No. 139PA13 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

BRIEF OF DEFENDANTS (RESPONDENTS)
TILMON GOLPHIN,
CHRISTINA WALTERS,
AND QUINTEL AUGUSTINE

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INTRODUCTION

Nearly 30 years ago, on behalf of the citizens of North Carolina, this Court declared it would not tolerate "the corruption of [our] juries by racism . . . and similar forms of irrational prejudice." *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987). Despite this Court's longstanding commitment to a system of justice free of racial prejudice, the evidence presented below shows plainly and powerfully that racial bias tainted the capital prosecutions of Tilmon

Golphin, Christina Walters, and Quintel Augustine. The evidence shows that prosecutors worked relentlessly to exclude African Americans from the juries in each of these three cases, and in capital cases tried contemporaneously in Cumberland County. In view of overwhelming evidence of race discrimination by prosecutors in these cases, the MAR court was compelled to conclude that race was a significant factor in the prosecution's decisions to exercise peremptory challenges in Cumberland County and each of Defendants' cases. The MAR court therefore vacated the death sentences and resentenced Defendants to life imprisonment without possibility of parole. The MAR court made the following core findings:

- Each Defendant was entitled to relief pursuant to the **Amended RJA**.
- Each Defendant was entitled to relief based solely on evidence from Cumberland County **during the time period prescribed by the Amended RJA**: from 10 years prior to the crime to two years after Defendant was sentenced to death.
- Each Defendant was entitled to relief based on **competent evidence**, including racially-charged notes, documented race consciousness in jury selection, disparate treatment of comparable black and white potential jurors, and statistical evidence.
- Each Defendant was entitled to relief based on evidence of **intentional discrimination** in his or her own case.

The State's brief barely mentions these core rulings necessary to the judgment for each Defendant. Instead, the State concentrates nearly all of its

argument on alternate holdings made by the MAR court, including that Defendants were entitled to relief pursuant to the original RJA, or were entitled to relief on a theory of collateral estoppel.[1] These holdings are properly regarded by this Court as dicta and, as such, the Court need not address them. Rather, the Court must review whether there is competent evidence to support the findings of fact necessary to the judgment for each Defendant. The pertinent evidence, almost entirely ignored by the State in its brief, establishes that race was a significant factor in prosecution strike decisions in the cases of Tilmon Golphin, Christina Walters, and Quintel Augustine.

The MAR court reached its conclusion that race was a significant factor in prosecution decisions to exclude African-American citizens from jury service in these cases after a historic fact-finding opportunity. The MAR court painstakingly considered an enormous amount of evidence. This evidence included the testimony of Cumberland County prosecutors, notes written by prosecutors, jury selection training materials, voir dire transcripts, and expert testimony regarding

[1] The State also contests the following alternative rulings made by the MAR court: (1) Defendants were entitled to relief based on evidence from 1990 through 2010; (2) Defendants were entitled to relief based on evidence from North Carolina as a whole; (3) Defendants were entitled to relief based on statistical evidence alone; (4) the superior court judges who presided over Defendants' trials should not be permitted to testify about their mental processes or respond to hypothetical questions from the State about how they would have ruled on constitutional questions; and (5) Defendants were not required to prove intentional discrimination or that race was a significant factor in their individual cases.

complex statistical analyses. In addition to holding a substantial evidentiary hearing on Defendants' Amended RJA claims, the MAR court also admitted all of the evidence from the *Robinson* RJA hearing.

In its brief, the State ignores the wealth of evidence presented by Defendants, most of it not contested. Thus, there is no mention in the State's brief of the fact that the MAR court found, as to the State's two principal witnesses, the prosecutors who tried Defendants' cases, that one was consistently unpersuasive and the other gave false testimony. The testimony of these prosecutors was frequently at odds with the transcripts of jury selection, common sense, and their own notes.

Defendants presented other evidence that race was a significant factor in the prosecution's strike decisions: documents showing race consciousness and motivation, empirical and uncontested evidence of disparate treatment of black and white potential jurors, lay and expert testimony on the history of race discrimination in jury selection in Cumberland County, expert testimony on implicit or unconscious racial bias, and statistical analyses of the jury selection in Defendants' cases and other capital cases tried in Cumberland County.

It is no small point that the State has barely any complaint about the fact-finding below. The State's complaints to this Court are limited almost entirely to questions of law, the vast majority of which this Court need not address. On closer

examination, as detailed below, the State's complaints range from beside the point to spurious. The judgment of the MAR court should be upheld and the State's petition dismissed.

STATEMENT OF FACTS

Tilmon Golphin, an African-American man, was sentenced to death in 1998 for the murder of two white law enforcement officers, N.C. Highway Patrol Officer Lloyd Lowry and Cumberland County Sheriff's Deputy David Hathcock. Christina Walters, a Native-American woman, was sentenced to death in 2000 for the murder of two white victims, Tracy Lambert and Susan Moore. Quintel Augustine, an African-American man, was sentenced to death in 2002 for the murder of African-American Fayetteville Police Department Officer, Roy Turner.

During the nearly two-week hearing below, the MAR court heard testimony from several witnesses, including two prosecutors who tried Defendants. The MAR court also admitted, with the stipulation of the State and Defendants, all of the testimony and exhibits from the twelve days of evidentiary hearing in *Robinson*. Three experts testified for the defense at the Augustine, Golphin and Walters hearing and all three testified that race was a significant factor under the Amended RJA in Defendants' cases. No State expert testified about the Defendants' Amended RJA claims or at the Augustine, Golphin and Walters hearing. In the expert witness testimony admitted from the *Robinson* hearing, no

expert testified that race was not a significant factor in Cumberland County. The MAR court received close to 300 exhibits, approximately 170 from the *Robinson* hearing, and more than 110 new exhibits.

In *Augustine*, the State secured an all-white jury after striking all five qualified African Americans in the jury pool. Prosecutors struck black potential jurors at a rate that was 3.7 times that for white potential jurors. Order at ¶ 282; HTpp. 344-445, 1482; DE118.[2]

In *Golphin*, the State struck five of seven African-American venire members. Prosecutors struck black potential jurors at a rate that was 2.0 times that for whites. Only one African American served on Golphin's jury. Order at ¶ 273; HTpp. 342, 1482; DE117.

In *Walters*, the State used 10 of 14 peremptory strikes to exclude African Americans from the jury. The prosecution struck black potential jurors at a rate 3.6 times that for whites. Order at ¶ 277; HTp. 344; DE119.

Prosecutor Margaret B. Russ

Margaret B. Russ was a prosecutor in Cumberland County for almost 25 years, during which time she prosecuted a number of murder and capital murder cases. Russ prosecuted all three of Defendants' cases and participated in jury

[2] Findings of fact appear in the MAR court's December 13, 2012 order as numbered paragraphs and are cited here as "Order at ¶ _." Citations to the hearing transcript are given as HTp. _. Citations to defense exhibits appear as DE__.

selection in each one. Order at ¶¶ 3, 7, 8; HTpp. 181, 782-83, 825, 1106. Russ testified briefly as a defense witness. She was then called as the second and final witness for the State. On direct, Russ gave testimony about jury selection in *Walters* and *Golphin*.

The MAR court found ample evidence that Russ offered pretextual reasons for striking black potential jurors, attempted to "cover up" her real reasons for strikes of African Americans, gave "misleading and evasive" testimony, and generally demonstrated "untrustworthiness." Order at ¶¶ 58, 64, 76-77, 79. Moreover, the MAR court found that Russ testified falsely in the RJA hearing itself. *Id*. at ¶¶ 79-93.

Russ' Past Violation of *Batson* and Persistent Denials of Discrimination

In 1998, the same year as Golphin's trial, Russ capitally prosecuted Maurice Parker. In *Parker*, the trial judge found Russ had violated *Batson v. Kentucky*, 476 U.S. 79 (1986). He sustained defense counsel's objection to the strike of African-American citizen Forrester Bazemore and seated Bazemore on the jury. Order at ¶ 62; DE147, 149, 155.

The transcript of voir dire in *Parker* shows that Russ said her "first concern" with Bazemore was his age. Russ said the State also considered Bazemore's "body language," which Russ described as "evasive" and "defensive." Order at ¶ 63; DE147 at 444-45.

The trial judge interjected to point out that Russ had passed a white juror with the "very same birthday" as Bazemore. Order at ¶ 63; DE147 at 447. Ultimately, the trial court sustained the *Batson* objection. The court noted the disparate treatment of Bazemore and a white juror of the same age. DE147 at 451. The court also rejected Russ' demeanor reasons as pretextual. Order at ¶ 64; DE147 at 455.

At the RJA hearing, Defendants' attorneys questioned Russ about the sustained *Batson* objection in *Parker*. The MAR court found Russ' answers to these inquiries illuminating in a number of respects. First, despite saying many times how much she respected the trial court[3] in *Parker*, Russ absolutely denied she had done anything improper or unlawful in attempting to strike a black juror in violation of the Fourteenth Amendment. Order at ¶ 65; *see also* HTpp. 1295 ("Because I didn't intentionally use race to strike a juror, sir."); 1302 ("The conduct was not unlawful."); 1305 ("It's just not true."); 1332 ("No, I don't think a ruling of a court on . . . *Batson* . . . is an indication that we are doing anything wrong."). After listening to her testify and observing her demeanor, the MAR court found that Russ' persistent denials of wrongdoing rang hollow and were not credible. Order at ¶ 65. The MAR court determined that Russ' unwillingness to take responsibility for her conduct "severely undercut the credibility of her

[3] HTpp. 1296-97, 1303-04, 1330, 1360-61.

testimony" and illustrated her strong resistance to the constitutional requirement of *Batson.* Order at ¶ 93.

Russ' denial of clear past wrongdoing was not confined to her practices in *Parker,* nor was *Parker* the first time a court had found that Russ had engaged in deceitful conduct. In *State v. Bass,* 121 N.C. App. 306, 465 S.E.2d 334 (1996), the Court of Appeals found that Russ' argument to the jury was "calculated to mislead or prejudice the jury." 121 N.C. App. at 313, 465 S.E.2d at 338 (internal citation omitted). When cross-examined about this, Russ refused to admit any wrongdoing on her part. Order at ¶ 61. The MAR court found that this "unwillingness to accept responsibility for her conduct and the judgment of the appellate court undermines Russ' credibility." *Id*.

Given her firm belief that she had done nothing wrong in attempting to strike Bazemore for pretextual reasons, Russ did not change her method of jury selection after she was deemed to have violated *Batson*. HTp. 1336. Likewise, her superiors did nothing to suggest they believed Russ' constitutional violation was problematic. Order at ¶ 126 ("The Cumberland County District Attorney's office never monitored nor disciplined findings of intentional discrimination in violation of *Batson*"); ¶ 128 ("It is similarly notable that Russ was not subjected to any discipline or required to undergo any training as a result the court's ruling that Russ' exercise of a peremptory strike . . . ."); *see also* HTpp. 917, 1360.

Russ' Testimony Regarding *Batson* Training

The MAR court found that Russ proffered reasons for her peremptory strikes based on a training handout of 10 categories of pat *Batson* responses. Order at ¶ 70. Russ appears regularly to have used this handout in picking capital juries. Order at ¶ 74. The MAR court found that Russ used the handout or "cheat sheet" in a "calculated" and "largely successful" effort to "circumvent *Batson*." Order at ¶¶ 70, 76. The MAR court found further that Russ' use of the cheat sheet was "evidence of her inclination to discriminate on the basis of race." Order at ¶ 76.

In 1995, the North Carolina Conference of District Attorneys put on a training called *Top Gun II*. Russ reported to the North Carolina State Bar that she attended this seminar. Order at ¶ 69; DE81A. Among the materials *Top Gun II* attendees received was a handout that looked like this:

BATSON Justifications: Articulating Juror Negatives

1. Inappropriate Dress – attire may show lack of respect for the system, immaturity or rebelliousness.
2. Physical Appearance – tattoos, hair style, disheveled appearance may mean resistance to authority.
3. Age – Young people may lack the experience to avoid being misled or confused by the defense.
4. Attitude – air of defiance, lack of eye contact with Prosecutor, eye contact with defendant or defense attorney.
5. Body Language – arms folded, leaning away from questioner, obvious boredom may show anti-prosecution tendencies.
6. Rehabilitated Jurors – or those who vacillated in answering DA's questions.
7. Juror Responses which are inappropriate, non-responsive, evasive or monosyllabic may indicate defense inclination.
8. Communication Difficulties, whether because English is a second language, or because juror appeared to have difficulty understanding questions and the process.
9. Unrevealed Criminal History re: voir dire on "previous criminal justice system experience."
10. Any other sign of defiance, sympathy with the defendant, or antagonism to the State.

Top Gun II *Jury Voir Dire*

DE111.

The voir dire transcript in *Parker* shows convincingly that Russ used this cheat sheet in responding to defense counsel's *Batson* objection. Order at ¶ 70. First, the reasons she gave appear on the cheat sheet. Age is number three and body language is number five. Russ' description of Bazemore's body language also tracks the cheat sheet. She claimed Bazemore "folded his arms and sat back in the chair away and kept his arms folded." DE147 at 445; *see also* DE147 at 449 ("body language that I clearly observed from here of the folded arms and so on, which those are very classic examples of body language that are negative"). Similarly, the cheat sheet says "arms folded, leaning away from questioner." Order at ¶ 72; DE111. Russ went on to talk about Bazemore's eye contact, a "juror negative" listed as number four on the cheat sheet. DE147 at 445. Russ also described Bazemore as "evasive." *Id*. This adjective appears at number seven on the cheat sheet, as does Russ' next voiced concern about Bazemore, namely that he gave "basically minimal answers." *Id*. On the cheat sheet, "mono-syllabic" comes right after "evasive."[4] DE111.

[4] Defense counsel vigorously contested Russ' characterization of Bazemore's demeanor. Counsel stated he had watched Bazemore "intently" during the individual voir dire and counsel "didn't notice any body language any different from any other persons in the courtroom, quite frankly, other jurors, parties, court personnel." DE147 at 448. Counsel disputed that Bazemore displayed any evasiveness, hostility, or defensiveness. *Id*. *See also* DE147 at 454 (defense counsel argues that there must be "some factual basis" for a demeanor reason). The trial judge ultimately rejected Russ' proffered demeanor reasons. *Id*. at 455. He described Bazemore as "thoughtful and cautious." *Id*. at 450.

Russ also used the language of the cheat sheet when addressing the trial judge. In summing up her reasons for striking Bazemore, Russ said, "Judge, just to reiterate, those three categories for *Batson* justification we would articulate is the age, the attitude of the defendant (sic) and the body language." Order at ¶ 73; DE147 at 447 (parenthetical in original).

It was at this point that the trial judge pointed out to Russ that she had passed a white juror with the same birthday as Bazemore. Russ responded, "Well, as I said, that's one of the factors, the body language and the attitude, which are *Batson justifications, articulable reasons* that the State relied upon." Order at ¶ 73; DE147 at 447 (emphasis added).

Later, after defense counsel's rebuttal, the trial judge asked Russ for case law on demeanor as a race-neutral reason. Russ' response makes clear she was reading straight from the *Top Gun II* handout:

> Judge, *I have the summaries here.* I don't have the law with me. I hadn't anticipated this, of course, *for articulable juror negatives*, and *body language, arms folded, leaning away from questioner are some of the things listed.*

Order at ¶ 73; DE147 at 452 (emphasis added). The voir dire transcripts in other cases tried by Russ, including those of Walters' codefendants, strongly suggest that Russ used the cheat sheet regularly in jury selection. Order at ¶¶ 74-76; DE156 (Russ' voir dire of juror Picart in *State v. Francisco Tirado & Eric Queen*); DE157

(Russ' voir dire of juror Radcliffe in *State v. Carlos Frinks*). The MAR court concluded that Russ' assertion that she had not relied upon the training handout in trials was "misleading and evasive" and "damages her credibility overall." Order at ¶ 77.

Russ' Additional Misrepresentations at the RJA Hearing

In assessing Russ' credibility, the MAR court gave "significant weight" to the fact that Russ gave clearly misleading testimony at the RJA hearing itself, including false testimony concerning a note she made during jury selection in the *Parker* case. Order at ¶¶ 79, 92. Defendants introduced handwritten notes Russ made during the jury selection in *Parker*. The notes are dated and follow the progression of jury selection, as reflected in the voir dire transcript. Order at ¶ 81; DE148.

In *Parker*, Russ objected under *Batson* to one of defense counsel's strikes. The transcript shows that, in overruling Russ' *Batson* objection, the trial judge said, "I may not agree with the statement in *Purkett v. Elem*, but it's the law. I have to call them like I see them." DE149 at 1475. In the margin, beside her notes of the trial judge's rejection of her *Batson* objection, Russ wrote a "coarse epithet," followed by "No chance he'll ever know the law." Order at ¶ 81.

Defense counsel first asked Russ about her vulgar note late in the afternoon. Order at ¶ 82. The State objected, and the MAR court called a bench conference to

hear arguments from the parties. The MAR court took the matter under advisement, and court was recessed for the evening. HTpp. 1307-09. Notably, the State's objection assumed that Russ had made the comment about the trial judge. Consequently, the State argued that airing such a factor in open court would be unduly prejudicial. *See* HTpp. 1318-19 (State's attorney summarizing argument made in bench conference).

The next morning, the Court heard further argument from the State on its objection. Russ was absent from the courtroom during argument. Order at ¶ 82; HTpp. 1316-21. In the course of his argument, Rob Thompson, counsel for the State, said, "We have spoken to Ms. Russ . . . about the statement and who it may be in reference to and that kind of thing." Thompson then offered a startling revelation. He argued the statement was not relevant because it "wasn't in reference to the judge." Order at ¶ 83; HTp. 1320. The Court overruled the objection, finding that the evidence was relevant to impeach Russ' credibility. Order at ¶ 83; HTp. 1321.

Russ then returned to the witness stand and Defendants resumed their cross-examination. Defendants asked Russ to whom the vulgar note referred. Consistent with Thompson's representation, Russ claimed the note was not about the judge but about the defendant. Russ stated that Maurice Parker was cocky, extremely confrontational, extremely belligerent, had pranced around inside the courtroom,

and, throughout the trial, comported himself flamboyantly. Order at ¶ 84; HTpp. 1364-65.

After reminding Russ that the subject of the vulgar note came up right before the evening recess, Defendants next asked Russ, "[D]id anybody from the State ask you at that time who this comment was directed to?" Russ stated,

> Absolutely not. In fact they specifically told me not to talk to them about it once we left court . . . they said … I don't want to be offensive to you, but just don't bring this up [and] don't even talk about it [as] we're not going to have any conversation.

Order at ¶ 85; HTpp. 1365-66.

Russ continued,

> They just said as to this issue, we are not trying to be ugly to you or anything but … we probably don't want to talk about this issue — not sure if we're allow[ed to do so] or not so the safer thing to do is not do it so we didn't talk about it.

Order at ¶ 85; HTp. 1366.

At that point, defense counsel asked for a recess and the MAR court again excused Russ from the courtroom. *Id.* In Russ' absence, State's attorney Mike Silver recounted that Russ had told him the night before that she did not know to whom the note referred and she was going to have to think about it. Thompson reported to the Court that, the night before, he, separately from Silver, also had a very brief conversation with Russ on the subject. Order at ¶ 87; HTpp. 1367-72.

Back in court, defense counsel asked no further questions. On redirect examination, the State attempted, on numerous occasions, to elicit testimony from Russ acknowledging that she had talked with the State's counsel about the note. On each occasion, Russ emphatically denied having done so. When questioned by the MAR court, Russ was equally adamant. Order at ¶¶ 88, 89; HTpp. 1390-93, 1401-02.

The MAR court found that Russ gave false testimony concerning her conversations with counsel for the State concerning the subject of her vulgar note. Order at ¶ 92. Contrary to her "vigorous and repeated denials," the MAR court found that Russ had spoken with counsel for the State about this matter on two separate occasions. Order at ¶ 92. Russ' failure to testify honestly on this issue "casts doubt on all of her testimony, and in particular, her vehement denial that race has ever been a factor in her jury selection." Order at ¶ 93.

Disparate Treatment of Black and White Potential Jurors

At the RJA hearing, Russ testified primarily about her jury strikes in the *Walters* case. There were no *Batson* objections at trial in *Walters* but, in the course of the *Robinson* litigation, the State submitted an affidavit from one of the prosecutors, Charles Scott, proffering purported reasons for its disproportionate number of strikes against black potential jurors. Order at ¶ 56. At times, Russ offered reasons different than those offered by Scott. The MAR court deemed

many of the reasons offered by the State pretextual in view of the prosecution's disparate treatment of black and white potential jurors. Order at ¶ 99.

One of the ten African-American citizens excluded from jury service in *Walters* was Sean Richmond. During voir dire, Richmond recounted that, after his car CD player was stolen, he received a pamphlet for crime victims and a telephone number for counseling at a trauma center. Richmond explained that he did not feel so victimized by the theft that he needed therapy. Order at ¶ 99.

Russ struck Richmond because he "did not feel like he had been a victim even though his car had been broken into at Fort Bragg and his CD player stolen." Order at ¶ 99; HTpp. 1217-18. The MAR court contrasted Russ's treatment of white venire members who minimized the impact of property crimes with her treatment of Richmond. Russ passed white potential juror Lowell Stevens. When asked about being the victim of a crime, Stevens laughed, and said he felt responsible when a lawn mower was stolen from his equipment yard at work. Russ also passed white potential juror Ruth Helm, who explained that "someone stole our gas blower out of the garage. I know that is minor, but I assumed you needed to know everything." Order at ¶ 99.

Russ struck African-American venire member Ellen Gardner purportedly because she had a brother who was involved in the criminal justice system. Order at ¶ 99. Gardner's brother had been convicted of gun and drug charges and

received five years house arrest. *Id.* Gardner was not close to her brother. She believed he was treated fairly and said his experience would not affect her jury service. *Id.*

Russ was unbothered by family members charged with crimes when the potential juror was white. Thus, for example, Russ passed white venire member Amelia Smith, whose brother was in jail on a first-degree murder charge at the time of the jury selection proceeding. Smith was in touch with her brother in jail through letters. Order at ¶ 99.

The prosecution excluded African-American citizens but not white citizens who had ties to gangs. Order at ¶ 99. Russ struck African-American venire members Jay Whitfield and Marilyn Richmond in part because of their connections to gang members. *Id.* Whitfield played pick-up basketball and some of the people he played with talked about being members of a gang. Whitfield had no other contact with these individuals and had never talked directly with them about their potential gang activities. Richmond and Whitfield both said their limited contacts with possible gang members would not affect their ability to be fair and impartial. *Id.* Richmond was a substance abuse counselor who worked with adolescents, some of whom professed to belong to gangs. One of Walters' codefendants was a client at the mental health center where Richmond worked. Although she knew who he was, she had never spoken with him and did not know him personally. *Id.*

Meanwhile, Russ passed white venire member Tami Johnson who was good friends and a "bed buddy" with a former gang member. *Walters* Tpp. 391-95; Order at ¶ 99. Russ also accepted white venire member Penny Peace. Peace had a friend at work whose son was involved in a gang and had been sent to a detention center. Peace's son and her friend's son had played ball together in the past. Asked whether this situation would enter into her decision making or cause her to be unfair, Peace said, "I don't think so." *Walters* Tpp. 248-50; Order at ¶ 99.

Prosecutor Calvin W. Colyer

Calvin W. Colyer served as a prosecutor in Cumberland County. During his tenure of nearly 25 years, Colyer prosecuted approximately 50 capital cases, including *Augustine* and *Golphin*. Colyer was called briefly as a witness by Defendants in their case in chief. The State called Colyer as its first witness and he testified extensively about why he excluded black citizens from the *Augustine* and *Golphin* juries. Order at ¶ 3.

Empirical Evidence Disproving Colyer's Proffered Reasons

Defendants introduced evidence of Colyer's jury selection in *Burmeister* and *Wright*, two Cumberland County capital cases tried in 1997. The defendants were soldiers stationed at Fort Bragg who belonged to a white supremacist "skinhead" gang. They were tried separately for the racially-motivated murders of two

African-American victims and received life sentences. Colyer prosecuted both cases, along with John Wyatt Dickson, the prosecutor in *Robinson*. Colyer's prior pattern of jury selection - of accepting far more white venire members than African-American venire members - was turned on its head in *Burmeister* and *Wright*. HTpp. 925-26; *see also* Order at ¶ 25.

Colyer testified on direct examination about his reasons for striking African-American venire members in *Augustine* and *Golphin*. Colyer stressed that his approach to jury selection was consistent over the course of his career, from case to case, juror to juror.[5] Order at ¶ 22; HTpp. 811, 903-04, 924. Colyer insisted that his strikes in general, and particularly with regard to each of the nine black venire members he struck in *Golphin* and *Augustine*, were driven by the potential juror's reservations about the death penalty or because the juror or a family member had been charged with a crime. Order at ¶ 21; HTpp. 792, 800, 814, 817, 821, 835, 845, 851, 855. Colyer denied he struck potential jurors because of race. Order at ¶ 7; HTpp. 796, 802, 814, 818, 821, 836, 846, 852, 855. The MAR court found this testimony unpersuasive in light of evidence and testimony regarding the *Burmeister* and *Wright* cases. Order at ¶ 34. The MAR court further found that,

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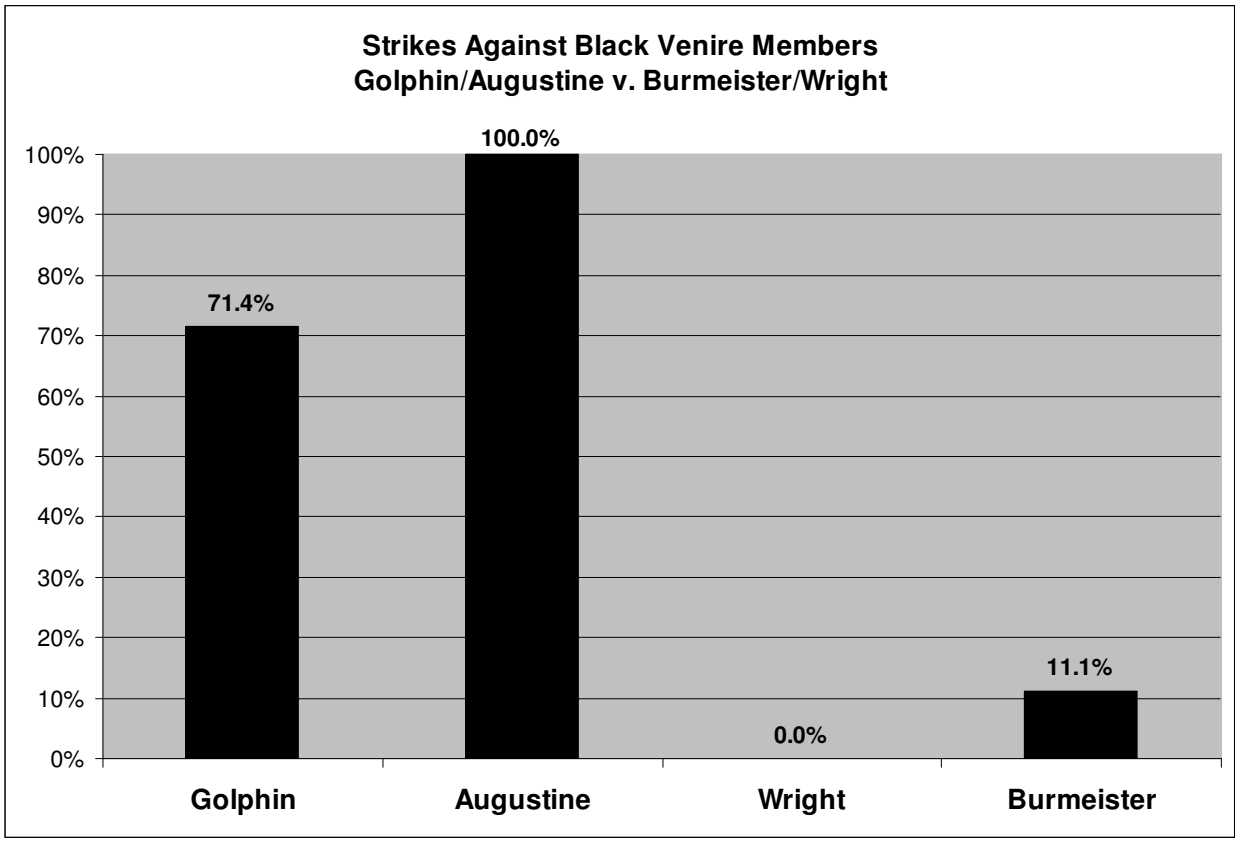
[5] Dickson gave similar testimony at the *Robinson* hearing. *See Robinson* HTpp. 1197-98 (method of jury selection in capital cases was "fairly consistent in all of them"); 1199 ("you approach it essentially the same way all the time"); 1200 (affirming "no difference" in questioning of different jurors); 1203 (as a general rule, he tried to approach jury selection "consistently case to case").

contrary to his testimony, in the *Burmeister* and *Wright* cases, Colyer consistently and consciously passed black venire members with significant misgivings about the death penalty and/or involvement with the criminal justice system. Order at ¶¶ 27-29.

Colyer approached jury selection very differently in *Burmeister* and *Wright* from his other capital cases. Order at ¶ 23. First, Colyer filed a motion requesting a jury selection expert in the *Burmeister* case. Colyer had never before and never again filed such a motion. Order at ¶ 23; HTp. 929. In the motion, Colyer argued that "the interest of justice requires that the people of the State of North Carolina are entitled to a fair and impartial jury free from racist attitudes and reactionary positions." DE125. Citing the "covert nature" of views on race, Colyer sought assistance in "recognizing potentially damaging racial attitudes or potential jurors with hidden racial agendas." *Id*. In a case in which he believed that racial attitudes might obstruct his litigation goals - a conviction and death sentence - Colyer deemed it important to ferret out those beliefs. Order at ¶ 23; HTpp. 930-31.

*Burmeiste*r and *Wright* differed in a second significant respect. The prosecution's pattern of strikes in *Burmeister* and *Wright* are "complete anomalies" among Cumberland County capital cases. Order at ¶ 25. In *Burmeister*, Colyer used nine of 10 strikes to excuse whites. Order at ¶ 24; DE127. The State struck one black venire member and passed eight. In *Wright*, Colyer used 10 of 10 strikes

against white venire members. *Id*. The State did not strike a single black venire member in *Wright*. *Id.*; DE126. The discrepancies seen in Colyer's prosecutions are stark:[6]



Colyer testified repeatedly that he struck jurors who expressed death penalty reservations. HTpp. 792, 814, 817, 855, 932-33. Indeed, in the statistical study of Cumberland County, death penalty views were the strongest predictor of strikes. HTpp. 354-56; DE120. But, in the upside down world of *Burmeister* and *Wright*, Colyer repeatedly accepted as jurors African Americans with strong death penalty reservations.

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[6] *See* Order at ¶ 24; DE126.

In *Burmeister*, Colyer passed African-American venire member Lorraine Gaines, who said it would be "hard" and "difficult" for her to vote for the death penalty. Order at ¶ 27; DE132. Colyer also passed African-American potential juror Betty Avery who stated that, because of her religious views, "I don't believe in the death penalty. I'm afraid." Avery also said she thought the death penalty was "kind of harsh." Order at ¶ 27; DE133.

Likewise in *Wright*, Colyer passed African-American potential juror Tina Hooper, Hooper said, "That's kind of a hard one. I really wouldn't like someone to be killed." Hooper also stated, "I'd rather for a person not to be killed." Later she added, "I would probably want to have life imprisonment if they didn't pull the trigger." Order at ¶ 29; DE153 at 519, 523.

On his copies of the jury questionnaires of passed African-American venire members, Colyer wrote notes about potential jurors' death penalty views. Thus, Colyer consciously elected to pass jurors despite being aware of reasons that, in other cases, he used to justify peremptory strikes. Order at ¶ 28; DE131-33.

The MAR Court further found that Colyer's creation of a race based list of all African-American potential jurors in *Burmeister* was additional evidence that race played a predominant role in jury selection. Order at ¶ 26. Colyer recorded the race of each prospective juror on his jury chart list, along with strike information. DE127. He tallied the prospective jurors by race and gender. *Id.* In

addition, Colyer created a separate sheet entitled "Jury Composition/History," where he listed the seat, race and gender, and notes for only the African-American venire members. DE168. The MAR Court found that creation of this segregated list "show[s] that race consciousness was very important in [Colyer's] thinking about jury selection generally." Order at ¶ 26.

Colyer's "Jury Strikes" Notes in *Augustine*

Defendants presented the results of Colyer's "race-based jury selection research," including notes that "disparaged African-American jurors on the basis of group characteristics" and demonstrated Colyer's reliance on "race" and "racial stereotypes" in jury selection. Order at ¶¶ 10, 20; DE98-103.

Colyer met with members of the Brunswick County Sheriff's Department to review the jury summons list for Augustine's trial. Because a change of venue had been ordered and Colyer had never tried a case in Brunswick County, Colyer also asked these officers about different neighborhoods. The purpose of the meeting is clear from the notes. Colyer was trying to find out which citizens to exclude from jury service. Hence the heading he wrote on each of the six pages, "Jury Strikes." Colyer listed potential jurors and wrote brief descriptions of them. Order at ¶ 10; DE98-103; HTpp. 183-86, 998.

The MAR court found that the notes were direct evidence that race played a role in jury selection in Augustine's case based on the explicit references to race in

the notes, the notes' equation of "black" neighborhood with "high crime," and racially biased comments about prospective jurors. The MAR court found it significant that Colyer's notes included explicit and charged references to race. Order at ¶ 13. The notes reflect that Colyer treated black and white potential jurors differently based on race. Order at ¶ 16. Colyer described African-American potential juror Tawanda Dudley as "ok" and noted that she was a member of a "respectable black family." DE102. Colyer did not describe a single white juror as okay because he or she was from a "respectable white family." The MAR court found in this context the use of the word "black" implied that it was notable to be from a family that was both black and respectable. Order at ¶ 15.

Colyer's notes reveal very different views of criminal records for black and white jurors. For example, African-American potential juror Jackie Hewett was castigated as a "thug[]" in view of his substantial criminal record, while Christopher Ray, who had a comparable record, but was white, was sympathetically described as a "n[e']er] do well." Order at ¶ 16; DE99-100; HTpp. 87-89. White venire member Tony Lewis who had been involved in "trafficking marijuana" in the early 1980's was described as a "fine guy." Order at ¶ 17; DE103; HTpp. 88-89.

While Colyer disparaged African-American potential juror Clifton Gore as a "bl[ac]k wino" the record illustrates Colyer's differential treatment of Gore and

other potential jurors. Order at ¶ 16. The State ran criminal record checks on potential jurors. DE104. Gore had no alcohol-related offenses. In contrast, white potential juror Ronald King had a DWI conviction. However, unlike Gore who was denigrated as not just a "wino" but a black one, King was forgivingly described as a "country boy" who merely "drinks" and was "ok." Order at ¶ 16; DE99; HTpp. 86-87; DE104.

Colyer's notes concerned a disproportionate number of African Americans, and nine of the 10 neighborhoods and streets written in his notes were predominantly populated by African Americans. Order at ¶ 12; DE166. The MAR court found troubling that a number of African-American citizens Colyer listed in his "Jury Strikes" notes were condemned for living in a black neighborhood, rather than on the basis of their individual conduct. Order at ¶ 17; DE98-99. Thus, despite having no criminal convictions herself, African-American venire member Shirley McDonald was condemned because she lived in Leland, North Carolina, which Colyer's notes described as a "bl[ac]k/high drug" area. Order at ¶ 17; DE99; HTp. 89. The MAR court found that this description equated black neighborhoods with crime. Order at ¶ 29.

Colyer used the "Jury Strikes" notes at trial. Order at ¶ 11. Colyer questioned African-American venire member Mardelle Gore. Colyer's notes reveal his concern that she lived in Longwood, a so-called "bad area." Longwood

is a predominantly African-American neighborhood and is one of the 10 geographic areas identified by Colyer in his "Jury Strikes" notes. Order at ¶ 11; DE103; HTpp. 206-07, 1070. During voir dire, Colyer asked Gore a number of questions about the location of Longwood. Gore described Longwood as located off Highway 904, and Colyer noted this down in his "Jury Strikes" notes. Order at ¶ 11; DE103.

Other Documents Showing Colyer's Race-Consciousness

Defendants presented other written documents illustrating Colyer's race-conscious method of jury selection. Colyer testified that sometimes on jury questionnaires he circled information he thought was important. Order at ¶ 33, HTp. 976. On the jury questionnaire of Arnold Williamson, a potential juror in *Wright*, Colyer circled Williamson's race, African American. Order at ¶ 33, DE129. The MAR court found this to be additional evidence of Colyer's race consciousness in jury selection. Order at ¶ 33. In *Burmeister*, Colyer's notes segregated African-American venire members by race and he made a separate list of the black potential jurors with brief descriptions of each one. Order at ¶ 26. He took similar actions in *Augustine* and *Golphin*. *Id.*

Colyer's Jury Selection in *Golphin*

Golphin and his brother were tried for their lives for the murders of two white law enforcement officers. The case was sufficiently notorious that it was tried before a jury chosen in Johnston County, rather than Cumberland County. HTpp. 825-27. Like with Augustine's case, the prosecutors in Golphin's case met first with law enforcement to discuss the jury panel and to investigate juror neighborhoods. Order at ¶ 21, n. 6; DE158.[7] Although the Golphin case was high profile in a number of respects, Colyer testified that race had nothing to do with the prosecution of the case or Golphin's motive in killing the officers. HTp. 947.

Colyer likewise testified that race had nothing to do with his strike decisions during jury selection in *Golphin*. Order at ¶ 21. The MAR court found Colyer's testimony on this point did "not bear scrutiny" and was "unpersuasive." Order at ¶¶ 40, 42, 45, 53. In other instances, the MAR court was "constrained to reject" or gave "little weight" to Colyer's insistence that he was motivated by non-racial considerations. Order at ¶¶ 41, 46.

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[7] Although Colyer testified that the prosecutors made "one or two visits" to Johnston County, he did not think they discussed neighborhoods, or the jury list. HTpp. 997-98. As the notes themselves reveal, and Russ initially conceded, the prosecutors sought information from law enforcement about the "areas of the county" that might be helpful in jury selection. HTpp. 1356-57; *see also* DE158 at 1 (should avoid juror "because of where he lives," as "he lives in a bad area"); DE158 at 2 (avoid juror who "lives on Chickpee Rd. – We don't want anyone who lives on this road or in Gaines Mobile Home Park").

The MAR court also considered Colyer's treatment of African-American potential juror John Murray. The MAR court found it significant that the trial judge rejected two of the four reasons Colyer gave for striking Murray.[8] Order at ¶¶ 48, 49. Thus, the trial judge rejected fully half the reasons Colyer advanced for striking Murray. Order at ¶ 49. The MAR court considered this fact, as well as additional evidence not before the trial judge. The MAR court had an opportunity to see Colyer cross-examined about his treatment of Murray, and to judge his credibility in light of this new evidence.[9] Order at ¶¶ 35, 37, 39-46.

At the RJA hearing, Colyer testified extensively about jury selection, including his statements and questions where he explicitly referred to race.[10] *See* HTpp. 1024-26 (questions about race of juror who made "woods" comment), 1028-29 ("as a young black male"), 1030-34 (black history and culture), 1036-40 (noting of race of "woods" jurors when explaining his strike of Murray). Colyer

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[8] The trial judge rejected the following reasons proffered by Colyer: 1) Murray's report that he overheard two venire members discussing the case and one said, "The defendants should never have made it out of the woods," and 2) Colyer's characterization of Murray as having a "rather militant animus" and being insufficiently deferential to the trial judge. DE137.

[9] Under North Carolina law, a criminal defendant may not subject the prosecutor to cross-examination in a trial or post-trial *Batson* hearing. *State v. Green*, 324 N.C. 238, 240, 376 S.E.2d 727, 728 (1989).

[10] The basis for defense counsel's questions was DE137, an excerpt from the voir dire in *Golphin*.

admitted at one point that Murray's race was consciously in his mind when he questioned Murray. HTp. 1028.

For the most part, however, Colyer persistently denied race influenced his treatment of Murray. Order at ¶ 35; HTp. 1024. In light of the new evidence, the MAR court repeatedly found Colyer's answers "unpersuasive." Order at ¶¶ 40-42, 45, 46; *see also* HTpp. 1031 (Colyer claimed for the first time that Golphin's hairstyle prompted him to ask Murray, and Murray alone, about Ziggy and Bob Marley), 1031-34 (Colyer claims his questions to Murray about international pop stars and an African monarch who died in 1975 were linked in his mind to Murray's report of the "woods" comment and his due process concerns). The MAR court, after reviewing all of the new evidence, found that Colyer's testimony evinced race-consciousness. Order at ¶¶ 36, 37, 42, 46-47.

Colyer's Disparate Treatment of Black and White Potential Jurors

As noted earlier, Colyer testified at the RJA hearing that his strike decisions were motivated by potential jurors' reservations about the death penalty or because jurors or family members had been charged with a crime. Order at ¶ 21l; HTpp. 792, 800, 814, 817, 821, 835, 845, 851, 855. The MAR court reviewed the voir dire transcripts in *Augustine*, *Golphin*, and other Cumberland County cases, and found that race nonetheless affected his treatment of these jurors. The MAR court

reviewed the largely "unrebutted" evidence that "Colyer treated similarly-situated black and non-black venire members differently." Order at ¶ 53.

In *Golphin*, Colyer struck African-American venire member Freda Frink in part because she had "mixed emotions" about the death penalty. Meanwhile, Colyer passed white venire member Alice Stephenson. Stephenson also said she had "mixed emotions" about the death penalty. Order at ¶ 53.

Similarly in *State v. Eugene Williams*, a Cumberland County capital case tried in 2004, Colyer struck African-American venire member Teblez Rowe because of her purported weakness on the death penalty. Rowe nevertheless clearly stated she could follow the law and impose the death penalty. A white venire member, Michael Sparks, also said he was against the death penalty. However, like Rowe, Sparks said he could follow the law. Colyer passed Sparks. Order at ¶ 53.

In *State v. John McNeill*, a 1995 Cumberland County capital case, Colyer struck African-American potential juror Rodney Berry in part because he said he could not vote for the death penalty for a felony murder conviction. Colyer passed white venire member Anthony Sermarini, who also expressed hesitation about imposing the death penalty in a case of felony murder. Order at ¶ 53.

In *Augustine*, Colyer said he struck African-American venire members Ernestine Bryant and Mardelle Gore because they had family members who

committed crimes. Bryant's son had been convicted on federal drug charges four or five years before and was sentenced to 14½ years. He was still incarcerated. Six years before, Gore's daughter had killed her abusive husband after he threatened to kill her; she served five years in prison in Tennessee and had since been released and was working for Duke University Hospital. Order at ¶ 53.

Also in *Augustine*, Colyer passed white venire members with family members who had criminal records. Melody Woods' mother was convicted of assault with a deadly weapon resulting in serious injury when she stabbed Woods' first husband in the back. Gary Lesh's stepson was convicted on drug charges in the mid-1990s, and received a five-year sentence; his uncle got into a shooting match with another man and both men died. Order at ¶ 53.

The MAR court found that the credibility of Colyer's proffered explanations in Cumberland County cases was "undermined by the Court's comparative juror analysis" and that Defendant's evidence of disparate treatment of Bryant and Gore in *Augustine* and Frink in *Golphin* was "unrebutted by the State." Order at ¶ 53.

Expert Testimony: Non-Statistical Evidence

Defendants presented testimony from Bryan Stevenson, an expert in race and the law. Order at ¶ 106l HTpp. 1460-1552. Stevenson had reviewed the voir dire transcripts in Defendants' cases, as well as other materials pertaining to jury selection in North Carolina. HTp. 1477. Stevenson testified that, in his expert

opinion, race was a significant factor in the prosecution's strike decisions in Defendants' cases. HTpp. 1549-52.

In numerous instances, the MAR court found that Stevenson's testimony corroborated and explained how race influenced Russ and Colyer's strike decisions. *See*, *e.g.*, Order at ¶ 16 ("Stevenson testified that the preoccupation with race reflected in Colyer's notes was highly suggestive of race consciousness and established that race was a significant factor in Augustine's case."); ¶ 18 ("Stevenson also discussed the phenomenon whereby neighborhood becomes a proxy for race [and] explained the significance of Colyer's notes about African-American communities and striking African-American venire members based on where they live."); ¶ 26 ("The Court credits Stevenson's opinion that [Colyer's noting of the race of black potential jurors in *Augustine* and *Golphin*] show that race consciousness was 'very important in thinking about jury selection generally.'"); ¶ 78 ("The Court credits Stevenson's observation that the handout from the *Top Gun II* training, utilized by Russ in a number of capital cases, including a number of Walters' capitally-tried co-defendants, is a paradigmatic example of this phenomenon [of training to avoid *Batson* violations]."); ¶ 91 ("Russ' conduct illustrates a phenomenon described by Defendants' expert Stevenson, namely the history of strong resistance to constitutional requirements of equal participation in jury selection by African Americans.").

The MAR court also admitted the prior testimony of Samuel R. Sommers, Ph.D., and the Honorable Louis A. Trosch. Sommers testified for the defense in *Robinson* as an expert in social psychology, research methodology, and race and jury selection. Trosch, a district court judge for the 26th District, testified in *Robinson* as an expert on implicit bias in the courtroom. Order at ¶¶ 106, 117-25. The MAR court found that their testimony supported Defendants' contention that race often plays a role in jury strike decisions, and attorneys are not a reliable source of information about the motive for their strike decisions because they will rarely report, and, in many cases, genuinely fail to realize, the role that race played in their decisions. Order at ¶¶ 106, 117-21, 125.

State's Proffer of Testimony from Trial Judges

The MAR court also considered the State's proffered testimony of superior court judges who presided over capital proceedings in Cumberland County, including Defendants' trials. Order at ¶¶ 132-38. The State designated the judges as lay, rather than expert, witnesses. Order at ¶ 132. The MAR court found that the judges were "highly qualified and greatly respected members" of the North Carolina judiciary, and credited their testimony concerning facts within their personal knowledge. Order at ¶¶ 139-42, 167.

The MAR court also considered the judges' testimony concerning their opinions and mental processes. Order at ¶¶ 159, 168. The MAR court identified

many understandable weaknesses in the testimony, including the judges' lack of independent recollection of trials that took place more than a decade ago and instances where the judges' recollections were contradicted by the trial record. Order at ¶¶ 160-61.

In addition, the MAR court found that the judges' testimony did not address, much less refute, Defendants' evidence of race discrimination that was not confined to the questioning during voir dire of prospective African-American venire members, including evidence of differential treatment of black and white potential jurors. Order at ¶¶ 162-64, 169.

The MAR court found that the judges were unaware of much of the evidence of discrimination presented to the MAR court. Order at ¶ 169. The judges did not know about Colyer's "Jury Strikes" notes in *Augustine* or Russ' prior violation of *Batson*. Order at ¶ 169; HTp. 938. The judges did not know about *Batson* training Cumberland County prosecutors received or how differently the prosecution approached jury selection in the *Burmeister* and *Wright* cases despite Colyer's claim that his method of picking juries was the same from case to case, juror to juror. Order at ¶ 169. The judges had not reviewed Defendants' statistical evidence. *Id*. Nor did the judges see Colyer and Russ testify at the RJA hearing. The MAR court concluded that the judges' testimony would not have changed the result in this case. Order at ¶ 159.

Statistical Evidence

Defendants introduced evidence from a large and comprehensive study of jury selection practices in Cumberland County and North Carolina conducted by researchers at the Michigan State University College of Law ("MSU study"). Order at ¶ 203. The MAR court considered statistical evidence only from Cumberland County and Defendants' individual cases, and only within the statutorily defined time frame in determining that Defendants were entitled to relief pursuant to the Amended RJA. The MAR court considered statewide evidence from the entire study period in reaching its alternate finding that Defendants were entitled to relief under the original RJA. This summary begins with the MAR court's findings about the methodology of the MSU study, proceeds to discuss the statistical evidence pertinent to Cumberland County and Defendants' own cases, and concludes with a discussion of the statewide evidence.

Methodology of the MSU Study

Two experts testified regarding the MSU study design, methodology, and conclusions: Barbara O'Brien, Ph.D., the principal investigator of the study and a law professor at Michigan State University College of Law, and George Woodworth, Ph.D., a statistics professor at the University of Iowa. Order at ¶¶ 204-06. O'Brien was qualified as an expert in social science research and legal

empirical studies, and Woodworth was qualified as an expert statistician. Order at ¶¶ 205-06.

In *Robinson*, the State presented expert testimony from Joseph Katz, Ph.D. The State elected not to recall Katz to testify in Defendants' case, and the MAR court admitted Katz's testimony from *Robinson* on the State's motion. Order at ¶ 204, n.21. At the *Robinso*n hearing, Katz at no time testified that race was not a significant factor in the exercise of peremptory challenges in capital cases in North Carolina or Cumberland County. Order at ¶ 209. Furthermore, Katz conceded that the evidence of racial disparities essentially constituted a prima facie case of discrimination. *Id*.

The MSU study had two parts. Part I was based on raw or "unadjusted" numbers, whereby the researchers simply counted the number of qualified[11] African-American venire members struck by the State and compared that to the number of other qualified venire members struck by the State. Order at ¶ 203. Part II was a regression analysis that examined variables other than race that might explain the racial disparities seen in Part I of the study. The results of Part II are sometimes referred to as "adjusted" numbers. Order at ¶ 203.

[11] Only venire members who were not excluded for cause and were either struck or passed by the State were included in the study.

The MAR court found the MSU study to be "a valid, highly reliable statistical study of jury selection practices." Order at ¶ 208. The MSU study was based on jury selection data from 173 capital proceedings for the inmates of North Carolina's death row in 2010. MSU researchers collected race and strike data for all but seven of the 7,424 venire members. Order at ¶ 208. They relied on original source materials including juror questionnaires, voir dire transcripts, and clerks' charts. Order at ¶ 233. If race data were not available from these sources, MSU followed a protocol to match the jurors to identifying information in public records for identification of their race. Order at ¶ 244. The MAR court found that the researchers' methods of determining the race of venire members were "reasonable and appropriate," that the researchers "were meticulous in their data collection and coding processes," and they produced "highly transparent and reliable data." Order at ¶¶ 232, 244.

Part II of the MSU study collected additional data for all of the Cumberland County cases, and for a randomly selected 25% sample of the statewide pool. Order at ¶¶ 236-39. The researchers gathered extensive data relevant to analyzing strike decisions, including demographic information (e.g., gender, age, marital status, children, employment), prior legal experiences of the juror and his or her family members and close friends (e.g., prior jury service, experience as a defendant or victim, connections to attorneys and law enforcement), views on the

death penalty, potential hardships, and any stated biases (collectively herein "descriptive variables"). Order at ¶¶ 240-41.

The researchers used a double-coding approach to this portion of the study, whereby two attorney researchers independently coded each venire member. Any differences between the two independent coding forms were reconciled by O'Brien personally. Order at ¶¶ 249-51. The MAR court found that this precaution, along with the "thoroughness of the documentation of the coding decisions and transparency" strengthened the MSU study's "reliability, validity, and credibility." Order at ¶ 252.

MSU researchers coded information for more than 65 descriptive variables. Order at ¶ 294. They selected these variables after extensive research about *Batson* litigation and commonly stated reasons provided by prosecutors for striking jurors, including review of this Court's published decisions, law review articles, treatises on jury selection, numerous North Carolina voir dire transcripts, and the protocol used in a similar study. Order at ¶ 291. MSU researchers reviewed the affidavits provided by prosecutors with purported explanations for strikes of black venire members and found that these explanations were consistent with the variables selected by MSU. Order at ¶ 291. The MAR court found that the descriptive variables used by MSU were appropriate and reliable. Order at ¶ 294.

MSU researchers were not able to include some variables, such as demeanor, because information was not available about them. Order at ¶ 332. After weighing extensive expert testimony regarding the selection of variables as well as hundreds of explanations provided by prosecutors, the MAR court found that there was no evidence to suggest that negative demeanor was correlated with both race and prosecutorial strike decisions. Order at ¶ 332. The MAR court further found that the State "presented no credible evidence that the MSU Study failed to consider any non-racial variable that might affect strike decisions and which could correlate with race and provide a non-racial explanation for racial disparities." Order at ¶ 329.

As a further check on the reliability of its study, MSU researchers conducted shadow coding that included every instance where a prosecutor indicated there was a non-verbal reason for striking the venire member that did not appear in the written record. Order at ¶¶ 347-48. This allowed MSU to incorporate every reason the prosecutors offered for striking a particular black venire member. Order at ¶ 348. Based on the shadow coding analysis, MSU researchers found that race of the venire member remained a statistically significant factor in both the statewide and county logistic regression models. Order at ¶ 349. Based on this analysis, the MAR court found that "even viewed in a light most favorable to the State . . . race was still a significant factor in decisions to exercise peremptory

challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases in North Carolina and Cumberland County. Order at ¶ 349.

Findings: Cumberland County Generally

The MSU study examined all 11 capital proceedings of persons on death row from Cumberland County during the MSU study period. These proceedings occurred between 1994 and 2007. The MAR court concluded that the MSU study showed "race is highly correlated with strike decisions in Cumberland County," and "none of the explanations for strikes frequently proffered by prosecutors or cited in published opinions" accounted for the disparities. Order at ¶ 208.

Looking first at the raw numbers, Cumberland County prosecutors struck 52.7% of qualified black venire members and only 20.5% of other qualified venire members. Cumberland County's strike rate ratio is 2.6. This disparity was statistically significant. Order at ¶¶ 262, 266; HTp. 324; DE120.

Looking next at the adjusted numbers, the results of the Cumberland County regression analysis yielded similar results. After controlling for eight non-racial variables which were predictive of prosecutorial strikes and representative of reasons commonly given by Cumberland County prosecutors, race was still statistically significant with a strike rate ratio of 2.4. Order at ¶ 308; HTp. 367; DE120.

In the same time period, there were also statistically significant disparities within potentially explanatory variables. Among Cumberland County jurors who expressed reservations about the death penalty, the State accepted only 5.9% of black venire members, but accepted 26.3% of other venire members. In other words, the State was far more likely to strike black venire members with death penalty reservations compared to all other venire members with death penalty reservations. Among Cumberland County jurors who had themselves or had a family member or close friend who had been accused of a crime, the State accepted 40.0% of black venire members, but accepted 73.7% of other venire members. Among Cumberland County jurors who stated jury service would be a hardship, the State accepted 14.3% of black venire members, but accepted 61.5% of other venire members. The State had no response to these stark racial disparities within individual variables, and the MAR court found these disparities were "compelling evidence of discrimination." Order at ¶ 304; HTpp. 363-64; DE120.

Findings: Cumberland County at the Time of Defendants' Trials

The MAR court also considered the Cumberland County evidence within each Defendant's statutory window. Order at ¶¶ 272, 312. This is the interval of time that conforms to the definition of "at the time of defendant's trial" as set forth under the Amended RJA, namely ten years before the capital offense and two years after the death penalty was imposed. Order at ¶ 272. The MSU study found

significant disparities based on race within each Defendant's statutory window. Order at ¶¶ 314, 318, 321.

There were seven capital proceedings in Golphin's statutory window, which spanned from September 23, 1987, to May 13, 2000. The average of the State's race strike ratios in these seven cases was 2.3. This disparity is statistically significant. Order at ¶¶ 312-16; HTpp. 376-77; DE117, 120.

In Walters' statutory window, running from August 17, 1998, to July 6, 2002, there were eight capital proceedings. The average of the race strike ratios in these eight cases was statistically significant with a strike rate ratio of 2.4. Order at ¶¶ 317-19; HTpp. 383-85; DE119, 120.

Augustine's statutory window ran from November 29, 1991, to October 22, 2004. Nine capital proceedings fell within this window, and the average race strike ratio was 2.6. This disparity was statistically significant. Order at ¶¶ 320-22; HTpp. 389-91; DE118, 120.

There was also evidence that race was a significant factor in Cumberland County cases at the precise time of Defendants' trials. In addition to the statutory window analyses, Woodworth performed a statistical analysis for the three cases to estimate the odds ratio at the precise time of each trial. This analysis, known as time smoothing, is used in other fields such as environmental and medical studies to analyze events over a continuum. *Robinson* HTpp. 542-43. It counts most

heavily the strike patterns in cases at, or close to, the time of the case being analyzed. *Robinso*n HTp. 580. Utilizing the time smoothing analysis, the odds ratios for each of the three Defendants exceeded 2.0 at their respective trials and were all statistically significant. Order at ¶¶ 313, 317, 320; HTp. 653; DE122.

Findings: Statistical Evidence in Defendants' Individual Cases

The MAR court also considered and made findings regarding the statistical evidence from each individual case. In *Golphin*, the State struck 71.4% of the black venire members and only 35.8% of other eligible venire members. The race strike ratio was 2.0. Only one person of color served on Golphin's jury. Order at ¶¶ 267, 273; DE120.

In *Walters*, the State struck 52.6% of the black venire members and only 14.8% of other eligible venire members. The State used 10 of its 14 peremptory strikes to remove black venire members. Order at ¶ 277. The strike rate ratio was 3.6. Walters' jury was comprised of six black jurors and six white jurors. Order at ¶ 267; DE120.

In *Augustine*, the State struck 100% of the black venire members and only 27% of other eligible venire members. The strike rate ratio was 3.7. No African Americans served on Augustine's jury. Order at ¶¶ 267, 282; DE120.

Findings: Statewide Statistics

Analysis of the prosecutors' strike patterns of black venire members and all other venire members revealed large racial disparities. Statewide, across the full study period, prosecutors struck qualified black venire members at slightly more than twice the rate they struck all other venire members. The probability that this disparity was due to mere chance was less than one in ten trillion, a statistically significant finding. Order at ¶ 254; DE120.

MSU researchers also took a randomly selected 25% sample of the statewide pool and subjected it to regression analysis similar to the adjusted analysis of Cumberland County. After controlling for numerous non-racial factors that one might expect to account for the disparities observed in the unadjusted numbers, the MSU study determined that race was still a significant factor in prosecution strike decisions, and that prosecutors statewide between 1990 and 2010 struck black potential jurors at more than double the rate they struck other potential jurors. Order at ¶ 297; DE120. The Court found that this was "very powerful evidence" that race was a significant factor in the prosecution's exercise of peremptory strikes across North Carolina. Order at ¶ 297.

Summary of Evidence Particular to Each Defendant

Thus, the MAR court reviewed an enormous amount of evidence pertinent to the question of whether race was a significant factor in prosecution decisions to

exercise peremptory strikes in each of Defendants' cases. As to all three Defendants' cases, the MAR court found significant statistical and non-statistical evidence supporting the conclusion that race was indeed a significant factor in the prosecution's strike decisions. Order at ¶ 328.

As to *Augustine* and *Golphin*, the MAR court considered Colyer's conduct in *Burmeister* and *Wright*, where Colyer made racially-segregated lists of potential jurors, highlighted race in his notes, and ignored death penalty reservations and involvement in the criminal justice system in order to seat African Americans on the juries. The MAR court also considered Colyer's testimony concerning his proffered reasons for strikes in these two cases, and found his credibility wanting. Order at ¶¶ 21-29, 33-34.

In addition, in *Augustine*, the MAR court also considered racially-explicit notes Colyer made about black potential jurors before trial, Colyer's decision to strike 100% of the qualified African-American venire members, and disparate treatment of black and white potential jurors. Order at ¶¶ 10-20, 53, 269.

As to *Golphin*, the MAR court also considered Colyer's disparate treatment of black and white potential jurors, Colyer's high strike rate against black venire members, and Colyer's admission that he was thinking about race while questioning an African-American potential juror. Order at ¶¶ 37, 53.

Finally, with regard to *Walters*, the MAR court considered the testimony of prosecutor Russ and found her to be a largely untruthful and untrustworthy witness. The MAR court also considered the high rate at which Russ struck African-Americans — 3.6 times the rate for other potential jurors — as well as Russ' disparate treatment of black and white jurors, her reliance on a "cheat sheet" to evade *Batson*, her prior violation of *Batson*, and her insistence that she had done nothing wrong despite this ruling. The MAR court also considered Russ' admission that she maintained her same jury selection methods after having been found guilty of violating *Batson*. Order at ¶¶ 54-99, 269.

STANDARD OF REVIEW

In reviewing a trial judge's findings of fact, an appellate court is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "Even if 'evidence is conflicting' the trial judge is in the best position to 'resolve the conflict.'" *Id.* (citing *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971)). "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." *Whitaker v. Earnhardt*, 289 N.C. 260, 265, 221 S.E.2d 316, 320 (1976) (emphasis added).

Findings supported by competent evidence will be affirmed even though incompetent evidence may also have been improperly admitted. *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984); *Brooks v. Brooks*, 12 N.C. App. 626, 628-29, 184 S.E.2d 417, 419 (1971).

Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294. Rulings subject to an abuse of discretion review are still subjected to deferential review:

> A trial court abuses its discretion when its ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1998). When we review a trial judge's ruling we consider only whether it is supported by the record, not whether we agree with the ruling. [*State v.*] *Lasiter*, 361 N.C. [299,] 302, 643 S.E.2d [909,] 911 [(2007)].

State v. Sherman, __ N.C. App. __, 2014 WL 46641, *2 (Jan. 7, 2014).

To uphold the judgment of the MAR court, this Court need only decide "whether the 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. Mbacke*, 365 N.C. 403, 406, 721 S.E.2d 218, 220 (2012) (citation omitted). This is a quite different formulation from the

one the State urges as to whether the MAR court acted under any "misapprehension of the law." State's Brief at 14-15. Regardless of whether all of the MAR court's alternate conclusions of law were correct, the MAR court's judgment must be upheld on appeal if the findings of fact are supported by competent evidence, and those findings support conclusions of law necessary to the judgment granting relief pursuant to the Amended RJA.

North Carolina law is clear that even if a ruling is made under a misapprehension of law, findings of fact will not be disturbed and the case will not be remanded if those decisions are not central to the grant or denial of relief. *See e.g., State v. Bone,* 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001) (upholding trial court's order where trial court made alternative conclusions of law, erroneously concluding that the search warrant was justified by probable cause but correctly finding the search was justified under the plain view doctrine); *State v. Spruill*, 358 N.C. 730, 601 S.E.2d 196 (2004) (ordering MAR court to grant defendant appropriate relief pursuant to N.C. Gen. Stat. § 15A-2006 where the trial court concluded defendant was mentally retarded at the time of the commission of the crime, but not currently mentally retarded, and erroneously failed to grant defendant relief); *Harrelson v. State Farm Mut. Auto. Ins. Co*., 272 N.C. 603, 609, 158 S.E.2d 812, 817 (1968) (affirming decision below even though trial court made a finding unsupported by the record, and drew a possibly erroneous

conclusion of law, because the necessary fact findings were supported by the record and were sufficient to support the central conclusion of law); *Thomas v. B.F. Goodrich*, 144 N.C. App. 312, 318, 550 S.E.2d 193, 197 (2001) ("Nevertheless, because the Commission made alternative findings of fact and conclusions of law to support its denial of Defendant's motion for a deduction, this error does not require reversal."); *McAdams v. North Carolina Dept. of Trans*., 716 S.E.2d 77 (N.C. App. 2011) (rejecting State's objection to adoption by the trial court of alternative findings in employment discrimination case where State Personnel Commission ruled first that it lacked jurisdiction, but, in the alternative, that plaintiff was discriminated on the basis of race); *In re C.D.A.W*., 175 N.C. App. 680, 687, 625 S.E.2d 139, 144 (2006), *aff'd*, 361 N.C. 232, 641 S.E.2d 301 (2007) ("Because the conclusion that respondent neglected the minor child is independently sufficient grounds to terminate parental rights, we need not address whether the court abused its discretion in permitting these amendments to the petition to terminate parental rights."); *compare with State v. Collins,* 724 S.E.2d 82, 84-85 (N.C. 2012)(remand required because the judge made an erroneous ruling of law and did not resolve in its order the factual dispute necessary to the case under the correct ruling of law).

SUMMARY OF ARGUMENT

In this appeal, the State has challenged six aspects of the MAR court's order. The first is issue preclusion. Issue preclusion is relevant when a court seeks to resolve a case without a hearing. Here, Defendants proceeded to a hearing, so this issue is moot.

The second point is the State's contention that the MAR court erred by finding that the Amended RJA statute did not apply to Defendants' cases. The MAR court did no such thing. Rather, it applied the Amended RJA and awarded Defendants relief pursuant to the Amended RJA. The MAR court's alternative findings regarding the continued viability of Defendants' claims under the original RJA were not necessary to its decision and, accordingly, need not be decided by this Court.

In the third and fifth questions presented by the State are arguments about whether the Amended RJA requires Defendants to show discrimination in their own cases. The MAR court issued findings assuming that the Amended RJA did require such a showing. Furthermore, Defendants concede that the Amended RJA does so require. The State also contends within these arguments that Defendants are required to show "intentional" discrimination for relief under the Amended RJA. While the Defendants dispute this requirement, this too is moot because the

MAR court found the prosecutors in each of the cases intentionally discriminated against African Americans in the exercise of their peremptory strikes.

The State's fourth point concerns whether Defendants are entitled to relief based on statistical evidence alone. This question too is an academic one: Defendants did not rely on statistical evidence alone, and the MAR court did not rest its holding solely on this evidence.

The only point that is contested and necessary for this Court to review is the State's sixth point. That is, whether the MAR court made unsupported findings of fact and clear errors of law in determining that race was a significant factor in jury selection. As shown below, the MAR court's factual findings were fully supported by the evidence and there are no errors of law warranting reversal.

ARGUMENT

I. THE MAR COURT'S FINDINGS OF FACT ARE BINDING ON APPEAL BECAUSE THEY ARE UNCONTESTED OR SUPPORTED BY COMPETENT EVIDENCE.

The MAR court's ruling was supported by the overwhelming weight of the evidence. Findings of fact by the MAR court pursuant to a hearing on the MAR 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). The trial court made 392 separate findings of fact, of which the State cited only "a few examples" that it claimed were unsupported by competent evidence.

State's Brief at 144. A trial court's findings of fact not contested by a party are binding on appeal. *Automotive Group LLC v. A-1 Auto Charlotte, LLC*, 750 S.E.2d 562, 566 (N.C. App. 2013).

The MAR court relied on categories of evidence described below that, when considered alone or cumulatively, constituted "competent evidence" supporting the findings of fact.

A. Credibility Findings.

The prosecutors' credibility was at the heart of the MAR court's inquiry in these cases. *See* Order at ¶¶ 7-8. The MAR court's credibility determinations, explained in depth in the Order, warrant deference because they were based on the experience of 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"); *Rice v. Collins*, 546 U.S. 333, 343-44 (2006) (Breyer, J., concurring) (opining that 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"). The trial judge

> sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The

> appellate court is much less favored because it sees only a cold, written record. Hence the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence.

State v. Cooke, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982).

Pursuant to the RJA, the MAR court is singularly placed to make determinations about prosecutors' credibility. This is because it is the only court to consider the testimony of prosecutors where that testimony is subject to examination by the defendant. *Compare* N.C. Gen. Stat. § 15A-2011(d) (permitting the testimony of prosecutors as "relevant" evidence), with *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988) (holding that a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney).

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 p. 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;" "her shifting explanations for strikes of black venire members;" and, "finally, her racially-disparate treatment of black and non-black venire members." Order at ¶ 54. Russ also provided "utterly unbelievable" testimony about a "vulgar note" she wrote about a judge who had found she violated *Batson* but denied her claim that the defense attorney had discriminated during jury selection in the same case. Russ then undertook a "preposterous effort to cover up [the note's] true meaning . . . ." Order at ¶¶ 90-91. Combined with her false testimony concerning her conversations with counsel for the State, these factors led the court to conclude that Russ lacked credibility. Order at ¶ 93.

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

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

Order at ¶ 9.

The MAR court's measured findings acknowledged that Colyer "genuinely believes his strikes in *Augustine* and *Golphin* were motivated not by race," but found that Defendants' evidence demonstrated that Colyer and other Cumberland County prosecutors "regularly took race into account and discriminated against African-American citizens." *Id.* at ¶¶ 124, 130.

The MAR court specifically found many of Colyer's answers "unpersuasive." *Id.* at ¶ 40; *see also id.* at ¶ 41 ("the Court gives little weight to Colyer's suggestion"); ¶ 42 ("Colyer's explanation does not bear scrutiny"); ¶ 45 ("This explanation is not persuasive."); ¶ 46 (The Court is constrained to reject Colyer's explanation").

Colyer's jury selection methods in Cumberland County capital cases and his testimony in the RJA hearing amply support the MAR court's findings. For example, the transcript and record in the *Burmeister* and *Wright* cases showed that race, not concern about connections to the criminal justice system or hesitation on the death penalty, drove Colyer's strikes. The MAR court reasonably concluded that the "corollary" of those cases 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." Order at ¶ 116. Accordingly, the MAR court rejected Colyer's

testimony that race played no part in his jury strike decisions. *See id*. at ¶ 31 (Colyer's acceptance of a black juror with strong reservations about the death penalty in *Wright* "undermines his claim that, in all cases, he consistently bases strikes on death penalty reservations, and not on race"); *see also id*. at ¶¶ 26-30, 33-34 (findings of disparate treatment, race consciousness, and facts at odds with Colyer's testimony concerning *Burmeister* and *Wright*). The State does not address or even reference the MAR court's *Burmeister* and *Wright* findings and their import to this litigation.

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 ¶ 10. The MAR court found that these notes "concern a disproportionate number of African Americans." *Id.* at ¶ 12. The notes disparaged African-American jurors with comments like "bl[ac]k wino." *Id*. at ¶ 13. 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 ¶ 14. The MAR court found that the comment about one area, that it was a "bl[ac]k/high drug" neighborhood, equated a black neighborhood with a high drug one. *Id*. at ¶ 29. In its brief, the State argues there is nothing wrong with describing a neighborhood as "high drug," but offers no explanation for why it was acceptable for a prosecutor to describe a

neighborhood as "black/high drug." State's Brief at 139-40. The alternative interpretation, that black and high drug are independent bases to strike the juror, is equally problematic. The State avoids this critical piece of evidence only by ignoring it entirely. *Id*.

Most of the credibility determinations by the MAR court are undisputed in the State's appeal and are therefore binding. Further, the MAR court was best placed to make the disputed credibility determinations, and because its findings are supported by competent evidence, they too are conclusive on appeal.

B. Findings Based on Prosecutors' Notes Intended for Use in Jury Selection.

The MAR court considered pretrial notes by prosecutors about potential jurors.[12] The MAR court found that the prosecutor recorded negative comments about black potential jurors, repeatedly explicitly referred to the race of jurors, and disparaged black potential jurors on the basis of group characteristics. Order at ¶¶ 13, 15, 17-20.

The MAR court weighed heavily the racially charged notes, including the fact that one juror was described as "ok" because she was from a "respectable black family," and that white jurors with similar characteristics were described far more positively than their black counterparts. Order at ¶¶ 16-17 (white juror Toney Lewis is a "fine guy" who trafficked in marijuana and white juror Ronald King, with a DWI conviction, "drinks" but is an "okay country boy" while black juror Clifton Gore, with no alcohol-related offenses, is a "bl[ac]k wino"). The State ignores this evidence.

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[12] The MAR court was the first court to consider prosecutors' notes as well as "manuals, policies and other documents which could shed light on the State's preparation for and conduct of jury selection" because they were unavailable pursuant to discovery prior to post-conviction proceedings. *See State v. Barden* (*Barden II*), 362 N.C. 277, 278, 658 S.E.2d 654, 655 (2008) (limiting application of discovery provisions contained in N.C. Gen. Stat. § 15A-1415(f) to post-conviction proceedings); N.C. Gen. Stat. § 15A-904 (a) (limiting pre-trial discovery of prosecutors' written materials and notes).

The MAR court additionally found that the notes suggested that prosecutors were biased against African-American venire members who simply lived in a predominantly black area compared to white venire members who actually had a history of crime. Order at ¶ 17. The MAR court found this evidence also supported a conclusion that race was a significant factor in jury selection. Order at ¶ 19. The State attempts to undermine the MAR court's findings by asserting that the prosecution was merely describing neighborhoods with high crime rates. Whether those neighborhoods were suspect only for their crime rate was a question of fact. The MAR court's finding to the contrary was amply supported by expert testimony about the notes, and the notes themselves, where the prosecutor "equated black neighborhoods with crime when he wrote "blk/high drug." Order at ¶ 19.

C. Findings Based on Prosecutors' Different Treatment of Jurors by Race in Cases Involving White Supremacist Defendants.

The MAR court found in *Burmeister* and *Wright* that the determining fact which drove prosecution strike decisions was race. Order at ¶¶ 21-34. In those cases, involving two white supremacist defendants and two African-American victims, the prosecutors sought to seat black jurors, and disproportionately struck white jurors. *Id.* The MAR court found that the evidence about the prosecutors' peremptory strikes in those cases "bears on the credibility of their strike

explanations in other Cumberland cases, including *Augustine* and *Golphin*."[13] Order at ¶¶ 23, 115-16.

The MAR court considered juror questionnaires, prosecutors' motions and notes, and other evidence of disparate treatment of white and black jurors in *Burmeister* and *Wright* to reject proffered explanations that jurors' death penalty reservations and connections to crime, and not race, motivated prosecutors' strike decisions. Order at ¶ 34. The MAR court found the contrast between the prosecutors' practice in *Burmeister* and *Wright*, and their "normal" and "consistent" practice in other capital cases, to be important in determining whether race was a significant factor in Defendants' cases. Order at ¶¶ 25, 115-16. This finding is not challenged at all by the State.

The MAR court's painstaking review of the testimony and evidence placed its ruling on firm footing. On appeal, this Court is not positioned to second-guess the MAR court's fact-intensive, record-based determinations. The MAR court's findings of fact are based on competent evidence and almost entirely unchallenged by the State, and therefore binding.

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[13] Contrary to the State's claim that the MAR court failed to consider factors such as the "race of the defendant," the "race of the victim" and the "susceptibility of the particular case to racial discrimination," that court's analysis of the *Burmeister* and *Wright* cases in comparison to *Augustine* and *Golphin* demonstrates that it was acutely aware of and carefully considered the prosecutors' actions in light of the particularized racial issues in those cases. *See* Order at ¶¶ 21-34.

D. Findings Based on the Use of Training Materials.

The MAR court considered materials distributed at a prosecutorial training session attended by Cumberland County prosecutor Margaret Russ. Order at ¶¶ 68-78. The court found that a one-page handout titled, "*Batso*n Justifications: Articulating Juror Negatives," provided a list of reasons prosecutors might proffer in response to a *Batson* objection. *Id*. at ¶ 70. The MAR court found that Russ relied on this training handout to avoid *Batson*'s mandate and was evidence of her inclination to discriminate on the basis of race. Order at ¶¶ 76-78. The MAR court's fact findings regarding the prosecutor's reliance on the training materials are uncontested and binding.

E. Peremptory Strikes of Individual Jurors in the Defendants' Cases.

The MAR court considered prosecutors' explanations of strikes in all three cases as additional evidence that race was a significant factor in those cases. Order at ¶¶ 35-52, 55-59, 94-98. The MAR court further considered the disparate treatment of black and white jurors in the cases. Order at ¶¶ 53, 99. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack … permitted to serve, that is evidence tending to prove purposeful discrimination . . . ." *Miller-El v. Dretke*, 545 U.S. 235, 241 (2005).

The MAR court found that the "quantitative and qualitative comparisons of the State's treatment of black and non-black venire members throughout

Cumberland County" show a conclusive record of disparate treatment, even when non-racial characteristics concerning to the State are taken into account and removed from the equation. Order at ¶ 116. The MAR court specifically found that the credibility of the prosecutors' proffered explanation for strikes in these three cases was "undermined by the Court's comparative juror analysis." *Id*. at ¶¶ 53, 99.

The State contests some of the MAR court's fact findings regarding Colyer's peremptory strikes against potential jurors Gore and Bryant in *Augustine*, and venire members Frink and Murray in *Golphin*. *See* State's Brief at 144-51 (Murray), 153-54 (Frink), 155-60 (Gore and Bryant), The State omits critical facts from its discussion. For example, nowhere does the State acknowledge that Colyer admitted Murray's race was consciously in his mind when he questioned him. Order at ¶ 37; HTp. 1028. Nowhere does the State acknowledge that Colyer passed white juror Alice Stephenson, who expressed reservations about the death penalty in exactly the same language as Frink. Order at ¶ 53.[14]

[14] The State attempts to challenge the MAR court's finding of disparate treatment as to Mardelle Gore, a black venire member the State struck in *Augustine*. Again, the State omits facts that undermine its argument. The State contends that white juror Lesh's connection to crime, his stepson's marijuana possession charge, is a "far cry" from Gore's daughter's homicide connection. Left unmentioned is that Lesh's uncle shot another man and died in the altercation. Order at ¶ 53. The State also stresses that Lesh's stepson had "turned his life around" but then conveniently ignores that Gore's daughter was an equally "productive citizen" working at Duke University Hospital. *Id*.

The State also objects to some of the MAR court's fact findings regarding strikes Russ exercised against African Americans in *Walters*. *See* State's Brief at 133-37 (discussing various jurors). Again, the State only selectively reads the record. For example, in challenging the MAR court's findings of disparate treatment with regard to African Americans John Reeves and Ellen Gardner, the State emphasizes that Reeves' grandson had a pending theft charge and Gardner's brother had been convicted on a drug charge. Yet nowhere does the State acknowledge that Russ passed white juror Amelia Smith, whose brother had a pending *murder* charge. Order at ¶ 99. Likewise, the State ignores the fact that Russ passed white jurors with connections to gang members but claimed such connections as a reason to strike Marilyn Richmond and Jay Whitfield, both African Americans. *Id*. The State also ignores evidence that the State passed white jurors who, like Sean Richmond, downplayed the significance of their experience as victims of property crimes. *Id*. In its discussion of Jay Whitfield, the State asks this Court to believe that Russ struck this African-American juror for a reason she never articulated. *Compare* State's Brief at 133, *with* Order at ¶ 99; HTp. 1209. Perhaps most curiously, the State suggests that this Court should simply disregard Russ' testimony concerning her reasons for striking Laretta Dunmore. State's Brief at 134-35. The MAR court heard the testimony of the prosecutors who struck those jurors and considered the entire jury selections and

records in those cases. The State has offered no justification for this Court to second-guess the findings made below.

F. MAR Court's Findings from Statistical Evidence.

Under the plain language of the Amended RJA, a defendant may rely upon "statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death" or "other evidence" to establish a claim for relief. N.C. Gen. Stat. § 15A-2011(d). Moreover, the "State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence." N.C. Gen. Stat. § 15A-2011(c); *see also* N.C. Gen. Stat. § 15A-2011(e) (State may offer evidence in rebuttal including, but not limited to, statistical evidence). Finally, "statistical evidence alone is insufficient to establish that race was a significant factor under this Article." N.C. Gen. Stat. § 15A-2011(e).

The MAR court honored these statutory requirements by considering statistical evidence as a complementary component of the Defendants' *prima facie* case. Order at p. 19. The MAR court found the MSU study to be a "highly reliable, statistical study of jury selection practices in capital cases from Cumberland County." Order at ¶ 208. The unadjusted study demonstrated "that race is highly correlated with strike decisions in Cumberland County," while the adjusted regression results showed that "none of the explanations for strikes

frequently proffered by prosecutors" diminished the "robust and highly consistent finding that race is predictive of strike decisions in Cumberland County." *Id*.

The MAR Court found that

> the disparities in [prosecutors'] strike rates against eligible black venire members compared to others are consistently significant to a very high level of reliability. There is a very small and insignificant chance that the differences observed in the unadjusted data are due to random variation in the data or chance.

Order at ¶ 390.

The MAR court further found that

> the statistical evidence demonstrates that race was a materially, practically, and statistically significant factor in the exercise of peremptory strikes by prosecutors . . . in Cumberland County, and in Defendants' individual cases at the time of their trials.

Id.

Based upon the totality of all the statistical evidence presented at the hearing, the MAR court found

> significant support for the proposition that race was a significant factor in decisions to exercise peremptory challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases in . . . Cumberland County, and in Defendants' own cases.

Order at ¶ 391.

The MAR court found that

> these conclusions are true whether the data from the full study period is considered, whether the data is focused through "time smoothing" on the precise time of Defendants' trials, or whether only cases that fall within defendants' "statutory windows" are considered.

Id.

In addition, based upon the totality of statistical evidence presented at the hearing, the MAR court found "significant evidence that prosecutors have intentionally discriminated against black venire members during jury selection by prosecutors when seeking to impose death sentences" in Cumberland County, and in Defendant's own cases. *Id*.

In contrast to the defense expert testimony, the State's statistical expert "gave no opinion as to whether race was a significant factor in the exercise of peremptory challenges in capital cases by prosecutors in . . . Cumberland County at any time." Order at ¶ 209.

The State urges reversal on the ground that the MAR court erred by concluding that "numerical disparities alone" are sufficient to establish that race was a significant factor. State's Brief at 113-14. The State's argument conflates a showing of numerical disparities in the percentage of strikes of white and black jurors with MSU's full multi-variable statistical study that controlled for potential non-racial explanations for the prosecutors' strikes. More fundamentally, and contrary to the State's argument, the MAR court consistently analyzed the

statistical evidence as only one of several components of its finding that race was a significant factor. *See*, *e.g.*, Order at ¶ 1 ("Defendants presented a wealth of case, anecdotal and historical evidence of racial bias in jury selection in Cumberland County and in their individual cases. This evidence included notes from the prosecution's own files documenting race consciousness and race-based decision-making in jury selection. The documentary and testimonial evidence of former Cumberland County prosecutors showed that race was a critical part of their jury selection strategy.").

While the State challenges the legal effect of the statistical evidence, it does not appear to challenge the MAR court's fact findings regarding the statistical evidence, except to claim that it is impossible to disentangle the MAR court's reliance upon irrelevant and inadmissible evidence. State's Brief at 71-72. To the contrary, the MAR court carefully made findings of fact regarding the statistical evidence that limited consideration of the statistical evidence to the statutory parameters endorsed by the State. *See* Order at ¶¶ 212, 272-86 (findings of fact considering only the evidence from the statutory window in the Amended RJA). The statistical testimony constitutes competent evidence supporting the MAR court's findings and these findings are therefore conclusive in this appeal. The MAR court's findings in turn support the court's conclusions of law, and

ultimately its judgment granting relief. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294.

II. THE MAR COURT'S ORDER FOUND INTENTIONAL DISCRIMINATION IN THE DEFENDANTS' OWN CASES.

The MAR court applied the Amended RJA and specifically found that race was a significant factor in decisions to exercise peremptory challenges in each of the Defendants' cases. Order at ¶¶ 10-20 (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 ¶¶ 50-52 (finding prosecution's strike of Juror Gore "additional evidence of discrimination" in *Augustine*); *id*. at ¶ 37 (Colyer's admission on cross-examination that race was consciously in his mind when he questioned an African-American potential juror in *Golphin* was evidence that race was a significant factor in Colyer's strike); *id.* at ¶ 53 (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 white venire member used the exact same phrase to describe her death penalty views and was accepted by the State); *id.* at ¶ 58 (finding that it was "not persuaded by [prosecutor] Russ's testimony" about why she struck 10 African-American prospective jurors in *Walters*); *id.* at ¶ 94 (finding as evidence of discrimination

"the lack of consistency in the State's defense" of its strikes in *Walters*); *id.* at ¶ 99 (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. State's Brief at 73-75.

The MAR court further found that the racial discrimination in each of these cases was intentional:

> Race was a significant and intentionally-employed factor in the State's decisions to exercise peremptory strikes in each of Defendants' cases and in Cumberland County at the time the death sentences were sought or imposed.

Order at ¶ 415. The MAR court's treatment of intent to discriminate is a "pure question of fact, subject to review under a deferential standard." *Hernandez v. New York*, 500 U.S. 352, 364 (1991). The finding is amply supported by competent evidence in the record, including evidence from the transcripts of Defendants' cases, testimony of the prosecutors in Defendants' cases, statistical data based on the transcripts and trial documents, and expert testimony.

III. THE MAR COURT'S ALTERNATE LEGAL CONCLUSIONS WERE CORRECT.

The MAR court ultimately applied the narrowest possible interpretation of the Amended RJA and found, based on competent evidence, that Defendants had carried their burden of proof to show that race was a significant factor in decisions to seek or impose the sentence of death in Defendants' cases at the time the death sentences were sought or imposed.[15] This fact is ignored almost entirely by the State's brief. The State's emphasis on the MAR court's finding that the original RJA applied to the Defendants, *see*, *e.g.*, State's Brief at 20-49, is misplaced because the MAR court specifically granted relief on Defendants' Amended RJA claims. *See* Order at ¶¶ 393-412.

This Court's resolution of any or all of the litany of interpretive and non-dispositive issues that the State raises — questions about issue preclusion, application of the original or Amended RJA, case-specific discrimination — will not change the outcome in *this* case. The issue preclusion question is moot because the MAR court granted an evidentiary hearing and relied on evidence

[15] Contrary to the State's argument in its brief at 60-61, the MAR court never shifted the burden of proof to the State, instead holding that "the ultimate burden of persuasion remains with the defendant, and, in considering whether the defendant has met this burden, the Court will weigh all of the admissible evidence and the totality of the circumstances." Order at p. 19.

presented at the hearing. 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 any impact on the outcome.[16] Thus, even if this Court resolves questions of statutory interpretation pertaining to Amended RJA in the State's favor, the substantive outcome in this case will not change.

A. The MAR Court Correctly Interpreted the Amended RJA to Require a Different Legal Standard from *Batson v. Kentucky* and to Require a Different Remedy.

1. The MAR Court Correctly Interpreted the Amended RJA Differently from *Batson*.

The Defendants urge this Court to adopt the MAR court's careful and well-reasoned statutory interpretation of the Amended RJA as set forth in the MAR Order at pp. 9-32. The heart of the State's disagreement with these findings is based on its view that the Amended RJA is merely a codification of *Batson v.*

[16] *See* Order at ¶ 159 ("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").

Kentucky. State's Brief at 58, 77-84. The State's view is contrary to the plain language of the statute, and runs against every canon of statistical interpretation.

The meaning of "significant factor" in the RJA is a question of statutory interpretation. The plain language of the Amended RJA requires only a showing that race was a "significant factor" in the exercise of peremptory strikes. N.C. Gen. Stat. § 15A-2011(a). Prior decisions of this Court, in different contexts, have defined "significant" as "likely to have influence or effect." *See State v. Sexton*, 336 N.C. 321, 375, 444 S.E.2d 878, 910 (1994) (interpreting mitigating circumstance contained in N.C. Gen. Stat. § 15A-2000(f)(1)); *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 101-02, 301 S.E.2d 359, 370 (1983) ("having or likely to have influence or effect" in worker's compensation case). These decisions are consistent with the common understanding of the term. *See, e.g., Adkins v. Fieldcrest Mills, Inc*., 71 N.C. App. 621, 322 S.E.2d 642 (1984) (quoting the Webster dictionary definition of significant as "having or likely to have influence or effect"). The MAR court thus appropriately concluded that race was a significant factor in jury strikes if race likely had influence or effect in jury selection.

The language and context of the statute as a whole make clear that intentional discrimination is not required. First, and most pointedly, the legislature did not include a requirement of "intentional" or "purposeful" discrimination. *Id*.;

see also Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO STATE JOURNAL OF CRIMINAL LAW, 103, 120 (2012); (noting that the RJA "eliminated the requirement to prove intentional discrimination").

The context of the term "significant factor" is further evidence that the legislature did not intend to require intentional discrimination. The provisions specifically addressing the influence of race in decisions to exercise peremptory challenges in the "county or prosecutorial district," during a time period "from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death penalty," conclusively support the MAR court's interpretation that the Amended RJA provides broader protections to capital defendants than *Batson*. N.C. Gen. Stat. § 15A-2011. The structure of the statute, with its emphasis on the role of race across geographic area and a broad time span requires a "pattern of results," not proof of intentional discrimination. Mosteller, *supra* at 120 (describing how the statute's structure and "significant factor" language require "a pattern of results" rather than specific proof of intentional discrimination). In contrast, *Batson* requires a showing of purposeful discrimination in the particular case against a particular juror. 476 U.S. at 96; *see also Mosteller, supra* at 120.

The State nonetheless contends that *Batson* and the RJA are guided by the same standard because this Court employed the term "significant factor" in the course of discussing a *Batson* challenge in *State v. Waring*, 364 N.C. 443, 491, 701, S.E.2d 615, 645 (2010). State's Brief at 57, 63, 81. *Waring* is the only North Carolina *Batson* case ever to mention "significant factor," and *Waring* was decided *after* passage of the original RJA. For that reason, the General Assembly could not possibly have intended to adopt that term based on the manner in which it was applied in *Waring*.

Furthermore, the legislature would not have passed a law which only restated existing constitutional doctrine. This point is particularly clear in light of the fact that the General Assembly provided a different and lesser remedy for violations of the RJA. Pursuant to the Amended RJA, the successful post-conviction defendant must be resentenced to life imprisonment without the possibility of parole. N.C. Gen. Stat. § 15A-2011(g). In contrast, pursuant to *Batson*, the defendant must be awarded a new trial on guilt or innocence. Since a state legislature has no power to reduce the remedy for a violation of the United States Constitution, the N.C. General Assembly must have intended the RJA to provide broader protections against racial discrimination than the United States Constitution.

2. Prior Determinations Pursuant to *Batson v. Kentucky* have no Preclusive Effect for Determinations Pursuant to the RJA.

The State argues that the MAR court was barred from considering as evidence jury strikes that were the subject of unsuccessful *Batson* challenges. State's Brief at 77-84. The State is wrong because there has been a change in the applicable legal context and because the RJA allows for consideration of broader evidence.

The United States Supreme Court's discussion of "issue preclusion" in *Bobby v. Bies*, 556 U.S. 825 (2009), acknowledges the inapplicability of issue preclusion if there has been an intervening "change in [the] applicable legal context." 556 U.S. at 834 (citations omitted); *see also State v. Adams*, 347 N.C. 48, 60-62, 490 S.E.2d 220, 226-27 (1997) (holding that the trial court did not err by refusing to instruct the jury that the mitigating circumstances found at the previous sentencing proceeding were established as a matter of law); *State v. Bone*, 354 N.C. 1, 550 S.E.2d 482 (2001) (holding that jury's prior rejection of mental retardation as a mitigating circumstance at a capital sentencing trial was not binding at a later proceeding conducted pursuant to new statutory criteria because defendant's "counsel had no reason to anticipate that defendant's IQ would have the significance that it has now assumed"). The RJA and Amended RJA represent a fundamental "change in [the] applicable legal context." *Bobby*, 556 U.S. at 834.

Furthermore, as shown below, there has been an intervening change in *Batson* itself.

The law of the case doctrine is similarly inapplicable because it only prevents an issue from being reopened in subsequent proceedings where the same questions are involved. *See Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956) (explaining the law of the case doctrine applies "provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal").

For the same reasons, consideration of evidence in cases with *Batson* determinations does not violate the rule prohibiting one superior court judge from overruling another. This rule provides that "one Superior Court judge may not correct another's *error 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) (citation omitted) (emphasis added). In the instances where the MAR court is evaluating Defendants' evidence derived from overruled *Batson* objections, that court is thus not revisiting the prior courts' judgment regarding constitutional violations. Rather, the MAR court is considering whether, under the RJA's different standard, and in light of new evidence, the prosecutors' strikes and

proffered reasons for those strikes are relevant to a finding that race was a significant factor.

The State argues that there was no "change in circumstances" since the prior *Batson* rulings, State's Brief at 83, but the passage of the RJA itself constituted a change in circumstances by mandating that the MAR court grant sentencing relief if it finds that race was a significant factor in decisions to seek or impose the death penalty. N.C. Gen. Stat. § 15A-2011(g).

Equally as important, there has been a sea shift in this Court's implementation of *Batson*. The State contends, relying on *Waring*, that *Batson* rulings by prior trial courts in the 1990's and early 2000's were actually determinations about whether race was a "significant factor" in jury selection. State's Brief at 81. As explained above, the *Batson* "purposeful" discrimination test for an individual strike is not interchangeable with the requirement of showing that race was a significant factor across a swath of time and geography. But the prior decisions of this Court reveal an additional flaw in this argument: the older *Batson* decisions cited by the State were all decided under this Court's jurisprudence that required defendants to show that race was the "sole" factor in jury selection in an individual strike. *See State v. Davis,* 325 N.C. 607, 617, 386 S.E.2d 418, 423 (1989); *State v. Robinson,* 330 N.C. 1, 15, 409 S.E.2d 288, 297 (1991); *State v. Quick*, 341 N.C. 141, 144, 462 S.E.2d 186, 188 (1995); *State v.*

Locklear, 349 N.C. 118, 136, 505 S.E.2d 277, 287 (1998); *State v. Cofield*, 129 N.C. App. 268, 276, 498 S.E.2d 823, 829 (1998); *State v. Mitchell*, 321 N.C. 650, 653, 365 S.E.2d 554, 556 (1998); *State v. Matthews*, 162 N.C. App. 339, 342, 595 S.E.2d 446, 449 (2004); *State v. Wright*, 189 N.C. App. 346, 350, 658 S.E.2d 60, 61 (2008).

State v. White, 131 N.C. App. 734, 509 S.E.2d 462 (1998), is a clear illustration of the application of this standard, where the Court of Appeals rejected a *Batson* claim on appeal even though the prosecutor gave the jurors' race as one of the bases for his strikes of two African-American women. The court noted that "[w]hile race was certainly a factor in the prosecutor's reasons for challenging Reynolds and Jeter, *our courts, in applying the Batson decision, have required* more to establish an equal protection violation, i.e., that *the challenge be based solely upon race*." *White*, 131 N.C. App. at 740, 509 S.E.2d at 466 (emphasis added).

In the wake of *Miller-El*, and other recent Supreme Court decisions about discrimination in jury selection, this Court has now firmly rejected this "sole" requirement test and held that a defendant need only show that race was a motivating factor. *Waring*, 346 N.C. at 480, 701 S.E.2d at 639. In *State v. Barden* (*Barden II*), 362 N.C. 277, 658 S.E.2d 654 (2008), this Court explicitly recognized that *Miller-El*, *Rice v. Collins*, 546 U.S. 333 (2006), and *Snyder v. Louisiana*, 552

U.S. 472 (2008), altered the "framework" applied to *Batson* claims by the North Carolina courts. [17] 362 N.C. at 279-80, 658 S.E.2d at 655-56. These decisions were all long after Defendants' trials in 1998, 2000, and 2002, and long after the trial court rulings cited in the MAR court's order. *See* State's Brief at 79-80 (citing a group of trial court *Batson* rulings from the 1990's and one from 2006).

Moreover, the RJA permits broader proof than *Batson*. *Cf. Bies*, 556 U.S. at 828 (relitigation of mental retardation appropriate for an *Atkins* determination even after a prior finding by the jury of the existence of the mitigation factor because "mental retardation for purposes of *Atkins,* and mental retardation as one mitigator

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[17] The State heavily relies on cases such as *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990), and *State v. Kandies*, 342 N.C. 419, 435-36, 467 S.E.2d 67, 75-76 (1996), to argue that disparate treatment of white and African-American jurors as to some, but not all, reasons proffered by prosecutors for strikes, fails to satisfy the test for discrimination in *Batson v. Kentucky*. State's Brief at 63, 69-70, 114, 120. However, recent decisions of this Court and the United States Supreme Court cast doubt on the Court's reasoning in *Porter* and *Kandies*, even in the context of a challenge to a peremptory strike under *Batson*. The United States Supreme Court made clear that it is not necessary, when comparing accepted and rejected jurors, that the jurors be identical in all respects for the comparison to be probative. Such a requirement of a one-to-one match of all characteristics would "leave *Batson* inoperable," because "potential jurors are not products of a set of cookie cutters." *Miller El II*, 545 U.S. at 247 n.6. In contrast, Justice Thomas argued in dissent in *Miller-El* that "similarly situated" means matching not just one but all of the given reasons for the strike. 545 U.S. at 291. Justice Thomas' dissent echoes this Court's holding in *Porter*. *See* Amanda Hitchcock, *"Deference Does not by Definition Preclude Relief": The Impact of* Miller-El v. Dretke *on* Batson *review in North Carolina Capital Appeals*, 84 N.C.L.Rev. 1328, 1350-55 (2006); *see also* Paul H. Schwartz, *Equal Protection in Jury Selection - the Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C.L.Rev. 1533 (1990).

to be weighed against aggravators are discrete issues"). Because those *Batson* determinations were made prior to the passage of the RJA with very different evidence, the MAR court was not bound by those prior determinations. Under the RJA, the MAR court must weigh a broad range of relevant evidence, including any instance of purported discrimination against an individual venire member, along with all of the other evidence, such as new systemic, statistical evidence that was not available to the trial courts when they made the *Batson* determinations. N.C. Gen. Stat. § 15A-2011(b).

Some types of evidence contemplated under the Amended RJA were unavailable as proof under *Batson*. For example, the Amended RJA specifically states that relevant evidence may include the sworn testimony of prosecutors. N.C. Gen. Stat. § 15A-2011(d). In contrast, North Carolina law does not permit defendants to call as witnesses prosecutors who exercised peremptory challenges in support of a *Batson* challenge. *See State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988) (holding that a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney at the time of jury selection because of the great potential to disrupt the trial by violating the attorney witness rule).

Similarly, prosecutorial notes that were critical evidence here and available pursuant to post-conviction discovery orders under the RJA were previously

unavailable at trial during jury selection when *Batson* objections were made and decided. *See* N.C. Gen. Stat. § 15A-904(a) (limiting pre-trial discovery of prosecutors' written materials and notes).

The State finally complains the MAR court failed to consider factors relevant to *Batson* challenges in individual cases, including "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 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." State's Brief at 124-25. The State is wrong about the jury selection evidence considered by the MAR court. The MAR court considered the totality of the evidence introduced by the parties, including evidence identifying the race of jurors and the peremptory strikes exercised by the parties, as well as the transcripts of the voir dire proceedings of each of the cases of persons currently on death row. Order at ¶¶ 5, 171. Moreover, to the extent any of these factors such as the race of the witnesses in the case was not in evidence, the State cannot now complain because the MAR court provided the State with a full and fair opportunity to present and argue this type of evidence.

3. The State's Criticism of the Use of Civil Discrimination Law is Misguided.

The State complains that the MAR court erroneously drew on civil employment law when considering whether the statistical evidence demonstrated a prima facie case of discrimination in jury selection. *See* State's Brief at 66-70. The State urges that the legal framework of civil discrimination is not appropriate in the criminal context, and that the MAR court should instead have used traditional statistical models to analyze discrimination in jury selection in criminal cases. *Id*. at 67-69. This is a false dichotomy, and is based on a fundamental misunderstanding of how courts evaluate claims of discrimination in jury selection.

In *Batson*, the Supreme Court adopted a burden shifting scheme to evaluate claims of purposeful discrimination in jury selection. *Batson* explicitly relied upon precedent from housing and employment discrimination cases. *Batson*, 476 U.S. at 93-94 (*citing Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976)); *see also McCleskey v. Kemp*, 481 U.S. 279, 294-95 (1987) (noting that the Court has accepted statistics as proof of intent to discriminate in jury selection cases and in cases of statutory violations under Title VII of the Civil Rights Act of 1964). The standard from *Batson* itself was extended later to control claims of alleged purposeful discrimination in civil cases. *See Edmonson v. Leesville Concrete Co.*,

500 U.S. 614 (1991). The State's attempt to craft a divide between civil and criminal discrimination law is simply unsupported by precedent.

The State's real complaint is that the MAR court interpreted the Amended RJA, a statute with its own standard (whether "race is a significant factor"), differently from the constitutional precedent in *Batson.* State's Brief at 66. As explained above, the MAR court is correct. The RJA, with its different statutory language, is clearly not merely a restatement of existing constitutional law.

4. Complete Deference to Prior *Batson* Determinations Would Not Alter the Outcome in Defendants' Case.

The State complains about "re-assessments" by the MAR court in a handful of cases. State's Brief at 79-81.[18] Even if this Court set aside the findings from each of these cases, they represent only a small fraction of the scores of examples of evidence of discrimination found by the MAR court.[19] Order at ¶¶ 171-201.

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[18] In some of these same cases, the MAR court relied upon the trial court's findings. *See, e.g.,* Order at ¶ 49 (MAR court finding some evidence of discrimination in *Golphin* where the presiding trial judge had rejected two explanations by the State as pretextual and unsupported by the record); Order at ¶ 180 (MAR court finding some evidence of discrimination in *Fowler* where the presiding trial judge had concluded that the State's initial reasons were neither credible nor race-neutral).

[19] The State does not specifically contest the great majority of the MAR court's findings of pretext in prosecutors' use of peremptory strikes to exclude African-American venire members. *See*, *e.g*., Order at ¶ 174 (*Fletcher* Juror Benjamin McKinney; *Prevatte* Juror Stanley Webster); Order at ¶ 176 (*Trull* Juror Rodney Foxx); Order at ¶ 177 (*Maness* Jurors Theresa Ann Jackson, Triston Robinson;

Thus, there is substantial competent evidence remaining to support the MAR court's fact finding. The State cannot show that the purported error of considering instances of disparate or pretextual treatment of jurors that did not rise to the level of *Batson* error was harmful in this case.

Watts Juror Christine Ellison; *Bowman* Juror Lee Lawrence, *Thibodeaux* Juror Marcus Miller; *Elliott* Juror Lisa Varnum; *Bond* Juror Mary Watson Jones); Order at ¶ 180 (*McCollum* Juror DeLois Stewart); Order at ¶ 181 (*Strickland* Juror Leroy Ratliffe; *Smith* Juror Sandra Connor; *Burke* Juror Vanessa Moore; *Peterson* Juror Carletter Cephas); Order at ¶ 188 (*Prevatte* Juror Randal Sturdivant; *Steen* Juror Andrew Valentine); Order at ¶ 190 (*Brewington* Juror Ursula McLean; *Ball* Juror Sheila Driver); Order at ¶ 191 (*Rose* Juror Sharon Sellars; *Ball* Juror Ella Pierce Johnson; *Mitchell* Juror Ricky Clemons; *Hedgepeth* Juror Rochelle Williams); Order at ¶ 193 (*Smith* Juror William Cahoon; *Brewington* Juror Belinda Moore-Longmire; *Mann* Juror Regina Locke; *McCarver* Jurors Renee Ellis and Charlotte Rucker; *McCollum* Juror DeLois Stewart); Order at ¶ 194 (*Woods* Juror Sadie Clement, *Garcell* Juror Tonette Hampton; *Thomas* Juror Quimby Mullins; *Elliott* Juror Lisa Varnum); Order at ¶ 196 (*Cole* Jurors Alvin Aydlett, Marvin Abbott, and Miles Watson; *Strickland* Juror Leroy Ratliffe; *Barden* Juror Lemiel Baggett; *Guevara* Juror Gloria Mobley; *Wilkerson* Juror Richard Leonard); Order at ¶ 197 (*Brewington* Juror Pamela Simon; *Parker* Juror George McNeill; *Garcell* Juror Pamela Wilkerson; *Wilkerson* Juror Richard Leonard); Order at ¶ 198 (*Miller* Jurors Tyron Pickett, Sean Duckett, and Josephine Chadwick; *Brewington* Juror Ursula McLean; *Hedgepeth* Juror Rochelle Williams; *Wooten* Juror Janice Daniels; *White* Juror Mark Banks; *Reeves* Juror Nancy Holland; *Moses* Juror Broderick Cloud; *Garcia* Juror Thomas Seawell); Order at ¶ 199 (*Strickland* Juror Leroy Ratliffe; *Anderson* Juror Evelyn Jenkins; *East* Juror Michael Stockton); Order at ¶ 200 (*Taylor* Juror Zebora Blanks; *Ball* Juror Ella Pierce Johnson; *Woods* Juror Sadie Clement; *Kandies* Juror Altrea Jinwright); Order at ¶ 201 (*Bowman* Juror Lee Lawrence; *Moses* Juror Broderick Cloud; *Elliott* Juror Kenneth Finger; *Hedgepeth* Juror Rochelle Williams).

The State also grossly exaggerates the importance and emphasis on evidence from cases outside the county in the MAR Order, calling it an "abuse of discretion which warrants reversal of the RJA Order." State's Brief at 78. 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). The MAR court concluded that the examples of disparate questioning and treatment of individual jurors from various cases outside the county "corroborates the evidence of discrimination in Cumberland County and in Defendants' individual cases." Order at ¶ 202. Even assuming that the MAR court wrongly considered this evidence, it constituted a minute portion of the total evidence considered and relied upon by the trial court, and did not render the trial court's ruling "so arbitrary that it could not have been the result of a reasoned decision." *Moore*, 152 N.C. App. at 161, 566 S.E.2d at 716.

B. The MAR Court Weighed the Full Proffered Testimony of Superior Court Judges, and its Alternative Legal Ruling Limiting the Testimony was Correct.

The MAR court permitted the testimony of trial judges as to relevant aspects of the cases including character evidence. Order at ¶ 139. As to other aspects of proffered testimony from judges, the MAR court properly exercised its discretion and limited the testimony. The State sought to introduce the testimony of judges

utilizing their specialized knowledge without first submitting them as expert witnesses and complying with pre-hearing disclosure requirements for experts. Order at ¶ 156. The MAR court correctly disallowed the State's effort to bypass the disclosure requirements for expert witnesses. Further, the MAR court properly sustained objections to proffered testimony regarding the "mental processes" of the judges for the capital trials over which they presided and speculation by the judges on how they may have ruled had *Batson* motions been made. Order at ¶¶ 147-55. Finally, the MAR court concluded after reviewing the State's proffer of the judges' testimony that the testimony would not alter its decision that race was a significant factor in the use of peremptory strikes at the time the death sentence was sought in Defendants' cases. Order at ¶¶ 159-70.

1. Nothing in the Amended RJA Changed Existing Precedent Prohibiting Judicial Testimony on Mental Processes.

Consistent with well-established precedent, the MAR court permitted the testimony of the State's trial judge witnesses in most regards but limited their testimony regarding their thought processes in trials over which they presided. The State acknowledges, as it must, that allowing judges to testify about mental processes "may not be appropriate." State's Brief at 93. The State's grudging acknowledgment obscures the fundamental principle that judges should not be available to testify as witnesses about trials they have previously conducted unless absolutely necessary and, even then, no judge can be called to testify about his or

her own mental processes. *See State v. Simpson*, 314 N.C. 359, 372-73, 334 S.E.2d 53, 62 (1985) (describing the "danger" that if permitted to testify, judges "might be subjected to questioning as to the mental processes they employed to reach a particular decision"); *State v. Lewis*, 147 N.C. App. 274, 555 S.E.2d 348 (2001) (disapproving of the testimony by a judicial official "when it gives an opinion as to a person's condition who had previously appeared before that judicial official"). In *Simpson*, this Court found "compelling reasons" to uphold the trial judge's refusal to permit the defendant to call as a witness the district court judge who presided at the defendant's first appearance. 314 N.C. at 372-73, 334 S.E.2d at 61-62.

It is a "cardinal principle of Anglo-American jurisprudence that a court speaks only through its minutes" and that a presiding judge's testimony regarding his or her mental processes is inadmissible. *Perkins v. LeCureux*, 58 F.3d 214, 220 (6th Cir. 1995); *see also In re Wilkinson*, 678 A.2d 1257, 1259 (Vt. 1996) (permitting "judges, clothed in the authority of the office, to testify at post-conviction relief hearings that the criminal trials over which they presided were conducted fairly and resulted in the correct verdict . . . would undermine both the propriety of the judicial office and the fairness of post-conviction relief proceedings"). In encouraging this departure, the State invites an endless stream of subpoenas to judges from litigants unhappy about the results of their cases seeking testimony about the trials and judges' mental processes.

The State's argument that "it is not the trial judge's mental process at issue here but the action of the prosecution in making decisions to exercise peremptory strikes during jury selection" is pure sophistry. State's Brief at 94. However, the State did proffer evidence of the trial judges' mental processes that relate to the prosecutor's decisions to exercise peremptory strikes. In the State's offer of proof, judges who were not qualified as expert witnesses were repeatedly asked their opinions about whether they saw evidence to support a *Batson* motion or whether race played a meaningful role in the jury selection process. One judge was asked to follow up on his "perception in the courtroom" concerning a response by a juror. State's Appendix 8B, p. 19. The State asked judges whether they would have "intervened" had they been aware of particular situations. State's Appendix, 8A, p. 51; 8D, pp. 26, 43; 8E, p. 32; 8F, p. 46. The State blinks reality by suggesting that these questions were anything but an attempt to probe the judges' mental processes.

Where a party seeks on appeal to overturn a trial court's decision to limit judicial testimony concerning proceedings over which the judge presided, it bears the burden of showing that "there were no other available witnesses who could testify" to the facts in question. *Simpson*, 314 N.C. at 372-73, 334 S.E.2d at 62. The MAR court ruled that the State had not met its burden of demonstrating that the judges' testimony was uniquely necessary to prove any disputed fact. Order at

¶¶ 145-46. Although the State argued that the judges possessed information relating to events not reflected in the record from their observations about jury selection at capital trials, the testimony of the judges, including the proffers of evidence,[20] do not bear this out.

In Defendants' cases, as in *Simpson*, there were "undoubtedly other persons" who could testify about facts related to prior judicial proceeding, "including the deputy clerk, the bailiffs, and other attorneys not involved in the case." 314 N.C. at 373, 334 S.E.2d at 62. The State did not proffer the testimony of any of these potential neutral witnesses.

Nothing in the plain language of the Amended RJA supports the State's position that the legislature intended to alter the existing evidentiary rules or case law applicable to the testimony of trial judges. Order at ¶ 157. The Amended RJA permits the admission of the testimony of trial judges along with others involved in the criminal justice system. *See* N.C. Gen. Stat. § 15A-2011(b) ("[T]he evidence may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, judicial officials, jurors, or others involved in the criminal justice system."). The General Assembly presumably was aware of the limitations imposed on the testimony of

[20] The State was permitted to introduce full proffers of sworn testimony in the form of judicial depositions, where the State was afforded the opportunity to ask any question it wished. The testimony was recorded, transcribed and introduced as a proffer of the evidence the State would have introduced. Order at ¶ 132.

judges in *State v. Simpson* and other cases, but did nothing to expand the scope of permissible testimony by those judges.

2. Any Error Concerning Admissibility of Judicial Testimony Would Not Change the Outcome in this Case.

The State made a full proffer of the judicial testimony, submitting extensive transcripts of sworn testimony by the judges. Order at ¶ 132. Even assuming the MAR court erred by limiting the judges' "mental process" testimony, the limitation was harmless error because the MAR court considered the proffer of their testimony and concluded that the value of the testimony was extremely limited. Order at ¶¶ 159-70.

This conclusion is well supported by a review of the proffered testimony. Much of the proffered testimony was only a response to hypothetical *Batson* scenarios that were of no value because of the constrained nature of the hypotheticals. The State typically read the superior court judge a purported race neutral explanation and then asked the judge to testify about whether he would have sustained a *Batson* violation in light of such an explanation. *See, e.g.*, State's Appendix 8D, pp. 9-10, 16-17, 21-22, 24. In essence, the State's testimony presumed the trial judge would rule at step two of *Batson*, where the defendant has established a *prima faci*e case and the prosecution has proffered an explanation for the strikes at issue. The problem with these hypotheticals is that trial judges do not make *Batson* rulings until step three, after the defendant has had an opportunity to

respond with arguments about why the State's explanation was pretextual and in light of all of the evidence. The State never presented the superior court judges with any of the arguments made by defendants for why the explanations were pretextual, or the other evidence supporting a finding of discrimination. Without considering the defendant's surrebuttal, the trial judges' opinions about whether they would have sustained *Batson* objections are legally irrelevant because they are based on an insufficient foundation. *See, e.g., State v. Green,* 324 N.C. 238, 240, 375 S.E.2d 727, 728 (1989) (remanding to allow defendant to introduce evidence rebutting state's explanations for peremptory strikes); *State v. Peterson*, 344 N.C. 172, 176, 472 S.E.2d 730, 732 (1996) (holding that if a prosecutor does rebut the prima facie case with race neutral explanations, the defendant has the right to surrebuttal to show pretext).

The State belittles what it terms the MAR court's "after-the-fact consideration of the State's proffer of evidence." State's Brief at 87. Courts routinely make alternative rulings about proffered evidence that they have ruled is inadmissible. *See, e.g., Welch v. State*, 2 P.3d 356, 376-77 (Okla. Crim. App. 2000) (denying defendant an evidentiary hearing on an ineffectiveness of counsel claim by concluding that the proffered evidence was inadmissible, and alternatively, even if admitted, insufficient to warrant a hearing); *State v. Garcia*, 358 N.C. 382, 420, 597 S.E.2d 724, 750 (2004) (error for court to rule evidence of

remorse inadmissible, but error is harmless); *State v. Jones*, 339 N.C. 114, 154, 451 S.E.2d 826, 847-48 (1994) (same). In this case, the MAR court appropriately considered the full proffer of evidence submitted by the State, concluded it was of "limited of probative value," and found that it "would not have changed the result." Order at ¶¶ 159, 170.

C. Retroactive Application of the Amended RJA to Eviscerate Claims under the Original RJA would Violate State Law and the State and Federal Constitutions.

This Court need not resolve the State's argument not to consider Defendants' claims under the original RJA, because Defendants clearly prevail under the Amended RJA. Nevertheless, assuming the Court reaches this question, the Court must hold that the original RJA applies to Defendants' claims.

1. The State Law and State Constitution Independently Protect Vested Rights.

For over 120 years, North Carolina law and the North Carolina Constitution have protected vested rights from being retroactively repealed by statute.[21] *See Lowe v. Harris,* 112 N.C. 472, 17 S.E. 539, 539 (1893) ("The legislature unquestionably had and has the power to modify or repeal the whole of the statute

[21] Defendants continue to assert that the Due Process clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution also protect their rights under the original Racial Justice Act. Nevertheless, because the state law and the state constitution provide an adequate and independent basis for affirming the MAR court's order, this Court need not reach the federal question. If this Court disagrees with Defendants' state law arguments, however, then it must decide the separate federal constitutional claims.

of frauds in so far as it applies to future contracts for the sale of land, but its authority to give the repealing statute a retroactive operation is as certainly restricted by the fundamental rule that no law will be allowed to so operate as to disturb or destroy rights already vested."); *Wilson v. Anderson*, 232 N.C. 212, 221 59 S.E.2d 836, 843 (1950) (holding that "in this State a statute will not be given retroactive effect when such construction would interfere with vested rights, or with judgments already entered"); *Smith v. Mercer*, 276 N.C. 329, 337, 172 S.E.2d 489, 492 (1970) ("It is especially true that the statute or amendment will be regarded as operating prospectively only . . . where the effect of giving it a retroactive operation would be to . . . destroy a vested right or invalidate a defense which was good when the statute was passed.") (internal quotations omitted); *Fogleman v. D & G Equipment Rentals, Inc*., 111 N.C. App. 228, 232, 431 S.E.2d 849, 852 (1993) ("The trial court's application of the amended version of section 97-10.2 deprived appellants of vested rights and, thus, was unconstitutionally retroactive.").

Article IV, Sec. 13 of the North Carolina Constitution states: "No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury." This constitutional provision has been interpreted to protect vested substantive rights. *Fogleman*, 111 N.C. App. at 230, 431 S.E.2d at 851.

Similarly, Article I, Sec. 19 of the North Carolina Constitution states in pertinent part that

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land.

This provision has been interpreted to prevent interference with vested rights. *See Lowe*, 112 N.C. 472, 17 S.E. 539.

Defendants' rights under the original RJA are substantive. *See Smith*, 276 N.C. at 334, 172 S.E.2d at 492 (noting that the amendment was one of substantive law "affect[ing] the relief provided by statute and not the mode of obtaining relief"). The language of the original RJA indicates the legislature's intent to vest capital defendants' substantive rights under the statute at the time it was enacted: "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010.

Under the original RJA, a defendant can prove a substantive defense to execution by showing "that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2011(a). Thus, the original RJA conferred on defendants new

substantive rights to prove racial bias in their cases by relying upon the collective conduct of district attorneys in various geographic units.

Finally, the original RJA mandates that the death sentence "shall" be vacated and life imprisonment without parole imposed if the trial court finds that race was a significant factor in decisions to seek or impose the death sentence in any of the specified geographic units. N.C. Gen. Stat. § 15A-2012(a)(3). This mandatory remedy is yet another substantive right provided by the original RJA. This remedy differed from the constitutional remedy for race discrimination in jury selection which provided a new trial or a new sentencing proceeding. Under the RJA, capital defendants who prove race was a significant factor in the criminal justice system in the relevant time and geographic location are automatically entitled to a sentence reduction.

Because the original RJA created substantive rights for capital post-conviction defendants, those rights cannot be taken away from defendants who filed claims under the law. Our state courts have protected a wide range of substantive claims and vested interests. *See generally*, 2 Norman J. Singer, Sutherland Statutory Construction, § 41:06, at 375 (7th ed. 2007); *Bolick v. American Barmag Corp.*, 306 N.C. 364, 366-367, 293 S.E.2d 415, 418 (1982) (holding that a statute of repose was intended to be a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce

rights); *Smith*, 276 N.C. at 338-39, 172 S.E.2d at 495 (holding that an act which provides for the creation of a new right of action for wrongful death is wholly substantive); *Fogleman,* 111 N.C. App. at 232, 431 S.E.2d at 852 (holding that a right to a subrogation lien is a substantive right).

North Carolina courts draw a sharp distinction between substantive and procedural rights when deciding whether those rights have vested. *See Smith*, 276 N.C. at 337-39, 172 S.E. 2d at 494-95 (holding that statutes which affect substantive rights cannot be applied retroactively to enlarge or diminish the rights of any party, but that statutes that affect procedural rights do not come within the general rule against the retrospective operation of statutes). In contrast to substantive rights, procedural rights vest if and only if they are "secured, established and immune from further legal metamorphosis." *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980); *see also State v. Morehead*, 46 N.C. App. 39, 43, 264 S.E.2d 400, 402 (1980) (holding that "no vested right in procedure and statutes affecting procedural matters may be given retroactive effect or applied to pending litigation").

2. Defendants' Rights Accrued at the Time They Filed Claims under the Original RJA.

North Carolina courts recognize rights as vested—and thus protected from retroactive abrogation—when they have accrued. Accrual occurs at the time of injury. *Booker v. Duke Med. Ctr.,* 297 N.C. 458, 467, 256 S.E.2d 189, 195-96

(1979) (holding that defendant's rights vested at time of employee's death, not onset of disease, when plaintiff was eligible to file for relief under Workmen's Compensation Act, and framing the inquiry as whether the new act "as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect"); *Raftery v. W. C. Vick Construction Co.*, 291 N.C. 180, 187, 230 S.E.2d 405, 409 (1976) (plaintiff's cause of action accrued at the time he was injured); *Smith*, 276 N.C. at 338, 172 S.E.2d at 495 (declining to apply statute creating a new cause of action for wrongful death to a case involving a death that occurred prior to the effective date of the statute); *Mizell v. Atlantic Coast Line R. Co.*, 181 N.C. 36, 106 S.E. 133 (1921) (holding that cause of action arose at the moment the injury occurred and resulting vested right could not be defeated or modified by effect of subsequent statute).

The "harm," under the original RJA occurred "at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2011(a). Defendants' rights accrued after passage of the original RJA when they asserted their claims under the law. Indeed, the legislature contemplated a specific accrual date for "persons under a death sentence imposed before the effective date of this act" by applying the law "retroactively" and by requiring that a motion "be filed within one year of the effective date of this act." 2009 N.C. Sess. Laws 264 s.2.

The State provides no reasoned explanation as to why the date of accrual in criminal cases should be the date of judgment while the date of accrual for civil cases should be the date of injury. Indeed, the State itself relies exclusively on civil cases to craft its argument that rights are not vested until final judgment. *See* State's Brief at 26-28. Nor does it account for this Court's careful distinction between procedural versus substantive rights. *See*, *e.g.*, *State v. Morehead*, 46 N.C. App. 39, 42-43, 264 S.E.2d 400, 402-03 (1980) (applying vested rights analysis to Speedy Trial Act and distinguishing between "vested or substantial" rights and "statutes affecting procedural matters"). The State's citation of federal cases, including its extensive analysis of *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), disregards the salient fact that this is first and foremost a question of applying long-standing North Carolina law and constitutional provisions to a North Carolina statute.

The State argues that the most significant distinction between these cited civil cases and the Defendants' criminal cases is that, in 2012, "the Legislature has very clearly made the amendments to the RJA applicable to RJA claims pending at the time of the statute's enactment." State's Brief at 40; *see also* State's Brief at 26. Even assuming that to be true, the legislature had no power to deprive the Defendants of vested rights, and the State's analysis completely ignores the intent of the legislature in 2009 to confer those rights. First, the 2009 legislature

explicitly applied the original RJA retroactively to post-conviction cases. *See* 2009 N.C. Sess. Laws 464 s.2. The legislature sought to remedy harm in trials that occurred long before the passage of the statute. Secondly, the RJA more closely resembles remedial statutes in civil cases than statutes that define criminal conduct or defenses. Here the right and remedy fashioned by the legislature in response to perceived race discrimination in decisions to seek or impose the death penalty is unrelated to either the circumstances of the crime or the conduct of the defendant. Third, the original RJA provided that persons under a death sentence shall be permitted to file motions under the act "within one year of the effective date of this act," and the defendants filed their motions within the statutory deadline. *See* 2009 N.C. Sess. Laws 464 s.2.

The State relies upon *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 79, 40 S.E.2d 690, 695 (1946), for the unremarkable proposition that "inchoate" or "incomplete" statutory rights may be taken away by statute. State's Brief at 29, 32, 34. While this is true as a general rule, it begs the question as to whether and when a right has "vested" and can no longer be taken away. In *Pinkham*, the court held that the statutory right to revoke a deed can be taken away by the legislature "before its exercise and before the happening of the contingency of which it speaks." 227 N.C. at 79, 40 S.E.2d at 696. According to the court in *Pinkham*:

> Powers of the kind under review are generally regarded as 'imperfect' or 'inchoate' rights which may be taken away by statute before their attempted exercise, although, *when exercised before the statutory withdrawal, the resulting estate is a vested right which cannot be retroactively affected.*

227 N.C. at 79, 40 S.E.2d at 695 (emphasis added). Here, Defendants attempted to exercise their rights by filing a claim under the original RJA and prior to the passage of the amended statute.

The State urges this Court to adopt the rather astounding proposition that a person commanded by law to forfeit his life or liberty is entitled to less protection and fewer rights under the North Carolina law and the North Carolina Constitution than persons who seek money or equitable distributions under civil law. State's Brief at 36-41. This is not now, and has never been, the law. *See Stann v. Levine*, 180 N.C. App. 1, 11, 636 S.E.2d 214, 220 (2006) (noting that "injustice is far more manifest when a person's life or liberty is at stake" and, consequently, Rule 2 has found its greatest acceptance in the criminal context"). Capital cases are provided even greater scrutiny. *Id*., fn. 4 (collecting cases). In sum, under state constitutional principles, Defendants' substantive rights are protected from retroactive repeal and vested when they filed claims within the deadline prescribed by the original RJA.

3. Equitable Principles and Defendants' Rights to Equal Protection Support a Finding that Defendants' Rights Vested Under the Original RJA.

When deciding whether defendants' rights under the original RJA are vested and thus protected from repeal, principles of equal protection and fundamental fairness must be considered. At its core, the application of due process to protect vested rights involves a concern about fairness. *See*, *e.g.*, *Michael Weinman Assoc. Gen. Partnership v. Town of Huntersville*, 147 N.C. App. 231, 234, 555 S.E.2d 342, 345 (2001) (recognizing that vested rights protect interests in certainty, stability and fairness); *Langston v. Riffe,* 754 A.2d 389, 402 (Md. 2000) ("Justice Holmes once remarked with reference to the problem of retroactivity that 'perhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions,' and suggested that the criteria which really governed decisions are 'the prevailing views of justice.'"); 2 Norman J. Singer, Sutherland Statutory Construction, §41:06 (7th ed. 2007) ("Judicial attempts to explain whether such protection against retroactive interference will be extended reveal the elementary considerations of fairness and justice govern.").

Defendants should not be penalized merely because a superior court judge was unavailable to hear their claims at an earlier time. Defendants cannot be deprived of their statutory rights consistent with the equal protection clause of the United States and North Carolina Constitutions simply because the superior court

chose to hear Marcus Robinson's claims before theirs. *See Best v. Wayne Mem'l Hosp., Inc.*, 147 N.C. App. 628, 634, 556 S.E.2d 629, 633 (2001) (applying equal protection principles and noting disparities in access to resident superior court judges, and observing that the legislature would not have "intended for some plaintiffs to have more or better access to the courts of our state").

Moreover, as the MAR court appropriately found, "the equities weigh against applying the Amended RJA retroactively." Order at p. 43. Defendants had perfected the filings of their meritorious claims that clearly entitled them to relief. Those claims did not proceed to hearing before the amended law was passed due to the delay and dilatory tactics of the State.

Attorneys for the Defendants sought to consolidate litigation. Order at p. 41. The State opposed efforts to streamline litigation or consolidate the cases, and sought to delay litigation under the original RJA as long as possible. Order at pp. 41-43. In particular, the State engaged in tactics intended to delay the *Robinson* hearing, while at the same time lobbying the legislature to repeal the original RJA. Order at pp. 42-43. Defendants filed motions for entry of judgment just three weeks after the MAR court's decision in *Robinson*. Order at p. 42. Without the delay tactics of the State, Defendants' cases could have proceeded prior to the enactment of the Amended RJA. Order at p. 43.

Defendants' cases were ready to proceed to an evidentiary hearing in 2010. By filing their detailed and supported motions under the original RJA in August 2010, Defendants satisfied the statutory requirement that they "state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2012(a). Once this was done, the legislature mandated that "the court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. § 15A-2012(a)(2). The Defendants had done everything they could to pursue their claims.

Moreover, the State treated the *Robinson* case as the lead case in a unified statewide strategy in RJA litigation. After the RJA MARs were filed in August 2010, the Conference of District Attorneys formed a group which included prosecutors, ex-prosecutors and a statistician for the purpose of providing a statewide resource to District Attorneys. August 31, 2012 Motions Hearing, Tpp. 42-44. In the *Robinson* litigation, the Conference of District Attorneys assigned an out-of-district prosecutor Jonathan Perry from Union County. *Robinson* HTp. 3. The State's expert, Dr. Jonathan Katz, surveyed all of the capital prosecutors in the state and based his testimony in part on that survey. *Id*. at 1800-17. In this case,

the State brought in Mike Silver, a prosecutor in Forsyth County, to assist in the litigation. HTp. 8.

There is every reason to believe that the State would have treated Defendants' state and division claims exactly the same as it did in *Robinson*. This Court need not speculate about that; the State's statewide and division evidence was materially the same in both cases.

Had Defendants' cases proceeded at an earlier date, the decision in *State v. Robinson* indicates that Defendants would have succeeded. The MAR court found in *State v. Robinson* that, from 1990 to 2010, including the time of Defendants' trials, race was a significant factor in the use of peremptory strikes across the state and in Cumberland County. Given this evidence of racial bias in the district and statewide and in Defendants' own cases, it would be unfair for this Court to deny Defendants a verdict under the original RJA simply because the MAR court allowed the lead case of *State v. Robinson* to be decided first.

Equal protection, equity and fairness demand that Defendants not be denied of their rights under the original RJA.

4. The Amended RJA Cannot be Construed to have Retroactive Effect Barring Defendants' Claims Under the Original Law.

"This Court has stated that '[e]very reasonable doubt is resolved against a retroactive operation of a statute.'" *State v. Green*, 350 N.C. 400, 404, 514 S.E.2d 724, 727 (1999) (quoting *Hicks v. Kearney*, 189 N.C. 316, 319 (1925)).

The Amended RJA is at best ambiguous as to its application to defendants' MARs under the original RJA. Section 6 of the Amended RJA states that

> *unless otherwise excepted*, this act, including the hearing procedure, evidentiary burden, and the description of the 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 pursuant to S.L. 2009-464.

2012 N.C. Sess. Law 416 s. 6 (emphasis added). The MAR court found that this section along with other provisions of the Amended RJA "require application of the amended RJA to motions filed under the 2009 law," but "fail to address whether the amended RJA applies in conjunction with or instead of [the] original RJA." Order at p. 33. The MAR court concluded that this "omission constitutes evidence that the legislature did not intend the amended RJA to be retroactive." Order at p. 33.

N.C. Gen. Stat. § 15A-2011(a1) provides an additional reason to believe that the legislature intended to apply the Amended RJA prospectively only. That

section states in pertinent part that "[i]t is the intent of this Article to provide for an amelioration of the death sentence." N.C. Gen. Stat. § 15A-2011(a1). Construing the statute as stripping substantive defenses previously enjoyed by capital defendants would hardly be consistent with legislative intent. Reading all of the provisions of the Amended RJA as a whole, the MAR court found "persuasive evidence in the amended RJA's language and structure that it was not intended to operate retroactively." Order at pp. 34-35.

Alternatively, even assuming the legislature generally intended the Amended RJA to supplant the original RJA as applied to post-conviction defendants, Section 8 of the Amended RJA supplies an exception applicable here:

> 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.

Both sides to this case had a full "opportunity to present evidence, including witness testimony and rebuttal evidence" as to the statewide, division and county claims in *State v. Robinson*. In *Robinson*, the MAR court "made findings of fact and conclusions of law after an evidentiary hearing" on April 20, 2012, prior to the enactment of the Amended RJA.

The State and the defendants litigated the same questions of whether race was a significant factor in the State, judicial division, and Cumberland County at the time the death sentences were sought and imposed. The parties were represented by most of the same attorneys who utilized the same experts. The evidence as to statewide and division discrimination was the same.

Counsel for Golphin, Walters and Augustine were fully satisfied with the opportunity the *Robinson* hearing provided their clients "to present evidence, including witness testimony and rebuttal evidence" as to the statewide and division claims under the original RJA. For this reason, Defendants moved the evidence from *Robinson* into the record and utilized it as the basis for their statewide and division claims. HTp. 242. The State, in turn, moved successfully to introduce the entire *Robinson* transcript in evidence, not just the defense evidence. HTp. 256.

There is at least reasonable doubt about the legislature's intent to deprive these three defendants of their claims that so closely relate to the claims upon which Robinson was granted relief. This question must therefore be resolved against the retroactive application of the amended statute. *Hicks*, 127 S.E.2d at 207.

5. Applying the Amended RJA to Bar Defendants' RJA Claims would Violate the Constitutional Prohibition of Denial of Equal Protection of the Laws and Against Arbitrary Administration of the Death Penalty.

In enacting the original RJA, the North Carolina General Assembly recognized that statewide, system-wide discrimination against African-American venire members in capital cases is intolerable. *See* S.L. 2009-464, N.C.G.S. §15A-2012(a)(3) (stating that a court finding that race was a significant factor in capital-case decisions statewide mandates imposition of a life sentence). Consistent with the MAR court's statewide findings and conclusions in *State v. Robinson*, Defendants are also entitled to relief under the terms of the original RJA pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 19, 26 and 27 of the North Carolina Constitution.

Article I, § 26 of the North Carolina Constitution prohibits "exclu[sion] from jury service on account of sex, race, color, religion, or national origin." The Court in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987), concluded this provision "does more than protect individuals from unequal treatment." *Cofield*, 320 N.C. at 302, 347 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).

In their original RJA pleadings, Defendants presented statistical, anecdotal, and historical evidence that capital jury selection proceedings in North Carolina, as a whole, have been significantly affected by racial considerations. Substantially the same evidence was presented in *Robinson*, and, based on that evidence, the *Robinson* court concluded that race had been a significant and intentional factor in prosecutors' peremptory strike decisions in capital cases statewide from 1990 through 2010.

Following the decision in *Robinson*, the General Assembly substantially amended the RJA. Among other things, the Amended RJA eliminated claims focused on statewide proof of racial discrimination as a basis for relief. In light of the findings in *Robinson*, applying the Amended RJA retroactively to bar these pending claims would violate the federal and state constitutions. *See Furman v.*

Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) ("Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."); *State v. Case*, 330 N.C. 161, 163, 410 S.E.2d 57, 58-59 (1991) (granting new trial "to prevent capital sentencing from being irregular, inconsistent and arbitrary" and thus "to protect the constitutionality of our capital sentencing system").

Concurring in the judgment in *Furman*, Justice Douglas wrote that it "would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it . . . is imposed under a procedure that gives room for the play of [racial] prejudices." *Furman,* 408 U.S. at 242 (emphasis added); *see also McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987) (upholding the death penalty where there was no evidence that the legislature maintained the statute because of its racially disproportionate impact, and the capital sentencing system is able to operate in a fair and neutral manner). Accordingly, the Amended RJA cannot be construed to bar claims under the original RJA. Any attempt to turn away from compelling statewide evidence of systemic, race-based problems in capital jury selection fundamentally conflicts with the federal and state constitutional prohibitions against arbitrariness in the administration of the death penalty.

IV. DEFENDANTS' LIFE SENTENCES ARE FINAL.

A. The Amended RJA Mandated the Imposition of Life Sentences.

Review of Defendants' cases by this Court can have no effect on Defendants' life sentences and any opinion interpreting the RJA would be advisory only. Pursuant to statutory mandate, the MAR court resentenced Defendants to life imprisonment without the possibility of parole:

> If the court finds that race was a significant factor . . . the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without possibility of parole.

N.C. Gen. Stat. § 15A-2011(g).[22] The MAR court dutifully followed this statutory mandate and Defendants are now serving life sentences without the possibility of parole. The North Carolina Constitution's express separation of powers clause requires that the courts enforce a statute's clear and unambiguous mandate. *State v. Whitehead*, 365 N.C. 444, 722 S.E.2d 492 (2012). According to this Court:

> Under Article I, Section 6 of the Constitution of North Carolina, '[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.' N.C. Const. art. I, § 6; *see also, Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 853-54, *cert. denied*, 533 U.S. 975, 122 S.Ct. 22, 150 L.Ed.2d 804 (2001); *Jernigan v. State*, 279 N.C.

[22] This provision in the Amended RJA was derived from one contained in the original RJA at N.C. Gen. Stat. § 15A-2012(a)(3).

> 556, 563-64, 184 S.E.2d 259, 265 (1971). It is axiomatic that the 'legislature has exclusive power to determine the penalogical (sic) system of the [State]. It alone can prescribe the punishment for the crime.' *Jernigan*, 279 N.C. at 564, 184 S.E.2d at 265 (alteration in original) (citations omitted). The function of the judicial branch is 'to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law.' *Id*. at 563-64, 184 S.E.2d at 265 (citation omitted). The executive branch in turn must implement the lawful sentence pursuant to the requirements set forth by the legislature. *Id*. at 564, 184 S.E.2d at 265. Because the legislature has the exclusive authority to prescribe the punishments for the crimes, and sentence ordered by the judicial branch and enforced by the executive branch must be within the parameters established by the legislature.

Whitehead, 365 N.C. at 446, 722 S.E.2d at 494. Because the MAR court properly enforced the statutory mandate, there is nothing left for this court to decide.

Unlike the typical MAR case where relief is granted, the conviction or sentence is vacated, and the court orders a retrial or resentencing proceeding, here the legislature mandated that the MAR court resentence Defendants to life imprisonment, and the court acted pursuant to that statutory mandate. In the typical MAR case, the State may challenge the MAR court's grant of a new guilt or sentencing trial prior to resentencing by a petition for *certiorari*. *See, e.g., State v. Frogge*, 359 N.C. 228, 607 S.E.2d 627 (2005) (reversing the MAR court's order requiring a new sentencing trial based on a finding of ineffective assistance of

counsel). The creation of this legislative mandate in this limited category of cases indicates the legislature did not intend to provide a mechanism for the judicial branch to alter Defendants' sentences after they were resentenced to life imprisonment. Otherwise, the statutory mandate in N.C. Gen. Stat. § 15A-2011(g) would have no independent meaning. Because "the legislature has the exclusive authority to prescribe punishment for crimes," its intent to circumscribe the State's appeals of a final sentence must be honored. *See Whitehead*, 365 N.C. at 446, 722 S.E.2d at 494.

B. N.C. Gen. Stat. § 15A-1335 Prohibits Resentencing Defendants to Greater Punishment Even Assuming Error.

Moreover, once a defendant has been resentenced, North Carolina law explicitly bars the courts from inflicting a more severe sentence. N.C. Gen. Stat. § 15A-1335 provides:

> 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.

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 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 without parole sentences imposed by the MAR court 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.

N.C. Gen. Stat. § 15A-1335 applies only after a defendant is resentenced to life imprisonment and not to all cases where the appellate court reverses a grant of relief by an MAR court. If this Court were to now vacate Defendants' life sentences, they could not be resentenced to anything more severe.

C. The Double Jeopardy Clause Prohibits Resentencing Defendants.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution also prohibits resentencing Defendants to death following their acquittal of the death penalty. The Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged. *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. *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 rejected 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 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." *Bobby*, 556 U.S. at 833-34. Defendants, in contrast, were acquitted of the death penalty, resentenced to life imprisonment, and double jeopardy prevents the state from seeking to retry them or to increase their punishment.

In *Evans v. Michigan,* 133 S.Ct. 1069 (2013), the United States Supreme Court considered whether a directed verdict of acquittal based on a mistake of law constitutes an acquittal for double jeopardy purposes barring further prosecution. After the State rested in an arson prosecution, the trial court entered a directed

verdict of acquittal on grounds that the State had provided insufficient evidence of a particular element of the offense. However, the trial court erred; the unproven "element" was not actually a required element at all. The Court noted that it had previously held in *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984), that a judicial acquittal premised upon a "misconstruction" of a criminal statute is an "acquittal on the merits . . . [that] bars retrial." It found "no meaningful constitutional distinction between a trial court's 'misconstruction' of a statute and its erroneous addition of a statutory element." According to the Court, "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*, 133 S.Ct. at 1074.

The State's assertion that the Defendants have not been "acquitted" of the death penalty is plainly wrong. Because "the legislature has the exclusive authority to prescribe punishment for crimes," its determination of what constitutes an acquittal of the death penalty must be honored. *See Whitehead*, 365 N.C. at 446, 722 S.E.2d at 494. The legislature mandated that "no person . . . shall be executed pursuant to any judgment that was sought or obtained on the basis of race," and further mandated that the remedy would be that the defendants would be resentenced to life imprisonment without the possibility of parole. N.C. Gen. Stat. §§ 15A-2010 and 15A-2011(g). Like findings of mental retardation or

juvenile status under statutes that exempt those categories of persons from execution, a finding that race was a significant factor in decisions to seek or impose the sentence of death in the defendant's case is an acquittal of the death penalty.

Thus, once the MAR court imposed a life sentence without parole Defendants can no longer be executed for their crimes. So, even if this Court were to find fault in the underlying determination of entitlement to the RJA's remedy, no harsher sentence is permissible.

CONCLUSION

The hearing below was fair and free from error. Where the State had an alternative view of the law or evidence was excluded, the court considered it and reached alternative findings compelling the same result as it otherwise reached. And, under the law, defendants cannot be resentenced to death. For those reasons and others identified above, Defendants respectfully urge this Court to affirm the MAR court's order granting sentencing relief to the defendants.

Respectfully submitted, this the 13th day of January, 2014.

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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' Brief upon opposing counsel by electronic mail to:

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