No. 181A93-4 DISTRICT 22A

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Iredell
	)	92-CRS-1195
RAYFORD LEWIS BURKE	)	

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DEFENDANT-APPELLANT'S BRIEF

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DEFENDANT-APPELLANT'S BRIEF

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QUESTIONS PRESENTED

IS PETITIONER ENTITLED TO AN EVIDENTIARY HEARING AND/OR A NEW TRIAL BECAUSE THE PROSECUTION VIOLATED *BATSON V. KENTUCKY* BY INTENTIONALLY EXCLUDING AFRICAN-AMERICAN CITIZENS FROM PETITIONER'S JURY BECAUSE OF THEIR RACE?

IS PETITIONER ENTITLED TO PURSUE HIS CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE RETROACTIVE APPLICATION OF THE REPEAL TO PETITIONER VIOLATES THE FEDERAL AND STATE CONSTITUTIONS, AND NORTH CAROLINA LAW GOVERNING THE RETROACTIVE APPLICATION OF STATUTES?

PROCEDURAL HISTORY

Petitioner Rayford Burke was sentenced to death in 1993, following a capital trial and sentencing hearing in the Superior Court of Iredell County. Burke's appeal to this Court was unsuccessful. *State v. Burke*, 343 N.C. 129, 469 S.E.2d 901 (1996), *cert. denied*, *Burke v. North Carolina*, 519 U.S. 1013 (1996). Burke's case entered post-conviction proceedings and he filed a motion for appropriate relief (MAR) on November 25, 1997.

On August 6, 2010, Burke filed an MAR pursuant to N.C. Gen. Stat. §§ 15A-2010-2012, the North Carolina Racial Justice Act (hereafter "RJA"). Rpp. 4-93. Contemporaneously, Petitioner also filed a discovery motion seeking information relevant to his RJA claims. Rpp. 94-100.[1]

On December 16, 2011, the Superior Court denied Petitioner's non-RJA MAR. This Court denied *certiorari* review on August 23, 2012. *State v. Burke*, 366 N.C. 238, 731 S.E.2d 138 (2012).

On January 31, 2012, the Superior Court of Cumberland County convened the first evidentiary hearing in the state to be held pursuant to the RJA. The defendant was Marcus Robinson. On April 20, 2012, Robinson was awarded RJA relief and was resentenced to life imprisonment without possibility of parole after the Superior Court found that race was a significant factor in prosecution decisions

[1] Citations to the record on appeal appear as "Rp. __." Citations to the trial transcript appear as "Tp. __."

to use peremptory strikes against African-American citizens. *State v. Robinson*, 91 CRS 23143 (April 20, 2012) (hereafter "*Robinson* Order"). [2]

On August 30, 2012, following the North Carolina General Assembly's enactment of changes to the RJA, Petitioner filed an amendment to his RJA MAR. Rpp. 101-36. In his RJA MAR and amendment, Petitioner alleged that race was a significant factor in decisions to seek and impose the death penalty against him, and in the prosecution's use of peremptory strikes. Rpp. 12-22.

On August 31, 2012, Burke filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of North Carolina. That Petition remains pending. *Burke v. Joyner*, No. 5:12cv137.

On October 1, 2012, the Superior Court of Cumberland County convened a second evidentiary hearing pursuant to the RJA. The Court heard evidence in the cases of three death-sentenced prisoners: Tilmon Golphin, Christina Walters, and Quintel Augustine. On December 13, 2012, Golphin, Walters, and Augustine received RJA relief. The Superior Court ruled that race was a significant in prosecution decisions to strike African Americans and resentenced the three prisoners to life without parole. *State v. Golphin, Walters & Augustine*, 97 CRS

[2] The Superior Court of Cumberland County's order in *State v. Robinson* is available at https://www.aclu.org/legal-document/north-carolina-v-robinson-order, last read July 20, 2016.

47314-15, 98 CRS, 34832, 35044, 01 CRS 65079 (December 13, 2012) (hereafter "*Golphin* Order").[3]

On June 19, 2013, the General Assembly repealed the RJA. Rpp. 137-141.

On August 23, 2013, the State moved to dismiss Petitioner's RJA MAR based on repeal of the RJA. Rpp. 142-48. Petitioner responded to the State's motion on December 3, 2013. Rpp. 149-169. On the same day, citing evidence obtained during RJA litigation in Cumberland County, Burke filed an amendment to his RJA MAR. Rpp. 170-248. In this amendment, Burke alleged the State had violated *Batson v. Kentucky*, 476 U.S. 79 (1986), through its discriminatory use of peremptory strikes against African-American citizens. Rpp. 174-79. Petitioner asked for an evidentiary hearing on his *Batson* claim and on any factually-contested procedural default issues. Rp. 184.

The Superior Court entered an order on June 3, 2014, dismissing Petitioner's RJA MAR. Rpp. 249-55.

On July 14, 2014, the State moved to dismiss Petitioner's *Batson* amendment. Rpp. 256-60.

On July 31, 2014, the Superior Court entered an order dismissing Petitioner's *Batson* amendment. Rpp. 261-66.

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[3] The Superior Court of Cumberland County's order in *State v. Golphin* is available at https://www.aclu.org/legal-document/north-carolina-racial-justice-act-order-granting-motions-appropriate-relief, last read July 20, 2016.

Petitioner on August 29, 2014, sought *certiorari* review in this Court. The State filed a response on October 29, 2014, agreeing that *certiorari* review was appropriate.

In an order issued March 18, 2016, this Court granted review.

GROUNDS FOR APPELLATE REVIEW

This death penalty case is before the Court on a petition for writ of *certiorari* filed, pursuant to N.C.R.App.P. Rule 21(f), after the Superior Court denied Petitioner's motion for appropriate relief filed pursuant to N.C. Gen. Stat. §§ 15A-2010-2012, the North Carolina Racial Justice Act. Burke's petition for writ of *certiorari* also challenges the Superior Court's denial of Petitioner's amendment based on *Batson v. Kentucky*, 476 U.S. 79 (1986).

STATEMENT OF FACTS

Enactment of the Racial Justice Act

In 2009, North Carolinians of good will had reason for grave concern about the influence of race discrimination in our system of capital punishment. More than sixty percent of the prisoners on death row were people of color.[4] Close to twenty percent were sentenced to death by an all-white jury. Rp. 30, Figure 1. Forty percent were sentenced to death by a jury that had a maximum of one person of color. Rpp. 30-31, Figures 1 & 2.

Meanwhile, more than two decades had passed since the United States Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), and outlawed the practice of excluding citizens from jury service based on race. Our appellate courts had reviewed more than one hundred *Batson* claims and found only one case in which the prosecution had discriminated against a minority juror. *State v. Wright*, 189 N.C. App. 346, 658 S.E.2d 60 (2008). *See also* Amanda S. Hitchcock, "*Deference Does not by Definition Preclude Relief: The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*," 84 N.C. L. REV. 1328, 1328 (2006); Catherine Grosso and Barbara O'Brien, *A Stubborn Legacy:*

[4] The North Carolina Department of Safety maintains lists of current death row prisoners and prisoners removed for death row. The race of each defendant is included on these lists. *See* http://www.ncdps.gov/Adult-Corrections/Prisons/Death-Penalty/Death-Row-Roster, and https://www.nccrimecontrol.org/index2.cfm?a=000003,002240,002327,002338, last read July 20, 2016.

The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials, 97 Iowa L. Rev. 1531, 1535 (2012).

Our Governor had been compelled to grant clemency to Robert Bacon, an African-American man convicted of killing a white man. Bacon's white codefendant received a life sentence while Bacon was sentenced to death by an all-white jury. Just weeks before his execution date, a juror admitted that race played a role in Bacon's punishment. "N.C. governor commutes sentence of death-row inmate to life," *CNN.com./LAWCENTER*, October 3, 2001, available at http://edition.cnn.com/2001/ LAW/10/03/nc.death.row/index.html, last read July 18, 2016; *State v. Bacon*, 337 N.C. 66, 128 & 131, 446 S.E.2d 542, 577-78 (1994) (Exum, C.J., and Frye, J., dissenting).

A federal court had ordered an evidentiary hearing for Kenneth Rouse, another African-American man sentenced to death by an all-white jury for the killing of a white woman. The court granted the hearing because of Rouse's "serious and troubling claim" that one of his jurors had concealed his "deep-seated racial prejudice" and "contempt" for African Americans. *Rouse v. Lee*, 314 F.3d 698, 700 & 710 (4th Cir. 2003).[5]

[5] The *en banc* Fourth Circuit reversed after concluding that Rouse's attorneys had missed the filing deadline for his federal habeas petition by one day, thus depriving him of federal habeas review of his race discrimination claim. *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003) (*en banc*).

In view of this grim reality, and consistent with the Supreme Court's observation in *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987), that state legislatures are best suited to address evidence of systemic racial disparities in capital cases, in 2009, the North Carolina legislature enacted the Racial Justice Act, N.C. Gen. Stat. §§ 15A-2010 to 2012 (eff. August 11, 2009 to July 1, 2012). The RJA provided 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. Gen. Stat. § 15A-2010.

In order to implement the RJA's substantive guarantee of capital proceedings free from racial bias, the RJA mandated that a defendant was ineligible for the death penalty if he or she showed that race was a "significant factor" in charging or sentencing decisions, including the exercise of peremptory strikes. N.C. Gen. Stat. § 15A-2011(a); § 15A-2011(b)(1), (b)(2) & (b)(3). A defendant could rely on statistical evidence, and could show bias in his or her individual case, county, judicial division, or the entire state. N.C. Gen. Stat. § 15A-2011(a) & (b). A subsequent amendment of the law narrowed relief to require defendants to show bias in his or her own case. N.C. Sess. Laws 2012-136.

Under the RJA, if a defendant showed race was a significant factor in decisions leading to the death sentence, the remedy was to vacate the sentence of

death and resentence the defendant to life imprisonment without possibility of parole. N.C. Gen. Stat. § 15A-2012(a)(3).

Prisoners who were under sentence of death at the time of the RJA's enactment were given one year in which to file motions for appropriate relief under the new law. N.C. Sess. Laws 2009-464, Section 2. In subsequent months, researchers from the Michigan State University College of Law (hereafter "MSU") conducted a comprehensive analysis of hundreds of murder cases in North Carolina. The researchers looked at prosecution decisions to seek the death penalty, jury decisions to impose the death penalty, and prosecution decisions to exercise peremptory strikes in capital cases. Rpp 26-69. *See also Golphin Order* at ¶¶ 232-52 (describing comprehensive nature of MSU jury selection study).

The MSU study concluded, among other things, the following:

- At the time of Burke's trial in 1993, prosecutors statewide struck qualified black and racial minority citizens from service on death penalty juries at more than twice the rate they struck white citizens. Rp. 29, ¶ 13.
- At the time of Burke's trial, prosecutors statewide were 2.2 times more likely to exclude black venire members from capital juries than whites. Rp. 29, ¶ 15.
- This pattern of race discrimination in the use of peremptory challenges against black venire members was consistent across two decades, from 1990 to 2010. Rp. 29, ¶ 13-15.
- In cases with black or other minority defendants like Burke, prosecutors were even more race-conscious in their use of peremptory strikes. Looking at capital cases from 1990 to 2010, when the

defendant was black, prosecutors were 2.6 times more likely to strike black venire members. Rp. 30, ¶ 16.

- Discrimination in the 22nd prosecutorial district where Burke's trial took place was more intense than in the state as a whole. Prosecutors in the 22nd district were 2.4 times more likely to strike qualified venire members who were black. Rp. 34, ¶ 31.

- Discrimination in Iredell County was particularly virulent. Iredell County prosecutors were 3.2 times more likely to strike qualified venire members who were black. Rp. 34, ¶ 34.

- In Petitioner's own case, prosecutors struck 75 percent of black venire members and only 31 percent of other venire members. The disparity between these strike rates is 2.4. Rp. 50, Table 10.

- Petitioner was tried and sentenced to death by an all-white jury. Rp. 30, Figure 1.

- Historically, prosecutors in Iredell County have overwhelmingly sought the death penalty against African Americans. Between 1990 and 2010, prosecutors brought just under six percent of death-eligible cases with racial minority defendants to a capital trial. During that same time period, prosecutors in Iredell County brought no death-eligible cases with white defendants to a capital trial. Rp. 45, ¶ 116.

Based on this evidence, and like nearly every prisoner under a death sentence at the time, Petitioner argued that race was a significant factor in decisions that led him to death row, and timely filed an MAR pursuant to the RJA. Rpp. 4-93; *see also* "Bias claims are new diversion for N.C. executions," *WRAL.com*, August 11, 2010, available at http://www.wral. com/news/ state/story/8121766/, last read July 20, 2016 (reporting that 135 death-sentenced prisoners filed RJA claims).

Over the course of the next two years, there were two evidentiary hearings on RJA claims, both in the Superior Court of Cumberland County. Marcus Robinson had an evidentiary hearing starting in January 2012, and three other death row prisoners, Tilmon Golphin, Christina Walters, and Quintel Augustine, had a joint evidentiary hearing in October 2012. Both of these hearings concerned the defendants' jury selection claims.

For its part, the State presented evidence from a statistician named Joseph Katz. Katz asked prosecutors throughout North Carolina to provide race neutral reasons for their strikes of African-American venire members who were peremptorily excused in capital cases in their districts. In response to this request, prosecutors submitted affidavits with reasons for the strikes. *See Robinson* Order at ¶¶ 247-69 (describing Katz's survey of prosecutors). In a number of cases, including Petitioner's, this was the first time the State had gone on record as to why African-American citizens were excluded from jury service.

Based on the evidence presented at the two evidentiary hearings, the Cumberland County Superior Court found pervasive race discrimination in jury selection in capital cases throughout the state over two decades. *Robinson* Order at ¶ 118; *Golphin* Order at ¶¶ 254, 297. The judge also found that prosecutors had discriminated in the prisoners' individual cases and had engaged in intentional discrimination. *Robinson* Order at ¶¶ 80, 95, 119, 220; *Golphin* Order at ¶¶ 172,

328, 392, 397. In view of these findings, the presiding judge found that all four defendants had established that race was a significant factor in prosecution decisions to use peremptory strikes. *Robinson* Order at ¶ 219; *Golphin* Order at ¶¶ 403, 409, 414. The court granted relief and resentenced the defendants to life imprisonment without possibility of parole. The State sought discretionary review.

In 2013, while the four Cumberland County cases were still pending in this Court, the North Carolina General Assembly repealed the RJA. The title of the bill pertaining to repeal was, "TO ELIMINATE THE PROCESS BY WHICH A DEFENDANT MAY USE STATISTICS TO HAVE A SENTENCE OF DEATH REDUCED TO LIFE IN PRISON WITHOUT PAROLE." Rp. 137.

The repeal bill itself reads in pertinent part:

> **SECTION 5.(a)** Article 101 of Chapter 15A of the General Statutes is repealed.
>
> **SECTION 5.(b)** The intent and purpose of this section, and its sole effect, is to remove the use of statistics to prove purposeful discrimination in a specific case. Upon repeal of Article 101 of Chapter 15A of the General Statutes, a capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury and who sought a capital conviction did not do so on the basis of race, that the jury that hears his or her case is impartial, and that the trial was free from prejudicial error of any kind. These rights are protected through multiple avenues of appeal, including direct appeal to the North Carolina Supreme Court, and discretionary review to the United States Supreme Court; a postconviction right to file a motion for appropriate relief at the trial court level where claims of racial discrimination may be heard; and again at the federal level through a petition for habeas corpus. A capital defendant prior to the passage of Article 101 of Chapter 15A

> of the General Statutes had the right to raise the issue of whether a prosecutor sought the death penalty on the basis of race, whether the jury was selected on the basis of race, or any other matter which evidenced discrimination on the basis of race. All these same rights, existing prior to the enactment of Article 101 of Chapter 15A of the General Statutes, remain the law of this State after its repeal.

Rp. 140.

Following repeal of the RJA, the State moved to dismiss Petitioner's RJA claims, as well as his claim that evidence unearthed in the RJA litigation in Cumberland County established a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), in Petitioner's case. Rpp. 142-48, 256-60. The Superior Court granted the State's motions and Petitioner sought discretionary review in this Court. Rpp. 249-55, 261-66.

On December 18, 2015, this Court remanded the cases of the four Cumberland County defendants, directed reconsideration of these defendants' RJA MARs, and ordered that the State be permitted to engage its own expert and conduct its own study of race discrimination in North Carolina capital cases. *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015); *State v. Golphin, Walters & Augustine*, 780 S.E.2d 552 (N.C. 2015). In neither opinion did this Court address the effect of the repeal of the RJA or in any way suggest that the repeal should be applied retroactively to defeat the claims of the Cumberland County RJA defendants.

Three months later, the Court granted review in this case, as well as the case of Andrew Ramseur, another prisoner sentenced to death in Iredell County whose RJA claims were dismissed in view of the RJA repeal.

The Trial of Rayford Burke

Rayford Burke, an African-American man faced the death penalty in Iredell County in 1993 for the murder of Timothy Morrison, an African-American police informant. Only four qualified African-Americans were questioned during jury selection in this case. Rp. 50, Table 10. The prosecution struck three of them: Vanessa Moore, Jerome Morris, and June Watts Ingram. Tpp. 172, 296, 434. Prosecutors struck fewer than a third of qualified white venire members but used their peremptory strikes to dismiss three-quarters of the qualified African-American venire members, thus helping to ensure a monochrome jury.[6] Rp. 50, Table 10. Defense counsel did not object to the strikes of any of these three African-American venire members. Tpp. 172, 296, 434.

The prosecution's disparate use of peremptory strikes against African-American citizens in this case — excluding them at a rate 2.4 times that of other citizens — was consistent with its history and practice in other capital cases. There are only two death-sentenced prisoners from Iredell County, Petitioner and Andrew Ramseur. Both are African Americans and both were condemned to die by all-

[6] The defense struck Rufus Heaggens, the only qualified African American left in the pool after the State exercised its strikes. Tp. 251.

white juries. Rp. 30, Figure 1. Looking more broadly at the 22nd prosecutorial district, four of seven death row prisoners were sentenced to death by all-white juries.[7] *Id*.

The incidence of all-white juries in Petitioner's prosecutorial district is not the result of happenstance. Rather, over the course of 20 years, prosecutors in this district have made a habit of striking African-American venire members at a much higher rate than other venire members. According to the MSU Study, prosecutors in the 22nd district have used peremptory challenges to exclude blacks at a rate that is 2.4 times — more than double —the rate for other citizens. Rp. 34, ¶ 31. The African Americans struck by the State in Petitioner's case are discussed below.

One of the African Americans questioned by the State was Vanessa Moore. Tp. 296. Moore was in her late 30s, married, with three daughters. She was working at a local business and was a member of a Methodist church. Moore had a cousin who had worked in the sheriff's department and she expressed no hesitation about imposing the death penalty. Tp. 280-81, 285-87; Rpp. 272-74.[8]

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[7] In addition to Burke and Ramseur, Wayne Laws and Jathiyah Al-Bayyinah were sentenced to death by all-white juries.

[8] Moore's marital status and church affiliation are not discussed in the transcript but appear in her jury questionnaire. Petitioner has filed with his brief a motion to amend the Record on Appeal to include this questionnaire, which was produced to counsel for the State and Petitioner pursuant to court order. Rp. 3.

Moore grew up in Iredell County and graduated from Mooresville High School. After graduation, she moved to Washington, D.C. At the time of Petitioner's trial, Moore had been living in Mooresville for eight years. Tp. 285-86.

In a 2011 affidavit prepared in connection with the RJA litigation in Cumberland County, assistant district attorney Mikko Red Arrow averred, based on his review of notes the prosecutor made at trial, that Moore was struck in part because she "Lived in Wash. DC + Maryland." Rp. 203.

The prosecution passed four white potential jurors who had lived in other states and had Iredell County ties of much shorter duration than Moore's.

- Scott Tucker lived in Chicago, Illinois, for 16 years before moving to North Carolina. He had lived in North Carolina for nine years, only one year longer than Moore. Tp. 325.

- Rita Johnson was born in Georgia, lived in Virginia, and had lived at her then-current address in North Carolina for only two years. Tpp. 327-28.

- Jeffrey Smallwood was born and raised in Alabama, and lived in Iowa and Missouri before migrating to North Carolina. Smallwood had lived in Statesville for only three and a half years at the time, a year and a half less than Moore had been a resident of the county. Tpp. 333-35.

- Janis McNemar had lived at her then-current address for only about five months and in the county for a fraction of the time Moore had — two and a half years. Before that, McNemar lived in Kentucky. Tp. 803.

Based on this evidence, the Superior Court of Cumberland County concluded that the prosecution's strike of Moore evinced evidence that the State had "misused the notion of community to exclude black persons from capital juries" and "thereby deprive them of one of the most salient emblems of citizenship." *Golphin* Order at ¶ 181.[9]

June Watts Ingram was another African-American potential juror questioned by the State. Watts Ingram was a lifelong resident of Iredell County and had been working at a local textile manufacturer for 21 years. She had graduated from high school, married, and owned her own home. She attended a Baptist church. Watts Ingram had one son, who was 28 years old and working. Watts Ingram expressed no reservations about the death penalty. Tpp. 138-39, 157, 159; Rpp. 277-79, 281.[10]

The State struck Watts Ingram. Tp. 172. As the defense did not lodge an objection, the reasons for the prosecution's strike of Watts Ingram, as with Moore, are found in the affidavit of Mikko Red Arrow. According to Red Arrow, the

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[9] This Court directed reconsideration of the ruling in *Golphin* because the cases of three defendants were joined for hearing and because the State was denied a third continuance and opportunity to develop its own statistical evidence. *State v. Golphin, Walters & Augustine*, 780 S.E.2d 552 (N.C. 2015). Neither the joinder nor the continuance issue has any bearing on the Superior Court's findings with regard to comparative juror analysis.

[10] The fact that Watts Ingram never lived outside Iredell County, was a high school graduate and homeowner, as well as her church affiliation and her son's age are not noted in the transcript but appear in her jury questionnaire. As noted earlier, Petitioner has filed with his brief a motion to amend the Record on Appeal to include this questionnaire, which was produced to counsel for the State and Petitioner pursuant to court order. Rp. 3.

prosecution struck Watts Ingram for two reasons, one of which was that she was nervous about viewing autopsy photographs and other graphic evidence. Rp. 202.

The record shows that the prosecutor asked jurors whether it would be a problem for them to hear testimony or view photographs related to an autopsy. Watts Ingram admitted this kind of material made her "nervous" and "flustered." Tp. 104. Asked whether her emotional reaction might influence her ability to judge the evidence, Watts Ingram said, "In a way. You know, it's — makes me nervous." *Id*. The prosecutor then went on to another topic before eventually striking Watts Ingram.

Like Watts Ingram, white potential juror Marilyn Gant was asked whether graphic evidence about an autopsy would make her "uncomfortable and would unduly affect [her] in any way." Gant answered, "Yes, it would." The prosecutor asked, "You feel that it might?" Gant said, "Uh-huh." Tp. 446. The prosecutor then asked whether it would impair her abilities as a juror, and Gant said no. *Id*.

Red Arrow also averred that the prosecution struck Watts Ingram because she "sought to be excused from the trial by the Court, citing work related issue[s]." Rp. 202. The transcript shows that the trial judge asked jurors whether they had "any pressing situations" at home or work that prevented them from being able to serve. Tp. 81. Watts Ingram reported that her employer was "so strict" that she worried she might not be allowed to serve. Tp. 84. Watts Ingram explained that

workers were given "X's when you're not there" and "if you have so many absentees and stuff, they can, you know, let you go." Tp. 85. After the trial judge assured Watts Ingram that her employer could not penalize her for absence due to jury service, Watts Ingram said she understood and had no other concerns. Tpp. 84-85.

Jerome Morris was the third African-American venire member struck by the State in Petitioner's case. Tp. 434. Morris was a teacher. Tp. 426. He had no opposition to the death penalty. Tp. 422.

Red Arrow's affidavit advanced a number of reasons for striking Morris. One reason proffered by the State was that the father of one of the defense attorneys, Samuel Winthrop, represented Morris in his divorce. Rp. 202.

The record shows that defense counsel Winthrop's father represented Morris, and that the case concluded about a year before the trial in this case. Morris had no contact with Winthrop himself, and he had an amiable attorney-client relationship with Winthrop's father. Tpp. 429-30.

The prosecution passed white venire member Michael Kennedy. Kennedy went to high school with defense counsel Winthrop, and Winthrop himself had prepared wills for Kennedy and his wife. Tp. 340. Asked by the trial judge if he might feel uncomfortable, if he took a position different from Winthrop's in this trial, Kennedy admitted, "Maybe — maybe a little, yes, sir." Tp. 341. Kennedy

allowed as there was a "slight chance" that the fact that Winthrop had previously represented him might prevent him from basing his decision solely on the evidence. *Id*.

The prosecutor then questioned Kennedy about his relationship with defense counsel. Kennedy replied, referring to Winthrop by his first name, "I have known Sam on a personal basis probably since — since at least the tenth grade in high school. At least ten, twelve years." Tp. 341. Kennedy said he "would hope" his relationship with defense counsel "wouldn't have any bearing or any influence" but he felt it "possibly could influence" him. Tp. 342.

The State challenged Kennedy for cause. *Id*. After questioning by defense counsel Mallory and a few of its own inquiries, the trial court denied the challenge, and the State ultimately accepted Kennedy as a juror. Tp. 345. At no time did the prosecution challenge Morris for cause because of his connection to defense counsel.

The State additionally deemed Morris objectionable because he "stated that he was undecided about the death penalty." Rp. 202.

The record shows that the prosecutor asked Morris whether he had any personal, moral, or religious beliefs against the death penalty. Morris said no. Tp. 422. The prosecutor next asked whether Morris had previously considered the death penalty. Morris explained that he taught government and law in the Catawba

County school system. In the course of teaching, Morris had addressed the death penalty with his students. He stressed that he tried to give an evenhanded presentation in class: "I ask my students questions, do they think it's right, do they think it's wrong." Tpp. 422-23. Morris added that he tried not to give his students his own personal opinion because it was "not for me to decide." Tp. 423. He noted that there could be mixed emotions on the death penalty. *Id*. Morrison concluded by saying that he had talked about this issue a lot in class but "as for my own personal convictions, I'm one that's undecided." *Id*.

The prosecutor followed up by asking Morris if he could impose a death sentence. Morris said, "If I have to, I would." Tp. 424. Morris affirmed he would base his verdict on the evidence. *Id*. Apparently satisfied, the prosecutor moved on to another area of inquiry. *Id*.

The State additionally cited the fact that Morris "knew and played basketball with a witness in the case and [] this could affect his impartiality." Rp. 202. The transcript shows that the witness in question was the State's lead investigator and that Morris's discomfort stemmed from his bias in favor of the State given his friendship with Grant. Tpp. 416-17.

The State also proffered as a reason for striking Morris that "he went to sleep in the jury room; people told him that he snores." Rp. 202. The record shows that, in the course of the prosecutor's inquiry about Morris's views on

capital punishment, Morris was asked whether he'd given much thought to the death penalty since learning the case was capital. Morris said he had not and admitted he had gone to sleep "back there in the jury room." He mentioned also that other jurors "tell me I snore. Tp. 422. When questioned about his ability to pay attention to the evidence, Morris repeatedly assured the prosecutor he would not fall asleep if selected as a juror. Tpp. 424-25.

The State also claimed it struck Morris because "he had an unpleasant encounter with a law enforcement officer and that he felt that he was being harassed." Rp. 202.

In voir dire, Morris was asked about a negative experience with law enforcement that he reported on his jury questionnaire. The prosecutor first ascertained that the incident occurred in Statesville and then asked if it involved a criminal charge. Tp. 427. Morris responded as follows:

> No, I just call it harassment in a sense. I mean, I figure that he had better things to do than stop me and ask me where I was going, which I proceeded to tell him none of his business. I know what he may have thought. But because of the type of car that I drive and the way I was dressed, he must assume that every person who dress[es] like that is doing something illegal. And I didn't appreciate it. And I proceeded to tell him I didn't appreciate it.
>
> But to just stop and ask me where I was going, I didn't appreciate that either. And that was just basically all it was. I — you know, I realize that crime is rampant, but everybody that wears a suit or drives a sports car is not a drug dealer or something like that. And I didn't appreciate that at all or the fact that I had to justify myself. And I

> know they serve and protect. He was going too far to ask me where I was going. I just proceeded to tell him none of his business.

Tpp. 427-28.

After Morris gave this explanation of the traffic stop, the prosecutor moved to other matters.

In closing argument at the guilt-innocence phase, the prosecution pressed for a guilty verdict and described Petitioner to the all-white jury as a "big black bull." Tp. 1848.

ARGUMENT

I. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING AND/OR A NEW TRIAL BECAUSE THE PROSECUTION VIOLATED *BATSON V. KENTUCKY* BY INTENTIONALLY EXCLUDING AFRICAN-AMERICAN CITIZENS FROM PETITIONER'S JURY BECAUSE OF THEIR RACE.

There is compelling evidence that the prosecutors in Petitioner's case struck African-American venire members because of their race. This evidence includes significant statistical disparities in the State's strikes of blacks and whites, disparate treatment of otherwise similar black and white venire members, proffered reasons not supported by the record, a longstanding pattern and practice of discrimination against African-American potential jurors in other capital cases tried by the same office, training to evade the strictures of *Batson*, and an explicitly racial appeal to Petitioner's all-white jury. A fair court considering this evidence today could only conclude that the prosecution violated *Batson v. Kentucky*, 476

U.S. 79 (1986), and intentionally discriminated on the basis of race during jury selection in Petitioner's case.

Much of the evidence supporting Petitioner's *Batson* claim became available to Petitioner only after passage of the Racial Justice Act and litigation of RJA claims in Cumberland County. Consequently, the failure of Petitioner's counsel to raise a *Batson* claim at trial or on direct appeal should not now bar Petitioner from receiving merits review of this claim. Moreover, in repealing the RJA in 2013, the General Assembly evinced a clear intent to permit Petitioner an opportunity to present evidence of race discrimination in his case and to have his day in court.

The Superior Court rejected Burke's *Batson* claim on substantive and procedural grounds. On the merits, the Superior Court asserted that Burke "failed to show discrimination in his own case." Rpp. 264-65, ¶¶ 23 & 25. The Superior Court further found the *Batson* claim procedurally barred because Burke did not raise it previously "when he was in a position to do so." Rp. 264, ¶ 22. As shown below, the Superior Court was wrong on both counts.

A. Petitioner's Evidence of Intentional Race Discrimination at his Trial is Clear and Powerful.

Batson and its progeny established a three-step process a trial court must use to determine whether the State's peremptory challenges were based on race, and thus violated the Constitution:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (internal quotations and citations omitted).

i. Statistical Evidence

Following enactment of the RJA, MSU researchers conducted a comprehensive study of jury selection in capital cases in North Carolina between 1990 and 2010. The MSU study documented pervasive racial disparities in prosecution decisions about which citizens to put on a jury and which to strike. "The [MSU] numbers describing the prosecution's use of peremptories are remarkable." *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240 (2005). For example:

- Prosecutors statewide were 2.2 times more likely to exclude black venire members from capital juries than whites. Rp. 29, ¶ 15.
- When the defendant was black, prosecutors statewide were 2.6 times more likely to strike black venire members. Rp. 30, ¶ 16.

- In Petitioner's prosecutorial district, prosecutors were 2.4 times more likely to strike qualified venire members who were black. Rp. 34, ¶ 31.
- In Petitioner's county of conviction, Iredell County, prosecutors were 3.2 times more likely to strike qualified black venire members than white venire members. Rp. 34, ¶ 34.
- In Petitioner's own case, prosecutors struck 75 percent of black venire members and only 31 percent of other venire members. The disparity between these strike rates is 2.4. Rp. 50, Table 10.
- Petitioner was tried and sentenced to death by an all-white jury. Rp. 30, Figure 1.

Looking simply at the raw numbers in this case, one must conclude that "[h]appenstance is unlikely to produce this disparity." *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 342 (2003).

Indeed, after completing their initial study of jury selection, the MSU researchers in 2013 conducted further research which confirmed the discriminatory intent behind these numbers. MSU focused its second analysis on prosecution strikes in the 22nd prosecutorial district. The researchers looked at a number of variables one might expect to explain prosecution strikes. These variables included, for example, reservations about the death penalty, involvement in the criminal justice system, familiarity with counsel, and hardship. Rpp. 196-97, ¶¶ 35-28. The MSU analysis showed that, after controlling for these race-neutral factors, potential jurors who were African-American faced odds of being struck by the State that were 11.8 times those faced by other potential jurors. Moreover, this

result was statistically significant. Rpp. 197-98, ¶ 39; Rp. 201, Table 1. There is less than a one in a thousand chance this disparity would manifest if the jury selection process were in fact race-neutral. Rpp. 197-98, ¶ 39.

None of the factors analyzed by MSU eliminated the effect of race on prosecution strike decisions. In other words, in every analysis of the 22nd district that MSU performed, race was a significant factor in prosecution decisions to exercise strikes in capital cases. Consequently, the statistically significant influence of race on the odds of being struck was consistently strong and substantial. Rpp. 198-99, ¶¶ 40, 43-46. The MSU researchers concluded that their findings supported an inference of intentional discrimination. Rp. 198, ¶¶ 39, 41.

In view of the initial MSU study and the subsequent analysis of the 22nd prosecutorial district, "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-El I*, 537 U.S. at 342.

ii. Disparate Treatment of Black and White Venire Members

Even "[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that

is evidence tending to prove purposeful discrimination . . . ." *Miller-El II*, 545 U.S. at 241.

The prosecution clearly treated Vanessa Moore differently from white venire members. The proffered reason for striking her — that she had lived in Washington, D.C. and Maryland — applied "just as well" to "otherwise-similar nonblack[s]" who were permitted to serve. *Id*. In this case, the State accepted four white venire members who had lived in Chicago, Virginia, Missouri, Iowa, and Kentucky, and had far more tenuous ties to the county than Moore, who was born and raised in Iredell County and, at the time of Burke's trial, had lived there for nearly a decade. "The fact that [the prosecution's] reason also applied to these other panel members, most of them white, none of them struck, is evidence of pretext." *Id*. at 248.

Likewise, the prosecution treated June Watts Ingram differently from white venire members. Watts Ingram and a white venire member, Marilyn Grant, both expressed distress over the prospect of viewing gory crime scene photographs. Watts Ingram described feeling "nervous" and "flustered" while Grant admitted she felt "uncomfortable." Tpp. 104, 446. Both conceded these feelings might influence their ability to judge the evidence: Watts Ingram said her emotions might influence her "[i]n a way" and Grant admitted this evidence "would unduly affect" her. *Id*. Yet the State passed Grant and struck Watts Ingram. Thus, the

plausibility of the prosecution's proffered explanation "is severely undercut by the prosecution's failure to object to [an]other panel member[] who expressed views much like" those of Watts Ingram. *Miller-El II*, 545 U.S. at 248.

Finally, the prosecution also treated Jerome Morris differently from white venire members. Morris and white venire member Michael Kennedy both had connections to defense counsel, although Morris's relationship to defense counsel was far more tenuous. Morris had engaged the services of defense counsel's *father*, who was also a lawyer. Morris had had no contact with defense counsel himself. Tpp. 429-30. Meanwhile, Kennedy had gone to high school with defense counsel and was on a first-name basis with him. Defense counsel had also prepared Kennedy's will and that of his wife. Tpp. 340-41. Kennedy admitted he would feel uncomfortable taking a position contrary to defense counsel and worried aloud that his relationship with defense counsel "possibly could influence" him. Tpp. 341-42.

The prosecutor was concerned enough about Kennedy's relationship with Burke's attorney that she challenged Kennedy for cause. Tp. 342. But, when the trial court denied that challenge, rather than strike Kennedy, the prosecution passed him. Tp. 345. Yet now the State asks this Court to believe that the prosecutor struck Morris because he had previously hired defense counsel's father to represent him.

"The implausibility of this explanation is reinforced by the prosecutor's acceptance of [a] white juror[] who disclosed [connections to defense counsel] that appear to have been at least as serious." *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008). *See also Foster v. Chatman*, 136 S.Ct. 1737, 1752-54 (2016) (Court finds comparison of jurors "compelling" and "particularly salient" where prosecution struck black venire member who denied source of bias but accepted white venire member who admitted bias from identical source).

Petitioner anticipates that the State will point to other reasons the prosecution offered for striking Moore, Watts Ingram, and Morris, and will urge the Court to deny relief after finding at least one of those reasons to be race-neutral. The recent decision in *Foster* squarely rejects that kind of analysis. In *Foster*, the petitioner challenged the prosecution's strikes of two African-American citizens. As to both potential jurors, the prosecution offered a "laundry list" of reasons why these two African Americans were objectionable. *Foster*, 136 S.Ct. at 1748.

The Court did not analyze each and every reason proffered by the State. Rather, after unmasking and debunking three of eleven reasons for the strike of one venire member and five of eight reasons for the other strike, the Court called it a day and concluded that the strikes of these jurors were "motivated in substantial part by discriminatory intent." *Id*. at 1754, quoting *Snyder*, 552 U.S. at 485.

iii. Reasons Not Supported by the Record

In addition to disparate treatment of similarly-situated white and black prospective jurors, the State has also offered reasons that are not borne out by the transcript. For example, the prosecution claims that it struck Watts Ingram because she tried to evade jury service. Rpp. 202-203. The record shows clearly that Watts Ingram was concerned about the strict attendance policy at her work place and did not understand that she could not be given an "X" for missing work because of jury duty. The trial judge reassured Watts Ingram on that point and she had no further concerns. Tpp. 84-85.

Two of the State's proffered reasons for striking Morris similarly lack basis in fact. According to the prosecution, Morris "stated that he was undecided about the death penalty." Rp. 202. In fact, what Morris stated was that, in his role as a teacher, he encouraged his students to form their own opinions about whether the death penalty was right or wrong. Morris emphasized that he did not push his own opinion in class because it was not for him to decide. Tpp. 422-23.

Significantly, Morris said he had no personal, moral or religious beliefs against the death penalty and he would impose the death penalty if the evidence called for it. Tpp. 422, 424.

The State also attempted to justify its strike of Morris because he knew and played basketball with a witness. On its face, this appears to be a race-neutral and

logical reason to strike someone. However, the transcript shows that the witness was the State's chief investigator. To the extent Morris was biased, it was *in favor* of his friend and fellow basketball player. Tpp. 416-17. The State's reliance on this reason is, at best, misleading.

Where a proffered reason is "contradicted by the record," this Court is bound to reject it as pretextual. *Foster*, 136 S.Ct. at 1750.

iv. Other Pretextual Reasons

Included in the State's "laundry list" of reasons for striking Morris was that he took a catnap in the jury room and snored. Rp. 202. This explanation falls into the nonsensical and "fantastic" category condemned by the Supreme Court. *Foster*, 136 S.Ct. at 1752. Morris was questioned late in the afternoon of the second day of jury selection. A review of Morris's voir dire reveals an alert citizen who was paying attention and was fully engaged in answering questions put to him. Moreover, as the prosecutor herself acknowledged in opening statement, jury selection can be — and in this case apparently was — wearying. *See* Tp. 824 (prosecutor begins her argument by acknowledging, "The jury selection process has been a lengthy one. I hope that we haven't tired you out or taxed you."). The implausibility of this proffered reason supports the conclusion that it is pretextual. *Foster*, 136 S.Ct. at 1752.

Finally, with regard to Morris's experience of being pulled over by the police while wearing a suit and driving a sports car, this proffered reason is troubling for a number of reasons. It is reasonable to conclude from Morris's description of the incident that he felt he had been racially profiled. Morris is hardly the only African-American man to have suffered this indignity. *See*, *e.g.*, Sharon LaFraniere and Andrew W. Lehren, "The Disproportionate Risks of Driving While Black," *New York Times*, October 24, 2015, available at http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html, last read July 14, 2016 (finding that African Americans are disproportionately subject to traffic stops and arrests in Greensboro, North Carolina, and noting, "Officers were more likely to stop black drivers for no discernible reason.").[11]

Morris was friends with the State's chief investigating officer. Tpp. 418, 420-21. Morris clearly stated that he would base any decision on the evidence and law as presented without regard to his relationship with that officer. Tp. 421. Morris affirmed he would judge the testimony and credibility of a police officer just as he would any other witness. Tp. 427. Significantly, the prosecutor never asked Morris whether the traffic stop would affect his ability to fairly judge the

[11] The prosecution asked white venire member Sheman Johnson about any unpleasant experiences with law enforcement. When Johnson answered, "Huh-huh. No, I just got a speeding ticket, that's all." The prosecutor was quick to normalize his experience, saying, "I think we all do." Tp. 294. All except Morris, who was stopped and did not get a speeding ticket.

evidence, apparently satisfied with his earlier affirmation that he would base his decisions as a juror on the evidence and the law. Tp. 421. Were the State permitted to strike every African-American citizen who has been treated unfairly by the police, our commitment to equal justice would be reduced to a mockery.

v. Historical Evidence

It is significant also that Petitioner's statistical evidence arises over a 20-year period and is rooted in more than half a dozen capital cases tried by the same prosecutor's office. Particularly striking is the following:

- Out of the nine capital juries selected in the 22nd prosecutorial district between 1990 and 2010, and analyzed by MSU, four were all-white. Rp 30, Figure 1. Petitioner's case was among these, along with the cases of Laws, Al-Bayyinah I, and Ramseur. *Id*.
- In four of the nine cases, only one African American served on the jury. *See* Rp. 31, Figure 2 (William Gregory I and II, Al-Bayyinah II, Watts).
- Petitioner is one of two African-American defendants sentenced to death in Iredell County. Both Burke and Ramseur had all-white juries. Rp 30, Figure 1.
- Petitioner and one other African-American defendant in the 22nd prosecutorial district, Jathiyah Al-Bayyinah, were prosecuted by the same assistant district attorney. Burke and Al-Bayyinah both had all-white juries. Rp 30, Figure 1.

These numbers demonstrate "broader patterns of practice" in the prosecution's conduct of jury selection and establish a "case for discrimination." *Miller-El II*, 545 U.S. at 253. Indeed, these facts arguably meet the onerous (and, for that reason, discarded) standard of *Swain v. Alabama*, 380 U.S. 202 (1965),

because they show "a longstanding pattern of discrimination" whereby "'in case after case, whatever the circumstances,' no [or few] blacks served on juries." *Miller-El II*, 545 U.S. at 238, quoting *Swain*, 380 U.S. at 223.

The numbers are just part of the story. An examination of other capital cases tried in the 22nd district shows that the strikes of African-American venire members Moore, Watts Ingram, and Morris in this case are not an aberration. Rather, there is a documented history in the district of the prosecution using its peremptory strikes to exclude African-American venire members explicitly on account of their race and dismissing them for possessing characteristics that are apparently not objectionable when possessed by white venire members. Petitioner includes here a few illustrative examples.

In *State v. Al-Bayyinah*, tried in Davie County in 1999 by the same prosecutor who tried Burke's case, the prosecution offered a "facially discriminatory explanation" for the strike of African-American venire member Laverne Keys. *Golphin* Order, ¶¶ 174-75.[12] The prosecutor struck Keys in part because "she had worked with an African-American lawyer on a black history program at her local library." *Id.* at ¶ 175. The prosecution's reliance on Key's participation in a "formal acknowledgment of black history . . . as a basis to continue denying [her] civil rights is deeply troubling." *Id.*

[12] As in Petitioner's case, the Superior Court of Cumberland County based this finding in part on affidavits produced by the State for the first time in 2011.

In *State v. Watts*, tried in Davidson County in 2001, the same assistant district attorney who prosecuted Petitioner struck African-American venire member Christine Ellison in part because she misspelled words and made other errors on her jury questionnaire. Rp. 207. Ellison did write South "Caroline" instead of Carolina. In a similar vein, white venire member Tammy Alley wrote "Randolf" County instead of Randolph, and white venire member John Reaves spelled Asheboro as "Ashbore." The State passed Alley and Reaves. Rpp. 209-211. *See also Golphin* Order at ¶¶ 177-178; *Robinson* Order at ¶ 317.

In *State v. Elliott*, tried in Davidson County in 1994, just a year after Petitioner's trial, the prosecution struck African-American venire member Lisa Varnum. The State claimed it struck Varnum because she responded to a number of questions by "nodding her head and making uh-huh responses." The record shows that Varnum answered "uh-huh" three times and twice nodded her head in response to questions from the prosecutor. On three occasions, Varnum said, "yes" and once she answered, "yeah." *Golphin* Order at ¶¶ 177-78.

At least four white venire members who nodded and gave uh-huh responses were passed by the State. Kristie Fisher said "uh-huh" a total of 18 times and nodded twice. Rpp. 231-40. Robert Bryant gave non-verbal responses eight times, nodding five times and shaking his head three times. Rpp. 213-19. Vickie Pierce nodded in response to eight questions. Rpp. 220-25. Kristie Oxendine

nodded three times and said "uh-huh" once. Rpp. 226-30. *See also Golphin* Order at ¶¶ 177-178

Also in *Elliott*, the State struck Kenneth Finger in part because he was not married and had never been married. *Golphin* Order at ¶ 202. The State passed a number of white venire members who had always been single: Robert Bryant, Martha Sink, and Kristie Fisher. *Id*. The State also passed white venire members Dawn Johnson and Kristie Oxendine, even though they had no children. *Id*.

Finally, in *State v. Gregory*, tried in Davie County in 1994, the prosecution struck African-American venire member Tonya Anderson explicitly because of her race. When the State moved to strike Anderson, the defense objected. In explaining why Anderson was "not the kind of juror" the State was looking for, the prosecutor said,

> Her age is almost identical to what the victim's age would be, 20 years old. If the victim were alive, she would be 20 years old. *The victim is a black female. That juror is a black female. I left one black person on the jury already.*

Rpp. 241-43 (emphasis added). *See also Golphin* Order at ¶ 173 (finding "exceptionally clear proof" of purposeful race discrimination with regard to the strike of Tonya Anderson); *Foster*, 136 S.Ct. at 1755 (evidence that prosecutor anticipated "*having to pick* one of the black jurors" supports finding of *Batson* violation) (emphasis in original).

These examples clearly establish "broader patterns of practice" in jury selection and a "general policy . . . to exclude black venire members from juries at the time [Burke's] jury was selected." *Miller-El II*, 545 U.S. at 253.

vi. Training to Evade <u>Batson</u>

As in *Miller-El II*, there is evidence that prosecutors in the 22nd district were trained in how to strike black jurors and get away with it. 545 U.S. at 264-66. After examining statistical evidence, disparate treatment, and a history of excluding African-American citizens from jury selection, the Supreme Court observed, "If anything more is needed for an undeniable explanation of what was going on, history supplies it. The prosecutors took their cues from a 20-year-old manual of tips on jury selection." *Id*. at 266. This manual advised prosecutors on "the reasoning for excluding minorities from jury service." *Id*. at 264.

Similarly here, the prosecution's actions are consistent with training it received. In the course of the Cumberland County RJA litigation, the State produced a copy of a handout from a 1994 continuing legal education program for prosecutors called *Top Gun II*. The handout provided a list of 10 "justifications" a prosecutor might offer up in response to a *Batson* objection. Included on the list are age or youth, "obvious boredom," "inappropriate, non-responsive, evasive or monosyllable" responses, "communications difficulties, and "antagonism to the State." Rp. 244. These reasons mirror explanations given for the strikes of

African-American venire members in capital cases from the 22nd district. Attorney CLE records maintained by the North Carolina State Bar indicate that the elected district attorney at the time of Petitioner's trial, H.W. Zimmerman Jr., attended the 1993 *Top Gun* CLE.[13] Rp. 245.

vii. The Prosecution's Racial Appeal

Finally, there is the fact that, in front of an all-white jury, the prosecutor explicitly drew attention to Burke's race. In closing arguments, while urging jurors to find Burke guilty, the prosecution referred to Burke as a "big black bull." Tp. 1848.

This Court has ruled that statements made by a prosecutor may "tend to support or refute an inference of discrimination." *State v. Smith*, 328 N.C. 99, 121, 400 S.E.2d 712, 724 (1991). In this case, the prosecutor's blatant appeal to racial bias constitutes additional evidence supporting an inference of discrimination. *See, e.g.*, *Foster*, 136 S.Ct. at 1755 (prosecution's "focus on race . . . plainly demonstrates a concerted effort to keep black prospective jurors off the jury").

It would have been inflammatory and derogatory enough to compare this African-American defendant to a beast of burden. Adding Burke's race into the mix only heightened the inflammatory nature of the prosecution's statement. There could be no legitimate reason, let alone a race-neutral one, to refer to Burke

[13] No training materials from the 1993 program were produced to the defense. Consequently, Petitioner cannot say with certainty that identical materials were provided at the seminar Zimmerman attended. This topic would need to be explored at an evidentiary hearing.

as black. Moreover, it seems hardly likely that the prosecutor would have made this comment had she not been addressing an all-white jury.

Taken as a whole, Petitioner's evidence — statistical, comparative, and historical — is "compelling." *Foster*, 136 S.Ct. at 1754. Petitioner has shown a pattern of discrimination, not only in his own case, but in numerous cases tried by the same prosecutor and her office. Under *Miller-El I* and *II*, *Snyder*, and *Foster*, Petitioner is entitled, at a minimum, to an evidentiary hearing in which he might present his evidence of race discrimination and win a new trial.

B. Petitioner's Batson Claim is Based on New Evidence Not Previously Available to Him and therefore is Not Procedurally Defaulted.

As described above, Petitioner's *Batson* claim is based on several categories of evidence, including statistical analyses performed by MSU, statements of the prosecution as to why certain African-American venire members were struck, examples from other capital cases tried in the same district, and training materials. This evidence became available to Petitioner following enactment of the RJA and through the litigation of the RJA cases in Cumberland County. The Superior Court's findings to the contrary are clearly incorrect.

i. Prosecution Affidavit

The affidavit of Mikko Red Arrow is significant new information. This affidavit was signed in 2011 and, along with trial prosecutor notes Red Arrow reviewed in preparing the affidavit, was produced for the first time in connection

with the Cumberland County RJA litigation. Rpp. 202-206. The Superior Court found that Red Arrow's affidavit was not new evidence because it merely "restates facts from the transcript and prosecutor's notes at trial." Rp. 263, ¶ 17.

It should be noted first that, prior to enactment of the RJA, Petitioner had no power to compel testimony from a prosecutor, either at trial or in a post-trial *Batson* hearing. *See State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988) ("We hold that a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney."); *State v. Sessoms*, 119 N.C. App. 1, 4, 458 S.E.2d 200, 202 (1995). In contrast, under the RJA, testimony of attorneys, prosecutors, law enforcement officers, jurors, and other members of the criminal justice system became admissible. N.C. Gen. Stat. § 15A-2011(b). Thus, it was only after enactment of the RJA that Petitioner was in a position to obtain and use sworn testimony from prosecutors regarding jury selection in his case.

In addition, there is a significant difference between an instance in the transcript and a signed statement from a prosecutor saying, "*This* is the reason we struck that black juror." The latter is an admission of a party opponent. N.C. R. Evid. 801(d). Moreover, as a matter of constitutional law, '[o]nce a prosecutor has offered a race-neutral explanation for the peremptory challenges . . . the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991). That is to

say, having come forward with a proffer of reasons for the strikes of venire members Moore, Watts Ingram, and Morris, the State has taken us to step two of the *Batson* analysis.

Also, as noted, some of the reasons included in Red Arrow's affidavit were not, in fact, supported by the transcript. Petitioner was hardly in a position to anticipate the State's misrepresentations of the record.[14]

The Supreme Court's recent decision in *Foster* is also instructive here. In *Foster*, much of the evidence supporting the petitioner's *Batson* claim was discovered in proceedings well after the trial and direct appeal. It was only through a public records request that the defense obtained notes from the prosecution's file, draft affidavits, and other documents. 136 S.Ct. at 1747-48. In reviewing the case, the Court considered all of the evidence, not just the evidence available at trial and on direct appeal. This Court should do the same. *See also Amadeo v. Zant*, 486 U.S. 214, 224-27 (1988) (finding cause to excuse a procedural default when, as a result of interference by officials, the otherwise defaulted claim was reasonably unknown to petitioner's lawyers and the State withheld jury selection notes containing racial designations).

[14] The Superior Court also assert that Petitioner had received the trial prosecutor's notes in post-conviction discovery. Rpp. 263-64, ¶18. There was no evidence in the record that this was the case.

ii. MSU Study

The Superior Court said the MSU study "merely counts strikes in capital cases" and "does not constitute new information, but merely a new tabulation of old information that was available at trial, on appeal and in prior state post-conviction." Rp. 264, ¶ 19.

The Superior Court's view is very much at odds with the view of this Court's. In remanding one of the Cumberland County RJA cases, this Court described the MSU study as "so unusual and so complex" that the State was entitled to a third continuance in order to have "adequate time to gather evidence and address" the study. *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015). This Court also emphasized the need on remand to "consider additional statistical studies presented by the parties," whether they be "quantitative" or "qualitative." *Id*. It seems difficult to believe that this Court would have reached the conclusion it did in *Robinson* if the MSU study were merely a "tabulation of old information." Rp. 264, ¶ 19.

Moreover, with his *Batson* amendment, Petitioner also submitted evidence of a "fully controlled logistic regression analysis" of all of the eligible venire members in capital cases in the 22nd district. Rp. 195, ¶ 28. As described by the MSU researchers, such an analysis involves a carefully designed study, identification of an appropriate study population, meticulous coding of data, and

development of a protocol to insure accuracy. Rpp. 189-94. The MSU researchers examined information on 289 venire members and analyzed 72 possible control variables. Rpp. 195-96. Ultimately, the MSU researchers concluded that race was a significant factor in prosecution strike decisions, even after controlling for eight factors that were otherwise strongly predictive of prosecution strikes. Rpp. 198-99 & 201, Table 1. It is simply not plausible to reduce this thorough and rigorous methodology to a mere "tabulation of old information."

iii. Additional New Evidence

As noted above, it was only as a result of litigation of RJA claims in Cumberland County that prosecutors throughout the state provided affidavits with explanations for their strikes of African-American citizens. *See, e.g.*, Rpp. 207-208 (prosecutor's affidavit concerning strikes in *State v. Watts*). The explanations in these cases, particularly those tried by the same assistant district attorney who prosecuted Burke, and other cases from Iredell County and the 22nd prosecutorial district also reveal pretext and are new evidence supporting Petitioner's contention that there are "broader patterns of practice" evincing discrimination. *Miller-El II*, 545 U.S. at 253.

Likewise, it was only through the Cumberland County RJA litigation that Petitioner was able to obtain evidence about prosecution training to evade *Batson*.

Rpp. 244-45; *see also Robinson* Order at ¶¶ 221, 360-61 (describing discovery materials pertaining to prosecution *Batson* training).

There is no mention in the Superior Court's order discussing this additional, new evidence. This omission is fatal to the Superior Court's finding regarding Petitioner's failure to present new evidence and thereby overcome procedural bar.

C. In Repealing the RJA, the North Carolina Legislature Expressed an Intent to Ensure Merits Review of Constitutional Claims of Race Discrimination, Including Batson Claims.

When the General Assembly repealed the RJA, it included this language in the repeal statute:

> [A] capital defendant retains all of the rights which the State and federal constitutions provide to ensure that the prosecutors who selected a jury . . . did not do so on the basis of race . . ..
>
> A capital defendant prior to the passage of Article 101 of Chapter 15A of the General Statutes had the right to raise the issue of whether . . . the jury was selected on the basis of race, or any other matter which evidenced discrimination on the basis of race. All these same rights, existing prior to the enactment of Article 101 of Chapter 15A of the General Statutes, remain the law of this State after its repeal.

Rp. 140.

"It is well settled that the meaning of any legislative enactment is controlled by the intent of the legislature and that legislative purpose is to be first obtained from the plain language of the statute." *State v. Bates*, 348 N.C. 29, 34, 497 S.E.2d 276, 279 (1998). Significantly, in interpreting a statute, "the legislature will be presumed to have inserted every part thereof for a purpose. Thus, it should not be presumed that any provision of a statute is redundant." *State v. Williams*, 286 N.C.

422, 432, 212 S.E.2d 113, 119 (1975), quoting 73 Am.Jur.2d, Statutes, § 250. In *Williams*, the Court emphasized that it is the "cardinal rule" of statutory construction that "significance and effect should, if possible, without destroying the sense or effect of the law, be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." *Id*. All of this is to say, unlike a court decision, a legislative enactment contains no *dicta*.

Applying these well-established principles to the RJA repeal statute, this Court should conclude that the General Assembly intended to guarantee a death-sentenced prisoner like Petitioner "the right to raise the issue of whether . . . [his] jury was selected on the basis of race."

It is perhaps instructive to begin with what the plain text of the repeal statute does *not* mean. It cannot be the case that the General Assembly meant to reassure the public and the courts that in repealing the RJA it was not overruling *Batson* or other United States Supreme Court decisions in the area of constitutional law and race discrimination. There is no question the General Assembly lacks that power and, thus, there could be no need to offer reassurance on that point.

Nor as alluded to above, is this Court free to declare portions of RJA repeal to be mere musings by the legislature. To the contrary, this Court "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The only way to give effect to the General Assembly's directive that capital defendants retain all constitutional rights which "ensure that the prosecutors who selected a jury . . . did not do so on the basis of race" is to do what the General Assembly said: give capital defendants their day in court to present evidence on "any other matter which evidenced discrimination on the basis of race" in their trial, including in selection of the jury.

The context in which the RJA repeal was enacted is supportive of this interpretation. *See Bates*, 348 N.C. at 37, 497 S.E.2d at 280-81 (construing provision in light of other legislative changes). The legislature voted to repeal the RJA in 2013. At that point, the Superior Court of Cumberland County had issued two widely-publicized rulings finding pervasive discrimination in jury selection in North Carolina capital cases over a 20-year period. It is difficult to credit the view that the legislature was indifferent to this powerful evidence of race discrimination.

Rather, and again turning to the plain language of the RJA repeal itself, it was the General Assembly's "intent and purpose" and the "*sole effect*" of the repeal "to remove the use of statistics to prove purposeful discrimination in a specific case." Thus, the General Assembly repealed the RJA and eliminated an individual cause of action based on statistical patterns under state law. At the same time, the General Assembly ensured that capital defendants could make use of evidence of racial discrimination in order to prove constitutional claims.

II. PETITIONER IS ENTITLED TO PURSUE HIS CLAIMS UNDER THE RACIAL JUSTICE ACT BECAUSE RETROACTIVE APPLICATION OF THE REPEAL TO PETITIONER VIOLATES THE FEDERAL AND STATE CONSTITUTIONS, AND NORTH CAROLINA LAW GOVERNING THE RETROACTIVE APPLICATION OF STATUTES.

The Superior Court dismissed Petitioner's RJA MAR after concluding that the legislature's repeal of the RJA rendered Petitioner's RJA claims "void as a matter of law." Rp. 251, ¶ 15; Rp. 253, ¶¶ 21-22. This Court should remand Petitioner's RJA MAR for reconsideration because, as set out here, retroactive application of the repeal is unconstitutional and fundamentally unfair.

A. Retroactive Application of the RJA Repeal Would Violate Due Process under the North Carolina Constitution.

North Carolina courts have long held that due process under the state constitution protects a litigant's rights from retroactive repeal so long as (1) the retroactive change would affect the litigant's substantive rights and (2) the litigant's rights were vested at the time the repeal went into effect. *See Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 365-370, 293 S.E.2d 415, 417-19 (1982) (holding that the newly-enacted statute of repose did not apply to the plaintiff's pending tort claim because statutes of repose are substantive in nature and the plaintiff's rights had vested prior to the effective date of the statute); *Smith v. Am. & Efird Mills*, 305 N.C. 507, 511, 290 S.E.2d 634, 637 (1982) (holding that a newly-enacted disability benefits statute applied to the plaintiff's case because

while the new law affected substantive rights, the plaintiff's rights did not vest until after the statute went into effect).

A statute serves as a "source of substantive rights" if the statute itself, rather than some other source, grants the litigant the right to relief. *See Clayton v. Branson*, 170 N.C. App. 438, 452, 613 S.E.2d 259, 269 (2005) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). By contrast, a procedural right provides merely the "method for vindicating . . . rights elsewhere conferred" by another source, such as the constitution or another statute. *See id.* (holding that 42 U.S.C. § 1983 is not a source of substantive rights because the statute provides only a mechanism for enforcing rights already granted by the federal constitution).

North Carolina courts recognize a substantive right as vested — and thus protected from retroactive abrogation — when it has accrued. Accrual occurs at the time of injury. *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 466-68, 256 S.E.2d 189, 195-96 (1979) (holding that a dependent's right to workers' compensation benefits—when the worker died as a result of workplace injury—vests at the time of the worker's death, not upon onset of the disease, and framing the inquiry as whether the new act "as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect"); *Raftery v. W. C. Vick Construction Co.*, 291 N.C. 180, 187, 230 S.E.2d 405, 406 (1976) (holding that plaintiff's cause of action accrued at the time he was injured); *Smith v. Mercer*, 276

N.C. 329, 172 S.E.2d 489 (1970) (declining to apply statute creating a new cause of action for wrongful death to a case involving a death that occurred prior to the effective date of the statute); *Mizell v. Atlantic Coast Line R. Co.* 181 N.C. 36, 106 S.E. 133 (1921) (holding that cause of action arose at the moment the injury occurred, and resulting vested right could not be defeated or modified by subsequent statute).

In sum, the guarantee of due process provides that substantive claims and interests are immune from statutory abrogation when the injury giving rise to the claim occurred before the statute went into effect. *Smith*, 276 N.C. at 337, 172 S.E.2d at 494 ("It is especially true that the statute or amendment will be regarded as operating prospectively only . . . where the effect of giving it a retroactive operation would be to . . . destroy a vested right . . . .") (quoting 50 Am. Jur. *Statutes* § 478); *Lowe v. Harris*, 112 N.C. 472, 17 S.E. 472, 539 (1893) ("The legislature unquestionably had and has the power to modify or repeal the whole of the statute of frauds in so far as it applies to future contracts for the sale of land, but its authority to give the repealing statute a retroactive operation is as certainly restricted by the fundamental rule that no law will be allowed to so operate as to disturb or destroy rights already vested."); *Fogleman v. D & G Equipment Rentals, Inc.*, 111 N.C. App. 228, 233, 431 S.E.2d 849, 852 (1993) ("The trial court's

application of the amended version of section 97-10.2 deprived appellants of vested rights and, thus, was unconstitutionally retroactive.").

i. The RJA Created Substantive Defenses to Execution

In determining whether retroactive application of the amended RJA and repeal bill would violate due process under the state constitution, the first question is whether Petitioner's rights under the RJA are substantive. An examination of the text of the RJA reveals they are.

In its opening provision, the RJA provides, "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. Gen. Stat. § 15A-2010. Thus, the RJA's stated purpose was to confer on defendants whose death sentences were tainted by racial influence a substantive defense against execution. *See Smith,* 276 N.C. at 337, 172 S.E.2d at 494 ("[T]he statute or amendment will be regarded as operating prospectively only . . . where the effect of giving it a retroactive operation would . . . invalidate a defense which was good when the statute was passed.").

After setting forth its purpose, the RJA defines how a defendant can prove that the "judgment was sought or obtained on the basis of race." Under the RJA, a defendant can make a case by showing "that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial

district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2011(a). Thus, the RJA conferred on defendants a new substantive right to prove racial bias in their cases by relying upon the collective conduct of district attorneys in various geographic units.

In making these geographically-based claims, defendants proceeding under the RJA are then permitted to present evidence of racial influence based upon the race of the defendant or victim, or based upon the use of peremptory strikes. N.C. Gen. Stat. § 15A-2011(b). Moreover, defendants may rely on "statistical evidence or other evidence." These statutory provisions grant new substantive avenues for defendants to prove racial bias, avenues which were unavailable prior to the enactment of the RJA. *Compare* N.C. Gen. Stat. § 15A-2011(b) *with McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) (holding that aggregate statistical evidence is insufficient, standing alone, to prove "discriminatory purpose" in the application of the death penalty).

Finally, the RJA mandates that the death sentence "shall" be vacated and life imprisonment without parole imposed if the trial court finds that race was a significant factor in decisions to seek or impose the death sentence in any of the specified geographic units. N.C. Gen. Stat. § 15A-2012(a)(3). This mandatory remedy is yet another substantive right provided by the RJA. The repeal clearly strips away substantive causes of action. Accordingly, retroactively applying the

repeal to Petitioner's case would unconstitutionally deprive him of substantive rights.

ii. Petitioner's Substantive Rights under the RJA Vested Prior to Repeal of the RJA

Petitioner's rights under the RJA had already vested by the time the repeal was adopted in 2013. The acts of discrimination underlying Petitioner's claims — the "injury" necessary for a right to vest — occurred between the time he was charged capitally in 1992, and subsequently sentenced to death in 1993. Once the RJA was enacted in 2009, Petitioner's claims accrued and vested immediately because the discrimination that formed the basis of his claim had already occurred. Even if one considers the evidence from other events between 1999 and 2010 used to support Petitioner's claim, his claim still accrued well before the 2013 repeal went into effect.

iii. Principles of Equity Demand that Petitioner's Vested, Substantive Rights under the RJA Cannot Be Retroactively Repealed

In deciding whether Petitioner's rights under the RJA vested and are thus protected from repeal, principles of fundamental fairness must be considered. At its core, the application of due process to protect vested rights involves a question of fundamental fairness. *See, e.g., Michael Weinman Assocs. v. Town of Huntersville*, 147 N.C. App. 231, 234, 555 S.E.2d 342, 345 (2001) (recognizing that a municipality's attempt to stop a developer from constructing a shopping

center that the municipality itself had previously approved interfered with defendant's vested rights and undermined interests in certainty, stability, and fairness); Norman J. Singer, *Sutherland Statutory Construction*, § 41.06, at 375 (7th ed. 2007) ("Judicial attempts to explain whether such protection against retroactive interference will be extended disclose that *elementary considerations of fairness and justice govern the decision*.") (emphasis added).

In this case, the equities favor recognition of Petitioner's rights as vested. From the moment the RJA was enacted, Petitioner pursued litigation in the most efficient and orderly fashion available. Petitioner diligently investigated his claim, filing, for example, a motion to unseal jury questionnaires in his case. Rp. 3. Petitioner timely filed his RJA MAR and supported it with affidavits and other documents as required by law. Rpp. 4-93. He also sought discovery. Rpp. 94-100. When the General Assembly amended the RJA and established a new deadline for the filing of RJA amendments, Petitioner duly complied. Rpp. 101-36.

Meanwhile, the Superior Court of Cumberland County became the focus of RJA litigation, first with Marcus Robinson's case, and later with the cases of Tilmon Golphin, Christina Walters, and Quintel Augustine. Having these four cases proceed while others remained pending avoided the unnecessary expense of judicial and state resources that would have resulted from duplicative RJA

litigation in multiple trial courts. Significantly, however, the State sought to delay RJA litigation in Cumberland County, seeking multiple continuances. *State v. Robinson*, 780 S.E.2d 151 (N.C. 2015). At the same time, through legislative hearing testimony and issuance of public statements, prosecutors urged the General Assembly to repeal the RJA. *See* Neal Inman, "Time for a Return to an Effective Death Penalty," *nccivitas.org*, Nov. 29, 2011, available at https://www.nccivitas.org/2011/time-for-a-return-to-an-effective-death-penalty, last read July 13, 2016. Absent these tactics, Petitioner's case could have proceeded before repeal.

Furthermore, retroactively rescinding the RJA after evidence of systemic racial bias has been uncovered would introduce arbitrariness into North Carolina's death penalty. This arbitrary act would violate the state constitution, which places a high premium on consistent statewide application of capital punishment. *See State v. Case*, 330 N.C. 161, 163, 410 S.E.2d 57, 58 (1991) (remanding a capital case for a new trial where the district attorney declared the case non-capital despite the presence of aggravating circumstances, thereby rendering the capital sentencing system unconstitutionally "irregular, inconsistent and arbitrary").

B. Retroactive Application of the RJA Repeal to Petitioner Would Violate the United States Constitution Prohibition of Bills of Attainder.

The RJA gave death-sentenced prisoners the right to have their sentences reduced to life upon proof of certain facts through a motion for appropriate relief.

Consequently, the RJA re-established life as a possible sentence for the 135 prisoners who filed RJA claims. By removing life as a possible sentence for Petitioner, retroactive application of the RJA repeal would amount to a legislative guarantee of death sentences, in violation of the prohibition against bills of attainder in the United States Constitution. The RJA repeal abolished an existing defense to the death penalty in Burke's case by legislative action rather than by judicial determination of his RJA claims.

Article I, Section 10, Clause 1 of the United States Constitution provides: "No State shall . . . pass any bill of attainder." Article I, Section 9, Clause 3 contains an identical prohibition against bills of attainder passed by Congress. The Supreme Court of the United States has defined bills of attainder as "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). The Supreme Court emphasized in *Cummings v. Missouri*, 71 U.S. 277, 323 (1866), that while bills of attainder "are generally directed against individuals by name . . . they may be directed against a whole class." In addition, the Court has explained that the constitutional prohibition against bills of attainder must "be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v.*

Brown, 381 U.S. 437, 447 (1965). The prohibition against bills of attainder "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Brown*, 381 U.S. at 445. The prohibition against bills of attainder is not limited to explicit legislative pronouncements of criminal guilt or criminal punishment without a trial as the prohibition "intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." *Cummings*, 71 U.S. at 325.

There is evidence that members of the General Assembly were intent on ensuring the execution of "specifically designated persons," namely those death-sentenced prisoners who had filed RJA motions. *See, e.g.*, Laura Leslie, "Senate votes to repeal Racial Justice Act," *WRAL.com*, April 3, 2013, available at http://www.wral.com/senate-votes-to-repeal-racial-justice-act/12300868/, last read July 15, 2016 (quoting Sen. Goolsby as saying repeal of the RJA would end the moratorium on executions and ensure justice for "cold-blooded deliberative killers"); Laura Leslie, "House votes to roll back Racial Justice Act," *WRAL.com*, June 4, 2013, available at http://www.wral.com/house-votes-to-roll-back-racial-justice-act-/12516075/, last read July 15, 2016 (describing recitation of names of victims of prisoners who filed RJA motions and urging repeal because it would"

allow 'swift and sure' justice"). Repeal of the RJA was thus designed to guarantee the execution of Petitioner and others like him by eliminating a powerful defense to the death penalty. To the extent there is a factual dispute concerning legislative intent on this score, at a minimum, Petitioner should be permitted to return to Superior Court for an evidentiary hearing on the matter.[15]

Courts have held that a variety of legislative acts have violated the prohibition against bills of attainder. *See, e.g.*, *Cummings*, 71 U.S. at 325 (reversing a conviction for serving as a priest without taking a designated oath under the post-Civil War Missouri Constitution, which, *inter alia*, prohibited anyone from serving as a member of the clergy without swearing that he or she had never supported the Confederacy); *Lovett*, 328 U.S. at 315 (striking down an act of Congress that prohibited payment of salaries to three federal employees who were alleged to have engaged in subversive activity); *Brown*, 381 U.S. at 461-62 (reversing a conviction for violating a federal statute that prohibited members of Communist Party from serving as officers or employees of unions); *Putty v. United States*, 220 F.2d 473, 478-79 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955) (after the defendant was improperly charged in Guam by information rather than by indictment, and was then convicted, Congress enacted legislation providing that no conviction in Guam may be reversed on the ground that the defendant had not been

[15] As noted in the procedural history, Petitioner asked the Superior Court for an evidentiary hearing on any factually-contested procedural default issues. Rp. 184.

charged by indictment; the court reversed the conviction, holding *inter alia* that the post-conviction legislation was a bill of attainder).

To construe the General Assembly's repeal of the RJA retroactively would constitute an unconstitutional bill of attainder because it would amount to a legislatively-imposed punishment on Petitioner, an easily-ascertainable member of a small, designated group of people, namely one of the 135 death-sentenced prisoners sought relief pursuant to the RJA. As noted earlier, retroactive application of the RJA repeal would impose punishment because it would deprive Petitioner of a defense to the death penalty. Specifically, it would deprive him of his right under the RJA to have a court impose a life sentence, in lieu of a death sentence, upon making the showing required by the RJA. The imposition of punishment was a bill of attainder because it was accomplished by legislation instead of through a judicial proceeding. Indeed, the very language used in the RJA repeal legislation — declaring that all RJA motions filed before the effective date of the repeal "are void" — confirms that the legislation was enacted to supplant the judicial determination of punishment. N.C. Sess. Laws 2013-154 Sec. 5.(d).

C. Retroactive Application of the RJA Repeal to Petitioner Would Violate the Prohibition Against Ex Post Facto Laws in the United States and North Carolina Constitutions.

The RJA established a defense to a death sentence even for cases involving crimes committed before it became effective on August 11, 2009. Retroactive

application of the RJA repeal eliminating this defense would violate the Ex Post Facto Clauses of Article I, Section 16 of the North Carolina Constitution, and Article I, Section 10, Clause 1 of the United States Constitution.

The two critical elements which must be present for a law to be considered ex post facto: (1) the case law or statute must apply to events occurring before its enactment, and (2) the case law or statute as applied must disadvantage the offender affected by it. *Harter v. Vernon*, 139 N.C. App. 85, 91-92, 532 S.E.2d 836, 840 (2000). Both of these elements are satisfied here.

The RJA repeal statute threatens the kind of harm that the Ex Post Facto Clause seeks to avoid. The United States Supreme Court stated at the very beginning of the Republic,

> A constitution that permits such action, by allowing legislatures to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation, and erosion of the separation of powers."

Weaver v. Graham, 450 U.S. 24, 29, n. 10 (1981). *See also Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810) (viewing the Ex Post Facto Clause as a protection against "violent acts which might grow out of the feelings of the moment").

Similarly, in support of the inclusion of an ex post facto clause in the constitution, James Madison argued,

> Bills of attainder, ex-post-facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . The sober

> people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the proceeding.

James Madison, *Federalist* No.10, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 282.

More recently, the Court has emphasized that "there is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 520 U.S. 513, 533 (2000).

In explaining why the drafters of the U.S. Constitution added two Ex Post Facto clauses to limit the power of federal and state legislatures, Justice Chase explained that they had witnessed and learned from Great Britain's retroactive use of "acts of violence and injustice." *Calder v. Bull*, 3 U.S. 386, 389 (1798). One category of such unjust acts passed by Parliament included "times they inflicted punishments, where the party was not, by law, liable to any punishment." *Id.*

Justice Chase opined that "*ex post facto*" referred to certain types of criminal laws. He cataloged those types as follows:

> I will state *what laws* I consider *ex post facto laws,* within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.").

Id. at 390 (emphasis in original); *see also Calder, supra*, at 397 (opinion of Paterson, J.) ("[T]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty.").

Repeal of the RJA violates Justice Chase's third rule by changing the punishment, or by inflicting greater punishment, and his fourth rule by altering the legal rules of evidence, and requiring less, or different testimony than the law previously required in order to sentence an offender to death. Prior to repeal of the RJA in 2013, no person in North Carolina could be executed pursuant to any judgment that was sought or obtained on the basis of race. After passage of the repeal, executions were once again a possibility for those persons whose judgments of death were tainted by racial discrimination. Pursuant to the RJA and prior to its repeal, statistical evidence could be used to prove that race was a significant factor in seeking or imposing the death penalty. The RJA repeal prevented use of such evidence to establish a claim for relief under state law.

While the RJA was not in effect at the time Petitioner was arrested and tried, this does not bar application of the Ex Post Facto prohibition. In *State v. Keith*, 63 N.C. 140 (1869), the Court considered a similar legal question as here, where the defendant served as a Confederate soldier in the Civil War. In 1866, the legislature granted a general pardon to persons who fought for the Confederacy.[16] In 1868, the legislature attempted to revoke the pardon by passing a new statute and applying it retroactively. The Court held that the 1868 repeal of the amnesty law was unconstitutional and that it was "substantially an ex post facto law." 63 N.C. at 145, cited with approval in *Stogner v. California*, 539 U.S. 607, 617 (2003). The RJA is analogous to a pardon because at the time it was passed it created a defense to executions to previously-committed crimes and applied to trials held before the passage of the law.

Ordinarily, in applying ex post facto provisions, courts look to whether the legislature increased punishment beyond what was prescribed when the crime was consummated. *See, e.g.*, *Weaver v. Graham*, 450 U.S. 24, 29-31 (1981). However, the singular terms of the RJA, meant to be applied retroactively and as a defense to execution, cannot be so constrained.

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[16] In *United States v. Wilson*, 32 U.S. 150, 151 (1833), Chief Justice Marshall stated that pardon by act of parliament has "the same effect on the case as if the general law punishing the offense had been repealed or annulled."

In 2009, the North Carolina General Assembly created an affirmative defense to the death penalty, stating 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. Gen. Stat. § 15A-2010 (emphasis added). The General Assembly further indicated that the defense was not moored to the timing of the commission of the crime in two additional ways. First, it stated:

> *Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes*, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by a filing a motion seeking relief.

N.C. Gen. Stat. § 15A-2012(b) (emphasis added). Further, the General Assembly applied the law "retroactively" in Section 2 of S.L. 2009-464. By enacting these provisions, the General Assembly made it crystal clear that a defendant's expectations at the time of the commission of the crime were immaterial.

By filing claims under the RJA, and subsequently under the amended RJA, Petitioner demonstrated reliance on the laws passed by the General Assembly. The General Assembly may not now deprive Petitioner of these defenses to execution that were available prior to the time of the repeal.

D. Applying the RJA Repeal to Bar Petitioner's RJA Claims Would Violate the State and Federal Constitutional Prohibition Against Arbitrary Administration of the Death Penalty.

In enacting the RJA, the North Carolina General Assembly recognized that statewide, systemic race discrimination in capital cases is intolerable. *See* N.C. Gen. Stat. § 15A-2012(a)(3) (stating that a court finding that race was a significant factor in capital-case decisions statewide mandates imposition of a life sentence).

In his RJA MAR and Amendment, Petitioner presented statistical, anecdotal, and historical evidence that capital jury selection proceedings in North Carolina, as a whole, have been significantly affected by racial considerations. Substantially identical evidence was presented to the Cumberland County Superior Court and, based on that evidence, the Superior Court concluded that race had been a significant and intentional factor in prosecutors' peremptory strike decisions in capital cases statewide from 1990 through 2010. The Court also found a racially-discriminatory strike in Burke's own case. *Robinson* Order at ¶¶ 302, 311; *Golphin* Order at ¶ 181.

These findings demonstrated that the RJA was working as intended: widespread discrimination in capital cases was discovered and remedied. However, a majority of legislators in the General Assembly voted to abrogate the RJA, first by amending it and then by repealing it entirely. Thus, having provided Petitioner an opportunity to present evidence of the systemic use of race in capital

cases, and having been presented with a determination by the Superior Court of Cumberland County that race-based jury selection occurred, the General Assembly has attempted to bar the courthouse door to RJA claims. While legislators may choose to turn a blind eye to discrimination, this Court is not free to do the same.

This action is the height of arbitrariness in the administration of the death penalty and conflicts with our federal and state constitutions. *See Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) ("Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."). Concurring in the judgment in *Furman*, Justice Douglas wrote that it "would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it . . . is imposed under a procedure that gives room for the play of [racial] prejudices." *Id*. at 242 (emphasis added). *See also Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (concluding that capital punishment violates the Eighth Amendment, in part because of the persistent "risk of discriminatory application of the death penalty"); *Ring v. Arizona*, 536 U.S. 584, 613, 614-18 (2002) (Breyer, J., concurring) (explaining that jury sentencing is constitutionally necessary in capital cases, in part because of concerns that the death penalty is "potentially arbitrary" in light of evidence that "the race of the victim and socio-economic factors seem to matter").

Arbitrary application of the law is especially intolerable in the context of the death penalty. The decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the Supreme Court of the United States held that the death penalty is unconstitutional as applied to persons with mental retardation and persons under age eighteen, respectively, have applied to all defendants, regardless of when they were sentenced to death or when they filed their claims.[17] As with the categorical exclusion of persons with mental retardation and juveniles from the death penalty, it would be unconstitutionally arbitrary now, after evidence of pervasive race discrimination has been presented in court and found to be compelling, to say Petitioner is too late and he is entitled to no opportunity to seek the protection of the RJA's categorical exclusion of the death penalty for cases tainted by racial considerations.

Accordingly, the repeal should not be construed to bar Petitioner's RJA claims. The General Assembly's attempt to ignore compelling evidence of

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[17] Courts have uniformly applied *Atkins* retroactively. *See, e.g.*, *In re Holladay*, 331 F.3d 1169, 1172-73 (11th Cir. 2003) ("At this point, there is no question that the new constitutional rule . . . formally articulated in *Atkins* is retroactively applicable to cases on collateral review."); *Ochoa v. Simmons*, 485 F.3d 538, 540 (10th Cir. 2007) (holding that *Atkins* applies retroactively); *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003). Courts have uniformly applied *Roper* retroactively as well. *See, e.g.*, *Loggins v. Thomas*, 654 F.3d 1204, 1206 (11th Cir. 2011) (noting *Roper* had been applied retroactively to the defendant's case); *Lee v. Smeal*, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (unpublished) (same); *Horn v. Quarterman*, 508 F.3d 306, 308 (5th Cir. 2007) (same); *Little v. Dretke*, 407 F. Supp. 2d 819, 824 (W.D. Tex. 2005) (same); *Sims v. Commonwealth*, 233 S.W.3d 731, 733 (Ky. Ct. App. 2007) ("*Roper* must be given retroactive application in all those cases in which a sentence of death was imposed upon a defendant who was under the age of 18 at the time he committed the crime."); *Duncan v. State*, 925 So. 2d 245, 252 (Ala. Crim. App. 2005) (applying *Roper* retroactively).

systemic, race-based problems in capital cases in our state fundamentally conflicts with the federal and state constitutional prohibitions against arbitrariness in the administration of the death penalty. Claims based on improper racial considerations go "to the fairness of the trial — the very integrity of the fact-finding process," and thus must be made available to all death-sentenced prisoners. *See Linkletter v. Walker*, 381 U.S. 618, 639 (1965). To find otherwise would violate the federal and state constitutions' absolute prohibition on racial bias in the legal system. *See State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987) ("The people of North Carolina have declared [through the state constitution] that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice.").

CONCLUSION

For the reasons argued here, Petitioner asks this Court to remand his case for an evidentiary hearing on his claim that the prosecution exercised peremptory strikes in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Petitioner also asks that the Court remand his case of an evidentiary hearing on his claims under the RJA; in the alternative, Petitioner asks the Court to remand his case for an evidentiary hearing on his argument that retroactive application of the RJA repeal would violate the constitutional prohibition against Bills of Attainder.

Respectfully submitted this the 21st day of July 2016.

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Pursuant to Rule 33(b) of the North Carolina Rules of Appellate Procedure, I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing Brief of Defendant-Appellant by email upon Jonathan P. Babb, Assistant Attorney General, N.C. Department of Justice, P.O. Box 629, Raleigh, NC 27602-0629, JBabb@ncdoj.gov.

This the 21st day of July 2016.

/s/Gretchen M. Engel
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