NO. *** TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
	)	
v.	)	**From CUMBERLAND**
	)	
	)	
MARCUS REYMOND ROBINSON	)	
Defendant	)	

****

STATE'S PETITION FOR WRIT OF CERTIORARI

****

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Defendant	)	

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STATE'S PETITION FOR WRIT OF CERTIORARI

****

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

NOW COMES the State of North Carolina [hereinafter "State"], by the Office of the District Attorney for the Twelfth Prosecutorial District, through Assistant District Attorneys Robert T. Thompson and G. Robert Hicks, III, and respectfully submits the following PETITION FOR WRIT OF CERTIORARI pursuant to Rules 2 and 21 of the North Carolina Rules of Appellate Procedure, and pursuant to Article IV, Section 12 of the North Carolina Constitution, seeking review of the ORDER GRANTING MOTION FOR APPROPRIATE RELIEF [hereinafter "RJA Order"]

filed on 20 April 2012, which vacated the 1994 death sentence of Marcus Reymond Robinson [hereinafter "Robinson"] for his first-degree murder conviction based upon application of North Carolina's Racial Justice Act pursuant to N.C.G.S. §15A-2010 to 2012. In support of this PETITION, the State shows the Court the following:

INTRODUCTION

The RJA Order [attached hereto as State's Attachment 1] vacating Robinson's 1994 death sentence, is the first grant of relief under the North Carolina Racial Justice Act, N.C.G.S. § 15A-2010 to 2012 [hereinafter, collectively "RJA"], enacted in 2009. While the 2009 RJA has since been amended and the new 2012 RJA controls for all cases except Robinson's, nevertheless some of the issues raised in this petition relating to statutory interpretation and application of the 2009 RJA are matters of great importance for the jurisprudence of North Carolina in both capital and noncapital cases. A decision from this Court could impact the capital sentences of the majority of capital defendants currently on death row even though they would be covered by the 2012 RJA.

The RJA Order is replete with findings of fact not supported by competent evidence. The RJA Order interprets the RJA statutes in such a way that results in significant legal error including, among other things: the unreasonable application of well-established existing criminal law; the unrealistic evaluation of legal and practical

value of the use of statistics offered by Robinson in support of his RJA Motion; the erroneous grafting from civil employment law analysis into the criminal justice system; and requiring unrealistic and unachievable statistical balance which would have been required state-wide by District Attorneys who operate independently of one another. In fact, under the MAR Court's interpretation of the RJA, District Attorneys would have been forced to violate the constitution to comply with the statute. This was not the intent of the Legislature.

Most significantly, the RJA Order interprets the RJA such that a capital defendant could have obtained relief under the RJA even if that defendant had never personally experienced any racial discrimination in his case at any stage of the criminal justice process.

Therefore, in the interest of justice, this Court should grant certiorari review pursuant to N.C. R. App. P. 2 and 21(f).

STATEMENT OF THE CASE AND RELEVANT FACTS

On 21 July 1991, Robinson and Roderick Williams asked for a ride from 17 year old Erik Tornblom. As soon as Robinson and Williams got in Tornblom's car, they put a gun to the back of Tornblom's neck and forced him to drive in the direction that they demanded. Robinson admitted to police that "the boy kept begging and pleading for us not to hurt him, because he didn't have any money." Robinson and

Williams directed Tornblom to a side street, where he was told to lie down. As he begged for his life, the two men shot Tornblom in the face with a shotgun. Robinson then took Tornblom's wallet and split the twenty-seven dollars therein with Williams.

Notably, there was a racial aspect to the murder as Robinson told his aunt two days prior to the murder that "he was going to burn him a whitey." Robinson repeated this statement three times. At trial, a witness testified that the day after the murder, Robinson said that he had robbed a white man the night before and had shot him in the head.

Robinson pled guilty to the charges of first degree kidnapping, robbery with a dangerous weapon, possession of a weapon of mass destruction, felonious larceny, and possession of a stolen vehicle. Robinson was capitally tried before a jury on the count of first degree murder. The jury found Robinson guilty both on the basis of premeditation and deliberation and under the felony murder rule.

During the sentencing phase the jury unanimously found as aggravating circumstances that the capital felony was committed while the defendant was engaged in the commission of or attempting to commit robbery with a firearm and first degree kidnapping and that the capital felony was especially heinous, atrocious, or cruel. N.C.G.S. §§ 15A-2000(e)(5) and (e)(9). The jury recommended the death penalty for the murder which the trial court duly imposed in accord with N.C.G.S. § 15A-2000.

Robinson appealed to this Court. On 3 November 1995, this Court unanimously found no error either in the trial or in the sentencing proceeding for the first degree murder and affirmed all of Robinson's sentences, including the death sentence. State v. Robinson, 342 N.C. 74, 463 S.E.2d 218 (1995). On 13 May 1996, the United States Supreme Court denied certiorari review. Robinson v. North Carolina, 517 U.S. 1197, 134 L. Ed. 2d 793 (1996). During appeal Robinson raised no claims of racial discrimination.

Thereafter, Robinson completed both state and federal post-conviction review, including a full evidentiary hearing in state court on his Motion for Appropriate Relief. Robinson was scheduled to be executed on 26 January 2007. The Governor of North Carolina held a clemency hearing on 17 January 2007. In the meantime, on 16 January 2007, Robinson filed another motion for appropriate relief and motion for stay of execution, claiming to have brain damage hitherto undiscovered. On 19 January 2007, the Cumberland County Superior Court denied both motions. On 22 January 2007, Robinson filed a civil action in Wake County Superior Court requesting injunctive relief on the grounds that use of lethal injection to execute him would violate the Eighth Amendment. The Wake County Superior Court has since granted summary judgment for the State on these claims, and Robinson has appealed.

During Robinson's trial the State exercised nine peremptory challenges which

included four challenges to white venire members and five challenges to black venire members. (RJA Order, p 68, ¶ 74). No Batson challenges were raised by either the State or the defense during jury selection. Although Robinson attempted a pre-emptive Batson motion prior to jury selection at his capital trial, he did not actually raise a claim under Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). In fact, he raised no claim of racial discrimination during jury selection, on direct appeal or in post-conviction, until the filing of his RJA MAR sixteen years after his trial.

On 5August 2010, Robinson filed a Motion for Appropriate relief pursuant to the Racial Justice Act [hereinafter "RJA MAR"]. N.C.G.S. § 15A-2010, et seq. The State filed an Answer to the RJA MAR on 2 May 2011 [attached hereto as State's Attachment 2]. Subsequently, the State filed a Motion to Dismiss the RJA MAR for Robinson's failure to allege racial discrimination in his own case [attached hereto as State's Attachment 3]. The Cumberland County Superior Court conducted an evidentiary hearing on the first three claims of Robinson's RJA MAR which related to the exercise of peremptory challenges in jury selection under N.C.G.S. §15A-2011(b)(3). On 20 April 2012, the MAR Court entered a written Order ["RJA Order"] granting Robinson's RJA MAR. The MAR Court ordered transcription of the proceedings for the record and the same were received by the State on 11 May

2012 [attached hereto as State's Attachment 4].

REASONS WHY CERTIORARI SHOULD BE GRANTED

Clearly, as this case aptly illustrates, Superior Court Judges and post-conviction practitioners are in need of guidance as to the correct interpretation and application of the RJA. This is a case of first impression.

The importance of granting certiorari and correcting the errors in the RJA Order goes far beyond the present case. Contrary to legislative intent, the MAR Court did not require Robinson to establish any racial discrimination in his case to be awarded relief from his eighteen-year-old death sentence.

Moreover, at least one other Superior Court has entered a ruling inconsistent with the RJA Order, finding that discrimination must be shown in the particular defendant's case for a defendant to obtain relief.[1] This same Superior Court Judge has also defined evidence relevant to be considered "at the time the death sentence was sought or imposed" to be limited to a five year time period surrounding the defendant's capital trial. See N.C.G.S. § 15A-2011(b). Thus two vastly different interpretations of the RJA exist. It is incumbent upon this Court to give Superior

[1] The court records from State v. Moses, 96 CRS 19456-57, including the Superior Court's Order Denying the State's Motion to Dismiss, the hearing transcript on the Motion to Dismiss, the State's Discovery Motion, the court's Discovery Order and hearing transcript on the Motion for Discovery, the Honorable William Z. Wood, Jr. Superior Court Judge presiding, have not been attached herein but can be made available to the Court.

Courts guidance as to the proper interpretation of this new statute and instruct those courts, as the Legislature intended, that the RJA requires discrimination be shown in a particular defendant's case.

Also, other capital defendants have attempted to use the RJA Order in Robinson's case to obtain relief in their individual cases in both state and federal court. In total 152 capital defendants have filed RJA Motions statewide. Following the RJA Order issued in Robinson's case, four of those capital defendants in post conviction review filed Motions for Summary Adjudication of their RJA claims, alleging that the RJA Order in Robinson precludes the State from relitigating the discrimination issue based on collateral estoppel principles and that they are entitled to summary relief under the RJA. (See State v. Walters, 98 CRS 34832, 89 CRS 35044; State v. Augustine, 01CRS 65079; State v. Golphin, 97 CRS 47314; and State v. Meyer, 86 CRS 53729).[2] The MAR Court in Robinson's case is also presiding over these cases and has combined these three cases for hearing, presently scheduled to begin the week of 1 October 2012.

Further, capital defendants in federal post conviction review have alleged that all federal proceedings should be held in abeyance pending resolution of their state court RJA claims. (See e.g., Hurst v. Branker, 1:10CV725; Tucker v. Branker,

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[2] These motions are not attached but can be made available to the Court.

1:07CV 868; Forte v. Lassiter, 5:09HC2054; DeCastro v. Branker, 5:08HC2075, Harden v. Branker, 3:06CV248). One such capital defendant has now argued the RJA Order in Robinson's case justifies holding federal review in abeyance before the Fourth Circuit Court of Appeals. (Harden v. Lassiter, 11-8, 4th Cir). Clearly, capital defendants are using the RJA Order in Robinson's case to argue legal issues significant to the jurisprudence of our State.

The Constitution of North Carolina grants the Supreme Court "jurisdiction to review upon appeal any decision of the courts below." N.C. Const. Art. IV, § 12; State v. Whitehead, __ N.C. __, __, 722 S.E.2d 492, 494 (2012). The Court has exercised its authority in the interest of "ensur[ing] the uniform administration of North Carolina's criminal statutes." State v. Ellis, 361 N.C. 200, 205, 639 S.E.2d 425, 429 (2007). It has also "exercise[d] its rarely used general supervisory authority when necessary to promote the expeditious administration of justice." State v. Stanley, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975)(citations omitted).

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

Standard of Review

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

However, "[i]t is well established that '[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light.'" State v. Collins, __ N.C. App. __, __, 724 S.E.2d 82, 85 (2012)(quoting Helms v. Rea, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973)).

An abuse of discretion "occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." State v. Moore, 152 N.C.

App. 156, 161, 566 S.E.2d 713, 716 (2002)(quotation marks omitted). "'When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion.'" State v. Shannon, 182 N.C. App. 350, 357, 642 S.E.2d 516, 522 (2007)(quoting Gailey v. Triangle Billiards & Blues Club, Inc., 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006), disc. rev. denied, 361 N.C. 426, 648 S.E.2d 213 (2007); see also, State v. Cornell, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972)("[W]here rulings are made under a misapprehension of the law, the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require.").

Here, the RJA Order found facts which are erroneous because they are contrary to the record and made rulings under a misapprehension of the law. The RJA Order erred in interpreting the RJA statute and in applying well established laws of this State to the particular facts in this case.

ARGUMENTS

I. The MAR Court Crafted An Interpretation of the RJA That Is Completely at Odds with Well Established North Carolina Law.

The RJA Order is the first grant of relief and the second interpretation of the

newly enacted RJA statute.[3] This is the first case to reach this Court for review. This Court should grant review because the RJA Order crafts an interpretation of the RJA Statutes that is at odds with well established law regarding what is required for a capital sentencing scheme to be constitutional and what is required in reviewing the exercise of peremptory challenges in jury selection. Specifically, the MAR Court erroneously concludes from its interpretation of the RJA that discrimination need not be shown in a defendant's own case. Further, the MAR Court has erred in interpreting legislative intent of the RJA. Finally, the MAR Court erred in interpreting the RJA to allow statistical analysis over a time span of twenty years of capital litigation in this State.

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

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

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[3] Judge Wood in State v. Moses, 96 CRS 19456-57, concluded that the RJA is constitutional if interpreted to require discrimination be proven in an individual defendant's case.

should grant review to correct this misinterpretation.

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

The RJA Order incorrectly determined that Robinson need not show discrimination in his own case in order to obtain relief under the RJA. (RJA Order, p 35). This ruling conflicts with the expressed intent of the Legislature in the first provision of the RJA, Article 101, which states that "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C.G.S. § 15A-2010. The plain language of this statute establishes that racial discrimination must be shown in the decisions involving the imposition of a defendant's particular judgment of death.

The plain reading of N.C.G.S. § 15A-2010, which refers to a singular sentence of death and singular judgment sought or imposed, indicates that racial discrimination must be shown in the particular defendant's case. Additionally, reading various provisions in the RJA as a whole supports the conclusion that a defendant must establish racial discrimination in his own case in order to be afforded relief under the RJA. For example, N.C.G.S. § 15A-2011 confirms that discrimination must be shown in the defendant's particular case by allowing "evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a

factor in seeking or imposing a sentence of death." N.C.G.S. § 15A-2011(c). Again, this reference is to a singular, not plural, trial of a particular defendant. Further, the RJA limits the inquiry to showing that race was a significant factor in seeking or imposing the death sentence "at the time the death sentence was sought or imposed." N.C.G.S. § 15A-2011(c). Again, this reference to a singular death sentence ties the relevant evidence to be reviewed to the time of a particular defendant's prosecution for capital murder.

The RJA Order errs as a matter of law in concluding that a defendant need not show discrimination in his own case. (RJA Order, p 35). By this interpretation, a defendant convicted of first degree murder and sentenced to death could obtain relief in post conviction review under the RJA even if the capital defendant has never personally experienced any racial discrimination in his own case at any stage of the criminal justice process. This interpretation is an absurd result the Legislature could not have intended. In re Brake, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997) ("[t]his Court presumes that the legislature acted in accordance with reason and common sense, and that it did not intend an absurd result.")(citing King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970)); State v. Spencer, 276 N.C. 535, 547, 173 S.E.2d 765, 773 (1970)(courts must interpret the language of a statute "so as to avoid an absurd consequence.").

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

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

The MAR Court erred in interpreting legislative intent by incorrectly analyzing United States Supreme Court law. The RJA Order claims that the North Carolina General Assembly took up the invitation given them in McCleskey v. Kemp, 481 U.S. 279, 319, 95 L. Ed. 2d 262, 296 (1987), and passed a statute providing that statistics alone are sufficient to obtain relief under the RJA. (RJA Order, pp 35-36). This was a blatant misinterpretation of McCleskey.

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

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

Moreover, the MAR Court erred in interpreting legislative intent for the RJA by comparing language from drafts of the RJA with language actually passed by the Legislature in the RJA. Well established law advises that courts may not interpret statutory meaning based upon the failure of the legislature to enact the statute with specific language. North Carolina Dept. Of Correction v. North Carolina Medical Bd., 363 N.C. 189, 202, 675 S.E.2d 641, 650 (2009) ("That a legislature declined to enact a statute with specific language does not indicate the legislature intended the exact opposite."). "In determining legislative intent, the appellate court does not look to the record of the internal deliberations of committees of the legislature considering proposed legislation." Id.; see also, Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc., 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991). Yet in its interpretation of the RJA, the MAR Court here incorrectly and improperly considered "legislative history" in considering an earlier version of the bill, that was never passed. (RJA Order, p 36). This Court should grant review to correct the

misapprehension of this Court's clearly established law regarding statutory interpretation.

3. The MAR Court Erred Interpreting the RJA Statute to Allow Consideration of Evidence Spanning Twenty Years of Capital Litigation.

Further, the MAR Court erred in interpreting the RJA statute to allow evidence to be considered of all capital cases resulting in a death sentence over a twenty year time period in this State. Allowing evidence from twenty years of capital litigation[4] is an overly broad interpretation of the RJA statute which required racial discrimination to be shown "at the time the death sentence was sought or imposed." N.C.G.S. § 15A-2011(c)(emphasis added).

As noted above, "at the time the death sentence was sought or imposed" centers the evidence to a particular time period related to the particular capital defendant's criminal prosecution. (Id.). In determining what is a relevant time, it is instructive that the United States Supreme Court, analyzing constitutional claims of racial discrimination, considered an appropriate time span to be that which is "reasonably

[4] In fact the MAR Court did not include all capital litigation in a twenty year time period, but restricted the evidence to only include those capital cases which resulted in a death sentence, excluding capital cases which were tried but resulted in the imposition of life sentences, cases in which defendants had already been executed, and cases which resulted in the imposition of life sentences after the sentence was reversed on appeal. (RJA Order, p 47-49,¶¶ 12-15, RJA Order, pp 161-62, ¶ 8, HT pp 228-31). The State continues to maintain that this was an unreasonable restriction of the evidence and that any evidence the MAR Court relied upon should have included all of the cases which proceeded capitally during the period of time considered.

contemporaneous with the challenged decision[.]" McCleskey v. Kemp, 481 U.S. at 298, n.20, 95 L. Ed. 2d at 282 n.20 ("Unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value.").

Here the MAR Court considered cases tried nineteen years after Robinson's crime was committed. Principally, the MAR Court relied upon a statistical study conducted by Michigan State University [hereinafter "MSU"] which contained 173 capital cases resulting in death sentences which had been tried over a twenty year time span. A specific time period is not delineated in the RJA statute.

A court's consideration of cases tried nineteen years beyond a defendant's case, as was the case in Robinson, is not reasonably contemporaneous with a defendant's case. A twenty year time span for evidence related to capital prosecutions is simply unreasonable and overly broad to address the issue of intent contemporaneous with the defendant's prosecution. It is relevant that another Superior Court Judge has defined evidence relevant to be considered "at the time the death sentence was sought or imposed" to be limited to a five year time period surrounding the defendant's capital trial.[5] This Court should grant review to define that the proper interpretation of the RJA requires review of evidence which is reasonably contemporaneous with

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[5] State v. Moses, 96 CRS 19456-57, Discovery Motion, Discovery Order and Hearing transcript; see supra, fn 1.

a defendant's capital prosecution, not a twenty year period which is too remote to be relevant.

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

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

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

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

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

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

"It is an elementary rule in the construction of statutes that the court will not attribute to the Legislature the intention to punish the failure to do an impossible thing. 'No text imposing obligations is understood to demand impossible things.' Walker v. Railroad, 137 N.C. 163, Stone v. Railroad, 144 N.C. 220." Garrison v. Southern R. Co., 150 N.C. 575, 582, 64 S.E. 578, 580 (1909). Prosecutors will also

not be able to comply with a law that allows a successful RJA claim based purely on statistics if defense strike rates are considered in the equation of evaluating racial balances in jury selection.

The RJA Order found that evidence regarding defense strikes could also form the basis of an RJA claim. (RJA Order, p 45, ¶ 6, RJA Order, p 103,¶ 204). Thus the MAR Court ruled that the exercise of peremptory strikes by a capital defendant was sufficient to support a capital defendant's RJA claim. (Id.; RJA Order, p 103, ¶ 204). If this is to be the proper interpretation of the RJA, it will be impossible for prosecutors to ever comply to prevent racial discrimination because it will allow the defense to create its own RJA claim at the time of jury selection in a capital case, based upon the peremptory challenges the defense exercises. This is an absurd result which the Legislature could not have intended because it seeks to punish the failure of the prosecution to effectuate the impossible – to insulate cases from racial discrimination by the defense. This Court should grant review to correct the misinterpretation that statistics alone are sufficient to establish a claim under the RJA and that evidence of defense peremptory strikes are sufficient to establish an RJA claim.

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

In its attempt to construct a framework for the use of statistics in RJA cases, the MAR Court erroneously relied upon the law governing federal employment law in civil cases. The MAR Court applied the Equal Opportunity Employment Commission's [hereinafter "EEOC"] "four-fifths" rule applicable to Title VII cases. The MAR Court further relied upon what are commonly referred to as "mixed motive" federal employment cases. The application of these laws is not appropriate in the criminal context, and this Court should grant review to define the appropriate use of statistics in reviewing claims under the RJA.

EEOC's regulations are published annually in Title 29 of the Code of Federal Regulations (CFR). The EEOC's four-fifths rule is defined in 29 CFR § 1607.4 (D). Title 29 states the regulations' purposes are "for carrying out its responsibilities in the administration and enforcement of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Genetic Information Nondiscrimination Act of 2008." Nowhere in Title 29's identification of the purpose of its regulations does it state that the EEOC regulations are applicable to criminal proceedings. 29 CFR § 1601.1

Our appellate courts have already analyzed statistics in the criminal context,

specifically in the jury selection context. Statistical disparity is already admissible as a factor in determining whether racial discrimination motivated decisions for peremptory strikes.

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

State v. Fletcher, 348 N.C. 292, 320, 500 S.E.2d 668, 684 (1998); See also, State v. Wiggins, 159 N.C. App. 252, 261-63, 584 S.E.2d 303, 311-15 (2003); Miller-El (I) v. Cockrell, 537 U.S. 322, 342-47, 154 L. Ed. 2d 931, 953-56 (2003) (noting that statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but reaffirming that other factors must be considered including the nature of the questions asked during jury selection, state jury-selection practices, and historical evidence).

In North Carolina purposeful discrimination in jury selection is established by showing that race was a "significant factor" in the decision to exercise a peremptory challenge. State v. Waring, 364 N.C. 443, 491, 701 S.E.2d 615, 645 (2010). In the

criminal jury selection context, disparity of strike rates alone is not sufficient to establish that race was a significant factor in the exercise of peremptory challenges. Nothing about the RJA changes this law and the analysis which should be conducted in evaluating jury selection.

While statistical evidence is admissible under the RJA (N.C.G.S. § 15A-2011(b)), nothing in the RJA alters the legal weight and applicability of statistics to capital cases. There is already a body of law in the jury selection context which allows for statistical evidence to be viewed in context with other factors. A federal employment law which allows for statistical significance weighted beyond what this Court has already allowed in the context of criminal jury selection is an unreasonable interpretation of the RJA and should be rejected. The four-fifths rule, or any other regulation of the EEOC, has no basis for application in a criminal capital case, and this Court should not create new law authorizing its use in RJA claims.

Likewise, the RJA Order unreasonably intertwined civil law as applied to "mixed motive" disparate treatment cases. (RJA Order, p 42). Statistical disparate impact analysis has never been sufficient to establish racial discrimination in either the jury selection or the Equal Protection context. See McCleskey, 481 U.S. at 292-93, 95 L. Ed. 2d at 278-79 (disparate impact does not necessarily equal purposeful discrimination in capital cases); Miller-El (I), 537 U.S. at 342-47, 154 L. Ed. 2d at

953-56 (statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but other factors must also be considered); State v. Porter, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990) ("alleged disparate treatment of prospective jurors would not be dispositive necessarily.").

Nothing about the RJA establishes the application of "mixed motive," or EEOC rules, in reviewing a claim of racial discrimination in capital cases. Had the Legislature intended to apply civil law in this criminal context, it certainly could have done so. It did not. As such the more reasonable interpretation of this new statute is that this Court's well established law would continue to apply in the review of alleged racial discrimination in jury selection. It does not include a formula or reliance upon statistical disparity alone.

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

A. The MAR Court's Finding of Racial Discrimination in Robinson's Case Was Erroneous Since Robinson Submitted No Evidence of Discrimination In His Case.

Robinson presented no direct evidence supporting a finding of racial discrimination in his own case. This further highlights the necessity of this Court's

granting review in order to correct the erroneous conclusion that a capital defendant can gain relief without showing racial discrimination ever occurred at any stage of his own case. At the hearing on this matter Robinson presented no witnesses or jurors from his own trial. He did not call either of his trial counsel or any other member of the criminal justice system to testify about any specifics regarding his case. Instead, he merely relied upon the number of jury strikes in his case to establish what he claimed was proof of racial discrimination in his case.

The State was the only party to present evidence from Robinson's trial at the RJA hearing. The State called witnesses in rebuttal to Robinson's claim of racial discrimination which had been based solely on statistical evidence. Judge John Dickson, who had been one of the prosecutors at Robinson's 1994 capital trial, testified directly to the issue at hand -- whether race had been a significant factor in the decisions to exercise peremptory jury strikes at Robinson's trial. Judge Dickson categorically denied that race was a significant factor in the exercise of any peremptory challenge to any African-American venire member in Robinson's trial. (HT p 1092).[6] Thus the only direct evidence of the events occurring during jury

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[6] References herein to "HT p_" are to the official transcript of the evidentiary hearing regarding Robinson's RJA Motion conducted in Cumberland County Superior Court beginning 30 January 2012 and ending 15 February 2012, consisting of thirteen volumes numbered chronologically pages 1 through 2638, and attached hereto as State's Attachment 4.

selection at Robinson's trial was evidence that there was no racial discrimination during jury selection.

Contrary to the only direct evidence presented, however, the MAR Court concluded that Robinson had met his burden of showing that race had been a significant factor during jury selection in Robinson's 1994 capital trial. Because no evidence of racial discrimination during jury selection at Robinson's trial was ever presented to the MAR Court, the court's findings of fact are not supported by competent evidence and do not support the court's unreasonable conclusions of law.

Other portions of Judge Dickson's testimony demonstrate that the RJA Order's findings of fact are not supported by competent evidence from the actual evidence presented. For example, the RJA Order finds as fact the following:

> Robinson's prosecutor Dickson agreed that there was racial discrimination in the criminal justice system and elsewhere, admitted that he harbors unconscious bias, but nevertheless denied ever taking race into account in any jury selection. HTpp. 1177-82.

(RJA Order, p 119, ¶ 244)

This finding of fact is an unreasonable finding from the actual testimony and not supported by competent evidence. On cross-examination Judge Dickson admitted that he could be as subject to subconscious racism as any other person might be. (HT pp 1177-79). He testified that if race was a factor it was a subconscious one which

would not have been a significant factor in his exercising of peremptory challenges. (Id.). It was unreasonable for the MAR Court to convert this testimony into a finding that the witness "admitted that he harbors unconscious bias" (RJA Order, p 119, ¶ 244) and a finding that he acknowledged "his own implicit bias[.]" (RJA Order, p 166,¶ 27).

The RJA Order contains other findings of fact regarding Robinson's jury selection that are clearly erroneous from the record presented. For example, in finding that there was discrimination shown in Robinson's case, the MAR Court made several findings of fact regarding the affidavit submitted by Cumberland County Assistant District Attorney Cal Colyer. (RJA Order, p 149, ¶ 334, p 151-52, ¶¶ 340, 342, and 343). The State does not agree with the MAR Court's characterization of ADA Colyer's affidavit, but more importantly, the RJA Order ignores the fact that ADA Colyer did not participate in any jury selection in Robinson's case. (See State's Exhibit 32; Affidavit of Colyer "...I did not participate in jury selection nor was I present for the Robinson trial in 1994."; attached hereto as State's Attachment 7). Consequently, the record establishes that ADA Colyer could not have discriminated against Robinson in jury selection as he did not participate in Robinson's trial. Even so, the RJA Order finds that ADA Colyer's statements as to why he believed jurors might have been peremptorily challenged in

Robinson's case were "inaccurate or misleading characterizations" of the evidence and "constitute some evidence that reasons offered by prosecutors in Cumberland County and in Robinson's case were neither credible nor race-neutral, and some evidence that race was a significant factor in prosecutor strike decisions." (RJA Order, p 152, ¶344)(emphasis added); see also, (RJA Order pp 149, ¶334, pp 151-52, ¶342, p 152, ¶343); (RJA Order, p 137, fn 19)(court finds numerous instances where prosecutors engaged in differential treatment/peremptory strikes of African-American venire members; finds that some reasons listed were pretextual, others were plausible, race-neutral reasons but that "reference to even one pretextual explanation is some evidence of discrimination."). Basing any finding that discrimination had been proven in Robinson's jury selection based upon ADA Colyer's affidavit was clearly erroneous, considering the fact that ADA Colyer did not participate in any jury selection in Robinson's case.

Further, the conclusion that the prosecution intentionally discriminated in the exercise of peremptory challenges in Robinson's case is belied by the record. Even a brief review of the transcript of the jury selection from Robinson's case would have revealed the most obvious non-racial motivations for the State's exercise of peremptory challenges against the African-American jurors struck by the State in Robinson's case. The State exercised peremptory challenges against five out of ten

African-American potential jurors in the venire. These five jurors were: Tandra D. Whitaker, Margie F. Chase, Sylvia Robinson, Elliot Troy, and Nelson Johnson. Ms. Whitaker was excused when she stated "it's hard to say now" in response to a question if she could personally vote for the death penalty. (State v. Robinson, 91 CRS 23143, T p 371). She stated that she favored life and wouldn't want to be on a case where she had to have a say in someone dying. (Id., at 373-74). Margie Chase stated that she did not believe in the death penalty and did not think she could vote for it because of a guilty conscience. (Id., at 485-88). She said she was brought up not to believe in the death penalty. (Id., at 486-87, 493). ADA Dickson's challenge for cause of this juror was denied and he exercised a peremptory challenge instead. (Id., at 495-99, 506). Sylvia Robinson equivocated on her ability to vote for the death penalty and stated several times that she could not vote for it. (Id., at 1205, 1207-12). She articulated that she favored life imprisonment. (Id., at 1216). ADA Dickson again sought to excuse for cause but when that was denied, he exercised a peremptory challenge. (Id., at 1216). Elliot Troy was unemployed, had a prior public drunkenness charge, and had a friend with a breaking and entering conviction as well as an accessory after the fact to a murder charge where the shooting occurred at a liquor house. (Id., at 273, 316-20). He said that he preferred a life sentence as punishment for murder. (Id., at 323). Finally, Nelson Johnson stated that he would

require an eye witness to testify and that the defendant be caught on the scene in order to convict someone of murder. (Id., at 1797-98). ADA Dickson's challenge for cause was denied, and he exercised a peremptory challenge to excuse this juror. (Id., at 1798). No Batson challenge was raised to any of these strikes. No Batson claim was raised on appeal. Ultimately, the jury which heard Robinson's case was comprised of two African-American jurors, one Native-American juror and nine white jurors.

This Court has already determined that a prospective juror's reservations or doubts about the death penalty provide ample reason for the prosecutor of a capital case to exercise a peremptory strike of the juror. See e.g., State v. Basden, 339 N.C. 288, 297, 451 S.E.2d 238, 242-43 (1994)("A prosecutor may properly exercise a peremptory challenge to excuse a juror due to his hesitancy over the death penalty."); State v. Porter, 326 N.C. at 498, 391 S.E.2d at 151 (a prosecutor's peremptory challenge "need not rise to the level justifying exercise of a challenge for cause."). Likewise, "[c]ourts commonly allow prosecutors to challenge venirepersons who have criminal records or relatives with criminal records." State v. Porter, 326 N.C. at 499, 391 S.E.2d at 151 (quotation omitted). This Court has also made clear that the State's acceptance of eligible African-American prospective jurors is a factor, though not a dispositive one, tending to refute an allegation of purposeful discrimination. State v. Ross, 338 N.C. 280, 285, 449 S.E.2d 556, 561 (1994). It does not appear that

the RJA Order contemplated any of this Court's prior guidance in regard to determining whether race was a significant factor in the exercise of peremptory strikes during jury selection in Robinson's case. Rather, it is apparent that the MAR Court solely based its conclusion that the prosecutors in Cumberland County intentionally discriminated in the exercise of peremptory challenges of five out of ten African American prospective jurors. For reasons noted below, mere statistical disparity has never before been found to be sufficient to establish that race was a significant factor in the exercise of peremptory challenges. Hernandez v. New York, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405-06 (1991) (prosecutions peremptory challenge will not be held unconstitutional solely because it results in a racially disproportionate impact...")(quotation omitted); McCleskey, 481 U.S. at 292-93, 95 L. Ed. 2d at 278-79 (disparate impact does not necessarily equal purposeful discrimination in capital cases); Miller-El (I), 537 U.S. at 342-47, 154 L. Ed. 2d at 953-56 (statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but other factors must also be considered); State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152 ("alleged disparate treatment of prospective jurors would not be dispositive necessarily.").

Robinson did not, because he could not, present any direct testimony of discrimination during the jury selection of his capital case. This is not surprising

since in the eighteen years since his 1994 capital trial, none of Robinson's attorneys have ever raised a claim of racial discrimination in jury selection on direct appeal or in state or federal post conviction review. It is apparent that trial counsel who were both well respected and experienced,[7] were aware and sensitive to possible Batson issues arising during jury selection as the record establishes that trial counsel filed a preemptive Batson motion before jury selection began in Robinson's trial. Even still, trial counsel made no claim of racial discrimination occurring during jury selection at trial.

The RJA Order unreasonably finds discrimination in Robinson's jury selection despite the record which shows no direct evidence of any discrimination occurring at Robinson's trial. The findings of fact found regarding discrimination in Robinson's case are not supported by competent evidence and are clearly erroneous.

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

Robinson consistently objected to all questions inquiring of Superior Court Judges[8] who presided over capital cases tried in Cumberland County between 1990

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[7] At his capital trial Robinson was represented by attorneys Randy Gregory and Edward Brady (now former North Carolina Supreme Court Justice).

[8] The State's evidence was to include testimony of Superior Court Judge Gregory Weeks, who presided over Robinson's RJA Motion and who entered the RJA Order, but Judge Weeks

and 2010, including the presiding judge at his trial, as to whether any racial discrimination had been observed during jury selection. (HT pp 1232-51, 1254-95, 1390; RJA Order, pp 18-23). The MAR Court erroneously sustained these objections and refused to allow admission of such evidence. (HT pp 1295-1303).

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

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moved to quash his subpoena, alleging the subpoena was "unreasonable or oppressive." [See Motion to Quash, attached hereto as State's Attachment 5]. The matter of his subpoena was assigned to another Superior Court Judge who ultimately quashed Judge Weeks' subpoena. No other Superior Court Judges moved to quash the State's subpoena of them.

require.").

The MAR Court misapprehended the law regarding the admissibility of testimony of Superior Court Judges. Nothing in the RJA prevents the State from calling witnesses to rebut the defendant's case. In fact, the RJA wholly supports the use of such evidence. The issue to be decided was whether in Robinson's case the "judgment....was sought or obtained on the basis of race." N.C.G.S. § 15A-2010. The RJA contemplates admission of relevant evidence including, but not limited to the following: "sworn testimony of attorneys, prosecutors, law enforcement officers, jurors or other members of the criminal justice system..." N.C.G.S. § 15A-2011(b)(emphasis added). Because the issue to be decided was whether discrimination existed in Robinson's case, and because the RJA contemplates sworn testimony of members of the criminal justice system as relevant to this issue, the State should have been allowed to offer the testimony of the Superior Court Judge presiding over Robinson's trial, at the very least.

At the RJA Hearing, prosecutors asked the Honorable Lynn Johnson, Superior Court Judge who had presided over Robinson's capital trial in 1994 the following:

> Q: Sir, based upon your observations as trial judge, was race a significant factor in the State's peremptory strikes against black jurors in the case of the State of North Carolina versus Marcus Robinson?

(HT p 1390).

Robinson objected to this question being answered and the MAR Court sustained the objection. (Id.). The State sought to proffer Judge Johnson's testimony, but the MAR Court refused to allow the proffer to be introduced in open court during the hearing. (HT pp 1295-1303). Pursuant to direction of the court, the State presented a proffer of evidence of what would have been Judge Johnson's testimony which was transcribed outside the courtroom and presented to the MAR Court after the hearing in open court concluded.[9] From the RJA Order the State learned that the MAR Court did apparently review this proffer of evidence but concluded the following:

> Finally, the Court has reviewed the offer of proof by the State showing what the judges would have testified to if permitted by the Court. The Court finds that testimony, even if considered by the Court, would not have changed the result in this case and, in fact, would not have assisted the Court in its determination of whether race was a significant factor in jury strikes.

(RJA Order, p 23)(emphasis added).

The proffer of Judge Johnson's testimony, which the MAR Court has concluded would not have made a difference to its determination, would have

[9] All of the Superior Court Judges presiding over capital trials in Cumberland County from 1990 to 2010, except Judge Weeks, provided sworn testimony in a proffer of evidence submitted by the State to the Court, pursuant to the MAR Court's direction. These statements are attached hereto as State's Attachment 6.

established through direct evidence that no racial discrimination occurred during the jury selection in Robinson's case. From the proffer of evidence, the MAR Court learned that Judge Johnson's testimony would have shown the following:

> Q [by prosecutor]: Based upon your observations as the trial judge, did you observe that race was a significant factor in the exercise of any peremptory challenges against any black jurors in the State of North Carolina versus Marcus Robinson?
>
> A [by Judge Johnson]: Absolutely none.
>
> Q: Based upon your observations as the trial judge, did the state racially discriminate in the exercise of any peremptory strike against any black juror?
>
> A: Absolutely not.
>
> Q: As the trial judge in the State of North Carolina versus Marcus Robinson, would you have raised a Batson challenge or a Batson objection ex mero motu, or on your own motion, had you observed the state exercise a peremptory strike against a black juror based upon race?
>
> A: Absolutely.
>
> Q: As the trial judge, if you would have observed the state exercise a peremptory strike against a black juror based upon race and the defense had not raised such a Batson objection, would you have intervened ex mero motu, or on your own motion, to correct that situation by denying the state's peremptory strike and sustaining your own Batson objection?
>
> A: Yes.

Q: And in this particular case, did you see anything by way of exercise of peremptory strikes exercised by the state that were either discriminatory or race was a significant factor indicating to you that you or the defense should have exercised a Batson challenge?

A: There was no race discriminatory use of peremptory challenges in that case.

Q: And race was not a significant factor in the exercise of any peremptory strikes?

A: That is correct.

(State's Attachment 6, State's Offer of Proof, Statement of Judge Lynn Johnson, pp. 25-26)(emphasis added).

This proffer was powerful and compelling evidence, from the one source the law says is best able to evaluate whether racial discrimination occurred during jury selection - the presiding trial judge. This was additional direct evidence that there was no discrimination during jury selection in Robinson's trial. It is inconceivable that the MAR Court would have determined that this evidence "would not have assisted the Court in its determination of whether race was a significant factor in jury strikes" in Robinson's case. (RJA Order, p 23). The MAR Court's exclusion of this key State's evidence was an abuse of discretion.

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

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

It is well established that the presiding judge is in the best position to determine if racial discrimination occurs during the selection of a jury. Consistent with United States Supreme Court case law, this Court has repeatedly emphasized that deference must be shown to the trial court and that reversal of the trial court on a Batson ruling requires the appellate court to find that the ruling was clearly erroneous. "[T]he trial court's decision as to whether a prosecutor had a discriminatory intent is to be given great deference and will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." State v. Lawrence, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000); see e.g., State v. Spruill, 338 N.C. 612, 632-33, 452

S.E.2d 279, 289 (1994), cert. denied, 516 U.S. 834, 133 L. Ed. 2d 63 (1995); see also, State v. Jackson, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988), cert. denied, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989)(this Court might not have reached same result as trial court but "we must [give] deference to its findings"); State v. Best, 342 N.C. 502, 513, 467 S.E.2d 45, 52 (trial "court then held as to each [Batson] challenge that the challenges were not racially motivated. Giving this finding of fact great deference, as we are required to do, we cannot hold it was error for the court to rule as it did"), cert. denied, 519 U.S. 878, 136 L. Ed. 2d 139 (1996); State v. Floyd, 343 N.C. 101, 104, 486 S.E.2d 46, 48 ("[w]hether the prosecutor intended to discriminate against the members of a race is a question of fact, the trial court's ruling on which must be accorded great deference by a reviewing court"), cert. denied, 519 U.S. 896, 136 L. Ed. 2d 170 (1996).

As this Court said in State v. Smith:

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

328 N.C. 99, 127, 400 S.E.2d 712, 727-28 (1991)(citation omitted).

The United States Supreme Court has similarly noted the trial court's exclusive province to review the best evidence in evaluating a prosecutor's state of mind in

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

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

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

In barring Judge Johnson's testimony, as well as the other current and former Superior Court Judges called by the State, the MAR Court prohibited testimony from

the one source best situated to detect and discover any discrimination by the State during jury selection - the presiding judge. Being that such a decision is directly contrary to well established law from this Court and the United States Supreme Court, it was an abuse of discretion and warrants this Court's review.

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

The MAR Court misapprehended the law of this State in concluding that Superior Court Judges were restricted from testifying about jury selection in capital cases. In support of the ruling barring this direct evidence, the MAR Court cited several cases from other jurisdictions and two North Carolina cases which were not controlling or supportive of its decision. See, State v. Simpson, 314 N.C. 359, 334 S.E.2d 53 (1985) and Dalenko v. Peden General Contractors. Inc. 197 N.C. App. 115, 676 S.E.2d 625 (2009).[10]

In Simpson, the North Carolina Supreme Court acknowledged that it is generally accepted that judges are competent to testify as to proceedings held before

[10] Dalenko is completely irrelevant to the present case. In Dalenko a party moved to recuse the presiding judge as he might become a fact witness "because there are issues of fact regarding the prior arbitration proceedings that were before you in September of 2003 that need to be decided independently of whatever interest you may have of preserving your prior rulings." Dalenko, 197 N.C. App. at 123, 676 S.E.2d at 630-31. Here there were no prior rulings on discrimination by Judge Johnson because no Batson challenge was made by defendant at trial.

them. However, where concerns exist that a judge's testimony might be accorded more weight before the jury or where the judge may be required to testify as to his or her mental processes in rulings, allowing judicial testimony may not be appropriate.

> It is generally accepted that a judge is competent to testify as to some aspects of a proceeding previously held before him. Hale v. Wyatt, 78 N.H. 214, 98 A. 379 (1916); People v. Bevilacqua, 12 Misc.2d 558, 170 N.Y.S.2d 423, reversed on other grounds, 5 N.Y.2d 867, 155 N.E.2d 865, 182 N.Y.S.2d 18 (1958). However, the propriety of calling a judge as a witness in cases not on trial before him has been questioned by many courts. Some courts have taken the position that allowing judges to testify would be prejudicial to the rights of the opposing party due to the fact that the jury would likely accord greater weight to the testimony of a judge than an ordinary witness. E.g., Merritt v. Reserve Insurance Company, 34 Cal.App.3d 858, 110 Cal.Rptr. 511 (1973); Commonwealth v. Connolly, 217 Pa.Super. 201, 269 A.2d 390 (1970). Other courts have viewed with trepidation the possibility that judges might be subjected to questioning as to the mental processes they employed to reach a particular decision. E.g., State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943); State ex rel. Carroll v. Junker, 79 Wash.2d 12, 482 P.2d 775 (1971). Because of these problems, it has been held that a judge should not be called as a witness if the rights of the party can be otherwise protected. E.g., Woodward v. City of Waterbury, 113 Conn. 457, 155 A. 825 (1931); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421.

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

None of the possible concerns mentioned in Simpson apply to the present case. The concern that "that the jury would likely accord greater weight to the testimony

of a judge than an ordinary witness" does not apply as there was no jury to determine this issue. The concern that "judges might be subjected to questioning as to the mental processes they employed to reach a particular decision" does not apply to testimony from Judge Johnson, or to any other trial judge where no Batson challenge was ruled upon at trial.

The RJA Order also erred in finding that the State failed to justify calling Superior Court Judges to testify because the State failed to show that other court personnel who observed jury selection could not testify instead of Superior Court Judges. (RJA Order, p 22). This finding fails to acknowledge this Court's well established law that trial judges are in the best position to assess racial discrimination in jury selection and that deference is owed to them considering their unique position presiding over trials. Moreover, unlike other court personnel, the trial judge is in a unique position to rule ex mero motu upon any detection of constitutional violation occurring during a capital case, including during jury selection. This makes a trial judge's testimony all the more relevant to the issue of whether race was a significant factor in the exercise of peremptory challenges of jurors. A bailiff, chiefly concerned with courtroom security, or a court clerk, chiefly concerned with record keeping, are not nearly as well positioned as the presiding trial judge to observe the nuances of personal interaction occurring during the jury selection process. The trial judge,

unlike any other courtroom personnel, is uniquely situated to observe, detect, and correct any discrimination occurring during jury selection. It is for this reason that this Court (and all other courts) defer to the trial courts' assessment of whether discrimination has occurred during jury selection.

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

Further, the MAR Court's determination that Robinson has suffered racial discrimination in his own case, even after reviewing Judge Johnson's proffer of evidence, is clearly erroneous. Judge Johnson's proffer clearly and unequivocally states that there was no racial discrimination in Robinson's case. (State's Attachment 6, State's Offer of Proof, Statement of Lynn Johnson, pp. 25-26). Former prosecutor Dickson also testified that race was not a significant factor in his decisions to exercise peremptory challenges in Robinson's case. (HT p 1092). This evidence completely

and overwhelmingly rebuts any inference of racial discrimination in jury selection at Robinson's case. The MAR Court's conclusion that Robinson has shown discrimination in his own case is clearly erroneous in light of the proffered testimony of Judge Johnson, which was consistent with the direct testimony received of former prosecutor Dickson.

The MAR Court abused its discretion in excluding testimony from Superior Court Judges who, according to well established law, are in the best position to determine whether racial discrimination has occurred during jury selection. This Court should grant review in order to clarify that testimony of Superior Court Judges is relevant, admissible, and owed deference on review of claims of racial discrimination in jury selection, consistent with this Court's prior well established law.

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

Contrary to well established law, the MAR Court concluded that the numerical disparities in jury selection were, by themselves, sufficient to establish intentional discrimination. (RJA Order, p 70, ¶ 79). From the numbers alone the MAR Court found intentional discrimination not only by the prosecutors in Robinson's case but also by all prosecutors statewide from 1990 to 2010. (Id.). Not only is this ruling

erroneous, but also it stands alone in concluding that disparate impact of jury strikes in itself is sufficient to prove discriminatory intent. The law is clear that in order to show race was a significant factor in decisions to exercise peremptory challenges during jury selection a defendant must show purposeful discrimination.

It is settled in North Carolina that "purposeful discrimination" in a jury strike is established by showing that race was a "significant factor" in the decision to strike. State v. Waring,364 N.C. at 491, 701 S.E.2d at 645.

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

Id. Other North Carolina cases support this analysis. See e.g., State v. Best, 342 N.C. at 513, 467 S.E.2d at 52 ("The court then held as to each challenge that the challenges were not racially motivated"); State v. Thomas, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991)("In light of all the relevant circumstances, we affirm the trial court's ruling that no purposeful racial discrimination occurred in the peremptory challenges of black jurors in this case."); State v. Golphin, 352 N.C. 364, 433, 533 S.E.2d 168, 215 (2000)("Given the foregoing, we are convinced the State did not discriminate on the basis of race in exercising its peremptory challenges against Holder and Murray.")

Similarly, under the RJA itself, to show that "[r]ace was a significant factor in

decisions to exercise peremptory challenges during jury selection," pursuant to N.C.G.S. § 15A-2011(b)(3), the defendant must necessarily show purposeful discrimination, which would involve intent and motive. N.C.G.S. § 15A-2011(b)(3)(emphasis added). Thus under N.C.G.S. § 15A-2011(b)(3), a defendant is required to show that race was a significant factor in decisions to exercise peremptory challenges during jury selection, not in the results of disparities in jury strikes. Under this portion of the RJA, the key word is decisions - not results, or disproportionate strike rates. This is a determination to be made as to individual action taken, not results of strike patterns across a wide spectrum. Consequently, under N.C.G.S. § 15A-2011(b)(3), it is not the numerical totals of strikes which is determinative, but rather it is the actual basis of the decision to exercise the peremptory strike which establishes the claim.

The above-noted specific language regarding the exercise of peremptory challenges which directs the court's attention to the decisions made to challenge a particular juror is identical to this Court's evaluation in Batson claims on direct review, requiring purposeful discrimination.

Batson and its progeny do not guarantee proportional representation on the jury by race. See Batson, 476 U.S. at 86 n.6, 90 L. Ed. 2d at 80 n.6 ("It would be impossible to apply a concept of proportional representation to the petit jury in view

of the heterogeneous nature of our society."). Rather, those decisions protect against purposeful discrimination in the jury selection process. Thus, a prosecutor could peremptorily challenge all members of a particular race or a particular gender without violating any constitutional guarantees, so long as the challenges were not impermissibly motivated. Inversely, even one racially discriminatory strike is a constitutional violation even if the number of strikes are equally distributed by race. Snyder v. Louisiana, 552 U.S. at 478, 170 L. Ed. 2d at 181 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose.")(citations omitted). The RJA, by its similar language of requiring the defendant to prove that decisions to exercise peremptory challenges were based upon race as a significant factor, anticipates the same.

No other court has ever stated that numerical disparities alone are sufficient to establish that race was a significant factor in the exercise of peremptory challenges. See Hernandez, 500 U.S. at 359, 114 L. Ed. 2d at 405-06 (peremptory challenges which result in disproportionate impacts are not a violation of the Equal Protection Clause without proof of discriminatory intent or purpose); McCleskey, 481 U.S. at 292-93, 95 L. Ed. 2d at 278-79 (disparate impact does not necessarily equal purposeful discrimination in capital cases); Miller-El(I), 537 U.S. at 342-47, 154 L. Ed. 2d at 953-56 (statistical disparity "raises some debate as to whether the

prosecution acted with a race-based reason when striking prospective jurors," but other factors must also be considered); State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152 ("alleged disparate treatment of prospective jurors would not be dispositive necessarily."); Wiggins, 159 N.C. App. at 261-63, 584 S.E.2d at 311-15. Instead, every court has required proof of purposeful discrimination to show that race was a significant factor in decisions to exercise peremptory challenges in jury selection. (Id.). Nothing in the RJA requires otherwise.

This Court's well-established law provides ample guidance in the evaluation of whether prosecutors have engaged in racial discrimination during jury selection. Unfortunately, the MAR Court employed none of it in evaluating the evidence before it. Instead, the MAR Court eschewed this Court's well worn principles for properly evaluating motivation in jury strikes. The MAR Court announced as much by concluding that Batson's "protections have proven to be more illusory than real." (RJA Order, p 115, ¶ 234).

The newly enacted RJA did not fundamentally alter the legal framework of evaluating jury selection in our criminal jurisprudence. Had it meant to do so, the Legislature surely would have stated so in the newly enacted statute. From a practical standpoint, it is unreasonable to hold the criminal justice system to one standard to be applied in evaluating jury selection at trial, and a wholly different standard to be

applied in evaluating that same jury selection in post conviction. Yet under the auspice of interpreting the RJA, this RJA Order has fundamentally divorced itself from this Court's precedent for evaluating jury selection and launched forward to create new law.

Because N.C.G.S. § 15A-2011(b)(3) specifically uses language identical to that used in a Batson inquiry, the proper interpretation of the meaning of statistical evidence to be evaluated in an RJA claim should be the same as the use of statistics in Batson claims. Accordingly, reliance on statistics alone to show only a disparity in strike rates between African-American jurors and white jurors is insufficient to prove that race was a significant factor in the decisions to exercise peremptory challenges. The RJA does not allow evidence of mere numbers to be sufficient to determine that racial discrimination existed. Rather the RJA requires proof of purposeful discrimination in the decisions made to exercise peremptory challenges. Consequently, contrary to the RJA Order, a defendant must show more than mere disparity in jury selection to establish that the decision to exercise a peremptory strike was based upon purposeful discrimination.

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

the RJA.

D. The MAR Court Erred as Matter Of Law in Re-Evaluating Jury Strikes Which Have Already Been Determined to Be Free of Racial Discrimination By Other Courts Reviewing Batson Challenges to these Strikes.

The RJA Order erroneously concluded that prosecutors intentionally discriminated statewide in the exercise of peremptory challenges even where a Batson challenge had been made and rejected by the trial court in other cases. In so doing, the MAR Court has failed to afford deference to the trial courts reviewing those Batson challenges in the first instance, and has attempted to overrule this Court's review of those Batson challenges on direct appeal. This is an erroneous finding of fact and error as a matter of law.

Well-established law advises deference to trial courts in reviewing Batson challenges. Batson v. Kentucky, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21; Hernandez, 500 U.S. at 364, 114 L. Ed. 2d at 408-09 ("In Batson, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.") "Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases." Id. at 364, 114 L. Ed. 2d at 409. The Court noted finally that "an issue does not lose

its factual character merely because its resolution is dispositive of the ultimate constitutional question." Id. at 366, 114 L. Ed. 2d at 410.

As noted above, this deference is owed because all agree that trial courts are in the best position to observe firsthand "reactions, hesitations, emotions, candor and honesty" of both the lawyers and prospective jurors. See e.g., State v. Smith, 328 N.C. 99, 127, 400 S.E.2d 712, 727-78; see also, Batson,476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21 (noting that findings on the ultimate purpose for the exercise of peremptory strikes "largely will turn on evaluation of credibility," and as a result the "reviewing court ordinarily should give those findings great deference.").

Hence, the trial court's ruling on a Batson objection may be overturned only if the reviewing court finds that the Batson ruling by the trial court was "clearly erroneous." Hernandez, 500 U.S. at 364-65, 369, 114 L. Ed. 2d at 409; State v. D. Robinson, 336 N.C. at 94, 443 S.E.2d at 313 ; State v. Spruill, 338 N.C. at 632-33, 452 S.E.2d at 289. This Court in the regular course of reviewing Batson challenges on appeal, defers to the trial court's assessment. Smith, 328 N.C. at 127, 400 S.E.2d at 727-78.

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

same deference here to the review of the decisions to exercise peremptory challenges.

Without acknowledging the deference owed trial courts and the justification for it, here the MAR Court engaged in a re-assessment of jury strikes which were made and previously rejected by trial courts. (See e.g., RJA Order, p 132, ¶ 286 (Dwight Robinson); RJA Order, p 133, ¶ 287 (Barnes, Blakeney, Chambers); RJA Order, p 133-34, ¶ 288, and p 135, ¶ 292, and pp 136-37, ¶ 300 (Golphin); RJA Order, p 136, ¶ 299 (Fowler); RJA Order, p 138, ¶ 304 (Barden)). Further, the MAR Court even engaged in a re-assessment of cases in which this Court had evaluated the Batson claim on direct appeal and determined that race was not a significant factor in the exercise of the peremptory strike. See RJA Order, pp 132-55; State v. D. Robinson, 330 N.C. 1, 19-20, 409 S.E.2d 288, 298 (1991); State v. D. Robinson, 336 N.C. 78, 94-95, 443 S.E.2d 306, 313 (1994), State v. Fletcher, 348 N.C. 292, 319, 500 S.E.2d 668, 684 (1998); State v. Barnes, 345 N.C. 184, 211-13, 481 S.E.2d 58-59 (1997); State v. Golphin, 352 N.C. 364, 433, 533 S.E.2d 168, 215 (2000); State v. Bell, 359 N.C. 1, 16, 603 S.E.2d 93, 105 (2004). This determination is in error as a matter of law.[11]

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[11] The MAR Court once acknowledged this Court's prior determination finding no racial discrimination in jury selection in a capital case, in State v. Barnes, 345 N.C. 184, 211-12, 481 S.E.2d 44, 58-59 (1997), but went on to re-evaluate the jury strike (against prospective juror Hall), finding it evidence in support of the RJA claim. (RJA Order, p 133, fn 17). So where this Court found no racial discrimination, the MAR Court has found evidence of racial discrimination to support the RJA claim. This is clearly erroneous. The MAR Court's reliance upon State v. Bone,

In addition to ruling contrary to Batson, the MAR Court's evaluation of jury strikes constitutes an overruling of other trial court's decisions on those same jury strikes. However, in this state, one Superior Court cannot overrule another. "The power of one judge of the superior court is equal to and coordinate with that of another." Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966).

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

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

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

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

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

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354 N.C. 1, 26-28, 550 S.E.2d 482, 497-98 (2001), as justification for ignoring this Court's prior ruling is inapplicable as the very same issue to be determined in the Batson challenge raised during the Barnes trial was the very same issue the MAR Court re-evaluated contrary to this Court's determination fifteen years earlier.

S.E.2d 495, 499 (1981)).

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

Moreover, it is axiomatic that the Superior Court cannot overrule this Court. Here, however, the RJA Order engaged in a re-assessment of jury strikes which this Court has already determined to be not racially discriminatory, and concluded just the opposite. In so doing, the RJA Order attempted to overrule this Court's legal conclusions finding these jury strikes free of racial discrimination. The MAR Court's conclusions here and otherwise are in error as a matter of law and must be reversed.

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

The MAR Court's reliance upon the MSU Study for its determination that race was a significant factor in decisions to exercise peremptory challenges was clearly erroneous and unreasonable for three reasons: 1) the MSU Study erroneously

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

The MSU Study purportedly sought to determine if race was a significant factor in prosecutors' decisions to exercise peremptory challenges. (RJA Order, p 46, ¶ 9; HT pp 110-11). The study had two significant, and very different, parts. The first part was a statistical survey of peremptory strikes across geographical regions, including the State, the Judicial Division, and the County of prosecution for each capital case. These statistics represent the number of jurors excused by use of peremptory challenges in the sample of 173 capital cases in the state.[12] The study also

[12] The MSU Study relied upon a limited sample of 173 capital cases tried in the state during the time period from 1990 to 2010 which resulted in the imposition of the death penalty. It did not include capital cases tried during this same period which resulted in life imprisonment. The State has argued, and continues to assert, that this sample which excluded cases in which life sentences were imposed and cases where the death sentence has already been carried out is insufficient and not a valid representation of jury selection in capital cases in North Carolina tried during this time period.

attempted to catagorize the race of those individual jurors.[13] (HT pp 111-13, 120).

The RJA Order found that in Part I of the MSU Study, the "unadjusted disparities [of jury strikes] measure differential race outcomes without regard to other variables that could potentially explain peremptory strikes." (RJA Order, p 34, fn 7). From this unadjusted data alone, MSU researchers concluded an "inference that race was a significant factor in prosecutors' use of peremptory strikes" in North Carolina, in the Second Judicial Division, in Cumberland County, and in Robinson's case. (RJA Order, p 69, ¶ 77). As a result of these unadjusted disparity of strike rates alone, the MAR Court concluded that "race was a materially, practically and statistically significant factor in decisions to exercise peremptory challenges during jury selection by prosecutors" who sought the death penalty across the State, in the Second Judicial Division, in Cumberland County and in Robinson's case. (RJA Order, p 70, ¶ 79).

The second part of the MSU Study attempted to assign motivations which

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[13] Where race was not noted in the transcript or on a juror questionnaire, the MSU Study relied mostly on records from voter registration and internet searches to determine a juror's race. (HT pp 122-24, 127). The MAR Court noted that in 6.9% of the cases, race could not be determined from a self-reporting source. (RJA Order, p 54, ¶ 31). In those cases, the MSU Study used defense counsel representations and court clerk notations in the seating chart to define the race of the juror. (Id.). The MAR Court's acceptance of this as a valid source to define the race of the juror is contrary to well established law and an error of law. This Court has made clear that only jurors may supply this information and that the Court will not rely upon the subjective assessment of counsel or court personnel to define the race of the juror. State v. Brogden, 329 N.C. 534, 407 S.E.2d 158 (1991); State v. Mitchell, 321 N.C. 650, 655-56, 365 S.E.2d 554, 557-58 (1988).

might explain why these jurors were stricken. (HT p 112). The RJA Order found that in Part II of the MSU Study, the researchers examined whether the "disparities in the unadjusted data were affected in any way by factors that correlate with race but that may themselves be race-neutral." (RJA Order, p 71, ¶ 81). In this, the MSU Study employed a statistical regression analysis model, the purpose of which was to "take into account and control for the impact of those non-racial variables." (RJA Order, p 34, fn 7)(see also HT p 100 (defense witness testifying that regression analysis is simply a statistical model which allows the researcher to "disentangle potential factors that might bear on the same outcome.")). "The result of a logistic regression analysis is an estimate of the influence of each of several explanatory factors on the outcome, stated as an adjusted odds ratio." (RJA Order, p 75, ¶ 90). In short, the researchers attempted to identify all the many variables, other than race of the juror, which might explain why the prosecution would exercise a peremptory strike of a juror from a capital murder trial.

The researchers settled on twelve non-racial variables, or reasons, to explain, other than race, why a juror might be removed from the jury. (RJA Order, p 75, ¶ 92).[14] The MAR Court found that these variables were potential alternative

[14] In total the MSU Study researchers identified sixty-five "candidate" variables, but focused their tabulations on twelve which were most commonly identified as potential reasons explaining a prosecutor's strike of a juror. (RJA Order, p 88, ¶ 120, HT pp 175-179, 182-85). Essentially the

explanations for "apparent race-based disparities." (Id.). These variables were chosen based upon one of the MSU researcher's review of Batson litigation for the most common reasons given by prosecutors to peremptorily excuse jurors. (RJA Order, p 74, ¶ 88; HT p 179). It does not appear from the record that this researcher ever talked with North Carolina prosecutors or judges who had engaged in capital litigation in North Carolina in identifying potential explanatory reasons for peremptory strikes. (HT pp 121-22, 175). Nonetheless, the MAR Court found these variables were "highly representative of the explanations given by prosecutors as factors used in their exercise of peremptory strikes[.]" (RJA Order, p 75, ¶ 92).

The twelve variables which the MSU Study recognized as the most "highly explanatory" (id., at p 78-79, ¶96) non-racial justifications for striking a juror statewide were: 1) venire members who expressed reservations about applying the death penalty; 2) venire members who were not married; 3) venire members who were or had been accused of a crime; 4) venire members who stated that serving on the jury would be a hardship; 5) venire members who were homemakers; 6) venire members who worked in law enforcement or knew someone who worked in law enforcement;

MSU researchers were identifying the most common reasons revealed through patterns that occurred in jury selection. (HT p 175). As noted below, the MAR Court rejected any other variable not appearing on the candidate list of potential variables as "idiosyncratic" and therefore insignificant to the evaluation of the issue of whether race was a significant factor in the decision to exercise a peremptory challenge.

7) venire members who knew the defendant; 8) venire members who knew a witness in the case; 9) venire members who knew one of the attorneys in the case; 10) venire members who expressed a view that "suggested favorability to the State"; 11) venire members who went to graduate school; 12) venire members who were twenty-two years of age or younger. (RJA Order, pp 76-77, ¶ 93; HT p 187; 197-98).[15]

This regression analysis was then used to analyze a random sample of about twenty-five percent of the total number of jurors peremptorily struck from cases which resulted in death sentences. (HT p 164). The random sample served as a representative sample from which researchers drew inferences about the whole statewide population used in the study. (HT p 167).

The MSU Study concluded that, after controlling for the twelve non-racial variables, the odds ratio supported the conclusion that race was the reason for the peremptory strikes included in its study. (RJA Order, p 79, ¶ 96; HT pp 208-09, 213).

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[15] It is significant that these variables changed, depending upon the geographical area to be analyzed. In its analysis of the peremptory challenges in Cumberland County cases, the MSU researchers only identified eight potential non-racial variables, which included different variables than the twelve listed above. (RJA Order, pp 80-81, ¶ 101; HT pp 204-05). The controlled variables changed again when researchers reviewed only the cases tried by certain prosecutors in Cumberland County, including Robinson's case, for which only three variables were identified. (RJA Order, pp 83-84, ¶ 106, HT pp 210-11, 214). The MSU researchers created a "candidate variable list of 65 factors which could potentially explain strike decisions." (RJA Order, p 88, ¶ 120; HT p 185). From this list, the MSU Study identified patterns emerging in each geographical area and selected the "most highly" explanatory list of variables for that area (See e.g., RJA Order, pp 78-79, ¶96; RJA Order, pp 80-81, ¶¶99, 101; RJA Order, pp 82-83, ¶¶104-06; HT pp 194-95, 210-11, 214).

This conclusion led the MAR Court to find that

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

(RJA Order, p 87, ¶ 117). Therefore, based upon this regression analysis, that allegedly controlled for all the non-racial reasons which could have motivated a prosecutor to peremptorily strike a juror, the RJA Court concluded that race was "a materially, practically and statistically significant factor in decisions to exercise peremptory challenges during jury selection by prosecutors when seeking to impose death sentences in capital cases" in the State of North Carolina, in the Second Judicial Division, in Cumberland County, and in Robinson's case. (RJA Order, p 87, ¶ 118).

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

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

The MSU Study concluded an inference of intentional racial discrimination

from the unadjusted disparity of strike rates alone. (RJA Order, pp 69-70, ¶¶ 77, 80). As a result of the unadjusted disparity of strike rates alone, the MAR Court concluded that "race was a materially, practically and statistically significant factor in decisions to exercise peremptory challenges during jury selection by prosecutors" who sought the death penalty across the State, in the Second Judicial Division, in Cumberland County and in Robinson's case. (RJA Order, p 70, ¶ 79). From this the MAR Court concluded that "[b]ased on the unadjusted data alone, the Court so finds that prosecutors in capital cases have intentionally discriminated against black venire members" in the entire state, in the Second Judicial Division, in Cumberland County and at Robinson's trial. (RJA Order, p 70, ¶ 80)(emphasis added). As noted above, no other court has ever stated that numerical disparities alone are sufficient to establish that race was a significant factor in the exercise of peremptory challenges. See Hernandez, 500 U.S. at 359, 114 L. Ed. 2d at 405-06 (peremptory challenges which result in disproportionate impacts are not a violation of the Equal Protection Clause without proof of discriminatory intent or purpose); McCleskey, 481 U.S. at 292-93, 95 L. Ed. 2d at 278-79 (disparate impact does not necessarily equal purposeful discrimination in capital cases); Miller-El (I), 537 U.S. at 342-47, 154 L. Ed. 2d at 953 (statistical disparity "raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors," but other factors

must also be considered); State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152 ("alleged disparate treatment of prospective jurors would not be dispositive necessarily."); Wiggins, 159 N.C. App. at 261-63, 584 S.E.2d at 311-15.

To the extent that the MAR Court relied upon the MSU Study which concluded that racial disparities in strike rates were, by themselves, sufficient to establish that race was a significant factor in decisions to exercise peremptory challenges, this was unreasonable because it is contrary to this Court's prior precedent and that of the United States Supreme Court.

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

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

the variables identified by the MSU Study.

The MAR Court acknowledged that the State's expert, Joseph Katz, criticized the MSU Study because it "failed to appropriately define and include all relevant variables in its analysis[,]" noting, for example, that the variables could not capture what was not in the written record. (RJA Order, p 88, ¶ 120). However the RJA Order dismissed this criticism, finding that the "MSU Study has collected information on all potential non-racial variables that might bear on the State's decision to exercise peremptory challenges and which could correlate with race and provide a non-racial explanation for the racial disparities[.]" (RJA Order, p 89, ¶ 120)(emphasis added). The MAR Court dismissed any suggestion that the MSU Study had not sufficiently captured all the many non-racial reasons that could explain a prosecutor's exercise of a peremptory challenge by concluding that any reason not listed in the MSU Study list was an "idiosyncratic"reason and was not significant. (RJA Order, pp 89-90, ¶ 122)(the "MSU Study controlled for all significant variables that influence prosecutorial strike decisions and the presence of idiosyncratic reasons for strike decisions by prosecutors do not influence, bias or skew the findings of the MSU Study.")(emphasis added). In other words, the MAR Court rejected any other explanatory variable which may exist if it was not included in the MSU Study. Thus the MAR Court concluded that any other variable, even if it is a race neutral

explanation for the strike, would be "idiosyncratic" and would not have changed the court's conclusion that prosecutors have intentionally discriminated in every case across North Carolina. The problem with this finding is that it is contrary to the well established law of this Court which has identified a plethora of non-racial reasons justifying peremptory strikes in countless cases reviewing Batson challenges over the years. A vast number of reasons which this Court has found would be non-racial reasons explaining an exercise of peremptory challenge are not included in the MSU Study upon which the MAR Court relied in forming its opinion.

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

For instance, the MSU Study did not identify as one of it's pre-set variables that a prosecutor might choose to exclude a juror because of the juror's feelings about drugs, or drug dealers, or alcohol, or substance abuse, though these factors might

obviously affect the jurors' assessments of the evidence in a capital case involving drugs and alcohol. Likewise, the MSU Study did not identify a variable as to a juror's feelings about psychiatric evidence, including psychological testimony, though these too might influence a juror's feelings about a capital case, especially if the prosecution anticipated that the defense would present psychological testimony. The MSU Study did not include variables as to a juror's feelings about the sufficiency of a single eyewitness or of accomplice testimony, although this too might be extremely important in the assessment of a juror qualified to serve on a capital case where such issues might be anticipated to be presented. The MSU Study also did not include variables as a juror's feelings about gangs or gang membership, although this would have been relevant to a prosecutor's evaluation in a case involving defendants or witnesses involved in gang activity.

The MSU Study also did not, because it could not, include observations which were not apparent from the transcript and/or a jury questionnaire. These might include the subtle nuances of demeanor, personal interaction, attitude, voice inflection, eye contact, body language, nervousness, candor, and personal appearance. These are all relevant observations that any litigant would use in evaluating whether to exercise a peremptory challenge in any case, capital cases included. State v. Porter, 326 N.C. at 500, 391 S.E.2d at 152 ("[f]ailure to make appropriate eye contact with

the prosecutor when coupled with other reasons can be a legitimate reason to peremptorily challenge a prospective juror . . . . Excessive eye contact with defense counsel when coupled with other reasons can be an equally legitimate reason."); See, State v. Smith, 328 N.C. at 125-26, 400 S.E.2d at 727 (prospective juror's nervousness or uncertainty in response to counsel's questions, may be a proper basis for a peremptory challenge, absent defendant's showing that the reason given by the State is pretextual. . . ."); State v. Floyd, 343 N.C. at 105, 468 S.E.2d at 49 (prospective juror's answers indicated she was headstrong and she wore tinted glasses, making eye contact with her difficult); Purkett v. Elem., 514 U.S. 765, 769, 131 L. Ed. 2d 834, 840 (1995)(court found reason offered for strike that juror had long, unkempt hair as well as a mustache and bear to be a racially neutral reason, noting that shagginess and facial hair is not peculiar to any particular race); and United States v. Lane, 866 F.2d 103, 106 (4th Cir. 1989)(prospective juror's "general appearance and demeanor" may properly influence prosecutor's decision). The MSU Study did not take into account juror inattentiveness or sleeping which may have been obvious to the participants at trial but would not appear in the record. State v. Caporasso, 128 N.C. 236, 244, 495 S.E.2d 157, 162 ("When, as here, a juror displays a lack of attention, the prosecution may use a peremptory challenge to excuse the juror from service"), appeal dismissed, 347 N.C. 674, 500 S.E.2d 91 (1998); State v.

Kandies, 342 N.C. 419, 436, 467 S.E.2d 67, 76 (1996)(prospective juror "nodding off" during voir dire). Perhaps most importantly, the MSU Study could not sufficiently capture the quality and quantity of juror responses on issues. Whether the juror was strongly entrenched in a position or only mildly acknowledging it could not be captured in a study that looked only to juror questionnaires and the cold record of the transcript.

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

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

discriminatory in their jury strikes.

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

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

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

were sufficient to establish race was a significant factor in decisions to exercise peremptory challenges. Nonetheless, these same statistics included cases where Batson challenges were made and rejected by the trial court at trial, some of which were later raised and rejected by this Court. Inconsistent with these prior determinations, the MSU Study contains these very same juror strikes. Because these jury strikes did not fall within the set list of variables which the researchers determined to be race netural reasons for a strike, the results of the study showed that the strikes were based upon race. The MAR Court's reliance on a study which concludes the exact opposite of what this Court has already found in regard to these specific jury strikes is clearly erroneous.[16]

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

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

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

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

1. The MAR Court's Findings of Fact from Its Analysis of the Cold Record Is Clearly Erroneous because the Findings of Fact Are not Supported by the Record.

Not only has the MAR Court erred in re-evaluating legal conclusions which have already been determined by other Superior Courts and by this Court, but also the MAR Court's assessment of the facts found from the record are clearly erroneous as they are not supported by the record. The MAR Court engaged in a re-assessment of jury strikes in specific capital cases from the transcripts of selected cases and determined that these peremptory strikes constituted evidence of intentional discrimination. (RJA Order, p 132, ¶ 285). Inconsistently, the MAR Court conducted an evaluation of these peremptory strikes based upon transcripts from the jury voir dire in these cases but discounted the same analysis by prosecutors reviewing these same jury transcripts years after the case. (See RJA Order, p 126, ¶ 267)(discounting affidavits of prosecutors reviewing transcripts who did not participate at trial and also finding the "probative value of a post hoc response from a prosecutor [who did participate at trial] several years after the trial about why he or she struck a particular

juror" to be of "limited" probative value).[17] Notwithstanding this inconsistency, the MAR Court engaged in an evaluation of these peremptory strikes and made findings of fact of these strikes which are clearly erroneous from the record presented.

In introducing an entire section of "Case Examples of Discrimination" the RJA Order states:

> The Court finds that the following examples from capitally tried cases individually and collectively constitute some evidence that race played a role in the exercise of peremptory strikes by North Carolina prosecutors and some evidence of intentional discrimination.

(RJA Order p. 132, ¶ 285.)

But as shown below there are several instances where the RJA Order either misapplied the law or finds facts unsupported by the record. A few examples illustrate the point.

The RJA Order gives examples of cases in which prosecutors allegedly "struck African-American venire members because of their membership in an organization or association with an institution that is historically or predominantly African-American." (RJA Order, p 132). One such example listed in the RJA Order

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

is State v. Dwight Robinson. The RJA Order finds as a fact that "the prosecutor struck African-American venire member Lolita Page in part because she was a graduate of North Carolina State A&T University." (RJA Order, p 132, ¶ 286). Contrary to the MAR Court's conclusion, the transcript establishes that the basis for the prosecution's exercise of a peremptory strike of Ms. Page was not because of the school from which she graduated but because she had a master's degree in education and had a young male child approximately the age of the defendant. The prosecutor stated his reasons as follows:

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

impartial to the State.

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

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

Again it is significant that a Batson challenge was raised and rejected in Dwight Robinson's case. Yet the RJA Order re-analyzed the exercise of this peremptory strike without affording deference to the trial court's assessment. Notably the MAR Court recognized that a Batson challenge was made and rejected, but the RJA Order dismissed this finding, noting that trial counsel failed to argue that "attendance at a historically black college was not a race-neutral explanation" for the peremptory strike. (RJA Order, p 133, fn 16). The obvious fallacy with this assertion, however, is that the record belies the claim that the prosecutor exercised a peremptory

based upon the juror's attendance at North Carolina A&T University.

These findings of fact are clearly erroneous from the record. As a result, the RJA Order's finding of racial discrimination in this case is not based on competent evidence and cannot support the conclusions of law.

The RJA Order gives examples of cases in which prosecutors allegedly "struck African-American jurors after asking them explicitly race-based questions." (RJA Order, p 133). One such example listed in the RJA Order is State v. Barnes, in which the MAR Court found that the prosecution "directed questions about the potential impact of racial bias only to the black venire members, Melody Hall and Chalmers Wilson, and did not ask those questions to non-black venire members." (RJA Order, p 133, ¶ 287).

As an initial matter it is important to note that the law is well settled that inquiry of potential jurors as to potential interracial biases is not only acceptable but must be allowed in a cross-racial killing where the State is seeking the death penalty. Turner v. Murray, 476 U.S. 28, 90 L. Ed. 2d 27 (1986)(overturning death sentence after trial court would not allow jury to be questions regarding racial bias); State v. D. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991). This is because our courts have recognized that racial prejudice which jurors bring to trial can affect the jury. As the United States Supreme Court noted in Rosales-Lopez v. United States, 451 U.S. 182,

68 L. Ed. 2d 22 (1981):

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

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

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

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

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

Comparing this exchange to questioning of other jurors highlights the fact that this was an appropriate exchange to ferret out any racial discrimination. Upon similar questioning, potential juror Mr. Wilson (African-American) stated unequivocally that he would not be subject to criticism. The prosecution accepted him, but Co-

Defendant Blakney peremptorily struck him from the jury. (State v. Barnes, JS T Vol 1, p 370; Vol 2, p 69). Potential juror Mrs. Deborah Rice (African-American) stated unequivocally that she would not be subjected to criticism for returning a guilty verdict or a death sentence recommendation (State v. Barnes, JS T. Vol. 2, pp 8-9). The prosecutor accepted Mrs. Rice as a juror (Id. at p 21), but the defense peremptorily struck her from the jury. (Id. at 60-61.)

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

MR. KENERLY: Mr. Smith and Mrs. Rice, in the last series of jurors that were in the box, I asked some questions about being subject to criticism either way for your decision in this case if you are selected to be a juror. Mrs. Rice, would you be in your daily life, the people you see on a regular basis, work with or family or go to church with, or whatever, would you be subject to being criticized if you returned a verdict of guilty of first degree murder in this case?

MRS. RICE: No.

MR. KENERLY: If it went to the second phase then, and you returned a verdict recommendation of death for one or more of these defendants, would you be subject to criticism in your place of employment or family?

MRS. RICE: No.

MR. KENERLY: Would it be, understanding the decision making process has to be based upon the law, would it be, if we had proven to you beyond a reasonable doubt, after proving guilt, if we proved to you beyond a reasonable doubt that the appropriate legal punishment was death, would it be more difficult for you to return that verdict not only as a member of a group, but as an individual juror because these defendants are black.

MRS. RICE: No.

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

MR. SMITH: No.

(State v. Barnes, JS T. Vol. 2, pp 8-9).

Here the District Attorney appropriately probed both black and white jurors for racial sensitivity, racial fear, or racial favoritism that could affect their ability, as jurors, to evaluate the evidence impartially. The RJA Order which finds that the prosecution's valid attempt to probe for any racial bias within the prospective jurors is instead evidence of racial discrimination is a misapprehension of the law. As a consequence, these findings of fact are clearly erroneous and cannot support the

Court's conclusions of law finding racial discrimination in this case. See Helms v. Rea, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973)(facts found under misapprehension of law should be set aside).

The RJA Order gives examples of cases in which prosecutors allegedly "subjected African-American venire members to different questioning during voir dire" (RJA Order, p 134). One such example listed in the RJA Order is State v. Trull, where the RJA Order finds as a fact that the "prosecutor questioned African-American venire member Rodney Foxx repeatedly about the same topics, and spent a significant amount of time conferring with the prosecution team during Foxx's questioning." (RJA Order, p 134, ¶ 291). Contrary to this finding of fact, the record is barren of evidence that a "significant amount of time" was spent conferring over this juror. The record shows only one instance when the prosecution asked for a moment from the trial court during the voir dire of prospective juror Mr. Foxx and there is no notation in the record that indicates how long that moment lasted. (State v. Trull, T p 606). From the record it is apparent that the prosecution did ask numerous questions of Mr. Foxx regarding the fact that he was a minister and worked in prison ministry. The record, however, does not support the allegation that this juror was subject to different questioning than other prospective jurors based upon race. The transcript reveals no other venire members stated that they were ministers

engaged in prison ministry. This finding of fact is therefore not supported by competent evidence and is clearly erroneous. As such it cannot support the conclusion that there was racial discrimination in this case.

Additionally, in its post hoc determination, the MAR Court concluded that the state's prosecutors have intentionally discriminated in the striking of various jurors across the state, by highlighting specific rationale given by the prosecution which the MAR Court has then determined, from the cold record, to have been pretextual, patently irrational, and inconsistent with jurors accepted by the State. (RJA Order, pp 135-37). These findings were clearly erroneous as they were not based on the competent evidence presented. In its analysis, and contrary to well-established law of this Court, the MAR Court has pitted isolated factors given as the rationale of individual strikes against a similar factor identified in a passed juror. State v. Porter, 326 N.C. at 501, 391 S.E.2d at 152; State v. Kandies, 342 N.C. at 435-36, 467 S.E.2d at 75-76.

These are only some examples of the errors the RJA Order made in its assessment of the evidence presented. The flaws in the MAR Court's analysis serve to highlight why this Court encourages deference to trial courts in the evaluation of peremptory challenges. Deference is owed to trial courts who are in the best vantage point to assess the nuances of personal interaction in jury selection as opposed to

reviewing courts which have only the cold record to assess. The RJA Order has evaluated these jury strikes based upon nothing other than the cold record and assessed that these strikes were racially motivated. The RJA Order's findings of fact are clearly erroneous and cannot support its conclusions of law. Consequently, this Court should grant review not only to correct the erroneous findings of fact found in this case, but also to discourage post conviction courts from engaging in the re-evaluating peremptory challenges based only on the written record with no deference afforded to the trial courts conducting jury selection in these capital cases.

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

The RJA Order fails to adequately evaluate jury strikes applying the well-established law this Court has provided for reviewing whether race is a significant factor in a jury strike. Instead of reviewing each of these jury strikes according to the guidance given by this Court, the MAR Court reviewed isolated comments in jury selection and isolated references in prosecutors' statements to the ultimate conclusion that the reasons stated were "pretextual" and evidence intentional racial discrimination. In its review, the MAR Court found that "many facially-neutral explanations provided by prosecutors in the form of affidavits or testimony were pretextual or substantively invalid, and evince intentional discrimination in

Cumberland County, the former Second Judicial Division, and in the State of North Carolina." (RJA Order, p 166, ¶ 28); see also,(RJA Order, p 120, ¶ 247; p 136, ¶ 298, p 152, ¶ 344, p 157, ¶ 360, p 159, ¶ 366)(finding reasons given by prosecutors for their jury strikes to be "inaccurate" "misleading" and "pretextual"). This led the Court to the sweeping conclusion that "[p]rosecutors intentionally used the race of venire members as a significant factor in decisions to exercise peremptory strikes in capital cases" in North Carolina, in the former Second Judicial Division, in Cumberland County, and in Robinson's trial. (RJA Order, p 166, ¶¶ 29-32).

This Court has provided sufficient guidance to courts evaluating peremptory challenges. Though the MAR Court did not acknowledge it, this Court's guidance includes a three step inquiry in reviewing whether race was a significant factor in the exercise of peremptory challenges. [18] Here it appears that the MAR Court has by-passed steps one and two which would have required the defendant to first establish a prima facie case of purposeful discrimination and second for the State to offer race neutral reasons for the peremptory strike and landed firmly in step three.[19] This is

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

[19] Ironically, the MAR Court faulted the State's expert, Joseph Katz, for failing to engage in an analysis of the third prong of the Batson inquiry. (RJA Order, p 128, ¶ 272).

significant because it is not until the third step that the persuasiveness of the reason given for the peremptory strike is analyzed for purposeful racial discrimination. Purkett v. Elem., 514 U.S. at 768, 131 L. Ed. 2d at 839; State v. White, 349 N.C. at 548, 508 S.E.2d at 262. Such a determination would require consideration of many factors such as the "'susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by 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 v. Golphin, 352 N.C. at 427, 533 S.E.2d at 211 (quoting State v. White, 349 N.C. at 548-49, 508 S.E.2d at 262); see also, State v. Lawrence, 352 N.C. at 15, 530 S.E.2d at 816; State v. Kandies, 342 N.C. at 435, 467 S.E.2d at 75.

None of these factors were considered by the MAR Court in determining whether purposeful discrimination existed in each of the juror strikes considered. There is no indication that the MAR Court considered whether the State used all of its peremptory challenges in any particular case. There is no indication that the MAR Court took into consideration the race of witnesses or the defendants, for that matter, in the case. There is no indication that the MAR Court considered whether the State had accepted any African-American jurors in any particular case in which a jury strike

was reviewed. The MAR Court simply failed to analyze all of the relevant circumstances which this Court has said is vital in determining whether racial discrimination was a significant factor in the exercise of a peremptory strike. See, State v. Golphin, 352 N.C. at 427, 533 S.E.2d at 211.

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

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

Astonishingly, the MAR Court concluded that the failure of fifty percent of the state's prosecutors to respond to the Cumberland County prosecution's request to submit affidavits explaining the reasons behind the prosecutorial strikes in every one of the capital cases analyzed over a twenty year period was "evidence of intentional discrimination on a statewide basis." (RJA Order, p 126, ¶ 265). Without

acknowledging any of the obvious impediments to complying with the Cumberland County request,[20] the MAR Court concluded that the reason had to be because the state's prosecutors were intentionally engaged in racial discrimination. Like the MSU Study upon which the MAR Court relied, the MAR Court made a tragic rush to judgment and found race to be the explanation. This finding is so overly broad and so lacking in support in the record that it is stunning. To make such a sweeping allegation in a single case without legal or factual support is clearly erroneous and not competent to inform the court's legal conclusion.[21]

This Court should grant review to correct the clearly erroneous finding that every prosecutor in every case tried in North Carolina during the time period from 1990 to 2010 has intentionally discriminated in jury selection.

III. The MAR Court Abused its Discretion In Denying the State's Third Motion for a Continuance.

The MAR court abused its discretion in denying the State's third motion to

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

[21] Notably, the MAR Court determined that the missing data of prosecutorial reasons evidenced intentional discrimination, but determined that missing data in the MSU Study did not invalidate or bias the study's conclusions at all. (RJA Order, p 79, ¶ 98).

continue, which severely hampered the State's opportunity to litigate its position. (RJA Order, pp 5, 23-28). Specifically with regard to the denial of the motion to continue, the MAR court ignored the prosecution's pleas that the court had grossly underestimated the time constraints and pressures for reviewing the district attorney's tendered race-neutral reasons for the peremptory strikes. (HT p 12) This was a historic and complicated endeavor, in which prosecutors had to review copious materials, in addition to continuing their duties to prosecute criminal cases. (Id. at 16) As noted by the State in arguing for the continuance, many people in the various district attorneys' offices have retired, died, or are practicing in other areas. (Id. at 15)

The MAR Court acknowledged the breadth of the data collected and included in the MSU Study. (RJA Order, p 91, ¶ 128)("The MSU Study included many thousands of coding decisions and data entries into the database which support the analyses by the researchers.")(emphasis added)(citing HT p 2319). The State needed time to review the coding decisions and data entries which had been assigned to each of the 173 cases included in the MSU Study. As the deadline for the evidentiary hearing neared and as the defense responded to the State's identification of errors in the study, the defense continued to submit discovery. The State expressed its wishes to have an opportunity to investigate the defense revisions and additional discovery.

(HT pp 15, 17, & 21-22) The defense had the ability and time to repair errors identified in the MSU Study, while the Cumberland County prosecutors did not have the ability to force other prosecutors, in 99 other counties, to put aside their other duties, including trying other murder cases, to submit affidavits. (Id. at 16) Notably, the State did not request a continuance of the entire hearing, only the State's portion to gather additional resources. (Id. at 14) Based upon the above-noted reasons tendered by the State in support of its motion, along with others the State noted at the evidentiary hearing, the MAR Court should have granted the State's motion for a continuance. Because it refused to do so, the court's ruling was manifestly unsupported by reason and therefore an abuse of discretion. See State v. Hayes, 314 N.C. at 471, 334 S.E.2d at 747; State v. White, 349 N.C. at 552, 508 S.E.2d at 264.

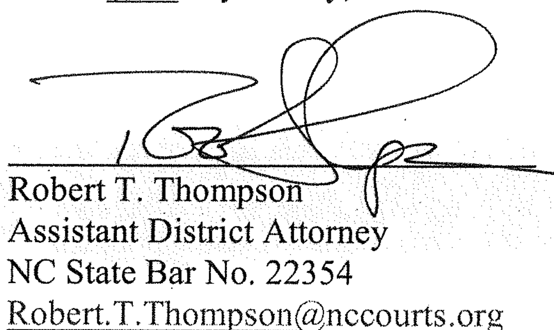
The State was denied the opportunity for a full and fair hearing in the very first hearing to be conducted under North Carolina's Racial Justice Act. For the reasons noted above, the MAR Court's conclusions were replete with errors and based upon the misapprehension of law. Most notably, the RJA Order has misinterpreted the RJA such that a defendant who has never personally experienced any racial discrimination in his case at any stage of the criminal justice process has been granted relief. This interpretation is at odds with well established law. In the interest of justice this Court should grant certiorari review to correct this incorrect interpretation of the RJA and

to provide guidance to Superior Court Judges and post conviction practitioners as to the correct interpretation and application of the RJA.

CONCLUSION

WHEREFORE, for the foregoing reasons, the State respectfully prays that this Court issue its writ of certiorari to review the 20 April 2012 RJA Order of the Superior Court below, and that the State have such other relief as the Court may deem appropriate.

Respectfully submitted, this the 10th day of July, 2012.



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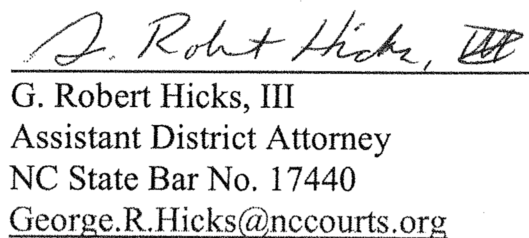

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CERTIFICATE OF SERVICE

I HEREBY certify that the foregoing STATE'S PETITION FOR WRIT OF CERTIORARI has been served upon counsel of record for the defendant by United States Mail, postage prepaid, addressed as follows:

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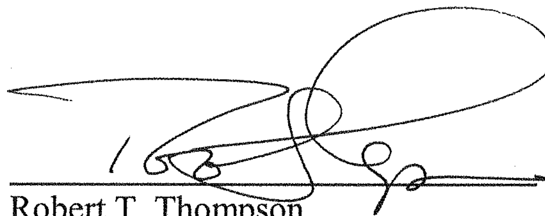
This the 10th day of July 2012.



Robert T. Thompson
Assistant District Attorney

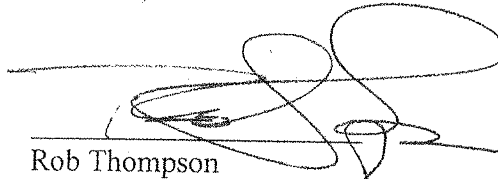
G. Robert Hicks, III
Assistant District Attorney

VERIFICATION

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

I, Robert T. Thompson, Assistant District Attorney for the 12th Prosecutorial District, first being duly sworn, hereby deposes and says that he has read the foregoing PETITION FOR A WRIT OF CERTIORARI and knows the same to be true to the best of his knowledge except as to those matters and things therein alleged upon information and belief, and as to those he believes them to be true.



Rob Thompson
Assistant District Attorney

Sworn to and subscribed before
me this 9 day of July, 2012.

Kathy L. Fancher
Notary Public

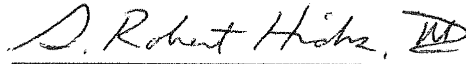
My Commission Expires: 9-1-2013

VERIFICATION

STATE OF NORTH CAROLINA

COUNTY OF CUMBERLAND

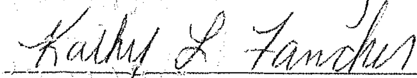
I, G. Robert Hicks III, Assistant District Attorney for the 12th Prosecutorial District, first being duly sworn, hereby deposes and says that he has read the foregoing PETITION FOR A WRIT OF CERTIORARI and knows the same to be true to the best of his knowledge except as to those matters and things therein alleged upon information and belief, and as to those he believes them to be true.



G. Robert Hicks, III
Assistant District Attorney

Sworn to and subscribed before

me this 9 day of July, 2012.



Notary Public

My Commission Expires: 9-1-2013