No. 181A93-4 DISTRICT 22A

SUPREME COURT OF NORTH CAROLINA

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

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BRIEF OF AMICUS CURIAE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF DEFENDANT-APPELLANT

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BRIEF OF AMICUS CURIAE
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF THE CASE AND FACTS

Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. ("LDF") adopts Defendant-Appellant's Statement of the Case and Facts.[1]

[1] Pursuant to N.C. R. App. P. 28(i)(2), LDF states that no person or entity other than amicus curiae, its members, or its counsel, directly or indirectly wrote this brief or contributed money for its preparation.

STATEMENT OF INTEREST

LDF is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, organizing and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their full civil and human rights. Since its inception, LDF has sought to eliminate the arbitrary role of race on the administration of the criminal justice system by challenging laws, policies, and practices that have a disproportionate impact on African Americans and other communities of color.

LDF has long been committed to ensuring racial equality in jury selection, having served as counsel or amicus curiae in multiple cases before the United States Supreme Court on this issue. *See*, *e.g.*, *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Georgia v. McCollum*, 505 U.S. 42 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Swain v. Alabama*, 380 U.S. 202 (1965). Moreover, as counsel in *McCleskey v. Kemp*, 481 U.S. 279 (1987), LDF has a significant interest in the North Carolina Legislature's response to the *McCleskey* decision by enacting the North Carolina Racial Justice Act, and the issues

arising from the subsequent repeal of that legislation.

LDF has also participated in cases involving individuals who have been sentenced to death in North Carolina as part of its advocacy for a fair and just criminal justice system. For example, LDF was counsel in *Woodson v. North Carolina*, 428 U.S. 280 (1976), in which the United States Supreme Court invalidated North Carolina's mandatory death penalty scheme as a violation of the Eighth and Fourteenth Amendments. Moreover, LDF recently submitted an amicus brief in support of Defendants-Appellants in *State v. Robinson*, No. 411A94-6; *State v. Walters*, No. 548A00-2; *State v. Golphin*, No. 441A98-4; and *State v. Augustine*, No. 130A03-2, which are pending before this Court.

Given its mission, history, and expertise in opposing racial injustice generally—and in combating racial discrimination in the use of peremptory strikes and in the imposition of the death penalty specifically—LDF has a substantial interest in the issues raised in Defendant-Appellant's case.

INTRODUCTION

Defendant-Appellant Rayford Burke's appeal to this Court presents an important and historic opportunity for North Carolina. After a long and tragic history of entrenched racial discrimination in the administration of North Carolina's death penalty, this Court can pave a new path for North Carolina's judicial system that demonstrates an unequivocal commitment to fundamental fairness and racial equality. Especially with respect to juries, which are a crucial exercise of citizenship that is essential to the integrity of the judicial process, there simply should be no tolerance for the taint of racial bias.

The laudable goal of removing the taint of racial bias from a death sentence was at the heart of the North Carolina Racial Justice Act, N.C.G.S. §§ 15A-2010 *et seq*. (2009) ("RJA"). Indeed, the RJA was the North Carolina Legislature's response to the United States Supreme Court's failure to make a similar commitment to racial equality in its decision in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which declined to find purposeful discrimination in the imposition of a death sentence notwithstanding compelling statistical evidence of such discrimination. As the legal organization that represented Warren McCleskey before the

United States Supreme Court, LDF is especially supportive of efforts in North Carolina to fully eradicate racial discrimination from the death penalty and the judicial process.

A subsequent legislature's repeal of the RJA does not diminish the importance of rooting out racial discrimination from North Carolina, especially in connection with the selection of juries in capital cases. North Carolina is not in the same posture now as it was prior to the enactment of the RJA. The RJA provided a mechanism to prove racial discrimination in death penalty cases, and a North Carolina court has found such discrimination to exist in prosecutors' discriminatory use of peremptory challenges in its exhaustive opinions in *State v. Robinson* and *State v. Golphin*. These judicial opinions also explicitly recognized a specific instance of purposeful discrimination against an African-American prospective juror in Mr. Burke's own capital trial.

No act by the North Carolina Legislature can wish away what we now know to be true from overwhelming statistical evidence: racial discrimination impermissibly influences the administration of North Carolina's death penalty. With that knowledge—as well as substantial evidence of racial discrimination in the former and current Judicial

Division 3, Prosecutorial District 22, Iredell County, and Mr. Burke's own case—Mr. Burke, at a minimum, must be given the opportunity to challenge his death sentence.

Refusing to permit Mr. Burke to prove racial discrimination in jury selection based solely on compelling statistical evidence—as a claim under either the RJA or the North Carolina Constitution with more expansive protections than its federal counterpart—would raise substantial questions about the integrity and legitimacy of the judicial process that convicted and sentenced Mr. Burke. This Court must not let such suspicions infect public confidence in North Carolina's courts. Accordingly, LDF respectfully urges this Court to reverse the lower court's decision and allow Mr. Burke to pursue his discrimination claims.

ARGUMENT

I. This Court Must Commit to the Eradication of Racial Discrimination in North Carolina's Death Penalty and Judicial Systems.

Like many states, North Carolina's death penalty has a long and tragic association with racial bias. In 2012, systemic racial discrimination in capital cases was proven—and found—to exist in a North Carolina court of law under the RJA. In light of the substantial evidence of racial discrimination across North Carolina, as well as the

jurisdictions specific to Mr. Burke's case, this Court should allow Mr. Burke to also make his case of racial discrimination in a court of law.

A. North Carolina's Death Penalty and the Selection of Juries Across the State Have Long Suffered the Pernicious Stain of Racial Discrimination.

Racial discrimination has infected North Carolina's death penalty as long as this ultimate punishment has been imposed within the state's borders. African Americans—mostly slaves—comprised 71% of those executed from 1726 to 1865. Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031, 2044-45 (Sept. 2010) ("Kotch, *Racial Justice Act*"). "[M]any slaveowners believed that these public executions served an important purpose in deterring misbehavior among the slave population at large." *Id.* at 2047-48. The disproportionate execution of African Americans continued in North Carolina between the end of the Civil War and 1910, with African Americans making up 74% of the 160 people executed during that time even though they were, at most, 38% of the overall population. *Id.* at 2053.

In 1910, the State of North Carolina assumed responsibility for executions, which ensued until 1961, when the last North Carolina

prisoner was executed before the death penalty was ruled unconstitutional by the United States Supreme Court in *Furman v. Georgia,* 408 U.S. 238 (1972). Kotch, *Racial Justice Act* at 2039. During that time between 1910 and 1961, African Americans comprised 283 of 362 (78%) of the people executed in North Carolina although the state African-American population ranged from only 32% in 1910 to 25% in 1960. *Id.* at 2056. Presently, 55% (77 out of 140) of North Carolina's death row are African American,[2] compared to about 22% of North Carolina's general population being African American.[3]

One of the most indelible legacies of slavery and Jim Crow on North Carolina's death penalty is the starkly disproportionate pattern of executing people, especially African Americans, for crimes committed against white victims. The execution of African Americans accused of raping white women stands as a stark example: from the pre-*Furman* era of 1910 to 1961, 67 of 78 men executed for rape were African American, and 58 of those cases involved a white victim. *Id.* at 2066.

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[2] N.C. Dep't of Public Safety, *Death Row Roster*, https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster (last visited February 12, 2019).

[3] N.C. Office of State Budget & Mgmt., State Demographer, County Estimates, *Population in North Carolina Counties by Race* (as of July 1, 2016), https://files.nc.gov/ncosbm/demog/totalbyrace_2016.html.

More recently, a study of North Carolina homicides from 1980 to 2007 found that "the odds of a death sentence for those suspected of killing Whites are approximately three times higher than the odds of a death sentence for those suspected of killing Blacks," and the "race of the victim effect is largest for Black suspects suspected of killing White victims, who are five times more likely to be sentenced to death than Black suspects with Black victims." Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina, 1980-2007*, 89 N.C. L. Rev. 2119, 2120, 2141 (Sept. 2011) ("Radelet, *Race and Death Sentencing*"). Numerous other studies confirm the persistent influence of the victim's race in the administration of the death penalty in North Carolina:

- Analysis of 1977-78 North Carolina data: Defendants of any race who killed a white victim were "six times more likely to be found guilty of first degree murder than defendants in cases with nonwhite victims."[4] "In addition, nonwhite defendants were more likely to receive the death penalty compared to whites."[5]
- Analysis of 1977-80 North Carolina data: "Among [ ] homicides with additional felony circumstances present . . . 13.6% of those

[4] Isaac Unah, *Empirical Analysis of Race and the Process of Capital Punishment in North Carolina*, 2011 Mich. St. L. Rev. 609, 622 (2011) ("Unah, *Empirical Analysis*") (quoting Barry Nakell & Kenneth A. Hardy, *The Arbitrariness of the Death Penalty* 146-48 (1987)) ("Nakell, *Arbitrariness*"); *see also* Radelet, *Race and Death Sentencing*, at 2134 (citation omitted); Barbara O'Brien, et al., *Untangling the Role of Race in Capital Charging and Sentencing in North Carolina, 1990-2009*, 94 N.C. L. Rev. 1997, 2005 (Sept. 2016) ("O'Brien, *Untangling the Role*").

[5] Unah, *Empirical Analysis*, at 622 (citing Nakell, *Arbitrariness*, at 94).

suspected of killing Whites were sentenced to death, compared to 4.3% of those suspected of killing Blacks."[6]

- Analysis of 1993-97 North Carolina data: "When a nonwhite defendant kills a white victim, the death-sentencing rate is 5.1 percent. However, when a nonwhite defendant kills a nonwhite victim, the death-sentencing rate is only 1.5 percent."[7]

- Analysis of 1990-2009 North Carolina data: (1) "Cases in which the defendant killed at least one white victim were significantly more likely to receive a death sentence than cases in which the defendant killed only black victims"; (2) "Prosecutors were significantly less likely to bring cases in which black defendants killed only black victims to a capital trial than any other case"; (3) "Juries were significantly less likely to sentence defendants to death in cases where white defendants kill only black victims than any other case."[8]

Equally troubling is the historic and longtime exclusion of African Americans from capital juries, beginning with the absolute bar to jury service for African Americans during the time of slavery. Kotch, *Racial Justice Act*, at 2072. Despite the United States Supreme Court's ruling in *Strauder v. West Virginia*, 100 U.S. 303 (1880), that the Fourteenth Amendment prohibited state laws barring African Americans from jury service, North Carolina instituted statutory requirements during the first half of the twentieth century that effectively achieved the same

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[6] Radelet, *Race and Death Sentencing*, at 2135 (citing Samuel R. Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* 89 (1989)).

[7] Unah, *Empirical Analysis*, at 637.

[8] O'Brien, *Untangling the Role*, at 2043.

result. For example, North Carolina statutes during that time required for jury service: "(1) payment of taxes for the preceding year; (2) good moral character; and (3) sufficient intelligence" for jury service, which gave wide discretion to exclude African Americans from juries. Kotch, *Racial Justice Act*, at 2073. A 1948 opinion from this Court noted that no African American was deemed eligible for jury service, let alone seated, in an eastern North Carolina county where African Americans made up the majority of the population. *State v. Speller*, 229 N.C. 67, 68-70, 47 S.E.2d 537, 538-39 (1948), *cited in* Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 Ohio St. J. Crim. L. 103, 126 n.109 (2012) ("Mosteller, *Responding to* McCleskey *and* Batson").

Even though the United States Supreme Court later prohibited the systemic exclusion of African Americans from juries, *see Swain v. Alabama*, 380 U.S. 202 (1965), and the discriminatory use of peremptory challenges against African Americans, *see Batson v. Kentucky*, 476 U.S. 79 (1986), African Americans are still disproportionately excluded from jury service, as demonstrated in Mr. Burke's case. *See infra* Section I.B.

A recent study of 2011 felony trials in North Carolina found that prosecutors used peremptory challenges against African-American prospective jurors at twice the rate they excluded white prospective jurors. Ronald F. Wright, et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue,* 2018 Univ. Ill. L. Rev. 4, 26 (Sept. 7, 2017), https://ssrn.com/abstract=2994288 (available via SSRN).

In his concurrence in *Batson*, Justice Marshall emphasized how the "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant" because, *inter alia*, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons." *Batson*, 476 U.S. at 103, 105 (Marshall, J., concurring). Additionally, "the conscious or unconscious racism" of prosecutors or judges may lead to differing perceptions of African American jurors, as compared to white jurors, and the court's ready acceptance of the prosecutor's proposed explanation for the challenge. *Id.* at 106. The record of *Batson* rulings in this Court and the North Carolina Court of Appeals justifies Justice Marshall's concerns about the difficulties of remedying the racially discriminatory use of peremptory challenges: the appellate courts of North Carolina have

never ruled that a prosecutor intentionally discriminated against a juror of color since *Batson* was decided.[9] Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. Rev. 1957, 1961-62 (Sept. 2016) ("Pollitt, *Thirty Years of Disappointment*").

B. Mr. Burke Must Have an Opportunity to Challenge His Death Sentence Based on Substantial and Compelling Evidence of Racial Discrimination.

In a closely divided 5-4 decision, the majority of the United States Supreme Court acknowledged in *McCleskey v. Kemp* that there was "a discrepancy that appears to correlate with race" regarding whom Georgia prosecutors decided to charge with capital crimes, but found those disparities to be "an inevitable part of our criminal justice system" that were insufficient to prove a "discriminatory purpose" under the

[9] On three occasions, this Court found the trial court to have erred in finding no prima facie case of discrimination in the first of *Batson*'s three-step inquiry and conducted or ordered further review, but it has never reached an ultimate finding of intentional discrimination. Pollitt, *Thirty Years of Disappointment*, at 1961. The North Carolina Court of Appeals has found intentional discrimination in the peremptory challenges used against two white prospective jurors, and a prima facie case of discrimination—which did not lead to findings off intentional racial discrimination—in two other cases. *Id.* at 1961-63. However, no North Carolina appellate court has found that a peremptory challenge was used in an intentionally discriminatory manner against a prospective juror of color. A search for decisions issued by this Court and the North Carolina Court of Appeals after the publication of this study did not yield any state appellate decisions finding *Batson* violations.

Fourteenth Amendment. 481 U.S. 279, 295-99, 312 (1987). As Justice Blackmun commented in his dissent, the *McCleskey* Court "sanction[ed] the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence." *Id.* at 345 (Blackmun, J., dissenting).

LDF represented Warren McCleskey before the United States Supreme Court and continues to believe that the *McCleskey* decision was an incorrect interpretation of the Eighth and Fourteenth Amendments, which has allowed racial discrimination to pervade the criminal justice system, including capital cases. Indeed, Justice Powell, who wrote the majority opinion in *McCleskey* and cast the deciding vote, publicly stated in retirement that, in retrospect, he would have decided *McCleskey* differently. Opinion, *Justice Powell's New Wisdom*, N.Y. Times (June 11, 1994), https://www.nytimes.com/1994/06/11/opinion/justice-powell-snew-wisdom.html. In passing the RJA, however, the North Carolina Legislature specifically responded to the improper constraints imposed by *McCleskey* on federal claims of racial discrimination by permitting state statutory claims of racial discrimination based on statistical

evidence. *See* Barbara O'Brien & Catherine M. Grosso, *Confronting Race: How a Confluence of Social Movements Convinced North Carolina to Go Where the* McCleskey *Court Wouldn't*, 2011 Mich. St. L. Rev. 463, 463-64, 473-74 (2011); Mosteller, *Responding to* McCleskey *and* Batson at 116; Kotch*, Racial Justice Act* at 2111-13.

The RJA opened the door for capital defendants to present statistical evidence of racial discrimination in the selection of juries in capital trials. Ultimately, the Superior Court of Cumberland County granted RJA relief in *State v. Robinson*, based, in part, on the following findings of jury discrimination in the capital trials of all prisoners currently on North Carolina's death row:

- "[P]rosecutors statewide struck 52.6% of eligible black venire members, compared to only 25.7% of all other eligible venire members. . . . The probability of this disparity occurring in a race-neutral jury selection process is less than one in ten trillion."
- "Of the 166 cases statewide that included at least one black venire member, prosecutors struck an average of 56.0% of eligible black venire members, compared to only 24.8% of all other eligible venire members. . . . The probability of this disparity occurring in a race-neutral jury selection process is less than one in 10,000,000,000,000,000,000,000,000,000,000."
- "The statewide disparity in strike rates has been consistent over time, whether viewed over the entire study period, in four five-year periods, or two ten-year periods."

Order Granting Motion for Appropriate Relief at 58-59, *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012) ("*Robinson* Order"); *see also* Order Granting Motions for Appropriate Relief at 136-201, *State v. Golphin, et al.*, Nos. 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (N.C. Super. Ct. Dec. 13, 2012) ("*Golphin* Order"). Similar statewide evidence was presented in Mr. Burke's Motion for Appropriate Relief Pursuant to the Racial Justice Act ("RJA MAR"), which was filed on August 6, 2010, and pending in the Superior Court of Iredell County when the RJA was repealed in 2013. Rpp. 14, 29-33.

In support of its grant of RJA relief, the *Robinson* Court also found disparate treatment of an African-American prospective juror in Mr. Burke's case, who had been struck by the prosecutor "for a purportedly objectionable characteristic" while "non-black venire members with comparable or even identical traits" were accepted. *Robinson* Order at 137, ¶ 302. Specifically, "the prosecutor struck African-American venire member Vanessa Moore in part because she had previously lived in Maryland and Washington, D.C." even though "Moore was raised and went to school in North Carolina and had been living in the state for the past eight years," and the State had not struck four white

prospective jurors, who all "had been born and/or lived for substantial periods of time in other states" and all but one "had lived in North Carolina less than four years." *Id.* at 141, ¶ 311; *see also Golphin* Order at 118, ¶ 181 (citing peremptory strike against Ms. Moore as example of "exclud[ing] African Americans from jury service and thereby depriv[ing] them of one of the most salient emblems of citizenship").

It is mere chance that—unlike Marcus Robinson, Christina Walters, Tilmon Golphin, and Quintel Augustine, whose RJA appeals are also before this Court—Mr. Burke did not secure a ruling on his RJA claims before the repeal of the RJA statute given that he timely filed his RJA MAR in 2010. And, based on the compelling statistical evidence that Mr. Burke presented in support of his RJA claims, it is very likely that relief would have been granted. This evidence includes the following statistical results pertaining to the judicial divisions, prosecutorial district, and county relevant to Mr. Burke's case by the same experts who had submitted evidence in the Robinson, Walters, Golphin, and Augustine cases:[10]

[10] While this amicus curiae brief focuses on the statistical evidence of prosecutors' racially discriminatory use of their peremptory challenges, Mr. Burke has also presented substantial statistical evidence that the race of the victim and the

- From 1990-1999 in the former Judicial Division 3, before the reorganization of the judicial divisions in 2000, "prosecutors in 36 cases 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%. Thus, prosecutors were 2.6 times more likely to strike qualified venire members who were black. This difference in strike levels is significant at the $p < .001$ level." Rp. 33, ¶ 29 (footnote omitted).

- From 2000 to 2010 in the current Judicial Division 6, after the reorganization of the judicial divisions in 2000, "prosecutors in 4 cases struck qualified black venire members at an average rate of 70.8% but struck qualified non-black venire members at an average rate of only 25.7%. Thus, the prosecutors were 2.8 times more likely to strike qualified venire members who were black." *Id.* at 33-34, ¶ 30 (footnote omitted).

- "In Prosecutorial District 22, prosecutors in 8 cases struck qualified black venire members at an average rate of 65.6% but struck qualified non-black venire members at an average rate of only 27.8%. Thus, prosecutors were 2.4 times more likely to strike qualified venire members who were black. This difference in strike levels is significant at the $p < .01$ level." *Id.* at 34, ¶ 31 (footnote omitted).[11]

- A controlled regression analysis of Prosecutorial District 22 "estimates that after controlling for several other race-neutral factors, black venire members face odds of being struck by the state that are 11.8 times those faced by all other venire members. That difference was statistically significant at $p < .001$; put differently, there is a less than one in one thousand chance that we would observe a disparity of this magnitude if the jury

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race of the defendant impermissibly influence charging and sentencing decisions in capital cases across North Carolina, in former Judicial Division 3, in current Judicial Division 6, in Prosecutorial District 22, and in Iredell County. *See* Rpp. 35-46, 76-86.

[11] The strike pattern in Prosecutorial District 22 was included in the court's findings in the *Robinson* case. *See Robinson* Order at 62-63, ¶ 59.

selection process were actually race neutral." *Id.* at 197-98, ¶ 39.

- "In Iredell County, the prosecutors in 2 cases struck qualified black venire members at an average rate of 87.5% but struck qualified non-black venire members at an average rate of only 27.2%. Thus, prosecutors were 3.2 times more likely to strike qualified venire members who were black." *Id.* at 34, ¶ 34.[12]

All-white juries (like the jury that convicted Mr. Burke, an African American) or juries with only one person of color are commonplace in North Carolina and in the specific jurisdictions relevant to Mr. Burke's case. Over 40% of the 159 people on North Carolina's death row were convicted and sentenced by either an all-white jury or a jury with only one person of color. *Id.* at 13, ¶ 44. Between 1990 and 1999, 83% (19 of 23) of the capital defendants sentenced to death by all-white juries came from the former Judicial Division 3, including Mr. Burke. *Id.* at 14, ¶ 53. And all three individuals on death row, including Mr. Burke, who were tried in Iredell County, are African-American men convicted and sentenced by all-white juries. *Id.* at 16, ¶ 65.

Besides the statistical evidence of jury discrimination, Mr. Burke presented other evidence of racial discrimination by the prosecutor in his case. The prosecutor used peremptory challenges on three of the four

[12] The strike pattern in Iredell County was included in the court's findings in the *Robinson* case. *See Robinson* Order at 63-64, ¶ 61.

(75%) of the qualified African Americans on the venire panel. *Id.* at 172, ¶ 13. One of these prospective jurors was Vanessa Moore, whose improper strike was included to support the findings of racial discrimination in the *Robinson* and *Golphin* opinions. *See Robinson* Order at 141, ¶ 311; *Golphin* Order at 118, ¶ 181; *see also Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("More powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination . . . ."). The two remaining African-American veniremembers were likewise treated differently by the prosecutor than white veniremembers who provided similar answers. Rpp. 175-79. In addition, H.W. Zimmerman, the elected District Attorney for Prosecutorial District 22, attended the North Carolina Conference of District Attorneys' *Top Gun* training in 1993—a training that the court in the *Robinson* and *Golphin* opinions found to support a finding of jury discrimination due to instructions to prosecutors about how to justify peremptory challenges with a ready-made list of

race-neutral reasons. *Id.* at 181-82, ¶¶ 80-81; *Robinson* Order at 156-57, ¶¶ 360-61; *Golphin* Order at 73-77, ¶¶ 68-78.

The prosecutor's reference to Mr. Burke as "a big black bull"—in arguments to an all-white jury sitting in judgment of an African-American defendant—further infected Mr. Burke's trial with racial bias. Rp. 179 (citing Tp. 1848). This racially inflammatory comment is especially alarming given the racial climate in Iredell County around that time. *See* Rpp. 105-08, ¶¶ 122-32. At least two dozen incidents of racially motivated violence occurred in Iredell County from 1982 to 1985—more than twice the number of any other county in North Carolina—approximately a decade before Mr. Burke's trial.[13] These incidents included gunshots and cross-burnings at the homes of African-Americans or individuals in bi-racial families or relationships.[14] Indeed, Iredell County had been called the county most sympathetic to the Ku

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[13] Bruce Henderson, *Trial of 9 to Focus on Klan Upsurge in Iredell County*, Charlotte Observer, Dec. 15, 1985, at 1A; *see also* Keith Williams, *Iredell, Alexander Counties Focus on Klan Probe*, Charlotte Observer, Aug. 18, 1985, at 1.

[14] Henderson, *supra* note 13, at 1A; Bruce Henderson & Keith Williams, *9 More N.C. Residents Linked to Klan Indicted*, Charlotte Observer, Jan. 9, 1986, at 10A; Bruce Henderson, *Tending Wounds of Klan Violence: 2 Years of Terrorism Forced Iredell County to Examine Black-White Relations,* Charlotte Observer, Apr. 20, 1986, at 1A.

Klux Klan throughout North Carolina.[15]

In January 1983, fifteen robed Klansmen attempted to "bail out" a 20-year old African-American man accused of raping a 16-year-old white girl from the Iredell County Jail.[16] Klan members distributed literature at West Iredell High School in 1983 and 1984,[17] burned a cross at the school in 1984,[18] attended a meeting of the Iredell County Board of Education in March 1985,[19] and held a public rally in a parking lot next to the Statesville Police Department.[20] Federal investigations led to the indictment of 21 high-ranking Klan members,[21] most of whom lived in Iredell or Alexander County.[22] In 1993, the Confederate flag flew over the Iredell County Courthouse with the permission of the County

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[15] Liz Chandler, *Klan Activity Embarrassing to Alexander*, Charlotte Observer, Dec. 1, 1985, at 1.

[16] Ashley Halsey, *In N.C. Klan's Cry of "White Power" Is Growing Louder*, Philadelphia Inquirer, Aug. 20, 1984, at A-6.

[17] *Id.*; Keith Williams, *Mother Disputes Comments Made at Trial*, Charlotte Observer, Iredell Neighbors, Aug. 25, 1985, at 8; Keith Williams, *Statesville Man, 19, Found Guilty in Cross Burnings*, Charlotte Observer, Aug. 22, 1985, at 4.

[18] Jeff Byrd, *Community Anti-Klan Resolution Having Far-Reaching Effects*, Charlotte Observer, Oct. 20, 1985, at 1; Williams, *Mother Disputes Comments Made at Trial*, *supra* note 17, at 8.

[19] Herman Horne, *Klan in Battle Dress Seeks "Peace" for All?*, Iredell County News, Mar. 14, 1985, at 1, 4.

[20] Editorial, *Split Tongues?*, Iredell County News, Sept. 12, 1985, at 1.

[21] Williams, *supra* note 13, at 1.

[22] Henderson & Williams, *supra* note 14, at 10A.

Commissioners.[23] And the Ku Klux Klan planned to have one of its monthly rallies and cross-burnings at a private residence in northern Iredell County as recently as 2012,[24] and circulated fliers in Iredell County that said "Join The Klan And Save Our Land" in 2015.[25]

The statistical evidence presented by Mr. Burke reveals the type of racial discrimination that continues to exist beyond the protection of the Fourteenth Amendment due to the *McCleskey* decision, and the type of discrimination that the RJA was designed to redress. Especially when considered in conjunction with the other striking evidence of discrimination in his case, this Court should not condone the injustice of preventing Mr. Burke from pursuing his RJA claims. Mr. Burke has presented compelling and credible evidence that African Americans are routinely and systematically excluded from capital juries because of their race in Iredell County, in Prosecutorial District 22, in the former Judicial Division 3, in the current Judicial Division 6, and across the State of North Carolina. Mr. Burke has additionally made a substantial showing that the prosecutor discriminated against prospective African-American

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[23] *Flag Protest Planned for Sunday*, Iredell County News, May 6, 1993.

[24] *KKK to Rally in Northern Iredell*, Charlotte Observer, May 23, 2012.

[25] *KKK Fliers Dropped Off in Granite Quarry Neighborhoods; Police Looking for Culprits*, Charlotte Observer, Dec. 23, 2015.

jurors in his own case. To foreclose an avenue of relief for Mr. Burke, therefore, would leave a pernicious stain of racial discrimination on his death sentence and undermine the legitimacy and credibility of North Carolina's judicial system. This Court simply cannot let that happen.

II. The Integrity of North Carolina's Judicial System Relies on Public Confidence that Juries Are Free of Racial Bias.

An impartial jury, fairly drawn from a defendant's community, is essential to upholding our democratic ideals, our judicial system, and public confidence in that judicial system. Ignoring the compelling evidence of jury discrimination in Mr. Burke's case not only harms him and the African Americans who were unlawfully excluded from jury service, but also undermines the integrity of the entire judicial process as a whole. This Court, therefore, must take a firm and unequivocal stance denouncing racial discrimination of all forms in the judicial process and allowing capital defendants, like Mr. Burke, to seek redress for the discrimination in their cases.

A. Juries Untainted by Racial Bias Are Essential to Preserve Democratic Governance.

It is impossible to overstate the importance of ensuring that Mr. Burke is tried by a legitimately convened jury—for him personally, but also for the community at large. Our nation's Founders placed great

stock in the right to trial by jury in criminal cases, which is mentioned three separate times in the Constitution's main text and the Bill of Rights. *See* U.S. Const. art. III. § 2, cl. 3; U.S. Const. amend. V; U.S. Const. amend. VI. They understood that a robust right to a jury trial is indispensable to any government claiming to derive its "just powers from the consent of the governed." Declaration of Independence ¶ 2 (U.S. 1776). "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

The right to a jury trial protects values that are central to the rule of law and to democracy itself. The federal and state guarantees of "an impartial jury" aim to assure that defendants receive a fair day in court. U.S. Const. amend VI; *State v. Thomas*, 344 N.C. 639, 645, 477 S.E.2d 450, 452 (1996). Blackstone called that right "the most transcendent privilege which any subject can enjoy." *State v. Kirkman*, 208 N.C. 719, 719, 182 S.E. 498, 500 (1935) (quoting 3 William Blackstone, *Commentaries* 379 (Phila.: J.B. Lippincott Co., 1893)). And, for potential jurors, access to jury service is no less a part of full citizenship than suffrage. After all, aside from "voting, for most citizens . . . jury duty is

their most significant opportunity to participate in the democratic process." *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

The jury not only protects defendants' rights; it "preserves in the hands of the people that share which they ought to have in the administration of public justice." 3 Blackstone, *supra*, at 380. In so doing, it "spreads amongst all classes a respect for the decisions of the law" and "makes all feel that they have duties to fulfill towards society, and that they take a part in its government[.]" *Cooper v. Seaboard Air Line R. Co.*, 163 N.C. 150, 150, 79 S.E. 418, 419 (1913) (citation omitted). In short, the jury should give the people "security" that they, "being part of the judicial system of the country[,] can prevent its arbitrary use or abuse." *Powers*, 499 U.S. at 406 (citation omitted). It is their "commonsense judgment" that "hedge[s] against the overzealous or mistaken prosecutor" or "perhaps overconditioned or biased response of a judge." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citation omitted).

Of course, the entire community cannot sit in judgment of every criminal case. The jury can only satisfy its purpose if it is "truly representative of the community." *State v. Scott*, 314 N.C. 309, 311-12, 333 S.E.2d 296, 297-98 (1985) (quoting *Smith v. Texas*, 311 U.S. 128, 130

(1940)). Thus, illegitimate exclusions from jury service strike at the heart of the jury's democratic role. *See Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (observing that unlawful jury composition harms "the law as an institution," the "community at large," and "the democratic ideal reflected in the processes of our courts.") (citation omitted). The existence of juries from which discrete groups are excluded is a declaration that the excluded are not true citizens. *See Strauder*, 100 U.S. at 308. And the privileging of only a subset of the community to pass judgment stimulates doubts regarding the validity of those judgments. *See Powers*, 499 U.S. at 407 (emphasizing that public confidence in jury legitimacy is essential to the "continued acceptance of the laws by all of the people") (citation omitted); *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982) ("[T]he appearance of a fair trial before an impartial jury is as important as the fact of such a trial.").

The elimination of racial discrimination thus takes on particular urgency in the jury-selection context. *See Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017); *Scott*, 314 N.C. at 311-12, 333 S.E.2d at 297-98 (holding that the jury must be free of racial discrimination to ensure it is a "body truly representative of the community" (quoting *Smith*, 311

U.S. at 130)). It was the jury's centrality to a functioning democracy that led the Reconstruction Republicans to place special emphasis on purging racism from Southern jury processes, which they saw "as the central impediment to justice for blacks in the South." James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 897, 923-26 (Jan. 2004). History proved them right: after Reconstruction, the "perpetuation of white supremacy within the [Southern] legal system depended substantially on the preservation of all-white juries." Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 62 (2000).

The drafters of the revisions to North Carolina's Constitution in 1970 understood the significance—for criminal defendants and prospective jurors—of adding Article I's express prohibition on jury discrimination: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." N.C. Const. Art. I, § 26. This Court has called this a "declara[tion]" by the "people of North Carolina . . . that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice." *State v. Moore*, 329 N.C. 245, 247, 404 S.E.2d 845, 847 (1991) (quoting *State v. Cofield*,

320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987)); *see also State v. Peoples*, 131 N.C. 784, 784, 42 S.E. 814, 815 (1902) (recognizing that excluding African Americans from juries is an "assertion of their inferiority, and a stimulant to . . . race prejudice") (quoting *Strauder*, 100 U.S. at 303).

On this vital issue, this Court and the United States Supreme Court speak with one voice. Cognizant of the "particular threat" of postbellum "racial discrimination in the jury system" to the "promise of the [Fourteenth] Amendment and to the integrity of the jury trial," the United States Supreme Court has held for over a hundred years that racial exclusion of jurors is unconstitutional. *Peña-Rodriguez*, 137 S. Ct. at 867 (collecting cases). Its cases reiterate that racism undermines the core promise of a jury trial by destroying the "fact and the perception" that the jury system is truly a "check against the wrongful exercise of power by the State and its prosecutors." *Powers*, 499 U.S. at 411 (citation omitted). Indeed, "prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice[.]" *Miller-El*, 545 U.S. at 237-38 (citation and quotation marks omitted).

In sum, a healthy polity demands legitimate juries that are free of

corruption and suspicion. Prosecutors play a key role in ensuring this mandate is met. They "may strike hard blows" but not "foul ones," and must "refrain from improper methods calculated to produce a wrongful conviction" no less than they may "use every legitimate means to bring about a just one." *State v. Sanderson*, 336 N.C. 1, 8, 442 S.E.2d 33, 38 (1994) (citation and internal quotation marks omitted). Racial discrimination in peremptory strikes violates both that principle and venerable precedent.

B. A Death Sentence Tainted by Racial Discrimination in Jury Selection Harms the Defendant, the Prospective Juror, and the Integrity of the Entire Judicial System.

When, as here, racial discrimination infects jury selection, it deprives the defendant of the right to the considered judgment of a fairly constituted jury as a check against the exercise of arbitrary or biased state power. *See Batson*, 476 U.S. at 86-87 (citing *Strauder*, 100 U.S. at 309) (explaining that a jury of one's peers helps "secure the defendant's right under the Fourteenth Amendment to protection of life and liberty against race or color prejudice"). A single race-based strike creates a significant risk "that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings." *J.E.B. v. Alabama*

ex rel. T.B., 511 U.S. 127, 140 (1994).

With this understanding, this Court has warned that racially-biased peremptory challenges, if unremedied, place "the courts' imprimatur on attitudes that historically" have denied African Americans full citizenship, "entangle[] the courts in a web of prejudice and stigmatization," and undermine the "integrity of the judicial system." *Cofield*, 320 N.C. at 303-04, 357 S.E.2d at 625-26; *see also id.* at 301, 357 S.E.2d at 625 ("This Court has long recognized the wrong inherent in jury proceedings tainted by racial discrimination."). Indeed, this Court has recognized these concerns for over one hundred years. *See id.* at 301, 357 S.E.2d at 625 (examining *Peoples*, 131 N.C. at 790, 42 S.E. at 816). Yet, despite the constitutional rules set forth by this Court and the United States Supreme Court, North Carolina prosecutors continue to persistently violate the rights of defendants and jurors through their use of peremptory challenges. Indeed, Mr. Burke has presented compelling statistical evidence of such discrimination in Iredell County, the prosecutorial district and judicial divisions containing Iredell County, and across the State of North Carolina, as well as substantial evidence that African American prospective jurors were unlawfully struck in his

own case. *See supra* Section I.B.

The violation of a defendant's constitutional right to an impartial jury, drawn from a fair cross-section of the community, deprives that defendant of the fundamental right to a fair trial. And, in addition to the deprivation of that inalienable right, non-diverse juries are less deliberative, employ a narrower set of life experiences, make more factual mistakes, and are less likely to consider the full body of evidence. *See* Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive & Procedural Fairness in Death Penalty Litigation*, 97 Iowa L. Rev. 1969, 1972-75 (Oct. 2012) (collecting evidence and examples). They are also less able to prevent the insidious effects of explicit and implicit bias. *Id.* at 1975-80; *see also Peters v. Kiff*, 407 U.S. 493, 503 (1972) (stating that racial prejudice within the jury system "create[s] the appearance of bias in the decision of individual cases, and . . . increase[s] the risk of actual bias as well").

Those "excluded from juries because of their race" are "as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 329 (1970). The exclusion is "practically a brand" and an "assertion of

inferiority"; a declaration that the juror and people like him or her are second-class citizens. *Peoples*, 131 N.C. at 784, 42 S.E. at 815 (quoting *Strauder*, 100 U.S. at 308). Moreover, the illegally struck juror "suffers a profound personal humiliation heightened by its public character." *Powers*, 499 U.S. at 413-14. A report by the non-profit Equal Justice Initiative describes the harm suffered by individuals subjected to this humiliation. *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 28-34 (Aug. 2010) ("EJI Report"), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf. Twenty years after being struck, one African-American juror "grew emotional" when he "recalled how the prosecutor's racist actions made him feel unworthy." *Id.* at 30.[26] Another African-American juror, purportedly struck because he "had traffic tickets and expressed hesitation about the death penalty" (although similar white individuals were not struck), was unsurprised "because that's how the system is around here." *Id.* at 29. These and other stories illustrate how racially-biased peremptory challenges undermine African

[26] In 1992, the Court of Criminal Appeals of Alabama recognized his strike as a *Batson* violation. *Neal v. Alabama*, 612 So. 2d 1347, 1349-50 (Ala. Crim. App. 1992); EJI Report at 30 & n.150.

Americans' full citizenship and their confidence in the judicial system.

Skepticism among African-American prospective jurors about the integrity of the judicial process can impact the entire community's perception of justice. Jury discrimination causes the belief that "the deck has been stacked in favor of one side." *J.E.B.*, 511 U.S. at 140 (internal citation and quotation marks omitted); *see also* Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 Yale L.J. 2236, 2269-70 (May 2014) (citing research showing "that people's perceptions of an authority's legitimacy are influenced most by their perceptions of the fairness of the process and procedures by which it enforces the law"). That is why this Court has emphasized "that the judicial system of a democratic society must operate evenhandedly" and "be perceived to operate evenhandedly" if "it is to command the respect and support of those subject to its jurisdiction." *Moore*, 329 N.C. at 247, 404 S.E.2d at 847 (citation omitted); *see also Georgia v. McCollum*, 505 U.S. 42, 49-50 (1992) (concluding that bias in the jury system "undermine[s] the very foundation of our system of justice—our citizens' confidence in it"); *Batson*, 476 U.S. at 87 (recognizing that jury discrimination "undermine[s] public confidence in the fairness of our

system of justice") (citation omitted); *Rose*, 443 U.S. at 556 (observing "injury . . . to the community at large") (citation omitted).

For the African-American citizens of North Carolina—indeed, for all citizens of this State—to have confidence in the rule of law, racial discrimination in jury selection must be eliminated. Given the constraints from the *McCleskey* decision, this Court must permit Mr. Burke to demonstrate the impermissible taint of racial bias on his death sentence through, among other evidence, statistically-proven patterns of systemic and widespread racial discrimination in jury selection. This discrimination not only harms Mr. Burke personally, but also harms the excluded jurors and the community at large. And foreclosing appropriate remedies for this discrimination would place a devastating judicial imprimatur on the racial discrimination that has been presented in this case.

As the United States Supreme Court observed: "The duty to confront racial animus in the justice system is not the legislature's alone." *Peña-Rodriguez*, 137 S. Ct. at 867. This Court must, therefore, act unequivocally to protect the rights of criminal defendants to legally-comprised juries and to ensure public faith in the fairness and integrity

of North Carolina's judicial processes.

CONCLUSION

For the foregoing reasons, LDF respectfully requests this Court to provide all appropriate relief under the RJA, the United States Constitution, and/or the North Carolina Constitution as argued by Defendant-Appellant in the appeal at issue.

Respectfully submitted, this 15th day of February, 2019.

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I hereby certify that, on February 15, 2019, I served a copy of the foregoing Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Defendant-Appellant, by electronic means upon the following counsel of record:

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