STATE OF NORTH CAROLINA
COUNTY OF RANDOLPH

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91-CRS-3316, -3317; 92-CRS-2

STATE OF NORTH CAROLINA)
)
v.)
)
KENNETH BERNARD ROUSE,)
)
Defendant.)

****

MOTION FOR APPROPRIATE RELIEF
PURSUANT TO THE RACIAL JUSTICE ACT

****

NOW COMES Kenneth Bernard Rouse, by and through his undersigned counsel, and moves this Court to grant him relief from his sentence of death pursuant to the Racial Justice Act (RJA), N.C. Gen. Stat. §§ 15A-2010 to 15A-2012, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Art. I, §§ 1, 19, 24, 26, and 27 of the North Carolina Constitution. Under the RJA and constitutional law, Mr. Rouse is entitled to a sentence of life imprisonment without parole.

INTRODUCTION

1. Kenneth Rouse, a black man, was convicted by an all-white jury of the attempted rape, armed robbery, and murder of an elderly white woman. At Mr. Rouse's trial, the prosecutor removed every eligible non-white prospective juror from the jury with a peremptory challenge. Moreover, at least one member of the jury that convicted him and sentenced him to die harbored racial animus that played a role in the decision to impose a death sentence.

2. The RJA specifically and conclusively provides: "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010. The RJA, and its application to the death sentence imposed in this case, could hardly be clearer.

3. After his sentence of death was imposed, Mr. Rouse learned Joseph Scott Baynard, a member of the jury, failed to disclose that his own mother had been murdered and her killer was convicted, sentenced to death, and executed in the mid-1950s, despite having been asked during jury selection whether he knew anyone who had been a victim of a crime. Baynard did so for a specific reason: he knew if he disclosed this information, he would be excused from jury service.

4. Yet, in trying to deflect any impact this non-disclosure of his mother's murder might have one the jury's decision to convict Mr. Rouse and sentence him to die, Baynard explained:

> [t]here are numerous factors* which I feel could be more influential in making a legal decision aside from my mother's almost forgotten murder.
>
> *bigotry, ...etc.

(RJA Ex. 7, Baynard Affidavit) The affidavit was typed but, in his own handwriting, Baynard himself added the asterisk and penned the word "bigotry." There could hardly be a more glaring example of race playing a direct and conclusive role in the imposition of a sentence of death, something expressly prohibited under the RJA.

5. During the post-conviction investigation in which he provided his own affidavit, Baynard spoke with Renee Walthall, then a law student aiding Mr. Rouse, about his experiences and attitudes. Walthall recounted her discussions with Baynard. She noted:

> Mr. Baynard also expressed views concerning racial matters. Mr. Baynard stated that 'blacks do not care about living as much as whites do.' Further, he stated that black men rape white women so that they can brag to their friends about having done so, and that such was probably Mr. Rouse's motivation for attacking Ms. Broad[a]way. In my presence Mr. Baynard used the word 'niggers' to refer to members of the black race.
>
> ...
>
> He characterized Mr. Rouse as 'one step above a moron.'[1]

(RJA Ex. 8, Walthall Affidavit) Without hearing any evidence regarding this claim of juror misconduct and racial bias, the state court denied the claim, and Mr. Rouse has never been permitted an evidentiary hearing concerning the dishonesty and "bigotry" of this juror.[2]

---

[1] In his closing argument, District Attorney Garland Yates referred to Mr. Rouse as a non-person. (*State v. Rouse* Transcript at 553)

[2] On appeal to the Fourth Circuit, Rouse was denied relief, as a slim majority of the en banc court found his counsel filed his petition for a writ of habeas corpus one day after the statutory deadline passed, and this error barred federal review. The opinion for the four dissenting judges characterized the deprivation to Mr. Rouse from Baynard's deception and racial prejudice as follows: "Rouse presents what must be considered on its face a powerful constitutional claim: that a juror's personal vengeance and racial bias infected his death sentence." *Rouse v. Lee*, 339 F.3d 238, 260 (4th Cir. 2003) (en banc) (Motz, J., dissenting), *cert. denied*, 541 U.S. 905, 158 L.Ed.2d 248 (2004).

6. The facts presented in this motion and its attachments reveal that race played a determinative role in the jury's decision to impose a death sentence on Mr. Rouse. It is a quintessential illustration of a death sentence prohibited by section 15A-2010.

7. In addition to this specific evidence of race playing a determinative role in the death sentence imposed on Kenneth Rouse, the evidence set out in this motion establishes that North Carolina's system of capital punishment has operated in a manner in which race has played an impermissible role in the imposition of the death penalty. The comprehensive, statistical study presented here demonstrates that race is a significant factor in capital proceedings.

8. Statewide, in Prosecutorial District 19B, and in Randolph County, where Kenneth Rouse was prosecuted, prosecutors strike eligible black and other racial minority venire members from capital juries at double the rate they strike eligible white venire members. All-white juries are common in this district and county.

9. In addition to the specific evidence that race played a role in the jury's decision to sentence Mr. Rouse to death, the statistical evidence shows that statewide, in the former Third Judicial Division, in Prosecutorial District 19B, and in Randolph County, cases which involve white victims are much more likely to proceed to a capital trial and individuals who kill whites are punished much more harshly than those who kill blacks or other racial minorities.

10. Additionally, in the former Third Judicial Division, in Prosecutorial District 19B, and in Randolph County, juries are more likely to impose a death sentence in cases involving white victims.

PROCEDURAL HISTORY

11. Mr. Rouse was convicted of first degree murder, armed robbery and attempted first-degree rape and sentenced to death for first degree murder as well as forty years for armed robbery and twenty years for attempted first degree rape.

12. His convictions and sentences were affirmed. *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), *cert. denied*, 516 S.E.2d 832, 133 L.Ed.2d 60 (1995). He sought post-conviction relief in state court by a motion for appropriate relief. It was denied, and the Supreme Court of North Carolina denied review. *State v. Rouse,* 350 N.C. 104, 531 S.E.2d 830 (1999).

13. He then sought review in federal court. His petition for a writ of habeas corpus was dismissed as untimely, a ruling that was initially reversed by a divided panel, but then affirmed by a divided en banc decision. *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 905, 158 L.Ed.2d 248 (2004).

14. While his federal litigation was pending, Mr. Rouse also filed a motion for appropriate relief based on his suffering from mental retardation. This motion was denied, and the Supreme Court of North Carolina denied review on 11 March 2010.

THE RACIAL JUSTICE ACT

15. In enacting the RJA, North Carolina decreed race could not influence the administration of the death penalty. In so doing, the legislature accepted the challenge of *McCleskey v. Kemp* that it was the duty of the states "to respond to the will and consequently the moral values of the people" when addressing the difficult and complex issue of racial prejudice in the administration of capital punishment. 481 U.S. 279, 319 (1987).

16. Under the RJA, a capital defendant shall prevail if there is evidence proving that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2012(a)(3).

17. As noted above, section 15A-2010 of the RJA explicitly prohibits any person being subjected to a sentence of death that was sought or obtained on the basis of race. In addition, the RJA identifies three different categories of racial disparities a defendant may present in order to meet the "significant factor" standard. Evidence establishing any one of these categories is sufficient to establish an RJA violation:

- Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
- Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
- Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

N.C. Gen. Stat. § 15A-2011(b)(1)-(3).

18. If a defendant is able to "state with particularity how the evidence supports a claim that race was a significant factor" in any of these three categories, the RJA provides that "[t]he court *shall* schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties." N.C. Gen. Stat. §§ 15A-2012(a) and (a)(2) (emphasis added).

19. Once the defendant has established a *prima facie* case of significant racial disparities, the state has the opportunity to respond with its own statistical evidence. Because the RJA mandates relief upon a showing of racial disparities in the judicial division or the state, *see* N.C. Gen. Stat. § 15A-2012(a)(3), if the defendant's case is based on a showing of statewide or division-wide discrimination, the State's rebuttal cannot be based simply upon a showing that no disparities occurred in the county or prosecutorial district.

20. If the defendant ultimately proves an RJA violation, the remedy is the imposition of a sentence of life imprisonment without the possibility of parole. N.C. Gen. Stat. § 15A-2012(a)(3); *compare Batson v. Kentucky*, 476 U.S. 79, 100 (1986) (holding that a defendant's

conviction will be reversed under the Equal Protection Clause if there is evidence that the State exercised peremptory strikes based on race). Proof of an RJA violation does not entitle the defendant to a new trial or a new sentencing hearing.

21. For the reasons stated below, Mr. Rouse is entitled to relief under the RJA, N.C. Gen. Stat. §§ 15A-2010 to 15A-2012.

STATISTICAL STUDIES

MSU Peremptory Strike Study

22. In support of these claims, Mr. Rouse relies on several statistical studies. The first is an extensive study of capital charging, sentencing, and jury selection in North Carolina conducted in 2009 and 2010 by Catherine Grosso and Barbara O'Brien, professors at Michigan State University's College of Law (MSU Study).[3] In conducting their study, Professors Grosso and O'Brien collaborated with George Woodworth, University of Iowa Professor of Statistics and Actuarial Science. *See* RJA Exhibit 2, Affidavit of George Woodworth.

23. The MSU Study shows that, statewide for the past two decades, prosecutors have struck qualified black and racial minority[4] venire members at more than twice the rate at which they struck other venire members.[5]

24. The MSU Study also shows that prosecutors are even more race-conscious in cases involving black or racial minority defendants. In those cases, prosecutors struck qualified black and racial minority venire members at an even higher rate.

25. This statistical analysis includes only those venire members found by the court to be legally eligible to serve on a capital jury. In other words, every venire member peremptorily struck by prosecutors had been "death-qualified." Thus, the statistics demonstrate that, across the State of North Carolina, a person of color who could follow the law and was willing to impose the death penalty was more than twice as likely to be struck by prosecutors as a similarly-situated white juror.

26. These findings are consistent with the body of published studies on the use of race and peremptory strikes. Those studies found that in Durham, North Carolina; Philadelphia, Pennsylvania; Dallas County, Texas; and the State of Louisiana, the prosecution strikes venire

---

[3] MSU Study data reported in this pleading is attached as RJA Exhibit 1, Affidavit of Catherine Grosso and Barbara O'Brien.

[4] The term "racial minority" includes black, Hispanic, Asian, and Native American persons, as well as persons of mixed race.

[5] Qualified venire members are those venire members who were not removed from the venire for cause or hardship and were thus eligible to serve on the jury.

members of color at a higher rate than white venire members.[6] A study released by the Equal Justice Initiative in June 2010 also demonstrated that across the South—in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee—prosecutors exclude blacks from jury service at disproportionately high rates and use pretextual "race-neutral" explanations to mask their discrimination.[7] This body of research finding discrimination in jury selection across the country confirms the validity of the MSU Study's finding of racial disparities in North Carolina prosecutors' use of peremptory strikes in capital proceedings.[8]

MSU Charging and Sentencing Study

27. The MSU Study also shows that, statewide from 1990 through 2009, cases that involved white victims were far more likely to result in death sentences than cases that involved no white victims. The MSU Study found that in cases with at least one white victim, a defendant was 2.6 times more likely to be sentenced to death than if the case did not involve a white victim. This finding of racial disparities based on the race of the victim persisted even when other case-related factors, such as statutory aggravating and mitigating circumstances, were taken into account.

28. In short, the race of the victim -- regardless of the aggravating or mitigating facts of a crime -- is a significant factor in the imposition of death sentences in North Carolina.

Radelet-Pierce Study

29. The results of another recent analysis of race and the death penalty in North Carolina confirm the MSU Study's conclusion that race of the victim is a significant factor in the imposition of the death penalty.

30. Professors Michael L. Radelet of the University of Colorado and Glenn L. Pierce of Northeastern University examined capital sentencing in North Carolina between 1990 and 2007 and found that homicides against white victims were three times more likely to result in a

---

[6] David C. Baldus, *et al.*, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 1, (2001) (Philadelphia, PA); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County,* 23 LAW & HUM. BEHAV. 695, 698-99 (1999) (Durham County, NC); Steve McGonigle, *et al., Jurors' race a focal point for defense; rival lawyers reject whites at a higher rate,* Dallas Morning News, (Jan. 24, 2006) (Dallas County, TX); Billy M. Turner, *et al., Race and Peremptory Challenges during Voir Dire: Do Prosecution and Defense Agree?,* 14 J. CRIM. JUST. 61, 63 (1986) (Louisiana).

[7] The Equal Justice Initiative's report on race discrimination in jury selection can be found online at the following web address: http://www.eji.org (follow "Race and Jury Report" hyperlink; then follow "PDF: Read the Report" hyperlink).

[8] As noted in the *Reference Guide on Statistics*, "convergent results strongly suggest the validity of the generalization" when multiple statistical studies document the same effect. The *Reference Guide on Statistics* can be found online at the following web address: http://ftp.resource.org/courts.gov/fjc/sciam.0.stats.pdf.

death sentence (Radelet-Pierce Study).[9] The Radelet-Pierce Study determined that 3.9% of homicides against white victims resulted in death sentences, compared with only 1.2% of homicides against black victims.

31. The Radelet-Pierce Study also revealed disparities even after controlling for two statutorily significant factors: first, whether the homicide involved multiple victims, and second, whether the homicide was accompanied by another felony, e.g., robbery or rape.[10] Controlling for these two factors, the Radelet-Pierce Study showed that, statewide from 1990 to 2007, homicides of white victims faced odds of resulting in a death sentence that were nearly three times higher than other cases.

Other Studies

32. The results of both the Radelet-Pierce Study and the MSU Study are corroborated by numerous prior statistical analyses which have documented race of victim disparities in capital charging and sentencing decisions in North Carolina and other death penalty jurisdictions around the country.

33. For example, in North Carolina, a study of the years 1993 to 1997 was conducted by Isaac Unah, an Associate Professor of Political Science at UNC-Chapel Hill, and John Charles Boger, Dean and Professor of Law at UNC-Chapel Hill's School of Law. The Unah-Boger Study accounted for 33 non-racial factors that may have influenced case outcomes and nonetheless found disparities based on the race of the victim. The Unah-Boger Study analyzed all first degree homicides in which the defendant received a death or life sentence, a total of 402 cases. It also randomly sampled 100 other cases, including homicide cases that resulted in sentences in terms of years. Based on this universe of cases, the Unah-Boger Study found that a defendant's odds of receiving a death sentence are increased 3.5 times if the victim in the case is white.[11]

34. Other studies from North Carolina have reported similar results. In 2000, the *Charlotte Observer* conducted a study of 10,000 murder arrests in North and South Carolina. This study found that although only 40% of the states' murder victims are white, 66% of the victims in death row cases are white. It also found that black defendants who kill white victims are the defendants most likely to be sentenced to death. The *Observer*'s study found that even though black-on-white murders comprised only 7% of murders between 1987 and 1997, they comprised 26% of all death row cases. Similarly, white-on-white murders comprised 32% of the

---

[9] Radelet-Pierce Study data reported in this pleading is attached as RJA Exhibit 3, Affidavit of Michael L. Radelet.

[10] *See* N.C. Gen. Stat. § 15A-2000(e)(5) ("The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of" certain specified felonies"); N.C. Gen. Stat. § 15A-2000(e)(11) ("The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons").

[11] The Unah-Boger Study can be found online at the following web address: http://www.common-sense.org/pdfs/NCDeathPenaltyReport2001.pdf.

cases examined but 40% of all death row cases. Eric Frazier and Ames Alexander, *Disparities in death sentences raise concerns about racism*, CHARLOTTE OBSERVER, Sept. 13, 2000, at 1A.

35. A study of North Carolina data from 1977 to 1980 by Samuel R. Gross and Robert Mauro also found racial disparities based on race of the victim. Although defendants charged with killing white victims were sentenced to death in 14% of the cases, defendants charged with killing black victims were sentenced to death in only 4% of the cases. Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27, 134 (1984).

36. Early North Carolina studies also documented racial disparities. Researchers Barry Nakell and Kenneth Hardy conducted a study of 600 homicide cases in 1977 and 1978 in North Carolina. They found that "a defendant charged with murder of a white was six times more likely to be convicted than a defendant charged with murdering a nonwhite." BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (Temple University Press 1987).

37. Sociologist Harold Garfinkel documented race of the victim disparities in the 1930s in North Carolina. He found that although there were only 51 cases with white victims and black defendants, 17 of those cases resulted in death sentences, or 31%. In contrast, there were 581 cases with black defendants and black victims and only 15, or 3%, resulted in death. Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949).

38. In 1941, another study found that among 330 murder cases in five North Carolina counties between 1930 and 1940, 32% of all black defendants, but only 13% of white defendants, received death sentences when the victims were white. Moreover, death sentences were imposed in 17.5% of all white victim cases, but only four-tenths of one percent of black victim cases. Guy B. Johnson, *The Negro and Crime*, 217 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 99 (1941).

39. In 1990, the United States General Accounting Office (GAO) reviewed 28 studies of racial disparities in capital punishment from across the country and found that, in 82% of those studies, the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty. The finding that the race of victims affects which defendants live and which die "was remarkably consistent across data sets, states, data collection methods, and analytic techniques. The finding held for high, medium, and low quality studies."[12] These similar results, arrived at by independent studies, demonstrate the reality that the race of the victim matters greatly in determining whether a defendant is sentenced to death.

[12] The GAO Study can be found online at the following web address: http://archive.gao.gov/t2pbat11/140845.pdf.

FACTUAL BACKGROUND

History of District 19B

40. From 1990 to 1995, District 19B was comprised of Randolph and Montgomery counties. In 1996, the state legislature passed a law transferring Moore County to Prosecutorial District 19B. *See* N.C. Gen. Stat. §7A-41 (1996). From January 1, 1997 until January 15, 2007, District 19B was comprised of Randolph, Montgomery and Moore counties. In 2006, the state legislature amended this subsection, by creating Prosecutorial District 19D and allocating Moore County to this newly-created district. *See* N.C. Gen. Stat. §7A-41 (2006). Moore County is now in District 19D. District 19B is currently made up of Randolph and Montgomery counties.

41. Until December 31, 1999, the counties comprising District 19B were part of the now former Third Judicial Division. After January 1, 2000, the counties comprising District 19B became part of the Fifth Judicial Division. Mr. Rouse was convicted and sentenced to death in 1992, in Randolph County, which at the time was part of the former Third Judicial Division.

42. District Attorney Garland Yates has been the elected District Attorney in District 19B since January 1, 1981. He has been re-elected in every election for District Attorney since 1980, having now served for 29 years.

The Racial Make-Up of District 19B

43. According to the United States Census for 1990, the population of Randolph County was 92.6% white, 6% black, and 1.4% other races. The population of Montgomery County was, during this same time period, 71% white, 25.6% black, and 3.4% other races. The population of Moore County was 80.1% white, 18.4% black, and 1.6% other races.

44. According to the 1990 Census, the population of District 19B as a whole was 86% white, 12.3% black, and 1.7% other races.

45. According to the United States Census for 2000, the population of Randolph County was 86% white, 5.6% black, and 8.4% other races. The population of Montgomery County was, during this same time period, 65.3% white, 21.6% black, and 13.1% other races. The population of Moore County was 78.7% white, 15.4% black, and 5.9% other races.

46. The population data from the 2000 Census shows that the population of District 19B as a whole was 81.3% white, 10.6% black and 8.1% other races.

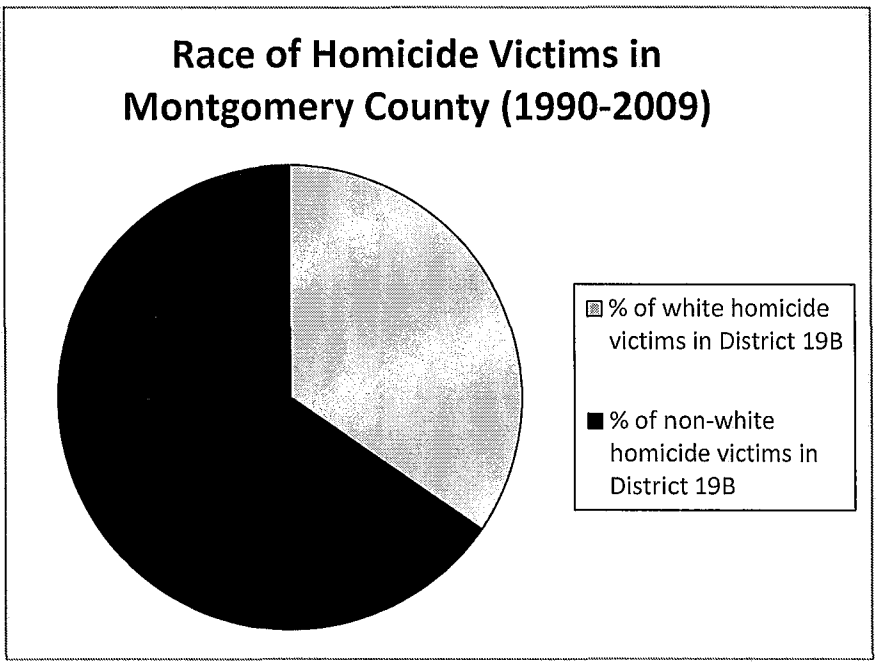
47. According to a detailed survey conducted by the US Census Bureau covering the years 2006-2008, the population of Randolph County was 82.2% white, 5.9% black, and 11.9% other races. The population of Montgomery County was, during this same time period, 62.4% white, 19.6% black, and 18.0% other races. The population of Moore County was 77.6% white, 14.5% black, and 7.9% other races.

48. Thus, from 1990-2008, the population of District 19B as a whole has been approximately 81.6% white and 18.4% non-white.

Breakdown of Homicide Victims in District 19B by Race

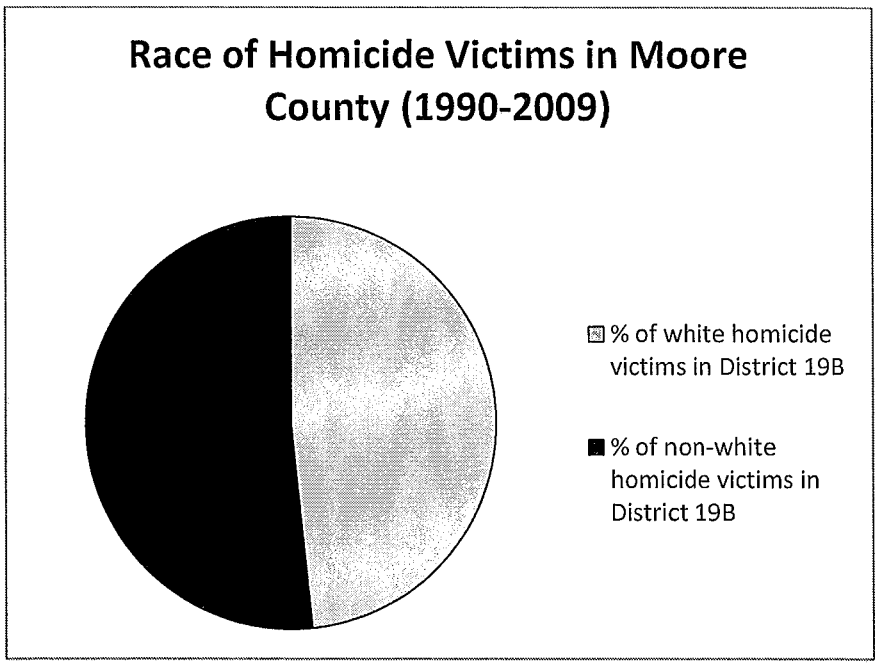
49. According to data compiled by the North Carolina Medical Examiner's Office,[13] between 1990 and 2009, there were 310 victims of homicide in District 19B, comprising Randolph, Montgomery and Moore counties.[14]

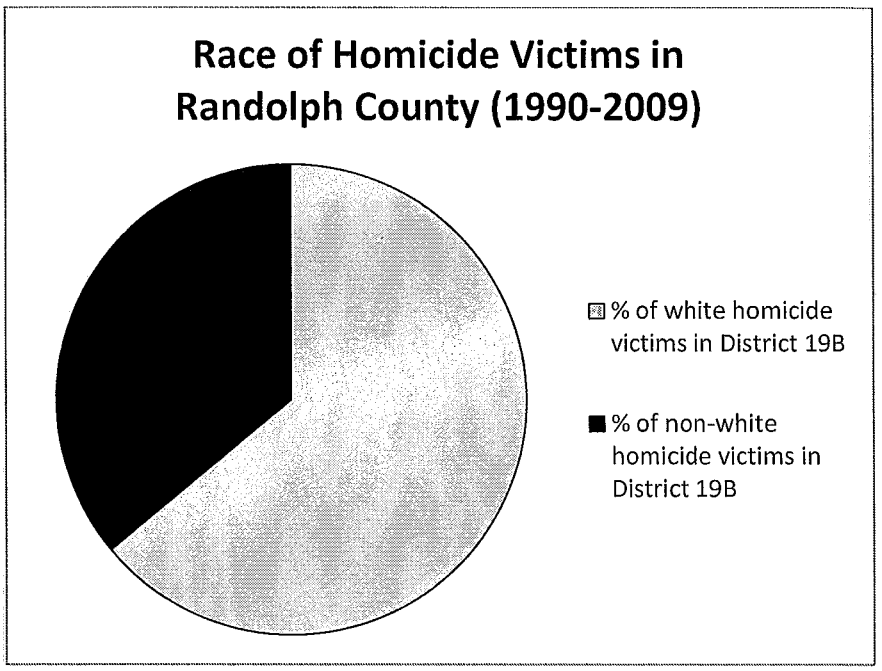
50. In Randolph County, there were 164 victims of homicide, of which 64% were white, 24% were black, and 12% were of other races. In Montgomery County, there were 52 victims of homicide, of which 35% were white, 40% were black and 25% were of other races. In Moore County, there were 121 victims of homicide, of which 48% were white, 43% were black, and 9% were of other races.



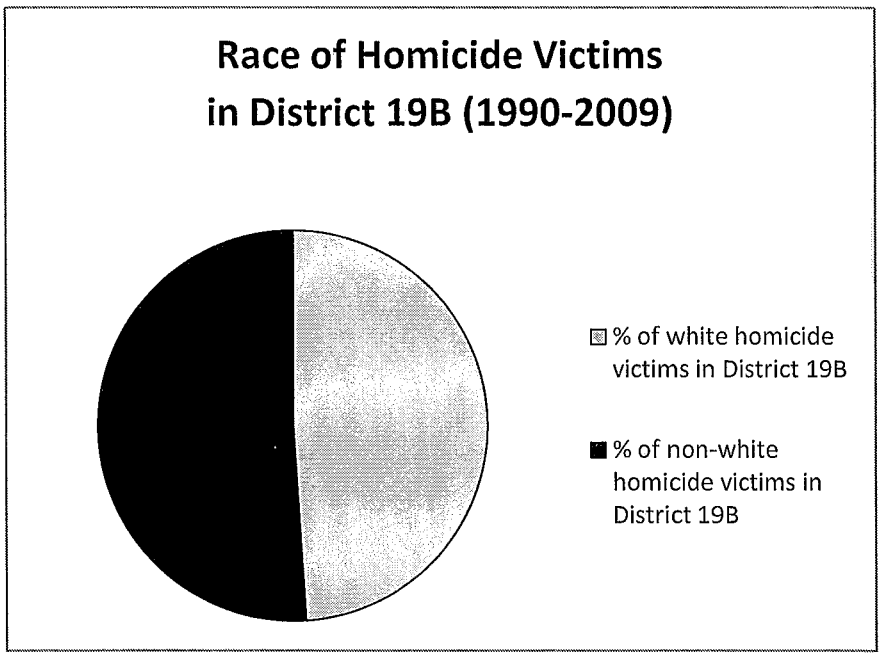
[13] The North Carolina Medical Examiner's Office provided electronic data to the Center for Death Penalty Litigation for all homicides in North Carolina from 1980 to 2009. These materials are voluminous and are available upon request.

[14] Moore County has not continuously been a part of District 19B since 1990. For purposes of this pleading, however, Defendant has included the total number of homicide victims throughout the time period of the MSU Study.





51. Overall in District 19B, between the years 1990 and 2009, roughly 49% of murder victims have been white and 51% have been non-white. Thus, while District 19B is more than three quarters white, the breakdown of homicide victims by race in District 19B is roughly even.


Race of Homicide Victims
in District 19B (1990-2009)
% of white homicide victims in District 19B
% of non-white homicide victims in District 19B

Imposition of the Death Penalty in District 19B

52. Since 1990, 11 men, in 10 cases, have been sentenced to death in District 19B.[15] Currently, there are 10 individuals on death row from District 19B.

53. All of these cases were prosecuted during Garland Yates' tenure as District Attorney. In all but one of the cases, that of George Wilkerson, Yates participated in the prosecution. Mr. Yates is white and, since at least 1988, there have been no non-white attorneys, legal assistants, victim and witness assistants, or investigators employed by the District Attorney's Office in District 19B. (RJA Ex. 4, District 19B Attorney Chart)[16] Thus, in each of the capitally-tried cases, the prosecution was an all-white team. Furthermore, the trial judge in each of these cases was white.

Name of Defendant	Race	County	Date of Death Sentence
Kenneth Rouse	B	Randolph	3/23/1992
James Edwards Williams	W	Randolph	11/3/1993
Jeff Kandies	W	Randolph	4/20/1994
Gary Trull	W	Randolph	11/19/1996
Ronald Poindexter[17]	W	Randolph	11/30/1999
Ronald Poindexter	W	Randolph	1/29/2002
Scott Allen	W	Montgomery	11/18/2003
Terrance Elliott	B	Moore	12/18/2003
Jason Hurst	W	Randolph	3/17/2004
John Scott Badgett	W	Randolph	5/6/2004
Alexander Polke	NA	Randolph	2/7/2005
George Wilkerson	W	Randolph	12/20/2006

[15] *See* NC Department of Corrections website, http://www.doc.state.nc.us/dop/deathpenalty/index.htm. The DOC compiles relevant information concerning current offenders on North Carolina's death row and those defendants who have been removed from death row.

[16] The Administrative Office of the Courts provided the names of all attorneys, investigators, legal assistants and witness/victim assistants employed by District 19B from the years 1988 through 2009. The race of each employee was determined by reference to the NC State Board of Elections website, http://www.sboe.state.nc.us/, or North Carolina criminal records. In order to protect the privacy of the non-attorneys who have been employed by District 19B, these employees' names are not included in the attached exhibit. This information is available upon request. *See also* RJA Ex. 5, *Kandies v. Branker*, Case No. 1:99-CV-00764, Excerpts from State's Response to Interrogatories, No. 8.

[17] Ronald Poindexter was sentenced to death on November 30, 1999. He was granted relief on direct appeal to the North Carolina Supreme Court. *State v. Poindexter*, 353 N.C. 440 (2001). He was again sentenced to death on January 29, 2002. During the pendency of his direct appeal, Poindexter filed an MAR. Upon remand to the Randolph County Superior Court, Poindexter's death sentence was vacated. *State v. Poindexter*, 359 N.C. 287 (2005). His case is currently pending in Randolph County for a third capital sentencing hearing.

54. All but one of these defendants sentenced to death in District 19B was sentenced to death for the murders of white victims. Terrance Elliott, who is black, was sentenced to death in Moore County for the murder of a black victim.

Name of Defendant	Race	Name of Victim(s)	Race
Kenneth Rouse	B	Hazel Broadaway	W
James Edwards Williams	W	Elvie Rhodes	W
Jeff Kandies	W	Natalie Osborne	W
Gary Trull	W	Vanessa Dixon	W
Ronald Poindexter	W	Wanda Coltrane	W
Jason Hurst	W	Daniel Branch	W
Scott Allen	W	Christopher Gailey	W
Terrance Elliott	B	Alice Mae McCrimmon	B
Alexander Polke	NA	Toney Summey	W
John Scott Badgett	W	Grover Kiser	W
George Wilkerson	W	Casey Dinoff, Christopher Voncannon	W, W

55. Thus, 91%, or ten of the eleven individuals, were sentenced to death for killing white victims.

56. In addition to the obvious and significant numerical disparities, the history of District 19B's prosecutor makes it clear that race plays a role in the decisions about which jurors to accept or reject and which cases to prosecute most harshly. For example, in closing argument in the cross-racial capital case of *State v. Diehl*, the prosecutor appealed directly to race. District Attorney Yates argued to the all-white jury:[18]

> You're the only twelve people that stand between him and walking out that door ... If, and I hope that is the answer, if twelve people good and true, twelve White jurors in Randolph County, just doesn't think . . . .

(RJA Ex. 6, *State v. Diehl*, No. 195A00, Defendant's Brief to the NC Supreme Court at 14)

57. At that point, defense counsel objected, saying, "Your Honor, please, I object to the racism." Judge W. Douglas Albright, pointedly not approving the thrust of Yates' argument, stated, "Well, let's just – We're not going to have that thing going on." *Id.* Yates completed his closing argument and court was adjourned for the evening recess. *Id.* at 15. On the next day of court, defense counsel sought to expand upon their earlier objection to Yates' "inappropriate and racist arguments." The trial court responded,

[18] In jury selection, Yates struck 100% of the non-white jurors. Information on the jury selection in *State v. Diehl* came from the court clerk jury chart, jury questionnaires, and the jury summons list. These documents are voluminous and are available upon request.

> Well, I sustained the objection on the spot, right where [Yates] stood. Before the words were hardly silent, I sustained the objection to any line of argument that attempted to inject racial division in the argument *and I sustained the objection to the type of argument that the D.A. was about to make which would have constituted a feel for a race-based decision*, and I don't know – I ruled for you.

Id. at 15, emphasis added)[19] As District Attorney Yates requested, the jury returned a verdict finding Diehl guilty of first-degree murder.

58. Jurors are also race conscious. Evidence that racial prejudice has played a role in a jury's decision to impose a death sentence is apparent in the case of *State v. Rouse*. In Rouse's case, one of the jurors who convicted and sentenced him to death has admitted that his "bigotry" played a role in his decision. (RJA Ex. 7, Affidavit of Joseph Baynard) In discussing his jury service, this juror used the word "niggers" when talking about blacks and stated that "blacks do not care about living as much as whites do." (RJA Ex. 8, Affidavit of Renee Walthall)

Jury Selection and the State's Use of Peremptory Strikes in Capitally-Tried Cases

59. There has been a documented history of race being used as a factor by District Attorney Yates in his selection of jurors on capital juries.

60. Defense counsel in District 19B who have represented capitally-charged defendants have made efforts to ensure that the state does not strike eligible non-white jurors during capital jury selection, including the filing of pre-trial motions and raising objections under *Batson v. Kentucky,* 476 U.S. 79 (1986), at trial and appeal. *See, e.g.*, RJA Ex. 9 (Pre-Trial motions in *State v. Allen*, *State v. Badgett*, *State v. Hurst*); *see also State v. Rouse*, 339 N.C. 59 (1994); *State v. Williams*, 345 N.C. 345 (1996); *State v. Kandies*, 342 N.C. 419 (1996).

61. In five of the ten cases for which defendants are still under sentence of death in District 19B, 100% of the eligible non-white jurors were struck peremptorily by the prosecution: Alexander Polke, Kenneth Rouse, Gary Trull, James Williams, and George Wilkerson.

62. Importantly, on two occasions, trial courts have found that District Attorney Yates used race as a factor in exercising peremptory challenges against prospective black jurors. (RJA Ex. 10, *State v. Trull* Order; RJA Ex. 11, *State v. Johnston* news article)

---

[19] Defense counsel then moved for a mistrial, arguing that Yates "did inject [racial division] and the jury did hear it." (RJA Ex. 6 at 15) The trial court denied the motion. On direct appeal, the North Carolina Court of Appeals granted Diehl a new trial, finding the trial court had abused its discretion by failing to grant Diehl's motion for a mistrial. *State v. Diehl*, 137 N.C. App. 541, 545 (2000). The North Carolina Supreme Court reversed, finding no abuse of discretion. *State v. Diehl*, 353 N.C. 433 (2001). Despite the Supreme Court's ruling reversing the grant of relief, as pointed out in the dissenting opinion by Justice Martin, the Supreme Court did not dispute the propriety of Judge Albright's sustaining of the objection immediately upon Yates' appeal to the "twelve White jurors in Randolph County." *Diehl*, 353 N.C. at 439 (Martin, J., dissenting).

63. In November 1996, in *State v. Trull*, 94 CRS 7046, Judge Charles C. Lamm, Jr. granted defense counsel's second *Batson* objection to the State's use of a peremptory challenge to excuse Rodney Foxx, a black prospective juror, finding that "all reasoning offered by the State in support of the exercise of this peremptory challenge to which the defendant objected fails to rise to the level of a sufficient race-neutral explanation." (RJA Ex. 10, *Trull* Order) The trial court further stated, "[T]he District Attorney has spent noticeably more time conferring with the law enforcement officer at the State's table and requestioning this potential juror on things that he had already questioned him about more so than he has any other juror during the entire selection process." (RJA Ex. 10, *Trull* Order) In light of all the evidence, the trial court found "that the existence of – attempted exercise of this peremptory challenge is pretextual, whether intentional or not, surely remains pretextual, and the defendant's objection to the State exercising a peremptory challenge as to this juror is sustained." (RJA Ex. 10, *Trull* Order) As a remedy, the trial court seated Rodney Foxx as the second alternate juror. Mr. Foxx did not participate in jury deliberations, and Trull was convicted and sentenced to death by an all-white jury.

64. Judge Lamm again found that District Attorney Yates used race as a factor in exercising a peremptory challenge against a black venire member in *State v. Johnston*, 2000 CRS 000828. In this case, the defendant, who was black, was tried capitally in the homicide of a Montgomery County magistrate, who was white. During capital jury selection, Yates exercised a peremptory challenge against a black prospective juror. Trial counsel made a *Batson* objection, and the trial court found that Yates' reasons for striking the black prospective juror were not race neutral. The trial court further found that Yates had already exercised peremptory challenges against two other African American prospective jurors. Yates accepted the black prospective juror only after the trial court stated that it would declare a mistrial if Yates exercised a peremptory challenge against the prospective juror. RJA Ex.11, *State v. Johnston* newspaper article.

65. There is further evidence that the ostensibly race-neutral reasons given by Yates for exercising peremptory strikes against eligible non-white jurors are suspect. In the capital trial of Jeffrey Kandies, Yates stated that his reasons for striking two of the eligible black prospective jurors included the fact that he had "discussed the panel with the High Point Police Department, and they indicated [prospective jurors McClure and Rawlinson] would not be good jurors for this type of case because 'they were weak on the death penalty question.'" (RJA Ex. 12, *State v. Kandies* Transcript at 160-61) *See also Kandies*, 342 N.C. at 436.

66. Garland Yates was subsequently deposed as part of the ongoing litigation in *Kandies v. Polk*, 99-cv-00764. Kandies had raised a *Batson* claim on direct appeal to the North Carolina Supreme Court, claiming that the State's use of peremptory strikes against nine of the 12 eligible non-white jurors violated *Batson*. *State v. Kandies*, 342 N.C. 419 (1996). Kandies then raised this claim on federal habeas review. Following his appeal to the Fourth Circuit, Kandies raised this claim in a petition for *certiorari*. *Kandies v. Polk*, 385 F.3d 457 (4th Cir. 2004). The United States Supreme Court remanded Kandies' case for further review in light of

the United States Supreme Court's decision in *Miller-El v. Dretke,* 545 U.S. 231 (2005). *Kandies v. Polk*, 545 U.S. 1137 (2005).[20]

67. In his deposition, Yates did not reaffirm the race-neutral reason offered to the trial court: that he had spoken to the High Point Police Department and that members of the police department had indicated that these jurors would not be favorable jurors because of their death penalty views. Rather, Yates stated under oath that he never spoke to any members of the High Point Police Department concerning any prospective jurors in Kandies' case. He stated that he had asked newly-hired Assistant District Attorney Andrew Gregson to pass around the jury summons list for Kandies' case and to see if any police officers knew any of the jurors and whether any of the prospective jurors had a criminal record. RJA Ex. 13, Deposition of Garland Yates at 13, 15, 16, 24-27. Yates did not seek information regarding prospective jurors' views on the death penalty. (RJA Ex. 13, Deposition of Garland Yates at 26-27)

68. Finally, attorneys who have practiced in District 19B for decades have recognized the role race has played in Yates' use of peremptory strikes in selecting juries.

69. During Mr. Kandies' trial in Randolph County in 1992, trial counsel referred to the prosecution's history of discriminatory use of peremptory challenges upon making his first *Batson* objection. (RJA Ex. 12, *State v. Kandies* Tp. at 123) In addition, in a 2006 affidavit, Clark Bell, who represented Mr. Kandies at his capital trial, has stated:

> Early in the jury selection process, I noticed Mr. Yates was exercising peremptory challenges against African Americans. This development did not surprise me as I had been practicing in Randolph County for a number of years and knew, both from personal experience and from discussions with other local criminal defense lawyers, Mr. Yates tended to use peremptory challenges against African Americans. I recall that I made a number of objections to this practice under *Batson v. Kentucky*. At one point, I told the trial court, as a basis for one of my Batson objections that I had been practicing in Randolph County for about ten years and that Mr. Yates had never left an African American on one of my juries. I did not make this statement as an off-hand remark. Rather, I made it based upon my personal experience defending criminal cases in which Mr. Yates was the prosecutor. It was true when I made it.

(RJA Ex. 14, Clark R. Bell Affidavit at ¶¶4-5)

70. The experience of this attorney who has practiced in District 19B for many years is not an isolated belief. Rather, it is the perception of attorneys who have practiced in this jurisdiction that Yates has a history of seeking to eliminate non-white jurors, especially in the

[20] Kandies' *Batson* claim is the only North Carolina *Batson* claim ever remanded by the United States Supreme Court.

1990s. Each of these attorneys has had extensive opportunity to view District Attorney Yates' jury selection behavior, and all agree that he had a demonstrated propensity towards striking jurors on the basis of race.

71. Attorney Franklin E. Wells, Jr., has practiced law in Randolph County for twenty years. (RJA Ex. 15, Frank Wells Affidavit at ¶2) In his years of practice, Wells has noticed District Attorney Yates' pattern of excluding blacks from jury service in criminal cases.

> I tried several capital cases before juries against Mr. Yates and have observed or been aware of a number of other jury trials he has handled. In my opinion, it has been accepted by most courthouse observers that Mr. Yates prefers not to have African Americans serve on the juries in his cases and that he does what he can to prevent them from sitting on his juries. This was especially true during the 1990s.
>
> I have noticed Mr. Yates' tendency to remove otherwise qualified African Americans from juries with peremptory challenges. Given the small number of African Americans in Randolph County and the correspondingly small number of African Americans in the usual jury venire, it has been relatively easy for Mr. Yates to remove most qualified African Americans from his capital juries. ...
>
> ...
>
> In my opinion, Mr. Yates, in the past, has preferred to keep otherwise qualified African Americans from sitting on juries in his cases through the use of peremptory challenges. I also believe this practice is well-known to other criminal defense lawyers in Randolph County.

(RJA Ex. 15, Wells Affidavit at ¶¶3-4, 6) *See also* RJA Ex. 16, Supplemental Affidavit of C. Pierre Oldham at ¶5; RJA Ex. 14, Bell Affidavit at ¶¶3, 7).

72. Finally, Richard Roose, who served as an assistant district attorney under Yates for more than decade from 1979 until 1993, recalls:

> I tried several cases before juries with Mr. Yates and observed or was aware of a number of other jury trials he handled. In my opinion, it was noticeable that he preferred not to have African Americans on the juries in his cases. He and I never discussed the issue, but I observed his tendency to remove otherwise qualified African Americans with peremptory challenges.
>
> After I left the Office of the District Attorney, I handled a large number of criminal matters in superior court, many of which were

> tried to a jury. Based on my personal experiences, my observations, and my discussions with other criminal defense lawyers, Mr. Yates continued to have a marked tendency to remove qualified African Americans from the juries when he tried cases. In my opinion, it was noticeable that the race of a particular juror would play a role in the way in which he selected juries and exercised peremptory challenges.

(RJA Ex. 17, Roose Affidavit at ¶¶2-4)

73. The opinions articulated in these 2006 affidavits, detailing Yates' long-standing practice of striking prospective jurors based on race, especially during the 1990s, are fully borne out by the results of the MSU study.

Judicial Division History and Background

74. Throughout the 1990s, North Carolina was separated into four judicial divisions. The former Third Judicial Division consisted of the following counties: Ashe, Alleghany, Surry, Stokes, Rockingham, Wilkes, Yadkin, Forsyth, Guilford, Alexander, Iredell, Davie, Rowan, Davidson, Randolph, Cabarrus, Stanly, Montgomery, Moore, Union, Anson, and Richmond.

75. Mr. Rouse was convicted and sentenced to death in 1992 in Randolph County, which was then part of the Third Judicial Division. For purposes of this Motion, Judicial Division 3 as constituted before 2000 will be referred to as the former Third Judicial Division.

CLAIMS FOR RELIEF: PEREMPTORY STRIKES

I. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY STRIKES IN CASES THROUGHOUT NORTH CAROLINA.

76. Mr. Rouse is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(3) because, at the time of his capital trial, race was a significant factor in North Carolina prosecutors' decisions to exercise peremptory strikes during jury selection. *See also Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973) (explaining that "a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race"); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding that once a state has created a right, the Fourteenth Amendment requires that state to provide "minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated"); *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (same); *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980) (same). Statistical and other evidence demonstrates that, across the State of North Carolina, race was a significant factor in whom the state chose to exclude from capital juries.

All-White Juries

77. Since our country's earliest days, black American citizens have historically been excluded from participating in civic life through jury service. Slaves were prohibited from serving on a jury even if the defendant was a slave who was charged with a crime against another slave. From North Carolina's inception as a state through the end of the Civil War, blacks were barred from serving on juries by the state constitution itself. The Reconstruction era, from 1868 to 1875, brought a brief period of black jury participation. After Reconstruction ended, however, historical evidence indicates that blacks continued to be excluded from juries in North Carolina. Statutory requirements for jury service in the early 1900s were vague and allowed local officials unlimited discretion to make racially discriminatory judgments about who was qualified to serve. *See* Seth Kotch and Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 6: 113, n. 44; 139-43 (forthcoming 2010, available at SSRN: http://ssrn.com/abstract=1645813).

78. While some black persons did begin to serve on juries by the middle of the twentieth century, they remained chronically under-represented in jury pools. In *State v. Price*, 301 N.C 437 (1980), the North Carolina Supreme Court approved an absolute disparity of 14% between the local black population and the black population in the jury pool. In *State v. Bowman*, 349 N.C. 459 (1998), the Court approved a disparity of nearly 15%.

79. Over the past twenty years, North Carolina prosecutors have continued the tradition of excluding black citizens from juries through the use of the peremptory strike. In today's capital trials, the prosecutor's peremptory strike serves the same discriminatory function as our old constitutional provisions barring black slaves from jury service or vague statutes permitting local officials to exclude black citizens from jury pools.

80. As documented by the MSU Study, 31 of North Carolina's current death row inmates were sentenced to death by all-white juries.[21] The MSU Study has also documented that 38 of North Carolina's current death row inmates were sentenced to death by juries with only one person of color.[22] Taken together, this means that over 40% of the defendants on North Carolina's 159-person death row were sentenced to death by a jury that included either one or no persons of color.[23]

81. All-white capital juries are therefore a widespread and pervasive phenomenon in North Carolina. The current death row inmates sentenced by all-white or juries with only one person of color had trials that occurred in diverse counties across North Carolina. All-white juries have occurred even in counties with significant black populations, such as Forsyth, Camden, Johnston, and Wayne.

---

[21] Wayne Laws (1985, Davidson County); Clinton Rose (1991, Rockingham County); Kenneth Rouse (1992, Randolph County); Carl Moseley (1992, Forsyth County); Carl Moseley (1993, Stokes County); James Williams (1993, Randolph County); Rayford Burke (1993, Iredell County); Martin Richardson (1993, Union County); Wade Cole (1994, Camden County); Thomas Larry (1995, Forsyth County); Darryl Strickland (1995, Union County); Keith East (1995, Surry County); Tony Sidden (1995, Alexander County); Eric Call (1996, Ashe County); Guy LeGrande (1996, Stanly County); Gary Trull (1996, Randolph County); Russell Tucker (1996, Forsyth County); Roger Blakeney (1997, Union County); Phillip Davis (1997, Buncombe County); Ted Prevatte (1999, Stanly County); Eric Call (1999, Ashe County); Andre Fletcher (1999, Rutherford County); James Jaynes (1999, Polk County); Jathiyah Al-Bayyinah (1999, Davie County); Cerron Hooks (2000, Forsyth County); Paul Brown (2000, Wayne County); Mitchell Holmes (2000, Johnston County); Quintel Augustine (2002, Cumberland County); Alexander Polke (2005, Randolph County); Chris Goss (2005, Ashe County); William Raines (2005, Henderson County); George Wilkerson (2006, Randolph County); Andrew Ramseur (2010, Iredell County).

[22] Michael Reeves (1992, Craven County); Edward Davis (1992, Buncombe County); James Jaynes (1992, Polk County); Nathan Bowie (1993, Catawba County); William Bowie (1993, Catawba County); John Burr (1993, Alamance County); Johnny Daughtry (1993, Johnston County); Randy Atkins (1993, Buncombe County); Eugene DeCastro (1993, Johnston County); James Campbell (1993, Rowan County); Vincent Wooten (1994, Pitt County); Frank Chambers (1994, Rowan County); Daniel Cummings, Jr. (1994, Brunswick); John Elliot (1994, Davidson County); William Gregory (1994, Davie County); Alden Harden (1994, Mecklenburg County); Marvin Williams, Jr. (1995, Wayne County); Danny Frogge (1995, Forsyth County); Malcolm Geddie, Jr. (1994 Johnston County); Darrell Woods (1995, Forsyth County); William Morganherring (1995, Wake County); Kenneth Neal (1996, Rockingham County); James Davis (1996, Buncombe County); Melvin White (1996, Craven County); William Gregory (1996, Davie County); Leroy Mann (1997, Wake County); John Williams, Jr. (1998, Wake County); Tilmon Golphin (1998, Cumberland County); James Morgan (1999, Buncombe County); Carlette Parker (1999, Wake County); Billy Ray Anderson (1999, Craven County); Marcus Jones (2000, Onslow County); Terry Hyatt (2000, Buncombe County); James Watts (2001, Davidson County); Jim Haselden (2001, Stokes County); Clifford Miller (2001, Onslow County); Terrance Campbell (2002, Pender County); Jathiyah Al-Bayyinah (2003, Davie County); John Badgett (2004, Randolph County); Ryan Garcell (2006, Rutherford County); Jeremy Murrell (2006, Forsyth County).

[23] In reaching this conclusion, only the racial composition of the deliberating jury was considered. Black or racial minority alternates were not considered because they did not participate in capital deliberations.

82. The problem of white capital juries in North Carolina spans not only place, but time as well. The oldest case on death row, originating in 1985, had an all-white jury, as did the newest case on death row, which concluded with a death sentence in June of 2010.

Statistical Evidence

83. Statistical evidence also demonstrates that race has been a significant factor in the State's exercise of peremptory strikes statewide over the last twenty years.

84. The MSU Study shows that, at the time of Mr. Rouse's trial, prosecutors statewide struck qualified black and racial minority citizens from service on death penalty juries at more than twice the rate they struck white citizens.

85. Statewide from 1990 through 1994, the state struck eligible black venire members at an average rate of 57.3% but struck all other venire members at an average rate of only 26%.[24] The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

86. Prosecutors have consistently exercised a disproportionate number of peremptory strikes against black venire members over the past twenty years. Statewide, from 1990 through 2010, prosecutors struck eligible black venire members at an average rate of 55.5% but struck other venire members at an average rate of only 24.8%.[25] The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.01.

87. These disparities cannot be explained away by any suggestion that they resulted from non-racial factors that correlate with venire members' race. In cases with black or other minority defendants, the MSU Study shows that prosecutors are even more race-conscious in their use of peremptory strikes.

88. Specifically, the MSU Study found that in cases with black defendants, from 1990 through 2010, the state struck eligible black venire members at an average rate of 59.9% and struck other eligible venire members at an average rate of 23.1%. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.02.

---

[24] Similarly, prosecutors struck qualified racial minority venire members at an average rate of 56.2% but struck qualified white venire members at an average rate of only 26.0%. This difference in strike levels is significant at the 0.001 level. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

[25] Similarly, prosecutors struck qualified racial minority venire members at an average rate of 54.0% but struck qualified white venire members at an average rate of only 24.5%. This difference in strike levels is significant at the 0.001 level. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

89. Similarly, in cases with racial minority defendants, from 1990 through 2010, the state struck eligible minority venire members at an average rate of 57.6% and struck eligible white venire members at an average rate of 22.9%. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.02.

II. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY STRIKES IN CASES IN THE FORMER THIRD JUDICIAL DIVISION.

90. The foregoing evidence and law with respect to statewide disparities in jury selection is incorporated into this claim by reference.

91. Mr. Rouse is entitled to relief under the RJA because, at the time of his capital trial, race was a significant factor in the State's decisions to exercise peremptory strikes during jury selection in the former Third Judicial Division.

92. In the former Third Judicial Division, from 1990 through 1999, prosecutors struck qualified black venire members at an average rate of 65.4% but struck qualified non-black venire members at an average rate of only 25.3%.[26] Thus, prosecutors were 2.6 times more likely to strike qualified venire members who were black. The probability of observing a statewide racial disparity of this magnitude in a race neutral peremptory strike system is less than 0.001.

93. Of the thirty-one current death row inmates in North Carolina sentenced to death by all-white juries, twenty-two (71%) were sentenced in the counties of the former Third Judicial Division. *See* footnote 20 above (listing cases with all-white juries). All-white juries returned 43% (22/51) of all current death sentences from Ashe, Alleghany, Surry, Stokes, Rockingham, Wilkes, Yadkin, Forsyth, Guilford, Alexander, Iredell, Davie, Rowan, Davidson, Randolph, Cabarrus, Stanly, Montgomery, Moore, Union, Anson, and Richmond Counties in the last 20 years.

94. The disparities in the selection of white and racial minority venire members for service on capital juries are significant and show that race has been a significant factor in decisions by prosecutors in the former Third Judicial Division to exercise peremptory challenges in capital cases from 1990 to 1999. Mr. Rouse is therefore entitled to relief pursuant to N.C. Gen. Stat. §15A-2011(b)(3).

III. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY

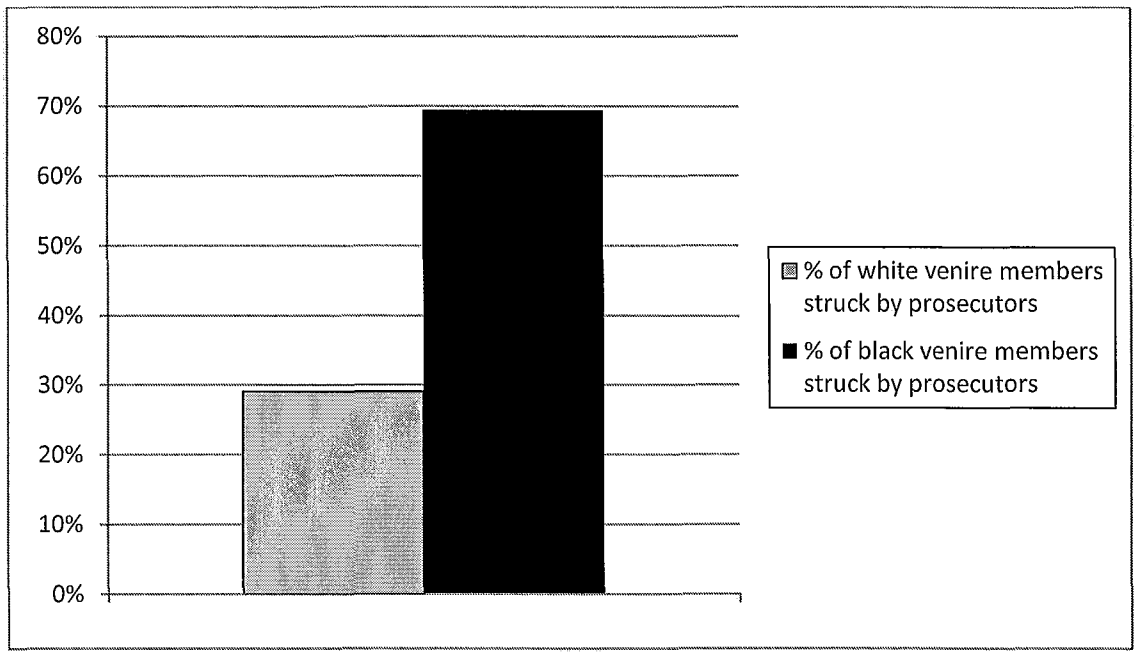
[26] In the former Third Judicial Division, prosecutors struck qualified racial minority venire members at an average rate of 65.3% but struck qualified white venire members at an average rate of only 25.2%. The difference in strike levels is significant at the .001 level.

STRIKES IN CASES IN PROSECUTORIAL DISTRICT 19B.

95. The foregoing evidence and law with respect to statewide and division-wide disparities in jury selection is incorporated into this claim by reference.

96. Mr. Rouse is entitled to relief under the RJA because, at the time of his capital trial, race was a significant factor in the State's decisions to exercise peremptory strikes during jury selection in Prosecutorial District 19B.

97. In Prosecutorial District 19B, prosecutors struck qualified black venire members at an average rate of 69.4% but struck qualified non-black venire members at an average rate of only 29.0%. Thus, prosecutors were 2.4 times more likely to strike qualified venire members who were black. The difference in strike levels is significant at the .02 level.



98. When accounting for the prosecution's strikes of blacks and other racial minorities, the ratio is even higher. In Prosecutorial District 19B, prosecutors struck racial minority venire members at an average rate of 70.8% but struck white venire members at an average rate of only 28.3%. Thus, prosecutors were 2.5 times more likely to strike qualified venire members who were racial minorities. The difference in strike levels is significant at the .01 level.

99. All-white juries routinely result in District 19B from the prosecution's use of peremptory strikes against racial minority venire members.[27] Of the ten defendants currently sentenced to death from District 19B,[28] five of the ten defendants had all-white juries deliberating on their cases: Alexander Polke, Kenneth Rouse, Gary Trull, James Williams, and George Wilkerson.

100. For all five of these defendants, the all-white juries were a result of the State's use of peremptory strikes against 100% of the qualified racial minority venire members. Furthermore, in all ten of the cases, the jury foreperson was white. (RJA Ex. 19, Jury Foreperson Chart)[29]

101. In four of the five cases where 100% of the racial minority venire members were struck peremptorily by the prosecution, Yates conducted the jury selection: Alexander Polke, Kenneth Rouse, Gary Trull and James Williams. In the fifth case, George Wilkerson, Assistant District Attorney Gregson conducted the jury selection.

102. These stark disparities in the selection of capital juries are consistent with the documented history of race being used as a factor by District Attorney Yates in striking black prospective jurors both in *State v. Trull* and *State v. Johnston*.

103. Furthermore, the sworn testimony in Yates' 2008 deposition in the *Kandies* litigation, which contradicts the ostensibly race-neutral reasons Yates gave for striking two black

---

[27] The State struck 100% of the eligible black venire members in the cross-racial case of *State v. Mary Jane Carter*. In that case, the defendant, who is black, noted that all of the other participants in her capital trial were white, including all members of the jury. Prior to the start of her trial, Carter exclaimed to the trial court, "I feel like this right here is a lynching – a legal lynching." RJA Ex. 18, April 26, 2002 *News & Record* Article.

[28] Ronald Poindexter was sentenced to death in 1999 and again in 2002. His first capital jury was also all white after the State struck 100% of the qualified racial minority venire members.

[29] It is widely accepted in the legal and social science literature that the foreperson of the jury exerts considerable influence upon the outcome of a particular case. *See* Philip J. Hermann, Predicting Personal Injury Verdicts and Damages, in 6 AM. JUR. TRIALS 966, § 17 (1967); William Bevan et al., Jury Behavior as a Function of the Prestige of the Foreman and the Nature of His Leadership, 7 J. PUB. L. 419, 436 (1958) (finding that, in the dynamics of a deliberating jury, "group opinion reflects to a significant degree the view of an effective leader"); Franklin J. Boster *et al.*, An Information-Processing Model of Jury Decision Making, 18 COMM. RES. 524, 541 (1991) (finding that "the foreperson was a very influential group member" and that "the impact of the foreperson relative to other jurors increased more than proportionally as jury size increased"); Ray E. Moses, "Scratching the Juror's Itch: Toward a Model of Fair Deliberative Process," CHAMPION, Aug. 1997, at 55 (observing that "the foreperson has disproportionate power and control" over the jury's decision-making processes); John F. Manzo, "Taking Turns and Taking Sides: Opening Scenes from Two Jury Deliberations," 59 SOC. PSYCH. Q. 107, 108 (1996) (finding that "jury forepersons exert considerable influence on the shape of jury deliberations, including the organization of turn taking"); *see also State v. Cofield*, 320 N.C. 297, 303 (1987)(stating in reference to the grand jury foreperson that "[t]he foreman, by his very title, is distinguished from other members of the grand jury. As the titular head of the grand jury, the foreman is first among equals, both in the eyes of his fellow jurors and in the eyes of the public.").

prospective jurors in Kandies' 1994 trial, demonstrates race has played a role in the selection of capital juries in District 19B.

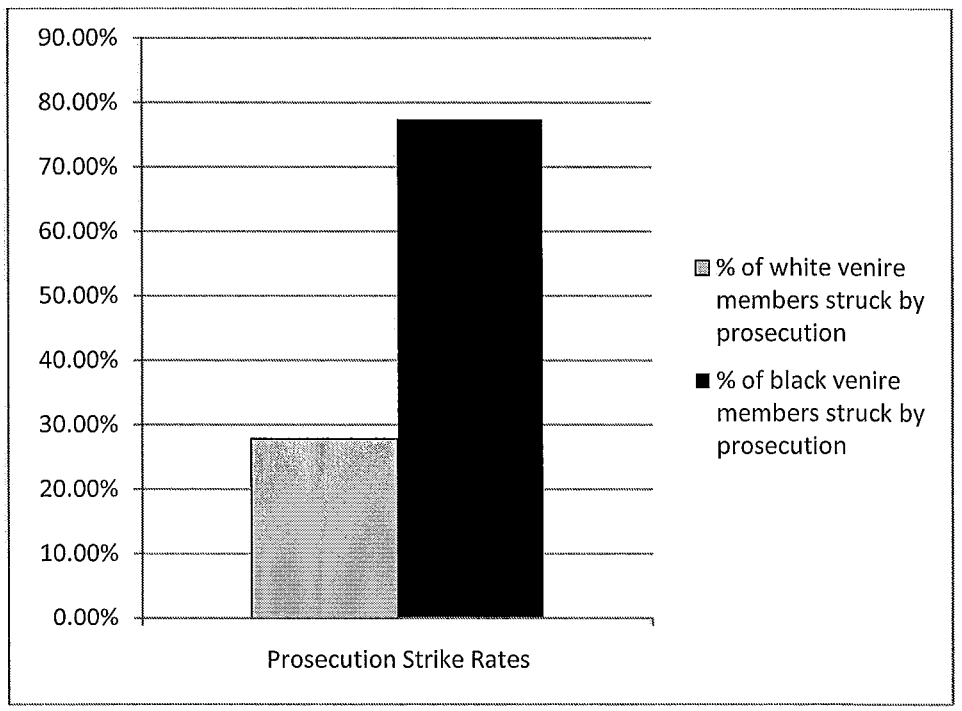
104. The disparities in the selection of white and racial minority venire members for service on capital juries are significant and show that race has been a significant factor in decisions by the prosecution in District 19B to exercise peremptory challenges in capital cases from 1990 to 2009. Mr. Rouse is therefore entitled to relief pursuant to N.C. Gen. Stat. §15A-2011(b)(3).

IV. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY STRIKES IN CASES IN RANDOLPH COUNTY.

105. The foregoing evidence and law with respect to statewide, division-wide, and district-wide disparities in jury selection is incorporated into this claim by reference.

106. Mr. Rouse is entitled to relief under the RJA because, at the time of his capital trial, race was a significant factor in the State's decisions to exercise peremptory strikes during jury selection in Randolph County.

107. In Randolph County, the prosecutors struck qualified black venire members at an average rate of 77.4% but struck qualified non-black venire members at an average rate of only 27.8%. Thus, prosecutors were 2.8 times more likely to strike qualified venire members who were black. The difference in strike levels is significant at the .02 level.



108. When accounting for the State's use of peremptory strikes against all racial minority venire members, prosecutors struck qualified racial minority venire members at an average rate of 77.40% but struck qualified white venire members at an average rate of only 27.4%. Thus, prosecutors were again 2.8 times more likely to strike qualified venire members who were racial minorities. The difference in strike rates is statistically significant at the .02 level.

109. As a result of these stark disparities in the selection of capital juries, all-white juries have been and continue to be common in Randolph County. Of the eight defendants currently under sentences of death imposed by Randolph County juries, five of these defendants had all-white juries: Alexander Polke, Kenneth Rouse, Gary Trull, James Williams, and George Wilkerson.

110. These stark disparities in the selection of capital juries are consistent with the documented history of race being used as a factor by District Attorney Yates in striking black prospective jurors both in *State v. Trull* and *State v. Johnston*.

111. Furthermore, the sworn testimony in Yates' 2008 deposition in the *Kandies* litigation, which contradicts the ostensibly race-neutral reasons Yates gave for striking of two black prospective jurors struck in Kandies' 1994 trial, demonstrates race has played a role in the selection of capital juries in Randolph County.

112. The disparities in the selection of white and black and other racial minority jurors for capital cases are significant and show that race has been a significant factor in decisions by the prosecution in Randolph County to exercise peremptory challenges in capital cases from 1990 to 2009. Mr. Rouse is therefore entitled to relief pursuant to N.C. Gen. Stat. §15A-2011(b)(3).

Conclusion: Peremptory Strike Claims

113. Discrimination against prospective jurors based on race undermines the integrity of the judicial system and our system of democracy. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (explaining that "community participation [in the jury system] is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system").

114. Both defendants and society are injured by the use of peremptory strikes in a racially-biased manner:

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury . . . but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."

> Nor is the harm confined to minorities. When the government's choice of jurors is tainted with racial bias, that "overt wrong . . . casts doubt over the obligation of the parties, the jury and indeed the court to adhere to the law throughout the trial . . . ."

Miller-El v. Dretke, 545 U.S. 231, 237-38 (2005) (internal citations omitted); *see also State v. Cofield*, 320 N.C. 297 (1987) (explaining that "the judicial system of a democratic society must operate evenhandedly . . . [and] be perceived to operate evenhandedly. Racial discrimination in the selection of grand and petit jurors deprives both an aggrieved defendant and other members of his race of the perception that he has received equal treatment at the bar of justice").

115. Mr. Rouse is therefore entitled under the RJA and constitutional law to a sentence of life imprisonment without parole based on evidence of racial disparities in the state's use of peremptory strikes during jury selection in the State of North Carolina, the former Third Judicial Division, Prosecutorial District 19B, and Randolph County.

CLAIMS FOR RELIEF: CHARGING AND SENTENCING DECISIONS

V. AT THE TIME OF MR. ROUSE'S TRIAL, AS A RESULT OF THE COMBINED EFFECT OF CHARGING AND SENTENCING DECISIONS, RACE WAS A SIGNIFICANT FACTOR IN THE IMPOSITION OF THE DEATH PENALTY THROUGHOUT NORTH CAROLINA.

116. Mr. Rouse is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(2) because, at the time of his capital trial, death sentences were imposed significantly more frequently as punishment for capital offenses against white victims than as punishment for capital offenses against victims who were not white. *See also Ham*, 409 U.S. at 526-27; *Wolff*, 418 U.S. at 557; *Clemons*, 494 U.S. at 746; *Hicks*, 447 U.S. at 346-47.

117. Racially disparate outcomes are not necessarily a product of overt racial animus. This is why the RJA allows the use of statistics to reveal disparities even in the absence of direct evidence of racial bias. *Compare McCleskey*, 481 U.S. at 292 (holding that, to prevail on a federal constitutional claim of racial discrimination in the imposition of the death penalty, a defendant "must prove that decisionmakers in *his* case acted with discriminatory purpose") (emphasis in original).

White Victim Disparities

118. The MSU Study found significant disparities as a result of the combined effect of prosecutors' charging decisions and juries' sentencing decisions. The MSU Study shows that, at the time of Mr. Rouse's trial, death eligible defendants were significantly more likely to receive the death penalty if they were convicted of killing at least one white victim.

119. Statewide, from 1990 to 1999, 11.25% of death eligible cases with at least one white victim resulted in death sentences, while only 4.71% of death eligible cases without white

victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.4 times more likely to result in a death sentence than all other cases.

120. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.478 times higher than the odds faced by all other similarly situated defendants from 1990 to 1999.

121. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.7 times higher than the odds faced by all other similarly situated defendants from 1990 to 1999.

122. Statewide, from 1990 to 1994, 12.14% of death eligible cases with at least one white victim resulted in death sentences, while only 3.90% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 3.1 times more likely to result in a death sentence than all other cases from 1990 to 1994.

123. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.7 times higher than the odds faced by all other similarly situated defendants from 1990 to 1994.

124. This trend has been consistent over the past two decades. The MSU Study demonstrates that, statewide from 1990 through 2009, death eligible cases with at least one white victim were 2.6 times more likely to result in a death sentence.

125. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls regression model, statewide between 1990 and 2009, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 2.1 times higher than the odds faced by all other similarly situated defendants.

126. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls regression model, statewide between 1990 and 2009, death eligible defendants in cases with at least one white victim faced odds of receiving a death sentence that were 1.6 times higher than the odds faced by all other similarly situated defendants.

127. Thus, race of the victim disparities cannot be explained away by any suggestion that crimes against white victims are more heinous or death-worthy.

128. The Radelet-Pierce Study confirms the MSU Study's conclusions. The Radelet-Pierce Study demonstrates that, statewide between 1990 and 2007, homicides against white victims were three times more likely to result in a death sentence. Even after accounting for the impact of multiple victims and whether the homicide was accompanied by another felony, the

Radelet-Pierce Study found that homicides of white victims were still three times more likely to result in a death sentence.

129. The MSU Study's conclusions about race of victim disparities can also be corroborated by comparing the racial makeup of the overall homicide victim population with the racial makeup of the victims of the people executed in North Carolina. Of the 56 victims of the people executed in North Carolina since 1977, 79% were white and 18% were black. In contrast, 54% of all homicide victims in North Carolina since 1976 were black while 42.3% were white.[30]

130. In other words, in North Carolina capital cases in which defendants have been executed, black victims are vastly under-represented when compared to the proportion of black victims in the overall homicide population. This demonstrates that juries and prosecutors simply do not pursue the death penalty as aggressively in homicide cases involving black victims.

VI. AT THE TIME OF MR. ROUSE'S TRIAL, AS A RESULT OF THE COMBINED EFFECT OF CHARGING AND SENTENCING DECISIONS, RACE WAS A SIGNIFICANT FACTOR IN THE IMPOSITION OF THE DEATH PENALTY IN THE FORMER THIRD JUDICIAL DIVISION.

131. The foregoing evidence and law with respect to statewide disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

132. According to the MSU Study, in the former Third Judicial Division, from 1990 to 1999, 11.13% of death eligible cases with at least one white victim resulted in death sentences, while only 4.37% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 2.6 times more likely to result in a death sentence.

133. Data obtained from the Medical Examiner's Office, which identifies the race of homicide victims in the former Third Judicial Division between 1990 and 1999, shows that, during this time period 51.2% were black, 42.4% were non-Hispanic white, and 115 were of other or unknown races, mostly "white/Hispanic."

134. Thus, while more than half of the homicide victims in the former Third Judicial Division in the 1990s were black or other racial minorities, blacks and other racial minorities accounted for the victims in only one third of the cases for which defendants received the death penalty and are under sentence of death.

135. Among the 33 cases for which inmates are currently under sentence of death pursuant to sentences obtained in the 1990s within the former Third Judicial Division, 67% (22)

---

[30] This data is available in a report produced by UNC-Chapel Hill Political Science Professor Frank R. Baumgartner. Professor Baumgartner's report can be found online at the following web address: http://www.unc.edu/~fbaum/Innocence/NC/Racial-discrepencies-NC-homicides-executions.pdf.

of the cases involved white victims, just 30% (10) of the cases involved black victims, and 3% (1) of the cases involved victims of other races.

Name	D Race	County	Year	V Race
Blanche Moore	W	Forsyth	1990	W
Clinton Rose	W	Rockingham	1991	W
Ernest McCarver	W	Cabarrus	1992	W
Carl Moseley	W	Forsyth	1992	W
Kenneth Rouse	B	Randolph	1992	W
Rayford Burke	B	Iredell	1993	B
James Williams	W	Randolph	1993	W
James Campbell	W	Rowan	1993	W
Carl Moseley	W	Stokes	1993	W
Martin Richardson	B	Union	1993	W
John Elliott	W	Davidson	1994	W
Jeffrey Kandies	W	Randolph	1994	W
Frank Chambers	B	Rowan	1994	W, W
William Barnes	B	Rowan	1994	W
Tony Sidden	W	Alexander	1995	W
Darrell Woods	B	Forsyth	1995	B
T. Michael Larry	B	Forsyth	1995	W
Keith East	B	Surry	1995	B, B
Darrell Strickland	O	Union	1995	B
William Gregory	B	Davie	1996	B
Russell Tucker	B	Forsyth	1996	B
Walic Thomas	B	Guilford	1996	W
Gary Trull	W	Randolph	1996	W
Lawrence Peterson	B	Richmond	1996	W
Kenneth Neal	B	Rockingham	1996	B
Guy LeGrande	B	Stanly	1996	W
Errol Moses	B	Forsyth	1997	B, B
Roger Blakeney	B	Union	1997	B
Danny Frogge	W	Forsyth	1998	W
James King	B	Guilford	1998	B
Eric Call	W	Ashe	1999	O
Raymond Thibodeaux	W	Forsyth	1999	W
Ted Prevatte	W	Stanly	1999	W

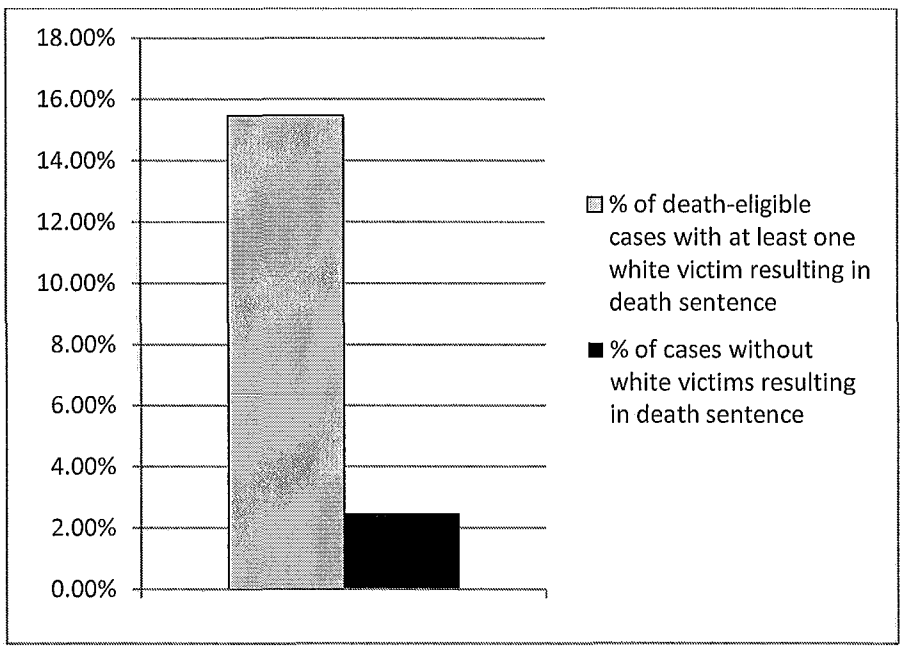
136. Accordingly, Mr. Rouse is entitled to relief.

VII. AT THE TIME OF MR. ROUSE'S TRIAL, AS A RESULT OF THE COMBINED EFFECT OF CHARGING AND SENTENCING DECISIONS, RACE WAS A SIGNIFICANT FACTOR IN THE

IMPOSITION OF THE DEATH PENALTY IN THE PROSECUTORIAL DISTRICT 19B.

137. The foregoing evidence and law with respect to statewide and division-wide disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

138. In Prosecutorial District 19B, from 1990 to 2009, 15.47% of death eligible cases with at least one white victim resulted in death sentences, while only 2.47% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were 6.26 times more likely to result in a death sentence.



139. Accordingly, Mr. Rouse is therefore entitled to relief.

VIII. AT THE TIME OF MR. ROUSE'S TRIAL, AS A RESULT OF THE COMBINED EFFECT OF CHARGING AND SENTENCING DECISIONS, RACE WAS A SIGNIFICANT FACTOR IN THE IMPOSITION OF THE DEATH PENALTY IN RANDOLPH COUNTY.

140. The foregoing evidence and law with respect to statewide, division-wide, and district-wide disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

141. In Randolph County, from 1990 to 2009, 16.46% of death eligible cases with at least one white victim resulted in death sentences, while 0% of death eligible cases without white victims resulted in death sentences. Thus, death eligible cases with at least one white victim were an infinite times more likely to result in a death sentence.

142. Accordingly, Mr. Rouse is therefore entitled to relief.

IX. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS THROUGHOUT NORTH CAROLINA.

143. The foregoing evidence and law with respect to disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

144. Mr. Rouse is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(2) because, at the time of his capital trial, prosecutors sought death sentences significantly more frequently as punishment for capital offenses against white victims than as punishment for capital offenses against any other race.

White Victim Disparities

145. The statistical results of the MSU Study show that at the time of Mr. Rouse's trial, North Carolina prosecutors were more likely to seek the death penalty in cases with at least one white victim.

146. Statewide, for the time period between 1990 and 1999, prosecutors brought 22.44% of death eligible cases with at least one white victim to capital trials, but brought only 11.36% of those cases without white victims to capital trials. Thus, prosecutors were 2.0 times more likely to bring a case to a capital trial if there was at least one white victim.

147. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.5 times higher than the odds faced by all other similarly situated defendants from 1990 to 1999.

148. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.5 times higher than the odds faced by all other similarly situated defendants from 1990 to 1999.

149. Statewide, for the time period between 1990 and 1994, prosecutors brought 24.01% of death eligible cases with at least one white victim to capital trials, but brought only 10.20% of those cases without white victims to capital trials. Thus, prosecutors were 2.4 times more likely to bring a case to a capital trial if there was at least one white victim.

150. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.8 times higher than the odds faced by all other similarly situated defendants from 1990 to 1994.

151. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.6 times higher than the odds faced by all other similarly situated defendants from 1990 to 1994.

152. This trend has been consistent over the past two decades. Statewide from 1990 through 2009, prosecutors were 1.9 times more likely to bring a case to a capital trial if there was at least one white victim.

153. These disparities also persisted in regression models that account for the impact of non-racial statutory aggravating and mitigating circumstances in the cases. Even after controlling for statutory aggravating and mitigating circumstances in the statutory controls model, statewide from 1990 through 2009, death eligible defendants in cases with least one white victim faced odds of advancing to a capital trial that were 1.5 times higher than the odds faced by all other similarly situated defendants.

154. Even after analyzing the importance of and where appropriate controlling for over 200 additional factors in the all meaningful controls model, statewide from 1990 through 2009, death eligible defendants in cases with at least one white victim faced odds of advancing to a capital trial that were 1.6 times higher than the odds faced by all other similarly situated defendants.

155. Thus, the disparities based on race of the victim cannot be explained away by any suggestion that crimes against white victims are more heinous or death-worthy.

X. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS IN FORMER THIRD JUDICIAL DIVISION.

156. The foregoing evidence and law with respect to statewide disparities in the State's capital charging decisions is incorporated into this claim by reference.

157. In the former Third Judicial Division, from 1990 to 1999, prosecutors brought 20.28% of death eligible cases with at least one white victim to capital trials, but brought only 10.28% of death eligible cases without white victims to capital trials. Thus, prosecutors were 2.0 times more likely to bring a case to a capital trial if there was at least one white victim.

158. Accordingly, Mr. Rouse is therefore entitled to relief.

XI. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS IN PROSECUTORIAL DISTRICT 19B.

159. The foregoing evidence and law with respect to statewide and division-wide disparities in the State's capital charging decisions is incorporated into this claim by reference.

160. In Prosecutorial District 19B, District Attorney Yates proceeded capitally against defendants at a significantly higher rate in white victim cases than in cases involving non-white victims.

161. Overall, from 1990 to 2009, prosecutors brought 22.50% of death eligible cases with at least one white victim to capital trials, but brought only 14.84% of death eligible cases without white victims to capital trials. Thus, prosecutors were 1.52 times more likely to bring a case to a capital trial if there was at least one white victim.

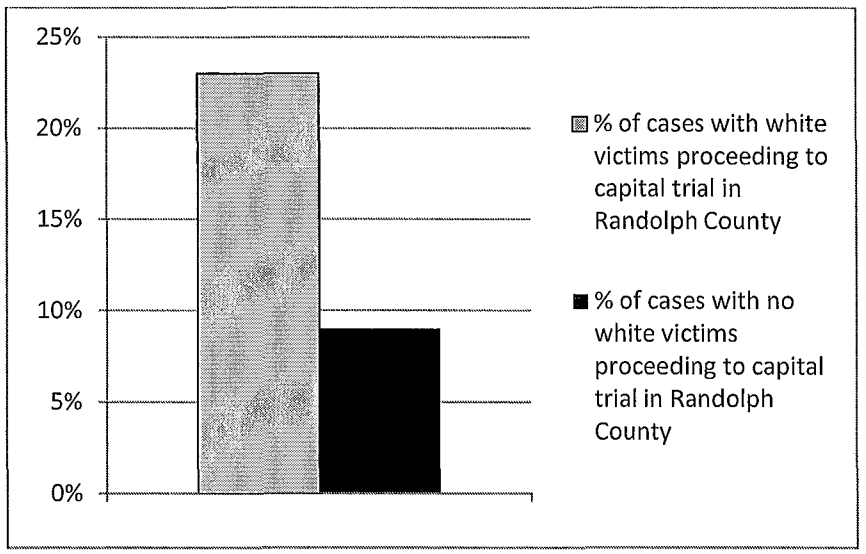
162. The disparities in capital charging in District 19B – whereby cases involving white victims are 1.5 times more likely to proceed to a capital trial – show that race is a significant factor in decisions to seek a death sentence. Accordingly, Mr. Rouse is therefore entitled to relief pursuant to N.C. Gen. Stat. §2011(b)(2).

XII. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS IN RANDOLPH COUNTY.

163. The foregoing evidence and law with respect to statewide, division-wide, and district-wide disparities in the State's capital charging decisions is incorporated into this claim by reference.

164. District Attorney Yates has proceeded capitally against defendants at a significantly higher rate in white victim cases than in cases involving non-white victims.

165. In Randolph County, from 1990 to 2009, prosecutors brought 23.05% of death eligible cases with at least one white victim to capital trials, but brought only 8.96% of death eligible cases without white victims to capital trials. Thus, prosecutors were 2.6 times more likely to bring a case to a capital trial if there was at least one white victim.



166. The disparities in capital charging in Randolph County – whereby cases involving white victims more than 2.5 times more likely to proceed to a capital trial – show that race is a significant factor in decisions to seek a death sentence. Accordingly, Mr. Rouse is therefore entitled to relief pursuant to N.C. Gen. Stat. §2011(b)(2).

XIII. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN CAPITAL SENTENCING DECISIONS BY JURIES IN FORMER THIRD JUDICIAL DIVISION.

167. The foregoing evidence and law with respect to disparities in the imposition of the death penalty based on the combined effect of charging and sentencing decisions is incorporated into this claim by reference.

168. The statistical results of the MSU Study show that at the time of Mr. Rouse's trial, capital juries in the former Third Judicial Division were more likely to impose the death penalty in cases with at least one white victim.

White Victim Disparities

169. In the former Third Judicial Division, from 1990 to 1999, juries imposed death sentences in 54.88% of all penalty phase trials with at least one white victim, but only 42.50% of penalty phase trials without white victims. Thus, juries were 1.3 times more likely to sentence a defendant to death if the case had at least one white victim.

Racial Minority Defendant/White Victim Disparities

170. In the former Third Judicial Division, from 1990 to 1999, juries imposed death sentences in 64.00% of all penalty phase trials with racial minority defendants and at least one white victim, but only 47.42% of all other penalty phase trials. Thus, juries were 1.4 times more

likely to sentence a defendant to death if the case had a racial minority defendant and at least one white victim.

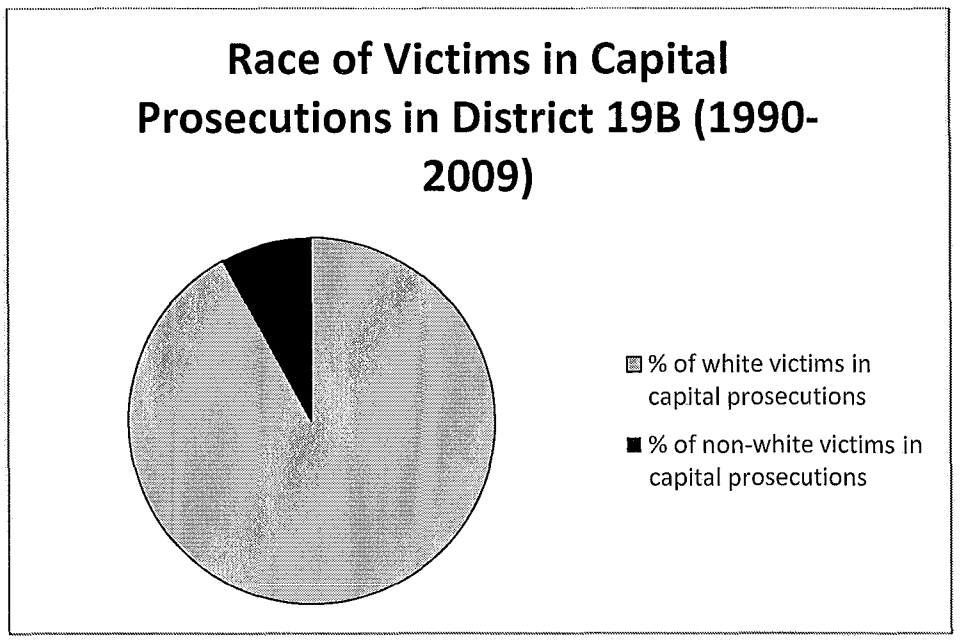
171. Thus, Mr. Rouse is entitled to relief under N.C. Gen. Stat. §15A-2011(b)(2) because, at the time of his capital trial, race was a significant factor in juries' decisions to impose death sentences. The statistical results of the MSU Study demonstrate that these disparities existed in the Judicial Division at the time of Mr. Rouse's trial.

XIV. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN CAPITAL SENTENCING DECISIONS BY JURIES IN PROSECUTORIAL DISTRICT 19B.

172. The foregoing evidence and law with respect to the fact that race was a significant factor in capital sentencing decisions by juries on a division-wide basis is incorporated into this claim by reference.

173. In Prosecutorial District 19B, from 1990 to 2009, juries imposed death sentences in 68.75% of all penalty phase trials with at least one white victim, but only 16.67% of penalty phase trials without white victims. Thus, juries were 4.13 times more likely to sentence Mr. Rouse to death if the case had at least one white victim.

174. Between 1990 and 2009, white victims accounted for 49% of homicide victims in District 19B but accounted for almost 92% of the victims in cases in which the death penalty was imposed.



175. As noted above, these statistics were poignantly illustrated by the facts of this case, where race played a role in the jury's decision to sentence Mr. Rouse to death for the killing of a white victim. He was sentenced to death by an all-white jury after the prosecutor struck all of the qualified non-white venire members.

176. Furthermore, one juror who sat, deliberated, and voted for a death sentence admitted (a) he intentionally did not disclose that his mother had been murdered and the killer caught and executed, and (b) that his self-described "bigotry" influenced the sentencing decision. This juror expressed views concerning racial matters, such as "blacks do not care about living as much as whites do" and "black men rape white women so that they can brag to their friends about having done so," going so far as to suggest that such "was probably Mr. Rouse's motivation for attacking" his elderly white victim. He also frequently used the word "niggers" to refer to black people.

177. The disparities in capital sentencing depending on the race of the victim show that race is a significant factor in decisions to impose the sentence of death in District 19B. Indeed, the facts of this case confirm those findings. Mr. Rouse is therefore entitled to relief pursuant to N.C. Gen. Stat. §15A-2011(b)(2).

XV. AT THE TIME OF MR. ROUSE'S TRIAL, RACE WAS A SIGNIFICANT FACTOR IN CAPITAL SENTENCING DECISIONS BY JURIES IN RANDOLPH COUNTY.

178. The foregoing evidence and law with respect to division-wide and district-wide disparities in the capital sentencing decisions by juries is incorporated into this claim by reference.

179. In Randolph County, from 1990 to 2009, juries imposed death sentences in 71.43% of all penalty phase trials with at least one white victim, but 0% of penalty phase trials without white victims. Thus, juries were an infinite times more likely to bring a case to a capital trial if there was at least one white victim.

180. In Randolph County, there were 17 capital prosecutions that proceeded to a capital sentencing hearing. On ten occasions, the jury recommended a sentence of death. In all ten of these cases, there were only white victims. In the three capital cases with black victims that proceeded to a capital sentencing hearing, the jury rejected the death sentence and recommended a life sentence. This, despite the fact that, in one of the three cases involving black victims, there were multiple black victims. The one multiple white victim case in Randolph County that proceeded to a capital sentencing hearing resulted in a death sentence.

Defendant Name	Victim 1 Race	Victim 2 Race	Victim 3 Race	Sentence
Quesinberry, Michael R.	W			Life
Rouse, Kenneth	W			Death
Williams, James Edward	W			Death
Kandies, Jeffrey	W			Death

Mickey, Terry	W			Life
Trull, Gary Allen	W			Death
Chavis, Herbert	W			Life
Diehl, David	B			Life
Shoffner, Gary	B	B		Life
Carter, Mary Jane	W			Life
Yarrell, Rashawn	B			Life
Badgett, John Scott	W			Death
Polke, Alexander	W			Death
Wilkerson, George	W	W		Death
Poindexter, Ronald (1999)	W			Death
Poindexter, Ronald (2002)	W			Death
Hurst, Jason	W			Death

181. The disparities in capital sentencing show that race of victim is a significant factor in decisions to impose the sentence of death in Randolph County. Mr. Rouse is therefore entitled to relief pursuant to N.C. Gen. Stat. §15A-2011(b)(2).

Conclusion: Charging and Sentencing Claims

182. The RJA addresses discrimination in the application of the death penalty by permitting defendants to demonstrate the existence of racial disparities in capital charging and sentencing decisions through the use of statistical evidence. This approach only makes sense given the historical context. While overtly racist sentiments were openly expressed by all components of our criminal justice system in the historical periods before *Furman v. Georgia*, 408 U.S. 238 (1972) (invalidating the death penalty in part due to racial disparities), the concerns that remain today are whether the legacy of those historical prejudices remain in North Carolina practices, procedures, and policies, even though they may not be openly expressed by individual actors. This very real concern has been recognized by the Supreme Court. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) (explaining that "[m]ore subtle, less consciously held racial attitudes could . . . influence a juror's [capital sentencing] decision").

183. In *Rose v. Mitchell*, the Supreme Court explained that although racial discrimination may operate more subtly than in previous times, it remains potent:

> [W]e . . . cannot deny that, 114 years after the close of the War Between the States . . . racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

443 U.S. 545, 558-59 (1979).

184. As demonstrated above, racial disparities in charging and sentencing existed at the time of Mr. Rouse's trial. Whatever the cause of this phenomenon, the legislature has provided a

remedy. Mr. Rouse is entitled under the RJA and constitutional law to a sentence of life imprisonment without parole based on this evidence of racial disparities in capital charging and sentencing decisions.

CONCLUSION

185. As a matter of statistical analysis and specific facts, the death sentence imposed on Kenneth Bernard Rouse was sought or obtained on the basis of race. Under the explicit directive of the Racial Justice Act, his death sentence must be set aside and a sentence of life imprisonment imposed.

Respectfully submitted this the 2nd day of August, 2010.

RUDOLF WIDENHOUSE & FIALKO

M. Gordon Widenhouse, Jr.; State Bar No. 10107
312 West Franklin Street
Chapel Hill, N.C. 27516
(919) 967-4900
(919) 967-4953 facsimile
mgwidenhouse@RWF-law.com

OFFICE OF THE CAPITAL DEFENDER

Robert Manner Hurley
123 West Main Street, Suite 601
Durham, N.C. 27701
(919) 560-5837
(919) 560-6900 facsimile
Robert.M.Hurley@nccourts.org

ATTORNEYS FOR KENNETH BERNARD ROUSE

STATEMENT OF COMPLIANCE WITH
N.C. Gen. Stat. § 15A-1420(a)(1)(c1)

There is a sound legal basis for this motion. This motion is being filed in good faith. Both the District Attorney's Office and trial counsel have been notified of the filing of this motion. The undersigned has in good faith determined that a full review of the trial transcript is not required in order to file this motion.

Respectfully submitted this the 2nd day of August 2010.

M. Gordon Widenhouse, Jr.

Robert Manner Hurley

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to N.C. Gen. Stat. § 15A-1420(b1)(1), I caused to be served a copy of the foregoing Racial Justice Act Motion, by first class mail upon:

Roy A Cooper III
Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629

Garland Yates
District Attorney
176 E. Salisbury Street, Suite 305
Asheboro, NC 27203

This the 2nd day of August 2010.

M. Gordon Widenhouse, Jr.