

No. 411A94-5

TWELFTH DISTRICT

NORTH CAROLINA SUPREME COURT

STATE OF NORTH CAROLINA)
)
Appellant,)
)
v.)
)
MARCUS REYMOND ROBINSON)
)
Appellee.)
)

BRIEF OF *AMICI CURIAE* FORMER SENIOR UNITED STATES
MILITARY OFFICIALS

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INTEREST OF THE AMICI CURIAE

Amici are former senior United States military officials who attest to the effectiveness of the racial sensitivity training programs engaged in by members of the Armed Forces for more than four decades. In our experience, these training programs, coupled with strong leadership support for such programs, have played a pivotal role in combatting institutional discrimination and individual bias based on race in the military.

Stephen Abraham, Lieutenant Colonel, U.S. Army (Ret.); former military intelligence officer; served from 1981 to 2008.

David Irvine, Brigadier General, U.S. Army (Ret.); former Army Reserve strategic intelligence officer; former faculty member with the Sixth U.S. Army Intelligence School; served from 1967 to 2002.

Murray Sagsveen, Brigadier General, U.S. Army (Ret.); former Senior Judge Advocate General, Army National Guard; served from 1968 to 1996.

Colby C. Vokey, Lieutenant Colonel, U.S. Marine Corps (Ret.); former Judge Advocate General; served from 1987 to 2008.

Lawrence B. Wilkerson, Colonel, U.S. Army (Ret.); former Deputy Executive Officer of U.S. Army Forces Command; former Special Assistant to the Chairman of the Joint Chiefs of Staff; former Deputy Director of the Marine Corps War College; served from 1966 to 1997.

Stephen Xenakis, Brigadier General, U.S. Army (Ret.); former officer, Army Medical Corps; served from 1970 to 1998.

INTRODUCTION AND SUMMARY OF ARGUMENT

In determining whether race was a significant factor in the decision to seek or impose the death penalty upon Marcus Reymond Robinson, Judge Gregory A.

Weeks was expressly entitled by the North Carolina Racial Justice Act to consider evidence of prosecutor participation, or lack thereof, in racial sensitivity training programs. By permitting courts to consider evidence of participation in such training programs, the North Carolina Racial Justice Act undisputedly recognizes that the programs are effective and encourages prosecutors to participate in them.

The prosecutors who secured a death sentence against Marcus Reymond Robinson did not participate in any racial sensitivity training program. The prosecutor's office made no such program available to them. Indeed, in his closing argument at the hearing on Mr. Robinson's claim under the Racial Justice Act, Assistant District Attorney Calvin Colyer attempted to excuse his office's deliberate defiance to participating in racial sensitivity training programs by denigrating similar programs he took part in as a member of the United States military. "[T]hose efforts," he said, "may or may not have resulted in the eradication of institutional racism in those branches of service and in the Department of Defense. It was an effort. The people who went I'm sure thought this is not doing any good but maybe it did." *Master Index of Racial Justice Act Hearing, North Carolina v. Robinson*, No. 91 CRS 23143, 728-29 (N.C. Super. Ct., County of Cumberland, Feb. 29, 2012) [hereinafter "Racial Justice Act Hearing"]. Objective evidence shows that Mr. Colyer was in error.

Former military officials file this brief, on behalf of Mr. Robinson, to refute the erroneous statements of Mr. Colyer. The United States military has more than four decades of experience with racial sensitivity training programs. This experience makes clear that, contrary to Mr. Colyer's assertions, such efforts, coupled with strong command leadership, have been crucial to integrating the Armed Forces, limiting racial discrimination, and promoting equality of opportunity for servicemen and servicewomen of all races.

Evidence of participation in training programs supports a conclusion that a capital sentence was *not* "sought or obtained on the basis of race." Here, in contrast, the failure of prosecutors to engage in meaningful racial sensitivity training programs supports the lower court's holding that racial bias played an impermissible role in the prosecution of Mr. Robinson, and in particular, the exercise of preemptory strikes. Accordingly, this Court should sustain the holding of the court below.

ARGUMENT

I. NORTH CAROLINA COURTS MAY CONSIDER EVIDENCE OF RACIAL SENSITIVITY TRAINING PROGRAMS WHEN DETERMINING WHETHER RACE WAS A FACTOR IN SEEKING OR IMPOSING THE DEATH PENALTY.

North Carolina's Racial Justice Act (the "Act") prohibits capital sentencing "sought or obtained on the basis of race." N.C. Gen. Stat. Ann. § 15A-2010 (West 2009). The influence of racial bias on a "decision to seek or impose a death

sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the death penalty in the defendant's case." N.C. Gen. Stat. § 15A-2011(a) (West 2009).

In determining whether race was a "significant factor," *id.* § 15A-2011(b), courts consider "statistical evidence or other evidence," *id.*, that "[d]eath sentences were sought or imposed significantly more frequently," *id.* § 15A-2011(b)(1), either "upon persons of one race than upon persons of another race," *id.*, or "as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race." *Id.* § 15A-2011(b)(2). Evidence that "race was a significant factor in decisions to exercise preemptory challenges during jury selections" – the particular violation found in Mr. Robinson's case – may also be considered. *Id.* § 15A-2011(b).

Additionally, courts may consider "evidence of the impact upon the defendant's trial of *any program* the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death." *Id.* § 15A-2011(c) (emphasis added). As the lower court found, "racial sensitivity" or "racial bias" training programs can mitigate "[t]he unfortunately high risk that unconscious bias will lead to discrimination in jury selection" and other prosecutorial decisions. Order Granting Mot. for Appropriate Relief ¶ 227 ("Apr. 20 Order"), *State v. Robinson*, No. 91 CRS 23143 (N.C. Super. Ct. Apr. 20, 2012); *see also* Racial Justice Act

Hearing at 729. Participation in racial sensitivity training program supports a finding that a prosecutor's decisions were not influenced or motivated by racial bias. Conversely, a lack of participation in such programs bolsters a conclusion that racial bias may have been a "significant factor."

**II. ASSISTANT DISTRICT ATTORNEY CALVIN COLYER
DISPARAGED RACIAL SENSITIVITY TRAINING PROGRAMS BY
MAKING UNSUBSTANTIATED STATEMENTS ABOUT THE USE
OF SUCH PROGRAMS BY THE UNITED STATES MILITARY.**

At Mr. Robinson's Racial Justice Act hearing, expert witnesses testified about the existence of implicit racial bias, the capacity for training programs to combat that bias, and the failure of North Carolina prosecutors to participate in these important programs. *See infra* Part IV. Assistant District Attorney Calvin Colyer, in his closing argument, attempted to refute this expert testimony and defend his office's decision not to participate in training programs by opining on the programs offered by the military in the early 1970s.

Mr. Colyer's statements – unsubstantiated, anecdotal, and misleading – were as follows:

In the late '60's and the early '70's, we were in Southeast Asia and our military was almost imploding on itself because of bad race relations. And the military leaders and the civilian leaders in the Department of Defense said we have got to do something about this and one of the ways we're going to do this is to make our people sensitive and make our people aware and make them go to class, make them go to sensitivity training sessions One way they did that was through tea group sessions. If you're old enough to remember these occurrences, you probably remember some things in the newspaper

about it and how it was dealt with by people who didn't want to be there, whether they were white or black. *Very derisive terms were used about this session, this tea group training. Blacks called it "honky you" [sic] and whites called it "watermelon college" and the people who worked there were social pariahs. . . .* And the goals were to increase awareness, increase understanding, increase communication and to eradicate institutional racism in the military It was intended to also eradicate individual implicit bias and implicit racism, whether you knew it or not.

So this is not a new concept. The Department of Defense conducted their sociological experiment back in the early '70's. And I must admit, I don't know if it's still going on to tell you the truth but it's not something that's new. . . . Personally I think all of us could stand to go to some more sensitivity training and maybe we will in the future. Who knows? But those efforts may or may not have resulted in the eradication of institutional racism in those branches of service and in the Department of Defense. It was an effort. The people who went I'm sure thought this is not doing any good but maybe it did.

Racial Justice Act Hearing at 2577-79 (emphasis added). Mr. Colyer's statements, carefully worded as they were, expressed a clear message: the military's "sociological experiment" with racial sensitivity training was ineffective. And, by implication, any similar training given to North Carolina prosecutors would have been ineffective. The experience of the military since the early 1970s shows that Mr. Colyer's intended message was erroneous.

III. CONTRARY TO THE STATEMENTS OF ASSISTANT DISTRICT ATTORNEY CALVIN COLYER, MILITARY RACIAL SENSITIVITY TRAINING PROGRAMS HAVE EFFECTIVELY COMBATED INSTITUTIONAL DISCRIMINATION AND INDIVIDUAL BIAS BASED ON RACE.

A. Members of the United States Military Were Historically Treated Unequally Based on Race.

The United States military was a segregated institution until the issuance by President Harry S. Truman of Executive Order 9981 on July 26, 1948. *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948). The Order aimed to remedy discriminatory practices long-supported by leadership in the Department of Defense (DoD).¹ It mandated "equality of treatment and opportunity for all persons in the Armed Services without regard to race, color, religion or national origin" and established the President's Committee on Equal Service and Opportunity in the Armed Forces – known as the "Fahy Committee" – to oversee integration. Exec. Order No. 9981. Despite the initial resistance of several branches of the military, by the mid-1950s integration was "an accomplished fact." *See* Charlie C. Moskos, Jr., *Racial Integration in the Armed Forces*, Am. J. Soc. 72, 132 (1966).

¹ An October 1925 report by Major General H.E. Ely, for example, stated:

Negro troops are efficient and dependable only so long as led by capable White officers. Under Negro officers they have displayed entire inaptitude for modern battle. The psychology of the Negro, based on heredity derived from mediocre African ancestors, cultivated by generations of slavery, is one from which we cannot expect to draw leadership material.

Major General H.E. Ely, Memorandum for the Chief of Staff, *The Use of Negro Manpower in War* 9-10 (1925).

Integration, while significant, did not eliminate institutional discrimination and individual bias, nor did it guarantee equal treatment regardless of race.² Never was the continued existence of race relations issues more evident than during the Vietnam War. Disparate treatment among the integrated and increasingly diverse members of the Armed Forces led to "numerous outbreaks of racial hostility and violence in a worldwide pattern Riots and protests at bases in the United States and abroad and even on Navy ships at sea, reached a level that clearly undermined morale and threatened to impede the smooth functioning of military units." RAND Nat'l Corp., *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment* 180 (1993), available at, <http://www.rand.org/publications/MR/MR323/index.html>. According to one Marine Corps Lieutenant General, "racial tensions reached a point where there was an inability to fight" "We were pulling aircraft carriers off line because there was so much internal fighting." David Maraniss, *U.S. Military Struggles To Make*

² Leaders after Truman recognized this reality and took action to limit racial prejudice. In 1962, President John F. Kennedy established The President's Committee on Equal Opportunity in the Armed Forces, known as the "Gesell Committee." The committee's final report concluded:

The objective of equal opportunity and equal treatment of all persons serving in the [military] without regard to race, creed or color cannot be achieved by regulations or expressions of good will alone. A continuing interest and sustained effort is required. . . . The goal of equal opportunity has not been achieved. It can be achieved only if the Department works persistently toward these objectives with zeal and energy.

The Gesell Committee, *The President's Committee on Equal Opportunity in the Armed Forces: Final Report* 15 (Nov. 20, 1964), available at, http://www.aacvr-germany.org/GenSys/DVD/publishing/XML-Files/XML/R_10002_LS.xml.

Equality Work, Wash. Post, Mar. 6, 1990, at A-1 (quoting Lt. Gen. Frank Petersen, Jr.).

The military had an urgent need to address its race relations issues. Racial sensitivity training programs, supported by strong leadership from the top, would be a cornerstone of its efforts.

B. The Military Developed and Implemented Racial Sensitivity Training Programs to Remedy the Institutional Discrimination and Racial Bias That Persisted in Its Ranks.

DoD Leadership developed racial sensitivity training programs in the early 1970s in response to contentious race relations in Vietnam and calls for action from members of government. These programs continuously expanded and evolved over the next several decades.

A 1969 directive from the House Armed Services Committee charged DoD with instituting mandatory training programs. *See Managing Diversity in the Military: Research Perspectives from Defense Equal Opportunity Management Institute* 13-14 (Mickey R. Dansby, James B. Steward, Schuyler C. Webb eds., Transaction Publishers, New Brunswick, N.J. 2011). Secretary of Defense Melvin Laird established the Interservice Task Force on Education in Race Relations to carry out the committee's demand. *See id.* The work of the Task Force culminated in the issuance of DoD Directive 1322.11, "Department of Defense Education in Race Relations for Armed Forces Personnel." Directive 1322.11 created the Race

Relations Education Board ("RREB"), which would oversee racial sensitivity training programs, and the Defense Race Relations Institute ("DRRI"), which would prepare instructors to teach the programs. DoD Directive 1322.11 (1971). The Secretary of Defense required each branch of the military, with help from the RREB and DRRI, to develop and implement its own curriculum.³

Implementation of the training programs was largely successful. The Army's implementation effort was the "largest . . . in terms of numbers of people and hours of training ever made by an organization to provide race relations instruction." U.S. Army Research Inst. for the Behavioral and Soc. Sciences, *Race Relations Research in the U.S. Army in the 1970s: A Collection of Selected Readings* 36 (James A. Thomas ed. 1988). An April 1978 progress report presented to Deputy Assistant Secretary of Defense M. Kathleen Carpenter stated that the "training programs now have clearly articulated goals and provide guidelines for reaching these goals" and stated that "[c]urrent training curricula help to identify discriminatory behavior and to provide methods of handling such situations." H.L. Krieger, *Report to M. Kathleen Carpenter, Department of*

³ The Army's program, for example, implemented by Regulation ("AR") 600-42, "integrate[d] formal instruction in race relations given in the training establishment with a comprehensive program to improve interracial communication To ensure that top managers and leaders [were] sufficiently sensitive to the problem of racial tension and the methods of countering it, they [were] given 'special training.'" *To Increase Units' Effectiveness: Race Relations Education in the U.S. Army*, 13 Commander's Dig. 4, 15-16 (U.S. Gov't Printing Office Nov. 30, 1972); see U.S. Dep't of the Army, Army Regulation ("AR") 21 (July 26, 1973). Each Army service member was required to attend a minimum of 18 hours of training and at least one course per year. See *To Increase Units' Effectiveness: Race Relations Education in the U.S. Army*, 13 Commander's Dig. 4, 15-16 (U.S. Gov't Printing Office Nov. 30, 1972).

Defense, Director Federal Personnel and Compensation Division, No. B-182739, app. III, at 27 (Apr. 18, 1978), *available at*, <http://www.gao.gov/assets/130/122440.pdf> [hereinafter "Report to M. Kathleen Carpenter"].

The training infrastructure has expanded and evolved substantially since its initial implementation. In 1979, DRRI was renamed the Defense Equal Opportunity Management Institute ("DEOMI") and its responsibilities increased to include developing training curricula, consulting on all equal opportunity matters, conducting research on training issues, and evaluating training programs. *See* Office of the Deputy Assistant Secretary of Defense for Equal Opportunity and Safety Policy, Dep't of Defense, *Black Americans In Defense of Our Nation* 45 (1985). Today, DEOMI – which has graduated more than 41,000 service members – continues to spearhead the military's training efforts. *See* Defense Equal Opportunity Management Institute, DEOMI History, *available at*, <http://www.deomi.org/AboutDEOMI/DEOMIHistory.cfm> (last visited Aug. 9, 2013). In addition, DoD leadership remains committed to guaranteeing equal opportunity to all service members.⁴ The Department has created a Deputy

⁴ Undersecretary of Defense Edwin Dorn, Army Secretary Togo D. West Jr., Navy Secretary John H. Dalton and Air Force Secretary Sheila E. Widnall prepared the following remarks for a June 25, 1996 hearing of the House National Security Committee:

What military leaders say and do – the command climate they establish – is very important, perhaps more important than the formal rules and reports.

(cont'd)

Assistant Secretary for Equal Opportunity and restructured the membership of the Defense Equal Opportunity Council ("DEOC") to include the Deputy Secretary of Defense as its chair, and other high-ranking officials as members. Dep't of Def., Def. Manpower Data Ctr., *Armed Forces Equal Opportunity Survey 3* (1999) (chap. 2: Survey Methodology), *available at*, <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA366037> [hereinafter "Manpower Data Ctr. Report"]. The sensitivity training efforts currently in place address diversity of religion, sexual orientation, and disability, among other areas. More than forty years after its initial implementation, however, racial sensitivity training remains a crucial part of the curriculum.

C. Military Racial Sensitivity Training Programs Have Effectively Limited Institutional Discrimination and Individual Bias Based on Race.

The United States military has often been hailed as a "model of successful race relations." Orlando Patterson, *The Ordeal of Integration: Progress and Resentment in America's "Racial" Crisis* 19 (Basic Civitas 1997). Though outright

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This is a useful lesson for others of us who occupy positions of leadership. We should be mindful of the impression we create when we talk about racial issues.

The stain of racism didn't evaporate with the passage of civil rights laws; it is fading, but very slowly. We should use our moral and mental energies to promote racial justice. We should use our positions of leadership to foster racial reconciliation (and not to fan the embers of racial resentment).

Deterring and Eliminating Hate Group Activities, 104 Cong. (2d Sess. June 25, 1996) (statement as prepared for delivery by Undersecretary of Defense Edwin Dorn, Army Secretary Togo D. West Jr., Navy Secretary John H. Dalton and Air Force Secretary Sheila E. Widnall to the House National Security Committee).

eradication of racial prejudice in the Armed Forces remains an incomplete goal, DoD has for decades been a standard bearer with regard to integrating racially diverse individuals and promoting equal treatment regardless of skin color. Historical reports support the substantial contribution racial sensitivity training programs have made to that effort, a sentiment with which *Amici* wholeheartedly concur.

Reports of marked improvement in race relations emerged shortly after the implementation of the military's racial sensitivity training programs. A 1976 Army survey analyzed in a 1995 report by the United States General Accounting Office ("GAO") found that by 1976, "the perceptions of the black and white Army personnel sampled substantially supported the proposition that the racial situation in the Army had improved." U.S. Army Research Inst. for the Behavioral & Soc. Sciences, *Changes in Black and White Perceptions of the Army's Race Relations/Equal Opportunity Programs—1972 to 1974* (1976) (Appendix III to United States Gen. Accounting Office, GAO/NSIAD-95-103, *Equal Opportunity: DOD Studies on Discrimination in the Military* 22 (1995) [hereinafter GAO Report], available at, <http://www.gao.gov/assets/230/221030.pdf>. The GAO Report continued, "[t]here was far less dissatisfaction in 1974 with military justice than there was in 1972." *Id.* By 1980, according to an Army survey, "[o]fficers and enlisted soldiers ranked race problems among the last in relation to other unit

personnel problems." Dep't of the Army, *Equal Opportunity: Fourth Annual Assessment of Military Programs 20* (1980) (GAO Report, app. I), available at, <http://www.gao.gov/assets/230/221030.pdf>.

In 1999, DoD published its most comprehensive report on race relations in the military. The report did identify significant areas in which the Armed Forces must improve, but its conclusions were positive:

In general, race relations on military installations/ships are perceived to be better than those in local civilian communities. . . . Large majorities of members of all races indicated having positive personal and social interactions with members of other racial and ethnic groups. . . . A majority of all racial/ethnic groups said military life was as good or better than civilian life in areas such as fair performance evaluations, freedom from harassment and hate crimes, and freedom from discrimination.

Manpower Data Ctr. Report, at iv (Executive Summary). Increases in the numbers of minority service members also reflect substantial progress. DoD quadrupled minority representation in its ranks of newly commissioned officers between 1967 and 1991, and minority representation increased by nearly five percent from 1986 to 2006. Beth J. Asch, Trey Miller & Allesandro Malchiodi, *A New Look at Gender and Minority Differences in Officer Career Progression in the Military* 1 (RAND 2012) (prepared for the Office of the Secretary of Defense), available at, http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1159.sum.pdf.

Many reports attribute improved race relations directly to racial sensitivity training programs. The GAO Report, which analyzed 72 DoD studies spanning three decades, concluded that "[r]acial harmony training in the Army improved effectiveness in dealing with racial problems." GAO Report, at 1. A study conducted by the Army in 1978 identified "more positive race-related attitudes, perceptions, knowledge, and reported behaviors in units with higher quality training programs than in units with lower quality programs." *Id.* at 28 (summarizing U.S. Army Research Inst. for the Behavioral & Soc. Sciences, *An Analysis of the Unit Race Relations Training Program in the U.S. Army* (July 1978)). A second 1978 Army study attributed "marked reductions in measures of institutional racial discrimination in many dimensions, such as the relative speed of promotion of white and non-white enlisted personnel" to training programs. *Id.* at 27 (summarizing the findings in U.S. Army Research Inst. for the Behavioral & Soc. Sciences, *Analysis and Assessment of the Army Race Relations/Equal Opportunity Training Program: Summary Report* (1978) (GAO Report, app. I)).

The abstract of a report that assessed a particular training course designed for commanders stated:

Commanders exposed to the course demonstrated greater knowledge of the facts, methods, and skills needed to deal with interracial issues in a military unit compared to commanders not exposed to training. Enlisted soldiers serving under commanders from the experimental training group reported that their commanders implemented more

policies to ensure racial harmony and that their commanders were more effective in dealing with racial problems.

Id. at 26 (summarizing U.S. Army Research Inst. for the Behavioral & Soc. Sciences, *Racial Harmony Training for Company Commanders: A Preliminary Evaluation* (1978) (GAO Report, app. I)). The 1978 progress report presented to Assistant Deputy Secretary of Defense M. Kathleen Carpenter stated that the "[r]epresentatives of the Department of Defense . . . Army, and Air Force said their current race relations training has led to a decrease in discrimination complaints and racial incidents at their military installations." Report to M. Kathleen Carpenter, app. III, at 26.

Later accounts contain similarly positive conclusions about racial sensitivity training programs in the Armed Forces. A 1989 report found that, in the Air Force's programs, "the treatment of prejudice was well-grounded in psychological and sociological theory concerning interpersonal and intergroup behavior . . . and skill development was effectively integrated with academic material." GAO Report, at 24-25 (summarizing Colgate University for the Air Force, *Review and Evaluation of Air Force Human Relations Curriculum* (1989) (GAO Report, app. I)). A 1990 report by the Army Inspector General declared, "[T]he Army does not have a major [equal opportunity] problem, having made significant [equal opportunity] achievements since the 1970s." GAO Report, at 15 (summarizing U.S. Army Inspector Gen., *Special Assessment of Equal Opportunity* (1990) (GAO

Report, app. I)). Racial sensitivity training programs did not and cannot, on their own, cure the military of racial prejudice. The positive effect that such programs have had in combatting institutional discrimination and individual bias, however, is undeniable.

IV. THE LOWER COURT CORRECTLY CONSIDERED THE FAILURE OF PROSECUTORS TO ENGAGE IN A MEANINGFUL RACIAL SENSITIVITY TRAINING PROGRAM IN FINDING A VIOLATION OF THE NORTH CAROLINA RACIAL JUSTICE ACT.

The lower court heard expert witness testimony on implicit racial bias, the racial sensitivity training programs that are designed to eliminate that bias from prosecutorial decision making, and the failure of North Carolina prosecutors to participate in such programs. The experiences with training programs of expert witnesses Samuel R. Sommers, an Associate Professor of Psychology, Bryan Stevenson, a Professor of Law and Director of the Equal Justice Initiative in Montgomery, Alabama, and the Honorable Louis A. Trosch, Jr., a North Carolina State District Court Judge, accords with the experience of the military – such programs effectively combat institutional discrimination and individual bias.

All three expert witnesses testified about the "continuing body of evidence" on implicit bias that demonstrates how "race continues to have an effect on the way we make judgments and see each other and think about and interact with each other." Racial Justice Act Hearing, at 728-29; *see also id.* at 864-65, 1016-17. The experts discussed the capacity of racial sensitivity training programs to "mitigate"

the influence of race on decision making. *See id.* at 735, 1037-38. According to all three experts, the so-called "training programs" that North Carolina prosecutors engaged in were unlike the meaningful programs that successfully address implicit bias. The North Carolina programs were "not an effort to . . . educate the professionals who are receiving this training in the science of implicit bias or to render such bias less likely to occur in the actual decisions that are being made." *Id.* at 761-62. Rather, the programs facilitated "resistance" such that "lawyers would get together and actually come up with ways to conceal racial bias by developing reasons [for striking jurors] that were going to be deemed race-neutral." *Id.* at 864-65.

The lower court carefully considered this "unrefuted testimony regarding implicit bias," Apr. 20 Order ¶ 246, and agreed that "race continues to have an impact on our thought processes and decision-making often as an unconscious process." *Id.* ¶ 238. As to the prosecutors office's participation in meaningful training programs, it concluded that "there is no evidence that North Carolina prosecutors have ever engaged in this kind of important training." *Id.* ¶ 227.

The lower court's holding was supported by an immense body of statistical and other evidence that race was a significant factor in decisions to exercise preemptory challenges during jury selection in Mr. Robinsons case. *See generally* Apr. 20 Order. As discussed herein, the court's analysis of racial sensitivity

training programs and its conclusions about the failure of prosecutors to participate in such programs also supported that holding. The statements of Mr. Colyer about training programs are at odds with the extensive evidence presented at Mr. Robinson's hearing, and contrary to the experience of the United States military. Accordingly, the statements of Mr. Colyer discussed herein, unlike those of Mr. Sommers, Mr. Stevenson, and Mr. Trosch, should be rejected by this Court.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the decision of the court below be sustained.

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

/s/ Jeffrey D. Gerrish
Jeffrey D. Gerrish
Skadden Arps Slate Meagher &
Flom LLP
NC State Bar No. 21005
1440 New York Ave. N.W.
Washington, D.C. 20005
202 - 371 - 7381
jeffrey.gerrish@skadden.com

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

/s/ Gregory B. Craig

Gregory B. Craig
Skadden Arps Slate Meagher &
Flom LLP
DC Bar No. 164640
1440 New York Ave. N.W.
Washington, DC 20005
202 - 371 - 7400
greg.craig@skadden.com

/s/ Alex T. Haskell

Alex T. Haskell
Skadden Arps Slate Meagher &
Flom LLP
DC Bar No. 1009739
CA Bar No. 280143
1440 New York Ave. N.W.
Washington, DC 20005
202 - 371 - 7332
alex.haskell@skadden.com

/s/ James P. Cooney III

James P. Cooney III
Womble Carlyle Sandridge & Rice
N.C. State Bar No. 12140
One Wachovia Center
301 South College Street, Suite 3500
Charlotte, North Carolina 28202-6037
704 - 331 - 4960
jcooney@wcsr.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing BRIEF OF *AMICI CURIAE* FORMER SENIOR UNITED STATES MILITARY OFFICIALS by electronically mailing the same in PDF format to counsel of record for Appellant and Appellee, using the following electronic addresses:

William P. Hart, Sr.
Senior Deputy Attorney General
North Carolina Department of Justice
bhart@ncdoj.gov

Danielle Marquis Elder
Special Deputy Attorney General
North Carolina Department of Justice
dmarquis@ncdoj.gov

Jonathan P. Babb
Special Deputy Attorney General
North Carolina Department of Justice
jbabb@ncdoj.gov

Robert T. Thompson
Assistant District Attorney
12th Prosecutorial DA's Office
Robert.T.Thompson@nccourts.org

Malcolm R. Hunter, Jr.
Center for Death Penalty Litigation
tye@cdpl.org

D. Clark Smith
Smith Moore Leatherwood LLP
clark.smith@smithmoorelaw.com

Donald H. Beskind
Professor of the Practice of Law
Duke University School of Law
beskind@law.duke.edu

This the 9th day of August, 2013.

/s/ Jeffrey D. Gerrish
Jeffrey D. Gerrish
Skadden Arps Slate Meagher &
Flom LLP
NC State Bar No. 21005
1440 New York Ave. N.W.
Washington, D.C. 20005
202 - 371 - 7381
jeffrey.gerrish@skadden.com

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

/s/ Gregory B. Craig

Gregory B. Craig
Skadden Arps Slate Meagher &
Flom LLP
DC Bar No. 164640
1440 New York Ave. N.W.
Washington, DC 20005
202 - 371 - 7400
greg.craig@skadden.com

/s/ Alex T. Haskell

Alex T. Haskell
Skadden Arps Slate Meagher &
Flom LLP
DC Bar No. 1009739
CA Bar No. 280143
1440 New York Ave. N.W.
Washington, DC 20005
202 - 371 - 7332
alex.haskell@skadden.com

/s/ James P. Cooney III

James P. Cooney III
Womble Carlyle Sandridge & Rice
N.C. State Bar No. 12140
One Wachovia Center
301 South College Street, Suite 3500
Charlotte, North Carolina 28202-6037
704 - 331 - 4960
jcooney@wcsr.com