No. 411A94-5 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
	)	
v.	)	From Cumberland County
	)	No. 91-CRS-23143
	)	
	)	
MARCUS REYMOND ROBINSON,	)	
	)	
Defendant.	)	

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AMICUS CURIAE BRIEF
NORTH CAROLINA ADVOCATES FOR JUSTICE

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Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Advocates for Justice submits this brief as *amicus curiae* in support of Defendant Marcus Reymond Robinson.

SUMMARY OF ARGUMENT

In 2009, the General Assembly enacted the Racial Justice Act ("RJA") to comprehensively address racial discrimination in the imposition of the death penalty, permitting consideration of broad-based statistical evidence. In doing so,

the legislature responded to and overrode limitations imposed by the United States Supreme Court in *McCleskey v. Kemp,* 481 U.S. 279 (1987). The RJA also explicitly addressed the discriminatory use of peremptory strikes in jury selection. The RJA remedied the flaws in the outmoded framework provided by *Batson v. Kentucky*, 476 U.S. 79 (1986), which has proven to be grossly inadequate in combating the pervasive practice of racially discriminatory peremptory challenges in capital trials.

The RJA expanded the inquiry into racially-based peremptory strikes beyond the confines of *Batson* by greatly increasing the potential scope of the evidentiary record, elevating the importance of statistical evidence, and eliminating the requirement that discrimination be found intentional. In exchange, the Act provides a more limited remedy to affected defendants: their death sentence is reduced to life without parole, while a *Batson* violation results in their conviction being overturned. Just as *McCleskey* suggested, the General Assembly addressed jury selection discrimination with a "flexibility of approach that is not available to the courts." *See McCleskey*, 481 U.S. at 320.

In this case, the trial court correctly interpreted and applied the RJA in its order granting relief to defendant Marcus Robinson. The trial court's order should be affirmed.

ARGUMENT

I. The Framework Established by *Batson v. Kentucky* is Incapable of Addressing Racial Discrimination in Jury Selection.

A. To Correct the Flaws in *Swain v. Alabama*, the Supreme Court in *Batson* Created a Limited Inquiry for Peremptory Strikes.

The United States Supreme Court first addressed the problem of racially discriminatory peremptory strikes in *Swain v. Alabama*, 380 U.S. 202 (1965). In *Swain*, the prosecutor had used peremptory challenges to strike all six black persons on the petit jury venire. *Id.* at 210. While rejecting the defendant's claim of purposeful discrimination, the Court nonetheless indicated that the Equal Protection Clause placed some limits on the State's exercise of peremptory strikes. *Id.* at 222-24.

Preserving the peremptory challenge free of judicial control, the Court in *Swain* declined to scrutinize a prosecutor's actions in a particular case by relying on the presumption that he properly exercised challenges. *Id.* at 221-22. However, an inference of purposeful discrimination would be raised on evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve

on petit juries." *Id.* at 223 (emphasis added). The defendant in *Swain* did not meet the standard because he offered no proof regarding prosecutors' striking of black jurors beyond the facts of his own case. *Id.* at 224-28.

"A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause." *Batson v. Kentucky*, 476 U.S. 79, 92 (1986) (citing, among others, *State v. Shaw*, 284 N.C. 366, 200 S.E.2d 585 (1973)). The Supreme Court changed course in *Batson* because this "crippling burden of proof" resulted in peremptory strikes being "largely immune from constitutional scrutiny." *Id.* at 92-93. The Court employed a three-step procedure designed to eliminate "purposeful" race-based discrimination while at the same time "permit[ting] prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991) (plurality opinion).

The *Batson* three-step procedure is triggered whenever a party moves to disallow an opponent's use of a peremptory strike based on an allegation of racial discrimination. At the first step, *Batson* requires the trial court to consider whether "the totality of the relevant facts" establishes that the moving party has made out "a prima facie case of purposeful discrimination." *Batson*, 476 U.S. at 93-94.

Relevant factors in showing a prima facie case include the pattern of strikes against jurors of different races, counsel's questions and statements during voir dire, and the race of the defendant, victim, and juror. *Id.* at 97; *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *State v. Taylor*, 362 N.C. 514, 528, 669 S.E.2d 239, 254 (2008).

Once a prima facie case of discrimination is established, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97. An explanation will not be considered race neutral if it is based on an "intuitive judgment" or "assumption" that members of a particular race generally hold certain views or are likely to be biased in favor of a particular party. *Id.*

The Court subsequently made clear just how low the bar for the prosecutor is at the second step. The second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995) (per curiam). To pass muster, a "'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* at 69; *State v. Barnes*, 345 N.C. 184, 209, 481 S.E.2d 44, 57 (1997). The only issue "is the facial validity of the prosecutor's explanation," and "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Elem*, 514 U.S. at 768; *State v. Headen*, 206 N.C. App. 109, 116, 697 S.E.2d 407,

413 (2010); *see also State v. Best*, 342 N.C. 502, 511, 467 S.E.2d 45, 51 (1996) (holding that the "explanation may be implausible or even fantastic").

If the proponent of the strike is able to articulate a race-neutral explanation, the *Batson* analysis shifts to step three. At this step, the trial court must evaluate "the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338-39 (2003). Given the nature of voir dire proceedings, "[t]here will seldom be much evidence bearing on th[is] issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge." *Id.* at 339 (quoting *Hernandez*, 500 U.S. at 365). The ultimate question thus "comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible," which "can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id.*

The Supreme Court also established that the trial court's step three determinations must be "accorded great deference," because a determination "based on demeanor and credibility" implicates an area of inquiry that "lies 'peculiarly within a trial judge's province"' and is poorly suited to second-guessing on appeal. *Hernandez*, 500 at 364, 365; *State v. Gaines*, 345 N.C. 647, 669, 483

S.E.2d 396, 409 (1997) (holding same). As a result, those determinations are essentially unreviewable on appeal.

B. *Batson* has Proven to be Inadequate to Address Race-Based Peremptory Strikes.

Despite the best intentions of the Supreme Court in *Batson* and its progeny, the *Batson* framework has proven to be woefully inadequate in addressing race-based peremptory strikes. Comprehensive studies in a number of states, including North Carolina, have shown that racially discriminatory peremptory strikes remain a pervasive problem.

An analysis of 317 capital murder trials in Philadelphia between 1981 and 1997 demonstrated that (1) "discrimination in the use of peremptory challenges on the basis of race and gender by both prosecutors and defense counsel is widespread;" (2) "United States Supreme Court decisions banning these practices appear to have had only a marginal impact;" (3) "prosecutors are considerably more successful than defense counsel in their attempts to control jury composition;" and (4) this prosecutorial advantage "enhances the probability of death for all defendants [and] raises the level of racial discrimination in the application of the death penalty." David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J.

Const. L. 3, 10, 45, 127-30 (2001); *see also* Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 Notre Dame L. Rev. 447, 448, 503 (1996) (surveying reported decisions of every federal and state court applying *Batson* between 1986 and 1993 and concluding, in light of, *inter alia*, the nature of race-neutral reasons permitted to explain a challenged strike, "*Batson* is almost surely a failure.").

The Equal Justice Initiative study of jury selection procedures in eight Southern states found "shocking evidence of [continuing] racial discrimination in jury selection in every state" where "[h]undreds of people of color called for jury service have been illegally excluded from juries after prosecutors asserted pretextual reasons to justify their removal" that are false, humiliating, demeaning, and injurious. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, at 4, 6 (Aug. 2010) ("EJI Study"), available at http://www.eji.org/eji/raceandpoverty/juryselection; *see also* Hearing Transcript, State Att. 4, pp. 857-63 (testimony of Bryan Stevenson regarding the study).

Reaching the same conclusion, the Mississippi Supreme Court stated that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down." *Flowers v. State*, 947 So. 2d 910, 937 (Miss. 2007) (plurality). The court found that *Batson* should be reconsidered because "prosecuting and

defending attorneys alike have manipulated *Batson* to a point that in many instances the voir dire process has devolved into an exercise in finding race neutral reasons to justify racially motivated strikes." *Id.*

Like these other studies, the statistical evidence that Mr. Robinson presented in this case demonstrates that race was a significant factor in the peremptory strikes of prosecutors in North Carolina from 1990 to 2010. (April 20, 2012 Order of Judge Gregory A. Weeks, State Att. 1 (hereinafter "RJA Order") at 108.) Nonetheless, because the *Batson* framework is inadequate as discussed below, North Carolina appellate courts have only once found a *Batson* violation and reversed a conviction on that basis. *See* Amanda S. Hitchcock, *"Deference Does Not by Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. Rev. 1328, 1328-29 (2006) (discussing complete lack of reversals before 2006 in 61 direct appeals from capital convictions raising *Batson*); *State v. Wright*, 189 N.C. App. 346, 354, 658 S.E.2d 60, 65 (2008) (reversing on *Batson* grounds because prosecutor failed to provide any rationale for two of the seven struck African American jurors).

In some other states, courts have never found a *Batson* violation. *See, e.g.*, *State v. Saintcalle*, 2013 WL 3946038, at ¶ 22 (Wash. Aug. 1, 2013) ("In over 40 cases since *Batson*, Washington appellate courts have never reversed a conviction

based on a trial court's erroneous denial of a *Batson* challenge."); EJI Study, *supra*, at 22 (finding that in over 100 cases, Tennessee appellate courts have never reversed a conviction based on a *Batson* violation). The Washington Supreme Court ascribed this pattern not to racial progress, but to inadequacies with *Batson*, because "it would be naive to assume Washington is somehow immune from this nationwide problem [of discriminatory jury selection]." *Saintcalle*, 2013 WL 3946038, at ¶ 21.

Finally, a recent study reviewed all 269 federal court decisions evaluating a race-based *Batson* challenge in either a civil or criminal case from 2000 through 2009. Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1092 (2011). In these 269 *Batson* cases, the reviewing court granted a new trial in only eighteen cases, 6.69% of the total. *Id.* Analyzing the cases, the authors found that "prosecutors regularly respond to a defendant's prima facie case of racially motivated jury selection with tepid, almost laughable 'race-neutral' reasons, as well as purportedly 'race-neutral' reasons that strongly correlate with race." *Id.* at 1093. More significantly, they found that "courts accept those reasons as sufficient to establish the absence of a racial motivation

under *Batson*, and almost without exception, those reasons survive subsequent scrutiny in the federal courts." *Id.*

Reviewing much of this same literature and the limits of the *Batson* framework, Justice Breyer was unsurprised that "despite *Batson*, the discriminatory use of peremptory challenges remains a problem." *Miller-El v. Dretke*, 545 U.S. 231, 268 (2005) (Breyer, J., concurring). He subsequently concluded that *Batson* does not "ferret out unconstitutional discrimination in the selection of jurors" because of its "fundamental failings." *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring). As explained below, Justice Breyer is surely correct.

C. *Batson* Provides an Insufficient Evidentiary Record For Judges to Evaluate Claims of Discrimination.

The *Batson* three-step procedure requires a trial court to decide whether a prosecutor has committed an intentional constitutional violation – essentially sanctionable misconduct – based only on a meager evidentiary record that pales in comparison to the record in an employment discrimination case. Courts are understandably reluctant to do so. In addition, prosecutors can take simple steps to conceal racially based peremptory strikes, further thwarting the *Batson* process. Given both of these realities, it is unsurprising that, as discussed above, *Batson* violations are rarely found in the face of pervasive race-based jury selection.

Under *Batson*, the trial court cannot reject a peremptory challenge unless it makes two findings that constitute attorney misconduct. *See* Bellin & Semitsu, *supra*, at 1113-14. First, the court must find that the prosecutor's proffered reason for the peremptory strike is not his actual reason, *i.e.*, that he has made a material misrepresentation to the court. Second, the court must find that the prosecutor has intentionally discriminated in making the strike, in violation of the Constitution. Given the seriousness of both findings, it is understandable that courts err on the side of accepting proffered reasons for strikes absent compelling evidence of discrimination. *Id.* at 1114-15.

Despite the importance of the trial court's decision, the *Batson* process provides little evidence for the court to consider. In fact, the *Batson* "hearing" may take only a matter of seconds, with (1) a *Batson* motion, (2) a reason proffered by the striking attorney, and (3) the trial court's ruling all occurring in rapid succession. *Id.* at 1116. "In most cases there will be little argument and no evidence presented during this brief colloquy." *Id.*; *see Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) (noting that "there will seldom be much evidence bearing on the question of whether an attorney exercised a discriminatory strike and that the best evidence often will be the demeanor of the attorney who exercises the

challenge"). Thus, there is little chance of marshalling evidence of discrimination sufficient for a trial court to find a *Batson* violation.

The paucity of evidence in a *Batson* hearing stands in sharp contrast to the typical evidentiary record in an employment discrimination case, which presents a factfinder with the similar question of whether the proffered rationale for a decision is genuine or instead pretext for unlawful discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), one of the Supreme Court's seminal employment discrimination cases, established the three-step burden-shifting process later incorporated in *Batson*. *See Batson*, 476 U.S. at 94 and n.18 (citing *McDonnell Douglas*).

At issue in *McDonnell Douglas* was an employer's liability for racial discrimination when it refused to rehire a black applicant purportedly because of his participation in an unlawful protest of the employer. 411 U.S. at 794-95, 807. The Court noted that the dispositive question of pretext could be resolved by considering: (1) evidence that white employees involved in similar conduct were nevertheless retained or rehired ("comparator evidence"); (2) the employer's treatment of the plaintiff during his prior term of employment; (3) the employer's reaction to the plaintiff's legitimate civil rights activities; and (4) the employer's general practice with respect to minority employment, including "statistics as to

[the employer's] employment policy and practice." *Id.* at 804-05. Similar evidence is almost always absent for a trial court in a *Batson* inquiry.

Meaningful statistical evidence is typically unavailable because there are few peremptory strikes against minorities in any particular case. "It is axiomatic in statistical analysis that the precision and dependability of statistics is directly related to the size of the sample being evaluated." *State v. Headen*, 206 N.C. App. 109, 119, 697 S.E.2d 407, 415 (2010) (quoting *Moultrie v. Martin*, 690 F.2d 1078, 1083 (4th Cir. 1982)). Courts reject statistical evidence as unpersuasive when only a handful of strikes against minorities are made, even if this results in an all-white jury. *See, e.g.*, *State v. Nicholson*, 355 N.C. 1, 22, 558 S.E.2d 109, 125 (2002) ("While the state did exercise its first two peremptory challenges to excuse African–American jurors, those excusals took place too early in voir dire to establish a pattern of discrimination."); *Headen*, 206 N.C. App. at 119-20, 697 S.E.2d at 415 (rejecting statistical evidence where prosecutor peremptorily struck the one African-American juror); *Wade v. Terhune*, 202 F.3d 1190, 1198 (9th Cir. 2000) (where one of three of prosecutor's peremptory challenges had been exercised against an African-American, and only four of 64 of prospective jurors in venire were African-Americans, observing "that the sample is so small that the statistical significance of the percentages is limited").

Relevant comparator evidence is likewise often unavailable because of the small number of jurors in a single case. Comparator evidence is very significant because "if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005); *see Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (finding *Batson* violation because the prosecutor kept white jurors who disclosed conflicting obligations at least as serious as those of the stricken black juror). In fact, the study reviewing all federal *Batson* cases from 2000-2009 showed that in those few cases finding *Batson* violations, the majority "involved undeniable evidence of implausibility based on side-by-side comparisons of similarly situated jurors of different races." Bellin & Semitsu, *supra*, at 1099.

Finding similarly situated jurors is difficult, however, because they must share all relevant characteristics. "Rarely will a single factor control the decision-making process." *State v. Porter*, 326 N.C. 489, 501, 391 S.E.2d 144, 152 (1990); *see also State v. White*, 131 N.C. App. 734, 740, 509 S.E.2d 462, 466 (1998) ("While race was certainly a factor in the prosecutor's reasons for challenging Reynolds and Jeter, our courts, in applying the *Batson* decision, have required

more to establish an equal protection violation, *i.e.*, that the challenge be based solely upon race."). This Court has held:

> Merely because some of the observations regarding each stricken venire person may have been equally valid as to other members of the venire who were not challenged does not require finding the reasons were pretextual. A characteristic deemed to be unfavorable in one prospective juror, and hence grounds for a peremptory challenge, may, in a second prospective juror, be outweighed by other, favorable characteristics.

Porter, 326 N.C. at 501, 391 S.E.2d at 153. Therefore, comparator evidence must involve jurors who share all factors articulated by a prosecutor in justifying a particular strike. *Id.* at 501, 391 S.E.2d at 152-53. As commentators have realized, however, if prosecutors justify a peremptory strike by citing multiple characteristics of a juror, "that makes it statistically impossible that another individual will have an identical response." Bellin & Semitsu, *supra*, at 1104. Comparator evidence is thus often unavailable within the confines of a single case.

In addition to the dearth of relevant evidence, trial courts also have to confront prosecutors who may have been specifically trained to evade *Batson* by providing certain responses to *Batson* inquiries. *See, e.g.*, *Comm. v. Basemore*, 744 A.2d 717, 729-31 (Pa. 2000) (discussing video evidence of Philadelphia District Attorney training for new prosecutors, which unabashedly advocated

striking blacks and women from jury venires and described methods for providing pretextual rationales to defeat *Batson* motions).

Here, the trial court found that prosecutors in Cumberland County used training they had received to concoct a multi-factor race-neutral rationale (age, "attitude," and "body language") to respond to a *Batson* objection. (RJA Order at 157, ¶ 361.) Such responses are ideally suited to evading *Batson* because they make finding comparator jurors impossible. *See* Bellin & Semitsu, *supra*, at 1104-06. As the trial court correctly found, "Robinson presented examples where it is clear that the prosecutors were relying on training materials provided by the Conference [of District Attorneys] to provide race-neutral reasons that were pretextual." (RJA Order at 157, ¶ 360.)

Intentional evasion by prosecutors further complicates an already nigh impossible task for courts. "Under current *Batson* doctrine, then, the trial court is expected to function as something of a human lie detector in evaluating whether an Equal Protection violation has occurred." Bellin & Semitsu, *supra*, at 1117-18. Presented with such a decision, courts hardly ever find *Batson* violations. *See* Section I.B, *supra*. This leaves discriminatory jury selection in place absent changes to the law.

D. Unconscious Bias Leads to Race-Based Peremptory Strikes that *Batson* Fails to Identify and Prevent.

Batson's other fatal flaw is that it presumes prosecutors are consciously discriminating based on race when, in fact, the discrimination may be unconscious. Unconscious bias in jury selection has been documented by experts, including those who testified for Mr. Robinson below. (RJA Order at 115-19, ¶¶ 237-46.) Courts have increasingly recognized the problem of unconscious bias and *Batson*'s inability to address it.

As Justice Breyer observed, "*Batson* asks judges to engage in the awkward, sometime hopeless, task of second-guessing a prosecutor's instinctive judgment – the underlying basis for which may be invisible even to the prosecutor exercising the challenge." *Miller-El v. Dretke*, 545 U.S. 231, 267-68 (2005) (Breyer, J., concurring). "In such circumstances, it may be impossible for trial courts to discern if a 'seat-of-the-pants' peremptory challenge reflects a 'seat-of-the-pants' racial stereotype." *Id.* Justice Breyer perceptively asked, "How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?" *Rice v. Collins*, 546 U.S. 333, 343 (2006) (Breyer, J., concurring).

The Washington Supreme Court recently addressed the issue of unconscious bias. It found that "discrimination in this day and age is frequently unconscious

and less often consciously purposeful. That does not make it any less pernicious." *State v. Saintcalle*, 2013 WL 3946038, at ¶ 26 (Wash. Aug. 1, 2013). "Problematically, people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it." *Id.* "Unconscious stereotyping upends the *Batson* framework. *Batson* is only equipped to root out 'purposeful' discrimination, which many trial courts probably understand to mean conscious discrimination." *Id.* The court thus called for a new framework to address unconscious bias, though was not ready to fashion one yet. *Id.* at ¶¶ 40-44.

One recent study, described briefly in the trial court's order, (RJA Order at 116-17, ¶ 239), powerfully illustrates how unconscious bias affects peremptory challenges. Professors Samuel Sommers and Michael Norton asked three groups – college students, advanced law students, and practicing attorneys – to play the role of prosecuting a twenty-four-year-old black male defendant in a robbery and aggravated assault trial. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 Law & Hum. Behav. 261, 265 (2007).

Each "prosecutor" was given one remaining peremptory strike with instructions to strike one of two prospective jurors because they did not think the juror would be fair or would not be sympathetic to their case. *Id.* at 266. Both jurors were given a trait that was equally likely to be unattractive to a prosecutor. *Id.* at 265. Juror #1 was a journalist who had, several years earlier, written articles about police misconduct. Juror #2 was an executive who stated during voir dire that he was skeptical of statistics because they are easily manipulated. *Id.* Photos of the hypothetical jurors accompanied the descriptions. However, half of each "prosecutor" group saw that Juror #1 was black and Juror #2 was white, while the other half saw that Juror #1 was white and Juror #2 was black. *Id.* at 266.

The study showed that all three groups were significantly more likely to challenge a prospective juror when he was black as opposed to white. *Id.* at 269. When justifying these decisions, participants rarely cited race as a factor, focusing instead on the race-neutral characteristics associated with the black prospective juror. *Id.* The study "provides clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence." *Id.* The *Batson* framework is thus unable to detect the racial bias that the study demonstrated.

Statistical analysis of the challenged decisions in the aggregate did, however, reveal the racial bias, which is otherwise obscured when considering an individual decision alone. *See id.* ("For any given participant, we are unable to determine whether the peremptory was influenced by race or whether the justification provided was valid. Only in the aggregate does evidence of racial bias emerge."). In enacting the Racial Justice Act, the General Assembly recognized that a new legal framework, fully incorporating statistical analysis, is necessary to address racial bias in jury selection

II. THE RACIAL JUSTICE ACT WAS INTENDED TO AND DID REMEDY *BATSON*'S INADEQUACIES TO ADDRESS RACIAL DISCRIMINATION IN JURY SELECTION IN CAPITAL TRIALS.

A. The General Assembly Heeded *McCleskey* and Acted to Address Systematic Discrimination in the Death Penalty.

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the United States Supreme Court held that in an Equal Protection challenge to the death penalty, the defendant must prove that the decision-makers in his case acted with discriminatory purpose. *Id.* at 292. The Court then ruled that statistical evidence regarding apparent disparities in sentencing based on race was insufficient to prove that death penalty sentencing was unconstitutional. *Id.* at 293-97. The Court, however, invited state legislatures to address the results of statistical studies concerning the death penalty:

> McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility – or indeed even the right – of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people. Legislatures also are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Id. at 320 (emphasis added, internal citations and quotation marks omitted).

In 2009, the General Assembly enacted the Racial Justice Act ("RJA"). N.C. Gen. Stat. §§ 15A-2010 (2009), 15A-2011 (2009, pre-2012 amendment) & 15A-2012 (2009, pre-2012 repeal). The legislature explicitly authorized the use of statistical evidence in determining whether racial discrimination was a significant factor in death sentences. *See* § 15A-2011(b) ("Evidence relevant to establish a finding that race was a significant factor . . . may include statistical evidence . . . ."). In doing so, legislators responded to *McCleskey*'s invitation and consciously acted to undo *McCleskey*'s limitation on the use of statistics. *See* Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 Ohio St. J. Crim. L. 103, 116 (2012) (describing statements of key supporting legislators).

While *McCleskey* was concerned with discriminatory charging and sentencing decisions in capital cases, the RJA went further and explicitly addressed

the discriminatory use of peremptory strikes in jury selection: "Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death . . . may include statistical evidence or other evidence . . . [that] (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection." § 15A-2011(b). "If the court finds that race was a significant factor in decisions to seek or impose the sentence of death . . . the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole." § 15A-2012(a)(3).

The RJA expanded the inquiry into racially-based peremptory strikes beyond the confines of *Batson* by greatly increasing the potential scope of the evidentiary record, elevating the importance of statistical evidence, and eliminating the requirement that discrimination be found intentional. In exchange, the Act provides a more limited remedy to affected defendants: their death sentence is reduced to life without parole, while a *Batson* violation results in their conviction being overturned. Just as *McCleskey* suggested, the General Assembly addressed jury selection discrimination with a "flexibility of approach that is not available to the courts." *See McCleskey*, 481 U.S. at 320.

B. The Racial Justice Act Overcomes *Batson*'s Limitations by Expanding the Evidentiary Record, Emphasizing Statistical Evidence, and Removing the Intent Requirement so that Discrimination in Jury Selection Can Be Uncovered and Remedied.

The RJA provides a more comprehensive legislative scheme to address racial discrimination in capital trials than is afforded under existing constitutional law. By explicitly including discriminatory peremptory strikes as a ground for relief, the General Assembly provided a more robust inquiry into potentially race-based strikes than *Batson* currently offers. Compared to *Batson*, the RJA expands the available evidentiary record, facilitates the use of statistical evidence, and eliminates the intent requirement so that unconscious bias can be addressed.

The RJA expands the available evidentiary record for a discrimination inquiry both substantively and procedurally. Substantively, the RJA explicitly states that a defendant can present evidence of discrimination from beyond just his own case. "A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." § 15A-2011(a) (emphasis added). Expanded in this way, the evidentiary record can approach that available to plaintiffs in

employment discrimination suits: a substantive inquiry into a discriminatory practice that encompasses decisions made at other trials in the same timeframe. Expanding the record to other cases makes it possible to find relevant comparator evidence because more juror strike decisions can be analyzed to determine if prosecutors treat jurors of different races differently. Likewise, analysis of multiple trials allows statistical evidence to reach statistical and legal significance. *See* Section I.C, *supra*.

Procedurally, the RJA allows a trial court to consider this greater range of evidence by providing a separate hearing for an RJA claim. § 15A-2012(a)(2). As discussed in Section I.C, *supra*, a *Batson* inquiry in the middle of jury selection provides little practical opportunity for the introduction of evidence apart from the prosecutor's proffered rationale and his actions to that point in jury selection. A distinct hearing allows a defendant to present the full range of relevant evidence, as Mr. Robinson did in this case.

The RJA also accords weight to statistical evidence in response to *McCleskey* by providing that statistical evidence, standing alone, can demonstrate that race was a significant factor in the imposition of the death penalty. *See* § 15A-2011(b); Mosteller, *supra*, at 118. The State may then rebut this evidence, including with its own statistical evidence. § 15A-2011(c). If the State fails to

rebut the evidence, the court "shall" grant relief. § 15A-2012(a)(3). According such weight to relevant statistical evidence permits courts to ferret out intentional discrimination obscured by self-serving, pretextual rationales, and to expose unconscious discrimination. *See* Sections I.C & I.D, *supra*.

Finally, the RJA, unlike *Batson*, does not require that discrimination be intentional in order to provide relief. As cogently explained by the trial court, (RJA Order at 34-38), the RJA's requirement that race be a "significant factor" in the imposition of the death penalty does not equate to a finding of intentional discrimination. Because the "significant factor" language references statistical evidence encompassing multiple trials, counties, and prosecutorial districts, it is plainly inconsistent with an intent requirement. Otherwise, the RJA would simply be an unnecessary codification of *McCleskey* and *Batson*. *Cf. Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (holding that it must be presumed that the General Assembly did not intend for any of its legislation "to be mere surplusage").

The RJA's "significant factor" test also departs from *Batson* analysis because it does not require race to be the sole factor in a peremptory challenge, just a significant one. *Cf. State v. White*, 131 N.C. App. 734, 740, 509 S.E.2d 462, 466 (1998). As the trial court explained, the "significant factor" test is much like the

"motivating factor" standard under Title VII of the Civil Rights Act, under which courts engage in a mixed-motive analysis of discriminatory decisions. *See* RJA Order at 42; 42 U.S.C. § 2000e-2(m); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989).

By eschewing an intent requirement and lessening the causation standard, the RJA permits courts to address the pervasive phenomenon of unconscious bias in jury selection, providing a new legal framework in line with the insights of Justice Breyer and the Washington Supreme Court.

C. The Trial Court Correctly Applied the RJA in Granting Robinson Relief.

The trial court correctly interpreted and applied the RJA in its order granting relief to Mr. Robinson. The court appropriately considered and credited statistical evidence based on jury selection in contemporaneous trials in North Carolina, the Second Judicial Division, Cumberland County, and in those prosecuted by the prosecutor in Mr. Robinson's case. (RJA Order at 44-108, ¶¶ 2-220.) The trial court also appropriately considered and credited evidence of racially disparate jury selection in numerous cases, including detailed comparator evidence. (RJA Order at 132-55; ¶¶ 285-354.) The trial court also considered evidence of training provided to prosecutors on how to evade *Batson* inquiries into their race-based

peremptory strikes, as well as the failure to train prosecutors to overcome racial bias. (RJA Order at 155-57; ¶¶ 355-61.) This evidence was sufficient to overcome the State's evidence, which primarily consisted of *post hoc* rationales by prosecutors for their past peremptory strikes of minorities. The trial court thus considered the full range of evidence envisioned by the RJA, not limited by a traditional *Batson* inquiry.

The court then correctly concluded that Mr. Robinson had shown that race was a "significant factor" in capital trials at the time of his death sentence, and in his own trial, by proving that it was a significant factor in peremptory challenges during jury selection. (RJA Order at 164, ¶¶ 19, 23.) After considering the testimony of the prosecutor in Mr. Robinson's case and evaluating his credibility, the court also found that he had intentionally discriminated on the basis of race in jury selection, including in Mr. Robinson's case, (RJA Order at 164-65, ¶ 24), leaving no doubt that Mr. Robinson is entitled to relief.

In its brief, the State repeatedly argues that the trial court's decision is contrary to established law under *Batson*. (State Br. at 18-20, 22-23, 42-43, 45-46, 72, 83-84.) *Batson*, however, does not provide the legal standard or procedure in this case. Remedying the flaws in *Batson*, the RJA expanded the scope of relevant evidence and altered the standard for granting relief. Case law under *Batson* does

not control this case. Rather, after properly interpreting and applying the RJA, the trial court correctly afforded Mr. Robinson the limited relief to which the Act entitles him: resentencing to life in prison without parole.

CONCLUSION

For the foregoing reasons, the Court should affirm the trial court's order granting defendant Marcus Robinson relief under the Racial Justice Act.

Respectfully submitted, this 9th day of August, 2013.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

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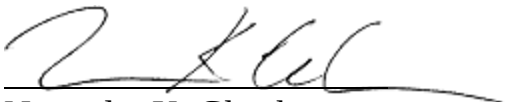

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