NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

16-CRS-223562-63; 16-CRS-223384;
16-CRS-5701; 19-CRS-205311

STATE OF NORTH CAROLINA,)
)
vs.)
)
)
BRANDON XAVIER HILL,)
Defendant.)

MOTION TO BAR DISCRIMINATORY DEATH DISQUALIFCATION PROCESS

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The removal of community members from capital juries under the rubric of "death qualification" is an antiquated, discriminatory, unfair, and unconstitutional practice that Brandon Hill, by and through undersigned counsel, moves to bar at his capital trial.

"Death qualification" removes jurors who come to this courthouse willing and able to participate in our democracy in the most serious cases. As a process of exclusion rather than "qualification," it is thus more properly called death *dis*qualification. This practice disproportionately excludes Black Americans, women, and people of faith—specifically Catholics—from serving on capital juries. The resulting juries reflect a gerrymandered slice of the community, not a

cross-section: whiter, more male, and with less religious diversity than the community. Death qualified juries are more likely to convict and more likely to impose death. Death qualification skews both the demographics and the attitudes of juries in capital trials. The result is the perverse outcome that, with the highest stakes for all parties, capital juries are the least diverse and least impartial.

A new study drawn from a decade of capital jury selection in Wake County cases demonstrates the toll of death disqualification. Ex. A. The study shows that death disqualification in the county's last ten capital trials excluded Black potential jurors at twice the rate of white jurors, and Black women at significantly higher rates; it also shows that Wake County prosecutors further rid the jury of Black Americans and women with a second tool – peremptory strikes – removing Black prospective jurors more than twice as often as white, and Black women at the highest rate of all. In total, with these two procedures, prosecutors rid the jury of over forty percent of Black potential jurors, while also disproportionately excluding people of faith and Catholics. This motion relies on that study, almost four decades of empirical research since *Lockhart v. McCree*, 476 U.S. 162 (1986), historical evidence of North Carolina's racialized violence towards Black residents, the sworn testimony of North Carolina prosecutors,

and evidence to be presented at a pre-trial hearing, including the following exhibits to this motion:

A. Report of Professors O'Brien and Grosso

B. Transcript of Professor Cronin's 2012 Testimony, RJA Evidentiary Hearing, *State v. Robinson*, 91 CRS 23143

C. N.C. Department of Public Safety Research and Planning, *Automated System Query* (first-degree murders)

D. Affidavit of Professors O'Brien and Grosso (RJA Litigation)

E. Transcript Excerpts of Motions Hearing, *State v. Harvey Green*, Pitt County file numbers 84 CRS 31-32

F. Affidavit of Former Prosecutor Karl Knudsen

As shown below, the evidence establishes violations of several provisions of the North Carolina Constitution. Specifically, the disproportionate exclusion of Black and women jurors from capital trials violates Article 1, Sections 19, 26, and 27, of the North Carolina Constitution. Striking jurors for their religious objections to capital punishment breaks our state Constitution's unique promise not to exclude jurors based on their religion. N.C. Const. art. 1, § 26.

More than thirty-five years ago, the United States Supreme Court rejected a claim that death qualification violates the Constitution's fair cross section requirement in *Lockhart v. McCree*, 476 U.S. 162 (1986). Justice Thurgood Marshall dissented, arguing that death disqualification would discriminate

against Black jurors and that the resulting juries would unfairly stack the deck in favor of conviction. *Id.* at 188-89. This Court should adopt the reasoning of this dissent under North Carolina's greater constitutional protections. N.C. Const. art 1, §§ 18, 19, 26, 27. Moreover, even under the Sixth Amendment, neither the *McCree* Court's reasoning nor its factual analysis withstand the scrutiny of today's evidence. The Court in 1986 lacked the kind of empirical evidence proffered in this motion, and lamented its absence. It also rejected what it viewed as a call for a final jury "balanced" – i.e., specifically chosen to include people with all death penalty views. Mr. Hill seeks no such remedy: he does not ask for the inclusion of any specific jurors. He seeks only to avoid the discriminatory culling of the jury to exclude large segments of the population.

He relies on evidence showing the dramatic shift in public attitudes about the death penalty since the Court decided *McCree*. When *McCree* was argued in 1986, only twenty-two percent of Americans opposed the use of the death penalty. Gallup, *In Depth: Topics A to Z: Death Penalty*, https://news.gallup.com/poll/1606/death-penalty.aspx. Today, the percentage of Americans opposed to the death penalty is more than double that number—43 percent. *Id.* Opposition in North Carolina is even higher. In 2009 polling by Elon University, less than half of respondents, 48%, believed that the death penalty is

the "most appropriate punishment for first degree murder." R. Teaguebeck, *The drop in death penalty support*, News Observer (March 5, 2009).

Because such a large proportion of the community now opposes the death penalty, the process of death qualification shrinks the jury pool in ways antithetical to the promise of the jury's role as a voice of the community. The study proffered here documents that, other than hardship removals, death disqualification was the most likely outcome for jurors called to serve in these capital cases.

The harms from this unconstitutional practice flow beyond capital defendants like Mr. Hill to members of the groups disenfranchised by the practice. "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145-46 (1994).

Particularly in this new era of renewed attention on the need to "root[] out the insidious vestiges of racism" in our criminal justice system,[1] this Court should refuse to tolerate death disqualification, and should instead bar it as unconstitutional under both the state and federal constitutions. As shown below, the practice of death disqualification, particularly when it is combined with the

[1] *Robinson v. State*, 375 N.C. 173, 178-79 (2020); *see also State v. Clegg*, 380 N.C. 127 (2022).

racially disparate use of peremptory strikes, violates North Carolina's protective constitutional rights against removal of persons based on race, sex, and religion, Article 1, §§ 19, 26, as well as the Sixth and Fourteenth Amendment guarantees of a fair trial, jury trial, equal protection, and the heightened reliability demanded by the Eighth Amendment of the United States Constitution, along with Article 1, sections 18, 24, and 27 of the North Carolina Constitution.

"Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes." *Graham v. Florida*, 560 U.S. 48, 85 (2010) (Stevens, J., concurring). In this state, the mistaken path of death disqualification must end.

FACTUAL EVIDENCE

A. The Wake County study reveals disproportionate exclusion of Black Americans, women, and Catholics through death disqualification and prosecution peremptory strikes.

The study undergirding Brandon Hill's motion confirms that the same old story of a discriminatory process seen across other jurisdictions (*see* § B, supra) has played out in Wake County. Michigan State law Professors Barbara O'Brien and Catherine Grosso (MSU researchers) – whose research predicated the relief ordered under the Racial Justice Act (RJA) and recently affirmed by our state's high court[2] –conducted the study. Employing protocols similar to those used in

[2] *State v. Robinson*, 375 N.C. 173, 179 (2020); *State v. Augustine*, 375 N.C. 376, 378 (2020).

their RJA study, the MSU researchers examined the transcripts of all capital trials in this county since 2008, including trials with both life and death outcomes. Their study includes the following ten capital trials, and tracks the disposition of over 1,281 jurors:

2008	Wilson, Jakiem	Life
2008	Dickerson, Charles	Life
2010	Cooper, Samuel	Life
2011	Stepp, Joshua	Life
2012	Williford, Jason	Life
2014	DeVega, Armond	Life
2016	Smith, Travion	Life
2017	Holden, Nathan	Life
2018	Richardson, Donovan	Life
2019	Seaga Gillard	Death

Studying the transcripts as well as notes from the clerk's office, the MSU researchers recorded, or "coded," an outcome for every juror, including the following: excused due to hardship, excused for cause, excused for cause due to

death disqualification and other reasons, excused for cause due to death disqualification alone, excused for cause due to inability to consider a life sentence (life disqualification), peremptorily struck by the defense, and peremptorily struck by the prosecution.

The most frequent exclusion, after the 485 jurors excused for hardship, was for death disqualification and additional reasons, and the second most frequent exclusion was for death disqualification alone. Ex. A, at 8. Across these ten trials, prosecutors had the right to peremptorily strike up to 140 jurors, N.C. G.S. § 15A-1217(a)(2) (14 per trial allowed), 120 jurors were selected to serve, and only 56 potential jurors were excluded for life disqualification. *Id.* 176 were excluded by death disqualification. *Id.*

Using the prospective jurors' identification of their race in questionnaires, and the identification recorded in N.C. Board of Election and public-record databases when necessary, the researchers also coded the race of each of the 1,281 prospective jurors. *Id.* at 1.

Their findings demonstrate that the death disqualification process eliminated 25% of Black jurors, but only 11% of white jurors. *Id.* at 8. Meanwhile, prosecutors' peremptory strikes removed 54% of strike-eligible Black jurors who remained in the venire, but only 25% percent of white jurors. *Id.* at

11. When the two different types of removals are combined, 42% percent of Black jurors were removed, but only 20% percent of white jurors. *Id.* at 13.

The researchers also examined death disqualification's impact on the gender composition of capital venires. They documented a 17% exclusion rate for women, compared to 11% for men. *Id.* at 9. This disparity was driven primarily by the exclusion of Black women, at the dramatically higher rate of 31%—over double the overall disqualification rate. *Id.* at 10. Further, prosecutors used peremptory strikes to remove 57% of all Black women who were strike-eligible, far surpassing any other group. *Id.* at 12.

Finally, the researchers used the jury questionnaires and transcripts to code for religion and then analyzed the varying rates of exclusion for different religious groups. The coding process rated jurors as religious or non-religious, and then also coded when prospective jurors identified with a particular religion. Although information on religiosity was not available for around one third of the prospective jurors in this study (as opposed to race and gender, available for every juror), for those for whom these data points were available, the study demonstrates that death disqualification removed 20% of religious individuals as compared to 12% who identified as not religious, *id.* at 10, and 25% of Catholics as compared to only 14% of all other jurors. *Id.* at 11. While Catholics made up 9% percent of the prospective jurors with a known religious affiliation, they

constituted 14% percent of the jurors removed by death disqualification. *Id.* at 11.

B. Empirical and other evidence aligns with the Wake County study's findings of disparate exclusion of Black jurors, women, Black women, and the religious.

1. The exclusion of Black Americans is predicated on death-penalty views that reflect an experience of racial discrimination.

The largest body of evidence in this area involves the exclusion of Black Americans from American juries. This research overwhelmingly shows that Black Americans are far more likely than white Americans to be excluded from service on capital juries through death disqualification. *See generally* Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision-Making and Death-Qualified Juries*, 40 L. & Pol'y 148, 153, 157 (2018).[3] Moreover, at least three times in reported North Carolina decisions

[3] Interviews with actual jurors and retrospective studies of excluded jurors have shown large racial disparities in death qualification. *See* Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 137 (2016) (study of data from Louisiana death penalty trials revealed Black jurors almost twice as likely to be excluded through death qualification than white jurors); Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases*, 1997-2012, 9 Ne. U. L. Rev. 299, 333–36 (2017) (hereafter *Removal of Women and African Americans in S.C.*) (finding in study of transcripts in South Carolina capital trials that 32% of Black potential jurors removed for cause based upon death penalty opposition, but only eight percent of white potential jurors); Report of Dr. Jacinta Gau, in *State of Florida v. Dennis Glover* (Duval Co. Fla. 2022), https://www.aclu.org/legal-document/study-dr-jacinta-gau (finding Black prospective jurors excluded at over twice the rate of white prospective jurors). Surveys of juror-eligible residents conducted across numerous jurisdictions have

have litigants raised these same types of disparities in individual cases. *State v. Perkins*, 345 N.C. 254, 271–72 (1997) (reviewing evidence that only "only five

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repeatedly documented these same disparities between Black and white respondents. *See* Haney, C., Zurbriggen, E. L., & Weill, J. M., *The continuing unfairness of death qualification: Changing death penalty attitudes and capital jury selection*, 28 Psychol. Pub. Pol'y & L. 1, 8, 11 (2022) (hereafter *Continuing Unfairness*) (finding Black respondents in California and Florida surveys to be significantly more likely to be excludable under death qualification than both white respondents and other-race respondents); Justin D. Levinson, Robert J. Smith & Danielle M. Young*, Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 553, 558 (2014) (finding in study of 445 jury-eligible citizens from six leading death penalty states that "white participants were significantly more likely to be death-qualified (83.2%) than non-White participants (64.3%)"); Alicia Summers, R. David Hayward & Monica K. Miller*, Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. App. Soc. Psych. 3218, 3224-25, 3228 (2010) (finding in study of mock jurors that "racial minority members were more than twice as likely as were White mock jurors to be excluded by the death-qualification item"); Craig Haney, Aida Hurtado & Luis Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 L. & Hum. Behav. 619, 630 (1994) (finding in survey of adult California residents that 26.3% of the group excluded by death qualification were racial minorities, "so that death qualification (even when it included strong death penalty proponents) resulted in the loss of 27.1% of [the] minority respondents"); Rick Seltzer, Grace M. Lopes, Marshall Dayan & Russell F. Canan, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 573, 604 (1986) (hereafter *The Maryland Example*) (finding in 1983 Maryland public opinion survey that 34.1% of Black respondents would be disqualified through death qualification, compared to 9.5% of white study participants); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & Hum. Behav. 31, 46 (1984) (finding that "[b]lacks are more likely than other racial groups to be excluded under *Witherspoon* (25.5% vs. 16.5%)"); Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. Crim. L. & Criminology 379, 386 (1982) (finding that 55.2% of Black respondents were "*Witherspoon*-excludable" compared to 20.7 % of white respondents).

percent of white veniremen were excused for their opposition to the death penalty, while thirty-five percent of black veniremen were so excused"); *State v. Noell*, 284 N.C. 670, 681 (1974) (reviewing claim that all Black venire members death disqualified); *State v. Sanders,* 276 N.C. 598, 606 (1970) (reviewing claim that six of nine Black prospective jurors death disqualified).

Social scientists observe that opposition to the death penalty in the Black community is best explained by a historically-rooted distrust of a state power, resulting from the state's discriminatory use of its power.[4] *See* Sections C,D, *infra* (outlining in brief this history and current data in North Carolina). *See also* James Unnever, Francis Cullen & Cheryl Lero Johnson, *Race, Racism, and Support for Capital Punishment*, 37 Crime & Just. 45, 83 (2008).[9] Black Americans have frequently experienced the state as an institution that protects white interests and the criminal punishment system "as unjust and potentially an instrument of oppression," which "fostered wariness among African Americans about the state's power to take life." *Id.* at 82. The resulting

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[4] Pew Research Center, *Most Americans Favor the Death Penalty Despite Concerns About Its Administration* (June 2, 2021), https://www.pewresearch.org/politics/2021/06/02/mostamericans-favor-the-death-penalty-despite-concerns-about-its-administration/ (finding among Black respondents, that 85% said "Black people are more likely than Whites to receive the death penalty for being convicted of similar crimes (61% of Hispanic adults and 49% of White adults [said] this)").

racial difference in opinion about the death penalty is "so robust that it was observed in nearly every public opinion poll and social scientific survey undertaken within this country over the past fifty years." John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. Crim. Just. 85, 85 (2006).

Indeed, in prior death penalty litigation, the State of North Carolina has conceded that high levels of distrust among Black Americans in the criminal and capital punishment systems results from the discrimination this community has endured. In the Racial Justice Act litigation, the statewide litigation team called a sociologist, Dr. Christopher Cronin, to explain why North Carolina prosecutors disproportionately use their peremptory strikes to remove Black jurors. Dr. Cronin noted the wide body of "general literature," including surveys and research, showing that Black Americans' historical sense of unfairness translates to less trust in the criminal punishment system. Ex. B at 2198. He explained that Black "Americans do not favor the death penalty as much as white Americans or other minority demographics." *Id.* Dr. Cronin further testified that it would be wrong for the prosecution to base decisions about Black jurors supporting equality when they had suffered inequality for long years of history. *Id.* 2213.

2. Women oppose the death penalty at greater rates than men, and are underrepresented on capital juries.

Evidence reveals that women support the death penalty less frequently than men. John Cochran & Beth Sanders, *The Death Gap in Death Penalty Support: An Exploratory Study*, 37 J. Crim. Just. 3, 525 (2009) (reporting their own statistically significant finding that nearly 75% of surveyed males supported the death penalty, compared to 63.2% of surveyed females). The divide between males and females in support for the death penalty "has appeared in nearly every survey, over time, and across a variety of methodological designs." *Id.* at 530.[5]

As cited above, Professor Ann Eisenberg's study concerning race additionally found that women and men were excused at different rates during the death disqualification phase of capital trials. *See* Eisinberg, *supra*, *Removal of Women and African Americans in S.C.,* 9 Ne. U.L. Rev. at 340. She analyzed data from a set of 35 cases in South Carolina that resulted in death sentences

[5] *See also* Robert M. Bohm, *American Death Penalty Opinions, 1936-1986*, *in* The Death Penalty in America: Current Research 113, 113-45 (1991) (finding that the difference in male-female support for the death penalty was greater than that across all other socio-demographic characteristics except race); David Lester, The Death Penalty: Issues and Answers (2nd ed. 1998) (reviewing forty studies showing higher support for death penalty by men); John T. Whitehead & Michael M. Blankenship, *Gender Gap in Capital Punishment Attitudes: An Analysis of Support and Opposition*, 25 Am. J. Crim. Just. 1, 1-13 (2000) (tracking difference in death penalty support across genders and higher support among men than women).

between 1997 and 2012 and included information for over 3,000 prospective jurors. Her study revealed that 13.68% of women, versus 9.72% of men, were removed from the venire based on their opposition to the death penalty. *See id.* at 333. Unsurprisingly given the consistent polling concerning the gender gap in death penalty support, the vast majority of women struck for their views on capital punishment were removed because they opposed the death penalty (79%), rather than favored it too strongly (21%), while the findings for men proved much closer for the two groups (44% removed for being pro-death versus 56% for being anti-death). *Id.* at 334.

Eisenberg later conducted a follow-up study which clarified the gender gap and aligns closely with the Wake County study here: "For women, an average of 14.28% of potential jurors were excused due to a refusal to enforce the death penalty across all cases, compared to 9.94% of male potential jurors." Ann M. Eisenberg et. al, *If It Walks Like Systematic Exclusion and Quacks Like Systematic Exclusion: Follow-Up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. Rev. 373, 386 (2017). These studies represent just two of several proving this point.[6]

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[6] *See* Alice Summers et. al, *Death Qualification as Systematic Exclusion of Jurors With Certain Religious and Other Characteristics*, 40 J. Applied Psych. 3218, 3228 (2010) (finding, at the death qualification stage, that "women were more likely than were men to be excluded"); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 L. &

In sum, the process of death qualification "systematically siphon[s] off women" from capital venires. Eisenberg et. al, *supra*, at 388.

3. People of faith, especially Catholics, are well represented in this state and county, but are not well represented on N.C. juries.

As the current Wake County study demonstrates, death disqualification excluded 20% of religious jurors, and 25% of Catholics. According to a study by the Pew Research Center, 62% of adults in North Carolina say religion is very important while an additional 22% rank it as somewhat important.[7] Christians

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Soc'y Rev. 69, 73 (concluding that the death qualification process has a disparate impact on potential women and African American jurors); Richard Salgado, *Tribunals Organized To Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green*, 2005 BYU L. Rev. 519, 519 (2005) (citing three additional sources in noting that "[a] death qualified jury is different demographically from a regular jury, particularly with regard to African Americans and women"); Jill M. Cochran, *Note: Courting Death: 30 Years Since Furman, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 Val. Univ. L. Rev. 1399, 1444 (2004) (finding that women jurors are more likely to be removed during voir dire for their opposition to capital punishment); Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials,* 25 Behav. Sci. & L. 57, 65 (2007) (reporting that death-qualified jurors are more likely to be male than female); Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process* in The Jury System: Contemporary Scholarship 169-70 (Valerie Hans ed., 2006) (noting a study in California that found the same).

[7] Pew research Center, *Religious Landscape Study: Adults in North Carolina* (2014), https://www.pewresearch.org/religion/religious-landscape-study/state/north-carolina/. *See also* Gabby Galvin, *Most Religious States in America*, U.S. News & World Report (Aug. 22, 2017), https://www.usnews.com/news/best-

make up the overwhelming majority of the state's population, at 77%. Religion plays a crucial role in the majority of North Carolinians' lives. The Glenmary Research Center reported that there are 86 religious communities, with half of the North Carolina population identifying with one of them.[8]

Given the documented exclusion of Catholics in Wake County, it is crucial to acknowledge a fundamental difference between Wake County and the rest of this state. Wake County resembles not the overwhelming majority of the counties, where Southern Baptists comprise the largest number of religious adherents.[9] As measured by the U.S. Religion 2010 Census,[10] in Wake (as well

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states/slideshows/10-most-religious-states-in-america?slide=2 (reviewing findings that 65% of North Carolina adults identify as devout or deeply religious).

[8] Alfred W, Stuart, Overview of Religion in NC (NCPedia Jan. 1, 2004), https://www.ncpedia.org/religion/overview

[9] Rebecca Tippett, *Religion in North Carolina: Southern Baptists dominate, Catholicism and non-denominational affiliation rising* (Carolina Demography June 2, 2014), https://www.ncdemography.org/2014/06/02/religion-in-north-carolina-southern-baptists-dominate-catholicism-and-non-denominational-affiliation-rising/. *See also* Association of Religion Data Archives, *County Membership Report* (2010), https://www.thearda.com/rcms2010/rcms2010a.asp?U=37183&T=county&Y=2010&S=Name

[10] "The U.S. Religion Census was originally conducted by the U.S. government in five special reports from 1890 through 1936. In 1952, the National Council of Churches organized its own religion census, which was repeated in 1971 and 1980 with strong support from Glenmary Research Center. Since 1990, this decadal census has been conducted by the Association of Statisticians of American Religious Bodies." U.S. Religion Census, *About the Census*, http://usreligioncensus.org/about-census. Data from the 2020 census has been collected, and is scheduled for release in the late fall of 2022. U.S. Religion Census, *2020 Study*, http://usreligioncensus.org/maps2020_study.

as Orange County), *Catholics*, among the various religious bodies, make up the largest number of religious adherents. Note 8, *supra*. And despite other denominations dominating in virtually every other county, the state's religious data as a whole tell a story of rapid growth in the Catholic Church. As of 2010, 393,000 Catholics resided in the state, a figure that grew from roughly 100,000 in 1980, 150,000 in 1990, and 316,000 in 2000. *See* note 8, *supra* (citing Tippett).

Catholic doctrine strongly opposes the death penalty, taking the stance that capital punishment is "both cruel and unnecessary."[11] In 2010, Pope Francis ordered a revision of the Catechism of the Catholic Church to reflect the Church's view that "the death penalty is inadmissible."[12]

Further, literature supports the finding in the current Wake County study that Catholic jurors are disproportionately excluded. *See* Alicia Summers, R. David Hayward, and Monica K. Miller, *Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. App. Soc. Psych. 3218, 3229 (2010) (studying 994 Nebraska study participants and

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[11] *The Church's Anti-Death Penalty Position*, United States Conference of Catholic Bishops (2019), http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm.

[12] Cindy Wooden, *Pope revises catechism to say death penalty is 'inadmissible'*, National Catholic Reporter (Aug. 2, 2018), https://www.ncronline.org/news/theology/pope-revises-catechism-say-death-penalty-inadmissible.

finding Catholics were twice as likely to be excluded by death disqualification, alongside those with higher devotionalism score).

Finally, empirical research lags even further behind concerning opposition in other Christian faiths (and non-Christian faiths such as Judaism, Islam Buddhism, and Hinduism, among others). The N.C. Council of Churches works to end the death penalty among other efforts to reform the criminal punishment system and promote racial equity. The organization provides on its website information on how to take action against the death penalty, updates on community organizing, and resources from various faith groups concerning their opposition to the death penalty. N.C. Council of Churches, Criminal Justice, https://www.ncchurches.org/criminal-justice/. *See id.* at Resources tab (linking to statements against the death penalty by Episcopal Church, Evangelical Lutheran Church in America, Disciples of Christ and United Church of Christ, Mennonite Church USA, Presbyterian Church USA, and United Methodist Church).

C. State actors have earned distrust from Black community members, creating the conditions for pro-life cause removals.

1. Current enforcement and sentencing practices foster distrust.

Two years ago, in the wake of the police murder of George Floyd, Black communities and many others rallied for justice across our Nation, and our then Chief Justice spoke from the bench to the pain in the streets. Chief Justice Cheri

Beasley began by acknowledging that the protests were "grounded in the belief that justice is perpetually denied in cases involving African-Americans." North Carolina Judicial Branch, *Press Release: Chief Justice Beasley Addresses the Intersection of Justice and Protests around the State*, June 2, 2020 (hereafter Beasley Address), https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state. She also acknowledged "the disparities and injustice that continue to plague black communities. Disparities that exist as a result of policies and institutions; racism and prejudice have remained stubbornly fixed and resistant to change." *Id.*

She observed that many people believe "there are two kinds of justice" because of their own lived experience, experience regrettably borne out by the data. *Id.* "In our courts, African-Americans are more harshly treated, more severely punished and more likely to be presumed guilty." She explicitly called upon the justice system to do better, and committed the court system to do better. *Id.*

Data support her observations. The average rate of imprisonment for Black persons in North Carolina is 810 persons per 100,000 residents, but only 209 white persons per 100,000. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, 7 at Table 1, The Sentencing Project (Oct.

2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/. Black people make up 21% of this state, but 51% of our prison population. *Id.* at 20, Table 5.

This disparity begins at law "enforcement." For example, as researchers for the Governor's Crime Commission have found, in 2019, the rate of traffic stops for Black drivers far surpassed the rate for any other racial group, more than double the rate for white drivers and almost 1.5 times that of other races. Crim. Justice Analysis Center, *North Carolina Traffic Stop Reporting Program Series: Part 1* (July 2020), https://www.ncdps.gov/media/5026/download. Black North Carolinians challenging such practices have frequently found the courthouse doors closed. *See*, *e.g.*, *State v. Johnson*, 2020 WL 7974001, at *8 (N.C. App. 2020) (unpublished) (denying equal protection claim of Black motorist in Raleigh for stop by officer who used 82% of his nearly 300 traffic stops to stop Black drivers, in a city with 28% Black population, because though "'stark' at first glance," the statistics did not account for "the demographics of southeast Raleigh"), *pet. for review granted*, 379 N.C. 150 (2021).

Disparate policing, prosecution and imprisonment have also led to false convictions, for which Black defendants stand at high risk. Seventy innocent people, who collectively served 910 years of imprisonment, have been exonerated

from North Carolina prisons.[13] Fifty-four of the seventy, or 77%, were Black innocent prisoners.[14]

Similar disparities plague North Carolina's death sentencing. Of 134 people on North Carolina's death row today, 73, or 54.5%, are Black. North Carolina Department of Public Safety, *Death Row Roster*, https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-rowroster.

Of 544 persons sentenced to death in this state since 1972, 288, or 53%, are Black. Death Penalty Information Center, *Death Penalty Census Database* (filter to North Carolina, race Black), https://deathpenaltyinfo.org/database/sentences?race=Black&jurisdiction=North+Carolina.

Right now, eight of the ten (80%) serving death sentences imposed in Wake County are Black men, while the ninth is listed as Asian:

Received	Last Name	First Name	Race	Sex
2/24/1995	Thomas	James	Black	M

[13] National Registry of Exonerations (University of Michigan), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7Bfaf6eddb-5a68-4f8f-8a522c61f5bf9ea7%7D&SortField=ST&SortDir=Asc&FilterField1=ST&FilterValue1=NC.

[14] National Registry of Exonerations (University of Michigan), https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7Bfaf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7%7D&SortField=ST&SortDir=Asc&FilterField1=ST&FilterValue1=NC

Received	Last Name	First Name	Race	Sex
7/22/1995	Herring	William	Black	M
7/15/1997	Mann	Leroy	Black	M
11/4/1997	Mitchell	Marcos	Black	M
3/5/1998	Williams	John	Black	M
4/7/1998	Holman	Allen	White	M
5/18/1999	Fair	Nathaniel	Black	M
4/19/2001	Garcia	Fernando	Asian	M
7/2/2007	Waring	Byron Lamar	Black	M
3/4/2019	Gillard	Seaga	Black	M

North Carolina Department of Public Safety, *Death Row Roster*, https://www.ncdps.gov/our-organization/adult-correction/prisons/death-penalty/death-row-roster (filter to Wake County).

Finally, of the twelve innocent men exonerated from North Carolina's death row during this same period, ten are Black men. *Id.* (filter to exoneration, and race Black). With a total of 43 executions in this time period, North Carolina

has seen at least one documented wrongful capital conviction (predominantly of Black men) for every 3.5 executions. *Id.* (filter to execution).

2. Our intertwined history of lynching and executions has created distrust.

> "*The past is never dead. It's not even past*." William Faulker, Requiem for a Nun.

The racial violence and terror our state carried out against Black Americans mars our history like nothing else. White enslavers brought Africans across the Atlantic to the shores of Virginia in 1619. The governments of our new nation stripped Black people of legal rights to marry or claim their own children, while permitting their lawful rapes, assaults, and murder. *See*, *e.g.*, Nikole Hannah-Jones, *The 1619 Project: A New Origins Story* 11-33 (2021). Our own state high court helped to enforce this order, ruling, for example, among its first decisions, that enslavers could not be prosecuted for assaulting the Black persons they held in bondage. *State v. Mann*, 13 N.C. 263, 263 (1829) ("The Master is not liable to an indictment for a battery committed upon his slave.").

After the civil war, racial violence and dehumanization continued. Black codes denied Black Americans economic and civic participation. And, for decades, lynchings struck racial terror across the south and here in North Carolina. Mobs committed over 170 documented lynching-murders in our state.

Seth Kotch, *Lethal State: A History of the Death Penalty in North Carolina* 228-238 (UNC Press 2019) [hereinafter *Lethal State*].

Little more than a century ago, in Wake County, a lynch mob of 300 people killed Greg Taylor, a Black man; they lodged 100 bullets in his body and carved multiple knife slices throughout his back and sides. *Negro Lynched by Mob in Wake Co.*, The News and Observer (Raleigh), November 7, 1918, at 10.[15] But the impact of lynch law in North Carolina extended far beyond individual instances. It created a culture of terror intended to keep Black Americans "in their place." Michael Ayers Trotti, *What Counts: Trends in Racial Violence in the Postbellum South*, 100 J. Am. Hist. 375, 377 (2013). White mobs orchestrated lynchings to be public events and "documented, disseminated, and even commoditized images to extend their reach beyond the borders of their communities," normalizing the dehumanization of Black Americans. Kotch,

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[15] Greg Taylor had been accused of assaulting the white wife of a prominent Wake County farmer and was the fourth Black man taken by authorities to be identified by her. *The Wake County Drum Majors for Racial Justice*, The 1918 Lynching of George Taylor, https://sites.google.com/exploris.org/1918georgetaylorlynching/home. Even though she initially did not recognize him, the deputized citizen who arrested Taylor forced him to stay in the farmer's yard for an extended period of time before the wife accused him of the crime. *Negro Lynched by Mob in Wake Co.*, The News and Observer (Raleigh), November 7, 1918, at 10. Later that day, just 500 feet from the farm, Taylor was kidnapped by four men in blue hoods who brought him to a ravine where he was kept under guard until the mob arrived. *Id.* His corpse was later found hanging by its feet from a tree, and community members were said to return to site to find bullets buried in the surrounding grove to take home as souvenirs of the lynching. *Id*

Lethal State, at 50. Lynchings served as a violent social occasion for members of the mob, and a public spectacle for the rest of the community. Lynching victims were occasionally left hanging on display before thousands of citizens who flocked to view their lifeless bodies. *Negro Lynched in Franklin County*, The News and Observer (Raleigh), August 22, 1919, at 1.

From the late nineteenth century to the early twentieth century, state actors used lynching as a threat to encourage the state's use of what was considered a more civilized death penalty. Kotch, *Lethal State*, at 53. In a 1904 murder trial, a North Carolina prosecutor told the jury that "lynching would be the rest" if they did not find the defendant guilty. This prosecutor noted, "Strike down the strong arm of the law, and bloodshed will run riot in the land." Kotch, *Lethal State*, *supra*, at 50. In a 1927 case in Wayne County, a judge needed to fire his pistol through the courtroom roof to prevent a lynch mob from kidnapping a Black defendant. The same lynch mob later demanded that the judge sentence the defendant to death if he was spared a lynching. Kotch, *Lethal State, supra,* at 39. Newspaper coverage from the early 1900's reveals that (at least) almost half of the executions of Black men for suspected rapes of white women in the state were influenced by mobs. *Id.* at 40. As late as 1957, state officials in Statesville, North Carolina had to hide away a Black man accused of burglary in case he suffered mob violence *Id.* at 35.

In Raleigh today, as elsewhere in the south, the lynchings of yesteryear not only stain our history, but linger in our collective conscience, calling out for justice. In 1952, Wake County Sheriff's deputies hung Lynn Council in an effort to force a confession to a robbery. Gerald Owens, *Decades later, Wake sheriff apologizes to Apex man, 86, hanged by deputies* (June 14, 2019), https://www.wral.com/decades-later-wake-sheriff-apologizes-to-apex-man-86-hanged-by-deputies/18451929/. In 2019, Sheriff Baker issued a formal apology to Mr. Council. And today, racial justice advocates in Raleigh call for the arrest of Carolyn Bryant Donham. Aaron Thomas, *Dozens in Raleigh searching for woman at center of decades-old arrest warrant in Emmett Till's murder*, WRAL (July 6, 2022), https://www.wral.com/dozens-gather-in-raleigh-searching-for-woman-at-center-of-decades-old-arrest-warrant-in-emmett-till-s-murder/20362984/. In 1955, she made the false report that led to the brutal lynching of the Mississippi youth Emmett Till. Authorities in Mississippi issued an arrest warrant but never served it, and she eventually fled to Raleigh. *Id.* Mr. Till's family and community still seek a just resolution nearly 70 years later. *Id.*

Given their intertwined nature, through the late 1800s until through the mid-1900's, lynchings and executions correlated:

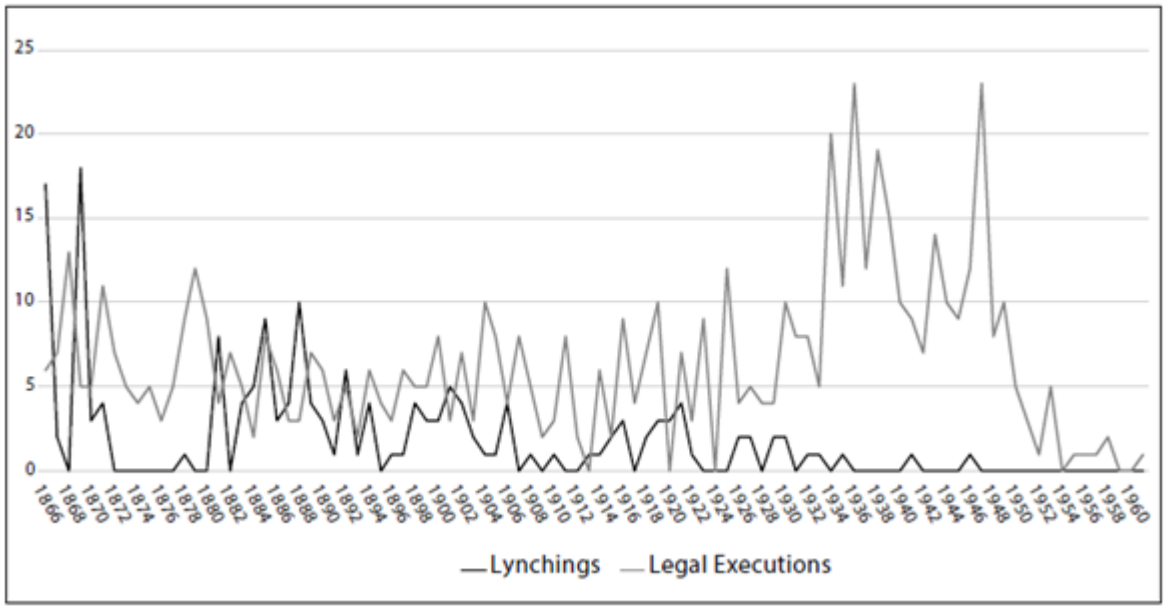

Figure 1. Lynchings and executions in North Carolina, 1866 - 1960. *Id.* at 30.

Seeking to burnish the state's image, however, state actors in the early 1900's began to substitute executions for lynchings. Charles David Phillips, *Exploring Relations among Forms of Social Control: The Lynching and Execution of Blacks in North Carolina,* 21 Law & Soc'y Rev. 361, 369-372 (1987) (hereafter *Exploring Relations*). Lynchings and threatened lynchings slowly declined in the state through the 1930s. From 1930 to 1941, however, North Carolina executed 141 people, more than 75% of whom were Black men. *Executions in the U.S. 1608-2002: The Espy File*, https://files.deathpenaltyinfo.org/legacy/documents/ESPYstate.pdf (search NC).

North Carolina, in particular, relied more on executions than on lynchings compared to the rest of the South, a reflection of the effort to consolidate white

control of the state's political institutions. Kotch, *Lethal State*, *supra*, at 7. This state action was made possible in part by the disenfranchisement of Black voters through the 1900 Suffrage Amendment to the North Carolina Constitution, which imposed poll taxes and impossible literacy tests on Black voters. N.C. Const. of 1868, art. VI, as amended in 1900. Executions rose precisely at the same time as the suffrage amendment "disintegrated" the "political power of black voters." Phillips, *Exploring Relations*, at 368.

The state's use of the death penalty grew more discriminatory over time to match the targets of lynch mobs. *Lethal State*, *supra*, at 24. This substitution was recognized by the community itself, with one citizen in 1917 writing to the then-governor of North Carolina Thomas W. Bickett: "The courts in the land are all in control of the whites, so there is never an excuse for a lynching." *Id.*

Stark racial disparities stain the 740 North Carolina executions from the colonial period to 1972: we executed 533 Black persons, and only 178 white persons. *See Executions in the U.S. 1608-2002: The Espy File*, *supra*.

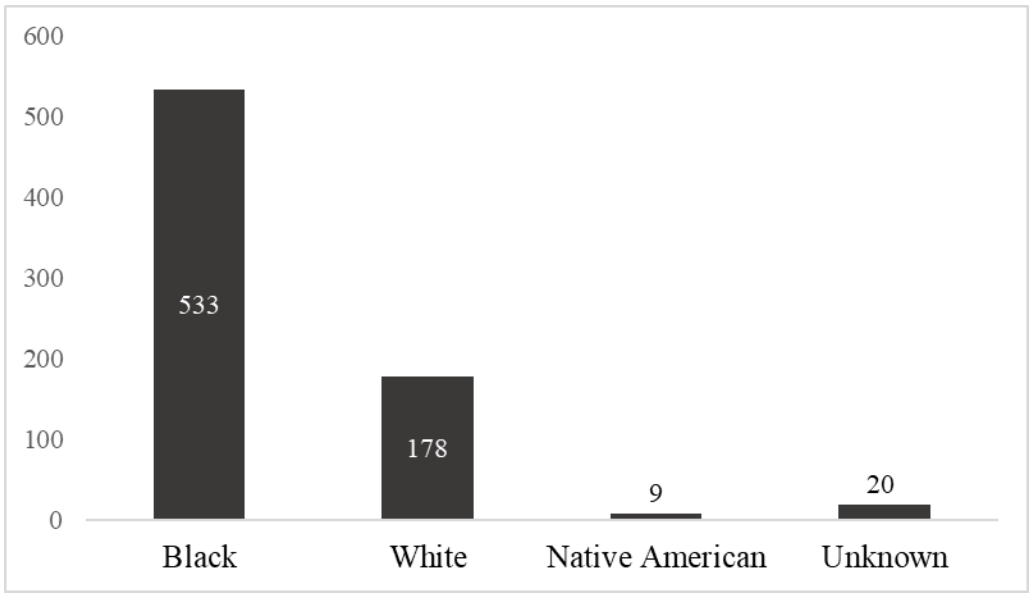

Figure 2 NC Executions by Race, 1726-1972. See *Executions in the U.S. 1608-2002: The Espy File*, *supra*.

North Carolina's death penalty during this period was nothing if not "racially prejudicial" in application. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2076 (2012). Death sentences were primarily reserved for two scenarios: cases involving Black defendants and cases involving white victims. *Id.* In cases involving white defendants or Black victims, the death sentence was less likely to be given. *Id.* at 2071. In the 1930s, Black North Carolinians with white victims were nearly ten times more likely to be convicted of capital murder, which carried an automatic death sentence, than were Black defendants with Black victims. *Id.* Further, cases with Black victims resulted in death sentences only 2.5% of the time compared to cases with white

victims, which resulted in death sentences 12.0% of the time. *Id*. One study even found that Black defendants whose victims were white received the death sentence approximately eighteen times more frequently than any other defendant and victim combination. Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals of the Amer. Acad. of Polit. & Soc. Sci., 119, 126-33 (1973).

From 1865 to *Furman v. Georgia*, 408 U.S. 238 (1972), Wake County executed twenty-one Black men and four white men, meaning that 84% of known executions in the county were of Black men, Kotch, *Lethal State*, *supra*, at 191-227, foreshadowing the current figure: 83% of men currently on death row in the county are Black men. Of the county's 25 executions during this period, 48% punished a Black man for a crime against an alleged white victim, while another 36% saw a Black man executed for a crime against an alleged Black victim. *See Id.* Only 16% were reserved for non Black persons. *See Id.*

The county has never executed a white person for a crime against a Black victim. *See Id.*

Rapes and burglary prosecutions proved even more racist. In North Carolina, death sentences were mandatory for first-degree burglary convictions until 1941 and for rape convictions until 1949. Kotch & Mosteller, *supra,* at 2055. Indeed, evidence suggests that rape and burglary were capital crimes in

this state because of the stereotype of sexual aggression by Black men against white women, particularly inside their homes. Kotch & Mosteller, *supra* at 2066, 2086. These punishments were "almost exclusively reserved for African American criminals with white victims." *Id.* at 2077. Of the 80 North Carolinian men executed for rape from 1910 to 1961, 67 were Black, 58 of whom were convicted of raping a white victim. *See Executions in the U.S. 1608-2002: The Espy File*, *supra*. Before the U.S. Supreme Court outlawed executions for the crime of non-homicide rape in *Coker v. Georgia*, 433 U.S. 584 (1977), North Carolina executed 102 men for non-homicide rape, 89 of whom were Black and 9 of whom were white. See *Executions in the U.S. 1608-2002: The Espy File*, *supra*. That ratio is nearly 10 to 1. From 1910 to 1961, North Carolina's executions for first-degree burglaries were reserved exclusively for Black men who burgled the homes of white women. Kotch & Mosteller, *supra* at 2039. In parallel to these executions, between 1933 and 1976, North Carolina involuntarily sterilized 7,500 people, disproportionately Black. Gregory n. Price, et al, *Did North Carolina Economically Breed-Out Blacks During Its Historical Eugenic Sterilization Campaign?* American Review of Political Economy, 15 no. 1 (2020), https://socialequity.duke.edu/uncategorized/7717/.

Our first post-*Furman* execution took place in 1984, the first in over two decades. *Id.* At 172. We have since executed 43 people, ranking ninth in the

country among the states with the highest execution rates. *See* U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, *Capital Punishment, 2019 – Statistical Tables*: *Table 15: Number of executions, by jurisdiction, 1930–2019 and 1977–2019*, https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cp19st.pdf. Our post-*Furman* use of capital punishment has paralleled our pre-*Furman* use: it is pursued at a higher rate in cases with white victims than in cases with non-white victims. *Lethal State*, *supra*, at 156. And we continue to disproportionately sentence Black persons to death. See *supra*.

D. Wake County prosecutors exercise peremptories disproportionately against Black prospective jurors.

In *State v. Robinson*, 375 N.C. 173 (2020), our Supreme Court documented our state's long history of discrimination in jury selection. After a protracted chapter in which state actors composed jury pools in discriminatory manners, "[p]eremptory challenges became the next tool for limiting African-Americans from serving as jurors because there were previously no African-American jurors on the jury panel against whom peremptory challenges could be used. In North Carolina, the number of authorized peremptory challenges increased from six to fourteen during this period." *Robinson*, 375 N.C. at 178.

Like their counterparts throughout this state, Wake County prosecutors used this tool. In their study of 1,300 jury trials in 2011, involving 30,000 prospective jurors, Wake Forest Law Professors Ronald F. Wright, Kami Chavis, and Gregory S. Parks documented prosecutor strike rates across North Carolina and provided data for major urban counties. Mirroring other findings, they found Wake County prosecutors exercised their peremptories against Black prospective jurors 1.7 times more frequently than against white jurors. *See* Ronald F. Wright, Kami Chavis, Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue, University of Illinois Law Review*, 2018 U. Ill. L. Rev. 1407, 1428 (2018). Professors Grosso and O'Brien found slightly higher numbers in their statewide study of strikes in North Carolina capital trials, finding "prosecutors struck 52.6% (636/1,208) of eligible black venire members, compared to only 25.7% (1,592/6,185) of all other eligible venire members." Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Capital Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 Iowa L. Rev. 1531, 1548 (2012).

But highest yet is the strike rate of Wake County (Judicial District 10) prosecutors within the RJA dataset. For the 10 Wake County death-penalty cases in the study, prosecutors struck qualified black venire members at an average rate of 61.5% but struck qualified non-black venire members at an

average rate of only 25.1 %. Thus, prosecutors were 2.5 times more likely to strike qualified venire members who were Black. Exhibit D, at 9 (2012 Grosso & O'Brien affidavit).

The testimony of former Wake County prosecutors Howard Cummings and Karl Knudsen show that Wake County prosecutors used peremptories to discriminate intentionally. Former Assistant District Attorney Howard Cummings admitted in 1989 that he had used race as a "tactical advantage" during jury selection. Exhibit E (Transcript Excerpts of Motions Hearing, *State v. Harvey Green*, Pitt County file numbers 84 CRS 31-32). Former assistant district attorney Karl Knusden elaborated on the office culture:

> Conventional wisdom in capital cases was to not permit black jurors to serve. Attorneys believed prosecutors should not leave any black venire member on a capital jury, especially if Defendant was black… while there was no official office policy about this, I recall discussions about the problem of leaving a black juror or jurors on capital juries, which then caused the jury to hang and thus the defendant received a life sentence. In my practice, I could usually get all or almost all of the black jurors struck for cause by asking them certain questions and leading them to a cause challenge.

Ex. F (Knudsen Affidavit).

E. Removing Black jurors skews juries in favor of conviction, while death qualification skews juries in favor of conviction and execution.

Studies on jurors who have served in capital trials and mock-jury trials reveal the guilt-prone biases of death-qualified jurors. One researcher observed, capital "jurors hold disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution." Benjamin Fleury-Steiner, *Jurors' Stories of Death: How America's Death Penalty Invests in Inequality* 24–25 (2004).[16]

[16] *See also* Rick Seltzer et al., *The Effect of Death-qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 607 (1986) ("This study, combined with the body of empirical data on death-qualification, conclusively shows that the removal for cause of *Witherspoon* excludables results in a petit jury that is prone to convict and under representative of the community from which it is drawn."); Mike Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 Law & Hum. Behav. 715, 724–25 (1998) ("[E]ven minimal restrictions of juror membership using any type of death qualification can create a jury more likely to convict. . . . The data support the conclusion that death-qualified *voir dire* practices produce jurors more likely to render guilty verdicts and therefore more likely to invoke the death penalty."); Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. L.J. 769, 784–85 (2006) ("After carefully controlling for each of the McCree Court's concerns, the [Capital Jury Project] data nevertheless invariably confirms what Professor Zeisel's study showed back in the 1950s: The death-qualification process today still seats juries uncommonly willing to find guilt, and uncommonly willing to mete out death.").

Additional studies reveal that the exclusion of Black jurors decreases the quality of deliberations and threatens the presumption of innocence. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Pers. & Soc. Psychol. 597 (2006) (finding racially diverse mock juries, compared to all-white juries, deliberated longer, discussed more case facts, and juror members less likely to assert inaccurate facts, and their white members less likely to believe Black defendant guilty at the outset of deliberations).[17] Studies of actual jury outcomes confirm that the less racially diverse the jury, the more likely the conviction.[18]

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[17] *See also* Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & Hum. Behav. 232 (2019) (replicating and extending the Summers study).
[18] Marian R. Williams, & Melissa W. Burek, *Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts*, 31 J. Crime & Just. 149, 164 (2008) (finding in an analysis of felony trial outcomes that "juries with a higher percentage of Whites serving on them were more likely to convict black defendants," after controlling for legally relevant case factors); *see also* Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. Econ. 1017 (2012), (examining 731 non-capital criminal trial outcomes in two Florida counties, and finding that conviction rates for Black and white defendants did not differ from each other among juries when there were Black potential jurors in the jury pool, but Black defendants were convicted at a higher rate when no Black citizens were in the pool).

With respect to sentencing, the Capital Jury Project, hereafter "CJP," investigated how jurors in capital cases decide between life and death sentences through a series of in-depth juror interviews across 14 different states, including North Carolina. The CJP found that in cases with a Black defendant and a white victim, having even one Black juror significantly reduced the likelihood of receiving a death sentence. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U.Pa. J. Const. L. 171, 193-94 (2001). Further, this study shows Black men, and to a lesser extent Black women, are more likely than white people to see the defendant as remorseful, believe the defendant's background adversely influence their life, have lingering doubts about the defendant's role in the crime, and believe the defendant did not pose a future danger—factors a jury considers to return a life sentence. *Id.* at 215-26.

Death-qualified juries also commonly misunderstand or do not follow the law, exacerbating the influence of preexisting prejudice. There exists a "robust scholarly consensus that death-qualification of jurors lowers the effective standard of proof in capital cases." Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 88 (2005).[19] Furthermore, death-

[19] *See, e.g.*, Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 Law & Hum. Behav.

qualified jurors have difficulty processing mitigating evidence, especially as it relates to mental illness. Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill of Rights J. 487, 518 (2014).

Structurally, the death-qualification process itself biases jury deliberations toward death.[20]

481, 486 (2009) (finding that between 14 and 30% of pro-death jurors on a death-qualified panel "actually weighed mitigating evidence as favoring a death sentence," interpreting this evidence as aggravation instead); Erik Lillquist, *Absolute Certainty and the Death Penalty*, 42 Am. Crim. L. Rev. 45, 88 (2005) (noting the "robust scholarly consensus that death-qualification of jurors lowers the effective standard of proof in capital cases"); William J. Bowers & Wanda J. Foglia, *Still Singularly Agonizing*, 39 Crim. Law Bull. 51, 57 (2003) (finding that 30.3% of jurors had decided to vote for death before the start of the penalty phase); *id.* at 69 (finding that 49.2% of jurors thought that mitigating evidence was required to be proven beyond a reasonable doubt); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1506–07 (1998) (finding that among a survey of 916 capital jurors, over half the jurors believed that the death penalty is the *only* acceptable punishment for each of repeat murder, multiple murder, and premeditated murder).

[20] *See* David Niven et al., *A "Feeble Effort to Fabricate National Consensus": The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. Ky. L. Rev. 83, 108 (2006) (noting that "[t]he pre-trial voir dire process of focusing on the willingness of potential jurors to impose a death sentence encourages a belief among jurors that the defendant is guilty. . . . and that opposition to the death penalty is disfavored by legal authorities"); Brooke M. Butler & Gary Moran, *The Role of Death-qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 Law & Hum. Behav. 175, 183 (2002) ("[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances."); Craig Haney, *On the Selection of*

In sum, death-qualified juries are prejudiced and imbalanced. They bias in favor of conviction, disregard mitigating evidence, ignore legal instructions, and impose the death penalty with a lower standard of proof.

ARGUMENT

I. The antiquated tradition of death disqualification relies on obsolete law and must yield to new facts showing its discriminatory and unconstitutional effect.

The exclusion of North Carolinians from capital juries started off as a means of ensuring juries could return lawful verdicts. But it has ended up today as a self-perpetuating practice that has only continued because prior prosecutors liked it and because prior courts allowed it for reasons that no longer apply, based on outdated doctrines, assumptions, and legal argument and evidence far different from that presented in this motion. In short, and as shown in further depth below:

- Contrary to the mandatory nature of the death penalty for a capital conviction when the rule arose, today, a life verdict for a first-degree

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Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 L. & Hum. Behav. 121, 128–29 (1984) ("The death-qualification process led subjects to perceive both the prosecutor and judge as more strongly in favor of the death penalty, and to believe that the law disapproves of people who oppose the death penalty. And it led jurors to choose the death penalty as an appropriate punishment much more frequently than persons not exposed to it.").

murder conviction is the statutory default and the outcome in 95% of cases.

- Until now, litigants have neither presented systemic evidence of death disqualification's discriminating effects nor relied significantly on Article 1, section 26 of our Constitution to challenge this practice.
- A large body of evidence not previously presented proves that death qualified juries are conviction-prone and fail to decide issues of life and death fairly and in accord with the law.

A. Death disqualification relies on obsolete law and finds no legitimate current justification.

Our statutory law does not provide for removals for those opposed to execution. The General Assembly has passed no law containing language on the issue. The only potentially pertinent provisions of the statute govern cause challenges, and they allow them only on the grounds that a juror:

> (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
> (9) For any other cause is unable to render a fair and impartial verdict.

G.S. § 15A-1212(8),(9). The case law has appeared to rely mainly on the rationale if not the text of subdivision eight.

The first apparent North Carolina decision permitting death disqualification came in 1879. *See State v. Bowman*, 80 N.C. 432, 436 (1879).

There, a man charged with killing his wife objected to the State's cause challenge of a juror who "had conscientious scruples against capital punishment[.]" *Id.* The challenged juror stated in voir dire "that it would hurt and do violence to his conscience to render a verdict of guilty, but if the evidence satisfied him beyond a reasonable doubt that the prisoner was guilty, he could bring in a verdict of guilty; yet it would hurt and do violence to his conscience." *Id.* The Court concluded that this juror "would naturally be influenced by his prejudices and go into the jury box with such a bias in favor of the prisoner as would render him incompetent to do justice to the state." *Id.* Critically, the only decision before the jury was conviction or acquittal – not execution.

The mandatory nature of the death penalty during this period was undisputed. For example, juries deciding a charge of burglary in the first degree, which carried a mandatory death sentence, possessed absolutely no discretion to convict on the lesser charge of second-degree burglary to keep the accused safe from the hangman's noose. *See State v. Fleming*, 107 N.C. 905, 909 (1890) (so holding); *State v. Alston*, 113 N.C. 692 (1893) (same); *State v. Johnson*, 218 N.C. 604 (1940) (reaffirming this line of cases traced back to *Fleming*).

In 1941 and 1949, North Carolina law changed to permit juries the discretion to recommend mercy upon conviction. *See* Cindy F. Adcock, *The Twenty-Fifth Anniversary of Post-*Furman *Executions in North Carolina: A*

History of One Southern State's Evolving Standards of Decency, 1 Elon U. L. Rev. 113, 117 (2009) (describing replacement of mandatory death sentences with a discretionary system, first for burglary and arson in 1941, and then for murder and rape in 1949). Under the change in 1949 for murder, death became the default (rather than mandatory) punishment for first-degree murder, with an option that the jury issue a binding life recommendation. *State v. Roseboro*, 276 N.C. 185, 193-94 (1970) (describing a predecessor version of N.C. G.S.§ 14-7). In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), in 1974, the General Assembly switched gears once again, requiring mandatory death sentences for certain convictions. *Woodson v. North Carolina*, 428 U.S. 280, 286 (1976). The U.S. Supreme Court struck down this scheme in 1976. *Id.* at 305. The current discretionary, two-phase capital trial system was thus born.

Under it, life without parole is the statutory default for first-degree murder if death is unsuccessfully sought from a jury. G.S. § 14-17 (a); G.S. 15A-2000 (a)(1), (b)

And life imprisonment has become the outcome nearly always. A total of 2,501 North Carolina prisoners are currently sentenced for first-degree murder, Ex. C, and, as documented above, only 134 are sentenced to death, a miniscule five percent. Thus, a juror who will not consider a death sentence can no longer be said to be one who will not return a lawful judgment. In sum, execution was

once the only option for first-degree murders, rapes, burglaries, and robberies. It became the presumptive option. It is now the statutory *exception* to life imprisonment, available only for murder. And that exception is employed rarely.

Yet, throughout all of these changes, the courts repeatedly reaffirmed the 1879 decision in *Bowman* with little to no analysis, with no citation to a supporting statute, as though jurors who could not consider death were incapable of returning lawful verdicts. The courts have simply restated their former holdings without acknowledging whether the jury possessed or lacked discretion to do anything more than convict. *See, e.g., State v. Childs*, 269 N.C. 307, 317–18 (1967) (tracing authority to 1879 and *Bowman)*: "It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain *beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty*.") (emphasis added).

After *Witherspoon v. Illinois*, 391 U.S. 510, 531 (1968),[21] North Carolina courts cited that decision and the *Bowman* line of decisions, rather than any

[21] There, the Court reversed a death sentence because jurors against the death penalty were removed for cause, regardless of their ability to follow the law. *Witherspoon*, 391 U.S. at 531. But in a footnote, the Court clarified that it *would not have* reversed for the removal of a juror who would have automatically imposed

statute, as authority for death disqualification. *State v. Sanders*, 276 N.C. 598, 607 (1970) ("The record here discloses no violation of the rule in *Witherspoon*.").

Throughout this line of decisions, North Carolina courts gave little consideration to N.C. G.S. § 15A-1212 (8), which provides that a party may challenge for cause a potential juror who "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." The drafters intended the statute to codify *Witherspoon*, but after its passage the courts did not consider whether its plain text supported or forbade the more expansive exclusion allowed under *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (excluding those "substantially impaired" in their ability to consider execution). *See* Criminal Code Commission Commentary, N.C. G.S. Ann. § 15A-1212; *State v. Avery*, 315 N.C. 1, 19 (1985) (statute codifies *Witherspoon*).

While the North Carolina Supreme Court has considered § 1212(8) in tandem with the *Witt* test a number of times, it has never addressed an argument that the statute limits the state's ability to exclude otherwise qualified jurors more than *Witt* does. *See*, *e.g.*, *State v. Garcia*, 358 N.C. 382, 401–04 (2004). But the statute's plain text *does* impose stricter limits on removal: a

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death or whose "attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 522 n.21.

court may exclude only jurors who would be "unable to render a verdict," "regardless of facts and circumstances." A finding of "substantial impairment" alone should not support exclusion under the statute's express terms. But more to the point, the old bases for exclusion no longer exist in a world where anti-execution jurors may return lawful verdicts of guilt and life.

B. In rejecting prior claims, the United States Supreme Court never considered evidence as comprehensive as the new evidence presented here.

On the heels of *Witherspoon*, a North Carolina defendant argued that his jury was a conviction-prone body, organized to convict. In a brief part of an opinion addressing other issues, the Court rejected the claim because the prisoner had presented "no evidence to support the claim that a jury selected as this one was is necessarily 'prosecution prone[.]'" *Bumper v. North Carolina*, 391 U.S. 543, 545 (1968).

The Court followed up *Bumper* with a more in depth decision in *McCree*, 476 U.S. at 169. It again rejected a challenge to death qualification, finding "several serious flaws in the evidence upon which the courts below reached the conclusion that 'death qualification' produces 'conviction-prone' juries." *Id*. The Court further found that those excluded through this process "are singled out for exclusion in capital cases on the basis of an attribute that is *within the*

individual's control." *Id.* at 176-77. The Court refused to recognize those excluded as a cognizable group, and denied relief. *Id.*

As a factual matter, the U.S. Supreme Court in *McCree* and *Bumper* did not have the nearly forty-year body of empirical research since published – showing both that death-qualified juries are conviction prone and that less racially diverse juries are more conviction prone. *See* Facts, § E, *supra*.

And, as a legal matter, the Court did not address the significant claims presented in this motion, namely that death disqualification disproportionately removes Black jurors, women, Black women, religious persons and Catholics. Nor have North Carolina courts that have approved of death qualification grappled with these issues, particularly in light of the unique protections that Article 1, section 26 of the North Carolina Constitution affords.[22]

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[22] Counsel have only been able to locate two decisions in which a challenge to death disqualification referenced this provision of the North Carolina Constitution. Both were failed challenges but not controlling here. In *State v. Perkins*, 345 N.C. 254, 271–72 (1997), a death sentenced prisoner cited the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 19, 23, 24, and 26 of the North Carolina Constitution in a challenge predicated on the facts of his own jury selection in which, consistent with the data in the current Wake Study, "only five percent of white veniremen were excused for their opposition to the death penalty, while thirty-five percent of black veniremen were so excused. He argued the jury selected was far less representative of the community than the venire originally called." The Court rejected this challenge with focus on a challenge under the Equal Protection Clause, which requires discriminatory intent. *See id.* The Court concluded that merely showing disproportionate impact on the racial composition of the jury was insufficient to make out a claim under the various state and federal constitutional provisions cited.

II. By disproportionately excluding Black persons, women, Black women, religious persons, and Catholics, death qualification violates Article 1, section 19 and 26 of the North Carolina Constitution.

Entertaining challenges to the discrimination inherent in death qualification under the Kansas Constitution, the Kanas Supreme Court recently acknowledged that whether death qualification "excludes Black veniremembers" and results in juries that are "disproportionately guilt-prone and death-prone," and thus violates a defendant's right to an impartial jury, are important questions that require factual hearing and "most certainly warrant careful analysis and scrutiny." *State v. Carr*, 502 P.3d 546, 583 (Kan. 2022). Such

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In a pre-*Batson,* pre-*Woodson*, and pre-*Coker v. Georgia*, 433 U.S. 584 (1974)-rape case resulting in a mandatory death sentence, a Black prisoner relied on Article I, section 26 to challenge the prosecutor's removal of all "Negro jurors who indicated some bias toward defendant because of their acquaintance with him or because of their feelings against the death penalty" and removal of the last Black prospective juror with a peremptory. *State v. Noell*, 284 N.C. 670, 681 (1974). Relying on the framework the U.S. Supreme Court had set out in *Swain v. Alabama*, 380 U.S. 202, 222 (1965), the Court concluded: "Defendant's mere showing that all Negroes in this case were challenged by the solicitor is not sufficient to establish a prima facie case of an arbitrary and systematic exclusion of Negroes. The record is silent about any prior instances in which the solicitor challenged Negroes from the jury. The defendant has the burden of proof of showing such arbitrary and systematic exclusion, and he has failed to carry that burden." *Id.* at 683.

scrutiny and analysis is warranted here too. And it begins with North Carolina's unique constitutional protections.

Our Constitution provides an extraordinary level of protection against discrimination in jury selection. Article 1, section 19 provides generally that "no person [shall] be subjected to discrimination by the State because of race, color, religion, or national origin." But in 1970, North Carolina voters amended our Constitution with Article 1, section 26, replicating word-for-word a federal statute Congress enacted in 1968.[23] Section 26 is more specific than § 19 to the context here: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. *See generally* Report of the N.C. State Constitution Study Commission to the North Carolina State Bar and the North Carolina Bar Association (1968), https://www.ncleg.gov/Files/Library/studies/1968/st12308.pdf.

[23] "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status." 28 U.S.C. § 1862, Pub. L. 90-274, § 101, Mar. 27, 1968. This provision was part of a larger statute that, as Congress indicated, implemented a number of reforms designed to "obtain[] jury lists that represent a cross section of the relevant community and . . . establish[] an effective bulwark against impermissible forms of discrimination and arbitrariness." H.R. Rep. 90-1076, 1968 U.S.C.C.A.N. 1792, 1793, 1798 (Feb. 6, 1968).

In a now famous decision, our high court has trumpeted the importance of this provision in stamping out the corruption of juries by racism, sexism, and religious intolerance:

> Article 1, section 26 does more than protect individuals from unequal treatment. The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction. It must also be perceived to operate evenhandedly.
>
> Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice. Such discrimination thereby undermines the judicial process.

State v. Cofield, 320 N.C. 297, 302–03 (1987) (*Cofield I*) (holding that the selection process of a grand jury foreperson which resulted in disparate impact violates § 26) (note omitted). The court emphasized that "[e]xclusion of a racial group from jury service entangles the courts in a web of prejudice and stigmatization." *Id.* Further, the Court found that the exclusion of Black jurors through the grand-jury selection process, if permitted to stand, would "put the

courts' imprimatur on attitudes that historically have prevented blacks from enjoying equal protection of the law." *Id.*

As shown below, Article 1, section 26, supported in part by section 19, prohibits the disproportionate exclusion of Black jurors, women jurors, Black women, and the religious caused by death disqualification for several reasons: A) the distinct text of Article 1, section 26, differs from both the more limited protections in section 19 and from the U.S. Constitution, providing greater protection, consistent with *Cofield*, *supra*; B) rather than following prior decisions that have failed to grapple this issue, this Court should interpret the North Carolina Constitution in harmony with our state high court's recent directives to eradicate racial inequity; C) if there is an intent requirement, it is met if the State goes ahead with death disqualification under notice of its discriminatory impact; and D) specific considerations relevant to each of these populations, including the prior discrimination by state actors that has shaped views about the death penalty in the Black community, support only a finding that death disqualification violates these provisions.

A. North Carolina's Constitution provides broader protection against suspect exclusion from jury service than does the U.S. Constitution, and Section 26 provides protections distinct from Section 19.

As our high Court has recently recognized, consistent with other state high courts and the views of legal scholars, language in a state constitution's

text will often give greater protections to the state's citizens than the minimum federal requirements. For example, multiple state courts, including North Carolina's, have held that a difference of one word ("cruel *or* unusual" instead of "cruel *and* unusual" punishment) requires more robust state constitutional protections. In *State v. Kelliher*, 873 S.E.2d 366, 382 (N.C. 2022), for example, the Supreme Court relied in part on the "textual distinction" between the Eighth Amendment and Article 1, § 27 to hold that any sentence requiring a juvenile to serve more than 40 years before parole eligibility is "cruel *or* unusual" punishment (emphasis added).

Former Justice Harry C. Martin has strongly encouraged the use of our state Constitution to provide protection separate from those in the U.S. Constitution:

> When faced with an opportunity to provide its people with increased protection through expansive construction of state constitutional liberties, a state court should seize the chance. By doing so, the court develops a body of state constitutional law for the benefit of its people that is independent of federal control.

Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. Rev. 1749, 1751, 1755 (1992) (hereafter *The State as a Font of Individual Liberties*) ("The disjunctive term 'or' in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment.").

In comparison to the state provisions here, the Fourteenth Amendment to the U.S. Constitution bars states from "deny[ing] any person within [their] jurisdiction the equal protection of the laws." And the Sixth Amendment protects the criminally accused with the right of "an impartial jury of the state and district wherein the crime shall have been committed[.]" The caselaw most pertinent to the issues presented arises in decisions under the Fourteenth Amendment barring intentional racial or sex discrimination in the use of peremptory strikes, *Batson v. Kentucky*, 476 U.S. 79, 93 (1986), decisions under the Sixth Amendment guaranteeing a fair and impartial trial, *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), and decisions, also under the Sixth Amendment, securing the right to a fair cross section in the jury venire. *See*, *e.g.*, *McCree*, 476 U.S. at 176-77 (finding no fair-cross section violation). *See also* Section IV, *infra* (distinguishing this case).

As important as those federal rights and decisions are, and despite Mr. Hill's entitlement to relief under them, evaluating the distinct protections in Sections 19 and 26 requires a deeper analysis. The significant difference between the text of these provisions and "the [Sixth and Fourteenth] Amendment[s] suggests that the people of North Carolina intended to provide greater protections in the North Carolina Constitution than the federal constitution." *Kelliher*, 873 S.E.2d at 382.

Like the Fourteenth Amendment, section 19 begins by providing that "[n]o person shall be denied the equal protection of the laws," but it continues by adding that "no person [shall] be subjected to discrimination by the State because of race, color, religion, or national origin."

Section 26, moreover, focuses solely on jury selection and employs language broader than *discrimination*, focusing instead on *exclusion*: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. art. I, § 26. The inverse of exclusion is of course inclusion, which Justice Mitchell found in his *Cofield I* concurrence to be this provision's touchstone: "[I]t is clear beyond any doubt that this section of our Constitution was intended as an *absolute guarantee* that all citizens of this State would *participate fully* in the honor and obligation of jury service in all its forms[.]" *Cofield I*, 320 N.C. at 310 (Mitchell, J., concurring in the result) (emphasis added).

With Section 26's exclusion-oriented text, it is not difficult to see how Justice Mitchell reached his call for full participation and how the Court reached its decision in *Cofield*. This is not a test of intentional discrimination, like that required under *Batson*, decided one year earlier and thus available to the *Cofield* court. Instead, it is a test of whether exclusion occurred, and its impact, regardless of intent.

Indeed, the *Cofield I* court granted relief under these provisions to a defendant who raised a challenge that likely would have failed under the federal standard. He argued that the white foreman in his grand jury had been appointed in a racially discriminatory fashion, when a sheriff who knew the foreman had recommended that the state appoint him. 320 N.C. at 299. The trial court appointed the foreman even though "[n]o effort was made to ascertain the qualifications of 6 black members" of the grand jury to see if they showed comparable promise of being a suitable foreman. *State v. Cofield*, 324 N.C. 452, 460 (1989) (hereafter *Cofield II*). Not even acknowledging the question of discriminatory intent, the *Cofield I* court decided that §§ 19 and 26 of the state constitution controlled the case and warranted relief, due to the discriminatory *impact* of the selection process and the damage it does to the perception of evenhanded justice. 320 N.C. at 301-02 (italics in original); *see also State v. Mettrick*, 306 N.C. 383, 385 (1982) ("The appearance of a fair trial before an impartial jury is as important as the fact of such a trial."). Where members of protected groups are systematically excluded from jury service, the justice system will not be perceived to have "operate[d] evenhandedly," and the selection process responsible for the exclusion cannot stand—regardless of whether litigants and judges navigate that selection process with good intentions. *Cofield I*, 320 N.C. at 301-02.

Cofield I thus stands for the proposition that *any* practice that excludes from juries the groups listed in sections 19 and 26 violates the state constitution.[24] The North Carolina Supreme Court clarified as much two years later, after *Cofield I* went back on remand and up again on appeal. *See Cofield II*, 324 N.C. at 452. In *Cofield II*, the Court clarified that the harm lay precisely in the discriminatory *result* of the process; accordingly, the process itself was not racially neutral, and the disparate impact could not be remedied by a showing of innocuous intent: "Because all black members and all but one white member were eliminated from consideration for the position of grand jury foreman by the recommendation process used here, the process was not racially neutral and was a violation of article 1, section 26 of our Constitution." *Id.* at 461. *Cofield II* clarified that "the spirit of article 1, section 26 requires that *all* grand jurors be considered for appointment as grand jury foreman," 324 N.C. at 460 (italics included), regardless of race, gender, or any other protected status. The upshot of the *Cofield* cases is simply this: all people must be afforded equal chances to serve on juries.

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[24] Incidentally, the *Cofield I* court was also "persuaded that defendant's equal protection challenge to the foreman selection process in Northampton County ha[d] merit under the fourteenth amendment to the United States Constitution" in addition to the state constitution. *Cofield I,* 320 U.S. at 305. But because "our decision on this case can stand on the North Carolina Constitution alone," the Court reasoned, it "need not reach the federal question presented," and declined to do so. *Id.*

Thus, similar to the requirement that all grand jurors "must be considered for appointment as grand jury foreman," *Cofield II*, 324 N.C. at 460, all venirepersons must have an equal opportunity to participate as full citizens in all cases before our courts, including cases deciding life and death issues. *See State v. Price*, 301 N.C. 437, 448-49 (1980) ("[T]he data base must be such that the competing perspectives in the community are given a reasonable opportunity to participate in the judicial process through service on a jury.").

B. The Court's recent directives to root out racial inequity in the criminal justice system inform the meaning of sections 19 and 26.

Although *Cofield* requires the relief requested here, recent directives, observations, and examples from our high court further cement this conclusion. At least three times in earlier years, the Supreme Court has confronted the disproportionate exclusion of Black potential jurors through death disqualification, sometimes combined with state peremptory challenges:

- *Perkins*, 345 N.C. at 271–72 (rejecting claim made under multiple provisions of both the federal and state constitution, including sections 19 and 26, of prisoner showing Black venirepersons death disqualified at 7 times the rate of white, because he did not prove discriminatory intent needed under the Equal Protection Clause, without acknowledgment of independent protections of state constitution);
- *Noell*, 284 N.C. at 681 (rejecting challenge that all Black persons in venire dismissed through death disqualification, finding burden of proof of

showing arbitrary and systematic exclusion, including across prior trials, unmet);

- *Sanders,* 276 N.C. at 606 (pre-Article I, sections 19 and 26, rejecting claim of Black defendant who argued that six of nine Black prospective jurors improperly excluded under death disqualification, without addressing any protections in the N.C. Constitution).[25]

Our high court's response in all three cases revealed little concern for the exclusion of Black jurors. Similarly, until earlier this year, despite having heard scores of challenges under *Batson* in over a three-decade period, our high Court "ha[d] never held that a prosecutor intentionally discriminated against a juror of color." *Robinson v. State*, 375 N.C. 173, 178-79 (2020); *State v. Clegg*, 380 N.C. 127, 170 (2022) (Earls, J., concurring) ("This is the first case where we have reversed a conviction on *Batson* grounds.").

The Supreme Court has now changed course. In *Robinson*, the Court finally acknowledged that prosecutors were employing peremptory strikes as a "tool" to remove Black citizens from our state's juries. 375 N.C. at 178. The Court noted that the RJA provided "a statutory mechanism for rooting out the insidious vestiges of racism in the implementation of our state's most extreme punishment." *Id.* at 175. *See also* Beasely Address, *supra* (calling on the courts

[25] Sections 19 and 26, although approved by the voters in November of 1970, did not take effect until 1971, after *Sanders* was decided.

to address racial inequities). In parallel, sections 19 and 26, as already interpreted by *Cofield*, provide a constitutional mechanism for rooting out the deeply entrenched racial inequity in capital jury selection challenged in this motion. *See also Clegg*, 380 N.C. at 163 (reversing "trial court's order overruling defendant's *Batson* objection," in high Court's first-time finding *Batson* violation).

C. If intent to discriminate is required, the prosecutor's willingness to proceed with death disqualification provides the proof.

Even if a test requiring discriminatory intent is required, that test is satisfied here. The decision to proceed with death-qualification, in the face of the ample evidence of its disparate impact on cognizable groups, demonstrates that intent.

As the U.S. Supreme Court recently noted, a "person acts recklessly, in the most common formulation, when he 'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards. Speeding through a crowded area may count as reckless even though the motorist's 'chances of hitting anyone are far less [than] 50%.'" *Borden v. United States,* 141 S. Ct. 1817, 1824 (2021) (internal citation omitted)).

Similarly, in the context of the Worker's Compensation Act, our high Court has held "that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees

and an employee is injured or killed by that misconduct, that misconduct is tantamount to an intentional tort." *Woodson v. Rowland*, 329 N.C. 330, 340–41 (1991) (citing, inter alia, W. Prosser, Handbook of the Law of Torts § 8 (4th ed. 1971) ("'Intent is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does.'"). Certainly, what works for workers ought also apply to jurors. They merit the courts' same vigilant protection as they walk into the courts of this county seeking to fulfill "the solemn obligation of all qualified citizens[.]" N.C. G.S. § 9-6. Any requisite discriminatory intent is thus proven.

D. Special considerations for each protected class further fortify Mr. Hill's right to an order barring death disqualification.

1. Excluding Black jurors based on warranted distrust in the criminal and capital punishment system clashes with basic fairness and our constitution.

The entire history of this State's criminal punishment practices, from slavery to racial terror and lynchings to the modern-day inequities in our systems, explain the death-penalty views of a substantial portion of Black North Carolinians. The distrust has been earned. The breach of trust that has spread over hundreds of years cannot be repaired in a day. In Wake County, this breach has caused exclusions of Black potential jurors at a rate of more than two to one over white potential jurors. What's more, prosecutors have removed Black jurors

with peremptory strikes at a two to one rate for Black versus white prospective jurors.

One of the most significant consequences of death disqualification is exclusion not merely from deciding punishment but from deciding guilt in the first phase of the trial. As set out in Facts Section (C)(1), this is a state with a significant number of exonerations of innocent prisoners,. An overwhelming majority of these wrongfully-convicted persons are Black men. In a state with this history, it is unfathomable to follow a course of jury selection that disproportionately excludes Black jurors, particularly where less exclusionary procedures are possible.[26]

The argument for death disqualification is that Black jurors who oppose the death penalty are not fit to serve: they are not even qualified to decide if a person is guilty. It's an undeserved stamp of inferiority. Excluding such jurors only entangles our courts further in discrimination and enhances wrongful convictions. It does nothing to promote the perception of even handed operation or to command "the respect and support of those subject to its jurisdiction." *Id.*

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[26] See Marian R. Williams, & Melissa W. Burek, *Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts*, 31 J. Crime & Just. 149, 164 (2008); Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. Econ. 1017 (2012).
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2. **Excluding women through death disqualification exacerbates sex discrimination in jury selection.**

The MSU study demonstrates that Wake County death disqualification has excluded 17% of women, compared to 11% of men. Ex. A, at 9. This study adds to the previously-discussed literature showing this same disproportionate exclusion. What's more, this disparity "is concentrated in the experiences of Black women who appeared for jury duty in these cases." *Id.* For Black women, 31% were excluded during death qualification, a rate more than *double* that observed overall during death disqualification. *Id.* at 9-10. In other words, Black women bore the brunt of the disparity in disqualification between men and women.

These findings follow naturally from the sex discrimination that has long marred this Nation, particularly in the context of jury selection. For over a century, American laws explicitly provided for the exclusion of women from jury pools. *See* Joanna L. Grossman, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 Stan. Law Rev. 1115, 1115 (1994). Statutes barring women from jury service crowd the annals of state law and, in many instances, track the history of opposition to women's suffrage.[27]

[27] For example, Alabama voted against ratification of the 19th Amendment in 1919 and did not officially endorse suffrage for women until 1953. *Gender-Based Jury Exclusion,* Equal Justice Initiative (2021) n.6, https://eji.org/report/race-and-the-jury/why-representative-juries-are-necessary/sidebar/gender-based-jury-exclusion/.

At least three states—Alabama, Mississippi, and North Carolina—retained such statutes "well into the 1960s." *Id.* Proponents of gender exclusion "tended to couch their objections in terms of the ostensible need to protect women from the ugliness and depravity of trials," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994). not yet realizing that this "attitude of 'romantic paternalism,'" antiquated by modern standards, functioned in retrospect to "put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion).

Not until the latter half of the 20th century did the United States Supreme Court recognize the constitutional infirmity of gender-based exclusion from juries. *See Taylor v. Louisiana*, 419 U.S. 522, 525 (1975) (striking down an affirmative registration statute that allowed women to serve on juries only if they volunteered and forbidding other state statutes that functioned to cull women from the jury pool outright). Even after *Taylor*, moreover, discrimination continued through the tool of peremptory strikes. States largely permitted the use of gender-based peremptory strikes until 1994, when the United States Supreme Court finally decided that the practice violated the federal Constitution. *J.E.B.*, 511 U.S. at 146. Unlike the *Taylor* Court, the *J.E.B.* Court

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Similarly, "Alabama statutorily barred women from serving on juries until 1967. For the next 11 years, state law authorized judges to exclude women—and only women—from jury service if good reason could be articulated." *Id.* at n.7.

drew heavily on the Equal Protection Clause, as well as evidence illustrating women's historic exclusion from jury service in America. Excluding women from juries by striking them on the basis of their gender, the Court concluded, amounted to "discrimination by state actors [that] violates the Equal Protection Clause" in all cases. *Id.* at 130-31. But discrimination still persists, particularly as documented here, for women of color. Recent studies reflect "clear patterns . . . that marginalized groups, in particular women of color, experience significant hurdles to participate in the jury process" writ large. Alexis Krell, *Juries Have a Diversity Problem. What's Being Done to Address it in Washington State?*, The News Tribune (2021).This is the historical context of death disqualification's exclusion of women. If the price of a "fair trial" on capital sentencing for the State is death disqualification, it must be acknowledged that Black women, as ever in other contexts throughout U.S. history, will bear the brunt of that cost with their disproportionate exclusion. The Wake County study, which found that Black women were excused at a rate over double the overall disqualification rate, suggests strongly that Black women in this jurisdiction in particular will carry this burden if it goes unchecked. Ex. A, at 9-10; *see also* Gau, *supra* note 3, at 10 (finding that nearly 43% of Black women were removed due to death disqualification, compared to one-third of black men, one-fifth of white women, and even fewer white men). The consequences where the excluded group is a

member of not one, but two protected statuses, cannot be overstated, and were in fact considered in *J.E.B.*, 511 U.S. at 127. Quite presciently, the justices wrote that, in the absence of protecting gender, given the "overlapping categories" of gender and race, "gender [could] be used as a pretext for racial discrimination." *Id.* at 145. *See also* Elizabeth Hambourger, *NC Case Shines Rare Light on Sexism in Death Penalty Jury Selection*, N.C. Coalition for Alternatives to the Death Penalty (Oct. 9, 2019), https://nccadp.org/death-penalty-sexism-jury-selection. Yet evidently, even the *J.E.B.* holding proved to be insufficient protection because as recently as 2001, in the capital trial of Brian Bell, a prosecutor defended his strike of a Black woman by arguing he struck her because of her gender, a reason the appellate court accepted as valid. *Id.*

Especially in light of the ease with which jurors may be death disqualified under *Witt*, 469 U.S. at 424, a process as subjective as death disqualification "illustrates the potential for pretextual challenges made by attorneys with discriminatory motives." Eisenberg, s*upra*, at 315. Women of color stand on the receiving end of this pernicious discrimination. It must end.

3. **Death disqualification disproportionately excludes religious persons and Catholics.**

The MSU study documented the disproportionate exclusions death disqualification caused for religious persons and Catholics, excluding 20% of

religious persons as compared to 12% who identified as not religious, and 25% of Catholics as compared to only 14% of all jurors.

At bottom, the decisions capital juries make over whether a person must die or may live becomes a "question of mercy." *Kansas v. Carr*, 577 U.S. 108, 119 (2016) The ultimate decision that capital jurors must make about the defendant, once convicted, is to gauge his or her "moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000). The perspectives of religious persons generally and Catholics in particular would strengthen juries' ability to serve as the conscience of the community in making this decision. Nevertheless, the death disqualification process disproportionately excludes them.

Judicial orders that pick and choose between jurors who may serve and must be dismissed based on differences in their moral judgments entangle courts in juror exclusion based on religion, in a manner that destroys any perception of even- handed justice and gravely diminishes respect for the courts. *Cofield*, 320 N.C. at 301-02.

III. Death disqualification would deny Brandon Hill his state and federal constitutional rights to a fair and impartial jury, because the process stacks the deck in favor of guilt and execution.

One of death disqualification's most pernicious effects is to rig juries in favor of conviction. It is the tail that wags the dog of unreliable convictions. Although 95% of North Carolina first-degree murders are punished with life

imprisonment, a prosecutor who seeks death can gain an extraordinary tactical advantage: without dipping into allotted peremptory challenges, they can force the judge to exclude the jurors most likely to be skeptical of the State's case, and reduce the racial diversity that promotes good deliberations. *See* Facts § (A), (B), (E), *supra*. As noted above, this state has repeatedly convicted the innocent.

Mr. Hill is presumed innocent. As much as he wants a fair trial on the question of sentence should that become necessary, he demands first a fair and impartial determination of his guilt. His right to an impartial jury trial is guaranteed by differently-worded rights in the U.S. and North Carolina Constitutions. *Kelliher*, 873 S.E.2d at 382 (setting out this mode of analysis).

- Article 1, Section 18 of the North Carolina Constitution ensures, in pertinent part, that "right and justice shall be administered without favor, denial, or delay[,]" while Section 24 promises that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]"
- The Sixth Amendment, incorporated through the Fourteenth, affords those criminally accused "the right to a speedy and public trial, by an impartial jury . . ." U.S. Const. VI; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (applying this right); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (same).

That the North Carolina framers selected different language than the Sixth Amendment or the Fourteenth Amendment already provided "suggests that the people of North Carolina intended to provide a distinct set of protections in the North Carolina Constitution than those provided to them by the federal constitution." *Kelliher*, 873 S.E.2d at 382. In particular, the term "*without favor*" overlaps with but appears more specific and more demanding than the "impartial" jury guaranteed by the Sixth Amendment.

For the reasons set out in Justice Marshall's dissenting opinion in *McCree*, this Court should hold, in reliance on Mr. Hill's North Carolina constitutional right to a trial without favor, that *McCree* was wrongly decided from the outset, because of the abundant evidence that death qualification produces conviction-prone juries. In the alternative, Mr. Hill seeks relief under both the state and federal constitutions, because the facts have changed: the evidence the majority thought insufficient in *McCree* has since become extraordinarily robust.

A. This Court should adopt Justice Thurgood Marshall's *McCree* dissent, under our state constitution's enhanced protection.

In *McCree,* 476 U.S. at 165–68, the Court denied relief to a prisoner who was convicted, but sentenced to life, by a death-qualified jury. He argued that death disqualification denied him a fair and impartial jury, because he was convicted by a tribunal unconstitutionally ""organized to convict."" *Id*. at 179 (quoting *Witherspoon*, 391 U.S. at 520-21) (quoting *Fay v. New York*, 332 U.S.

261, 294 (1947), *rev'd on other grounds Taylor v. Louisiana*, 332 U.S. 261 (1975))). In *Witherspoon*, the Court heard but left open the guilt-phase question, holding instead that the jury was organized to condemn the prisoner to death and finding the record insufficient at that time on the guilt-phase question. 391 U.S. at 518. But social scientists supplemented the record after *Witherspoon*, with a number of studies confirming that death qualification produces a conviction-prone jury. The majority denied relief in *McCree*, 476 U.S. at 173.

The *McCree* Court found that only six of the studies the petitioner had proffered, which a lower federal court had credited and relied on, dealt with the "central issue" of measuring the "effects on the determination of guilt or innocence of excluding '*Witherspoon*-excludables' from the jury." *McCree*, 476 U.S. at 170. And the Court dismissed three of the six as previously presented in *Witherspoon*, and "still insufficient." *Id.* at 171. The Court dismissed the newer three because they did not involve "actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant." *Id.* Finally, the Court held that only one of the six studies attempted to "identify and account for the presence of so-called 'nullifiers,'" jurors who would not follow the law, making the remaining five "fatally flawed." *Id.* at 172.

In Justice Marshall's dissent, joined by Justices Brennan and Stevens, McCree had a far stronger claim than Witherspoon. Whereas the Court in

Witherspoon assumed that the "exclusion of scrupled jurors would unacceptably increase the likelihood that the defendant would be condemned to death," *McCree* had introduced solid empirical evidence, "subjected to the traditional testing mechanisms of the adversary process," to support his claim that death-qualified juries are "substantially more likely to convict." *Id*. at 190–91, 197. A lower federal court emphasized that the federal district court had "exhaustively analyzed" the findings of the studies performed by different researchers employing "diverse subjects and varied methodologies." *Id*. at 187, 189.[3] Justice Marshall's dissent also confronted the majority's failure to address the racially discriminatory impact of death qualification. He observed that "[b]ecause opposition to capital punishment is significantly more prevalent among blacks than among whites, the evidence suggests that death qualification will disproportionately affect the representation of blacks on capital juries." *Id*. at 201.

Justice Marshall summarized *McCree's* persuasive evidence as follows:

1. "The data strongly suggest" that death qualification would exclude 11% to 17% of "jurors who could be impartial during the guilt phase of trial." *Id.* at 187 (Marshall, J., dissenting).

2. Death-qualified jurors' conviction-proneness is the product of "perspectives on the criminal justice system" that are antagonistic to the defendant; *e.g.*, these jurors are more likely to believe that a defendant's

failure to testify is evidence of guilt, and to be "hostile to the insanity defense," distrustful of defense counsel, and "less concerned" about the risk of wrongful convictions. *Id.* at 188 (Marshall, J., dissenting).

3. "[T]he very process of death qualification-which focuses the attention on the death penalty before trial has even begun-has been found to predispose the jurors that survive it to believe the defendant is guilty." *Id.* at 188 (Marshall, J., dissenting).

4. For several reasons, "[t]he true impact of death qualification on the fairness of a trial is likely even more devastating than the studies show." Id. at 190 (Marshall, J., dissenting). First, prosecutors use their peremptory challenges to "systematically" remove jurors with reservations about capital punishment who survive death qualification, thus "expanding" the excluded group beyond the limitations imposed by *Witherspoon*. *Id.* at 191. Second, studies show that trial and appellate courts have been lax in their application of *Witherspoon* and have sanctioned the removal of jurors whose opposition to capital punishment was not "absolute." *Id*. Third, the Court's decision in *Witt* enlarged the number of excludable jurors. *Id.* at 192 (Marshall, J., dissenting).[28]

[28] Justice Marshall also argued to credit the simulation studies, observing that it is "the courts who have often stood in the way of surveys involving real jurors." *McCree*, 476 U.S. at 189 (Marshall, J., dissenting) (internal quotation marks and citation omitted). Justice Marshall responded to the majority's claim that only one study took into account "nullifiers." *Id.* at 189. He explained that although "some studies" may have "fail[ed] to distinguish ... between nullifiers (whom [McCree] concedes may be excluded from the guilt phase) and those who could assess guilt impartially," the results were "entirely consistent with those [results] obtained after nullifiers had indeed been excluded [from a study]." *Id.*

At least three social scientists engaged in a comprehensive evaluation of the *McCree* majority's reading of the empirical evidence and found it deeply flawed. *See The Maryland Example*, *supra*, 29 How. L.J. at 573, 577-78, 581 (reviewing twelve of the jury studies presented in *McCree*, and concluding the case "demonstrates the inability of the highest court in the land to accurately interpret and apply social science data" because "there are no competent empirical studies which reach contrary conclusions [on the conviction-proneness question]" leaving "the empirical question raised in *Witherspoon* has been conclusively answered"); *see also id.* at 586 (agreeing with Justice Marshall's dissent, taking account of studies showing death-qualified jurors more likely to distrust insanity defense, to believe a defendant is guilty if he doesn't testify, more likely convict the innocent, less concerned with mercy and the presumption of innocence, and more likely to believe a police officer than a Black defendant); *id.* at 587 (defending the three studies from *Witherspoon*, critiqued as still insufficient in *McCree*, because they had since been published and their authors cross-examined in multiple hearings); Thomas Moar, *Death Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree*, 19 Colum. Hum. Rts. L. Rev. 369, 376, 382 (1988) (finding that majority's analysis was superficial and that "none of [the studies'] independent weaknesses appear to

justify the Court's rejection of the studies' significance for *McCree's* claim that the death qualification procedure tends to produce guilt-prone juries," particularly in light of the subsequent studies validating the three initially presented in *Witherspoon*); William C. Thompson, *Death Qualification after* Wainwright v. Witt *and* Lockhart v. McCree, 13 L. & Hum. Behav. 185, 196, 202 (1989) (critiquing *McCree* in detail as "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality" and as raising "serious doubts about the ability of these Justices to understand and deal with social science").

In sum, Justice Marshall was correct to credit the studies establishing that death-qualified juries are organized to convict. The test under the North Carolina Constitution is whether a death-qualified jury can adjudicate Mr. Hill's guilt and sentence *without favor*. The data shows that death qualification impermissibly places a thumb on the scales for the state.

B. The empirical research published since *McCree* further cements the conclusion that death-qualified juries are organized to convict.

Section (F) of the factual summary above presents data showing that death-qualified "jurors hold disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution."

Benjamin Fleury-Steiner, *Jurors' Stories of Death: How America's Death Penalty Invests in Inequality* 24–25 (2004). *See* note 16, *supra*. Additionally, we show above how the reduction in Black jurors caused by death disqualification independently increases the likelihood of conviction and reduces the quality of deliberations. *See* notes17, 18, *supra*, and accompanying text. This empirical evidence proves that a death-qualified jury is one unconstitutionally organized by race and "organized to convict." *Fay,* 332 U.S. at 294; U.S. Const. amends. VI; XIV. It is also a jury operating unconstitutionally, by favoring the State. N.C. Const. art. 1, §§ 18, 24.

C. Death-qualified juries go beyond giving the state a fair trial on sentence, and instead unconstitutionally favor death sentences.

Since *McCree*, extensive social science data has emerged showing additional qualities that bias death qualified juries in favor of a death sentence. A disturbingly significant percentage of these jurors do not understand penalty phase instructions, do not follow the law, and are motivated to vote for death based on erroneous beliefs about the death penalty and/or LWOP. *See* Facts, § E, notes 19-20, *supra*. This evidence, too, demonstrates that death disqualification unconstitutionally biases the jury in favor of execution, and in violation of the federal and state constitutional provisions outlined above.

IV. Death disqualification violates the Eighth and Fourteenth Amendments, as well as North Carolina's constitutional protection against cruel or unusual punishment.

Death qualification also violates Mr. Hill's rights under the Eighth Amendment of the U.S. Constitution (to be free from cruel and unusual punishment) and Article 1 § 27 of the North Carolina Constitution (to be free from cruel or unusual punishment). At the outset, it is important to repeat that in *Kelliher*, 873 S.E.2d at 382, our state's high court ruled that Article 1, § 27 must be given independent effect from the Eighth Amendment and its provision barring cruel or unusual punishment is more protective. Thus, each of the arguments presented here is made, in the alternative, under both the federal and state provisions.

It is not unusual to hear in the halls of this courthouse, and in public pronouncements, that the State will "allow the jury to decide." But the truth is that death qualification rigs the jury in favor of the State's preferred outcome of execution. It does so while ridding juries of those most willing to consider mitigating evidence and evidence of innocence. Most troubling to Mr. Hill, a Black man, it does so while disproportionately excluding Black jurors from the process. Obtaining a death verdict by employing a death-qualified jury would not accurately reflect "contemporary community values," *Witherspoon*, 391 U.S. at 519 n.15, and would constitute an arbitrary outcome forbidden by the Eighth

Amendment and section 27.

Death-qualified juries do not speak for the community. Time after time, the U.S. Supreme Court has emphasized the link between community values and punishment permitted under the Eighth Amendment. In *Witherspoon*, the Supreme Court observed that "one of the most important functions any jury can perform in making [the penalty] selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" 391 U.S. at 519 n.15 (plur. op. of Warren, C.J.) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

In *Furman v. Georgia*, Justice Brennan concluded that the death penalty had "proved progressively more troublesome to the national conscience" as evinced by "[j]uries, 'express(ing) the conscience of the community on the ultimate question of life or death.'" 408 U.S. 238, 299 (1972) (Brennan, J., concurring) (quoting *Witherspoon*, 391 U.S. at 519). Justice Brennan observed that juries "vote[d] for death in a mere 100 or so cases among the thousands tried each year where the punishment [was] available." *Id.* Justice Powell, joined by three other Justices in his dissenting opinion, agreed that "[a]ny attempt to discern where the prevailing standards of decency lie must *take careful account of the jury's response* to the question of capital punishment." *Id.*

at 440–41 (emphasis added).

Four years later, in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the plurality emphasized the importance of jury verdicts as evidence that our state's then mandatory capital punishment statute did not comport with "contemporary values." *Id.* at 295 (plur. op. of Stewart, J.). In *Coker v. Georgia*, Justice White observed that "'(t)he jury is a significant and reliable objective index of contemporary values because it is so directly involved.'" 433 U.S. 584, 596 (1977) (plur. op. of White, J.) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)); *see also Enmund v. Florida*, 458 U.S. 782, 788 (1982) (explaining that the Court must look, among other factors, at juries' sentencing decisions).

If the function of juries is to "maintain a link between contemporary community values and the penal system," *Witherspoon*, 391 U.S. at 519 n.15, what role do death-qualified juries play? As the Court explained in *Witherspoon*, a jury "cannot speak for the community" when it is "[c]ulled of all who harbor doubts about the wisdom of capital punishment." *Id.* at 520.

As one scholar has explained, after reviewing death qualification in Louisiana trials, the "use of death-qualified jury verdicts as 'objective indicia' of contemporary values produces an obviously warped data set from which to gauge 'evolving standards of decency.'" Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 128 (2016). Stated differently, the Supreme Court's

view that "juries serve as a link between punishments and the conscience of the community" fails "to account for the impact of death qualification upon the representativeness of the capital jury." *Id.* at 124, 126. Cover concluded that "[d]eath qualification eliminates from jury service a sizable portion of the population that disagrees with the morality of the death penalty and therefore prevents jury verdicts from accurately reflecting the stance of the community on whether the death penalty is 'cruel and unusual.'" *Id.* at 126.

This Court should additionally bar death disqualification, under the above authorities, because the evolving standards of decency test cannot be fairly or meaningfully operationalized if the death sentences being measured are being returned by the unrepresentative juries death disqualification creates.

Death-qualified juries fail to consider mitigation. Community judgments about execution are "moral judgments" made through individual assessments of culpability that account for "evidence about the defendant's background and character." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Sentencers thus "must consider all relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982). And because that analysis is largely dependent on a person's moral judgment, *Williams*, 529 U.S. at 398, a juror's determination of

mitigation becomes a "question of mercy." *Carr*, 577 U.S. at 119.

Studies have shown that death-qualified jurors are more likely to both devalue mitigation and overvalue aggravation compared to non-death-qualified jurors. *See Facts* § (E), *supra*.

Death qualification undermines a defendant's right to due process. Mitigating evidence is just one aspect of a sentencing trial that death-qualified juries cannot meaningfully assess. Research has also shown that these groups were "less accepting" of the procedural protections of due process, making them more likely to perceive a defendant who exercises his rights to not testify or exclude evidence as constructively admitting guilt. *See* James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials,* 12 Law & Hum. Behav., 263, 264 (1988). This is not a matter of opinion, but a refusal to adhere to constitutional principles which can determine whether someone lives or dies. Such mental biases are closely connected with those questions a death-qualified jury would have to work through to make a life-or-death decision for a defendant.

Death qualification introduces an arbitrary factor – race. The U.S. Supreme Court has repeatedly critiqued the arbitrary impact of racial

discrimination in death-penalty determinations.[29] When race infects the decision to execute, the Court has struck down such death sentences. This includes instances in which the trial permits "an infusion of race into proceedings." *Buck v. Davis*, 137 S. Ct. 759, 779 (2017). There can be no more pernicious infection of race bias than into a capital sentencing trial of a Black man.

By systematically and disproportionately excluding Black jurors, by excluding people who are more likely to consider the mitigating factors inherent in Mr. Hill's background -- and instead retaining a racially unrepresentative group more likely to ignore mitigation – the death qualification process would eviscerate the judgment of the community on whose behalf the State seeks Mr.

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[29] *See Furman*, 408 U.S. at 255 (Douglas, J., concurring) ("we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position"); *id.* at 294 (Brennan, J., concurring) ("[n]o one has yet suggested a rational basis that could differentiate ... the few who die from the many who go to prison"); *id.* at 365 (Marshall, J., concurring) ("committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is ... an open invitation to discrimination" [internal quotation marks omitted]); *Baze v. Rees*, 553 U.S. 35, 85 (2008) (Stevens, J., concurring in the judgment) ("[a] ... significant concern is the risk of discriminatory application of the death penalty"); *Tuilaepa v. California*, 512 U.S. 967, 991–92 (1994) (Blackmun, J., dissenting) (noting risk that unguided jurors will rely on race).

Hill's execution. The law requires much more. It requires both jurors capable of considering Mr. Hill's proffered mitigating circumstances, and jurors capable of rendering mercy. Death qualification, if permitted, would sever the connection between punishment that is informed by "evolving standards of decency."

Exclusion of religious and of Catholics: A sentencing decision is "largely a moral judgment." *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)) ("'Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.'"). Preventing jurors from using their moral judgment, including their religious beliefs, would "[invade] the sphere of intellect and spirit, which is the purpose of the First Amendment to our Constitution to reserve from all control." *W. Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). When a juror takes into consideration her religion in weighing what punishment best fits a crime, she does not fail to follow the law, but rather acts within the discretion granted to her by Supreme Court precedent.

Death disqualification thrives under the wrong end of a double standard. Veniremen deemed substantially impaired in their ability to consider death are excludable under *Witt*, 469 U.S. at 424,while only those

who would *automatically* vote for death are excludable under *Morgan v. Illinois*, 504 U.S. 719, 728, 724 (1992). The result is asymmetrical removals, stacking the deck in favor of the State. One byproduct of this asymmetry is to force defendants to use peremptory strikes on death-favoring veniremen, stripping them of the opportunity to influence jury composition and shape a jury that is fair and impartial. The State, on the other hand, can exclude life-favoring veniremen through *Witt* and thus have more control over determining the final jury by using peremptory strikes on other grounds. The disparity between the *Witt* and *Morgan* standards is arbitrary under the Eighth Amendment. *Gregg*, 428 U.S. at 188 (holding prohibiting imposition of the death penalty "under sentencing procedures that creat[e] a substantial risk that it would be inflicted in an arbitrary and capricious manner") (paraphrasing *Furman v. Georgia*, 408 U.S. 238 (1972)).

In the alternative to issuing an order barring death disqualification, Mr. Hill preserves a request for the lesser relief of an order permitting cause challenges either to life favoring jurors only when they would automatically impose a death sentence, or an order permitting cause challenges to death favoring jurors substantially impaired in their ability to consider a life sentence.

V. Death qualification violates the fair cross section requirements of the North Carolina Constitution and the Sixth Amendment.

Constructing a jury using death qualification would violate Mr. Hill's rights under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article 1, section 24 of the North Carolina Constitution. It would also deprive him of an impartial jury and a "petit jury selected from a fair cross section of the community." *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979). Here, Mr. Hill requests the increased protections of the distinctively-worded section 24 of Article 1, which provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]"

Juries play a vital role in our democracy. Repeatedly, the Supreme Court has emphasized the belief that jurors represent the "conscience of the community." *McCree,* 476 U.S. at 197 (Marshall, J., dissenting); *see, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice."); *Witherspoon*, 391 U.S. at 519 n.15 ("[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system."); *Woodson*, 428 U.S. at 293 (relying on jury determinations as one of the "crucial indicators of evolving standards of decency"); *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring)

(explaining that juries represent "community's moral sensibility" because they "reflect more accurately the composition and experiences of the community as a whole"). The exclusion of Black jurors and other people of color from the jury "inhibits the functioning of the jury as an institution to a significant degree." *Ballew v. Georgia*, 435 U.S. 223, 231 (1978) (finding five-member jury deprived defendant of Sixth and Fourteenth Amendment right to trial by jury).

The framers afforded the jury the right to stop "oppression by the Government." *Duncan*, 391 U.S. at 155. Its purpose was to serve as a roadblock to prosecution based on the malice or incompetence of government officials. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (quoting *Duncan*, 391 U.S. at 156). The right protects a criminal defendant's interest "in having the judgment of his peers interposed between himself and the officers of the state who prosecute and judge him[.]" *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972). The term "peers" carries constitutional significance: it means "a representative cross section of the community[,]" serving as "an essential component of the Sixth Amendment right to a jury trial." *Taylor*, 419 U.S. at 528.

As the U.S. Supreme Court has more recently made clear, the protections of the Sixth Amendment – the only amendment that affirmatively affords benefits to individuals rather than simply restricting the government – trumps prosecutorial interests, such as "in securing its punishment of choice as well as

the victims' interest in securing restitution." *Luis v. United States*, 578 U.S. 5, 19 (2016). As the Court held, such state interests, though "important," as compared to the Sixth Amendment right to counsel, "lie somewhat further from the heart of a fair, effective criminal justice system." *Id.* So too here. The State's conceded interest in seeking its punishment of choice must yield to Mr. Hill's Sixth Amendment right to having his jury drawn from a representative pool.

When *McCree* was decided – in 1986– rejecting a fair-cross section challenge to death qualification – nearly four out of every five Americans supported the death penalty and a comparatively tiny number opposed. *Continuing Unfairness*, *supra*, at 12 (reviewing survey data). Execution support was then climbing to an all-time high, while those in opposition had dwindled considerably. *Id.* During this time, the effects of death qualification were arguably at their smallest.

But the opposite trend has since taken hold, resulting in a greater percentage of prospective jurors who are likely to be excluded through the death qualification process. Recent polls show that, as of 2018, opposition to the death penalty is shared by over 40% of Americans. Justin McCarthy, *New Low of 49% in U.S. Say Death Penalty Applied Fairly*, Gallup (Oct. 22, 2018), https://news.gallup.com/poll/243794/new-low-say- death-penalty-applied-fairly.aspx. Further, 45% of Americans believe the death penalty is applied

unfairly and 29% believe the death penalty is applied too often. *Id.* A substantially larger group of opponents, compared to 16% of death penalty opponents in the early 1990s, means that death qualification more significantly affects jury composition than previously considered.[30] And the data here shows the highest opposition exists in the Black community, and other communities of color.

To establish a prima facie violation of the fair cross section requirement, the defendant must show: "1) that the group alleged to have been excluded is a 'distinctive group' in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364. The test for distinctiveness is whether "1) the group is defined and limited by some factor; 2) that a common thread or basic similarity in attitude, ideas, or experience runs through the

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[30] *See also* Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, Gallup (Nov. 19, 2020), https://news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx ("Americans' support for the death penalty continues to be lower than at any point in nearly five decades. For a fourth consecutive year, fewer than six in 10 Americans (55%) are in favor of the death penalty for convicted murderers. Death penalty support has not been lower since 1972, when 50% were in favor.").

group; and 3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process." *Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983). A defendant making a fair cross section claim need not show that the absence of a fair cross section is the result of discriminatory purpose or intent, but only that its absence is the inherent product of the particular method of selection used. *Duren*, 439 U.S. at 366. Once the defendant has established a prima facie case, the burden shifts to the State to demonstrate that the State's interest outweighs the defendant's constitutional right to a jury drawn from a fair cross section of the community. *Id*. at 368.

As evidenced by the study of capital trials in this county, and other studies, Black people are disproportionately excluded, as are women, and people of faith, particularly Catholics.

Courts have repeatedly recognized that Blacks constitute a distinctive group in relation to jury selection. *Peters v. Kiff*, 407 U.S. 493, 498 (1972). In *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), the Court recognized that the exclusion of Blacks from jury service injures the members of the excluded class, denying them the "privilege of participating equally . . . in the administration of justice" and declaring them unfit for jury service by putting "a brand upon them, affixed by law, an assertion of their inferiority." *Id.* Courts

have since provided relief to uphold the interests of Black prospective jurors. *See State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984) Women too are a cognizable group, *State v. McCoy*, 320 N.C. 581, 584 (1987), as are people of various religious faiths. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *Jackson v. State*, 191 So. 3d 423, 427 (Fla. 2016); 1 Jurywork Systematic Techniques § 5:26 n.33 (collecting examples of rulings that various religious groups are cognizable groups).

Although the Court in *McCree* concluded that the death qualification process did not violate the fair cross section requirement because it did not involve systematic exclusion of a distinctive group in the community, empirical evidence, unavailable at the time of *McCree*, but presented here, demonstrates that excluding people who oppose the death penalty effectively means that members of protected classes—Blacks, women, and people of faith, particularly Catholics—are excluded. *See* Facts § (A), (B), *supra*. As shown above, death qualification in Wake County death cases excluded Black jurors at a rate over twice the rate of white jurors, Black women at a rate of over double the overall rate of exclusion, and Catholics at a rate of 25%, versus 14% of all other jurors. This study demonstrates that the representation of these cognizable groups is not fair and reasonable in relation to their number in the county, meeting *Duren*'s second criterion. *Duren*, 439 U.S. at 364.

As to *Duren*'s third criterion of showing systemic exclusion, the data in the MSU study unmistakably "demonstrate[es] that a large discrepancy occurred not just occasionally but" over a period of years and every currently-available capital trial since 2010, "manifestly [indicating] that the cause of the underrepresentation was systematic – that is, inherent in the particular jury selection process utilized." *Duren*, 439 U.S. at 366 (finding such systemic exclusion based on a year's worth of data week to week).

Under the final step of *Duren* analysis, once the defendant has established a prima facie case, the burden shifts to the State to demonstrate that the State's interest outweighs the defendant's constitutional right to a jury drawn from a fair cross section of the community. *Duren*, 439 U.S. at 368.

The State cannot do so here.

As shown above, North Carolina law anticipates sentences of life imprisonment, which has become the punishment of 95% of those convicted of first-degree murder. "[L]egislative will is not frustrated if the [death] penalty is never imposed[.]") *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring).

In comparison to the legitimate and lawful views of Black persons, women, and Black women concerning the death penalty, the State's desired punishment of death is just that – a preference among lawful options. It "lie(s)

somewhat further from the heart of a fair, effective criminal justice system." *Luis,* 578 U.S. at 19. It cannot trump the constitutional interest in preventing the systematic exclusion of cognizable groups. *See id.* (holding prosecutor's desire to impose punishment of restitution, and victim's interest in restitution, could not trump Sixth Amendment right to counsel).

By excluding Black prospective jurors, women, Black women, people of faith and Catholics, based on opposition to the death penalty, death qualification would create a jury that is homogenous and unrepresentative of the community's views, and one that will tend to silence adherents of minority views in deliberation.

VI. Death disqualification would violate Mr. Hill's rights under the Equal Protection Clause.

Death qualification, if permitted, would also violate Mr. Hill's right to equal protection under the Fourteenth Amendment of the U.S. Constitution, because the process disproportionately excludes Black people from capital juries.

To establish a prima facie claim of discrimination against a particular class, the defendant must demonstrate that 1) the group is a recognizable class, "singled out for different treatment under the laws, as written or as applied," 2) the selection procedure resulted in substantial underrepresentation of the group over a significant period of time, and 3) the

selection procedure is "susceptible of abuse or is not racially neutral." *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *see Cunningham v. Zant*, 928 F.2d 1006, 1013 (11th Cir. 1991). Once a prima facie case of discrimination is made, the burden shifts to the State to rebut that showing. *Castaneda*, 430 U.S. at 495.

As discussed in detail in the pages above, Black persons and women are distinctive groups, and the selection process results in their substantial underrepresentation. *Peters*, 407 U.S. at 498. The exclusion of Black prospective jurors, and Black women, is not race neutral. The death qualification process would thus violate Mr. Hill's rights under the Equal Protection Clause.

CONCLUSION

The decision whether to execute a fellow citizen is the most important decision a jury can make. The second most important is probably the decision whether a person accused of first-degree murder is guilty, meaning that that person will die in prison, naturally, or at the hands of the state. Under our traditions, and our constitutions, these decisions must reflect the conscience and judgment of the community. Death disqualification mocks these precepts. It excludes Black people, women, and people of faith. And, for this procedure that exists to facilitate the prosecutor's capital sentencing choices, Black women pay the most dearly. This must end. Let the voices of our full community finally be heard.

Respectfully submitted, this the 16th day of August 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing motion upon counsel for the State, by hand and by email to the following:

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This the 16th of August, 2022

Exhibit A

Report on Wake County Jury Selection Study

Catherine M. Grosso & Barbara O'Brien

Professors of Law

August 15, 2022

I. Introduction

This report documents the study design, methodology, analysis, and results for a study on the jury selection in trials of ten capital defendants in Wake County, North Carolina. The study examined how the jury selection process in ten capital proceedings impacted venire members of different races differently. The primary investigators for the study are Catherine Grosso and Barbara O'Brien. Both are professors of law at Michigan State University College of Law.

II. Study Design and Population

This study examined jury selection in ten capital proceedings in Wake County from 2008-2019. For each proceeding we sought to include every venire member who faced excusal for cause (including hardship) or a peremptory challenge as part of jury selection. For the purposes of this report a "venire member" includes anyone who was subjected to voir dire questioning, including alternates. It does not include potential jurors who were summoned and appeared at court, but who did not participate in voir dire.

As reported in Table 1, Columns C and D, among these 10 cases, there was variation in the number of venire members involved, ranging from 81 (Donavan Richardson) to 201 (Jason Williford), producing a database of 1,281 potential jurors. Of these, 628 (49%) were women and 653 (51%) were men.[1]

As reported in Table 2, Columns C and D, the venire members' racial composition was as follows: white (979, 76%); Black (211, 16%); Asian (49, 4%); Latine/Hispanic (16, 1%); mixed race

[1] Percentages in this report may not add up to 100 due to rounding.

(4, 0.3%); other (4, 0.3%); Native American (2, 0.2%); and unknown (16, 1%). Note that according to the U.S. Census Quick Facts the Wake County, NC, population is approximately 67% white, 21% Black, 8% Asian, 10% Latine/Hispanic, 3% mixed race, and 0.8% Native American.[2] The white population in the coded venire members is 9 points larger (76% vs. 67%) than would be expected in the population.

Table 1. List of Cases in Study with Number of Venire Members per Case and Percent of Venire Members Provided by Each Case

	A	B	C	D	E	F
	StudyID	Defendant Last Name	Number of Venire Members	Percent of Venire Members	Number of Black & White Venire Members Only	Percent of Black & White Venire Members Only
1.	1013	Cooper	106	8%	105	9%
2.	1014	Devega	188	15%	169	14%
3.	1015	Dickerson	85	7%	79	7%
4.	1011	Gillard	120	9%	109	9%
5.	1021	Holden	108	8%	99	8%
6.	1025	D. Richardson	81	6%	71	6%
7.	1020	Smith	115	9%	107	9%
8.	1019	Stepp	178	14%	167	14%
9.	1018	Williford	201	16%	187	16%
10.	1016	Wilson	99	8%	97	8%
		Total	1,281		1,190	

The findings presented in this report limit the database to Black and white venire members for simplicity of presentation. We ran parallel analyses for every finding using the full dataset. Limiting the data to Black and white venire members did not change magnitude, direction, or significance of findings in any instance.

As reported in Table 1, Columns E and F, when the database is limited to Black and white venire members, the number of venire members involved varied with the same low and high numbers as in the full dataset: 71 (Donavan Richardson) and 187 (Jason Williford). This produces a database of 1,190 potential jurors. Of these, 578 (49%) were women and 613 (51%) were men. As reported in Table 2, Columns D and E, the venire members' racial composition was as follows: white (979, 83%); Black (211, 18%).

[2] U.S. Census, QuickFacts, Wake County, North Carolina (https://www.census.gov/quickfacts/wakecountynorthcarolina).

Table 2. Venire Members in the Study by Race or Ethnicity

	A	B	C	D	E
	VM Race/Ethnicity	Number Venire Members	Percent of Venire Members	Number of Black & White Venire Members Only	Percent of Black & White Venire Members Only
1.	White	979	76%	979	82%
2.	Black	211	16%	211	18%
3.	Asian	49	4%	---	---
4.	Latine/Hispanic	16	1%	---	---
5.	Native American	2	0.2%	---	---
6.	Other	4	0.3%	---	---
7.	Mixed (Self-Reported)	4	0.3%	---	---
8.	Unknown	16	1%	---	---
	Total	1,281	100.00	1,190	100.00

A. Data Collection

We created an electronic case file for each proceeding in the study. The case file contains the primary data for every coding decision. The materials in the case file typically include some combination of juror seating charts, individual juror questionnaires, and attorneys' or clerks' notes. Each case file also includes an electronic copy of the jury selection transcript and documentation supporting each race coding decision.[3]

B. Overview of Database Development

Staff attorneys completed all coding and data entry under the direct supervision of the primary investigators. As set forth more fully below, staff attorneys received detailed training on each step of the coding and data entry process. A total of five staff attorneys and two students worked on this project.

i. Development of Data Collection Instruments

Data collection instruments (DCIs) are forms that staff attorneys completed based on the primary documents and transcripts. We used two data collection instruments for coding data in this study: (1) the Venire Member Level Data Collection Instrument (VM-Level DCI) [4] and (2) the Missing Venire Member Race Data Collection Instrument (VM-Level Race Coding DCI).[5]

Questions 1-15 of the VM-Level DCI documented basic identification and procedural information specific to each venire member, including whether they were struck or excused for cause.

[3] We are missing the transcript for one day of jury selection in Wilson's case. This limits detailed jury selection information for four venire members.
[4] See Appendix A.
[5] See Appendix B.

Questions 4-7 and 13 capture the process of challenges and excusals of venire members for cause, including who initiated a motion for cause and whether either party objected.

Questions 8-9 document details as to which party, if either, exercised a peremptory strike. Question 10 of the VM-Level DCI required the staff attorney to determine strike eligibility for each potential juror. This variable is necessary to analyze the exercise of discretion in the use of peremptory strikes. "Strike eligibility" refers to which party or parties had the chance to exercise a peremptory strike against a particular venire member. For instance, if the prosecution struck someone before the defense had a chance to question that person, that juror would be strike eligible to the prosecution only. Likewise, if the court excused a venire member for cause, then neither party had the chance to exercise a peremptory strike. This determination refines the analysis of strike decisions to examine only those instances in which that party actually had a choice to pass or strike a juror, and it excludes those when the decision was out of the party's hands.

Questions 15-24 document more detailed information about the venire members' personal characteristics, such as race, gender, and religious affiliation.

Question 18 documents the race and ethnicity of the venire member. Staff attorneys completed this question from information venire members provided on their juror questionnaires or from public records. We were unable to code race for 1.2% (16/1,281) of the venire members. Details on race coding are provided below.

Questions 25-29 capture information about the bases for cause excusals, relying primarily on N.C. Gen. Stat. § 15A-1212. In addition to the factors specified in section 15A-1212, two additional bases were specified: 1) the venire member expressed disqualifying death penalty views, and 2) the venire member would face "compelling personal hardship" under N.C. Gen. Stat. § 9-6.

Question 30 records whether the juror was seated on the jury or selected as an alternate.

ii. Race Coding

We obtained information about potential jurors' race from two sources. First, we collected juror questionnaires for many of the venire members in our study. These questionnaires asked the venire member's race, and the vast majority of respondents provided that information. We considered potential venire members' self-reports of race to be highly reliable and were able to get this information from juror questionnaires for 82.3% (1,054/1,281) of the venire members.

For 17.7% (227/1,281) of venire members, we used electronic databases to research race information and record the race in the VM-Level Race Coding DCI. The VM-Level Race Coding

DCI also records the quality of the match for race coding from public records and the source of the race information. The primary investigators prepared a strict protocol for use of these websites for race coding and trained coders on that protocol.[6]

Many of the case files included juror summons lists with addresses and dates of birth. This information allowed coders to match online records to each juror with a high level of certainty. Coders and the primary investigators entered this information in the North Carolina Board of Elections Voter Search website (https://vt.ncsbe.gov/reglkup/) and the Lexis-Nexis Public Records Locate a Person (Nationwide) database according to the protocol described below to identify juror race.

Throughout this process, coders were required to code a venire member's race as "unknown" unless they were able to meet strict criteria ensuring that the person identified in the public record was in fact the venire member and not just someone with the same name.[7] Coders were not to rely on a record containing information that was not wholly consistent with whatever information we had about a particular venire member. For instance, they would not rely on a public record in which the person's middle initial was inconsistent with that of the venire member, unless they were able to document a name change to account for the discrepancy (such as when a record indicated that a venire member started using her maiden name as a middle name). If coders found someone with the same name as the venire member but with a different address, they were to use that record only if they could trace the person's address back to that of the venire member. Coders saved an electronic copy of all documents used to make race determinations.[8] The files are organized by proceeding and are available for review.

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[6] See Appendix C for the protocol used in this process. The primary investigators developed this protocol for use in a statewide jury selection study. See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2011).

[7] For instance, coders were instructed to use information such as the venire member's middle name or year of birth to link the venire member to records of someone with the same name. When at all in doubt, coders were instructed to code the venire member's race as unknown.

[8] For instance, if a coder identified the race of a venire member through the North Carolina Board of Elections website, she would save the record with the venire member's race designation (usually as a screen shot). If the coder relied upon an address provided in the jury summons list to identify a venire member had moved since the time of the trial, she would also save records of the venire member's change of addresses over the years. This information was often available on Lexis-Nexis Locate a Person (Nationwide) Database, which allowed the coder to trace the venire member's address from the jury summons list to the current address reflected in the North Carolina Board of Elections website. Coders saved a copy of the electronic record for each step in the process linking current information about each venire member to information recorded at the time of the trial.

The methods described in this section allowed us to document the race of all but 16 of the 1,281 venire members in our study.[9] In other words, our database includes race information for 98.75% of the venire members.

iii. Coding Procedures

Staff attorneys coded the venire members in the study using the complete case file, including juror questionnaires (when available) and the transcripts of voir dire proceedings. Staff attorneys used the search function in Adobe Acrobat to search for venire members by name. This allowed them to reliably and efficiently find each instance when a particular venire member answered questions during the jury selection process. Every question in the DCI provided a code for the staff attorney to indicate that the case file did not contain sufficient information for a particular characteristic.

We also instituted standard double coding procedures. Under these procedures, two staff attorneys separately coded information for each venire member to ensure accuracy and intercoder reliability. A senior staff attorney with extensive experience working on the study compared and reviewed their codes for consistency and suggested corrections, subject to approval of the primary investigators.

After a primary investigator resolved the issue, the senior staff attorney documented the proper coding for the issue in the coding log ("Cause DCI Questions and Answers").[10] All staff attorneys had access to the coding log and were responsible for reviewing this document regularly to inform themselves about ongoing coding decisions. The coding team met weekly with the primary investigators to review discrepancies and discuss questions. This system allowed the study team to develop a shared expertise and enhanced intercoder reliability. The number of differences in judgment diminished over time due to staff attorney experience with the data collection instruments, the data themselves, and the coding log.

[9] We were unable to determine the race of the following sixteen venire members: 1019.0.597 Carol Adams, 1014.0.626 Matthew Alpal, 1014.0.619 Leeann Bove, 1025.0.010 Andrew Bratt, 1014.0.629 Josie Dorches, 1014.0.647 Richard Hepperg, 1019.0.586 Heather Hood, 1014.0.543 Sam Lingrim, 1018.0.590 Ricky Oliver, 1018.0.599 Michael O'Sary, 1018.0.588 Katen Patel, 1018.0.598 Sashlie Psioda, 1014.0.621 Michael Spierer, 1018.0.571 Gain Sidney, and 1018.0.587 Amanda Ward.

[10] See Appendix D.

C. Steps for Ensuring Accuracy of Data

The full database includes information about 10 proceedings and 1,281 venire members. As noted above, we took several steps to minimize coding errors. We also developed systematic procedures to catch and correct errors in data entry.

Once the coding was reviewed and discrepancies reconciled, staff attorneys entered data into an Excel spreadsheet. The data entry fields accepted only valid responses in order to minimize errors. For instance, if an item on the DCI allowed for only three possible responses (0 = No, 1 = Yes, and 9 = Unknown), then entering anything other than 0, 1, or 9 would be rejected and the person entering the data would be prompted to re-enter an acceptable value for that question. Although this mechanism could not prevent all data entry errors (e.g., it could not catch a misspelling of a venire member's name), it provided one line of defense against human error.

We used several other methods to catch and correct other errors in coding or data entry. Using the Stata statistical program, we identified instances where inconsistencies in data indicated possible errors and established a process for review and, where appropriate, correction.

III. Analysis and Results

As noted above, we limited the database to Black and white venire members. This section includes three parts. Section A reports race and gender disparities in the impact of death qualification, including the combined effect of race and gender. Section B reports the race and gender disparities in state's exercise of peremptory strikes. Finally, Section C reports the combined impact of death qualification and state peremptory strikes on the population of Black and white venire members.

Throughout this section, we report the disparities observed as well as a measure of the likelihood that the finding would occur as a result of chance. This measure, called a *p*-value, reflects the probability of observing a disparity of a given magnitude simply by luck of the draw. The lower the *p*-value, the lower the chance that an observed disparity was due merely to chance. The *p*-values for the racial disparities observed in this study are consistently well below the standard scientific benchmarks for reliability.[11]

[11] Federal Judicial Center & National Research Council, *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* 249-52 (National Academies Press 2011).

A. Racial and Gender Disparities in the Impact of Death Qualification

Section A reports the race and gender disparities in the impact of death qualification. Table 3 presents the rate at which jurors are removed from the venire because of their opposition to the death penalty under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and related cases. Fourteen percent of the venire members were excluded because of their opposition to the death penalty. This decision impacted 176 venire members who were ready to serve. Only hardship excusals, granted at the request of the venire member and primarily allowing a venire member to fulfil obligations to work or family, impacted a larger segment of the venire members in the study (485, 38%). Venire members excluded because they would automatically impose the death penalty constitute only 4% (56 venire members). This is the least common basis for excusal. Over 20% of venire members were removed by peremptory strikes. The state struck 128 venire members (10%), and the defense struck 137 venire members (11%).

Black venire members were excluded in this way at a significantly higher rate than white venire members. As reported in Column C, 25% of Black venire members were removed for death qualification (52/211) compared to 11% of white venire members (111/979). This is a relative ratio of 2.27 (25%/11%). The disparity is statistically significant ($p < .0001$).

Table 3. Death Qualification of Venire Members by Race *(Death qualification of venire members aggregated across cases.)*[12]

	A		B	C	D
	Venire Member Race		Death Qualified	Removed as Not Death Qualified	Totals
1.	White	*number*	868	111	979
		percent	89%	11%	100%
2.	Black	*number*	159	52	211
		percent	75%	25%	100%
	Total		1,027	163	1,190
			86%	14%	

This disparity persists if we focus on venire members for whom the transcript presents no basis for cause removal other than failure to be death qualified. This reduces the number of death-disqualified jurors from 163 to 154, and from 14% of venire members to 13%. Black venire members

[12] We replicated this analysis by calculating the rate of removal by death qualification in each of the ten cases and averaging these rates across the ten cases. In this analysis, Black venire members faced an average death qualification removal rate of 24% (SD = 2.49) compared to white venire members' average death qualification removal rate of 12.0% (SD = 1.97). A paired t-test indicates that this difference in strike rates is significant at $p < .001$.

were death disqualified with no other basis for cause removal 23% of the time (48/211), whereas white venire members were death disqualified with no other basis for cause removal 11% of the time (106/979). The relative rate of dismissal remains over two, at 2.09 (23%/11%). The disparity remains statistically significant ($p < .001$).

Table 4. Death Qualification of Venire Members by Race where No Other Cause Basis for Dismissal Was Presented *(Death qualification of venire members aggregated across cases.)*[13]

	A		B	C	D
	Venire Member Race		Death Qualified	Removed as Not Death Qualified	Totals
1.	White	*number*	873	106	979
		percent	89%	11%	100%
2.	Black	*number*	163	48	211
		percent	77%	23%	100%
	Total		1,036	154	1,190
			87%	13%	

Table 5. Death Qualification of Venire Members by Gender *(Death qualification of venire members aggregated across cases.)*[14]

	A		B	C	D
	Venire Member Gender		Death Qualified	Removed as Not Death Qualified	Totals
1.	Female	*number*	482	96	578
		percent	83%	17%	100%
2.	Male	*number*	545	67	612
		percent	89%	11%	100%
	Total		1,027	163	1,190
			86%	14%	

We also calculated the rate at which men and women were excluded by the death qualification requirements. Table 5, Column C, reports that women were excluded at a higher rate than men. In particular, 17% of women (96/578) compared to 11% of men (67/612) were death disqualified. This

[13] We replicated this analysis by calculating the rate of removal by death qualification alone in each of the ten cases and averaging these rates across the ten cases. In this analysis, Black venire members faced an average death qualification removal rate of 23.0% (SD = 2.46) compared to white venire members' average death qualification removal rate of 11.0% (SD = 1.87). A paired t-test indicates that this difference in strike rates is significant at $p < .001$.

[14] We replicated this analysis by calculating the rate of removal by death qualification in each of the ten cases and averaging these rates across the ten cases. In this analysis, female venire members faced an average death qualification removal rate of 17.7% (SD = 3.21) compared to male venire members' average death qualification removal rate of 11.1% (SD = 1.49). A paired t-test indicates that this difference in strike rates is significant at $p < .03$.

is a smaller relative disparity than observed for race: 1.54 (17%/11%). It is statistically significant ($p < .01$).

The disparity presented in Tables 3 and 5 is concentrated in the experiences of the Black women who appeared for jury duty in these cases. Table 6, Column C, reports that 31% of Black women are excluded under death qualification (35/112). This rate is 2.2 times the 14% overall rate of removal under death qualification in this study (31%/14%) and 2.6 times the 12% rate of all other venire members (128/1,078). The disparity is statistically significant ($p < .001$). It is higher than we identified for any other race-gender combination in separate analysis.

Table 6. Death Qualification of Black Female Venire Members *(Death qualification of venire members aggregated across cases.)*[15]

	A		B	C	D
	Venire Member Race-Gender		Death Qualified	Removed as Not Death Qualified	Totals
1.	Black Female	*number*	77	35	112
		percent	69%	31%	100%
2.	All Other Venire Members	*number*	950	128	1,078
		percent	88%	12%	100%
	Total		1,027	163	1,190
			86%	14%	

As noted in the section on study design, we also collected information where available on religion. In particular, we looked for evidence to answer two questions: (1) Is the venire member religious? and (2) With what religious organization does the venire member identify? This information was not always available in the materials we collected. As a result, we are missing this information for 30% of the venire members for the first question and 36% of the venire members for second question.

For the remaining venire members, we found that death qualification excluded 20% of jurors identified as religious (113/577) compared to 12% of those identified as not religious (21/178).

Venire members identified as religious make up 69% of the venire members excluded for death qualification (113/163). Venire members identified as not religious make up 13% (21/163),

[15] We replicated this analysis by calculating the rate of removal by death qualification in each of the ten cases and averaging these rates across the ten cases. In this analysis, Black female venire members faced an average death qualification removal rate of 34.3% (SD = 5.20) compared to all other venire members' average death qualification removal rate of 12.0% (SD = 1.95). A paired t-test indicates that this difference in strike rates is significant at $p < .001$.

and venire members for whom we did not identify information on religious beliefs make up 18% (29/163).

These exclusions included 25% of Catholic venire members (20/80), and 33% of Quakers (1/3), two religious organizations that have expressed formal opposition to the death penalty. These rates exceed the overall rate of exclusion for death qualification of 14% (163/1,190), with relative disparities of 1.79 and 2.36. Catholic venire members made up 9% of those with a known religious affiliation (80/840) overall, but they composed 14% of those with a known religious affiliation who were excluded because of their death penalty opinions (20/139). Catholic venire members' share of those excluded increased by a factor of 1.5 (14%/9%).

B. Racial and Gender Disparities in the Impact of State Peremptory Strikes

Earlier research has demonstrated the ongoing significance of race in the exercise of peremptory challenges.[16] This section presents the rate at which prosecutors exercised peremptory challenges against Black versus white venire members when they had the opportunity to strike.

Table 7. State Strikes against Strike Eligible Venire Persons by Race *(Peremptory strikes aggregated across cases.)*[17]

	A		B	C	D
	Venire Member Race		No Strike	State Peremptory Strike	Totals
1.	White	*number*	253	83	336
		percent	75%	25%	100%
2.	Black	*number*	31	36	67
		percent	46%	54%	100%
	Total		284	119	403
			70%	29%	100%

As in earlier North Carolina research, prosecutors struck Black venire members at a significantly higher rate than white venire members.[18] Table 7, Column C, reports that state strikes removed 54% of eligible Black venire members (36/67) compared to 25% (83/336) of eligible white

[16] See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post*-Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531 (2011).
[17] We replicated this analysis by calculating the prosecutorial strike rate in each of the ten cases and averaging these rates across the ten cases. In this analysis, prosecutors struck Black venire members at an average rate of 54.7% (SD = 4.20) compared to white venire members' average strike rate of 24.5% (SD = 1.05). A paired t-test indicates that this difference in strike rates is significant at $p < .001$.
[18] Id.

venire members. The relative strike ratio is 2.16 (54%/25%). This disparity is statistically significant ($p < .0001$).

We replicated the gender analysis presented in Section A but did not observe disparities in prosecutorial exercises of peremptories strikes against all women. We did, however, observe significant disparities in strikes against Black women.[19] Table 8 shows that the state removed 57% of eligible Black women with peremptory strikes (16/28) compared to 27% of all other venire members (103/375). This is a relative strike ratio of 2.1. This disparity is statistically significant ($p < .01$).

Table 8. State Strikes against Strike Eligible Black Female Venire Persons *(Peremptory strikes aggregated across cases.)*[20]

	A		B	C	D
	Venire Member Race-Gender		No Strike	State Peremptory Strike	Totals
1.	Black Female	*number*	12	16	28
		percent	43%	57%	100%
2.	All Other	*number*	272	103	375
		percent	72%	27%	100%
	Total		284	119	403
			70%	29%	100%

C. Combined Impact of Death Qualification and State Peremptory Strikes by Race

The final section of this report presents the combined effect of death qualification and state peremptory strikes on jury selection. Table 9 collects information presented in the early parts of the report. Column B reports the number of Black and white venire members in the study. Column C presents the number of Black and white venire members removed by death qualification. Column D presents the number of Black and white venire members removed by state peremptory strikes. Column E combines the number of venire members removed by death qualification and state strikes, and presents the totals for Black and white venire members. Finally, Column F presents the number of Black and white venire members in the reduced population.

[19] Note that very few Black women remained in the venire and eligible for prosecutorial peremptory strikes. State strikes removed all of the strike eligible Black women in three of the ten cases: Cooper (1 of 1), Devega (2 of 2), and Stepp (1 of 1). In a fourth, Richardson, no Black women were eligible for state strikes.

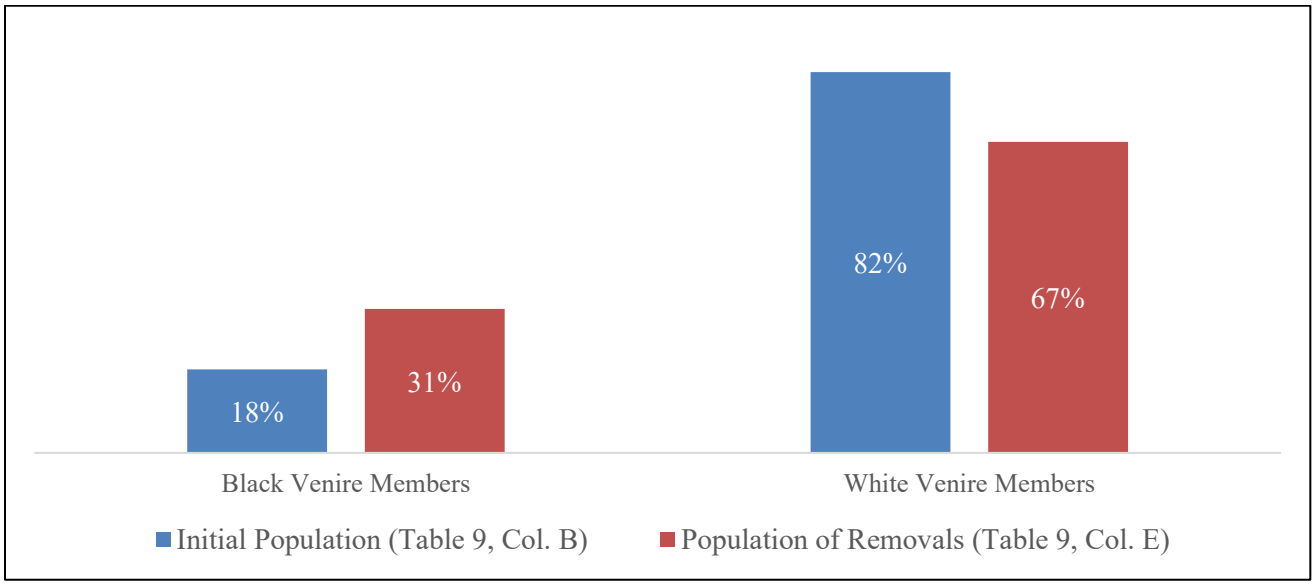
[20] We replicated this analysis by calculating the prosecutorial strike rate in each of the ten cases and averaging these rates across the ten cases. In this analysis, prosecutors struck Black female venire members at an average rate of 57.9% (SD = 11.57) compared to all other venire members' average strike rate of 24.2% (SD = 2.90). A paired t-test indicates that this difference in strike rates is significant at $p < .02$.

Table 9 also presents basic calculations concerning the impact of these decisions on jury diversity. Column G shows that Black venire members were removed at 2.1 times the rate of white venire members (42%/20%). This may in part be because Black venire members make up only 18% of the initial venire (Column B), but removals of Black venire members constitute 31% of the total removals (Column E), almost two times the rate of their presence in the overall population (as illustrated in Figure 1). The white venire members, by contrast, face removal at more than 15 percentage points less frequently, a rate of 0.8 as frequently.

Table 9. Combined Impact of Removals by Death Qualification and State Strikes

	A		B	C	D	E	F	G
	Venire Member Race		Initial Number of Venire Members	Removed as Not Death Qualified	State Strikes	Total Removed (C+D) & Percent	Reduced Population (B-E) & Percent	Rate Removed (E/B)
1.	White	number	979	111	83	194	785	20%
		percent	82% (979/1,190)			69% (194/282)	86% (785/908)	194/979
2.	Black	number	211	52	36	88	123	42%
		percent	18% (211/1,190)			31% (88/282)	13% (123/908)	88/211
	Totals		1,190	163	119	282	908	1,190

Figure 1. Comparison of Representation in the Initial Population of Venire Members to the Representation in Venire Members Removed Under Death Qualification or State Strikes.



IV. Summary of Findings

We examined the process of jury selection in ten capital trials in Wake County from 2008 to 2019. Our findings replicated and expanded on prior research documenting racial disparities in the jury selection in North Carolina capital trials. The process of death qualification of potential jurors excluded disproportionality more Black potential jurors than their white counterparts, removing Black potential jurors at 2.27 times the rate of their white counterparts. This disparity persists even when we limit the inquiry to venire members for whom no basis other than death disqualification applied: Black venire members were removed on this basis at 2.09 times the rate of white venire members.

In addition, women were excused under death qualification at a higher rate than men—a ratio of 1.54. This disparity was driven largely by the disparate removal of Black women, who were removed under death qualification at 2.2 times the rate of other potential jurors.

The death qualification process also disparately affected venire members based on their religious views. Twenty percent of venire members who were religious were excused as not death qualified, compared to just 12% of those who were not. This disparity was more pronounced for some religious affiliations than others. Twenty-five percent of venire members who identified as Catholic and one-third of Quakers were excused as not death qualified.

The racial disparity resulting from the process of death qualification persisted in the prosecution's exercise of peremptory strikes. The state struck Black potential jurors at 2.16 times the rate it struck white venire members; Black women were struck at 2.1 times the rate of all others. The cumulative effect of the death qualification process and the state's exercise of peremptory strikes meant that Black potential jurors were removed at almost twice the rate of their representation in the population of potential jurors, whereas white potential jurors were removed at 0.8 times their rate.

REPORT ON WAKE COUNTY JURY SELECTION STUDY

APPENDIX A

WAKE COUNTY, NORTH CAROLINA
DEATH QUALIFICATION STUDY
Venire Member Level Data Collection Instrument

Version: 13 July 2020

I. 01IDENTIFYING INFORMATION

1. Venire Member's Study Identification Number Q1000 |_____|_____|_____|_____|.|____|.|_____|_____|_____|

2. Defendant's Name

|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
LAST [Q1001]

|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
FIRST [Q1002] MI [Q1003]

3. Venire Member's Name **NOTE**: CONFIDENTIAL. This name is not to be shared publicly at any time.

|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|
LAST [Q1004]

|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
FIRST [Q1005] MI [Q1006]

II. CHALLENGES TO VENIRE MEMBER

4. Excused for Cause (circle one) Q1007

0 = No 1 = Yes 9 = Unknown

5. Cause Challenge initiated by State (circle one) Q1008

0 = No 1 = Yes 9 = Unknown

6. Cause Challenge initiated by Defense (circle one) Q1009

0 = No 1 = Yes 9 = Unknown

7. Cause Challenge initiated by Court (circle one) Q1010

0 = No 1 = Yes 9 = Unknown

8. Peremptory Challenge by State (circle one) Q1011

0 = No 1 = Yes 9 = Unknown

9. Peremptory Challenge by Defense (circle one) Q1012

0 = No 1 = Yes 9 = Unknown

10. Peremptory strike eligibility (circle one) Q1013

1 = Both Defense & State 2 = State 3 = Defense (State exhausted strikes) 4 = Neither or N/A 9 = Unknown

11. Record the transcript volume and page number for the successful challenge: _____ Q1014

12. Approximately how many pages of transcript involve voir dire with this juror? Q1015

1 = 5 or fewer 3 = 11-25 5 =More than 50

2 = 6-10 4 = 25-50

13. Initial response(s) to the eventually successful challenge for cause (circle all that apply) Q1016

0 = No objection or rehabilitation.

1 = Court conducts additional voir dire to rehabilitate or test basis for strike.

2 = Opposing party objection.

3 = Opposing party conducts additional voir dire to rehabilitate or test basis for strike

8 = Does not apply.

14. How many times did the state move to strike this juror for cause? (enter actual number) ____|____ Q1017

15. How many times did the defense move to strike this juror for cause? (enter actual number) ____|____ Q1018

III. VENIRE MEMBER CHARACTERISTICS

16. Venire Member's Gender (circle one) Q1019

0 = Female 1 = Male 9 = Unknown

17. Source of information for Gender (circle one) Q1020

1 = Indicated Explicitly 2 = Inferred from other information (e.g., name) 9 = Gender unknown

18. Venire Member's Race (circle one) Q1021

1 = White/Caucasian 5 = Latino/Hispanic 8 = Mixed (self-reported)

2 = Black/African American 6 = Native American _____

3 = Asian/Asian American 7 = Other (specify) 9 = Unknown

4 = Pacific Islander _____

19. Source of information for race (circle one) Q1022

1 = Indicated Explicitly on questionnaire or during voir dire. 2 = Noted by court or counsel during voir dire and not disputed. 9 = Race unknown

20. Age . Q1023

0 = Under 18 2 = 26-39 4 = 60+

1 = 18-25 3 = 40-59 9 = Unknown

21. Is the venire member religious? (circle one) Q1024

0 = No 1 = Yes 9 = Unknown

22. With what religious organization does the juror identify? (circle) Q1025

1 = Catholic 4 = Jewish 8 = Does not belong to a religious org

2 = Quaker 5 = Muslim 9 = Unknown

3 = Other Christian 6 = Other: _____

23. Source of information on religious organization: Q1026

1 = Stated on Jury Questionnaire 2 = Stated in response to question during voir dire. 3 = Stated both on Jury Questionnaire and in voir dire 9 = Religious organization detail unknown.

24. If the juror was asked about religion, who asked? (choose all that apply) Q1027

1 = Judge 2 = Prosecutor 3 = Defense Counsel 9 = Not asked.

IV. INFORMATION ON CAUSE STRIKE

25. Use the list of bases for cause strikes to code the basis or bases **given** for the cause strike. A list of bases for cause strikes appears on page 5.

Q1028 ___|___ Q1030 ___|___

Q1029 ___|___ Q1031 ___|___

88 = No factors apply or venire member was not excused for cause (enter in Q1028)

99 = Responses unknown (enter in Q1028)

26. Use the list of statutory bases for cause strikes to code the statutory basis or bases that applied to the venire member but **were not given** for the cause strike.

Q1032 ___|___ Q1034 ___|___

Q1033 ___|___ Q1035 ___|___

88 = No factors apply that were not given or venire member was not excused for cause (enter in Q1031).

99 = Responses unknown (enter in Q1031).

27. Death Penalty Opinions. If the venire member is removed because of disqualifying death penalty opinions, what opinion or opinions did the venire member express? (circle all that apply) Q1036

10 = Venire member expressed a moral or religious opposition to the death penalty

11 = Venire member expressed other reasons they could not vote for a death sentence.

12 = Venire member could not consider a life sentence.

13 = Venire member could not consider mitigation.

14 = Venire member expressed disqualifying support for imposition of the death penalty.

88 = Not applicable (Venire member did not express disqualifying death penalty opinions).

99 = Venire member expressed disqualifying death penalty opinions, but record provides no details.

28. History of Inequality. Did the venire member indicate that they did not trust law enforcement or the criminal court system to be fair after years of inequality and racism? Q1037

0 = No 1 = Yes

29. Hardship. If the venire member is removed because requiring service would be a hardship, what hardship did the venire member express? (circle all that apply) Q1038

10 = Work obligations

11 = Economic hardship

12 = Care for children or another family member

88 = Venire member was not excused for hardship.

99 = Venire member was excused for hardship but the record provides no details.

13 = Age (over 65).

14 = Medical concern or physical ability

15 = Medical competence

16 = Other

30. What was this venire member's ultimate status? (circle one) Q1039

0 = Neither seated on the jury nor selected as alternate

1 = Seated on the jury

2 = Seated on the jury as an alternate

9 = Unknown

Coder's Name

|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|

LAST [Q1040]

|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____|

FIRST[Q1041] MI [Q1042]

Date Coded _____/_____/_____ Q1043

MM DD YEAR

Bases for Cause Strikes

01 = Does not have the qualifications required by N.C. Gen. Stat. § 9-3. § 15A-1212 (1).[1]

02 = Is incapable by reason of mental or physical infirmity of rendering jury service. § 15A-1212 (2).

03 = Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant. § 15A-1212 (3).

04 = Has been or is a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution. § 15A-1212 (4).

05 = Is related by blood or marriage within the sixth degree to the defendant or the victim of the crime. § 15A-1212 (5).

06 = Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant. § 15A-1212 (6).

07 = Is presently charged with a felony. § 15A-1212 (7).

08 = As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina. § 15A-1212 (8).

09 = For any other cause is unable to render a fair and impartial verdict. § 15A-1212 (9).

10 = Death Qualification. Venire member expressed disqualifying death penalty views.

11 = Hardship. Reasons of "compelling personal hardship" or "because requiring service would be contrary to the public welfare, health, or safety." G.S. 9-6(a).

[1] Statutory Disqualification Grounds under N.C. Gen. Stat. § 9-3: Not a citizen of the State. Not a resident of the county. Had served as juror during the preceding two years. Under 18 years of age. Physically or mentally incompetent. Cannot understand the English language. Convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony and has not had citizenship restored pursuant to law. Had been adjudged non compos mentis.

REPORT ON WAKE COUNTY JURY SELECTION STUDY

APPENDIX B

WAKE COUNTY CAUSE STUDY
Missing Venire Member Race Data Collection Instrument
Version: 8 June 2022

1. Venire Member Study Identification Number [Q1000] |____|____|____|____|.____|.____|____|____|____|

2. Venire Member's Name |_____ _____|____| _____ _____|_____|_____|_____|_____|_____|_____|_____|
LAST [Q1004]

|_____|_____|_____|_____|_____|_____|_____|_____|_____|_____| |_____|
FIRST [Q1005] MI [Q1006]

3. Venire Member's Race (circle one) [Q1021]

1 = White/Caucasian	5 = Latino/Hispanic	8 = Mixed (self-reported)
2 = Black/African American	6 = Native American	_____
3 = Asian/Asian American	7 = Other (specify)	9 = Unknown
4 = Pacific Islander	_____	

4. Please indicate the source of information for race. Choose the lowest number that applies, even if a subsequent foil is also applicable (e.g., if you match based on notes in the jury chart and checked against BOE or Lexis, choose 3 even though 4 would also technically be correct). (Circle one) [Q1045]

1 = Self-reported on questionnaire	= BOE website and/or Lexis 8 =
2 = Noted by court or counsel in transcript and no dispute about characterization	N/A because race is unknown
3 = Noted on a jury chart or in counsel's notes and verified by another source	

5. If the source of race information was based in any way on either the BOE website or a Lexis public records search (or both), please indicate *all* of the criteria on which you were able to match using the following codes.

1 = Matched to this information
0 = Unable to match on this information
Blank = Not applicable because race unknown

First & last name [Q1046] |_____|	Address [Q1047] |_____|	Middle name/initial [Q1048] |_____|
DOB [Q1049] |_____|	SSN (any part) [Q1050] |_____|	City [Q1051] |_____|
County [Q1052] |_____|		Other (please specify) [Q1053] |_____| _____[Q1054]

6. **Coder's Name** _____
[Q1055]

7. **Date Coded** [Q1056]_____/____/_____
MM DD YEAR

Appendix C

Race Coding Protocol

NOTE: The primary investigators developed this protocol for use in a statewide jury selection study. See Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-Batson North Carolina Capital Trials*, 97 Iowa L. Rev. 1531 (2011).

(1) Memo re: Protocol for Determining Race of Jurors
(2) Instructions for Race Coding

To: RJA Jury Study File
From: Barb O'Brien
Re: Protocol for Determining Race of Potential Jurors
Date: February 18, 2010

This study requires that the race of potential jurors be accurately recorded. Below is the protocol for coding a potential juror's race. For each juror, please indicate the source relied on in the spreadsheet column entitled "source."

1. **Self or Contemporaneous Report of Race based on Direct Observation**: The following are considered definitive sources of race information, in descending order of preference. (In other words, rely on the source of information listed in (a) before (b).)
    a. The juror reports his or her own race either in a questionnaire or on the record during voir dire
    b. The juror's race is noted by the court or an attorney as part of the record (e.g., race is mentioned in connection with a *Batson* motion or the clerk reads the race of the venire members into the record) and there is no indication of any unresolved dispute about that characterization.
    c. The juror's race is noted on the seating chart, and verified using public sources listed in Part 2.

2. **Secondary Sources of Information**: If the sources of information listed in section 1 are not available, you may look to the North Carolina Board of Elections website or Lexis Public Records for race information. Below are the circumstances in which you may find a match and thus rely on these records for information about race, in descending order of preference (in other words, rely on matches based on (a) before (b), and (b) before (c)). In all cases, the person named in the record *must* have been at least 18 at the time of trial. Information that a person would have been under 18 at the time of trial is a sufficient basis to exclude him or her as a match.
    a. You may rely on the public record for race if the record is consistent with our information about the venire member's name *as well as* either the venire member's (1) address, *or* (2) birth date.
        i. For the information to be considered "consistent" it must not contradict the information we have. For instance, if we know the juror's middle name, any information about the middle name in the public record must be consistent with what we have. If both sources provide all three names, then all three names must be the same to be treated as "consistent." If the public record provides only a middle initial, that initial must be consistent with the venire member's reported middle name. If either source lacks information about a middle name, then the presence of information about

it in the other source does not render them inconsistent and preclude a match.

1. Example: We have information about a venire member named "Jack Shepherd." On the BOE website, you find "Jack A. Shepherd." This would be considered consistent. The same would be true if we had the information on the venire member's middle initial, but the BOE website did not. In contrast, suppose we have information about a venire member named "Jack A. Shepherd." On the BOE website, you find a record for "Jack B. Shepherd." This would *not* be considered consistent as to name, and thus preclude a match.
2. Slight discrepancies may be acceptable if there are other strong indicators of a match that suggest that the inconsistency is likely due to data entry error or some other reasonable explanation. However, this assumption should not be made casually, but only when significant other evidence supports the inference.
    a. Example: We have information on venire member Richard Alpert, living 4815 Jacobs Way, with a DOB 8/15/1960. On Lexis, you find a record for Richard A. Alpert at 4815 Jacobs Way, whose DOB is listed as 8/15/1961. Another record for Richard Alpert at a different address (from a different year) lists his DOB as 8/15/1960. Lexis records often give partial Social Security Numbers. If the two records for Richard Alpert have matching partial SSNs, it is reasonable to find this to be a match for our venire member despite the difference in the year of birth in one of the records.
    b. Example: We have information about venire member Katherine R. Austin, born 1/6/1978. You find a record created several years after trial for Katherine Austin Ford, born 1/6/1978. If there are other pieces of information to indicate that these are the same people (e.g., DOB or partial Social Security numbers), the "Ford" does not render the names inconsistent because it could have been changed upon marriage.

ii. Because people move, lack of consistency between the venire member's address and the address indicated in the public record isn't necessarily fatal to finding a match based on other criteria. However, if information about the address suggests that these are not the same people (e.g., the

person did not reside in the county at the time of trial), that person should not be treated as a match.

b. You may rely on the public record for race information if the record is consistent with the venire member's name and county of residence at time of jury duty. If more than one record matches based on these criteria, you may rely on race information *only* if all the people with the matching records have the same race.
    i. Example: A search for John Locke in Wake County produces a single match for someone of that name who would have been old enough to serve on a jury at the time of the trial. That match is unique and you may rely on that record's information about race. But suppose the search produces several people with that name in Wake County. If all of those people are indicated as being white, for instance, code the potential juror as "white." If the matching records include people of different races, code venire member John Locke's race as "unknown."
    ii. Example: A search for John Locke in Wake County produces two matches for people with that name, but only one of whom would have been old enough to serve on a jury at the time of the trial. You may exclude the younger person and thus conclude that you have found a match.
    iii. Use information about the date of trial to assess whether there is a match as to county. As with address, lack of consistency between the venire member's county and the county indicated in the public record isn't necessarily fatal to finding a match. People do move from county to county. However, if information in the record suggests that the person did not reside in that county at the time of trial, that person should not be treated as a match.

c. If you cannot match on county, you may rely on a match based on a statewide search on name alone *only* if it produces a unique match or multiple matches of people of the same race. It will likely be very rare to find a match on this basis even if we have the middle name, but it may be possible for a particularly unusual name.

Instructions for Race Coding

Our goal is to determine the race of venire members in our study. Your job is to track down public records for the venire members and record their race. To do this, you will receive various types of information about the venire members. The level of detail will vary. Use the information you have available to find a record that matches with as much specificity as possible.

Below is a step-by-step guide to finding these records. During this process, however, you should not abandon your own common sense and good judgment. If something doesn't make sense, please don't be afraid to ask questions. For each venire member, you will fill out a sheet with questions about how you made your determination.

1. Create a folder with the defendant's case number and name as the title (e.g., for defendant John Badgett, create a folder named "14 Badgett".
2. Use two electronic sources of information:
    a. North Carolina Board of Elections (BOE) website (http://www.sboe.state.nc.us/VoterLookup.aspx?Feature=voterinfo)
    b. Lexis public records search (http://w3.lexis.com/lawschoolreg/researchlogin04.asp)
        i. If that link doesn't work, go to lexis.com and log in. Then look under "Public Records" and then "Voter Registrations Search." Be sure to select "North Carolina" as the state.

3. **If the information provides name AND address or date of birth**, search by name and county in the BOE website.
    a. If you find a unique match on the BOE website, you may record that venire member's race and stop looking.
        i. A "unique match" is entirely consistent with the venire member's name and also matches either the address or date of birth (DOB) as provided.
        ii. Name Consistency: For the information to be considered "consistent" it must match the information provided as follows:
            1. If both sources provide all three names, then all three names must be the same to be treated as "consistent."
            2. If the public record provides only a middle initial, that initial must be consistent with the venire member's reported middle name (and vice versa)
            3. If either source lacks information about a middle name, then the presence of information about it in the other source does not render them inconsistent and preclude a match.
        iii. Address Consistency. For the information to be considered "consistent" it must match the information provided perfectly.
            1. If you find multiple matches with the same address, you may record the race if all the records are for people with the same race.
    b. If the BOE search does not produce a unique match or does not produce any matches, run the same search in Lexis.

i. Look for Name Consistency.
ii. Look for Address Consistency. For the information to be considered "consistent," it must be possible to determine **two** items of information:
    1. The person identified lived at the address provided at or near the time of the trial.
    2. The person identified also lived at the address provided by the BOE.
iii. If you find Name Consistency and Address Consistency, you may record that venire member's race and stop looking.

c. If searching by name and county produces multiple matches with multiple race information, try to narrow the possible matches. Eliminate duplicate candidate matches in each database (BOE & Lexis) based on the following:
    i. The person did not reside in the county of trial at the time of trial.
    ii. The person would not have been old enough to serve on a jury at the time of trial. (BOE and Lexis often provide year of birth.)

d. If searching by name and county does not produce any matches in BOE,
    i. Use Lexis to determine if a venire member has changed her name. Search in Lexis under the name provided. If Lexis documents a name change, search again in the BOE website with the new name. Look for a unique match. Note that Lexis often includes partial Social Security Numbers that allow you to confirm a match even if the person's name has changed.

4. If the information does not provide address or DOB on the venire member, search BOE by name and county. If you find a record for someone with that name living in the county of trial at the time of trial, record the race if:
    a. The search produces a unique match
        i. In determining whether you have a unique match, use Lexis to gather additional information that may allow you to exclude some potential matches as ineligible.
    b. The search produces records for several people with that name in that county and all are of the same race.
5. Create an electronic folder for each juror for whom you are able to make a race designation. Name the folder based on the based on the juror's last and then first name (e.g., for juror John Locke save the PDF as "Locke_John". For each electronic record you rely upon to determine race, save a PDF named the same way you named the folder, with an extension to indicate whether the source is BOE or Lexis. Save the PDF to the folder created for this juror, which is within the folder created for this defendant's case. You can usually do this quite easily by selecting "print page" and then select "Adobe PDF" as the printer. You can also select "save as" and save the html page as a PDF.
    a. Example: When working on defendant Badgett's case, create a folder named "14 Badgett". Within that folder, create a folder for juror John Locke named "Locke_John". You find several BOE records for John Locke, and look to Lexis to exclude some as a potential match. Within the folder "Locke_John", save as PDFs the documents you relied upon to make the race determination.

REPORT ON WAKE COUNTY JURY SELECTION STUDY

APPENDIX D

Wake County, North Carolina - Death Qualification Study

Coding Questions & Answers

Question numbers in this Coding Log relate to the Wake County, North Carolina, Death Qualification Study Venire Member Level Data Collection Instrument dated 13 July 2020.

This is a working document intended to communicate key previous coding decisions for the Death Qualification Study. This coding protocol has been updated throughout the coding and review process as needed. All staff attorneys coding cases are expected to read this document before beginning coding and to refer to it throughout the coding process. Close adherence to this protocol is essential to completing a reliable study.

Refer to this document when coding questions arise. When coders present questions or issues, I will make a note of the resolution here so that it is available to everyone. If you have a question about how to code something, check this document to see if it has already been resolved. When you have a question, please post it at the top of this page and I will address it asap.

NOTE: Please put new questions at the top so that the older ones move to the bottom over time. Please start your question with "Q" followed by the corresponding DCI question in green.

FYI - The Q21 Random Sample Review included 70 venire members. The review resulted in the following codes

- Unknown (9): 63
- Yes (1): 4
- No (0): 3

If we all agree that the three Q&A venire members remain unknown, this is a 10% correction rate: 7/70.

Q21 1017.0.019- James Brohard- VM says his religious preference is Catholic. During VD he is asked if he practices regularly or … He says no.. Is this enough to change from unknown to religious- KCS (pg 588) BO'B: 9

Q21 1018.0.547-Sharon Morrison-Still unknown? VM says she is not the member of a church on her questionnaire. Then there is this follow up. After VM says "Baptist" Court moves on. BO'B: 9

HE COURT: And we're going to talk about the processes and things a lot in a few minutes. We asked you about religious or other affiliations, church-type affiliations, and you said that you were not currently active or involved in a church group. Have you at any point in your life been active in any type of church activities?

PROSPECTIVE JUROR MORRISON: Yes.

THE COURT: And what faith or denomination were those activities?

PROSPECTIVE JUROR MORRISON: Baptist.

Q21 1018.0.023-Donald Barber-Still unknown? VM checked that he was not the member of a church on questionnaire and the following took place during questioning: BO'B: 9

You are currently not participating as a member, parishioner, anything any type of church group. Have you at any point in your life been an active member or a participant in a church or faith group?

PROSPECTIVE JUROR BARBER: When I was young I was brought up Catholic.

THE COURT: The Catholic church has a stance on the death penalty, as they do on a lot of other topics. Do you adhere to the church's position or are you your own man when it comes to that kind of thing?

PROSPECTIVE JUROR BARBER: I have my own beliefs.

THE COURT: Okay. Do you have any

Q27- In the instructions below this is what we have under Question 27:
**Coded 88 unless Q25 or Q26 is coded 10. [CHECK THIS AFTER DATA ENTRY]
I am wondering if we can be more explicit. In reliability checks, I am seeing consistent coding where both coders code a 10 in Question 26 but it is not reflected in Question 27 (they both code 88 in question 27). I

know this is on our re-code list. Maybe we can add something in the Question 26 instructions and Question 27 instructions like "If you code a 10 in question 26, make sure to capture the DP opinion in question 27"? Good idea. I added this sentence below at Q26 and Q27.

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Coding Log (by Question)

Updated: 17 May 2021

Questions 4-7: Excused for Cause

- When the defense clearly anticipates that the VM will be excused for cause, but no motions are offered before the Court asks both parties if either has an objection to removing her, code Q7 = yes.
- While the Court is questioning VM, he elicits her DP views and she is not death qualified. He then turns to the other parties, and asks if they have questions. They do not. VM is excused for cause. Q7 = yes.
- Defense counsel moves 3 times unsuccessfully to strike him for cause. Then on the 4th time the Court excuses the VM. Q6 = yes.

Question 10: Peremptory Strike Eligibility

- If VM was removed for cause à Code 4. All VMs excused for cause will be coded 4.
- Code 1 when the juror is seated rather than 4, because both parties had the opportunity to strike VM, but chose not to.
- When VM was removed by a peremptory strike:
    - Code 1 à If both Defense and State had opportunity to question VM, unless the State strikes first.
    - Code 2 à If only State had opportunity to use a peremptory VM (i.e. VM was removed before Def had the chance to question).
    - Code 3 à If only Def had opportunity to use a peremptory on VM (would happen only if State had exhausted all their strikes).

Question 12

- When two coders count a slightly different number of pages that leads to a different code for Q12, the coder doing the reliability check should select the higher code and not recount pages.

- If VM is questioned for exactly 25 pages, code 4, not 3..

Question 13, 14 & 15: Number of Motions for Cause

- When an attorney has moved for cause, been denied, continued questioning about cause bases, said "Your Honor, may we be heard?", and then the Court began asking the VM questions before sending the VM out, and then the attorney formally makes another motion for cause . . . code as <u>two rather than three motions</u>. (Do not treat "may I be heard" as an independent motion.)

- Q13 = 0 when the court excuses a VM and no one complains.

- Where Defense objects to the Court's motion to excuse VM, still code Q13 = 2 (opposing party objection).

Question 16. Venire member gender

- Where VM marked "M" on their questionnaire, but is always referred to by feminine salutations/pronouns in the transcript and VM's name is a female gendered name code Q16 = 9 (unknown).

Question 18. Venire member race or ethnicity

- English is the VM's second language. VM did not enter race was on the questionnaire. The court asked the VM what his race was but he did not understand the question. The VM was born in Mexico. It is a fair inference to code as Latino/Hispanic.

- VM enters race as "Iranian." Code = Other

Question 21: Religiosity

- Info can be taken from either the questionnaire or the transcript.

- Start here:

    - If VM is a member of a religious org that is enough to say the VM is religious in the absence of other clearly contradictory information.

    - If the VM mentions faith or religious reasons as the basis for an opinion that is enough to say the VM is religious even if the VM does not belong to a specific church.

- Jury Questionnaires – Use these guides only in the absence of stated membership in a religious org or use of religion as the basis for an opinion (as stated above)
    - Wilson Questionnaire asks what their religion is, what denomination (ex. what branch of Christianity), and how much do they participate in church's civil or social activities (not at all, a little, some, or a great deal). How do we want to categorize their answers?
        - "Not at all" = no, "a little = don't know if religious, "some" and "a great deal" = yes
    - Gillard Questionnaire asks Are you a member of a church, temple, or other religious organization? (Yes/No); If yes, please list the name. How frequently do you attend service?
        - At least weekly (Q21 = yes), Once a Month (Q21 = yes), Special Occasions (Q21 = don't know), Rarely (Q21 = don't know).
    - Devega Questionnaire asks Are you a member of a church: _ yes _ No; Which church and denomination do you belong?; How often do you participate in your church's activities?
        - A great deal (Q21 = yes), some (Q21 =yes), a little (Q21 = don't know), not at all (Q21 = no)
    - Richardson Questionnaire asks "what is your religion preference, if any?"
        - If they answer this question with a blank = not religious; "none" = not religious; "Catholic, Baptist, etc." = religious unless there is conversation in the voir dire that suggests otherwise
- Examples of not religious (0)
    - VM grew up going to Catholic schools and went to a Jesuit college, but says his parents were not Catholic and his views on DP did have not anything to do with religion. VM also marked that he was not a part of a religious organization on his questionnaire.
    - VM was raised as a Quaker, in a Quaker church, but does not currently attend and belong to the church today. VM "holds a lot of their beliefs in my background and in my family." Code Q22 as Quaker but Q21 not religious.
    - VM writes Christian/N/A as religious preference on questionnaire. Code Q21 = not religious, but Q22 is other Christian.
    - VM writes N/A as religious preference on questionnaire.
    - VM drew a dash through the question "what is your religious preference?"

    - VM says he is not a member of a local church, temple, or other religious organization and does not participate, but still upholds the Christian morals he was taught as a child.
    - "I have faith, but religion is not very strong for me. Moral, yes. I would say morally . . ."

- Examples of religious where VM does not say belongs to church or rely on faith in stating opinion (1)
    - VM is not part of a church community or faith group but responded to a question "We are currently not attending a specific church, but we did, growing up attend Westland Church, and more recently we have been going to the Methodist church, but we are not currently members."
    - VM is no longer a member of a church but he used to be a youth leader. VM explained that he moved away from his old church and his work hours made attending church now difficult. [Note he was very active, and hasn't said he rejected it.]
    - VM does not participate in any church or religious or faith community, or pray regularly, but is "very much a part of" her faith's feast and celebrations.
    - VM is not a member of a local church, but goes to service weekly and substitute teaches at a Christian school.
    - VM says on her questionnaire that she is not a member of a church, but says she sometimes goes to church activities.
    - VM does not believe in DP because of her religious beliefs but does not belong to a religious organization.
    - VM notes that his mother is quite religious and that "her beliefs are pretty much my beliefs." On his questionnaire he indicates he does not belong to a religious org.
    - During voir dire she says that since moving she has not gone in a while and my husband is not very religious, so it makes it hard to go.
- Unknown (9)
    - If no answer is given, or conflicting info is given, code Unknown.
    - VM on her questionnaire indicates she is not a member of a local church, temple or other religious organization. The Court asks her if she has ever been active in a church or faith based group at any point in her life. VM says that she has gone to church. "Not been a member of a church, but I have attended church every so often with my best friend."
    - If the VM only provided that they are not a member of a church on their questionnaire (no additional info) and is not asked about it during voir dire, the code should be unknown.

- On questionnaire VM states they do not belong to a religious org and no one actually asks her about faith/religion, but she talks about keeping her children "sheltered and in church" as a way of keeping them from gun violence or guns in general.

Question 22. What religious org?

- When a person says they are not a member of a church and provides no other information then code "8", not 9 (unknown).
- Catholic (1)
  - VM's questionnaire she says she is a member at a Methodist church but attends a Catholic church.
  - VM says he gets his wife and children to Catholic church and joins them there. His questionnaire does say he is a member of a church.
  - VM says "as a Christian I'm aware that humans are fallible people."
- Other Christian (3)
  - VM grew up attending the Westland Church and has been going to the Methodist church.
  - VM is strongly opposed to the death penalty due to his religious views. His mother was a preacher. On JQ said that he was a member of a church, did not put down what denomination, and said that he did not attend his church's activities. [We can rule out non-Christian because of church, Catholic because mom was a preacher.]
  - VM goes to different churches but says most of the denominations she attends are Baptist. She was raised Baptist.
  - Mormon should be coded as 3, Other Christian.

Question 23: Source of Info on Religious Org

- General guidance
  - Refers to specific religious organization (Lutheran, Baptist, Non-denom, Muslim, etc), not just general religiosity in transcript.
  - A party can ask VM about religion in general and VM can answer about religion without referencing a specific religious organization. So, it is possible to have Q24 coded affirmatively (asked) without having Q23 = 2 or 3 coded (during questioning) because of the way Q24 is phrased.
  - Q23 about membership in a religious org can be based on the JQ only, even if religiosity in Q24 was "asked". They are asking slightly different things, it is not incompatible

    - When Q21 and Q22 are coded "unknown" using information (not just blanks) from the questionnaire, Q23 should be coded "1." Code 9 only if the VM does not answer the question on the questionnaire.

    - When VM mentions that they are christian during voir dire that is enough for the source of the information to be from voir dire

- Unknown

    - VM was not asked about religion during voir dire. On his questionnaire he checked both boxes and scratched out the religious organization he wrote down.

    - Code 9 if the VM does not answer the question on the questionnaire.

- Stated during voir dire only (2)

    - VM on his questionnaire says that he does not belong to a religious organization but he participates in activities twice a year. During questioning, VM says he is Lutheran.

Question 24: Who asked about religion?

- State asks about religion (2)

    - VM references conversation with pastor. State follows up, "you went and sought counsel from your pastor?" State also asks "And so clearly this is an issue that comes not just morally, but also religious?"

    - The State asks "Is that a personal, moral, religious, all of the above kind of position you have on this?" State does not follow up on religion specifically.

    - Pros. asks VM about a mission trip and the VM talks about going with his church. Pros never asks about the church and is really only asking about the mission trip because the VM had earlier talked about this trip.

- Judge asks about religion (1)

    - The judge, while questioning, reads the questionnaire to VM, "You said I am against the death penalty religiously because I feel that we have no right to take a person's life even if it is warranted. How long have you felt that way?"

    - "Do you have any personal, moral, or religious position on the death penalty?"

- Not asked

    - Defense states, "I'm going to start off with faith and their family are important to everybody. Outside of faith and family what's important to you?"

- Defense says, “Let me ask you first of all, what’s important in your life? We all have faith and we all have family that [else] is important to us.”

Question 25: Bases for cause strikes given.

- Is it not possible to have a code other than 88 in Q25 if the juror is seated or struck with a peremptory.

- When a VM is excused for cause there should be codes in Q25 even when the court does not state a reason why the VM is excused.

- Examples for specific codes in Q25 or Q26 are included here:

  01 = Does not have the qualifications required by N.C. Gen. Stat. § 9-3. § 15A-1212(1).

  - VM is from Pennsylvania but was in NC to help take care of family. He had his mail sent to NC there, which is how he received a jury summons. He plans to return to Pennsylvania now that his family is better.
  - VM does not speak or understand English.
  - VM is moving prior to trial out of the county, so he will no longer be a resident.
  - VM is moving out of state in one month.

  02 = Is incapable by reason of mental or physical infirmity of rendering jury service. §15A-1212(2).

  - *Generally defer to code 11, hardship, but raise a question if 2 seems like a better fit.*
  - VM has hard time understanding the questions. Highest level of education is 8th grade and VM is 71 years old.

  03 = Has been or is a party, a witness, a grand juror, a trial juror, or otherwise has participated in civil or criminal proceedings involving a transaction which relates to the charge against the defendant. § 15A-1212 (3).

  - This is rare. Will relate specifically to this case.
  - VM is approached by a cousin of the defendant, cousin is charged with witness tampering and now the VM must be a witness against the cousin.

  06 = Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant. § 15A-1212 (6).

  - VM states she has formed opinions on the case and she might have a hard time in this case.
  - VM lives near the crime scene and notes there was a high level of focus on it in the community.

- VM was excused because he mentioned to another VM that he thought the defendant was guilty, even when he denied making those statements when questioned by the Judge,

08 = As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina. § 15A-1212 (8).

- Only code 08 in addition to 10 if there is an additional aspect to their inability to follow the law.
- Because of religious beliefs, VM feels he cannot partake in the guilt/innocence phase of trial.
- Where VM is a Jehovah's Witness and gets excused because he does not feel he can partake in the guilty or innocent phase of the trial. Q25 gets 8; Q26 gets nada; Q27 gets a 88.
- Judge was concerned that VM read philosophy books (like Noam Chomsky) to think about her views on the death penalty and thoughts was concerned that she might not follow instructions.
- Court asks if VM would have difficulty separating her faith beliefs and her duty as a juror under NC law. VM says "I think that would be a problem for me. The only reason is, I would be compromising my faith...."

09=For any other cause is unable to render a fair and impartial verdict. § 15A-1212 (9).

- Note: 9 is a catch all—broader than 6—because everything that qualifies as a 6 would also qualify as a 9, but the reverse isn't true.
- Because of personal experiences, VM would favor the defendant in the case.
- VM's niece was raped and this has impacted her ability to be impartial.
- VM dismissed because it's not the appropriate case for her to sit on "with your personal, you know, the background and things that happened to your family members."
- VM is a medical administrator at prison where defendant is being held.
- VM's visible distress in court without other context.
- Trouble viewing crime scene photos
- VM would be unable to look at physical evidence,
- VM is a sexual assault survivor (in a case involving sexual assault).

- VM is a convicted felon who has gotten back his rights, but does not believe in the court system.
- VM is untruthful about his own criminal history
- VM is excused for discussion that other jurors had in the jury room, even though he is not aware of the discussion.
- Trouble following beyond a reasonable doubt standard
- VM was excused for having a concern that LWOP might not mean what it says over time leading the Defendant, if found guilty, to get parole.

Examples with Both 9 & 10

- VM has been taking care of a 19 year old male, no blood relation, since he was young. The male recently was in trouble with the law, and VM was not happy with how the Court handled it. He also tends to be against the DP and feels that he would likely favor the defense based on the situation with the 19 year old.
- VM expressed disqualifying death penalty views and court also finds that VM seems to have trouble following the Court's instructions and answering questions consistently.
- VM does not think she can be fair, but also expresses disqualifying DP views.

10 = Death Qualification. Venire member expressed disqualifying death penalty views.

- Examples of distinctions between not enough for a code 10 and just over the line into 10 being appropriate
    - Appropriate for code 10
        - VM says she doesn't know if she could impose a sentence of death. She doesn't have any views about DP, just doesn't know if she is capable of doing that. VM keeps saying she just doesn't know.
        - VM would require that mitigating circumstances be proven more than "just a preponderance." (The Constitution requires only a preponderance.)
    - Not appropriate for code 10 (unless the judge made it clear this was the basis for excusal)
        - Cannot code DP reservations when it is unclear that her opposition would have been substantial enough to warrant removal for cause.

        - VM has never really thought about DP. Says "if the person who is convicted did something morally awful like multiple murders or such." Says she doesn't know if she could consider DP. Doesn't want to be put in a position to decide somebody else's fate. She's a mom. Supposes she could consider it if the circumstances deemed necessary. VM doesn't know if she can fairly consider DP because she doesn't want that burden on her. Says it would be hard but she could be fair.

        - VM says both DP and LWOP are equal, but would much rather not suffer in jail, so would lean towards death, but would consider both. After questions about her statements that she leans towards death she reaffirms she would be able to fairly consider both.

11 = Hardship. Reasons of "compelling personal hardship" or "because requiring service would be contrary to the public welfare, health, or safety." G.S. 9-6(a).

- VM would be unable to give her full attention to the case because she would be concerned about her daughter who would have to live with her grandmother during the trial.

- VM's cousin, who lives in NJ, was injured just before the VM came to jury duty. The Judge excuses him because the Judge can see he is very concerned.

- VM wrote on JQ that it would be difficult to live with the fact that someone died and then it was later found out they were innocent.

Question 26: Statutory Bases Not Given

- Is it not possible to have a code other than 88 in Q26 if the juror is seated or struck with a peremptory.

- If you code a 10 in question 26, make sure to capture the DP opinion in question 27.

- Q26 will have numerical codes (explained in previous question) only when the record shows an explicit additional reason for the excusal or when the VM is excused prior to additional question on a statement they made. Otherwise, coded 88.

- Only rarely should Q26 have something and Q25 not—only in cases where a peremptory is explicitly used charitably to avoid a cause inquiry.

- Examples of times that Q26 should not be 88 or 99

    - The Judge and Lawyers have a discussion about how they would have excused VM based on his questionnaire answer that he does not believe in the death penalty. They did not have a chance to ask him any questions about it.

- State ultimately used a peremptory strike, but VM talks about leaning towards LWOP, and that they feel very strongly that they would not like to be in the situation where they are asked to impose death. They talked about it through the entire voir dire. Attorneys and judge agree that VM would probably be struck for cause at some point, but agree to use a peremptory strike to save time.

- VM was excused for an economic hardship since his job is solely commissioned based. Judge then says "he is in real estate and works for York … that is the group has the house listed on Cardia Drive … which is the scene of the crime or offense … I'll just put that on the record, which is a reason that I excused him as well." (Code = 9)

- VM is not qualified to be a juror in NC. (Q25 = 1) He also needs to return to PA to get two more surgeries. Lastly, he is very much against the death penalty. (Q26 = 10 & 11).

- Court notes on the record (after the fact): "We noticed <u>also</u> the verbal, the physical reaction she had to that, and I believe her condition. [The State] and I talked about her condition with her daughter, taking her to school probably would have conflicted with her actually being able to serve." (Q26 = 11)

- VM was excused because he became a witness to jury tampering in connection to the case where he was a potential juror. VM had strong DP views but said that he could follow the law, prior to being excused. Since he could follow the law and there was no further discussion he does not warrant a code 10 in Q26

- Examples of 88

  - State uses a peremptory strike, but VM opposes the death penalty.

  - Defense uses peremptory strike, but VM talks about a strong gore/blood aversion and discuss the difficulty they may have viewing the evidence and analyzing it.

  - Defense peremptory strike, but expresses strong support for the death penalty. Judge denied motions for cause for death penalty opinions.

  - Defense peremptory, VM repeatedly said that they wanted Defense to put on evidence and they wanted the Defendant to testify.

  - Judge says VM was excused because of his death penalty views. During voir dire VM stated he has trouble staying focused and does not think he can give the case the attention it deserves. (No 11 code here. Only 88.)

Question 27: Death Penalty Opinions.

**Coded 88 unless Q25 or Q26 is coded 10. [CHECK THIS AFTER DATA ENTRY]

** If you code a 10 in question 26, make sure to capture the DP opinion in question 27.

** The most important distinction here is between anti-death penalty and pro-death penalty. In each case, if you cannot decide which category of anti or pro, select the lowest number in that group (i.e. 10 for anti or 12 for pro).

10 = Venire member expressed a moral or religious opposition to the death penalty

- VM says she is not in favor of DP so the State asks, "Is that a personal, moral, religious, all of the above kind of position you have on this?" VM says "It's all of them really."
- VM was raised as a Quaker and holds a lot of their beliefs including a belief in non-violence that makes involvement in a death penalty decision really challenging.
- VM has personal moral beliefs against the DP that are connected to religious and moral values.

11 = Venire member expressed other reasons they could not vote for a death sentence.

- Concerns that aren't about the morality or ethics, but something like "It would give me nightmares" or "The death penalty doesn't deter and it's too expensive"
- VM just keeps repeating that they are uncomfortable with DP.
- VM states, regarding his hesitancy toward DP that " it's just a decision that I would have to live with and whether or not – again, you know, if it did warrant it, I don't know if that's a decision I could live with so."
- In her discussion about DP she mentions that she went out and read philosophy books. Read about DP and its use to deter crime, which she doesn't believe DP accomplishes.

12 = Venire member could not consider a life sentence.

- "If you kill someone you need to suffer the consequences of death."
- VM says that someone who is convicted of premeditated, planned murder "doesn't deserve to live his life in jail."
- When asked about his feelings in general on LWOP, VM says, "I mean, I think, they killed somebody, they should be killed themselves. Doesn't feel like LWOP is an appropriate punishment for a first degree murder, feels like it's a free pass

13 = Venire member could not consider mitigation.

- VM says she cannot consider LWOP as an option if someone "was proven guilty for killing somebody else." VM repeats no matter what mitigation evidence is offered she cannot consider LWOP.

14 = Venire member expressed disqualifying support for imposition of the death penalty.

- "If you kill someone, you deserve the same punishment."
- When State asks whether VM believes every murder case deserves DP, VM says "My first reaction would be yes."
- "I strongly feel if you take someone else's life, you should have the death penalty, only exception to be accidental."

Question 28: History of Inequality

- Q28 = 1
    - Construe this question broadly to cover any expressions of concern about the system's fairness.
    - VM does not believe in the penal system, the way it is administered, because guilty people go free and innocent people get sent to jail.
    - VM is not a fan of the court system. He mentions that grand jury indictments are really quick. He also talks about a case where the person was convicted and the defense appeals, which acquits the defendant. After being acquitted the defendant is then tried in military court and convicted.
- Q28 = 0 (not enough)
    - VM cared for a minor child for several years and considers him a son. At 19, this person was convicted of shoplifting and served a month in jail. VM indicates that he did not believe that the DA (specifically the DA in this case) treated that person fairly and that he would be biased in a way that he's sure the defense table would love to have him on the jury.
    - Does not apply when VM is unsatisfied with the venire process and she is upset about the jury selection process.

Question 29: Hardship

**Coded 88 unless Q25 or Q26 is coded 11. [CHECK THIS AFTER DATA ENTRY]

10 = Work obligations

- VM is needed at her job because there will be no one to do billing.
- VM is a full time student just starting his last semester.
- VM is self-employed and jury service would interfere significantly with VMs business.
- VM has a business conference.

- VM has a prepaid/pre booked travel for work.
- VM is in charge of 17 people and is heading up two different projects that have strict deadlines.
- VM just lost his job and is concerned jury duty will prevent him from finding a new one.

11=Economic hardship

- Prepaid Vacations
- Son's wedding
- Court asks if it would put him into financial hardship and he says "Yeah. I mean, I have a—most that me and my wife—my wife works too and she travels, so, I mean, I have kids that I got to take places and also work."
- VM is moving out of state, during the trial, and would be required to get a hotel if selected for the jury.
- VM is sole money-maker for the family, being on a jury would put her into financial hardship.
- VM works seasonally and doesn't have any work in the summer.
- If she misses a day of work, she does not get paid. Her husband is a seasonal cook and so he's not bringing in an income currently. She has four children and four sons and it will financially bankrupt her.
- VM has a 3 year old and 5 weeks of service would cost her a thousand dollars in daycare.
- VM is a commission salesman and the only income in his household. He is helping out his son who is out of work and has to keep two kids in college. If he doesn't work he doesn't make anything. He's a private contractor. If he is out for "four or five weeks I'm out of---I start over." [Note – all of this relates to money, so only 11.]

12 = Care for children or another family member

- VM needs to drive his wife to work every day as she does not have a license.
- He has two kids and his mom just passed and now he has to take care of his dad, too.
- Trip is not yet booked but VM is planning to go to India to visit elderly parents.
- VM's mother is in hospice

- Has plans to travel for a funeral and to help his mother with his dad, and travel over spring break for his children. No mention about if anything is booked.
- Has plans to visit his mother, who is battling cancer. The trip is open ended

14= Medical concern or disability

- VM has scheduled surgery or treatments during the time trial is scheduled to take place.
- VM suffers from PTSD
- VM is on disability and under psychiatric care. Note: this is not sufficient evidence for incompetence under 15.

16=Other

- VM would not be able to focus on the trial for one reason or another
- VM's niece is coming from Taiwan during the trial for a few months and VM planned a three-day trip to see her mother in law while her niece visited, which she said she would cancel if required to serve.
- VM had a vacation planned to her family's condo on the beach. Her family would not go if she was placed on the jury.
- VM is excused because her son recently passed away.
- VM has a scheduled unrelated court case during the time of the trial
- VM is concerned for her family that lives in the Ukraine. Ukraine was going through some unrest at the time.

Question 30. What was this venire member's ultimate status?

- If VM was originally seated on the jury but was later replaced with an alternate during voir dire code "neither seated on the jury nor selected as an alternate" and code cause strike information on DCI.

Exhibit B

NORTH CAROLINA	**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
CUMBERLAND COUNTY	**FILE NO. 91 CRS 23143**

STATE OF NORTH CAROLINA,

vs.

MARCUS ROBINSON,
Defendant.

RACIAL JUSTICE ACT HEARING

MASTER INDEX

Master Index of Racial Justice Act Hearing taken during the January 30, 2012 through February 15, 2012 session of Superior Court before the Honorable Gregory A. Weeks, Judge Presiding.

A P P E A R A N C E S

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For the Defendant: Jay Ferguson & Cassandra Stubbs, Durham County Bar; Malcolm Hunter, Orange County Bar; and James Ferguson, Mecklenburg County Bar Attorneys at Law

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THE COURT: And we will certainly accommodate you on -- in that regard.

MR. JAMES FERGUSON: Yes, sir.

THE COURT: We'll start tomorrow morning.

MR. JAMES FERGUSON: Yes, sir. I just wanted to be clear we didn't have a witness ready to go this afternoon.

THE COURT: All right.

MR. JAMES FERGUSON: So, the time -- this witness' testimony will take, at the most, a couple of hours.

MR. THOMPSON: Depending on the length of cross.

MR. JAMES FERGUSON: It all depends on cross. It won't be more than a couple of hours.

MR. COLYER: I'll be glad to go get Doctor Cronin so we can start now, if it's agreeable with everyone.

THE COURT: Okay. Yes, sir. Okay.

[Mr. Colyer departed the courtroom.]

[Pause.]

[Mr. Colyer and the witness entered the courtroom.]

MR. THOMPSON: Your Honor, please the Court, the State of North Carolina calls Doctor Christopher Cronin.

THE COURT: All right. If you will raise your right hand, please.

[The witness did as directed and was sworn.]

THE COURT: If you will, come around and have a seat.

[The witness approached.]

THE COURT: Would you like some water, sir?

THE WITNESS: I'm good, actually. Thank you.

THE COURT: Okay.

MR. THOMPSON: Madam Clerk, we're at 78 -- is the next number ----

MADAM CLERK: Yes, sir.

MR. THOMPSON: ---- is that correct?

THE COURT: Once you're seated, sir, if you will, state and then spell both first and last name for the court reporter.

[The witness seated himself in the witness stand.]

THE WITNESS: Sure. Christopher Cronin, C-H-R-I-S-T-O-P-H-E-R, C-R-O-N-I-N.

THE COURT: Thank you, sir.

MR. THOMPSON: May I have a second, Judge?

THE COURT: Yes, sir.

[Pause.]

CHRISTOPHER CRONIN, having been first duly sworn, was called as a witness by the State and testified as follows on DIRECT EXAMINATION conducted by MR. ROB THOMPSON:

Q. Doctor Cronin, how are you employed, sir?

A. Say again.

Q. How are you employed sir?

A. I'm an Assistant Professor at Methodist University.

Q. How long have you been so employed?

A. Three and a half years there.

Q. Well, let’s back up. What year did you graduate high school, sir?

A. 1997.

Q. Where’d you go from there, sir?

A. I went to St. Michael's College in Burlington, Vermont, for undergrad and graduated there 2001.

Q. What kind of degree did you have in 2001 from that -- from that ----

A. Political Science and Economics.

Q. And where did you go from there, sir?

A. I went to grad school at the University of Massachusetts in Amherst.

Q. When did you start there, sir?

A. The year 2002.

Q. Did you complete a program at the University of

Massachusetts?

A. I did indeed, yes, with a PhD and graduated, finally, in 2009, though I was already employed by Methodist at that point.

Q. Okay. What did you received a PhD in, in 2009?

A. Political Science, specifically American Politics.

Q. Did you -- have you taught in other places since you've gotten your PhD and during your time in your PhD program?

A. I sure have. I taught a few places as an Adjunct, Greenfield Community College, Eastern Connecticut State University, some at U-Mass while I was a grad student there.

THE COURT: May I interrupt? Did I understand your PhD was in Political Science primarily American Politics?

THE WITNESS: Yes, sir.

THE COURT: Okay. Yes, sir.

Q. Now, while we're there, let's -- let's describe exactly what that is, Political Science with a concentration, if you will, in American Politics. Can you describe what -- what exactly that means?

A. Sure. There's -- there's a few different pieces of Political Science. There's American, Comparative, International Relations, Political Theory; and, some places, Constitutional Law is a separate piece; and, generally, you

have to specialize in at least two of those, take some comprehensive exams, eventually write a dissertation in one of those fields.

Q. And your chosen field?

A. American -- I also -- I took my exams in Comparative, but my PhD's in American Politics.

Q. What kind of things are kind of covered under the umbrella that's American Politics in the Political Science arena?

A. Depending on the school of thought, there's Historical Development, how the system developed from the Constitutional era. There is Basic Political Ideology, how people come to their political decisions. There is Voting Behavior and, then, some more specific stuff depending on how you specialize.

Q. And what kind of thing -- what kind of things make up kind of the body of knowledge that would -- where would you get your body of knowledge when it comes to -- to the items that you've just described?

A. Sure. Political Science is a Social Science, so some of it is field research. Some of it is historical in nature. Some of it is survey data, interview data; and, as a discipline, we draw from some of our own methodology, but also from sociology, economics, history.

MR. THOMPSON: May I approach the

witness, Judge?

THE COURT: Yes, sir.

[Pause.]

MR. THOMPSON: 78, Your Honor, that's your copy [handing the exhibit to the Court].

THE COURT: CV?

MR. THOMPSON: Yes, sir.

Q. Doctor, I'm showing you what's been marked for purposes of identification as State's Exhibit Number 78 [handing the exhibit to the witness]. Are you familiar with State's 78?

A. I am.

Q. What is State's Exhibit Number 78?

A. This is my resume or CV.

Q. Did you preparation this resume in preparation for your testimony today?

A. I did.

Q. Does it contain some of your teaching experience and education that you've already testified about?

A. Yes, sir.

Q. Does it also contain, on page 2, the research and professional contributions you've made?

A. Yes.

MR. THOMPSON: Could I have just a moment, Judge?

THE COURT: Yes, sir.

[Pause.]

MR. THOMPSON: Please the Court, the state would tender Doctor Cronin as an expert in American Politics.

THE COURT: Okay. Folks?

MR. JAMES FERGUSON: If Your Honor please, we'd like to voir dire this witness.

THE COURT: Yes, sir.

MR. JAMES FERGUSON: The tender is as a -- suggesting -- the field -- it would be helpful to the Court ----

THE COURT: Yes, sir.

[Pause.]

VOIR DIRE EXAMINATION was conducted by MR. JAMES FERGUSON:

Q. Doctor Cronin, I -- I have a copy of your resume, which has been admitted -- I believe -- as State's Exhibit Number 78. Do you have that in front of you, sir?

A. Yes, sir.

Q. Now, may I assume that this resume includes all of the information about your background and your experience, that you consider to be significant for your purposes in being here today; is that correct?

A. Yes, sir.

Q. And, if I look at this correctly, you have one page

-- page 1 of your resume deals primarily with your education -- educational background and teaching experience; is that correct?

A. True.

Q. And the second page contains a list of your research and professional contributions?

A. Yes.

Q. Do you have any additional research or professional contributions that are not listed here?

A. No.

Q. You understand, don't -- don't you, Doctor Cronin, that this case involves the North Carolina Racial Justice Act?

A. I do.

Q. Prior to your involvement in this case, had you done any research concerning the Racial Justice Act?

A. No.

Q. Then, let me just understand a few things here. I take it you've read Racial Justice Act?

A. Yes.

Q. Apart from reading the Racial Justice Act, did you do any further research on the Racial Justice Act?

A. Yes, as requested by the prosecution.

Q. And we'll come to that. Have you ever published anything yourself on race and jury selection in capital

cases?

A. No, sir.

Q. Have you ever published on race and capital cases generally speaking, not just selecting a -- jury selection?

A. No, sir.

Q. Have you ever published on race and the Criminal Justice system?

A. No.

Q. Have you ever published on the Criminal Justice system?

A. Not specifically, no.

Q. Have you ever published on race in general?

A. I have dealt with race in some of the publications, but not as the main topic, no.

Q. Which publications did you deal with race ----

A. My dissertation -- I eventually came -- was published -- dealt with the Social Gospel Movement in American Politics and there's a racial [indiscernible] to that.

THE COURT: I'm sorry. That was Social Gospel ----

THE WITNESS: Social Gospel, it's a religious movement.

THE COURT: Okay.

Q. And -- what specifically on race did you publish

on?

A. As -- as it related to religion in early 20th Century American.

Q. Race and religion?

A. Yes.

Q. And that was the extent of your treatment of race, in your dissertation; is that correct?

A. Correct.

Q. Have you -- have you done any publishing on statistical methodology?

A. I have used some statistics in my research, yes, but ----

THE COURT: Sir?

A. ---- but I -- I used some statistics in my research, I'm not published on the topic of statistical analysis.

Q. And have you had training in statistical analysis?

A. Yes.

Q. And tell me what that training is.

A. As part of a PhD program, a couple methodology courses that teach quantitative methodology, how to conduct, how to understand statistics significance.

Q. And maybe you answered this -- have you published on statistical methodology?

A. No.

Q. And, in the methodology that you -- the couple of courses that you took, did you deal with the statistical method of regression and statistical analysis?

A. Yes, sir. I -- I teach that as well?

Q. Sir?

A. I teacher that as well. I teach a methodology course.

Q. Now, what about empirical studies, have you yourself done any empirical studies?

A. Mostly secondary analysis.

Q. And, when you say secondary, you mean, by that, you have read some empirical studies?

A. Other peoples' primary research, right.

Q. But you have not done any yourself; is that correct?

A. I've done some interviews, but that's not the bulk of what I've done, no.

Q. Yes, sir; and, you haven't got any legal training, have you?

A. No.

Q. And you haven't done any training as it relates to Criminal Justice, I take it?

A. No.

Q. And you haven't done any training as it relates to race in Criminal Justice -- I take it; is that correct?

A. No.
Q. You're saying no you have not done ----
A. No, I have not done.
Q. What was it you were asked to do in this case, Professor?
A. I was asked to give a background about race and political ideology as it relates, most specifically, to capital punishment.
Q. You were asked to give a background on that?
A. Yeah. Do some research -- essentially, literature review, find out what the discipline has to say about race as it relates to death penalty and political ideology in general.
Q. When were you asked to do it?
A. I believe I was first contacted end of October, November, sometime around there.
Q. Do you know how it is you happened to be called upon to do it?
A. I believe they contacted the chair of my department who doesn't do much active research, so he pointed them in my direction.
Q. I'm sorry. Based on your active research?
A. Right. I actively do research, and my -- the chair of my department does a little more administrative matters. He still teaches, but he doesn't research as often. Plus, I

think I would be interested.

Q. If I understand that, then, he pointed them in your direction because you do research, but not because of any particular topic you've done research on; is that right?

A. Aside from the fact that I'm the American -- at Methodist, that I teach the American Political Science courses.

Q. Let me review with you just for a moment your publications and research.

A. Sure.

Q. On page 2 of your resume -- Exhibit 78 -- I'm counting one, two three, four, five, six, seven, eight, nine, ten -- eleven references here on the research and professional contributions; is that correct?

A. Yes.

Q. And, apart from the one you've already mentioned, regarding the social gospel article that you did, none of these publications have any direct bearing on any issues in this case, does it?

A. That's correct.

Q. Now, there's one publication here -- I'll look for -- the one, two, three, four -- the third -- the fourth one down, Current Issues in Justice and Politics, where would that publication from?

A. That's from the University at Southern Utah.

Q. And you're on the board of that publication?
A. That's right.
Q. And you've been on the board since June of 2009?
A. Yes.
Q. On the Editorial [inaudible] ----
A. Yes.
Q. Could that be -- the titling, could that be an error in that title? You say Current Issues in Justice and Politics. I looked for that and didn't find a publication called Current Issues ----
A. You might be right. That might be critical instead of current. That might be an error.
Q. I'm sorry?
A. Critical -- it may be critical.
Q. Oh, the current may be ----
A. Might -- might be critical, yes, sir.
Q. Now, then -- so, do I understand you've done some general research in -- at the request of the prosecution regarding race and the death penalty; is that correct?
A. Yes, sir.
Q. You haven't done any research specifically directed to jury selection in capital punishment -- in death penalty cases in North Carolina, have you?
A. I have not.
Q. You haven't done any research on jury selection and

capital cases in general, have you?

A. I have not.

Q. So, you are here then to offer the benefit of what -- or, whatever benefit that would be -- in your research on the death penalty and race in general; is that correct?

A. Yes, and ideology in general.

Q. Yes, sir.

MR. JAMES FERGUSON: Your Honor, please, I -- I submit there is not an area of expertise that would fit under Rule 702.

THE COURT: That's what I'm looking at; and, I mean absolutely no disrespect to the witness.

THE WITNESS: Yes, sir.

THE COURT: When I understood that the area of expertise was American Politics, I flipped to page 2 of the CV.

THE WITNESS: Yes, sir.

THE COURT: The question that may help us out in terms of expediting the procedure -- and I'm not attempting to cut you off -- written report by the witness?

MR. THOMPSON: Yes, sir.

THE COURT: May I see the written report?

MR. THOMPSON: Yes, sir.

THE COURT: It's now five minutes till

1:00. What I propose is as follows. Let me review the written report. I'm -- dangerous thing -- assuming that any opinions or conclusions would be contained in the written report?

MR. THOMPSON: Yes, sir.

THE COURT: Okay. All right. Do you all have any objection to my reviewing these materials?

MR. JAMES FERGUSON: Not at all, Your Honor. We would encourage you to do it.

THE COURT: Okay. All right.

Thank you, sir. You may step down for the moment.

[The witness withdrew to the spectator area.]

THE COURT: We're going to take the lunch recess. Two o'clock okay, folks?

MR. THOMPSON: Will I be given an opportunity to ----

THE COURT: Oh, absolutely.

MR. THOMPSON: ---- voir dire?

THE COURT: But I want to put it in context after I read the report.

MR. THOMPSON: Yes, sir.

THE COURT: And I thought I said, at the outset, I'm going to give you the opportunity to be heard.

MR. THOMPSON: I wanted to make sure of that, Judge. I just heard his side of voir dire. I hadn't got ----

THE COURT: No. No. No, sir. I'm going to give you the opportunity to do that; but, for purposes of me understanding what may be developed on voir dire ----

MR. THOMPSON: Yes, sir.

THE COURT: ---- by you ----

MR. THOMPSON: Yes, sir.

THE COURT: ---- this will be helpful to the Court.

MR. THOMPSON: It would be, Judge.

THE COURT: Okay. All right. So, two o'clock, folks. Thank you. We're down till then

[The hearing recessed at 12:55 p.m. and reconvened at 2:00 p.m., February 13, 2012, with all pertinent parties present prior to the recess once again present, to include the defendant.]

THE COURT: Okay. Let the record reflect all counsel are present. The defendant is present. More specifically, Ms. Stubbs is now present in the courtroom; and, again, good afternoon, Ma'am.

MR. THOMPSON: We dealt with her absence on Friday; did we not?

THE COURT: We did, and we dealt with it again this morning. Okay.

MR. JAMES FERGUSON: If Your Honor, please, with the Court's permission, I have just a couple other questions that I wanted to ask.

THE COURT: Absolutely.

THE COURT: Mr. Cronin, if you would, come up and retake the witness stand, sir. You remain under oath.

[The witness approached.]

THE COURT: Would you like some water, sir?

THE WITNESS: I'm good. Thanks.

[The witness seated himself in the witness stand.]

THE COURT: Okay. Yes, sir, Mr. Ferguson.

MR. JAMES FERGUSON: Thank you, Your Honor.

VOIR DIRE EXAMINATION continued conducted by MR. JAMES FERGUSON:

Q. Doctor Cronin, you told me that you reviewed the Racial Justice Act; is that correct?

A. Correct.

Q. What are the -- apart from the articles that are referenced in your report, what materials were you given relative to this particular case, Marcus Robinson's case, if

any?

A. Nothing specific to his case other than, as a secondary point of research, looking into the funding for the Michigan state report.

Q. Yes, sir. I'll come to that in a moment.

A. okay.

Q. But you weren't provided any transcript of his trial, were you?

A. I believe there was an option for that to be made available to me. I did not look at it.

Q. You didn't consult that?

A. Right.

Q. You didn't get any excerpts of any material about what particular jurors said during the jury selection process, did you?

A. I did not.

Q. So, just so I'm sure then -- clear then -- you were asked to generally research race and the death penalty and to report back, I suppose, to the prosecution, the results of your study; is that correct?

A. Correct.

Q. And you then read some articles concerning race and -- and the death penalty; is that right?

A. Yes.

Q. And, looking at your report, am I correct that your

report is essentially a summary of some of the literature that you read; is that correct?

A. I would characterize it as a sum of what the majority of discipline has to say on these few topics as relates to ideology in general, as relates to partisanship, as it relates to race and the death penalty, yes.

Q. Yes, sir; and -- and what I'm trying to be clear about -- you -- you -- your -- your report, your expert report, consists of seven topic areas ----

A. Right.

Q. ---- right; and, in each one of these topic areas, you, after doing sort of a survey of what the literature had to say about them, then you wrote --you wrote -- well, the first thing is Political Science as a Discipline. You explained what -- what that was; is that right?

A. Yes.

Q. And, then, you had a section on Basic Ideology and Race in America; and, that was a summary, so to speak, of the literature you read on the topic of Basic Ideology and Race in America; isn't that right?

A. Yes.

Q. And, with the third topic here, Partisanship, you read some literature about that and you summarized what you read about that, in -- in item 3; isn't that -- isn't that true?

A. Yes, sir.

Q. And I won't go down each one of them, but that's what you did in each one of the seven topics that you referenced here in your report; is that correct?

A. Yes.

Q. So, essentially, although it's topic related, as you've just said, you provided the prosecution with a -- a survey of what some of the literature said; isn't that right?

A. Sure. Yes.

Q. And you just got -- give a sampling of the various literature that was there; isn't that true?

A. Yes. Yes.

Q. You didn't offer any summary of how any of this literature affected jury selection in Marcus Robinson's case?

A. That's correct.

Q. So, if we wanted to know what the literature says, then your paper tells us what some of the literature says?

A. I believe so.

Q. Yes, sir. Now, you've told us that you had been contacted by the chair of your department; is that correct?

A. Yes.

Q. Did you know any of the folks on this side of the table before that?

A. No.

Q. Mr. Thompson or Mr. Colyer?

A. No.
Q. Anybody with the DAs office?
A. No.
Q. What about your chair of the department? Did he know of some of these folks?
A. Not to my knowledge. I don't think so.
Q. You may have answered this already, but let me just be sure about it. You have never done this type of survey before for anything in the Criminal Justice system, correct?
A. That's correct.
Q. And not on jury selection or -- race and the death -- you've not done this kind of survey before?
A. That's correct.
Q. I -- your resume didn't speak to this one way or the other, but have you ever appeared in a court to testify as an expert?
A. No.
Q. So, this is your first foray with the court ----
A. Yes, sir ----
Q. ---- is that correct?
A. Yes.
Q. And did you charge these folks something for your services?
A. I believe I will be paid, yes, sir.
Q. Yes, sir; and, what -- what will you be paid,

Doctor Cronin?

A. I think the rate is $200 an hour for the research hours put in.

Q. And how much time have you put into it?

A. Recent tally, 8, 9 10 hours, somewhere in that range.

Q. Yes, sir.

A. Yes.

Q. And you've done this survey, but you don't hold yourself out as an expert on race and jury selection?

A. Not that specifically, no, sir.

Q. And I suppose -- I don't know -- does -- does one survey -- I don't know how you all do things [indiscernible], so I -- if you do one survey, does that -- do you then qualify or think of yourself as an expert in the area you do the survey on?

A. I think of myself as an expert in surveying the research of Political Science. So, insofar as I -- I understand the discipline. I mean, I could go on ad nauseam for more and more sources. It's -- if it's a conventionally held piece of Political Science -- was that -- I think I'm expert enough to -- to offer the sources to indicate that.

Q. Certainly. So, you're -- you're an expert in Political Science research?

A. Yes.

Q. And that's what you bring to this case; is that right?

A. I -- I hope so.

Q. Yes, sir.

MR. JAMES FERGUSON: That -- that's all I have.

THE COURT: Okay. Any questions by the State on voir dire?

MR. THOMPSON: Yes, Judge.

THE COURT: Yes, sir.

VOIR DIRE EXAMINATION was conducted by MR. ROB THOMPSON:

Q. When you were called by the State of North Carolina and you met with myself and Mr. Colyer in reference to -- to this case, we had a request of you; is that correct?

A. Yes.

Q. What did we -- what we -- what did we request of you?

A. You requested I present a report summarizing what Political Science had to say about race and ideology and how it might pertain to the death penalty through -- through my research.

Q. Did we explain the context in which you would be testifying as far as it would be in a hearing involving the Racial Justice Act?

A. Yes.

Q. Did we discuss with you studies that had been done,

statistical studies that may or may not have been discussed during this Racial Justice Act here?

A. Yes.

Q. Did we use the term explanatory factors or some other type paraphrase of that phrase?

A. Yes.

Q. What kind of things -- when you went about your job, going about the task that we had -- we had asked you to perform, how did you go about doing that?

A. Well, initially, I just -- I went about it through some academic search engines, which is my standard beginning, seeing what pops up, what's most recent. If I recognize some of the names, see what their references are. I contacted a few colleagues, a former dissertation advisor who was in the Justice Department, to see if he had any ideas. So, just sort of spread out and see what I could find. I used the reference librarian.

Q. Did you have difficulty in finding any Political Science data research, resources on the topic we asked you to look at?

A. No.

Q. Did you, first -- when you first -- had our conversation in reference to what we had asked of you, did you think you would have some problems?

A. No.

Q. Why is that?

A. This is one of the few -- few constants in Political Science, when we talk about demographics; and, that is, some of the -- the concepts included in my report are long-standing for dec -- decades and for the foreseeable future are pretty uncontended concepts in Political Science.

Q. Are we -- does part of your research and part of how you went about this duty that we asked you to perform, looking at the opinions, attitudes and beliefs -- beliefs that different demographic groups have about different things in American Politics?

A. Yes, indeed.

Q. And, in your report, did you start pretty broad and then narrow down the death penalty?

A. Yeah. That's typically my approach, and that is what I did.

Q. So, is it sufficient to say -- let's see -- you started, in your report, with basic ideology and race in America; is that right?

A. Yes.

Q. You discussed partisanship?

A. Yes.

Q. How does that relate to the -- the ----

THE COURT: Well, we're getting into the gist of the testimony at this point, and I've got the

report of the witness now before the Court.

MR. THOMPSON: Yes, sir.

THE COURT: So, this -- this -- if I understand correctly, where we are is there is an objection premised on 702.

MR. JAMES FERGUSON: Yes, sir.

MR. THOMPSON: What -- what it's actually relevant to, Judge, is 702(a)(3). One of the issues is can we get down to how it relates to this case.

THE COURT: Well, it -- let me -- let me -- if I may ----

MR. THOMPSON: Please.

THE COURT: ---- direct your attention to 702(a).

MR. THOMPSON: Yes, sir.

THE COURT: If scientific technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue with which the witness is qualified, et. cetera; and, then, we get down into subsections (a)(1), (a)(2) and (a)(3).

MR. THOMPSON: Yes, sir.

THE COURT: Yes, sir.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: Okay.

Q. Now, did you have any trouble finding sources?

A. No, sir.

Q. Did you list the sources you found ----

A. I listed ----

Q. ---- when you prepared your report?

A. Yes.

Q. The sources that you relied on, do you know how they did their general studies and -- that -- that brought the conclusion to the publication that you relied on?

A. There are various methodologies involved. A few of them are survey research. Some of them are interview research. Some of it is cultural [indiscernible], sort of being around and observations; but, it's sort of a wide range of methodology.

Q. Let's talk about survey research. Is that normally used in your line of work in Political Science?

A. Very common.

Q. How is it used especially with ideology and trying to understand public opinion as it relates to policy decisions. So, respondents are given surveys with sort of scales to rate how they feel, what they think about policy, how they self-identify.

Q. Do politician use surveys?

A. I believe so, yes.

[General laughter.]

MR. THOMPSON: Maybe not a great example

here, Judge.

THE COURT: No -- no comment, Mr. Thompson.

Q. You -- you cited a study by MSU in here; is that correct, in your report?

A. Yes. Yes.

Q. That a study done by O'Brien, Barbara O'Brien, and Catherine Grosso, 2011, the report on the jury selection study, Michigan State University College of Law?

A. Correct.

Q. Was that study brought to your attention by us, if you remember?

A. Yeah. I believe so.

Q. Now ----

MR. THOMPSON: Can I have a second?

THE COURT: Yes, sir.

MR. THOMPSON: For purposes of voir dire, Judge, we don't have any further questions. I suspect there might be some argument coming, but ----

THE COURT: Absolutely.

MR. THOMPSON: And I'd like an opportunity to be heard.

THE COURT: Yes, sir.

MR. THOMPSON: For voir dire purposes -- unless something comes up, the argument -- we'd like to

reopen if something else happens; but, right now, I think we ----

THE COURT: Mr. Ferguson?

MR. JAMES FERGUSON: If I may just ask one -- one other ----

THE COURT: Yes, sir.

MR. JAMES FERGUSON: I shouldn't say one, but -- one other thing.

VOIR DIRE EXAMINATION was conducted by MR. JAMES FERGUSON:

Q. You just heard prosecution counsel mention the MSU study -- he said was brought to you attention; is that correct?

A. Correct.

Q. What were you asked to do in relation to the Michigan State University study.

A. Initially, it was brought to my attention as one of the pieces of research that is important to the case . Later, I was asked to look into how the study was funded.

Q. How it was funded?

A. Right.

Q. Yes, sir. You don't -- you weren't asked to do that as a part of your expertise as a researcher, were you?

A. I -- I think the request there was to -- to see if there were overt political backing to that study.

Q. They asked you to do that?

A. Other than that, were you asked to do anything with reference to the Michigan State University study?

A. No, sir.

Q. And you didn't do anything in relation to it other than that; is that correct?

A. True.

MR. JAMES FERGUSON: Yes, sir. That's all.

THE COURT: Anything else?

MR. THOMPSON: Nothing on voir dire, Judge.

THE COURT: If you will, bear with me. I just need some clarification. I'm looking at page 7, sir, the second full sentence on -- in the paragraph at the top; and, this is -- correct me if I'm wrong -- in reference to the MSU study -- the potential danger with such analysis -- referring to the MSU study -- is to make the logical leap from race as statistically significant to race as most significant in the mind and actions of the particular member of the legal process. Did I read that correctly?

THE WITNESS: You read it correctly, sir.

THE COURT: All right; and, the following sentences -- given the cultural and political dynamics discussed above, the race of a potential juror may simply be a -- and I'm reading it the way it is -- be a

variable indicates a larger political ideology. Did I read the correctly?

THE WITNESS: Yes, sir.

THE COURT: And the last sentence in that paragraph, because of this, it's important to examine individual actions and legal reasoning behind each particular decision. Did I read that correctly?

THE WITNESS: You did, sir.

THE COURT: Okay; and, that is the upshot of any conclusion that you've got?

THE WITNESS: I imagine so.

THE COURT: Okay. Anything else?

MR. JAMES FERGUSON: I've answered all -- I mean, I've asked all my questions, Judge.

THE COURT: Okay.

MR. JAMES FERGUSON: I'd like to talk to the Court about it for a minute.

THE COURT: All right. Yes, sir. Absolutely.

MR. JAMES FERGUSON: Well, Your Honor, insofar as 702 is concerned ----

THE COURT: Yes, sir.

MR. JAMES FERGUSON: ---- if you examine it, then, based on what the witness has said, he did what the prosecution asked him to do; but, he doesn't bring any

scientific technical or other specialized knowledge to the case other than his abilities as a researcher, which I certainly don't question; and, in terms of assisting the trier of the facts in the case, it -- he doesn't bring anything to the understanding of the evidence or in determining a particular fact in issue. That's just not present. So, in order to have something to bring to this case, they need to be -- to be qualified by knowledge -- which he has lots of knowledge in research, but it doesn't bring a particular knowledge of anything that is at issue in this case. Skill, he's obviously a skilled researcher, but that skill doesn't translate to anything that would assist a trier of fact in this case. Experience, he has experience in teaching Political Science and he's written several articles basically on religion and Political Science. So, here's a witness who has some -- some expertise in a subject that has no bearing on this case; and, the prosecution, for whatever reason, is trying to elevate his considerable research skills to something that applies to this case, and it doesn't.

THE COURT: Okay.

MR. JAMES FERGUSON: So, he does -- he just doesn't qualify under 702; and, I think it's interesting to note what the State said they were going to call him for. They said they offered him as an expert in American Politics. That's what they said.

THE COURT: Yes, sir.

MR. JAMES FERGUSON: And we've talked to the witness, and he's told us that he does research. So, I'm suggesting to the Court, strongly, to -- that he doesn't really qualify under 702. Of course, it's up to Your Honor how to receive that; but, I -- I -- our position is that he doesn't qualify; or, if -- if he -- if the Court chooses to -- to let his testimony in, then we certainly will come back to the Court and talk about the weight to be given to that testimony.

THE COURT: Yes, sir.

MR. JAMES FERGUSON: Yes, sir.

THE COURT: Mr. Thompson.

MR. THOMPSON: With all due respect, Judge ----

THE COURT: Yes, sir.

MR. THOMPSON: ---- I'm not sure why this is unclear, but I, for the record, will spell it out. The -- the defense presented evidence that there is a statistical difference between the way black jurors are chosen by the prosecutors.

THE COURT: Yes, sir.

MR. THOMPSON: And then presented evidence that -- and, during the study, said we looked at a lot of factors, but we couldn't explain it, so it must be

race. That's kind of the nutshelling [phonetic] the larger study of the MSU. We looked at all these things. We couldn't figure out anything else other than race. That's all we were left with. Then, they put on witnesses that said, oh, yeah, there's this other thing that's called unconscious racist. So, it must be because the prosecutors dis -- disparity -- tried to explain the disparity by saying we -- that white people gen -- generally tend to prefer white people; and, so, we would kick black people more often from a jury, just kind of the -- the logical argument that they're making and given from the testimony. That's -- the reality of it is -- and what we're trying to present is explanatory factors. As testified by Doctor O'Brien, that there is a correlation between -- that black jurors tend to be against the death penalty in larger numbers than the white jurors are kicked, which would fall exactly in line to the evidence that we presented, that prosecutors are -- there -- there is a disparity between the races and the -- the peremptory challenge. There's also disparity by the defense in that window of people that -- you get beyond cause, but they're hesitant about the death penalty or they're pro death penalty, pushing for the death penalty, would lean for the death penalty; and, in large amounts, at an aggregate level, could be explained in part by their backgrounds, that we would expect larger numbers of white jurors to say I'm for

the death penalty, because the polling data says, generally, more often, white people -- the white folks polled would be for the death penalty, would be stronger for the death penalty, would be a proponent of the death penalty, and those are jurors the defense would not like to have on a jury involving capital punishment. So, it is unclear to me why, each time we put a witness on the stand, they shrug their shoulders. It's because they want to stop at numbers, numbers, numbers, numbers; that's it; just stop as soon as you look at that. Explanatory factors explain. They toll -- they tell the rest of this story. Numbers cause a question to be asked, and this is one potential explanatory answer to the question. It is certainly relevant in what we're talking about. It would certainly be -- it would assist the trier of fact; that is, Your Honor; and, we were told, from the beginning, let's try the case. You try the case. You try the case -- because you're the one person that gets to hear all this, and you're the one person that gets to decide all of this; and, to -- to tell us, before we begin, not even consider it, would rob the State of some of the evidence that we've elected to present to explain this dispar -- this disparity we've been accused of, and the explanation that they have jumped to and concluded to, it would rob us of the right to a -- to defend ourselves in that -- in the examination that the MSU study has chosen to assume, percent

respectfully. So, we're asking you to deny the defendant's motion.

THE COURT: Okay. Anything further, Mr. Ferguson?

MR. HUNTER: Your Honor, I -- I'll just say this. I don't want to belabor this point, but it is interesting that the State initially has taken the position what's race got to do with it and said race has nothing to do with it. Now, they seem to be suggesting that, well, race does have something to do with it; and, this witness is telling us how race has something to do with it; and, the something to do with it is that -- I think what he's saying now is that black folks don't like the death penalty as much as white folks do and, therefore, the prosecution is somehow justified in coming up with a kind of stark, glaring, stunning statistics that are shown in the Michigan State University study. So, they seem to be trying to have it both ways. When it's convenient, race has nothing to do with it; but, if they've got a witness who'll give them a little bit of race, then they say that witness ought to be allowed to testify. That -- that's what it seems like, Your Honor. So -- and -- and we're not trying to keep their witnesses on the stand because they called them -- off the stand -- because they called them. We're doing our job as lawyers representing Mr. Robinson to -- to make sure, to the extent

that we can, that the witnesses who testify, testify within the rules; and, we raised the rule; and, in the comments we've just heard, there actually was no reference to the rule.

THE COURT: Well ----

MR. COLYER: Judge Weeks ----

THE COURT: Yes, sir, Mr. Colyer.

MR. COLYER: ---- the rule speaks for itself, and you can apply the rules of what we're talking about here; and, he does have information that he brings to this decision-making process that is expert in its opinion and in its scope that the Court doesn't necessarily have with respect to the survey of the material that he has presented and his conclusions in each one of those subsections based upon his review as it relates to the -- the end question that you mentioned; and, with all due respect to Mr. James Ferguson, what we're talking about here and what we have been talking about is -- is not an explanation based on race. It has never been an explanation based on race. It is an explanation based upon attitudes, opinions and beliefs of the folks who comprise the jury venire, some of whom are white, some of whom are black. We are not trying to justify numbers based on race. What we are trying to do is to explain, as we have through our expert opinion of Doctor Katz and as we're attempting to supplement with the expert opinion of Doctor

Cronin, that the -- the reasons people are taken off of jury selection is not because of their race; it's because of their attitudes, their opinions and their beliefs that are reflected in their answers that may be influenced upon their cultural, their ethnic or their racial background, their ideology as people; and, it is a combination of those things, respectfully, Your Honor, that make all of us who we are. When we come into the courtroom and we're asked questions by the judge and by the prosecutor or by the defense attorneys, we give answers based upon our background, our attitudes, our opinions, our beliefs and that's what is central to this. One way to assess what the State has been talking about with respect to explanatory valuables is to explain it in the context of contemporary American Politics and how the ideologies of various groups might affect the formation of their opinions or attitudes and beliefs as it relates to questions like law and order, like punishment, like capital punishment in particular; and, we contend that the information that we present through Doctor Cronin supplements the information that we have presented through Doctor Katz and it is informative to the trier of fact, the Court, with respect to understanding what the State says is its defense. Again, as we have said all along, you're the trier of fact. You determine how much weight to be given any of the evidence; but, respectfully, Judge, we think that our

evidence is admissible for your consideration. The extent to which you consider it, the weight you give it, is not for any of us to tell you. That's based upon your intelligence, your knowledge, your experience and how you filter the information that comes through here to you as the judge and as the trier of fact. We would ask that Doctor Cronin be, one, recognized as an expert on American Politics and he be allowed to express an opinion consistent with that expertise, sir.

THE COURT: Okay. Anybody want to be heard further?

[There were no responses from counsel for either side.]

THE COURT: Mr. Colyer, I understand your argument. Mr. Thompson, I understand your position. I've stated numerous times -- and it's been -- I've been reminded on numerous occasions -- that I've indicated it's my objective, it's my goal, to allow both sides a full, fair opportunity to be heard, within the rules of evidence. I can't ignore my responsibility to apply the rules of evidence in the case. I am looking at a number of factors in making the decision that I'm about to make. One is the fact that the witness ha been tendered in the area of American Politics. I understand the reasons that you've asserted for purposes of the record in that respect as -- based on your contention that it bears on issues to be decided by the Court. The upshot of his testimony -- and as he's indicated

in response to my questions -- was to tell the Court that it's important to examine the individual actions and legal reasoning behind each particular decision. I know that. I know that is intimately involved in the issues that are now before the Court. I don't think the witness' testimony passes the test of 720, in my view, in that respect, for the reasons that were asserted by counsel for the defendant in this case; and, since that determination is based on the rules of evidence and what I understand his testimony is to be, the objection is sustained. Counsel for the State's objection and exception to the ruling of the Court are noted for the record.

MR. THOMPSON: We'd like to make an offer of proof.

THE COURT: Absolutely entitled to do that. I've indicated all along that I'm not going to prevent anybody from making their record in this case.

Do you folks want to be heard?

[Pause.]

THE COURT: Do you folks want to be heard?

MR. JAMES FERGUSON: Your Honor, I -- I understand they're entitled to make their offer of proof.

THE COURT: Yes, sir.

MR. JAMES FERGUSON: And I -- I -- I assume, in

doing so, we would have an opportunity to probe that offer.

THE COURT: Absolutely.

MR. JAMES FERGUSON: After we've heard from them. I would submit we want to be heard again after that.

THE COURT: Okay. Yes, sir.

MR. JAMES FERGUSON: Thank you.

THE COURT: All right. Mr. Thompson, are you conducting the examination?

MR. THOMPSON: I will be, Judge, insofar as -- Your Honor, as we object -- I want to make sure the exception's noted.

THE COURT: I've -- I've already put it in, as is my practice. Yes, sir. Go ahead, sir.

MR. THOMPSON: Thank you, Your Honor.

DIRECT EXAMINATION continued conducted by MR. ROB THOMPSON:

Q. Doctor Cronin, you had a conversation with myself and Doctor -- I'm sorry -- and -- and Mr. Colyer in my office a number of months ago; is that correct?

A. Yes.

Q. Tell us what that conversation was about.

A. It was about my involvement in this case and hoping to get some Political Science expertise into some ideological, partisan and background as it relates to the death penalty.

Q. How did you go about that research?

A. I began with some of my methodological training, went through some academic search engines, looked to what I could find as relevant research, which there is -- there's a lot of it. It's not a contended concept in Political Science -- and -- and chose some of the most representative of that -- that research.

Q. Did you -- once you finished your research, did you cause a report to be done?

A. Yes, sir.

Q. Did you prepare that report and forward it to us?

A. Yes.

Q. I'll represent to you, sir, that we have forwarded this to the Court, actually, now and to the defense.

MR. THOMPSON: May I approach, Your Honor?

THE COURT: Yes, sir; and, I've got my copy.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: 79?

MR. THOMPSON: Yes, sir.

THE COURT: Okay.

Q. Sir, I'm showing you what's been marked, Doctor Cronin, for purposes of identification as State's Exhibit Number 79 [handing the exhibit to the witness]. Can you take a look through 79, and I'll have a couple of questions in

just a second.

[Pause.]

Q. Have you had a chance to take a look at State's Number 79?

A. I have.

Q. Do you recognize State's 79?

A. I do.

Q. What is State's Exhibit 79?

A. This is the report that I submitted to you.

Q. Using your -- your report as a guide, can you walk us through Political Science as a discipline?

A. Sure. It is a discipline that really grew up in the 20th Century, born out of history and -- and social science in general, a wide range of mythologies, but seeks to understand power, applying some understanding of majority and minority power and explaining how change happens.

Q. What kind of folks use Political Science as tools of their trade?

A. Well, ideally, politicians especially, anybody in a representative position and social scientists in general.

Q. You studied -- or, you included a section in your report Basic Ideology and Race in America. Tell us about that.

A. This is a section surveying what this particular minority demographic of black Americans -- how that falls and

fits into American Ideology as a whole.

Q. How did you go -- how did you determine what your results or your opinions are as it relates to that issue?

A. Well, the -- the first stop in the research -- in this -- for most of us political scientists are survey data, the National Election survey data that's been collected -- has a lot of longitudinal validities. It's been done for decades. So, that was my first stop and, then, then the literature in general.

Q. Are those the kinds of -- is that the kind of data that's generally relied on by politicians, by political scientists in your field?

A. Especially political scientists and sometimes politicians.

Q. What -- and what were the results that you found in just basic ideology, race in America, with a -- with a demographic that we asked you to discuss based on the MSU study of blacks in the United States?

A. The minority demographic of black Americans tends to scale more liberal on various -- especially on an aggregate level -- sometimes self-identification for Americans is hard. People like to lump themselves as all moderates; but, especially, when we add up the particular policy positions, we find black Americans tend be more liberal than other demographics and more liberal than white

Americans, the majority of the population.

Q. How about partisanship?

A. Partisanship's a little clearer because that's a simple D or R response and that has been more clear over the past few decades as to black Americans identify much more strongly with the Democratic Party as a whole than the majority of the population.

Q. Did you study particular -- did you drill it down, in essence -- when you did this report, at our request, did you drill it down further throughout other issues that relate to politics in the United States?

A. Sure. First addressing the overall ideology, it's not quite so simple to say every black American is liberal, but the categories in which that overall ideology is skewed the most -- tend to be issues of inequality or what quality means.

THE COURT: I'm sorry?

A. Tends to be in -- in issues of inequality, addressing inequality, what the government should do to address inequality, how to define equal opportunity in American and also in terms of criminal justice.

Q. Discuss with us, if you will, what your findings were as relates to the demographic of black Americans as it relates to criminal justice, law enforcement and those general areas -- as far as, were you able to find that and

how were you able to find it?

A. Right. Through a -- through the general literature review there, there's a number of studies, survey research, some [indiscernible] showing that black Americans have hysterical sense of unfairness in how the laws have been applied to them as a minority population, are less trusting of the criminal justice system in general.

Q. How about law enforcement?

A. Yes, and -- and less -- less trusting of police officers and in sentencing being administered in a fair manner.

Q. Did you drill it down further to specific aggregate opinions of black Americans as it relates to the death penalty?

A. I did, and this is -- this is the clearest ideological division between black Americans as a minority population and majority population -- the -- the gap between public opinion is -- is largest in this subcategory of public policy in that black Americans do not favor the death penalty as much as white Americans or other minority demographics.

Q. How did you -- how did you form this opinion?

A. Through the survey data that's available and the -- the other secondary research done.

Q. Tell us about this survey data. Where -- where does that come from?

A. Well, in particular, the -- the most trustworthy -- the National Election survey data, that's administered every year to -- to thousands of Americans to establish some statistical significance.

Q. Are you familiar with their methodology?

A. Yeah.

Q. And is it -- the kind of methodology they use -- normally used in your field?

A. It is. It's a standard, as it's been noted for -- for decades now.

Q. Do the people that depend on this kind of research depend on those surveys through the normal course of their business?

A. Yes.

[Pause.]

Q. Again, in -- in the section of your report, page 5, Ideology as it relates to the death penalty, you -- you sort -- you named a couple of sources starting with footnote number 10, Steven Cohn and Steven Bar -- Barkan and William Haltman, 1991. Are you -- do you remember this -- that paper that you cited?

A. Yes.

Q. Can you tell us about that a little bit?

A. It -- it's one of many discussing this topic, but it is one of the more most cited. As political scientists

research, we cite -- we keep count of that. The more you get cited, the more trustworthy your research is; and, this is a fairly well cited piece of research.

Q. And footnote number 11, J.A. Arthur, a paper from 1998, Racial attitudes and opinions about capital punishment: Preliminary findings, that was in the International Journal of Comparative and applied Criminal Justice, can you tell us about that a little bit?

A. Again, another report that -- published article that is well cited and pretty clear. That's a large part of why it's -- it's well cited.

Q. And the same question as it relates to number 12 -- I'm sorry -- head -- footnote number 12, as it relates to a 2004 paper?

A. The -- yes, the same -- same response. Very well cited article.

Q. Footnote number 13, again, now on page 6 of your report, first full paragraph, you've cited footnote number 13, R.M. Bohm, B-O-H-M, 1991, and a paper. Can you discuss that?

A. Sure. It's a paper I remember citing back when I had to take my comprehensive exams for my PhD, and it's since been cited often as a good, clear example of the death penalty opinion differences.

Q. Is it noted, in footnote 13, what the source of

Doctor Bohm's, Mr. Bohm's, research was?

A. Yes. It's a -- it's a publication called death penalty in America, current research.

Q. Okay. Did it examine the gallop polls?

A. It did.

Q. What are the gallop polls?

A. Gallop polls is a national polling organization that seeks objective polling data.

Q. Did you use some of that polling data or some -- about the gallop polls in order to accomplish this research?

A. I -- I generally keep abreast of gallop polls, so -- it's a background source, yes.

[Pause.]

Q. Did you compare, during your research -- you indicated that there was a large gap between black -- how black Americans feel about the death penalty and how white Americans feel and other minorities feel about the death penalty. Can you give as much detail as you have about how far that -- how large that gap is or where that came from?

A. It depends on the study. Some are as narrow as looking at college student opinions. Some are as wide as NES data looking nationwide. The largest gaps can range to 20 percent, some as small as 15 present, but it's a pretty consistent gap, and those -- those numbers are not big in some arenas; but, in politics, that's -- that's a big gap.

MR. THOMPSON: May I have just a moment, Judge?

THE COURT: Yes, sir.

[Pause.]

Q. In section 7 of your report, starting on the bottom of page 6 -- it's entitled Challenging Social Science: Racism -- can you discuss your -- can you discuss that section, please?

A. Sure. I just addressed the difficulties of studying racism from a social science point of view, the different ways you can come at racism as a topic, the difficulties in finding racism as a cause versus other factors. It's a challenging social science topic, as it's created, as it's re-created, to cultural experience. So, we -- we have various ways to approach it. Sometimes statistical, sometimes sociological, but there's a lot of debate as -- as to -- to what racism -- what race is to begin with. So, studying racism is challenging.

Q. What are some of the challenges as it relates to using statistical evidence to form opinions as it relates to race and race reasoning behind decisions?

A. Well, for me, a very broad Political Science point of view. Any minority demographic, when it has a divergent policy decision from a majority demographic, is going to present -- I think the challenges we see we're dealing with

in this case. So, whether it's race or income, whatever the -- whatever describes that minority demographic -- so, it shouldn't be surprising to see divergent outcomes when we have divergent public policy decisions and opinions, and it is difficult to tell if it is skin tone or with a larger concept of races or whether it is simply a minority demographic cultural decision ideology. It's difficult to pin that down.

Q. Now, page 7, the -- that first paragraph, couple of lines up, where it says given the cultural and political dynamics discussed above, the race of a potential juror may simply be a variable, is there a missing word there? Is it ----

A. You're correct. There should be a that or some ----

Q. In between ----

A. ---- some other grammar there, yes.

[Pause.]

Q. Can you read those last three sentences of that paragraph and explain those, please?

A. Beginning with the potential danger?

Q. Yes, sir.

A. The potential danger with such analysis is to make the logical leap from race as statistically significant to race as most significant in the mind and actions of the

particular member of the legal process. Given the cultural and political dynamics discussed above, the race of a potential juror may simply be a variable -- my addition -- that indicates a larger political ideology. Because of this, it is important to examine the individual actions and legal reasoning behind each particular decision.

Q. Can you expand on that?

A. Certainly. Again, dealing with a minority demographic that has a divergent public opinion on that -- here, this case happens to be capital punishment -- it strikes me that it is important to look at the factors involved in the individual decisions that eliminate a juror, though I'm not a jury selection specialist, but in a -- from a general Political Science point of view, race as a variable is one of the variables and may simply indicate a minority population that has a cultural and political ideology that would make it less likely to be favored by the majority population which is represented by the State, and the State's interest is to represent that majority population and its intent for laws, punishment et. cetera. So, race as a -- a possible variable is an important variable, but it is -- it is sometimes simply a placeholder for a minority populations' divergent political opinions.

MR. THOMPSON: No further questions, Judge. Thank you.

THE COURT: Okay. Any cross-examination?

MR. JAMES FERGUSON: Yes, Your Honor. I would like ----

THE COURT: Yes, sir.

MR. JAMES FERGUSON: ---- just a few questions.

CROSS-EXAMINATION was conducted by MR. JAMES FERGUSON:

Q. Going to your report ----

A. Yes, sir.

Q. ---- Doctor Cronin -- and I want to look at page -- I think it must be page 1; and, under section 2, where you -- the topic is Basic Ideology and Race in American, the second sentence there says as a general rule, black Americans are more politically liberal than other racial groups. Did I read that correctly?

A. You did.

Q. And the next sentence says there are many exceptions, and depending on the particular issue, some divergent ideological scoring. That's what you said in your report?

A. Yes, sir.

Q. Now, when you say many exceptions, are there any particulars there or does this just kind of run the gamut of all kinds of exceptions to that general rule about black people being more liberal?

A. I think, on the individual level, it runs the gamut. There are plenty of black Americans that would score conservative on any number of issues. As a -- as a whole -- as a whole, let me go policy by policy -- certain social public policy, political issues, we do not see black Americans scoring more liberal than white Americans.

Q. Yes, sir. So, would you agree that because there's so many exceptions, it might be unfair, in certain contexts, at least, to base one's decision about a black person's ability to reach fair decisions on this broad label that black people are more liberal? You would agree with that, wouldn't you?

A. Sure.

Q. And it wouldn't be right, in your view, would it, for the prosecution to select jurors on the basis of whether they're black and therefore more liberal than whites?

A. I think that would be a hard contention -- I -- I think that would be a wrong decision.

Q. It would be wrong to do that, wouldn't it?

A. Yes.

Q. So, on the fact that -- that, in some surveys, black Americans come out more liberal in some ways that white Americans, you wouldn't recommend to the prosecution or anybody else that they use that as a basis for jury selection?

A. That would -- exactly. That would be a bad basis of decision.

Q. For example, they might have missed out on Clarence Thomas if they'd went that liberal; isn't that right, who, generally, I think, self-identifies conservative?

A. It could --- it could endanger his candidacy if that was the mode of decision-making.

Q. Yes. They might eliminate -- they might not -- you know, it might eliminate Hermon Cane from the jury. He describes hisself as being conservative.

A. He is a conservative black American, yes, sir.

Q. Yes, sir; and, there are many others.

A. Yes.

Q. So, as a social scientist and a political scientist, you know, of course, that all black Americans don't think alike; is that right?

A. That's true.

Q. We've got some liberal, some not so liberal, some conservative, even some more conservative; isn't that right?

A. That's correct.

Q. So, by doing your study, you weren't suggesting to the prosecution that you can -- that you can explain these racial disparities by the fact that some large percentage of African-Americans self-identify as liberals?

A. I was not -- I was not presenting a case that the

prosecution should base decisions on race or even in understanding of the race's particular -- or, a general ideology ----

Q. Yes, sir. All right. You were just telling them what the literature said about it?

A. That's right.

Q. As a matter of fact, the same survey you used to -- to -- to state that the majority of black Americans are liberal tells you that the majority of white Americans are liberal; isn't that correct?

A. Depending on the questions, yes.

Q. Yes, sir.

A. But ----

Q. Well, I -- I'm -- if you look on page 2 -- and I'm looking at the last sentence of the para -- the paragraph that carries over from page 1; and, it says approximately 36 percent of white Americans claim to be conservative, while only 16 percent of black Americans identify as such; isn't that right?

A. That's right.

Q. So, if 36 percent of white Americans claim to be conservative, then that means that 64 percent of white Americans claim to be something other than conservative; isn't that right?

A. It's a seven-point scale. So, in the middle would

be moderate, then we've got somewhat liberal, very ----

Q. Yes, sir.

A. So, would be something other than conservative.

Q. All right. So, if you used a liberal conservative divide to make decisions about jury selection, you'd take off a lot of white folks, too, wouldn't you?

A. I suppose so.

Q. Yes, sir; and, then you go on to say that you cannot say that black Americans are consistently liberal on an issue-by-issue basis. You can't say that, can you?

A. Right.

Q. So, if you were going to base jury selection on jury -- I'm sorry. If you were going to base explanations of blacks being stricken from juries on -- even on the basis of ideology, you'd have to know what a particular juror thought about the issues before that juror in that case; isn't that right?

A. If -- if I'm going to attempt to explain why a particular juror was kicked off, I'd imagine you'd have to look at those particular decisions, yes.

Q. Yes, sir; and, then, if we go to the partisan -- entitled Partisanship section of your report, basically that tells us that more black Americans -- that black Americans tend to -- to vote -- or, identify democratic than republican; isn't that right?

A. Yes, sir.

Q. You wouldn't use that as a basis for saying black folks ought not serve on a jury because they're Democrats, would you?

A. No, sir.

Q. And you wouldn't apply that to determine what black folks think about the death penalty?

A. Insofar as Democrats tend to favor [indiscernible] -- capital punishment more than Republicans, you might infer something, but it's not conclusive.

Q. Yes, sir. That's because Democrats are very conservative ----

A. They are.

Q. So, you can't make these broad assumptions about whether this particular group or that particular group would be able to vote for -- would vote for the death penalty in a case; isn't that true?

A. I think you can make generalizations, but to make assumptions, that would be dangerous.

Q. Yes, sir; and, to act on the basis of generalizations could also be dangerous; isn't that true?

A. Probably.

Q. And you also indicated a couple of other things about the survey. If we go to the first [sic] full paragraph on page 3 and look at the third sentence there -- beginning

with the third sentence -- where you say, for instance, research finds that, increasing, in America, there is a direct correlation between a city's political leanings and its racial makeup. The whiter a city is, the more conservative and Republican its residents. Cities with high black American population populations rank clearly as the most liberal and Democratic; and, while that may be a trend, there may be exceptions to that; isn't that true?

A. Sure. As social science -- trend -- that's -- that's -- that's a significant majority ----

Q. Yes, sir.

A. ---- of the findings, but there are exceptions.

Q. Yes, sir; but, nobody would tell you that Chapel Hill -- are you familiar with Chapel Hill?

A. Yes.

Q. Nobody would tell you that Chapel Hill was Republican and conservative?

A. No.

Q. But they would tell you that it's mostly white folks?

A. They would.

Q. So, you can't just look at the city and decide which way folks think, how they vote, what they're going to do; isn't that right?

A. You can generalize, but there are exceptions.

Q. Yes, sir; and, if we go on then to category number 4, which is Ideology: Inequality, you cite an instance where blacks are conservative on some issues; and, you cite gay marriage ----

A. Indeed.

Q. ---- isn't that right?

A. Yes.

Q. And you mention that much of what accounts for an overall trend toward liberal ideology among back Americans is found in public policies that address inequality; is that correct?

A. Yes, sir.

Q. And to the extent that history factors into it, you would expect black people to be more liberal on issues involving inequality ----

A. Yes.

Q. ---- based on the history of the absence of inequality in our society with black people for so long ----

A. Absolutely.

Q. ---- isn't that true?

A. That's true.

Q. And you wouldn't keep -- you wouldn't recommend or support keeping black folks off juries because they try to address inequality, would you?

A. I would not support that.

Q. And it wouldn't be right for the prosecution to base its decisions on black folks being in favor of equality when they've suffered inequality for long years of history; isn't that right?

A. That would be -- yes.

Q. Yes, sir; and, we -- we go on to number 5, Ideology and law enforcement. I think you say that some studies show that minorities hold less favorable views of police action and sentencing in general; isn't that right?

A. In general.

Q. Yes, sir; and, there again, history comes into it, doesn't it?

A. Yes.

Q. And you would agree and acknowledge that historically there has been at lease a perception that -- that -- of -- of -- on -- on the part of black people that they have not always been treated fair by the police ----

A. Yes, sir.

Q. ---- isn't that true?

A. That is true.

Q. And there's a perception that black people are more likely to be the victims of police brutality than other racial groups; isn't that true?

A. That's true.

Q. And, to the extent that these perceptions may be

factual based, you would not -- I'm sorry -- you wouldn't strike black people from the jury because they're attempting to address a problem -- mistreatment or in -- unequal treatment by the police, would you?

A. That question confused me a little. I'm sorry. Could you ----

Q. And I'm sorry.

A. ---- please restate it?

Q. It probably was confusing. You wouldn't keep black people off of a jury just because of a history of police brutality and their feelings that that ought not to take place?

A. If I have the power to select juries, I would not keep black people off juries because they've suffered a history of violence and police brutality, no, sir.

Q. Yes, sir; and, finally, we come to the death penalty, which is your number 6. I want to talk about that for a moment. You state that black Americans are significantly more likely to oppose the death penalty than other racial groups; isn't that true?

A. True.

Q. I suppose if you have a little bit of history tied up in that too, don't we?

A. I imagine so.

Q. Particularly in the south, if you're looking for

statistics, you find that the death penalty has operated more to the detriment of blacks as a group than other racial groups; isn't that true?

A. Many more black Americans have been put to death than other racial groups.

Q. Yes, sir; and, there again, I take it you wouldn't support keeping black people off of juries because more black people have gotten the death penalty than any other racial group?

A. That would not be a reason I would use, no.

Q. Yes, sir; and, taking that a step further, I just wanted to ask you a few other questions about that. Were you told by the prosecution -- well, I'm sorry. You read -- you familiarized yourself with the Michigan State University study, didn't you?

A. Yes, sir.

Q. And you saw that that study concluded that statewide, district-wide and countywide, that a black person was more than 2.3 times more likely to be excluded from a capital jury than white people?

A. I did.

Q. Is that correct?

A. Yes.

Q. All right. You haven't looked behind that to see what the reasons might be for that?

A. I've not done any research specific to that, no.

Q. Did the prosecution tell you that the point at which the peremptory strikes on capital jurors were exercised in the studies would have been the point at which the jury had been death qualified? You can tell me if you don't know what I mean by death qualified.

A. I -- I can infer, but you might as well tell me, please.

Q. Well, let -- let's [indiscernible] -- and you've told me you're not that familiar with the process, so I want to tell you a little bit about it so you can answer that question. If I'm wrong, they'll point it out. In getting pools of black people -- I'm sorry -- of jurors, of potential jurors, in capital cases, the jurors are asked about whether or not they can consider the death penalty as punishment in the case. Are you with me so far?

A. I got you.

Q. All right. So, to the extent that a juror says he or she can consider the death penalty in a case, they sort of pass that first threshold as to whether they can consider the death penalty or whether your views against the death penalty are so strong that you just can't consider the death penalty.

A. Okay.

MR. COLYER: Object to the form of the question, Your Honor. That misstates the law with respect to

capital jury selection in terms of qualifying a juror.

THE COURT: All right. Rephrase your question, if you will, Mr. Ferguson.

MR. JAMES FERGUSON: Certainly, Your Honor.

Q. Let me just -- let me just actually move to this. Among a group of people, potential jurors -- I'm giving you this hypothetical.

A. Okay.

Q. Among a group of jurors who've all been asked whether or not they could consider the death penalty, other things being equal, would you expect a stark disparity between the numbers of blacks and whites who have said that they can consider the death penalty as ----

MR. COLYER: Objection.

Q. ---- [indiscernible] ----

THE COURT: Do you want to be heard, Mr. Colyer, for the record?

MR. COLYER: Yes, Your Honor.

THE COURT: Yes, sir.

MR. COLYER: That misstates with respect to both jury selection and what qualifies a person for a peremptory strike or a challenge for cause and it is a basic, fallacious assumption with respect to who is qualified for jury selection.

MR. JAMES FERGUSON: Your Honor, I wasn't

trying to ask all of the questions about ----

THE COURT: Yes. I understand that.

MR. JAMES FERGUSON: I said other things equal.

THE COURT: Okay.

MR. COLYER: It's a misleading question, Your Honor.

THE COURT: I understand your objection, and I'm going to ask that the question be rephrased. [Indiscernible.] Your objection is sustained to the form of the question.

Go ahead, Mr. Ferguson.

MR. JAMES FERGUSON: I'm sorry, Your Honor?

THE COURT: You may rephrase your question, sir.

MR. JAMES FERGUSON: Yes, sir.

Q. Well, other things being equal, Doctor Cronin, would you expect that, in a group of people who have similar or near equal views about the death penalty, that blacks would be eliminated 2 to 2 and a half times more quickly than whites -- other things being equal?

MR. COLYER: Objection. It's an improper hypothetical question.

THE COURT: All right.

MR. JAMES FERGUSON: Your Honor, he -- he'll have an opportunity to ask questions.

THE COURT: All right. Let's -- let's step back, take a deep breath, take a moment. The objection is sustained to the form of the question. You may rephrase or ask other questions ----

MR. JAMES FERGUSON: Thank you, Your Honor.

THE COURT: Yes, sir.

Q. Well based on your survey of the literature, as you have done, you don't have any explanation to offer as to why blacks were stricken from juries during a 20-year period of time at a rate of 2 to 2 and a half times more than whites by a peremptory strike by the prosecutors?

MR. COLYER: Objection.

THE COURT: Well, it's an open-ended question.

Can you answer the question?

THE WITNESS: Perhaps what I can offer, as a political scientist, is there is a long-term Democratic problem dealing with minority demographics versus majority demographics; and, I imagine that problem, which is -- we do not have a very satisfactory solution to at this point in 200 and some years with trying democracy -- I imagine that problem exists with jury selection. As to how the problem of a demographic that has different policy views plays out in the specifics of jury selection, I'm probably not familiar enough with that process to answer that.

THE COURT: Do you want to heard further, Mr. Colyer?

MR. COLYER: No, sir.

THE COURT: Okay. All right.

MR. JAMES FERGUSON: Your Honor, I ----

THE COURT: Yes, sir.

MR. JAMES FERGUSON: ---- may we interrupt my cross at this point? Could we take our afternoon break?

THE COURT: Yes, sir. I think it's appropriate.

MR. JAMES FERGUSON: Yes, sir.

THE COURT: 15 minutes enough time, folks, or do you need longer?

MR. JAMES FERGUSON: Your Honor, could we have about 20 minutes?

THE COURT: Yes, sir. Absolutely. We're at ease.

[The hearing recessed at 3:10 p.m. and reconvened at 3:30 p.m., February 13, 2012, with all pertinent parties present prior to the recess once again present, to include the defendant.]

THE COURT: Let the record reflect all counsel are present.

Doctor Cronin, if you would, take the witness stand, please, sir.

[The witness approached and seated himself in the witness stand.]

THE COURT: Thank you, sir.

[Pause.]

THE COURT: Yes, sir. Ready when you are.

MR. JAMES FERGUSON: Thank you, Your Honor.

THE COURT: Yes, sir.

CROSS-EXAMINATION continued conducted by MR. JAMES FERGUSON:

Q. Doctor Cronin, let's go back for a moment to how some of the ideological findings that you made might factor into what we're doing here. Insofar as your survey shows there are certain demographic factors that may apply to a given racial group and, in this case, jurors -- black members. If a prosecutor wanted to know the specifics of some of these demographic findings, for example, whether a given juror was conservative -- identified himself as conservative or liberal, he could simply ask that question, couldn't he, the prosecutor?

A. I suppose so.

Q. I mean, a lot of these surveys are based on self-reporting?

A. Yes.

Q. So, one way you could find out information about a person's views is to ask that person?

A. Yes.
Q. You -- you under -- you agree with that?
A. Yes.
Q. They could ask them how they feel about police brutality, for example -- ask that, how they feel about the tax system, they could ask that; is that -- is that correct?
A. True.
Q. Any -- any -- any any particular demographic factor that the prosecutor felt was important in his or her decision-making is something that they could find out from the jurors views in a particular case?
A. I suppose so.
Q. And that would be true whether the juror was black or white; do you agree with that?
A. I think so.
Q. Yes, sir; and, I take it that that's part of what your reasoning was in saying that you have to look at individual factors sometimes in order to get a full picture; is that right?
A. True.
Q. And you've already told us you didn't look at the voir dire of the transcript of jury selection in this case.
A. That's right.
Q. But, if you had looked at it, you would want to look for what questions were asked of the potential jurors

about their views on the death penalty for example; is that right?

A. If -- if I was trying to understand how the jury was selected, I would certainly want to look at specific questions.

Q. Yes, sir; and, you'd want to know -- you'd want to look at what the jury selection said about the jurors or potential jurors' views on certain aspects of politics, for example?

A. I don't know how much that's done, but that sounds logical to me.

Q. Yes, sir. You might ask them how they feel about the welfare system or the tax system or questions along that line to find out where they stand in the particular case? [Pause.]

Q. Would you agree with that?

A. Sure.

Q. And if there were no questions in the transcript about the matters that would inform the prosecutor about the jurors' views on issues of importance in determining their political views or economic views or sociologic views, whatever those views are that would inform you about the individual juror -- if a jurors questions were not there, then you wouldn't expect that those would be things that would drive the jury selection; is that correct?

A. I -- I think I agree in the sense, though, it -- if you're taking an individual jury -- juror member and you give me the questions asked ----

Q. Yes, sir.

A. ---- that does sound like -- that's -- that's how I would go about it, looking at the individual answers to questions.

Q. Yes, sir; and, would you expect there to be some relative parroting between the questions that were asked of white jurors and the questions asked of black jurors?

A. I'm not sure -- I -- I guess so.

Q. Yes, sir. You mentioned the MSU study that you had looked at and, I think, in your report, said that you have to be careful with that kind of stuff; am I correct about that?

A. You're right.

Q. But you also said that race was viewed as a variable in that study.

A. It is.

Q. And you're familiar with studies such as the MSU study that controls for certain variables in a case ----

A. Yes.

Q. ---- are you not? Okay; and, one reason you control for these variables is to find out whether that particular variable is what's driving the result or whether something else is; isn't that correct?

A. That's ideal.

Q. Yes; and, of course, race is a variable that -- that can be controlled for in some studies; isn't that true?

A. In some studies, yes.

Q. Yes, sir; and, of course, you know, from looking at the Michigan State study, that race was controlled as a variable within that study?

A. They -- that is the way they designed it, yes.

Q. Yes, sir; and, if you were designing a study to try to determine the significance of race in a particular arena, a particular study, then you would control for race, wouldn't you?

A. You would attempt to touch on it.

Q. Yes, sir; and, that's what was done in this case; isn't that correct?

A. That's correct.

Q. And you don't have any problem with the design of that study insofar as it addressed race as a variable?

A. It's a fairly well-designed study, yes.

Q. Yes, sir. I wanted just to ask you a few questions about some of the sources that you refer to your report; and, you listed a number of them, but let me just start with a study you cited which is called The Racial Divide in Support for the Death Penalty, does white racism matter -- let me just see where I can find that for you to your report.

[Pause.]

Q. Give me just a second.

A. That's in my bibliography. I don't think that specifically footnotes, so you're not going to ----

Q. Oh, it's in the bibliography.

A. Right.

Q. Yes. Okay. I don't know whether you have that -- you don't have that up there with you, do you?

A. That's -- no, sir. Have on me, no.

Q. Okay. I have it here. I just wanted ----

A. Okay.

Q. ---- to call your attention to one or two things, if I may. I think I can let you ----

[Pause.]

Q. Well, let me see if this will -- on page 1293 of that -- and I know you don't have it in front of you right now -- I'll hand it up to you if you need it. The study says clearly -- I'm sorry -- says clearly the results of the current study and those of others suggest that there are divisions of support for the death penalty among whites. Do you recall that?

A. Yes.

Q. Nonracist whites are less likely to support capital punishment than racist whites. Do -- do you recall that?

A. I do recall that phrase.

Q. And went on to say, indeed, Barkan and Cohn report that only a slim majority of nonracist whites, 56.5 percent, support the death penalty. Do you recall that?

A. I don't recall that, but that's in keeping with their study.

Q. Yes, sir; and, that would indicate that, if you took out racist whites, then the divide between attitudes or opinions about the death penalty between blacks and whites, without the racist part of it, would be much closer; is that current?

A. Their study definitely suggests that.

Q. Yes, sir; and, that same article concluded it is clear that capital punishment cannot be considered as a race-neutral public policy because white racism is inextricably involved in differential public support for the death penalty.

A. That is that particular study's conclusion, yes.

Q. Yes, sir; and, likewise, in the study of Taste for Punishment or the article of Taste for Punishment which you cited, on page 157, it notes that a study suggests that anti-black, racial prejudice may be a key factor in differentiating the crime policy views of blacks and whites; and, on page 171, it notes the most consist -- consistent predictor of criminal justice policy attitudes is in fact a form of racial prejudice. Do you recall that in that

article?

A. I don't recall those specific words, but each of -- not each of these -- many of these individual studies, though they agree on the -- the -- what I pulled for them is what they agree in general. Each of them offer up various arguments as to what accounts for the divide; and, this is -- in this case, that is their argument.

Q. Yes, sir; and, you had several of them -- several of them that you have read and the one that I'm reading now from Punitive Attitudes toward Criminals, page 293, it -- it notes -- and I'll quote -- different -- differing levels of prejudices have a very large effect upon punitives [phonetic]. Do you recall that?

A. Yes, sir.

Q. Yes, sir; and, when we come to race, politics and the process of capital punishment in the south, an article by Isaac Unah and John Charles Boger, they note, on page 17, there is a stark difference in death sentencing rates between white and nonwhite victim cases. The rate for white victim cases, 3.4 percent, is more than twice the rate for nonwhite victim cases; and, the highest death sentencing rate occurs where a nonwhite kills a white. Do you recall ----

A. I do.

Q. ---- reading that -- that article; and, on page 21, they note the odds -- the odds are eight times greater that a

nonwhite defendant who murders a white victim will receive capital punishment than a white defendant who murders a nonwhite, even after accounting for aggravating and mitigating circumstances. Do you recall that?

A. I recall that.

Q. Yes, sir; and, on page 24, they state, under the U.S. Constitution and under several state statutes, only legal factors should influence capital prosecution and sentencing. After analyzing capital sentencing date in North Carolina for murders committed from 1993 to 1997, we conclude that this ideal is hardly the case. Beyond legitimate aggravating and mitigating circumstances, several illegitimate factors duly influence the decision to sentence defendants to death. Do you recall that?

A. I recall that.

Q. Yes, sir; and, if race is a significant factor in the selection of juries in -- in capital cases, even if it is not the most significant factor, you would agree, wouldn't you, that it is an improper factor?

A. Yes.

MR. JAMES FERGUSON: Thank you, sir. That's all my questions.

THE COURT: Any redirect?

MR. THOMPSON: Yes, sir.

REDIRECT EXAMINATION was conducted by MR. ROB THOMPSON:

Q. Was your research in this case, on this issue, designed to explain an individual strike or explain on an aggregate scale the statistical difference between the strikes?

A. My -- my goal was to look in generalities and on the aggregate level.

Q. Would it be fair to say that the important thing about each individual strike would be the answers that come out of the juror's mouth?

A. Yes.

MR. THOMPSON: Nothing further. Thank you.

THE COURT: Okay. Anything further, Mr. Ferguson?

MR. JAMES FERGUSON: No, sir, Your Honor.

THE COURT: Okay. Folks, may the witness be released?

MR. THOMPSON: The State has no objection as to such, Judge.

THE COURT: Mr. Colyer?

MR. COLYER: No, sir.

THE COURT: All right. Mr. Ferguson?

MR. JAMES FERGUSON: Yes, Your Honor. I -- this -- this was their proffer ----

THE COURT: Yes, sir.

MR. JAMES FERGUSON: ---- of this witness; and, of course, we couldn't know all that would be proffered and all that was going to be said until we did the full ----

THE COURT: Yes, sir.

MR. JAMES FERGUSON: ---- examination. So, in -- in -- in light of that, Your Honor, we have two views on the matter that we would share with the Court.

THE COURT: Okay.

MR. JAMES FERGUSON: One is that, while we feel that the expertise tendered does not fully meet the standards of the statute, that, even if this proper had been made as substantive evidence in the case, that it wouldn't take the prosecution's case anywhere because [indiscernible] race for all the reasons we've set forth. So, to the extent that the Court might consider, in light of the 40 -- proffer, we don't have a real problem with that because we think the substance of the testimony is [indiscernible] ----

MR. THOMPSON: Judge, can I get kind of a procedural frame for what we're talking about really, right here?

THE COURT: Well ----

MR. THOMPSON: Respectfully, I -- I'm trying to ----

THE COURT: I'm -- Yes, sir.

MR. THOMPSON: ---- trying to figure out

where we are.

THE COURT: All right. Objection was made ----

MR. THOMPSON: Yes, sir.

THE COURT: ---- under 702.

MR. THOMPSON: Yes, sir.

THE COURT: I sustained the objection.

MR. THOMPSON: Yes, sir.

THE COURT: The State, as it's absolutely entitled to, made an offer of proof.

MR. THOMPSON: Yes, sir.

THE COURT: That's chronologically, I think, where we are.

MR. THOMPSON: Right.

THE COURT: What I'm hearing now -- and correct me if I'm wrong -- is, if the Court were to reconsider that ruling, the position of counsel for defendant would go to weight not to admissibility.

MR. JAMES FERGUSON: I'm sorry. Yes, sir. It would go to the weight. Yes. I say that in light of -- I assume part of the proffered by the prosecution was to -- to ask the Court to reconsider it ----

THE COURT: That -- that was my understanding as well.

MR. JAMES FERGUSON: Yes, sir.

THE COURT: That's my understanding as well.

MR. JAMES FERGUSON: So, just in terms of the record, we think that, if it was considered, that the weight of the substantive ----

THE COURT: Okay.

MR. JAMES FERGUSON: ---- [indiscernible] ----

MR. THOMPSON: Just to keep me straight, Judge, would it be all right if we let the State make our argument before they start fighting about what my argument is. I'm just, you know ----

MR. JAMES FERGUSON: I'm sorry.

MR. THOMPSON: ---- trying to keep up with current events and where we are; and, it throws a simple man like myself to -- to do that.

THE COURT: Well, Mr. Thompson, any time I hear those words, I'm just a simple man, I kind of step back a little bit because I'm not sure what's coming; but, I -- absolutely, you're entitled to be heard ----

MR. THOMPSON: That's -- I'd appreciate ----

THE COURT: ---- about the Court's reconsideration, sir. Yes, sir.

MR. THOMPSON: We had -- we -- we have laid our foundation. We've laid our offer of proof.

THE COURT: Yes, sir.

MR. THOMPSON: It's -- it's my habit, after being talked to a number of times by a person I admire a great deal, not to argue after a ruling's been made. So, we respectfully object to the ruling. We except to it, as you've already noted; and, we'd like to move on. So, we -- we'd love you to reconsider if Your Honor is considering reconsidering.

[General laughter.]

MR. THOMPSON: But until Your Honor invites me to argue about something, you know, I -- that's already been ruled on respectfully. So, we would like to lease Doctor Cronin.

THE COURT: All right.

MR. THOMPSON: And -- unless anybody else wants another shot at him or any other reason why we ----

THE COURT: Well, certainly, he doesn't need to be sitting here while we're dealing with the issue. So, if -- if everybody's in agreement -- thank you, Doctor Cronin.

MR. THOMPSON: Yes, sir. Thank you.

THE WITNESS: Thank you.

[Pause.]

MR. THOMPSON: And I would -- we do have a number of things we'd like to tender when -- either in the

offer of proof or if Your Honor is going to reconsider for substantive evidence, then State's Exhibit Number 78, 79 -- we have tendered and authenticated through Doctor Cronin.

THE COURT: All right. So, for purposes of clarification, did I understand that we've got some procedural matters, among them which is your argument for reconsideration?

MR. THOMPSON: Judge, if you're offering to -- to ----

THE COURT: No. I'm not offering. I'm trying to find out what your position is, Mr. Thompson.

MR. THOMPSON: Mr. Ferguson started this, Judge.

[General laughter.]

MR. JAY FERGUSON: Mr. James Ferguson.

MR. THOMPSON: James Ferguson.

THE COURT: Jay Ferguson wants that noted for the record. Let the record so show. Yes, sir. Go ahead.

MR. THOMPSON: If Your Honor lets me know we're -- we're arguing about that, I'd like to be heard.

THE COURT: Yes, sir.

MR. THOMPSON: Until that point comes, I don't have anything I'd like to request other than we do have some procedural things to take care of ----

THE COURT: Absolutely.

MR. THOMPSON: ---- at the end of this testimony.

THE COURT: Thank you, sir. You're free to go.

THE WITNESS: Thank you, Your Honor.

THE COURT: I appreciate it.

[The witness withdrew to the spectator area.]

MR. COLYER: If I could approach, Your Honor?

THE COURT: Yes, sir, Mr. Colyer.

[Pause.]

[Mr. Colyer departed the courtroom.]

MR. THOMPSON: Now, are 78 and 79 accepted by the Court for our offer of proof?

THE COURT: Okay. 79 would be Doctor Cronin's report.

MR. THOMPSON: Yes, sir.

THE COURT: All right. 78 would be his CV?

MR. THOMPSON: Yes, sir.

THE COURT: The State is now moving for reconsideration as to those items for the record?

MR. THOMPSON: Yes, sir.

THE COURT: Fair statement?

MR. THOMPSON: Fair enough.

THE COURT: Okay. Okay. Do you folks want to be heard further?

MR. JAMES FERGUSON: Nothing further than what we've said, Your Honor ----

THE COURT: Okay. All right.

MR. JAMES FERGUSON: ---- in our examination.

THE COURT: 78 and 79 are admitted. I agree with you folks. Having had the full opportunity to hear the testimony, I believe it does go to the issue of weight. So, it's in.

MR. THOMPSON: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. THOMPSON: Before we go too much further, Judge, I'd like for Mr. Colyer to return. He stepped out to make sure Doctor Cronin was taken care of.

THE COURT: We may need to take a short break.

MS. STUBBS: Thank you, Judge.

THE COURT: Yes, ma'am.

THE COURT: We -- we may need to take a short break.

MR. THOMPSON: We're fine with that, Judge.

THE COURT: Okay.

MR. THOMPSON: Good time for it.

THE COURT: Okay; and, I'm not cutting you off. We'll come back to it in a few minutes, Mr. Thompson.

MR. THOMPSON: I'm perfect, Judge.

THE COURT: Okay. All right.

[The hearing recessed at 3:49 p.m. and reconvened at 4:01 p.m., February 13, 2012, with all pertinent parties present prior to the recess once again present, to include the defendant, and with the exception of Mr. Colyer and Ms. Stubbs.]

THE COURT: We're -- we're still on the record. All of defense counsel are present. Can you give us a hint, Mr. Thompson -- my understanding is the State's about to wrap up.

MR. THOMPSON: Yes, sir.

THE COURT: Okay.

MR. THOMPSON: We wanted to make sure Doctor Cronin didn't get lost in the catacombs back here.

THE COURT: Yes, sir.

MR. THOMPSON: Respectfully, counsel has been kind of become familiar with -- probably found a couple of folks back there in their time here; but, we've got some business that I'd like some adult supervision on before ----

THE COURT: Okay.

Exhibit C

DPS RESEARCH AND PLANNING

Automated System Query (A. S. Q. DOC 3.0b)

Prison Entries 7-1-2021 thru 6-30-2022

----- Selection Criteria -----

County of Conviction *WAKE*
:
Most Serious *MURDER FIRST DEGREE*
Offense :

EVNTTYPE	County of Conviction	TOTAL
Prison Entries	WAKE	30
------	------	
GRAND TOTAL		**30**

Start Over | Return | Show Percentages

DISCLAIMER

Every effort has been made to report accurate and complete information. Any questions concerning the accuracy of this information should be submitted, in writing, to the North Carolina Department of Public Safety - Communications Office, 4202 Mail Service Center Raleigh, NC 27699-4202. Any misuse of this information is strictly prohibited and violators are subject to prosecution.

A. S. Q. Custom Offender Reports
North Carolina Department of
Public Safety
Office of Research and Planning

Created on 08/05/2022
A.S.Q 3.0b

asqs050

Exhibit D

Affidavit of Catherine Grosso and Barbara O'Brien

1. Our names are Catherine Grosso and Barbara O'Brien. We are both professors at the Michigan State University (MSU) College of Law. Together we have undertaken an extensive study of capital charging, sentencing, and jury selection in North Carolina between the years of 1990 and 2009. Our statistical consultant is University of Iowa Professor of Statistics and Actuarial Science George Woodworth.

2. I, Catherine Grosso, graduated from the University of Iowa College of Law in 2001 with high distinction and was admitted to the *Order of the Coif*. I am currently an Assistant Professor of Law at the MSU College of Law where I teach courses in criminal procedure and corrections law. Prior to joining the faculty at the Michigan State University College of Law, I was a Visiting Assistant Professor of Law at the University of Illinois College of Law where I taught courses in criminal procedure, constitutional law, evidence, and capital punishment law. In my professional career, I have been involved in conducting research and empirical studies on race and the death penalty. My publications on race and the death penalty include: David Baldus, George Woodworth, Neil Alan Weiner, David Zuckerman, & Catherine M. Grosso, *Empirical Studies of Race and Geographic Discrimination in the Administration of the Death Penalty: A Primer on Key Methodological Issues*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH (Charles S. Lanier, William Bowers, and James Acker eds., 2009); David C. Baldus, George Woodworth, & Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143 (2007); David C. Baldus, George Woodworth, Catherine M. Grosso, & Aaron M. Christ, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002).

3. I, Barbara O'Brien, am an Associate Professor of Law at the MSU College of Law where I teach courses in criminal law and criminal procedure. I received my J.D. from the University of Colorado School of Law and was admitted to the *Order of the Coif*. I received a Ph.D. in social psychology from the University of Michigan. My doctoral training involved advanced courses in research methods and statistics. I have published several articles applying empirical methodology to legal questions, such as identifying predictors of false capital convictions and understanding prosecutorial decision making. Some of my publications include: Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009); Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315 (2009); Barbara O'Brien, Samuel Sommers, & Phoebe Ellsworth, *Ask and What Shall Ye Receive? A Guide for Using and Interpreting What Jurors Tell Us*, forthcoming in the *University of Pennsylvania Journal of Law & Social Change;* Barbara O'Brien & Daphna Oyserman, *It's Not Just What You Think, But How You Think about It: The Effect of Situationally-Primed Mindsets on Legal Judgments and Decision-making*, 92 MARQ. L. REV. 149 (2008); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008).

4. This affidavit presents our initial findings. We began data collection for the study in the fall of 2009 and completed it in the spring of 2010. Because of the broad scope of the study and the large amount of data involved, we have had time to perform only some of the relevant analyses. While our analysis is ongoing, we are highly confident in the accuracy of the findings reported here.

SUMMARY OF METHODOLOGY

Peremptory Strike Study

5. This study documented racial disparities in the prosecutorial use of peremptory strikes in the cases between the years of 1990 and 2010 of persons currently on death row.[1] Of the 159 defendants on death row, we obtained data to analyze strike patterns by race in 173 proceedings. The number of proceedings is higher than the number of defendants because some defendants had multiple trials, and one defendant had separate juries for the guilt and penalty phases of the trial. Our database contains information about 7,421 venire members, of whom 7,400 were qualified to be struck by the state.

6. We analyzed the prosecutors' strike patterns of all "qualified" venire members. A venire member was considered "qualified" if he or she was present at the *voir dire* selection and was not excluded for cause. Data collection and coding was performed by law graduates (herein "coders"), under our direct supervision. The coders determined the prosecution's strike patterns based on the venire members the prosecution either passed to the defense or removed with a peremptory strike. We collected strike data about these jurors by reviewing *voir dire* transcripts, court files, and jury seating charts.

7. We then collected information regarding the race of each venire member. We first relied on venire members' self-reported race in jury questionnaires and transcripts. When such information was not available, the coders with assistance from law students used a protocol to search for venire members' race in public record databases, including voter registration, motor vehicle, and death records. Unless a coder was relying on a transcript for identifying information about venire member, all coders searched for race information without knowing the strike information.[2] We are missing race information for only 4 venire members out of all qualified venire members present at all jury selection proceedings for the 159 current death row inmates.

8. We documented racial disparities in prosecution strike rates of venire members statewide, by judicial division, by prosecutorial district, and by county.

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[1] The study also analyzed peremptory strike data from one 1985 capital proceeding. The defendant involved in this proceeding is currently on death row. Moreover, for current death row inmates with vacated convictions or sentences, peremptory strikes in the vacated proceeding were considered if the trial occurred in 1990 or later.

[2] In order to ensure that the race coders were blind to the strike information we used separate data collection questionnaires for the strike and race data and in no case did the same person who coded a case for strikes also search for race information except in those cases where consulting the transcript was necessary.

Charging and Sentencing Study

9. In conducting the charging and sentencing study, we reviewed thousands of murder cases in North Carolina. Based on this review we estimated that 5,775 cases were eligible for the death penalty in North Carolina between the years of 1990 and 2009.[3] All of the case screening work was done by graduates with law degrees and supervised by a full-time project manager who is also a trained lawyer and a member of the North Carolina bar. Retired North Carolina Superior Court Judge Melzer A. Morgan, Jr., reviewed all cases in which the only potential basis for death eligibility was a fact-intensive aggravating circumstance, such as the crime being especially heinous, atrocious, or cruel. For these cases, Judge Morgan made final determinations as to death eligibility under North Carolina law.

10. The charging and sentencing study includes detailed information from every death eligible murder case that was brought to a penalty trial, a total of 691 cases. Our study also includes detailed information from 871 death eligible murder cases that did not advance to a capital trial. These 871 cases are a random sample of the universe of death eligible cases. Thus, our study includes detailed information for a total of 1,562 cases. For each case, we collected information on the race of the defendant and victim and over 200 factors, including the statutory aggravating and mitigating factors, as well as numerous other factors identified in the case law and previous research as potentially relevant. Our sources of data included:

a. Superior Court files;
b. Appellate Court opinions and records on appeal;
c. Official Crime Versions prepared by the Department of Correction, obtained with the cooperation of the Department of Correction and Attorney General;
d. Homicide victim data obtained from the Office of the Chief Medical Examiner;
e. Department of Correction website;
f. Media reports;
g. Lexis Nexis;
h. Archived issues of the Capital Update, published by the Center for Death Penalty Litigation; and
i. In limited circumstances, conversations with attorneys involved in the case.

11. We analyzed the statewide evidence of disparities based on race of the victim in three ways. First, we used cross-tabular procedures to calculate racial disparities in capital charging or sentencing practices, without considering the impact of other potential explanatory factors ("unadjusted disparities"). Second, we constructed a logistic multiple regression model that analyzed the relationship between race and charging and sentencing, after accounting for the statutory aggravating and mitigating factors ("statutory controls regression model"). Third, we constructed a regression model that analyzed the role of race in charging and sentencing, after analyzing the importance of and where appropriate controlling for over 200 potentially

[3] The charging and sentencing study collected data and analyzed cases between 1990 and 2009. The study includes two additional cases that resulted in a death sentence in 2010: Michael Ryan and Andrew Ramseur.

explanatory variables in addition to the statutory aggravating and mitigating circumstances that might impact the outcome of a capital case ("all meaningful controls regression model"). The regression models have been "adjusted" by the controls to take into account potentially explanatory variables.

12. We analyzed four individual or combined charging and sentencing decision points: (1) the combined impact of the charging and sentencing decisions in the issuance of death sentences; (2) the prosecutor's decisions to seek death at any point in the charging process; (3) the prosecutor's decision to advance the case to capital trial; and (4) the jury's penalty trial sentencing decision.

ANALYSIS AND RESULTS: PEREMPTORY STRIKES

Statewide Evidence, 1990-2010

13. Our analysis revealed that statewide, from 1990 to 2010, North Carolina prosecutors exercised peremptory challenges at a significantly higher rate against black venire members than against non-black venire members. Statewide, prosecutors struck 52.5% of qualified black venire members but only 25.8% of qualified non-black venire members. Thus, prosecutors were more than twice as likely to strike qualified venire members who were black. *See* Table 1.

14. We observed a similar disparity in strike rates when we compared statewide the prosecution's strikes of white venire members to strikes of racial minority venire members.[4] Statewide, prosecutors struck 50.6% of qualified racial minority venire members but only 25.6% of qualified white venire members.[5]

15. We also found significant disparities when we calculated the average of the strike rates of each individual case during this period statewide ("average strike rates").[6] Of the 166 cases that included qualified black venire members, prosecutors struck an average of 55.5% of qualified black venire members compared to only 24.8% of all other qualified venire members. *See* Table 2.[7]

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[4] Throughout our study, we have defined the term "racial minority" to include black, Hispanic, Asian, Native American persons and persons of more than one race.

[5] Of 1,353 minority jurors, the prosecution struck 685. In contrast, of the 6,043 white jurors, the prosecution struck 1,544. This difference in strike rates is significant at the $p < .001$ level.

[6] In contrast, Table 1 reports prosecutorial strikes by race of venire member aggregated across all cases in the database.

[7] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 54.1% but struck qualified white venire members at an average rate of only 24.5%. Thus, prosecutors were 2.2 times more likely to strike qualified racial minority venire members. This difference in strike levels is significant at $p < .001$.

16. These disparities are even greater in cases involving black defendants. In cases with black defendants, the average strike rate is 59.9% against black venire members and 23.1% against other venire members. *See* Table 3. In contrast, in cases with defendants of other races, the average strike rate is 50.1% against black venire members and 26.9% against all other qualified venire members.[8] *Id.*

17. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than .01.

18. Among the 173 cases analyzed, we found that, in 33 cases, all of the jurors who decided punishment were white.[9] *See* Fig. 1, below.

FIGURE 1
Current Death Row Inmates Sentenced to Death by All-White Juries
(by sentencing year and county)

Al-Bayyinah, Jathiyah	1999	Davie	LeGrande, Guy T	1996	Stanly
Augustine, Quintel	2002	Cumberland	Moseley, Carl S	1992	Forsyth
Blakeney, Roger M	1997	Union	Moseley, Carl S	1993	Stokes
Brown, Paul A	2000	Wayne	Polke, Alexander C	2005	Randolph
Burke, Rayford L	1993	Iredell	Prevatte, Ted A	1999	Stanly
Call, Eric L	1996	Ashe	Raines, William H	2005	Henderson
Call, Eric L	1999	Ashe	Ramseur, Andrew D	2010	Iredell
Cole, Wade L	1994	Camden	Richardson, Martin A	1993	Union
Davis, Phillip	1997	Buncombe	Rose, Clinton R	1991	Rockingham
East, Keith B	1995	Surry	Rouse, Kenneth B	1992	Randolph
Fletcher, Andre L	1999	Rutherford	Sidden, Tony M	1995	Wilkes
Goss, Christopher E	2005	Ashe	Strickland, Darrell E	1995	Union
Holmes, Mitchell D	2000	Johnston	Trull, Gary A	1996	Randolph
Hooks, Cerron T	2000	Forsyth	Tucker, Russell W	1996	Forsyth
Jaynes, James E	1999	Polk	Wilkerson, George T	2006	Randolph
Larry, Thomas M	1995	Forsyth	Williams, James E	1993	Randolph
Laws, Wayne A	1985	Davidson			

[8] Racial disparities in the State's use of peremptory strikes are also greater in cases involving other racial minority defendants. In cases with racial minority defendants, the average strike rate is 57.6% against racial minority venire members and 22.9% against other venire members. In contrast, in cases with white defendants, the average strike rate is 48.5% against racial minority venire members and 27.1% against white venire members. This difference in strike levels is significant at the $p < .02$ level.

[9] In five of the 33 cases with all-white juries, one non-white person was selected as an alternate juror. We have confirmed that none of those non-white alternates participated in sentencing deliberations.

19. Among the 173 cases analyzed, we found that 40 cases had only one non-white seated juror.[10] *See* Fig. 2, below.

FIGURE 2
Current Death Row Inmates Sentenced to Death by Juries with Only One Non-White Juror (by sentencing year and county)

Atkins, Randy L	1993	Buncombe		Gregory, William C	1996	Davie
Al-Bayyinah, Jathiyah	2004	Davie		Harden, Alden J	1994	Mecklenburg
Anderson, Billy R	1999	Craven		Haselden, Jim E	2001	Stokes
Badgett, John S	2004	Randolph		Hyatt, Terry A	2000	Buncombe
Bowie, Nathan & Bowie, William	1993	Catawba		Jaynes, James E	1992	Polk
Burr, John E	1993	Alamance		Jones, Marcus D	2000	Onslow
Campbell, James A	1993	Rowan		Mann, Leroy E	1997	Wake
Campbell, Terrance D	2002	Pender		Miller, Clifford R	2001	Onslow
Chambers, Frank J & Barnes, William	1994	Rowan		Morgan, James	1999	Buncombe
Cummings, Daniel, Jr.	1994	Brunswick		Morganherring, William	1995	Wake
Daughtry, Johnny R	1993	Johnston		Murrell, Jeremy D	2006	Forsyth
Davis, Edward E	1992	Buncombe		Neal, Kenneth	1996	Rockingham
Davis, James F	1996	Buncombe		Parker, Carlette E	1999	Wake
Decastro, Eugene T	1993	Johnston		Reeves, Michael M	1992	Craven
Elliot, John R	1994	Davidson		Watts, James H	2001	Davidson
Frogge, Danny D	1995	Forsyth		White, Melvin L	1996	Craven
Garcell, Ryan G	2006	Rutherford		Williams, John, Jr.	1998	Wake
Geddie, Malcolm, Jr.	1994	Johnston		Williams, Marvin, Jr.	1990	Wayne
Golphin, Tilmon C	1998	Cumberland		Woods, Darrell C	1995	Forsyth
Gregory, William C	1994	Davie		Wooten, Vincent M	1994	Pitt

[10] In seven of the 40 cases with one non-white seated juror, one non-white person was also selected as an alternate juror. We have confirmed that none of those non-white alternates participated in sentencing deliberations.

Statewide Evidence, Ten Year Periods

20. The disparities in prosecutors' use of peremptory strikes persist even if the patterns are examined over smaller time periods. When we examine the ten year period between 1990 and 1999, we find that prosecutors struck 52.1% of qualified black venire members at an average rate of 54.9% but struck 25.7% of qualified non-black venire members at an average rate of only 24.7%.[11] Thus, prosecutors were twice as likely to strike qualified venire members who were black. *See* Table 4.

21. When we examine the period between 2000 and 2010, we find that prosecutors struck 53.5% of qualified black venire members at an average rate of 56.9% but struck 25.8% of qualified non-black venire members at an average rate of only 25.1%.[12] Thus, prosecutors were more than twice as likely to strike qualified venire members who were black. *See* Table 5.

22. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than .01.

Statewide Evidence, Five Year Periods

23. When we examine the five year period between 1990 and 1994, we find that prosecutors struck qualified black venire members at an average rate of 57.3% but struck qualified non-black venire members at an average rate of only 26.0%.[13] Thus, prosecutors were 2.2 times more likely to strike qualified venire members who were black. *See* Table 6.

24. When we examine the five year period between 1995 and 1999, we find that prosecutors struck qualified black venire members at an average rate of 53.6% but struck qualified non-black venire members at an average rate of only 24.1%.[14] Thus, prosecutors were 2.2 times more likely to strike qualified venire members who were black. *See* Table 7.

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[11] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 53.7% but struck qualified white venire members at an average rate of only 24.3%. Thus, prosecutors were 2.2 times more likely to strike qualified racial minority venire members. This difference in strike levels is significant at the $p < .001$ level.

[12] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 54.9% but struck qualified white venire members at an average rate of only 25.0%. Thus, prosecutors were 2.2 times more likely to strike qualified racial minority venire members. This difference in strike levels is significant at the $p < .001$ level.

[13] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 56.2% but struck qualified white venire members at an average rate of only 26.0%. Thus, prosecutors were 2.2 times more likely to strike qualified racial minority venire members. This difference in strike levels is significant at the $p < .001$ level.

[14] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 52.5% but struck qualified white venire members at an average rate of only 23.4%. Thus, prosecutors were 2.2 times more likely to strike qualified racial minority venire members. This difference in strike levels is significant at the $p < .001$ level.

25. When we examine the five year period between 2000 and 2004, we find that prosecutors struck qualified black venire members at an average rate of 57.2% but struck qualified non-black venire members at an average rate of only 25.0%.[15] Thus, prosecutors were 2.3 times more likely to strike qualified venire members who were black. *See* Table 8.

26. When we examine the nearly six year period between 2005 and the present, we find that prosecutors struck qualified black venire members at an average rate of 56.4% but struck qualified non-black venire members at an average rate of only 25.4%.[16] Thus, prosecutors were 2.2 times more likely to strike qualified venire members who were black. *See* Table 9.

27. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than .01.

Local Evidence

28. These disparities further persist across the jurisdictions implicated in individual death sentenced cases. Specifically, we observed significant racial disparities in the exercise of peremptory strikes by the prosecution at the judicial division, prosecutorial district, and individual case level.

29. **Former Judicial Division, 1990-1999.** In former Judicial Division 2,[17] from 1990 through 1999, prosecutors in 37 cases struck qualified black venire members at an average rate of 51.3% but struck qualified non-black venire members at an average rate of only 25.2%.[18] Thus, prosecutors were 2.0 times more likely to strike qualified venire members who were black. This difference in strike levels is significant at the $p < .001$ level.

30. **Current Judicial Division, 2000-present.** In current Judicial Division 3, from 2000 to 2010, prosecutors in 2 cases struck qualified black venire members at an average rate of 63.9% but struck qualified non-black venire members at an average rate of only 21.5%.[19] Thus,

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[15] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 53.3% but struck qualified white venire members at an average rate of only 24.9%. Thus, prosecutors were 2.1 times more likely to strike qualified racial minority venire members. This difference in strike levels is significant at the $p < .001$ level.

[16] Similarly, we find that prosecutors struck qualified racial minority venire members at an average rate of 57.9% but struck qualified white venire members at an average rate of only 25.0%. Thus, prosecutors were 2.3 times more likely to strike qualified racial minority venire members. This difference in strike levels is significant at the $p < .01$ level.

[17] This study refers to former and current judicial divisions because, on January 1, 2000, North Carolina's judicial divisions were reconstituted from four divisions statewide to eight divisions statewide.

[18] In former Judicial Division 2, prosecutors in 37 cases struck qualified racial minority venire members at an average rate of 47.9% but struck qualified white venire members at an average rate of only 24.1%. This difference in strike levels is significant at the $p < .001$ level.

[19] In current Judicial Division 3, prosecutors in 2 cases struck qualified racial minority venire members at an average rate of 55.0% but struck qualified white venire members at an average rate of only 22.1%. This difference in strike rates is statistically significant at the $p = .28$ level.

prosecutors were 3.0 times more likely to strike qualified venire members who were black. This difference in strike levels is significant at the $p = .21$ level.

31. **Prosecutorial District.** In Prosecutorial District 10, prosecutors in 10 cases struck qualified black venire members at an average rate of 61.5% but struck qualified non-black venire members at an average rate of only 25.1%.[20] Thus, prosecutors were 2.5 times more likely to strike qualified venire members who were black. This difference in strike levels is significant at the $p < .001$ level.

32. **Individual Cases.** Average strike rates for individual cases in this district are reported below in Table 10.

ANALYSIS AND RESULTS: CHARGING AND SENTENCING

Statewide Evidence, 1990-2009

33. The statewide analysis of charging and sentencing in death eligible murder cases shows significant, strong, and consistent disparities based on the race of the victim. The statewide data analysis reveals that between 1990 and 2009 defendants in North Carolina were significantly more likely to be charged and sentenced to death if at least one of the victims was white.

34. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 1990 to 2009, 8.26% of death eligible cases with at least one white victim resulted in death sentences, while only 3.19% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.59 times more likely to result in a death sentence than all other cases. *See* Table 11.

35. We also measured race disparities in adjusted analyses that account for the impact of non-racial factors that bear on charging and sentencing outcomes. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 2.067 times higher than the odds faced by all other similarly situated defendants. *See* Table 12.

36. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.635 times higher than the odds faced by all other similarly situated defendants. *See* Table 13.

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[20] In Prosecutorial District 10, prosecutors in 10 cases struck qualified racial minority venire members at an average rate of 58.3% but struck qualified white venire members at an average rate of only 25.0%. This difference in strike rates is statistically significant at the $p < .001$ level.

37. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, from 1990 to 2009, prosecutors brought 17.21% of death eligible cases with at least one white victim to a capital trial, but brought only 8.86%of those cases without at least one white victim to a capital trial. Thus, prosecutors were 1.94 times more likely to bring a case to a capital trial if the case involved at least one white victim. *See* Table 11.

38. These disparities also persisted in regression models that account for the impact of non-racial statutory aggravating and mitigating circumstances in the cases. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.530 times higher than the odds faced by all other similarly situated defendants. *See* Table 14.

39. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.609 times higher than the odds faced by all other similarly situated defendants. *See* Table 15.

Statewide Evidence, 1990-1999

40. The statewide data analysis reveals significant disparities based on the race of the victim between 1990 and 1999.

41. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 1990 to 1999, 11.25% of death eligible cases with at least one white victim resulted in death sentences, while only 4.71% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.39 times more likely to result in a death sentence than all other cases. *See* Table 16.

42. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.481 times higher than the odds faced by all other similarly situated defendants. *See* Table 12.

43. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.708 times higher than the odds faced by all other similarly situated defendants. *See* Table 13.

44. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, for the time period between 1990 and 1999, prosecutors brought 22.44% of death eligible cases with at least one white victim to capital trials, but brought only 11.36% of those cases without white victims to capital trials. Thus, prosecutors were 1.98 times more likely to bring a case to a capital trial if there was at least one white victim. *See* Table 16.

45. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.478 times higher than the odds faced by all other similarly situated defendants. *See* Table 14.

46. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.469 times higher than the odds faced by all other similarly situated defendants. *See* Table 15.

Statewide Evidence, 2000-2009

47. The statewide data analysis reveals significant disparities based on the race of the victim between 2000 and 2009.

48. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 2000 to 2009, 4.18% of death eligible cases with at least one white victim resulted in death sentences, while only 1.50% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.78 times more likely to result in a death sentence than all other cases. *See* Table 17.

49. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 2.647 times higher than the odds faced by all other similarly situated defendants. *See* Table 12.

50. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 2.158 times higher than the odds faced by all other similarly situated defendants. *See* Table 13.

51. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, for the time period between 2000 and 2009, prosecutors brought 10.11% of death eligible cases with at least one white victim to capital trials, but brought only 6.09% of those cases without white victims to capital trials. Thus, prosecutors were 1.66 times more likely to bring a case to a capital trial if there was at least one white victim. *See* Table 17.

52. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.651 times higher than the odds faced by all other similarly situated defendants. *See* Table 14.

53. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.417 times higher than the odds faced by all other similarly situated defendants. *See* Table 15.

Statewide Evidence, 1990-1994

54. The statewide data analysis reveals significant disparities based on the race of the victim between 1990 and 1994.

55. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 1990 to 1994, 12.14% of death eligible cases with at least one white victim resulted in death sentences, while only 3.90% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 3.11 times more likely to result in a death sentence than all other cases. *See* Table 18.

56. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.742 times higher than the odds faced by all other similarly situated defendants. *See* Table 12.

57. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.255 times higher than the odds faced by all other similarly situated defendants. *See* Table 13.

58. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, for the time period between 1990 and 1994, prosecutors brought 24.01% of death eligible cases with at least one white victim to capital trials, but brought only 10.20% of those cases without white victims to capital trials. Thus, prosecutors were 2.35 times more likely to bring a case to a capital trial if there was at least one white victim. *See* Table 18.

59. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.805 times higher than the odds faced by all other similarly situated defendants. *See* Table 14.

60. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.608 times higher than the odds faced by all other similarly situated defendants. *See* Table 15.

Statewide Evidence, 1995-1999

61. The statewide data analysis reveals significant disparities based on the race of the victim between 1995 and 1999.

62. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 1995 to 1999, 10.42% of death eligible cases with at least one white victim resulted in death sentences, while only 5.41% of death eligible cases without white victims resulted in death

sentences. Thus, death eligible cases with at least one white victim were 1.93 times more likely to result in a death sentence than all other cases. *See* Table 19.

63. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.389 times higher than the odds faced by all other similarly situated defendants. *See* Table 12.

64. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 2.150 times higher than the odds faced by all other similarly situated defendants. *See* Table 13.

65. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, for the time period between 1995 and 1999, prosecutors brought 20.98% of death eligible cases with at least one white victim to capital trials, but brought only 12.38% of those cases without white victims to capital trials. Thus, prosecutors were 1.70 times more likely to bring a case to a capital trial if there was at least one white victim. *See* Table 19.

66. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.362 times higher than the odds faced by all other similarly situated defendants. *See* Table 14.

67. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.464 times higher than the odds faced by all other similarly situated defendants. *See* Table 15.

Statewide Evidence, 2000-2004

68. The statewide data analysis reveals significant disparities based on the race of the victim between 2000 and 2004.

69. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 2000 to 2004, 4.98% of death eligible cases with at least one white victim resulted in death sentences, while only 2.34% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.13 times more likely to result in a death sentence than all other cases. *See* Table 20.

70. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 2.173 times higher than the odds faced by all other similarly situated defendants. *See* Table 12.

71. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.324 times higher than the odds faced by all other similarly situated defendants. *See* Table 13.

72. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, for the time period between 2000 and 2004, prosecutors brought 10.89% of death eligible cases with at least one white victim to capital trials, but brought only 9.40% of those cases without white victims to capital trials. Thus, prosecutors were 1.16 times more likely to bring a case to a capital trial if there was at least one white victim. *See* Table 20.

73. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.045 times higher than the odds faced by all other similarly situated defendants. *See* Table 14.

Statewide Evidence, 2005-2009

74. The statewide data analysis reveals significant disparities based on the race of the victim between 2005 and 2009.

75. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 2005 to 2009, 3.16% of death eligible cases with at least one white victim resulted in death sentences, while only 0.55% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 5.69 times more likely to result in a death sentence than all other cases. *See* Table 21.

76. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 10.681 times higher than the odds faced by all other similarly situated defendants. *See* Table 12.

77. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 6.322 times higher than the odds faced by all other similarly situated defendants. *See* Table 13.

78. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, for the time period between 2005 and 2009, prosecutors brought 9.12% of death eligible cases with at least one white victim to capital trials, but brought only 2.36% of those cases without white victims to capital trials. Thus, prosecutors were 3.86 times more likely to bring a case to a capital trial if there was at least one white victim. *See* Table 21.

79. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced

odds of advancing to a capital trial that were 5.404 times higher than the odds faced by all other similarly situated defendants. *See* Table 14.

80. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 3.210 times higher than the odds faced by all other similarly situated defendants. *See* Table 15.

Statewide Evidence, Native American Defendant Disparities, 1990-2009

81. **Combined Effect of Charging and Sentencing Decisions.** Statewide, from 1990 to 2009, 10.58% (12/113)[21] of death eligible cases with Native American defendants resulted in death sentences, while only 5.32% (301/5662) of death eligible cases without Native American defendants resulted in death sentences. Thus, death eligible cases with Native American defendants were 1.99 times more likely to result in a death sentence than all other cases.

82. Even after controlling for statutory aggravating and mitigating circumstances, death eligible Native American defendants faced odds of receiving a death sentence that were 1.815 times higher than the odds faced by all other similarly situated defendants.

83. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors, death eligible Native American defendants faced odds of receiving a death sentence that were 1.198 times higher than the odds faced by all other similarly situated defendants.

84. **Prosecutors' Decisions to Seek Death at Any Point in the Charging.** Statewide, from 1990 to 2009, prosecutors sought the death penalty at some point in the charging process in 81.86% (93/113) of death eligible cases with Native American defendants. Prosecutors sought the death penalty at some point in the charging process in 60.45% (3391/5609) of death eligible cases without Native American defendants. Thus, prosecutors were 1.35 times more likely to seek the death penalty in cases with Native American defendants.

85. Even after controlling for statutory aggravating and mitigating circumstances, death eligible Native American defendants faced odds of being charged capitally at some point in the charging process that were 2.883 times higher than the odds faced by all other similarly situated defendants.

86. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors, death eligible Native American defendants faced odds of being charged capitally at some point in the charging process that were 3.298 times higher than the odds faced by all other similarly situated defendants.

[21] From this point forward in the affidavit, we provide the numbers of cases used to calculate the selection rate in parentheses following the percentage. The numbers for the previous sections of the affidavit are available in the tables.

87. **Prosecutors' Decisions to Advance to Capital Trial.** Statewide, from 1990 to 2009, prosecutors brought 27.34% (31/113) of death eligible cases with Native American Defendants to capital trials, but brought only 12.24% (692/5657) of death eligible cases without Native American defendants to capital trials. Thus, prosecutors were 2.23 times more likely to bring a case to a capital trial if there was a Native American defendant.

88. Even after controlling for statutory aggravating and mitigating circumstances, death eligible Native American defendants faced odds of advancing to a capital trial that were 2.797 times higher than the odds faced by all other similarly situated defendants.

89. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors, death eligible Native American defendants faced odds of advancing to a capital trial that were 2.258 times higher than the odds faced by all other similarly situated defendants.

Former Judicial Division 2, 1990-1999

90. Data analysis for former Judicial Division 2 reveals significant disparities based on race from 1990 to 1999.

White Victim Disparities

91. **Combined Effect of Charging and Sentencing Decisions.** In former Judicial Division 2, from 1990 to 1999, 10.54% (39/370) of death eligible cases with at least one white victim resulted in death sentences, while only 3.25% (20/615) of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 3.24 times more likely to result in a death sentence.

92. **Prosecutors' Decisions to Seek Death at Any Point in the Charging.** In former Judicial Division 2, from 1990 to 1999, prosecutors sought the death penalty at some point in the charging process in 68.55% (251/367) of death eligible cases with at least one white victim. Prosecutors sought the death penalty at some point in the charging process in 55.50% (338/609) of death eligible cases without white victims. Thus, prosecutors were 1.24 times more likely to seek the death penalty in cases with at least one white victim.

93. **Prosecutors' Decisions to Advance to Capital Trial.** In former Judicial Division 2, from 1990 to 1999, prosecutors brought 23.25% (86/370) of death eligible cases with at least one white victim to capital trials, but brought only 9.26% (57/615) of death eligible cases without white victims to capital trials. Thus, prosecutors were 2.51 times more likely to bring a case to a capital trial if there was at least one white victim.

94. **Jury Sentencing Decisions.** In former Judicial Division 2, from 1990 to 1999, juries imposed death sentences in 45.35% (39/86) of all penalty phase trials with at least one white victim, but only 35.09% (20/57) of penalty phase trials without white victims. Thus, juries were 1.29 times more likely to sentence a defendant to death if the case had at least one white victim.

Racial Minority Defendant/White Victim Disparities

95. **Prosecutors' Decisions to Seek Death at Any Point in the Charging.** In former Judicial Division 2, from 1990 to 1999, prosecutors sought the death penalty at some point in the charging process in 79.63% (125/157) of death eligible cases with racial minority defendants and at least one white victim. Prosecutors sought the death penalty at some point in the charging process in 56.73% (464/818) of all other death eligible cases. Thus, prosecutors were 1.40 times more likely to seek the death penalty in cases with racial minority defendants and at least one white victim.

Current Judicial Division 3, 2000-2009

96. Data analysis for current Judicial Division 3 reveals significant disparities based on race from 1990 to 1999.

White Victim Disparities

97. **Combined Effect of Charging and Sentencing Decisions.** In current Judicial Division 3, from 2000 to 2009, 2.47% (2/81) of death eligible cases with at least one white victim resulted in death sentences, while only 0% (0/155) of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were an infinite times more likely to result in a death sentence.

98. **Jury Sentencing Decisions.** In current Judicial Division 3, from 2000 to 2009, juries imposed death sentences in 40.00% (2/5) of all penalty phase trials with at least one white victim, but only 0% (0/8) of penalty phase trials without white victims. Thus, juries were an infinite times more likely to sentence a defendant to death if the case had at least one white victim.

Racial Minority Defendant Disparities

99. **Prosecutors' Decisions to Seek Death at Any Point in the Charging.** In current Judicial Division 3, from 2000 to 2009, prosecutors sought the death penalty at some point in the charging process in 66.13% (136/205) of death eligible cases with racial minority defendants. Prosecutors sought the death penalty at some point in the charging process in 39.79% (12/30) of death eligible cases with white defendants. Thus, prosecutors were 1.66 times more likely to seek the death penalty in cases with racial minority defendants.

100. **Prosecutors' Decisions to Advance to Capital Trial.** In current Judicial Division 3, from 2000 to 2009, prosecutors brought 14.25% (29/205) of death eligible cases with racial minority defendants to capital trials, but brought only 6.59% (2/30) of death eligible cases with white defendants to capital trials. Thus, prosecutors were 2.16 times more likely to bring a case to a capital trial if there was a racial minority defendant.

101. **Jury Sentencing Decisions.** In current Judicial Division 3, from 2000 to 2009, juries imposed death sentences in 18.18% (2/11) of all penalty phase trials with racial minority defendants, but only 0% (0/2) of penalty phase trials with white defendants. Thus, juries were an infinite times more likely to sentence a racial minority defendant to death.

Racial Minority Defendant/White Victim Disparities

102. **Combined Effect of Charging and Sentencing Decisions.** In current Judicial Division 3, from 2000 to 2009, 3.96% (2/51) of death eligible cases with racial minority defendants and at least one white victim resulted in death sentences, while only 0% (0/185) of all other death eligible cases resulted in death sentences. Thus, death eligible cases with racial minority defendants and at least one white victim were an infinite times more likely to result in a death sentence.

103. **Jury Sentencing Decisions.** In current Judicial Division 3, from 2000 to 2009, juries imposed death sentences in 66.67% (2/3) of all penalty phase trials with racial minority defendants and at least one white victim, but only 0% (0/10) of all other penalty phase trials. Thus, juries were an infinite times more likely to sentence a defendant to death if the case had a racial minority defendant and at least one white victim.

Prosecutorial District 10

104. Data analysis for Prosecutorial District 10 reveals significant disparities based on race from 1990 to 2009.

White Victim Disparities

105. **Combined Effect of Charging and Sentencing Decisions.** In Prosecutorial District 10, from 1990 to 2009, 6.56% (9/137) of death eligible cases with at least one white victim resulted in death sentences, while only 2.67% (6/225) of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.46 times more likely to result in a death sentence.

106. **Prosecutors' Decisions to Seek Death at Any Point in the Charging.** In Prosecutorial District 10, from 1990 to 2009, prosecutors sought the death penalty at some point in the charging process in 55.24% (76/137) of death eligible cases with at least one white victim. Prosecutors sought the death penalty at some point in the charging process in 36.51% (82/225) of death eligible cases without white victims. Thus, prosecutors were 1.51 times more likely to seek the death penalty in cases with at least one white victim.

107. **Prosecutors' Decisions to Advance to Capital Trial.** In Prosecutorial District 10, from 1990 to 2009, prosecutors brought 16.77% (23/137) of death eligible cases with at least one white victim to capital trials, but brought only 12.48% (28/225) of death eligible cases without white victims to capital trials. Thus, prosecutors were 1.34 times more likely to bring a case to a capital trial if there was at least one white victim.

Racial Minority Defendant Disparities

108. **Jury Sentencing Decisions.** In Prosecutorial District 10, from 1990 to 2009, juries imposed death sentences in 39.39% (13/33) of all penalty phase trials with racial minority defendants, but only 25.00 (2/8) of penalty phase trials with white defendants. Thus, juries were 1.58 times more likely to sentence a racial minority defendant to death.

Racial Minority Defendant/White Victim Disparities

109. **Combined Effect of Charging and Sentencing Decisions.** In Prosecutorial District 10, from 1990 to 2009, 8.52% (7/82) of death eligible cases with racial minority defendants and at least one white victim resulted in death sentences, while only 2.86% (8/280) of all other death eligible cases resulted in death sentences. Thus, death eligible cases with racial minority defendants and at least one white victim were 2.98 times more likely to result in a death sentence.

110. **Prosecutors' Decisions to Advance to Capital Trial.** In Prosecutorial District 10, from 1990 to 2009, prosecutors brought 18.26% (15/82) of death eligible cases with racial minority defendants and at least one white victim to capital trials, but brought only 12.88% (36/280) of all other death eligible cases to capital trials. Thus, prosecutors were 1.42 times more likely to bring a case to a capital trial if there was a racial minority defendant and at least one white victim.

111. **Jury Sentencing Decisions.** In Prosecutorial District 10, from 1990 to 2009, juries imposed death sentences in 46.67% (7/15) of all penalty phase trials with racial minority defendants and at least one white victim, but only 30.77% (8/26) of all other penalty phase trials. Thus, juries were 1.52 times more likely to sentence a defendant to death if the case had a racial minority defendant and at least one white victim.

Catherine Grosso, J.D.
Assistant Professor of Law
Michigan State University College of Law

Barbara O'Brien, J.D., Ph.D.
Associate Professor of Law
Michigan State University College of Law

Sworn and subscribed to before me, a notary public for the County of Ingham, State of Michigan, on this the 30 day of July 2010.

NOTARY PUBLIC

BETH ANNE WEY
Notary Public, State of Michigan
County of Clinton
My Commission Expires Nov. 29, 2015
Acting in the County of Ingham

MY COMMISSION EXPIRES ON: _____

TABLE 1
Statewide Prosecutorial Peremptory Strike Patterns over Entire Study Period

		A Black Venire members	B All Other Venire members	C Unknown	D Total
1	**Passed**	572 (47.5%)	4595 (74.2%)	3 (75.0%)	5170 (69.9%)
2	**Struck**	631 (52.5%)*	1598 (25.8%)*	1 (25.0%)	2230 (30.1%)
3	**Total**	1203 (100.0%)	6193 (100.0%)	4 (100.0%)	7400 (100.0%)

*This difference in strike rates is significant at $p < .001$.

TABLE 2
Statewide Average Rates of State Strikes
By Entire Study Period

	A Average Strike Rate	B Number of Cases
1. **Strike Rates Against Black Qualified Venire Members**	55.5%	166
2. **Strike Rates Against All Other Qualified Venire Members**	24.8%	166

*This difference in strike rates is significant at $p < .001$.

TABLE 3
Disparities in Strike Patterns by Race of Defendant
Statewide Average Rates of State Strikes

	Race of Defendant	A Strikes Against	B Average Strike Rate	C Number of Cases
1.	**Black**	**Black Qualified Venire members**	59.9%	90
2.		**All Other Qualified Venire members**	23.1%	
3.	**Non-Black**	**Black Qualified Venire members**	50.1%	76
4.		**All Other Qualified Venire members**	26.9%	

*This difference between the disparities in strike rates by race of defendant is significant at $p < .02$.

TABLE 4
Statewide Average of Rates of State Strikes
From 1990 through 1999

	A Average Strike Rate	B Number of Cases
1. **Strike Rates Against Black Qualified Venire Members**	54.9%	122
2. **Strike Rates Against All Other Qualified Venire Members**	24.7%	122

*This difference in strike rates is significant at $p < .001$.

TABLE 5
Statewide Average of Rates of State Strikes
From 2000 through 2010

	A Average Strike Rate	B Number of Cases
1. **Strike Rates Against Black Qualified Venire Members**	56.9%	44
2. **Strike Rates Against All Other Qualified Venire Members**	25.1%	44

*This difference in strike rates is significant at $p < .001$.

TABLE 6
Statewide Average of Rates of State Strikes
From 1990 through 1994

	A Average Strike Rate	B Number of Cases
1. **Strike Rates Against Black Qualified Venire Members**	57.3%	42
2. **Strike Rates Against All Other Qualified Venire Members**	26.0%	42

*This difference in strike rates is significant at $p < .001$.

TABLE 7
Statewide Average of Rates of State Strikes
From 1995 through 1999

	A Average Strike Rate	B Number of Cases
1. **Strike Rates Against Black Qualified Venire Members**	53.6%	80
2. **Strike Rates Against All Other Qualified Venire Members**	24.1%	80

*This difference in strike rates is significant at $p < .001$.

TABLE 8
Statewide Average of Rates of State Strikes
From 2000 through 2004

	A Average Strike Rate	B Number of Cases
1. **Strike Rates Against Black Qualified Venire Members**	57.2%	29
2. **Strike Rates Against All Other Qualified Venire Members**	25.0%	29

*This difference in strike rates is significant at $p < .001$.

TABLE 9
Statewide Average of Rates of State Strikes
From 2005 through 2010

	A Average Strike Rate	B Number of Cases
1. **Strike Rates Against Black Qualified Venire Members**	56.4%	15
2. **Strike Rates Against All Other Qualified Venire Members**	25.4%	15

*This difference in strike rates is significant at $p < .01$.

TABLE 10
Rates of State Strikes for Cases in Prosecutorial District 10
By Entire Study Period

Name of Defendant	Mean Strike Rate	
	Black Qualified Venire Members	All Other Qualified Venire Members
Nathaniel Fair	66.7% (4/6)	25.0% (8/32)
Fernando L. Garcia	77.8% (7/9)	21.1% (8/38)
Allen R. Holman	37.5% (3/8)	32.5% (13/40)
Leroy E. Mann	75.0% (3/4)	28.6% (10/35)
Marcus D. Mitchell	71.4% (5/7)	22.9% (8/35)
William Morganherring	60.0% (3/5)	19.4% (6/31)
Carlette E. Parker	50.0% (2/4)	26.5% (9/34)
James E. Thomas	66.7% (4/6)	22.6% (7/31)
Byron L. Waring	50.0% (2/4)	21.9% (7/32)
John Williams	60.0% (3/5)	30.2% (13/43)

TABLE 11
Statewide Unadjusted Racial Disparities: North Carolina, 1990-2009

	A	B **Racial Minority Defendant** (DefRM)	C **White Victim** (WhiteVic)	D **Minority Defendant/ White Victim** (RMWV)
1.	Combined Effect of Charging and Sentencing Decisions (Death1=1) n = 1562 (weighted analysis) Overall Rate: 5.42%	Yes: 4.23% (175/4135) No : 8.42% (138/1640) Diff: -4.18 points Ratio: 0.50 (p < 0.0001)	Yes: 8.26% (210/2544) No : 3.19% (103/3231) Diff: 5.07 points Ratio: 2.59 (p < 0.0001)	Yes: 7.64% (82/1074) No : 4.91% (231/4701) Diff: 2.72 points Ratio: 1.55 (p < 0.01)
	Charging Decisions			
2.	Prosecutors' Decisions to Seek Death at Any Point in the Charging (EverSeekDeath=1) n = 1549 (weighted analysis) Overall Rate: 60.88%	Yes: 60.68% (2489/4102) No : 61.39% (995/1620) Diff: -0.71 points Ratio: 0.99 (p = 0.85)	Yes: 62.15% (1564/2516) No : 59.88% (1920/3206) Diff: 2.27 points Ratio: 1.04 (p = 0.52)	Yes: 62.23% (660/1060) No : 60.57% (2824/4662) Diff: 1.66 points Ratio: 1.03 (p = 0.72)
3.	Prosecutors' Decisions to Advance to a Capital Guilt Trial (CapTrial=1) n = 1561 (weighted analysis) Overall Rate: 12.53%	Yes: 10.48% (433/4135) No : 17.73% (290/1635) Diff: -7.25 points Ratio: 0.59 (p < 0.0001)	Yes: 17.21% (437/2539) No : 8.86% (286/3231) Diff: 8.35 points Ratio: 1.94 (p < 0.0001)	Yes: 16.39% (176/1074) No : 11.65% (547/4696) Diff: 4.74 points Ratio: 1.41 (p = 0.005)
	Sentencing Decisions			
4.	Jury Decision to Impose Death Sentence at Penalty Trial (PTDeath=1) n = 691 (unweighted analysis) Overall Rate: 45.30%	Yes: 42.17% (175/415) No : 50.00% (138/276) Diff: -7.83 points Ratio: 0.84 (p = 0.05)	Yes: 49.65% (210/423) No : 38.43% (103/268) Diff: 11.21 points Ratio: 1.29 (p < 0.01)	Yes: 46.59% (82/176) No : 44.85% (231/515) Diff: 1.74 points Ratio: 1.04 (p = 0.73)

TABLE 12

Combined Effect of Charging and Sentencing Decisions (Death1): North Carolina, 1990-2009
Statutory Controls Regression Models, Twenty- (Col. B), Ten- (Cols. C-D), and Five-Year (Cols. E-H) Periods
(*Variable definitions are provided in Table 22.*)

	A	B		C		D		E		F		G		H	
		Full Study Period Twenty Years 1990-2009		**First Ten Years 1990-1999 (FiveYears = 1 or 2)**		**Second Ten Years 2000-2009 (FiveYears = 3 or 4)**		**First Five Years 1990-1994 (FiveYears=1)**		**Second Five Years 1995-1999 (FiveYears=2)**		**Third Five Years 2000-2004 (FiveYears=3)**		**Fourth Five Years 2005-2009 (FiveYears=4)**	
1.	# death sentences	313		245		68		117		128		49		19	
2.	n	1,562		1,042		520		492 (117)		550		349		171	
3.	weighted n	5,775		3,166		2,609		1,503 (117)		1,663		1,413		1196	
4.	R^2	0.22		0.36		0.19		0.43		0.32		0.14		0.19	
		Coefficient *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**
5.	Intercept	-3.8966 *<.0001*		-4.1666 *<.0001*		-5.2539 *<.0001*		-4.4929 *<.0001*		-4.2219 *<.0001*		-4.5123 *<.0001*		-6.8322 *<.0001*	

6.	DefRM	-0.4019 *0.0477*	0.669	-0.7408 *0.0021*	0.477	0.2776 *0.5165*	1.320	-1.0616 *0.0008*	0.346	-.03871 *0.2597*	0.679	0.2568 *0.5405*	1.293	0.4297 *0.5116*	1.537
7.	WhiteVic	0.7261 *0.0002*	2.067	0.3929 *0.0877*	1.481	0.9736 *0.0123*	2.647	0.5552 *0.0984*	1.742	0.3283 *0.2873*	1.389	0.7759 *0.0385*	2.173	2.3685 *0.0039*	10.681
8.	AggE2	1.6087 *0.0093*	4.996												
9.	AggE3	1.0228 *<.0001*	2.781	1.5219 *<.0001*	4.581	1.1614 *0.0002*	3.195	1.7509 *<.0001*	5.760	1.3842 *<.0001*	3.992	1.1797 *0.0006*	3.254	1.2205 *0.0551*	3.389
10.	AggE4	1.4083 *<.0001*	4.089	1.3748 *0.0005*	3.954	1.8172 *0.0004*	6.155	1.4072 *0.0011*	4.084	1.3987 *0.0050*	4.050	2.0649 *<.0001*	7.885		
11.	AggE5							1.3367 *0.0003*	3.807						
12.	AggE6	0.5454 *0.0009*	1.725	0.9137 *<.0001*	2.493					0.6908 *0.0120*	1.995				
13.	AggE8	1.7449 *0.0002*	5.725												
14.	AggE9			1.9593 *<.0001*	7.094	0.9570 *0.0014*	2.604	2.2905 *<.0001*	9.880	1.7528 *<.0001*	5.771			1.5244 *0.0166*	4.592

15.	**AggE11**	0.4493 *0.0055*	1.567	0.8614 *<.0001*	2.366					1.0101 *0.0002*	2.746				
16.	**MitF4**	-2.5612 *<.0001*	0.077	-2.7634 *0.0002*	0.063	-1.7442 *0.0764*	0.175	-2.7737 *0.0147*	0.062	-2.3078 *0.0145*	0.099				

TABLE 13

Combined Effect of Charging and Sentencing Decisions (Death1): North Carolina, 1990-2009
All Meaningful Controls Regression Models, Twenty- (Col. B), Ten- (Cols. C-D), and Five-Year (Cols. E-H) Periods
(*Variable definitions are provided in Table 22.*)

	A	B		C		D		E		F		G		H	
		Full Study Period Twenty Years 1990-2009		**First Ten Years 1990-1999 (FiveYears = 1 or 2)**		**Second Ten Years 2000-2009 (FiveYears = 3 or 4)**		**First Five Years 1990-1994 (FiveYears=1)**		**Second Five Years 1995-1999 (FiveYears=2)**		**Third Five Years 2000-2004 (FiveYears=3)**		**Fourth Five Years 2005-2009 (FiveYears=4)**	
1.	# death sentences	313		245		68		117		128		49		19	
2.	n	1,562		1,042		520		492		550		349		171	
3.	weighted n	5,775		3,166		2,609		1,503		1,663		1,413		1,196	
4.	R^2	0.68		0.71		0.49		0.68		0.73		0.57		0.65	
		Coefficient *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**	**Coefficient** *p-value*	**Odds Ratio**
5.	Intercept	-4.8856 *<.0001*		-4.5854 *<.0001*		-5.6177 *<.0001*		-5.7754 *<.0001*		-5.0176 *<.0001*		-3.6447 *<.0001*		-2.6945 *0.0008*	
6.	**DefRM**	-0.4869 *0.0355*	0.615	-.03050 *0.2622*	0.737	-0.0713 *0.8628*	0.931	-0.5224 *0.1609*	0.593	-0.0479 *0.8902*	0.953	-0.5536 *0.3058*	0.575	-0.3120 *0.6665*	0.732
7.	**WhiteVic**	0.4918 *0.0317*	1.635	0.5355 *0.0409*	1.708	0.7690 *0.0480*	2.158	0.2274 *0.5498*	1.255	0.7657 *0.0503*	2.150	0.2809 *0.6111*	1.324	1.8441 *0.0139*	6.322
8.	**AggE3**	0.9582 *<.0001*	2.607	1.4261 *<.0001*	4.162			1.7937 *<.0001*	6.012						
9.	**AggE4**									1.5169 *0.0023*	4.558				
10.	**AggE6**			0.8951 *0.0004*	2.448			1.3255 *0.0002*	3.764						
11.	**AggE9**	0.7440 *0.0010*	2.104	0.9758 *0.0002*	2.653			1.6297 *<.0001*	5.102						
12.	**AggCirScale**	0.2092 *0.0064*	1.233			0.5835 *<.0001*	1.792			0.4623 *0.0012*	1.588	0.2840 *0.0483*	1.328		
13.	**AssaultGun**									1.9584 *0.0028*	7.088				
14.	**Disrobe**			0.8197 *0.0230*	2.270										
15.	**EvidType2**	0.7204 *0.0002*	2.055			1.2455 *0.0006*	3.475					1.8750 *<.0001*	6.521		
16.	**EvidType3**	1.2376 *0.0002*	3.447												

	A	B		C		D		E		F		G		H	
17.	EvidType9							1.1744 *0.0031*	3.236						
18.	EvidType10	0.8562 *<.0001*	2.354	0.9507 *<.0001*	2.587					1.8852 *<.0001*	6.588	1.6348 *<.0001*	5.129		
19.	EvidType11			1.2532 *<.0001*	3.502					1.1982 *0.0003*	3.314				
20.	Execution	0.5053 *0.0193*	1.657												
21.	FemVic	0.5707 *0.0068*	1.770	0.5472 *0.0283*	1.728			1.5406 *<.0001*	4.668						
22.	GratuitousFelony			1.2308 *0.0003*	3.424										
23.	HeadWound	0.7893 *0.0002*	2.202	0.7085 *0.0043*	2.031			1.3188 *0.0002*	3.739						
24.	Killer							1.3490 *0.0006*	3.853						
25.	PleasureKill					1.5200 *0.0020*	4.572								
26.	PTDNDX_DTH1													1.5850 *<.0001*	4.879
27.	SeverePain	0.9714 *<.0001*	2.642	0.8787 *0.0005*	2.408					2.0666 *<.0001*	7.898				
28.	SpecialAgg2							1.0551 *0.0073*	2.872						
29.	Trauma	1.6213 *<.0001*	5.060	1.3318 *0.0001*	3.788	1.9783 *<.0001*	7.231	1.7858 *0.0005*	5.965						
30.	TwoVic	0.7748 *0.0058*	2.170	1.5423 *<.0001*	4.675					1.6506 *0.0002*	5.210				
31.	VStranger	1.3186 *<.0001*	3.738			1.4054 *<.0001*	4.077					1.4337 *0.0053*	4.194	1.3840 *0.0605*	3.991
32.	DefenseType15	-1.4165 *<.0001*	0.243	-1.1568 *0.0051*	0.314							-3.6388 *0.0008*	0.026		
33.	DRage	-1.0233 *0.0006*	0.359												
34.	DselfD	-2.0764 *0.0046*	0.125												
35.	MinorAcc2	-2.0905 *<.0001*	0.124	-1.9885 *<.0001*	0.137					-3.1534 *<.0001*	0.043				
36.	NoLongPlan											-0.1437 *0.0048*	0.866		

	A	B		C		D		E		F		G		H	
37.	**ProvokeQ**			-1.5015 *0.0058*	0.223										
38.	**TookResp**	-2.4856 *<.0001*	0.083	-2.5294 *<.0001*	0.080	-2.7178 *<.0001*	0.066	-2.2360 *<.0001*	0.107	-3.1430 *<.0001*	0.043	-2.6564 *<.0001*	0.070		
39.	**YoungDef**			-0.9880 *0.0552*	0.372										

TABLE 14

Prosecutors' Decisions to Advance to a Capital Guilt Trial (CapTrial): North Carolina, 1990-2009
Statutory Controls Regression Models, Twenty- (Col. B), Ten- (Cols. C-D), and Five-Year (Cols. E-H) Periods
(*Variable definitions are provided in Table 22.*)

	A	B		C		D		E		F		G		H	
		Full Study Period Twenty Years 1990-2009		**First Ten Years 1990-1999 (FiveYears = 1 or 2)**		**Second Ten Years 2000-2009 (FiveYears = 3 or 4)**		**First Five Years 1990-1994 (FiveYears=1)**		**Second Five Years 1995-1999 (FiveYears=2)**		**Third Five Years 2000-2004 (FiveYears=3)**		**Fourth Five Years 2005-2009 (FiveYears=4)**	
1.	# capital trials	695		521		174		250		271		124		50	
2.	n	1,561[22]		1,041		520		491		550		349		171	
3.	# capital trials weighted	723		521		202		250		271		142		60	
4.	weighted n	5,770		3,161		2,609		1,498		1,663		1,413		1,196	
5.	R^2	0.22		0.31		0.14		0.31		0.23		0.16		0.31	
		Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio
6.	Intercept	-2.6157 *<.0001*		-2.5605 *<.0001*		-3.2582 *<.0001*		-2.5286 *<.0001*		-2.6312 *<.0001*		-3.0327 *<.0001*		-5.2368 *<.0001*	
7.	DefRM	-0.3875 *0.0347*	0.679	-0.6533 *0.0005*	0.520	-0.0402 *0.9059*	0.961	-0.8265 *0.0020*	0.438	-0.4819 *0.0612*	0.618	0.1993 *0.5948*	1.221	0.2116 *0.7345*	1.236
8.	WhiteVic	0.4253 *0.0097*	1.530	0.3905 *0.0346*	1.478	0.5014 *0.0836*	1.651	0.5903 *0.0254*	1.805	0.3088 *0.2000*	1.362	0.0438 *0.9000*	1.045	1.6872 *0.0014*	5.404
9.	AggE3	0.7503 *<.0001*	2.118	0.9719 *<.0001*	2.643	0.6549 *0.0148*	1.925	1.0059 *<.0001*	2.734	1.0113 *<.0001*	2.749	0.9394 *0.0005*	2.558		
10.	AggE4	0.9420 *0.0027*	2.565	1.7350 *<.0001*	5.669					1.4251 *0.0012*	4.158	1.6024 *0.0002*	4.965		
11.	AggE5							0.8063 *0.0061*	2.240					1.1412 *0.0506*	3.131
12.	AggE6	0.4455 *0.0027*	1.561	0.6753 *<.0001*	1.965					0.4342 *0.0335*	1.544				
13.	AggE8	2.0516 *<.0001*	7.780			1.9073 *0.0010*	6.735								
14.	AggE9	0.8104 *<.0001*	2.249	1.1270 *<.0001*	3.087	1.9073 *0.0020*	2.439	1.3156 *<.0001*	3.727	0.9174 *<.0001*	2.503	0.7285 *0.0104*	2.072	1.1944 *0.0433*	3.301
15.	AggE11			0.7358 *<.0001*	2.087					0.8468 *<.0001*	2.332				
16.	MitF4			-0.7472 *0.0214*	0.474			-1.2233 *0.0057*	0.294					-1.8037 *0.0465*	0.165
17.	MitF8	-0.7885 *0.0006*	0.455	-0.8127 *0.0062*	0.444										

[22] This model has one fewer case than the models in Tables 12 and 13 because it is not known whether one case went to a capital or non-capital trial. It did not result in a death sentence.

TABLE 15

Prosecutors' Decisions to Advance to a Capital Guilt Trial (CapTrial): North Carolina, 1990-2009
All Meaningful Controls Regression Models, Twenty- (Col. B), Ten- (Cols. C-D), and Five-Year (Cols. E-H) Periods
(*Variable definitions are provided in Table 22.*)

A	B		C		D		E		F		G		H	
	Full Study Period Twenty Years 1990-2009		**First Ten Years 1990-1999 (FiveYears = 1 or 2)**		**Second Ten Years 2000-2009 (FiveYears = 3 or 4)**		**First Five Years 1990-1994 (FiveYears=1)**		**Second Five Years 1995-1999 (FiveYears=2)**		**Third Five Years 2000-2004 (FiveYears=3)**		**Fourth Five Years 2005-2009 (FiveYears=4)**	
18. # capital trials	695		521		174		250		271		124		50	
19. n	1,561		1,041		520		491		550		349		171	
20. # capital trials weighted	723		521		202		250		271		142		60	
21. weighted n	5,770		3,161		2,609		1,498		1,663		1,413		1,196	
22. R^2	0.78		0.81		0.72		0.74		0.81		0.75		0.64	
	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio	Coefficient *p-value*	Odds Ratio
23. Intercept	-3.4175 *<.0001*		-2.4295 *<.0001*		-3.4456 *<.0001*		-1.8714 *<.0001*		-3.7178 *<.0001*		-5.3015 *<.0001*		-4.6543 *<.0001*	
24. **DefRM**	-0.7704 *0.0004*	0.463	-0.7889 *0.0075*	0.454	-0.4545 *0.2349*	0.635	-0.6603 *0.0394*	0.517	-0.7227 *0.0339*	0.485	-0.6058 *0.2649*	0.546	0.0741 *0.8906*	1.077
25. **WhiteVic**	0.4758 *0.0326*	1.609	0.3849 *0.1674*	1.469	0.3482 *0.3209*	1.417	0.4748 *0.1339*	1.608	0.3814 *0.2546*	1.464	-0.2392 *0.6022*	0.787	1.1662 *0.0284*	3.210
26. **AggE3**	0.7792 *0.0009*	2.180	1.2621 *<.0001*	3.533					0.7321 *0.0177*	2.079				
27. **AddCrime**	0.6813 *0.0035*	1.976												
28. **AggCirScale**							0.3662 *0.0005*	1.442						
29. **AggCirScale2**									0.7385 *0.0003*	2.093	0.5339 *0.0122*	1.706	1.1098 *0.0021*	3.034
30. **EvidType1**	1.2811 *0.0004*	3.601												
31. **EvidType2**	0.5200 *0.0075*	1.682							1.0887 *0.0004*	2.970				
32. **EvidType3**	1.2975 *0.0002*	3.660	1.0258 *0.0361*	2.789	1.2130 *0.0224*	3.363								
33. **EvidType4**											1.5445 *0.0001*	4.686		
34. **EvidType8**	0.6386 *0.0019*	1.886	1.0646 *<.0001*	2.900										
35. **EvidType9**							1.4493 *0.0005*	4.260						

A	B		C		D		E		F		G		H	
36. **EvidType10**	0.7424 *0.0002*	2.101	0.9582 *0.0002*	2.607	1.0138 *0.0016*	2.756								
37. **EvidType11**			1.0857 *<.0001*	2.962					0.8098 *0.0112*	2.248				
38. **FemVic**	0.8392 *<.0001*	2.315	0.9424 *0.0001*	2.566	1.1508 *0.0002*	3.161			1.6394 *<.0001*	5.152	1.6403 *<.0001*	5.157		
39. **HeadWound**	0.7482 *<.0001*	2.113	0.7609 *0.0016*	2.140					0.9710 *0.0025*	2.640				
40. **Indifferent**	0.6476 *0.0157*	1.911												
41. **Killer**			0.7783 *0.0031*	2.178			1.0418 *0.0020*	2.834						
42. **LowSES**					0.9484 *0.0036*	2.582					1.8288 *<.0001*	6.226		
43. **ManyWound**							1.1059 *0.0012*	3.022						
44. **PleasureKill**					1.2300 *0.0351*	3.421								
45. **PreArmed**	0.5706 *0.0066*	1.769			1.0800 *0.0015*	2.945			1.0732 *0.0010*	2.925	1.7748 *<.0001*	5.899		
46. **PriorThreat**	0.8185 *0.0004*	2.267							0.7872 *0.0263*	2.197				
47. **RapeSodomy**							1.0087 *0.0260*	2.742					1.8348 *0.0046*	6.264
48. **RobBurg**			0.6853 *0.0059*	1.984			0.5961 *0.0427*	1.815						
49. **SeverePain**	1.0614 *<.0001*	2.890			1.8982 *<.0001*	6.674	0.7230 *0.0078*	2.061			1.7896 *<.0001*	5.987		
50. **SilenceWitness**													1.6984 *0.0017*	5.465
51. **SpecialAggHi**							1.3353 *0.0013*	3.801						
52. **Suffering**			0.5447 *0.0155*	1.724										
53. **TenPlusStab**	0.9877 *0.0190*	2.685	1.0302 *0.0426*	2.802										
54. **TwoVic**	0.8596 *0.0042*	2.362	1.3770 *<.0001*	3.963	1.1123 *0.0066*	3.041								
55. **Vhome**			0.8112 *0.0013*	2.251					1.1098 *0.0005*	3.034	0.9402 *0.0066*	2.561		
56. **VStranger**	0.9451 *<.0001*	2.573	0.9555 *0.0006*	2.600	1.347 *0.0051*	3.110			0.9527 *0.0057*	2.593	1.4336 *0.0008*	4.194		
57. **DefenseType5**	-1.2576 *0.0001*	0.284	-1.4691 *0.0002*	0.230					-1.9360 *0.0006*	0.144				
58. **DefenseType14**	-1.6406 *<.0001*	0.194	-1.7221 *0.0013*	0.179					-2.8562 *0.0071*	0.057	-3.6484 *0.0108*	0.026		

	A	B		C		D		E		F		G		H	
59.	**DVHome**	-1.4151 *<.0001*	0.243			-1.7049 *0.0028*	0.182								
60.	**DRage**	-0.7602 *0.0034*	0.468	-0.9594 *0.0015*	0.383					-0.8761 *0.0533*	0.416				
61.	**MitType302**					-1.2209 *0.0046*	0.295							-2.7599 *<.0001*	0.063
62.	**NoLongPlan**	-0.0756 *0.0018*	0.927	-0.0985 *0.0003*	0.906	-0.1428 *0.0003*	0.867	-0.1086 *0.0016*	0.897			-0.1918 *<.0001*	0.825		
63.	**TookResp**	-2.7677 *<.0001*	0.063	-3.1282 *<.0001*	0.044	-2.0169 *<.0001*	0.133	-2.5154 *<.0001*	0.081	-3.6533 *<.0001*	0.026	-3.1852 *<.0001*	0.041		
64.	**YoungDef**							-1.4310 *0.0007*	0.239						

TABLE 16
Statewide Unadjusted Racial Disparities: North Carolina, 1990-1999
(FiveYears in (1 2))

	A	B **Racial Minority Defendant** (DefRM)	C **White Victim** (WhiteVic)	D **Minority Defendant/ White Victim** (RMWV)
1.	Combined Effect of Charging and Sentencing Decisions (Death1=1) n = 1042 (weighted analysis) Overall Rate: 7.74%	Yes: 5.88% (133/2262) No : 12.40% (112/903) Diff: -6.52 points Ratio: 0.47 (p < 0.0001)	Yes: 11.25% (165/1466) No : 4.71% (80/1699) Diff: 6.54 points Ratio: 2.39 (p < 0.0001)	Yes: 9.61% (62/645) No : 7.26% (183/2520) Diff: 2.35 points Ratio: 1.32 (p = 0.11)
	Charging Decisions			
2.	Prosecutors' Decisions To Seek Death at Any Point in the Charging (EverSeekDeath=1) n = 1031 (weighted analysis) Overall Rate: 56.77%	Yes: 53.67% (1201/2237) No : 64.62% (571/884) Diff: -10.95 points Ratio: 0.83 (p = 0.01)	Yes: 64.11% (922/1439) No : 50.49% (849/1683) Diff: 13.62 points Ratio: 1.27 (p < 0.01)	Yes: 63.66% (402/631) No : 55.02% (1370/2490) Diff: 8.64 points Ratio: 1.16 (p = 0.18)
3.	Prosecutors Decisions to Advance to a Capital Guilt Trial (CapTrial=1) n = 1041 (weighted analysis) Overall Rate: 16.48%	Yes: 13.17% (298/2262) No : 24.82% (223/899) Diff: -11.65 points Ratio: 0.53 (p < 0.0001)	Yes: 22.44% (328/1462) No : 11.36% (193/1699) Diff: 11.08 points Ratio: 1.98 (p < 0.0001)	Yes: 20.31% (131/645) No : 15.50% (390/2516) Diff: 4.80 points Ratio: 1.31 (p = 0.06)
	Sentencing Decisions			
4.	Death Sentence Imposed in a Penalty Trial (PTDeath=1) n = 521 (unweighted analysis) Overall Rate: 47.02%	Yes: 44.63% (133/298) No : 50.22% (112/223) Diff: -5.59 points Ratio: 0.89 (p = 0.21)	Yes: 50.30% (165/328) No : 41.45% (80/193) Diff: 8.85 points Ratio: 1.21 (p = 0.06)	Yes: 47.33% (62/131) No : 46.92% (183/390) Diff: 0.41 points Ratio: 1.01 (p = 1.00)

TABLE 17
Statewide Unadjusted Racial Disparities: North Carolina, 2000-2009
(FiveYears in (3 4))

	A	B **Racial Minority Defendant** (DefRM)	C **White Victim** (WhiteVic)	D **Minority Defendant/ White Victim** (RMWV)
1.	Combined Effect of Charging and Sentencing Decisions (Death1=1) n = 520 (weighted analysis) Overall Rate: 2.61%	Yes: 2.24% (42/1873) No : 3.53% (26/737) Diff: -1.29 points Ratio: 0.64 (p = 0.10)	Yes: 4.18% (45/1077) No : 1.50% (23/1532) Diff: 2.68 points Ratio: 2.78 (p < 0.001)	Yes: 4.66% (20/429) No : 2.20% (48/2181) Diff: 2.46 points Ratio: 2.12 (p = 0.01)
	Charging Decisions			
2.	Prosecutors' Decisions to Seek Death at Any Point in the Charging (EverSeekDeath=1) n = 518 (weighted analysis) Overall Rate: 65.81%	Yes: 69.09% (1288/1864) No : 57.51% (424/737) Diff: 11.57 points Ratio: 1.20 (p = 0.05)	Yes: 59.53% (641/1077) No : 70.25% (1070/1524) Diff: -10.72 points Ratio: 0.85 (p = 0.06)	Yes: 60.12% (258/429) No : 66.93% (1454/2172) Diff: -6.81 points Ratio: 0.90 (p = 0.31)
3.	Prosecutors' Decisions to Advance a to Capital Guilt Trial (CapTrial=1) n = 520 (weighted analysis) Overall Rate: 7.75%	Yes: 7.22% (135/1873) No : 9.08% (67/737) Diff: -1.86 points Ratio: 0.80 (p = 0.39)	Yes: 10.11% (109/1077) No : 6.09% (93/1532) Diff: 4.02 points Ratio: 1.66 (p = 0.03)	Yes: 10.50% (45/429) No : 7.21% (157/2181) Diff: 3.29 points Ratio: 1.46 (p = 0.11)
	Sentencing Decisions			
4.	Death Sentence Imposed in a Penalty Trial (PtDeath=1) n = 170 (unweighted analysis) Overall Rate: 40.00%	Yes: 35.90% (42/117) No : 49.06% (26/53) Diff: -13.16 points Ratio: 0.73 (p = 0.13)	Yes: 47.37% (45/95) No : 30.67% (23/75) Diff: 16.70 points Ratio: 1.54 (p = 0.03)	Yes: 44.44% (20/45) No : 38.40% (48/125) Diff: 6.04 points Ratio: 1.16 (p = 0.48)

TABLE 18
Statewide Unadjusted Racial Disparities: North Carolina, 1990-1994
(FiveYears = 1)

	A	B **Racial Minority Defendant** (DefRM)	C **White Victim** (WhiteVic)	D **Minority Defendant/ White Victim** (RMWV)
1.	Combined Effect of Charging and Sentencing Decisions (Death1=1) n = 492 (weighted analysis) Overall Rate: 7.79%	Yes: 4.91% (55/1120) No : 16.18% (62/383) Diff: -11.27 points Ratio: 0.30 (p < 0.0001)	Yes: 12.14% (86/709) No : 3.90% (31/794) Diff: 8.23 points Ratio: 3.11 (p < 0.0001)	Yes: 7.69% (28/364) No : 7.82% (89/1139) Diff: -0.12 points Ratio: 0.98 (p = 0.9501)
	Charging Decisions			
2.	Prosecutors' Decisions To Seek Death at Any Point in the Charging (EverSeekDeath=1) n = 485 (weighted analysis) Overall Rate: 47.80%	Yes: 43.35% (479/1104) No : 60.99% (227/373) Diff: -17.64 points Ratio: 0.71 (p = 0.0051)	Yes: 56.79% (395/695) No : 39.82% (311/782) Diff: 16.97 points Ratio: 1.43 (p = 0.0073)	Yes: 53.21% (189/355) No : 46.09% (517/1122) Diff: 7.11 points Ratio: 1.15 (p = 0.4023)
3.	Prosecutors' Decisions to Advance to a Capital Guilt Trial (CapTrial=1) n = 491 (weighted analysis) Overall Rate: 16.69%	Yes: 12.06% (135/1120) No : 30.39% (115/378) Diff: -18.33 points Ratio: 0.40 (p < 0.0001)	Yes: 24.01% (169/704) No : 10.20% (81/794) Diff: 13.81 points Ratio: 2.35 (p < 0.0001)	Yes: 18.13% (66/364) No : 16.23% (184/1134) Diff: 1.91 points Ratio: 1.12 (p = 0.5679)
	Sentencing Decisions			
4.	Death Sentence Imposed in a Penalty Trial (PTDeath=1) n = 250 (unweighted analysis) Overall Rate: 46.80%	Yes: 40.74% (55/135) No : 53.91% (62/115) Diff: -13.17 points Ratio: 0.76 (p = 0.0424)	Yes: 50.89% (86/169) No : 38.27% (31/81) Diff: 12.62 points Ratio: 1.33 (p = 0.0781)	Yes: 42.42% (28/66) No : 48.37% (89/184) Diff: -5.95 points Ratio: 0.88 (p = 0.4727)

TABLE 19
Statewide Unadjusted Racial Disparities: North Carolina, 1995-1999
(FiveYears = 2)

	A	B **Racial Minority Defendant** (DefRM)	C **White Victim** (WhiteVic)	D **Minority Defendant/ White Victim** (RMWV)
1	Combined Effect of Charging and Sentencing Decisions (Death1=1) n = 550 (weighted) Overall Rate: 7.70%	Yes: 6.83% (78/1143) No : 9.61% (50/520) Diff: -2.79 points Ratio: 0.71 (p = 0.08)	Yes: 10.42% (79/758) No : 5.41% (49/905) Diff: 5.01 points Ratio: 1.93 (p < 0.001)	Yes: 12.09% (34/281) No : 6.80% (94/1382) Diff: 5.29 points Ratio: 1.78 (p < 0.01)
	Charging Decisions			
2.	Prosecutors' Decisions to seek Death at Any Point in the Charging (EverSeekDeath=1) n = 546 (weighted analysis) Overall Rate: 64.82%	Yes: 63.72% (722/1133) No : 67.27% (344/511) Diff: -3.54 points Ratio: 0.95 (p = 0.53)	Yes: 70.97% (528/743) No : 59.75% (538/901) Diff: 11.21 points Ratio: 1.19 (p = 0.04)	Yes: 77.12% (213/276) No : 62.34% (853/1368) Diff: 14.77 points Ratio: 1.24 (p = 0.03)
3.	Prosecutors' Decisions To Advance to a Capital Guilt Trial (CapTrial=1) n = 550 (weighted) Overall Rate: 16.30%	Yes: 14.26% (163/1143) No : 20.76% (108/520) Diff: -6.50 points Ratio: 0.69 (p = 0.01)	Yes: 20.98% (159/758) No : 12.38% (112/905) Diff: 8.60 points Ratio: 1.70 (p < 0.001)	Yes: 23.12% (65/281) No : 14.91% (206/1382) Diff: 8.21 points Ratio: 1.55 (p < 0.01)
	Sentencing Decisions			
4.	Death Sentence Imposed In a Penalty Trial (PTDeath=1) n = 271 (unweighted) Overall Rate: 47.23%	Yes: 47.85% (78/163) No : 46.30% (50/108) Diff: 1.56 points Ratio: 1.03 (p = 0.80)	Yes: 49.69% (79/159) No : 43.75% (49/112) Diff: 5.94 points Ratio: 1.14 (p = 0.39)	Yes: 52.31% (34/65) No : 45.63% (94/206) Diff: 6.68 points Ratio: 1.15 (p = 0.39)

TABLE 20
Statewide Unadjusted Racial Disparities: North Carolina, 2000-2004
(FiveYears = 3)

	A	B **Racial Minority Defendant** (DefRM)	C **White Victim** (WhiteVic)	D **Minority Defendant / White Victim** (RMWV)
1.	Combined Effect of Charging and Sentencing Decisions	Yes: 3.13% (32/1022) No : 4.35% (17/391)	Yes: 4.98% (30/602) No : 2.34% (19/811)	Yes: 4.83% (13/269) No : 3.15% (36/1144)
	(Death1=1) n = 349 (weighted analysis) Overall Rate: 3.47%	Diff: -1.22 points Ratio: 0.72 (p = 0.30)	Diff: 2.64 points Ratio: 2.13 (p = 0.01)	Diff: 1.68 points Ratio: 1.53 (p = 0.23)
	Charging Decisions			
2.	Prosecutors' Decisions to Seek Death at Any Point in the Charging	Yes: 70.66% (716/1014) No : 59.65% (233/391)	Yes: 63.00% (379/602) No : 71.04% (570/803)	Yes: 64.05% (173/269) No : 68.44% (777/1135)
	(EverSeekDeath=1) n = 347 (weighted analysis) Overall Rate: 67.60%	Diff: 11.01 points Ratio: 1.18 (p = 0.11)	Diff: -8.05 points Ratio: 0.89 (p = 0.16)	Diff: -4.39 points Ratio: 0.94 (p = 0.56)
3.	Prosecutors' Decisions To Advance to a Capital Guilt Trial	Yes: 10.20% (104/1022) No : 9.60% (38/391)	Yes: 10.89% (66/602) No : 9.40% (76/811)	Yes: 11.14% (30/269) No : 9.78% (112/1144)
	(CapTrial=1) n = 349 (weighted analysis) Overall Rate: 10.04%	Diff: 0.60 points Ratio: 1.06 (p = 0.80)	Diff: 1.49 points Ratio: 1.16 (p = 0.51)	Diff: 1.36 points Ratio: 1.14 (p = 0.63)
	Sentencing Decisions			
4.	Death Sentence Imposed in a Penalty Trial	Yes: 37.21% (32/86) No : 48.57% (17/35)	Yes: 47.62% (30/63) No : 32.76% (19/58)	Yes: 43.33% (13/30) No : 39.56% (36/91)
	(PTDeath=1) n = 121 (unweighted analysis) Overall Rate: 40.50%	Diff: -11.36 points Ratio: 0.77 (p = 0.31)	Diff: 14.86 points Ratio: 1.45 (p = 0.14)	Diff: 3.77 points Ratio: 1.10 (p = 0.83)

TABLE 21
Statewide Unadjusted Racial Disparities: North Carolina, 2005-2009
(FiveYears = 4)

	A	B **Racial Minority Defendant** (DefRM)	C **White Victim** (WhiteVic)	D **Minority Defendant/ White Victim** (RMWV)
1.	Combined Effect of Charging and Sentencing Decisions	Yes: 1.18% (10/851) No : 2.60% (9/346)	Yes: 3.16% (15/475) No : 0.55% (4/721)	Yes: 4.39% (7/159) No : 1.16% (12/1037)
	(Death1=1) n = 171 (weighted analysis) Overall Rate: 1.59%	Diff: -1.43 points Ratio: 0.45 (p = 0.10)	Diff: 2.60 points Ratio: 5.69 (p < 0.01)	Diff: 3.24 points Ratio: 3.80 (p < 0.01)
	Charging Decisions			
2.	Prosecutors' Decisions to Seek Death at Any Point in the Charging	Yes: 67.21% (572/851) No : 55.10% (190/346)	Yes: 55.13% (262/475) No : 69.37% (500/721)	Yes: 53.48% (85/159) No : 65.28% (677/1037)
	(EverSeekDeath=1) n = 171 (weighted analysis) Overall Rate: 63.71%	Diff: 12.11 points Ratio: 1.22 (p = 0.17)	Diff: -14.23 points Ratio: 0.79 (p = 0.09)	Diff: -11.80 points Ratio: 0.82 (p = 0.28)
3.	Prosecutors' Decisions To Advance to a Capital Guilt Trial	Yes: 3.64% (31/851) No : 8.49% (29/346)	Yes: 9.12% (43/475) No : 2.36% (17/721)	Yes: 9.41% (15/159) No : 4.37% (45/1037)
	(CapTrial=1) n = 171 (weighted analysis) Overall Rate: 5.04%	Diff: -4.84 points Ratio: 0.43 (p = 0.08)	Diff: 6.76 points Ratio: 3.86 (p < 0.01)	Diff: 5.04 points Ratio: 2.15 (p = 0.07)
	Sentencing Decisions			
4.	Death Sentence Imposed in a Penalty Trial	Yes: 32.26% (10/31) No : 50.00% (9/18)	Yes: 46.88% (15/32) No : 23.53% (4/17)	Yes: 46.67% (7/15) No : 35.29% (12/34)
	(PTDeath=1) n = 49 (unweighted analysis) Overall Rate: 38.78%	Diff: -17.74 points Ratio: 0.65 (p = 0.24)	Diff: 23.35 points Ratio: 1.99 (p = 0.13)	Diff: 11.37 points Ratio: 1.32 (p = 0.53)

TABLE 22
Variable Definitions

	Variable Name	Explanation
1.	AggE3	Defendant previously convicted of a violent felony. 15A-2000(e)(3)
2.	AggE4	Murder committed to prevent arrest or to effect escape. 15A-2000(e)(4)
3.	AggE5	Felony aggravator. 15A-2000(e)(5)
4.	AggE6	Murder committed for pecuniary gain. 15A-2000(e)(6)
5.	AggE8	Murder committed against certain lines of public officers in the line of their duties. 15A-2000(e)(8)
6.	AggE9	Murder was especially heinous, atrocious, or cruel. 15A-2000(e)(9)
7.	AggE11	Murder was part of defendant's course of violent conduct toward another person or persons. 15A-2000(e)(11)
8.	AddCrime	Defendant charged with at least one additional crime.
9.	AggCirScale	Five-level scale based on number of aggravating circumstances in the case.
10.	AggCirScale2	Three-level scale based on number of aggravating circumstances in the case.
11.	AssaultGun	D shot V with an assault rifle.
12.	DefenseType5	Defendant played a less substantial role than competitor.
13.	DefenseType14	Insanity
14.	DefenseType15	Lack of mens rea because of mental illness or intoxication.
15.	DefRM	Defendant is a racial minority.
16.	Disrobe	Victim or a nondecedent victim was forced to disrobe or was disrobed by perpetrator (in whole or in part)
17.	DRage	Defendant acted in rage.
18.	DselfD	Defendant acted in perceived self-defense.
19.	DVHome	Homicide occurred in residence of V and D or co-D
20.	EvidType1	Pretrial identification of the defendant occurred
21.	EvidType2	Defendant identified by someone who knew him or her.
22.	EvidType3	Defendant identified by a police officer.
23.	EvidType4	Defendant identified by two or more witnesses.
24.	EvidType8	Weapon found linking defendant to murder.
25.	EvidType9	Scientific evidence linking defendant to murder (e.g. DNA, or fingerprint evidence).
26.	EvidType10	Physical evidence specifically linking defendant to murder.
27.	EvidType11	Testimony of primary witness was corroborated.
28.	Execution	Execution-style homicide (homicide against a subdued or passive victim)
29.	FemVic	At least one victim was female.
30.	Firearm	Firearm was used in the killing.
31.	FiveYears	Groups the cases in five year intervals based on the date of sentencing.
32.	GratuitousFelony	Case involved a contemporaneous felony and homicide that was unnecessary to complete the crime to the point of being gratuitous
33.	HeadWound	Victim received wounds to the head.
34.	Indifferent	Defendant motivated at least partly by complete indifference to the value of life (e.g. defendant acted without anger or frustration or other recognizable human emotion).
35.	Killer	Defendant was actual killer (if there were co-perpetrators).
36.	LowSES	The variable is a rough approximation of defendant socioeconomic status. It is made by combining education level data and appointment of counsel data.
37.	ManyWound	Victim suffered many wounds.
38.	MinorAcc2	Combines the coding in MitF4 ("Defendant was an accomplice in or accessory to a murder committed by another person and the defendant's participation was relatively minor"), MinorAcc ("Defendant was an accomplice to the crime committed by another and defendant's participation was relatively minor"), and DefenseType5 ("Defendant played a less substantial role than competitor").

	Variable Name	Explanation
39.	MitType302	Defendant showed remorse for the crime, or confessed to the crime, or otherwise took responsibility for the crime.
40.	NoLongPlan	Homicide was not planned for more than five minutes.
41.	PleasureKill	File at least suggests that defendant expressed pleasure with the homicide.
42.	PreArmed	Defendant or co-perpetrator came to the scene of the crime with the weapon ultimately used to kill the victim.
43.	PriorThreat	File at least suggests that defendant threatened victim in victim's presence to kill victim's family members or others who were close to victim, or announced in advance to a third person an intention to kill the victim.
44.	ProvokeQ	Other disputes and fights where it is unknown who provoked the altercations.
45.	PTDNDX_Dth1	A race-purged index variable constructed using the variables in the 20-year model presented in Table 13.
46.	RapeSodomy	Case involved sexual assault or attempted sexual assault.
47.	RobBurg	Case involved robbery or burglary.
48.	SeverePain	Victim suffered severe physical pain.
49.	SilenceWitness	Defendant motivated at least partly by the desire to silence a witness.
50.	SpecialAgg2	Offense reflects at least one of a list of aggravating feature that can be specifically attributed to the defendant.
51.	SpecialAggHi	Offense reflects at least four of a list of aggravating feature that can be specifically attributed to the defendant.
52.	Suffering	Victim suffered severe physical suffering immediately prior to death.
53.	TenPlusStab	Deceased victim suffered from ten or more stab wounds or shots, except when murder weapon was penknife or other small cutting instrument.
54.	TookResp	Defendant took responsibility for the offense (other than confession to capital murder).
55.	Trauma	Defendant suffered physical or psychological trauma, e.g., brain injuries or observing a parent be killed.
56.	TwoVic	Case involved more than one victim.
57.	Vhome	Homicide occurred in residence of V or V's close friend or relative.
58.	VStranger	Defendant did not know victim before the murder.
59.	WhiteVic	Case involved at least one white victim.
60.	YoungDef	Defendant is less than 20 years old.

Exhibit E

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

COUNTY OF PITT — SUPERIOR COURT DIVISION
FILE NO. 84-CRS-31
84-CRS-32

STATE OF NORTH CAROLINA,

VS.

HARVEY LEE GREEN, JR.,
DEFENDANT.

T R A N S C R I P T

TRANSCRIPT OF MOTIONS AND HEARINGS TAKEN IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION, GREENVILLE, PITT COUNTY, NORTH CAROLINA, AT THE MAY 8, 1989, AND JULY 24, 1989, RESPECTFULLY, CRIMINAL SESSIONS, BEFORE THE HONORABLE THOMAS S. WATTS, JUDGE PRESIDING.

APPEARANCES:

FOR THE STATE:

MS. JOAN HERRE BYERS
SPECIAL DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
P. O. BOX 629
RALEIGH, N.C. 27602

FOR THE DEFENDANT:

MR. MALCOLM RAY HUNTER, JR.
APPELLATE DEFENDER
P. O. BOX 1070
RALEIGH, N.C. 27602

FOR THE DEFENDANT:

MR. ROBERT S. MAHLER
N.C. DEATH PENALTY RESOURCE CT.
P. O. BOX 1070
RALEIGH, N.C. 27602

FOR THE DEFENDANT:

MR. ROGER W. SMITH
209 FAYETTEVILLE ST. MALL
P. O. BOX 1151
RALEIGH, N.C. 27601

MARK W. GARVIN
OFFICIAL REPORTER
ROUTE 1, BOX 704
SELMA, NC 27576
(919) 965-6755

HAIGWOOD HAD EVER MADE ANY STATEMENT TO YOU ABOUT HIS PHILOSOPHY ABOUT THE USE OF PEREMPTORIES TO REMOVE BLACKS AND YOU SAID NOT IN SO MANY WORDS. HAS HE EVER MADE ANY STATEMENT TO YOU ABOUT HIS PHILOSOPHY ABOUT EXCUSING BLACKS?

A. HE'S NEVER--AND I WANT TO MAKE ONE THING VERY CLEAR--HE'S NEVER, AT ANYTIME, INDICATED TO ME ANY RACIALLY DISCRIMINATORY MOTIVES ABOUT ANYTHING.

I THINK THAT AS I PRACTICED, HE WAS SOMEBODY THAT I HAD RESPECT FOR AND WANTED TO OBSERVE AND CERTAINLY, COMMENTS THAT HE MADE ABOUT HOW TO TRY CASES, WHAT HIS INTERESTS WERE IN TRYING CASES, AND IN SELECTING JURIES THAT WERE SYMPATHETIC TO THE KIND OF CASE YOU HAD. THAT'S ALL I'M TALKING ABOUT.

I DON'T BELIEVE FOR A MINUTE THAT TOM IS RACIALLY DISCRIMINATORY.

MR. SMITH: THANK YOU. COME ON DOWN.

THE COURT: THANK YOU, MR. MILLER. UNLESS THERE IS SOME OBJECTION, WE WILL EXCUSE MR. MILLER.

HOWARD CUMMING, BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS DURING DIRECT EXAMINATION BY MR. SMITH:

Q. WHAT IS YOUR NAME?

A. HOWARD JOHNSON CUMMINGS.

Q. AND WHAT DO YOU DO FOR A LIVING?

A. I'M AN ATTORNEY. I PRACTICE LAW.

Q. AND DO YOU PRACTICE IN GREENVILLE, PITT COUNTY?

A. MY OFFICE IS OVER IN FARMVILLE. IT'S LEWIS, LEWIS, BURTI AND CUMMINGS.

Q. HOW LONG HAVE YOU PRACTICED LAW IN PITT COUNTY?

A. SINCE NOVEMBER 1ST OF 1980.

Q. WHEN WERE YOU ADMITTED TO THE BAR?

A. IN THE SUMMER OF 1980.

Q. HAVE YOU DONE A FAIR AMOUNT OF CRIMINAL WORK SINCE YOU'VE BEEN PRACTICING LAW?

A. YES, SIR, FROM NOVEMBER 1 OF 1980 THROUGH--I WAS GOING TO SAY ALL FOOLS DAY, BUT I WILL SAY APRIL 1 OF 1983, I WAS AN ASSISTANT DISTRICT ATTORNEY AND SO OBVIOUSLY, I PRACTICED A LOT OF CRIMINAL LAW DURING THAT TIME.

Q. DURING THAT PERIOD OF TIME, WERE YOU WORKING FOR MR. HAIGWOOD OR WERE YOU WORKING FOR MR. BLOOM AT THAT TIME?

A. I WORKED FOR MR. BLOOM UNTIL MR. HAIGWOOD TOOK OFFICE, I BELIEVE, IN JANUARY OF '83. I'M PRETTY SURE THAT'S RIGHT.

Q. DID YOU, DURING THAT TIME THAT YOU WERE AN ASSISTANT DISTRICT ATTORNEY TRY ANY CRIMINAL--JURY CRIMINAL CASES WITH MR. HAIGWOOD--WITH HIM OR YOU SAT AT THE TABLE WITH HIM?

A. I TRIED SOME.

THE COURT: FOR PURPOSES OF THE RECORD, LET ME CLARIFY. YOU'RE TALKING ABOUT ELI BLOOM WHO WAS THE FORMER SOLICITOR OF THE 3RD PROSECUTORIAL DISTRICT, IS THAT CORRECT?

A. YES, SIR.

THE COURT: AND YOU WERE ALSO THERE WHEN MR. HAIGWOOD AS AN ASSISTANT DISTRICT ATTORNEY?

A. YES, SIR.

THE COURT: HE BECAME THE DISTRICT ATTORNEY IN JANUARY 1 OF '83?

A. THAT'S CORRECT.

Q. AND DURING THAT TIME YOU DID SIT AT COUNSEL TABLE AND TRY TO SOME JURY TRIALS WITH MR. HAIGWOOD?

A. I DID.

Q. DID YOU OBSERVE HIM TRY JURY TRIALS IN WHICH YOU DID NOT PARTICIPATE ACTIVELY WHILE YOU WERE AN ASSISTANT D.A.?

A. I WOULD SAY I WAS MORE OFTEN NOT ACTIVE AND JUST OBSERVING.

Q. AFTER YOU LEFT THE D.A.'S OFFICE, DID YOU CONTINUE TO DO CRIMINAL WORK AND TRY CRIMINAL CASES?

A. YES, SIR.

Q. AND IN THE COURSE OF THAT, DID YOU TRY CASES AGAINST MR. HAIGWOOD WHERE HE WAS THE PROSECUTOR AND YOU WERE DEFENDING THE DEFENDANT?

A. WE HAVE TRIED SEVERAL TOGETHER. AS FAR AS A JURY HAVING DECIDED CASES, I DON'T THINK THERE'S BEEN ONE OTHER THAN THE GREEN CASE. I THINK THAT WE HAVE PICKED A COUPLE OF OTHER JURIES BUT AT WHATEVER STAGE DURING THE TRIAL, THEY JUST NEVER WENT TO THE JURY TO DECIDE IT.

Q. WHILE YOU'VE BEEN IN PRIVATE PRACTICE HAVE YOU

OBSERVED MR. HAIGWOOD--HAVE YOU OBSERVED MR. HAIGWOOD PICKING JURIES WHEN YOU WEREN'T AN ASSISTANT DISTRICT ATTORNEY OR IT WASN'T YOUR CASE, COME INTO COURT AND WATCH HIM PICK A JURY AND TRIAL IN WHICH YOU WEREN'T INVOLVED WHEN YOU WERE A D.A.?

A. BITS AND PIECES OF THEM. I THINK THERE MIGHT HAVE BEEN SOME, I DON'T REMEMBER ANY ONE SPECIFICALLY, BUT I'VE SIT IN COURT FROM TIME TO TIME BECAUSE CERTAINLY I HAVE A LOT LESS EXPERIENCE THAN A LOT OF LAWYERS DO. SO I TRY TO LEARN.

Q. WHEN YOU APPROACHED THE TRIAL OF STATE VERSUS--WERE YOU--DID YOU REPRESENT--WERE YOU ONE OF THE ATTORNEYS WHO REPRESENTED THE DEFENDANT, MR. GREEN, IN THIS CASE?

A. THAT'S CORRECT. JEFF MILLER WAS INITIALLY APPOINTED AND SINCE IT WAS A CAPITAL CASE, I WAS APPOINTED TO ASSIST HIM.

Q. AND AS YOU AND JEFF APPROACHED--PREPARED FOR THE TRIAL OF THIS CASE, DID YOU HAVE AN OPINION IN YOUR MIND ABOUT WHETHER OR NOT YOU ANTICIPATED THAT DURING THE COURSE OF JURY SELECTION, MR. HAIGWOOD MIGHT TEND TO USE PEREMPTORY CHALLENGES TO REMOVE BLACK PROSPECTIVE JURORS BECAUSE THEY WERE BLACK?

MS. BYERS: OBJECTION.

THE COURT: OVERRULED.

A. I DID HAVE AN OPINION.

MS. BYERS: OBJECTION.

Q. AND WHAT IS THAT OBSERVATION?

THE COURT: OVERRULED.

A. THAT HE WOULD.

MR. SMITH: THAT'S ALL THE QUESTIONS I HAVE.

CROSS EXAMINATION BY MS. BYERS:

Q. MR. CUMMINGS, DO YOU--DID YOU SELECT JURORS ON THE BASIS OF RACE?

A. DID I SELECT--I'M SORRY...

Q. DID YOU SELECT JURIES ON THE BASIS OF RACE?

A. DID I?

Q. YES, DID YOU?

A. I PROBABLY HAVE USED THAT AS A FACTOR.

Q. SO THEN YOU'RE TELLING THIS COURT THAT YOU USE RACE AS ONE OF THE BASIS FOR SELECTING JURIES?

A. ONE OF THE BASIS, YES.

Q. NOW, DO YOU DO THAT BECAUSE YOU ARE PREJUDICE AGAINST ONE RACE OR ANOTHER OR FOR A CERTAIN TACTICAL ADVANTAGE?

A. I USE IT FOR A TACTICAL ADVANTAGE.

Q. DO YOU PERCEIVE THAT THERE ARE SOME QUALITIES MORE OFTEN FOUND IN BLACKS OR MORE OFTEN FOUND IN WHITES THAT ARE TACTICALLY BENEFICIAL TO YOUR CLIENT, BE IT THE STATE, AS YOU ONCE WERE, OR THE DEFENSE AS YOU ARE NOW?

A. IT APPEARS THAT I DO SUCH--I DO USE THAT TACTIC.

Q. SO YOU'RE SAYING THAT YOU USED IT FOR TACTICAL ADVANTAGE NOT BECAUSE YOU'RE PREJUDICE AGAINST BLACKS AS

SUCH, AND FEEL THAT THEY ARE UNABLE TO BE FIT JURORS OR AGAINST WHITE AS SUCH BECAUSE YOU'RE UNABLE TO BELIEVE THEY ARE FIT JURORS, IS THAT A FAIR STATEMENT?

A. I WAS TRYING TO FOLLOW WHAT YOU SAID, BUT I'M NOT SURE.

Q. SO YOU'RE SAYING THAT THE FACTORS WHICH YOU BELIEVE FALL DISPROPORTIONALLY WITHIN THE BLACK POPULATION OR WHITE POPULATION WERE REALLY WHAT YOU'RE GOING FOR AS OPPOSED TO SAYING THAT YOU'RE AGAINST BLACKS OR YOU'RE AGAINST WHITES, YOU'RE GOING FOR SOME OTHER FACTORS?

A. I'M TRYING TO FOLLOW YOUR QUESTION. I'M SORRY.

Q. DO YOU TAKE BLACKS OFF THE JURY BECAUSE THEY'RE BLACK?

A. NO.

Q. DO YOU JUST TAKE WHITES OFF THE JURY BECAUSE THEY'RE WHITE?

A. PROBABLY NOT.

Q. THEN WHAT IS THE REASON UNDERLYING YOUR ONE RACE OR ANOTHER OFF THE JURY OR TAKING RACE INTO CONSIDERATION?

A. WELL, IT WOULD DEPEND ON THE PARTICULAR CASE.

Q. WELL, LET'S TAKE THE GREEN CASE. YOU TOOK WHITES OFF THE JURY THERE. WERE YOU TAKING THEM OFF BECAUSE THEY WERE WHITE AND THAT'S ALL, OR WERE YOU TAKING THEM OFF BECAUSE THEY WERE PERCEIVED TO BE SYMPATHETIC TO THE VICTIMS?

A. I CAN'T RECALL ANY SPECIFIC JUROR, ALTHOUGH I DO

KNOW ONE INDIVIDUAL THAT I CAN RECALL.

Q. AND WHICH INDIVIDUAL IS THAT?

A. THAT'S MR. HOWARD.

Q. AND WHY DID YOU TAKE HIM OFF THE JURY? WAS IT SIMPLY BECAUSE HE WAS WHITE?

A. NO, MA'AM.

Q. WHY DID YOU TAKE HIM OFF?

A. BECAUSE I WAS FAMILIAR WITH HIS SOCIOECONOMIC BACKGROUND. I WAS SOMEWHAT FAMILIAR WITH...

Q. WHAT'S HIS SOCIOECONOMIC BACKGROUND?

A. UPPER CLASS.

Q. WOULD YOU SAY THAT THAT TENDS TO BE SOMETHING THAT FALLS DISPROPORTIONALLY WITHIN THE WHITE RACE AS OPPOSED TO THE BLACK RACE IN YOUR EXPERIENCE IN PITT COUNTY?

A. SURE.

Q. AND THAT'S PERCEIVED TO BE A PROSECUTOR'S--AN ADVANTAGE FOR A PROSECUTOR, ISN'T IT? SOMEONE WHO'S GOT A STAKE IN SOCIETY, LAW AND ORDER?

A. I HAVE TO SAY THAT'S ONE FACTOR THAT I USED.

Q. WHAT OTHER FACTORS DID YOU USE IN TAKING MR. HOWARD OFF THE JURY?

A. I CAN'T RECALL ANYTHING SPECIFIC, OBVIOUSLY. I THINK THAT I PERCEIVED THAT WITH HIS BACKGROUND, AND AGAIN, IT'S JUST AN OPINION, AN ASSUMPTION THAT ATTORNEYS HAVE WHEN THEY PICK JURORS, THAT HE WOULD BE, PERHAPS, A LITTLE MORE

INCLINED TO--I DON'T RECALL ANYTHING FURTHER.

Q. WELL, HE SEEMED ENTHUSIASTIC ABOUT THE APPROPRIATENESS OF THE DEATH PENALTY, DID HE NOT?

A. I DON'T RECALL THAT HE DID OR NOT. I WOULD SAY FROM WHAT I KNOW ABOUT HIS BACKGROUND, I WOULD SAY I WOULD HAVE EXPECTED HIM TO HAVE BEEN MORE ENTHUSIASTIC THAN SOMEONE WHO WAS, PERHAPS, NOT OF HIS SOCIOECONOMIC BACKGROUND.

Q. WELL, YOU TOOK THAT INTO CONSIDERATION IN TAKING HIM OFF THE JURY, DIDN'T YOU?

A. WHAT DO YOU MEAN THAT?

Q. WELL, YOU DIDN'T WANT SOMEONE WHO WAS STRONGLY IN FAVOR OF THE DEATH PENALTY ON YOUR JURY, DID YOU?

A. I WOULDN'T THINK THAT I WOULD HAVE.

THE COURT: WHAT WAS YOUR ANSWER, MR. CUMMING.

A. I WOULD NOT THINK THAT I WOULD WANT SOMEONE THAT WAS STRONGLY IN FAVOR OF THE DEATH PENALTY SITTING ON THE JURY. EVERYONE THAT I GOT WAS IN FAVOR OF THE DEATH PENALTY.

Q. SO OF THEM MORE STRONG...

A. SO I HAD TO USE WHATEVER I COULD ABOUT WHETHER I KNEW SOMEONE PERSONALLY OR WHETHER I KNEW WHERE THEY LIVED OR WHO THEIR BROTHER WAS OR WHO THEIR DAUGHTER WAS, ANYTHING ABOUT THEM, IF IN MY MIND I HAD OPINION THAT THEY MIGHT BE THE SLIGHTEST BIT LESS LIKELY, THEN THAT'S WHAT I HAD TO USE.

Q. AND THAT WAS AN IMPORTANT CONSIDERATION TO YOU, WASN'T IT, BECAUSE YOU WANTED--A WIN FOR YOU IN THIS CASE WAS

TO GET LIFE INSTEAD OF DEATH, WASN'T IT?

MR. SMITH: OBJECTION ABOUT THAT, YOUR HONOR.

MS. BYERS: YOUR HONOR, THEY PLEAD HIM GUILTY.

THE COURT: AT THE TIME OF THE JURY SELECTION THAT WAS NOT DONE. I'M GOING TO SUSTAIN THE OBJECTION.

Q. THAT WAS YOUR ULTIMATE CONSIDERATION IN SELECTING THE JURY, WASN'T IT, MR. CUMMINGS.

A. WHAT DO YOU MEAN BY THAT?

Q. TRYING TO SELECT A JURY THAT WOULD NOT RETURN A DEATH VERDICT?

MR. SMITH: OBJECTION.

THE COURT: OVERRULED.

A. NOT WHEN WE SELECTED THE JURY.

Q. THAT WAS AN IMPORTANT CONSIDERATION IN YOUR JURY SELECTION?

A. WELL, IT'S SORT OF A TWO-PHASED TRIAL; SOMETHING WE HAD TO KEEP IN MIND.

Q. LIKEWISE, YOU DIDN'T WANT PEOPLE ON THE JURY WHO KNEW THE VICTIMS IN THIS CASE, DID YOU?

A. THAT'S NOT TRUE.

Q. DIDN'T YOU TAKE TWO PEOPLE OFF THAT HAD ASSOCIATIONS WITH THE VICTIM?

A. I DON'T RECALL.

Q. DID YOU NOT CHALLENGE FOR CAUSE TWO PERSONS WHO HAD SOME RELATIONSHIP WITH THE VICTIM, SHEILA BLAND?

A. I DON'T RECALL. IT'S BEEN FIVE YEARS AND FOUR OR FIVE WEEKS.

Q. YOU DIDN'T REVIEW THE TESTIMONY IN PREPARATION FOR THIS HEARING, DID YOU, SIR?

A. I HAVE NEVER SEEN THE TRANSCRIPT.

Q. YOU PLEAD YOUR CLIENT GUILTY, DIDN'T YOU?

A. AT A POINT IN THE TRIAL, WE DID.

MS. BYERS: NO FURTHER QUESTIONS.

THE COURT: THANK YOU, MR. CUMMINGS, YOU MAY STEP DOWN.

(THE WITNESS WAS EXCUSED.)

MR. SMITH: YOUR HONOR, THE ONLY THING WE INTEND TO DO AT THIS POINT IS TO MOVE INTO EVIDENCE H-2 AND H-3, AND THEREAFTER, WE DON'T HAVE ANY MORE EVIDENCE TO OFFER.

I DON'T KNOW HOW THE COURT WANTS TO PROCEED.

THE COURT: THE TIME NOW IS TEN AFTER FIVE. WE WILL TAKE A RECESS UNTIL 9:30 TOMORROW MORNING.

(THE COURT RECESSED AT 5:10 JULY 24, 1989.)

(THE COURT IS CALLED TO ORDER AT 9:30 JULY 25, 1989.)

THE COURT: GOOD MORNING, LADIES AND GENTLEMEN. FOR THE RECORD, I TOOK THE COURT'S EXHIBIT NUMBER 1, WHICH WAS THE TRANSCRIPT OF THE JULY 24, 1987, PROCEEDING--I TOOK IT WITH ME AND I BROUGHT IT BACK THIS MORNING, MADAM CLERK, AND I READ IT, AS THE OLD SAYING GOES, FROM COVER TO COVER TO REFRESH MY RECOLLECTION.

NORTH CAROLINA

MITCHELL COUNTY

CERTIFICATE

I, MARK W. GARVIN, OFFICIAL REPORTER FOR THE STATE OF NORTH CAROLINA, DO HEREBY CERTIFY THAT THE ABOVE-ENTITLED MATTER CAME ON FOR HEARING; AND THAT THE FOREGOING PAGES CONSTITUTE A TRUE AND ACCURATE TRANSCRIPTION OF THE PROCEEDINGS.

IN WITNESS WHEREOF, I HAVE HEREUNTO AFFIXED MY HAND THIS 20TH DAY OF OCTOBER, 1989.

MARK W. GARVIN

MY COMMISSION EXPIRES: FEBRUARY 11, 1990.

Exhibit F

NORTH CAROLINA

WAKE COUNTY

AFFIDAVIT OF KARL E. KNUDSEN

NOW COMES KARL E. KNUDSEN, being first duly sworn and says:

1. I am a citizen and resident of Wake County, North Carolina; am over 18 years of age; and am under no disability.

2. I am a licensed attorney in the State of North Carolina and have been continuously licensed since 1978. I am also a Board Certified Specialist in State Criminal Law.

3. Since 1987, I have been engaged in the private practice of law with my office in Raleigh, Wake County, North Carolina. Prior to 1987, I served as an Assistant District Attorney for Wake County for two stints, 1978-1982 and 1983-1986.

4. As an Assistant District Attorney I prosecuted all types of cases, from traffic offenses to capital murder.

5. Based upon my experience in Wake County, I learned that the conventional wisdom in capital cases was to not permit black jurors to serve. Some Assistant District Attorneys believed prosecutors should not leave any black venire-member on a capital jury, especially if the defendant was black. I recall specific discussions about this that occurred with other Assistant District Attorneys. While there was never any official office policy about this, I recall discussions about the problem of leaving a black juror or jurors on capital juries which then caused the jury to hang and thus the defendant received a life sentence.

6. In my practice, I could usually get all or almost all of the black jurors struck for cause by asking them certain questions and leading them to a cause challenge.

7. I distinctly recall two senior prosecutors telling me that they would never under any circumstance keep a black juror on a capital jury unless they had to.

8. In a rape case that I prosecuted, I passed one black juror who was then seated. This juror caused the jury to hang 11 (guilty) to 1 (not guilty). After this, I recall other assistant prosecutors telling me I should have excused the black juror.

9. As a defense attorney, I believe the Wake County prosecutors use race as a basis for striking black jurors. In the case of State v. Durron Ray, on August 28, 1997, my co-counsel, Stacy Miller and I filed a Motion to Prohibit District Attorney From Peremptorily Challenging Blacks in an effort to prevent the State from striking black jurors.

This the 22 day of August, 2012.

Karl E. Knudsen

Sworn to and subscribed before me
this the 22 day of August, 2012.

Notary Public

My commission expires: 11/9/2012

NICOLA A. WILLIS
NOTARY PUBLIC
STATE OF NORTH CAROLINA
MY COMMISSION EXPIRES 11/9/2012