No. 139PA13 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	From Cumberland County
v	)	No. 01CRS65079,
	)	97CRS47314-15,
QUINTEL AUGUSTINE	)	98CRS34832, 98CRS35044
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	

****

PETITION FOR WRIT OF CERTIORARI TO REVIEW
ORDER OF SUPERIOR COURT OF CUMBERLAND COUNTY
(State of NC)
(Filed 21 March 2013)
(Allowed 3 October 2013)

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No. 139PA13 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
	)	
v.	)	From CUMBERLAND
	)	
	)	
QUINTEL AUGUSTINE	)	
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	
Defendants	)	

****

STATE'S PETITION FOR WRIT OF CERTIORARI

****

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COMES the State of North Carolina [hereinafter "State"], by the Honorable Roy Cooper, Attorney General of North Carolina, and Senior Deputy Attorney General William P. Hart, Sr., and Special Deputy Attorney General Danielle Marquis Elder and Special Deputy Attorney General Jonathan P. Babb, and respectfully submits the following PETITION FOR WRIT OF CERTIORARI pursuant to Rules 2 and 21 of the North Carolina Rules of Appellate Procedure, and pursuant to Article IV, Section 12 of the North Carolina Constitution, seeking review

of the ORDER GRANTING MOTIONS FOR APPROPRIATE RELIEF [hereinafter "RJA Order"] filed on 13 December 2012, which vacated the 22 October 2002 death sentence of Quintel Augustine, the 13 May 1998 death sentences of Tilmon Golphin, and the 6 July 2000 death sentence of Christina Walters, [hereinafter "Defendants"] for their first-degree murder convictions based upon application of North Carolina's Amended Racial Justice Act pursuant to N.C.G.S. §15A-2010, et seq. In support of this PETITION, the State shows the Court the following:

INTRODUCTION

This RJA Order [attached hereto as State's Appx. 1] vacating Defendants' death sentences, is the first grant of relief under the North Carolina Amended Racial Justice Act, N.C.G.S. §§ 15A-2010 and 2011 [hereinafter, collectively "Amended RJA"], enacted in 2012.[1] It is the second grant of relief by the same Superior Court which first interpreted the original RJA, enacted in 2009, and granted relief to capital Defendant Marcus Robinson on 20 April 2011. The State, through the Cumberland County District Attorney's Office, has petitioned this Court for review of the Superior Court RJA Order in Robinson [hereinafter "Robinson Order"] and that matter is still pending before this Court. (See State v. Robinson, No. 411A94-5).

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[1] These three unrelated capital cases were joined for hearing over the State's objection.

The MAR Court erroneously concluded that its previous findings of fact and conclusions of law in the Robinson Order precluded litigation of the factual and legal issues in the instant cases. (See Order Granting Defendants' Motions for Preclusion, attached hereto as State's Appx. 10). This is a clear misapprehension of North Carolina law which still requires mutuality of parties and identity of issues before collateral estoppel may be used to preclusive effect in criminal cases. The applicability of non-mutual offensive collateral estoppel in criminal cases appears to be an issue of first impression.

The statutory interpretation and application of the RJA statutes are matters of great importance for the jurisprudence of North Carolina in both capital and noncapital cases. In fact, it is likely the most significant issue relevant to our capital jurisprudence to come before this Court since the reimposition of the death penalty, because a decision from this Court will impact the capital sentences of the majority of capital defendants currently on death row.

The RJA Order is replete with findings of fact not supported by competent evidence. The RJA Order interprets the RJA statutes in such a way that results in significant legal error including, among other things: the finding that the Amended RJA does not apply to Defendants' post conviction motions; the unreasonable application of well-established existing criminal law; the unrealistic evaluation of

legal and practical value of the use of statistics offered by Defendants in support of their Amended RJA Motions; the erroneous grafting from civil employment law analysis into the criminal justice system; the re-evaluation of juror strikes previously found to be free from racial discrimination, and the resulting unrealistic and unachievable statistical balance which will be required by District Attorneys. In fact, if the RJA Order's interpretation is allowed to stand, District Attorneys will be forced to violate the constitution to comply with the statute. This was not the intent of the Legislature.

Most significantly, the RJA Order interprets the RJA statutes such that a capital defendant can obtain relief even if that defendant has never personally experienced any racial discrimination in his or her case at any stage of the criminal justice process.

Pursuant to Rule 2, to "prevent manifest injustice" and to "expedite [a] decision in the public interest" it is appropriate for this Court to accept review of these three cases. Before the Court are three cases which involve some of the most notorious murders in this State in the last twenty years. Two involve murders of three sworn law enforcement officers while in the performance of their duties, and the other involves the murder of two innocent victims arbitrarily targeted in a gang initiation. Given the nature of the crimes presented by these three cases and the errors committed by the MAR Court noted in the discussion below, the interests of justice

dictate that this Court should grant certiorari review pursuant to N.C. R. App. P. 2 and 21(f).

STATEMENT OF THE CASE AND RELEVANT FACTS

Over the State's objection, these three unrelated capital post conviction cases were joined for evidentiary hearing. The resulting RJA Order granted relief to all three capital murderers. A brief summary of the procedural history and relevant facts for each case is detailed below.

State v. Quintel Augustine

Defendant Augustine was tried and convicted for the 29 November 2001 first degree murder of Officer Roy Turner of the Fayetteville Police Department who was on routine patrol. Defendant gunned down Officer Turner as he exited his patrol car. Officer Turner was shot multiple times. His service weapon was still in its holster when his body was recovered from the scene. Earlier in the evening Defendant reported to a friend that he was angry because his brother had been imprisoned and that he wanted to shoot a police officer. This Court succinctly summarized the evidence presented in Defendant Augustine's case in State v. Augustine, 359 N.C. 709, 712-14, 616 S.E.2d 515, 520-21 (2005). Defendant Augustine is African-American. His victim, Officer Roy Turner, was African-American. During the sentencing phase the jury unanimously found the following aggravating factor was

proven beyond a reasonable doubt: The capital felony was committed against a law-enforcement officer engaged in the performance of his official duties. See N.C.G.S. § 15A-2000(e)(8).

Defendant Augustine raised a claim under Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), at trial and on direct appeal. This Court, like the trial court before it, rejected Defendant Augustine's Batson claim. State v. Augustine, 359 N.C. at 714-716, 616 S.E.2d at 521-522.

Defendant Augustine filed a state post conviction Motion for Appropriate Relief which was pending at the time that he filed his original RJA motion on 6 August 2010. Thereafter, he filed his Amended RJA on 3 July 2012.

State v. Tilmon Golphin

Defendant Golphin was tried and convicted for the first degree murders of State Highway Patrol Trooper Lloyd E. Lowry and Cumberland County Sheriff's Department Deputy David Hathcock who stopped Defendant Golphin and his brother, Kevin Golphin, who were driving a stolen vehicle. The Golphin brothers engaged in a multi-state crime spree that began with an armed robbery in South Carolina and eventually ended with their apprehension in North Carolina. State Highway Patrolman Ed Lowry stopped their vehicle on Interstate 95 (I-95) and Cumberland County Sheriff's Deputy David Hathcock arrived shortly thereafter to assist Trooper

Lowery. The Golphin brothers gunned down both Trooper Lowry and Deputy Hathcock, and then fled the scene. Several civilian travelers along I-95 observed the shootings, and several stopped to render immediate medical aid to the slain officers. Civilian Ronald Walters, who observed the shootings, gave chase after calling 911. Mr. Walters narrowly escaped death when Tilmon Golphin's SKS rifle jammed as he attempted to shoot Mr. Walters. Kevin and Tilmon Golphin were eventually apprehended after crashing their vehicle and attempting escape into the woods. This Court succinctly summarized the evidence presented in Defendant Golphin's case in State v. Golphin, 352 N.C. 364, 380-385, 533 S.E.2d 168, 183-186 (2000). Defendant Golphin is African-American, and Trooper Lowry and Deputy Hathcock were both Caucasian.

During the sentencing phase the jury unanimously found the following four aggravating factors were proven beyond a reasonable doubt: The capital felony was committed while in flight after committing robbery, N.C.G.S. § 15A-2000(e)(5); the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, N.C.G.S. § 15A-2000(e)(4); the capital felony was committed against a law-enforcement officer engaged in the performance of his official duties, N.C.G.S. § 15A-2000(e)(8); and the murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and

which included the commission by the defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11).

Defendant Golphin raised a claim under Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, at trial and on direct appeal. This Court, like the trial court, rejected Defendant Golphin's Batson claim. State v. Golphin, 352 N.C. at 425-33, 533 S.E.2d at 210-15. The United States District Court and the United States Court of Appeals for the Fourth Circuit also rejected Defendant Golphin's Batson claims in federal habeas review. Golphin v. Branker, 519 F.3d 168 (4th Cir. 2008). Defendant Golphin had completed both state and federal review at the time he filed his original RJA motion on 9 August 2010. Thereafter, he filed an Amended RJA motion on 3 July 2012.

State v. Christina Walters

Gang leader Christina Walters was tried and convicted for the 17 August 1998 first degree murders of Tracy Lambert and Susan Moore and the attempted murder of Debra Cheesborough. Defendant Walters shot Ms. Cheesborough multiple times and left her for dead in a remote area of Cumberland County. Despite her extensive injuries, Ms. Cheesborough managed to live after a passerby found her hours later. Later that evening Defendant Walters ordered the execution-style murders of Tracy Lambert and Susan Moore who were randomly chosen victims to be murdered for the

purpose of gang initiation and robbery. Defendant Walters' victim Ms. Cheesborough testified against her at trial. This Court succinctly summarized the facts of these gang initiation murders in State v. Walters, 357 N.C. 68, 76-78, 588 S.E.2d 344, 349-50 (2003). Christina Walters is Native-American. Her victims Tracy Lambert and Susan Moore were Caucasian, and the victim who lived, Debra Cheesborough, is African-American. After a sentencing hearing the jury found the following aggravating circumstances beyond a reasonable doubt: (1) the murder was committed while defendant was engaged in the commission of a first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (3) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (4) the murders for which defendant was convicted were part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11).

In affirming the submission of the (e)(9) aggravating circumstance, this Court found that victims Tracy Lambert and Susan Moore "were subjected to at least an hour and a half of psychological torture by being trapped in the trunk of a car while pleading for their lives." Walters, 357 N.C. at 99, 588 S.E.2d at 363. Furthermore, this Court specifically noted that "Susan Moore was forced to witness Tracy Lambert

being shot in the head" prior to her own murder. Id. at 99-100, 588 S.E.2d at 363. This Court found the evidence "more than warranted" the submission of the (e)(9) aggravating circumstance. Id. at 100, 588 S.E.2d at 363.

Defendant Walters filed a state post conviction Motion for Appropriate Relief which was pending at the time that she filed her RJA motion on 4 August 2010 . Thereafter, she filed her Amended RJA motion on 3 July 2012.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Clearly, as these cases aptly illustrate, Superior Court Judges and post-conviction practitioners are in need of guidance as to the correct interpretation and application of the Amended RJA. The State's Petition for review of the Robinson Order is presently before this Court. (See State v. Robinson, No. 411A94-5). As the State forecasted in the State's PWC in Robinson, guidance was necessary from this Court for the correct interpretation of universal concepts from the original RJA which were carried forth into the Amended RJA. Absent guidance from this Court as to the correct interpretation of these concepts, the MAR Court has again failed to correctly interpret the RJA statutes. Furthermore, the MAR Court has interpreted the Amended RJA contrary to applicable and well-established precedent from this Court in such a manner that the resulting conclusions of law are a misapprehension of law which cannot support the result.

Furthermore, the MAR Court has erroneously determined that its factual findings and conclusions of law in the Robinson Order had preclusive effect on the instant cases. (See Order Granting Defendants' Motions for Preclusion, State's Appx. 2). This Court should grant review to correct the misapprehension of North Carolina law that applied issue preclusion to findings of fact and conclusions of law in an unrelated criminal case.

The importance of granting certiorari, correcting the errors in the RJA Order and in the Order granting preclusion, and providing much needed guidance regarding the Amended RJA goes far beyond the present case. Contrary to legislative intent, the MAR Court did not require Defendants to establish any racial discrimination in their own cases to be entitled to relief. For reasons noted below, the fact that the MAR Court found evidence of racial discrimination in Defendants' cases was clearly erroneous and contrary to controlling precedent of this Court.

Defendants must establish discrimination in their own cases to be entitled to relief under the Amended RJA. See N.C.G.S. § 15A-2011(a)("A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was significant factor in decisions to seek or impose the death penalty in the defendant's case at the time the death sentence was sought or imposed."). The RJA Order finding to the contrary is a misapprehension of the law,

requiring this Court to remand the matter for proper findings of fact and consideration of the evidence after correct interpretation of the clear law.

Furthermore, the MAR Court determined that irrespective of the clear language in the Amended RJA statute, the amended provisions in the statute did not apply to Defendants' cases. Hence the MAR Court applied law from the original RJA in its analysis of Defendants' cases. The fact that the MAR Court found in the alternative that Defendants had established racial discrimination under the Amended RJA does not cure the error as it is clear that the MAR Court's decision was inexorably intertwined with legal conclusions and factual findings based upon its interpretation of the original RJA. This cannot be untangled.

Moreover, at least one other Superior Court has entered rulings inconsistent with the RJA Order, finding that 1) the Amended RJA applies to capital defendants who had RJA claims pending at the time that the RJA statutes were amended; 2) statewide and judicial division-wide statistics are not relevant to a RJA claim under the Amended RJA; 3) statistical evidence alone is insufficient to support a RJA claim; and 4) discrimination must be shown in the particular defendant's case in order for a defendant to obtain relief. (See Orders in State v. Haselden (99 CRS 6321), State v. Carl Stephen Moseley (91 CRS 5146), and State v. East, (95 CRS 594-96, 94 CRS 6000-01), attached hereto as State's Appx. 10).

Further, capital defendants in federal post conviction review have alleged that all federal proceedings should be held in abeyance pending resolution of their state court RJA claims, and some have been successful. See e.g., Tucker v. Branker, No. 1:07CV 868 (M.D.N.C.) (granted in part); Burke v. Lassiter, No. 5:12CV00137 (M.D.N.C.)(pending); Hurst v. Lassiter, No. 1:10CV725 (M.D.N.C.) (pending); Kandies v. Lassiter, No. 1:99CV00764 (M.D.N.C.)(pending); Harden v. Lassiter, No. 11-8 (4th Cir.) (granted); Forte v. Lassiter, No. 12-3 (4th Cir.) (granted), Morgan v. Lassiter, No. 12-6 (4th Cir.) (granted). Capital defendants have been using the RJA Order in Robinson's case to argue legal issues significant to the jurisprudence of our State, and presumably will do so with the RJA Order from these three cases as well. See State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) (recognizing that how our state courts interpret state law has the potential to affect federal habeas review).

The Constitution of North Carolina grants the Supreme Court "jurisdiction to review upon appeal any decision of the courts below." N.C. Const. Art. IV, § 12; State v. Whitehead, __ N.C. __, __, 722 S.E.2d 492, 494 (2012). The Court has exercised its authority in the interest of "ensur[ing] the uniform administration of North Carolina's criminal statutes." State v. Ellis, 361 N.C. 200, 205, 639 S.E.2d 425, 429 (2007). It has also "exercise[d] its rarely used general supervisory authority

when necessary to promote the expeditious administration of justice." State v. Stanley, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975)(citations omitted).

This Court has the authority to grant review and for these reasons, and the ones stated below, the State now requests that this Court grant review to resolve the following issues, among others, concerning the RJA Order.

Standard of Review

Upon review of orders entered pursuant to motions for appropriate relief, this Court must inquire whether the trial court's "findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." State v. Stevens, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982) (concluding that findings of fact by trial court on motion for appropriate relief are binding if supported by evidence). When there is "an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponderance of the evidence every fact to support his motion." State v. Adcock, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984). Findings of fact "made by the trial court pursuant to hearings on motions for appropriate relief" are binding on appeal if they are supported by competent evidence. Stevens, 305 N.C. at 720, 291 S.E.2d at 591.

However, "[i]t is well established that '[f]acts found under misapprehension of

the law will be set aside on the theory that the evidence should be considered in its true legal light.'" State v. Collins, __ N.C. App. __, __, 724 S.E.2d 82, 85 (2012)(quoting Helms v. Rea, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973)).

An abuse of discretion "occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." State v. Moore, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002)(quotation marks omitted). "'When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion.'" State v. Shannon, 182 N.C. App. 350, 357, 642 S.E.2d 516, 522 (2007)(quoting Gailey v. Triangle Billiards & Blues Club, Inc., 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006), disc. rev. denied, 361 N.C. 426, 648 S.E.2d 213 (2007); see also, State v. Cornell, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972)("[W]here rulings are made under a misapprehension of the law, the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and applicable law may require."); see also, State v. Dorman, 2013 N.C. App. LEXIS 182 (19 February 2013) , ___N.C. App. ___, ___ S.E.2d ___ (2013)(citing Blitz v. Agean, Inc., 197 N.C. App. 296, 312, 677 S.E.2d 1, 11 (2009) (holding that judicial actions based upon a misapprehension of law constitute an abuse of discretion).

Here, the RJA Order found facts which are erroneous because they are contrary

to the record and made rulings under a misapprehension of the law. The RJA Order erred in interpreting the RJA statutes and in applying well-established laws of this State to the particular facts in these cases. For these reasons, this Court should grant review.

ARGUMENTS

I. The MAR Court Erroneously Concluded that Its Previous Findings of Fact and Conclusions of Law in the State v. Robinson RJA Order Precluded Litigation of Issues in the Instant Cases.

This Court should grant review to correct the erroneous conclusion of the MAR Court which found that its previous findings of fact and conclusions of law in the State v. Robinson RJA Order precluded litigation of factual and legal issues raised in the instant cases. (See Orders Granting Defendant's Motions for Preclusion, p 1, attached hereto as State's Appx. 2 (finding State precluded "from relitigating all material factual and legal findings necessary to the judgment in Robinson.")). The MAR Court noted that "once a court has made a systemic finding of discrimination, the public and the justice system have a compelling interest in its consistent application." (Id. at p 6)(citations omitted). The MAR Court found that although its findings of fact and conclusions of law should have had preclusive effect in the instant cases, the Court "treated these proceedings as if they were being litigated anew." (Id. at 6-7). The MAR Court's determination that issue preclusion applied

in the instant cases is erroneous and a misapprehension of law. This Court should grant review to correct this misinterpretation of North Carolina's law concerning the doctrine of collateral estoppel.

To apply collateral estoppel in criminal cases such as Defendants' there must be both mutuality of parties and identity of the issues. Despite the MAR Court's conclusion to the contrary, this Court has not removed the requirement of identity of parties in the applicability of collateral estoppel to criminal cases. As a such, the MAR Court could not have given any preclusive effect to the Order in Robinson. The equitable doctrine of collateral estoppel, otherwise known as issue preclusion, precludes the relitigation of a fact, question or right. State v. Warren, 313 N.C. 254, 328 S.E.2d 256 (1985); see also, State v. Summers, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000). At common law, traditional collateral estoppel required identity of parties, sometimes referred to as mutuality of estoppel or parties, in both criminal and civil cases. See generally, Warren, 313 N.C. 254, 328 S.E.2d 256, and Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986). Following the modern trend, however, this Court removed such a requirement in civil cases for the party against whom the doctrine is asserted where that party "had a full and fair opportunity to litigate the issue in the earlier action." Hall, 318 N.C. at 432, 349 S.E.2d at 559. This Court removed the mutuality requirement because, according to

the Court, it was not "tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issues." Id. at 434, 349 S.E.2d at 560.

However, this Court has not removed the traditional common-law requirement of identity of parties in criminal cases. Thus, North Carolina, like the overwhelming majority of jurisdictions including federal courts, continues to follow the traditional rule of requiring identity of parties in criminal cases. See Commonwealth v. Stevens, 885 N.E.2d 785, 790-91 (Mass. 2008)(collecting cases and noting so in the context of orders on motions to suppress); see also, Standefer v. United States, 447 U.S. 10, 64 L. Ed. 2d 689 (1980)(providing that, under federal common law, mutuality of parties is still required to successfully assert collateral estoppel in a criminal case); and State v. Brooks, 337 N.C. 132, 146, 446 S.E.2d 579, 588 (1994)("Although this Court has recognized and applied the doctrine of collateral estoppel, we have held that there either must be an identity of parties or the party against whom the defense is asserted must have been in privity with a party in the prior proceedings in order for the doctrine to apply.")

Review of North Carolina appellate cases reveals that the applicability of non-mutual offensive collateral estoppel in criminal cases appears to be an issue of first impression. Nothing in North Carolina case law supports the application of non-mutual offensive collateral estoppel in criminal cases. The MAR Court has

misapprehended the law in finding otherwise.

Furthermore, there can be no identity of the issues in RJA motions because the RJA requires that racial discrimination be proven in the particular defendant's case. There is no question that motions made pursuant to the RJA statutes are criminal in nature and are to be litigated on a case-by-case basis. For reasons explained in more detail below, it is apparent that the RJA statutes unambiguously require that relief may only be awarded upon proof of discrimination in a particular defendant's case. There is no provision in the RJA statutes which dictates that one superior court's order should preclude another superior court's order. There is furthermore no provision for joint motions or joint adjudications of the issues, factual findings, or conclusions of law. Had the General Assembly intended to create a separate civil cause of action or a cause of action which allowed defendants to litigate certain issues collectively, it could have done so. It did not.

The MAR Court had no authority to apply non-mutual offensive collateral estoppel in Defendants' cases. Further, there was no basis for applying non-mutual collateral estoppel in RJA motions. Finally, Defendants could not meet the criteria of collateral estoppel even if mutuality of parties is not required. As argued by the State in the Robinson PWC presently pending before this Court, the MAR Court made numerous erroneous findings of fact under the misapprehension of law. The

State further argued that because of these findings, and because the MAR Court refused to grant the State a continuance, it was not afforded a full and fair hearing to litigate the issues raised in the Robinson case. As such, the MAR Court erred in allowing Defendants to assert collateral estoppel such that it gave any preclusive effect to the Robinson RJA Order.

Despite the MAR Court's conclusion to the contrary, the RJA Order in Robinson had no preclusive effect on the instant cases. To apply collateral estoppel in criminal cases such as these there must be both mutuality of parties and identity of the issues. Defendants met neither criteria, and the MAR Court was without authority to alter those requirements. This Court should grant review to correct the MAR Court's erroneous interpretation of North Carolina law.

II. The MAR Court Crafted An Interpretation of the Amended RJA That Is at Odds with Well-Established Law of this Court.

This Court should grant review because the RJA Order, which is the first to interpret the newly amended RJA, crafts an interpretation of the RJA Statutes that is at odds with well-established law regarding what is required for a capital sentencing scheme to be constitutional and what is required in reviewing the exercise of peremptory challenges in jury selection.

Specifically, the MAR Court erroneously concluded from its interpretation of

the Amended RJA, that the Amended RJA did not apply to Defendants' cases despite clear and unambiguous language in the statute to the contrary. Also, like it did for the interpretation of the original RJA, the MAR Court determined that discrimination need not be shown in a defendant's own case. Next the MAR Court erred as a matter of law in concluding that a defendant need not show intentional discrimination in order to establish that "race was a significant factor in decisions to exercise peremptory challenges during jury selection" under N.C.G.S. § 15A-2011(d). Further, the MAR Court erred in considering statistical evidence which was 1) beyond that derived from the County and/or Prosecutorial District where a defendant was convicted and sentenced and 2) beyond that falling within the time limitations proscribed by the Amended RJA. All of these erroneous interpretations of the Amended RJA are so significant that this Court cannot rely upon the resulting findings of fact in support and should remand these cases for proper findings of fact based upon admissible and relevant evidence and for reconsideration under proper legal interpretation of the Amended RJA.

A. The MAR Court Erred as a Matter of Law In Finding the Amended RJA Statute Not Applicable to Defendants' Cases

In the first ruling interpreting the Amended RJA statute, which was enacted 3 July 2012, the MAR Court determined that the Amended RJA did not apply to

Defendants' cases. This conclusion was error as a matter of law. The MAR Court centered its decision upon three findings, all of which are based upon a misapprehension of law. First, the MAR Court erroneously concluded that the Amended RJA statute was ambiguous as to whether the Legislature meant for it to apply retroactively. Second, the MAR Court erroneously concluded that the Defendants' due process rights had vested at the filing of their original RJA motion such that the Amended RJA could not apply to them retroactively. Finally, the MAR Court erroneously concluded that applying the Amended RJA to Defendants' cases would result in "arbitrariness" in the application of North Carolina's death penalty in violation of the Eighth Amendment to the United States Constitution. For the reasons noted below, each of these conclusions was based upon a misapprehension of the law and is therefore insufficient to support the rulings of the MAR Court.

1. The MAR Court Erroneously Concluded that the Amended RJA Statute Is Ambiguous And Therefore Not Retroactively Applicable to Defendants

First, the MAR Court erroneously found that the Amended RJA statute was ambiguous about whether it applies retroactively to Defendants' claims. (RJA Order, pp 33-35). The MAR Court, noting that laws are presumed to operate prospectively "unless they are clearly and unambiguously retroactive[,]" then found that the language of the Amended RJA left doubt as to whether the statute was to be applied

retroactively. (Id.). The plain language of the statute refutes this finding.

The Racial Justice Act (RJA) originally enacted in 2009 by Session Law 2009-464, was amended by Session Law 2012-136 which became law on 2 July 2012. The provisions of the newly amended Racial Justice Act make clear that the amendment applies to all pending RJA claims filed pursuant to the original RJA (Session Law 2009-464).

> SECTION 6. Unless otherwise excepted, this act, including the hearing procedure, evidentiary burden, and the description of evidence that is relevant to a finding that race was a significant factor in seeking or imposing a death sentence, also applies to any postconviction motions for appropriate relief that were filed pursuant to S.L. 2009-464. This act also applies to any hearing that commenced prior to the effective date of this act.

2012 N.C. Sess. Laws 136, s.6 (emphasis added)(attached as State's Appx 3).

This same section allowed defendants who had previously filed post conviction RJA motions under the original RJA to amend their motions within sixty days to conform to the newly enacted provisions of the Amended RJA. 2012 N.C. Sess. Laws 136, s.6. (State's Appx 3). Further, the Amended RJA specifically prohibited any new motions, separate and apart from the claims which had been filed under the original RJA. 2012 N.C. Sess. Laws 136, s.7. (State's Appx 3).

In fact, the Amended RJA made clear that the only exception where the Amended RJA did not apply is in a case in which an evidentiary hearing has taken

place and a final order had been entered.

> SECTION 8. This act does not apply to a postconviction motion for appropriate relief which was filed pursuant to S.L. 2009-464 if the court, prior to the effective date of this act, made findings of fact and conclusions of law after an evidentiary hearing in which the person seeking relief and the State had an opportunity to present evidence, including witness testimony and rebuttal evidence.

2012 N.C. Sess. Laws 136, s.8 (emphasis added)(State's Appx. 3).

For the reasons noted below, the clear language of the statute is unambiguous and consistently tracks other law related to the retroactive application of newly enacted statutory law.

In Defendants' cases, there had been no evidentiary hearing nor a final order at the time that the RJA statutes were amended. Consequently, by the clear language of the statute, all of the provisions of the Amended RJA applied in Defendants' cases, including the requirement that Defendants' amend their previously filed RJA motions.[2] While it is true that the rules of statutory construction tend to disfavor retroactive application, those general rules apply only when the statute is ambiguous as to whether its provisions apply retroactively. Landgraf v. USI Film Prod., 511 U.S. 244, 264-65, 114 S. Ct. 1483, 1496-1497, 128 L. Ed. 2d 229, 252 (1994). Here the General Assembly was clear that the Amended RJA applies to all pending claims

[2] Defendants did so, filing amendments to their original RJA motions on 3 July 2012.

which had not yet had a final order entered after an evidentiary hearing.

Here Defendants' RJA claims had not yet been heard, and no final order had yet been entered. This clear and unambiguous language should have eliminated all doubt as to whether the Amended RJA was meant to apply to Defendants whose RJA claims were still pending at the time the Amended RJA law was enacted. The MAR Court's finding to the contrary was a misapprehension of law, and this Court should grant review to correct the incorrect determination that the Amended RJA does not apply retroactively to Defendants' RJA claims.

2. The MAR Court Erroneously Concluded That Defendants Had a Vested Right In the Continuation of Existing Law

Next, the MAR Court erroneously concluded that irrespective of the clear language of the statute, the Defendants had a vested Due Process Right to the application of the law that existed at the time that they filed their RJA claims under the original RJA. (RJA Order, pp 35-43). In specific, the MAR Court found that the original RJA afforded defendants the substantive right to present statewide and judicial division-wide evidence to support claims under the RJA and to present claims based upon the race of the victim, which the Amended RJA eliminated. (RJA Order p 37). Most significantly, the MAR Court found that Defendants' substantive rights in the original RJA allowed them to succeed on a RJA claim based upon statistics

alone. (RJA Order p 37). The State continues to assert that this is an incorrect interpretation of the original RJA.[3] Mere statistics have never been enough to establish racial discrimination in the decisions to exercise peremptory challenges. At bottom, however, this is a procedural, not substantive change in the law. The whole purpose of the RJA is to provide relief from the death penalty imposed on a specific defendant, based upon proof of racial discrimination in a specific defendant's case. It is not a group-relief or class action process. Consequently, the RJA has never given defendants the opportunity to establish racial discrimination across the State. The relevant inquiry has always been whether racial discrimination has infected a specific case. So a change in the method or manner in which a capital defendant can establish racial discrimination in his own case under the RJA is procedural, not substantive, in nature.

More to the point, however, as long as the Defendants' RJA claims were pending at the time of the amendments to the RJA, those claims were subject to changes in the law by the Legislature. All of Defendants' claims were pending because no final order or judgment had yet been entered by a Superior Court as to

[3] The State incorporates by reference herein, the State's Petition for Writ of Certiorari filed in State v. Robinson (411A94-5), presently pending before this Court on the specific issue of whether statistics alone could ever be enough to establish a claim under the original RJA.

their RJA claims.

Contrary to well-established law, the MAR Court found that Defendants' Due Process Rights vested at the time that the original RJA statute was enacted. The MAR Court found that the rights to be protected here would have been vested "at the time of the injury that gives rise to the cause of action." (RJA Order, p 36). The MAR Court concluded that the "evidence of discrimination became a legally operative claim when the original RJA was enacted in 2009." (RJA Order, p 39). Assuming for the purpose of discussion only that Defendants' did have a "legally operative claim" at the passage of the original RJA, they absolutely did not have a vested Due Process Claim.

A vested right cannot exist where a final judgment has not yet been entered. In Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980), this Court established that the deciding point in determining whether a right has vested, is in the determination of whether there has been a final order by a court.

> The crux of this appeal is whether a statute may be applied retroactively to alter the effect of a final judgment which had previously established the proper venue for an action. We hold that it may not and affirm the decision of the Court of Appeals.

Id. at 716, 268 S.E.2d at 469 (emphasis added).

Thus where a final order has been entered, a change in legislation cannot alter

or amend the prior order.

> It follows, then, that a legislative declaration may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction. Hospital v. Guilford County, 221 N.C. 308, 20 S.E.2d 332 (1942).

Id. at 719, 268 S.E.2d at 471. It is well-established that until a right is vested, the legislature may destroy it. See Dyer v. Ellington, 126 N.C. 941, 36 S.E. 177 (1900); Dunham v. Anders, 128 N.C. 207, 38 S.E. 832 (1901)(same); see also, Williams, Williams v. Atl. Coast Line R.R. Co., 153 N.C. 360, 365, 69 S.E. 402, 403 (1910) ("where suit is brought during the life of the statute and pending at its repeal, without having gone to judgment, the Legislature may, by express terms, take away the right of action."). Thus until the MAR Court entered a final order on Defendants' RJA claims, Defendants had no vested rights under the original RJA and were subject to the legislative change of the Amended RJA.

The MAR Court's conclusions to the contrary contravene the above well-established principles. A decision to afford the Defendants an evidentiary hearing on their claims does not constitute a final order or judgment on the pleadings. (RJA Order, p 39)[4] It is not a final order and did not impart any vested right to Defendants.

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[4] The State disputes that Defendants were entitled to an evidentiary hearing on any of their claims. Before the Amendment to the RJA passed, the State moved to dismiss Defendants' original RJA claims for failure to appropriately state a claim since their original RJA motions failed to establish racial discrimination in their own cases. The State continues to maintain that they were never entitled to an evidentiary hearing and

Moreover, the MAR Court has erroneously concluded that Defendants have a vested right in the continuation of existing law. Yet where there is no established vested right, there can be no such expectation. Armstrong v. Armstrong, 322 N.C. 396, 401-02, 368 S.E.2d 595, 598 (1988).

When the Legislature chose to amend the RJA statute, it did so with pending RJA claims in mind, and addressed these claims specifically. The Defendants' RJA claims were pending at the time of the legislative amendment. There was no final order or judgment entered in their cases. Consequently, the Amended RJA applied to Defendants, and the MAR Court erroneously concluded otherwise.

3. The MAR Court Erroneously Concluded That Application of the Amended RJA to Defendants' Cases Would Be Arbitrary and a Violation of the Eighth Amendment to the United States Constitution

The MAR Court erroneously concluded that the Legislature's amendment to the RJA statutes was not applicable to Defendants' cases. As the MAR Court saw it, the Legislature "ignored" and "turned away" from the MAR Court's conclusion in Robinson finding statewide prosecutorial discrimination in jury selection, thereby introducing "an element of arbitrariness into the administration of the death penalty." (RJA Order p 44). In this, the MAR Court has concluded that because it has

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that, in accord with N.C.G.S. § 15A-1420, these claims should have been summarily denied as a matter of law.

previously found statewide prosecutorial discrimination in Robinson, Defendants, and all capital defendants similarly situated, have been denied the right to relief under the Amended RJA. This interpretation presupposes group relief, or a class action type procedure. The original RJA and the Amended RJA both require proof of racial discrimination in a specific defendant's case. Consequently, the findings of this MAR Court in Robinson are not relevant to any other capital defendant similarly situated.

Contrary to the MAR Court's findings, nothing about the Amended RJA is arbitrary or a violation of the constitutional standards required by the Eighth Amendment to the United States Constitution. The amendments to the RJA allow a defendant who can show racial discrimination in his case relief in the form of a life sentence instead of death. If a defendant cannot show racial discrimination in his case, then he remains on death row. This is far from arbitrary, it is logical and fair, and is the exact opposite of an arbitrary system.

The amended RJA is consistent with efforts by the State to prevent the death penalty from being handed out in an arbitrary manner and meets North Carolina's obligation to prevent the death penalty from being "infected by impermissible considerations such as race." Walker v. Georgia, 555 U.S. 979, 985, 172 L. Ed. 2d 344, 347 (2008). Nothing could be more arbitrary than affording relief under the RJA

statutes based upon facts in cases unrelated to Defendants' cases. The MAR Court's conclusion to the contrary is erroneous, and this Court should grant review to correct the wrong assessment that North Carolina's death penalty system violates the Eighth Amendment to the United States Constitution.

B. The MAR Court Erred as a Matter of Law in Interpreting the RJA to Find That Discrimination Need Not Be Shown in A Defendant's Own Case in Order for Him to Gain Relief under the RJA.

By the interpretation of the RJA in this Order, a defendant convicted of first degree murder and sentenced to death can obtain relief in post conviction review under the RJA even if the capital defendant has never personally experienced any racial discrimination in his own case at any stage of the criminal justice process. This is an absurd result and cannot be a correct interpretation of the RJA. This Court should grant review to correct this misinterpretation and prevent manifest injustice from this absurd result.

1. The Statutory Interpretation of the Plain Language of the RJA Statute Establishes that Racial Discrimination Must Be Shown in A Defendant's Own Case.

The RJA Order incorrectly determined that a defendant need not show discrimination in his own case in order to obtain relief under the RJA. (RJA Order, p 17)(finding "proof in defendant's individual trial" not requirement to succeed under Amended RJA). This ruling conflicts with the expressed intent of the Legislature in

the first provision of the Amended RJA, Article 101, which states that "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C.G.S. § 15A-2010. The plain language of this statute establishes that racial discrimination must be shown in the decisions involving the imposition of a defendant's particular judgment of death.

The plain reading of N.C.G.S. § 15A-2010, which refers to a singular sentence of death and singular judgment sought or imposed, indicates that racial discrimination must be shown in the particular defendant's case. Additionally, reading various provisions in the RJA as a whole supports the conclusion that a defendant must establish racial discrimination in his own case in order to be afforded relief under the Amended RJA. For example, N.C.G.S. § 15A-2011 confirms that discrimination must be shown in the defendant's particular case by allowing "evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death." N.C.G.S. § 15A-2011(c). This reference is to a singular, not plural, trial of a particular defendant. Further, the Amended RJA limits the inquiry to showing that race was a significant factor in seeking or imposing the death sentence "at the time the death sentence was sought or imposed." N.C.G.S. § 15A-2011(c). This reference to a singular death sentence ties

the relevant evidence to be reviewed to the time of a particular defendant's prosecution for capital murder.

The RJA Order errs as a matter of law in concluding that a defendant need not show discrimination in his own case. (RJA Order, p 17). By this interpretation, a defendant convicted of first degree murder and sentenced to death could obtain relief in post conviction review under the RJA even if the capital defendant has never personally experienced any racial discrimination in his own case at any stage of the criminal justice process. This interpretation is an absurd result the Legislature could not have intended. In re Brake, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997) ("[t]his Court presumes that the legislature acted in accordance with reason and common sense, and that it did not intend an absurd result." (citing King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970))); State v. Spencer, 276 N.C. 535, 547, 173 S.E.2d 765, 773 (1970)(courts must interpret the language of a statute "so as to avoid an absurd consequence.").

This Court should grant review in order to clarify that the RJA requires that discrimination be shown in a particular defendant's case in order to be entitled to relief.

2. The MAR Court Erred In Interpreting Legislative Intent for the RJA

The MAR Court erred in interpreting legislative intent by incorrectly analyzing

United States Supreme Court law. The RJA Order claims that the North Carolina General Assembly took up the "explicit invitation" given them in McCleskey v. Kemp, 481 U.S. 279, 319, 95 L. Ed. 2d 262, 296 (1987), and passed a statute allowing the use of statistics to obtain relief under the Amended RJA without requiring the proof of intentional discrimination. (RJA Order, pp 20-21). This was a blatant misinterpretation of McCleskey.

The United States Supreme Court in McCleskey stated that legislatures are "better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'" McCleskey v. Kemp, 481 U.S. at 319, 95 L. Ed. 2d at 296 (emphasis added). The invitation in McCleskey was for legislatures, not the courts, to consider any appropriate studies and take appropriate legislative action on punishments. Had the North Carolina General Assembly been intent on following McCleskey's directive, it would have ordered its own statistical study.

The correct interpretation of the Amended RJA allows for the admission of statistics to potentially guide the Court's opinion, but like in McCleskey, the Amended RJA still requires defendants to establish discrimination in their own cases. This Court should grant review of this case to reaffirm that statistics alone are never sufficient to establish racial discrimination under the Amended RJA.

Moreover, the MAR Court erred in interpreting legislative intent for the RJA by comparing language from drafts of the RJA with language actually passed by the Legislature in the RJA. (RJA Order, pp 21-22)(comparing ratified SB 9 which was vetoed by Governor with Amended RJA which became law on 2 July 2012). Well-established law advises that courts may not interpret statutory meaning based upon the failure of the legislature to enact the statute with specific language. North Carolina Dept. of Corr. v. North Carolina Med. Bd., 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) ("That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite."). "In determining legislative intent, the appellate court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation." Id.; see also, Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc., 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991). Yet in its interpretation of the Amended RJA, the MAR Court here incorrectly and improperly considered an earlier version of the bill that never became law. (RJA Order, pp 21-22). This Court should grant review to correct the misapprehension of this Court's clearly established law regarding statutory interpretation.

C. The MAR Court Erred As a Matter of Law In Interpreting the Amended RJA to Find that Intentional Discrimination Need Not Be Shown to Prove that Race Was a Significant Factor In Decisions To Exercise Peremptory Challenges During Jury Selection And that Statistical Disparity Alone Is Sufficient to Establish a Claim Under the Amended RJA.

Further, the MAR Court erred as a matter of law in finding Defendants need not establish intentional discrimination in proving that "race was a significant factor in decisions to exercise peremptory challenges during jury selection" in accord with N.C.G.S. § 15A-2011(d). (RJA Order, p 19 (finding intentional discrimination need not be proven to succeed on claim under Amended RJA)). Instead, the MAR Court found that proof of statistical racial disparity in jury selection alone suffices to establish a claim under the Amended RJA and that the State need not establish that any action by the State was purposeful. (RJA Order, p 24)(finding that the RJA focus is defined as whether "race has been a significant factor over time and place such that prosecutors' strike decisions have had a disparate impact on African-American venire members." (emphasis added)). This interpretation of the Amended RJA is erroneous as a matter of law, and any facts the Court found pursuant to this misapprehension of the law must be set aside.

1. The MAR Court Erroneously Concluded that Defendants Need Not Show Intentional Discrimination In the Exercise of Peremptory Challenges In Order To Establish that Race Was a Significant Factor in the Decisions to Exercise Peremptory Challenges.

The law is clear that in order to show race was a significant factor in decisions to exercise peremptory challenges during jury selection a defendant must show purposeful discrimination. It is settled in North Carolina that "purposeful discrimination" in a jury strike is established by showing that race was a "significant factor" in the decision to strike. State v. Waring, 364 N.C. 443, 491, 701 S.E.2d 615, 645 (2010).

> After considering all the relevant circumstances, we conclude that the State's proffered race-netural reasons were not pretextual and that race was not a significant factor in the strike of [the prospective juror]. Because there was no evidence of purposeful discrimination, the trial court was not clearly erroneous in denying defendant's Batson claim.

Id. Other North Carolina cases support this analysis. See e.g., State v. Best, 342 N.C. 502, 513, 467 S.E.2d 45, 52, cert. denied, 519 U.S. 878, 136 L. Ed. 2d 139 (1996) ("The court then held as to each challenge that the challenges were not racially motivated") ; State v. Thomas, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991)("In light of all the relevant circumstances, we affirm the trial court's ruling that no purposeful racial discrimination occurred in the peremptory challenges of black jurors in this case."); State v. Golphin, 352 N.C. 364, 433, 533 S.E.2d 168, 215

(2000)("Given the foregoing, we are convinced the State did not discriminate on the basis of race in exercising its peremptory challenges against Holder and Murray.")

Similarly, under the Amended RJA itself, to show that "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection," pursuant to N.C.G.S. § 15A-2011(d), the defendant must necessarily show purposeful discrimination, which would involve intent and motive. N.C.G.S. § 15A-2011(d)(emphasis added). The above-noted specific language regarding the exercise of peremptory challenges which directs the court's attention to the decisions made to challenge a particular juror is identical to this Court's evaluation in Batson claims on direct review, requiring proof of purposeful discrimination.

Batson and its progeny do not guarantee proportional representation on the jury by race. See Batson, 476 U.S. at 86 n.6, 90 L. Ed. 2d at 80 n.6 ("It would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society."). Rather, those decisions protect against purposeful discrimination in the jury selection process. Thus, a prosecutor could peremptorily challenge all members of a particular race or a particular gender without violating any constitutional guarantees, so long as the challenges were not impermissibly motivated. Inversely, even one racially discriminatory strike is a constitutional violation even if the number of strikes are equally distributed by race.

Snyder v. Louisiana, 552 U.S. 472, 478, 170 L. Ed. 2d 175, 181 (2008)("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." (citations omitted)). The Amended RJA, by its similar language of requiring the defendant to prove that decisions to exercise peremptory challenges were based upon race as a significant factor, anticipates the same. N.C.G.S. § 15A-2011(d).

Furthermore the MAR Court has erred in erroneously interpreting the Amended RJA to allow the burden to be shifted from the defendant to the State to dispel any inference of discrimination established through the use of statistics without proving intentional discrimination. (See RJA Order, p 19 (concluding that State had burden to "actually rebut the defendant's case or to dispel the inference of discrimination, not merely advance a non-discriminatory explanation." (emphasis added)). This interpretation is a radical departure from the clearly stated burden defined in the Amended RJA and from prior well-established criminal law governing the review of alleged racial discrimination in the jury selection context.

The Amended RJA makes clear that the burden of proving that race was a significant factor is that of the defendant's. N.C.G.S. § 15A-2011(c). There is no provision in the Amended RJA which shifts that burden to the State to disprove or "dispel" an inference of discrimination. Instead, the Amended RJA allows that the

State may offer evidence in rebuttal of the defendant's evidentiary showing. N.C.G.S. § 15A-2011(c). There is not a requirement that the State must offer evidence or that the State is required to come forward with any evidence to counter the defendant's production. That is so because ultimately the defendant has the burden of production and the burden of persuasion.

This is consistent with the law governing review of alleged racial discrimination in jury selection in criminal cases. See Batson, 476 U.S. at 94, 90 L. Ed. 2d at 86 ("The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion."); accord, Hernandez v. New York, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991); see also, State v. Wiggins, 334 N.C. 18, 31, 431 S.E.2d 755, 763 (1993). A proper interpretation of the Amended RJA is that, just as in Batson challenges, the defendant always has the ultimate burden of persuasion and that it is not the State's burden to "dispel" an inference of discrimination. Rather, it is the defendant's burden to establish intentional racial discrimination, regardless of any evidence which the State may, or may not, produce.

Because N.C.G.S. § 15A-2011(d) specifically uses language identical to that used in a Batson inquiry, the proper interpretation of the meaning of statistical evidence to be evaluated in an RJA claim should be the same as the use of statistics

in Batson claims. Accordingly, the MAR Court has erred in interpreting the Amended RJA to find that Defendants need not show evidence of actual racial discrimination in jury selection and, further, has erred in finding that the State has the burden to "dispel" the mere inference of racial discrimination. No amount of confidence can be placed in the MAR Court's findings of fact in this case owing to the misinterpretation of the Amended RJA and general criminal law regarding proper burdens of proof in claims of racial discrimination in the jury selection context. This Court should accept this case for review and remand the case for a proper consideration of the facts with the correct standards and burdens of proof established.

2. The MAR Court Erroneously Concluded that Statistical Disparity Alone Was Sufficient to Establish that Race Was a Significant Factor in Decisions to Exercise Peremptory Challenges.

Contrary to the clear language of the Amended RJA and contrary to well-established pre-existing law for jury selection review in general, the MAR Court erroneously concluded that numerical disparities in jury selection were, by themselves, sufficient to establish racial discrimination in jury selection. (RJA Order, pp 200-01, ¶ 390-392). From the numbers alone the MAR Court found intentional discrimination not only by the prosecutors in the three capital cases for which the State seeks review but also by all prosecutors statewide from 1990 to 2010. (Id. at

¶ 392). Not only is this ruling erroneous, but also it stands alone in concluding that disparate impact of jury strikes in itself is sufficient to prove discriminatory intent.

Under N.C.G.S. § 15A-2011(d), a defendant is required to show that race was a significant factor in decisions to exercise peremptory challenges during jury selection, not in the results of disparities in jury strikes. Under this portion of the RJA, the key word is decisions, not results. So disproportionate strike rates in themselves cannot be sufficient to establish relief. Relief is to be awarded upon the determination that racial discrimination existed in the individual peremptory challenges, not from the results of strike patterns across a wide spectrum. Consequently, under the Amended RJA, it is not the numerical totals of strikes which is determinative, but rather it is the actual basis of the decision to exercise the peremptory strike which establishes the claim.

No other court has ever stated that numerical disparities alone are sufficient to establish that race was a significant factor in the exercise of peremptory challenges. See Hernandez, 500 U.S. at 359, 114 L. Ed. 2d at 405-06 (peremptory challenges which result in disproportionate impacts are not a violation of the Equal Protection Clause without proof of discriminatory intent or purpose); McCleskey, 481 U.S. at 292-93, 95 L. Ed. 2d at 278-79 (disparate impact does not necessarily equal purposeful discrimination in capital cases); Miller-El (I) v. Cockrell, 537 U.S. 322,

342-47, 154 L. Ed. 2d 931, 953-56 (2003) (statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but other factors must also be considered); State v. Porter, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990) ("alleged disparate treatment of prospective jurors would not be dispositive necessarily."); see also, State v. Wiggins, 159 N.C. App. 252, 261-63, 584 S.E.2d 303, 311-15 (2003). Instead, every court examining the issue has required proof of purposeful discrimination to show that race was a significant factor in decisions to exercise peremptory challenges in jury selection.

Nothing in the Amended RJA requires otherwise. In fact, the Amended RJA makes clear that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor" under the RJA statutes. N.C.G.S. § 15A-2011(e). Notwithstanding this provision, the MAR Court concluded that the statistical evidence alone showed prosecutors had intentionally discriminated in jury selection statewide, in Cumberland County, and in Defendants' cases. (RJA Order, pp 200-01, ¶ 392). This conclusion is contrary to the clear limits placed on the use of statistical evidence under the Amended RJA and contrary to well-established law of our appellate courts in reviewing jury selection.

Even beyond the clarification presented in the Amended RJA, the MAR Court

need only have looked to our vast body of law governing evaluation of jury selection in the criminal context for direction. Our appellate courts have already analyzed statistics in the criminal context, specifically in the jury selection context. Statistical disparity is already admissible as a factor in determining whether racial discrimination motivated decisions for peremptory strikes.

> [T]his Court has on a number of occasions utilized a numerical or statistical analysis in determining whether a prima facie case of racial discrimination in jury selection exists. See State v. Ross, 338 N.C. 280, 285, 449 S.E.2d 556, 561-62 (1994) (minority acceptance rate of 66% failed to establish prima facie case of discrimination); State v. Allen, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988) (minority acceptance rate of 41% failed to establish prima facie case of discrimination), sentence vacated on other grounds, 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990); State v. Abbott, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369 (1987) (acceptance rate of 40% failed to establish prima facie case of discrimination).

State v. Fletcher, 348 N.C. 292, 320, 500 S.E.2d 668, 684 (1998); see also, Wiggins, 159 N.C. App. at 261-63, 584 S.E.2d at 311-15; Miller-El (I), 537 U.S. at 342-47, 154 L. Ed. 2d at 953-56 (noting that statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but reaffirming that other factors must be considered including the nature of the questions asked during jury selection, state jury-selection practices, and historical evidence).

In North Carolina purposeful discrimination in jury selection is established by showing that race was a "significant factor" in the decision to exercise a peremptory

challenge. Waring, 364 N.C. at 491, 701 S.E.2d at 645. In the criminal jury selection context, disparity of strike rates alone is not sufficient to establish that race was a significant factor in the exercise of peremptory challenges. Nothing about the Amended RJA changes this law and the analysis which should be conducted in evaluating jury selection. In fact, the Amended RJA has reconfirmed this standard following the erroneous interpretation that this same MAR Court made in its interpretation of the appropriate use of statistics in the original RJA in Robinson. (See Robinson, PWC, No. 411A94-5).

It is clear that the Amended RJA does not allow evidence of mere numbers to be sufficient to determine that racial discrimination existed. Rather, consistent with well-established case law, the Amended RJA requires proof of purposeful discrimination in the decisions made to exercise peremptory challenges in Defendants' cases. Consequently, contrary to the RJA Order, a defendant must show more than mere disparity in jury selection to establish that the decision to exercise a peremptory strike was based upon purposeful discrimination.

This Court should grant review in order to clarify that numerical disparities in jury strikes alone are not sufficient to establish that race was a significant factor in the exercise of peremptory challenges in any jury selection analysis, including that under the Amended RJA.

3. The MAR Court's attempt to Construct a Framework For The Use of Statistics in RJA Cases Erroneously Relied Upon Civil, Federal Employment Law.

In its attempt to construct a framework for the use of statistics in RJA cases, the MAR Court erroneously relied upon the law governing federal employment discrimination cases. (RJA Order, p 22). Specifically, the MAR Court erroneously concluded that in the Amended RJA the "General Assembly adopted a well-established model of proof used in civil rights litigation [employment discrimination claims]" where no intentional discrimination need be proven. (RJA Order, p 22). From this finding, the MAR Court then applied the Equal Opportunity Employment Commission's [hereinafter "EEOC"] "four-fifths" rule applicable to Title VII cases. The MAR Court further relied upon what are commonly referred to as "mixed motive" federal employment cases. The application of these civil laws is not appropriate in the criminal context, and this Court should grant review to define the appropriate use of statistics in reviewing claims under the Amended RJA.

The Amended RJA could not be more clear when it clarified that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor" under the RJA statutes. N.C.G.S. § 15A-2011(e)(emphasis added). While statistical evidence is admissible under the Amended RJA, see N.C.G.S. § 15A-2011(d), nothing in the

Amended RJA alters the legal weight and applicability of statistics to capital cases as has been previously determined by our appellate courts. This Court's well-established law provides ample guidance in the evaluation of whether prosecutors have engaged in racial discrimination during jury selection.

There is already a body of law in the jury selection context which allows for statistical evidence to be viewed in context with other factors. An analysis based on federal employment law, which allows for statistical significance weighted beyond what this Court has already allowed in the context of criminal jury selection, is an unreasonable interpretation of the Amended RJA. The four-fifths rule, or any other regulation of the EEOC, has no basis for application in a criminal capital case, and this Court should not create new law authorizing its use in RJA claims. The Amended RJA did not fundamentally alter the existing legal framework of evaluating jury selection in our criminal jurisprudence and it certainly does not rely upon a civil law framework for evaluation of discrimination claims. Had the Legislature meant to do so, it surely would have stated so in the statute.

Moreover, statistical disparate impact analysis has never been sufficient to establish racial discrimination in either the jury selection or the Equal Protection context. See McCleskey, 481 U.S. at 292-93, 95 L. Ed. 2d at 278-79 (disparate impact does not necessarily equal purposeful discrimination in capital cases);

Miller-El (I), 537 U.S. at 342-47, 154 L. Ed. 2d at 953-56 (statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but other factors must also be considered); Porter, 326 N.C. at 501, 391 S.E.2d at 152 ("alleged disparate treatment of prospective jurors would not be dispositive necessarily.").

Likewise, the RJA Order unreasonably intertwined civil law as applied to "mixed motive" disparate treatment cases. (RJA Order, pp 27, 31, 209). The MAR Court admitted that in its review of the State's past peremptory challenges it would "often focus on a single reason among several provided by the State" in determining whether race was a significant factor in the State's decision to exercise its peremptory challenges. (RJA Order, p 27). The RJA Order is replete with this type of analysis, taking a single explanation from many given at jury selection or in prosecutor affidavits, out of context, and determining that racial discrimination motivated the State's strike. The MAR Court has pitted isolated factors given as the rationale of individual strikes against a similar factor identified in a passed juror. This Court has never allowed this type of analysis without requiring more in-depth evaluation of the entirety of the jury voir dire, including all the many reasons a prosecutor might have chosen to peremptorily challenge a prospective juror. See State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152; State v. Kandies, 342 N.C. 419, 435-36, 467 S.E.2d 67,

75-76, cert. denied, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). For this reason, the MAR Court's use of this analysis, or any other "mixed motive" analysis grafted from civil employment law litigation is improper as it is contrary to well-established law of this Court controlling the review of peremptory challenges for racial discrimination.

Nothing about the Amended RJA establishes the application of "mixed motive," or EEOC rules, in reviewing a claim of racial discrimination in capital cases. This Court should grant review to clarify the appropriate standard and burden of proof under which to evaluate RJA claims.

D. The MAR Court Erred As a Matter of Law In Considering Statistical And Other Evidence Beyond That Delineated In the Amended RJA As Relevant

The Amended RJA specifically limits the relevant statistical evidence to that derived from the county and/or prosecutorial district and the relevant time period to a span of ten years prior to the commission of the offense to two years after the imposition of the death sentence. N.C.G.S. § 15A-2011(a) & (d). In direct contravention of the limitation on the admissible and relevant evidence, the MAR Court considered evidence well beyond these parameters. (See RJA Order, p 14 (concluding that "litigants proceeding under the amended RJA may present evidence derived from within the statutory claim's parameters, as well as corroborative

evidence outside the time and geographic parameters.")) (see also, RJA Order, pp 136-201 (Court's findings regarding evidence which was beyond time and geographic limitations of Amended RJA).

As a result, the MAR Court's conclusion is impermissibly tainted by consideration of inadmissible and irrelevant evidence. This Court should accept this case for review in order to remand the case for a determination under the proper consideration of statistical evidence as defined by the statute.

The relevant time period for evidence supporting a claim of discrimination under the Amended RJA is "the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence." N.C.G.S. § 15A-2011(a).

Admissible statistical evidence is specifically limited to that derived from the county or prosecutorial district where defendant was sentenced to death. Under N.C.G.S. § 15A-2011(d):

> Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the **county or prosecutorial district** at the time the death sentence was sought or imposed may include **statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death**...

N.C.G.S. § 15A-2011(d)(emphasis added).

Despite the RJA's plain directive, the MAR Court accepted and considered

statistical evidence derived from a statewide statistical study conducted by Michigan State University (MSU) which included statewide and Judicial Division-wide statistics. The MAR Court erroneously concluded that the clear language of the statute limiting the relevant statutory evidence to that derived only from the county and prosecutorial district was no limitation at all, finding instead that other evidence outside the statute's geographic and time parameters was admissible and properly considered.[5] (RJA Order, pp 13-15 (finding evidence outside geographic and time parameters to be "helpful to [the MAR Court's] determination").

The MAR Court's reliance on inadmissible and irrelevant evidence was an abuse of discretion and has impacted the entirety of the ruling of the court. It is impossible to know to what extent this inadmissible and irrelevant information affected the MAR Court's decisions. It is impossible to disentangle the MAR Court's reliance upon other irrelevant and impermissible evidence which the amendments specifically excluded. As a consequence, this Court should accept review of this case and remand it for a determination based upon properly admitted and considered evidence as proscribed by the Amended RJA.

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[5] Notably, the MAR Court also relied upon statistical studies outside North Carolina, including those from Pennsylvania and Texas. (RJA Order, p 179 (finding statistical studies from other states lent credibility to MSU study)).

III. The MAR Court's Incorrect Interpretation of RJA Leads To A Practically Unrealistic and Unachievable Standard Of Constitutionally Sound Jury Selection in Capital Cases.

Should this MAR Court's interpretation of the Amended RJA be allowed to stand, the results will be an unrealistic and unachievable standard of constitutionally sound jury selection in capital cases going forward. This the Legislature did not intend with the passage of the Amended RJA, and this Court should grant review to correct this erroneous interpretation of the Amended RJA.

A. If Defendants Are Not Required to Prove Discrimination In Their Own Individual Cases and If a Successful RJA Claim Can Be Based Only Upon Statistics, Prosecutors Will Be Forced to Violate Constitutional Law in Prosecutions of Capital Cases.

It is a constitutional violation to exercise peremptory challenges on the basis of race. Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69; State v. Glenn, 333 N.C. 296, 301, 425 S.E.2d 688, 692 (1993); State v. Nicholson, 355 N.C. 1, 559 S.E.2d 109 (2002); see also, Powers v. Ohio, 499 U.S. 400, 113 L. Ed. 2d 411 (1991). If this Court agrees that a defendant need not show discrimination in his own case to establish an RJA violation, then prosecutors will be forced to engage in unconstitutional considerations in capital prosecutions to comply with the RJA statutes. This incorrect interpretation of the RJA statutes will require prosecutors to actually consider race in jury selection by coordinating with one another to reach

proportional statistical racial balance in all their cases. Stated differently, if statistics alone are sufficient to prove a RJA claim, then prosecutors will have to consider race in ensuring that the jury selection of each capital case reflects a statistical balance in the racial composition of jurors struck in each case as it is tried and simultaneously in each capital case tried throughout the County and Prosecutorial District.[6] This is an impossible, unconstitutional, and absurd result that the Legislature could not have intended. State v. Pool, 74 N.C. 402, 406 (1876)("Whenever an act of the Legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts.").

B. If Defendants Are Not Required to Prove Discrimination In Their Own Individual Cases and If a Successful RJA Claim Can Be Based Only Upon Statistics Alone, Prosecutors Will Never Be Able to Prevent a Defendant from Creating an RJA Claim Based Upon a Defendant's Own Jury Strikes.

Prosecutors will also not be able to comply with a law that allows a successful RJA claim based purely on statistics if defense strike rates are considered in the equation of evaluating racial balances in jury selection. "It is an elementary rule in the construction of statutes that the court will not attribute to the Legislature the

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[6] Furthermore, the MAR Court's interpretation of the Amended RJA allows courts to consider statewide statistics, which will compound the problem by requiring prosecutors to coordinate with one another statewide to ensure statistical balance in the racial composition of jurors struck in each case tried across the State.

intention to punish the failure to do an impossible thing. 'No text imposing obligations is understood to demand impossible things.' Walker v. Railroad, 137 N.C. 163, Stone v. Railroad, 144 N.C. 220." Garrison v. Southern Ry. Co., 150 N.C. 575, 582, 64 S.E. 578, 580 (1909).

The RJA Order found that evidence regarding defense strikes could also form the basis of an RJA claim. (RJA Order, p 190 ¶ 358)(concluding that evidence of defense strikes "would be additional evidence that race is a significant factor in jury selection."). Thus the MAR Court ruled that the exercise of peremptory strikes by a capital defendant was sufficient to support a capital defendant's RJA claim. (Id.)(finding from statistical showing that defense attorneys "have discriminated in the decisions to exercise peremptory challenges in capital cases" statewide, judicial division-wide and in Cumberland County). If this is to be the proper interpretation of the Amended RJA, it will be impossible for prosecutors to ever comply to prevent racial discrimination because it will allow the defense to create its own RJA claim at the time of jury selection in a capital case, based upon the peremptory challenges the defense exercises. This is an absurd result which the Legislature could not have intended because it seeks to punish the failure of the prosecution to effectuate the impossible – to insulate cases from racial discrimination by the defense. This Court should grant review to correct the misinterpretation that statistics alone are sufficient

to establish a claim under the Amended RJA and that evidence of defense peremptory strikes are relevant or sufficient to establish an RJA claim.

IV. The MAR Court Made Numerous Erroneous Findings of Fact and Clear Errors of Law In Evaluating Whether Racial Discrimination Was A Significant Factor in Decisions to Exercise Peremptory Challenges During Jury Selection.

A. The MAR Court Erred As a Matter of Law In Re-Evaluating Jury Strikes Which Have Already Been Determined to Be Free of Racial Discrimination By Other Courts Reviewing Batson Challenges to These Strikes.

The MAR Court erroneously concluded that prosecutors intentionally discriminated in the exercise of peremptory challenges even where a Batson challenge had been made and rejected by the trial court in other cases. In so doing, the MAR Court has failed to afford deference to the trial courts reviewing those Batson challenges in the first instance, and has attempted to overrule the trial court's rulings which found no racial discrimination in the juror strikes. Additionally, the MAR Court has even attempted to overrule this Court's review of those Batson challenges on direct appeal. This is an erroneous finding of fact and error as a matter of law. It is an abuse of discretion which warrants this Court's review.

Well-established law advises deference to trial courts in reviewing Batson challenges. Batson v. Kentucky, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21; Hernandez, 500 U.S. at 364, 114 L. Ed. 2d at 408-09 ("In Batson, we explained that

the trial court's decision on the ultimate question of discriminatory intent represents a finding of the sort accorded great deference on appeal.") "Batson's treatment of intent to discriminate is a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases." Id. at 364, 114 L. Ed. 2d at 409. The Court noted finally that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." Id. at 366, 114 L. Ed. 2d at 410.

As noted above, this deference is owed because all agree that trial courts are in the best position to observe firsthand "reactions, hesitations, emotions, candor and honesty" of both the lawyers and prospective jurors. See e.g., State v. Smith, 328 N.C. 99, 127, 400 S.E.2d 712, 727-78 (1991); see also Batson,476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21 (noting that findings on the ultimate purpose for the exercise of peremptory strikes "largely will turn on evaluation of credibility," and as a result the "reviewing court ordinarily should give those findings great deference."). Moreover, the MAR Court was bound by these prior rulings and could not overrule them.

Even on direct appeal, reviewing courts defer to the trial court's ruling on a Batson objection and may overturn the ruling only if the reviewing court finds that the Batson ruling by the trial court was "clearly erroneous." Hernandez, 500 U.S. at 364-65, 369, 114 L. Ed. 2d at 409; State v. Robinson, 336 N.C. 78, 94, 443 S.E.2d

306, 313 (1994), cert. denied, 513 U.S. 1089, 130 L. Ed. 2d 650 (1995) ; State v. Spruill, 338 N.C. 612, 632-33, 452 S.E.2d 279, 289 (1994), cert. denied, 516 U.S. 834, 133 L. Ed. 2d 63 (1995). This Court in the regular course of reviewing Batson challenges on appeal, defers to the trial court's assessment. Smith, 328 N.C. at 127, 400 S.E.2d at 727-78.

Because this Court is bound to afford deference to trial courts on review of Batson challenges, the same is expected of a post conviction court reviewing the same strike decades later. Yet the MAR Court did not apply the same deference here to the review of the decisions to exercise peremptory challenges.

Instead, the MAR Court engaged in a re-assessment of jury strikes which were made and previously rejected by trial courts. (See e.g., RJA Order, pp 59-65, Golphin (John Murray); RJA Order, pp 65-66, Augustine (Mardelle Gore); RJA Order, p 67, Augustine (Ernestine Bryant, Mardelle Gore); RJA Order, p 113, Robinson (Lolita Page), Al-Bayyinah (Laverne Keys); RJA Order, p 114, Barnes, Blakeny & Chambers (Melody Hall), Cummings (Alfredia Brown), Harden (Kenneth Brown); RJA Order, p 117, Fowler (Pamela Collins); RJA Order, p 119, Richardson (Donnell Peoples), Larry (Tonya Reynolds); RJA Order, p 121, Fowler (Clarence Stewart); RJA Order, p 122, Davis (Wanda Jeter); RJA Order, p 124, Williams (Harry Smith); RJA Order, p 127, Williams (Mary Cheek); RJA Order, p 129, Bonnett (Ossie Brown); RJA

Order, p 131, Cummings (Alfredia Brown), Wooten (Janice Daniels); RJA Order, p 134, Maness (Alveria Bellamy, Sanica Maultsby); RJA Order, p 135, Wiley (Gail Mayes), Harden (Shannon Smith)).[7] Further, the MAR Court even engaged in a re-assessment of cases in which this Court had evaluated the Batson claim on direct appeal and determined that race was not a significant factor in the exercise of the peremptory strike. (See e.g., RJA Order, pp 59-65, Golphin (John Murray); RJA Order, p 67, Augustine (Ernestine Bryant); RJA Order, p 113, Robinson (Lolita Page); RJA Order, p 114, Barnes, Blakeny & Chambers (Melody Hall), Cummings (Alfredia Brown); RJA Order, p 124, Williams (Harry Smith); RJA Order, p 127, Williams (Mary Cheek); RJA Order, p 129, Bonnett (Ossie Brown); RJA Order, p 131, Cummings (Alfredia Brown); RJA Order, p 134, Maness (Sanica Maultsby); RJA Order, p 135, Harden (Shannon Smith)). This determination is in error as a matter of law.

The MAR Court acknowledged that it was re-evaluating jury strikes in cases where prior Superior Court Judges and even this Court had found no racial discrimination existed. (RJA Order, p 25). However, the MAR Court erroneously

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[7] In addition, the MAR Court listed juror Renita Lytle from State v. Sanders and juror Johnny Lewis from State v. Bowie in the RJA Order under "Exclusion based on Race or Racial Proxy," when, in fact, the prosecution kept those jurors in each case (Sanders JS T p 993; Bowie JS Tp 190)

concluded that the Amended RJA does not require proof of intentional discrimination and, as such, allowed the MAR Court to re-evaluate the same jury strikes previously determined to be free of racial discrimination under a "new and lower legal standard" applicable through the RJA statutes. (RJA Order, p 26). This is a clear error of law. As noted above, it is well settled in North Carolina that "purposeful discrimination" in a jury strike is established by showing that race was a "significant factor" in the decision to strike. State v. Waring, 364 N.C. at 491, 701 S.E.2d at 645. This identical language is used in the RJA statutes requiring defendants to establish that race was a "significant factor in decisions to exercise peremptory challenges during jury selection." N.C.G.S. § 15A-2011(d). There can be no doubt that in repeating this specific language the Legislature intended that defendants alleging racial discrimination under the RJA statutes would necessarily have to establish purposeful discrimination.

The MAR Court's re-evaluation of jury strikes which have already been found to be free of racial discrimination constitutes an overruling of other trial court's decisions on those same jury strikes. However, in this state, one Superior Court cannot overrule another. "The power of one judge of the superior court is equal to and coordinate with that of another." Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966).

> Accordingly, it is well established in our jurisprudence that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

State v. Woolridge, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003).

Rather, there must be a substantial change in circumstances before a second judge may justifiably reconsider an issue already resolved by another judge.

> [A] second judge may reconsider the order of the first judge "only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter."

Id. at 549-550, 592 S.E.2d at 194 (quoting, State v. Duvall, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981)).

Here there has been no such change in circumstance. The statistical evidence presented in the instant cases does not amount to a substantial change in circumstances. The statistics used to argue that race was a significant factor in decisions to exercise peremptory challenges were based upon the same transcript of the same jury strikes which have already been determined to be free of racial discrimination where a Batson challenge was raised and determined at the trial court level.

Moreover, it is axiomatic that the Superior Court cannot overrule this Court.

Here, however, the RJA Order engaged in a re-assessment of jury strikes which this Court has already determined to be not racially discriminatory, and concluded just the opposite. In so doing, the RJA Order attempted to overrule this Court's legal conclusions finding these jury strikes free of racial discrimination. So where this Court found no racial discrimination, the MAR Court has found evidence of racial discrimination to support Defendants' RJA claims. This is clearly erroneous.

The MAR Court's conclusions here and otherwise are in error as a matter of law and constitute an abuse of discretion. As such, the MAR Court's conclusions must be reversed.

B. The MAR Court Abused its Discretion In Excluding Testimony of Superior Court Judges And Prohibiting Admission of Direct Evidence that No Discrimination Occurred in Cumberland County Capital Cases.

As in Robinson, Defendants consistently objected to all questions inquiring of Superior Court Judges[8] who presided over capital cases tried in Cumberland County between 1990 and 2010, including the presiding judge at their trials, as to whether

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[8] In Robinson, the State sought to include testimony of all Superior Court Judges presiding over Cumberland County capital cases, including the Honorable Gregory Weeks, who presided over Robinson's RJA Motion and who entered the RJA Order, but Judge Weeks moved to quash his subpoena, alleging the subpoena was "unreasonable or oppressive." [See Motion to Quash, attached as State's Attachment 5 to Robinson PWC]. The matter of his subpoena was assigned to another Superior Court Judge who ultimately quashed Judge Weeks' subpoena. No other Superior Court Judges moved to quash the State's subpoena of them.

any racial discrimination had been observed during jury selection. The State argued that the Amended RJA clearly allowed the testimony of "judicial officials" and therefore the Superior Court Judges' testimony was admissible.[9] The MAR Court erroneously sustained Defendants' objections and refused to allow admission of such evidence. (HT pp 761-63; RJA Order, pp 97-112). Additionally, the State requested but was denied the opportunity to proffer live testimony of the Superior Court Judges. (HT pp 764-65)(State's Appx. 7). In the alternative, the State made a proffer of evidence in the form of transcribed testimony which was the same written proffer of evidence that the MAR Court had allowed in Robinson. (HT pp 765-66)(State's Appx. 7)(see also, State's Proffer of Evidence, attached as State's Appx. 8). After considering the State's written proffer of evidence, the MAR Court reaffirmed that the evidence would have been inadmissible, but found it would not have made a difference to the Court's determination. (RJA Order, p 108,¶ 159 (finding that Superior Court Judges' proffered testimony "even if considered by the Court, would

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[9] The State argued that, contrary to the MAR Court's previous determination in Robinson that Superior Court Judges could not testify, the Amended RJA specifically allowed the admission of testimony of "judicial officials" and that "it would be a mistake" to exclude judges' testimony since the evidence was "clearly admissible[.]" (HT p 750)[references herein to "HT p _" are to the official transcript of the RJA evidentiary hearing in Defendants' cases, attached hereto as State's Appx. 7)(see also N.C.G.S. § 15A-2011(d)). In response, the MAR Court warned counsel of possible Rule 12 sanctions for failure to "yield gracefully to rulings of the court and avoid detrimental remarks both in court and out of court." (Id.)

not have changed the result in this case.")). Both findings are erroneous.

The MAR Court's decision to exclude this testimony was an abuse of discretion. An abuse of discretion "occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." State v. Moore, 152 N.C. App. 156, 161, 566 S.E.2d 713, 716 (2002)(quotation marks omitted). "'When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion.'" State v. Shannon, 182 N.C. App. 350, 357, 642 S.E.2d 516, 522 (2007)(quoting Gailey v. Triangle Billiards & Blues Club, Inc., 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006), disc. rev. denied, 361 N.C. 426, 648 S.E.2d 213 (2007); see also, State v. Cornell, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972)("[W]here rulings are made under a misapprehension of the law, the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and applicable law may require.").

The MAR Court misapprehended the law regarding the admissibility of testimony of Superior Court Judges. Nothing in the Amended RJA prevents the State from calling witnesses to rebut the defendant's case. In fact, the Amended RJA wholly supports and specifically allows the use of such evidence. N.C.G.S. § 15A-2011(d)(evidence admissible at RJA hearing may include, but is not limited to "sworn

testimony of attorneys, prosecutors, law enforcement officers, judicial officials, jurors, or others involved in the criminal justice system.")(emphasis added).

The issue to be decided was whether in this case the "judgment....was sought or obtained on the basis of race." N.C.G.S. § 15A-2010. Because the issue to be decided was whether discrimination existed in Defendants' cases, and because the Amended RJA specifically allows sworn testimony of "judicial officials" as relevant to this issue, the State should have been allowed to offer testimony of the Superior Court Judge presiding at each of their cases, at the very least. Failure to do so was an abuse of discretion which has not been cured by the Court's after-the-fact consideration of the State's proffer of evidence.

In the written proffer of evidence, prosecutors asked Superior Court Judges who presided over Defendants' cases relevant questions regarding jury selection in these specific cases, which was the very crux of the issue to be decided at this RJA hearing, which was whether race was a significant factor in the decisions to exercise peremptory challenges in Defendants' cases. (See State's Appx. 8). This testimony, which the MAR Court has concluded would not have made a difference to its determination, would have established through direct evidence that no racial discrimination occurred during the jury selection in these Defendants' cases. The exclusion of this evidence was an abuse of discretion in clear contradiction to the

Amended RJA provision which allows "judicial officials" to testify at RJA hearings. N.C.G.S. § 15A-2011(d). This Court should accept review to correct this erroneous interpretation of the clear statutory authority for allowing Superior Court Judges to testify and remand for a hearing for consideration of the claims after a full evidentiary hearing has been allowed.

1. The MAR Court Abused Its Discretion In Failing to Allow Superior Court Judges To Testify Because The Law of this Court Establishes That Trial Judges Are in the Best Position to Determine If Racial Discrimination Has Occurred During Jury Selection.

As at the Robinson hearing, the MAR Court not only erroneously restricted the State's production of evidence, but also engaged in a re-evaluation of the jury selection conducted in Defendants' cases (as well as in many other capital cases) without benefit of those witnesses in the best vantage point to evaluate whether any racial discrimination occurred. This was a misapprehension of the law which constitutes an abuse of discretion.

It is well established that the presiding judge is in the best position to determine if racial discrimination occurs during the selection of a jury. Consistent with United States Supreme Court case law, this Court has repeatedly emphasized that deference must be shown to the trial court and that reversal of the trial court on a Batson ruling requires the appellate court to find that the ruling was clearly erroneous. "[T]he trial

court's decision as to whether a prosecutor had a discriminatory intent is to be given great deference and will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." State v. Lawrence, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000); see e.g., State v. Spruill, 338 N.C. 612, 632-33, 452 S.E.2d 279, 289 (1994), cert. denied, 516 U.S. 834, 133 L. Ed. 2d 63 (1995); see also, State v. Jackson, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988), cert. denied, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989)(this Court might not have reached same result as trial court but "we must [give] deference to its findings"); State v. Best, 342 N.C. 502, 513, 467 S.E.2d 45, 52 (trial "court held as to each [Batson] challenge that the challenges were not racially motivated. Giving this finding of fact great deference, as we are required to do, we cannot hold it was error for the court to rule as it did"), cert. denied, 519 U.S. 878, 136 L. Ed. 2d 139 (1996); State v. Floyd, 343 N.C. 101, 104, 486 S.E.2d 46, 48 ("[w]hether the prosecutor intended to discriminate against the members of a race is a question of fact, the trial court's ruling on which must be accorded great deference by a reviewing court"), cert. denied, 519 U.S. 896, 136 L. Ed. 2d 170 (1996).

As this Court said in State v. Smith:

> The ability of the trial judge to observe firsthand the reactions, hesitations, emotions, candor, and honesty of the lawyers and veniremen during voir dire questioning is crucial to the ultimate determination whether the district attorney has discriminated.

328 N.C. 99, 125-27, 400 S.E.2d 713, 727 (1991)(citation omitted).

The United States Supreme Court has similarly noted the trial court's exclusive province to review the best evidence in evaluating a prosecutor's state of mind in exercising a peremptory strike. Batson v. Kentucky, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21 (reviewing courts should give deference since findings largely turn on evaluation of credibility in challenges to jury strikes); Hernandez v. New York, 500 U.S. at 365, 114 L. Ed. 2d at 409 (trial court has exclusive province to evaluate credibility and demeanor of prosecutor in challenge to jury strikes); Snyder v. Louisiana, 552 U.S. 472, 479, 170 L. Ed. 2d 175, 182 (2008) (trial judge is given deference because cold transcript cannot show all relevant factors for consideration).

> The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying Batson. See Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

Rice v. Collins, 546 U.S. 333, 343-344, 163 L. Ed. 2d 824, 835 (2006) (J. BREYER, concurring).

In barring judicial officials' testimony, in clear contravention of the statute, the MAR Court prohibited testimony from the one source best situated to detect and

discover any discrimination by the State during jury selection - the presiding judge. It is not enough that the MAR Court considered the proffer after-the-fact. This evidence was clearly admissible under the Amended RJA statute and should have been allowed to be presented fully in open court during this proceeding. See N.C.G.S. § 15A-2011(d). Being that such a decision is directly contrary to well-established law from this Court and the United States Supreme Court, it was an abuse of discretion and warrants this Court's review. This Court should consider remanding this case for a full hearing wherein the State is afforded an opportunity to actually present the evidence admissible under the statute.

2. The MAR Court Abused Its Discretion in Failing to Allow Superior Court Judges To Testify Because the Law Does Not Restrict Accepting Testimony From the One Source In the Best Position to Evaluate Whether Racial Discrimination Occurred During Jury Selection.

The Legislature has specifically allowed for the testimony of "judicial officials" which would necessarily include Superior Court Judges who presided during capital cases. Nonetheless, the MAR Court held otherwise, and in so doing, has misapprehended the law of this State in concluding that Superior Court Judges were restricted from testifying about jury selection in capital cases. In support of the ruling barring this direct evidence, the MAR Court cited several cases from other jurisdictions and two North Carolina cases which were not controlling or supportive

of its decision. See State v. Simpson, 314 N.C. 359, 334 S.E.2d 53 (1985), and Dalenko v. Peden Gen. Contractors. Inc. 197 N.C. App. 115, 676 S.E.2d 625 (2009).[10]

In Simpson, this Court acknowledged that it is generally accepted that judges are competent to testify as to proceedings held before them. However, where concerns exist that a judge's testimony might be accorded more weight before the jury or where the judge may be required to testify as to his or her mental processes in rulings, allowing judicial testimony may not be appropriate.

> It is generally accepted that a judge is competent to testify as to some aspects of a proceeding previously held before him. Hale v. Wyatt, 78 N.H. 214, 98 A. 379 (1916); People v. Bevilacqua, 12 Misc. 2d 558, 170 N.Y.S. 2d 423, rev'd on other grounds, 5 N.Y. 2d 867, 155 N.E. 2d 865, 182 N.Y.S. 2d 18 (1958). However, the propriety of calling a judge as a witness in cases not on trial before him has been questioned by many courts. Some courts have taken the position that allowing judges to testify would be prejudicial to the rights of the opposing party due to the fact that the jury would likely accord greater weight to the testimony of a judge than an ordinary witness. E.g., Merritt v. Reserve Insurance

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[10] Dalenko is completely irrelevant to the present case. In Dalenko a party moved to recuse the presiding judge as he might become a fact witness "because there are issues of fact regarding the prior arbitration proceedings that were before you in September of 2003 that need to be decided independently of whatever interest you may have of preserving your prior rulings." Dalenko, 197 N.C. App. at 123, 676 S.E.2d at 630-31. Here the only possible argument to be made about prior materials of fact would have been in regard to prior Batson challenges ruled upon at trial. In that regard, the transcript would certainly suffice, and, in some cases, this Court's ultimate review of that issue would be sufficient to establish whether race was a significant factor in the exercise of a peremptory challenge. There are many other juror strikes that the MAR court considered besides those which were met with Batson challenges at trial.

> Company, 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973); Commonwealth v. Connolly, 217 Pa. Super. 201, 269 A. 2d 390 (1970). Other courts have viewed with trepidation the possibility that judges might be subjected to questioning as to the mental processes they employed to reach a particular decision. E.g., State v. Donovan, 129 N.J.L. 478, 30 A. 2d 421 (1943); State ex rel. Carroll v. Junker, 79 Wash. 2d 12, 482 P. 2d 775 (1971). Because of these problems, it has been held that a judge should not be called as a witness if the rights of the party can be otherwise protected. E.g., Woodward v. City of Waterbury, 113 Conn. 457, 155 A. 825 (1931); State v. Donovan, 129 N.J.L. 478, 30 A. 2d 421.

Id. at 372-373, 334 S.E.2d at 61-62.

None of the possible concerns mentioned in Simpson apply to the present case. The concern that "the jury would likely accord greater weight to the testimony of a judge than an ordinary witness" does not apply, as there was no jury to determine this issue. The concern that "judges might be subjected to questioning as to the mental processes they employed to reach a particular decision" does not apply to testimony from Judges where no Batson challenge was ruled upon at trial. And in that event, the transcript sufficiently records the Judge's findings. Additionally, in such circumstance, this Court also has the opportunity to review any Batson challenges made at trial, and this Court's findings would certainly suffice to establish that race was not a significant factor in the exercise of peremptory challenges.

The RJA Order also erred in finding that the State failed to justify calling Superior Court Judges to testify because the State failed to show that other court

personnel who observed jury selection could not testify instead of Superior Court Judges. (RJA Order, p 102 ¶ 146). This finding is contrary to the Amended RJA which specifically allows such testimony without qualification. Also, this finding fails to acknowledge this Court's well-established law that trial judges are in the best position to assess racial discrimination in jury selection and that deference is owed to them considering their unique position presiding over trials. Moreover, unlike other court personnel, the trial judge is in a unique position to rule ex mero motu upon any detection of constitutional violation occurring during a capital case, including during jury selection. This makes a trial judge's testimony all the more relevant to the issue of whether race was a significant factor in the exercise of peremptory challenges of jurors. A bailiff, chiefly concerned with courtroom security, or a court clerk, chiefly concerned with record keeping, are not nearly as well positioned as the presiding trial judge to observe the nuances of personal interaction occurring during the jury selection process. The trial judge, unlike any other courtroom personnel, is uniquely situated to observe, detect, and correct any discrimination occurring during jury selection. It is for this reason that this Court (and all other courts) defer to the trial courts' assessment of whether discrimination has occurred during jury selection.

The MAR Court concluded incorrectly that the possibility of judges testifying

about prior decisions is reason enough to exclude the testimony in light of clear statutory authority to the contrary and in light of prior well-established law of this Court. This misapprehension of law was "manifestly unsupported by reason" and was "so arbitrary that it could not have been the result of a reasoned decision" such that it constituted an abuse of discretion. See State v. Hayes, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985); State v. White, 349 N.C. 535, 552, 508 S.E.2d 253, 264 (1998), cert. denied, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999).

Further, the MAR Court's determination that these Defendants have suffered racial discrimination in their own cases, even after reviewing the proffer of evidence from the Superior Court Judges to the contrary, is clearly erroneous. For example, from the proffer of evidence the MAR Court would have learned that former Superior Court Judge Jack Thompson, who presided over Defendant Augustine's trial, ruled on two Batson objections and held the opinion that he saw no evidence to support a Batson motion in any other jury strike in the case. (See Statement of Jack Thompson, pp 29-45)(State's Appx. 8A). He further testified that he never observed race to be a significant factor in the peremptory challenge of any prospective juror in Defendant Augustine's case. (Id. at 50-51). He also testified that if he had observed racial discrimination in jury selection for which the defense had not raised a Batson objection that he would have intervened ex mero motu to correct the situation in

denying the State's peremptory challenge in the Court's own Batson motion. (Id. at 51).

From the proffer of evidence of former Senior Resident Superior Court Judge Coy Brewer, who presided over the Defendant Golphin's trial, the MAR Court would have learned that "race played no meaningful role in the jury selection process" in Defendant Golphin's trial. (See Statement of Coy Brewer, p 38)(State's Appx. 8B). Judge Brewer testified as to his rulings on two of the State's peremptory challenges which met with Batson objections at trial. Judge Brewer confirmed that he ruled at trial that the Batson challenge was denied to the State's peremptory challenge of prospective juror Deardra Holder because the State articulated a reason that the "juror was relatively young and close to the age range of the defendant and that juror had a sibling at approximately the age range of the defendant" which was a race neutral reason for exercising the peremptory challenge. (Id. at p 18). Judge Brewer also testified that one of the reasons that the State articulated for the peremptory challenge of Ms. Holder was "the juror's hesitancy in responding to a question about the death penalty." (Id. at p 19). The Judge testified that "even though her response as read on the record might seem to be okay" he recalled that his "perception in the courtroom of that response and that hesitancy played a role" in the Court's decision "even though it was not specifically articulated in the decision." (Id. at p 19)(emphasis

added). Judge Brewer also testified as to the peremptory challenge of John Murray which was met with a Batson challenge. (Id. at pp 20-26). Judge Brewer confirmed that John Murray stated that his father had been convicted of robbery when Mr. Murray was very young and that Mr. Murray had been convicted of DUI. (Id. at pp 23-24). Judge Brewer confirmed that he ruled that the State had established a nonracial basis for the peremptory challenge and denied the Batson motion. (Id at p 26). Judge Brewer testified that his primary focus was the fact that prospective juror Murray's father had a prior serious criminal conviction and was taken out of the home when Murray was very young which Judge Brewer opined may have had an impact on his view of the criminal justice system. (Id. at p 26).

As noted, these two rulings were the result of Batson challenges made at trial (and later on direct appeal before this Court). The MAR Court determined that Judge Brewer's testimony in this regard was irrelevant to the issue to be determined, and yet the MAR Court set about to re-analyze these very jury strikes decades later and formed opinions directly contrary to that of Judge Brewer who was in the courtroom and observing the jury selection process at the time of the Batson challenge. (See RJA Order, pp 59-64).[11]

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[11] Notably, the MAR Court specifically faulted the State for not providing testimony through ADA Russ as to the "reasons for the strike of Deardra Holder" but refused to consider the evidence in Judge Brewer's proffer of evidence regarding his

In regard to the jurors whose peremptory challenges were not met with Batson objections, Judge Brewer testified that none were racially discriminatory. As to the peremptory challenge of Kenneth Dunston who stated in jury selection that he would not "like to be the one to [choose] someone's fate" (Id. at p 34), Judge Brewer testified that he saw no racial discrimination in the state's peremptory challenge of Juror Dunston (Id. at p 37). Judge Brewer confirmed that Mr. Dunston also stated that he had been arrested before for breaking and entering. (Id. at p 34). Mr. Dunston represented that the charges were dropped, but the State questioned him as to whether or not he actually had pled guilty to misdemeanor breaking and entering. (Id. at p 35). Mr. Dunston also represented that he had an assault on a female charge involving his ex-wife, where a prayer for judgment continued was entered. (Id. at pp 35-36). Judge Brewer confirmed that even though there was not a Batson objection to the State's peremptory challenge of this juror, he would have allowed the challenge based upon the race neutral reasons that the juror was reluctant on the death penalty, had prior criminal convictions, and may have had questionable honesty based upon his representations in the jury questionnaire. (Id. at p 37).

Judge Brewer testified as to the State's peremptory challenge of prospective

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determination of the race neutral reasons given in the State's peremptory challenge of her. (See RJA Order, p 55, n 7).

juror Freda Frink which was not met with a Batson challenge at trial. Judge Brewer confirmed that during jury voir dire Ms. Frink articulated that she had "mixed motions" about capital punishment and that she couldn't "truthfully" say that she could return a death sentence. (Id. at pp 27-30). Judge Brewer confirmed that Ms. Frink also had a fiancé who got shot in the head and killed, although she had not put it in her questionnaire. (Id. at pp 30-31). It was for this reason that the juror articulated that she had "mixed emotions" about the death penalty. (Id. at p 31). Judge Brewer acknowledged that even though there was no Batson objection for the peremptory challenge of Ms. Frink that he would have allowed the challenge based upon Ms. Frink's equivocation on the death penalty, noting that with this particular juror, "this wasn't even a close call" on the Batson issue. (Id. at p 31). Apparently the MAR Court thought otherwise, as the MAR Court re-evaluated the peremptory challenge of Ms. Frink and concluded that it showed evidence of racial discrimination in jury selection. (RJA Order, pp 67, 126). The fact that the MAR Court did not find Judge Brewer's proffer of evidence relevant to the very issue that the MAR Court sought to evaluate is telling. The MAR Court was simply unconcerned with any decisions made at the time of trial and would not allow any of those contemporaneous judgments to impede the MAR Court's re-evaluation of jury selection decades later.

The MAR Court would also have learned that Judge Brewer's judicial

observation over twenty years led him to the opinion that there was statistically a disproportionate number of African American prospective jurors struck by prosecutors across the State but that Judge Brewer believed that to be unique to the jury selection process in capital cases. (Id. at pp 42-43). Judge Brewer explained that in capital case jury voir dire jurors are asked about their attitudes and feelings about the death penalty, unlike in other criminal or even civil cases where attitudes and feelings of prospective jurors are not explored. (Id. at 43-44). This exploration of feelings about the death penalty in capital case jury selection highlights what Judge Brewer's observation and research of polling statistics show which is that statistical norms within demographic groups reveals that African-Americans and minorities in general are disproportionately more reluctant to impose the death penalty. (Id. at p 46). Judge Brewer's observations of jury selection established that this reluctance is often revealed through body language, voice inflection, and other nonverbal cues which would inform an attorney's decision in selecting or excusing a juror for a capital case. (Id. at p 47).

Judge Brewer's testimony was obviously relevant to the issue of alleged racial discrimination in the jury selection of Defendant Golphin's case. But also, Judge Brewer's testimony embodied personal observation relevant to the issue of jury selection process in North Carolina capital cases in general. It just so happened that

Judge Brewer's opinions regarding how the unique nature of jury selection in capital cases reveals otherwise undetectable reluctance to impose the death penalty was consistent with, and corroborated, the social science evidence which the State presented through the testimony of Christopher Cronin, a political science professor accepted as an expert in American politics.[12] Cronin testified that national demographic studies, predominantly the National Election survey data and Gallop polls, have shown a clear ideological division between African-Americans and Caucasians in terms of attitudes and opinions of the death penalty. (Robinson RJA Hrg T pp 2198-99). Specifically, as a general demographic group "black Americans do not favor the death penalty as much as white Americans or other minority demographics." (Id.).[13] Defense witness, Professor O'Brien testified that there is no

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[12] The State admitted Professor Cronin's testimony from the State v. Robinson RJA Hearing into evidence at Defendants' RJA Hearing. (HT pp 400-401)(State's Exhibit 104)(Cronin's testimony at Robinson RJA Hrg T pp 2153-2230); (see also, RJA Order, p 48, ¶ 6). At the Robinson RJA Hearing the MAR Court initially denied the State's motion to tender Professor Cronin as an expert in American politics, but accepted the State's proffer of evidence from the witness. (Robinson RJA Hrg T pp 2192). The MAR Court appeared to reconsider its previous ruling after the proffer was made. (Id. at p 2237). In the instant RJA Order, the MAR Court has referred to Professor Cronin's testimony, presumably having considered it at the instant RJA Hearing. (RJA Order, pp 48, 91 ¶¶ 6, 116).

[13] On cross-examination Professor Cronin clarified that nothing in his research suggests that prosecutors should base jury strike decisions on race or on research that shows that a particular demographic holds a political ideology. (Robinson, RJA Hrg T p 2208). Rather, Professor Cronin testified only that the research may explain why many more African-American jurors are eliminated in capital cases based upon the

dispute that the data supports this conclusion. (Robinson, HT pp 2350, 2376)(State's Appx. 7). Judge Brewer's testimony was relevant to the issue of his observations in the Golphin trial as well as his general observations of jury selection in capital cases. It was error to exclude this evidence and troubling that the MAR Court found it not helpful overall.

Finally, the proffer of evidence of Judge William C. Gore, Jr. would have established that Judge Gore did not observe race to be a significant factor in the exercise of any peremptory challenges against any African-American jurors in Defendant Walters' case, over which he presided. (Statement of William C. Gore, Jr., p 37)(State's Appx. 8C). He testified that had he made that observation, he would have intervened ex mero motu. (Id. at p 37). Judge Gore confirmed that there were no Batson challenges raised by the defense to any of the peremptory challenges made by the State. (Id. at pp 10-11). Nonetheless, in his review of the jury selection transcript, as well as his extensive memory of the facts of the case, he found sufficient racial neutral reasons for the State's peremptory challenges of specific jurors in Defendant Walters case and articulated that he would have denied any Batson motion as to these jurors had any been lodged by the defense. (Id. at pp 8-33, 37). Judge Gore found no evidence of racial discrimination in the State's peremptory challenges

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higher percentage of African-American in general disfavoring the death penalty.

of any of these jurors. (Id.). The MAR Court found this evidence irrelevant to the issue to be determined but set about to re-evaluate the jury selection in the Walters case, finding the State's peremptory challenges of specific jurors to be evidence of racial discrimination in jury selection, the exact opposite conclusion made by the Superior Court Judge who presided over the jury selection in Defendant Walters' case. (See RJA Order, pp 69-70, 82-84, 130-35).

These proffers were powerful, compelling, and unequivocal evidence that there was no racial discrimination in Defendants' cases and rebuts any presupposition to the contrary.[14] This evidence was from the one source the law says is best able to evaluate whether racial discrimination occurred during jury selection - the presiding trial judge. This was additional direct evidence that there was no discrimination during jury selection in Defendants' trials. Yet, remarkably, the MAR Court determined that this evidence would not have assisted the Court in its determination of whether race was a significant factor in jury strikes in Defendants' cases. The

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[14] Curiously, the MAR Court specifically found that the State had failed to rebut Defendants' "prima facie showing" of racial discrimination but that "even if the State's evidence were sufficient in rebuttal" the Court still found that the Defendants' had carried their burden of persuasion. See RJA Order, p 202-06, 209 ¶¶ 396, 402, 408, 423. Consequently, it appears that the MAR Court concluded that even if the State had sufficiently rebutted the inference of racial discrimination from Defendants' showing, the MAR Court still concluded that Defendants would succeed on their RJA claims. This is a standard completely beyond reason and a clear misapprehension of law.

MAR Court's exclusion of this key State's evidence was an abuse of discretion.

Both Colyer and Russ testified extensively to every one of their peremptory challenges of African-American prospective jurors in Defendants' cases. (HT p 796, 802, 814, 818, 821, 836, 846, 852, 855, 910, 1141, 1152, 1155, 1177, 1188, 1197, 1206, 1209, 1213, 1218-19, 1221, 1250)(State's Appx. 7). Both denied that race was ever a significant factor in their decisions to exercise peremptory challenges in any of their peremptory challenges of capital cases tried in Cumberland County. (Id.)

The MAR Court's conclusion that Defendants have proven discrimination in the jury selection of their cases is clearly erroneous in light of the proffered testimony of Judges, which was consistent with the direct testimony received of prosecutors in this case. The MAR Court abused its discretion in excluding testimony from Superior Court Judges who, according to well-established law, are in the best position to determine whether racial discrimination has occurred during jury selection. This Court should grant review in order to clarify that testimony of Superior Court Judges is relevant, admissible, and owed deference on review of claims of racial discrimination in jury selection, consistent with the clear language of the Amended RJA (N.C.G.S. § 15A-2011(d)) and this Court's prior well-established law. The failure of the Superior Court to fully consider this State's evidence is reason enough to remand the case for re-consideration in light of all the properly admitted evidence.

C. The MAR Court's Reliance on the MSU Study to Establish What Constituted a Significant Factor in the Exercise of Peremptory Challenges Was Clearly Erroneous.

The MAR Court's reliance upon the MSU Study for its determination that race was a significant factor in decisions to exercise peremptory challenges was clearly erroneous and unreasonable for three reasons: 1) the MSU Study erroneously concluded that numerical disparities alone were sufficient to establish that race was a significant factor in decisions to exercise peremptory challenges; 2) the MSU Study was flawed in its analysis of the motivations for peremptory strikes such that the study reached an erroneous conclusion that race was a significant factor in decisions to exercise peremptory challenges; and 3) the MSU Study was flawed because it failed to acknowledge that prior decisions of other courts, including this one, have already determined the issue of racial discrimination (or lack thereof) in specific jury strikes included in the study.

The MSU Study purportedly sought to determine if race was a significant factor in prosecutors' decisions to exercise peremptory challenges statewide. (RJA Order, p 143 ¶ 223; HT pp 416, 442, 603-04). The statewide study had two significant, and very different, parts. The first part was a statistical survey of peremptory strikes across geographical regions, including the State, the Judicial Division, and the County of prosecution for each capital case. These statistics represent the number of

jurors excused by use of peremptory challenges in the sample of 173 capital cases in the state.[15] (RJA Order, p 143, ¶ 223). The study also attempted to catagorize the race of those individual jurors.[16] (RJA Order, p 150-51, ¶ 244).

The RJA Order found that in Part I of the MSU study, the unadjusted disparities in jury strikes measure differential race outcomes without regard to other variables that could potentially explain peremptory strikes. (RJA Order, pp 140, 142, 146 ¶¶214, 219, 231). From this unadjusted data alone, MSU researchers concluded that "race was a significant factor in the State's decisions to exercise peremptory challenges" in North Carolina, in the Judicial Division (formerly second, currently

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[15] The MSU study relied upon a limited sample of 173 current capital cases tried in the state during the time period from 1990 to 2010 which resulted in the imposition of the death penalty. (RJA Order p 143, ¶ 223). It did not include capital cases tried during this same period which resulted in life imprisonment or cases in which the death penalty had already been carried out. (HT p 562). The State has argued, and continues to assert, that this sample is insufficient and not a valid representation of jury selection in capital cases in North Carolina tried during this time period.

[16] Where race was not noted by self reporting in the transcript or on a juror questionnaire, the MSU Study relied mostly on records from voter registration and other internet searches to determine a juror's race. (RJA Order, p 150-51, ¶ 244). The MAR Court noted that in 6.9% of the cases, race could not be determined from a self-reporting source. (RJA Order, p 150, ¶ 243). In those cases, the MSU Study used representations by court personnel to define the race of the juror. The MAR Court's acceptance of this as a valid source to define the race of the juror is contrary to well-established law and an error of law. This Court has made clear that only jurors may supply this information and that the Court will not rely upon the subjective assessment of counsel or court personnel to define the race of the juror. State v. Brogden, 329 N.C. 534, 407 S.E.2d 158 (1991); State v. Mitchell, 321 N.C. 650, 655-56, 365 S.E.2d 554, 557-58 (1988).

fourth), and in Cumberland County (HT pp 345-51). From this unadjusted data alone, MSU researchers concluded that there was "an inference" of "intentional discrimination" in the State's decisions to exercise peremptory challenges in Defendants' cases. (HT pp 352-354).

The second part of the MSU study attempted to assign motivations which might explain why these jurors were stricken. (RJA Order, p 148, ¶ 236). The RJA Order found that in Part II of the MSU study, the researchers examined whether the "disparities in the unadjusted data were affected in any way by other potential factors that correlate with race but that may themselves be race-neutral." (RJA Order, p 166, ¶ 288). In this, the MSU study collected "descriptive information that might bear on the decision of a prosecutor to peremptorily challenge a venire member." (RJA Order, p 148, ¶ 236, HT p 355). In this, the MSU study employed a statistical regression analysis model the purpose of which was to "examine whether any alternative explanations may factor into the peremptory challenge decision of prosecutors." (RJA Order, p 146, ¶ 231 (emphasis added); (see also HT p 355 (defense witness testifying that regression analysis is statistical model allowing "certain characteristics" of prospective jurors to be disentangled from what "might bear on the decision to strike")). "The result of a logistic regression analysis is an estimate of the influence of each of several explanatory factors on the outcome, stated

as an adjusted odds ratio." (RJA Order, p 143 ¶ 222). In short, the researchers attempted to identify all the many variables, other than race of the juror, which might explain why the prosecution would exercise a peremptory strike of a juror from a capital murder trial. (HT pp 443, 616).[17]

The researchers settled on thirteen "predictor variables" which were non-racial reasons to explain, other than race, why a juror might be removed from the jury. (RJA Order, pp 168-69, ¶¶ 294 and 296).[18] The MAR Court found that these variables were potential alternative explanations for "apparent race-based disparities." (RJA Order, p 169, ¶ 294). These variables were chosen based upon one of the MSU

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[17] MSU Researchers admitted, however, that certain variables were not included because they were found to be statistically insignificant. (HT pp 504-05, 508-09)(State's Appx. 7). If a variable inconsistently appeared in various cases, it was determined to not be significant as a "reliable predictor." (Id. at pp 466-67, 614). Notably the MSU Study did not include "interaction variables" to determine whether one variable influenced another such that the whole of this information would be greater than just viewing individual variables. (Id. at pp 431, 452-53, 672-73, 676). This was because adding more variables allowed for less ability to detect interaction effect and according to the MSU researchers would not be "significant" for analysis. (Id. at p 431).

[18] In total the MSU Study researchers identified sixty-five "candidate" variables, but focused their tabulations on thirteen which were most commonly identified as potential reasons explaining a prosecutor's strike of a juror statewide. (RJA Order, pp 169-70, ¶ 296, HT p 441). Essentially the MSU researchers were identifying the most common reasons for strike decisions revealed through patterns that occurred in jury selection. (HT pp 441, 457, 614). As noted below, the MAR Court rejected any other variable not appearing on the candidate list of potential variables as "idiosyncratic" and therefore insignificant to the evaluation of the issue of whether race was a significant factor in the decision to exercise a peremptory challenge.

researcher's review of Batson litigation for the most common reasons given by prosecutors to peremptorily excuse jurors. (RJA Order, pp 167-68, ¶ 291; HT p 357, 447). It does not appear from the record that this researcher ever talked with North Carolina prosecutors or judges who had engaged in capital litigation in North Carolina in identifying potential explanatory reasons for peremptory strikes. (HT pp 447-50, 618). Nonetheless, the MAR Court found these variables were "highly representative of the explanations given by prosecutors as factors used in their exercise of peremptory strikes." (RJA Order, p 169, ¶ 294).[19]

The thirteen variables which the MSU study recognized as the most highly explanatory non-racial justifications for striking a juror statewide were: 1) venire members who expressed reservations about applying the death penalty; 2) venire members who were not married; 3) venire members who were or had been accused of a crime; 4) venire members who stated that serving on the jury would be a hardship; 5) venire members who were homemakers; 6) venire members who worked in law enforcement or knew someone who worked in law enforcement; 7) venire

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[19] However, where prosecution explanations for the peremptory challenges varied from the reasons the MSU Study identified, the MSU researchers made their own determinations as to which reason was reflected in the transcript. (HT p 601). So where a prosecutor had submitted an affidavit stating that the prospective juror had expressed reservations about the death penalty, if the MSU researchers did not agree that this variable was shown from the transcript, it was not credited as an explanatory reason for the strike. (Id.).

members who knew the defendant; 8) venire members who knew a witness in the case; 9) venire members who knew one of the attorneys in the case; 10) venire members who expressed a view that "suggests favorable to the State;" 11) venire members who went to graduate school; 12) venire members who were twenty-two years of age or younger; and 13) venire members who work with or are close to someone who works with defense attorney. (RJA Order, pp 169-70, ¶ 296).[20]

This regression analysis was then used to analyze a random sample of about twenty-five percent of the total number of jurors peremptorily struck from current capital cases which resulted in death sentences. (RJA Order, p 148, ¶ 237). The random sample served as a representative sample from which researchers drew inferences about the whole statewide population used in the study. (Id.).

The MSU Study concluded that, after controlling for the thirteen non-racial variables, the odds ratio supported the conclusion that race was the reason for the

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[20] It is significant that these variables changed, depending upon the geographical area to be analyzed. In its analysis of the peremptory challenges in Cumberland County cases, the MSU researchers only identified eight potential non-racial variables, which included different variables than the thirteen listed above. (RJA Order, p 173, ¶ 305). The controlled variables changed again when researchers reviewed only the cases tried in Cumberland County, including Defendants' cases. (HT pp 362, 614). MSU researchers confirmed that a smaller number of variables are not as predictive. (HT p 616). In total, the MSU researchers created a "candidate variable list of 65 factors which could potentially explain strike decisions." (RJA Order, p 168, ¶ 294). From this list, the MSU study identified patterns emerging in each geographical area and selected the most highly explanatory list of variables for that area.

peremptory strikes included in its study. (HT pp 369-382, 386-89, 392-94, 645). The MSU Study extended this conclusion to its analysis of the Second and Fourth Prosecutorial District, to Cumberland County, and to Defendants' cases in particular. (HT pp 370-371, 374-82, 386-89, 392-94, 645) This conclusion led the MAR Court to find that

> being black predicts whether or not the State will strike a venire member, even when holding constant or controlling for non-racial variables that do affect strike decisions. When those predictive, non-racial variables are controlled for, the effect of race upon the State's use of peremptory strikes is not simply a compound of something that is correlated or associated with race; race affects the State's peremptory strike decisions independent of other predictive, non-racial factors.

(RJA Order, pp 178-79, ¶ 326). Therefore, the RJA Court concluded that this regression analysis, that allegedly controlled for all the non-racial reasons which could have motivated a prosecutor to peremptorily strike a juror, was "strong evidence that race was a significant factor in the State's decision to exercise peremptory challenges throughout the State of North Carolina and Cumberland County throughout the full study period between 1990 and 2010, and at the time of Defendant's trials, and Defendants' own cases." (RJA Order, p 179, ¶ 328). Ultimately the MAR Court found that "race was a materially, practically, and statistically significant factor in the exercise of peremptory strikes by prosecutors" who sought the death penalty across the State, in Cumberland County, and in each

Defendants' case. (RJA Order, p 201, ¶ 390).

For the reasons noted below, the MSU Study was fundamentally flawed and the MAR Court unreasonably relied upon it, making erroneous findings of fact and conclusions of law not supported by the evidence.

1. The RJA Order Unreasonably Relied upon a Statistical Study Which Erroneously Concluded, Contrary to the Amended RJA, That Numerical Disparities In Jury Selection Were Sufficient Alone to Establish That Race Was a Significant Factor in Decisions to Exercise Peremptory Challenges.

The MSU Study concluded that the statistical disparity in strike rates alone showed intentional racial discrimination. From this statistical evidence, the MAR Court concluded that "race was a materially, practically and statistically significant factor in decisions to exercise peremptory strikes by prosecutors statewide in North Carolina, in Cumberland County, and Defendants' individual cases at the time of their trials." (RJA Order, p 201, ¶ 390). Thus the MAR Court concluded that "based upon the statistical evidence presented at the hearing, the Court finds significant evidence that prosecutors have intentionally discriminated against black venire members" in the entire State, in Cumberland County, and at Defendants' trials. (RJA Order, p 201, ¶ 392)(emphasis added). Therefore, the MAR Court has found evidence of intentional discrimination from mere statistics. This finding is contrary to the clear language of the Amended RJA which states that "[s]tatistical evidence alone is

insufficient to establish that race was a significant factor" in the decisions to exercise peremptory challenges. N.C.G.S. § 15A-2011(e)(emphasis added).

The Amended RJA restriction on the weight to be given statistical evidence is consistent with well-established law. As noted above, no other court has ever stated that numerical disparities alone are sufficient to establish that race was a significant factor in the exercise of peremptory challenges. See Hernandez, 500 U.S. at 359, 114 L. Ed. 2d at 405-06 (peremptory challenges which result in disproportionate impacts are not a violation of the Equal Protection Clause without proof of discriminatory intent or purpose); McCleskey, 481 U.S. at 292-93, 95 L. Ed. 2d at 278-79 (disparate impact does not necessarily equal purposeful discrimination in capital cases); Miller-El (I), 537 U.S. at 342-47, 154 L. Ed. 2d at 953 (statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but other factors must also be considered); State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152 ("alleged disparate treatment of prospective jurors would not be dispositive necessarily."); Wiggins, 159 N.C. App. at 261-63, 584 S.E.2d at 311-15.

To the extent that the MAR Court relied upon the MSU study which concluded that racial disparities in strike rates were, by themselves, sufficient to establish that race was a significant factor in decisions to exercise peremptory challenges, this was

unreasonable because it is contrary to this Court's prior precedent and that of the United States Supreme Court.

2. The RJA Order Unreasonably Relied Upon a Statistical Study Which Was Flawed in its Analysis of the Non-Racial Variables, or Motivations, for Peremptory Strikes Contrary to Well-Established Law of this Court.

The MSU Study was also flawed in its analysis of non-racial variables, or motivations, to be considered when reviewing peremptory strikes for racial discrimination. The MSU Study attempted to assign motivation to peremptory strikes by eliminating what it identified as the most plausible non-racial reasons a prosecutor might have to strike a juror from a capital case. However, the MSU Study failed to acknowledge that there are a plethora of non-racial reasons which could motivate a prosecutor to peremptorily excuse a juror in a capital case. Without a doubt, the list of non-racial reasons that a prosecutor might strike a juror is significantly greater than the variables identified by the MSU Study.

The MAR Court acknowledged that the State's expert, Joseph Katz, criticized the MSU Study for its "failure to define and include all relevant variables in its analysis[,]" noting, for example, that the variables could not capture what was not in the written record. (RJA Order, p 179, ¶ 329). However the RJA Order dismissed this criticism, finding that the "MSU Study has collected information on all potential non-racial variables that might bear on the State's decision to exercise peremptory

challenges and which could correlate with race and provide a non-racial explanation for the racial disparities[.]" (RJA Order, p 181, ¶ 333 (emphasis added)). The MAR Court also dismissed any suggestion that the MSU Study had not sufficiently captured all the many non-racial reasons that could explain a prosecutor's exercise of a peremptory challenge by concluding that any reason not listed in the MSU Study list was an "idiosyncratic"reason and was not significant. (RJA Order, p 182, ¶ 336 (the "MSU Study controlled for all significant variables that influence prosecutorial strike decisions.....the presence of idiosyncratic reasons for strike decisions by prosecutors do not influence, bias, or skew the findings of the MSU Study." (emphasis added))); (see also RJA Order, p 178, ¶ 325 (finding from statistical evidence that race as a predictor of jury strikes so convincing to the court that including race neutral variable predictive of outcome would still not explain racial disparity in jury strikes)). In other words, the MAR Court rejected any other explanatory variable which may exist if it was not included in the MSU Study.

Thus the MAR Court concluded that any other variable, even if it is a race neutral explanation for the strike, would be "idiosyncratic" and would not have changed the court's conclusion that prosecutors have intentionally discriminated in every case across North Carolina. The problem with this finding is that it is contrary to the well-established law of this Court which has identified many more non-racial

reasons justifying peremptory strikes in cases reviewing Batson challenges over the years. A vast number of reasons which this Court has found would be non-racial reasons explaining an exercise of peremptory challenge are not included in the MSU Study upon which the MAR Court relied in forming its opinion.

The MSU study did not include many of the most obvious and legally sound other variables which might be legitimate, race-neutral reasons which prosecutors might have for excluding a juror from jury service in a capital case. Notably missing from the MSU Study are the variables which would be specifically unique to each case. A study such as the one MSU had created sought to define in a one-size-fits-all manner all the variables which would be consistent across the board in every case, rather than eliminating all the peculiar issues unique to any one case.

For instance, the MSU study did not identify as one of its pre-set variables that a prosecutor might choose to exclude a juror because of the juror's feelings about drugs, or drug dealers, or alcohol, or substance abuse, though these factors might obviously affect the jurors' assessments of the evidence in a capital case involving drugs and alcohol. Likewise, the MSU study did not identify a variable as to a juror's feelings about psychiatric evidence, including psychological testimony, though these too might influence a juror's feelings about a capital case, especially if the prosecution anticipated that the defense would present psychological testimony. The

MSU study did not include variables as to a juror's feelings about the sufficiency of a single eyewitness or of accomplice testimony, although this too might be extremely important in the assessment of a juror qualified to serve on a capital cases where such issues might be anticipated to be presented. The MSU study also did not include variables as a juror's feelings about gangs or gang membership, although this would have been relevant to a prosecutor's evaluation in a case involving defendants or witnesses involved in gang activity.

The MSU Study also did not, because it could not, include observations which were not apparent from the transcript and/or a jury questionnaire. These might include the subtle nuances of demeanor, personal interaction, attitude, voice inflection, eye contact, body language, nervousness, candor, and personal appearance. These are all relevant observations that any litigant would use in evaluating whether to exercise a peremptory challenge in any case, capital cases included. Porter, 326 N.C. at 500, 391 S.E.2d at 152 ("Failure to make appropriate eye contact with the prosecutor when coupled with other reasons can be a legitimate reason to peremptorily challenge a prospective juror . . . . Excessive eye contact with defense counsel when coupled with other reasons can be an equally legitimate reason."); See Smith, 328 N.C. at 125-26, 400 S.E.2d at 727 (prospective juror's nervousness or uncertainty in response to counsel's questions, may be a proper basis for a peremptory

challenge, absent defendant's showing that the reason given by the State is pretextual. . . ."); Floyd, 343 N.C. at 105, 468 S.E.2d at 49 (prospective juror's answers indicated she was headstrong and she wore tinted glasses, making eye contact with her difficult); see also Purkett v. Elem., 514 U.S. 765, 769, 131 L. Ed. 2d 834, 840 (1995)(court found reason offered for strike that juror had long, unkempt hair as well as a mustache and beard to be a racially neutral reason, noting that shagginess and facial hair is not peculiar to any particular race); United States v. Lane, 866 F.2d 103, 106 (4th Cir. 1989)(prospective juror's "general appearance and demeanor" may properly influence prosecutor's decision). The MSU Study did not take into account juror inattentiveness or sleeping which may have been obvious to the participants at trial but would not appear in the record. State v. Caporasso, 128 N.C. 236, 244, 495 S.E.2d 157, 162 ("When, as here, a juror displays a lack of attention, the prosecution may use a peremptory challenge to excuse the juror from service"), appeal dismissed, 347 N.C. 674, 500 S.E.2d 91 (1998); Kandies, 342 N.C. at 436, 467 S.E.2d at 76 (prospective juror "nodding off" during voir dire). Perhaps most importantly, the MSU Study could not sufficiently capture the quality and quantity of juror responses on issues. Whether the juror was strongly entrenched in a position or only mildly acknowledging it could not be captured in a study that looked only to juror questionnaires and the cold record of the transcript.

In fact, the MSU study was ill-equipped to take into account all the myriad of possible reasons for strikes into consideration. This is because a number of them would not have been revealed through direct questioning in the jury transcript. Rather they might have been limited to the prosecution's review of jury questionnaires or in observation of demeanor and attitude shown in response to other juror's questioned.

As this Court has noted, jury selection is more art than science. Porter, 326 N.C. at 501, 391 S.E.2d at 152 ("Choosing jurors, more art than science, involves a complex weighing of factors. Rarely will a single factor control the decision-making process."). It should not be presumed then, that the failure of the MSU coders to identify from a cold record one of the pre-set variables in the MSU study means that the prosecution had race as its motivation in exercising any particular jury strike. Yet the RJA Order has erroneously concluded that these statistics alone were sufficient evidence that prosecutors across this state were intentionally racially discriminatory in their jury strikes.

The RJA Order is based upon a misapprehension of existing law, that race is the only explanation to be assigned to a juror strike if not within the set variables

identified by the MSU study.[21] The MAR Court's finding that all other reasons propounded would be "idiosyncratic" and therefore insignificant is in direct contravention of this Court's prior holdings of what constitutes race-neutral reasons justifying peremptory challenges. This Court's significant precedent in reviewing Batson challenges establishes far more non-racial reasons explaining the exercise of peremptory strikes than the MSU Study has identified. Consequently, the RJA Order's reliance upon this study was unreasonable as the study's premise is contrary to this Court's well-established law. This Court should grant review to establish to what extent Superior Courts may rely upon statistical studies which do not adequately mirror reality in jury selection and make conclusions regarding whether race was a significant factor in the exercise of peremptory challenges which are contrary to this Court's well-established law.

3. The RJA Order Unreasonably Relied Upon a Statistical Study Which Was Flawed Because it Failed to Acknowledge That Prior Decisions of This and Other Courts Have Already Determined That Race Was Not A Significant Factor In Peremptory Strikes Included In the Study.

The RJA Order relied upon the MSU study to find that statistical disparities

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[21] The clear limitations of statistics to capture all the relevant information to be evaluated in determining whether racial discrimination exists in the exercise of peremptory challenges highlights the importance of the Judges' testimony which has been specifically delineated as admissible under the Amended RJA. N.C.G.S. § 15A-2011(d).

were sufficient to establish race was a significant factor in decisions to exercise peremptory challenges. Nonetheless, these same statistics included cases where Batson challenges were made and rejected by the trial court at trial, some of which were later raised and rejected by this Court. Inconsistent with these prior determinations, the MSU study contains these very same juror strikes. Because these jury strikes did not fall within the set list of variables which the researchers determined to be race neutral reasons for a strike, the results of the study showed that the strikes were based upon race. The MAR Court's reliance on a study which concludes the exact opposite of what this Court has already found in regard to these specific jury strikes is clearly erroneous.[22]

D. The RJA Order's Conclusion that Prosecutors Intentionally Discriminated During Jury Selection Is An Unreasonable Determination from the Evidence Because the MAR Court's Post Hoc Analysis of Jury Strikes was Clearly Erroneous and In Error As a Matter of Law.

Perhaps recognizing that it is not sufficient to rely completely on statistical disparities, the MAR Court engaged in its own post hoc analysis of individual jury selection in a number of capital cases. The MAR Court's conclusions in some of these cases are in error as a matter of law as they are contrary to this Court's prior

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[22] For the reasons noted below, the MAR Court also erred in re-evaluating these jury strikes to determine whether racial discrimination was a significant factor as this Court has already determined that issue.

decisions. In others, the MAR Court's conclusions are clearly erroneous because they are not supported by the record.

1. The RJA Order's Findings of Fact That Prosecutors Have Offered Pretextual Reasons for Peremptory Challenges Is Based Upon a Misapprehension of Law.

The RJA Order fails to adequately evaluate jury strikes by applying the well-established law from this Court dictating that each of these jury strikes should be reviewed under a multi-step process. Instead, the MAR Court reviewed isolated comments in jury selection and isolated references in prosecutors' statements to the ultimate conclusion that the reasons stated were a "proxy" for race and evidence intentional racial discrimination. In its review, the MAR Court found that many "purportedly race-neutral reasons" provided by prosecutors in the form of affidavits or testimony were pretextual or substantively invalid, and evinced intentional discrimination in Cumberland County, the former Second Judicial Division, and in the State of North Carolina. (See e.g., RJA Order, pp 24, 48, 55, 112, 125, 128, 132, 134-35, ¶¶ 5, 21, 171, 194, 197, 199, 201 (finding reasons given by prosecutors for their jury strikes to be "inaccurate" "misleading" "irrational" "pretextual" and a "proxy" for race)). This led the Court to the sweeping conclusion that "race was both a significant and intentionally-employed factor in the State's exercise of peremptory strikes in North Carolina, in Cumberland County, and in Defendants' individual

cases." (RJA Order, p 112, ¶ 172).

This Court has provided sufficient guidance to courts evaluating peremptory challenges. This Court's guidance includes a three step inquiry in reviewing whether race was a significant factor in the exercise of peremptory challenges. [23] Here it appears that the MAR Court has by-passed steps one and two which would have required the defendant to first establish a prima facie case of purposeful discrimination, and second, for the State to offer race neutral reasons for the peremptory strike and landed firmly in step three.[24] This is significant because it is not until the third step that the persuasiveness of the reason given for the peremptory strike is analyzed for purposeful racial discrimination. Purkett v. Elem., 514 U.S. at 768, 131 L. Ed. 2d at 839; White, 349 N.C. at 548, 508 S.E.2d at 262. Such a determination would require consideration of many factors such as the "'susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by

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[23] The three steps of a Batson analysis are: 1) the defendant must establish a prima facie case of invidious racial discrimination; 2) the prosecution has the burden of production in offering a race-neutral explanation; and 3) the trial court must determine, taking into consideration all relevant circumstances, whether the opponent of the strike has proved purposeful racial discrimination. Golphin, 352 N.C. at 426-27, 533 S.E.2d at 210-11.

[24] Ironically, the MAR Court faulted the State's expert, Joseph Katz, for failing to engage in an analysis of the third prong of the Batson inquiry. (RJA Order, p 200, ¶ 389).

the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors.'" Golphin, 352 N.C. at 427, 533 S.E.2d at 211 (quoting State v. White, 349 N.C. at 548-49, 508 S.E.2d at 262); see also Lawrence, 352 N.C. at 15, 530 S.E.2d at 816; Kandies, 342 N.C. at 435, 467 S.E.2d at 75.

None of these factors were considered by the MAR Court in determining whether purposeful discrimination existed in each of the juror strikes considered. There is no indication that the MAR Court considered whether the State used all of its peremptory challenges in any particular case. There is no indication that the MAR Court took into consideration the race of witnesses or the Defendants, for that matter, in the case. There is no indication that the MAR Court considered whether the State had accepted any African-American jurors in any particular case in which a jury strike was reviewed. The MAR Court simply failed to analyze all of the relevant circumstances which this Court has said is vital in determining whether racial discrimination was a significant factor in the exercise of a peremptory strike. See Golphin, 352 N.C. at 427, 533 S.E.2d at 211.

As a consequence, the MAR Court has made erroneous findings of fact based upon a misapprehension of the law. A few examples from the instant Defendants' cases proves this point.

Factual Findings Related to Defendant Walters' Case

In its review of Defendant Walters' jury voir dire, the MAR Court found that the State's articulated reasons given at the hearing for five of the ten State's peremptory challenges exercised against African-American prospective jurors in Defendant Walters' case were "pretextual." (RJA Order, p 70, ¶ 58). Furthermore, the MAR Court was "unpersuaded" by the prosecution's explanations given at the RJA hearing for the remaining peremptory challenges. (Id.). The MAR Court questioned one prosecutor's reasoning since, according to the MAR Court, the explanations given by this prosecutor diverged from the reasoning given by the other prosecutor who was present for jury selection in Defendant's Walters' case. (RJA Order, pp 81-83, ¶¶ 94-98).[25] Finally, the MAR Court concluded from its review of the transcript of jury voir dire in Defendant Walters' case that the prosecution subjected "similarly-situated black and non-black venire members" to "[r]acially-[d]isparate [t]reatment." (RJA Order, pp 83-84, ¶ 99). Yet it does not appear that the MAR Court considered any of the guidance of this Court in evaluating these State's peremptory challenges in the case.

This Court has articulated the factors relevant to a determination of whether the

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[25] ADA Buntie Russ explained that it is not uncommon for two prosecutors observing the same jury voir dire to reach differing conclusions as to the reasons for peremptorily challenging a juror. (HT pp 1119-20, 1220).

defendant has carried his burden of establishing a prima facie case of purposeful discrimination as follows:

> "Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors."

State v. Hoffman, 348 N.C. 548, 550, 500 S.E.2d 718, 720 (1998) (quoting, State v. Quick, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995)). In State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, this Court stated that "[a]ll relevant circumstances are considered, including the 'defendant's race, the victim's race, the race of key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, a pattern of strikes against minorities, or the State's acceptance rate of prospective minority jurors.'" Id. at 426, 533 S.E.2d at 210-11 (quoting State v. White, 349 N.C. 535, 548, 508 S.E.2d 253, 262 (1998)). "In addition 'the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Hoffman, 348 N.C. at 550, 500 S.E.2d at 720 (quoting Batson, 476 U.S. at 96, 90 L. Ed. 2d at 87). One factor tending to refute an allegation of discriminatory use of peremptory challenges

is the acceptance rate of black jurors by the State. State v. Braxton, 352 N.C. 158, 181, 531 S.E.2d 428, 441 (2000), cert. denied, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); see also, State v. Gregory, 340 N.C. 365, 398, 459 S.E.2d 638, 656-57 (1995) "This Court has previously emphasized that the frequency with which a prosecutor accepts black jurors is relevant to the issue of whether he is purposefully discriminating against blacks." Braxton, 352 N.C. at 181, 531 S.E.2d at 441 (citing, State v. Allen, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988), (where minority acceptance rate of 41% failed to establish prima facie case of purposeful discrimination), sentence vacated on other grounds, 494 U.S. 1021, 110 S. Ct. 1463, 108 L. Ed. 2d 601 (1990)); see also, State v. Abbott, 320 N.C. 475, 481, 358 S.E.2d 365, 369-70 (1987) (acceptance rate of 40% failed to establish prima facie case).

Here the MAR Court specifically rejected consideration of the composition of seated jurors in its analysis, giving testimony about the composition of final juries "no probative weight[.]" (RJA Order, p 139, fn 22, p 189-90, ¶¶ 357, see also RJA Order, p 30).[26] The State agrees that by its terms the Amended RJA states that it is the

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[26] Despite the MAR Court's proclamation that it would not consider the racial composition of final juries, it in fact detailed only the current capital cases in which there had been "all-white juries" or juries with "only one black venire member" (RJA Order, p 190, ¶ 359; RJA Order, p 94, ¶ 123) and made findings of fact regarding the "impact" of State peremptory challenges on the "final composition" in Defendants' cases. See RJA Order, pp 162, 164, ¶¶ 273, 282

decision to exercise a peremptory challenge that constitutes an RJA violation, not the overall racial composition of the seated jury which determines the issue. See N.C.G.S. § 15A-2011(d). Nonetheless, in evaluating whether that decision is based upon racial discrimination, this Court has repeatedly emphasized the relevance of reviewing the "frequency with which a prosecutor accepts" jurors of the racial composition forming the basis of the Batson challenge. State v. Braxton, 352 N.C. at 181, 531 S.E.2d at 441. The MAR Court considered none of that in its review of the State's peremptory challenges in Defendant Walters' case.

For example, the MAR Court clearly did not consider the races of the defendant, jury, or key witnesses in this case. The record establishes that Defendant Walters is of a minority race, Native American. The two murder victims were white. The attempted murder victim is black. Defendant's jury was comprised of six black jurors[27] and six white jurors. The State's two chief witnesses against Defendant Walters, who were also the actual eyewitnesses to the murders and attempted murder, were members of racial minorities. Debra Cheeseborough, a black female and defendant's victim in the attempted murder case, was the State's chief witness against

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[27] The State relies on the Jury Summary contained in the Record on Appeal in State v. Walters, No. 548A00, for information relating to the races of the jurors questioned. (See State v. Walters, No. 548A00, R pp 229-30); References herein to "Walters, JS T pp __" are to the official transcript of the jury selection in Defendant Walters' case.

the defendant in that case, testifying in detail to the events leading up to and surrounding the shooting, and specifically and unequivocally identifying defendant as the gang member who shot her. Ione Black, who described her mother as half-white and half-Indian, and her father as half-black and half-Indian, (State v. Walters, JST p 401) was the State's chief witness in the murder cases, testifying in detail to the events leading up to the murders, defendant's role in the gang, and defendant's role in the murders.

The State exercised ten peremptory challenges, the first six to challenge black jurors (Marilyn Richmond, Sean Richmond, Jay Whitfield, Laretta Dunmore, Sylvia Robinson, Norma Bethea)(Walters, JST pp 293, 340, 420), and the last four to excuse white jurors (Mary Ford, Charles Abbott, Judith Bunce, Ben Ray)(Id. at pp 461, 707, 749). Stated otherwise, 40% of its peremptories to excuse white jurors and 60% to excuse black jurors, a difference of two jurors out of fifty two.

Between the time the State peremptorily challenged its first and sixth black jurors,[28] (id. at pp 293-420), it passed four black jurors (Laquita Peavy, Edith Whitted, Cornelius Wooten, and Donna Parson)(id. at 293). After the State peremptorily challenged its sixth and last black juror (Norma Bethea)(id. at 420), it passed six minority jurors, (Albert Pye, Samuel Blossom, Wilhelm Leslie, Juan

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[28] (Walters, JST pp 293 through 420)

Morales, Virginia Brazier, Richard Council)(id. at pp 38, 707, 798, 1087, 1153) while peremptorily challenging four white jurors. (id. at p 461) (Mary Ford, Judith Bunce, Charles Abbott, Ben Ray)(Id. pp 461, 707, 749).

Of a total of 52 jurors called into the panels questioned, 20 were of a racial minority and 32 were white. (Walters, R pp 229-30) Of the 20 minority jurors, the State passed 10,[29] or one-half (8/16). Of the 32 white jurors, the State passed 18,[30] or 9/16. Hence, a greater proportion of the available black jurors than white jurors actually served in Defendant Walters' case: of the 32 prospective white jurors, 6 served. Of the 20 prospective black jurors, 6 served.

The record shows that there was no questioning by the prosecutor which tends to support an inference of discrimination. Neither the State's voir dire of the panels on which the six peremptorily excused jurors sat, nor the State's questioning directed specifically to those jurors, suggest any discriminatory intent. (See Walters, JST pp 208-93 (panel on which Marilyn Richmond, Sean Richmond, and Jay Whitfield, sat;

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[29] (Walters, JST pp 38, 293, 707, 798, 1087, 1153) (Laquita Peavey, Edith Whitted, Cornelius Wooten, Donna Parson, Albert Pye, Samuel Blossom, Wilhelm Leslie, Juan Morales, Virginia Brazier, Richard Council).

[30] (Walters, JST pp 38, 293, 340, 461, 492, 707, 749, 1087) (Evie Smith, Robert Firmani, Rebecca Honeywell, Richard Garner, Penny Peace, Diane Petrowski, Ruth Helm, Tami Johnson, Crystal Sisk, Dan Stephens, Daniel Pietz, Richard Bruton, Melinda Pulliam, Amelia Smith, Betty Harrison, Philip Hedgepath, Kathrene Boxwell, Patricia Geroux).

(Id. at pp 221- 24, 225-26, 247-48, 261-64) (Marilyn Richmond); (Id. at pp 272-75) (Sean Richmond); (Id. at pp 250-52, 287-88) (Jay Whitfield); (Id. at pp 310-40) (panel on which Laretta Dunmore and Sylvia Robinson sat); (Id. at pp 313-17, 320, 323-24, 330, 331, 334-35, 337) (Laretta Dunmore); (Id. at pp 320, 323-24, 330, 332-33, 337-39) (Sylvia Robinson); (Id. at pp 373-420) (panel on which Norma Bethea sat); (Id. at pp 382, 383-84, 386-87, 390-91, 396-97, 402, 404-06, 408-16, 419-20) (Norma Bethea)).

At the RJA Hearing ADA Russ testified that her peremptory challenges in the Walters case were based upon a number of reasons including demeanor of the prospective jurors in their responses to her questions. (See e.g., HT pp 1450, 1212).[31] The MAR Court rejected this reasoning, finding it "vague[,]" "utterly generic" and unpersuasive. (RJA Order, p 70, ¶ 58). Of course, what was truly relevant to the issue of whether race was significant factor in the peremptory challenge of any

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[31] For example, ADA Buntie Russ observed one prospective juror pausing before answering any question related to the death penalty. (HT p 1148). These pauses were not transcribed in the record but were part of the prosecutor's observation which informed her decision on whether this prospective juror would have difficulty implementing the death penalty. (Id. at pp 1148-49; see also, HT p 1181). ADA Buntie Russ observed another prospective juror visibly upset when discussing his grandchildren being killed. (Id. at p 1212). He indicated that the seventy-five years that the killer got was not enough, and ADA Buntie Russ was concerned that this prospective juror would hold the State responsible for that in some manner. (Id. at p 1213).

prospective juror was what occurred at Defendant's trial. Consequently, even if the MAR Court was not persuaded by ADA Russ' RJA Hearing testimony, owing to what the court found to be faulty memory of the case, the most relevant evidence was from the trial itself. Regardless of the testimony at the RJA Hearing, even a cursory review of the record of what occurred during jury selection at trial belies the MAR Court's finding that any of these peremptory challenges were made on the basis of race.

Marilyn Richmond was peremptorily challenged by the State after she indicated that someone she knew had been charged with armed robbery in Cumberland County, was found guilty and sentenced to prison for 15 years to life, but got out in the late 1980's or in 1990. (Walters, JS T pp 220-222). She also acknowledged that she worked as a substance abuse therapist with several adolescent clients who professed to be gang members. (Id. at pp 246-47). It would certainly be a race neutral reason to strike a prospective juror who was a therapist to professed gang members and had a relative who had been involved in criminal activity. Prospective juror Jay Whitfield was peremptorily challenged by the State after he professed to play ball in the neighborhood with people who claimed to be gang members. (Id. at pp 250-51).[32]

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[32] At the RJA Hearing ADA Russ testified that it was not only that he had previously played basketball with gang members but also that he was continuing to do so and that there was no way for the prosecution to know whether this prospective juror would know anyone who would know any of the nine gang member co-defendants or other witnesses in the case. (HT p 1209).

Additionally, the court reporter recorded in the transcript that when asked about gang activity, prospective juror Jay Whitfield did not just raise his hand, but appeared to be making a hand signal. (Id. at p 246). The fact that this juror stated that he played basketball with people he believed to be gang members and was observed making a hand signal when asked about gang members would have been a race neutral reason sufficient to withstand a Batson challenge. Prospective juror Norma Bethea professed to have a health problem which would prevent her from sitting five or six hours a day. (Id. at pp 361-65). Specifically, she had arthroscopic surgery on her knee which had never fully healed. (Id.). Ms. Bethea also stated that her nephew had been charged with breaking and entering approximately five years prior and had gone to prison. (Id. at p 411). The fact that this juror stated that she had health problems and a relative who went to prison constituted race neutral reasons for the peremptory challenge.

Prospective juror Laretta Dunmore professed to have a brother who had pled guilty to armed robbery in New Jersey approximately 10 years prior. (Id. at pp 313-15). She stated that they were pretty close and that he had been released from prison. (Id.). The MAR Court "decline[d] to credit" ADA Russ' testimony at the RJA Hearing wherein she explained that one of her reasons for striking this juror was because this juror had attended a paralegal course that ADA Russ had taught. (RJA

Order, p 82, ¶ 96-97)(see also, HT pp 1193, 1197-98). Irrespective of ADA Russ' testimony at the RJA Hearing, however, the fact that this juror had a brother who pled guilty to robbery and had gone to prison was certainly a race neutral reason justifying the peremptory challenge. See State v. Williams, 339 N.C. 1, 16-17, 452 S.E.2d 245, 254 (1994).

Prospective juror Sylvia Robinson stated in jury voir dire that she did not feel comfortable judging other people. (Walters, JS Tpp 294, 303). She clarified that this feeling did not necessarily relate to the death penalty but instead was related to judging other people. (Id. at p 332). The fact that Ms. Robinson expressed that she had discomfort judging other people would have been a race neutral reason.

Prospective juror Calvin Smith professed that his son-in-law killed Mr. Smith's grandchildren in 1986 in Cumberland County. (Id. at pp 1529, 1538). His son-in-law was charged with murder and given 75 years in prison. (Id. at p 1538). The fact that this prospective juror had a relative convicted of the murder of his grandchildren certainly would have been a race neutral reason for the peremptory challenge.

Prospective juror Sally Robinson stated that she could "possibly" consider the death penalty if it was proven "completely" and that it would have to be proven to her "beyond reason." (Id. at pp 1378, 1394-95, 1401). The fact that this prospective juror would have required a standard of proof higher than the law required certainly

would have been a race neutral reason justifying the State's peremptory challenge.

Prospective juror John Reeves stated that his twenty-eight year old grandson had been charged with theft in Fayetteville. (Id. at pp 1329-32). In this prospective juror's opinion, the criminal justice system was "taking too long" for his grandson's case to get to trial. (Id. at p 1332). No doubt the Cumberland County District Attorney's Office was responsible for the prosecution of this case. The fact that this prospective juror had a grandson charged with a pending theft charge for which the Cumberland County District Attorney's Office would be responsible for prosecuting, and the fact that this prospective juror was critical of the criminal justice system "taking too long," was certainly a race neutral reason for the State's peremptory challenge of him. (Id.).

Prospective juror Ellen Gardner testified that her younger brother was caught with marijuana and a gun in Miami, Florida approximately six years prior and that he was sentenced to five years. (Id. at pp 1169, 1185-87). She also stated that it "grieves [her] spirit" to hear about gang activity. (Id. at p 1197). When asked if she could consider the death penalty as an appropriate punishment, Ms. Gardner stated "[i]f I have to." (Id. at p 1205). She stated that she would have to "think about that real hard." (Id. at pp 1209-10). Ms. Gardner's reluctance to impose the death penalty combined with having a relative convicted of drug charges was certainly a

sufficiently race neutral reason to justify the State's peremptory challenge of her.

Prospective juror Sean Richmond stated that he did not believe he was a victim of a crime even after his car was broken into and his CD player stolen. (Id. at p 274). Certainly the State's peremptory challenge of this juror was justified based upon the non-racial reason that this juror did not believe he was a victim of a crime although criminal activity had been perpetrated against him.[33]

Notably, Judge Gore, who presided over Defendant Walters' case, was not allowed to testify, but his proffer of evidence supports the conclusion that no peremptory challenge in Defendant Walters' case was exercised on the basis of race. From his review of the jury selection transcript as well as his extensive memory of the facts of the case, he found sufficient racial neutral reasons for the State's peremptory challenges of all but one of these jurors,[34] and articulated that he would have denied any Batson motion as to these jurors had any been lodged by the defense. (See Statement of William C. Gore, pp 8-33, 37)(State's Appx. 8C). Judge Gore found no evidence of racial discrimination in the State's peremptory challenges of

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[33] ADA Russ testified at the RJA Hearing that she had real concerns about how this prospective juror would feel about the victims in Defendant Walters' case if he did not feel like he had been a victim of any criminal activity. (HT p 1218).

[34] It appears that the State neglected to ask Judge Gore about the State's peremptory challenge of prospective juror Sean Richmond. (See Statement of William C. Gore)(State's Appx. 8C).

any of these jurors. (Id.).

Findings of Fact Related to Defendant Augustine's Case

In finding that prosecutors have offered pretextual reasons for jury strikes, the MAR Court evaluated evidence presented at Defendants' RJA hearing which the MAR Court described as the prosecution's "[r]ace-[b]ased [j]ury selection [r]esearch" in Defendant Augustine's case. (RJA Order, pp 51-54, ¶¶ 10-20). The MAR Court concluded that racial discrimination in jury selection was evidenced by ADA Cal Colyer's pre-trial notes prepared in anticipation of jury selection in Defendant Augustine's case. ADA Colyer made the notes when he interviewed members of the Brunswick County Sheriff's Department for guidance as to specific jurors slated for the panel since they were drawn outside his prosecutorial district, from neighboring Brunswick County. (Id.)(HT p 998). Specifically, the MAR Court found invidious racism lurking in the notations that ADA Colyer made regarding certain neighborhoods identified by Brunswick County Sheriff's Department members as "bad areas" rife with "high drug" and "high-crime" activity. (RJA Order, pp 53-54, ¶ 19).[35] The MAR Court found these "race-based notes" informed the prosecutor's

[35] ADA Colyer explained that he did no investigation on any of the neighborhoods but merely recorded information given to him during his meeting with the Brunswick County Sheriff's Department personnel. (HT pp 939, 1049). None of the information given to him indicated that any of the neighborhoods listed were predominantly occupied by any particular race of individuals. (Id.).

jury questions and peremptory strike decisions in jury selection. (RJA Order, p 51, ¶ 11). The MAR Court rejected ADA Colyer's explanation that he made note of these neighborhoods out of concern because these areas were represented to him as neighborhoods with high crime rates. (RJA Order, p 53, ¶ 19). Instead, the MAR Court assessed that ADA Colyer's notations regarding "bad areas" and "high-crime" areas was simply a proxy for race. (RJA Order, pp 53-54, ¶¶ 18-19). Thus the MAR Court found that ADA Colyer's notations prepared in anticipation of jury selection of jurors who came from areas with which he was unfamiliar constituted "irrefutable evidence that race, and racial stereotypes, played a role in the jury selection process in [Defendant] Augustine's case." (RJA Order, p 50, ¶ 10).

The MAR Court's conclusion is not supported by competent evidence and is contrary to the law. There is nothing inherently racial in describing neighborhoods as "bad" areas or areas subject to "high crime" or "high drug" activity. In fact, this Court has frequently done so with no apparent racially discriminatory purpose. See State v. Bone, 354 N.C. 1, 4, 550 S.E.2d 482, 484 (2001)(this Court's recitation of facts that police began operations "in high-crime areas around the victims' neighborhood.")(emphasis added); State v. Barnard, 362 N.C. 244, 245, 658 S.E.2d 643, 644 (2008)(this Court's findings of fact that Officer was on patrol "in a high crime area of downtown Asheville where a number of bars are located.")(emphasis

added); State v. Murphy, 342 N.C. 813, 817, 467 S.E.2d 428, 430 (1996)(this Court's findings of fact that victim's truck was later found abandoned in "high crime and drug area")(emphasis added); State v. Augustine, 359 N.C. 709, 713, 616 S.E.2d 515, 520 (this Court's recitation of facts that officer had been shot in "an area associated with drug activity, alcohol consumption, and domestic disputes.")

Hence to say that merely describing a neighborhood or area as "bad" or noting that it is an area rife with "high crime" or "high drug" activity is code for stating that the neighborhood is predominantly populated by African-Americans is a clearly erroneous finding. This kind of notation is merely a description of the potential criminal activity that surrounds the neighborhood. It has nothing to do with race. The MAR Court's conclusions from this evidence that "race was a significant factor in [Defendant] Augustine's case" is thus erroneous.

Also, the MAR Court faults the State with having made notations designating the race of specific jurors. (RJA Order, p 52, ¶ 14). The MAR Court was persuaded by the testimony of a law professor who was admitted as an "expert in race and the law." (RJA Order, p 52, ¶ 15). Defendants' expert found that the prosecution's notations of a juror's race was evidence of the prosecution's "preoccupation with race" and "highly suggestive of race consciousness" such that the MAR Court concluded that "race was a significant factor in [Defendant] Augustine's case." (RJA

Order, p 52, ¶ 15). Yet there is nothing inherently racially motivated in a prosecutor noting the race of jurors. In light of the requirements under Batson and Miller-El, it is appropriate for prosecutors to keep track of the racial composition of their jury strikes in the event that there is an objection to any of them.[36] As noted above, upon a trial court's finding of a prima facie showing of a Batson objection against the State's peremptory challenge of a jury, it is incumbent upon the State to offer a race neutral reason for the strike. The trial court is then required to review all of the jury voir dire, beyond just the instant juror, to determine if racial discrimination has been established in the striking of the prospective juror. As such, it is important for all participants at the trial to keep records of the racial composition of the jurors who are excused. This method of identification does not evidence racial discrimination. See United States v. Barnette, 644 F.3d 192, 211-12 (4th Cir. 2011)(rejecting defendant's argument that evidence of discrimination was shown in prosecutor's written notations of jurors' race and gender which were, as the prosecutor claimed, simply a method of identification); see also Barnes v. Branker, No. 1:08CV 271, 2012 U.S. Dist. LEXIS 13213 (M.D.N.C. Feb. 3, 2012)(Sharpe, M.J.)(unpublished but available

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[36] In fact, ADA Colyer testified that his motivation in keeping track of gender and race was for the very reason that he might have been called upon to respond to a Batson motion with accurate and timely figures regarding his peremptory and for-cause challenges. (HT p 940-41).

electronically) (concluding that notations of jurors' race by a North Carolina state prosecutor were "more a 'method of identification not discrimination.'" (citation omitted)). The MAR Court's findings to the contrary are clearly erroneous.

The MAR Court's finding of fact that prosecutors have intentionally discriminated in jury selection was not based upon an evaluation consistent with the well-established law of this Court. These findings are clearly erroneous because they are based upon a misapprehension of law. This Court should grant review to define to what extent a post conviction court can re-visit jury selection to determine whether a prosecutor's race neutral reason given was "pretextual" in nature and how that evaluation must be made.

2. The MAR Court's Findings of Fact Are Clearly Erroneous because the Findings of Fact Are not Supported by the Record.

Not only has the MAR Court erred in re-evaluating legal conclusions which have already been determined by other Superior Courts and by this Court, but also the MAR Court's assessment of the facts found from the record are clearly erroneous as they are not supported by the record. The MAR Court engaged in a re-assessment of jury strikes in specific capital cases from the transcripts of selected cases and determined that these peremptory strikes constituted evidence of intentional discrimination. (See e.g., RJA Order, pp 59-67, 130). Inconsistently, the MAR Court

conducted an evaluation of these peremptory strikes based upon transcripts from the jury voir dire in these cases but discounted the same analysis by prosecutors reviewing these same jury transcripts years after the case. (RJA Order, pp 199-200, ¶¶ 386, 388)(discounting affidavits of prosecutors reviewing transcripts who did not participate at trial and also finding the "probative value of a post hoc response from a prosecutor [who did participate at trial] several years after the trial about why he or she struck a particular juror" to be of "limited" probative value).[37] Notwithstanding this inconsistency, the MAR Court engaged in an evaluation of these peremptory strikes and made findings of fact about these strikes which are clearly erroneous from the record presented.

In just two examples, drawn from the specific cases under review, it is clear that the MAR Court has found facts not based upon competent evidence. From its review of the evidence, the MAR Court found that race was a significant factor in the State's decision to exercise peremptory challenges of prospective jurors John Murray and Freda Frink in Golphin and prospective jurors Mardell Gore and Ernestine Bryant

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[37] The United States Supreme Court identified the inherent difficulty of asking prosecutors to defend their decisions made in death penalty cases years after the fact and noted that "[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts." McCleskey, 481 U.S. at 297 n. 17, 95 L. Ed. 2d at 281 n. 17.

in Augustine (RJA Order, pp 59-67, 130). The evidence from the record establishes that none of these peremptory strikes were discriminatory.

Peremptory Strike of Prospective Jurors John Murray and Freda Frink in State v. Golphin

The MAR Court found that the State's peremptory challenges of prospective jurors John Murray and Freda Frink was evidence of racial discrimination in Defendant Golphin's case. (RJA Order, pp 59-67). The record shows otherwise.

After examining prospective juror John Murray, the State exercised a peremptory challenge to excuse him from the jury. (Golphin, JS T p 2110).[38] Defendant objected pursuant to Batson. (Golphin, JS T p 2111) The prosecutor, ADA Colyer, offered the following explanations for the challenge:

> MR. COLYER: . . . Your Honor, we would challenge Mr. Murray on the cumulative effect of three things. One, he has a prior conviction himself for driving while impaired. Two, his father has a prior conviction for robbery for which he served, if I remember correctly, six years in the Department of Corrections. And three, Mr. Murray's statement that he attributed to a male and a female white juror in the courtroom with respect to what he viewed as a challenge to the due process rights of the defendants. The cumulative effect of that we contend makes him challengeable by the state from our point of view peremptorily.
>
> I would also note that during the course of his answers at no time other than answering the question and facing the person that was asking him

[38] References herein to "Golphin, JS T p _" are to the official transcript of jury selection in Defendant Golphin's case (State v. Golphin, No. 441A98).

the questions, while I certainly don't expect to be afforded any courtesy or recognition of authority because I don't have any authority, so to speak, but I noticed that when he spoke, he did not refer to the Court with any deferential statement other than saying "yes" or "no" in answering your questions when you asked them.

In addition, in my view with respect to his demeanor, I noted that he had a gold earring in his left ear. I also noted and perceived from my point of view a rather militant animus with respect to some of his answers. He elaborated on some things. Other things, he gave very short, what I viewed as sharp answers and also noted that when he spoke to the Court, that he did not defer, at least in his language, to the Court's authority, did not refer to the Court in answering yes, sir or no, sir. Did not address the Court as Your Honor. He just simply gave rather short, cryptic answers.

(Golphin, JS T pp 2111-2112)

After hearing rebuttal from defense counsel, the trial court made its ruling:

THE COURT: All right. The Court determines that the state has established a non-racial basis for the peremptory challenge and the objection to that peremptory challenge based upon Batson is overruled and denied.

(Id. at p 2114)

The trial court then stated:

THE COURT: I would just note for the record that I did not perceive - since this has been raised, I did not perceive any conduct of the juror to be less than deferential to the Court. I think that the juror did demonstrate a consistent reticence to elaborate on questions, but all of his responses were appropriate to the specific questions asked. And probably that - there was a substantial degree of clarity and thoughtfulness in the juror's responses.

And the Court will note for the record that it is primarily relying upon

> the defendant's prior record, specifically which it involved an interaction with a traffic law enforcement officer, and the potential empathy that might be engendered from a father who was a criminal defendant as the basis for the exercise of the peremptory challenge.
>
> I would note further I am not relying upon the impact of the incident in the courtroom as providing a basis for this and frankly is not - I do not consider it to be appropriate for even the exercise for a peremptory challenge.

(Id. at pp 2114-2115)

The MAR Court found from this transcript that the Superior Court rejected two of the reasons given by the State for the peremptory strike of John Murray. (RJA Order, p 65, ¶ 49). This, according to the MAR Court was sufficient to establish "evidence that race was indeed a significant factor in the strike." (Id).

The State does not agree that the trial court "rejected" two of the four reasons the prosecution gave for its peremptory challenge. Even if it had, however, the trial court ultimately allowed the State's peremptory challenge, finding no evidence of racial discrimination. (Golphin, JS T p 2114). The MAR Court appears to have discounted this essential fact – that the Batson motion was denied.

Nonetheless, the MAR Court concluded that prospective juror John Murray was subject to "racially disparate treatment[.]" (Id. at p 64, ¶ 46). The record shows otherwise. First, there was not a single white juror who had both a criminal conviction and also close relative who served time for a criminal conviction as Mr.

Murray had. It was more than appropriate for the prosecution to inquire as to Mr. Murray's experiences with the criminal justice system. Even still, the MAR Court found that racial discrimination was shown by the prosecutor's question to Mr. Murray concerning his arrest:

> MR. COLYER: Is there anything about the way you were treated as a taxpayer, as a citizen, as a young black male operating a motor vehicle at the time you were stopped that in any way caused you to feel that you were treated with less than the respect you felt you were entitled to, that you were disrespected, embarrassed or otherwise not treated appropriately in that situation?

(Golphin, JS T p 2073). According to the MAR Court, this question alone was evidence that "race was a significant factor in [ADA] Colyer's decision to strike Murray." (RJA Order, p 60, ¶ 37).

Contrary to the MAR Court's finding, however, the mere mention of race during jury selection does not necessarily indicate purposeful racial discrimination. In a case like Defendant Golphin's, where both defendants are black and both victims were white, it is permissible to delve into potential biases and prejudices during jury selection. See Turner v. Murray, 476 U.S. 28, 35, 1688, 90 L. Ed. 2d 27, 37 (1986) (noting that inquiring into racial bias is especially important in capital cases). In light of the facts of this case, it was appropriate for the State to inquire of Mr. Murray whether he felt he may have been mistreated by police due to his youth and his race. In fact, both Defendant Golphin and his co-defendant brother Kevin Golphin asked

prospective white jurors about whether the fact that they were black and the victims were white would affect their impartiality. (See Golphin JS T pp 994-995). Nothing is inherently wrong in these questions during jury voir dire. It certainly does not evidence racial discrimination. Just the opposite; it evidences a prosecutor attempting to ensure that race does not infect the jury's consideration of the evidence presented at trial.

The MAR Court also found evidence of racial discrimination in the prosecutors questions regarding Mr. Murray's report that he had overheard other jurors commenting about the case. (RJA Order, p 60, ¶ 36). The record showed that Mr. Murray reported to the trial court that he had overheard prospective white jurors saying, "The defendants should never have made it out of the woods." (Golphin, JS T p 2054) Mr. Murray's feelings about what he heard raised questions about whether his service on the jury could have been impacted by having to serve with these persons regardless of their race. Although Mr. Murray believed hearing the comments by the other prospective jurors would have no impact on his jury service, he stated that he "would question their ability" to be jurors, that it caused him "concern," that the comment showed "that those people believe that the defendants were already guilty without hearing any testimony," and that he had no way of knowing whether those jurors would end up on the jury. (Id. at pp 2078-2080) The

State's concerns about Mr. Murray's service on the jury after hearing the other prospective jurors' comments were objectively reasonable and were neither race-based nor pretextual. Yet the MAR Court found that this line of questioning and the resulting colloquy which formed part of the explanation of the State's reasons for the peremptory challenge revealed "race-consciousness and race-based decision making" by the prosecution. (RJA Order, p 62, ¶ 42).

Finally, among the reasons the prosecution gave for exercising a peremptory challenge against Mr. Murray was Mr. Murray's appearance and disposition. The MAR Court in its review of the record determined that this was evidence of racial discrimination. The record shows otherwise. The prosecution explained that Mr. Murray had an earring and that he had "a rather militant animus" when questioned. The MAR Court found this explanation patently race-based and evidence of stereotyping by the State. (RJA Order, p 116 ¶ 179). However, there was nothing racial about this explanation, and personal appearance, attire, and demeanor are relevant and proper factors in determining preemptory strikes as they have been found to be race neutral reasons for exercising preemptory strikes.

In Purkett v. Elem, 514 U.S. at 769, 1771, 131 L. Ed. 2d at 840, the Court found that striking a prospective juror "because he had long, unkempt hair, a mustache, a beard - is race neutral and satisfies the prosecution's step two burden of

articulating a nondiscriminatory reason for the strike." In doing so, the Court found that the wearing of beards and growing of long, unkempt hair is not a characteristic peculiar to any race. The same reasoning would apply to earrings. Certainly a prosecutor's perception of a juror's demeanor would be a race-neutral ground upon which a prosecutor may validly exercise a peremptory challenge. United States v. Lane, 866 F.2d 103, 106 (4th Cir. 1989)(prospective juror's "general appearance and demeanor" may properly influence prosecutor's decision).

In the present case, the MAR Court also found the State's explanations were race-based and that the State's reasoning that Mr. Murray was not appropriately deferential to the trial court was not supported by the record. (RJA Order, p 64, ¶¶ 47-48). The record shows that the trial court, after overruling the Batson objection, explained that it believed the fact that Mr. Murray heard other jurors make a biased comment was not appropriate for the exercise of a peremptory challenge and that it believed Mr. Murray had been appropriately deferential. But at no point did the trial court find that either of the two explanations was race-based or a pretext for purposeful racial discrimination. Indeed, although the trial court may have been of the opinion that the explanations should not have been put forward to support a peremptory challenge, there was nothing race-based or pretextual about them. By overruling the Batson objection, the trial court found that the State's reasons for

challenging Mr. Murray did not show purposeful racial discrimination.

Most significantly, on direct review, this Court reviewed the State's peremptory challenge of Mr. Murray and affirmed the trial court's determination that no racial discrimination had been shown. It is instructive that this Court, unlike the MAR Court, actually did a full review of the entire jury selection in order to appropriately assess the Batson challenge to the State's peremptory challenge of Mr. Murray and another prospective juror, Ms. Holder. After such full assessment, this Court held as follows:

> As the State provided race-neutral reasons for its peremptory challenges of Holder and Murray, we move to the third prong of Batson. In light of the factors we consider in evaluating whether there is purposeful discrimination, we note that **this case may be one susceptible to racial discrimination because defendants are African-Americans and the victims were Caucasian.** See White, 349 N.C. at 548-49, 508 S.E.2d at 262. However, the State did not exhaust the statutory number of peremptory challenges allowed for the first twelve jurors, nor did it exhaust its challenges in selecting the four alternate jurors. See N.C.G.S. § 15A-1217; White, 349 N.C. at 548-49, 508 S.E.2d at 262. In addition, based on the discussion which occurred at the time the State challenged Holder, the State had exercised nine peremptory challenges, only three of which were against African-Americans; the next day, when Murray was challenged, the State had exercised eleven peremptory challenges, only four of which were against African-Americans, one being Holder. The State had accepted six prospective jurors, one of whom was African-American. This constituted a higher percentage of African-Americans accepted by the State than were in the jury pool. In selecting the twelve jurors and four alternates, the State exercised twenty-seven peremptory challenges, only four of which were against African-Americans. This ratio represents a percentage of African-Americans equivalent to the percentage of African-Americans

> in the jury pool. **Moreover, during jury selection, the State made no comments which would support an inference of discrimination in the instant case.**
>
> From our review of the transcript in the instant case, it is apparent the trial court gave great consideration to the arguments by all parties with regard to these two Batson challenges before concluding the State did not purposefully discriminate against Holder or Murray. **We give great deference to the trial court's rulings.** See Bonnett, 348 N.C. at 433, 502 S.E.2d at 575. Given the foregoing, **we are convinced the State did not discriminate on the basis of race in exercising its peremptory challenges against Holder and Murray.** See Kandies, 342 N.C. at 434-35, 467 S.E.2d at 75. Defendants' assignments of error are overruled.

Golphin at 432-433, 533 S.E.2d at 214-215 (emphasis added).

This Court has found from its review of the jury selection transcript that the "State made no comments which would support an inference of discrimination in the instant case." (Id.)(emphasis added). Yet the MAR Court has found just the opposite from its review of the very same transcript. However, unlike the MAR Court, this Court actually conducted an in-depth analysis of the particular peremptory challenges as they occurred during the voir dire of this case based upon the particular facts in Defendant Golphin's case. Where the trial court and this Court have found no racial discrimination in the peremptory challenge of John Murray, the MAR Court's conclusion to the contrary is not supported by competent evidence and cannot support its conclusions.

The MAR Court has also found the State's peremptory challenge of prospective

juror Freda Frink was racially discriminatory. (RJA Order, pp 67, 126-27). It is significant that the State's peremptory challenge of prospective juror Freda Frink was not met with a Batson challenge at trial. Thus what the defense and the trial court did not see as racially discriminatory at the time, the MAR Court has found to be proof of racial discrimination years later. The record belies the MAR Court's findings.

During jury voir dire Ms. Frink articulated that she had "mixed emotions" about capital punishment and that she couldn't "truthfully" say that she could return a death sentence. (Golphin, JS T pp 659, 675-76). Ms. Frink admitted that she had a pending communicating threats charge taken out against her. (Id. at p 671). Ms. Frink also had a fiancé who got shot in the head and killed, although she had not put it in her questionnaire. (Id. at pp 685-86). She noted that her fiancé's killer was "set free...." (Id. at p 686). It was for this reason that the juror articulated that she had "mixed emotions" about the death penalty and admitted that she had reservations about participating in a death penalty case. (Id. at pp 659, 684). Though the MAR Court refused to admit the evidence, the presiding trial judge in his proffer of evidence acknowledged that there was no Batson objection for the peremptory challenge of Ms. Frink, but that he would not have allowed a challenge in any event based upon Ms. Frink's equivocation on the death penalty. In so doing, the trial court noted that with this particular juror, "this wasn't even a close call" on the Batson

issue. (See Statement of Coy Brewer, p 31)(State's Appx. 8C).

The presiding trial judge's assessment is consistent with this Court's law. A prospective juror's reservations or doubts about imposing the death penalty provides ample reason for the prosecutor in a capital case to exercise a peremptory strike. See e.g., Williams, 339 N.C. at 19, 452 S.E.2d at 256; State v. Basden, 339 N.C. 288, 297, 451 S.E.2d 238, 242-43 (1994)("A prosecutor may properly exercise a peremptory challenge to excuse a juror due to his hesitancy over the death penalty."). Additionally, here the prospective juror also had criminal charges taken out against her and her fiancé had been shot in the head while his killer was "set free." A juror's involvement in the criminal justice system is a race neutral reason to exercise a peremptory challenge. Williams, 339 N.C. at 16-17, 452 S.E.2d at 254.

There was nothing in the peremptory challenge of Freda Frink that evidenced any racial discrimination by the State. No Batson challenge was lodged, and the presiding trial court has indicated that it would not have even been a "close call" to resolve. The fact that the MAR Court in post conviction, years later, has determined from its review of the transcript that racial discrimination existed where none was established before is clearly erroneous.

Peremptory Challenges of Mardelle Gore and Ernestine Bryant in State v. Augustine

The MAR Court also found that the State's peremptory challenges of

prospective jurors Mardelle Gore and Ernestine Bryant was evidence of racial discrimination in Defendant Augustine's case. (RJA Order, pp 65-67, 130). Specifically, the Court compared the State's reasons for its peremptory strike of Ms. Gore and Ms. Bryant to that of other jurors to conclude that the State's reasoning for striking these prospective jurors (because they had family members who had criminal convictions and had been imprisoned) was a pretext for a race-based decision. (RJA Order, p 67). The MAR Court's analysis is not supported by the record or the law of this Court.

From its review of the record, the MAR Court concluded that the State struck prospective juror Mardelle Gore for "race-based reasons." (RJA Order, p 66). The record shows, however, that the criminal conviction and imprisonment of Ms. Gore's daughter was only one reason in an entire set of explanations given. The prosecutor gave his reasons for the peremptory challenge after a Batson challenge lodged by the defense:

> MR. COLYER: Your Honor, with respect to Ms. Gore, the primary reason is in response to her question (sic) on the questionnaire -- and in explanation of the charge question on the back, she indicated that her daughter had been convicted of killing someone and had spent five years in prison about six years ago in Tennessee as a result of -- as she described it -- the husband threatened to kill her. "She grabbed the gun off the bed before he could and she shot him."
>
> Her other questions, she was fairly monosyllabic in her answers. "Yes." "No." Fairly short answers. Not, uh, uh didn't elaborate very much on

anything with respect to questions that she was asked as it related to, uh, the function of a jury with respect to guilt-innocence or the death penalty. A yes or no.

I attempted to ask her questions that would draw her out, get her talking, but she didn't indicate anything by way of, uh, her opinions or feelings other than a yes or no. She indicated that, uh -- on her questionnaire, that she had not had prior jury service, and then indicated that she had served in Southport she thought on a civil case. Um her, uh, body language tended to be a -- I don't want to say defensive, but somewhat defensive in that she didn't make a whole lot of eye contact and would look away. And then, when there was a question that was put to her to explain or to -- especially with respect to the death penalty question - she would pause and get kind of a quizzical look on her face, almost a little bit of a smile; but then would just answer with a "yes" or a "no" and not explain her position.

As it relates to her ability to serve on this case, with respect to the homicide, we challenged her based on her experience with her daughter having been a homicide defendant apparently, although she said she did not know what they called it, in Tennessee for the killing of her husband.

I'll be glad to try to answer questions if you or the defense have any others.

(Augustine, JST pp. 930-931)[39]

The trial judge considered the Batson motion and denied it finding:

The court further finds that the method of selection and questions asked by the prosecutor were uniform, and it appeared to the court that all prospective jurors were treated alike.

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[39] References herein to "Augustine, JS_T p_" are to the official transcript of jury selection in Defendant Augustine's case. (See State v. Augustine, No. 130A03).

> The court further notes and finds that the defendant and the victim are black; that the prosecutors appearing in this action are white; that the defense attorneys appearing in this action are white. That, particularly in view of the fact that the victim and the defendant are black, makes this case not particularly susceptible to racial discrimination.
>
> **The court further finds that based upon personal experience and knowledge, having tried on numerous occasions homicides, both capital and noncapital, with the prosecutor Calvin Colyer -- and on occasion with the defense attorneys Jim Parish and Haral Carlin that the court in the past has observed no apparent discriminatory practices in the selection of the jury by this assistant DA.**
>
> The court finds that the dismissal of juror Mardelle Gore -- or the exercise of peremptory challenge of juror Mardelle Gore is not because of intentional discrimination by the state. And the motion is denied.

(Id. at pp 934-935)(emphasis added).

Similarly, Defendant Augustine made a Batson objection to the State's peremptory challenge of Ernestine Bryant. (Id. at p 191). During the voir dire of this prospective juror, the State elicited information from Ms. Bryant that she had a twenty-three year old son currently serving a fourteen and a half year sentence for federal drug convictions. (Id. at pp 172-74). The trial court found that there was no evidence even supporting a prima facie case of racial discrimination and denied the motion. (Id. at pp 190-91).

On direct appeal, this Court, in reviewing the jury voir dire for possible Batson violations, concluded that "[t]his case, where defendant, the victim, and the State's three critical witnesses were all African American, was not particularly susceptible

to racial discrimination." Augustine, 359 N.C. at 716, 616 S.E.2d at 522 (citing State v. Smith, 351 N.C. 251, 263, 524 S.E.2d 28, 37 (2000)). Notably, on direct review Defendant Augustine did not raise an issue as to the peremptory challenge to Ms. Gore. However, this Court reviewed the jury voir dire in total, and concluded that Defendant Augustine failed to establish a prima facie showing of racial discrimination in the peremptory challenge of Ms. Bryant, in comparison to other prospective jurors whom Defendant Augustine alleged were similarly situated.[40] Augustine, 359 N.C. at 714-16, 616 S.E.2d at 521-22. Thus the same arguments made in the Defendant Augustine's RJA motion have been denied by this Court on direct review.

Notwithstanding this clear finding by the trial court and this Court that the prosecution's peremptory strikes were not based upon racial discrimination by the State, the MAR Court found otherwise. The MAR Court discounted one of the State's given reasons by focusing in on other prospective jurors which the MAR Court found were similarly situated who were not struck by the State based upon involvement in the criminal justice system. (RJA Order, pp 65-67). Thus the MAR

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[40] The prospective juror who was compared to the peremptory challenges of Ernestine Bryant in Defendant Augustine's brief on direct appeal was Gary Lesh. Defendant also acknowledged that a Caucasian prospective juror, Carolyn Lambert was struck at the same time that Ms. Bryant was peremptorily challenged. (Augustine, 130A03, Def's Br, pp 89-90).

Court cited these examples as evidence that race was a significant factor in the selection of jurors. In so doing, the MAR Court found that "African Americans are often excluded from jury service for the slightest association with crime." (RJA Order, p 130, ¶ 198). But a review of the prospective jurors peremptorily challenged in Defendant's Augustine's case belies this claim.

The MAR Court highlighted two Caucasian prospective jurors, Melody Woods and Gary Lesh, whom the MAR Court found were similarly situated to prospective jurors Gore and Bryant but who were not peremptorily struck from jury service by the State. (RJA Order, p 67). Melody Woods did have a family member that was convicted of assault. But there were significant differences in Ms. Woods' situation. Ms. Woods' family member was her mother, from whom she was alienated and had not reconciled. And of course, the crime was assault not murder. (Augustine, JS T pp 827-30). Gary Lesh had a stepson who served time in prison for possession of marijuana. (Id, at pp 715-17). Mr. Lesh stated that his stepson had turned his life around and was a productive citizen. (Id.). Mr. Lesh also had a nephew by marriage who was in law enforcement. (Id. at p 670). This was a far cry from Ms. Gore's situation where her biological daughter was serving time in prison for a homicide, or from Ms. Bryant's son who was still serving a fourteen and one-half year sentence for federal drug convictions.

In short, none of these prospective jurors were similar to Ms. Gore or Ms. Bryant, or Ms. Bryant's son who was still serving a long sentence for substantial federal drug crimes. The MAR Court's findings are also directly contrary to this Court's conclusion that there was no evidence of racial discrimination in the peremptory challenge of Ms. Bryant at trial. Augustine, 359 N.C. at 714-16, 616 S.E.2d at 521-22.

In addition, the MAR Court has completely trivialized the reasons given by the prosecutor at the RJA Hearing relating to body language and demeanor of prospective jurors who were peremptorily challenged by the State.[41] However the trial court's observation of jurors at the time of jury voir dire is very significant to the analysis and should not be discounted since the trial court was in the unique position to observe demeanor and non-verbal communication firsthand. This Court recognized the unique position the trial court had in evaluating body language and general demeanor in its review of the peremptory challenge of Ms. Bryant. Specifically, this Court stated that "[t]he trial court observed Bryant's answers concerning her son, and such responses from prospective jurors are pertinent to a determination of whether

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[41] Though the MAR Court discounted the prosecution's reliance on juror's non-verbal communication in informing decisions regarding peremptory challenges, notably ADA Russ testified that prior to law school she had taught speech courses which included research on non-verbal communication and was particularly aware of the importance of body language in communication. (HT pp 1288-90).

defendant has met his burden." Augustine, 359 N.C. at 716, 616 S.E.2d at 522 (emphasis added), (citing State v. Nicholson, 355 N.C. 1, 23, 558 S.E.2d 109, 126 (2002)). Consistent with this recognition, the presiding Superior Court Judge, whose testimony the MAR Court did not allow, stated in his proffer of evidence that he denied the two Batson motions raised in Defendant Augustine's trial and that he never observed race to be a significant factor in the peremptory challenge of any prospective juror in Defendant Augustine's case. (See Statement of Jack Thompson, pp 29-45, 50-51)(State's Appx. 8A).

Defendant's arguments on direct appeal were similar to the MAR Court's findings here. Yet they did not succeed before this Court in view of the jury selection as a whole and particulars of his case. The MAR Court afforded no deference to the trial court or to this Court's review of the jury selection as a whole but found instead that race was a significant factor in the State's peremptory challenge of Ms. Gore and Ms. Bryant. This conclusion of fact is not supported by competent evidence and cannot fairly support the MAR Court's conclusion.

The MAR Court's Statewide Case Reviews of Peremptory Challenges Beyond Cumberland County and Defendants' Cases

In clear contravention of the Amended RJA, which clearly limits the relevant evidence to be considered to that from the County or prosecutorial district and Defendants' own cases, the MAR court engaged in a re-evaluation of numerous jury

strikes in capital cases across the state and found these strikes constituted evidence that prosecutors have intentionally discriminated in jury selection. (RJA Order, pp 112-36).

In all the findings the MAR Court found that the State's peremptory challenge of a juror was based upon race or a "racial proxy." (Id.). As mentioned above, the MAR Court was unconcerned that other trial courts, and even this Court on direct appeal, had already reviewed the State's peremptory challenges of some of these cases and found no racial discrimination. As such, the MAR Court's conclusions are contrary to established law.

Additionally, as shown below there are several instances where the RJA Order either misapplied the law or made findings of fact unsupported by the record. It is beyond this Petition to respond to each one, but a few examples illustrate the point.

The RJA Order gives examples of cases in which prosecutors allegedly struck African-American venire members because of their membership in an organization or association with an institution that is historically or predominantly African-American. (RJA Order, pp 113-14, 174-75). One such example listed in the RJA Order is the State's peremptory challenge of prospective juror Lolita Page in the case of State v. Dwight Robinson from Guilford County. The RJA Order finds as a fact that "the prosecution struck African-American venire member Lolita Page in part

because she was a graduate of North Carolina State A&T University." (RJA Order, p 113, ¶ 174). Contrary to the MAR Court's conclusion, however, the transcript in the Dwight Robinson case establishes that the basis for the prosecution's exercise of a peremptory strike of Ms. Page was not because of the school from which she graduated, but because she had a master's degree in education and had a young male child approximately the age of the defendant. The prosecutor stated his reasons as follows:

> Your Honor, the State contends that as to juror Lolita Page, Ms. Page is a liberal arts teacher, if your Honor please, at Page High School. she got a degree in English, and she has a master's degree in education. Her husband is also a teacher, if your Honor please, and has been so for twenty years.
>
> The State felt that this juror would not be sympathetic to the State's position as to capital punishment, given her liberal arts education at North Carolina A&T University, and given the liberal arts education also of her husband.
>
> Your Honor, we also noted that she has a male child of some teenage years, and we felt that she would not be sympathetic to the State's position since she had a male child approximately -- well, he's sixteen years of age, and he is a male child. We felt like that would give her some degree of sympathy toward the defendant and not to the State of North Carolina, your Honor.
>
> I noted when I asked her several of my questions, she answered with her arms folded, and did not answer in a very direct manner. We did not feel like she would be a juror that could be completely fair and impartial to the State.

(State v. Dwight Robinson, JS T pp 88-89)

A plain reading of the transcript reveals that the prosecutor did not strike Ms. Page because of where she went to school. The transcript shows that the actual reason given, along with her demeanor and her having a young male child, was that she was a teacher with a master's degree. The master's degree in liberal arts education was the key here, not the school she attended. If the prosecutor was striking venire members who attended historically or predominantly black colleges, he would not have accepted Ms. Carey, who attended North Carolina A&T (Id. at pp 72-73) or Ms. Armstrong, who attended Elizabeth City State (Id. at p 74).

Again it is significant that a Batson challenge was raised and rejected in the Dwight Robinson case. Yet the RJA Order re-analyzed the exercise of this peremptory strike without affording deference to the trial court's assessment. The record belies the finding that the prosecution exercised a peremptory challenge based upon the juror's attendance at North Carolina A&T. These findings of fact are clearly erroneous from the record. As a result, the RJA Order's finding of racial discrimination in this case is not based on competent evidence and cannot support the conclusions of law.

The RJA Order gives examples of cases in which prosecutors allegedly struck African-American jurors after asking them "explicitly race-based" questions and "based on these racialized [sic] inquiries." (RJA Order, p 114, ¶ 176). One such

example listed in the RJA Order is State v. Barnes, Blakeney & Chambers, in which the MAR Court found that the prosecution "singled out" two African-American venire members, Melody Hall and Chalmers Wilson, to ask questions of them about the potential "impact of race on [their] decisions" as jurors. (Id.). The MAR Court's finding that these jurors were "targeted" in jury selection is belied by the record. (Id.). Furthermore, there is nothing improper with inquiring into the possibility that racial considerations might affect a juror's ability to impartially view the evidence in a case.

As an initial matter it is important to note that the law is well settled that inquiry of potential jurors as to potential interracial biases is not only acceptable but must be allowed in a cross-racial killing where the State is seeking the death penalty. Turner v. Murray, 476 U.S. 28, 90 L. Ed. 2d 27 (overturning death sentence after trial court would not allow jury to be questioned regarding racial bias); State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991). This is so because our courts have recognized that racial prejudice which jurors bring to trial can affect the jury. As the United States Supreme Court noted in Rosales-Lopez v. United States, 451 U.S. 182, 68 L. Ed. 2d 22 (1981):

> It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise such a possibility [of racial prejudice affecting the jury].

Id. at 192, 68 L. Ed. 2d at 31.

A review of the transcript in State v. Barnes, Blakeney & Chambers establishes that the prosecutor was, in fact, attempting to ferret out racial bias from the jury in a capital case that involved a black defendant and a white victim. This exchange between the District Attorney, William Kenerly, and prospective juror, Ms. Hall, occurred during jury selection:

> MR. KENERLY: Would the people Thank [sic] you you see every day, your black friends, would you be the subject of criticism if you sat on a jury that found these defendants guilty of something this serious?
>
> MS. HALL: Yes, I would.
>
> MR. KENERLY: If you returned a verdict of death, would you be the subject of comment and criticism among your friends?
>
> MS. HALL: Yes, I would.

(State v. Barnes, Blakeney & Chambers, JS T. Vol. 1, p 342)

Comparing this exchange to questioning of other jurors highlights the fact that this was an appropriate exchange to ferret out any racial discrimination. Upon similar questioning, potential juror Mr. Wilson (African-American) stated unequivocally that he would not be subject to criticism. The prosecution accepted him, but Co-Defendant Blakney peremptorily struck him from the jury. (Id. at JS T Vol 1, p 370; Vol 2, p 69). Potential juror Mrs. Deborah Rice (African-American) stated

unequivocally that she would not be subjected to criticism for returning a guilty verdict or a death sentence recommendation (Id. at JS T. Vol. 2, pp 8-9). The prosecutor accepted Mrs. Rice as a juror (id. at p 21), but the defense peremptorily struck her from the jury (id. at 60-61).

The transcript of this case also reveals that similar questions regarding potential racial bias of jurors was asked of white members of the jury pool. The prosecutor examined Ms. Rice and Mr. Smith (presumably white), who were called into the jury box at the same time, as follows:

> MR. KENERLY: Mr. Smith and Mrs. Rice, in the last series of jurors that were in the box, I asked some questions about being subject to criticism either way for your decision in this case if you are selected to be a juror. Mrs. Rice, would you be in your daily life, the people you see on a regular basis, work with or family or go to church with, or whatever, would you be subject to being criticized if you returned a verdict of guilty of first degree murder in this case?
>
> MRS. RICE: No.
>
> MR. KENERLY: If it went to the second phase then, and you returned a verdict recommendation of death for one or more of these defendants, would you be subject to criticism in your place of employment or family?
>
> MRS. RICE: No.
>
> MR. KENERLY: Would it be, understanding the decision making process has to be based upon the law, would it be, if we had proven to you beyond a reasonable doubt,

after proving guilt, if we proved to you beyond a reasonable doubt that the appropriate legal punishment was death, would it be more difficult for you to return that verdict not only as a member of a group, but as an individual juror because these defendants are black.

MRS. RICE: No.

MR. KENERLY: Mr. Smith, the same question. Would it be easier or would you be more inclined to return a verdict of guilty of murder because the victims in this case are white? If that verdict were returned, would you be more inclined to return a recommendation of death because the victims are white in this case?

MR. SMITH: No.

(Id. at JS T. Vol. 2, pp 8-9).

Here the District Attorney appropriately probed both black and white jurors for racial sensitivity, racial fear, or racial favoritism that could affect their ability, as jurors, to evaluate the evidence impartially. The RJA Order, which finds that the prosecution's valid attempt to probe for any racial bias within the prospective jurors is instead evidence of racial discrimination, is a misapprehension of the law. As a consequence, these findings of fact are clearly erroneous and cannot support the Court's conclusions of law finding racial discrimination in this case. See Helms v. Rea, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973)(facts found under misapprehension of law should be set aside).

The RJA Order also gives examples of cases in which prosecutors allegedly excluded jurors based on gender in violation of Batson and J.E.B. v. Alabama ex. Rel. T.B., 511 U.S. 127, 128 L. Ed. 2d 89 (1994). One such example listed in the RJA Order is the prosecution's peremptory strike of Viola Morrow in the State v. Bell case from Onslow County. (RJA Order, pp 120-21; ¶¶ 185-86). Based only upon its interpretation of a prosecutor's affidavit explaining the reasons for the peremptory challenge, the MAR Court here concluded that the prosecution engaged in an "unconstitutional use of peremptory strikes on the basis of gender." The MAR Court found this to be "evidence of a willingness to consciously and intentionally base strike decisions on discriminatory reasons, and evidence that race was a significant factor in prosecutor strike decisions." (RJA Order, pp 120-21, ¶ 186).

Contrary to this MAR Court's review of this jury challenge, however, another Superior Court Judge in S.E.2d review of this same jury selection issue raised in an MAR in the State v. Bell case has found the exact opposite. In ruling on the defendant Bell's allegation of gender discrimination in this very peremptory challenge, the Honorable Charles Henry, Superior Court Judge presiding, reviewed the relevant facts from the entire case and determined that defendant Bell had "not proven that intentional discrimination was a substantial or motivating factor in the decision to exercise the strike of Ms. Morrow." (See Order Denying Motion for

Appropriate Relief in State v. Bell, 01 CRS 2989-2991, p 52)(State's Appx. 9). Judge Henry specifically held the following:

> The record makes clear that the prosecution was not attempting to eliminate women from the jury. It is also clear from the record that the prosecutor struck Ms. Morrow based on her medical conditions and concerns. In fact, her medical condition rose to the level justifying a challenge for cause. Peremptorily challenging Ms. Morrow was not discriminatory and did not violate her Fourteenth Amendment right to equal protection of the law.

(Id. (emphasis added)).

The MAR Court's decision to the contrary highlights the problem with Superior Courts reviewing peremptory challenges without the benefit of the relevant facts from the entire case. It is yet another good reason why the Amended RJA statute should be interpreted to limit relevant evidence to that which is derived from the county or prosecutorial district where the sentence was imposed, rather than allowing selective review of random jury strikes across the state to inform their decisions.

These are only a few examples of the erroneous findings made by the MAR Court in its post hoc analysis of State peremptory challenges of venire members across the state. From its review of these and other cases, the MAR Court concluded that the state's prosecutors have intentionally discriminated in the striking of various jurors across the state, by highlighting specific rationale given by the prosecution

which the MAR Court has then determined, from the cold record, to have been pretextual, patently irrational, nonsensical, misleading, not race neutral, and, in some cases, without explanation. (RJA Order, pp 112-36). Furthermore, the MAR Court has found that the State improperly challenged similarly situated African-American and Caucasian prospective jurors inconsistently . (RJA Order, pp 66-67, 83-84, 86, 126-36). These findings were clearly erroneous, as they were not based on the competent evidence presented. In its analysis, and contrary to well-established law of this Court, the MAR Court has pitted isolated factors given as the rationale of individual strikes against a similar factor identified in a passed juror. This Court has never allowed this type of analysis without requiring more in depth evaluation of the entirety of the jury voir dire, including all the many reasons a prosecutor might have chosen to peremptorily challenge a prospective juror. See State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152; State v. Kandies, 342 N.C. at 435-36, 467 S.E.2d at 75-76.

The flaws in the MAR Court's analysis of only these few examples serve to highlight why this Court encourages deference to trial courts in the evaluation of peremptory challenges. Deference is owed to trial courts who are in the best vantage point to assess the nuances of personal interaction in jury selection as opposed to reviewing courts which have only the cold record to assess. The RJA Order has evaluated statewide jury strikes from the cold record and assessed that these strikes

were racially motivated even where prior trial courts and this Court have found otherwise.

The RJA Order's findings of fact are clearly erroneous and cannot support its conclusions of law. Consequently, this Court should grant review not only to correct the erroneous findings of fact found in this case, but also to discourage post conviction courts from engaging in the re-evaluating peremptory challenges based only on the written record with no deference afforded to the trial courts conducting jury selection in these capital cases.

3. The RJA Order's Finding that Failure of Prosecutors to Respond to A Request To Explain Their Reasoning for the Exercise of Peremptory Challenges In Jury Selection Over a Twenty Year Time Span Evidences Intentional Statewide Discrimination Is Clearly Erroneous.

Astonishingly, the MAR Court concluded that the failure of "a significant number" of the State's prosecutors to respond to the Cumberland County prosecution's request to submit affidavits explaining the reasons behind the prosecutorial strikes in every one of the capital cases analyzed over a twenty year period was "evidence of discrimination on a statewide basis." (RJA Order, p 120, ¶ 184). Without acknowledging any of the obvious impediments to complying with the

Cumberland County request,[42] the MAR Court concluded that the reason had to be because the State's prosecutors were intentionally engaged in racial discrimination.

There was really no evidence from the prosecution which would suffice for the MAR Court. If prosecutors failed to return the requested review of jury voir dire of capital cases tried throughout the state, the MAR Court found this proof of racial discrimination. (RJA Order, p 120, ¶ 184). If prosecutors returned the review but in the form of unsworn affidavits, the MAR Court found this to be evidence of intentional discrimination. (RJA Order, p 199, ¶ 385). If prosecutors returned a sworn affidavit reviewing the jury selection in capital cases tried in their district but were not the actual prosecutor who conducted the jury selection, the MAR Court found this evidence to be "speculative" and of such limited value that it "undermined" the State's presentation of evidence. (RJA Order, pp 199-200, ¶¶ 386, 388). Finally, the MAR Court even discounted any sworn affidavits from prosecutors who actually engaged in the jury selection at the trial of the capital cases tried in their districts because these affidavits constituted post hoc responses from prosecutors made years

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[42] The most obvious reasons could easily have been acknowledged to have been that this effort would have required the state's prosecutors to have combed through copious amounts of the litigation record in decades-old cases and dusty boxes of handwritten notes to attempt to determine what they, or someone else who no longer worked in the office, may have thought about the case and the fitness of the particular juror struck all while attempting to carry on with the regular duty assigned to them to prosecute the state's criminal cases.

after the trial. (RJA Order, p 199, ¶ 386). It appears from these rulings that the MAR Court did not credit any prosecutorial explanation for jury strikes even while the MAR Court conducted its own re-evaluation of jury selection in these cases. This is particularly notable since it is obvious that the MAR Court relied heavily upon the conclusions formed by the statistics generated in the MSU study. As noted above, these statistics were not based upon actual reasons for strikes but upon a simple odds ratio of predicting whether race would affect the State's exercise of a peremptory challenge.[43]

The MAR Court's sweeping finding that evidence of discrimination existed in the failure of the State's prosecutors to return affidavits which were, invariably, found to be further evidence of discrimination at this RJA Hearing, is erroneous and not competent to form the court's legal conclusion. This Court should grant review to correct the clearly erroneous finding that every prosecutor in every case tried in North Carolina during the time period from 1990 to 2010 has intentionally discriminated in jury selection.

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[43] Notably, the MAR Court determined that the missing data of prosecutorial reasons evidenced intentional discrimination, but determined that missing data in the MSU Study did not invalidate or bias the study's conclusions at all. (RJA Order, pp 183-86, ¶¶ 339-351).

ATTACHMENTS

Attached to this petition for consideration by the Court is the certified copy of the RJA Order and Order Granting Defendants' Motions for Preclusion, along with other documents pertinent to the consideration of the petition and detailed in the Appendix index sheet attached hereto. (See State's Appendices 1-10).

CONCLUSION

WHEREFORE, for the foregoing reasons, the State respectfully prays that this Court issue its writ of certiorari to review the 13 December 2012 RJA Order of the Superior Court below, and that the State have such other relief as the Court may deem appropriate.

Respectfully submitted, this the 21st day of March 2013.

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VERIFICATION

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Danielle Marquis Elder, Special Deputy Attorney General for the State of North Carolina, first being duly sworn, hereby deposes and says that she has read the foregoing STATE'S PETITION FOR WRIT OF CERTIORARI and knows the same to be true to the best of her knowledge except as to those matters and things therein alleged upon information and belief, and as to those she believes them to be true.

Danielle Marquis Elder
Special Deputy Attorney General
State Bar No. 19147

Sworn to and subscribed before

me this 21st day of March, 2013.

ANGELA WEST
Notary Public, Wake County, NC

Notary Public

My Commission Expires 1/5/2015

CERTIFICATE OF SERVICE

I HEREBY certify that I have this day served the foregoing STATE'S PETITION FOR WRIT OF CERTIORARI and STATE'S ATTACHMENT LIST by electronically mailing the same in PDF format to the counsel of record, using the following electronic address.

I HEREBY certify that due to the size, I have this day served the STATE'S ATTACHMENTS by placing a compact disc into the United States First Class Mail, postage prepaid.

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This the 21st day of March 2013.

Electronically Submitted
Danielle Marquis Elder
Special Deputy Attorney General

NO. *** TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
	)	
v.	)	From CUMBERLAND
	)	
	)	
QUINTEL AUGUSTINE	)	
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	
Defendants	)	

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STATE'S APPENDIX

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STATE'S APPENDIX 1: RJA Order, filed on 13 December 2012
State v. Augustine (01 CRS 65079)
State v. Golphin (97 CRS 47214)
State v. Walters (98 CRS 34832)

STATE'S APPENDIX 2: Order Granting Defendants' Motions for Preclusion, filed on 13 December 2012
State v. Augustine (01 CRS 65079)
State v. Golphin (97 CRS 47214)
State v. Walters (98 CRS 34832)

STATE'S APPENDIX 3: Amended Racial Justice Act (2012)
N.C.G.S. § 15A-2010 (2012)
N.C.G.S. § 15A-2011 (2012)

STATE'S APPENDIX 4:	State's Answers to the Motions for Appropriate Relief Pursuant to the Racial Justice Act, filed on 2 May 2011 State v. Augustine (01 CRS 65079) State v. Golphin (97 CRS 47214) State v. Walters (98 CRS 34832)
STATE'S APPENDIX 5:	State's Motions to Dismiss Defendants' "Motion for Appropriate Relief Pursuant to the Racial Justice Act" For Failure to State a Valid Claim Under the North Carolina Racial Justice Act, filed on 16 August 2011 State v. Augustine (01 CRS 65079) State v. Golphin (97 CRS 47214) State v. Walters (98 CRS 34832)
STATE'S APPENDIX 6:	State's Answers to Amended Motions for Appropriate Relief Pursuant to Racial Justice Act (2012), And Motions for Judgment on the Pleadings, filed on 27 August 2012 State v. Augustine (01 CRS 65079) State v. Golphin (97 CRS 47214) State v. Walters (98 CRS 34832)
STATE'S APPENDIX 7:	RJA Hearing Transcripts (1 October 2012-11 October 2012)
STATE'S APPENDIX 8:	State's Proffer of Evidence -Superior Court Judges 8A: Transcribed Statement of Jack A. Thompson 8B: Transcribed Statement of Coy E. Brewer, Jr. 8C: Transcribed Statement of William C. Gore, Jr. 8D: Transcribed Statement of Lynn Johnson 8E: Transcribed Statement of Knox V. Jenkins, Jr. 8F: Transcribed Statement of Thomas H. Lock
STATE'S APPENDIX 9:	Order Denying Motion for Appropriate Relief in State v. Bryan Christopher Bell (01 CRS 2989-2991)

STATE'S APPENDIX 10: Orders, Denying RJA and Amended RJA
State v. Haselden (99 CRS 6321),
State v. Carl Stephen Moseley (91 CRS 5146),
State v. East, (95 CRS 594-96, 94 CRS 6000-01)

No. 139P13 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	From Cumberland County
TILMON GOLPHIN,	)	
CHRISTINA WALTERS,	)	
QUINTEL AUGUSTINE,	)	
	)	
Defendants	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 139P13 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	**From Cumberland County**
TILMON GOLPHIN,	)	
CHRISTINA WALTERS,	)	
QUINTEL AUGUSTINE,	)	
	)	
Defendants	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COME the Defendants, Tilmon Golphin, Christina Walters and Quintel Augustine by their attorneys, James E. Ferguson, II, Cassandra Stubbs and Jay H. Ferguson, and respectfully submit the following DEFENDANTS' RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI. In support thereof, the Defendants show the Court the following:

INTRODUCTION

After hearing two weeks of evidence in this matter, the lower court granted the Defendants' Motions for Appropriate Relief ("MAR") under the Amended Racial Justice Act ("ARJA"). The MAR court did not arrive at this decision lightly. "[B]ased primarily on the words and deeds of the prosecutors involved in Defendants' cases," the MAR court concluded that race was a significant factor in the State's decisions to exercise peremptory challenges during jury selection in Cumberland County at the time these death sentences were sought or imposed. Order Granting Motions for Appropriate Relief ("Order") at 3. Indeed, the testimony given by the prosecutors was the evidence at "[t]he heart of this evidentiary hearing . . . ." *Id.* at 49. Some of the most compelling evidence included a Cumberland County prosecutor's "notes about the jury pool" in one of these cases taken during a meeting with law enforcement which "described the relative merits of North Carolina citizens and prospective jurors in racially-charged terms." *Id.* at 3.

The Defendants also presented the lower court with a "'cheat sheet' of pat explanations" that another prosecutor "involved in all three Defendants' cases" used to "defeat *Batson* challenges." *Id.* This prosecutor, when faced with a *Batson* motion at another defendant's trial, responded in a way "that [left] little doubt that she was reading from the handout." *Id.* at 74. This same prosecutor had

previously been found to have violated *Batson* by a Superior Court Judge, misrepresented facts in a closing argument resulting in a reversal by the Court of Appeals and "gave false testimony" at the hearing below. *Id.* at 68-81. Most importantly with respect to this prosecutor, the MAR court found that, in capital cases, including Defendants' cases, she treated African-American venire members differently from other similarly situated venire members. *Id.* at 83-85.

Additionally, the MAR court found that the Defendants demonstrated statistically that these prosecutors disproportionately struck qualified African-American prospective jurors in capital cases.

The MAR court also found that the State's use of peremptory strikes in two particular cases demonstrated more broadly that the State considered race in jury selection in capital cases because it perceived that seating jurors of a particular race created "tactical" advantages. The State's patterns of peremptory strikes in *State v. Burmeister*[1] and *State v. Wright*,[2] which involved defendants "who belong[ed] to a white supremacist 'skinhead' gang," and who killed two black victims in a racially motivated crime were "complete anomalies:" the State struck only one black venire member in *Burmeister* and "not a single black venire member" in *Wright*. *Id.* at 54, 56. The overwhelming statistical pattern showing that the State disproportionately

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[1] 131 N.C. App. 190, 506 S.E.2d 278 (1998).

[2] 135 N.C. App. 386, 528 S.E.2d 76 (1999)(unpublished).

struck black venire members in capital cases was thus "turned on its head in the notorious *Burmeister* and *Wright* capital cases" because the same prosecutors from the *Augustine* and *Golphin* cases "sought, for tactical reasons, to seat African Americans as jurors." *Id.* at 4. This striking evidence left the lower court with no doubt that race was a significant factor in the State's decision-making during jury selection in capital cases generally: "The corollary of *Burmeister* and *Wright* is that, in Defendants' cases, where the prosecution did not perceive such an advantage in obtaining black jurors, the State reverted to its normal practice of assuming black jurors will not be friendly toward the State." *Id.* at 91.

The evidence offered by the Defendants, including the prosecutors' testimony, further supported the MAR court's ultimate finding. A prosecutor who tried two of the Defendants testified he sometimes circled items on jury questionnaires he thought were important; in one case, he circled a prospective black juror's race on the questionnaire. *See id.* at 33. With respect to another prosecutor who was involved in all three of the Defendants' cases, the MAR court found that her "persistent denials that she has ever used race as a factor in exercising a peremptory strike are not credible" in light of overwhelming evidence to the contrary, including a prior *Batson* violation in a capital trial. *See id.* at 71-73. This same prosecutor "gave false testimony" before the MAR court which the court found "probative of her credibility generally." *Id.* at 80. Moreover, one of

the prosecutors in *Golphin* explained he struck an African-American venire member in part because of his "militant" attitude, but the trial judge who observed the juror rejected that demeanor-based reason. *See id.* at 64.

The MAR court relied on the prosecutors' illuminating testimony and a substantial amount of additional corroborating evidence in ultimately determining that Defendants had prevailed under the ARJA. Accordingly, it vacated their death sentences and resentenced them to life without the possibility of parole. *See id.* at 203 (finding race a significant factor in *Golphin*); *id.* at 205 (finding race a significant factor in *Walters*); *id.* at 207 (finding race a significant factor in *Augustine*); *id.* at 210 (resentencing Defendants to "life imprisonment without the possibility of parole").

This Court should deny the State's Petition for Writ of Certiorari ("PWC") for three principal reasons. First, federal constitutional and state statutory law make clear that no court can disturb the final orders setting aside the Defendants' death sentences to reinstate the ultimate punishment. Second, neither statutory law nor the Rules of Appellate Procedure authorize the petition in this case. Finally, this case does not warrant the extraordinary step of suspension of the court's rules. Defendants' cases have no bearing on the "uniform administration" of the ARJA

now that the legislature has repealed the law entirely.[3] Nor should the specter of the repeal's applicability to defendants who had filed for relief under the ARJA statute serve as a basis: such questions do not apply to these three cases, and thus are not ripe. And, although this Court may in some instance choose to exercise this extraordinary power to engage in fact correction of egregious error, these cases are far from such an instance: the MAR court's findings were considered, thorough, and well supported by the record.

BRIEF STATEMENT OF THE RELEVANT FACTS

In 1998, a jury found Tilmon Golphin guilty of two counts of first-degree murder for his role in the September 23, 1997 killings of Edward Lowry and David Hathcock. In 2000, a jury found Christina Walters guilty of two counts of first-degree murder for the August 17, 1998 killings of Susan Moore and Tracy Lambert. And, in 2002, a jury found Quintel Augustine guilty of first-degree murder for the November 29, 2001 killing of Roy Gene Turner, Jr. All three Defendants were sentenced to death.

Defendants filed MARs under the RJA and amended them under the ARJA. Over the span of two weeks in October 2012, the MAR court held an evidentiary hearing on Defendants' claims that race was a significant factor in decisions to exercise peremptory challenges during jury selection. In addition to the testimony

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[3] 2013 North Carolina Laws S.L. 2013-154 (S.B. 306).

of several witnesses, the MAR court received "scores of exhibits including the complete voir dire transcripts from North Carolina capital cases, including the Defendants' cases and other Cumberland County cases" as well as "affidavits and statements from Cumberland County prosecutors" and the vast presentation of statistical and non-statistical evidence from the *State v. Marcus Robinson* case that was moved into evidence in these Defendants' cases. *Order* at 48. On December 13, 2012, the MAR court issued a 210-page order granting Defendants' MAR and resentencing them to life without the possibility of parole in accordance with the ARJA.

REASONS TO DENY OR DISMISS THE PETITION

I. Federal Constitutional Law and North Carolina Statutory Law Bar Future Reinstatement of the Defendants' Already-Overturned Death Sentences

This Court should deny the PWC because two separate sources of binding law preclude the reinstatement of death sentences that have been vacated. First, the Fifth Amendment's Double Jeopardy Clause forbids another sentence-determinative hearing where a trial court has already found that the Defendants were legally entitled to life without the possibility of parole sentences and resentenced them accordingly. Second, under N.C. Gen. Stat. §15A-1335, the courts cannot impose a sentence harsher than the life without the possibility of parole sentence the lower court handed down upon granting MAR relief.

A. The Double Jeopardy Clause Precludes the Possibility that Defendants Could Again Be Sentenced to Death

This Court should deny the PWC because the Fifth Amendment's Double Jeopardy Clause forbids another sentence-determinative hearing like the one the lower court conducted here. This alone is a sufficient reason for this Court to deny certiorari.

The Fifth Amendment to the U.S. Constitution prohibits any reinstatement of Defendants' vacated death sentences because no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V. The Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged. *See Bullington v. Missouri*, 451 U.S. 430, 437 (1981). The prohibition against double jeopardy is also embodied in the "Law of the Land" clause of the North Carolina Constitution. N.C. Const. art. I, § 19; *State v. Crocker,* 239 N.C. 446, 80 S.E.2d 243 (1954).

The protection afforded by the Double Jeopardy clause to convictions applies as well to sentencing in capital cases. *See Bullington*, 451 U.S. at 446. Likewise, a judicial acquittal premised upon a "misconstruction" of a criminal statute is an "acquittal on the merits . . . [that] bars retrial." *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984); *see also State v. Jones*, 299 N.C. 298, 307-09, 261 S.E.2d 860, 867 (1980) (holding that "(d)ouble jeopardy considerations precluded a retrial" when a defendant is duly convicted of a capital offense but erroneously

sentenced to life imprisonment by the trial judge who failed to conduct a sentencing hearing in the presence of evidence which would have supported at least one aggravating circumstance).

In *Bobby v. Bies*, 556 U.S. 825 (2009), the United States Supreme Court considered a double jeopardy claim by a defendant whose jury found mental retardation as a mitigating circumstance prior to a time that persons with mental retardation were exempt from the death penalty. The Supreme Court found that "there was no acquittal," no "effort by the State to retry him or to increase his punishment," and no "state determination . . . [that] entitle[d] him to a life sentence." *Id.* at 833-34. Augustine, Golphin, and Walters, in contrast, were acquitted of the death penalty by a state court that found they were entitled to life sentences and resentenced them to life imprisonment; double jeopardy prevents the State from seeking to retry them or to increase their punishment.

Here, the ARJA conditioned sentencing relief upon judicial findings about whether race was a significant factor in the case; only "[i]f the court finds that race was a significant factor" must "the court [] order . . . that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole." N.C. Gen. Stat. § 15A-2011(g). Because the lower court resentenced these Defendants to life imprisonment without the possibility of parole pursuant to this statute, any attempt to resentence

them to death would violate the Double Jeopardy Clause. *See, e.g., Rumsey*, 467 U.S. at 211 (finding a "judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty").

The Double Jeopardy bar to the reinstatement of death sentences here is impervious to the claim that the decision triggering the constitutional protection was erroneous. Although the State's PWC insists that the MAR court's ruling clearly "misapprehen[ds]" the law, *PWC* at 3, 10, 11, 14, 15, 16, 17, 19, 22, 25, 35, 36, 63, 65, 68, 72, 80, 96, 99, 101, 118, 144, the Supreme Court has held that any misapprehension is irrelevant to the constitutional analysis. As the Court recently reiterated, a ruling like the one the lower court made here is "unreviewable" and:

> . . . precludes retrial even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a "misconstruction of the statute" . . . . In all these circumstances, the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.

Evans v. Michigan, 133 S. Ct. 1069, 1074 (2013) (internal citations omitted). In *Evans*, the Court found there was "no question" the trial court's ruling was "wrong" and "was the product of an 'erroneous interpretatio[n] of governing legal principles,'" but held that the Double Jeopardy protection barred retrial nonetheless. *Id.* at 1074, 1075 (internal citations omitted). Therefore, even if any of

the State's claims that the MAR court misapprehended or misinterpreted the law were meritorious—and they are not—no court would have the legal authority to resentence Defendants to death. The Court should deny the PWC.

B. N.C. Gen. Stat. §15A-1335 Ensures that Life Without the Possibility of Parole is Now the Most Severe Sentence Available for the Defendants

A straightforward application of North Carolina law prevents this Court from effectuating the sentencing outcome the State ultimately seeks on review. Once a defendant has been sentenced, North Carolina law does not permit the courts to inflict a more severe sentence:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. §15A-1335. This law is a blanket prohibition on the imposition of a more severe sentence. Consequently, it prohibits the imposition of the death penalty if, at any point, the defendant has been sentenced to life imprisonment for the same crime. *See, e.g., State v. Oliver*, 155 N.C. App. 209, 212, 573 S.E.2d 257, 259 (2002) (holding that, for purposes of applying § 15A-1335, consecutive life sentences can never be considered more severe than a death sentence). Thus even assuming Defendants' life sentences imposed by Judge Weeks are set aside by this court on collateral attack, "the court may not impose a new sentence for the same

offense," which is more severe than a life sentence without the possibility of parole.[4]

The resentencing mandate of the RJA is not unique. N.C. Gen. Stat. § 15A-2006 required the court to resentence the defendant to life imprisonment if it found that he or she satisfied the criteria for mental retardation. Consequently, all seventeen persons who obtained relief under this law were resentenced to life imprisonment.[5] The findings and resentencings by the lower court amounted to an

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[4] Given that the Court cannot hand down a decision that would bear on the Defendant's sentence, the State essentially asks this Court to issue an advisory opinion on the RJA. However, "[t]he North Carolina Constitution does not authorize the Supreme Court to issue advisory opinions." *In re Advisory Opinion*, 335 S.E.2d 890, 891 (N.C. 1985). Additionally, "[*United States v*] *Evans*[] exemplifies an important general point: if a prosecution appeal is seeking a remedy prohibited by double jeopardy law, then the case becomes one in which the appellate court would be rendering an advisory opinion on the underlying merits of the prosecution appeal." James A. Strazzella, The Relationship of Double Jeopardy to Prosecution Appeals, 73 NOTRE DAME L. REV. 1, 7 (1997)(explaining the U.S. Supreme Court's ruling in *United States v. Evans*, 213 U.S. 297 (1909)). Moreover, no "manifest injustice" could flow from the circumstances in which state law precludes the courts from imposing any new sentences. And, no "decision in the public interest" can be made here. *See, e.g., infra* Sec. III (fleshing out reasons the Court should not suspend the rules or exercise supervisory authority).

[5] *State v. Williams*, 89 CRS 1983-84 (Wayne County, February 2, 2012); *State v. Anderson*, 98 CRS 9949 (Craven County, December 21, 2010); *State v. Nicholson*, 97 CRS 9890-96 (Wilson County, November 5, 2010); *State v. Smith*, 96 CRS 948-951 (Halifax County, November 6, 2008); *State v. Williams*, 79 CRS 1867 (Gaston County, July 24, 2006); *State v. McLaughlin*, 84 CRS 2566 (Bladen County, July 25, 2006) *State v. Anthony Hipps*, 95 CRS 14790 (Rowan County, August 1, 2005); *State v. Holden*, 85 CRS 1559 (Duplin County, October 11, 2004); *State v. Spruill*,

"acquittal" of the death penalty. The State had no appellate recourse to challenge these sentences and, except for one unsuccessful effort pursued by the District Attorney in *State v. Melanie Anderson*, 60A97-3, did not attempt to do so. Similarly, pursuant to the RJA, the State has no appellate recourse once the MAR court sentences defendants to life imprisonment. The sole exception to N.C. Gen. Stat. § 15A–1335, and the only circumstance in which a higher sentence will be allowed on resentencing, is when a statutorily mandated sentence is required by the General Assembly. *See State v. Kirkpatrick,* 89 N.C. App. 353, 355, 365 S.E.2d 640, 641 (1988) ("where the trial court is required by statute to impose a particular sentence (on resentencing) § 15A–1335 does not apply to prevent the imposition of a more severe sentence"); *see also State v. Whitehead,* 365 N.C. 444, 446, 722 S.E. 2d 492, 495 (2012) (holding that MAR court failed to apply the statutorily mandated sentence). In contrast, here the MAR court applied the statutorily mandated sentence of life imprisonment without parole. This alone is a sufficient reason for this Court to deny *certiorari.*

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84 CRS 1423 (Northampton County, September 27, 2004); *State v. Gibbs*, 91 CRS 4081 (Beaufort County, June 30, 2004); *State v. Leeper*, 98 CRS 10902 (Mecklenburg County, May 11, 2004); *State v. Bone*, 97 CRS 73219 (Guilford County, January 29, 2004); *State v. Robinson,* 86-CRS-25054 (Guilford County, November 7, 2003); *State v. Norwood*, 93 CRS 5239, 5251 (Nash County, August 29, 2003); *State v. Anderson*, 94 CRS 5669 (Wilkes County, July 29, 2003); *State v. McClain*, 94 CRS 30181 (Mecklenburg County, December 11, 2002); *State v. Skipper*, 90 CRS 4825-26 (Bladen County, December 12, 2001).

II. This Court Should Deny the State's Petition because Neither the Rules of Appellate Procedure nor Statutory Law Authorize Certiorari in this Case

The State must have specific authorization from the Rules of Appellate Procedure or statutory law before it can obtain certiorari review in a criminal case. None exists here. The PWC urges this Court to grant certiorari under Rule 21(f), a provision that establishes this Court with exclusive certiorari jurisdiction and delineates the proper timing of petition for certiorari review in post-conviction death penalty cases. Rule 21(f), however, is constrained by the scope of review delineated by Rule 21(a)(1). Under 21(a), this Court only has certiorari jurisdiction over post-conviction capital cases where the trial court *denied* the MAR, and, even then, only over cases in which MARs were filed under N.C. Gen. Stat. §15A-1415. Thus, 21(f) is inapplicable here because the PWC exceeds the scope of certiorari review that 21(a) makes available to this Court.[6]

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[6] Rule 21(a)(1) permits this Court to grant a petition for a writ of certiorari in one of three instances: (1) where "the right to prosecute an appeal has been lost by failure to take timely action," (2) "when no right of appeal from an interlocutory order exists," or (3) "for review pursuant to N.C. Gen. Stat. §15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief." N.C. R. App. P. 21(a)(1). Each of these three paths to certiorari is unavailable to the State in this case. *See State v. Starkey*, 177 N.C. App. 264, 268, 628 S.E.2d 424, 425-26 (2006) (acknowledging that no ground is applicable in a writ application seeking review of a judge's order granting sentencing relief in a motion for appropriate relief). The first path is facially inapplicable here. The second path is also unavailable. It is reserved for review of interlocutory orders, i.e., those orders that are not ripe for adjudication because an intervening event (e.g., a new trial or sentencing hearing)

Like the Rules, North Carolina statutory law does not provide the State with a right to seek certiorari. N.C. Gen. Stat. §15A-1422(c)(3) does not address motions filed under the ARJA, and the ARJA itself contains no language providing the State with a right to seek appellate review. Therefore, the State cannot obtain appellate review. *See State v. Elkerson*, 304 N.C. 658, 669, 285 S.E.2d 784, 792 (1982) ("The right of the State to appeal in a criminal case is statutory, and statutes authorizing an appeal by the State in criminal cases are strictly construed."); *State v. Vaughan*, 268 N.C. 105, 108, 150 S.E.2d 31, 33 (1966) (quoting and endorsing 4 AM. JUR. 2D, APPEAL AND ERROR §268: "As a general rule the prosecution cannot appeal or bring error proceedings from a judgment in favor of the defendant in a criminal case, in the absence of a statute clearly conferring that right."). The legislature's decision not to create a path for the State to obtain appellate review under the ARJA is decisive. *See Elkerson*, 304 N.C. at 670 ("If the State's right to

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can render the issue moot. *See Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). The order here is a final judgment—unlike an order that grants a new trial or sentencing hearing, the trial court vacated Defendants' death sentences and imposed sentences of life without the possibility of parole. *See id.* at 361-362 (defining a "final judgment" as "one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court"). The final path is also a dead-end. Rule 21(a) echoes the statutory authority granted by N.C. Gen. Stat. §15A-1422(c)(3), in which the Legislature provided this Court with the discretion to grant a petition for a writ of certiorari to review a final judgment issued by a trial court *denying relief* on a motion for appropriate relief filed under N.C. Gen. Stat. §15A-1415. The plain language of Rule 21(a) suggests that it only applies to cases—unlike this one—where the trial court denied the MAR.

appeal is to be enlarged, it must be done by the legislature."). This Court should deny the PWC because the legislature has not authorized the State to seek review in this case.[7]

III. The Court Should Not Suspend the Rules of Appellate Procedure or Exercise Its General Supervisory Authority Because a Drastic Departure from the Appellate Process is Not Appropriate Merely to Correct Alleged Error in this Case

The State urges this Court to either suspend the rules of appellate procedure or exercise its supervisory authority. *See* PWC at 1, 4, 5, 13; *see also* N.C. R. App. P. 2; N.C. CONST. ART. IV, § 12. Either course of action would require a drastic departure from the ordinary appellate process. This case does not warrant it.

A. Rule 2 Suspension of the Rules is an Extraordinary Step that is Inappropriate Because the Court Lacks Jurisidiction Over this Case

In "exceptional circumstances," Rule 2 permits this Court to "cautiously" consider the "extraordinary step" of suspending the rules of appellate procedure where doing so would either (1) "prevent manifest injustice to a party" or (2)

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[7] According to the Shuford North Carolina Civil Practice and Procedure with Appellate Advocacy treatise, "Certiorari may not be ordered by either appellate court on petition by the State in a criminal case unless the State had a right to appeal under N.C. Gen. Stat. § 15A-1445." 1 N.C. Civil Prac. and Proc. § 95:2 (6th ed.); *see also State v. Todd,* 224 N.C. 776, 777, 32 S.E.2d 313-14 (1944) ("Nor is the situation saved by the application for certiorari. . . . To bring up the matter in this way would be to accomplish by indirection what the statute [on appeals by the State] expressly forbids."). N.C. Gen. Stat. § 15A-1445 does not provide the State a right to appeal where the trial court grants a MAR under the ARJA.

"expedite decision in the public interest." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008); N.C. R. App. P. 2. As a preliminary matter, Rule 2 is a mechanism for this Court to review cases that it originally had the power to hear but in which the procedural steps to obtain review have been botched. 362 N.C. at 197 (explaining that "Rule 2 permits the appellate courts to excuse a party's default . . ." in exceptional circumstances). It is not, however, a mechanism for expanding the scope of appellate review. *Id.* at 198 (noting that "in the absence of jurisdiction, the appellate courts lack authority to consider whether the circumstances of a purported appeal justify application of Rule 2"); *id.* (emphasizing that "suspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns" (quoting *Bailey v. State*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000)). There is no procedural default at issue in this case; the legislature simply did not create a mechanism for this Court to review a lower court's final order granting relief on a MAR filed under the ARJA. Thus, suspending Rule 2 would expand the Court's jurisdiction rather than excuse a procedural default in the interest of curing a manifest injustice. The Court should decline the State's invitation to create a jurisdiction-expanding precedent here.

B. Supervisory Authority is Rarely Used and Inappropriate Here Because the Case Has No Bearing on the Future Administration of Criminal Statutes

The PWC fails to present the type of case that warrants the "unusual step" of this Court exercising its constitutional supervisory authority. *See State v. Norris*, 360 N.C. 507, 511, 630 S.E.2d 915, 917 (2006) (referring to the "unusual step of invoking our supervisory authority under Article IV of the North Carolina Constitution"). The legislature recently repealed the Racial Justice Act in its entirety, *see* 2013 North Carolina Laws S.L. 2013-154 (S.B. 306) (repealing in full the ARJA), and the State has asserted in unresolved ARJA cases that the repeal applies to them. This means that, even under the State's own argument, the resolution of any questions of statutory interpretation in this matter will apply to no other cases. The issues here will not affect the "uniform administration of North Carolina's criminal statutes;" and no grounds exist to justify exercise of this Court's "rarely used" general supervisory powers. *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975); *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 429 (2007).

IV. The Court Should Not Take the Extraordinary Step of Granting Certiorari Because This Case Presents Insurmountable Impediments to Meaningful Review

Even if the State's PWC presented questions warranting review, this case is not the appropriate vehicle through which to consider them. Review in this case

would not change the outcome not only because laws and constitutional provisions prohibit reinstatement of the death sentences, *see supra* § I, but also because the MAR court's comprehensive ruling effectively forecloses outcome-altering review. Here, the MAR court's ruling was not ambiguous or contingent in the ways the PWC implies. The MAR court specifically found that race was a significant factor in decisions to exercise peremptory challenges in each of the Defendants' cases. *See supra* Introduction at 4; *Order* at 50-54 (discussing prosecutor Colyer's testimony about "Jury Strikes" notes in the *Augustine* case and finding "powerful evidence that, in the prosecution's view, many African-American citizens summoned for jury duty . . . had a strike against them before they even entered the courthouse); *id.* at 65-66 (finding prosecution's strike of Juror Gore "additional evidence of discrimination" in *Augustine*); *id.* at 66-67 (finding in *Golphin* that the explanation for the strike of Juror Frink—her self-proclaimed "mixed emotions" about the death penalty—"further undermined" the State's credibility because a similarly situated non-black venire member used the exact same phrase to describe her death penalty views and was accepted by the State); *id.* at 68-70 (finding that it was "not persuaded by [prosecutor] Russ's testimony" about why she struck 10 African-American prospective jurors in *Walters*); *id.* at 81 (finding as evidence of discrimination "the lack of consistency in the State's defense" of its strikes in *Walters*); *id.* at 83-85 (finding that prosecutor Russ "treated similarly-situated

black and non-black venire members differently" in *Walters*). Therefore, the State's proclamations that a ruling that "defendants are not required to prove discrimination in their own individual cases . . . will [] force[] [prosecutors] to violate constitutional law" is beside the point because the MAR court found discrimination in these individual cases. *PWC* at 52; *see also id.* at 21.

The State's emphasis on the MAR court's finding that the original RJA applied to the Defendants, *see, e.g.*, *PWC* at 22, is misplaced because the MAR court specifically granted relief on the Defendants' ARJA claims. *See Order* at 201-08. The State necessarily concedes "[t]he fact that the MAR Court found in the alternative that Defendants had established racial discrimination under the Amended RJA," but argues that these findings do "not cure the error as it is clear that the MAR Court's decision was inexorably intertwined" with its decisions under the original RJA. *PWC* at 12. The State provides no analysis to support this assertion. Indeed, the MAR court's order did the opposite of intertwining its ruling; it specifically set out in separate sections its conclusions under the ARJA and conclusions under the original RJA. *Compare, e.g., Order* at 201-08 *with id.* at 208-10.

This Court's resolution of any or all of the litany of interpretive and non-dispositive issues that the PWC raises—questions about issue preclusion, application of the original or amended RJA, case-specific discrimination—would

not change the outcome in *this* case. The MAR court *did* find that the Defendants suffered discrimination in their individual cases, *did* find impermissible discrimination in the prosecutors' decisions to strike prospective jurors within even the most restrictive interpretation of when the death sentence was sought or imposed, and specifically ruled that the judicial testimony (based on the information presented in the State's offer of proof) would not have had an impact on the outcome of the MARs.[8] Thus, even if this Court grants the PWC and resolves questions of statutory interpretation pertaining to ARJA, the substantive outcome in this case would not change.

Affording discretionary review here comes at the expense of prudence. Rather than "promot[ing] the expeditious administration of justice," review of this case is likely to delay the inevitable and do so at a significant cost of this Court's time and resources. The State has not and cannot articulate how "manifest injustice" arises where Defendants will serve life sentences without the possibility of parole. *See Graham v. Florida*, 560 U.S. 48 (2010) ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is

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[8] *See Order* at 108 ("review[ing] all of the testimony introduced, and the full offer of proof by the State showing what the judges would have testified to if permitted by the Court" and finding that the judges' "testimony, even if considered by the Court, would not have changed the result in this case").

irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."). Therefore, this Court should deny or dismiss the PWC.

V. The MAR Court's Findings are Unsuitable for Review Because They Deserve Deference and Were Well-Supported by the Copious Evidence Presented Below

This Court should deny certiorari because the MAR court's ruling was well-considered. Findings of fact by the MAR court pursuant to hearing on MARs are conclusive on appeal if they are supported by evidence, "even though the evidence is conflicting . . . ." *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982); *see also*, *e.g.*, *State v. Moorman*, 320 N.C. 387, 398, 358 S.E.2d 502, 509 (1987); *Whitaker v. Earnhardt*, 289 N.C. 260, 265, 221 S.E.2d 316, 320 (1976) ("When the trial judge sits as the trier of facts, his judgment will not be disturbed on the theory that the evidence did not support his findings of fact if there *be any evidence* to support the judgment." (emphasis added)). The MAR court's careful and detailed order vindicates the dictate that the appellate court provides deference:

> [This Court] can only read the record and, of course, the written word must stand on its own. But the [hearing] judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words. The [hearing] judge's findings, therefore, which turn in large part on the credibility of the witnesses, must be given great deference by this Court. 'Because the

> [hearing] court [is] in the best position to assess [] credibility, we will not overturn its determination absent clear error.'

State v. Sessoms, 119 N.C. App. 1, 6, 458 S.E.2d 200, 203 (1995), *aff'd, State v. Sessoms,* 342 N.C. 892, 467 S.E.2d 243 (1996).

There is no doubt that the prosecutors' credibility was at the heart of the MAR court's inquiry in these cases. *See Order* at 49. The MAR court's credibility determinations, explained in-depth in the order, warrant deference because they were based on the court's experience seeing the witnesses testify and hearing the evidence firsthand. *See, e.g., Wainwright v. Witt*, 469 U.S. 412, 421 (1985) (noting that "finding[s] [] based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province" are "entitled to deference even on direct review"). After hearing from many witnesses for both parties, the MAR court found in the end that the prosecutors lacked credibility. Indeed, the MAR court found that "the State's evidence, including testimony from prosecutors . . . rather than causing the Court to question Defendants' proof, leads the Court to be more convinced of the strength of Defendants' evidence." *Order* at 5.

For example, prosecutor Margaret Russ, who prosecuted all three Defendants, took the stand. The MAR court considered several factors in deciding that her explanations for striking African-American jurors were not credible: "an utter lack of independent recollection;" "denial of misconduct in a case reversed by the Court of Appeals;" "Russ' clear reliance on a prosecution training 'cheat sheet'

to circumvent *Batson*;" "her false testimony concerning her consultation with counsel for the State;"[9] "her shifting explanations for strikes of black venire members;" and, "finally, her racially-disparate treatment of black and non-black venire members." *Order* at 68. Russ also provided "utterly unbelievable" testimony about a "vulgar note" she wrote about a judge who had denied her claim that the defense attorney had discriminated during jury selection in one case, and undertook a "preposterous effort to cover up its true meaning . . . ." *Id.* at 79, 77, 80. Combined with her "false testimony concerning her conversations with counsel for the State," these factors led the court to conclude that Russ lacked credibility. *Id.* at 80.

The MAR court also evaluated prosecutor Calvin Colyer's credibility in light of several factors. It found "significant:"

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[9] The record itself is crystal clear that Russ misrepresented to the court her conversations with assistant district attorneys Silver and Thompson about a note she had written during one of her trials. Defense counsel sought to question Russ about the note at the end of the day during cross-examination. The State objected on the ground that allowing Russ to answer would be unduly prejudicial. The court took the matter under advisement, and instructed the parties to return to court the next day. The next morning, without Russ present, the court took additional argument. During this argument, counsel for the State reversed course and told the court that defense counsel's question and Russ's answer were unlikely to be a problem. The State's attorney explained that he and his co-counsel had spoken with Russ, and consequently they knew what she would say regarding the note. *See* Vol. 7, p. 1317, 1320. Russ then testified that she had "absolutely not" talked about the note with the State's attorneys – directly contrary to their representations earlier that morning. *Id.* at 1365.

> his pretrial investigation principally devoted to African-American potential jurors in *Augustine*; Colyer's very different approach to jury selection and the seating of African Americans in the notorious skinhead murder cases of *Burmeister* and *Wright* from his approach in other capital cases; his explanations for striking African-American potential juror John Murray in *Golphin*; his introduction at this hearing of additional reasons for strikes or repudiation of reasons previously presented in court; and, finally, his disparate treatment of black and non-black venire members in capital cases.

Order at 49-50. The court's measured findings acknowledged that Colyer "genuinely believes his strikes in *Augustine* and *Golphin* were motivated not by race," but found that the Defendants put on credible, uncontroverted, and persuasive evidence that unconscious bias played a role in Colyer's jury selection. *Id.* at 95.

More importantly, the MAR court found many of Colyer's answers "unpersuasive." *Id.* at 61; *see also id.* at 63 ("This explanation is not persuasive."). And, Colyer's actions in these cases reasonably support the MAR court's finding. For example, before the *Augustine* trial, Colyer "investigated potential jurors" by meeting with members of the Brunswick County Sheriff's Department and "wrote six pages of notes." *Id.* at 50. The MAR court found that these notes "concern a disproportionate number of African Americans." *Id.* at 51. Although the State denied discriminatory intent, it "offered no explanation for why Colyer recorded only the race of black venire members as part of his investigation of pretrial investigation of potential jurors." *Id.* at 52. The notes disparaged African-American

jurors with comments like "bl[ac]k wino," and a juror who lived in a "bl[ac]k/high drug" neighborhood, and another juror who was "ok" because she was from "a respectable bl[ac]k family." *Id.* at 51-52, 54.

Although former prosecutor John Dickson "acknowledged racial bias as both a historical precedent and an ongoing challenge," the court did not credit his testimony that race was not a significant factor in jury selection in these cases. *Id.* at 85. The court based this determination in part on the fact that "Dickson cited characteristics of black venire members which he found acceptable in non-black venire members he passed in the same case . . . ." *Id.* at 86. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). The court further found that Dickson's testimony was less credible because he participated in *Burmeister* and *Wright* "where the State perceived it had something to gain by seating African Americans on the jury . . . ." *Order* at 86-87.

The MAR court's painstaking review of the testimony offered below placed its ruling on firm footing. On appeal, this Court is not positioned to review and second-guess the MAR court's fact-intensive, record-based determinations. The MAR court's findings of fact are based on evidence developed below, and

therefore deserve deference. Because these findings provide more than sufficient justification for the ruling entered below, this Court should deny certiorari.

VI. Conclusion

For all of the foregoing reasons, this Court should dismiss or deny the PWC. It should be especially inclined to dismiss or deny the PWC because: federal constitutional law and state statutory law prohibit reinstatement of death sentences in these cases; this Court possesses no ordinary statutory authority to hear this case; any ruling will apply to this case alone; and, a ruling from this Court on the issues the State raises would not alter the outcome here because the MAR court made thorough, well-supported, factually detailed alternative findings for the decisions rendered.

Respectfully submitted, this the 21st day of August, 2013.

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N.C. R. App. P. 33(b) Certification: I certify that the attorneys listed above have authorized me to list their names on this document as if each had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing DEFENDANTS' RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by electronic mail to:

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This the 21st day of August, 2013.

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NO. 139P13 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
	)	
v.	)	From CUMBERLAND
	)	
	)	
QUINTEL AUGUSTINE	)	
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	
Defendants	)	

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STATE'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF NORTH CAROLINA

NOW COMES the State of North Carolina, by the Honorable Roy Cooper, Attorney General of North Carolina, and Special Deputy Attorneys General Danielle Marquis Elder and Jonathan P. Babb [hereinafter "State"], and respectfully submits the following STATE'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ["Reply"]. In support of the State's Reply, the State shows the following:

Double Jeopardy does not apply

Defendants' double jeopardy argument rests on their position that the MAR court's order was an "acquittal" of their death sentences. Here defendants have not been "acquitted," and the superior court's order is subject to proper review by this Court.

The United States Supreme Court has held that "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" Sattazahn v. Pennsylvania, 537 U.S. 101, 109, 123 S. Ct. 732, 738, 154 L. Ed. 2d 588, 597 (2003).

Defendants attempt to distinguish their case from Bobby v. Bies, 556 U.S. 825, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009), but the review here is similar. The United States Supreme Court held in Bies:

> Here, as in Sattazahn, there was no acquittal. Bies' jury voted to impose the death penalty. At issue now is Bies' "second run at vacating his death sentence," 535 F.3d, at 531 (Sutton, J., dissenting from denial of rehearing en banc), not an effort by the State to retry him or to increase his punishment.

Bies at 833-834, 129 S. Ct. at 2152, 173 L. Ed. 2d at 1182.

Similarly, here, defendants were not acquitted of their death sentences - in fact defendants would have to acknowledge this based upon their strenuous contention

that proof under the RJA does not even have to be connected to the facts of their own cases. This effort under the RJA was simply an additional "run" to escape their death sentences. Therefore, double jeopardy will not be violated by re-imposition of their valid death sentences upon this Court's review and reversal of the MAR court's order.

The arguments advanced by defendants that their sentences are final and cannot be reviewed by this Court are in conflict with this Court's constitutional authority and contrary to common sense. Defendants argue for the position that once a single superior court judge enters an order granting some form of relief to a defendant, then that order is final and the appellate courts are powerless to correct any errors. This would convert our legal system into an arbitrary game. As the United States Supreme Court has held:

> The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.

Bozza v. United States, 330 U.S. 160, 166-167, 67 S. Ct. 645, 649, 91 L. Ed. 2d 818, 822 (1947).

N.C. Gen. Stat. § 15A-1335 does not apply

Defendants next cite N.C. Gen. Stat. § 15A-1335 in support of their argument that this Court does not have the authority to review the superior court's MAR order. This argument is also without merit.

N.C. Gen. Stat. § 15A-1335 states,

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

Id.

Defendants contend N.C. Gen. Stat. § 15A-1335 applies as soon as a lower court makes a ruling, prior to any review by a higher court. If defendants' interpretation of N.C. Gen. Stat. § 15A-1335 was correct, then every North Carolina Court of Appeals' opinion granting relief to a criminal defendant would be the "final word" and there would be no effect to a reversal by this Court of the North Carolina Court of Appeals' opinion on review. This is inconsistent with this Court's duties. N.C. Gen. Stat. § 15A-1335 cannot overcome this Court's constitutional authority under Art. IV, § 12 to review lower court's orders.

Review Is Authorized in this Case under Several Theories, Including the Rules of Appellate Procedure and Statutory Law

This Court has already decided this same question and granted review in State v. Robinson (411A94-5). In the Order granting the State's Petition for Writ of Certiorari this Court specifically noted N.C. Const. Art. IV, § 12 and N.C. Gen. Stat. § 7A-32(b). Additionally, while not specifically mentioned by this Court in that

Order, the State continues to assert that review of MAR orders under N.C. R. App. P. 21(f) is also proper for both the State and a defendant.

Even if this Court held that Rule 21 did not allow the State to seek review of a MAR order granting relief to a criminal defendant, this Court has the jurisdiction under Rule 2 to grant review in a case "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest" such that this Court may suspend or vary the rules for purposes of granting review. N.C. R. App. P. 2.

Finally, even if this Court were to agree with defendants that the rules of appellate procedure and the North Carolina state statutes did not authorize review, the case is still reviewable under Rule 2 and also under N.C. Const. Art. IV, § 12. While defendants admit Rule 2 and Art. IV are each valid bases of review, they ask this Court to refuse to use its authority to review this case, in part because the Racial Justice Act has been repealed by the legislature.

While it is the State's position that the RJA repeal is valid and applies to all cases in which a final order had not yet been entered, this Court has not yet made that ruling. Until this Court enters a ruling holding the repeal voids all RJA claims which were pending at the time of the repeal, review under Art. IV is certainly appropriate. Even after this Court holds the RJA repeal is valid and the Amended RJA statute applies only to these defendants, review under Art. IV is still appropriate for the

proper administration of justice. Defendants each received death sentences for one or more brutal murders - including the murders of three law enforcement officers, an order by a single superior court judge overturning three separate juries' sentences of death should be reviewed by this Court even if these are the only cases where the amended statute applies.

Review is Warranted in These Cases and There Are No "Insurmountable Impediments" to Review by this Court

Defendants claim that the MAR court's order "forecloses outcome-altering review." Defendants state that this Court's resolution of issues such as issue preclusion, application of the original or amended RJA and case specific discrimination are irrelevant and would not change the outcome in this case. (Brief pp. 18-21) Defendants are wrong.

If this Court were to agree with the State that (1) under the original or amended RJA a defendant must show discrimination in their own case and (2) that one superior court judge can't overrule a prior determination by a superior court judge in the same case that race was not a significant factor in the exercise of a jury strike (prior Batson rulings), then this would overrule the MAR court's order. Neither of these two legal positions are remarkable as the first is the only reasonable interpretation of the original RJA (and the obvious interpretation of the amended RJA), and the second is

based on well founded North Carolina law.

If this Court were to agree with those two legal positions, then the Court would either deny defendants' RJA claims or remand for a new hearing conducted under the proper legal standards. Far from "insurmountable," the impediments to review are easily scaled by the State and this Court.

The MAR Court's Findings are Suitable for Review

Defendants state that this Court should deny review of this case because the MAR court's ruling "was well-considered." As was recently demonstrated, an order from a superior court, even a lengthy order with "copious" findings of fact, may be reviewed and reversed by an appellate court where appropriate. State v. Allen, __ N.C. App. __, 731 S.E.2d 510 (2012). The MAR court's order is no different and should be reviewed by this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons as well as the reasons stated in the original petition, the State respectfully prays that this Court issue its Writ of Certiorari to review the 13 December 2012 RJA Order of the Superior Court below, and that the State have such other relief as the Court may deem appropriate.

Respectfully submitted, this the 4th day of September, 2013.

ROY COOPER
ATTORNEY GENERAL

Electronically Submitted
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Pursuant to N.C. R. App. P. 33(b), I certify that the attorney listed below has authorized me to list their name on this document as if they had personally signed it.

Electronically Submitted
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CERTIFICATE OF SERVICE

I HEREBY certify that I have this day served the foregoing STATE'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI by electronically mailing the same in PDF format to the counsel of record, using the following electronic addresses:

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This the 4th day of September, 2013.

Electronically Submitted
Danielle Marquis Elder
Special Deputy Attorney General

Supreme Court of North Carolina

STATE OF NORTH CAROLINA

v

QUINTEL AUGUSTINE, TILMON GOLPHIN, and CHRISTINA WALTERS

From Cumberland
(01CRS65079 97CRS47314-15 98CRS34832 98CRS35044)

ORDER

Upon consideration of the petition filed by State of NC on the 21st of March 2013 in this matter for a writ of certiorari to review the order of the Superior Court, Cumberland County, the following order was entered and is hereby certified to the Superior Court of that County:

"Allowed by order of the Court in conference, this the 3rd of October 2013."

Beasley, J. recused

s/ Jackson, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of October 2013.

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
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