought
7 to the Court's attention by way of an exhibit in court other
8 than referring to all this information, these bazillion
9 gigabytes of information that they have on a thumb drive.

10 THE COURT: Yes, sir.

11 MR. COLYER: And that's the point that we wanted
12 to make that the transcripts which are on the thumb drive that
13 we have attempted to introduce here have been referred to as
14 material that was relevant to come in for an offer of proof but
15 the transcript spoke for itself.

16 THE COURT: Yes, sir.

17 MR. COLYER: And so our witnesses, and I guess us
18 in argument at this point, have not been able to argue to you
19 from the transcripts, so we're just asking for the same
20 limitation with respect to the defense as has been placed on the
21 State.

22 THE COURT: Okay. All right.

23 MR. HUNTER: Your Honor, as I understand it, the
24 only reason some of the State's exhibits are offers of proof is
25 because they tried to introduce them through witnesses that Your

1 Honor has determined is not appropriate for them to give
2 testimony --

3 THE COURT: That is the distinction that I was
4 going to make for the reasons that I have already stated for the
5 record and the case law that I have already put on the record.

6 MR. HUNTER: If they just wanted to introduce
7 those on their own or through any other witness, I don't think
8 there would be anything wrong with it. I think the whole point
9 was they were doing it through witnesses that the Court has
10 already determined shouldn't be allowed to testify.

11 MR. THOMPSON: Not to quibble, Judge, but they
12 were allowed to testify. The judges were allowed to testify,
13 but it was when they got into areas -- A -- there were two main
14 objections as I saw them. They were sustained and dealt with
15 pretty quickly. But, A, transcripts speak for themselves, so if
16 we asked a question that was included in the transcript, that
17 was cut off, and then, secondly, when we got into the thought
18 process of the judge --

19 THE COURT: Yes, sir.

20 MR. THOMPSON: -- that was the limitation.

21 THE COURT: Yes, sir.

22 MR. THOMPSON: And --

23 THE COURT: Mental impressions, thought
24 processes --

25 MR. THOMPSON: Exactly.

1 THE COURT: Matters -- let me ask you that because
2 some of the questions gave rise to the potential for speculative
3 testimony.

4 MR. THOMPSON: Yes, but a huge chunk of the
5 questions were: Did you hear the juror say this, or did the
6 juror say this or -- mainly coming straight from the transcript.
7 So there would be a limitation on the State -- or arguably a
8 limitation on the State during closing arguments to use those
9 exhibits. We might be able to use the transcripts. I guess we
10 can do it indirectly the same way.

11 THE COURT: Yes, sir.

12 MR. THOMPSON: So it might be a difference -- a
13 difference without a difference.

14 THE COURT: Yes, sir.

15 MR. THOMPSON: But insofar as it might not be, we
16 want to preserve it.

17 THE COURT: Absolutely.

18 MR. THOMPSON: And we want to be -- as we have
19 said before, we'd like to be treated the same way.

20 THE COURT: All right. Clarification. You're
21 offering these, at this point, for substantive purposes, Mr.
22 Hunter? I need clarification.

23 MR. HUNTER: Yes, Your Honor.

24 THE COURT: The objection is to their being
25 received for substantive purposes so that the record is

1 absolutely clear. Am I understanding that there is no objection
2 for them to be considered for purposes of simply focusing the
3 Court on matters already in evidence in this case?

4 MR. THOMPSON: If the defense wants to use them as
5 an exhibit during closing?

6 THE COURT: Yes, sir.

7 MR. THOMPSON: We don't see anything necessarily
8 wrong with that because the evidence contained within them -- it
9 is just organized, so it would be like a diagram.

10 THE COURT: Yes, sir.

11 MR. THOMPSON: So insofar as -- we're not
12 objecting to that. We're just making sure there is the same
13 limitation on them that we have on ours for the same reasons.

14 THE COURT: All right. I'm somewhat at a loss
15 because I'm hearing folks characterize what's in the documents,
16 but it will be helpful for me to look at one simply so I can
17 make a determination.

18 MR. COLYER: I think Mr. Hunter said that what he
19 wanted to do was show you reasons in an affidavit, reasons that
20 the jurors spoke in the transcript, and then go maybe to the
21 same case and look at how similar questions and answers were
22 dealt with with other jurors.

23 THE COURT: Yeah. Yeah.

24 MR. COLYER: So -- and, again, that goes back to
25 what I think you have said to us is that the transcript speaks

1 for itself, and so there has been no direct examination of any
2 defense witnesses about going and reading the transcript and
3 dealing with the logistic regression models and the PowerPoints
4 and those sort of things. And so our point is it appears that
5 they're being allowed to do the transcripts --

6 THE COURT: Which y'all were not allowed to do.

7 MR. COLYER: Yes, sir. Even in questioning
8 their -- some of their witnesses.

9 THE COURT: All right. Mr. Hunter, do you want to
10 be heard further, sir?

11 MR. HUNTER: Just a second, Your Honor.

12 THE COURT: Absolutely. Yes, sir.

13 (There was a pause in the proceedings.)

14 MR. HUNTER: Your Honor, I think it's Rule 1006
15 which deals with summaries --

16 THE COURT: Yes, sir. That's what I'm looking at.

17 MR. HUNTER: And, again, I think the dissimilarity
18 between these two situations is we don't have a -- we're not
19 trying to introduce these through a witness that Your Honor has
20 already decided should not be testifying about this subject
21 matter that the transcript deals with.

22 THE COURT: Okay.

23 MR. HUNTER: And so I think that's the difference.
24 I mean, all -- all we intend to do is I am going to argue from
25 this. Wanted to give the State notice, wanted the Court to have

1 this available to them but -- and there's nothing in here that
2 isn't already admitted substantively. There is nothing in here
3 that isn't already admitted. There is not a single piece of
4 paper in here -- well, except for the affidavits, which I think
5 will be admitted sometime soon I am sure.

6 MR. THOMPSON: But in so -- we don't object to
7 them using these during closing as exhibits, if you would,
8 examples, but he's asked to enter them as substantive evidence,
9 and that's the distinction. Again, it may or may not later have
10 a difference, but it may.

11 THE COURT: May I ask a clarifying question.

12 MR. THOMPSON: Yes, sir.

13 THE COURT: Has the State formally introduced all
14 of the transcripts in the cases at issue in the record in this
15 case? Are they now part of the record?

16 MR. THOMPSON: The defense has, yes, sir.

17 THE COURT: I mean, pardon me, the defense. So
18 those matters are already in the record?

19 MR. THOMPSON: Yes, sir.

20 THE COURT: Okay. Rule 106 {sic.} -- and the
21 reason I asked is because of the language of the rule.

22 The contents of voluminous writings, recordings, or
23 photographs which cannot conveniently be examined in court may
24 be presented in the form of a chart, summary, or calculation.
25 The originals or duplicates shall be made available for

1 examination or copying or both by other parties at a reasonable
2 time and place. The court may order that they be produced in
3 court.

4 We already have them as part of the record in this
5 case. The only basis, generally speaking, for exclusion of a
6 summary that's otherwise appropriate is when the summary is or
7 does not fairly represent the underlying data, the underlying
8 documents in question.

9 MR. THOMPSON: Again, I don't want to belabor the
10 point. We tried to do this earlier with our judges for the same
11 purpose, and we feel like we are going to be limited -- we are
12 going to be barred from using those bits and pieces --

13 THE COURT: Which bits and pieces?

14 MR. THOMPSON: The summaries, the transcripts we
15 put in.

16 THE COURT: But it's a different animal, and I
17 respectfully disagree. It's a different animal because the
18 ruling of the Court with regard to proposed testimony by judges
19 was predicated on the case law and on the fact that the records
20 were already in or were coming in and the records spoke for
21 themselves, and it was based on, being as specific as I can, any
22 proposed testimony about mental processes, mental impressions,
23 any matters based on speculation or conjecture that was not part
24 of the record in the case but resulted from the judge's mental
25 processes involved.

1 MR. THOMPSON: But the objections came long
2 before. When we showed the transcripts and asked questions, the
3 objections came long before and were sustained long before we
4 got into any of that, and so it was -- my view of those
5 objections really dealt with the transcripts speaks for
6 themselves issue, and that's why I asked a couple times for
7 clarification.

8 THE COURT: Well, I believe the record reflects,
9 Mr. Thompson, that -- and I am simply harkening back to the
10 history of the case. When indications were made on the record
11 that there would be an attempt to call me as a witness in this
12 case, I specifically asked every time the issue came up on the
13 record, What for? What is it you contend would be admissible or
14 material in terms of my testimony? And that, based on my
15 recollection, occurred on at least two occasions on the record
16 and may have occurred on a couple of other occasions in the
17 pretrial matters that are not of record where we met on
18 scheduling and discovery matters. I believe it's also reflected
19 in the record that I indicated on several occasions, Folks, I am
20 aware of the body of law that prohibits jurors, judges, or
21 anybody else coming in to testify about matters outside of the
22 record in the case. That was a ground, but I believe there is a
23 distinction here in terms of what they're offering at this point
24 and your argument in that respect. I don't think it's the same
25 thing, so your objection is noted.

1 MR. THOMPSON: You understand the State's
2 argument, Judge.

3 THE COURT: Absolutely. Your objection is noted
4 for the record. Your exception is noted for the record. They
5 are received pursuant to Rules of Evidence 8C Rule 1006.
6 State's objection and exception are noted for the record.

7 MR. COLYER: And, Judge, just at the tail end of
8 what we were talking about, these are already in, and to the
9 extent they are being used as demonstrative aids for argument is
10 one thing, but now they have been marked as specific exhibits
11 that were introduced for purposes of this body of evidence, so
12 to speak. We, obviously, don't have any objection to them using
13 whatever is already in evidence, but one of our objections is
14 that we now go from 82 up to 96, which is a compilation of
15 materials that are on a thumb drive that has been referred to
16 generally here as being introduced into evidence, the
17 transcripts of the jury selections and --

18 THE COURT: Yes, sir. Yes, sir.

19 MR. COLYER: We're not arguing about that.

20 THE COURT: Okay.

21 MR. COLYER: I guess -- and it may be form over
22 substance, but now portions of Defense Exhibit Number 1, for
23 example, that they want to use when they argue to you tomorrow
24 are now marked as Defense Exhibit Number 82 through 96.

25 THE COURT: Okay. Let me make sure I understand

1 what you are saying, Mr. Colyer. The thumb drive you're
2 referring to is containing all of the transcripts, the entire
3 record of all of the cases that are the subject matter --

4 MR. COLYER: If I understood what we were talking
5 about --

6 THE COURT: Is that accurate?

7 MR. COLYER: Thumb drive is one and that number,
8 yes, sir.

9 MR. JAY FERGUSON: I believe Defense Exhibit 2.

10 MR. COLYER: Stand corrected.

11 THE COURT: Yes, sir. All right.

12 MR. COLYER: And so --

13 THE COURT: So your point is --

14 MR. COLYER: There are portions -- today, they are
15 moving into evidence portions of Defense Exhibit Number 2 that
16 they wish to use in argument tomorrow, and these are now marked
17 as Defense Exhibits 82 through 96 or whatever it is for
18 substantive purposes here.

19 THE COURT: Okay. I'm following you now. I
20 apologize.

21 MR. COLYER: What I'm saying is we don't have any
22 objection if they want to stand up and tomorrow pass out and
23 say, Judge, here's a demonstrative aid. It is not a State's
24 exhibit. It is from Defense Exhibit Number 2. It is not a
25 defense exhibit in and of itself. It comes from Defense Number

1 2, and you can have it and look at it, and when you are finished
2 with it, it's collected up, but what is in the record are the
3 defense exhibits from which it came, Defense Number 2, and their
4 arguments.

5 THE COURT: I apologize. I am following you now.

6 Yes, sir.

7 MR. HUNTER: Your Honor, we do want these in as
8 rebuttal to the State's case. In other words, the State has
9 offered affidavits, which we've agreed to. They're coming in.
10 We're entitled to offer material to impeach those affidavits.
11 Those affidavits talk about the treatment of various black
12 jurors and the reasons that they were excused. We're now
13 offering documentary evidence, which is already in evidence, to
14 rebut the evidence or impeach the evidence.

15 THE COURT: The affidavits come in yet, Mr.
16 Hunter?

17 MR. HUNTER: No, they haven't come yet, but they
18 are long promised. They are long promised.

19 MR. THOMPSON: They actually have come in, Judge.

20 THE COURT: That's what I thought.

21 MR. THOMPSON: They are in evidence. We are
22 swapping out copies.

23 MR. HUNTER: Okay. Well, they are in.

24 MS. STUBBS: I think the next item of business is
25 finally our objections because I assume that, as of today, this

1 is really the final affidavits that you guys have since I think
2 evidence is about to close.

3 THE COURT: All right.

4 MS. STUBBS: I think we are going to get to that
5 issue next.

6 THE COURT: Well, let me back up for a moment
7 because I suspect that the two are, at least arguably,
8 interwoven to one degree or another: affidavits and objections
9 related to the affidavits and the matters you're now proposing
10 to be introduced for substantive purposes in rebuttal of those
11 affidavits. It's been a long day, folks. I apologize. State's
12 position is they don't mind them coming in for consideration by
13 the Court for purpose of argument. They object to them coming
14 in for substantive evidence. The defense argument is they are
15 substantive because they tend to rebut matters that may be
16 admitted in the affidavits. Fair statement?

17 MR. HUNTER: Well, I think now I should correct
18 that and say they have been admitted.

19 THE COURT: All right. All right. Putting the
20 cart a little bit before the horse, I guess, as to the way you
21 expressed it. Your matters are noted for the record. Your
22 objection and your exception are noted for the record. They're
23 admitted.

24 Let's move on to the affidavits. If anybody wants to
25 me to step back and reconsider, I'm open to that.

1 MR. HUNTER: Your Honor, if I might approach. I
2 will just give you these.

3 THE COURT: Yes, sir.

4 MR. HUNTER: These are your copies. I am going to
5 bypass you, Your Honor, but I will have a copy for you, and I
6 will give them to you today, or I'll give them to you tomorrow.
7 You tell me which you prefer.

8 THE COURT: My clerk has informed me that we've
9 run out of boxes. We'll have to get some more boxes. All
10 right.

11 MR. HUNTER: Your Honor, I do have a copy for you,
12 and I will hold them till tomorrow and give them to you, or I'll
13 give them to you right now.

14 THE COURT: If you don't mind, let's hold off
15 until tomorrow that way we can deal with it in context.

16 All right. Next order of business, I assume, deals
17 with the affidavits?

18 MS. STUBBS: Yes, Your Honor.

19 THE COURT: Yes, ma'am. And I don't have a copy.
20 It would help if I can follow along on specific copies of the
21 affidavits.

22 MS. STUBBS: Well, I think before we get to the
23 defense objections, are you done moving them in?

24 MR. THOMPSON: Got one sitting on my desk I need
25 to put in, just swap these out. I didn't have heads up we were

1 doing this right now, but I am happy to do that. Judge -- and
2 can I do that later. I have -- I hold in my hand State's 32 we
3 have already put in. It is in my right hand.

4 THE COURT: Yes, sir.

5 MR. THOMPSON: It has the original affidavits. We
6 talked about swapping out the binder that is in my left hand of
7 the copies of those affidavits. I have one to add from the
8 honorable Jonathan Perry that -- they've got copies sitting on
9 my desk. We just need to make copies. I have another one we
10 have tried to chase down and that is not going to make it in
11 here, and that's just fine.

12 THE COURT: You have not yet received it?

13 MR. THOMPSON: No. She's got a copy of it. I
14 gave it to her yesterday, and she's had earlier copies. This is
15 just the signed notarized copy I need to add to State's 32. We
16 were going to swap out so we can get the originals to the
17 Conference of District Attorneys and get the copies into the
18 court file.

19 THE COURT: Okay.

20 MR. THOMPSON: So insofar as we need to make that
21 swap, understanding I can add the copy of Jonathan Perry's to
22 this once I get it from my desk, I'd like to go ahead and make
23 that swap before we start this fight, respectfully.

24 THE COURT: Yes, sir. Yes, sir.

25 MR. THOMPSON: Then I am going to hand you what's

1 now entered -- I need to mark --

2 THE COURT: Is there any -- I am trying to read
3 between the lines here, which is a dangerous proposition. Is
4 there any objection to Mr. Perry's affidavit being included?

5 MS. STUBBS: Well --

6 THE COURT: Just simply because it is just now
7 coming in?

8 MS. STUBBS: No. No. We have a number of
9 objections to Mr. Perry's affidavit, but that's not one of them.

10 THE COURT: That is what I wanted to clarify. All
11 right. So, Mr. Thompson, you're asking for leave to go get
12 whatever you need to get from your desk, bring that in, formally
13 put it in the record?

14 MR. THOMPSON: That would be just fine with me,
15 Judge.

16 THE COURT: Okay. Considering how my lunch is
17 still on my desk behind the courtroom, that will work out fine
18 for me. If you will give me about five minutes.

19 MR. THOMPSON: Yes.

20 THE COURT: Yes, sir.

21 (Whereupon, a recess was held from 2:49 until 2:55
22 p.m.)

23 (The following proceedings continued in open
24 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
25 Ferguson, Ms. Stubbs, Mr. Colyer, Mr. Thompson, and Mr. Perry

1 were present.)

2 THE COURT: Okay. All counsel are present. The
3 defendant is present.

4 Yes, ma'am, Ms. Stubbs.

5 MS. STUBBS: Your Honor, may I use the overhead
6 projector?

7 THE COURT: Yes, ma'am.

8 MS. STUBBS: Actually, first, if I can approach.

9 THE COURT: Yes, ma'am.

10 (There was a pause in the proceedings.)

11 MS. STUBBS: I'm handing you a copy of our motion
12 in limine. This is -- I filed it today, but I served it on the
13 State on the 9th, and it sets forth the same grounds that I made
14 orally as the basis for our objections. And then, Your Honor,
15 may I approach.

16 THE COURT: Yes, ma'am. Thank you.

17 (There was a pause in the proceedings.)

18 MS. STUBBS: And, Your Honor, just while we're
19 waiting for the machine to start, so I've labeled this binder,
20 Defense objections to State's Exhibit 32. This is an exact
21 copy, I think, to the best of the State's belief and mine that
22 of State's Exhibit 32 except that it has highlighted portions.

23 THE COURT: That's helpful because I started
24 making notes already. Thank you, ma'am.

25 MS. STUBBS: So then if you look at the chart that

1 I just handed you, I handed you an excel chart, and this chart
2 tracks the affidavits in the order that they're in the binder
3 with the -- and this is what I was going to show the Court.

4 THE COURT: Okay.

5 MS. STUBBS: So it has -- for example, the first
6 line is Sean Boone from Alamance County, the defendant's name,
7 and then it says, Was he present at trial?

8 No.

9 Is the affidavit based on the transcript only?

10 Yes.

11 And then what objections, and it has every objection
12 that we have with the specific rule of evidence.

13 THE COURT: Yes, ma'am.

14 MS. STUBBS: So then if you open to the first
15 transcript here, you'll see that it says for Sean Boone, the
16 highlighted portion says, The Burr case was tried prior to my
17 employment and thus I have no personal knowledge of the case.

18 THE COURT: Yes, ma'am.

19 MS. STUBBS: So we believe that together these
20 documents reflect precisely and totally all of our objections to
21 the affidavits for the reasons that we've argued earlier, and I
22 don't think that we need to be heard further unless Your Honor
23 has questions about these.

24 THE COURT: Okay.

25 MS. STUBBS: And, Your Honor, may I approach.

1 THE COURT: Yes, ma'am.

2 MS. STUBBS: That's it.

3 MR. THOMPSON: Okay. Didn't want to step on your
4 toes, Judge. We don't wish to be heard further. We've already
5 been heard as to these issues. I'd add, Judge, that some of the
6 affidavits that had no prosecutor reviewers, if they're
7 discounted completely, it puts a much greater burden on the
8 Court to read that transcript, and we'll deal with that if it
9 comes up in argument or if you have any questions as far as that
10 goes, but insofar as these affidavits -- we talked about it's
11 got a range. Folks that were there, remember the case, know all
12 about it. They should be weighted pretty heavily. Not there,
13 reading the transcript, admissible but not weighted as much, so
14 insofar as they might be a guide --

15 THE COURT: Okay.

16 MR. THOMPSON: -- here to answers and page numbers
17 or whatever.

18 THE COURT: Okay.

19 MR. THOMPSON: We do not wish to be heard further.
20 If Your Honor wishes for us to be heard further or if you have
21 questions once you crawl through this stuff, which I think will
22 take a little bit of time, I am happy to be heard at that time.

23 THE COURT: All right. As to Mr. Boone, bases of
24 the objections are Rule 701, lay opinion; Rule 602, lack of
25 personal knowledge; Rule 802, hearsay confrontation clause

1 citing *Melendez-Diaz v. Massachusetts* and the cite; and,
2 finally, Rule 1002, best evidence referring to the document
3 being the best evidence for what it is or what it says, correct?

4 MS. STUBBS: Yes, Your Honor.

5 MR. THOMPSON: May I ask for clarification on the
6 confrontation clause.

7 THE COURT: Okay. Ma'am?

8 MS. STUBBS: Well, if the -- what happened here is
9 that Sean Boone, who was not present in the trial, is purporting
10 to give the reasons for the trial attorney. If the actual trial
11 attorney had stated, I chose this -- I struck this juror because
12 of this reason, we would be entitled to cross-examine and
13 confront that prosecutor. We're being denied that opportunity
14 because it's coming in through this hearsay. This is a classic
15 hearsay confrontation clause problem.

16 MR. THOMPSON: But it's not because Mr. Boone was
17 not present and these came in by stipulation; is that correct?

18 MS. STUBBS: It is not because Mr. Boone is
19 sitting in the chair as opposed to writing the affidavit.
20 That's correct.

21 MR. THOMPSON: Then I preserve that. I wanted to
22 make sure it was clear on its face. Thank you.

23 THE COURT: Yes. Well, that needed a
24 clarification, and I appreciate that.

25 MR. THOMPSON: Thank you, Your Honor.

1 THE COURT: The State, as I understand it, does
2 not wish to be heard further?

3 MR. THOMPSON: No, sir. We have been heard, and
4 if Your Honor has questions and wants argument, let us know. We
5 will be happy to accommodate.

6 THE COURT: Folks, the -- essentially, your motion
7 is to exclude from consideration the specific affidavits we're
8 talking about, correct?

9 MS. STUBBS: Yes, Your Honor.

10 THE COURT: All right. Motion is allowed as to
11 Mr. Boone. Court predicates its rulings on Rule 701, Rule 602,
12 and Rule 802, so that's allowed.

13 Okay. Next person?

14 MR. THOMPSON: Judge, before we go further, it was
15 my intent -- I thought we were going to let Your Honor take a
16 look at these and then go forward, rule when you ruled on the
17 case.

18 THE COURT: We can do it that way. That's fine.
19 That way you folks have an opportunity to be heard in context.

20 MR. THOMPSON: Well, we also wish -- well, if we
21 went through these one by one, we would not finish in time to
22 argue.

23 THE COURT: That was my thought. So I'm willing
24 to do it any way you want to. Frankly, folks, from my point of
25 view, it will be helpful for purposes of any argument you might

1 want to make or anything else to -- I mean, we now know what the
2 bases is. Let me look at them, but I'm willing to go forward in
3 any way y'all think is appropriate.

4 MR. COLYER: And, Judge, it might work out with
5 the schedule we've talked to you about generally with Mr. Perry
6 going this afternoon and then other counsel tomorrow, when the
7 final arguments are over, the Court may still have some rulings
8 that it wishes to enter in the record before it actually begins
9 its deliberative process, and so perhaps we can deal with it
10 then, which might mean later tomorrow afternoon or Thursday or
11 whenever it is convenient to the Court rather than rush and jam
12 up right now.

13 THE COURT: Okay. One way or another, we are
14 going to have the issues arise.

15 MR. COLYER: Then that way, we know what you are
16 concerned about before you start your deliberation all other
17 things already having been presented.

18 THE COURT: Do y'all want to be heard in that
19 respect --

20 MS. STUBBS: No, Your Honor.

21 THE COURT: -- about how we are going to do it?

22 MS. STUBBS: I think that we had actually earlier
23 agreed to that, to this process.

24 THE COURT: Okay. We may have, but as I said,
25 it's been a long day. So strike the ruling the Court just

1 entered without prejudice to either side in that respect.

2 All right. Do you want to go on to your next witness
3 or next affidavit? I am sorry. Do you want to be heard?

4 MR. THOMPSON: I think everybody agreed we are not
5 going to do it person by person --

6 MR. COLYER: Right now.

7 MR. THOMPSON: -- right now.

8 MR. COLYER: If you wish --

9 THE COURT: Well, I was unclear about that because
10 I thought that was the agreement that had been reached
11 yesterday, but then I thought I had an impression that you
12 wanted to be heard on all these folks today.

13 MS. STUBBS: No, we don't want to be heard at all.
14 Unless the Court has questions or the State wishes, I think
15 we'll all in agreement that we have submitted our bases to you,
16 and you can rule at your convenience.

17 THE COURT: I appreciate that. I thought that's
18 what the understand was. I misunderstood your position just a
19 few moments ago, and I apologize to you for that.

20 MS. STUBBS: I am sorry, Judge. I am sure I
21 wasn't clear.

22 THE COURT: Fault was mine, not yours. Then I've
23 got the matters under consideration, and we'll deal with it as
24 we originally planned.

25 MR. COLYER: Yes, sir. If you need any input from

1 Ms. Stubbs or Mr. Thompson or any of us after -- when we get to
2 that point, whether that's late tomorrow afternoon or Thursday
3 or whenever you're ready to do that, I think everybody's saying
4 we're prepared to standby and try to answer questions if you
5 have any after reviewing the documents.

6 THE COURT: That will work out well for me because
7 I'm tired.

8 MS. STUBBS: Well, Your Honor, in all candor, we
9 are, too. So we're hoping we're not going to be back on
10 Thursday. We would like to do this tomorrow.

11 THE COURT: Can we firm that up in terms of an
12 agreement as to when it's going to be heard because we talked
13 about two possibilities, if I recall correctly, both tomorrow
14 and -- what is today? Tuesday? Thursday. So we're on the same
15 page in terms of doing it tomorrow? Is that a fair statement?

16 MR. COLYER: And the only reason I suggested
17 Thursday, I have no idea how long everybody is going to argue
18 tomorrow, and if we get finished at quarter to 5:00 tomorrow, it
19 would be unfair for the Court to have to stay over or whatever
20 to deal with this if you had questions as well as the court
21 personnel. So if we get to a point tomorrow where everybody's
22 finished and the Court has questions, we are happy to deal with
23 them then. If not, we're telling you that we're available on
24 Thursday if you wish to do it.

25 THE COURT: I appreciate that. I think all of us

1 can use the time, to be quite candid with you.

2 Mr. Ferguson, I see you rising.

3 MR. JAMES FERGUSON: Judge, I think Ms. Stubbs was
4 about to say this -- at least I hope she was. The understanding
5 I thought we had was that all the submissions that needed to be
6 made to you regarding affidavits have been made with the
7 submission of what we have today.

8 THE COURT: Okay. We're on the same page so far.

9 MR. JAMES FERGUSON: And the other understanding
10 we had was you can rule on that any time even as of the time you
11 enter your order. So there is no reason for either side to be
12 heard further on it.

13 THE COURT: It appears I'm not the only tired one
14 here.

15 MR. JAMES FERGUSON: Isn't that where we were?

16 MR. THOMPSON: We have already been heard on this.
17 They've been heard on it. We've been heard on it. We don't
18 have any further -- and insofar as Your Honor had said when we
19 dealt with all this a couple days ago, you can rule on it at the
20 time you make all of your findings, and everybody, I think, was
21 satisfied with that --

22 MR. JAMES FERGUSON: Yes.

23 MR. THOMPSON: -- as the way to go forward. So --
24 and insofar as both sides are able to argue and use these in our
25 arguments, they're not limited as far as arguments we can make

1 from the affidavits. There are no limitations on either side as
2 far as those go, and Your Honor is able to --

3 THE COURT: All right. Correct me, folks, but I
4 thought our understanding was -- and, apparently, there is, at
5 least in my mind, some confusion. And I apologize about that.
6 We were going to try to accommodate Mr. Perry.

7 MR. THOMPSON: Well, all we wanted to do today --

8 THE COURT: That is what I'm talking about. In
9 terms of going forward with his argument, leaving all the other
10 matters to be dealt with down the road.

11 MR. THOMPSON: Right. And we are just kind of
12 letting you know we have already dealt with this and may not
13 have to deal with it down the road unless Your Honor comes to us
14 after you looked at it and Your Honor has questions. Unless --
15 I don't want to speak for the other side, but I think
16 everybody's in agreement. We have already chewed this ground
17 up, and it is in Your Honor's hands whenever Your Honor wants to
18 rule on it. If Your Honor feels like you have to rule on it
19 before this thing finishes or Your Honor can deal with it in the
20 findings that you make as part of your ultimate order at the end
21 of this hearing.

22 THE COURT: I thought that's where we were, but
23 the confusion, again, is probably mine.

24 MR. JAMES FERGUSON: That is where we were.

25 THE COURT: Okay.

1 MR. JAMES FERGUSON: Yes, sir.

2 THE COURT: All right. Fair enough, folks.

3 Mr. Perry, you need about 30 minutes?

4 MR. THOMPSON: Need about 20, now, Judge.

5 THE COURT: Twenty. Okay. All right. I can
6 certainly use it. We'll be at ease -- 3:30, Mr. Perry, 3:35?
7 Is that okay?

8 MR. PERRY: Yes, sir.

9 THE COURT: Okay. So 3:35 we will go forward with
10 Mr. Perry's argument. I've got the matters under submission.
11 Thank you.

12 (Whereupon, a recess was held from 3:09 p.m. until
13 3:36 p.m.)

14 (The following proceedings continued in open
15 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
16 Ferguson, Ms. Stubbs, Mr. Colyer, Mr. Thompson, and Mr. Perry
17 were present.)

18 THE COURT: Okay. Let the record show that all
19 counsel are present. The defendant is present.

20 Mr. Perry, we are ready whenever you are. If you need
21 a few moments, that's absolutely okay.

22 MR. PERRY: Just a moment, Your Honor.

23 MR. JAY FERGUSON: We would like to close our
24 evidence. We would like to present Exhibit 81-A, which is the
25 redacted version -- the State's reviewed it -- CLE records. If

1 I can move that for admission into evidence.

2 THE COURT: So that the record is clear, the
3 State's objections are renewed in apt time, Mr. Thompson, Mr.
4 Colyer, and your exception is noted for the record.

5 (There was a pause in the proceedings.)

6 THE COURT: Thank you.

7 MR. JAY FERGUSON: And with that, the defense
8 rests.

9 THE COURT: All right. Thank you, sir.

10 MR. PERRY: May it please the Court.

11 THE COURT: Yes, sir.

12 MR. PERRY: Your Honor, I think I am somewhat
13 together here.

14 THE COURT: Take your time, sir.

15 MR. PERRY: And I -- let me just say I appreciate
16 the accommodation --

17 THE COURT: Yes, sir.

18 MR. PERRY: Letting me speak. And maybe the good
19 news is I'm going to be pretty succinct mostly because I am only
20 here to talk about a limited scope of things, and that's
21 involving the statistical analysis that's been done and not done
22 in this case, so that's what I'm confining my remarks to and
23 about. And probably the most striking thing to me is I've been
24 working on these cases and this material is something I read --
25 and this is quoted in Dr. Katz's report but it's also present in

1 the trial transcript of *State v. Christina Walters*, and this is
2 a quote from Judge Gore. And what he told potential jurors
3 was -- and I am going to read it, make sure I get it right:
4 There can be 10,000 different reasons -- he was talking to the
5 jury --

6 THE COURT: I'm familiar with the quote, but you
7 can go ahead.

8 MR. PERRY: Yes, sir. That you might not be able
9 to be a fair and impartial juror in this case, and I think folks
10 have talked about this quote before in the context of this
11 litigation. And, Judge, the reason that I wanted to point that
12 out is because that has a great deal of relevance to the
13 statistical issues at issue in these cases and in this analysis
14 in this litigation.

15 And the reason I say that -- and I'm going to go back
16 to some of the things that Professors O'Brien and Dr. Woodworth
17 talked about in their previous testimony but also today, in
18 particular. One thing I would note is in the testimony, they
19 testified that what was looked for was a consistent predictor of
20 strikes. In other words, something that separates what's
21 important or what's being considered versus something that's
22 just noise.

23 Now, the important thing I think to take note of -- and
24 this is why I -- the Court may have gotten tired of me asking,
25 What does idiosyncratic mean to you? I think you know I asked

1 that a couple times because I wanted to be really clear in terms
2 of how these researchers approached this problem. To them,
3 idiosyncratic meant present in small quantities -- something
4 that only happens once, twice, maybe three times -- sort of
5 relatively depending on what the universe is of things that
6 you're looking for, and that's important.

7 It's important because when you define idiosyncratic as
8 a low number of occurrences, you miss out when you're doing your
9 analysis on some of the really important factors at play and,
10 again, I'm going to quote from some of the previous testimony,
11 and I think if I get it right, this is from Dr. Woodworth's, I
12 believe, direct examination. He said, Transparency is one of
13 the keys to credibility and scientific research. And he's right
14 about that. He's absolutely right about that. And I think the
15 Court has probably seen -- and I think both sides have tried to
16 demonstrate -- exactly what is going on in all this research
17 that's been done and been presented to the Court.

18 What I've tried to do when I've asked questions about
19 these statistical things that have happened is to demonstrate to
20 the Court just how these things are sensitive or not sensitive
21 or to what extent they capture reality versus to what extent
22 they don't. The thing to remember, at least in my way of
23 thinking, is this constriction or constraint or problem with
24 using logistic regression. The problem with logistic regression
25 is when you use it, you become dependent on looking at factors

1 or looking at things or recognizing things as being
2 statistically significant or systematically predictive.

3 Now, there was a reason that I asked Dr. Woodworth
4 during his earlier testimony about the hypothetical example
5 involving the employment decision in CPAs, in that kind of
6 designation. One of the things that we discussed when we went
7 back and forth was the limitations of regression, logistic
8 regression analysis in that context if there were other factors
9 that were present in small quantities that may have explained
10 what was going on in the employment decision. For example, one
11 of the things that logistic regression would not pick up in our
12 hypothetical example would be if the person that was hiring
13 these folks liked Chevrolet Camaros, and two of the people
14 happened to drive Chevrolet Camaros. It wouldn't pick up two of
15 the people that went to the same school as the guy doing the
16 hiring. It wouldn't pick up two people who were relatives of
17 people that he lived in the neighborhood with. It would pick up
18 things that were present in large quantities like somebody's
19 ethnicity or somebody's gender. People are either male or
20 female.

21 So the danger of using logistic regression in that
22 hypothetical example -- and, again, we sort of set it up to be a
23 constrained example -- was that it would look at things that
24 were systematically present or systematically predictive, but it
25 wouldn't look at these little small quantity explanatory

1 factors. And, in fact, it makes things that are not
2 systematically present -- idiosyncratic, as the experts referred
3 to -- nonexplanatory. And that's why I asked him about the hung
4 jury example. There was no question that those two folks who
5 were on hung juries previously were struck, but logistic
6 regression, because they were not systematically present or
7 present in large numbers -- they were idiosyncratic -- were not
8 treated as explanatory. Again, it's the danger of using that
9 particular kind of model.

10 Now, the first question I asked Dr. Woodworth today
11 was: Have you ever used a map to get anywhere? And I had a
12 reason to ask him that, too, and he responded by disagreeing
13 with my analogy. I think he knew what I was getting to is that
14 sometimes -- and we're talking about this concept of
15 overfitting. Sometimes, there are a lot of twists and turns
16 that explain how you get from one point to another or how one
17 process unfolds, such as the jury selection process.

18 Now, the problem, as Dr. Woodworth and to some extent,
19 Dr. O'Brien saw it, was that this was an overfitting issue.
20 And, again, going back to the testimony, the danger was that
21 insignificant factors started to be included in the analysis,
22 and they said that by overfitting, you didn't get a reliable
23 model. In other words, there was noise from nonsystematic data
24 that was present or nonsystematic factors. Again, idiosyncratic
25 in the way they explained it, but it's not necessarily true that

1 because something is not systematically present, it's not
2 explanatory. Again, he may disagree with my way of looking at
3 things, but sometimes to get from point A to point B, it's not a
4 straight line. It's nonlinear. Or there's another way to get
5 to it, or there are a number of twists and turns you have to
6 take.

7 Again, going back to Judge Gore's quotation, Sometimes
8 there are 10,000 reasons why you may not be a good juror. You
9 don't know them. The other side doesn't know them. Sometimes
10 the State doesn't know them. But there are a bunch of different
11 individual factors always at work in individual cases. That's
12 why I like his quote because his quote points out the
13 idiosyncratic nature of the jury selection process. And,
14 unfortunately, the danger when you look at logistic regression
15 and the approach mathematically that's at issue is that it tends
16 to ignore those idiosyncratic factors.

17 Again -- and I want to make sure I get it right. This
18 was Dr. Woodworth who said, Overfitting is not a problem with
19 the MSU study. I agree. I agree. And I agreed because there
20 was not really a way to accommodate idiosyncratic factors. In
21 fact, one of the State exhibits that was introduced close to the
22 end of the slides were State's Exhibit Number 47 was the table
23 of 15 sort of individualized reasons some of which I had asked
24 Professor O'Brien about earlier on her cross-examination. When
25 I approached and showed her some of those jurors, I asked her to

1 identify some of these factors present in the DCIs. Some of
2 them weren't mentioned at all. And under the logistic
3 regression approach or the way that the study has been set up,
4 those would be idiosyncratic factors. Again, the danger is
5 those things aren't picked up in the analysis because they're
6 not present in a bunch of other jurors' responses.

7 On that note, one of the observations that I hope was
8 developed during the cross-examination in particular was the
9 difficulty in the validity, to use the term from today's
10 testimonies, of the variables at issue. Now, I think fairly,
11 Professor O'Brien recognized that there was some validity issues
12 in her most current iteration of the -- and I want to make sure
13 I get this right. I think it was the statewide model. And you
14 can see that reflected in the inclusion in table 12 of this
15 police prosecutor variable. So she's admitted that there were
16 some -- some degree of concern or some inability of this
17 variable as it was previously, and previously, it was in the
18 model as the JLaw enforcement all variable, to distinguish or to
19 explain or to tease out what was going on when somebody was a
20 member or a close relative to somebody who was a police officer
21 or worked for a prosecutor. That's the new version.
22 Previously, it was a little broader, and it was a person or
23 somebody other -- who works in law enforcement in a broader
24 scope or a broader expanse.

25 Now, the other point that I wanted to make about that is

1 that there's no magic level of detail. The employment codes in
2 this model have a number of subcategories. The descriptive
3 characteristics have another number of subcategories. The
4 number of subcategories differs from one variable to the next.
5 It's not like the p-values or other statistical conventions
6 where there's an accepted level or some kind of rule of thumb to
7 use. For these descriptive characteristics for these individual
8 variables in the way they've been set up, there was a lot of
9 looking for significance. In other words, there was an attempt
10 to look and see what was systematically present. What would
11 systematically predict what was going on? Now, process, as she
12 explained it, was recoding. Sometimes things were aggregated.
13 Sometimes they were parsed out a little bit. And what was
14 arrived at eventually was something that was systematically
15 present. Again, just an example of the judgment that goes into
16 putting these models together.

17 Now, to sort of build on Judge Gore's quote, I also
18 like the way that Dr. Woodworth put it. He said that what we're
19 looking at is a complicated discretionary system, and he's
20 absolutely right about that. I mean, he's clearly done a lot of
21 research, done a lot of thinking over the last couple years --
22 and when I say a couple, I mean a long time. He's done a lot of
23 research on what makes up the elements and the components of
24 this complex discretionary system.

25 Again -- make sure I get the attribution right. I

1 think in Professor O'Brien's direct examination, she said it was
2 important to have some understanding of the phenomenon you study
3 to identify what's going on, and it's a problem when you know
4 statistics but not the system. And I agree with her. What I
5 would point to is that the context of the jury selection system
6 is pretty well captured in Judge Gore's quote and in Dr.
7 Woodworth's observation: that it is a complex discretionary
8 system

9 Now, what the defense has tried to do -- and like Dr.
10 Woodworth said, what Professor O'Brien did was try to define
11 these variables so that they were valid and reliable. Now,
12 during cross-examination and during direct examination of Dr.
13 Katz, we've tried to elicit and demonstrate that, at least in
14 the way that Dr. Katz perceived from his review and discussions
15 with prosecutors, these variables were not well-defined. The
16 Court may recall my example of treating two people as equivalent
17 in terms of their classification under these variable or these
18 coding protocols as to between somebody who had been charged
19 with murder and somebody who had gotten a speeding ticket.

20 Now, Professor O'Brien corrected me and said they made
21 some decision at some point where somebody who had gotten a
22 speeding ticket would not be included in a category. So my
23 follow-up was to ask her, Well, if that's the case, then what
24 about somebody who has been convicted or charged with a break-in
25 and somebody who has been charged and convicted of murder? The

1 variables as they had set them up under that specific category
2 of variable would not distinguish between the two. So the
3 question the State would ask at that point is: As Dr. Woodworth
4 said, does that variable, for example, measure what it purports
5 to measure? Is it valid? Does it capture what it's intended to
6 capture? Again, in the context, as he said, of a complicated
7 discretionary system.

8 Now, in this context, why does not statistically
9 significant equal not important? Again, to go to this
10 definition of idiosyncratic variables, to not recognize these
11 idiosyncratic variables or factors present in small quantities,
12 captures part of what prosecutors look at but not all of it. So
13 prosecutors, for example, in the Cumberland County model, may
14 look at whether somebody's unemployed, may look at whether
15 somebody is under a hardship, may look at whether or not
16 somebody is very young, but that's not all they look at. Again,
17 these models are only going to pick up things that are present
18 in large quantities relative to the number of cases that are
19 looked at. And that should, I think from the State's
20 perspective, give the Court a little pause because you have to
21 look, I think, at the two models, at the statewide model and at
22 the Cumberland County model.

23 If you look at these models, the suggestion here is that
24 in Cumberland County, it doesn't matter that somebody knows the
25 defendant, knows a witness, knows an attorney, or knows somebody

1 in law enforcement. Their own model does not include those
2 variables as significant. Now, the Court has its own experience
3 to draw on from observing jury selections and trials and things
4 like that, and I don't even think Professor O'Brien would
5 disagree that there is a theoretical good reason that those
6 variables ought to be present in Cumberland County. Again,
7 going back to the hung jury example, if somebody knew the
8 defendant, if somebody knew one of the attorneys involved,
9 they're probably likely to get struck. But you won't know that
10 in the Cumberland County model because one of two things:
11 Either they weren't significant or they were present in small
12 quantities because they were idiosyncratic.

13 Now, we've only got one example to look at in the sense
14 that we've only got one county to compare with the statewide
15 model. Now, you would expect that these variables would change
16 from the statewide model to these county models because the
17 number of observations is a lot larger. In other words,
18 relatively speaking, these variables -- a juror knew a
19 defendant, a juror knew a witness, a juror knew an attorney --
20 could be present in the Cumberland County model but only once or
21 twice -- or they could be present once. In the statewide model,
22 they could be present a number of times and, in fact, looking at
23 their model results, they are present a number of times. Again,
24 what changes from the Cumberland County level of detail to the
25 statewide level of detail? Just the number of observations in

1 the model. Theoretically, it shouldn't make any difference
2 whether or not you're in Cumberland County or you look statewide
3 at another county, say Union County where I'm from, or some
4 place on the coast or some place in the mountains and, for some
5 reason, it doesn't matter that people know folks involved in the
6 cases. Theoretically, there's no reason why these should be
7 present statewide and not present in Cumberland County. The
8 reason is the math. And I point that out just to make the point
9 that mathematically using logistic regression, which is a way to
10 look at systematic predictors of what happens in jury selection,
11 is a limited way to address the realities of the complex
12 discretionary system that we see every day in these courtrooms.

13 Now, going back to the models, we've got a number of
14 different models. As Professor O'Brien testified, there were at
15 least three versions that were present in the courts. We've got
16 a July version. We've got a September version. We've got a
17 December version. We've got a version or actually two versions
18 from today, one of which we sort of loosely term as the
19 resolution model and then the second one the shadow coding
20 model. So that's at least five versions of the model.

21 Now, what the State would point out is that it should be
22 a little unsettling that these models change from version to
23 version to version. Not only do the estimates of these
24 coefficients and odd ratios change but the variables switch.
25 The variables change from one model to the other. There's

1 recoding done. These recodings work to generate different
2 combinations and permutations -- in other words, levels of
3 detail -- of the variables that are present in the model. And
4 there's no -- in fact, we know there's not a guarantee that this
5 is going to stop because, as Professor O'Brien testified today,
6 as she gets more information, she adds it into a model. These
7 are going to change as more information gets included and more
8 data is collected from whatever the source, whether it be from
9 the affidavits or further investigation or additional changes
10 made to the DCIs or whatever method that more information is
11 collected. Again, something to point out in terms of assessing
12 the overall reliability or validity of these models.

13 Now, just in point of contrast, for the State, Dr. Katz
14 took a different approach. He tried to collect information in
15 the form of affidavits partly, as he explained, because he felt
16 like that would give a little more certainty or a little more
17 stability to the information that was collected. As Mr.
18 Ferguson pointed out, that is a different approach. He tried to
19 use the example of tobacco executives. Now, I will state for
20 the record I think the comparison is maybe not quite so apt. I
21 don't necessarily think we're peddling harmful products or
22 anything like that, but the interesting thing about that example
23 was Dr. Katz pointed out the affidavits got those folks in
24 trouble because that was something that was on the record. It
25 did not change. Once it was out there, it was out there. Now,

1 that's different from the model, which, in the last six months,
2 has changed five times. I just point that out because it's a
3 difference in a distinction between the methods of analyzing
4 what's going on in the jury selection process.

5 Now, on a broader -- maybe not broader but bigger
6 picture, in terms of what the model that Professor O'Brien
7 provides us can tell us, the State contends we have some
8 problems, too. And the Court has had a chance, through the
9 direct examination and the cross-examination of Dr. Katz, to
10 hear about some of these issues, and his report lays it out
11 pretty much line by line. One of the big problems, as Dr. Katz
12 perceives it, with the defense study is the sampling. Now, from
13 the standpoint of the State and even from the standpoint of the
14 defendants, there is a question about the appropriateness of the
15 sample.

16 Now, I know Dr. Woodworth described it as flawless, but
17 as the State pointed out through Dr. Katz, the defendants
18 themselves have identified a broader pool of folks who were
19 involved in the capital litigation process. For example, though
20 173 cases are included in the time span from 1990 to 2010, their
21 own charging and sentencing study identified 696 cases that
22 would quality under their own parameters for inclusion into that
23 same time period.

24 Now, what does that suggest? Well, it may suggest that
25 all the inferences and all the statistics that they generated

1 have no meaning whatsoever because it's not a random sample. In
2 other words, if you're truly picking names out of a hat, you've
3 got to be really careful about your population and how you
4 define it. Now, I think pretty clear, Professor O'Brien
5 testified that the 173 cases were chosen for a reason, and she
6 gave the Court that reason. What the State contends is if
7 you're trying to figure out what was going on and what had been
8 going on from 1990 to 2010 in terms of jury selection and the
9 exercise of State strikes, the appropriate population of trials
10 to look at would be, as they've calculated, 696. And, again,
11 that same logic would apply to all the different sort of subtime
12 break downs, so the five-year periods and the ten-year periods
13 on both sides of the year 2000.

14 And that was one of Dr. Katz's big issues was this idea
15 that the sample, the 173 cases, was not a random sample and,
16 again, it's kind of a yes/no question. Something is either a
17 random sample or it isn't. Now, admittedly -- and I think Dr.
18 Katz was pretty frank about this -- you don't have a lot of
19 guidance as to what is actually an appropriate population to
20 look at when you look at the RJA statute. In terms -- in
21 addition to the identification of the population at issue, you
22 also have a time element. So the second part that I asked him
23 about in the context of sampling issues was what time frame did
24 you look at and what time frame did the defense look at from the
25 perspective of the statutory language.

1 So when it says, At the time of, what does that mean?
2 Only because there are a couple of different analyses that you
3 can do when you're looking at data. Just in broad terms, you
4 can do time series analysis, which is looking at things that
5 happened from point A to point B, ten years, five years,
6 three weeks, two days -- different time periods. Then you can
7 do cross-sectional analysis, and that's kind of what it sounds
8 like. You just sort of slice something and look at a big chunk
9 of things all in one sort of defined time span.

10 Again, the State, in looking at what the statute
11 suggests in terms of what does, At the time of means, and
12 through Dr. Katz's report, thinks that that may not mean the
13 whole 20 years of these 173 trials or the 696 trials that have
14 been identified. So in terms of sampling, we would suggest
15 there's two issues. One, the identification of the population
16 and it s appropriateness and the subsequent sampling, and then,
17 two, the time element, and those are intertwined to a certain
18 extent.

19 Again, I have already mentioned -- and I won't belabor
20 the point -- that in Dr. Katz's report, he has the same sort of
21 or some of the same observations that I've made about the
22 explanatory variables that have been defined by the defense or
23 by Professor O'Brien and about the limitations of logistic
24 regression methodology. As we've discussed or as I've pointed
25 out, part of the problem is the limitations of logistic

1 regression in terms of the presence of a large number of what
2 the State would contend would be explanatory factors in these
3 cases along the lines of the 10,000 different factors that Judge
4 Gore points out or mentions in his quote.

5 Again, because of the limitations of what's been
6 collected to this point -- and I think Dr. Katz was pretty
7 frank. We only have a certain number of affidavits that have
8 been provided. I don't think Professor O'Brien would argue with
9 the fact that those affidavits provide useful information.
10 Whether or not she's incorporated them -- because sometimes she
11 agrees and recolors thing as yellow and sometimes she doesn't.
12 But I think she would agree that in the presence of new
13 information, she'd incorporate that into a model. The issue or
14 the potential concern is we could be one version away from the
15 variable black or the variable law enforcement all or the
16 variable SingleDivorced or the variable Homemaker dropping
17 completely out of the model because it's not significant.
18 That's the problem. We just don't know. And, clearly, there
19 are data limitations when you're looking at the information that
20 was collected on the part of the State.

21 The bottom line is -- and this is tough, Your Honor. I
22 do not envy you. One of the things that you've got to look at
23 is the credibility of these models and the credibility of these
24 approaches. Again, through the context of direct examination of
25 the State's expert and the cross-examination of at least, from

1 the statistics portion, the defense experts, we've tried to
2 demonstrate that there are some credibility issues with the
3 defendant's model specifically related to the methodology they
4 employed, which is the logistic regression approach and, again,
5 the fundamental problem in terms of what the math does seems to
6 the State to go against the reality, as Judge Gore points out,
7 of these 10,000 factors by treating them as idiosyncratic and
8 not allowing their explanatory value to be recognized. And that
9 makes, from the State's perspective, the defense model as
10 constructed, in whichever one of these versions you want to look
11 at, have some credibility issues.

12 In some ways, it's reversing that observation that you
13 hear sometimes of people missing the forest through the trees.
14 What the defense has done through this statistical analysis is
15 try to get people to lose sight of the trees and focus on the
16 forest. In other words, look for those big, broad, what they
17 term systematically predictive factors that are present. And
18 from a statistics standpoint, I would suggest to the Court that
19 that's not axtrally (phonetic) and accurately capturing the
20 complicated, discretionary nature of what's going on in these
21 very, very complicated cases, and that's what I would offer to
22 the Court.

23 THE COURT: Thank you, Mr. Perry.

24 MR. PERRY: Yes, sir.

25 THE COURT: Okay. Folks, as I believe I

1 understand the schedule, we're going to stop at this point, go
2 forward with the argument, remaining arguments in the case
3 tomorrow morning. As indicated, State would have the -- pardon
4 me. The defendant would have the opportunity for opening.
5 We've accommodated Mr. Perry because of his schedule. That
6 would be followed by argument by -- and I want to be clear on
7 the record in this respect. Mr. Thompson, Mr. Colyer, both of
8 you are free to argue tomorrow, and I'm not putting any time
9 limitations on anybody. And following argument, the remaining
10 arguments by counsel for the State, same thing applies to the
11 arguments of counsel for the defendant, and I believe that
12 accurately reflects the understanding regarding arguments. If
13 anybody disagrees, feel free to let me know that. Is that where
14 we are?

15 MR. COLYER: Yes, sir.

16 MR. THOMPSON: Yes, sir.

17 MR. JAMES FERGUSON: Yes, sir.

18 THE COURT: All right. Thank you, folks.

19 MR. COLYER: Judge, can I ask one other --

20 THE COURT: Yes, sir.

21 MR. COLYER: -- consideration from the Court, and
22 this really does not affect anything for tomorrow. Obviously,
23 there are some follow-ups that we need to be doing that you had
24 mentioned to us earlier. One would be assistance of the Court
25 with respect to findings of fact, conclusions of law, and we

1 have on us that we have generated, self-induced, under the
2 Court's rulings here, the quasi deposition. I'd like to ask the
3 Court and the defense if it would be thinking in terms of giving
4 us some guidance tomorrow when the arguments are finished before
5 the Court tells us what schedule we're going to be on as to how
6 we're going to deal with those because they impact the State a
7 little bit more right now than they would the defense in terms
8 of making sure that we get the record complete and put it in a
9 proper format --

10 THE COURT: Yes, sir.

11 MR. COLYER: -- for whatever may come down the
12 road. And the reason I'm asking that is I have some
13 considerations within the next week or so relating to a trial
14 that I have next week that I've been dealing with an attorney
15 and some potential witnesses here as it relates to next week,
16 and I have told them that we are still on track to go next week,
17 but that could be affected by the schedule that the Court wants
18 to follow with respect to the remainder of the hearing and the
19 rulings. And so what I'd like to give the Court notice of: At
20 some point if you're able to help us out tomorrow in terms of
21 that schedule, myself and the other attorney involved in that
22 trial next week may want to address the Court with respect to
23 some motions unrelated to this that might affect that case
24 either next week or the week after. So just --

25 THE COURT: Okay. In terms of guidance, to at

1 least some degree, I am depending on input from you folks in
2 terms of what you think is feasible, what time frame is
3 practical, can be worked out. It's my intent not to close the
4 presentation of evidence or the record, more aptly, the record
5 in this case until you folks have had an opportunity to do that.
6 So as far as the record is concerned, those matters will be
7 included in the record. I can tell you that now. But if you've
8 got some suggestions, some ideas, some time frames about
9 accomplishing the inclusion in the record of the matters being
10 offered for purposes of offers of proof, that would be helpful.

11 MR. COLYER: Well -- and that will help us also
12 and me in particular with my schedule.

13 THE COURT: Yes, sir. I guess the broad answer is
14 I am willing to work with you and accommodate you on scheduling,
15 but if you -- and I know we've all been here. I know we've all
16 been tied up. We've all been busy with the matter now before
17 the Court, but have you talked about at all how you, time-wise,
18 when and how it will be done? In the courtroom? Some place
19 else? Things of that nature.

20 MR. COLYER: Just of a general nature, Your Honor.
21 We haven't nailed anything down. We have mentioned to our
22 witnesses that we are going to need to get back with them and
23 get some scheduling material from them, and we just talked to
24 them in very general terms. Haven't nailed anything down.

25 MR. THOMPSON: That may be in large part depend on

1 the ability of the court reporters to be able to join us. Their
2 schedule is probably most important to determining that schedule
3 and whether or not we have to get somebody from out of county
4 and whether we can get some assistance from the trial court
5 administrator from getting an out-of-county if that's necessary.

6 THE COURT: Have you gotten any information, any
7 information from the folks about what their schedules might
8 permit?

9 MR. THOMPSON: I've spoken to -- you mean the
10 judges, Judge?

11 THE COURT: Yes, sir.

12 MR. THOMPSON: The judges have generally been
13 available. Most are retired at this point and have told us
14 they'll work with us any way they can. We have a few
15 limitations on their schedules. There might be some -- there
16 are a couple that are, obviously, still working, but our first
17 point of contact, likely, is going to be the court reporters and
18 how they want to do that and figure out the length of time. My
19 guess is separate it into two days, three on one day, three on
20 the next to -- or three on two different sessions, but we'll
21 need to know the schedule of the court reporters.

22 THE COURT: Well, for purposes of the record, let
23 me be as clear as I can be at this stage of the process. All of
24 us are tired, and I recognize that. One, I am telling the State
25 the record will not be closed until you folks have had the

1 opportunity to include those matters. That's number one.
2 Number two, I am willing to work with you folks so that
3 everybody's schedule can be accommodated, the information can be
4 included. Number three, this goes to an offer of proof, and I
5 recognize that it's somewhat unorthodox. We had some other
6 options that we talked about, and you folks feel free to jump in
7 if you want to. One of the options that was discussed was the
8 option of putting it in writing. My understanding was the State
9 preferred not to do that. The State preferred to do it in the Q
10 and A type thing, setting, and that's absolutely okay. So I'll
11 work with you on that, but the more information you can get from
12 the folks involved, the judges involved, about their schedules
13 and after -- have you communicated at all with any of the court
14 reporters at this point?

15 MR. COLYER: Not directly, Judge. We've been
16 trying to not burden them with thinking about anything else
17 while they work on getting the transcripts done, and we know
18 that they have other cases where they've got some transcript
19 requirements on, so we've just been waiting to get some guidance
20 from the Court and then not to affect what they're trying to do
21 in terms of --

22 MR. THOMPSON: There is a second part to the court
23 reporter issue is because Your Honor has requested findings from
24 the State and both sides, we'd like to see the transcript and --

25 THE COURT: Well, that's the other issue that we

1 needed to talk about, and I appreciate you bringing that up.
2 Two things about that. I have been informed -- I believe the
3 most recent information that I've gotten is that week one should
4 be forthcoming by the end of this week or at least that's the
5 expectation.

6 MR. COLYER: You mentioned that to us the other
7 day, Judge.

8 THE COURT: Obviously, that doesn't deal with week
9 two and this week. On proposed findings and conclusions, the
10 reason that I asked for that was, first, to give both counsel or
11 both sides the opportunity to have input into submitting matters
12 that both sides respectively contended ought to be considered by
13 the Court in the Court's findings and conclusions. If you can
14 do that on a jump drive, that would be helpful, or some other
15 electronic format. That would be helpful.

16 I also understood at the time I indicated that, that
17 that would probably be tied to the preparation of the
18 transcripts in the case, and the two were interwoven. I thought
19 I recalled some indication from counsel from the defendant that
20 they anticipated being able to submit matters within a,
21 relatively speaking, short period of time. Is that still their
22 position?

23 MR. JAY FERGUSON: Yes, Your Honor.

24 THE COURT: Okay. All right. Let me think about
25 some of the things that we've talked about today, and I

1 appreciate you raising them, Mr. Colyer. And we will try to
2 address what we can when we can tomorrow as best we can.

3 MR. COLYER: Thank you.

4 THE COURT: All right. Anything else, folks?

5 MR. THOMPSON: I just need to inquire from counsel
6 whether they'll need the Nomad for tomorrow.

7 MR. JAY FERGUSON: Yes.

8 MR. THOMPSON: Nothing further.

9 THE COURT: Okay. All right. Thank you, folks.
10 Have a good evening. Is 9:30 tomorrow morning okay?

11 MR. THOMPSON: Yes, sir.

12 MR. JAMES FERGUSON: Your Honor, would you
13 consider 10:00?

14 THE COURT: I will, 10:00, okay.

15 MR. COLYER: Ten's fine, Judge.

16 THE COURT: All right. Again, Mr. Perry, take
17 care, sir.

18 (Whereupon, the Court adjourned at 4:18 p.m.,
19 Tuesday, February 14, 2012, until Wednesday, February 15, 2012,
20 at 10:00 a.m.)

21 (REPORTER'S NOTE: Ms. Jennifer Hack was replaced
22 by Ms. Shannon Ransom.)

23

24

25

C E R T I F I C A T E

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

I, Jennifer L. Hack, RPR, the officer before whom the foregoing proceeding was taken, do hereby certify that said hearing, Pages 2265 through 2466, inclusive, is a true, correct, and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

This 5th day of March, 2012.



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

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

vs.

MARCUS ROBINSON,
Defendant

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

This is to certify that the transcript of the proceedings in the above-captioned case, as ordered on the 3rd day of February, 2012, being 202 pages in Volume XII of XIII, was delivered electronically and by U.S. Mail to counsel listed below on the 5th day of March, 2012.

THE HONORABLE GREGORY A. WEEKS
Superior Court Judge

ROBERT THOMPSON
Assistant District Attorney
BEL LEWIS, Legal Assistant
Cumberland County Courthouse
P.O. Box 363
Fayetteville, North Carolina 28302
On behalf of the State

JAY H. FERGUSON
Attorney at Law
119 East Main Street
Durham, North Carolina 27701
On behalf of the Defendant



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

NORTH CAROLINA
CUMBERLAND COUNTY

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

_____)	
STATE OF NORTH CAROLINA,)	
)	RACIAL JUSTICE ACT HEARING
)	
vs.)	HEARD 2/15/12
)	
MARCUS ROBINSON,)	VOLUME XIII
Defendant.)	(Pages 2467 through 1638)
_____)	

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: Calvin Colyer and Rob Thompson,
Assistant District Attorneys,
12th Judicial District

For the Defendant: Jay Ferguson & Cassandra Stubbs,
Durham County Bar;
Malcolm Hunter, Orange County Bar; and
James Ferguson, Mecklenburg County Bar
Attorneys at Law

SHANNON RANSOM
Official Court Reporter
Cumberland County Courthouse
Fayetteville, North Carolina 28302
(910) 733-0826 (cell phone)
sransom1@nc.rr.com

DATE REQUESTED: 2/3/12

DATE DELIVERED: 3/6/12

1 (The following proceedings began in open court.
2 The defendant, defense attorneys and state's attorneys were
3 present.)

4 THE COURT: Let the record reflect all counsel
5 are present. The defendant is present. My understanding
6 as to the order of defendant's arguments, Mr. Jay Ferguson,
7 you are going to initially argue?

8 MR. JAY FERGUSON: That's correct, Your Honor.

9 THE COURT: Your argument will be followed by Mr.
10 Tye Hunter, and as to the opening argument, last argument
11 will be made by Ms. Cassandra Stubbs; is that correct?

12 MS. STUBBS: Yes, Your Honor.

13 THE COURT: And as to the state's arguments, my
14 understanding is first argument will be made by Mr.
15 Thompson?

16 MR. THOMPSON: Yes, sir.

17 THE COURT: And that argument will be followed by
18 Mr. Colyer?

19 MR. COLYER: Yes, Your Honor.

20 THE COURT: And in conclusion, last argument will
21 be made by Mr. James Ferguson?

22 MR. JAMES FERGUSON: That is correct, Your Honor.

23 THE COURT: All parties ready to go forward?

24 MR. JAMES FERGUSON: Yes, Your Honor.

25 MR. COLYER: Yes, sir.

1 MR. HUNTER: Your Honor, I did want to bring -- I
2 hate to do this but I did want to bring something up that
3 happened yesterday, and when I was characterizing these
4 exhibits, defendant's 80 -- and I think it's 82 through 96,
5 I said everything in there had already been admitted, but
6 as I think all of us know, there are affidavits within
7 these exhibits -- all the transcripts have been admitted
8 but the affidavits have been admitted sort of
9 conditionally. I think they have been admitted to support
10 Dr. Katz's opinion. And then there's a -- Your Honor's
11 still considering as to whether they are all admitted
12 substantively or not, and so I think we agree they should
13 be on the same -- they are the same thing, whether -- you
14 know, however you decide about that. But I just wanted to
15 clarify that point, and we're not asking that they be
16 treated any different in our exhibit than the Court
17 ultimately decides about the substantive use of those
18 affidavits and I just -- I wanted to clarify that and I
19 hope -- I hope that is clarifying and that's all I've got
20 to say and I'm going to sit down. Thank you very much.

21 MR. THOMPSON: There's no change in the state's
22 position based on that clarification.

23 THE COURT: I understand. As a matter of fact, I
24 was just checking with our clerk to determine whether or
25 not the motion in limine to limit was of record. I knew I

1 had a copy but I wanted to make sure there's a file copy
2 for the purpose of the record. I am informed there is.
3 Any other matters, folks?

4 MR. COLYER: Just at the end of the day, Judge,
5 we need to talk to you about scheduling as it might impact
6 on some matters next week so we'll remind you of that.

7 THE COURT: Yes, sir.

8 MR. COLYER: Thank you.

9 THE COURT: Thank you, Mr. Colyer. All right.
10 Mr. Jay Ferguson, you may proceed.

11 MR. JAY FERGUSON: Thank you, Your Honor. Your
12 Honor, in the summer of 2009, the North Carolina
13 legislature accepted an invitation from the United States
14 Supreme Court to allow the use of statistics to prove
15 racial disparities in the death penalty in North Carolina.
16 And that summer of 2009, we began a long journey that leads
17 us to this day in this courtroom. And personally -- on a
18 personal note, I want to thank the Court for this
19 opportunity. I want to thank Mr. Robinson for the
20 privilege of representing him and it is a privilege to be
21 here in the lead case of the Racial Justice Act and
22 especially before this Court.

23 The journey began with respect to the statistical
24 evidence at Michigan State University College of Law with
25 two researchers, Professors Grosso and O'Brien, and they

1 began a very arduous task of compiling mountains of data,
2 mountains of information to present the study that was
3 ultimately presented by Dr. O'Brien to this Court.
4 Yesterday it was characterized by the state that we have to
5 look at the credibility of the models as if that's really
6 the issue. I submit to the Court we need to step back for
7 a moment and first look at the credibility of the
8 statistical information that's provided -- that has been
9 provided to this Court. I have a PowerPoint presentation.
10 I will be glad to hand up a copy --

11 THE COURT: Yes, sir.

12 MR. JAY FERGUSON: -- so the Court can follow it.

13 THE COURT: I appreciate that.

14 MR. JAY FERGUSON: May I approach?

15 THE COURT: Yes, sir. Thank you.

16 MR. JAY FERGUSON: And I'm going to ask the Court
17 to look at the credibility of the Michigan University study
18 and compare that to the credibility of the information and
19 analyses that Dr. Katz did, and what we see is a stark
20 disparity in how they went about their study. The Michigan
21 State University researchers did a comprehensive review of
22 every voir dire for every death row inmate on death row as
23 of July of 2010. They looked at juror questionnaires,
24 clerk's notes, any public records that they could glean
25 information that would be relevant for this court.

1 Dr. Katz, on the other hand, says that he
2 believed that the best method for doing a statistical
3 analysis was to do a survey for the prosecutors and
4 specifically the survey differed from the research inquiry
5 for the Court. The issue under the Racial Justice Act is
6 whether race is a significant factor in the exercise of
7 peremptory challenges by the prosecutors in the State of
8 North Carolina in this judicial division and in this
9 county. That's the research inquiry.

10 The inquiry by Dr. Katz was he asked the
11 prosecutors if they used race as a basis for striking black
12 jurors. That may have been relevant but, you know what?
13 That actually was not his inquiry. His inquiry was he
14 asked the prosecutors not whether race was a basis for
15 striking black jurors but whether they could provide a race
16 neutral explanation for each strike of a black juror.
17 That's a distinct and different inquiry for this Court.
18 The Michigan State University researchers did meticulous
19 blind coding by attorneys, by people who had graduated law
20 school, not one but two.

21 In the -- Dr. Katz's report, there was not a
22 single element of that report that was blind or objective.
23 The race of the jurors was sent. There was no -- no
24 comparison of white and black jurors. Nothing was
25 objective. The Michigan State University study, when you

1 look at the credibility, has been an accepted statistical
2 methodology utilized by courts around the country in all
3 sorts of cases. I'm talking about logistic regression
4 analysis, and routinely accepted for peer review in referee
5 publications.

6 Dr. Woodworth described what Dr. Katz did and,
7 remember, on every model in Dr. Katz's report, there's a
8 warning or something at the top that says this is not
9 intended to predict state strikes. There's qualification
10 throughout his analyses. That's not the kind of
11 information that this Court should derive its findings of
12 fact from. The Michigan State researchers are both law
13 professors, both extensive legal experience. Dr. Katz said
14 he had no legal training whatsoever. And I think pertinent
15 for this Court is the Michigan State University researchers
16 did not financially gain one penny from their work in this
17 case. The only accolades they get, if any, is what comes
18 along with academic research. We heard from Dr. Katz that
19 what he has produced for this Court cost the State of North
20 Carolina over \$100,000.

21 So we looked at what do we have? What evidence
22 did we present? And I'm going to ask the Court as we go
23 through today to look not only at what was presented but
24 what was absent from the evidence because sometimes the
25 absence of evidence can be as powerful as the presence of

1 evidence. This is the evidence that was present in this
2 courtroom. It shows a statewide prosecutorial strike
3 pattern where white jurors -- excuse me, nonblack jurors
4 are much more acceptable to the state than are black
5 jurors. Black jurors are struck at more than two to one
6 statewide. The statistical significance of that disparity
7 is less than one in ten trillion. We're not talking about
8 P values of .01 or .05, one in ten trillion.

9 Now, if we just look at the cases where there
10 were African-American jurors to be struck and looked at the
11 average strike rates within those cases -- because that
12 takes out some of them because in the Michigan State study,
13 it shows how many all white juries we have had that
14 sentenced men to death row in North Carolina. But if we
15 look at just the cases where African Americans can be
16 struck, that's the probability of that occurring by chance
17 in a random race neutral jury selection process, that's --
18 I don't know what that number is. It's bigger than I can
19 count.

20 We didn't stop there. We looked at different
21 time periods and throughout all these graphs -- I know
22 you've seen them. I'm not going to spend a lot of time on
23 them. If the black chart on the strike rate is higher than
24 the white, it shows a disparity between the strikes of
25 African-American jurors and all other jurors. From 1990 to

1 1999, 2010, more than two to one. If you break it down in
2 five-year time periods, more than two to one in every
3 single one of those time periods. You would hope that it's
4 different in 2010 than it was in 1990 but look at this
5 chart. Consistent. For 20 years, it's been consistent.
6 It hasn't changed. The strikes in 1999 by the prosecutors
7 are the same today. We looked at every prosecutorial
8 district in North Carolina. District after district after
9 district after district, there's a gross and stark
10 disparity of strike in African-American jurors as opposed
11 to all others.

12 We didn't stop there. We looked at what -- I'm
13 sorry. The prosecutorial districts, this is a very
14 compelling exhibit because what it shows, the gray
15 districts indicate that there are no people on death row
16 from those districts. There are three white districts.
17 Those are the only three prosecutorial districts where
18 there is not a disparity between strikes of black jurors
19 and other jurors. In each of those three, there's only one
20 case that's represented in the study. So in every
21 prosecutorial district in the State of North Carolina where
22 there are two or more cases represented in the study for
23 people on death row, there is a disparity over and above
24 1.2. And the red -- the dark red is over three to one
25 meaning African-American jurors are struck at three times

1 the rate as all others. But we didn't stop with
2 prosecutorial districts. We looked at counties. County by
3 county by county by county, by county by county throughout
4 the State of North Carolina, geographically, it's clear
5 that African-American jurors are struck at a much higher
6 rate than all others. When we look at the current
7 division -- former division in Cumberland County, we see
8 it's all more than two to one. Cumberland County, worse
9 than the statewide average.

10 When we look at the individual cases within
11 Cumberland County, every single one of them has a disparity
12 of striking African-American jurors over all others, 11 out
13 of 11. The only one that's close is the one that's second
14 from the left. That's the only one that's even close to
15 there not being a disparity. When you compare what happens
16 in Cumberland County as opposed to the state, these are the
17 strike rates in Cumberland County for each of the 11 cases.
18 A strike disparity of one means no disparity. There's that
19 one case that's close to one. The statewide strike
20 disparity, which is stark in and of itself, is two to one.
21 We have, in Cumberland County, eight out of 11 cases which
22 have a strike disparity greater than the already stark
23 strike disparity we see around the state.

24 We didn't stop there. We looked at the cases
25 prosecuted by Judge Dickson, who was the prosecutor of Mr.

1 Robinson. And look, if you would, at the strike patterns
2 in these three cases, Marcus Robinson: 3.5; John McNeill,
3 4.4; and Jeffery Meyer, 2.2, still above the statewide
4 average. The probability of that occurring randomly in a
5 race neutral selection process, about one in a thousand.
6 We didn't stop there. We looked at Marcus Robinson's
7 trial, his just one trial, and there was a statistically
8 significant finding only in that one trial of 3.6 in a
9 hundred. Less than four chances in a hundred that that
10 would have occurred by chance in a random race neutral jury
11 selection process.

12 We could have stopped there because those are the
13 unadjusted numbers for the state, the judicial division and
14 the county. And if the Court recalls, that's exactly what
15 they show for the Swain violation in Horton versus Zant,
16 which is the case Dr. Katz talked about. These stark
17 disparities are sufficient in and of themselves for a
18 finding of a violation of the Racial Justice Act. Ms.
19 Stubbs will talk about the effect of the prima facie case
20 and I don't mean to go into that. But researchers being
21 researchers, Professors O'Brien and Grosso decided, well,
22 let's go further. Let's see if we can find any other
23 factors that are driving these disparities, some factor
24 other than race, and that's what they did.

25 You've heard of the meticulous coding process,

1 everything they did, the model building, how they adhered
2 to the scientific principles of logistic regression. They
3 didn't throw in a hodgepodge of variables to see if they
4 could make these things go away. They complied with
5 science. That's why you see over here P values that are
6 relevant, P values that are material for this Court, P
7 values that are significant statistically. That's the way
8 you build a model. And what you see statewide and in
9 Cumberland County is a consistent odds ratio.

10 Now, the state argued, well, they keep changing.
11 They did a report in July, one in September, one in
12 December, one in January -- excuse me, February. The truth
13 of the matter is that lends itself more to the credibility
14 and integrity of the MSU study. It's not as if they
15 prepared a report for this Court and said that's my story
16 and I'm sticking to it. Yesterday, if Dr. O'Brien was
17 given a coding error that they had just caught today, she
18 would be correcting that in her database. That's what
19 people who adhere to science do and that's what she has
20 done and what Professor Grosso has done.

21 And whether you look at the July, September,
22 December or February report, there's one consistency, an
23 amazing consistency, and that is venire member being black
24 is statistically significant and the odds ratio is around
25 2.3 to 2.5. The only time -- the only time it dips near 2

1 is when you do the shadow coding, which is not a real
2 analysis. It's something that was giving the state every
3 benefit of the doubt.

4 I do want to slow down and spend a few moments on
5 the tables that we showed to the Court yesterday about the
6 individual variables that the state has indicated is
7 significant as well as table 11 from the Michigan State
8 study. We've heard -- and if the Court reviews these
9 affidavits from prosecutors, you're going to see many, many
10 times they say death penalty reservations or unemployed.
11 They don't want someone who is unemployed because they
12 don't have a stake in the community. They don't want a
13 venire member who has been accused of a crime or family
14 member who's accused of a crime.

15 So taking them at their word, we looked at what
16 would happen to the Michigan State study if we took out all
17 the people with death penalty reservations and did the
18 analysis. You know what happens? It's still more than two
19 to one. If we took out all the people who are unemployed,
20 all the people who have been accused of a crime, just took
21 them out of the analysis and did a subset, and what happens
22 is it's still two to one. What that tells us is it's not
23 death penalty reservations or being unemployed or being
24 accused of a crime that's driving these decisions. It's
25 race. That's what's driving decisions.

1 Death penalty -- there's no doubt that having a
2 death penalty reservation causes the state to strike the
3 juror. So then we look -- so we said okay, well, let's
4 look at the death penalty reservations. Of all the people
5 in the Michigan State study who had stated on the record
6 not -- I mean the words had come out of their mouth, not
7 that their skin tone makes them more liberal and they make
8 -- whatever Dr. Cronin was talking about. This is based
9 upon what the jurors said in the record. Of those, what we
10 find is the State of North Carolina finds venire members
11 who have death penalty reservations and who are black
12 acceptable less than ten percent of the time statewide. If
13 you are not black and have a death penalty reservation,
14 you're much more acceptable to the state. Same thing with
15 people accused of a crime -- venire members who are accused
16 of a crime or have a close friend or family member accused
17 of a crime, if you're black, you're much less acceptable to
18 the state.

19 So the question for this Court is, is the fact
20 that you have a death penalty reservation or accused of a
21 crime driving the decision or is the fact that you're
22 African American driving the decision or a combination of
23 both? But it's clear that it's not just these factors.
24 When you look at Cumberland County, it's even more stark.
25 For those venire members who have a death penalty

1 reservation, the state accepted less than six percent of
2 the black jurors but accepted the same statewide, about 26
3 percent of the nonblack jurors. These are all people who
4 have said I've got some problem with the death penalty or
5 articulated in the record some problem with the death
6 penalty. Same thing with venire members who are accused of
7 a crime or have a family or close friend accused of a
8 crime, blacks were acceptable 40 percent of the time,
9 nonblacks 73 or 74 percent of the time.

10 And we heard a new excuse that's more often in
11 Cumberland than the rest of the state and that is hardship.
12 If a juror has a hardship in serving, we like to strike
13 them. That's throughout the affidavits. But what we see
14 is not hardship. It's hardship and being black that causes
15 the strike because only 85 percent of the time did --
16 excuse me, 85 percent of the black jurors were struck with
17 a hardship but less than 40 percent of the nonwhite jurors
18 were struck with a hardship.

19 Yesterday during the closing, Mr. Perry said the
20 big issue was the sampling issue. That was the big issue
21 that Dr. Katz had with the study, so I feel compelled to
22 talk just a moment about that big issue. Dr. Katz said
23 that the Racial Justice Act requires analysis of all the
24 capital trials, the universal capital trials, 636 trials I
25 believe is the number, not the 173 trials, because that's

1 not a random sample. And according to Dr. Katz, that's
2 important because if that 173 subset of cases is not
3 random, then you can't generalize or articulate that race
4 or infer -- excuse me, infer those statistical results into
5 a larger population. That's his argument. We heard
6 Professor O'Brien say no. We did 100 percent of the
7 population of interest. So if the Court finds that the
8 population of interest is -- are the individuals on death
9 row who could have a cognizable claim under the Racial
10 Justice Act, the inquiry goes no further. Dr. Sommers also
11 echoed the opinion of O'Brien, that we have studied the
12 entire population of interest.

13 But what if Dr. Katz is correct? What if you
14 can't infer statistical results to the whole population of
15 capital trials if that's what's required by the Supreme
16 Court? Then we will be asking for alternative findings to
17 Dr. Katz's report. So what if Katz is correct? Well,
18 let's look to the Federal Reference Guide on Statistics,
19 page 117, which we provided to the Court before the case
20 started. This is talking about statistical inference from
21 -- drawing from a small subset of observations into a much
22 larger. Says statistical inference, whether done with
23 confidence intervals or significance probabilities, by
24 objective methods or subjective, depends on the validity of
25 statistical models for the data. If the data are collected

1 on the basis of a probability sample -- that's what Dr.
2 Katz says has to be done -- or a randomized experiment,
3 there will be statistical models that fit the situation
4 very well, and inferences based on these models will be
5 quite secure. Otherwise, calculations are generally based
6 on analogy. This group of people is like a random sample.
7 That observational study is like a randomized experiment.
8 The fit between the statistical model and the data may then
9 require examination: How good is the analogy?

10 So if Dr. Katz is correct, we submit to you that
11 this is the examination that you must do next is, how good
12 is this analogy of the 173 cases for the total number of
13 cases? We've got evidence of that. Dr. Woodworth was
14 asked about that question, about whether the 173 cases is
15 analogous to the greater population, and he said I'm a
16 statistician. That's not my role. You've got to get legal
17 experts. I defer to them for that decision.

18 So O'Brien -- Professors O'Brien and Dr. Sommers
19 said really the same thing and that is when a prosecutor --
20 it's common sense, when a prosecutor is picking a capital
21 jury, the prosecutor doesn't know the outcome yet. So
22 their motivation is the same at the time they make that
23 strike decision. There would be no difference whatsoever,
24 regardless of the outcome. There's is no difference in the
25 death cases than the cases that end in a life verdict.

1 There's no one difference in these 173 cases than someone
2 who is on death row or who's executed or died a natural
3 death. There's no -- common sense. There's no way there's
4 any difference between those two. Judge Dickson
5 essentially said the same thing. He was asked, Judge
6 Dickson, when you picked capital juries, did you treat --
7 did you do anything different based upon how the case
8 turned out? And he kind of had this puzzled look on his
9 face because it is a stupid question. He said no, I pretty
10 much did the same thing in all my cases.

11 Of all the affidavits you have in state's exhibit
12 number 32, there's not a single affidavit from any
13 prosecutor who says that they picked juries differently
14 based upon how the case turned out. There is no evidence
15 of that. The absence of evidence, remember that. Mr.
16 Colyer, in discovery arguments on September 6th, argued to
17 the Court that -- when we were trying to get transcripts of
18 all the life cases in Cumberland County, argued that they
19 weren't relevant. So on September the 6th to this Court he
20 said they weren't relevant.

21 Dr. Katz, who is not qualified to give an opinion
22 on any kind of legal analogy, still testified. Let's look
23 at what Dr. Katz did about it. We know that Dr. Katz had a
24 telephone conversation on August 24th, two weeks prior to
25 Mr. Colyer standing up to this Court arguing that the life

1 cases are not relevant, and here are Dr. Katz's notes. He
2 says population not representative of all capital murder
3 trials. Select capital trials that ended in something
4 other than death. Calculate the pass rate for those
5 trials. Is the black pass rate higher? So on August the
6 24th, he knew this was an issue, and six months and
7 \$100,000 later, we don't have a single bit of evidence of
8 any disparity between the strike rates in life cases and
9 those in death cases. So when you're judging the
10 credibility of the opinions, when Mr. Perry stands up and
11 says the big issue is sampling, the absence of any analysis
12 that they knew needed to be done six months ago is
13 compelling.

14 Now, there were -- I'm going to briefly talk
15 about some of the other criticism of the MSU study. It was
16 variables are too general, various are too broad, variables
17 are too ambiguous, too common, too -- you can fill in the
18 adjective. It's like the Princess and the Pea. Nothing is
19 going to satisfy a hired gun expert. That's what they're
20 hired to do is to come in and nitpick. Now in closing
21 we're hear for these really idiosyncratic variables that
22 are not accounted for in the analysis. They found two hung
23 juries -- two venire members who had served on a hung jury.
24 Both of them were struck and so, therefore, this is a
25 factor that wasn't in the model. It doesn't count those

1 idiosyncratic variables. It's as if you flipped a coin
2 twice and it came up heads the second time -- first and
3 second time, it would always come up heads. That's a
4 fallacy. That's what logistic regression is for is to
5 disentangle all the variables so the Court can see, is race
6 a significant factor?

7 The most important point on any argument that the
8 state makes, any argument, whether it's we failed to
9 capture demeanor or things outside the record or anything
10 of that nature, is -- I hope the Court will ask the state,
11 does that factor correlate with race? Because if it
12 doesn't correlate with race, it's not going to change the
13 black racial disparity that we see in the model. Just
14 because something is not in the model, it doesn't matter
15 unless it correlates with race. Yesterday, Mr. Perry stood
16 up and said, look in the statewide model, the variable
17 juror knew the defendant comes in the statewide model but
18 it didn't come into the Cumberland County model. Another
19 example of the failure of the model.

20 But what Mr. Perry didn't tell this Court and
21 this is in evidence and you can look at this coding, the
22 reason it didn't come into the model in Cumberland County
23 is because if you look at that variable in Cumberland
24 County, not a single venire member knew the defendant. So
25 if that is absent in total for the Cumberland County data

1 set, of course, it's not going to come in the model. Dr.
2 Katz knew that. Credibility.

3 Here's the bottom line position of the state.
4 What you're going to hear from the state, I believe -- I
5 don't mean to step on their argument but I think it's going
6 to be you can't do a statistical study. It's just not ripe
7 for statistics because there's so many decisions, so many
8 variables. You can't do a statistical study. But you know
9 what? The legislature disagreed. So this journey that
10 started back in the summer of 2009 comes to today. The
11 legislature accepted that invitation to present statistics.
12 We have presented statistics.

13 And now I want to talk about a couple things.
14 One is the absence of evidence and the meaning -- excuse
15 me, the meaningfulness of evidence. This is a page -- I
16 think it's page 28 out of Dr. Katz's report. And you'll
17 see this is where he was doing his cross-tab analysis where
18 he says 110 equals 32 times five and it's just a math
19 error. 32 times five doesn't equal 110. You didn't hear
20 me ask Dr. Katz about this little math error. And you know
21 why? It's not meaningful. We understood what he was doing
22 on the cross-tabs. That's why we presented an alternative
23 visual for the Court with all the graphs and the splitting
24 up to 90,000 subgroups. When you see an error in a report,
25 you just don't point out the error. What you do is show an

1 alternative analysis that's meaningful for the Court and we
2 hope we did that for the Court.

3 And that brings us to what is as compelling as
4 the presence of evidence in this case and that's the
5 absence. Because every single time Dr. Katz said anything
6 about our study being inaccurate, our study being wrong, he
7 never said it was meaningful. For example, Jonathan Perry
8 asked Dr. Woodworth, now, you've got gamma 30 in there
9 twice or something like that. He said, yes, that's
10 correct. That's an error. But what the next question
11 should have been from Mr. Perry was, well, if you corrected
12 that error, would it have changed the results in your
13 study? But that question wasn't asked and the reason it
14 wasn't asked is because it wasn't meaningful. It wasn't
15 material for this Court. The same reason we didn't ask Dr.
16 Katz about his math errors because everybody makes
17 mistakes. The question is, are the mistakes relevant for
18 this Court?

19 What's most notably absent in this case are two
20 things. One is -- I practiced law for over two decades and
21 I have never in my career heard an expert witness say I
22 formulated an opinion based upon conversations with
23 individuals, in this case, prosecutors around the State of
24 North Carolina. And, I said, oh, really? Did you take
25 notes of that? No, I didn't. Why not? Well, I knew we

1 were under a discovery order so I didn't want to take notes
2 because they would be turned over to Mr. Robinson's
3 lawyers. I've never heard an expert who is adhering to
4 scientific principles say anything like that.

5 So when you judge the credibility of Michigan
6 State University with all of its transparency, you've got
7 everything we've got about that study, everything they've
8 got about that study with an expert who purposefully hides
9 evidence from the Court, who purposefully hides evidence
10 from Mr. Robinson. You've got to judge those
11 credibilities, and we are specifically -- specifically
12 contending to this Court that this Court should make a
13 finding of fact that Dr. Katz's analysis is not credible.

14 Now, I want to tell you the most notably absent
15 thing is the question that was not asked by the state of
16 Dr. Katz. And that is, Dr. Katz, do you have an opinion as
17 to whether race was a significant factor in the exercise of
18 peremptory strikes in North Carolina at the time of Marcus
19 Robinson's trial? It wasn't asked. Dr. Katz, do you have
20 an opinion as to whether race was a significant factor in
21 the exercise of peremptory strikes by the prosecutors in
22 Cumberland County at the time of Mr. Robinson's trial? It
23 wasn't asked. The absence of those two questions leaves
24 the study of Michigan State with no alternative analysis,
25 no alternative explanation, nothing. This is what they've

1 got, affidavits in a three-ring binder by prosecutors.

2 I submit to you that while the absence of those
3 two questions is silence, the magnitude of that silence is
4 reverberating in this courtroom today, and we ask the Court
5 to find that the Michigan State study is relevant, is
6 statistically significant and valid. Thank you, Your
7 Honor.

8 THE COURT: Okay. Mr. Hunter, I understand
9 you've got the next argument, sir?

10 MR. HUNTER: Yes, Your Honor.

11 THE COURT: Okay. As everybody is aware, the
12 press has made a request to place microphones accordingly.
13 So where -- pardon me. Where will you be arguing?

14 MR. HUNTER: I'm going to be here, Your Honor,
15 and then I'm going to brave that machine up there and I'm
16 going to go put some things on the Elmo and show -- show
17 them to you, Your Honor, and then I'm going to come back
18 here, so I'm going to be two different places.

19 THE COURT: I've already indicated to members of
20 the press that if they need to adjust the microphones, they
21 will be able to do that. Anybody want to be heard?

22 MR. HUNTER: I've been told, for better or worse,
23 that people can usually hear me.

24 THE COURT: Okay. Yes, sir. You may proceed
25 with your argument, Mr. Hunter.

1 NEWS LADY: They are fine.

2 MR. HUNTER: Your Honor, I want to start out
3 making what I hope is an obvious point but I think it's a
4 point that perhaps isn't clear to everyone. This is -- we
5 are not making personal attacks on anybody, although in
6 part, I am going to talk about specific prosecutors in part
7 of my presentation. But I think we are all convinced -- I
8 think our experts are convinced that this is not a personal
9 problem of some bad individuals. This is a systemic
10 problem that we have. And I think when we look across all
11 the data county after county, this isn't about Cumberland
12 County. This isn't about Mr. Colyer. This isn't about Mr.
13 Dickson. This isn't about whether any of those people are
14 good people or bad people.

15 This is about what has happened for more than 20
16 years and we're all responsible, defense lawyers, judges,
17 prosecutors, the public, we're all responsible for what has
18 happened. And Cumberland is no different, as Mr. Jay
19 Ferguson has already shown, than the vast majority of
20 counties in North Carolina. We aren't here because
21 Cumberland is the worse or the -- or anything like that,
22 but there's a problem in Cumberland County. There's a
23 problem in North Carolina and it needs to be fixed and I'm
24 satisfied it's not going to be fixed until there are
25 consequences for that behavior.

1 Professor Stevenson testified that the history of
2 African Americans trying to have a meaningful role in the
3 courtroom as -- as jurors and otherwise, that history has
4 always been one of resistance by authority and it's
5 continuing through to today. It's resistance to meaningful
6 African-American participation.

7 Now, Judge Trosch testified that nine-tenths of
8 our biases are beneath the surface, like that iceberg that
9 he had on his -- on his presentation. And Professor
10 Sommers testified that while overt and explicit expressions
11 of racial bias are generally disapproved in our current
12 society, and that, of course, is a good thing, there is a
13 wide body of research -- this is not a disputed -- this is
14 not controversial as a scientific matter. There is a wide
15 body of research concluding that race still has a huge
16 effect on how we, me, you, the state, the folks out here in
17 the audience, make decisions. It's not a legal issue.
18 It's a human issue. It's still here.

19 And Professor Sommers -- incidentally, Professor
20 Sommers has done all of his research. Professor Sommers
21 has done all of his studies. He never heard of the Racial
22 Justice Act. This was all an independent body of research
23 that Professor Sommers has been doing for years that had
24 nothing to do with this litigation. We found him. We were
25 delighted, of course, to have him, but he did not do

1 anything for us except read the Michigan State study, read
2 Katz's study and brush up in order to come here and
3 testify.

4 Now, in addition to Dr. Sommers saying what I
5 think is probably obvious to everyone who has lived in the
6 world for a while, that race still makes a difference in
7 the way we make decisions, he also had a second important
8 point and that is if you want to find out whether race is
9 operating in somebody's decision, if you ask that decision
10 maker whether race played a role, you're not likely to get
11 very good information from that person. That's not because
12 prosecutors are liars. That's not because we're -- that's
13 just because we're all human and we don't like to talk
14 about race and I think we kid ourselves a lot of times and
15 say we're making decisions that race is not having anything
16 to do with it.

17 So again, I'm not casting any aspersions. We're
18 all part of -- of humanity and that's where we are right
19 now. Things are better than they used to be. These
20 outward and overt expressions of race discrimination are
21 now disapproved. And when I was a little boy, that wasn't
22 true. So, you know, hurray. We're doing better. But
23 people don't want to admit that race is influencing their
24 decisions. And it's likely -- and I think again this goes
25 to what Judge Trosch also testified -- that people aren't

1 entirely aware. And I think John Dickson admitted this in
2 his testimony, that they aren't entirely aware of how race
3 is operating.

4 Doctors -- I just want to call your attention
5 again to Dr. Sommers's paper on race based judgment, race
6 neutral justifications, which is defendant's exhibit 15,
7 where he did an experiment with -- with college students,
8 law students and also lawyers and sets it up in a way where
9 race was the only difference -- race was the only
10 difference in that case. There is no extraneous
11 idiosyncratic reasons out there in this case and race made
12 a difference. It made a difference, not because those
13 people who participate in that study were evil but because
14 they are human and that's where we are right now.

15 And then he did another thing is he asked people
16 afterwards, well, why did you decide this way or that way?
17 And he testified almost no one recognized or admitted, he
18 doesn't know which one, that race in fact played a role.
19 What -- is that because all of these people are liars?
20 It's because we're human. It's because right now we don't
21 want to recognize that race is playing a role, if in fact
22 it is playing a role.

23 Now, the Supreme Court has recognized that race
24 can influence -- our U.S. Supreme Court has recognized that
25 race can influence jury selection in a series of decisions

1 over the years, Batson and its progeny being the most
2 recent example. Professor Stevenson testified and
3 expressed concern that it seemed like the training that
4 people were receiving about Batson was not, okay, let's
5 figure out how we can avoid these biases. Let's figure out
6 how we can include everybody in our juries and make sure
7 that we're not consciously or unconsciously excluding a
8 portion of the population by our jury strikes and let's
9 learn about that. And, in fact, Judge Trosch has a program
10 where he's going around and talking to judges and other
11 people to try and do those sorts of things.

12 But that's not the training that we have had here
13 in North Carolina. And I just want to give a little
14 example of that that I think supports Professor Stevenson's
15 concern and I'm just going to run through this very
16 quickly. And, Jay, if you'll turn on the -- ready?

17 MR. JAY FERGUSON: Yes.

18 MR. HUNTER: Judge will recognize this. This is
19 defendant's exhibit 16. If you look in the bottom
20 left-hand corner, it says Top Gun II, jury voir dire. If
21 you look at the top, that was the marking on it when we
22 received it from the D.A.'s Conference. It says, Capital
23 Case Seminar, July 1995. And then I've got CL history --
24 CLE history. We talked about this yesterday. This is for
25 Margaret Russ, who used to be an assistant district

1 attorney here. This is the first page and it shows her CLE
2 from 1990 through 1994. I'm going to turn the page over.
3 Here's 1995, and I think you will see right here, there she
4 was. She's at Top Gun II, trial advocacy course. Now we
5 don't know if she went to the jury selection but let's see.
6 I'm going to put up a different -- I'm going to put up a
7 different -- this is the same as the defendant's exhibit
8 but I have marked this one up and emphasized some things.
9 And, Your Honor, I'm going to give you, if I may approach
10 the bench --

11 THE COURT: Yes, sir.

12 MR. HUNTER: -- a copy. Let me make sure I
13 didn't give you the one that I have marked, Your Honor.
14 And I have so I will give you a different one. There you
15 go.

16 THE COURT: Okay.

17 MR. HUNTER: Mr. Colyer.

18 MR. COLYER: Thank you, sir.

19 MR. HUNTER: And this is already in evidence,
20 Your Honor. This came into evidence as part of Professor
21 Stevenson's testimony, and I'm going to leave up this
22 Batson justifications and I think this was actually later
23 used in statewide district attorney training with David
24 Spence but it was originally from the Top Gun program that
25 Ms. Russ testified (sic) to. So now I've got the

1 transcript of a jury selection in the Maurice Parker case
2 here in Cumberland County and if you'll turn to page 444,
3 Your Honor -- and I'm going to skip around a little bit and
4 if I've mischaracterized it, you have the whole transcript.
5 This is argument and I'm sure the other side will point it
6 out. And so on page 444, Ms. Russ is saying the first --
7 she's asking to peremptorily excuse an African-American
8 juror. She says, The first concern that the state has is
9 the defendant's age as compared to this juror's age. That
10 was a consideration of the state. And I think you can see
11 up there, Your Honor, age is number three on the list.
12 That was a consideration.

13 Some other considerations that the state had were
14 body language. And, Judge, I think you can see that's
15 number five up there on the list. And she goes onto say,
16 The body language of the juror was important to the state
17 on several occasions and most notably to the state perhaps
18 is the -- when I started to talk to him about the death
19 penalty issue, he folded his arms and sat back in his chair
20 away and kept his arms folded. And if you'll read a little
21 more, arms folded, leaning away from the questioner. Some
22 closing of his eyes and blinking and holding back at that
23 point on the issue of the death penalty was also noted by
24 the state and we also actually made a note about that body
25 language. And then she goes on, He seemed at points to us

1 evasive. And if you drop down, see, she's -- she's
2 following right down this list if you drop down to juror
3 responses under evasive. When I asked him a question, he
4 would respond with a question.

5 And then if you would just flip to 447, we don't
6 have time to go through every page of this. And she says,
7 Judge, just to reiterate, those three categories for Batson
8 justification -- she uses that phrase. Now, I'm not sure
9 that's a phrase we've heard in two and a half weeks here,
10 that Batson justification, but there it is in the title of
11 that presentation. Those three categories for Batson
12 justification we would articulate is the age, the attitude
13 of the defendant (sic) and the body language.

14 And here comes the Court, You are aware, Mr.
15 Sellers -- this was another white juror who was in the same
16 box -- has the very same birthday as this -- as this juror?
17 Now, I -- I've got to give Ms. Russ some credit here, Your
18 Honor. A lot of lawyers, I think, would lose their
19 confidence at that point but she says, Well, I said that's
20 one of the factors, the body language and the attitude,
21 which are Batson justifications, articulable reasons that
22 the state has relied upon.

23 And then I'll flip to page 449, Ms. Russ again,
24 Judge, as I understand Batson, the state has to articulate
25 race neutral reasons for their decision. We have not

1 suggested that age alone was a reason at all but we said in
2 combination with the body language that I clearly observed
3 from here of the folded arms and so on which are very
4 classic examples of body language that are negative and the
5 attitude that we discerned in his expressions. And then
6 down to the last line of that page, But as I understand it,
7 as long as the state can articulate race neutral reasons
8 for their decision, they have met -- that we have met our
9 burden.

10 And then -- so the judge, he listens to this and
11 the judge says, I tell you what. If you're going to cite
12 me something regarding his body language, I want to see
13 some law on it. And here's what Ms. Russ says -- this is
14 on page 452, Your Honor -- Judge, I have the summaries
15 here. I don't have the law with me. I hadn't anticipated
16 this, of course. For articulable jury negatives and body
17 language, arms folded, leaning away from the questioner are
18 some of the things -- she didn't have the law but she had
19 the summary with her.

20 And I think just what Professor Stevenson
21 predicted is what happened in this case, that this is being
22 used to cover up pretextual excusals of African-American
23 jurors. And I'm not picking on Ms. Russ. I do not believe
24 Ms. Russ is a bad apple in this. As a matter of fact, I
25 believe a judge has already testified to her good character

1 in terms of this kind of conduct. The judge, by the way,
2 did find an intentional race discrimination and a Batson
3 violation in this case.

4 So -- and our position -- and I think it's been
5 characterized that our position is that our experts say
6 white people don't like black people and, therefore, white
7 people excuse black people more than they should. And they
8 say, well, what about the defense lawyers? They're mostly
9 white people and they're not eliminating -- they're not
10 eliminating black people. So all this stuff you've got
11 about race playing a part or implicit bias, that must be
12 wrong. But that -- I think both sides, Your Honor, are
13 relying on stereotypes. I think -- and those stereotypes
14 are that black people aren't as concerned about law
15 enforcement, that black people aren't as tuned into the
16 authority figures of the state. Both sides -- both sides
17 are operating from stereotypes -- racial stereotypes and --
18 and it's wrong on both sides. I would say that. And, in
19 fact, we have -- we have introduced some affidavits from
20 some defense lawyers and former prosecutors who acknowledge
21 that that's -- and I don't think that statement would
22 surprise any person who has participated in jury selection
23 over the last 20 years.

24 And if you go and look again at Dr. Katz's single
25 note from a conversation he had with a prosecutor in North

1 Carolina before he stopped taking notes, you can see right
2 there when they are discussing this case, women over 50
3 tend to be sympathetic. Now, if Mr. Thompson said that, I
4 will forgive him. As he gets older and is better
5 acquainted with women who are over 50, he may move that
6 number. But I think that's referring -- perhaps he's
7 thinking about his mother or his grandmother. They are
8 sympathetic. Women 50 tend to be sympathetic. Here's
9 another one. We want jurors who can relate to the victim.
10 We already know who the -- what the race is of the great
11 majority of the victims of cases that are actually tried
12 for death are. The great, large majority, of course, are
13 white and so they are looking for jurors who can identify
14 with the victim.

15 One thing I didn't mention and I want to go back
16 to is what happens -- and I think John Dickson testified a
17 little bit about this. What happens when there's a Batson
18 violation in the office? And Mr. Colyer on September 6th
19 -- and I'm looking at pages 86 -- page 86 of the transcript
20 of the proceeding in this case. We were asking again for
21 discovery. We wondered if there was a log, Mr. Hill said,
22 or any record of Batson violations in the office, we wanted
23 it. And here is what Mr. Colyer said. He said, Let me be
24 as transparent as I can be. I've been here for almost 28
25 years. I'm not aware of any such log, any supervisory

1 entries, any chastising, anything that dealt with
2 documenting anything in particular or in general about such
3 a challenge, talking about Batson challenge in a particular
4 case. So that's the response of the office. They don't
5 have a response when these things happen. Again, I'm not
6 picking on Cumberland County. I think that is very likely
7 true all the way across the state.

8 I did want to bring Your Honor -- I have another
9 affidavit. We were talking about stereotypes about women
10 and, of course, Dr. Katz told the prosecutors that he did
11 not want them to be giving them any race reasons and this
12 particular prosecutor -- this is from Gregory Butler. This
13 particular prosecutor says here he was not using race. He
14 was using gender. Apparently the training on Batson in the
15 D.A.'s Association has not extended to where they realized
16 that's also unconstitutional. And he says -- Viola Morrow,
17 she was excused. He said, I was making a concerted effort
18 to send male jurors to the defense as they were taking off
19 every male juror. So we have an admission here of a
20 different kind of a Batson violation but they were told not
21 to use race and so, dutifully, they did not.

22 These affidavits -- and now I'm going to bring up
23 to Your Honor, if I may -- and I gave the state a copy of
24 these yesterday. Let me make sure I give you the right
25 copy and don't leave myself without any. These are

1 exhibits 82 through 96 and I held Your Honor's copy. The
2 Court has a copy. The state has a copy and I'm just
3 handing you those now because I'm going to be talking from
4 those for a few minutes. One of the things the state has
5 said in this case is all we have are numbers. They have
6 facts. We have numbers. Well, every one of those numbers
7 represents a fact or several facts and, more importantly,
8 represents a person. So I thought it would be worthwhile
9 for just a few minutes to sort of let you see the facts
10 underneath some of these -- some of these numbers. And I
11 have given you about 15 cases. I am only going to look at
12 five. I may cut it off before five if I'm running long,
13 Your Honor. But you have them all. They are in evidence.
14 You can consider them whether I talk to you about them or
15 not.

16 And I want to start with a case from Marcus
17 Robinson's case. This is D84, Your Honor. This is a black
18 juror, Nelson Johnson. It's an affidavit that Mr. Colyer
19 produced and here's what it says. It says as to Nelson
20 Johnson, juror number five, said he would require -- here
21 is why the juror was struck. Because the juror said he
22 would require an eyewitness and the defendant being caught
23 on the scene in order for conviction. And you'll remember
24 Judge Dickson testified about this too and Judge Dickson
25 noted, Well, we really don't usually have cases like that

1 so we don't want a juror who's going to require that there
2 be an eyewitness and a defendant being caught on the scene
3 in order to convict somebody. Sounds pretty reasonable to
4 me.

5 Now let's look at the transcript and, again, I'm
6 going to skip around a little bit. On 1786, the juror is
7 identified as Nelson Johnson. I will represent to the
8 Court Mr. Johnson is an African American. Now I'm turning
9 to 1794 and here goes Mr. Dickson, Okay. In a first degree
10 murder cases, if a jury does find the defendant guilty, the
11 jury also has to decide what punishment he would received.
12 And under our law, there are two possible punishments. Do
13 you know what those are? The juror, Death penalty or life
14 in prison. Okay. Do you have any feelings or beliefs
15 against the death penalty as a punishment? No. If they
16 did it and it wasn't self-defense, just to be killing
17 somebody, then I think they should get the death penalty.
18 Okay. What do you think about life imprisonment as a
19 punishment for first degree murder? Well, yes. Well, it
20 could be life in prison. I have no objection about it.
21 Have you given much thought to punishment, either life
22 imprisonment or the death penalty? Have you ever spent any
23 time thinking about that or talking to people about it?
24 No. No, I haven't. Let me see, I've never been in a
25 situation where I had to do that before. Mr. Dickson

1 answers, Very few people have. It's not something that
2 people do on a regular basis.

3 And then he goes off asking about whether the
4 defendant (sic) can read and so forth and I'll skip that
5 but the defendant (sic) says he certainly can read. Do you
6 personally think that you could consider the death penalty
7 as a punishment? The juror says, Like I say, it depends on
8 what the case comes out. Mr. Dickson, When I talk about
9 first degree murder, I'm talking about a case that -- it's
10 got to be one -- let me say this. Are you familiar with
11 the terms premeditated and deliberate? Yes, sir. That's
12 one kind of first degree murder. That's a murder that's
13 sort of planned or thought out. It may be for a very short
14 period -- and then he goes on to talk about felony murder.
15 And he asks the juror, Do you understand that? Yes, sir.
16 So when I'm talking about first degree murder, that there's
17 no question of self-defense, there's no question of
18 accident or misadventure -- yes, sir. It's just a cold
19 killing. Cold murder, the defendant (sic) says.

20 THE COURT: I'm sorry. You said the defendant
21 says.

22 MR. HUNTER: The defendant -- I'm sorry, the
23 juror says, Cold murder. Mr. Dickson says, Okay. And the
24 juror nods up and down. How do you feel or what kind of
25 feelings do you have for life imprisonment for that kind of

1 murder? Well, if you take a life, you have to give -- I
2 mean, if you take a life for that reason, you need the
3 death penalty I think. Do you -- and then onto the next
4 page, Do you feel that the death penalty is the appropriate
5 punishment for those kinds of cases? Yes, sir. Or that
6 the death penalty is a proper punishment? Here the juror
7 says, It will make people think twice for that kind of
8 action -- taking that kind of action. Do you feel that in
9 all cases of first degree murder that the death penalty is
10 the proper punishment? The juror answers, Just downright,
11 cold-out murder, robbery, stealing, murder like that?
12 Well, the types I talked about just a minute ago. Do you
13 think that the death penalty is always the appropriate
14 punishment for that kind of murder? Yes. If they prove
15 that he did it beyond a reasonable doubt, yes. I'm sorry,
16 Your Honor. I didn't understand what he said. Mr.
17 Johnson, could you speak a little bit louder for us. And
18 then the juror repeats -- he's asked to repeat what he said
19 before and here's what he said. Yeah, if they prove he
20 done it beyond a reasonable doubt and he was there and
21 someone seen him do it and they caught him on the scene,
22 yes.

23 So now they're sort of -- there's a new issue and
24 it's elaborating about this. You know, he has given an
25 example of a case where it was a very strong case. And so

1 I could -- I could think of a prosecutor to say, well, wait
2 a minute, you're not saying we have to have that in order
3 for you to be satisfied, are you? You need to explain that
4 to us, Mr. Juror, a little more. Here's what Mr. Dickson
5 did, Thank you very much. I have no further questions.

6 We submit, Your Honor, he got the answer he
7 wanted. He had the excuse he wanted and then he
8 immediately challenged the juror for cause and that was
9 denied and then he exercised a peremptory. I -- I contend
10 you cannot read this and find that the juror said that he
11 would require that evidence. He was just giving an example
12 of the kind of evidence where he would be satisfied. If
13 the state wanted to know whether he would require it, they
14 could have asked. They didn't want to ask. They wanted to
15 get rid of him. And it wasn't because of any of his
16 answers because, from what I've talked to you about, this
17 guy was very strong in favor of the death penalty and yet
18 he is gone. No judge ex mero motu interrupts him. No
19 tiger-like defense lawyers complaining. Next juror.
20 Nothing happened.

21 The next case I want to talk about is the Jeffery
22 Meyer case and, again, the affidavit is done by Mr. Colyer
23 and this is Randy Mouton, and he said he had financial
24 concerns about serving as a juror and losing money because
25 his child support payments had increased. And there was

1 testimony by -- and he admitted he had been to court
2 recently and they increased his child support and so he's
3 asked is there anything about his experiences with the
4 court system and I'm on -- let's see. I don't see a page
5 number on here, Your Honor. Yeah, I think the pages are
6 cut off. But Mr. Dickson said, Is there anything about
7 your experiences with the court system that would affect
8 your ability to be fair? No, other than they need to pay
9 you a little bit more for child support. Paying that each
10 week, coming up here. Mr. Dickson says, Let me ask you,
11 understanding that this case, in all likelihood, would not
12 finish this week, is that likely to work a financial
13 hardship on you that would get you in trouble with the
14 court system otherwise?

15 So here's Mr. Dickson very sympathetic to this
16 juror's plight and actually suggesting that if he's serving
17 on a jury and unable to work because of that, that he would
18 still be in trouble with the court. He would be -- that's
19 Mr. Dickson's suggestion that he inserts in there, that he
20 would be in trouble with the court if, because of his jury
21 service, he didn't have income adequate to pay his child
22 support. And then Mr. Dickson goes on, There's a provision
23 in our law which allows for jury's fees. I can assure you
24 it's not a princely sum. But do you think, even knowing
25 that, that would work such a hardship on you that it would

1 affect your ability to sit on this case? And the juror
2 says, Yes, because it's coming out of my check. And if
3 they don't get it by the 21st of each month, whether I miss
4 a day or not, then it's my responsibility to make sure it's
5 in there. Mr. Dickson, Understanding that it would be a
6 financial hardship on you, okay? The juror says, Um-hmm.
7 Mr. Dickson, Do you feel that that situation would affect
8 your ability to sit on this case and base a decision on the
9 evidence you hear and see in the courtroom? Juror, No.
10 Okay. One is apples. One is oranges here. Okay. It's
11 sort of -- the juror nods his head up and down. Even
12 though that would be a hardship, you could not let that
13 affect your ability to sit here; is that correct? That's
14 correct. So the juror has very clearly said that yes, it
15 would be a hardship but I won't let it affect what I do
16 here. And, of course, that juror, who was an
17 African-American male, was excused.

18 And now we'll turn to the same case and this
19 juror is -- Mr. Miller is juror number five and I
20 apologize, Your Honor. I don't seem to have copied the
21 page numbers. But juror number five, who is Mr. Miller,
22 who I represent is a white male, he's asked, Mr. Miller, if
23 you were to sit on this case, understanding the nature of
24 the charges and the decision that the jury in this case is
25 going to make, do you think that you could be fair both to

1 the defendant and to the State of North Carolina? Mr.
2 Miller, Yes. Yes, sir, I do. Ah, I would be very frank
3 and upfront with you. I probably am not going to have all
4 my total thoughts here because I've got a lot going on at
5 work right now because I'm going through an operational
6 readiness inspection, and with the world's situation
7 happening in Kuwait right now, I'm drumming up for that
8 stuff too so that's a possible factor too. Mr. Dickson,
9 Yes, sir. But I am in charge of all the air lift that goes
10 on out there. Mr. Dickson, None of us can tell you what is
11 or are not going to happen out at Fort Bragg with that.
12 Juror number five, Right. But I have to plan for it. Mr.
13 Dickson, Yes, sir. All we can ask is that you give your
14 best effort. Do you think you can do that? That juror, of
15 course, was kept.

16 So there's two jurors. Both of them said there
17 would be difficulties if they were not (sic) allowed to
18 serve and that's why you see the four-to-one ratio on
19 hardship with these jurors in Cumberland County because
20 hardship, we submit, is being used as a pretext to get rid
21 of jurors that they don't want for other reasons and I
22 think the reason in this case is race.

23 I'm just -- very quickly, the next case I want to
24 look at is defendant's 86. It's Christina Walters. The
25 affidavit says that her brother in New Jersey had been

1 charged with armed robbery ten or 11 years ago -- ten or 11
2 years before and he was out now and she said, quote, There
3 wasn't a fair trial for her brother that she was pretty
4 close to. I'm not going to go through it, Judge, but if
5 you read that transcript, she never says there wasn't a
6 fair trial. She says he pled guilty. She said there was
7 no trial at all. They asked, Did you think it was handled
8 appropriately? She says, Yes.

9 So here's a juror -- and this is an affiant who I
10 believe whose honesty and integrity I don't question and
11 who judges have testified is honest, but this affidavit,
12 although it will be forever, is incorrect. She didn't say
13 that he didn't get a fair trial. She said he pled guilty
14 and that it was handled appropriately. Those are pretty
15 different accusations.

16 Jay Whitfield is a juror and this is in the
17 Christina Walters case. This is another affidavit from Mr.
18 Scott. He says Jay Whitfield was 21 years old and knew
19 some gang guys from playing basketball, and that's pretty
20 much it. He said he went out and played pick-up basketball
21 games in the neighborhoods in Fayetteville and that some of
22 the guys he played basketball with would talk about stuff
23 and gave him the impression maybe they were in gangs. But
24 Mr. Whitfield didn't really -- wasn't involved with them,
25 wasn't involved with the gangs, didn't know anything about

1 the gangs. He was an African-American male. He was
2 excused.

3 And then in the same case -- and I know there
4 were gangs involved in that. In the same case, there was a
5 juror who was not African American and who testified that
6 she also knew people who had been involved in gangs. She
7 said, I've met people at parties and so forth, being in
8 high school -- I'm on page 392. I've known people who have
9 been in gangs but nobody close to me. Okay. And then the
10 juror says, And in basic training, I was good friends with
11 a girl who was in a gang. Okay. What gang was she in?
12 The Crips. And you were good friends with her, did you
13 say? Just for the time, because it's basic training so you
14 bond with your bed buddy. Not an African American.
15 Passed.

16 Now, I have no doubt the state can explain -- I
17 could go through this all day. And once you pile these up,
18 these discretionary decisions are being made in case after
19 case after case and they are always being resolved or
20 almost always being resolved in favor of the elimination of
21 African-American jurors and in favor of keeping
22 nonAfrican-American jurors. You know, these affidavits are
23 almost self-impeaching for the reasons Jay Ferguson has
24 already talked about. They weren't even set up to be an
25 actor and look at this. They were set up only to try and

1 show that the state could come up with nonracial reasons.

2 And I will submit, Your Honor, you give me all
3 7,400 of the jurors in this study, I can find a nonracial
4 reason to eliminate every single one of them if -- if you
5 will just use any characteristic you want. And I will --
6 to give you an example of that, and since the state has
7 talked about idiosyncrasy, I want to talk about one more
8 juror, also from Christina Walters. This was a black
9 juror, Sean Richmond. This is D-88, Your Honor.

10 THE COURT: Okay.

11 MR. HUNTER: And here's the reason Sean Richmond
12 was eliminated according to the affiant. Sean Richmond did
13 not feel like he had been a victim even though his car had
14 been broken into at Fort Bragg and his CD player stolen.
15 Now, I'm turning to page 274 of the transcript. And so she
16 had asked a general question were people victims -- had
17 they been victims of a crime and this juror, the African
18 American, said he had. And she says, You too indicated
19 you've been a victim of crime ; is that right? According
20 to the MP's, when I was gone to Fort Lee last month for a
21 thing on water purification units, somebody had broke in my
22 car and stole my CD player. As far as they are concerned,
23 they gave me this little pamphlet saying, quote, if you're
24 the victim of a crime, end quote. They gave me a number
25 for a trauma center but I didn't feel like I was the victim

1 of a crime but that's what they said so -- and Ms. Russ
2 interrupts and says, So you didn't feel like you were the
3 victim of a crime that needed to have any counseling or
4 anything? And he says, No. That's obviously what he's
5 saying. And she says, I presume from the way you answered
6 that question, so correct me if I'm wrong, that there's
7 nothing about that situation as you evaluate it that would
8 enter into your decision making process here that might
9 cause you to be unfair to either side. Is that accurate?
10 Yes, ma'am.

11 That exchange where he said his car was broken
12 into, they automatically gave him his pamphlet so he could
13 go get counseling if he needed counseling as a result of
14 the trauma of having his car broken into, he said I don't
15 really feel like I need that, that was the reason for
16 eliminating that African-American juror. The only -- well,
17 the only nonracial reason, Your Honor, because that's all
18 the affiant was asked to give. I mean this is a classic
19 pretext. Nobody objected. The judge didn't ex mero motu
20 rule. So that's supposed to be proof that this isn't going
21 on? It's going on all the time.

22 And I will stop just because of time, but I have
23 given Your Honor additional cases and there are more after
24 those. And let me just give you a final fact before I sit
25 down. Almost every black juror who was excluded by the

1 state, if they were asked whether they could be fair to
2 both sides, said yes, they could be fair to both sides.
3 And that's the critical decision that the person who's
4 selecting this jury has to make is, do I believe that juror
5 when they tell me they're being fair? And so the decision
6 that's being made -- and it splits down starkly racial
7 lines -- is whether to credit what that juror says. And I
8 would say this comes back to what Rob Thompson and the
9 single note we have from a conversation with a prosecutor
10 where he talks about it and right here, Your Honor, it
11 says, Does past discrimination help explain why -- why
12 blacks are less accepting of all law enforcement testimony?
13 That's the stereotype. That's the stereotype. And this
14 has been flipped around and so the idea is they don't trust
15 us, so you know what? We don't trust them. Thank you very
16 much, Your Honor.

17 THE COURT: Yes, sir. Folks, we're going -- 15
18 minutes okay, ma'am?

19 COURT REPORTER: (Nodding head.)

20 THE COURT: 15-minute recess. We'll come back
21 and complete the opening portion of the defendant's closing
22 argument, Ms. Stubbs. Thank you. That's 25 till by the
23 clock on the back wall. Thank you, folks.

24 (Recess taken.)

25 (The following proceedings continued in open

1 court. The defendant, defense attorneys and state's
2 attorneys were present.)

3 THE COURT: Okay. Let the record reflect all
4 counsel are present. The defendant is present. I think
5 the question, Ms. Stubbs, is where you will be arguing from
6 so that they can reposition their microphones if that's
7 necessary.

8 MS. STUBBS: Your Honor, I'll be here.

9 THE COURT: Okay. Anybody need to make any
10 adjustments?

11 (No response from media.)

12 THE COURT: Okay. Apparently not. Yes, ma'am,
13 Ms. Stubbs.

14 MS. STUBBS: Thank you, Your Honor. May I
15 approach?

16 THE COURT: Yes, ma'am.

17 MS. STUBBS: It's just a copy of the PowerPoint.
18 If it please the Court, Your Honor, I would like to talk
19 with you this morning in the third and final part of our
20 opening and closing arguments about the Racial Justice Act
21 itself and the law. Clearly it's a landmark new law. It's
22 clear to all of us that it confirms new protection, but as
23 we have all acknowledged over these last couple weeks,
24 there are open questions about the law. So for this
25 portion, I would invite the Court, if you have questions --

1 I'm going to try to share with you what we believe the law
2 to stand for and what we believe the law is and then I'm
3 also going to try to share with you that we think, under
4 any plausible interpretation, our evidence is sufficient
5 such that we should prevail. But if you have any questions
6 at any point, I would encourage Your Honor to ask them now
7 because really this is our opportunity to have a dialog
8 with you about this new law and this first case under the
9 Racial Justice Act.

10 THE COURT: Okay.

11 MS. STUBBS: And so I thought we should start
12 with the text of the law itself and I've highlighted here
13 in bold on this slide and the next slide several of the
14 provisions that I am going to go through this morning.
15 This is section, 15A-2011, which is proof of
16 discrimination, so this is where the Racial Justice Act
17 talks about what is going to be proven. And we've talked
18 already about the fact that the Racial Justice Act allows
19 for statistical evidence which, of course, in the context
20 of charging and sentencing, those kind of claims that we
21 are not here about today, that's a landmark and watershed
22 addition. Under McCleskey, statistical evidence was not
23 sufficient and now statistical evidence is.

24 But in the context of Batson, the mere use of
25 statistics is not watershed. We always -- when we made a

1 Batson objection, we would stand up and say the state has
2 used three of their last four peremptory strikes. We have
3 always -- they have always had a place in this area of the
4 law. What's new and what's very different and important is
5 the use of statistics together with the -- with the new
6 geographical boundaries, jurisdictions that are set out by
7 the law.

8 So if you look under subsection (a), it says that
9 a finding of race may be established if race was a
10 significant factor in the county, the prosecutorial
11 district, the judicial division or in the state. And
12 that's what's new. And -- and that -- we believe and I'm
13 going to argue to the Court that together, those provisions
14 suggest that there is no -- we're not under discriminatory
15 intent anymore. We're under a disparate impact model, that
16 those two work together in that way. And -- and just to be
17 clear, I am going to refer throughout today interchangeably
18 with the county and the prosecutorial district because, of
19 course, here in Cumberland, they are one and the same,
20 although for other cases, those obviously could be
21 distinct.

22 Then the next important provision is subsection
23 (3) there where it -- under (b) where it says evidence
24 relevant to establish a finding includes statistical
25 evidence or other evidence if one or more -- if one or more

1 of the following applies, (3), race was a significant
2 factor in decisions to exercise peremptory challenges. And
3 that focuses our inquiry there for the entire case. The
4 single question is whether race was a significant factor
5 and that again we think is evidence of the fact that the
6 Racial Justice Act does not require intent. It does not
7 say that prosecutors intended or purposefully discriminated
8 in their exercise of peremptory challenges. It's just race
9 was a significant factor.

10 The best analogy we believe based on this
11 structure is the disparate impact from employment cases.
12 These are under Title 7 in the field of employment law. A
13 plaintiff may show that a neutral practice had an adverse
14 disparate impact on a protected group. And it's clear that
15 that's regardless of motive or regardless of purpose, and
16 that's important because that makes clear that the Racial
17 Justice Act involves both conscious as well as unconscious
18 bias. And we've had really uncontroverted testimony -- the
19 state's own witnesses, including Judge Dickson, who was the
20 prosecutor in Mr. Robinson's case, stood up and said, of
21 course, I'm affected by unconscious bias. We're all
22 affected by unconscious bias.

23 The expert testimony by Dr. Sommers went utterly
24 unrefuted on this point, that we are all making decisions
25 and are informed by unconscious biases and those are -- and

1 those form part of our proof under the disparate impact
2 model. But we also have introduced evidence of conscious
3 bias and I want to just be clear about what we mean when we
4 say we introduce evidence of conscious bias. As Mr. Hunter
5 already pointed out this morning, we're not talking about
6 racial anarchy. We're not talking about prosecutors who
7 are making statements that the media -- that someone would
8 characterize as a racist statement. What we're talking
9 about are statements that are generalizations. Statements
10 that begin with, I struck black jurors because -- and then
11 used some generalization. And not only do we see this in
12 the transcripts and different places, we've heard it from
13 the prosecution through this hearing and we've heard it
14 through the prosecution's witnesses.

15 They called Dr. Cronin to the stand to testify to
16 this Court that there was a reason as to why
17 African-American jurors are disproportionately struck, and
18 all those reasons are generalizations. This is an example
19 of conscious bias. It mirrors the notes that Dr. Katz took
20 from his conversation with Rob Thompson. When Dr. Cronin
21 testifies that African Americans are more Democrats or
22 African Americans have this view about the death penalty or
23 African Americans have this view about law enforcement, all
24 of those are generalizations and they are -- they're used
25 as part of decisions to exercise strikes as an example of

1 conscious bias.

2 The central question we believe for this Court is
3 whether district attorneys used race in -- in exercising
4 their strikes produced -- I'm sorry, produced a disparate
5 impact on African-American jurors and here the evidence is
6 utterly overwhelming. This is the unadjusted numbers. Is
7 there a different pattern if we look at race in the strike
8 patterns in Cumberland County? Is there a different
9 pattern statewide? Is there a different pattern in the
10 judicial division? And as Mr. Ferguson already presented
11 this morning, those numbers went completely uncontroverted.
12 Even Dr. Katz agreed. He testified that there was a large
13 and a significant disparity between the strike rates
14 against African-American jurors and white jurors. We
15 believe that we have satisfied with that evidence our prima
16 facie case.

17 But even if this Court views this statute
18 differently, even if you believe that under the statute we
19 have to show intentional discrimination, then we think
20 there are examples in the law that would give the Court
21 guidance, and one example is the body of evidence from
22 grand juries and jury pools. They talk about in those
23 cases the need to show the defendant is the moving party in
24 those cases and they need to show that there is a
25 substantial underrepresentation. And, again, they're using

1 unadjusted numbers. They're talking about in grand jury
2 pools the numbers of African Americans who are eligible and
3 the numbers who are in the pool. They are using unadjusted
4 numbers, the same numbers that we have presented with great
5 detail to this Court.

6 Another example is the Title 7 mixed motive
7 cases. Now, this is a line of cases under again in
8 employment where the court is framing it as -- these are
9 intentional discriminations, but in this context, the court
10 has recognized that a hiring decision or a firing decision
11 may be motivated by more than one thing. It may be race
12 plus. It may be gender plus. So it may be that the --
13 that the juror, if we take that analogy into the jury
14 selection, it may be that the juror has a death penalty
15 reservation. But as we saw so starkly on those charts, if
16 you have a death penalty reservation and you're a black,
17 something different happens more often than not than if you
18 have a death penalty reservation and you are a white. And
19 that's an example of how race is a mixed -- is part of a
20 mixed motive on the part of the state.

21 We have a lot of evidence, in addition to the --
22 to those charts, which I think very powerfully show that.
23 Another is our adjusted regression study. And I think one
24 way to think about the regression study -- we're all
25 familiar with the Batson contest, and in Batson, as the

1 Supreme Court has gone on to refine it in Miller-El, we are
2 instructed to look at, well, the prosecutor says that this
3 was the reason for the strike. But then we should look and
4 see how that reason is applied to white jurors and jurors
5 of other racial groups and do what we would refer to as a
6 comparative juror analysis.

7 One way to think about our adjusted study is that
8 it's a large scale comparative juror analysis. It looks
9 over the whole group for the different populations of
10 Cumberland County or the statewide. It looks over the
11 entire population and says let's look at how you're
12 treating different jurors of different races, assuming the
13 same factors apply, assuming they have death penalty
14 reservations or assuming that they knew the defendant or
15 assuming they knew someone in law enforcement. How are you
16 treated? Is there still a race effect? And the answer in
17 both regression models was an overwhelming yes, and we
18 think that evidence is very clear and should compel a
19 Court, even under an intentional discrimination.

20 There is additional evidence -- there is evidence
21 in the form of the prosecutor affidavits themselves, which
22 has been the subject of much debate, but -- but if you look
23 at the prosecutor affidavits, there are a couple of
24 interesting things. One interesting thing is that they
25 didn't come in from -- in any form from a number of

1 prosecutors and we do not know and the record is silent
2 about why some prosecutors chose not to answer, Can you
3 give us a race neutral reason? Other prosecutors -- and,
4 for example, in Wake County, which we know has a large
5 number of death sentences, those -- that there was no
6 prosecutor who was willing to even identify -- to respond
7 in any way to Dr. Katz and identify someone who might be
8 willing to undertake this review. Maybe they don't want to
9 answer or maybe they can't answer why race -- maybe they
10 can't provide a race neutral explanation.

11 But the other thing is that there are a number of
12 these juror affidavits -- I think there are at least four
13 venire members who are identified in these affidavits where
14 the prosecutor argued -- or responded that they couldn't
15 find a race neutral reason, that they looked at the
16 transcript and it wasn't apparent. These are concessions
17 that there was no race neutral reason for striking the
18 black juror.

19 Similarly, there are sustained Batson objections
20 that we entered -- that we referred to and that you will
21 find in the transcript, times when courts in North Carolina
22 across the state have found that the prosecution has
23 intentionally and purposefully discriminated against
24 African-American jurors. That's more evidence that
25 complements, not the centerpiece, maybe not even the most

1 -- an important piece but it's additional evidence that
2 complements our overwhelming statistical showing.

3 And we believe that even if -- as I think the
4 implication from Dr. Katz's testimony is that even if this
5 Court were to assume that this -- the Racial Justice Act
6 did not mean what it says about the inquiry being race
7 being a significant factor and it doesn't -- it didn't mean
8 anything new by looking at the collective conduct by the
9 new geographical jurisdictions, if we assume that all the
10 Racial Justice Act does is give a super Batson where the
11 inquiry is the same under Batson, we believe that we would
12 still be entitled to prevail. Because even then, Your
13 Honor, we are going to submit briefing and the evidence is
14 in the transcripts that there was disparate treatment of
15 jurors. Even if you do the kind of classic Miller-El
16 analysis, there is evidence that these strike patterns are
17 -- are no coincidence.

18 THE COURT: May I interrupt at this point?

19 MS. STUBBS: Yes.

20 THE COURT: I believe the record reflects and I
21 believe the testimony of Dr. Katz reflects that early on,
22 and I think it was back in the September hearing on the
23 record, that I indicated my initial analysis was that this
24 was a disparate impact case. That kind of analysis would
25 arguably be brought to bear on the issues involved under

1 the Act. My understanding, my reading of the law is that
2 Batson was the law at the time McCleskey was decided.
3 Batson was the law at the time the RJ Act was passed by our
4 legislature. And I'm understanding, I think, your argument
5 to be that, one, you contend that's not the relevant
6 analysis that ought to be brought to bear in this case.
7 It's disparate analysis under the applicable case law. Is
8 that a fair statement?

9 MS. STUBBS: Yes, Your Honor.

10 THE COURT: And, secondarily to that, my
11 understanding is that even if some kind of, quote, unquote,
12 super Batson analysis were applicable, you contend you have
13 met your burden in that respect as well?

14 MS. STUBBS: That's correct, Your Honor.

15 THE COURT: Just wanted to clarify that for the
16 record. Yes, ma'am.

17 MS. STUBBS: And I think that goes really to the
18 next point of difference between the Racial Justice Act and
19 -- and the previous law, and that's whether or not we have
20 to show a disparity in Marcus Robinson's case.

21 THE COURT: Yes, ma'am.

22 MS. STUBBS: I think we would all agree that
23 under Batson, that was the law. There is nothing in this
24 statute that requires us to make a showing in Mr.
25 Robinson's case. However, we've introduced evidence that

1 even if this Court were to find that such a showing were
2 required, that it would satisfy it. The strike ratio was
3 higher in Marcus Robinson's case than it was statewide.
4 Statewide we see slightly over two. It was higher than it
5 was on average in Cumberland County. In Marcus Robinson's
6 case, the state removed three and a half times the number
7 of African Americans from his case. This is the case where
8 we heard from Judge Dickson, the prosecutor, who testified
9 that he used subjective factors in deciding to use his
10 peremptory strikes and he testified that he knew that
11 unconscious bias affected his decision making.
12 Furthermore, we heard from Mr. Hunter an example of
13 disparate treatment of one of the jurors, Nelson Johnson.
14 Again, that's all evidence from Marcus Robinson's
15 individual case.

16 The next issue I think that this Court will have
17 to determine is what's the meaning -- what is the term of
18 the meaning significant? And if we come back here, we see
19 that throughout the statute it refers to this language,
20 race was a significant factor. And in the next slide, we
21 have the burden of proving that race was a significant
22 factor. This Court is clearly going to have to interpret
23 what significant means. And here we think the evidence is
24 completely clear that under any definition, we have met it.

25 Let's first start with the different definitions

1 -- statistical definitions for statistically significant
2 that the courts have used. And I'd like to start with the
3 employment context again because I think that's so
4 analogous. In the area of employment -- this slide quotes
5 from an employment discrimination treatise. In the area of
6 employment, the EEOC has come up with what's called the
7 four-fifths rule, and under this basic rule of thumb,
8 disparate impact will be presumed if the minority success
9 rates under challenged employment policy is equal to or
10 less than four-fifths of the majority success rate.

11 And then they walk us through an example. If you
12 had 200 white applicants and 100 black applicants, you
13 would calculate what the success rate is for the white
14 applicants and then take four-fifths of that and see
15 whether the black success rates was greater than
16 four-fifths. If it's greater than four-fifths, there's not
17 -- they don't see a prima facie evidence of discrimination.
18 If it's less than four-fifths, that's evidence of
19 discrimination.

20 So let's apply that to Cumberland County. These
21 are the passed rates. These are just the inverse of the
22 struck rates that are in evidence. So for nonblack jurors
23 in Cumberland County, they are passed -- and passed to the
24 defense for questioning or to be on the jury almost 80
25 percent of the time. And if we take four-fifths of that,

1 or 80 percent times the 79, we get 63.6 percent. Let's
2 look at the pass rates for African-American jurors, 47.3.
3 47.3 is clearly lower than 63.6. So the EEOC would say
4 that we have established a significant disparity here.
5 We've satisfied the four-fifths rule. The same applies
6 statewide. Statewide the pass rate for nonblack jurors is
7 74 percent. Four-fifths of 74 percent is close to 60
8 percent. We see the pass rate for black jurors is 47
9 percent. Again, much lower than the required showing.

10 We've also heard -- and throughout the testimony,
11 we heard from Dr. Woodworth and Professor O'Brien about the
12 statistical significance in terms of P values and we've
13 given you the statistical chapter from the federal bench
14 guide that discusses that and that's important in courts
15 usually in terms of .05. Our P values are way below that.
16 We have guidance from the Supreme Court that talks about
17 standard deviations, whether it's two or three standard
18 deviations. This is from Castaneda, one of those cases
19 that I alluded to earlier. Dr. Woodworth was very clear
20 that all of the results were more than standard deviations.
21 We meet this definition of statistical significance.

22 Finally, a third term that's used by courts in
23 terms of statistical significance is absolute disparity.
24 In absolute disparity, I like to think of it as just a
25 simple math subtraction, and the statewide -- and the rule

1 of thumb and a number of circuit courts have held -- and
2 this information was in our briefing, but a number of
3 circuit courts have held that the rule of thumb is you need
4 an absolute disparity of ten percent or more. In
5 Cumberland County, we have an absolute disparity of over 30
6 percent. Statewide, we have an absolute disparity -- if
7 you subtract the strike rate for African Americans from the
8 strike rate for all other jurors, you have a disparity of
9 26, almost 27 percent. So again, we're clearly above the
10 ten percent rule. We're clearly above the .05 P values.
11 We're clearly above the three standard deviations. We're
12 clearly above the four-fifths EEOC rule. Under any of
13 those definitions of statistical significance, our evidence
14 meets it.

15 It's also practically significant, and Dr.
16 Woodworth testified and made this distinction and he gave
17 his opinion that it was practically significant. And he
18 talked about it in terms of public health and how in public
19 health, an odds ratio of 1.2 in the context of
20 environmental tobacco smoke was large enough to make huge
21 policy decisions. Here we are talking about odds ratios of
22 2.0 and above and these are enormous. These are doubling
23 of -- there's no question that we're talking about a
24 meaningful and a significant disparity.

25 The next issue is the time period, and this is a

1 -- this is another area where our case we believe went
2 unrefuted. Dr. Woodworth testified that this was the
3 appropriate way to evaluate the disparity at the exact time
4 of Marcus Robinson's trial. The statute directs that we
5 need to look at the time the death sentence was imposed.
6 Here we are looking at exactly August of 1994 for Marcus
7 Robinson. That's the red line. And he testified that the
8 odds ratio was approximately 3.0, adjusted. And that
9 incorporates all of the data from the 20-year period.

10 You heard Dr. Katz take the stand and say that he
11 was retained by the state to review Dr. O'Brien's report
12 and Dr. Woodworth's analysis. There's nothing in his
13 report, there's no testimony by him that impeaches that --
14 this evidence at all or says that this is not a proper way
15 to do it. This -- the validity of this as a statistical
16 matter is utterly unchallenged in this case and for good
17 reason. Dr. Woodworth testified that this is a method he
18 was published in before. He used it in age discrimination
19 cases. It's used widely in other areas of the law and
20 other areas of statistics and medicine and public health.

21 But even if this Court were not inclined to
22 accept this uncontroverted evidence, any definition of time
23 that's been put forth we satisfied. Dr. Katz suggested
24 that maybe the right time would be to look at the period
25 from charging until sentencing, 1991 to 1995. Well, if you

1 follow the axes on the bottom there, you will see those are
2 in two-year increments. 1990 -- the 1991 will be
3 approximately at the beginning of the green bar, the first
4 green axis, and 1994 will be at the red line. There you
5 see for that period, we have an odds ratio of 3.0 or hire
6 during that period. If -- if you choose to make your --
7 the time period the whole 20 years, we introduced evidence
8 both adjusted here and unadjusted, there is an increased
9 risk. If you choose to make the time period a five-year
10 band, that's what those green axes represent. Under any
11 definition of the relevant time period, we have satisfied
12 -- we have shown that there was statistically significant
13 disparity.

14 Next I want to talk about the fact that this
15 involves rebuttal. The statute here -- I'm going to go
16 back. Again, this is all under the proof section. It says
17 the state may offer in evidence in rebuttal of the claims
18 or evidence of the defendant, including statistical
19 evidence. The court may also consider evidence of the
20 impact upon the defendant's trial of any program, the
21 purpose of which is to eliminate race as a factor. So the
22 first thing to note is that the state did not introduce any
23 of this kind of evidence. The state did not introduce an
24 independent statistical study that attempted to look at
25 whether or not race was a significant factor. The state

1 did not introduce an independent statistical study that --
2 for Cumberland County or statewide.

3 They also did not introduce any evidence of any
4 program that Cumberland County or that the State of North
5 Carolina has embraced to try to address jury selection.
6 And, in fact, the only evidence on that point has come from
7 the defense and that's evidence that suggests just the
8 opposite. In the wake of Batson, instead of training on
9 how to comply with Batson and how to bring and see change
10 in terms of how juries are selected, the district attorneys
11 received training on how to articulate Batson and defeat a
12 Batson challenge.

13 The case law we think is also helpful from the
14 areas of employment discrimination and jury pools. Under
15 those, you need to show either -- once the burden has
16 shifted to the state, the state has to either dispel the
17 inference -- produce enough evidence to dispel the
18 inference or they have to show that there was a business
19 consensus. There's been no kind of showing like that from
20 the state in this case.

21 Finally, move forward here, we come to the relief
22 required under the statute. The statute is quite clear
23 that only one thing is required and that is the only thing
24 that can be imposed and that is life without parole. This
25 is section 15A-2012(a)(3) and it says in crystal clear

1 terms the court shall order -- if you make a finding that
2 race was a significant factor, the court shall order that
3 the defendant be sentenced to life imprisonment without the
4 possibly of parole. That's the relief we have asked for.
5 No one has disputed that that would be the appropriate
6 relief for the Court, and we would ask that you impose that
7 sentence for Mr. Robinson. Thank you, Your Honor.

8 THE COURT: Thank you, ma'am. Mr. Thompson, my
9 understanding is you will be making the first argument on
10 behalf of the state. Consistent with the earlier inquiry
11 by members of the press, are mics appropriately situated?

12 MR. THOMPSON: They are, Your Honor.

13 THE COURT: Okay. Yes, sir. You may proceed.

14 MR. THOMPSON: May it please the Court.

15 THE COURT: Yes, sir.

16 MR. THOMPSON: If I may have just a moment,
17 Judge?

18 THE COURT: Yes, sir.

19 MR. THOMPSON: There have been a lot of ironies
20 in this courtroom in the last two and a half weeks and I
21 don't have time to talk about all of them. Erik Tornblom
22 has largely been left out of this courtroom. Erik Tornblom
23 was the only person relevant to this case who was
24 discriminated against based on race. The irony that we
25 have is that Marcus Robinson stands before you -- after

1 saying, I'm going to burn me a whitey, he stands
2 straight-faced and says he was discriminated against.
3 We're going to talk about that a little bit later but that
4 irony cannot go without being pointed out.

5 You have a monumental task, Your Honor. We've
6 all talked about it. The law is one thing you obviously
7 need to start with and we've all talked about -- no
8 disrespect to the law. This is not the appropriate forum
9 for me to discuss my opinions or thoughts about how it was
10 written but we're stuck with the way it was written. Some
11 of the things I'd like to point out, when you have to
12 analyze -- we're stuck with the language that it's written
13 by -- A finding that race was the basis of the decision to
14 seek or impose the death sentence, in the state's mind and
15 in the mind of folks much smarter than me who do this much
16 more than me, limits the nature of how this needs to be
17 interpreted by the Court in the Marcus Robinson case.

18 Now, we've talked at length about we can't just
19 argue that because Your Honor may disagree. The Supreme
20 Court may disagree. So we have a number of different
21 audiences here we're arguing to, but unfortunately, because
22 there is absolutely no guidance in the law as to how it's
23 to be interpreted and there is wide school of thought on
24 how it should be interpreted, we are left to argue all
25 possible interpretations. We'll do our best to not do that

1 here. We've discussed it at length in this hearing but
2 it's clear that there is no guidance and so a lot of my
3 argument is going to go to different reasons that Your
4 Honor could consider and the Supreme Court can consider,
5 just so it makes more sense.

6 There has been an argument about state action and
7 we're going to talk later about how the state's actions are
8 being talked about a great deal but not the defense's
9 actions. But if you look at the law, number three, which
10 is where we are, race was a significant factor in decisions
11 to exercise peremptory challenges during jury selection, it
12 does not say state used peremptory challenges. It says
13 decisions. And there -- the way we discussed these
14 peremptory challenges -- I have to clear up. We're not
15 saying that -- when we talk about the defense strike rates
16 are twice on whites what they are on black jurors, we're
17 not saying, well, they did it too so it's okay. We're
18 saying that clearly -- and we're going to talk about that,
19 that it's not that they are trying to get rid of white
20 jurors and the state is trying to get rid of black jurors.
21 It speaks to the fact that there are explanatory factors to
22 the numbers difference, and that also enters into the
23 academic analysis of how this case gets dealt with. So
24 there are so many prongs to be weaved in through this case.
25 It is not a simple task, but we're doing our best to try to

1 maneuver these areas.

2 The seated rates we considered to be incredibly
3 important and we talked about this evidence at length.
4 White jurors and black jurors were seated on juries at the
5 same rate as each other. Because of the reverse numbers of
6 the defense getting rid of twice the whites as blacks and
7 the state the same, they had the seated rates of exactly --
8 within a very tiny amount. It was testified as
9 statistically irrelevant or insignificant. I'm sorry.

10 Academically, the question in the statute is, did
11 the jury that sentenced Marcus Robinson to death impose
12 that sentence based on race? That's one way the statute
13 can be interpreted. That's -- evidence of it can be
14 presented by the defense in lots of different ways, one of
15 which different rates, statistical evidence, but the
16 question ultimately legally and academically comes down to,
17 did the jury that imposed the death sentence on Marcus
18 Robinson do so with race as a significant factor? That's
19 the ultimate question that you have to answer.

20 THE COURT: Okay. May I interrupt?

21 MR. THOMPSON: Yes, sir.

22 THE COURT: The issues that you're raising, Mr.
23 Thompson --

24 MR. THOMPSON: Yes, sir.

25 THE COURT: -- aren't they the issues that are

1 now pending in Forsyth County with regard to charging and
2 sentencing decisions as opposed to matters related to
3 decisions to exercise peremptory challenges?

4 MR. THOMPSON: I would argue not, Judge.

5 THE COURT: Okay.

6 MR. THOMPSON: The ultimate question in this
7 statute is the imposition of the death penalty.

8 THE COURT: Okay.

9 MR. THOMPSON: The evidence can be argued that
10 under these stats and these numbers point to that but the
11 ultimate question is, did the jury impose the death
12 sentence based on race? And this jury, like all other
13 juries in North Carolina, was seated with a black juror and
14 a white juror having statistically the same chance of
15 serving on that jury. So what a great deal of our argument
16 comes down to is again the explanatory factor --

17 THE COURT: Okay.

18 MR. THOMPSON: -- of why those numbers are
19 different. Now, that's both on black juror strikes from
20 the state and white juror strikes from the defense.
21 Consider as well when we're talking academics the task
22 that's being -- that Your Honor is being asked to perform.
23 One of the most precious things in government, one of the
24 most precious things that the people have is knowledge that
25 a judgment -- that the actions of the courts are final.

1 We've read some cases in other contexts here that deal with
2 that.

3 Let's step back and see why we're here. This
4 defense -- this argument that's being made, they're asking
5 Your Honor to overturn the decision of 12 jurors who were
6 seated with a judge, a prosecutor, two defense attorneys,
7 Mr. Robinson all in an open courtroom who went through a
8 trial, who have gone through an appellate review up all --
9 and all points being upheld and later is asking Your Honor
10 to come in and change all of that work by jurors,
11 prosecutors, defense attorneys, judges, appellate courts,
12 and the AG's office. All they're asking you to do and what
13 they have brought to you and what we have repeatedly heard
14 about over and over is one thing, numbers, numbers,
15 numbers. That's what everything comes down to.

16 That was an analysis that was not good enough for
17 McCleskey. Statistics are not good enough. That's a
18 constitutional argument. Let's talk about that. They have
19 attempted to shift all of the questions and all of the
20 views to what the state has done because we're used to
21 talking about state action. You're talking about state
22 action in a constitutional -- it's a constitutional
23 academic requirement that the state has to perform some
24 action to step on a defendant's constitutional rights.
25 This is not a constitutional question. This is a statutory

1 question. So that's why it's important that what happened
2 on this side of the courtroom and what happens on this side
3 of the courtroom are all academically relevant and
4 important to your decision. So that's one of the reasons
5 we're discussing what happened in this courtroom. It's not
6 just on this side of the courtroom but in this courtroom.

7 They have numbers. They do not have evidence of
8 purposeful discrimination. They do not have some secret
9 society of prosecutors maniacally plotting to remove people
10 from juries. They do not have any of that because there is
11 no such evidence. It doesn't exist. They have numbers.
12 They cannot go after John Dickson, an honorable man, a
13 great prosecutor, a good judge. They cannot go after Cal
14 Colyer. And with your -- at risk of offending his modesty,
15 I'd put Cal Colyer up against any prosecutor in this state
16 for integrity, honor, skill, and six or seven other things
17 that I don't want to mention because I don't want to offend
18 his modesty. They can't go after these two men because
19 there's no evidence of purposeful discrimination, so they
20 have brought you numbers, assumptions, conclusions,
21 conjecture.

22 And I've got some very recent examples of that
23 we'll discuss. What numbers do is raise questions. They
24 do not provide answers. Recall that this is a study of
25 elimination. MSU designed this study after the CDPL,

1 Center For Death Penalty Litigation, came to them and asked
2 them to do it. It's an elimination study, and I have no
3 idea whether that's an industry term, whether I'm using the
4 right term. It's a shorthand. We've created a lot of them
5 in this case. Because they studied what they considered to
6 be appropriate factors to study jury selection. And if
7 they put this in and put this in and put this in, then they
8 compare it to race. At the end of their study, the
9 ultimate result is we can't explain race. We can't explain
10 the difference in numbers given the factors we've looked
11 at. Well, then what's our job? Well, let's look at how
12 those numbers were developed. Let's look at who came up
13 with that study. Let's ask those questions.

14 I mean no disrespect to Dr. O'Brien. She made a
15 wonderful witness. She was very polite. She was very
16 honest in her answers as they came back. But she is wholly
17 unqualified to stand anywhere and say she knows anything
18 about capital jury selection, that she is qualified to come
19 up with factors that capital juries are picked from, from
20 prosecutors, from defense attorneys. We asked her, What
21 did you look at? How did you come up with these factors?
22 I read some literature, read some transcripts. Have you
23 ever watched a capital jury selection? No. Again, there's
24 no disrespect intended.

25 This is a monumental, historic law that they have

1 brought to us. Why did they not go to 25 folks that have
2 practiced law for 30 years and tried 35 capital jury cases
3 and have them come up with the factors that they
4 considered? Why did they not sit down with prosecutors and
5 say, we're studying you guys? We would love to find out
6 what's in your head when you're picking that jury. There
7 are thousands of us all over the nation that have tried
8 capital cases who would be happy to sit down and talk to
9 them about those cases. So they could get it from us. Did
10 they do that? No. She's never watched a capital jury
11 selection but she came up with all the variables that she
12 thinks are in prosecutors's minds.

13 Let's start with that. So the flaw with their
14 study was at the very beginning and it continued. Now,
15 again, you have a monumental, historic, important,
16 obviously far-reaching impact that this could have. You've
17 got 173 cases to look at. Who do you get to code those?
18 Who do you get to look through an incredibly difficult,
19 intricate process of jury selection? Law students that
20 have just gotten their J.D.'s, not passed the bar or
21 getting reading to pass the bar, maybe studying for the
22 bar, and don't have jobs yet, arguably have never tried a
23 case, much less a capital murder case. And they are
24 looking at transcripts and jury questionnaires and trying
25 to crawl into the brain of the prosecutor with what's going

1 on. This back seat quarterback concept of, oh, we know
2 better. We have the written page. We're going to talk
3 later about some examples of how that just doesn't work.
4 We know better because we just graduated law school and it
5 doesn't make sense. They did not step up with a real
6 attempt to do this right.

7 Also glaring, again, all credit to Dr. O'Brien
8 when she testified, did you study the disparity in the
9 defense strikes? Absolutely, we sure did. She didn't
10 hide. She wasn't bobbing and weaving these answers. She
11 was giving them straight. She was straight when she got up
12 on that witness stand. She testified beautifully. No, we
13 didn't study those. We saw them. I agree that they are
14 there but we didn't look at them. Why didn't you include
15 them in your report? I wasn't asked to. We were asked to
16 study prosecution strikes. We were not asked to -- but if
17 you are really studying jury selection in capital cases,
18 why would you study half of jury selection in capital
19 cases?

20 They have thrown lots at us to say your study is
21 half complete and they're right. Our study is half
22 complete, if you can call it a study, however you'd like to
23 phrase it. Their study was half complete and half
24 reported. I consider that to be more telling of the nature
25 of really where it comes from. They knew it. Dr. O'Brien

1 knew about this disparity but didn't report it. We found
2 it because we were lucky enough to find somebody who has
3 done this. In 1983 when McCleskey came up, Dr. Katz was
4 their expert --

5 THE COURT: I'm sorry?

6 MR. THOMPSON: He was the expert in McCleskey,
7 not their expert at MSU but he was the expert that the
8 government went to. So in '83, he was the expert. I was
9 in the ninth grade and he was already the expert.

10 Something happened in this courtroom earlier
11 today that was extraordinarily telling of the point that
12 I'm trying to make. When I use the word assumptions, I'm
13 not trying to make anybody mad but that's really what you
14 get down to is an assumption. And I'm not picking on Mr.
15 Hunter because he made this perfect example when he -- he
16 gave how a black juror and a white juror, he said, were
17 treated differently and tried to compare those two answers.
18 The first juror I believe to be the black juror that was
19 stricken had a child support obligation and it was being
20 argued in the context of a hardship distraction. He was
21 stricken. The child support -- worried about money and Mr.
22 Hunter argued that the white juror who had obligations at
23 work was not stricken, and he immediately went to that
24 assumption, that conclusion. That's what I'm talking
25 about. That incredible danger that arises when you look at

1 just numbers.

2 The answer could very well be in the example.
3 Child support obligation he had to go to court for. There
4 are not many prosecutors that want somebody on the jury who
5 had to be ordered and has to go to court for child support.
6 Those obligations should be taken care of by that --
7 without court order. That's one possible solution. But I
8 don't even know that that's the case because I was given
9 such a very small example in this closing argument, but it
10 beautifully illustrates the danger in the assumption, the
11 conclusions and the conjecture that go on in the minds when
12 all you have are numbers.

13 What else did the defense bring us? They brought
14 us evidence as to implied racism. It's an interesting
15 package when you talk about implied racism as a social
16 science and how you present it to this Court. You don't
17 know you're doing it. Everybody does it. We can't measure
18 at all who's doing it, who's not doing it and to what
19 extent and, by the way, if somebody asks you about it
20 you're not going to tell the truth about it and you won't
21 know that either. It's a little convenient a package. But
22 here's the beauty of it. It falls completely apart as far
23 as capital jury selection goes as far as being an
24 explanatory theory when you consider most defense attorneys
25 are white, most defense attorneys struck white jurors at

1 twice the rate of black jurors. Their theory was white
2 people prefer white people and that's where the implied
3 racism comes in.

4 My example of myself going to the grocery store
5 and picking the counter -- my example that I'm the fat guy
6 and I go to the counter with the candy in it and it doesn't
7 have anything to do with whether there's a black cashier or
8 a white cashier. There's another explanatory factor. So
9 this theory of implied racism completely falls apart when
10 you look at the numbers, when you look at the juror
11 strikes. It was a theory, and that's what they've brought
12 us, numbers and theory.

13 Even if you make an argument that the defense
14 attorney was representing a black defendant and so struck
15 white jurors as if the defense attorney put himself in the
16 defendant's shoes, even if you stretch it to that point,
17 look at the numbers. Look at the strikes. That also falls
18 apart. It doesn't show up in the numbers. Wilkinson,
19 Cagle and Meyer all were white-on-white violence. All had
20 larger numbers of white strikes like everybody else's. So
21 their theory -- the second part of their theory completely
22 falls apart when you hold it up to the light. That's why
23 O'Brien didn't report it because it's contrary to the
24 person's -- the folks that paid for the study, it was
25 contrary to what their point was. That's why she didn't

1 report it.

2 We asked these social scientists who gave us
3 these theories -- I believe it was Sommers specifically --
4 Sommers, what should we do about this? Okay. Let's assume
5 for a moment this exists, and I'm sure it does on some
6 level in some situations but nobody -- the experts in the
7 field in the nation, sitting in this room, nobody could
8 tell us at what point, at what level, who does it apply to
9 and how much? But when we ask, all right, what do we do
10 about it? It came down to be aware of it, sensitivity
11 training. I don't say that disrespectfully, but have
12 training. Make yourself aware of it. Make yourself
13 sensitive to the idea that that might be happening. And in
14 just a few minutes, we'll talk about one of the techniques
15 Judge Trosch talked about, which I think was brilliant.

16 But when you look at that theory in light of
17 capital jury selection, that dog won't hunt. Stevenson,
18 obviously an incredibly bright person, what he very
19 politely argued to the Court was the sociological and
20 philosophical change in the court system and how it needs
21 to work. There may or not -- may or may not be merit to
22 what he had to say as far as theory goes. But his theory
23 -- and he said the words cross-section of the community a
24 number of times -- really comes down to picking names out
25 of a hat. He -- he said on the stand he was less concerned

1 with convictions and more concerned with the cross-section
2 being in the jury box. When you have a sample as small as
3 12 people, the only way to accomplish that would be pulling
4 names out of a hat. And there is no sane person that's
5 involved in the court system that's going to argue that as
6 an appropriate way when you're talking about trying a man
7 for his life after murdering a 17-year-old who was
8 completely innocent. It's a philosophical argument, a
9 sociological argument. It is not a legal argument.

10 It's an interesting -- interesting way Dr.
11 Stevenson -- sorry, Professor Stevenson's analysis was
12 done. His study was shown to a juror. They talked to the
13 juror. Wrote an affidavit about -- from what that juror
14 said and then gave it to Dr. Stevenson and asked him if the
15 opinions of the juror were -- worked along with his report
16 that had been given to the juror. The circular nature of
17 that -- I'm no scientist, Judge, but I suspect there may be
18 a flaw in his methodology.

19 And his -- and the defense's argument exclusion
20 of jurors as kind of a standing that there is a group of
21 jurors that has been excluded and they shouldn't be
22 excluded from jury selection -- I have not seen one comment
23 from the defense or from the stand rising to the side of
24 the white jurors excluded by the defense. I have not seen
25 righteous indignation about the white jurors that were

1 excluded by the defense at the same rate that black jurors
2 were excluded.

3 I have to admit a note about righteous
4 indignation. Judge, I have done my best -- you know me
5 well enough to know that I've got plenty in me. I have
6 done my best to keep it from spilling out this was not the
7 appropriate forum for righteous indignation. A man I
8 admire greatly taught me if you're going to be loud, be
9 right. We are. So insofar as that indignation has spilled
10 out, it's well deserved.

11 I have righteous indignation about what the
12 defense is accusing the court system of. They're not just
13 attacking prosecutors. They are attacking judges. They
14 are attacking defense attorneys. They are attacking
15 jurors. They are indicting all of us. But they can't
16 quantify how much this concept applies to capital juries.
17 They are just, you didn't do Batson right. The defense
18 attorneys aren't jumping up and down when they should. The
19 judges are letting the state get away with it and not --
20 and it's -- that's where some of the righteous indignation
21 comes from. These four know better than all the judges,
22 all the prosecutors, all the defense attorneys who sat at
23 these tables and defended other men and women's lives. And
24 what have they done that with? Numbers.

25 I want to clear something up about Dr. Cronin.

1 We knew that his evidence would be mischaracterized. I
2 didn't know which argument it would come out in and, of
3 course, it was Ms. Stubbs who just talked about it. We
4 made it clear, we are not trying to say, nor will we ever
5 -- have ever tried to say that the -- the prosecution feels
6 like, well, if a general -- if a general opinion of a race
7 appears, and that person with that skin appears, we can use
8 that. It's ridiculous. That's never been said nor will it
9 be said. We used it as an explanatory factor, that we
10 listened to the opinions, beliefs, attitudes that come out
11 of the mouths of the individuals.

12 Dr. Cronin was here to testify that if you look
13 at the aggregate of all of those opinions, you would expect
14 to see higher numbers of opinions in this race and higher
15 numbers of this opinion in this race when you look at the
16 aggregate, like the MSU study tried to do. It's been now
17 mischaracterized, like we fully expected it would be. But
18 I'm correcting that now. He corrected that when he
19 testified when they tried to get him to say that. That is
20 we strike jurors based on what comes out of their mouths,
21 what happens when they sit there and the information we
22 have. It has absolutely nothing to do with race.

23 The defense carries the burden here and if you
24 nutshell -- if I nutshell the defense's case, the way I
25 nutshell it, the MSU study: we don't know, so it must be

1 race. Sommers: you make race in your decisions; we don't
2 know how much; you didn't know you were doing; if we asked
3 you about it, you aren't going to tell us the truth anyway.
4 And Stevenson: judges, defense attorneys, prosecutors,
5 everybody does a sorry job; they don't do a good enough job
6 on Batson so we need to pull names out of a hat or come up
7 with some other method. That's what the defense has shown,
8 numbers and theory. Numbers raise questions. They don't
9 answer them.

10 So what did we do? We asked. We found the
11 prosecutors that were still prosecutors, we still had some
12 hold on where we could ask a boss, can you ask this guy to
13 sit down with this file and tell us why these jurors were
14 stricken? Real people sitting down with real transcripts,
15 their notes, whatever it is that they had, folks that know
16 capital litigation. And we presented it to Your Honor as
17 best we could gather in the time we had and handed it to
18 the Court and said here, read this, please. Look at this.
19 These are the answers. You could take those, for whatever
20 worth Your Honor considers them to have. Take them and
21 crawl through the transcripts that are in evidence. See if
22 those reasons make sense. Read the answers of the jury --
23 of the jurors from the black and white pages of the
24 transcripts.

25 The Robinson case, for example, juror Sylvia

1 Robinson stricken by the state, Do you feel that you
2 personally could vote to impose the death penalty?
3 Unh-unh, no, was her answer. Do you think your feelings
4 are such that under no circumstances you could personally
5 vote for the death penalty? No. And then you're asking,
6 what does she exactly mean by no? Does that mean you could
7 not vote for the death penalty? That's correct. I
8 couldn't vote for it. Mr. Dickson, But there's just no way
9 you personally could vote for the death penalty? Is that
10 fair? Is that true? That's true.

11 Nelson Johnson, another perfect example -- again,
12 I'm really not meaning to pick on Mr. Hunter but it was an
13 example when he read the reason why we struck him and then
14 read the background of the transcript just a few minutes
15 ago, if you recall that in his argument. If they prove it
16 done beyond a reasonable doubt and he was there and someone
17 seen him do it and they caught him on the scene, yes. All
18 right. This is where transcripts fail. I wasn't there.
19 In 1994, I was in law school. But Judge Dickson was.

20 I'm not as good an actor as Mr. Hunter in
21 intonation and tone. I'm not being sarcastic but it's --
22 listen to the difference. Yeah, I mean if they prove it
23 beyond a reasonable doubt and the guy was there and you
24 caught him there, yeah. Seriously different answer than
25 just reading it off the page. That's where -- that's why

1 you don't put first-year prosecutors on capital cases
2 because Judge Dickson, then John Dickson, looked at that
3 juror, heard his answer, listened to the tone and
4 intonation in his voice and made an appropriate decision in
5 this case, a decision that has never been argued or has
6 been upheld as nonviolative of Batson.

7 Tandra Whitaker, But do you favor in your own
8 mind -- this is Mr. Dickson -- one punishment over the
9 other at all? No. Just by learning them, I would say life
10 imprisonment. I wouldn't want to be on a case -- later on
11 -- I wouldn't want to be on a case where I had to say --
12 you know, I've had the say in someone dying. Elliot Troy,
13 without reading word for word, he talked about a friend of
14 his who was charged involving a homicide and, if memory
15 serves, that was still pending.

16 Margie Chavis, First of all, let me ask you --
17 again Mr. Dickson -- do you have any religious, moral or
18 personal feelings against the use of the death penalty as a
19 punishment? I don't have a belief -- well, not religious
20 but I don't believe in the death penalty. Again, juror
21 number two -- sorry, the same juror, Well, I don't know.
22 It's just something I don't believe in, you know. It's
23 like, you know, a tooth for a tooth, you hit me, I hit you,
24 I don't believe that. And I don't know -- I don't know
25 whether my mind is prejudiced. I've never know anyone to

1 go, you know, under the death penalty. It's just something
2 -- maybe I was brought up that way. Do you feel like this
3 is a belief -- again Mr. Dickson -- about the death penalty
4 you've held for some period of time through the growing up
5 and the way you were raised and that kind of thing? Yes, I
6 do. As you sit there right now, your basic belief is you
7 do not believe in the death penalty as a punishment; is
8 that correct? Um-hmm, yes. And that's a strongly held
9 personal belief? Yes. That's said a couple more times.

10 Those are the five strikes of black venire
11 members that the defense is trying to give you to tell you
12 17, 18 years later to overturn the work of 12 jurors, one
13 judge, two defense attorneys, one prosecutor. And we've
14 talked about who the defense attorneys were. Randy
15 Gregory, Ed Brady, both accomplished trial lawyers, one
16 later became a Supreme Court Justice, neither one of which
17 were afraid of the devil himself. And to say in this
18 courtroom through a witness they must have been afraid to
19 make a Batson challenge so they wouldn't make Mr. -- Mr.
20 Dickson mad -- I don't want to get cute here, but they
21 obviously don't know Ed Brady or Randy Gregory. To imply
22 that is ridiculous. I'll just say that.

23 Judge, I'm winding up. You've made some rulings
24 throughout this case. I'm not here to argue those rulings.
25 There's a guy in the back of the courtroom that would fuss

1 at me later for doing it. You've ruled. I'm not arguing
2 with them. I'm arguing their logical extension and what we
3 now consider some burdens may be on the Court as a result
4 and some implications that some of those rulings may
5 legally have. You ruled that if the transcript is in -- in
6 essence, if it's in the transcript, we can't talk about it.
7 It speaks a great deal to speak to Mr. Ferguson -- not to
8 pick on Mr. Jay Ferguson's argument, silence being
9 deafening.

10 If the transcript speaks for itself, I would
11 contend to the Court -- if there was no Batson violation
12 raised, then there was no Batson violation. I would
13 contend that if the appellate decisions upheld any Batson
14 questions, they are precluded by issue of preclusion
15 arguing now that there were Batson violations. An argument
16 of collateral estoppel comes to mind. If those transcripts
17 speak for themselves, no case in North Carolina history --
18 no capital case has been overturned based on a Batson
19 violation, certainly not this one. So insofar as legally
20 the transcripts speak for themselves, we would agree to
21 that to the point that if no Batson challenge was made or
22 that it was made and overruled and upheld by appellate
23 courts, that issue is precluded from -- they are now
24 precluded from coming in here and arguing otherwise.

25 Delicately, I'm going to ask Your Honor as well,

1 if the transcripts speak for themselves, they would not
2 speak at all if Your Honor does not read them. Look
3 through them. Crawl through them. We would impress upon
4 you -- we would request that of you. That if we can't get
5 it out in here because we are precluded from doing so --
6 again, not arguing with your ruling -- that it would
7 impress upon the Court the responsibility of letting them
8 speak to the Court. You're in the unique position to be
9 the person to hear this, the person deciding this.

10 Finally, Judge, again, delicately, you notice
11 I've said a lot of things about the defense witnesses but I
12 haven't cut into Trosch. There is a reason for that.
13 Trosch said something incredibly brilliant and telling. If
14 you consider yourself you may be looking at a situation
15 differently because of race, check yourself, as the judge
16 and he did with his bench -- swap the races of the parties.
17 I'm not patronizing Your Honor when I say this. I couldn't
18 argue this in front of a lot of judges. Your Honor, I
19 think, understands the spirit in which this next thing will
20 be intended. I'm not questioning Your Honor. I'm asking
21 Your Honor to take a look at something, a logical
22 similarity and distinction. The irony in this case is the
23 claim of racial discrimination by a defendant who was
24 racially motivated. Swap the race of the defendant.

25 You're familiar with the case on the opposite

1 side that, but for one juror, would be sitting on death row
2 now, Mr. Burmeister. If Mr. Burmeister was in this
3 courtroom, having done the despicable act or acts that he
4 did, would anyone listen? In a case full of ironies, I
5 submit to Your Honor that one person mentioned in this room
6 could claim racial discrimination. He's not here. His
7 parents are. Erik Tornblom earned the right in this case
8 to make that argument. Mr. Robinson has not.

9 THE COURT: Mr. Thompson, I didn't want to
10 interrupt your argument but I'm going to ask some questions
11 solely for purposes of clarification.

12 MR. THOMPSON: Yes, sir. I'm completed with my
13 argument, Judge.

14 THE COURT: I thought you indicated early --
15 pardon me, early on in your argument that United States
16 Supreme Court in McCleskey versus Kemp -- this is what I'm
17 asking you to clarify -- found as a matter of law -- that's
18 what I thought I understood you to say, I don't believe you
19 used these words directly -- that statistical evidence was
20 insufficient. Is that your understanding of the holding of
21 the United States Supreme Court in that case?

22 MR. THOMPSON: That's a nutshell of it, yes, sir,
23 where statistical evidence was not enough constitutionally
24 to overturn the conviction in that case. Yes, sir.

25 THE COURT: Okay. Well, as I read the case, the

1 court held that, for reasons stated in the opinion, the
2 statistical evidence was insufficient to show that there
3 was discrimination in his particular case which was
4 required and the court invited -- the state said it was the
5 function of the state legislatures to determine what, if
6 any, broader consideration ought to be given to statistical
7 evidence. And I thought I understood you to say toward the
8 latter part of your argument with regard to this particular
9 defendant's case --

10 MR. THOMPSON: Yes, sir.

11 THE COURT: -- that the implication was Batson
12 issues had been raised and ruled upon by the appellate
13 courts?

14 MR. THOMPSON: Not in this case, Judge.

15 THE COURT: Okay.

16 MR. THOMPSON: Not in this case.

17 THE COURT: I just wanted to clarify that.

18 MR. THOMPSON: Yes, sir.

19 THE COURT: Thank you, sir. And I agree with
20 you, there are a number of ironies in this case.

21 MR. THOMPSON: Yes, sir.

22 THE COURT: Mr. Colyer.

23 MR. COLYER: Yes, sir.

24 THE COURT: If you will bear with me one second,
25 please, sir. You okay?

1 COURT REPORTER: Are we going to lunch?

2 THE COURT: Yes, ma'am, we're going to do that.

3 MR. COLYER: Judge, I don't think I would be
4 finished in ten minutes.

5 THE COURT: Well, I apologize. I had lost track
6 of time. I apologize.

7 MR. COLYER: I can get my heart beating again,
8 Judge.

9 THE COURT: Yes, sir. And as I indicated
10 yesterday, let me repeat it for purposes of the record
11 today, folks, I recognize the importance of the case, the
12 issues involved. It's not my intent to inhibit anybody in
13 terms of length of argument, number of arguments. I want
14 to give everybody a full opportunity to be heard.

15 MR. COLYER: Judge, I'd like to stand on Mr.
16 Thompson's argument but I think he might have something to
17 say if I don't get up and at least chime in a little bit.
18 So respectfully we would like to make a second argument.

19 THE COURT: Yes, sir, absolutely. Yes, sir. One
20 hour okay, folks?

21 MR. COLYER: Yes, sir.

22 MR. HUNTER: Sure.

23 THE COURT: Is that agreeable -- well, actually
24 little bit more than an hour. 2:00. Thank you, folks.
25 We're at ease.

1 (Lunch recess taken.)

2 (The following proceedings continued in open
3 court. The defendant, defense attorneys and state's
4 attorneys were present.)

5 THE COURT: Okay. Let the record reflect all
6 counsel are present. The defendant is present. Mr.
7 Colyer, I understand you are ready. If you need some time,
8 let me know, to go forward with your argument.

9 MR. COLYER: Yes, sir.

10 MR. THOMPSON: Can I have just a second, Judge?

11 THE COURT: Yes, sir.

12 MR. COLYER: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 MR. COLYER: Good afternoon.

15 THE COURT: Good afternoon.

16 MR. COLYER: Please the Court, Mr. Thompson,
17 opposing counsel, Mr. Tornblom's family. Judge Weeks, how
18 about if we had a machine that would randomize jury
19 selection without jury voir dire or voir dire and thus take
20 the human decision making process and the questions and
21 answers out of the equation? Do you think that might work
22 in terms of picking a capital jury that might be acceptable
23 to everyone? The Agora Museum in the Stoa section of
24 Athens, where Socrates, Plato and other great Greek
25 philosophers sat at the foot of the Acropolis, has such a

1 device. This device was used as far back as the 6th
2 Century B.C. Athenian democracy developed out of what was
3 then called isonomia, which was equality of law and
4 political rights, and sortician, which was the allotment or
5 the drawing of lots, and that was the principal way of
6 alleviating any unfairness with respect to the selection of
7 magistrates who administered the government but, more
8 particularly as we're concerned with here, the selection of
9 juries.

10 Now, Athenians believed that sortician was more
11 democratic than elections and it used some simple, yet
12 complex, procedures with a purpose-built allotment machine
13 that was called a kleroterion, or plural, kleroteria, if
14 I'm pronouncing it correctly. If I could approach?

15 THE COURT: Yes, sir.

16 MR. COLYER: This may be a little difficult for
17 the Court to see and for counsel because of the
18 reproductive nature there, Your Honor.

19 THE COURT: Thank you, Mr. Colyer.

20 MR. COLYER: Yes, sir. Judge, this kleroterion
21 was used to avoid corrupt practices that were used by
22 oligarchs to buy their way into public office and then was
23 used to select juries at random, a term that you've heard a
24 lot in the last couple of weeks. Sortician is the
25 selection of decision makers by lottery. The decision

1 makers were chosen as a random sample from a larger pool of
2 candidates. Now, those candidates were every Athenian
3 citizen who was eligible for jury duty. Jury duty can be
4 composed of as many as 5,000 people or as few as 11. And,
5 actually, it wouldn't be 5,000 people because there always
6 was an odd number.

7 And it always wouldn't be people, it would only
8 be men. There were no women. There were no foreigners.
9 There were no servants. There were no peoples who had been
10 conquered and brought back to Athens and forced into any
11 type of involuntary servitude. They were the men who were
12 the citizens of the Athenian state. A naturalized citizen
13 could not serve.

14 There was always an odd number because jury
15 decision was made by a simple majority, not a unanimous
16 decision like we have in our criminal justice system, not a
17 capital justice or a capital sentencing scheme that
18 required a guilt-innocence phase and a sentencing phase,
19 but a decision made by a majority -- a simple majority of
20 11 people. It was always an odd number, even if it went
21 higher than 11, because a single vote -- a single vote
22 could determine the outcome of the case. And there were no
23 hung juries. There were no retrials. There were no
24 do-overs. It was done one time and the simple majority
25 ruled. Jurors were totally chosen at random without the

1 filter of voir dire.

2 And that brings me to this photograph up here,
3 Judge. This kleroterion was a slab of marble stone that
4 was incised with rows of slots that you can see running
5 vertically in the photograph. Citizens, the men, if you
6 will, were given tokens that were called pinakias,
7 P-I-N-A-K-I-A, again if I'm pronouncing it correctly, and
8 it had their names inscribed on it. They would be placed
9 on the left side of the kleroterion and then the slots at
10 the top were filled with different colored marbles or balls
11 and the different colors were black and white. The dice
12 were released one by one and each die corresponded to a row
13 of pinakia and the color of the ball, the color of the die,
14 determined whether the owners of those pinakia in the
15 corresponding row were selected as jurors or to hold
16 office. In our case, it would determine a jury of your,
17 quote, unquote, peers, at least 11 people.

18 And ironically, again, harkening back to some of
19 the ironies that we've talked about today and that Mr.
20 Thompson pointed out to you, the irony of it, the color of
21 the balls, black and white. And whether it was intended as
22 a racial slight by the Athenians in 6 B.C., if you got a
23 white ball, unfortunately for you, you were on the jury.
24 Everybody in your row who had the white ball was on the
25 jury. If you got a black ball, you were excused. I don't

1 know if that's where the term being black-balled came from
2 but it might have some origin in that. And again, I don't
3 offer that to the Court with respect to any kind of
4 justification to deal with people based on a difference in
5 their race. Just the way it was. So the folks that got
6 the white ball beside their name served on the jury. The
7 folks that got the black ball were excused.

8 Obviously, we don't have a kleroterion and we
9 don't use kleroteria to pick juries. When called for jury
10 service, each man would present himself in a room in Stoa
11 where the presiding magistrate was located. And there was
12 located the kleroterion, the jury selection machine. They
13 inserted their small thin red ribbons with their names
14 written on it and they watched while the official dropped
15 as yet unseen balls into the top and then they found out
16 whether or not they were going to be on the jury.

17 A funnel containing a number of those black and
18 white marbles was then inserted into the hole in the upper
19 left side of that photograph. The marbles drained from the
20 funnels into the hole and then down the left side, and the
21 beginning of each row, those I.D. tags, those pinakia to
22 which the resulting column of marbles could be seen, a
23 white marble coming to rest by the row of selected jurors
24 meant they were on the jury and the black ball meant that
25 the rest of those jurors were dismissed.

1 Now, in the lower right-hand corner of that
2 photograph -- it's difficult to see -- are some disks.
3 Those disks were actually the ballots that were used in
4 terms of deciding whether someone was guilty or innocent or
5 deserving of remuneration because of some civil wrong.
6 There were two types of ballots. The guilty ballot had a
7 small solid knob in the center. The not guilty ballot had
8 a small hollow knob in the center. Juries carried -- or
9 jurors carried one of those in each hand when they went
10 into a trial, and they took their place in the theatre
11 somewhere near the Acropolis such as the Theatre of
12 Dionysis. They held the disk in their hands. They
13 listened to the testimony and the evidence. They covered
14 the disk with their thumbs and their forefingers. And at
15 the end of the trial, the jurors dropped one of the ballots
16 secretly into a verdict box and the majority ruled. That's
17 how jury selection was done in ancient Athens. That's how
18 cases were decided.

19 Juxtapose that, if you will, with the scheme
20 which you are well aware and familiar, as well as all of
21 the attorneys in this proceeding, where capital jury
22 selection in North Carolina, different judges do their
23 orientation different ways. I've had the opportunity to
24 appear in front of a number of different judges in capital
25 jury selection and no two do it the same, although they

1 borrow from each other a lot with respect to their jury
2 questionnaires, their instructions and their orientation.
3 One judge uses sometimes, always and never. That has been
4 picked up by some other judges. It's also been picked up
5 by some prosecutors who thought that was a good way to
6 break the ice and deal with a subject that most folks don't
7 want to have to deal with, especially in the context of a
8 public arena and having to make a decision in the public
9 eye. Sometimes, always and never. Can you consider the
10 death penalty to be the appropriate punishment in all cases
11 always, in no case never, or in some cases sometimes based
12 upon the evidence, right in the middle?

13 And, Judge, really when you look at the jury
14 selection process, that's what jury selection is really all
15 about. Both sides, the state and the defense, work against
16 the ends to get to the middle. And how we do that is based
17 upon the attitudes, the opinions and the beliefs of the
18 jurors as they express to us in answer to the Court's
19 questions, questionnaires, and from the state's point of
20 view, questions that are asked of the state because we get
21 to go first. We get to hear their answers first and,
22 indeed, we get to act before the defense and may prevent
23 someone from going to the defense where they would have an
24 opportunity to ask questions. But I assert to the Court
25 that in no case are those decisions based upon race and

1 that this is not a numbers game.

2 Now, there may be some gamesmanship, and I hate
3 to say that really in the context of something that's as
4 serious of life or death, but there may be some
5 gamesmanship with respect to how one goes about exercising
6 peremptory challenges because, as you know, as these ladies
7 and gentlemen know, there are a limited number that you can
8 use. In capital cases, you have 14. And once you exhaust
9 those, but for the good grace of the other side and/or the
10 Court exercising some discretion that sometimes most of us
11 on the other side feel they don't have, you're stuck with
12 your peremptory uses in terms of numbers. When you get to
13 the alternates, you get one per alternate and you can use
14 whatever you've not used beforehand.

15 One of the things that we haven't talked about in
16 this case is that strategy and tactics that might be going
17 into the use of a peremptory challenge with respect to
18 trying to make the other side, in our case, the state make
19 the defense, use a peremptory challenge by passing someone
20 to them that might be questionable as a juror that the
21 other side might not want on the case more than you don't
22 or another way of saying that, you don't mind them being
23 there less than the other side.

24 So when you're talking about peremptory
25 challenges, you're not talking about them in a vacuum

1 because there are a limited number. In most cases, judges
2 will not exercise discretion and allow more peremptories
3 than are allotted. In most cases, one side will not give
4 their peremptory challenges to the other side. Although I
5 must admit, I've heard some stories over the years about
6 people being gracious enough to do that, and maybe that
7 goes to the search for justice. But the use of those
8 peremptory challenges by one side or the other may be as
9 strategic as any other aspect of your case.

10 Now, please don't get me wrong. I'm not trying
11 to justify in this closing argument the use of peremptory
12 challenges with respect to anything that's been presented
13 to you here by the defense or their experts by saying,
14 well, you can dismiss that because of strategy and tactics.
15 All I'm saying is, Judge, it might be another variable that
16 doesn't have so much to do with a particular juror as it
17 does with the juror's answers and how you might be able to
18 use that, perhaps tactically to your advantage, by passing
19 someone to the defense that they may have to exercise a
20 peremptory on.

21 That's why we contend, Your Honor, that numbers
22 and statistics are not enough. They are just not enough.
23 Judge Gore has been cited in this case in the transcript
24 dealing with the 10,000 reasons. I've heard this Court
25 tell jurors there are many reasons why you may be stricken.

1 Don't be offended. Don't take offense if you are not asked
2 to serve because there may be a reason that is unbeknownst
3 to you in your answers that one side or the other takes you
4 off. And unfortunately, when you deal with statistics and
5 you just deal with numbers, you don't get to the
6 explanation, to the variables. And, indeed, even if you
7 do, it's questionable how they are treated with respect to
8 an overall view of what happens during jury selection.

9 Judge, I'm going to try not to repeat anything
10 that my learned co-counsel here has talked about. I do
11 want to touch upon a couple of things that he mentioned
12 with respect to the task that falls to the Court. Ms.
13 Stubbs, for the defense, mentioned this with respect to her
14 presentation in terms of the interpretation of the statute.
15 Both of them pointed out to you information in the statute
16 and asked you to consider their -- their points of view
17 when you get around to making your determination here.

18 And just as general -- just as general ideas,
19 really what you're going to end up dealing with, Judge, is
20 trying to interpret some ambiguous language and some
21 conflicting provisions. And in doing so, you're going to
22 be aware of what the consequences of those interpretations
23 are and in the application of the statute one way or the
24 other, there are going to be greater implications with
25 respect to how we deal with this subject matter in the

1 future and how the statute is applied.

2 One of the things that was -- is concerning to me
3 as a representative of the state -- and we've only heard
4 this in kind of veiled references. It hasn't been said
5 quite exactly in these terms and I don't mean by saying
6 this to try to be alarmist in any way. I don't mean to try
7 to be flip in any way. But it really sounds like what we
8 get down to talking about when we start talking about
9 numbers and ratios and percentages and the next word in
10 that is quotas. One of the presentations made by Ms.
11 Stubbs dealt with the four-fifths rule. The four-fifths
12 rule has its applications, Your Honor, in the law. We
13 contend it's not applicable here because there is a
14 difference between the subject matter of EEOC as it relates
15 to jobs and how they are meted out and the selection of
16 people to serve on a jury.

17 We mention the procedure of going through a
18 guilt-innocence phase, unless a defendant pleads and you go
19 directly to the sentencing phase. So there's still a
20 potential for kind of a binary type of an operation here.
21 Guilt-innocence, yes or no. Sentencing, yes or no. What
22 you don't have, if you go strictly with a numbers game, a
23 percentage, a ratio, a quota, is the makeup of the
24 individual person's thought processes, attitudes, opinions
25 and beliefs as they sit on your jury.

1 From the state's point of view, we have to
2 convince 12 people beyond a reasonable doubt that we have
3 proven our case. As you're fond of saying, it's not the
4 defendant who's on trial. It's the state's case. That's
5 foremost in every prosecutor's mind when you start a trial
6 because if you're not able to prove your case, you don't
7 get to the second phase.

8 Now, our job is to do justice, not just to win
9 but we do represent people who can't speak for themselves.
10 And so sometimes it's difficult not to take it personally
11 and not to try to invest some of yourself in the case.
12 Perhaps a better way to do it would be to deal with it at
13 arms length and be totally immune from the emotions and the
14 loss and the families but you can't. So if you don't get
15 to the guilty decision, you don't get to the sentencing.

16 Now, it seems to me that some of the things that
17 we have heard in court here makes it more important -- and
18 again, I don't mean to be demeaning anyone's opinion or
19 being flip about it, but it seems like it makes -- the gist
20 of some of the testimony here is it's more important to
21 have a representative sampling on the jury than it is for
22 the respective parties, the defense and the state, to try
23 to find 12 people that they think who will be receptive to
24 their testimony and evidence and who are not in a position
25 that have to otherwise be convinced that punishment, either

1 life imprisonment without parole or the death penalty, is
2 an appropriate punishment.

3 This is not an apt analogy but it's almost like
4 if you had someone that was against abortion and you had to
5 have them on a jury and to convince them that some
6 procedure that resulted in an abortive result or an
7 abortion for preventing the birth of a child, you'd be so
8 far behind the power curve that you'd never catch up. And
9 you wouldn't expect someone who was opposed to that from a
10 philosophical, a religious, a social, a personal point of
11 view to be on that jury. Yet it sounds like in here that
12 what we, as prosecutors, ought to do would be to make a
13 random selection of jurors and let whomever hits the box,
14 whatever baggage they bring, whatever attitudes, opinions,
15 beliefs, good things, bad things, whatever it is, we would
16 have to convince them that our case had merit and that we
17 could prove it beyond a reasonable doubt. And then if they
18 found someone guilty, then we might even have to convince
19 them, if they had any reservations about the death penalty,
20 or from the defense point of view, if they had any
21 reservations about life imprisonment without parole, we'd
22 have to dissuade them of those thoughts, get them to
23 disabuse their minds of those thoughts and accept our point
24 of view with respect to the proof of aggravating and
25 mitigating circumstances.

1 Defense attorneys take folks off of juries who
2 are pro death penalty, and that's not based upon race. The
3 state takes folks off of juries who are against the death
4 penalty, and that's not based upon race. It's based upon
5 answers to questions, attitudes, opinions and beliefs.
6 Because all of us, from both sides of the courtroom, want
7 the jury to accept our point of view. We want them to find
8 that we have either proven our case or, from the defense's
9 point of view, that they have convinced the jury that they
10 have a reasonable doubt.

11 Once it gets to the sentencing phase and the
12 question of punishment arises, no right thinking defense
13 attorney wants to have to go in and convince someone on a
14 jury panel that life imprisonment without parole may be an
15 appropriate punishment if they are against that to start
16 with because not only do they have to prove their case
17 essentially to one juror with respect to the mitigating
18 circumstances, not all of them but just one, and then
19 everybody can consider it, but if they're having to deal
20 with someone who is so opposed to life imprisonment without
21 parole, it might put them at a disadvantage.

22 It does not, however, put them at the same
23 disadvantage as a prosecutor. Why do I say that? Because
24 we have to convince 12 people. All they have to convince
25 is one person. We have to convince 12 people that we have

1 proven our case beyond a reasonable doubt and we have to
2 convince 12 people that we have proved those four issues
3 with respect to capital punishment not only beyond a
4 reasonable doubt but unanimously. And if we leave someone
5 on a jury that we have reservations about with respect to
6 their ability to consider the ultimate punishment, we've
7 placed ourselves at a grave disadvantage because, not only
8 do we have to carry the day with our burden of proof, but
9 we may have to philosophically or sociologically or
10 personally convince someone to do something that they would
11 not otherwise do because they had a reservation, a
12 hesitation, a reluctance to either consider the death
13 penalty or to vote for the death penalty.

14 Now, we tell jurors when it comes time to
15 instruct them that their decisions must be unanimous,
16 across the board, even with respect to punishment.
17 Ideally, that is correct. If the jury returns a life
18 imprisonment without parole recommendation, it is supposed
19 to be, under the law, unanimous but you know, I know, these
20 ladies and gentlemen who represent Mr. Robinson know that
21 that is not the way the law is applied. And if a jury
22 cannot make a decision with respect to life without parole
23 being a unanimous verdict or the death penalty being a
24 unanimous verdict, it only takes one person for that case
25 to be taken from them and not -- not to have a mistrial,

1 not to have a hung jury, not to do it again, but to impose
2 life imprisonment without patrol, one juror.

3 That's why jury selection is so important to both
4 sides, particularly in the context of the Racial Justice
5 Act that we're talking about today to the state and why we
6 take offense --

7 (Mr. Colyer becomes emotional.)

8 THE COURT: Take your time.

9 MR. COLYER: -- with respect --

10 THE COURT: Take your time, Mr. Colyer.

11 MR. COLYER: -- to say that we make these
12 decisions based on race. I'm going to be a little more
13 forceful in my language than my young colleague was. The
14 goals may be admirable with respect to this legislation but
15 it is an insult to the prosecutors and to the judges of
16 this state and, yes, even to the defense attorneys of this
17 state. Their experts have essentially told you, Judge, you
18 can't trust the prosecutors. You can't even trust
19 yourself. You can't trust the defense attorneys. You
20 can't trust the appellate judges. It's not just that
21 they're saying you can't trust everybody to do their jobs.
22 They're saying you can't trust them and we can prove it to
23 you with numbers. We contend that numbers are just not
24 enough, Judge.

25 I have a feeling I'm probably going to digress

1 here a few times and I'll try to stay on track as much as I
2 can and keep this moving in the direction of finishing in a
3 timely fashion. But there's a few things that I'd like to
4 say. We heard in this courtroom something about implicit
5 bias, implicit racism. I submit to you that this is not a
6 new concept. It's not a concept that, respectfully to Dr.
7 Sommers, he came up with. He looks like a relatively young
8 man, well-spoken, very intelligent, presents himself well
9 and presents his point of view very well.

10 I know you were in the military. I know you were
11 in the air force and you served in Southeast Asia. What I
12 don't know and can't remember based upon our conversations
13 is when you got out of the air force and started your
14 career in law and ultimately as a jurist. But I think you
15 might be able to relate to this. The Department of Defense
16 back in the late '60's and the late -- or the early '70's
17 had such a problem with race relations in the United States
18 military that a grand sociological experiment was
19 undertaken. The Department of Defense sent a directive to
20 each one of its branches of service and said you will get
21 rid of racism in your ranks from the top to the bottom and
22 the way you're going to do that is you're going to make
23 everybody sensitive. You're going to make everybody aware
24 of what's going on.

25 What gave rise to this, as you may recall

1 historically -- and my good friend Mr. James Ferguson
2 started us off thinking about some historical perspectives
3 and I'm going to follow that up with a little more recent
4 historical perspectives taking it now away from ancient
5 Greece, ancient Athens. In the late '60's and the early
6 '70's, we were in Southeast Asia and our military was
7 almost imploding on itself because of bad race relations.
8 And the military leaders and the civilian leaders in the
9 Department of Defense said we have got to do something
10 about this and one of the ways we're going to do this is to
11 make our people sensitive and make our people aware and
12 make them go to class, make them go to sensitivity training
13 sessions. In the air force, we called it social actions,
14 equal opportunity and treatment, race relations, drug and
15 alcohol. All three of those were related to the race
16 problem that was almost epidemic in the military in the
17 late '60's and early '70's.

18 The Department of Defense set up a school at
19 Patrick Air Force Base in Florida and people were selected
20 based upon volunteering from around the military, all over
21 the world, all branches, to go to that school to be
22 sensitized, to be made aware and to go back and share that
23 sensitivity with the people at their posts, their bases and
24 their ships, their outposts. One way they did that was
25 through tea group sessions. If you're old enough to

1 remember these occurrences, you probably remember some
2 things in the newspaper about it and how it was dealt with
3 by people who didn't want to be there, whether they were
4 white or black. Very derisive terms were used about this
5 session, this tea group training. Blacks called it "honky
6 you" and whites called it "watermelon college" and the
7 people who worked there were social pariahs.

8 People were brought into the classroom for a week
9 at a time and kept from 9:00 in the morning until 4:00 or
10 4:30 in the afternoon and they saw films. They had
11 discussions with each other. They had speakers and they
12 listened to records and they talked. And the goals were to
13 increase awareness, increase understanding, increase
14 communication and to eradicate institutional racism in the
15 military, and institutional racism was made up of people.
16 It was intended to also eradicate individual implicit bias
17 and implicit racism, whether you knew it or not.

18 So this is not a new concept. The Department of
19 Defense conducted their sociological experiment back in the
20 early '70's. And I must admit, I don't know if it's still
21 going on to tell you the truth but it's not something
22 that's new. Judge Trosch talked about it with respect to
23 judges. Personally I think all of us could stand to go to
24 some more sensitivity training and maybe we will in the
25 future. Who knows? But those efforts may or may not have

1 resulted in the eradication of institutional racism in
2 those branches of service and in the Department of Defense.
3 It was an effort. The people who went I'm sure thought
4 this is not doing any good but maybe it did.

5 Maybe the Racial Justice Act is doing some good
6 by getting people in the state to talk about this issue, if
7 nothing else, to be aware of it, to be sensitive to it and
8 to talk about it. Maybe that's what we should have done
9 instead of saying, This is a law. It's now passed. We're
10 not going to tell you what it means. You read it and
11 interpret it and here are some of the things that you can
12 use to apply it without giving further guidance and saying
13 that statistics are evidence. But really are statistics
14 and numbers enough? We contend that they are not and we
15 contend that we have demonstrated that in this courtroom by
16 the examination of the defense witnesses and the
17 presentation of evidence with respect to the state's case
18 based upon dealing with those answers that give rise to the
19 numbers, the explanations, the variables, if you will.

20 I'm not a statistician. I'm not a mathematician.
21 Thank God for Jonathan Perry. Glad he was here to
22 represent the state. He did a good job doing that, just as
23 my friend Rob Thompson did a good job representing the
24 state in this case and bringing his youth and enthusiasm to
25 it, and I commend him for his closing argument today. It

1 was well thought out, well presented and he conducted
2 himself the way the Court would want all of us to conduct
3 ourselves under Rule 12.

4 Judge, let's talk about this case for a minute.
5 Mr. Thompson has already started talking to you about this
6 a little bit and I'm not going to go through the
7 transcripts that he brought to your attention. What I want
8 to point out to you is, when we started this, you were told
9 that 50 percent of the black jurors, black veniremen --
10 members who came into the box were excused by the state.
11 We can't argue with that number. Five out of ten came into
12 the box. Five out of ten were excused by the state. Five
13 were passed by the state. Some were struck by the defense,
14 I believe three if I'm correct -- if I remember that. Why
15 did they take three black jurors off of this case? I would
16 argue to you that it wasn't because they were black. It
17 was probably based upon their attitudes, their opinions and
18 their beliefs, just like everybody else in this case and
19 every other one that we've talked to you about was excused
20 because of their answers.

21 Now, if -- and I must admit, I don't understand
22 this and if I say something that's incorrect, please excuse
23 me. It's totally out of ignorance. It's not out of trying
24 to hoodwink the Court or being smart or anything. Seems to
25 me if you've got a legitimate reason for taking somebody

1 off of the jury, that that person gets moved from column A
2 to column B and doesn't get counted against you, even if
3 you adjust for the variables. My point is, if you look at
4 the five jurors that were taken off by John Dickson that
5 are the subject matter of Mr. Robinson's complaint here,
6 three of them had very clear black and white reservations
7 about the death penalty. You've heard it from the
8 transcripts. You've seen it. The witnesses have talked to
9 you about it.

10 So if we move them from column A, not just to
11 column B, but take them off the chart, why did they still
12 get counted against us? If three people had serious
13 reservations about the death penalty, why doesn't it come
14 down from five to two and we deal with the explanations for
15 those two? If three came out of the five and two were
16 removed for another reason besides race or the death
17 penalty reservation, how does that compare with the three
18 that the defense took off? We're actually behind the
19 defense at that point. Our percentages and figures would
20 be lower than theirs. A reservation with respect to the
21 death penalty doesn't mean you're a bad person. It seems
22 to imply, and one may infer, that a reservation about the
23 death penalty means that you can't follow the law in that
24 particular case because the Court is going to give the law
25 to the jury.

1 Now, Judge that raises another issue that we
2 haven't talked about here and it is one that's almost
3 without quantification and sometimes difficult to even try
4 to qualify and that's the answers that jurors give you.
5 Sometimes a juror will tell you one thing and do something
6 else entirely. Sometimes a juror will say, yes, I can
7 follow the law. I can do that. I can vote for that. And
8 then it gets reported back when the case is over days,
9 weeks, months later and somebody who was in the jury pool
10 wants to share information with someone else, like maybe
11 giving an affidavit or talking to somebody at the grocery
12 store, and they share -- although not to impeach the jury
13 verdict, but to show that this is a very tenuous existence
14 that we live with respect to picking jurors and taking what
15 they say at face value and, yes, making life and death
16 decisions based upon what they say. Jurors reporting back
17 that yeah, when a person got into the jury pool and they
18 couldn't do it. They couldn't -- they couldn't vote for
19 the death penalty. Another juror said to them, well, but
20 you told the judge, you told the prosecutor, you told the
21 defense attorney that you could do it. I don't care what I
22 told them. I can't do it. Were they lying when they were
23 in here? Or were they telling what they thought they
24 needed to say to get on the jury? Or were they trying to
25 tell both sides I've never done this before? I don't know.

1 I think I can. Oh, yes, I can. But only to find out later
2 that they couldn't.

3 You've been over here where we are, Judge, not as
4 a prosecutor but as a defense attorney. And you've asked
5 questions of jurors and had to take them at face value with
6 respect to what they told you about your clients and your
7 clients' cases. And I'm sure that in some cases you have
8 been disappointed to find out that a juror told you one
9 thing in jury selection only to do something else later.
10 Yes, I can hold the state to that burden of proof. Yes, I
11 can consider life without parole. Did they? We all hope
12 that when a juror tells us something that they're telling
13 us the truth, that they're shooting straight with us so
14 that we can make a decision for our respective sides and in
15 good conscience say, I tried to do my job, represent my
16 client, and go to sleep at night.

17 Two of the jurors in the Robinson case submitted
18 affidavits. Those affidavits were part of ten affidavits
19 that came in in defense exhibits I think it was 36 to 44,
20 somewhere in there. And those affidavits were used by
21 Professor Stevenson as an example of his basis of his
22 opinion with respect to showing the harm that a juror feels
23 when they are excused peremptorily and later, rightly
24 because of the information they heard or read or saw, they
25 -- or wrongly because they might have been given some bad

1 information, they think that they have been harmed in some
2 way. Two of those affidavits from Mr. Robinson's case,
3 Troy Elliott and Nelson Johnson, Judge, read those
4 affidavits. Read the transcripts that Mr. Thompson brought
5 to your attention, that Mr. Hunter brought to your
6 attention. And I dare say you are going to read some
7 things in those two affidavits that are not supported by
8 the record.

9 Now, is that because memories fade? People
10 remember what they think they remember or what they want to
11 remember? People are trying to justify their own feelings
12 or the way they were treated? An innumerable number of
13 potential reasons, just like there are an innumerable
14 number of explanations and variables with respect to trying
15 to assess the answers, the attitudes, the opinions and the
16 beliefs of jurors when they -- when they answer your
17 questions in jury selection.

18 Judge Weeks, you and I had the opportunity to be
19 involved in a couple of cases together and those
20 transcripts are in this study. Some of those answers and
21 questions have been referred to by witnesses here in the
22 courtroom. Judge, I don't think for a minute that you
23 didn't do your job. I'm sure the defense attorneys didn't
24 think you didn't do your job. I'm sure the jurors didn't
25 think you didn't do your job. And I'll bet the seven

1 justices on the Supreme Court when they reviewed those two
2 cases didn't think that you didn't do your job.

3 We attempted to subpoena you as a witness not to
4 get you off this case, Judge, but to get the benefit of
5 your knowledge and your wisdom and what you knew about jury
6 selection in those cases and this case and we were vilified
7 in the media. Law professors and lawyers called us
8 racists, called us unethical and called us liars. I guess
9 we'll have to let the public be the judge of that. But I'm
10 telling you that's not why we did that.

11 Judge, we've talked about Batson challenges here.
12 You probably know already of the 11 cases in Cumberland
13 County, there were two cases that had Batson challenges.
14 Ironically, both of them involved the homicides of law
15 enforcement officers. One case, the Golphin case where two
16 brothers were charged with killing a highway patrolman and
17 a Cumberland County sheriff's deputy, we had to go to
18 Johnston County to pick the jury, bring them back to
19 Cumberland County for the trial in front of Judge Brewer
20 because of the pretrial publicity. During the course of
21 the Golphin case, there were two Batson challenges raised.
22 Golphin was tried in 1998. The lawyer who made those
23 Batson challenges is a good friend of mine, James Parish.
24 Judge Brewer determined that those Batson challenges, based
25 upon what he heard and what he saw, would be denied. The

1 North Carolina Supreme Court had an opportunity to have
2 assignments of error brought to them that may have related
3 to something that was done wrong in the trial. And as Mr.
4 Thompson pointed out to you earlier today in his argument,
5 Batson was not a reason for a reversal. Indeed, those
6 convictions and death penalty cases were upheld on appeal.

7 The next case where we had some Batson
8 challenges, State versus Augustine, another Cumberland
9 County case involving the death of a law enforcement
10 officer. That case was sent to Brunswick County for trial,
11 again because of pretrial publicity. The judge in that
12 case, Honorable Jack Thompson, defense attorneys, Jim
13 Parish and Haral Carlin. Two more Batson challenges made,
14 again, by Mr. Parish. In one situation, Judge Thompson
15 found that there was no prima facie case, and in the other
16 case, the other challenge, he found that the state did not
17 intentionally discriminate against that juror or any other
18 jurors.

19 All the other nine cases in Cumberland County,
20 there was no Batson challenge raised. And indeed, Randy
21 Gregory, whose name has been invoked here earlier today, in
22 respect to dealing with the peremptory challenge of Tandra
23 Whitaker, said specifically, We are not raising a challenge
24 with respect to race or racial discrimination as it relates
25 to this juror. Randy Gregory, being the bulldog that he

1 is, wanted Ms. Whitaker on his jury because she had
2 reservations about the death penalty and he contended that
3 her answers -- when he spoke to Judge Johnson, his
4 justification were her answers -- she is just the kind of
5 juror we want. I guess so.

6 And that -- that -- that proves my point with
7 respect to that, Judge. No disrespect intended to anybody
8 but that's the crux of this whole thing. You have to
9 listen to what the jurors say and try to make the best
10 decision you can to get the best jury who will be receptive
11 to your point of view, who will follow the law and who will
12 give you a fair shot at the guilt-innocence and the
13 punishment, if you get there. And if you have to keep
14 someone who expresses a reservation about the death
15 penalty, it's almost like tying one hand behind your back
16 before you start. We wouldn't make the defense keep
17 someone that they wanted to peremptorily excuse because
18 they had reservations about life imprisonment without
19 parole, whether they could consider it or whether they
20 could vote for it, depending on how they answer those
21 questions. But if the defense attorneys thought that based
22 upon the answers, the way they answered it, the inflection,
23 the intonation, the body language, whatever it was, if they
24 had misgivings about that person's answers and whether or
25 not they could really do what they said they would do, they

1 wouldn't leave them. And they are not thereafter second
2 guessed for taking them off.

3 Judge, Mr. Thompson spoke to you about Dr. Cronin
4 and I wanted to briefly comment about Dr. Cronin as a
5 witness. Dr. Cronin said that juror etiology, not racism,
6 can explain the results of statistical studies and black
7 dismissal at a higher rate, not justifying it based on
8 stereotypes, not justifying it based on generalizations,
9 but indicating, as we tried to indicate with all of our
10 evidence, that you have to listen to what the juror says
11 and the perspective from which the juror is answering your
12 question, not the white perspective, not the black
13 perspective, but the personal perspective, what it is that
14 makes them say how they feel, what they believe, what they
15 think.

16 Everybody in this case, both defense and state's
17 witnesses, have talked about polls, voting polls, census
18 polls. The polls are not what people make their decisions
19 about with respect to jury selection, Your Honor. They may
20 be an indicator of somebody's etiology, of the way somebody
21 thinks. But we don't ask jurors when they come in here,
22 have you had a poll recently? Has anybody polled you to
23 see what your attitudes are about these subject matters?
24 We're actually doing a poll when we ask them questions.
25 It's like a survey. It's like an individual poll and an

1 individual survey of that juror based on the questions that
2 they are asked by the state and the answers that they give.
3 It's not a poll done across the United States. It's not a
4 poll done in North Carolina based on voting. It's an
5 individual poll based on questions and answers of an
6 individual juror.

7 Judge, you've heard a lot of information about
8 facts and figures and statistics and you've seen slides and
9 you've got a wealth of material in front of you. And none
10 of us envy you in the job that you have to do to go through
11 this and to make sense of it and to tell both sides and
12 everybody in the state what the outcome of this is going to
13 be based upon what you've seen and heard in this courtroom.
14 It is significant. It is important that there are
15 statistics which show the relative seat rate of everybody
16 who comes into the courtroom. That chance of hitting the
17 seat and serving is the same for everybody. It doesn't get
18 much better than that.

19 Judge, there's been a lot of media coverage of
20 this case and there's been a lot of reporting and I want to
21 reflect back to you some -- something that I've run across,
22 not attributing it to anybody, not attributing it to a
23 speaker but just the words. More significant is, what is
24 the person's background and what do they say their views
25 are? Sometime when this is all over, you might run across

1 this quote. One side or the other might have an
2 opportunity to speak with you after the decision is made
3 and you may hear where that quote came from. It doesn't
4 really matter at this point where it came from. What
5 matters is the gist of it because that's what we've been
6 talking about in here for the last two and a half weeks
7 from the state's point of view. What is significant?
8 Interesting that the speaker used that word, significant.
9 What is the person's background and what do they say their
10 views are?

11 Mr. Thompson and I have been referring to
12 attitudes, opinions, beliefs, feelings. What we're talking
13 about are views. Getting somebody to share with you in a
14 public setting information that may be of an intimate
15 nature to them with respect to their views on life and
16 death. That's what our decisions are made upon, Your
17 Honor, not on race. Reservations of a juror concerning his
18 or her ability to impose the death penalty constitute a
19 racially neutral basis for exercising a peremptory
20 challenge. Who says that? Cal Colyer? No. The State of
21 North Carolina speaking through the Justices of the North
22 Carolina Supreme Court say that, and they said that as far
23 back as 1994 in the State versus Basden case. Reservations
24 of a juror concerning his or her ability to impose the
25 death penalty constitute a racially neutral basis for

1 exercising a peremptory challenge. Our Supreme Court has
2 said in their opinions that, referring to themselves, This
3 court has held that a prosecutor may exercise peremptory
4 challenges in order to select a jury that is stable,
5 conservative, mature, government oriented, sympathetic to
6 the plight of the victim and sympathetic to law
7 enforcement, crime-solving problems and pressures.

8 Judge, that applies across the board to the
9 citizens of the State of North Carolina. It doesn't say
10 white citizens. It doesn't say black citizens. It says
11 jury members. And the way the state goes about dealing
12 with selecting jurors is based upon their answers, their
13 explanations, if you will, their reasons, the variables
14 that were referred to by Dr. Katz and by others in this
15 case.

16 Your Honor, I know the defense has told you what
17 they contend their position is and what they contend you
18 will be doing in making your decision, but I contend to you
19 that from the state's perspective, to accept the statistics
20 that they're talking about, you have to believe that the
21 state discriminated intentionally against these jurors,
22 that there were not race neutral reasons for the exercise
23 of peremptory strikes, that there were not legitimate,
24 legally recognized reasons for the excusal of jurors that
25 the state was going to have to attempt to prove in most

1 cases guilt beyond a reasonable doubt and that the answer
2 to those four questions were proven beyond a reasonable
3 doubt and unanimously with respect to the appropriate
4 punishment.

5 You have to believe that your fellow judges were
6 asleep at the wheel. You know that's not true. You've
7 been one of those judges. You have to believe that you and
8 they didn't do your jobs in monitoring jury selection and
9 enforcing State versus -- excuse me, enforcing Batson
10 versus Kentucky against the state in their exercise of
11 peremptory challenges. You have to believe that the North
12 Carolina Supreme Court deferred to the trial court, not for
13 legal reasons, not for the reasons that the trial court was
14 in a better position to assess the credibility, the
15 believability, the body language, the intonation of the
16 answers given by a particular juror when they were either
17 passed or struck by the state.

18 That's why my good friend Rob Thompson said that
19 what this is is an indictment of all of us. It's not only
20 an indictment of all of us that we didn't do our jobs or
21 that we did our jobs improperly but in essence it is an
22 indictment that we're all racists. Because if numbers
23 alone are enough, that means you can't explain it. That
24 means you can't explain a particular strike. The only
25 thing that is explicative of that is race.

1 I'm hesitant to make this statement I'm getting
2 ready to make, Judge, because it kind of concerned me and
3 almost scared me when we were in here earlier listening to
4 the testimony of some of the defense experts. And I want
5 to disclaim what I'm getting ready to say to you from the
6 sense that I don't believe this. I'm not advocating this.
7 But it almost sounded like the next thing that was going to
8 come out of somebody's mouth with respect to jury
9 selection, even going beyond quotas -- when we were talking
10 in this courtroom about implicit racism and how people make
11 their decisions, I was holding my breath because I was
12 wondering, surely to God, this is not going to be the next
13 thing that comes out here about what kind of decisions
14 people make with people who are different than them and are
15 of a different color. It almost sounded like at one point
16 that we were talking about not going to a jury selection
17 machine like the ancient Athenians used, the kleroterion,
18 where there was no individual voir dire, where there was a
19 totally random selection of the pool from which they had to
20 pick, not even that, not -- not drawing names out of a hat,
21 not even that. It almost sounded like somebody was getting
22 ready to propose the God awful solution of separate juries,
23 a black judge, a white judge, a black defendant, a white
24 defendant, a black prosecutor, a white prosecutor, a black
25 defense attorney, a white defense attorney, all black

1 jurors, all white jurors. That would be an indictment of
2 all of us if that's what we have to revert to in order to
3 make justice work.

4 Thankfully nobody said that. It wasn't a
5 suggestion but it sounded like we were getting
6 precipitously close to that if you buy into the implicit
7 racism and the decision making process that is infected by
8 that totally unbeknownst to us as people. That would not
9 be a solution. Nobody in this room would advocate that.
10 But it almost sounds like if you carry it to its logical
11 conclusion with respect to the concept that that's where
12 you're headed.

13 If you're going to take the human element out of
14 it, if you're going to take the voir dire out of it, give
15 me a hat with names. Give me a modern day kleroterion.
16 And don't make a decision based on race. Don't make a
17 decision, Your Honor, we implore you, with respect to the
18 Racial Justice Act based upon numbers. Don't envy you,
19 Judge, but I do admire you. Thank you.

20 THE COURT: Mr. Colyer. 15 minutes enough time?

21 COURT REPORTER: (Nodding head.)

22 THE COURT: Okay. Mr. Ferguson, we're going to
23 allow the court reporter and all of us to take a brief
24 recess and then we'll come back for your final argument.

25 MR. JAMES FERGUSON: Thank you, Judge.

1 THE COURT: We're at ease. Thank you, folks.

2 (Recess taken.)

3 (The following proceedings continued in open
4 court. The defendant, defense attorneys and state's
5 attorneys were present.)

6 THE COURT: Okay. Let the record reflect all
7 counsel are present. The defendant is present. Mr. James
8 Ferguson, we're ready for your argument. I'm looking out
9 in the audience. Don't see any members of media with
10 cameras present but if there's anybody that wants to be
11 heard about positioning of any recording devices, please
12 let me know now. My understanding is you're going to speak
13 from the podium, Mr. James Ferguson?

14 MR. JAMES FERGUSON: From that area, Your Honor.

15 THE COURT: Okay. In that general area?

16 MR. JAMES FERGUSON: Yes, sir.

17 THE COURT: We're ready to go. Thank you, sir.

18 MR. JAMES FERGUSON: Thank you, Your Honor. May
19 it please the Court --

20 THE COURT: Yes, sir.

21 MR. JAMES FERGUSON: -- counsel. We've talked
22 about the journey that has been represented by this case
23 and, in a larger sense, the journey that is reflected in
24 the Racial Justice Act. And to be sure, though my
25 colleagues said that that journey with this case started in

1 2009 with the passage of the Racial Justice Act, in a
2 larger sense, Your Honor, that journey started long before
3 that. I initially was going to talk about that journey
4 starting with captive slaves being brought to these foreign
5 shores and brought into a life of slavery but my colleague
6 on this side has taken that journey even further back and
7 talks about -- I think he called it a kleroterion and
8 sortician in ancient Greece and the trial of Socrates. And
9 I suppose if we look even beyond that, we'd have to look at
10 not just ancient Greece but ancient Africa from whom we
11 borrowed much of their civilization and they did have a
12 system of capital punishment. Socrates was tried under
13 that system. And while we are not here to try Socrates, I
14 think we have to make the observation that human kind has
15 been trying for a long time to get this system right and
16 we're not there yet.

17 So it is that the Racial Justice Act causes us to
18 focus on what has been the history that has led to the
19 Racial Justice Act. The Racial Justice Act didn't come out
20 of 2009. The Racial Justice Act wasn't put there because
21 somebody wanted to indict prosecutors or judges or whoever
22 the charge is in North Carolina. But that Act, Your Honor,
23 is the culmination of efforts to obtain for
24 African-American citizens the same rights of citizenship
25 that all Americans are entitled to without regard to the

1 color of their skin.

2 So it was not an Act that easily was presented to
3 and sailed through the North Carolina legislature, but it
4 was the Act that was the result of centuries of bloodshed
5 and tears and agony and pain but, in spite of all that,
6 hope and aspiration to realize those ideals that were
7 enunciated, perhaps first, in the Declaration of
8 Independence and then in the constitution of the United
9 States. But even with that, after being here on these
10 shores for more than two centuries, African Americans were
11 still faced with a decision from the United States Supreme
12 Court that said to them and said to all America, black men
13 have no rights which a white man is bound to respect. The
14 court said that in 1857 in the Dred Scott decision. The
15 Constitution had been in place for more than 50 years.

16 And even after that, Your Honor, there was a
17 bloody Civil War as part of this quest for the recognition
18 of the full rights of a significant segment of our nation.
19 And even after a bloody Civil War and three Civil War --
20 four Civil War amendments, we found ourselves in this
21 country still denying to African Americans those rights
22 which were supposed to be simply incident to citizenship.

23 Now, all during this time, African Americans had
24 been denied the rights of citizenship and had been denied
25 the right to serve on juries. And even after the Civil War

1 amendments, there was only a brief respite during which
2 some relief was seen. So that when the Court decided the
3 Strouder case in the 1880's, it was against this background
4 of long years of suffering and pain but yet aspiration and
5 hope that the court made that decision. And 40 years after
6 the Dred Scott decision, when the Court decided the Plessy
7 versus Ferguson decision, there was still only second-class
8 citizenship for a large segment of people who were supposed
9 to be protected by the Constitution of the United States.

10 And I could carry us forward from there with what
11 the Brown decision was all about, which was the elimination
12 of stereotypes in public life. But even after Brown, for
13 many, many years after Brown, there was resistance to that.
14 And even today, we still see some resistance of pre-Brown
15 America.

16 Now, how this plays out in juries is that during
17 this same period of time, there was a quest for equality in
18 all aspects of citizenship, including jury selection. But
19 as late as 1966, in the Swain case, that still was not
20 apparent in terms of African Americans simply serving on
21 juries. So that if we go from 1966 to 1986 with the Batson
22 decision, what we see in Batson is not an indictment of the
23 past but an attempt to shed some light on the future in
24 terms of rights of a segment of our country, of our nation
25 that had been denied those rights for years. And just as

1 Swain didn't accomplish the purpose of assuring rights for
2 African Americans in jury service, neither did Batson,
3 although Batson moved us forward. And the beacon of light
4 that Batson shed on the system of jury selection in America
5 is that the court recognized that in the exercise of
6 peremptory challenges, race had played a role, race had
7 played an unseemly role, race had played an unacceptable
8 role. So it was the hope with Batson that we can get
9 beyond race being an eliminating factor in participation in
10 jury service for all Americans.

11 Now we're going to move from Batson to where we
12 are now but let me just say that at each step of the way on
13 this long, torturous journey, there was resistance. There
14 was resistance to slavery. There was resistance to
15 emancipation. There was even resistance to Plessy versus
16 Ferguson which said the races can be kept separate but they
17 must be equal. There was resistance to Brown. There was
18 resistance to the Civil Rights Act of 1964, the Voting
19 Rights Act of 1965, the Housing Act -- Fair Housing Act,
20 1968, to affirmative action when it was declared by
21 President Johnson. There was resistance to fighting racism
22 in the service, not just in the '60's but back in the
23 '40's.

24 So change, and particularly systemic change, Your
25 Honor, has always been met with resistance. And,

1 therefore, I suppose it should come as no surprise today
2 that in this latest step in North Carolina, the Racial
3 Justice Act, that there would likewise be resistance. And
4 there is and, sadly, we heard some of that resistance in
5 this courtroom today. These steps forward are often met
6 with steps backwards, have somehow moved us forward still
7 in spite of what resistance there has been, just as this
8 latest forward movement by the North Carolina legislature
9 can and will move us forward in spite of the resistance
10 that will be raised against it.

11 So I think it's important that we understand
12 clearly today that the fact that some light has now been
13 shown on this process of jury selection in North Carolina
14 and throughout the nation for that matter, that that light
15 cannot be dimmed by the intensity of the opposition to its
16 shine. And what the legislature saw in enacting the Racial
17 Justice Act was that, although Batson v. Kentucky had been
18 at work for over 20 years, there was still work to be done
19 and more needed to take place in order to move forward as a
20 state.

21 So I cannot support those who say that by shining
22 a light on the jury selection system in North Carolina and
23 by trying to move us forward in that system to a time when
24 we would not have African Americans, or any ethnic group
25 for that matter, excluded or eliminated from jury service

1 because of their race, I cannot subscribe to a notion that
2 the legislature of North Carolina indicted district
3 attorneys. I cannot subscribe to a notion that the
4 legislature of North Carolina somehow indicted judges and
5 indicted defense lawyers and indicted a criminal justice
6 system. To shine a light on a practice that is
7 inappropriate and unacceptable is not to indict the system
8 but to move the system forward.

9 And so we stand here today in this courtroom with
10 the first opportunity to make sure that that bright light
11 shines and is not dimmed by the intensity of the
12 opposition. And it is that journey that this case is a
13 part of and it is that journey that this case is all about.

14 Now, we've been told that somehow or another, for
15 our side of the table, this has become a numbers game. But
16 I'm going to be quick to say that if it is a numbers game,
17 we didn't start it. The North Carolina legislature in
18 response to McCleskey versus Kemp, where the United States
19 Supreme Court invited states to determine what their
20 response to McCleskey would be, our legislature looked at
21 it and said here is what the response will be. In
22 McCleskey, Justice Powell of the Supreme Court said we will
23 not accept statistics for proving race in this individual
24 case. That's what they said about the Georgia system.
25 They didn't say the statistics weren't acceptable. They

1 said we don't accept statistics to prove race in Warren
2 McCleskey's individual case. If the states want to deal
3 with statistics, they can. And North Carolina said yes, we
4 can. And that's what they did with the Racial Justice Act.

5 And they said specifically in that Act, you can
6 rely on statistics, that numbers have a place, that a
7 statistical showing is among the evidence that can
8 appropriately be considered by a judge in deciding whether
9 race was a significant factor in jury selection. Today
10 we're talking about it in this case. So that's what the
11 legislature said. But the legislature didn't just say that
12 to Marcus Robinson and other defendants who had been
13 convicted and who were on death row. It said it to
14 prosecutors throughout the State of North Carolina. It
15 said it to those involved in the criminal justice system
16 that statistics are important. So it's not like somehow or
17 another they were surprised by statistics. They were
18 informed that statistics would be a part of this case and
19 should be a part of the case. That was the direct response
20 to McCleskey.

21 So to somehow suggest that because we're on this
22 side following what the legislature prescribed and directed
23 are somehow indicting the whole system of criminal law
24 mischaracterizes what that law is all about -- and I point
25 that out, Your Honor, because the Michigan State

1 researchers did not have a monopoly on statistics. They
2 did not have a monopoly on the data that they collected.
3 That information was equally available to the prosecutors
4 in this case, in Winston-Salem and throughout the State of
5 North Carolina. That information has been equally
6 available. Not only that, where they could have gotten
7 their own statistics to say we hear you, legislators, and
8 here are our statistics and here are how these statistics
9 show something different from what theirs do, they didn't
10 do that. But they didn't have to do that, Your Honor. We
11 gave them our statistics, they -- our -- the information
12 that underlay our statistics and our statistics.

13 So if that was in error -- if those statistics
14 didn't show what they say now it doesn't show, where is
15 their study? Where are their statistics done in accordance
16 with the standards of the scientific community to say, not
17 like they say it, it's the way we say it? They chose not
18 to conduct a study and they spent a good deal of time
19 through their only statistical expert on the stand making
20 sure that they didn't characterize his report or they
21 didn't characterize his testimony as a study. They didn't
22 rise to that level because they didn't take it to that
23 level. Although they had the opportunity to do that, they
24 chose not to.

25 So they called it, not a study, but a report.

1 Although, I think they called it at one point data
2 collection is what they said it was because even they
3 recognized that it didn't rise to the level of a study.
4 Even they recognized that it didn't meet the standards of
5 the scientific community of that area in using whatever
6 information they did or whatever analysis that they did as
7 a study that had any comparable level to the Michigan State
8 study. So by their own concession, they have not done the
9 study. By their own acknowledgment, they have not brought
10 statistics in to do that. And I have to say, Your Honor,
11 without repeating what has been said before, that it's rare
12 in a case such as this where you will see statistics such
13 as these that carry such a powerful message and that shine
14 such a bright light on the practices that led to it during
15 that 20-year period.

16 One comment that I heard them say was that by
17 their using the statistics, we can't overcome that, a
18 proposition with which, of course, we agree, not because
19 they are statistics but because they are the result of a
20 very careful, a very scientific, a very clear process and
21 analysis that they have not refuted and they cannot refute.
22 Now, let me say also that, although the statistical showing
23 that we have presented to the Court reflects specifically
24 what happened over a 20-year period, that this case is
25 really about -- just like the RJA is really about more than

1 just this 20-year period. That was just a glimpse of what
2 had happened to start and they chose a 20-year period
3 because that was appropriate for this case dealing with a
4 1994 conviction in this case but also a relevant period for
5 the State of North Carolina, given the statistics regarding
6 those on death row themselves.

7 So it's an appropriate period of time but it is
8 simply a reflection of what has been going on for decades
9 and centuries and it portends what can go on for more
10 decades unless something is done to address the issue which
11 they have done and they told us what we needed to do and we
12 have done that, Your Honor.

13 And if this case was to be interpreted and
14 analyzed simply as a Batson case, then there would have
15 been no need for the Racial Justice Act because Batson was
16 already in effect and had been in effect in North Carolina
17 since 1986. And what's being suggested from the state's
18 side of the case is that somehow we need to treat this as
19 though only Batson is what we deal with today. And that --
20 that state of mind, that kind of thinking, no doubt, is
21 what has fueled their presentation in this court, for all
22 we have heard from them essentially is that your study is
23 no good because we don't like it but what we have are the
24 real facts, they call it. What we have are statements from
25 some of the people who were involved in the system. We've

1 got some prosecutors that can tell you some things about
2 what they did over time but they don't even claim that
3 that's a representative of what happened throughout the
4 system. They cannot validly claim that that somehow
5 refutes or undermines the statistical analysis of the
6 Michigan State University study. They say we have facts,
7 not statistics as those statistics are not based on facts
8 and we know that they are.

9 So they bring affidavits to Court from some of
10 the prosecutors who responded to their study but then they
11 apparently don't trust their own affidavits. We looked at
12 those affidavits and saw that the affidavits don't tell the
13 story, that the affidavits appear to be more results of
14 this Batson qualification, Top Gun seminar, whatever it is,
15 that some folks have gone to and that these explanations
16 are being given, not because that's what was actually in
17 the mind of the prosecutor at the time, but that's because
18 what might satisfy the Court at this time.

19 So when we looked at the -- one of the particular
20 affidavits that Mr. Hunter talked about this morning, that
21 was the one about the hardship case where the person was
22 concerned about being able to continue to work to pay his
23 child support and another one was concerned about what
24 would happen to his job if he served on this jury. And
25 after -- after we showed them that in their affidavit

1 concerning that jury and those jurors, they said that the
2 reason that the African-American jurors were struck was
3 because of hardship. Now, if that was the case, then you
4 would expect that to be the case for all time.

5 But once it was pointed out, as Mr. Hunter did
6 this morning, that there was another case of hardship and
7 it was a white juror who had hardship with his job and then
8 suddenly the reason for excluding the bad juror which was
9 given in their affidavits -- this was in Mr. Colyer's
10 affidavit -- as being hardship, then we hear his colleague,
11 Mr. Thompson, suddenly say, well, hardship -- everybody
12 knows when somebody is in the system for child support,
13 that that's not a juror that the state's going to accept.
14 So we simply have to ask the question why wasn't that
15 apparent when this case was reviewed that hardship was
16 given as the reason? Why has hardship now somehow morphed
17 into being charged with child support and that is the
18 reason? And it really is for that reason, Your Honor, that
19 simply talking to folks who have a motive to justify what
20 took place cannot be a good ironing point.

21 It's not because of dishonesty. It's because of
22 what Judge Dickson said. He said, When we're in a case,
23 we're in a case to win and we make our decisions based on
24 what we need to do to win, not under ethical, not on that
25 sort of thing. That's how we're talking about. But you

1 think about how this fits with what your theory is. You
2 think about what makes this work for you in that
3 circumstance. So in this instance, this is how I suspect
4 in countless -- this is why we didn't spend the Court's
5 time this morning, when you look at some reason that was
6 given at a time that wasn't at the time the decision was
7 being made to begin with and you find that that reason
8 doesn't fit, then you begin to think of other reasons which
9 might fit. Whether or not that was the reason at the time
10 is the reason it fits now. That's what happens when you
11 use anecdotes and affidavits such as the kind that they
12 have put into the record. And the only prosecutor who
13 actually testified in this case was Judge Dickson. They
14 chose to put the others in through affidavits, which was
15 their choice.

16 But I think it's significant to note that Judge
17 Dickson did say himself in his testimony, number one, that
18 he has seen prosecutors engage in racial bias, whether
19 implicit or otherwise. He saw it himself. He even went so
20 far as to recognize his own susceptibility to implicit
21 racial bias, which I think is admirable that he
22 acknowledged that. That's true as our experts have said
23 and not only said but demonstrated is true. So if there
24 had been some district attorney who had said differently
25 and who can say, well, no, district attorneys are immune to

1 this implicit bias that you're talking about, I suspect we
2 would have heard from that district attorney. They
3 certainly had the opportunity to do that.

4 So what that tells us then is that the method
5 that they chose to undercut or undermine the validity of
6 our study cannot be relied upon to do that and that the
7 affidavits must be taken for what they are, the statements
8 after the fact of some of the prosecutors involved but some
9 who were not involved and some who didn't directly respond
10 to the affidavits but others looked at it and decided what
11 they may have done under that circumstance. So if they
12 would come and tell this Court not to rely upon the showing
13 that we have made, the overwhelming showing that we have
14 made, the irreparable showing that we have made, then one
15 would think they would come with something of their own to
16 say that showing is no good. Let me show you the one that
17 is.

18 They have said on more than one occasion our
19 study is incomplete. That's what their experts said from
20 the stand. They argued earlier today that their study
21 presents only half of a picture. That's them talking about
22 their own study. Our study is not only complete but is one
23 which is responding to the very criticisms that they
24 raised, and we've been through that. Each time we said
25 there's a flaw in it, there's an error in it, our

1 researchers went back and they corrected it and they
2 controlled for hardship and they controlled for
3 reservations against the death penalty and they controlled
4 for the things that they suggested should be controlled
5 for. And when they control for those, where do we come
6 back to? Race. Race is a central factor in the exercise
7 of peremptory challenges throughout the State of North
8 Carolina over a 20-year period of time in Cumberland County
9 and in this prosecutorial district, that that has been the
10 case.

11 So recognizing, no doubt, that their affidavits
12 could not suffice, they now make the claim that, well, we
13 couldn't present our case because the judges were not
14 allowed to testify as to what happened at the trial and the
15 judges were being blocked from giving testimony that would
16 have to do with this case and, Your Honor, I think we need
17 to put that to rest. The judges were not blocked from
18 testifying, number one. The judges were not blocked from
19 testifying to any matters that the rules of evidence
20 allowed them to testify to, number two. Number three, the
21 judges were not allowed to testify as to matters in the
22 record in the cases over which they presided. And it's not
23 because of some rule we got together for this case. That's
24 because of that rules that the North Carolina Supreme Court
25 has enunciated and ought to be applied to them just as they

1 are to be applied to us.

2 I can see a complaint, Your Honor, if we had
3 brought judges in here and they had testified about what
4 they observed in the case and their observations in the
5 case favored the defense in this case and then the
6 prosecution put up experts and the court said no, no, these
7 judges can't testify about your case, only the judges who
8 testified about the defense's case because then they would
9 have something to complain about, but that's not the case.
10 They brought those judges in. They knew the rules. When
11 they brought those judges in, they had read the case, no
12 doubt, and they knew that judges had been prohibited in
13 North Carolina for years from testifying about matters in
14 the record in cases in which they had presided. And that's
15 what that's all about. That would apply to Your Honor
16 yourself. If you had been subpoenaed by them and placed on
17 the stand, you would have had to sustain an objection
18 against your testifying.

19 So this notion that somehow or another they can't
20 present their case because they are bound by the same rules
21 that we are just doesn't work as an explanation for this
22 case. I might add parenthetically that we did have an
23 affidavit from a judge but we didn't call that judge in to
24 try to testify about what happened in a trial in which he
25 presided. The judge's affidavit was brought into evidence

1 because it was part of the information that Professor
2 Stevenson relied upon and it was used for that purpose.

3 And they brought in and could legitimately bring
4 in evidence that their experts relied upon, but that
5 doesn't mean that somehow or another they could put a judge
6 on the stand to testify about matters that the rules say
7 that they are not allowed to do. And when we look at the
8 underlying reasons for those rules, Your Honor, it informs
9 the process that the Court appropriately used to deal with
10 that testimony. The rules say you can't bring a judge in,
11 not because the evidence is hearsay, not because the best
12 evidence rule is a record itself, but they talked about
13 what impact and what effect that would have upon the
14 integrity of our system, and they talked about the
15 unseemliness of a judge, who is supposed to be an impartial
16 arbiter of what takes place in the courtroom, taking the
17 stand and testifying about what he did, his reasons for
18 doing that and his thought processes for doing that. The
19 rules makes all the sense in the world and the rules that
20 Your Honor correctly recognized is saying that we've got to
21 find a way of doing this without allowing the proffer of
22 evidence to undermine the very purpose and policy that
23 underlies the rule itself. That's what that's all about,
24 not some effort to treat them differently because they are
25 distinct in this case.

1 So then, Your Honor, we -- we hear them say that
2 they don't like that law. They don't like this law that
3 says we can shed some light on the jury selection system
4 when we exercise our peremptory challenges. And they even
5 describe themselves as being stuck with the law. And that,
6 Your Honor, indicates one of the fundamental issues or
7 fundamental problems, let me say, that we face in this
8 area. Because I suppose to the extent that one feels stuck
9 with the law, then one just doesn't like it, doesn't want
10 to comply with it, feels like it's unfair to them, feels
11 like it's an indictment and all the things that we've heard
12 about so far, which is very different than being governed
13 by the law when you realize that that law is here for all
14 of us, that it should inform and fuel our conduct. And
15 although it may be a law we don't like, let's make the most
16 of it.

17 And this very law that they -- the state in this
18 case feels stuck with is the law that points them in the
19 direction to do better in the future. In the law itself,
20 it says that the law takes into account programs directed
21 to making sure that race is not a significant factor in the
22 selection of -- I mean the exercise of peremptory
23 challenges, and it tells the court to look to see if there
24 are some programs that the state or the prosecution has
25 looked to or has implemented, maybe even come up with, to

1 try to address the problems that underlie the Racial
2 Justice Act itself.

3 The only written material we were able to
4 identify -- they didn't identify any, but the only written
5 materials we could identify were materials that inform
6 prosecutors how to get around the Batson part of the law,
7 inform prosecutors what's safe when a Batson challenge is
8 raised, and we saw an example of that -- that the Court
9 went through that this morning where one prosecutor in
10 Cumberland County, as a matter of fact, basically followed
11 the script that was laid out in one of the programs for
12 prosecutors that says what you do when a Batson challenge
13 is raised. You explain it on these juror negative
14 responses and whatever it says and that prosecutor went
15 right down the line.

16 We didn't hear any evidence about programs that
17 had been instituted, such as what Judge Trosch said be made
18 available, which talk about the fact what Batson meant and
19 what the Racial Justice Act means is that we want our
20 juries to be open equal to everybody. We want juries that
21 are not selected because race is a significant factor in
22 the process. And did we have any kind of sensitivity
23 training that Mr. Colyer talked about that he was aware of
24 from the late '60's and early '70's in the services where
25 they brought people in and said there's not going to be any

1 more discrimination? I haven't heard that kind of program
2 for that. We haven't seen any showing under the statute
3 that that's what's taking place in Cumberland County or
4 anywhere else for that matter so far as this record is
5 concerned. Now, there are some programs, as Judge Trosch
6 talked about, taking place in Mecklenburg County and some
7 efforts are being made to do that.

8 But we have this -- this feeling of being
9 offended by the law. We have this feeling that somehow or
10 another it's an attack on the system, an attack on the
11 judges, an attack on the district attorneys. But we have
12 nothing in this record to say, Your Honor, here is how we
13 dealt with Batson. We don't even have a record of what
14 happened with Batson. Your Honor, here is what we are
15 trying to do for our prosecutors in sensitizing them. I
16 didn't even hear them say when Professor Stevenson talked
17 about programs, well, Professor Stevenson, can you make
18 that program available to us? Professor Sommers, can you
19 make your knowledge of this area and your training of this
20 area available to us? Judge Trosch, can you come to
21 Fayetteville? Can you come to Cumberland County? Let us
22 participate in these programs. Let us grow. Judge, let us
23 let this new light shine on us too. We didn't hear any of
24 that, Your Honor. All we heard is how offended and how
25 righteously indignant they were that somehow or another the

1 defense in this case has availed itself of the law passed
2 by the legislature.

3 And then, of course, we heard how terrible that
4 could be, how that's going to lead to quotas, how that's
5 going to take us back to the kleroterion and back to the
6 sortician and this, that and the other, gonna take us back
7 all the way to the Sixth Century Greece in Athens when in
8 fact, Your Honor, the only real and true consequence of the
9 application of this statute would be to give us a more
10 transparent system of selecting juries in capital cases,
11 give us a more equal system of selecting jurors and give us
12 a greater opportunity to make sure that all of our citizens
13 who are eligible and qualified participate as jurors in the
14 system, not that they would be selected in every case.

15 If the system were working as it should, then you
16 wouldn't be able to come up with the kind of statistics
17 that have been so graphically shown in this courtroom from
18 the very beginning. There wouldn't be this consistent
19 racially skewing of jurors over a 20-year period. What you
20 would see would be that there would be some reflection of
21 the makeup of the pool from which juries are drawn, that
22 there would be some parity of participation based on the
23 groups -- the racial groups that are brought in. But you
24 wouldn't be able to show that in county after county, in
25 district after district and statewide you have a racially

1 skewing of jurors for a 20-year period that was analyzed by
2 the study.

3 So then all the claims about the system breaking
4 down and not being able to select jurors if you eliminate
5 race as a significant factor, if you don't believe what --
6 not necessarily don't believe but don't accept what the
7 prosecutors say about it or somehow or another the system
8 doesn't work, the system will continue to work. It will
9 work even more acceptably. Because in the end, what is
10 important about the system, Your Honor, is not that it's
11 clinging to the past, not that it resists the light of
12 truth and justice which has to be shown on the system from
13 time to time. But it will be a system which can command
14 the respect of all of the citizens of North Carolina and
15 not one where African Americans will have a distrust of the
16 system because it is a system that says to them, when you
17 come to this system, you are 2.3 or more times likely to be
18 struck than someone who is not an African American. And I
19 don't need to talk about what being struck based on your
20 race can do to a person. What it can do to the system is
21 it can undermine and erode confidence in the system. It
22 can undermine and erode any integrity of the system itself.

23 So it is that we hope that what this case will do
24 as the first case on the Racial Justice Act is to move us
25 to a point where we do open up that process and where we do

1 eliminate the harm that's done to the system itself by
2 limiting and excluding folks from serving on that jury as a
3 result of race being a significant factor. So the
4 prescription of the statute is relatively simple to follow.
5 And if the prescription of the statute not to use race as a
6 factor is followed, then eventually we won't have this kind
7 of case in Cumberland because the statistics won't show
8 during the relevant period of time going forward that race
9 has been the consistent constant -- the consistent common
10 denominator in the exercise of peremptory challenges in
11 capital cases.

12 So then when we look at what is at stake in this
13 case is the integrity and respect that the system is
14 entitled to. The remedies under the statute are really
15 simple, one remedy actually, and that is simply that
16 because race has been demonstrated to be a significant
17 factor in the state and the prosecutorial district and/or
18 the county, then the relief that the Court provides is not
19 the reversal of the conviction. It's not a new trial for
20 the defendant but, because race has infected the process,
21 then the legislature in its wisdom has decided that the
22 relief will be relatively minimal and that is that the
23 death penalty cannot be enforced and that for those
24 defendants who make that showing under the statute, their
25 death sentences will be converted to life. And each

1 defendant who avails himself or herself of the relief that
2 the statute provides upon the proper appropriate showing
3 will simply live out his life or live out her life in the
4 confines of a prison. It's not as though the state's now
5 going to suddenly be confronted with a series of new trials
6 which is going to drain their resources and co-op their
7 personnel and this, that and the other. It simply means
8 that there would be a conversion of a death sentence to
9 life imprisonment without parole.

10 So, Your Honor, if we look at it then in terms of
11 the journey, whether we started that journey in ancient
12 Greece or ancient Africa or Egypt or whether you start it
13 with the inception of these United States or the
14 Constitution of North Carolina, which initially did not
15 allow blacks to serve on a jury, or whether you look at it
16 in the contours and context of history, where we move
17 forward little by little in making changes and where
18 peremptory challenges themselves were not commonly used for
19 the state until the mid '20's and '30's and forward, then
20 what we find is some movement along this road of progress
21 where we try to implement a system that affords to
22 everyone, from Socrates to Marcus Robinson, fairness in the
23 selection of juries, fairness in the way that the law
24 applies to them, equality under the law.

25 And we provide that to a whole segment of people

1 who have been denied that, but not just to them but to
2 everyone who operates under that constitution or operates
3 under that law. White people and black people alike, we
4 provide to them a system that is characterized by the
5 integrity, by transparency, by equality under the law.
6 Some have called it simple justice. That's all we come to
7 this court seeking, simple justice. Thank you, Your Honor.

8 THE COURT: Thank you, Mr. Ferguson. All right.
9 Folks, we've got some scheduling matters that we need to
10 address. What I propose is taking about five or ten
11 minutes. My understanding, so that this is on the record,
12 is that Mr. Colyer, Mr. Thompson, I believe you've had the
13 opportunity to consult with at least the court reporter who
14 is present, and I may be assuming too much, but I believe
15 she's had input from the other court reporters as well --

16 COURT REPORTER: (Nodding head.)

17 THE COURT: -- and I see her nodding her head,
18 but it appears for purposes of making your offer of
19 record -- is it Thursday or Friday?

20 MR. THOMPSON: This is tentative --

21 THE COURT: Tentatively.

22 MR. THOMPSON: -- Judge, only with the
23 communications that we've had.

24 THE COURT: Are the dates correct or the days
25 correct?

1 MR. THOMPSON: Thursday and Friday is our first
2 target date. We've got to check.

3 THE COURT: Okay.

4 MR. THOMPSON: It depends on Mr. Colyer's
5 availability and the judge's availability.

6 THE COURT: Yes, sir. And I appreciate that and
7 I do recognize it as tentative for our purposes. Before we
8 take a short recess -- I apologize. I've got one call I've
9 got to make. So that there's no confusion in the record,
10 folks, and I'm confident everybody knows this, this court
11 is not the final arbiter regarding the issues relating to
12 interpretation regarding the Racial Justice Act in this
13 case. Again, I'm confident everybody knows that and
14 understands that. It is, however, my responsibility, based
15 on the fact that this is the first case coming for --
16 before a court in our state, to initially interpret it.
17 That interpretation, as all of us are aware, is subject to
18 review one way or another by the appropriate appellate
19 court or courts that may be involved. But to avoid any
20 confusion, my responsibility, as best I can -- and that's
21 all I can do, the best I can, is to interpret the meaning
22 of the statute based on the statute.

23 All of us are aware of the rules regarding
24 statutory interpretation and instruction. In that regard,
25 I pulled as much as I possibly could find. If either

1 counsel wants to submit any additional matters or if either
2 counsel wants to submit a memorandum of law -- there was
3 some indication that that was something being
4 contemplated -- I encourage folks to do that. Anything
5 that might be helpful from either perspective is welcomed
6 by the Court. Anything further, folks?

7 MR. COLYER: Your Honor, when we come back on the
8 recess -- from the recess, are we going to talk about the
9 scheduling?

10 THE COURT: Yes, sir.

11 MR. COLYER: Okay. I just didn't want not to
12 avail ourselves of that if this was the end of our session.

13 THE COURT: Well, I guess we can go forward. I
14 will deal with my other responsibilities later. Let's go
15 forward now. Are you okay, ma'am?

16 COURT REPORTER: (Nodding head.)

17 THE COURT: Yes, sir.

18 MR. COLYER: Your Honor, we asked for some
19 guidance from the Court and I think you started to address
20 this.

21 THE COURT: Yes, sir.

22 MR. COLYER: I guess as simple as I know how to
23 put it, we would like to be able to know as best you can
24 tell us what our time table will be with respect to the
25 completion of the written offer of proof as it relates to

1 the judges and whatever submission you wish from counsel
2 for both sides with respect to findings of fact and
3 conclusions of law. I have sort of a selfish motive in
4 asking this. I have a trial scheduled for Monday.

5 THE COURT: I understand.

6 MR. COLYER: And I don't want to throw all of the
7 work on my partner here, and at the same time, I don't want
8 to continue that case if there's going to be some time
9 after next week, without trying to drag it out. But I just
10 need some guidance on --

11 THE COURT: Well --

12 MR. COLYER: -- where we're going.

13 THE COURT: I understand. In large part, that is
14 going to be driven by the availability of the transcript.

15 MR. COLYER: Yes, sir.

16 THE COURT: Again, I've said it numerous times,
17 week one I understand will be available at the end of this
18 week. That leads me to the possibility, at least, the
19 potential for another -- Madam Court Reporter, feel free to
20 indicate what your understanding might be -- two, three
21 weeks beyond that for the rest of the transcript. They are
22 preparing it week by week, if I understand correctly.

23 MR. COLYER: Judge, what I didn't want to do, if
24 the transcript was coming in this week, I didn't want to
25 throw that on Mr. Thompson.

1 THE COURT: Complete transcript will not be
2 available this week.

3 MR. COLYER: But I think it would behoove us to
4 work in increments with it --

5 THE COURT: Yes, sir.

6 MR. COLYER: -- so that we don't get it all at
7 one time.

8 THE COURT: I don't mean to interrupt but my
9 objective is and I've communicated this to our court
10 reporters -- folks, I know the difficulties you're dealing
11 with right now. I know what your other responsibilities
12 are. I know that the transcript on a daily basis in this
13 case, information that I have in that regard, is that it
14 runs minimum of 250 pages, more closely averaging to 300
15 pages, if I understand correctly, or thereabouts. That's a
16 lot of work to do in addition to their other
17 responsibilities and the other transcripts that they are
18 responsible for.

19 MR. COLYER: Plus, the subject matter that
20 they're covering is not the easiest --

21 THE COURT: Technical.

22 MR. COLYER: Yes, sir.

23 THE COURT: Highly technical which increases the
24 difficulty.

25 MR. COLYER: Yes, sir.

1 THE COURT: So I don't think it's out of line to
2 anticipate that the complete transcript -- what I -- I
3 apologize. Let me back up. My hope was if we got week one
4 as early as possible, that would give us a starting point.
5 Week two would help us further that journey down the road
6 on the transcript in the preparation of proposed findings
7 and conclusions. So that it wouldn't have to be done in
8 one lump sum at the end of three or four weeks, we could
9 work on it as we get it to expedite the process as best we
10 can. But I think ball park figure, three to four weeks is
11 what I've been told.

12 That ought not interfere with your trial. It
13 ought to provide all of us -- Mr. Thompson, perhaps in your
14 absence while you're in trial, will at least get a start on
15 it so that you can come in at whatever point you're
16 available. These folks, I'm confident, have other matters
17 as well. Now, I am not suggesting that if one side or the
18 other feels like you're ready to submit what you contend
19 are findings -- proposed findings and conclusions earlier
20 than waiting until the end, folks are free to do that. I
21 will be absolutely candid. I've consulted -- or staff in
22 my office have consulted with AOC. I have essentially told
23 them, folks, I've got other responsibilities in other
24 counties in the district that I'm assigned to. I'm asking
25 to be relieved of those responsibilities so I can devote my

1 time to this. At least as far as next week, I've been
2 cleared on that. I don't know how far beyond that I'm
3 going to be accommodated but I've asked for that. And so
4 that it's clear on the record, I started sometime ago in
5 anticipation of some of the issues that I thought would
6 arise in this case going through the materials that have
7 already been provided.

8 As you noted earlier on, Mr. Colyer, Mr.
9 Thompson, we started -- Judge Johnson and then later when I
10 became senior resident, we started a repository shortly
11 after the Act was passed. So I have access to all of the
12 Cumberland County materials. Many -- much of them -- many
13 of those materials are already either in my office, in my
14 car or on the table in my dining room, so I've already
15 started the process.

16 MR. COLYER: Copies of those, Your Honor, because
17 the repository is still --

18 THE COURT: No, I'm talking about copies of them.

19 MR. COLYER: Yes, sir. I didn't want anyone to
20 think you --

21 THE COURT: No, I haven't removed anything. Let
22 me clear that up for the record. I haven't removed
23 anything in Fayetteville. Okay. Copies. And that's been
24 supplemented to a great extent by some of the materials
25 that have been submitted by way of exhibits in this case.

1 MR. COLYER: Yes, sir.

2 THE COURT: Our clerk has worked very hard to
3 provide me with copies of those materials so that the
4 matters that are of record are still in her control.

5 MR. COLYER: Judge, I thank you for taking the
6 time to share this with us. It gives me an opportunity to
7 talk with Mr. Thompson for just a moment and then to speak
8 with counsel involved in the case next week. And I think
9 from what I've heard so far, we will be proceeding on next
10 week with respect to our trial and if I can just have a
11 moment to confer with them on this break, I can tell you
12 whether or not we'll be in need of your expertise and your
13 rulings here later this afternoon.

14 THE COURT: I didn't realize it but I was
15 informed when we came back from the last break that court
16 file is up here for purposes of any motions.

17 MR. COLYER: Yes. I asked it be brought up and I
18 asked counsel for the defense and my co-counsel to step up
19 so we can all talk for a moment.

20 THE COURT: I hate to ask it this way but it's
21 the way it's asked. I don't know the nature of the case
22 and there are what are euphemistically referred to as
23 standard motions. Are we talking about standard motions,
24 evidentiary motions?

25 MR. COLYER: This would have been strictly my

1 motion to continue if I was needed to work on this next
2 week.

3 THE COURT: Okay. All right.

4 MR. COLYER: It doesn't look like I'm going to
5 need to be working on this first part of the week. I will
6 confer with Mr. Thompson. So there likely will be no
7 continuance motion by the state. We'll press onto trial
8 next week.

9 THE COURT: Okay. All right.

10 MR. COLYER: I just need a moment to confer with
11 them.

12 THE COURT: Absolutely. We'll take five minutes
13 and come back.

14 MR. COLYER: Thank you, Judge.

15 THE COURT: Yes, sir. And, folks, if you've got
16 any concerns or any questions, we can address it when we
17 come back.

18 MR. HUNTER: Thank you, Your Honor.

19 MR. JAY FERGUSON: Yes, sir.

20 (Recess taken.)

21 (The following proceedings continued in open
22 court. The defendant, defense attorneys and state's
23 attorneys were present.)

24 THE COURT: Mr. Thompson, let me inform you --
25 the defendant is here and we've got our court reporter. I

1 neglected to mention that my office contacted AOC and they
2 are going to give us an additional court reporter to take
3 over some of the daily responsibilities next week. So as I
4 understand it, at least on a rotating basis, that will free
5 up some of the court reporters involved in this case to try
6 to expedite the transcript. So they've accommodated us in
7 that respect. All right.

8 MR. COLYER: Judge Weeks --

9 THE COURT: Yes, sir.

10 MR. COLYER: -- you inquired if there was
11 anything that you wanted us to -- that we could offer to
12 pass onto you.

13 THE COURT: Yes, sir.

14 MR. COLYER: And I don't know whether my
15 colleagues think this would be appropriate but we do have a
16 hand-out that we've been working with over the months from
17 the Attorney General's office, Mr. Hart, with respect to
18 Racial Justice Act issues primarily dealing with the Act
19 and the interpretation of the language, that sort of thing.
20 Be glad to make a copy of that and give it to Ms.
21 Bloomfield if you wish to have it. If the defense has an
22 objection to that, obviously whatever the Court --

23 THE COURT: So in the interest of transparency, I
24 pulled from the public records as much as I could find
25 about legislative history and some of the physical notes

1 including notes from the department of justice in that
2 respect. So I've got already at least some of the
3 information related to legislative history and I believe
4 some of that information may have been included in some of
5 the materials that were submitted earlier.

6 MS. STUBBS: It may have been. I think this was
7 something distinct that was prepared by Mr. Hart and we
8 don't have any objection to the state providing it.

9 THE COURT: Okay. All right.

10 MR. COLYER: Judge, we'll get you a clean copy.
11 The one I have has some handwritten notes. We'll get you a
12 clean copy and give it to Ms. Bloomfield to bring to your
13 attention.

14 THE COURT: Yes, sir.

15 MR. COLYER: Thank you.

16 MR. THOMPSON: We will send a copy to the defense
17 as well.

18 MR. COLYER: Yes, sir.

19 THE COURT: All right. Mr. Colyer, you were
20 going to report back with regard to the other case with Mr.
21 McRae.

22 MR. COLYER: Yes. I spoke with Mr. McRae and Mr.
23 Baker and the state is not making a motion to continue. We
24 are going to begin at 10:00 Monday morning in 4B and
25 hopefully we'll be finished by the end of the week and I

1 believe my colleague, Mr. Thompson, can handle what might
2 arise during the course of the week with the transcript.
3 If he gets to the point to start working on the offer of
4 proofs with the judges by Thursday and Friday, hopefully
5 we'll be close to finishing. If not, I feel like I'm in
6 capable hands with him handling it in my absence and will
7 catch up with him after that.

8 THE COURT: There was one other thing and I'm
9 trying to remember what that was. If you'll bear with me.
10 Had to do with the court reporters and I'm trying to recall
11 what it was. This is what happens when you get up in age,
12 senior moments. Yes, ma'am.

13 MS. STUBBS: I think actually Mr. Ferguson and I
14 were about to address the same issue perhaps, which is we
15 were just going to propose that perhaps as a working
16 deadline that both sides could submit proposed findings of
17 fact and conclusions of law within one week of the final
18 transcript.

19 THE COURT: I think that's reasonable. That's
20 one of the matters we were going to get to and I appreciate
21 -- one week after you have received the transcript --
22 because you've already got the opportunity as you're
23 receiving it piecemeal to start working on it. Is that
24 agreeable or do y'all want to think about it? And the
25 other thing -- I just remembered -- there's been a request,

1 at least by some of the court reporters involved, that you
2 provide them with some means of contacting you folks
3 electronically.

4 COURT REPORTER: We did that.

5 THE COURT: That's been done. I didn't need to
6 say anything.

7 MR. COLYER: Judge, before we answer with respect
8 to Ms. Stubbs's proposal, could you give us again what we
9 think right now is the outside parameters of the receipt of
10 the full transcript?

11 THE COURT: Three to four weeks, correct me if
12 I'm wrong, from today you folks should have the complete
13 transcript. That's the expectation.

14 MR. COLYER: So then it would be one week after
15 that.

16 THE COURT: One week after that.

17 MR. COLYER: So we're looking at four to five
18 weeks for the submission --

19 THE COURT: Let me inquire. Is it impractical,
20 given the fact that week one is already done or will be
21 done by the end of this week, to set it at three weeks
22 beyond that for the complete transcript? Is that not -- is
23 that workable?

24 COURT REPORTER: (Nodding head.)

25 THE COURT: Okay. So we're talking about three

1 weeks from today for receipt of the entire transcript. One
2 week after that for submission of proposed findings and
3 conclusions.

4 MR. COLYER: Can we -- since we've been dealing
5 with numbers for so long, can we round this off a little
6 bit?

7 THE COURT: Four weeks from today -- four weeks
8 from this Friday.

9 MR. COLYER: That's what I was going to ask.
10 Today is Wednesday so we've got Thursday and Friday this
11 week and --

12 THE COURT: Four weeks from this Friday coming
13 up. Is that agreeable?

14 MR. HUNTER: Yes, sir.

15 MR. COLYER: Judge, in that time frame, we've got
16 this trial coming up next week and then I believe the week
17 after -- let's see. Next week is the 20th and the week
18 after is the 27th. We've got admin two weeks out and then
19 I've got another noncapital case that starts March the
20 12th. So instead of doing the four weeks, can we do five
21 -- in the next four-week period, I've got at least two
22 one-week trials scheduled. As I said, I don't want to
23 continue those out and keep snowballing this thing, but at
24 the same time, I don't want to put all this work on my
25 partner and --

1 THE COURT: Five weeks from this Friday okay with
2 you, folks? Do you have any strong concerns about that?

3 MR. JAMES FERGUSON: Your Honor, we don't have
4 any strong concerns and I certainly understand the state's
5 position and we all have obligations piled up --

6 THE COURT: We all do.

7 MR. JAMES FERGUSON: -- from being away from the
8 last two and a half weeks. But I would suggest with the
9 Court we could stay with the four-week period --

10 THE COURT: And see where we are.

11 MR. JAMES FERGUSON: Yes, sir, from where we are.
12 And if we got to that point and one side or the other had
13 some actual reasons to extend it, we could revisit that,
14 make a motion to extend.

15 THE COURT: Mr. Colyer, I would prefer that
16 because it gives us a target date.

17 MR. COLYER: Sure.

18 THE COURT: But I wanted to go on the record that
19 if either side wants to be heard both -- either side is
20 entitled to be heard about a one-week extension.

21 MR. COLYER: Okay, Judge.

22 THE COURT: Is that agreeable?

23 MR. COLYER: That's fair enough.

24 THE COURT: Is that fair enough?

25 MR. COLYER: Sure.

1 THE COURT: All right. So we're talking about
2 four weeks from this Friday --

3 MR. JAMES FERGUSON: Yes, sir.

4 THE COURT: -- without prejudice to either side
5 to come in and seek an additional week if that becomes
6 necessary. All right. Any other matters, folks?

7 MR. JAY FERGUSON: No, Your Honor.

8 MR. COLYER: No, sir.

9 THE COURT: Okay. One last administrative
10 matter. I've been asked by our jail personnel whether or
11 not Mr. Robinson may be shipped back to Raleigh after
12 today?

13 MR. HUNTER: Yes. Yes, he may.

14 THE COURT: All right. Anything in that regard?

15 MR. COLYER: No, sir. And, Judge, earlier you
16 had asked about making a ruling out of term, out of
17 session, out of court.

18 THE COURT: Yes, sir.

19 MR. COLYER: And we had asked that it be on the
20 record. If you'll just let us know in sufficient time for
21 us to do a writ to have Mr. Robinson returned.

22 THE COURT: Oh, absolutely.

23 MR. COLYER: We'll -- we don't have a problem
24 with that at all.

25 THE COURT: So for the record, I believe that

1 there is consent from both counsel for the state, counsel
2 for the defendant for the Court to enter any ruling out of
3 term, out of county, out of session, in camera -- well, not
4 in camera or on vacation -- out of term, out of session.

5 MR. HUNTER: I don't think the state consented to
6 that.

7 MR. THOMPSON: The state did not consent.

8 THE COURT: Oh, I'm sorry. I misunderstood.

9 MR. COLYER: I was just commenting, Judge, you
10 had asked about that. We had asked for the ruling --
11 obviously we don't have any objection over the length of
12 time the Court needs to prepare that but we would
13 respectfully request the ruling be done in court.

14 THE COURT: Oh, no. We're in agreement on that.
15 I've already indicated --

16 MR. COLYER: That's what I thought.

17 THE COURT: I apologize.

18 MR. COLYER: We will have Mr. Robinson brought
19 back for that proceeding --

20 THE COURT: Absolutely.

21 MR. COLYER: -- as long as we can get sufficient
22 notice to get the writ back to DOC, that sort of thing.

23 THE COURT: And the confusion was mine. It is my
24 intent -- it was raised earlier on in the proceedings
25 because of the significance -- the importance of the case.

1 I think it's absolutely appropriate to enter the ruling on
2 the record in open court. That's my intent. So we are in
3 agreement, even though I was confused about what we were in
4 agreement about.

5 MR. JAMES FERGUSON: Thank you, Your Honor.

6 MR. HUNTER: Thank Your, Your Honor.

7 THE COURT: Yes, sir.

8 MR. JAY FERGUSON: Thank you, Judge.

9 MS. STUBBS: Thank you, Judge.

10 MR. COLYER: Thank you, Judge.

11 THE COURT: Have a good one.

12 MR. COLYER: You too.

13 (The proceedings adjourned at 4:50 p.m.,
14 Wednesday, February 15, 2012.)

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

STATE OF NORTH CAROLINA)

COUNTY OF CUMBERLAND)

I, SHANNON RANSOM, CSR, RPR, the officer before whom the foregoing proceedings were taken, do hereby certify that said transcript is a true, correct and complete verbatim transcript of said proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of this action.

This 6th day of March, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

NORTH CAROLINA
CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 91 CRS 23413

STATE OF NORTH CAROLINA,)
)
)
vs.)
)
MARCUS ROBINSON,)

)

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

I certify that the transcript of the Racial Justice hearing held February 15, 2012, Volume XIII, consisting of pages 2467 through 2638, was delivered on March 6, 2012 by emailing the electronically-signed PDF transcript and by delivering a CD-ROM containing the PDF transcript to Judge Gregory A. Weeks, Superior Court Judge; Ms. Bel Lewis and Mr. Rob Thompson, district attorney's office; and Mr. Jay Ferguson, defendant's attorney. I further certify that the transcript was ordered on February 3, 2012.

This 6th day of March, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

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

vs.

MARCUS ROBINSON,
 Defendant

RACIAL JUSTICE ACT HEARING

Heard February 2, 2012

**VOLUME IV of XIII
 (Pages 692 through 949)**

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: CALVIN W. COLYER & ROB THOMPSON
 12th Judicial District
 JONATHAN W. PERRY, 20th Judicial District
 Assistant District Attorneys
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302

For the Defendant: MALCOLM R. HUNTER, JR. & JAY H. FERGUSON
 JAMES E. FERGUSON, II, & CASSANDRA STUBBS
 Attorneys at Law
 119 East Main Street
 Durham, North Carolina 27701

JENNIFER L. HACK, RPR
 Official Court Reporter
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302
 jennifer.l.hack@nccourts.org

DATE REQUESTED: 02/03/12

DATE DELIVERED: 02/17/12

1 (The following proceedings began in open court on
2 Thursday, February 2, 2012, at 9:36 a.m. The defendant, Mr.
3 Hunter, Mr. Jay Ferguson, Mr. James Ferguson, Mr. Colyer, and
4 Mr. Thompson were present.)

5 (Ms. Stubbs and Mr. Perry were not present.)

6 (REPORTER'S NOTE: The Master Index will be
7 submitted in a separate volume entitled Master Index.)

8 MR. JAMES FERGUSON: Your Honor, we have a matter
9 whenever the Court is ready.

10 THE COURT: Yes, sir.

11 MR. JAMES FERGUSON: Your Honor may recall, I
12 believe it was yesterday, the issue came up regarding affidavits
13 of prosecutors, whether or not they would be considered -- could
14 be considered as substantive evidence or as the basis for expert
15 opinion. We've had occasion to consider it, and our position
16 now is that we won't object to the affidavits coming in as
17 substantive evidence as long as it is understood that that
18 substantive evidence would be subject to the same rules of
19 evidence as if the prosecutors were on the stand themselves. In
20 other words, the fact that it is in an affidavit doesn't
21 automatically make it admissible.

22 THE COURT: Rule -- yes, sir. Yes, sir.

23 MR. JAMES FERGUSON: So under that circumstance,
24 we are willing to work with the State to avoid the prosecutors
25 from around the State having to travel.

1 MR. THOMPSON: So -- I want to make sure I
2 understand, and I would like some time to consult with outside
3 folks before we make a final decision. Obviously, this is more
4 important than just a speeding ticket, respectfully, Judge, but
5 the -- I want to make sure I understand so when I talk with
6 those other folks, I can make it clear. The defense is offering
7 to stipulate that they're admissible, those affidavits,
8 prosecutor affidavits, and I am assuming we are talking about
9 the 74 that we talked about --

10 MR. JAMES FERGUSON: Yes, sir.

11 MR. THOMPSON: -- for substantive purposes.

12 THE COURT: But subject to the rules of evidence.

13 MR. THOMPSON: But subject to the rules of
14 evidence. So we can argue that the facts are true, they can
15 argue the facts are not true? That's the point where I start to
16 fall away a little bit is -- they're admissible for substantive
17 evidence but subject to the rule -- rules of evidence? And how
18 so?

19 MR. JAMES FERGUSON: Perhaps I will just take
20 another minute to explain.

21 MR. THOMPSON: No caffeine yet. Sorry, Judge.
22 Might have to speak slow and use small words. Forgive me.

23 THE COURT: Yes, sir.

24 MR. JAMES FERGUSON: Well, what you just said is
25 correct. Once they are in as substantive evidence, then the

1 weight to be given them, of course, is up to the Court, as it
2 would be if the witness were on the stand himself or herself.

3 MR. THOMPSON: With you so far.

4 MR. JAMES FERGUSON: Now, when we say subject to
5 the rules of evidence, what we mean by that is if a prosecutor
6 was on the stand and started to testify, I was in the wilds of
7 Australia and I was there, went to Australia, we would want --
8 we would say that has no relevance to what's happening here, and
9 we could object to that just as we would if it is in the
10 affidavit, we could object to it if it is coming from the stand.
11 So the source of the evidence does not make it unobjectionable.
12 So whatever could be testified to can be testified to. Whatever
13 could be objected to as inadmissible under the rules, we can
14 object to it, and the Judge will make a ruling as to whether it
15 is admissible as evidence in the case.

16 MR. THOMPSON: I think I follow --

17 MR. JAMES FERGUSON: But there is not going to be
18 any objection on the grounds that this is not an authentic
19 affidavit. There is not going to be any objection that this
20 can't come in because the prosecutor is not here to talk about
21 it. We'll evaluate the evidence on the basis of what it is.

22 MR. THOMPSON: We do appreciate the offer of
23 stipulation, and we'll discuss it with the outside folks that
24 we're consulting with to --

25 THE COURT: Yes, sir.

1 MR. THOMPSON: And, again, we appreciate the
2 offer. We'll, um, like to get to you after lunch if we don't
3 get to it before about what we are -- I know other folks have
4 scheduling to do, and that would be a huge difference in how we
5 will --

6 THE COURT: Yes, sir.

7 MR. THOMPSON: So we will be respectful of that
8 and move on quickly with that decision.

9 THE COURT: Is that satisfactory?

10 MR. JAMES FERGUSON: Very well, Your Honor.

11 MR. COLYER: And thank you very much for that,
12 gentlemen.

13 MR. JAMES FERGUSON: Yes, sir.

14 THE COURT: Well, folks, since we are talking
15 about affidavits, I am going to come back to the State's motion
16 for supplemental discovery filed on January 30th, 2012. Mr.
17 Thompson, let me admit to some confusion. The gist of what I
18 understand you're asking for is essentially set out in paragraph
19 11. You're looking for reciprocal supplementary materials from
20 the defense whether or not these things are in the possession of
21 the defense, and paragraph A relates to the jurors involved with
22 regard to the affidavits.

23 MR. THOMPSON: Yes, sir.

24 THE COURT: What you're asking for is detailed
25 summaries, recordings, and/or copies of all materials provided

1 to, read to, discussed with, or communicated to the affiants at
2 issue.

3 MR. THOMPSON: We assumed just because we
4 understand how these affidavits get done that there was some
5 interview process --

6 THE COURT: Yes, sir.

7 MR. THOMPSON: -- ahead of time and that is just
8 the pragmatics of it. Nobody is going to walk in off the street
9 and hand you an affidavit.

10 THE COURT: Well, in that regard, my recollection
11 is -- and if you differ in any respect, either counsel let me
12 know -- that Ms. Stubbs indicated some things on the record with
13 regard to this request.

14 MR. THOMPSON: That is correct.

15 MR. JAMES FERGUSON: That is correct.

16 THE COURT: Can you folks state for me what was
17 stated by Ms. Stubbs in response to that specific request? My
18 recollection was -- and I recognize I am dealing with a matter
19 under seal that I asked for to review in camera. My
20 recollection was she indicated that there were staff members of
21 some organizations who were involved in the taking of the
22 affidavits. Is that accurate?

23 MR. HUNTER: Yes, Your Honor.

24 THE COURT: Okay. And my recollection further is
25 that in the course of those interviews, copies of transcripts

1 may have been provided. Is that accurate?

2 MR. HUNTER: I think that is, and I think they
3 have made some disclosures to the State. I wasn't privy to it,
4 so maybe they can tell us what they have already been told.

5 MR. THOMPSON: She did and, I'm sorry, not to
6 interrupt this, but I have noticed her absence. Is that all
7 right with everybody?

8 THE COURT: Well, we are going to take that up in
9 just a moment, but I wanted to get through this first.

10 MR. THOMPSON: But the -- um, my notebook I made
11 the notes on, she indicated that the EJI -- the EJI, Equal
12 Justice Initiative paper that was done by Dr. Stevenson --

13 THE COURT: Was shown.

14 MR. THOMPSON: -- was shown to -- and she
15 mentioned three. She couldn't -- and -- and the party that she
16 discussed was giving this information couldn't remember whether
17 it was given to this third person before or after the
18 interview --

19 THE COURT: Okay.

20 MR. THOMPSON: -- or the affidavit. So she had
21 mentioned those three, and I have those three names written
22 down. Yes, sir.

23 THE COURT: All right. So I guess my question is
24 in large part, the matters that you've agreed you can put -- the
25 information you requested surrounding the circumstances of the

1 taking of the affidavit has largely been provided here.

2 MR. THOMPSON: Yes, in the respect that -- that
3 information has been provided to me, and I am not -- I am really
4 not trying to quibble, Judge, especially -- everybody has so far
5 gotten along beautifully, and I'd love to keep that up.

6 THE COURT: Yes, sir.

7 MR. THOMPSON: But because I don't know what
8 happened, who prepared the affidavits, what -- I can't tell you
9 how much of that information has been given to me because I
10 don't know what the universe is that it contains, so I can tell
11 you, yes, she has told us what you -- we have just talked about.

12 THE COURT: Staff members of the ACLU, the other
13 organization --

14 MR. HUNTER: Also, Your Honor, staff members of
15 CDPL.

16 THE COURT: CDPL.

17 MR. THOMPSON: And Mr. Ferguson, actually has, Jay
18 Ferguson, actually been involved with one as well. He actually
19 notarized one, so we do understand those facts, and to the
20 extent that that is the universe of information -- I am not
21 saying there is more, and I can't say I have it all if I don't
22 know what that universe is exists. I can tell you that has been
23 provided to us and we are willing to go forward based on that if
24 that's all the information there is. Yes, sir.

25 THE COURT: Okay. I guess that leads me to my

1 next question. For what purpose are you asking for the
2 information? What is your intent with regard to how you intend
3 to use it? What is your concern?

4 MR. THOMPSON: It is cross-examination during Dr.
5 Stevenson who was provided those affidavits. As I understand
6 it, he was the only one, if memory serves, that those ten
7 affidavits were provided to so --

8 THE COURT: Well, for impeachment purposes
9 potentially?

10 MR. THOMPSON: Yes. Potentially. Potentially,
11 yes, sir.

12 THE COURT: I reviewed the affidavits. As the
13 record will reflect, I didn't have access, didn't -- haven't
14 read the affidavits until I received them late yesterday
15 afternoon.

16 MR. THOMPSON: Yes, sir.

17 THE COURT: I reviewed them last night.

18 MR. THOMPSON: Yes, sir.

19 THE COURT: If the purpose is to determine whether
20 or not there are any grounds for impeachment as to the contents
21 of the affidavits, am I understanding that correctly or the
22 circumstances?

23 MR. THOMPSON: It's the contents and the
24 circumstances surrounding their creation, yes, sir.

25 THE COURT: Mr. Thompson, having reviewed the

1 affidavits, an argument can be made that any grounds for
2 impeachment, any grounds relating to circumstances under which
3 the affidavits were taken are self-evident in the affidavits
4 themselves.

5 MR. THOMPSON: There are a number of those
6 factors, yes, sir, and we -- we do understand that part, yes,
7 sir. There -- and, again, I am not quibbling, I promise you,
8 but it's the -- there are additional potential grounds for
9 impeachment of that material depending on how those materials
10 were developed, how those affidavits were made could also
11 provide additional impeachment material if we were aware of the
12 answers to the questions we had. For example, who prepared the
13 affidavits and the information that was provided to them. Now,
14 we do have the information best -- Ms. Stubbs has that
15 information as to what information was provided to those jurors.
16 And to the extent that I believe Ms. Stubbs has done everything
17 she could to gather the information we requested, we understand
18 she has made a good faith effort, and we certainly don't want to
19 leave the impression with the Court that she is hiding anything.

20 THE COURT: Which leads me, I guess, to the next
21 area I want to talk about. The affidavits would be offered in
22 support of any opinion by one or more of the experts you intend
23 to call.

24 MR. JAMES FERGUSON: That is correct, Your Honor.

25 THE COURT: All right.

1 MR. COLYER: Judge, may I interrupt for just a
2 moment.

3 THE COURT: Yes, sir.

4 MR. COLYER: One of the reasons that we asked for
5 that was essentially out of a concern for reciprocity with
6 respect to the material that we had been asked to gather and
7 provide to the defense --

8 THE COURT: What is that, if I may ask?

9 MR. COLYER: It was used by our affiants, the
10 material we talked about earlier this morning, the 74 affidavits
11 and the affiants, in terms of the basis of their opinion with
12 respect to the reasons, explanations for the strikes explained
13 in the affidavit, primarily by the participants, if they had
14 notes, seating charts, anything that was in addition to the
15 transcript that they relied upon in terms of the preparation of
16 the affidavit. And then also with respect to the reviewers who
17 were not participants but reviewed and made an affidavit based
18 upon materials such as transcripts, notes of the prosecutors, if
19 any, seating charts that they had, whatever information they
20 could gather to put into their affidavits and maybe in some
21 cases conversations with the person who was the participant who
22 might be retired or might be in a different capacity with the
23 justice system now, and so that's what we were looking for in
24 terms of getting the material that was used by the persons who
25 made the affidavit, whether it was the affiant themselves and/or

1 perhaps an investigator or a paralegal, someone who was present
2 at an interview, an attorney who was present at an interview,
3 took some contemporaneous notes, and then included that in an
4 affidavit preparation. So, essentially, we were looking for
5 basically the same type of material that we had been requested
6 to give to the defense by them and arguably ordered to give by
7 them to them as some of the discovery --

8 THE COURT: Well, again, I come back to the
9 contents of the affidavits in and of themselves because in most
10 respects, that's reflected as evidenced what was provided to the
11 affiant prior to the taking of the affidavit in the body of the
12 affidavit themselves.

13 MR. COLYER: And, respectfully, we understand
14 that, Your Honor, but we disagree. We think there is some more
15 in terms of who the person was that said -- for instance, an
16 affiant might have said, I have learned since the trial that
17 prosecutors did such and such with other jurors --

18 THE COURT: I don't disagree with that. There is
19 at least one instance where that's the case.

20 MR. COLYER: Yes, sir.

21 THE COURT: Let me make the following observations
22 about the affidavits. The affidavits, on their face, provide
23 the name of the juror involved, the name of the defendant
24 involved as it relates to that affiant, the time frame within
25 which that trial was held, the county in which that trial was

1 held. So all of the information that you folks are looking for
2 at least in those respects is available to you already in your
3 possession.

4 MR. COLYER: We don't disagree that we have the
5 names of the case, the name of the county, the rough time when
6 the case was done. And we've attempted to get copies of cases,
7 copies of transcripts, that sort of thing that might relate to
8 that but, respectfully, Your Honor, we don't think that the
9 affiant necessarily had copies of cases from the Supreme Court
10 decisions, copies of the transcripts where they testified and
11 other persons unless -- unless the persons that interviewed them
12 brought it to them and said, By the way, did you know, and
13 showed them a copy of something, talked to them -- and,
14 basically, we are just trying to get to the basis of the
15 affiant's information that is used by the expert as the basis of
16 his opinion.

17 THE COURT: Okay. All right. Second observation
18 I want to make is if there's anything in an individual affidavit
19 that contradicts what was said by the prosecutor involved and
20 you got affidavits from all of those prosecutors --

21 MR. COLYER: We do, Your Honor.

22 THE COURT: -- then that information is available
23 to you for purposes of impeachment of the information in the
24 affidavits being offered by the defendant.

25 MR. COLYER: To the extent we have an affidavit

1 that relates to that case because, as you know, Judge, based
2 upon what we have said previously, there are roughly 74 versus
3 80 or more --

4 THE COURT: And that is a fair statement, yes,
5 sir.

6 Folks, do y'all want to be heard further on this
7 because the issue that is now before me is -- frankly, in all
8 candor, I think based on what is already of record in this case,
9 statements made by Ms. Stubbs, that the additional information
10 now being requested does not put a burden on your folks, but I
11 am willing to give you an opportunity to be heard.

12 MR. HUNTER: Well, Your Honor, Ms. Stubbs isn't
13 here, and so I feel a little awkward because I think the burden
14 would be on her to come forward. I would like to comment about
15 the issue about conversations. I think that is one of the
16 things they have asked for, and I think to the extent there are
17 written materials that are out there, I think that's what we
18 have gotten from the State as the basis for their affidavits. I
19 think in one case, an assistant district attorney said, I talked
20 to Judge Lock about it, but we did not get the content of that
21 conversation. We just got the fact. Now, obviously, these
22 staff members talked to these affiants, but the idea that if
23 there are no notes now of those conversations that those --
24 those -- that they should try and recreate what that
25 conversation was, I think that goes beyond what the State has

1 given us.

2 MR. COLYER: We're not asking for that.

3 MR. THOMPSON: We are not asking --

4 THE COURT: To the extent it is in your possession
5 is what I understand --

6 MR. THOMPSON: If a prosecutor, for example, took
7 notes of that conversation with Judge Lock, he would have passed
8 those over, and so to the extent --

9 MR. HUNTER: Right. And so if we have anything in
10 writing, Judge, I can tell you I am entirely ignorant of it, but
11 I don't think that is really -- that doesn't mean that much in
12 this particular situation, and so let me -- I will talk to --
13 let me just explain Ms. Stubbs isn't here because she is working
14 with another witness we are going to present, and it's all right
15 with our client that she be away also working on this case doing
16 another thing, and so I wanted to let the Court know, and so --
17 but I will talk to her. I will talk to her this morning. I
18 don't think there's anything else. I have -- no one has told me
19 there's anything else. I have not been really intimately -- I
20 wasn't involved in any of these affidavits, and so I'm not
21 entirely on the inner circle, but I'm in the room when we meet
22 and talk about things, and no one has ever indicated that there
23 is material, you know, that we got over here that we are not
24 giving unless the Judge makes us give and so --

25 MR. THOMPSON: We'll accept that on faith, Judge.

1 MR. HUNTER: And I'll -- but let me check with Ms.
2 Stubbs, and then we'll give you either more of an assurance
3 about that or maybe there is something that I don't know about,
4 and if that's what the Court orders, that's what we'll do.

5 MR. COLYER: Mr. Hunter, would that be with
6 respect to talking to her and getting back to us before Mr.
7 Stevenson testifies today?

8 MR. HUNTER: Well, I -- since she is going to be
9 doing the direct of Mr. Stevenson, we will see her -- I hope we
10 will see her before Mr. Stevenson.

11 MR. THOMPSON: We may be asking for a few --

12 THE COURT: Is that agreeable?

13 MR. THOMPSON: That is, Judge. We may ask, at
14 some point, for a couple of minutes if there is, like, a last
15 minute kind of thing, but we will deal with that.

16 MR. HUNTER: My projection is you've got
17 everything, but I absolutely don't know everything about this
18 particular situation.

19 MR. COLYER: All right, sir. Thank you.

20 THE COURT: Then I will hold in abeyance any
21 ruling on it until we get to that point. Is that agreeable?

22 MR. THOMPSON: Yes, sir. Thank you.

23 MR. COLYER: Yes, sir.

24 THE COURT: You folks ready to go forward with
25 your next witness?

1 MR. JAMES FERGUSON: Yes, sir, Your Honor.

2 MR. COLYER: Judge, excuse me.

3 THE COURT: I apologize. I need to put something
4 on the record with regard to Mr. Robinson.

5 MR. COLYER: Yes. That and then Mr. Ferguson said
6 he had a matter. I think Mr. Thompson and I have a couple
7 things. First thing is, do we need to put a rubber baffle on
8 this? Yesterday, Dr. Katz was sitting here and didn't use this.
9 I noticed yesterday when Ms. McClain had to put a baffle for Dr.
10 Woodworth, and this one is missing. I tried to pull one off on
11 one of the others and --

12 THE COURT: Are you able to hear and transcribe
13 what's being said?

14 THE COURT REPORTER: So far, I'm okay.

15 MR. COLYER: If this starts buzzing or popping or
16 whatever, just let me know. We'll try to get it fixed.

17 MR. HUNTER: I think it is more of an issue when
18 it is right up against your mouth.

19 THE COURT: I agree.

20 Was there another matter, Mr. Colyer?

21 MR. COLYER: Yes, sir. I believe -- let me check.

22 MR. THOMPSON: Judge, during some of our
23 cross-examinations -- this is a minor housekeeping -- we're
24 using transcripts, excerpts of stuff, transcripts, from -- that
25 we -- that's been provided by the defense to us, and we did a

1 large amount of printing off of those transcripts today. It
2 is -- to the extent that those segments of transcripts we'll be
3 using do not have cover pages and do not have certification
4 sheets also printed out, we wanted to see if there was an
5 objection to that. I will show an example to the defense. We
6 printed off relevant pages. If I may approach.

7 THE COURT: Yes, sir.

8 MR. THOMPSON: Sometimes -- we don't do this
9 often, but sometimes certification sheet and cover sheet are
10 included. If I may have a second.

11 THE COURT: Yes, sir.

12 (There was a pause in the proceedings.)

13 MR. THOMPSON: I think we have an agreement
14 between the parties, Judge, no certification sheet or cover
15 sheet would be necessary in the items we are going to be passing
16 on to the -- during any cross-examination, and we will certainly
17 extend the same courtesy to the defense should they need to do
18 the same thing, so we've got that, Judge.

19 THE COURT: Okay. All right. Mr. Robinson, it
20 has already been noted on the record that all of your attorneys
21 are present with the exception of Ms. Stubbs. Information just
22 provided by Mr. Hunter is that Ms. Stubbs is meeting with
23 another witness. She is working on your case, but she is not
24 present in the courtroom.

25 THE DEFENDANT: I knew yesterday.

1 THE COURT: Pardon?

2 THE DEFENDANT: I knew yesterday.

3 THE COURT: Okay. You consent to going forward
4 with Mr. Jay Ferguson, Mr. James Ferguson, Mr. Hunter being
5 present, and Ms. Stubbs being absent.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Let the record so show.
8 Any other matters, folks?

9 MR. COLYER: No, sir. Thank you.

10 THE COURT: Okay. Yes, sir.

11 MR. JAMES FERGUSON: Thank you, Your Honor. At
12 this time, we call Dr. Sam Sommers.

13 THE COURT: Yes, sir.

14 And if you'll place your left hand on the Bible and
15 raise your right hand, please.

16 SAMUEL R. SOMMERS, called as a witness herein,
17 having been first duly sworn, was examined and testified as
18 follows:

19 THE COURT: If you will come around and have a
20 seat. Would you like some water, sir?

21 THE WITNESS: That would be great.

22 THE COURT: Okay. While I am getting that, if
23 you'll state and then spell first and last name for the benefit
24 of the court reporter.

25 THE WITNESS: Samuel R. Sommers, S-a-m-u-e-l, last

1 name, S-o-m-m-e-r-s.

2 THE COURT: Thank you, sir.

3 Yes, sir.

4 DIRECT EXAMINATION (On Qualifications)

5 BY MR. JAMES FERGUSON:

6 Q Go ahead, if you will, and state your name in full.

7 A Samuel Sommers.

8 Q And, Dr. Sommers, what is your occupation or
9 profession?

10 A I'm an associate professor of psychology at Tufts
11 University outside of Boston.

12 Q And how long have you served in that capacity?

13 A I have been on faculty at Tufts since 2003, and I have
14 been an associate professor with tenure since 2009.

15 Q You have been asked to serve as an expert in this case
16 on behalf of the defense; is that correct?

17 A Correct.

18 Q I want us to tell the Court something about your
19 qualifications to serve as an expert, and to facilitate that, I
20 am going to hand you a document, and I will also hand it to the
21 State.

22 I have handed you a document that we have marked as
23 Defendant's Exhibit Number 11. Would you look at that and tell
24 us what it is, please.

25 A This is my curriculum vitae, my CV.

1 Q Now, then, let's start with your education, and would
2 you tell the Court your educational background.

3 A Sure. I received my Bachelor of Arts, my B.A. degree,
4 from Williams College in Williamstown, Massachusetts, in
5 psychology in 1997, and I then --

6 Q Well, before you go on -- I am sorry --

7 A Oh, I'm sorry.

8 Q Did you receive your degree with any honors?

9 A I did.

10 Q I see something here called summa cum laude. Did you
11 graduate summa cum laude?

12 A I did, yes.

13 Q Go on then and tell what further education you have.

14 A After that, I pursued graduate study at the University
15 of Michigan in Ann Arbor, Michigan, where I received a Masters
16 of Arts in psychology in 1999 and a Ph.D. in psychology in 2002.

17 Q Tell us a little bit about your teaching activities and
18 duties now in your position at Tufts.

19 A Sure. I teach courses at Tufts University in research
20 methods, so I teach our department's required research methods
21 course. I teach introductory psychology, social psychology. I
22 teach advanced seminars in my field of social psychology and
23 also a seminar on psychology in law, the intersection between
24 psychology and the legal system.

25 Q Who are the students that you teach? Are they

1 undergraduates, graduates, doctoral students? Who are those
2 students?

3 A They're both, so I teach undergraduate students. I also
4 teach graduate students, and have doctoral candidates, graduate
5 students, who work with me on research and who I teach in the
6 classroom as well.

7 Q Is there a field of psychology called social
8 psychology?

9 A Yes.

10 Q Tell us what that is, Dr. Sommers.

11 A Well, I am a social psychologist, which means I study
12 the ways in which we think and make decisions and interact in
13 day-to-day social situations. It is a behavioral science aspect
14 of psychology and so -- I, again, study -- we use phrases like
15 perception and cognition and decision-making in day-to-day
16 situations, how we see the world, think, make decisions, and
17 that is sort of the general description of what the field of
18 social psychology focuses on.

19 Q And tell us something about the scholarship you have
20 done in the area of social psychology.

21 A Sure. My area of expertise focuses on -- well,
22 intergroup relations, how people interact and communicate in
23 diverse settings, looks at how factors such as race and
24 ethnicity affect people's decision-making and the way they see
25 each other and interact with each other. I have a particular

1 focus on those issues as they play out in the legal setting and
2 so how the race and ethnicity affects decision-making in the
3 legal context among attorneys and jurors and so on -- memory
4 among witnesses and so on.

5 Q Yes, sir. Referring, again, to the Exhibit 11, your
6 curriculum vitae, are you a member of any professional
7 organizations?

8 A I am.

9 Q Tell us what those are and tell us a little bit about
10 each organization as you do that.

11 A Sure. Member of the American Psychology-Law Society,
12 which is a professional organization of behavioral researchers
13 and legal scholars and some legal professionals who conduct
14 research on psychological perspectives on the legal system. I
15 am a member of the Association for Psychological Science, which
16 is a professional organization for research psychologists such
17 as myself. Similar would be Society for Experimental Social
18 Psychology and the Society for Personality and Social
19 Psychology, both also professional organizations devoted to
20 behavioral research or social psychology researchers such as
21 myself. The Society for Psychological Study of Social Issues,
22 which, again, is sort of a similar membership but with a group
23 of researchers who focus on these issues of psychology as they
24 play out with contemporary social and policy issues.

25 Q Yes. I don't want to offend your modesty, but I want

1 you to go to page four, and I see here a list of honors and
2 awards. Do you mind telling us a little bit about that?

3 A Sure. Well, I received some teaching awards at Tufts
4 University, professor of the year award and prize for
5 outstanding teaching and advising. In 2008, I received the
6 Saleem Shah Award for Early Career Excellence in Psychology and
7 Law, and that is given by the American Psychology-Law Society
8 every year to one researcher for a body of research
9 contributions to the scholarship in that area of psychology and
10 law, and then named as fellow of some of those societies that I
11 mentioned to you earlier as well as honored for some of my
12 service work on campus and in the profession at large.

13 Q Very well. Now, have you authored or coauthored any
14 publications in your field?

15 A I have.

16 Q I want us to talk about that a little bit, so if we
17 take a look at page five of your CV, can you just give us a
18 sampling of some of the articles that you have written for
19 professional journals?

20 A Sure. Again, much of my research focuses on these
21 questions of how race affects decision-making and communication
22 and thinking style and so on, and so -- would you like me to
23 highlight specific publications from this list?

24 A Yes, sir.

25 Q Well, in this past year in 2011, I published a paper

1 with Michael Norton in *Perspectives in Psychological Science*,
2 where we examined both white and black Americans' perceptions of
3 race and racial bias in contemporary America and the extent to
4 which people believe racial bias is still a continuing issue in
5 America that is one that needs to be sort of talked about and
6 addressed.

7 If you want the specific publications with regard to
8 legal decision-making, a lot of those are going to appear on
9 page six where I published papers such as -- well, in 2008,
10 Sommers and Norton, 2008, *American Psychologist*, piece on race
11 and jury selection, psychological perspectives on the peremptory
12 challenge debate, as well as the bottom of that page, an
13 empirical study, Sommers and Norton, 2007, race-based judgments,
14 race-neutral justifications, experimental examination of
15 peremptory use and the *Batson* challenge procedure. So, in
16 general terms, my publications -- I have looked at how race
17 affects decision-making and interacts more generally in society
18 as just human nature and how race affects human nature, but I
19 have also published some studies specifically looking at issues
20 of jury racial composition, race and peremptory challenge use,
21 and the like.

22 Q Yes. What is a peer-review publication or a
23 peer-review journal?

24 A The way that publication in my fields, including my
25 field in psychology, proceeds is that when one wants to publish

1 a paper, a new empirical paper based on new data or a
2 theoretical review paper, you submit it to the journal in
3 question, and the journal then sends it out for peer review
4 which means that usually three or four members of your field
5 receive the paper anonymously, are asked to -- almost always
6 anonymously -- are asked to evaluate that paper, write a written
7 review that then goes to the editor, who then has to make a
8 decision as to whether the paper should be accepted. Journals
9 vary with regard to their acceptance rates, but most of the top
10 flight journals in the fields in which I and my colleagues
11 publish have rejection rates in the 80, 90 percent range, so
12 most papers are not accepted. Often, they are sent back and
13 asked additional data or analyses or revisions are required, but
14 it is the process by which one publishes and advances the field
15 of scientific knowledge and psychology and in many related
16 disciplines.

17 Q What about the articles that you have written? Have
18 you had articles submitted to and accepted by peer-review
19 publications?

20 A As listed on my CV under publications, with the
21 exception of book chapters, these are almost exclusively
22 peer-review publications in these journals, yes.

23 Q And those appear on page -- starting on page five and
24 going to page --

25 A Five through eight.

1 Q Through eight; is that correct?

2 A Yes. Yes.

3 Q I tried to count them all, but I stopped counting at
4 about 21, so is that about right?

5 A I haven't counted. I take your word for it.

6 Q Yes, sir. Have you yourself served on editorial boards
7 or publications, review articles?

8 A Yes.

9 Q Tell us a little bit about your experience in that
10 regard.

11 A Well, so part of this peer-review process is that the
12 editor -- the editors of a journal often recruit an editorial
13 board, which is a group -- it varies depending on the size of
14 the journal -- but a dozen, two-dozen of the leading researchers
15 in the field who will serve on that board and appear on the
16 masthead of the journal and will, even more so than other
17 colleagues in the field will be asked to review papers for the
18 journal. So, for example, most editorial boards I am on, the
19 expectation is somewhere in the neighborhood of 10 to 12 papers
20 a year you will receive. So you receive a great deal more
21 papers as a member of the editorial board to review than you
22 would otherwise, and the idea is that the editor, the editorial
23 staff, can then rely on the editorial board as a sort of a
24 regular reviewer of these papers.

25 So I'm on the editorial board of three journals

1 currently. One would be *Law and Human Behavior*, which is the
2 flagship journal for the empirical -- psycho-legal research that
3 I conduct, and I have been on that for several years -- and I
4 have to look -- since maybe 2008, though it may be earlier. And
5 editorial board for *Psychological Science*, which is a leading
6 journal in the field of psychology more generally, and as well
7 as an editorial board member of *Journal of Personality and*
8 *Social Psychology*, which is the leading journal in experimental
9 social psychology, which is my particular subfield. And so as a
10 member of those editorial boards, I get -- I receive several,
11 numerous papers every year or two to review as part of this
12 peer-review process and, well, it enables me and forces me to
13 stay up-to-date on the latest research findings that are coming
14 out in these different research areas.

15 Q You do all of that within the period of 24 hours a day,
16 or do you have some secret we don't know about?

17 A No. That is squeezed in and around parenting duties and
18 other things as well, yes.

19 Q Do you have any -- you mentioned special areas of
20 interest. Do you have special interests or scholarship within
21 the field of psychology?

22 A I do.

23 Q Tell us about what some of your focuses have been on in
24 special areas in the field.

25 A Sure. I am particularly interested in my research in

1 the nature of contemporary racial bias, the ways in which race
2 influences our thinking and our judgments and our
3 decision-making in this day and age even in an era where most
4 people will tell you that they are fair-minded individuals, and
5 I think, in many instances, genuinely believe that they're not
6 influenced by issues such as race and other demographics but
7 studying, from an empirical standpoint, what the data tell us
8 about the extent to which race does still color the way we see
9 each other, interact with each other, make decisions, and so on.
10 And as I said, a lot of that work also -- though not
11 exclusively -- but a lot of that work also looks at those issues
12 in the context of legal settings and among jurors and witnesses
13 and attorneys and the like.

14 Q Yeah, if you will, just go ahead and describe for us
15 the kind of work that you have done in the criminal justice
16 field and just specific to jury selection and race and some of
17 the things you were just talking about.

18 A Sure. With regard to jury selection and race, I have
19 conducted experimental research on jury selection, which means
20 studies of race and jury selection but in a controlled setting,
21 so as opposed to an archival analysis where you would look at,
22 say, a fixed number of cases in a particular state over a
23 particular period of time that actually occurred and try to use
24 statistical analysis to uncover patterns in these real data, I
25 conduct experimental research, jury selection simulations, for

1 example, where we present our participants, our respondents,
2 with a scenario and ask them to render the kind of judgments,
3 the ones we would make in a jury selection forum. The advantage
4 of -- every research methodology have strengths and limitations.
5 They just inherently do. There is no perfect study. There
6 never can be a perfect study. That's how research works.

7 And when it comes to archival analyses and experimental
8 research, the type that I do, there's trade-offs involved so,
9 obviously, when I am doing a simulation study, I am sacrificing
10 realism. I am not looking at an actual set of jury selection
11 judgments made in actual cases at a period of time, but what I
12 am able to do is isolate the -- control the variables of
13 question and isolate the causable effects of one variable on
14 another in a very straightforward way. So in one study --
15 should I use specifics of a study.

16 Q Well, I was just going to ask you -- just give us an
17 example of kind of what you do in an experiment --

18 A So one example would be a study I conducted that I
19 mentioned here with Michael Norton where we presented our
20 respondents, three groups of respondents, college students,
21 advanced law students, and practicing attorneys with jury
22 selection experience, a jury selection scenario, and so we gave
23 them a brief description of a trial involving an
24 African-American defendant, and we gave them two prospective
25 juror profiles to read through, and in one version of the study,

1 Juror A and Juror B -- and we have photographs with those
2 jurors.

3 And in one version of the study, Juror A was depicted
4 as a white male and Juror B as an African-American male. And
5 then in the other version of the study, the exact same profile
6 as Juror A and B, but we just flip the photographs around. So
7 now Juror A is black, Juror B is white. And what it enables us
8 to do is when we present these scenarios to participants and
9 randomly assign them to which version that they see and ask them
10 to read through the scenario as if they were a prosecutor
11 selecting a jury in a criminal case and to evaluate the
12 prospective jurors and tell us which, if any, of these jurors if
13 you had one peremptory challenge to use, who would you
14 challenge, who would you remove from the jury?

15 What we are able to do is isolate the causal impact of
16 race on those decisions because these are groups of people who
17 are randomly assigned to conditions so we have reason to believe
18 through probability that they are comparable groups to start
19 with. They experience the exact same scenario, the exact same
20 juror profile, the exact same summary of a trial, and are asked
21 the exact same set of questions but for one difference, which is
22 which juror is white and black, so we flip that around. And so
23 we see differences in their assessments at the end of the trial
24 or the end of the study, the only explanation -- there's only
25 two explanations for why you find a difference like that. The

1 one -- one is that it's the manipulation, the variable that we
2 controlled, which is different across versions. The only other
3 explanation would be that it is a fluke, that it is random
4 chance, you know, that it is something that just happened out of
5 laws of probability, and that is why you use inferential
6 statistics, then, to determine if that is a reliability finding
7 and one that you can have confidence in.

8 And so in that study, we find that indeed our
9 respondents in all three samples are more likely to challenge a
10 prospective juror when he is black than when he is white. They
11 are significantly -- statistically significantly more likely to
12 challenge that juror when he is black as opposed to when he is
13 white. And then we follow up by asking the respondents to
14 explain why they made the challenge that they did. So what is
15 the reason for the challenge that they made, the decision that
16 they made, and we were able to analyze those responses and see
17 what kind of information we get from those.

18 The data of that study showed that few -- very, very
19 few participants make any sort of mention of race whatsoever
20 even though we know from the study there is a significant impact
21 of race on their judgments. Instead, what they do is they cite
22 the race-neutral characteristics and information associated with
23 the juror who they chose to challenge. That is what they talk
24 about. So they inflate the importance of the race-neutral
25 explanation that justifies the decision that they made.

1 And so they -- when Juror A is a juror who is discussed
2 as having written about in his job as a juror, police issues and
3 investigations in the past and has -- and has had -- written
4 some critical articles about police, when Juror A is black, that
5 is what the respondents cite as the reason for excluding him
6 because they were nervous about his attitudes about the police
7 and so on and thought that would be detrimental to their case.
8 When Juror A was white, they are much less concerned about the
9 police issue. Instead, they -- in that instance, Juror B is
10 black, and Juror B is discussed in terms of not having a good
11 background in science and being sort of skeptical about
12 statistics and there will be forensic evidence in the case and
13 so that is a concern, and so when Juror B is black, that's what
14 the respondents are citing is skepticism about statistics and
15 his discomfort or lack of comfort with the analyses that will
16 come up during trial; something that they are not as concerned
17 about, don't talk about, when that juror is white.

18 So the really short answer to the study is -- your
19 question, is that the study shows us a causal impact of race on
20 jury selection judgments and shows us that when you ask
21 individuals to explain their judgments, they don't provide
22 answers that give any hint of that actual influence of race that
23 we've observed.

24 Q Yes, sir, and we are going to want to talk a little bit
25 more about that later on. So you have given us a description of

1 an experimental-type study. You had mentioned an archival
2 study. Can you just contrast experimental or compare
3 experimental studies with archival studies and just kind of give
4 us a brief description of the differences?

5 A An archival study is a study of existing data, data that
6 are already there. So if you were to look at a particular state
7 in a particular time period in a particular subset of cases and
8 use logistical regression, multiple regression to determine
9 factors that are significant predictors of outcomes and
10 disparities in that sample, that's an archival analysis. That
11 is making use of data that are already there.

12 The experimental method that I described is a
13 researcher creating his or her own data. In other words,
14 collecting new data by assigning individuals to different
15 conditions of a study, a treatment and a control or different
16 treatment conditions, varying some factor across the different
17 groups, and they are looking to see what effect varying that
18 factor has on their outcome measure. Both of those methods have
19 their unique strengths and limitations, but that's sort of the
20 critical difference between them.

21 Q And what experience have you had in teaching, studying,
22 researching methodologies?

23 A I -- sure. I teach a semester-long course every year on
24 research methodology. I -- in the course of being on the
25 editorial board and someone who reviews for other journals as

1 well, that is one of the major if not the major issue you are
2 looking at in evaluating an empirical paper, certainly, is the
3 rigor of the method of the design. So I have had a lot of
4 experience from that perspective evaluating other researchers'
5 methodologies and certainly as someone who conducts original
6 research of my own. It's something that I have to think about
7 and wrestle with and deal with on a regular basis.

8 Q And when you're evaluating papers for peer-review
9 journals and the editorial work that you do, is part of that
10 function the evaluation and criticism of various research
11 methods as you look at these papers?

12 A Yes, very much.

13 Q Now, have you been admitted as an expert in other
14 courts before?

15 A Yes, I have.

16 Q Give us sort of a range of where you've been -- the
17 kinds of cases and where you've been received as an expert
18 witness, Dr. Sommers.

19 A Sure. Well, I've testified in three different cases as
20 an expert in capital case matters, one in Massachusetts and --
21 actually, okay for me to look at my exact dates?

22 Q Yes. I think they appear on --

23 A I believe they do, and the dates I don't know off the
24 top of my head.

25 Q Take a look at page two.

1 A Thank you. Yes. So starting at the top, in January,
2 2008, I testified in a post-trial hearing in the Commonwealth of
3 Massachusetts in a matter involving -- it was a post-trial
4 hearing in a capital murder case in which the discussion was
5 allegedly discriminatory statements that had been made during
6 jury deliberations, and there is precedent in the Commonwealth
7 of Massachusetts to have a post-trial hearing where the jurors
8 come back and are polled by the judge and interviewed by the
9 judge, and expert testimony was included regarding the nature of
10 contemporary racial bias and how it might play out in the legal
11 context.

12 I also testified twice in pretrial hearings, once in
13 New Hampshire and once in Oregon, on research regarding racial
14 bias, racial disparities in capital murder trials and
15 decision-making made in capital trials. I have also -- the
16 remainder of the other five or six listings here would be
17 locally in Massachusetts, I have often testified on issues of
18 eyewitness memory and photo array administration, and matters
19 along those lines.

20 MR. JAMES FERGUSON: Very well. If Your Honor
21 please, at this time, we tender Dr. Sommers as an expert in
22 social psychology; research methodology; the influence of race
23 on perception, judgment, and decision-making; race and the
24 United States legal system; and race and jury selection.

25 THE COURT: Folks, do you want to be heard as to

1 the tender?

2 MR. THOMPSON: No, sir. Thank you.

3 THE COURT: You may proceed, Mr. Ferguson.

4 DIRECT EXAMINATION

5 BY MR. JAMES FERGUSON:

6 Q Dr. Sommers, is there a body of research and
7 scholarship concerning the continuing influence of race in
8 contemporary United States society?

9 A Yes.

10 Q Can you give us a description of that scholarship and
11 talk briefly about what the conclusions of that scholarship are?

12 A Sure. There is an extensive body of research, of
13 empirical research, on the question of how race influences our
14 cognition and perception, the way we think, the way we see each
15 other, the way we make decisions. What the research
16 demonstrates is that there have been shifts over time in the
17 forms and manifestations of racial bias, so it is certainly the
18 case that overt and explicit and blatant forms of racial bias
19 are frowned upon in contemporary society in many cases in ways
20 that they weren't to the same degree earlier in our society.
21 And so sort of the overt and blatant forms of racism are in many
22 respects and many studies less visible than they once were and
23 less present. But at the same time, there is still a continuing
24 body of evidence that a wide variety of decisions and thought
25 processes and interactions that race continues to have an effect

1 on the way we make judgments and see each other and think about
2 and interact with each other. It goes by -- these conclusions
3 go by theoretical names like modern racism or subtle racism, and
4 there is this body of research now that demonstrates that a lot
5 of the influence of race on our decision-making processes
6 operates at a less-conscious level; that it's not something we
7 are always aware of or can articulate when asked about it, and
8 that even well-intentioned and fair-minded and individuals who
9 genuinely in good faith are trying to make decisions that are
10 not influenced by these factors, that those motivations alone
11 are not enough to preclude race from having an effect, that you
12 often see unconscious influence of race on decisions and on
13 people's perceptions and interactions with each other.

14 Q And I think you're telling us, are you, that this --
15 you're not just talking about the legal system but you are
16 talking about just in the way we live, in a society in general,
17 that race plays itself out in the ways that you have described?

18 A That is correct. I was answering sort of as a general
19 proposition regarding the human nature more generally.

20 Q Yes, sir. And have there been studies about that and
21 how race affects hiring decisions and other decisions that we
22 encounter in everyday society?

23 A There have. There have been studies in a variety of
24 different domains, so to take the hiring domain, for example. A
25 recent study by economists, by behavioral economists, they sent

1 job resumes out to thousands of job openings in, I think,
2 Chicago and Boston in that study, and for openings in
3 administrative and clerical positions. And what they did was
4 they created a series of resumes that were all different,
5 different versions of resumes but resumes that had been rated by
6 other individuals as being comparable so -- all resumes are
7 different but pretty comparable, in-the-same-ballpark resumes.

8 And what they did was they sent these resumes out to
9 prospective hirers, and they varied the name that was put on
10 those resumes. They used birth records to pick names that were,
11 quote, unquote, white-sounding names or black-sounding names
12 based on birth records. I believe the title of the paper is
13 something like, Are Jamal and Lakisha more employable than Greg
14 and Emily, just to give you an example of some of the names that
15 they used.

16 And what they found was that, indeed, the same resumes
17 were viewed very differently depending on the name that was on
18 top of them, depending on the implied race of the individual who
19 was on top of those resumes. Just to cite one of the findings
20 they have, for resumes with a white-sounding name, it took ten
21 resumes on average to get one callback for a prospective
22 interview or follow-up. For the same resumes with a
23 black-sounding name, it would take 15 resumes to get a callback
24 or a follow-up. Just as an illustration of, again, individuals
25 making judgments in these HR departments, not judgments based

1 necessarily on racial animus or dislike of members of particular
2 groups but probably individuals trying to make good decisions
3 for their company but, you know, decisions that are, in this
4 case, providing a clear statistical disparity and how, in this
5 instance, white and black Africans are evaluated.

6 Q And if, in the circumstances you have talked about, for
7 example, if the person hiring were called upon to explain the
8 hiring decision, would that person always acknowledge, recognize
9 that race was a factor in doing that?

10 A What we know from research is that when -- and not just
11 in this domain of hiring but in general, when you ask people to
12 explain their decision-making in situations like this, that
13 people are remarkably good at giving you legitimizing
14 race-neutral explanations for the decisions that they've made, I
15 think, quite often, we know from the research, genuinely
16 believing those to be fair assessments of why they made the
17 decisions that they did. But to give you the short answer of
18 your question, no. When you ask questions like that, you
19 typically don't find evidence of the influence of race even
20 though you know from the actual outcomes that you study that
21 there was an effect of race there.

22 Q Why don't people just say, Well, yeah, I mean, I
23 decided on the basis of race. Why don't they just do that?

24 A There's multiple possibilities. One is they don't want
25 to admit it. They don't want the, in the case of an HR

1 director, the legal liability that would follow from admitting
2 something like that or, for that matter, the social disapproval
3 or sanction that might come from admitting something like that
4 in public, so that is certainly a possibility. But we also know
5 from a lot of research that quite often, the influence of race
6 is not operating at a conscious level, that people aren't making
7 a conscious decision of I don't like people who look like this.
8 It is a much more subjective, I didn't get a good vibe during
9 this interview, or, I can't quite put my finger on it, but I am
10 going to go with this person. And so if you're not aware of the
11 influence of race, then certainly being asked about it isn't
12 going to produce information that diagnoses it or identifies it.

13 Q Well, are these things you are telling about these
14 studies and conclusions, are they generally known and accepted
15 in the scientific world that you live in and work in?

16 A Yes. I mean, scientists, as you probably know by now,
17 like to argue, and so there is always a quarrel to be had about
18 the specific test that is used or the specific way this is being
19 measured but the general proposition that -- that race continues
20 to have an impact on our thought processes and decision-making
21 on a regular basis and that that is often unconscious process.
22 That is a well-established conclusion in the scientific
23 literature.

24 Q Well, you mentioned the term implicit and unconscious.
25 Let me just ask you when you use the term implicit or implicit

1 bias, implicit racism or whatever, tell me what you mean by
2 that.

3 A Psychologists use the phrase implicit bias or implicit
4 in general to talk about something about which they're not
5 consciously aware. So an implicit attitude or an implicit
6 association would be an association you hold between members of
7 a certain group and certain characteristics about which you are
8 not even consciously aware. So this idea of implicit bias would
9 be, again, exhibiting bias in judgments or decisions that are
10 made but not necessarily being aware that you're doing that.

11 Q What about the term unconscious racism or unconscious
12 bias? Is that something you can tell us about?

13 A Yeah. I think that that's quite often used synonymously
14 with implicit bias. It gets at the same idea that -- that the
15 sort of disparities and bias that you see in this day and age
16 are often not the result of overt conscious processes or overt
17 explicit animus towards members of certain groups but that is
18 often more unconscious.

19 Q I have even heard the term aversive racism. Tell us
20 about that.

21 A Yeah. Aversive racism is a phrase that -- well, Sam
22 Gaertner and John (Jack) Dovidio were first to use that phrase,
23 and it's also a description of the contemporary nature of racial
24 bias in society and refers to the idea that for most people in
25 this day and age, bias is aversive, it's unpleasant, it's

1 something that we don't want to have because we don't want to be
2 disapproved of by others but also because we genuinely want to
3 see others and be fair-minded people that the idea of being
4 biased in our decision-making is often aversive. It's something
5 that we wish to avoid. We certainly wish to avoid the label of
6 being called biased or racist or what have you. And so as a
7 result of that, again, in very clear-cut cases where you get the
8 job resume and she's got phenomenal recommendations and awards
9 and this and that and the other and it is clear this is a good
10 person, that person might very well -- that person probably gets
11 hired regardless. But in that middle ground where life often
12 exists in the more ambiguous and grayer areas where people have
13 pluses and minuses in their candidacies, that's where you're
14 going to see bias manifest itself in subtle ways, in ways that
15 the people making the decisions aren't going to be able to
16 articulate necessarily, are going to be able to give a
17 legitimate race-neutral explanation for. So aversive racism is
18 this idea that we find bias to be unpleasant and will often
19 give, again, justifications for our decisions that will avoid
20 any appearance of impropriety.

21 THE COURT: For the benefit of the court reporter,
22 Dr. Sommers, if you will spell the term aversive.

23 THE WITNESS: Yeah, sure, aversive,
24 a-v-e-r-s-i-v-e.

25 BY MR. JAMES FERGUSON:

1 Q Are there any programs ongoing to address these issues
2 you have talked to us about to try to mitigate the influence of
3 race?

4 A Yes, there are.

5 Q Can you talk about that a little bit?

6 A Well, they occur in different domains. For example,
7 well, on my college campus, like many university campuses --
8 well, I often am asked to give presentations in workshops in
9 different groups with incoming students, with our human
10 resources department, with the university police staff where we
11 present to them the research on implicit bias, on unconscious
12 bias, and talk about when it's likely to emerge, when it's
13 likely to arise, how we can individually and institutionally
14 strategize to combat and to make less likely the manifestation
15 of such bias. So I have actually been involved at that level of
16 the university setting. I have also given similar workshops at
17 times to legal professionals or continuing legal education and
18 local law schools, so I am aware of those kinds of initiatives.
19 I am also aware of colleagues in the field who have conducted
20 similar workshops and presentations and training manuals for
21 legal professionals for the purpose, again, of trying to
22 enlighten, educate the populous as to these processes and the
23 science behind contemporary racial bias and, again, to
24 strategize concretely about how to structure situations and how
25 to make such bias less likely to emerge.

1 Q I do want to come now to the legal system and talk
2 about that. Let me just ask: Is there a body of research and
3 scholarship concerning the effect of race on the United States
4 criminal justice system?

5 A Yes.

6 Q Can you just briefly describe that scholarship and
7 summarize its --

8 A Sure. Well, briefly put, this is a body of research
9 that makes use of different methodologies, so I talked about
10 archival analysis and experimental analysis, and those are both
11 a part of that literature. And the basic conclusion of that
12 literature is that these processes that I talked about that you
13 see in the population at large, that you see in human resources,
14 individuals that do job hiring and promotion, you also see them
15 in legal circles. You see an influence of race on how jurors
16 evaluate defendants, on how attorneys evaluate prospective
17 jurors and how, for that matter, witnesses are able to remember
18 individuals they have seen in terms of their memory, and so you
19 see that -- this influence of race in this day and age on our
20 thought processes, our decision-making. The legal system is by
21 no means exempt from that. It exists in the legal system as it
22 does elsewhere.

23 Q And I wanted you to just be specific about that. So in
24 the legal system, you are saying that you don't find that the
25 system is immune to the kind of implicit bias, unconscious bias,

1 aversive racism. Does that apply to the legal system just as it
2 does to society in general?

3 A That's correct, yeah.

4 Q Now, what about examples of race and the death penalty?
5 Have you taken any look at that? Do you have any examples of
6 scholarship concerning race and the death penalty itself?

7 A I am aware of the body of scholarship on that question,
8 yes.

9 Q And have you looked at any opinions by the United
10 States Supreme Court dealing with race and the death penalty or
11 race and jury bias and so forth?

12 A Well, I'm not a legal -- I am not a law school
13 professor. I don't teach constitutional law, but I am certainly
14 versed in major rulings. In fact, in my psychology and law
15 course, we -- I teach the -- we read *McCleskey v. Kemp*, we read
16 *Batson v. Kentucky*, and I would not put myself up as being a
17 well-renowned legal scholar from a constitutional standpoint,
18 but I am familiar with the basic major findings in this domain.

19 Q I understand. Has there been some research and study
20 done in the area of race and the use of strikes by prosecutors
21 in criminal cases?

22 A Yes, there has.

23 Q Okay. And is there a body of scholarship regarding
24 that aspect of race in the criminal justice system?

25 A Yes, there is.

1 Q Would you be able to just give us sort of a summary of
2 that or a description of that?

3 A Sure. The quick summary would be that data collected by
4 multiple different researchers in multiple different states over
5 different time periods have converged on the finding that race
6 does indeed tend to predict the peremptory challenge use of
7 prosecuting as well as defense attorneys. That prosecuting
8 attorneys, again, across different studies conducted by
9 different researchers are statistically more likely to challenge
10 a juror when he or she is black and, for that matter, defense
11 attorneys are statistically more likely to challenge a
12 prospective juror when that juror is white, and there are
13 multiple studies that have demonstrated that finding.

14 Q And I want to go ahead and describe some of those
15 studies, if we can. First of all, are you familiar with the
16 Michigan State study, Michigan State University study in this
17 case?

18 A Yes, I am.

19 Q And at that, I want to show you what we have now marked
20 as Defendant's Exhibit 12, which I will hand to the prosecution
21 and the Court and I will hand one to you. And would you tell us
22 what Defendant's Exhibit 12 is.

23 A Sure. It is a published paper by David Baldus and
24 colleagues regarding the use of peremptory -- the relationship
25 between race and peremptory challenges in Philadelphia in

1 capital murder trials I believe published in, I think 2001 or --
2 2001.

3 Q And is that an example of the kind of studies you were
4 talking about that describe the impact or the influence of race
5 in jury selection?

6 A This is an example of the study that demonstrates the
7 statistically significant relationship between juror race and
8 jury selection outcome, yes.

9 Q And let me show you another paper here which we have
10 marked as Defendant's Exhibit Number 13. Tell us what Exhibit
11 Number 13 is, Dr. Sommers.

12 A This is a Dallas Morning News write-up of a similar
13 study conducted in Texas in Dallas regarding the relationship
14 between prospective juror race and strikes during jury
15 selection.

16 Q And I take it that is another of the studies that
17 you -- or kind of studies you have looked at that address the
18 issue of the racial impact and influence of the use of strikes
19 in death penalty cases?

20 A This is, indeed, yes, a study I am familiar with that
21 demonstrates that relationship between race and strikes during
22 jury selection.

23 Q I am going to hand you another paper that we've marked
24 as Exhibit 14, Defendant's Exhibit Number 14, and let me hand a
25 copy to the Court. Take a look at Defendant's Exhibit Number 14

1 and tell us what that is, please, sir.

2 A Yes. This is an article written by sociologist Mary
3 Rose also looking at, in this case, noncapital but felony trials
4 in North Carolina and the relationship between race and jury
5 selection strike decisions.

6 Q And do you know where this study was carried out?

7 A It was carried out in North Carolina.

8 Q In North Carolina. And as a general matter, what do
9 these studies tell us about jury selection and the way it plays
10 out in -- I am sorry. What do these studies tell us about race
11 and how it plays itself out in jury selection?

12 A Sure. What these studies demonstrate -- every study is
13 different, but they converge on the conclusion there is a
14 significant relationship between race and peremptory challenge
15 strikes and a relationship that exists for prosecutors as well
16 as defense attorneys, that you see a statistical --
17 statistically significant relationship between race and
18 peremptory challenge strikes with, again, prosecutors being
19 significantly more likely to strike black prospective jurors and
20 defense attorneys statistically more likely to strike white
21 prospective jurors.

22 Q And each of the studies you have talked about, is that
23 characteristic? Blacks tend to be preferred by prosecutors -- I
24 am sorry. Whites tend to be preferred by prosecutors more than
25 blacks?

1 A That tends to be the findings that you see, again, yeah,
2 prosecutors more likely to strike a prospective juror who is
3 black and defense attorneys more likely to strike a prospective
4 juror who is white.

5 Q And have you yourself done any experimental research in
6 this area?

7 A I have.

8 Q Tell us about that.

9 A My research is a little different as I alluded to
10 before. I don't profess to be studying a particular state in a
11 particular period of time and a particular subset of cases.
12 What I try to do in my research is come at the same set of
13 questions but from a different methodology because as any good
14 sound research methodologist will tell you, you become more
15 confident in the conclusions that you want to offer in a
16 scientific literature if you are studying that question and
17 coming at it from different methods because any one method has
18 its inherent limitations and strengths. And so what I try to do
19 in my research is experimentally look at directly what's the
20 cause -- the causal relationship between juror race, prospective
21 juror race and juror strike decisions and, number two, when
22 you -- to the extent that you can demonstrate or find to the
23 extent there is evidence of an influence of race on those strike
24 decisions, to what degree can you identify that influence by
25 asking people to explain and justify their challenge decision?

1 And so those are really the two questions that I asked in that
2 research study, and we found that when we manipulate the race of
3 a -- the photographs associated with prospective jurors in that
4 study, that race does indeed have a causal effect on the
5 challenge decisions being made; moreover, when you ask the
6 respondents to explain the basis for their challenge decisions,
7 they don't talk about race. They are quite easily able to
8 recruit race-neutral explanations for that affected race that
9 we've observed objectively.

10 Q Are you able to quantify the influence of race in the
11 studies that you have done and in the research that you have
12 done in this area?

13 A Yes. It's going to be different in every study. I
14 could create a scenario in which I have juror profiles that are
15 not comparable and, therefore, the numbers go from one direction
16 versus another. What we find in our research where we've tried
17 to create two juror profiles that were somewhat comparable was
18 the effect of race in the neighborhood of, well, of 25 percent
19 so when one of the jurors was white, he was challenged at a rate
20 of 25 or 30 percent, but when that same juror was black, he was
21 challenged at a rate of 50, 50-something percent, and for the
22 other juror, the numbers went from about 50 to 75 percent but a
23 jump of 20, 25 percentage points when the same exact juror
24 profile was depicted as an African-American male versus a white
25 male.

1 Q So in those studies that you have done, would you
2 describe the impact of race and the factor of race to be
3 significant?

4 A Well, the statistics that we run there lend themselves
5 to the conclusion that, yes, that is a statistically consistent
6 and reliable finding. The inferential statistics demonstrate
7 and -- and, frankly, if it weren't significant, it wouldn't pass
8 the peer-review process and get published.

9 Q So in terms of the work that you have done, the studies
10 that you have familiarized yourself with, is this consistent --
11 the influence of race that you see in the criminal justice
12 system, the use of prosecutor strikes, is that consistent with
13 the general body of scholarship concerning race and
14 decision-making, race and judgment, race and perception?

15 A Yes. The findings regarding peremptory challenge use
16 fit the -- the narrative fit the story being told by the data
17 more generally. There are, again, a robust body of scientific
18 literature demonstrating that race still does have an effect on
19 decision-making processes across the board in a variety of
20 different domains in society and the findings that we obtain for
21 jury selection in the legal system are consistent with that
22 story.

23 Q Coming now to the case at hand, this case. Have you
24 looked at the reports of some of the experts in this case?

25 A Yes, I have.

1 Q I think you have already told us you're familiar with
2 the Michigan State University study?

3 A Yes, I am.

4 Q Have you looked at a report by one of the defense
5 experts -- I am sorry, one of the prosecution's experts, Dr.
6 Christopher Cronin?

7 A Yes, I have.

8 Q Did you have any reaction to that report when you
9 looked at it that you can share with us?

10 A Yes. I -- when you get to the concluding, the
11 conclusions being offered in Dr. Cronin's report, sort of right
12 at the end, the final paragraph, he's making the argument that
13 you can't differentiate between a disparity that may be based on
14 race and a disparity that may be based on something else like
15 ideology. I agree with him that there -- I mean, the
16 implication is that there is a disparity to be explained, and I
17 do agree there is a disparity to be explained, but the argument
18 that you can't differentiate between those explanations is
19 incorrect and actually stands in contrast to what he writes
20 earlier in the report when he talks about studies in which you
21 can control for race and look to see if there is still a
22 difference in ideology or you can control for ideology
23 statistically and still see if there is a difference by race.
24 But my major reaction is to take issue, from a scientific
25 standpoint, with the final conclusion that the best way to

1 identify the influence of race in a series of decisions, in a
2 series of jury selection decisions, would be to simply look at
3 the case-by-case scenario, to talk to the people involved, and
4 that's not -- that is not consistent with the scientific
5 literature on these issues.

6 Q Let me return with you to something we talked a little
7 bit about, and that is the *Batson* case or the *Batson v. Kentucky*
8 case?

9 A Yes.

10 Q You told us you're familiar with that case. Have you
11 done any writing on that?

12 A I have.

13 Q And what observations and conclusions have you made
14 about *Batson* and how it has operated in the criminal justice
15 system?

16 A I would offer, from a psychological standpoint, that
17 there are two psychological -- two empirical and behavioral
18 science assumptions underlying the *Batson* decision. Number one
19 is that race can and does and has the potential to have an
20 impact on jury selection decisions and, number two, that the
21 procedure put in place in the wake of *Batson* by which a judge
22 asks the attorney to justify his or her challenge in certain
23 cases, that that procedure is going to identify and reveal
24 information that will be useful in figuring out whether race has
25 actually had an effect. So I have written about those two

1 assumptions underlying the *Batson* ruling and written about the
2 extent to which the scientific literature is consistent with
3 those two conclusions.

4 Q All right. And what is your conclusion about *Batson*
5 and its effect on race in jury selection?

6 A Well, on that first conclusion regarding the effect of
7 race on jury selection, the scientific evidence is pretty clear
8 that that's correct, that there does seem to very much be not
9 just the potentially but a real significant relationship between
10 race and jury selection, and that is the conclusion of the
11 exhibits that we talked about earlier and is the conclusion of
12 the experimental research that I have done. So that assumption
13 there is consistent with the social science data.

14 The second assumption that by asking questions about
15 the basis for the challenge decision, one can uncover
16 information and identify the actual influence of race through
17 that self-report conversation, the data there also pretty strong
18 but in the opposite direction to suggest that that assumption
19 doesn't have support. Again, the data -- well, my study is just
20 one example -- demonstrates that race often has an effect on
21 judgments that we don't articulate when we are asked about those
22 judgments but, more generally, there is a wide body of research
23 that demonstrates that because people don't want to admit and
24 because people sometimes can't admit because they are not aware
25 of it, the influence of race, that asking them about why they

1 made the decision they did won't reveal information that is
2 going to help you identify the impact of race. And so in short,
3 to phrase it more articulately, that second assumption I think
4 puts judges in a rather unenviable task of having to sit and
5 almost be mind readers to say what really accounted for a
6 challenge that was made when the only information available to
7 them is the self-report answer that the attorney provides.

8 Q Well, then, do I hear you saying that although *Batson*
9 recognized race as a factor and was intended to address race as
10 a factor in jury selection in criminal cases, that the
11 self-reporting requirements of *Batson* and that approach to
12 ferreting out bias doesn't work; is that correct?

13 A That's the conclusion that the scientific -- the reason,
14 the evaluation of the scientific literature would lead you to
15 offer; moreover, for example, in the Baldus study that is
16 Exhibit 12, there is evidence there that that's a study that
17 looks at cases, jury selections from 1981 through 1997. So
18 *Batson* is right in the middle of that period of time. Their
19 conclusions are that there is no difference in prosecutorial
20 strike outcomes and decisions before and after *Batson*, that
21 it's -- once *Batson* is -- the ruling comes out and is handed
22 down, the effect, the relationship between race and jury
23 selection outcome doesn't change. So that is just further
24 evidence that, yes, I would agree that the scientific literature
25 leads to the conclusion that the *Batson* challenge procedure is

1 not particularly -- it is not particularly consistent with what
2 we know about the psychology of identifying the influence of
3 race on a series of judgments.

4 Q Let's go from here into -- in the report that we have
5 in the case of Dr. Katz, Joseph Katz. Have you taken a look at
6 that --

7 A I have.

8 Q -- report? And you're aware that that report
9 criticizes the Michigan State University --

10 A I am.

11 Q -- study in several particulars. And do you recall
12 what some of the criticisms are that Dr. Katz made in his study
13 about the Michigan State University study?

14 A I do.

15 Q Can you talk about that?

16 A Sure. And my perspective on those criticisms?

17 Q Yes, please.

18 A Well, one of the opening criticisms that Dr. Katz makes
19 of the Michigan State study is one of sampling, suggests it is
20 not a random sample. I actually take issue with the criticism
21 from the standpoint that there is no sampling going on at all in
22 the Michigan State study. The Michigan State study was, as
23 articulated by the researchers, set out to accomplish a
24 particular empirical objective, which was to look at all of the
25 cases for which a claim might potentially be offered under the

1 Racial Justice Act and to examine the extent to which a variable
2 such as race might have predicted jury selection outcomes in
3 that set of cases. Sampling is when you select a subset of
4 cases from the population that you care about. So political
5 polls don't call everyone in the country; they call a sample,
6 and they hope to generalize from that sample to the population.
7 But here, the Michigan State researchers selected the entirety
8 of the cases that could conceivably have claims made under the
9 Racial Justice Act, and they looked at every single one of them.
10 And what you are concerned about with sampling is: Is the
11 researcher cherry-picking data, first and foremost? Are they
12 simply picking the cases that are most friendly to them and
13 leaving out the data that are not consistent with their
14 predictions, but the researchers in the Michigan State study
15 just picked all the cases. They didn't cherry-pick a certain
16 subset. They picked them all, which makes a more expensive,
17 more elaborate and time-consuming process, but they picked all
18 of them. From a sampling standpoint, the other criticism, the
19 reason you're talking about sampling is that you're worried
20 somehow that a particular subset of cases will differ in
21 meaningful ways from other cases but, again, there is no
22 indication and no reason to believe that the cases that were
23 examined by the Michigan State study in any way vary
24 substantively from any other kinds of cases that were held by
25 similar judges and prosecutors and defense attorneys and so on.

1 So on the account of sampling, I think it is a bit of a -- it is
2 a bit of a red herring to be talking about the problems of a
3 nonrandom sample in the Michigan State study when the Michigan
4 State study didn't sample those cases. They looked at every
5 single one that was potentially eligible for a claim under the
6 Racial Justice Act.

7 Q What about sampling in the Katz report itself?

8 A Well, the irony -- my major critique of the Katz report
9 would be his proposition that the better way to identify the
10 influence of race on challenge decisions is to ask people about
11 them. And specifically what he does in his interviews, his
12 survey at the end of his report, is he asks prosecutors a
13 particular question. He asks them the question of, you know, If
14 possible, provide the race-neutral justification for this
15 challenge. So it is not even an open-ended question of, Explain
16 to me why you made the decision you did. It's, If you can, give
17 me a race-neutral explanation for this challenge. So it is not
18 hypothesis testing. It's an effort to elicit confirming
19 information in support of a race-neutral conclusion, but the
20 irony of talking about sampling is that, as he admits in his
21 report, he doesn't have a random sample of cases. He is looking
22 at a particular subset of those cases, and he only has the data
23 for a certain number of those, so if the sampling issue applies
24 to any of the analyses in the Katz report, it would be to his --
25 to his interviews at the end of the report, not to the Michigan

1 State study.

2 MR. JAMES FERGUSON: Very well. Your Honor, might
3 this be a good time to break?

4 THE COURT: We are going to stop until 11:20 by
5 the clock on the back wall.

6 Thank you, sir. You may step down.

7 We're at ease until 11:20.

8 (Whereupon, a recess was held from 10:57 a.m.
9 until 11:19 a.m.)

10 (The following proceedings continued in open
11 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
12 Ferguson, Ms. Stubbs, Mr. Colyer, and Mr. Thompson were
13 present.)

14 THE COURT: For purpose of the record, Ms. Stubbs
15 is present. I understand you were interviewing other witnesses
16 or were otherwise involved in matters related to this case
17 earlier this morning.

18 MS. STUBBS: Yes, sir.

19 THE COURT: But Ms. Stubbs is now present in the
20 courtroom.

21 Secondly, folks, I feel obligated to bring to your
22 attention matters related to communications that I am receiving
23 on a fairly regular basis from my court reporters. Before
24 saying anything else, I would like to state, for purposes of the
25 record, that I am absolutely convinced and satisfied that we

1 have the best court reporters in the State. So that is a matter
2 of record.

3 The concern is a legitimate concern on their part. The
4 most recent information that I've received, both last night and
5 reiterated again this morning, is that from their point of view,
6 it takes one day of involvement in the case -- and you'll notice
7 that we've had all three of our court reporters rotating in.

8 Essentially, one day's testimony equates to about 250
9 to 300 pages of unproofread material. My understanding is that
10 most, if not all, of our court reporters have no out-of-court
11 days for the next several weeks. Mr. Colyer, Mr. Thompson are
12 aware -- y'all may or may not be aware -- next week is our admin
13 court, our administrative session. They'll be involved in that.
14 The point that I'm leading up to, it is their position -- I
15 indicated to them my desire to have a complete transcript within
16 a week after the hearings had concluded. Their indication is
17 that is virtually impossible. They anticipate and what they're
18 asking me to consider is allowing them four weeks given their
19 responsibilities.

20 Now, in response to the communications that I've gotten
21 from them, our trial court administrator is on the phone to AOC,
22 Administrative Office of the Courts, as we speak attempting to
23 determine whether or not we can get other court reporters
24 rotated in so that we can allow them more out-of-court time for
25 purposes of this transcript. Necessarily what that means is if

1 it takes them a month to complete or provide us with a complete
2 transcript, you folks are absolutely entitled to some period of
3 time to review the transcripts prior to your submission of any
4 proposed findings or conclusions.

5 So, potentially, we're talking about anywhere from six
6 to eight weeks after the conclusion of the presentation of
7 evidence. That, to some degree, depends on whether or not we
8 can get other court reporters to come in, allow our court
9 reporters some down time to work on the transcript. I am
10 absolutely confident they are going to do the best they can to
11 give us a transcript as quickly as they can, but I felt
12 obligated to let you folks know what our situation is. We don't
13 have the capabilities for realtime at this juncture.

14 MR. JAMES FERGUSON: Your Honor, we appreciate
15 your sharing that with us and, from our perspective, coming into
16 the hearing, we had hoped to be able to get the transcript
17 during the trial but that couldn't be done, and we understand
18 that. From our perspective now, Your Honor, we actually don't
19 have to have transcripts to submit to you our proposed findings
20 and conclusions, and we would like to move towards a resolution
21 of this matter as expeditiously as possible. So in terms of the
22 time you're talking about, we're prepared. We will be prepared
23 to submit to you for our proposed findings and conclusions
24 within a day or so -- certainly within a week after the
25 conclusion of the case.

1 THE COURT: Okay. Now, what I am informed or
2 what's been indicated to me is that, by way of example, they may
3 be able to provide you piecemeal proofread portions of the
4 testimony on a by-week basis. So at the end of whatever time
5 period might be involved, you'll get the first week, and that
6 will be supplemented by the transcription of any second week
7 testimony that may be involved as quickly as possible because
8 they are doing the absolute best they can.

9 MR. JAMES FERGUSON: I am sure they are, and we
10 will come back to you on whether we even need that.

11 THE COURT: Okay. But I simply want to let you
12 folks or make you folks aware where we are on that.

13 MR. COLYER: Judge, we too would like to revisit
14 this with you at a later point because --

15 THE COURT: Yes, sir.

16 MR. COLYER: -- Mr. Thompson and I have some trial
17 schedules scheduled for later this month and next month, and I
18 don't know what Mr. Perry's trial schedule is or his obligations
19 are back in his home county for later this month and, obviously,
20 we're getting some outside consultation with respect to how to
21 handle this and how to move forward from our other
22 contemporaries around the State, so we'd like to revisit with
23 you also.

24 THE COURT: I think that's appropriate.

25 MR. COLYER: I don't know that we would be in a

1 position to be able to respond within a matter of days with
2 proposed findings of fact from our point of view.

3 THE COURT: Well, we may have to come back and
4 talk about whether or not we are going to follow that path --

5 MR. JAMES FERGUSON: Yes, sir.

6 THE COURT: -- at some point. So I'm open to
7 that, but we'll see where we are. I simply wanted you folks to
8 be aware what the situation is.

9 MR. JAMES FERGUSON: Yes, sir.

10 THE COURT: All right. Dr. Sommers, if you will
11 please retake the stand, sir. Would you like some more water,
12 sir?

13 THE WITNESS: Actually, that will be great. Thank
14 you.

15 THE COURT: Yes, sir.

16 MR. JAMES FERGUSON: Thank you, Your Honor.

17 BY MR. JAMES FERGUSON:

18 Q Dr. Sommers, we had talked some about your review of
19 Dr. Katz's report.

20 A Yes.

21 Q And I want to pick up on that just so we can be clear
22 about what your criticisms actually are. And what I want you to
23 do now is talk about your understanding of what approach or
24 method Dr. Katz used to gather information that he used in his
25 report.

1 A The approach that he describes in his report is that he
2 spoke to or sought to speak to the prosecutors in question to
3 find out from their perspective what the race-neutral
4 explanations for their peremptory strikes were in the subset of
5 these cases from the MSU study, and so he describes a process by
6 which he posed a question -- and I am not going to be quoting it
7 directly -- but he poses a question which is paraphrased as: If
8 you can, what race -- provide the race-neutral explanation for
9 this challenge, if possible. And so he's advocating in the
10 report that opposed to looking at -- he is advocating in the
11 report that the most useful way to figure out what has
12 influenced the strike choices in these cases is to ask the
13 prosecutors in question to explain what influenced the strike.

14 Q Now, you say the prosecutors in question. Do you know
15 whether or not his -- the respondents to his questions were the
16 prosecutors who actually did the jury selection in the case or
17 participated in the trial or were there other respondents who
18 were not actually at the trial who didn't actually exercise the
19 strikes?

20 A Well, my understanding in the report is that he asks.
21 He does not, by his own admission, have the entire sample from
22 the MSU study included. He has a subset of those cases that in
23 many of those instances, he was asking the prosecuting attorney
24 question -- to answer questions about that case but that that
25 wasn't always possible.

1 Q Now, in terms of that approach or that methodology, if
2 you will, is that an accepted method of a scientific study where
3 you're trying to determine whether or not race was a factor in
4 the jury selection?

5 A No. It's not the way that behavioral scientists would
6 approach this issue, would study this issue. It's as if -- the
7 argument, the analogy of his argument is the following: that if
8 you really wanted to know -- let's take hiring and promotion
9 decisions. So if you really wanted to know whether factors like
10 race or ethnicity were affecting hiring decisions or firing
11 decisions or promotion decisions at a given company, what he is
12 suggesting is you wouldn't look at the aggregated data across
13 those actual hiring and promotion and firing decisions. What
14 you do is you go to the HR managers, the management, the human
15 resources people, and you ask them, Why did you hire this
16 person? Why did you fire this person? Why did or did you not
17 promote this person? That that would be more useful. Moreover,
18 the way his question is phrased, it is not even an open-ended,
19 Tell me more, if you would, about why you hired or fired this
20 person or why you struck this juror or decided to strike this
21 juror. The question is: Provide, if you can, a race-neutral
22 explanation for why you didn't hire this person, why you didn't
23 fire this person. And people are remarkably able, remarkably
24 good and quick about coming up with a legitimate explanation for
25 decisions like these both in the world of human resources, more

1 generally, and in the legal context. And so you're not, at that
2 point, setting up your inquiry in a way that is going to produce
3 anything other than a denial that race was in play, or you're
4 not setting up your inquiry in a way as to do anything other
5 than to solicit, to elicit, a race-neutral explanation. That is
6 all you can get out of that method.

7 Q So then if you got that kind of information and you
8 base your conclusions on that, would that be the kind of method,
9 research method, if you were reviewing a paper that was based
10 upon that, would that be a paper that you would accept for a
11 peer-review article?

12 A No. In brief, no. The field has moved beyond this idea
13 that you can simply ask people and that -- to explain the basis
14 for their decision and that that's the best information that
15 you're going to get, and you would never be able to win an
16 employment discrimination lawsuit. You'd never be able to prove
17 that race has an effect on anything if that was all you were
18 allowed to rely upon in scientific literature. No. The
19 conclusions of the scientific community are that you are going
20 to not find a lot of information regarding the true influences
21 on those kinds of judgments when you rely on self-report
22 information like that because, again, a lot of the influence of
23 race on people's perceptions and judgments is unconscious and
24 outside of their conscious awareness.

25 Q So in the scientific community, would the method that

1 Dr. Katz advocates and uses in his report be an accepted way of
2 determining whether or not race was a significant factor in jury
3 selection?

4 A No. You wouldn't see published papers in a peer-review
5 journal that relied on just those methods, on just the sort of
6 interview methodology that Dr. Katz described. That wouldn't
7 pass peer-review muster in the journals that I review for.

8 Q You mentioned that his approach was to send questions
9 to prosecutors who were involved in the process to get their
10 responses. Have you reviewed materials regarding -- that were
11 used in training prosecutors in North Carolina to deal with the
12 *Batson* issue?

13 A Yes.

14 Q Let me hand you a document we've marked as Plaintiff's
15 {sic.} Exhibit Number 16. Take a look at 16, please. Does that
16 contain some of the materials that you reviewed that you
17 understood was involved in training prosecutors?

18 THE COURT: Folks -- I apologize -- have we
19 skipped a number?

20 MR. JAMES FERGUSON: Yes, sir -- I didn't mean to
21 skip one.

22 MR. HUNTER: Did we skip a number? That's my
23 fault if we did, Your Honor.

24 THE COURT: We don't have a Defense 15.

25 MR. HUNTER: I apologize. We have skipped a

1 number, then.

2 THE COURT: Do you want to --

3 MR. JAMES FERGUSON: Can we renumber this as 15?

4 MR. HUNTER: And we will call this one 16.

5 THE COURT: So --

6 MR. HUNTER: That was very solid up until we got
7 up over 14, Your Honor. I want the record to show.

8 THE COURT: The jury voir dire document you just
9 handed up is to be remarked --

10 MR. JAMES FERGUSON: Your Honor, I am sorry. I am
11 sorry. I misspoke. We did skip 15. We haven't put it in yet.
12 I do have a 15 -- that is our fault. I do have a 15 that I will
13 submit shortly.

14 THE COURT: We're okay.

15 MR. JAMES FERGUSON: Let's keep this one at 16 for
16 now.

17 THE COURT: Yes, sir.

18 BY MR. JAMES FERGUSON:

19 Q And before we talk specifically about 16, I want to
20 hand you another packet of documents here that we've marked as
21 17. Let me ask you to look at Number 17, Dr. Sommers, and tell
22 us whether or not that is also a set of training materials that
23 you understand to be utilized for training prosecutors in North
24 Carolina --

25 A Yes.

1 Q -- in dealing with *Batson* issue.

2 A Yes.

3 Q Now, I think you told us that there were ongoing
4 programs in both nonlegal areas and legal areas on how to deal
5 with this question of the influence of race in perception
6 judgment, decision-making. Am I correct about that?

7 A That's correct.

8 Q Let me ask you to look at numbers, the exhibits number
9 16 and 17, and give us your comment and opinion as to whether or
10 not these materials are materials which would be designed to
11 address the influence of race in jury selection.

12 A Well, those programs, initiatives you are discussing are
13 ones in which the effort is to educate the parties in question
14 regarding the science of bias and implicit and nonconscious bias
15 to articulate strategies for how to structure situations and how
16 to go about making decisions in a way that is likely to not
17 suffer the manifestation of such bias, and that's the heart of
18 those initiatives. With Exhibit 16, when you flip to the last
19 page, the aspect of this that addresses issues of *Batson*, the
20 label for what appears on the final page is: *Batson*
21 justifications articulating juror negatives. So this is not an
22 effort to, in the way I was describing, educate the
23 professionals who are receiving this training in the science of
24 implicit bias or to render such bias less likely to occur in the
25 actual decisions that are being made. Rather, this is a list of

1 information or justifications that one could use in the effort
2 to provide an explanation to the courts that would comply with
3 *Batson* that would be viewed as race-neutral and viewed as
4 legitimate. So this is not an example of one of those training
5 methods that is intended to reduce the likelihood of implicit
6 bias. It is a list of readily-available handy race-neutral
7 explanations for challenges.

8 Q I think it might help us if we just go through -- there
9 is a list of ten items here on the last page, page three of
10 Exhibit 16. Can you just take us through that and tell us what
11 it taught prosecutors about how to deal with *Batson*?

12 A Sure. I have it as page four.

13 THE COURT: Yes.

14 BY MR. JAMES FERGUSON:

15 Q Yes. You're correct. Page four.

16 A Would you like me to read some of them?

17 Q Yes, sir.

18 A Inappropriate dress - Attire may show lack of respect
19 for the system, immaturity, or rebelliousness.

20 Physical appearance - Tattoos, hairstyles, disheveled
21 appearance may mean resistance to authority.

22 Age - Young people may lack the experience to avoid
23 being misled or confused by the defense.

24 Attitude - Air of defiance, lack of eye contact with
25 prosecutor, eye contact with defendant or defense attorney.

1 Body language - Arms folded, leaning away from
2 questioner, obvious boredom may show anti-prosecution
3 tendencies.

4 Rehabilitated jurors or those who vacillated in
5 answering DA's questions.

6 Juror responses which are inappropriate, nonresponsive,
7 evasive, monosyllabic --

8 THE COURT REPORTER: Whoa. I'm sorry.

9 THE WITNESS: I'm sorry. I apologize. I do
10 apologize.

11 THE COURT REPORTER: You started out good.

12 THE WITNESS: Which one --

13 THE COURT REPORTER: Answering DA's questions,
14 juror responses --

15 THE WITNESS: That was --

16 MR. COLYER: Number seven.

17 THE WITNESS: Number seven. Thank you.

18 Number seven: Juror responses which are inappropriate,
19 nonresponsive, evasive, or monosyllabic may indicate defense
20 inclination.

21 Communication difficulties, whether because English is
22 a second language or because juror appeared to have difficulty
23 understanding questions and the process.

24 Unrevealed criminal history, voir dire on previous
25 criminal justice system experience.

1 And number ten is any other sign of defiance, sympathy
2 with defendant, or antagonism to the State.

3 And so, again, these are a list of explanations one
4 might give in a *Batson* challenge procedure, but these are not
5 efforts to educate attorneys or professionals regarding the
6 implicit bias on the effect of race on challenges.

7 BY MR. JAMES FERGUSON:

8 Q So if someone had genuine nonracial reasons for
9 excusing a juror, would they need a list like this from somebody
10 to tell them what they ought to be saying?

11 MR. COLYER: Objection.

12 THE COURT: Rephrase the question.

13 MR. JAMES FERGUSON: Yes, sir.

14 BY MR. JAMES FERGUSON:

15 Q With a list such as this, does this seem to suggest to
16 prosecutors ways they might justify excusing a juror if called
17 upon to provide race-neutral reasons?

18 MR. COLYER: Objection.

19 THE COURT: Overruled.

20 You may answer.

21 THE WITNESS: This seems to be a, yes, a list of
22 possible race-neutral justifications for justifying challenges
23 when called to do so in a *Batson* challenge procedure.

24 BY MR. JAMES FERGUSON:

25 Q Yes, sir. And in your experience in dealing with

1 racial influence and race-neutral justifications, has it been
2 your observation or experience that someone who has a
3 race-neutral reason for taking some action, would they need to
4 be prompted by training to explain race-neutral reasons that
5 they might have?

6 A Well, I would respond by saying that people are
7 remarkably good at generating these kinds of explanations on
8 their own, so it's -- most intelligent individuals are able to,
9 on their own, come up with race-neutral explanations for a
10 challenge or a decision that may potentially be problematic.
11 Certainly having an additional list of readily available
12 justifications would only serve to increase one's ability to do
13 that and, for that matter, articulate the objective of the
14 training session was to make sure people had race-neutral
15 justifications available.

16 Q Let me ask you to look at the first page of number 16,
17 and if you'll look in the upper right-hand corner, you'll see a
18 date, a handwritten date written there. You see the handwriting
19 on the upper right?

20 A I do.

21 Q What -- go ahead and read what you can of what's there.

22 A Sure. It says capital case seminar, and it seems to
23 have dates. I believe July 4th through 8th, 1995, seems to
24 read.

25 Q Very well. Now let me ask you to look at number 17,

1 Exhibit Number 17, and what is the -- or what is the date on
2 number 17? What is the handwritten portion in the upper right
3 there and what is the date?

4 A Says, Capital litigation, March 23rd through 25th, 2011.

5 Q And the title of the document is, Jury selection in
6 capital cases; is that correct?

7 A Yes.

8 Q Let me direct your attention to page 22 of Exhibit 17.
9 Have you had an opportunity to look at that?

10 A I have.

11 Q And if you'll look at number 17 -- I am sorry. Page 22
12 of number 17. What does that appear to you -- let me ask you to
13 just tell us what it is and read that page.

14 A Sure. Page 22 is a slide that asks the question: What
15 are your nondiscriminatory reasons?

16 Q And then look at page 23 as well and tell us what
17 appears there.

18 A It reads: Tell the court what type of jury you want,
19 and there is a quote, Stable, conservative, mature, governmental
20 oriented, sympathetic to the plight of the victim, sympathetic
21 to law enforcement and crime solving problems and pressures, and
22 then a reference to a *State v. Jackson* case from 1988.

23 Q And page 24?

24 A Page 24 --

25 Q Let me ask you to read that as well.

1 A Sure. Has a citation *Purkett v. Elem*, P-u-r-k-e-t-t,
2 versus Elem, E-l-e-m, a 1995 citation, and then a quotation, He
3 has long unkempt hair with a moustache and beard, end of
4 quotation. And then the slide itself ends with the following
5 statement: A race-neutral reason in that shagginess and facial
6 hair is not peculiar to any race.

7 Q And do the pages that you've just read there appear to
8 be training or suggestions as to how to provide a race-neutral
9 reason in the face of a *Batson* challenge?

10 A Again, I would suggest that they are not -- they are
11 clearly not training intended to educate about the problem of
12 implicit bias or ways to avoid it. It rather seems to be a list
13 of ways in which one can -- or potential nondiscriminatory
14 reasons that can be offered in a *Batson* challenge procedure.

15 Q Now, I want to go back and clear up Exhibit Number 15
16 for a moment. Now that we actually do have a number 15, I want
17 to hand a copy to counsel and to the Court. And would you just
18 take a look at Exhibit Number 15 and tell us what it is, Dr.
19 Sommers.

20 A Yes. This is a paper that I coauthored from 2007 that I
21 discussed previously during my testimony. It's titled,
22 Race-based judgments, race-neutral justifications, experimental
23 examination of peremptory use and the *Batson* challenge
24 procedure.

25 Q And does this paper describe the experiment that you

1 used and the conclusions you reached that you described to us
2 before when I asked you about whether you had done any
3 experimental studies yourself?

4 A Yes. This is a write-up of that experimental study that
5 I was describing before.

6 MR. JAMES FERGUSON: If Your Honor please, let me,
7 at this point, go ahead and move the admission of Defendant's
8 Exhibits Number 11, 12, 13, 14, 15, 16, and 17. They were all
9 identified during the course of this witness' testimony.

10 THE COURT: Yes, sir.

11 You folks want to be heard?

12 MR. THOMPSON: No objection.

13 THE COURT: Without objection, they're admitted.

14 (There was a pause in the proceedings.)

15 BY MR. JAMES FERGUSON:

16 Q Now, then, with reference to the Katz report which we
17 have been talking about, in that report, there is a reference to
18 Dr. Katz's opinion or conclusion that there might be other
19 explanations opposed to the death penalty, higher incarceration
20 and probation that -- of whether they are adequately accounted
21 for in the study as a basis for discrimination. Can you comment
22 on that as an approach for Dr. Katz?

23 A Yes. I can say that the MSU study reveals a fairly
24 large disparity by race, a fairly large discrepancy by race, and
25 Dr. Katz is right that the specific ways in which different

1 variables are defined can lead to some changes here and there in
2 what the precise numbers wind up being in a case like that but
3 don't -- his critiques do not override the general conclusion of
4 that MSU study that there is this strong reliable disparity by
5 race. He uses a different methodology and basically proposes to
6 slice the data at such a thin, fine line between so many
7 different factors that you wind up with what we say in the field
8 as sort of an *n* of three or four, like a population of two or
9 three in these different cells, those analyses. He is slicing
10 the data at such a fine level that no reliable effects can ever
11 survive because you need a certain number of cases to get
12 significant effects in a research study. So, you know, he is
13 not offering an analysis or set of conclusions the likes of
14 which you see in the published scientific literature on these
15 issues.

16 Q And what about his observation that the explanatory
17 factors are too broadly defined and there are not enough
18 explanatory factors in the Michigan State study. Can you
19 comment on that?

20 A He raises a valid point in that the more precisely one
21 defines one's factors in an analysis, the better one's results
22 would be, and that is very much a fair point. He overlooks, I
23 think, the fact that -- and it is true that the more factors one
24 has in a model, the more variance and variability one is
25 controlling for. There are an infinite number of factors, and

1 the Michigan State study looks at a very large number of
2 nonracial factors. He overlooks the notion that they also have
3 some catchall factors in the Michigan State study that sort of
4 leans State, leans defense, and ways of trying to capture some
5 of the other potential nonracial factors that could fall through
6 the cracks of their coding scheme and help account for some of
7 the potential arguments that are raised, but as a general
8 proposition, I agree with his assessment that the more precisely
9 one defines one's terms in race-neutral terms in an analysis
10 like this, the better one's results will wind up being, that
11 that's a fair point that he raises.

12 Q And what about the cross-tab method observation?

13 A Well, again, slicing the data at such a thin level of
14 slices that you wind up with only one or two cases in each of
15 the tables of your cross-tabs, you are never going to find
16 anything that is significant at that point in time. It is not a
17 method that is used in the peer-review literature. It is not a
18 method that you see in these published studies. What you see
19 are these regression analyses, the likes of which are included
20 in the MSU study.

21 Q So then would that be an accepted method in the
22 scientific community?

23 A If one's goal is to, in an open-ended manner, truly test
24 whether or not there is a relationship between variables, then
25 that is not what one would use in the kinds of papers that are

1 accepted and published in the peer-review process in the
2 scientific literature.

3 Q Now, I want to come to the Michigan State study you're
4 familiar with. I think you've already told us that you have
5 looked at the Michigan State study. Am I correct about that?

6 A I have.

7 Q Can you comment on the method and approach of the
8 Michigan State study as to whether or not it is a valid and
9 generally accepted approach in the scientific community?

10 A Sure. In short, it is. Research is always, as I tell
11 my students, a never-ending list of decisions you make. You
12 make choices about which cases to include and how to code, and
13 there are many ways to make those decisions, and so one can
14 always second guess and say, What if we had done it this way,
15 what if we had done things that way? The choices that were made
16 in that Michigan State study reflect a very carefully designed
17 investigation. Again, they could have picked just a subset of
18 the cases currently on death row to examine. They don't do
19 that. They took the entirety of the sample, which is a much
20 more time and labor intensive and expensive way to do the study,
21 and they did the study that way, and they coded for a large
22 number of potential race-neutral explanations in the literature
23 that could affect the analysis. So it's a rigorous research
24 design the likes of which you see in peer-review accepted
25 publications in the scientific literature.

1 Q And what about their data collection methods? Can you
2 comment on that?

3 A I offer the same assessment. They are rigorous and
4 thorough, the procedures that have been followed, that are
5 consistent with the nature of the scientific literature.

6 Q You mentioned earlier with reference to some of your
7 own empirical studies and the other studies that have been done
8 in the field of jury selection and race, a convergence factor.
9 Now, explain to us what you mean when you say a convergence
10 factor and explain how that works.

11 A I think a lot of people when they are evaluating
12 research have the knee-jerk response that, Well, if different
13 people did their studies in different ways, it means they hadn't
14 made up their minds or they're inconsistent or, well, they used
15 the term wrong or they're schizophrenic -- that's not really
16 what that word means, but I digress. And that's the ways in
17 which I think people think about different research
18 methodologies, but that's actually exactly backwards of the
19 right assessment you should be offering when you -- no one
20 research design is perfect. They all have limitations and
21 strengths. And so what you want to do is you want to ideally
22 come at a research question, any research question, from
23 multiple angles, different researchers in different universities
24 with different samples using different methods because if you do
25 that, you triangulated the research question and the strength of

1 one research method, let's say the archival analysis which looks
2 at actual cases in the actual jurisdiction you care about,
3 complement directly the limitations of another research method,
4 the experimental method where you are using a simulation that is
5 lacking in realism and so on. And so when you find results that
6 converge on similar conclusions across states, across research
7 teams, across research designs, across era, you become more
8 confident in the reliability of those conclusions, and the fact
9 that different study types converge on similar conclusions
10 doesn't mean the state of literature is confused or can't make
11 up its mind. It suggests that they're approaching this problem
12 from multiple perspectives and we, therefore, become even more
13 confident in the conclusions we can draw.

14 Q And relative to the empirical studies that you did and
15 the -- your review of other studies in the area, did you find
16 the convergence effect that raised the confidence level in your
17 study and the other studies based on the results of those
18 studies?

19 A The results of the experiment that I talked about are
20 very much consistent with the results of those archival analyses
21 that we talked about. They are very much consistent with the
22 results as reported by the MSU paper.

23 Q Now, then, Dr. Sommers, based upon your expertise, your
24 knowledge and experience in the field, and having reviewed the
25 Michigan State University study and the Dr. Katz report, do you

1 have an opinion as to whether or not race was a significant
2 factor in decisions to exercise peremptory challenges at jury
3 selection in capital cases in North Carolina at the time of
4 Marcus Robinson's trial?

5 A I do.

6 Q And what is that opinion?

7 A That opinion is that race was indeed a significant
8 predictor of both prosecution and defense strikes in those
9 cases.

10 MR. JAMES FERGUSON: Thank you. You have answered
11 my questions. I have no further questions.

12 THE COURT: Okay. Cross-examination.

13 MR. THOMPSON: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. THOMPSON:

16 Q Good morning, Dr. Sommers. I'm Rob Thompson. I
17 represent the State of North Carolina. I'd like to ask you a
18 couple questions. Would that be all right?

19 A Absolutely.

20 Q Now, let's back way up, Dr. Sommers. You do your own
21 research with some study groups; is that correct?

22 A I collect original data with participants, yes.

23 Q So would it be fair to characterize those study groups
24 to be mock trial or mock jury selections, sir?

25 A I think that is a fair characterization.

1 Q Where do you get your participants from those studies?

2 A It varies by study. I mean, in the paper that I was
3 discussing earlier, we had multiple samples. We had a
4 convenient sample of college participants, we had a sample of
5 advanced law students, and we had a sample of practicing
6 attorneys with jury selection experience.

7 Q Convenience sample of the undergrad, let's say, those
8 folks. How would you go about collecting those people? Ad in
9 the newspaper, fliers on campus? What kind of way would you
10 gather them?

11 A Fliers on campus, students in various courses on a -- at
12 a university can often earn extra credit or complete a course
13 participation requirement by engaging in a certain number of
14 research studies and the like.

15 Q The advanced law students, how would you collect those
16 students?

17 A In that particular instance, that was by having
18 colleagues who had courses who teach at law schools and were
19 willing to administer a survey to their students.

20 Q And you said some lawyers?

21 A Yeah.

22 Q When you say practicing lawyers, did you -- how did you
23 gather those attorneys to do the research?

24 A Through personal contact and professional personal
25 contacts, professional organizations and the like.

1 Q How many lawyers are we talking about?

2 A I have to look to get the exact number. I believe it's
3 something in the neighborhood of 32 lawyers in that setting.

4 Q What were their areas of practice?

5 A Well, we had to assure the -- both the ethics review
6 board at our university and the attorneys in question and the
7 organizations in question that we would not be collecting
8 identifying information about the respondents given the nature
9 of our questions, and so we're limited, in that instance, to
10 knowing that they have experience with jury selection in
11 criminal cases. We have prosecutors as well as defense
12 attorneys, but I can't speak to the specific numbers of each.

13 Q So literally you have no way of telling whether any one
14 of those 32 picked a capital jury; is that correct?

15 A They were not explicitly asked if they had picked a
16 capital jury. That's correct.

17 Q So you offered the students credit or had some
18 colleagues give surveys to their students. What did you offer
19 the attorneys in response to their participation in the study?

20 A A warm thank you. There was no compensation.

21 Q No compensation. Just -- fair enough. How long did
22 their study last or their participation in the study?

23 A How long did it take to actually complete the materials
24 to participate in the study?

25 Q Yeah.

1 A Oh, in the neighborhood of 15 to 20 minutes --
2 15 minutes.

3 Q Did you collect data as to the race of the lawyers, the
4 students, that were used in the study?

5 A We do have racial background information on the college
6 participants. I do not believe we have it on the law students,
7 and we don't have it on the attorneys, I don't believe. I would
8 have to double-check that, though, to be honest.

9 Q Do you have any idea what their makeup was, racial,
10 between the lawyers picking jurors in those kind of studies that
11 you did? Do you have any idea what the racial makeup was in the
12 folks you were studying?

13 A In my research?

14 Q Yes, sir.

15 A For the attorneys, you're asking?

16 Q The attorneys and the undergraduates.

17 A We do have the racial background -- the undergraduates
18 were 75 percent white, primarily white sample, but also smaller
19 numbers of minority participants as well. The law students, I
20 don't believe we have identifying information. I have to
21 actually check, and I can check on that but -- or, sorry, the
22 demographic information. For the attorneys, we did not
23 explicitly ask for demographic information.

24 Q The 25 percent minority group, do you know what their
25 makeup was?

1 A Not off the top of my head. I can look it up. The
2 traditional demographic composition of that group of students
3 tends to be in the neighborhood of 8 to 10 percent
4 African-American or 6 to 8 percent African-American and
5 Asian-American and a few Hispanic students as well. I can get
6 the exact breakdowns, but I don't know them off the top of my
7 head.

8 Q So would it be fair to say that your research, just
9 limiting it to that for now, you studied predominantly white or
10 nonblack participants?

11 A That's very fair.

12 Q And you found that that predominantly white group would
13 shy away from the black juror in the example you gave of two
14 photographs of the white juror and the black juror. You found
15 that the white, predominantly white group would keep the white
16 juror more often than they would keep the black juror. Am I
17 characterizing that correctly?

18 A You're -- from that study in which you're playing the
19 role of prosecutor and the defendant was African-American, that
20 is what we found. Exactly.

21 Q Did you study whether the black participants in the
22 study treated that black juror differently than the white
23 participants in the study?

24 A We do for the college students. I don't believe we
25 report that analysis in the final paper, but the numbers are

1 such that the likelihood of a statistically significant
2 difference isn't going to be there because it is a small number
3 of African-American participants, but there is no statistical
4 evidence of a difference but, again, I am hesitant to put too
5 much stock into that because, as you suggested, it is a
6 predominantly white or nonblack sample.

7 Q Forgive me. I'm a layman when it comes to statistics
8 but -- so you don't have any idea whether or not the black
9 participants treated the black juror differently or not?

10 A There is no evidence that they did, but I can't offer a
11 sort of a statistically significant report on there being a
12 difference there. Right. I can't speak to that.

13 Q When you study the defense attorney strikes at a much
14 larger rate, striking white jurors at a much larger rate than
15 black jurors, did you study the race of the defense attorney?

16 A Well, that is a conclusion that is tied to the archival
17 analyses of other researchers so the study I present --

18 Q Yes.

19 A Oh, that is what we are talking about? I apologize.

20 Q I'm sorry. I skipped forward.

21 A I apologize. Can you repeat the question?

22 Q Did you or are you familiar with whether or not the
23 race of those defense attorneys was studied and their striking
24 of white, predominantly white jurors at a greater rate than
25 black jurors?

1 A I'm not -- and I don't rule out the possibility that in
2 footnotes and in aspects of those studies such a difference is
3 reported in those studies, but off the top of my head, I can't
4 recount for you statistical analysis or comparison by attorney
5 race, if that's the question.

6 Q So, again, no idea?

7 A Based on those studies and my ability to recount what
8 they have done right now, that's correct.

9 Q This -- can we put a label on this concept just for
10 these purposes of questioning? The unconscious racism? Would
11 that be appropriate?

12 A I think that is fair.

13 Q Just so we can communicate about it.

14 A Sure.

15 Q Does this concept of unconscious racism, does it apply
16 to every decision we all make every day, period?

17 A Absolutely not.

18 Q So it is fair to say they apply to some decisions?

19 A Well, you see evidence of them in some decisions in --
20 the unconscious associations are there, and they have the
21 potential to impact us in a variety of different circumstances.
22 I would not, nor would any social scientist, sit here and tell
23 you that every decision everyone makes is always affected by
24 race.

25 Q Are different people affected differently by

1 unconscious racism?

2 A That is one possibility. The research is pretty clear
3 that in certain circumstances, the influence of that unconscious
4 bias is going to be greater or lesser. So, for example, when
5 you instruct people about the nature of implicit bias and talk
6 about the research on unconscious bias -- sorry, unconscious
7 bias -- you render them more able to correct for it, to think
8 about it, so there are particular circumstances in which it
9 becomes more or less likely to emerge, particular types of
10 tasks, decisions that are being made, very subjective decisions
11 where you don't have a lot of cut and dry objective criteria
12 become more susceptible to these kinds of biases, so there is
13 certainly variability across situations and decisions and
14 individuals, yes.

15 Q It'd also be variability from individual to individual,
16 wouldn't there?

17 A Sure.

18 Q So we're all not affected by implied racism or
19 unconscious racism in the same way, are we?

20 A That's fair. The same way, no. I would agree with
21 that.

22 Q And we're all not affected by the unconscious racism to
23 the same degree?

24 A There are measures that are designed to, as
25 psychologists like to say, tap into people's unconscious bias

1 and demonstrate that there is a continuum, that some people show
2 more unconscious bias, more implicit associations by race, some
3 people show less, so there is variability.

4 Q Are there people that show no signs of unconscious
5 racism?

6 A On some tests, yes.

7 Q And so it varies widely?

8 A There is variability.

9 Q Are different professions affected or do different
10 professions affect the level, the rate at which there is
11 unconscious racism in their decision?

12 A So if I can just restate, make sure --

13 Q Please.

14 A So you're asking are there differences in sort of base
15 rates of unconscious bias across certain professional groups?

16 Q Yes, sir. Dentists, for example, against
17 cardiologists?

18 A Right. So there -- I'm not familiar with studies that
19 have explicitly had as their objective answering that question.
20 I do know that studies with physicians, for example, have
21 uncovered evidence of bias in diagnosing decisions and studies
22 of attorneys identified bias of, so I am not aware of a
23 profession that has been demonstrated to be immune from this,
24 but I am also not aware of specific comparisons of different
25 professional groups. It may exist. I'm not familiar with that.

1 Q How about education level?

2 A Education level is sometimes included as a variable in
3 these studies.

4 Q And does the education level affect the rate at which
5 one would be expected to manifest some implied or unconscious
6 racism?

7 A The complicated part of answering the question is it
8 depends on what the outcome measure that we use would be, so
9 there are studies of very well-educated individuals and
10 professionals and adults as well as young adults that exhibit or
11 show clear signs of implicit bias. There are studies that show
12 less evidence of it. So it depends on if we're just looking at
13 attitudes and people's beliefs and what they sort of respond on
14 stated reaction time tasks, that is one way that a psychologist
15 would have measured implicit bias is how quickly people are able
16 to associate concepts like pleasant and unpleasant with white
17 and black. So in some of those studies, there may very well
18 emerge a correlation with education level and the like. But so
19 the short answer to the question is that is a relationship that,
20 in the study of racial bias, has been found in some studies that
21 education can be a predictor of that. In other studies, it
22 doesn't emerge as a predictor. So it varies by the specific
23 task at hand and the specific population studied.

24 Q Let's go to a hiring decision scenario.

25 A Okay.

1 Q If there was a job being applied for and there were
2 three different people that were interviewing this applicant,
3 would that be one of the ways unconscious racism could be
4 avoided?

5 A I guess you'd have to give me -- I don't see how, on the
6 face of it, that fact alone would render implicit bias more or
7 less likely. I suppose if you have something specific in mind,
8 I can speak to that.

9 Q Three different people forming an opinion based on the
10 subject, the applicant in this case, three different people
11 watching that applicant, interviewing the applicant all at the
12 same time, three different people actually reviewing the resume,
13 and three different people making that hiring decision. Would
14 that help to reduce the amount of unconscious racism in that
15 employment scenario?

16 A I don't see why it would. I think in the resume
17 studies, for example, those resumes are often looked at by
18 multiple individuals. Job hiring decisions are often made by
19 committees. Jury decisions, which I have studied, are obviously
20 group decisions. So there is nothing about a group decision
21 that renders it less likely, I think, to be susceptible to those
22 kinds of biases.

23 Q When you -- skipping around a little bit. Sorry.

24 A Sure. No problem.

25 Q You were contacted to do this study by someone; is that

1 correct?

2 A No. My research study?

3 Q No. I am talking about -- pardon me. Let me back up.

4 You were contacted to become involved in this case at some
5 point?

6 A Yes.

7 Q Who were you contacted by?

8 A I originally was contacted by an attorney who is not
9 present to consult on a different appeal, potential appeal under
10 the Racial Justice Act, and I believe when that case didn't
11 proceed forward, my information was forwarded to Mr. Hunter. I
12 believe that is the origin of that.

13 Q Which case was that? Which lawyer?

14 A I believe -- I couldn't tell you off the top of my head.

15 Q Do you know what county the case was?

16 A I don't -- to be honest, it didn't proceed past
17 preliminary discussions, so I can't actually speak to that.

18 Q Do you know if that person was a member of the Center
19 for Death Penalty Litigation?

20 A I don't believe so. I believe she was located in Ohio,
21 to be honest with you but, honestly, I don't recall the details.

22 Q How did you get involved with this particular case?

23 A I believe what happened was she passed my information
24 along to one of the attorneys, Mr. Hunter, I believe, in the
25 case. At some point, I received a notification from, I believe

1 Mr. Hunter, that he'd be interested in talking to me about this
2 case.

3 Q I noticed in your resume you had some -- you passed
4 through, in your education, through Michigan; is that correct?

5 A Yes.

6 Q Where did you go to school in Michigan?

7 A I went to University of Michigan for graduate school.

8 Q Did you have contact or have you had contact since then
9 with Dr. O'Brien, who testified yesterday?

10 A We overlapped for I believe a year at Michigan, and she
11 and I have a paper that -- we have coauthored a paper where we
12 conducted some reanalysis of some of my old dissertation data
13 from years earlier that she took the lead on writing it and
14 published, so I see her at conferences from time to time and am
15 friendly with her. I have not spoken to her about this case
16 but --

17 Q When was that paper that you and Dr. O'Brien did
18 together?

19 A It is recent.

20 Q It is actually on your resume, but there is no date.

21 A I am sorry. That may be the earlier version of my
22 resume. It is either in press or it's --

23 Q I am sorry.

24 A 2011, I believe is the new version. It was a paper we
25 wrote several drafts of it years prior to that and eventually

1 was accepted for publication. It came out in 2011.

2 Q Was the title: Ask and -- Ask and What -- yeah -- What
3 Shall Ye Receive? A Guide for Using and Interpreting What
4 Jurors Tell Us?

5 A Yes.

6 Q Is that published yet?

7 A I believe that it is. I believe I have it listed as
8 2011, so I believe it is now published.

9 Q You said you overlapped with Dr. O'Brien for a year?

10 A I believe she started the Ph.D. program at Michigan as I
11 was finishing it. I finished in 2002. I believe we have one
12 year there at the same time.

13 Q When you say you were with her at Michigan State, was
14 that during your employment or during your study?

15 A Sorry. So it was University of Michigan. We get a
16 little sensitive. It's not Michigan State. Different. Go
17 blue. But we overlapped -- again, the years are fuzzy to me,
18 but I believe that my -- it was either that my final year as a
19 grad student, as a fifth year graduate student, she was a first
20 year graduate student, or it could have been that my final year
21 at Michigan that I spent as a nontenured faculty member from
22 2002-2003 was her first year as a grad student. It was
23 something along those lines that we had, I believe, one year
24 where we were both affiliated with that department in some
25 capacity.

1 Q So both of you before you got your Ph.D.; is that
2 correct?

3 A I believe in her case, it definitely was before her
4 Ph.D. In my case, it was either my final year of my Ph.D.
5 program or that one year right after my Ph.D. when I stuck
6 around as a faculty member for a year.

7 Q How many -- you indicated you studied jury selection
8 and jury decisions made by both prosecution and defense where
9 you actually studied the study; is that correct?

10 A Well, it is an area I have conducted some research on,
11 and I am well-familiar with the published literature on the
12 topic, yes.

13 Q Have you -- how many capital jury selections have you
14 witnessed?

15 A In person?

16 Q Yes, sir.

17 A None.

18 Q How many murder cases, noncapital jury selections, have
19 you witnessed?

20 A I have often been asked to read through transcripts of
21 such proceedings. I am rarely, if ever, invited to be there for
22 the actual proceeding itself.

23 Q So is that none?

24 A In person, that's correct. None.

25 Q Any jury selections in any felony cases that you

1 watched in a courtroom?

2 A Other than being there for jury duty myself, I am going
3 to say that I have not been there live in the courtroom for any.

4 Q Have you ever served on a jury?

5 A I have not served on a jury, no.

6 MR. THOMPSON: Can I have a moment, Judge.

7 THE COURT: Yes, sir.

8 (There was a pause in the proceedings.)

9 BY MR. THOMPSON:

10 Q Around the same point, have you received legal training
11 about jury selection?

12 A What do you mean -- legal training. Have I been trained
13 to select juries?

14 Q Have you had any training that a prosecutor or a
15 defense attorney may have had or similar training about how to
16 pick a jury?

17 A Oh, have I gone through that sort of training?

18 Q Yes, sir.

19 A No, I have not.

20 Q How much material have you read about jury selection
21 and how it's done by lawyers?

22 A A substantial amount.

23 Q Are you trained as a psychiatrist -- I am sorry --
24 psychologist. You are trained in nonverbal cues; is that
25 correct?

1 A The perception of nonverbal cues is an area that
2 research psychologists study, yes.

3 Q Is it one of your areas?

4 A It is a variable that I have included in some of my
5 research studies, yes.

6 Q Is it clear that there are -- the transcripts you have
7 read in jury selection have none of those verbal or nonverbal
8 cues?

9 A Oh, I am sure that is the case. I am sure you are
10 correct.

11 Q Tell the Court a little bit about your experience in
12 what you observe in nonverbal cues in what we are talking about
13 with jury selection.

14 A I am sorry. Can you repeat the question? What have I
15 observed?

16 Q When -- you say in some of your studies, you have
17 included the nonverbal clues as a variable. Tell the Court
18 about that.

19 A So to clarify my response, you have to find and examine
20 nonverbal behavior by research that I have. It hasn't been in
21 the studies that involve jury selection because, as we talked
22 about, I described the procedures I used for that study. I use
23 nonverbal behavior as a measure in the more general
24 investigation of interracial interaction and how people interact
25 with one another when they have a conversation and communicate

1 in a diverse setting, and what we find is that, well, there are
2 a number of findings. You can use nonverbal data to demonstrate
3 that individuals are sometimes more or less anxious in a
4 particular situation. You can find evidence in some studies and
5 other researchers have found evidence that the very same
6 nonverbal behaviors can sometimes be interpreted differently by
7 a perceiver depending on the race of the person who exhibits
8 them. So what might be perceived by an individual in one
9 instance interacting with a white conversation partner as a mild
10 level of anxiety or engagement might be perceived very
11 differently in interacting with a black conversation partner.
12 So my response that I've studied nonverbal behavior wasn't tied
13 to this research on jury selection but my more general
14 exploration of how people communicate and have conversations and
15 interact in diverse settings.

16 Q So it's fair to say that nonverbal communication is an
17 intricate part of how we communicate with one another just as
18 human beings; is that correct?

19 A I think that's fair, yeah.

20 Q And it's also fair to say that they are interpreted by
21 different people different ways?

22 A Yeah, I think that's fair to say.

23 Q And it is fair to say as well that there can be
24 extraordinarily broad ways nonverbal communication can be
25 interpreted by the person paying attention to them; is that

1 correct?

2 A So in terms of broad meaning --

3 Q Lots of --

4 A -- variability in how people might perceive?

5 Q Yes.

6 A Sure. There's convergences. There's also variability,
7 yes.

8 Q You indicated your familiarity with *Batson*?

9 A Yes.

10 Q Are you familiar with how a *Batson* procedure works in a
11 courtroom during jury selection?

12 A Yes.

13 Q Can you give us your basic understanding of how that
14 works?

15 A Well, I know it is variable depending on the specific --
16 the courts in question, but the general procedure is that when
17 an attorney on one side is able to make a prima facie case that
18 race may have affected a peremptory challenge, the burden then
19 shifts to opposing counsel to articulate a race-neutral
20 justification for that challenge, and the third step of that
21 procedure is the judge evaluating the viability, the legitimacy
22 of that offer, race-neutral -- or evaluating the legitimacy of
23 that justification as offered.

24 Q And I notice you used the language race-neutral
25 justification.

1 A Yeah.

2 Q Is that pretty much from *Batson*?

3 A The language race-neutral justification?

4 Q That one phrase, yes, sir.

5 A Well, what I was suggesting is that the attorney is
6 given an open-ended response as to explaining, to provide an
7 explanation for their challenge, and it's then up to the judge
8 to determine whether or not that's a challenge in violation of
9 *Batson*.

10 Q And when you have read transcripts, have you read some
11 *Batson* challenges --

12 A I have.

13 Q -- and discussions?

14 A Yeah.

15 Q Is the term race-neutral reason or race-neutral
16 justification used sometimes by judges quoting *Batson*?

17 A I suppose that's a possibility. It's a phrase that I
18 use in my research and to describe what we are talking about
19 here, but I, off the top of my head, couldn't cite you a
20 specific example of having seen that particular phraseology used
21 in a transcript.

22 Q Are you familiar with the *Batson* body of law that sets
23 out whether a court found that a reason, a race-neutral
24 justification or a race-neutral reason given by a prosecutor was
25 upheld?

1 A As in the case law that has followed *Batson*?

2 Q Yes, sir.

3 A Yeah, I -- again, not a constitutional scholar so I
4 wouldn't put my expertise there up against other folks
5 necessarily, but I have read and I am aware of some of the
6 progeny, the cases that have followed *Batson* in addressing those
7 issues.

8 Q The -- would it be useful for a prosecutor in a
9 position in a capital murder case to be able to articulate, give
10 a decision, a reason that would be upheld later on so they
11 wouldn't have to retry the case? Would you expect that would be
12 a good thing for a prosecutor --

13 A I would expect that a prosecutor would hope to be able
14 to do that. I would expect prosecutors would be motivated to do
15 so.

16 Q So you would expect a prosecutor wouldn't have to try
17 the same case two or three times?

18 A I would expect that most prosecutors would prefer not
19 to.

20 Q So we try to avoid error when we can?

21 A I would think -- I would think that that's, in my line
22 of work, one that, yes, attorneys would follow as well.

23 Q Would you expect the defense to do the same?

24 A Would I expect that a defense attorney would rather not
25 have to try a case a second time?

1 Q Yes, sir.

2 A It's an interesting question. I assume that the answer
3 to that is that if a case were to certainly be -- lead to an
4 acquittal, then the answer is solved, right? There is not an
5 opportunity. If you are asking me to get in the head of a
6 defense attorney in the way I did in the head of a prosecutor,
7 if the choice between having to retry a case and having the case
8 stand with a guilty verdict, if the defense attorney believed
9 that there had been a problematic ruling or aspect of the
10 previous case, I can imagine they would like to see it retried,
11 sure.

12 Q Would you be familiar with the concept of throwing
13 yourself on the sword as a defense attorney?

14 A I have not read about and published papers, but I can
15 understand the meaning, sure.

16 Q So would you expect that if a prosecutor had a reason
17 to strike a juror, he would want that reason to pass muster and
18 pass appellate review and know that before he spits it out of
19 his mouth and puts error into a case. Would you expect that
20 would be a rational response to a *Batson* challenge?

21 A I would -- most of -- when you started the statement
22 with, If he had a legitimate reason, so leaving that aside for a
23 second, I believe that most prosecutors are very much motivated
24 to provide a justification that would preclude the possibility
25 of having to retry the case. I think that whether or not they

1 have a race-neutral justification that they are consciously
2 aware of or whether or not they have thought about race
3 consciously ahead of time, that that motivation would remain.

4 Q One -- you indicated in your earlier testimony that you
5 have developed some ways and have participated in some ways to
6 try to slow down or make people aware of this unconscious bias;
7 is that correct?

8 A Yes.

9 Q Would a motion in limine before jury selection ever
10 starts in a capital murder case where a defense attorney says to
11 the court, We want you to tell the State not to commit a *Batson*
12 violation during jury selection. We want to forbid the State
13 from committing a *Batson* violation. Would that be one way a
14 defense, a judge, and a prosecution could bring it up -- bring
15 the situation up and, therefore, reduce the risk of unconscious
16 racism?

17 A Well, it's an empirical question, of course, and I am
18 not aware of data on the topic. I would presume -- you asked me
19 to, sort of, get in the minds of defense and prosecuting
20 attorneys earlier. I would presume that most prosecutors are
21 already well aware of the *Batson* restrictions, and the training
22 manuals actually seem to suggest that that's the case and being
23 reinforced. So while, in principle, being reminded about the
24 nature of implicit bias is something that can have an effect as
25 you discussed, reminding attorneys of something that their

1 training has already, sort of, made quite clear that I would
2 imagine they are already aware of, I guess my informed
3 speculation would be that that would probably not have a
4 tremendous effect but, again, it's an empirical question.

5 Q Could have some effect, couldn't it?

6 A I can't rule that out.

7 Q Let's talk about sample sizes.

8 A Okay.

9 Q When you're studying something, in general, bigger the
10 sample size, the better. Is that the general rule?

11 A A bigger sample size provides you with more power to
12 uncover effects so, typically, people do -- I mean, a bigger
13 sample size is also usually far more expensive and time
14 consuming so there is a balance but bigger sample sizes afford
15 you more power as a researcher to draw conclusions.

16 Q Is time an appropriate factor, that you're in a hurry,
17 an appropriate factor that you -- you need to get a study done
18 quickly so make it a smaller sample size. Is that an
19 appropriate methodology?

20 A I would say as a blanket statement, no, it is certainly
21 not, but within reason, it would be like suggesting that a
22 political scientist who wants to do a presidential poll should
23 interview all 300-plus million Americans, and you can't do it,
24 and so you have to draw a line somewhere. So, no, I think that
25 most researchers who publish their research in this or any field

1 are motivated primarily by the desire to accurately gather
2 information and test hypotheses and while there are always
3 tradeoffs that have to be made in practical terms about how wide
4 ranging the scope of a study can be, that that time is not
5 usually, to my experience, one of the considerations that is at
6 the forefront or pressing concern.

7 Q When you were made aware of the sample that was chosen
8 by the defense in the jury selection study, the 173 cases. When
9 you were aware -- when you were made aware of that sample and
10 how that was chosen -- I believe you talked about that earlier,
11 is that correct, that it was a --

12 A Yes, I would --

13 Q -- good sample?

14 A I would argue it is not a sample. It is the entire
15 population of those cases but, yes, I'm --

16 Q Well, let's talk about that.

17 A Sure.

18 Q When capital jury selection is studied, can't an
19 argument be made that capital juries should be looked at?

20 A So what you're asking is an important question about the
21 scope of one's investigation itself. The scope of one's
22 investigation is the cases for which a potential claim under a
23 given piece of legislation could be filed, then that would be
24 the population that you care about. That would be the
25 population of those cases. If your question is capital -- as

1 you suggested, capital juries in general across an entire state
2 or across an entire country, then that becomes the population
3 you care about. So it is a question of what the focus, the
4 stated objective of a research investigation is.

5 Q The -- staying on that vein, if you're studying capital
6 jury selection and peremptory strikes --

7 A Okay.

8 Q -- by lawyers, would it be a good idea to study both
9 sides?

10 A If you want to get a -- if that is your objective to get
11 a complete picture of how it works on both sides of the aisle,
12 so to speak, then that is what you would need to do.

13 Q Would you expect that if you studied both sides, the
14 final report would have both sides in the final report?

15 A I mean, again, we are talking hypothetical, so I guess
16 it would depend on toward what end such a report is being used
17 but --

18 Q Would you expect to see that both sides would be
19 reported if there was a significant finding in both the defense
20 and the jury -- and the prosecution's strike?

21 A Well, if we are talking about a paper submitted to a
22 journal that I review for, for example, it was made clear in the
23 method section that one study, both prosecuting and defense
24 attorneys, you would certainly expect the results section of
25 that paper to reference both prosecuting and defense attorneys.

1 If you are talking about a report that was proffered in a legal
2 proceeding or for a training purpose -- I mean, it would depend
3 on that objective, but from a research standpoint, what you
4 articulate as the method you collected would then inform the
5 results you expect to see presented, yes.

6 MR. THOMPSON: May I have a moment.

7 THE COURT: Yes, sir.

8 (There was a pause in the proceedings.)

9 BY MR. THOMPSON:

10 Q Now, getting back to the sample of the 173, if you are
11 studying capital jury selections and peremptory strikes by
12 lawyers in those capital jury selections, could an argument be
13 made -- let me back that up. Let me back up. A bigger sample
14 would include the nondeath result cases. Wouldn't that result
15 in a bigger sample?

16 A That would be a bigger group of cases. I mean, just as
17 you suggested, you were studying, you said capital jury
18 selection among lawyers, I mean, that's potentially nationwide,
19 right? So it depends on how we're specifying. If you're asking
20 me, Does adding additional cases make a group of cases larger,
21 then the answer is, obviously, yes.

22 Q And there wouldn't be a distinction in jury selection
23 with noncapital and capital results because that result hasn't
24 happened yet, obviously. Does that make sense? The jury
25 selection would be done the same way whether -- regardless of

1 the result, arguably.

2 A Right. I would argue that that's a reasonable
3 assumption, that the jury selection is conducted in -- by
4 similar -- by the same attorneys in the same courthouses in the
5 same jurisdictions in the same point of time are undergoing the
6 same types of processes, yes.

7 Q How about a jury selection done -- let's pick 1995 --
8 and later that inmate dies before the death sentence is actually
9 imposed from natural causes. That would be a jury selection
10 that should have been included in the study arguably.

11 A Well, again, if one's goal were to conduct an
12 all-encompassing study of capital jury selection, period, and
13 the sentence there, then that would be a case that could be
14 included. If your objective was to conduct an examination of
15 capital jury selection in cases for which a legitimate claim for
16 appeal might be raised under a certain given -- under a given
17 legislation, then I would argue, no, since there is probably not
18 going to an appeal filed by the dead inmate.

19 Q Reasonable mind could argue that a bigger sample
20 including more jury selections would have given a more accurate
21 result.

22 A It would give them a result that would speak to a
23 broader population of cases.

24 Q In general in research, bigger sample generally gives a
25 more accurate result?

1 A Well -- and I am not trying to be evasive. I apologize.
2 But when you suggest accurate, accuracy means something specific
3 in the research world, and so the idea here that if you had
4 reason to believe that there was a different process that was
5 undergone for a certain subset of jury selection cases and that
6 subset of jury selection cases were not included in an
7 examination of another subset, then that reason to believe that
8 there is a difference there means you have reason to believe
9 that including those other cases would lead to a different set
10 of conclusions. I mean, as we were discussing, there is no real
11 reason here to believe that jury selection procedures that were
12 conducted by the similar attorneys in similar courtrooms in
13 front of similar judges had different outcomes exhibited any
14 different process whatsoever. So given that, it wouldn't change
15 the accuracy of a result. It would just change the scope of
16 what those conclusions are. So that's why I was -- the accuracy
17 means something specific. It is not really at play here.

18 Q Have you ever been educated as to the factors you would
19 take into consideration if you were picking a jury?

20 A Have I gone through personal training for --

21 Q Yes, sir.

22 A No, I have not.

23 Q So would you expect that the more training and
24 experience you had in jury selection, the better you would be at
25 being able to determine variables to study in jury selection?

1 A So are you asking -- you said study. Are you asking a
2 researcher --

3 Q Yes. If a researcher had more experience in jury
4 selection, more training in jury selection, would they be better
5 at picking variables to study jury selection?

6 A I think if a researcher were regardless of his or her
7 experience personally as someone who had or had not conducted
8 jury selection that if someone were aware, had read the
9 literature, had read training, seen training materials, seen
10 training videos and were familiar, even not having gone through
11 it themselves with the kinds of issues that are at play in those
12 trainings and in those manuals and the like, that that would
13 give one a pretty good grounding to be given an empirical
14 investigation.

15 Q So pretty good grounding would be that result. How
16 about if somebody had done 30 capital cases, picked 30 capital
17 juries. Would that be better, all else being equal, at being
18 able to pick variables to study in a jury selection study?

19 A At explaining their own decisions? No.

20 Q No. Somebody just studying jury selection of somebody
21 else or broader group, would somebody with 30 capital jury
22 trials under their belt, for example, be better at selecting the
23 variables that are taken into consideration in capital jury
24 selection than somebody with absolutely no trial experience?

25 A If you're asking me does the experience actually

1 conducting those jury selections oneself versus reading
2 transcripts and being familiar with the training manuals, is
3 that a demonstrable difference in terms of people being better
4 able to identify variables for future research? I mean, that is
5 an empirical question. I don't have any data to speak to, but I
6 would think that certainly one who is -- has read about, has
7 read the transcripts and has, in many cases, had conversations
8 with folks who have conducted these procedures would have the
9 ability to select variables that would be studied in these kinds
10 of investigations.

11 Q Well, we said that. They would have the ability to do
12 so. Who would be better? The guy with 30 years' experience and
13 30 capital cases or the guy without it?

14 A At simply making a list of potential factors or
15 conducting an actual study?

16 Q Making a list of potential factors.

17 A It is a good question because, you know, what you are
18 asking basically has to deal with people's self-reported
19 information about, Here's what I can tell you affects me when I
20 make these decisions and when I do these processes. I am, by no
21 means, up here to suggest that prosecutors or defense attorneys
22 are liars or disingenuous. I don't mean to suggest that at all.
23 I am suggesting they're human beings and that when it comes to
24 explaining the factors that have actually influenced our
25 decision-making, time and time again, the data suggests we are

1 remarkably poor at doing that accurately. So it is a hard
2 question to answer from that perspective.

3 Q Does that mean you shouldn't listen to us?

4 A Who is the you and the us? I am sorry.

5 Q Well, when you're studying our answers --

6 A Yeah. Yeah.

7 Q -- as lawyers --

8 A Yeah.

9 Q -- does it mean necessarily we're just lying?

10 A Oh, no. As I said, no.

11 Q Doesn't necessarily think that that's an adequate
12 explanation?

13 A No. What I would suggest is that one -- anyone who is
14 well-versed in the scientific literature knows that there's only
15 so much stock that can be placed in self-report information
16 especially for decisions like these where individuals know what
17 is at stake -- as you suggested, they don't want to retry a
18 case -- know what the constitutional prohibitions are -- what
19 they are allowed to consider and what they are not -- and know
20 and have readily available to them a means of avoiding having to
21 retry the case, and it becomes really hard to get accurate
22 information just like it does for people on all walks of life
23 when they are being pressed to explain why they made a decision
24 that may or may not be problematic.

25 Q You have no way to quantify or measure at all the level

1 in which the answer should be listened to, do you?

2 A Are you asking me the relative weights between how much
3 stock we should put in self-report data versus other data like
4 aggregated data?

5 Q In this circumstance, yes.

6 A What I can tell you is that what the consensus
7 scientific conclusion would be is that we are going to learn a
8 whole lot more from the objective aggregation of data and
9 outcomes than we are from the self-report information provided
10 by defense or by prosecuting attorneys.

11 Q So we should just listen to stats and not pay attention
12 to the reasons?

13 A No. What I'm suggesting is that the reasons themselves
14 are, as you suggested, wholly predictable. People don't want
15 to -- prosecutors don't want to retry their cases, as you
16 suggested. I, by no means, am suggesting that I am making an
17 argument about attorneys harboring any sort of racial animus
18 either, but from a strategic standpoint of wanting to impanel a
19 sympathetic jury -- I think that's what attorneys are doing
20 during jury selection. You can correct me if I am wrong. But
21 from that standpoint, you are trying to select a jury in a way
22 that's constitutionally acceptable and that will produce that
23 means.

24 Q Getting around to my point, though, you can't measure
25 how much self-reporting is accurate on a huge scale, can you?

1 A I can tell you, for example, in my study that the
2 self-reporting is not accurate because we have an effect, a
3 quantifiable effect of race but no evidence of it in the
4 self-report information.

5 Q Do you have -- you have no way to quantify to what
6 degree --

7 A To tell you that is it eight times, seven times, four
8 times more liable? No, I can't tell you that.

9 THE COURT: Folks, if you will bear with me.

10 Mr. Thompson, if you will allow the witness to complete
11 his answer.

12 Sir, if you will allow Mr. Thompson to complete his
13 question; otherwise, it is very difficult for the court
14 reporter.

15 Go ahead, Mr. Thompson.

16 MR. THOMPSON: Yes, sir.

17 BY MR. THOMPSON:

18 Q So was the answer to my question you have no way to
19 measure it quantifiably?

20 A I can't give you a number to answer that question.

21 Q You appeared in a number of different cases as an
22 expert in different areas; is that correct?

23 A Yes.

24 Q Were they three different cases in expert testimony or
25 more than that?

1 A Well, if we are speaking specifically to issues related
2 to capital cases and issues related to race, then the answer
3 would be three, yes.

4 Q In Christopher McCowen versus Mass- -- I'm sorry.
5 *Massachusetts v. Christopher McCowen* in January of 2008. Are
6 you familiar with the facts of the case?

7 A Yes.

8 Q It was a home invasion and rape and murder of a mother
9 of a two-year-old?

10 A Yes.

11 Q Is that right?

12 A That is what he is convicted of, yes.

13 Q You testified in a post-conviction hearing; is that
14 correct?

15 A It was.

16 Q What was the result of that post-conviction hearing?

17 A Oh, the result of the hearing was the motion for a new
18 trial was declined.

19 Q Who called you as a witness? Which side?

20 A I was approached by the defense attorney in that case.

21 Q In *New Hampshire v. Michael Addison* in April of 2008,
22 testified pretrial; is that correct?

23 A That's correct.

24 Q Who called you?

25 A I was contacted by the defense attorney.

1 Q And you testified for the defense?

2 A I testified as an expert at the request of the defense.

3 Q What was the result of that case?

4 A The result of the hearing was that the judge ruled that
5 the capital case could proceed with the death penalty on the
6 table.

7 Q *Oregon v. Tremayne Durham*, June of 2008. You testified
8 pretrial; is that correct?

9 A That is correct.

10 Q Who called you as a witness?

11 A I was contacted by defense.

12 Q What was the result?

13 A In that case, there was a plea, and to be honest with
14 you, I am not sure if the plea came before or after, so I am not
15 familiar with whether there was a ruling, but there was a plea
16 agreement in that case.

17 Q You testified in five other cases not involving capital
18 murder; is that correct?

19 A I believe there is one on the next page. I think it is
20 six.

21 Q Pardon me. Six other cases.

22 A That's right.

23 Q Who did you testify for in each of those case?

24 A Well, in each of those cases, I was paid by the
25 Commonwealth of Massachusetts but contacted by a defense

1 attorney on behalf of an indigent defendant.

2 MR. THOMPSON: May I have just a moment, Judge.

3 THE COURT: Yes, sir.

4 (There was a pause in the proceedings.)

5 THE COURT: Folks, it's almost 15 till. I am not
6 suggesting anything. If you need additional time, feel free to
7 let me know.

8 MR. THOMPSON: Thank you, Judge. It will likely
9 just be --

10 MR. COLYER: If we can just kind of give it a shot
11 here, we can do it, Your Honor.

12 THE COURT: Yes, sir.

13 (There was a pause in the proceedings.)

14 MR. THOMPSON: Judge, to be more thorough, I would
15 rather not have to take a minute here and there. If it is all
16 right, we can take a break now and come back a little earlier.
17 I can finish up pretty quickly.

18 THE COURT: Do you folks want to be heard?

19 MR. JAMES FERGUSON: We are fine to take a break
20 now.

21 THE COURT: Okay.

22 MR. HUNTER: If we can just take an hour because
23 we do have other witnesses we are trying to get on and get out
24 of here.

25 MR. COLYER: No problem, Your Honor.

1 MR. THOMPSON: We are happy to do that, Judge.

2 THE COURT: So 1:45. Is that agreeable?

3 MS. STUBBS: Yes, Your Honor. I was just
4 wondering if the Court wanted to address the affidavit issue now
5 or --

6 THE COURT: Well, we've got the opportunity. I'm
7 confident you have been apprised of what we talked about on the
8 record this morning?

9 MS. STUBBS: I think I understand.

10 THE COURT: Okay. I guess the issue is -- I am
11 sorry.

12 May I have the sealed matter, ma'am.

13 MR. JAMES FERGUSON: Excuse me. May I be excused
14 from the courtroom for a moment.

15 (Attorney James Ferguson left the courtroom.)

16 THE COURT: For the record, Mr. Robinson, you're
17 aware that Mr. James Ferguson, one of your attorneys, is
18 stepping out of the courtroom for a brief period. Any objection
19 to going on forward in his absence, sir?

20 THE DEFENDANT: (The defendant shook his head
21 negatively.)

22 THE COURT: Okay. All right. Bear with me. I am
23 trying to recall where we were. The issue is you provided the
24 Court a memorandum based on my request for in camera review as
25 to information that was being requested by way of reciprocal

1 discovery by counsel for the State, and I think where we ended
2 up, folks, was whether or not there were additional materials
3 other than the materials you've stated on the record have been
4 provided to the State.

5 MS. STUBBS: Well, my understanding was that there
6 was a new request that in addition to the materials that were
7 the subject of the motion, which were materials that we gave to
8 the jurors that they now want our attorney work product notes
9 and impressions of the jurors, and if I misunderstood --

10 THE COURT: That is not my understanding.

11 MS. STUBBS: All right. Then let me be -- then,
12 Your Honor, there are no additional materials and all the
13 materials are in that, I'm happy to state, again, for the
14 record, and I think the other issue that came up was who
15 prepared the affidavits. I would be happy to tell Your Honor
16 they were either all -- they were prepared either by those
17 investigators and then reviewed by me or they were personally
18 prepared by me. They were then shown to the jurors and changed
19 if the juror had -- if we had a word wrong or a sentence wrong,
20 and then they were signed. That was the entire process.

21 THE COURT: Sir?

22 MR. THOMPSON: Judge, I wanted to ask a
23 clarification as to -- so there are notes of investigators? Are
24 there -- are there notes of investigators -- I don't want and I
25 don't think I am entitled to the notes of the folks sitting here

1 at this table.

2 THE COURT: Okay.

3 MR. THOMPSON: You'd certainly have to pull my
4 notes out of my cold, dead hands on some occasions, so I don't
5 propose to be asking for their notes, but I want a
6 clarification. Were there investigator notes that were handed
7 up about those events, and maybe we might need to discuss those
8 investigator notes?

9 THE COURT: Well, let's take it one step at a
10 time. The only thing that you folks don't have at this point
11 are the names of the folks who were involved in the interviewing
12 process; is that correct?

13 MS. STUBBS: Yes, Your Honor.

14 THE COURT: You have been told who --

15 MR. THOMPSON: Yes, sir.

16 THE COURT: -- what organizations they were
17 involved with but not their specific names. Are you asking for
18 names?

19 MR. THOMPSON: I think it would be appropriate to
20 have the names, Judge. I can't tell you right off the top of my
21 head without discussing it further with Mr. Colyer whether or
22 not we'd plan on doing anything with the names --

23 THE COURT: Well --

24 (Attorney James Ferguson returned to the
25 courtroom.)

1 THE COURT: I'm sorry.

2 MR. THOMPSON: I think it'd be appropriate --

3 THE COURT: Your position is this material may
4 bear on matters relating to impeachment?

5 MR. THOMPSON: Yes, sir, and that person is coming
6 up here pretty quickly, so I can't tell you in the next hour I
7 will be able to sit down with these folks.

8 THE COURT: We've already discussed the fact that
9 matters related to materials that may have been reviewed in
10 large part is reflected in the substance of the affidavit
11 involved for the most part.

12 MR. THOMPSON: At least in some part, yes, sir. I
13 have no idea the extent. Yes, sir.

14 THE COURT: All right. Now, I understand one of
15 your concerns is the fact that you've received -- and I'm not
16 characterizing it any other way than what I understand your
17 position to be. You've received less than complete responses
18 from some of the prosecutors with regard to some of the cases
19 that are involved, and if that's the situation, you don't
20 necessarily have something to compare with the content of
21 affidavits that may be involved.

22 MR. THOMPSON: I am with you. I'm catching up,
23 yeah.

24 THE COURT: You don't have an affidavit from that
25 prosecutor potentially that you can look at and make some

1 determination as to whether or not that is consistent with or
2 inconsistent with matters asserted in one or more of the
3 affidavits.

4 MR. THOMPSON: Yes, sir. I am with you so far.

5 THE COURT: So what you're asking for now -- and I
6 want to be clear on the record -- are the names of the folks who
7 conducted the interviews and you've added to that -- just, I am
8 not suggesting anything by this -- but you just indicated you're
9 also asking for notes of any investigators.

10 MR. THOMPSON: The investigator only insofar as
11 those notes -- and I am happy to have Your Honor review them.
12 Insofar as those notes may refer to the events that took place
13 before the affidavit was done. I am happy for them to be
14 redacted. I am happy for Your Honor to review them, but
15 that's -- obviously, what I think is material -- I don't want,
16 This kind of sounds like a great guy, or, This guy would make a
17 good witness. I don't care about those things. What I'm
18 looking for is the information that may contain as it relates to
19 just what was told, Sat down with this juror, told him about X,
20 Y, and Z, interviewed him -- those kind of just so my -- I think
21 those are the only relevant portions of those that we would have
22 some real use for that would be appropriate.

23 MR. COLYER: Read him the transcript, told him
24 what somebody else did, that sort of thing.

25 THE COURT: Yes, sir.

1 MR. THOMPSON: And I trust the Court -- they get
2 filtered through the Court, and I don't want to step on the
3 work-product toes by any means.

4 THE COURT: Well, that's the reason I asked for
5 the initial memorandum so that we could place that matter in the
6 record for any potential appellate review.

7 MS. STUBBS: Judge, for the record, Your Honor
8 referred to this as reciprocal discovery.

9 THE COURT: Well, that's their position.

10 MS. STUBBS: I would like to make clear how far
11 from the discovery order we have now traveled. Under the
12 discovery order, this Court entered a very broad discovery order
13 for statistical evidence including all of the underlying data.
14 Dr. Katz chose to do a statistical study involving prosecutors
15 so, as a result, the underlying data is actually the data in the
16 prosecutor affidavits that refers to the data they referred to.

17 THE COURT: Yes, ma'am.

18 MS. STUBBS: That is how it got elevated to be
19 part of this broad discovery order. There is no discovery order
20 that refers to any information experts relied on outside of
21 that. We disclosed to them all of the information that our
22 experts have reviewed, all -- including a lot of affidavits.
23 The only affidavits the State has now -- ironically, in a case
24 about discrimination against jurors, the only affidavits the
25 State is now seeking all kinds of information including who got

1 them, what were the circumstances, what was the investigator for
2 the attorney, all of that information, and only seeking for
3 these jurors. They have had the juror affidavits for a
4 significant period of time. If they wanted to go interview
5 those jurors to cross-examine Dr. Stevenson's testimony, they
6 were certainly free to do so.

7 THE COURT: Well, one of the additional matters
8 they are asking for is current addresses.

9 MS. STUBBS: The addresses -- we have provided the
10 pertinent -- we have provided the Board of Election output, we
11 provided a lot of public records. If they -- I have to believe
12 that if the State wanted to find these jurors -- we found them
13 using public records -- that the State could have found them
14 using public records. They're not hidden anywhere.

15 THE COURT: They are in the records, matters
16 already introduced in this case, if I understand correctly.

17 MS. STUBBS: I -- I -- I believe many if not all.
18 I can't certify to that, but we're now asking for notes of our
19 staff who would fall within the same attorney-client privilege
20 and are privileged notes. As a practical matter, Your Honor,
21 our witness is scheduled to go on after break. I -- this is the
22 first I have ever gotten wind of it. I don't have them. I
23 can't get them here, you know. We object.

24 THE COURT: I understand the position. In all
25 candor, from my point of view, it is further complicated by the

1 fact that I think I have an understanding of what it is you want
2 this information for: purposes of impeachment. The impeachment
3 involved would apply to any testimony given by another expert
4 witness to be called by the defendant because presumably the
5 affidavits were relied upon for purposes of formulation of some
6 opinion.

7 MR. THOMPSON: Yes, sir. And we just wanted to
8 make a matter of record that we got it on the 18th of January,
9 so we have had a limited chance to be able to follow up on --

10 THE COURT: Okay. I agree with you.

11 Correct me if you think I'm wrong. I understand the
12 State's position to be: We provided you -- we being the State,
13 you being counsel for the defendant -- with information relating
14 to the surrounding circumstances of affidavits provided to the
15 extent they have been provided by attorneys in this case.

16 MS. STUBBS: Well, they actually haven't --

17 THE COURT: Well, that's their position.

18 MS. STUBBS: But we haven't sought that
19 information. We just sought the underlying data that the
20 affidavits said they relied on.

21 MR. THOMPSON: Wait a minute. We haven't
22 sought -- I want to make sure I understand what we're talking
23 about. I missed something. We haven't sought that information.
24 What information are we talking about?

25 MS. STUBBS: The circumstances that the affidavits

1 were prepared. I don't care whether an attorney's secretary
2 typed it up. I'm not asking you that. I'm not asking who
3 reviewed it before they went out. I'm not asking if the elected
4 DA reviewed the line (phonetic) DA. I am not seeking any of
5 that information. We've never sought that information. That is
6 the kind of comparable information they are now seeking from us.

7 THE COURT: Well, let's -- I recognize I am eating
8 into our lunch hour and I apologize, but I want to make sure we
9 deal with this correctly and fairly. Their motion for
10 reciprocal discovery is predicated, if I read it correctly --
11 and I am trying to find -- here it is. Paragraph five, During
12 the discovery process between the State and the defendant, the
13 State delivered to the defense a folder containing the
14 supplementary materials, paren, materials used to prepare the
15 affidavits that were not originally provided by the defense,
16 closed parens, the prosecutor affiants use. Paragraph six,
17 There was no order in place that required the State to provide
18 that material to the defense. Paragraph seven, When the defense
19 made a request to the State, the State provided supplementary
20 materials from our affiants that was not contained in the
21 provided folder. The State requested reciprocal materials for
22 the defense affiants. So that's their position.

23 MS. STUBBS: That is their position, Your Honor.

24 THE COURT: Yes, ma'am. That is their position.

25 MR. THOMPSON: We have argued it. We don't wish

1 to be heard further. We have kind of argued it ad nauseam.

2 THE COURT: I agree, and I am not being critical
3 of anybody but -- folks, the Court is going to enter the
4 following order: Based on the reasons I have already stated for
5 the record, first of all, much of the information that might
6 serve as the basis for impeachment of any opinion testimony
7 given by a witness to be called by the defendant is self-evident
8 on the face of the contents of the affidavit in and of
9 themselves. Secondly, that information relating to the
10 current address and location of the affiants involved is a
11 matter of public record or is readily available or ascertainable
12 by the State. Thirdly, I agree that the notes of any of your
13 investigators would constitute work product, and that request
14 just being made is denied, to which the State objects and
15 excepts for the record.

16 MR. THOMPSON: Thank you.

17 THE COURT: Any other matters we need to deal
18 with, Mr. Thompson, Mr. Colyer?

19 MR. THOMPSON: No, sir.

20 MR. COLYER: No, sir.

21 THE COURT: Anything else, folks?

22 MS. STUBBS: No, Your Honor.

23 THE COURT: All right. Thank you. We're at ease.
24 We're coming back at 1:45. We have 45 minutes yet. All right.
25 Thank you, folks.

1 (Whereupon, a recess was held from 12:56 p.m.
2 until 1:48 p.m.)

3 (The following proceedings continued in open
4 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
5 Ferguson, Ms. Stubbs, Mr. Colyer, and Mr. Thompson were
6 present.)

7 THE COURT: Let the record reflect all counsel are
8 present. The defendant is present. We had Dr. Sommers on the
9 stand for purposes of cross-examination.

10 You need some water, sir?

11 THE WITNESS: If you don't mind.

12 MR. THOMPSON: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 BY MR. THOMPSON:

15 Q Dr. Sommers, we talked a couple times about the study
16 in which you had two jurors with similar or actually the same
17 exact facts you had about -- and you had two photographs. One
18 was a white individual; one was a black individual. Do you
19 happen to have those photographs in the courtroom?

20 A Do I have the photographs in the courtroom? I don't
21 believe they appear in the published paper, so I do not have
22 them in the courtroom.

23 Q Do you remember anything about the manner in which the
24 different folks were dressed or the manner of their hair or
25 their grooming, their slouching, whether it was a face, a

1 full -- you know, those kind of details. Could you just tell us
2 about that?

3 A Sure. So what we do in a study like that is we rely on
4 pretesting, so what we do is we assemble a variety of possible
5 options to use for photographs and try to select them to be
6 comparable posed and comparable attire and comparable age and
7 show them to a group of participants who were not involved in
8 the ultimate study and asked them to rate the attractiveness of
9 the individuals, the friendliness of the individuals, rate them
10 on a series of different dimensions and then select from those
11 preratings two photographs that have been rated on all those
12 dimensions as comparable. In this instance, they were
13 photographs of individuals, sort of a similar shot from the
14 chest up of them in both instances wearing a shirt and tie.

15 Q So head shots?

16 A Head shots including a little bit of the torso, but,
17 yeah, shoulders and head shots, yes.

18 Q Expression? Expressionless?

19 A Both, in this case, neither smiling, having sort of
20 neutral expression as rated by these individuals.

21 Q We are going to skip around a little bit since this is
22 clean up, so I will try to make sure we're simpatico here. When
23 reading a transcript, pretty safe to say that the tone and
24 intonation in a voice is almost unreadable in a transcript?

25 A I think that's fair. It can be very hard to determine

1 that.

2 Q Would it be fair to say that when you're interpreting a
3 negative affect from body language, that an individual would be
4 prone to be cautious to do so?

5 A I suppose it depends on the circumstances. Research
6 suggests we quite often form very quick, split-second
7 impressions. It would depend on the circumstances, so I guess
8 it would depend on the particulars of the evaluation.

9 Q Would one of those particulars -- would it be important
10 if it was your job at that moment, it was your purpose in life,
11 to actually evaluate that person for honesty and whether or not
12 they're being complete and whether or not they'd be a fair and
13 impartial juror? Would that kind of add into the -- one's
14 ability to detect a negative affect in tone?

15 A I'm not aware of research that suggests it would affect
16 one's ability. I take your point to be that in some
17 circumstances we might pay more attention and try even harder to
18 come to an accurate conclusion about someone than in another
19 circumstance, and I would agree with that assessment.

20 Q When you're reading -- when one person is reading
21 another person in the same context that we've talked about here,
22 is it -- which reading is more accurate? Paper or in person?

23 A It's an interesting question. It depends on what you're
24 trying to do. Research on detecting deception, for example,
25 trying to tell whether someone is telling the truth or not,

1 suggests that actually attending to the verbal cues can be
2 misleading under some circumstances and attending to nonverbals
3 can be more informative, and there are other situations in which
4 the research suggests that verbal information might be certainly
5 a better indicator of a variety of different outcomes. So both
6 sources, both streams of information are valuable and can tell
7 us different things, can be evaluated differently as well.

8 Q And on paper, you only have the one stream of
9 information; is that correct?

10 A That strikes me as a fair assessment, yeah.

11 Q In person, you'd have both the visual nonverbal cues
12 and you'd have what -- we'd have the words that were coming out
13 of their mouths.

14 A In person, you have that ability to attend to both
15 streams, sure.

16 Q So, again, would be more accurate to make and to form
17 an impression on somebody's deception or anxiety or the feelings
18 about a certain subject if that conversation was in person or on
19 paper?

20 A It is actually hard to say because there are, again,
21 when it comes to detecting deception, there are some findings
22 that if you just provide people with the audio track so they can
23 simply hear and not actually pay attention to the nonverbals and
24 gesticulations and such that sometimes we do a better job of
25 focusing on the content of what's being said and how plausible

1 it is and so on and so forth. So it is not a cut and dry --
2 sometimes more information can be misleading, but certainly in
3 person, you have an ability to base that judgment on more
4 inputs, more streams of information.

5 Q So in person would be content and intonation would both
6 be present, correct?

7 A In person, you would, in theory, have the ability to
8 assess both content, intonation.

9 Q And on paper, intonation and the actually physical
10 nonverbal cues would not be present?

11 A In most transcripts I have read, that's correct.

12 Q You had used the term mind reader earlier in your
13 direct that *Batson* kind of puts the judge in a position to have
14 to be a mind reader. Define how you mean mind reader.

15 A What I meant to -- what I meant to say is simply that
16 judges in these scenarios are put in a situation of trying to
17 infer from and conclude from the justifications they hear from
18 the attorney what was really going on in the attorney's mind at
19 the time that the decision was made.

20 Q And when that judge is making that determination from
21 that attorney, obviously, in a courtroom setting in a capital
22 murder case, for example, that would be made in person; is that
23 correct?

24 A My understanding is that that's how it's done.

25 Q And that would be made while the judge is in a position

1 to see, in normal circumstances, the lawyer; is that correct?

2 A Under normal circumstances.

3 Q Under normal circumstances, the judge would be able to
4 read the intonation in the lawyer's voice?

5 A That would certainly be information available.

6 Q And to note any change in their behavior during that
7 communication?

8 A Sure.

9 Q All of which can be assessed by the trial judge as to
10 whether or not that attorney, at that time, was credible?

11 A A judge might -- again, I don't put myself in the role
12 of being a judge, but a judge could certainly attend to a
13 variety of factors like that.

14 Q In addition, a judge would be able to measure what the
15 lawyer heard as far as the conversation that had just occurred
16 with the juror; is that correct?

17 A Well, I am not sure about measure, but the judge would
18 have heard the same information.

19 Q Right. So it would be fair to say the judge would be
20 in a pretty good position to be able to read the lawyer at the
21 time that lawyer made that statement?

22 A Well, I guess I would ask how you're operationally
23 defining read. I mean, they would have access to all the
24 information that the attorney is conveying, and they would be
25 able to, as you suggested, to take into consideration what they

1 chose, intonation and body language and gesticulation and so
2 forth. Whether they are able to accurately deduce issues like
3 honesty and a variety of other characteristics is a separate
4 issue.

5 Q Interesting you bring that up. Perfect segue to my
6 next question. If the judge had prior knowledge of that
7 attorney as in had practiced law with that lawyer, had tried
8 cases with that lawyer, was involved, the judge would be in even
9 a better position to make those -- these same analyses if he or
10 she was aware of that person's reputation and character; is that
11 correct?

12 A You know, again, it is an empirical question, so the way
13 I intend to think about questions, queries like that, that's a
14 question we could test with data. I mean, I -- it is the case
15 that sometimes people that you know quite well, you get a good
16 read on. It is the case sometimes that the people you know
17 quite well, it can be hard to get a read on them. So I am not
18 aware of empirical evidence that suggests that judges who have a
19 preexisting relationship with an attorney are better able to
20 deduce their responses.

21 Q Would a judge be in a better position to read somebody
22 he knew than somebody he or she did not know?

23 A Again, I'm not aware of any empirical data to speak to
24 that.

25 Q Okay. In the same vein, the attorney -- I am sorry.

1 The judge has just heard the same thing the lawyer has heard,
2 arguably, and seen what the lawyer has seen, and would be in a
3 position to be able to compare what the lawyer just said to what
4 the judge had seen, is that correct, given the normal scenario
5 that we are talking about?

6 A The judge would have access to the same information and
7 heard the same information that the attorney had just heard?
8 Absolutely.

9 Q And could use that in the judge's analysis?

10 A I would think, sure, she or he could do that.

11 Q Again, skipping around, the studies you've done, the
12 groups you've gathered together, the actual -- would you call
13 them experiments?

14 A Right. Experiment.

15 Q Were they all done at Tufts?

16 A I was on the faculty at Tufts when they were done. They
17 were not all done with individuals who were there at Tufts.

18 Q Was it in the Tufts' area as far as where the
19 participants lived?

20 A The college student sample, yes. The other samples
21 were, no, not in the Tufts' area.

22 Q What area was it?

23 A In the law student example, it was advanced law students
24 at a law school in the Midwest.

25 Q Which law school?

1 A It was at the University of Michigan Law School.

2 Q And the lawyers?

3 A Were across state and across -- all from the U.S. but
4 across different regions of the country.

5 Q And the lawyers' analysis was paper; is that correct?
6 Just, in essence, filling out a survey kind of thing?

7 A Correct.

8 Q Was that a collection instrument where they fill it
9 out, or was it just a survey?

10 A I'm not sure I see the distinction. I mean, I think the
11 survey would be the version of the collection -- the survey was
12 the way to collect the data.

13 Q You've offered and discussed some ways that you have
14 taken part and participated in trying to avoid unconscious
15 racism and simply in educating the folks that you're training as
16 to its existence and how it happens and ways to avoid it; is
17 that right?

18 A Yes.

19 Q Have you offered that kind of training to prosecutors?

20 A I have never actually formally offered it to anyone. I
21 am typically approached by organizations and entities, but if
22 approached, I would be more than amenable to offering it to
23 prosecutors, yes -- scheduling permitting, logistics, but yes.

24 Q Let's talk about how you would do that. Don't give us
25 a class because time permitting, but can you give us a basic

1 idea of some of the things that you would discuss with these
2 participants -- I am sorry -- in the training, we are talking
3 about?

4 A Oh, well, I mean, I would, one could -- I or a variety
5 of my colleagues could certainly conduct a workshop in which you
6 articulated the basic findings of the current literature on race
7 and how race influences decision-making and demonstrate that
8 there are particular circumstances, particular types of
9 decisions, particular contexts in which race is likely -- is
10 more likely to have an impact than in others and then what the
11 literature has identified as some of the strategies that one can
12 pursue in order to try to prevent that from occurring in any of
13 those instances.

14 Q Give us an idea of what the literature says we should
15 be doing about that.

16 A Talking about the existence of this unconscious form of
17 bias, making it clear that simple -- simply believing and
18 maintaining genuinely good faith, believing that race does not
19 affect the way we see each other, interact with one another,
20 does not rule out the possibility -- in fact, the likelihood, in
21 many instances, is that it still does. Talking about ways to
22 structure decisions that when decisions are more subjective,
23 when the evidence to be evaluated is more ambiguous, those are
24 conditions under which the effect of race on perception and
25 judgment are more likely to occur, and those are sort of a

1 couple of examples.

2 Q So, in essence, would it be fair to say that you would
3 be reminding the participants, hey, this happens, and telling
4 them when those situations were occurring or likely, more likely
5 to occur, that, hey, you need to watch out for this when you're
6 making these decisions. Would that be kind of one way that
7 you're describing to overcome this?

8 A I think taking that and tethering to data to make those
9 arguments and to say -- and here are the data, here are the
10 studies, here's the empirical basis for those conclusions I'm
11 offering you right now, but, yes, that's how you would do it by
12 saying, Here's what the research shows us and what we can learn
13 from it.

14 Q Now, what effect should this have on jury selection,
15 this concept of unconscious racism? Are you proposing that we
16 make changes to jury selection, how it's done?

17 A Well, I'm not here as a policymaker so I am not here to
18 initiate any new legislation. What I would suggest is that
19 given the current system -- and I am working within the
20 framework of the system that we have, that there are certain
21 ways in which one could effort to make the influence of race on
22 jury selection less likely to occur.

23 Q Like what?

24 A Well, like some of the training methodology that we just
25 talked about, like devoting time in attorney manuals and

1 training sessions to not have discussion so much of here are our
2 race-neutral or here are *Batson*-friendly justifications for
3 challenges but rather here is an issue, here is why we want to
4 avoid it because, frankly, a lot of the stereotypes that we're,
5 sort of, using to make these evaluations aren't necessarily
6 verified by empirical support anyway. Here's what we want to be
7 doing as prosecutors, as defense attorneys, and here's how we
8 can get there, at least in terms of what the research suggests
9 to us.

10 Q So you're not suggesting any radical change in the way
11 we do jury selection?

12 A Well, no one has ever asked me for a formal policy
13 recommendation on jury selection, so I am not here to propose an
14 entirely new procedure to doing jury selection.

15 Q Give us some thought. What do you think? Should we
16 just radically throw out jury selection and pull names out of a
17 hat or do some other kind of radical change or just do it the
18 way we have done it, become aware this exists. Which would be
19 your suggestion?

20 A Well, it's a question that I can answer for you as an
21 informed scientist. Again, like I suggested, I am not a
22 policymaker by any means, but what I can tell you is that if the
23 objective of the system is going to be to -- if the objective of
24 the system is going to be to impanel juries in a way that is not
25 influenced by race and is not influenced by ethnicity, then the

1 way we currently do it with that *Batson* challenge as we
2 currently have it set up is not an effective tool to ensure that
3 that is going to happen.

4 Q So are you suggesting *Batson* should be tossed out?

5 A Well, the Supreme Court hasn't asked my opinion on it,
6 obviously. What I'm suggesting is that while I think a lot of
7 individuals would concur with the motivation underlying *Batson*
8 to try to prevent race from influencing the proceeding in jury
9 selection, that the way that the system is currently set up, the
10 procedures we have in place, don't accomplish that goal.

11 MR. THOMPSON: Can I have a sec, Judge.

12 THE COURT: Yes, sir.

13 (There was a pause in the proceedings.)

14 MR. THOMPSON: Thank you, Your Honor. No further
15 questions.

16 THE COURT: Okay. Thank you, sir.

17 Any redirect?

18 MR. JAMES FERGUSON: Just very briefly, Your
19 Honor.

20 THE COURT: Yes, sir.

21 REDIRECT EXAMINATION

22 BY MR. JAMES FERGUSON:

23 Q Dr. Sommers, I think I heard you say that -- I think it
24 was in response to some opinions about the Katz study -- that
25 you agreed with the proposition that the more precisely one

1 defines one's factors, the better one's analysis would be.

2 A As a general proposition, I think that that's a fair
3 assessment.

4 Q Yes, sir. Now, in terms of the Michigan State
5 University study, what is your opinion as to whether or not the
6 factors there, the variables there, were precisely defined to
7 the point that it made an effective study, an effective
8 analysis?

9 A They seemed to be fairly well-designed factors and
10 variables. They articulate clearly what they are assessing. In
11 some cases, they combine responses across categories, but there
12 are times when one needs to do that as a researcher for reasons
13 of statistical power, and they also have safeguards in place to
14 sort of catchall -- sort of leans State and leans defense --
15 categories that will catch issues that they haven't been able to
16 a priori articulate ahead of time -- that's redundant -- but
17 that they haven't been able to articulate ahead of time, so it
18 seems the variables as they are constructed are, in my opinion,
19 reasonable variables rigorously designed for the purposes of
20 those analyses.

21 Q So when you agreed that the precisely -- the more
22 precisely one defines the factors, the better one's analysis is,
23 you didn't mean that as some criticism of the Michigan State
24 study, but your view is that the Michigan State study was
25 sufficiently precise to accomplish the purpose?

1 MR. THOMPSON: Objection. Leading, Judge,
2 respectfully.

3 THE COURT: Well, it is, folks, but we don't have
4 a jury.

5 So if you'll rephrase your question, sir.

6 MR. THOMPSON: Yes, sir.

7 BY MR. JAMES FERGUSON:

8 Q So when you agreed with the proposition that the more
9 precisely one defines the factors, the better one's analysis
10 will be, were you meaning to criticize the Michigan State study
11 by that statement?

12 A No. I was offering that as a general proposition about
13 research methods. It is not an absolute statement either
14 because, as I suggested, if you define your variables so
15 precisely that there is only one or two or three people fit that
16 bill, then you no longer have statistical power to do anything
17 of any import, but as a general proposition, I would endorse
18 that assessment, but I was not offering specific criticism of
19 the variables as defined in the Michigan State study.

20 Q And what is your view of the variables that were
21 defined in the Michigan State study?

22 A I think that they were designed, again, rigorously in a
23 way to pursue the research questions outlined in that report.

24 Q So that if the prosecutors in North Carolina decided
25 that they wanted to do a program or a project on reducing race

1 bias in jury selection, would you be available and willing to
2 come down and help them?

3 A Schedule permitting, logistics permitting with my wife's
4 permission and child care duties taken care of. I mean,
5 certainly, that is something that I or a variety of my
6 colleagues are able to do and have done in some other -- meeting
7 with other groups, and it is something that I think you would
8 find a wide range of social scientists, myself included, who
9 would be willing to do something like that and who have been
10 asked to do that for other groups before.

11 Q Well, I was going to ask: Have you been asked to do
12 that for police officers?

13 A I have done training -- workshops is really -- I have
14 done training workshops with police departments. I have done
15 them with professional organizations and of legal professionals,
16 defense attorneys, I have been asked by one organization,
17 continuing legal education, which is more of a mixed crowd in
18 terms of who attends, but I have been asked by those parties.

19 MR. JAMES FERGUSON: Thank you, Dr. Sommers.
20 Those are all my questions.

21 THE COURT: Mr. Thompson, any additional
22 cross-examination?

23 MR. THOMPSON: No, but thank you, Judge.

24 THE COURT: May the witness be released, folks.

25 MR. THOMPSON: No objection from the State.

1 THE COURT: Thank you, sir. Yes, sir.

2 Yes, ma'am.

3 MS. STUBBS: Your Honor, the defense calls Bryan
4 Stevenson to the stand.

5 THE COURT: Okay. If you'll come up and be sworn,
6 please, sir.

7 BRYAN STEVENSON, called as a witness herein,
8 having been first duly sworn, was examined and testified as
9 follows:

10 THE COURT: If you'll come around and have a seat.
11 Would you like some water, sir?

12 THE WITNESS: That'd be great, Judge.

13 THE COURT: Once you are seated, if you will state
14 and then spell first and last name for the benefit of the court
15 reporter, please.

16 THE WITNESS: Yes, Your Honor. My name is Bryan
17 Stevenson. It's B-r-y-a-n, S-t-e-v-e-n-s-o-n.

18 DIRECT EXAMINATION (On Qualifications)

19 BY MS. STUBBS:

20 Q Professor Stevenson, can you tell us how you're
21 currently employed?

22 A I am a professor of law at the New York University
23 School of Law and the director of the Equal Justice Initiative
24 in Montgomery, Alabama.

25 Q And what does the Equal Justice Initiative do?

1 A It's a nonprofit law organization that provides legal
2 services to poor people. It does some research and policy work.
3 We provide information to various institutions that are looking
4 at the issues that we care about and, as I mentioned, we provide
5 a lot of direct services as well.

6 MS. STUBBS: Your Honor, I am just going to try to
7 rearrange so I can see the witness.

8 THE COURT: Yes, ma'am. Yes, ma'am.

9 (There was a pause in the proceedings.)

10 BY MS. STUBBS:

11 Q And what do you do in your teaching capacity?

12 A I've been on the faculty for, I guess, 14 years. I
13 teach mostly in the area of criminal justice and specifically on
14 issues of race in the criminal justice system, Eighth Amendment
15 law, capital punishment law, advanced criminal procedure, and
16 that's been sort of the general area of my scholarship in
17 teaching since I joined the faculty.

18 MS. STUBBS: Your Honor, may I have permission to
19 approach the witness.

20 THE COURT: Yes, ma'am.

21 (There was a pause in the proceedings.)

22 BY MS. STUBBS:

23 Q Professor Stevenson, I have handed you what has been
24 marked as Defendant's Exhibit 18. Is that a copy of your
25 resume?

1 A Yes, it is.

2 Q And we're going to be offering you this morning as an
3 expert in racial -- or this afternoon -- racial bias and the
4 law, so I'd like to focus on your experience in that area. Will
5 your resume help us do that?

6 A Sure.

7 Q Okay. So when did you first start working in the field
8 of racial bias?

9 A Well, I was a joint degree student at Harvard Law
10 School. I actually did a degree in public policy at the Kennedy
11 School of Government at the same time, and my work at the
12 Kennedy School was focused on criminal justice, and my
13 particular interest was the influence of race and poverty in the
14 administration of criminal justice.

15 Q And then as an attorney?

16 A Yeah. Immediately after graduating from Harvard, I went
17 to the Southern Center for Human Rights where my practice
18 actually focused on antidiscrimination work in the criminal
19 justice context, particularly in death penalty cases. My early
20 work was on underrepresentation of cognizable groups in jury
21 pools, specifically, African-Americans and women, and then did a
22 lot of work in the south around the kind of disparities between
23 these groups in the community and the pools from which jurors
24 were selected. And then after that work, we did a lot of work
25 around racial bias in jury selection relating to peremptory

1 strikes. I did work around racial bias in sentencing
2 disparities both in the death penalty context and in other
3 noncapital contexts, and that really was sort of the foundation
4 of my later work, research and writing, which has focused on
5 these issues since I have joined the faculty -- even before. I
6 wrote articles in the early nineties and worked on training
7 manuals around these issues throughout my career -- done several
8 manuals and training materials for addressing racial bias in
9 jury selection.

10 Q Can you tell us a little bit more about what that
11 litigation on peremptory strikes has involved, what these cases
12 were?

13 A Yeah. Again, as I mentioned, in the sort of pre-Batson
14 era, a lot of the litigation on racial bias in jury selection
15 was focused on whether cognizable groups, particularly the
16 African-Americans, were fully represented in the jury pools from
17 which they were selected, and there was a set of cases that the
18 court had announced that basically allowed lawyers to challenge
19 statistically significant disparities between the pool from
20 which jurors are selected and the community, and so we did a lot
21 of work researching whether these disparities existed. And
22 where they existed, we would provide assistance to the lawyers
23 or to states even in selection systems to try to eliminate those
24 disparities, so that was kind of what I did initially in the
25 mid-eighties.

1 After the *Batson* decision came down and as we had some
2 success with that litigation, the emphasis seemed to shift from
3 the underrepresentation of people of color to the use of
4 peremptory strikes because as you had more people of color
5 showing up in the courtrooms and actually sitting down in the
6 boxes where juries are selected, you had actually greater
7 opportunity to use peremptory strikes in a discriminatory
8 manner. And so I was very involved in litigation around those
9 issues both in Georgia and in Mississippi and Louisiana --
10 across the deep south -- and then when we opened our project in
11 Alabama, that was a very heavy focus of our work there, probably
12 the issue I have litigated the most over the last 25, 27 years I
13 have been doing this with these kinds of cases.

14 Q And you mentioned already that you've published in this
15 area. Looking at your resume, could you identify for us what
16 some of the publications that deal with the issue of racial bias
17 in the law?

18 A Sure. I think the first thing I did was an article on
19 racial bias in jury selection that was published in the
20 Washington & Lee Law Review in 1994. All of the manuals that
21 we've done have had sections devoted to understanding, thinking
22 about, and confronting racial discrimination in jury selection,
23 and those began in the early nineties. A lot of the articles I
24 have written subsequent to that have focused on this issue.
25 There was a book about reflections on the death penalty that

1 focused a lot on racial bias in jury selection, and then perhaps
2 the most substantive thing we have done recently is the report
3 that we did in 2010, which looked specifically at the issue of
4 racial bias in jury selection across the south.

5 Q And in addition to your -- to the work you've already
6 mentioned, have you conducted interviews of excluded venire
7 members and jurors?

8 A Yeah, a big part of what our work has been focused on is
9 trying to understand the impact of this discrimination. That
10 was a very big part of our study. So we talked to over 100
11 people who had been summoned for jury service and who were
12 excluded. Some of them we knew had been found to be the victims
13 of racial discrimination, others had not, but we interviewed
14 lots of those folks. We also routinely do juror interviews for
15 the post-conviction work that my office has done, and so I have
16 been doing that for 20 years talking to jurors about their
17 experience in the jury courtroom.

18 Q And as part of your academic work and research, are you
19 familiar with the body of social science about jury selection
20 and bias?

21 A Yes. That's been an area of focus and an area of
22 interest for me. I have talked for many years, of course, on
23 race, poverty and criminal justice where we devote several weeks
24 on jury selection and jury selection-related issues. Even my
25 capital punishment and Eighth Amendment work has devoted a good

1 bit of attention to jury selection because it has been such a
2 dominant area in capital cases. It has always been something
3 that I've focused heavily on.

4 Q And outside of your law school teaching, have you done
5 any lecturing on these topics?

6 A Yeah. I give lots of lectures and trainings on the
7 question of racial bias, racial bias in jury selection, better
8 practices and procedures. I have been doing that for almost
9 15 years, 15 to 20 years.

10 Q And have you received any award or degrees in
11 recognition of your work in the area of race and the law?

12 A I have. I -- several of awards I have received have
13 been specific to the work I do around race. Some of them have
14 been more general for the work we are doing on behalf of the
15 poor, but, yes, there are a number of awards.

16 Q And some of your awards have included honorary degrees?

17 A That's right.

18 Q From Yale and Georgetown?

19 A That's correct.

20 Q And you won a MacArthur Genius Fellowship --

21 A In 1995, yes, I was able to receive one of those.

22 Q And an award from the Ford Foundation?

23 A That's right.

24 Q And, Professor Stevenson, have you ever been -- have
25 you ever testified as an expert in state or federal courts?

1 A Yes, I have.

2 Q And in state court? Federal court?

3 A Yeah, in both, I have done -- I have done expert work in
4 several state courts in a variety of states and also in two or
5 three federal cases as well.

6 Q And were you an expert on race in jury selection in any
7 of those cases?

8 A Yes, in some of those cases I was.

9 Q And, Professor Stevenson, for your testimony today and
10 at our request, have you reviewed any North Carolina material?

11 A I have, yes. I have reviewed transcripts and historical
12 information and collected information from lawyers, judges,
13 prosecutors, excluded jurors -- a wide range of information
14 specific to the issue of racial bias in jury selection in North
15 Carolina.

16 Q And based on that review and your experience and
17 training, are you prepared to testify about some of your
18 opinions in this case?

19 A I am, yes.

20 MS. STUBBS: Your Honor, at this time, we would
21 tender Professor Stevenson as an expert in race and the law.

22 THE COURT: Do you want to be heard as to the
23 tender?

24 MR. COLYER: Only subject to the motion in limine
25 we filed earlier, Your Honor.

1 THE COURT: Yes, sir. Yes, sir. At any time you
2 want to be heard in that respect, please let me know. Are you
3 asking to be heard at this point?

4 MR. COLYER: No, sir.

5 THE COURT: Yes, ma'am. You may proceed.

6 MS. STUBBS: And, Your Honor, we would also move
7 for the admission of Defendant's Exhibit 18.

8 MR. COLYER: No objection.

9 THE COURT: It is admitted without objection.

10 DIRECT EXAMINATION

11 BY MS. STUBBS:

12 Q Professor Stevenson, have you, as part of your research
13 and study and, in particular, with your jury selection report,
14 have you studied the history of juror discrimination?

15 A I have and, in my opinion, that's a critical component
16 when you think about issues of racial bias in jury selection.
17 You really cannot approach the question of whether there is
18 contemporary evidence of discrimination in my view without
19 putting it in an historical context. In the study that we
20 published and in actually all of my published work, I focus
21 heavily on understanding this narrative that has emerged about
22 whether African-Americans in particular are allowed to serve on
23 juries, and the sad reality is that throughout most of our
24 country's history, black people have been told, You are not
25 permitted to serve on juries and particularly not in criminal

1 trial juries. Much of the most significant civil rights work
2 really was developed around this point in the 19th century. The
3 first civil rights act that we actually had was the Civil Rights
4 Act of 1875 that focused specifically on making it a crime to
5 exclude people on the basis of race. The United States Supreme
6 Court's first decision on the rights of African-Americans was
7 *Strauder v. West Virginia*, which was an effort to respond to
8 that state specifically prohibiting black people from serving on
9 juries. And so to me, that is a really important part of
10 understanding how and where we are. And I say that really
11 because the history of African-Americans serving on juries has
12 really been defined by resistance. After the *Strauder* decision,
13 really nothing changed. African-Americans were still largely
14 excluded in most states. After the Civil Rights Act of 1875,
15 nothing changed. No people of color were serving on juries in
16 many of these jurisdictions and, in fact, there was horrific
17 outrage and resistance to implementing either of those
18 provisions, the constitutional provision or the legislative
19 congressional provision, and in places even like North Carolina,
20 you saw tremendous even violent resistance to the idea of giving
21 African-Americans equal opportunities. The Wilmington riots of
22 1899 -- 1898 are the more dramatic examples of how people were
23 saying, No, we will not accommodate even these federal laws that
24 permit these practices.

25 Q And what about the more recent history?

1 A Well, I think that things did change, although it's
2 worth noting that throughout most of, you know, the 1900s, very
3 little changed with regard to jury service. In the 1920s, 1930s
4 in places like North Carolina, you never saw people of color on
5 juries. It just did not happen and, in fact, the literature
6 tells us that one of the arguments that would be made about why
7 you don't want black people on juries is that the white
8 population would never accept that, and it would actually
9 stimulate more lynching. And the fact, the idea of
10 African-Americans serving on juries was actually an argument
11 that was rejected because it was seen as so provocative, so
12 dangerous, it would increase the number of people being lynched
13 and, of course, North Carolina, like most southern states, had a
14 horrific problem of violent, unlawful assaults on
15 African-Americans around prime issues throughout the early part
16 of the 20th century.

17 By the 1940s and 1950s, the United States Supreme Court
18 had retreated from actually trying to enforce these protections.
19 They upheld a statute out of Texas that said only one black
20 person can serve on a jury, and the Supreme Court said, you
21 know, that's okay. In the Scottsboro cases, the court did
22 challenge the wholesale exclusion of African-Americans but,
23 again, things didn't change.

24 It was really only after the civil rights movement
25 began to make reforms in other areas that we saw a serious

1 effort to allow African-Americans to participate on juries, and
2 that effort was really primarily organized around
3 underrepresentation, allowing people to actually get into the
4 pools that might permit them to serve, and we saw some progress
5 on that issue in the 1960s and 70s, and that is when we really
6 start seeing peremptory strikes becoming relevant to racial bias
7 and discrimination. Really, prior to that era, there was really
8 no need to use peremptories to exclude African-Americans because
9 there were no African-Americans to exclude.

10 In 1965, the court, in my judgment, made a departure
11 from the rest of its civil rights work. In the 1960s,
12 African-Americans won a lot of freedoms, won a lot of progress
13 in other areas -- education, employment, voting rights, et
14 cetera -- but with regard to criminal justice, they lost. In
15 *Swain v. Alabama*, the court said, We are not going to make it
16 easy for people to prove that there is racial bias in peremptory
17 strikes and, as a result of that, nothing changed. And it was
18 really only until 1986 with the Supreme Court's decision in
19 *Batson v. Kentucky*, that we hear the court saying, We are going
20 to change things now. We are going to kind of make it a little
21 bit easier to show that this long history of excluding people of
22 color from serving on juries is still evident in cases. And
23 that's when we created the *Batson* standard and, as I'll mention
24 later probably, even that wasn't very effective, in my opinion.

25 But I do think it's important to recognize the history

1 because without understanding the history, you don't get why
2 it's so meaningful to people of color to have the right to serve
3 on a jury. You don't get why the criminal justice system is
4 perceived to be so insensitive to the needs of poor and people
5 of color given its history, and you also don't appreciate how
6 practitioners in this system have gotten very comfortable with
7 juries that typically do not fully represent people of color.
8 That has just not been our history.

9 If you learned how to practice law in the fifties or
10 the sixties, you learned how to practice law in front of
11 all-white juries. And even in the sixties and seventies and the
12 seventies and eighties, those were the norms. Those were the
13 values that shaped the way we thought about jury service and
14 presenting cases. So when we start talking about things like
15 what you are comfortable with and all of those, I think we have
16 to understand its history to appreciate why your comfort level
17 is not going to be responsive to the court's demand that we
18 eliminate discrimination.

19 Q And, Professor Stevenson, you have been referring to
20 jury selection. Is there anything different about jury
21 selection in capital cases?

22 A I think there is. I mean, I think that the -- the --
23 the evidence is quite dramatic that whatever the tensions,
24 whatever the pressures, whatever the resistance to full
25 diversity in a normal criminal trial, it's dramatically greater

1 in a capital trial, and that is really for three reasons. One,
2 the juror -- the capital juries, jurors who serve on death
3 penalty cases, have tremendously more responsibility. They are
4 not only going to decide whether the person is guilty or not
5 guilty -- and in some cases, that is not so complicated -- but
6 they are also going to decide whether the person gets the death
7 penalty or, and in most jurisdictions, life without parole.
8 That is a highly subjective much more discretionary decision,
9 and if you don't trust certain groups of people to make those
10 kinds of decisions generally, you're really not going to trust
11 them in the death penalty context, and so we've seen some of the
12 most dramatic evidence of resistance to full diversity both with
13 regard to gender and with regard to race in the death penalty
14 context than we have in other cases.

15 The second reason I will just mention is that there is
16 also the history of the death penalty which also has some really
17 unfortunate aspects with regard to race. In all of the states
18 of kind of the old Confederacy, there is a disproportionate use
19 of the death penalty against African-Americans and, of course,
20 the Supreme Court in 1972 in *Furman* struck down the death
21 penalty in part because of these racial disparities.

22 The death penalty in this country has always been
23 shadowed by the perception that it is being imposed in a
24 racially-biased manner. And you can just look at the data, you
25 know, 87 percent of the people executed for the crime of rape

1 between 1930 and 1972 were African-American; 78 percent of the
2 people executed in North Carolina at any relevant period,
3 colonial period, the period between 1910 and 1972 prior to the
4 Supreme Court's decision in *Furman* for African-Americans; more
5 recently, a huge disparity based on race of the victims in
6 places like North Carolina and other states. So this perception
7 that the death penalty is racially biased has also contributed
8 to these dynamics around racial bias in jury selection.

9 And finally, I think the other component that makes
10 death penalty cases unique is that throughout most of our
11 history, we've had segregation, we've had racial subordination,
12 people of color in places like African-Americans have been
13 subordinate in many ways. They have been legally kind of
14 excluded. They have been legally marginalized, and these
15 conditions you really could not sustain simply by passing a law
16 just like what we saw in Wilmington in 1898, without violence,
17 the threat of violence, without a system to enforce -- this kind
18 of racial segregation and hierarchy -- people simply weren't
19 going to abide by it.

20 And the death penalty and the power that the death
21 penalty represents and lynching before it was always seen as the
22 way organized society said, If we say use the colored water
23 fountain, if we say use the colored bathroom, if we say stay in
24 the balcony, you better do it and we have the power to exercise
25 really violent force to force that if you don't. And so the

1 death penalty had very powerful symbolic features in the
2 relationship between, kind of, race and power and politics and
3 certainly in enforcing racial segregation throughout most of our
4 history.

5 MS. STUBBS: Your Honor, may I approach the
6 witness.

7 THE COURT: Yes, ma'am.

8 (There was a pause in the proceedings.)

9 BY MS. STUBBS:

10 Q Professor Stevenson, I have handed you what's been
11 marked for identification as Defendant's Exhibit 19. This is
12 the Equal Justice Initiative study. Can you tell us what this
13 book is?

14 A Yes. This is the study that we completed.

15 MR. COLYER: Professor, excuse me for a moment,
16 sir.

17 THE WITNESS: Sure.

18 MR. COLYER: Judge Weeks, this is part of the
19 motion in limine that we addressed with respect to the study
20 with the exclusion of North Carolina.

21 THE COURT: Well, there are two ways we can deal
22 with it. One is under the applicable rules, it goes for the
23 basis for the opinion, so you have the option under rules of
24 evidence to inquire as to the basis for any opinions that might
25 be proffered at this time prior to any opinion being given. Or

1 you have the opportunity to say we're dispensing with that;
2 we're content to be heard.

3 MR. COLYER: We're not asking to examine the
4 professor at this time with respect to this as it relates to his
5 opinion. We understand that likely this is part of the basis of
6 his opinion. We objected to it simply on the grounds that --

7 THE COURT: It does not. I apologize.

8 MR. COLYER: I'm sorry, Judge. Simply on the
9 grounds it did not include North Carolina as part of the old
10 south, and I understand that the professor is speaking about
11 contemporary happenings in North Carolina and has related his
12 testimony, will relate his testimony of North Carolina, but as
13 it relates to this particular exhibit and the basis of opinion
14 with respect to the foundation in this exhibit, we would object
15 without wishing to be heard.

16 THE COURT: Okay.

17 MR. COLYER: And, Your Honor, one of the things
18 that I, with all due respect to the professor and the exhibit,
19 there is some rather graphic photographs in the exhibit that --
20 the defense objected to photographs that the State was going to
21 attempt to use with respect to homicide victims here in North
22 Carolina.

23 THE COURT: Can you point me -- I apologize.

24 MR. COLYER: If you just flip through it. I dare
25 say those photographs are much more offensive, much more graphic

1 and in relation to the Professor Stevenson's testimony has
2 photographs of victims of lynchings --

3 THE COURT: Yes, sir. I am looking at page ten
4 now.

5 MR. COLYER: Yes, sir. And with respect to the
6 professor's opinion, we think that it could be expressed in this
7 forum and in this case without the use of Defendant's Exhibit
8 Number 19.

9 THE COURT: Nineteen. Okay. Mr. Colyer, so that
10 the record is clear and I'm understanding you correctly, the
11 initial basis is that Defendant's Exhibit 19 doesn't relate to
12 any matters pertaining to North Carolina, first and foremost.

13 MR. COLYER: Directly, Your Honor, yes, sir.

14 THE COURT: Secondly, your concern is that
15 under *Hennis*, there are matters depicted in that exhibit that
16 ought to be excluded or you contend should result in the entire
17 exhibit being excluded simply because of the inflammatory nature
18 of those matters.

19 MR. COLYER: Not necessarily just on the basis of
20 *Hennis*, Your Honor, but with respect to just the inflammatory
21 nature of the photographs. And the exhibit in and of itself, we
22 would contend, adds nothing to the professor's testimony here or
23 his opinion, and we would just ask that it be excluded.

24 THE COURT: For what purpose is Defendant's
25 Exhibit 19 being offered, ma'am?

1 MS. STUBBS: Your Honor, it is for the purpose of
2 showing the professor's work in this area. It relates directly
3 to a number of his opinions. He is going to later go through
4 North Carolina materials and discuss them in the context of this
5 report and the findings of this report. We don't have any
6 problem with covering up any photographs that the State objects
7 to in the report. There's the lynching picture on page ten --

8 THE COURT: Yes, ma'am.

9 MS. STUBBS: -- and there's an electric chair
10 picture on page 12.

11 THE COURT: Yes, ma'am.

12 MS. STUBBS: There's the picture of the -- of
13 African-American teens from Scottsboro. I am not sure if that
14 is one of the pictures they object to. The rest, I do believe,
15 are pictures of -- the majority are pictures of excluded
16 African-American venire members. I don't know what the
17 objection there would be, but we have no problem covering any
18 photos the State objects to as inflammatory.

19 THE COURT: Well, I guess what I am asking
20 specifically is this study by its very terms, as I understand
21 it, refers to matters apparently part of research or scholarly
22 work done as part of the --

23 THE WITNESS: Yes.

24 THE COURT: -- Equal Justice Initiative in a
25 number of southern states excluding North Carolina.

1 MS. STUBBS: Well, North Carolina was not part of
2 it. I believe Texas was not part -- I mean, Professor Stevenson
3 is in a better position than I am to -- but Texas, Virginia,
4 North Carolina -- there were a number of southern states that
5 were not included in this, but this represents Professor
6 Stevenson's work in this field and directly relates to the
7 opinions that we are going to get into this morning with respect
8 to the North Carolina materials. So, in other words, I -- he
9 makes a number of findings. I am going to ask him about those
10 findings, ask him about North Carolina materials, whether they
11 were consistent, and in this way, put it in the framework of his
12 general scholarship and also to show that these are, you know,
13 these are not isolated instances.

14 THE COURT: Okay. Mr. Colyer, do you want to be
15 heard further, sir?

16 MR. JAY FERGUSON: Your Honor, can he unmute his
17 mic. so my client can hear what he says? We can't hear anything
18 he says over here.

19 MR. COLYER: Your Honor, not to be -- don't wish
20 to be heard any further other than to say we're not objecting to
21 the statement of Professor Stevenson's opinion.

22 THE COURT: Yes, sir.

23 MR. COLYER: He's qualified as an expert and, with
24 all due respect to him and his scholarly work, it is not
25 relevant to North Carolina. He can express his opinions,

1 attempt to tie his opinions to the exhibits that might be
2 related to North Carolina that would come later on direct
3 examination, but the exhibit in and of itself, we respectfully
4 ask that it be not admitted into evidence.

5 THE COURT: All right. Anything further on behalf
6 of the defendant, ma'am?

7 MS. STUBBS: No, Your Honor.

8 THE COURT: All right. Fundamental issue in this
9 case is the issue of race as it may bear on the jury selection
10 process. This study, as I understand it, relates to that issue.

11 THE WITNESS: Yes, sir.

12 THE COURT: The State's objection and exception
13 are noted for the record. Defendant's Exhibit 19 is admitted.
14 Yes, sir.

15 BY MS. STUBBS:

16 Q Professor Stevenson, can you describe for us generally
17 what this study looked at?

18 A Yes. So, of course, my ears are open, so it is hard --
19 we actually did look at jury selection all across the south
20 including North Carolina. We looked at court opinions, we
21 looked at transcripts, we talked to excluded jurors, we talked
22 to lawyers, we talked to former prosecutors, we talked to
23 prosecutors. We were trying to evaluate what is the extent of
24 racial bias in the current use of peremptory strikes in
25 particular. We reported findings on just eight states, and we

1 didn't report findings on North Carolina because our work in
2 North Carolina was nowhere near as extensive as our work in
3 these other states, so we didn't report findings on those, but
4 we did look at evidence of racial bias throughout the south.
5 And, in fact, some of the images are not from any of the eight
6 states. Some of the decisions we talk about are not from any of
7 the eight states.

8 We were trying to document: Is this resistance to full
9 representation, particularly in serious criminal cases and
10 capital cases -- is it still evident? And that is what we were
11 curious about. Twenty years, 25 years after *Batson*, have we
12 made dramatic progress, have we made little progress, have we
13 made no progress? And we were interested not only in
14 understanding the answers to those questions but we were also
15 interested in thinking about what we might do about it, so we
16 wanted to make recommendations on how we could eliminate this
17 long history of excluding people on the basis of race, and so
18 that was the intent.

19 And what we found, which was not really a surprise to
20 us, is that there was still dramatic evidence of
21 underrepresentation, of racial bias, in jury selection in the
22 states that we reviewed. In some jurisdictions, we found that
23 as many as 80 percent of the African-Americans in particular
24 communities were being excluded through peremptory strikes. We
25 found a majority of black counties where no person of color had

1 ever served on a capital trial jury. We found persistent
2 exclusion and discriminatory use of peremptory strikes, and we
3 found other things that were deeply troubling to us with regard
4 to the lingering persistence of the legal racial discrimination
5 in jury selection.

6 Q What time period did this report focus on?

7 A We began mostly after the *Batson* decision came down. We
8 were primarily interested in knowing whether *Batson* had the kind
9 of impact that many had hoped it would have with regard to
10 eliminating racial bias in jury selection. So we looked
11 primarily at cases between the mid-eighties up until about 2010.

12 Q And can you tell us in a little more detail who did the
13 research and what the sources were?

14 A Sure. My staff and I did the research. I directed the
15 research. I had a dozen attorneys and paralegals and law
16 students who helped review transcripts, who helped review
17 records, who went out and interviewed people with direct
18 experience and direct knowledge of jury selection. As I
19 mentioned, I think we interviewed about 100 excluded jurors. We
20 talked to dozens of lawyers, court personnel, other courtroom
21 actors about these issues and reviewed, you know, hundreds and
22 hundreds of records around the question of whether there was
23 racial bias in jury selection.

24 Q And you mentioned earlier that not -- that there has
25 not been that significant a change. Can you tell us about why,

1 through your research, you found that we still have problems in
2 discrimination even after *Batson* was decided?

3 A Yeah. Yeah. No, I think there were a number of things
4 that became clear, you know, pretty immediately. Number one is
5 that when you have the kind of history that I've described,
6 you're not going to just turn things around without a conscious
7 commitment to that. What we've learned in antidiscrimination
8 work is that if discrimination has become part of the culture,
9 that is if not having people of color in the jury box has become
10 both the history and the tradition and the culture around trial
11 work, a court can't just say, Don't do that anymore, and things
12 change. You really have to make an overt commitment to
13 correcting that problem, particularly when the problem has been
14 around as long as this has, and we found virtually no evidence
15 of that kind of commitment. In the communities where these
16 problems had been well-documented, there wasn't really much of
17 an acknowledgment that racial bias in jury selection had been a
18 problem, and there was certainly no commitment to eliminate it,
19 and so the absence of that I think created a condition where it
20 was quite likely that these problems were going to persist.

21 The second thing we found was that *Batson*, although
22 well-intentioned, did not really do a lot to disempower
23 decision-makers who were motivated to exclude people on the
24 basis of race. What the court said is that a defense lawyer can
25 object and say, Look, it looks like there is racial bias in jury

1 selection going on in my case. And if the judge -- and it is a
2 big if -- if the judge believed that that was true, the
3 prosecutor would then be required to explain why these people
4 were being excluded, and then the court would have an
5 opportunity to evaluate whether that violated any rights. It's
6 an incredibly discretionary, very subjective mechanism for
7 challenging racial discrimination.

8 And what we found in our study is that there were
9 problems at every level, first, with regard to whether defense
10 lawyers object. You know, talking about race in American
11 society is still very difficult, particularly in public venues
12 like courtrooms. So in a lot of the cases that we reviewed, the
13 initial problem was that the defense lawyer was quite unwilling
14 to say that the prosecutor was doing something that might be
15 interpreted as racist because, in our society, at least today,
16 being characterized that way is very, very provocative. We
17 don't like to call other people racist. We don't like to say
18 someone is engaged in racial discrimination. It is a very
19 powerful attention in our society. So what we found in a lot of
20 these cases is that African-Americans -- excuse me,
21 defendants -- defense lawyers simply weren't objecting and when,
22 of course, they didn't object, that typically meant there was no
23 scrutiny, no analysis, the same old same old continued.

24 The second thing we found is that with the way the
25 court defined and applied *Batson*, it was really easy to give a

1 reason that a court might accept as race-neutral. You just
2 simply had to describe the juror in some terms that didn't
3 include race. Well, that's the woman, that's a young person,
4 that's an old person, that's a person wearing glasses, that's a
5 person who is dressed this way, that's a person who sits this
6 way, that's a person who stands this way, that's a person that
7 walks -- you just had to give a description, and in a lot of
8 courtrooms, we found that was all the judge was looking for.
9 That was all that was expected even when the descriptions seemed
10 completely inconsistent with the actual reasons that the person
11 was being excluded, that is, the same description could be made
12 of white jurors who were now been included. The description
13 seemed to be completely unrelated to the person's ability to
14 serve, like wearing eyeglasses or talking softly or talking
15 loudly were some of the reasons we saw on some of these records.
16 But because of that and because it was tolerated became very
17 clear to a lot of people very early that you were not going to
18 dramatically affect the composition of juries through *Batson*.

19 The third thing we found which I think was deeply
20 troubling to us was that it was very injurious to people of
21 color, that is, coming to court, showing up in court, and then
22 being excluded, sometimes in case after case, was creating a
23 real harm that they would articulate when we talked with them,
24 and that harm they related to the general experience of
25 African-Americans who had suffered historic exclusion. But I

1 think the primary reasons were you didn't have robust
2 interventions by defense counsel, you had a very malleable
3 standard, and then the reviewing courts had a critical role to
4 play in some states, and North Carolina is one of those states,
5 the reviewing courts were very, very tolerant. North Carolina
6 really never reversed many of these cases, and there are other
7 states, other jurisdictions where that didn't happen, but I
8 think these were the conditions that meant that absent a very
9 strong commitment by local players to eliminate racial
10 discrimination, these problems were going to persist, and that
11 is what we have seen.

12 MS. STUBBS: Your Honor, may I approach the
13 witness.

14 THE COURT: Yes, ma'am.

15 (There was a pause in the proceedings.)

16 THE COURT: Is this 20?

17 MS. STUBBS: Yes, this is going to be 20 and 21.

18 THE COURT: Okay. Thank you, ma'am.

19 This is not being marked?

20 MS. STUBBS: That is not being marked.

21 THE COURT: Okay.

22 BY MS. STUBBS:

23 Q Now, Professor Stevenson, I have handed you a set of
24 slides as well as two exhibits that have been marked as Defense
25 Exhibits 20 and 21. For the record, Defendant's Exhibit 20 is

1 actually a duplicate of an exhibit that was previously admitted,
2 but if we take it out, all of the numbers will be wrong on your
3 future exhibits so --

4 THE COURT: That's okay.

5 BY MS. STUBBS:

6 Q Professor Stevenson, you mentioned that the response of
7 the district attorneys was one of the reasons that you found for
8 the limits in *Batson* essentially. Did you review some of the
9 training materials that have been used in district attorney
10 trainings in North Carolina?

11 A I did, yes.

12 Q And this is the -- a slide that was taken from
13 Defendant's Exhibit 20, which has already been admitted. Can
14 you comment on this in light of that finding?

15 A Sure. And let me just say as sort of context for this,
16 what we found in terms of how people were thinking about *Batson*
17 was very rare, very infrequent examples of a prosecutor saying,
18 We're going to change everything, I'm going to create a
19 zero-tolerance policy in my office, we're going to confess -- we
20 are going to do everything we can to signal that racial bias in
21 jury selection is not tolerated, that we want to create more
22 diverse juries, and there was some evidence of that. There was
23 a federal prosecutor in Memphis who created these procedures in
24 her office and had some really remarkable outcomes, but mostly
25 what we saw was resistance, and the resistance would be manifest

1 in a number of ways.

2 One of the ways it was manifest was that lawyers would
3 get together and actually come up with ways to conceal racial
4 bias by developing reasons that were going to be deemed
5 race-neutral and, therefore, acceptable to reviewing courts, and
6 in training materials, we saw a good bit of evidence of that.
7 We saw that in states all across the country where lawyers were
8 saying, Here's how you get around a *Batson* objection. Here's
9 how you deal with a *Batson* objection. Here are some reasons you
10 can give to avoid a finding of a *Batson* violation. And so what
11 you have here is an example of that. This is not a document
12 that is intended to tell you how to pick a jury. This is a
13 document that is labeled *Batson* justifications. *Batson*
14 justifications typically are only relevant when someone has said
15 you're excluding African-Americans, you're excluding people of
16 color, you're excluding some cognizable group.

17 And so what this reads like, in fact, is when you
18 exclude people of color, this is what you should say. These
19 are -- these are the things you should articulate, and we have
20 seen this in lots of the jurisdictions where we've done work
21 and, essentially, the goal is to describe the juror, preferably
22 in terms that are visible only to the people in the courtroom.
23 We like demeanor. We like the way they're sitting. We like the
24 way they move because those aren't subject to the same kind of
25 scrutiny on appeal in different settings as they are in the

1 courtroom. So the number one goal is to describe them in ways
2 that are less subject to criticism and critique to someone who's
3 not there. And then you develop all these other things that are
4 intended to make your decision to exclude them sound rational,
5 and you have these juror negative, juror negatives that are
6 being offered for that purpose.

7 Q Professor Stevenson, if you could turn to the next
8 slide, and this should correspond to the exhibit that I handed
9 you that was marked Defendant's Exhibit 21.

10 A Yes.

11 Q And can you explain what those materials appear to be?

12 A Yeah, well, I think what's significant about this -- and
13 I think it's significant to a lot of the problem that we have
14 found in creating a society that will actually diversify juries.
15 You know, you've heard evidence about unconscious bias, and then
16 there's evidence of what we call rational bias, and then
17 there's, of course, conscious bias. When -- the issue that the
18 court was dealing with in *Strauder v. West Virginia* was
19 conscious bias. It was a statute that said, We don't want black
20 people on juries. That's willful. That's intentional.

21 You heard the testimony about unconscious bias, which
22 is the person is not intending to necessarily do anything that's
23 racially discriminatory but their presumptions and their
24 attitudes are actually facilitating bias and discrimination that
25 is going to have a disparate impact. There is a third kind of

1 bias which we call rational bias. That is I am going to exclude
2 people disproportionately on the basis of race, but I have a
3 reason for it, and the reason that I have is that, well, they're
4 not as friendly to the prosecution. They're not as friendly to
5 the police. They have a history of discrimination. They may
6 have an attitude. They have all of these features that make
7 them less good for me if I'm trying to get a conviction, and the
8 problem with that, of course, is that when we create a gender
9 parody in jury selection, it was -- you could credibly argue
10 that allowing women on juries might mean that the jury is less
11 prosecution prone, but you couldn't justify the exclusion of
12 women simply because it felt better for the prosecutor to have
13 an all-male jury.

14 The same is true for race. It may be true that you're
15 more comfortable with an all-white jury. It may even be true
16 that that jury is more likely to presume guilt than to presume
17 innocence, but that fact doesn't allow you to discriminate. We
18 don't have equal protection and equal justice simply because it
19 works for us. We have it even when it doesn't work for us, and
20 so what you see here are reasons being offered that are intended
21 to legitimate why, if you're trying to get the conviction, it
22 doesn't matter, and so that's what we call rational bias.
23 There's a reason why these African-Americans aren't going to be
24 as good for me as whites, and that means that my reason is not
25 race, it's race-neutral when, in fact, what's organizing that

1 reason is this presumption built on race. And we see these
2 kinds of presentations in many of the training programs that
3 we've gotten evidence about.

4 Q And for the record, this refers to a portion of the
5 exhibit that -- or actually, Professor Stevenson, could you read
6 this portion for us?

7 A Sure. This is the -- from a capital case seminar in
8 1995 with directives to how to approach jury selection in an
9 effort to define the features of jurors that will be good for
10 your side.

11 Q You mentioned that the role of defense counsel and
12 their -- I think you described it as being uncomfortable with
13 making objections had played a role. I'd like you to turn to
14 the next slide and --

15 MS. STUBBS: Your Honor, may I approach the
16 witness.

17 THE COURT: Yes, ma'am.

18 (There was a pause in the proceedings.)

19 BY MS. STUBBS:

20 Q Professor Stevenson, do you recognize this slide here?

21 A Yes. Yes. This is one of the cases that I reviewed in
22 going through North Carolina materials, and what was interesting
23 to me about it was really sort of two things. First, even with
24 the directive that you cannot exclude people on the basis of
25 race, what was astonishing to us was when we reviewed the

1 materials, we found that sometimes people were so race-conscious
2 in their jury selection that even when they were attempting to
3 give race-neutral reasons, they were actually relying on race,
4 and this is an example of this. A defense attorney has objected
5 or -- excuse me. There has been a challenge around jury
6 selection, and the court is reviewing what the prosecutor said,
7 and what the prosecutor said is that he struck these two women,
8 quote, both black females, both 27 years old, old enough, almost
9 the same age as the defendant. And so it's an example of one of
10 the times where even in trying to explain the rationale for
11 excluding someone, we see a prosecutor invoking race, which
12 strongly suggests that there is race consciousness.

13 The second thing that is significant about this case,
14 however, is that the defense lawyer doesn't specifically object
15 to the fact that the prosecutor is relying on race to explain
16 the exclusion of these jurors, and so the court can't actually
17 grant relief, can't remedy this discrimination, because it
18 believes that it doesn't have an adequate objection, and that's
19 the challenge in many of these jurisdictions. Most
20 jurisdictions and certainly outside the death penalty context
21 but even in the death penalty context, without a clear and
22 specific objection, it doesn't matter that there's overwhelming
23 evidence of overt bias and racial discrimination in jury
24 selection. Most courts feel disempowered to do anything about
25 that. So it reinforces the point I was making earlier about the

1 problems with defense lawyers talking about these issues, and it
2 also reinforces the fact that race consciousness was quite
3 rampant in jury selection both in North Carolina and the other
4 states that we studied.

5 Q And just for the record, you have been talking about
6 *State v. White*.

7 A That's correct. Yes, this is *State v. White* out of
8 Forsyth County in 1997.

9 Q Now, Professor Stevenson, you mentioned these concepts
10 of conscious and unconscious bias and rational bias. Could you
11 please turn to the next slide?

12 MS. STUBBS: Your Honor, may I approach.

13 THE COURT: Yes, ma'am.

14 (There was a pause in the proceedings.)

15 BY MS. STUBBS:

16 Q And, Professor Stevenson, I have handed you what's been
17 marked as Defendant's Exhibit 23. Can you identify what that
18 is?

19 A Yes. That's a section of a colloquy from *State v.*
20 *Green*, a case from Pitt County, 1989, where a lawyer is being
21 examined, and in this examination, the lawyer, who was a former
22 prosecutor, is being asked about his selection practices and
23 approaches when he was a prosecutor and what the lawyer, Howard
24 Johnson Cummings, subsequently acknowledges is that he did, in
25 fact, rely on race when selecting jurors, and he would use race

1 to exclude people and, you know, what he says: Did you select
2 juries on the basis of race?

3 Did I?

4 Question: Yes. Did you?

5 Answer: I probably have used that as a factor.

6 And he then goes on to say, I did this because it was a
7 tactical advantage for me.

8 And this is an example of what I mean by rational bias.
9 If you're persuaded that you're allowed to do whatever you have
10 to do to maximize the chance of your success, then you can
11 persuade yourself that even if you're excluding people on the
12 basis of race, that's okay. And, of course, that's what the
13 courts, I believe, have held that you cannot do, but you see
14 lots of evidence of that both in North Carolina and many of the
15 other states that we studied.

16 MS. STUBBS: Your Honor, may I approach.

17 THE COURT: Yes, ma'am.

18 (There was a pause in the proceedings.)

19 BY MS. STUBBS:

20 Q I have handed you what has been marked as Defendant's
21 Exhibit 24. Professor Stevenson, have you seen any other
22 materials where there's a reference to what you would describe
23 as a rational bias?

24 A Yes. I was provided with notes or documentation around
25 the study that Dr. Katz has done and specifically identified was

1 language that sort of suggested that the reason why there might
2 be exclusion of African-Americans was this history of past
3 discrimination. Does past discrimination make it more likely
4 that African-Americans are not going to trust law enforcement,
5 believe in law enforcement? These kinds of presumptions, these
6 kinds of prejudices have often been invoked to defend and
7 legitimate the exclusion of people of color, and it's notable
8 because we see it so frequently. In our work, in our studies,
9 we have people tell us all the time, Look, I have to get a
10 conviction, and I have doubts about these folks. I don't know
11 them. I don't trust them.

12 It's interesting in the statutory area that this is a
13 real issue. Throughout most of our history, we had statutes on
14 who could be in the jury box, and a lot of these statutes in
15 places like even North Carolina and certainly Georgia and other
16 states would say something like, You have to be a, quote,
17 upright and intelligent citizen. And you could certainly make
18 the argument that we want upright and intelligent citizens, but
19 if we interpret that to mean that only men can be upright and
20 intelligent or you have to know somebody to be deemed that way,
21 it is going to have very, very discriminatory consequences. And
22 the courts have been saying, You cannot rationalize, you cannot
23 legitimate it based on your preference for the kind of jury
24 you'd want, and I see this as an example of that where you're
25 kind of invoking a history of discrimination as a rational

1 basis, as a basis for why it would be permissible to exclude
2 people of color.

3 Q Professor Stevenson, can you describe for us the term
4 disparate treatment in the area of jury selection?

5 A Sure. One of the things that's happened in applying
6 *Batson* is in addition to looking at how many strikes were used
7 and what the numbers are, some courts have really been careful
8 about evaluating whether the reasons that are being articulated,
9 say something like age, apply equally to white jurors or white
10 prospective jurors as to black prospective jurors. If you say
11 you don't want anybody under the age of 30 and that is the
12 reason why you are excluding this African-American but there are
13 one or two white prospective jurors who are under the age of 30
14 who you didn't exclude, some courts have said that's a pretext.
15 That's not really about age; it's about race. And so looking at
16 whether people are being treated differently based on race
17 becomes an important part of the inquiry. Everybody knows not
18 to use race -- or most people know -- but what -- it doesn't
19 answer the question if you're actually only applying these
20 reasons to people of color, and so disparate treatment gets a
21 lot of attention in the *Batson* cases and in how we think about
22 how this reason is actually race-neutral or not.

23 Q And what does the term targeting refer to?

24 A Yeah, one of the phenomena that we found both in North
25 Carolina and in many of the other states that we've looked at is

1 that frequently the way some prosecutors have dealt with the
2 challenge of *Batson* -- if you're resisting *Batson*, then one of
3 the ways you might deal with it is you will kind of look
4 carefully at the African-Americans. We are going to specially
5 investigate African-American prospective jurors because we know
6 we need to come up with some description of them. We need to
7 disqualify them in some way. So what you tend to see is that
8 there's this intense inquiry either during voir dire or even
9 sometimes pretrial of African-American prospective jurors that
10 is really directed only at those black jurors. And even when
11 you find something that might be a legitimate basis, person has
12 a DUI, person has a relative that is a criminal defendant, it
13 doesn't negate the fact that there is racially-motivated
14 profiling going on in that particular case. And even though the
15 reason may be legitimate, it doesn't undermine the fact that
16 this is kind of race-conscious jury selection because our
17 profiling is actually going to give us an opportunity to find
18 things about some jurors that we're not going to find against
19 other jurors because we just don't care if the juror is white
20 and has these kind of issues. And so we saw some evidence of
21 that in some of the cases that we've reviewed.

22 MS. STUBBS: Your Honor, may I approach.

23 THE COURT: Yes, ma'am.

24 (There was a pause in the proceedings.)

25 BY MS. STUBBS:

1 Q Professor Stevenson, I have handed you Defendant's
2 Exhibit 25, *State v. Gary Trull*. Could you read this portion?

3 A Sure. This is *State v. Trull* from Randolph County in
4 1996, and in this particular case, the court actually makes a
5 finding about this phenomena that I'm describing. The court
6 says, quote, The court notes specifically that the district
7 attorney has spent noticeably more time conferring with the law
8 enforcement officer at the State's table and questioning this
9 potential juror on things that he had already questioned him
10 about more so than he has any other juror during the entire
11 selection process.

12 And, of course, this prospective juror was an
13 African-American.

14 Q And turning to Defendant's Exhibit 26.

15 A Yes. This is another example of this phenomena. This
16 is from *State v. Sanders* out of Transylvania County in 1995, and
17 the defense lawyer is complaining about what he perceives to be
18 harassments of the African-American jurors, and he is reported
19 as saying, I believe this juror is being asked these questions
20 solely because she is black, certain questions solely because
21 she is a black juror. I think the questions are blatantly
22 racist. Nobody else has been asked about child support,
23 illegitimate children, who's paying child support or anything
24 like that, and I think these questions are demeaning to all of
25 us who are sitting here and to the juror who's sitting up there,

1 and I'm asking the court to stop it.

2 Again, we found cases where the level of inquiry during
3 voir dire is much greater for people of color than for
4 similarly-situated white prospective jurors.

5 Q And, Professor Stevenson, can you explain the term
6 race-conscious questioning?

7 A Sure. It just simply means that you're going to get
8 questioned -- you're going to be treated differently based on
9 your race. If I show up into a court, what some people are
10 going to see first is that I'm African-American and, again, it
11 doesn't always mean overt hostility. I've practiced in
12 communities where I haven't practiced before, and I have sat
13 down at counsel table or at the table and a judge has walked out
14 and said to me, Where's your defense attorney? You shouldn't be
15 in here without your defense attorney. And he is making a
16 presumption that is rooted in just his experience. It doesn't
17 mean he's trying to be racist, and I think he thinks of it as an
18 honest mistake, and so -- but it is race conscious, right? It's
19 the fact that's triggering that observation. What -- we see
20 lots of evidence of that in jury selection. Different
21 protocols, different procedures, different thinking with regard
22 to how people are being questioned, evaluated, and considered
23 based on their race.

24 MS. STUBBS: Your Honor, may I approach.

25 THE COURT: Yes, ma'am.

1 (There was a pause in the proceedings.)

2 BY MS. STUBBS:

3 Q Professor Stevenson, I have handed you Defendant's
4 Exhibits 27 and 28. Can you identify what those are?

5 A Yes. This is from a Cumberland County case, *State v.*
6 *Golphin* in 1998 and relates to an issue that emerged around this
7 particular juror who heard some things and observed some things
8 that ultimately resulted in him being excluded peremptorily.

9 Q And before we get to those incidents, could you -- this
10 excerpt of questioning of the juror -- can you comment on this?

11 A Sure. Sure. Yes. This prospective juror had been
12 previously stopped for driving under the influence, and the
13 question was, essentially, Have you felt like you've been the
14 victim of racial profiling? The specific question is: Is there
15 anything about the way you were treated as a taxpayer, as a
16 citizen, as a, quote, young black male operating a motor vehicle
17 at the time you were stopped that, in any way, caused you to
18 feel that you were treated with less than the respect you felt
19 you were entitled to, that you were disrespected, embarrassed,
20 or otherwise not treated appropriately in that situation?

21 And, again, we've seen evidence where there's a
22 presumption that if you have any history of discrimination, that
23 that history is going to preclude you or bar you from being a
24 fair juror. Well, of course, there are many people of color who
25 have had incidents where they've been subjected to treatment

1 that they have perceived to be discriminatory, and the argument
2 has been that you cannot allow the past history of
3 discrimination to disqualify you from jury service because then
4 people of color will never get to serve on juries and, frankly,
5 if we continue to exclude them in the rates we have seen, that
6 problem will persist for a very long period of time. So it was
7 deemed an unobjectionable way to voir dire or qualify someone
8 for jury selection.

9 Q And if you can turn to the next slide and describe for
10 us this incident that you were alluding to earlier?

11 A Yes. This was a case where the prospective juror,
12 African-American juror, during voir dire complained about the
13 fact that when he was in the box, two jurors behind him made
14 comments, and the comments that they made was that the accused,
15 the two accused, the two defendants, quote, Should have never
16 made it out of the woods alive, and it was basically suggesting
17 that they felt like they should have been executed on the spot.
18 This prospective juror was very upset by that, reported it to
19 the prosecution and the judge, and that assertion was later used
20 by the prosecution to exclude that person from serving on a
21 jury -- was one of the reasons they used.

22 Q And the next slide just shows that in detail. Can you
23 describe the court's response?

24 A Yeah. What's interesting is that this was, again,
25 another instance where the trial judge felt uncomfortable with

1 this kind of use of this prosecutor of this prospective juror's
2 implication, and the court basically disagreed that the reasons
3 why the juror was excluded was because of this prior incident,
4 that the arrest on this driving under the influence, this
5 assertion about what happened in the courtroom during the jury
6 selection where he's complaining about these jurors who are kind
7 of suggesting that the defendant should be summarily executed,
8 and then the prosecutor also made comments about his demeanor.
9 He said he was not sufficiently deferential, that he had an
10 attitude, and the court contradicted that and said, I was here.
11 I saw none of that. So you see some evidence of that in this
12 transcript.

13 Q Now, Professor Stevenson, you alluded to this earlier,
14 but in your study, when you examined reportedly race-neutral
15 explanations, did you find examples that seemed facially
16 pretextual?

17 A Yes, frequently.

18 Q And can you just describe in general terms of --

19 A Sure. I mean, a lot of times, you'll have reasons that
20 are descriptive, but they don't really relate to what's going on
21 in the trial. So, for example, some people have been excluded
22 because they were too young at 28 to serve on a jury and too old
23 at 43 to serve on a jury. Some people have been excluded
24 because they're single. Some people are excluded because they
25 haven't read anything about the trial; some because they have

1 read too much. And so these kinds of reasons are frequently
2 invoked but on their face, don't really give you a basis for
3 concluding that this is something about their -- that this is
4 about anything other than race.

5 Sometimes the assertion is actually kind of a proxy for
6 race. For example, I don't know if we want to get to that, but
7 in *State v. Fletcher* out of Rutherford County in 1996, a juror
8 was excluded because of his membership, his association, with an
9 organization, and when questioned what the organization was, it
10 was the NAACP. And, here again, this was, in my view, not a
11 race-neutral reason, and the assertion that the organization was
12 anti-state or anti-death penalty, you could actually make that
13 association or assertion about lots of institutions. The
14 Catholic church might be perceived as anti-death penalty, but
15 there was very little evidence of white prospective jurors being
16 excluded simply because they were Catholic or other things like
17 that.

18 So, again, these were the kinds of reasons and, you
19 know, in *State v. Robinson* out of Guilford County in 1992, a
20 juror was excluded presumably because she had a liberal arts
21 education, and there are, of course, many, many jurors in cases
22 that serve that have liberal arts education. What was
23 particular about her liberal arts education was it was a liberal
24 arts education at North Carolina AT&T -- A&T State University,
25 which is an historically black college. While the word race

1 doesn't appear in his explanation, it would be, in any view,
2 difficult to see this as race-neutral, and the person also
3 complains about her husband also having this liberal arts
4 execution.

5 The other thing we sometimes see that are clearly
6 pretextual have to do with these kind of gut feelings. You
7 know, I just don't feel good about this person. We saw a lot of
8 evidence of this, and an example of that is in *State v. Gaines*,
9 a case out of Mecklenburg County in 1993, you know, and you see
10 what the prosecutor is asserting. This juror -- and I am
11 reading here.

12 This juror, the first thing that made the State, me,
13 have a question about him is he's the only juror that sat down
14 in the box and said he hasn't read anything about this case.
15 Secondly, his age is close in age to the defendants and that is
16 he is 25 and they are 19. In addition, he did go to Harding
17 (phonetic). That's where these defendants went. I have not
18 heard anything, did not ask him -- well, he did say he didn't
19 know them. But for these reasons, I would ask that he be
20 excused and would ask the court to consider *State v. Porter* and
21 *State v. Smith* in making a decision on this which says that the
22 State -- that among the reasons the State can have that are
23 proper are hunches about a juror, and I have a feeling about
24 this juror that is not a good feeling based on, number one, what
25 he has said either -- either not having heard anything about the

1 case that that's not true or, two, if he hasn't heard anything
2 about the case, I would be concerned that he's the type of
3 person that would not be sympathetic to the position of the law
4 enforcement.

5 And here, the judge sustains an objection, but this
6 kind of feeling, this gut feeling, is a reason we see asserted
7 frequently in some of these procedures.

8 MS. STUBBS: Your Honor, may I approach.

9 THE COURT: Yes, ma'am.

10 (There was a pause in the proceedings.)

11 BY MS. STUBBS:

12 Q Professor Stevenson, I have handed you what has been
13 marked as Defendant's 29 to 32. The exhibits 29 through 31, can
14 you just identify those for the record?

15 A Sure. What I was talking about, *State v. Fletcher*, this
16 is from -- 29 is from *State v. Fletcher*; 30 is from *State v.*
17 *Robinson*, which was the case I was describing; 31 is *State v.*
18 *Gaines*, which was another of the cases that we were discussing;
19 and then 32 is *State v. McCollum*, which we haven't discussed yet
20 but --

21 Q And before I ask you about that, Professor Stevenson,
22 you mentioned that *State v. Gaines*, that was a sustained
23 objection. What is the significance of the sustained objection?

24 A Well, it's a finding that these reasons are not valid,
25 that the evidence of racial bias in jury selection seems to be

1 persuasive, that this reviewer is persuaded that the real reason
2 the person is being excluded is because of race and not because
3 of these asserted, articulated rationales.

4 Q And now if you can turn to Defendant's Exhibit 32,
5 *State v. Henry McCollum*. What was significant about that case?

6 A Yes, and, I mean, again, I think that it's not that hard
7 to simply describe someone. It's just not. I mean, people who
8 practice law are capable of doing this, you know, pretty easily.
9 What's fascinating is that the descriptions sometimes so clearly
10 do not establish a credible basis for excluding someone when
11 there's been an assertion that they've been excluded on the
12 basis of race. This was a prospective juror who actually had
13 served as the trial court administrator for Cumberland County,
14 and she was being excluded because she was said to have been
15 familiar with the employees of the public defender's office.
16 Well, of course, as the trial court administrator, she would
17 also be familiar with the employees of the district attorney's
18 office and other judicial employees, and that was not deemed a
19 legitimate basis for excluding this person, and we see that
20 quite a bit where the reasons aren't kind of fairly applied.
21 There are differences when you actually look at them. The
22 reasons don't seem credible and persuasive.

23 Q And in that case, what was the response of the district
24 attorney after the --

25 A Well, this is why I think this word of resistance is so

1 descriptive because I think that the culture has been so
2 protected of being able to minimize the participation of people
3 of color to kind of be able to pick very discriminately among
4 African-Americans in ways that we don't among whites that it is
5 sometimes perceived as an outrage when somebody says you can't
6 do it. And in this particular case, the judge did not permit
7 this exclusion, actually sustained an objection, and that
8 resulted in a motion to disqualify the judge presumptively
9 because the judge had dared to say, No, you can't get away with
10 that. And there was a whole proceeding following this where the
11 judge had to make findings but, ultimately, did not authorize
12 this exclusion.

13 MS. STUBBS: Your Honor, may I approach.

14 THE COURT: This is probably a good point for us
15 to take a short break.

16 Folks, for purposes of planning, is it the goal to try
17 to complete the testimony of Professor Stevenson today?

18 MS. STUBBS: If at all possible, yes.

19 THE COURT: Well, State is entitled to full
20 opportunity to cross --

21 MR. COLYER: Judge, I'm sorry. I really hate to
22 say this, but I doubt that's going happen.

23 THE COURT: And I was about to say that. The
24 State is entitled the full opportunity to cross, but you've
25 answered my question in terms of the length of the break we're

1 about to take. We'll take the full 20 minutes. Is that
2 agreeable?

3 MR. COLYER: Yes, sir. Thank you.

4 THE COURT: Thank you, sir. You may step down.

5 (Whereupon, a recess was held from 3:24 p.m. until
6 3:45 p.m.)

7 (The following proceedings continued in open
8 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
9 Ferguson, Ms. Stubbs, Mr. Colyer, and Mr. Thompson were
10 present.)

11 MR. THOMPSON: Judge, before we actually go
12 forward -- we were trying to --

13 THE COURT: Scheduling matters?

14 MR. THOMPSON: Yes, and some details about some
15 conversations we had earlier. I don't want to get into those
16 now. I would like to continue where we are, but I would like to
17 reserve a few minutes before we stop or stay a couple minutes
18 late. I think that will save us all some logistic time later
19 on.

20 THE COURT: I appreciate that. Thank you, folks.

21 Okay. Let the record reflect all counsel are present.
22 The defendant is present.

23 Yes, ma'am.

24 MS. STUBBS: Your Honor, may I approach.

25 THE COURT: Yes, ma'am.

1 BY MS. STUBBS:

2 Q Professor Stevenson, I have handed you what has been
3 marked as Defendant's Exhibits 33 and 34.

4 A Yes.

5 Q Could you identify those for us?

6 A Yes. These are documents from *State v. Parker*, which is
7 a case out of Cumberland County and *State v. Williams* out of
8 Wayne County.

9 Q And could you read for us or describe for us the
10 colloquy that is shown on this slide here?

11 A Yes. This is another instance where we found,
12 basically, disparate treatment. The prosecutor is asserting the
13 reason for excluding this person, and what he says is, Judge,
14 just to reiterate, those three categories for *Batson*
15 justification we would articulate is the age, the attitude of
16 the defendant, and the body language. And the court comments
17 that, You are aware that Mr. Sellers, who is a white prospective
18 juror in seat six, has the very same birthday. Again,
19 emphasizing this problem with disparate treatment of prospective
20 African-American jurors.

21 Q And can you describe for us the significance of
22 Defendant's Exhibit 34?

23 A Yeah. This was another reason that emerges quite
24 frequently in our review, both here in North Carolina and in
25 other jurisdictions as well, where people are excluded based on

1 where they live, and frequently, the assertion is, well, you
2 live in sort of a bad neighborhood or a so-called high crime
3 area and, of course, residential segregation frequently means
4 that is a disproportionate percentage. In some communities, it
5 is the entire African-American community. And this was a case
6 where a juror was excluded or asserted to be excluded because
7 she lived on South Virginia Avenue. This was out of Wayne
8 County. And what was interesting to me was this actually was
9 one of the few cases where we had an African-American attorney
10 who also lived in the same community. But this problem of
11 geography as a basis for exclusion and geography being a proxy
12 for race in communities that are still quite segregated
13 residentially is another of the reasons we see popping up from a
14 race and law perspective that we would not deem to be
15 race-neutral.

16 Q And, Professor Stevenson, if you could go back to
17 Defendant's Exhibit 22.

18 A Sure.

19 Q And just for the purposes of the record, I realized I
20 didn't ask you to identify that.

21 A Yeah. That was from a capital case seminar, a capital
22 case seminar for prosecuting attorneys, I believe in 1995.

23 MS. STUBBS: Your Honor, at this time, defense
24 moves for the admission of Defendant's Exhibits 21 through 34.

25 MR. COLYER: No objection, Your Honor.

1 THE COURT: Well, there was an objection
2 previously made as to, I believe -- I am trying to remember the
3 exhibit number.

4 MR. COLYER: Other than the objection that was
5 previously stated, and thank you for reminding me.

6 THE COURT: Previous objection being preserved
7 and, again, overruled, exception being noted for the record.
8 They're admitted. Yes, sir.

9 MS. STUBBS: And, Your Honor, just for
10 clarification, I believe the State's objection was to
11 Defendant's Exhibit 19.

12 THE COURT: Yes, ma'am. Yes, ma'am.

13 BY MS. STUBBS:

14 Q Professor Stevenson, are there other tactics that
15 you've come across in your review of the North Carolina
16 materials that you would characterize as avoidance with *Batson*
17 compliance?

18 A Well, one of the interesting things -- and we saw here
19 in North Carolina, we have also seen it in other jurisdictions,
20 is that, you know, the kind of effort to get around *Batson*
21 seemed to be such a dominant way of thinking about this issue,
22 that you will see in cases prosecutors giving reasons for other
23 people who actually struck the juror. That is, these are
24 prosecutors who are actually either looking at the record or
25 looking at other things and effectively theorizing why the

1 people were struck. And, of course, that's not going to be an
2 actual reason unless the person who is actually striking
3 actually gives the reasons. And some courts have been good
4 about not accepting that; others have not been. But there was a
5 high incidence of that where, you know, the reasons being
6 offered by someone else and even in some of the litigation
7 around these issues you will frequently see something that
8 suggests that the prosecutor is being told to, quote, give a
9 true race-neutral reason for why someone was excluded and, of
10 course, that is a very suggestive way of talking about it
11 because the reality is there is not supposed to be any race
12 consciousness at all, and you're just supposed to give your
13 reason why you struck the person. If that reason is in any way
14 shaped by race or race consciousness, then you haven't really
15 overcome the prima facie case that's been established by the
16 *Batson* objection. So I think the language that we use in
17 talking about this very much suggests that, for a lot of people,
18 it's kind of a game. Can I come up with something? Can someone
19 come up with something? Can we put something together that will
20 satisfy a reviewer that this looks like it's not about race,
21 whether, in fact, it is or not? And, of course, in
22 antidiscrimination work, that has been an historic problem.
23 We're living in an era where very few people willingly admit to
24 racial bias but it does, I think, suggest the level of
25 resistance that we've had to this longstanding problem, a full

1 participation on the part of African-Americans.

2 Q Now, Professor Stevenson, at the beginning of your
3 remarks, you mentioned the injury to excluded African-American
4 community members. Can you describe what you found in your
5 report about that?

6 A Yeah. I think for me, it wasn't totally surprising, but
7 I was a little struck by the intensity of the sense of
8 victimization that people had. You know, as a lawyer involved
9 in these cases, you sometimes get frustrated because the
10 appearance is that nobody wants to serve on a jury, and you
11 sometimes see people doing everything they can to get out of
12 jury service, but what we found with this population was a
13 tremendous sense of hurt. People felt really victimized, really
14 burdened by the fact that they had been excluded. Some of them
15 talked about being police officers or correctional officers or
16 military people, and they would say things like, I have been
17 trying my whole life to be deemed acceptable to the people that
18 make these decisions, and yet I'm still not. And that kind of
19 conversation was striking to me because it did reveal how
20 harmful the perception of this bias and the practice of this
21 bias can be not only for the excluded jurors but for their
22 communities as well. We talked to the children of a lot of
23 people who have been excluded that would give voice to some of
24 these perspectives. So I was struck, frankly, at how resonant
25 this problem was in the communities where we did our work, and I

1 certainly saw evidence of that in the juror statements that I
2 reviewed here in North Carolina where people seemed quite broken
3 by the experience of not being able to serve on a jury because
4 of their race and the perception that it's about this continuing
5 resistance to allowing people of color to have a space in the
6 criminal courts.

7 MS. STUBBS: Your Honor, may I approach.

8 THE COURT: Yes, ma'am.

9 (There was a pause in the proceedings.)

10 BY MS. STUBBS:

11 Q Professor Stevenson, I have handed you what has been
12 marked as Defendant's Exhibits 36 through 44. Can you identify
13 what those are?

14 A Yes. These are affidavits that were collected from
15 people who have been excluded from jury service. They are all
16 African-Americans commenting on their histories in the
17 communities where this took place and their recollection about
18 their experience being excluded.

19 Q And how did these affidavits fit with what you found in
20 your study of the other states?

21 A This is very much consistent with what we saw. What we
22 noticed is when we started talking to people about the instances
23 that took place in the case, people would immediately start
24 talking about kind of their broader history. If they were of
25 age to have experienced Jim Crow, they would talk about

1 segregation. They would talk about the practices and customs
2 that were designed to humiliate and demean and marginalize
3 people of color, and their experience of being struck really
4 seemed to trigger that, and they would be quite emotional, some
5 of these interviews, quite intense, and you see evidence of that
6 in these statements as well. People talk about the hardships
7 that they've overcome and the accomplishments they've made.
8 They talk about their commitment to full participation in the
9 civic life of the community, trying to help the community, their
10 readiness to convict. I mean, one of the presumptions that I
11 think is particularly provocative to people of color, you know,
12 the rates of violence, the rates of victimization from violent
13 crime are much higher in communities of color than in noncolor
14 communities, and so this notion that somehow, you know, there's
15 this disinterest in prosecuting crime or protecting people from
16 victimization is very provocative, and you see some evidence of
17 that in these statements and the statements of people we
18 encountered along the way. These comments, these affidavits are
19 very consistent with the evidence we discovered when we looked
20 at this issue across the region.

21 MS. STUBBS: Your Honor, can I have just one
22 minute.

23 THE COURT: Yes, ma'am.

24 (There was a pause in the proceedings.)

25 BY MS. STUBBS:

1 Q Professor Stevenson, have you reviewed any evidence or
2 affidavits from North Carolina practitioners?

3 A Yes, I have. I have looked at affidavits from lawyers
4 and prosecutors and judges who have all been commenting on their
5 observations about the persistence of race consciousness in jury
6 selection, racial bias in jury selection.

7 MS. STUBBS: Your Honor, may I approach.

8 THE COURT: Yes, ma'am.

9 (There was a pause in the proceedings.)

10 BY MS. STUBBS:

11 Q Professor Stevenson, I have handed you what has been
12 marked as Defendant's Exhibit 35. Can you identify those?

13 A Yes. These are the statements that I reviewed from
14 lawyers, people in the courtrooms during jury selection giving
15 their observations about the persistence of racial bias that --
16 the disparate treatment of African-Americans that they've
17 observed during jury selection, their reflections on how this
18 problem continues and the lack of meaningful response of reform
19 in the communities where they practice.

20 Q And what was your conclusion based on that review?

21 A Well, that, again, similar to what we found in our
22 review of the records and our review of the available evidence,
23 that this was quite consistent with what we've seen in other
24 jurisdictions that -- you know, what's interesting about this
25 kind of discrimination -- and I think the study reveals this as

1 well -- you see very dramatically that your chance of getting on
2 a jury is much, much, much lower if you're a person of color in
3 many of these communities, and what these reflections and what
4 these reports suggest is that it's visible to lots of people
5 including the people who are actively involved in jury
6 selection.

7 MS. STUBBS: Your Honor, at this time, we would
8 move for the admission of Exhibits 35 through 44.

9 MR. COLYER: Your Honor, respectfully, with
10 respect to these, as long as they are used for the basis of
11 Professor Stevenson's opinion and since these affiants are not
12 testifying and we are still discussing the issue of substantive
13 use of our affidavits as it's going to prolong this hearing, we
14 have no objection to the admission of the affidavits for the use
15 by Professor Stevenson on the basis of his opinion, but we are
16 not conceding that they are substantive evidence for those
17 purposes.

18 THE COURT: As a preliminary matter, they will be
19 utilized for purposes of defendant attempting to establish there
20 are bases for any opinion or opinions that may be given by the
21 witness?

22 MS. STUBBS: Yes, Your Honor.

23 THE COURT: Okay. Folks, we are going to have to
24 address this issue down the road both with regard to the
25 affidavits now being tendered and affidavits I anticipate will

1 be tendered by the State in terms of whether they're coming in
2 for substantive purposes or otherwise, so I'm admitting them
3 conditionally at this point for the reasons they are being
4 proffered without prejudice to your right at some later time to
5 seek to have them admitted for substantive purpose as well. We
6 will deal with that on that issue at that time. Is that
7 agreeable?

8 MS. STUBBS: Yes, Your Honor.

9 MR. COLYER: Judge, I would like to say for the
10 record that whatever happens with respect to the admission of
11 these --

12 THE COURT: Yes, sir.

13 MR. COLYER: -- if they are admitted for
14 substantive purposes, I believe the defense said earlier today
15 that they would proffer to us that we could use our affidavits
16 of the prosecutors for substantive purposes --

17 THE COURT: That is what I thought I understood.

18 MR. COLYER: -- subject to the rules of evidence,
19 and that is what we are still deliberating candidly, Your Honor.
20 We just don't know exactly how that fits in to potential
21 appellate litigation, and we want to make sure -- we, Mr.
22 Thompson and I -- don't do something here that hamstring anyone
23 in the future that might have to deal with this one way or the
24 other. And so if and when there is a ruling with respect to the
25 substantive use of these affidavits by the defense, we'd like

1 the Court to be mindful that they were going to allow our
2 affidavits to be substantively used subject to the rules of
3 evidence if we didn't call witnesses and extend this, and it
4 looks like there's about the same number of witnesses, Your
5 Honor, in this package perhaps as we might be getting to. And
6 so out of an abundance of judicial economy as an aid to the
7 defense in trying to get their witness testimony in and
8 finished, we don't want to be giving up any rights that we might
9 be waiving by not stating this objection.

10 THE COURT: Okay. Ms. Stubbs?

11 MS. STUBBS: We don't have any problems with that,
12 Your Honor.

13 THE COURT: Okay. Thank you, ma'am.

14 BY MS. STUBBS:

15 Q Professor, you mentioned the study. What study were
16 you referring to?

17 A Yes. I was referring to the Michigan State University
18 study that I think has been discussed previously here.

19 Q And have you reviewed that study?

20 A I have reviewed the study, yes.

21 Q And what conclusions did you draw from that study?

22 A Well, it was very much consistent with what we found in
23 our work and certainly what we saw in our review in North
24 Carolina as well is that African-Americans are dramatically less
25 likely to serve on juries, that they're being excluded anywhere

1 from two to three times more frequently than white prospective
2 jurors, and that is very much what we have seen in the other
3 jurisdictions that we've studied.

4 Q And, Professor Stevenson, based on your review of all
5 of this evidence including the Michigan State study, do you have
6 an opinion about whether race was a significant factor in
7 exercising peremptory strikes by prosecutors in North Carolina?

8 A Yes, I do. Unfortunately, I find dramatic evidence of
9 racial consciousness, racial bias in jury selection and the
10 proceedings surrounding these capital cases much like we have
11 found in other jurisdictions. But, yes, my opinion is that
12 there is considerable evidence of race consciousness, racial
13 bias in jury selection in North Carolina capital cases,
14 particularly in this era at the time of Mr. Robinson's trial.

15 MS. STUBBS: Thank you, Professor. We have no
16 further questions.

17 THE COURT: Okay. Mr. Colyer? Mr. Thompson?

18 MR. COLYER: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. COLYER:

21 Q Good afternoon, Dr. Stevenson.

22 A Good afternoon.

23 Q My name is Calvin Colyer. I don't think we've met
24 before. I'd like to ask you some questions if I might.

25 A Sure.

1 Q Sir, how was it that you came to be involved in this
2 litigation in this hearing?

3 A I was contacted by one of the members of the defense
4 team. I don't actually recall which one it was, but I was asked
5 if I would be willing to share some of our findings and asked
6 specifically about what we did in North Carolina when we
7 completed our report. I think I was first contacted after our
8 report was published.

9 Q And that was your August report of 2010 that was
10 Defendant's Exhibit Number 19, I believe?

11 A I think so. I think it was June -- I can't recall. We
12 had one draft that came out in June and one that came out in
13 August maybe.

14 Q Sir, do you have a copy of that up there with you,
15 Defense Number 19?

16 A Yes, sir. I do.

17 Q And on the inside flyer down at the bottom of the first
18 page, does it indicate it was printed in August of 2010?

19 A That's right, but just so you will know, there were
20 actually two versions of it. It didn't change substantively.
21 We had a different picture, and we just put it out again.

22 Q And sometime after the publication, either in June or
23 August of 2010, you were contacted by someone from the defense
24 team?

25 A I believe that's right. Yes, sir.

1 Q I noted on your CV, sir, that you have the 1991 ACLU
2 National Merit of Liberty Award {sic.} and wondered if perhaps
3 Ms. Cassandra Stubbs of the ACLU or the North Carolina chapter
4 of the ACLU had perhaps been the initial contact or
5 intermediary?

6 A For that award or --

7 Q No, sir. For this litigation.

8 A It could have been Ms. Stubbs or it could have been -- I
9 mean, I know many of the defense team members. I just don't
10 recall which one called me first.

11 Q Yes, sir. I'd like to ask you starting out, Professor,
12 some questions with respect to Defense Exhibit 19, if I could.

13 A Yes, sir.

14 Q I noted in the opening pages, I believe it's on page
15 six, that you have -- excuse me, page seven -- that you have
16 some recommendations --

17 A That's correct.

18 Q -- based upon your findings at pages five, six, and
19 seven, and two of your recommendations, specifically numbers
20 four and five.

21 A Uh-huh.

22 Q As part of those recommendations, it was stated in part
23 that, Prosecutors who repeatedly exclude people of color from
24 jury service should be subject to fines, penalties, suspensions,
25 and other consequences to deter this practice.

1 A Uh-huh.

2 Q That was a recommendation based on your finding.

3 A Yes, it was.

4 Q And then with respect to recommendation number five at
5 that same page, that, The Justice Department and federal
6 prosecutors should enforce 18 U.S.C. Section 243, which
7 prohibits racial discrimination in jury selection, by pursuing
8 actions against district attorney's offices with a history of
9 racially-biased selection practices.

10 A Yeah, that's right. I mean, one of our concerns was
11 that the Civil Rights Act of 1875, which authorized these kinds
12 of prosecutions, have never been pursued. In the 135-year
13 history, there have never really been any prosecutions, and we
14 thought that that undermined the effectiveness of signaling to
15 everyone that racially-discriminatory jury selection is simply
16 unacceptable.

17 Q And, sir, I believe we spoke earlier this afternoon, in
18 the context of the Court and the attorneys here, the Defense
19 Exhibit Number 19, Illegal Racial Discrimination in Jury
20 Selection: A Continuing Legacy, was based primarily upon the
21 historical precedents, perspectives, and study of what has, I
22 believe you referred to as the old south or the traditional
23 south, the nine states that geographically make up the southern
24 tier of the United States?

25 A Well, actually, what we did was we looked -- we gathered

1 evidence in a number of jurisdictions. We really only had the
2 resources to make findings in about eight states because we
3 wanted to travel to the states, and so we identified the states
4 in the beginning of the report that we were going to make -- we
5 were going to produce findings around, and so those are the
6 states that we identified. We were concerned about racial bias
7 in jury selection, frankly, throughout the region and, for that
8 matter, all across the country, but our focus was on the south,
9 and then our report findings are on these eight states.

10 Q And for the record, sir, would you state those states
11 for us?

12 A Sure. Sure. It was Alabama, Arkansas, Florida,
13 Georgia, Louisiana, Mississippi, South Carolina, and Tennessee.

14 Q Thank you, sir. Now, if you would not mind turning to
15 the back portion of Defense Exhibit 19, the section entitled,
16 Notes, beginning at page 51.

17 A Yes.

18 Q And --

19 A Yes.

20 Q I learned a long time ago not to go toe-to-toe with
21 somebody who's smarter than you are, especially a law school
22 professor so, sir, and I stand to be corrected if I am wrong in
23 this, and I don't mean any disrespect by any of these questions,
24 but in the footnotes 1 through 255 --

25 A Uh-huh.

1 Q -- there are no North Carolina cases cited there, are
2 there, sir?

3 A I don't -- I haven't looked at them carefully. It
4 wouldn't surprise me if there are no North Carolina cases cited.

5 Q And at footnote 245, there is one North Carolina --
6 although I am sure some alumni in here that might take exception
7 to that, the Judge included -- law school mentioned with respect
8 to citation, the Duke University Law School, volume 57, page
9 345, a 2007 discussion indicating that racially-diverse juries
10 may make fewer cognitive errors than homogeneous jurors.

11 A That is correct.

12 Q So would that be the only North Carolina citation so
13 far as law schools or scholarly publications that you're aware
14 of in this study?

15 A In all likelihood -- again, there are a lot of citations
16 so, but, yeah, it wouldn't surprise me that that's correct.

17 Q Just for the record, Mr. Stevenson, I am not a Carolina
18 or a Duke grad in any way. My allegiances are with State, but
19 that is a different matter. Now, sir, with respect to the
20 citations and the persons that you cite by way of authority here
21 on footnote number 47, I see the name of Bryan A. Stevenson --

22 A Correct.

23 Q Would that have been the young man, professor, who --
24 doctor who preceded you on the stand so far as you know?

25 A Me, yes.

1 Q Yes, sir. Okay. That's you?

2 A That's me.

3 Q That's you we're talking about. You're the Bryan
4 Stevenson professor that we're talking about?

5 A That's right.

6 Q All right. Okay. So you are cited in the publication
7 with respect to the footnotes and the scholarly work that you've
8 done in this field as it's indicated on your CV?

9 A That's right. It is a reference to some of my earlier
10 work, yeah.

11 Q Yes, sir. And, again, you're cited at footnote number
12 87 and footnote number 88. Is that some of your work, sir?

13 A Yes.

14 Q That is on page 53. I'm sorry.

15 A Yes. It's the same study, yes.

16 Q Yes, sir. And then, sir, over on page 58 at footnote
17 237, Samuel R. Sommers that is cited there, is that the doctor,
18 the professor from Tufts University who preceded you on the
19 stand?

20 A It is.

21 Q The man who testified ahead of you?

22 A It is.

23 Q Also at footnote 239, David C. Baldus. Is he the
24 gentleman that was referred to so far as you know with respect
25 to Dr. Sommers and has been referred to in this litigation by

1 other expert witnesses for the defense?

2 A Probably. I mean, I wasn't here for most of that, but,
3 yes. He actually did a study with Dr. Woodworth, who I believe
4 testified earlier, so I am sure there is really only one David
5 Baldus, so that would be him.

6 Q And, again, referring to footnotes number 241, 243,
7 244, and 245 where we mentioned the Duke law review, again,
8 Sommers is referred to, and that's Professor Sommers who
9 testified here earlier?

10 A That's correct.

11 Q And I believe, sir, just for the record so it will be
12 correct -- I sort of lost my place here in my citation, but I
13 think your notes did cite a fourth circuit case --

14 A Uh-huh.

15 Q -- in the notes we've been referring to, did it not?

16 A It probably did, yes.

17 Q And that was just on one occasion?

18 A Again, there's over a thousand references in here. It
19 wouldn't surprise me if it was just one.

20 Q And, sir, at page 19 of your study, Defendant's Exhibit
21 Number 19, I believe it refers in that -- the body of the
22 paragraph in the middle of the page there that corresponds with
23 footnote number 90, you cite the process in that particular case
24 in Alabama, they're talking about the process of jury selection
25 in Alabama.

1 A Yes.

2 Q And how the strikes go back and forth. Is that similar
3 to the federal court system that some jurisdictions use?

4 A It is, but what's distinct about Alabama -- and we were
5 trying to identify selection procedures that we thought
6 increased the likelihood of racially-conscious or
7 racially-biased jury selection. Alabama is one of the few
8 states that doesn't actually set a limit on the number of
9 peremptory strikes, so in Alabama we sometimes have cases where
10 25 out of 25 peremptories have been used to exclude all 25
11 African-Americans. Because there are no limits, someone who has
12 a mind to exclude people on the basis of race can do that, and
13 usually the argument is is that the more strikes you get, the
14 more, if you will, destructive you can be if there is some race
15 consciousness. So we were talking about how these various
16 procedures sometimes lend themselves to that more than others.
17 If each side only gets three strikes, then you tend to see less
18 evidence, and that was sort of the point there. But Alabama is
19 one of the states that has no limit on peremptories, and that is
20 what we were highlighting.

21 Q You're aware that North Carolina, under its capital
22 jury selection, has 14 peremptories with respect to the regular
23 jury and then one each for the alternates, and they can carry
24 over if not used?

25 A I am, yes. Fourteen is actually more than a lot of

1 jurisdictions, so it is still kind of at the high end, but you
2 are absolutely right that there are limits here that we don't
3 have in Alabama.

4 Q I noted in your Defense Exhibit 19, it has some
5 vignettes, for lack of a better term, with respect to the
6 persons that you mentioned who were disparately impacted and
7 tells a little story about their jury selection. Is that
8 similar, sir, to the affidavits you were given with respect to
9 jurors here -- I believe it was up to number 34, 36 somewhere in
10 that range?

11 A Yes, it is. I mean, it's basically -- you see a lot of
12 the same kinds of sentiment, the same kind of reflections that
13 we encountered when we did the study.

14 Q Professor Stevenson, you spoke with respect to the
15 roles of the various parties in the jury selection process, and
16 I might refer back to this --

17 A Okay.

18 Q -- to your exhibit. But you were talking about defense
19 attorneys being vigilant or not being vigilant or not perhaps
20 socially wanting to raise a *Batson* challenge to either deal with
21 that or embarrass someone. Is that what you're saying
22 basically?

23 A Yeah. We found a lot of communities where we rarely saw
24 timely objections, and when we'd talk to people, it was just,
25 for some people, very difficult to assert that someone was

1 acting in a racially-biased manner. That was, obviously, not
2 universal. Seen lots of places where there's vigorous
3 litigation around *Batson*, but frequently -- and this is
4 certainly true in the appellate opinions -- people don't get
5 relief on what appeared to be pretty dramatic evidence of race
6 bias in jury selection in part because of an inadequate
7 objection. The defense lawyer simply hasn't preserved the issue
8 or made the kind of record that would permit the court to grant
9 relief, and we saw a lot of evidence of that.

10 Q In the jurisdictions that you studied, did the trial
11 court have the ability to raise their own objections either *sua*
12 *sponte* or *ex mero motu*?

13 A They sometimes do. There's a theory under which you can
14 argue that that's the case, but we found very, very little
15 evidence of that in any of the jurisdictions that we studied.

16 Q Evidence that it existed or evidence that it actually
17 happened?

18 A That it happened. And in the jurisdictions where it was
19 possible, we rarely saw evidence of it.

20 Q Sir, I think that's all the questions I have with
21 respect to that particular exhibit so we can move on to
22 something else.

23 May I ask you a personal question, sir.

24 A Sure.

25 Q Do you have any opposition to the death penalty?

1 A Yeah, I -- I -- I don't like the death penalty.

2 Q Would it be correct for me to say that you are opposed
3 to the death penalty?

4 A That would be fair, yeah, sure.

5 Q Based upon what you know about capital litigation,
6 would you be a juror who could survive a challenge for cause?

7 A You know, I actually talk about that with my students a
8 good bit. I -- I think I probably could be a juror who could
9 survive a motion for cause. I probably wouldn't be a juror who
10 would survive a peremptory strike, but I actually believe that
11 in -- I think most trained professionals should be able to put
12 aside personal opinions and deal with honest questions. I'd
13 like to think I could do that.

14 Q So if you were being questioned as a juror in North
15 Carolina, do you think that you could fairly and impartially
16 consider both life imprisonment without parole and the death
17 penalty?

18 A You know, I think I could.

19 Q And do you think that you could fairly and impartially
20 vote for the punishment that was appropriate under the facts and
21 circumstances and the law as explained to you by the trial
22 court?

23 A If I accepted that role, yes. I think I could.

24 Q So -- all right, sir. Sir, when you said that you were
25 familiar with or perhaps there was some education with respect

1 to zero tolerance of bias with respect to jury selection, what
2 do you mean by that?

3 A Sure. So there were a handful of prosecutors who were
4 quite interested in changing the culture around jury selection
5 in the communities where they were practiced. These were
6 prosecutors who were willing to acknowledge that, yes, that
7 there was racially discriminatory use of peremptory strikes.
8 They witnessed it. They have been in offices where they felt
9 like that was even encouraged, and so a handful of them decided
10 that when they became either the elected district attorney or
11 the U.S. attorney, that they were going to very consciously try
12 to change that. That is, they were going to do proactive things
13 to educate their staff that people should not be excluded on the
14 basis of race. We should not be presuming that based on where
15 somebody lives, they can't be a fair juror or based on the way
16 someone necessarily dresses, they can't be a fair juror, and
17 that there would not be really any tolerance of evidence that
18 that prosecutor was engaging in peremptory strikes that appeared
19 to be racially biased. And I mentioned the U.S. attorney from
20 Memphis, Veronica Coleman-Davis, who told me about her efforts
21 with regard to that. She said it took a while to change the
22 culture because it had been the culture of that office for
23 decades, but she felt like she was successful in doing that by
24 addressing it, by being very vocal about it, by talking publicly
25 about her support for *Batson* and what it represents, by

1 acknowledging this history of excluding people of color and
2 being very vocal about her desire to see that end, and creating
3 an atmosphere where everyone knew that that courtroom was not
4 going to be a place where you'd see some of the disparities that
5 we've seen in some of these other jurisdictions.

6 Q I believe you mentioned that was in Memphis?

7 A Yes. Yes, sir.

8 Q And that was a state within the Defense Exhibit 19
9 study?

10 A It was, yes.

11 Q Have you seen or read anything with respect to the
12 study of the application of *Batson* in trial courts or appellate
13 courts for North Carolina?

14 A I have, yes. Both in my training here and, obviously,
15 in preparation for this, there was a good amount of attention
16 given to what was being done both on the state side and on the
17 defense side, and I referenced some of that.

18 Q And, sir, I believe you indicated that you had read Dr.
19 Katz's report?

20 A I have not.

21 Q Okay. You were asked about it with respect to a slide,
22 but you have not read his report?

23 A That's correct.

24 Q But you have read the Michigan State study?

25 A Yes, sir.

1 Q And based upon the Michigan State study and the study
2 in preparation for this, is that why you say that you think
3 you'd be peremptorily excused instead of --

4 A Well, not so much that. I mean, I -- you know, one of
5 the issues that's come up, you know, is what do people know when
6 they're in the courtroom, and I was actually dealing with this
7 in another case recently. In just trying to make a point, I am
8 an African-American. I could show up for jury service. I could
9 be questioned, and I could be excluded. I could not say just
10 based on the fact that I have been excluded that my exclusion is
11 on the basis of race. I couldn't make that representation. In
12 a capital case, I might say I can do all of these things in
13 compliance with the court's cases, but a lawyer wouldn't
14 necessarily be wrong to say, Oh, look, you're a full-time
15 advocate on these issues. I'm going to strike you. Or even the
16 fact that I'm a lawyer might get me struck. So there are things
17 about me that I could recognize being legitimate reasons why I
18 wouldn't get picked to serve on a jury. That said, there's no
19 question that, you know, race can be a part of that and, in
20 fact, one of my personal gripes is at 52, I have never been
21 summoned for jury service, and I am sort of not happy about
22 that, you know. I have been a homeowner for a long time. And
23 that's where these issues about the underrepresentation of
24 people of color in the pools have become very kind of real, and
25 we have been concerned about that, but I would concede that

1 somebody might strike me for reasons having nothing to do with
2 my race.

3 Q And would you concede that a reason for striking you
4 might be your reservation or opposition to the death penalty
5 despite the fact that you said you could follow the law?

6 A You know, I could see someone saying that, although, I
7 would -- I mean, I'd like to think of myself as somebody who
8 would take the oath very seriously. I would think long and hard
9 about that. I actually have never had that opportunity, but I
10 would think long and hard about that. My hunch is that there
11 are other things having nothing to do potentially with race or
12 nothing to do with my work on these issues that might be a
13 bigger problem. A lot of lawyers just don't like lawyers on
14 juries.

15 Q Have you ever heard any anecdotal evidence or any
16 information with respect to any of your studies that jurors
17 sometimes say they can vote for the death penalty and then they
18 get into the jury room and tell the other jurors, I don't care
19 what I told prosecutor and the judge. I am not going to vote
20 for the death penalty in this case or any other case. Have you
21 heard situations like that?

22 A There have been a few instances where we have
23 encountered cases where we have jurors who are identified as not
24 being able to comply with the law and we, in fact, have some
25 cases where there is litigation about their removal or their

1 nonremoval, et cetera. We see that actually on a range of
2 issues. You frequently find jurors having reactions to the
3 evidence that they didn't anticipate and that becoming an issue
4 that gets subject to litigation.

5 Q Would you agree that the capital punishment might be an
6 issue that would give rise to people doing that because of the
7 emotional nature of it and the complexity of it and perhaps the
8 personal reservation that someone would express after they said
9 that they could do it?

10 A Yeah, I don't -- no, I actually wouldn't say that. I
11 mean, my experience is that, you know, the evidence of these
12 crimes which are sometimes very distressing, very, very horrific
13 is quite powerful, and when it's established that there's a
14 highly aggravated crime, people who acknowledged that they are
15 willing to play this role are usually quite capable of it. It's
16 not easy, and I hear a lot of anecdotal expressions saying it
17 wasn't easy, but I actually think that's appropriate. It should
18 be challenging. It should be difficult. These are very, very
19 weighty decisions. But I actually haven't seen evidence in our
20 review that suggests that there is some huge institutional
21 barrier once you get to the deliberation process. Our state
22 actually doesn't require unanimity. Alabama doesn't require
23 unanimity on penalty phase, so we actually see a wide range of
24 jury verdicts coming back in support of these cases, and it is
25 surprising to me how little variance there is in some of these

1 cases.

2 Q You know that North Carolina does require unanimity --

3 A Absolutely.

4 Q -- for both the guilt and innocence phase and the
5 sentencing phase?

6 A That is right, and the guilt phase would be true in all
7 of the jurisdictions.

8 Q And that it does not require unanimity with respect to
9 mitigating factors?

10 A That is correct, and that's constitutionally required as
11 well.

12 Q *State v. McKoy* is our state case. You're familiar with
13 that?

14 A That's right and *Mills v. Maryland*, yes, sir.

15 Q But personally, you have never had any experience as a
16 juror?

17 A Not as a juror, no.

18 Q Have you ever had any experience as an attorney
19 participating in a capital case, a litigation, either as a
20 defense attorney or as a prosecutor?

21 A Yes.

22 Q And may I ask what role and can you tell us a little
23 bit about that?

24 A Sure. A defense attorney. I have never prosecuted a
25 criminal case, and I've been counsel in lots of death penalty

1 cases, both at the trial and the penalty level.

2 Q Please don't be modest. If you can, how -- when you
3 say lots, how many are you talking about?

4 A I probably represented over 100 death row prisoners. We
5 currently have about 108 cases in my office, death penalty
6 cases. I have been doing death penalty litigation since the
7 mid-eighties. Most of my work has been either in collateral
8 review or in post-conviction. Most of my trial work was
9 actually when the case is sent back down for a retrial, so I
10 have probably done a dozen of those kinds of cases.

11 Q And how many capital juries have you selected, sir?

12 A Probably a half-dozen.

13 Q And would those be all in the jurisdiction of Alabama
14 courts?

15 A Yes. Yes. One in Georgia, one -- I think one in
16 Georgia and the rest are in Alabama.

17 Q And when was the last time you did that, sir?

18 A Well, we've got a case pending now. It hasn't gone to a
19 jury yet. The last time we actually resolved a case was
20 probably a year-and-a-half ago. Last time we took it to a jury,
21 probably five, six years -- maybe longer.

22 Q So haven't picked a capital jury in the last five or
23 six years?

24 A No, not in the last five or six years.

25 Q And over what period of time backwards from that point

1 did your experience entail, if you can give us some years?

2 A Probably from 1990 until 2006.

3 Q So clearly in the post-Batson era?

4 A Yes. Yes. All in the post-Batson era.

5 Q Yes, sir. Now, sir, the affidavits that are before you
6 on the bench there, you read those before you came to court
7 today?

8 A Yes, sir.

9 Q The ones with respect to the jurors?

10 A Uh-huh.

11 Q And the ones with respect to the judges, lawyers. Now,
12 I am going to represent to you, sir, that we have had presented
13 to us previously the affidavits of the jurors --

14 MR. COLYER: And please correct me if I'm wrong,
15 defense counsel. I don't know that we have had the affidavits
16 with respect to the judges.

17 MS. STUBBS: You have.

18 MR. COLYER: We have. Okay. So those are ones
19 that have been coming -- forthcoming with respect to discovery?

20 MS. STUBBS: Yes.

21 MR. COLYER: All right. Thank you.

22 BY MR. COLYER:

23 Q Now, those affidavits, sir, they form the basis of your
24 opinion with respect to what you've testified this afternoon in
25 this courtroom?

1 A Part of my -- part of my -- yeah, part of the basis,
2 yes.

3 Q Not entirely but --

4 A That's correct.

5 Q -- you used those in the formulation of your opinions
6 here?

7 A Yes, sir, I did.

8 Q And with respect to the jurors, would that be as it
9 relates to -- I believe you said the disparate impact it had on
10 them as people in terms of victimization of them?

11 A Yeah, I would regard the relevance of the affidavits
12 from the jurors to be related to this question of harm, the
13 injury, the burden, the cost, the consequence of discrimination.

14 Q And then the affidavits from the judges, lawyers, and
15 prosecutors, et cetera, I believe you cited that as an example
16 of what? How did -- their take on how this system works or
17 their experiences or what -- how did you characterize that, sir?

18 A Well, it just sort of reinforced the observations that I
19 was able to see just reviewing these records, that is, I saw
20 evidence of race consciousness in jury selection in the way
21 *Batson* was being discussed, the way jury selection was being
22 managed, the way reasons were being offered. And I saw in these
23 affidavits from these lawyers and judges and others similar
24 reflections with similar observations but just confirmed what I
25 concluded based on the review that I conducted.

1 Q Now, sir, with respect to the slides that were shown,
2 is it correct that some of the material in the -- or all of the
3 material in the slides are reflected in the defense exhibits?

4 A Correct.

5 Q And you were handed exhibits and identified those and
6 then referred to slides?

7 A That's correct.

8 Q Do you recall any of the slides that were shown -- I
9 was trying to keep up, but I'm not sure that I was able to do
10 it. But do you recall any of the slides that refer to any items
11 that were not contained in one of the defense exhibits that Ms.
12 Stubbs asked you to identify and was admitted into evidence?

13 A I don't believe so.

14 Q So if we used the PowerPoint presentation type with
15 respect to some questions, they would relate directly to the
16 exhibits that have been admitted with the exception of the
17 affidavits; is that correct?

18 A I think so. Yes, I believe so.

19 MR. COLYER: Do you think that is right?

20 MS. STUBBS: All of the slides relate to a
21 document in evidence.

22 MR. COLYER: Yes, ma'am.

23 MS. STUBBS: Not all of the documents in evidence
24 are in the slides.

25 MR. COLYER: That is what I was asking.

1 BY MR. COLYER:

2 Q So with respect to the affidavits of the jurors --

3 A Uh-huh.

4 Q -- and the affidavits of the judges, prosecutors,
5 lawyers, et cetera, they are not -- there were no slides that
6 related to those?

7 A That's correct.

8 Q Okay, sir. Thank you. Appreciate it. Quite frankly,
9 sir, that is going to affect how I approach some additional
10 cross-examination and let me deal with the slides first --

11 MR. COLYER: And then we might be able to cut that
12 shorter, Your Honor.

13 THE COURT: Okay.

14 BY MR. COLYER:

15 Q Now, Professor Stevenson, with respect to the slides
16 that dealt with the defense exhibits talking about trials,
17 portions of transcripts, and those sort of things, would it be
18 correct to say, sir, that what you have on the bar in front of
19 you and the table in front of you that relate to those defense
20 exhibits, those are the only portions of the trial transcripts
21 that you saw with respect to the slides that relate to those
22 defense exhibits? For instance -- and let me -- I'm not trying
23 to be cute or play games. I notice that some of the exhibits
24 had a page --

25 A Uh-huh.

1 Q -- with some trial transcripts --

2 A Uh-huh.

3 Q -- statements by the court, perhaps statements by the
4 prosecutor, defense attorney. Would it be correct to say that
5 all that you have reviewed and seen with respect to those
6 exhibits are those pages? For instance, there weren't pages of
7 the transcript on either side or volumes that were given to you
8 for you to review?

9 A No, there were. So we did look at other parts of the
10 record. I mean, to be just direct, what I was interested in
11 doing was we found problems in some of the jurisdictions that we
12 studied so this problem of targeting, and so in evaluating these
13 records, I was interested in knowing was there any evidence of
14 that? And when I would find that, I would highlight it, and I
15 wouldn't necessarily highlight it all the time, but it would
16 just be my way of recognizing, well, I do see some evidence of
17 that here. Geography. Do I see some evidence of that?
18 Disparate treatment. Pretext. Et cetera.

19 Q But what you have in the exhibit is the culmination of
20 your examination and, from the defense point of view and from
21 your testimony, attempts to make your point with that particular
22 slide and that particular exhibit?

23 A I think that's right. With regard to what I was talking
24 about today, it would be reflected in these exhibits, yes, sir.

25 Q The reason I was asking that, sir, I noticed in

1 particular, let's say the *State v. Golphin* case that I was
2 involved in --

3 A Uh-huh.

4 Q The examination that you had on the slide with respect
5 to Mr. Murray --

6 A Uh-huh.

7 Q -- the juror who had witnessed, by hearing not by
8 seeing, some jurors make some statements in the back of the
9 courtroom. And I believe on one of the slides, you indicated
10 that the questions that I asked dealt with asking him if he
11 could tell if they were black or white. Would you concede that
12 that might have been an answer or a question that was asked by
13 myself to assist the court and the juror to attempt to identify
14 who those jurors were in an effort to ferret them out as opposed
15 to being racially biased in some way?

16 A Absolutely. No, I mean, I think it would have been very
17 appropriate to try to identify those jurors not only through
18 this particular juror to make sure that neither one of them
19 served on a jury as a juror who offered that kind of opinion,
20 and my judgment would not be able to fairly --

21 Q Did you discern from my questions, sir, that I was
22 trying to identify who those folks were and help in that
23 identification process?

24 A Well, you know, I actually looked at more of the
25 transcript, and I actually didn't see any additional effort to

1 try to identify those folks. I think had I seen that, it would
2 have made me feel better that that was the purpose, and then I
3 guess when that response, that kind of willingness to talk about
4 this was asserted to be a basis for his exclusion, it made it
5 seem like it was about him coming forward with it, not about
6 trying to find out what happened.

7 Q As opposed to his concerns about the violation of the
8 due process rights as expressed by him with respect to the
9 defendants?

10 A Well, I guess I read them as both the same, that is, he
11 regarded it to be not fair and an issue that the court might
12 want to address if people are saying these people should be
13 summarily executed before trial.

14 Q But would you concede that based upon what he said,
15 that he didn't see, he only heard, and he thought they sounded
16 white, but he could not identify anyone?

17 A Yeah. I think what he said was they were white --

18 Q Yes.

19 A -- and he said he knew they were white. He didn't turn
20 around and look at them, but there were so few people of color,
21 he knew where the people of color were in the box, and I
22 absolutely agree that it could have been that we should
23 investigate this. He said maybe some people sitting near me
24 heard it. We could have inquired about it. We could have
25 polled the jury. We could have done some further investigation,

1 and I think that, in my mind, would have made the primary
2 concern identifying these jurors for whom it might not be
3 appropriate to permit jury service.

4 Q Do you recall who the trial judge was in that case?

5 A I don't recall actually.

6 Q Would you accept my representation that it was the
7 Honorable Coy E. Brewer --

8 A I would.

9 Q -- who gave one of the affidavits in Defense Exhibit
10 Number 36?

11 A Correct. I think it is 35.

12 Q Thirty-five. Excuse me. Thank you, sir. And, sir, I
13 believe there was an exhibit and a slide perhaps dealing with --
14 I take that back. I think it was just an exhibit with respect
15 to *State v. White* out of Forsyth County, a North Carolina Court
16 of Appeals case?

17 A Yes, sir.

18 MR. COLYER: Could I have just a moment to find
19 it?

20 THE COURT: Yes, sir.

21 Folks, do y'all know what exhibit number that was?

22 MR. COLYER: If they have the number, that would
23 be helpful.

24 MS. STUBBS: It was the third slide, so I think it
25 would have been maybe 22? It was very early.

1 THE COURT: Okay.

2 MR. COLYER: Yes. Thank you very much, Ms.
3 Stubbs. It was 22. I just found it in my notes.

4 THE COURT: Thank you, ma'am.

5 BY MR. COLYER:

6 Q Sir, if you would, do you have that in front of you?

7 A I do, yes.

8 Q And I believe you cited this as an example of -- I'm
9 trying to go from memory --

10 A Sure. I can restate it for you. It was two things.

11 Q Thank you very much.

12 A It was both race consciousness, that is, the person is
13 invoking race in explaining why the people were excluded.

14 Q And no specific objection?

15 A That's right.

16 Q Yes, sir.

17 A And the failure of a specific objection, which the court
18 talks about as a basis for its inability to do more.

19 Q Just wanted to let you know I was listening. Just
20 having trouble with my notes. Professor Stevenson, the opinion
21 in that case, Judge Timmons-Goodson -- do you happen to know
22 Judge Timmons-Goodson?

23 A I do not.

24 Q So you do not know that she is an African-American
25 female?

1 A I do not.

2 Q You do not know that she is from Cumberland County?

3 A Didn't know that either.

4 Q You do not know that she was on the district court
5 bench here before she went to the Court of Appeals and then the
6 Supreme Court, and that she was previously a prosecutor in our
7 office. You don't know any of those facts?

8 A No.

9 Q But would it be correct to say that this was a case
10 that you cited with respect to the -- and I don't want to put
11 words in your mouth, and if I am mischaracterizing it, the,
12 perhaps, shortcomings of *Batson* and how the courts have to deal
13 with the issue?

14 A Well, to me, I mean, the appellate judge is frustrated
15 that there is evidence of race consciousness, race bias, but
16 given the way the review procedures are set up, she feels
17 disempowered to address it because of the absence of a precise
18 objection. And we do see lots of evidence of that where there's
19 a barrier to getting to the problem because either there's no
20 adequate objection or there's some other procedural challenge.
21 In fact, one of the things we talked about in our report is the
22 way in which proceduralism has actually shielded some of this.
23 The court didn't actually make *Batson* fully retroactive, and so
24 there were a bunch of executions in the eighties and early
25 nineties where there was dramatic evidence that juries were

1 selected in ways that appeared to be racially discriminatory but
2 because *Batson* wasn't fully retroactive, they could not actually
3 raise a *Batson* challenge. And one of the recommendations that
4 we made was that we not do that, that we elevate the importance
5 of racial fairness in juries over, even, the procedural
6 requirements that would insist on contemporaneous and precise
7 objections in part because we are trying to save the integrity
8 of the court, of the institution, and we don't want to just make
9 that responsibility the defense lawyer's and in the absence of
10 an objection not permit the court to create a meaningful remedy.
11 So I thought it was significant that this judge was expressing
12 some frustration about not being able to address the issue in
13 addition to the fact that the prosecutor in the case was
14 invoking race to explain why this person had been excluded.

15 Q And you are reading the invocation of race by the fact
16 that he referred to the two jurors based upon their race?

17 A Yes, and there are actually a lot of cases that address
18 that. There are a lot of states where that is just almost
19 summarily reversible error because reason is not race-neutral
20 when you invoke race.

21 Q You're not reading this as an identification, a further
22 identification of the jurors in trying to be specific as opposed
23 to just saying, two ladies or two men?

24 A That is right. Not in the *Batson* context where there is
25 a prima facie showing of discrimination.

1 Q And you did note in Defense Exhibit Number 22 that this
2 was a unanimous opinion?

3 A Yes. Yes.

4 Q And you realize the consequences of that in North
5 Carolina with respect to further appellate review?

6 A I am familiar with that.

7 Q Okay, sir. Professor Stevenson, I know you have some
8 obligations about moving on, and I want to apologize to you
9 before I say this because I have a stack of material here that,
10 frankly, I was thinking about discussing with you as it related
11 to the juror affidavits that you have --

12 A Uh-huh.

13 Q -- with respect to those exhibits. And, obviously, if
14 I go through this, it is going to take more than the next
15 15 minutes that we have here, and I may not do that. I may not
16 do that after making a decision with respect to conferring with
17 counsel and others about how to deal with these in terms of the
18 affidavits and the questions. So if I keep you over, let me
19 apologize to you for upsetting your plans, and I hope you won't
20 hold it against me if we come back in the morning and I don't
21 have a whole lot of questions for you, and I just wanted to
22 state that on the record and for Professor Stevenson's travel
23 plans if that's all right.

24 A I appreciate that.

25 Q We may not have to go through that at all, but we might

1 have to spend some more time tomorrow. And for the next few
2 minutes, sir, I'd like to deal with the exhibits and perhaps
3 some of the defense -- excuse me, the slides, and some of the
4 defense exhibits that maybe we can take care of that before we
5 break this afternoon. Defense Exhibit Number 32, sir, dealing
6 with *State v. McCollum*.

7 A Uh-huh.

8 Q And I don't know -- here it is. It is this particular
9 slide.

10 A Yeah. I have it, yes, sir.

11 Q Okay, sir. Thank you. Now, this says *State v.*
12 *McCollum*, Robeson County, 1991. Did you read some of the
13 transcript on either or -- excuse me. Did you read the order
14 entirely from which this excerpt was taken that's the exhibit?

15 A I did, yes.

16 Q And did you have a chance to read any of the trial
17 transcript with respect to *State v. McCollum*?

18 A Just some of it, yes, sir.

19 Q You're aware that *State v. McCollum* is a case that
20 occurred in Robeson County, and this was a retrial, change of
21 venue to Cumberland County, primarily by the *State v. McKoy* era
22 that we mentioned earlier?

23 A That's correct. I do recall that.

24 Q Are you aware, sir, that in this particular case, that
25 the prosecutor that came from Robeson County to Cumberland

1 County was an African-American male?

2 A I was aware of that, yes.

3 Q And do you know that -- and I stand to be corrected,
4 but I believe he is a district court judge now or was elevated
5 to the district court bench, and I believe he is still there,
6 Mr. John Carter, Judge John Carter?

7 A I don't know what his current position is.

8 Q And the order that is referred to there is from the
9 Honorable Jack Thompson?

10 A That is correct.

11 Q And have your colleagues here and defense counsel
12 informed you that he is the father of Assistant District
13 Attorney Rob Thompson?

14 A I was informed of that, yes.

15 Q All right, sir. With respect to that order, aside from
16 this, excuse me, teaching point that you have here, is there
17 anything in that order that made you think that Judge Thompson
18 was not doing, in some way, his job with respect to the
19 allegations that were brought forward in that case that resulted
20 in that order?

21 A No. I actually thought this was an example of a judge
22 responding appropriately to a reason being offered that was, in
23 the mind of this judge, clearly pretextual. You have somebody
24 sitting in the middle of the courtroom every day to say, We're
25 going to exclude them because they know the defense when they

1 obviously know the prosecution and everyone else equally, I
2 think would be a legitimate basis for pretext and so, no, I was
3 actually making the point that the fact that the court found
4 evidence of race consciousness in jury selection yielded a
5 motion to disqualify. You know, judges make rulings all the
6 time adverse to one party or the other, and we don't tend to
7 think that an adverse ruling is a basis for disqualification.
8 Although, in our review, we did find instances where when lower
9 court judges would sometimes make these *Batson* findings, that
10 there seemed to be a higher likelihood that there might be some
11 effort to disqualify the judge to suggest that this judge,
12 because they are willing to acknowledge race consciousness in
13 the jury selection, shouldn't be involved in the proceeding.
14 And this kind of presumption that if you say there's race bias,
15 you're no longer the kind of judge fit to do these cases is a
16 part of a bigger problem that we were interested in talking
17 about. So, no, what I found interesting about it is that the
18 judge was subjected to that motion simply for making a ruling
19 even if it was an adverse ruling, and that was consistent with
20 what we'd seen in some other jurisdictions.

21 Q And, sir, were you aware that one of the reactions that
22 Judge Thompson took was to excuse the entire jury panel that was
23 in court that day based upon his admonitions to counsel and the
24 result of what he felt was a *Batson* violation?

25 A That's right. And there's a real debate about that. A

1 lot of judges and advocates are now contending that that is the
2 more appropriate way to remedy *Batson* violations. I think there
3 was -- in the early days, people talked about putting the juror
4 back on, and then there was some suggestion that that frequently
5 doesn't work very well, either because of the mechanisms for
6 jury selection or because depending on the exposure that the
7 party has had to that, it can be actually problematic. And so
8 in a lot of cases, in a lot of jurisdictions, you see starting
9 over again, new panel, as the kind of remedy that courts are
10 frequently imposing to respond to *Batson* violations.

11 THE COURT: I apologize for the interruption. May
12 I see counsel at the bench, and I will put it in the record at
13 the appropriate time. Come on up, folks.

14 (Whereupon, a bench conference was held off the
15 record.)

16 MR. COLYER: Judge, I don't want to get out of
17 your province, obviously, with putting that on the record. Can
18 we defer putting that on the record until we finish?

19 THE COURT: Yes, sir. I simply wanted to make, in
20 the interest of full disclosure, everybody aware.

21 MR. COLYER: And my questions I'd like to pursue
22 with Professor Stevenson along those lines. I'm not trying to
23 preempt the Court --

24 THE COURT: Not at all. Go forward.

25 BY MR. COLYER:

1 Q Professor Stevenson, the juror that was in question
2 there, Ms. Stewart, she was referred to in the slide as having
3 worked in the Trial Court Administrator's Office back in 1991,
4 and the Trial Court Administrator's Office we are talking about
5 is here in Cumberland County. You understand that, sir?

6 A Yes.

7 Q And Judge Thompson was a member of the Cumberland
8 County Superior Court bench of which, obviously, Judge Weeks is
9 a member of that bench. And the lady that was involved was the
10 then assistant trial court administrator with whom Judge
11 Thompson would have been familiar with her background in his
12 office relationship, et cetera. Did you know that?

13 A I did not know that, no. From my perspective, I think
14 what was important to me about this juror was the implication in
15 terms of the offered reasons that this person was going to favor
16 the defense.

17 Q Yes, sir.

18 A She wasn't excluded because she was an employee of the
19 judge. She wasn't excluded because she's a courtroom personnel.
20 She wasn't excluded for cause because of her relationship to any
21 of the parties. She was excluded under the proffer because of
22 an intimation that she was going to favor the defense because
23 she was familiar with them. And what I read was the court
24 saying, That's not credible. Familiarity. She is familiar with
25 everybody, and you may have a reason for excluding her, but I

1 don't think this is it. And that, frankly, doesn't really, in
2 my judgment, get shaped by other reasons that might have existed
3 or even her status as the judge's employee.

4 Q And as we mentioned before that brief discussion, the
5 entire panel was excused, and that's apparently what gave rise
6 to then ADA Carter --

7 A Uh-huh.

8 Q -- filing a motion to recuse Judge Thompson that gave
9 rise to this order reciting that and denying the motion to
10 recuse.

11 A I understood. And the only point in my earlier answer
12 was new panel is actually a very common remedy for *Batson*
13 violations, and in a lot of jurisdictions, you see that's
14 actually the preferred remedy, so I am just trying to say it
15 wasn't an unusual thing to do that.

16 Q Thank you for bringing us back to that point. I kind
17 of lost where I was going when we had that conversation at the
18 bench. In the transcripts that you saw with respect to North
19 Carolina cases --

20 A Uh-huh.

21 Q -- did you see any procedures with respect to jury
22 selection that were markedly different in the way that they're
23 done in, for instance, Alabama. For example, what I am
24 referring to are the group questions and then the individual
25 voir dire and dealing with sensitive issues out of the presence

1 of other jurors. Do you do that in Alabama?

2 A Yeah, I think that there are a variety of practices. In
3 death penalty cases, you may get individually sequestered voir
4 dire, but you don't necessarily get that in all death cases.
5 The judges have a lot of discretion. I think the mechanism in
6 North Carolina that's distinct which we don't see in most of the
7 other jurisdictions is actually the priority sort of being given
8 to the State, the State actually having the first opportunity to
9 both engage in voir dire and in peremptory strikes typically
10 without much colloquy from the defense. And I know it varies
11 from court to court, but that's an unusual procedure that we
12 don't typically see.

13 Q Can I interrupt you for a second?

14 A Sure.

15 Q Do you see that procedure in any way impacting on the
16 way juries are selected for being or attempting to be
17 race-neutral in North Carolina?

18 A Yeah, I actually think it increases the likelihood of
19 racially-biased jury selection.

20 Q And why is that?

21 A Well, typically, you have an opportunity in most states
22 for both parties to interact with the juror and develop kind of
23 a complete picture of who the juror is so that if there's then a
24 peremptory challenge or even a cause challenge, the judge has
25 kind of a fully developed picture of who this person is and can

1 make a determination about whether the reason being offered is
2 actually credible or not. So, for example, if the juror kind of
3 pauses or hesitates on the question around whether they can
4 impose the death penalty, the defense lawyer might further
5 explore that, and the juror might say, you know, I was pausing
6 because I'm a big supporter of the death penalty, and that pause
7 wouldn't be a basis for exclusion. And so in a lot of the
8 states, it's this full record that then gives rise to the
9 assertion that this is a prima facie showing of discrimination,
10 but you really can't get to, in North Carolina, without having
11 the opportunity for the defense to ask questions of the juror
12 before they're peremptorily struck. A lot of states, for
13 example, don't allow a prima facie showing to be made just based
14 on the numbers, and that means you have to be able to kind of
15 look at some other things which are going to have a harder time
16 developing in North Carolina unless the defense is given an
17 opportunity to develop the questions.

18 Q Did you see in your review of any of the transcripts in
19 preparation for your testimony where superior court judges, even
20 though they might be reserving judgment with respect to the
21 showing of a prima facie case requiring the prosecutors to state
22 their reasons on the record or asking them if they wish to
23 voluntarily give their --

24 A Yes, I did see some of that, and there were certainly
25 instances of that, and we've seen that in other jurisdictions as

1 well.

2 THE COURT: Mr. Colyer, I apologize, but this is a
3 good point for us to stop.

4 MR. COLYER: Absolutely, sir.

5 THE COURT: Thank you, sir.

6 THE WITNESS: You're welcome.

7 THE COURT: You may step down.

8 THE WITNESS: Yes, sure.

9 THE COURT: Folks, is there any problem in our
10 starting at nine tomorrow morning?

11 MS. STUBBS: We were going to suggest that, Your
12 Honor.

13 MR. COLYER: No, sir.

14 MS. STUBBS: No problem.

15 MR. COLYER: Judge, there is one matter that Mr.
16 Thompson wants to talk to you about with respect to scheduling,
17 if you would give us an opportunity.

18 THE COURT: In this case?

19 MR. COLYER: Yes, sir, before we break this
20 afternoon. Didn't mean to interrupt you.

21 THE COURT: Absolutely. Not at all. That's okay.

22 MR. THOMPSON: We have been talking to the defense
23 about the affidavits, the particular details of how they would
24 come into evidence. And, again, we are trying to clarify these
25 for logistical reasons, and we may have to have an answer

1 tomorrow morning instead of this afternoon, we wanted to
2 clarify. And I think I have done so with Mr. Ferguson, James
3 Ferguson, during conversation before we went back in that, in
4 essence, the limitations discussed really meant -- and, Mr.
5 Ferguson, correct me if I'm wrong. The affidavits, the 74
6 affidavits, they would stipulate that they would be entered into
7 evidence to be used or could be used as substantive evidence as
8 it relates as if those folks had gotten on the witness stand and
9 testified on direct with the limitation that if there was
10 something in that affidavit if they had testified about that in
11 the affidavit would have been objectionable.

12 So if John Smith, in a made up example, said, I talked
13 to Jane Smith about this, and this is what Jane Smith said about
14 this, then I put it -- and then John Smith put it in the
15 affidavit. That would have been the level of hearsay and
16 subject to argument about admissibility. So I wanted to clarify
17 that, make sure that was correct both with the defense and with
18 the Court. And I also -- while we make the decisions we make
19 for the reasons we have to make them. First of all, like to
20 clarify with Mr. Ferguson, have I accurately laid out the
21 stipulation defense is willing to make as far as those 74
22 affidavits?

23 MR. JAMES FERGUSON: I think you have, but let me
24 just make sure we have an understanding.

25 THE COURT: Yes, sir.

1 MR. THOMPSON: Yes, sir.

2 MR. JAMES FERGUSON: We have stipulated that if
3 the Court accepts an affidavit as proffered by the defense --

4 THE COURT: Okay.

5 MR. JAMES FERGUSON: -- then that affidavit may be
6 received as substantive evidence subject to the rules of
7 evidence. Now, for us, that means a couple of things.

8 THE COURT: Okay.

9 MR. JAMES FERGUSON: One is that if the affidavit,
10 by its content, would not be admissible to the evidence as
11 substantive evidence, then we could challenge that affidavit
12 just as we could a witness.

13 THE COURT: In part or its entirely depending on
14 the circumstances.

15 MR. JAMES FERGUSON: Yes, sir. If there is a part
16 of it that we deem to be inadmissible, we may raise that
17 objection on admissibility before the Court, and the Court will
18 make a decision. If the Court decides that the content is
19 admissible, then it can be considered by the Court as
20 substantive evidence. I don't want to be read as saying that
21 because they have told us a document is an affidavit, it is
22 admissible.

23 THE COURT: Yes, sir.

24 MR. JAMES FERGUSON: So I just want to be clear
25 about that. We are going to view the affidavit as a person, and

1 if that person has evidence to offer that is not admissible, we
2 are going to object on it and hope the Court rules with us.

3 THE COURT: Well, for purpose of consideration,
4 folks, I initially thought about this when the issue came up
5 earlier. Rule 806 under the rules of evidence --

6 MR. JAMES FERGUSON: I'm sorry, Judge?

7 THE COURT: Rule 806, Attacking and supporting
8 credibility of declarant. When a hearsay statement has been
9 admitted into evidence, the credibility of the declarant may be
10 attacked and, if attacked, may be supported by any evidence
11 which would be admissible for those purposes if declarant had
12 testified as a witness. Evidence of a statement or conduct by
13 the declarant at any time, inconsistent with his hearsay
14 statement, is not subject to any requirement that he may have
15 been afforded an opportunity to deny or explain. If the party
16 against whom a hearsay statement has been admitted calls the
17 declarant as a witness, the party is entitled to examine him on
18 the statement as if under cross-examination.

19 MR. JAMES FERGUSON: I think that clarifies it,
20 Judge.

21 THE COURT: It does.

22 MR. JAMES FERGUSON: I think the simplest way to
23 say it is that we're not going to object to the materials in an
24 affidavit because the affiant is not present.

25 THE COURT: Yes, sir.

1 MR. JAMES FERGUSON: That is not going to be an
2 objection we will raise --

3 THE COURT: Yes, sir.

4 MR. JAMES FERGUSON: -- on the one hand. On the
5 other hand, if the material is objectionable and would be
6 objectionable even if the affiant were present --

7 THE COURT: Under any of the rules of evidence.

8 MR. JAMES FERGUSON: -- under any of the rules,
9 then we have a valid objection. Now, once the Court rules on
10 what can come in, then it can be considered as substantive
11 evidence by the Court if it's admitted as substantive evidence.

12 THE COURT: Yes, sir.

13 MR. JAMES FERGUSON: There may be instances where
14 a part of an affidavit may qualify as substantive evidence and
15 another part of it may not, but it might be accepted under some
16 other rule.

17 THE COURT: Okay.

18 MR. JAMES FERGUSON: But what I am saying is we
19 have available to us the full weight of the rules of evidence as
20 to these affidavits as do they. We don't want to be waiving
21 that. Now, let me just say parenthetically that we have
22 received some affidavits which -- the contents of which have not
23 been signed, and when we say that an affidavit is admissible,
24 then it is a signed affidavit. We do not waive signature of an
25 affidavit. You understand that?

1 MR. THOMPSON: Yes. Yes.

2 MR. JAMES FERGUSON: So, Judge, that is as clear
3 as we can be.

4 THE COURT: Well, making -- and I understand. But
5 making it as clear and as plain as possible, if there is a 401
6 objection, you would be free to make that objection.

7 MR. JAMES FERGUSON: Yes, sir.

8 THE COURT: If there's a balancing test under 403
9 that is required to be made, you're free to make that objection.

10 MR. JAMES FERGUSON: Yes, sir.

11 THE COURT: Any of the objections that would be
12 applicable if the witness were present in the courtroom under
13 the rules of evidence, you're preserving the right to make those
14 objections.

15 MR. JAMES FERGUSON: Yes, sir. Your Honor, let me
16 just be clear about one other aspect of this. The content of
17 the affidavit we would not object to per se on hearsay grounds,
18 but if an affidavit contained a hearsay statement by the
19 affiant, we will object to that hearsay statement.

20 THE COURT: Yes, sir.

21 MR. JAMES FERGUSON: Prosecutor A told prosecutor
22 B and prosecutor B told me this, then we may object to that, but
23 that's -- all that's just being a little more detailed about
24 what we are saying, but that's all we're saying. They are
25 subject to the rules of evidence.

1 THE COURT: Does that answer your question?

2 MR. THOMPSON: It does, Your Honor. Now, I am
3 contemplating -- I don't think we should discuss it now because
4 we hadn't fully contemplated --

5 THE COURT: I guess the starting point is look at
6 your affidavits and see what's there.

7 MR. THOMPSON: That's kind of what I was thinking
8 is -- and I am happy, instead of doing all this in open court,
9 sitting down with a member of the defense team at some point
10 with maybe we agree on ten as by way of example. I don't -- I
11 am reminded by an old boss of mine used to talk about buying a
12 pig in a poke. I gotta know what I'm getting before I agree to
13 anything. And it certainly makes sense and we have to represent
14 the State appropriately. I would love to save the State of
15 North Carolina and everybody in the courtroom the great deal of
16 time it will take, so that is why we are chasing this down, but
17 I certainly don't want to give up, just like the defense doesn't
18 want to give up any potential argument. I think if we sit down
19 with ten of them -- and I will discuss that after court -- we
20 might be able to have a further example of what we are talking
21 about and maybe save some time.

22 But as it relates to that, in the meantime, what we
23 foresee as our plan of calling witnesses, we don't expect to get
24 to any of those witnesses until Friday -- I am sorry, Thursday
25 of next week given what we have done so far, where we are. And

1 if -- to the extent we can get the Court's leave to tell those
2 prosecutors we will not need you until Thursday and we can nail
3 this down and the Court can -- we can all nail this down -- we
4 will know before Thursday, obviously, whether we need those
5 folks, but we wanted, based on the forecast, we thought there is
6 no way we would get to them before Thursday. We are assuming a
7 day for Katz. That may be short. That may be a little -- may
8 be a little short, may be a little long. But -- and we can fill
9 up Monday and Tuesday with the witnesses that we have planned at
10 least. So if scheduling -- if that scheduling is all right with
11 the Court and I can send an e-mail out to those prosecutor
12 reviewers, that would serve as fixing our immediate scheduling
13 problem.

14 THE COURT: Again, for purposes of
15 clarification --

16 MR. THOMPSON: Yes, sir.

17 THE COURT: -- Dr. Katz is anticipated to be your
18 first witness on Monday?

19 MR. THOMPSON: Yes, sir.

20 THE COURT: You've got additional witnesses that
21 you've got --

22 MR. THOMPSON: Not Monday but Wednesday, Judge.

23 THE COURT: I apologize. Wednesday. That's
24 right. We talked about that. You've got other witnesses that
25 we can start with on Monday.

1 MR. THOMPSON: Yes, sir.

2 THE COURT: Dr. Katz on Wednesday which, based on
3 your estimate, would carry us into Thursday.

4 MR. THOMPSON: Yes, sir.

5 THE COURT: That's the reason you are asking for
6 leave to have those folks released until that date.

7 MR. THOMPSON: Exactly. As well, just with Judge
8 Dickson as far as tomorrow, I think earlier in the week we
9 decided to schedule, if defense went into tomorrow, that we
10 would start Judge Dickson as our first witness we expect on
11 Monday.

12 THE COURT: Monday. Yes.

13 MR. COLYER: That's what we talked about earlier.

14 THE COURT: Yes, that's what we talked about
15 earlier.

16 MR. THOMPSON: Wanted to make that a matter of
17 record and make sure we are all on the same page. I think that
18 is all.

19 MR. COLYER: Well, no. Two things just with
20 respect to --

21 THE COURT: Yes, sir.

22 MR. COLYER: First, don't forget to put on the
23 record if there is anything in addition about the discussion
24 about --

25 THE COURT: That is what I am going to do, yes,

1 sir.

2 MR. COLYER: And it may be late in the day. This
3 may be way over my head. I may not just be having my eye on the
4 ball. When we are talking about the mechanics of the objections
5 based upon rules of evidence, are we talking about at the court
6 trial, court level here, or at the appellate court level?

7 THE COURT: Well, it's here because under the MAR
8 statute, the rules of evidence apply.

9 MR. COLYER: Yes, sir. No. And I understand
10 that, but are we expected to go through these affidavits for the
11 defense purposes and have their objections in the record here
12 before you make your rulings with respect to --

13 THE COURT: Admissibility?

14 MR. COLYER: -- admissibility so that that affects
15 your findings of fact, I guess is what I am asking, as opposed
16 to one or the other of us relying on some information in an
17 affidavit that was used here only to find out at the appellate
18 level that the other side objected or is objecting at that level
19 based on a rule of evidence.

20 THE COURT: Well, if you don't make the objection
21 here, I think you waive it.

22 MR. COLYER: Well, and that may be the little
23 quagmire that we might be getting into just by saying the rules
24 of evidence as they relate here and being required to inform you
25 of that before --

1 THE COURT: Yes, sir.

2 MR. COLYER: -- you make a ruling, which may be
3 putting some additional work on us to read the affidavits and,
4 you know, highlight or otherwise indicate to the Judge what is
5 objectionable before the ruling's made.

6 MR. JAMES FERGUSON: Well, and our position is
7 that we will make the objection at the time the affidavit is
8 offered.

9 MR. COLYER: Okay, sir. I just wanted to make
10 sure.

11 MR. JAMES FERGUSON: To simplify the process, if
12 you'll give us some advanced notice of which affidavits you want
13 to admit --

14 MR. COLYER: Yes, sir.

15 MR. JAMES FERGUSON: -- then we will know at that
16 point once we view that affidavit what objections we have to it,
17 and we will make that -- those objections known to the Court.

18 MR. COLYER: And then for -- it might -- would it
19 be something as simple as for the Court's edification and any
20 appellate review to highlight the portions in the affidavit that
21 one side, perhaps, has objection to and be --

22 THE COURT: What we'll probably have to do is have
23 two copies, one for purposes of the trial redacted or some
24 indication of what's redacted, what the ruling is predicated
25 upon. The record in that respect should speak for itself, but

1 if y'all will think about having a separate copy -- if it's
2 redacted, we don't have a jury, we don't have to worry about
3 that issue. I can simply rule on the basis of what's before me
4 at the time.

5 MR. COLYER: That's why I wanted to suggest maybe
6 we have a clean copy for the record --

7 THE COURT: That's the point I'm making.

8 MR. COLYER: -- and the redacted copy. Rather
9 than getting into a lot of cutting and pasting, would it be
10 satisfactory just to highlight the portion that is objectionable
11 in something that the Court could read --

12 THE COURT: Into the record.

13 MR. COLYER: -- like a yellow into the record and
14 then if the Court is going to say, I'm sustaining that
15 objection, then without having to cut and paste and spend a lot
16 of time housekeeping on those things, the Court would just say,
17 That's not admissible. I'm not considering it, and it's
18 preserved for the record in a clean copy and then a copy that is
19 highlighted with the portion that was objected to and excluded.

20 THE COURT: Is that agreeable?

21 MR. JAMES FERGUSON: Well, Your Honor, we don't
22 have any objection to some process being in place to address
23 that. I don't know whether it is going to be precisely that or
24 not. We'll think about a way to get that done.

25 THE COURT: Okay.

1 MR. JAMES FERGUSON: I think we will be able to
2 come up with something.

3 THE COURT: I appreciate that.

4 Any further matters from counsel for the State? I am
5 going to deal with the other issue now.

6 MR. COLYER: Yes, sir.

7 THE COURT: For the record, there was a bench
8 conference which was out of the hearing of Mr. Robinson, who was
9 present in the courtroom. The bench conference was initiated by
10 the Court solely for the purpose of -- confident that both Mr.
11 Colyer and Mr. Thompson are aware but it dealt with one of the
12 exhibits. And, folks, if you'll help me out, the exhibit
13 number? Judge Thompson's order?

14 MR. COLYER: Judge, I believe it was Defense
15 Exhibit Number 32.

16 THE COURT: Thank you. There was reference in
17 Judge Thompson's order to the juror at issue in that case,
18 Delois, D-e-l-o-i-s, Stewart, and there was further reference in
19 the order to her being an employee of the Trial Court
20 Administrator's Office. I felt it was appropriate, in the
21 interest of full disclosure, to inform counsel for the
22 defendant, who may not have been aware, that Ms. Stewart worked
23 for the trial court administrator, which is housed in the
24 Superior Court Judge's Office and was considered, for all
25 practical purposes, as a member of our staff, and she was in

1 that capacity at the time of that trial. So that is simply for
2 purposes of your information.

3 All right. Anything else? That's the subject --
4 anybody disagree that that is what we discussed at the bench
5 conference?

6 MR. COLYER: State agrees.

7 THE COURT: All right. So that's on the record
8 for purposes of Mr. Robinson being aware of that as well.

9 Any other matters, folks?

10 MR. COLYER: No, sir.

11 THE COURT: All right. Nine o'clock tomorrow
12 morning.

13 MR. COLYER: Yes, sir.

14 THE COURT: Thank you, folks. Have a good
15 evening.

16 (Whereupon, the Court adjourned at 5:17 p.m.,
17 Thursday, February 2, 2012, until Friday, February 3, 2012, at
18 9:00 a.m.)

19 (REPORTER'S NOTE: Ms. Jennifer Hack was replaced
20 by Ms. Shannon Ransom.)

21

22

23

24

25

C E R T I F I C A T E

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

I, Jennifer L. Hack, RPR, the officer before whom the foregoing proceeding was taken, do hereby certify that said hearing, Pages 692 through 949, inclusive, is a true, correct, and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

This 17th day of February, 2012.



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

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

vs.

MARCUS ROBINSON,
Defendant

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

This is to certify that the transcript of the proceedings in the above-captioned case, as ordered on the 3rd day of February, 2012, being 258 pages in Volume IV of XIII, was delivered electronically and by U.S. Mail to counsel listed below on the 17th day of February, 2012.

THE HONORABLE GREGORY A. WEEKS
Superior Court Judge

ROBERT THOMPSON
Assistant District Attorney
BEL LEWIS, Legal Assistant
Cumberland County Courthouse
P.O. Box 363
Fayetteville, North Carolina 28302
On behalf of the State

JAY H. FERGUSON
Attorney at Law
119 East Main Street
Durham, North Carolina 27701
On behalf of the Defendant



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

NORTH CAROLINA
CUMBERLAND COUNTY

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

_____)	
STATE OF NORTH CAROLINA,)	
)	RACIAL JUSTICE ACT HEARING
)	
vs.)	HEARD 2/3/12
)	
MARCUS ROBINSON,)	VOLUME V
Defendant.)	(Pages 950 through 1082)
_____)	

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: Calvin Colyer & Rob Thompson,
Assistant District Attorneys,
12th Judicial District; and
Jonathan Perry, Assistant District
Attorney, 20th Judicial District

For the Defendant: Jay Ferguson & Cassandra Stubbs,
Durham County Bar;
Malcolm Hunter, Orange County Bar; and
James Ferguson, Mecklenburg County Bar
Attorneys at Law

SHANNON RANSOM
Official Court Reporter
Cumberland County Courthouse
Fayetteville, North Carolina 28302
(910) 733-0826 (cell phone)
sransom1@nc.rr.com

DATE REQUESTED: 2/3/12

DATE DELIVERED: 2/22/12

1 (The following proceedings began in open court.
2 The defendant, defense attorneys and state's attorneys were
3 present.)

4 THE COURT: We ready to go forward, folks?

5 MR. COLYER: Yes, sir.

6 THE COURT: Let the record reflect all counsel
7 are present, the defendant is present. Professor
8 Stevenson, if you will please retake the stand and for the
9 record, sir, you remain under oath.

10 (BRYAN STEVENSON resumes the stand.)

11 THE WITNESS: Yes, sir.

12 THE COURT: Yes, sir.

13 MS. STUBBS: Your Honor, just before we get
14 started, by stipulation, the defense is moving into
15 evidence defendant's exhibit 45, which is a flash drive of
16 the transcript expert -- the voir dire transcripts
17 Professor Stevenson testified about yesterday.

18 MR. COLYER: As I understand it, Your Honor, they
19 were used in preparation of some of the exhibits that
20 Professor Stevenson used yesterday morning.

21 THE COURT: Okay.

22 MR. COLYER: And Ms. Stubbs has indicated to us,
23 and you can look at the exhibit and see, it has perhaps one
24 or two or three or four or five pages and there might be
25 some pages that were skipped in between to make the point

1 but not have it so voluminous for the exhibit, I assume.

2 THE COURT: So these are portions of the
3 transcripts.

4 MR. COLYER: Yes, sir.

5 MS. STUBBS: The portions were admitted
6 yesterday.

7 THE COURT: Yes, ma'am.

8 MS. STUBBS: And today we're admitting -- when I
9 say full transcript, I mean the full voir dire transcript,
10 not the actual trial.

11 MR. COLYER: That gave rise to the making of the
12 exhibits.

13 THE COURT: Yes, sir. And I understand there is
14 a stipulation as to its admissibility?

15 MR. COLYER: Yes, we have no objection as to its
16 admissibility showing the basis of the formation of the
17 exhibits and the basis of Professor Stevenson's opinion.

18 THE COURT: Thank you, sir.

19 MR. COLYER: Yes, sir.

20 THE COURT: All right. Defendant's exhibit 45 is
21 admitted for those purposes. All right.

22 MS. STUBBS: Thank you.

23 THE COURT: Yes, ma'am -- I'm sorry. Mr. Colyer.

24 MR. COLYER: Thank you, Your Honor.

25 CONTINUED CROSS-EXAMINATION

1 BY MR. COLYER:

2 Q. Good morning, Professor Stevenson.

3 A. Good morning.

4 Q. Sir, yesterday I indicated to you that I might have
5 some questions with respect to some of the exhibits and I
6 will try to do that as expeditiously as possible this
7 morning and it may be that we don't have as many questions
8 as we might have had otherwise yesterday --

9 A. Sure.

10 Q. -- in our thoughts in preparation. Okay. Let's see.
11 Primarily, the questions I want to start asking you about
12 this morning deal with the defense exhibits that were part
13 of the slide presentation yesterday, PowerPoint
14 presentation. And if you have those in front of you, I'll
15 try to go in order without skipping around so that we can
16 go from -- I think it's defense exhibit 20 now up to
17 defense exhibit 45.

18 A. Okay.

19 Q. 45 being the flash drive that Ms. Stubbs moved to
20 admit this morning.

21 A. All right.

22 Q. Okay. With respect to defense exhibit number 20, the
23 slide with the statewide district attorney training by Mr.
24 Spence that starts out with the Batson justification?

25 A. Yes, sir.

1 Q. Sir, do you know whether or not you had an opportunity
2 to review all of the training material that was provided by
3 the Conference of D.A.'s to the defense pursuant to their
4 public documents request and discovery and the information
5 that was requested about the training?

6 A. No. What I reviewed was the training materials that
7 related to jury selection.

8 Q. Okay, sir. But so far as you know, you were able to
9 look at all the training materials that dealt with jury
10 selection?

11 A. That was provided to me, yes.

12 Q. That was provided to you.

13 A. Yes.

14 Q. Yes, sir. And did it include more than just what was
15 admitted yesterday in the slide and the defense exhibits 20
16 and 21, do you recall?

17 A. I really don't recall. The slide apps (phonetic) did
18 not include even all of exhibit 20.

19 Q. Correct, sir.

20 A. So we just used the sheet from the slide but there
21 were other materials, yes, that I did review.

22 Q. When you were preparing for your testimony with
23 respect to the slides that were used yesterday, did you
24 have occasion to have the then proposed defense exhibit
25 presented to you for examination at the same time you were

1 prepping with the slide or studying with the slide?

2 A. I'm sorry. I didn't follow that.

3 Q. Okay.

4 A. Did I review these other materials at the same time?

5 Q. Yes, sir.

6 A. Yes.

7 Q. Okay. Now, and with respect to defense exhibit 20,
8 obviously it indicates that there was some training with
9 respect to Batson?

10 A. Correct.

11 Q. And there's been some testimony from Dr. Sommers that
12 one of the ways to become more sensitive to the unconscious
13 implicit bias and racism that he talked about was
14 awareness?

15 A. Um-hmm.

16 Q. Talking about it with peers and receiving lectures and
17 presentations and that sort of thing?

18 A. Right.

19 Q. So do you know the context in which state's exhibit --
20 excuse me, defense exhibit number 20, dealing with the
21 Batson justifications, were presented in terms of dealing
22 with the subject of Batson?

23 A. Yes. And I guess my concern is that I do think it's
24 important to talk about these issues. I think it's
25 important to talk about getting all lawyers open to trying

1 cases to a broader, more diverse population and there are
2 lots of things that we can do to do that. We do this with
3 defense attorneys as well and I've actually done it with
4 judges. So what you talk about is actually not relying on
5 a comfort level, not relying on familiarity as a basis for
6 presenting the case but rather thinking about how you talk
7 to people who are not just like you, who you've not seen
8 before and there's actually a lot of interesting stuff that
9 we've looked at from the earlier part of the century, you
10 know, when juries became integrated with women. There was
11 a lot of resistance. A lot of people were saying, look,
12 I'm not comfortable presenting my case to an integrated men
13 and women jury. And they had just gotten used to all
14 largely white male juries and so there was this transition.
15 And there was some interesting literature about presenting
16 your case to women, et cetera, and you could do some
17 training around that. The problem here is that we've seen
18 lots of trainings and I consider this to be one of them
19 where the goal seems to be to get around Batson to avoid
20 being found to have violated Batson and so the
21 characterization of, quote, Batson justifications
22 articulating jury negatives in my view is inconsistent with
23 actually training people to confront unconscious bias,
24 training people to embrace diverse juries, training people
25 to get past their comfort level, their hunches, their

1 concerns about people who don't look like the standard
2 juror and rather kind of a work-around, how you avoid
3 detection. And that's the difficulty I have with proposed
4 justifications for how you are excluding people when the
5 Batson objection has been made.

6 Q. So, sir, are you saying that the materials you
7 reviewed contained nothing but how to get around. It
8 didn't contain anything about Batson is the law. We have
9 to follow the law. We have to be mindful of it and this is
10 an attempt to make you more sensitive and aware that you
11 are going to be dealing with a diverse group of people?

12 A. No. There was information both about general jury
13 selection voir dire and there was certainly information
14 about Batson being a reality that you have to deal with.
15 It is the law. What I didn't see was that turned into
16 let's think about presenting cases to more diverse juries.
17 Let's think about getting past hunches and comfort zones.
18 Let's assess whether a person is competent to serve on a
19 jury in broader ways. Instead, there was this kind of
20 recognition about Batson and then here's some reasons that
21 you can assert when you're challenged, which to me is
22 completely opposite of what we're trying to do. What we're
23 trying to do is get people past presuming that someone
24 can't be a fair juror because of their race.

25 Q. And, sir, did you see in that jury selection material

1 anything about nonverbal cues, body language? Of course,
2 that would apply to all prospective jurors regardless of
3 their ethnicity, background, culture.

4 A. That's exactly right. And there's been a long
5 tradition of assessing, you know, what kind of message is
6 being communicated to you. And I don't think any of that
7 is really disputed. I think the difficulty is what -- and
8 again, I keep analogizing to gender because I think you saw
9 the same issues there. What you see a lot of times is
10 people wanting to try cases to the jury that they believe
11 are going to maximize the chance for a conviction. And I
12 -- I actually think that the court is saying in Batson that
13 that's not the goal. We actually have to open up the
14 courthouse. We have to open up the jury, and if you're no
15 longer talking to people who might presume guilt, which
16 would make it easier if you're prosecuting the case, or who
17 respond immediately to seeing the defendant in that role
18 and assuming guilt, we're going to have to kind of change
19 things. We're going to have to actually require that
20 presumption of innocence. We're going to actually have to
21 have more diverse juries. So even your instincts around
22 hunches and demeanor and nonverbal are going to be
23 subordinate to an obligation to make sure that no one is
24 being denied the right to serve on the jury because of
25 their race, because of their gender, because of some

1 cognizable status.

2 Q. So it would be the defense attorney's duty and the
3 judges required to be vigilant to prevent people from
4 serving on the jury who presume guilt so that there is a
5 mechanism in place even if you're, as a defense attorney,
6 concerned about that, you can deal with it?

7 A. Well, yes. I think though there's quite a bit of
8 evidence out there that there are juries that are deemed to
9 be more prosecution prone. And the difficulty of getting
10 someone to acknowledge a presumption of guilt is the same
11 as acknowledging a presumption of innocence. When you
12 actually test for that -- I mean there have been a great
13 deal of studies on this point. There are cohorts that are
14 going to embrace some of these narratives more than others.
15 There was actually a set of studies that were done in the
16 '80's on this question of death qualification. You may
17 recall there was an effort to actually not permit death
18 qualification at the first phase of the trial because the
19 data suggested that when you actually eliminate people who
20 are opposed to the death penalty, the likelihood of a
21 conviction goes way up. The remaining jurors are more
22 likely to trust and believe police officers, more likely to
23 trust and believe what the prosecution is presenting. We
24 call them prosecution prone. So this kind of continuum
25 suggested that there are some jurors who are going to be

1 responsive to particular narratives particularly when
2 you're talking about, say, defendants of color. The analog
3 I give and this you could -- and this is sort of just kind
4 of a bland example. I don't mean to make it too dramatic.
5 But you've got a jury of people who are all members of,
6 say, a white supremacist group, a hate group. You could
7 argue that it might be easier to get them to convict a
8 minority defendant but it wouldn't be appropriate. And the
9 fact that it might be easier doesn't justify a strategy of
10 selection that then excludes other people. So the idea was
11 that getting a diverse jury -- and this is what some of the
12 studies support -- actually creates a more critical jury.
13 The more heterogenous the jury, the more kind of -- you
14 have to engage in a systematic review of the evidence. You
15 can't act on presumption. So all of that was behind the
16 idea that you would try to diversify in juries and try to
17 create more reliable outcomes.

18 Q. Sir, in jury selection, would you agree or disagree
19 that one of the things that the participants try to do are
20 to identify the attitudes, opinions and beliefs of the
21 venire person in order to try to assess whether or not they
22 are going to be receptive to the guilt-innocence phase and
23 then the sentencing phase from both sides, from the state
24 and the defense?

25 A. Absolutely.

1 Q. And are you saying that the use of peremptory
2 challenges in your opinion and view here with respect to
3 the cases that you've reviewed in North Carolina were done
4 on the basis of race and not upon the basis of trying to
5 discern and draw out the underlying attitudes, opinions and
6 beliefs of the individual jurors?

7 A. No. I think both things are -- I think both things
8 have happened. I think actually that for a lot of lawyers,
9 when they see a person of color, it triggers some
10 presumptions. It triggers some preconceptions and you see
11 some of that manifest in the way they're thinking and
12 talking about these kinds of jurors. They are also -- that
13 doesn't mean that they are not also looking at jurors and
14 evaluating jurors and trying to assess how responsive they
15 are going to be to their case. The difficulty is when we
16 treat people differently based on their race. And this is
17 true even for defense attorneys, right? I train defense
18 attorneys that you make a huge mistake if you presume that
19 a person of color is going to be favorable to you. That's
20 a mistake. Communities of color in many parts of this
21 state live in very high crime areas. They are just as
22 concerned about ending violent crime and responding to
23 abuses of power as anyone. So what you have to do is
24 actually engage in a colloquy that is not shaped by the
25 fact that the person is a minority. What we see is that

1 there is a lot of that going on, people asking questions,
2 and people of color do end up serving on juries. But we
3 also see that there's this increased burden that seems to
4 be assigned to African-Americans that they are subject to
5 more scrutiny, they are subject to more doubt, they are
6 subject to more suspicion, they have a higher burden to
7 meet to be trusted. And it's that differential in the way
8 they are treated, the way they are burdened and the way
9 other jurors are not burdened that creates a presumption or
10 evidence that there is race consciousness, that their
11 opportunity to serve is being diminished by the fact of
12 their race.

13 Q. Sir, yesterday -- correct me if I'm wrong, please --
14 did you indicate that you had reviewed some 100 jurors who
15 had been excluded from various trials around North Carolina
16 as part of your basis of your opinion?

17 A. No. The hundred people that I personally sort of
18 talked to and interviewed and my staff was actually part of
19 our study.

20 Q. Got ya.

21 A. So those were not in North Carolina. Those were in
22 the other states.

23 Q. And the people that you talked to in that study --

24 A. Yes.

25 Q. -- did they include any nonblacks or

1 nonAfrican-American persons?

2 A. Yes, they did.

3 Q. So in that 100 person group who had been excluded from
4 jury service by peremptory challenge?

5 A. Actually the cohort of jurors we talked to was much
6 bigger than the 100. So there were 100 people who were
7 excluded, most of whom were African-American but there were
8 some other people excluded as well.

9 Q. The other percentage -- don't mean to interrupt you.

10 A. It's probably 90 percent African-American but we also
11 talked to dozens of other jurors who were not excluded or
12 not excluded through peremptory strikes who were
13 nonminority.

14 Q. In your studies that you've done, have you had an
15 opportunity to study the strike rates of defense attorneys
16 with respect to capital jury selection?

17 A. Yes.

18 Q. What did you find in your study with respect to how
19 the percentages lined up, comparing the government or the
20 state's peremptory challenges for blacks and nonblacks and
21 then comparing in your studies the defense attorney's
22 strikes with respect to nonblacks and blacks peremptory
23 challenges?

24 A. Yeah, peremptory challenges, well, there is a much
25 lower rate of excluding non -- minorities on the defense

1 side. Sometimes that's just a function of the way the
2 system plays out. If there are five African-Americans in a
3 venire and they are all struck by the state, then obviously
4 the defense is not going to have an opportunity to exclude
5 any African-Americans.

6 Q. Sure. I guess what I'm asking you is with respect to
7 the relative percentages, did your study across the board
8 show that the rates were somehow inversely proportional or
9 inversely related? For example, in the exercise of
10 peremptories by the state with respect to blacks and
11 nonblacks --

12 A. Um-hmm.

13 Q. -- I take it that what you are saying is that blacks
14 were stricken at a higher rate than the nonblacks?

15 A. That's correct.

16 Q. When you looked at the defense studies, were the
17 nonblacks stricken at a higher rate than the black
18 defendants (sic), given, as you point out, that the pool
19 may have been smaller by the time it got to the defense if
20 they used one of the jury selection techniques that you
21 mentioned that differs around the state?

22 A. Sure.

23 Q. As opposed to both getting to ask questions, one side
24 going to ask questions and then excusing?

25 A. I think what you're asking is, are most of the strikes

1 being exercised by the defense lawyers strikes against
2 people who are white?

3 Q. Yes, sir.

4 A. Then the answer would be yes. And most of the
5 counties that we're looking at are actually majority white
6 counties, so you would actually expect that both the state
7 and the defense are using the majority of their strikes
8 against whites. What we're finding is that a
9 disproportionately high percentage of the strikes being
10 used by prosecutors are being used against minorities and
11 there's not necessarily a disproportionately higher
12 percentage of strikes being used against whites by defense
13 lawyers. It does turn a lot on the nature of the
14 proceeding. If the pool or the pot the defense lawyers is
15 dealing with is now 90 percent white or 95 percent white,
16 then you're going to see that reflected in their peremptory
17 strikes. But there's no question that in virtually most of
18 the counties that we're talking about, unless it's a
19 majority black county, you would expect to see more whites
20 being struck peremptorily by both the state and the
21 defense. You see it on the defense side a lot more clearly
22 than you see it on the prosecution side.

23 Q. Sir, getting back to our slides for a moment --

24 A. Sure.

25 Q. -- with respect to the training we started talking

1 about, on defense exhibit number 21, the capital case
2 seminar the PowerPoint slide was made from --

3 A. Yes.

4 Q. -- those factors that were talked about in that slide
5 and in defense exhibit number 21, regardless of the
6 diversity or the color of the jurors, would you agree that
7 those factors are important factors for the state to keep
8 in mind with respect to selecting jurors? That is, juror
9 who has a stake in the community, as you mentioned black
10 communities have some crime and they're concerned about
11 that, a juror may have an affinity for the main prosecution
12 witness or the victim, a juror whose intelligence is
13 commensurate with the case requirements, a juror who
14 appears to be decisive, a juror with whom you feel
15 comfortable, at least one juror who appears to be a leader,
16 there's nothing implicitly racist or biased about that in
17 terms of trying to be mindful of who you're putting on your
18 jury, are you?

19 A. Well, I think it could be but I actually think that
20 the more appropriate way to talk about it would be you want
21 a jury -- a juror who's going to be fair. I mean that's
22 what our law sort of requires us. If you mean a juror --
23 if by a juror who may have an affinity with the main
24 prosecution witness or the victim you mean someone who
25 shares that person's race or status or something like that,

1 then that may be problematic. The reality is that the jury
2 actually has to make a decision about the defendant. Are
3 they guilty? Are they culpable? What's their degree of
4 guilt? What's their degree of culpability? They then have
5 to make a decision about what's an appropriate punishment
6 for that defendant. And while you want that juror to
7 adequately appreciate the crime that has been committed,
8 the harm that has been done, we actually in our criminal
9 court system say at least that this is not like a civil
10 trial. It is not a contest between the victim and the
11 defendant. It is a proceeding where we are going to assess
12 whether the state has sufficient evidence to make a
13 determination if this person is culpable and, in a capital
14 case, if they are culpable, what's the appropriate
15 punishment? And so I -- I am concerned about this
16 language. There may be an interpretation that you could
17 give it. You could broaden it out in a way where it would
18 make me less concerned but I don't think that suggesting
19 that this is who you like the most, the victim or the
20 defendant, who do you identify with the most, the victim or
21 the defendant, is going to be very healthy in communities
22 where, as we've seen this relates to the other issues with
23 the death penalty in particular where there are real
24 disparities based on race of the victim, and what the data
25 tells us is that white case victims are much more likely to

1 result in death cases. So I'm concerned about it and that
2 would be -- those would be some of my concerns.

3 Q. Of course, your concerns would be the same if the
4 victim were black?

5 A. Absolutely. That's exactly right.

6 Q. Now, sir, with respect to defense exhibit number 21 --
7 and it may be cured with respect to the admission of
8 defense 45 this morning, the thumb drive. I just wanted to
9 point out with respect to defense exhibit, that's a
10 two-page exhibit, correct, sir, defense 21?

11 A. It's -- yeah, it's clipped to something with me but
12 I'll -- yeah, that's right, jury selection.

13 Q. And at the end of -- the bottom of page one, it said I
14 would specifically thank -- and then at the top of the next
15 page it says these are spurious, based on outdated
16 historical experience and sometimes outright bias and
17 racism. You cannot be so wed to specific notions -- and it
18 says, underlined, because you really have no idea what a
19 perfect jury is. Now, it does appear that there is a
20 break, does it not, between page one and page two and those
21 two pages don't appear to be directly related to one
22 another?

23 A. That's correct.

24 Q. Okay. And it may be that it's on the thumb drive, the
25 other pages that are in between?

1 A. Yes.

2 Q. But there is a discussion at least at the top of page
3 two of that exhibit about the historical perspective and
4 perhaps you were talking about yesterday in that one has to
5 be mindful of bias and racism and be aware of diversity in
6 some sense?

7 A. That's correct.

8 Q. Okay. I believe we talked about defense exhibit
9 number 22 yesterday, sir, so let's move on to defense
10 exhibit number 23, which is a portion of the transcript
11 from the State of North Carolina versus Harvey Lee Green.
12 You with me on that, sir?

13 A. Yes, sir.

14 Q. Okay. And I think there were three accompanying
15 slides with that. So if I can get you to put one in one
16 hand and one in the other, perhaps we can --

17 A. Sure.

18 Q. It might help, sir, if you have those slides, if you
19 put those to the side and I'll try to direct you to them
20 so --

21 A. Right.

22 Q. Okay. Now, with respect to defense exhibit number 23,
23 the attorney for the defendant listed on the transcript
24 sheet included three different attorneys, correct?

25 A. Yes.

1 Q. And one of those was the Honorable Malcolm Ray Hunter,
2 Junior --

3 A. Correct.

4 Q. -- who was then the appellate defender and is the
5 gentleman who is participating in this as one of Mr.
6 Robinson's lawyers?

7 A. That's right.

8 Q. And there is also Robert Mahler -- Mahler --

9 A. Yes.

10 Q. -- who was then the North Carolina Death Penalty
11 Resource Center attorney?

12 A. Right.

13 Q. And Mr. Roger Smith, who practices in the Wake County
14 bar in Raleigh.

15 A. Okay.

16 Q. Do you know any of those gentlemen besides Mr. Hunter?

17 A. I believe I just know Mr. Hunter.

18 Q. Okay. Well, I will represent to you it's a formidable
19 group of defense attorneys.

20 A. All right.

21 Q. Now, sir, this -- this hearing in defense exhibit
22 number 23, it indicates on the transcript it was held in
23 1989?

24 A. Yes.

25 Q. And as we look at the exhibit itself on pages 288 and

1 289, and again there is a break up to page 292.

2 A. Yes.

3 Q. And that's covered by defense exhibit 45. With
4 respect to Mr. Cummings, the gentleman that was referred to
5 in two of the three slides, at page 289, he indicated that
6 he was an attorney practicing in Greenville, Pitt County,
7 at the bottom of page 289. Then on the next page at line
8 nine, he indicated that from November 1 of 1980 through
9 April the 1st of 1983, he was an assistant district
10 attorney and obviously practiced a lot in criminal courts.

11 A. Correct.

12 Q. And he worked for a Mr. Bloom who was a preceding
13 district attorney and then up until the time Tom Haigwood
14 took over --

15 A. Okay.

16 Q. -- in early '83. That's what it says there, does it
17 not, at --

18 A. Yes.

19 Q. -- lines 9 through 16?

20 A. Yes, that's correct.

21 Q. Now, the time period that Mr. Cummings is talking
22 about on page 288, 1980 to 1983, would have been
23 pre-Batson?

24 A. That's correct.

25 Q. And so whatever he was saying with respect to that

1 hearing as it related to that time period would obviously
2 have been before the Supreme Court intervening the State
3 versus -- excuse me, Batson versus Kentucky and then sent
4 it to the 50 states?

5 A. That's correct. Batson was 1986.

6 Q. Yes, sir. And then the case that was listed there,
7 sir, back on defense exhibit 23, that was -- are you
8 familiar with the way cases are numbered in our criminal
9 courts here in North Carolina?

10 A. I have a general idea. It's my understanding if it's
11 84, that would have been the year of the indictment or the
12 arrest or initiation of the prosecution.

13 Q. That's the point I was going to ask you.

14 A. Sure.

15 Q. Yes, sir. Thank you. I think the next two slides
16 deal with state's exhibit 24 and I believe you indicated
17 that those and the slide indicates that there's notes from
18 Dr. Joseph Katz based upon a telephone conference with Mr.
19 Thompson back in August of 2011?

20 A. Correct.

21 Q. And I believe you spoke about that yesterday in the
22 context of women on juries and related back to some
23 historical perspective with respect to that?

24 A. Yes.

25 Q. On defense exhibit number 25, State versus Trull,

1 Randolph County, 1996, with respect to Judge Lamm's order,
2 the second page of the exhibit, paragraph three, that
3 indicates that the juror that was the object of the
4 objection with respect to the Batson challenge was kept --

5 A. Correct.

6 Q. -- is that correct? By the trial judge?

7 A. That's correct.

8 Q. So whatever the objection made by the defense
9 attorneys, whatever the explanation given by the district
10 attorney, the judge found that it was not sufficient and
11 seated the juror, essentially allowed the Batson challenge?

12 A. That's right. My interest in it was in illustrating
13 this phenomenon that we've identified, which is additional
14 scrutiny, extra scrutiny, even the word targeting around
15 some African-American jurors. And in this particular
16 instance, the court saw that and made a determination that
17 that was racially discriminatory and permitted that juror
18 to serve.

19 Q. And then the next defense exhibit number 26 dealing
20 with State versus Sanders --

21 A. Yes.

22 Q. -- and the accompanying slide, again this is a
23 one-page excerpt?

24 A. Correct.

25 Q. And perhaps all the other pages are contained on

1 defense exhibit 45. But do you have any reason to believe
2 that the court's ruling that the motion is allowed at the
3 bottom of the state's -- defense's slides and the context
4 in which it was offered in defense exhibit 26 was not
5 followed in some way?

6 A. No, I don't.

7 Q. So whatever the defense attorney complained of in that
8 particular case, the court, in allowing the motion as
9 evidenced by the other pages, did in fact stop the line of
10 questioning and cured what was being done incorrectly in
11 that sense?

12 A. Well, yes and no. They were obviously -- there were a
13 number of concerns being raised by the attorney. With
14 regard to this one particular concern, the judge was
15 responsive. There were other concerns where there was no
16 response. But I think with regard to this one, yes, that's
17 correct.

18 Q. And I believe we talked yesterday about defense
19 exhibit 27 and defense exhibit 28, the State versus Golphin
20 case?

21 A. Right.

22 Q. The one where you mentioned that Judge Brewer was the
23 judge and I was the prosecutor asking questions in this
24 case?

25 A. Right.

1 Q. Now, in that particular case and with respect to the
2 juror who was in question there, Mr. Murray?

3 A. Yes.

4 Q. Okay. One of the questions that was asked about him
5 from his questionnaire and from the jury selection dealt
6 with his having been stopped for a traffic violation. I
7 believe it was a DWI?

8 A. Yes.

9 Q. Do you recall that?

10 A. Yes, I do.

11 Q. Do you -- were you made aware of the facts and
12 circumstances of the Golphin case itself?

13 A. I was, yes.

14 Q. So you know that the facts in that case dealt with two
15 brothers who were driving a car on the interstate that were
16 stopped by a North Carolina highway patrolman?

17 A. Yes.

18 Q. And when that patrolman stopped them and took the
19 driver out of the car and asked him to come back to his
20 car, he then called for a backup and a Cumberland County
21 sheriff's deputy responded, and from there, the situation
22 deteriorated and both of the law enforcement officers were
23 shot and killed as a result of their encounter with the
24 Golphin brothers?

25 A. That -- yes.

1 Q. You are aware of that?

2 A. I am aware of that, yes.

3 Q. So in your view, was it not appropriate to inquire
4 about the attitudes, opinions and beliefs of a juror who
5 had been stopped by a law enforcement officer with respect
6 to a DWI?

7 A. No. I think it -- I think it's appropriate to inquire
8 about any sort of law enforcement encounter. I don't think
9 there can be a presumption that anyone who has ever been
10 stopped by a law enforcement officer in a case like that
11 can't be a fair juror. I'm guessing that most of the
12 people in that venire had stopped -- been stopped by an
13 officer, speeding, some kind -- it would be very unusual to
14 have a venire where a good percentage of the jurors had not
15 had one of those kind of encounters. So I don't think
16 there is anything problematic about that. I think what's
17 problematic is assigning, because of the person's race, a
18 particular reaction to that experience that would make them
19 less capable of being a fair juror. It would effectively
20 mean that if you've ever been profiled on the basis of race
21 or you feel that you have, that that would permanently
22 disqualify you from jury service, that would be the
23 problem. But no, I don't think it's inappropriate to ask
24 people about law enforcement encounters to ask if they've
25 ever been stopped. If you ask everybody, I think it would

1 be totally appropriate.

2 Q. Well, one way we are aware they've been stopped is
3 through their questionnaires.

4 A. Correct.

5 Q. Some jurors put their answers on the questionnaires,
6 some don't. And even when you ask some jurors, you are
7 aware that sometimes they tell you and sometimes they
8 don't?

9 A. That's right. And that's why it would seem to me that
10 if that was a, you know, really important component of the
11 case, which you could certainly make that determination,
12 you would be very conscious about making that inquiry with
13 all prospective jurors. What we find is that frequently
14 the scrutiny -- the level of investigation in some of the
15 jurisdictions that we've studied, we've even found that
16 there are kind of prehearing profiles where the prosecutor
17 might go run an NCIC check on -- on certain jurors of
18 color. They might investigate certain things. That's the
19 problem. Because even when you find something that would
20 be a legitimate basis for excusal, it's been compromised by
21 this targeting, by this focussing on jurors of color. And
22 so if that becomes an important question, it seems to me if
23 you're really interested in that, you then have to make
24 that inquiry, and I think it would be totally appropriate
25 under those facts to make that inquiry. You just have to

1 make that inquiry of everyone. And you can't assign race,
2 that you're an African-American male being stopped by a
3 police officer, to have some added significance to that
4 experience because that would then mean that you're
5 suggesting -- you might be suggesting that if you've ever
6 been profiled because of your race -- and there are a lot
7 of people of color who would say they've been profiled in
8 that way. I've been followed around in Wal-Mart. I've had
9 these experiences where I feel like my race is drawing
10 attention to me in ways that are very discomfoting. I
11 don't think it means that I'm incapable of then being fair
12 or considering the law or respecting the law. I want law
13 enforcement just like everybody else. So that's the
14 difficulty I see with that inquiry. It's totally
15 legitimate to be concerned about people's encounters with
16 law enforcement and to inquire about it. You just have to
17 do it in a race neutral way without presuming that people
18 of color are going to be somehow affected by that in ways
19 that nonminorities are not and, therefore, disqualified.

20 Q. And recognizing that in that particular case, there
21 was a traffic stop of a minority motorist by a highway
22 patrolman --

23 A. Yes, that's right. But I guess I wouldn't think that
24 the race of the defendant puts an additional burden on
25 same-race jurors to kind of show something, to show

1 commitment to the rule of law, commitment to fairness that
2 we're not expecting from nonminority jurors. The fact that
3 the defendant is African-American for better or worse is
4 very common in these cases.

5 Q. It wouldn't be appropriate to inquire if they felt
6 like they had been in that particular case somehow targeted
7 or profiled in their experience?

8 A. Well, I guess if you're going to ask questions about
9 racial profiling -- those are going to be questions
10 typically that only apply to people of color. And if you
11 read into that history of profiling, that they had an
12 experience with profiling makes you less capable of being a
13 juror, I'm going to argue that that's not appropriate. You
14 could ask questions about sexual harassment, unwelcomed
15 advances to women and a lot of them might say yes, I've had
16 that experience. It doesn't mean that they are then,
17 therefore, disqualified, incompetent, less prepared to be
18 jurors. Having a diverse jury, women and men, means that
19 you're going to now have to present your case to people who
20 might have some shared experience around harassment or
21 might have some shared experience around profiling, but to
22 make the verdict from that jury in a community that's
23 diverse meaningful, you want their perspective. You want
24 their assent that the evidence establishes that this person
25 is guilty regardless of that. So I think that asking

1 questions about have you ever had experience with profiling
2 or discrimination as a basis for then excluding them would
3 not be race neutral. In our society, sadly, many people of
4 color -- I'm going to suggest most people of color have had
5 those experiences and sadly for women, many women have been
6 targeted for sexual advances and harassment that they
7 didn't want.

8 Q. And -- sorry.

9 A. No, I'm sorry.

10 Q. And it may affect an individual case, whether we're
11 talking about women or someone who had been profiled,
12 whether or not they feel victimized or felt victimized and
13 whether or not they are then receptive or nonreceptive to a
14 similar type situation?

15 A. It may. But again what I believe is that a fair
16 cross-section requirement means that that's part of the
17 challenge. It's part of the challenge. You have to make
18 the case persuasive to both women and men, to both people
19 who are African-American and white. And even though they
20 have these histories and experiences, you can't avoid
21 dealing with that by simply excluding them because those
22 experiences in histories sadly uniquely burden people of
23 color and women and race that means that they won't get the
24 same opportunity to serve.

25 Q. Sir, with respect to defense exhibit number 28, I

1 believe we talked about that a little bit yesterday, Mr.
2 Murray's concern about people in the audience and that sort
3 of thing?

4 A. Yes, um-hmm.

5 Q. And then I think we talked and you acknowledged that
6 Mr. Murray on a challenge for -- a peremptory challenge,
7 there was a Batson hearing and Judge Brewer found that the
8 motion for the Batson in that particular case would be
9 denied?

10 A. Correct. That's correct.

11 Q. And, sir, you mentioned yesterday with respect to
12 defense exhibit number 29 where there was some concern
13 about a conversation between Mr. Walker and the court and
14 the fact that he had cited that the NAACP had a legal
15 defense fund -- I mean that was on the two slides -- part
16 of the slide dealt with a concern that the organization had
17 a legal defense fund which files briefs in death penalty
18 cases, and then when the judge asked him what it was,
19 that's when he said it was the NAACP that he was concerned
20 about the individual juror's association?

21 A. That's correct.

22 Q. So those two kind of went together on those two slides
23 and are shown in defense exhibit number 39?

24 A. That's right. I mean, again, what's significant about
25 that to me is -- I mean just as a factual matter, the NAACP

1 is a different organization than the NAACP legal defense
2 fund. And the NAACP generally is not filing briefs in
3 death penalty cases and an inquiry about that would
4 probably expose that this juror had no knowledge of what
5 the legal defense fund does, which is a completely
6 different organization. And, of course, only typically
7 most members of the NAACP are African-American, just like
8 most people who attend historically black colleges. So
9 that was the critique, that that's not a race neutral
10 justification.

11 Q. Sir, with respect to defense exhibit number 31, and
12 perhaps this has been cured by defense exhibit 45 this
13 morning, that exhibit consists of six pages and it appeared
14 that there was a break on the slide between the discussion
15 with Mr. Caudill and the court at the bottom where the
16 court says, All right. The objection as to this juror is
17 sustained. Frankly, I couldn't find it in the particular
18 exhibit. That's what I was going to ask you about. But,
19 nonetheless, it appears that again in that case, State
20 versus Gaines, that the defense's objection with respect to
21 what was asked by the prosecutor, that their objection was
22 sustained as it related to those reasons, correct?

23 A. That's correct. I was very interested in the
24 instances where there had been some recognition of the
25 Batson violation, was particularly concerned what was

1 happening there. In our study we were really interested to
2 see to what extent we saw courts engaging in this and there
3 were really big varieties -- you know, states like Alabama,
4 we've had 25 death penalty reversals because of a finding
5 of intentional racial discrimination at the appellate
6 level. Tennessee there have been none. North Carolina
7 very, very, few, none at the Supreme Court level, just a
8 couple at the intermediate court level. So I was
9 particularly interested in the trial court and so I did
10 look at a lot of those. This was an example of one of
11 those as it relates to one of the jurors.

12 Q. I believe in relation to what you just said, in North
13 Carolina, there have been no death penalty cases which have
14 been reversed because of Batson violations based on your
15 study?

16 A. That's right. And that's one of the things in our
17 report that we're especially critical about. That is we --
18 we did find evidence that in many jurisdictions, there
19 wasn't the kind of strong intervention that we think the
20 evidence required in enforcing Batson and that's why the
21 historical context is so important. You have this long
22 history and this culture has emerged. We think courts at
23 all levels need to really be very aggressive at challenging
24 that, and when there is evidence to support a reversal, we
25 think they should do that. Doesn't always mean that in

1 every case that's going to happen but we did note that in
2 North Carolina, despite what we were seeing in a lot of
3 these cases, there had been no reversals.

4 Q. Based upon your review and to the extent you've done
5 it with respect to North Carolina, Batson and the trial
6 courts and the appellate courts, is it your opinion that
7 the trial courts in the State of North Carolina are not
8 adequately enforcing Batson versus Kentucky?

9 A. Yes. I am seeing lots of evidence that we could be
10 doing a much better job at challenging and managing the
11 mandate of full inclusion. And yes, I think in a lot of
12 the instances that we have talked about, there weren't
13 actually sustained Batson objections and I believe that the
14 evidence was quite compelling and there could have been.
15 Beyond that, we're not seeing the kinds of, I think, very
16 strong statements around this that I think we need to see.
17 So yeah, that would be --

18 Q. So do you think that the trial judges in North
19 Carolina are basically rolling over for the state and
20 rolling over for the prosecution with respect to the
21 enforcement of Batson versus Kentucky?

22 A. No. I wouldn't characterize it that way. I think
23 that there are a lot of components to it. I talked some
24 yesterday about how if the defense bar is not making the
25 kind of presentations that they need to make, that's going

1 to influence it. I think that if we have this
2 understanding that all you have to do is say something that
3 doesn't involve race, if that is your understanding, then
4 you're not going to recognize it. There's a whole range of
5 dynamics that I think is shaping in this. I wouldn't say
6 rolling over but I would also say there hadn't been the
7 kind of, I think, visible and active commitment to change
8 the culture around diversity of juries.

9 Q. And based upon your review of the appellate opinions,
10 do you think that the North Carolina appellate courts are
11 being too deferential to the trial courts who are ruling on
12 the Batson?

13 A. I don't think they are being too deferential. I mean
14 there are actually some legal questions out there that
15 impact on this. So that there are states that engage in de
16 novo review on Batson cases. There are states like Florida
17 that have created a standard where the court, as a part of
18 its commitment to eliminating discrimination and bias, is
19 going to search the record around these issues. There are
20 states that in death penalty cases will not be inhibited
21 from correcting error, even if it has not been procedurally
22 preserved. So in Alabama, for example, I talked about
23 these 25 death penalty reversals. In most of those cases,
24 there wasn't an adequate preservation but the court has
25 said that they're going to address that anyway. Don't have

1 those kind of added protections in North Carolina so that
2 actually means that it's going to be harder for the court
3 without articulating those added protections to get to
4 these problems. Doesn't mean that what they're doing is
5 somehow way out because that's the standards that they
6 typically use but we lay out in our report a variety of
7 ways that all institutions, prosecutors, defense lawyers,
8 trial judges, appellate judges, could do a better job of
9 challenging this practice, this culture, this history and
10 making it something from the past. And one of those things
11 is kind of more scrutiny of evidence and allegations of
12 racial bias at all levels.

13 Q. Sir, speaking of more scrutiny, you are aware that
14 there are cases in North Carolina, death penalty cases,
15 where the Supreme Court has sent it back to the trial court
16 for hearings with respect to prima facie showings and even
17 with respect to motions for appropriate relief, sending
18 matters back for additional inquiry on the Batson issue?

19 A. That -- that's right. And the question of whether
20 it's a prima facie case or not has been kind of almost
21 separate and we've seen in all these jurisdictions a lot of
22 those kinds of cases where there was the remand on that
23 that wasn't the appropriate recognition of what was
24 required. And yes, there are some instances of that.

25 Q. So I guess what I'm asking, sir, based upon your

1 review in your study, are you critical of the trial courts
2 of North Carolina and critical of the Supreme Court of
3 North Carolina in the way that they over the years have
4 handled the Batson versus Kentucky issue?

5 A. I think the fair way to put it is I am critical of the
6 continuing legacy. I am regretful that you are three times
7 more likely to be excluded peremptorily if you're
8 African-American in this state than if you're white. I'm
9 critical of these reasons being asserted in some of these
10 cases that I think are deeply demeaning and frustrating to
11 communities of color that just want the opportunity to
12 serve. I think we all have a responsibility for that. I
13 am very capable of saying the defense bar has not done what
14 it should do. Prosecutors are not doing what they should
15 do and reviewing courts have not done what they could do.
16 So I'm critical of an institution that has not committed
17 itself to break from this history, to do something
18 dramatic, to shift away from this very, very difficult,
19 very, very demoralizing history. And I think everyone has
20 a role. What I'm focussing on in this case obviously is
21 the role of the prosecutor but no, I think that we all bear
22 some responsibilities for that.

23 Q. Sir, I believe yesterday we spoke about the slide
24 dealing with defense exhibit number 32 in the McCollum
25 case?

1 A. Yes.

2 Q. And, again, that was a case from an adjacent county
3 that came here on retrial and it wasn't a Cumberland County
4 case --

5 A. That's correct.

6 Q. -- to start with. It was just tried in Cumberland
7 County?

8 A. That's correct.

9 Q. Okay. Now, sir, with respect to the defense exhibit
10 number 34, State versus Williams in the Wayne County case,
11 do you know the outcome of that particular example that you
12 were speaking of with respect to the juror that lived on
13 the street where the defense attorney lived on?

14 A. Yeah. To be perfectly honest, I'm not sure I do. I
15 believe that juror was excluded is my recollection but I'm
16 not a hundred percent sure about that.

17 Q. And again, on defense exhibit number 34, based upon
18 your study, did you learn that Mr. Jerry Braswell was an
19 African-American?

20 A. Yes.

21 Q. I think you mentioned yesterday --

22 A. I did.

23 Q. -- that one of the attorneys was African-American?

24 A. That's correct.

25 Q. And at least Mr. Braswell was. And the Honorable G.K.

1 Butterfield, who was the judge presiding in the trial
2 court, are you aware that he's an African-American male?

3 A. Yes.

4 Q. But is no longer a Superior Court judge but is now a
5 congressman for North Carolina?

6 A. Yes, I was aware of that.

7 Q. I think that deals with the slides that we were
8 talking about yesterday, sir, and I wanted to go on for a
9 moment with the other exhibits. And I think there was a --
10 there were a group of affidavits in defense exhibit 35?

11 A. Yes.

12 Q. And then there were a group of exhibits that were
13 individually numbered 36 through 44?

14 A. Yes.

15 Q. Let me deal with those kind of as a group --

16 A. Sure.

17 Q. -- and then maybe individually.

18 A. Sure.

19 Q. Now, these two groups of affidavits were reviewed by
20 you for purposes of the formulation, the basis of your
21 opinion; is that right, sir?

22 A. Yes.

23 Q. And did you have an opportunity to speak to any of
24 these affiants personally?

25 A. I did not.

1 Q. Okay. And other than being in receipt of the
2 affidavit, were you given any information about how the
3 affidavits were accomplished -- more concerned about the
4 accomplishment of the affidavits with respect to 36 to 44
5 where the veniremen, the prospective jurors, have been
6 excused?

7 A. No.

8 Q. So no information for you about who the investigator
9 was or what information they had beforehand other than as
10 it is reflected in their affidavit?

11 A. That's right. And I can just supplement that by
12 saying I didn't question or investigate or evaluate the
13 methodology used in putting together the affidavit,
14 particularly the juror affidavits. I really read them as
15 they were provided to me, and to be perfectly honest, my
16 interest was in evaluating whether the reactions from
17 excluded jurors in North Carolina were consistent with the
18 reactions that we encountered in other states.

19 Q. So would it be correct that, based upon what you said
20 yesterday and today, that your review and your concern was
21 that these formed part or the basis of your opinion as it
22 relates to the peremptory challenges against black or
23 African-American veniremen which caused feelings of
24 victimization or disenfranchisement with respect to the
25 particular affiant and is that a correct understanding of

1 what you're saying?

2 A. Yes. These sets of affidavits, I think, went to the
3 point I was making about harm which is -- which is sort of
4 -- you can argue is not directly involved in the day-to-day
5 but I think it gets to the broader problem of what happens
6 when there is a perception that the system is not being
7 fair and that there is discrimination being tolerated.

8 Q. And based upon what you said this morning, would it be
9 true that as to these juror affidavits you didn't
10 personally talk with any of the jurors, the affiants,
11 didn't speak with anyone who interviewed any of them, you
12 didn't read any transcripts or jury selection involving
13 these particular affiants who may or may not have been the
14 subject of a Batson challenge. And if they were, you're
15 not aware, based upon the reading of the affidavits, how
16 the challenge, if there was a challenge, was handled?

17 A. No. That would be true. I mean some of these jurors
18 are actually mentioned and referenced in the transcripts
19 that I reviewed and so --

20 Q. With respect to the slides that we've talked about and
21 the defense exhibit 45?

22 A. I think -- I don't know all that's in defense exhibit
23 45 so I don't -- but many of them were in cases where I was
24 looking at jury selection procedures, not all of them but
25 many of them.

1 Q. Would the cases that you were looking at either be the
2 Supreme Court opinion or the jury selection with respect to
3 that particular juror?

4 A. Yes.

5 Q. Okay.

6 A. Yes or the proceedings, the trial court proceedings.

7 Q. Yes, sir.

8 A. Yeah.

9 Q. And, for instance, with respect to the juror in
10 defense exhibit number 36, Ms. Sonya Waddell's affidavit --

11 A. Right.

12 Q. -- that was related to defense exhibit number 22, the
13 State versus White case that we talked about, correct, sir?

14 A. That's correct.

15 Q. Okay. And that the affidavit in Mr. John Louis
16 Murray, Junior's case, state's -- defense exhibit, excuse
17 me, 42 is related to defense exhibits 27 and 28 that we
18 talked about yesterday and again this morning in relation
19 to Judge Brewer and the facts of that case that we spoke
20 about earlier?

21 A. That's correct.

22 Q. Okay. All right. If I could have just a moment?

23 A. Sure.

24 THE COURT: Would you like some water?

25 THE WITNESS: Sure.

1 THE COURT: I apologize.

2 THE WITNESS: That's okay. I really appreciate
3 it.

4 THE COURT: Yes, sir.

5 THE WITNESS: Thank you, sir.

6 THE COURT: Yes, sir.

7 BY MR. COLYER:

8 Q. Sir, also with respect to defense exhibit 35, I jumped
9 over that because it was a selection of several affidavits
10 and one exhibit?

11 A. Right.

12 Q. Please correct me if I'm wrong. When you testified
13 about that yesterday, this particular defense exhibit being
14 the basis of your opinion, that related to -- in one case,
15 a judge, some defense attorneys, former prosecutors --

16 A. Right.

17 Q. -- and their experience with respect to peremptory
18 challenges, jury selection, that sort of thing?

19 A. That's correct.

20 Q. Anything else about that that I -- I don't want to
21 mischaracterize what you said but the basis of your opinion
22 there?

23 A. No. I mean in our work, what we did quite often was
24 talk to lawyers who do this work. Sometimes we talk to
25 judges, retired judges typically or former prosecutors --

1 Q. Can I interrupt for just a second?

2 A. Certainly.

3 Q. When you say in your work, that was in your work
4 generally but not in this particular case?

5 A. That's exactly right. This was in our work outside of
6 North Carolina.

7 Q. Yes.

8 A. We would have these conversations and what we would
9 experience is we really created kind of a safe place to
10 have an honest conversation. Most of the people we would
11 talk to would acknowledge that yes, race was a very big
12 factor in how they selected juries. Lots of usually former
13 prosecutors tell me that -- former prosecutors who became
14 defense attorneys would talk about that. And I was really
15 just interested to know whether there were similar
16 experiences here in North Carolina and so, you know, these
17 affidavits were collected. I didn't have those personal
18 conversations, but I found this useful because it reflected
19 what we had experienced when we actually sat down with
20 people who felt comfortable talking honestly about these
21 issues where nothing bad would happen. And then some were
22 motivated to actually be very upfront about that. But my
23 experience is that it's not a big mystery that, you know,
24 this has been part of our culture and history for so long
25 that people readily acknowledge it and that was of interest

1 to me in dealing with this problem of racial discrimination
2 in jury selection.

3 Q. Now, relating back -- back to what you said yesterday
4 about your involvement in this, do you remember, sir, when
5 you first got involved in this particular piece of
6 litigation?

7 A. You know, I'm so bad about this. I -- I --

8 Q. I know you have a lot of things, a lot of different
9 cases around.

10 A. I really do. I think -- because this case was
11 supposed to go to court several months ago is my
12 recollection --

13 Q. Back in September originally, yes, sir.

14 A. Okay. So it would have been sometime I think in 2011.
15 I knew about it for a little while before that. How much
16 earlier than that, I'm not entirely sure. Maybe last
17 winter. I just don't recall.

18 Q. Last winter being?

19 A. 2011.

20 Q. Calendar year 2011?

21 A. Yeah.

22 Q. All right, sir. Excuse me just one moment.

23 A. Certainly. Certainly.

24 Q. Just a couple questions in relation to -- the
25 affidavits that we referred to in 36 through 44, I take it

1 you saw in there a couple of affidavits that related
2 specifically to the Marcus Robinson case?

3 A. Yes.

4 Q. And when you saw the affidavits, were you able to
5 relate that to this particular case. That would be the
6 affidavit of Mr. Elliott Troy?

7 A. Yes.

8 Q. And the affidavit of Mr. Nelson Johnson?

9 A. Yes.

10 Q. And is it correct that those were the only affidavits
11 that you reviewed for the basis of your opinion about the
12 harm that were related directly to the Marcus Robinson
13 cases?

14 A. That's correct.

15 MR. COLYER: Again, if you excuse me for just a
16 moment. Can I have moment, please?

17 THE COURT: Yes, sir.

18 MR. COLYER: Professor Stevenson, thank you for
19 your time. Your Honor, that's all the questions I have on
20 cross-examination.

21 THE COURT: Any redirect examination, folks?

22 MS. STUBBS: Yes, Your Honor.

23 THE COURT: Yes, ma'am.

24 REDIRECT EXAMINATION

25 BY MS. STUBBS:

1 Q. Professor Stevenson, the prosecution asked you some
2 questions about the Golphin case and specifically defense
3 exhibit 28. If you could turn to that exhibit. The
4 prosecution asked you what the court's ruling on that case
5 was and you indicated that the -- that it could have been
6 the objection was overruled. I just wanted to go a little
7 bit more in depth about the court's ruling. The
8 prosecution in that case had offered four bases, Mr.
9 Murray's DWI, his father's criminal history, his reporting
10 of the juror, the misconduct by other venire members and
11 his lack of deference to the court. Could you please
12 describe for us what the court's ruling was on each of
13 those four points. Maybe first do his DUI and criminal
14 history.

15 A. Right. Well, the court did take exception to some of
16 the proffered reasons and the court found that he didn't
17 see a lack of deference. He basically concluded that the
18 juror did not have an improper attitude, was not
19 interacting inappropriately, and the court then said it was
20 relying only on the interaction with the traffic law
21 enforcement officer and the fact that he had a father who
22 had been convicted and incarcerated. He basically didn't
23 accept the other proffered justifications for excluding
24 this juror including his being forthcoming about what he
25 heard in the -- during jury selection. And also these

1 suggestions about inadequate deference, respect, et cetera.

2 Q. Now, turning to defense exhibit number 19, your
3 report.

4 A. Yes.

5 Q. The prosecution yesterday asked you about your
6 recommendations and I wanted, with respect to prosecutors,
7 I wanted to turn your attention to your recommendation
8 number 14 and that appears on page eight.

9 A. Sure. Yes. So this is one of the recommendations
10 that we made is that we actually think that there should be
11 broader engagement with community members on these issues.
12 We think that community groups and others who are concerned
13 about fairness and diversity should be in open
14 communication and dialog with prosecutors and that we try
15 to work through some of these presumptions. We've had
16 people in some of the cases where we've worked on from some
17 of the, quote, high crime neighborhoods. This was coming
18 up in a lot of the cases that we saw, go and meet with the
19 prosecutor and just sort of talk to them about how they
20 don't think living in a certain part of the community
21 should disqualify them from jury service. We've had people
22 from churches who have been excluded because of their
23 membership or association with the church. Had the same
24 kinds of communication and colloquy, even civil rights
25 groups like NAACP or historically black colleges, and we

1 found that that has been helpful in creating the kind of
2 understanding that makes those kinds of realities, where
3 you live, where you go to school, where you go to church
4 less of a barrier for having an opportunity to serve on the
5 jury. And so because we've seen it be effective, we've
6 recommended that that become a bigger part of how we think
7 about dealing with this problem of racial bias in jury
8 selection.

9 Q. And can you read for us your recommendation number 14
10 on page eight there.

11 A. Yes. The other recommendation we make is for greater
12 racial diversity to be achieved within the judiciary,
13 district attorney's offices, defense bar and law
14 enforcement to promote and strengthen the commitment to
15 ensuring that all citizens have equal opportunities for
16 jury service. As was noted actually during the cross, many
17 times we see a responsiveness to these problems by
18 African-Americans on the bench, African-Americans in other
19 roles. And while, of course, having an African-American in
20 the courtroom doesn't guarantee anything, doesn't ensure
21 that these problems won't exist, we have found that greater
22 diversity has had a very positive impact on eliminating
23 discrimination of the sort that we've been talking about.
24 And unfortunately, there are real disparities. There are
25 not many African-American judges at the trial court level

1 in many of the states that we've studied. There are not
2 many elected district attorneys who are African-American in
3 the states that we studied and in some of the states, there
4 are not many African-Americans in reviewing positions. And
5 we think the absence of that has absolutely made an
6 environment where there is less rigor, less attention and
7 less sensitivity to doing harms that are created by racial
8 bias.

9 Q. And did you look at the racial diversity within the
10 elected district attorneys here in North Carolina?

11 A. Yes. That's one of the things I'm always curious
12 about when evaluating the persistence of racial bias, and
13 what I found was consistent with what we've seen in many
14 other states, the overwhelming majority of elected district
15 attorneys in this state are white. I think there were 95
16 that I identified between 1990 and 2010 and about 95
17 percent of them were white. There were six
18 African-Americans that I could find and actually half of
19 them only served for relatively short periods of time. And
20 so, yeah, you have basically at the leadership level in the
21 district attorney offices mostly people who are white.

22 Q. And finally, if I could turn your attention back -- I
23 misplaced it but I think it's defense exhibit 21, it's that
24 capital case seminar?

25 A. Yes.

1 Q. If you can look at the slide, the second slide.

2 A. Yes.

3 Q. When you -- you mentioned earlier that you give
4 training. Would you, as part of that training, instruct
5 prosecutors or defense attorneys to select a juror with
6 whom you feel comfortable?

7 A. I don't think comfort is the appropriate way to think
8 about it because the reality is you've got to present a
9 case, and there are issues that will be part of that case
10 that you want to make sure people are prepared to do. Our
11 death qualification is really about can you be open to
12 thinking about the death penalty. And then there's another
13 set of cases, Morgan versus Illinois, can you be open to
14 thinking about life if you're the kind of juror who
15 believes in an eye for an eye? If the person is guilty,
16 they should be sentenced to death and you can't really
17 consider mitigation. You may be comfortable with that
18 person but they are not legally eligible to serve. So I
19 think that the challenge really is is to make sure that
20 people can be fair. You are going to certainly be
21 presenting things that are responsive to your case. If I'm
22 representing somebody who has severe mental illness, I want
23 to know whether jurors are aware of that, what their level
24 of understanding is about that, whether they have thought
25 about that, what their experience is with that. If they

1 don't believe in severe mental illness, they are not going
2 to be able to give my case, my evidence the kind of
3 consideration that is required. But it's not really about
4 my comfort. It's about their ability to assess the
5 evidence to review what we're presenting and to make an
6 appropriate judgment. I've got a particular history,
7 unique sort of background and, you know, it's for me at
8 least not going to turn on that. You have to be
9 comfortable in my view, this is what I would train lawyers,
10 to talk to anybody. You have to get comfortable talking
11 with jurors who are men and women. You have to get
12 comfortable talking to jurors that are black and white and
13 other racial minorities. You have to get comfortable
14 talking to young jurors and old jurors. You have to get
15 comfortable talking to the community because it's the
16 community's decision and you can't deny that community that
17 decision because you're not comfortable with people of
18 color or women or white people or whomever and that's the
19 orientation that I think is appropriate.

20 MS. STUBBS: No further questions, Your Honor.

21 THE COURT: Mr. Colyer, anything?

22 MR. COLYER: Just briefly, Your Honor.

23 THE COURT: Yes, sir.

24 RE-CROSS-EXAMINATION

25 BY MR. COLYER:

1 Q. Professor Stevenson, with respect to the burden of
2 proof on a case, obviously the state has the burden of
3 proof.

4 A. That's correct.

5 Q. And Judge Weeks, one of our trial judges here in
6 Cumberland County and in this case, is often quoted as
7 saying in his trials that it's not the defendant that's on
8 trial. It's the state's case. That's what the jury has to
9 assess is the state's case in its entirety because we have
10 the burden of proof. We have the elements. And you
11 understand, based upon your experience undoubtedly, that
12 the burden of proof is on the state and not on the
13 defendant?

14 A. That's correct.

15 Q. And in this case in this state, capital cases, felony
16 cases that go to the jury, it only takes one juror to keep
17 a case from being found guilty and it only takes one juror
18 to keep a case from being capital. So when you're talking
19 about the comfort level, would you concede that it doesn't
20 necessarily mean the comfort level of dealing with people
21 who are different than yourself but dealing with the
22 comfort level of having the burden and the responsibility
23 of proving the case to the jury, proving your case to the
24 jury and then persuading them that under the facts and
25 circumstances, the aggravators, if you will, in the facts

1 of the case, that that particular crime is deserving of the
2 death penalty and they are the jury that should vote for
3 it? You understand that that's what prosecutors have to do
4 in capital cases?

5 A. No, absolutely. And again, I don't think what I am
6 suggesting is that there's anything inappropriate about
7 that burden. I think the way our system is structured, we
8 don't want to put people in jail and we certainly don't
9 want to execute people unless we're very, very confident
10 that they are guilty of the crimes for which they have been
11 accused --

12 Q. Yes, sir.

13 A. -- and that the death sentence is appropriate. And so
14 there is a burden that has to be met. And yes, in some --
15 in most states, a single juror has the ability to make a
16 different conclusion about that but that's the way, in my
17 view, our legal system has been organized because we really
18 do value so greatly making sure we don't convict people who
19 are not guilty. We empower every individual juror with
20 that opportunity and that sense, that obligation. That
21 right belongs to black jurors just like it belongs to white
22 jurors, belongs to women just like it -- it belongs to
23 anyone who has the privilege of serving in that box. It
24 doesn't mean that we can be sort of distrustful of groups
25 or sexes or anything like that. I think it's just part of

1 the way it works. And it is that way for every criminal
2 case in every state in this country.

3 Q. But from the prosecution point -- let me ask you a
4 question to lead into this question.

5 A. Sure.

6 Q. Have you ever tried a case where you had the burden of
7 proof?

8 A. Yes.

9 Q. Civil, criminal?

10 A. Civil.

11 Q. Civil case. Lower standard burden of proof than proof
12 beyond a reasonable doubt?

13 A. Well, I mean, some of the cases, I do question whether
14 it's a lower standard or not but when you're doing
15 conditions cases and trying to show deliberate indifference
16 to the medical needs of someone, I don't know whether I can
17 actually concede that that's a lower standard. It's not
18 guilty beyond a reasonable doubt. I will concede that.

19 Q. But with respect to a criminal case --

20 A. Criminal case, that's correct.

21 Q. -- and that burden of proof is proof beyond a
22 reasonable doubt, having to prove the elements of the case
23 and then in a capital situation, the various questions that
24 the state has to prove, the aggravators and in North
25 Carolina the four-questions that we have to convince the

1 jury of, you understand that?

2 A. That's correct.

3 Q. So I guess my question is this. For example, if a
4 juror expresses reservations about the death penalty, not
5 enough to be excused for cause either pro-death penalty or
6 anti-death penalty, but if they express a reservation about
7 the death penalty and you know that you have the burden of
8 proof to prove your case to them to get to the guilt stage
9 and then you have your burden of proof to get to the
10 punishment, are you saying that because of diversity or in
11 the face of diversity that prosecutor should be unmindful
12 of that burden of proof and then the -- that they have to
13 convince someone that not only did they prove their case
14 but that that particular individual should overcome their
15 reservations about capital punishment and vote for it in a
16 particular case?

17 A. No, no. You know, I think that there are a lot of
18 factors that can legitimately cause a prosecutor to exclude
19 someone with an appropriate strike, lots of them, and, you
20 know, we all know what some of them might be. In a death
21 penalty case if there is the kind of resistance to the
22 death penalty that doesn't make you confident that they can
23 actually be a fair juror, that would be a totally
24 legitimate purpose. The problem is is that if we're
25 scrutinizing people of color differently, if we're making

1 presumptions about their reticence that we're not making
2 about other people even when that reality is there, you
3 have a jury selection process that's essentially biased.
4 In a lot of our cases, what we find is that all of their
5 ten questions about people of color about their support or
6 opposition to the death penalty and there is one question
7 for nonminorities. That then creates a situation where
8 even where that juror is expressing reservations, you can't
9 discount race as a component of that. That's what I meant
10 when I said earlier. We frequently see cases where if you
11 just do investigations of African-Americans, you'll find
12 some things. You may say, well, here's somebody with ten
13 traffic stops and I'm going to exclude this person because
14 of ten traffic stops and excluding them because of ten
15 traffic stops in a case where that's an issue might be an
16 appropriate thing to do. The difficulty is when you have
17 only investigated the people of color, it is racially
18 biased. And so we have to stop that targeting. We have to
19 stop that focussing on people of color with an eye towards
20 proving to ourselves that they are not who we want. And
21 part of what this is about is getting past our
22 preconceptions of thinking that African-Americans, because
23 of where they live or because of their history of dealing
24 with discrimination, because they might have been profiled
25 or because they go to church, because they have an

1 education, somehow disqualifies them from being fair, being
2 capable of rendering a verdict of guilty or being capable
3 of rendering a verdict of death. The evidence suggests
4 that that's simply not the case. We've got lots of cases
5 where you have minorities on juries where guilty verdicts
6 are being returned, where death verdicts are being
7 returned. And all I'm saying is we shouldn't avoid that
8 problem of racial bias and discrimination simply because we
9 think we have a better chance if we keep black people out
10 or if we keep women out. And there are a lot of things we
11 can assign to why we're doing that, but in my view they are
12 completely inadequate and they are illegal. I agree with
13 you that the burden is a heavy one. I think it should be a
14 heavy one. My research suggests that the problem frankly
15 isn't that we've made it too hard to get a conviction in
16 the death sentence. One of the interesting studies that
17 are out there about diversity in jurors is that actually in
18 the wrongful conviction cases in the death penalty here, we
19 have now had over 140 people exonerated, proved innocent
20 after wrongful conviction. Some of the researchers are now
21 looking at higher levels of homogeneity among those jurors,
22 the deliberation process. The decision making process is
23 somehow not as rigorous, not as critical. So I think if
24 we're really concerned about making sure the verdicts are
25 what they should be, diversity helps. It doesn't hinder.

1 It doesn't make it too hard. If anything, I think it makes
2 it more reliable and that would be my kind of orientation
3 on that issue.

4 Q. Going back to what you said with respect to
5 questioning of a juror, if a prosecutor is consistent in
6 his or her questions to all of the jurors, for example,
7 with respect to the death penalty, and asks the same
8 questions with respect to consideration of both
9 punishments, being able to vote for both punishments,
10 whether they think it's appropriate sometimes, always or
11 never and trying to be consistent with respect to, as I
12 said the example of the death penalty, that would be an
13 appropriate way to ask the questions and to try to include
14 and get the attitudes, opinions and beliefs out and be
15 diverse in your selection process?

16 A. It would definitely be a step in the right direction.
17 Of course, you have to do more than ask the questions. You
18 also have to credit the answers the same way.

19 Q. Sure.

20 A. But you're absolutely right that, yes, when you're
21 only asking certain questions of people of color, when
22 you're only focussing on questionnaires of people of color,
23 when you're kind of inquiring into things like marital
24 status and child support and whatnot from people of color
25 and you're not doing that, that is absolutely a problem,

1 even when you've asked those questions. If an
2 African-American has to say it ten times before they are
3 credible to get on a jury but a white person only has to
4 say it once, that's still a problem. But yes, I totally
5 agree that having uniform selection procedures where you're
6 actually treating everyone the same, evaluating everyone
7 the same, viewing everyone the same, it's absolutely the
8 way to start this process and then you have to do some
9 other things to complete it but that's absolutely key to
10 starting the process.

11 MR. COLYER: Thank you, sir. No other questions,
12 Your Honor.

13 THE COURT: Any additional questions?

14 MS. STUBBS: No, Your Honor.

15 THE COURT: All right. May the witness be
16 released, folks?

17 MR. COLYER: No objection from the state, Your
18 Honor.

19 THE COURT: Thank you, sir.

20 THE WITNESS: Thank you, Judge.

21 THE COURT: Take care.

22 THE WITNESS: Thanks.

23 (Witness leaves the stand.)

24 THE COURT: Next witness ready?

25 MR. HUNTER: We actually have what for me will be

1 a challenging technical presentation, Your Honor. I wonder
2 if it's okay we can take a break, that would assist me.

3 THE COURT: Absolutely. Absolutely.

4 MR. COLYER: I'm empathetic to Mr. Hunter. I
5 certainly don't have any objections.

6 THE COURT: All right. Five till?

7 MR. HUNTER: Sure.

8 THE COURT: That enough time? Thank you.

9 MS. STUBBS: Judge, can we have until 11:00? Is
10 that okay?

11 THE COURT: Okay. Yes. Let me correct, 11:00.
12 Yes, ma'am, 11:00.

13 (Recess taken.)

14 (The following proceedings continued in open
15 court. The defendant, defense attorneys and state's
16 attorneys were present.)

17 THE COURT: Okay. We've got all present. The
18 defendant is also present. We ready to go forward, Mr.
19 Hunter?

20 MR. HUNTER: Yes, Your Honor.

21 THE COURT: Yes, sir.

22 MR. HUNTER: Your Honor, we call Louis Trosch to
23 the stand.

24 THE COURT: Okay. If you'll come up and be
25 sworn, please, sir.

1 LOUIS TROSCH, JR., called as a witness herein,
2 having been first duly sworn, was examined and testified as
3 follows:

4 THE COURT: Thank you, sir. Come around and have
5 a seat and once you're seated, if you will -- here's some
6 water, Mr. Trosch. If you'll state your full name and if
7 you'll spell both first and last name for the benefit of
8 the court reporter, please.

9 THE WITNESS: Louis, L-O-U-I-S, A, Trosch,
10 T-R-O-S-C-H, Junior.

11 THE COURT: Thank you, sir. Mr. Hunter.

12 DIRECT EXAMINATION

13 BY MR. HUNTER:

14 Q. All right. Judge Trosch, can you please tell the
15 Court your current judicial position.

16 A. I am a District Court judge in the 26th Judicial
17 District of North Carolina. That's Charlotte, Mecklenburg.

18 Q. Judge Trosch, because we are going to be offering you
19 as an expert in this case, I would like to ask you some
20 questions about your background and training.

21 MR. HUNTER: And, Your Honor, if I may approach
22 you and the witness?

23 THE COURT: Yes.

24 MR. HUNTER: I've got his C.V., which I think the
25 state already has but here's another copy. Here's a copy

1 for you, Your Honor.

2 Q. And you have a copy?

3 A. I do have a copy.

4 Q. And it's about you so you should know it, Judge
5 Trosch.

6 A. Hopefully. My judicial assistant knows it.

7 Q. Judge Trosch, how long have you served as a District
8 Court judge?

9 A. I've been a District Court judge since 1999, February
10 of 1999.

11 Q. And where is it that you serve as a District Court
12 judge?

13 A. Mecklenburg County.

14 Q. And have you recently received any awards for your
15 service as the District Court judge?

16 A. I have.

17 Q. And can you tell us about that?

18 A. Yes. I received the distinguished jurist award from
19 the North Carolina Association of District Court Judges in
20 October of 2011.

21 Q. And how many judges -- District Court judges do they
22 give that award to?

23 A. Just one.

24 Q. Where did you grow up, Judge Trosch?

25 A. I grew up in Charlotte.

1 Q. And where did you attend schools as you were growing
2 up?

3 A. I went to Cotswold Elementary, Randolph Middle School
4 and graduated in 1984 from West Charlotte High School.

5 Q. And did you go to college?

6 A. I did.

7 Q. Where did you attend?

8 A. Washington and Lee University in Lexington, Virginia.

9 Q. And did you receive any academic honors at Washington
10 and Lee?

11 A. I did. I received a scholarship from a fraternity for
12 my academic performance. I was the co-captain of the
13 basketball team and I graduated magna cum laude.

14 Q. And did you go to law school?

15 A. I did.

16 Q. And where did you go?

17 A. Chapel Hill, University of North Carolina at Chapel
18 Hill.

19 Q. And did you graduate from the law school?

20 A. I did. I graduated in 1992.

21 Q. And did you receive any honors upon graduating from
22 the law school?

23 A. I did. I graduated with honors and was inducted into
24 the Order of the Coif. I was also a note editor on the law
25 review and I received a scholarship -- Graham Carlton

1 scholarship for academic performance at -- in law school.

2 Q. How did you spend your professional career prior to
3 becoming a judge in 1999?

4 A. I was a public defender here in Fayetteville for a
5 little over a year after graduation. After that, I went to
6 the Children's Law Center in Charlotte, North Carolina. I
7 was there for three years. I represented children in a
8 variety of different capacities, different legal
9 proceedings. I advocated on behalf of children. Then I
10 went to private practice from -- for approximately four or
11 five years with a small law firm, was a family law firm in
12 Charlotte. I did mostly civil litigation. At that time, I
13 also continued to do some criminal litigation while I was
14 in private practice. I also taught -- have taught at the
15 University of North Carolina at Charlotte business law,
16 which is an introduction to the law course for
17 undergraduate students. I taught there in the late '90's
18 and I just last year, in 2010, began teaching again.

19 Q. I think you mentioned earlier that you were a
20 basketball player in college and I assume that means you
21 also played basketball in high school; is that right?

22 A. I did.

23 Q. And tell us a little something about -- well, tell us
24 about the racial makeup of your basketball team in high
25 school in Charlotte and what year was it?

1 A. I graduated 1984. I was known as the white boy so I
2 was the one and only white player for West Charlotte.
3 Played with -- in middle school, high school. I also
4 played -- I don't think they called it AAU back then but it
5 was the same thing as AAU and in college. And there were
6 whites and blacks on all those teams, predominantly
7 African-Americans.

8 Q. And when did you become a judge and under what
9 circumstances?

10 A. I was appointed to the bench in 1999, February -- I
11 started February -- I believe it was February 1st of 1999.
12 I was appointed by Governor Hunt for that position.

13 Q. And when you were first a judge and then you had been
14 a judge for a little while, did you have any particular
15 insight into the possibility that various implicit biases
16 might be affecting your judicial decisions?

17 A. No. It wasn't something that I thought about. It
18 wasn't something that I was aware of. It was something
19 that -- given my background and friendships and where I
20 grew up and where I went to school, I didn't think there
21 was such a thing inside me.

22 Q. What -- what happened that changed your thinking about
23 that, if your thinking did change?

24 A. Well, a couple of things. Soon after I was on the
25 bench, about a year after I was on the bench, our senior

1 resident Superior Court judge -- I always get that wrong,
2 so I hope that's right, Judge Shirley Fulton and our Chief
3 District Court judge, Bill Jones, responded to a survey
4 that had been done in Charlotte for court participants
5 about how they viewed how they were treated by the court
6 system and whether they were treated fairly and whether
7 some groups were treated differently than other groups.
8 That study was -- or survey was done primarily in the
9 district criminal courtroom, some felony probation hearings
10 and some district court misdemeanor cases. As a result of
11 that survey -- and that was before I was a judge that the
12 survey was conducted, but as a result of that, they
13 partnered with a group in Charlotte called initiative --
14 called Community Building Initiative, which is designed to
15 build bridges across communities. And they closed court
16 for two days and all of the judges, both Superior and
17 district court judges, participated in a -- what was to be
18 a two-day training on judicial leadership, power,
19 privilege, racism. And as a result of that training, I
20 became aware of some things about myself that I previously
21 was unaware of. Along with awareness of my colleagues
22 about how race, ethnicity, social class, gender impacts a
23 lot of what we do and a lot of the decisions that we make
24 often unbeknownst to ourselves.

25 Q. So you said you went to a two-day --

1 A. I did.

2 Q. You went to a two-day workshop and you were exposed to
3 some material --

4 A. I was.

5 Q. -- you hadn't really thought about before and then
6 what happened?

7 A. Well, I think the -- when I went, you know, I thought
8 this is going to be diversity training. I'm going to sit
9 in the back. Do my time because they told me I had to go.
10 I don't need this. I'm sure some of these other judges
11 need it but I don't need it. And after those two days, I
12 realized that my way of thinking and the privileges I have
13 had growing up shaped a lot of how I viewed the world and
14 how I viewed other people. I wasn't the only one. I don't
15 want to say universally but almost universally, the judges
16 -- or unanimously the judges that participated, I think
17 their eyes were open for the first time and so we asked
18 Judge Fulton and Judge Jones if they would continue -- and
19 CBI, Community Building Initiative, if they would continue
20 working with us and that turned into about an 18-month
21 process, somewhere between 15 months and 24 months of us
22 meeting and talking about and having real discussions about
23 how social class, social categories impacted our jobs as
24 judges and how we conducted our courts.

25 Q. In addition to those 18 months, that program you

1 participated in that you've just described, have you had
2 other training concerning implicit bias since that time?

3 A. So -- so after that training, it probably changed the
4 way I viewed things and the way I understood myself but I
5 don't think I fully understood implicit bias at that time.
6 Several years later, I was active with an organization
7 called the National Council of Juvenile and Family Court
8 Judges and they were partnering with another organization
9 called Casey Family Programs around the issue of the
10 disproportionality and disparity that children of color
11 were facing in the child welfare system. And basically,
12 that means that children of color are more likely to be
13 placed into foster care in similar situations to white
14 children. Children of color, once they enter the foster
15 care system, often remain in that foster care system longer
16 than white children do. They reunify with family members
17 at a lower rate than white children. When they are free
18 for adoption, it's more difficult to find adoptive homes
19 for those children. So because of all those long-standing
20 issues and problems, the National Council and Casey Family
21 Programs partnered to begin an initiative to try and reduce
22 those disproportionalities and disparities. It's called
23 Courts Catalyzing Change. And I was asked to participate
24 as a steering member or a member of a steering committee
25 for that initiative. And through that steering committee,

1 I participated in a lot of training, did a lot of research
2 and reading of -- sort of they told me what to read and I
3 read what they told me to read, but we participated in a
4 number of trainings ourselves. And then out of that, I was
5 taught enough information in how to work with other judges
6 across the country. So after I went through a lot of
7 training myself, I went out with other judges and social
8 psychologists and other experts to train other judges about
9 implicit bias. So I worked with them on a national level.
10 At the same time in Charlotte, we have a committee -- and
11 again, I'm a juvenile court judge so a lot of what I'm --
12 mostly -- a lot of what I'm talking about is in the
13 juvenile court context. I think it's applicable to all
14 courts but that's where it arose. We had a local group --
15 we call it the partnership group and it was made up of all
16 four of the juvenile court judges along with the head of
17 our department of social services, an assistant
18 superintendent of schools, the head of our guardian ad
19 litem program, county attorneys who represent the state in
20 abuse and neglect cases, defense attorneys from child
21 advocacy agency in Charlotte, mental health agency, et
22 cetera. And we also began to look at the disparities that
23 were going on. And some discussions came up -- honestly it
24 came up over a dress code. There was a discussion about a
25 dress code and a white judge -- a black -- an

1 African-American judge said, well, I make kids dress in X
2 way. I make them pull their pants up and wear a collar
3 shirt in school and a white judge responded and said, well,
4 I couldn't do that. And we probably for the first time had
5 some discussions about the comfort levels that different
6 judges had raising issues about race and class and how they
7 impact and what goes on in court. And out of that, we
8 again contacted Community Building Initiative and went
9 through about a nine-month process with that group again
10 focussing on how privilege and implicit bias and how that
11 impacts the work that all of us do in the -- both the
12 juvenile justice and the child welfare system, so I
13 participated in that also.

14 Q. So is it fair to say that this interest in implicit
15 bias and disparity has become a principal interest in your
16 professional career?

17 A. I want to do a good job and if I want to do a good job
18 as a judge, I better be aware of this and I better do
19 everything I can to make sure I understand what's going on
20 in my conscious mind -- my subconscious mind, what biases I
21 have so that I can try and deal with those biases.

22 Q. And have you participated in programs as a trainer or
23 presenter around North Carolina or around the country
24 related to implicit bias?

25 A. I have. I have extensively worked with judges in

1 North Carolina, Virginia, Georgia and Texas actually going
2 to Virginia on several occasions and to several groups in
3 North Carolina, most specifically Guilford and Pitt County.
4 I've spent a lot of work with their judiciary on helping
5 judges understand the concepts of implicit bias. But
6 moreover to understand that you can do something about
7 those biases that all of us as human beings have inside our
8 -- our beings.

9 Q. Well, that's what I was going to ask you next. What
10 are the point of these trainings?

11 A. Well, first to introduce the concept so that judges
12 and other participants in the juvenile system -- and I
13 should say that I don't just present to judges, so there
14 have been prosecutors, defense attorneys, clerks,
15 advocates, county attorneys, that -- and other social
16 workers and mental health professionals that participated.
17 But the idea is to, first, make people aware and introduce
18 the concept of implicit bias because I wasn't aware of it.
19 Most people, when you talk about it at first, are not aware
20 of the way your brain works and how you -- the mental
21 shortcuts or how these biases end up impacting what you do.
22 So it's to introduce the concept. After you introduce the
23 concept, to go into a little bit more detail about how it
24 impacts what we do as judges and how it plays out in
25 courtrooms, and then finally to talk about and to help

1 groups of judges and other professionals work on steps that
2 they can take to mitigate or minimize the effects of these
3 implicit biases.

4 Q. Thank you very much.

5 MR. HUNTER: Your Honor, we would tender Judge
6 Trosch as an expert on implicit bias in the courtroom and
7 methods for reducing the effect of implicit bias.

8 MR. THOMPSON: No objection.

9 THE COURT: All right. Yes, sir. You may
10 proceed, Mr. Hunter.

11 BY MR. HUNTER:

12 Q. Judge Trosch, you were present in court yesterday when
13 Professor Stevenson and Dr. Sommers testified?

14 A. I was.

15 Q. And I think you've already mentioned that there is --
16 you were presented with evidence of disparate and
17 disproportionate treatment of African-Americans in the
18 juvenile courts; is that right?

19 A. Yes.

20 Q. Both nationally and --

21 A. Yes. We've done --

22 Q. -- and locally?

23 A. We've done statistical analysis in Charlotte and in
24 North Carolina and then there have been national studies as
25 well.

1 Q. And in your opinion, as an expert, was there -- is
2 there a connection between implicit bias and those
3 disparities and disproportions?

4 A. Most definitely. I must say that I don't think that's
5 the only cause of disparity and disproportionalities and
6 nobody within the Court Catalyzing Change Initiative or
7 Casey Family Programs or our local initiatives would say
8 that all of the disproportionalities or disparities are
9 caused by racial bias or any type of implicit bias but it
10 is a factor.

11 Q. Judge Trosch, I have prepared a brief PowerPoint
12 that's actually from slides that you have presented in some
13 of your presentations and it's --

14 MR. HUNTER: And, Your Honor, I have marked this
15 as exhibit 47.

16 THE COURT: Okay. Thank you, sir.

17 BY MR. HUNTER:

18 Q. I think you've got a copy of the slides, don't you,
19 sir?

20 A. I do.

21 Q. And why don't we put up the first one here and do you
22 recognize this slide?

23 A. I do. This is, as I said, I often -- when I present,
24 I take the role of talking about how implicit bias plays
25 out in the courtroom and from a judicial perspective or

1 from a judge's perspective Kelly Tate is a professor at the
2 University of Nevada at Reno and she's a social
3 psychologist and so she talked more about the science of
4 implicit bias. But together I'm pretty sure this is a
5 presentation we did in Georgia for judges in -- across the
6 state of Georgia.

7 Q. And what's the significance of anything of the picture
8 you've got there on the right side of the screen?

9 A. It's -- I wish I was more creative but it's an iceberg
10 so the reference is that in this country and individually,
11 we've done a really good job of dealing with explicit bias
12 or -- and y'all talked about some or I heard the testimony
13 some about that yesterday, the idea that it is not a good
14 thing to be openly racist or to treat different classes of
15 people in different ways in an open way and that's I
16 believe Professor Stevenson said it's a provocative way to
17 think. But that's the tip of the iceberg, so to speak, in
18 this illustration. What we've done in this country and
19 individually, we understand what's showing above the water.
20 The explicit bias is what we're consciously thinking but
21 there's a whole lot, as you see, in any iceberg going on
22 underneath the surface that often we're not aware of.

23 Q. Is it really true that nine-tenths of an iceberg is
24 under the water?

25 A. I am not a mathematician, Mr. Hunter, so I'll take

1 your word for it.

2 Q. Can you use this and the other PowerPoint slides to
3 help you explain briefly to the Court about the concept of
4 implicit bias and also give an example of your
5 presentations on this topic?

6 A. I can.

7 Q. All right. Let's go to the next slide. Now, there's
8 some terminology here. We've heard implicit bias mentioned
9 already but if you would, just take us through these two
10 terms on this slide?

11 A. So you all talked a lot about implicit bias yesterday.
12 You used unconscious bias, subconscious, racism. You used
13 a number of different terms so if it's okay, for my
14 purposes, I'm going to use the term implicit bias, but it
15 really means the same thing you all -- that was defined
16 yesterday and that is, as you can see, we all have
17 unconscious or beneath the surface preferences and they can
18 be positive or they can be negative for social categories
19 or different groups of people. So that's the concept of
20 implicit bias, at least as I define it. Again, it's very
21 similar to the definitions that you all have for
22 unconscious bias or subconscious racism, but it all means
23 the same thing. Heuristics --

24 Q. Just to clarify --

25 A. Sure.

1 Q. -- implicit bias would not be confined to -- race is
2 one social category?

3 A. Right.

4 Q. There are other social categories that could also --

5 A. Right. And so it's -- it could be about tall, short,
6 thin, fat.

7 Q. You don't need to be more specific.

8 A. You don't want me to get into the hair thing, do you?

9 THE COURT: We would appreciate that.

10 MR. HUNTER: Close to the bone.

11 THE WITNESS: I also don't want to get into that
12 either.

13 BY MR. HUNTER:

14 Q. And how about heuristics?

15 A. Heuristics are really -- it's the scientific name for
16 the shortcuts that your brain or the gymnastics that are
17 going on inside your brain to make sense of the world and
18 help you maneuver through the world and so basically
19 another way of looking at it is there are rules of thumb
20 that you use to navigate through the world. For example,
21 tall people play basketball, that would be a rule of thumb.
22 Or it's better to take the freeway than to take the back
23 roads. That would be a rule of thumb that you go through
24 and there are a lot of these -- some of them that we're
25 aware of but many of them that our brain's using that we're

1 not aware of, they are often beneath the conscious level.
2 And often they are very helpful because of all the stimuli
3 that we're being bombarded with all day long, without these
4 mental shortcuts, we really couldn't function in the world.

5 Q. I have a -- I have a video that, Judge Trosch, that
6 you actually showed me that I want -- would this be helpful
7 to you to illustrate the point you've just made?

8 A. I think so.

9 Q. Okay. Well, I have marked this as exhibit 50. The
10 state already has a copy of it, although Mr. Colyer, as a
11 good sport, has agreed not to preview the video so he
12 hasn't seen it. His companion has seen it. So why don't
13 we -- why don't we roll this and -- it lasts a minute.

14 THE COURT: Yes, sir.

15 MR. HUNTER: So just to know how long you have to
16 pay attention.

17 (Mr. Hunter plays defendant's exhibit 50.)

18 THE WITNESS: So there is no sound here but they
19 ask the question -- there are 13 passes but did you see the
20 moon-walking bear, which most people didn't see the first
21 time but I'm betting you're seeing him right now across the
22 middle.

23 BY MR. HUNTER:

24 Q. Okay. I want a show of hands of who did not see that
25 walking bear the first time through.

1 A. And we've shown this across the country and they've
2 done this a lot. This is actually based on research
3 studies they have done. That particular video clip is an
4 ad that was for -- in Britain for cyclists -- for motorists
5 to look out for cyclists. But it really is telling that
6 when you watch that video the first time, most people,
7 maybe one in a hundred people may see the bear the first
8 time but you don't see the bear. And the reason is because
9 your brain was cued in to look for and comb through all
10 those stimuli. There is a black team passing balls around.
11 The white team was moving back and forth and so your brain
12 was cued to just focus on the white team and them passing
13 the ball and so it ignored the other stimuli because it was
14 focussing only on what it had the ability to focus on. The
15 reality is we can't focus on everything. And because of
16 that, you completely miss this bear that -- this man in a
17 bear suit actually that walks across -- and moon -- very
18 badly I might add, but he moon-walks across the stage until
19 it's pointed out to you. Once it's pointed out to you,
20 your brain now knows, oh, I need to look for the bear and
21 then you see the bear the second time. So that's really
22 how heuristics often work or that's one example of
23 heuristics. That one is a heuristic called focussing and
24 it's basically you were told at the beginning of that to
25 focus on the white team throwing the balls so that's what

1 your brain focuses on to the exclusion of other -- what
2 could be very important things that are in that video.

3 Q. All right. Let's go back to the -- back to the slides
4 and here's another more -- more terms I think, Judge
5 Trosch.

6 A. So you use heuristics for everything. It's not -- you
7 don't just use heuristics for race or how you see people.
8 You use heuristics really for everything in your life. For
9 example, right now, there are a lot of stimuli going. The
10 air is blowing over there. Some people are breathing.
11 Somebody in the audience's stomach may be rumbling.
12 Somebody may be thinking I'm hungry. I want to go to
13 lunch. You've got other things that are going on. But
14 your brain figures out I need to focus on the witness right
15 now, so the judge or the attorneys are focussing on the
16 witness and ignoring a lot of those other stimuli. So you
17 do that for things, places but you also do it for people.
18 And when you utilize these mental shortcuts for people,
19 then oftentimes you end up with bias. And what happens is
20 -- and we'll talk about this in a minute, but your brain
21 categorizes things, categorizes certain people. For
22 example, I'm tall. I'm six-six. And if you hadn't asked
23 me the questions that you did about my background, all of
24 you, if you were with me for more than two minutes standing
25 up, would ask me if I play basketball. Never met a person

1 that didn't ask me within two minutes of meeting me did I
2 play basketball. And the reason is because there is a
3 stereotype or a generalization about where I fit as a
4 category of a person. I am a tall person. Tall people
5 must play basketball so that's what leads to stereotypes.
6 You -- you come up with a typical person in a category and
7 you assume that all people that fit in that category have
8 those same characteristics. That then goes to prejudice,
9 which is how you actually feel about somebody based on what
10 category they are in or your brain has placed them in. And
11 then finally, that can then lead to a behavioral result
12 which is discrimination which is not always intentional at
13 all. In fact, most of the time, as you saw from that
14 iceberg, it's not intentional that you treat or act towards
15 people in a given social category -- again, this is not
16 just racially. This is gender. It's age. It's any kind
17 of social category you can come up with but you treat
18 people in a certain way based on that category that your
19 brain has put them in.

20 Q. Judge Trosch, you're saying you and I know you're
21 talking about me but are --

22 A. General, I mean people.

23 Q. -- you talking about people in general?

24 A. When I talk about this, it's everybody. It's all
25 people. So I'm using you in the general sense.

1 Q. All right. Well, let's go on to the next -- the next
2 slide. This says innate human tendencies?

3 A. So this is really how implicit bias plays out in the
4 brain. Some of this is based on these heuristics that I
5 talked about. But one of the things your brain does, as I
6 said just a minute ago, is it categorizes things, places
7 and people. So, for example, there's a cup in front of me
8 and when my brain sees this, I don't have a -- I don't
9 analyze this for five minutes figuring out that this is a
10 cup. I very quickly do what they did -- I don't know if
11 you remember the old Sesame Street. Which one is not --
12 what is this like? This is like other things that I drink
13 out of and my brain immediately pulls up, oh, this is a cup
14 so I know it's a cup. I know to pick it up and drink from
15 it. So I categorize things and then I make generalizations
16 based on other things that are in that category. You can
17 do that with places as well. For example, I live in
18 Charlotte. There are a lot of big buildings in Charlotte.
19 There are a lot of banks in Charlotte. So if you live in
20 Charlotte or you come to Charlotte and you see one of the
21 big buildings, people just refer to them as, oh, that's a
22 bank building. Every big building downtown in Charlotte or
23 Uptown they call it is presumed to be a bank because a big
24 building is in a category along with banks. We have a lot
25 of banks and so you generalize all tall buildings must be

1 banks. And you can do that, as I said just a minute ago,
2 with people as well. The other thing your brain does is it
3 simplifies things. As the film showed very well, we're
4 flooded with all this information and so your brain has to
5 create shortcuts and process -- really, it's over 90
6 percent of the stimuli that the things that are going on
7 around you have to be -- your brain has to basically be on
8 autopilot and that can be very helpful. For example, if
9 you're in the ocean and you see a fin -- you're swimming in
10 the ocean and you see a fin next to you, you don't want to
11 stand there thinking wow, you know, that could be a shark
12 but dolphins have fins also and maybe it's a nurse shark.
13 You don't -- you just want to see shark, get out. And so
14 it helps you in fight or flight situations make very quick
15 decisions and not have what's called the analysis paralysis
16 where you -- where you end up in a dangerous situation, not
17 frozen and not moving forward. The other thing that
18 simplification in these shortcuts do is they save your
19 cognitive resources. Your brain -- making decisions is
20 taxing. Processing information cognitively is very taxing
21 and it's like exercise to the physical body. It makes you
22 tired. It wears out your brain. So if your brain can only
23 utilize those cognitive -- valuable cognitive resources on
24 things that it has to, very complicated decisions or
25 situations, it will. It wants to simplify as much about

1 life as possible. When I was driving here the other day --
2 I go to work the same way every day. I bet you've all done
3 this. I hope everybody's done this or a lot of people have
4 done this. As I get older, I do it more but anyway I'm
5 driving to work. I go the same way as I would go to
6 Fayetteville. I go Independence Boulevard and I take a
7 left to go to work and I drive down and I go to work. If I
8 want to go to Fayetteville from Charlotte, I take a right.
9 Well, I was thinking about my testimony. I was thinking
10 about something that my daughter was doing that day and so
11 I got to the turn. I just turned left like I always do and
12 got halfway to work before I realized, oh, I'm supposed to
13 go to Fayetteville today and I had to turn around because
14 my mind had turned on this autopilot. The third thing your
15 brain does is prefer the familiar and the similar. Again,
16 there are a lot of reasons for this and I won't bore you
17 with all the reasons but it plays out in you like to go
18 home. You know where everything is at home. You feel
19 better at home. You know, I stayed in a hotel room last
20 night. It was a nice bed, nice facilities but it's not my
21 bed so it's uncomfortable for me and people are like that
22 as well. They've done studies with six-month-old children
23 and six-month-old children already begin to prefer people
24 that look like their mother, racial category, gender, et
25 cetera, voices that are similar to their mother. They've

1 done other studies with children and adults to show that
2 all of us like to be around things that are familiar and
3 similar to us. And the last thing that I wanted to talk
4 about that's important is this notion of rationalization
5 and filtering. First of all -- and you all talked a little
6 bit about this actually yesterday. There was some
7 discussion about this yesterday. Oftentimes, when our
8 brain is engaged in these shortcuts, we're not aware of it.
9 We don't know it at all and we just go through things.
10 When someone asks us why did you do that? Why did you ask
11 the tall guy if he plays basketball? We might come up with
12 a long, more reasoned explanation when we are challenged
13 and you all got into some discussion about that yesterday
14 about challenging jurors and why -- what explanations you
15 might have to challenge those jurors that are legitimate.
16 And so after the fact, often you rationalize decisions that
17 really were made on a snap -- sort of gut level,
18 subconscious level. The other thing that you do is you
19 filter information that comes in. Basically, we take
20 information in and the way we take it in is to confirm what
21 we already think. We take -- we process information to fit
22 our preconceived notions. And sometimes because of that,
23 we don't ask for or receive all of the information about a
24 person, a place or a thing because we're making assumptions
25 about those people, places and things. You know, magicians

1 know all about this stuff. That's how they fool us all the
2 time. They use all these mental heuristics to trick us all
3 the time and it's, I guess, very profitable for them.

4 Q. Let's go to the next slide and again, this is again a
5 little bit more about human tendencies.

6 A. Yeah. So if everybody holds their hands together and
7 you interlace your fingers and just put your hands together
8 like in that picture, if you do that, you'll notice that
9 you put one thumb on top of the other one. Mine is the
10 left thumb. Yours may be the right thumb. I don't know.
11 But if you do that and then you unlace your fingers and
12 move them down one notch so that the other thumb is on top,
13 it feels really weird. It feels bizarre to you. It's no
14 different. There's no difference. It's just I like it
15 with my left thumb on top. That feels right to me. So
16 familiar then goes beyond, well, this is just the way I do
17 it because this is the right way to do it. And if somebody
18 had said, well, I do it a different way. Well, that's not
19 the right way. My way is the right way. And when you take
20 that familiar and similar and that seems right and feels
21 normal and natural to you, you see that people then
22 actively and often unconsciously want to be around people
23 that are like them, in favor of people that are like them.
24 To see that, all I have to do is go to a high school
25 lunchroom. If you go to a high school lunchroom, all the

1 basketball players sit together. All the cheerleaders sit
2 together. All the people that can do the computer stuff --
3 I mean people divide themselves in high school into these
4 really small social categories and then spend most of their
5 time with people that are familiar or comfortable with
6 them. So it goes beyond race.

7 Q. Go on to the next slide. Okay. And so, you know, I
8 don't know if you are familiar with this, Judge Trosch, but
9 you know, there's a famous memo from Justice Scalia I think
10 in the McCleskey case where this is an interjustice memo
11 where he acknowledges that, you know, we all have these,
12 you know, racial loyalties and things. But I mean his
13 position is basically there is nothing anybody can do about
14 it. We'll paralyze ourselves if we try and acknowledge
15 them in the law. Do you agree?

16 A. I'm a judge so you're asking me -- with all due
17 respect to Justice Scalia, I don't think he could be more
18 wrong. There are things that people can do to minimize or
19 mitigate these effects. It's not easy all the time but
20 there are things that can be done to -- I wouldn't say
21 solve but to do better than we do currently.

22 Q. What are those things?

23 A. Well, there are several things. The first thing --
24 y'all have had some discussion about this. It's really to
25 become aware, first of all, of the problem. And so you

1 want to make sure that people are in fact aware, hey, this
2 is what's going on beneath the surface. This is the other
3 90 percent of your brain and how it works and how it
4 sometimes tricks you so that you understand that not just
5 white men, by the way, but all people have implicit bias --
6 implicit biases. And then not only to go through -- so you
7 have to go through some training or some education about
8 that and not just one time. But you have to -- this is
9 something that if you go through a training, like you all
10 have gone through a week of this or several days of
11 learning about this, if you don't remove that or continue
12 to remind yourself of this or continue to get training,
13 you'll fall back right into the same traps that you did
14 before. It's kind of like when you go on a diet. If you
15 quit dieting, you quit eating healthy, you fall right back
16 into the same eating patterns. Well, this is the same way.
17 So you not only have to become aware of the problem but you
18 then have to continually remind yourself of what's going on
19 inside your own brain.

20 Q. All right. Let's look at the next slide.

21 A. So the next thing you can do is really to hold people
22 accountable and there are a lot of different ways you can
23 do that. One way -- and we do this now for a bench guard
24 that we have is to internally hold yourself accountable.
25 So you are aware now that these are tendencies that I have

1 and these are ways that I see the world and you now look
2 for patterns in your own decisions. You question your own
3 decisions and you remind yourself of -- of what's going on
4 inside your brain and I now oftentimes will do things like
5 -- if I've got a defendant and a victim, I'll switch them
6 so if the victim is a white female and the defendant's a
7 black male, I'll switch -- I will say what if the victim is
8 now the defendant and the defendant is now the victim?

9 Q. You're doing this in your mind obviously?

10 A. Yeah. I'm not literally --

11 Q. This is an exercise you're doing.

12 A. I don't come out and move people in the courtroom but
13 in my mind, I'm thinking to myself would my sentence --
14 would my verdict and my sentence be the same if these two
15 people had different -- were in different social
16 categories. So you can hold this -- that's an internal way
17 of holding yourself accountable. You can also externally
18 hold people accountable because the reality is study after
19 study shows people do better when somebody is watching
20 them. When they know somebody is watching them, they do a
21 much better job. So one of the things that we've done in
22 Charlotte is we now observe each other. Judges observe
23 other judges to see how we're handling these situations and
24 then we talk to each other about it. That's one way to
25 externally, sort of a kind and gentle way to hold

1 colleagues accountable. Professor Stevenson talked a
2 little bit about I guess some more draconian ways or more
3 punitive ways that you can hold people accountable. I
4 won't make any judgment but there are a lot of different
5 ways that you can externally hold people accountable. And
6 then finally, you can use -- you can use checklists and
7 those are really just list the questions that you want to
8 make sure -- and Mr. Colyer was talking about this. It's
9 really a great idea that he was talking about earlier which
10 is if you ask everybody the same questions all the time,
11 then you are much less likely to make mistakes. You are
12 much less likely to use shortcuts if you do that. So we
13 now actually have a checklist that we use in court as a
14 judge when I ask questions, it makes me ask the second
15 question and the third question and makes sure that I ask
16 everybody the same questions and I don't zero in on one
17 group of people and ask them more questions and other
18 groups of people fewer questions, not because I'm intending
19 to, not because I purposely want to treat different people
20 different -- or different categories of people in
21 discriminatory ways but because of the way my mind works
22 and the assumptions that I'm making.

23 Q. And this -- what about this next slide?

24 A. Another thing that is really critical in these
25 heuristics is your brain, when it's under stress -- so when

1 you're making very difficult, complex decisions and you
2 have a very short period of time to make those decisions,
3 you resort to something to simplify the process. You
4 resort to a heuristic. And there are a lot of those
5 heuristics, by the way, and we talked about -- and they
6 don't just deal with race but you resort to these shortcuts
7 because you're pressed for time. Just the other day, I was
8 in court. It was 4:50 I think and I had two cases left.
9 And I'm a juvenile court judge and -- and again, with all
10 due respect to Superior Court, I have to keep going until I
11 finish. And so if that means 6:00, we're there until 6:00.
12 And so it had been a very difficult day and a case was
13 coming in and I just caught myself saying a prayer to
14 myself, please, God, let this be a simple case because I
15 can't deal with another -- that's the time when I'm tired,
16 I'm stressed, I don't have much more time, that I'm very
17 likely to just go along with the flow, to make assumptions,
18 to use shortcuts. So we now try to use -- make sure that
19 our hearings are scheduled with sufficient amounts of time.
20 We take breaks and we really -- the other thing that all
21 people do is they make a decision very early in the
22 process, after like the first or second piece of
23 information, rather than listening to everything. So I now
24 consciously try to make myself listen, even after my mind's
25 saying, all right, I know what I'm going to do here. I

1 know what I'm going to do here. And so those are things
2 that taking extra time will help you avoid these mental
3 shortcuts.

4 Q. What does this mean, think about your thinking?

5 A. A lot of times people in our society think if we --
6 you said Justice Scalia. If we just pretend like these
7 things don't exist, they'll go away. If we put our head in
8 the sand, then it won't be there. If we say that we're
9 color blind, if we just make ourselves be color blind, if
10 we don't -- if we say I treat everybody the same -- which
11 is what I did before I went through this process, by the
12 way. If -- the more that we do that, the more likely we
13 are to fall prey to implicit biases and to use these mental
14 shortcuts. The more that we acknowledge to ourselves on a
15 daily basis I make judgments about people based on
16 categories that I have put them in, whether it's they are
17 tall, they play basketball. They are a woman, they work at
18 home and not professionally. They are African-American,
19 they're more likely to live in this part of town or less
20 likely to be favorable to the state. Whatever those --
21 those categories are, if I acknowledge that I'm doing that,
22 I can then cognitively override those implicit biases,
23 those shortcuts. And so being conscious of difference
24 actually help -- and the way you view that helps you avoid
25 those pitfalls.

1 Q. Okay.

2 A. And the last thing that -- there are a lot of things
3 that you can do but the last thing I've listed here is to
4 really consciously then confront those stereotypes that you
5 have. You can go and take this test, it's called the IAT
6 test and I would warn you it's not really a good individual
7 diagnostic tool and there's a lot of controversy about it,
8 but it's a good way to see that people view different
9 groups of people differently without thinking about it.
10 Because in that test, you push a button -- you just push
11 buttons. You're not going through a long thinking process.
12 But you can do that. The other thing that you can do is
13 when you familiarize or become more familiar of -- and I
14 said this a minute ago, reversing the parties, but if you
15 purposely go seek contact with people that are different
16 than you, that are not familiar to you, then you can come
17 to override some of the categories that you placed them in
18 and instead build what you have in common with people that
19 are different than you, whether it's older people or people
20 that aren't lawyers or people that don't play sports or
21 people that are black or white or old or young, you can
22 disabuse yourself and start to change some of the
23 categories that you have in your brain. And they have
24 actually done studies where when people just on their -- on
25 their computer have a screen saver that shows positive role

1 models from different groups of people -- so
2 African-American men, for example, in -- as scientists, as
3 lawyers, as judges, as presidents, that -- or women in
4 professional roles, et cetera, things that cut against what
5 a lot of our biases are, that also erodes some of those
6 negative categories or negative categorizations that we
7 make and generalizations we make about people.

8 Q. And then finally?

9 A. Justice Scalia is right that it's not easy but there
10 is something that can be done. So that's where I differ
11 with his analysis. First of all, everybody -- it's not one
12 person or -- we're real good at saying, well, yes, people
13 can be racist in this society. It's just not me. It's
14 everybody but me. And the reality is all people have bias,
15 not because they are racist, not because they're bigots,
16 not because they necessarily want to but because how the
17 human brain works. And once you are aware of that and
18 engage in both training and processes, then you can reduce
19 those stereotypes, those implicit biases, those categories.
20 And I would also say, you know, the, well, this is the way
21 the brain works, there's nothing we can do about it, that's
22 really an excuse and this is not -- the way your brain
23 works is not an excuse for discriminatory behavior.

24 MR. HUNTER: Okay. Thank you, Judge. Your
25 Honor, if I may approach the bench and the witness?

1 THE COURT: Yes, sir.

2 MR. HUNTER: I have a couple of other exhibits
3 here.

4 Q. And you mentioned something about bench cards and I'm
5 going to show you exhibits 48 and 49.

6 MR. HUNTER: There is your versions, Your Honor.

7 THE COURT: This is the Court's version?

8 MR. HUNTER: Yeah -- yes. You've got your
9 original bench cards.

10 THE WITNESS: I do.

11 MR. HUNTER: So let me give you one for your very
12 own, Your Honor.

13 THE COURT: Thank you.

14 BY MR. HUNTER:

15 Q. Can you tell me what you've got there?

16 A. I've got two things. One is a court -- did you hand
17 both --

18 Q. Yes.

19 A. I have -- one is a court observation form and, as I
20 said earlier, one of the things -- well, basically we've
21 done five things in my jurisdiction and I think a lot of
22 courts across the country are doing. And I might add that
23 it's not just juvenile courts. The National Center for
24 State Courts asked me to be a part of a training team that
25 they have working with courts on all different levels,

1 judges in all different types of courtrooms as well as
2 other participants in that process, so attorneys and other
3 court personnel that are involved in the judicial process,
4 their project, which is just -- they just are getting ready
5 to publish their findings, focuses on training judges and
6 other court personnel about implicit bias and how it
7 impacts decisions that people make. So one of the things
8 that we've done --

9 Q. Yeah. Tell us what do you do in those two things I've
10 just -- two exhibits.

11 A. One is a court observation form and that form is we
12 use those to go observe each other. A lot of the things on
13 that form are just sort of best practice questions that you
14 would expect a judge to ask. But there are questions that
15 specifically center on race, ethnicity and there is a place
16 to take notes. So we then have informal discussions about
17 the -- about the observations that other judges have had
18 with judges. So that's one of the exhibits. I don't know
19 what the number is. That's number --

20 THE COURT: 47 (sic).

21 THE WITNESS: 47 (sic).

22 THE COURT: Yes, sir.

23 THE WITNESS: And the other exhibit is the bench
24 card and that was developed by the National Counsel of
25 Juvenile and Family Court Judges in consultation with some

1 university professors and I don't know all their titles but
2 to mitigate the effects of implicit bias, specifically in
3 preliminary protective hearings in juvenile court and so we
4 use those -- that's exhibit 48?

5 THE COURT: Yes, sir.

6 THE WITNESS: We use those when we hold court
7 hearings. I literally go down and I ask these questions.
8 If you look at those on page one, it tells me who should be
9 in court. If they're not there, to ask about why they're
10 not there, what I can do to make sure that all of the
11 people that can give me all the information that I need can
12 be present. The second page, I asked -- there is a -- I
13 don't know if -- yours is shaded gray but mine is purple
14 but the gray shaded area is really that part that I talked
15 about making myself aware of my own biases and how they
16 might impact my decision. So I read those questions to
17 myself before I begin the hearing. And they are things
18 like what assumptions have I made about the cultural
19 identity, genders and background of the families? What is
20 my understanding of this family's unique culture and
21 circumstances, et cetera? And there are questions that go
22 on, am I making assumptions? Am I relying on factors
23 beyond the evidence that's before me in making a decision?
24 So I ask those questions to hold myself internally
25 accountable. And then if you see on pages three and four,

1 I just go through and either I ask these questions or the
2 attorneys that are in my court produce this evidence while
3 I'm checking it off to make sure that it's all -- it's been
4 presented so that I make sure to ask all of the questions.
5 And I can give you two examples of that if you like.

6 BY MR. HUNTER:

7 Q. Sure.

8 A. The first is you see the first thing at the top of
9 page three is the Indian Child Welfare Act or ICWA. ICWA,
10 that's unique. That's got nothing to do with a death
11 penalty case but it's unique to juvenile court but it's a
12 federal law that requires that if a child is eligible for
13 or a member of a federally recognized Indian tribe, then
14 there's a whole different legal process that we have to
15 follow. In fact, even the burdens of proof are different
16 and we have to take a number of steps to change the nature
17 of the proceedings. In my 12 years, before we started
18 using this bench card, I was told we don't have any Native
19 American kids in Charlotte. It doesn't apply because the
20 native Americans that live in Charlotte are Lumbee Indians
21 and they are not federally recognized so ICWA doesn't apply
22 to Lumbee Indians, so in every report that I would get, it
23 would say ICWA doesn't apply. And I never asked further.
24 I didn't ask any more questions about it. I just assumed
25 again the categories, shortcuts, simplifying my day, okay,

1 they've done what they're supposed to do. We don't have
2 any Native Americans so this law doesn't apply and I just
3 accepted it. Now that I ask in every case and I ask the
4 parents as well as the social workers, we've done more
5 investigation since January of 2011, which is when we
6 started using this form, than we did in the 12 years before
7 -- before we utilized these bench cards. It's completely
8 transformed the nature of the inquiry that our social
9 workers engage in when they talk to families, the colloquy
10 and the questions that the lawyers ask in court, and what
11 we're doing really to make sure that we're effectuating
12 federal law and treating members of Native American tribes
13 in the way that the law demands that we treat them. So
14 that's one example. Another example is, if you look down
15 to page four where we talk -- where I think it's the second
16 bullet point down, appropriateness of placement.
17 Oftentimes, especially with -- we ask is there another
18 placement -- and forgive me because I know the -- the
19 procedures are not the same as death penalty. But what's
20 going on underneath it is exactly the same thing that
21 happens in Superior Court. How it plays out in juvenile
22 court is frequently I will ask are there relative
23 placements. The child is in foster care. So these are
24 hearings where a child has been removed from their home and
25 they have been placed in foster care so we come to court

1 very quickly after that. It's called a preliminary
2 protective hearing. They are often in foster care and I
3 will ask are there relative placements available? In other
4 words, could they go with a family member, like an aunt or
5 an uncle, grandparents, instead of being in foster care.
6 And the answer usually is, well, we're looking at so and so
7 or we looked at an aunt and an uncle but they are not
8 appropriate. And before, again, I accepted that. I didn't
9 ask any more questions. Or I might say well, could you go
10 work with them again or let's talk -- see if there is some
11 other people that the mom or dad can look into. Now I ask
12 the second question. That's why this bench card is so
13 valuable because it forces me to make an inquiry beyond
14 that surface level justification for not placing children
15 with relatives. And now that I ask -- because I then say,
16 well, wait a minute, what are the reasons they're not
17 appropriate? And then I will get reasons like, well,
18 grandpa had a DWI 15 years ago. Okay. Has grandpa had any
19 more DWI's? No. Has grandpa -- you have any suspicion
20 that grandpa has alcohol issues that would impact his
21 ability to care for these children? No. Have -- do you
22 have any other information that grandpa's driving the
23 children around after he's been drinking or putting them in
24 dangerous situations? No. Then I can say that your reason
25 for grandpa not being appropriate is not legitimate and you

1 need to look again. And so this card forces the court --
2 and the lawyers frankly do this now without me having to
3 ask all these questions. But it forces all of us to make
4 sure all of the information is received about all of the
5 people that are in front of us, not just some of the
6 information about some of the people. So that's what we
7 use this bench card for.

8 Q. Thank you very much. And, finally, Judge, are you
9 aware -- you've done training in North Carolina?

10 A. I have.

11 Q. You said extensive training. Any prosecutors in North
12 Carolina or any trainers for prosecutors in North Carolina
13 ask you or anyone else you know just implicit bias
14 training? Have they asked for your help or training?

15 A. It's my -- no one has asked for my help, specifically
16 prosecutors. I've gone to speak to defense attorneys. I
17 have spoken to social workers. I've spoken to the North
18 Carolina District Court Judge's Association. I have spoken
19 to specific jurisdictions. I think I mentioned Guilford
20 and Pitt County specifically. So I've talked to a lot of
21 those organizations but not specifically to prosecutors.
22 However, I am aware that in Mecklenburg County, our
23 district attorney, Peter -- our former district attorney,
24 Peter Gilchrist, partnered with Community Building
25 Initiative for his prosecutors several years ago to go

1 through the process where they discussed a lot of these
2 issues. At least that's my understanding. I didn't
3 participate in those trainings. In addition, our juvenile
4 prosecutors participate or there are trainings that are
5 made available to them through our juvenile court. It's
6 called race matters for juvenile justice and that along
7 with our collaborative court -- I mean we put on these
8 trainings and they are invited and do participate in some
9 of those trainings. So I'm aware of that but other than
10 that, I'm not aware of anything.

11 MR. HUNTER: Your Honor, I have defendant's
12 exhibit 50, which is my very valuable video, and I just --
13 I wanted to make sure it gets -- the state has a copy of
14 that.

15 THE COURT: Okay. Now, is that the video that
16 was utilized?

17 MR. HUNTER: Yes. That's the video with the
18 bear.

19 THE COURT: Yes, sir.

20 MR. THOMPSON: No objection.

21 THE COURT: It's admitted without objection.

22 MR. HUNTER: And, Your Honor, I would move to
23 admit the other exhibits I have marked and offered.

24 THE COURT: All right.

25 MR. THOMPSON: No objection.

1 THE COURT: That would include 46, 47 and did I
2 miss any?

3 THE CLERK: 48 and 49.

4 MR. HUNTER: 48 and 49 and 50.

5 MR. THOMPSON: No objection.

6 THE COURT: Without objection.

7 BY MR. HUNTER:

8 Q. So my final question for you, Judge Trosch, is are you
9 available if the prosecutors are interested in this?

10 A. There are a number of people available. In fact, in
11 Charlotte we are part of the model court project with the
12 national counsel and they provide technical assistance to
13 us. So we could actually make national trainers available
14 along with myself or other judges that have gone through
15 the same kinds of trainings that I have.

16 MR. HUNTER: Thank you very much. No further
17 questions, Your Honor.

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. THOMPSON:

21 Q. Judge, my name is Rob Thompson. I represent the State
22 of North Carolina. If it's all right, I would like to ask
23 you a couple questions.

24 A. That's fine.

25 MR. THOMPSON: Before we start, Judge, do you

1 mind if we cut the lights back on?

2 THE COURT: Yes, sir.

3 MR. THOMPSON: Thank you, Judge.

4 Q. The training we talked about a lot in a nutshell
5 thing, so I want to make sure I'm being accurate. Would
6 one fair nutshell be the training -- trying to make the
7 participants in the training aware that -- and sensitive to
8 the concept of implicit racism?

9 A. Yes.

10 Q. And one of the factors that you teach or you show to
11 actually avoid the concept of implied racism, or we'll use
12 your term implied racism today, is a thorough examination,
13 to ask more questions, don't accept things on face value?

14 A. Correct.

15 Q. Is it fair to say that implicit racism affects
16 different people in different ways?

17 A. I think it affects all people but yes, it affects
18 different people in different ways.

19 Q. One person would be more aware of their racism or
20 implicit racism and somebody else may not be aware at all?

21 A. Right.

22 Q. Is it fair to say as well up to now, no one has been
23 able to quantify how an individual would be subject to this
24 concept?

25 A. Well, I -- the test I showed you, the IAT test, I'm

1 not a scientist so I'm kind of getting out of my department
2 here but it's my understanding that's demonstrating both
3 group and individual impact of implicit bias.

4 Q. They weren't able to quantify it to, well, this person
5 is -- four percent of his decisions would be --

6 A. I think one of the biggest problems is -- is trying to
7 individualize the concept, what works better and what we
8 work with people on is let's create a system of regardless
9 of where y'all fall on a spectrum -- I think y'all talked
10 about a spectrum earlier. No matter where you fall on that
11 spectrum, you're going to be put through a process that
12 makes it less likely that you'll utilize implicit bias. So
13 I don't -- I am probably not the best person to answer
14 whether -- how much they quantified individual implicit
15 bias.

16 Q. One of the ways you taught -- and actually one of the
17 steps that Mecklenburg County does when you're talking
18 about your own decisions as the judge is to have each other
19 watch court of other judges, correct?

20 A. Yes.

21 Q. I'm not sure I phrased that beautifully but --

22 A. I'm with you.

23 Q. Would it be maybe peer review would be a good way to
24 -- peer reflection, peer --

25 A. Yes.

1 Q. -- analysis?

2 A. Yes.

3 Q. Something like that?

4 Q. So if two judges watched another judge while that
5 third judge was on the bench, that would be even greater
6 impact -- have a greater impact on giving that --

7 A. It depends.

8 Q. -- seated judge feedback?

9 A. It depends. It depends in large part about whether
10 those two judges that are observing are aware of the
11 concept of implicit bias, how it plays out in court, and
12 how it impacts people. But yes, if they are aware of those
13 things and schooled in that and trained in that, then yeah,
14 it could be -- it could be I would say more valuable. They
15 could see more. But I guess the converse of that is, if
16 they're not aware of it themselves, then it could make the
17 situation worse but they wouldn't be able to help very
18 much.

19 Q. Have you ever quantified how many folks saw the guy in
20 the dancing bear suit the first time they watched it?

21 A. I haven't.

22 Q. Is it fair to say some people are better at looking at
23 a number of things at the same time than others?

24 A. Yes, but we all have our limits. Nobody can pay
25 attention to all of the stimuli that are going on around

1 them at a time, and the problem is that all of us choose to
2 focus on certain aspects of what's going on around us and
3 that's what we -- based on what we deem important within
4 our own minds.

5 Q. Somebody who is viewing a subject matter, a video or a
6 person, if the person doing the viewing is trained and good
7 at paying attention to a number of things at the same time,
8 that would reduce in some respect -- not quantifiable but
9 in some respect that viewer's -- the impact of unconscious
10 racism on that viewer if that viewer was aware of the
11 concept?

12 A. It could. I'm not trying to equivocate with you but
13 it depends on the situation so if the training was fresh in
14 their mind, if they were aware of it at that time, yes. If
15 they had training ten years ago and crossed it off their
16 list, okay, I've dealt with diversity training and hadn't
17 thought about it again in ten years, then no.

18 Q. If they had been recently brought up -- if the concept
19 had recently been brought to the table and discussed with
20 them shortly before they make these observations, it would
21 be -- they would be better at avoiding unconscious racism;
22 is that a fair statement?

23 A. I would think that it -- it's one way that you could
24 mitigate those impacts.

25 Q. Capital prosecutors -- let me back up a little bit.

1 You yourself, you came through this office -- public
2 defender's office --

3 A. Right.

4 Q. -- 1992 and '3; is that right?

5 A. Yes.

6 Q. What kind of work did you do?

7 A. I did mostly misdemeanors and then I did some Superior
8 Court work toward the end but I didn't do any death penalty
9 cases here.

10 Q. You pick any juries?

11 A. Yes.

12 Q. How many if you had to guess?

13 A. Here?

14 Q. While you were here, yes.

15 A. Three -- three maybe, three or four.

16 Q. You went to a child advocacy group --

17 A. Yes.

18 Q. -- with -- and for a couple years? Any litigation
19 during those years?

20 A. I was in court but we didn't -- we weren't in front of
21 juries.

22 Q. And during your time with your -- your firm -- in
23 essence, your family firm, you said you did criminal and
24 civil work. How much jury work was there before you got on
25 the bench?

1 A. Between five and ten jury cases maybe. I did one MAR
2 in a capital case but that was the only capital work that I
3 did.

4 Q. Any of those juries involve criminal juries?

5 A. Yes.

6 Q. So it -- would it be safe to say you've never picked a
7 capital jury?

8 A. No.

9 Q. No, it wouldn't be safe to say or --

10 A. No, I have not. I have not.

11 Q. Just want to make sure the record is clear. Have you
12 ever watched capital jury selection?

13 A. Yes.

14 Q. How often?

15 A. Couple times, not often.

16 Q. Did you watch the whole thing or just kind of sit in
17 for a little while?

18 A. I watched the whole thing once and then other times in
19 and out.

20 Q. When in your career was that?

21 A. Early, long time ago, in here I think.

22 Q. Who did you watch, do you remember?

23 THE COURT: Are you referring to prosecutor,
24 professional or both?

25 MR. THOMPSON: Anybody.

1 Q. Judge, prosecutor, defender?

2 A. I can't -- I can't -- I'm thinking -- I don't want to
3 say because I'm thinking John Dickson.

4 Q. Okay.

5 A. I think it was him and Paul Herzog maybe and Steve --
6 I'm blacking on Steve's last name.

7 THE COURT: Freedman.

8 BY MR. THOMPSON:

9 Q. Freedman?

10 A. I think that's right but I don't want to say. I don't
11 know.

12 Q. Fair enough. Who did you work for in the public
13 defender's office. Who was the public defender?

14 A. Mary Ann Tally was when I started and she left and
15 Paul Herzog took over toward the very end of when I was
16 there.

17 Q. Did you happen to see her earlier?

18 A. I did.

19 Q. On the bench, through your experience on the bench,
20 have you had any occasion to work with any type of jury?

21 A. Yes, but only in -- I had one case in a family court
22 setting which was really a prenuptial agreement and then
23 several district civil cases but never any criminal juries.

24 Q. Skipping back a little bit to what we were talking
25 about, the concept of implicit bias, you indicated during

1 your direct that people in these heuristics that they use
2 tend to relate -- associate or prefer, if I can paraphrase,
3 people that look like them, they are comfortable with. In
4 essence, a white lawyer might prefer a white juror, would
5 that be one particular argument of implied racism?

6 A. Potentially.

7 Q. If -- have you ever studied defense capital strikes in
8 jury selection?

9 A. I have not.

10 Q. Are you aware of any body of scholarship on potential
11 -- sorry, on peremptory strikes done by defense attorneys?

12 A. I'm not -- no. I am not aware of the literature. I'm
13 not -- that's not my area.

14 Q. Okay. Let's take this concept of implied racism for
15 me to a simple point.

16 A. Sure.

17 Q. If I'm in a grocery store and there are two aisles
18 open --

19 A. Right.

20 Q. -- two cashiers open and aisle one is a black cashier
21 and aisle two is a white cashier. Let's assume the two
22 cashiers, same age, same attractiveness, all other things
23 are consistent just in this theory of picking on myself.
24 Okay. If you're studying implied racism in this concept
25 that we've been talking about and I as a white person go to

1 the aisle one every time I go to that grocery store with
2 the black cashier and you're studying implied racism, would
3 you look for another explanatory factor?

4 A. What?

5 Q. Would you look for a concept, for example, that I'm a
6 short fat guy and aisle one has candy and aisle two has
7 magazines and I might go to aisle one because of the candy,
8 has nothing to do with the race of the cashier?

9 A. Yeah. There are a lot of explanations. It's
10 difficult to -- yes, there could be a lot of different
11 explanations.

12 Q. And I believe you actually said that. There's not
13 only one cause of disproportionate --

14 A. Right.

15 Q. -- behavior?

16 A. Correct.

17 Q. But you believe that implied racism could be a factor?

18 A. Yes.

19 Q. There could be a hundred explanatory factors having
20 absolutely nothing to do with race, couldn't there?

21 A. There are other -- other causes and explanations, and
22 I think that's why it's often so tricky in this area
23 because you can always come up with a -- with a
24 rationalization. You can always come up with another
25 reason. Now, sometimes that other reason is in fact

1 exactly what's motivating you. You go to line one because
2 you get -- the candy is in line one but sometimes it's --
3 it's an excuse. It's not -- it's not a credible
4 explanation.

5 Q. Now, when you say sometimes --

6 A. Um-hmm. I can't quantify it for you.

7 Q. Nobody can, can they?

8 A. Can quantify when?

9 Q. Yes, sir.

10 A. I think that we can look at specific situations and
11 make determinations based on specific situations but no,
12 you can't always quantify it.

13 Q. Again, skipping around -- forgive me.

14 A. Sure.

15 Q. Getting back to you said this concept of implied
16 racism you would apply in the court system and life in
17 general pretty much everywhere; is that right?

18 A. Yes.

19 Q. Would you expect there to be a difference in how good
20 it's caught by the defense as far as the prosecution
21 strikes based on race? Would you -- would you expect --
22 let me back up a little bit. Let it make more sense. You
23 are aware, although you hadn't done much jury selection in
24 capital cases that --

25 A. I haven't done any jury selection in a capital case.

1 Q. Sorry. That you hadn't observed much I guess.

2 A. Right.

3 Q. That there are two defense attorneys on the other side
4 that are paying attention to the prosecutor's jury
5 selection while it's going on.

6 A. Correct.

7 Q. And if -- would it make a difference in the quality of
8 the two defense attorneys in them catching any Batson
9 violations or any kind of racism going on -- that the
10 quality of their work, if they're good at what they do?

11 A. If they are aware of what's going on --

12 Q. Yes, sir.

13 A. -- and they've been trained and they know the law and
14 -- we're making a lot of assumptions, but if all of those
15 things are true, then, yes, you would hope that they would
16 be able to raise potential Batson violations.

17 Q. And just the number of them helps, the fact there are
18 two experienced folks on the other side of the courtroom
19 watching the prosecutor, that helps just doubling the
20 effort; is that right?

21 A. That could help.

22 Q. And Dr. Sommers -- I believe you saw his testimony
23 yesterday?

24 A. I did.

25 Q. There was a concept he was concerned about that said

1 that defense attorneys were reluctant maybe to bring up --
2 bring up a Batson violation; is that right?

3 A. Yes.

4 Q. Would that be defeated if both the guys on the other
5 side -- both defense attorneys, males or females, were not
6 afraid of anything at all? Would that help?

7 A. If they weren't --

8 Q. If they weren't afraid to make a challenge?

9 A. If you have defense attorneys that are willing to make
10 a challenge and do make challenges, obviously, yes, that
11 would be helpful -- that would help catch potential
12 violations.

13 Q. Do you know Randy Gregory?

14 A. I know -- I know -- I know who he is.

15 Q. And do you know Ed Brady?

16 A. I do.

17 Q. Recently retired Supreme Court Justice?

18 A. I do.

19 Q. Would it help --

20 MR. THOMPSON: May I have a second, Judge?

21 THE COURT: Yes, sir.

22 BY MR. THOMPSON:

23 Q. Do you think it would help the process -- if I may,
24 Judge -- do you think it would help the process in that
25 kind of situation, a capital jury selection, two lawyers,

1 one prosecutor, pay attention to the race-based nature of
2 the examination if the defense attorneys brought up Batson
3 before jury selection even started? Would that -- would
4 that help sensitize everybody to the concept?

5 A. Maybe, yes, maybe no.

6 Q. Okay.

7 A. In other words, if you bring it up and it's just by
8 row, this is something that we do, this is a law, we know
9 what it is -- I mean when I was a lawyer, I didn't do
10 capital cases but there was like a stack of motions that I
11 filed in pretty much every case, sort of like here they
12 are, and if it's just by -- we're just kind of going
13 through, all right, here's Trosch's motions, bomb, boom,
14 boom and it's --

15 Q. What if it was more than that? What if it was an
16 unusual thing for that to be brought up ahead of time? Do
17 you think it could make some difference --

18 A. It could.

19 Q. -- to everybody's sensitivity?

20 A. Again, it depends on -- it depends on how the
21 challenges are treated, what questions are asked, et
22 cetera, but yes, it could. If they brought it up, they
23 raised the issue, the other side was aware of it, standard
24 questions were asked the same to all of the potential
25 jurors, the judge was steeped in or understood what was

1 going on with implicit bias, all of those things could --
2 could help mitigate implicit bias.

3 Q. Did you ever have occasion during your time here or
4 any other time to practice in front of Judge Lynn Johnson?

5 A. I did. Mostly probation violations in front of him I
6 think is --

7 Q. Okay.

8 A. They didn't go very well usually for me.

9 MR. THOMPSON: May I have just a moment, Judge?

10 THE COURT: Yes, sir.

11 THE WITNESS: Yes.

12 BY MR. THOMPSON:

13 Q. One quick other question, Judge.

14 THE COURT: Yes, sir.

15 MR. THOMPSON: Sorry, that judge.

16 THE COURT: I apologize.

17 BY MR. THOMPSON:

18 Q. You remember it may have been John Dickson, may have
19 been Steve Freedman, do you have any idea who was on the
20 bench at the time?

21 A. I have no idea. I'd be guessing.

22 Q. Understand it was a long time ago. Other than the
23 training we have talked about and the bench cards that we
24 have talked about and what you've already kind of discussed
25 during direct examination, would you have any other

1 suggestion to reduce the impact of the concept that you
2 described?

3 A. Yeah, actually I would. I would -- let me see what I
4 covered. I would recommend that there be steps taken
5 within each of the office -- so within the prosecutor's
6 office, that you have a plan how to address implicit biases
7 so that you are educated, you are aware of that and that
8 specific steps be taken. One of those might be to set up
9 the images on the screen saver that I talked about. In
10 addition, the defense attorneys should have a similar plan
11 that works for their offices and the court should have a
12 similar plan that works for the court as well. I am
13 probably going out of my depth, you know, recommending --
14 because I am not an expert with the death penalty but I'll
15 let the other experts testify with respect to that because
16 it's not my area of expertise.

17 MR. THOMPSON: Thank you, Judge. No further
18 questions.

19 THE COURT: Okay. Any redirect, Mr. Hunter?

20 REDIRECT EXAMINATION

21 BY MR. HUNTER:

22 Q. I just had one -- one question. We, of course, left
23 out a bunch of slides in the interest of time and so forth.
24 But you do have a slide and I think you might have it up
25 there about some cognitive errors that contribute to biased

1 thinking and I wanted to ask you just about one concept
2 that's in there.

3 A. Okay.

4 Q. And I don't think you need to look at the slide. This
5 has to do with overconfidence and pro-self-bias. I wonder
6 if you could just talk about that a little bit, what that
7 is and what that means?

8 A. One of the things that they -- that researchers have
9 demonstrated is that people, first of all, are not aware of
10 some of these mental processes that are going on inside
11 their brains. Secondly, when -- when they -- and they then
12 explain away the impact of them and then thirdly, people
13 are overconfident in their abilities to make decisions to
14 ferret out the truth or a lie, to judge nonverbal and
15 verbal cues to avoid thinking errors. And so people
16 oftentimes think that they are counting -- consciously
17 processing information and, in fact, they are not. So you
18 underestimate the errors that you make. A really good
19 example of that is if you ask people now, most members of
20 the public, what's the crime rate like, most people are
21 going to tell you, oh, the crime rate is going up. In
22 fact, the statistics are real clear that the crime rate has
23 been going down since the early 1990's across the board,
24 violent crime, property crime, drug crimes are all on the
25 downswing. But the public believes that in fact it's going

1 up. And there's a reason for that. There's -- there's
2 something called the availabilities heuristic and the
3 availability heuristic says that you are going to latch
4 onto what's readily accessible. The easiest thing for your
5 brain to pull up is what you're going to access. So y'all
6 are lawyers. You know as lawyers that when you're in a
7 trial, you've got to turn it into a story so that the
8 jurors will remember the story because people remember
9 stories better than statistics. Similarly with the crime
10 example, even though all the data -- and some of it's very
11 complicated but all the data shows the crime is going down,
12 the news every night says it's an ever present problem.
13 And that every -- that news which you see every single
14 night or the stories that someone may have told you
15 override the statistics. But if you tell somebody, well,
16 look, the statistics say this, they will continue to argue
17 with you. Well, that's not my experience. That's not what
18 I know. Because of their overconfidence in their own
19 abilities and all of us have those overconfidence in our
20 abilities. If you're wrong, it's because you're not very
21 smart. If I'm wrong, it's an exception to the rule because
22 I am usually right. That's kind of how we view the world.

23 MR. HUNTER: Thank you. No further questions.

24 MR. THOMPSON: Nothing further on that. Thank
25 you, Judge.

1 THE COURT: Folks, may the witness be released?

2 MR. HUNTER: Yes.

3 MR. THOMPSON: No objection.

4 THE COURT: Take care.

5 (Witness leaves the stand.)

6 MR. JAY FERGUSON: Your Honor, could we have just
7 a moment to confer with the clerk to make sure our exhibits
8 have been entered?

9 THE COURT: Yes, sir.

10 MR. JAY FERGUSON: Your Honor, I don't believe
11 exhibit 45 was entered into evidence. It was a stipulation
12 but she doesn't have it shown as being admitted. It's the
13 flash drive that has some transcripts. We would move for
14 admission of exhibit 45 into evidence.

15 THE COURT: Okay. I thought it had been.

16 MR. COLYER: I did too, Your Honor. No objection
17 again.

18 THE COURT: Simply to make sure the record is
19 clear, there's no objection.

20 MR. COLYER: Yes, sir.

21 THE COURT: Defendant's exhibit 45 is admitted.

22 MR. JAY FERGUSON: I believe the record shows the
23 remainder of our exhibits have been entered into evidence.
24 If not, we move all of them.

25 THE COURT: All right. Do you want to be heard

1 as to any specific exhibits?

2 MR. THOMPSON: I don't other than to have a
3 question. I'm not sure whether it was early on there was
4 transcripts on a thumb drive and I want to make sure they
5 were -- see how they were moved in, if they were moved in
6 for substantive purposes. We don't have objection if they
7 are but I'm trying to pay attention to that. I just didn't
8 get a clarification.

9 THE COURT: My understanding is they are coming
10 in without limitation.

11 MR. JAY FERGUSON: Right.

12 MR. COLYER: Yeah, that's the jury selection.

13 THE COURT: Yeah.

14 MR. THOMPSON: Jury selection transcripts. With
15 the Court's permission and subject to the supervision of
16 the clerk and whoever else, I would like to take a look at
17 some of those thumb drives at some point and make sure I've
18 got copies of all the stuff. I think I do.

19 THE COURT: Okay.

20 MR. THOMPSON: I wanted to doublecheck if that's
21 all right with the Court.

22 THE COURT: Well, if I am reading the tea leaves
23 correctly, you folks are about to rest?

24 MR. JAY FERGUSON: That's correct, Your Honor.

25 THE COURT: So how much time do you need, Mr.

1 Thompson?

2 MR. THOMPSON: I don't need to do that before we
3 do any of this. It's just at some point I just want to
4 doublecheck. I'm making sure I have --

5 THE COURT: I guess then I apologize. I guess my
6 question is for purposes of admission at this point, you
7 want to be heard?

8 MR. THOMPSON: No, sir. No, sir, not at all.
9 I'm sorry. I didn't mean to imply.

10 MR. COLYER: We just want to make sure that --

11 THE COURT: You have copies.

12 MR. COLYER: -- we have everything that we are
13 talking about.

14 THE COURT: I am confident if you don't, they
15 will be provided.

16 MR. THOMPSON: Yes, sir. It's just archiving.
17 I'm making sure I've got all of this though.

18 MR. COLYER: We're confident we've been given it,
19 Judge. We're just trying to housekeep to make sure we
20 don't lose something in the process.

21 THE COURT: Certainly, I understand. That's
22 okay. All matters previously introduced for purposes of
23 the record are -- all exhibits previously offered are now
24 admitted. Mr. Colyer, again, as to exhibit 19, the state's
25 objection previously made is being preserved, renewed in

1 apt time. Again it's overruled. Exception is noted for
2 the record.

3 MR. COLYER: I understand, Your Honor. Thank
4 you.

5 THE COURT: My recollection is this is a point
6 where we are going to stop or are you folks prepared to put
7 on some evidence this afternoon?

8 MR. COLYER: The former, Your Honor, your
9 recollection we are going to stop.

10 THE COURT: That's what I thought. So we're down
11 until -- is there any objection to us -- next week is admin
12 week. You folks are probably not aware. We made some
13 changes in our administrative court procedures. We were
14 utilizing -- is it 4B -- 4A, that's what I thought --
15 courtroom 4A because of the numbers of folks that were
16 involved. We've already made changes in that so those --
17 we are going back to the old practice I think in terms of
18 where the folks are going to go on Monday as opposed to
19 coming here.

20 MR. COLYER: Yes, sir.

21 THE COURT: They are going to courtroom 3C as we
22 used to do. I'm leading up in a very obtuse way to 9:30
23 okay to start or would your preference be 10:00?

24 MR. COLYER: Whatever the Court wants.

25 MR. THOMPSON: You tell us, Judge. We're good.

1 THE COURT: Folks, you have any position on
2 whether we start at 9:30 or 10:00?

3 MR. JAMES FERGUSON: We have no problem with
4 either time, Judge.

5 MR. THOMPSON: As a matter of housekeeping, I
6 want to talk to the Court and the defense about -- we
7 talked a little bit to the defense about this as well. In
8 light of trying to get the affidavits of the state affiants
9 in --

10 THE COURT: Yes, sir.

11 MR. THOMPSON: -- and avoiding their being
12 called, we made some serious progress in making that
13 happen.

14 THE COURT: Okay.

15 MR. THOMPSON: What our office is doing now, and
16 we have discussed this with the defense, is we are making
17 one binder in essence, one accordion file --

18 THE COURT: Okay.

19 MR. THOMPSON: -- containing the originals.

20 THE COURT: Okay.

21 MR. THOMPSON: We're making copies of those
22 originals as they appear, the ones with signatures, and
23 making several copies of binders containing all those
24 originals.

25 THE COURT: Okay.

1 MR. THOMPSON: Just logistically, the way we
2 figured to handle it is there was going to be objections
3 possibly in some of the individual affidavits to a small
4 amount of the material in the affidavit.

5 THE COURT: On evidentiary grounds.

6 MR. THOMPSON: Yes, something that may have gone
7 outside the evidentiary hearing. We are happy to deal with
8 it this way. What I am proposing is before the defense
9 team leaves today, and actually hopefully they are ready
10 now, hand them that copy.

11 THE COURT: Well, that's the reason -- and I
12 apologize.

13 MR. THOMPSON: Yes, sir.

14 THE COURT: The reason I am suggesting 9:30 is we
15 can deal with any evidentiary issues relating to them
16 early.

17 MR. THOMPSON: Well, that was what my thinking
18 was similar in the respect I can hand them that. They can
19 look through every single one of those affidavits,
20 highlight, somehow mark the ones that they have issue with.
21 Maybe five, maybe 25, don't know.

22 THE COURT: Okay.

23 MR. THOMPSON: We get those back from them to
24 where we can mark ours in our copy.

25 THE COURT: Okay.

1 MR. THOMPSON: And then designate a time on
2 Tuesday, on Monday late, whenever the Court designates,
3 where we talk about it.

4 THE COURT: Okay.

5 MR. THOMPSON: And either enter them or not enter
6 them, fight about that at that point if there is any
7 fighting to be done. We have kept all of our prosecutors
8 on the hook --

9 THE COURT: Standby.

10 MR. THOMPSON: -- until the time that those are
11 entered, there are no questions or issues. The talks
12 haven't broken apart completely and we've got permission of
13 the Court not to call them until Thursday anyway.

14 THE COURT: Yes, sir.

15 MR. THOMPSON: But if we can admit them earlier,
16 we can call them off and shorten the proceedings --

17 THE COURT: Okay.

18 MR. THOMPSON: -- which would impact the
19 scheduling of the defense as well on rebuttal.

20 THE COURT: Okay.

21 MR. THOMPSON: So that's logistically how I am
22 suggesting it.

23 THE COURT: Okay.

24 MR. THOMPSON: I bring it up to the Court and I
25 have talked to the defense about it.

1 THE COURT: All right. Yes, sir, Mr. Colyer.

2 MR. COLYER: Your Honor, since our roles are
3 somewhat reversed here --

4 THE COURT: Yeah.

5 MR. COLYER: -- and since I'm not a defense
6 attorney and in trying to analogize this to what happens in
7 cases that I tried.

8 THE COURT: Yeah.

9 MR. COLYER: To the extent that we are required
10 at this point to make any motions to dismiss --

11 THE COURT: Yes.

12 MR. COLYER: -- we would ask that in apt time
13 that all of our previous motions to dismiss are reasserted.

14 THE COURT: Yes, sir.

15 MR. COLYER: We would be making a verbal motion
16 to dismiss based upon all previous filings as well as the
17 testimony and evidence that has now been presented.

18 THE COURT: Okay.

19 MR. COLYER: Don't wish to take your time to
20 argue it now. If you want us to argue it at some point, we
21 would be glad to do that but we just wanted to preserve for
22 the record our motions and get a ruling from the Court at
23 some point.

24 THE COURT: Well, for purposes of clarification,
25 prehearing motion to dismiss was filed.

1 MR. COLYER: Yes, sir.

2 THE COURT: Ruled upon by the Court. And I agree
3 with you, this is an entirely foreign area for all of us in
4 terms of procedure.

5 MR. COLYER: Yes, sir.

6 THE COURT: You saw my eyebrow raise when Mr.
7 Thompson referred to the defendant's rebuttal. As I read
8 the statute, we are going to be dealing with your rebuttal
9 come next week and they may offer surrebuttal if that's how
10 we're going to characterize it. So this is all new to all
11 of us.

12 MR. COLYER: Yes, sir.

13 THE COURT: Motion to dismiss being -- do y'all
14 want to be heard?

15 MR. JAMES FERGUSON: Let me make sure I
16 understand where we are. Is the Court now about to go
17 ahead and make a ruling on the motion to dismiss?

18 THE COURT: Yes, sir.

19 MR. JAMES FERGUSON: We don't need to be heard,
20 Your Honor, other than to say we urge upon the Court we
21 have filed -- I mean we have presented a prima facie case
22 at this stage and should be allowed to go forward, which
23 now would shift the burden of proof to the defense.

24 THE COURT: Yes.

25 MR. COLYER: With all --

1 MR. JAMES FERGUSON: Sorry, to the state.

2 MR. COLYER: -- due respect, Your Honor, we're
3 just trying to make sure we jump through the right hoop at
4 the right time --

5 THE COURT: Exactly. I understand.

6 MR. COLYER: -- for whatever purpose may be in
7 the future.

8 THE COURT: We may have some other issues to
9 discuss procedurally down the road.

10 MR. COLYER: Yes, sir.

11 THE COURT: I have no problem with that. The
12 state's prehearing motion to dismiss having been denied
13 being renewed in apt time, at the conclusion of the
14 presentation of the defendant's evidence in this case, is
15 denied to which the state objects and excepts for the
16 record.

17 MR. COLYER: And to the extent our pretrial
18 motion was limited to any specific area, we would verbally
19 make a general motion to dismiss based upon the testimony
20 and the evidence and I guess to say formally in the lack of
21 a prima facie case to require us to go forward.

22 THE COURT: Yes, sir. That's so noted and again
23 denied and exception is noted for the record.

24 MR. COLYER: Thank you, Your Honor.

25 THE COURT: Okay. Any other matters folks?

1 MR. COLYER: No, sir.

2 MR. HUNTER: I don't think so, Your Honor.

3 THE COURT: Mr. Hunter --

4 MR. HUNTER: I guess we talk about the --

5 THE COURT: -- in fairness to you, Mr. Thompson,
6 Mr. James Ferguson and myself, I see Judge Trosch made a
7 hasty retreat about his ill-advised remark about hair.

8 MR. HUNTER: That wasn't the only one, Your
9 Honor, that was hurtful.

10 THE COURT: I understand. But have a good
11 weekend, folks.

12 MR. HUNTER: Thank you, Your Honor.

13 MR. THOMPSON: Thank you, Your Honor.

14 MR. COLYER: You too, Judge.

15 (The trial adjourned at 12:35 p.m., Friday,
16 February 3, 2012, and reconvened at 9:30 a.m., Monday,
17 February 6, 2012. Court Reporter Jennifer Hack to the
18 proceedings on February 6, 2012.)

19

20

21

22

23

24

25

CERTIFICATE

STATE OF NORTH CAROLINA)

COUNTY OF CUMBERLAND)

I, SHANNON RANSOM, CSR, RPR, the officer before whom the foregoing proceedings were taken, do hereby certify that said transcript is a true, correct and complete verbatim transcript of said proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of this action.

This 22nd day of February, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

NORTH CAROLINA
CUMBERLAND COUNTY

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

STATE OF NORTH CAROLINA,)
)
)
)
vs.)
)
MARCUS ROBINSON,)

)

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

I certify that the transcript of the trial held February 3, 2012, Volume V, consisting of pages 1 through 1082, was delivered on February 22, 2012 by emailing the electronically-signed PDF transcript and by delivering a CD-ROM containing the PDF transcript to Judge Weeks, Superior Court Judge; Ms. Bel Lewis and Mr. Rob Thompson, district attorney's office; and Mr. Jay Ferguson, defendant's attorney. I further certify that the transcript was ordered on February 3, 2012.

This 22nd day of February, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

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

vs.

MARCUS ROBINSON,
 Defendant

RACIAL JUSTICE ACT HEARING

Heard February 6, 2012

**VOLUME VI of XIII
 (Pages 1083 through 1252)**

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: CALVIN W. COLYER & ROB THOMPSON
 12th Judicial District
 JONATHAN W. PERRY, 20th Judicial District
 Assistant District Attorneys
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302

For the Defendant: MALCOLM R. HUNTER, JR. & JAY H. FERGUSON
 JAMES E. FERGUSON, II, & CASSANDRA STUBBS
 Attorneys at Law
 119 East Main Street
 Durham, North Carolina 27701

JENNIFER L. HACK, RPR
 Official Court Reporter
 Cumberland County Courthouse
 P.O. Box 363
 Fayetteville, North Carolina 28302
 jennifer.l.hack@nccourts.org

DATE REQUESTED: 02/03/12

DATE DELIVERED: 02/22/12

1 (The following proceedings began in open court on
2 Monday, February 6, 2012, at 9:30 a.m. The defendant, Mr.
3 Hunter, Mr. Jay Ferguson, Mr. James Ferguson, Ms. Stubbs, Mr.
4 Colyer, and Mr. Thompson were present.)

5 (Mr. Perry was not present.)

6 (REPORTER'S NOTE: The Master Index will be
7 submitted in a separate volume entitled Master Index.)

8 (Whereupon, a bench conference was held off the
9 record.)

10 (Whereupon, a recess was taken from 9:31 a.m.
11 until 10:31 a.m.)

12 (The following proceedings continued in open
13 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
14 Ferguson, Ms. Stubbs, Mr. Colyer, and Mr. Thompson were
15 present.)

16 THE COURT: Thank you, sir. Good morning, folks.

17 Folks, there's a preliminary matter. First order of
18 business is the Court has signed an order extending the session
19 for purposes of the record and, Madam Clerk, if you'll place
20 that in the record.

21 I understand you folks have apparently conferred about
22 some matters. I am not entirely clear on what it is that you
23 talked about. I heard general conversation that it had to do
24 with the scheduling of witnesses, and I appreciate you folks
25 talking together in that respect.

1 Mr. Thompson, are you in a position to tell us where we
2 are?

3 MR. THOMPSON: To the extent I know what we talked
4 about. I am a little confused as well, respectfully, but we've
5 had some meaningful conversations with reference to this
6 affidavit issue and the potential stipulation of the affidavits
7 coming in in lieu of the live testimony of the prosecution.

8 THE COURT: Okay.

9 MR. THOMPSON: I think we have an agreement, but
10 there are steps we'd like to take and folks we'd like to consult
11 with before we agree to it and figure out the methodology in
12 which we are going to do that. I think we can do that first
13 thing this afternoon, start having the conversations, at least
14 before the end of the day have that issue completely pushed in
15 the right direction and make some final decisions. Yes, sir.
16 So to the extent we'd like to wait until towards the end of the
17 day or at least until after lunch to make a final decision. We
18 do need to discuss it.

19 THE COURT: Okay. All right. Folks, anything
20 counsel for the defendant wants to add?

21 MR. JAMES FERGUSON: I don't know that this is
22 adding anything but just by way of clarification, we had wanted
23 to have these matters resolved before we proceeded this morning,
24 but it is my understanding that you are going to be calling
25 Judge Dickson?

1 MR. COLYER: Yes, sir.

2 MR. JAMES FERGUSON: This will not affect his
3 testimony, so I think we could wait until this afternoon to try
4 to get it resolved but earlier rather than later, Your Honor, we
5 want to know where we stand on that issue, and I think we have
6 an agreement but --

7 MR. THOMPSON: I am fairly certain we do have an
8 agreement to the extent we plan on calling Judge Dickson and --
9 just a second, Judge.

10 (There was a pause in the proceedings.)

11 MR. THOMPSON: We plan on calling Judge Dickson
12 and then Judge Johnson, and we have another judge witness lined
13 up this afternoon, so we expect none of this will step on toes,
14 what we are doing this morning. None of this should affect,
15 unless I have missed something, which is entirely possible. It
16 shouldn't affect our testimony till we make this decision.

17 THE COURT: Okay. All right. For the record, the
18 defense having rested, are you ready to go forward with your
19 presentation of evidence, Mr. Colyer, Mr. Thompson?

20 MR. COLYER: We are, Your Honor.

21 THE COURT: Okay. You may call your first
22 witness.

23 MR. COLYER: Actually, we'd like to make an
24 opening statement, if it please the Court.

25 THE COURT: I apologize. You did reserve that

1 right. Yes, sir.

2 MR. COLYER: Thank you, sir.

3 THE COURT: And who is going to be making --

4 MR. THOMPSON: I will be making it, Judge.

5 THE COURT: Yes, sir, Mr. Thompson.

6 MR. THOMPSON: Judge, what you're going to hear
7 from the State is a little bit different than what you've heard
8 from the defense.

9 THE COURT: Okay.

10 MR. THOMPSON: You are going to hear from the
11 State evidence that is not just data but are facts. You are
12 going to hear not just theory but knowledge. Fact: Prospective
13 black jurors have roughly a 33 percent chance of being seated on
14 a capital jury in North Carolina in Cumberland County. Fact:
15 Prospective white jurors have roughly a 33 percent chance of
16 being seated on a jury in a capital case in North Carolina,
17 Cumberland County. Fact: The decision to impose the death
18 penalty in North Carolina in Cumberland County cases was imposed
19 by a jury that was made up racially of those with an equal
20 chance of serving on that jury.

21 You're going to hear from Judge Dickson who prosecuted
22 the Marcus Robinson case. You are going to hear about the facts
23 of the Robinson case, the parties in the Robinson case. You are
24 going to hear about pretrial motions made in the Robinson case,
25 and you're going to hear about the jury strikes in the Robinson

1 case. You are going to hear from Judge Johnson who presided
2 over the Robinson case. You are going to hear his knowledge and
3 procedure regarding the *Batson* case, his knowledge, his
4 information about the parties in the Robinson case. You are
5 going to hear details of the Robinson case and other capital
6 cases here in Cumberland County from Judge Johnson. You are
7 going to hear from the judge that dealt with Cumberland County
8 capital cases, all of which arose in Cumberland County, some of
9 which were tried in other counties. You are going to hear what
10 they saw, their observations. You are going to hear about their
11 opinions about the parties involved in all of the Cumberland
12 County capital cases. You are going to read affidavits or hear
13 evidence from a couple of dozen North Carolina prosecutors who
14 have tried and reviewed capital cases and described the reasons
15 that prospective jurors were stricken. You are going to hear
16 from Dr. Cronin.

17 THE COURT: I'm sorry?

18 MR. THOMPSON: Dr. Cronin, Dr. Christopher Cronin,
19 who deals with a volley of knowledge and scholarship regarding
20 one of the explanatory factors.

21 THE COURT: Well, for the record, is that
22 K-r-o-n-i-n, Mr. Thompson?

23 MR. THOMPSON: C-r-o-n-i-n.

24 THE COURT: I apologize. Yes, sir.

25 MR. THOMPSON: You are going to hear a number of

1 facts regarding explanatory factors. You are going to see
2 statistics alone are not sufficient to complete the factual
3 picture of capital cases in North Carolina. You are going to
4 see that the assumptions or conclusions reached are just those,
5 assumptions and conclusions, and show that race was not a
6 significant factor in capital jury selection in North Carolina
7 or Cumberland County. You are going to see that it's not
8 appropriate to abandon the work done by the court, by
9 prosecutors, defense attorneys, jurors, and appellate courts all
10 of whom found defendant received a fair trial with talented
11 representation and a just result. You are going to hear from
12 Dr. Katz extensively as it relates to his study, both his work
13 and as it relates to the MSU study.

14 What you've heard from the defense so far on defense
15 direct is just data and just theory. We'll add to that facts
16 and knowledge and demonstrate that the defense has not met its
17 burden, respectfully.

18 THE COURT: Thank you, Mr. Thompson.

19 Mr. Colyer?

20 MR. COLYER: Your Honor, before we call our first
21 witness, I'd like to move into evidence those State's exhibits
22 that were identified last week with respect to --

23 THE COURT: Yes, sir.

24 MR. COLYER: If I can approach. And those would
25 be State's Exhibits 1 through 19, I believe, Madam Clerk.

1 And, Judge, if I can just approach your clerk and hand
2 her these.

3 THE COURT: Yes, sir.

4 MR. COLYER: These were exhibits that were dealt
5 with last week by Mr. Perry with respect to his examination of
6 Professor O'Brien and Dr. Woodworth.

7 THE COURT: Anything on behalf of the defendant as
8 to the State's proffer of State's Exhibits 1 through 19?

9 MR. JAY FERGUSON: Your Honor, if we may have a
10 moment to look over those.

11 THE COURT: Mr. Colyer, my recollection is they
12 were used primarily in cross-examination on at least those two
13 witnesses.

14 MR. COLYER: Yes, sir. And I think those were the
15 only exhibits that were used -- where State's exhibit numbers
16 were used -- in the cross-examination of Professor O'Brien and
17 Dr. Woodworth.

18 THE COURT: Yes, sir.

19 MR. COLYER: And while Mr. Ferguson is looking at
20 that, may I step out and retrieve our first witness.

21 THE COURT: Yes, sir.

22 Mr. Jay Ferguson?

23 MR. JAY FERGUSON: No objection, Your Honor.

24 THE COURT: Without objection, State's Exhibits 1
25 through 19 are admitted.

1 MR. COLYER: With respect to that, we would call
2 the Honorable John Wyatt Dickson to the stand, please.

3 THE COURT: Okay. Come up and be sworn, please,
4 sir.

5 JOHN WYATT DICKSON, called as a witness herein,
6 having been first duly sworn, was examined and testified as
7 follows:

8 THE COURT: Thank you, sir. If you will come
9 around to the witness stand. Would you like some water?

10 THE WITNESS: Gallon or two would be nice, Your
11 Honor.

12 THE COURT: Yes, sir. For the record, once you're
13 seated, if you will state and then spell your first, middle, and
14 last name for the benefit of the court reporter.

15 THE WITNESS: Yes, sir. Thank you. I am John,
16 J-o-h-n, Wyatt, W-y-a-t-t, Dickson, D-i-c-k-s-o-n.

17 THE COURT: Thank you, sir.
18 Mr. Colyer?

19 DIRECT EXAMINATION

20 BY MR. COLYER:

21 Q Good morning, Your Honor.

22 A Good morning, Cal.

23 Q Sir, if I should lapse and refer to you anything than
24 befitting your title, please excuse me.

25 A Mr. Colyer, after we've been together this long, if you

1 call me anything but John, I am probably going to be insulted.

2 It won't bother me.

3 Q All right, sir. Sir, how old are you?

4 A Sixty-four.

5 Q And you're a resident --

6 A Rapidly heading to 65.

7 Q And you're a resident of Cumberland County, sir?

8 A Yes, sir.

9 Q Where were you born?

10 A Honolulu, Hawaii.

11 Q What is your present occupation?

12 A I am a District Court judge for the 12th Judicial

13 District.

14 Q Were you the assistant district attorney who selected
15 the jury in the case of *State v. Marcus Robinson* back in 1994?

16 A Yes, sir, I was.

17 Q Did you exercise a peremptory strike against a black
18 juror using race as a significant factor?

19 A No, sir.

20 Q Did you exercise a peremptory strike against a black
21 juror based upon racial discrimination?

22 A No, sir.

23 Q Was race a significant factor in the exercise of a
24 peremptory strike against any black juror in that case?

25 A No, sir.

1 Q Now, sir, you were also the prosecutor, were you not,
2 in the John McNeill case in 1995?

3 A I couldn't tell you which year but John McNeill, yes.

4 Q Was there another prosecutor who assisted you in that
5 jury selection?

6 A Yes, sir.

7 Q And who was that?

8 A My good friend and distinguished prosecutor, Cal Colyer.

9 Q How did that come about?

10 A I had a child at a canoeing camp in Canada who had been
11 out canoeing for eight weeks and ended up in the Hudson Bay.
12 That's a long trip. And when they paddled in, I went to Canada
13 to see him paddle in, so I had to take some time from my trial.

14 Q Was that during the jury selection?

15 A And it was during jury selection.

16 Q Did you participate initially in some of that jury
17 selection?

18 A Yes, sir.

19 Q And after your return from Canada, did you take over
20 the duties of prosecuting the case by yourself?

21 A Yes, sir.

22 Q Was a jury already selected and was it impaneled or the
23 time of your return?

24 A Yes, sir.

25 Q Now, in that particular case, was there one juror that

1 you struck peremptorily who was a black person?

2 A Yes, sir.

3 Q In that case, did you exercise a peremptory strike
4 against that juror using race as a significant factor?

5 A No, sir.

6 Q Did you exercise a peremptory strike against that juror
7 based upon racial discrimination?

8 A No, sir.

9 Q Did you or in the selection of that juror was race a
10 factor in the exercise of the peremptory strike against that
11 juror?

12 A In no way, shape, or form.

13 Q Now, sir, were you also the prosecutor with respect to
14 Jeffrey Karl Meyer?

15 A Which time?

16 Q There were a number, weren't there, sir?

17 A Close to 36 people gave him the death penalty.

18 Q When was Mr. Meyer first tried here in Cumberland
19 County? If I say 1988, would that be approximately correct?

20 A That's just about when he escaped, uh-huh.

21 Q And do you recall at what stage of the trial he escaped
22 from the Cumberland County Detention Center or the Cumberland
23 County Jail?

24 A We were probably going to begin arguments the next day.

25 Q Or the presentation of defense evidence? Do you recall

1 which it was?

2 A May have been defense evidence.

3 Q At any rate, he escaped. And what happened to that
4 case?

5 A Judge Johnson declared a mistrial after about four or
6 five days without being able to catch him because we couldn't
7 proceed without him and --

8 Q Was Mr. Meyer's case rescheduled and sent to another
9 county for trial based upon a motion for change of venue by the
10 defense on pretrial publicity?

11 A Yes.

12 Q Where did we go?

13 A New Hanover.

14 Q Who assisted in that trial for yourself?

15 A I am sorry?

16 Q Who was your second chair in that case?

17 A You were.

18 Q Okay. What happened in the New Hanover case?

19 A Death penalty.

20 Q Do you recall what happened to that case on appeal?

21 A It came at a time when the law changed, and it got
22 overturned.

23 Q Was that *State v. McKoy*?

24 A *McKoy*.

25 Q And, sir, did you have occasion to retry Jeffrey Karl

1 Meyer in approximately 1995?

2 A Yes, sir.

3 Q Were you assisted by anyone in that case?

4 A I don't believe so.

5 Q So you were the sole prosecutor in that case?

6 A Yes, sir.

7 Q Now, in the case of Jeffrey Karl Meyer that was tried
8 here in Cumberland County in 1995, with respect to the jury
9 selection, did you exercise a peremptory strike against a black
10 juror using race as a significant factor?

11 A No, sir.

12 Q Did you exercise a peremptory strike against a black
13 juror based upon racial discrimination?

14 A No, sir.

15 Q Was race a significant factor or a factor at all in the
16 exercise of a peremptory strike against any black juror?

17 A No, sir.

18 Q Now, Judge Dickson, if you would, sir, can you tell us
19 a little bit about your upbringing and background with respect
20 to education? You mentioned that you were born in Honolulu,
21 Hawaii. Can you tell us a little bit about that?

22 A No, I don't remember.

23 Q Well, how did you --

24 A And I left when I was six months old so --

25 Q How did your parents get to Honolulu where you were

1 born?

2 A Well, my mother got there by Pan Am clipper ship, if
3 anybody remembers Pan Am and the old flying boats, and my father
4 got there by ship because he was in the Navy, and he was a
5 doctor.

6 Q And where was he stationed, sir?

7 A He was stationed at Pearl Harbor.

8 Q After your family left --

9 A And that's 1947, if anybody is keeping track.

10 Q After your family left in 1947 when you were
11 approximately six months old, where did you go?

12 A I believe that's when we went to Wilmington, Delaware,
13 where my father was attached to the Dupont Institute dealing
14 with cerebral palsy victims, polio victims at that time.

15 Q Now, you mentioned that your father was a medical
16 doctor?

17 A Yes.

18 Q And what was the ultimate rank that he achieved?

19 A Commander.

20 Q Can you tell us briefly a little bit about your travels
21 as a Navy junior up until the time you went to high school?

22 A In Wilmington, Delaware, Charleston, South Carolina,
23 went to kindergarten in Charleston. From there, we went to Camp
24 Lejeune, and we actually lived at Topsail Beach, and I went to
25 first grade there. My father was then stationed to Philadelphia

1 Navy Base and we moved there, did second grade and first part of
2 third grade. My father died when I was there. My mother
3 brought -- I have an older brother -- brought the two of us to
4 my father's hometown after his death.

5 Q What town was that, sir?

6 A Raeford, North Carolina.

7 Q In adjoining Hoke County?

8 A Yes, sir.

9 Q And at one time, was Hoke County part of the --

10 A When I first started prosecuting, 12th Judicial District
11 consisted of Hoke and Cumberland.

12 Q Yes, sir. So you had chances to try cases both in
13 Cumberland County and in Hoke --

14 A Yes, sir.

15 Q -- during your early years. Do you recall
16 approximately how old you were when your family relocated to
17 Raeford in Hoke County?

18 A Third grade, about eight years old.

19 Q Did your family continue to remain in Raeford and in
20 Hoke County until you completed high school?

21 A Yes, sir.

22 Q Where did you go to high school, sir?

23 A Hoke County High.

24 Q After high school, did you work or go to school?

25 A Went to school at the University of North Carolina.

1 Q And what did you study there?

2 A Political science. I was one of the few people that
3 started out in political science and stayed there. Most
4 everybody else got there after they flunked chem one if they
5 were premed, and then they came to poli sci, but I started that
6 way.

7 Q And did you start at the University of North Carolina
8 at Chapel Hill in 1965?

9 A Yes, sir.

10 Q Is that also the year you graduated from high school at
11 Hoke County High?

12 A Yes, sir.

13 Q When did you finish at Carolina, your undergraduate?

14 A 1969.

15 Q And did you receive a BA in political science?

16 A Yes, sir, a liberal arts degree.

17 Q Liberal arts degree. What did you do after college
18 graduation?

19 A For a while, I sat around waiting for my draft number to
20 be called. I had a low draft number and was 1-A and figured I
21 was gone. Eventually, I worked at the beach that summer and
22 then went back to Raeford and began clerking for an attorney
23 named Palmer Willcox.

24 Q So when you say you worked at the beach, was that at
25 Topsail?

1 A Yes.

2 Q Had your family maintained some contact or home at
3 Topsail over the years?

4 A Yes, sir.

5 Q And what were you doing at the beach that summer? What
6 kind of work?

7 A Soda jerk.

8 Q What type of work --

9 A Short-order cook.

10 Q What type of work did you do for Mr. Willcox?

11 A Gofer, a lot of title searches, preliminary drafts of
12 wills.

13 Q How long did you do that, sir?

14 A Several years. I did it off and on for the next --
15 until '96.

16 Q Now, from --

17 A Seventy-six, excuse me.

18 Q Seventy-six. Okay. From your college graduation day
19 in '69 and the work you did that summer at Topsail and then back
20 in Raeford later that summer, did you again go to school to
21 pursue your education?

22 A Yes, sir. I was accepted to the University of North
23 Carolina Law School after a year or so out. Went up there and I
24 remember well -- I think it was Dickson Phillips was the dean
25 then. And first day of class, we all were in the auditorium and

1 he said, Take a good look at the people next to you. They won't
2 be there next year. And I looked at those poor souls on each
3 side of me and said, Sorry, guy. Well, I was the one that
4 wasn't there the next year. I was disinvited to come back.

5 Q After --

6 A So I flunked out.

7 Q After your first year at Carolina?

8 A Yes, sir.

9 Q All right. Did you come back to Raeford and work for
10 Mr. Willcox?

11 A That, I did.

12 Q And how long did that continue?

13 A Until 1974 when I went back to Chapel Hill, took some
14 extra courses in undergrad school to prove that I wasn't the
15 dope that I had shown myself to be and eventually talked my way
16 back into law school.

17 Q So you went to law school from '69 to '70, had a hiatus
18 from --

19 A Well, '70 to '71 and then a hiatus until '74.

20 Q Seventy to '71, then a hiatus until '74, then back to
21 law school. Were you admitted into a particular year in '74?
22 Were you 1L, 2L -- what were you?

23 A I can't tell you.

24 Q How long did you go to law school there?

25 A Well, I finished in two years.

1 Q All right, sir. So you were close to at least being a
2 2L at some point when you went back?

3 A Uh-huh.

4 Q And you graduated in 1976?

5 A Yes, sir.

6 Q From the University of North Carolina at Chapel Hill?

7 A That is correct.

8 Q With a JD degree?

9 A Yes.

10 Q Take the bar exam?

11 A Only once, thank God.

12 Q And where are you licensed to practice -- where were
13 you licensed, and are you still licensed to practice law in that
14 state?

15 A North Carolina.

16 Q Now, after graduating from Carolina in '76 in law
17 school and getting licensed, what type of work did you do and
18 where did you do that?

19 A I came here to Fayetteville as an assistant district
20 attorney.

21 Q And who hired you in 1976 as an assistant DA?

22 A Edward W. Grannis, Jr., the elected DA.

23 Q And for how long did you work for Mr. Grannis?

24 A One month shy of 20 years.

25 Q Was that continuous service, sir?

1 A Yes, sir.

2 Q So would that be correct -- would it be correct that if
3 you started to work with him in 1976, you left his employ in
4 1996?

5 A Correct, sir.

6 Q And where did you go with respect to your employment in
7 1996?

8 A I was appointed to the District Court bench by then
9 governor James B. Hunt.

10 Q And when did you first have to stand election?

11 A Two years later.

12 Q And have you continued to be elected to the District
13 Court bench here in Cumberland County since 1998 to the present,
14 2012?

15 A Yes, sir.

16 Q Now, let's deal with this a little bit in reverse order
17 chronologically. Can you tell us about your experience on the
18 bench as a District Court judge from 1996 to the present? What
19 type of work have you done?

20 A I am a certified juvenile court judge, and the bulk of
21 my work is in the juvenile court, both neglect and abuse and
22 delinquent.

23 THE COURT: I'm sorry?

24 THE WITNESS: And delinquent. Excuse me, sir. I
25 have done traffic. I have done everything there is to do. I

1 have stayed away from domestic as much as I could.

2 BY MR. COLYER:

3 Q Have you presided over civil jury trials in District
4 Court?

5 A Yes, sir.

6 Q And what is the nature of civil jury trials in District
7 Court, for those that might not be familiar with it?

8 A Most of what actually goes to trial are soft tissue
9 fender benders where insurance company is basically refusing to
10 pay.

11 Q And, for the record, there are no jury trials of a
12 criminal nature in District Court; is that correct?

13 A No, sir.

14 Q No, they're not or, no, that's not correct?

15 A No, there are not.

16 Q Okay, sir. Thank you. Bad question, sorry. Under
17 whose leadership have you worked in the District Court as a
18 District Court judge for the last period of time from '96 to the
19 present? If my math is correct about, what, 16, 18 years?

20 A The Honorable Beth Keever I find to be and think is
21 probably the best District Court judge in North Carolina.

22 Q Where did you first meet the Honorable Elizabeth A.
23 Keever?

24 A When I came to work in the District Attorney's Office,
25 she was already with the District Attorney's Office and

1 basically been with her ever since.

2 Q Did she leave the District Attorney's Office to go to
3 the bench?

4 A She did.

5 Q Would that have been in the late seventies, early
6 eighties?

7 A Late seventies, early eighties.

8 Q All right. Do you know the Honorable Gregory A. Weeks,
9 the gentleman seated to your right?

10 A Yes, sir.

11 Q And how do you know him?

12 A The same way. He came about the same time. I can't
13 tell you exactly when but there was a crop of us, Jim Parish,
14 Greg Weeks, Fred Williams, that all came about the same time.
15 Most of us are still around.

16 Q And how did you come to know Judge Weeks?

17 A He was with the Public Defender's Office.

18 Q Do you see anybody else in here that you know from the
19 Public Defender's Office here in Cumberland County?

20 A Mr. Tye Hunter, Malcolm Tye Hunter.

21 Q And was he practicing during that same time period
22 generally? We are talking about Judge Keever, Judge Weeks,
23 yourself, and Mr. Hunter?

24 A I can't tell you exactly when Tye was here. I am
25 guessing it to be late seventies or early eighties.

1 Q Now back to your time in the DA's office, when you
2 first started in the DA's office in 1976, what type of duties
3 and assignments did you have?

4 A Well, first, I had responsibility for Hoke County
5 District Court and mainly traffic court here in Cumberland
6 County. As I stayed with the office, I moved up to Superior
7 Court fairly rapidly and began prosecuting felony cases and,
8 eventually, at some point, was named the senior assistant DA
9 where I took on more administrative duties than I cared to.

10 Q Generally, in the performance of your duties dealing
11 with felony jury trials, did you have a particular type of cases
12 or subject matter of cases that were assigned to you by
13 Mr. Grannis?

14 A For a number of years, I was pretty much in charge of
15 all rapes and child abuse and child cases, sexual or physical.

16 Q Did you also become one of Mr. Grannis' chief
17 prosecutors with respect to homicide cases?

18 A Yes, sir.

19 Q And in that capacity, did you have an opportunity to
20 try capital cases for the office?

21 A Yes, sir.

22 Q This is just an approximate that I am asking for, John,
23 here but do you have an idea as an assistant DA how many jury
24 trials you tried of all subject matters?

25 A Somewhere between 20 and 30.

1 Q How many?

2 A That's a rough guess.

3 Q Could that be significantly low?

4 A It could be significantly higher.

5 Q Now, I am talking about just all of jury-type trials
6 because it sounds like it might be a little low to me but --

7 A Well, I think it probably is but --

8 Q Okay. Now, sir, with respect to murder cases, do you
9 have an idea of how many murder cases you tried?

10 A Capital and noncapital?

11 Q Just noncapital to start with -- first-, second-degree
12 murder that didn't involve the death penalty as a potential
13 punishment?

14 A My guess would be 10 or 15.

15 Q And with respect to capital murder cases, do you have
16 an estimate as to how many of those you tried?

17 A Somewhere around the same number.

18 Q All right. In 1994, did you have the opportunity to
19 try the *State of North Carolina v. Marcus Robinson* case?

20 A Yes, sir.

21 Q Can you give us a thumbnail sketch of the facts of that
22 case as you recall them with respect to the allegations
23 involving the death of Erik Tornblom?

24 A Erik Tornblom was a young man who had a job at
25 Chi-Chi's. He left work one night. On his way home, he went to

1 a convenience store on Owen Drive. There, he saw two people,
2 one of whom he knew, Mr. Robinson's codefendant, from school,
3 and they asked him for a ride, which he gave them. As they
4 pulled away from the convenience store, one of them put a
5 shotgun to his head. They made him drive to an area that was
6 not too far away to an abandoned lot. There, they made him get
7 out of the car, lie down on the ground. The evidence showed
8 that Mr. Tornblom begged for his life at that point. The jury
9 found and the evidence showed that Mr. Robinson shot him
10 basically point-blank in the head as he was on the ground. Then
11 Mr. Robinson took his wallet and various other items. They
12 eventually took his car.

13 The evidence further went on to show that Mr. Robinson
14 had made a statement to the effect prior to the killing that he
15 was going to get him a whitey. The jury found him guilty both
16 of felony murder and premeditated murder and gave him a death
17 sentence.

18 Q Now, had Mr. Robinson pled guilty to some of the
19 offenses for which he was charged in an indictment?

20 MR. JAMES FERGUSON: Your Honor please, I am going
21 to object to this detailed description of what took place at the
22 trial. Number one, it is irrelevant. Number two, to the extent
23 the events of the trial ought to be recounted here, the record
24 will speak for itself.

25 THE COURT: Well, for just a moment, let's talk

1 about the second prong of your objection because I anticipate
2 that is a matter that we may be getting into with other
3 witnesses as well.

4 MR. JAMES FERGUSON: Yes, sir.

5 THE COURT: Well, let me back up from what I just
6 said. As to the first prong, I have indicated to all counsel I
7 believe on several occasions on the record that it was my
8 inclination to give both counsel wide latitude in terms of
9 introduction of evidence in this case. I believe I also
10 indicated on the record that I was aware of the body of law
11 relating to the propriety, the admissibility, of folks who were
12 involved in cases that were finalized, testifying to matters
13 outside of the record in this case. Now, as Mr. James Ferguson
14 just pointed out, the facts of the case are matters of record.

15 Mr. Colyer, how far do you intend to go in this area,
16 sir?

17 MR. COLYER: That's as far as I was going, Judge.

18 THE COURT: Okay.

19 MR. COLYER: With respect to that question. I am
20 going to follow up with an exhibit, if I might be allowed to.

21 THE COURT: Yes, sir. And simply for purposes of
22 the record, what would the exhibit be?

23 MR. COLYER: The printed opinion of the case of
24 the *State of North Carolina v. Robinson* at 342 N.C. 74, 1995.

25 THE COURT: Okay. All right. That's obviously

1 part of the record in the case.

2 MR. COLYER: Judge, if I might --

3 THE COURT: Yes, sir.

4 MR. COLYER: We are doing this as kind of a
5 convenience thing for the Court because, obviously, there is a
6 huge body of knowledge out there with respect to case law and as
7 convenient as we could make it if it needs to be in the record
8 for the Court's decision and for any review that might be
9 required in the future, we're simply trying to do that as
10 conveniently and expeditiously as we can rather than standing up
11 and asking every time to take judicial notice about a particular
12 situation. But since you raise that point, obviously, we would
13 be asking the Court, at some point, to take judicial notice of
14 all of these cases --

15 THE COURT: Okay.

16 MR. COLYER: -- with respect to their opinions and
17 a number of other things perhaps as we go through this, but
18 we'll deal with those as we address them, if it please the
19 Court.

20 THE COURT: Yes, sir. Let me address the bases of
21 your objection. First basis, as I understand it, is relevance.

22 MR. JAMES FERGUSON: Yes, sir.

23 THE COURT: I understand the basis. Consistent
24 with what I said about giving wide latitude to both sides. I am
25 going to overrule it on that ground.

1 MR. JAMES FERGUSON: Very well.

2 THE COURT: Second basis.

3 MR. JAMES FERGUSON: Second basis, Your Honor, is
4 that our courts have long prohibited trial judges from talking
5 about events of a trial where there is a record of the trial.

6 THE COURT: Yes, sir.

7 MR. JAMES FERGUSON: There is a record of the
8 trial in this case, and that record is part of the record in
9 this case.

10 THE COURT: Yes, sir.

11 MR. JAMES FERGUSON: We didn't object to all of
12 the description. We thought a brief description is fine, but to
13 go on and on about details of the events at trial would be
14 improper, against the rules of our State Supreme Court.

15 THE COURT: Well, folks, we've got a lot of legal
16 knowledge on both sides of this case, but if I understood Judge
17 Dickson's testimony correctly, the matters he testified to,
18 specifically the factual matters that he recalled from his
19 involvement in the case, are part of the record in this case.
20 Is there any dispute as to that?

21 MR. COLYER: No, sir.

22 MR. JAMES FERGUSON: I don't believe so, Your
23 Honor.

24 THE COURT: All right. I hear your objection. It
25 is overruled because, in my view, it did not go outside the

1 record in the case but, folks, let me state for purposes of the
2 record that if we get to an issue in the case where matters are
3 being testified to, observations or other matters outside of the
4 record, both sides are entitled to be heard.

5 MR. COLYER: Thank you, Your Honor.

6 THE COURT: Okay.

7 MR. COLYER: May I approach, Your Honor.

8 THE COURT: Yes, sir.

9 BY MR. COLYER:

10 Q Judge Dickson, I am going to hand you what's been
11 marked for identification as State's Exhibit Number 20. And I
12 am going to tell you there is an extra page --

13 MR. COLYER: And, Mr. Ferguson, there is an extra
14 page to that last page on there. For convenience's sake, I
15 stapled them together and marked them as one exhibit, and that
16 last page is actually -- deals with the petition for cert. that
17 was filed relating to the MAR, I think. I was just trying to
18 keep up with the history of it. We are not going to be dealing
19 with that, but that is the last page.

20 THE COURT: I am sorry. This is 20?

21 MR. COLYER: Yes, sir. State's Exhibit 20.

22 THE COURT: For the record, is this the Court's
23 copy or the clerk's copy?

24 MR. COLYER: That is the Court's copy. Judge
25 Dickson has the red-labeled State's exhibit copy, Judge, so

1 you're free to write on that one all you want.

2 THE COURT: I appreciate it. Yes, sir.

3 BY MR. COLYER:

4 Q Judge Dickson, can you identify for the record what is
5 marked as State's Exhibit Number 20?

6 A It's the Supreme Court opinion in *State v. Robinson*,
7 which appeared at 342 N.C. 74, 1995.

8 Q All right, sir. And I believe the objection came on a
9 question where I had asked you if Mr. Robinson had pled guilty
10 to something pre-jury selection in the trial or at some point in
11 pre-offering of evidence.

12 THE COURT: For clarification, is that part of the
13 record in this file number?

14 MR. COLYER: It is, Judge, and it indicates in the
15 opinion what he pled to. I just want -- and if Judge Dickson
16 can answer that with a yes or no, that is as far as we are
17 going.

18 THE WITNESS: If I remember correctly, he had
19 entered pleas to just about everything other than premeditated
20 murder and felony murder.

21 MR. COLYER: Okay, sir. Thank you.

22 BY MR. COLYER:

23 Q Okay. Now, with respect to State's Exhibit 20, does
24 that appear to be a copy of the opinion *State v. Robinson* that
25 we've been referring to? The case?

1 A Yes, sir.

2 MR. COLYER: Your Honor, for the record, we move
3 to introduce State's Exhibit Number 20.

4 THE COURT: Okay. Folks, do you want to be heard?

5 MR. JAMES FERGUSON: No, Your Honor.

6 THE COURT: It is admitted without objection.

7 BY MR. COLYER:

8 Q Judge Dickson, who were the participants in that trial?

9 A As in the attorneys?

10 Q Judge, attorney, anyone else that participated?

11 A The Honorable E. Lynn Johnson was the presiding judge.
12 Mr. Robinson was represented by Randy Gregory and Edward Brady
13 at trial and then represented by Jim Parish on appeal.

14 Q Sir, have you had an opportunity to review the opinion
15 that I've handed you in State's Exhibit Number 20, the Robinson
16 case, from the State Supreme Court?

17 A Yes, sir.

18 Q I take it, as in most cases that go to the appellate
19 level, the Supreme Court, with respect to death penalty cases,
20 there were assignments of error?

21 A Yes, sir.

22 Q And they were dealt with in the opinion; is that
23 correct?

24 A Yes, sir.

25 Q Did any of the assignments of error, so far as you

1 recall, deal with any issue of jury selection?

2 MR. JAMES FERGUSON: Your Honor please, I object.

3 THE COURT: The objection is sustained. The
4 objection is sustained.

5 MR. COLYER: And, again, Your Honor, is this on
6 the basis of the record speaks for itself?

7 THE COURT: Yes, sir. And the fact that you've
8 introduced the opinion of the North Carolina Supreme Court.

9 BY MR. COLYER:

10 Q And on that basis, Judge Dickson, since there were no
11 assignments of error dealing with jury selection issues, was the
12 case affirmed on appeal?

13 THE COURT: Rephrase your question, Mr. Colyer.

14 BY MR. COLYER:

15 Q Was the case affirmed on appeal, Judge Dickson?

16 A Yes, sir.

17 Q No error?

18 A Yes, sir.

19 Q Now, let's deal with, if we could -- in this particular
20 case, sir, have you been made aware that one of the concerns in
21 this litigation is that there were five out of ten black jurors
22 who were peremptorily excused by you?

23 A Yes, sir. I have been made aware of that.

24 Q And I take it that the other five were passed by you to
25 the defense?

1 A Yes, sir.

2 Q Were there any blacks that served on the jury?

3 A Yes, sir.

4 Q How many?

5 A I want to say three actually ended up serving, but I'm
6 not positive of that.

7 Q So at least --

8 A I know the defense took several off.

9 Q So the defense took some of those jurors off that you
10 passed, and some of the jurors that you passed that were black
11 were acceptable to both sides?

12 A Yes, sir.

13 Q And, again, the record speaks for itself in terms of
14 how many?

15 A Yes, sir.

16 Q Have you had an opportunity, sir, to review transcripts
17 and review the opinions with -- the opinions with respect to the
18 case, the State's Exhibit 20 that I have talked to you about,
19 and specifically looked at the questions that you asked and the
20 answers that you received from the five jurors that I mentioned
21 to you at the beginning of this examination?

22 A Yes, sir.

23 Q Are you in a position to discuss what the jurors said
24 to you that resulted in you exercising a peremptory strike
25 against them?

1 A Yes, sir, but I'll have to qualify that. What a juror
2 says is a part of it. There's also an interaction in a
3 courtroom picking a jury in any case, whether it's a
4 death-qualified jury --

5 THE COURT: And I am sorry, Judge Dickson, for
6 interrupting, but I need clarification. You started out your
7 response, I need to qualify. A juror's responses are part of --
8 were you referring to part of the record?

9 THE WITNESS: No, sir. It is part of the decision
10 you make, but it is not the entire decision.

11 THE COURT: Okay. All right.

12 THE WITNESS: I'm not -- with you, I am speaking
13 to the choir here, but I don't know what jury selection
14 experience some of these folks may have, if any, and --

15 THE COURT: Okay.

16 THE WITNESS: -- it's not a cut-and-dried
17 situation. The responses are a part of overall balance that you
18 try to get in picking a jury.

19 BY MR. COLYER:

20 Q In picking --

21 A So I think the answer to the question is yes with that
22 qualification.

23 Q I have asked earlier about in your jury selection with
24 respect to any of these five peremptorily stricken jurors who
25 were black whose names I mentioned to you, you've already said

1 that race was not a significant factor in their selection?

2 A Yes, sir.

3 Q Was not a factor at all in their selection?

4 A No.

5 Q Do you recall --

6 A Mr. Colyer, one thing I always want is my cases to stand
7 up on appeal. I hate retrying cases because my evidence usually
8 goes downhill, and I want to do it right the first time. I know
9 what the law is. That's all. My ego's too big not to.

10 Q Well, as we discuss these factors that are in addition
11 to what the juror says, the two counsel that you mentioned,
12 Mr. -- or did you mention the counsel's name in this case?

13 A Randy Gregory and Ed Brady.

14 Q Have you had an opportunity to practice with those two
15 gentlemen before and after this particular case?

16 A Yes, sir.

17 Q And you mentioned that Judge Johnson was the trial
18 judge?

19 A Yes, sir.

20 Q Did you feel like you were being observed and that your
21 actions were being scrutinized by those parties while you were
22 asking questions, making observations, and making your
23 prosecutorial decisions with respect to strikes?

24 A Most certainly, sir. Anybody who knows Randy Gregory,
25 Ed Brady, or Judge Johnson knows what quality attorneys they

1 are, what quality judge Judge Johnson is, and what -- Randy and
2 Ed aren't scared of anything, certainly not me.

3 Q Earlier we mentioned some persons who were in the
4 District Attorney's Office or the Public Defender's Office
5 during your tenure in the DA's office. What about Mr. Gregory?
6 Was he ever in the DA's office?

7 A He was in the DA's office in 1976 when I came here. He
8 left to go into private practice several years after that. I
9 can't tell you exactly which year. I'm pretty sure he didn't
10 make the transition from the old courthouse to the new
11 courthouse.

12 Q Did he have a nickname when he was in the DA's office?

13 A Yes, sir. I am trying to remember what it was. Golden
14 heart.

15 Q And what was that nickname based upon and what was the
16 significance of that nickname?

17 A 'Cause it's the exact opposite of what Randy was like
18 both as a prosecutor and a defense attorney. He is like a junk
19 yard dog. He'll take a fender off a car and shake it just to
20 see what happens, and he won't let go of it.

21 Q Would tenacious be a good way to describe it?

22 A That would be slightly less a version of what he
23 actually is. Tenacious is part of it.

24 Q You mentioned Ed Brady. How did you know Mr. Brady at
25 that time?

1 A He was a defense attorney, former ATF agent, in the
2 military, was in private practice.

3 Q The names of the jurors that I mentioned to you:
4 Ms. Whitaker, Ms. Chase, Mr. Robinson, Mr. Troy, and
5 Mr. Johnson. Do you remember anything in particular that they
6 said during the jury selection that helped you or assisted you
7 in making your decision about exercising a peremptory strike
8 against them?

9 A Yes, sir, but I would like to inquire, Your Honor, or do
10 y'all have a way you're referring to these jurors other than by
11 name?

12 MR. COLYER: Your Honor --

13 THE WITNESS: I do not think it is fair to them --

14 MR. COLYER: No, sir. I believe --

15 THE WITNESS: -- to put this in the record with
16 their names attached.

17 THE COURT: Folks, the names are already of record
18 in the context of the affidavits that have been introduced into
19 evidence in the case. So while I appreciate your concern in
20 that respect, Judge Dickson, those matters are already up here.

21 THE WITNESS: All right, sir. Thank you.

22 MR. JAMES FERGUSON: If Your Honor please, let
23 me -- may I impose a limited objection to the question before
24 the witness at this time. He was asked if he remembered things
25 that the witnesses said, that the jurors may have said that

1 affected his decision, and I am going to object to this witness
2 giving his recollection of what was said. There's going to be
3 some recounting of what was said. We ask that that be based on
4 what's in the record itself.

5 THE COURT: Well, that's the next matter I was
6 going to go to, Mr. Ferguson. Since those matters are already
7 of record in the context of the affidavits involved, if you'll
8 utilize them for purposes of the questions.

9 MR. COLYER: And I believe, Your Honor, earlier I
10 asked Judge Dickson if he had had an opportunity to examine the
11 transcripts, and I thought he said he had.

12 THE COURT: Yes, sir.

13 MR. COLYER: And, basically, what I'm asking is
14 with respect to their answers to his questions about certain
15 subjects. I will try to limit it so as to let him know where
16 I'm going.

17 THE COURT: Okay.

18 MR. COLYER: But I think he's indicated he did
19 have a basis for that.

20 THE COURT: Okay. Well, I guess my concern, Mr.
21 Colyer, is the record because the response generically referred
22 to jurors. It does not specifically designate what juror, what
23 questions.

24 MR. COLYER: I will clarify that, Judge, if it
25 please the Court.

1 THE COURT: Yes, sir.

2 BY MR. COLYER:

3 Q Judge Dickson, with respect to juror Tandra Whitaker,
4 was she asked questions about her views on punishment?

5 A Yes, sir.

6 Q What do you recall she said with respect to her views
7 about either the death penalty or life imprisonment?

8 MR. JAMES FERGUSON: Now I object to any
9 recitation by this witness of what the juror said, Your Honor,
10 but he can talk about his reaction to it, what he did as a
11 result of it, but I object to his recounting what a witness said
12 when we have a record of what the witness said.

13 THE COURT: Yes, sir. And why don't we take just
14 a moment because the clerk is pulling those affidavits so I can
15 follow along. If anybody has copies handy that will be helpful.

16 MR. HUNTER: Your Honor, are you talking about
17 the -- what affidavits are you talking about?

18 THE COURT: Of the jurors excluded presumably by
19 Mr. Dickson in the Marcus Robinson case.

20 MR. COLYER: Actually, we are talking not
21 specifically about an affidavit, Your Honor. That same
22 information may be contained in that affidavit, but I think that
23 is one of the discussions we had this morning about the
24 affidavits. So we are not talking about them specifically.

25 THE COURT: All right.

1 MR. COLYER: We are just talking about what Judge
2 Dickson had an opportunity to recall with respect to either
3 transcripts or information as it relates to what the jurors said
4 in response to general questions. And for the Court's
5 information, I am not going to go through a lengthy question and
6 answer session just to establish from his particular perspective
7 what a juror said on certain subjects, and we are not going into
8 a great deal of detail on that, but -- and I guess what I'm
9 trying to do is to point out to the Court that these are things
10 that are in the transcript and not rely upon the Court or put
11 the burden upon the Court to have to go back and read everything
12 without having some tie to what the witness said.

13 THE COURT: Well, obviously, there are transcripts
14 of the voir dire conducted in this case reflecting questions
15 that were asked by all of the lawyers that were involved and
16 responses given by the jurors who were involved.

17 MR. COLYER: Yes, sir.

18 THE COURT: So I'm understanding now what it is
19 that you're going after. I'm a little bit at a loss here,
20 folks, because I don't have -- haven't had access to those
21 transcripts, not sure where we are going --

22 MR. COLYER: Judge, maybe I can short-circuit this
23 a little bit.

24 THE WITNESS: They are rather lengthy.

25 MR. COLYER: If I can have a little bit of leeway

1 with respect to leading the witness on the first question --

2 THE COURT: Okay. That may be helpful.

3 MR. COLYER: -- and then if that doesn't help the
4 Court --

5 THE COURT: Okay. I will hold off ruling on your
6 objection, Mr. Ferguson, until I hear the specific question,
7 certainly without prejudice to your right to be heard on your
8 objection.

9 Go ahead, Mr. Colyer.

10 MR. JAMES FERGUSON: Yes, Your Honor.

11 BY MR. COLYER:

12 Q Judge Dickson, when Ms. Whitaker was asked generally
13 about views on punishment, do you recall her saying something,
14 either a paraphrase of this or a quote of this, that it's hard
15 to say now if I could go for the death penalty, that she favored
16 life but she wouldn't want to be on a case where she had to have
17 a say in someone dying?

18 A That's what my notes reflect, yes, sir.

19 THE COURT: All right. For the record, were these
20 notes that were provided in the discovery process as to this
21 juror in this case?

22 MR. COLYER: Yes, sir, and they came all in the --
23 well, the transcripts were placed into the record originally by
24 the defense, and then the material that went to Dr. Katz that
25 was the basis of his spreadsheets as well as the material that

1 was used in the formulation of affidavits related to what was
2 said in the transcript. So it's kind of a --

3 THE COURT: This is analogous to affidavits
4 provided in discovery from other prosecutors in other cases in
5 terms of what their observations and recollections were as to
6 reasons that they exercised the peremptory challenge.

7 MR. COLYER: Yes, sir.

8 THE COURT: Any disagreement with that, folks?

9 MR. JAMES FERGUSON: I am not sure -- not sure
10 quite what I understand the situation to be. Do I understand
11 the witness to say that he has some notes he is referring to
12 now?

13 THE COURT: And that those notes were provided to
14 you in the context of --

15 THE WITNESS: These are my notes, Your Honor.
16 Those are my written notes.

17 THE COURT: Oh, I misunderstood. I am sorry.

18 MR. COLYER: But, Judge, he does have notes that
19 were provided to him as part of the information from the
20 discovery that the defense had either in the form of affidavits,
21 transcripts, that sort of thing so, yes, sir.

22 THE COURT: Okay.

23 MR. JAMES FERGUSON: Your Honor, may we simply
24 ask at this point since the witness is testifying from notes
25 that we haven't seen that we have an opportunity to see the

1 notes.

2 THE COURT: Absolutely. Yes, sir.

3 MR. JAMES FERGUSON: May I approach.

4 THE COURT: And these were notes prepared in
5 anticipation of your testimony at this hearing?

6 THE WITNESS: Yes, sir.

7 THE COURT: Mr. Colyer, do you want to be heard?

8 MR. COLYER: No, sir.

9 THE COURT: Yes, sir.

10 MR. JAMES FERGUSON: Mr. Ferguson, yes, sir.

11 MR. THOMPSON: If it would speed things along, I
12 am happy to take those notes, with Your Honor's permission and
13 the witness' permission, make copies and give to the other side,
14 if it would speed things along.

15 THE COURT: What is your preference, folks?

16 MR. JAMES FERGUSON: That's fine if you want to
17 make copies now.

18 MR. THOMPSON: If it is all right with the Court.

19 THE COURT: All right.

20 MR. COLYER: Sure. And we can --

21 THE COURT: Do you want to stand down for a few
22 moments while that is done so we will have access to it?

23 MR. COLYER: We want Mr. Ferguson to have a full
24 opportunity to look at this before he has to listen to any more
25 questions or ask any questions. We have no objection to that.

1 THE COURT: I think that's appropriate.

2 Thank you, Judge Dickson. You may step down for a
3 moment, Your Honor.

4 All right. We're at ease, folks.

5 MR. JAMES FERGUSON: Thank you, Your Honor.

6 MR. COLYER: Mr. Thompson is counting the pages so
7 he can make sure --

8 MR. THOMPSON: Going to see how long it's going to
9 take me, Judge.

10 THE COURT: We'll be at ease for just a moment.

11 (Whereupon, a recess was held from 11:31 a.m.
12 until 11:41 a.m.)

13 (The following proceedings continued in open
14 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
15 Ferguson, Ms. Stubbs, Mr. Colyer, and Mr. Thompson were
16 present.)

17 THE COURT: Okay. Mr. James Ferguson, did you
18 have an opportunity to review the notes?

19 MR. JAMES FERGUSON: Yes, Your Honor. I'm sorry.
20 We are ready to proceed.

21 THE COURT: Judge Dickson, if you will retake the
22 stand, sir.

23 Okay. Ready to go forward when you are, Mr. Colyer.

24 MR. COLYER: Yes, sir. Thank you, Judge.

25 BY MR. COLYER:

1 Q Judge Dickson, do you have your notes back up there on
2 the stand?

3 A Yes, sir.

4 MR. COLYER: If I could approach, Your Honor. For
5 the record, I will now mark those notes that have been delivered
6 to the defense as State's Exhibit Number 21, and I will just ask
7 Judge Dickson --

8 BY MR. COLYER:

9 Q Is this a copy, sir, that Mr. Thompson has made of your
10 notes that you delivered to court this morning?

11 A Yes, sir.

12 MR. COLYER: Okay. We'd move to introduce State's
13 Exhibit 21, then, Your Honor.

14 THE COURT: Okay. Folks?

15 MR. JAMES FERGUSON: No objection.

16 THE COURT: They're admitted without objection.

17 BY MR. COLYER:

18 Q Judge Dickson, dealing with Ms. Whitaker, do you recall
19 the question I asked about what she said as reflected in the
20 transcript with respect to issues of death penalty and life
21 sentence?

22 A Yes, sir.

23 Q Okay. Now, what did she say as you have indicated in
24 your notes based upon your review of those documents with
25 respect to the death penalty or life?

1 A She basically stated on those -- that subject -- that
2 it's hard to say now if I could go for death penalty, that she
3 favored life and wouldn't want to be on a case where she had to
4 have a say in someone dying. And those notes are basically from
5 the transcript and from an affidavit I think that she prepared
6 as to what those were.

7 Q Sir, with respect to the juror who was peremptorily
8 stricken, Margie Chase, what did you note that she said with
9 respect to her views on capital punishment or the death penalty?

10 A That she didn't believe in the death penalty, she didn't
11 think she could vote for it, basically, under any circumstances
12 because of a guilty conscience, that she had been brought up
13 from childhood to not believe in the death penalty.

14 Q Did you make a challenge for cause with respect to her,
15 sir?

16 A Yes, sir.

17 Q Was it allowed or denied?

18 A Denied.

19 Q And did we, thereafter, peremptorily strike her?

20 A Yes, sir.

21 Q With respect to Ms. Sylvia Robinson, what did she say
22 with respect to her view of the death penalty or her ability to
23 vote for it?

24 A She was wishy-washy. She -- and somewhat equivocal. At
25 one point, she'd indicate she might be able to and several times

1 stated that she couldn't vote for it, basically, under any
2 circumstance.

3 Q Did you make a challenge for cause with respect to her?

4 A I did.

5 Q And was it allowed or denied?

6 A Denied.

7 Q Did you, thereafter, peremptorily strike Ms. Robinson?

8 A Yes, sir.

9 Q With respect to the juror Elliot Troy, did you note in
10 review of his transcript answers to questions that you asked or
11 information that may have been contained in a questionnaire as
12 to what he said about either punishment for a murder offense or
13 anything in particular about his background?

14 A Sorry. Who are you asking about?

15 Q Mr. Elliot Troy.

16 A Mr. Troy had a conviction for public drunkenness -- or
17 not drunkenness but drinking on public property. He indicated
18 during the examination that he had a friend with a B and E
19 conviction and a friend with an accessory to murder at a liquor
20 house. Given that background, I did exercise a peremptory.

21 Q Do you recall if he said anything about his preference
22 with respect to a particular punishment, death penalty or life
23 sentence?

24 A Right offhand, Mr. Colyer, I can't remember, and I
25 didn't make any notes about that.

1 Q All right.

2 A If I recall correctly, though, he was not in favor --
3 opposed to the death penalty by any means.

4 Q Do you recall him making a statement to the effect that
5 he stated he preferred a life sentence as a punishment for
6 murder?

7 MR. JAMES FERGUSON: Your Honor --

8 THE WITNESS: I don't have a specific recollection
9 of that.

10 MR. JAMES FERGUSON: -- I object. The witness
11 said he doesn't recall. He is now leading the witness. We
12 object.

13 THE COURT: The objection is sustained.

14 Either rephrase or ask another question.

15 BY MR. COLYER:

16 Q You mentioned that you saw and had access to affidavits
17 or an affidavit?

18 A Yes, sir.

19 Q Was that the affidavit that dealt with the Robinson and
20 Meyer cases?

21 A Yes, sir.

22 Q Do you recall whether in that affidavit it had a
23 statement that Mr. Troy said he --

24 MR. JAMES FERGUSON: I object, Your Honor.
25 Leading the witness again. We object.

1 THE COURT: The objection is sustained.

2 Gentlemen, Mr. Colyer, you referred to an affidavit
3 when you asked a question. What affidavit are we talking about,
4 sir?

5 MR. COLYER: The affidavit that was entitled
6 Affidavit of Robinson and Meyer, 1995.

7 THE COURT: Made by whom?

8 MR. COLYER: Made by myself, Your Honor, in
9 relation to that which Mr. Dickson said he had an opportunity to
10 review at some point.

11 THE COURT: Well, to the question as phrased, the
12 objection is sustained.

13 MR. COLYER: Yes, sir.

14 THE COURT: Yes, sir.

15 BY MR. COLYER:

16 Q Now, Judge Dickson, with respect to the juror Nelson
17 Johnson, based upon your review of the information we previously
18 described, do you recall what he said with respect to his view
19 of returning a guilty verdict?

20 A Yes, sir.

21 Q What did Mr. Nelson Johnson say?

22 A That he would require an eyewitness and that the
23 defendant would have to be caught on the scene in order to
24 convict. I don't have any cases like that.

25 Q Did you --

1 A I challenged for cause.

2 Q Yes, sir.

3 A For some reason, that was denied.

4 Q And did you, thereafter, peremptorily strike
5 Mr. Johnson?

6 A Yes, siree.

7 (There was a pause in the proceedings.)

8 MR. COLYER: Approach the witness, Your Honor.

9 THE COURT: Yes, sir.

10 BY MR. COLYER:

11 Q Judge Dickson, I am going to hand you what's been
12 marked for identification as State's Exhibit Number 22 and ask
13 if you'll take a moment to look at that. Should be about ten
14 pages. See if you recognize what is marked for identification
15 there.

16 A These appear to be State's Exhibit 22, juror
17 questionnaires for Ms. Whitaker, Ms. Chase, Ms. Robinson, Elliot
18 Troy, and Johnson, Nelson.

19 Q Sir, would those have been copies of the questionnaires
20 that would have been distributed to both counsel for the State
21 and counsel for the defense prior to the questioning of any of
22 those prospective jurors?

23 A Yes, sir, but I hope our originals were a little more
24 legible than these.

25 MR. COLYER: Your Honor, we'd move to introduce

1 State's Exhibit 22, those questionnaires of the five jurors.

2 THE COURT: Okay. Mr. Ferguson?

3 MR. JAMES FERGUSON: No.

4 THE COURT: They're admitted without objection.

5 MR. JAMES FERGUSON: Yes, sir.

6 MR. THOMPSON: May I have a second, Judge.

7 THE COURT: Yes, sir.

8 (There was a pause in the proceedings.)

9 MR. COLYER: Judge, may I have just a moment,
10 please, sir.

11 THE COURT: Yes, sir.

12 (There was a pause in the proceedings.)

13 MR. COLYER: Approach, Your Honor, please.

14 THE COURT: Yes, sir.

15 MR. COLYER: Approach the witness, Your Honor.

16 THE COURT: Yes, sir.

17 BY MR. COLYER:

18 Q Judge Dickson, in the interest of time and dealing with
19 some voluminous pages of transcript, I am going to hand you
20 what's marked for identification as State's Exhibit Number 23
21 and relate to you that based upon the transcript, it appears
22 that the juror we were talking about earlier, Mr. Troy, was in
23 the number two jury position at some point?

24 A Yes, sir.

25 Q And do you recall that I asked you a question with

1 respect to his preference or what he said with respect to his
2 views about punishment?

3 A Yes, sir.

4 Q Does that appear to be the page at the transcript where
5 that was reflected as to what he said as evidenced by your notes
6 in State's Exhibit 21?

7 A Yes, sir.

8 Q All right. And with respect to what he said, was that
9 part of your decision-making process in deciding to exercise a
10 peremptory strike against him?

11 A Yes, sir, it was.

12 MR. COLYER: Your Honor, we'd move for the
13 introduction of just that one page of the transcript that Judge
14 Dickson has identified, State's Exhibit 23.

15 BY MR. COLYER:

16 Q And I believe -- is it page 323, sir --

17 A Yes, sir.

18 Q -- of the jury selection in the *State v. Robinson*?

19 A Yes, sir.

20 MR. COLYER: I'm sorry. We move that into
21 evidence, Judge.

22 MR. JAMES FERGUSON: No objection.

23 THE COURT: It is admitted without objection.

24 BY MR. COLYER:

25 Q What did Mr. Troy say, sir, with respect to his views

1 in that particular regard?

2 A Life imprisonment I prefer. I really prefer that on the
3 death penalty because the person can -- the person can change,
4 like a second chance, I guess, life imprisonment.

5 Q And, Judge Dickson, do you have a pen with you?

6 A Yes, sir.

7 MR. COLYER: Your Honor, with your permission, may
8 he just write the juror's last name at the top of that page just
9 in case at some point in the future -- since it is out of the
10 transcript, you know, that it was with respect to Elliot Troy,
11 that page and that juror number two.

12 THE COURT: Yes, sir. Without objection, he may.

13 MR. JAMES FERGUSON: Yes, Judge.

14 MR. COLYER: Thank you.

15 (The witness complied with the request.)

16 BY MR. COLYER:

17 Q Judge Dickson, you indicated earlier that in addition
18 to the answers to the questions that you received, information
19 on questionnaires, that there were other observations that you
20 made with respect to jurors when you decided to keep them or
21 exercise a peremptory challenge or move to strike for cause; is
22 that correct?

23 A Yes, sir.

24 Q All right. Some of those factors that are not
25 reflected in the record, per se -- although sometimes the court

1 reporters would indicate actions of a particular person during
2 the course of a trial. What are some of the things that you're
3 talking about that you observed or took into consideration
4 generally about jurors in response to your questions and their
5 answers?

6 THE COURT: Now, so that the record is clear --

7 MR. COLYER: Just generally. Nobody in particular
8 at this point.

9 THE COURT: As to the jurors we've just discussed
10 for purposes of the record or generally --

11 MR. COLYER: Just generally, Your Honor.

12 THE COURT: Okay. Do you folks want to be heard?

13 MR. JAMES FERGUSON: Your Honor, if he's offering
14 it just to say what the things are in general that he thinks
15 about --

16 THE COURT: Yes, sir.

17 MR. JAMES FERGUSON: -- in jury selection, I don't
18 really have any objection to that, but if he is saying these are
19 the things I thought about in general with these jurors, we
20 object.

21 THE COURT: Yes, sir. That's why I asked the
22 question.

23 MR. COLYER: It is just a general question to
24 start with, Your Honor.

25 THE COURT: Yes, sir. You may answer if you can.

1 THE WITNESS: What was the question, again?

2 BY MR. COLYER:

3 Q With respect to observing jurors in addition to
4 listening to what they say, what other general factors did you
5 try to take into consideration as you listened to their answers
6 and made observations about them with respect to whether to keep
7 them as a juror, challenge them for cause, or peremptorily
8 strike them?

9 A Well, there are hundreds of things that you look at, I
10 think. Whether they can look you in the eye when they are
11 answering questions, whether they're making eye contact with the
12 defense attorneys, whether they are making eye contact with the
13 defendant, how they're sitting in their chairs, are they paying
14 attention to what's going on around them, how do they answer the
15 questions -- not just what they say but how do they answer them?
16 And sometimes it just comes down to whether or not you believe
17 somebody or not. I think all of us who have picked juries have
18 had somebody answer the questions right down the line, yet you
19 take them off because you just don't believe them. I'm always
20 scared of a juror who wants to be on a jury. Nobody in their
21 right mind wants to be on a death-qualified jury, I don't think.
22 Some people do. And there's an ulterior motive there. I don't
23 know whether that motive is going against me or for me, and I'm
24 not going to take that chance. But the way they answer the
25 question -- and it doesn't show up in the transcript. It's not

1 something I kept voluminous notes on or any notes for that
2 matter. But if I'm not comfortable with the juror for whatever
3 reason, I'm not going to leave that juror on if I don't think
4 that juror is going to be just as fair to the State as it will
5 be to the defendant.

6 Q With respect to your comfort level, did your comfort
7 level ever include race as a consideration, just the race of the
8 juror?

9 A No, sir.

10 Q With respect to these five jurors that I've asked you
11 about by name in the Robinson case that were struck
12 peremptorily -- and this is just a yes or no question to start
13 with. Do you have any specific recollection about any of those
14 jurors and any of these factors that you referred to in the last
15 couple of answers to my questions? And, again, that is just a
16 yes or no at this point.

17 A Can I refer to my notes for just a second?

18 Not to these particular jurors, no, sir.

19 Q Now, sir --

20 MR. COLYER: Can I have just a moment, Your Honor.

21 THE COURT: Yes, sir.

22 (There was a pause in the proceedings.)

23 BY MR. COLYER:

24 Q Judge Dickson, during your years in the District
25 Attorney's Office, did you have to attend CLE courses and

1 classes and go to the national conferences and state conferences
2 with respect to either continuing legal education or
3 opportunities to go and get some training?

4 A Yes, sir.

5 Q Was the training along the lines of subject matter,
6 case law, presentations, jury selection, that type of thing?

7 A It always ran the gamut. There was always an update
8 from the Institute of Government on law in recent cases from a
9 prosecutorial standpoint, and there were also -- I think the
10 appropriate word now is sensitivity training. Of course, we
11 also had Judge Freeman Britt talk to us, which I think was
12 probably non-sensitivity training, and various -- I mean, it ran
13 the gamut from the mental health of prosecutors and how to
14 maintain it all through racial sensitivity, ethnic sensitivity,
15 and, of course, statutes, law.

16 Q Now, in any of that training, did you ever receive any
17 training in, whether the national level, the state level, the
18 local level, at any level, that trained you how to pick a jury
19 based on race?

20 A Just the opposite.

21 Q After *Batson* became law in 1986, were you trained at
22 continuing legal education, either at the state or the national
23 level, with respect to the *Batson* case and what that meant in
24 terms of the impact on jury selection?

25 A Yes, sir.

1 Q In the *Batson* case in particular, in this case, *State*
2 *v. Marcus Robinson*, do you remember any motions that were made
3 pretrial with respect to *Batson*?

4 A If I recall correctly, Mr. Gregory and Mr. Brady filed a
5 pretrial *Batson* motion. As I recall, Judge Johnson ruled that
6 that would be on a juror-by-juror basis as we went through the
7 process.

8 Q Do you recall whether there were any *Batson* challenges
9 raised by the defense based upon any peremptory strikes that you
10 exercised in the *State v. Marcus Robinson* case?

11 A There were not.

12 Q Sir, at the local level here in the District Attorney's
13 Office that you worked for, were there any training sessions,
14 were there any policy statements, or were there any -- was there
15 any information that was given to you by anybody in your office
16 with respect to picking a jury based upon race?

17 A No, sir, absolutely not.

18 Q Earlier, we talked a little bit about your experience
19 in the McNeill case.

20 A Yes, sir.

21 Q Did your notes that we've been referring to, State's
22 Exhibit Number 21, contain any references to the McNeill case?
23 And I direct your attention to what appears to be the last page
24 there of your notes.

25 A Yes, sir.

1 Q Specifically, earlier, I asked you about someone else's
2 participation in the case. Do you recall that there were three
3 blacks who were peremptorily excused from the jury?

4 A I do not recall that there were three. I was -- from
5 the record, I was not there for two of them. My good friend,
6 Mr. Colyer, managed to do that for me.

7 Q So you were there with respect to the peremptory
8 challenge of one juror?

9 A Eddie Anderson.

10 Q I am sorry. His name?

11 A Eddie Anderson.

12 Q And at some point, did you learn that in your absence,
13 your second chair had removed two blacks peremptorily?

14 A Yes, sir.

15 Q With respect to Mr. Eddie Anderson, the juror that was
16 peremptorily struck when you were present, do you recall whether
17 that was a decision that was made jointly, severally,
18 separately, or how that decision was made as between you and
19 your co-counsel?

20 A That was mine alone.

21 Q Sir, with respect to Mr. Eddie Anderson, what were the
22 statements and answers to questions and or information from his
23 jury questionnaire that you noted in your notes in State's
24 Exhibit Number 21 with respect to his excusing?

25 A He had been stationed in the Army at Schofield Barracks

1 in Hawaii, which is not a bad thing in and of itself, but while
2 there, he was convicted of drug offenses, served six months
3 federal time, was discharged dishonorably. He had an uncle out
4 of state -- I believe maybe Michigan -- who was charged with
5 murder, found not guilty. He had another family member charged
6 with burglary, and he had a friend who was charged with
7 first-degree murder.

8 Q And he was struck peremptorily by yourself?

9 A Yes, sir.

10 (There was a pause in the proceedings.)

11 MR. COLYER: Approach the witness, Your Honor.

12 THE COURT: Yes, sir.

13 BY MR. COLYER:

14 Q Judge Dickson, I am going to hand you what's been
15 marked for identification as State's Exhibit 24. Do you
16 recognize that, sir?

17 A I don't recognize it. I know what it is.

18 Q All right, sir. What is it?

19 A It is the LexisNexis version of the opinion in the *State*
20 *of North Carolina v. John Davis McNeill*.

21 Q And, sir, is that the case that we were referring to
22 just a moment ago with respect to the exercise of a peremptory
23 against Mr. Eddie Anderson?

24 A Yes, sir.

25 Q Does that appear to be the copy of the opinion that

1 dealt with the case that was tried here in Cumberland County,
2 sir?

3 A Yes, sir.

4 Q And was there any error found in that case?

5 A No.

6 MR. COLYER: Your Honor, we move to admit State's
7 Exhibit 24, please.

8 MR. JAMES FERGUSON: Your Honor, we are going to
9 object to that. I realize it is an opinion of the appellate
10 court, but so far, there's been shown no relevance to that
11 opinion as to any issue involved in this case nor anything the
12 witness testified. I haven't had a chance to read it. They
13 showed it to me briefly. But unless it has some particular
14 relevance to this witness' testimony about his reasons for
15 striking this juror or some relevance to the issues in this
16 case, we object to it.

17 THE COURT: Okay. Mr. Colyer?

18 MR. COLYER: Judge, earlier, I tried to ask a
19 question about the *State v. Robinson* case with respect to
20 whether or not the opinion dealt with any issues in jury
21 selection, and that objection was sustained, so I decided not to
22 ask that same question in this particular situation.

23 THE COURT: Yes, sir. And for purposes of
24 clarification or clarity in the record, the reason that I
25 objected is the opinion is in evidence, and the opinion speaks

1 for itself.

2 MR. COLYER: Yes, sir. And that's all we are
3 doing now is placing -- attempting to place a copy of the
4 opinion into the record.

5 THE COURT: I hear your objection.

6 MR. JAMES FERGUSON: Yes, sir.

7 THE COURT: I have stated on a couple of occasions
8 and perhaps it's appropriate for me to put in the record once
9 again: We don't have a jury. At some point as the reviewing
10 authority for purposes of determination of what the evidence
11 shows, what it doesn't show, whether it's relevant or whether
12 it's not relevant, I am going to have to make that
13 determination, so I am admitting, at least these matters
14 conditionally with the understanding that the Court will also
15 ultimately have to make the decision about its relevance or not.
16 I recognize that the relevant matters are the matters that are
17 set out in 15A-2010, 2011, and 2012, and I will consider matters
18 for purposes of any determ- -- or decision in this case solely
19 on the basis of the statute. I understand the position of
20 counsel for the defendant. I understand the position of counsel
21 for the State.

22 By way of example, an argument can be made -- I'm not
23 making any determination at this point. But an argument can be
24 made that the facts underlying the killing of Erik Tornblom,
25 while certainly tragic, brutal, heinous, really don't bear on

1 the issues that are before the Court with regard to the exercise
2 of peremptory challenges. I recognize that, but I am giving
3 latitude and leeway to both sides in this case with the
4 understanding that we're guided by the law. The statutory
5 provisions that involve the issues that are now before the Court
6 refer us back to the MAR provisions of the statute. The rules
7 of evidence apply to MARs, and I will apply those rules of
8 evidence in my consideration of the evidence presented.

9 So I note your objection. It is overruled. It's
10 admitted conditionally with the understanding that, ultimately,
11 I am going to have to make a determination as to what is
12 relevant and what's not.

13 MR. COLYER: Judge -- and if I might forecast for
14 you a little bit our reason for putting this in at this point is
15 when we get to closing statements --

16 THE COURT: Yes, sir.

17 MR. COLYER: -- if we ask you to take judicial
18 notice of something such as an opinion --

19 THE COURT: Yes, sir.

20 MR. COLYER: -- and we don't have a copy of an
21 opinion then to hand to you, puts the burden on you to go find
22 it.

23 THE COURT: And I appreciate that.

24 MR. COLYER: By putting it in with respect to the
25 prosecutor or whomever the case deals with, it gives you an

1 opportunity to have a hands-on copy in the courtroom such that
2 when we make a closing statement, if it relates to what the
3 Supreme Court has done with respect to the issues they've
4 considered and any potential argument with respect to issue
5 preclusion or any potential argument with respect to the issues
6 that were before them as it related to, for example, jury
7 selection --

8 THE COURT: Yes, sir.

9 MR. COLYER: -- it's there for you. And as a
10 convenience to the Court and for us to know that it's in the
11 record for you and/or any other court that wants to pick it up
12 and look at it and not have to worry about getting it from
13 somewhere else that it's there gives us an opportunity to argue.

14 THE COURT: Okay.

15 MR. COLYER: And Mr. --

16 THE COURT: So while the objection is noted for
17 the record, for our purposes right now, it is overruled with the
18 understanding that, ultimately, it will be my responsibility to
19 decide whatever it is to consider, whatever it is not to
20 consider with regard to the issues involved.

21 MR. JAMES FERGUSON: Yes, sir. Thank you, Your
22 Honor, for that clarification.

23 THE COURT: Yes, sir. So it's admitted in accord
24 with what I just stated for the record.

25 MR. COLYER: Yes, sir.

1 THE COURT: Yes, sir.

2 BY MR. COLYER:

3 Q Now, Judge Dickson, with respect to your notes, State's
4 Exhibit 21, do those notes likewise have information with
5 respect to the case I asked you about earlier, the 1995 case of
6 *State v. Jeffrey Karl Meyer*?

7 A Yes, sir.

8 Q All right. In that particular case, were there seven
9 peremptory challenges against blacks exercised by the State?

10 A Yes, sir.

11 Q And based upon your review of the transcript,
12 questionnaires, affidavits, information that you had available,
13 did you make some notes in State's Exhibit Number 21, your notes
14 about those individual jurors?

15 A Yes, sir, based on going through the transcripts and
16 also your affidavit.

17 Q With respect to the juror Mary McLean, what did you
18 note about Ms. McLean?

19 A She had a near relative with a pending accessory to
20 murder charge.

21 Q With respect to the juror Lucille Brewer {sic.}, what
22 did you note with respect to her answers to questions?

23 A That she was in favor of life, she didn't think she
24 could put a person to death, that she had felt that way all
25 along, that she could possibly vote for death but preferred

1 life.

2 Q With respect to juror Hanna Miller, what did you note
3 with respect to her answers?

4 A She had a nephew on Pennsylvania who was on death row.
5 She was against the death penalty. Life rather than death.
6 Didn't think she could ever vote for death. She was against the
7 death penalty, never vote for it under any circumstances.

8 Q Did you exercise a peremptory strike against
9 Ms. Miller?

10 A Yes, sir.

11 Q With respect to Richard Hudgins, H-u-d-g-i-n-s, what
12 did you note with respect to his answers?

13 A He had a nephew in Maryland who had been convicted of
14 murder, that the only circumstances under which he could
15 consider the death penalty as a possible punishment was if and
16 only if the victim was a family member of his. He could imagine
17 no other set of circumstances where he could vote for it.

18 Q Was a peremptory strike exercised against Mr. Hudgins?

19 A Yes, sir.

20 Q With respect to Elesia Hamilton, what did you note with
21 respect to her answers?

22 A She did not believe anyone should ever get the death
23 penalty, that she had always felt that way, and could not vote
24 for the death penalty.

25 Q Exercised a peremptory against her?

1 A I did, sir.

2 Q Randy Moutan, if I am pronouncing his name correctly.
3 What did you note with respect to his answers?

4 A That he really didn't want to be there, that he had
5 financial concerns, that he was losing money being out of work
6 and, particularly, because his child support had increased. And
7 his financial concerns were, to me, were obviously going to be
8 bothering him during the trial.

9 Q Sometimes in cases like that, are financial concerns
10 considered as hardships or excuses to have one excused from jury
11 service without either side having to use a peremptory?

12 A At times, yes, sir.

13 Q I take it it was not in this case?

14 A No, sir.

15 Q Tera Farris. What did you note with respect to her
16 answers?

17 A I have some independent recollection of that, too.
18 She -- and this is from a transcript, from what I remember, she
19 claimed to be a criminal justice major. She had a friend
20 charged with arson when we started examination, and then she
21 said that it was a May of 1995 larceny case. I never could make
22 eye contact with her.

23 Q Did you peremptorily excuse her?

24 A Yes, sir.

25 Q Sir, what was that last exhibit number that I gave you?

1 Do you recall? Up here on the bar?

2 A Twenty-four.

3 Q Thank you very much.

4 MR. COLYER: Approach the witness, Your Honor.

5 THE COURT: Yes, sir.

6 For the record, Mr. Colyer, this appears to be a copy
7 of the opinion of the North Carolina Supreme Court in *State v.*
8 *Meyer* is being offered for the same purpose, sir?

9 MR. COLYER: Yes, Your Honor, and the reason I
10 delayed in getting that identified -- I wanted to hand up a copy
11 to the Court. Earlier, I delayed giving it to Mr. Ferguson
12 because I lost it over here, and I found one for him on John
13 Davis McNeill. I will give you a copy of that too, please.

14 MR. COLYER: And just for establishing in the
15 record, Your Honor --

16 BY MR. COLYER:

17 Q Judge Dickson, the State's Exhibit Number 25, what is
18 that, sir?

19 A The Supreme Court opinion in *State v. Meyer*, which
20 appears as 345 N.C. 619, 1997.

21 Q And, sir, so far as you know, based upon your review of
22 that, does that deal with the case that we've been referring to
23 that was the 1995 case that you did here in Cumberland County?

24 A Yes, sir.

25 Q Now, sir -- and, again, I know it is stated in the

1 opinion but just for the record, what was the result in that
2 case, sir?

3 A Death penalty.

4 Q And what was the result on appeal?

5 A It was overturned because Judge Smith wanted to smoke a
6 cigarette. That's not their opinion. I am sorry. It was
7 overturned because of an in-chambers conference supposedly where
8 the defendant was not present.

9 Q At any rate, it came back to Cumberland County for
10 retrial?

11 A Yes, sir.

12 Q Were you involved in the retrial or --

13 A I don't believe so, sir.

14 Q All right, sir. And, in fact, by the time it came
15 back, were you already on the bench in District Court in 1999?

16 A Yes, sir.

17 Q Judge Dickson, I am going to take a moment to look at
18 my notes and confer with Mr. Thompson and --

19 MR. COLYER: Your Honor, if I could have just a
20 moment.

21 THE COURT: Yes, sir.

22 MR. JAMES FERGUSON: Your Honor, I don't know
23 whether 25 was formally offered.

24 MR. COLYER: I am sorry. Thank you.

25 THE COURT: It has not been.

1 MR. JAMES FERGUSON: I wanted to object to it on
2 the same grounds as the other opinion.

3 THE COURT: Yes, sir.

4 MR. COLYER: We would move to introduce it, Your
5 Honor.

6 THE COURT: And, again, it's conditionally
7 admitted. The Court has the responsibility at some point to
8 determine whether it has any relevance to this case.

9 BY MR. COLYER:

10 Q Mr. Dickson or Judge Dickson -- I'm sorry -- you
11 indicated earlier that you had an opportunity to work on some
12 other capital cases in the District Attorney's Office besides
13 the three that are involved in the Michigan State study by way
14 of examination of jury selection, Mr. Robinson, Mr. McNeill, and
15 Mr. Meyer. Do you recall any of the other cases that you worked
16 on that were tried capitally but did not result in a capital or
17 a death penalty result and the persons that you worked with on
18 those cases?

19 A Yes, sir.

20 Q And what cases come to mind when you think about that?

21 A Hennis is the first one that comes to mind.

22 MR. JAMES FERGUSON: I am sorry? I was unable to
23 hear you.

24 THE WITNESS: Hennis.

25 BY MR. COLYER:

1 Q That was the case that was tried in New Hanover County?

2 A Originally tried here, reversed by the Supreme Court,
3 then tried in New Hanover County.

4 Q And when it was tried here the first time, did you
5 participate in that case on the record --

6 A Not on the record, no, sir.

7 Q Was there another person in the District Attorney's
8 Office that had primary responsibility for that trial?

9 A William VanStory.

10 Q When it was sent back for retrial, is that when it was
11 transferred on a venue motion to New Hanover County?

12 A Yes, sir.

13 Q And who participated with you in that case, sir?

14 A You did.

15 Q So that was the case that you and I did for that trial?

16 A Yes, sir.

17 Q Any other cases that you have in mind?

18 A Noncapital -- that ended up noncapital?

19 Q Yes, sir.

20 A French case, which involved the multiple murders of
21 Luigi's, the Wright --

22 Q Let me interrupt you just a second. Who were your
23 co-counsel, if any, in that case?

24 A You and Grannis.

25 Q And what was Mr. Grannis' role, if anything, with

1 respect to jury selection?

2 A That's sort of hard to say. As I recall it, you and I
3 did most of the actual talking to the jury, and Mr. Grannis
4 sometimes would throw in an opinion as to whether to keep or
5 strike a juror, but I only remember one instance when we
6 disagreed, and I think it was us against the boss, and the boss
7 won.

8 Q Now, do you recall the race of that juror?

9 A Yes, sir.

10 Q What was his race?

11 A White.

12 Q So we wanted to get --

13 A Merchant marine.

14 Q All right, sir. Any other case you have in mind?

15 A Wright and Burmeister, the slaying of --

16 Q Euphemistically known as the skinhead case?

17 A Yes, sir. I always called it the Nazi case but --

18 Q The Nazi case. Who participated in that case with you,
19 sir?

20 A You and Mr. Grannis.

21 Q Mr. Burmeister's case, was it tried here in Cumberland
22 County?

23 A Yes, sir.

24 Q And Mr. Wright's case, was it tried in New Hanover
25 County?

1 A Yes, sir.

2 Q Again, do you recall what Mr. Grannis' role was with
3 respect to input into jury selection into either one of those
4 cases?

5 A Pretty much the same as in all cases. Don't really
6 remember any disagreements in any of those cases right now.

7 Q Now, with respect to the French, Burmeister, and Wright
8 cases, the result in all three were noncapital life-type
9 sentences?

10 A Regrettably, yes, sir.

11 Q Clearly in the Burmeister and Wright cases, there was a
12 racial motivation by the defendant, correct, sir?

13 A Yes, sir.

14 Q Was that an issue that was dealt with during the jury
15 selection in that case?

16 A Yes, sir.

17 Q Any other cases that I've not dealt with that come to
18 mind to you?

19 A It's hard to sometimes remember what was capital and
20 what was noncapital because there was a hiatus a number of years
21 where what would have been capital cases weren't capital cases,
22 and I tended to run some of those through my mind, too.

23 Q Judge Dickson, I just thought of another case:
24 Mr. Meyer's codefendant.

25 A Yes, sir.

1 Q Now, we've talked about Mr. Meyer being tried at least
2 four times. Did he have a codefendant by the name of Thompson?

3 A Yes, he did.

4 Q And how many times was he tried?

5 A Once.

6 Q And where was he tried?

7 A I want to say that was in Wilmington.

8 Q You were the lead counsel on that case?

9 A Yes, sir.

10 Q And do you recall who the second chair in that case
11 was?

12 A Honestly, I do not.

13 Q If I said the name Scott Hancox --

14 A It would be Scott Hancox.

15 Q And is Mr. Hancox a practicing attorney here in
16 Cumberland County?

17 A Yes, sir.

18 Q And is his wife Ellen Hancox the TCA for this judicial
19 district?

20 A Correct.

21 Q And, again, was that a life result?

22 A Yes, sir.

23 Q Now, you mentioned earlier that Mr. Robinson had a
24 codefendant. Was that Roderick Williams?

25 A Yes, sir.

1 Q Was he tried capitally?

2 A Yes, sir.

3 Q In 1995?

4 A Yes, sir.

5 Q And was his result a noncapital result?

6 A Yes, sir, it was.

7 Q Judge Dickson, I asked you earlier about the exercise
8 of peremptory strikes in the Robinson, McNeill, and Meyer cases.
9 Do you recall those questions?

10 A Yes, sir.

11 Q Anything that has been brought to mind to you by way of
12 questions, answers, or thoughts that you've had that would
13 change your answer in any way with respect to whether race was a
14 significant factor in your decision to peremptorily strike a
15 black juror in any of those cases?

16 A No doubts whatsoever that that was not so.

17 Q And in those three cases, did you exercise a peremptory
18 strike against any of the black jurors that were stricken in
19 those cases because of racial discrimination?

20 A No, sir.

21 Q And with respect to the jurors that we have spoken of
22 this morning in those three cases, was race a factor -- was race
23 a significant factor in the exercise of the peremptory strikes
24 against any of those black jurors in any of those three cases?

25 A No, sir, it was not.

1 MR. COLYER: Thank you, Your Honor. That's all
2 the questions I have at this time.

3 THE COURT: Mr. Ferguson, it's almost 20 till one.
4 Is your preference to go forward? I guess we also need to talk
5 about the length of the lunch hour.

6 MR. JAMES FERGUSON: I'm sorry the length of --
7 oh, yes, sir.

8 THE COURT: Lunch break.

9 MR. JAMES FERGUSON: Right.

10 THE COURT: And I am trying to tie some things
11 together, so please bear with me. You folks indicated that you
12 needed to speak with some others regarding decisions that may
13 impact on witnesses at this trial, if I understood correctly.

14 MR. THOMPSON: Yes, sir.

15 THE COURT: I guess the point I am leading up to
16 is, is it appropriate to give you the opportunity to do that
17 now, defer cross-examination so we can see where we are, or is
18 it your preference to go forward now?

19 MR. JAMES FERGUSON: Actually, Your Honor, what I
20 wanted to do with the Court's permission is I did want to ask
21 the witness just a couple questions about some of the papers
22 that he has with him --

23 THE COURT: Yes, sir.

24 MR. JAMES FERGUSON: -- since we are entitled to
25 look at those. Perhaps we can take a lunch break and look those

1 over and not have to ask the Court for time to do that this
2 afternoon.

3 THE COURT: Certainly. You may proceed.

4 MR. JAMES FERGUSON: If I can just ask a couple
5 questions about that.

6 THE COURT: Absolutely.

7 CROSS-EXAMINATION

8 BY MR. JAMES FERGUSON:

9 Q Judge Dickson --

10 A Yes, sir.

11 Q -- I noticed that you did bring to the stand with you
12 what looks like a Redweld folder with some papers and documents
13 in it. Am I correct about that?

14 A Yes, sir.

15 Q Can you just give me a general description of what
16 there is in those -- in the folder?

17 A Yes, sir. My notes, copies of the juror questionnaire
18 sheets in Robinson, copy of the opinion from the Supreme Court
19 in Robinson and from Meyer --

20 Q Yes, sir. I am not going to necessarily ask you to go
21 through each document, Judge. I just wanted to see if they were
22 materials --

23 A -- and a few pages of --

24 Q I'm sorry. Go on.

25 A -- transcripts of jury selection in *State v. McNeill* and

1 in *State v. Robinson*.

2 MR. JAMES FERGUSON: Very well. If Your
3 Honor please, it appears that all of those documents are
4 relevant to his testimony in this case. What we'd like to do at
5 this time is ask the Court to allow us to inspect the folder,
6 the documents in his folder, over the lunch hour --

7 THE COURT: Okay.

8 MR. JAMES FERGUSON: -- and resume
9 cross-examination at that time.

10 THE COURT: Mr. Colyer, Mr. Thompson, do you want
11 to be heard?

12 MR. COLYER: No, sir.

13 THE COURT: Okay. Judge Dickson, if you'll leave
14 those materials on the bar and -- well, I guess we need to
15 maintain some degree of integrity with regard to the -- Mr.
16 Ferguson, allow you to look at the originals but then make
17 copies if that is agreeable.

18 MR. JAMES FERGUSON: Yes, sir. After we take a
19 quick look at them, we can determine whether or not there is a
20 need for a copy. Yes, sir.

21 THE COURT: All right. And we'll take the lunch
22 recess until 2:00 o'clock. Is that enough time, folks?

23 MR. JAMES FERGUSON: Very well. Yes, sir.

24 MR. COLYER: Yes, sir.

25 MR. THOMPSON: Yes, sir.

1 THE COURT: Thank you, folks. We are down until
2 2:00 o'clock.

3 (Whereupon, a recess was held from 12:42 p.m.
4 until 2:02 p.m.)

5 (The following proceedings continued in open
6 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James
7 Ferguson, Ms. Stubbs, Mr. Colyer, and Mr. Thompson were
8 present.)

9 THE COURT: Okay. Let the record reflect all
10 counsel are present. The defendant is present.

11 And, Judge Dickson, if you will please retake the
12 stand. Would you like some water, sir?

13 THE WITNESS: Yes, sir.

14 THE COURT: Mr. Ferguson, do you need a few
15 moments, or are you ready to go?

16 MR. JAMES FERGUSON: I'm ready to go. Thank you
17 so much.

18 THE COURT: Yes, sir.

19 BY MR. JAMES FERGUSON:

20 Q Judge Dickson, I returned your Redweld folder. It is
21 right there in front of you.

22 A Thank you, sir.

23 Q And, in fact, I want to ask you a question or two about
24 some of its contents.

25 A All right, sir.

1 Q I noted that inside the Redweld, there were some pages
2 that had been copied from the transcript of this trial. Am I
3 correct about that, sir?

4 A Yes, sir.

5 Q And did you copy those pages? Did you make those
6 copies of the pages yourself when you --

7 A No, sir.

8 Q -- were going through the transcript? You didn't make
9 those copies.

10 A I requested the State to provide them to me.

11 Q Yes, sir. And exactly what was it that you asked the
12 State to provide?

13 A One section is on Eddie Anderson in the McNeill trial,
14 if I'm correct, and I'm not exactly sure which -- some of
15 these are Eddie Anderson's, which was the only -- my only
16 peremptory.

17 Q Safe to assume that whatever copies of the transcripts
18 that are in the folder that you brought with you here that those
19 are parts of the transcript that you requested that the State
20 copy and provide to you; is that correct?

21 A I had previously requested at the time I received the
22 subpoena the entire transcript in Robinson.

23 Q You requested the entire transcript in Robinson?

24 A Yes, sir. So I have in my office four volumes, I
25 believe, of that.

1 Q Did you review that entire transcript?

2 A I'm afraid to say I did, sir.

3 Q Did you make notes as you were reviewing the
4 transcript?

5 A Some, yes, sir.

6 Q And can you tell me what notes you made?

7 A No, sir.

8 Q I did notice that there is a pad, a legal pad, inside
9 the --

10 A Yes, sir.

11 Q -- folder there with some notes on it that you made?

12 A Uh-huh.

13 Q Are those notes you made at the time you reviewed the
14 transcript?

15 A Not the first time I reviewed the transcript.
16 Subsequent to that --

17 Q I'm sorry?

18 A Subsequent to my actually going through the transcript
19 and reading it --

20 Q Then you made --

21 A Let me finish, please, sir.

22 Q Yes, sir, please.

23 A Mr. Colyer provided me with an affidavit as to notes he
24 had made going through the transcript. I then took his notes,
25 which are in the affidavit, went back through the transcript and

1 double-checked, and that's when I wrote these down.

2 Q Very well, then. Let me just make sure I understand
3 this process. You received a subpoena --

4 A Yes, sir.

5 Q -- from the State, I take it --

6 A Yes, sir.

7 Q -- to appear. Do you recall approximately when it was
8 you received that subpoena?

9 A Several months ago. I have had two subpoenas.

10 Q Then tell me about the two subpoenas, approximately
11 when they were. I don't need the exact --

12 A One for something that was set prior, and I don't know
13 what that was. I wasn't required to testify. And then a second
14 subpoena for this proceeding.

15 Q Did you request a full copy of the transcript when you
16 received the first subpoena?

17 A Yes, sir.

18 Q And I take it you had some conversation with Mr. Colyer
19 somewhere along the line there after you got the subpoena, maybe
20 even before. When was that?

21 A Probably after this thing got filed --

22 Q Yes, sir.

23 A -- fairly shortly after to tell me that it had been
24 filed and they were starting to work on it.

25 Q So --

1 A I gave them my condolences --

2 Q I am sorry. Go ahead, sir.

3 A I gave him my condolences and went on.

4 Q Yes, sir. And I take it then that you had some
5 conversations back and forth with Mr. Colyer, Mr. Thompson,
6 after you were on notice that the motion for appropriate relief
7 had been filed. Am I correct about that?

8 A Yes, sir.

9 Q I -- you probably don't remember all of the different
10 conversations you had with him, do you?

11 A Off the top of my head, no.

12 Q Now then to come back to where we were a moment ago, I
13 understood from you that you made notes from the transcript as
14 you reviewed the transcript. Am I correct about that?

15 A No, sir.

16 Q So then you have no notes that you made from your --
17 your review of the transcript itself; is that correct?

18 A That is correct.

19 Q The notes you do have -- and I am actually referring
20 now to the notes that are in the folder there that you have are
21 notes that you made from the transcript of Mr. Colyer; is that
22 correct? From the affidavit of Mr. Colyer; is that correct?

23 A Yes. What I did was take the affidavit --

24 Q Yes, sir.

25 A -- and go back through the transcript to see how

1 accurate the affidavit was --

2 Q Yes, sir.

3 A -- and I had no problems with it, and that's where I
4 made notes.

5 Q So that if we just take a look at your notes --

6 A They are very much alike. I think that's probably where
7 you're going.

8 Q That is exactly where I'm going. I want to make sure
9 we're on the same page with that.

10 A Yes, sir.

11 Q So I am going to just -- with your permission, I am
12 going to look in here and pull your notes out and hand them to
13 you.

14 A All right, sir.

15 Q And I have handed you a legal pad, and that legal pad
16 contains the notes that you made from -- primarily from Mr.
17 Colyer's affidavit. Am I correct about that, sir?

18 A Starting on page two, yes, sir.

19 Q Yes, sir. And starting on page two, Judge Dickson,
20 just so we can be clear about this -- well, let's first of all
21 see how many pages there are. How many pages are there to your
22 notes? They are not numbered, so we will have to count them.
23 Can you do that with me?

24 A Eight.

25 Q Eight pages. And you said starting on page two is when

1 you made notes from Mr. Colyer's affidavit, is that correct,
2 after you had checked it?

3 A Yes, sir.

4 Q And from page two through page eight, is there anything
5 in those notes that does not appear in the affidavit of Mr.
6 Colyer?

7 A I do not think so. Maybe not in quite the same form.

8 Q Yes, sir. Then just so we can be clear, from page two
9 in your notes to page eight, you were basically making notations
10 from the affidavit of Mr. Colyer; is that correct?

11 A Yes, sir, and double-checking.

12 Q Now, when I looked through your folder over the lunch
13 period, I didn't see an affidavit of Mr. Colyer. Do you have
14 Mr. Colyer's affidavit?

15 A Not here, no, sir.

16 Q You just brought your notes of the affidavit and not
17 the affidavit itself?

18 A Yes, sir.

19 Q You made a reference to one juror -- if you can help me
20 with this. I believe her name was -- I believe it was a juror
21 named Tera L. Farris from the case of *State v. Jeffrey Karl*
22 *Meyer*?

23 A Yes, sir.

24 Q And you said you had an independent recollection, I
25 believe, of her not making eye contact with you?

1 A Yes, sir.

2 Q When you were reviewing either the transcript or Mr.
3 Colyer's notes, did you make any notation of any kind that this
4 juror did not make eye contact with you?

5 A Yes, sir.

6 Q And where did you make that note?

7 A Um --

8 Q I think I see it here on page -- the last entry of your
9 notes; is that correct?

10 A The no eye contact?

11 Q Yes, sir.

12 A Yes, sir.

13 Q And that's the only notation you made on here that
14 didn't appear in Mr. Colyer's affidavit?

15 A Under her, yes, sir.

16 Q Yes, sir. Let's go, then, to the first page of your
17 notes.

18 A Yes, sir.

19 Q And so that I'm staying true to the record, I believe
20 your notes have already been introduced as State's Exhibit
21 Number 21?

22 A Yes, sir.

23 Q And the first entry on there on State's Exhibit
24 Number 21 at the top of the page is the word, Attitudes, quote,
25 end quote; is that correct?

1 A Attitudes comma opinions.

2 Q Yes, sir. And you wrote that?

3 A Yes, sir.

4 Q What does that refer to, those two words. What do they
5 refer to?

6 A Things I considered. Not only -- that goes along with
7 general demeanor, their attitudes, the way I felt about any
8 juror toward prosecution, toward me, toward the defense, toward
9 the defendant. Covers a lot of the stuff I talked about
10 earlier.

11 Q The things that you generally consider when you're --

12 A Yes, sir.

13 Q -- evaluating jurors?

14 A Yes, sir.

15 Q You think about their attitudes?

16 A Uh-huh.

17 Q And you think about the opinions that they've
18 expressed; is that correct?

19 A Uh-huh.

20 Q The next entry I see here is unconscious
21 discrimination, and is that your writing also?

22 A Yes, sir.

23 Q What does that refer to, Judge Dickson?

24 A That refers to things I have been to seminars about and
25 stated about and is something -- all of us discriminate.

1 Q Sir?

2 A Everybody discriminates.

3 Q Everybody discriminates?

4 A Yes, sir.

5 Q Yes, sir. And that would include you and me and --

6 A I think the whole shooting match, yes, sir. And a lot
7 of that, or some of it sometimes is unconscious. Some people do
8 it purposefully.

9 Q Some people intend to discriminate for whatever reason
10 they might have; is that right?

11 A Yes, sir. Some people don't.

12 Q And there are some people who don't intend to
13 discriminate.

14 A But that does not mean necessarily that it doesn't creep
15 through.

16 Q Yes, sir. And the fact that you call it unconscious
17 discrimination means that the person who may be discriminating
18 is not always conscious that he or she is discriminating; is
19 that correct?

20 A That's correct. And that's why as a district attorney
21 selecting a jury, I worked very, very hard at not doing that.
22 That doesn't mean I was perfect either.

23 Q Exactly.

24 A I can't say that.

25 Q It means in spite of your best efforts you may have

1 engaged in unconscious discrimination just like everybody else
2 who may try not to, they could engage in unconscious
3 discrimination --

4 A I'm a human being, yes, sir.

5 Q Exactly. So you or other district attorneys just like
6 everybody else in the world can engage in unconscious
7 discrimination and, by definition, that means you would not be
8 aware of it. Am I correct about that? If it's unconscious,
9 you're not aware of it, are you?

10 A I would hope not.

11 Q Yes, sir. And you don't -- no one can say with
12 certainty that I could never have been subject to unconscious
13 discrimination on one occasion or another; isn't that true?

14 A Yes, sir.

15 Q And even in selecting a jury --

16 A Yes, sir.

17 Q -- you or some other district attorney in Cumberland
18 County might be unconsciously discriminating and just not know
19 that's what's going on; is that correct?

20 A That is always a possibility, yes, sir.

21 Q Yes, sir. Now, then, the next entry we have here on
22 your State's Exhibit 21 says, Affidavit, didn't learn of case
23 from me. And I take it that's your handwriting. I am not going
24 to ask you that anymore. Is it all --

25 A It is all my handwriting, yes, sir.

1 Q So what was meant by this entry that says, Affidavit,
2 didn't learn of case from me?

3 A I want to be as accurate, obviously, as I can. Mr.
4 Colyer told me that some jurors in one of the cases -- I don't
5 know which -- that you folks have affidavits from --

6 Q That we had?

7 A Uh-huh.

8 Q The defense has an affidavit from them?

9 A Yeah.

10 Q All right.

11 A And I went back after finding who, and what I was
12 told -- I never saw the affidavits, by the way.

13 Q Yes, sir.

14 A But -- and so I don't know the contents of them, but I
15 was told that they indicated that these persons felt that they
16 could have been fair jurors, that I took them off anyway, and
17 what they knew about the case at the time of the affidavit, they
18 could have been fair. I don't know when the affidavit was
19 taken. I don't know the circumstances in which it was taken,
20 but in the Robinson case in particular, I took great pains with
21 jury and jury selection not to give a forecast --

22 Q I am sorry?

23 A Not to give a forecast of any sort of what my evidence
24 would show. I didn't want to risk contaminating the jury pool.
25 If there were certain items of evidence that came out that -- I

1 can't recall for sure if the defense asked about them to set the
2 jury up a little bit knowing it was coming. But they couldn't
3 have had any information from the State as to what the evidence
4 would show.

5 Q And that's what you were referring to when you made
6 this note right here?

7 A Yes, sir. That they sure didn't get it from me.

8 Q Yes, sir.

9 A If they knew anything about the case.

10 Q I am just going to go down this first page. The next
11 entry on State's Exhibit Number 21, the next entry that I see is
12 Troy, Elliot, and then there's a mark beside that. And can you
13 just tell me why that appears on this page?

14 A Things I wanted to look at. Troy, Elliot was one of
15 them; Troy, Elliot's questionnaire.

16 Q You wanted to look at his questionnaire?

17 A Yes, sir.

18 Q And then the next entry seems to be three lines, and it
19 says, 14th juror, and then the next line says, Johnson -- this
20 looks like Johnson, Nelson. The next line says, By himself.
21 Did I read that correctly?

22 A Yes, sir.

23 Q What does that mean? Why was that entry made here?

24 A Number one, I take really bad notes. I will try. If I
25 remember correctly, Mr. Colyer told me that he was one of the

1 affidavits.

2 Q That Nelson Johnson was one of the affidavits --

3 A Yes, sir.

4 Q Or one of the affiants that provided an affidavit?

5 A Yes, sir. And I think he was the last juror, the
6 alternate, and I'm not sure of that, but I also wanted -- I put
7 that down because I went and tried to go back in the transcript
8 and find it. But he came in by himself. There were no other
9 jurors being examined. And his statement, as I understand it --
10 and I haven't seen his affidavit -- was that he had the same
11 answers as the other jurors had, and I don't believe he was
12 present for that.

13 Q All right, sir. Now, I did notice in State's Exhibit
14 Number 21 that the names of the jurors that appear there seem to
15 be the names of black or African-American jurors in cases. Am I
16 correct about that?

17 A Yes. That's what I was told, yes, sir.

18 Q Did you, in reviewing this case -- when I say reviewing
19 this case, when you reviewed the transcript of the case, did you
20 do comparisons of jurors? Compare juror number 14 who was
21 struck peremptorily with some other juror who was not struck
22 peremptorily? Did you go through that kind of exercise in
23 reviewing the transcript of the case, Judge Dickson?

24 A I don't mean to be flip, but I have a day job, too,
25 and -- no, sir, I did not.

1 Q Yes, sir. I thought you had a day job that might make
2 it difficult for you to do those kinds of comparisons. That
3 would take a lot of time. So you didn't try to go through and
4 compare questions and the responses of each of the jurors who
5 were questioned in the Robinson case, in the McNeill case, or in
6 the Meyer case -- either one. If you need to separate them out
7 and talk about them, that's fine.

8 A No, sir.

9 Q And I take it also you didn't do any comparisons
10 between jurors that may have been peremptorily struck in one
11 case with jurors who might have been accepted in another, for
12 example. You didn't do that? I might have confused you.

13 A I think -- you mean talking about comparing Meyer jurors
14 with Robinson jurors?

15 Q Yeah, for example, yes. You didn't do that?

16 A For what reason would I?

17 Q I am just asking if you did.

18 A No, sir.

19 BY MR. JAMES FERGUSON:

20 Q All right. So if I am correct, then, you didn't do any
21 comparison of the questions that were asked of the jurors who
22 were stricken with the questions of jurors who were accepted by
23 the State, I'm talking about?

24 A No, sir.

25 Q You told us when you were answering questions by the

1 State that you had never consciously allowed race to be a factor
2 in your selection of jurors. Did I understand that to be
3 correct?

4 A Yes, sir.

5 Q Can you make the statement that race has never entered
6 into your consideration of a juror subconsciously or
7 unconsciously?

8 A No. I think we've already answered that.

9 Q You have, and I just wanted to put it into context of
10 these other questions. So when you told the State that race has
11 never been a significant factor in your jury selection, you were
12 telling them that race has never consciously been a part of
13 your consideration?

14 A It has never been a significant factor, period.

15 Q And you're saying consciously --

16 A It may have been subconsciously a factor.

17 Q Yes, sir.

18 A It has never ever been a significant factor in my jury
19 selection, sir.

20 Q I understand. So do I understand you to say, then,
21 that race cannot be a significant factor if it's subconscious or
22 unconscious?

23 A I'm not saying it couldn't be, sir.

24 Q Yes, sir.

25 A I am giving you the best answer I can. I have told you

1 that, yes, I think that sometimes racism is subconscious.

2 Q Yes, sir.

3 A And I can be as guilty as you of practicing it
4 subconsciously. In my mind, it has never ever been a
5 significant factor in my selection of a jury.

6 Q And I certainly, Judge Dickson, I understand that's
7 what you're saying --

8 A And I don't know how I can make it clearer.

9 Q Well, I'm asking you a slightly different question
10 and --

11 A And I can't tell you what you think.

12 Q Certainly. I am just going to try to ask this again
13 and see if I can help you with it. Can you categorically say
14 that race could never have been a significant subconscious or
15 unconscious factor with you? I am just asking that question.
16 Can you help me with that?

17 MR. COLYER: Objection. It's been asked and
18 answered, Your Honor.

19 THE COURT: Well, it's cross, Mr. Colyer.

20 MR. COLYER: Just for the record.

21 THE COURT: Yes, sir.

22 THE WITNESS: Would you please repeat that?

23 BY MR. JAMES FERGUSON:

24 Q Can you categorically say that race could never have
25 been a significant subconscious or unconscious factor with you

1 in jury selection?

2 A If it was a subconscious factor, I don't think it would
3 have been a significant factor, sir.

4 Q Yes, sir. You can categorically say that that couldn't
5 have happened?

6 A Yes, sir. That it could have been a factor.

7 Q Yes, sir.

8 A I can't say that because it's subconscious.

9 Q Yes.

10 A That it could be a significant factor, I can say that.

11 Q You told us earlier that you had taken some CLE or
12 courses of some kind or another regarding subconscious or
13 unconscious discrimination or -- did I understand that to be the
14 case?

15 A Yes, sir.

16 Q I'd like for you to tell me with as much specificity as
17 you can what courses you've taken regarding unconscious or
18 subconscious discrimination, race discrimination?

19 A That particular term, I cannot tell you. It is just a
20 term I use that I picked up somewhere over the last 30 years,
21 and I find it true in watching people, watching other people.
22 It's something I try to avoid in my own doing. I'm sure I had
23 some at the Institute of Government, probably some from Lou
24 Trosch at some point at one of the judges' conferences. I think
25 Lou has a very good grasp of it. I'm sure as a DA and a

1 prosecutor, we had some of that, too, but I can't tell you. The
2 Institute of Government things for the most part.

3 Q Yes, sir. And is that as specific as you can be for
4 me?

5 A That's about it, yes, sir.

6 Q All right, sir. I appreciate that.

7 A After 30 years that stuff sort of runs together.

8 Q Yes, sir. I understand that. That is best I can
9 remember after 30 days, so I know what you mean. Let me talk
10 with you a minute about your own experience. You've been a
11 prosecutor for a long -- or you served as a prosecutor for I
12 believe you said about 20 years?

13 A I think a month short.

14 Q Yes, sir. Starting at around 1976. Am I correct about
15 that?

16 A Yes, sir.

17 Q During the time that you served as a prosecutor here in
18 Cumberland County, did you ever witness yourself or see yourself
19 things happening in the courtroom that you deemed to be racially
20 discriminatory?

21 A Yes, sir.

22 Q Are you able to give me some example of that, if you
23 can recall?

24 A It was a different time, obviously, in '76, but I think
25 minorities in general were discriminated against by court

1 personnel, bailiffs, were not treated with the individual
2 respect that each of us is entitled to, and I saw that more with
3 minority members of the public and defendants than I did with
4 whites, and it was just a basic just not treating them on the
5 same level, which is wrong.

6 Q Was that related to a particular point in time, or is
7 that something you have seen ongoing?

8 A In one form or another, it's still ongoing. It is
9 nowhere near what it used to be, but the opposite holds true
10 now, too, that I see a lot of minorities, so-called minorities,
11 discriminate the opposite way and so, you know, it's -- I'm a
12 one big happy family type guy.

13 Q I understand. Going back, now, to when you started as
14 a prosecutor back in 1976 -- I don't need to tell you that was
15 ten years before the *Batson* case --

16 A Yes, sir.

17 Q -- was decided, *Batson*, '86. In the period of time of
18 1976 to 1986, I take it you were engaging in jury trials during
19 that period of time?

20 A Yes, sir.

21 Q Were you trying cases in Superior Court in Cumberland
22 County during that period of time?

23 A Yes, sir.

24 Q During that period of time, did you ever see -- well,
25 let me ask you this about yourself. During that period of time,

1 did you ever take race into account, or did race ever influence
2 your decision in jury selection?

3 A Consciously, no. That's not the way I was raised.

4 Q Yes, sir.

5 A That's not what my family believes in. It's not
6 anything I've ever believed in.

7 Q And I ask you that question because I wanted to follow
8 it up with a question with you about -- the question is after
9 *Batson*, did you in any way change your approach to jury
10 selection?

11 A No, sir, I did not change my approach, but I became much
12 more aware of discrimination without knowing it, and *Batson* was
13 a sign to me, at least, that it was something to be careful
14 about, and it just made me more vigilant. I hope that answers
15 your question.

16 Q Yes, sir, and I appreciate that. And I'm going to
17 preface my next question by telling you ahead before I ask it
18 that I'm not going to ask you to name any names, but I do want
19 to ask you this question. During the time that you have served
20 as an assistant district attorney here in Cumberland County,
21 have you ever seen any of the assistant district attorneys
22 engage in the use of race or any questioning that you felt was
23 allowing race to be a factor in their selection of the jury.
24 And I am serious when I say I am not going to try to get into
25 any names if you saw it. I just want to know whether you did.

1 A Yes, sir.

2 Q At the time, did you seek to address it in any way
3 yourself? When I say "it," the discriminatory conduct that you
4 saw.

5 A Yes, sir, I did.

6 Q Was that before or after *Batson*, if you can recall?

7 A I have no idea.

8 Q Sir?

9 A I have no idea.

10 Q You don't know whether it was before or after?

11 A It could have been before and after. I can't recall but
12 two or three occasions where I felt compelled to do it.

13 Q Yes, sir.

14 A Especially after *Batson*, I would have been more
15 compelled to do it.

16 Q After *Batson*?

17 A I would have been more compelled to call them out.

18 Q Yes, sir. And that is what I was about to ask you. If
19 you don't mind, just share with me, to the extent you can, what
20 you did about it when you observed it?

21 A At the close of the day, I had that -- either went to
22 that assistant's office or had them come to mine, shut the door
23 behind me, and blew them out, told them what I was observing and
24 that it wasn't fly, especially after *Batson*, but it wasn't right
25 and that it looked to people like it was racial.

1 Q And you, of course, recognize that a court decision
2 such as *Batson* in and of itself does not necessarily immediately
3 change the conduct of someone who might be discriminating on the
4 basis of race. Do you agree with that?

5 A Could you repeat that, please.

6 Q Yes, sir. I will do my best. Do you recognize that a
7 court decision such as *Batson* -- I will stay with that for
8 now -- doesn't necessarily change immediately the practices of
9 someone, a prosecutor, who may have been using race as a factor
10 in jury selection?

11 A I think that'd be a fair statement.

12 Q Yes, sir. Some people and some prosecutors might greet
13 *Batson* with the notion, I'm not going to change my practice; I
14 am just going to learn how to discriminate better and be able to
15 explain it if I do it. Is that something that could happen?

16 A Obviously. Are we in argument or cross?

17 Q Questioning. I'm not sure I'd characterize it either
18 way. I just wanted to ask you a few questions about a few
19 things if that's all right with you. And do you have any
20 feeling as to whether or not race discrimination continues to
21 take place in society today?

22 A I think my head is on this side of the dirt, and you'd
23 have to be an ostrich with your head buried about 20 feet below
24 not to believe that, sir.

25 Q Yes, sir. You think race still continues to -- race

1 discrimination continues to take place in some form or another
2 even in the criminal justice system today?

3 A I think it occurs everywhere, sir. It is an imperfect
4 world. It always will be.

5 Q Yes, sir.

6 A All we can do is our very best, and I can't speak for
7 anybody else.

8 Q Sir?

9 A And I cannot speak for anybody else.

10 Q Certainly. Now I want to come to the voir dire that
11 you conducted in a few cases, just to make sure we're clear. On
12 the Jeff Meyer case which we've talked about some --

13 A Yes, sir.

14 Q -- you did jury voir dire in that case yourself; is
15 that correct?

16 A In one of them, yes, sir.

17 Q In --

18 A I don't know which Meyer you're talking about.

19 Q Yes, sir. The Meyer case that was tried here in 1995,
20 did you do the voir dire in that case as you recall?

21 A I believe so, sir.

22 Q All right, sir.

23 A Meyer sort of runs together --

24 Q And I understand you may not remember exactly, and the
25 record will show it. I just wanted to see whether you recall

1 whether or not you did. It is hard to remember everything that
2 happened in every case, I'm sure. And in the John D. McNeill
3 case, *State v. John McNeill*, did you do the voir dire in that
4 case? Do you recall?

5 A Not all of them.

6 Q You did some of it?

7 A Yes.

8 Q And what about the voir dire in this case, the Marcus
9 Robinson case? You did the voir dire --

10 A Yes, sir.

11 Q -- in that case, did you not? I don't know whether
12 you're aware of it or not but, you know, there are some
13 statistics about the strike rates for African-American jurors
14 and non-African-American jurors in the Marcus Robinson case.
15 Are you aware of that?

16 A I did happen to see a paper the other week, yes, sir.

17 Q I am sorry?

18 A I did happen to see a newspaper that indicated that.

19 Q Yes, sir. I am sure you had -- not asking what it
20 is --

21 A I will be happy to tell you if you want to ask.

22 MR. JAY FERGUSON: Your Honor, may I approach the
23 exhibits to check something?

24 THE COURT: Yes, sir.

25 BY MR. JAMES FERGUSON:

1 Q I am going to refer you, if I can, to Defense Exhibit
2 Number 3, slide number 50, I believe it will be, if we can put
3 that up.

4 THE COURT: Do you need the light dim, sir?

5 MR. JAMES FERGUSON: Yes, Your Honor, if we can
6 just turn it down a notch, that would be helpful.

7 BY MR. JAMES FERGUSON:

8 Q So if we -- I think I got a laser pointer. If you see
9 this little red laser beam I've got here, you see the Marcus
10 Robinson case?

11 A Yes, sir.

12 Q And you'll see some figures at the bottom. It says --
13 and these are strike rates, I believe, of black venire members
14 in Marcus Robinson stricken at a rate of 50 percent. You don't
15 disagree with that, do you?

16 A What do you mean by strike rate?

17 Q The percentages of blacks who were struck who appeared
18 and who were struck from the jury?

19 MR. COLYER: Judge, I am going to object generally
20 to this line of questioning because the defense filed a motion
21 to sequester the witnesses, and Judge Dickson wasn't here to
22 hear the testimony. This slide is being taken out of context.
23 He is being asked a question about somebody else's work and
24 being asked to explain it, and I am going to object to it. I
25 think that --

1 THE COURT: Well, Mr. Colyer, if Mr. Ferguson,
2 Mr. James Ferguson -- first of all, it is cross-examination, and
3 all of us know that the rule is that wide latitude is allowed.
4 But if the question is phrased in terms of if the statistical
5 evidence offered in this case by the defendant shows that the
6 strike rate was whatever it is, would you disagree with that?
7 It doesn't matter at that point whether he was present in court
8 at that time, and the record is what it is in that respect. So
9 I understand your objection. The objection is overruled.

10 Mr. Ferguson, you may continue.

11 MR. JAMES FERGUSON: Thank you, Your Honor.

12 THE WITNESS: What was the question, please, sir.

13 BY MR. JAMES FERGUSON:

14 Q The question is do you disagree with what is shown here
15 on the chart, that the strike rate for African-American jurors
16 was -- potential jurors was 50 percent?

17 MR. COLYER: Objection to --

18 THE WITNESS: Is that for --

19 MR. JAMES FERGUSON: I'm --

20 THE COURT REPORTER: Wait. Wait. Wait.

21 THE COURT: Time out. I'm sorry. There's been an
22 objection. It was a quiet one, but there's been an objection.
23 And the objection, as I understand, Mr. Colyer, was to the form
24 of the question.

25 MR. COLYER: Yes, because it didn't say anything

1 about the Michigan State study.

2 MR. JAMES FERGUSON: Oh, I am happy to tell you
3 that.

4 THE COURT: Yes, sir. Your objection is
5 sustained.

6 BY MR. JAMES FERGUSON:

7 Q These are figures taken from the Michigan State
8 University study of African-American -- I am sorry. The study
9 of the North Carolina capital juries for a period of 20 years,
10 and what I am showing you is one part of the study which deals
11 with three cases, one of which is Marcus Robinson. On the chart
12 also is John McNeill and then Jeffrey Meyer. I will come to
13 those. I am asking you now about Marcus Robinson, and I should
14 have been more precise in my question to you. The figures shown
15 here for Marcus Robinson is a strike rate of 50 percent black
16 venire persons by the State, and my question to you is simply
17 whether you have any disagreement that the strike rate of
18 African-Americans for Marcus Robinson's jury was 50 percent by
19 the State of African-American jurors?

20 A I am not familiar with the term strike rate.

21 Q All right, sir. It means -- will you accept that it
22 means that 50 percent of the African-American jurors were struck
23 peremptorily by the State?

24 A I would neither agree nor disagree. I haven't seen the
25 basis for it.

1 Q You haven't seen it, but you don't disagree with it?

2 A I cannot agree or disagree with it, sir.

3 Q Yes, sir. And would you disagree that the strike rate
4 for non-black veniremen, venire persons would be 14.3 percent?
5 Do you disagree with that?

6 A I will neither agree nor disagree with it, sir.

7 Q Let's go, then, to the case of John McNeill. You've
8 talked about that case a little earlier and some of the jurors
9 who -- some of the black jurors who were stricken. The Michigan
10 State University study shows that black venire persons were
11 stricken at a rate of 60 percent by the prosecution. Do you
12 have any reason to disagree with that?

13 MR. COLYER: Object to the form of --

14 THE WITNESS: I have no reason to agree with it or
15 disagree with it.

16 MR. JAMES FERGUSON: Sir?

17 THE WITNESS: I have no reason to agree with it or
18 disagree with it.

19 MR. COLYER: I'll withdraw my objection at this
20 point.

21 THE COURT: Okay.

22 BY MR. JAMES FERGUSON:

23 Q Do you have any disagreement with that study's finding
24 that 13 percent, 13.6 to be exact, of the jurors in the McNeill
25 case -- I am sorry, 13.6 percent strike rate for non-black

1 venire persons.

2 MR. COLYER: Judge, I am going to object to this
3 question on the basis that Judge Dickson previously testified
4 that he had limited participation in the jury selection with
5 respect to John McNeill. He said there was one black peremptory
6 strike exercised by him, and he wasn't there for the balance of
7 the jury selection. I don't think there is a basis for this
8 question.

9 THE COURT: Well, that's my recollection of the
10 testimony, but the question being asked is if that is what the
11 study shows, would you agree or disagree. He is free to
12 explain.

13 MR. JAMES FERGUSON: That is all I am asking.

14 THE COURT: He is free to explain, Mr. Colyer.
15 Go ahead, Judge Dickson.

16 THE WITNESS: Again, I can neither agree nor
17 disagree. I don't know what it is based on, sir. I don't know
18 how it was conducted.

19 BY MR. JAMES FERGUSON:

20 Q Yes, sir. And I want to come to the Jeffrey Meyer case
21 where there was, according to the Michigan State study, there
22 was a finding that the strike rate for black jurors, black
23 venire persons, was 41.2 percent. Do you have any reason to
24 disagree with that?

25 MR. COLYER: And I will object to this one --

1 THE WITNESS: Again, I have no reason to agree or
2 disagree with it, sir.

3 THE COURT: One minute, Judge Dickson.

4 THE WITNESS: I'm sorry.

5 MR. COLYER: I will object to this one on the
6 basis there is no identifying material here that shows that that
7 was Jeffrey Karl Meyer, 1995, about which Judge Dickson has
8 testified. I don't have any objection to him answering the
9 question otherwise.

10 THE COURT: Okay. All right. Considering the
11 testimony that has been given about Judge Dickson's involvement
12 in this case and considering the fact that what is reflected
13 on -- and I apologize. The exhibit is Defendant's Exhibit 3?
14 There is no way of differentiating as to which trial may have
15 been involved, the objection is sustained, but you may rephrase.

16 MR. JAMES FERGUSON: Your Honor, I won't push the
17 point, but I recall the evidence from the -- from Dr. O'Brien
18 that it was the 1995 --

19 THE COURT: You may be correct.

20 MR. COLYER: Mr. Dickson wasn't here for that.

21 MR. JAMES FERGUSON: I agree he wasn't here for
22 that, but that is what she testified to in --

23 THE COURT: Folks, let's step back a moment. Take
24 a deep breath. The rules apply. It's cross-examination. Wide
25 latitude is allowed on cross-examination. You are entitled to

1 go back and clarify for purposes of redirect examination, Mr.
2 Colyer, but I am going to apply the rules.

3 MR. COLYER: Yes, Your Honor. Thank you.

4 THE COURT: Okay. Thank you, folks.

5 Go ahead with your questions, Mr. Ferguson.

6 BY MR. JAMES FERGUSON:

7 Q And my question simply, sir, is: Do you have any
8 reason to disagree that the strike rate for African-American
9 jurors in the John Meyer in 1995 case in which you said you
10 participated --

11 A Jeffrey Meyer?

12 Q Jeffrey Meyer. I'm sorry. Was 41.2 percent.

13 A Again, I can neither agree nor disagree with it, sir.

14 Q Yes, sir. And likewise with the non-black venire
15 persons, a strike rate of 19 percent. Do you have any reason to
16 disagree with that?

17 A I have no reason to disagree with it, no reason to agree
18 with it.

19 Q Yes, sir. And if one accepts these strike ratios,
20 would you agree that those percentages of jurors who were
21 stricken, would you agree that African-American jurors in the
22 Marcus Robinson case were stricken by the prosecution at a rate
23 3.5 times greater than white jurors or white venire persons? Do
24 you agree with that?

25 A I don't know what your numbers are. I haven't seen them

1 before, sir. All I can tell you is what I did in that case.

2 Q All right. I take it your answer will be the same?

3 A You're calling for a legal decision from me. I think
4 that's Judge Weeks' job. I can neither agree nor disagree.

5 Q If you assume the correctness of these three graphs
6 here, would it be your position that even though there's this
7 disparity shown by the chart here, that race was not a factor in
8 jury selection in either one of those cases irrespective of
9 these findings by the Michigan State University study?

10 A Can you repeat that?

11 Q If you assume the correctness of the figures shown in
12 Defendant's Exhibit Number 3, which is now showing on the
13 screen, would it be your position that race could not have been
14 a factor in these disparities that are shown in these three
15 cases in jury selection?

16 A Number one, I cannot comfortably make the assumption
17 that you've made that they're correct. Number two, I can only
18 state that racial discrimination on the part of the State did
19 not occur in any of those three cases. Whether there was racial
20 discrimination on the part of the defendants, we can fight
21 there, but that's not the question for this Court.

22 Q Yes, sir. And I gather, Judge Dickson, that you feel
23 that a prosecutor's statement such as yourself would be the best
24 way to determine whether or not race was a factor in jury
25 selection?

1 A No, sir, I certainly wouldn't. I mean, that's why we
2 have defense attorneys. That's why we have judges. That's why
3 the State has to prove their case. No. You hear both sides of
4 the story, sir. That's what the jury system is all about.

5 Q I may not have asked that question as carefully as I
6 should have. Let me ask it another way. Once jury selection
7 has taken place, if one wanted to determine whether or not race
8 had been a factor in jury selection in cases or a given case,
9 would you feel that a prosecutor's statement as to whether or
10 not he or she had taken race into account would be the best way
11 to determine whether or not race was a factor in a given trial
12 or a stream of trials over a period of time? Do you understand
13 my question now?

14 A No, sir. I -- you know, it's -- you don't want one side
15 of the story.

16 Q Yes, sir. You'd have to look at everything, wouldn't
17 you?

18 A Yes, sir.

19 Q And if there were some statistics --

20 A I mean, my son standing there with cookie crumbs on his
21 mouth and the cookie jar is broken on the floor and he is
22 saying, I didn't do it, Daddy --

23 Q Exactly.

24 A I'm sorry.

25 Q Yes, sir. And that would be true with jury selection,

1 too?

2 A Yes, sir.

3 Q If you had some figures that show starkly that race may
4 have been a factor, it wouldn't be enough just to have a
5 prosecutor say, I didn't do it; is that correct?

6 A My experience with statistics, sir, is that you can make
7 them say damn near anything you want to because they do not --

8 Q Well --

9 A And in this case, I don't think they can take everything
10 into consideration.

11 Q Yes, sir.

12 A There are things that go into jury selection that have
13 absolutely nothing to do with race one way or the other.

14 Q Yes, sir. And I don't mean to disparage prosecutors
15 because I think highly of them --

16 A I doubt it.

17 Q -- but a prosecutor can also say anything he or she
18 wants to when it comes to explaining something later on; isn't
19 that true?

20 THE COURT: Mr. Ferguson, pardon --

21 THE WITNESS: Yes, sir, and --

22 THE COURT: Mr. Dickson, Judge Dickson. My
23 responsibility is to ensure that the evidence presented in any
24 case, whether it be this case or any other case, is presented in
25 a way that hopefully leads to the truth. Doesn't matter to me

1 whether the person on the witness stand is a former judge,
2 sitting judge, former prosecutor, sitting or serving prosecutor,
3 defense lawyer, or otherwise. Same rules apply. So Rule 12
4 applies to all of us. All of us are officers of the court. All
5 of us have an obligation to conduct ourselves accordingly.

6 So if you'll repeat your question, please, sir.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: Yes, sir, Judge.

9 MR. JAMES FERGUSON: Let me ask the question
10 slightly different, if I may, Your Honor.

11 BY MR. JAMES FERGUSON:

12 Q For a prosecutor who may be called upon to explain his
13 or her actions decades ago, would you agree that one should look
14 at more than just what the prosecutor says but look at all the
15 facts and circumstances including statistical evidence of what
16 may have happened with jury selection. Do you agree with that?

17 A Yes, sir, assuming -- well, I'm not going to go there.

18 Q In your own practice in doing capital cases, you
19 mentioned you had done 10 or 15, I think, over your career; is
20 that correct?

21 A Somewhere.

22 Q Give or take, yes, sir. Was your approach to jury
23 selection in the capital cases that you tried any different in
24 those capital cases that resulted in death and those that
25 resulted in life imprisonment?

1 A I think I was fairly consistent in all of them. If
2 there was a difference, I don't know what it was.

3 Q You had a fairly consistent approach that you would
4 take in capital cases; is that correct?

5 A Well, yes, sir. I mean, there's one approach you take
6 when you're doing the group, and you want to make sure that you
7 don't taint. You may have something on the questionnaire that
8 you know you are going to ask at some point, but you don't want
9 to try to taint anybody at that point and you, say, paint a
10 broad brush there, and when you get into -- and I believe every
11 case I had was individual voir dire.

12 Q Yes, sir.

13 A And that's a different thing, and you may have something
14 on the questionnaire there where instead of going through your
15 usual explanation of a little bit about how it actually plays
16 out, you may cut right to that because you think it may be a
17 challenge for cause that you can go ahead and get without
18 wasting all that time.

19 Q Yes, sir.

20 A And it's individual. It's specific. It's juror
21 specific. There's no blanket way to do it as far as I'm
22 concerned. I don't know if that came close to answering your
23 question but --

24 Q Well, it was helpful, and I appreciate it. I want to
25 follow up. Of course, when you are starting out or when you're

1 engaging in jury selection in a capital case, you don't know at
2 that time whether the case is going to result in a death
3 sentence or not, do you?

4 A Correct, sir.

5 Q So that your approach --

6 A If statistics told us that, I think we could probably go
7 by statistics, couldn't we?

8 Q Sir? I missed that.

9 A If statistics could tell us that, we wouldn't have to
10 have a trial, would we?

11 Q Exactly. So you can't approach a case differently in
12 jury selection based on what the outcome is going to be, whether
13 it is going to be life or death, because you don't know at the
14 time, so you approach it essentially the same way all the time
15 regardless of whether it ultimately winds up with death or life;
16 isn't that true?

17 A Essentially the same, is the keyword, because each case
18 is different, each jury panel is different, each juror is
19 different.

20 Q Yes, sir.

21 A So, no, I have sort of a semi-script, but I can sure
22 deviate in a heartbeat depending on what an answer was, what a
23 look was.

24 Q And, Judge, based on what you've told us about race not
25 being a factor in your selecting jurors in any of your cases

1 including the Marcus Robinson case, the John McNeill case, the
2 Jeffrey Meyer case, I take it you would expect that if one
3 reviewed the transcripts of jury selection in those cases
4 carefully, they would find no difference in the way you approach
5 white jurors with questions and the way you approach black
6 jurors with questions, black venire persons with questions. Am
7 I correct about that?

8 A I would certainly like to think that.

9 Q Okay. So that if Judge Weeks looked at these
10 transcripts, he would find that he wouldn't find any differences
11 in the way you questioned black jurors and the way you
12 questioned white jurors. That is what you would expect; isn't
13 that right?

14 A There are always differences in the way you question any
15 juror. Black or white matters not.

16 Q Exactly. But what I am talking about now is as a group
17 of people, you would not expect there to be any differences
18 found in the way you questioned black jurors and the way you
19 questioned white jurors; am I correct?

20 A I honestly don't know how to answer that.

21 Q Well, you --

22 A Differences in my tone of voice?

23 Q Sir?

24 A Differences in my tone of voice? What are you talking
25 about?

1 Q Well, differences in the questions themselves.

2 A Sometimes there are differences in the questions. I
3 change the questions.

4 Q Based on race?

5 A No, sir.

6 Q That is what I am asking. Based on race?

7 A I have already told you I didn't do anything based on
8 race, sir.

9 Q That's right. So if someone looked at the transcript,
10 they'd find no difference in the way you approached black
11 veniremen with your questions from white venire persons; that
12 correct?

13 MR. COLYER: Object to the form, Your Honor.

14 THE WITNESS: I have no idea what somebody else is
15 going to find, sir.

16 BY MR. JAMES FERGUSON:

17 Q But you wouldn't expect them to find it, would you?

18 A If they thought that, they'd be mistaken.

19 THE COURT: Mr. Colyer, do you want to be heard,
20 sir, on your objection?

21 MR. COLYER: I will withdraw the objection. Sorry
22 for interrupting.

23 THE COURT: Okay. That's okay.

24 MR. JAMES FERGUSON: That's all I have, Judge
25 Dickson. Thank you, sir.

1 THE COURT: Redirect, Mr. Colyer?

2 MR. COLYER: Just briefly, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. COLYER:

5 Q Judge Dickson, you indicated that you had been
6 subpoenaed here more than one time?

7 A Yes, sir.

8 Q Do you recall receiving a subpoena for a hearing that
9 was scheduled for back in November of 2011?

10 A I believe that's probably accurate as to when it was.

11 Q And you received a subpoena for this hearing January of
12 2012 that leads us into this week of February?

13 A Yes, sir.

14 Q And I believe you told Mr. Ferguson that before you got
15 the first or -- either before you got the first subpoena or
16 shortly thereafter, you had requested that the State give you
17 copies of the jury selection with respect to Marcus Robinson and
18 some of the other either jurors in the other cases or the other
19 jury selection. Do you recall that?

20 A Yes, sir. That is correct.

21 Q So would it be correct to say that you had those
22 documents and are those the four volumes of documents you're
23 referring to that were in your office that you didn't bring with
24 you today?

25 A I did bring them back to the courthouse. They have been

1 at my house.

2 Q But they are now --

3 A But they are now downstairs in my office.

4 Q I believe -- I am not trying to second-guess Mr.
5 Ferguson or put words in his mouth, but it sounded to me like he
6 was asking you some questions that might be construed with
7 respect to the consistency of the approach in dealing with
8 jurors on general subject matters such as guilt-innocence,
9 sentencing, views on punishment, attitudes, opinions, beliefs,
10 that sort of thing. As a general rule, sir, did you try to
11 approach jury selection consistently case to case that you had
12 especially when you were dealing with capital cases?

13 A Yes, sir.

14 Q And were you telling Mr. Ferguson that it is difficult
15 to say how consistent you would be with respect to an individual
16 juror because of the answers that they would give you and/or
17 some of these intangible things that you were talking about
18 earlier might cause you to deviate from a script, I believe you
19 called it?

20 A Yes, sir. I mean, the whole idea of it is to listen to
21 what a juror says and how that juror says it and take it from
22 there. It's not to ask the question and not listen to the
23 answer.

24 Q And do you think under circumstances like that that
25 because you had a Superior Court judge and two defense attorneys

1 listening to what you were asking, the way you were asking it,
2 that if there was anything that was objectionable, someone would
3 have brought it to your attention, either the way you treated
4 jurors, asking questions that were inconsistent, and that sort
5 of thing.

6 MR. JAMES FERGUSON: Objection, Your Honor.

7 THE WITNESS: I know that --

8 MR. JAMES FERGUSON: The question calls for
9 speculation.

10 THE COURT: Rephrase it, if you will, Mr. Colyer.

11 Your objection is sustained.

12 BY MR. COLYER:

13 Q Did you ever have any situations where defense
14 attorneys and judges took you to task for the way that you dealt
15 with an individual juror which was different than anybody else
16 in the courtroom?

17 A No, sir.

18 Q With respect to the question that Mr. Ferguson asked
19 you and the answer that you gave him relating to counseling that
20 you did with individuals, I believe you said you'd take them
21 into your office, close the door, and I missed the term that you
22 used with respect to counseling them on the way that they were
23 dealing with jurors, but do you recall that line of questioning?

24 A I recall it. I don't recall exactly what term of
25 endearment I used either.

1 Q I take it that term of endearment, whatever it was, was
2 to indicate your displeasure with what they were doing and your
3 interpretation or your view of how it was seen by persons in the
4 court, that sort of thing?

5 A Yes, sir.

6 Q Now, specifically, during the time period from 1990 to
7 2010, would it be correct to say that based upon what you've
8 said earlier today, that you would have been a DA, an assistant
9 DA during the time period of 1990 to 1996 --

10 A Yes, sir.

11 Q -- before you went on the bench. During that time
12 period, did you have to counsel or do you have any specific
13 recollection of those occasions, those two or three occasions
14 falling in that time period, 1990 to 1996?

15 A I do not, sir.

16 Q Specifically, do you have any recollection or did you
17 counsel Charles Scott, an assistant DA, with respect to that?

18 A I did not.

19 Q Did you have to counsel Margaret Buntie Russ with
20 respect to that?

21 A No, sir.

22 Q Did you have to counsel myself, Calvin Colyer, with
23 respect to that?

24 A No, sir.

25 Q To your knowledge, was there anyone in the office that

1 you had to counsel with respect to that who were trying capital
2 cases from 1990 to 1996?

3 A No, sir.

4 Q Did you ever have to counsel Edward W. Grannis in that
5 regard as his senior assistant?

6 A Not on that subject, no.

7 Q Now, I want to make sure that you got a chance to
8 answer your question that you did not necessarily self-censure
9 yourself with respect to questions and answers and rulings, and
10 I believe when Mr. Ferguson asked you a question and you said --
11 and I think it had to do with statistics, and you said that
12 assuming, and then you said, I'm not going to say that or not
13 going to go there. Do you recall the context in which you were
14 making that statement earlier this afternoon?

15 A No, sir, I honestly do not.

16 Q Sir, I am going to try to paraphrase. If I make a
17 mistake, I apologize. I am not doing it intentionally. But
18 there was a statement or a question or a statement that was made
19 with respect to whether or not statistics should be used in
20 consideration with whether or not a prosecutor, he or she, gives
21 a reason or an explanation for what they did, and I think Mr.
22 Ferguson was asking you about whether or not you needed anything
23 or one should have anything in addition to the explanation by
24 the prosecutor. Does that put it in any better context for you?

25 A A hearing such as this, I think you need every bit of

1 information you can get from whatever source. It is up to the
2 Court, in this particular case, and Judge Weeks to determine the
3 reliability of any evidence that has been presented. I trust
4 Judge Weeks is not going to take my word without considering it
5 in all aspects nor is he going to take any statistics the same
6 way as to their reliability. That is his job, and he is going
7 to look at the testimony the same way I ask jurors to and find
8 the facts. I like a jury to have every bit of information they
9 can have which, the law provided, is allowable, and I am sure
10 Judge Weeks is in that same situation. I don't know what else
11 to say.

12 Q Judge, one --

13 A That is why you have two sides.

14 Q One other question I had for you. When you went up
15 there early this morning, you had a yellow copy of a newspaper
16 article that was in your accordion folder.

17 A Yes, sir.

18 Q Do you still have that?

19 A I do not, sir, and I probably need to put it on the
20 record that -- I believe defense counsel is aware of it, but I
21 gave Judge Weeks a present this morning. Totally unrelated to
22 this case.

23 Do you happen to have it with you?

24 THE COURT: No, sir. I thought it was back on the
25 table, but for the record, I appreciate that, Judge Dickson.

1 The record will reflect --

2 MR. JAMES FERGUSON: Judge, I don't want to
3 interrupt, but I believe if you will look in the folder, it
4 should be there.

5 THE COURT: Should be there. Thank you, sir.

6 THE WITNESS: Yes, sir.

7 BY MR. COLYER:

8 Q Is it back in your folder, Judge?

9 A Yes, sir.

10 Q What is that that you had that you presented earlier
11 this morning?

12 A It is the insight section of the Fayetteville Observer,
13 the Fayetteville Times, from Sunday morning, August 16th, 1981,
14 and I happened to find it when I was going through some stuff in
15 my desk over the weekend, and I didn't know if Judge Weeks
16 remembered it, so I gave it to him in case he wanted a copy, and
17 I believe it has now been shown to -- but if the camera can pick
18 that up, that fellow is Judge Weeks.

19 THE COURT: Back in the day when Judge Weeks had
20 hair.

21 MR. COLYER: Just for the record, Your Honor, we
22 are attempting to make a copy of that to mark as an exhibit to
23 put into the transcript for whatever use it may be in the
24 future. I believe Mr. Thompson is recovering that now. We are
25 just putting our next sticker number on it, and we will move

1 that into evidence.

2 With that having been said, that's all the questions I
3 have for Judge Dickson.

4 THE COURT: Thank you.

5 Mr. Ferguson, anything else?

6 MR. JAMES FERGUSON: I just had one thing I wanted
7 to clear up.

8 RE-CROSS-EXAMINATION

9 BY MR. JAMES FERGUSON:

10 Q Judge Dickson, you referred earlier to the affidavit
11 that Mr. Colyer prepared in this case?

12 A Yes, sir.

13 Q Did you yourself prepare an affidavit?

14 A No, sir.

15 Q You did not?

16 A I was not asked to.

17 MR. JAMES FERGUSON: All right. That's all I
18 have.

19 MR. COLYER: Judge, we -- I am advised by my
20 technical consultant, ADA Thompson, that it doesn't print any
21 better than we have here, so it is not a complete copy of the
22 article. I don't know that we can do that. But at least for
23 purposes of what we have here --

24 THE WITNESS: I am sure that Mr. Woolverton can
25 find a way, Your Honor, to go back to his place of employment

1 and probably manage to get Your Honor a copy of it.

2 MR. COLYER: Madam Clerk, what is our next number?

3 THE CLERK: Twenty-six.

4 MR. COLYER: Thank you.

5 If I can approach, Your Honor.

6 Judge Dickson, is this a facsimile -- I won't say a
7 copy, but is that a facsimile of the article that you brought
8 with you to court this morning?

9 THE WITNESS: Yes, sir, it is. It is pretty good.
10 It even came out yellow.

11 MR. COLYER: We'd move to introduce that for the
12 record, Your Honor.

13 THE COURT: All right. You folks want to be
14 heard?

15 MR. JAMES FERGUSON: No, Your Honor. The only
16 question I had I asked before lunch and that is I wanted to make
17 sure that you recognized the picture that you saw there, and you
18 indicated that you thought you did.

19 THE COURT: Yes, sir. State's Exhibit 26 is
20 admitted in evidence without objection.

21 Folks, I appreciate that because we need to make the
22 record as -- the term that's been used on a number of occasions
23 in this trial has a number of applications: transparency.

24 MR. COLYER: Yes, sir.

25 THE COURT: So it's received. Yes, sir.

1 MR. COLYER: And with that, Your Honor, may Judge
2 Dickson be excused.

3 THE COURT: Mr. Ferguson?

4 MR. JAMES FERGUSON: No objection.

5 THE COURT: Thank you, sir.

6 THE WITNESS: Your Honor, I'd like to apologize
7 both to you and Mr. Ferguson if I got a little bit friskier than
8 I should have.

9 THE COURT: Yes, sir.

10 Your next witness is --

11 MR. COLYER: Would be the Honorable E. Lynn
12 Johnson, Your Honor.

13 THE COURT: Okay. What is your preference?
14 Fifteen-minute break then go forward?

15 MR. COLYER: Sure, Judge.

16 MR. HUNTER: Your Honor, two things. I think
17 we're still trying to -- I don't know if we have reached a final
18 accord, final accord on --

19 THE COURT: Yes. That is what I was --

20 MR. HUNTER: If we can do that. We don't have to
21 do it before we take a break but maybe first thing when we come
22 back. And then we have a motion in limine concerning the
23 testimony of the judge that presided at the hearing that we
24 talked about some on January the 19th and then it was held in
25 abeyance or -- anyway, it wasn't resolved at that time, and it

1 seems like now is the time, and so I'd like to bring that back
2 up to the Court's attention and let you hear from both sides
3 about that.

4 THE COURT: Yes, sir. And I pulled a couple of
5 cases. I think I referred earlier on the record to *State v.*
6 *Gay*. I was the trial judge in *Gay*. I have also pulled
7 *McCarver*, which is --

8 MR. THOMPSON: Can I get those cites, Judge?

9 THE COURT: I will give you copies. *McCarver*, for
10 the record, is 329 N.C. 259. *Gay* is 334 N.C. 467, and there was
11 another case that I have somewhere up here in my stack. If
12 you'll bear with me. *Boyd* -- *State v. Boyd*, B-o-y-d, 332-101.
13 While not exactly on point, it deals with matters outside of the
14 record in the case.

15 All right. We're at ease for 15 minutes, 20 till --
16 well, before we go off the record, are you in a position now to
17 tell us where we are?

18 MR. THOMPSON: Judge, I think we are going to be
19 in a position to do the prosecutor affidavits by stipulation. I
20 think before end of day, we need to set up the logistics of
21 that, how we're going to do it exactly, and we're kind of
22 reserving the right to pull out of that stipulation before the
23 end of that conversation if things have gone belly-up with that
24 conversation. As far as I have an understanding of what the
25 facts are, the defense has an understanding of what the facts

1 are, I think we do have a stipulation is the short answer.

2 MR. HUNTER: I would suggest let's have the
3 conversation instead of -- I like drama as much as the next
4 person, but why don't we wrap this up. If that's all we need to
5 do, maybe we can spend some of this time in that conversation.

6 THE COURT: Okay. All right. So the conversation
7 we are talking about is between you folks during the break.

8 MR. HUNTER: Or do you want to have it on -- do
9 you think it's appropriate for on the record, then we can do it
10 on the record.

11 MR. THOMPSON: I think we are ready to have that
12 conversation on the record.

13 THE COURT: Let's go forward then.

14 MR. THOMPSON: Once we --

15 THE COURT: Let's finalize that if we can.

16 MR. THOMPSON: Come back or right this second?

17 MR. HUNTER: Either one is fine.

18 MR. THOMPSON: Let's do it when we come back.

19 MR. HUNTER: I would just like to do it first.

20 THE COURT: I agree. Okay. Thank you, folks.

21 We're at ease.

22 (Whereupon, a recess was held from 3:25 p.m. until
23 3:44 p.m.)

24 (The following proceedings continued in open
25 court. The defendant, Mr. Hunter, Mr. Jay Ferguson, Mr. James

1 Ferguson, Ms. Stubbs, Mr. Colyer, and Mr. Thompson were
2 present.)

3 THE COURT: Okay. Let the record reflect all
4 counsel are present. The defendant is present. For the record,
5 my understanding is Judge Johnson is the next witness. He is
6 not present in the courtroom at this time.

7 MR. THOMPSON: That is correct.

8 THE COURT: You indicated, Mr. Hunter, you want to
9 be heard -- wanted to be heard, pardon me, on your motion in
10 limine previously filed in this case.

11 MR. HUNTER: But I was hoping first we would
12 resolve our DA affidavit matter, and I think we are ready to go
13 on the record.

14 THE COURT: You did indicate that. I forgot. I
15 apologize. Are we ready to put those matters on the record, Mr.
16 Thompson?

17 MR. THOMPSON: Yes. Can I have a second?

18 THE COURT: Yes, sir.

19 MR. THOMPSON: Just lost power, Judge. Can I have
20 a second?

21 THE COURT: Yes, sir.

22 MR. THOMPSON: Literally as you were speaking,
23 lost power.

24 (There was a pause in the proceedings.)

25 MR. COLYER: Judge, there is a box that sticks up

1 out of the floor here, and we keep running into it.

2 THE COURT: Yes, sir. I see it.

3 MR. COLYER: Sorry.

4 MR. THOMPSON: Get a little panicky when I don't
5 have screens in front of me, Judge. I am going to need adult
6 supervision on this from all parties to make sure I make it to
7 where it is accurate when we talk about it. We've talked about
8 a lot of things. But the short answer is the prosecutor
9 affidavits that were included in the last final batch file
10 marked final in the discovery that has been given by the
11 defense, the copies that have -- we have original, signed
12 affidavits. We've got all those, and we are getting all those.
13 We have given copies to defense of all those. My understanding
14 of the stipulation is that they'll be entered into the State's
15 case as substantive evidence as if that prosecutor who did the
16 affidavit had testified to those facts subject, however, to
17 rules of evidence. So if there was a question, a statement
18 therein, I talked to judge so-and-so and judge so-and-so told me
19 "X." Insofar as we don't have judge so-and-so in that affidavit
20 or testifying, that there might be a question as to that line in
21 the affidavit. There are other arguments that are going to be
22 made by the defense, and I will let them make those arguments,
23 that deal with groups of these affidavits, and we'd like to be
24 heard. I think it would be appropriate to throw them the ball
25 and then be heard as to their admissibility to see if we can all

1 get to the stipulation.

2 THE COURT: Okay. All right.

3 MR. HUNTER: Well, I don't think we're prepared to
4 make our objections to the affidavits, but I can generally
5 describe them. I would -- one way to categorize these
6 affidavits is to say they're in three groups. And one group is
7 assistant district attorneys or district attorneys made
8 affidavits. They weren't at the trial. They got a copy of the
9 trial transcript. They've read through the trial transcript and
10 listed -- based on their own reading of the trial transcript,
11 they've made representations as to what they think are possible
12 or likely or -- I don't want to characterize them in some way,
13 you know, non-racial reasons that they think appear in the
14 transcript that could have been relied on by the prosecutor.
15 And so that's one category.

16 And our position on that, to put it in a nutshell, is
17 we don't think those are relevant because that is nothing more
18 than what -- Your Honor can do the same thing or we can argue
19 about those. So those -- in our opinion, if those witnesses
20 came in personally and their only involvement was, I reviewed
21 it, that is like putting up a legal expert, in our opinion. He
22 is just doing legal analysis, and these people haven't been
23 admitted or noted as experts, and so there's really no content
24 to that. Now, also included in those affidavits are statements
25 about this juror was excluded and that juror was excluded. All

1 of that information is already before Your Honor in the form of
2 the transcript. So that's one group.

3 And then there's a second group of prosecutors who did
4 take part in the trial. They may not have actually done the
5 jury selection but often they did do the jury selection, a few
6 of those, and I can only actually remember only one example, but
7 I think he did more than one case by affidavit. He said, I
8 honestly have no independent recollection of this trial, but I
9 have gone through -- and he's done the same thing those other
10 lawyers in group one have done. He's looked at it, he's, you
11 know, he said, Here's what I would say based on this record, and
12 he's prepared an affidavit. So we would make the same argument
13 as to that group, and that may only be one or two prosecutors
14 who did take part in some way in the trial but say in their
15 affidavit they have no independent recollection.

16 And then there's a third group where they say, We were
17 in the trial. We remember the trial. We've also reviewed the
18 trial transcript. Here's our best, you know -- here's our best
19 information, you know, sworn to as to why -- either why there
20 were race-neutral reasons or why, in fact, I excused somebody.
21 I think the form of the affidavits does vary a little bit. So
22 there's three groups, and we would have different objections
23 there based on those three groups.

24 And then in addition, there are some affidavits -- and
25 Rob just mentioned this -- where the affidavit says, I went and

1 consulted -- there's one where an assistant DA says he went and
2 consulted with Judge Lock about a case Judge Lock tried when
3 Judge Lock was the prosecutor. So that was part of his
4 preparation for the affidavit and so, of course, to the extent
5 there's hearsay -- he's relying on what Judge Lock told him --
6 we would object to that.

7 THE COURT: Okay. Folks, am I incorrect that
8 Judge Lock is one of the folks subpoenaed by the State in the
9 case?

10 MR. THOMPSON: He is. We intend -- we expect his
11 testimony to be tomorrow, but that's still up in the air right
12 now, Judge, but right now, he is scheduled to be here tomorrow
13 morning. Yes, sir.

14 MR. HUNTER: Right. And I don't know if we
15 have -- oh, yeah, and as to Mr. Colyer and the assistant
16 district attorney from Union County who --

17 MR. COLYER: Jonathan Perry.

18 MR. HUNTER: Jonathan Perry. Obviously, they have
19 both appeared as advocates. They are also both affiants, and so
20 there's a witness-advocate issue that exists whether they're
21 affiants -- or, Judge, we argue whether they're affiants or they
22 take the witness stand that, you know, we would want to raise
23 with Your Honor about that. So -- but in all of those cases,
24 we're not going to complain about the fact that these are
25 affidavits. In other words, we are going to make the same

1 arguments, the same objections we would make if they were live
2 witnesses, and then whatever Your Honor rules -- if you rule
3 that some part of these affidavits or some group of these
4 affidavits are excludable, then, obviously, the State would
5 proffer them and they would be in the record and any reviewing
6 court would see what you didn't consider, what you did consider,
7 and why, and then -- and our agreement to this isn't dependent
8 on what you're going to decide about our motions about the, you
9 know, the affidavits. In other words, we don't know what that's
10 going to be. I would think the appropriate time to argue that
11 is when they are introduced.

12 THE COURT: Do you disagree with that, Mr.
13 Thompson? At this point, I have no idea what your --

14 MR. HUNTER: Right. And that would take a while
15 to do that. I am just trying to get us to agree we are going to
16 use --

17 MR. THOMPSON: Well, I am reminded of one of my
18 old bosses used to try to explain to me a pig in a poke and that
19 I need to know -- I need to see the pig before I will agree to
20 buy it kind of thing. I can't just say, Yeah, we're good.
21 We'll work out the details later. I'm going to call these 30
22 folks off. I may be giving up a substantial right, and I would
23 be more than a little foolish to say, Yeah, we'll be fine, and
24 then it turns out I'm the idiot that gave up a substantial right
25 without knowing what I was getting. So that is why we are

1 having this conversation. I would like to know what it is we
2 are talking about whether or not I am going to call these folks
3 off.

4 But I think we can shortcut some of this, Judge. If
5 you look at all this -- first of all, this is not -- this isn't
6 a regular criminal trial. It's got a criminal caption but
7 that's not why we are here. They're in evidence or would be in
8 the evidence for a number of reasons. A, they are data
9 collection. They were given to the -- our state expert for
10 statistician purposes there. But this whole thing is about jury
11 strikes, and this goes into another argument, another situation,
12 but the defense's study, if you look at it clearly, it's a study
13 like a diagnosis of asphyxiation. It's a conclusion by
14 elimination of all the other factors, right? And when you're
15 talking about forensics and medical examination, there are only
16 so many ways a human being can die, right?

17 Kind of forget that analysis for a minute. These guys
18 came up with a -- when I say "these guys," MSU folks came up
19 with a series of variables, and they said, We looked at these
20 variables that we thought may explain jury strikes, and we
21 couldn't find any reason why to exclude race. In essence, it
22 was a finding of exclusion. We couldn't think of anything that
23 was an explanatory factor, right?

24 Then you throw the ball to us. We've got to have some
25 explanatory factors. The burden has shifted -- not the burden,

1 actually, but the case has shifted to us. We've got to be
2 allowed to put in evidence of the explanatory factors. If you
3 question whether this person was in the room or not and whether
4 or not that should even be considered, that's weight, not
5 admissibility. Sure, consider it, but it's clear from the
6 affidavit. I wasn't in the room, but here is what this juror
7 said.

8 Your Honor can look at things that are already in
9 evidence in light of what that affiant says against what the
10 transcript says. So if -- it's a pointing to these things when
11 you're talking about hundreds and thousands of pages of
12 transcripts. A prosecutor from that county or should be from
13 that county, looked at that case, looked at the notes, looked at
14 things, came up with these reasons, listed those reasons, what
15 that juror said. So, yes, they're admissible. Yes, they're
16 certainly relevant as to the point that this whole hearing is
17 about is they say, We couldn't figure out any other reason. It
18 must have been race. And us saying, No, no, no. We looked at
19 these. We got the prosecutors to review them. Here are the
20 reasons. Does that make sense?

21 So it's the reason by which they are offered plus, Your
22 Honor, there's no jury to be confused. You can read them as a
23 judge. You can say, This guy wasn't there. I am reading what
24 he is saying. It doesn't match up with what is in the
25 transcript. Toss it. You have the ability to do that in your

1 position. You're in one of the more unique positions of any
2 judge in North Carolina sitting with this kind of case. You can
3 toss that out if you don't find it to be credible. If it is
4 admissible and relevant, absolutely it is. You can't call it
5 irrelevant when you're talking about the whole point of juror
6 strikes and why we struck them and we're being accused of
7 striking them for racial purposes and we're telling you, No,
8 it's not. Here. Look at these reasons. Certainly, it's
9 admissible. Certainly, it's relevant. So to call those
10 otherwise is just not a genuine argument.

11 THE COURT: Well, I hear what you're saying, and I
12 apologize. I don't mean to cut you off. I hear what you're
13 saying, but I think that depends on the categories that were
14 referred to. By way of example --

15 MR. THOMPSON: Yes, sir.

16 THE COURT: -- if you called a prosecutor from
17 Scotland County -- I am just picking out Scotland County. That
18 prosecutor came in and said, I wasn't involved in the case,
19 wasn't present during any of the proceedings, may not have been
20 in the office at the time the case was tried, but I was asked to
21 review this transcript. And having reviewed this transcript, I
22 discerned from the transcript that these are possible
23 explanations as to why this juror was excused. If that person
24 were present in the courtroom testifying from the stand to those
25 facts, you're contending that would be admissible and relevant

1 for purposes of the issues involved in this case?

2 MR. THOMPSON: Yes, sir. Now, there's been this
3 discussion and this air in a lot of our discussions and -- that
4 if it's in the transcript, you can't talk about it. That's not
5 what any case has ever said. I don't know where we've gotten
6 that from. I am always subject to correction. But just because
7 it's in the transcript doesn't mean we can't talk about it. It
8 is certainly relevant, and it can be compared to -- everything
9 in the transcript is relevant.

10 And when you're talking about hundreds of thousands of
11 pages, it is certainly nice to have Your Honor have somebody on
12 the witness stand -- John Smith, who was a juror, when does he
13 start? What page did he start? Where can I go to to confirm
14 what he is saying? You can -- it is an amazing tool. But to
15 call it inadmissible is a misstatement of the law. There's
16 nowhere that says that transcripts are not admissible. There
17 are questions about how they get in. We will be talking about
18 that in the next fight we get into, but my point is it doesn't
19 make it incompetent testimony that it happens to also be
20 reflected in the transcript somewhere.

21 THE COURT: Well --

22 MR. THOMPSON: It's actually very helpful to the
23 Court, and you're in a position where you can just toss it. If
24 you read it and you read the transcript, you don't like it, you
25 can toss it.

1 THE COURT: We don't disagree on that point.

2 MR. THOMPSON: It is certainly relevant, and it's
3 certainly admissible, so I don't really understand how we got to
4 where -- oh, you shouldn't even put them in. You shouldn't even
5 listen to them. You shouldn't be considering them for
6 substantive purposes. That's kind of what -- the defense is
7 wanting to limit those affidavits. Oh, you shouldn't let those
8 in at all.

9 THE COURT: I am sorry. Now which affidavits are
10 we --

11 MR. THOMPSON: I am talking about the affidavits
12 of prosecutors, and my understanding is the defense is wanting
13 to limit you reviewing those that were done by folks that did
14 not participate in the trial.

15 THE COURT: That arguably is based on speculation
16 and conjecture.

17 MR. THOMPSON: Yes, sir. Now, you can review --
18 that's the thing. You can review the transcripts. You can look
19 at what they say in the quotes. That person that reviewed that
20 transcript was a trained prosecutor and prosecuting cases likely
21 in their office is the guy that tries capital cases.

22 THE COURT: I am following you now.

23 MR. THOMPSON: You see kind of my point is you can
24 say, I'm not going to consider it, but to say it's not
25 admissible or relevant, I don't think is accurate.

1 THE COURT: Okay. I'm following you.

2 MR. THOMPSON: I am sorry. Got one more point to
3 make about Perry and Colyer, same thing. They kind of skipped
4 some math. Oh, they're advocates in the case so can't look at
5 them. That body of law that advocates generally can't be called
6 as a witness in a case deals with these 12 folks sitting over
7 here. It confuses these folks. We're holding you to a little
8 higher standard being that easily confused. You know Mr.
9 Colyer. You can read his transcripts. You can see the stuff
10 that he's referring to. Same thing with Mr. Perry. You can
11 look at his affidavit, compare what he said, what he saw, to
12 what's in the affidavit and -- I am sorry. What is in the
13 transcript. So I disagree as well to just tossing them out
14 because they also happen to be -- well, there's a limited number
15 of humans in North Carolina that have tried capital cases for
16 the State of North Carolina and -- not trying to sound arrogant
17 on behalf of all of our prosecutors -- you should listen to
18 prosecutors about what prosecutors did. That's the most
19 relevant, most telling evidence about what prosecutors did
20 should come out of prosecutors not -- talking about speculation.
21 Given your logic -- I am sorry. Given the defense's logic,
22 well, you shouldn't even consider those unless they sat in the
23 courtroom, then absolutely none of their data should have come
24 in. None of it should be underlying in their case because not
25 one of those people ever tried a capital case. Not one of them

1 was involved in this case. They are the data collectors, and
2 they are in the same position we were in, and so they shouldn't
3 be listened to at all because they weren't even in North
4 Carolina at the time these cases happened. So if you're
5 following that logic, to say you shouldn't listen to us, I
6 think, again, it falls when you really look at it in -- through
7 logical glasses, respectfully.

8 THE COURT: Okay. Mr. Hunter?

9 MR. HUNTER: Well, where to start? Obviously,
10 if -- when you have witnesses who are qualified as experts, you
11 give notice they are going to give expert opinion, there is a
12 different set of rules for those people. They give opinions all
13 the time. The prosecutors who have been identified, the State
14 had an opportunity and a time to identify who their expert
15 witnesses were going to be who were going to give expert
16 testimony. Neither these prosecutors nor any of these judges --
17 not to leak over to the next argument -- were included in that
18 group of people who they were identifying because there are
19 certain responsibilities that came with identifying as expert
20 witnesses who were, therefore, entitled, if they're qualified,
21 to give expert testimony, give opinions and so forth. And so
22 that's the part of this that is -- we're arguing relevance.
23 It's the opinion of someone who has not been admitted as an
24 expert and can't be admitted as an expert because that time is
25 long over giving what's essentially expert legal opinion, legal

1 analysis of a transcript, and the time for them to identify a
2 witness to do that was a couple of months ago. And so I don't
3 want to -- again, I was trying to separate this -- these -- this
4 is -- my point is this is exactly the same argument we have
5 whether they are witnesses or affidavits. It doesn't make any
6 difference. And I would -- so I have been trying to convince
7 our esteemed prosecutors that they're not giving up any -- as I
8 recall this, they said they wanted these admitted as substantive
9 evidence. We said no. We thought about it overnight. We came
10 back and said, Yes, okay, and then we've been -- you know -- but
11 we're not agreeing that the rules of evidence don't apply except
12 as to the affidavits, we are agreeing we will go without any
13 complaint about the difference between an affidavit and a live
14 witness but, otherwise, we're treating them just like -- as if
15 they were live witnesses.

16 MR. THOMPSON: I can address that expert witness
17 issue. Now, we had till the 10th, if memory serves, 10th of
18 January, to give notice of our witness list and expert witnesses
19 included. We've done that, all of our witnesses. And on the
20 13th, three days later when we had our hearing -- I don't
21 remember where it was -- we discussed this, and we discussed
22 this very issue. Judge, we plan on calling these prosecutors,
23 and we are putting them in a couple categories. Some were
24 there. They were witnesses. Some were prosecutor reviewers.
25 Insofar as they're expert witnesses, we are not really calling

1 them that because they didn't do studies or whatnot. They
2 looked at a transcript, and they're giving us their best
3 information. But we gave notice of that during that hearing
4 three days later because we saw this very issue coming.

5 Is there a question as to whether or not somebody that
6 wasn't in the room during the trial has to be scrutinized a
7 little bit more than somebody who was in the room during the
8 trial? Absolutely. That is a question for Your Honor. After
9 looking at it, you can consider and toss. But we're not
10 talking -- we are talking about material, the word admissible,
11 and the word relevant and just throwing all these different
12 words. There are different questions here. Are they
13 admissible? Yes. Are they relevant? Yes. Do they have the
14 same weight? Maybe, maybe not. That's up to you. You can
15 consider that when you look at those affidavits. So that's kind
16 of -- that is a broader issue than yes or no. It's not a binary
17 decision.

18 THE COURT: We started this discussion, I believe,
19 from the perspective of, we think we have a tentative
20 agreement.

21 MR. THOMPSON: Yes, sir.

22 THE COURT: I am not sure we're there. Bear with
23 me. Let me read --

24 MR. THOMPSON: Well, we do in a lot of respects.

25 THE COURT: If you'll bear with me one second.

1 MR. THOMPSON: Yes, sir.

2 THE COURT: 15A-2011, Proof of racial
3 discrimination, subsection B: Evidence relevant to establish a
4 finding that race was a significant factor in decisions to seek
5 or impose the sentence of death in the county, prosecutorial
6 district, the judicial division, or the State at the time the
7 death sentence was sought or imposed may include statistical
8 evidence or other evidence -- and this is where it gets a little
9 bit murky, and I think that is the heart of where we are --
10 including, but not limited to, sworn testimony of attorneys,
11 prosecutors, law enforcement officers, jurors, or other members
12 of the criminal justice system or both that, irrespective of
13 statutory factors, one or more of the follows applies -- and we
14 are dealing with subsection three --

15 MR. THOMPSON: Yes, sir.

16 THE COURT: So the statute contemplates that sworn
17 testimony is admissible if otherwise admissible under the rules
18 of evidence, but it is not limited to that, and it is not
19 limited to statistical evidence.

20 MR. THOMPSON: Correct, Your Honor.

21 THE COURT: I'm not sure that we're at a point
22 where there is an agreement, in all candor. Let me make another
23 suggestion also for your consideration. I voiced it a couple of
24 times, but to the extent that it bears on where we are. We
25 don't have a jury. One option is to allow them to come in, let

1 you folks put your arguments respectively on the record, and in
2 my responsibilities in terms of deciding what is admissible
3 under the rules of evidence, factor that in in terms of findings
4 and conclusions, which is essentially what I understand you to
5 be saying.

6 MR. THOMPSON: Listen to them all, toss out what
7 you consider to be not worthy of weight.

8 MR. HUNTER: We --

9 MR. JAMES FERGUSON: That's the position we have
10 always taken. I have never had this much trouble agreeing with
11 someone.

12 THE COURT: Yes, sir.

13 MR. JAMES FERGUSON: We're saying that we reserve
14 our objections --

15 THE COURT: Exactly.

16 MR. JAMES FERGUSON: -- to --

17 MR. HUNTER: It is up to you, obviously.

18 MR. JAMES FERGUSON: -- be considered by the
19 Court.

20 THE COURT: Put your objections on the record.

21 MR. JAMES FERGUSON: Yes, sir.

22 THE COURT: Let the record reflect that the Court
23 is taking your objections under advisement and ultimately will
24 make a determination which will be reflected in the findings and
25 conclusions. I thought that's where we were.

1 MR. JAMES FERGUSON: I thought that's where we
2 were.

3 MR. THOMPSON: I am not putting this on record to
4 argue about it. I am putting it on record to make sure where I
5 understand we are with it, we are with it.

6 THE COURT: Okay.

7 MR. THOMPSON: Insofar as I'm misunderstood about
8 it, I am certain the gentlemen to my left would correct that
9 before we went too much further.

10 THE COURT: And the lady.

11 MR. THOMPSON: Gentlemen and lady. I wanted to
12 make sure all that was clear out in the open and with the Court
13 before we made that to the extent that those are the rules.

14 THE COURT: So we're not fighting this battle now.

15 MR. THOMPSON: No, sir.

16 THE COURT: It is coming in. The Court will do
17 what I am obligated to do consistent with my responsibilities.

18 MR. THOMPSON: Yes, sir.

19 THE COURT: That is where we are.

20 MR. JAMES FERGUSON: Yes, sir.

21 MR. THOMPSON: To the extent we have that
22 agreement, we will prep that final notebook under the
23 supervision of the gentlemen and lady to my left, and likely
24 present that tomorrow at some point.

25 THE COURT: And the litany that you're likely to

1 hear, that you will hear, is folks given the opportunity to make
2 their arguments, arguments being noted for the record, Court
3 taking the arguments or objections under advisement, rulings
4 will be reflected in the findings and conclusions.

5 MR. JAMES FERGUSON: Yes, sir.

6 THE COURT: And we're good to go. Fair enough?

7 MR. THOMPSON: Second, Judge.

8 THE COURT: Yes, sir.

9 (There was a pause in the proceedings.)

10 MR. THOMPSON: Yes, sir.

11 THE COURT: Okay. We do have an agreement. All
12 right. Thank you, folks.

13 MR. THOMPSON: Now we have another fight.

14 THE COURT: Yes, sir. Round two. Round two.
15 Yes, sir.

16 MR. THOMPSON: I am sorry. This is defendant's
17 motion. I'd like to be heard at the appropriate time.

18 THE COURT: Okay. Mr. Hunter?

19 MR. HUNTER: Your Honor, I will go first. I am
20 referring to a motion we filed -- I think it was on January 19th
21 entitled, Defendant's motion in limine regarding testimony by
22 presiding judges in capital cases. I understand the State has
23 given us notice that I think Judge Johnson who we all know who I
24 think was the presiding judge in I think more than one of these
25 cases is planning on being the next or they're going to call

1 next, and we have had an objection for some time to that, and I
2 presented to the Court already with --

3 THE COURT: Yes, sir.

4 MR. HUNTER: -- Mr. Thompson's permission, copies
5 of the two reports that we have gotten from Judge Johnson, and I
6 have them marked here as Defendant's Exhibits 51 and 52. And
7 here are the copies. And I gave those to Your Honor to read
8 because these are -- you know, in the past, we've been talking
9 somewhat theoretically about in various contexts about what a
10 presiding judge might or might not testify to, be able to
11 testify to and so forth, but I think in these two documents, we
12 have a pretty good forecast, I think, of the State's position on
13 what he could testify to.

14 And I'll talk about 52 first, which I would call a
15 legal analysis of the peremptory strikes against
16 African-Americans in Marcus Robinson's case. And our position
17 is that Judge Johnson is -- cannot get on the stand and give a
18 legal analysis of the peremptory strikes in Marcus Robinson's
19 case.

20 THE COURT: Yes, sir.

21 MR. HUNTER: Number one because he's not an expert
22 for the same reasons -- not because he doesn't have expertise.
23 He certainly does have expertise but because he hasn't been
24 identified as an expert, which is a similar argument before.
25 There are special concerns about judges testifying about cases

1 they presided in, which Your Honor I know is aware of some of
2 those cases. And, basically, the rule is that there is a
3 prohibition unless there is nobody else available to testify to
4 whatever the facts are that the judge can offer. So to the
5 extent this is a legal analysis, it's forbidden because we don't
6 let anybody get up on the stand at a hearing unless they're
7 identified as an expert and offer a legal -- an expert legal
8 analysis. And this is -- this handwritten piece of paper, D-52,
9 I don't think there is any other way to characterize this
10 besides an expert legal analysis by someone who is trained in
11 the law and who has read the transcript and is offering their
12 opinions on the legal implications of the State's conduct in
13 that case. That is not appropriate in this case unless that
14 person has been identified as an expert.

15 Now, I think it is fine for the lawyers to argue about
16 that, and they could have maybe identified a legal expert and
17 had a legal expert if they wanted, but I think that may have
18 raised some other issues. But the judge who presided over the
19 case I think is particularly an inappropriate person to come in
20 and take sides and talk about their intellectual response to the
21 facts of the jury selection. I think that is -- and for lots of
22 reasons, that is discouraged, to put it mildly, by our law, and
23 it should only be allowed where there's nobody else who's
24 available to testify as to those facts.

25 Well, here, we have, again, the transcript of that

1 trial, and any of these lawyers here can argue to you their
2 analysis of the case. You are the one who decides what the
3 proper legal analysis is applied to those facts, and I just
4 think it's not a good situation. I know it's not a good
5 situation for another Superior Court judge -- retired,
6 emergency, whatever status -- to come in and offer what may end
7 up being a competing analysis or it may be exactly the same
8 analysis as the Court is going to have to do in deciding this
9 case. I think in all of these cases, the transcript is
10 preferred. It's true that it might be easier if someone came in
11 and spoon-fed the Court the legal analysis, that you don't have
12 to do your own legal analysis and you can go home early at the
13 end of the day, but that is not the way our system works. The
14 way our system works is you have to do the legal analysis,
15 you're the legal expert in our case, and so you have to provide
16 it.

17 I will point out that 15A-2011, which deals with the
18 Racial Justice Act and which I think you just read --

19 THE COURT: Yes, sir.

20 MR. HUNTER: -- in connection with the
21 prosecutors, judges are not included in that list, which I don't
22 think is proof that they're not allowed, but I think it is -- it
23 respects the tradition which is, the tradition is judges do not
24 testify. If judges were intended to be in that list, my guess
25 that wouldn't be an oversight to leave them out. They list just

1 about everybody else who is in this courtroom except for you,
2 Your Honor, is listed there. So I think at least that is an
3 indication that the statute was respecting the traditional rules
4 of judges not being witnesses in the case, and I think there's
5 an analogous situation here, and that has to do with jurors.
6 They list jurors as people who can testify about race
7 discrimination, and as you know, the traditional rule is very
8 restrictive about what jurors can testify to and, in fact, there
9 is a provision in there that says they still have to obey Rule
10 606. So even though the jurors are listed, it's listed subject
11 to the traditional rule. Here, the judge isn't even listed
12 which I think, again, indicates respect for the rule.

13 So we have a transcript. We have the best evidence.
14 This -- we should not be getting legal analysis from the trial
15 lawyer in the -- I mean, from the trial judge in the case, and
16 if the State wanted an expert, they had the opportunity to
17 identify that expert, and that time has long passed. So that's
18 our argument. And let me just make it clear I don't have any
19 problem -- I gave you both of those reports that Judge Johnson
20 provided, but I think once you look at what the transcript
21 provides, once you take out legal analysis, which is not
22 appropriate for the judge to give, and also his opinion on the
23 relative legal qualifications of other lawyers -- that's another
24 expert opinion that he can only have as a basis of his
25 expertise. None of that is proper in this case for someone who

1 is not identified as an expert and especially not for a judge.
2 There's a whole separate body of law about judges, and I don't
3 really see anything left because everything else is already in
4 the transcript.

5 THE COURT: Okay.

6 MR. HUNTER: So that's my argument concerning not
7 just Judge Johnson, but I think there were a series of trial
8 judges who are being called.

9 THE COURT: Yes, sir.

10 MR. THOMPSON: Judge, not so much as experts,
11 again, not taking anything away from their qualifications, they
12 are witnesses. They were factual witnesses to the point that
13 we're all trying to get to. There is a huge body of law out
14 there that says the trial judge is in the best position to be
15 able to determine credibility of the people that you're talking
16 about. That's most of the time referred to in the cases from
17 witnesses, but other than Mr. Colyer, these judges are going to
18 be the only people that were actually in the courtroom at the
19 time these cases were tried. Not one of these lawyers -- or
20 maybe with the exception of Mr. Hunter on a couple of them --
21 were present during the jury selection that we're all talking
22 about. So in the respect that they shouldn't be able to talk
23 about this, they're the first folks we need to get talking about
24 these things. They were there. They witnessed. They saw Mr.
25 Colyer do his job. They saw whether or not the defense

1 attorneys did their job. They saw the inflections in the
2 voices -- I am sorry -- heard the inflections in the voices, saw
3 the behavior of the jurors and all of which with an eye toward
4 the legal analysis that we're all talking about which comes up
5 to *Batson*.

6 Let's back up just a little bit. Remember that in my
7 earlier argument we talked about how this study, the defense's
8 evidence, was a conclusion of elimination. We couldn't figure
9 out any other reason so it must be race, right? But then to
10 take away -- and I am sorry. We are using *Batson* as a clear
11 analytical tool to defend ourselves, to rebut the defense
12 proposition. This is not brain surgery. We have talked about
13 this for a long time. *Batson*, as you know, deals with
14 race-based jury strikes. There were -- this whole study and
15 this whole argument or RJA talked about race-based jury strikes.
16 They are a clear match. So it is clearly relevant. It is
17 clearly admissible what action was taken on *Batson*, what habits
18 were dealt with with *Batson*.

19 THE COURT: May I interrupt for just a moment.

20 MR. THOMPSON: Please.

21 THE COURT: Is it your position, for purposes of
22 our discussion right now, that a judge who presided over one or
23 more of the cases involved in the study would be entitled to
24 come up and say, I was a presiding judge, *Batson* challenges were
25 or were not made, period.

1 MR. THOMPSON: That is one of the many things we
2 will ask, yes, sir.

3 THE COURT: Isn't that reflected in the record?

4 MR. THOMPSON: Yes, sir, in very few of the
5 Cumberland County cases. There were four *Batson* challenges made
6 out of the 62 black venire strikes we made.

7 THE COURT: But whether a challenge was made under
8 *Batson v. Kentucky* or not --

9 MR. THOMPSON: Yes, sir.

10 THE COURT: -- is either in the record because of
11 the fact that it was made --

12 MR. THOMPSON: Yes, sir.

13 THE COURT: -- or not made because it is not
14 included in the record.

15 MR. THOMPSON: Yes, sir. But the -- just because
16 it is in the record, again, does not make it inadmissible or
17 irrelevant. It happens to also be in the record. There is no
18 body of law -- and we'll talk about that. I'd like to get to
19 that. This body of law that's been suggested by the defense is
20 not even in the ballpark. I've discussed with folks much
21 shorter -- I'm sorry, much smarter than me -- doesn't get much
22 shorter than me -- but this body of law if you read all these
23 cases --

24 THE COURT: Now what specifically are you
25 referring to?

1 MR. THOMPSON: These are the three cases that Your
2 Honor had talked about before --

3 THE COURT: I don't disagree that they are not
4 exactly on point but the principle is the same. That's their
5 position.

6 MR. THOMPSON: That is where I draw a serious
7 distinction. When I talked to folks that do this work -- all of
8 these cases, if you look closely, deal with the record on appeal
9 and whether or not an affidavit should supplement the record on
10 appeal.

11 THE COURT: Yes, sir. I don't disagree.

12 MR. THOMPSON: That's not anywhere near what we
13 are talking about, and it doesn't say -- none of these cases nor
14 any other cases that I'm aware of say that the judge is
15 incompetent to testify. They mention in dictum, really, guys,
16 try not to call the judges every time somebody drops their pen.
17 Come on. They don't say a judge can't testify. And this is not
18 a B and E case. This is not just some regular criminal case.
19 In this case, the State has been tossed the ball to say, By the
20 way, you guys did a terrible job on *Batson*. You guys didn't do
21 your job. Defense experts said judges didn't do their job on
22 *Batson* during their case. They should have done a better job.
23 We should be allowed to rebut that. The defense evidence -- we
24 talked about the legal conclusions. The defense just talked
25 about, well, they shouldn't be able to come up with a legal

1 conclusion. They shouldn't be able to testify about a legal
2 conclusion. They're a whole lot more capable, proper, to talk
3 about legal conclusions and give those -- give their thoughts to
4 Your Honor than the defense experts, all of which made legal
5 conclusions. Remember all those questions that were asked? And
6 he kind of roped -- did the State, in your opinion, use race as
7 a significant factor in the blip, blip, blip. They did it over
8 and over again in every one of their witnesses, if I remember
9 right and all of which testified to those legal conclusions.
10 And now our judges aren't qualified to testify as to their legal
11 conclusions?

12 THE COURT: I don't think that's the argument that
13 is being made. I think the argument that is being made is they
14 were never designated as such.

15 MR. COLYER: Judge, they're fact witnesses. We
16 keep talking about the transcript. The transcript can't be
17 sworn. The jurors -- the testimony that we're relying on here
18 with respect to transcripts are things that are reported in
19 transcripts from all over the state, more particularly from this
20 case and other cases here in Cumberland County, and who better
21 to have questions asked by the State and by the defense with
22 respect to what happened with respect to these jury selections
23 than the referee who was sitting there watching the proceeding
24 and making a determination as to whether both sides were doing
25 their job, for instance, with respect to *Batson*. One of the

1 questions that Mr. Ferguson asked Judge Jenkins was simply to
2 the effect of --

3 THE COURT: Judge Jenkins?

4 MR. COLYER: I am sorry, Judge Dickson.

5 THE COURT: Dickson.

6 MR. COLYER: Thank you, Judge. That Mr. Ferguson
7 asked Judge Dickson was, well, something to the effect of, Can
8 we trust what the prosecutor says about reviewing the transcript
9 or can we trust what the prosecutor says about their
10 explanation, and how does race figure into that? What we're
11 talking about is a referee who was sitting, watching, and
12 listening to what the juror was saying; watching, listening, to
13 what the State did; reacting to what the defense did or did not
14 do; and reporting to the Court what they saw. Some of these
15 judges, for instance, Judge Johnson may say something different
16 than what Judge Dickson said he heard, what he saw. Judge
17 Dickson said, I looked at the transcript. I looked at an
18 affidavit.

19 Judge Johnson, as you can tell from the defense
20 exhibit, read the transcript. The transcript in and of itself
21 is not a witness in this case, and in order for us to explain to
22 the Court to try to rebut the statistics or the presumption that
23 race was a factor, we respectfully contend that we should be
24 entitled to have the participants, to the extent that we call
25 them as a prosecutor or a judge, testify and be examined. If

1 their testimony is corroborative of what the prosecutor says, so
2 be it. If their testimony is contrary to what the prosecutor
3 says, then the defense has that opportunity.

4 Judge, I don't mean any disrespect to you when I say
5 this. I have the most respect for you, but we're talking about
6 thousands and thousands and thousands of pages of trial
7 transcript. Judge, I hope you live to be a very old man, but I
8 don't think you can live long enough to read all the pages in
9 these transcripts and be asked to discern whether or not the
10 explanations that are given, either in the affidavits or in the
11 transcripts themselves, are reasons for a peremptory strike
12 against a person who is black. And the judge can tell you when
13 he testifies that here's what I observed, here's what I saw,
14 here's what I saw the juror say, it's reflected in the
15 transcript, and based upon what they said, here's what I did,
16 here's what I didn't do.

17 We contend that that is powerful evidence with respect
18 to the explanation that the defense has proffered in their study
19 that -- they started out that race was a significant factor.
20 That was -- they said that from the stand. Race was a
21 significant factor. That was a premise. And now they are
22 coming back in and saying, Hey, Judge, we've done the study, and
23 race was a significant factor. Respectfully, we contend we have
24 and should have the opportunity to tell the Court through
25 witnesses that race was not a significant factor or that there

1 was some other acceptable explanation for why a juror was
2 excused.

3 The statute does not include judges nor does it
4 exclude, and it used one of those disjunctive legal terms, or
5 others, and I am going to take the opposite view of Mr. Hunter
6 here. He basically I think wants to say if they wanted judges
7 included, they would have said so. Our view is if they would
8 have wanted judges excluded, they would have said so. So it
9 puts the dilemma right back in your lap again.

10 MR. THOMPSON: I have a couple other things,
11 Judge, and I appreciate you listening.

12 THE COURT: Yes, sir.

13 MR. THOMPSON: And on that point, Mr. Colyer is
14 absolutely right. The statute actually takes the time to list
15 afterwards that the jurors' testimony -- after it lists all
16 those folks, the jurors' testimony, by the way, is limited to
17 606(b) under 8C-1. It mentioned no one else. It didn't limit
18 anybody else to anything, and under statutory construction
19 rules, it's clear they had the ability to limit it, they didn't.
20 They mentioned other people in the criminal court system.
21 Judges are obviously included in that, and if they wanted to
22 exclude judges, they could have.

23 Secondly, the body of law that really deals with the
24 judge not testifying all put in as its justification because of
25 their overwhelming impact on a jury, that a jury would look at

1 them and say, Hey, that guy's a judge, really knows his stuff.
2 It has an unfair effect. Well, again, that's not a problem
3 here. So these cases are not close and they're not even
4 comparable in their underlying analysis. So to follow that
5 would, I think, be error, respectfully -- would be a mistake.

6 Second, I mean, we talked about it in this last
7 argument how Your Honor can listen to their testimony and hear
8 what they have to say and decide whether or not their testimony
9 is appropriate, is considered, is -- and it is certainly
10 admissible and relevant. Again, we are talking about different
11 standards. They are saying they shouldn't even get to the
12 table, Judge. They should get to the table. They should
13 testify. You should hear them, and you can read the record and
14 consider their testimony like you would anybody else's because
15 you're in that unique position. There's not 12 people sitting
16 here.

17 Next, the -- they said that judges are taking sides.
18 They're not taking sides. They're on the stand. None of them
19 are looking forward to coming in here and dealing with this. So
20 to say they're marching in here taking sides sword in hand is an
21 unfair -- it's an unfair thing to call them, Judge. They would
22 much rather be -- most of them are retired. They'd much rather
23 do their retired stuff right now than be in here so,
24 respectfully.

25 The MSU study failed to explain this racial disparity,

1 and they have made an argument that that -- that should be
2 enough, but gutting us at our case and saying you can't call
3 judges, you can't call prosecutors, you can't explain it either,
4 to take all of that away is tieing our hands behind our back,
5 and it would not be appropriately applying the law as it says,
6 that all these things are admissible. This Court should hear it
7 all, figure it out. Does that make sense? That is the State's
8 argument.

9 THE COURT: I follow you.

10 MR. THOMPSON: You should hear it. So we're not
11 talking about -- to say it's not relevant and not admissible is
12 just wrong. It's -- Your Honor can consider it how Your Honor
13 considers it, respectfully. That's all I have.

14 THE COURT: Okay. All right. Folks, it's 4:34.
15 I recognize the importance of this issue, and as has been said
16 by a witness in this case, my goal is to try a case one time if
17 I can. My goal is to make sure that issues that don't need to
18 be in the case are not in the case. The position now being
19 taken by counsel for the State is this is so critical, it needs
20 to be dealt with cautiously and carefully. I've got some
21 concerns based on what I read in the handwritten notes marked as
22 Defendant's Exhibit 52. I don't want to rashly make a decision
23 as to the totality of it.

24 Let me ask a question that hopefully will eliminate
25 another delay down the road. My recollection of the expert

1 testimony offered by the defendant's experts in this case was
2 multipronged dealing with the appropriate forums as listed in
3 the statute, county and prosecutorial district, which is the
4 same in this instance, the judicial division, statewide, but it
5 also is multiprong in the sense that it encompassed both
6 intangible purposeful discrimination among other things. Did I
7 misunderstand that testimony?

8 MR. HUNTER: No.

9 MR. JAMES FERGUSON: No. I think it does
10 encompass that.

11 THE COURT: So at a minimum when I heard that
12 testimony, first thing that came to my mind was that potentially
13 opens the door to -- because it's arguably a character matter,
14 character and reputation. Anybody disagree with that? I am
15 asking simply because --

16 MR. JAMES FERGUSON: No, Judge. Your Honor, there
17 may be a place for character representation or character
18 evidence in this trial, this hearing, but it is going to depend
19 on whose character is at evidence and what trait of character is
20 being addressed.

21 THE COURT: I agree. I agree.

22 MR. JAMES FERGUSON: So I think that has to come
23 in based on the specifics of what is offered.

24 THE COURT: Exactly. And I am simply broaching
25 whether your position is, no, there's no basis here for any

1 character or reputation evidence of any kind, and I am
2 understanding it is not.

3 MR. JAMES FERGUSON: No, sir. We don't take a
4 blanket position on that, but we don't think the character of
5 every prosecutor in the State is at issue.

6 THE COURT: I don't disagree. I don't disagree.

7 MR. JAMES FERGUSON: Very well.

8 THE COURT: I know Judge Johnson has been waiting
9 here for some period of time, but because of the importance of
10 this issue, folks, I am going to think about it. I am going to
11 look at some additional law. There is a reason underlying the
12 policy about the appropriateness of calling judges to testify
13 about matters they were involved in. I think it is a reason
14 that is based on factors that go to how that might impact on the
15 integrity of the process and the system, so I want to look at
16 those cases.

17 The cases that I cited earlier deal with supplemental
18 information in the form of affidavits being offered outside the
19 record in the case. I agree with you. It was on appeal. The
20 court said, We're not considering any matters outside the
21 record. So that is a broad position taken in the narrow context
22 of the specific evidence that was offered in the phase of the
23 proceedings at which it was offered, but I am mindful of the
24 under -- the overriding policy about -- and I'll be direct.

25 Your position -- and I think there's a valid argument

1 in support of your position -- is it's fundamentally potentially
2 detrimental to the system to have one judge sitting on the bench
3 deciding the case and have one side or the other call other
4 judges and say, This is what I would do if I was sitting up
5 there. That's it. That's it. And I understand what you're
6 saying.

7 MR. THOMPSON: That's not what we are --

8 THE COURT: Well, indirectly it is because it
9 bears on the issues that ultimately I am going to be called upon
10 to decide.

11 MR. THOMPSON: They are being called because they
12 are witnesses to the events that are in question.

13 MR. COLYER: That you weren't, Your Honor,
14 respectfully.

15 THE COURT: And I hear you on that. So I think
16 there's a distinction between what may be admissible, if
17 anything, and what may not be admissible. That's the point that
18 I'm trying to make. So I am going to ask for your assistance
19 because I don't believe in having to do all the work by myself.
20 Folks, whatever law you want me to look at tomorrow morning -- I
21 am going to pull the law tonight. I am giving both counsel the
22 opportunity to pull whatever law you want to pull, and I will
23 make a determination tomorrow morning.

24 MR. COLYER: Judge, and just so that we remind the
25 Court of this, we have suggested previously when this motion was

1 made that even if we lose it, we'd like to make a proffer so --

2 THE COURT: I understand that.

3 MR. COLYER: So, respectfully, when we have our
4 folks down here, we're not trying to do something contrary to
5 what you're telling us to do, but we really feel like that in
6 order for us to make a record if those folks cannot testify, we
7 still need to go forward with their testimony by way of a
8 proffer. And to that extent, we've had folks lined up for
9 tomorrow. So Judge Johnson, if he is not going to get called
10 this afternoon, obviously, wouldn't get finished, we are going
11 to need some latitude to bump some folks --

12 THE COURT: Do you want to go forward with your
13 proffer on Judge Johnson now?

14 MR. THOMPSON: We don't have near the time.

15 THE COURT: I didn't think so.

16 MR. COLYER: All I am saying, Judge, is it could
17 affect our schedule for the rest of the week, but what we'd like
18 to do -- I think we have mentioned this to the defense. Dr.
19 Katz and Jonathan Perry are coming back on Wednesday morning.
20 Wherever we are tomorrow, we'd like to be able to finish with
21 perhaps that witness on Wednesday morning and then start with
22 Dr. Katz and then pick this up later either by way of testimony
23 and/or proffer, if it please the Court.

24 THE COURT: Yeah. And I recall and I think it is
25 entirely appropriate, you know, regardless of what my ruling

1 might be, you folks are entitled to make your record. Same
2 thing applies to counsel for the defendant. So I am mindful of
3 the fact that one way or another, the evidence you folks contend
4 ought to be admissible is going to be in the record anyway.

5 Mr. Hunter, Mr. James Ferguson, Ms. Stubbs, Mr. Jay
6 Ferguson, anything further you folks want to add?

7 MR. HUNTER: No, Your Honor. We are content to
8 wait until the morning.

9 THE COURT: Okay. All right. Whatever law you
10 want me to look at, folks -- and I recognize that part of the
11 dilemma we're all faced with here is there's not a lot of
12 guidance. I mean, the law has only been in effect since 2009.
13 This is the first case heard under the law. There is not a lot
14 of guidance, no precedent to help us through this process, but I
15 want to do the absolute best I can to deal with the issues
16 appropriately.

17 Thank you, folks; 9:30 tomorrow morning.

18 MR. COLYER: Yes, sir. Thank you.

19 MR. JAMES FERGUSON: Yes, sir.

20 THE COURT: Okay. Thank you.

21 (Whereupon, the Court adjourned at 4:40 p.m.,
22 Monday, February 6, 2012, until Tuesday, February 7, 2012, at
23 9:30 a.m.)

24 (REPORTER'S NOTE: Ms. Jennifer Hack was replaced
25 by Ms. Veronica McClain.)

C E R T I F I C A T E

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

I, Jennifer L. Hack, RPR, the officer before whom the foregoing proceeding was taken, do hereby certify that said hearing, Pages 1083 through 1252, inclusive, is a true, correct, and verbatim transcript of said proceeding.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action.

This 22nd day of February, 2012.



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

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

vs.

MARCUS ROBINSON,
Defendant


CERTIFICATE OF
DELIVERY OF TRANSCRIPT

This is to certify that the transcript of the proceedings in the above-captioned case, as ordered on the 3rd day of February, 2012, being 169 pages in Volume VI of XIII, was delivered electronically and by U.S. Mail to counsel listed below on the 22nd day of February, 2012.

THE HONORABLE GREGORY A. WEEKS
Superior Court Judge

ROBERT THOMPSON
Assistant District Attorney
BEL LEWIS, Legal Assistant
Cumberland County Courthouse
P.O. Box 363
Fayetteville, North Carolina 28302
On behalf of the State

JAY H. FERGUSON
Attorney at Law
119 East Main Street
Durham, North Carolina 27701
On behalf of the Defendant



JENNIFER L. HACK, RPR
Official Court Reporter
Twelfth Judicial District
Cumberland County Courthouse
Fayetteville, North Carolina
jennifer.l.hack@nccourts.org

1 STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
2 SUPERIOR COURT DIVISION
3 COUNTY OF CUMBERLAND FILE NO. 91 CRS 23143
4

5
6 STATE OF NORTH CAROLINA]
7]
8] RACIAL JUSTICE ACT HEARING
9 vs.]
10] DAY HEARD 02/07/12
11 ROBINSON, Marcus,]
12 Defendant.] Vol. VII OF XIII
13] [Pages 1253 through 1485]
14

15 The above-captioned case coming on for hearing at the January
16 30, 2012, Criminal Session of the Superior Court of
17 Cumberland County, Fayetteville, North Carolina, before the
18 Honorable Gregory A. Weeks, Judge Presiding, the following
19 proceedings were had, to wit:
20

21
22 A P P E A R A N C E S
23

24 FOR THE STATE: Calvin Colyer & Rob Thompson,
25 Assistant District Attorneys, 12th
26 Judicial District; and, Jonathan Perry,
27 Assistant District Attorney, 20th
28 Judicial District
29
30 FOR THE DEFENDANT: Jay Ferguson & Cassandra Stubbs, Durham
31 County Bar; Malcom Hunter, Orange County
32 Bar; and, James Ferguson, Mecklenburg
33 County Bar, Attorneys at Law
34

35
36 VERONICA E. McCLAIN
37 Official Court Reporters
38 Cumberland County Courthouse
39 P.O. Box 363
40 Fayetteville, North Carolina 28302
41 (910) 308-0517 (cell phone)
42 Verbrprtr45@nc.rr.com
43
44

45 DATE REQUESTED: 02/03/12 DATE DELIVERED: 02/21/12

February 7, 2012

1 [COURT REPORTER NOTE: The Master Index will be submitted in
2 a volume all of its own, entitled Master Index.]

3 [The hearing reconvened at 9:28 a.m., February 7, 2012, with
4 all pertinent parties present prior to the recess once again
5 present, to include the defendant, but with the exception of
6 the court reporter. Ms. Veronica McClain replaced Ms.
7 Jennifer Jack as the official court reporter.]

8 THE COURT: Let the record reflect all
9 counsel are present. The defendant is present.

10 Let the record further reflect that, prior to
11 the beginning of the proceedings this morning, in the absence
12 of the defendant, I provided copies of some case law that I
13 think bears on the issue that was raised late yesterday
14 afternoon, specifically the proposed testimony of the
15 Honorable E. Lynn Johnson, Retired Senior Resident Superior
16 Court Judge in this district

17 The cases that I've provided to counsel and
18 the citations that I've provided to counsel, begin, at least
19 in my view, with the decision of the Vermont Supreme Court
20 recognizing that there is no precedent as to this case in
21 North Carolina. I think it's illustrative and helpful of the
22 point or points at issue. It's as close as I can find to the
23 factual situation that we are now involved in, a post-
24 conviction hearing. That cite for the record is in Ray
25 Charles Wilkinson, 165 Vermont 183, 678 Atlantic, 2d, 1257,

February 7, 2012

1 1996, Vermont LEXIS 43. It was a case decided in 1996. The
2 pertinent issue raised was the propriety of allowing the
3 trial judge to testify in a post-conviction hearing in a case
4 where obviously that judge presided.

5 Essentially, the Court held that the trial
6 judge should not have been allowed to testify. His role at
7 the original trial meant that he could not testify as a
8 neutral and impartial observer of the trial. Let me read
9 some of the language because I think this more articulately
10 expresses the concerns that I put on the record yesterday.
11 As is true in North Carolina, Vermont had no statutory
12 provision or case law that explicitly barred testimony from a
13 trial judge. The gist of his testimony was the subject
14 matter of the Court's discussion. Although, here, the judge
15 in question did not entertain the application for post-
16 conviction relief, he did give crucial testimony evaluating
17 the evidence and the verdict at petitioners trial. The
18 judge's role, at the original trial -- and I'm omitting the
19 name of the judge -- does give him the benefit of first-hand
20 knowledge. Because of that role, however, and his
21 obligations as presiding judge, he cannot testify as a
22 neutral and impartial observer of the trial. The sites
23 follow.

24 The State argues that the judge in question --
25 that his testimony cannot be excluded merely because of his

1 possible bias. Of course, many witness are biased or have
2 some interest in a proceeding. Typically, bias of a witness
3 goes only to the weight of the evidence, not to its
4 admissibility. The judge in question, name omitted, however,
5 was not an ordinary witness. The State essentially argues
6 that we should permit judges clothed in the authority of the
7 office to testify at post-conviction relief hearings of
8 criminal trials over which they presided were conducted
9 fairly and resulted in the correct verdict.

10 We are convinced that such a practice would
11 undermine both the propriety of the judicial office and the
12 fairness of post-conviction relief proceedings. The Code of
13 Judicial Conduct also provides guidance on this issue.
14 Judges are required to, quote, act at all times in a manner
15 that promotes public confidence in the integrity and
16 impartiality of the judiciary. We have a similar provision
17 in our Code of Judicial Conduct in 2(a). Judges are also
18 required -- and I'm paraphrasing -- to perform judicial
19 duties without bias or prejudice. We have a similar
20 provision in our Code of Judicial Conduct. Although we
21 assume that the judge in question, name being omitted, was
22 not motivated by actual bias, his testimony was unduly
23 prejudicial, given its elevated aura of expertise.

24 Moreover, quote, a judge shall not, while a
25 proceeding is pending or impending in any court, make any

1 public comment that might reasonably be expected to affect
2 its outcome or impair its fairness. Making reference to
3 their provision of the Code of Judicial Conduct, we have a
4 similar provision under our code, and then the following
5 language: Although the judge in question, name being
6 omitted, was the State's expert witness, such testimony is
7 certainly public and is no more appropriate than the same
8 comments expressed in a newspaper, editorial or interview.
9 In fact, the testimony is more troubling because it was not
10 only likely to affect the outcome of the proceedings, but the
11 State intended that it do so. Cited in this opinion is the
12 federal case of Washington versus Strickland. Washington
13 versus Strickland -- and I believe the headnote is 16.
14 There's some initial discussion on, I believe, page 7, and
15 then going to page 21, it is a firmly established rule in our
16 jurisprudence that a judge may not be asked to testify about
17 his mental processes in reaching a judicial decision. Cites
18 follow.

19 But, in the case cited, the United States
20 Supreme Court ---- and I'm paraphrasing -- held the testimony
21 of a trial judge given 6 years after the case had been
22 disposed of in respect to matters he considered and passed
23 upon was obviously incompetent, true, the reasoning of the
24 Court for the rule prohibiting testimony by jurors is not
25 wholly applicable; whereas, the case was tried before a

February 7, 2012

1 single judge, there were not two or more minds coming by
2 different processes to the same result. Nevertheless, no
3 testimony should be received, except of open and tangible
4 facts, matters which are susceptible of evidence on both
5 sides. A judgment is a solemn record. Parties have a right
6 to rely upon it. It should not be lightly disturbed and
7 ought never to be overthrown or limited by the oral testimony
8 of a judge or juror of what he had in mind at the time of the
9 decision. There are a couple of other cites that essentially
10 reaffirm this point. I've given those cites to counsel
11 before the record ----

12 [Pause.]

13 THE COURT: Bear with me as I find it.

14 [Pause.]

15 THE COURT: Perkins versus Lecureux; I
16 think. The defendant's last name in that case was L-E-C-U-E-
17 E-U-X. The United States Court of Appeals for the Sixth
18 Circuit, headnote 4 is the applicable headnote, and I'm
19 reading simply from the headnote. A District Court should
20 not consider a trial judge's post-decision statements
21 concerning the influence various fact had on his decision.
22 Such post-decision statements by a judge or juror about his
23 mental processes in reaching a decision may not be used as
24 evidence in a subsequent challenge to the decision.

25 I've also given the cite of Ramirez versus

February 7, 2012

1 Ryan, R-Y-A-N, with the cite being 2010 US Dist. -- D-I-S-T,
2 District, LEXIS 110131; and, I think there was simply a
3 reference in that case to the Perkins case, or at least
4 that's the way I read the opinion. Folks, the State is
5 absolutely entitled to make a proffer as to Judge Johnson's
6 testimony, but I believe these decisions bear on not only his
7 testimony, but potentially the testimony of other witnesses
8 that the State intends to call.

9 Mr. Hunter?

10 MR. HUNTER: Your Honor, I had a fairly
11 substantial speech planned for this morning, but I'm not sure
12 I want to give it; but, I -- I would like to suggest that if
13 Your Honor decides this in line with those cases that Your
14 Honor has cited, none of which I understand are controlling
15 authority in ----

16 THE COURT: Yes, sir.

17 MR. HUNTER: ---- North Carolina.

18 THE COURT: Yes, sir.

19 MR. HUNTER: They're advisory. I think
20 we ought to think about the manner of the proffer. In other
21 words, I think public display of this, whether it's for
22 proffer purposes or out on the sidewalk or, as you say, in a
23 newspaper article, has the same damage to the integrity of
24 the system; and, so, depending on what happens, what I would
25 propose, and I've just thought about this and maybe we'll

1 have a better idea -- is that the State be allowed to make
2 some kind of a written proffer, that it be sealed. You know,
3 you can -- and it's fine with me for you to read it and look
4 at it; and, if after reading those proffers, you change your
5 mind, if you've made up your mind -- which, I know I'm ahead
6 of myself a little bit here -- but, I am concerned. I don't
7 want us to assume that a proffer is appropriate in public
8 because I think because of the issues that you've raised,
9 which are frankly similar to the issues we raised yesterday,
10 I don't think a proffer on the stand solves the same problems
11 you're talking about.

12 THE COURT: Yes, sir. That's why I
13 thought it was particularly appropriate and important to put
14 in the language used by the Supreme Court of Vermont
15 referencing their Code of Judicial Conduct; and, we have
16 again similar provisions under our law. I've got copies of
17 Canon 2, a judge should avoid impropriety in all activities;
18 Canon 3, a judge should perform the duties of the judge's
19 office impartially and diligently; and, let me state for the
20 record, in fairness to the State, I recognize that an
21 argument can be made by the State that Judge Johnson's
22 situation right now is he is a former judge; but, the subject
23 matter about which he would be called to testify are matters
24 which arose when he was a presiding judge. So, I've got the
25 applicable provisions of our code, which, in my view, are

February 7, 2012

1 substantially similar to the provisions in the Vermont Code
2 of Judicial Conduct.

3 MR. COLYER Judge, a couple things.

4 THE COURT: Yes, sir.

5 MR. COLYER I'm going to defer to Mr.
6 Thompson when we get to our argument, but I'm amused that
7 we're talking about the integrity of the system, that we're
8 talking about assaulting the integrity of the system when the
9 Michigan State study does nothing but attack the integrity of
10 the system, as well as the supporting information that comes
11 from the expert opinions who were allowed to testify for the
12 defense. We're not only looking at what prosecutors did
13 here. We're looking at actions of a trial judge and
14 appellate courts. It's sort of like that ----

15 THE COURT: May I interrupt for just a
16 moment?

17 MR. COLYER: Yes, sir.

18 THE COURT: For purposes of
19 clarification, Mr. Colyer, the issues involved in the claims
20 now before the Court relate to the exercise of peremptory
21 challenges.

22 MR. COLYER: Yes, sir; and,
23 respectfully, Judge ----

24 THE COURT: Yes, sir.

25 MR. COLYER: ---- peremptory challenges

1 that have attempted to be explained by the State and are
2 attempted to be explained by the State, peremptory challenge
3 that passed trial muster when the case was originally tried.

4 THE COURT: Yes, sir.

5 MR. COLYER And peremptory challenge
6 that passed appellate muster when the case went on appeal.
7 We're not talking about a situation here where we're
8 attacking a verdict with respect to guilt or innocence; and,
9 that's what the judge respectfully appeared to be doing in
10 the case that you've cited this morning from Vermont, which
11 is not controlling opinion in North Carolina.

12 THE COURT: I agree.

13 MR. COLYER But we are dealing with
14 something that is entirely new to our system of justice;
15 because the 2009 Legislature saw fit to pass this law and
16 included the language in it that they thought was appropriate
17 for it and giving no guidance to how we deal with this. So,
18 respectfully, Judge, we are not trying to attack the judicial
19 canons of ethics. We are not trying to attack judges, but we
20 think that it is important for the public to know that facts,
21 statistics are all a part of this consideration so -- and the
22 legislature; and, honestly, we feel like we're being
23 hamstrung with respect to only being able to deal with the
24 MSU statistics, and our explanatory evidence is being
25 excluded; and, I don't know honestly that we can convey in a

1 written form what we are talking about with respect to the
2 trial judges that heard the jurors speak, heard the questions
3 from the lawyers, observed the defense with respect to how
4 they dealt with it, and then either ruled on Batson
5 challenges then or were not called to rule on Batson
6 challenges by the defense and did not, on their own motion,
7 make a Batson challenge; and, then, thereafter, as the case
8 goes up, in some cases, there were questions on appeal that
9 dealt with jury selection issues and, on others, there were
10 not. Again, that's, we contend, an endorsement by the
11 appellate counsels that there was not anything of a
12 substantial nature to deal with the -- or, dealing with the
13 issue of improper jury selection; and, now, to come down and
14 deal strictly with just numbers -- it's sort of like
15 yesterday, when the defense asked Judge Dixon, well, you see
16 those numbers there; do you see those five out of however
17 many, and would you agree; and, there's been cross-
18 examination of defense witnesses, and there's been -- we
19 anticipate there will be testimony from the State that the
20 explanations, which are perfectly legal in the State of North
21 Carolina under the case law of the Supreme Court and the
22 appellate courts of this state, was discounted. I mean, if
23 you have two jurors that are excused, and one of them is
24 excused for a perfectly legal reason, how can you continue to
25 say that they were -- that the facts and figures alone make

February 7, 2012

1 it apparent that the State was racially discriminatory or
2 that race was a significant factor. It totally overlooks
3 years and years of jurisprudence and decisions in the state,
4 Your Honor; and, we ----

5 THE COURT: Well, I'm coming -- I
6 understand your argument. Go ahead, Mr. Thompson. I don't
7 want to interrupt you, sir. Go ahead.

8 MR. THOMPSON: Judge, this whole study,
9 as we talked about yesterday, being a study of exclusion,
10 they couldn't figure out why. They've accused us of all of
11 these violations, and then now they want us not to be able to
12 defend ourselves -- is -- I'm trying to ----

13 THE COURT: I'm listening

14 MR. THOMPSON: I'm trying to phrase it in
15 a way that's going to pass Rule 12, but I'm having problems
16 with, Judge.

17 THE COURT: Well, take your time, sir.

18 MR. THOMPSON: It's ridiculous to say,
19 oh, you did a terrible job; everybody saw it; and, by the
20 way, we -- you can't believe your own answers, because, you
21 know, self-reporting is a real terrible way to put it; throw
22 the judges under the bus saying they did a terrible job with
23 Batson, and so -- and they're self-reporting wouldn't be good
24 enough either; and then say, oh, by the way, and we don't
25 want you guys to be able to talk about it. To then hint, if

1 I've gotten the hint correct, to try to seal it and not tell
2 the Court -- you want to talk about the -- losing the -- the
3 public losing faith in the court system -- you accuse us of
4 all this stuff from the other side, and then you won't let us
5 publicly talk about it in a courtroom, where we're supposed
6 to be transparent and showing everything to everybody. Then,
7 they want to accuse us and then muzzle the response, and then
8 tie our hands until we can't defend ourselves -- is a
9 ridiculous proposition by the defense to suggest
10 respectfully. None of the law that has been brought up by
11 the defense is controlling in North Carolina. All of the law
12 ----

13 THE COURT: I -- let me interrupt.
14 These folks didn't bring up this law. This is law I found
15 last night.

16 MR. THOMPSON: Well -- but the law that
17 had been brought by the defense and, respectfully, the law
18 that you brought us this morning -- none of which is
19 controlling here.

20 THE COURT: Bear -- bear with me. In
21 light of your argument, I'm going to give you the option to
22 respond.

23 MR. THOMPSON: Yes, sir.

24 THE COURT: Because I think it's
25 appropriate that you respond.

February 7, 2012

1 MR. THOMPSON: Yes, Your Honor.

2 THE COURT: This is the United States
3 Supreme Court. Bear with me. The testimony of the trial
4 judge given 6 years after the case had been disposed of, in
5 respect to matters he considered and passed upon, was
6 obviously incompetent. True, the reasoning of the Court --
7 the rule -- and they're analogizing to the rule applying to
8 jurors -- prohibiting testimony by jurors, is not wholly
9 applicable, for -- as the case was tried by a single judge,
10 there were not two or more minds coming by different
11 processes to the same result. Nevertheless, no testimony
12 should be received except of open and tangible facts, matters
13 which are susceptible of evidence on both sides. A judgment
14 is a solemn record. Parties have a right -- a right --
15 pardon me -- to rely upon it. It should not lightly be
16 disturbed and ought never to be overthrown or limited by the
17 oral testimony of a judge or juror of what he had in mind at
18 the time of the decision.

19 MR. THOMPSON: What that did -- what that
20 case talked about was amended an order, changing what the
21 judge said because, later on, the family said he shouldn't
22 have done that.

23 THE COURT: Well ----

24 MR. THOMPSON: So, it -- it -- we're not
25 talking about that. We're talking a completely different

1 animal here.

2 THE COURT: Okay.

3 MR. THOMPSON: What we're talking about
4 is all right, Judge, if you would have heard these facts, if
5 the defense would have made an objection at the time, would
6 that -- would that survive a Batson challenge, as an example
7 of what we're trying to get into. We're not getting into why
8 they made their judgments. One of the cases that we relied
9 on dealt with a death sentence given by a court. A judge
10 actually decided death, and he was being probed as to why he
11 decided death. That's not what we're talking about here,
12 obviously completely inapplicable in North Carolina law; but,
13 -- and has nothing to do with what we're talking about. It's
14 in addition -- now, if the defense is willing to stipulate
15 that, if no Batson challenge was made, then no Batson
16 violation existed ----

17 THE COURT: Well, doesn't the record
18 show that, Mr. Thompson? Doesn't the record reflect whether
19 a challenge was made or not?

20 MR. THOMPSON: It does; but, if one was
21 never made, I'm happy to stipulate that no race-based strike
22 was done.

23 THE COURT: Well, by its absence from
24 the record ----

25 MR. THOMPSON: That can be argued.

February 7, 2012

1 THE COURT: Yes, sir.

2 MR. THOMPSON: But what they did was
3 attack the argument. When they put on their evidence, they
4 said defense attorneys -- they won't Batson, because they're
5 afraid of making a prosecutor mad. By implication, the judge
6 may not step in. The concept of I don't want to accuse a
7 prosecutor of doing something wrong, so I kept my mouth shut,
8 they attacked it; and, then, they're trying to take away our
9 ability to rebut that -- is completely improper and it's
10 unreasonable and untenable to ask the State -- we're going to
11 heap all this stuff on you, but we don't want you to defend
12 yourselves; and, if you do, you've got to do it in secret and
13 seal it. That brings this Court in disrepute by throwing
14 stones at us and sealing our responses. I strongly disagree
15 with the concepts that have been brought from other courts
16 and twisted by the defense into fitting here. This doesn't
17 fit. This is not what we're trying to do. We're trying to
18 put judges up to testify about the reputations of the people
19 in the courtroom. Would you expect Randy Gregory and Ed
20 Brady, if they saw a Batson violation, to step up? Would you
21 expect that they would object if you -- did you evaluate
22 their competence level? Did you have an opportunity to do
23 that? Certainly, they did. Certainly, they would have; but,
24 we haven't been able to put that into evidence under these --
25 under this argument. The Batson analysis would be thrown out

February 7, 2012

1 and sealed under the defense's argument, which is just
2 unreasonable; and, I -- again, I would consider it to be
3 error, respectfully.

4 THE COURT: Yes, sir. Well -- and I
5 mean no disrespect, and I'm confident you don't as well. The
6 bottom line, Mr. Thompson, is, whether we like the law or
7 not, all of us have an obligation to follow the law; and, the
8 law is well settled.

9 MR. THOMPSON: It's that last part, that
10 I -- that last couple of words -- the law is not well
11 settled, not with any of this. We've all said it in open
12 court. The law is absolutely not well settled; and, we --
13 you're setting the precedent that you're completely typing
14 the State's hands in defending itself, and we object
15 strenuously.

16 THE COURT: Well, I understand. What
17 is your position, folks? I'm going to make a proposal in a
18 moment. You may want to allow me to do that, so you can take
19 it into account. Your proposal is to have the State proffer
20 in writing what the contended testimony would be, have the
21 Court review that, and make a determination based on what's
22 submitted as to what may be admissible, what may not be
23 admissible, seal it for purposes of appellate review,
24 correct?

25 MR. HUNTER: Yeah; but, I'm -- you

1 know, I'm certainly willing to listen. If they would prefer
2 some kind of an in-camera proceeding, if they say it can't be
3 done in writing -- I don't understand. Anybody's testimony
4 can be reduced to writing. I don't understand what it is
5 about judges' testimony ----

6 THE COURT: We already have the
7 testimony reduced to writing in their proposed exhibits, 51
8 and 52.

9 MR. HUNTER: Yeah. Those are -- I
10 introduced those; but, I'm not sure if they would propose
11 them as exhibits; but, that's right, Your Honor. I agree;
12 but, in any event ----

13 THE COURT: I apologize. 51 or 52, I
14 believe, are the notes, the handwritten notes, of Judge
15 Johnson himself. One of them ----

16 MR. HUNTER: Yeah. 52 is his notes and
17 51 is a report he prepared.

18 THE COURT: Yeah.

19 MR. COLYER: And we did intend to mark
20 those as State's exhibits and talk about them.

21 THE COURT: Yes, sir. Yes, sir.

22 MR. HUNTER: So, I -- they're marked as
23 defense exhibits just for purposes of our motion.

24 THE COURT: Yes, sir.

25 MR. HUNTER: I want to go back just a

1 little bit and sort of set this in perspective.

2 THE COURT: Yes, sir.

3 MR. HUNTER: Especially in light of --
4 of the State's argument. You know, months ago, this issue of
5 whether judges were appropriate to testify in these cases was
6 raised. It was raised in connection with the State
7 subpoenaing you, as you well know.

8 THE COURT: Yes, sir.

9 MR. HUNTER: You determined, at that
10 time, you did not believe you were a material witness. We
11 went over and saw Judge Sumner in another county. He agreed
12 the State had entirely failed to demonstrate that you were a
13 material witness. I'm not saying that's controlling on this
14 question, but I do think it's relevant to this question. Now
15 -- and the State also said they're planning on calling these
16 other judges. They gave us official notice that they
17 intended to call the judges, and we filed a motion saying we
18 don't think these judges -- that it's appropriate for these
19 judges to testify for the reasons we gave on January the
20 19th. At that time, we did not have any report from Judge
21 Johnson or any report from any judge; and, we frankly did not
22 really know exactly what the State was proposing; and, so,
23 there's very little in that motion about the content of the
24 proposed testimony, but just about the status of the judges
25 as -- as judges; and, we said we didn't think it was

February 7, 2012

1 appropriate for them to testify. We -- our purpose is not to
2 hamstring the State. Our purpose is not to gut the State's
3 -- or, to be unfair to the State. We have one
4 responsibility. That's to represent our client, and we're
5 going to do that to the best of our ability; and, as Your
6 Honor has already observed, we are -- our presentation is
7 limited by the law. Their presentation is limited by the
8 law. So, I don't appreciate -- and I don't think it's
9 appropriate to characterize this as we are doing something we
10 have a choice about. If we let evidence in that we think is
11 not properly in under the law, we're committing malpractice.
12 We are unethical to our client. So, the -- these -- this
13 should not be personalized. This is what we're doing. This
14 is what we're supposed to do; and, the idea that we are
15 heaping disrespect on the State or heaping disrespect on the
16 judiciary -- we are following the law. We are following the
17 law as to the procedure. We are following -- we are
18 following the law; and, we're just saying the State should
19 have to follow the law too, the same law, the law that my co-
20 counsel -- in Mecklenburg County -- that I have in Orange
21 County, where I live; that Jay has in Durham County. When
22 we're down here visiting in Fayetteville, it's the same law;
23 and, that's all we're asking; nothing more, nothing less. So
24 -- so these characterizations, Your Honor, I don't think are
25 helpful. I think they again cast this hearing and our

February 7, 2012

1 efforts in disrepute, which I think is damaging and not
2 proper; and, I just think -- and, so far, we have avoided it;
3 but, I think -- and I am entirely convinced of the State's
4 sincerity that they're unhappy about their ability to respond
5 to our case. I don't think there's any question about that.
6 I would stipulate to that; but, their unhappiness and the
7 strength of their feelings do not substitute for law. They
8 still have to find a lawful avenue for providing it, just
9 like we had to. We couldn't put on whatever we wanted to.
10 We had to follow the law. The State has to follow the law.
11 So, we know -- we knew very little about the content; but,
12 since then, we've received two reports from Judge Johnson,
13 one dated January 23rd, and that's marked Defendant's Exhibit
14 51; and the other was updated, handwritten, that we received
15 yesterday, marked Defendant's Exhibit 52. When the State
16 announced they were going to intro -- to bring Judge Johnson
17 onto the stand, we renewed our motion that we had made
18 January 19th, long before the hearing started, about our
19 concern about these judges testifying. I have not reviewed,
20 but I was told yesterday that the State has provided more
21 than 100 pages that I'm not sure about what it is -- it may
22 be mostly transcripts -- that are from Judge Thompson in
23 anticipation of his testimony in this matter. I heard Mr.
24 Thompson argue several times yesterday that where the trans
25 -- the official transcript of a trial is available, that does

February 7, 2012

1 not mean other witnesses are not free to come in and testify
2 about the content of those transcripts. He said there's no
3 law like that; but, I -- I believe that's precisely what the
4 best evidence rule provides, which is Rule 1002 ----

5 THE COURT: Yes, sir.

6 MR. HUNTER: ---- under our rules of
7 evidence; and, if -- if you look at the first case note in my
8 book of Civil Procedure and Evidence, and look under Rule
9 1002 -- I'll read the case note. The so-called best evidence
10 rule merely requires the exclusion of secondary evidence
11 offered to prove the contents of a document whenever the
12 original document itself is available. So, for the proof of
13 the contents of that document -- that is, what happened, what
14 that -- what that juror said -- we have the proof for that.
15 We have the best evidence for that; and, other evidence about
16 that, I believe, is excludable under Rule 1002. That's not
17 something I pulled out of my hat. That's a rule that applies
18 to everybody. So, re -- and this is -- this is for any
19 witness. It doesn't matter whether -- I haven't even gotten
20 to their status as a judge, yet, Your Honor. Now, you'll
21 recall the State has commented that, in our case, Brian
22 Stevenson looked at some portions of some transcripts and
23 offered expert opinion based on what he read. He read some
24 portions of transcripts and then he commented on those as to
25 what -- his interpretation of it. Why can't the State's

1 witnesses do exactly the same thing? I mean, I think that's
2 the question. We had a procedure for identifying persons as
3 experts in this case. They identified two experts. Those
4 two experts, if they have expertise in this area, can get up
5 there and comment all they want and offer expert opinions.
6 None of these judges were identified as experts; and, again,
7 I haven't even gotten to their status as a judge. So, I
8 think there are two independent bases from -- excluding
9 almost everything Judge Johnson has in these two reports
10 without even getting to the question of their status as a
11 judge; and, this is controlling North Carolina authority. I
12 don't think there's any dispute on the foundation of these
13 two points; one, that the transcripts are in evidence, and
14 they are the best evidence of whatever they say. So, as to
15 the contents of those things, there is no competent secondary
16 evidence; and, two, that these judges have not been noticed
17 to us as experts.

18 THE COURT: Well, the recitation, if I
19 understood correctly from Mr. Colyer yesterday -- the
20 indication, rather, was that, as least as it relates to Judge
21 Johnson, who is a fact witness, who's not being called as an
22 expert witness.

23 MR. HUNTER: Well, if -- if -- I --
24 maybe that is what he said, but if you -- if you read at
25 least the handwritten report ----

1 THE COURT: Yes, sir.

2 MR. HUNTER: ---- it's nothing but

3 legal ----

4 THE COURT: Yes, sir.

5 MR. HUNTER: ---- anal -- I'm not

6 criticizing, but I'm just saying it's nothing but legal anal

7 -- that is not factual. That's legal analysis.

8 THE COURT: Yes, sir.

9 MR. HUNTER: ---- and, in his original

10 typewritten report, there is some fact -- most of which is in

11 -- already in the transcript.

12 THE COURT: Yes, sir.

13 MR. HUNTER: And then there's a lot of

14 analysis and opinions about the quality of the various

15 advocates and so forth, all of which is expert opinion.

16 THE COURT: I agree.

17 MR. HUNTER: And, of course, the -- the

18 cardinal rule for opinion testimony, under 701 or 702, lay or

19 expert witness, is -- is it helpful to the finder of fact.

20 THE COURT: Yes, sir.

21 MR. HUNTER: So, it's really -- if you

22 don't think it's helpful, that resolves the issue; and -- and

23 -- and so I just -- and, again, that's North Carolina law.

24 That's not from Vermont. That's not the US Supreme Court. I

25 didn't realize the US Supreme Court law didn't apply, but

1 that's North Carolina law. Now, we turn, finally, to what
2 we've spent most of our time talking about -- but, I don't
3 want you to forget about these two separate bases for
4 excluding 95 percent of what I understand -- and it's just an
5 understanding. I may be mistaken -- of what I think Judge
6 Johnson and these other judges are going to testify to. Now,
7 we turn to the special problems inherent in a trial judge
8 testifying or offering affidavits about what happened or did
9 not happen at a trial, what the judge thought about what
10 happened, what he thinks about it now, what he might have
11 done if things had been handled differently, what he would
12 have done if he had seen the State do something different,
13 what he would have done if the defense had objected to
14 something. I mean, I think that's all the classic kind of
15 material that the cases Your Honor talked to us about earlier
16 this morning is intended to cover. Another point that the
17 State made yesterday was that some of the cases we cited had
18 to do with cases on appeal, which is perfectly true. Some of
19 them were, and it had to do with judges or the State trying to
20 offer affidavits of judges once the record on appeal had been
21 settled; and, the courts -- the appellate courts -- I think
22 both the Court of Appeals and the Supreme Court said we're
23 not interested; we've got the full transcript; we've got the
24 record on appeal; we're not going to accept an affidavit from
25 the trial judge after that; and, the State also argued that

February 7, 2012

1 the only reason to worry about these judges testifying is
2 because it might confuse a jury; but, it seems to me those
3 two points are at war with one another because the State
4 Supreme Court's concern wasn't about confusing any jury. The
5 State Court of Appeals' concern wasn't about confusing any
6 jury. It was about the integrity of our processes and not
7 allowing judges to be witnesses. So, those two points, I
8 think, are inconsistent. I think the interest being
9 protected in those cases and in the cases Your Honor has
10 raised here is not about confusing jurors, but it's the
11 integrity -- it's, number one, the integrity of the written
12 record, sort of the same interest as the best evidence rule,
13 but sort of the super best evidence rule when it comes to the
14 record we keep in our judicial process; but, it's also a
15 protection of the judiciary as an institution; and -- and I
16 think that is a very important point; and, it brings me to
17 State v. Simpson, which is North Carolina law, which was
18 cited in our original proceedings; and, Simpson actually
19 quotes from another case -- and let me see if I can find it,
20 Your Honor.

21 [Pause.]

22 MR. HUNTER: And, this is on page 4 of
23 our motion in limine; and, I'll just read the first sentence
24 of what the Court said. This is from Carroll v. Junker,
25 which is a Washington case, but it was cited in State v.

1 Simpson. In other words, when our North Carolina Supreme
2 Court decided State v. Simpson, they cited Carroll v. Junker
3 in support; and, here is the quote, only in the rarest
4 circumstances should a judge be called to give evidence as to
5 matters upon which he has acted in a judicial capacity; and,
6 these occasions, we think, should be limited to instances in
7 which there is no other reasonably available way to prove the
8 facts sought to be established. No other -- and that is, in
9 fact, the rule we contend that was set down in State v.
10 Simpson, that the State has to show that there's no other way
11 they can present this evidence and, with specificity, say
12 what the evidence is. So, I think there are independent
13 bases, in addition to the judge's status, that this evidence
14 should be kept -- left -- kept out almost in its entirety;
15 and, then, there are the additional concerns of the judges'
16 status. These are not illegitimate or ridiculous concerns.
17 I think they are just the opposite. I think they're very
18 serious. I think the prevailing law is on our side on this
19 point, and I think what the State has is characterizations
20 and accusations and -- and, frankly, expression of ire, which
21 does not -- which I understand and I've been there, but it is
22 not a substitute for the law; and, so, I just thank you for
23 your patience, and I think I'll sit down now with these
24 judges should not testify because the law is clear they
25 should not testify, and not because of anything else. If

February 7, 2012

1 they want to get this evidence in or any evidence in, there
2 was a proper way to do this, and there were options. If they
3 want character evidence about themselves, there are plenty of
4 witnesses, I'm sure, who would be happy to offer character
5 evidence for them. The idea that only these judges can offer
6 character evidence -- of course, they would rather have
7 judges, and the reason they prefer judges is just for that
8 improper reason, that somehow that will be given some extra
9 credibility, some extra expertise by somebody down the line,
10 and that's -- that's why they want the judges, I think; but,
11 -- and I understand it, and I'm not criticizing, but that's
12 just why it's not appropriate for the judges to get in here
13 and offer that testimony. So -- thank you very much.

14 MR. THOMPSON: If I may, Judge?

15 THE COURT: Yes, sir.

16 MR. THOMPSON: State v. Simpson also says
17 it is generally accepted that a judge is competent to testify
18 as to some aspects of a proceeding previously held before
19 him.

20 THE COURT: I don't disagree with that
21 proposition.

22 MR. THOMPSON: It quotes other places
23 around the State. So, no court has said a judge can't
24 testify.

25 THE COURT: I don't disagree with

1 that, Mr. Thompson

2 MR. THOMPSON: The best evidence rule
3 doesn't apply here as well. The best evidence is talking
4 about the documents. There is a document that was created
5 about live testimony and the things that went on in a
6 courtroom. The best evidence of things that went on in a
7 courtroom are people that were in the courtroom at the time;
8 the transcripts, we've talked about a hundred times in here,
9 don't have inflections of voice. They don't contain
10 information about reputation of the people. There's lots
11 more that we're talking about than just what's in the
12 transcript; and, there's been testimony about lots of
13 different things that prosecutors and other folks take into
14 consideration when doing peremptory strikes that are not
15 going to be written in the transcript. So, to say best
16 evidence applies and that's it is an oversimplification of
17 the simple truth that the best evidence of what happened in
18 the courtroom should be testified by the people that were
19 sitting in the courtroom.

20 THE COURT: Well, I think that
21 reference to best evidence relates to the best admissible
22 evidence.

23 MR. THOMPSON: Yes, sir; and, we've
24 already established ----

25 THE COURT: Yes, sir.

1 MR. THOMPSON: ---- the testimony of
2 judges is admissible. It's relevant. It's helpful. Your
3 Honor is in charge. Your Honor is making the full decision
4 here. What they clearly want to do, by asking you to seal
5 this -- and they kept looking back, like, well, we're not
6 going to make this public, is shut down -- it's a PR stunt
7 that they're pulling.

8 MR. HUNTER: Your Honor, I'm going to
9 ----

10 THE COURT: Yes, sir. I'm stopping
11 ----

12 MR. THOMPSON: They've ----

13 MR. HUNTER: They've complained about
14 that before ----

15 THE COURT: Yes, sir.

16 MR. HUNTER: ---- and, with all due
17 respect, this is -- this is unethical behavior; and, it's not
18 the first time; and, I would just like the Court to -- I
19 resent it, and it's not appropriate, and it's not true.

20 MR. THOMPSON: To seal ----

21 THE COURT: Mr. Thompson, bear with
22 me. First of all folks, I, at least on one other occasion,
23 reminded all of us we are officers of the Court. We have an
24 obligation to make sure our conduct is in accord with the
25 applicable provisions of the Rules of Professional

1 Responsibilities ----

2 MR. THOMPSON: Yes, sir.

3 THE COURT: ---- and in accord with
4 the Code of Judicial Conduct. This case is not being tried
5 in a public forum. This case is being tried in a court of
6 law based on law and evidence. That's the responsibility
7 that I have as the trial judge, to make sure that this case
8 is considered -- evidence in the case is in accord with the
9 applicable rules of evidence as is set out in 15A-2010, et
10 seq. The rules of evidence applying to MARs apply to this
11 proceeding. The rules of evidence govern. I understand the
12 fervor with which you're representing your side in this case.
13 I understand the fervor with which counsel for defendant are
14 representing their side in this case. That is to be
15 expected. That is what this system is all about; but, all of
16 us are governed by rules, rules of conduct, rules applying to
17 evidence, rules applying to what it is that we are charged
18 with the responsibility of doing in this case. This case is
19 not to be tried in a public forum. This case is to be tried
20 on the basis of the evidence and law applying to this case.

21 MR. THOMPSON: We're not asking it to be,
22 Judge; but, the defense has implied they want to seal the
23 responses and the evidence of the State of North Carolina.
24 That is inappropriate. To close the courtroom or have us
25 give testimony under seal is the -- are the words -- it's not

February 7, 2012

1 a transparent showing of what happens to the people who are
2 sitting out in this audience and wanting to hear this case.
3 As well, it's important to note, with the Simpson quote that
4 was given by the defense, that only in an extraordinary
5 circumstance or an exceptional circumstance should a court --
6 I can think of no more exceptional circumstance than this
7 case, respectfully.

8 THE COURT: Yes, sir. Okay. Mr.
9 Colyer?

10 MR. COLYER I will try to temper my
11 remarks, Your Honor.

12 THE COURT: Yes, sir.

13 MR. COLYER: But I did want to approach
14 a couple of things. One was with respect to the status of
15 the judges. As we've mentioned in here before, you're the
16 referee. You're the referee here. You decide what comes in,
17 and there are ways that we can deal with our objections and
18 the -- whether or not we want the evidence to come in.

19 THE COURT: Yes, sir.

20 MR. COLYER We understand that.
21 You're the referee in terms of listening to the witnesses,
22 looking at the evidence. Our position is the trial judges
23 who we have noticed by subpoena to call here were the
24 referees essentially with respect to the actions of the
25 district attorney, or the assistant district attorney, in the

1 particular cases here in Cumberland County that dealt with
2 peremptory strikes against blacks; and, there is no question
3 that there is a transcript. We're not arguing that. The
4 completeness of those transcripts, even with respect to
5 missing pages, may be at issue at some point.

6 THE COURT: Yes, sir.

7 MR. COLYER And if that's all the
8 Court has, if there are missing pages in a transcript, on the
9 defense exhibit and the State's attempt to make sure that
10 same exhibit is in front of the Court, that's a hole.
11 There's also a hole with respect to what the judge saw, the
12 intonation of voice, what they heard, the inflection, the
13 innumerable cues or qualifiers that went with the spoken
14 word; but, our position is, Judge, if you really read the
15 spoken word with respect to -- and I'm talking about you.
16 I'm talking about you generalized. If you read the spoken
17 word with respect to the jurors that were excused, there were
18 reasons in black and white in the transcript for why they
19 were excused ----

20 THE COURT: Yes, sir.

21 MR. COLYER ---- and it had nothing to
22 do with race.

23 THE COURT: Okay.

24 MR. COLYER: That apparently is not
25 sufficient for the statisticians. At one of our hearings, I

February 7, 2012

1 kind of -- and I hope not flippantly -- but kind of suggested
2 that it almost sounded like that the way this case was going
3 to be tried, from the defendant's perspective, was to put the
4 numbers up and get us to respond to the numbers and make a
5 decision based strictly on the numbers; and, that's what I'm
6 talking about when -- when you see witnesses questioned
7 about, well, see where there was five out of ten jurors;
8 that's 50 percent, isn't it? Sure, that's 50 percent. We're
9 not arguing with those numbers; but, the qualification of
10 those five, if you looked at the legal reasons and subtracted
11 them from the total, it might be down to two or one ----

12 THE COURT: Yes, sir.

13 MR. COLYER ---- of the ten, which is
14 a significant change in the stats. They would reduce three-
15 and-half-times down to one point something times.

16 THE COURT: May I interrupt for just a
17 second?

18 MR. COLYER Yes, sir.

19 THE COURT: One, you've already
20 pointed out that those factors can be adduced by other
21 evidence. By way of example, Judge Dixon, who was a
22 prosecutor in this defendant's case, testified yesterday as
23 to those matters reflected in the record. You have other
24 prosecutors, either through affidavits or through live
25 testimony, who can come in and proffer reasons which may

1 impact on the statistics that have been offered by counsel
2 for the State [sic]; and, I guess, simply for purposes of
3 pointing us to where my mindset is, based on what I
4 understand the law to be, I'm going back to my decision. In
5 talking about the judge's role in that case, it said the role
6 -- judge's role, at the post-conviction relief hearing, is
7 disturbing, both because he was asked to speculate about
8 evidentiary -- the evidentiary basis for the jury verdict,
9 which is arguably not applicable here, and because he
10 testified to the basic fairness of a criminal trial for which
11 he was the presiding judge. Now, as I understand it and as I
12 see what's reflected in State's Exhibits 51 and 52, the gist
13 of the testimony, at least in part, in major part, is to --
14 the State's position -- we're entitled to have a judge come
15 in and say they were in the courtroom, they had an
16 opportunity to observe, and their viewpoint is this trial was
17 fair.

18 MR. COLYER Judge, if I could -- if I
19 could back up one step with respect to that.

20 THE COURT: Yes, sir.

21 MR. COLYER: They're going to say that,
22 with respect to these jurors who are in question, that they
23 had the opportunity to observe, hear and see what the jurors
24 said and how they said it; and, at the time, when the State
25 exercised a peremptory challenge, if the defense didn't raise

1 a Batson, they did not see any reason to raise a Batson on
2 their own motion; and, what they heard was a legitimate
3 reason for striking the juror, else they would have acted;
4 and, that's -- that's what the statistics are overlooking,
5 respectfully, Your Honor. The defense keeps saying read the
6 transcript, read the transcript, read the transcript. Well,
7 we do. We want you to read the transcript and see what the
8 jurors said and then take into consideration what the judges
9 who heard it said with respect to why they acted or didn't
10 act; and, then, you will know that the statistics that have
11 been offered alone are skewed because they include people in
12 the statistics that were legally excluded; and, that legal
13 exclusion has been endorsed by the Supreme Court with respect
14 to the appellate opinion in the case -- whatever -- the
15 particular case, and it is endorsed by the trial judge, by
16 not intervening ex mero motu and changing it because there
17 was no reason to change it; and, that's why I kind of said,
18 well, it looks like we're just going to get down to numbers,
19 our numbers versus their numbers; but, their numbers don't
20 take into consideration those factors that are explanatory.
21 They say that they're self-explanatory and you can't trust
22 it. Well, we're saying, from the affidavits or from the
23 spreadsheet that we have asked the prosecutors to provide,
24 that they have criticized as being self-explanatory and you
25 can't trust it, it's not just self-explanatory. It's

February 7, 2012

1 supported by the record and the judges who heard it endorsed
2 it based upon what they did or did not do.

3 THE COURT: Yes, sir.

4 MR. COLYER Judge, the stats are not
5 alone -- and there's one other thing that I want to mention
6 here. We're talking about characterizations.

7 THE COURT: Yes, sir.

8 MR. COLYER Part of our frustration,
9 perhaps, and part of our reaction is we've been vilified
10 literally in the media by supporters of folks on that side of
11 the courtroom. We've been called racists. We've been called
12 unethical. We've been called liars when we tried to subpoena
13 the Court just like we did other judges. We went to a
14 hearing out of county and Judge -- the judge there said I
15 don't care how many judges you have, you're not going to be
16 able to present it. We had a witness that we couldn't even
17 call. So, then, from law professors and folks who were, I
18 guess, maybe sympathetic to the defense side, again rose up
19 and said those guys are being unethical; they're being
20 racists; they're lying about what they're doing; they're
21 really try to get Judge Weeks off of this case because he's a
22 black jurist; and, that was never our intention. Never; and,
23 now, it appears that what we are being told is that our
24 evidence is not good enough, that the way we were going to
25 try to defend ourselves is literally, Judge, outside of the

February 7, 2012

1 box. What we're talking about with respect to the judicial
2 canons of ethics that you've cited and the opinions, this is
3 a whole new creation; and, the language of the statute
4 itself, as we've pointed out here, says you can call this
5 person, this person, this person, or others. It doesn't
6 include judges. It doesn't exclude judges; and, perhaps
7 there's a reason why they didn't mention judges, because they
8 didn't want one side or the other, at that point, to feel
9 like that was the only way that they could prove or disprove
10 their case; but, the situation is it's -- it's a fluid
11 situation. It's a dynamic situation. It's new law; and,
12 with respect to that, we wholeheartedly contend that one of
13 the ways that we could legitimately prove the explanations
14 that we have offered is to call the judges. One other thing
15 that I would mention -- and then I'll sit down -- even with
16 respect to the affidavits -- there was some discussion
17 yesterday about the affidavits. I filed an affidavit ----

18 THE COURT: Yes, sir.

19 MR. COLYER ---- to help with the
20 explanation for Doctor Katz. Now, there's some question as
21 to whether or not my affidavit can come in because I'm an
22 advocate. When I did that affidavit, I was not advocating
23 anything other than what the juror said; and, that affidavit
24 can be matched up with the jurors that I examined their
25 testimony in the cases that I did; and, I've tried to self-

1 report what they heard that we did, but that's not good
2 enough. That's the self-explanation reported to the experts,
3 and it's not sufficient. What we're looking for is
4 corroboration and, essentially, endorsement of our reasons
5 so, when you make your decision, you will have, in addition
6 to what the juror said, additional information to help you
7 decide whether or not we improperly excluded black jurors
8 with a peremptory strike. We contend we did not, and we
9 contend this is a way for us to prove it; and, respectfully,
10 we would ask you to reconsider your ruling.

11 THE COURT: Well, I haven't made one
12 yet.

13 MR. COLYER Yes, sir, I know.

14 THE COURT: Yes, sir.

15 MR. COLYER: To consider this when you
16 make your ruling, Your Honor. I misspoke.

17 THE COURT: Yes, sir. Folks, let me
18 -- I recognize the emotion that's involved in these
19 proceedings. I've known counsel on both sides of this case
20 for a considerable period of time. I have respect for
21 counsel on both sides in this case. My obligation is to
22 follow the law. My obligation is to do the best I can
23 recognizing, as Mr. Colyer has pointed out, and as all of us
24 recognize, there isn't very much in the way of guidance in
25 this particular situation. I've -- the cases that I've put

1 on the record in this case are put on the record because I
2 believe there is some degree of guidance about the law
3 generally that is applicable to this case.

4 Your position, as I understand it, is that,
5 consistent with the precedent that we've talked about this
6 morning, my responsibility is to exclude the evidence.

7 Mr. Colyer, Mr. Thompson, my understanding of
8 your position is that -- and if I'm incorrect, feel free to
9 let me know -- one, we believe we're entitled to put it on in
10 its entirety; two, if you disagree with that, Judge Weeks,
11 then we're entitled to at least offer testimony that may be
12 otherwise admissible in this case in light of what the
13 precedent is, in one form or another; and, what I mean by
14 that specifically is through an offer of proof. Am I
15 misunderstanding?

16 MR. COLYER No, sir.

17 THE COURT: Okay. I mentioned, I
18 believe it was yesterday, that a term which was used early on
19 in these proceedings is a term that, in my view, has larger
20 meaning. That term is transparency. Do you folks want to be
21 heard further?

22 MR. JAMES FERGUSON: Well, Your Honor, let me
23 just say this. As to the offer of proof, assuming that Your
24 Honor follows what precedent there is -- we think it's clear
25 ----

1 THE COURT: Yes, sir.

2 MR. JAMES FERGUSON: that these judges cannot
3 testify. The question then becomes how do we preserve for
4 the record their right to state their objection.

5 THE COURT: Yes, sir.

6 MR. JAMES FERGUSON: There are a number of ways
7 to do that. One has already been suggested, and that is that
8 they make a written submission of what they propose to offer
9 through these judges; and, that can be done in a way that it
10 doesn't undermine the very rule that says judges cannot
11 testify, and that would be to preserve it -- not for the
12 public because they seem to have some interest here -- but to
13 preserve it for a review in court should -- should that need
14 arise. If, for some reason, they cannot reduce it to
15 writing, then there are ways to put it into the record live,
16 I would suggest to the Court, to preserve it without
17 undermining the ruling such that it becomes a public aspect
18 of the trial. In other words, you can do that in camera,
19 where the Court could hear what the witness had to say, a
20 record could be made of what they had to say; and, then, it
21 could be preserved in that way, without that becoming a part
22 of the public record in this case; and, I hasten to say,
23 Judge, that happens all the time in matters that the Court
24 could consider that, for one reason or another, do not need
25 to be made public. So, this -- if the Court should choose to

February 7, 2012

1 treat this in a way that it preserves their right to raise
2 their objection, but at the same time preserves the integrity
3 of the system, which is what these cases that say judges
4 can't testify talk about ----

5 THE COURT: Yes, sir.

6 MR. JAMES FERGUSON: ---- then that can be
7 done. So, we propose to the Court a way to -- to preserve
8 their right to object and to have it reviewed, but to do that
9 in a way that it doesn't bring in the testimony in a public
10 way, which would be in violation, we submit, of the
11 principles that underlie the policy that judges should not be
12 allowed to testify in cases about their rulings, about their
13 observation of the proceedings, where there is a record
14 already of those proceedings. I'm not going to go back and
15 argue the merits any more. I think that's been done fully
16 already; but, I do -- Judge, I'm compelled to say, for the
17 record, that we have no purpose to hamstring the prosecution
18 -- the State in this case. We have no purpose to prevent
19 them from presenting their case. They have a right to do
20 that. All we ask is that the same rules apply to them as
21 apply to us; and, that is, that we abide by the rules of
22 evidence; and, those cases that Your Honor has read were
23 cases that talk about certain evidentiary rules and the
24 policy underlying those rules. I want to make clear that our
25 case is not based on racists on that side of the table. They

February 7, 2012

1 are distinguished prosecutors. We recognize them as such.
2 We respect them as such. We have never said, from this
3 council of lawyers here, that they are racist prosecutors.
4 That's not our case. Our case is simply that race was a
5 significant factor in jury selection; and, we do not contend
6 that that means that the prosecutors all have to be racists.
7 It means that race was a significant factor; and, one way to
8 show that is through statistics; and, I hasten to say that we
9 did a study; they did their study; and, those studies are
10 being presented to the Court. They had every opportunity,
11 just like we did, to do statistical studies if they chose to
12 do that. They chose not to do that. They chose rather to
13 criticize our statistical evidence and to offer the
14 commentary of prosecutors. That's their right to do that;
15 but, they're not doing that because we forced them to do it.
16 They're doing it because they chose to. They have every
17 right to present whatever evidence they wish under the rules
18 of evidence; and, all we're insisting on is that they and we
19 and the Court follow the rules of evidence.

20 THE COURT: Yes, sir.

21 Okay, Mr. Thompson, Mr. Colyer, you folks want
22 to be heard further?

23 MR. COLYER No, thank you, Your Honor.
24 We've said our peace.

25 THE COURT: Folks, consistent with the

1 case law that I recited earlier on the record, I am going to
2 allow the State to make an offer of proof. They can choose
3 to do that either in writing or through live testimony. Let
4 me know what your preference is, and we can accommodate you
5 in a way that will not violate the policies, in my view, the
6 sound policies, underlying the reasoning set out not only in
7 [indiscernible] case, recognizing that's not precedent, but
8 also in Washington versus. Strickland and the other case law
9 that's been discussed on the record in this case.

10 Mr. Colyer, do you want a few moments to think
11 about that, sir?

12 MR. COLYER I think we've thought
13 about that, Your Honor. I didn't mean to interrupt you, but
14 I was going to try to save you some time.

15 THE COURT: Yes, sir.

16 MR. COLYER We would prefer to be able
17 to call our witnesses live as opposed to submitting a written
18 document.

19 THE COURT: Absolutely. That's your
20 right; and, I guess the question now becomes how that will be
21 accomplished so as not to violate the applicable provisions
22 of law and ethical concerns.

23 MR. COLYER: Judge, without giving up
24 our objection to ----

25 THE COURT: Yes, sir.

1 MR. COLYER: ---- the Court's ruling
2 with respect to not being able to call them essentially in
3 our case in chief and being required to do an offer of proof,
4 I think Mr. Ferguson's suggestion about an in-camera type
5 proceeding ----

6 THE COURT: Yes, sir.

7 MR. COLYER: ---- essentially excluding
8 the media, excluding the public, so as to preserve the
9 concerns that the Court has, would be the better way to do
10 that; and, I don't know any other way to do it than in this
11 courtroom by excluding the public and the media.

12 THE COURT: Well, that raises an
13 entirely -- another issue, an entirely new issue, pardon me;
14 and, that -- I'm confident, we've got representatives from
15 the press here, who want to be heard on that issue. So, I'm
16 obligated, as a matter of law, to give folks an opportunity
17 to be heard in that respect. Anybody disagree with that?

18 MR. THOMPSON: No, sir.

19 MR. COLYER: Judge, we do not agree
20 with that; and, when I suggested that, I'm not -- I'm not
21 endorsing necessarily that procedure; but, I'm saying, of the
22 two procedures that Mr. Ferguson talked about, that's the one
23 that we would prefer.

24 THE COURT: Yes, sir.

25 MR. COLYER: And we're not -- we're not

1 trying to keep the media out. We're just trying to say
2 that's the better preference in terms of preserving the
3 record ----

4 THE COURT: Yes, sir.

5 MR. COLYER ---- and is in the best
6 form.

7 THE COURT: Yes, sir.

8 MR. COLYER: And, Judge, we are not
9 trying to -- I want to qualify this so that it doesn't look
10 like that we are trying to trod on anybody else's
11 constitutional rights ----

12 THE COURT: Yes, sir.

13 MR. COLYER: ---- or that the State is
14 doing anything to prevent the free access of information
15 under the First Amendment. So, we're not suggesting that is
16 necessarily our position; but, given the choices -- and I'm
17 going to use the term, Hobbesian choices ----

18 THE COURT: Yes, sir.

19 MR. COLYER: ---- that's the one we
20 choose, Your Honor.

21 THE COURT: Yes, sir. All right. For
22 the record, I see at least one face which I recognize as
23 being someone associated with the press.

24 If you will -- this has to be a matter of
25 record, sir. So, if you will, please come forward and state

February 7, 2012

1 your name.

2 [A spectator approached.]

3 MADAM COURT REPORTER: By counsel?

4 THE COURT: Yeah. If you will, come
5 up between the tables so the court reporter is able to hear
6 you, sir.

7 [The spectator did as directed.]

8 THE COURT: And, for the record, your
9 name is, sir?

10 MR. BAEZ: Gilbert Baez with ABC 11
11 Eyewitness News.

12 THE COURT: Okay. You've been present
13 during the proceedings this morning?

14 MR. BAEZ: Yes, Your Honor.

15 THE COURT: Yes, sir. I'll give you
16 the opportunity to be heard.

17 MR. BAEZ: Well, the -- the
18 proceedings have been open to the media from day one.

19 THE COURT: Yes, sir.

20 MR. BAEZ: I would like to cite that
21 we have First Amendment rights and freedom of the press to --
22 to continue letting the public know what happens in this
23 particular case.

24 THE COURT: Yes, sir.

25 MR. BAEZ: To exclude any one portion

1 of it from the public, I think, is -- is a travesty and an
2 injustice to -- not only to the media, but the public in
3 general. This is not a hearing where you're going to go into
4 closed session because of some personal matter. The entire
5 hearing is a personal matter, and the public should have the
6 opportunity to hear ever part of it.

7 THE COURT: Okay.

8 MR. BAEZ: So, I would strongly
9 object to having any portion of this where the media is told
10 to leave or the public is asked to leave the courtroom and
11 not hear these proceedings. The decision that you render not
12 only will affect the defendant in this case, but probably
13 will set precedent for a lot of cases across the state.
14 There are more than 160 defendants who are probably going to
15 use the RJA to proceed; and, it's just imperative that all of
16 these proceedings are -- are made open to the public and to
17 the press.

18 THE COURT: Yes, sir. Anything else,
19 Mr. Baez?

20 MR. BAEZ: That's all I have.

21 THE COURT: Mr. Baez, I'm not
22 responding in any way. I'm simply noting for purposes of the
23 record that I understand the basis upon which your request is
24 being made; and, I want to, for purposes of the record,
25 reiterate that one of the primary concerns relates to North

1 Carolina's Code of Judicial Conduct Canon 3, specifically, a
2 judge -- and I'm reading from subsection (a)(6) -- a judge
3 should abstain from public comments about the merits of a
4 proceeding in any state or federal court dealing with a case
5 or controversy arising in North Carolina or addressing North
6 Carolina law and should encourage similar abstention on the
7 part of court personnel subject to the judge's direction and
8 control. This subsection does not prohibit a judge from
9 making public statements in the course of official duties
10 itself, which is not applicable. One of the primary
11 concerns, as set out in at least the Vermont case -- and, for
12 the record, that is in re: Charles Wilkinson, 165 Vermont
13 183, 678 Atlantic 2nd 1257, 1996 Vermont LEXIS 43; and, it
14 relates to the impropriety -- and I'm going to read
15 specifically from the opinion. The Code of Judicial Conduct
16 -- their provision, which is similar to our provision -- also
17 provides guidance on this issue. Judges are required to act
18 at all times in a manner that promotes public confidence in
19 the integrity and impartiality of the judiciary, with cites,
20 perform judicial duties without bias or prejudice, with
21 cites. Although we assume that the judge in question was not
22 motivated by actual bias, his testimony was unduly
23 prejudicial given his elevated aura of expertise. Moreover,
24 a judge shall not, while a proceeding is pending or
25 impending, in any court, make any public comment and may

1 analogize testimony on the public record as a public comment
2 that might reasonably be expected to affect its outcome or
3 impair its fairness. That's simply so the record is clear as
4 to factor -- a factor or factors that have to be considered
5 by the Court.

6 MR. BAEZ: I think -- I think that
7 the media's concern, and probably the public's concern, is
8 that you will make a decision in this case based on all the
9 evidence that's presented to you, and the public and the
10 media has a right to know what that evidence is.

11 THE COURT: Yes, sir. I hear you.
12 The point being made is that the issue raises whether or not
13 the testimony referred to will be considered in that
14 decision-making process. All right; but, thank you, sir.

15 MR. COLYER Judge -- and, for the
16 record, I think that, for further comment, subject to your
17 correction, the offer of proof is to establish what the
18 witness would have said.

19 THE COURT: Would have said.

20 MR. COLYER: Not what the Court is
21 considering because the Court ----

22 THE COURT: Exactly. That's the point
23 that I was trying to make.

24 MR. COLYER Yes, sir. The Court has
25 determined that it is not going to consider that; but, for

1 purposes of appellate review, you're just preserving what the
2 witness would have said, so someone else could essentially
3 litmus paper test what you've done and see if it was correct.

4 THE COURT: I appreciate that, Mr.
5 Colyer. That's exactly the point that I was in-artfully
6 trying to make. Thank you, sir.

7 All right. Anybody want to be heard further?

8 MR. HUNTER: [Negative shake of the
9 head.]

10 THE COURT: Okay.
11 [Pause.]

12 THE COURT: Is there anybody here on
13 behalf of the press, legal counsel, who wants to be heard?

14 MR. WOLVERTON: We'd like the opportunity
15 to consult with our legal counsel.

16 THE COURT: Pardon me?

17 MR. WOLVERTON: I'm Paul Wolverton with
18 the Fayetteville Observer. We would like the opportunity to
19 consult our legal counsel.

20 THE COURT: Well, Mr. Wolverton,
21 that's why I made the comment, in the interest of
22 transparency and in the interest of giving everybody who has
23 a right to be heard the opportunity to be heard. How much
24 time are you going to need, sir?

25 MR. WOLVERTON: I'll have to ask my

1 editors, but I've already alerted them ----

2 THE COURT: All right. We're going to
3 take about a 15-minute recess.

4 [Mr. Colyer stood.]

5 THE COURT: Yes, sir.

6 MR. COLYER: Judge, could I maybe
7 assist with this? I've mentioned to the defense counsel team
8 when we spoke yesterday sort of what we had intended to do
9 with our presentations over the next couple of days.
10 Obviously, we were going to try to call some of the judges
11 today.

12 THE COURT: Yes, sir.

13 MR. COLYER: And then Doctor Katz and
14 ADA Jonathan Perry are coming back tomorrow.

15 THE COURT: Yes, sir.

16 MR. COLYER: And our understanding is
17 that they probably will take all of tomorrow and a portion of
18 Thursday. I think I mentioned that yesterday.

19 THE COURT: So, we can set these
20 matters off until later.

21 MR. COLYER: We can, Your Honor. We
22 have witnesses set for today, and then a couple of whom may
23 be here already.

24 THE COURT: Okay.

25 MR. COLYER: But what that would do is

February 7, 2012

1 -- some of our other out-of-town judges, we had scheduled for
2 Thursday and Friday, with the exception of one judge who was
3 going to -- who's now in private practice, a retired judge
4 ----

5 THE COURT: Yes, sir.

6 MR. COLYER: ---- who's now -- was
7 going to be in Robeson County this afternoon, and was going
8 to check and see if he could get in this afternoon. His only
9 available time was tomorrow morning.

10 THE COURT: Okay.

11 MR. COLYER: So, we were going to ask
12 to be able to put him up and then push Doctor Katz back a
13 little bit.

14 THE COURT: Okay.

15 MR. COLYER: And then go with Doctor
16 Katz and finish with him, direct, cross, redirect, recross,
17 until we could let him go, and then go back to the other
18 witnesses, to include the judges and Professor Cronin.

19 So, if that helps you in terms of your
20 scheduling -- we do have a witness right now that we can go
21 with.

22 THE COURT: Unrelated to the issues
23 now before the Court?

24 MR. COLYER: No, sir. No. I'm sorry.

25 THE COURT: Oh, I apologize. I mis

1 ----

2 MR. COLYER: I just wanted to let you
3 know that we do have one that we had anticipated to call this
4 morning, Judge Johnson.

5 THE COURT: Judge Johnson.

6 MR. COLYER: Yes, sir.

7 THE COURT: Okay.

8 MR. COLYER: Yes, sir; and we'll be
9 more than glad to work with the Court's schedule. I'm sure
10 Judge Johnson understands, and he would, you know,
11 accommodate us; but, I just wanted to give you what we were
12 thinking about scheduling-wise, so that, if that impacts on
13 your decision with respect to timing, Mr. Wolverton's
14 opportunity to contact counsel ----

15 THE COURT: Let me make the following
16 -- well, let me give you folks the opportunity to have some
17 input. I apologize.

18 MR. JAMES FERGUSON: Your Honor, we certainly
19 respect the interests of the press and the media in this, and
20 their desire and -- to have a right to be heard, but we think
21 a reasonable time to do that ----

22 THE COURT: That's where we're going.

23 MR. JAMES FERGUSON: ---- would be to give --
24 take a short recess.

25 THE COURT: Yes, sir.

February 7, 2012

1 MR. JAMES FERGUSON: This is not the first time
2 that press counsel has dealt with these sorts of issues.

3 THE COURT: Yes, sir.

4 MR. FERGUSON: So, we would propose a
5 short recess. Let them be heard, and then we'd like to
6 proceed in the order that we're proceeding in and have the
7 proffer made and go from there.

8 THE COURT: Short is a relative term.
9 How much are we talking about, Mr. Ferguson?

10 MR. JAMES FERGUSON: I think ----

11 THE COURT: Well, let me give you
12 folks the opportunity ----

13 MR. BAEZ: I think 20 to 30 minutes.

14 THE COURT: Thirty minutes okay? At
15 least give you the opportunity to contact counsel and find
16 out additional information that we may be required to
17 consider.

18 MR. WOLVERSON: Yes, sir.

19 THE COURT: Is that agreeable?

20 MR. WOLVERSON: Yes, sir.

21 MR. COLYER: Judge, we don't object to
22 that, and my -- my rising to give you that schedule was just
23 to help you with your decision.

24 THE COURT: I appreciate that. Thank
25 you, Mr. Colyer.

February 7, 2012

1 MR. COLYER: Yes, sir.

2 THE COURT: It's 20 till. 11:15.

3 That's 35 minutes. That way, you folks will have an
4 opportunity to do what you need to do. Thank you, folks.

5 [The hearing recessed at 10:39 a.m. and reconvened at 11:16
6 a.m., February 7, 2012, with all pertinent parties present
7 prior to the recess once again present, to include the
8 defendant.]

9 [The bailiff conferred with the Court.]

10 THE COURT: Yes, sir. I was coming
11 down the hallway, saw Mr. Beaver, and thought I understood
12 Mr. Beaver to say I'm in this. Now, what that means -- I
13 know Mr. Beaver is a local attorney. He's out in the
14 hallway. If he's in it, he needs to be in here.

15 MR. THOMPSON: Your Honor ----

16 MADAM COURT REPORTER: Are you on the
17 record?

18 MR. THOMPSON: ---- just to pass word to
19 the Court, Mr. Beaver is ----

20 THE COURT: Yes, ma'am.

21 THE COURT: Yes, sir. We -- I
22 apologize.

23 MR. THOMPSON: Oh. He did indicate he
24 wanted to be heard.

25 THE COURT: Yes, sir.

February 7, 2012

1 MR. THOMPSON: I don't want to speak for
2 him or -- but he did indicate that -- he came in just a
3 minute ago, and attempted to get somebody on the telephone
4 before he came in.

5 THE COURT: He was on the phone as I
6 was speaking. Let me go back and put the record some of the
7 comments that may have been missed.

8 The bailiff indicated to me that Mr. Baez was
9 present in the courtroom with his cell phone to his ear, had
10 apparently indicated to the bailiff that their attorney was
11 on the phone.

12 Is that correct, Mr. Baez?

13 MR. BAEZ: I'm sorry, sir?

14 THE COURT: Your attorney's on the
15 phone?

16 MR. BAEZ: We have two attorneys here
17 from New York and Raleigh.

18 THE COURT: And I also -- I want to
19 make sure this is on the record -- as I was coming into the
20 courtroom, Mr. Beaver indicated -- he had a cell phone to his
21 ear. He indicated to me that he, quote, unquote, as I
22 understood it, was -- I am in this, were his words, if I
23 recall his words correctly.

24 MR. COLYER Judge, and, for purposes
25 of the record, everything you have said, and since you've

1 starting saying it, all of the parties are here, and the
2 defendant was in the courtroom.

3 THE COURT: Thank you, Mr. Colyer.

4 MR. COLYER: Yes, sir.

5 THE COURT: I appreciate it.

6 MR. COLYER: Yes sir.

7 THE COURT: All right. Folks, also
8 for purposes of the record, the Court has pulled a copy of a
9 paper, which I just had in my hand, from the Institute of
10 Government dealing with this issue. The Court also asked for
11 a copy of State of North Carolina versus Myron Keith Britt.
12 I was the presiding judge in that capital trial, tried in
13 Robeson County. A similar issue arose in that case in the
14 context of a jury view requested by counsel for the defendant
15 of the premises upon which the defendant -- or, a premise
16 relied upon by the defendant for purposes of establishing his
17 alibi at the time in question -- that jury view was conducted
18 with no members of the press being present after the press
19 was given an opportunity to be heard pursuant to orders
20 entered by the Court and findings made on the record in that
21 case. So, I've got the case law. I've got the Institute of
22 Government paper by Michael Crowell -- Crowell, C-R-O-W-E-L-
23 L, I think is the spelling. I'm looking for it.

24 MR. THOMPSON: Do you have the cite for
25 the Britt case, Your Honor?

1 THE COURT: The cite for the Britt
2 case ----

3 [Pause.]

4 MR. THOMPSON: I'm sorry. I don't have
5 to have it now. I would like to have it though.

6 THE COURT: I've got it. I've got all
7 of them up here. I've got Britt. Well, let me back up.
8 Seminal cases Richmond Newspapers, Inc., et al., versus
9 Virginia, et al., a United States Supreme Court case dealing
10 with this issue, 448 US 555, 100 Supreme Court 2814, 65 Law
11 Edition 2d 973, 1980 US LEXIS 18, 6 Media L Report -- I think
12 -- 1833. I just had -- the Britt case citation is State of
13 North Carolina versus Myron Keith Britt, Court of Appeals,
14 North Carolina, 718 Southeast 2nd 725, 2011 NC App., LEXIS
15 2428. That's a 2011 decision.

16 All right. Mr. Britt -- pardon me. Mr.
17 Beaver, since you're here live -- and I apologize -- the name
18 of your attorney is whom -- or, attorneys.

19 MR. BAEZ: We have Ian Rosenberg
20 [pointing] from New York, who represents ABC Incorporated
21 [inaudible] ----

22 MADAM COURT REPORTER: I need him to come
23 forward, please.

24 THE COURT: Okay. I
25 apologize. The court reporter can't hear you, Mr. Baez. If

1 you will, come up in between counsel tables, sir.

2 MADAM COURT REPORTER: Sorry.

3 THE COURT: That's all right.

4 [Mr. Baez approached.]

5 MR. BAEZ: I have, on the phone with
6 me, Ian Rosenberg, represents ABC Incorporated.

7 THE COURT: And, for the record,
8 that's I-A-N?

9 MR. BAEZ: I-A-N, Ian.

10 THE COURT: R-O-S-E-N-B-E or B-U?

11 MR. BAEZ: Spell your last name for
12 us, please.

13 MR. ROSENBERG: R-O-S ----

14 [A female voice also started speaking on the cell phone].

15 MR. ROSENBERG: ---- E-N-B-E-R-G.

16 THE COURT: B-E-R-G.

17 MR. BAEZ: And also, Amanda, you're
18 on speakerphone and can be heard as well. State your name
19 for the record. Is Amanda still ----

20 MS. MARTIN: Good morning, Your Honor.

21 I'm Amanda Martin from Stevens, Martin, Vaughn and Tadych in
22 Raleigh, North Carolina.

23 THE COURT: Yes, ma'am. All right.

24 We also have Mr. Jerry [sic] Beaver present in
25 the courtroom. Mr. Beaver, you're representing whom?

February 7, 2012

1 MR. BEAVER: Fayetteville Publishing
2 Company, Your Honor.

3 THE COURT: Okay. All right.

4 MR. JAMES FERGUSON: Your Honor, may we be
5 heard briefly before ----

6 THE COURT: Yes, sir. Folks, if you
7 will, bear with us.

8 I think I know where we're going, but it's
9 always dangerous to presume or assume. Yes, sir. Go ahead,
10 sir.

11 MR. JAMES FERGUSON: Yes, sir. Your Honor, we
12 -- we had an opportunity to confer during this recess; and,
13 when I say we, the defense team.

14 THE COURT: Okay.

15 MR. JAMES FERGUSON: ---- and in light of the
16 obviously heavy media interest in these proceedings ----

17 THE COURT: Okay.

18 MR. JAMES FERGUSON: ---- and also taking into
19 account the interest in transparency, it occurred to us that
20 there is a way to address this matter without having to close
21 the doors to the press. The Court presented -- as a matter
22 of fact, I initially took the position myself that there were
23 two ways to do this. One is the in-camera hearing.

24 THE COURT: Yes, sir.

25 MR. JAMES FERGUSON: The other is the in

1 writing submission.

2 THE COURT: Yes, sir.

3 MR. FERGUSON: On reflection and in light
4 of the media interest and in the interest of transparency,
5 the defense position is that the Court has authority to make
6 that choice, rather than giving it to the prosecution; and,
7 in the interest of open hearings, transparency, media
8 interest, we propose that the Court require a written
9 submission of the State's proffer, and that will avoid having
10 to lock the press out, so to speak.

11 THE COURT: Or the public.

12 MR. JAMES FERGUSON: Or the public; and, would
13 accomplish the same goal.

14 THE COURT: Well, it turns out, we --
15 I was going in that direction. I pulled the paper entitled
16 Public, paren's, and News Media, close paren's, to Access to
17 Courts and the court records, citing the applicable law. The
18 presumption that generally court proceedings must be open to
19 the public, including the news media, unless there's an
20 overriding reason for closing the courtroom, the law that's
21 applicable essentially is as follows: A Criminal proceeding
22 may not be closed unless doing so is necessary, a, to serve
23 an overriding governmental interest and, then,
24 parenthetically, such as protecting witnesses, preserving a
25 defendant's right to a fair trial, or avoiding public

1 disclosure of sensitive information; b, there is no less
2 restrictive way or means of protecting that interest, and
3 that's where we are. There is a less restrictive way. A
4 less restrictive way is to make the showing in writing.
5 Finally, the third consideration of the -- required by the
6 law is that the scope and duration of the closure is kept as
7 narrow as possible. The Court must make findings sufficient
8 to support the decision to close the court.

9 Mr. Colyer, I understand your request for live
10 testimony, but I have to balance that against the rights of
11 the media and the public; and, there is a less restrictive
12 way short of closing the proceedings to the public or to the
13 media; and, that's to do what we do otherwise in these kinds
14 of cases; and, that's to require that matters be submitted to
15 the Court for in-camera inspection. Let me state for the
16 record, I am not suggesting nor am I ruling that there may
17 not be evidence that the State can offer for the purposes
18 that you've already enunciated on the record to meet the
19 goals of your evidentiary showing. I'm not suggesting that.
20 What I am suggesting is that I'm bound by the applicable laws
21 as relates to judges.

22 MR. COLYER: Judge, respectfully, you
23 may not be trying to limit us; but, with respect to the
24 discovery issues that we have in front of the Court on the
25 record with respect to dates and times and identification of

February 7, 2012

1 witnesses, I'm sure that our esteemed colleagues and counsel
2 on the other side are going to say too late; you -- you've
3 made your bed, and now you're going to have to sleep in it;
4 and, so, what you're saying -- I understand what you're
5 saying; but, I'm sure that the defense is going to say, no,
6 not by the folks that you've noticed as potential witnesses.
7 I think it's already been pointed out to you this morning
8 that we didn't deem the judges to be experts. It wouldn't
9 have done any good anyway, apparently; but, it -- also, there
10 was no other expert deemed to be able to come in and say I've
11 had an opportunity to review all these transcripts; and, in
12 my view there was a sufficient legal reason. If the Court is
13 telling us, at this point, that we have that opportunity to
14 do that, we certainly will try to avail ourselves of that,
15 plus make the written submission that the Court is apparently
16 leaning towards with respect to the judges now; but,
17 essentially, that's going to necessitate, in order for us to
18 do that, the designation of witnesses who are not on our
19 witness list now; and, it's going to necessitate giving them
20 the opportunity to review the records, at least with respect
21 to the Cumberland County cases that the judges would have
22 testified to; which, Judge, respectfully, is going to
23 necessitate some delay; and, I do want to say that the State
24 is not trying to keep the media or the public out. We would
25 object and except to the ruling that, one, the judges can't

February 7, 2012

1 testify; two, that we can't do an oral proffer because of the
2 constraints; and, three, that we have to do a written
3 submission; and, as I understand it, the Court's ruling
4 essentially is to everything the judges have to say -- we
5 can't call them as a witness, period. I just wanted that for
6 clarification; but, I guess what I'm telling you is, if -- if
7 there is an alternative way for us to do this now, we are
8 going to need some time in order to do that; and, what I
9 might suggest, without having the benefit of my co-counsel's
10 thoughts -- and if I'm wrong, I'm going to ask him to jump up
11 here and put his thoughts into this -- we could go ahead with
12 Doctor Katz tomorrow and complete his testimony and Doctor
13 Cronin; but, it may necessitate a recess in order for us to
14 contact someone who would then have to be designated as an
15 expert outside of the time period that you've given us for
16 responding and presenting expert reports, and to get them
17 prepared for in-court testimony.

18 THE COURT: Well, let me clarify. I
19 was not suggesting by my comments that the Court is going to
20 reopen the discovery process or go back into that. I mean,
21 both sides had the opportunity, consistent with the discovery
22 order entered in this case, to comply with the orders or to
23 have input into any amendment of those orders. I mean, we
24 are where we are; and, I'm following the rules. So, I wanted
25 to clarify that for purposes of the record. I appreciate and

February 7, 2012

1 am grateful for your suggestion that we can go forward with
2 other evidence, so we don't lose additional time; and, I
3 understand what your position is; but, Mr. Colyer, Mr.
4 Thompson, in all candor, I don't see any reason why -- let me
5 give you an example. With regard to Judge Thompson's
6 testimony -- pardon me -- Judge Johnson's testimony, we've
7 already -- I've received from you folks exhibits marked by
8 the defendant, I believe, in support of your motion to
9 exclude, Defendant's Exhibits 51 and 52. That, as I
10 understand it, would constitute what it is that he would be
11 called upon to testify.

12 MR. COLYER That's what the defense
13 says, Your Honor; and, those are his notes. They've referred
14 to it as a report. It was never intended as a report, and it
15 wasn't until Judge Johnson came to an interview with us and
16 said here's some of my thoughts, that we said, at that point,
17 okay, these are your notes; we're going to turn this over to
18 the defense, which we did; and, then, when he came yesterday,
19 he had made some more handwritten notes. We turned those
20 over to the defense ----

21 THE COURT: Yes, sir.

22 MR. COLYER: ---- and said, you know,
23 these are some more of Judge Johnson's notes; but, to call
24 them reports is inaccurate.

25 THE COURT: I agree.

1 MR. COLYER And ----

2 THE COURT: And if I used that
3 inadvertently, I apologize, because what is -- let me read
4 what it says. The State of North Carolina, Cumberland
5 County, General Court of Justice, Superior Court Division,
6 File No. 91 CRS 23143, State of North Carolina versus Marcus
7 Raymond Robinson, defendant, comments and analysis of the
8 trial of Marcus Raymond Robinson conducted before the
9 undersigned in July of 1994. That's what I was referring to.
10 If I used the term report inappropriately or inadvertently, I
11 apologize.

12 MR. COLYER And our position is,
13 Judge, Judge Johnson can call his notes anything he wants to.

14 THE COURT: Yes, sir.

15 MR. COLYER: And if we -- if we -- we
16 likely would have had them marked for the record to show that
17 that's what his preparation was, so that both sides could ask
18 questions from that based upon his notes; but, we were not
19 intending to offer that as a quote, unquote, report ----

20 THE COURT: Yes, sir.

21 MR. COLYER: ---- just simply as the
22 judge's notes, both the typed portion -- or, the computer-
23 generated portion and the handwritten notes.

24 THE COURT: Thank you for the
25 clarification; but, the point that I'm making is that the

1 substance of what is contained in these documents is the gist
2 of what he would be, as I understand it, anticipated to
3 testify ----

4 MR. COLYER: Again, some of the gist of
5 it.

6 THE COURT: Are there any other
7 matters that you contend would be admissible under the Rules
8 of Evidence.

9 MR. COLYER: Well, with respect -- not
10 under the Court's ruling with respect to the Rules of
11 Evidence based upon your ruling this morning ----

12 THE COURT: Okay.

13 MR. COLYER: ---- but, with respect to
14 the cases he was involved in, he has notes, I think, with
15 respect to the Robinson case and the Wilkinson case.

16 THE COURT: Yes, sir.

17 MR. COLYER: Mr. Wilkinson does not
18 have an RJA motion pending, but he is one of the 173 jury
19 selections that the MSU study commented on; and, those facts
20 are -- or, those figures are a part of the statistics.

21 THE COURT: Okay.

22 MR. COLYER: So, to the extent that
23 Judge Johnson has made notes with respect to Robinson and his
24 observations on Robinson -- and, right now, off the top of my
25 head, I can't think of whether or not, in those handwritten

1 notes, it says anything about Wilkinson.

2 THE COURT: I believe -- let me -- I
3 don't want to state anything incorrectly on the record. I
4 don't believe it does, at least in the handwritten notes, but
5 it speaks for itself.

6 MR. COLYER: Yes, sir; and, what I'm
7 saying is that's just a partial -- and I'm not quibbling with
8 you, Judge, or arguing with you. That's a gist of what he
9 would be saying with respect to Mr. Robinson's case, but
10 there are other matters because the Wilkinson case is in the
11 study -- it would be of a similar ilk, if you will.

12 THE COURT: Yes, sir.

13 MR. COLYER: Plus additional material
14 that we have by way of questions, based on observations that
15 are not addressed necessarily in his -- his handwritten notes
16 and typed notes.

17 THE COURT: Okay. Yes, sir, Mr.
18 Thompson.

19 MR. THOMPSON: I don't know if this is
20 the appropriate time to discuss this, but I don't want that
21 time to pass.

22 THE COURT: Yes, sir.

23 MR. THOMPSON: But I'm largely the
24 logistics member of this team.

25 THE COURT: Okay.

1 MR. THOMPSON: And to the extent -- first
2 of all, we're not agreeing that the appropriate way to do
3 this is in writing.

4 THE COURT: Yes, sir.

5 MR. THOMPSON: I don't want any of this
6 to even imply that; but, there'll be a large amount of time
7 that's going to be necessary to provide that proper -- the
8 writing to the Court that Your Honor has requested; and, we
9 need that to be considered whenever you do rule, however you
10 rule. Again, we're not in any respect agreeing ----

11 THE COURT: I understand.

12 MR. THOMPSON: ---- that writing would be
13 appropriate. We consider live testimony would be entirely
14 appropriate. I have not vetted this next argument because
15 this is a new issue, but there is a consultation clause issue
16 that may come up if Your Honor's ruling is overruled by the
17 appellate courts; that we've just tendered this and they were
18 not subjected to cross-examination. So, I don't know to the
19 respect [sic] that that holds, because this is an entirely
20 new area of law; but, that issue's on the table,
21 respectfully; and, so, live testimony would cure that issue
22 if a later court found that Your Honor's ruling here was in
23 error, then they could only consider what would amount to a
24 direct testimony and rob the defendant of his right of
25 confrontation and send it back anyway for further

1 proceedings, which we could have here. So, respectfully,
2 that is one argument to go forward with live testimony.
3 Insofar as -- and I don't feel like that that right can be
4 waived, respectfully. So, again, I've not vetted that with
5 the status of the law because this is so new; and, to the
6 extent that I'm incorrect legally, the Court has my
7 apologies; but, it's an issue and it could be resolved by
8 live testimony.

9 MR. COLYER Judge, may I add one other
10 thing? Earlier this morning, one of counsel for the defense
11 mentioned that they had received some notes from Judge
12 Thompson, which, in fact, they have. It's actually 179 pages
13 that were sent electronically to them when -- before we
14 started court yesterday, I think, when we became aware that
15 Judge Thompson had some notes. There are some handwritten
16 notes in those pages about his observations related to the
17 jurors in the State versus McNeil ----

18 THE COURT: Okay.

19 MR. COLYER: ---- and the State versus
20 Golphin [phonetic] cases; and, -- I'm sorry -- Augustine.
21 Thank you. Augustine not Golphin, excuse me.

22 THE COURT: Okay.

23 MR. COLYER: And the majority of those
24 179 pages are literally documents from either transcripts or
25 slip opinions with respect to the cases that Judge Thompson

1 sat in as a trial judge, and it's not all things that are his
2 notes. Very few pages -- I would guess maybe ten or so, give
3 or take -- are actually his notes with respect to his
4 observations and I guess things he wanted to remind himself
5 of; but, the majority of those pages are opinions.
6 I think, in one case, there was a 1993 handout -- excuse me
7 -- from the Institute of Government, from Professor
8 Thornburg, where Judge Thompson had attended a training
9 session with respect to Batson and how trial courts should
10 become aware and deal with the procedures for handling Batson
11 and the case law that was cited there. So, it's not just
12 another hundred-and-some page report. It's notes that he
13 used, he made, and other materials that he consulted in
14 preparation for his testimony.

15 MR. JAMES FERGUSON: Your Honor, may I -- may I
16 just clarify a point or two?

17 THE COURT: Yes, sir.

18 MR. JAMES FERGUSON: First of all, I -- we want
19 to be clear that -- that our motion in limine to preclude
20 certain testimony is directed at the testimony.

21 THE COURT: Yes, sir.

22 MR. JAMES FERGUSON: We have not made a motion
23 to preclude any witness from taking the stand.

24 THE COURT: I understand.

25 MR. JAMES FERGUSON: If there are -- and -- and

1 that motion is based on the substance of what we have been
2 given as to what Judge -- what Judge Johnson would say.

3 THE COURT: Yes, sir.

4 MR. JAMES FERGUSON: That's included in 51 and
5 52, our exhibits. So, we don't want to be read as taking the
6 position that no judge can take the stand and testify about
7 anything.

8 THE COURT: That's the point that I
9 was trying to make. Yes, sir.

10 MR. JAMES FERGUSON: Yes, sir. If there are
11 relevant things that a judge can testify, which don't impinge
12 on the policies and the principles and the rules we've talked
13 about this morning ----

14 THE COURT: Yes, sir.

15 MR. JAMES FERGUSON: ---- then, so be it; but,
16 they -- what they -- what the cases say is that they cannot
17 talk about -- are the proceedings before them, their thought
18 processes in making decisions; and, obviously, they can't
19 speculate about what they would have done if certain things
20 had happened in the courtroom.

21 THE COURT: Yes, sir.

22 MR. JAMES FERGUSON: So, I think the -- the
23 gist of the cases is that judges cannot come in and give
24 their commentary, their opinions, their thought processes, or
25 even create a record of what took place before them in

1 proceedings that they had presided over.

2 THE COURT: Yes, sir.

3 MR. JAMES FERGUSON: If there are other
4 relevant matters that the State wishes to offer through a
5 judge or through any witness it has, so long as the testimony
6 itself is admissible under the rules, then it's not for us to
7 say how they get it in; but, the rules cannot be twisted
8 simply because they wish to call a judge to present certain
9 testimony. So, we want to be clear ----

10 THE COURT: Yes, sir.

11 MR. JAMES FERGUSON: ---- that that's what our
12 motion is directed at.

13 THE COURT: And that's the basis upon
14 which I -- or, at least, my understanding was the argument
15 that were heard -- arguments that were heard earlier this
16 morning, and the case law that reflected exactly what you are
17 talking about.

18 MR. JAMES FERGUSON: Yes, sir.

19 MR. THOMPSON: Just so we understand, is
20 it the defense's position and the Court's position -- we
21 haven't gotten into the details yet ----

22 THE COURT: Yes, sir.

23 MR. THOMPSON: ---- that they can -- the
24 judges can testify to some things, and then there will be
25 other things that will be objectionable under the body of law

1 that Your Honor has found.

2 THE COURT: Counsel for the State ----

3 MR. THOMPSON: Yes, sir.

4 THE COURT: ---- has pointed out
5 correctly, in my view, that there is no prohibition against a
6 judge testifying ----

7 MR. THOMPSON: Yes, sir.

8 THE COURT: ---- as long as it is on
9 matters -- related to matters that are otherwise admissible.

10 MR. THOMPSON: Yes, sir.

11 THE COURT: So, I think that's what's
12 being stated here.

13 MR. JAMES FERGUSON: Yes, sir.

14 THE COURT: Yes, sir.

15 MR. COLYER Judge, when we call a
16 judge, if we ask a question and it is objected to ----

17 THE COURT: Yes, sir.

18 MR. COLYER: ---- and the Court
19 sustains that objection, then how do we go about making our
20 offer of proof? I mean, this is all wrapped around the axle,
21 so to speak.

22 THE COURT: Yes, sir.

23 MR. COLYER: And it's -- I mean, I
24 think we're sort of splitting hairs here and mincing words
25 with respect to what the judges are going to be allowed to

1 testify to; and, if we ask a question and the Court sustains
2 an objection from the defense and the Court tells the witness
3 don't answer that ----

4 THE COURT: Yes, sir.

5 MR. COLYER: ---- then we would contend
6 that we would have, under an offer of proof, the right to
7 have the question and the answer on the record; and, then,
8 that's the material that you're talking about, I guess, that
9 might put the judge in disrepute under the canons of ethics
10 and the case law that's been cited here this morning. I
11 don't know how ----

12 THE COURT: I -- I hear -- go ahead.

13 MR. COLYER: I don't know how to do
14 that in light of Mr. Thompson's comment about the
15 confrontation. If we stopped at that point and we have to
16 put it in writing, then the defense is -- the defendant is
17 not going to be available -- he's not going to have heard
18 what the answer is. He's not going to know whether that's
19 what the judge would have said or that's our impression of
20 what the judge would have said. He would not have been
21 present when he said it.

22 MR. JAMES FERGUSON: Judge, this is very
23 simple. We do it all the time.

24 THE COURT: Yes, sir.

25 MR. JAMES FERGUSON: There are certain things

1 that the Court has already indicated its position on that
2 judges cannot testify to.

3 THE COURT: Yes, sir.

4 MR. JAMES FERGUSON: Now, with the Court's --
5 and then the Court will make its ruling on that; and, once
6 that's done, as officers of the Court, the prosecution, the
7 Court could preclude the prosecution, as officers of the
8 Court, from asking those questions because they would have
9 already been ruled on. As to other matters which they wish
10 to present through a judge, if they choose to do that, then
11 it can be done in some question-and-answer form; but,
12 witnesses are told all the time not to talk about certain
13 things because it's not admissible evidence or not
14 appropriate for the witness to comment on. So, that part is
15 simple to handle, and we do it all the time. As to the
16 proffer regarding the judges testifying about the proceedings
17 and the incidences of the proceedings, their thought
18 processes -- processes and all the things we've talked about,
19 that's what can be submitted in writing at whatever point
20 they choose to do that.

21 THE COURT: Yes, sir.

22 MR. JAMES FERGUSON: They could do it now.
23 They could do it later. The Court could hold the record open
24 for that. There are a myriad of ways for them to get that
25 testimony in. So, this is not a rocket-science task. It's

1 just a matter of the State understanding and following the
2 Court's ruling, whatever it should be, as to what judges will
3 not be allowed to testify to. The other matters that might
4 arise, we can do it in the way we always do it. If a
5 question is asked that we feel calls for improper testimony,
6 we would object at that time.

7 THE COURT: Okay.

8 MR. THOMPSON: Judge, I would like to put
9 out State v. Jacobs, 363 NC 815. It's been given as an
10 example to me for the need for the Court to lay down an
11 appropriate offer of proof; and, in writing would not be an
12 appropriate offer of proof. The danger that Mr. Ferguson
13 discussed -- I'm sorry -- Mr. James Ferguson just discussed,
14 that we should just not ask a question and that we should
15 tell them not to give the answer is an appropriate danger
16 with a trial involving a jury; but, Your Honor has made the
17 ruling, and You Honor has to -- you're in the position that
18 you have to consider the evidence as given, and then rule on
19 what is admissible and what is properly considered for your
20 ruling and what is not. So, to -- in case a judge's answer
21 went outside of these abstract bounds that -- in this
22 intricate kind of issue that we need to -- live testimony is
23 the only way to establish all the rights that were given to
24 the defendant and to the State, and ensure that we have a
25 full record. That's what we have all discussed is incredibly

February 7, 2012

1 important with this first hearing, is that the record is
2 complete. So, we're suggesting to the Court, respectfully,
3 that the only way in order -- the only way to do that is by
4 live testimony.

5 THE COURT: Okay. All right. Anybody
6 want to be heard further?

7 MR. BEAVER: May I be heard briefly?

8 THE COURT: Yes, sir.

9 MR. BEAVER: I'm representing
10 Fayetteville Publishing Company. It is difficult for me,
11 having been involved in the criminal justice system here, as
12 I have, for 38 years, not to understand these arguments and
13 want to get in the prosecution's argument and want to get in
14 the defense's argument; and, I need to tailor my comments and
15 make sure that I'm not doing that. The interest that
16 Fayetteville Publishing Company and the other media here are
17 trying to vindicate and enforce and uphold is the right of
18 public to know what is going on in these proceedings and what
19 is said. There are very few issues currently in this state
20 that bear greater interest and greater public interest and
21 you hear greater comment on in discussion than the Racial
22 Justice Act. It has been going on for several years. It is
23 resulting in tremendous swings in the General Assembly that
24 have occurred. It is resulting in a movement toward a veto
25 and an attempt to override it, which was unsuccessful, and it

February 7, 2012

1 is a matter of vital public interest. It appears to me that
2 what has happened today is there is a very, very strong
3 action being taken for the sole purpose of the -- of allowing
4 the public -- or, not allowing the public to know certain
5 things that may be very important to them. It may not be
6 important to this Court, but it may be important to the
7 public to know in trying to assess this very, very
8 controversial issue. I've been involved in criminal cases
9 for 38 years; and, the only time that I have seen something
10 like this is when a question -- a jury is in the courtroom
11 and a question is asked of a witness and the answer is
12 sustained and the other side wishes to make an offer of
13 proof. At that time, one of three things happen. Either the
14 jury is asked to leave, and the witness gives the offer of
15 proof in open court at that time, or the proceedings are held
16 -- or, go ahead and, then, at the end of the evidence, at a
17 break time, during the break time, the witness gives their
18 testimony or their offer of proof to the question; but, I've
19 never seen a situation in which I can remember that the
20 witness writes down what their answer would be and hands it
21 up to the judge, and the judge files it and keeps it in
22 camera, and then sends it on up to the Appellate Court to
23 rule on it in that manner. That's just historically not what
24 has been done. It appears to me, Your Honor -- and please do
25 not take offense to this -- but it appears to me that what is

February 7, 2012

1 being done here is that the Court has searched mightily to
2 try to find a way to do indirectly what it cannot do
3 directly; and, that is to keep these offers of proof from
4 becoming known to the public, and that is exactly why we have
5 the guarantees in our state constitution, that the courts
6 shall be freely open, and that is exactly why we have the
7 freedom of the press, and the various rights under the 14th
8 Amendment of the Constitution to a free and open trial, to
9 make sure that that right to the public and those things are
10 not handled behind closed doors. It is very much in the
11 public interest -- and Your Honor just read from the various
12 examples that you have given, and basically said, at the end
13 of it, that the public's right to know, if it's close, tips
14 the scales in favor of the public; and, we believe that to be
15 the case in this instance; and, I want to say this, Your
16 Honor. I'm -- I'm here on -- I serve as local counsel for
17 Fayetteville Publishing Company. There's the Wirewoods
18 [phonetic] law firm and several lawyers there who have
19 represented this company for a number of years, and I will be
20 passing things on to them.

21 THE COURT: Okay.

22 MR. BEAVER: Whatever I say, I would
23 like to be taken -- and whatever you do -- without prejudice
24 of them if they wish to come back and revisit this further
25 ----

February 7, 2012

1 THE COURT: Absolutely.

2 MR. BEAVER: ---- in the next day or
3 so; but, I do believe that this Court should not attempt to
4 do directly what it can't do directly.

5 THE COURT: Mr. Beaver, I take no
6 offense. I know you mean no disrespect. I do want to state
7 for the record that I disagree with your characterization
8 that I'm attempting to do mightily -- striving mightily, I
9 believe were your words -- indirectly what I can't do
10 directly. I understand your argument. I disagree with that
11 characterization. What I am striving mightily to do is to
12 follow the law as best I can; but, I understand and
13 appreciate the argument that you've made, sir.

14 MR. BAEZ: Your Honor?

15 THE COURT: Yes, sir.

16 MR. BAEZ: Our attorneys would like
17 to be heard as well.

18 THE COURT: Okay. If you will, come
19 up to the microphone, please, Mr. Baez.

20 [Mr. Baez approached.]

21 THE COURT: And, for purposes of the
22 record, if you will, ask the speaker to identify himself or
23 herself.

24 MR. BAEZ: Amanda, will you identify
25 yourself for the Court?

1 [Pause.]

2 MS. MARTIN: Good morning, Your Honor.
3 This is Amanda Martin from Stevens, Martin, Vaughn and Tadych
4 in Raleigh, North Carolina, on behalf of ABC Inc.

5 THE COURT: All right. One second.
6 We're trying to get -- non-verbal instructions from our court
7 reporter on what will help her do her job.

8 [Mr. Baez positioned his cell phone near a microphone.]

9 MR. BAEZ: Re-identify yourself,
10 please.

11 MS. MARTIN: This is Amanda Martin with
12 Stevens, Martin, Vaughn and Tadych in Raleigh, North
13 Carolina, on behalf of ABC Inc.

14 THE COURT: Good morning, ma'am.

15 [Pause.]

16 THE COURT: We're -- we're -- yes.

17 MR. BAEZ: Okay. He's ready for your
18 statement.

19 MS. MARTIN: Your Honor, thank you;
20 and, I apologize greatly that, because of this phone
21 connection, I have not been able to hear what has been said
22 in court so far. For that reason, I will try to be brief and
23 avoid duplicating anything that may have been argued to you
24 already; but, we appreciate very much the ability to appear
25 and make -- address these issues. As Your Honor is aware,

February 7, 2012

1 there are provisions in both the U.S. Constitution and the
2 North Carolina Constitution that address the issue of open
3 courts. In the U.S. Constitution, the Sixth Amendment
4 addresses public trials. In the North Carolina Constitution,
5 in Article I, Section 18, Section 24, and Article V, Section
6 9 -- all three of those provisions address the fact that
7 courts shall be open and that proceedings shall move forward
8 in a public session; and, the basis in part for this, Your
9 Honor, is especially appropriate in this circumstance, we
10 believe. As the US Supreme Court held in Richmond Newspapers
11 versus Virginia, at 448 US 555, Chief Justice Burger wrote,
12 people in an open society do not demand infallibility from
13 their institution, but it is difficult for them to accept
14 what they are prohibited from observing; and, we believe,
15 Your Honor, that this is a case in which that quote is
16 especially appropriate. You obviously are dealing with a
17 matter that is of extraordinarily high public concern, that
18 is not only a particular criminal case and its outcome, but
19 the very integrity of the North Carolina judicial system and
20 the way our courts operate; and, for that reason, we believe,
21 Your Honor, that if it is appropriate to receive testimony
22 from Judge Johnson, that it is necessary for the public to
23 have an opportunity to know what that testimony is. If Judge
24 Johnson's testimony is relevant to the proceeding and if it
25 would go toward the end ruling that you might make, then it

February 7, 2012

1 is particularly important for the public to understand what
2 has been put before you in connection with this motion. The
3 United States Supreme Court, in Waller versus Georgia, which
4 is at 467 US 39, set out the test that has to be overcome for
5 closing the judicial proceeding; and, in that case, the Court
6 said the party seeking to close the hearing must advance an
7 overriding interest that is likely to be prejudice. The
8 closure must be no broader than necessary to protect the
9 interest. The trial court must consider reasonable
10 alternatives to closing the proceeding and it must make
11 findings adequate to support the closure; and, the reason we
12 believe that the Waller standard cannot be met, Your Honor,
13 is -- is multifaceted. First, we don't believe that there is
14 any overriding interest here that is likely to be prejudice
15 because, among other things, there is no jury in this case.
16 There is no atmospheric interest that has to be protected.
17 If you receive testimony in court, you will make your
18 determination based on that testimony and that testimony
19 alone; and, so, this is not a circumstance like might be at
20 play in a circumstance of overwhelming pretrial publicity
21 that would have a right to -- have a potential to affect a
22 jury or something like that; and, for that reason, we believe
23 that this ought to be heard in open court, and that we would
24 urge Your Honor to continue the very access that you've
25 granted so far for this to be covered by electronic media, so

February 7, 2012

1 that the public could have access to know what is being put
2 before the Court and how the Court is receiving the evidence
3 and the arguments in this case. The Richmond Newspapers
4 principle and standard was reiterated by our very North
5 Carolina Supreme Court in Virmani versus Presbyterian Health
6 Services at 350 North Carolina 449. In that case, our court
7 said the United States Supreme Court has indicated that trial
8 court proceedings in criminal cases may not be summarily
9 closed when the trial court is faced with a First Amendment
10 claim to a right of access. Again, quoting Richmond
11 Newspapers, it says absent an overriding interest articulated
12 [indiscernible]. This is a matter that is receiving public
13 concern, attention, and scrutiny; and, we believe that it is
14 appropriate for the public to have access and to be able to
15 see for themselves what is proceeding in our courts and how
16 the Racial Justice Act is being interpreted and applied in
17 these proceedings. It's my understanding that this is the
18 first such proceeding and, for that reason, it is especially
19 important because it will set the tone for proceedings that
20 will follow. We believe that these constitutional
21 principles, that the cases that I have cited to you, and the
22 overall context of this would urge you to both keep the
23 courtroom open and to allow media to monitor and media access
24 to allow the greatest amount of public access to this very
25 important proceeding. I would be happy to address any

February 7, 2012

1 particular issue that you have, and I would be happy to
2 submit in writing an outline of these cases and principles
3 that I have addressed if that would be helpful or appropriate
4 for the Court.

5 THE COURT: And I apologize. It's Ms.
6 ----

7 MR. BAEZ: Amanda Martin.

8 THE COURT: ---- Martin. If you will,
9 relate to Ms. Martin -- Ms. Martin, are you able to hear me,
10 ma'am?

11 [Pause.]

12 MR. BAEZ: I'm moving forward so that
13 you can hear, Judge [approaching].

14 THE COURT: Ms. Martin, are you able
15 to hear me, ma'am.

16 MS. MARTIN: I am. Thank you, Your
17 Honor.

18 THE COURT: I appreciate your
19 argument. The case law that you've referred to is case law
20 that is now before me. I put Richmond on the record -- the
21 principles underlying the Waller versus Georgia matter, as
22 well as the Virmani v. Presbyterian Health Services Corp case
23 that you've referred to as well. So, I simply wanted you to
24 know that I'm aware of those cases and have the applicable
25 case law now before the Court.

February 7, 2012

1 Any other comments you want to make, ma'am?

2 MS. MARTIN: No, thank you, Your Honor.

3 THE COURT: Thank you ma'am.

4 MR. BEAVER: Your Honor, may I make one
5 further inquiry?

6 THE COURT: Yes, sir.

7 MR. BEAVER: The scope of your ruling,
8 I understand, is that certain testimony, which is proposed by
9 the State, will be submitted to the Court ----

10 THE COURT: That's what I'm about to
11 go into; and, it may put your comments in context.

12 MR. BEAVER: All right.

13 THE COURT: The threshold issue in
14 this case -- let me go back to what Ms. Martin said. If it's
15 appropriate to receive the testimony of Judge Johnson, if
16 that testimony has relevance, we contend the press, as well
17 as the public, are entitled to be present. I don't disagree
18 with that. The threshold issue in this case, under the
19 applicable case law, is whether it's appropriate and whether
20 it's relevant. We have guidance from the case law in the
21 following way: No testimony should be received except of
22 open and tangible facts, matters which are susceptible of
23 evidence on both sides, a judge -- pardon me -- a judgment is
24 a solemn record. The parties have a right to rely upon it.
25 It should not lightly be disturbed and ought never to be

1 overthrown or limited by the oral testimony of a judge or
2 juror of what he had or she had -- my words -- in mind at the
3 time of the decision. So, the fundamental issue to be ruled
4 upon here is the relevance, and the only thing that I have to
5 guide me in that respect is -- are the materials that have
6 been submitted, specifically what is marked now as
7 Defendant's Exhibit 51 and Defendant's Exhibit 52. That is
8 the only forecast before the Court as to whether or not this
9 testimony is admissible, relevant to the matters at issue in
10 this case; and, I'm open to receiving anything else.

11 MR. COLYER Judge, respectfully ----

12 MR. JAMES FERGUSON: Your Honor ----

13 MR. COLYER: ---- that's the only
14 tangible evidence you've said. We've given you oral reasons
15 and oral things that the judges would ----

16 THE COURT: I apologize. Yes, sir.

17 That's correct, Mr. Colyer. Yes, sir.

18 MR. JAMES FERGUSON: Your Honor, I -- in light
19 of what you've just said and in light of the concerns that
20 have been raised by -- appropriate -- raised appropriately by
21 the press, let me just be clear about a couple of things that
22 I think need to be clear.

23 THE COURT: Yes, sir.

24 MR. JAMES FERGUSON: Given the Court's

25 inclination to have -- give the State an opportunity to

1 submit in writing whatever it is they wish to submit, I think
2 that addresses the issue of the concern of the integrity of
3 the system because, to that extent, a judge would not be
4 allowed to take the stand and -- to testify as to matters
5 regarding the proceedings over which he presided. That's the
6 issue.

7 THE COURT: Yes, sir.

8 MR. JAMES FERGUSON: As to maintaining under
9 seal any submission that the State presents, I think that's
10 not even necessary now because the two exhibits that we have
11 presented, Exhibit 51 and Exhibit 52, include the substance
12 of what we were told that Judge Johnson would testify to.
13 That's in the record.

14 THE COURT: Yes, sir.

15 MR. JAMES FERGUSON: That's a part of the
16 record. That's not under seal. That's public. If the press
17 wants to come look at that, as I understand it, they can.

18 THE COURT: Yes, sir.

19 MR. JAMES FERGUSON: So, I think the assumption
20 that the media has made, and probably appropriately so given
21 what was said up to this point, that somehow or another all
22 of this is now secret, it's not.

23 THE COURT: I agree.

24 MR. JAMES FERGUSON: It's not under seal; and,
25 if they want to make a submission, we don't take the position

1 that that should be submitted under seal. If they want to
2 submit it to you, and you give it whatever consideration you
3 wish or make it part of the record, that's fine. What we're
4 concerned about is that we not be in a situation where the
5 Court makes a ruling that certain testimony is inadmissible
6 and is not to be received and considered by this Court,
7 certain testimony in this case, that we go through this
8 charade of having the judge take the stand, testify to
9 everything he would say, and to make a record on it, and then
10 have a ruling that it's not admissible. Then, the policy
11 considerations have already been undermined by that.

12 THE COURT: Yes, sir.

13 MR. JAMES FERGUSON: But, now that we've
14 proceeded in the manner that we have, the Court has what
15 forecast it has of what one of the judges would say, then
16 it's very appropriate for the Court to rule on that and
17 decide whether or not it should come into this court. If
18 they have other submissions they wish to make along that same
19 line, then the Court can consider that as it comes to it;
20 but, having already ruled or indicated its position, that
21 that testimony is not admissible, then it would be
22 inappropriate for that witness or any other judge to take the
23 stand to testify as to those matters. That's the position we
24 take. So, we're not trying to close the courtroom to
25 anybody.

February 7, 2012

1 THE COURT: Well ----

2 MR. JAMES FERGUSON: We're just trying to
3 protect the record and to protect the underlying principles
4 of the policy that judges should not testify about their
5 proceedings.

6 MR. COLYER Judge, may I ask a
7 question; and, perhaps the three of us or all of us can get
8 involved in this dialogue.

9 THE COURT: Yes, sir.

10 MR. COLYER: Is the defense position
11 that what is contained in Judge Johnson's -- let's deal with
12 the typewritten portion.

13 THE COURT: Which I believe is -- is
14 it 51 or 52, Mr. Colyer?

15 MR. JAMES FERGUSON: I think it's 50 -- it's
16 either -- I think it's 51 or 52.

17 MR. HUNTER: 51 is typed and 52 is
18 handwritten.

19 THE COURT: Thank you, 51.

20 MR. COLYER Starting with 51, is the
21 defense position that the material that is contained in 51
22 would be ----

23 THE COURT: In the record.

24 MR. COLYER Well, it's -- I'm not
25 arguing with that.

1 THE COURT: It's not under seal.

2 MR. COLYER: No, no. The material
3 that's contained within 51 ----

4 THE COURT: Okay.

5 MR. COLYER: ---- the typewritten
6 portion, is their position that that is the material that is
7 addressed by their motion and the Court [sic] should not
8 testify to anything that's contained in Defense Exhibit -- I
9 mean, the judge should not testify to anything that's
10 contained in State's 51?

11 THE COURT: Well ----

12 MR. COLYER And, then, look at State's
13 52, because it's different. It deals with the jurors and
14 what they said ----

15 THE COURT: Yes, sir.

16 MR. COLYER ---- with respect to that.
17 We -- we'd like some guidance ----

18 THE COURT: Yes, sir.

19 MR. COLYER: ---- with respect to what
20 it is that's in 51 and 52 that they think is offensive to the
21 policy; and, if I could suggest, if we ask a question ----

22 THE COURT: Yes, sir.

23 MR. COLYER: ---- and the Court says
24 that is objectionable or the defense imposes an objection and
25 the Court sustains it, that we just put that question aside

1 and move on to another question, so that we can essentially
2 kind of collect up the questions ----

3 THE COURT: Yes, sir.

4 MR. COLYER: ---- that are arguably,
5 from the defense point of view, offensive to the policy that
6 the Court has iterated this morning, because it seems to me
7 that some of the material that's in 51 and 52 may not fall
8 within that rubric; and, so, we're -- we're just guessing,
9 without further guidance, how far -- because the statement
10 the Court that said he had in mind at the time of the
11 decisions, meaning the witness, dealing with a potential
12 judge, what he had in mind at the time. Some of that is not
13 necessarily what he had in mind, but it's simply a reporting
14 of what he saw and heard, some of which is reflected in the
15 transcripts.

16 THE COURT: Okay. All right. I hear
17 you, Mr. Colyer. May I restate your question as I understand
18 it to be?

19 MR. COLYER Yes, sir.

20 THE COURT: Is it the defense position
21 that everything in its entirety in State's Exhibit -- pardon
22 me -- Defendant's Exhibit 51 is excluded either under the
23 Rules of Evidence or under the policies underlying -- or,
24 against judges testifying about matters before the Court.

25 MR. COLYER: Yes, sir, and does it also

1 -- and the same question with 52.

2 THE COURT: Earlier, I made a comment,
3 on the record, to counsel, that the Court was not suggesting
4 that the State couldn't offer -- and I'm paraphrasing -- some
5 evidence. That's the point that I was trying to make, Mr.
6 Colyer.

7 MR. COLYER And, again, I'm not
8 quibbling or arguing with the Court.

9 THE COURT: Yes, sir.

10 MR. COLYER: I just want to know where
11 we are, because it seems to me that we could ask a question
12 that they might think is objectionable and the Court might
13 not, or the Court might think it's objectionable, and we just
14 stop at that point and save it till the end, so that we know
15 -- if we have to submit anything in writing, we know
16 essentially what we're talking about and where we're going as
17 opposed to -- just a wholesale blanket prospect.

18 THE COURT: I hear you. Let me come
19 back to what I read just a moment ago. No testimony should
20 be received except of open, and tangible facts, matters which
21 are susceptible of evidence on both sides; the following
22 language, a judgment is a solemn record. The parties have a
23 right to rely on it. It should not be lightly disturbed.
24 The focus of the decisions that were referred to earlier deal
25 with mental processes and factors taken into account in

1 making decisions by the judge. The law is what it is. So, I
2 -- there is some degree of confusion here.

3 MR. THOMPSON: And that's what we're
4 trying get to, Judge.

5 THE COURT: Yes, sir. Yes, sir.

6 MR. THOMPSON: There are --- and I want
7 to make sure it's pointed out to the Court, 51 and 52, it's
8 not all that we planned on getting into.

9 THE COURT: I understand.

10 MR. THOMPSON: There's a great deal more.
11 You know, what were your habits during Batson? I mean, what
12 kind of things -- what kind of things did you go by, which --
13 I guess what I'm talking about is those are examples of --
14 they fall within the question, is it objectionable under this
15 ----

16 THE COURT: I can't -- I can't give an
17 advisory opinion about what's objectionable. That's the
18 point that I'm trying to make.

19 MR. THOMPSON: And we're not asking --
20 that's what we're talking about when we deal with the
21 logistics of how we go forward in this.

22 THE COURT: Yes, sir.

23 MR. THOMPSON: The only logical way to go
24 forward in the State's mind is put the judge on the witness
25 stand ----

1 THE COURT: I never suggested you
2 didn't have the right to do that, Mr. Thompson.

3 MR. THOMPSON: Okay. Well, I'm sorry.
4 We gotten the implication that you were leaning toward -- I'm
5 sorry -- maybe we misunderstood from what Your Honor had
6 said, that you're leaning toward just submitting it in
7 writing -- what we what we were planning on putting -- and
8 that's why we've been talking about a lot of this. So, to
9 the extent that that is not what's in the Court's mind, maybe
10 we should get into what is in the Court's mind, then we can
11 fight about how to go forward from there.

12 THE COURT: All right. I don't know
13 how to say it except to say it directly and honestly. I
14 think that I've given guidance based on the matters that
15 we've talked about this morning, as reflected in the opinions
16 that were on the record this morning, about what arguably is
17 and what is not permissible. You know, there are other
18 considerations that I brought to the attention of all
19 counsel, as annunciated, as set out. Let me go back, folks.
20 If you look at the facts of the case in Washington, the
21 testimony of the trial judge given 6 years after the case had
22 been disposed of, in respect to matters he considered and
23 passed upon was obviously incompetent. True, the reasoning
24 of the Court for the rule prohibiting testimony of jurors or
25 judges is not wholly applicable whereas the case was tried

1 before a single judge, et cetera; and, then, no testimony
2 should be received except of open and intangible facts,
3 matters which are susceptible of evidence on both sides; and,
4 then it goes back to the policy issues relating to the
5 judgment or judgments generally. A judgment is a solemn
6 record. The parties have a right to rely upon it. It should
7 not lightly be disturbed and ought never to be overthrown or
8 limited by the oral testimony of a judge, juror of what he
9 had in mind at the time of the decision.

10 [Pause.]

11 THE COURT: I can't make a
12 determination as to what is relevant, what's excludable,
13 until the issue is raised. Now, I am obligated, if counsel
14 chooses to take the position, Judge, we can point directly to
15 some matters we contend right now are not admissible under
16 the rules of evidence; and they're entitled to a ruling on
17 that.

18 MR. JAMES FERGUSON: Yes, sir.

19 THE COURT: That's where we are,
20 folks. Okay.

21 MR. JAMES FERGUSON: And, Judge, that was the
22 thrust of our motion in limine.

23 THE COURT: Yes, sir.

24 MR. JAMES FERGUSON: That there are matters
25 that have been brought to our attention, that are

1 inadmissible and should not be allowed.

2 THE COURT: Yes, sir.

3 MR. JAMES FERGUSON: And that's what Mr. ----

4 THE COURT: All right; and, I guess
5 what I hear from Mr. Thompson and Mr. Colyer what
6 specifically are those matters as it relates to the exhibits
7 marked as Defendant's Exhibit 51 and 52. Am I correct?

8 MR. COLYER Yes, sir.

9 MR. THOMPSON: Keeping in mind that 51
10 and 52 only reflect a part of Judge Johnson's ----

11 THE COURT: Then it's your burden, at
12 that point, to come forward with additional matters you
13 intend to elicit from any witness and be heard in argument as
14 to why you contend it's admissible.

15 MR. THOMPSON: During the testimony of
16 that witness, Your Honor?

17 THE COURT: I'm asking you to give us
18 a forecast, if you can.

19 MR. THOMPSON: We have done that on a
20 number of occasions, in a number of hearings, as it relates
21 to this type of issue.

22 THE COURT: All right.

23 MR. THOMPSON: Insofar as we've done that
24 in the past, we would incorporate those by reference.

25 THE COURT: Well, the only way I know

1 to do it, Mr. Thompson -- and I'm not trying to tell anybody
2 how to try their case.

3 MR. THOMPSON: Yes, sir.

4 THE COURT: Call your witness. Ask
5 your questions; and, I'm obligated to rule on objections.

6 MR. THOMPSON: We understand, and we're
7 fine with that method of going forward.

8 THE COURT: If there are matters that
9 I rule upon that you contend are matters that are appropriate
10 for some offer of proof, I'll give you whatever time you need
11 to submit any written offers of proof, which will be in the
12 record.

13 MR. THOMPSON: So, again, logistically,
14 we put a witness on the stand, there's an objection either by
15 the Court or the defense that the question we asked
16 elicits -- the question asks for an answer that steps on that
17 court's ruling, you will sustain that objection if Your Honor
18 finds it to be ----

19 THE COURT: You stand up and say we
20 want to make an offer of proof. My position is fine, put it
21 in writing, put it in the record. It's in the file. This is
22 no different from -- I recognize there's a lot of uncertainty
23 and a lack -- no disrespect intended -- there's not a lot of
24 guidance in the Act.

25 MR. THOMPSON: Yes, sir.

1 THE COURT: But, the rules are still
2 the rules. They still apply.

3 MR. THOMPSON: I think the bulk of this
4 conversation has been trying to get to that logistic kind of
5 solution.

6 THE COURT: Okay.

7 MR. THOMPSON: And we want to make sure
8 we're not stepping on the Court's ruling. We don't want to
9 step on the Court's toes.

10 THE COURT: I appreciate that.

11 MR. THOMPSON: We're trying to make sure
12 we go forward ----

13 THE COURT: My stated objective -- and
14 I'm sorry.

15 MR. THOMPSON: Yes, sir.

16 THE COURT: My stated objective was to
17 give both sides a full, fair opportunity to be heard within
18 the applicable rules.

19 MR. THOMPSON: Yes, sir.

20 THE COURT: That's where we are.

21 Folks, do you want to be heard as to any
22 specific matters at this point?

23 MR. HUNTER: No, Your Honor. We're --
24 we're content with what we understand the Court has said.

25 THE COURT: Okay. All right. Thank

1 you, folks. It's 12:15. What's your preference, Mr. Colyer?

2 Are you ready to go forward?

3 MR. COLYER: Judge, whatever the Court
4 would like us to do. We're ready to --

5 THE COURT: Do you folks want to be
6 heard? I'm ready to go.

7 [There were no responses from either of the defense
8 attorneys.]

9 THE COURT: All right. Let's go.
10 [Pause.]

11 MR. COLYER Judge, thank you for your
12 forbearance. Our witnesses are sequestered, so we have to go
13 get them.

14 THE COURT: Certainly, I -- thank you,
15 Mr. Colyer. I appreciate that. Yes, sir.

16 [Pause.]

17 [Mr. Thompson and the witness entered the courtroom.]

18 MR. COLYER: Your Honor, the State ----

19 THE COURT: Good morning, sir.

20 MR. COLYER: ---- would call the
21 Honorable E. Lynn Johnson.

22 [The witness approached.]

23 THE COURT: If you will, place your
24 left hand on the bible. Raise your right hand, please, sir.

25 THE WITNESS: All right, sir.

February 7, 2012

1 [The witness did as directed and was sworn.]

2 THE COURT: Good morning. If you
3 will, come around and have a seat. Would you like some
4 water, sir?

5 THE WITNESS: Something stronger,
6 please.

7 [General laughter.]

8 [Pause.]

9 THE COURT: For the record, sir, if
10 you will, state and then spell first and last name -- or,
11 first, middle, and last, whatever your preference is, for the
12 benefit of the court reporter?

13 THE WITNESS: My full name is Edwin, E-
14 D-W-I-N; Lynn, L-Y-N-N; Johnson, J-O-H-N-S-O-N.

15 THE COURT: Thank you, sir.

16 All right. Mr. Colyer.

17 MR. COLYER: Thank you, Your Honor.

18 THE COURT: Yes, sir.

19 **E. LYNN JOHNSON, having been first duly sworn, was called as**
20 **a witness by the State and testified as follows on DIRECT**
21 **EXAMINATION conducted by MR. CALVIN COLYER:**

22 Q. Good morning, Judge Johnson. How are you?

23 A. Good morning.

24 Q. Sir, before we get into some preliminary matters,
25 let me ask you a question with respect to some notes that we

February 7, 2012

1 had been referring to before we called you, just to make sure
2 that the Court is aware -- everyone's aware of what we have.
3 Back on or about January the 23rd, did you have occasion to
4 present to the State a typewritten set of notes that you had
5 made in preparation for your potential testimony in this
6 case?

7 A. I did.

8 Q. And, yesterday, when you were called by the State
9 to come and stand by as a witness, did you have some
10 additional notes that you had written in handwritten form,
11 consisting of six pages, if I've counted correctly, that you
12 gave us yesterday morning?

13 A. I did.

14 Q. Now, sir, have we made you aware that the original
15 notes that you gave us, the typewritten notes, were turned
16 over to the defense as part of the discovery when we received
17 them?

18 A. You did.

19 Q. And did we inform you yesterday, when you told us
20 about your notes, that we were taking those, copying them,
21 and giving those to the defense also?

22 A. That is correct.

23 Q. Now, sir, I'll represent to you that, so far, in
24 our proceedings here, your notes have been referred to by way
25 of Defense Exhibit Number 51 and 52?

February 7, 2012

1 A. All right, sir.

2 Q. And, later, as we go through this, this morning --
3 and perhaps right now might be a good time to do it.

4 THE COURT: Yes, sir.

5 Q. I'm going to mark your exhibit number -- so, if you
6 hear us refer to it as a State's Number, or you hear Defense
7 Exhibit 51 or 52, we're talking about the same thing?

8 A. All right.

9 MR. COLYER May I approach, Your
10 Honor?

11 THE COURT: Yes, sir.

12 MR. COLYER Mr. Hunter, do you need
13 another copy of that?

14 MR. HUNTER: No.

15 THE COURT: Judge Johnson, there's
16 your water, sir.

17 THE WITNESS: All right.

18 MR. COLYER: Judge, did you get a ----

19 THE WITNESS: Is there anything else in
20 it?

21 THE COURT: No, sir.

22 THE WITNESS: All right.

23 [General laughter.]

24 MR. COLYER: Judge, did you get a
25 separate copy of the notes that we were referring to? I know

1 Defense 51 and 52 were in the courtroom earlier, but do you
2 have a copy that you could write on, if you wish.

3 THE COURT: Mr. Colyer, the originals
4 are apparently on the table.

5 MR. COLYER All right, sir.

6 Madam Clerk, would you mind telling me what
7 numbers I'm up to, please?

8 THE CLERK: This is going to be 27.

9 MR. COLYER: 27 for the first one.

10 THE COURT: And that will be
11 Defendant's Exhibit 51, Mr. Colyer?

12 MR. COLYER: That will be correct, Your
13 Honor. For the record, State's 27 would be the same as
14 Defense 51, if I'm understanding the marking correctly; and,
15 State's 28 would be Defense 52.

16 Q. And, Judge Johnson ----

17 May I approach, Your Honor?

18 THE COURT: Yes, sir.

19 Q. Judge, I'm going to hand you what's marked as
20 State's 27 and State's 28 [handing the exhibits to the
21 witness]?

22 A. All right, sir.

23 MR. COLYER: And, Your Honor, to the
24 extent that you do not have -- you have a copy of that one
25 already?

1 THE COURT: Yes, sir.

2 MR. COLYER: And you have both of them?

3 THE COURT: Yes, sir.

4 MR. COLYER: All right, sir.

5 THE COURT: Thank you.

6 Q. Judge Johnson, just for the record, could you
7 identify for us what State's Exhibit 27 and State's Exhibit
8 28 are, please, sir?

9 A. All right. State's Exhibit Number 27 is a
10 typewritten memorandum that I prepared as a result of
11 examining the jury selection in State versus Marcus Raymond
12 Robinson. As I've indicated in the preliminary remarks I
13 made, I was subpoenaed to testify before Judge Weeks. The
14 return on the subpoena was actually Monday, January 30th;
15 and, I asked the State if they would be so kind as to give me
16 a copy of the transcript in this trial, so that I -- because
17 I had not interacted in this case since 1994. A copy of the
18 transcript was presented, not in person, but was left at my
19 front door step on a drive-by by Mr. Thompson; and, I took
20 the formatted CD ----

21 THE WITNESS: Which, Judge Weeks, I have
22 a copy here if you need it.

23 THE COURT: Okay?

24 A. And utilized that -- I also asked for a copy of the
25 North Carolina Supreme Court -- and I can't remember the

February 7, 2012

1 sequencing of how they were given to me, but then I also
2 later asked for --

3 Q. When you say the North Carolina Supreme Court, you
4 mean the Robinson ----

5 A. In the Rob -- State versus Marcus Robinson. I'm
6 sorry. I also asked for copies of the questionnaires that
7 were utilized in this case. I also asked for and received,
8 eventually, the appellate record in this case, including the
9 brief that was submitted by Jim Parish. I think those are
10 the main documents that I have looked at.

11 Q. And, sir, in relation to being subpoenaed, were you
12 subpoenaed previously for hearings and/or a prior scheduled
13 hearing that was continued?

14 A. Yes.

15 Q. For the January hearing?

16 A. This is a newly issued subpoena for this hearing.

17 Q. So, this is at least the second or third subpoena
18 that you've received?

19 A. That is correct

20 Q. Now, sir, with respect to additional material that
21 you requested, did you request any material that was related
22 to the State versus Wilkinson case?

23 A. Yes.

24 Q. In general, what was that?

25 A. The transcript of those portions dealing with the

1 peremptorily challenged jurors in that particular case by the
2 State.

3 Q. Okay, sir. At this point, having made that
4 identification, we're just going to lay that aside?

5 A. All right, sir.

6 MR. COLYER: I'd like to go back, if I
7 might, Your Honor, and ----

8 THE COURT: Yes, sir.

9 MR. COLYER: ---- begin with the
10 typical fashion of examination.

11 Q. Judge Johnson, for the information and the
12 edification of those that may not know, can you share with us
13 some of your background and experience before you became a
14 judge, starting with where you're from, your hometown, where
15 you went to high school, your education, and some of your
16 later work; and, I'll try to interrupt, if I might, and ask
17 questions, so you don't have to do this necessarily in a
18 narrative form?

19 A. All right, sir. I was raised in the city of
20 Clinton, North Carolina, the home of the Clinton Dark Horses.
21 I graduated in 1959. I thereafter went to the University of
22 North Carolina at Chapel Hill. I received a BS in accounting
23 and, thereafter, went straight into law school; graduated
24 from law school at UNC Chapel Hill in 1966. Thereafter,
25 because I had grown up reading the Hardy Boy books, listening

1 to This Is Your FBI on the radio, sent away and got a badge
2 that glowed in the dark. I had a bent [phonetic] for
3 investigation; and, so, I enlisted with -- as a Special Agent
4 with the FBI, entering their class in November of 1966. Mr.
5 Hoover wanted to educate a little, old, southern boy from
6 Clinton, North Carolina, so I went through their training
7 until February of 1967. My first office was Detroit,
8 Michigan. I there worked bank robberies and fugitive
9 matters. Mr. Hoover wanted to further educate me, so he sent
10 me to the big city of New York. I was there for 3 years. I
11 worked internal security for a year-and-a-half and organized
12 crime for a year-and-a-half. After that, I met my new ----

13 Q. So, what -- what year are we up to now, sir?

14 Excuse me for interrupting?

15 A. 1970.

16 Q. All right, sir. Thank you?

17 A. I met my beautiful bride in New York. My son was
18 born there. I elected to try to find employment in North
19 Carolina. I met now the Honorable Jack A. Thompson through
20 my brother. He asked for an interview with me. I flew down
21 in June of 1970, interviewed with your colleague, Rob
22 Thompson's, father, who was the newly elected District
23 Solicitor. Jack Thompson offered me a job; so, my wife, my
24 son and I moved down in December of 1970. I was sworn in as
25 an Assistant Solicitor, as they called them in those days, on

February 7, 2012

1 January 1, 1971; and, I served for the next roughly 3 years
2 with Jack A. Thompson as a District Solicitor.

3 Q. If I could interrupt you at that point, Judge,
4 during your term as the Assistant Solicitor in this judicial
5 district, would that have covered Cumberland County and Hoke
6 County?

7 A. That is correct, at that time.

8 Q. And can you share with us and tell us what your job
9 duties and responsibilities were during your time as an
10 Assistant Solicitor in Cumberland and Hoke Counties?

11 A. I became a District Solicitor, Jack A. Thompson's
12 chief deputy, so to speak. I set up the management of the
13 office; and, for many, many years, the protocol that was used
14 in the District Attorney's Office was the protocol that I
15 used. I simply stole it from the FBI, to be honest; but --
16 and I prosecuted cases and was a -- probably the lead
17 investigator for now Judge Thompson in the removal of a
18 magistrate and the removal of the Clerk of Superior Court.

19 Q. So, in addition to having what we would now call
20 Assistant DA's duties for handling cases, you had some
21 investigative-type duties also with then Solicitor Thompson?

22 A. That is correct.

23 Q. Now, the types of cases that you handled during
24 your tenure in the Solicitor's Office, now comparable to the
25 District Attorney's Office, what type of cases did you

1 handle, sir?

2 A. Everything from murder, burglary, drugs, moonshine
3 cases, the wide gamut that most of us still do today.

4 Q. And I take it that most of those cases were jury
5 trials?

6 A. Correct.

7 Q. What was the status of the law when you were
8 working as an Assistant Solicitor as it related to capital
9 punishment or death penalty cases?

10 A. Well, the statute that was in effect at that time
11 was subsequently overturned by the US Supreme Court; but,
12 Jack Thompson prosecuted the first death penalty case that
13 had been tried, insofar as I recall, in 25 years in
14 Cumberland County.

15 Q. Did you assist in that prosecution, sir?

16 A. I was probably the gopher in the case.

17 Q. And, based on your personal experience during the
18 time that you were in the Solicitor's Office, did you handle
19 homicide cases? Did you have an opportunity to pick any
20 capital injuries under the old statute?

21 A. I did not.

22 Q. You did not. Did you assist or were second chair
23 with respect to those in the office that were at the time?

24 A. Insofar as I know, there was only one capital
25 murder case tried in my tenure there, which was two-and-

1 three-quarters years; and, thus, I probably sat second seat
2 on the one and never personally was responsible for the
3 prosecution.

4 Q. Did there come a time when you left the Solicitor's
5 Office, sir?

6 A. I did.

7 Q. And when was that?

8 A. October 1st or September 30th of 1973.

9 Q. And who was the Solicitor and/or District Attorney
10 at that time?

11 A. Jack Thompson was still Solicitor.

12 Q. Was there another Assistant Solicitor or another
13 Assistant DA that was in the office at that time who
14 succeeded to the office of District Attorney after Judge
15 Thompson?

16 A. Edward W. Grannis, Junior, in -- January the 1st of
17 1975.

18 Q. So, when you were in the office as an assistant,
19 was Mr. Grannis in the office part of that time as an
20 assistant?

21 A. We were all sworn in together on January 1st, 1971.

22 Q. Where did you go upon leaving the Solicitor's
23 Office, or the District Attorney's Office, in '74?

24 A. I was actually recruited by Larry Thompson, who met
25 me on the steps of the old courthouse and asked me if I would

1 be interested in joining their firm; and, they gave me a deal
2 I could not refuse; and, so, I joined their firm on October
3 1st of 1973. The firm eventually became known as Blackwell,
4 Thompson, Swearingen, Johnson and Thompson; and, you'll note
5 that Jack A. Thompson is at the rear of the name of the firm.
6 [General laughter.]

7 Q. At some point, did Judge Thompson join the firm
8 that you were in?

9 A. He did not run again for District Solicitor or
10 District Attorney and joined the firm January 1st of 1975.

11 Q. And, the gentleman, Larry Thompson, what relation,
12 if any, was he to Judge Thompson?

13 A. Larry Thompson was the older brother.

14 Q. How long did you practice in the firm of Swearingen
15 ----

16 A. Blackwell, Thompson, Swearingen, Johnson and
17 Thompson.

18 Q. Yes, sir. How long did you practice in that firm?

19 A. From January 1st -- I mean, Dec -- October 1st of
20 1973 through January 17th of 1983, when I was sworn in as a
21 Superior Court Judge.

22 Q. And what kind of practice did you have, Judge
23 Johnson, between 1973 and 1983 in that private law firm?

24 A. The huge component of it was criminal, some
25 plaintiff's injury work; and, unfortunately, in February of

1 1978, Larry Thompson, who was age 40, had a heart attack and
2 died, so I took over what was then existing as a huge
3 bankruptcy practice. So, I wasn't a volunteer, but I was the
4 low man on the totem pole; and, so, I had to learn bankruptcy
5 law on the run.

6 Q. During your tenure in private practice from '73 to
7 '83, did you represent criminal defendants in criminal cases?

8 A. Many.

9 Q. And could you tell us the courts in which you
10 practiced?

11 A. Of course, the Superior Court here. On occasion, I
12 would go to the surrounding counties, the District Court. I
13 participated in -- before Frank Dupree in the federal system,
14 a murder case. I tried court-martials at Fort Bragg,
15 particularly the parachute murder case in the late 1970's.
16 I did appellate work in the state court system, and I did
17 appellate work before the Fourth Circuit.

18 Q. So, essentially, you did state criminal practice,
19 federal criminal practice, and practice under the UCMJ?

20 A. That is correct.

21 Q. Now, any of those cases that you dealt with during
22 that time period, sir -- it sounds like some of them were
23 murder cases?

24 A. Absolutely

25 Q. And were some of them capital in nature?

1 A. In the state court system, they were.

2 Q. Do you have an estimate, sir, as to the number of
3 state court capital murder cases you did as an attorney
4 during the time period of '73 to '84?

5 Q. Two, State versus Gregory Cousin, tried in roughly
6 1970 -- January of 1976. He was convicted, sentenced to two
7 deaths sentences by the jury, despite my best efforts; and,
8 thereafter, the US Supreme Court case came down holding North
9 Carolina's statutory scheme at that time unconstitutional;
10 therefore, eventually his sentence was commuted to life.

11 Q. You said there were two. What was the other one?

12 A. The other was State versus Joseph Philip Smith, and
13 his codefendant Johnny Benjamin Smith, tried in this county
14 before a Superior Court Judge. It took about 8 weeks to try
15 it, and he received a life sentence, but it was capitally
16 tried for both of them.

17 Q. In that particular case, sir, do you remember
18 anything about your closing argument?

19 A. Yes.

20 Q. And would you mind telling us a little bit about
21 that?

22 A. I knew ahead of time -- and I have to describe the
23 facts briefly. Joseph Philip Smith and his brother, Johnny
24 Benjamin Smith, were serving time in the Wayne County unit of
25 the North Carolina Department of Corrections. For some

February 7, 2012

1 reason, they were given weekend passes or leaves to leave the
2 Department of Corrections. Joseph Philip Smith and Johnny
3 Benjamin Smith would get up with their friends and they would
4 go and commit armed robberies in Selma, Smithfield, Durham,
5 and Fayetteville, and some other places that I don't recall.
6 In respect to the issues in Fayetteville, they entered a
7 bookstore on Bragg Boulevard. They committed the robbery
8 against the bookstore owner. The evidence tended to show
9 that they left, but Joseph Philip Smith went back in with
10 either a .44 or .45 and blew the head off the bookstore
11 owner. He was subsequently charged in Durham County with
12 doing the same thing in a bookstore up there; and, I can't
13 remember which case was tried first, but I believe the one I
14 tried was tried first; and, I knew ahead of time, because of
15 their activities of being in prison and committing all these
16 armed robberies, that Joseph Philip Smith, who was the
17 alleged shooter in the case, was a very good candidate to
18 maybe receive the death sentence. So, I knew that I had to
19 do something and prepare an argument, a closing argument on
20 the sentencing phase, which I did weeks in advance; and, it
21 simply consisted of a letter to my son, who -- Patrick, who
22 was about 8 years of age at the time; and, the letter was
23 basically the arguments against imposing the death penalty;
24 and, I don't remember all the content today; but, I tried to
25 -- and the way I handled it is I asked the judge permission

February 7, 2012

1 to sit before the jury; and, I pulled a chair up to the jury
2 and I simply read the letter to my son about why they
3 shouldn't impose the death penalty on Joseph Philip Smith.
4 By chance, the foreman of the jury -- I did not know at the
5 time, but subsequently became a friend -- was Albert Kane
6 [phonetic]. He was the foreman of the jury, and they
7 returned a life sentence recommendation.

8 Q. Now, sir, you mentioned also that you had some
9 experience in federal court with respect to murder cases.
10 How many cases did you try in federal court?

11 A. I tried an assault case with Judge Frank Dupree and
12 a murder case -- United States -- USA versus Crazy Fred
13 Hankson [phonetic], tried to a jury. The jury convicted him
14 of second-degree murder. Judge Dupree sentenced him to a
15 federal correctional facility in Pennsylvania. I do not know
16 his status now. That particular case had the same issues.
17 It was probably one of the two or three murder cases ever
18 tried in the Eastern District, as far as I know; but, it had
19 the same evidentiary issues as in the United States versus
20 McDonald. I had third-party confession issues in that case;
21 and, after Judge Dupree sentenced Hankson, I gave notice of
22 appeal, perfected the appeal and argued it before the Fourth
23 Circuit in Baltimore, Maryland, where they wanted to hold
24 court because they were opening the new Baltimore Harbor at
25 that time.

February 7, 2012

1 Q. And, sir, you mentioned that you had an opportunity
2 to try a murder case under the UCMJ in a courts-martial
3 proceeding?

4 A. Correct.

5 Q. When what that?

6 A. Probably late '79, '80 is my best recollection. It
7 was the Government versus PFC Alvin Williams, who is the
8 famous parachute murder case at Fort Bragg.

9 Q. So, would it be correct to say that, up to this
10 point in your career, in 1983, you had been in a District
11 Attorney's Office and had perhaps assisted then Solicitor --
12 District Solicitor Thompson with a homicide case; but, then,
13 on your own, in private practice, you had the responsibility
14 for defending those accused of murder and/or, in some cases,
15 a capital murder?

16 A. That is correct. I also represented all the ladies
17 of the evening on Hay Street.

18 [General laughter.]

19 Q. Was that in District Court or Superior Court?

20 A. I tried to keep them in District Court.

21 Q. Now, sir, you mentioned that, in 1983, you ascended
22 to the bench?

23 A. Yes, sir.

24 Q. Could you tell us a little bit about that, how that
25 came to pass?

1 A. Judge Braswell, who I only have the highest for,
2 was elected to the North Carolina Court of Appeals; and, you
3 went through a process where, then, Governor Hunt, who had a
4 merit selection committee -- and you were interviewed by 11
5 to 15 people from all walks of life; and, Jack Cazort
6 [phonetic] was his legal counsel at the time. I met Justice
7 William Copeland and about 10 to 15 other people, clerks of
8 court, lawyers, people from private enterprise, at the old
9 courthouse in Lillington; and, they interviewed me, as well
10 as the other candidates, for a lengthy period of time. Two
11 survived, whose names were submitted to Governor Hunt. I
12 received a call about eleven o'clock on -- I think it was a
13 December evening, from Governor Hunt, telling me he was going
14 to appoint me to succeed Judge Braswell. I was sworn in on
15 January 17th, 1983, as a Superior Court Judge.

16 Q. And, as part of that vetting process, did you have
17 to get your name submitted to the folks in Raleigh from any
18 Bar Associations that you were associated with or any type of
19 recommendation from someone at the local level?

20 A. I had many, many letters of recommendation from the
21 Bar members here that went directly to Governor Hunt, because
22 I got copied; but, there was no formal process of appearing
23 before a Bar Association or any others.

24 Q. So, on January 17th, 1983, you became a Superior
25 Court Judge?

1 A. That is correct.

2 Q. And who were the other judges with whom you worked
3 at that time, sir?

4 A. Judge Herring and Judge Brewer, I believe.

5 Q. Now, ultimately, based on retirements and the like,
6 did you ascend to the position of Senior Resident Superior
7 Court Judge for this judicial district?

8 A. Judge Brewer retired March 1st of 1998, and I did a
9 horizontal transfer rather than ascendancy to the Senior
10 Resident Judge's position.

11 Q. From 1998 until when did you serve as this
12 district's Senior Resident?

13 A. I retired effective January 1st, 2011; so, I was
14 Senior Resident Judge for 13 years.

15 Q. During that time period, sir, who were some of the
16 judges that you served with in addition to Judge Herring and
17 Judge Brewer over that period of time after you became the
18 Senior Resident?

19 A. After Senior Resident?

20 Q. Yes, sir.

21 A. Of course, Judge Thompson; from here, Judge Weeks
22 came on the bench in 1989. Judge Thompson came on in 1991.
23 Judge Ammons came on in 1998. No. Yes, came from a District
24 Court bench to Superior Court in 1998. From out of county,
25 Judge B. Craig Ellis, Judge Frank Floyd, Judge Bell, Judge

1 Tom Lock, Knox Jenkins, Judge Bill Gore. Let's see. Frank
2 Lanier from -- I'm trying to go down the counties.

3 Q. Yes, sir?

4 A. And many others from the surrounding area; and,
5 there were other out-of-county judges from -- who were
6 assigned here periodically.

7 Q. Now, sir, during your service as a Superior Court
8 Judge -- and I'm just going to talk about the entire time
9 period, 1983 to 19 -- or, excuse me, till 2011. Did you have
10 occasion to try homicide cases and, in particular, capital
11 cases?

12 A. I did.

13 Q. Do you have an estimate as to how many homicide
14 cases and/or capital cases you tried during that period of
15 time, not only here in Cumberland County, but around the
16 State of North Carolina?

17 A. Homicide cases, I've been in 45 counties roughly;
18 and, it would be numerous noncapital murder cases. When I
19 first started, you would go into a district and, because you
20 did not have the number of weeks that you have today and the
21 -- usually in a criminal session, they wanted to move as many
22 cases as they could, so it would not be unusual for a
23 Superior Court Judge at that time -- because you dispose of a
24 lot of cases today by pleas, but not as much in those days --
25 you would be trying two to three jury cases per week. I've

1 actually tried, in this county, five jury cases, but they
2 were all DWI, back to back. So, you do not -- in my latter
3 tenure, I was not trying as many cases because of the
4 discovery rules and so forth. You didn't -- more cases were
5 disposed of by pleas.

6 Q. When you mentioned the five cases in one week, that
7 was an example to show how many cases of jury trials you had
8 tried in one week ----

9 A. Correct.

10 Q. ---- during a session of court; and, with respect
11 to capital cases, or death penalty cases, do you have an
12 estimate as to the number of those types of cases that you
13 presided over which involved a jury selection in North
14 Carolina?

15 A. Probably eight to ten, in that range. Now, not all
16 of them received death penalty.

17 Q. Yes, sir.

18 A. But you may have started a capital case and, in one
19 fashion or another, it may have been resolved or resulted in
20 a life imprisonment.

21 Q. Do you know how many of those eight to ten cases
22 that were tried capitally did result in the jury recommending
23 the death penalty for a particular individual?

24 A. Five.

25 Q. And do you recall them by name?

1 A. Yes.

2 Q. Could you recite those for us, please, sir?

3 A. As best I can. It will be like going down my
4 grandchildren's ages; but, in any event, the first one I
5 tried was State of North Carolina versus Timothy Bailey
6 Hennis. Hennis was a white male. His victims were an adult
7 white female ----

8 MR. HUNTER: Objection to this, Your
9 Honor.

10 THE COURT: Objection is sustained.

11 MR. COLYER Judge, if we might, with
12 respect to a proffer ----

13 THE COURT: Absolutely.

14 MR. COLYER: ---- could we reserve the
15 opportunity to include this in writing at a later time?

16 THE COURT: Absolutely, Mr. ----

17 MR. COLYER: The reason I'm doing that
18 is to remind myself ----

19 THE COURT: Yes, sir.

20 MR. COLYER: ---- and ask the Court and
21 to have Mr. Thompson keep an accurate record for us.

22 THE COURT: Okay. Absolutely; and, I
23 believe that's consistent with the matters we discussed on
24 the record.

25 MR. COLYER Yes, sir.

1 THE COURT: I guess where I'm going is
2 timeframe. At some juncture, we're going to have to talk
3 about that.

4 MR. COLYER: Yes, sir.

5 THE COURT: But, for purposes of the
6 record, yes, sir.

7 MR. COLYER: Well, we'll try to keep a
8 list so that we're in a position, respectfully, Your Honor,
9 to talk about that at the appropriate time; and, just for the
10 record, so it doesn't appear that I'm waiving anything, we
11 would again note our objection and that you note our
12 exception.

13 THE COURT: Objection is sustained.
14 The State's exception is noted for the record. So, all
15 issues are preserved; and, feel free to do that, Mr. Coyer.

16 MR. COLYER: And, Your Honor, so that
17 we don't need this, may we have essentially a continuing line
18 of objections, so that we don't have to stand up and say this
19 every time we get stopped on a question?

20 THE COURT: I mean, that's ----

21 MR. COLYER: Not so much to the
22 objection, excuse me ---

23 THE COURT: Yes, sir.

24 MR. COLYER: ---- but just to the
25 process with respect to the motion in limine and the offer of

1 proof that will be required in writing later.

2 THE COURT: Okay. It's your
3 preference, your call. I am aware, and I'm confident you're
4 aware, of the case law on waiver issues.

5 MR. COLYER: Yes, Your Honor.

6 THE COURT: My practice has been and
7 continues to be I'll note it.

8 MR. COLYER Judge, from now on,
9 whenever there is an objection that is sustained ----

10 THE COURT: I'll note it.

11 MR. COLYER: --- if I could just say
12 objection, and you will know what I'm talking about.

13 THE COURT: Yes, sir; absolutely.
14 Yes, sir.

15 MR. COLYER: Yes, sir. Thank you.

16 THE COURT: Yes, sir.

17 Q. Excuse me, Judge Johnson, back to your list of the
18 defendants in capital cases you presided over as a trial
19 judge that were recommended for the death penalty, the next
20 case after Mr. Hennis would be?

21 A. State of North Carolina versus Kenneth Bernard
22 Rouse, Randolph County; State of North Carolina versus Earl
23 Richmond, Junior, Cumberland County; State of North Carolina
24 versus Marcus Robinson, Cumberland County; State of North
25 Carolina versus Philip Wilkinson, Cumberland County; and, I

February 7, 2012

1 started a capitally impaneled jury of State versus Jeffrey
2 Carl Myer. Mr. Myer escaped from ----

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Sustained.

5 MR. COLYER Objection.

6 THE COURT: Noted, and exception is
7 noted for the record.

8 MR. COLYER: And, Judge, just -- just
9 so you'll know, we'll supplement the record with information
10 on all of those cases.

11 THE COURT: Yes, sir.

12 MR. COLYER: Thank you.

13 THE COURT: Yes, sir, Mr. Colyer.

14 Q. And that was here in Cumberland County originally;
15 was it not, sir?

16 A. Which one?

17 Q. Mr. Myers's case?

18 A. Yes; correct.

19 Q. And, when it went to New Hanover County on a
20 transfer of venue, you did not participate?

21 A. I did not

22 Q. All right, sir. Thank you. Now, going back just
23 for a moment with respect to the case of State of North

24 Carolina versus Marcus Robinson ----

25 A. Correct.

1 Q. ---- was that tried in 1994, sir?

2 A. Correct.

3 Q. And Philip Wilkinson, was that tried in 1995, sir?

4 A. Yes, shortly thereafter.

5 Q. And the Jeffrey Carl Myer case that you referred
6 to, would that have predated 1990? Would that have occurred
7 sometime in 1988, 1989?

8 A. I don't recall the date.

9 Q. Judge Johnson, I'm going to represent to you that
10 the State of North Carolina versus Marcus Robinson and the
11 State of North Carolina versus Philip Wilkinson are included
12 within a study that was done by the Michigan State
13 University, some professors there, encompassed within the
14 time period 1990 through 2010?

15 A. All right, sir.

16 Q. Have you been made aware of that in some form or
17 fashion?

18 A. Only vaguely. I don't know any of the details,
19 only there's a study.

20 Q. All right, sir. Now, just some initial
21 housekeeping facility -- or, questions related to -- the case
22 of Marcus Robinson, do you recall who was the prosecutor in
23 that case?

24 A. Assistant District Attorney John Dixon.

25 Q. Do you recall who the defense attorneys were?

1 A. Randy Gregory and Ed Brady.

2 Q. With the case of Philip Wilkinson, 1995, do you
3 recall who the Assistant District Attorney was in that case?

4 A. You.

5 Q. And do you know who the defense attorneys were in
6 that case?

7 A. Jack Carter and Larry McLaughlin, I believe.

8 Q. Now, I'm going to ask you a general question and
9 then we'll come back and deal with some specifics, if I can;
10 and I'd like for you, generally, to answer those -- this
11 question, if you can ----

12 A. All right, sir.

13 Q. ---- with respect to first the Marcus Robinson case
14 ----

15 THE COURT: Mr. Colyer, is this a good
16 place for us to take a lunch recess?

17 MR. COLYER: Judge, as you can see,
18 I've got about a one-square meter area here, and I'm having a
19 tendency to hide things from myself that I know are right
20 here in front of me. I would appreciate that indulgence.

21 THE COURT: I'm familiar with the
22 problem. Yes, sir. All right.

23 Thank you, Judge Johnson. You may step down,
24 sir.

25 THE WITNESS: All right. Thank you,

February 7, 2012

1 sir.

2 THE COURT: 2:15, or do you want be
3 heard as to the normal lunch hour of 2:30?

4 MR. JAMES FERGUSON: Either way, Your Honor.

5 MR. HUNTER: Whatever the Court likes.

6 THE COURT: All right. Mr. Colyer,
7 Mr. Thompson, 2:15, 2:30 -- have any preference?

8 MR. COLYER: That's fine, Judge. 2:15,
9 whatever the Court wants is fine. Thank you, Judge Johnson.

10 THE COURT: 2:15.

11 [The hearing recessed at 12:55 p.m. and reconvened at 2:15
12 p.m., February 7, 2012, with all pertinent parties present
13 prior to the recess once again present, to include the
14 defendant.]

15 MR. THOMPSON: May I have a second,
16 Judge?

17 THE COURT: Yes, sir.

18 [Pause.]

19 MR. THOMPSON: Logistics ----

20 THE COURT: Yes, sir.

21 MR. THOMPSON: --- has been the word of
22 my tenure here. Insofar as we had a lot of our morning taken
23 up ----

24 THE COURT: Yes, sir.

25 MR. THOMPSON: We have Judge Johnson

February 7, 2012

1 available. I believe he's still outside the courtroom
2 waiting for this. We have Judge Thompson here and available,
3 but we wanted to get this dealt with before -- so we could
4 cut him loose, if possible, based on what he's going to say.
5 The affidavits, we've dealt with. I've got a couple -- a few
6 minutes of last minute stuff I've got to do to get that
7 straight, I think that ----

8 THE COURT: What affidavits are we
9 talking about?

10 MR. THOMPSON: The State affidavits.

11 THE COURT: The prosecutors?

12 MR. THOMPSON: The prosecutor's
13 affidavits.

14 THE COURT: Okay.

15 MR. THOMPSON: Before end of day, based
16 on the scheduling of all the other parties and their
17 schedules, the other prosecutors, we wanted to get those into
18 evidence, have whatever final discussions we're going to have
19 about that and actually hand those in, in the form that
20 they're going to be in court.

21 THE COURT: Okay.

22 MR. THOMPSON: And given the different
23 hundred nuances we've had in relation to that, I didn't
24 expect that would be a quick process, but we'll see; but, to
25 the extent scheduling-wise, what we wanted permission of the

February 7, 2012

1 Court to do is finish with Johnson, whenever that happens.

2 THE COURT: Okay.

3 MR. THOMPSON: Go forward with the
4 affidavits and any other matters ----

5 THE COURT: Okay.

6 MR. THOMPSON: ---- start with -- and
7 deal with -- a fresh start tomorrow with either Katz or Gore.
8 Potentially, we have a question as to -- Gore has a
9 scheduling issue -- we may have to put him in first thing in
10 the morning.

11 THE COURT: Okay.

12 MR. THOMPSON: But we wanted permission
13 to cut Judge Thompson loose so he's not sitting around
14 wasting his retirement time in a courtroom in the DA's
15 office, respectfully -- in the courthouse in the DA's office.
16 Permission-wise, we wanted permission to cut him loose, but
17 we may begin a little early -- we deal with the affidavit
18 issue, get those in, and then move on.

19 THE COURT: Okay.

20 MR. THOMPSON: If it's all right with the
21 Court.

22 THE COURT: I'm seeing Mr. Hunter
23 nodding his assent.

24 MR. HUNTER: Yes. That sounds fine.

25 THE COURT: Yes, sir.

February 7, 2012

1 MR. THOMPSON: The next thing, we want
2 time to deal with, at the end of the day -- we do not want to
3 get into it now. We'd love to get back into it with Judge
4 Johnson; but, insofar as to get in Your Honor's brain and the
5 defense brain, thinking about the process of the proffers --
6 what we had come up with is one of us, Mr. Colyer or myself,
7 may rely on the court reporting to keep up with the questions
8 ----

9 THE COURT: The objections?

10 MR. THOMPSON: ---- which the objections
11 -- and the bouncing around of objections that will be done
12 ----

13 THE COURT: Okay.

14 MR. THOMPSON: ---- when that time comes
15 -- we'll need the Court's permission and order to get a court
16 reporter and that witness and a prosecutor in a room and ask
17 those questions, get those answers down in the form -- they
18 would be in a courtroom -- in essence, in their entirety, not
19 tinkered with ----

20 THE COURT: So, how are you going to
21 enter it on the record in the presence of the court reporter;
22 simply one of you speaking what the proffer would be?

23 MR. COLYER: Certainly, like a
24 deposition.

25 THE COURT: Yes, sir.

1 MR. COLYER: It's just with us and the
2 witness and the court reporter for preservation purposes ----

3 THE COURT: Okay.

4 MR. COLYER: ---- so that we don't have
5 to do a summery or a synopsis. It would be question and
6 answer, and it would be more in keeping with the type of
7 thing that the Court deals with in ruling on, and then that
8 would be submitted in that form.

9 MR. THOMPSON: And, insofar as the
10 questions on direct examination are the only ones affected by
11 the ruling ----

12 THE COURT: Yes, sir.

13 MR. THOMPSON: ---- and redirect -- or,
14 in essence, questions from this side of the courtroom ----

15 THE COURT: Yes, sir.

16 MR. THOMPSON: ---- the cross-examination
17 obviously would not be affected by those -- we wanted the --
18 we wanted those answers to be complete and proper, so -- but
19 we'll need leave of the Court to sign the order -- or, be
20 willing to sign that order for a court reporter to take an
21 hour, however long it'll take for each one of these judges.
22 Now, I fear these court reporters as much as Your Honor does,
23 [General laughter.]

24 MR. THOMPSON: And I think with really
25 good reason given the look on the court reporter's face now;

1 but, the State of North Carolina has other court reporters
2 elsewhere that we might not be so afraid of; but, again, I
3 don't want to talk it about now . I wanted to throw to the
4 Court and to the defense. We're looking for methodology.
5 I'm the logistics guy, and I'd like to bring that up. That's
6 something else I'd like to discuss after Judge Johnson
7 testifies.

8 THE COURT: Folks, if you -- if you
9 would like time to think about your position on that, if
10 you'd like time to consider whether or not you'd like to have
11 someone from your side present, that's absolutely okay. I'm
12 understanding that you're simply throwing it out for
13 consideration at this point.

14 MR. COLYER: Yes, sir.

15 THE COURT: All right.

16 MR. THOMPSON: And, for the record, it's
17 all right, we'll cutting loose Judge Thompson for today's
18 purposes.

19 THE COURT: Yes, sir. We are -- we
20 are.

21 MR. THOMPSON: Thank you, Your Honor.

22 THE COURT: And let me state for the
23 record, Mr. Thompson, I will not be the one in the room with
24 the court reporters.

25 MR. THOMPSON: Well, it's going to have

1 to have your signature on it, Judge, to make that happen, so

2 ----

3 THE COURT: Yes, sir.

4 MR. THOMPSON: ---- we'll talk about that
5 later this afternoon.

6 THE COURT: Yes, sir. All right. Are
7 we ready to go otherwise, Mr. Colyer.

8 MR. COLYER We think so, Your Honor.
9 I just wanted to make sure we weren't ----

10 THE COURT: Yes, sir.

11 MR. COLYER: ---- overstepping. Yes,
12 sir. Thank you.

13 THE COURT: Okay.

14 MR. COLYER: Corporal Brown?

15 [The witness entered the courtroom.]

16 THE COURT: Yes, sir. If you would,
17 take the stand. Would you like some water, sir?

18 THE WITNESS: Something stronger, Judge
19 Weeks.

20 [General laughter.]

21 THE COURT: Here you are, sir [handing
22 a cup of water to the witness].

23 THE WITNESS: You're not charging me
24 today, are you?

25 THE COURT: No, sir.

February 7, 2012

1 THE WITNESS: All right.

2 THE COURT: Okay. Mr. Colyer?

3 THE WITNESS: If you would, give me one
4 moment just to put my books ----

5 MR. COLYER: Sure. I'm sorry.

6 [Pause.]

7 THE WITNESS: All right, sir.

8 MR. COLYER: Do you need both -- Madam
9 Court Reporter, do you need both of these off?

10 MADAM COURT REPORTER: Sometime it helps.

11 MR. COLYER: Okay.

12 [Pause.]

13 **DIRECT EXAMINATION continued conducted by MR. CALVIN COLYER:**

14 Q. Judge Johnson, before lunch, we asked you --
15 actually, before you started your background testimony, about
16 the material that you had had an opportunity to review. Did
17 we include everything that you had an opportunity to review
18 in that?

19 A. I'm pretty sure of that.

20 Q. And here's the question I wanted to ask you when we
21 broke earlier, based upon your observations as a trial judge,
22 was race a significant factor in the State's peremptory
23 strikes against black jurors in the case of the ----

24 MR. HUNTER: Objection, Your Honor.

25 Q. ---- State of North Carolina versus Marcus

1 Robinson?

2 THE COURT: Before you answer, sir --
3 I'm sorry. Go ahead and complete your question. I'm noting
4 that there's an objection; but, so that the question is clear
5 on the record, if you would, repeat it, please, sir.

6 MR. COLYER: Yes, sir.

7 Q. Sir, based upon your observations as the trial
8 judge, was race a significant factor in the State's
9 peremptory strikes against black jurors in the case of the
10 State of North Carolina versus Marcus Robinson?

11 THE COURT: The objection is
12 sustained.

13 MR. COLYER: Objection.

14 THE COURT: I'm sorry. Exception is
15 noted for the record.

16 MR. COLYER: Thank you.

17 THE COURT: I apologize, Mr. Colyer.
18 Yes, sir.

19 MR. COLYER: And, Judge, I want to
20 follow-up with a series of questions. I don't mean any
21 disrespect.

22 THE COURT: I understand.

23 MR. COLYER: I just want the record to
24 be clear.

25 THE COURT: Abs -- absolutely. Yes,
February 7, 2012

1 sir.

2 Q. Judge Johnson, based upon your observations as the
3 trial judge, was race a significant factor in the State's
4 peremptory strikes against black jurors in the State of North
5 Carolina versus Philip Wilkinson ----

6 MR. HUNTER: Objection.

7 THE COURT: The objection is
8 sustained.

9 MR. COLYER: And our objection ----

10 THE COURT: Exception is noted for the
11 record. I apologize.

12 MR. COLYER: And, just for further
13 clarifications, would it be appropriate for us to ask, at
14 this point, the basis of the objection stated on the record?

15 THE COURT: Absolutely.

16 MR. COLYER: Thank you.

17 THE COURT: As the record will
18 reflect, we've had a fairly extensive discussion on what's
19 appropriate and what's not appropriate for, in this case, a
20 judge who was presiding over the matter at issue to testify
21 about matters outside of the record in the case. My
22 understanding is you're asking for his opinion as to,
23 arguably, an issue related to the fairness of the process;
24 and, it's on that basis that the objection is sustained.

25 MR. COLYER: And, actually, with

1 respect to that question, Your Honor, I'd like to be heard.
2 My question is couched based on observations which we are
3 contending are sight and sound as well as reading the record.
4 We're not asking to get into his mental thought processes as
5 it related to his decisions at trial, that obviously is, as
6 you have pointed out, a public -- a matter of record at this
7 point; but, this is based strictly upon observations, as he's
8 testified to, with respect to reading the transcript and
9 seeing and hearing the jurors at the time of the occurrence.

10 THE COURT: Yes, sir. Your rationale
11 is of record. The objection remains sustained. The State's
12 objection and exception are noted for the record.

13 MR. HUNTER: Your Honor, if I may, I
14 just want to add that that would obviously be an expert
15 opinion, and he was not identified as an expert ----

16 THE COURT: I appreciate ----

17 MR. HUNTER: ---- according to the rule
18 ----

19 THE COURT: ---- your bring that to
20 our attention, because it was noted as part of your position
21 that Judge Johnson had not been designated as an expert in
22 this case; and, the record will further reflect that Mr.
23 Colyer, earlier -- I believe it was yesterday -- indicated
24 that Judge Johnson was being called solely as a fact witness.
25 So, I appreciate your bringing that that to our attention.

February 7, 2012

1 MR. COLYER: And, Your Honor, I
2 appreciate that; but, I respectfully -- this question was
3 asked of Judge Dixon, a the prosecutor ----

4 THE COURT: Yes, sir.

5 MR. COLYER: ---- and there was no
6 objection about him commenting on it with respect to being an
7 expert witness. So, we contend that this question is not an
8 expert-witness question. It was asked of Judge Dixon without
9 objection. It was allowed in court -- his answer; and, we
10 contend that it's the same type of situation with respect to
11 Judge Johnson, since he was the trial judge and presumably
12 had the same opportunity to see and hear the jurors, as well
13 as, he's testified here read the transcripts which are part
14 of this record.

15 THE COURT: Yes, sir. Okay; and, let
16 the record reflect that is the position of the State. The
17 ruling of the Court remains in effect; and, objection and
18 exception are noted for the record.

19 MR. COLYER: And along those lines,
20 Your Honor, I'm going to ask specific questions now with
21 respect to the jurors, if I might?

22 THE COURT: Yes, sir.

23 [Pause.]

24 Q. Specifically, Judge Johnson, based upon your
25 observations as the trial judge in the State of North

1 Carolina versus Marcus Robinson case, was race a significant
2 factor in the State's peremptory strike of the black juror,
3 Elliott Troy [phonetic]?

4 MR. HUNTER: Objection.

5 THE COURT: Sustained. Objection and
6 exception of the State are noted for the record.

7 Q. Specifically, Judge Johnson, based upon your
8 observation as the trial judge in the State of North Carolina
9 versus Marcus Robinson, was race a significant factor in the
10 State's peremptory strike of the black juror, Tandra
11 Whitakers?

12 MR. HUNTER: Objection.

13 THE COURT: The objection is
14 sustained. The State's objection and exception to the ruling
15 are noted for the record.

16 Q. Specifically, Judge Johnson, based upon your
17 observation as trial judge in the State of North Carolina
18 versus Marcus Robinson, was race a significant factor in the
19 State's peremptory strike of the black juror Margie Chase?

20 MR. HUNTER: Objection.

21 THE COURT: Objection is sustained.
22 The State's objection and exception to the ruling of the
23 Court is noted for the record.

24 Q. Specifically, Judge Johnson, based your
25 observations as the trial judge in the State of North

1 Carolina versus Marcus Robinson was race a significant factor
2 in the State's peremptory strike of the black juror Sylvia
3 Robinson?

4 MR. HUNTER: Objection.

5 THE COURT: The objection is
6 sustained. The State's objection and exception to the ruling
7 of the Court is noted for the record.

8 Q. Specifically, Judge Johnson, based upon your
9 observations as the trial judge in the State of North
10 Carolina versus Marcus Robinson, was race a significant
11 factor in the State's peremptory strike of the black juror
12 Nelson Johnson?

13 MR. HUNTER: Objection.

14 THE COURT: Object -- pardon me. The
15 objection is sustained. The State's objection and exception
16 to the ruling of the Court is noted for the record.

17 MR. COLYER: And, Your Honor, with the
18 Court's permission, I'd like to ask the same questions with
19 respect to the Philip Wilkinson case.

20 THE COURT: Yes, sir. Yes, sir.

21 Q. Specifically, Judge Johnson, based upon your
22 observations as the trial judge in the State of North
23 Carolina versus Philip Wilkinson case, was race a significant
24 factor in the State's peremptory strike of the black juror
25 Colleen Peterson?

1 MR. HUNTER: Objection.

2 THE COURT: The objection is
3 sustained. The State's objection and exception to the ruling
4 of the Court is noted for the record.

5 Q. Specifically, Judge Johnson, based on your
6 observations as the trial judge in the State of North
7 Carolina versus Philip Wilkinson case was race a significant
8 factor in the State's peremptory strike of the black juror
9 Alfred McNeil.

10 MR. HUNTER: Objection.

11 THE COURT: The objection is
12 sustained. The State's objection and exception to the ruling
13 of the Court is noted for the record.

14 Q. Specifically, Judge Johnson, based upon your
15 observations as the trial judge in the State of North
16 Carolina versus Philip Wilkinson, was race a significant
17 factor in the State's peremptory strike of the black juror
18 JoAnn Thomas?

19 MR. HUNTER: Objection.

20 THE COURT: Objection is sustained.
21 The State's objection and exception to the ruling of the
22 Court is noted for the record.

23 Q. Specifically, Judge Johnson, based upon your
24 observations as the trial judge in the State of North
25 Carolina versus Philip Wilkinson, was race a significant

1 factor in the State's peremptory strike of the black juror
2 Nathaniel McDonald?

3 MR. HUNTER: Objection.

4 THE COURT: Objection is sustained.

5 The State's objection and exception to the ruling of the
6 Court is noted for the record.

7 Q. Now, Judge Johnson, do you recall whether or not
8 there was a Batson challenge raised by the defense attorneys
9 in the State of North Carolina versus Marcus Robinson case?

10 MR. HUNTER: Objection.

11 THE COURT: Objection is sustained.

12 The State's objection and exception are noted for the record.
13 That's a matter of record in this case.

14 Q. Do you recall, Judge Johnson, whether there was a
15 pretrial motion in limine with respect to Batson that was
16 raised in the Marcus Robinson case?

17 MR. HUNTER: Objection.

18 THE COURT: Objection's sustained. The
19 State's objection and exception are noted for the record.
20 The basis is the same, Mr. Colyer and Mr. Thompson.

21 MR. COLYER: Yes, sir.

22 MR. THOMPSON: May we ask, Judge -- the
23 court -- that the defense states, with particularity, what --
24 what the objection is. They're -- they're changing, and I
25 need to make sure that I've kept track of what needs to be

1 done and keep the record straight, so the appellate courts
2 can review it.

3 THE COURT: Folks, any response by
4 counsel for the defendant?

5 MR. HUNTER: If you -- we want to make
6 it longer, I'm happy to make it longer, Your Honor.

7 THE COURT: Well, folks, you're free
8 to try the case you believe is the appropriate way to try it.
9 I'm doing the best I can to put my bases on the record ----

10 MR. COLYER: Judge, we ----

11 THE COURT: ---- so it's there for
12 appellate review.

13 MR. COLYER: The only reason that we
14 say that is to make sure the record is clear and to make sure
15 that, if there is a shifting or changing basis ----

16 THE COURT: Yes, sir.

17 MR. COLYER: ---- other than what has
18 previously been stated of record in this court, that we -- we
19 note it so that it can be dealt with appropriately; and, if
20 there's no change, then that -- that's fine.

21 THE COURT: Okay. Folks, if you want
22 to state your basis -- otherwise, folks, I think all of us
23 are aware of the case law dealing with general objections;
24 but, that's where we are.

25 Go forward, Mr. Colyer.

1 MR. COLYER: Yes, sir.

2 [Pause.]

3 MR. COLYER: And I apologize for the
4 form of this question. I know it's probably going to be
5 objectionable just in the form; and, to the extent that it is
6 and there's a further objection with it, we won't quibble
7 over which objection is controlling, but ----

8 THE COURT: Yes, sir.

9 Q. Judge Johnson, since the State -- excuse me. Since
10 the defense did not make any Batson challenges or objections
11 in the case of State of North Carolina versus Marcus Robinson
12 ----

13 MR. HUNTER: Objection.

14 THE COURT: Basis?

15 MR. HUNTER: To the form of the
16 question.

17 THE COURT: All right. The objection
18 is sustained. Is it -- well, let me give you the opportunity
19 to be heard, Mr. Colyer.

20 MR. COLYER: Judge, I'd just like to
21 ask the question. That's why I mentioned that, because that
22 -- there might be an additional grounds for objection, but I
23 think it's going to go back to the -- the same issue we've
24 been dealing with. So, with respect to this question,
25 although it may -- the form of the question itself may be

1 objectionable, just for the record, I'd like to be able to
2 ask the question ----

3 THE COURT: Yes, sir.

4 MR. COLYER: ---- so that the objection
5 can ----

6 THE COURT: I'll give you that
7 latitude. Yes, sir.

8 MR. COLYER: Thank you, sir.

9 THE COURT: Go ahead.

10 Q. Judge Johnson, since the defense did not make any
11 Batson challenge or objection to a particular juror in the
12 case of State of North Carolina versus Marcus Robinson, as
13 the trial judge, had you observed the use of race as a
14 significant factor in the State's peremptory strike of a
15 black juror, would you have intervened *ex mero motu* or *sua*
16 *sponte* or on your own motion to correct the situation?

17 MR. HUNTER: Objection.

18 THE COURT: Objection is sustained.
19 The State's objection and exception are noted for the record.

20 MR. COLYER: Judge, I'd also like to
21 ask the same question with respect to Philip Wilkinson,
22 please.

23 THE COURT: Yes, sir.

24 Q. Judge Johnson, since the defense did not make or
25 raise a Batson challenge or objection with respect to the

1 case of State of North Carolina versus Philip Wilkinson, as
2 the trial judge, had you observed the use of race as a
3 significant factor in the State's peremptory strike exercise
4 against a black juror, would you have intervened ex mero motu
5 or sua sponte or on your own motion to correct the situation?

6 MR. HUNTER: Objection.

7 THE COURT: The objection is
8 sustained. The State's objection and exception are noted for
9 the record.

10 MR. COLYER: If I could have just a
11 moment to confer with counsel?

12 THE COURT: Yes, sir.

13 [Pause.]

14 MR. COLYER: Judge, respectfully, if I
15 may be allowed to ask a question for the record with respect
16 to the same format, but just a slightly different change in
17 the subject matter?

18 THE COURT: Yes, sir.

19 Q. Judge Johnson, based upon your observations as
20 trial judge, did the State racially discriminate in the
21 exercise of any peremptory challenge against a black juror in
22 the case of State of North Carolina versus Marcus Robinson?

23 MR. HUNTER: Objection.

24 THE COURT: Objection is sustained.

25 The State's objection and exception are noted for the record.

February 7, 2012

1 Q. Judge Johnson, based upon your observations as
2 trial judge, did the State racially discriminate in the
3 exercise of any peremptory challenge against any black juror
4 in the case of State of North Carolina versus Philip
5 Wilkinson?

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: Objection is sustained.

8 The State's objection and exception are noted for the record.

9 MR. COLYER: And, Judge, if you will,
10 bear with me for a couple more questions, please, sir.

11 THE COURT: Yes, sir.

12 Q. Judge Johnson, as the trial judge, if you would
13 have observed the State's exercise of a peremptory strike
14 against a black juror based upon race and the defense had not
15 raised a Batson objection, would you have intervened ex mero
16 motu or on your own motion to correct the situation by
17 denying the State's peremptory strike and sustaining the
18 Batson objection raised by the ex mero motu objection by
19 yourself as the trial judge ----

20 MR. HUNTER: Objection.

21 MR. COLYER: Excuse me.

22 Q. ---- in the case of State of North Carolina versus
23 Marcus Robinson?

24 MR. HUNTER: Objection.

25 THE COURT: Objection is sustained.

February 7, 2012

1 The State's objection and exception to the ruling are noted
2 for the record.

3 MR. COLYER: And, finally, with respect
4 to this line of questioning, Judge Weeks, if you please ----

5 THE COURT: Yes, sir.

6 Q. Judge Johnson, as the trial judge, if you would
7 have observed the State's exercise of a peremptory strike
8 against a black juror based upon race and the defense had not
9 raised a Batson objection, would you have intervened ex mero
10 motu or on your own motion to correct the situation by
11 denying the State's peremptory strike and sustaining the
12 Batson objection raised ex mero motu by yourself as the trial
13 judge?

14 MR. HUNTER: Objection.

15 THE COURT: Objection is sustained.

16 The State's objection and exception to the ruling are noted
17 for the record.

18 [Pause.]

19 MR. THOMPSON: I'm going to need just a
20 minute, Judge.

21 THE COURT: I'm sorry, sir?

22 MR. THOMPSON: I'm going to need just a
23 minute, please.

24 THE COURT: Yes, sir.

25 [Pause.]

1 MR. COLYER: I was probably talking too
2 fast, Judge. I'm sorry. He's trying to catch up with me.

3 MR. THOMPSON: I don't have the skills of
4 the court reporter, Judge.

5 MR. COLYER: If we could have just a
6 moment, please, sir?

7 THE COURT: Yes, sir.

8 [Pause.]

9 Q. Judge Johnson, directing your attention to State's
10 Exhibit Number 27 ----

11 MR. COLYER: If I could approach, Your
12 Honor?

13 THE COURT: Yes, sir.

14 [Pause.]

15 MR. COLYER: I'm going to put 27 and 28
16 on the bar in front of Judge Johnson, Judge Weeks.

17 THE COURT: Yes, sir.

18 [Pause.]

19 Q. Earlier today, you identified those as your notes
20 based upon your review in preparation for testimony in this
21 case; is that correct?

22 A. That is correct.

23 Q. All right. Sir, what was the methodology that you
24 used? How did you go about compiling these notes for us, if
25 you will?

1 MR. HUNTER: Objection.

2 [Pause.]

3 THE COURT: Mr. Hunter, that objection
4 is overruled. In terms of what materials were reviewed, if
5 it deals with any thought processes or other matters, then
6 feel free to let me know you want to be heard.

7 All right. Go ahead, Judge Johnson.

8 A. I received, the week of January 2nd, a copy of the
9 transcript of the trial of State versus Marcus Robinson in a
10 CD format. It was left at my front door by Assistant
11 District Attorney Rob Thompson. There was no conversation
12 between Mr. Thompson and myself except he called me on his
13 cell phone after he left, and I went to the door and
14 retrieved the CD. Sometime shortly after that, I began a
15 review of the transcript, with particularity, the jury
16 selection in this case, which was the matter at issue. I sat
17 in front of my home computer and went page by page by page
18 for the sum of approximately 2,000 pages of the jury
19 selection. I used the master index from the court reporter
20 which records the jury selection, the page that a juror went
21 into the jury box, the page reference when the juror was
22 either passed or excused. I made shorthand notes on a copy
23 of the master index as to whether or not a juror was excused
24 by a State's peremptory or challenge for cause; the same
25 thing for the defendant, whether a juror was excused by a

February 7, 2012

1 defendant's challenge for cause or a defendant's peremptory.
2 I, thereafter, at one point in time, asked for the
3 questionnaires that were utilized in this trial. I
4 subsequently obtained those. I have those with me here in
5 the courtroom. I took the questionnaires and went down the
6 master index and recorded the sex and the race of the
7 individuals as reflected on the questionnaires.

8 MR. COLYER: May I approach, Your
9 Honor?

10 THE COURT: Yes, sir.

11 [Pause.]

12 Q. Judge Johnson, I'm going to hand you what's marked
13 for identification as State's Exhibit 29 [handing the exhibit
14 to the witness]. Can you tell us what that is, sir?

15 A. This is the master index of jury selection that was
16 prepared by the court reporter in the case, and it is a copy
17 of the one that I utilized, except it does not have my
18 handwritten notes on it, but it's a copy of the original.

19 Q. Yes, sir. Now, at the time that you tried this
20 case in 1994, how much experience did you have on the bench?

21 A. At that time, I'd been on the bench 11 years.

22 Q. And the Assistant District Attorney who represented
23 the State, John Dixon, were you familiar with him at that
24 point, before he had begun to try the case of State of North
25 Carolina versus Marcus Robinson?

1 A. Mr. Dixon was a seasoned Assistant District
2 Attorney.

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Well, the question
5 basically required a yes or no answer. So, the objection is
6 sustained.

7 A. Yes.

8 Q. So, you were familiar with him?

9 A. Yes.

10 Q. And were you familiar with him enough at that point
11 to be aware of his character and reputation with respect to
12 his prosecution skills and his character and reputation as it
13 relates to being a prosecutor in this judicial district?

14 A. Yes.

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Okay. Folks, I'm looking
17 at 404, 405, methods of proving character; and, 404 relates
18 to a pertinent character trait. Objection is sustained. You
19 may rephrase your question.

20 Q. Specifically, sir, were you familiar with John
21 Dixon's reputation and character as a trial attorney,
22 prosecutor, in this district as it related to jury selection
23 and whether or not he used race as a basis for selecting
24 jurors?

25 MR. HUNTER: Objection.

1 THE COURT: To the form of the
2 question, the objection is sustained, but you may rephrase,
3 Mr. Colyer.

4 Q. Judge Johnson, were you familiar with the character
5 and reputation with respect to Assistant District Attorney
6 John Dixon for integrity?

7 A. Yes.

8 Q. What was your knowledge and/or observations about
9 his character and reputation for integrity in 1994, sir?

10 MR. HUNTER: Objection.

11 THE COURT: Do you want to be heard,
12 Mr. Hunter?

13 MR. HUNTER: Well, it's just not --
14 it's not a character trait that's in issue, Your Honor.

15 THE COURT: Yes, sir. The objection
16 is sustained.

17 [Pause.]

18 THE COURT: Well, Judge Dixon has
19 testified at -- this case as a witness.

20 MR. COLYER: I have another question
21 that ----

22 THE COURT: Go ahead.

23 MR. COLYER: ---- I could follow-up.

24 THE COURT: Yes, sir. Go ahead.

25 Q. Judge Johnson, in 1994 and even here in 2012, do

1 you have an opinion based upon the character and reputation
2 of John Dixon for credibility?

3 A. yes.

4 Q. What is your opinion ----

5 MR. HUNTER: Objection, Your Honor.

6 THE COURT: Overruled.

7 Q. ---- with respect to his character and reputation
8 for credibility?

9 A. In the years that I've known John Dixon, he has
10 always been a professional attorney appearing in front of me
11 and his credibility has always been exceptional.

12 MR. HUNTER: Exception for the record,
13 Your Honor.

14 THE COURT: The defendant's objection
15 and exception are noted for the record.

16 MR. THOMPSON: May I have a second,
17 Judge?

18 THE COURT: Yes, sir.

19 [Pause.]

20 Q. Judge Johnson, at the time this case was tried in
21 1994, based upon your knowledge and observations of John
22 Dixon, did he have any reputation for bad character traits
23 for racially discriminating against jurors in the selection
24 process in ----

25 A. No.

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: It's overruled.

3 MR. HUNTER: Move to strike.

4 THE COURT: Motion to strike is denied
5 for the record.

6 MR. HUNTER: Exception, Your Honor.

7 THE COURT: Your exception is noted
8 for the record.

9 Q. Now, sir, who were the participants, as you recall,
10 that represented the defendant?

11 A. Randy Gregory and Ed Brady.

12 Q. And I take it you knew both of those gentlemen?

13 A. Yes, sir.

14 Q. In 1994, did Randy Gregory have a reputation in
15 this jurisdiction for being a competent and an ardent
16 advocate for his clients?

17 MR. HUNTER: Objection, Your Honor.

18 THE COURT: Do you want to be heard,
19 Mr. Hunter?

20 MR. HUNTER: I don't think that's at
21 issue, Your Honor.

22 THE COURT: I simply want to make sure
23 the record reflected what the basis was. Your basing it on
24 relevance grounds. All right. The objection is sustained.
25 The State's objection and exception are noted for the record.

February 7, 2012

1 MR. COLYER: And I'd ask the same
2 question, just for the record, with respect to the Honorable
3 Ed Brady.

4 THE COURT: Yes, sir.

5 Q. Did he have a reputation in 1994 as a trial
6 attorney zealously representing his client and for
7 competency?

8 MR. HUNTER: Objection.

9 THE COURT: Same grounds?

10 MR. HUNTER: Yes, Your Honor.

11 THE COURT: Object is sustained. The
12 State's objection and exception are noted for the record.

13 MR. COLYER: Yes, sir.

14 Q. Now, Judge Johnson, what -- and, specifically, with
15 respect to this case -- not in general, but specifically with
16 respect to the case of State of North Carolina versus Marcus
17 Robinson, what procedures did you use with respect to jury
18 selection and/or orientation of the jurors in placing the
19 jurors, impaneling, that sort of thing -- just the mechanics
20 of how you went about beginning the trial and getting it to
21 the stage where there were questions and answers asked of
22 prospective jurors?

23 MR. HUNTER: Objection.

24 THE COURT: Sustained. The State's
25 objection and exception are noted for the record.

1 Q. Judge Johnson, do know who represented Mr. Marcus
2 Robinson on appeal?

3 A. Yes.

4 Q. Who was that?

5 A. James R. Parrish.

6 Q. And, then, were you familiar with Mr. Parrish's
7 character and reputation for his skills as a trial advocate
8 as well as an appellate advocate for his clients?

9 A. Yes.

10 Q. What ----

11 MR. HUNTER: Objection.

12 THE COURT: Same grounds?

13 MR. HUNTER: Yes, Your Honor.

14 THE COURT: Objection is sustained.

15 The State's objection and exception are noted for the record.

16 Q. Judge Johnson, when this case was tried back in
17 1994, you were familiar with the Batson versus Kentucky
18 decision?

19 A. Yes.

20 MR. HUNTER: Objection, Your Honor.

21 THE COURT: Well, as to whether or not
22 he was familiar, the objection is overruled.

23 A. Yes.

24 MR. HUNTER: Motion to strike.

25 THE COURT: Motion to strike is

1 denied; to which, the defendant objects and excepts for the
2 record.

3 Q. Do you recall whether or not you had any training
4 with respect to the Superior Court Judges' conferences or the
5 Institute of Government back in 1994 with respect to Batson?

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: Objection's overruled.

8 Exception is noted for the record. Motion to strike is
9 denied for the record.

10 As to whether or not he had any training, you
11 may answer yes or no.

12 A. I had training at Superior Court Judges'
13 conferences after Batson versus Kentucky came down.

14 MR. HUNTER: Motion to strike.

15 THE COURT: Motion to strike is
16 denied. Exception is noted for the record.

17 Q. Earlier, you indicated that you read the 2,000
18 pages of the transcript. Did you note, in the reading of
19 that transcript, any Batson challenges or objections that
20 were raised?

21 MR. HUNTER: Objection.

22 THE COURT: Objection is sustained.

23 The State's objection and exception are noted for the record.

24 Q. What accommodations did you make with respect to
25 allowing counsel, either for the State or for the defense, if

1 any, to confer with persons in the courtroom in the exercise
2 of peremptory challenges?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Objection is sustained.

5 That's a matter of record. The State's objection and
6 exception are noted for the record.

7 MR. COLYER: Judge, we would
8 respectfully note our objection and exception to that ruling.
9 I -- I don't think that the record itself proper necessarily
10 indicates what the judge did in relation to -- there may be
11 an indication that there was a brief break without indicating
12 exactly why there was a break.

13 THE COURT: Well, Mr. Colyer, if you
14 will, bear with me. I'm relying, in large part -- because
15 that's all I have at this point -- on what's previously been
16 marked as Defendant's Exhibits 51 and 52; and, I believe the
17 corresponding marking is 27 and 28 of yours.

18 MR. COLYER: Judge, if you will, go to
19 page 3 on State's Exhibit 27.

20 THE COURT: Okay. Bear with me.

21 [Pause.]

22 THE COURT: Okay.

23 MR. COLYER: That's the basis of the
24 question, Your Honor, the conferencing with attorneys and
25 family members.

1 THE COURT: Well, what I'm looking at,
2 on -- and the corresponding document -- are references to
3 page numbers in the transcript.

4 MR. HUNTER: Yes, sir.

5 THE COURT: Okay. The objection is
6 sustained. The State's objection and exception are noted for
7 the record.

8 Q. Judge Johnson, in reading the transcript, did you
9 note where challenges for cause were made?

10 A. Yes.

11 MR. HUNTER: Objection, Your Honor.

12 THE COURT: The objection is
13 sustained. Exception is noted by the State to the ruling of
14 the Court for the record.

15 Q. And, specifically, Judge Johnson, did the State,
16 through Assistant District Attorney John Dixon, on three
17 occasions, interpose an objection on behalf of the defendant
18 for Mr. Brady and Mr. Gregory where a juror had expressed
19 that they were either pro-death penalty or could only
20 consider the death penalty?

21 MR. HUNTER: Objection, Your Honor.

22 THE COURT: Objection is sustained.
23 The State's objection and exception to the ruling are noted
24 for the record.

25 Q. Judge, just for the record, with respect to some --

1 a question I'm going to ask in a few minutes about another
2 exhibit, when you reviewed the jury-selection transcript, did
3 you note if there were challenges for cause?

4 A. Yes.

5 MR. HUNTER: Objection, Your Honor.

6 THE COURT: Objection is sustained.

7 The State's objection and exception are noted for the record.

8 Q. Did you note where there were peremptory challenges
9 both by the State and the defense?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Objection is sustained.

12 The State's objection and exception are noted for the record.

13 Q. Did you note the final composition of the jury?

14 A. Yes.

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Objection is sustained;

17 and, to any matters beyond that, exception by the State is
18 noted in the record.

19 MR. COLYER: Excuse me if I have asked
20 this question previously. I'm not trying to ----

21 THE COURT: Okay.

22 MR. COLYER: ---- be disrespectful, but
23 ----

24 Q. With respect to the transcript that you read, Judge
25 Johnson, did it contain any references to the motions

1 hearings, the pretrial motions hearings, that were dealt with
2 immediately before jury selection started?

3 MR. HUNTER: Objection.

4 THE COURT: Okay. I'm -- I'm trying
5 to make sure I'm understanding your question. If you will,
6 repeat your question, please ----

7 MR. COLYER: Yes, sir.

8 THE COURT: ---- Mr. Colyer.

9 Q. Judge Johnson, you indicated that you read the
10 transcript with respect to the jury selection?

11 A. Correct.

12 Q. And ----

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: The objection is -- well,
15 this is for purposes of clarification. Simply re-ask your
16 question, if you will, please, sir.

17 MR. COLYER: Sorry, sir.

18 THE COURT: Just re-ask the question.

19 MR. HUNTER: Will you please instruct
20 the witness not to reply until ----

21 THE COURT: Yes, sir. If you will,
22 give us a moment after an objection is made, so that I can
23 rule before any answer is given on the record.

24 Go ahead, Mr. Colyer.

25 MR. COLYER: Yes, sir.

1 Q. The jury selection transcript that you reviewed,
2 Judge Johnson, did it include any pretrial motions
3 recordation with respect to motions hearings?

4 MR. HUNTER: Objection.

5 THE COURT: Objection is sustained.
6 Pretrial motions in a case that was pending as a capital case
7 would have been recorded and would be part of the record in
8 this case.

9 MR. COLYER: Judge, I'm not sure that
10 that's actually the case with respect to what the defense put
11 in the overall internet exhibit because, as you may be aware,
12 when you look at the transcripts, quite often, they're
13 divided into motions and then jury selections and then
14 evidence. I just wanted to make sure that, for this next
15 question, what Judge Johnson had referred to here in
16 preparation for his testimony. I'll just cut right to the
17 chase here ----

18 THE COURT: Yes, sir, if you would.

19 MR. COLYER: ---- if you want me to.

20 THE COURT: Yes, sir.

21 Q. Did the defense file a motion in limine with
22 respect to Batson that was heard pretrial?

23 MR. HUNTER: Objection.

24 THE COURT: I'm going to allow a yes
25 or no answer only, Mr. Hunter.

1 If you will, answer yes or no, please, sir.

2 A. Yes.

3 MR. HUNTER: Motion to strike.

4 THE COURT: Motion to strike -- and,
5 for the record, the objection is overruled. Motion to strike
6 is denied; to which, the defendant objects and excepts for
7 the record.

8 Q. As a result of that pretrial motion in limine filed
9 on Batson, did the proceedings, the procedures that you
10 utilized with respect to jury selection -- was it altered in
11 any way?

12 MR. HUNTER: Objection.

13 THE COURT: Sustained. The State's
14 objection and exception are noted for the record.

15 Q. Specifically, Judge Johnson, were the attorneys
16 permitted to address the jurors on the issue of racial bias?

17 MR. HUNTER: Objection, Your Honor.

18 THE COURT: Sustained. The State's
19 objection and exception are noted for the record.

20 Q. And, if they were allowed to ----

21 MR. HUNTER: Objection to the form of
22 the question.

23 THE COURT: Sustained. Rephrase, if
24 you will, please, sir.

25 Q. Were both defense and State allowed to address the

1 issue of racial bias in their jury questions if they wished?

2 MR. HUNTER: Objection.

3 THE COURT: Sustained. The State's
4 objection and exception are noted for the record.

5 [Pause.]

6 MR. COLYER: [Approaching the witness.]

7 THE COURT: What's the exhibit number,
8 Mr. Colyer?

9 MR. COLYER: Number 30, Your Honor.

10 THE COURT: Okay.

11 [Pause.]

12 MR. COLYER: [Handing documents to the
13 Court.]

14 THE COURT: Thank you, sir.

15 Q. Judge Johnson, I'm going to show you what's marked
16 for identification as State's Exhibit Number 30 [handing the
17 exhibit to the witness] and ask you if, beginning at about
18 the center of the page, where it says 12, Cumberland, 262
19 Robinson, comma, Marcus R., seated, black, 262.0.001 ----

20 A. Yes, sir. I see ----

21 Q. ---- Allen, Viviette, L.

22 MR. HUNTER: Objection, Your Honor.

23 THE COURT: The objection is
24 sustained, sir.

25 Mr. Colyer, you're now referring to matters in

1 terms that reflect the contents of the document you're -- go
2 ahead, sir.

3 MR. COLYER: Yes, sir. I apologize,
4 Judge. I was just trying to get him to a particular point in
5 time.

6 THE COURT: Yes, sir.

7 MR. COLYER: A point in space.

8 THE COURT: Yes, sir.

9 Q. Judge Johnson, as you look at that particular
10 exhibit, State's Exhibit 30, beginning on that line that I
11 mentioned, continuing over to the next page ----

12 A. All right, sir.

13 Q. Let's see. Let me count the lines again.

14 [Pause.]

15 Q. Twelve lines down from the top on the second page
16 of State's Exhibit 30, do you recognize that to be, based
17 upon your review of the transcript of the jury selection in
18 this case, the seated jurors, the alternates, those jurors
19 that were struck by the State and those jurors that were
20 struck by the defense?

21 MR. HUNTER: Objection.

22 THE COURT: Sustained. The State's
23 objection and exception are noted for the record.

24 [Pause.]

25 MR. COLYER: Your Honor we would ask to

February 7, 2012

1 move into the record, just for whatever purpose, State's
2 Exhibit Number 30.

3 THE COURT: Do you have a marked copy?

4 MR. COLYER: I do, Your Honor.

5 THE COURT: Okay; and, this is for
6 purposes of making your offer of proof for the record, Mr.
7 Colyer?

8 MR. COLYER: Yes, sir.

9 THE COURT: Okay. I've got another
10 copy.

11 MR. COLYER: Okay, sir. Very good.

12 Thank you.

13 THE COURT: Do you want to be heard,
14 folks?

15 MR. HUNTER: No objection if it's for
16 making ----

17 THE COURT: Okay.

18 MR. HUNTER: ---- the offer of proof.

19 THE COURT: It's entered in the record
20 for purposes of the State's offer of proof with regard to the
21 last question asked.

22 Any other purposes, Mr. Colyer?

23 MR. COLYER: No, Your Honor.

24 THE COURT: Okay.

25 MR. COLYER: Not at this point with

1 this witness ----

2 THE COURT: Okay. Yes, sir.

3 MR. COLYER: ---- as to that exhibit.

4 Q. Now, Judge Johnson, if you would, turning your
5 attention to State's Exhibit Number 28, the exhibit that you
6 ----

7 A. All right, sir.

8 Q. ---- identified earlier, what was the purpose in
9 preparing the notes that are contained in State's Exhibit
10 Number 28 that caused you to bring them to Court with you
11 yesterday?

12 MR. HUNTER: Objection, Your Honor.

13 THE COURT: Sustained. The State's
14 objection and exception are noted for the record.

15 Q. With respect to these notes, Judge Johnson, I'd
16 like to ask you some questions ----

17 A. All right, sir.

18 Q. ---- about them. Do the notes on page 1 contain
19 your notes as it relates to the case of Batson versus
20 Kentucky and how it related to the case of State of North
21 Carolina versus Marcus Robinson?

22 MR. HUNTER: Objection, Your Honor;
23 and, I'm going to start objecting to leading at this point in
24 addition, Your Honor.

25 THE COURT: The objection is

February 7, 2012

1 sustained.

2 You may rephrase. Your objection and
3 exception are noted for the record. You want to offer this
4 in the record, Mr. Colyer, for purposes of preserving your
5 record ----

6 MR. COLYER: Judge, I believe,
7 respectfully, this is already in evidence. I think we moved
8 it in evidence earlier, unless I'm mistaken.

9 MR. HUNTER: I don't believe it has
10 ----

11 THE COURT: No, sir.

12 MR. COLYER: 27 and 28.

13 THE COURT: No, sir. They're not
14 offered.

15 MR. COLYER: Well, at this time, then,
16 we'd move to introduce State's Exhibit 27 and 28.

17 THE COURT: For what purposes, sir?

18 MR. COLYER: For the purposes of record
19 preservation. I know you're not going to consider it ----

20 THE COURT: Offer of proof?

21 MR. COLYER: On the offer of proof,
22 yes, sir.

23 THE COURT: Okay. All right. You
24 folks ----

25 MR. HUNTER: We object to it in their

1 case in chief, but we have no objection as part of the offer
2 of proof.

3 THE COURT: It is to be made part of
4 the record -- thank you, sir -- part of the record in this
5 case for purposes of the State's offer of proof.

6 MR. COLYER: And, Judge, I realize that
7 I -- I may be leading; but, respectfully, in order for us to
8 be able to address the offer of proof later ----

9 THE COURT: Yes, sir.

10 MR. COLYER: ---- I apologize for the
11 leading. I think it might save us a little bit of time if we
12 ----

13 THE COURT: I -- I don't disagree, Mr.
14 Colyer; and, I'm inclined to allow some latitude in some
15 respects.

16 MR. COLYER: Yes, sir.

17 THE COURT: Yes, sir.

18 MR. COLYER: And I'll try just to ask
19 questions that help to identify and perhaps give some
20 indication to the Court what we're doing in terms of asking a
21 question.

22 THE COURT: Yes, sir. That would be
23 helpful.

24 Q. So, Judge Johnson, if you have State's Exhibit 28
25 back in front of you again, please, sir ----

1 THE COURT: I apologize.

2 MR. COLYER: I'm sorry, Judge.

3 THE COURT: Give him 27 as well, or
4 just 28?

5 MR. COLYER: I believe we've finished
6 with 27, Judge, respectfully.

7 THE COURT: Okay. I'm sorry.

8 MR. COLYER: 28's the one we need.

9 THE COURT: Yes, sir.

10 [The Court handed documents to the witness.]

11 Q. Judge Johnson, at page 3 of that document, State's
12 Exhibit Number 28 -- on page 3 and page 4, over onto page 5,
13 are there notes made by you which reference the transcript
14 dealing with the answers of the particular juror that is
15 noted in the paragraph dealing with their answers on page 3,
16 4 and 5 ----

17 MR. HUNTER: Objection.

18 Q. ---- the -- the jurors in the State of North
19 Carolina versus Marcus Robinson who were peremptorily
20 challenged by the State who were black jurors?

21 MR. HUNTER: Objection.

22 THE COURT: All right. The objection
23 is sustained. The State's objection and exception are noted
24 for the record.

25 Q. Have you noted, on that exhibit, the answers that

February 7, 2012

1 they gave with respect to the questions asked of them in
2 summary form noting the pages in the transcript?

3 MR. HUNTER: Objection.

4 THE COURT: Objection is sustained.

5 The State's objection and excep -- exception, pardon me, are
6 noted for the record.

7 [Pause.]

8 Q. Judge Johnson, based upon your review of the
9 transcript and in relation to the notes that you took with
10 respect to the five jurors in question, did you note that
11 there existed, of record, race-neutral reasons with respect
12 to the exercising of a peremptory challenge against them?

13 MR. HUNTER: Objection.

14 THE COURT: Objection is sustained.

15 The State's objection and exception are noted for the record.

16 MR. COLYER: Could I have just a
17 moment, Your Honor?

18 THE COURT: Yes, sir.

19 [Pause.]

20 Q. Judge Johnson, did your review of the peremptory
21 strikes used against jurors in State versus Marcus Robinson
22 and State versus Philip Wilkinson include a review of any
23 affidavits by the State in relation to those cases?

24 MR. HUNTER: Objection.

25 THE COURT: Objection is sustained.

February 7, 2012

1 The State's objection and exception are noted for the record.

2 MR. COLYER: Judge, just for the
3 record, with respect to what he has reviewed, could we have
4 leave to understand the grounds of that particular objection?
5 It seems like it's similar to the ones that we asked
6 previously about the ----

7 THE COURT: Well, frankly, Mr. Colyer,
8 I'm trying to remember, at this point, what it was. Are you
9 asking whether or not the witness would be permitted to
10 answer yes or no ----

11 MR. COLYER: Yes, sir.

12 THE COURT: ---- or get into any
13 review?

14 MR. COLYER: For the record,
15 respectfully, although we have excepted to the Court's ruling
16 ----

17 THE COURT: Yes, sir.

18 MR. COLYER: ---- just to get into the
19 yes or no at this point, Judge.

20 THE COURT: Okay. All right. Mr.
21 Hunter, do you want to be heard?

22 MR. HUNTER: No, Your Honor.

23 THE COURT: All right. I will allow
24 an answer of yes or no. I will sustain the objection as to
25 anything beyond that.

1 MR. HUNTER: We'll object.

2 THE COURT: Your objection and
3 exception are noted for the record. So, your issue's
4 preserved. Yes, sir.

5 [Pause.]

6 MR. COLYER: I'm sorry.

7 THE COURT: We -- we didn't get the
8 answer.

9 You can answer yes or no.

10 A. Yes.

11 Q. And that is, just to make sure that I haven't
12 dropped the ball here -- that does include that your -- your
13 review of the material, before you came here to testify
14 today, sir, did include a review of some affidavits dealing
15 with the Marcus Robinson and the Philip Wilkinson case?

16 A. Yes.

17 Q. All right, sir; and, was that -- the affidavits
18 you're talking about, that I, as the affiant, prepared?

19 A. Correct.

20 THE COURT: Objection is noted.
21 Exception's noted for the records. So, your issue is
22 preserved.

23 MR. COLYER: Thank you, Judge.

24 [Pause.]

25 MR. COLYER: Judge, again, this is just

February 7, 2012

1 for the record; and, Judge Johnson, I apologize for asking
2 you this question; but ----

3 Q. At the time of the Philip Wilkinson case in 1995,
4 were you aware of the character and reputation of the State's
5 attorney in that case with respect to jury selection and/or
6 racial discrimination or using race as a basis to exclude
7 jurors of the black race peremptorily?

8 MR. HUNTER: Objection.

9 THE COURT: Folks, I'm trying to
10 recall the testimony presented by counsel for the defendant
11 in this case. My recollection is it did pertain to the
12 Wilkerson case as part of the overall study; is that correct?

13 MR. HUNTER: Yes, Your Honor.

14 MR. COLYER: Yes, sir.

15 MR. THOMPSON: Yes, sir.

16 THE COURT: Okay. The objection is
17 overruled. Exception is noted for the record.

18 You may answer the question initially yes or
19 no.

20 A. Yes.

21 MR. HUNTER: Motion to strike.

22 THE COURT: Motion to strike is
23 denied. Exception is noted for the record.

24 Q. And, with respect to the reputation for the counsel
25 for the State in the State versus Philip Wilkinson case, what

1 was that reputation and character as it related to racially
2 discriminating against jurors using race as a reason for jury
3 selection or using race as a basis for a peremptory challenge
4 against black jurors for that attorney who was the State's
5 attorney in State's versus -- the State versus Philip
6 Wilkinson?

7 MR. HUNTER: Objection.

8 THE COURT: Objection is noted for the
9 record. It's overruled. Exception is noted.

10 You may answer.

11 A. You're referring to yourself, Mr. Colyer.

12 Q. Yes, sir.

13 A. Your reputation as a prosecutor in this state, in
14 this judicial district, was exemplary.

15 MR. HUNTER: Motion to strike.

16 THE COURT: Motion to strike is
17 denied. Exception is noted for the record.

18 MR. COLYER: Thank you, Judge. Could I
19 have just a moment, please?

20 THE COURT: Yes, sir.

21 [Pause.]

22 Q. Judge Johnson, have you had experience in this
23 jurisdiction with respect to the Racial Justice Act, any
24 motions hearings?

25 MR. HUNTER: Objection, Your Honor.

1 THE COURT: Sustained. The State's
2 objection and exception are noted for the record.

3 MR. COLYER: And, again, just for the
4 record, Your Honor ----

5 THE COURT: Yes, sir.

6 MR. COLYER: ---- I'm just going to ask
7 Judge Johnson, if he will, to identify this for us, Judge;
8 and, then, we'd ask that it be ----

9 THE COURT: Yes, sir.

10 MR. COLYER: ---- proffered as part of
11 the documents; that way, when we do the -- for all of these
12 documents -- to explain our position on this.

13 THE COURT: Okay.

14 MR. COLYER: When we do the -- the
15 paper -- papering of the proffered evidence, at least they
16 will refer back to the exhibits that we're referring to in
17 court and that have been identified for the record by the
18 witness.

19 THE COURT: Okay.

20 MR. COLYER: Not that we're trying to
21 get into the substance of it here, but just to kind of close
22 the circle.

23 THE COURT: Yes, sir.

24 MR. HUNTER: What's the number of this?

25 MR. COLYER: 31, sir.

February 7, 2012

1 THE COURT: This -- yeah. This is 31.

2 Q. Judge Johnson, I'm going to hand you what's marked
3 for identification as State's Exhibit Number 31, sir [handing
4 the exhibit to the witness] and ask you, if you could, just
5 for the record, identify what State's Exhibit 31 is.

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: All right. Folks, give me
8 a moment. This is the first opportunity I've had to look at
9 this; and, this is probably -- since we came back a little
10 bit less than an hour ago -- this is somewhat voluminous.
11 What -- we're going to take about 10 minutes so I can look
12 through the document, folks. We'll be at ease for 10
13 minutes.

14 Thank you, sir. You may step down.

15 [The witness withdrew from the witness stand.]

16 THE COURT: If you will, give me about 10
17 minutes.

18 [The witness withdrew from the spectator area.]

19 [The hearing recessed at 3:15 p.m. and reconvened at 3:25
20 p.m., February 7, 2012, with all pertinent parties present
21 prior to the recess once again present, to include the
22 defendant.]

23 THE COURT: Let the record reflect all
24 counsel are present. The defendant is present.

25 Mr. Colyer, what's the -- where are we going

February 7, 2012

1 with -- is it 31?

2 MR. COLYER: Yes, sir.

3 THE COURT: Yes, sir.

4 MR. COLYER: Judge, this is the ----

5 [The witness entered the courtroom.]

6 THE COURT: Yes, sir. If you will,

7 come back to the stand, please. Thank you.

8 [The witness resumed his seat in the witness stand.]

9 MR. COLYER: This is the transcript of
10 the hearing that was conducted on November 6th of 2009 by
11 Judge Johnson in three cases that were pending.

12 THE COURT: For clarification
13 purposes, the three defendants -- the three cases that you're
14 referring to, are not involved, in any way, in the MSU study?

15 MR. COLYER: No, sir; but, they had
16 filed RJA motions with respect to deciding perhaps pre-rule
17 24 ----

18 THE COURT: Yes, sir.

19 MR. COLYER: ---- or pretrial ----

20 THE COURT: Yes, sir.

21 MR. COLYER: ---- the status of their
22 potential cases in relation to the death penalty. I believe
23 I heard one of the counsel say that they did not have this.
24 I thought this had been given to them in -- on the internet,
25 the drop box part of discovery, after we had had some

February 7, 2012

1 discussion with Judge Johnson, and there was a request to get
2 a copy of the transcript.

3 THE COURT: Yes, sir.

4 MR. COLYER: This hearing gave rise to
5 the establishment of the third floor repository, if you will,
6 which the Court, I know, has supplemented in its tenure here
7 ----

8 THE COURT: Yes, sir.

9 MR. COLYER: ---- as the Resident
10 Senior -- Senior Resident Superior Court Judge, and has had
11 some material added to it; and, I wanted, for purposes of the
12 hearing today, as it relates to the proffer, to show that
13 there had been, by Judge Johnson, consideration of the RJA
14 and what he had -- the conversation he had with counsel on
15 the record, both State and defense attorneys, as related to
16 the Racial Justice Act in November of 2009, and then what his
17 actions were to try to collect material for the benefit of
18 everyone in the use of the RJA, the transcripts that we've
19 been talking about here ----

20 THE COURT: Yes, sir.

21 MR. COLYER: ---- related to the
22 Cumberland County cases, the questionnaires, the records;
23 because, honestly, most of the stuff that we gave Judge
24 Johnson came from that repository, not necessarily on the
25 internet. I know when I -- as I told you before, when I

February 7, 2012

1 worked there, I went down to the third floor and worked
2 there, didn't work off of a computer screen; and, in many
3 cases -- in Judge Johnson's case, rather, made copies of
4 material that I had there and then Mr. Thompson pulled some
5 stuff off of the internet.

6 THE COURT: Okay.

7 MR. COLYER: So, just wanted to kind of
8 close the loop with respect to this; and, I understand we're
9 still subject to the Court's ruling. I just wanted to
10 identify for the record and wanted to ask him a question
11 about that third floor repository and the material that was
12 there.

13 THE COURT: Okay. All right. That's
14 what I thought after I reviewed the document. Obviously, I
15 didn't read all of it, but I read enough of it to surmise
16 that that's where we were going with this.

17 Do you folks want to be heard?

18 MR. COLYER: Judge, obviously, there
19 are some opinions expressed or thought processes ----

20 THE COURT: Yes, sir.

21 MR. COLYER: ---- expressed in here.
22 We're not trying to get into that here.

23 THE COURT: Yes, sir.

24 MR. COLYER: We just wanted to begin
25 for the record, and I'm sorry ----

1 THE COURT: I guess the logical
2 question is, first of all, how is it relevant; but, do you
3 folks want to be heard?

4 MR. HUNTER: If they want to make it as
5 part of their proffer ----

6 THE COURT: Yes, sir.

7 MR. HUNTER: ---- I think -- I don't --
8 I'm not going to bother to complain about it; but, I don't --
9 I haven't read the whole thing either, but it doesn't seem
10 relevant ----

11 THE COURT: Yes, sir.

12 MR. HUNTER: ---- at this point.

13 THE COURT: Do you want to proffer
14 State's 31 for purposes of the record as part of your offer
15 of proof in this case, sir?

16 MR. COLYER: Yes. May I ask a couple
17 of questions just for identification and ----

18 THE COURT: Is there any issue as to
19 identification, folks?

20 MR. COLYER: I won't get into the
21 substance of it ----

22 THE COURT: Well, let me give them the
23 opportunity to be heard, first of all.

24 MR. HUNTER: Well, I'll hear the
25 questions and ----

1 THE COURT: Yes, sir.

2 MR. HUNTER: ---- we'll object if we
3 object.

4 THE COURT: I mean, it is what it is.

5 MR. HUNTER: Right. I -- I -- Judge
6 Johnson was the pre -- I'll read it. I think I can get
7 through it. November 6th, Judge Johnson was the presiding
8 judge, and these three defendants, Anthony McMillan, Dexter
9 McCray, and Richard Smith were the defendants, and they
10 appeared. It looks like Mr. Colyer was there, and I don't
11 know what else -----

12 THE COURT: All right.

13 MR. HUNTER: If you want to just read
14 the -- what do you want in the record -- and you can put it
15 in yourself, Mr. Colyer.

16 MR. COLYER: I'd like to ask the Judge
17 the questions, if I could, subject to what we've been doing
18 to this point.

19 THE COURT: Yes, sir.

20 MR. HUNTER: Okay.

21 THE COURT: Go forward. Yes, sir. Go
22 ahead.

23 MR. COLYER: Thank you.

24 **DIRECT EXAMINATION continued conducted by MR. CALVIN COLYER:**

25 Q. Judge Johnson, you have in front of you there a

February 7, 2012

1 transcript marked as State's Exhibit 31?

2 A. Correct.

3 Q. Do you recognize that, sir?

4 A. I do.

5 Q. Can you tell us for the record what State's Exhibit
6 Number 31 is?

7 A. It's a hearing that was initiated in front of me on
8 November the 6th, 2009, with Todd Conormon and Carl Ivarsson
9 representing the Defendant McMillan; Todd Conormon and James
10 Payne representing the Defendant McCray; and Mike Ramos and
11 James Payne representing the Defendant Smith.

12 Q. And, sir, as a result of this hearing, did it cause
13 you to set up or create a repository on the third floor of
14 this courthouse, a room which contained material that you
15 directed various court personnel to collect in relation to
16 the Racial Justice Act?

17 A. Yes.

18 MR. HUNTER: Objection.

19 THE COURT: The objection is
20 sustained. Motion to strike is allowed. The State's
21 objection and exception to the ruling of the Court are noted
22 for the record.

23 Do you want to offer State's 31, Mr. Colyer?

24 MR. COLYER: I would like to proffer

25 State's 31, and I need a couple more questions that I

1 understand will be objected to.

2 THE COURT: Yes, sir. Go ahead.

3 Q. Judge Johnson, as a result of your ruling in this
4 particular hearing evidenced by State's Exhibit 31, did all
5 of the cases from Cumberland County where there was a jury
6 selection, so far as you were aware in November of 2009, end
7 up in that repository by way of transcripts, questionnaires,
8 clerk file material, motions, and the like?

9 MR. HUNTER: Objection.

10 THE COURT: Objection is sustained.
11 The State's objection and exception to the ruling of the
12 Court are noted for the record.

13 Q. And my co-counsel has pointed out to me that I
14 didn't use the word capital jury selection, that I should
15 have. So, I'll be glad to ask that question again if it's
16 necessary for the record.

17 THE COURT: Is it necessary,
18 gentlemen?

19 MR. HUNTER: No. No, Your Honor

20 THE COURT: Okay. Clearly, the --
21 counsel for the defendant are willing to stipulate that the
22 reference was to capital cases under the RJA potentially.

23 Q. Judge Johnson, are you aware of the cases which the
24 Michigan State study included in their 173 jury selections
25 from across the State of North Carolina that were related to

1 Cumberland County cases?

2 MR. HUNTER: Objection, Your Honor.

3 THE COURT: Objection is sustained.

4 Exception is noted for the record to the ruling of the Court
5 by the State.

6 Q. Judge Johnson, so far as you know, is your
7 repository on the third floor -- that you started in 2009,
8 that Judge Weeks has continued in his tenure as the Senior
9 Resident -- does it include State of North Carolina versus
10 Augustine, State of North Carolina versus Robinson, State of
11 North Carolina versus Wilkinson, State of North Carolina
12 versus McNeil, State of North Carolina versus Myer, two jury
13 selections, State of North Carolina versus Walters, State of
14 North Carolina versus Williams, the two jury selections, and
15 State of North Carolina versus Cagle?

16 THE COURT: You may answer, sir.

17 MR. HUNTER: Objection, Your Honor.

18 THE COURT: I'm sorry. I didn't hear
19 it. Yes, sir.

20 MR. HUNTER: I wasn't sure we were at
21 the end of the list. I should have counted.

22 MR. COLYER: I think that's 11. If I'm
23 mistaken, I apologize.

24 THE COURT: Objection is sustained.

25 The State's objection and exception to the ruling of the

1 Court are noted for the record.

2 MR. COLYER: My trusted co-counsel
3 tells me I missed ----

4 THE COURT: Capital ----

5 MR. COLYER: State of North Carolina
6 versus Golphin.

7 THE COURT: I apologize.

8 MR. COLYER: Thank you.

9 MR. HUNTER: Objection.

10 THE COURT: Sustained. The State's
11 objection and exception are noted for the record, folks.

12 MR. COLYER: And, Judge, did you
13 receive State's 31 for purposes of the proffer?

14 THE COURT: [Indiscernible] State's 31
15 as part of the State's proffer in this case -- as part of the
16 record.

17 MR. HUNTER: Objection as to their
18 case. No objection as to the proffer, Your Honor.

19 THE COURT: Did I say their case?

20 MR. HUNTER: No, you didn't, Your
21 Honor. I ----

22 MR. COLYER: Okay. Okay.

23 MR. HUNTER: I did not -- you did not.

24 THE COURT: Yes, sir, Mr. Colyer; any
25 further questions, sir?

February 7, 2012

1 MR. COLYER: Just checking my checklist
2 here, Judge.

3 THE COURT: Yes, sir. Take your time.
4 [Pause.]

5 MR. COLYER: Judge, with respect to the
6 State's exhibits that I've mentioned previously, if I have
7 not previously moved those into evidence, for which I
8 understand there would be an objection, I would so move them
9 into the Court's possession and custody with respect to our
10 offer of proof, 27, 28, 29, 30, and 31.

11 THE COURT: I think all have been
12 offered for purposes of your offer of proof.

13 Is that what your records reflect, ma'am?
14 [The Court conferred with Madam Clerk.]

15 THE COURT: Okay. All right. Again,
16 it's being received simply for purposes of your offer of
17 proof as to the matters involved in this case; and, now, that
18 includes all of them; is that correct, Madam Clerk?

19 THE CLERK: Yes.

20 THE COURT: Anything further from you
21 folks in that respect?

22 MR. HUNTER: No, Your Honor.

23 THE COURT: Okay. Yes, sir, Mr.
24 Colyer?

25 MR. COLYER: Judge, that's all the

February 7, 2012

1 questions I have for Judge Johnson at this time.

2 THE COURT: Any cross-examination?

3 MR. HUNTER: Your Honor, may I approach
4 the witness?

5 THE COURT: Yes, sir.

6 MR. HUNTER: Judge Johnson, very nice
7 to see you again. I -- I notice you have some materials here
8 that you've consulted ----

9 THE WITNESS: You can copy them, Mr.
10 Hunter.

11 MR. HUNTER: Well -- thank you very --
12 if I can ----

13 THE WITNESS: You can look through them.
14 You already have them.

15 MR. HUNTER: I beg your pardon?

16 THE WITNESS: You already have them,
17 except the questionnaires.

18 MR. HUNTER: And is the affidavit that
19 was mentioned -- is that in here?

20 THE WITNESS: No, sir. It wasn't given
21 to me. I read it.

22 MR. HUNTER: I -- okay. Well, Judge,
23 if I could just have a little time to look at this and ----

24 THE WITNESS: They're the questionnaires
25 from the trial.

February 7, 2012

1 MR. HUNTER: ---- and get a copy, if we
2 need to copy anything and ----

3 THE WITNESS: You already have the other
4 two books, Mr. Hunter.

5 MR. HUNTER: And ----

6 THE COURT: Bear with me. Okay.
7 These are matters that were utilized in the preparation of
8 the testimony given in this case, Judge Johnson?

9 THE WITNESS: Yes, sir.

10 THE COURT: Okay.

11 THE WITNESS: They already have them.

12 THE COURT: Yes, sir; but, that's for
13 them to have the opportunity to look through and determine.
14 So, we're going to take a short break at this time, folks.

15 Will 15 minutes be enough?

16 MR. HUNTER: That'll be more than
17 enough. Thank you.

18 THE COURT: Okay. All right. Thank
19 you. We're at ease. Thank you, folks.

20 [The hearing recessed at 3:33 p.m. and reconvened at 3:49
21 p.m., February 7, 2012, with all parties present prior to the
22 recess once again present, to include the defendant.]

23 THE COURT: Let the record reflect all
24 counsel are present. The defendant is present.

25 Folks, there are two preliminary matters that

February 7, 2012

1 we probably need to address at this time.

2 Our clerk's inquiry to me was with regard to
3 the matters that are being offered for purposes of offer of
4 proof, how should she handle that. I've indicated that they
5 are not being received for substantive purposes. They're
6 being offered and received simply for the purpose of the
7 State's proffer or offer of proof as to the matters involved.

8 Anybody disagree with that?

9 MR. COLYER: No, sir.

10 MR. HUNTER: No, Your Honor.

11 MR. THOMPSON: May I have a second?

12 [Pause.]

13 MR. COLYER: Judge, to the extent that
14 they would be substantive, but sustained as opposed to being
15 the basis of the expert opinion, for example, that's the only
16 qualification that we would ask; but, we know that the
17 exhibits themselves ----

18 THE COURT: Yes, sir.

19 MR. COLYER: ---- are going to be
20 separated ----

21 THE COURT: Yes, sir.

22 MR. COLYER: ---- from the exhibits
23 that the Court might otherwise consider.

24 THE COURT: And that's the point that
25 I'm trying to make.

February 7, 2012

1 MR. COLYER: Yes, Your Honor.

2 THE COURT: I appreciate that. Second
3 matter, folks, I'm looking at Canon 3, specifically the
4 following provisions of Canon 3, subsection (a)(2) reads as
5 follows: A judge should maintain order and decorum in
6 proceedings before the judge; subsection (3): A judge should
7 be patient, dignified and courteous to litigants, jurors,
8 witnesses, lawyers, and others with whom the judge deals in
9 the judge's official capacity, and should require similar
10 conduct of lawyers, of the judge's staff, court officials,
11 and others, including witnesses, subject to the judge's
12 discretion and control.

13 Judge Johnson, for whom I have the greatest
14 respect, I am going to require no less of any witness called
15 either by the defense or by the State in this case, and I
16 wanted that to be put on the record.

17 Are you ready to go forward, folks?

18 MR. HUNTER: Yes, Your Honor. May I --
19 may I approach the witness?

20 THE COURT: Yes, sir.

21 MR. HUNTER: Judge Johnson, here are
22 your ----

23 THE WITNESS: All right, sir.

24 MR. HUNTER: ---- materials back

25 [handing the binder back to the witness]. Thank you very

February 7, 2012

1 much.

2 [Pause.]

3 MR. HUNTER: Your Honor, we don't have
4 any questions.

5 THE COURT: Okay. Any other matters,
6 Mr. Colyer or Mr. Thompson.

7 MR. COLYER: If we might have just one
8 moment, please, Your Honor?

9 THE COURT: Yes, sir.

10 [Pause.]

11 MR. COLYER: Judge, we have no other
12 questions at this time based upon cross-examination.

13 THE COURT: Yes, sir.

14 MR. COLYER: We would ask -- we have no
15 objection to Judge Johnson being ----

16 THE COURT: That was going to be the
17 next matter.

18 MR. COLYER: ---- excused subject
19 to ----

20 Judge Johnson, I apologize to you for this.

21 ---- potential recall at a later point if the
22 situation changes, or there's some development that would
23 warrant it. So, I guess what we'd ask is that Judge Johnson
24 be allowed to go and do his -- his ----

25 THE COURT: But he remains under

1 subpoena.

2 MR. COLYER: Yes, and just subjection
3 to potential recall, and obviously ----

4 THE COURT: Okay. Folks?

5 [There were no responses from the defense attorneys.]

6 THE COURT: All right. Thank you,
7 sir. Thank you.

8 THE WITNESS: Thank you, sir.

9 THE COURT: Yes, sir.

10 [The witness departed the courtroom.]

11 THE COURT: Yes, sir, Mr. Colyer, Mr.
12 Thompson?

13 MR. COLYER: Judge, I guess we're, at
14 this point, based upon your allowing us to not call another
15 witness this afternoon -- deal with the updating; and, I
16 guess, if we could take it in somewhat of a reverse order
17 ----

18 THE COURT: Okay.

19 MR. COLYER: ---- dealing with this
20 last issue on the preservation and the proffer, we would ask
21 leave of the Court -- Mr. Thompson thought of an idea over
22 lunchtime about how we could go about preserving this and put
23 it in the record in a form that would be acceptable to the
24 Court.

25 THE COURT: Okay.

1 MR. COLYER: Rather than doing a
2 summary or a synopsis or using our words, he thought it might
3 be appropriate if we had almost like a mini-deposition, and I
4 think we mentioned that earlier before we started.

5 THE COURT: Yes, sir.

6 MR. COLYER: What that would require
7 would be some order from the Court allowing us to essentially
8 contract with a court reporter for the state to have he or
9 she come and sit while we put -- or, she or he put the
10 witness under oath, and we finish the answers to the
11 questions that we started in court this afternoon.

12 THE COURT: Okay.

13 MR. COLYER: And then put it in the
14 same format as a question and answer, so that it will be
15 preserved for the record, rather than us trying to put our
16 own words on paper representing what the witness would say.
17 So, we would ask permission of the Court to give us an order
18 or give us some sort of authority to contact court reporters
19 for setting that up outside of court time.

20 THE COURT: Okay.

21 MR. COLYER: And give us sufficient
22 time, if the Court please, to make that record to supplement
23 the in-court proceedings; and, I want Mr. Thompson to pull me
24 down if I say the wrong thing here. I don't think that that
25 would be necessary for the Court's ruling, because the Court

February 7, 2012

1 has said it's not going to consider that under the motion in
2 limine filed by the defense and the Court's ruling.

3 THE COURT: Okay.

4 MR. COLYER: But we would contend that
5 it would need to be a part of the record before it went up
6 with respect to an appellate decision. So, we'd ask for an
7 applicable -- or, an appropriate amount of time to get that
8 done.

9 THE COURT: Do you have some timeframe
10 in mind, folks? It would help ----

11 MR. COLYER: Well, Judge, to be honest
12 with you and to let you know what's coming, we've got five
13 other judges ----

14 THE COURT: I know.

15 MR. COLYER: ---- that are in the same
16 situation; and, as you can see, it takes about a half-hour,
17 maybe not quite that much, to establish their background for
18 the record, and then Judge Johnson took a little bit longer
19 because it was our first foray into it, but I think it would
20 probably be somewhere in the neighborhood of about a half
21 hour to an hour with respect to the questions that are
22 objectionable that then would go into the proffer.

23 So, I'm guessing that with respect to the
24 court reporter, we'd probably need at least an hour with each
25 judge, so that would be a minimum of six hours, and then

1 however much time it took that court reporter to transcribe
2 those materials and get them back to the Court for inclusion
3 in the record, not for the Court's consideration, but just
4 inclusion in the record.

5 THE COURT: Okay. Folks, you -- have
6 you had the opportunity to think about what's being sug -- do
7 you want to talk first?

8 MR. JAMES FERGUSON: If we would like to confer
9 just a moment.

10 THE COURT: Yes, sir.
11 [Pause.]

12 MR. HUNTER: Your Honor, I -- I don't
13 think we have any objection to what they've proposed. If it
14 suits Your Honor -- I mean, really, how they make their
15 proffer is ----

16 THE COURT: Yes, sir.

17 MR. HUNTER: I think we've already
18 identified several ways they can do it. As far as timing, we
19 would suggest whenever they're -- they close, the day after
20 that, maybe they could devote to this, and then we would
21 start surrebuttal the day after that.

22 MR. COLYER: Mr. Hunter, I don't mean
23 to interrupt you, sir; but, we've got two judges who are
24 retired, that, you know, it would probably work into their
25 schedule; one judge who's still on the bench and will be

1 likely in session somewhere; and, then -- three judges who
2 are retired, excuse me -- three retired, one on the bench,
3 and two who are practicing attorneys now, that we're trying
4 to work with their schedules. So, I'm -- while we would like
5 to accommodate the schedule and get it done as quickly -- I
6 don't know that we'd be able to do it the day after -- before
7 something else started, because we can't guarantee that they
8 could come to us or that we could go to them and that ----

9 THE COURT: Well, I mean, we could
10 certainly alter before rebuttal -- or, pardon me --
11 surrebuttal, whatever -- let me give you an example. See if
12 this is consistent with what it is that you're offering at
13 this point. Say, by way of example, you folks otherwise rest
14 Thursday or Friday, more specifically Thursday. If some
15 witnesses are available on Friday, go forward with those. If
16 some witnesses are -- remaining witnesses on Saturday or
17 Monday -- we could complete that process, which I think is
18 their objective -- completing the process, pardon me, prior
19 to any surrebuttal.

20 Is that a fair statement of where we are?

21 MR. THOMPSON: Run that by me again,
22 Judge.

23 THE COURT: Yes, sir. If, by way of
24 example -- what is today?

25 MR. COLYER: Tuesday.

February 7, 2012

1 THE COURT: If, by way of example, you
2 complete your evidence on Thursday, that leaves Friday,
3 potentially Saturday, to complete the process you're now
4 talking about, the deposition-type scenario with all of your
5 witnesses. If you don't complete it on Saturday, you can
6 carry over to Monday, and we'll pick up on Tuesday with their
7 surrebuttal evidence.

8 MR. THOMPSON: Maybe I've missed
9 something. Why does it have to be in before surrebuttal? I
10 mean, is that -- did we just kind of pull that out somewhere,
11 or is that -- is that a requirement? Have we argued about
12 that, 'cause I may have missed something.

13 THE COURT: I thought I understood
14 your preference was that that be completed before you went
15 forward with your surrebuttal.

16 MR. THOMPSON: Can we get why that is?

17 MR. HUNTER: No. I -- I think we're
18 fine with that, if they need more time to do it. I mean, I
19 ----

20 THE COURT: Yeah; but, his question is
21 why do we need to have that process completed before ----

22 MR. HUNTER: I don't think we do. That
23 was just a suggestion.

24 THE COURT: All right.

25 MR. HUNTER: I don't think we ----

1 THE COURT: Okay.

2 MR. HUNTER: As far as we're concerned,
3 we don't have to.

4 MR. THOMPSON: Just wanted to make sure I
5 didn't miss something. Now, I'm -- I'm the guy that's likely
6 going to be scheduling it and working it out, and I'm going
7 to have to carefully beg for the assistance of the court
8 reporter; and, obviously, what I'd love to do is to have the
9 court reporter there one time, and bring in the folks, but
10 ----

11 THE COURT: Yes, sir. Ideally, that
12 would be the perfect thing.

13 MR. THOMPSON: And, because of that, I've
14 got six schedules I've got to ask about. So, for me to tell
15 you now or us to tell you now, yeah, we can get it done, no
16 problem, would be a foolishly arrogant thing for me to do;
17 and, I've likely been called that before, but I don't want to
18 be called that on this case. Respectfully, Judge, we've got
19 six schedules to deal with. We will do our best to get it
20 done very quickly, but I just can't promise you when.

21 THE COURT: Is that satisfactory,
22 folks?

23 MR. HUNTER: Yes. My understand is
24 this is -- won't -- none of this will be information that
25 will be considered by the Court in its decision. So, it

February 7, 2012

1 shouldn't affect the Court's schedule as far as consideration
2 of this matter and ----

3 THE COURT: That's ----

4 MR. HUNTER: ---- given that that's
5 true ----

6 THE COURT: Okay.

7 MR. HUNTER: ---- and I think the State
8 understands that as well.

9 THE COURT: We're all on the same page
10 now?

11 MR. HUNTER: Yes.

12 THE COURT: Okay. So, we'll go
13 forward with that.

14 MR. THOMPSON: Yes, sir.

15 THE COURT: All right. You indicated
16 there were some other matters, Mr. Colyer, Mr. Thompson?

17 MR. COLYER: Yes, sir. Mr. Thompson on
18 the affidavits, Judge.

19 THE COURT: Yes.

20 MR. THOMPSON: Judge, I have now gathered
21 ----

22 [Pause.]

23 MR. THOMPSON: Judge, we have here -- and
24 I guess the way I'd like to do it is to give the defense a
25 few minutes to cull the through affidavits one by one of the

1 actual exhibit we intend to present into Court pursuant to
2 stipulation.

3 THE COURT: Okay.

4 MR. THOMPSON: The exhibit is -- will be
5 -- we'll mark it as 32. I want to make sure I have that ----

6 THE COURT: Yes, sir.

7 MR. THOMPSON: We'll mark it as State's
8 Exhibit Number 32. We'll probably need a few minutes to sit
9 down together to make sure everybody's got copies -- I've
10 just handed the few straggler copies -- pull out any copies
11 that weren't signed or whatnot; and, so, at some point,
12 before end of business today, we can say, Judge, by
13 stipulation, lay it out, hand you State's Exhibit 32; and,
14 then, tonight, I can send an e-mail to those folks and cut
15 them all loose ----

16 THE COURT: Okay.

17 MR. THOMPSON: ---- officially, once that
18 is accepted by the Court, assuming it is. We would like -- I
19 think we can get that -- the actual process of that done in
20 just 8 or 10 minutes, sitting across the desk from each
21 other, barring any ----

22 THE COURT: That -- do we double or
23 triple that?

24 [General laughter.]

25 MR. THOMPSON: Well, I've already -- I've

February 7, 2012

1 already kind of -- I've already kind of stretched it for that
2 ----

3 [General laughter.]

4 THE COURT: And I apologize. I'm not
5 being disrespectful. I'm just ----

6 MR. THOMPSON: Of course, Judge.

7 THE COURT: Yes, sir.

8 MR. THOMPSON: That's the bulk of what I
9 think we need to do today.

10 THE COURT: Okay.

11 MR. THOMPSON: And that's why I wanted to
12 leave a little bit of time in case there was some slippage
13 and some questions and some argument to be done; and, if we
14 could get to that, that would be great.

15 THE COURT: Okay. All right. I
16 appreciate the effort.

17 MR. THOMPSON: Thank you.

18 THE COURT: So, why don't we say 15
19 minutes, and then we can come back. Is that agreeable?

20 [There were no responses from counsel for either side.]

21 THE COURT: We're at ease folks.
22 Thank you.

23 [The hearing recessed at 4:03 p.m. and reconvened at 4:40
24 p.m., February 7, 2012, with all parties present prior to the
25 recess once again present, to include the defendant.]

February 7, 2012

1 MR. THOMPSON: Your Honor, I think we are
2 ready. I think that was about 10 minutes ----

3 [General laughter.]

4 THE COURT: Yes, sir.

5 MR. THOMPSON: ---- by my watch. Judge,
6 I do have State's Exhibit Number 32. We've talked about it
7 at length a number of times throughout these proceedings. We
8 have gone through, one by one, to ensure that everything that
9 currently is in State's Exhibit Number 32 contains an
10 original signature and notary seal for the different
11 affidavits that are contained within State's Exhibit Number
12 32, from prosecutors and the prosecutor reviewers and -- and
13 witness reviewers, participant reviewers, that we've talked
14 about at length a number of times during the hearing. I have
15 pulled from that, with the knowledge of the defense, three
16 affidavits from Karen Hobbs, one affidavit from Sean
17 McGinnis.

18 THE COURT: And -- I'm sorry. For the
19 record, Ms. Hobbs and Mr. McGinnis are both Assistant
20 District Attorneys?

21 MR. THOMPSON: All of these folks will
22 be, yes, sir. Yes, sir.

23 THE COURT: That's what I wanted to
24 simply clarify for the record. Yes, sir.

25 MR. THOMPSON: Three from Karen Hobbs,

February 7, 2012

1 one from Sean McGinnis, one from Ricky Bowman, and one from
2 Jonathan Perry, all to get original signatures. I'm sorry.
3 Mr. Perry's needs a signature and notary seal. We can deal
4 with that tomorrow morning ----

5 THE COURT: Okay.

6 MR. THOMPSON: ---- easily enough. The
7 other five, we're -- we just need notary seals or originals
8 with notary seals on them. We intend on submitting those
9 later with permission of the defense to supplement straight
10 into State's Exhibit Number 32 ----

11 THE COURT: Okay.

12 MR. THOMPSON: ---- for those purposes.
13 Now, we've stated a number of times on the record the answer
14 to the question of the limitation, that these are all
15 submitted for substantive purposes, subject to rules of
16 evidence that apply within their body ----

17 THE COURT: Yes, sir.

18 MR. THOMPSON: ---- as if the witnesses
19 -- I'm sorry -- the affiants had testified on direct
20 examination to the facts that are contained within these
21 affidavits, subject to the rules of evidence.

22 THE COURT: Yes, sir.

23 MR. THOMPSON: If I have stated that
24 incorrectly, I'd love to go ahead and get corrected so we can
25 have a point in the transcript of this hearing that that

1 stipulation is nailed down in a nice, pretty package,
2 respectfully.

3 THE COURT: Okay. All right.
4 [Pause.]

5 MS. STUBBS: I think that, just out of
6 an abundance of caution, we want to make clear that we would
7 have objected to the -- on -- on the witness advocacy --
8 advocate rule to the testimony of two -- of both Cal Colyer
9 and Jonathan Perry; but, we can get to that point, I think,
10 substantively when we -- as we work through the affidavits
11 and our objections.

12 THE COURT: Okay; and, folks, for --
13 for purposes of the record, which should already reflect it,
14 I've requested both counsel to submit post findings and post
15 conclusions for consideration by the Court. I'm fairly
16 confident -- and if I'm wrong in this respect, let me know.
17 I'm fairly confident that, at least with regard to the
18 matters at issue about evidentiary matters, those will be
19 addressed.

20 MS. STUBBS: Yes, Your Honor.

21 THE COURT: Okay. Is that a fair
22 statement?

23 MR. THOMPSON: Yes, sir.

24 THE COURT: Okay. All right. Does
25 satisfy you, Mr. Thompson?

1 [Pause.]

2 MS. STUBBS: Well, I guess maybe I
3 wasn't -- we will address that in our proposed findings, but
4 we were also prepared to go through our ----

5 THE COURT: No. I'm not foreclosing
6 that. I apologize.

7 MS. STUBBS: Okay.

8 THE COURT: I just wanted to make sure
9 that both in court and in your proposed matters, those
10 matters will be reflected or dealt with.

11 MS. STUBBS: Yes, Your Honor.

12 THE COURT: Okay. All right. Thank
13 you, ma'am. Thank you, sir.

14 MR. THOMPSON: State's 32, Judge [handing
15 the exhibit to the Court].

16 THE COURT: Okay. All right.

17 MR. THOMPSON: Is State's 32 now accepted
18 for those purposes with those limitations.

19 THE COURT: Based on the stipulation.

20 MS. STUBBS: Yes; and, we're -- we're
21 -- with the Court's indulgence, we're prepared to make our
22 objections ----

23 THE COURT: Yes, ma'am.

24 MS. STUBBS: ---- with respect to these
25 affidavits.

February 7, 2012

1 THE COURT: Yes, ma'am.

2 MS. STUBBS: And what we've done,
3 pursuant to the method, I think that we all agreed or
4 suggested earlier, is we've -- we've highlighted on our
5 copies the portions that we object to, which we'll be
6 prepared to have marked as well ----

7 THE COURT: Okay.

8 MS. STUBBS: ---- after I work our way
9 through those.

10 THE COURT: I've not seen the
11 affidavits, so I'm somewhat in the blind here, but I'm
12 confident you folks will address what you feel needs to be
13 addressed for purposes of the ruling. Okay.

14 MS. STUBBS: Yes, Your Honor.

15 THE COURT: All right. Yes, ma'am.

16 MS. STUBBS: I think it might be
17 helpful if I -- and allow us to save time as I go through
18 each individual one -- if I just give a list of our global
19 objections.

20 THE COURT: Yes, ma'am.

21 MS. STUBBS: First, we object to the
22 affidavits of the Assistant District Attorneys who were
23 either not present and, therefore, don't -- and lack any
24 foundation or personal knowledge, or those who were present
25 at the hearing, but have sworn in their affidavits that they

1 have no independent recollection; and, I can identify both of
2 those groups as we go through, but that's our first global
3 objection.

4 THE COURT: Okay.

5 MS. STUBBS: Our second objection, as I
6 mentioned earlier, is to the admission of affidavits by
7 Jonathan Perry and Cal Colyer.

8 THE COURT: And the basis for that?

9 MS. STUBBS: That's on the grounds that
10 that violates the witness advocate rule. I think there's
11 been a little bit of argument on this earlier, and the State
12 had suggest that this is really just an issue if there's a
13 jury. I think the rules are actually quite clear that the
14 problem is with the conflict of interest that comes when you
15 are both a witness and an advocate; and, that applies equally
16 whether we're in front of a judge or a jury; and, one of the
17 things that the rules direct us to do is to look to the
18 extent that this was foreseeable; and, when the Court sees
19 the affidavits -- first, I take Perry's affidavit. Jonathan
20 Perry had nothing to do with any of the cases that he wrote
21 the affidavit for. Certainly, this conflict was foreseeable.
22 In fact, the State itself foresaw it. They mentioned it
23 several times during our bench conferences, our status
24 conferences in the summer; and, then, also, on September 6th,
25 there's a comment by Cal Colyer on the record about the fact

1 that this could be an issue. I don't think it's a surprise
2 to anyone; and, given that it was entirely foreseeable,
3 [indiscernible] any reason why another attorney in Mr.
4 Perry's office could not have executed that affidavit. With
5 respect to Mr. Colyer's affidavits, he's executed two
6 affidavits, one involving the cases that he participated in,
7 and a second involving the cases including Mr. Robinson.
8 That affidavit, as we heard from Judge Dixon -- Judge Dixon
9 actually testified in this case. There was no reason for
10 that affidavit. There is absolutely -- it offers nothing
11 except perhaps to [indiscernible] Mr. Dixon's own
12 recollections or impressions; and, we -- so, we would
13 strenuously object to the admission of those affidavits on
14 those grounds. The other reasons are -- I think are more
15 minor. As you go through, they're just highlighted in a few
16 places where we object to the characterizations. Sometimes
17 the affidavits will say this was the true race-neutral
18 reason, but we would object to that; and, in one case, there
19 is hearsay in the affidavit of ADA Butler -- from Johnston
20 County Assistant District Attorney Butler talking about
21 Malcolm Reddy's [phonetic] case. He says that he talked to
22 Judge Lock, and that seems like clearly double hearsay; and,
23 we are not stipulating to what Butler would say.

24 THE COURT: Okay.

25 MS. STUBBS: So, I -- I don't know if

1 you wanted me now to -- to turn -- that's the gist of, sort
2 of, the big picture.

3 THE COURT: Yes, ma'am.

4 MS. STUBBS: If we should now go
5 through the -- each affidavit?

6 THE COURT: All right. That, from my
7 point of view, would be helpful.

8 What -- do you want to be heard on that, Mr.
9 Thompson, Mr. Colyer, going through the affidavits
10 individually at this point?

11 MR. COLYER: Yes. May I say something
12 in response to Ms. Stubbs' observations?

13 THE COURT: Yes. Yes. Yes, sir. Yes,
14 sir.

15 MR. COLYER: Judge, back in March of
16 last year, the Court ordered us to file an answer ----

17 THE COURT: Yes, sir.

18 MR. COLYER: ---- in this -- to this
19 MAR; and, myself and I think, Judge, Mr. Thompson signed the
20 answer in May; and, then, we started into a series of
21 pretrial conferences and ended up with a -- an initially
22 proposed hearing date in September with another hearing date
23 in November.

24 THE COURT: Yes, sir.

25 MR. COLYER: And the September date was

February 7, 2012

1 continued to November; and, initially, what we started to do
2 as Das -- and I'm not talking about me and Mr. Thompson. I'm
3 just talking about people after we started working with
4 Doctor Katz -- was to get information for him with respect to
5 Batsons -- Batson challenges in the cases, and do the review,
6 so to speak, for the spreadsheet; and, then, at some point,
7 after we were well into this, in September, approaching
8 November, the affidavits came along; and, I had already done
9 the review, spent the -- as I mentioned to you, the three
10 weeks on the third floor down there, doing the review for the
11 spreadsheet and for the Batson; and, then, rather than
12 duplicate the effort, I went ahead and did the affidavits for
13 the cases that I was involved in; and, the other two -- I was
14 either involved in the case by myself or the other
15 participants were Mr. Grannis and Ms. Russ, who were retired,
16 and Judge Dixon no longer being in the office, so the three
17 of those folks who -- Mr. Grannis would have been involved,
18 but Ms. Russ and Mr. Dixon were no longer available; and,
19 what we were trying to do was to involve people who were
20 still active in the District Attorney's Office in some
21 jurisdiction, but not retired folks, not jurors, not judges,
22 who had moved from the DAs office. So, I did the affidavit
23 for my cases, and then I did the affidavit for Mr. Dixon's
24 cases -- for Judge Dixon's cases, the one for Marcus Robinson
25 and the one for Myer, '95; and, I got Charles Scott to do the

February 7, 2012

1 affidavit for the case that he and Ms. Russ and Mr. Grannis
2 were on, Ms. Walters case, in the summer of 2007. So, in
3 Cumberland, we have three affidavits. Charles Scott
4 participated in that he did one. I participated in several
5 of them and did one, and did not anticipate in Marcus
6 Robinson or Myer, '95. I did one for Judge Dixon. So,
7 that's why there's the disparity there with respect to those
8 affidavits, three from our jurisdiction. So, I've got a foot
9 on each side of Ms. Stubbs' globe, one as a reviewer and one
10 as a participant; and, quite frankly, Judge, there was nobody
11 else in the office who could do that as a participant except
12 myself. Nobody else in the office was a participant. The
13 only other potential participants were either retired Ms.
14 Russ or were not a judge, Judge Dixon; and, so, that's why I
15 did it. I wasn't trying to get around any advocacy rules or
16 anything like that. I wasn't trying to get around any
17 potential rulings of the Court; but, I just wanted to explain
18 for the record why that happened.

19 THE COURT: Yes, sir.

20 MR. COLYER: And I do remember
21 mentioning in September ----

22 THE COURT: Yes, sir.

23 MR. COLYER: ---- and I think I
24 mentioned it at one of the pre-trial conferences, that I
25 would rather be a witness in this than a participant ----

February 7, 2012

1 THE COURT: Yes, sir.

2 MR. COLYER: ---- at some point, and I
3 ended up almost being both, I guess; but, that's why that is;
4 and, we would respectfully object to the exclusion of the
5 affidavit because, if it gets excluded, Judge, it appears
6 that we haven't -- we're like some of the other folks that
7 didn't respond at all. We've tried to respond, give it our
8 best shot; and, I can tell you that those statements in the
9 affidavit came from the transcript as -- and I didn't -- I
10 didn't try to editorialize, didn't try to put a spin on it in
11 any way. So, I would ask leave of the Court to consider that
12 affidavit of myself with respect to those cases that I was
13 involved in and the affidavit for Judge Dixon that I did to
14 be considered in the same way that you would consider the
15 other affidavits, however that is.

16 THE COURT: Okay.

17 MR. COLYER: Thank you.

18 THE COURT: Mr. Thompson?

19 MR. THOMPSON: The argument that I'm
20 making here in response to those issues deals with, again,
21 the weight, not admissibility. The admissibility threshold
22 is pretty clear. It's relevant, and it tends to shed some
23 light on the issues that are in the courtroom. Your Honor --
24 obviously there's no jury, so Your Honor is the audience for
25 that affidavit. Your Honor can read the affidavit and read

1 the tenor of it, read this juror said this on this page; but,
2 there are very few people in the State of North Carolina that
3 can try capital cases and intelligently discuss them; and, so
4 we're very limited. We want Mr. Colyer in the courtroom
5 dealing with this issue because of its importance. To
6 exclude him from being able to -- to give an affidavit would
7 -- would substantially prejudice the State in its explanation
8 of these -- of all of his actions up to now; and, it's a form
9 over function kind of argument. Because he has the title of
10 advocate means he can't -- you can't consider anything he
11 says is not an accurate statement. It deals with just mainly
12 juror stuff. Your Honor is in a very different position.
13 So, as it relates to Mr. Colyer's affidavit and Mr. Perry's
14 affidavit, Your Honor is in the position to be able to review
15 them and consider them and consider all those facts. Yes,
16 he's an advocate in this case, and you know that. We're not
17 hiding that; but, if you actually read the affidavits -- and
18 you're at a tremendous disadvantage right now because we've
19 talked about these at length and you haven't seen them. So,
20 if you review them, at least before you rule on this
21 particular issue, you'll be in a much better position to be
22 able to read the State's argument here that really they're
23 just referencing page numbers and juror statements, in large
24 part, the juror said this, the juror said that, and those
25 kind of things. I'm not being cute when I say this next

February 7, 2012

1 thing. I know sometimes there's a presumption that I'm being
2 smart -- not in a good way. To pull out a lot of these
3 affidavits, in the State's mind, would then put on the Court
4 the requirement to read every word of all these transcripts
5 before it could appropriately rule in this case. We have
6 spent so much time talking about, well, the record speaks for
7 itself. If we can't even point out, by affidavit, the page
8 numbers and the things that were said by the jurors, that I
9 consider -- the Court would have to say that, well, I went
10 back and I looked -- because all that has been excluded from
11 -- and a lot of -- limited in our ability to point these
12 things out to the Court because of the Court's rulings about
13 if it's in the transcript, we can't get it out on direct.
14 So, it would put a huge obligation on the Court, before you
15 rule, to have to go through these transcripts; and, I --
16 given what you've said about your intentions this year, I
17 don't know that you have the time, if you did nothing else,
18 with 173 cases. It took Mr. Colyer 3 weeks to look at 11.
19 So, again, you are in a position to review them and determine
20 their -- to just say that they're inadmissible I think would
21 be a mistake; but, to say that you would be able to look at
22 them and say, okay, I'm weighing that, and I'm weighing that
23 in the light of he's an advocate or he's a reviewer, he
24 wasn't in the courtroom.

25 THE COURT: Okay.

February 7, 2012

1 MR. THOMPSON: So, I mainly wanted to
2 point that out to the Court. It would put a tremendous
3 burden on the Court to otherwise -- without -- without this
4 -- at least, just pointing to the page numbers or to the
5 juror comments that -- that -- that were made.

6 MR. COLYER: Judge, one other thing I
7 want to say just to ----

8 THE COURT: Yes, sir.

9 MR. COLYER: My affidavit does not
10 recite to the page numbers. I use the terms, the juror said
11 this, the juror said that. The spreadsheet that I did had
12 the page numbers on it; but, when I did the affidavit, I
13 wanted to put it in a form that would be readable, so I
14 didn't say page transcript numbers. I have that available,
15 and I can give you the page range or give you the specific
16 pages, if that makes it any easier; but, when you -- when you
17 read these, if you do, to rule on it, I didn't want you to
18 hear us say, well, he said he recited the page numbers. The
19 page numbers are not in my affidavit. Don't want to mislead
20 you in any way on that.

21 THE COURT: All right.

22 MR. COLYER: But they did come from the
23 page numbers and the words of the jurors that I did for the
24 spreadsheet, just took out the numbers and that sort of
25 thing.

February 7, 2012

1 THE COURT: Folks, if you don't mind,
2 what I'd like to do is talk for just a moment before giving
3 you the opportunity to be heard as to Mr. Perry. Ms. Stubbs
4 has indicated that Mr. Perry, who also appeared as counsel in
5 this case, provided an affidavit, and that relates to Union
6 County.

7 MS. STUBBS: Yes.

8 MR. COLYER: Yes, sir.

9 THE COURT: Union County?

10 MR. THOMPSON: Yes.

11 MR. COLYER: His affidavit bears on
12 cases arising out of Union County?

13 MR. THOMPSON: I believe so, Judge.

14 MR. COLYER: Yes, sir.

15 THE COURT: All right; and, am I
16 understanding correctly that part of your argument as to him,
17 ma'am, is that he had no firsthand knowledge, was not present
18 during any of the trials that may be referenced in the
19 affidavit?

20 MS. STUBBS: That's correct, Your
21 Honor.

22 THE COURT: Okay. So, essentially,
23 whether we set aside the attorney -- the advocate-witness
24 matter for the moment, he falls in that first category?

25 MS. STUBBS: That's right, Your Honor.

February 7, 2012

1 MR. COLYER: Judge, we've been
2 referring to these on our side as participants and reviewers.

3 THE COURT: Okay.

4 MR. COLYER: If you were a participant,
5 you were either first, second, or third chair ----

6 THE COURT: Yes, sir.

7 MR. COLYER: ---- and witnessed or were
8 part of the decision-making process. If you were a reviewer,
9 you either -- maybe you weren't even an Assistant DA then, or
10 you weren't in the office, or you were somewhere else; and, I
11 understand, from talking to Ms. Stubbs this afternoon, that
12 they've got a qualification, a third group there. We were
13 talking about participants and reviewers, and I think there
14 is another category that they have that she's mentioned to
15 you -- that you were talking about.

16 THE COURT: Okay. So, not present, no
17 independent recollection, and there's a third category of
18 ----

19 MS. STUBBS: Well, so not present is --
20 is the first group. No independent recollection is the
21 second group ----

22 THE COURT: Okay.

23 MS. STUBBS: ---- and the third group
24 is present and remembers.

25 THE COURT: Okay.

1 MR. COLYER: So ----

2 MS. STUBBS: So -- and -- and we're not
3 guessing about those groups. Some of these affidavits say I
4 was there, however, I have no independent recollection, so
5 I'm exclusively relying on my review of the transcript.

6 THE COURT: Okay.

7 MR. COLYER: So, Judge, you have a
8 participant group with no independent recollection; I had go
9 back and review the transcript. That's what that person
10 said.

11 THE COURT: Okay.

12 MR. COLYER: And then persons who said
13 I was there and I've reviewed the transcript, and here's my
14 affidavit. So, two within the participant group and then one
15 in the reviewer group that wasn't there, didn't have any
16 independent knowledge, personal knowledge or anything. They
17 said that they had to rely totally on the transcripts because
18 they didn't participate at all.

19 THE COURT: Okay; and, that's Mr.
20 Perry?

21 MR. COLYER: Yes, sir. That's my
22 understanding.

23 THE COURT: That's what I wanted to
24 clarify for the record. That's Mr. Perry. So, essentially,
25 you've got two grounds as to Mr. Perry?

1 MS. STUBBS: Yes, Your Honor.

2 THE COURT: Okay. That's -- that's
3 where I'm going. I apologize.

4 Yes, ma'am. You were about to respond.

5 MS. STUBBS: Yes, Your Honor. Well, I
6 actually wanted to just focus on Mr. Perry for a minute to
7 point out that -- so, not only does he not have any personal
8 knowledge, so all of his affidavit is speculation; but, he
9 also is -- is not from Cumberland County; and, so, he -- he
10 wrote an affidavit that any attorney in his office could have
11 written, and he chose to enter an appearance in this case,
12 when presumably any attorney for the State of North Carolina
13 could have assumed that role. So, he -- he took on this dual
14 role himself; and, so, in that way, he seems somewhat
15 special; but, we also don't want to lose sight of the fact
16 that Mr. Colyer executed these two separate affidavits, one
17 affidavit, in his own language, the -- a participant
18 affidavit, and one a reviewer affidavit. Well, the reviewer
19 affidavit entirely overlaps with Judge Dixon's testimony.
20 So, we would -- so, we have both arguments for those
21 affidavits that -- for that affidavit by Mr. Colyer as well.

22 THE COURT: Okay.

23 MS. STUBBS: And I just wanted to make
24 clear, in case I didn't say the word initially, that we
25 object to these on the grounds that they are entirely

1 speculative. For attorneys who were not present and, thus,
2 are just reading the transcript, they are not -- there's
3 nothing to swear to there. They don't have any knowledge
4 that they can attest to, unless perhaps they were called as
5 legal experts; but, we've been through that. They're not
6 legal experts; and, to the extent that the State feels that
7 they are hamstrung by not being able to point out to this
8 Court where in the record you should look, that's the role
9 of briefing, Your Honor. You can invite both parties to
10 submit a post-trial memorandum. There's nothing that will
11 prevent them from making these arguments and signing their
12 own name to them; but, they don't need to be cloaked in the
13 language of a sworn attorney affidavit.

14 THE COURT: Okay. Any further
15 response, Mr. Thompson, Mr. Colyer; and, so you'll know where
16 I'm going, what I'm thinking is I do not want to decide this
17 issue irrationally.

18 MR. THOMPSON: Yes, sir.

19 THE COURT: From my point of view,
20 from my perspective, there are -- there's ample opportunity
21 for me to make a determination, to the extent that I can, as
22 I can but on matters that I believe require further
23 consideration down the road. I don't know if that makes any
24 sense or not, but that's where I am. I mean, ultimately, at
25 some point, I can reflect in findings and conclusions what I

1 considered and what I didn't. That's the point I'm trying to
2 make.

3 MR. THOMPSON: And that's kind of the
4 argument ----

5 THE COURT: Yes, sir.

6 MR. THOMPSON: ---- from the State's
7 point, is they've entered an agreement to enter them
8 substantively pursuant to the rules of evidence, but Your
9 Honor shouldn't even pay attention to these groups; and, our
10 argument is they get to the table. Yes. You should read
11 them. You should look at them and pay attention to them. To
12 the extent that you consider they're -- they shouldn't be
13 considered, you can do that.

14 THE COURT: Yes, sir.

15 MR. THOMPSON: So, that's -- that's kind
16 of the nutshell of the State's argument, respectfully.

17 THE COURT: Okay. All right. I think
18 we're all on the same page in that respect.

19 MS. STUBBS: Although, Judge, we are
20 inclined -- we certainly think it's reasonable for Your Honor
21 to review them in order to make the determination.

22 THE COURT: Yes, ma'am.

23 MS. STUBBS: We feel that in order to
24 submit our proposed findings ----

25 THE COURT: You need to know.

1 MS. STUBBS: ---- we need to know what
2 you're ----

3 THE COURT: Yes, sir.

4 MS. STUBBS: ---- going to be relying
5 on.

6 THE COURT: Yes, sir.

7 MS. STUBBS: So ----

8 THE COURT: Ma'am, I'm sorry. Yes,
9 ma'am.

10 MS. STUBBS: So, Judge, we're
11 not -- we're not seeking a ruling from the bench right at
12 this moment.

13 THE COURT: I understand.

14 MS. STUBBS: But we ----

15 THE COURT: I understand.

16 MS. STUBBS: ---- would ask before
17 [indiscernible] ----

18 THE COURT: Yeah; and, let me just
19 think for a moment. It's been a long day. I recognize the
20 -- the argument that we need to know for purposes of our
21 findings, our proposed findings, what's being considered and
22 what's not; and, frankly, I'm trying to think of how that
23 might be addressed. You referred to a memorandum or a brief
24 accompanying -- did I misunderstand -- accompanying those
25 findings?

1 MS. STUBBS: Your Honor, perhaps I
2 misunderstood the Court. I just assumed that the parties
3 would be submitting legal briefs with their proposed
4 findings, but that was entirely an assumption on my part.

5 THE COURT: I don't -- I -- any
6 guidance, any help I can get, any matters for purposes of
7 consideration -- I'm not requiring it, but certainly it would
8 be helpful. All right. Let me respond as follows. I'm
9 going to look at the affidavits in question. To the extent
10 that I am comfortable at this point giving you as much notice
11 as possible as to what my ruling is, I'll do that. There may
12 be instances where I'm not comfortable doing that, and I
13 don't want to foreclose and lock myself out in that respect.
14 I won't make any ruling on any matters that I believe require
15 or may require additional consideration without giving both
16 of you the opportunity to be heard; and, I guess -- I guess
17 part of my dilemma at this point is I don't know what's in
18 the packet.

19 MR. HUNTER: Right.

20 MS. STUBBS: Yes.

21 THE COURT: That's part of my dilemma.
22 I don't know what's there. So, if you will, give me the
23 opportunity to look at -- at this point, so I can figure out
24 where we're going from there.

25 MS. STUBBS: That seems reasonable.

February 7, 2012

1 THE COURT: Is that agreeable?

2 MR. THOMPSON: Yes, sir.

3 THE COURT: Okay.

4 MS. STUBBS: And, then, just the -- the
5 only question I guess I have is whether -- I -- I have our
6 highlighted copies -- whether we should move those in or if
7 you would prefer that, at some point, we go through the
8 highlighting and I state which of those general objections
9 the highlighting corresponds to.

10 MR. THOMPSON: If I could suggest,
11 tomorrow, at some point, myself and Ms. Stubbs sit down. I
12 can go through the highlighted portion.

13 THE COURT: Okay.

14 MR. THOMPSON: And I don't care if I step
15 out during Katz' testimony, as long as she's comfortable in
16 doing that ----

17 MS. STUBBS: I'm not.

18 MR. THOMPSON: ---- so we can do two
19 things at once. Then, we'll have to pull time aside
20 somewhere and go through ----

21 THE COURT: And note what -- what
22 objection applies?

23 MR. THOMPSON: Exactly.

24 THE COURT: Okay.

25 MR. THOMPSON: So we can kind of

1 intelligently understand each other, so we can be prepared
2 whenever ----

3 THE COURT: Can you ----

4 MR. THOMPSON: ---- we get through that
5 to actually fight about that.

6 THE COURT: Is -- and I've seen your
7 child, beautiful young lady.

8 Is it possible to note your objections and
9 show them to Mr. Thompson at some point tomorrow ----

10 MS. STUBBS: Yes, Your Honor.

11 THE COURT: ---- so that we could
12 review it in that way?

13 MR. THOMPSON: Either tomorrow or
14 Thursday, or whenever we can pull some time out.

15 THE COURT: Is that agreeable?

16 MR. COLYER: Yes, sir.

17 MR. THOMPSON: Yes, sir.

18 MS. STUBBS: Yes.

19 MR. THOMPSON: Agreeable with the State.

20 MR. COLYER: That's what we were
21 talking about ----

22 THE COURT: Satisfactory, folks? Yes,
23 sir.

24 MR. THOMPSON: Yeah. That's what we're
25 -- that's what we're suggesting.

February 7, 2012

1 THE COURT: Okay. All right. Then,
2 that's the way I would feel more comfortable proceeding, if
3 that's agreeable. We'll hold off. Let me look at the
4 materials, and I'll have the benefit of what it is that
5 you're objecting to and the basis in each of the instances.
6 Okay?

7 MR. THOMPSON: Thank you, Your Honor.

8 MR. HUNTER: Thank you, Your Honor.

9 THE COURT: Okay. Thank you. All
10 right, and ----

11 MR. JAY FERGUSON: Your Honor, may I address
12 the Court on one brief matter?

13 THE COURT: Yes, sir.

14 MR. FERGUSON: It's my understand Doctor
15 Katz is going to be testifying tomorrow. We have a motion in
16 limine to prevent part of his testimony ----

17 THE COURT: Okay.

18 MR. JAY FERUSON: ---- that I want to
19 present to the Court and the State so they can ----

20 THE COURT: I appreciate that, so I'll
21 have an opportunity to spend yet another night ----

22 [General laughter.]

23 MR. JAY FERGUSON: Since you had nothing to
24 do ----

25 THE COURT: ---- look -- looking --

1 looking at some law.

2 MR. JAY FERGUSON: And I'll note ----

3 THE COURT: Well, the Carolina, Duke
4 game is tomorrow, so I'm good to go.

5 [General laughter.]

6 THE COURT: Mr. Thompson, Mr. Colyer,
7 you've not seen this as well. First thing tomorrow morning,
8 take it up.

9 MR. JAY FERGUSON: That will be great, Your
10 Honor. Thank you.

11 THE COURT: Do you want to be heard
12 now in any respect?

13 MR. JAY FERGUSON: No.

14 THE COURT: All right. Okay. Any
15 other matters, folks?

16 MR. THOMPSON: Nothing from the State,
17 Your Honor.

18 MS. STUBBS: No, Your Honor.

19 MR. COLYER: Judge, just one other
20 matter.

21 THE COURT: Yes, sir.

22 MR. COLYER: We might need to get Mr.
23 Perry involved in this, so -- he's going to be here tomorrow
24 morning; and, we had mentioned earlier that we might have
25 Judge Gore here to go through his testimony.

February 7, 2012

1 THE COURT: Yes, sir.

2 MR. COLYER: So, we will get this to
3 Mr. Perry and let him have an opportunity to look at it
4 before he gets here first thing in the morning, while we're
5 doing -- well, one of us are doing Judge Gore, so that we can
6 respond before Doctor Katz starts; but, if we could have
7 leave to at least do it after Judge Gore.

8 THE COURT: Yes, sir. Yes, sir.
9 We'll accommodate you.

10 MR. COLYER: All right. Thank you.

11 THE COURT: All right. Anything else?

12 [There were no responses from counsel for either side.]

13 THE COURT: Thank you, folks. Have a
14 good evening.

15 [The hearing recessed at 5:11 p.m., February 7, 2012]

16 [END OF PAGE]

1 [COURT REPORTER NOTE: The Master Index will be submitted in
2 a volume all of its own, entitled Master Index.]

3 [The hearing reconvened at 9:28 a.m., February 8, 2012, with
4 all pertinent parties present prior to the recess once again
5 present, to include the defendant.]

6 MR. THOMPSON: Good morning, Judge.

7 THE COURT: Morning, sir.

8 MR. THOMPSON: Thank you for the
9 accommodation.

10 THE COURT: Yes, sir.

11 MR. THOMPSON: We have Judge Gore off to
12 the side, which has been the plan this morning. I want to
13 make sure there aren't any other motions, surprises or
14 anything else we need to deal with before we call Judge Gore.
15 If so, we'd like to go ahead and send out Mr. Colyer to ----

16 THE COURT: Well, if you will, bear
17 with me. There's one matter I would like to go into for
18 purposes of the record. I'm going to ask both counsel, but
19 let me begin by asking the State is it the State's position
20 that the only way a defendant can prevail under the Racial
21 Justice Act is to prove that race was a significant factor in
22 his particular case.

23 MR. THOMPSON: That's one theory the
24 State has, Judge; and, because -- I can't give you a straight
25 answer. I've got to give you a lawyer's answer because this

February 8, 2012

1 is the first time ----

2 THE COURT: Yes, sir.

3 MR. THOMPSON: This has never been
4 interpreted by a court. One of the State's theories is it
5 would be unconstitutional to read it otherwise.

6 THE COURT: Okay. That's what I
7 wanted to clarify for the record. My reading of the law, my
8 understanding of the law, is that, in order to prevail under
9 the Racial Justice Act, the defendant need not prove that
10 race was a basis of the decision, in this instance, to
11 exercise peremptory challenges in his particular case. By
12 its terms -- I mean, that would take us back to McCluskey
13 versus Kemp, if it were otherwise.

14 MR. THOMPSON: I understand, and I'm
15 happy to -- I'm not being cute when I say this. I'm happy to
16 discuss this if this is the time to do so; but ----

17 THE COURT: Well ----

18 MR. THOMPSON: ---- it's -- there
19 are so many ways that this can be interpreted, but it has to
20 -- the State's argument is it has to be interpreted in light
21 of the Constitution and other -- other factors that overrule
22 -- just blank ----

23 THE COURT: Yes, sir.

24 MR. THOMPSON: ---- just black paper on a
25 page -- black ink on page.

February 8, 2012

1 THE COURT: And I apologize for the
2 interruption.

3 MR. THOMPSON: Yes, sir.

4 THE COURT: The reason that I asked
5 the question was because I anticipate that that
6 constitutional challenge will certainly be made for purposes
7 of preservation of the record.

8 MR. THOMPSON: Yes, sir.

9 THE COURT: Counsel for the defendant,
10 is that your understanding of the applicable law?

11 MR. HUNTER: No, Your Honor.

12 THE COURT: Okay. Folks, my purpose
13 is to ask simply for my information about what issue or
14 issues might be involved, and I appreciate your response to
15 my question. Again, as I read the law, that's not what is
16 contemplated by the Racial Justice Act. That's for obviously
17 an appellate court to determine or some other court to
18 determine; but, my purpose is also to make sure that, as the
19 law is written, the information about the issues involved,
20 information about the applicable law, is accurate; there's no
21 potential for misinformation, inaccurate information, that
22 has the potential to confuse the issues related to this case.
23 By its terms, my understanding of the applicable law, which
24 is to be interpreted by other courts at some time in the
25 future, is that it is not necessary that a defendant prove

1 that race was a significant factor, although he's not
2 precluded from doing so, or she's not precluded from doing
3 so, under the provisions of the Racial Justice Act.

4 MR. THOMPSON: One of the very -- one of
5 the many difficult parts of trying this case is we have
6 absolutely -- because of the way it was written and the
7 complete lack of guidance as to how it's to be interpreted,
8 also bringing in the different factors that will affect its
9 interpretation, like the Constitution, we have to try to
10 argue it on all points. Our -- one of our contentions is it
11 would be unconstitutional. It would -- it would, in essence,
12 as it -- as it relates to an absurd result to let other cases
13 affect this case. That's -- that's a serious
14 oversimplification of our argument, but that's one of the --
15 or, many arguments; but, insofar as the Court may find
16 otherwise, we have to be able to argue it at any level ----

17 THE COURT: Absolutely.

18 MR. THOMPSON: ---- that the courts are
19 interpreting. So, I -- I don't want to call myself flexible
20 because a lot of folks in this courtroom are going to giggle
21 at that; but, our -- our arguments have to be flexible
22 because we have no idea how this will be interpreted; and,
23 so, we have to be able to fight at every level.

24 THE COURT: Don't misunderstand me,
25 Mr. Thompson.

1 MR. THOMPSON: Yes, sir.

2 THE COURT: You're absolutely entitled
3 to make your record.

4 MR. THOMPSON: Yes, sir.

5 THE COURT: And I certainly understand
6 that. I just wanted clarification for my purposes on what
7 your position was.

8 MR. THOMPSON: Yes, sir. The -- the --
9 if I could have -- and I'll -- I'll ----

10 MR. COLYER: If I could come to my co-
11 counsel's aid just ----

12 THE COURT: Yes, sir.

13 MR. COLYER: ---- to perhaps further
14 give you what our position is?

15 THE COURT: Yes, sir.

16 MR. COLYER: Judge, North Carolina
17 General Statute 15A-2010, the North Carolina Racial Justice
18 Act, no person shall be subject to or given a death sentence
19 or shall be executed pursuant to any judgment that was sought
20 or obtained on the basis of race.

21 THE COURT: That's the core provision.

22 MR. COLYER: Yes, sir.

23 THE COURT: Yes, sir.

24 MR. COLYER: We contend that this
25 provision seems to indicate that the defendant would have to

1 show discrimination in the decision involving the imposition
2 of his particular judgment of death. However, there are
3 parts of 15A-2011 that seem to bring that interpretation into
4 question; and, that's why we're being so ----

5 THE COURT: Yes, sir.

6 MR. COLYER: ---- I guess, ambiguous in
7 our answer.

8 THE COURT: Yes, sir.

9 MR. COLYER: 2011(a) seems to provide
10 that a finding of race was the basis of a decision -- may be
11 established if the Court finds that race was a significant
12 factor in decisions in other cases in various places.

13 THE COURT: Statewide, division-wide,
14 countywide or prosecutorial district-wide.

15 MR. COLYER: What it says in the
16 statute.

17 THE COURT: Yes, sir.

18 MR. COLYER: 15A-20 [sic] (b), evidence
19 relevant to establishing a finding that race was a
20 significant factor in decisions to seek or impose the death
21 -- sentence of death in the county, the prosecutorial, the
22 judicial division or the state at the time the death sentence
23 was sought or imposed may include statistical evidence or
24 other evidence including but not limited to sworn testimony
25 of attorneys, prosecutors, law enforcement officers, jurors

1 and other members of the criminal justice system or both
2 that, irrespective of statutory factors, one of the following
3 applies; and, it appears that the first two that are listed
4 there deal with the charging and sentencing, that we're not
5 talking about.

6 THE COURT: Yes, sir.

7 MR. COLYER: So, I'll jump over that
8 and go down to (3), that race was a significant factor in
9 decisions to exercise peremptory challenges during jury
10 selection. Now, we've got a plural or decisions and we've
11 got a singular for jury selection.

12 THE COURT: Yes, sir.

13 MR. COLYER: The decisions we contend
14 deal with the variety or the various veniremen in a
15 particular case, but that the jury selection is singular and
16 would, we contend, apply to the defendant in whose case is at
17 issue in the courtroom. Another part of 20 (a) 11 -- seems
18 to support the individual case determination where the Court
19 may consider evidence of the impact upon the defendant's
20 trial of any program the purpose of which is to eliminate
21 race as a factor in seeking or imposing a death sentence;
22 and, that's the last sentence of 2011(c).

23 THE COURT: Yes, sir.

24 MR. COLYER: Then, 2012(a)(3) seems to
25 ignore the last sentence of 2011(c) and states the Court

1 shall offer relief upon certain showing. It says if the
2 Court finds that race was a significant factor in decisions
3 to seek or impose the sentence of death in the county, the
4 prosecutorial district, the judicial division, or the State
5 at the time the death sentence was sought or imposed, the
6 Court shall order that a death sentence not be sought or that
7 the death sentence imposed by the judgment shall be vacated
8 and the defendant resentenced to life imprisonment without
9 the possibility of parole. The sentence contained in 15A-
10 2010 clearly indicates that the intent of the legislature was
11 to make sure that there was no prejudicial racial
12 discrimination involved in the decisions related to a
13 particular defendant's case. That -- that's our positions.
14 So, to answer your question in one word, yes, we think it has
15 to be particularized to ----

16 THE COURT: Yes, sir.

17 MR. COLYER: ---- the defendant whose
18 RJA motion is at hearing in front of a particular court.

19 THE COURT: Yes, sir; and, I simply
20 wanted to put what your position was -- to the extent you
21 were comfortable in stating your position -- on the record.

22 MR. THOMPSON: Judge, to supplement what
23 -- what Mr. Colyer has said, that will be our position.
24 However, we have to -- we don't want our evidence to be
25 limited to just this case because we understand the Court may

1 consider a different interpretation or the appellate courts
2 may consider a different interpretation, so we -- we don't
3 feel our evidence should be limited to this case.

4 THE COURT: I'm not suggesting that.

5 MR. COLYER: And, Judge, I know you've
6 heard me say ----

7 THE COURT: I'm not suggesting that.

8 MR. COLYER: ---- probably a hundred
9 times, when I stand on this side of the courtroom as a
10 prosecutor and listen to the defense in a case -- it's the
11 waterfront defense?

12 THE COURT: Yes, sir.

13 MR. COLYER: Your Honor, we have to be
14 prepared to meet all of the defense's -- well, in our case,
15 we are trying to avail ourselves of all defenses, and we do
16 not wish to limit ourselves to one definitive interpretation
17 because we're trying to defend it across-the-board.

18 THE COURT: Absolutely.

19 MR. COLYER: Yes, sir.

20 THE COURT: Yes, sir. Okay. All
21 right. You indicated you've got Judge Gore ----

22 MR. THOMPSON: We do.

23 THE COURT: ---- outside. There's a
24 motion pending relating to Doctor Katz. What's your
25 preference about ----

1 MR. THOMPSON: We prefer to hold onto
2 that. We have Doctor Katz and Mr. Perry in a room off to the
3 side working; and, of course, when Doctor Katz is going to
4 come in, Mr. Perry's going to come in with him. We'd like to
5 defer that until we finish with Judge Gore and start with
6 ----

7 THE COURT: Well, you indicated
8 yesterday there were some scheduling matters related ----

9 MR. THOMPSON: Yes, sir.

10 THE COURT: ---- to Judge Gore.

11 MR. HUNTER: That's fine with us.

12 THE COURT: Okay.

13 MR. HUNTER: Judge, I did bring an
14 audio recorder. As you know, you've already given us
15 permission to do video; and, it has a microphone on it, but
16 the audio quality leaves a little to be desired.

17 THE COURT: Yes, sir.

18 MR. HUNTER: So, I'm wondering -- I was
19 just going to turn this on, leave it right there at the -- at
20 the witness stand.

21 THE COURT: Okay. You folks want to
22 be heard in that regard?

23 MR. COLYER: No, sir.

24 MR. THOMPSON: No.

25 THE COURT: Yes, sir. Yes, sir.

1 MR. HUNTER: If -- if I may, I'll just
2 go up there and turn it on; and, then, we won't have to think
3 about it again for a while ----

4 THE COURT: Thank you, sir.

5 MR. HUNTER: ---- until lunch.

6 [Pause.]

7 MR. HUNTER: Thank you, Your Honor.

8 THE COURT: Yes, sir.

9 MR. THOMPSON: With your permission, we'd
10 like to go get Judge Gore.

11 THE COURT: Absolutely.

12 MR. COLYER: Excuse me, Your Honor,
13 please.

14 [Mr. Colyer departed the courtroom.]

15 [Pause.]

16 [Mr. Colyer and the witness entered the courtroom.]

17 THE COURT: Good morning, sir.

18 THE WITNESS: Good morning.

19 THE COURT: If you will, place your
20 left hand on the Bible and raise your right hand, please.

21 [The witness did as directed and was sworn.]

22 THE COURT: If you will, come around
23 and have a seat.

24 [The witness approached.]

25 THE COURT: Would you like some water,

1 sir?

2 THE WITNESS: I've got some.

3 THE COURT: Yes, sir.

4 [The witness seated himself in the witness stand.]

5 THE COURT: Once you're seated, if you
6 will, please state your first and last name; and, if you
7 will, spell both for the court reporter.

8 THE WITNESS: William Gore, Junior; W-I-
9 L-L-I-A-M, G-O-R-E.

10 THE COURT: Thank you, sir.

11 Yes, sir.

12 MR. THOMPSON: Thank you, Your Honor.

13 Please the Court.

14 **WILLIAM GORE, JR., having been first duly sworn, was called**
15 **as a witness by the State and testified as follows on DIRECT**
16 **EXAMINATION conducted by MR. ROBERT THOMPSON:**

17 Q. Good morning, Judge Gore.

18 A. Good morning, sir.

19 Q. How are you employed now?

20 A. I am on counsel with a law firm in Whiteville named
21 Hill and High, LLP. I practice mainly criminal law.

22 Q. How long have you been so employed?

23 A. About 2 and a half years.

24 Q. Before you worked there, at your current
25 occupation, where did you work?

February 8, 2012

1 A. I was Commissioner of Motor Vehicles, at the
2 Division of Motor Vehicles, between August of 2007 and
3 January of 2009.

4 Q. And, before August of 2007, what was your
5 occupation?

6 A. I was a Superior Court Judge for the State of North
7 Carolina, 13th Judicial District.

8 Q. How long were you a Superior Court Judge for the
9 State of North Carolina?

10 A. Seventeen years.

11 Q. During that time, one of the many cases that you
12 tried was Christine or Christina Walters?

13 A. Yes, sir.

14 Q. Was that here in Cumberland County?

15 A. It was.

16 MR. HUNTER: Objection, Your Honor.

17 Move to strike.

18 THE COURT: Okay. The same basis?

19 MR. HUNTER: Yes, Your Honor.

20 THE COURT: Folks, you're attempting
21 to elicit some historical facts at this point, correct?

22 MR. THOMPSON: Yes, sir.

23 THE COURT: The objection as to
24 whether or not Judge Gore presided over the case is
25 overruled. Exception is noted for the record; but, you're

February 8, 2012

1 free to reserve your right -- or, you have the right to ask
2 -- make additional objections.

3 MR. HUNTER: Yes. Move -- move to
4 strike his answer.

5 THE COURT: Motion to strike is
6 denied. The exception is noted for the record.

7 Go ahead, sir.

8 Q. Do you recall that case?

9 A. Do I recall it?

10 Q. Yes, sir.

11 A. Yes, sir.

12 Q. All right.

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Objection is noted. It's
15 overruled. Exception is noted for the record. Motion to
16 strike is denied.

17 MR. THOMPSON: Before we get into the
18 facts of that case, we're going to go way back.

19 Q. What year did you graduate high school, sir?

20 A. High school?

21 Q. Yes, sir.

22 A. That is way back.

23 [General laughter.]

24 Q. Yes, sir.

25 A. 1970.

1 Q. And where did you go from there, sir?

2 A. I attended the University of North Carolina at
3 Chapel Hill. I graduated from there in 1974 with an English
4 degree.

5 Q. From -- from UNC in ----

6 A. From UNC Chapel Hill.

7 Q. Yes, sir. From there, where did you go?

8 A. All right. I -- then, I was accepted and attended
9 North Carolina Central University Law School in Durham. I
10 graduated from that law school in 1977. Do you want the rest
11 of my profession ----

12 Q. I would love for you to just keep going; yes, sir
13 ----

14 A. All right.

15 Q. ---- if it doesn't offend your ----

16 A. No. That's fine.

17 Q. ---- modesty.

18 A. I went back to my hometown of Whiteville, where I
19 was in a general practice of law for about a year and a half.
20 After that, I was appointed as an Assistant District Attorney
21 by then prosecutor Mr. Lee Greer for Bladen, Brunswick and
22 Columbus counties. At that point in time, there were three
23 prosecutors -- three Assistant DAs, two staff people and the
24 District Attorney for all three counties; and, we -- we did
25 everything in all courts. I stayed there until 1980. In

1 December of 1980, after having run a contested election, I
2 was elected to the District Court bench. I was a District
3 Court Judge from 1980 to 1984. In 1985, I was appointed the
4 Chief District Court Judge by then Chief Justice Joseph
5 Branch. I continued on the District Court bench until 1990.
6 I ran an uncontested election in 1990, was elected to the
7 Superior Court bench; and, I remained on the Superior Court
8 bench until I retired in August of 2000 -- strike that --
9 July of 2007. For the first 2 years on the Superior Court
10 bench, I was a Resident Superior Court Judge. After that
11 time, Judge Giles Clark, who was our Senior Resident Superior
12 Court Judge, retired; and, by virtue of my seniority, I
13 became the Senior Resident Superior Court Judge.

14 Q. All right. Let's back up just a little bit.
15 During your time as a prosecutor -- about how long did you
16 spend as a prosecutor, first of all?

17 A. About 1 and a half years.

18 Q. During that time, you said you -- you pretty much
19 handled a number of different counties with just a very small
20 staff?

21 A. Yes, sir.

22 Q. What kind of cases were you involved in during that
23 -- that year and a half?

24 A. Everything from simple assault to capital murder.

25 Q. Did you take part in any jury trials during that

1 time?

2 A. Yes, sir.

3 Q. Were any of those jury trials murder cases?

4 A. Yes, sir.

5 Q. Were any of those jury trials capital-murder cases?

6 A. Yes, sir.

7 Q. Did you take part, during the capital-murder cases,
8 as far as your time as an Assistant DA, in the actual
9 selection of the jurors?

10 A. Yes, sir.

11 Q. Did you do so with any other folks with you, or
12 were you by yourself?

13 A. You mean were there other prosecutors at ----

14 Q. Yes, sir. I'm sorry.

15 A. ---- the table?

16 Q. Yeah. Anybody else with you prosecuting?

17 A. Yes, the elected District Attorney, Mr. Lee Greer,
18 was there at the table with me.

19 Q. Do you call, if you recall, understanding it was
20 quite a long time ago, how many capital-murder cases that you
21 were involved in during your time as a -- as a ----

22 A. As a prosecutor?

23 Q. Yes, sir.

24 A. Well, I was involved in maybe two or three, but I
25 -- I actually only tried, as a prosecutor, in trial, one.

February 8, 2012

1 Q. Okay. Now, moving on now forward to your time as a
2 Superior Court Judge, during your time as a Superior Court
3 Judge, obviously you were involved in a number of jury
4 trials; is that correct?

5 A. Yes, sir.

6 Q. And, during that time, were you involved in a
7 number of murder cases during your tenure as a Superior Court
8 Judge, capital and non-capital?

9 A. Yes, sir, over 50.

10 Q. During that time as a Superior Court Judge, were
11 you involved in a number of capital-murder cases?

12 A. Yes, sir.

13 Q. Do you have an approximate number of capital cases
14 at you were involved in as a Superior Court Judge -- in your
15 approximation?

16 A. Well, of the cases that were tried capitally ----

17 Q. Yes, sir.

18 A. ---- approximately 30.

19 THE COURT: I'm sorry.

20 THE WITNESS: Approximately 30.

21 THE COURT: Thank you.

22 Q. Do you know, if you know, the number of those
23 capitally murdered -- I'm sorry -- capitally tried murder
24 cases that resulted in a verdict of death, do you know many
25 those would be?

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: The objection is
3 sustained.

4 Judge Gore, I'm going to ask for your
5 indulgence. We're about to get, I believe, shortly, into a
6 line of questioning where I anticipate there are going to be
7 objections made based on matters -- motions previously filed
8 in this case. So, if you will, bear with me. If you will,
9 allow, after any question that might be asked, a slight
10 pause, so I can deal with any objections.

11 THE WITNESS: Yes, sir.

12 THE COURT: Thank you, sir.

13 Okay.

14 [Pause.]

15 Q. During capital cases, murder cases, and other
16 cases, during your tenure as a Superior Court Judge, did you
17 have occasion to hear Batson challenges?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: Objection is sustained.

20 The State's objection and exception are noted for the record.

21 Q. Did you, Your Honor, have a particular procedure
22 that you dealt with Batson challenges that were made in
23 criminal cases in front of Your Honor during the tenure --
24 your tenure as a Superior Court Judge?

25 MR. HUNTER: Objection, Your Honor.

1 THE COURT: The objection is
2 sustained. The State's objection and exception to the ruling
3 are noted for the record.

4 Q. Would you describe the procedure ----

5 MR. THOMPSON: I'm sorry. It's difficult
6 with no answer to ----

7 THE COURT: Yes, sir.

8 MR. THOMPSON: And, before we go further,
9 I want to make sure it's clear -- it may save us some time.
10 It may not.

11 THE COURT: Okay.

12 MR. THOMPSON: The State's offer of
13 proof, as we're allowed to give it, that we talked about at
14 length yesterday, is going to be outside of this courtroom
15 per Your Honor's order. The answers that are not given
16 today, based on the Court order, would normally respond in
17 additional questions ----

18 THE COURT: Yes, sir.

19 MR. THOMPSON: ---- in the natural flow
20 of direct examination done in the normal flow.

21 THE COURT: Yes, sir.

22 MR. THOMPSON: I want to make sure that,
23 if I need the questions to be asked in the courtroom,
24 objected to and sustained and go through this process in
25 order to get them properly in the offer of proof, I need to

February 8, 2012

1 know whether to ask those questions or know whether I'll be
2 given leeway in the offer of proof to ask the natural follow-
3 up questions that would result.

4 THE COURT: Yes, sir.

5 MR. THOMPSON: Does that make sense?

6 THE COURT: It does.

7 MR. THOMPSON: I don't want to offend the
8 Court ----

9 THE COURT: No ----

10 MR. THOMPSON: ---- but I don't want to
11 give up any rights the State has in laying our offer of
12 proof.

13 THE COURT: Well, Mr. Thompson, as
14 I've indicated a number of times, you have the absolute right
15 to make your record.

16 MR. THOMPSON: Yes, sir.

17 THE COURT: But I have the
18 responsibility of ruling on matters of -- evidence matters of
19 law in court.

20 MR. THOMPSON: Yes, sir.

21 THE COURT: We've already established
22 that you will be given the opportunity in a quote, unquote
23 deposition-type setting to make your offer of proof, so that
24 your -- if your inquiry right now is do I have to go through
25 the litany of asking the questions on the record with

1 objections being made and rulings being entered by the Court
2 or can I do what I need to do to make my offer of proof in
3 the context of the deposition ----

4 MR. THOMPSON: Yes, sir.

5 THE COURT: ---- type setting --
6 what's your position on that?

7 MR. HUNTER: We're -- we're fine.
8 We're going to -- he -- they can make whatever showing they
9 want in their -- in the deposition.

10 THE COURT: Yeah.

11 MR. THOMPSON: I mainly wanted to clear
12 that up. I didn't want anybody going line-by-line in our
13 offer of proof, oh, no, you didn't ask that and get objected
14 to, so we can't even consider that.

15 THE COURT: That -- that's not an --
16 that's not an issue as far as I'm concerned.

17 MR. THOMPSON: And -- and I wanted ----

18 THE COURT: You have the right to make
19 your offer of proof, and we'll allow you to do that.

20 MR. THOMPSON: I also did not want to
21 appear to the Court to be defiant by asking follow-up
22 questions that assumed an answer that I knew would be coming
23 in an offer of proof.

24 THE COURT: Don't -- don't worry about
25 that. I'm conf -- I understand what it is you folks are

1 doing.

2 MR. COLYER: So, with respect to Judge
3 Johnson's questions yesterday ----

4 THE COURT: Yes, sir.

5 MR. COLYER: ---- where there was an
6 objection, and we moved on to the next question, if there is
7 a necessity to place additional questions between those
8 questions in the deposition-type setting, we have leave to do
9 that?

10 THE COURT: I'm not putting any
11 restrictions on your attempt to make your offer of proof.

12 MR. COLYER: All right, sir.

13 THE COURT: And you folks want to be
14 heard in that respect?

15 MR. HUNTER: No. No, Your Honor.

16 THE COURT: Okay. All right.

17 [Pause.]

18 MR. THOMPSON: Thank you, Your Honor.

19 THE COURT: Yes, sir. Yes, sir.

20 Q. And thank you, Your Honor. Let's back up just a
21 little bit, Judge.

22 MR. THOMPSON: I'm sorry. Judge
23 [pointing at the witness].

24 Q. When -- when were you contacted approximately, and
25 whom were you contacted by in reference to your testimony?

1 A. I think I was contacted by Mr. Colyer first, and it
2 was probably about 2 months ago.

3 Q. Did you request, after that conversation, any
4 materials be provided to you in preparation for your
5 testimony?

6 A. No, sir.

7 Q. Did you have conversations with me and Mr. Colyer
8 or Mr. Colyer or me in reference to your testimony today?

9 A. Yes, sir.

10 Q. And did -- did we discuss with you what would be
11 discussed with you on the witness stand?

12 A. In very general terms, yes.

13 Q. Yes, sir. Did -- do you recall the Christina
14 Walters case?

15 A. Yes, sir.

16 MR. HUNTER: Objection, Your Honor.
17 Move to strike.

18 THE COURT: The objection is
19 sustained. We've already got it in for purposes of Judge
20 Gore being the presiding judge. So, I understand the
21 objection. I understand your effort to preserve your issues
22 in this case; but, the heart of the ruling of the Court was
23 predicated on the case law that was discussed and the code --
24 judicial code. So, as to your answer, whether you presided,
25 sir, you may answer yes or no; and, you've already done that.

1 THE WITNESS: Yes.

2 Q. Do you recall who the parties were at -- sitting at
3 the respective tables?

4 THE COURT: All right. Now, that goes
5 into the record. The objection is sustained. The State's
6 objection and exception are noted for the record. The record
7 speaks for itself in that particular proceeding.

8 Q. Was -- to your knowledge, was -- one of those
9 parties was Mr. Cal Colyer; is that correct?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Sustained. The State's
12 objection and exception are noted for the record.

13 MR. THOMPSON: May I have a moment,
14 Judge?

15 THE COURT: Yes, sir.

16 MR. THOMPSON: Madam Clerk, what number
17 are we -- is next? 33 would be the next number?

18 MADAM CLERK: [Indiscernible.]

19 THE COURT: Yeah. The last one I
20 have, Mr. Thompson is 32, and that would be -- are the
21 affidavits of the prosecutors. It's 33.

22 [Pause.]

23 MR. THOMPSON: Believe it or not, our
24 technical difficulties involve paper this time, Judge. If we
25 can have just a second.

1 THE COURT: Yes, sir.

2 [Pause.]

3 MR. THOMPSON: May I approach?

4 [Pause.]

5 MR. THOMPSON: May I approach?

6 THE COURT: Yes, sir. I'm sorry.

7 [Pause.]

8 MR. THOMPSON: May I approach Your Honor?

9 THE COURT: Yes, sir.

10 [Pause.]

11 MR. THOMPSON: This is your copy of 33

12 [handing documents to the Court].

13 THE COURT: All right. Thank you.

14 Q. Judge Gore ----

15 MR. THOMPSON: These questions are

16 foundational, Judge. We -- the ----

17 Q. I'm going to hand you what's been marked for

18 purposes of identification as State's Exhibit Number 20 --

19 I'm sorry -- 33, which is part of a transcript that is now in

20 evidence in State's -- I'm sorry -- Defendant's Exhibit 2, I

21 believe, which contains the jury selection transcript of 173

22 murder cases -- I'm sorry -- capital -- capitally-trying

23 murder cases included the Walters case that we're going to

24 talk about. So, I'm going to hand you State's Exhibit Number

25 33 understanding that [handing the exhibit to the witness]

February 8, 2012

1 and ask you to look at it for just a second, and I may have a
2 couple of questions as it relates to State's Exhibit 33 in
3 just a second.

4 [Pause.]

5 MR. THOMPSON: May I have just a moment,
6 Judge?

7 THE COURT: Yes, sir.

8 [Pause.]

9 Q. Judge, have you had an opportunity to look at
10 State's Exhibit Number 33?

11 A. Yes, sir.

12 Q. State's Exhibit 33, does it appear to be ----

13 MR. THOMPSON: Again, foundational.

14 Q. Does it appear to be part of a transcript of jury
15 selection insofar as you can tell?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: The object is sustained.

18 The State's objection and exception are noted for the record.

19 Q. In State's 33, there are -- it's the questioning --
20 Ms. Russ of juror number 13, and the transcript reflects the
21 an -- the questions and answers of Ms. Russ and juror number
22 13. To your knowledge, is that correct?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Objection is sustained.

25 The State's objection and exception are noted for the record.

February 8, 2012

1 Q. Juror number 13 was being asked, on page 1185, the
2 first page of State's 33, about if -- by Ms. Russ -- anybody
3 -- do you know anybody who has been charged with, accused of,
4 blamed for a homicide, killing or murder of any kind; and,
5 that's -- is that what's going on in State's 33?

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: The objection is
8 sustained. The State's objection and exception are noted for
9 the record.

10 Q. Does the juror answer, in State's Exhibit Number
11 33, that her brother had been charged with -- that her
12 brother had been charged with a serious crime?

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Objection is sustained.
15 The State's objection and exception are noted for the record.

16 Q. In State's 33, it continues to go on, on 1186 --
17 does it go on that, in Miami, Florida; it's been about 6
18 years ago; they found a weapon, some drugs and it turned out
19 he was a year younger than she -- is that reflected in
20 State's Exhibit Number 33?

21 MR. HUNTER: Objection.

22 THE COURT: Objection is sustained.
23 The State's objection and exception are noted for the record.

24 Q. On page 1187 of State's Exhibit Number 33, does it
25 -- that's three pages down -- does it indicate that that --

1 that person -- the brother of the juror received 5 years for
2 that behavior?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Sustained. The State's
5 objection and exception are noted for the record.

6 Q. On page 1198, also contained within State's Exhibit
7 Number 33, does it indicate that the -- the juror and Ms.
8 Russ were discussing violence and her attitudes toward
9 violence?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Sustained. The State's
12 objection and exception are noted for the record.

13 Q. Does it indicate, on that same page, that the
14 juror's response was it just grieves my spirit to hear about
15 stuff like that?

16 MR. HUNTER: Objection, Your Honor.

17 THE COURT: Sustained. The State's
18 objection and exception are noted for the record.

19 Q. On page 1209 -- this is the second page from the
20 back of page number -- I'm sorry -- of the -- item number 33
21 -- State's Exhibit Number 33, towards the bottom, is it
22 evident that the juror and the Court are discussing her
23 opinions on the death penalty?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Sustained. The State's

1 objection and exception are noted for the record.

2 Q. And, on the bottom of page 1209, it's the juror's
3 response I have to think about that real hard now; because,
4 the death penalty, that's something very -- and then she's
5 cut off by the Court.

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: Sustained. The State's
8 objection and exception are noted for the record.

9 MR. THOMPSON: May I have a second,
10 Judge?

11 [Pause.]

12 THE COURT: Yes, sir.

13 MR. THOMPSON: May I approach?

14 THE COURT: Yes, sir.

15 [Pause.]

16 MR. THOMPSON: May I approach, Your
17 Honor?

18 THE COURT: Yes, sir.

19 [Pause.]

20 THE COURT: This is your copy of
21 State's Exhibit Number 34 [handing documents to the Court].

22 THE COURT: Thank you, sir.

23 Q. Judge [handing the exhibit to the witness], I'm
24 showing you what's been marked for purposes of identification
25 as State's Exhibit Number 34 [handing the exhibit to the

1 witness]. I'd like you to take a look at that just for a
2 minute, and I'll have some -- well -- questions about it in
3 just a moment.

4 [Pause.]

5 Q. Now, have you had a chance to take a look at
6 State's Exhibit 34 for just a moment?

7 A. Yes, sir.

8 Q. Can you identify what State's Exhibit Number 34 is
9 a copy of?

10 MR. HUNTER: Objection, Your Honor.

11 THE COURT: Sustained. The State's
12 objection and exception are noted for the record.

13 Q. Would it be fair to characterize State's Exhibit
14 Number 34 -- what's been marked for purposes of
15 identification as State's Exhibit Number 34 -- is the jury
16 chart from the State of North Carolina versus Christina Shea
17 Walters, 98 CRS 34832 through 35044?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: Sustained. The State's
20 objection and exception are noted for the record.

21 Q. And are seating charts created by the clerk in jury
22 trials as a standard of purpose -- standard practice for jury
23 trials in the state of North Carolina?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Sustained. The State's

1 objection and exception are noted for the record.

2 Q. Is the signature, as far as you know, Regina DeMark
3 [phonetic], as a deputy clerk of Superior Court -- at a date
4 -- 30th of May of 2000 -- listed on the bottom of State's
5 Exhibit Number 34?

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: Sustained. The State's
8 objection and exception are noted for the record.

9 MR. THOMPSON: Your Honor, I tender 33
10 and 34 into evidence for the State's offer of proof.

11 THE COURT: Yes, sir. They are
12 received for that purpose.

13 MR. THOMPSON: Thank you, Your Honor.

14 THE COURT: Yes, sir.

15 Q. For -- State's Exhibit Number 34 would contain --
16 or, do they contain the names of the jurors and the seats in
17 which they appeared in the Christina Walters case, to your
18 knowledge, Judge?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Sustained. The State's
21 objection and exception are noted for the record.

22 Q. And juror number 13 -- one of jurors number 13 is
23 Ellen Gardner as listed as alternate number 1 -- would be the
24 juror 13 slot -- would that be correct, Judge Gore?

25 MR. HUNTER: Object. Are -- are you --

1 I'm sorry. I'm not clear. Is he asking whether the judge
2 has independent knowledge of this or just asking him to read
3 off this chart?

4 MR. THOMPSON: I'm asking whether or not
5 Ellen Gardner is listed as one of jurors number 13 in the
6 jury selection -- I'm sorry -- in the seating chart that's
7 marked as State's Exhibit Number 34.

8 MR. HUNTER: Objection.

9 THE COURT: Sustained. The State's
10 objection and exception are noted for the record.

11 MR. THOMPSON: May I approach, Your
12 Honor?

13 THE COURT: Yes, sir.

14 [Pause.]

15 THE COURT: 35, Mr. Thompson?

16 MR. THOMPSON: Yes, sir. May I
17 approached, Your Honor?

18 THE COURT: Yes, sir.

19 [Pause.]

20 MR. THOMPSON: This is Your Honor's copy.
21 I'm trying to designate that so we don't have any problems.

22 THE COURT: Yes, sir. I appreciate
23 it.

24 MR. THOMPSON: Your Honor's copy of
25 State's Exhibit Number 35 [handing the exhibit to the Court];

1 and, I'm sorry. May I approach the witness?

2 THE COURT: Yes, sir.

3 [Pause.]

4 Q. Judge, if I could ask you to take -- take a look at
5 State's Exhibit Number 35 [handing the exhibit to the
6 witness] and then compare -- juror number 14 would be the
7 second alternate slot; would that be correct?

8 MR. HUNTER: Objection, Your Honor.

9 THE COURT: Sustained. The State's
10 objection and exception are noted for the record.

11 Q. Would it -- would the seating chart that's marked
12 and now entered for proffer purposes as State's 34 indicate
13 that John Reed was was one of the jurors number 14, Judge?

14 MR. HUNTER: Objection, Your Honor.

15 THE COURT: Sustained. The State's
16 objection and exception are noted for the record.

17 Q. Juror number 14, on page 1329, that's now been
18 marked and entered [sic] as State's Exhibit Number 35, does
19 he say that his grandson was charged with a serious crime
20 after being asked those question by Ms. Russ during jury
21 selection?

22 MR. HUNTER: Objection, Your Honor.

23 THE COURT: Sustained. The State's
24 objection and exception are noted for the record.

25 MR. THOMPSON: May I approach, Your

1 Honor?

2 THE COURT: Yes, sir.

3 [Pause.]

4 MR. THOMPSON: May I approach?

5 THE COURT: Yes, sir.

6 MR. THOMPSON: Your copy of State's

7 Exhibit Number 36 [handing the exhibit to the Court].

8 THE COURT: Thank you, sir.

9 Q. Judge Gore, I'm going to ask you to take a look at
10 State's Exhibit Number 36 [handing the exhibit to the
11 witness]. Does it appear that State's Exhibit Number 36 --
12 oh, sorry -- does it appear State's Exhibit Number 36 is part
13 of a transcript also of the Christina Walters -- like the
14 other ones before?

15 MR. HUNTER: Objection, Your Honor.

16 THE COURT: Sustained. The State's
17 objection and exception are noted for the record.

18 Q. Does it appear that this is the jury selection of
19 juror number 14, which would be the second alternate slot;
20 this would be a Sally Robinson -- is her -- Sally Robinson
21 appear as one of the jurors number 14, which would be the
22 second alternate slot on State's Exhibit 33 [sic]?

23 MR. HUNTER: Your Honor, if I could
24 just ask him to restate that question.

25 THE COURT: Yes, sir.

1 MR. HUNTER: I'm not sure I understood
2 it.

3 MR. THOMPSON: That question should have
4 been taken out and shot. I agree, Judge.

5 Q. Does it appear, in State's Exhibit Number 33 [sic],
6 that Sally Robinson appeared as alternate slot number two
7 which would have been designated as juror number 14 as far as
8 the transcript goes?

9 MR. HUNTER: Objection, Your Honor.

10 MADAM COURT REPORTER: Number 34.

11 THE COURT: Sustained. The State's
12 objection and exception are noted for the record.

13 THE WITNESS: I think he asked me about
14 number 33.

15 MR. THOMPSON: State's Exhibit 34.

16 THE COURT: Oh, I'm sorry.

17 MR. THOMPSON: 34, Judge.

18 THE COURT: 34.

19 MR. THOMPSON: I'm sorry.

20 THE COURT: Thank you, Judge Gore.

21 MR. THOMPSON: The seating chart. Pardon
22 me. I ----

23 THE COURT: Thank you, sir.

24 MR. THOMPSON: ---- referred to it
25 several times as 33.

February 8, 2012

1 Q. Does it appear that State's Exhibit Number 36 lists
2 a conversation between juror number 14 and Ms. Russ that deal
3 with the questions that relate to the juror's opinions,
4 feelings about the death penalty?

5 MR. HUNTER: Objection, Your Honor.

6 THE COURT: Sustained. The State's
7 objection and exception are noted for the record.

8 Thank you for the clarification [speaking to
9 the witness].

10 Q. Does it appear that there may have been some
11 confusion between Ms. Russ and juror number 14 as it relates
12 to her opinions on the death penalty?

13 THE COURT: That's speculative, sir;
14 but, the objection to the reference to a matter of record is
15 sustained. The State's objection and exception are noted for
16 the record.

17 Q. On the final page of State's Number 36, does it
18 appear the juror says to Ms. Russ, talking about the death
19 penalty, like I was telling the judge, that's just -- there
20 is a scenario where I, you know, will say this man really
21 needs the death penalty because of what he has done; and,
22 then, responds later, there are no more emotions there; there
23 is no love there; and, later, in the same page, and saying
24 that, you know, it has to be proven to me, you know, beyond
25 reason -- as her answers in her responses to juror questions

1 relating to her opinion on the death penalty? Does that
2 appear in State's Exhibit 36?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Sustained. The State's
5 objection and exception are noted for the record.

6 MR. THOMPSON: May I approach?

7 THE COURT: Yes, sir.

8 [Pause.]

9 MR. THOMPSON: May I approach, Your
10 Honor?

11 THE COURT: Yes, sir.

12 [Pause.]

13 MR. THOMPSON: This is your copy of
14 State's 37 [handing the exhibit to the Court].

15 THE COURT: Thank you.

16 Q. Judge, Gore, I'm going to ask you to take a look at
17 State's 37 [handing the exhibit to the witness]. Does it
18 appear that State's Exhibit Number 37 is a portion of the
19 trial transcript that's been entered into evidence as
20 Defendant's Exhibit Number 2 that deals with the jury
21 selection of Christine -- I'm sorry -- Christina Walters, 98
22 CRS 34832, like the other exhibits ----

23 THE COURT: I'm sorry. You referred
24 to ----

25 MR. THOMPSON: I'm sorry. State's

1 Exhibit 37.

2 THE COURT: Yes, sir.

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Sustained. The State's
5 objection and exception are noted for the record.

6 Q. Does it appear that juror number 16 and Ms. Russ
7 are having a conversation in this jury selection -- juror
8 number 16 would be -- one would be Calvin Smith according to
9 State's Exhibit 34 ----

10 MR. HUNTER: Objection to that
11 question, Your Honor.

12 THE COURT: Sustained. The State's
13 objection and exception are noted for the record.

14 Q. Does it appear that juror number 16's response,
15 when asked by Ms. Russ, have you known anyone who was charged
16 with a serious crime; I don't mean speeding; I mean a serious
17 crime; the juror's response was, well, my son-in-law killed
18 my grandchildren, '80, pause, '86 -- I believe that is the
19 year 1986 as indicated on the transcript -- that, yes, it was
20 in Cumberland County off Murchison Road; the person's name
21 was -- and the person was charged with murder, received a
22 sentence of 75 years? Does that appear on page 1538 of the
23 item that's marked as State's Exhibit Number 37?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Sustained. The State's

1 objection and exception are noted for the record.

2 MR. THOMPSON: May I approach, Judge?

3 THE COURT: Yes, sir.

4 [Pause.]

5 MR. THOMPSON: May I approach, Your
6 Honor?

7 THE COURT: Yes, sir.

8 [Pause.]

9 MR. THOMPSON: This is your copy of
10 State's Exhibit Number 38, Your Honor [handing the exhibit to
11 the Court].

12 THE COURT: Thank you.

13 Q. Judge Gore, I'm handing you what's been marked for
14 purpose of identification State's Exhibit Number 38 [handing
15 the exhibit to the witness]. Would you take a look at that
16 for just a minute, and I'll have some questions.

17 [Pause.]

18 Q. Does it appear, Judge Gore, that State's Exhibit
19 Number 38 appears, as well, to be portions of the trial
20 transcript entered in as State's Exhibit Number 2 -- I'm
21 sorry -- Defendant's Exhibit Number 2 -- appear to be pages
22 from the trial transcript of the Christina Walters case?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Sustained. The State's
25 objection and exception are noted for the record.

February 8, 2012

1 Q. Does it appear, in State's Exhibit Number 38, juror
2 number 10 and the Court are having a conversation in
3 reference to jury selection; and, juror number 10 -- one of
4 jurors number 10 was a Norman Bethea -- Norma Bethea, as it
5 appears in the seating chart that's marked as State's 34?

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: Sustained. The State's
8 objection and exception are noted for the record.

9 Q. Does it appear that the juror had discussions with
10 the Court in reference to arthroscopic surgery on his [sic]
11 knee and had issues with being able to get up and move -- or,
12 having to get up and move around during trial; he [sic]
13 doesn't -- he -- he can't sit for a long time -- I'm sorry --
14 she can't sit for a long time; and, on page 411, that juror
15 indicated they had a family member that was accused of
16 breaking and entering; it was a nephew; charged and went to
17 prison for breaking and entering? Does it appear -- all that
18 appear in State's Exhibit Number 38?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Sustained. The State's
21 objection and exception are noted for the record.

22 MR. THOMPSON: May I approach?

23 THE COURT: Yes, sir.

24 [Pause.]

25 MR. THOMPSON: May I approach?

1 THE COURT: Yes, sir.

2 [Pause.]

3 MR. THOMPSON: This is State's 39. This
4 is a copy for Your Honor [handing the exhibit to the Court].

5 THE COURT: Thank you.

6 Q. Judge Gore, I'm showing you what's been marked for
7 purpose of identification as State's Exhibit 39 [handing the
8 exhibit to the witness]. I'd like you to take a look at
9 that, and we'll have a couple of questions.

10 [Pause.]

11 Q. Does State's Exhibit Number 39 appear to be jury
12 selection from the same case we've been -- well, discussing
13 or not discussing here in the courtroom.

14 MR. HUNTER: Objection, Your Honor.

15 THE COURT: Sustained. The State's
16 objection and exception are noted for the record.

17 Q. And, the third page in, on page 274, that deals
18 with jury selection between juror number 5 and Ms. Russ;
19 juror number 5, one of which, according to State's 34, is
20 Sean Richmond or Rich -- yeah, Richmond? Does it appear that
21 -- that way in State's 34?

22 MR. HUNTER: Objection, Your Honor.

23 THE COURT: Sustained. The State's
24 objection and exception are noted for the record.

25 Q. On the third page, on State's 39, does it indicate

1 that the defendant -- I'm sorry -- the juror had been the
2 victim of a crime, but did not consider himself to be a
3 victim of a crime for -- but didn't consider himself to be a
4 victim of a crime?

5 MR. HUNTER: Objection, Your Honor.

6 THE COURT: Sustained. The State's
7 objection and exception are noted for the record.

8 [Pause.]

9 MR. THOMPSON: Sorry. May I approach?

10 THE COURT: Yes, sir.

11 [Pause.]

12 MR. THOMPSON: I don't remember whether I
13 asked that or not.

14 THE COURT: That's okay, Mr. Thompson.

15 [Pause.]

16 MR. THOMPSON: This is your copy of
17 number 40, Your Honor [handing the exhibit to the Court].

18 THE COURT: Okay. Thank you.

19 Q. Judge Gore, I'm going to ask you to take a look at
20 what's been marked for purpose of identification State's
21 Exhibit Number 40 [handing the exhibit to the witness]. Does
22 State's Exhibit Number 40 also appear to be transcripts of
23 the Christina Walters case?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Sustained. The State's

1 objection and exception are noted for the record.

2 Q. Page 303, the first page of State's Exhibit Number
3 40, appears to be jury selection between juror number 11, one
4 of which is a Sylvia Robin -- or -- juror number 5, I'm
5 sorry, towards the bottom of the page -- one of jurors number
6 5 is Sylvia Robinson?

7 MR. HUNTER: Objection, Your Honor.

8 THE COURT: Sustained. The State's
9 objection and exception are noted for the record.

10 Q. Does juror number 5 indicate, on page 303, in that
11 transcript that I -- during the earlier conversations dealing
12 with guilt, innocence, judging other people, those general
13 questions asked during jury selection, that I pause -- I just
14 don't feel comfortable judging other people, on page 303;
15 and, on page 332, also contained within State's Exhibit
16 Number 40, indicates that she's not necessarily -- not
17 comfortable with the death penalty and not judging -- I'm
18 sorry.

19 THE COURT: Rephrase your question,
20 sir.

21 MR. THOMPSON: Yes, sir. Thank you.

22 [Counsel conferred.]

23 MR. THOMPSON: Got'cha.

24 Q. Does it appear, in the middle of page 332, that is
25 a part of State's Exhibit Number 40, that Ms. Russ is

1 discussing with juror number 5 -- Ms. Russ says Ms. Robinson,
2 you said that -- you did express some discomfort in judging
3 people and you have some religious and personal or
4 philosophical differences with the death penalty as I
5 understanding it; you told us about those things, right,
6 earlier; juror number 5 says not necessarily with the death
7 penalty; Ms. Russ, okay, with judging; juror number 5, right?
8 Does that appear in State's Exhibit Number 40?

9 MR. HUNTER: Objection, Your Honor.

10 THE COURT: Sustained. The State's
11 objection and exception are noted for the record.

12 MR. THOMPSON: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 [Pause.]

15 Q. Does it appear in State's Exhibit Number 34 that
16 one of the jurors number 1 is a Marilyn Richmond to you,
17 Judge Gore?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: Sustained. The State's
20 objection and exception are noted for the record.

21 MR. THOMPSON: May I approach, Your
22 Honor?

23 THE COURT: Yes, sir.

24 [Pause.]

25 MR. THOMPSON: May I approach, Your

1 Honor?

2 THE COURT: Yes, sir.

3 MR. THOMPSON: I'd rather ask you twice
4 than not at all.

5 THE COURT: Okay.

6 [Pause.]

7 Q. Judge, I'm showing you what's been marked for
8 purpose of identification State's Exhibit Number 41 [handing
9 the exhibit to the witness]. Does State's Exhibit Number 41
10 appear to have jury selection which contains questions and
11 answers between Ms. Russ and Marilyn Richmond, juror number
12 1?

13 MR. HUNTER: Objection, Your Honor.

14 THE COURT: Sustained. The State's
15 objection and exception are noted for the record.

16 Q. Does it appear, on page 262, the final page of
17 State's Exhibit Number 41, that the juror had a psychology
18 degree from Methodist College.

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Sustained. The State's
21 objection and exception are noted for the record.

22 Q. Do you recall, Judge, whether or not that juror
23 number 1 had discussed with the Court and Ms. Russ during
24 that part of jury selection that she had worked with want-to-
25 be gang members?

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: Sustained. The State's
3 objection and exception are noted for the record.

4 Q. And that she had worked as a teenage drug counselor
5 during some period of her life?

6 MR. HUNTER: Objection, Your Honor.

7 THE COURT: Sustained. The State's
8 objection and exception are noted for the record.

9 [Pause.]

10 MR. THOMPSON: I think we have one more
11 if I may approach, Judge?

12 THE COURT: Yes, sir. 42?

13 MR. THOMPSON: Yes, sir.

14 THE COURT: Okay.

15 [Pause.]

16 MR. THOMPSON: Your copy, Your Honor
17 [handing the exhibit to the Court].

18 THE COURT: Thank you.

19 Q. And, Judge, finally, State's Exhibit Number 42
20 [handing the exhibit to the witness], I'll have some
21 questions in just a moment.

22 [Pause.]

23 THE COURT: Mr. Thompson ----

24 MR. THOMPSON: Yes.

25 THE COURT: ---- for purposes of

1 clarification in the record, your question obviously is of
2 record at this point; but, you were referring, as to State's
3 41, specifically to what you contend was juror number 1.

4 MR. THOMPSON: Yes, sir. Yes, Judge. I
5 think I have that number correct.

6 THE COURT: Okay.

7 MR. THOMPSON: 41 was Marilyn Richmond,
8 juror number 1, as far as my questions were concerned. Yes,
9 sir.

10 THE COURT: I just wanted to make sure
11 that, for purposes of the clerk maintaining the records,
12 that's -- that's clear ----

13 MR. THOMPSON: Yes, sir.

14 THE COURT: Yes, sir. All right.

15 Q. Now, as far as State's Exhibit 42 goes, does
16 State's 34 indicate that Laretta Dunmore -- L-A-R-E-T-T-A;
17 Dunmore, D-U-N-M-O-R-E -- was one of the jurors number 1 in
18 that seating chart?

19 MR. HUNTER: Objection, Your Honor.

20 THE COURT: Sustained. The State's
21 objection and exception are noted for the record.

22 Q. Does State's Exhibit Number 42 contain portions of
23 the transcript of discussions between juror number 1 and Ms.
24 Russ in regard to jury selection in general terms, as far as
25 you can tell?

1 MR. HUNTER: Objection, Your Honor.

2 THE COURT: Sustained. The State's
3 objection and exception are noted for the record.

4 Q. The bottom of page 313, does it indicate when -- a
5 discussion with Ms. Russ and juror number 1, have you ever
6 known anybody that was charged with a serious crime; Ms.
7 Dunmore, okay; Ms. Dunmore, yes; could you tell me a little
8 bit about that; and, juror number 1 indicated armed robbery;
9 that her brother was charged in New Jersey, got a 10-year or
10 11-year sentence -- that's now going into page 30 -- I'm
11 sorry -- 314; that he had done that time; that the defendant
12 -- I'm sorry -- that that defendant, that -- that -- and --
13 the brother of the juror had pled guilty; that she had had
14 conversations with him about his experiences; and that he did
15 not get a fair trial? Is that all contained within State's
16 Exhibit Number 42 of that transcript?

17 MR. HUNTER: Objection, Your Honor.

18 THE COURT: Sustained. The State's
19 objection and exception are noted for the record.

20 Q. Judge Gore, do you know Buntie Russ or Margaret
21 Russ and Charles Scott?

22 THE COURT: You may answer, sir.

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Do you want to be heard
25 beyond what's ----

1 MR. HUNTER: No. No, Your Honor.

2 THE COURT: The objection's noted.

3 It's overruled. The defendant's exception is noted for the
4 record.

5 You may answer.

6 A. Yes, sir. I know both of them.

7 Q. How do you know both of them?

8 A. They were prosecutors here in the District
9 Attorney's Office in Cumberland County and prosecuted many
10 cases before me, each of them.

11 MR. HUNTER: Motion to strike, Your
12 Honor.

13 THE COURT: Motion to strike is
14 denied. Exception is noted for the record.

15 Q. Were you -- was there an unusual story in how you
16 came to try the Christina Walters case and other cases that
17 surrounded the Christina Walters case?

18 MR. HUNTER: Objection, Your Honor.

19 THE COURT: Sustained. The State's
20 objection and exception are noted for the record.

21 Q. Did Christina Walters, to your knowledge, have
22 codefendants?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Sustained. The State's
25 objection and exception are noted for the record.

1 Q. Did you end up trying all three -- all four of the
2 total codefendants involving Christina Walters who went to
3 trial?

4 MR. HUNTER: Objection, Your Honor.

5 THE COURT: Sustained. The State's
6 objection and exception are noted for the record.

7 MR. THOMPSON: May I ask what -- the
8 nature of this objection? Those -- those statements are not
9 -- lots of those other cases are not part of the State's --
10 I'm sorry -- Defendant's Exhibit Number 2.

11 MR. HUNTER: There's still a judge
12 commenting on his work.

13 THE COURT: Yes.

14 MR. THOMPSON: I just want to make sure I
15 know the nature of the objection. Thank you, Your Honor.

16 THE COURT: Yes, sir.

17 Q. Do you know -- are you familiar with the race of
18 Buntie Russ?

19 THE COURT: You may answer, sir.

20 A. Yes, sir.

21 Q. What -- what is her race?

22 A. Caucasian.

23 Q. She's obviously a female?

24 A. Yes, sir.

25 Q. Charles Scott, do you know what his race, gender

1 ----

2 THE COURT: You may answer.

3 A. Yes, sir. He's an African-American.

4 Q. And male?

5 A. Yes, sir.

6 Q. You had indicated you had been part of this
7 judicial district for how long a period of time, in total --
8 your total career in this judicial district?

9 MR. HUNTER: Objection, Your Honor.

10 THE COURT: Well ----

11 A. I'm not sure I understand ----

12 THE COURT: Are you talking about the
13 12th Judicial District, sir?

14 MR. THOMPSON: Let me back that up a
15 little bit.

16 THE COURT: Yes, sir.

17 Q. You spent 17 years as a Superior Court judge; is
18 that correct?

19 A. Yes, sir.

20 Q. And, during that time, you rode a circuit
21 throughout North Carolina which included Cumberland County;
22 is that correct?

23 THE COURT: You may answer.

24 A. Yes, sir.

25 Q. During that time, were you a part of that judicial

1 community for a sufficient length of time to form an opinion
2 as to the reputation of Charles Scott for honesty and
3 integrity?

4 MR. HUNTER: Objection, Your Honor.

5 THE COURT: Sustained.

6 [Pause.]

7 THE COURT: The State's objection and
8 exception are noted for the record.

9 MR. THOMPSON: That's what I was waiting
10 for, Judge.

11 THE COURT: Yes, sir. I apologize.

12 MR. THOMPSON: I'm happy to make them
13 myself, but Your Honor's ----

14 THE COURT: Well, folks, I'm -- I'm
15 doing the best I can to make sure the record is as complete
16 as it can be.

17 MR. COLYER: Judge, we'd be glad to
18 spell you and start making them if it'll help.

19 [General laughter.]

20 THE COURT: Yes, sir. It's noted for
21 the record.

22 Q. Have you been a practicing judicial member -- I'm
23 sorry -- through your experience as a member of the Superior
24 Court bench in this judicial division, did you have a
25 sufficient opportunity to form an opinion as to the

1 reputation and character of Margaret Russ for honesty and
2 integrity?

3 MR. HUNTER: Objection, Your Honor.

4 THE COURT: Sustained. What's the
5 pertinent character trait, Mr. Thompson?

6 MR. THOMPSON: Honesty and integrity.

7 THE COURT: The objection is
8 sustained. The State's exception -- objection and exception
9 to the ruling of the Court is noted.

10 Q. During your time as a Superior Court Judge, have
11 you had the opportunity to form an opinion as to Mr. Colyer's
12 reputation for the pertinent character trait of competence as
13 a prosecutor?

14 MR. HUNTER: Objection, Your Honor.

15 THE COURT: The objection is
16 sustained. The State's objection and exception are noted for
17 the record.

18 Q. Were you a member of the judicial community
19 involving this judicial district for a sufficient length of
20 time to form an opinion as to the opinion -- I'm sorry -- the
21 -- the character and reputation of Mr. Colyer for the
22 pertinent character trait of equal treatment of all races?

23 MR. HUNTER: Objection, Your Honor.

24 THE COURT: Objection's noted. It's
25 overruled. Exception is noted for the record.

1 You may answer yes or no first of all, sir.

2 A. Yes, sir.

3 Q. What's your opinion?

4 MR. HUNTER: Motion to strike.

5 THE COURT: Motion to strike is
6 denied.

7 You may answer.

8 MR. HUNTER: I -- I want to renew my
9 objection to this new question.

10 THE COURT: Yes, sir. Your -- your
11 objection to any opinion is noted in apt time. It's
12 overruled. Exception is noted.

13 You may answer, sir.

14 A. My opinion is that he was, in my experience, fair
15 and equal in his treatment of all races.

16 MR. HUNTER: Motion to strike, Your
17 Honor.

18 THE COURT: Yes, sir. Motion to
19 strike is denied. Exception is noted.

20 [Pause.]

21 Q. Do you recall, Judge, who represented the different
22 sides in the first capital case you tried as a Superior Court
23 Judge?

24 MR. HUNTER: Objection, Your Honor.

25 THE COURT: Sustained. The State's

1 motion -- pardon me. The State's objection and exception to
2 the ruling are noted.

3 Q. Do you recall the first capital case that you ever
4 tried as a Superior Court Judge?

5 MR. HUNTER: Objection, Your Honor.

6 THE COURT: Sustained. The State's
7 objection and exception are noted.

8 MR. THOMPSON: Thank you, Your Honor.

9 Q. Do you know whether that case was in Cumberland
10 County -- that first Superior Court Judge capital case that
11 you tried as a Superior Court Judge?

12 MR. HUNTER: Objection, Your Honor. I
13 thought these follow-ups were what we said they could do
14 without asking ----

15 THE COURT: Yes, sir. Objection is
16 sustained. The State's objection and exception to the ruling
17 are noted for the record.

18 Q. Based on your observations as the trial judge in
19 the Christina Walters case, Judge -- I'm sorry -- Judge, did
20 you observe that race was a significant factor in the
21 exercise of any peremptory strikes against any black jurors
22 in the State of North Carolina versus Christina Walters?

23 MR. HUNTER: Objection.

24 THE COURT: Sustained. The State's
25 objection and exception are noted for the record.

1 Q. Based on your observations as the trial judge, did
2 the State racially discriminate in the exercise of any
3 peremptory strike against any black jurors?

4 MR. HUNTER: Objection, Your Honor.

5 THE COURT: Sustained. The State's
6 objection and exception are noted for the record.

7 Q. As the trial judge in State versus Christina
8 Walters, would you have raised a Batson objection ex mero
9 motu or on your own motion had you observed the State
10 exercise a peremptory challenge against a black juror based
11 on race?

12 MR. HUNTER: Objection, Your Honor.

13 THE COURT: Sustained. The State's
14 objection and exception to the ruling are noted for the
15 record.

16 Q. As the trial judge in the Christina Walters case,
17 would you observ -- if you would observe -- I'm sorry. As
18 the trial judge in the Christina Walters case, if you would
19 have observed the State's exercise of a peremptory strike
20 against a black juror based on race and the defense had not
21 raised a Batson objection, would you have intervened ex mero
22 muto or on your own motion to correct the situation by
23 denying the State's peremptory strike and sustaining your own
24 Batson objection?

25 MR. HUNTER: Objection, Your Honor.

1 THE COURT: Sustained. The State's
2 objection and exception are noted for the record.

3 Q. Do you recall, Judge, that there were no Batson
4 challenges made in the State versus Christina Walters case?

5 MR. HUNTER: Objection, Your Honor.

6 THE COURT: Sustained. The State's
7 objection and exception are noted for the record.

8 [Pause.]

9 MR. THOMPSON: Your Honor, I intend -- to
10 save just a chunk of time ----

11 THE COURT: Yes, sir.

12 MR. THOMPSON: ---- I intend to go
13 through the proffer -- and I want to make sure the defendant
14 has the right to object. I intend, during the proffer
15 portion, to go through each juror with Judge Gore ----

16 THE COURT: Yes, sir.

17 MR. THOMPSON: ---- and deal with some
18 Batson questions as it relates to the different reasons ----

19 THE COURT: Again, I'm not precluding
20 that. You folks are entitled to make your offer of proof.
21 That was suggested and I -- I thought agreed upon as a matter
22 of convenience, at least in part, for the witnesses involved
23 ----

24 MR. THOMPSON: Yes, sir.

25 THE COURT: ---- and so that you can

1 make your complete record.

2 MR. THOMPSON: Because we're doing that
3 outside the presence of the defense -- and, again, over ----

4 THE COURT: Well, that's a matter that
5 was open for discussion yesterday.

6 MR. THOMPSON: That's why I was bring
7 that back up, Judge.

8 THE COURT: Yes, sir. I specifically
9 asked whether or not -- Mr. Colyer analogized this to a depo
10 -- deposition -- pardon me -- type scenario.

11 MR. COLYER: Yes, sir.

12 THE COURT: At which, ordinarily,
13 opposing counsel would be entitled to be present. It was
14 kind of left open, but I specifically asked -- in terms of
15 what procedure would be utilized -- what your position was;
16 and, I don't believe we ever got around to any discussion
17 about that for the record.

18 MR. HUNTER: Right. Yeah. If we're
19 going to just -- I'm happy to -- if we're almost finished
20 with Judge Gore, we could ----

21 THE COURT: Let's go ahead and
22 complete -- 'cause I understand Judge Gore has some
23 scheduling matters.

24 MR. THOMPSON: Yes, sir. Yes, sir; and,
25 if I may have just a second?

1 THE COURT: Yes, sir. Any additional
2 questions you might have for him.

3 MR. THOMPSON: Thank you. If I may have
4 just a sec?

5 THE COURT: Yes, sir.

6 [Pause.]

7 MR. THOMPSON: Just double-checking with
8 my learned colleague here, Judge. Those are all the
9 questions that we would have for Judge Gore. We've explained
10 the process ----

11 THE COURT: Yes, sir.

12 MR. THOMPSON: ---- to an extent -- a
13 little bit here in court, that we may be asking Judge Gore to
14 sit down with us on a previous occasion and -- I'm sorry ----

15 THE COURT: Yes, sir.

16 MR. THOMPSON: ---- subsequent occasion
17 to deal with this offer of proof ----

18 THE COURT: Okay.

19 MR. THOMPSON: ---- respectfully; and, we
20 -- we appreciate his time and his patience.

21 THE COURT: Yes, sir.

22 Any cross-examination, folks?

23 MR. HUNTER: No, Your Honor.

24 THE COURT: All right. I guess, now,
25 can we release Judge Gore for our purposes?

February 8, 2012

1 MR. THOMPSON: I have no objection to the
2 release of Judge Gore for those purposes, yes, sir.

3 THE COURT: Is that agreeable?

4 MR. HUNTER: Yes, Your Honor.

5 THE COURT: Thank you, sir.

6 MR. HUNTER: Thank you, Judge Gore.

7 MR. COLYER: Thanks, Judge.

8 MR. THOMPSON: Thanks, Judge Gore.

9 [The witness departed the courtroom.]

10 MR. THOMPSON: Judge, we'd like to move
11 State's Exhibit now 33 through ----

12 THE COURT: 42.

13 MR. THOMPSON: ---- 42 into evidence for
14 purposes of our offer of proof.

15 THE COURT: For purpose of the offer
16 of proof, they're received at this time.

17 MR. THOMPSON: Thank you, Your Honor.

18 THE COURT: All right. Now, let's
19 take just a moment to talk about the offer of proof outside
20 the courtroom. Folks, typically -- and I'm confident
21 everybody knows this -- you've got lawyers on both sides at a
22 deposition. Is it your position that you're entitled to have
23 somebody present at the time the State makes its offer of
24 proof utilizing that process?

25 MR. HUNTER: I think that's our

1 position now; but, frankly, we really haven't discussed it
2 and resolved it; and, so, if -- if you would -- I don't know
3 when they think they're going to start the process or ----

4 THE COURT: Yes, sir.

5 MR. HUNTER: And I understand it would
6 make a difference if they've got to include our schedules in
7 it.

8 THE COURT: Yeah.

9 MR. HUNTER: And we'll discuss it and ,
10 admitted -- could we, after lunch, if we remember it, we'll
11 have an answer as to that.

12 THE COURT: Is that agreeable?

13 MR. COLYER: Yes, sir. We'd like to
14 throw in one other thing for them to consider. We're --
15 we're going to ask the Court to allow us to complete this
16 offer of proof and get it transcribed and presented as part
17 of the record. Hopefully ----

18 THE COURT: I understand.

19 MR. COLYER: ---- and -- and
20 we'd ask, before either one of these occurrences, the defense
21 starts its sur-surrebuttal or whatever we're calling it or
22 before the Court rules ----

23 THE COURT: Yes, sir.

24 MR. COLYER: ---- because I know
25 there's been some consideration about how long it's going to

February 8, 2012

1 take to get the transcript ----

2 THE COURT: Yes, sir.

3 MR. COLYER: ---- of the proceeding;
4 but, we -- we don't want to get into a situation, Your Honor,
5 whether either the ruling of the Court comes down or the
6 transcript of the proceeding is complete before we get the
7 transcript of the proffer to be made part of the record and
8 introduced into the Court appropriately, not as an exhibit
9 for the Court to consider, but as an exhibit to support the
10 record ----

11 THE COURT: Creates all kinds of
12 issues if that were to occur.

13 MR. COLYER: It does, Judge.

14 THE COURT: And I understand that.
15 That's why I also -- and this is just for what it's worth.
16 We don't want any issues potentially to arise down the road
17 if there's a scenario where an argument can be made both
18 sides were not present.

19 MR. COLYER: And, Judge, we would note
20 for the record that the defendant is not going to be present.

21 THE COURT: I understand that.

22 MR. COLYER: And, in our view, that
23 needs to be addressed and somehow dealt with.

24 THE COURT: That's -- that's something
25 that I thought about, frankly, last night. Okay. We'll just

February 8, 2012

1 have to deal with it ----

2 MR. HUNTER: We -- let us talk about
3 it. We can talk. We'll think about it, and we'll talk about
4 it some more ----

5 THE COURT: I agree.

6 MR. HUNTER: ---- maybe after lunch.

7 MR. COLYER: Yes, sir.

8 THE COURT: I agree. All right.

9 Thank you, Mr. Colyer.

10 MR. COLYER: Judge, may we have just a
11 short break to relocate ourselves and get ready for the next
12 portion of our presentation?

13 THE COURT: Yes, sir. Fifteen
14 minutes?

15 MR. COLYER: Yes, sir.

16 THE COURT: Okay.

17 MR. HUNTER: Your Honor, I did have one
18 thing. I know Judge Gore has gone, but I just -- I just want
19 the record to be clear -- I think it is clear -- that Judge
20 Gore was not designated as an expert.

21 THE COURT: Well, that's -- that's a
22 pertinent point.

23 MR. HUNTER: Yeah.

24 THE COURT: And he was not, as I
25 understand it, designated as an expert.

1 MR. HUNTER: Yes. Thank you.

2 THE COURT: Any disagreement with
3 that?

4 MR. COLYER: That's correct; and, just
5 for the record, though -- I don't know that it would have
6 done any good anyway, but we did not designate him as one.

7 MR. HUNTER: Right.

8 THE COURT: All right. We're at ease,
9 folks.

10 [The hearing recessed at 10:53 a.m. and reconvened at 11:17
11 a.m., February 1, 2012, with all pertinent parties present
12 prior to the recess once again present, to include the
13 defendant.]

14 THE COURT: All right. For purposes
15 of the record, all counsel are present. The defendant is
16 present.

17 Folks, I have read the defendant's motion in
18 limine to prohibit expert testimony pursuant to Rules 702 and
19 703 of the Rules of Evidence. I reviewed copies of Howarton
20 and some other case law. I understand the position of
21 counsel for the defendant; but, for purposes of clarity in
22 the record, the issues being raised are -- to some extent,
23 deal with the interplay between 702 and 703. Primarily, if I
24 understand your position correctly, it's predicated on 703.

25 MR. JAY FERGUSON: That's correct, Your

February 8, 2012

1 Honor.

2 THE COURT: Okay.

3 MR. JAY FERGUSON: But we are not -- we are
4 not contesting the second prong of Howarton, which is the
5 expert witness' qualifications as a statistician.

6 THE COURT: All right.

7 MR. JAY FERGUSON: It's really only prongs
8 one and three.

9 THE COURT: Okay. That's what I was
10 about to ask, and I appreciate you going directly to that.
11 I'm absolutely content to hear argument from both counsel.
12 You have the right to be heard; but, for purposes of
13 consideration, as I understand the case law, the primary
14 concern is the potential for confusing or misleading the
15 jury. Is that consistent with your understanding, sir?

16 MR. JAY FERGUSON: I would not agree with
17 that, Your Honor, respectfully.

18 THE COURT: Okay.

19 MR. JAY FERGUSON: I believe that you, as the
20 trial judge, have to be the gatekeeper to make sure that the
21 threshold showing is made by the State by their proffered
22 testimony, proffered witness ----

23 THE COURT: Well, that's what I wanted
24 clarification on.

25 MR. JAY FERGUSON: And, if they can't meet

February 8, 2012

1 that burden ----

2 THE COURT: Yes, sir.

3 MR. JAY FERGUSON: ---- and -- we would like
4 to put on evidence through Doctor Katz for the purpose of
5 this motion in limine to show that this is not the type of
6 information that is normally and customarily relied upon by
7 statisticians doing a study.

8 THE COURT: Okay.

9 MR. JAY FERGUSON: And, if I could ask the
10 Court to recall the testimony from Doctor Sommers ----

11 THE COURT: Yes, sir.

12 MR. JAY FERGUSON: And can I give you maybe a
13 1-minute spiel of what this is all about?

14 THE COURT: Yes, sir.

15 MR. JAY FERGUSON: Two -- two aspects of
16 Doctor Katz' report that we're challenging. The first is --
17 you've heard some testimony about a survey or questionnaires
18 being sent out to prosecutors ----

19 THE COURT: Yes, sir.

20 MR. JAY FERGUSON: ---- and then prosecutors
21 responding to that. That's the information about the survey
22 from the federal guide that I sent you. That's what -- we
23 contend that that's not what is customarily relied upon by
24 statisticians to do any type of statistical study.

25 THE COURT: In what respect, the fact

February 8, 2012

1 that it's, based on your contention, incomplete in part?

2 MR. JAY FERGUSON: That it's not random.

3 It's incomplete. It was a self-selected sample.

4 THE COURT: Yes, sir.

5 MR. JAY FERGUSON: Only the prosecutors that
6 wanted to respond responded.

7 THE COURT: Yes, sir.

8 MR. JAY FERGUSON: It -- it was not an
9 independent survey. Surveys are looked at more cautiously
10 than an objective study. It was a sur -- it was a survey
11 that was designed by Doctor Katz and the prosecution team.
12 Every respondent knew exactly what the purpose was, and every
13 respondent, except for the very first one -- the first
14 prosecutor sent a response to Doctor Katz. Doctor Katz
15 reviewed it, edited it, sent it back to him; and, then, that
16 became the model for all the other surveys.

17 THE COURT: Okay.

18 MR. JAY FERGUSON: So, every response after
19 that first one is tainted ----

20 THE COURT: Okay.

21 MR. JAY FERGUSON: ---- by the non-
22 objectivity from the inception of the study.

23 THE COURT: Okay.

24 MR. JAY FERGUSON: Now, that's one prong of
25 what we're attacking.

1 THE COURT: All right.

2 MR. JAY FERGUSON: And that's the Dukes case,
3 Dukes versus Wal-Mart.

4 THE COURT: Yes, sir.

5 MR. JAY FERGUSON: Mirror images ----

6 THE COURT: Yes, sir.

7 MR. JAY FERGUSON: ---- of what happened.

8 THE COURT: I've read the Dukes case
9 last night.

10 MR. JAY FERGUSON: The second aspect is
11 what's called cross-tabulation analysis.

12 THE COURT: Yes, sir.

13 MR. JAY FERGUSON: If I could ask the Court
14 to recall the testimony of Doctor Sommers, who sits on -- I
15 believe it was three review boards for peer-review
16 publications. He reviews these peer-review publications, and
17 he says that he's never seen any type of cross-tabulation
18 analysis like that, that was done in the study, in any kind
19 of social-science survey -- not survey -- excuse me -- any
20 social-science study.

21 THE COURT: Yes, sir.

22 MR. JAY FERGUSON: And that it would not be
23 something that would pass peer-review for publication in the
24 social-science community.

25 THE COURT: Yes, sir.

1 MR. JAY FERGUSON: So, we've got that
2 evidence in the record, and I intend to show the Court,
3 through brief testimony, hopefully, that it's not something
4 that should be relied upon by the Court in the formulation of
5 any opinion by Doctor Katz.

6 THE COURT: Okay.

7 MR. JAY FERGUSON: And I don't make this -- I
8 don't make this motion lightly. I know that we're not the
9 federal courts and it -- it goes to the weight and not the
10 admissibility. There's a line of cases that say that. I
11 know that.

12 THE COURT: Yes, sir.

13 MR. JAY FERGUSON: But there still has to be
14 a threshold showing under 702 and 703, and we don't believe
15 the State can make it. I may have confused the Court more
16 than I've helped it ----

17 THE COURT: No, sir.

18 MR. JAY FERGUSON: ---- but, if you have any
19 questions, let me know.

20 THE COURT: Yes, sir.

21 Folks, let me give you the opportunity to be
22 heard at this point, if you wish. Certainly, you're entitled
23 to have your arguments heard at some point.

24 MR. THOMPSON: Judge, we're not there
25 yet.

1 THE COURT: I understand. I
2 understand.

3 MR. THOMPSON: And, insofar as when we
4 get there, we'd like to be able to be heard ----

5 THE COURT: Yes, sir.

6 MR. THOMPSON: ---- but, to try to
7 preliminary muzzle us would be not ripe quite yet. We'd like
8 to fight that fight when we get there, respectfully. Once
9 evidence comes in and it -- just not -- it's not to blindside
10 Mr. Ferguson insofar as evidence coming in during our case,
11 we were -- we asked to do that during their case and were
12 rejected; and, I don't want to imply that our answer will
13 likely be in kind; but, it will likely, right now, be in
14 kind. So, insofar as they want to present evidence during
15 our case ----

16 THE COURT: Well, I don't know that
17 they're wanting ----

18 MR. THOMPSON: He mentioned that up
19 front, we'd like to present evidence during their -- we'd
20 like to enter evidence -- I think is the words he used. So,
21 I don't want to blindside him, but we're likely not going to
22 be agreeing to that. When we were -- we asked to do the same
23 thing. We were turned down. So, when we get there, we'd
24 like to talk about it; but, until then, Your Honor has ----

25 THE COURT: For clarity in the record

February 8, 2012

1 ----

2 MR. THOMPSON: Yes, sir.

3 THE COURT: ---- Mr. Ferguson, you
4 used the term present evidence. Your position -- and I don't
5 want to speak for you. Go ahead. You tell ----

6 MR. JAY FERGUSON: Present evidence in a voir
7 dire hearing ----

8 THE COURT: Exactly.

9 MR. JAY FERGUSON: ---- on the admissibility
10 of an expert's ----

11 THE COURT: Exactly.

12 MR. JAY FERGUSON: Yes, sir.

13 THE COURT: This is a voir dire
14 hearing.

15 MR. COLYER: Judge, our position is, if
16 -- if -- when Doctor Katz is offered as an expert and they
17 wish to assail his expertise, they can do that at that point
18 in time.

19 THE COURT: Okay.

20 MR. COLYER: When we get to the point
21 where his report is being offered into evidence ----

22 THE COURT: Okay.

23 MR. COLYER: ---- they could do that at
24 that time to object to his report coming in. What they're
25 trying to do is a preemptive strike to keep the State from

1 being able to get to his report before we ever call him as a
2 witness; and, we think that's not appropriate, Your Honor.
3 There's a manner by which they can assail him with respect to
4 their report, but they've labeled this a motion in limine to
5 get it in front of the Court before Doctor Katz even gets
6 called as a witness.

7 THE COURT: All right.

8 MR. THOMPSON: And just so it's a matter
9 of record, Judge, we got this motion in limine just after
10 court broke yesterday. It's 16 pages, I believe ----

11 MR. COLYER: With attachments.

12 MR. THOMPSON: ---- with attachments, was
13 not -- unless there was somebody in the backroom working
14 pretty furiously -- had been prepared before, and we were hit
15 with this last night, last minute. I'm -- I'm not
16 necessarily complaining about that. I'd just like that to be
17 a matter of record, that we were given this either just
18 before or just shortly after court had shutdown.

19 THE COURT: Well, may I ask a
20 practical question?

21 MR. THOMPSON: Yes, sir.

22 THE COURT: Simply for purposes of
23 discussion right now ----

24 MR. THOMPSON: Yes, sir.

25 THE COURT: ---- let's say, for

1 example, they make some showing as to the -- what they
2 contend are defects, deficiencies in the report that go to
3 the issue of reliability or otherwise are matters for
4 purposes -- should be considered for purposes of determining
5 whether it should be included or excluded, the State's still
6 going to make an offer of proof; the State's still going to
7 attempt to introduce the report for purposes of appellate
8 review ----

9 MR. THOMPSON: So, why would we do it
10 twice, Judge, respectfully, do it ahead of time, fight about
11 it, and then do it during the testimony, where -- where --
12 you're going to hear the same thing, and they're -- and
13 they're -- they have the ability to later come in and say,
14 Judge, you shouldn't consider this report because of X, Y and
15 Z, which we would likely contend this is all cross-
16 examination material and not -- not dealing with ----

17 THE COURT: Well, was I wrong that --
18 I mean, that would be the State's intent to offer the report
19 for purposes of the record anyway?

20 MR. THOMPSON: Yes, sir. Later during
21 our case. My point is -- is timing, not -- it's procedure
22 not ----

23 THE COURT: I understand.

24 MR. THOMPSON: It's why -- why should we
25 do it twice when it's only Your Honor hearing it. If it was

1 a question of what should be in front of a jury, sure, we
2 would do it once outside the presence and once inside; but,
3 instead of wasting the time to do it twice, we -- we'd
4 recommend to the Court let's just go forward; and, when the
5 time comes to object to it, then we'll deal with it at that
6 time.

7 THE COURT: Okay.

8 MR. COLYER: I mean, everybody is now
9 on notice that they've filed a limiting motion with respect
10 to it. So, we just get up to that point, stop, deal with it;
11 and, as the Court has correctly pointed out, if there is a
12 limitation, that we would like to show, for the record, that
13 -- our offer of proof and proceed on or incorporate that in
14 part of the presentation by the State; but, to do it now, as
15 I said, it's kind of a preemptive strike; and, if we're going
16 to end up having to do it in here on this record multiple
17 times, then I would ask the Court to please consider the
18 position Mr. Thompson has elaborated.

19 THE COURT: Okay. Mr. Jay Ferguson,
20 what's your position on this, sir?

21 MR. JAY FERGUSON: I think the alternative
22 is, during the middle of their examination, he gets to his
23 first opinion question, I object and request a voir dire ----

24 THE COURT: Yeah.

25 MR. JAY FERGUSON: ---- then it shifts back

1 to me, and I've got to do all this that I'm planning to do
2 right now.

3 THE COURT: Yes, sir.

4 MR. JAY FERGUSON: Whereas, now, I can give
5 the Court a preview of exactly what our objections are so
6 that the State has a better idea of what they need to cover
7 on direct examination ----

8 THE COURT: Okay.

9 MR. JAY FERGUSON: ---- the Court has a clear
10 indication of what our objections are with respect to the
11 admissibility of the evidence, and then they can start their
12 examination. If -- if we decide we want to just incorporate
13 this voir dire testimony into the substantive evidence, we
14 can do so; but, voir dire of expert witnesses is routine.
15 I've had state -- the State do it to me in criminal cases.

16 THE COURT: Yes, sir.

17 MR. JAY FERGUSON: It's done in civil cases.

18 THE COURT: Yes, sir.

19 MR. JAY FERGUSON: It's something that the
20 Courts have indicated is appropriate to do before the witness
21 starts to testify. I -- what I'm asking to do is not out of
22 the ordinary.

23 THE COURT: I -- I ----

24 MR. THOMPSON: Judge ----

25 THE COURT: ---- don't disagree with

February 8, 2012

1 that, Mr. Ferguson.

2 MR. THOMPSON: ---- the State's
3 difference is these 12 empty seats over here [pointing]. In
4 addition to that ----
5 [Pause.]

6 MR. THOMPSON: If Mr. Ferguson wants to
7 spit out a preemptive strike now, our response to that is
8 sitting at this table where we're going to put him on during
9 direct anyway. We would be doing it twice. We -- I assume
10 you will give the State the opportunity to be heard in
11 rebuttal of his argument; and, our rebuttal would be putting
12 Doctor Katz on and doing it twice. That's kind of my point.
13 We don't have a jury here. It is a waste of time to do a
14 preemptory strike, and this has kind of been the modus
15 operandi of the defense up to now. So, we're wanting to do
16 -- well, they're -- they're -- they're wanting to do
17 everything ahead of time. Let's fight about it when it's
18 time to fight.

19 THE COURT: Okay. All right. Folks,
20 it's not my prerogative, my place, to tell counsel how they
21 ought to do stuff. When stuff is done, I rule on it. So,
22 Mr. Ferguson, your position is, if I understand correctly,
23 you're ready to go forward now?

24 MR. JAY FERGUSON: That's correct, Your
25 Honor.

1 THE COURT: I understand the State's
2 position in that regard. You may proceed, sir.

3 MR. JAY FERGUSON: Thank you, Your Honor.

4 THE COURT: Yes, sir.

5 MR. JAY FERGUSON: I've already told the
6 Court legally where we are.

7 THE COURT: Yes, sir.

8 MR. JAY FERGUSON: I'd call Doctor Katz to
9 the stand, please.

10 THE COURT: Okay. Doctor Katz ----
11 [The witness approached.]

12 THE COURT: Note the State's objection
13 and exception for the record, so that that issue is
14 preserved.

15 If you will, place your left hand on the
16 Bible. Raise your right hand.

17 [The witness did as directed and was sworn.]

18 THE COURT: Come around, if you will,
19 and have a seat. Would you like some water, Doctor Katz?

20 THE WITNESS: Yes, please. Thank you,
21 Your Honor.

22 THE COURT: Once you're seated, sir --
23 you can have a seat.

24 [The witness seated himself in the witness stand.]

25 THE COURT: If you will, state, for

February 8, 2012

1 the benefit of the court reporter, your first and last name;
2 and, if you will, spell both, please [handing a cup of water
3 to the witness].

4 THE WITNESS: Thank you.

5 THE COURT: Yes, sir.

6 THE WITNESS: Joseph Katz; J-O-S-E-P-H,
7 Joseph; K-A-T-Z, Katz.

8 THE COURT: Yes, sir.

9 MR. JAY FERGUSON: Thank you, Your Honor.

10 **JOSEPH KATZ, having been first duly sworn, was called as a**
11 **witness by the defense and testified as follows on VOIR DIRE**
12 **EXAMINATION conducted by MR. JAY FERGUSON:**

13 Q. Doctor Katz, I'm Jay Ferguson. I believe we've had
14 the opportunity to meet before. I represent Marcus Robinson.
15 I'm going to ask you a few questions, and I -- just for the
16 purposes of this voir dire, can you tell us what your
17 occupation is?

18 A. I'm an applied statistician.

19 Q. And you've been admitted as an expert -- as a
20 statistician before; is that correct?

21 A. Yes.

22 Q. Were you hired by the State to do an examination or
23 do any work in this case of State versus Marcus Robinson?

24 A. Yes.

25 Q. When were you hired, approximately?

February 8, 2012

1 A. I was hired by Cumberland County -- well, I was
2 retained around August 1st of last year.

3 Q. Have you reviewed the motion in limine that I filed
4 yesterday and provided to the State?

5 A. Not very -- not -- not that -- in great detail, no.

6 Q. But were you present when I was telling the Court
7 what the defense's concerns are with respect to your
8 analysis?

9 A. Yes.

10 Q. As I understand it -- and for the purposes of this
11 voir dire, we're going to be talking about two separate
12 things. One is the surveys that you did of North Carolina
13 prosecutors on one hand; and, then, your cross-tabulation
14 analysis is a separate issue. Okay.

15 A. Okay.

16 Q. If I refer to those things as the prosecutorial
17 surveys and the cross-tabs, will you know what I'm referring
18 to?

19 A. Yes.

20 Q. Now, with respect to the survey of the prosecutors
21 -- let's talk about that for a few minutes. What was your
22 purpose of the survey?

23 A. I have a methodology that I believe is appropriate
24 in trying to explain strikes of black venire members which
25 involves pretty much the way Batson challenges are -- are

1 done in trial courts. Basically, this methodology -- well, a
2 -- in a trial court, if, for example, there were five black
3 venire members that were struck with none passed, that
4 typically will trigger a Batson challenge; and, the way to
5 explain the disproportionality, if a prima facie case is
6 found by the judge, is for the prosecutor to provide the
7 race-neutral explanations for each black venire member that's
8 struck. If that explanation turns out to be accepted by the
9 Court, then the disproportionality has been explained. Here
10 ----

11 Q. [Indiscernible.]

12 A. I -- I'm sorry. I haven't finished. Here, we have
13 a case where we're looking at 173 trials; and, in those 173
14 trials, based upon the work done by your experts and the work
15 that I've done also, there is a disproportionality in strike
16 rates by the State; in that, black venire members are struck
17 at a higher rate than white venire members. So, my
18 methodology to address that is to attempt to obtain the best
19 explanation possible for each of the black venire members
20 that were struck. In this case, as of January 10th, that
21 would be 636 black venire members. Now, part of what guides
22 my decision here is the judge, in the discovery hearing, had
23 indicated that he sees this as a disparate-impact theory
24 case; in that, if the State [sic] shows the disparity was
25 significant, the burden shifts over to the State to explain

1 that disparity. As the statistical expert for the State,
2 given the possibility and what seems to be -- be reality,
3 that there is a statistically significant disparity, the
4 State has to come up with an explanation. The kinds of
5 methods that your expert used involving modeling does not
6 appear to be a method that the prosecutors would consider
7 appropriate for their decision-making. So, as the
8 alternative, I came up with this methodology; in that, it's a
9 direct application of how Batson challenges are held; and,
10 it's also information that I could ask prosecutors to
11 provide, that they can agree to do and also to provide
12 affidavits for; whereas, if I came up with a statistical
13 model, I doubt if the prosecutors would believe that the
14 model was basically representative of their decision-making
15 in jury strikes.

16 Q. Are you finished?

17 [Pause.]

18 A. That's basically what my methodology was.

19 Q. My question wasn't methodology.

20 A. I understand.

21 Q. Do you recall my question?

22 A. Let me -- let me go on. Your question was ----

23 Q. Do you recall my question?

24 THE COURT: I apologize. Let me
25 interrupt. Rule 12, let the examiner complete his question;

February 8, 2012

1 and, let him complete his answer, Mr. Ferguson. Yes, sir.
2 Go ahead.

3 MR. JAY FERGUSON: May I proceed?

4 THE COURT: Yes, sir.

5 Q. Do you recall what my question was?

6 A. Was about the surveys that I did.

7 Q. Was the purpose -- what I'm looking for is what was
8 -- what was your specific research question that you were --
9 for the reason that you did these surveys? What was the
10 research question.

11 A. My purpose was to identify, for each of the 636
12 black venire members that had been struck by the State, the
13 best possible race-neutral reason by asking prosecutors who
14 were actually involved in the selection of jurors to provide
15 those race-neutral reasons; and, if that wasn't possible, to
16 have the DAs identify a reviewer that would be best able and
17 available to provide those race-neutral explanations. It's
18 -- pretty much, what I came up with is the methodology trying
19 to extend how Batson challenges are done to the case where we
20 have a disparity and we have to come up with an explanation;
21 and, this is what the prosecutors were willing to do.

22 [Pause.]

23 MR. JAY FERGUSON: Your Honor, I'm going to
24 be showing some documents. May I stand at the ----

25 THE COURT: Yes, sir.

1 MR. JAY FERGUSON: ---- projector?

2 THE COURT: You may.

3 [Pause.]

4 Q. Doctor Katz ----

5 MR. JAY FERGUSON: Madam Clerk, can you tell
6 us what number we're up to?

7 [Pause.]

8 MR. JAY FERGUSON: Your Honor, would you like
9 for us to continue in sequential order, or would you like for
10 me to mark this as Voir Dire Exhibit 1.

11 THE COURT: What we've done in the
12 past -- at least, our practice here is to mark it VD 1; and,
13 then, if it is given another number, then we can make the
14 change as necessary.

15 MR. JAY FERGUSON: All right.

16 THE COURT: So, is that agreeable with
17 all counsel?

18 MR. THOMPSON: Yes, sir.

19 THE COURT: Okay.

20 MR. JAY FERGUSON: May I approach the
21 witness, Your Honor?

22 THE COURT: Yes, sir.

23 [Mr. Jay Ferguson handed documents to the Court.]

24 Q. Doctor Katz, let me show you what's marked as Voir
25 Dire Exhibit Number 1 [handing the exhibit to the witness]

1 and ask if you can identify that.

2 THE COURT: I'm sorry. Is this the
3 original for Court purposes or is this my copy?

4 MR. JAY FERGUSON: He's got -- he has the
5 original [pointing to the witness].

6 THE COURT: Thank you. Thank you, Mr.
7 Ferguson.

8 A. [Reviewing the exhibit.]

9 [Pause.]

10 A. I've reviewed them.

11 Q. Doctor Katz, I'll ask you, are these e-mails that
12 you sent to prosecutors throughout the state?

13 A. Yes.

14 Q. So, referring to Voir Dire Exhibit 1, these were
15 sent on what date?

16 A. Most of them were sent on September 10th. A few
17 were sent after that time.

18 Q. Is it fair to say that around September 10th is
19 when you first made contact with prosecutors outside of
20 Cumberland County, at least, to obtain information for your
21 study?

22 A. Yes.

23 Q. Now, would you agree with me that, for any study or
24 survey, it's imperative to have a clearly defined research
25 question?

1 A. This is neither a study or a survey. This is an
2 attempt to identify race-neutral reasons for black venire
3 members who were struck by the State. It's -- it's not --
4 the purpose of this was more data collection on my part than
5 a study on my part. The real evidence here is the race-
6 neutral reasons that were provided as part of the affidavits;
7 and, it -- it doesn't require my involvement at all. At some
8 point, if we did get all 636 venire members reviewed, I could
9 look at that data and do some analysis; but, in terms of the
10 State, the importance would be having potentially race-
11 neutral reasons for all the venire members struck. So, it's
12 not a study in the traditional sense. It's more data
13 collection for the State.

14 Q. Those affidavits -- you've been gone for -- I'll
15 represent to you that, yesterday, the affidavits, even some
16 since the date of your study, were admitted into evidence.
17 Okay?

18 A. Okay.

19 Q. And I believe they're not identical, since there's
20 been some changes to them, but almost the same ones that were
21 in your study. Okay. Unless you know something different?

22 A. My study was limited in a basic summarization of
23 some of the elements; but, the purpose of -- of that was to
24 try and see if I could identify factors that would help
25 explain the general disparities. The main purpose of the

1 collection of this evidence was to have evidence to support
2 the methodology that I proposed in terms of having, as best
3 as possible, race-neutral explanations for all the black
4 venire members that had been struck by the State over that
5 21-year time period for those 173 trials.

6 Q. Okay; and, maybe I'm putting the cart before the
7 horse. Let me ask you this, and it may short-circuit a lot
8 of our examination and voir dire. Did you rely upon any
9 responses from prosecutors in the formulation of any of your
10 opinions in this case?

11 A. Yes.

12 Q. Okay. So, earlier, I asked you what the research
13 question was; and, you stated that it was to identify the
14 best possible race-neutral reasons; is that correct?

15 A. For each of the 636 venire members struck by the
16 State.

17 Q. Now, when you -- in your initial contact, you
18 indicate that you -- you're doing this for the purpose of
19 testifying regarding the reasons that a venire member was
20 struck by the State.

21 A. Yes.

22 Q. That's what you originally asked the prosecutors
23 for; is that correct?

24 A. In that original e-mail, which was just a few days
25 after the discovery hearing; and, at that point, this was

1 more e-mail to make contact with the DAs to identify the
2 reviewers. I didn't have a firm idea as to what I was going
3 to ask the reviewers to do at that point. So, it's -- it's
4 very general.

5 Q. You would agree with me that a research question of
6 trying to determine the reasons that a venire member was
7 struck by the State is different from the research question
8 of identification of the best race-neutral reasons, wouldn't
9 you?

10 A. Yes.

11 Q. Okay.

12 MR. JAY FERGUSON: Your Honor, I'd move for
13 Voir Dire Exhibit Number 1 be admitted for the purposes of
14 voir dire.

15 THE COURT: Okay. Folks.

16 [Pause.]

17 THE COURT: All right. It's admitted
18 for that purpose without objection.

19 Q. Is it fair to say that you followed up with more e-
20 mails to prosecutors the following days?

21 A. Yes.

22 Q. Okay. I won't go through all of those; and, I
23 noticed, on Voir Dire Exhibit 1, it was -- that e-mail was
24 copied to Calvin Colyer and Rob Thompson; is that correct?
25 Do you need to see it again? You've got it.

February 8, 2012

1 A. Yes.

2 Q. Okay; and ----

3 A. Although, sometimes, I may have forgotten to
4 include them; but, for the most part, I tried to copy them on
5 all these e-mails.

6 Q. And it's fair to say that you were working with Mr.
7 Thompson and Mr. Colyer as you were doing this? What -- what
8 would you like me to call it, survey, study, analysis?
9 What's your word?

10 A. Request for affidavits to provide the race-neutral
11 reasons for ----

12 Q. All right. Request for affidavits.

13 A. Yup.

14 Q. You were working with the State during that time --
15 process?

16 A. Yes.

17 Q. You -- you -- they were involved in the research
18 question, weren't they?

19 A. No.

20 Q. That was your decision?

21 A. I hadn't made a decision at that point.

22 Q. When the decision was made, was that your decision?

23 A. No. It wasn't totally my decision.

24 Q. Whose decision was it?

25 A. It was -- once -- once I decided on what I thought

1 should be done, I contacted Jonathan Babb of the Attorney
2 General's Office and asked him directly for input as to what
3 should be collected given that we have a very short timeframe
4 to do this and also in terms of the legal issues that he
5 would need to think about in terms of what we collect. My
6 thinking was we could collect a whole lot of data, but the
7 prosecutors have to provide that data and it has to be
8 something that is needed for the purposes that the -- the
9 State would make use of it. Mr. Babb -- I had contacted him
10 where his father had, unfortunately, a heart attack; and, so,
11 he was out of the office for a little while; but, once he got
12 back in the office, I talked to him; and, he said he needed
13 to contact his Section Chief to talk to that person about
14 what the appropriate sample should be and what should be
15 collected; and, at the same time, Mr. Colyer was on vacation,
16 so I talked with Mr. Thompson and told him about this is an
17 issue that he needs to discuss with the AG's Office to help
18 me in terms of what needs to be collected in terms of all the
19 different factors that are -- that are out there.

20 Q. So I get this correctly, you're working with Mr.
21 Thompson, Mr. Colyer and Jonathan Babb at this point, in mid-
22 September; is that right?

23 A. Mr. Thompson and Mr. Babb. Mr. Colyer was on
24 vacation.

25 Q. Okay; and, Mr. Babb is employed by the Attorney

1 General's Office?

2 A. Yes, sir.

3 Q. And, when we were here in court in September, he
4 was actually present as an attorney for the State at the
5 tables; is that correct?

6 A. Yes.

7 Q. And Jonathan Babb then -- and you were also working
8 with Mr. Babb's -- did you say division head or Section
9 Chief?

10 A. Mr. Babb, what -- I asked him about what should be
11 collected. He said that was not a decision he wanted to make
12 by himself. He wanted to consult with his Section Chief.

13 MR. JAY FERGUSON: May I approach the
14 witness, Your Honor?

15 THE COURT: Yes, sir.

16 [Pause.]

17 Q. Let me show you what's marked as Voir Dire Exhibit
18 Number 2 [handing the exhibit to the witness] and ask if you
19 can identify that document.

20 A. This is an e-mail that I sent to Mr. Thompson, and
21 I'm not sure whether this is the final set of instructions
22 that we ultimately came up with; but, I wanted feedback
23 regarding this document in terms of whether it covered
24 everything that needed to be covered in terms of what I
25 needed to collect from the prosecutors.

February 8, 2012

1 Q. And this was on September 27th?

2 A. Yes.

3 Q. It was sent to Rob Thompson?

4 A. Yes.

5 Q. And it was for his review and comments and
6 feedback; is that right?

7 A. Yes.

8 Q. Now, the second page is the prosecutor reviewer
9 instruction sheet that you referred to; is that correct?

10 A. Yes.

11 Q. Now, the date on this review sheet is September
12 27th, 2011; is that right?

13 A. That's correct.

14 Q. And you made edits to that over the course of time;
15 is that right?

16 A. Yes.

17 Q. And, then, we'll get to the final one in a few
18 minutes; but, to be clear, Mr. Thompson and Mr. Colyer had
19 feedback into those instructions that we see on the screen
20 right here; is that correct?

21 A. They had the opportunity to review this -- I'm not
22 sure if it was this document or something that I might have
23 updated; and, I did get some feedback, but it was limited.

24 Q. If you scroll down here -- I lost my pointer. The
25 number 1 and number 2 there, do you see that, overall, we're

February 8, 2012

1 seeking feedback on two issues; is that correct?

2 A. Yes.

3 Q. And the first issue is you're asking the
4 prosecutors -- this -- this hasn't been sent out to anybody;
5 it's still in formulation stages; is that right?

6 A. Yes.

7 Q. And, so, what you thought is that you would seek
8 information for every black venire member who was struck by
9 the State and asked the district attorneys to provide what
10 they believe is the race-neutral explanation if possible; is
11 that right?

12 A. Or the reviewer.

13 Q. Or the reviewer, yes.

14 A. Not necessarily the DAs.

15 Q. And, then, also, the secondary issue and
16 information you were seeking is information about the
17 defendant's jury selection study report; is that correct?

18 A. Yes.

19 Q. And that's the Mich -- we refer to as the Michigan
20 State Study?

21 A. Yes.

22 Q. The same report we're talking about?

23 A. Yes.

24 MR. JAY FERGUSON: Okay. Your Honor, I'd
25 move for admission of defense -- of Voir Dire Exhibit Number

1 2 into evidence for voir dire purposes.

2 THE COURT: Mr. Colyer, Mr. Thompson?

3 MR. THOMPSON: No, sir. No objection.

4 THE COURT: It's admitted without
5 objection for that purpose

6 MR. JAY FERGUSON: May I approach the
7 witness, Your Honor?

8 THE COURT: Yes, sir.

9 [Pause.]

10 Q. Let me show you what's marked as Defense Voir Dire
11 Exhibit Number 3 [handing the exhibit to the witness] and ask
12 if you can identify that document.

13 MR. JAY FERGUSON: May I approach?

14 THE COURT: Yes, sir.

15 MR. JAY FERGUSON: [Handing documents to the
16 Court.]

17 [Pause.]

18 A. Yes. This is the feedback I received from Mr.
19 Colyer and Mr. Thompson.

20 Q. And I believe the coversheet says that -- a portion
21 of the feedback is highlighted, the portion that they added;
22 is that right?

23 A. Yes.

24 Q. Okay; and, so, turning to page 2, I'll ask you if
25 that highlighted portion there is what Mr. Colyer or Mr.

1 Thompson added to your instruction list?

2 A. Yes.

3 Q. And what they indicated is in an effort to better
4 utilize the limited resources of the State and to prevent
5 speculation as to why a particular juror was stricken; and,
6 then, it goes on they didn't believe there should be
7 reviewers reviewing the cases unless they had been involved
8 in the trial.

9 MR. THOMPSON: Objection.

10 Q. Is that ----

11 THE COURT: Sustained as to the form
12 of the question, as to what they believed.

13 MR. JAY FERGUSON: Okay.

14 THE COURT: It speaks for itself.

15 Q. The prior exhibit -- in the prior exhibit with the
16 instructions that you had sent to them for review, it was set
17 up so that anybody could review the voir dieres of the capital
18 cases, the 173 trials? Is that a fair statement, anybody
19 with capital experience?

20 A. Well, not anybody. It would have to be an ADA who
21 has -- who was selected by the district attorney.

22 Q. There was no requirement in the prior instructions
23 that you sent to Mr. Thompson and Mr. Colyer that would have
24 required a reviewer to have been present at the trial, was
25 there?

1 A. No.

2 Q. And this came back to you as a suggestion from Mr.
3 Colyer or Mr. Thompson, didn't it?

4 A. Yes.

5 Q. And, when you read this, as a statistician, did you
6 believe that they were indicating to you that that should be
7 included into the -- in the instruction sheet?

8 A. Not as a statistician, just that's what it -- it
9 says.

10 Q. As someone who's doing this study?

11 A. What I wanted to do was talk to them about what the
12 implications were, but they were very hard to reach.

13 Q. When you received this document from Mr. Thompson
14 and Mr. Colyer, did you read that highlighted portion?

15 A. Yes.

16 Q. As an expert, did it cause you some concern that it
17 might be speculative for someone who was not sit -- sitting
18 at the trial of a case to review the reasons for strikes in
19 capital cases?

20 A. I understand that complaint, but if we're going to
21 try to come up with race-neutral reasons, we're not going to
22 have access to all the prosecutors who actually did strike
23 the juror. As Mr. Hill told me during the discovery hearing
24 -- that many of these prosecutors are now judges or defense
25 attorneys or deceased. It's going to be impossible to do

1 that, but that doesn't mean that we can't try to come up with
2 the best race-neutral explanation as possible; and, of
3 course, I didn't ask the prosecutors who did the reviews to
4 testify that this was the race-neutral explanation. I just
5 wanted them, based upon their expertise, to do the best
6 possible job they could; and, I wanted them to use whatever
7 materials they had and they would be located in the county or
8 the jurisdiction where the trial was held, so they would know
9 where all the resources were, more than what the defendant
10 may have been able to access. So, yes, I understood that we
11 weren't going to get the answers, but I didn't ask the
12 reviewers to say that in their affidavit. In fact, that --
13 that was an issue that would come up periodically. I said
14 just do the best you can. You're the expert. You're not the
15 actual prosecutor.

16 Q. And a reviewer who was not at trial not only could
17 not give the race-neutral explanation, they couldn't -- they
18 clearly could not give the actual reason for the strike,
19 could they?

20 MR. THOMPSON: Objection. Calls for
21 speculation.

22 MR. JAY FERGUSON: I think that's my point.

23 THE COURT: Yes, sir. The objection's
24 overruled.

25 You may answer the question.

1 A. They would have to use their expertise to get the
2 best possible answer they could, yes; and, that could -- and,
3 of course, they wouldn't know what the actual reasons were
4 because that would be the prosecutors.

5 Q. I'm sorry. That would be what?

6 A. The prosecutor who actually did the strike would
7 know that.

8 MR. JAY FERGUSON: I would move Defendant's
9 Exhibit Voir -- Defendant's Voir Dire Exhibit 3 into evidence
10 for the purposes of voir dire.

11 THE COURT: Mr. Thompson, Mr. Colyer?

12 MR. THOMPSON: No objection.

13 THE COURT: All right. It's received
14 for that purpose without objection.

15 MR. JAY FERGUSON: Your Honor, I'm going to
16 hand this to the witness.

17 THE COURT: Yes, sir.

18 Q. Let me show you what's marked as Defendant's
19 Exhibit 4 -- Voir Dire Exhibit 4 [handing the exhibit to the
20 witness] and ask if you can identify that.

21 [Pause.]

22 A. Is this post-it part of the exhibit?

23 Q. I'm sorry?

24 A. Is this part of the exhibit?

25 Q. No. I'll take that. Thank you.

1 THE COURT: I'm sorry. Do I have a
2 copy of ----

3 MR. JAY FERGUSON: I'm -- I'm -- yeah,
4 directly.

5 THE COURT: I apologize. Yes, sir
6 [retrieving an exhibit from Mr. Ferguson]. I just want to
7 make sure I don't lose it up here. Thank you, sir.
8 [Pause.]

9 A. Okay. I've reviewed it.

10 Q. Is that Number 4?

11 A. Yes.

12 Q. Now, Defendant's Exhibit 4 [sic], is that an e-mail
13 that you sent to a Frank Parrish?

14 A. The Voir Dire Exhibit 4?

15 Q. Yes, Voir Dire Exhibit 4.

16 A. Yes.

17 Q. Is this -- and attached to it is -- are some
18 instructions; is that right?

19 A. Yes.

20 Q. And I've -- I've -- you sent a lot of e-mails out
21 to a lot of district attorneys around the state with this
22 same information, didn't you -- similar information?

23 A. Similar information.

24 Q. You changed -- for each district attorney, you
25 changed the name of the case that you were asking that

1 district attorney to review; is that correct?

2 A. Yes. I made it specific for the reviewer.

3 Q. And, then, at the end of this exhibit, there's a
4 spreadsheet of all the jurors involved in the cases that
5 pertained to that particular district attorney; is that
6 right?

7 A. Yes.

8 Q. Now, I'd like to go through this exhibit -- and,
9 again, the research question or the -- this is what you
10 ultimately decided on asking the prosecutors to do. Is that
11 a fair statement?

12 A. Number 1 and 2?

13 Q. Yeah. Number 1 and 2.

14 A. Yes.

15 Q. You asked them to provide race-neutral explanations
16 if possible; is that correct?

17 A. Yes.

18 Q. You were not asking them to state the reasons for
19 those strikes, were you?

20 A. No. I chose this form.

21 Q. And the second is you were asking them to review
22 the Michigan State study, correct?

23 A. Yes.

24 Q. You were asking them to determine the accuracy and
25 the credibility of the variables involved; is that right?

February 8, 2012

1 A. Yes.

2 Q. Now, at this point, by October, you had gotten all
3 of the data collection instruments from the Michigan State
4 Study, hadn't you?

5 A. Yes. The DCIs?

6 Q. DCIs, yes.

7 A. Yes.

8 Q. And, then, on page 2 -- I'm sorry. Turning now to
9 -- before we go to page 2 -- I'm sorry -- you mentioned here
10 -- excuse me. Go to page 3, if you would, please, Doctor
11 Katz.

12 [Pause.]

13 Q. This is the prosecutor reviewer instructions that
14 you agreed upon for your analysis; is that right -- a comp --
15 assemblage of the affidavits?

16 A. Pretty much, yeah.

17 Q. I don't mean to mince words. This is the
18 prosecutor reviewer instructions you agreed upon for whatever
19 study you were doing; is that right?

20 [Pause.]

21 Q. I'll strike that question. Is this the prosecutor
22 reviewer instructions that you decided upon to accomplish
23 your goals?

24 A. Yes.

25 Q. Thank you. I'm sorry. Now, it indicates here, at

1 the end of the second paragraph -- it says this is -- I'm
2 sorry -- it -- each one goes -- this one went to Frank
3 Parrish; is that right?

4 A. Yes.

5 Q. And he's a prosecutor in North Carolina?

6 A. He's a DA in North Carolina.

7 Q. And it indicates, this last sentence, it says I
8 have spoken with you regarding what the State is trying to
9 accomplish; is that correct?

10 A. Yes.

11 Q. You spoke orally to every prosecutor reviewer
12 before sending these instructions; is that right?

13 A. Yes.

14 Q. And ----

15 A. I tried to. There may be some that I didn't reach,
16 but most of them.

17 Q. I'm sorry. You tried -- you tried to, and you
18 talked to most of them?

19 A. Yes.

20 Q. Did you make notes of those phone conversations?

21 A. No.

22 Q. Did you record those phone conversations in any
23 way?

24 A. No.

25 Q. Did you have any script or anything that you read

1 to them what you hoped to accomplish?

2 A. No.

3 Q. You told them you -- what -- why you were doing
4 this, didn't you?

5 A. Yes.

6 Q. You told them it was partly to dispute the MSU
7 study?

8 A. No.

9 Q. Did you ----

10 A. I wanted feedback regarding the MSU study.

11 Q. Okay.

12 A. I hadn't decided yet about whether the MSU study
13 was credible or not. I needed feedback. I need information
14 provided to me from experts or -- or something that I can use
15 to -- to make these judgments. At the discovery hearing, I
16 testified that that was one of the things I was having to do,
17 was try to assess the credibility of the MSU study because,
18 if it is credible, then I can use it for -- for purposes of
19 trying to explain the disparity in strike rates by the -- by
20 the prosecutors. If -- if it isn't credible, then I can't.
21 So, I'm -- I'm really seeking feedback from the prosecutors
22 regarding what -- what they can tell me about the MSU study.

23 Q. So, as of October 15th, 2011, you had not
24 formulated an opinion as to the validity of the MSU state
25 study?

1 A. No. I don't believe so.

2 Q. And, then, you mentioned Peg Dorer, right here, in
3 this paragraph. Who is she?

4 A. She is the Director -- I believe the Director of
5 the Conference of DAs.

6 Q. Was it your goal or Ms. Dorer in the Conference of
7 District Attorneys to serve as sort of a repository of all of
8 the discovery documents, the data collection instruments and
9 the like?

10 A. Well, that's how it turned out. We needed a way to
11 disseminate all the jury study material so that the reviewers
12 would have access to them; and, Mr. Thompson worked out
13 something with Peg Dorer where there was a site set up on the
14 ALC computers where all this material could be stored; and,
15 it made sense that, as new materials would emerge, it would
16 also end up on this site so that the State would be able to
17 continue to maintain all these materials; in that, there are
18 many RJA motions out there; and, so, I expected -- it -- it
19 made sense to build some infrastructure for all these
20 materials.

21 Q. And, when affidavits came in, in response to this
22 request, those affidavits got put on that server, didn't
23 they?

24 A. I don't know.

25 Q. You included all of this information on the server

1 for every district attorney to access around the state who
2 was doing this project; is that correct?

3 A. Yes, or even not doing this project. This is
4 accessible to every DA's Office, through their network, their
5 computer network.

6 Q. Now, attached to this affidavit is a spreadsheet
7 that you mention; is that correct?

8 A. I think there are a few spreadsheets. One was the
9 list of the venire members for each of the cases -- for Frank
10 -- for DA Frank Parrish.

11 Q. Okay.

12 A. And, then, there's a second spreadsheet.

13 THE COURT: For clarification, Mr. Jay
14 Ferguson, did you refer to -- the question -- attached to
15 this affidavit?

16 MR. JAY FERGUSON: I'm sorry.

17 Q. Attached to this e-mail, was there a spreadsheet;
18 and, you indicated there were two.

19 A. Two spreadsheets.

20 Q. Did I leave one off? Is that what you're telling
21 me?

22 A. No. You included it.

23 Q. Okay.

24 A. There are two of them.

25 Q. Okay. The first spreadsheet is a list of all the

1 jurors who were struck in the capital cases in Mr. Parrish's
2 district; is that right?

3 A. Not necessarily. It was meant to be the
4 spreadsheet for all the jurors, regardless of whether they
5 were struck or not, for the cases that DA Parrish was
6 supposed to review.

7 Q. And the -- the African-American jurors are
8 highlighted, aren't they?

9 A. The African-American jurors that were struck by the
10 State are highlighted to make it simpler to identify which
11 ones need to be reviewed.

12 Q. And your research question was only to ask them to
13 state the race-neutral reasons for the African-American
14 jurors; is that right, not ----

15 A. That were struck by the State.

16 Q. That were struck by the State. You didn't ask them
17 to compare the white jurors or anything of that nature?

18 A. I -- I wanted to ask initially for that
19 information, why the -- what jurors were struck and what the
20 race-neutral reason for that would be. I also wanted to get
21 information of why those jurors that weren't struck were not
22 struck; but, you know, to me, that's -- that would be great
23 information to have, but that would be very expensive --
24 expensive relative to using prosecutor time to do this
25 research, to generate all these materials; and, that was a

1 consideration -- given that this is the middle of October and
2 we have a hearing scheduled November 14th.

3 Q. But it's fair to say, as a statistician, to do an
4 appropriate analysis, you wanted to compare the strikes of
5 non-black jurors with the strikes of the black jurors?

6 A. Well, I wanted to do lots of things, except -- in
7 terms of the methodology that I proposed, the important
8 element of that was the reasons for the strikes of the black
9 venire members who were struck by the State. It would have
10 helped -- it would have given me more research that I could
11 do if I had gotten more information; and, that would have
12 been fine for me as long as I don't have to do all that work;
13 but, there is a cost to collecting all that information; and
14 -- and, when we're talking about the white jurors, we've got
15 636 black venire members struck; the white jurors struck is
16 maybe three times that. So -- and -- and this is a month
17 away from the hearing. So, I -- so, I think I -- I did what
18 I could do given the methodology that I proposed and the
19 resources that I had available.

20 Q. Did you do any sampling of the white jurors or
21 request any sampling of the white jurors?

22 A. That was one thing that I considered about doing
23 that for Cumberland County, but I was not getting very good
24 feedback from Mr. Thompson and Mr. Colyer for other things
25 that I requested. In fact, at the discovery hearing, one of

1 the things that I had asked for, that would have really
2 helped, and was granted by Judge Weeks, was all the venire
3 members that had been challenged under Batson for the 173
4 trials; and, I still haven't received that. So, it's -- I'd
5 love to do more and more in terms of the analysis, but I need
6 data to do that, and I need the resources and the support to
7 provide that data.

8 Q. To be clear, my recollection from the September
9 hearing is you had requested the information about the Batson
10 challenges from the State?

11 A. That's absolutely correct. The information that --
12 that we requested from the defendant was turned over. It's
13 just the State information wasn't turned over.

14 Q. Now, if I could ask you to turn to the last page of
15 the instructions, before you get to the spreadsheets, Doctor
16 Katz.

17 [Pause.]

18 Q. Is that what's shown on the screen here?

19 [Pause.]

20 A. Okay.

21 Q. Is that correct? It says I have several questions
22 for you to consider; and, this went to all the prosecutors
23 who were serving as reviewers for you?

24 A. Yes.

25 Q. And you were asking the prosecutors to answer all

1 those questions with respect to the MSU study; is that right?

2 A. Yes.

3 MR. JAY FERGUSON: Your Honor, I would move
4 -- is this Defendant's Voir Dire 4?

5 THE COURT: Yes, sir.

6 MR. JAY FERGUSON: I would move Defendant's
7 Voir Dire 4 into evidence for voir dire purposes.

8 MR. COLYER: No objection.

9 THE COURT: It's admitted without
10 objection.

11 Q. Do you recall, Doctor Katz, who the first district
12 attorney that responded with an affidavit was?

13 A. Yes. It was Sean Boone.

14 MR. JAY FERGUSON: May I approach?

15 THE COURT: Yes, sir.

16 Q. I'm showing [handing the exhibit to the witness]
17 you what's marked as Defendant's Voir Dire -- I'm sorry. I
18 didn't put voir dire on that. May I have that back for just
19 a moment [retrieving the exhibit from the witness]?

20 [Pause.]

21 Q. Defendant's Voir Dire Exhibit 5 [handing the
22 exhibit back to the witness] and ask if you can identify
23 that, please.

24 [Pause.]

25 A. These were e-mails sent between myself and Sean

February 8, 2012

1 Boone regarding the review that he did.

2 Q. If I could ask you to turn on page -- to page 2, at
3 the top, it says from Sean B -- is that Sean Boone?

4 A. Yes.

5 Q. And he's a District Attorney in Alamance County; is
6 that -- do you recall that?

7 A. I think he's an ADA.

8 Q. Yes, Assistant District Attorney. Excuse me; and,
9 he indicates attached is a draft affidavit. Please review
10 and let me know if it's acceptable; is that correct?

11 A. Yes.

12 Q. And it came to you in an unsigned format?

13 A. Yes. I believe so.

14 Q. I've got it here if you'd like to refresh your
15 recollection.

16 A. Okay. Yes.

17 Q. Let me show you what's marked Defendant's Voir Dire
18 Exhibit 6.

19 THE COURT: Okay.

20 MR. JAY FERGUSON: May I approach?

21 THE COURT: Yes, sir.

22 MR. JAY FERGUSON: [Handing an exhibit to the
23 Court.]

24 THE COURT: Thank you, sir.

25 MR. JAY FERGUSON: Excuse me.

1 [Pause.]

2 Q. I believe that exhibit has the affidavit attached
3 [handing the exhibit to the witness], doesn't it?

4 A. Okay.

5 Q. So, going back to 5 ----

6 A. He also sent a spreadsheet.

7 Q. Okay. Thank you; because, what happened is you --
8 you asked the persecutor reviewer to send a narrative
9 affidavit, but to also cut-and-paste their responses, their
10 race-neutral reasons, into a spreadsheet that you had
11 provided to them; is that right?

12 A. Yes.

13 Q. Okay. So, the prosecutor reviewers were sending
14 you two things, the spreadsheet that had the race-neutral
15 reasons -- purported race-neutral reasons and then the
16 affidavits, draft affidavits, to you for your review; is that
17 right?

18 A. That's too broad. Sean Boone did that.

19 Q. Okay.

20 A. But other reviewers would send me either just the
21 spreadsheet or a word file, not necessarily an affidavit.

22 Q. Okay. Looking at Defendant's Exhibit Exhibit 5
23 first, he indicates -- I'm looking at the second page from
24 Sean Boone, attached is a draft affidavit; please review;
25 and, let me know if it's acceptable, correct?

February 8, 2012

1 A. Okay.

2 Q. And, if you turn back to the first page, your
3 response to him is shown on that page; is that right?

4 A. Yes.

5 Q. And you said your draft affidavit looks good, but
6 didn't you propose edits to it -- don't you?

7 A. In the spreadsheet, he indicated that one venire
8 member, Dawyer Gross, was identified as black when in fact
9 he's white. That was on the spreadsheet, but not in his
10 affidavit. I'm trying to get the race-neutral reasons for
11 everybody and -- on the list, and he did not include the
12 information about Dawyer Gross in his affidavit. So, I asked
13 him if it would be okay for him to include that information
14 so I would have a complete accounting of those venire members
15 that the MSU study had indicated were black and struck by the
16 state.

17 Q. So, to be clear with this Court, you were
18 suggesting edits to Mr. Boone's affidavit knowing that, as an
19 expert, you intend to rely on those affidavits in the
20 formulation of an opinion in this case; is that correct?

21 A. I recommended not edits, but corrections or things
22 that were missing. I'm not in a position to edit their
23 reasoning; but, if I do find cases -- and there were cases
24 where someone would refer to a person and use the wrong name
25 -- I would identify that. If they left out something from

1 their affidavit, that I could tell was included in a
2 spreadsheet, I would recommend that. I'm trying to get to
3 the best answers. My ability to provide those answers
4 doesn't exist, but what I can do is provide corrections to
5 things that the reviewers have not done, have -- have --
6 where they have made mistakes.

7 Q. Let me show you -- I believe this is Voir Dire
8 Exhibit 5; is that correct, sir?

9 MR. JAY FERGUSON: May I approach?

10 A. No. It's 6.

11 Q. Is that the right -- 6. I'm sorry.

12 THE COURT: 6, yes, sir.

13 Q. Defense Exhibit 6 -- Voir Dire ----

14 A. Voir Dire 6.

15 Q. ---- 6. Now, this is the same e-mail chain, at the
16 bottom of the screen there, from Sean Boone there; it's got
17 attached is a draft affidavit; and, you sent that affidavit
18 then to Mr. Thompson and Mr. Colyer for their review; is that
19 correct?

20 A. Yes.

21 THE COURT: Mr. Jay Ferguson ----

22 MR. JAY FERGUSON: Yes.

23 THE COURT: ---- if you will, bear
24 with me. I'm sorry.

25 Just for purposes of clarification, Doctor

February 8, 2012

1 Katz, let me direct your attention to Voir Dire Exhibit
2 Number 5.

3 THE WITNESS: Okay.

4 THE COURT: At the bottom of that,
5 immediately above your signature, appears the following
6 language: Also, can I send out your spreadsheet and draft
7 affidavit to the other prosecutor reviewers as an example of
8 how to do the review?

9 THE WITNESS: Yes.

10 THE COURT: What -- what did you mean
11 by that?

12 THE WITNESS: This is information that
13 I'm requesting from the ----

14 THE COURT: Yes, sir.

15 THE WITNESS: ---- prosecutors, and I
16 have one example, Sean Boone, who has provided me with his
17 information and results; and, I wanted the other reviewers to
18 be able to see the format and how it was provided.

19 THE COURT: Okay.

20 THE WITNESS: Not necessarily give those
21 race-neutral reasons, but this did seem to be a good example
22 that would hopefully spur these reviewers to do what they
23 needed to do to provide me with their reviews.

24 THE COURT: Okay. I'm sorry.

25 Q. And, to be fair, you -- you weren't receiving the

1 responses that you had hoped to get by this time; is that
2 right?

3 A. That's correct, yes.

4 Q. And I'm leaving out many, many, many e-mails that
5 you sent to district attorneys throughout the state?

6 A. There were other attempts to get information from
7 the reviewers.

8 Q. Now, the judge has already talked about my next
9 exhibit. Let me show you what's marked as Defendant's
10 Exhibit Voir Dire Exhibit 7.

11 MR. JAY FERGUSON: May I approach?

12 THE COURT: Yes, sir.

13 [Pause.]

14 MR. JAY FERGUSON: [Handing an exhibit to the
15 Court and to the witness.]

16 Q. Is it fair to say -- I'm sorry. Take your time.

17 [Pause.]

18 A. Oh, I'm ----

19 [Pause.]

20 A. Okay.

21 Q. I'm going to show you Defendant's Voir Dire Exhibit
22 7; and, the date of this is October 18th; is that correct?

23 A. Yes.

24 Q. By this point, is it fair to say that you had --
25 from all the e-mails you sent to prosecutors after this date,

February 8, 2012

1 you started sending this spreadsheet review by Sean Boone, as
2 well as the draft affidavit from Sean Boone; is that right?

3 A. Yes.

4 Q. And this went to prosecutors around the State of
5 North Carolina?

6 A. Yes.

7 Q. And, by the time you started sending this out, you
8 had only received one response from one prosecutor in the
9 State of North Carolina?

10 A. Well, I know I received a response from Sean Boone.
11 I don't know that -- there may have been others, but not that
12 many at that point.

13 Q. Fair enough; and, I'll just ask you, Doctor, isn't
14 it -- by sending out an example of an affidavit, an example
15 of a spreadsheet, isn't that a signal to the district
16 attorneys that this is what we anticipate receiving from you?

17 A. In terms of the format.

18 Q. Okay.

19 A. Not in terms of the content. I think the district
20 attorneys are knowledgeable about what testimony is and
21 evidence. I didn't think that I was dealing with someone who
22 didn't understand what I was asking for. I was pretty much
23 trying to address the format issue.

24 Q. You wouldn't -- certainly wouldn't call this a
25 blind inquiry, would you?

1 A. It's not blind in that I know who the reviewers
2 are.

3 MR. JAY FERGUSON: Move for Voir Dire Exhibit
4 7 into evidence for voir dire purposes.

5 MR. THOMPSON: No objection.

6 THE COURT: Without objection, it's
7 admitted.

8 Q. And -- I'm sorry. On Voir Dire 7, I believe the
9 language you used is the Excel spreadsheet reviewed from ADA
10 Sean Boone, an example of what is requested; is that right?

11 A. Yes, and meant in terms of the format, not in terms
12 of using those race-neutral reasons to be the race-neutral
13 reasons for their strikes.

14 Q. Does it say format?

15 A. No, but that's what was intended.

16 THE COURT: Mr. Ferguson ----

17 MR. JAY FERGUSON: Sir?

18 THE COURT: ---- have you formally
19 introduced or moved into introduce 5 and 6 -- at this point?

20 MR. JAY FERGUSON: I would move, yes, Your
21 Honor. Thank you.

22 THE COURT: Folks, do you want to be
23 heard?

24 MR. THOMPSON: No object for the limited
25 purpose of voir dire.

1 THE COURT: They're admitted without
2 objection.

3 Q. I'm showing you what's marked as Defendant's Voir
4 Dire Exhibit 8 [handing the exhibit to the witness] and ask
5 if you can identify that, please.

6 [Pause.]

7 MR. JAY FERGUSON: And, you know what, we can
8 take off a lot of those pages. They're just duplicates -- if
9 that will make it easier. Let me [retrieving the exhibit
10 from the witness]----

11 [Pause.]

12 Q. I'm handing you Voir Dire Exhibit 8 [handing the
13 exhibit to the witness], which is two pages, the first top
14 two pages of what I handed out.

15 A. All right.

16 Q. Is that sufficient? Is -- what is that document?

17 A. It's an e-mail I sent out when I discovered that I
18 may have been using incorrect e-mail addresses, so I resent
19 materials. At some point, I discovered, from Peg Dorer, that
20 DAs have several e-mail addresses, and they don't necessarily
21 read their e-mail for all the addresses; and, so, I needed
22 the addresses that I can contact them to make sure that they
23 did get the materials.

24 Q. All right. Now, on the second page of that
25 exhibit, it indicate -- you sent this to district attorneys

1 around the state; is that right?

2 A. It would be district attorneys that hadn't
3 responded to my other e-mail requests.

4 Q. And is that ----

5 A. I don't know that I sent it to DAs that had already
6 provided reviews.

7 Q. October 26th, you had not received many reviews,
8 had you?

9 A. I don't know how many reviews I had at that time.
10 I believe Sean Boone had already sent his review.

11 Q. Well, I'll stipulate to that because, if you look
12 at the second page, you'll see -- it talks about sending out
13 what was sent in the case of John Burr; that's Sean Boone; is
14 that right?

15 A. Yes.

16 Q. And it says this is an example of the type of
17 feedback I anticipate from the review of your capital trials;
18 is that correct?

19 A. In terms of the format, yes.

20 Q. Does it say the word ----

21 A. It doesn't say that, but that was the intention.

22 Q. Now ----

23 MR. JAY FERGUSON: Are we up to 9, Madam
24 Clerk?

25 THE COURT: Yes, sir.

1 Q. Let me show you what's marked Voir Dire Exhibit 9
2 [handing the exhibit to the witness] and ask if you can
3 identify that?

4 [Pause.]

5 A. Yes.

6 Q. And what is this document?

7 A. It's an e-mail that I sent to Rob Thompson and Cal
8 Colyer.

9 Q. This was just prior to the November hearing; is
10 that right?

11 A. Yes. This was sent November 9th.

12 Q. And it indicates, as of November 9th, that you had
13 concluded, based upon the feedback that you received from
14 prosecutors, that the defendant's database could not be
15 relied upon to provide the race-neutral reasons why
16 prosecutors struck black venire members; is the correct?

17 A. Yes.

18 Q. You're under a Court order to give us all of your
19 communications with prosecutors; is that right?

20 A. Yes.

21 Q. As of November 9th, 2011, you had received
22 responses with respect to critique of the MSU study -- I'm
23 not talking about the race-neutral reasons -- all those seven
24 questions that you had asked about, is that ----

25 A. Six questions.

1 Q. Six questions?

2 A. Yes.

3 Q. By November 9th, you had received two responses?

4 A. And some reviews.

5 Q. I'm not talking about the reviews of the race-
6 neutral reasons. I'm talking about critique of the MSU
7 study. You'd received two responses.

8 A. Yes.

9 Q. One from Anna Greene and Mikko Arrowwood [sic]; is
10 that correct?

11 A. Sean Boone, so it's three.

12 Q. Okay. Sean Boone, did he critique the study?

13 A. Yes.

14 Q. Okay. So, you had three ----

15 A. He had four pages of critiques and went through
16 each of the six questions in detail, yes.

17 Q. So, is it fair for this Court to know that you
18 based your opinion and critique of the MSU study and came to
19 your conclusion based upon talking to three prosecutors in
20 the State of North Carolina?

21 A. No. I talked to more prosecutors. I didn't take
22 notes, but these are the ones that provided me with the
23 reports; and, I also had reviews at that point, and I don't
24 know how many. I don't recall; but, I had enough to conclude
25 that I wouldn't be able to use the data from the MSU study in

1 some analysis that the prosecutors would rely on and -- and
2 testify to.

3 Q. As of November 9th, you had received explanations
4 for about 150 out of 635 black venire members; is that
5 correct?

6 A. I -- I don't know.

7 Q. I could show you, Doctor, to refresh your
8 recollection, if you would like. I'm intending to introduce
9 it; but, does that refresh your recollection [handing the
10 exhibit to the witness]?

11 [Pause.]

12 A. Yes.

13 THE COURT: I'm sorry. That number
14 again, sir? As of November 9th ----

15 THE WITNESS: The number is 150 venire
16 members out of the

17 THE COURT: Total possible number of
18 what?

19 THE WITNESS: 635.

20 Q. And you may have testified about this. I'm sorry
21 if I'm asking it again. These e-mails that went to the
22 prosecutors referenced the fact that, as their affidavits
23 came in, they would be put on the server at the Conference of
24 District Attorneys, didn't they?

25 A. I don't -- I don't recall that.

1 Q. And these responses that were coming back to you
2 were in no way chosen by you as a random sample, were they?

3 A. No.

4 Q. These were only the prosecutors who chose to
5 respond to your study, your -- your review -- questionnaire?

6 A. Yes.

7 Q. And, as a -- as an objective statistician, you
8 would have to take into account the possibility that
9 prosecutors who had used race as a basis for selecting juries
10 would choose simply not to respond to you?

11 A. That is -- the reasons for nonresponse can be many,
12 and that could be one of them.

13 Q. Did the -- Mr. Perry or the -- the attorneys for
14 the State share with you the reference guide on survey
15 research from the Federal manual?

16 A. No.

17 Q. I'd like to just ask you some questions with
18 respect to this review, whatever we're calling it.

19 A. Data collection effort.

20 Q. I'm sorry?

21 A. Data collection effort.

22 Q. Data collection effort. Well, it's more than the
23 collection of data because you were surveying these
24 prosecutors as to their belief in the credibility of the MSU
25 study, weren't you?

1 A. I was asking them for their expert opinion on it.
2 If you want to call it a survey, I guess you can; but, I
3 didn't see it as -- as a survey more than trying to find the
4 best person to provide the race-neutral explanations.

5 Q. I'd like to read something from this reference
6 manual on scientific evidence and ask if you agree with it?
7 It says a survey is presented by a survey expert who
8 testifies about the responses of a substantial number of
9 individuals who have been selected according to an explicit
10 sampling plan and asked the same set of questions by
11 interviewers who were not told who survey -- who sponsored
12 the survey or what answers were predicted or preferred. Do
13 you agree with that as a scientific statement?

14 A. Would you repeat it again.

15 Q. A survey is presented by a survey expert who
16 testifies about the responses of a substantial number of
17 individuals who have been selected according to an explicit
18 sampling plan and asked the same set of questions by
19 interviewers who were not told who sponsored the survey or
20 what answers were predicted or preferred.

21 A. Yes. I'll agree with that.

22 Q. Another statement I'll ask if you agree with as a
23 scientific person, an expert: Surveys not conducted
24 specifically in preparation for, or in response to,
25 litigation may provide important information, but they frequ

1 -- I'm sorry. That's not what I meant to read. Strike that.

2 [Pause.]

3 Q. With response to -- with respect to responses to
4 survey, I'll ask if you agree with this: Potential bias
5 should receive greater scrutiny when the response rate drops
6 below 75 percent. If the response rate drops below 50
7 percent, the survey should be regarded with significant
8 caution as a basis for precise quantitative statements about
9 the population from which the sample was drawn.

10 [Pause.]

11 A. I agree that, if you get response rates that are
12 too low, that does affect -- or, allows for possible bias. I
13 don't know about -- I necessarily agree with 75 percent and
14 50 percent as the thresholds.

15 Q. What's the response rate in this case from
16 prosecutors throughout the State of North Carolina at the
17 time you finalized your report on January 9th, 2012?

18 A. Somewhere around 39 to 40 percent for the
19 statewide.

20 Q. Yes.

21 A. And it was 100 percent for Cumberland County.

22 Q. And, then, again, we -- we've talked mostly
23 statewide. Cumberland County's 100 percent of only the black
24 venire members; is that correct?

25 A. Yes, the 62 black venire members that were struck

February 8, 2012

1 by the State.

2 MR. JAY FERGUSON: May I have just a moment,
3 Your Honor?

4 THE COURT: Yes, sir.

5 Q. I'd like to turn your attention now, Doctor Katz
6 ----

7 [Counsel conferred.]

8 MR. JAY FERGUSON: Yeah. Your Honor, if I
9 have not done so, I'd move all of the voir dire exhibits into
10 evidence for the purposes of the voir dire.

11 MR. THOMPSON: We don't have an objection
12 for the limited purpose of voir dire.

13 THE COURT: Well, we're up to Voir
14 Dire 9; and, I believe all, with that exception -- is that
15 what you show, ma'am?

16 [The Court conferred with Madam Clerk.]

17 THE COURT: 8 and 9. I'm sorry. So,
18 8 and 9 are now admitted. All other voir dire -- pardon me
19 -- voir dire and -- it's been a rough morning -- exhibits are
20 received for that purpose. Yes, sir.

21 MR. JAY FERGUSON: May I approach ----

22 THE COURT: Yes, sir.

23 MR. JAY FERGUSON: ---- the bench and the
24 witness, Your Honor?

25 THE COURT: Yes, sir.

1 [Pause.]

2 Q. Doctor Katz, I'd like to turn our attention to the
3 second aspect of your study, the cross-tab analysis. I've
4 got a PowerPoint presentation I want to go through to make
5 sure that -- one, that I understand what the analysis is and
6 that -- that we're all on the same page.

7 [Pause.]

8 Q. Now, cross-tabulation in and of itself is a method
9 that's used in many statistical analyses; is that correct?

10 A. Yes.

11 Q. It lets you see the frequency of something -- or,
12 lets you see the frequency of observations within a dataset;
13 is that a fair characterization?

14 A. It allows you to directly control for factors.

15 Q. Okay; and, as I understand your cross-tab analysis,
16 you started with a total of 1122 venire members in your
17 dataset; is that right, through your statewide?

18 A. These were the venire members that were counted as
19 part of the logistic regression in -- in the jury selection
20 study report, table 12.

21 Q. For the cross-tab analysis, you could have included
22 all of the jurors -- excuse me -- in the 25 percent sample;
23 is that correct?

24 A. They would have fallen out because of missing
25 information, so I ended up -- I would have ended up with

1 1122.

2 Q. And, so, the per -- so, what you do -- what you
3 generally did in your cross-tab analysis is to start with a
4 group and then you started dividing based upon variables; is
5 that right?

6 A. Controlling for variables one at a time, starting
7 with employment category.

8 Q. So, let's look at that. So, the first thing that
9 happened is you -- there were 32 employment categories in the
10 Michigan State study?

11 A. Defined by Doctor O'Brien, yes.

12 Q. Now, not all 32 of those employment categories
13 ended up being a predictor as to a state strike, did they?

14 A. You mean weren't included in the logistic
15 regression model?

16 Q. Yes. That's a start.

17 A. Okay; but, they were available to be considered.

18 Q. But, in any dataset, there are explanatory
19 variables and extraneous variables, aren't there?

20 A. These were employment categories that Doctor
21 O'Brien defined for her study. Whether they're extraneous or
22 not, I don't know. I didn't make that judgment. I simply
23 used the categories as Doctor O'Brien defined them.

24 Q. So, throughout your cross-tab analysis then, is it
25 fair for the Court and us to assume that the division of

1 these cells into subsets is not based upon explanatory
2 variables?

3 A. It is based upon explanatory variables, the
4 employment category.

5 Q. Okay.

6 A. That -- that's the explanation. It may not be
7 statistically significant, but they're still explanatory.

8 Q. Okay. So, you -- you divide -- you've got 32
9 employment categories, so there's 1122 venire members getting
10 put into 32 separate cells?

11 A. Cells or boxes.

12 Q. Boxes?

13 A. Yes.

14 Q. Okay.

15 A. Where, within each cell, the venire members all
16 have the same employment category designation.

17 Q. So, that -- is -- it's small. There's -- 10 was
18 one employment category, so that's one; and, then, there's an
19 11, and so forth ----

20 A. Yes.

21 Q. So, you have 32. So, for each one of the 32
22 employment categories, you then separate those -- each of
23 those 32 cells into five more cells based upon marital
24 status.

25 A. Yes. So, after two levels, each venire member is

1 similarly situated with respect to both conditions, both
2 control variables simultaneously.

3 Q. So that, if -- if there's two jurors in the same
4 cell, it means they have the same employment and the same
5 marital status?

6 A. Yes.

7 Q. Okay. So, by this point, you've got 160 cells?

8 A. Yes.

9 Q. Each one of those 160 cells are then divided into
10 cells based upon the seven education variables?

11 A. Yes.

12 Q. So, by the end of that analysis, you have 1120
13 cells available for 1122 venire members?

14 A. Yes.

15 Q. Then, you take each of those 1120 cells and divide
16 each of those by that 81 descriptive characteristics that
17 were controlled for -- excuse me -- that were coded for in
18 the MSU study?

19 A. No. It wasn't the 81 descriptive characteristics,
20 but it was the set or list of descriptive characteristics
21 that were assigned to each venire member. Venire members
22 could have had one descriptive characteristic, two, three, up
23 to ten.

24 Q. Okay. So, how many cells do you end up with at the
25 end?

1 A. A lot.

2 Q. At least -- well, it really is 81 if ----

3 A. No.

4 Q. I really want to ask it because I want to
5 understand this, because I'm -- I'm having trouble with this
6 analysis; and, if you can help ----

7 A. All right. Sure. I'll be glad to.

8 Q. There are 81 descriptive characteristics in the MSU
9 study?

10 A. Yes.

11 Q. By your report, your count?

12 A. Yes.

13 Q. And, if someone had the exact same employment
14 status, exact same marital status, exact same education
15 status, at least through that third level, they match and are
16 in the same cell?

17 A. Yes.

18 Q. Then, if you've got two jurors in that same cell,
19 one of which is coded for having served on a jury before, one
20 of which had known descriptive characteristics, those two
21 jurors would then be in separate cells ----

22 A. Yes.

23 Q. ---- based on that one descriptive characteristic?

24 A. Yes.

25 Q. And there's 81 of them?

1 A. Yes.

2 Q. So, help me with my math, because I did that and
3 got to 90,000 cells?

4 A. No. It's more than that.

5 Q. Okay.

6 A. Because you can ----

7 Q. For ----

8 A. ---- have -- for an individual venire member, they
9 could be coded with previous jury service along with, let's
10 say, the 420 code, where I believe that's family member had a
11 previous criminal charge ----

12 Q. Okay.

13 A. So, there could be one, two, three, four, up to ten
14 different descriptive factors.

15 Q. So, really, you'd have to do this 90,000 times 10
16 to the 10th power, right? Would that be it?

17 A. I don't know.

18 Q. Whatever, it's a big number?

19 A. It's going to be a very big number, yes.

20 Q. Okay. So, what we end up with is a total number of
21 subgroups exceeding 90,000? Can we agree on that?

22 A. I agree on that, yes.

23 Q. For 1122 venire members?

24 A. Yes.

25 Q. What's the average number of venire members that

1 you see in the cells if there's more than 90,000 cells?

2 A. The average number, I didn't calculate that; but,
3 many were classified unique -- into where a cell would only
4 have one venire member.

5 Q. And you have the opinion, as you have opined in
6 your report, that if a juror is segregated after all of this
7 into its own cell -- is that -- is that called an orphan
8 cell? Is that -- or, what's the term for it if you've got
9 one single person in that cell?

10 A. I don't know.

11 Q. Okay. A single occupied cell ----

12 A. I can go with that.

13 Q. If you've got a single occupied cell after all this
14 division, you have the opinion that that, per se, constitutes
15 a race-neutral reason for striking that juror?

16 A. That can be a race-neutral reason, yes.

17 Q. So that, after your analysis, what you came up with
18 is, of the 1123 venire members, after dividing it all out,
19 there are 1084 jurors in single occupied cells?

20 A. No. That's not right.

21 Q. Your -- your report doesn't indicate there are 1084
22 venire members in single occupied cells?

23 A. I don't think so.

24 Q. Statewide.

25 A. No. I don't think that's what it says. I think --

1 if it does, it's -- it's erroneous. It should say that there
2 are 1084 venire members that are classified in cells where
3 there's no example of black and non-black venire members.
4 So, it's all the same race. It could be a single venire
5 member. It could be -- I think there were some of the cells
6 where there may have been eight or ten venire members, and
7 they were all the same race. So, there was no ability to
8 find a disparity of any kind ----

9 Q. You're right. I'm sorry

10 A. ---- between the races.

11 Q. So, if you've got like four venire members in a
12 cell and they're all black, there's nothing to compare in
13 that cell?

14 A. That's correct.

15 Q. So, the whole analysis is only if there are more
16 than one juror in a cell and there's a distinction based on
17 race and a distinction based on strike patterns between the
18 races?

19 A. This is outside of the 1084?

20 Q. Yes.

21 A. Yes.

22 Q. And that leaves us with 38 venire members to
23 compare ----

24 A. Yes.

25 Q. ---- in your analysis?

1 A. Yes.

2 Q. Okay.

3 THE COURT: Mr. Ferguson, are you

4 ----

5 MR. JAY FERGUSON: This is a great place to
6 stop.

7 THE COURT: Yes, sir. I was going to
8 suggest it.

9 Thank you, Doctor Katz. You may step down,
10 sir.

11 [The witness withdrew to counsel table.]

12 THE COURT: Okay. I have a matter
13 unrelated to this case. So, is 2:30 okay?

14 MR. THOMPSON: Yes, Your Honor.

15 MR. HUNTER: Yes.

16 MR. JAY FERGUSON: Do you need this court --
17 do I need to ----

18 THE COURT: No. It's an in-chambers
19 matter.

20 Thank you, folks. We're down till 2:30

21 [The hearing recessed at 1:00 p.m. and reconvened at 2:28
22 p.m., February 8, 2012, with all pertinent parties present
23 prior to the recess once again present, to include the
24 defendant.]

25 MR. THOMPSON: Judge, we don't want to

February 8, 2012

1 get into anything now, but we do want to save a little, small
2 chunk of time at the end of the day.

3 THE COURT: Okay.

4 MR. THOMPSON: To deal with what amounts
5 to a couple of housekeeping matters.

6 THE COURT: Yes, sir.

7 MR. COLYER: Just wanted to alert you
8 to it before we get there, and we didn't want to upset the
9 flow of the voir dire hearing; but, we do need about 5 to 10
10 minutes at the end of the day.

11 THE COURT: I appreciate it. In terms
12 of the scheduling, you've got Doctor Katz on the stand now.
13 Other witnesses present ----

14 MR. THOMPSON: No other witnesses are
15 present. The -- the estimated time takes Katz well into
16 tomorrow.

17 THE COURT: Yes, sir.

18 MR. THOMPSON: That brings up probably
19 another question -- is are we -- do we have the Court's
20 permission to delay any other witnesses until tomorrow
21 afternoon, at the very earliest? We don't expect to be done
22 with Katz -- I honestly lied then, but we want to make sure,
23 in case we are surprised by how quick things move, that we
24 have until tomorrow afternoon to call our next witness.

25 THE COURT: Do you mind if I ask who

1 that might be?

2 MR. THOMPSON: Likely be more judges.

3 MR. COLYER: We -- more judges, Your
4 Honor.

5 THE COURT: Okay.

6 MR. COLYER: And, likely, we could do a
7 mid-course correction at the close of the day, if necessary.

8 THE COURT: Okay.

9 MR. COLYER: So, if you'll ----

10 THE COURT: Yes, sir. I think I'm on
11 record. I'll do what we need to do to accommodate either
12 counsel.

13 MR. THOMPSON: Thank you, Judge.

14 MR. COLYER: Thank you, Your Honor.

15 THE COURT: Yes, sir. All right.

16 You ready to go forward?

17 MR. JAY FERGUSON: Yes. May I proceed?

18 THE COURT: If you will, bear with me.

19 Let the record reflect all counsel are present. The
20 defendant is present; and, yes, sir; you may continue with
21 your voir dire examination.

22 MR. JAY FERGUSON: Thank you, Your Honor.

23 **VOIR DIRE EXAMINATION continued conducted by MR. JAY**

24 **FERGUSON:**

25 Q. Now, Doctor Katz, I believe, when we broke for

February 8, 2012

1 lunch, we'd explained how we got down to these 90 -- more
2 than 90,000 cells, and there were 1084 that were either in a
3 single cell or were in a cell where there was no disparity --
4 disparity that could be compared; is that correct?

5 A. Yes. I would just characterize it as 1084 were in
6 cells where there was only one racial factor for those cells.
7 Either they were all black or non-black.

8 MR. JAY FERGUSON: May I approach the
9 witness, Your Honor?

10 THE COURT: Yes, sir.

11 [Pause.]

12 Q. Let me show you ----

13 MR. JAY FERGUSON: Madam Clerk, what number
14 am I up to?

15 MADAM CLERK: 10.

16 Q. Let me show you what's marked as Defendant's Voir
17 Dire Exhibit 10 [handing the exhibit to the witness].

18 MR. JAY FERGUSON: [Handing an exhibit to the
19 Court], and your copy, I think, is from the attorney general
20 -- excuse me -- the DA.

21 THE COURT: Yes, sir.

22 Q. And I'll ask you if you recognize that document?

23 A. It appears to be my report.

24 Q. And if I could direct your attention to page DA-
25 119.

1 MR. COLYER: Mr. Ferguson, excuse me.
2 Is it 10 or 11? I think ----
3 MR. JAY FERGUSON: I'm sorry. I think that
4 is 11.
5 MR. COLYER: I think this was 10 before
6 lunch [holding up an exhibit].
7 MR. JAY FERGUSON: Let me go back. I think
8 the PowerPoint -- I didn't admitted it yet.
9 THE COURT: Yeah. That is 10. I
10 apologize. This will be 11.
11 MR. JAY FERGUSON: Right. I have not ----
12 THE COURT: The PowerPoint will be
13 proffered as 10?
14 MR. JAY FERGUSON: It will be when I'm
15 finished with it.
16 THE COURT: I understand.
17 MR. JAY FERGUSON: There's another slide.
18 THE COURT: Yes, sir.
19 MR. JAY FERGUSON: So, this will be 11, if I
20 could remark that, Your Honor.
21 THE COURT: Yes, sir. Do you have the
22 original?
23 MR. JAY FERGUSON: You have the original, the
24 notebook.
25 THE COURT: My apologies. Yes, sir.

February 8, 2012

1 [Pause.]

2 THE COURT: Thank you, Mr. Colyer.

3 MR. COLYER: Yes, sir.

4 [Pause.]

5 THE COURT: And just out of curiosity,
6 the copy I have has a bunch of blank -- pink, blank areas.
7 That's filled in with information on the PowerPoint that's
8 going to be introduced?

9 MR. JAY FERGUSON: You keep -- you turn the
10 page and you see more information.

11 THE COURT: Okay.

12 MR. JAY FERGUSON: And this ----

13 THE COURT: This is the way it
14 proceeds?

15 MR. JAY FERGUSON: Yes.

16 THE COURT: I apologize.

17 MR. JAY FERGUSON: And the last page will be
18 the regression analysis that he did based upon this cross-
19 tabs.

20 THE COURT: Okay.

21 MR. JAY FERGUSON: But, I'm not there yet.

22 THE COURT: Yes, sir. Thank you, sir.

23 Q. Now, Doctor Katz, looking at page DA-119 ----

24 A. Yes.

25 Q. ---- tell us what this exhibit -- I guess it's

1 Exhibit 1 from your report -- what is that?

2 A. This is the result of the cross-tabulation for the
3 statewide, 25 percent sample for observations, of 1122
4 observations, that survived logistic regression analysis from
5 table 12 of Doctor O'Brien and Doctor Grosso's report.

6 Q. Okay. If you could ----

7 A. I need to say more.

8 Q. Oh. I'm sorry.

9 A. This controls for the four categories that we
10 discussed on the PowerPoint prior to lunch, employment
11 category, marital status category, education and the
12 descriptives' list; and, then, within each block, I've
13 identified the actual venire member that was so classified
14 into that cell or that box or that grouping.

15 Q. Are you finished?

16 A. Yes.

17 Q. Now, if you could, turn, please, to page 168; and,
18 I'd like to make sure that I understand what this shows.

19 [Pause.]

20 Q. If you would, look at observation 275 and 276,
21 please.

22 A. All right.

23 Q. Those are two venire members of the 1100-and-some
24 venire members; is that right?

25 A. Of the 1122, yes.

1 Q. So, this is an example of a cell where there are
2 two venire members who match precisely on those variables of
3 employment, marital status, education status and the exact
4 descriptive; is that correct?

5 A. Yes.

6 Q. And I think this is already in evidence, but I'm
7 going to ask you some questions that may be helpful. I'm
8 going to ask you about some questions about the descriptors.
9 Would it be helpful to have the coding appendix from the MSU
10 study?

11 A. Yes, it would.

12 MR. JAY FERGUSON: This is -- I can mark it
13 as an exhibit, Your Honor, but it's already in evidence.

14 THE COURT: Okay. Do you know what
15 the exhibit number is?

16 MR. PERRY: Your all's was 6.

17 THE COURT: 6?

18 MR. PERRY: I think it was 6, Your
19 Honor.

20 [Pause.]

21 MR. JAY FERGUSON: Yes. Exhibit 6.

22 THE COURT: You're showing him a copy
23 of what's previously been introduced as Defendant's Exhibit
24 6?

25 MR. JAY FERGUSON: Yes, Your Honor.

1 THE COURT: Yes, sir.

2 [Mr. Ferguson handed a document to the Court and to the
3 witness.]

4 THE COURT: Thank you, sir.

5 Q. So, what this cell tells us, with observations 275
6 and 276, is that they matched on everything, plus the
7 descriptive of 200, which means prior jury service; is that
8 correct?

9 A. Yes.

10 Q. All right. Now, if you look at observation 274 --
11 I'd like to compare observation 274 to 275.

12 A. All right.

13 Q. 275 indicates it's a black juror who was struck by
14 the State; is that correct?

15 A. Yes.

16 Q. 27 -- I'm sorry. That was 275. 274 is a non-black
17 juror who was accepted by the State; is that correct?

18 A. Yes.

19 Q. And juror 274 and 275 matched precisely on three of
20 the variables, employment, marital status and education,
21 correct?

22 A. Yes, they do.

23 Q. The difference comes with all these 81 descriptors
24 that come into play, correct?

25 A. A combination of descriptives.

1 Q. A combination. For example, this non-black juror
2 who was accepted by the State has code 1210; is that correct?

3 A. The first code -- out of a list of several.

4 Q. Yeah. We'll go through all of them.

5 A. All right.

6 Q. 1210 is the first one, correct?

7 A. Yes.

8 Q. So, that non-black juror expressed reservations on
9 imposing the death penalty because of a moral or ethical
10 belief; is that right?

11 A. Yes.

12 Q. Also, code 1111 -- excuse me -- 1112 is that that
13 -- the non-black juror in 274 had information -- learned
14 about the case through a social network; is that right?

15 A. Yes.

16 Q. And, code 1112 -- I'm sorry -- 1111 is obtained
17 information about the case through the media. 1112 is
18 obtained information through a social network, correct?

19 A. Yes.

20 Q. Also, these other two codes, 752, which means the
21 age of the victim, would affect the juror's decision in the
22 case ----

23 A. Yes.

24 Q. ---- that the State found that acceptable -- well

25 ----

1 A. I think I'm familiar with this venire member.

2 Q. Okay. The -- with these codes?

3 A. No. It's O'Hara. Is this the John Burr?

4 Q. I -- I don't -- this doesn't -- I don't know what
5 code 54 is.

6 A. Well, this is one that I believe Sean Boone did.

7 Q. Okay.

8 A. And he gave me a write-up about this particular
9 venire member.

10 Q. Okay. Well, we'll get to that, but let's talk
11 about your analysis?

12 A. Okay. Well -- yes.

13 Q. The way this cross-tab is setup is that it does not
14 -- it doesn't compare observation 275 with 274, does it?

15 A. No, it doesn't.

16 Q. So that, when you slice all the data down, they
17 just got put in separate cells?

18 A. Yes.

19 Q. And, likewise, if you look at 275 and compare it to
20 277, same thing. The only difference in this cross-tab
21 analysis between 275 and 277 is the descriptive. The
22 African-American juror in 275 had prior jury service, and the
23 juror in 277 had a -- either herself, a family member or a
24 friend who was the victim of a crime? That's the only thing
25 that's different?

1 A. On those four variable, yes.

2 Q. And, so, those -- your analysis doesn't compare
3 observation 275 with 277?

4 A. Right. They had classified in different groups.

5 Q. Code 200 is what's distinguishing observation 275
6 from these other jurors. Is that a fair statement?

7 [Pause.]

8 Q. Well, let me withdraw that. Let me show you a
9 better example that'll make it an easier question. Look at
10 page, if you would, DA-170.

11 A. Okay.

12 Q. Do you see -- let me see. There's observation 275
13 from the prior sheet. The only thing different between this
14 cell here [pointing] and this cell here [pointing] is this
15 has descriptive list 8888. Do you know what that means? Do
16 you recall what that means?

17 A. No descriptive values.

18 Q. So, they have no descriptive values for any of
19 these jurors; and, the only descriptive is the prior jury
20 service by the juror in observation 275, correct?

21 A. Yes.

22 Q. So, the only thing that distinguishes that cell in
23 275 and 276 with the cell down at the bottom of the page is
24 her prior jury service?

25 A. Just based upon those four control variables.

1 Q. Right. Based upon ----

2 A. It doesn't ----

3 Q. ---- doing cross-tab analysis.

4 A. But it doesn't look at other variables that haven't
5 been included in the cross-tab analysis.

6 Q. I understand that there are ----

7 A. All right.

8 Q. ---- other variables, but you controlled for four,
9 employment, marital status, education and all these
10 descriptives?

11 A. Right, but I could have controlled for five or six
12 or seven.

13 Q. Right.

14 A. And that could further subdivide these venire
15 members.

16 Q. In -- in this [indiscernible], in 291 for example,
17 Kimberly Adcox -- do you see that one, 291?

18 A. Yes.

19 Q. She's of similar -- she's non-black; is that right?

20 A. Yes.

21 Q. She's of similar age, 46 as compared to 34 -- close
22 in age. They both have children. They both are involved in
23 a religious organization. Neither of them have military
24 service; and, both of them, their spouse has the same
25 employment. Do you see that in 291 as compared to 275?

1 A. The ages are different.

2 Q. Well, 34 to 46; is that right?

3 A. And they do have the same spouse employment values,
4 yes.

5 Q. And they both have children?

6 A. And they both have children.

7 Q. And they both have religious affiliations?

8 A. Yes.

9 Q. Neither of them have military service?

10 A. That's correct.

11 Q. And the only factor that's different is an age of
12 12 -- 12 years in age difference and ----

13 A. And a 200.

14 Q. And -- and the 200 code?

15 A. Yeah.

16 Q. And we talked, before lunch, about extraneous
17 variables and explanatory variables. Can you tell the Court
18 whether -- how many prosecutor reviewers have you seen so far
19 now? I think it's 40 percent. Do you remember the number
20 [indiscernible]?

21 A. The 246 was about 40 percent, but it's now up to
22 about 318, I think, about 50 percent.

23 Q. Of the 318 you've seen, how many of those jurors --
24 how many race-neutral reasons provided by the prosecutors
25 explained that they struck a juror because of prior jury

1 service alone?

2 A. I don't think I've seen that -- well, there were
3 prior jury service where there was a hung jury, but that's
4 not part of this 200 code.

5 Q. Right. That's a different code.

6 A. Right.

7 Q. So, based just on prior jury service, is it fair to
8 say that not a single prosecutor has said they struck a juror
9 because they'd served on juries before?

10 A. I can't be definitive about that, but I don't
11 recollect that that was something that I saw in -- in the
12 reviewed.

13 Q. And my point here is -- I want to make sure I'm
14 clear. This distinguishing factor, the code 200, prior jury
15 service, prevents your analysis from comparing observation
16 275 with all these other jurors in this cell at the bottom,
17 on DA-170? That's the only distinguishing feature based upon
18 your cross-tabs?

19 A. It's based on a cross-tab for all the cells, yes.

20 Q. Right.

21 A. For the specific one you picked out, the only
22 difference I see is in terms of the age.

23 Q. Would you -- in your opinion, is serving on a jury
24 previously, since no -- since you're not aware of any
25 prosecutor having given that as an explanatory reason for

1 striking a juror, would you say that's an extraneous variable
2 or an explanatory variable?

3 A. In my opinion, based upon the reviews, all these
4 variables are pretty much extraneous, not -- I won't say all
5 of them, but a lot of them. I wouldn't use employment the
6 way it's defined. I wouldn't use marital status the way it's
7 defined; and, that's something that I've concluded based upon
8 the reviews. So, I agree with you that distinguishing them
9 based upon the 200 code doesn't make sense, but I would have
10 questions about all these control variables and to the extent
11 that they make sense in terms of whether a prosecutor would
12 strike a venire member.

13 Q. And, by using these extraneous variables, that's
14 how you get to these 90,000-plus cells, correct?

15 A. These extraneous variables are variables defined by
16 Doctor O'Brien in her study; and, as you've pointed out, my
17 conclusion is that these variables are representative and
18 credible to explain why prosecutors strike venire members.

19 Q. Did you say are or are not? I didn't hear.

20 A. Are not.

21 Q. And you came to that conclusion of November 9th.
22 We've already establish that?

23 A. Yes.

24 Q. Based upon your review ----

25 A. 150 reviews and three reviews about the study that

1 I received from the reviewers, yes, plus additional
2 discussions with prosecutors throughout the State, including
3 Mr. Colyer and Mr. Thompson.

4 Q. You do have notes of your conversations with Mr.
5 Thompson, don't you? You've provided that to us?

6 A. Yeah. That was early on. I decided early on that,
7 since I don't take very good notes, that the best way to get
8 the correct information from prosecutors through this process
9 is just to ask them directly to provide me information; and,
10 I did that as part of the instructions; and, part two, to
11 review the -- the MSU study; and, that way, I would have --
12 my notes would -- are not generally very good.

13 Q. Is that why you decided not to take any notes of
14 your phone conversations with the prosecutors?

15 A. Yes; that and I didn't want to write something down
16 that I would have to turn over through discovery that would
17 be misleading, that I would then have to, you know, try to
18 explain or cause a problem for the prosecutors.

19 Q. You purposefully did not take notes so you wouldn't
20 have to turn it over in discovery?

21 A. I purposely didn't take notes because I didn't -- I
22 don't take good notes, and that would be something that would
23 cause potential problems in terms of my mis --
24 misrepresenting things. I wanted the prosecutors to
25 basically write down their reviews, write down their reports,

1 so I could study it and I could learn from it and not try and
2 rely on notes where I misrepresent things.

3 Q. If I could ask you to turn to DA-246, observation
4 number 700; and, I'm not sure if you recall Sean Richmond was
5 a name that we heard in the courtroom today as a juror that
6 the State talked about during their testimony with Judge
7 Gore?

8 A. Yes.

9 Q. And this is -- a page of your report indicates Mr.
10 -- observation 700's employment status, marital status and
11 education; is that right?

12 [Pause.]

13 A. I'm sorry. Employment status, 60?

14 Q. It's employment code 60, marital status ----

15 A. Marital status, 1; education, 4, descriptive list
16 310, yes.

17 Q. Right; and, the only difference between observation
18 700 and observation 699, for your cross-tab analysis, are the
19 descriptives, correct?

20 A. Yes.

21 Q. And Mr. -- let's see. The Cumberland County juror
22 700 had descriptive 310, which means the juror was a victim
23 of a crime; is that correct?

24 A. Yes.

25 Q. As opposed to jur -- observation 699, that juror

1 had served on jury duty, 200, correct?

2 A. Yes.

3 Q. And that non-black juror had a hardship, had
4 difficulty communicating or understanding; is that right?

5 THE COURT: I'm sorry. That's the
6 reference to 140 being the descriptor?

7 MR. JAY FERGUSON: Observations 699;
8 descriptive list, 140.

9 THE COURT: Yes, sir.

10 Q. Is that correct?

11 A. Yes, yup.

12 Q. Do you recall, by chance, during the voir dire
13 testimony -- during the testimony of Doc -- of Judge Gore,
14 what the excuse was the State gave for striking Sean
15 Richmond?

16 THE COURT: And that would be ----

17 MR. JAY FERGUSON: I'm sorry. Observation
18 700.

19 THE COURT: Okay.

20 A. I wasn't here during the testimony of Judge Gore.

21 Q. I'm sorry. You weren't.

22 A. Yeah.

23 Q. I apologize. I thought you were. You've got in
24 your report the -- the excuses that the ----

25 A. Yes.

1 Q. ---- jurors gave. Can you ----

2 A. I can flip to that.

3 Q. ---- flip to that?

4 [Pause.]

5 A. Page DA-33?

6 [Pause.]

7 A. Or, maybe you want to go to table 18?

8 Q. Table 18, DA-33?

9 A. Well, I ----

10 Q. Could I look ----

11 A. Let's go to table 18. That's probably the -- let
12 me find it.

13 [Pause.]

14 Q. I believe, sir, it's on page -- 168 is the
15 affidavit, or we can look at -- even though I'm -- hold on
16 one second. It's on page DA-73.

17 A. Yes. I've got that.

18 [Pause.]

19 Q. And you have an affidavit from Charles Scott; is
20 that correct?

21 A. Yes.

22 Q. And the explanation given for Mr. Richmond was that
23 he did not feel like he had been a victim even though his car
24 had been broken into at Fort Bragg and a CD player stolen?

25 A. Yes.

1 Q. That's the only thing that distinguishes Mr.
2 Richmond from the other similarly situated jurors with the
3 same employment, marital status and education status, isn't
4 it?

5 [Pause.]

6 Q. Is that correct?

7 A. I don't understand your question.

8 Q. Okay. Well, let's look at the next observation
9 down, on the next page, observation 701.

10 A. All right.

11 Q. There, we have -- in observation 700, Mr. Richmond,
12 who is black; observation 701, Mr. Lewis, who is not black,
13 similar age. They both have the same employment status; both
14 have the same marital status; both have the same educational
15 status; is that correct?

16 A. Yes.

17 Q. Both -- in Mr. Richmond's case, he had been a
18 victim of a crime, the CD we talked about, CD player; and 7
19 ----

20 A. Yes.

21 Q. ---- 701, Mr. Lewis, a family member or close
22 friend had been a victim of a crime based on code 320; is
23 that correct?

24 A. Yes.

25 Q. And, there again, we see that 200, that he had

1 served on a jury before?

2 A. Yes.

3 Q. There, again, the only thing that -- that because
4 you have sliced the data into these two separate cells, your
5 analysis doesn't compare these two jurors, does it?

6 A. 'Cause they're not similarly situated with respect
7 to the four control variables.

8 Q. And because -- and, by your assumption in this case
9 -- is that, if you get in -- if a juror finds himself in a
10 single cell, that that per se, is a race-neutral explanation?

11 A. That -- that can be an explanation for why that
12 venire member was struck or not struck; but, again, I don't
13 believe that that's necessarily the race-neutral explanation
14 or the explanation.

15 Q. Okay. Now, if we could go back to the PowerPoint
16 we were looking at, we see how we got the division of the
17 cells and the data split into all the cells. Then, you did a
18 logistics regression analysis; is that correct?

19 A. Yes.

20 Q. And, here, again, I'm going to -- I think I
21 understand what you did, but please correct me if I'm wrong.

22 A. I will.

23 Q. I'm sure you will.

24 [General laughter.]

25 Q. You recoded -- there's 1122 jurors. You recoded

February 8, 2012

1 the jurors. All the jurors who were either in single cells
2 or cells where there was no disparity -- you re -- and whom
3 were struck -- you recoded all those venire members as struck
4 jurors, correct?

5 A. No.

6 Q. Okay. Tell me.

7 A. I looked at a subgroup after controlling for the
8 four control variables; and, if everyone in that subgroup was
9 struck by the State, then each one in that subgroup would be
10 given the strike group equal to one. They don't necessarily
11 have to be of the same race. They just all have to be struck
12 by the State.

13 Q. So, if there was a cell with two jurors in it,
14 regardless of race, one was struck and one was not struck
15 ----

16 A. It would not have been ----

17 Q. That would be one of the 38 -- two of the 38?

18 A. Thirty-eight is probably not the correct number.
19 That would go into a group where strike group would be zero
20 and passed group would be zero for those venire members. I'm
21 not sure where you got the 38 value from.

22 Q. If you could -- in your report ----

23 [Pause.]

24 Q. If you could turn, sir, to DA-28.

25 A. All right.

1 Q. That first full paragraph beginning with after
2 simultaneously, do you see that?

3 A. Yes.

4 Q. You control for employment, marital status,
5 education, descriptives?

6 A. Yes.

7 Q. 1084 to 1122 were classified in three unique
8 subgroups; is that correct?

9 A. Yes.

10 Q. Unique subgroup meaning either single cell or all
11 non-struck or struck?

12 A. The 1084 are venire members who, after being
13 controlled for the four control variables, the subgroup is
14 such that the race for the venire members in that subgroup
15 are all the same. So, there is no disparity by race
16 possible.

17 Q. Okay; and, then, at the end of that paragraph, it
18 says the -- the remaining 38 venire members ----

19 A. Yes.

20 Q. ---- after that, correct?

21 A. Yes.

22 Q. And, then, you recoded. I'm not sure where ----

23 A. I -- I'm not sure you understand my coding on
24 strike group and pass group.

25 Q. Which ones were struck? Which ones were coded

1 strike group?

2 A. Probably the easiest way to do this is to go to
3 Exhibit 1 and look at some of these subgroups, and I'll tell
4 you which ones -- when it's a strike group and which ones
5 when it's a pass group and ----

6 Q. To table -- I'm sorry. Table 1 or ----

7 A. Exhibit 1. That's that 200-and-something page ----

8 Q. I've got 'cha.

9 A. ---- exhibit.

10 THE COURT: And that begins on what
11 page, Doctor Katz?

12 THE WITNESS: DA-284.

13 THE COURT: Okay. Thank you, sir.

14 [Pause.]

15 THE WITNESS: I'm sorry. No. I ----

16 MR. JAY FERGUSON: It starts on 119.

17 THE WITNESS: 119.

18 THE COURT: Okay.

19 THE WITNESS: I apologize.

20 THE COURT: That's okay.

21 [Pause.]

22 A. Okay. Starting on DA-119, the first group,
23 observation 1, every venire member in this group was passed,
24 so that would be a pass group.

25 Q. That would be the middle category here, correct?

February 8, 2012

1 A. Yes.

2 Q. Pass group ----

3 A. Yes.

4 Q. ---- would be coded 1 ----

5 A. Yes.

6 Q. ---- because they're passed? Okay.

7 A. And the variable that would be associated with this
8 would be the interaction variable with -- for the employment
9 equal to 10; marital equal to 1; education equal to 3; and
10 descriptive list equal to 1030, 932 and 620.

11 Q. Okay.

12 A. So, that would mean -- and there's only one. So,
13 that's -- that's how it gets categorized. Ultimately, this
14 strike group and pass group will be composite variables. The
15 next observation, there's only one venire member; and, that
16 has strike state equal to one, so that would go into the
17 strike group.

18 Q. The one on the left?

19 A. The one on the left, yes.

20 Q. Okay.

21 A. Okay. Now, let's find a -- a subgroup where
22 there's more than one.

23 Q. How about observation 17, on page 122?

24 A. Okay. Here -- in observation 17 and 18?

25 Q. Yes.

1 A. Strike state for both of them are zero, so each one
2 would be pass group equal to one.

3 Q. So, those two would go in the middle set -- middle
4 column?

5 A. That would go in the middle column, yes.

6 Q. Now, I guess we need, finally -- the disparity for
7 strike and pass and in a cell; is that right?

8 A. A cell where they can all be the same race, but
9 some of them are strike state equal to one. Others are
10 strike state equal to zero.

11 Q. How about trying 1 -- page 131, observations 63
12 through 74?

13 A. Okay. Yes. They all have the same control
14 variables. In one case, the venire member was struck. The
15 other cases, the venire member wasn't struck. So, this is
16 neither strike group or pass group. It would be zero, zero.

17 Q. So, these, whatever, 10 or 11 -- I guess 11
18 observations would go where in your logistic regression?

19 A. The third group.

20 Q. Okay.

21 A. And you can see you already have a large number of
22 observations.

23 Q. Okay.

24 A. So, ultimately, we're probably going to do more
25 than the 38.

1 Q. Okay. So, can -- can you just explain to me where
2 the number 38 comes from on page 28?

3 A. Okay. Thirty-eight comes from table 15.

4 Q. Okay. Got that. That's DA-53.

5 THE COURT: Okay.

6 A. These are subgroups where each subgroup has both
7 black venire members and non-black venire members, and that's
8 the 38. So, there's a mix of races within each subgroup.

9 Q. Okay. Let me just scroll down here. This might
10 help me figure this out. When you did your logistic
11 regression analysis, tell us what the dependent variable was.

12 A. The dependent variable was strike state, zero or
13 one.

14 Q. To determine whether the State struck this juror or
15 not, correct?

16 A. Yes.

17 Q. That's what you were trying to predict, correct?

18 A. Yes.

19 Q. Okay. Tell me what the independent or explanatory
20 variables were for your analysis?

21 A. They were strike group and pass group.

22 Q. And one more, right?

23 A. No.

24 Q. You just -- so, you did ----

25 A. Oh, well, maybe ----

1 Q. ---- just ----

2 A. ---- and black.

3 Q. Right.

4 A. The race, yeah.

5 Q. Yeah.

6 A. I'm sorry. Yeah.

7 Q. So, you -- the independent variables that you're
8 using to try -- to try to predict the dependent variable are
9 strike group, pass group and black, correct?

10 A. Yes.

11 Q. One hundred percent of the venire members in strike
12 group had been struck, correct?

13 A. Yes.

14 Q. One hundred percent of the venire members in the
15 pass group had been struck, correct?

16 A. Passed.

17 Q. Excuse me. Had been passed?

18 A. Yes. The variable is a composite of the
19 interaction of the four controlled variables for each of the
20 subgroups.

21 Q. Wouldn't you expect, if you have a variable where
22 100 percent of the jurors were struck and you're trying to
23 predict whether the juror struck -- that there would be a
24 correlation there?

25 A. And there was.

1 Q. Almost a hundred percent, almost.

2 A. Well, not -- not quite, but it's -- the idea was
3 simply to show how, from the cross-tabulation, you can define
4 these composite interaction variables that would control for
5 things.

6 Q. You've not -- and there's some qualifications in
7 your report, and I want to be clear. You're not saying that
8 this cross-tabulation analysis is a predictor of which jurors
9 are struck or not struck, are you?

10 A. I'm not because I don't believe that the variables
11 that have been defined are sufficiently distinguishing
12 between the reasons why a prosecutor would strike a venire
13 member or not strike a venire member. So, the only way this
14 cross-tabulation analysis would have any validity is if there
15 was an acceptance of the data that the defendant -- that
16 Doctor O'Brien had produced. If -- if it's found that the
17 data is credible, then these cross-tabulations are possible
18 devices to control for factors to produce explanations.

19 Q. There's also something known as a cart analysis.
20 Are you familiar with that?

21 A. No.

22 Q. Classification and regression tables?

23 A. No.

24 [Pause.]

25 Q. Classification and regression trees. Excuse me.

1 A. Is this recursive partitioning?

2 Q. Say that again, please.

3 A. Recursive partitioning, where you're ----=

4 Q. I'm aware of that term.

5 A. Okay.

6 Q. You -- you're not familiar with the cart analysis,
7 data mining?

8 A. I'm not familiar with that, no.

9 Q. A binary tree?

10 A. I'm familiar with binary trees, yes.

11 Q. Would you agree that, if -- if this Court, as the
12 finder of facts in this case, determines that factors such as
13 code 200, being on prior jury service, is not an explanatory
14 variable, would you agree that your assumption that being in
15 a single cell renders that juror to be a reason that would --
16 a reason for that juror being struck is race-neutral, that
17 would render your assumption invalid, wouldn't it?

18 A. I don't propose this as the explanation for why
19 venire members are struck at all. It's simply an analysis
20 that shows how, if we control for the factors that were
21 defined by Doctor O'Brien and -- and used prevalently in her
22 analyses in her logistic regression models -- if we use that,
23 we do have the potential for categorizing venire members into
24 virtually unique categories. Doctor O'Brien talked about
25 having, in her control book -- I think there's over a hundred

1 variables. I'm simply saying all those variables are
2 considered to be possible explanatory variables, and there's
3 lots of possible explanations; but, I don't know that any of
4 the cross-tabular explanations that I have are the
5 explanation; and, that's what I stated in the report.

6 Q. Okay.

7 MR. JAY FERGUSON: May I have just one
8 moment, Your Honor?

9 THE COURT: Yes, sir.

10 [Pause.]

11 MR. JAY FERGUSON: That's all the questions
12 that I have of this witness. Thank you, Your Honor.

13 THE COURT: Folks, do you have any
14 questions on voir dire, Mr. Perry?

15 MR. PERRY: Just briefly, Your Honor.

16 THE COURT: Yes, sir.

17 MR. PERRY: If I may have a moment,
18 Your Honor?

19 THE COURT: Yes, sir.

20 [Pause.]

21 THE COURT: If you need a few moments,
22 let me know, sir.

23 MR. PERRY: Could I have a few
24 moments, Judge?

25 THE COURT: Yes, sir.

1 MR. PERRY: That might speed things
2 up.

3 THE COURT: Okay. Absolutely.
4 Doctor Katz, please step down.
5 Fifteen?

6 MR. PERRY: That'd be more than
7 enough, Judge. I could probably ----

8 THE COURT: Ten?

9 MR. PERRY: ---- do it in five.

10 THE COURT: All right. We'll be at
11 ease for about 5 minutes.

12 You may step down, Doctor Katz.

13 [The witness withdrew to counsel table.]

14 [The hearing recessed at 3:12 p.m. and reconvened at 3:15
15 p.m., February 8, 2012, with all pertinent parties present
16 prior to the recess once again present, to include the
17 defendant.]

18 MR. JAY FERGUSON: ---- his examination, I
19 would like to move for admission of the Defendant's Voir Dire
20 Exhibits 9 [sic] and 10 [sic] for voir dire purposes only.

21 THE COURT: Okay.

22 Mr. Colyer, Mr. Thompson, 9 and 10 have not
23 been introduced for voir dire purposes.

24 MR. COLYER: But I thought 9 had been.
25 10 and 11 ----

February 8, 2012

1 MR. JAY FERGUSON: I'm sorry. 10 and ----

2 THE COURT: 10 and 11.

3 MR. JAY FERGUSON: 10 and 11.

4 THE COURT: 10 and 11, yes, sir.

5 MR. JAY FERGUSON: Thank you.

6 MR. COLYER: No objection.

7 THE COURT: Thank you, sir.

8 All right. Without objection, Voir Dire

9 Exhibits 10 and 11 -- Defendant's Voir Dire Exhibits 10 and
10 11 are admitted.

11 Mr. Perry, we're ready whenever you are.

12 MR. PERRY: Yes, sir. I'm ready.

13 THE COURT: Take your time.

14 MR. PERRY: Thank you, Your Honor.

15 THE COURT: Okay. Yes, sir.

16 **VOIR DIRE EXAMINATION was conducted by MR. JONATHAN PERRY:**

17 Q. Let's see. Doctor Katz, if I could, let me -- let
18 me just ask you sort of a specific question first. Have you
19 got a copy of the Voir Dire Exhibit Number 3 handy.

20 A. Yes.

21 Q. Okay. I just want to ask you a question to clarify
22 something. Earlier, Mr. Ferguson had put up on the screen or
23 mentioned this -- this highlighted portion that's on the --
24 it's what's numbered as page 3, the instructions for Cal
25 Colyer.

February 8, 2012

1 A. On page 2?

2 Q. Yeah. I've got 3 on mine, but ----

3 MR. COLYER: That's -- that's this
4 information.

5 MR. PERRY: Oh, okay.

6 Q. That's right page 2.

7 A. Yes.

8 Q. The second highlighted paragraph, was there -- and,
9 again, I think you testified earlier that there was some
10 back-and-forth between yourself and Mr. Thompson and Mr.
11 Colyer as far as the format of these instructions that were
12 sent out to the Assistant DA's and the DA's?

13 A. Yes.

14 Q. Just to clarify, subsequent to this suggestion that
15 they made about putting this language in, was there a reason
16 that it either stayed or didn't stay when you sent out the
17 actual instructions?

18 A. After I received this, I went to my roster which
19 has a list of each of the -- each of the trials and the
20 reviewers that I had lined up for that trial to review; and,
21 I then went to another document that I had that identified
22 whether those reviewers were the prosecutors in the case, in
23 the trial; and, what I discovered was that I'd be losing a
24 lot of reviewers if I went to this standard; and, from what
25 is indicated here, the purpose seems to be to save state

1 resources.

2 Q. Mmm-hmm [nodding head in the affirmative].

3 A. I was more concerned that we would not be able to
4 get sufficient or all the reviews that I was attempting to
5 get and that, if it turned out that a -- an actual prosecutor
6 was going to become available to do the review, that,
7 somehow, we would have -- have misused some of the State
8 resources. I didn't -- I thought the -- that wasn't a
9 sufficient reason to keep the reviewers that I had.

10 Q. Let me ask you to clarify that by asking you a few
11 questions. Was there an original sort of best-case scenarios
12 you had in mind? In other words, what were you shooting for
13 when you were sending out these?

14 A. I was asking the DA'S to provide the best person to
15 do the review and was al -- and the person who's also
16 available.

17 Q. Okay.

18 A. And I -- I didn't set any limit on that. I wanted
19 the DA to provide that information, and I didn't have a
20 constraint about who that person was. I want the actual
21 prosecutor who did the -- the striking at the trial; and, if
22 I -- if that wasn't a person who was available, then I would
23 let the DA decide, you know, who -- who the best person would
24 be.

25 Q. Okay; and, I just want to make sure I understand

1 correctly. So, the -- sort of the first best result would be
2 the actual prosecutor in the case to do the review?

3 A. Yes.

4 Q. Okay; and, after you had started, you realized that
5 a significant number of those folks were no longer available
6 in the DA's offices to do those reviews?

7 A. I pretty much knew that starting off, after the
8 discovery hearing in September, that that may be a problem,
9 getting the actual prosecutors who did the strikes.

10 Q. Okay; and, I just wanted to make sure I understand.
11 When you mentioned it would be a misuse of state resources,
12 can you -- can you just tell us exactly what you were
13 thinking -- or what you meant by saying that, that it would
14 be a misuse of resources?

15 A. Well, that's what's indicated in the -- this yellow
16 highlighted paragraph, that in an effort to better utilize
17 the limited resources of the state -- and, to me, I felt
18 that, if that would cause me not to be able to get reviews
19 for all the venire members and have -- and not be able to
20 come to court with a full set of reviews, that it was worth
21 the cost of possibly some duplication efforts, if that's what
22 occurred.

23 Q. Okay. Now, at that point, I think Mr. Ferguson
24 asked you this; but, you had already been in touch with some
25 of the ADAs who had been designated?

1 A. Yes. So, I already had reviewers who, some of
2 them, I knew were working on providing their reviews, who
3 weren't the actual prosecutors.

4 Q. Okay. Do you recall just roughly what the
5 proportion was of people who were not here originally ----

6 A. No, I don't.

7 Q. ---- the prosecutors and the people who were doing
8 the reviews?

9 A. No, I don't.

10 Q. Okay. I don't want to be too precise, but is it a
11 lot?

12 A. Whatever I give you would be a rough estimate.
13 We'd probably lose, maybe, half the reviewers.

14 Q. Okay.

15 A. But that's a very rough kind of number, but -- but
16 it was substantial. It wasn't like we're going to lose out
17 on 5 percent or 2 percent. It was going to be a good number.

18 Q. Okay; and, I know we've got the instructions, and
19 that's what I've been referring to here for the last couple
20 of questions; but, aside from the instructions that the
21 prosecutors got, what was your purpose in sending out these
22 reviews?

23 A. My purpose was simply to provide the information to
24 the reviewers in a format that they could easily identify the
25 venire members and the case numbers because I had access to

1 the databases, and I was able to do the programming to send
2 out the spreadsheets. So ----

3 Q. Now, when you say databases, you're referring to
4 the Michigan State study?

5 A. The Michigan State study databases. So, I was able
6 to run programs that would create the spreadsheets and other
7 materials that I would then e-mail to the reviewers; and, I
8 was probably the best person to -- to do that part of this --
9 of this data collection effort.

10 Q. Why is that the case?

11 A. Because I ----

12 Q. Why was that the case -- I mean?

13 A. Because I have the program and capability to very
14 quickly generate the spreadsheets that would go to each of
15 the reviewers individually.

16 Q. Okay; and, let me ask you, on the -- on the line of
17 questions about resources, who was working on this in terms
18 of sort of the collection of all these affidavits and things
19 like that that were coming in?

20 A. It -- it turned out to be me for the most part. I
21 had requested support of some kind. In fact, I want -- I
22 didn't really want to collect the affidavits. I wanted to
23 get the spreadsheets that I could then use to build the
24 database, but I didn't want the affidavits per se. I wanted
25 them to go to the Cumberland County DA -- DA's Office for

1 them to manage it.

2 Q. And can -- can you explain exactly why you would
3 rather have had the Cumberland County DA's Office handle that
4 as opposed to you?

5 A. Because I -- I see this as an effort where the
6 affidavits represent the evidence that the Cumberland -- that
7 the State would be using to provide the race-neutral
8 explanations for the 636 venire members that were struck --
9 black venire members struck.

10 Q. Okay.

11 A. And that's not part of -- of what I wanted to do in
12 terms of this data collection. My ultimate contribution
13 would be to look at the data and see if I can identify any
14 trends or factors that would help generally explain why we
15 have a disparity in strike rates, but -- so, that was -- that
16 was -- that was really my purpose. Another purpose would be
17 to do a test of the accuracy of the Michigan State University
18 study versus the information that was provided in these
19 affidavits.

20 Q. And when you say focus, you mean your sort of
21 overall purpose on how to approach this?

22 A. Just in terms of the overall use that would be made
23 of this information. I had ideas of doing some testing
24 because -- to test the validity of the Michigan State
25 University data, I need some base to compare it to; and, I

1 felt that, by collecting this information from experts,
2 prosecutors, that that would give me a basis of comparison to
3 the DCIs that were produced by the defendant in their study.

4 Q. And I want to make sure that I'm understanding.
5 So, the point of the reviews that were submitted was to
6 provide a basis of comparison?

7 A. The point of the reviews that were submitted was to
8 provide the 636 race-neutral explanations which -- in
9 affidavit format -- so that the State, under this methodology
10 of -- Batson-like methodology applied to the 173 trials would
11 have the ability to show some explanation of the disparity.

12 Q. Was there a particular reason that the format was
13 an affidavit to be submitted?

14 A. It's an affidavit because I want the answers to be
15 -- the reviews and the -- and the reasons to be as accurate
16 as possible, but as truthful as possible. I want the
17 prosecutors to stand behind what -- what they're testifying
18 to as to the reason; and, I also wanted to do this in a way
19 where the reasons aren't going to change from hearing to
20 hearing, where we -- we do the best job we can and identify
21 the race-neutral reason and that's it. It doesn't -- and so
22 the courts have basically the best information we can produce
23 to decide on whether it does truly provide an explanation for
24 the disparity in strike rates.

25 Q. Okay; and, I think you mentioned Batson, I think,
February 8, 2012

1 twice as we've been talking. Did you look at the Batson
2 procedure or the Batson process as a way to sort of go about
3 thinking about how to handle this.

4 A. Yes. I -- that's the methodology that made sense
5 to me; in that, in a Batson trial, by the prosecutor
6 explaining the race-neutral reasons for striking each of the
7 black venire members, that -- that he's required to explain
8 -- if that's accepted, then that explains the disparity, the
9 disproportionality, the disparate pattern; and, I'm simply
10 trying to take that methodology and apply it to a large body
11 of trials; understanding, of course, that, in a Batson
12 context, the trial is occurring in real-time and everyone's
13 information about the venire members is fresh, and they're
14 dealing with more or less complete information about the
15 process; whereas, here, we don't have complete information on
16 trials that occurred many, many years ago. We have the
17 transcripts. We have jury questionnaires. We have notes.
18 We may have the prosecutor who did the strike remember
19 things; but, it's -- it's going to be a little more
20 difficult; and, I would think the courts would have some
21 allowance for that; but, I believe that, to really apply this
22 methodology, we need to review every -- every black venire
23 member who was struck.

24 Q. Okay; and, I wanted to ask you about that. In
25 terms of -- of what you did, did you review any of the -- any

1 of the primary source material that the defense used for
2 their compilation of data, their DCIs; or, was that something
3 that was strictly done by the prosecutors? In other words,
4 did you read any of the transcripts?

5 A. I did read some of the transcripts because I was
6 getting data very slowly, and I needed to make decisions
7 about how accurate their data was; and, I needed to
8 understand more about the process that prosecutors go through
9 in deciding whether -- or, why to strike a venire member;
10 and, the hearing date was fast approaching, and I wasn't
11 getting the data quickly enough. So, part of what I did was
12 started reading the trial transcripts to try and learn more
13 about the process and -- so, that was something that -- that
14 I ended up doing.

15 Q. Okay. As part of that -- I mean, at that point,
16 you'd already read through the defense study?

17 A. Yes.

18 Q. Okay. Now, as a follow-up on that -- I think Mr.
19 Ferguson was asking you about your conversations with the
20 prosecutors and taking notes and things like that; and, you
21 said that you didn't take note purposely; but, I want to
22 clarify something. You said you didn't want to mislead
23 folks. Can you -- can you tell -- tell me exactly what you
24 meant by that?

25 A. I don't take very good notes; and, so, even if I

1 did take notes, I wouldn't rely on them. What made more
2 sense to me was relying on e-mails, reports, reviews, other
3 things that I can keep and have as a document and read and
4 think about. Otherwise, I'd be relying on information that
5 just may not be reliable; and, I may be creating information
6 that's misleading, because my note taking is not that good.

7 Q. Okay. Now, is that something you did from the
8 start -- or, didn't do from the start -- I guess I should
9 say.

10 A. I did do that from the start; but, then I looked at
11 the notes that I took when I talked to Mr. Thomson and Mr.
12 Colyer over the phone, and I could see that I wasn't really
13 doing a good job; and, once -- once discovering that, I
14 really thought about, you know, is it -- is there really any
15 value to taking these -- these notes in terms of the
16 confusion it can create at some point. So, I didn't see it
17 as helpful to me, so I -- I didn't do it.

18 Q. And I want to ask you -- going beyond the
19 collection of the affidavits, I'd asked you if you had
20 reviewed the defense study; and, you indicated, at that
21 point, you had looked through their study; and, I wanted to
22 clarify -- or, ask you to clarify something you said earlier
23 when Mr. Ferguson was asking you questions about the strike
24 -- the strike groups, where you made the categories; and, he
25 was asking you about how those groups were created or what

1 constituted those groups; and, you said that the -- in your
2 opinion, the variables were not predictive because they can't
3 distinguish. Can you explain exactly what you meant by that?

4 A. That's the variables in Doctor O'Brien's study.

5 Q. So, not your -- not the variables in the strike and
6 the pass group designations ----

7 A. Well, those variables are defined from Doctor
8 O'Brien's study because they -- they come from the cross-
9 tabulations; but, it was more a general comment about -- from
10 the feedback I received from the prosecutors, I -- I believe
11 I have some understanding -- although I'm not an expert in
12 this -- of some of the basic underlying reasons that
13 prosecutors look to strike venire members; and, I don't --
14 and I see that the variables that Doctor O'Brien defined seem
15 to be very broad to where they don't distinguish venire
16 characteristics that would tend to be a bias against the
17 State or a bias against the defense.

18 Q. And, now, in plain English, can you tell me what
19 you mean by that? In other words, if you're try -- can you
20 give us an example of what you mean by the inability to
21 distinguish?

22 A. For example, if -- one of the variables that's
23 defined by Doctor O'Brien is that the juror knew a witness.
24 Well, from my reading of the transcripts, I noted that,
25 whenever a juror would indicate that they knew a witness,

1 that wasn't the end of the inquiry. There would be a time
2 when that juror would be questioned about what that
3 relationship was with the witness, so that the prosecutor and
4 the defense attorney can try and gauge whether there's bias
5 against their side; and, that wasn't something that was done
6 in Doctor O'Brien's definition of these variables.

7 Q. Okay; and, I wanted to ask you, just to follow-up
8 on that, about the second part of what Mr. Ferguson was
9 asking you about, just the application of the cross-tab
10 analysis. Why did you use that method as a way to look at
11 the variables and the data that Professor O'Brien put
12 together?

13 A. I did that because it allows one to create
14 subgroups that are similarly situated. They have all the
15 same values for your control factors; and, one of the things
16 that it shows is that, if you have a process where there are
17 a lot of different possible control factors -- well, we're
18 not talking about -- an employment discrimination case with
19 three or four variables. We're talking about limitless
20 variables potentially. Then, the cross-tabulation is --
21 shows how, as you start controlling for things, the number of
22 possible subgroups that -- that result are virtually
23 limitless; and, this is also based upon my understanding of
24 how prosecutors make decisions; and, this is based upon what
25 -- the feedback I received from Mr. Thompson about --

February 8, 2012

1 prosecutors ask a lot of questions about various areas,
2 looking for potential bias against the State, bias against
3 the defendant and, after asking all these questions, makes a
4 judgment as to whether it's appropriate to use one of the
5 strikes at that time against the venire member or to pass the
6 venire member; and, so it's a process where they don't ask
7 everyone necessarily the same questions. It depends upon
8 each venire member's answers and -- and positions on things,
9 to where the prosecutor will ask what -- what's appropriate
10 to -- to determine if a bias exists or not. So, that's --
11 so, that kind of tells me that you have to consider to some
12 extent this combination of that, which is something that
13 cross-tables do.

14 Q. And, when you -- and I want to clarify that
15 because, when you say combination of things, what
16 specifically are you talking about?

17 A. Well, you could have a situation where a venire
18 member has some factor that's a bias against the State and
19 another factor that's a bias against the defense; and, so,
20 that -- it -- it's probably easy to decide who to strike if
21 the bias all goes in one direction or if there's a bias like
22 opposition to the death penalty. That's probably an easy
23 decision for a prosecutor to make; but, when you have several
24 features that can go in different directions, then the
25 prosecutor has to make a judgment based upon that combination

1 of features that -- that exists.

2 Q. Okay; and, I -- I wanted to get you to clarify --
3 if there is a difference -- between what you referred to as
4 the composite sort of combination of these interactions and
5 then the way you did the strike state -- your logistic
6 regression that Mr. Ferguson was asking about.

7 A. Okay. The variable that is ultimately defined as
8 either strike group or pass group is a very complex composite
9 variable; and, a composite variable is a variable where, if A
10 occurs or B occurs, then set it equal to one. So, you're
11 looking at two different variables. If either one occurs,
12 you set it equal to one. Here, we have a composite variable
13 where the A and the B are these interaction variables, these
14 four control variables set to the specific values for the
15 subgroup; and, there may be, ultimately -- and -- and this is
16 a guess; but, just as an example -- 500 different interaction
17 variables that are all added together as composite variables
18 to define pass group or strike group.

19 Q. And I want to know -- going back to the basic
20 cross-tab analysis that you did, was there any particular
21 rationale for the selection of those four factors that you
22 used?

23 A. Those were factors that were used by Doctor O'Brien
24 in her logistic regressions.

25 Q. Okay. So, were there other additional factors that

1 were identified by Professor O'Brien's study that you could
2 have controlled for?

3 A. Yes, and that appears -- after I controlled for the
4 subgroup, then there's the additional variables as part of
5 the identification of the venire member and whether or not
6 the venire member was struck. There's variables like
7 religious organization or military. Yes. There are
8 additional variables.

9 THE COURT: I apologize ----

10 MR. PERRY: Yes, sir.

11 THE COURT: ---- for the interruption.

12 We've not had a break -- the court reporter.

13 MADAM COURT REPORTER: I'd love one

14 whenever.

15 THE COURT: Okay; and, I apologize.

16 Sometimes we lose track of that. We took a very short 5-
17 minutes, more or less, break; but, the court reporter's job
18 is an arduous job. So, 15 minutes, ma'am, from now till four
19 o'clock?

20 MADAM COURT REPORTER: [Nodding head in the
21 affirmative.]

22 THE COURT: Okay. All right. Yes,
23 ma'am. I apologize.

24 MADAM COURT REPORTER: Sorry.

25 THE COURT: Yes, ma'am. That's okay.

1 We're at ease, folks. Four o'clock.

2 [The hearing recessed at 3:45 p.m. and reconvened at 4:00
3 p.m., February 8, 2012, with all pertinent parties present
4 prior to the recess once again present, to include the
5 defendant.]

6 THE COURT: All counsel are present.
7 The defendant is present.

8 Mr. Perry, are you ready to continue, sir?

9 MR. PERRY: Your Honor, I don't
10 believe I have any further questions.

11 THE COURT: Okay. Any redirect -- or,
12 additional examination?

13 MR. JAY FERGUSON: No, Your Honor.

14 THE COURT: Okay. All right. Thank
15 you, Doctor Katz. You may step down.

16 [The witness withdrew to counsel table.]

17 THE COURT: Okay. You folks want to
18 be heard in argument? Folks, I'm looking -- attached to the
19 motion were a number of materials, including case law; but, I
20 believe, in pertinent point, we're looking at -- I have been
21 looking at the Dukes v. Wal-Mart case and the factors that
22 were considered there. So, I anticipate that's going to be a
23 -- at least a part of the argument that's about to be made.

24 MR. JAY FERGUSON: May I proceed?

25 THE COURT: Yes, sir.

February 8, 2012

1 MR. JAY FERGUSON: Your Honor, I just want to
2 bring out a few points from -- as you recall, I believe Mr.
3 Hunter sent to Your Honor months ago these federal guides
4 which I found very ----

5 THE COURT: I've got them. I was
6 reading along as the testimony was being presented.

7 MR. JAY FERGUSON: If I could -- I just want
8 to point out -- I've read a couple of provisions. There's a
9 couple more I want -- if we could ask the Court -- you don't
10 have to look -- there's just -- it poses questions about
11 whether a survey's appropriate.

12 THE COURT: Yes, sir.

13 MR. JAY FERGUSON: Page 246, one of the big
14 headline questions is what procedures were used to reduce the
15 likelihood of a biased sampling.

16 THE COURT: You're talking about the
17 ----

18 MR. JAY FERGUSON: Of the surveys.

19 THE COURT: Yes, sir.

20 MR. JAY FERGUSON: And the answer to that is
21 not only nothing was done. It's even worse than that. Only
22 the prosecutors who felt that they could honestly sign an
23 affidavit under oath as to the race-neutral reasons submitted
24 affidavits.

25 THE COURT: Yes, sir.

1 MR. JAY FERGUSON: As of the time he did his
2 report, 60 percent of the prosecutors around the state were
3 unwilling to do so for whatever that reason is. That's a
4 biased sample. What precautions were taken to ensure that
5 only qualified respondents were included in the survey? I
6 don't need to go into all the problems with having people who
7 weren't even at the trial testify based upon some notes of a
8 prosecutor 20 years ago. Doctor Katz doesn't even rely on
9 his notes from yesterday; but, yet, the State wants to put in
10 affidavits from prosecutors who have reviewed prosecutors'
11 trial notes from 20 years ago. The -- the survey, from the
12 very beginning -- this federal judicial guide says were
13 questions on the survey framed to be clear, precise and
14 unbiased. In all can -- I mean, I think Doctor Katz was very
15 candid with the Court. He wasn't looking at what were the
16 reasons for the strike. That's not what his inquiry was.
17 It's can they mine the data; can they mine the transcript to
18 come up with race-neutral reasons. Now, if you've read the
19 Dukes case, you know ----

20 THE COURT: Yes, sir.

21 MR. JAY FERGUSON: ---- these two surveys are
22 identical; and, I know you've read the memo, and I've made my
23 arguments; and, I'm not going to make any more. I do -- with
24 can -- with all candor to the Court, I want to acknowledge
25 that Dukes is under the federal rules.

February 8, 2012

1 THE COURT: And it dealt with a
2 slightly different issue.

3 MR. JAY FERGUSON: Slightly different issue.

4 THE COURT: Yes, sir.

5 MR. JAY FERGUSON: Now, in North Carolina,
6 the rule -- or, the general rule is it goes to the weight not
7 the admissibility.

8 THE COURT: Yes, sir.

9 MR. JAY FERGUSON: I sincerely believe and
10 argue to this Court that they don't even meet the threshold
11 under North Carolina law for reliability of the -- of the
12 underlying data for the expert to rely upon; but, assuming
13 that they do, I'm going to urge this Court, if the Court does
14 allow this evidence to be admissible, to give it the very
15 limited weight that is due based upon all the problems I've
16 set forth in the memo and the evidence you've heard; and, I
17 don't wish to be heard any further than that unless the Court
18 has any inquiry of me.

19 THE COURT: Well, I'm going to give
20 you -- obviously, you folks the opportunity to be heard. Let
21 me go to page 8 of the Dukes opinion. The factors that were
22 considered by the Court in that case -- and I recognize this
23 is a federal case out of California. I understand that. The
24 factors that were considered: It's undisputed that
25 defendant's counsel and defendant developed and prepared the

1 survey instrument and administered the survey. In addition,
2 defendant did not dispute that the surveyed managers knew
3 that the surveys were being utilized in connection with this
4 litigation. The survey instrument indicates also, based on
5 the Court's finding, bias on its face. For example -- and
6 this is the Court speaking -- instead of asking the parties
7 involved open-ended questions; such as, what factors do you
8 rely upon, the survey provided the interviewees with a set
9 list of over 100 suggestive factors with the chance to add
10 additional factors tacked on at the very end. The Court held
11 that, quote, in sum, the record demonstrates that the survey
12 was designed and administered by counsel in the midst of the
13 litigation; the interviewees knew the survey was related to
14 the litigation; the survey instrument exhibits bias on its
15 face. Taken together, these factors plainly demonstrate that
16 the results from the survey are not the, quote, product of
17 reliable principles and methods, close quote, and therefore
18 are not the type of evidence that would, quote, reasonably be
19 relied upon by experts, citing Federal Rules 702, 703. I
20 also, as already has been acknowledged by Mr. Jay Ferguson,
21 recognize the general rule, that these matters ordinarily go
22 to weight not to admissibility. I also recognize, in
23 fairness, that the circumstances involved in this case may
24 negate some of the factors that I've just referred to. By
25 way of example, this is a case where the folks involved are

February 8, 2012

1 the prosecutors of the State of North Carolina. The only
2 source of that information has to come from the prosecutors
3 of the State of North Carolina. That doesn't address the
4 closed-ended nature of the questions, as I understood the
5 testimony of Doctor Katz; and, I -- I have stated on a number
6 of occasions, I believe in being direct and straightforward
7 on the record. Fundamentally, in any case that I'm involved
8 in, on issues that are similar to this, one of the factors
9 that I take into account is, in terms of the record, on
10 appeal, is it necessary to have an issue in the case that
11 doesn't need to be there; because, as already has been
12 acknowledged, ultimately, it will be the responsibility of
13 the trial court to determine matters relating to weight in
14 this case. So, that's something that I'm thinking about as
15 well.

16 Mr. Thompson, Mr. Colyer or Mr. Perry -- I
17 apologize. I don't know who's going to be making the
18 argument; but, do you want to be heard, sir?

19 MR. PERRY: Your Honor -- and I'll --
20 I'll be brief, Your Honor.

21 THE COURT: Yes, sir.

22 MR. PERRY: I won't be as eloquent
23 because I haven't had as much time to look through this; but,
24 let me just make a couple of points that we'd ----

25 THE COURT: Yes, sir.

1 MR. PERRY: ---- ask the Court to
2 think about. One of the things that I was eliciting from
3 Doctor Katz is, in the context of this case in particular and
4 in the context of what he was doing ----

5 THE COURT: Yes, sir.

6 MR. PERRY: ---- I don't think -- it's
7 not the same kind of survey. In fact, I would say it's not a
8 survey in the sense that this is a survey. When he referred
9 to it, he referred to it as data collection.

10 THE COURT: Well, it's essentially the
11 same.

12 MR. PERRY: Well ----

13 THE COURT: Regardless of what name
14 you put on it, information -- information was requested in
15 the Dukes case from Wal-Mart managers, in this case, from
16 prosecutors in the respective offices who hopefully would
17 have had personal knowledge and/or involvement ----

18 MR. PERRY: Right.

19 THE COURT: ---- but, if they didn't,
20 essentially, they were asked -- and I'm paraphrasing what I
21 understood Doctor Katz' testimony to be -- come up with any
22 possible explanation that you can that's race-neutral.

23 MR. PERRY: Right; and I'm agreeing
24 with the Court ----

25 THE COURT: Yes, sir.

1 MR. PERRY: ---- to a certain extent
2 because, like you said, there's no way around it in some
3 cases.

4 THE COURT: Yes, sir.

5 MR. PERRY: In this particular
6 proceeding, because the prosecutors are the folks who were
7 involved ----

8 THE COURT: Yes, sir.

9 MR. PERRY: ---- so, in some ways, you
10 have to rely on that. What I meant by this was not a survey
11 in this context ----

12 THE COURT: Okay.

13 MR. PERRY: ---- was he's not
14 designing a random sample ----

15 THE COURT: I -- I agree.

16 MR. PERRY: [Indiscernible] --
17 inferential, you know, statistics to make predictions on ----

18 THE COURT: I agree.

19 MR. PERRY: ---- other cases.

20 THE COURT: Yes, sir.

21 MR. PERRY: That's why I say it's
22 different.

23 THE COURT: Okay.

24 MR. PERRY: Only because of that
25 factor.

1 THE COURT: Okay.

2 MR. PERRY: In addition to that, if
3 you read the descriptions that the Court noted in this
4 particular opinion, these things applied to the surveys and
5 the DCIs that the defense has produced.

6 THE COURT: Yes, sir.

7 MR. PERRY: In fact, they more aptly
8 describe their process ----

9 THE COURT: Yes, sir.

10 MR. PERRY: ---- in the sense that, if
11 you look at whose questions were more open-ended and closed-
12 ended -- for example, these descriptive characteristics, that
13 points somebody in a much more narrow identification type
14 process than what Doctor Katz asked the prosecutors to do on
15 the State's behalf to come up with these reviews.

16 THE COURT: Okay.

17 MR. PERRY: So, that's -- that's one
18 thing I would point out; and, I'm not -- like we, said, this
19 is a different kind of proceedings, so you can't treat this
20 as an examination of -- you know, typical sort of statistical
21 endeavors that are undertaken.

22 THE COURT: Yes, sir.

23 MR. PERRY: And, again, you know, if
24 you look, I think that, from Doctor Katz' testimony, you can
25 tell he was in charge of a lot more in terms of the design

1 and how to do this than may be true for the Michigan State
2 study; and, I say that because he was pretty much a one-man
3 operation, I think.

4 THE COURT: Yes, sir.

5 MR. PERRY: And the State -- the State
6 being -- my observation in this case -- and from Doctor Katz'
7 concurring [indiscernible], from the stand, has no problem in
8 admitting that we did not have enough resources to get this
9 job done to the extent it should have been done.

10 THE COURT: Yes, sir.

11 MR. PERRY: I don't think there is any
12 kind of argument one way or the other on that point.

13 THE COURT: I'm sorry?

14 MR. PERRY: I don't think there's any
15 argument one way or the other on that point, that the State
16 did not have enough resources to do this job as it would have
17 liked to have produced ----

18 THE COURT: I don't mean to quibble
19 with you. I agree with you as a general proposition.

20 MR. PERRY: Yes, sir.

21 THE COURT: But the gist of his
22 testimony was he made numerous attempts to get information
23 from the prosecutors from whom he was seeking information
24 that may have some application to this case.

25 MR. PERRY: That's -- that's correct,

February 8, 2012

1 Your Honor.

2 THE COURT: It wasn't his fault that
3 he didn't get any response.

4 MR. PERRY: That -- and that's my
5 point.

6 THE COURT: Yes, sir.

7 MR. PERRY: He was frustrated with the
8 lack of response as well, and I would -- I would completely
9 agree with that, Judge Weeks.

10 THE COURT: Yes, sir.

11 MR. PERRY: Again, beyond that, if you
12 look at this particular decision and the languages that are
13 used in these, you know, different paragraphs, about what was
14 done in that particular case ----

15 THE COURT: Yes, sir.

16 MR. PERRY: ---- again, at the point
17 in the process that Doctor Katz was at, he was more trying to
18 get a handle on what was going on and responding to the
19 defense survey and coming up with a separate study to stand
20 alone in and of itself. So, again, that's just another
21 distinction I would point to the Court to look for between
22 what happened in that particular case and what's going on
23 with this proceeding.

24 THE COURT: Yes, sir, Mr. Perry.

25 MR. PERRY: And that -- those are

1 the observations I would make at this point, Your Honor.

2 THE COURT: Well, I also appreciate
3 Doctor Katz' candidness. I mean, he stated -- and my notes
4 are not usually that good as well; but, I recall his
5 testimony being I don't propose this as an explanation as to
6 why jurors were stricken at all. This is simply among the
7 realm of poss -- in the realm of possibilities.

8 Do you want to be heard further, Mr. Ferguson,
9 Mr. Jay Ferguson?

10 MR. JAY FERGUSON: No, Your Honor. I will
11 say one thing.

12 THE COURT: Yes, sir.

13 MR. JAY FERGUSON: The State has said many
14 times that they didn't have the resources. I'm not faulting
15 Doctor Katz.

16 THE COURT: Yes, sir.

17 MR. JAY FERGUSON: But if we need to get into
18 evidence about how the prosecutors have spent days in the
19 Legislature, days in front of the cameras ----

20 THE COURT: Yes, sir.

21 MR. JAY FERGUSON: ---- days talking to the
22 press ----

23 THE COURT: Yes, sir.

24 MR. JAY FERGUSON: ---- to re -- to dispute
25 the Racial Justice Act, we will.

February 8, 2012

1 THE COURT: Well ----

2 MR. JAY FERGUSON: Lack of resources is not
3 an excuse for not being prepared in this courtroom.

4 THE COURT: And I don't suggest that
5 it is. I'm simply making the point that the testimony of the
6 State's expert was that he had great difficulty in getting
7 responses from the prosecutors in this case. That's why
8 [indiscernible].

9 MR. HUNTER: Your Honor -- Your Honor,
10 one thing we don't have is -- he says he talked to
11 prosecutors. He did not take any notes, as I understand it
12 -- at least after the first time; but, I wonder if there are
13 prosecutors who told him they simply weren't going to do it,
14 not that they didn't have time to do it, not that they didn't
15 have resources to do it, but that they simply chose not to do
16 it.

17 THE COURT: Well, that question wasn't
18 asked. So, if anybody wants to recall Doctor Katz, they're
19 free to do that.

20 [Pause.]

21 MR. JAY FERGUSON: No, Your Honor.

22 THE COURT: Okay.

23 MR. COLYER: Judge, I don't think you
24 saw me stand up here a minute ago.

25 THE COURT: I'm sorry?

1 MR. COLYER: I don't think you saw me
2 stand up when Mr. Perry was ----

3 THE COURT: I didn't. I apologize.

4 MR. COLYER: And I -- I just wanted to
5 -- I don't want to be long.

6 THE COURT: Yes, sir.

7 MR. COLYER: As you were going through
8 on page 8, I had made some notes with respect to the Dukes
9 opinion.

10 THE COURT: Yes, sir.

11 MR. COLYER: And I note that -- that
12 last paragraph on page 8.

13 THE COURT: Yes, sir. I'm looking at
14 that.

15 MR. COLYER: The irony, it says not
16 surprising, the courts have refused to allow surveys that,
17 under circumstances, usually rejecting them on the grounds of
18 being unreliable hearsay ----

19 THE COURT: That's -- yeah.

20 MR. COLYER: Yeah; and -- and, again,
21 to dovetail with what Mr. Perry said, I -- and I'm not trying
22 to quibble, but calling this a -- a data collection attempt,
23 I think is different than a survey.

24 THE COURT: Yes, sir.

25 MR. COLYER: And when it talks about

1 unreliable hearsay, the hearsay that we have to respond to
2 and rely on are the transcripts ----

3 THE COURT: Yes, sir.

4 MR. COLYER: ---- of the jurors, what
5 they said ----

6 THE COURT: Yes, sir.

7 MR. COLYER: ---- not necessarily what
8 a prosecutor said they said.

9 THE COURT: Yes, sir.

10 MR. COLYER: And I noted, with some
11 humor here, that the surveys must be conducted independent of
12 attorneys ----

13 THE COURT: Yes, sir. I noted that.

14 MR. COLYER: ---- and then there was
15 another common rejecting expert surveys where there was
16 heavily and -- heavy involvement of defense counsel in its
17 design and conduct. Obviously not in the design and conduct,
18 but heavy involvement here by prosecutors. It's just the
19 nature of the animal with respect to this, Judge; and, we
20 would ask that you deny the motion.

21 THE COURT: I -- I agree with you in
22 that respect, Mr. Colyer.

23 MR. COLYER: Thank you, sir.

24 THE COURT: The Court has concerns,
25 and I've expressed those concerns, about the study. I'm

1 going to admit the study. Ultimately, we don't have a jury
2 in this situation, where there's a risk of confusion or
3 misleading the jury. I will give it what weight I believe is
4 appropriate after consideration of all of the evidence in the
5 case. Note the defendant's objection and exception for the
6 record.

7 Okay. All right. So, that takes us to where
8 we are now. Much of his testimony has already been adduced
9 on voir dire. What's your position, since he's your witness,
10 folks?

11 MR. COLYER: Judge, with -- without
12 being intentionally repetitive, we respectfully request that
13 we be allowed to begin the direct examination just as if we
14 were starting off afresh and ----

15 THE COURT: I think that's the
16 appropriate way to do it.

17 MR. COLYER: Yes, sir. Thank you very
18 much.

19 THE COURT: Are you wanting to go
20 forward now?

21 MADAM COURT REPORTER: Tomorrow.

22 MR. COLYER: I believe so, Judge. It's
23 up to the court reporter or counsel. I think we're ready to
24 go.

25 THE COURT: Well, I was -- do you need

1 ----

2 MADAM COURT REPORTER: No. That's fine.

3 THE COURT: Are you okay.

4 MADAM COURT REPORTER: [Nodding head in the
5 affirmative.]

6 MR. COLYER: Judge, we're down to less
7 than 45 minutes. I guess what we would be talking about
8 today anyway would just be some background qualifications.

9 THE COURT: Yes, sir.

10 MR. COLYER: If it please the Court, we
11 could start all over tomorrow.

12 THE COURT: It's been a long day.
13 It's been a long day.

14 MR. COLYER: Yes, sir.

15 THE COURT: Now, there was some other
16 -- the reason I'm asking ----

17 MR. COLYER: Yes.

18 THE COURT: ---- given the time ----

19 MR. COLYER: Yes. Thank you.

20 THE COURT: ---- there were some other
21 matters that you folks wanted to talk about.

22 MR. COLYER: Yes, sir. There were,
23 and I appreciate you reminding us of that.

24 THE COURT: Yes, sir.

25 MR. COLYER: Because I was getting

February 8, 2012

1 ready to forget.

2 THE COURT: Yeah.

3 MR. COLYER: One of the matters we
4 talked earlier about with Mr. Ferguson was the request to be
5 able to substitute copies of the duly executed affidavits in
6 State's Exhibit 32 and to remove the originals so that they
7 could be placed in some type of a repository for whatever use
8 they may be needed in the future ----

9 THE COURT: Yes, sir.

10 MR. COLYER: ---- if any. That way, we
11 don't have to come and get a certified copy ----

12 THE COURT: Exactly.

13 MR. COLYER: ---- of a copy from the
14 clerk and put our clerk's office in a bad situation.

15 MR. THOMPSON: Ms. Stubbs, graciously,
16 actually -- she brought it up yesterday, and -- and I kind of
17 insisted, well, no; it should be the originals; just out of
18 habit, wanted the originals; but, if the offer's still open,
19 we'd like to take them up on it because this likely is not
20 the last time they're going to be used.

21 MS. STUBBS: Yes. We don't object.

22 MR. COLYER: Thank you very much. We
23 appreciate that.

24 MR. THOMPSON: And I'll -- I'll have them
25 kind of go with me through the process once that actual swap

February 8, 2012

1 is made to make sure that we swap one for one, and right the
2 right ones and that kind of thing.

3 THE COURT: I appreciate it. I
4 appreciate it.

5 MR. COLYER: And, Judge, the other
6 issue is with respect -- and I mentioned this to Mr. Hunter
7 earlier this afternoon, before we started -- or, late this
8 morning. I've kind of lost track of time. With respect to
9 one of our designated witnesses, Jeff Welte, Professor Welte
10 works at the Institute of Government ----

11 THE COURT: Yes, sir.

12 MR. COLYER: ---- and he was noticed as
13 an expert with respect to Batson.

14 THE COURT: Okay.

15 MR. COLYER: In light of our -- our
16 inability to get the testimony in through the trial judges
17 ----

18 THE COURT: Yes, sir.

19 MR. COLYER: ---- we are seeking an
20 amendment, if you will, of Professor Welte's evidence,
21 potential evidence, in relation to not only Batson, but in
22 relation to the transcripts as related to the Cumberland
23 County cases, but more specifically to the Robinson and ----

24 THE COURT: Wilkinson?

25 MR. COLYER: ---- McNeil case.

1 THE COURT: McNeil. I'm sorry.

2 MR. COLYER: Yes, sir; but, to -- that
3 Judge Dixon talked about, as well as the other state case --
4 or, the State of North Carolina cases in Cumberland County,
5 that he would have the opportunity to review before we call
6 him as a witness. So, he -- he already has one portion
7 designated of what he would testify. We're simply notifying
8 the defendant that we may wish to expand, with the Court's
9 permission, his potential testimony as it relates to the
10 transcripts and the answers of the jurors that we were not
11 able to get in through the judges because of their status
12 with respect to incompetency, respectfully.

13 [General laughter.]

14 MR. COLYER: And ----

15 [General laughter.]

16 MR. COLYER: --- the basis of his
17 opinion would be those -- those transcripts of what he read
18 in light of Batson, which he's already been noticed as an
19 expert on for purposes of this litigation, please.

20 THE COURT: First of all, do you all
21 have any objection to the expanded scope of testimony?

22 MR. HUNTER: Yes. Yes, we do, Your
23 Honor.

24 THE COURT: Failure to designate --
25 failure to designate him, at least, in terms of that expanded

1 area?

2 MR. HUNTER: Yes. I -- I -- I'm still
3 not completely clear; but, even if I was completely clear
4 ----

5 [General laughter.]

6 MR. HUNTER: ---- we would -- so, I
7 don't -- I don't think I need more -- I don't think more
8 clarification of his expanded role is that -- we would object
9 to any role of Professor Welte beyond what's happening. I
10 think this is just -- is another -- you know, is a -- I
11 understand the desire. I -- I'm -- but ----

12 THE COURT: Well ----

13 MR. HUNTER: ---- we have rules, all of
14 us -- we got -- you know, we might be interested in a couple
15 of new experts, but we're not going to trade.

16 MR. COLYER: Well, we certainly would
17 entertain any suggestion, if you have any.

18 MR. HUNTER: I -- so -- we feel like
19 we've abided by the rules. We've set the rules as to when
20 experts had to be set and reports had to be given, and now
21 we're, you know ----

22 THE COURT: Well ----

23 MR. HUNTER: ---- in the middle of --
24 of the trial. It's -- it's too late.

25 MR. COLYER: Yes, sir; and, we're just

1 asking for leave of the Court to expand his potential
2 testimony. We -- we realize that the discovery deadlines
3 have passed. We realize that he was designated as an expert
4 and for a different reason than and we want to expand him on;
5 and, quite frankly, Your Honor, we're -- we're trying to do
6 what we can to kind of pull the bacon out of the fire here,
7 since we sort of blew it with the judges -- to be honest with
8 you. So ----

9 THE COURT: And I appreciate the
10 candor; but, let -- let me be equally candid with you. I
11 believe the record shows -- if I'm wrong on the dates or in
12 any other respect, feel free to let me know. We had a number
13 of scheduling conferences, administrative conferences, prior
14 to our first court hearing, which I believe was in September.
15 As it relates to Doctor Katz, there was a discussion about --
16 toward the end of those conferences -- whether or not the
17 State had designated an expert, how much time that expert
18 might need; and, I believe the record will reflect -- or, at
19 least, hopefully, your recollections will be in accord. I
20 said, folks, the only way we're going to resolve this, in my
21 view, is to set it on a hearing date, have Doctor Katz
22 present in the courtroom, so we can find out a number of
23 things, matters he needs by way of discovery, what kind of
24 timeframe we're talking about, things of that nature.
25 Anybody disagree with that?

February 8, 2012

1 [There were no responses from counsel for either side.]

2 THE COURT: All right. We scheduled
3 that hearing in September. The request, at that time, was, I
4 believe, for 8 weeks.

5 MR. COLYER: Judge, I think we -- we
6 might have said 3 to 4 months.

7 THE COURT: Well, I stand corrected.
8 I looked at the -- I've kept copies of all the transcripts;
9 and, as I stated on the record, folks, if we ask for whatever
10 time period and it's granted, there's a likelihood we're
11 going to come in at the end of that time period and
12 additional time will be asked. So, my objective is to get
13 the train on the track and get the case moving. We scheduled
14 another hearing in November. For a variety of reasons, the
15 only productive thing that came out of that -- well, let me
16 re-characterize. I don't mean to categorize it -- the only
17 thing that came out of that in terms of a timeline was the
18 State asked for a continuance until ----

19 MR. COLYER: I think we might have
20 asked that -- for that 3 or 4 months ----

21 THE COURT: Yes, sir.

22 MR. COLYER: ---- [indiscernible] ----

23 THE COURT: Yes, sir. I guess the
24 point that I'm trying to make is I believe in doing the best
25 I can to accommodate folks so that folks have a full and fair

1 opportunity to be heard; but, at some point, we have to live
2 with where we are.

3 MR. COLYER: And we understand that,
4 Judge.

5 THE COURT: Yes, sir.

6 MR. COLYER: We ----

7 THE COURT: So, the request to expand
8 the scope of expertise for Professor Welte is denied. To
9 which, the State objects and excepts for the record.

10 MR. COLYER: Yes, sir.

11 THE COURT: I don't see why an
12 appellate court can't take judicial notice of certain things.

13 MR. HUNTER: Your Honor, not to pile
14 on, not -- I just want to make it clear. I think there may
15 be an issue as to whether Professor Welte has been properly
16 identified as any kind of expert. I just don't -- I haven't
17 disputed that characterization for purposes of our
18 conversation, but I'm just letting you know and I'm letting
19 them know ----

20 THE COURT: That's an issue.

21 MR. HUNTER: ---- that that may be an
22 issue.

23 THE COURT: Okay.

24 MR. COLYER: And it sounds like, at
25 this point, it's moot anyway, Your Honor. So ----

1 THE COURT: Okay.

2 MR. COLYER: ---- we respectfully
3 except and object. Thank you for hearing us.

4 THE COURT: Yes. Yes, sir. It is --
5 your objection and exception are noted for the record.

6 Were there other matters we needed to talk
7 about, Mr. Thomson, Mr. Colyer, other than that?

8 MR. COLYER: I don't think so, Your
9 Honor.

10 THE COURT: Okay.
11 Mr. Ferguson?

12 MR. JAMES FERGUSON: Well, I understood there
13 was some question about these affidavits that we ----

14 MR. HUNTER: Offer of proof.

15 MR. JAMES FERGUSON: The offer of proof. I'm
16 sorry. That is the offer of proof for the judges' testimony.

17 THE COURT: Yes, sir. I appreciate
18 you bringing that up.

19 MR. JAMES FERGUSON: And I -- I want to make,
20 at least, our position clear on that; and, that is that we --
21 a -- a -- a procedure has been identified and apparently the
22 State plans to pursue it for putting the offer of proof into
23 the record -- a proffer into the record.

24 THE COURT: Yes, sir.

25 MR. JAMES FERGUSON: And my understanding of

1 that is that they're to do it in writing, and they have
2 decided that the way they want to do it in writing is to have
3 their witnesses give information through a court reporter and
4 then do whatever they're going to do with it and submit it to
5 the Court; to which, we have no objection.

6 THE COURT: Okay.

7 MR. JAMES FERGUSON: But the concern we have is
8 that, because they have opted to do it in that fashion, that
9 seems to me to have been elevated into some part of the
10 hearing procedure itself.

11 THE COURT: Yes, sir.

12 MR. JAMES FERGUSON: And our position is they
13 can put it in, in whatever manner they choose, insofar as the
14 writing is concerned; but, to the extent that that may
15 impinge on hearing time during this procedure, we would ask
16 that they do that -- that the time they take to talk to the
17 judges and get the transcript, whatever it is they want to
18 do, not be something that's done as a part of ----

19 THE COURT: Yes, sir.

20 MR. JAMES FERGUSON: ---- as the court
21 proceedings.

22 THE COURT: Okay.

23 MR. JAMES FERGUSON: And that there be no delay
24 in the court proceedings ----

25 THE COURT: Yes, sir.

1 MR. JAMES FERGUSON: ---- for that reason.
2 When they do it -- in that regard so long as it doesn't
3 interrupt or delay the hearing proceeding. We -- we clearly
4 -- that's our position.

5 MR. THOMPSON: Insofar as that's a
6 problem, Judge, our plans are to do it after the hearing is
7 over. So, it should not interfere with -- if that maybe gets
8 rid of any concerns that Mr. Ferguson has. After the actual
9 hearing is over, we planned on finding a day -- try to may --
10 maybe schedule it before the hearing is over -- start the
11 scheduling process, but actually schedule it after this
12 hearing is over. As Your Honor said, you're not going to
13 consider their answers and you said there's no need to have
14 them in before the hearings over to begin with. So,
15 scheduling-wise, we'd like to be in a courtroom in here; and,
16 we don't have any plans as of now. We've got a lot of
17 schedules to deal with, and we've got a lot going on right
18 now and haven't had any time to schedule it. So,
19 respectfully, just if that -- if that gets rid of the fears
20 that Mr. Ferguson has ----

21 THE COURT: Am I understanding
22 correctly that the defendant's position is we don't need to
23 be there; our client doesn't need to be there; they can go
24 there with their witness ----

25 MR. JAMES FERGUSON: No, sir. It's their

1 proffer. They can make it whatever they ----

2 THE COURT: That's what I wanted to
3 clarify.

4 MR. JAMES FERGUSON: Let me just say on at that
5 point, Your Honor, just so we can be clear, our position is
6 that they can do it after the hearing. We have no problem
7 with that; but, even then, we don't want it to hold up the
8 process ----

9 THE COURT: Yes, sir.

10 MR. JAMES FERGUSON: ---- for submitting the
11 proposed findings or whatever we're going to offer for your
12 rendering a decision -- I assume that what they want to do is
13 make sure that it is a part of the record for appellate
14 purposes.

15 MR. THOMPSON: We intend to get it to the
16 Court before the Court rules. So, if -- there's no question
17 that it would be a part of the record on appeal.

18 THE COURT: Well, obviously, based on
19 my ruling, it would not implicate any of the findings, any of
20 the conclusion; it's simply for preservation purposes. So,
21 it shouldn't delay.

22 MR. JAMES FERGUSON: So, we have no problem
23 then.

24 THE COURT: Okay.

25 MR. COLYER: The only -- the only

1 extent to -- the only extent to which it might delay, Your
2 Honor, while we're trying to do that in terms of if you give
3 us an opportunity to do some findings of fact for you, it may
4 be a little problematic in order for us to be able to
5 accomplish that in a day or two and then also get the
6 findings of fact to you.

7 THE COURT: Okay.

8 MR. COLYER: We just -- as Mr. Thompson
9 pointed out, we just don't want to -- and Mr. Ferguson also
10 -- we just wanted to make sure that that proffer gets to be
11 made part of the record, not for your consideration. We
12 understand that.

13 THE COURT: Yes, sir.

14 MR. COLYER: But made a part of the
15 record before the Court rules ----

16 THE COURT: Yes, sir.

17 MR. COLYER: ---- so that whatever time
18 the clock starts to tick on, whether it's the beginning of
19 the entry of the ruling or the -- the delivery of the
20 transcript, what -- whatever is going to be the magic date
21 that makes that clock start ticking, that our part is in and
22 part of the record, so that -- because we won't be able to
23 supplement the record after the fact.

24 THE COURT: Yes, sir.

25 MR. COLYER: And we don't want to be in

1 a situation where that's a problem.

2 THE COURT: You're talking about the
3 time restraints -- time constraints involved in appeal under
4 the MAR statute?

5 MR. COLYER: Yes, sir. Petition for
6 certs.

7 MR. THOMPSON: Sixty days ----

8 THE COURT: Yes, sir.

9 MR. THOMPSON: ---- for a petition.

10 THE COURT: Yes, sir.

11 MR. THOMPSON: I mean, the delivery of
12 the transcript ----

13 THE COURT: Yeah. I'm mindful of
14 that. Okay. All right. Well, it sounds like we're on the
15 same page. What I propose is let's get to where we are in
16 terms of the end of the hearing or, hopefully, before the end
17 of the hearing and nail it down.

18 MR. COLYER: Yes, sir.

19 THE COURT: Is that agreeable?

20 MR. THOMPSON: Yes, sir.

21 THE COURT: All right. In terms of
22 times for submission -- times for supplementing -- strike
23 that -- putting in the record matters relating to the offer
24 of proof ----

25 MR. COLYER: Yes, sir.

1 THE COURT: ---- to be followed by
2 submission of proposed findings and conclusions. Is that
3 agreeable?

4 MR. COLYER: Yes, sir.

5 THE COURT: All right.

6 MR. JAMES FERGUSON: Yes, sir.

7 THE COURT: Thank you, folks. It's
8 been a long day. Scheduling for tomorrow ----

9 MR. COLYER: If I understand my
10 colleagues correctly, it would be Doctor Katz and, I think,
11 there was an anticipation that it might be a day ----

12 THE COURT: Yes, sir.

13 MR. COLYER: ---- on direct and time
14 for cross. Earlier, Mr. Thompson asked about not having our
15 witnesses here until tomorrow afternoon. We -- we'll contact
16 them today and tell them that they're on kind of a quazi-
17 standby for tomorrow afternoon. If we get there that
18 quickly, we could contact them at lunch and say come on down
19 or wait until Friday, if it please the Court, but that's ----

20 THE COURT: Well, we still have the
21 short day on Friday. So, I guess we need to talk about that.

22 MR. COLYER: Yes; and, I don't think we
23 had nailed down the exact stopping time. I noted a signup
24 list out in the hallway that said if you wanted to go to that
25 CLE, today was the last day to sign up; and, we didn't know

1 whether or not we were going to stop and have time to go to
2 that at eleven, twelve or one o'clock, so we just haven't
3 signed up for it. So, we're yours ----

4 THE COURT: That ----

5 MR. COLYER: ---- as long as you want
6 us.

7 THE COURT: Yeah. That -- that's the
8 request -- and I signed off on the order as Senior Resident
9 along with Chief District Court Judge Bev Keever. My
10 understanding -- and I haven't heard this directly from her,
11 but I've heard from folks in our office that even though she
12 -- initially she intended to close all of the courts down at
13 the District Court level, some of the courts probably will
14 not be closed down because of the nature of the courts and
15 the fact that stuff needs to be done. So, I'll talk with
16 her. We can talk more about that tomorrow morning.

17 MR. COLYER: Judge -- and we're --
18 we're not suggesting that we stop so that we can go. We're
19 ----

20 THE COURT: No. I understand.

21 MR. COLYER: We're content to keep
22 working here as long as you want us working on Friday.

23 THE COURT: Okay.

24 MR. COLYER: And ----

25 THE COURT: Okay.

1 MR. COLYER: ---- just ----

2 THE COURT: All right. Thank you,
3 folks. Anything else?

4 MR. JAMES FERGUSON: Judge, just for my own
5 planning purposes in getting back to Charlotte, what -- what
6 time are we slated to quit on Friday?

7 THE COURT: I believe ----

8 MR. JAMES FERGUSON: If there is a time.

9 THE COURT: I believe -- isn't the
10 scheduled stop time for most of the courts eleven o'clock or
11 11:30?

12 MR. COLYER: I believe that's what I
13 had saw, Judge, 11:00 or 11:30.

14 THE COURT: Yeah.

15 MR. COLYER: They're doing a luncheon
16 ----

17 THE COURT: Yeah.

18 MR. COLYER: ---- with their -- they're
19 going to have some CLE and a luncheon from like 11:00 to
20 2:00, or something like that. 11:00 to 2:30 -- 11:30 to
21 2:30. I don't know.

22 THE COURT: So, I guess, for our
23 purposes, 12:00, 12:30 -- twelve o'clock or 12:30?

24 MR. COLYER: Whatever's good for the
25 Court, 12:30, one o'clock. Doesn't make any difference.

February 8, 2012

1 MR. JAMES FERGUSON: I'm just asking
2 for my own information, Judge.

3 THE COURT: No later than 12:30.

4 MR. JAMES FERGUSON: Yes, sir.

5 THE COURT: Because there's a luncheon
6 followed by the CA -- CLE, from what I understand; or, are
7 they combined?

8 MR. COLYER: Judge, I -- I -- I really
9 don't know.

10 THE COURT: I haven't had time to find
11 out. I'll have more information for you -- more definitive
12 information tomorrow, Mr. Ferguson. I apologize.

13 MR. JAMES FERGUSON: Thank you, Judge.

14 THE COURT: Yes, sir.

15 Anything else?

16 [There were no responses by counsel for either side.]

17 THE COURT: Thank you, folks. Have a
18 good evening.

19 [The hearing recessed at 4:37 p.m., February 8, 2012.]

20 [END OF PAGE]

21

NORTH CAROLINA
CUMBERLAND COUNTY

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

_____)	
STATE OF NORTH CAROLINA,)	
)	RACIAL JUSTICE ACT HEARING
)	
vs.)	HEARD 2/9/12
)	
MARCUS ROBINSON,)	VOLUME IX
Defendant.)	(Pages 1704 through 1910)
_____)	

The above-captioned case coming on for hearing at the January 30, 2012, Criminal Session of the Superior Court of Cumberland County, Fayetteville, North Carolina, before the Honorable Gregory A. Weeks, Judge Presiding, the following proceedings were had, to wit:

A P P E A R A N C E S

For the State: Calvin Colyer & Rob Thompson,
Assistant District Attorneys,
12th Judicial District; and
Jonathan Perry, Assistant District
Attorney, 20th Judicial District

For the Defendant: Jay Ferguson & Cassandra Stubbs,
Durham County Bar;
Malcolm Hunter, Orange County Bar; and
James Ferguson, Mecklenburg County Bar
Attorneys at Law

SHANNON RANSOM
Official Court Reporter
Cumberland County Courthouse
Fayetteville, North Carolina 28302
(910) 733-0826 (cell phone)
sransom1@nc.rr.com

DATE REQUESTED: 2/3/12

DATE DELIVERED: 2/29/12

1 (The following proceedings began in open court.
2 The defendant, defense attorneys and state's attorneys were
3 present.)

4 THE COURT: Okay. Let the record reflect --
5 we're waiting for -- we have got Ms. Stubbs, that's right.
6 There she is. All counsel is present. Defendant is
7 present. You ready to go forward, Mr. Perry?

8 MR. PERRY: Your Honor, I think just another
9 moment or two and I should be.

10 THE COURT: Okay. Let us know when you're ready,
11 sir.

12 (Court was at ease.)

13 MR. PERRY: Your Honor, I think I'm ready. We
14 had a jump drive that we were putting into evidence. I
15 wanted to let Mr. Ferguson know kind of what was on it
16 before we put it up.

17 THE COURT: I appreciate. Okay. Yes, sir. You
18 can call your witness, sir.

19 MR. PERRY: The state will call Dr. Joseph Katz.

20 MR. JAY FERGUSON: Your Honor, as he approaches
21 the stand, can I address something Mr. Perry and I
22 addressed?

23 THE COURT: Yes, sir.

24 MR. JAY FERGUSON: We filed a motion in limine
25 preventing him from testifying.

1 THE COURT: Yes, sir.

2 MR. JAY FERGUSON: And as the Court well knows,
3 the rule of law in North Carolina is I have to object every
4 time he mentions something about -- so I can preserve the
5 issues in the motion in limine. Mr. Perry and I discussed
6 that every time Dr. Katz said -- based upon the feedback
7 from prosecutors X, Y and Z, I would have to object.

8 THE COURT: Yes, sir.

9 MR. JAY FERGUSON: And I just think that would
10 break the stream of his direct and that's not my intent.

11 THE COURT: Okay.

12 MR. JAY FERGUSON: The state is willing to
13 stipulate, as I understand, that to the extent the issues
14 were raised in the motion in limine with respect to use of
15 the prosecutors' affidavits in formulating the basis of his
16 opinion, that I have preserved those issues on each and
17 every question.

18 THE COURT: All right. Mr. Perry, is that in
19 fact -- or, Mr. Thompson, is that in fact stipulated to?

20 MR. THOMPSON: We have discussed it and I've
21 stipulated insofar as we can agree. We certainly don't
22 want the flow of the testimony to be unnaturally
23 interrupted over and over. We'll agree that they will have
24 preserved that in order to avoid the kind of interruption
25 over and over.

1 THE COURT: All right. Then based on statements
2 of counsel, let the record reflect that the defendant is
3 not waiving any objection raised in the defendant's motion
4 in limine to exclude the testimony of Dr. Katz insofar as
5 it relates to the affidavits, if I understand correctly.

6 MR. JAY FERGUSON: That's correct, Your Honor.

7 THE COURT: And they have formed a basis for any
8 opinion that he is to give in this case. Is that an
9 accurate statement, gentlemen?

10 MR. THOMPSON: Yes, sir.

11 MR. JAY FERGUSON: Yes, Your Honor.

12 THE COURT: Then let the record so show. Mr.
13 Perry -- Dr. Katz, you've previously been sworn for voir
14 dire purposes. You remain under oath, sir.

15 THE WITNESS: Yes.

16 DIRECT EXAMINATION

17 BY MR. PERRY:

18 Q. Can you state your name for the Court, please, sir?

19 A. Joseph Katz.

20 Q. And what's your occupation?

21 A. I'm an applied statistician with expertise in the
22 areas of statistics, data analysis and sampling.

23 Q. And can you explain to the Court exactly what an
24 applied statistician is?

25 A. Generally, my work involves the analysis of databases

1 and the application of statistics to practical problems
2 rather than someone who deals with the theoretical
3 advancement of statistical theory.

4 Q. Can you tell the Court what degrees in education you
5 have received?

6 A. I have a bachelor's degree in mathematics, a
7 bachelor's degree in computer science, a master's degree in
8 mathematics and a Ph.D. in quantitative methods. All my
9 degrees are from Louisiana State University.

10 Q. And the focus of your doctoral program, what was that?

11 A. The Ph.D. in quantitative methods, the focus was the
12 use of statistics and other quantitative techniques to
13 analyze data to solve business problems.

14 Q. And can you tell the Court what you did after you
15 graduated from school?

16 A. After I left Louisiana State University, I taught at
17 the University of Arizona for two years, and then I moved
18 to Atlanta and began teaching at Georgia State University.

19 Q. Okay. And now at Georgia State University, what
20 classes did you teach when you were employed there?

21 A. I regularly taught a two-course sequence in the
22 mathematical theory of probability and statistics to
23 doctoral students. I also taught some general statistics
24 courses and I have taught a course in sampling at both the
25 graduate and undergraduate level.

1 Q. And the statistic classes, were those graduate and
2 undergraduate as well?

3 A. Yes.

4 Q. And what's your current employment?

5 A. I retired from Georgia State in 2002, so I'm currently
6 an independent consultant on statistical matters.

7 MR. PERRY: May I approach, Your Honor?

8 THE COURT: Yes, sir.

9 MR. JAY FERGUSON: What number is that, Mr.
10 Perry?

11 MR. PERRY: 43.

12 Q. Dr. Katz, I am going to show you what I've marked for
13 identification purposes as state's exhibit number 43. Can
14 you tell the Court what that is?

15 A. That's a current version of my C.V.

16 Q. Would it help a little bit if you looked at that as I
17 asked you questions?

18 A. Yes, it would.

19 Q. I wanted to ask you a couple questions about your
20 prior experience with litigations that are similar to or
21 involved in analysis similar to that that we've discussed
22 with this. Have you had prior experience involving
23 discrimination in racial justice type litigation?

24 A. Yes, I do. On page three of my C.V., the first case
25 under the section, Criminal Sentencing, Race and the Death

1 Penalty, is a case that I was involved in, Warren McCleskey
2 versus Walter Zant, which later was renamed Ralph Kemp. I
3 was hired by the Attorney General for Georgia to review two
4 large databases that had been compiled by Professor Baldus,
5 Dr. Woodworth and Professor Pulaski relating to defendants
6 who had been convicted of murder or voluntary manslaughter
7 in Georgia. The issue was whether there was racial bias in
8 the charging and sentencing of defendants in terms of the
9 death penalty -- racial bias in the terms of race of the
10 victim or race of the defendant.

11 Q. Okay. And now just to be clear, you were present when
12 Dr. Woodworth was here earlier for the hearing and
13 testifying?

14 A. Yes.

15 Q. Was that the same litigation that he was referring to
16 in the McCleskey litigation?

17 A. Yes, it was.

18 MR. JAY FERGUSON: Can I interrupt one second?
19 Your Honor, can I request the witness to bring that
20 microphone down?

21 THE COURT: Yes, sir, so everybody can hear you.
22 Especially when that vent kicks in, Dr. Katz.

23 THE WITNESS: All right.

24 MR. JAY FERGUSON: Thank you.

25 BY MR. PERRY:

1 Q. Now that we've got somewhat of a time frame, how long
2 were you involved with the McCleskey litigation, Dr. Katz?

3 A. I was hired in late 1982 and I testified at the
4 hearing in federal district court in the summer of 1983.
5 That case eventually went to the United States Supreme
6 Court, and as issues arose along the way, I would assist
7 the attorney general's office in that litigation. So
8 pretty much off and on between the summer of '83 to the
9 point where it was finally heard by the United States
10 Supreme Court in I think it was '86 and decided in '87.

11 Q. I wanted to ask you because you mentioned two
12 databases that you did some analyses on. Were those
13 databases that you had any doing as far as the construction
14 of them or was that something you just reviewed in the
15 literal sense? In other words, did you have any part in
16 the construction of those databases?

17 A. No. Those were databases that had been compiled by
18 Professor Baldus, Dr. Woodworth and Professor Pulaski. I
19 analyzed them and reviewed them and testified regarding my
20 findings.

21 THE COURT: Mr. Perry, if you'll pull the
22 microphone down as well, please.

23 MR. PERRY: Yes, sir.

24 MR. COLYER: Your Honor, yesterday it helped a
25 little bit if we had both of them on.

1 THE COURT: Yes, sir.

2 BY MR. PERRY:

3 Q. Dr. Katz, let me ask you a question. For the
4 McCleskey case, in terms of the analysis, did that also
5 involve statistical analysis?

6 A. Yes.

7 Q. What kind of statistical analysis was done in the
8 McCleskey litigation as far as the work that you did?

9 A. I assessed the reliability and the validity of the
10 data and I did various analyses on the integrity of the
11 data and also comparing data between the two databases to
12 see how well the data matched up. One thing I found in the
13 -- in the data was that there was a lot of missing
14 information which pretty much limited what you can do using
15 multivariate analyses like logistic and multiple regression.
16 I ultimately did some analyses where just using items that
17 were part of the database on item-by-item analysis that
18 indicated that there seems to be different patterns of --
19 well, homicide patterns seem to be different depending upon
20 the race of the defendant and race of the victim, and I did
21 some analyses to illustrate that.

22 Q. Just to be clear, the two databases, they were
23 databases that related to different subject matters or
24 different data or were they --

25 A. There was two databases. One was the parole board's

1 study which was a compilation of murder -- defendants in
2 Georgia that had been, I believe, convicted of murder so
3 they were either sentenced to life or death. And I think
4 he had a -- I don't -- I don't recall that that finally --
5 I think that was the parole board study. Then the Georgia
6 charging and sentencing study, the second database, added
7 defendants who were convicted of voluntary manslaughter.

8 Q. Okay. So they were separate?

9 A. They were separate. And I think the second database
10 was also not complete in that it involved sampling. I'd
11 have to sort of review my materials to be more precise
12 about what -- what that database was but it was a large
13 database. Had about 1100 observations.

14 Q. And as part of the analysis that you did statistically
15 on those two databases, did you do various regression
16 analyses or other sort of analyzing of the information that
17 was contained therein?

18 A. I tried to do that but one of the problems when you
19 have a lot of missing information is, as you run regression
20 analyses, it kicks out the observations that are
21 incomplete. And so if you try to run a regression analysis
22 with 20 or 30 variables, if you use any variable that has
23 lots of missing information, that will pretty much cut your
24 number of observations that you have available to consider.
25 So that would -- I ran a few regressions under that

1 protocol and would get very few observations left once I
2 was done with it. And so that kind of told me that I --
3 because of all the missing information, if I was going to
4 try and get any insights as to what I could get from the
5 database, I'd probably have to look at it on my
6 variable-by-variable level rather than try to combine lots
7 of variables together to create a model.

8 Q. Okay. And let me ask you -- I want to ask you a
9 little more specifically as far as the previous work you've
10 done, have you done work involving research or analysis of
11 jury selection previously?

12 A. Yes. There is one case that I was involved in, the
13 Jimmy Lee Horton versus Ralph Kemp, I believe, which was
14 later renamed Jimmy Lee Horton V. Walter Zant. Apparently
15 the warden from the Georgia Diagnostic and Classification
16 Center, the respondent named, switched back and forth so
17 I'm not sure exactly when all that happened. But in that
18 case, the -- the issue was whether the D.A. from the
19 Ocmulgee Judicial Circuit in Georgia, Joe Briley, generally
20 used his peremptory strikes to strike black venire members
21 in a way to virtually exclude them from jury service. And
22 this was based upon Swain versus Alabama. As I understand
23 it, it's a standard that was used prior to Batson. And I
24 analyzed a data set of jury strikes related to Joe Briley's
25 cases.

1 Q. Okay. And just to be clear, you were actually
2 employed in that case by whom?

3 A. I was also employed by the Georgia Attorney General in
4 that case.

5 Q. Attorney general. Okay. Now, as far as the analysis
6 or the data actually in that case, was that something where
7 you compiled data or was that analysis of data someone else
8 had compiled?

9 A. The -- the defendant had compiled that data set.

10 Q. Okay.

11 A. I didn't compile it.

12 Q. All right. And as far as what you actually did, did
13 you do your statistical analysis or did you just evaluate
14 -- I think you referred to it as the data integrity or
15 reliability. What exactly did you do as part of your work
16 on that particular case?

17 A. I think I pretty much did just analysis of counts and
18 percentages of times when black venire members weren't
19 struck to show that they weren't struck at a rate where
20 they were totally excluded from jury service. I don't
21 recall -- there were several analyses that I did. I don't
22 recall them specifically at this point.

23 Q. Now, did you have any part in -- I guess in reviewing
24 the integrity or the reliability data that had been
25 assembled into the database, did you collect primary

1 materials from which to review at all? Is that part of
2 what you did?

3 A. No. I wasn't given materials to allow me to determine
4 if the database was accurate in terms of the representation
5 of the jury strikes. I believe we asked for those
6 materials, although that's going back many years. I'm not
7 -- you know, I shouldn't -- I don't really know at this
8 point. I don't recall.

9 Q. But that's not something that you asked for as part of
10 what you did?

11 A. No.

12 Q. Now, as part of looking at or analyzing the claims of
13 disparity, did you do work for the Georgia Department of
14 Corrections involving allegations of discrimination or
15 disparities?

16 A. Yes. I did a case involving an investigation by the
17 justice department where they allege that there was a bias
18 in the hiring of correctional officers by the department of
19 corrections based upon gender and this was just an
20 investigation. They had compiled some data and produced
21 this huge disparity in hiring rates, and the department of
22 corrections hired me to review what the justice department
23 had done and also provide them with assistance in deciding
24 what they should do going forward.

25 Q. Okay. So again, just to be clear that was not a

1 database that you assembled. That was something that
2 somebody else assembled and gave to you?

3 A. Yes. The justice department had their database and
4 the department of corrections provided me with other data
5 that I asked for to help me assess -- or try to understand
6 why the disparity existed between -- in hiring rates
7 between -- by gender.

8 Q. Now, was that -- was that something that ended up in
9 litigation or what was that in that particular case?

10 A. I found some explanations as to why the disparity
11 existed and those explanations were forwarded to the
12 justice department, the people handling this case, and they
13 considered it. And, ultimately, they lost interest in
14 pursuing the investigation but they held it open for a few
15 years. They lost interest in that. They stopped asking
16 the state for more and more information and they went to do
17 other issues. The investigation ultimately was closed
18 several years later once the Bush administration took over
19 in 2001 or so.

20 Q. So that was about the end point as far as your work
21 with that particular case?

22 A. My end point was a lot earlier. Once the justice
23 department seemed to lose interest in the case, there
24 wasn't any need for me to do anything so -- but I did get a
25 letter several years later indicating that the

1 investigation had been closed.

2 Q. All right. And I think you mentioned the Bush
3 administration. I actually want to ask you about another
4 Bush administration. Did you do work involving the State
5 of Florida at some point?

6 A. Yes, I did.

7 Q. And specifically did you look at questions involving
8 sort of, I guess, repeat offenders or felony convicted
9 offenders from Florida?

10 A. Yes. This -- this was a case, Johnson V. Jeb Bush,
11 governor of Florida, and I was hired by the -- for the
12 State of Florida. And the issue was whether there was
13 racial bias by the clemency board in their job in restoring
14 the civil rights for ex-felons who had completed their
15 sentence. And I did -- I obtained a lot of data from the
16 Florida Department of Law Enforcement as I was doing the
17 work on the issues that I needed to address in terms of
18 racial disparities and I ultimately submitted two expert
19 reports. One of them dealt with logistics regression.

20 Q. Was that -- again, just to be clear, that was data
21 that was not compiled by you. That was just a review that
22 you did?

23 A. Yes.

24 Q. And the logistics regression you did, was that -- I
25 guess, was that part of what went into your final reports?

1 A. Yes. It was responding to the logistic regression
2 that the expert for the defendant or for Johnson did.

3 Q. Okay. And did you -- how did that litigation end up?
4 Was that something that went to -- went to court or was
5 that something like the previous case was settled before it
6 actually went to court?

7 A. That litigation, the State of Florida filed a motion
8 for summary judgment and that motion was granted. It then
9 was appealed to the 11th Circuit Court of Appeals. The
10 three-judge panel reviewing that case reversed the district
11 court, ordering it sent back on the issue of the summary
12 judgment. The State of Florida appealed to the full 11th
13 Circuit Court of Appeals and the full 11th Circuit Court of
14 Appeals accepted the case. And the full 11th Circuit Court
15 of Appeals ended up restoring the decision of the district
16 court by a wide margin and so -- and then it was appealed
17 to the U.S. Supreme Court and cert was denied and that, I
18 believe, was the end of the case.

19 Q. Now, during that -- while all that was going on, were
20 you doing additional analyses or at some point were you --

21 A. No, I wasn't. The irony is after going through all
22 that litigation, when the new governor of Florida, Charlie
23 Christ, came into power, he basically agreed with the
24 plaintiffs in that case and pretty much did away with the
25 clemency board as I understand it.

1 Q. So at that point, you had no further need to be
2 involved I guess?

3 A. Well, I wasn't involved at that point but I thought
4 that was kind of ironic that the state would fight so hard
5 for -- well, under Governor Bush and then it just changed
6 overnight virtually.

7 Q. Then I wanted to ask you specifically about another
8 area of racial discrimination that you -- that you worked
9 in and that's the election -- sort of the district analysis
10 questions. Have you looked at discrimination in the
11 drawing of the election districts?

12 A. In voting rights cases?

13 Q. Yes, sir.

14 A. Yes, I have. I'm sorry.

15 Q. On your C.V. what I'm looking at is the Davida Johnson
16 versus Zell Miller case. Is that the case where you did
17 that kind of analysis?

18 A. Yes, it is. I was involved in several voting rights
19 cases involving the election of judges and also the case
20 involving the challenge to Georgia's congressional
21 districts. This would be the congressional district plan
22 based upon the 1990 census. So this is an older case.
23 There was a challenge to the way those district lines were
24 drawn claiming that race was used inappropriately and I was
25 hired by the state of Georgia to assist on providing

1 statistical support for that case. I ended up testifying
2 before a three-judge panel in Savannah, Georgia about the
3 extent of racially polarized voting in Georgia at that
4 time.

5 Q. As far as the data for the analysis that you did, was
6 that another case where there was data compiled by another
7 party and you reviewed it or was there data work that you
8 actually did for that case?

9 A. I didn't collect the data. That was data -- most of
10 it was collected by the justice department.

11 Q. And now as far as the outcome of that particular
12 litigation, was that something that was settled before
13 there was a trial or proceeding or did that actually go
14 through -- go through the court system formally?

15 A. That trial went through the court system. I testified
16 before the three-judge panel and this was the case, Davida
17 Johnson versus Zell Miller, Governor of Georgia. The
18 three-judge panel decided two to one in favor of the
19 plaintiffs. That case was then appealed to the U.S.
20 Supreme Court who heard the case and ruled five to four in
21 favor of the plaintiffs so that knocked out the
22 congressional -- the 11th Congressional District which
23 ultimately voided the complete congressional plan for
24 Georgia. So the case was sent back to the three-judge
25 panel. The three-judge panel redrew the congressional

1 district lines. And at this point, the state switched
2 sides and supported the new plan and the new plan was
3 challenged and appealed to the U.S. Supreme Court a second
4 time. The U.S. Supreme Court took the case and heard it
5 and ultimately decided in a five-to-four decision that the
6 new redrawn congressional district lines were okay. As
7 part of that decision -- this is a case Abrams -- Abrams V.
8 Johnson. As part of the decision, Justice Kennedy cited my
9 testimony regarding the methods I used to measure the
10 extent of racially polarized voting in Georgia. Because
11 the three-judge panel had used my testimony in part to
12 redraw the lines, Justice Kennedy stated in his opinion
13 something to the effect that the fact that the three -- the
14 three-judge panel had relied on my testimony to redraw the
15 lines was not clearly erroneous.

16 Q. So you bring in endorsement?

17 A. Yes.

18 Q. I wanted to ask you, when you talk about analysis for
19 that particular case, were there specific things that you
20 analyzed? In other words, like the previous case I asked
21 you about, was that one where you used logistic regression
22 or multiple regression? Were there specific things you
23 were asked to do in that case as far as analysis?

24 A. There were specific things involved. I developed a
25 methodology that I thought did a good job in showing how

1 the -- the likelihood of electing a black representative is
2 related to the percentage of -- of blacks within the voting
3 district. I had a model that I had come up with called
4 precinct probability analysis that showed that for
5 districts --

6 THE WITNESS: I'm sorry, Your Honor. Could I get
7 some water?

8 THE COURT: Yes, sir. Yes, sir. New cup, sir?

9 THE WITNESS: New cup is good. Thank you.

10 THE COURT: All right.

11 (The Court hands the witness a cup of water.)

12 THE WITNESS: Thank you.

13 THE COURT: Yes, sir.

14 BY MR. PERRY:

15 Q. Again, as far as covering your other areas of research
16 and expertise, I asked you briefly about a case involving
17 peremptory strikes which you had worked on but have you
18 done much other work involving jury selections
19 specifically?

20 A. Other than the Jimmy Lee Horton case?

21 Q. Um-hmm.

22 A. No.

23 Q. I mean do you consider yourself to having any
24 expertise in jury selection specifically?

25 A. No. What knowledge I have at this point has been

1 gained for the most part based upon my feedback from
2 prosecutors and from the reviews that I have looked at that
3 they have provided in this case.

4 Q. Okay. For this particular case?

5 A. Yes.

6 Q. All right. As far as qualifications, have you been
7 qualified as a statistical expert witness before?

8 A. Yes. I've been -- I've testified in federal district
9 court as a statistical expert seven times and three times
10 in Georgia Superior Court. I've also been involved in a
11 number of other litigations, I would say non-Medicaid fraud
12 related litigations about 20 or so times.

13 Q. Now, you mentioned non-Medicaid related litigation.
14 Have you done work involving Medicaid?

15 A. This would be Medicaid fraud cases and yes, I do
16 sampling plans. Since 2000, I've been retained by the
17 Georgia -- the Department of Audits and Accounts and they
18 do audits of Medicaid providers. And since that time --
19 and I -- I provide statistical support in terms of sampling
20 plans and projections and I am available to testify and --
21 if it does go to some kind of administrative review. And
22 I've been doing that since 2000. Over that time period,
23 I've probably produced, you know, I have over 200 sampling
24 plans.

25 Q. I want to ask you about that as far as clarification.

1 When you say producing sampling plans, what work were they
2 actually asking you to do? In other words, what was your
3 output when they asked you to do sampling plans?

4 A. Typically they would send me data related to the
5 billings of the provider, the claims that have been filed
6 by the provider and it's a provider that has some --
7 something in their data that suggests they may be
8 overbilling in some way. And they would indicate which
9 codes they thought were the ones that needed to be reviewed
10 and I devised a sampling plan. I would tell them how many
11 -- well, first of all, how to divide up the universe of
12 claims they wanted reviewed. I would tell them what's --
13 what type of sample to use, whether a random sample or a
14 stratified random sample and I would give them an
15 indication of the sample size that should be used for the
16 audit.

17 Q. Okay. Now, do you do that work just for the Medicaid
18 fraud unit?

19 A. Well, I do that for the Georgia Department of Audits
20 and Accounts. I also do similar work for the Georgia
21 Medicaid Fraud Control Unit. The difference is the
22 department of audits and accounts will audit the provider
23 and send them a bill at the end of the day saying they owed
24 -- they were overpaid by say \$50,000. The Georgia Medicaid
25 Fraud Control Unit is looking into more criminal fraud than

1 just overpayments and so they -- that's a different entity.
2 But I do similar kind of work in that I provide sampling
3 plans and assist them with projections and also assist them
4 with the litigation that follows if I need to testify
5 regarding what I've done.

6 Q. Okay. Is that something you're currently still doing?

7 A. Yes. I'm still working with the Georgia Medicaid
8 Fraud Control Unit. And I also do similar work for the
9 U.S. Attorney's Office in Atlanta for their investigations
10 of Medicaid fraud.

11 Q. How long have you been working with that office?

12 A. Well, that's kind of off and on. I did a case back in
13 the '90's that involved a provider who had billed like 60
14 million dollars and ended up being overpaid by 15 or some
15 million dollars. It was a case United States versus
16 Marshall Newsome Enterprises and that was the first time I
17 worked with them on Medicaid fraud. Since that time I've
18 probably done maybe five to ten cases, some of them of
19 limited involvement, others that have involved actual
20 testimony.

21 Q. Okay. And on the -- on the federal note, have you
22 done work for the IRS, taxing authorities?

23 A. Yes. I'm also -- since 2000, I'm the contract
24 statistician for the Treasury Inspector General for Tax
25 Administration, or TIGTA. They're an agency that audits

1 the IRS processes to try and make sure the IRS is audited
2 and operates as efficiently and fairly as possible.

3 Q. And for what specific purposes -- when you say
4 contract statistician, what do they actually ask you to do
5 as part of their work for them?

6 A. Well, they are auditors and they want me to assist
7 them in developing their audit objectives. They will also
8 ask me about sampling plans and projections. They often
9 have conferences with the IRS at the end of their audit to
10 try to explain their audit results and they often want me
11 to be part of that to support these statistical analyses
12 and findings that were part of their audit.

13 Q. And, again, is that something you're doing ongoing
14 work for?

15 A. Yes.

16 Q. Or you're involved with them currently?

17 A. Yes. I am currently involved with them, yes.

18 Q. Dr. Katz, I've asked you a lot about the -- sort of
19 involvement with litigation and contract work that you've
20 done. You've also done research?

21 A. Yes.

22 Q. And on your C.V., does that list a number of the
23 research publications and papers that you've worked on over
24 the last several years?

25 A. I haven't really worked on much the last several

1 years. Most of what I've done has been early in my career.
2 The last several years I focused pretty much on applied
3 practical kind of work outside of the academic area.

4 Q. Since your retirement?

5 A. Yes.

6 MR. PERRY: Your Honor, at this time I would
7 tender the witness as an expert in statistics, data
8 analysis and sampling, specifically referring to him as an
9 applied statistician.

10 THE COURT: Folks, do you want to be heard as to
11 the tender?

12 MR. JAY FERGUSON: No, Your Honor.

13 THE COURT: Yes, sir. You may proceed.

14 MR. PERRY: Thank you, Your Honor. I guess as
15 part of that, I move to introduce state's exhibit number
16 43.

17 THE COURT: Yes, sir. Without objection, that's
18 received.

19 BY MR. PERRY:

20 Q. Dr. Katz, as part of your work here recently since
21 your retirement, have you become involved with the
22 Cumberland County District Attorney's Office as a result of
23 this Racial Justice Act litigation?

24 A. Yes.

25 Q. Now, have you had a chance to review materials

1 provided by the defense at various points in this
2 litigation?

3 A. Yes, I have.

4 Q. And at some point, did you also prepare a report based
5 on your analysis?

6 A. Yes, I did.

7 Q. And you provided that to Mr. Thompson and Mr. Colyer?

8 A. Yes.

9 MR. PERRY: May I approach, Your Honor?

10 THE COURT: Yes, sir.

11 MR. PERRY: Your Honor, since this was entered as
12 a voir dire exhibit, I'm just going to put a state's
13 exhibit sticker on it so this would be the final report
14 from yesterday.

15 THE COURT: Okay. And that exhibit number for
16 our purposes now is what, sir?

17 MR. PERRY: 44, Your Honor.

18 THE COURT: Yes, sir.

19 BY MR. PERRY:

20 Q. Dr. Katz, I'm going to hand you what I have marked for
21 identification purposes as state's exhibit 44. Did you
22 have a chance to review that yesterday during the voir dire
23 proceeding?

24 A. Yes.

25 Q. Was that the same report that you looked at yesterday?

1 A. Yes.

2 Q. Now, as part of your analysis, I asked you if you had
3 looked at the materials that were provided by the defense.
4 Did you look at the -- most -- or did you look at some
5 reports that were generated by Professor O'Brien in regards
6 to this litigation?

7 A. And Professor Grosso.

8 Q. And Professor Grosso.

9 A. Yes. I looked at the MSU study reports, well, the
10 original version which was dated around July 2011. There
11 was a revised version dated September 2011 and the last
12 version was dated I believe December 15, 2011.

13 Q. Okay. So you've had a chance to review those?

14 A. Yes.

15 Q. And as part of your report that you generated, did you
16 incorporate information from those reports?

17 A. Yes, I did.

18 MR. PERRY: May I approach, Your Honor?

19 THE COURT: Yes, sir.

20 MR. PERRY: Your Honor, I think the copy of the
21 December report --

22 THE COURT: What's that number, Madam Clerk, the
23 December 2011 version? I think it's December 15.

24 MR. JAY FERGUSON: 6?

25 MR. PERRY: Should be 11. What I'm going to do,

1 Judge, just to cut down on it, this is something we marked
2 as state's exhibit 11 during the cross-examination --

3 THE COURT: Okay.

4 BY MR. PERRY:

5 Q. Dr. Katz, I am going to hand you what was marked as
6 state's exhibit 11 earlier in these proceedings. Is that a
7 copy of the defense report?

8 A. This is the September 29th report.

9 Q. That's the September 29th report?

10 A. Yes.

11 Q. So that -- of the reports that you reviewed, that
12 would actually be the middle report?

13 A. The middle report, yes.

14 Q. Okay. I'm going to hand you what I've marked
15 previously in the earlier proceedings as state's exhibit
16 number 10. That's the July report.

17 MR. PERRY: Is that correct, Madam Clerk?

18 THE CLERK: Yes.

19 MR. PERRY: Okay.

20 THE WITNESS: Yes.

21 Q. And I guess I answered my own question but is that the
22 July report you also had a chance to look at?

23 A. Yes, it is.

24 Q. Now, in addition to those two reports, did you also
25 take a look at the sort of underlying material that was

1 provided by the defense? In other words, did you look at
2 what they used to actually generate their report?

3 A. Yes. I looked at a lot of materials and spent time
4 analyzing databases that were developed by the defense to
5 produce much of what appears in the report.

6 Q. And did that include copies of the DCI's or data
7 collection instruments?

8 A. I didn't look at the DCI's all that closely. I pretty
9 much focused on the databases.

10 Q. Okay. I'm going to hand you what I have marked in the
11 earlier proceedings as state's exhibit number 9. Is that a
12 copy of the DCI's?

13 A. Yes.

14 Q. And specifically in that particular state's exhibit,
15 can you tell us which DCI's those are?

16 A. It appears to be the DCI's for the Cumberland County
17 cases.

18 Q. Now, as part of your analysis, did you look at
19 material that was analyzed on a statewide level as well as
20 material that was analyzed just strictly at the Cumberland
21 County level?

22 A. Yes. I looked the materials for both Cumberland
23 County alone and statewide.

24 MR. PERRY: Your Honor, if I may approach one
25 more time?

1 THE COURT: Yes, sir.

2 MR. PERRY: Judge, now I'm going to mark just
3 with an additional state exhibit sticker defendant's
4 exhibit number 6 and that would be the December report.

5 THE COURT: Sorry, again the number, sir?

6 MR. PERRY: I think it's defendant's exhibit
7 number 6.

8 THE COURT: Okay.

9 BY MR. PERRY:

10 Q. So, Dr. Katz, I'm going to hand you what I have put
11 state's exhibit number 44 on. For identification purposes
12 can you put --

13 THE COURT: Should be 45.

14 BY MR. PERRY:

15 Q. 45. I'm sorry.

16 A. This is the third version of the Michigan State report
17 on jury selection study dated December 15, 2011.

18 Q. Okay. Now, those materials that we've gone through
19 and identified now, those were part of the review process
20 that you did to generate your final report; is that
21 correct?

22 A. Yes.

23 Q. Now, as part of your review process, did you also look
24 at some of the underlying data in the form of spreadsheets
25 that were provided by Professors O'Brien and Grosso?

1 A. Yes, I did.

2 MR. PERRY: May I have a moment, Your Honor?

3 THE COURT: Yes, sir.

4 MR. THOMPSON: May we have just a second, Your
5 Honor?

6 THE COURT: Yes.

7 (The prosecutors confer.)

8 MR. JAY FERGUSON: Your Honor, may I address the
9 Court? It's my understanding that the state's going to get
10 into some documents I haven't seen. It was given to me on
11 a thumb drive. It's been represented to me what's on there
12 and don't know any -- have any objection at this point.
13 What I would like to do is reserve the right to review it
14 -- there's a lot of information on the thumb drive. Review
15 it tonight and come back and lodge any objections I may
16 have tomorrow with respect to this data.

17 THE COURT: Absolutely. Another alternative -- I
18 extended the same accommodation to counsel for the state.
19 I am going to extend it to you as well. If you want an
20 opportunity to review those prior to any testimony being
21 elicited, I'm certainly willing to give you that
22 opportunity.

23 MR. JAY FERGUSON: Perhaps if I could have just a
24 few minutes to look at what the documents are.

25 MR. THOMPSON: That's fine with us.

1 THE COURT: Okay. Is that agreeable?

2 MR. THOMPSON: Sure.

3 THE COURT: Ten, 15 minutes?

4 MR. JAY FERGUSON: That would be great.

5 THE COURT: Is that enough?

6 MR. JAY FERGUSON: Thank you.

7 THE COURT: All right. We're at ease. You may
8 step down, Dr. Katz.

9 (Recess taken.)

10 (The following proceedings continued in open
11 court. The defendant, defense attorneys and state's
12 attorneys were present.)

13 THE COURT: Okay. Let the record reflect all
14 counsel are present. The defendant is present. I don't
15 mean to interrupt if you need more time or are you ready to
16 go? Do you want to be heard further, sir, at this time?

17 MR. JAY FERGUSON: I have seen the documents and
18 I am prepared to go forward and I will object to each
19 document as it comes in.

20 THE COURT: Yes, sir. Okay. Yes, sir, Mr.
21 Perry.

22 MR. PERRY: Your Honor, on the other note, I
23 think Mr. Ferguson has had a chance to look at the USB
24 drive materials so I'll just mark that as a state's exhibit
25 number and -- other than other objections he might make.

1 THE COURT: For the record -- I apologize. That
2 number is what?

3 MR. PERRY: 46.

4 THE COURT: 46. And that's the jump drive?

5 MR. PERRY: Yes, sir.

6 THE COURT: Okay. Yes, sir.

7 MR. JAY FERGUSON: Your Honor, may I put the
8 audio recorder up there?

9 THE COURT: Yes, sir.

10 MR. PERRY: Your Honor, before we resume with the
11 questions, if I may approach, I've got a copy of the
12 PowerPoint slides for the Court. Those are also contained
13 on the jump drive.

14 THE COURT: And -- all right.

15 MR. PERRY: So I wasn't going to mark them as a
16 separate exhibit.

17 THE COURT: Okay. Do we need to have them marked
18 as a separate exhibit? I think so.

19 MR. JAY FERGUSON: I think so, Your Honor.

20 MR. PERRY: I can do that.

21 THE COURT: Why don't we mark it as state's 47?

22 MR. PERRY: Yes, sir.

23 THE COURT: Okay. Is this my copy or the Court's
24 copy -- clerk's copy.

25 MR. PERRY: That would be your copy. I should

1 have one more copy. So I've now marked a copy of these
2 slides as state's exhibit number 47.

3 THE COURT: Okay. Thank you, sir.

4 BY MR. PERRY:

5 Q. Dr. Katz, if I can go back to where we were before the
6 break. What I was asking about involved the actual
7 analysis that you did and you indicated you produced the
8 final report. They were marked as an exhibit in front of
9 you.

10 A. Yes.

11 Q. As part of the issues that you looked at, did you look
12 at the sampling issues involved with this case?

13 Specifically, did you look at how the defense or how
14 Professors O'Brien and Grosso came up with their sampling
15 plan for their analysis?

16 A. Yes, I did.

17 Q. Okay. And can you explain to the Court what you
18 looked at?

19 A. In the report, it states that the sample or the study
20 population was all proceedings related to residents of
21 death row in North Carolina as of July 1st, 2010. I was
22 attempting to determine if that sample would be appropriate
23 given what's stated in the Racial Justice Act. My reading
24 of the Racial Justice Act suggests to me that --

25 MR. JAY FERGUSON: Objection as to his

1 interpretation of the Racial Justice Act.

2 THE COURT: The objection is sustained.

3 MR. PERRY: Let me rephrase or let me reask --

4 THE COURT: Okay.

5 MR. PERRY: -- that part of what I am asking
6 about.

7 Q. In terms of -- well, let me just ask you this. When
8 you approached the report and looked at the sampling, what
9 was your purpose in looking at how they sample? What was
10 your overall purpose?

11 A. My overall purpose was to determine if the sample they
12 had defined was appropriate for the analysis that they were
13 doing related to jury trials.

14 Q. All right. And in terms of your assessment of the
15 appropriateness of the sample, did you look for guidance
16 somewhere as to what the sample should be?

17 A. Yes.

18 Q. Okay.

19 A. And I looked to the Racial Justice Act.

20 Q. And I think, as is displayed on the PowerPoint, slide
21 number one is -- does that appear to be the Racial Justice
22 Act?

23 A. A part of it, yes.

24 Q. And as far as the part of it that's up on the screen,
25 is that what you looked to for guidance on developing your

1 own idea of what a proper sampling should be?

2 A. Yes.

3 Q. Now, just in terms of the sampling, when you assessed
4 what had been done in Professor O'Brien's report, did you
5 have specific things you were looking at to assess the way
6 they did their sampling?

7 A. Yes. I wanted to determine if the sample collected
8 for the analysis in Dr. O'Brien's report was a probability
9 sample that would allow inferences from the sample to be
10 made to the relevant population of capital or jury trials.

11 Q. And just to be clear, can you tell -- tell me what you
12 mean by probability sample. Can you explain what you mean
13 when you say that?

14 A. Probability sample is a sample where each element in
15 the universe has a known probability of selection. If you
16 add a random sample, each element in the population would
17 have the same probability of being selected.

18 Q. Now, you're mentioning population. Can you explain
19 what, if anything, is important about the identification or
20 specification of a population?

21 A. Well, the population would be the relevant trials that
22 the sample of trials would be inferred to.

23 Q. And not to dwell on the technical part of it, was that
24 something that you also considered in your analysis? In
25 other words, did you try to identify what a -- what an

1 appropriate population might be for these purposes?

2 A. Yes, I did. And the -- I don't have any guidance as
3 to what the relevant trials are but I looked at the Racial
4 Justice Act and tried to determine as best as I could what
5 could be the relevant set of trials that would constitute
6 the population and I made some judgments based upon what I
7 could see in the Racial Justice Act.

8 Q. Now, in addition to your -- your own separate review
9 of population and sample ideas, did you also review what
10 Professors O'Brien and Grosso had done in terms of
11 population and sampling?

12 A. Yes. They -- they seem to have defined the population
13 to be the 173 proceedings based upon the residents of death
14 row in North Carolina as of July 1st, 2010. But they also
15 in their report did analyses that would tend to project
16 their results or make tests of hypotheses of their results
17 to some larger population which wasn't completely specified
18 in that report.

19 Q. Okay. And we're talking about projection. To be
20 fair, there was a distinction between the statewide
21 analysis and the Cumberland County specific analysis in the
22 defense report?

23 A. Yes.

24 Q. Okay. The population as identified for Cumberland
25 County was what? What was the population of that in

1 Cumberland County?

2 A. There were 11 capital trials that were identified as
3 the population for Cumberland County. Basically, the
4 population would be based upon the trials and would
5 constitute the venire members who had been considered for
6 jury service in those trials such that a venire member was
7 not struck for cause, so had passed the threshold of not
8 being struck for cause and could be considered as either --
9 or would have been considered and would have either been
10 peremptorily struck by the state, the defense or seated as
11 a juror or alternate.

12 Q. And I want to ask you specifically about -- you
13 mentioned earlier the study population that Professor
14 O'Brien had in her report. In terms of your opinion of its
15 definition, what was your assessment of their definition of
16 the population?

17 MR. JAY FERGUSON: Objection if any part of his
18 opinion is based upon the affidavits of prosecutors. Renew
19 my motion in limine, Rule 702, 703 of the rules of
20 evidence, commutation clause under the federal and state
21 constitution.

22 THE COURT: Duly noted. And, folks, I've already
23 indicated that while the Court has some concerns -- well,
24 your objection is overruled. Exception is noted for the
25 record for purposes of preservation. Repeat your question,

1 Mr. Perry.

2 MR. PERRY: Yes, sir.

3 Q. And let me clarify it a little bit. In terms of the
4 population that was offered by Professor O'Brien, how did
5 you assess their definition of population?

6 A. They didn't state as I recall any large -- larger
7 population that their study sample referred to. My -- I
8 have tried to determine what possibly could be the
9 appropriate population based upon the Racial Justice Act
10 and I don't have any guidance from any rulings that have
11 been made about what that appropriate population is. So I
12 can only talk in terms of possibilities at this point. But
13 it appears to me that the larger population of eligible
14 trials will be capital trials within the time frame that
15 was specified in the report based upon the language about a
16 death sentence either sought or imposed. So as my
17 conclusion based upon a death -- a case where the death
18 sentence was sought would indicate a capital trial for the
19 third part of the -- or section three of the Racial Justice
20 Act for whether race was a significant factor in decisions
21 to exercise peremptory strikes.

22 Q. Okay. And let me ask you. In terms of your
23 assessment of the population and what Professor O'Brien
24 looked at, in your assessment, was that population, those
25 173 trials, did that appear to be a random sample?

1 A. If the population is capital trials, then no, it
2 wouldn't have been a random sample from the set of capital
3 trials.

4 Q. Okay. And in -- I guess as part of what you looked at
5 and you talked about capital trials, what's the distinction
6 between capital trials and the 173 cases that are included
7 in that report?

8 A. The 173 trials were limited to capital trials where
9 the outcome of the trial was a death sentence where the
10 defendant was currently on death row as of July 1st, 2010.

11 Q. Okay.

12 A. There are many other possible outcomes to capital
13 trials such as some of the capital trials held between 1990
14 and 2010 resulted in death sentences where the defendant
15 has been executed or removed from death row for some
16 reason. There's a possibility of a defendant being
17 convicted but not sentenced to death and there is the
18 possibility, but I am not sure if there is any cases of
19 this, where the defendant might have been acquitted.

20 Q. And to what extent -- well, let me ask you this in two
21 ways. To what extent did you look at those -- those
22 possibilities? Did you do any kind of analysis -- analyses
23 to see, you know, if that was the case or what those
24 numbers were? Is that part of what you did?

25 A. I did try to come up with some sense of what the

1 population size would be to the extent that I could. The
2 charging and sentencing study has some information
3 regarding cases that went to a capital trial and I looked
4 at -- and this is the other study that was done by
5 Professors Grosso and O'Brien. And what I found was in
6 searching for the number of capital trials from that study,
7 there were some like 696 capital trials. So the 173 that
8 Professor O'Brien reviewed would be a part of the 696 but
9 not necessarily a random sample from the 696.

10 Q. Okay. Let me ask you a question about the sort of
11 consequences of random versus nonrandom samples. What's
12 the problem of having a nonrandom sample if you have a
13 nonrandom sample?

14 A. If you don't have a nonrandom sample, you don't have
15 any probability theory to support any inference that can be
16 made from the sample to the population.

17 Q. And if it was -- if we are talking just in general,
18 with a random sample, what would you expect to see if you
19 were able to appropriately identify a random sample?

20 A. If you had a random sample, then you can use
21 probability theory and statistical methods to do
22 projections and provide confidence intervals, do tests of
23 hypotheses similar to what Dr. O'Brien did in her report,
24 come up with P values as to the strength of the difference
25 in strike rates, those kinds of things, yeah.

1 Q. And just going back to a question or two I had asked
2 you about when we were asking you about your background and
3 other work you had done, is there any difference or how
4 would you distinguish between what you do as far as working
5 with the Medicaid fraud folks and the analysis that has
6 been done in this case?

7 A. In my Medicaid fraud analyses, we're required to have
8 a probability sample if we want to project the overpayment
9 results from our sample to a larger population of claims.
10 Typically, if we had, say, a sample of a hundred claims
11 from a provider and suppose it was a random sample and
12 suppose we had a total overpayment based upon just these
13 hundred claims of say 2,000 dollars, if we were just
14 limited to collecting the overpayment of 2,000 dollars,
15 then we would have spent a lot of resources for very little
16 possible return. But if we have a random sample and, say,
17 the number of claims were, say, 10,000, then we could
18 project the 2,000 dollars to the larger set of claims and
19 ask for a repayment of something on the order of 200,000
20 dollars. But to do that, to apply statistical theory,
21 probability theory in that case, we have to be pretty sure
22 or absolutely sure that what we have is a random sample and
23 do those things that ensure that we haven't done anything
24 to violate statistical principles.

25 Q. And in the work you did with the Medicaid fraud folks,

1 were the populations identified clearly when you did your
2 work for them?

3 A. Yeah -- yes. They identified the population in terms
4 of which claims are a part of the audit universe and from
5 that I will be specific as to how the sample should be
6 selected. We typically try and select the sample before we
7 review claims from the providers' offices to make sure that
8 we're not doing anything to bias the claims that we select.

9 Q. Okay. Now, and let me just follow up on that. You
10 said bias the claims that you select, what do you mean by
11 that?

12 A. Well, if we have, say, a hundred claims that we're
13 reviewing and if we don't have a process to ensure that
14 it's a random sample, it's possible that an auditor can
15 simply go into a provider's offices and just pick out some
16 claims that appear to be easy to find or may even appear to
17 have less documentation than others that would probably
18 result in more overpayment than not. And just say, well,
19 this is my hundred claims and this is my sample and project
20 it to something that might turn out to be 300,000 dollars
21 instead of 200,000 dollars. That process wouldn't be fair
22 to the provider.

23 Q. And that was -- that would be based on the sampling?

24 A. Yes.

25 Q. Okay. Now, as far as -- we're talking sort of general

1 in terms of the sampling. Is there also -- or did you also
2 look at the time frame that was involved with the report
3 that was generated by Professors Grosso and O'Brien?

4 A. Yes. The time frame went from 1990 through 2010.

5 Q. Okay. And, in fact, did they actually identify
6 several different time periods?

7 A. Yes, various time periods. In terms of time periods
8 where Mr. Robinson's case fell into a specific range, there
9 was a five-year time period from 1990 to 1994, a ten-year
10 time period from 1990 to 1999 and a 21-year-time period
11 from 1990 to 2010.

12 Q. Okay. Now, in terms of your assessment of -- well,
13 let me ask you this. Would a time frame be relevant in
14 terms of your work with the Medicaid fraud analysis, is
15 there a time frame that you have to consider?

16 A. Yes. Typically we do define a time frame because
17 there are statute of limitation issues. So we will ensure
18 that the time frame is within the appropriate range that
19 doesn't violate the law.

20 Q. Okay. Now, for the Racial Justice Act, when you
21 looked to assess the sampling that was done, did you -- did
22 you find any guidance on what a time frame should be?

23 A. Well, there is some language in the Racial Justice Act
24 about at the time the death sentence was sought or imposed,
25 and I've tried very hard to think through what that might

1 mean in terms of a time frame. And the longer I looked at
2 it, the harder the problem seems to be in terms of coming
3 up with what's a suitable time frame. But there is some
4 language and I don't really know how to deal with it all
5 that well. Part of the difficulty that I see is that it
6 seems to pertain to all three sections of claims. Section
7 one, death sentences were sought or imposed significantly
8 more frequently upon persons of one race than upon persons
9 of another race. And then two and three, they're all kind
10 of combined under the same conditions of at the time the
11 death sentence was sought or imposed. And so that kind of
12 makes it, you know, to me a much more difficult process in
13 trying to come up with one single time frame that would
14 cover all the possible claims that can be raised.

15 Q. And you say it makes it more difficult. What
16 specifically about that makes it more difficult, just to be
17 clear?

18 A. Well, there's, in this case, two different studies,
19 the charging and sentencing study and the jury selection
20 study. And there may be different issues pertaining to
21 each one as to what a fair and relevant time frame should
22 be.

23 Q. Now, as part of your review -- again, this is -- we're
24 talking in this hearing and in your report, you look
25 specifically at the jury selection study to generate your

1 report; is that correct?

2 A. That's correct, yes.

3 Q. Did you look at the work that was done in the charging
4 and sentencing study?

5 A. Yes, I did. And I did find some numbers in terms of
6 the number of cases that fell within time ranges and these
7 would be the capital cases that had a capital trial and
8 found that there were a large number of cases and a large
9 number that fell within each of the three ranges that was
10 defined in Dr. O'Brien's report.

11 Q. Okay. And just if I could direct your attention to
12 what I marked as PowerPoint slide number two, does that
13 refer to the time period that we're talking about?

14 A. Yes, it does.

15 Q. From the defense study?

16 A. Yes.

17 Q. And you had mentioned there were three different
18 breakdowns of the time periods?

19 A. Yes. I looked at cases that had capital trials
20 between 1990 and 2010 and found 696 from the charging and
21 sentencing study statewide of which 42 came from Cumberland
22 County.

23 Q. Okay.

24 A. For the period from 1990 to 1999, there are 522
25 capital trials statewide with 28 from Cumberland County.

1 And between 1990 and 1994, 251 capital trials statewide
2 with eight from Cumberland County.

3 Q. Okay. And just to be clear, those numbers are not
4 numbers that you came up with?

5 A. Those were numbers that I calculated based upon the
6 database for the charging and sentencing study.

7 Q. Okay. And what was the relevance of looking at those
8 particular subsets of numbers. In other words, why were
9 those important to you in your analysis?

10 A. Well, one of the questions that came up at the
11 discovery hearing relevant to the time frame issue was
12 whether there were a sufficient number of cases to review,
13 and so I found that there were a lot of capital trials
14 available to review --

15 Q. Okay.

16 A. -- for the different time frames.

17 Q. Now, in -- I guess in overall terms, from the
18 standpoint of the sampling that was done in the report by
19 Professors Grosso and O'Brien, what were the main concerns
20 that you had?

21 A. My main concern was it wasn't a random sample. If the
22 eligible population of capital trials were -- or the
23 eligible population were all capital trials. And I also
24 have a concern in terms of the time frame not being
25 determined but that's difficult for any of us experts to

1 try and determine without more guidance from the courts as
2 to what that time frame should be, if any.

3 Q. Were you able to -- well, and let me ask you two
4 questions. One, when you're -- when you're saying that you
5 had concerns about the randomness of their sample, to be
6 clear, was that based on these numbers that are on this
7 slide number two that we've got displayed?

8 A. Yes.

9 Q. Okay. And then the second thing that you indicated,
10 the timing aspect of this analysis, were you able to come
11 up with any kind of time frame that you thought would be
12 appropriate based on looking at this statute?

13 A. No, I wasn't. I think it's more complex than I am
14 able to discern at this point.

15 Q. Okay. Now, if I could, I wanted to ask you about --
16 and I'll just follow the progression of your report. The
17 second thing you looked at in terms of reviewing the study
18 by Professors Grosso and O'Brien, did you have an
19 opportunity to look at the seated rates of jurors in cases?

20 MR. JAY FERGUSON: Objection, Your Honor. I'd
21 like to be heard.

22 THE COURT: Okay. Yes, sir.

23 MR. JAY FERGUSON: Your Honor, based upon the
24 PowerPoint as I know the next few slides to be --

25 THE COURT: Yes, sir.

1 MR. JAY FERGUSON: -- it's my understanding what
2 the state intends to do is to try to elicit testimony from
3 Dr. Katz as to what the final seated composition of the
4 jury is in I don't know whose case but probably all through
5 the state. The relevant inquiry under the Racial Justice
6 Act is whether race was a significant factor in the
7 exercise of peremptory challenges and we've made a claim
8 that that is the peremptory challenges by the State of
9 North Carolina. That's the relevant inquiry for the Court
10 under the Racial Justice Act, not the final composition of
11 any jury and, therefore, based upon Rule 401, we object to
12 that evidence coming in.

13 THE COURT: Okay. You want to be heard in
14 response, Mr. Perry, Mr. Thompson, Mr. Colyer?

15 MR. THOMPSON: Judge, in the reading of the
16 Racial Justice Act, it doesn't say the state strikes. It
17 says in jury selection. It doesn't say state or defense or
18 whatnot.

19 THE COURT: Let's go back to 15A-2011 --

20 MR. THOMPSON: Yes, sir.

21 THE COURT: Subsection (b)(3), race was a
22 significant factor in decisions to exercise peremptory
23 challenges during jury selection.

24 MR. THOMPSON: Yes, sir.

25 THE COURT: Yes.

1 MR. THOMPSON: We consider both the defense
2 strikes and the state strikes certainly to be relevant
3 here, especially in light of some of the defense testimony
4 that Dr. Sommers I think -- it was mainly Dr. Sommers that
5 white -- in their -- unconscious racist testimony, that
6 white people in general, if they are suffering from
7 unconscious racism, generally gravitate or prefer white
8 people, white situations.

9 THE COURT: Yes, sir.

10 MR. THOMPSON: Overgeneralization but I think you
11 recall his testimony.

12 THE COURT: Yeah.

13 MR. THOMPSON: Well, I think in small part, but
14 there is a lot of different things that this indicates, is
15 most of the defense attorneys around the state were white
16 and struck white at an incredibly larger rate that makes it
17 very similar to the rates that the defense is accusing us
18 of inappropriately. So the whole issue is -- it's a
19 complicated issue and I'm trying to make sense of it in a
20 nutshell but the whole issue is there has to be something
21 else going on, the explanatory factors. We don't believe
22 the defense engaged in racial discrimination when they
23 removed twice the number of white jurors as they did black
24 jurors just as in we don't believe that the state engaged
25 in racial discrimination when we are accused of doing the

1 same. We believe there is another explanatory factor and
2 that's one of the huge parts of the state. The defense
3 strikes at twice the rate. The state strikes at exactly
4 twice the rate. It actually equals out to the same chance
5 of the juror being seated in the box once the state and the
6 defense have finished their questioning. So to the extent
7 that it is relevant, it is certainly relevant. Whether
8 Your Honor -- how Your Honor considers it, the weight Your
9 Honor gives it is always up to Your Honor, of course, based
10 on the way this is laid out, but to call this not relevant
11 is not accurate respectfully.

12 THE COURT: Well, my responsibility, Mr.
13 Thompson, is to follow the law and the law, recognizing
14 that this is the first case heard under the Racial Justice
15 Act and we don't have any guidance in terms of any
16 appellate decision, requires me to consider (b)(3) based on
17 the language in the statute, that race was a significant
18 factor in decisions to exercise peremptory challenges in
19 jury selection. Your argument is predicated on Rule 401,
20 relevance.

21 MR. JAY FERGUSON: That's correct, Your Honor.

22 THE COURT: Also I'm required to consider in
23 ruling Rule 403, probative value versus prejudice. Anybody
24 want to be heard?

25 MR. COLYER: Please, Your Honor.

1 THE COURT: Yes, sir.

2 MR. COLYER: Judge, with respect to the
3 prejudicial value, we would consider -- since we're not
4 again -- we hate to keep harping on this. We are not
5 referring --

6 THE COURT: I understand that. That's the point
7 I was about to make. We don't have that jury consideration
8 issue.

9 MR. COLYER: And so you are in a position to
10 filter and accept and weigh the material. And, Judge, with
11 respect to the question of whether race was a significant
12 factor, again, the statute doesn't say with respect to the
13 exercise of peremptory challenges by the state. It doesn't
14 say with respect to the defense. So while we're not making
15 any accusations with respect to anybody, this is a -- we
16 contend, is a way to examine the data and to look at the
17 numbers because the question is the disparity in numbers,
18 and if that's all the question is, then the numbers are
19 what they are.

20 THE COURT: Yes, sir.

21 MR. COLYER: But if there is a reason, an
22 explanation for the numbers, then it applies equally under
23 the language of the statute with respect to an examination
24 of the exercise of a peremptory challenge. It doesn't
25 limit it to one side or another, and we would ask the Court

1 to consider our testimony and evidence with respect to that
2 and consider the doctor's information and examination of
3 these in the light that all of us are having to look at the
4 Racial Justice Act today, which seems to be a broad and
5 expansive view that perhaps would be narrowed by this
6 Court's ruling in some way.

7 THE COURT: Okay.

8 MR. COLYER: So it's information that we contend
9 is relevant and we would ask the Court to please consider
10 it and allow the doctor to testify.

11 THE COURT: Okay.

12 MR. JAY FERGUSON: Could I respond briefly?

13 THE COURT: Yes, sir.

14 MR. JAY FERGUSON: I specifically did not cite
15 Rule 403 because I don't think this has any probative value
16 whatsoever.

17 THE COURT: I understand.

18 MR. JAY FERGUSON: But I will submit to the
19 Court, just like in the motion in limine, if the Court
20 feels it has any probative value, it would go to the weight
21 and not the admissibility and the weight of this seated
22 juror testimony would be de minimus, and I don't wish to be
23 heard further.

24 THE COURT: All right. Folks, we're going to
25 stop for about 15 minutes while I think about it. We'll be

1 at ease. Thank you, Dr. Katz.

2 (Recess taken.)

3 (The following proceedings continued in open
4 court. The defense attorneys and state's attorneys were
5 present.)

6 THE COURT: Mr. Colyer, do you have any objection
7 if I look at this?

8 MR. THOMPSON: No, sir.

9 MR. HUNTER: I don't have a copy of it.

10 MR. COLYER: Is that just a copy of what was
11 filed?

12 THE COURT: Yes.

13 MR. COLYER: No, sir.

14 THE COURT: Okay.

15 MR. HUNTER: It goes through -- looks like the
16 affidavit, goes through table 19, table 21, table 22.

17 THE COURT: Well, let the record reflect that all
18 counsel are --

19 MR. COLYER: Is that the one signed by Ramos
20 and --

21 MR. HUNTER: Yes. Yes.

22 MR. COLYER: -- Hosford?

23 MR. HUNTER: Here.

24 MR. COLYER: That's okay.

25 MR. HUNTER: May I approach, Your Honor?

1 THE COURT: Yes, sir. Thank you.

2 MR. HUNTER: Sure.

3 (The defendant enters the courtroom.)

4 THE COURT: Okay. Let the record reflect all
5 counsel is present. The defendant is present. Mr.
6 Robinson -- well, in the absence of Mr. Robinson, the Court
7 asked for a copy of the original -- was attempting to find
8 it but it's apparent all of us have voluminous materials on
9 our respective desks. But I asked for a copy of the
10 original motion for appropriate relief filed in this case
11 and I'm going to get to the reasons as to why I asked for
12 that in a moment. Looking at the MAR, defendant Marcus
13 Robinson files this motion for appropriate relief pursuant
14 to the Racial Justice Act, North Carolina General Statute
15 Section 15A-2010, 15A-2012, the Sixth, Eighth and 14th
16 Amendments to the United States Constitution, Article I,
17 Sections 1, 19, 24, 26 and 27 of the North Carolina
18 Constitution. As to the claims which are now before the
19 Court, those being claims one, two and three, the claim as
20 it relates to claim one reads as follows. At the time of
21 Mr. Robinson's trial, race was a significant factor in the
22 state's decision to exercise peremptory strikes in cases
23 throughout North Carolina as is set forth in the motion for
24 appropriate relief. That claim is predicated on case law,
25 constitutional claims are related to case law dealing with

1 the 14th -- sorry, Sixth, Eighth and 14th Amendments to the
2 Constitution. So what's implicated here is state action.
3 The issue is what relevance is there as to -- what may be
4 shown in the record as to seated jurors when the claims are
5 predicated on the basis of exercise of peremptory
6 challenges, based on the Sixth, based on the Eighth and
7 based on the 14th Amendment. Yes, sir, Mr. Colyer, Mr.
8 Thompson.

9 MR. COLYER: Judge, the Rule 401 definition of
10 relevant evidence.

11 THE COURT: Yes, sir.

12 MR. COLYER: Relevant evidence means evidence
13 having any tendency to make the existence of any fact that
14 is of consequence --

15 THE COURT: Yes, sir.

16 MR. COLYER: -- to the determination of the
17 action more probable or less probable than it would be
18 without the evidence.

19 THE COURT: Yes, sir. I looked at 401 as well.

20 MR. COLYER: We contend that what is at issue
21 here, in addition to Mr. Robinson's motion for appropriate
22 relief, is the Racial Justice Act itself.

23 THE COURT: Yes, sir. That's what -- I
24 apologize. I didn't mean to cut you off.

25 MR. COLYER: I was going to say upon which his

1 MAR is predicated.

2 THE COURT: Yes, sir.

3 MR. COLYER: And the Act itself, unlike his MAR,
4 does not limit the evidence proof by one side or the other
5 with respect to the state. Judge, in this particular case,
6 they have had the opportunity to present all of their data.

7 THE COURT: Yes, sir.

8 MR. COLYER: And all of their expert opinions and
9 the data and the opinion that Dr. Katz is getting ready to
10 point out to the Court is contained within the data that
11 they gave, that they -- this universe of information that
12 they have collected. Indeed, the first seven columns of
13 the spreadsheet that we're talking about that's so big, you
14 can't get it on one computer screen at one time talks about
15 the seated jurors, their race, their names, the case, the
16 struck jurors by the state, their race, their name, the
17 struck jurors by the defense, their race and their name.
18 And what we are attempting to do, sir, is to show that
19 there are explanations for the state's exercise of
20 peremptory challenges that are not based upon race.

21 THE COURT: Yes, sir.

22 MR. COLYER: One way that we can do that,
23 respectfully, Your Honor, is to show that the defense
24 strikes which are included in the material that is
25 submitted, although they perhaps elected when they wrote

1 their report to not include that, there was
2 cross-examination of their experts that said yeah, we have
3 that data. We looked at it but we elected not to put it
4 into our report findings. But it's there and we contend
5 that perhaps one reason that we could argue to the Court
6 that they did not put it in there is because it helps to
7 explain the other side of the coin.

8 One of the issues that has been ferreted out here
9 is reservations with respect to punishment. They labeled
10 it reservations with respect to death penalty. But really
11 what it is is reservation with respect to punishment. And
12 when you look at the data, the state strikes can be
13 explained in some numbers with respect to reservations
14 about punishment as it relates to the death penalty. The
15 defense strikes could be explained with respect to
16 reservations about punishment as it relates to life
17 imprisonment without parole. And, Judge, we contend that
18 our ability to rebut what they are attempting to prove to
19 you should not be limited to what Mr. Robinson says in his
20 definition of his action here but it's based upon the
21 Racial Justice Act. The Racial Justice Act doesn't say
22 just state strikes with respect to proof.

23 THE COURT: I don't disagree with you.

24 MR. COLYER: And, Judge, honestly, since there --
25 since their data, since their experts have had this and

1 have had the opportunity to present it and have been
2 cross-examined by it, we're going to hearken back, Judge,
3 and take you at your word about what you've said all along,
4 in the pretrial conferences and in the motions hearings
5 that you're going to let the material in to the extent that
6 it is admissible legally. We contend that this is
7 admissible legally because it is relevant. Again, the
8 issue is with respect to how it is treated when the Court
9 has the ability to look at all of it, information from both
10 sides, and go from there. Judge, and we're just asking
11 that if we get it in, that it be a fair and full
12 opportunity to get the information in so that we can
13 explain our position. The Court can then weigh both sides
14 and make its decision not just based on a limited amount of
15 data.

16 THE COURT: Well, you've gotten to the point that
17 I was about to get to in terms of the language of the
18 statute. There's also another issue which I am raising
19 simply so that counsel will have an opportunity to be heard
20 on it. One of the factors under the RJA relates to
21 significance of strikes and Mr. Colyer, Mr. Thompson, Mr.
22 Perry, if I understand your position correctly, this also
23 goes to that factor as well.

24 MR. COLYER: It does, Your Honor. And I didn't
25 mean by not using that adjective to leave it out and I mean

1 that's really the gist of this.

2 THE COURT: Yes, sir.

3 MR. COLYER: It's just not a numbers count. It's
4 the significance, the explanation in relation to the data
5 that's brought to the Court.

6 THE COURT: Okay. All right. Folks, you want to
7 be heard further?

8 MR. JAY FERGUSON: No, Your Honor.

9 THE COURT: Okay. My objective, as Mr. Colyer
10 has reminded me and as I've stated on numerous occasions is
11 to give both sides a full, fair opportunity to be heard on
12 the issues involved before the Court at this time. Your
13 objection, Mr. Jay Ferguson, is overruled. Your exception
14 is noted for the record.

15 MR. JAY FERGUSON: Thank you, Your Honor.

16 THE COURT: Yes, sir. Did we lose -- there he
17 is. All right. Yes, sir.

18 MR. PERRY: Your Honor, if I may, I will back up
19 just a little bit so we can get back to sort of where we
20 were --

21 THE COURT: Yes, sir.

22 MR. PERRY: -- in our line of questioning.

23 Q. Dr. Katz, in addition to looking at the sampling
24 issues, you also did a review of the data that was provided
25 by the defense, correct?

1 A. Yes.

2 Q. Now, as part of what you did, did you look at the way
3 that jurors -- I guess the categories of jurors, in other
4 words, did you look at how they defined jurors who were
5 stricken or how strikes were exercised and how jurors were
6 seated, whether or not they identified jurors who were
7 challenged for cause. Did you look at that?

8 A. Yes.

9 Q. As part of that analysis, did you actually look at
10 what the seated rates were?

11 A. Yes.

12 Q. Okay. Now, in determining what the seated rates were,
13 what was your approach? How did you -- how did you figure
14 what the seated rates were?

15 A. There were two approaches, one using the aggregation
16 method. The second was the average method, similar to the
17 approaches that Dr. O'Brien used for her analysis of the
18 state strike rates.

19 Q. Is it fair to say you borrowed their description or
20 their categories as to how they did that?

21 A. I used their two methods. In terms of the analysis,
22 rather than looking at, say, the state strike rates, which
23 would be the number of venire members struck by the state
24 over the total considered, excluding those that were struck
25 for cause, the seated rate was the number of venire members

1 that were seated as either a juror or alternate divided by
2 the total number considered.

3 Q. Okay.

4 A. And we can do racial break downs of those rates.

5 Q. Now, going back to sort of the two-part analysis that
6 was done, did you look at this in terms of what happened on
7 the statewide level as well as what happened in Cumberland
8 County?

9 A. Yes. And I think that there were eight other
10 breakdowns that I looked at --

11 Q. Okay.

12 A. -- corresponding to the tables that were in the report
13 -- the MSU report.

14 Q. So you used those tables as a basis to do your
15 analysis?

16 A. Yes.

17 Q. If I can direct you to the next slide, which is going
18 to be slide number three, this is part of your report; is
19 that correct?

20 A. Yes. I think this is table one of my report or part
21 of table one.

22 Q. Now, you mention two different methods of calculation.
23 Can you tell the Court or identify for the Court which
24 method of your calculation approaches you used for this
25 particular table?

1 A. This is the aggregation method and tables one through
2 ten analyze the data for the ten different periods or
3 breakdowns using the aggregation method.

4 Q. And just to be clear, exactly how was the -- how does
5 the aggregation method calculate each race that are
6 displayed?

7 A. Okay. Probably the easiest thing to do is just
8 explain the seated race for this slide and it should be
9 clear what the aggregation method does.

10 Q. And if you can do that?

11 A. Okay. What I do is break down for all 173 capital
12 trials, I count how many venire -- black venire members
13 were seated as a juror or alternate. So it's an
14 aggregation or combination or adding together of all those
15 venire members divided by the total number of black venire
16 members that were considered.

17 Q. Okay.

18 A. So, for example -- and I also have breakdowns where I
19 compare the seated rates based upon race where race is
20 defined as black venire members to white venire members.
21 That would be columns two and three. And then I also do
22 the same analysis where I compare them by black venire
23 members to nonblack venire members. For the statewide
24 data, I think about 97 or 98 percent of the venire members
25 were classified as either white or black. So the results

1 are pretty similar between the black, white comparison and
2 the black, nonblack comparison. In my analysis, I do a few
3 things a little bit differently from what Dr. O'Brien did
4 in terms of coming up with my counts.

5 Q. And now why is that -- I guess, first of all, can you
6 tell us what those differences are?

7 A. The differences are there were 21, I believe, venire
8 members that were excluded in Dr. O'Brien's analysis
9 because those venire members came up at a time when the
10 state did not have any strikes available to it. I did not
11 exclude those 21 venire members. They are included as part
12 of these counts.

13 Q. Okay.

14 A. And there is one other change. Dr. O'Brien's analysis
15 treated Mr. Rodney Foxx who was that one venire member who
16 was initially struck by the state but under a Batson
17 challenge, that strike was overruled and so Mr. Foxx was
18 ultimately seated as a juror or alternate.

19 THE COURT: Do you recall what case was involved,
20 Dr. Katz?

21 THE WITNESS: Gary Trull. I do have a footnote
22 in my record that indicates that.

23 THE COURT: Okay.

24 THE WITNESS: And I counted Mr. Foxx as a seated
25 juror and not one that had been struck by the state.

1 BY MR. PERRY:

2 Q. Why did you do that? What was your rationale for that
3 decision?

4 A. Because my analysis is trying to look at the ultimate
5 disposition of each venire member and so that was his
6 ultimate disposition.

7 Q. So that was your objective to look at the ultimate
8 disposition?

9 A. Yes, for all venire members considered and not struck
10 for cause.

11 Q. So just to be clear, there were 22 venire members that
12 were included in your report that were not included in the
13 -- actually, it's vice versa.

14 A. No. There were 21 venire members that were included
15 in my analysis that were dropped in Dr. O'Brien's analysis
16 because the state had exhausted their strikes. There is
17 one venire member, Mr. Foxx, he was included in both
18 analyses, Dr. O'Brien's and mine, but he had a different
19 classification.

20 Q. Was his the only case like that that you recall?

21 A. Yes. There were also six or seven venire members
22 whose race was not identified and those venire members are
23 not counted in these tables.

24 Q. So those are completely removed from these
25 calculations?

1 A. Yes.

2 Q. All right. Going back to the slide -- slide three
3 here, so this is table one from your report?

4 A. Part of table one from my report, yes.

5 Q. And can you explain to us what calculations you
6 arrived at in table one.

7 A. In table one, using the database provided by the
8 defendant, looking at the comparison between black venire
9 members and white venire members, I counted, out of the
10 total of 1,211 black venire members that were considered,
11 428 were seated as either a juror or an alternate and that
12 percentage or seated rate is 35.34 percent. I then did the
13 same analysis for -- or same count for the white venire
14 members. Out of the 6,057 that were considered, 2,040 were
15 seated as jurors or alternates for a seated rate of 33.68
16 percent. The analysis on the comparison between black and
17 nonblack venire members has pretty much similar results.
18 The seated rate for the black venire members is the same
19 because that category hasn't changed, 35.34 percent, and
20 the seated rate for the nonblack venire members is a little
21 bit higher, 33.9 percent.

22 Q. Okay. And just if I could, you've got two -- or there
23 are two footnotes at the bottom of this slide. Can you
24 explain what those footnotes are addressing or what
25 information is contained in those?

1 A. Yes. I was attempting to come up with a test to see
2 if the difference in seated rates between black, white or
3 black, nonblack were statistically significant. And I'm
4 assuming here that the sample is a random sample, and what
5 I found is that the seated rates for black venire members
6 and white venire members, the difference in seated rates is
7 not statistically different from zero. So we can't reject
8 the null hypothesis that they are seated at equal rates.
9 And I have that same finding when I compare the seated
10 rates for black venire members and nonblack venire members.

11 Q. So just to be clear, the two footnotes address the two
12 different -- the one where you put blacks and whites and
13 leave out other folks and the second measure where it's
14 black and nonblack are all lumped together?

15 A. Yes.

16 Q. And again I think you mentioned you did this to
17 correspond with the number of tables that were in
18 Professors Grosso and O'Brien's report?

19 A. Yes, I did. There were ten difference breakdowns I
20 observed and so I ran this analysis along with the state
21 strike rate analysis and defense strike rate analysis for
22 all ten breakdowns that were reported in Professor O'Brien
23 and Professor Grosso's report.

24 Q. And just to be clear, the analysis that you did, for
25 example, in this table one, none of the four cause jurors

1 are included at all in these calculations?

2 A. That's correct.

3 Q. If I could direct your attention to slide number four
4 here, can you explain to the Court what information is
5 contained in this part of the table.

6 A. Here I focused on determining the state strike rates
7 by race in the same way I did for the seated rates by race.
8 Here, we again have a breakdown of black venire members and
9 white venire members and black venire members and nonblack
10 venire members as we had in the previous slide. To find
11 the state strike rate for, say, black venire members, I
12 took the total number of black venire members that were
13 struck by the state, which is 635, and divided that by the
14 total number considered, 1,211, and got a state strike rate
15 of black venire members to be 52.44 percent. Doing the
16 similar analysis for white venire members, there were 1,540
17 white venire members that were struck by the state out of a
18 total of 6,057 for a state strike rate for white venire
19 members of 25.43 percent. The similar analysis for the
20 comparison of black, nonblack generates pretty much the
21 same percentages. And at the bottom in the footnote, I do
22 a test to see if the state strike rates by race are equal
23 to zero or not equal to zero, the difference equal to zero
24 or not equal to zero. And what I find is that the state
25 strike rates by race are significantly different from zero.

1 And these findings are comparable to what Dr. O'Brien
2 reported in her report.

3 Q. Now, I was going to ask, you were present for her
4 testimony?

5 A. Yes.

6 Q. When she was -- when she was discussing the
7 disparities present in strike rate, I mean is this the part
8 of her report that she was talking about --

9 A. Yes.

10 Q. -- the strike rates?

11 A. The state strike rates, yes.

12 Q. Again the P values that you calculated, that's for
13 both of those different aggregations of jurors?

14 A. Right, comparison of black versus white venire members
15 and black versus nonblack venire members.

16 Q. Then the next slide, again this is part of table one?

17 A. Yes, sir.

18 Q. Can you explain to the Court the information that's
19 contained in this part of the table?

20 A. Okay. This is a calculation of the defense strike
21 rates by race. So the format of the table is similar. The
22 defense does not get to consider all the venire members.
23 The defense only gets to consider venire members that have
24 been passed by the state. So in terms of their strike
25 rates, it would be the number of strikes of the venire

1 member divided by the total number the defense could
2 consider which is the total number passed by the state. So
3 looking at the defense strike rates by race, columns two
4 and three, over the 173 capital trials, the defense struck
5 148 black venire members out of a total number that have
6 been passed by the state of 576, which is 25.69 percent.
7 For the white venire members, the defense struck 2,477 out
8 of a total passed by the state of 4,517 or 54.84 percent.
9 And a test to see if the strike rates are equal or not
10 equal, found that the strike rates are different -- are not
11 the same and that's reported in footnote three.

12 Q. Okay. So, again, the format of these tables and the
13 reporting of the results is the same for the last three
14 excerpts that we looked at?

15 A. Yes.

16 Q. Now, going to table two, who was -- the additional
17 analysis you did in table two, is that just the changing of
18 the time frame?

19 A. Yes.

20 Q. Okay. So the calculation method was the same?

21 A. Yes.

22 Q. So it's still in the aggregation method of
23 calculation?

24 A. Yes.

25 Q. All right. Can you tell the Court what information

1 you collected for the time frame involved here in table
2 two?

3 A. I'm sorry. Will you repeat the question.

4 Q. The time frame here is the shorter time frame; is that
5 correct?

6 A. Yes. This is from 1990 through 1999, ten-year period.

7 Q. Again this is statewide?

8 A. And this is statewide and this is a comparison of the
9 126 capital trials that were held within that time frame.

10 Q. What information did you find when you did your
11 analysis for this time frame?

12 A. What did -- my findings were basically the seated
13 rates and the seated rates were similar to what we found in
14 the previous table doing the comparison between black
15 venire members and white venire members. 35.33 percent of
16 black venire members were seated as jurors or alternates
17 compared to 33.44 percent of white venire members, with a
18 similar set of percentages, when we look at black versus
19 nonblack.

20 Q. And again, given the small number of folks considered
21 nonblack, did it change the calculations much at all?

22 A. No. And I did a test to see if the seated rates were
23 significantly different by race and the results were
24 reported in the footnotes and the P values are both greater
25 than .05, which indicates that the strike -- the seated

1 rates are not statistically significantly different.

2 Q. Okay. Now, did you look at the strike rates for this
3 time period as well?

4 A. Yes, for both the state and the defense.

5 Q. Going to the next slide, the state strike rate, is
6 that what's calculated in this part of the table?

7 A. Yes.

8 Q. And what were the results of your calculation of the
9 state's strike rates?

10 A. Similar to what we found in table one, 52 percent of
11 the black venire members were struck by the state compared
12 to 25.26 percent of the white venire members, and that
13 difference is statistically significant.

14 Q. Again, that's reflected in the footnotes?

15 A. Yes.

16 Q. And, similarly, for the defense strike rate
17 calculation?

18 A. Yes. For the defense strike rate calculation, 26.39
19 percent of black venire members were struck by the defense
20 compared to 55.26 percent of white venire members and that
21 difference is also statistically significant.

22 Q. Now, table three, again, that was a time frame that
23 was borrowed from the report in Professor Grosso and
24 O'Brien's report?

25 A. Yes it was. And again here, the time frame runs from

1 2000 to 2010 for which there were 47 capital trials.

2 Q. And these are statewide?

3 A. Yes.

4 Q. These are the seated rates?

5 A. Yes.

6 Q. For the seated rates, did you find the same kind of
7 results for the same time frame as you did for the two
8 previous time frames that you looked at?

9 A. Yes, I did.

10 Q. And what were those you said?

11 A. The black venire members were seated at a rate of
12 35.37 percent compared to 34.31 percent for the white
13 venire members and this difference is not significantly
14 significant.

15 Q. The next line, is that the calculation you did for the
16 state strike rates during this same time period?

17 A. Yes.

18 Q. And what were the results when you calculated that?

19 A. Black venire members were struck at a 53.70 percent
20 rate. White venire members were struck at a 25.85 percent
21 rate, and the difference is statistically significant.

22 Q. And then finally for table three, the defense strike
23 rate?

24 A. Yes. Black venire members were struck at a 23.61
25 percent rate. White venire members a 53.73 percent rate,

1 and that difference is also statistically significant.

2 Q. The next, table four, is the difference again just a
3 time frame that was involved?

4 A. Yes. Now we are looking at five-year periods.

5 Q. Okay. And again, this is statewide, correct?

6 A. Statewide starting with the period from 1990 to 1994.

7 Q. Okay.

8 A. The percentage of black venire members seated during
9 that time period is 31.43 percent. The percentage of white
10 venire members seated is 32.87 percent, and that difference
11 is not statistically significant.

12 Q. The next line shows the state strike rate?

13 A. Yes. Black venire members struck at a 53.57 percent
14 rate, white venire members 26.23 percent rate and that
15 difference is statistically significant.

16 Q. And, again, not -- there's not much difference between
17 the black or white versus nonblack categories, correct?

18 A. That's correct.

19 Q. Then the defense strike rate for that time period?

20 A. Yes. The blacks were struck -- excuse me, blacks were
21 struck at a 32.31 percent rate by the defense. White
22 venire members were struck at a 55.44 percent rate, and
23 that difference is statistically significant.

24 Q. Then table five again, we're looking at a smaller time
25 frame. This is a statewide calculation; is that correct?

1 A. Yeah. It's still a five-year time frame, statewide
2 calculation involving a few more trials, 83 capital trials.

3 Q. Let me clarify. So it was actually the same sort of
4 span of time but it's a different time period?

5 A. It's a different time period, yes. These next two
6 tables involve five-year time periods.

7 Q. Again, were these the time periods that came from
8 Professor Grosso and O'Brien's study?

9 A. Yes.

10 Q. And you calculated the seated rates for those time
11 periods?

12 A. Yes, I did.

13 Q. What were the seated rates for those time periods?

14 A. The seated rate for black venire members is 37.1
15 percent compared to the seated rate for white venire
16 members of 33.76 percent, and that difference is not
17 statistically significant.

18 Q. And again the results between white and category
19 nonblack?

20 A. You mean black and nonblack?

21 Q. Yes, sir.

22 A. Similar findings, again 37.10 percent of black venire
23 members were struck or seated compared to 34.19 percent of
24 nonblack venire members, and that difference is also not
25 statistically significant.

1 Q. And then the state strike rates for that time period?

2 A. Yes. Black venire members were struck at a 51.29
3 percent rate compared to white venire members struck at a
4 24.71 percent rate, and that difference is statistically
5 significant.

6 Q. And then the next slide, slide 17, that was a
7 calculation of defense strike rates?

8 A. Yes. Black venire members were struck by the defense
9 at a 23.84 percent rate. White venire members were struck
10 by the defense at a 55.15 percent rate, and that difference
11 is statistically significant.

12 Q. And, again, this is all using the aggregation method
13 still, correct?

14 A. That's correct, yes.

15 Q. Table six?

16 A. Now we're looking at the five-year time frame from
17 2000 to 2004 and there are 29 capital trials from the 173
18 that fell within that time frame. The seated rate for
19 black venire members is 34.43 percent. The seated rate for
20 white venire members is 34.44 percent. That difference in
21 rates is not statistically significant.

22 Q. You did the state strike rate calculation for that
23 time period as well?

24 A. Yes. Black venire members were struck at a 55.19
25 percent rate. White venire members struck at a 25.59

1 percent rate. That difference is statistically
2 significant.

3 Q. And then, finally, from table six, the defense strike
4 rates for that time period?

5 A. Black venire members during this time period were
6 struck at a 23.17 percent rate by the defense. White
7 venire members were struck at a 53.71 percent rate and that
8 difference is also statistically significant.

9 Q. And table seven, just again a different time period
10 that was selected?

11 A. Yes. This is the six-year time period from 2005 to
12 2010.

13 Q. And that had 18 trials involved --

14 A. Yes.

15 Q. -- as the slide shows?

16 A. Yes, that's correct.

17 Q. And the seated rate calculations for that time period?

18 A. Yes. Black venire members were seated at a 36.72
19 percent rate. White venire members were seated at a 34.0
20 -- I can't make that out, 34.08 or so percent, and that
21 difference is not statistically significant.

22 Q. And then the same -- same table but this is just the
23 state strike rate?

24 A. Yes. Blacks were struck at a 51.56 percent rate by
25 the state. White venire members were struck at a 26.27

1 percent rate, and the difference is statistically
2 significant.

3 Q. Then, finally, the defense strike rate for that time
4 period?

5 A. Yes. Black venire members were struck by the defense
6 at a 24.19 percent rate. White venire members were struck
7 at a 53.78 percent rate, and this difference is
8 statistically significant.

9 Q. Table eight -- the difference in table eight -- again
10 this comes from a study provided by the defense, correct,
11 their breakdowns?

12 A. Yes.

13 Q. This shows their breakdown or their compilation for
14 former Division II; is that correct?

15 A. Yes. There was a variable in the database that
16 identified these types of trials and that -- and there were
17 37 capital trials.

18 Q. Okay. And you did the same types of calculations for
19 this -- this geographic, I guess, area or this
20 identification?

21 A. Yes. Black venire members were seated at a 35.50
22 percent rate. White venire members were seated at a 33.47
23 percent rate, and the difference is not statistically
24 significant.

25 Q. Okay. And you calculated the strike rates as well?

1 A. Yes, I did. For the state, black venire members were
2 struck at a 49.84 percent rate. White venire members were
3 struck at a 35.46 (sic) percent rate. This difference is
4 statistically significant.

5 Q. Doctor, that's actually 25 percent, correct?

6 A. I said -- 25.64 percent. Yeah. White venire members
7 -- let me repeat that. White venire members were struck by
8 the state at a 25.46 percent rate. Black venire members
9 were struck at a 49.84 percent rate, and the difference
10 between those two rates is not -- is statistically
11 significant.

12 Q. And, again, with this breakdown -- with the Division
13 II breakdown as opposed to statewide, did it make much
14 difference as far as the two ways to create those
15 categories?

16 A. No, it didn't.

17 Q. Then the next slide, slide 26?

18 A. This is the defense strike rate by race for the former
19 Division II. Black venire members were struck by the
20 defense at a 29.22 percent. White venire members were
21 struck at a rate of 55.09 percent, and this difference is
22 statistically significant.

23 Q. The next slide shows table nine. Tell us what
24 information is in table nine or how does this differ from
25 the previous calculations?

1 A. Here the focus is on those trials that fall into
2 current Division IV. Again, there was a variable in the
3 database that identified these cases. There are eight
4 capital trials. Black venire members were seated at a
5 34.09 percent rate. White venire members were seated at
6 34.55 percent rate. That difference in seating rates is
7 not statistically significant.

8 Q. And the second part of table nine shows the state
9 strike rates, correct?

10 A. Yes, it does.

11 Q. For that time period in Division IV, what does it
12 show?

13 A. It shows that black venire members were struck by the
14 state at a 56.82 percent rate. White venire members were
15 struck at a 22.76 percent rate, and that difference in
16 strike rates is statistically significant.

17 Q. And then the last part of table nine, that shows the
18 defense strike rates?

19 A. Yes, it does.

20 Q. What were the results of those?

21 A. Black venire members were struck at a 21.05 percent
22 rate. White venire members were struck by the defense at a
23 55.26 percent rate and this difference is statistically
24 significant.

25 Q. And then finally, you did some individual -- or you

1 did an analysis for Cumberland County specifically,
2 correct?

3 A. Yes. For the 11 capital trials from the 173 that were
4 Cumberland County trials.

5 Q. And the time period in this slide, slide number 30, is
6 the entire time frame that's in the defense study, right?

7 A. Yes, it is.

8 Q. What were the results of the seated rate calculations?

9 A. For Cumberland County, black venire members were
10 seated at a 33.33 percent rate. White venire members were
11 seated at a 33.43 percent rate, and the difference is not
12 statistically significant.

13 Q. And then as far as strike rates, state strike rate
14 calculation?

15 A. Yes. Black venire members were struck by the state at
16 a 48.06 percent rate. White venire members were struck by
17 the state at a 22.19 percent rate. The difference is
18 statistically significant.

19 Q. And the defense strike rate for that time period?

20 A. Yes. Black venire members were struck by the defense
21 at a 35.82 percent rate. White venire members were struck
22 by the defense at a 55.03 percent rate, and that difference
23 is statistically significant.

24 Q. Now, you mentioned that there were two methods of
25 calculating, calculating these rates -- strike rates and

1 seated rates?

2 A. Yes. The first method for the first ten tables
3 involve the aggregation method.

4 Q. Now, you mention the second method you did was an
5 average selection rate calculation. What's the difference
6 between the aggregation and the average method that is --

7 A. In the aggregation method, for the set of trials
8 considered, we simply add together all the venire members
9 that fall into a certain classification and total it
10 together without concern about which trial the venire
11 member came from. For the second method, the average rate
12 method, what we do is we calculate the selection rates
13 within each trial individually and then average those
14 selection rates over the number of trials.

15 Q. So on this slide, where it's labeled average jury
16 selection rates, can you explain what information is shown
17 in that particular slide?

18 A. Okay. I put a lot of information on one slide. Table
19 11 goes through the average selection rates for seated
20 jurors, jurors struck by the state, jurors struck by the
21 defense for the same ten breakdowns that we looked at
22 previously. This part of the table focuses on the
23 statewide 173 capital trials between 1990 and 2010. The
24 seated rate information will be found in columns two and
25 three. The state strike rate information is columns four

1 and five and the defense strike rate information is columns
2 six and seven. And I again do my breakdowns by black
3 venire members versus white venire members and black venire
4 members versus nonblack venire members. Now, in this type
5 of calculation, there is the possibility that no black
6 venire members were ever considered in a particular trial.
7 So that it wouldn't make sense to include them as part of
8 the averaging process because we would have zero black
9 venire members considered so we couldn't -- we shouldn't
10 calculate at a rate of zero over zero. So there is a
11 question about which trials to consider and those that
12 involve -- those trials where there are no black venire
13 members considered were excluded from this average
14 calculations.

15 Q. So those are not included in this analysis?

16 A. That's correct. And as part of my table, I do give
17 the number of trials that were actually averaged. So
18 there's a sense as to how many trials had no black venire
19 members considered at all.

20 THE COURT: Dr. Katz, can you explain what you
21 mean when you say no black venire members considered at
22 all?

23 THE WITNESS: That means they may have appeared
24 and then considered and struck for cause but they didn't
25 survive that.

1 THE COURT: Okay.

2 THE WITNESS: So of all the venire members that
3 were not struck for cause, none of them would have been
4 black venire members.

5 THE COURT: Is that the only possible explanation
6 or are there others?

7 THE WITNESS: I am not sure I understand your
8 question.

9 THE COURT: Let me let counsel for the defendant
10 deal with that in cross-examination. All right. Go ahead,
11 sir.

12 MR. PERRY: Yes, sir.

13 Q. Let me ask you about the specifics of the table. So
14 you've got the difference of P value on all of these
15 calculations?

16 A. Yes.

17 Q. Can you explain what that -- what that is
18 communicating from the information in this table?

19 A. Yes. Just looking at the seated rate section, the
20 average seated rate for black venire members using this
21 method is 33.76 percent. And that is average over the
22 seated rates for black venire members over the 166 trials
23 where there was at least one black venire member considered
24 not struck for cause. For the white venire members, that
25 average seated rate is 33.98 percent. Then the difference

1 between these two seated rates is minus 0.22 percent. So
2 that's the black venire member average rate minus the white
3 venire member average rate for the difference. And then if
4 you go to the same row in column three, that number is the
5 P value for testing whether the difference in average
6 seated rates is equal or not equal. And the P value here
7 is .9125, which indicates that the difference of a very
8 small amount, minus 0.22 percent, is not statistically
9 significant.

10 Q. Okay. And let me maybe clarify and also help me
11 understand, the question about trials or venire members in
12 trials that were not considered, is that reflected in the
13 difference where you've got number of trials averaged, 166,
14 and then at the very back end, number of trials averaged,
15 148?

16 A. Yes. It's possible that you can have a black venire
17 member considered by the state and that venire member is
18 struck by the state so that when it comes time for the
19 defense to consider its set of venire members, the defense
20 may not have any black venire members to consider. So
21 that's why the 166 number of trials in the first part for
22 the seated rate and the state strike rate is reduced to 148
23 when we looked at the defense strike rates.

24 Q. And just to be clear, the difference between 173 and
25 the 176 (sic) number stems from what?

1 A. The 173 to the 166 number, there were seven trials
2 where no black venire members survived being struck for
3 cause and so were not considered in terms of being either
4 struck by the state, struck by the defense or seated.

5 Q. And just to make sure I understand, so in those seven
6 cases, the challenges for cause that were made against
7 black venire members were successful so none made it past
8 that point to be struck by one side or the other?

9 A. I don't know if there were any venire members that
10 appeared at all within those trials but I know if there
11 were any, then they would not have survived a challenge for
12 cause.

13 Q. Okay. Now, going to the next slide, again, this is
14 the same second method of calculation; is that correct?

15 A. Yes. Do you want me to finish the previous slide in
16 terms of the other defense strike rates?

17 Q. Well, if you can -- I wanted to make sure -- I'm not
18 trying to jump ahead too much. But overall, did these two
19 calculation methods give equivalent results?

20 A. Yes.

21 Q. So we don't have another set of 20 slides for the
22 particular calculation method; is that right?

23 A. That's right.

24 Q. Just want to make that clear before we started and
25 everybody thought we had 20 more slides.

1 THE COURT: Thank you, sir.

2 BY MR. PERRY:

3 Q. And let me go back. So what these two tables show is
4 these results for the statewide calculation that you did
5 for Cumberland County?

6 A. That's right, yes. And my report has the calculations
7 for all the others.

8 Q. Right. And in terms of the calculations along the
9 lines of the aggregation method and the average method,
10 those were pretty similar?

11 A. Yes. That's what I found, yes.

12 Q. Now, having given that as a preface, on table 11, if
13 we go back to some of the details in the calculations, the
14 P values that were indicated where you've got different P
15 values, just so I'm clear, in terms of the average seated
16 rate, the P value indicated what?

17 A. Indicated whether the difference in seated rates or
18 the difference in rates was statistically significant or
19 not.

20 Q. Okay. And in this case, it was --

21 A. For the seated rate, the difference of minus 0.22
22 percent is not statistically significant because the P
23 value, .9125, is very much larger than .05.

24 Q. Okay. And, again, with this second method of
25 calculation, the difference between the two ways to

1 categorize venire members, that did not make much of a
2 difference; is that right?

3 A. Right, in terms of black versus white or black versus
4 nonblack.

5 Q. Now, going to the strike rates.

6 A. Yes.

7 Q. For the state strike rates that were calculated, what
8 calculations did you arrive at with this method?

9 A. With this method, the average strike rate for black
10 venire members by the state was 55.57 percent. The average
11 strike rate for white venire members was 24.31 percent.
12 The difference in strike rates is 31.26 percent, and that
13 difference is statistically significant.

14 Q. Okay. And then the calculations that you did again
15 included the calculations for the defense strike rate; is
16 that right?

17 A. Yes, yes.

18 Q. What were the calculations or the results you got from
19 that analysis?

20 A. The average defense strike rate for black venire
21 members was 22.4-something percent. The average defense
22 strike rate for white venire members was 55.7 percent. And
23 the difference is minus 33.3 percent, and that difference
24 is statistically significant.

25 Q. Okay. And then at the bottom, you've got a footnote.

1 What's -- is that the same kind of qualifier that you had
2 on the previous method of calculation?

3 A. No. This is a different method to do the calculation
4 for P values, but I use the same test that Dr. O'Brien used
5 in her report for this method.

6 Q. Okay. Now, moving ahead to the next slide, this shows
7 the Cumberland County specific calculations; is that
8 correct?

9 A. Yes, for the 11 trials in Cumberland County.

10 Q. And now for the average seated rate using the second
11 method, can you just tell us what the results were?

12 A. Yes. The average seated rate for black venire members
13 was 29.56 percent. The average seated rate for white
14 venire members was 35.69 percent for a difference rate of
15 minus 6.13 percent, and this difference is not
16 statistically significant because the P value is .3013.

17 Q. And before I ask you about the strike rates, here I
18 believe earlier, there were 11 trials identified from
19 Cumberland County for this period, correct?

20 A. Yes.

21 Q. And so all 11 trials are included in this calculation?

22 A. That's correct.

23 Q. And in the strike rates for the state, when you look
24 to the strike rates from defense, you go from 11 to ten?

25 A. Yes.

1 Q. Just to be clear, can you explain why it goes from 11
2 considered to ten considered?

3 A. Apparently there was one trial where the state struck
4 all black venire members that came up for consideration
5 that survived being struck for cause so that the defense
6 did not have any black venire members to consider.

7 MR. PERRY: Okay.

8 THE COURT: And for the record, sir, do you
9 recall what trial that was?

10 THE WITNESS: I'm sorry. No, I don't.

11 THE COURT: Okay.

12 BY MR. PERRY:

13 Q. If I may refresh your recollection, Dr. Katz, would it
14 be State versus Augustine maybe?

15 A. I don't know.

16 Q. You don't remember offhand?

17 A. No, I don't. I would have to start looking at some of
18 the affidavits and reports. If you want me to do that, I
19 could probably answer your question.

20 Q. No. We can come back to that later.

21 THE COURT: Yes, sir. Yes, sir.

22 BY MR. PERRY:

23 Q. I believe from the slides we've gone through, you did
24 a number of these calculations, correct?

25 A. Yes. For all ten breakdowns.

1 Q. So even though we have only shown two slides, there
2 were equivalent numbers of tables for the other breakdowns
3 that we went through with the previous calculation method,
4 correct?

5 A. Yes, that's correct.

6 Q. Now, let me ask you specifically about the strike
7 rates, for the state strike rate for Cumberland County
8 during the overall time period, what were the calculations
9 of those?

10 A. For black venire members, the state strike rate, the
11 average was 52.69 percent and the state strike rate for
12 white venire members was 19.59 percent. The difference is
13 33.10 percent, and that difference is statistically
14 significant.

15 Q. And then the defense strike rate calculation?

16 A. The defense strike rate calculation is 38 point --
17 having a hard time reading the last two numbers.

18 Q. 38 point something sound about right?

19 A. I can give you -- I'm going to look it up in my
20 report.

21 THE COURT: Folks, is there any disagreement that
22 what's reflected in the table being referred to as to
23 average defense trying rate is 38.06?

24 MR. JAY FERGUSON: No, Your Honor.

25 MR. PERRY: No, sir.

1 THE WITNESS: That's what I have, 38.06 percent.
2 The average defense strike rate for white venire members is
3 57.02 percent for a difference of minus 18.96 percent, and
4 this difference is statistically significant.

5 BY MR. PERRY:

6 Q. Okay. And again it looks like the same note about the
7 P value calculations that you have from the previous slide?

8 A. Yes.

9 Q. Same -- same footnote?

10 A. Yes, it is.

11 Q. And, again, going back to the overall comparison
12 between the two methods. Was there a reason or an
13 expectation why one method of calculation would produce a
14 different estimate than another calculation? In other
15 words, did one method correct for something that the other
16 calculation method didn't?

17 A. Well, they are two different approaches to calculating
18 the strike rates, and you can get substantially different
19 answers if you only go up in a small number of trials. For
20 example, let's suppose we have only two trials and in the
21 first trial, five venire members were seated out of --
22 let's say five black venire members were seated out of a
23 possible ten that were considered, that is not struck for
24 cause, and in the second trial, zero black venire members
25 were seated out of one considered. Under the aggregation

1 method, the -- the seated rate would be five plus zero
2 divided by ten plus one or five over 11. So an initial --
3 so that seated rate would be about 45 percent, 46 percent.
4 If we use the average seated method, the five over ten is
5 50 percent. The zero over one is zero percent. We would
6 average the 50 percent and the zero percent to get 25
7 percent. So we could in theory any way get substantially
8 different numbers. But over a large number of trials, it
9 appears that that hasn't occurred and the average is pretty
10 much near what we found or what I found using the
11 aggregation method.

12 Q. Okay. So in -- after you had done these calculations,
13 it appeared that both those methods gave fairly equivalent
14 results?

15 A. Yes.

16 Q. All right. Now, Dr. Katz after the examination of the
17 data in terms of the strike rates by the state and seated
18 rates and strike rates by the defense, what was the next
19 thing you looked at? I guess we will broaden it, what was
20 your approach?

21 A. Well, what I found in my analysis is that the state
22 had struck a significantly higher rate of venire members --
23 of black venire members than white venire members. And so
24 my next step was to try and explain that disparity in
25 strike rates by race. Just because we have a disparity in

1 strike rates by race doesn't automatically infer that there
2 is any bias because the jury selection process is not what
3 we would know or what we say in statistical terms a random
4 selection process.

5 Q. Why do you say that? In other words, what about the
6 jury selection process makes it a nonrandom process?

7 A. Well, it's done where the prosecution and defense are
8 seeking to exclude through their strikes potential jurors
9 based upon their perception that that juror would not be
10 good for their side. If we had a random selection process,
11 jury selection might go like this, where we would take 40
12 names of jurors and put their names in a hat and shake up
13 the hat and first ask the state to randomly select 14 names
14 out of the hat to correspond to their strikes and then the
15 defense would randomly select 14 of the remaining names
16 from that hat that would correspond to defense strikes, and
17 what would be left would be the jury. Now, if selection
18 occurred in that way, you would expect equal seated race by
19 race, equal strike rates by race for both the state and the
20 defense. But that, as I understand it, is not how jury
21 selection is done in North Carolina.

22 Q. Okay. And I mean based on the calculations we've just
23 gone through, did you, in fact, see differences in the
24 strike rates between the state and defense?

25 A. Yes, I did.

1 Q. Now, as part of your report, did you try to understand
2 what was driving those disparities?

3 A. Yes.

4 Q. And what -- not necessarily the way Mr. Ferguson asked
5 you, but in terms of having a research question or an
6 overall approach to doing this, how did you proceed to
7 understand what was determined in those disparities?

8 A. What I needed to do to try and formulate some theories
9 as to what might be driving these disparities was to
10 collect data regarding these strikes that I could look at
11 and analyze that might help me understand what the driving
12 motivations might be behind the pattern of strikes.

13 THE COURT: Bear with me one second. Madam Court
14 Reporter, you okay?

15 COURT REPORTER: Um-hmm.

16 THE COURT: Yes, sir.

17 BY MR. PERRY:

18 Q. So as part of trying to understand what was going on
19 in the jury selection process, you would want to understand
20 what was driving the strike process?

21 A. Yes, reasons for the strikes.

22 Q. Reasons for -- okay. All right. Now, how did you go
23 about or how did you start doing that? I guess let me ask
24 you, at that point had you read through at least one of the
25 report versions that Professors Grosso and O'Brien had

1 done?

2 A. Yes, I had. And what I wanted to do initially was --
3 and this was after the discovery hearing -- was get a body
4 of strikes of black venire members where there was some
5 information on the record to explain the reasons behind the
6 strikes. So I was looking for strikes -- out of the 173
7 trials where the black venire member -- the strike of the
8 black venire member was challenged under Batson. And I
9 felt that would be a good beginning to be able to see what
10 -- what the reasons were to help me formulate both some
11 understanding of how accurate the data set that Dr. O'Brien
12 compiled was and also to get some insight into what -- what
13 might be driving the disparity in strike rates.

14 Q. Just so -- just so I'm clear, the reason that the
15 presence of a Batson challenge in a case was important was
16 because why?

17 A. Because the reason for the strike would be stated by
18 the prosecutor on the record.

19 Q. Okay. Now, your -- so your investigation started with
20 that. Did it expand? In other words, how did you go from
21 those cases -- because -- did you find that all cases did
22 not involve Batson challenges?

23 A. Well, I never received that data set that I asked for
24 in terms of those Batson cases where the record -- or the
25 reason for the strike was stated on the record. So for a

1 while, I was operating with very little data to help me
2 formulate my understanding of the kinds of things that
3 would affect strikes by the state. At that point, I began
4 formulating a plan for how to collect data that would give
5 me that kind of information and also be able to provide
6 what I thought would be the potential for the state to have
7 an explanation as to why there was a disparity in state
8 strike rates.

9 Q. Okay. So as far as -- and let me -- let me just make
10 sure, what you were trying to explain -- or what you were
11 looking at in terms of collecting information, that was the
12 -- that were those 636 venire members that had been struck
13 by the state?

14 A. Yes.

15 Q. Okay. And the case -- the identification of Batson
16 challenges for those 636, that's one of the first things
17 you asked for?

18 A. Yes.

19 Q. Okay. Now, after the -- after you had thought that
20 through, what was the next thing you attempted to do? I
21 mean you mentioned you tried to collect information. What
22 did you try to do next?

23 A. Once I came to that understanding, I also decided on
24 the methodology that I thought would be appropriate for the
25 state to explain the disparity in strike rates, which was

1 to get the strike reasons or race neutral reasons for each
2 of the black venire members that had been struck by the
3 state, which that number fluctuates as I get more
4 information, but it was 636 as of January 10th in my
5 report.

6 Q. Okay. And let me ask you, because you mentioned
7 methodology. So if you're talking about the way you
8 approached this, what was your methodology?

9 A. My methodology was to take the approach that's used in
10 a regular capital trial or actually a regular trial when
11 there is a disproportionality in strike rates against black
12 venire members and that is -- as I understand it, if, for
13 example, five black venire members are struck in a row with
14 no black venire members passed by the state, that that
15 would typically produce a disproportionality that the judge
16 might determine as a prima facie case. That would require
17 the state to provide race neutral or race neutral
18 explanations for striking each of the five black venire
19 members. So conceptually I thought of the 173 trials as
20 ones where we do have a disparity in strike rates by the
21 state and adopting that same approach that is used for the
22 Batson challenges to come up with the strike reasons or
23 race neutral reasons for why the prosecutor struck each of
24 the 636 black venire members over the 173 trials.

25 Q. And does that different -- would you say that is

1 different from the methodology that was used in Professor
2 Grosso and Professor O'Brien's report?

3 A. Yes.

4 Q. What's the difference between the two approaches?

5 A. Well, in my approach, my methodology, it focuses on
6 just explanation of the reasons for striking each black
7 venire member by the state without having to put together a
8 general formula or model or way things are done. In my
9 discussions with prosecutors, none of them told me to use
10 logistics progression --

11 MR. JAY FERGUSON: Objection.

12 THE COURT: Sustained.

13 BY MR. PERRY:

14 Q. Let me clarify -- or not clarify -- let me ask you --
15 let me ask you this. Is there a reason that you have, as
16 far as the approach taken by the defense and this
17 alternative approach, that made one better or worse than
18 the other?

19 A. Yes.

20 Q. From the feedback I got from the prosecutors --

21 MR. JAY FERGUSON: Objection.

22 THE COURT: Sustained. You can simply tell us
23 what you decided, sir.

24 THE WITNESS: All right.

25 THE COURT: Okay.

1 THE WITNESS: I decided to go with the
2 explanation approach because the prosecutors would be
3 willing to testify in affidavits as to what the strike
4 reasons were in a way that did not cause them to have to be
5 tied to a general model of explanation.

6 BY MR. PERRY:

7 Q. Okay. And what I'm asking you about, these two
8 differences is -- are these two different methodologies
9 things you had considered before in the other work you had
10 done?

11 A. The explanation methodology isn't one that typically
12 is possible in the other work that I've done because of the
13 complexity of capital cases and I'm referring to the sense
14 of if you're asked to -- if I ask a prosecutor why did this
15 particular defendant get sentenced to death, that's a hard
16 question to answer and try to do that on an affidavit.
17 However, I think in this context, because prosecutors do
18 state their reasons on the record, that there are reasons
19 and it's something that can be testified to if the
20 prosecutor remembers the case or has reviewed the notes or
21 whatever but also could be something that can be discerned
22 by experts by looking at the appropriate materials. So I
23 thought it was something that can be answered and done to
24 the -- to our best ability to get to the answer.

25 Q. Okay. And, sir, so I understand correctly, one of the

1 big differences in this contest or in this litigation was
2 the presence of Batson challenges and those things on the
3 record, in particular, that was different from some of the
4 other ones you've done?

5 THE COURT: Can you rephrase? My understanding
6 was that he requested materials related to Batson
7 challenges but received none. Is that accurate?

8 THE WITNESS: I received a few data sets but very
9 few. I didn't get all the -- I asked for all the Batson
10 challenges for the 173 trials and I haven't received that.

11 THE COURT: That's what I thought your testimony
12 was.

13 THE WITNESS: Yes.

14 MR. PERRY: Judge, I want to clarify my question
15 because it's more of a conceptual question.

16 THE COURT: Okay.

17 BY MR. PERRY:

18 Q. Did the potential availability of having information
19 due to the Batson procedures being in place, did that
20 suggest an explanation was a better alternative involved?
21 That's what I'm asking.

22 A. Yes. Because there are reasons that are stated on the
23 record and so that in my mind tells me that we may not be
24 able to get to precisely what those reasons are in trials
25 where we don't have the prosecutor who struck the juror but

1 we could potentially, through expert -- experts in jury
2 selection, be able to identify as best as we could what
3 those reasons might be.

4 Q. Okay. And let me ask you about that because --

5 THE COURT: Would you like some more water,
6 Doctor?

7 THE WITNESS: Yes.

8 THE COURT: All right.

9 THE WITNESS: Thank you.

10 THE COURT: Yes, sir.

11 (The Court hands the witness a cup of water.)

12 THE WITNESS: Thank you.

13 THE COURT: Yes, sir.

14 MR. PERRY: Thank you, Your Honor.

15 MR. THOMPSON: Can I have a second, Judge?

16 THE COURT: Yes, sir.

17 (Court was at ease while the prosecutors talk.)

18 MR. THOMPSON: Thank you, Your Honor.

19 THE COURT: Yes, sir.

20 BY MR. PERRY:

21 Q. And, Dr. Katz, just to be -- well, not just to be
22 clear but let me ask you some more questions about once you
23 decided on this approach, how you implemented it. In other
24 words, when you came up with this explanation approach, did
25 you have certain things that you did as far as how to get

1 that information to you?

2 A. Yes. Once I came up with this approach, I began
3 drafting instructions and creating the infrastructure to
4 allow the prosecutor reviewers to, first, be identified as
5 to whom would be best to review the strikes and also
6 provide them with the ability to get materials to assist
7 them in providing their reasons for the strikes.

8 Q. Okay. And I've advanced to the next slide in the
9 PowerPoint. This slide number 35 that we're looking at, is
10 that some of the different things that you did to sort of
11 facilitate this review process, follow this review process?

12 A. Yes.

13 Q. If you could, could you just explain to the Court what
14 was involved in each of these individual steps in the
15 review process?

16 A. Okay. The first step was identification of the
17 appropriate prosecutors to review the cases. That was not
18 a decision I wanted to make because I felt that the D.A.'s
19 with cases within their jurisdiction would be in a much
20 better position to identify and understand the county who
21 would be best suited to do the review. So I sent emails to
22 or attempted to send emails to all the D.A.'s throughout
23 the state who had cases out of the 173 trials asking them
24 for their assistance in this case and in identifying
25 potential reviewers.

1 Q. And for some of the --

2 THE COURT: Mr. Perry, again I apologize, sir.

3 MR. PERRY: Yes, sir.

4 THE COURT: For clarity in the record, you
5 referred to slide number 35. Are you referring to page 35
6 of state's exhibit 47?

7 MR. PERRY: Yes, sir.

8 THE COURT: Thank you, sir. Go ahead.

9 MR. PERRY: Let me make sure that was exhibit 47
10 also.

11 THE COURT: Yes, sir.

12 MR. PERRY: And I'll include that, Your Honor.

13 THE COURT: Yes, sir.

14 BY MR. PERRY:

15 Q. The emails or some of the emails that Mr. Ferguson had
16 shown you previously, were those some of those emails you
17 had sent back and forth in trying to identify or trying to
18 get in contact with these folks?

19 A. Yes.

20 Q. And you said you attempted to send emails. Did you
21 have to send some repeated emails to identify some of these
22 folks?

23 A. Yes. Some of the email addresses that I had
24 apparently were old addresses that never got read by the --
25 some of the D.A.'s.

1 MR. JAY FERGUSON: Objection. Move to strike.

2 THE COURT: Sustained. Your motion to strike is
3 allowed. I won't consider that.

4 BY MR. PERRY:

5 Q. And guess I won't -- did you get any bounced emails
6 back or anything like that?

7 A. I did, yes.

8 Q. Okay. As far as the next step in the process, once
9 you had people identified, did they email you and let you
10 know they were the people that were going to be responsible
11 for reviewing those cases? Is that how it worked?

12 A. Occasionally. Mostly the D.A.'s would make the
13 assignments and identify the person and I would attempt to
14 make contact with the reviewer.

15 Q. Okay. Now, after that part of the process, when you
16 had somebody identified, what was the next thing that you
17 did as part of getting them involved with the -- in the
18 review process?

19 A. The first thing I tried to do with each one was make
20 phone contact with them to explain what I was attempting to
21 do. And get some initial feedback from those reviewers,
22 and I was hoping that they would buy into what I was
23 attempting and see the importance of it so that they would
24 feel better about all this time they're going to spend in
25 doing the reviews.

1 Q. Let me clarify two things. One, when you say the
2 initial feedback, what kind of initial feedback were you
3 looking for?

4 A. Well, I wanted to present what I perceived our
5 situation was in terms of why I'm requesting this
6 information and I wanted to give the reviewer a chance to
7 correct me or tell me that there is easier ways to do it or
8 give me some -- some information that would help me in
9 better coming up with the plan that I had.

10 Q. You mean in terms of the methodology you had chosen?

11 A. Yes. I was -- I wanted anything that would make this
12 a better plan than what I had come up with or tell me
13 reasons why this plan was not going to work. So I was -- I
14 was looking for their sense as to what they thought about
15 what I was proposing.

16 Q. And then the second part in terms of getting them to
17 buy in or see it was a good use of their time, can you just
18 clarify a little bit what you meant by that. I think I'm
19 paraphrasing. Is that what you meant by that?

20 A. Yes. I wanted them to know that I'm not just trying
21 to collect this data as an academic project, that there's a
22 purpose to it so that -- and I was thinking that their
23 offices would have had RJA motions filed at that time and
24 would know something about what was happening and would be
25 interested in learning more about what was going on in

1 Cumberland County. I thought that would be an incentive
2 for them to participate. We had a lot of data put on the
3 ALC computer that these reviewers would have an opportunity
4 to look at and have access to. So I thought all of that
5 would be an incentive for them to be willing to
6 participate.

7 Q. As part of that, we have under number two of the
8 second bullet point here on slide 35 on states's 47,
9 materials were provided, when you first started contacting
10 these folks, had the transcripts and other things provided
11 by the defense been put on the common drive so they could
12 look at it?

13 A. No, it hadn't, not initially. That was something that
14 came later. Plus through discovery, we got the DCI's and
15 that was material that was put on the ALC computer so that
16 the reviewers would have access to those materials. But
17 the transcripts and these other materials, I don't believe
18 they were put on the ALC computer until either late
19 September or early October.

20 Q. So in your initial contact with these folks, did you
21 send any specific materials?

22 A. I may -- not materials. I may have emailed them but I
23 didn't really have, I don't believe, materials to send them
24 at that time.

25 Q. Okay.

1 A. I still had to come up with, first of all, how much
2 data we were going to ask for, how much we wanted them to
3 review. Then we had to develop the instructions and I
4 needed to prepare spreadsheets for them and we also needed
5 to get all this data onto a computer where they would have
6 access to them through their network drives -- their D.A.
7 network drives.

8 Q. Now, you mentioned the instructions. Some of the
9 emails and materials that we were asked -- asking you about
10 yesterday, were some of those materials some of the
11 instruction drafts and things that you were working on
12 during this time you were putting together?

13 A. Yes.

14 Q. At some point, did you get an instruction sheet put
15 together giving, sort of, guidelines for how to respond and
16 identify the D.A.'s or ADA's?

17 A. Yes.

18 Q. Now, did you follow up with them on the telephone
19 about, you know, receiving those materials and instructions
20 and that kind of thing?

21 A. I don't think I followed up on the telephone. ADA's
22 and D.A.'s are very hard to reach by phone, so I doubt --
23 if I did, it would just be a very few people.

24 Q. So it was mostly email communications?

25 A. Mostly, yes.

1 Q. And as part of the emails or conversations, did you
2 tell them this was all, you know, working in response to a
3 hearing that was coming up in Cumberland County?

4 A. Yes, I did.

5 Q. Now, the next bullet point we've got are the outputs
6 that were requested. Now, at this point, what kind of
7 things were you asking these reviewers to do?

8 A. There were two areas that I requested the reviewer
9 information from the reviewers. One was asking the
10 reviewers for their cases to provide the race neutral
11 reasons, if possible, for the strikes of -- by the state
12 for the black venire members. And in the spreadsheet that
13 I sent them, it would identify from the defendant's
14 database who those black venire members were.

15 Q. So that's something you provided individually to all
16 these folks?

17 A. Yes.

18 Q. The sections of the spreadsheet with the people they
19 needed to look at included?

20 A. Yes. But they also got the whole set of venire
21 members for the trial so that they could potentially
22 review, say, the race identifications for the other venire
23 members.

24 Q. Okay. Is that part of what you were looking for, your
25 overall assessment of the information that was included in

1 those worksheets that were provided to you?

2 A. Well, I decided not to ask for the racial
3 identifications for the other members specifically because
4 that would have been additional work. And the more that I
5 asked the reviewers to do, the less likely they would do it
6 and the longer things would take. So I felt the most
7 critical part was the strike reasons or race neutral
8 reasons and that's what the first part was and the focus.
9 So they were provided with this other information and if
10 they chose to assist and do those racial identifications,
11 then that was good. We had them.

12 Q. Okay. Now, I mentioned earlier sort of the number of
13 juror or potential jurors that you were looking at, 636
14 statewide?

15 A. Yeah, black venire members struck by the state as of
16 January 10, 2012.

17 Q. And as part of getting ready for this particular
18 hearing, did you do the same things and go through the same
19 process with Mr. Thompson and Mr. Colyer? In other words,
20 did you give them instructions for their specific
21 Cumberland County cases or ask somebody be identified from
22 Cumberland County?

23 A. Yes, I did.

24 Q. Do you remember about how many venire members were
25 involved just from Cumberland County?

1 A. For Cumberland County, there were 62 black venire
2 members that were struck by the state.

3 Q. Okay. So 636 statewide and 62 from Cumberland?

4 A. Yes.

5 Q. Now, did you also ask them -- by them, I mean the
6 reviewers that had been identified, did you also ask them
7 for any other feedback as you had mentioned earlier?

8 A. Yes, I believe so. The instruction sheet was several
9 pages and I pretty much sent the same -- virtually the same
10 instructions to all the reviewers where I would take out
11 the name of one reviewer and substitute the name of the
12 next reviewer and then create a document in that way so
13 that I am pretty sure I asked for the same information for
14 Mr. Colyer also.

15 Q. If I can direct your attention to the next slide, that
16 would be slide number 36.

17 THE COURT: Page number 36.

18 MR. PERRY: Page number 36, sorry, Your Honor.

19 THE COURT: State's exhibit 47.

20 MR. PERRY: State's exhibit 47.

21 THE COURT: Thank you, sir.

22 BY MR. PERRY:

23 Q. Can you tell the Court exactly what we're looking at.
24 It's labeled illustration of case review assignment process
25 but what is that actually showing in that slide?

1 A. In this slide, this indicates a part of table 17 which
2 is in my report. And this table was designed to identify
3 the review prosecutor for each of the cases that were part
4 of the 173 trials. Table 17 only identifies for my report
5 those prosecutors where I received the reviews. During the
6 process of collecting the data, I had many more review
7 prosecutors indicated on the table that ultimately I never
8 received reviews from.

9 BY MR. PERRY: And if I could approach, Your
10 Honor?

11 THE COURT: Yes, sir.

12 BY MR. PERRY:

13 Q. Dr. Katz, has this been an ongoing process? In other
14 words, have you been receiving information from prosecutors
15 even up until this week?

16 A. Yes.

17 THE COURT: Mr. Perry, for the record, the
18 material you're now showing to Mr. Jay Ferguson, have they
19 previously been provided to him?

20 MR. PERRY: I think he has gotten this, Judge.
21 If I may approach? And I'll explain what this is.

22 THE COURT: Okay. Thank you, sir.

23 MR. PERRY: And I've marked this as state's
24 exhibit number 48.

25 THE COURT: Okay.

1 BY MR. PERRY:

2 Q. Dr. Katz, state's exhibit number 48, can you tell the
3 Court what that is.

4 A. This is an exhibit that expands on table 17 by --
5 well, including those reviews that I have received since
6 January 10th and those reviewed -- those reviews are
7 reflected in the next to last column under review
8 prosecutor received. And then I have also added a column
9 of reviewers that had been assigned at some point or agreed
10 to do reviews at some point and listed the reviewers that
11 are still outstanding or potential reviewers. Some of
12 these people were identified many months ago. I'm not sure
13 if they necessarily remember they're supposed to provide
14 the reviews or not. But in terms of the -- my attempt to
15 keep track of the assignments, this is what I have as my
16 best assignment at this point in time of who the reviewers
17 are for these outstanding trials.

18 Q. Okay. So is it fair to say that sort of table 17 is
19 updated up to this week?

20 A. Yes.

21 Q. Now, let me ask you this. So that's sort of the
22 mechanics of the review process. In other words, that's
23 how you organize the prosecutor reviewers to collect
24 information and provide it to you, correct?

25 A. Yes.

1 Q. And, now, in terms of what you were trying to do with
2 this information, what was the purpose of setting all this
3 up and collecting this information?

4 A. In terms of the reviews, the purpose was to provide
5 the explanations for striking the 636 black venire members
6 and get those explanations in affidavit format so that the
7 state would have that as their explanation for the reasons
8 why black venire members were struck at a higher rate than
9 white venire members.

10 Q. Okay. And let me ask you a methodological question.
11 At this point, were you still considering approaching the
12 problem from the standpoint that Professors Grosso and
13 O'Brien did? In other words, was modeling still a
14 consideration at this point?

15 A. At which point are you referring to?

16 Q. When you were sending these interviews out with
17 instructions and things like that?

18 A. Well, there is still the possibility I could use their
19 data if I could get feedback that told me that their data
20 is reliable and something that the prosecutors would agree
21 was a fair representation of the reasons why they do their
22 strikes. So I was still investigating that possibility.
23 That was going all very slowly because I needed prosecutors
24 to provide reviews or I needed data that I could use to
25 test Dr. O'Brien's data set, and that was coming in very,

1 very slowly.

2 Q. When you're referring to testing Dr. O'Brien's data
3 set, what do you mean by that? In other words, how did you
4 use this information to test her data?

5 A. For example, if I have a review for one of the venire
6 members and if that venire member was also a part of the 25
7 percent sample that Dr. O'Brien analyzed, there would be
8 data pertaining to that venire member in her database that
9 I could then compare to what the reviewer states in his
10 review or his affidavit as to what the reasons were for
11 striking that venire member. These comparisons would all
12 be done in terms of black venire members because those were
13 the only kinds of reviews I was going to get from the
14 prosecutors.

15 Q. I think Mr. Ferguson asked you yesterday. At that
16 point, referring to the instructions that were going back
17 and forth or the draft instructions I guess we can refer to
18 them as between you and Mr. Colyer and Mr. Thompson, was
19 there some discussion about how much information to try to
20 get at that point from all these reviewers?

21 A. Yes. There was discussion. I contacted Jonathan Babb
22 at the attorney general's office. He had been part of the
23 discovery hearing so he was aware of -- of these issues.
24 And I asked him for his suggestion as to how much I needed
25 to obtain from the prosecutors so that for -- from his

1 legal perspective, it would be appropriate and enough. At
2 that point, I was open to collecting lots of data, if
3 that's what was required. Mr. Babb said he --

4 MR. JAY FERGUSON: Objection.

5 THE COURT: All right. Is this being offered for
6 the purpose of explaining subsequent conduct, what he did?

7 MR. PERRY: Your Honor, I can -- we can -- I can
8 refocus the question.

9 THE COURT: Yes, sir. Okay.

10 MR. PERRY: That's no problem.

11 Q. Let me ask you, Dr. Katz, aside from sort of the legal
12 considerations, as far as your methodological approach, was
13 there still a possibility in your mind of making some kind
14 of modeling effort akin to what Professors Grosso and
15 O'Brien were doing?

16 A. It was still a possibility, yes, because I didn't have
17 enough information to make a firm decision as to the
18 reliability of their data.

19 Q. So at that point, you were still evaluating the
20 appropriateness of one method versus the other?

21 A. I believe the explanation method is superior because
22 it -- it goes directly to the issue of providing the strike
23 reasons. The other method could have been used in some
24 manner that might also bolster the explanation method. So
25 before I rely on their data to produce something that I

1 would then testify was appropriate in terms of strike
2 decisions, I need to know if their data is credible and
3 reliable and then I would need also to know whether my use
4 of that data in terms of modeling would be appropriate or
5 not.

6 Q. And let me ask you just a couple follow-up questions
7 on that. So both -- both approaches, the explanation and
8 the modeling approach, is it fair to say both of them seek
9 to identify the factors that are at work in this process,
10 this strike process?

11 A. Yes.

12 Q. Now, as far as the modeling approach, if I can ask you
13 to take a look at the next slide, which is page 37, state's
14 exhibit number 47, in terms of what a modeling effort would
15 look like in this context. You were present when I was
16 asked Dr. Woodworth about a hypothetical hiring example?

17 A. Yes.

18 Q. Do you recall the testimony that he gave about that?

19 A. Yes.

20 Q. In the accounting hiring example, we were discussing
21 having a hundred applicants, 50 positions, again sort of
22 the details listed here on this slide, on state's exhibit
23 47. In terms of the comparison between modeling and
24 explanation, in the hypothetical example I was asking Dr.
25 Woodworth about, what would the difference be in terms of

1 those two approaches to this hypothetical example? In
2 other words, with the modeling approach, with the example
3 as we posed it to Dr. Woodworth, how would the modeling
4 approach handle our hypothetical example as we have it?

5 A. The hypothetical example that we have if we applied,
6 say, the explanation approach is the reasons the applicants
7 that were hired -- the reason behind why the 50 applicants
8 were hired was that they had CPA's. Okay. That would be
9 the explanation.

10 Q. So that would be one of those identifying -- or
11 factors that both approaches would look at --

12 A. Yes.

13 Q. -- to try to understand what was driving this
14 particular outcome or behavior?

15 A. Yes. And it's a simplified example where that's the
16 only factor that needs to be considered -- -

17 Q. Right.

18 A. -- given the way it's stated. In terms of the
19 modeling approach, there are various modeling approaches
20 that you could use. Dr. Woodworth was talking -- or -- and
21 Dr. O'Brien used logistic regression to do their modeling.
22 And for this example, logistic regression produces an
23 outcome where it states that the model isn't valid or could
24 be invalid because the variables are completely separable.
25 So even though we know that CPA is the explanation, the

1 logistic regression has a difficult time when there's a
2 perfect explanation of the hiring decision, as in this
3 case.

4 Q. When you say -- when you say the model has a difficult
5 time, what do you mean by that? In other words, when it's
6 saying it's having a difficult time, what is it trying to
7 tell you?

8 A. It has a difficult time in that the reasons -- the
9 process the model goes through to determine if the
10 coefficients are assigned properly requires some kind of
11 convergence that won't occur in cases where the variables
12 are completely separable, and the computer output will --
13 well, the statistical analysis system, SAS, output will
14 state that as part of the results of the analysis.

15 Q. And just to be clear, because it's been a couple days
16 since we had Dr. Woodworth in here, when we're talking
17 about separability in the variables, what exactly are we
18 talking about?

19 A. Because whether you are a CPA or not and whether
20 you're hired or not are -- are basically two variables that
21 separate out completely.

22 Q. So in other words, both of those factors are providing
23 the same information to the model?

24 A. Yes.

25 Q. Now, in terms of this hypothetical and these factors

1 that are involved, in other words, CPA and being hired, is
2 there any difference between those two as factors in and of
3 themselves, even though they are conveying the same
4 information at least in terms of the model understanding?

5 A. In terms of the logistic regression model?

6 Q. Yes, sir.

7 A. It can't see a difference and that's -- that's the
8 problem it has in trying to produce the coefficient
9 estimates that allow the convergence of the model.

10 Q. And that's the same kind of convergence again when I
11 was asking Dr. Woodworth about it earlier?

12 A. Yes.

13 Q. That's the same sort of idea we're talking about?

14 A. Yes, Dr. Woodworth was correct in his evaluation of
15 what would happen under logistic regression for this case.

16 Q. And just in general, the -- the problem that this
17 particular hypothetical example is demonstrating is what?
18 Is it separability of the variables? Is that the general
19 problem this hypothetical is illustrating?

20 A. Well, the problem is that here is an example where we
21 have an almost perfect explanation of hiring based upon the
22 CPA variable, and the logistic regression model is not
23 giving us that indication. It's saying the model is
24 invalid. So that's -- that's an issue that I have in that
25 it's not really doing a good job when everything is

1 perfectly explained. So I have some -- some other issues
2 regarding it as appropriate in cases where -- analyses
3 where there is a potential for having a lot of perfect
4 explanations as to whether the outcome is hired or not
5 hired.

6 THE COURT: Mr. Perry, I recognize it's a little
7 bit early but the testimony has been ongoing since 9:00.

8 MR. PERRY: Oh, yes, sir.

9 THE COURT: We're going to stop at this point.
10 Dr. Katz, thank you, sir. You may step down.

11 (Witness leaves the stand.)

12 THE COURT: 2:00 -- I'm sorry, 2:30. And,
13 frankly, because of the responsibilities of the court
14 reporter, we're going to take a normal lunch recess. 2:30.

15 (Lunch recess taken.)

16 (The following proceedings continued in open
17 court. The defendant, defense attorneys and state's
18 attorneys were present.)

19 THE COURT: Let the record reflect all counsel
20 are present. The defendant is present. Mr. Perry, you
21 need a few moments, sir?

22 MR. PERRY: Just a minute, Your Honor. Take a
23 second.

24 THE COURT: Yes, sir.

25 (Court was at ease.)

1 MR. PERRY: Your Honor, the state's ready.

2 THE COURT: Thank you, sir. You may proceed.

3 BY MR. PERRY:

4 Q. Dr. Katz, before the lunch break, I was asking you
5 questions about the slide up on the screen, which is
6 state's page 37 in state's exhibit number 47. That was our
7 hypothetical example involving the hiring decision for
8 CPA's?

9 A. Yes.

10 Q. To relate this to the context more specifically about
11 the Racial Justice Act research and things you looked at
12 specifically, if -- suppose there was a venire member that
13 was opposed to the death penalty and there was a variable
14 so that every venire member with that factor would be coded
15 as a positive for whatever that factor was and the state
16 would strike those particular jurors with that factor a
17 hundred percent of the time. In theory, is that a
18 well-defined variable?

19 A. That would be a variable that would work well in
20 explaining the reasons for those strikes for those venire
21 members.

22 Q. Let me ask this sort of in a backwards manner too.
23 What makes a variable a well-defined or a good variable?

24 A. For explanation?

25 Q. Yes, sir.

1 A. If you have a factor where every time that factor is
2 present for a venire member, that the state strikes that
3 venire member a hundred percent of the time and when that
4 factor is not present in a venire member, the state doesn't
5 strike that venire member.

6 Q. Okay. So in terms of the question I was asking before
7 the lunch break, in understanding the information contained
8 in a particular factor, you're saying a good variable would
9 convey that information in that factor?

10 A. Well, almost a perfect variable would be one that a
11 hundred percent of the time would be consistent with the
12 state striking the venire member, and if that factor wasn't
13 present, then -- well, the -- let me just stop at the first
14 part. That a hundred percent of the time, if that factor
15 is present, the venire member was struck.

16 Q. Going back to the hypothetical example that we had
17 been talking about, the CPA designation in this
18 hypothetical, that would be a well-defined variable in the
19 sense that you're talking about?

20 A. Yes. It would a very good predictor variable and is a
21 perfect predictor variable for which applicants were hired.

22 Q. Okay. Now, as part of the analysis you did for Mr.
23 Robinson's claim, in looking at the study that Professors
24 Grosso and O'Brien produced, did you look at the way they
25 set up or the way they define their variables?

1 A. Yes, I did.

2 Q. And did you do some, I guess, numerical analysis of
3 variables that were specified in their models?

4 A. Yes. I looked at the variables that they used in
5 their logistics regressions that ended up in table 12 and
6 table 13 of their report to see to what degree these
7 variables tended to approach these perfect predictor
8 variables that I just talked about.

9 Q. And if I can direct your attention, this will be page
10 38 in state's exhibit number 47. It's labeled table 12.
11 Is this actually table 12 in your report as well as it's
12 table 12 in their report?

13 A. Yes.

14 Q. So the numbers correspond?

15 A. Yes, they do.

16 Q. Now, can you explain to the Court what information is
17 contained in your table 12 that's displayed?

18 A. This is the first part of table 12 and the variable --

19 THE COURT: I'm sorry for the interruption.

20 Which table 12 is now reflected on the screen?

21 MR. PERRY: Your Honor --

22 THE COURT: The one in the MSU study or the one
23 prepared by the witness?

24 MR. PERRY: I will be more specific, Judge. I
25 apologize.

1 THE COURT: Yes, sir.

2 BY MR. PERRY:

3 Q. The page number 38 that's displayed, Dr. Katz, that's
4 your table 12, correct?

5 A. Yes.

6 Q. So that would be in your report?

7 A. Yes, it is.

8 Q. And if you could explain what information is contained
9 in your table 12.

10 A. Yes. There are more variables than what's listed on
11 the slide. The first variable that's listed is DP
12 reservations, which is a variable taken from table 12 of
13 the MSU study. And what I listed here are some basic
14 characteristics of that variable as it appeared in the
15 statewide 25 percent sample.

16 Q. And just to clarify, when you say characteristics,
17 what do you mean?

18 A. The number of cases where the variable is missing and
19 then the number of cases where the variable was coded as a
20 one. The number of cases where, when the variable was
21 coded as a one, the venire member was struck by the state.
22 Then the number of cases where the variable is coded as
23 one, the venire member was struck by the defense. And the
24 number of cases when the variable is coded as one, the
25 venire member was seated.

1 Q. Okay. And then under the numbers of the two
2 categories of strikes and the category of seated, you've
3 got percentages?

4 A. Yes.

5 Q. What are those percentages?

6 A. The percentages are the percentages of those cases
7 where they were coded -- those venire members that were
8 coded with a one fell into each of the categories. So, for
9 example, 78.31 percent of the venire members who were coded
10 with DP reservations equaled a one were struck by the
11 state. And that would be just 145 divided by 185.

12 Q. Okay. Now, is there a particular reason that you
13 calculated those percentages? In other words, what do
14 those percentages tell you as you're evaluating this
15 particular --

16 A. The higher the percentage is for the number of coded
17 struck by the state, the better that variable would be to
18 explain the state strikes in a model.

19 Q. All right. And let me ask you about the other
20 percentage you've got -- well, one of the other percentages
21 you've got up there, which is the number of coded juror or
22 venire members struck by the defense. For that percentage,
23 what information does that percentage convey to you?

24 A. Well that -- since the logistic regression model
25 variable is either struck by the state or not struck by the

1 state, that percentage, along with the seated rate
2 percentage, would indicate when the variable DP
3 reservations didn't correspond to a venire member being
4 struck by the state. So it's a -- if you add those two
5 percentages together, that would be an indication of the
6 percentage of times when we have a nonstruck by the state
7 outcome.

8 Q. Okay. And then, finally, the seated percentage, does
9 that convey the information to you when you're looking at
10 this in terms of the variable itself?

11 A. Pretty much in combination with the struck by the
12 defense and seated together, that percentage is basically
13 the difference of 78.31 percent and 100 percent, and the
14 smaller that percentage is, the better the variable will
15 predict and explain why the venire member was struck in a
16 model.

17 Q. Now, as part of what you looked at -- earlier I
18 believe you said you looked at these variable definitions
19 that were included in Professor O'Brien's report, correct?

20 A. Yes.

21 Q. Did have you a chance -- to go back to our
22 hypothetical example, in terms of looking at that variable,
23 how would you, I guess, sort of gauge the effectiveness of
24 this variable in communicating information about what's
25 going on with reservations about the death penalty?

1 A. It's pretty good. But if there's a way to possibly
2 redefine the variable to cause those cases where the venire
3 member was struck by the defense or seated to be not
4 included as part of the definition, then that variable
5 possibly could be improved in that definition.

6 MR. JAY FERGUSON: I didn't hear that last
7 response.

8 THE COURT: Yes, sir. If you could pull your
9 seat up, Dr. Katz. The vent's on.

10 MR. JAY FERGUSON: Just that last part.

11 THE WITNESS: If there's a way to redefine the
12 variable so that it would exclude the -- well, keep much of
13 the cases where the venire member was struck by the state
14 but drop off those cases where the venire member was struck
15 by the defense or seated, then that would be an improvement
16 on the explanatory power of that variable.

17 BY MR. PERRY:

18 Q. And why do you characterize that as an improvement in
19 its explanatory power?

20 A. Because it would be closer to the CPA example in that
21 if -- what we'd like to find is variables that a hundred
22 percent of the time are consistent with the state striking
23 the venire member as an explanatory variable.

24 Q. And that's how -- that's sort of the yard stick that
25 we're looking at. In terms of a variable's --

1 A. Power to explain. That's the objective.

2 MR. PERRY: May I approach, Your Honor?

3 THE COURT: Yes, sir. What's the next number,
4 Mr. Perry?

5 MR. PERRY: 49, Judge, I believe. May I
6 approach, Your Honor?

7 THE COURT: Yes, sir.

8 BY MR. PERRY:

9 Q. And, Dr. Katz, I'm going to hand you what I've marked
10 as state's exhibit number 49 for identification purposes.

11 A. Okay. This is an exhibit I prepared based upon the
12 shadow code analysis that Dr. O'Brien testified --

13 MR. JAY FERGUSON: Your Honor, I object if it's
14 something he prepared. I have not seen this. They are
15 under a duty to disclose everything to the defense and I
16 would object to its admissibility at this point.

17 THE COURT: Mr. Perry, this has not been
18 previously provided other than just a moment ago or few
19 seconds ago in court, sir?

20 MR. PERRY: Judge, it may not have in this
21 format. This is what came out of the shadow coding
22 discussion that we had, I guess, with the redirect from
23 Professor O'Brien if I have that right.

24 THE COURT: Yeah, but I guess the point that's
25 being made is that even though it may be -- may have been

1 prepared based on matters in evidence, this is the first
2 time they've seen this document for the purposes of any
3 testimony that would be given by the witness.

4 MR. PERRY: And that's probably right, Judge. I
5 think we talked about the numbers and things that
6 characterize this but we didn't talk -- I don't think they
7 have a copy of this I don't believe.

8 THE COURT: All right. Mr. Colyer, Mr. Thompson,
9 you want to be heard?

10 MR. THOMPSON: Judge, want to make sure -- can I
11 have just a second?

12 THE COURT: Yes, sir. And, Mr. Ferguson, I'm
13 going to give you or any other members of the defense team
14 an opportunity to be heard as well.

15 MR. JAY FERGUSON: Thank you, Your Honor.

16 THE COURT: Yes, sir.

17 MR. JAY FERGUSON: Your Honor, may I confer with
18 counsel?

19 THE COURT: Yes, sir.

20 (Court was at ease while all counsel talk.)

21 MR. JAY FERGUSON: Your Honor, I conferred with
22 opposing counsel and what we would be willing to do, with
23 the Court's permission, allow him to voir dire this witness
24 on this document so we can see what it is, whether it's
25 what the state purports it to be. If it's some meaningful

1 document we need to confer with our experts, then we will
2 lodge an objection at that point. Would that be
3 acceptable?

4 THE COURT: Yes, sir. Mr. Thompson, Mr. Colyer,
5 Mr. Perry, is that agreeable?

6 MR. COLYER: Yes, Your Honor.

7 MR. PERRY: Yes, sir, and I just want to be
8 clear, Judge, I don't intend to spring anything on them.
9 It may be clear from the voir dire what this is.

10 THE COURT: Okay. Let's go forward with the voir
11 dire. And that's as that state's 49?

12 MR. JAY FERGUSON: 49, yes.

13 BY MR. PERRY:

14 Q. Dr. Katz, if you will look at state's exhibit number
15 49, would you tell us exactly what this document is and
16 where it came from.

17 A. I started with the database of shadow codes that Dr.
18 O'Brien had prepared and I limited the observations to
19 those black venire members that had been struck by the
20 state.

21 Q. Let me stop you for one second just to go sort of
22 component by component. So when you're referring to the
23 database of shadow codes that Dr. O'Brien produced, are you
24 referring -- when did you get that? When did you get that
25 particular database?

1 A. Sometime in late January.

2 Q. Okay. Was it -- was it before this hearing?

3 A. Yes.

4 Q. Okay. Do you remember if it was before the 10th or
5 after the 10th. I think that was the cutoff date for some
6 of this material?

7 A. I think it was sometime around the 25th.

8 MR. JAY FERGUSON: Your Honor, object to the
9 cutoff date. That was their deadline, not ours.

10 THE COURT: Yes, sir.

11 MR. PERRY: I don't mean to characterize it --
12 just that particular date.

13 THE COURT: Yes, sir.

14 BY MR. PERRY:

15 Q. So it was past that particular date?

16 A. Yes.

17 Q. Okay. Was that -- in terms of what's on this
18 spreadsheet, was the database that was given to you by
19 Professor O'Brien, was it just this or was there more
20 information included?

21 A. There was a lot more information. I just limited it
22 to the selected variables at the top of the page -- of the
23 first page and also limited it to the black venire members
24 that were struck by the state because that's where we can
25 do the comparisons between the data that was in the 25

1 percent sample that Dr. O'Brien analyzed and the data that
2 the state submitted based upon the affidavits.

3 Q. Okay. And just to spell this out explicitly, you
4 heard Professor O'Brien's testimony about the shadow
5 coding?

6 A. Yes.

7 Q. So your understanding of what she sent to you in that
8 shadow coding database was what? In other words, what
9 information did you understand she was sending to you?

10 A. She was sending a different coding, which she called a
11 shadow code, that was based upon the state database that
12 had been turned over to the defendant I believe January
13 10th. So she reviewed those cases and defined a new
14 variable for DP reservations which she called DP2 which
15 included issues regarding the death penalty that the state
16 had identified in their database or affidavits.

17 Q. Okay. So just to be clear, the material that you
18 provided as of that January 10th date, that reflected
19 observations where they were, I guess, recoded or added in
20 the DP reservations in the variable. In other words, those
21 were places you were pointing out where the DP reservations
22 variable from the state's perspective ought to be one
23 instead of zero?

24 A. Yes, in the state's database. And Dr. O'Brien,
25 without necessarily accepting that, redid a variable DP2 to

1 account for the state's classification and what was
2 presented as the database on January 10th.

3 Q. Okay. And again, recalling her testimony, that's what
4 she was referring to when she was talking about the numbers
5 and whether or not the inclusion of DP2 versus DP would
6 have made a difference in her overall regression results?

7 A. Yes. She was redefining the codes, called them shadow
8 codes and reran her logistic regressions including those
9 shadow codes.

10 MR. PERRY: Okay. I think that's all the
11 questions I have.

12 THE COURT: Do you have any questions?

13 MR. JAY FERGUSON: Yes, Your Honor.

14 THE COURT: Yes, sir.

15 VOIR DIRE CROSS-EXAMINATION

16 BY MR. JAY FERGUSON:

17 Q. Do you recall the exhibits, Dr. Katz, that Professor
18 O'Brien presented to the Court last week about shadow
19 coding?

20 MR. JAY FERGUSON: May I approach the witness?

21 THE COURT: Yes, sir.

22 BY MR. JAY FERGUSON:

23 Q. My question, Dr. Katz, is going to be how does this
24 differ from what she presented to the Court so that
25 ultimately is what I'm going to try to figure out.

1 A. I think I know the answer.

2 Q. Okay. You don't -- okay. Great.

3 A. I think what Dr. O'Brien presented were where there
4 were differences -- the list of cases where there was some
5 difference between the original coding and the shadow
6 codes.

7 Q. And this differs how?

8 A. This includes cases where there was no difference
9 because it includes the 73 cases where the black venire
10 member was struck by the state. So it can include cases
11 where there's no changes.

12 Q. Why are some of them highlighted? What does that
13 represent?

14 A. There were four cases, and those are the highlighted
15 cases, where the state's database indicated that there was
16 an issue with the death penalty and that wasn't counted as
17 part of the shadow codes.

18 Q. I was not aware the state had a database. Can you
19 tell us what that is?

20 A. The database is the explanations -- at the time of
21 January 10th, there were 636 observations where black
22 venire members that had been struck by the state. There
23 were 246 filled in. And as part of the database, there was
24 an identification as to whether the explanation involved a
25 death penalty issue or a criminal background issue.

1 Q. Okay. Is the purpose of this exhibit to show that
2 there were four African-American jurors that should have
3 been included in the shadow coding and weren't?

4 A. That's one of the purposes.

5 Q. What's the other purpose?

6 A. If you look at the bottom of page two.

7 Q. Okay.

8 A. I produced a total for the number of venire members
9 that were coded with DP reservations versus the number of
10 venire members that had the shadow code DP2. So 19 -- a
11 total of 19 had DP reservations equal to one according to
12 the defendant's database. The recoded had a total of 35
13 with four other highlighted cases that could bring it to
14 39.

15 Q. Any other purpose for this exhibit?

16 A. No.

17 Q. Dr. Katz, these four jurors who were not included on
18 Professor O'Brien's shadow coding list, are these some that
19 came in after your report?

20 A. I don't believe so.

21 Q. Okay.

22 A. Because I referred to my database as of January 10th
23 and did the comparison.

24 MR. JAY FERGUSON: Okay. Your Honor, we object
25 as it being untimely.

1 THE COURT: Folks, I just want to make sure just
2 from the point of view of discovery where we are. The
3 state had a deadline of January 10th.

4 MR. JAY FERGUSON: That's correct.

5 THE COURT: All right. All materials were
6 supposed to have been turned over by that date.

7 MR. JAY FERGUSON: Yes, but this really is in
8 rebuttal, I think, to our rebuttal. So if I could --

9 THE COURT: Go ahead.

10 MR. JAY FERGUSON: We had a deadline of December
11 30th.

12 THE COURT: Yes, sir.

13 MR. JAY FERGUSON: They had a deadline of January
14 10th. Then we had a deadline of January 17th for rebuttal
15 to their evidence.

16 THE COURT: Yes, sir.

17 MR. JAY FERGUSON: And that's when the shadow
18 coding was turned over to the state.

19 THE COURT: Okay. Do you recall specifically --

20 MR. JAY FERGUSON: I'm not really objecting to
21 the fact that -- had this been given to me a few days ago
22 so I could have consulted with our experts, I would not
23 have any objection. I'm not saying because they didn't get
24 it to us on the 10th is the problem. The problem is we get
25 it in court. We have experts for a reason. We have

1 consultants for a reason and I haven't had an opportunity
2 to consult with those experts.

3 THE COURT: Yes, sir. Mr. Colyer.

4 MR. COLYER: Judge, may we conditionally just
5 leave where we are unless this affects the further
6 presentation by Dr. Katz, give the opportunity to the
7 defense -- not in the form of a recess unless they, you
8 know, need it, but in the form of giving them the
9 opportunity to speak with someone, either -- I notice we've
10 had Skype going on here and texting and that sort of thing.
11 Scan it and send it to them and not necessarily rule on it
12 at this moment but we can, from our point of view, back off
13 on it, give them a chance to run it by Dr. O'Brien or their
14 experts and see --

15 THE COURT: Yeah.

16 MR. COLYER: -- if they have additional
17 objections to or whatever so they can be better prepared to
18 address it. And then if they have other reasons, we can
19 deal with it then. If not, we can bring it back to the
20 Court's attention and go from there and just --

21 THE COURT: So we're going to leave the subject
22 at issue in abeyance. We're not going into it.

23 MR. COLYER: Unless I'm misspeaking here with
24 respect to Mr. Perry, unless that messes up his
25 presentation with Dr. Katz's opinion. If we can just leave

1 it in abeyance for a moment --

2 THE COURT: Okay.

3 MR. COLYER: -- give them the opportunity to
4 review it, so to speak.

5 THE COURT: Okay.

6 MR. COLYER: And then if they need more time,
7 certainly we'll be agreeable to let them do that. But
8 perhaps it might either firm up their position, make them
9 in a better position to raise their objections or whatever,
10 or give them an opportunity to say, after speaking with
11 their expert, that they understand they can contest it in
12 their surrebuttal and we can move on at that point.

13 THE COURT: All right. Mr. Jay Ferguson or
14 anyone else?

15 MR. COLYER: It was not our intent in any way to
16 surprise them. I know Mr. Perry didn't mean to do that.

17 THE COURT: No. I'm not suggesting -- all right.

18 MR. JAY FERGUSON: I suspect he's still going to
19 be on the stand tomorrow.

20 THE COURT: Yes, sir.

21 MR. JAY FERGUSON: So why don't we -- let me have
22 an opportunity to consult with our experts.

23 MR. COLYER: Thank you.

24 THE COURT: That's fair. That's reasonable. So
25 we'll go forward with other matters.

1 MR. PERRY: And, Your Honor, just to -- I want to
2 make sure -- I don't spring stuff on people. I was -- I
3 think that's repackage stuff but I had no problem at all --
4 he elicited the purpose for why we were talking about it
5 anyway.

6 THE COURT: Thank you, sir.

7 MR. PERRY: Yes, sir.

8 THE COURT: We're moving on to other matters.

9 MR. JAY FERGUSON: I understand none of this voir
10 dire evidence has been admitted into evidence.

11 THE COURT: It's not in evidence at this point.
12 The purpose of the voir dire was to determine where we're
13 going.

14 MR. COLYER: Judge, that's with respect to
15 state's exhibit 49 at this point.

16 THE COURT: Yes, sir. Yes, sir.

17 MR. COLYER: Thank you.

18 THE COURT: We need clarification in that regard.
19 It applies only to that exhibit and any testimony tied to
20 that exhibit. Yes, sir, Mr. Perry.

21 MR. PERRY: Thank you, Your Honor.

22 THE COURT: Okay.

23 BY MR. PERRY:

24 Q. All right. And, Dr. Katz, going back to the
25 observations in your table 12 and the definition of this DP

1 reservations variable, you've explained what the
2 percentages were in terms of whether or not they were
3 present in the strikes by the state and strikes by the
4 defense. And then whether or not a juror was seated.
5 That's kind of where we were.

6 A. Yes.

7 Q. If I can direct your attention to the next page,
8 that's going to be again the same table 12 from your
9 report. This is again the statewide logistic regression
10 models from the defense reports, table 12. Did you do
11 similar calculations in looking at the percentages of these
12 variables that were present in state strikes and defense
13 strikes and seated jurors?

14 A. Yes, I did.

15 Q. Okay. Now, looking at these variables -- again, this
16 is just an excerpt. It's not a full table 12 from your
17 report but it's a partial table 12. Again, the reason for
18 your calculation of these percentages was to do what or
19 what information did the calculation of these percentages
20 supply to you when you were looking at these tables?

21 A. It's -- the purpose is to show that in many of these
22 variables, we have a distribution of percentages across the
23 three different dispositions and it's not like the DP
24 reservations variable where we have a high concentration in
25 our percentages for those venire members that were struck

1 by the state. And so those variables are not going to be
2 as good as the DP reservations variable in trying to
3 explain why the venire member was struck.

4 Q. And if I could, let me ask you, if you can -- just to
5 clarify what you mean by comparison with the DP
6 reservations variable. If you could, with one of those
7 variables, explain the difference between the two in terms
8 of the percentages and what they communicate to you?

9 A. Okay. If you look at the single divorce variable,
10 41.6 percent of those venire members were struck by the
11 state compared to the 78.3 percent of the venire members
12 that were struck by the state for DP reservations. So it's
13 -- it means that 58.4 percent were not struck by the state
14 for those venire members who were coded as single divorced.
15 So it's not as good a variable in trying to distinguish who
16 gets struck by the state.

17 Q. And to clarify when you say it's not as good a
18 variable to distinguish, what do you mean by that?

19 A. Again, going back to the ideal variable -- the ideal
20 variable would strike the venire member -- would have a
21 hundred percent of the time the venire member is struck by
22 the state.

23 Q. Okay.

24 A. And zero percent of the time the venire member is not
25 struck by the state.

1 Q. Okay. If I can direct your attention to the next
2 page. Again, this is part of table 12 from your report,
3 correct?

4 A. Yes.

5 Q. Okay. And with these variables and these percentages,
6 what observations did you make about these variables?

7 A. Well, the variable J knew D, venire member or venire
8 member's family knew the defendant, that's a variable that
9 is predicting somewhat better than many of the -- than the
10 others venire members who get struck by the state because
11 it has a percentage of 75 percent. It only accounts for 15
12 cases out of the 20. The other variables have a much lower
13 percentage of -- of those cases defined with that variable
14 that were struck by the state.

15 Q. Okay. So in your example of the variable J knew
16 defendant, that is more like the DP reservations variable?

17 A. Yes.

18 Q. Okay. And the other variables that are present up
19 there on the screen, that's more like your example of the
20 single/divorce variable?

21 A. More or less, yes.

22 Q. And I'm noticing there was -- it looks like 36 missing
23 observations for a number of these cases?

24 A. Yes.

25 Q. Is there any meaning to the fact that a lot of the

1 variables are missing 36 of these observations?

2 A. I don't think there's any real significance to 36
3 missing. It just indicates that those cases won't be part
4 of the logistic regression model.

5 Q. So those observations are actually not included in
6 these percentages at all; is that correct?

7 A. That's correct, because they are missing and not coded
8 with a one.

9 Q. And then if I can ask you to look at one last part of
10 table 12. This has got the remaining three variables from
11 the logistic regression model from Professor O'Brien's
12 report table as well but these are again your last set of
13 calculations in terms of the percentages that you observed
14 in your table 12, correct?

15 A. Yes.

16 Q. Now, in terms of these particular variables, were you
17 able to see -- or gauge the variables in terms of the
18 percentages that you calculated?

19 A. (No response.)

20 Q. Well let me ask it like this. If you look at the
21 first one, leans state, is that more like a single/divorced
22 variable or is that more like the DP reservations variable?

23 A. I think it's neither of those.

24 Q. Why is that the case?

25 A. Because the percentage of cases where the venire

1 member was struck by the state is so low so it's not able
2 to account for the explanation for the state strike.

3 Q. For the remaining two variables, do those percentages
4 tell you anything, at least in terms of what was calculated
5 for state strike or defense strike and seated rates?

6 A. I think those are more like the single/divorced
7 variable.

8 Q. Those are more like that?

9 A. Yeah.

10 Q. Now, going back to the hypothetical example, for the
11 third category, the percentages of people who were seated
12 with those particular variables, is there anything that the
13 percentage seated tells you specifically as opposed to the
14 defense or the state or strike risk?

15 A. Not in terms of modeling whether or not the venire
16 member was struck by the state.

17 Q. Why is that?

18 A. Because if the venire member was seated or struck by
19 the defense, both cases, that venire member was passed by
20 the state so that would have a value of zero for the strike
21 -- for the decision whether or not to strike the venire
22 member by the state.

23 Q. Okay. Now, let me ask you, did you also take a look
24 in the same way as far as looking at the percentages for
25 Cumberland County's model specifically?

1 A. Yes, I did.

2 Q. And if I can direct you to the next slide, this is
3 page 42 of state's exhibit 47, again your table 13, this is
4 actually from your report, right?

5 A. Yes.

6 Q. And the same variable, DP reservations?

7 A. Yes, it is.

8 Q. But the numbers are the numbers that are actually from
9 the Cumberland County model, correct?

10 A. That's correct.

11 Q. Now, is this DP reservations for the Cumberland County
12 model about the same as the DP reservations in the
13 statewide model?

14 A. About, yes. It's a little bit higher for the
15 percentage that were struck by the state.

16 Q. Okay. So in your -- so if they are about the same,
17 does that mean there was any difference in terms of the way
18 the variable was defined one way or the other?

19 A. I don't understand your question.

20 Q. Okay. Can we say it's the same variable from the
21 statewide model to the Cumberland County model?

22 A. It's DP reservations, they are the same variables as
23 far as I know.

24 Q. So there's no definition between the statewide model
25 and the Cumberland County model?

1 A. I don't recall that there was a distinction made
2 between those two different models. It's two different
3 databases.

4 Q. So it's just the underlying data, not the variables
5 themselves, that's the only difference?

6 A. Yes.

7 Q. And if I can get you to look at the next page, this is
8 again part of table 13, there were different variables that
9 were included in the statewide model and the Cumberland
10 County model in the logistic regressions run by Professor
11 O'Brien, correct?

12 A. Yes.

13 Q. Are some of those different variables reflected in
14 this part of your table 13?

15 A. Yes.

16 Q. Now, in your calculations of the percentages, do those
17 percentages communicate any information as far as the
18 variables themselves?

19 A. Pretty much in the same way as I described for the
20 previous table. The variable unemployed only has six cases
21 that were coded with one and has a 66.6 percent of those
22 cases that were struck by the state. So that becomes
23 somewhat of a -- of a reasonable predictor variable but
24 just for a small number of cases.

25 Q. And then the accused all and the hardship variables,

1 are they more like the single/divorced example from the
2 statewide model?

3 A. More or less, yes.

4 Q. More or less. And then finally, this last section of
5 your table 13, does that contain the remaining variables --

6 A. Yes.

7 Q. -- from the table 13 model from the report Professor
8 O'Brien did?

9 A. Yes.

10 Q. And again, same calculation method to get those
11 percentages, correct?

12 A. Yes.

13 Q. And then in those last four variables, did those
14 percentages communicate anything to you about the variables
15 themselves?

16 A. They tend to be more or less -- it's hard to describe
17 all four of them together. The variables helping and
18 blue-all tend to have more or less an even distribution
19 across the three dispositions. The variable leans ambig,
20 well, that's -- that tends to have a very high percentage
21 for venire members who were struck by the defense. I don't
22 know that I would characterize any of them as being the
23 kind of explanatory variables that I would prefer to define
24 where the -- there's a high percentage of venire members
25 who were struck by the state and a very low percentage of

1 venire members who were not struck by the state.

2 Q. Okay. And again, that's because going back to our
3 hypothetical example of what a -- highly explanatory
4 variable looks like, is that why?

5 A. Yes.

6 Q. Okay. Now, in terms of the variables that were used
7 in these two models, the statewide model and the Cumberland
8 County model by Professor O'Brien, was there any other way
9 that you looked at the way she had constructed these
10 variables? In other words, this analysis was a calculation
11 of percentages. Were there any other things you did to
12 assess her variables in those two -- those two models?

13 A. I'm not sure that I understand your question. I did
14 run many different logistic regressions using her variables
15 that she defined in her code book.

16 Q. Well, let me be more specific. And this is sort of
17 switching tracks. But in terms of your analysis of the
18 models that were provided in Professor O'Brien's report,
19 did you do other types of analysis just in general?

20 A. Yes.

21 Q. Okay. Was cross-tabulation one of those types of
22 analysis you did?

23 A. Yes.

24 Q. And just to be brief, because I know we spent some
25 time on this yesterday, can you explain just briefly why

1 you would use the cross-tabulation approach in this
2 particular contest?

3 A. The cross-tabulation approach would take an example
4 like the accounting CPA example and it would perfectly
5 explain the reasons why the 50 applicants with CPA's were
6 hired. So it would do a direct control of the CPA variable
7 and perfectly predict who gets hired and who doesn't get
8 hired.

9 Q. All right. I want to ask you to clarify because you
10 said two things directly -- you said perfectly explained
11 and directly controlled. In the context of
12 cross-tabulation analysis, what does that mean?

13 A. Direct control means that we have a control variable,
14 like CPA, and we subdivide the population of cases, the --
15 which is the 100 applicants according to whether they had
16 that control variable, CPA or not CPA, and that's a direct
17 method of controlling for the CPA variable.

18 Q. Okay. If I can direct your attention to the next page
19 in state's exhibit -- this is labeled table 14 the
20 cross-tabulation method. Can you explain to the Court what
21 is included here in table 14?

22 A. The logistic regression that Dr. O'Brien ran for the
23 statewide model consisted of 1,122 venire members who were
24 part of that model. I began with those venire members.
25 And, using the cross tabulation method, I chose to control

1 for employment category by itself for those 1,122 venire
2 members, and this table is the result of doing that
3 control. There are 32 employment category codes and this
4 table identifies for each of the codes, the number of black
5 venire members that were classified according to that code,
6 the number of black venire members that were struck by the
7 state and the percentage, and then the columns have the
8 number of nonblack venire members who would be classified
9 in each code, then the number of nonblack venire members
10 who were struck by the state and its percentage and the
11 final column indicates the difference in strike rates
12 between the black venire member percentage and the nonblack
13 venire member percentage.

14 MR. PERRY: May I approach, Your Honor?

15 THE COURT: Yes, sir.

16 BY MR. PERRY:

17 Q. Dr. Katz, I'm going to hand you what I've marked as
18 state's exhibit number 50 for identification purposes. Is
19 that a copy of the table that's up there on the screen?

20 A. Yes. This is a copy of table 14.

21 Q. And just to be clear, this table 14, that's actually
22 table 14 in your final report; is that correct?

23 A. That's correct.

24 Q. Now, you had indicated earlier that you had a number
25 of columns. When you look at the last column, the strike

1 rate difference --

2 A. Yes.

3 Q. -- can you explain again the derivation of strike rate
4 difference is what?

5 A. It's a difference between column four, black state
6 strike rate, minus column -- the column titled nonblack
7 state strike rate. So zero percent of the black venire
8 members that were classified as management, professional
9 and related occupations were struck by the state. 20.77 of
10 the nonblack venire members that were classified as
11 management, professional and related occupations were
12 struck by the state, so the difference is minus 20.77
13 percent.

14 Q. Let me ask you a question because you've got -- in the
15 strike rate difference column, you've got negative numbers,
16 positive numbers and then you've got some just blank
17 spaces?

18 A. Yes.

19 Q. Using the second category, the employment category,
20 number 11, why is there a blank space in that particular
21 cell for strike rate difference?

22 A. There is a blank space for the strike rate difference
23 because there were no black venire members classified with
24 employment category 11.

25 Q. Now, as far as the cross-tabulation approach, looking

1 at this table, your table 14, which on the next page of
2 state's exhibit 47 we zoomed in on a little bit --

3 A. All right.

4 Q. -- what's the significance of the calculation of those
5 percentages? In other words, what information does a
6 negative number or a positive number communicate when you
7 are looking at these results?

8 A. For the strike rate difference, a negative number
9 indicates that nonblack venire members were struck at a
10 higher rate than black venire members for that category. A
11 positive percentage indicates that black venire members
12 were struck at a higher rate than white venire members for
13 that employment category.

14 Q. So using that interpretation, if you look at
15 employment category number 14, life, physical and social
16 science employment --

17 A. Yes.

18 Q. -- the 60 percent in the strike rate difference cell
19 for that employment category means that -- means what?

20 A. That's a difference between a hundred percent and the
21 40 percent. A hundred percent of the black venire members
22 were struck by the state to 40 percent of the nonblack
23 venire members.

24 Q. And, again, those were calculated for all these
25 employment categories, correct?

1 A. Yes.

2 Q. Now, if I can direct your attention to the next page
3 of state's exhibit number 47, can you tell the Court what
4 information is on that page? In other words, that's an
5 excerpt from what in your final report?

6 A. That's an excerpt from exhibit 1 of my final report.

7 Q. Okay. And can you tell the Court what the purpose of
8 exhibit 1 was. When you were doing this analysis, what was
9 exhibit 1?

10 A. The previous table 14 was the cross-tabulation results
11 after controlling for employment category alone. So that
12 every venire member that was classified within a category
13 was similarly situated with respect to employment alone and
14 that's it. I extended that analysis to add additional
15 control variables. The second control variable was marital
16 status. The third control variable was education. And the
17 fourth control variable was the list of descriptives taken
18 from Dr. O'Brien's data. So exhibit 1 shows the results
19 after classifying each of the 1,122 venire members
20 according to the simultaneous value for employment
21 category, marital status, education and descriptive list.
22 So the subgroups that we have would then provide us with
23 venire members who are similarly situated with respect to
24 those four control variables.

25 Q. Now, after you have generated all the subgroups in

1 exhibit 1, were there any particular subgroups that were of
2 interest to you? In other words, what things were you
3 looking for after you generated all these results?

4 A. If we have a subgroup that's similarly situated, such
5 that each member of the subgroup is of the same race,
6 either black or nonblack, then the -- the venire members in
7 that subgroup would not have any racial disparity in strike
8 rates because they would all be of the same race. So in a
9 sense there -- there's an explanation as to why the venire
10 members -- or an explanation to the racial effect because
11 none of the -- because they are not two different races
12 controlled for if they're all the same race.

13 MR. PERRY: May I approach, Your Honor?

14 THE COURT: Yes, sir. 50?

15 THE CLERK: 51.

16 MR. PERRY: 51.

17 Q. And, Dr. Katz, I'm going to hand you what I have
18 marked for identification purposes as state's exhibit
19 number 51. Take a minute and look at that.

20 A. Okay. This is table 15 from my report.

21 Q. So that's actually -- is that the entire table 15 from
22 your final report?

23 A. Yes.

24 Q. And can you tell the Court what the contents of table
25 15 are. In other words, how is table 15 different from

1 exhibit 1?

2 A. Exhibit 1 classified all 1,122 venire members into the
3 various subgroups taking over 200 pages to list. Table 15
4 identified those subgroups where the race of the venire
5 members in that subgroup was both -- some were black and
6 some were nonblack. So these were subgroups that were not
7 completely controlled for based upon the cross-tabulation
8 for the four control variables.

9 Q. Okay. And if you could, the first three observations
10 that are in a subgroup, can you explain what that subgroup
11 is and the significance of what we're looking at, in other
12 words, beyond just what was described, in other words, why
13 this made it into table 15 as opposed to just staying in
14 exhibit 1? Can you explain to us sort of what we're
15 looking at?

16 A. Yes. For the first subgroup, there are three
17 observations. The control variables are employment is 16,
18 marital is 1, education level is 5, and the descriptive
19 list is just the item three tab. Each of the three venire
20 members that fell into this subgroup have the same control
21 values. Now, that's included in this table because the
22 first venire member is black. The next two venire members
23 are nonblack. So we have a subgroup where after
24 controlling for the four variables -- four control
25 variables, we have a subgroup with both black and nonblack

1 venire members. And the rest of this table identified from
2 exhibit 1 all those subgroups where that occurred. That is
3 where we had a subgroup after controlling for the four
4 levels, we had venire members that had either -- were both
5 black or nonblack.

6 Q. Okay. So just as clarification, for observation one,
7 if Emma Willis instead of race -- her race being entered as
8 black, if it had been entered as nonblack, that would have
9 left observation one as race, nonblack, two as race
10 nonblack and three as race, nonblack. That would not have
11 been included in this table, correct?

12 A. If that occurred, yes. It would not have been
13 included in table 15.

14 Q. Okay. And that's regardless of whether or not in the
15 strike state category, there was a one or a zero?

16 A. Right.

17 Q. So for the cases where you had state strikes, if there
18 were an even number, in other words, if it was 50/50 or if
19 it was 25/75 or whatever, if the race for the venire member
20 category was all the same, those would not be included in
21 table 15; is that correct?

22 A. That's right, because they're already controlled for
23 in that there's no observations where you have black venire
24 members and nonblack venire members to compare to find a
25 disparity.

1 Q. Okay. And the page numbers for this exhibit 51, which
2 is table 15, there are four pages, correct?

3 A. Yes.

4 Q. So how many subgroups ended up qualifying under those
5 sort of controlled conditions for your exhibit 1?

6 A. I believe there are 14 on my exhibit, 14 in subgroups
7 in table 15.

8 Q. Okay. And then just one more clarification again in
9 this state's exhibit, which is state's exhibit number 51,
10 for observation three, for example, where the venire
11 member's name is Romaine Hudson, under religious
12 organization, looks like there's a little dot, is that an
13 indicator there is a missing value for that particular
14 variable?

15 A. Yes.

16 Q. And just to clarify, this is the material from the
17 statewide model?

18 A. Yes.

19 Q. And these are the variable categories from Professor
20 O'Brien's report, correct?

21 A. Yes.

22 Q. And then just one final clarification, this is from
23 the sample of venire members from Professor O'Brien's
24 report, correct?

25 A. The 25 percent sample, yes.

1 Q. Okay. Now, if I could direct your attention to the
2 next page in state's exhibit number 47, can you explain to
3 the Court what that is?

4 A. This is exhibit 2. I did this same cross-tabulation
5 analysis using the same control variables for the
6 Cumberland County data set.

7 Q. That exhibit 2, that's included in the copy of your
8 report?

9 A. Yes, it is.

10 Q. And again, like exhibit 1, was that a number of pages?

11 A. Yes, it was.

12 Q. Do you recall offhand -- or how many -- how many
13 observations or venire members were included in the
14 Cumberland County cross-tabulation you did?

15 A. 447. It's the first line under exhibit 2.

16 Q. And again the controls that you selected for this
17 particular cross-tab analysis or the variables you
18 selected, where did those come from?

19 A. The categories employment, marital status, education,
20 list of descriptives are variables taken from Dr. O'Brien's
21 data set and variables that were used as part of the
22 logistic regression models that she reported, although it
23 didn't use all the variables with all the breakdowns that I
24 have in my cross-tabulation analysis.

25 THE COURT: And for clarification purposes, am I

1 understanding that your testimony is employment was -- and
2 I'm using this term simply for purposes of understanding --
3 generalized on the O'Brien study, more specific as to your
4 study as to those factors, by way of example.

5 THE WITNESS: Dr. O'Brien's study didn't have in
6 the logistic model all the different employment categories.

7 THE COURT: Yes, which would make it general?

8 THE WITNESS: Right. Whereas I'm looking at each
9 employment category and allowing that --

10 THE COURT: Which would make it more specific?

11 THE WITNESS: Okay, yes.

12 THE COURT: All right. Go ahead, sir.

13 MR. PERRY: Yes, Your Honor. May I approach,
14 Judge?

15 THE COURT: Yes, sir. You okay on water, Dr.
16 Katz?

17 THE WITNESS: No. Thank you.

18 THE COURT: Yes, sir. I got to make sure I know
19 where it is because I'll lose it up here. Thank you, sir.

20 MR. PERRY: Yes, sir.

21 (The Court hands the witness a cup of water.)

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: Yes, sir.

24 BY MR. PERRY:

25 Q. Dr. Katz, I handed you what I've marked as state's

1 exhibit number 52.

2 A. Yes.

3 Q. Can you tell the Court what that is?

4 A. Is this part of it?

5 Q. Oh, no. Sorry.

6 A. This is a copy of table 16 from my report.

7 Q. And in the previous discussion of the statewide
8 analysis that you did, is table 16 again those categories
9 where there were at least one black and nonblack venire
10 member?

11 A. In a subgroup, yes.

12 Q. Okay.

13 A. So it's limited just to those subgroups where there's
14 both black and nonblack venire members.

15 Q. Okay. And again this table 16 from your final report
16 is shorter than table 15?

17 A. Yes.

18 Q. Okay. Why is that?

19 A. Table 15 was taken from analysis that started with
20 1,122 venire members. For the Cumberland County analysis,
21 we started with 447 venire members, so it's probably due to
22 the fact that we have less observations, less venire
23 members to classify.

24 Q. And as far as the results or your observations from
25 table 16, what was your -- what were your observations?

1 A. In table 16, looking at each of the subgroups, I find
2 that in most cases, the strike rates are zero for both
3 black and nonblack venire members. For example, the first
4 subgroup for observation one and two, the black venire
5 member was not struck by the state and the nonblack venire
6 member was not struck by the state, so there is no
7 disparity in strike rates for that first subgroup. The
8 same is true for the second subgroup and the third
9 subgroup. The fourth subgroup that starts at the bottom of
10 the page, there is a disparity, but here the nonblack
11 venire member was struck by the state and the black venire
12 member was not. Then going to page two, the fifth and
13 sixth subgroups, in both those cases, there were no strikes
14 by the state of any of the venire members. So there's no
15 racial disparity for those subgroups. So for the set of
16 subgroups, after controlling for the four levels of
17 variables, there's only one case in subgroup four where a
18 venire member was struck by the state and that was a
19 nonblack venire member.

20 Q. Okay. So just to be clear again, all those subgroups
21 in exhibit 2 may have had multiple observations or multiple
22 venire members but they just weren't different -- different
23 races, correct?

24 A. Yes.

25 Q. Now, in going back to the hiring example, using a

1 hypothetical situation that we had put on in an earlier
2 slide, in terms of this kind of analysis, this cross-tab
3 analysis, how would that -- how would that translate in our
4 hypothetical example? In other words, how would the
5 cross-tab analysis explain the hypothetical example we
6 discussed earlier?

7 A. Going back to our hiring example, the cross-tabulation
8 method would perfectly explain hiring. Using the CPA
9 variable, it would divide the hundred applicants into two
10 groups, CPA and not CPA. All the CPA applicants would be
11 hired. All the non-CPA applicants would not be hired. So
12 it wouldn't really matter what the race of the applicants
13 would be. It would still be perfectly explained by that
14 CPA variable.

15 THE COURT: Folks, may we stop here for a moment
16 because I want to make sure I understand the testimony. We
17 made reference to the accounting hiring example for
18 purposes, I'm assuming, of illustrating in large part the
19 testimony of Dr. Katz.

20 MR. PERRY: Yes, sir.

21 THE COURT: If we change the example being used
22 for illustrative purposes and we had an example of 12 seats
23 being available, 24 persons potentially eligible for those
24 seats, 12 white and 12 black, all black jurors being
25 excused according to the testimony, if I'm understanding

1 the testimony correctly, a perfect example of bias?

2 THE WITNESS: (No response.)

3 THE COURT: An explanation for why they were
4 excused.

5 THE WITNESS: It's an explanation, yes.

6 THE COURT: Which could lead or give rise to the
7 inference of bias.

8 THE WITNESS: If -- if the only consideration --
9 if they were randomly --

10 THE COURT: Yes, sir.

11 THE WITNESS: If the process involved random
12 selection, then yes, I believe that would be statistically
13 significant.

14 THE COURT: That would be the perfect example of
15 it, correct, based on your prior testimony regarding the
16 accounting hiring explanation or example?

17 THE WITNESS: Except in my hiring example, CPA is
18 a qualification.

19 THE COURT: Yes, sir.

20 THE WITNESS: And in your example --

21 THE COURT: Race would be the factor.

22 THE WITNESS: The factor rather than
23 qualification.

24 THE COURT: Exactly. All right. Go ahead, sir.

25 MR. PERRY: Yes, sir.

1 Q. And now, Dr. Katz, in addition to the cross-tab
2 analysis in these tables in these exhibits we've been
3 talking about, one other thing in terms of analysis -- and
4 if I can direct your attention to the next page, which is
5 page 51 in state's exhibit number 47, did you do some
6 additional analyses or do some regression analysis?

7 A. I did some logistic regression analysis, not for the
8 purpose of proposing models of how prosecutors do their
9 strikes of venire members, but more just to illustrate
10 examples that exist where the race variable is not
11 statistically significant.

12 MR. PERRY: If I could -- Your Honor, do you
13 still have your copy of Dr. Katz's report up there?

14 THE COURT: Yes, sir. That's what I'm looking at
15 right now. Are you talking about the notebook copy?

16 MR. PERRY: Yes, sir.

17 THE COURT: Yes, sir, I do. I apologize.

18 BY MR. PERRY:

19 Q. And, Dr. Katz, if I could get you to direct your
20 attention to appendix three materials in your report.

21 THE COURT: That's where in the report, sir?

22 MR. PERRY: Judge, it starts on page 457. 457.

23 THE COURT: Thank you.

24 MR. PERRY: Dr. Katz --

25 THE COURT: I apologize. I'm looking out for our

1 court reporters. I have a vested interest. We're going to
2 take a 20-minute break at this time.

3 THE COURT: Is that 457, Mr. Perry?

4 MR. PERRY: That's where the appendix three
5 started, Your Honor.

6 THE COURT: Yes, sir. Thank you. Okay. We're
7 at ease.

8 (Recess taken.)

9 (The following proceedings continued in open
10 court. The defendant, defense attorneys and state's
11 attorneys were present.)

12 THE COURT: All right. All counsel is present.
13 The defendant is present. Mr. Perry, you may continue,
14 sir.

15 MR. PERRY: Thank you, Your Honor. Just for
16 planning purposes, Judge, we're going to look at the final
17 report so everybody's got that handy.

18 THE COURT: I appreciate that. Thank you, sir.

19 MR. THOMPSON: Judge, before we actually
20 continue, will the defense be able to give us an idea of
21 the length of cross, best estimate and like to get into
22 discussion before folks start leaving their offices for
23 tomorrow.

24 THE COURT: Yes, sir. Well, that's a pertinent
25 inquiry at this point. I met briefly with Judge Keever

1 this morning about tomorrow's schedule.

2 MR. THOMPSON: Yes, sir.

3 THE COURT: And apparently registration continues
4 up through 10:30 tomorrow morning. That's my
5 understanding. I was informed about two different time
6 frames for the lunch, 11:30 and 12:00, and the program is
7 scheduled to start 30 minutes after lunch as I understand
8 it now. So Mr. James Ferguson was asking yesterday about
9 scheduling for his scheduling purposes and I'm open to
10 comments from counsel. We had talked about either stopping
11 at 11:30 or 11:00 I think is what I recall. So let's tie
12 those together if we can.

13 MR. THOMPSON: Well, I thought we had landed on
14 12:30 at the end of yesterday but I'm --

15 THE COURT: We had talked about that.

16 MR. THOMPSON: -- always subject to correction.
17 But we obviously are trying to plan for the next witnesses.
18 We've got four judges left and Dr. Cronin is where our
19 plans are right now. Obviously, the length of Dr. Katz's
20 cross will depend -- will make a lot of decisions.

21 THE COURT: How much more direct do we have? Do
22 we know at this point?

23 MR. PERRY: Your Honor, we only have a few slides
24 left so I'd say we should be able to finish that this
25 afternoon.

1 MR. THOMPSON: So likely just start cross
2 tomorrow morning or either start or finish cross tomorrow
3 morning. But I wanted to be prepared for either the next
4 witness or tell the other witnesses they're clear. We'll
5 start them on Monday morning. Insofar as the judges's
6 testimony goes, I suspect their testimony to be similar in
7 length to --

8 THE COURT: Yes, sir.

9 MR. THOMPSON: -- Judge Gore, that was give or
10 take 45 minutes to an hour.

11 THE COURT: Yes, sir.

12 MR. THOMPSON: And Dr. Cronin, I don't expect
13 incredibly complex direct there, can't speak as to cross.
14 But I expect, if all the winds shift just the right way
15 Monday, we will be finished with the presentation of
16 state's evidence.

17 THE COURT: Okay.

18 MR. THOMPSON: While we are there, is there a
19 motion in limine on Dr. Cronin. There's been a lot of them
20 right before. Is there anything y'all have prepared that I
21 can actually take a look at before we walk in the
22 courtroom? Just asking.

23 MR. HUNTER: We gave you the other one the night
24 before.

25 MR. JAMES FERGUSON: It's not prepared.

1 MR. THOMPSON: Kind of want to be on record as
2 asking for that, Judge.

3 MR. COLYER: Careful what you ask for, Mr.
4 Thompson.

5 MR. THOMPSON: But I'm sure we'll have, you know,
6 six or seven minutes to prepare for that one. But my point
7 is I needed some guidance from the Court so I can have my
8 witness -- either let them go about their lives until
9 Monday or not.

10 THE COURT: Well, we've got the additional
11 consideration of the disclosure as to the exhibit --

12 MR. COLYER: 49.

13 THE COURT: I'm sorry, Mr. Colyer?

14 MR. COLYER: 49.

15 THE COURT: 49. Thank you, Mr. Colyer. Mr.
16 Ferguson had indicated he wanted the opportunity to at
17 least overnight speak with your experts about that. Do you
18 need to do that prior to cross-examination, sir?

19 MR. JAY FERGUSON: No, I mean -- before I finish
20 cross-examination, yes.

21 THE COURT: I apologize. I confused you. It was
22 a bad way to ask the question. They indicated they are
23 going to complete their direct in 15, 30, more or less.

24 MR. PERRY: Probably 30 minutes, Your Honor.

25 MR. JAY FERGUSON: I can start my cross.

1 THE COURT: Okay. I apologize. I didn't make it
2 clear.

3 MR. THOMPSON: Do we expect the cross is going to
4 fill up --

5 THE COURT: That was going to be my next
6 question.

7 MR. THOMPSON: There we go. Trying to keep this
8 moving.

9 THE COURT: I appreciate it.

10 MR. JAY FERGUSON: If we do the cross the way I'd
11 like to do it, yes, but other team members may talk me out
12 of it.

13 THE COURT: That's not decided yet?

14 MR. JAY FERGUSON: I'm the last one to know also.
15 I think -- I'm not sure what time the court will get
16 started but I think I will take the bulk of tomorrow
17 anyway. And if you're asking --

18 MR. THOMPSON: That's what I would like is just
19 permission to release the rest of our witnesses.

20 THE COURT: Is that agreeable?

21 MR. HUNTER: Yes.

22 MR. JAY FERGUSON: Yes.

23 MR. THOMPSON: Line them up, shoot them down on
24 Monday.

25 THE COURT: I suspect very strongly that if we

1 were to conclude early tomorrow, nobody would be upset. So
2 we're good to go. You can let your folks go.

3 MR. THOMPSON: Time line tomorrow, just finish
4 with Katz. Whenever that's done, then we're done.

5 THE COURT: Yes, sir.

6 MR. THOMPSON: Perfect. Then I will step out and
7 make those phone calls.

8 THE COURT: Thank you, Mr. Thompson, for bringing
9 that to our attention because we needed to deal with that.
10 Okay.

11 MS. STUBBS: Your Honor, I apologize. I'm a
12 little confused about the schedule for tomorrow.

13 THE COURT: I am too.

14 MS. STUBBS: Okay. Are we going to break at this
15 time between 11:30 and 12:30 and then not come back?

16 THE COURT: The reason I didn't want to put a
17 specific time frame on is because I didn't want to put you
18 folks under any pressure with regard to cross-examination
19 given the other scheduling matters we've got to take into
20 account. So if you want to be heard -- if either counsel
21 wants to be heard as to a specific cut-off time so that
22 everybody knows where we are, I'm agreeable to doing that.

23 MR. THOMPSON: Judge, I'm more concerned -- I
24 want to make sure we finish Katz.

25 THE COURT: Yes, sir, that's the other

1 consideration.

2 MR. THOMPSON: You know, we've got two guys we
3 pulled out of their lives. We'd love to get them back to
4 their lives and we can --

5 THE COURT: Are we speaking about retired
6 gentlemen?

7 MR. THOMPSON: Well, one of them right here is
8 retired, Judge. I'd love to finish with Katz is our main
9 priority for tomorrow. Whether that goes until 5:00 or not
10 -- I don't expect it would, but that is paramount to us
11 just to get him to go back home and not have to come back
12 on Monday.

13 MS. STUBBS: I think we are all in agreement. I
14 think we would all like to be able to complete Dr. Katz's
15 testimony tomorrow if at all possible.

16 THE COURT: So --

17 MS. STUBBS: And then end there.

18 THE COURT: If I'm understanding the consensus,
19 everybody's satisfied, regardless of what kind of time
20 period might be involved in completing that objective, get
21 that done. Fair statement?

22 MS. STUBBS: Yes, Your Honor.

23 THE COURT: Okay. All right.

24 MR. THOMPSON: Thank you, Judge.

25 THE COURT: Okay. Yes, sir. Mr. Perry, you may

1 continue, sir.

2 MR. PERRY: Thank you, Your Honor. And right
3 before the break, Judge, I believe I was asking Dr. Katz
4 and you and Mr. Ferguson to follow along. This is page
5 457.

6 THE COURT: Thank you, sir.

7 MR. PERRY: The first page of appendix three in
8 his final report.

9 THE COURT: I'm there.

10 BY MR. PERRY:

11 Q. Dr. Katz, just briefly again, the contents of appendix
12 three, what are those -- and again going to state's exhibit
13 number 47 on page 51 where we've got it blown up, those six
14 examples that you have in that appendix, what are those?

15 A. Those are logistic regressions that I ran using
16 different variables than the ones that were used by Dr.
17 O'Brien. Five of these logistic regressions are using the
18 Cumberland County data set. The last one, example six, is
19 using the statewide data set but limited to the time period
20 from 1990 to 1994.

21 Q. Okay. And what was the reason for the inclusion of
22 these six particular examples in your appendix?

23 A. The purpose was just to show as an example there do
24 exist logistic regression models using the data from Dr.
25 O'Brien's database where the coefficient for the race

1 variable, which is black, is not statistically significant.

2 Q. Okay. And if I could, if you go to example one in
3 your appendix, which is page 458 of your final report, can
4 you explain to us what is included in that example. In
5 other words, in page 458, what are we looking at there?
6 What does that model include?

7 A. The first example is covered -- the output for this
8 example covers four pages and this is the output provided
9 by the statistical output system SAS for the logistic
10 regression model analysis. The first page gives some
11 general information about the variables that are being read
12 and, for example, looking at the second box of values, it
13 says the number of observations read, 474. That was the
14 number of observations for the Cumberland County data set.
15 And then below that is the number of observations used.
16 That's 446. So the logistic regression model is based upon
17 446 out of the 474 observations.

18 Q. And the difference in those two numbers or the reason
19 why there was some observations were dropped out?

20 A. Because of missing values.

21 Q. All right.

22 A. Then the next box indicates the variable that's being
23 predicted, strike state, and it shows the count of how many
24 of those observations -- how many of the 446 observations
25 had strike state equal to one and how many had strike state

1 equal to zero.

2 Q. So just in terms of the numerical examples, that means
3 130 indicated 130 strikes by the state, is that --

4 A. 130 of the venire members were struck by the state out
5 of the 446. 316 were not struck by the state.

6 Q. Okay. And again, right below that where it has a
7 note, that indicates that those 28 observations were
8 deleted because there were missing values?

9 A. Yes.

10 Q. Then as far as the next three boxes, where it
11 indicates something about the model convergent status, can
12 you explain what that means?

13 A. It indicates that the model did converge. So it's not
14 an invalid model.

15 Q. All right. And then as far as the remainder of the
16 results you got --

17 A. Yes. If you go to page -- the next page DA-459 of my
18 report.

19 Q. Yes.

20 A. The second box has the analysis of the maximum
21 likelihood estimates, and this is somewhat similar to what
22 was presented earlier by the defendant.

23 Q. So in the terms of the format, this is different but
24 it's the same information in general as is included in
25 tables 12 and 13 of Professor O'Brien's report?

1 A. Sort of. It's organized a little bit differently but
2 it's -- this report has more information than what was
3 included in tables 12 and 13 of the MSU report.

4 Q. In what sense?

5 A. We have four pages of information provided where the
6 MSU report defined their tables more specifically to
7 capture the specific items they wanted represented for
8 their model.

9 Q. Okay. And can you tell the Court, for example, on
10 page 459 there, in terms of the variable black, what
11 information is provided in that second box?

12 A. The variable black is similarly defined -- is a
13 variable used by Dr. O'Brien in her analysis for the race
14 variable. And what we have under the estimate is the
15 estimate for the coefficient for this variable, .4681. And
16 if you go all the way to the last column where it has PR
17 greater than CHISQ, that number is the P value --

18 Q. Okay.

19 A. -- for that coefficient. If you go to the table on
20 the next page at the bottom where it says odds ratio
21 estimates --

22 Q. That's on page 460, correct?

23 A. That's on page 460, yes.

24 Q. Okay.

25 A. Then the coefficient .4681 turns into an odds ratio

1 point estimate for black of 1.597 and the 95 percent
2 confidence interval for the odds ratio is .861 to 2.963.
3 So that confidence interval dips below one which indicates
4 that there's a chance that the odds ratio, well, is less
5 than one. So it wouldn't make the factor -- the odds
6 factor higher but lower.

7 Q. And just on that same variable for the black variable,
8 can you give us some -- can you give us an explanation how
9 you would interpret these values. So you have the estimate
10 and then you have the P value and then you have the odds
11 ratio.

12 A. Okay. Given the coefficient for the black variable,
13 the odds ratio is going to be the number -- well, let me
14 just respond in terms of the odds ratio. The odds ratio of
15 1.597 says that the odds of the state striking a black
16 venire member is 1.597 times the odds of strike -- the
17 state striking a similarly situated nonblack venire member.

18 Q. Okay.

19 A. And the confidence interval for that odds ratio goes
20 from .861 to 2.963. Because we had some of that range
21 below one, in those cases, if that were truly the value,
22 that would cause the odds ratio for striking the black
23 venire member to be something less than -- the odds of
24 striking the black venire member less than the odds of
25 striking a similarly situated nonblack venire member.

1 Q. So there is a significant for the fact --

2 (Interruption by the reporter.)

3 Q. So that means -- so there is some significance in the
4 fact that the confidence interval for the odds ratio
5 straddles the value of one?

6 A. Yes. And that's represented by the fact that the P
7 value for this black racial variable is greater than .05
8 and not significant.

9 Q. Again, just to clarify, these variables -- those are
10 not your variables. Those are variables from Professor
11 O'Brien's study?

12 A. Some of them are. I have added some additional
13 variables to the analysis that allow the logistic
14 regression model to produce the nonsignificant racial
15 variable black. For example, I found -- I followed a
16 pattern in defining these variables. If you go down to
17 about the middle of the table where it has the variable
18 employment under line ten, I defined that variable to
19 indicate for those venire members whose employment category
20 were ten, they were coded with a one. All other venire
21 members would be coded with zero. If you go a little
22 further down to the variable defined as marital under line
23 two, it's a similar scheme for coding. The venire member
24 that had marital status equal to two would be coded with
25 one. All other venire members would be coded with zero.

1 Then education -- variable education under line four, a
2 similar definition of -- as before in that if the venire
3 member had education equal to four, it was coded with a
4 one. Education not equal to four, it was coded with zero.
5 And then the descriptives, this comes from descriptive
6 lists that Dr. O'Brien had. If we had the variable -- or
7 look at the variable descriptive under line 200, if the
8 venire member was categorized or given that descriptive
9 level as part of their observation, then this variable
10 would be coded equal to one. All others would be coded
11 equal to zero. So in the way I define my variables, I'm
12 breaking things down into finer and finer pieces.

13 Q. And just to be clear, unlike the cross-tabulation
14 analysis for the descriptive codes that are included in
15 this model, those aren't combinations, right? Those are
16 just single descriptive characteristic categories?

17 A. Yes. This is done in the same way that Dr. O'Brien
18 did her models.

19 Q. Okay. And as far as the last page of example one, is
20 that -- that's just a continuance of the odds ratios for
21 the remaining variables that were included in the model?

22 A. Yes.

23 Q. And just on page 461, for example, where you see
24 descriptive 240 --

25 A. Yes.

1 Q. -- and you've got such a large value there, what does
2 that indicate?

3 A. Well, if you go back to the previous table where it
4 identifies the coefficient and that's on DA-460 at the top
5 of the page, the descriptive under line 240 has a very high
6 coefficient or parameter as to relevant to the other
7 coefficients. And descriptive under line 240, 240 is the
8 descriptive code for the venire member previously served on
9 a jury that failed to come to a final verdict or hung jury.
10 And it turns out -- I believe that for this particular
11 variable, there are two cases in the database for
12 Cumberland County in this model and both times, the venire
13 member was struck by the state. So it is a good predictor
14 variable but for a very limited number of cases. The fact
15 that you have a high estimate means that if that variable
16 would be credited to a venire member, that would pretty
17 much swamp everything else and cause the estimate to be
18 that the venire member would be struck by the state.

19 Q. Just to make sure I understand, so in the underlying
20 data itself, there were two cases where that characteristic
21 was present and both resulted in strikes?

22 A. Yes, by the state.

23 Q. Okay. Were there any other variables like that in
24 this example one that you calculated?

25 A. Not in that form. I have to look in my notes but

1 descriptive under line 720 has a large negative and I don't
2 recall exactly the number but I think that's a case where
3 -- no, I don't recall.

4 Q. And just as a -- as a way of explanation, when it's
5 got a large negative estimate for the coefficient like the
6 large positive coefficient for descriptive 240, does that
7 signify anything?

8 A. Yeah, I remember now. It signifies that if you have
9 that value 720, those venire members were not struck by the
10 state. So the high negative value would tend to classify
11 them as not going to be struck in the model.

12 Q. So just for clarity, positive numbers indicate
13 likelihood of being -- a high likelihood of being struck or
14 a likelihood of being struck by the state and negative
15 numbers would indicate the opposite?

16 A. Yes. And very high positive numbers indicate strong
17 indication that that variable would be -- almost by itself
18 would cause the venire member to be struck by the state and
19 a high negative -- and a low negative value like we see for
20 descriptive 720 would indicate that the venire member would
21 not likely be struck by the state.

22 Q. Okay.

23 A. But for each of these variables, we don't have that
24 many observations. I don't know how many I had for
25 descriptive under line 720.

1 Q. If I can ask you to look at page 462, that's example
2 two.

3 A. Yes.

4 Q. In terms of the difference between example one and
5 example two, is it just the particular variables that were
6 included?

7 A. Pretty much, yes.

8 Q. Okay. And how did you get -- how did you come to the
9 combination of variables in example two?

10 A. I did a lot of testing of the data and my purpose
11 wasn't to provide variables that explained anything that I
12 present as a model of anything but just to see if I could
13 find combinations of these variables where the race
14 variable black was not statistically significant.

15 Q. And was that the case in your example two model?

16 A. Yes.

17 Q. In terms of the number of observations, again, it was
18 the 474 original number of observations that were
19 available, correct?

20 A. Yes.

21 Q. And the same number of observations dropped out due to
22 missing information?

23 A. Yes.

24 Q. And again like the previous example on page 463, did
25 you get calculations for the coefficient estimates and for

1 the P values for these variables?

2 A. Yes, I did.

3 Q. So in terms of example two, again, for the variable --
4 for the classification black, that turned out to be
5 nonsignificant, correct?

6 A. Yes.

7 Q. And the P value, what was that?

8 A. P value is .1336.

9 Q. And that indicates what?

10 A. That the coefficient is not statistically significant
11 because it was greater than .05.

12 Q. And actually, let me ask you a question about the
13 variable below that. DP reservations, which we discussed a
14 little bit earlier in our questions, what does the model
15 have in terms of DP reservations?

16 A. It has a coefficient of 3.4471 and it is statistically
17 significant.

18 Q. And that's indicated by the low P value there?

19 A. Yes. P value is less than .0001.

20 Q. All right. In terms of the other variables included,
21 did you do the same sort of breakdown in the employment
22 categories that you did in the previous model?

23 A. Yes, in terms of defining those variables.

24 Q. Okay. And again the descriptive characteristics, also
25 those were individually defined?

1 A. Yes.

2 Q. Were there other significant variables in this
3 particular example?

4 A. You mean statistically significant?

5 Q. Yes, sir.

6 A. There are some.

7 Q. And those are all indicated by the low P values?

8 A. Yes.

9 Q. Now, did you have any variables in this particular
10 example that were equivalent to the descriptives, I think
11 it was 720 in example 1, the hung jury descriptive
12 characteristics?

13 A. The hung jury was 240.

14 Q. 240.

15 A. Yes. And descriptive under line 240 is included in
16 this model and it has a very high estimate again, 17.8361
17 and it does also contain the variable descriptive 720 with
18 a very low negative.

19 Q. Okay. So in terms of the coefficients and the P
20 values, for those two variables in particular, those were
21 the same types of results in example two as in example one?

22 A. Yes. In that descriptive under line 240, for a very
23 few cases, both were struck by the state. So it appears to
24 be a good variable for prediction purposes, but the P value
25 doesn't indicate that because it has a high P value. P

1 value for that is .9912.

2 Q. And then the next page -- I'm sorry, last part of that
3 page, 464 and page 465, that gives the same odds ratio
4 estimates and confidence intervals around those odds
5 ratios, correct?

6 A. Yes.

7 Q. Now, if I can ask you about page 466, that would be
8 example three?

9 A. Yes.

10 Q. Now, again, this is a logistic regression model that
11 was based on Professor O'Brien's variables, correct, just
12 like the other two examples were?

13 A. Based on her data, yes.

14 Q. All right. And in terms of example three, what
15 changed from example one and example two in terms of the
16 variables you have in example three?

17 A. I used a set of variables that allowed the model not
18 to exclude many observations so it has 472 observations
19 used compared to Dr. O'Brien's model and I relied on mostly
20 those definitions of each component part of a factor,
21 whether it be employment or marital status or education or
22 the descriptives to define my set of variables that were
23 included in this model.

24 Q. So previously in examples one and two, 28 observations
25 were deleted?

1 A. Yes.

2 Q. But in this example, only two observations were
3 deleted?

4 A. Yes.

5 Q. And you were able to do that due to -- can you explain
6 how you were able to do that?

7 A. I didn't use any variables that had missing values or
8 I limited the variables I used to where I only had two
9 cases that were missing.

10 Q. Okay. All right. Then again on page 467, you
11 obtained a set of results in terms of coefficients and P
12 value calculations for those variables?

13 A. Yes.

14 Q. And what did you find when you ran that particular
15 model in terms of variables that were significant and not
16 significant?

17 A. I found that the race variable black was not
18 statistically significant. Its P value is .2810. And then
19 there are a few other variables that are statistically
20 significant. Most of them are not.

21 Q. And this model does not include the variable death
22 penalty reservations, correct?

23 A. Not as -- as death penalty reservations. If you go to
24 the next page, it does contain the underlying descriptive
25 values, descriptive 1200, 1210, 1220 and 1240. The DP

1 reservations variable was defined, as I recall, descriptive
2 1200, 1210, 1220, 1230, 1240 and I don't know if there's a
3 1250 or not.

4 Q. And then within those four descriptive codes, am I
5 correct, it looks like descriptive 1200 and descriptive
6 1220, those both have P values that indicate statistical
7 significance?

8 A. Yes.

9 Q. And again, you obtained the odds ratio estimate and a
10 confidence interval around all of those variables on pages
11 468 and 469, correct?

12 A. Yes.

13 Q. And now for descriptive 1210 -- and this is on page
14 469.

15 A. Yes.

16 Q. There's a very large number for the point estimate and
17 then a very small number for the lower confidence level and
18 a very large number for the high confidence level. What
19 does that suggest to you when you got the results and
20 observed that?

21 A. I believe that it's a case that all venire members who
22 were coded with descriptive 1210 were struck by the state.

23 Q. Okay.

24 A. Similar to the hung jury descriptive.

25 Q. So that would be the model's response to a low number

1 of observations of that particular category?

2 A. It's a model's response wherever a venire member that
3 had that coded was struck by the state.

4 Q. Okay.

5 A. If it's a small number of venire members or a large
6 number of venire members, it will handle it the same way.

7 Q. Then the next example on page 470, that would be
8 example four?

9 A. Yes.

10 Q. What's the -- what's the difference in example four
11 and the previous three examples? What changed from the
12 previous examples to this example?

13 A. It's -- I use a slightly different set of variables
14 but there's not a substantial difference.

15 Q. Again, in terms of the significance of race of a
16 venire member being black, according to the P value in this
17 model, that indicates that black is not significant,
18 correct?

19 A. That is correct. The P value is .2343.

20 Q. And in terms of significant variables or factors,
21 would those include towards the back of the list on page
22 472 those descriptive characteristics 1200 and 1220?

23 A. I'm sorry. Could you ask that again, please.

24 Q. Sure. On page 472, descriptive characteristics 1200
25 and 1220, the model indicates those are significant in this

1 example as well, correct?

2 A. Yes.

3 Q. And then flipping to the first page of example five
4 which it's page 474, again, if you could just explain to us
5 what the distinction is between example five and the
6 previous four examples?

7 A. I think example five is similar to example four and
8 three with just a few variables changed.

9 Q. And again, the variable indicating black is a venire
10 member's race, that's nonspecific, correct?

11 A. That's correct. Its P value is .2169.

12 Q. And on page 476, descriptive characteristics, 1200 and
13 1220, in this model, again those are indicated to be
14 statistically significant, correct?

15 A. Yes.

16 Q. And then finally on page 478 -- now, there is a little
17 difference here in this model, correct, from the previous
18 five examples?

19 A. Yes.

20 Q. What's the difference -- what's one of the differences
21 in example six from the previous five examples?

22 A. This logistic regression was run for the statewide
23 sample limited to cases between 1990 and 1994.

24 Q. And again in terms of the number of observations on
25 page 478, you've got a number of observations that were

1 available and the number that were used and number deleted
2 due to missing values?

3 A. Yes.

4 Q. Looks like from the note, a number of these
5 observations were deleted due to missing values; is that
6 correct?

7 A. Yes.

8 Q. In fact, how many was it?

9 A. 211.

10 Q. Out of?

11 A. 405.

12 Q. Then on page 479, in terms of the variables that were
13 included in this permutation of the model, what did you
14 find to be statistically significant?

15 A. See the variable descriptive 1200 is statistically
16 significant. J knew attorney, statistically significant,
17 descriptive under line 620 and I believe that's it.

18 Q. And again, the variable indicating a venire member's
19 race was black was not statistically significant in this
20 model; is that correct?

21 A. That's correct.

22 Q. Now, Dr. Katz, let me ask you a question about
23 additional analyses, if I can direct your attention to
24 state's exhibit number 47, and this is going to be page 52,
25 which is displayed up there on the screen. Did you do some

1 additional logistic regression analysis?

2 A. Yes. I did a statewide logistic regression analysis
3 based upon cross-tabulation results.

4 Q. Okay. Can you tell -- can you tell the Court a little
5 bit about what you did in those analyses?

6 A. Yes.

7 Q. Are those included in appendix four and that starts on
8 page 483 in your final report?

9 A. Yes.

10 Q. Is that what we're looking at?

11 A. Yes. I defined my variables based upon what I
12 observed from the cross-tabulation results for the
13 statewide model. I defined two variables, strike group and
14 pass group. The strike group was defined to be one for all
15 those venire members in the cross-tabulation for the
16 statewide model where every venire member in that subgroup,
17 after controlling for the four levels of variables, were
18 struck by the state. For those variable -- for those
19 venire members in subgroups where not everyone was struck
20 by the state or none were struck by the state, strike group
21 would be equal to zero. Then the pass group was defined
22 similarly but to venire members in a subgroup controlled
23 after those four variables where each one in that
24 controlled subgroup was passed by the state and it would be
25 zero for everything else. And then the third variable is

1 just the race variable, black.

2 Q. Okay. And just to be clear, the model or I guess the
3 time period and the date that you are pulling this from --
4 again from where?

5 A. This is a statewide model. There's no time -- the
6 time period is the full time.

7 Q. So it's the full time period in the statewide data
8 set?

9 A. Yes.

10 Q. And did you receive some results for this particular
11 model when you ran it?

12 A. Yes. I ran it two ways. The first way using logistic
13 regression model and it gave me a message on page DA-484
14 that there's a problem with the estimation of a model.

15 Q. And for those of us who don't do this for a living,
16 can you interpret what this is talking about when it says
17 that?

18 A. Because I separated out the group so well, there's a
19 -- what is called a quasi-complete separation which doesn't
20 allow the convergence to occur for the model.

21 THE COURT: When you said -- I'm sorry. When you
22 said there is a warning, are you referring to that language
23 appearing to the left about the middle of the page,
24 warning, the maximum likelihood estimate may not exist?

25 THE WITNESS: Yes.

1 THE COURT: And then the warning immediately
2 below, the logistic procedure continues in spite, et
3 cetera?

4 THE WITNESS: Yes. And the ability of the model
5 fit is questionable.

6 THE COURT: Yes, sir.

7 BY MR. PERRY:

8 Q. And just to anchor us here, is there some way we can
9 use the earlier hypothetical about the CPA and the hiring
10 questioning? Is that what we were talking about earlier
11 when we said the model would have problems?

12 A. Yes. In that case, we had complete separability but
13 we would get similar warnings.

14 Q. The software here would interpret that in the same
15 way?

16 A. Yes.

17 Q. Now, despite that warning, did it give you -- I am
18 asking about page 485 next. Did it give you some estimates
19 for the coefficients in the variables in this problem?

20 A. Yes, it did.

21 Q. And what were those coefficients it had provided?

22 MR. JAY FERGUSON: Objection at this point, Your
23 Honor, based on our motion in limine. We reincorporate all
24 of our arguments.

25 THE COURT: All right. Repeat your question,

1 sir. I was looking at something in the exhibits.

2 BY MR. PERRY:

3 Q. I asked, Dr. Katz, can you explain on page 485 what
4 we're looking at in terms of the results?

5 THE COURT: Bear with me if you will, Dr. Katz.
6 The objection deemed renewed in apt time -- you're talking
7 about your motion with regard to admissibility of the
8 report?

9 MR. JAY FERGUSON: Yes.

10 THE COURT: It's overruled. Exception is noted
11 for the record so your issue is preserved. Go ahead, sir.

12 THE WITNESS: Okay. It does -- the validity of
13 it is questionable but it does have a model and estimates
14 and the estimate for the racial variable black is given as
15 .3438 and the P value is .6173 which would indicate that
16 the coefficient for black is not statistically significant.

17 BY MR. PERRY:

18 Q. And in terms of the confidence interval that appears
19 below, what does that indicate as far as the variable black
20 in this particular model?

21 MR. JAY FERGUSON: Objection, Your Honor. I
22 would request a line objection.

23 THE COURT: Line objection be made and for
24 purposes of the record so it's absolutely clear, this also
25 is subject to the previous motion to exclude on the grounds

1 stated. It's deemed renewed in apt time. Exception is
2 noted for the record. Objection is overruled.

3 MR. THOMPSON: Insofar as we can agree with the
4 stipulation that this is a line of objections, we can do
5 that.

6 THE COURT: Thank you, Mr. Thompson.

7 MR. JAY FERGUSON: Thank you.

8 BY MR. PERRY:

9 Q. And, Dr. Katz, the confidence interval for the
10 variables that was calculated, can you explain what we're
11 looking at in terms of those estimates?

12 A. For the odds ratio?

13 Q. Yes, sir.

14 A. The point estimate for the odds ratio for black is
15 1.410 and the 95 percent confidence interval goes from .366
16 to 5.431. So one is contained within that confidence
17 interval.

18 Q. And then for the strike group and the passed group
19 variables, in terms of the odds ratio estimate, can you
20 explain to us what those two numbers mean for each one of
21 those groups?

22 A. If you're in the strike group, the odds ratio is
23 virtually infinity or very, very high in that you're going
24 to be struck. So if you have the -- if you have any of the
25 conditions that define the strike group, if a venire member

1 has that, it's a very strong likelihood that that venire
2 member would be struck by the state. And for the pass
3 group, it's a very tiny odds ratio point estimate in that
4 if you have values for the four control variables that are
5 consistent with any of those venire members that were
6 defined in the pass group, that would cause this model to
7 predict that that venire member would not be struck by the
8 state.

9 Q. And in terms of understanding how this model is
10 working, what -- what do those indicate to you? In other
11 words, what do those almost infinity estimates of the odds
12 ratio, almost zero estimates of the odds ratio suggest
13 about the way the model is working?

14 A. Well, again, this model isn't presented as an example
15 of how prosecutors do strikes but just to indicate that you
16 can find variables that are defined from the Dr. O'Brien
17 data set where you can get a very good fit in terms of
18 strikes and pass values and where the resulting race
19 variable is not statistically significant.

20 Q. Okay. And then if I could, if you can flip to your
21 next example and that starts on page DA-487. Can you
22 explain to us what this is -- what this model is doing or
23 what the difference was in this model and the previous
24 model?

25 A. The previous model was a logistic regression model

1 where the validity of the model was in question. So I ran
2 an equivalent multiple linear regression model that won't
3 give me an indication of invalid model but it does have the
4 issue that the predictor variable -- the prediction will
5 not necessarily turn out to be a zero or a one as Dr.
6 Woodworth testified to.

7 Q. Okay. And in terms of the specifics, this was from
8 the -- from Dr. O'Brien's 25 percent statewide sample,
9 correct?

10 A. Yes.

11 Q. For the entire time period?

12 A. For the entire time period based upon the 1,122 venire
13 members that survived the logistic regression.

14 Q. Okay. And can you -- can you explain to us what
15 statistical results you obtained when you ran this model?

16 A. Yes. If you look at page DA-488, the -- the race
17 variable black has a very low parameter estimate of .00454,
18 which is not statistically significant with the P value
19 that can be found in the last column and is equal to .6737.

20 Q. And in terms of the strike group and pass group
21 categories, what -- what did this model tell you about
22 those two variables?

23 A. Those two variables are both statistically
24 significant. The strike group variable has a P value of
25 less than .0001. The pass group variable has a P value

1 less than .0001.

2 Q. Okay. And in terms of comparison between the logistic
3 regression model in the previous example and this multiple
4 linear regression model, what did the differences in the
5 estimates tell you, if anything at all, about running those
6 two models for that same data?

7 A. Well, the multiple linear regression model handles
8 these kinds of situations better than the logistic
9 regression model.

10 Q. And is that something that you can glean from the
11 results from the statistical analysis?

12 A. Yes, in that the multiple linear regression model
13 exists and has indications of a very good fit. The
14 logistic regression model has indications of invalid model.

15 Q. And are those the specific warnings that you pointed
16 us to earlier when I was asking -- when we were asking you
17 about that printout?

18 A. Yes.

19 Q. Now, in terms of statewide models based on cross-tab
20 results, were there any additional models that you ran?

21 A. I don't believe so.

22 Q. So these were -- these were the only two? Are these
23 two models the only two?

24 A. That I presented, yeah.

25 Q. In terms of logistic and then multiple linear

1 regression?

2 A. If you're asking me did I run other statewide logistic
3 models that I didn't put in my report, yes, I ran many.

4 Q. Okay. And the inclusion versus not putting them in
5 here that was just due to whether or not the variable
6 applied -- or the value for the variable being black was
7 statistically significant or not?

8 A. That and in running those models, as I would add
9 variables, I would run into issues of invalid model
10 indications, and I did try and produce a logistic
11 regression model similar to what I've shown for Cumberland
12 County on a statewide data but I wasn't able to do that
13 with the variable -- the available variables that I had to
14 work with. It needed to go into more of these interaction
15 variables, these combination variables similar to what I
16 got from the cross-tabulations. And rather than show a
17 complex model with the basic variables and all these
18 combination variables, I just simplified it by defining
19 strike group and pass group and showing that model.

20 Q. Okay. Now, if I can direct your attention, this
21 should be page 53, state's exhibit 47. This is page 53,
22 Dr. Katz, can you explain to the Court what we're looking
23 at and what's displayed as table 18?

24 A. Table 18 is a table I compiled based upon the
25 information that was provided to me from the affidavits or

1 other reports that was provided by the prosecutor
2 reviewers.

3 Q. And just to be clear, flipping back to an earlier
4 section of the report, this entire table is actually
5 included in your final report, correct?

6 A. Yes, that's table 18.

7 Q. And just so we're all literally on the same page, is
8 that page DA-63 in your final report?

9 A. Yes. It begins on DA-63.

10 Q. If you can tell us what information is contain in
11 table 18?

12 A. Yes. For each venire -- black venire member that was
13 struck by the state in the 11 Cumberland County capital
14 trials, there's the venire study I.D. that was defined by
15 Dr. O'Brien, the name of the reviewer for that strike, the
16 defendant name, the venire member name, whether or not
17 there was a Batson challenge to that venire member strike
18 and then the reasons for the strike which would -- which I
19 would copy and paste from the electronic versions of the
20 report that I received from the reviewer.

21 THE COURT: All right. Folks, if you'll bear
22 with me for two reasons, one, we are about out of time.
23 Two, I'm looking at reasons for strike, specifically the
24 matters in the relationship to the second -- same trial,
25 different juror, which may implicate prior rulings of the

1 Court about testimony. You folks want to be heard? If you
2 look at what is in the reasons for strike, the bottom
3 portion as to juror Mardelle Gore.

4 MR. JAY FERGUSON: I mean there's many reasons we
5 have objections. One, is there's been no foundation for
6 this coming in at all.

7 THE COURT: Yes.

8 MR. JAY FERGUSON: So I will add the foundation
9 objection in addition to the previous motion in limine.

10 THE COURT: Well --

11 MR. JAY FERGUSON: With respect to -- this brings
12 up the whole issue of prosecutor reviewers that were not
13 there at the trial.

14 THE COURT: Yes, sir.

15 MR. JAY FERGUSON: And just, you know, partitive
16 things they find from the transcripts.

17 THE COURT: Well, I'm just -- the prosecutor
18 reviewing this case was Mr. Colyer.

19 MR. COLYER: I was there. Believe me, I was
20 there.

21 MR. JAY FERGUSON: On all of this these, not just
22 this one.

23 THE COURT: I understand. And I recognize you
24 folks previously made a motion to exclude the affidavit of
25 Mr. Colyer on the grounds of advocate witness -- well, on

1 advocate witness grounds.

2 MR. JAY FERGUSON: Can I confer?

3 THE COURT: Yes, sir.

4 (Defense counsel confer.)

5 MR. JAY FERGUSON: She'll argue.

6 THE COURT: You've been elected, ma'am.

7 MS. STUBBS: Judge, I think our general position
8 is that Dr. Katz can testify about what formed the basis of
9 his opinion and so --

10 THE COURT: Yes, ma'am.

11 MS. STUBBS: -- to that extent we have not
12 objected. Although we are objecting to the affidavits
13 coming in as substantive evidence, there is obviously
14 overlap between those affidavits and some of this table,
15 and we're not objecting to his referring to the basis of
16 his opinions.

17 THE COURT: Okay. I just wanted to clarify for
18 the records.

19 MS. STUBBS: However --

20 THE COURT: Yes, ma'am.

21 MS. STUBBS: -- we do object to the extent that
22 this table appears to include completely superfluous and
23 highly prejudicial information that we think is -- is just
24 clearly objectionable. The juror that's here -- the venire
25 member Mardelle Gore, for example, although this table is

1 titled race neutral explanations and purportedly the reason
2 for the strike, it quotes --

3 THE COURT: Yes, ma'am.

4 MS. STUBBS: -- a finding by Judge Thompson.

5 That's not a reason for a strike. There's been no
6 foundation how that would form Dr. Katz's opinion in any
7 way and so we object to that portion.

8 THE COURT: Okay. All right. Mr. Colyer.

9 MR. COLYER: Judge, actually it quotes the
10 transcript and the transcript is already in evidence.

11 THE COURT: Yes.

12 MR. COLYER: The quote from this table is
13 directly from the transcript that the defense put in
14 evidence. So unless the Court wants to read all the
15 transcripts and all the strike reasons, we would suggest
16 it's a good basis for the --

17 THE COURT: Well, in fairness, folks, part of the
18 reason for my ruling with regard to testimony previously
19 offered by the state, Judge Johnson, Judge Gore, was the
20 record speaks for itself. It's in the record. It's not
21 being offered at this point through testimony by Judge
22 Thompson at this hearing.

23 MR. COLYER: Correct.

24 THE COURT: You folks want to be heard?

25 MS. STUBBS: No, Your Honor.

1 THE COURT: Your objection is noted. Exception
2 is noted for the record, but I am going to be as consistent
3 as I can. Matters that are of record are part of the
4 record. The record speaks for itself. Now, back to Mr.
5 Perry's 30-minute estimate, I'll just --

6 MR. COLYER: That was 30 minutes worth of
7 questioning.

8 THE COURT: I'm just teasing, Mr. Perry.

9 MR. PERRY: Judge, if you cannot tell my wife
10 this happened, I would appreciate it because she claims the
11 same thing about my time estimation ability.

12 THE COURT: Yes, sir. Where are we in terms of
13 how much more have we got, Mr. Perry?

14 MR. PERRY: Not much, Your Honor. I hate to put
15 a time estimate by now. I can give you a confidence limit
16 here or a confidence interval. To be honest, the state has
17 table 18 and we're not planning to go through table 18.

18 THE COURT: Yes, sir.

19 MR. PERRY: We'll just explain what's in it.
20 Then we've got a table 15, which is not long, and then
21 table 19 again just as a way to explain what materials that
22 Dr. Katz looked at.

23 THE COURT: That sounds like another 30 minutes.

24 MR. PERRY: It may be, Your Honor.

25 THE COURT: Yes, sir. I'm not being facetious.

1 I'm simply trying to take into account personnel --

2 MR. PERRY: Yes, sir.

3 THE COURT: -- and other matters. Anybody want
4 to be heard?

5 MR. JAY FERGUSON: Your Honor, can I bring up one
6 thing?

7 THE COURT: Yes, sir.

8 MR. JAY FERGUSON: There's been a lot of
9 discovery provided by both parties in this case.

10 THE COURT: Yes, sir.

11 MR. JAY FERGUSON: And I'm not faulting anybody
12 but he testified he did some recoding. We, to my
13 knowledge, don't have any recoding log or anything in the
14 evidence as to that.

15 THE COURT: Does such exist, Dr. Katz, recoding
16 log? And I think you're referring to the additional
17 variables.

18 MR. JAY FERGUSON: Correct. He took variables
19 and recoded one and zero for his analysis.

20 THE WITNESS: I provided all of those SAS,
21 statistical analysis system, programs.

22 MR. JAY FERGUSON: And also he's testified twice
23 he ran many models. I would just ask the Court to inquire
24 of Dr. Katz if all of them have been disclosed.

25 THE COURT: Are they in existence?

1 THE WITNESS: Yes, and they've all been turned
2 over to the defendant.

3 MR. JAY FERGUSON: Thank you.

4 THE COURT: We're going to stop, folks. And 9:00
5 tomorrow morning, okay?

6 MR. PERRY: Yes, sir.

7 THE COURT: All right. Thank you, folks. Thank
8 you, Dr. Katz. You may step down, sir.

9 (Witness leaves the stand.)

10 (The hearing adjourned at 5:00 p.m., Thursday,
11 February 9, 2012, and reconvened at 9:00 a.m., Friday,
12 February 10, 2012. Court Reporter Jennifer Hack to the
13 proceedings on February 10, 2012.)

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

STATE OF NORTH CAROLINA)

COUNTY OF CUMBERLAND)

I, SHANNON RANSOM, CSR, RPR, the officer before whom the foregoing proceedings were taken, do hereby certify that said transcript is a true, correct and complete verbatim transcript of said proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of this action.

This 29th day of February, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA

NORTH CAROLINA
CUMBERLAND COUNTY

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

STATE OF NORTH CAROLINA,)
)
)
vs.)
)
MARCUS ROBINSON,)

)

CERTIFICATE OF
DELIVERY OF TRANSCRIPT

I certify that the transcript of the Racial Justice Act hearing held February 9, 2012, Volume IX, consisting of pages 1704 through 1910, was delivered on February 29, 2012 by emailing the electronically-signed PDF transcript and by delivering a CD-ROM containing the PDF transcript to Judge Gregory A. Weeks, Superior Court Judge; Ms. Bel Lewis and Mr. Rob Thompson, district attorney's office; and Mr. Jay Ferguson, defendant's attorney. I further certify that the transcript was ordered on February 3, 2012.

This 29th day of February, 2012.



SHANNON RANSOM, CSR, RPR
OFFICIAL COURT REPORTER
TWELFTH JUDICIAL DISTRICT
FAYETTEVILLE, NORTH CAROLINA