IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent. BRYAN MAURICE JONES, Real Party in Interest.	Case No. S255826 **CAPITAL CASE** Appeal from the Court of Appeal, Fourth District, Division One, No. D074028 San Diego County Superior Court, No. CR136371, Honorable Joan P. Weber (Related to Habeas Corpus Case No. S217284 and Automatic Appeal Case No. S042346 [closed])

MATERIALS TO BE JUDICIALLY NOTICED PURSUANT TO EVIDENCE CODE SECTIONS 452 AND 459

VOLUME 2 OF 2

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Exhibit F

Order on Defendant's Extraordinary Motion for New Trial, *State of Georgia v. Johnny Lee Gates* (Jan. 10, 2019, Superior Court Muscogee Cty. SU-75-CR-38335.)

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
	)	
v.	)	Case No. SU-75-CR-38335
	)	
JOHNNY LEE GATES,	)	
Defendant.	)	
	)	

ORDER ON DEFENDANT'S

EXTRAORDINARY MOTION FOR NEW TRIAL

The facts, absent editorials from each side, are the same from each party. The facts are extracted from trial testimony and subsequent hearings and briefs by both sides in this hearing of May 2018.

STATEMENT OF FACTS

In January 1977, Gates, a black man, was charged with the murder, rape, and armed robbery of Katharina Wright, a white woman. The trial began on August 30, 1977. In the span of three days, Gates was tried, convicted, and sentenced to death by an all-white jury. The trial prosecutors were Assistant District Attorneys from the Chattahoochee Circuit. The Supreme Court of Georgia affirmed Gates's conviction and sentence on direct appeal, *Gates v. State*, 244 Ga. 587, 261 S.E.2d 349 (1979), cert. denied *Gates v. Georgia*, 455 U.S. 938 (1980), and Gates sought habeas corpus relief unsuccessfully in state and federal courts, *Gates v. Zant*, 863

F.2d 1492 (11th Cir. 1989), rehearing denied *Gates v. Zant*, 880 F.2d 293 (11th Cir. 1989), cert. denied *Gates v. Zant*, 493 U.S. 945 (1989).

In 1992, following a subsequent habeas petition, the state habeas court found that Gates was entitled to a trial to determine whether he is intellectually disabled and therefore ineligible for the death penalty. That habeas court specifically advised defendant that his claim of discrimination in jury selection was not being decided at that hearing but could possibly be brought after his mental hearing in a proper habeas court. In 2003, the Court conducted an intellectual disability trial. On the seventh day of the intellectual disability trial, the Court declared a mistrial. Later the same day, the State and Gates agreed to remove the possibility of a death sentence, and Gates was sentenced to life in prison without the possibility of parole.

After he was resentenced, Gates filed a series of pro se motions challenging his conviction. In 2015, attorneys from the Georgia Innocence Project entered the case on Gates's behalf and filed an Extraordinary Motion for Post-Conviction DNA Testing and For New Trial. Gates sought DNA testing on two items of physical evidence that were found at the crime scene. The State's files contained documentation indicating that the two items had been destroyed in 1979; however, the items were discovered in the District Attorney's Office in 2015 by Georgia Innocence Project interns. The Court ordered testing pursuant to the Extraordinary Motion for New Trial statute, O.C.G.A. § 5-5-41(c) (2010). *See* Consent Order

Granting Defendant's Motion for Post-Conviction DNA Testing (Dec. 16, 2015); Supplemental Consent Order (Feb. 1, 2017); Second Supplemental Consent Order (Jul. 6, 2017).

On November 27, 2017, Gates amended his Extraordinary Motion for New Trial to include claims concerning: 1) jury discrimination, 2) destruction of evidence, and 3) suppression of evidence. Gates also sought discovery of the prosecution's jury selection notes from the trial.

At a hearing on January 31, 2018, the Court ordered the District Attorney's Office to locate and produce to the defense all of its materials and information concerning jury selection in six capital cases involving black defendants in Muscogee County in the late 1970s. *See* Order Regarding Rulings Made at the January 31, 2018 Hearing (filed Feb. 8, 2018). Pursuant to the Order, the State disclosed its jury selection notes to Gates for the first time on March 2, 2018. Gates then supplemented his Amended Extraordinary Motion for New Trial, and the Court held an evidentiary hearing on May 7 and 8, 2018.

At the evidentiary hearing, Gates called five witnesses and presented thirty-five exhibits. R. 3-4, 218-19.[1] The State called two witnesses and presented seven

[1] "R. __" refers to the designated page of the reporter's transcript from the May 2018 evidentiary hearing transcript; "T. __" refers to the designated page of the transcript from Gates's 1977 trial.

exhibits. *Id.*

The evidence of systematic race discrimination during jury selection in this case is undeniable.

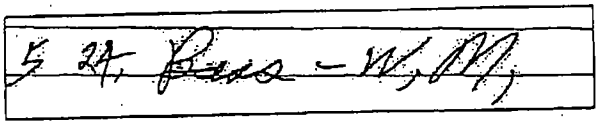
Because Gates's trial took place in 1977, prior to *Batson v. Kentucky*, 476 U.S. 79 (1986), Gates's jury discrimination claim is governed by *Swain v. Alabama*, 380 U.S. 202 (1965). *Swain* requires Gates to show that the State used its peremptory strikes to systematically discriminate based on race *in a pattern of cases*. *Id.* at 223. The ultimate question in a *Swain* inquiry is whether the prosecutors intended to engage in systematic race discrimination. *See Horton v. Zant*, 941 F.2d 1449, 1454-60 (11th Cir. 1991) (finding a *Swain* violation and explaining that "the defendant's goal in demonstrating that the prosecutor struck all or most of the blacks from criminal juries is to enable the court to infer the prosecutor's intent"). When a court is deciding a jury discrimination issue, all of the circumstances that bear upon the issue of racial animosity must be considered. *See id.* at 1459 (approaching a *Swain* analysis with a "broad interpretation of relevance"); *Batson*, 476 U.S. at 93-94 ("Moreover, since *Swain*, we have recognized that a black defendant . . . may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.") (citing *Washington v. Davis*, 426 U.S. 229, 239-42 (1976)); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (citing *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005)).

The prosecutors clearly engaged in systematic exclusion of blacks during jury selection in this case. They identified the black prospective jurors by race in their jury selection notes, singled them out for peremptory strikes, and struck them to try Gates before an all-white jury. The same prosecutors engaged in the same acts of discrimination in all death penalty trials of black males in Chattahoochee Circuit for the years 1975-1979. The prosecutors then made racially charged arguments to the all-white juries they secured. Based on the evidence presented at the hearing, as detailed below, the discrimination in this case during jury selection was patent. *See Swain v. Alabama*, 380 U.S. 202 (1965); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991); *Timberlake v. Georgia*, 246 Ga. 488, 271 S.E.2d 792 (1980).

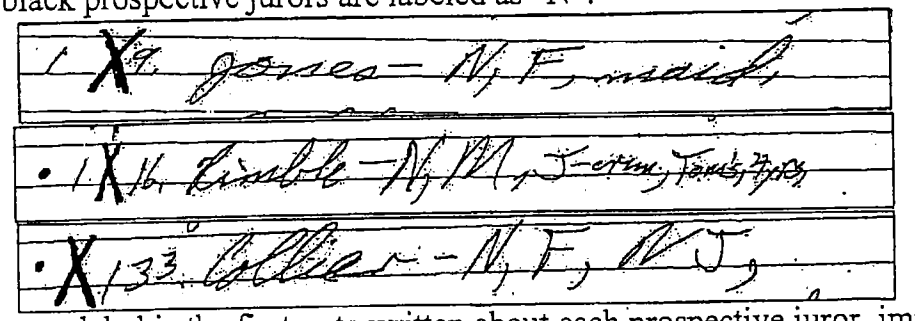
On March 2, 2018, the State turned over to the defense its jury selection notes from Gates's trial, as well as from other capital trials involving black defendants in Muscogee County in the late 1970s. It is uncontested that the Muscogee County District Attorney's Office has been in possession of these notes since the 1970s, with no obligation to give to any defendant absent a proper motion.

The notes support the inference of the prosecutors' practices of race discrimination in jury selection in death penalty cases with Black Defendants in the late 1970s. The notes reflect the following:

First, in Gates's case, the prosecutors labeled the prospective jurors by race. The white prospective jurors are labeled as "W":

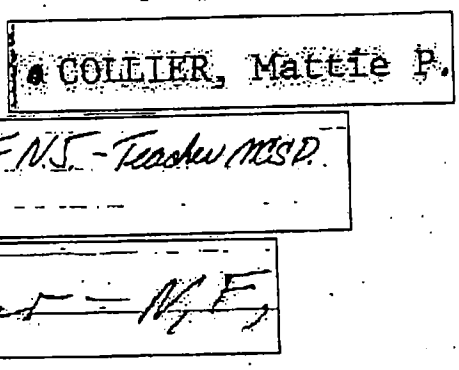


The black prospective jurors are labeled as "N":



This race label is the first note written about each prospective juror, immediately to the right of the jurors' names. In the other cases for which the State produced notes, the prosecutors similarly labeled black prospective jurors with either "N" or "B". These labels were used across multiple cases.

Second, the prosecutors singled out the black prospective jurors by marking dots in the margins next to their names:

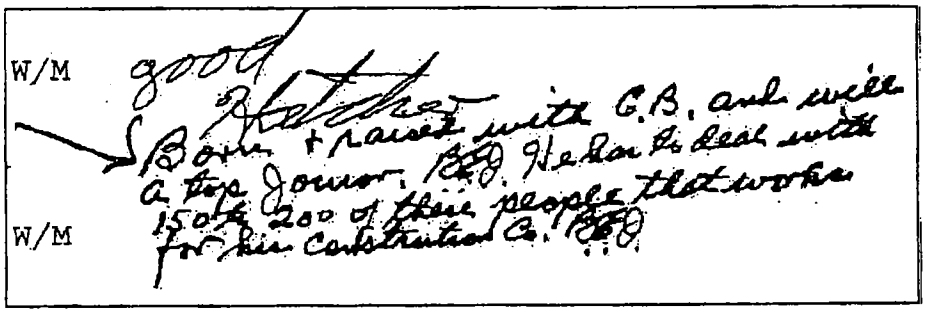


The prosecutors marked dots only for black prospective jurors. As with the "N" and "B" notations, this practice was used across multiple cases, including in Gates's case.

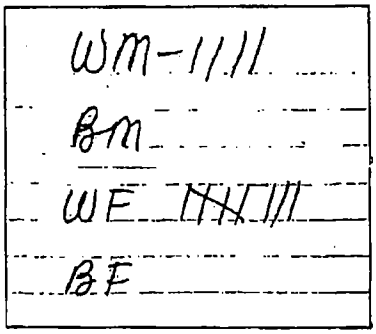
Third, the prosecutors described black prospective jurors as "slow," "old + ignorant," "cocky," "con artist," "hostile," and "fat."

Fourth, the prosecutors routinely ranked black prospective jurors as "1" on a scale of 1 to 5 without any further explanation. In Gates's case, the prosecutors ranked all four black prospective jurors as "1". In contrast, they ranked only one of the 43 white prospective jurors as "1", and they provided a specific explanation for that ranking: the prospective juror was opposed to the death penalty.

Fifth, in the notes from a case involving a 16-year-old black defendant accused of killing a white victim, one prosecutor wrote that a white prospective juror would be a "top juror" because he "has to deal with 150 to 200 of these people that works for his construction co.":



Sixth, in one case, the prosecutors tallied the race of the final jurors selected to serve, with twelve marks in the white column and no marks in the black column:



Taken together, the notes demonstrate a purposeful and deliberate strategy to exclude black citizens and obtain all-white juries. And significantly, both prosecutors from Gates's case wrote notes that reflect intentional discrimination.[2]

The Prosecutors' Strikes Across Cases Confirm the Discriminatory Intent Reflected in the Jury Notes.

The notes do not stand alone. The prosecutors' strikes across the cases confirm the discrimination. Records indicate that from 1975 to 1979, the State brought seven capital cases against black defendants in Muscogee County and struck a total of 41 black prospective jurors. In six of the seven cases, including in Gates's case, the prosecutors removed every black prospective juror to secure all-white juries. In the seventh case, an all-white jury was impossible because the pool of prospective jurors had more black citizens than the prosecutors had strikes.

One ADA was involved in five of the seven cases. In those five cases, the prosecution struck 27 of the 27 black prospective jurors who were qualified to serve. The following chart reflects the strikes in the cases involving this ADA:

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[2] At the May 2018 hearing, Gates presented the testimony of Steven Drexler, a handwriting expert, at the evidentiary hearing. Drexler testified that both ADA authored notes in Gates's case, as well as in each of the other cases for which they were counsel of record matched. R. 195-97.

Case	Qualified jurors called	Jurors struck by prosecution	Qualified black jurors called	Black jurors struck by prosecution	Black jurors on jury
Joseph Mulligan	42	8	4	4	0
Jerome Bowden	45	11	8	8	0
Johnny Lee Gates	47	12	4	4	0
Jimmy Lee Gates	46	11	4	4	0
William Spicer Lewis	42	10	7	7	0

ADA #2 was involved in four of the seven cases. The following chart reflects the prosecution's strikes in the cases involving this ADA:

Case	Qualified jurors called	Jurors struck by prosecution	Qualified black jurors called	Black jurors struck by prosecution	Black jurors on jury
Johnny Lee Gates	47	12	4	4	0
William Brooks	46	11	4	4	0
William Spicer Lewis	42	10	7	7	0
William Henry Hance	37	11	13	10	2

Together, the prosecutors struck 41 black prospective jurors across the seven cases.

The prosecutors' discriminatory intent is further reflected in the closing arguments they made across multiple cases. After securing all-white juries, the prosecutors made racially charged closing arguments. The racially charged arguments spanned across multiple cases, including Gates's case. For example, in the closing argument in *State of Georgia v. Jerome Bowden*, the prosecutor referred to Bowden as a "wild beast" and told the all-white jury, "It took more courage to build this great nation and it will take courage to preserve it, from this man and his like." R. Ex. 18 (Bowden Closing). In several closings, the prosecution employed "us" versus "them" language, R. Ex. 18-21 (Closing Arguments), which is also echoed in the prosecution's own jury selection note stating that a white prospective juror would be a "top juror" because he "has to deal with 150 to 200 of these people that works for his construction co.," R. Ex. 13. In Gates's case, the prosecutor inquired of the all-white jury, "Do you feel as free as you did ten years ago?," referencing the period from 1967 to 1977. T. 591. Accordingly, the closing arguments demonstrate the racial overtones that infected the prosecutions of these black defendants.

The factual matters described above are largely unrebutted. The State offered no rebuttal evidence.

The State argued that Gates should have shown a pattern across more than seven cases. R. 392. The Court rejects that argument. The seven cases addressed

at the hearing represent all of the capital cases tried against black defendants in Muscogee County from 1975 through 1979. That period covers the year of Gates's trial, which was 1977, as well as the two years before Gates's trial and the two years after it. The cases included in this period establish that the prosecution's race discrimination was pervasive and systematic.

Moreover, the ultimate focus of a *Swain* inquiry is the intent of the prosecutors. *See Horton v. Zant*, 941 F.2d 1449, 1454-60 (11th Cir. 1991). Each of the six other cases were tried by one or both of the same prosecutors who tried Gates. Accordingly, these seven cases are pointedly probative as to the prosecutors' practices at the time of Gates's trial. In addition, the evidence of discriminatory intent is overwhelming. Both prosecutors made notes that reflect racial animus in jury selection.

The preceding analysis and Findings of discriminatory intent are necessary to provide Defendant the relief he seeks, but such Finding is not sufficient. Defendant must also satisfy the six prongs required by *Timberlake v. State*, 246 Ga. 488 (1980).

"[T]he procedural requirements for ... [extraordinary motions properly brought before the courts] are the product of caselaw." *Dick v. State*, 248 Ga. 898,899 (1982). The long-standing requirements, pursuant to case law, for granting an extraordinary motion for new trial are set forth in *Timberlake v. State*, 246 Ga. 488 (1980). Under *Timberlake*, Defendant must prove:

> (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Id. at 491. "[O]ne who seeks to overturn his conviction for murder many years later bears a heavy burden to bring forward convincing and detailed proof." *Davis*, 283 Ga. at 446. Defendant's failure to meet even one of the requirements under *Timberlake* is grounds for a denial of relief. *See Dick*, 248 Ga. at 900; *see also Timberlake*, 246 Ga. at 491. Application of the rigorous *Timberlake* standard presented during the hearings conducted in this Court, in context of the evidence presented at Defendant's trial and in light of the lengthy post-conviction process pursued by Defendant, demonstrate that Defendant has failed to meet the prong of *Timberlake* requiring due diligence.

Defendant fails to reasonably account for the delay in bringing forth his motion sooner. His "litigation must come to an end." *See Drane v. State*, 291 Ga. 298, 304 (2012). Relief for this Jury Discrimination Issue is Denied.

Evidence of an alleged walk-through prior to Defendant's videotaped confession is not newly discovered.

Under *Timberlake*, to obtain the grant of an extraordinary motion for new trial, Defendant must show that "the evidence has come to his knowledge since the trial."

Timberlake, 246 Ga. at 491. Defendant's current counsel claim that they have recently discovered that Defendant was walked through the crime scene by the Columbus Police Department before he gave his confession that was videotaped there.

The most important witness to both the videotaped confession and any alleged, prior walk-through is Defendant. Evidence of an alleged walk-through, in the nature of things, must have been known to Defendant at trial. *See Ogelsby v. Cason*, 65 Ga. App. 813, 816 (1941) ("Evidence which in the nature of things must have been known to the accused before his trial was ended, cannot after verdict be treated as newly discovered."); *see also Bissell v. State*, 157 Ga. App. 711, 714 (1981) (holding that a ground of a motion for new trial is without merit when it appears from the ground that such evidence must have been known to the defendant before his trial).

"A part of the evidence called newly discovered is not so ... [if the defendant knew of it], and should have informed counsel." *Cobb v. State*, 219 Ga. 388, 391 (1963). "No valid excuse is offered for [Defendant's] failure to disclose his alleged knowledge." *Id.* "There is not attached to the extraordinary motion for new trial any affidavit by the movant, or any affidavit by counsel representing him on his trial, to the effect that they did not know of the matters ... at the time he was tried." *See Hall*, 215 Ga. at 376.

"Such affidavits are essential to an extraordinary motion for new trial where newly discovered evidence is relied on." *See Id.* During his state habeas evidentiary hearing held on September 16, 1980, Defendant testified that he informed trial counsel that Mr. Hicks walked him through the crime scene three times before his videotaped confession. Thus, Defendant fails to show that the facts set forth in this claim "were unknown to [Defendant or trial counsel] before trial." *Ogelsby*, 65 Ga. App. at 816.

The Georgia Supreme Court has repeatedly held that defendants who wait years to bring to the Court's attention evidence either that was known or could have been discovered by reasonable diligence were not entitled to relief. *See Bharadia*, 297 Ga. at 573; *Drane*, 291 Ga. at 304; *Davis*, 283 Ga. at 445; *Llewellyn v. State*, 252 Ga. 426, 428-29 (1984).

On February 10, 2018, almost 41 years after his trial, Defendant procured an affidavit from Mr. Hicks which allegedly reveals that Defendant was walked through the crime scene before his videotaped confession at the same crime scene. "[T]he record reflects no evidence showing that [Defendant] was unable to obtain this evidence prior to trial." *See Bharadia*, 297 Ga. at 573. Mr. Hicks was still employed by the Columbus Police Department at the time of Defendant's trial. (State's Response in Opposition to Defendant's Second Supplement to his Amended Extraordinary Motion for New Trial at Attachment K) He was clearly available to

be called as a witness by Defendant. *See Davis*, 283 Ga. at 445. "[Defendant] has failed to show that he has exercised due diligence in obtaining this new testimony, which was obtained from a witness who was readily identifiable pre-trial." *See Id.* at 446.

"[I]n considering due diligence under *Timberlake*, [the courts] look to the action and inaction of the defendant, including his counsel and defense team." *Bharadia*, 297 Ga. at 543 n.9. This evidence was at least discoverable during Defendant's first state habeas proceedings in 1980. In 2002, during his intellectual disability proceedings, defense counsel alleged that "it's quite possible that when [members of the Columbus Police Department] took [Defendant to Mrs. Wright's apartment] to give his confession, they had put his hand on that heater and that's how his handprint got there." (10-8-2002 Hearing at 49).

Defendant has failed to show any reason for his failure to exercise due diligence in coming forward with this affidavit sooner. This Court finds that Defendant cannot meet the second requirement of *Timberlake*, "that it was not owing to the want of due diligence that he did not acquire it sooner." *Timberlake*, 246 Ga. at 491.

Defendant fails to show that Mr. Hicks's affidavit is not merely impeaching.

Under *Timberlake*, Defendant must also show that his alleged new evidence is not merely impeaching. Defendant fails to satisfy these requirements.

Defendant's trial counsel thoroughly cross-examined Detective Hillhouse and Officer Lawrence regarding a walk-through of the crime scene with Defendant by members of the Columbus Police Department, including Mr. Hicks, prior to Defendant's videotaped confession. Both officers denied the allegation. TT 428-36. Importantly, the focus of the cross-examination was the existence of a prior walk-through during which Defendant's fingerprints were allegedly planted at the crime scene by police. TT 429-36. Therefore, Mr. Hicks's testimony about the existence of the alleged walk-through would merely serve to impeach the credibility of Detective Hillhouse and Officer Lawrence.

The State did not suppress favorable information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *supra.* Hicks was known to defendant at the time of trial but not called as a witness. Besides, issues of credibility are not within the province of this Court.

Accordingly, Gates is not entitled to a new trial based on the suppression of evidence claim.

The Newly Available DNA Evidence Is Exculpatory and Entitles Gates to a New Trial.

Gates presented DNA evidence at the May 2018 hearing that demonstrates that he is excluded as a contributor to the DNA on two key items of physical evidence used by the perpetrator to bind the victim's hands – a white bathrobe belt

and a black necktie. The State did not contest the defense's DNA test results. The exclusion of Gates's profile to the DNA on the two items is material and may be considered exculpatory. Therefore, Gates is entitled to a new trial.

The Experts for the State and Defense Agreed that Gates's DNA Is Not on the Bathrobe Belt or the Necktie, used to bind the victim.

At the hearing, Gates presented the expert testimony of Dr. Mark Perlin, the chief executive and scientific officer at Cybergenetics. R. 225-305. Dr. Perlin has a medical degree, a Ph.D in mathematics, and a Ph.D in computer science. R. 225-26. He was qualified, without objection, as an expert in the field of DNA interpretation and probabilistic genotyping. R. 226, 233. Dr. Perlin is the creator of a new DNA interpretation technology called TrueAllele. R. 227-29. TrueAllele is a computer program that uses probabilistic genotyping to objectively interpret degraded, low level, and complex mixtures of DNA. R. Ex. 26 (Cybergenetics Report). TrueAllele deconvolutes complex mixtures and can produce a statistic that indicates the likelihood that a given person's DNA profile is present or is not present in a DNA sample. R. 227-28. It is uncontested that TrueAllele was implemented by the Georgia Bureau of Investigations (GBI) in January 2018. R. 231, 316-17. Dr. Perlin trained the GBI staff in how to use TrueAllele. R. 231, 332. Dr. Perlin's testimony was credible. Dr. Perlin testified that the TrueAllele software determined

that Gates is excluded as a contributor to the DNA on the two items of evidence collected from the crime scene. R. 247-48.

The State called two witnesses at the evidentiary hearing, Ms. Kristen Pfisterer and Mr. James Sebestyen. They testified that human interpretation of the DNA, which was done prior to interpretation with TrueAllele, yielded inconclusive results. R. 311. The inconclusive human interpretation results are relevant insofar as they demonstrate the ability of TrueAllele to interpret what human interpretation methods could not (and the reason the GBI purchased it for use in its casework). R. 327-28, 339-40. Dr. Perlin testified that TrueAllele is designed to interpret complex, low level DNA mixtures, such as the mixtures in this case, where human interpretation cannot. R. 282 ("Human review methods don't separate out genotypes, so, [human interpretation methods] wouldn't have been able to [interpret the DNA]."); R. 290-91 ("The older human review systems would have difficulty getting interpretable results, whereas the more modern . . . computers don't have the same issue."). The State did not contest the accuracy of the TrueAllele results, and the State's witnesses testified that TrueAllele is "scientifically valid" in its approach to using data that falls below the human interpretation threshold. R. 317, 333-35.

It is noteworthy that, largely, Ms. Pfisterer and Mr. Sebestyen's testimony did not contradict, but instead supported, Dr. Perlin's testimony. This was the rare hearing in which the scientist who trained the GBI scientists testified on behalf of

the defense. R. 231, 332. Dr. Perlin presented well, answered questions in a direct and unbiased manner, and was the most qualified and credible of the three DNA experts who testified.

In light of the unified opinion of the experts that Gates is excluded as a contributor to the DNA on the two items taken from the crime scene, the State argued that (1) it stored the belt and necktie in such a way that Gates's DNA degraded, and is no longer on the items; and (2) Gates's DNA could have fallen off of or otherwise been lost from the items over time. R. 312-14, 325-28. The Court should reject these theories for the reasons provided below.

The evidence presented at the May 2018 hearing established that the perpetrator's DNA would be embedded in the bathrobe belt and necktie because of the way in which the crime occurred. At trial, the District Attorney's investigator testified for the State that the perpetrator tied the bathrobe belt "very, very tightly" around the victim's hands, "bound her wrists," and double knotted the belt. T. 276; *see also* R. Ex. 27 (GBI photographs depicting the knots). The necktie also was tied around the victim's hands, with knots binding it together. *Id.*

Citing a peer reviewed study, Dr. Perlin explained that manipulation of the belt and necktie in this manner would transfer a significant amount of DNA from the perpetrator's hands onto the items. R. 267-72; R. Ex. 28 (Goray Study) (discussing variables affecting DNA transfer onto cloth, including friction, pressure, and length

of time engaging with the material). Furthermore, Dr. Perlin testified that even if the perpetrator washed his hands prior to touching the bathrobe belt and necktie, he still would have transferred DNA to the items. R. 273.

The evidence presented at the May 2018 hearing established that TrueAllele yielded informative results, notwithstanding the possibility of degradation of the DNA over time. The State suggested that it stored the evidence in conditions so extreme that the conditions caused extensive bacterial growth resulting in the total degradation of the DNA on the items. R. 313-14, 326-27. There is no indication that the DNA on the items had completely degraded due to bacterial growth or any other reason. Instead, Dr. Perlin testified that while the DNA on the bindings had indeed degraded over time, the samples still uniformly yielded informative results that could be and were interpreted reliably by TrueAllele. R. 289-91, R. 298 ("[T]he data are really dispositive here. We see there's degradation. We see it's not complete degradation."); R. 302 ("We don't see a complete elimination of the data, we see a degradation pattern that shows longer sentences are producing less signal while shorter sentences are producing quite a good signal."). Dr. Perlin credibly explained the several ways that TrueAllele is able to accommodate for and interpret degraded DNA. R. 255.

In addition, the State suggested that the GBI's "inconclusive" findings following human interpretation attempts were due to the extent of DNA degradation

on the bindings. R. 311-13. However, Dr. Perlin explained that the inconclusive findings were not due to an inability of the degraded DNA to yield informative results, but rather due to an inability of the GBI to interpret the degraded, low level complex mixture using human interpretation methods. R. 290-91.

The evidence presented at the May 2018 hearing established that the perpetrator's DNA would not have transferred off of the items simply because other individuals touched the items. The State argued that Gates's DNA could have fallen off of the items because the items were handled by several people over the years and taken in and out of a manila envelope. R. 293, 340. The State's expert was unable to cite any studies to support the State's proposition. R. 316. In support of its theory, the State observes that only three or four DNA profiles were located by TrueAllele on each item, yet the State asserts that many more individuals handled the items.[3]

Dr. Perlin testified that once deposited, fabrics such as a cloth bathrobe belt or necktie would retain the DNA. R. 271 ("DNA sticks around for a long time . . . If it's in the weave of a fabric, it's going to stay there."). Dr. Perlin testified that if additional individuals touched the cloth bindings, their DNA could be added, creating a more complex mixture, but the touching would not remove the perpetrator's DNA. R. 274-76. Dr. Perlin explained that one reason that the items

[3] Although the State's counsel suggested that "dozens" of people handled the items, R. 326, there is no evidence to support that assertion.

may include fewer DNA profiles is because casual or brief touching of the items would result in less DNA, or possibly no DNA, being deposited. R. 298-99; R. Ex. 28 (Goray Study) (explaining the less friction, pressure, and time spent manipulating material, the less DNA deposited).

Gates has met the six elements of *Timberlake* with respect to the DNA issue and therefore is entitled to a new trial.

First, the exculpatory DNA evidence in this case has come to Gates's knowledge since the trial.

Second, Gates was diligent in obtaining the exculpatory DNA evidence. The DNA in Gates's case consists of a low level, degraded, complex mixture. The State and defense experts agreed that the DNA on the two items could be meaningfully interpreted through TrueAllele's probabilistic genotyping, whereas it could not be meaningfully interpreted by traditional human analysis. *See* R. 290-91 (Perlin) (testifying that "[t]he older human review systems would have difficulty getting interpretable results, whereas the more modern . . . computers don't have the same issue"); R. 316-17 (Pfisterer) (testifying that the GBI implemented TrueAllele so that it could analyze low level complex DNA mixtures, like the mixture in Gates's case); R. 333-35 (Sebestyen) (testifying that TrueAllele is a "scientifically valid" method that is able to interpret information below the analytical threshold).

Furthermore, the State and defense agreed that TrueAllele was adopted by the GBI in January 2018. R. 231, 316-17.

The State argued that Gates should have secured DNA testing when contact DNA testing first became available in the 1990s. The State's argument is flawed. According to O.C.G.A. § 5-5-41(c)(7)(C), the Court must grant DNA testing when "it would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior results." The evidence at the hearing demonstrated that TrueAllele's results are more discriminating and probative of the identity of the perpetrator than the prior results obtained by human interpretation of complex mixtures. Therefore, Gates satisfies the diligence requirement.

Alternatively, independent from the grounds above, Gates was diligent in his request for DNA testing because he requested the testing immediately after Georgia Innocence Project interns located the two items of evidence in the District Attorney's Office in 2015.[4] At a hearing in November 2017, an Assistant District Attorney

[4] While the State contends that the two items of evidence may have been present in court at a hearing held in October 2002, the State subsequently represented, in November 2002, that the two items of evidence at issue were destroyed in 1979. *See* Transcript of Hearing at 64-65 (Nov. 8, 2002) (indicating that the belt and necktie were among the items destroyed by the crime laboratory in 1979); GBI Record of Evidence Received by Crime Laboratory at 1, item 3 (attached as Ex. B to State's Supplement filed Apr. 9, 2018, indicating the same).

acknowledged that the items were "new evidence located in 2015." *See* Transcript of Status Hearing at 12 (Nov. 7, 2017).

Finally, the State did not raise a due diligence argument when Gates initially requested DNA testing in 2015.[5] And in 2017—after the State had secured the GBI's inconclusive human interpretation results, but before receiving the exculpatory TrueAllele results—the State explicitly conceded that the DNA testing was appropriate and proper. *See* Transcript of Status Hearing at 25 (Nov. 7, 2017) (Assistant District Attorney Bickerstaff) ("[W]e thought it proper that DNA should be tested on those items . . ."); *id.* ("[The items] were there and available and they decided they wanted to test them and we thought that was proper."); *id.* ("[T]he DNA testing would be proper based on the statute."); *id.* at 36 (Assistant District Attorney Lewis) (stating that it is "the State's position" that Gates is entitled to a statutory right to DNA testing); R. 224 (Lewis) ("There is no challenge here as to the testing that took place.").

Third, the exculpatory DNA evidence is material. For the reasons described above, the DNA evidence is meaningful and exculpatory because it demonstrates that Gates was not the person who bound the victim's hands.

Fourth, the exculpatory DNA evidence is not cumulative.

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[5] The State initially opposed DNA testing in 2015 on materiality grounds. *See* Transcript of Hearing at 41, 70-74 (Dec. 16, 2015).

Fifth, Gates submitted affidavits from expert witnesses prior to the evidentiary hearing, including affidavits and reports from Dr. Greg Hampikian and Dr. Mark Perlin. *See* Gates's Supplement to Amended Extraordinary Motion for New Trial Explaining DNA Test Results that Exclude Gates as a Contributor to the DNA on the Physical Evidence (filed Jan. 29, 2018); Notice of Additional Witnesses (filed Apr. 18, 2018). Accordingly, Gates satisfied the affidavit requirement.

Sixth, the evidence presented does not impeach the credibility of a witness. Instead, it provides substantive evidence that Gates did not commit the offense for which he was convicted.

The DNA evidence discussed above is even more concerning given the State's history of destruction of evidence in this case.[6] The State argues that the DNA test results are not sufficient to warrant a new trial for Gates, yet the State itself destroyed the bulk of the remaining evidence that could have been subjected to testing. The State destroyed most of the remaining evidence in 1979, less than two years after Gates's trial and before the Georgia Supreme Court affirmed Gates's conviction and sentence in this death penalty case. *See* GBI Record of Evidence Received by Crime Laboratory (attached as Ex. B to State's Supplement filed Apr. 9, 2018, indicating

[6] During the Extraordinary Motion for New Trial proceedings, the Court repeatedly requested that the State produce a list of evidence taken from the crime scene, the tests that were conducted on that evidence, and the test results. *See* Court Order (filed Feb. 23, 2018). To date, the State has not complied with the Court's request.

that all but five items of physical evidence in Gates's case were destroyed on May 2, 1979).

Some of the evidence destroyed by the State was material and exculpatory evidence. *See Arizona v. Youngblood*, 488 U.S. 51 (1988). One piece of material and exculpatory evidence included Type B blood found on a door next to the deceased victim at the crime scene. *See* GBI Crime Lab Supplementary Report at 1-2 (Feb. 3, 1977) (attached as Ex. B to State's Supplement filed Apr. 9, 2018, indicating that item 29—the red brown stains on the door—is positive for blood of human origin that is Type B). GBI records indicate that the blood was among the items destroyed in 1979.[7] *See* GBI Record of Evidence Received by Crime Laboratory at 1-2 (attached as Ex. B to State's Supplement filed Apr. 9, 2018). The Type B blood was material and exculpatory evidence because it placed a third party on the scene, as Gates and the decedent each had Type O blood. *See* T. 290 (noting the victim had O positive blood type). The State's destruction of evidence, when considered in conjunction with the new DNA evidence described above, provides further reason why Gates is entitled to a new trial.

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[7] Additional evidence destroyed by the State includes, in part, (1) two semen slides collected from the victim's cervix and vagina during a sexual assault examination; (2) the bathrobe the victim was wearing, which contained seminal stains; and (3) numerous Caucasian hairs collected from the victim and the crime scene.

Defendant is Granted a new trial on the DNA findings pursuant to O.C.G.A. § 5-5-41(C) (2010).

Defendant is Denied relief on all other grounds alleged in his Extraordinary Motion for New Trial.

SO ORDERED this 10th day of January, 2019.

John D. Allen

Honorable John D. Allen
Superior Court Judge
Chattahoochee Judicial Circuit

Exhibit G

Excerpts from Motion of North Carolina State Conference of the NAACP for Leave to File Brief as *Amicus Curiae* and Brief of Amicus Curiae, *State of North Carolina v. Marcus Reymond Robinson, et al* (July 11, 2018, N.C. 411A94-6, 548A00-2, 441A98-4, 130A03-2.)

Nos. 411A94-6, 548A00-2, 441A98-4, 130A03-2 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	91 CRS 23143
MARCUS REYMOND ROBINSON	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	98-CRS34832, 35044
CHRISTINA SHEA WALTERS	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	97 CRS 4312, 47314, 47315
TILMON CHARLES GOLPHIN	)	
STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Cumberland County
	)	01 CRS 65079
QUINTEL MARTINEZ AUGUSTINE	)	

****

MOTION OF NORTH CAROLINA STATE CONFERENCE OF THE NAACP FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

****

Pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Conference of the NAACP ("the NC Conference") respectfully moves this Court for leave to file an *amicus curiae* brief in support of petitioners Marcus Reymond Robison, Christina Shea Walters, Tilmon Charles Golphin, and Quintel Augustine. The NC Conference conditionally files its *amicus curiae* brief along with this motion, within the time permitted for the petitioners to file their briefs. In support of this motion, the NAACP shows the following:

NATURE OF AMICUS CURIAE'S INTEREST

Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization. Its mission is to ensure the political, educational, social, and economic equality of all persons and to eliminate racial hatred and racial discrimination. Throughout its more than 100-year history, the NAACP has been at the forefront of the struggle to eliminate racial disparities and discrimination in the criminal justice system, including in jury selection and composition. It or its former affiliate, the NAACP Legal Defense and Education Fund, Inc., have filed amicus curiae briefs in many of the seminal jury discrimination cases. As a result of this history, the NAACP's experience has yielded lessons that may be useful to this Court in resolving the pending claims.

The North Carolina State Conference of the NAACP is a non-partisan, non-profit organization with 101 active branches throughout the state.

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

Petitioners' cases are now before this Court for a determination of whether their fundamental rights under the United States Constitution were violated by the superior court's denial of their race discrimination claims filed pursuant to the Racial Justice Act ("RJA"), N.C. Gen. Stat. §15A-2010 to 2012, enacted in 2009, amended in 2012, and repealed in 2013. The issues in these cases relating to the application of the RJA to combat racial discrimination in the criminal justice system are of great importance to the people of North Carolina and to the NC Conference and its members.

As the oldest and largest civil rights organization in the state, the NC Conference of the NAACP vigorously advocated for passage of the RJA by the North Carolina General Assembly. When Governor Beverly Perdue signed the bill into law, the President of the NC Conference praised its enactment, noting:

> This law does not assure racial justice, but it can help bring it about. The law is one of the most powerful legitimate weapons we can use to rid our state of the criminal justice practice of racial bias. It does not address the roots of the problem – stereotypes, fear and even racism – but it is a start.[1]

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[1] *Statement by Rev. Dr. William J. Barber, II, at the Signing of the Racial Justice Act by Governor Perdue*, at http://carolinajustice.typepad.com/ncnaacp/2009/09/racial-justice-act-becomes-law.html#more

The NC Conference has a history of advocacy in other criminal cases in which racially discriminatory jury selection resulted in unfair trial. In 2012, the NC Conference spearheaded the successful, hotly contested campaign to obtain pardons of innocence for the individuals known as the Wilmington 10. *See Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980). The prosecution of these nine young African American men and one white woman represented the culmination of an eruption of race-based animus, anger, and racial bias directed against high school students who were protesting widespread racial discrimination within the New Hanover County School System. In 2012, forty years after their convictions, Governor Beverly Perdue issued full pardons of innocence for all of the Wilmington 10. The NC Conference believes that the evidence of the invidious racial discrimination in the Wilmington 10 case upon which Governor Perdue relied is also relevant to this Court's review of the petitioners' cases.

ISSUE OF LAW TO BE ADDRESSED IN THE *AMICUS* BRIEF

Whether the petitioners' constitutional rights will be violated if their claims under the RJA are not considered and adjudicated.

POSITION OF AMICUS CURIAE ON THE ISSUE OF LAW

The NC Conference believes that the evidence of racially-discriminatory jury selection in Mr. Augustine's case, detailed in the attached amicus brief, demonstrates that the problem of race-based discrimination during voir dire in

Cumberland County, where all four petitioners were tried, is substantial.[2] The issue should be the subject of a hearing pursuant to the RJA, indicating a need for this Court to address the petitioners' constitutional arguments in support thereof.

CONCLUSION

For the foregoing reasons, the North Carolina State Conference of the NAACP requests that the Court grant it leave to file an amicus curiae brief in support of the above-named petitioners.

Respectfully submitted, this 11th day of July, 2018.

Electronically submitted
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N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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[2] Evidence of a similar nature was adduced at the 2012 Racial Justice Act hearing of petitioners Golphin and Walters as well.

Counsel for the Amicus Curiae North Carolina State Conference of the NAACP

Nos. 411A94-6, 548A00-2, 441A98-4, 130A03-2 TWELFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA v. MARCUS REYMOND ROBINSON	)	From Cumberland County 91 CRS 23143
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STATE OF NORTH CAROLINA v. QUINTEL MARTINEZ AUGUSTINE	)	From Cumberland County 01 CRS 65079

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AMICUS CURIAE BRIEF
NORTH CAROLINA STATE CONFERENCE OF THE NAACP

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ARGUMENT[3]

Achieving justice in the petitioners' cases requires the honest, unflinching examination of the pervasive history of racial discrimination in the North Carolina justice system. Notwithstanding nearly 140 years of United States Supreme Court precedent aimed at eradicating racism from the jury selection process, the vast majority of death sentences in North Carolina in the modern era have been handed down by all-white or nearly all-white juries.

Despite attempts to remedy such discrimination, this practice has persisted with alarming continuity over the past three decades. Such moral and legal transgressions against the citizens and justice system of North Carolina cannot be countenanced. This Court should act to remedy the harms perpetrated upon defendants and excluded jurors when race-based discrimination in jury selection goes unchecked and to restore public confidence in the integrity and impartiality of the North Carolina system of justice.

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[3] In compliance with N.C. R. App. P. 28(i)(2), undersigned counsel recognizes the contributions of the following individuals to the formulation of this brief: James P. Longest, Jr., Clinical Professor of Law; Theresa Newman, Clinical Professor of Law; Neil Vidmar, Russell M. Robinson II Professor Emeritus of Law; Ali Nininger-Finch, Attorney at Law; and Joy Tsai, Duke Law School, Class of 2015.

I. Racially discriminatory jury selection undermines the function of the jury and damages the integrity of the justice system.

The race-based exclusion of otherwise-qualified North Carolinians from fulfilling their civic duty of jury service "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130, 61 S. Ct. 164, 165 (1940). The jury is at the crux of our justice system in "safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Batson v. Kentucky*, 476 U.S. 79, 86, 106 S. Ct. 1712, 1717 (1986). For nearly 140 years, the United States Supreme Court recognized that the exclusion of African American citizens from jury service on the basis of their race violates the fundamental principles of the United States Constitution. *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824 (1965); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986); *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756 (1987).

Explicitly recognizing the persistence of racial inequity in capital cases such as the petitioners', the Supreme Court stated in *McCleskey v. Kemp* that "it is the jury that is a criminal defendant's fundamental protection of life and liberty against race or color prejudice. Specifically, a capital sentencing jury representative of a criminal defendant's community assures a diffused

impartiality in the jury's task of expressing the conscience of the community on the ultimate question of life or death." 481 U.S. 279, 310, 107 S. Ct. 1756, 1776 (1987) (internal quotation marks, alterations, and citations omitted).

Race-based discrimination in jury selection not only harms the individual defendant and excluded juror but affects the entire community. *Batson*, 476 U.S. at 87, 106 S. Ct. at 1718. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." *Id.* Such discrimination is "pernicious" to the achievement of equal justice under the law. *Id.*

The selection of Mr. Augustine's jury violated 140 years of United States Supreme Court precedent designed to eradicate racism and to achieve representative juries in every American courtroom.[4] Rather than selecting a jury that reflected the community and which would reach a verdict with "diffused impartiality," Mr. Augustine's prosecutor classified prospective African American jurors on the basis of their race, described them in disparaging, racially-charged terms, and, if the individual was called, struck them from the jury. Such race-based discrimination "casts doubt on the

---

[4] Although this brief deals specifically with the handwritten notes of Assistant District Attorney Cal Colyer uncovered in Mr. Augustine's case, counsel believes that this analysis is relevant to the cases of Mr. Robinson, Mr. Golphin, and Ms. Walters as well. ADA Colyer was also the lead prosecutor on Mr. Golphin's case. Mr. Robinson and Ms. Walters likewise were tried by prosecutors from the Cumberland County District Attorney's Office during a similar time period and under the tenure of the same elected district attorney.

integrity of the judicial process and places the fairness of [the] criminal proceeding in doubt," *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1371 (1991). In the interests of justice and the integrity of the judicial system, a conviction so obtained cannot be allowed to stand.

II. Overt racial discrimination in jury selection infected Mr. Augustine's trial just as it contaminated the Wilmington 10 case some thirty years prior.

In October 1972, nine African American men and one white woman were convicted on charges stemming from armed confrontations between African American students boycotting New Hanover County public schools and their white opponents. *Chavis v. North Carolina*, 637 F.2d 213, 215-16 (4th Cir. 1980). The case typified what Governor Perdue powerfully described as "a very difficult time in our state's past, a period of racial tensions and violence that represents a dark chapter in North Carolina's history." Appendix p 10. These ten individuals, termed the "Wilmington 10," were convicted of various charges and sentenced to a total of 282 years in prison. Appendix p 13. In 1980, the United States Court of Appeals for the Fourth Circuit overturned all of the Wilmington 10's convictions due to prosecutorial misconduct, suppression of exculpatory evidence, perjury by State witnesses, and multiple errors of constitutional magnitude. *Chavis*, 637 F.2d at 222-26.

In 2012, Governor Beverly Perdue issued pardons of innocence to the Wilmington 10. Appendix p 10. In doing so, she explicitly recognized the odious

role that racial discrimination played in their unjust conviction. Referring specifically to the handwritten notes of the prosecutor who picked the jury at the 1972 trial, she recognized that "[t]hese notes show with disturbing clarity the dominant role that racism played in jury selection. The notes reveal that certain white jurors believed to be Ku Klux Klan members were described by the prosecutor as 'good' and that at least one African American juror was noted to be an 'Uncle Tom type.'" *Id.* Governor Perdue denounced the role of race in jury selection, proclaiming:

> This conduct is disgraceful. It is utterly incompatible with basic notions of fairness and with every ideal that North Carolina holds dear. The legitimacy of our criminal justice system hinges on it operating in a fair and equitable manner with justice being dispensed based on innocence or guilt – not based on race or other forms of prejudice. That did not happen here. Instead, these convictions were tainted by naked racism and represent an ugly stain on North Carolina's criminal justice system that cannot be allowed to stand any longer. Justice demands that this stain finally be removed. The process in which this case was tried was fundamentally flawed.

Id. Exercising her authority to right a wrong that had persisted for four decades, Governor Perdue issued full pardons to the wrongfully convicted Wilmington 10.

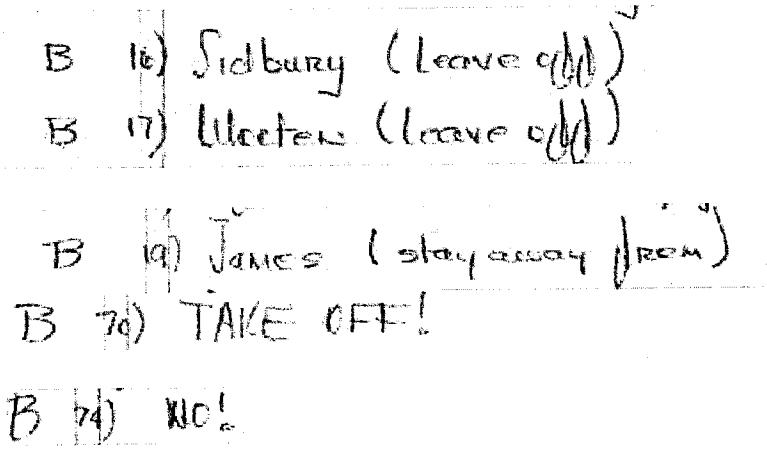
The Wilmington 10 were tried in 1972. Mr. Augustine's was tried in 2002. Despite the passage of thirty years between the two cases, the same invidious racial discrimination that pervaded the Wilmington 10 jury selection also infected voir dire at Mr. Augustine's trial. As discussed in detail, *infra*, the

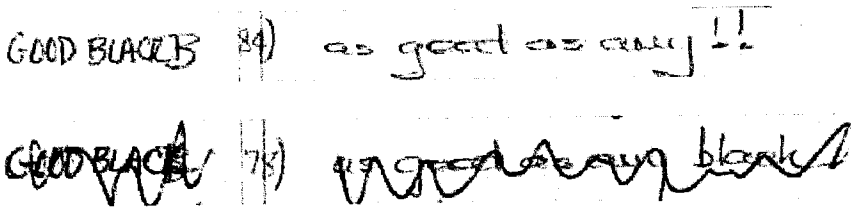
similarities between the racial stereotyping and disparagement that occurred in both cases is indisputable evidence that the scourge of racial discrimination in jury selection has continued unabated in a manner antithetical to the ends of justice in North Carolina.

A. The prosecutor's handwritten notes provided incontrovertible evidence of race-based discrimination in the Wilmington 10 case.

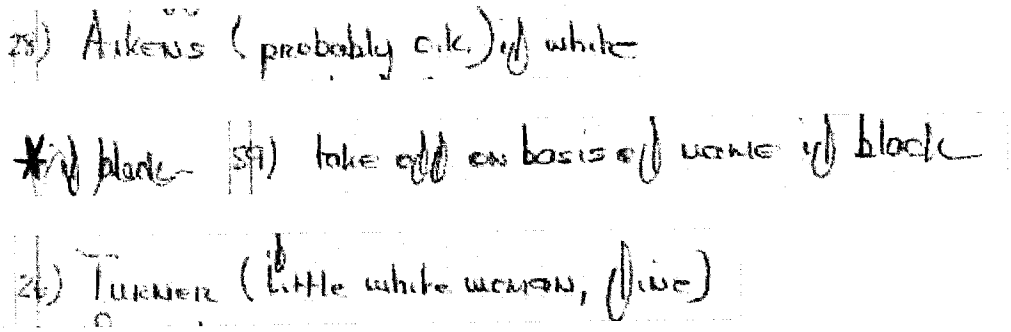
Evidence of racial discrimination in the jury selection of the Wilmington 10 was clear. Three pages of Assistant District Attorney James Stroud's handwritten notes indicated clearly that the prosecution's intended to exlude African American potential jurors, seat Ku Klux Klan members, and include only those African Americans who lived in certain pre-approved neighborhoods.

ADA Stroud began by explicitly noting the race of African American potential jurors, marking a capital "B" or writing the words "GOOD BLACK" next to their names:



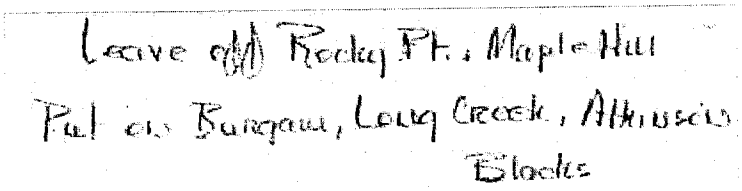


See Appendix pp 1, 3. Where he was not sure of a veniremember's race, ADA Stroud noted that certain jurors would be acceptable, but only if they turned out to be white:



See Appendix pp 1-2.

Indeed, ADA Stroud sought to keep residents of entire African American neighborhoods off the jury, while seating those from others that the prosecution deemed acceptable:



See Appendix p 1. In accordance with this note, African American jurors from the "bad" African American neighborhood of Maple Hill were recommended to be stricken:

B 2) Randolph (uc) on basis Maple Hill

* B 5) No! Black (from Maple Hill

See Appendix pp 1-2.

Other African American prospective jurors were indicated as acceptable risks due to their residence in a "good" African American neighborhood or the prosecution's odious assessment that they were an "Uncle Tom" or a "GOOD BLACK":

B 9) Murphy (worth chance because from Atkinson)

B 36) good name for blacks (??)

B 11) Graham (knows; sensible; Uncle Tom type)

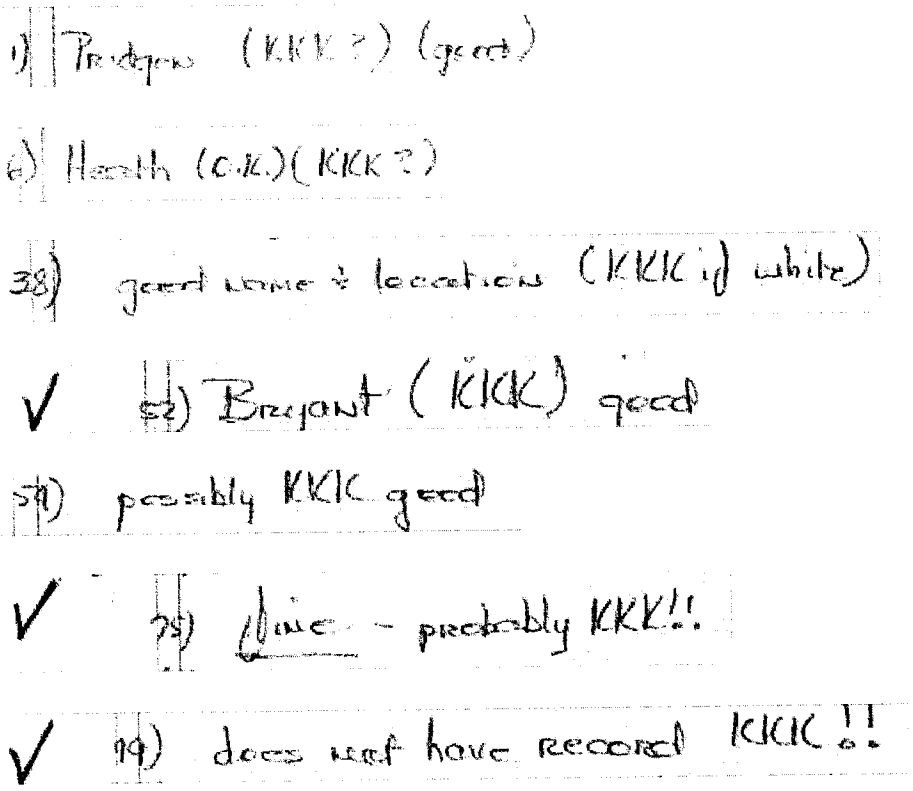
GOOD BLACK B 84) as good as any!!

GOOD BLACK 78) [illegible]

See Appendix pp 1-3.

ADA Stroud's notes left no question as to who the prosecution believed should replace the stricken African American veniremembers. Notably, ADA Stroud did not explicitly identify any potential jurors as white in the same categorical way as he marked African American veniremembers with a capital "B," indicating his belief in the "otherness" of African American prospective

jurors. He did, however, approvingly mark multiple potential jurors with one clear identifier: membership in the Ku Klux Klan. Prospective jurors belonging to the KKK were repeatedly marked as "good," "fine," and "OK." ADA Stroud even employed double exclamation marks to indicate his enthusiasm for seating these veniremembers:



See Appendix pp 1-3.

It was to this incontrovertible evidence of racial discrimination in jury selection that Governor Perdue referred when she declared that ADA Stroud's handwritten notes "show with disturbing clarity the dominant role that racism played in jury selection" in the Wilmington 10 case. Appendix p 10. As

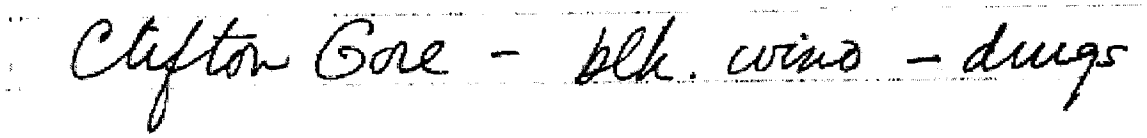
Governor Perdue recognized, the convictions obtained as a result of ADA Stroud's racially discriminatory jury selection were "tainted by naked racism and represent an ugly stain on North Carolina's criminal justice system that cannot be allowed to stand any longer." Appendix p 10.

B. The prosecutor's handwritten notes provide incontrovertible evidence of race-based discrimination in Mr. Augustine's case.

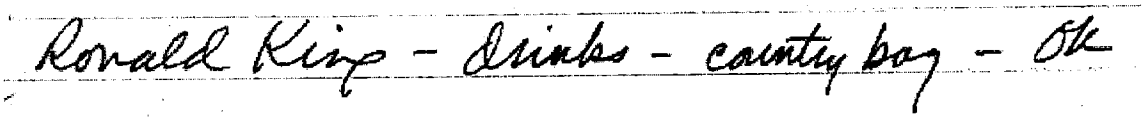
Despite the passage of 30 years between the Wilmington 10 case and Mr. Augustine's trial, the stain of racial discrimination in voir dire has not been eliminated. Indeed, history repeated itself, with the revelation of handwritten notes by Assistant District Attorney Cal Colyer classifying prospective jurors in a racially discriminatory manner almost indistinguishable from ADA Stroud's notes in the Wilmington 10 case.

Indisputable evidence of race-based discrimination can be found in the ADA Colyer's four pages of handwritten notes documenting his decision-making process in voir dire, entitled "Jury Strikes." *See* Appendix p 4. These notes reveal with crystal clarity that ADA Colyer judged similarly situation jurors differently depending upon their race.

For example, one African American prospective juror was explicitly classified by race and described derisively as a "blk. wino" who used drugs:

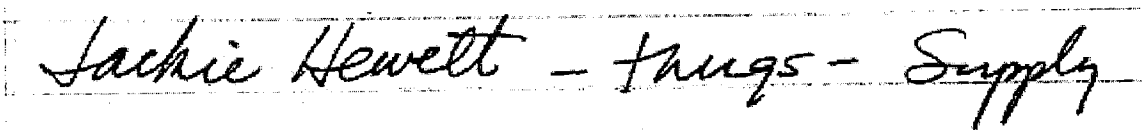


See Appendix p 5. In contrast, a white[5] venireman who apparently also had a drinking problem was described in approving terms, as a "country boy" who "drinks" but was nevertheless "OK":

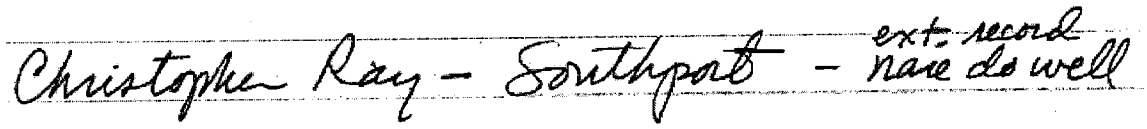


See Appendix p 5.

Likewise, ADA Colyer used the racially loaded, pejorative slur of "thugs" to refer to an African American prospective juror:



See Appendix p 5. By contrast, a white venireman with an "extensive" criminal record was described paternalistically as a mere "n[e'er] do well":



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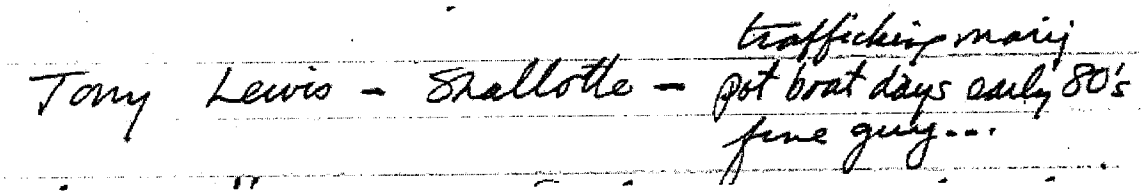
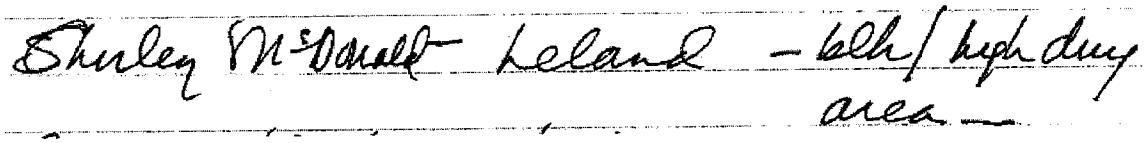
[5] To identify the race of the prospective jurors in Mr. Augustine's case, where that race is not already identified by ADA Colyer's notes, amicus counsel relies on the order issued by Judge Weeks in *State v. Golphin, et. al.*, 97 CRS 47314-15. Counsel recognizes that this order was vacated in *State v. Golphin, Walters & Augustine*, 368 N.C. 594, 780 S.E.2d 552 (2015). That decision does not appear to have indicated any disapproval of the order's factual findings as to the race of the potential jurors, however.

See Appendix p 6. Likewise, a white veniremember who trafficked in marijuana and ran "pot boats" in the early 1980s was described as a "fine guy" and ultimately passed as a juror by the State:

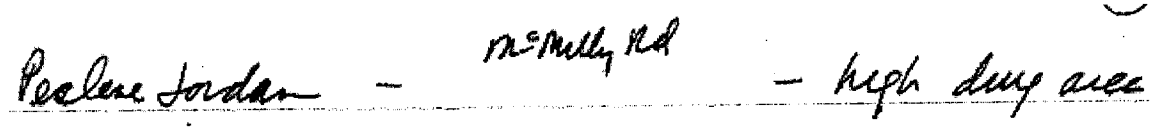


See Appendix p 9.

The description of another African American potential juror revealed that ADA Colyer classified an entire neighborhood as undesirable because it was "black" and "high drug":



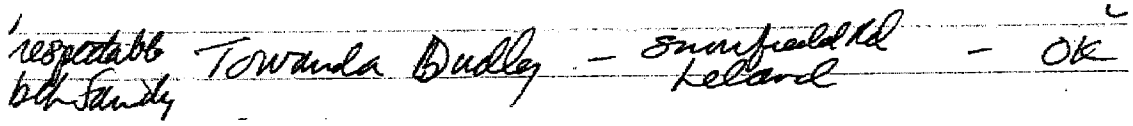
See Appendix p 5. This was in contrast to his more neutral, fact-based classification of other neighborhoods as merely "high drug areas," without any reference to the race of the people who lived there:



See Appendix p 8.

The near-universal nature of the prosecution's intention to exclude African American prospective jurors on the basis of race is confirmed by ADA Colyer's one noted exception about the apparent acceptability of veniremember

Towanda Dudley who, despite being African American, came from what ADA Colyer deemed a "respectable blk. family":



See Appendix p 8.

Not once did ADA Colyer note that a potential juror was white or came from a predominantly white neighborhood. *See* Appendix pp 4-9. This speaks to his overriding concern at ferreting out African American veniremembers and being sure to exclude them from Mr. Augustine's jury should the need arise.

CONCLUSION

A direct comparison of ADA Colyer's notes with the handwritten notes made by ADA Stroud three decades earlier reveals, with startling clarity, the persistence of racial discrimination in the North Carolina criminal justice system. Despite decades of effort by citizens, the legislature, and the courts to eliminate racial discrimination, change has come too slowly and at too high a price. When an African American citizen like Quintel Augustine can be sentenced to die by an all-white jury obtained through a voir dire process corrupted by overt racial discrimination, the jury process has ceased to act as the "fundamental protection of life and liberty against race or color prejudice," *McCleskey*, 481 U.S. 279, 310 (internal quotation marks omitted), and instead

become a manifestation of the "naked racism" to which Governor Perdue referred when granting pardons to the Wilmington 10 (Appendix p 10).

Forty years passed before the manifest injustice of the Wilmington 10 case was finally resolved. It need not take four decades to remedy the injustice in Quintel Augustine's case and conduct the same searching examination in Mr. Robinson's, Mr. Golphin's, and Ms. Walter's cases. This Court should grant the petitioners' constitutional arguments to allow the lower courts to fully evaluate petitioners' claims under the Racial Justice Act and vindicate their right to trial by a jury selected in a fair and non-discriminatory manner. The interests of justice require nothing less.

Respectfully submitted, this 11th day of July, 2018.

Electronically submitted
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N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using 13-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, captions, indices, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

Electronically submitted
Lisa A. Bakale-Wise

CERTIFICATE OF SERVICE

I certify that I have, this day, filed the foregoing motion electronically as allowed in Rule 26(a)(2) of the N.C. Rules of Appellate Procedure. I further certify that I have this day served a copy of the foregoing brief upon the following parties, by electronic mail as allowed under Rule 26(c):

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This the 11th day of July 2018.

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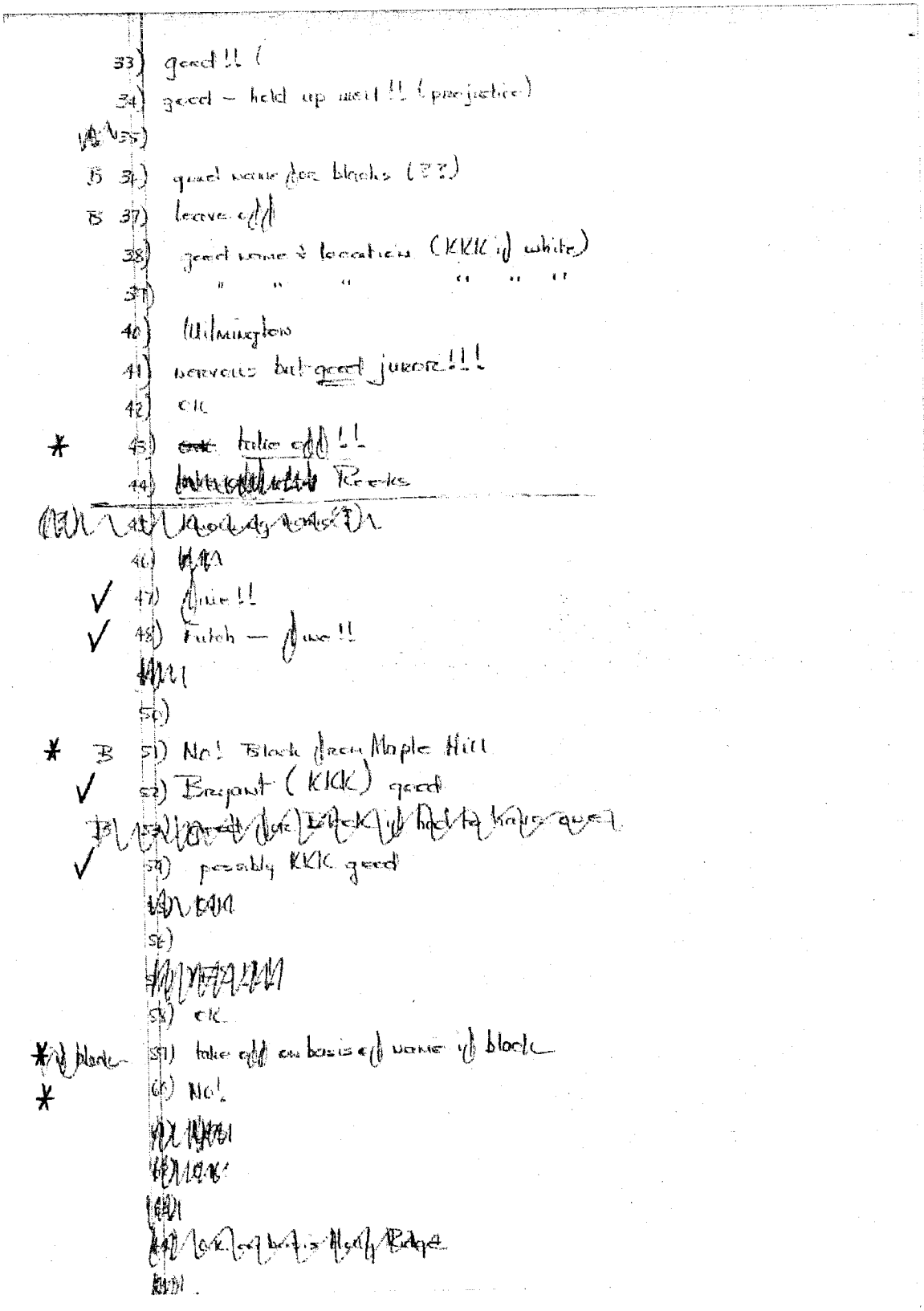
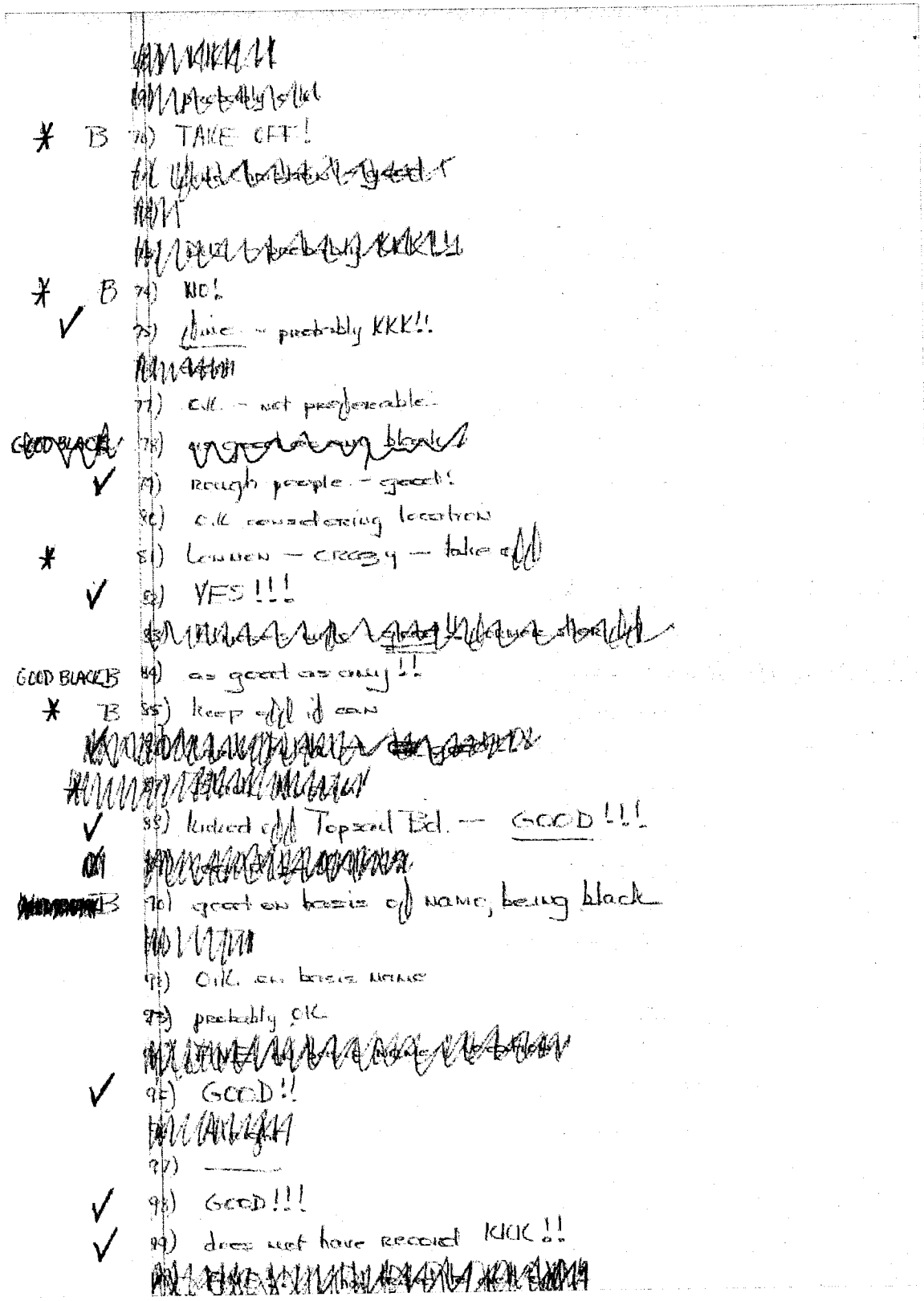
APPENDIX

– stay away from black [redacted]men

Leave off Rocky Pt. & Maple Hill
Put on Bungan, Long Creek, Atkinson
Blacks

1) Pridgen (KKK ?) (good)
2) Justice (O.K.) (on basis name)
3) Suggs
✓ 4) Thompson
5) Rocks (hosp)
6) Heath (O.K.)(KKK ?)
✓ B 7) McIntyre (Leroy)
✓ 8) Riverbank (O.K. on basis name)
B 9) Murphy (worth chance because from Atkinson)
✓ 10) Edens (good)
✓ B 11) Graham (knows, sensible; Uncle Tom type)
✓ 12) Wells (good on basis name, good)
13) ~~Spade~~ Spruyt (good on basis name)(Blueberry)
14) Wallace (Commissioner husband; fish camp) (not to be intimidated)
15) Bowen (outstanding)
/ B 16) Sidbury (leave off)
/ B 17) Wooten (leave off)
/ 18) Alford (C. represented; good)
/ B 19) James (stay away from)
20) Denby
21) Shingleton (C knows, good)
22) Jones (?) (O.K.) (part of rough family)
23) Flynn (good; fine)
B 24) Moore (no)
25) Smith
26) Turner (Little white woman, fine)
B 27) Stringfield (no women black on jury)
28) Aikens (probably o.k.) of white
B 29) Randolph (no) on basis Maple Hill
B 30) Aikens (as good as any; but no)


33) good !! (
34) good – hold up mark !! (projective)
35)
B 36) good name for blocks (??)
B 37) leave off
38) good name & location (KKK if white)
39) " " " " " "
40) Wilmington
41) nervous but good jurors !!!
42) etc
* 43) take off !!
44) Rooks
46)
✓ 47) Juan !!
✓ 48) Futch – Juan !!
50)
* B 51) No! Block from Maple Hill
✓ 52) Bryant (KKK) good
✓ 54) possibly KKK good
56)
58) etc
* 59) take off on basis of name of block
* 60) No!


* B 70) TAKE OFF!
* B 74) NO!
✓ 75) Juice - probably KKK!!
77) OK. - not preferable.
GOOD BLACK B 78)
✓ 79) Rough people - good!
80) OK considering location
* 81) Lawyer - crazy - take off
✓ 82) YES!!!
GOOD BLACK B 84) as good as any!!
* B 85) keep off if can
✓ 88) Indeed off Topsail Rd. - GOOD!!!
B 90) good on basis of name, being black
93) OK. on basis name
94) probably OK.
✓ 95) GOOD!!
97) ———
✓ 98) GOOD!!!
✓ 99) does not have record KKK!!

(1)

Jury Strikes

(15th)

? Sharon Atkinson - OI

✓ × Walter Johnson Ballard - Leland (drugs)

✓ × Bryant - Snowfield Rd - Leland (drugs)

✓ × Jerry Carter - Shallotte — (drugs)

× Bonnie Clevenger - Southport
↳ domestic history ext

? Collins - (bad drug) area ... Pat Loop Rd off Long Bch Rd.
beware Pat Loop Motel area

× Coster - Leland (drugs) Mt Misery Rd.

? Crisp - Leland (dangerous dogs)

× Desfonds — Boiling Sp. Lk (one chromosome fam.)

× Della Donda - drugs

✓ Evans - not best pick - son found burned in a car

✓ × Gerald Fisher - (dope) - Supply

(2)

Jerry Stokes (cont'd)

Garcia - Leland -

Gibbs - crack cocaine / pros. - Southport

Clifton Gore - blk. wind - drugs

Jerry Harden - Shallotte

Jackie Hewett - drugs - Supply

Ronald King - drinks - country boy - Ok

✓ Carolyn Lambert - Supply - marijuana (drugs)

Teresa Long - Ash - domestics / drugs

prison - Robt Lowe - Supply ... stabbing / murder
felony incest

Inagio Iqueda - Ash - idiot

Charle Nance - Supply drugs

Shirley McDaniel - Leland - blk / high drug area

? Candace McKoy - Leland - Blue Bank Rd

Vickie McNeill - Leland - high drug area

(3)

Mark Mitchell - Shallotte - oyster stealer

✓? → Mark Paul - Shallotte
Sanders Forest Rd - decent neighborhood -
7/11 many bust recently...

✓✗ Christopher Ray - Southport - ext. record - ne'er do well

Reeder - Bolivia

✓ Amanda Gayle Reeves - Riegelwood

✓ Connie Joye Stanley - Ocean Isle Bch - domestics

drugs Sweet - Cedar Hill Rd - high drug Rd

(17th)

✓✗ Anthony Barnard - Southport - Oak View drive - high drug area

✗ Sheila Butler - Marlow Rd Ashe - drugs / arrested

✓✗ Wm. Cribb - Supply - sons in jail. doesn't like LEO kidnap/rape

Butler - Ashe - dope - HW 130 - Whiteville

✓ Lisa Gore Floyd - Ashe - H dope deal

Garcia - Leland

✓ ✓ [illegible]

40442

Jury Strikes (cont'd) (4)

Peelene Jordan - McNully Rd - high drug area

✓ Eric Scott Karr - Supply - domestic

Lonnie Linker - Calabash 1967 revolving idiot

X ✓ Scottie Lumpkin - Winnabow - B&E's jail

X ✓ Massey - Pearl Rd Supply - drug area

✓? James Richard - Leland - rough area/anti LEO

Terry Riverbank - Leland - drugs

Iliha Robbins - Leland - drugs

✓ Harold Scoggins - Leland - "pillar of community!"

Dianne ~~Fab~~ Tacki Neck Rd Bolivia - high crime road

Earl Turner - Winnabow - ext. record...

? Terry Vaught - Chapel Rd Winnabow - prob.

Oreda Waddell - Chapel Loop Rd Leland - crazy family

✓ Karen White - 12th Street So Port - drug area

Jury Strikes (5)

✓ (19th) Andrews - Vassel? Leland - questionable area

Bass - Blake Cir Leland -

Luciana Bellamy - Supply crack dealers

✓ Michael Bishops - Supply - thief/bte's

Bobby Black - Supply - OBPBFP hook up

(ot) ✓ Ronnie Bufkin - Supply - ???

~~[illegible]~~ - ~~[illegible]~~ -

✓ Deann Cobb - Leland drug area

(ot) ✓ Linwood Davis - Bolivia - Statutory rape Charge?

✓ respectable blk family Towanda Dudley - Snowfield Rd Leland - OK

Paul Floyd - OI Bch - Floyd family

✓ Ethyl Gause - - family member shot "Flip"

Louis B. Hewett - Supply - antiPolice →

Pamela Hewett - Shallotte - drugs

Catrol [illegible] - [illegible] - [illegible] 40444

Lucy Stukes (cont'd) (6)

Tony Lewis - Shallotte - trafficking marij pot boat days early 80's fine guy...

/ Brenda Vromman - Supply - domestic viol. vic

John H. Wayland - Supply - (~~suspect assisted H~~)

Pinecrest → Marlowtown Rd / Stumpfetown Rd.

904 area 1/7/08 Longwood ← - Marlin/Carlin/Geo Daniels Freedom Star

Cedar Hill Rd.

Wolf Ridge Rd.

Snowfields Rd.

McMillan / McMilly Rd.

~~Rd~~ Hale Swamp Rd.

Seashore Rd.

Exhibit H

Excerpt from Order Granting Motions for Appropriate Relief, State of North Carolina v. Tilmon Golphin, et al (Dec. 13, 2012, Superior Court Cumberland Cty. 97 CRS 47314-15, 98 CRS 34832, 98 CRS 35044, 01 CRS 65079.)

STATE OF NORTH CAROLINA COUNTY OF CUMBERLAND		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
STATE OF NORTH CAROLINA	)	
	)	
	)	97 CRS 47314-15 (Golphin)
v.	)	98 CRS 34832, 35044 (Walters)
	)	01 CRS 65079 (Augustine)
	)	
TILMON GOLPHIN	)	
CHRISTINA WALTERS	)	
QUINTEL AUGUSTINE	)	
	)	
Defendants	)	

ORDER GRANTING
MOTIONS FOR APPROPRIATE RELIEF

This case is before the Court on Defendants' claims pursuant to the Racial Justice Act (RJA) that they are entitled to vacatur of their death sentences because race was a significant factor in the prosecution's use of peremptory strikes during jury selection. Defendants have each raised three claims under the original RJA as enacted in 2009. These claims allege RJA violations on the basis of prosecution decisions in North Carolina, Defendants' respective judicial divisions, and Cumberland County. Defendants have also raised one claim each under the amended RJA as enacted in 2012. These claims allege RJA violations on the basis of prosecution decisions in Cumberland County and their individual cases.

The Court convened an evidentiary hearing on October 1, 2012. The hearing concluded on October 11, 2012. Defendants Golphin and Walters waived their right to be present during the proceedings and were not in court during the hearing. Defendant Augustine was present throughout the hearing. Defendants were represented by James E. Ferguson II, of the Mecklenburg County Bar; Malcolm Ray Hunter, Jr., of the Orange County Bar; and Jay H. Ferguson and Cassandra Stubbs of the Durham County Bar. The State was represented by

in *Golphin*; his introduction at this hearing of additional reasons for strikes or repudiation of reasons previously presented in court; and finally, his disparate treatment of black and non-black venire members in capital cases. These matters are discussed in turn. The Court will first address Colyer's notes from *Augustine*.

Colyer's Race-Based Jury Selection Research And Notes In Augustine

10. Prior to Augustine's trial in 2002, Colyer investigated potential jurors. Due to the high profile nature of the case, venue was changed to Brunswick County. Having never tried a case there, Colyer was generally unfamiliar with that area. Consequently, on more than one occasion, Colyer met with members of the Brunswick County Sheriff's Department (BCSD). He asked questions about different neighborhoods and communities in Brunswick County and sought information about individuals on the jury summons list for Augustine's case. As a result of his meeting with members of the BCSD, Colyer wrote six pages of notes. These notes were introduced as DE98-DE103. Each page of Colyer's notes is titled, "Jury Strikes." The notations on DE98-DE103 consist primarily of negative comments about potential jurors. On the final page, DE103, there is a list of 10 neighborhoods and streets in Brunswick County. These notes are irrefutable evidence that race, and racial stereotypes, played a role in the jury selection process in Augustine's case.[5]

11. Colyer used these "Jury Strikes" notes in jury selection. Colyer testified, in response to a question from the State, that it was "very likely" he would have saved these notes

[5] The Court is concerned that the "Jury Strikes" notes were not produced to defense counsel during the *Robinson* litigation and, at this point, the original notes appear to have been misplaced or destroyed. Specifically, Augustine's post-conviction attorney Shelagh Kenney credibly testified regarding the whereabouts of Colyer's notes. According to Kenney, the notes were in the State's *Augustine* file in 2006. However, the notes were omitted from the materials the State disclosed in its *Robinson* discovery, though the "Jury Strikes" notes were clearly covered by the Court's discovery order. Moreover, Kenney reviewed the State's *Augustine* file again in 2012 in connection with this litigation and determined that Colyer's notes are no longer in the State's file. These facts could easily be construed to support an inference that the State intentionally destroyed the documents. The Court declines to make this finding, however, in light of the judicial testimony discussed below regarding Colyer's excellent reputation for truthfulness and integrity.

and used them during jury selection. Indeed, as Colyer conceded, they were prepared for the purpose of jury selection. The voir dire transcript confirms that the notes were used. On DE100, Colyer wrote an entry for black venire member Mardelle Gore: "Longwood – bad area." Longwood is the second community listed on DE103. During voir dire, Colyer asked Gore a number of questions about the Longwood neighborhood where she lived. Gore explained to Colyer that Longwood was located off Highway 904. In the margin next to Longwood, there is a notation of "904 area." As Colyer acknowledged, the reference to 904 appears to be in a "heavier hand" or different pen from the main body of notes. Based on this evidence, the Court concludes that Colyer used his race-based notes to inform his questions and strike decisions during jury selection.

12. The Court finds it significant that Colyer's "Jury Strikes" notes concern a disproportionate number of African Americans. At the time of Augustine's 2002 trial, African Americans made up approximately 14 percent of the population in Brunswick County. Colyer's "Jury Strikes" notes refer to approximately 70 potential jurors. Utilizing the State's criminal record checks and other public records, Defendants identified the race of approximately 55 of these 70. Of the potential jurors for whom race could be determined, more than 40 percent were African Americans. In addition, nine of the 10 neighborhoods and street designations listed on the "Jury Strikes" notes were all areas inhabited predominantly by African Americans.

13. Colyer's "Jury Strikes" notes identify a number of potential jurors as African Americans. There are references to individuals as "blk" which Colyer admitted meant black. Regarding potential juror Clifton Gore, Colyer wrote, "blk. wino - drugs." Regarding potential juror Shirley McDonald, Colyer noted she lived in Leland, an area he described as, "blk/high drug." Regarding potential juror Tawanda Dudley, Colyer noted she was from a "respectable blk

family" and lived on Snowfield Road. In addition, Colyer noted that Dudley was "ok." There is no reference anywhere in Colyer's notes to any potential juror being white or living in a white area.

14. Colyer indicated that the notes reflected comments and impressions of venire members by the Brunswick County Sherriff's department, not his own. Colyer, conceded however, that terms like "wino" were ones he uses on occasion. Most importantly, Colyer decided which things to write in his notes. The Court finds that it is highly significant that Colyer recorded the race of three prospective black venire members. The State offered no explanation for why Colyer recorded only the race of black venire members as part of his investigation of pretrial investigation of potential jurors.

15. This conclusion is supported by the testimony of Defendants' expert witness Bryan Stevenson. As noted above, Stevenson, a law professor, was admitted as an expert in race and the law. He testified that in his view, there is no reason to include a racial designation unless one believes race is important. Stevenson used Tawanda Dudley as an example: Colyer did not describe Dudley as from "a respectable family," he described her as from a "respectable black family." The use in that context of "black," suggests that it was notable to be from a family that was both black and respectable. Stevenson testified that the preoccupation with race reflected in Colyer's notes was highly suggestive of race consciousness and established that race was a significant factor in Augustine's case.

16. The Court also finds it significant that Colyer's notes reflect disparate treatment of potential jurors based on race. For example, black venire member Clifton Gore is described as "blk. wino – drugs" despite the fact he has no record of alcohol- or drug-related criminal convictions. By contrast, white potential juror Ronald King is described as "drinks – country

boy – ok." Elsewhere, black venire member Jackie Hewett is disparaged as a "thug[]" and, in fact, his criminal record was substantial. However, while Colyer noted white venire member Christopher Ray's similarly extensive criminal record, Ray is described more sympathetically as a "n[e'er] do well."

17. Especially troubling to the Court is that African-American potential jurors who appeared on the "Jury Strikes" notes were condemned simply for living in a predominantly black area perceived to be undesirable, and not on the basis of their own conduct. For example, African-American venire members Shirley McDonald and Mardelle Gore had no record of criminal convictions. Colyer's notes indicated that McDonald and Gore lived in a "blk/high drug" or "bad area." The State struck Gore. McDonald was not questioned during voir dire and the State had no opportunity to strike her. Meanwhile, in contrast, white potential juror Toney Lewis was passed by the State, and Colyer's notes deemed Lewis to be a "fine guy," despite the fact that he was involved in "trafficking marj[uana]" and running a "pot boat" in the early 1980s.

18. Stevenson also discussed the phenomenon whereby neighborhood becomes a proxy for race. He explained the significance of Colyer's notes about African-American communities and striking African-American venire members based on where they live. Housing in many communities in this country, and in Brunswick County, is racially segregated. Some of the neighborhoods Colyer listed on DE103 were close to 100 percent African-American communities. As a consequence of these facts, a potential juror's neighborhood can easily become a proxy for race.

19. Colyer suggested in his testimony that his concern about the neighborhoods listed on DE103 was not that they were black neighborhoods, but they were "neighborhoods where there's high crime rates." The Court does not doubt the sincerity of Colyer's belief that he was

motivated by the race-neutral fact of crime, and not race. However, as Stevenson explained and Colyer's own notes demonstrate, Colyer equated black neighborhoods with crime when he wrote "blk/high drug" and denominated Longwood as a "bad" area. Significantly, the State produced absolutely no evidence that these predominantly black neighborhoods were in fact "high-crime" neighborhoods or upon what exactly such characterizations were based. When potential jurors are excluded because they live in an all-black or nearly all-black community, "neighborhood" as a justification for the strike cannot be disentangled from race. Thus, the concern Colyer's notes evince about black neighborhoods is further evidence that race was a significant factor in Augustine's case.[6]

20. In sum, Colyer recorded negative comments about a disproportionately black group of potential jurors, he made explicit references to the race of African-American citizens, and he disparaged African-American potential jurors on the basis of group characteristics. Colyer did all of this on notes labeled "Jury Strikes" on every page. The "Jury Strikes" notes are powerful evidence that, in the prosecution's view, many African-American citizens summoned for jury duty in Augustine's case had a strike against them before they even entered the courthouse.

Colyer And Dickson's Reliance On Race In *Burmeister* And *Wright*

21. The Court next weighs the jury selection practices of Colyer and Dickson in the capital prosecutions of Malcolm Wright and James Burmeister, two Cumberland County defendants who were sentenced to life. Burmeister and Wright were soldiers stationed at Fort Bragg who belonged to a white supremacist "skinhead" gang. They were tried separately for the

[6] Colyer and Russ also discussed neighborhoods with law enforcement in Golphin's case after venue was transferred to Johnston County. The State attempted to suggest through its questioning of Russ that the purpose of this investigation was to determine which jurors lived too far to commute to the trial in Cumberland County. The answers of Russ, and the record itself, flatly contradict this theory. The Court finds that this is additional evidence that race was a significant factor in Golphin's jury selection and in Cumberland County.

416. Defendants have proven their claims under the alternative standards of proof known as "mixed motive" disparate treatment and "pattern or practice" discrimination, both of which the Court set forth in detail in the statutory interpretation section of this order.

417. In view of the foregoing, the Court finally concludes, based upon a preponderance of the evidence, that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed in each of their cases and in Cumberland County.

418. The judgments in *Golphin*, *Walters*, and *Augustine* were sought or obtained on the basis of race.

CONCLUSIONS OF LAW: ORIGINAL RJA CLAIMS

419. Although the Court has already found Defendants are entitled to relief under their amended RJA claims, the Court will reach Defendants' original RJA claims as well to ensure a complete record for appellate review.

420. In their originally-filed pleadings, Defendants also raised peremptory strike claims pursuant to the original RJA. These are claims I, II, and III of Defendants' original pleadings. They alleged that, at the time of Defendants' trials, race was a significant factor in the State's decisions to exercise peremptory strikes throughout North Carolina, in the former Second and current Fourth Judicial Divisions, and in Cumberland County.

421. In considering Defendants' original RJA claims, the Court incorporates all of the foregoing findings of fact made in conjunction with Defendants' amended RJA claims. To these facts, the Court will apply the same statutory interpretation set forth in its order in *Robinson*. Unless otherwise indicated, the Court has reached all of its conclusions in view of the totality of the evidence.

422. Defendants' case in chief established by a preponderance of the evidence a *prima facie* showing that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in their cases, in Cumberland County, in the judicial division,[53] and in North Carolina. The Court reaches this conclusion on the basis of the totality of the evidence, and on the basis of Defendants' unadjusted statistical findings standing alone.

423. The State's evidence failed to rebut Defendants' *prima facie* showing. However, even if the State's evidence was sufficient in rebuttal, Defendants ultimately carried their burden of persuading the Court by a preponderance of the evidence that, at the time the death sentence was sought or imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in their cases, in Cumberland County, in their respective judicial division, and in North Carolina.

424. Although not essential to Defendants' statutory claims in view of the Court's interpretation of the original RJA, the Court makes the following additional conclusions of law.

425. Defendants have persuaded the Court that the State's use of race in peremptory strike decisions in their cases, in Cumberland County, in their respective judicial division, and in North Carolina was intentional.

426. Race was a significant and intentionally-employed factor in the State's decisions to exercise peremptory strikes in each of Defendants' individual trials.

427. Defendants have proven their claims under the alternative standards of proof known as "mixed motive" disparate treatment and "pattern or practice" discrimination, both of

[53] Defendants Walters and Golphin were charged prior to 2000. Therefore, their cases arise out of the Second Judicial Division. Augustine was charged after 2000. Therefore, his case arises out of the Fourth Judicial Division.

which the Court set forth in detail in the statutory interpretation section of this order and the *Robinson* order.

428. In view of the foregoing, the Court finally concludes based upon a preponderance of the evidence that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed. Defendants' judgments were sought or obtained on the basis of race.

NOW, THEREFORE, IT IS ORDERED THAT:

The Court, having determined that Golphin, Walters, and Augustine are entitled to appropriate relief on their RJA jury selection claims, concludes that Defendants are entitled to have their sentences of death vacated, and Golphin, Walters, and Augustine are resentenced to life imprisonment without the possibility of parole.

The Court reserves ruling on the remaining claims raised in Defendants' RJA motions, including all constitutional claims.

This order is hereby entered in open court in the presence of Golphin, Walters, and Augustine, their attorneys, and counsel for the State.

The 13th day of December 2012.

The Honorable Gregory A. Weeks
Senior Resident Superior Court Judge Presiding

Exhibit I

Order, *Tennessee v. Abu-Ali Abdur'rahman* (Apr. 5, 2002, Tenn. M1988-00026-SC-DPE-PD.)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE v. ABU-ALI ABDUR'RAHMAN

No. M1988-00026-SC-DPE-PD

Filed April 5, 2002 (jsr)

ORDER

On March 22, 2002, Abu-Ali Abdur'Rahman filed a motion to recall the mandate issued by this Court in State v. Jones, 789 S.W.2d 545 (Tenn. 1990), and to consider post-judgment facts in support of the motion. Abdur'Rahman alleges that he has obtained new proof of racial discrimination by the prosecution in the selection of the jury in his 1987 capital murder trial and that this new proof establishes a violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). Specifically, he relies on prosecution notes obtained after issuance of the mandate, which allegedly demonstrate that the racially neutral reasons articulated by the prosecutor for removing certain African-American jurors were a pretext for racial discrimination. Abdur'Rahman requests that the Court consider the prosecution notes and an affidavit of one of the prospective jurors dismissed by the prosecutor as post-judgment facts under Tenn. R. App. P. 14.

On April 1, 2002, the State filed a response in opposition to the motion. The State asserts that the materials upon which Abdur'Rahman relies are not new evidence, that these materials are inappropriate for consideration by this Court, and that these materials do not establish extraordinary circumstances warranting recall of the mandate.

On April 2, 2002, Abdur'Rahman filed a reply to the State's response, reasserting that the materials establish a Batson violation. In addition, on that same day, the NAACP Legal Defense Fund, Inc., sought and was granted permission to file an amicus curiae brief in support of Abdur'Rahman's motion. On April 4, 2002, Abdur'Rahman filed a motion seeking a stay of execution, asserting that a stay is necessary to allow proper consideration of his motion to recall mandate.

After carefully considering the motions, the response, the reply, and the amicus curiae brief, a majority of this Court concludes that the motions are not well-taken. It appears that the materials upon which Abdur'Rahman relies in support of his motion to recall mandate were available to him as early as January of 1992, after the decision of the Court of Appeals in Capital Case Resource Center v. Woodall, No. 01A01-9104-CH-00150, 1992 Tenn. App. LEXIS 94 (Tenn. Ct. App. Jan. 29, 1992), which held that files maintained by the District Attorney General can be obtained under the Tennessee Public Records Act at the conclusion of the direct appeal in a criminal case. Exhibit 2 to Abdur'Rahman's reply to the State's response indicates that the prosecution's file, including the notes, were given to counsel for Abdur'Rahman at least by October 20, 1997, and apparently several years earlier during the state post-conviction proceedings. The delay in presenting this claim

is therefore inexplicable. See In re Byrd, 269 F.3d 561, 572 (6th Cir. 2001) (concluding that federal habeas petitioner was not entitled to bring a second or successive petition to raise a claim of perjured testimony, when "[h]e sat on this evidence, like a chicken waiting for an egg to hatch, for twelve years, despite repeated contact with both state and federal courts"). In any event, these materials do not contain post-judgment facts within the meaning of Tenn. R.App. P. 14. The materials do not relate to facts occurring after judgment nor do they describe facts which are unrelated to the merits, readily ascertainable, and not subject to dispute. See Tenn. R. App. P. 14(a); Advisory Commission Comments to Tenn. R. App. P. 14; Duncan v. Duncan, 672 S.W.2d 765, 767-69 (Tenn. 1984).

Furthermore, even if these materials are appropriate for consideration, they do not warrant recalling the mandate. The power to recall mandate is an extraordinary remedy and should be exercised sparingly. See, e.g., Calderon v. Thompson, 523 U.S. 538, 550, 118 S.Ct. 1489, 1498, 140 L.Ed. 2d 728 (1998) (stating that the power to recall mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies"). Moreover, to warrant a recall, the circumstances should be "sufficient to override the strong public policy that there should be an end to a case in litigation." Hines v. Royal Indemnity Co., 253 F.2d 111, 114 (6th Cir. 1958); see also Yocom v. Bratcher, 578 S.W.2d 44, 46 (Ky. 1979) ("There is a strong policy of repose which requires that mandates and the opinions which they effectuate carry a heavy seal of finality."). Abdur'Rahman is urging this Court to use the extraordinary remedy of recall to re-litigate issues previously determined not only by this Court, but according to the response of the State, by the federal district court as well. Contrary to the position of Abdur'Rahman, the materials presented do not conclusively establish that the racially neutral reasons offered by the prosecution for excusing the African-American jurors were merely pretextual in violation of Batson. Indeed, the materials support this Court's direct appeal decision on Abdur'Rahman's Batson claim.

Abdur'Rahman specifically contends that the notes indicate that the prosecutor struck two African-American jurors — Robert Thomas and Sharon Baker — for racially biased reasons. With regard to juror Thomas, he points to a "rating" system used by the prosecution that purportedly scored Thomas as "more acceptable than five white jurors and equally acceptable as five other white jurors" who were not removed. However, the handwritten notes on their face contain no indication of the criteria for the prosecution's "ratings" or the weight given to the individual "ratings" in exercising peremptory challenges. Moreover, Abdur'Rahman's motion appears to ignore the primary reason for excusing Thomas, credited by both the trial court and this Court, which was that the juror was "a close friend of defense counsel from whom he had solicited money for the church he had once pastored." Jones, 789 S.W.2d at 549. That explanation is fully supported by the notes which plainly state: "Lionel [Barrett] & he have known each other for several years. When he had church going he came to Lionel for a donation. He worked downtown delivering office supplies — thinks of Lionel as a friend." (Emphasis in original.) The notes also reflect numerous valid race-neutral reasons for the prosecutor's excusing juror Sharon Baker that were credited by both the trial court and this Court. These include Baker's demeanor and behavior during voir dire ("was sitting in the jury box reading a book during voir dire" and "she will not look at defendant") and her answers to questions (referred to a death sentence as a "killing"). See Jones, 789 S.W.2d at 549. In sum, Abdur'Rahman's contentions furnish no basis for the extraordinary remedy of recall of the mandate.

In closing, we feel compelled to respond to the dissent's comments on the perceived failure of state appellate review despite their irrelevance to the issues raised by the motion to recall. We emphasize that the brevity of an appellate opinion does not indicate that the appellate court did not thoroughly review the record and the relevant law in deciding the case. We have no doubt that at every level judges have thoroughly reviewed this case and pursued justice, as they are required to do by their oath of office.

Accordingly, the motion to recall mandate and the motion for stay of execution are hereby DENIED.

FOR THE COURT:

Frank F. Drowota, III, Chief Justice

Concurring:
E. Riley Anderson, Janice M. Holder, William M. Barker, JJ.

Dissenting by Separate Order:
Adolpho A. Birch, Jr., J.