No. 139PA13 TWELFTHDISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA v QUINTEL AUGUSTINE, TILMON GOLPHIN, and CHRISTINA WALTERS	)	From Cumberland County Nos. 01CRS65079, 97CRS47314-15, 98CRS34832, 35044

****

RETIRED MEMBERS OF THE NORTH CAROLINA JUDICIARY'S *AMICUS CURIAE* BRIEF

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SUMMARY OF ARGUMENT

In multiple ways, the United States Constitution, the North Carolina Constitution, and the Racial Justice Act have established that a capital jury must be selected on a basis that does not involve race. This commitment is designed to protect society's interest in an untainted proceeding and the interests of jurors and defendants against discriminatory treatment. These concerns are particularly important in capital cases.

Achieving the goal of selecting a jury untainted by race has proved elusive when courts use only constitutionally-commanded protections. For over a century, the courts have established and attempted to enforce a series of progressively more exacting constitutional commands to eliminate the pernicious impact of race on jury selection. Those efforts have made progress, but have proved only partially effective.

The Racial Justice Act as initially enacted and as amended has the purpose and effect of expanding constitutional protections by employing the multiple models of civil rights legislation. It also authorizes the use of statistical evidence to provide proof of relevant circumstances bearing on the propriety of peremptory strikes. The use of statistical evidence in the RJA is not unprecedented or of uncertain value. Indeed, under varying legal tests and in many varied circumstances, the United States Supreme Court has endorsed the importance of,

and often the critical role played by, statistical evidence in identifying the improper role of race.

While the precise resolution of the complicated legal issues presented in these cases is beyond the scope of this brief, each of these issues deserves careful consideration given the difficulty of removing the effect of racial considerations from the imposition of capital punishment. Moreover, the statistical evidence developed as a consequence of the RJA raises serious questions that the North Carolina criminal justice system and this Court should carefully consider, particularly given this Court's long-standing commitment under the command of the North Carolina Constitution to the elusive goal of eliminating the corrupting influence of race from jury selection.

ARGUMENT

I. THE CAPITAL JURY MUST BE SELECTED ON A BASIS THAT DOES NOT INVOLVE RACE

Both the Constitution of the United States and the Constitution of North Carolina forbid racial discrimination in jury selection. U.S. Const. amend. XIV, § 1; *Strauder v. West Virginia*, 100 U.S. 303 (1879); N.C. Const. art. I, § 26; *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). As the Supreme Court of the United States and this Court have made clear, this protection is derived from the defendant's right to equal protection under the law, citizens' rights not to be excluded from participation on juries because of their race, and from the public's

interest in a fair and unbiased criminal justice system. *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986); *Strauder*, 100 U.S. at 308–09.

Eliminating considerations of race in selection of jurors has proven to be an elusive goal and a continuing challenge to the judicial system. In enacting the Racial Justice Act in 2009, the North Carolina General Assembly adopted provisions, including the authorized use of statistical evidence, it considered necessary to better accomplish that unmet goal. That purpose remained clear as well after amendments enacted in 2012 more narrowly focused the law's use of statistical evidence in terms of temporal and geographic area of prosecution. The cases in this appeal call upon the Court to fairly and fully apply the applicable provisions of the RJA, which expand the procedures the judicial system had required under the United States and North Carolina Constitutions. We, the undersigned, lend our support to this enormously important goal.

A. Assuring a Jury Untainted by Race-Based Selection Protects Society's Interest in a Fair and Impartial System of Justice.

In *Strauder*, the United States Supreme Court declared that denying a person participation in jury service on account of his race both unconstitutionally discriminated against the excluded juror and unconstitutionally harmed the defendant whose case the juror was called to decide. *Strauder*, 100 U.S. at 308–09. Furthermore, in *Batson*, the Court recognized that a prohibition on race-based

jury selection also protects society's interest in justice, stating "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the *entire community*." *Batson*, 476 U.S. at 87 (emphasis added). Far from undermining the prosecution's ability to administer justice, *Batson*'s framework improves the justice system because "*public respect* for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99 (emphasis added). Remedying race-based jury selection, therefore, benefits the public. By contrast, tolerating jury selection based on race sends the damaging message that a racially-biased criminal justice system is acceptable.

This Court has independently reached this same conclusion under the North Carolina Constitution. *See* N.C. Const. art. I, § 26 (prohibiting "exclu[sion] from jury service on account of sex, race, color, religion, or national origin"). The Court in *Cofield* concluded this provision "does more than protect individuals from unequal treatment." *Cofield*, 320 N.C. at 302, 357 S.E.2d at 625. It serves as a declaration that "[t]he *people of North Carolina* . . . will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice." *Id.* This protection is important because the criminal justice system "must . . . be perceived to operate evenhandedly." *Id.* If discrimination goes unremedied, it

"undermines the judicial process," not just the individual defendant's trial. *Id.* This Court continued:

> Exclusion of a racial group from jury service . . . *entangles the courts in a web of prejudice and stigmatization.* To single out blacks and deny them the opportunity to participate as jurors in the administration of justice—even though they are fully qualified—is to put the courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law.

Id. at 303, 357 S.E.2d at 625–26 (emphasis added).

This Court has ruled that the right under the North Carolina Constitution articulated in *Cofield* protects the integrity of the judicial system beyond ensuring that individuals are not subjected to unequal treatment and extends past the reliability of the outcome of the proceedings. Moreover, it applies when jurors are not selected in racially-neutral fashion even if the motives of the prosecutor are pure. *See State v. Moore*, 329 N.C. 245, 247–48, 404 S.E.2d 845, 847 (1991).

This broader harm stands in addition to the clear damage improper exclusion of jurors can have on defendants. In one of its most recent *Batson* cases, *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 237–38 (2005), the United States Supreme Court summarized the interests protected and the damage done by a jury selected in a manner that relied on race:

> "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) . . . . Defendants are harmed,

> of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, *Strauder v. West Virginia*, *supra*, at 308, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice," *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994).
>
> Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial . . . ." *Powers v. Ohio*, 499 U.S. 400, 412 (1991). That is, the very integrity of the courts is jeopardized when a prosecutor's discrimination "invites cynicism respecting the jury's neutrality," *ibid.*, and undermines public confidence in adjudication, *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Batson v. Kentucky*, [476 U.S. 79, 87 (1986)].

B. This Assurance Is Especially Important in Capital Cases.

In cases where the defendant was sentenced to death, the public's interest in a trial free from racial discrimination is especially great. This Court has repeatedly emphasized that, as the most severe punishment, the death penalty requires special scrutiny. *See State v. Atkinson*, 275 N.C. 288, 321, 167 S.E.2d 241, 261 (1969) (ruling that the record in a capital case is to be reviewed without limitation to the assignments of error); *State v. Fowler*, 270 N.C. 468, 469, 155 S.E.2d, 83, 84 (1967) (adopting the approach that the record in every capital case is to be reviewed with "minute care" and that "all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State").

In the context of racial discrimination, the Court has said that "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence" and "the range of discretion entrusted to a jury in a capital sentencing hearing . . . ." *Turner v. Murray*, 476 U.S. 28, 35 (1986). Thus "[a] capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36–37. In *Miller-El II*, 545 U.S. at 238, a capital case addressing a *Batson* claim, the Court found that "the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication." In the particularly sensitive and important area of jury selection in capital cases, the North Carolina legislature added the special protections and methods of proof of the Racial Justice Act to the constitutional protections previously articulated by this Court and the United States Supreme Court. *See* N.C. Gen. Stat. § 15A-2011(d)(ii) (as amended 2012).

II. ACHIEVING THE GOAL OF SELECTING A JURY UNTAINTED BY RACE HAS PROVED ELUSIVE FOR THE COURTS USING ONLY CONSTITUTIONALLY-COMMANDED PROTECTIONS

The Supreme Court of the United States has held since 1879 that the Fourteenth Amendment prohibits racial discrimination in jury selection. *See Strauder*, 100 U.S. at 310 ("[c]oncluding . . . that the statute of West Virginia,

discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws"). In the difficult effort to remove the pernicious influence of race from jury selection, the battleground has moved through different stages of the jury selection process, and the United States Supreme Court has repeatedly revised and updated its standard to make this prohibition more effective and to facilitate enforcement of this constitutional imperative.

Strauder, the first case to address the issue of racial discrimination in jury selection, prohibited only state laws that expressly excluded blacks from the jury pool. *Id.* at 310–12. In the next century, the Court continued and sharpened its effort at eradicating the influence of race. Cases arising in North Carolina demonstrated that the command of the United States Supreme Court in *Strauder* was easily flouted by officials ostensibly following neutral principles.

In *State v. Speller*, 229 N.C. 67, 47 S.E.2d 537 (1948), this Court overturned the conviction of Raleigh Speller, an African American, for rape, reversing the denial of his motion to quash the indictment because African Americans had been improperly excluded from service on the grand jury that indicted him.

The Court recounted the facts as follows:

> The Register of Deeds of the County testified that he had been Clerk of the Board of County Commissioners for 17 years; that Negroes comprise approximately 60% of the population of the County, and about 35% or 40% of the taxpayers; that the names of Negroes in jury

> box No. 1 are printed in red, while those of Whites are printed in black; that the Commissioners pass upon the person whose name is drawn, and either accept or reject such person when called; that in his 17 years as Clerk to the Board of County Commissioners he had never seen the name of a Negro placed on the approved list of prospective jurors; that it is "common knowledge, and generally known, that Negroes do not serve and have not served on grand or petit juries in Bertie County"; that he knows some of the Negroes whose names have been drawn and rejected and he would say they are average citizens; that "whenever the name of a colored person was called at a drawing of the County Commissioners nobody said anything", or they would say: "Strike him out" or "Let him go"; that according to his records no Negro has ever been summoned for jury duty by the County Commissioners.

Id. at 70–71, 47 S.E.2d at 538–39.

Despite this apparently clear racial discrimination, the chairman of the board of county commissioners testified that there had been "no discrimination at all" in the selection of persons to serve on juries. Although he had never "known a Negro's name to be on the list of persons chosen for service on a grand or petit jury," the chairman testified that all rejections were for want of good moral character and sufficient intelligence. *Id.* at 68–69, 47 S.E.2d at 537–38. The trial judge accepted this explanation and ruled that there was "no intentional or purposeful discrimination against the colored race in the selection of jurors." *Id.* at 69, 47 S.E.2d at 538. This Court reversed the conviction, rejecting both the supposedly neutral explanation of the local official and the finding of the trial court. *Id.* at 71, 47 S.E.2d at 539. Practices such as having the names of potential jurors of different races printed in different colored ink was not restricted to one

part of the state, and like the exclusion of black potential jurors in *Speller*, it was justified by local officials on race-neutral grounds, a justification sometimes accepted by the reviewing courts. *See State v. Walls*, 211 N.C. 487, 493, 191 S.E. 232, 237 (1937) (accepting local officials' denial of intentional discrimination despite their use of different colored ink to designate jurors by race under the rationale that the colors made it helpful when names were selected to "know whether to look for a white man or a colored man").

Real progress in including African Americans on juries occurred through a series of United States Supreme Court decisions that began in the 1930s and continued into the 1970s. In those cases, the Court demonstrated a commitment to and developed a plan for ensuring meaningful African-American participation in the jury pool by enforcing neutral selection criteria for its makeup. These decisions often relied on statistical evidence. *See, e.g.*, *Sims v. Georgia*, 389 U.S. 404, 407–08 (1967) (per curiam) (ruling that procedures purportedly implementing neutral statutes are void when the results demonstrate substantial disparities between racial composition of the lists used and the resulting venire); *Whitus v. Georgia*, 385 U.S. 545, 548–49 (1967) (same); *Norris v. Alabama*, 294 U.S. 587, 598–99 (1935) (declaring a practice invalid that assumed members of the defendant's race were not qualified to serve). *See generally* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the*

Death Penalty in North Carolina, 88 N.C. L. Rev. 2031, 2072–76 (2010) (discussing African-American participation on juries from roughly the beginning of the twentieth century until the 1970s).

While these decisions better assured African Americans' inclusion in jury pools, discrimination continued through the exclusion of jurors based on race through the exercise of peremptory challenges to members of minority groups who had made their way not only into the venire but were called forward as potential members of the jury. In *Swain v. Alabama*, 380 U.S. 202, 227 (1965), the Court recognized that de jure exclusion of blacks from jury service through the use of peremptory strikes also violated the Constitution. However, it authorized relief only if the defendant could prove "systematic use of peremptory challenges against Negroes over a period of time." *Id.*

Twenty-one years later, in *Batson*, the Court held that the *Swain* standard, "placed on defendants a crippling burden of proof" that made "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny." *Batson*, 476 U.S. at 92–93. The *Batson* Court thus replaced *Swain* with a standard that focused on the context of the defendant's individual case. *Id.* at 95–98. While *Batson* represented a substantial improvement over the almost impossible to meet requirements of *Swain*, experience has demonstrated across jurisdictions that the system it established to eliminate race-based peremptory challenges gives judges

inadequate evidence to distinguish between legitimate and discriminatory challenges.[1] Unfortunately, the decisions of appellate courts under *Batson* can be misused as providing a list of potential grounds on which litigants can successfully model their responses to *Batson* objections. *See* Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 Rev. Litig. 209, 264 & n.219 (2003) (noting that litigants keep a "host of commonly offered and accepted reasons in their arsenal to be used whenever necessary"). *See also State v. Jackson*, 322 N.C. 251, 260, 368 S.E.2d 838, 843 (1988) (Frye, J., concurring) (warning against the potential for acceptable "profiles" of jurors to be "constructed in a manner so as to systematically exclude blacks").

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[1] Commentators have reached the conclusion that early Supreme Court case law construing *Batson* limited the effectiveness of *Batson* by giving weak support for enforcing its commands. One study examining all reported cases in the first five years of *Batson*'s operation found that "in almost any situation a prosecutor can readily craft an acceptably neutral explanation to justify striking black jurors because of their race." Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations under Batson v. Kentucky*, 17 U. Mich. J.L. Reform 229, 236 (1993). The prosecutor can explain the peremptory strike on the basis of age, occupation, unemployment, religion, demeanor, relationship with a trial participant that would not amount to a reason to strike for cause, intelligence, socioeconomic status, residence, marital status, previous involvement with the criminal justice system, and jury experience, and the prosecutor should expect to have the justification accepted as race neutral. *Id.* at 324-67 (analyzing 824 cases that applied *Batson* in its first five years of operation and finding reasons based on these grounds generally accepted).

Professor Charles Ogletree has explained one powerful reason why the elimination of race-based peremptory challenges has proved so difficult to eliminate. He stated, "[T]he Court has underestimated the interest litigants have in continuing to discriminate by race and gender if they can get away with it. Striking jurors on the basis of race or gender . . . can sometimes . . . simply be part of effective advocacy were it not entirely repugnant to the values and standards of the Constitution . . . ." Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 Am. Crim. L. Rev. 1099, 1104 (1994).

In 2005, the United States Supreme Court acknowledged a weakness in its jurisprudence: "*Batson*'s individualized focus" allowed a prosecutor's potentially race-based peremptory strike to stand so long as the prosecutor proffered "any facially neutral reason" for the strike, even if the reason was false. *Miller-El II*, 545 U.S. at 240. While it put primary emphasis on side-by-side-comparisons of reasons stated by the prosecutor for striking African Americans as compared with white jurors whom the prosecutor accepted, the Court stated that relevant consideration went beyond data in the individual case:

> Although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give. If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not

> amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

Miller-El II, 545 U.S. at 239–40 (quoting *Batson*, 476 U.S. at 96–97).

Specifically, the Court in *Miller-El II* relied on a policy in the prosecutor's office to exclude African Americans from juries that had existed for decades leading up to the time of the defendant's trial. *Id.* at 263. Although the proof of a policy of racial exclusion in *Miller-El II* was not sufficient to satisfy *Swain*, that history was part of the "relevant circumstances" that led the Court to grant relief under *Batson*. *Id.* at 263–64.

The critical point made in *Miller-El II* is that *Batson*'s statement that "all relevant circumstances" should be considered has real meaning. This broader examination is often necessary to avoid rendering *Batson* as toothless as *Swain* if any facially neutral reason provided in the individual case may be deemed sufficient. Instead, the Court cautioned that "[s]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Id.* at 240. The Court indicated the inquiry should include historical evidence and evidence of "broader patterns of practice [of discrimination] during the jury selection." *Id.* at 240, 253, 266. As endorsed in concept by the Court in *Miller-El*

II, the RJA provides an important mechanism for proof outside the particular case in the form of statistical evidence showing significant impact of race in the exercise of peremptory challenges in larger prosecutorial units within which the defendant's case was tried.

III. THE RACIAL JUSTICE ACT SEEKS TO REALIZE THE GOAL OF ELIMINATING RACE FROM JURY SELECTION DECISIONS IN CAPITAL CASES

The Racial Justice Act both as originally enacted in 2009, and as amended in 2012, represents an effort to more rigorously enforce the prohibition against race-based exclusion of jurors through peremptory strikes in the discrete and highly significant area of death penalty cases. Applicable only to this limited class of cases, which may be particularly subject to the influence of race, it establishes a different standard for establishing improper use of race in jury selection decisions by the prosecution—that race was a significant factor in decisions to exercise peremptory challenges. *See* N.C. Gen. Stat. § 15A-2011(b) (amended 2012).[2]

A. Authorized Use of Statistical Evidence to Establish RJA Claim

The legislation also approved the use of statistical evidence to help establish the improper use of race-based peremptory strikes. *See generally* Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial*

[2] While *Batson* and the RJA serve related purposes, the RJA did not simply follow *Batson* but sought to achieve the goal of eliminating race-based jury selection by additional legislatively-established standards, methods of proof, and procedures.

Justice Act Confronts Racial Peremptory Challenges in Death Cases, 10 Ohio St. J. Crim. L. 103, 127 (2012) (describing major innovations in the RJA regarding analysis of peremptory strikes). Initially, the legislation authorized use of statistical evidence on a statewide basis, as well as in the judicial division, the prosecutorial district, and the county in which the death penalty was sought or imposed. The 2012 amendments limited the geographic scope of statistics such that statewide and division-wide statistics were no longer permitted, but consideration was continued in the prosecutorial district and county "at the time the death sentence was sought or imposed," which was defined as a period of years running from ten years prior to the commission of the offense to two years after the imposition of the death sentence. *See* N.C. Gen. Stat. § 15A-2011(a)–(d) (as amended 2012).

As initially enacted, the RJA took as a model civil rights legislation. *See* Kotch & Mosteller, *The Racial Justice Act*, *supra* at 2112–13 (quoting legislative hearing statements). Such civil rights legislation in its various forms provides for both disparate treatment and disparate impact analysis as suggested by the language and structure of the RJA. *See* Mosteller, *Responding to McCleskey and Batson*, *supra* at 121–25 (describing correspondence between provisions of RJA and disparate treatment and disparate impact analysis). Clearly, the RJA as enacted and as amended demonstrates a broad remedial purpose to expand legal

protection using statistical proof, in addition to evidence of improper race-based peremptory strikes in the individual case. Deciding what type of analysis the RJA supports and whether Judge Weeks was correct in concluding it embraced both disparate treatment and disparate impact analysis, *see* RJA Order at 30–32, is a key element of this appeal, which we believe deserves careful consideration in light of the importance of eliminating improper race-based determinations in death penalty cases and the difficulty of their elimination.

Regardless of the determination of the precise mode of remedial analysis available, the overall effect is important. One potential effect of the use of statistical evidence in prosecutorial districts and counties over the period of time permitted by the amended RJA is to expand the availability of side-by-side comparison evidence found critical in *Miller-El II*. Superficial racially-neutral explanations for peremptory strikes are often easy to assert but difficult to refute in individual cases. The proof structure under the RJA permits the defense to demonstrate through statistical evidence the invalidity of these strikes by allowing examination of the racial pattern of strikes and the range of explanations across multiple cases. When broadly considered, explanations that are masks for improper race-based peremptory strikes, which may be based on conscious or unconscious discrimination, cannot in fact be neutrally justified. The essence of

the broader statistical proof the RJA authorized permits side-by-side comparisons outside of individual cases.

B. Statistical Evidence Is an Established and Judicially Sanctioned Method of Proving Claims of Improper Use of Race.

The United States Supreme Court has approved the use and endorsed the importance of statistical evidence in multiple situations, including disparate treatment cases involving intentional discrimination, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973), and in disparate impact cases such as *Dothard v. Rawlison*, 433 U.S. 321, 330–31 (1977). It has also observed that statistical evidence supplies critical evidence of discrimination sometimes unavailable otherwise.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), a case endorsing the use of statistical evidence by the government to aid in establishing that the employer and union engaged in system-wide pattern or practice of employment discrimination, the Court made several important observations:

> "[O]ur cases make it unmistakably clear that '(s)tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620 [(1974)]. *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 [(1973)] . . . . We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection

> cases, *see, e.g.*, *Turner v. Fouche*, 396 U.S. 346 [(1970)]; *Hernandez v. Texas*, 347 U.S. 475 [(1954)]; *Norris v. Alabama*, 294 U.S. 587 [(1935)]. Statistics are equally competent in proving employment discrimination.

Id. at 339. The Court also observed that "'[s]ince the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation . . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved.'" *Id.* at 340 n.20 (1977) (quoting *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir. 1971)).

In applying Supreme Court doctrine, the Fourth Circuit has been equally forceful in its endorsement of the importance and utility of statistical evidence to prove discrimination. In *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972), it stated:

> Courts have often observed that proof of overt racial discrimination in employment is seldom direct . . . . Recognizing this, we have found 'error in limiting Title VII to present specific acts of racial discrimination,' *United States v. Dillon Supply Co.*, 429 F.2d 800, 804 (4th Cir. 1970), and it is now well established that courts must also examine statistics, patterns, practices and general policies to ascertain whether racial discrimination exists.

Similarly, in *United States v. County of Fairfax*, 629 F.2d 932, 939 (4th Cir. 1980), the Fourth Circuit observed not only the value of such evidence but also its potential power:

> The government undertook to prove its disparate treatment case largely through the use of statistical evidence showing a substantial racial and sexual imbalance in the County's work force. Proof of such an imbalance "is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Teamsters v. United States*, 431 U.S. at 340, n. 20. Of course, proof of a discriminatory motive is a necessary element of a disparate treatment case, but statistics can establish a prima facie case, even without a showing of specific instances of overt discrimination. *See, e.g., Hazelwood School District v. United States*, 433 U.S. 299, 307–08 (1977); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975).

In terms of application, statistical evidence, particularly where it is broadly based and long-standing, has the power to prove discrimination when other explanations are unlikely to be sufficient. In *Hazelwood School District v. United States*, 433 U.S. 299, 307–08 (1977), the Supreme Court described such statistical evidence:

> This Court's recent consideration in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 [(1977)], of the role of statistics in pattern-or-practice suits under Title VII provides substantial guidance in evaluating the arguments advanced by the petitioners. In that case we stated that it is the Government's burden to "establish by a preponderance of the evidence that racial discrimination was the (employer's) standard operating procedure[—] the regular rather than the unusual practice." *Id.* at 336. We also noted that statistics can be an important source of proof in employment discrimination cases, since
>
> > absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic

> composition of the population in the community from which employees are hired. Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though . . . Title VII imposes no requirement that a work force mirror the general population. *Id.* at 340 n.20.
>
> . . . . Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination. [*Id.*] at 339.

Moreover, statistical evidence that clearly demonstrates unequal application of the law is sufficient to prove intentional discrimination where that is required. As the United States Supreme Court observed in *Washington v. Davis*, 426 U.S. 229, 241–242 (1976), "'It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination'" (quoting *Akins v. Texas*, 325 U.S. 398, 404 (1945)).

IV. CONCLUSION

We do not attempt to speak to how the Court should ultimately analyze and apply the provisions of the RJA, and all the statistical and other evidence presented to the trial court, to the cases considered in this appeal. What we do speak to is the importance of the goal of the RJA which is to enable our courts to remove insofar as practicable the impact of race on the selection of jurors in capital cases. And we do speak to this Court's constitutional obligation to insure that race was not a factor in the selection of the trial juries in the cases before it because, as the Court

has recognized, "[t]he people of North Carolina . . . will not tolerate the corruption of their juries by racism . . . ." *Cofield*, 320 N.C. at 302, 347 S.E.2d at 625. To the extent the statistical data presented to the trial court as authorized by the RJA assists the Court in fulfilling this obligation, it should not be ignored.

Respectfully submitted, this the 13th day of January, 2013.

/s/Robert P. Mosteller
Robert P. Mosteller
J. Dickson Phillips Distinguished Professor of Law
Campus Box 3380
U.N.C. School of Law
Chapel Hill, N.C. 27599-3380
919-962-8513 (office)
919-962-1277 (fax)
rmostell@email.unc.edu

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Brief of *AMICI CURIAE* upon all parties by electronic mail to:

Jay H. Ferguson
Thomas, Ferguson & Mullins, L.L.P.
119 East Main Street
Durham, NC 27701
ferguson@tfmattorneys.com

James E. Ferguson, II
Ferguson, Chambers & Sumter, P.A.
741 Kenilworth Avenue, Suite 300
Charlotte, NC 28204
jamesferguson@fergusonstein.com

Cassandra Stubbs
ACLU Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
cstubbs@aclu.org

Gretchen M. Engel
Center for Death Penalty Litigation
201 W. Main Street, Suite 301
Durham, NC 27701
Gretchen@cdpl.org

Shelagh R. Kenney
Center for Death Penalty Litigation
201 W. Main Street, Suite 301
Durham, NC 27701
Shelagh@cdpl.org

Kenneth J. Rose
Center for Death Penalty Litigation
201 W. Main Street, Suite 301
Durham, NC 27701
Ken@cdpl.org

Thomas J. Johnson, Jr.
Gray, Newell, Johnson & Blackmon, LLP
P.O. Box 2318
Greensboro, NC 27401
thjohnsonlaw@bellsouth.net

Jonathan E. Broun
Office of the Capital Defender
123 W. Main Street, Suite 601
Durham, NC 27701
Jonathan.E.Broun@nccourts.org

Malcolm Ray Hunter, Jr.
Law Offices of Malcolm Ray Hunter Jr.
P.O. Box 3018
Chapel Hill, NC 27505
tyehunter@yahoo.com

Danielle Marquis Elder
Special Deputy Attorney General
P.O. Box 629
Raleigh, NC 27602
Dmarquis@ncdoj.gov

Jonathan P. Babb
Special Deputy Attorney General
P.O. Box 629
Raleigh, NC 27602
jbabb@ncdoj.gov

William P. Hart, Sr.
Senior Deputy Attorney General
P.O. Box 629
Raleigh, NC 27602
bhart@ncdoj.gov

This the 13th day of January, 2014.

/s/Robert P. Mosteller
Robert P. Mosteller