

## CONVERSATIONS WITH THE COALITION THAT PASSED THE RACIAL JUSTICE ACT:

### KEN ROSE INTERVIEW\*

SPEAKERS: KEN ROSE\*\* & GENE NICHOL\*\*\*

*Ken Rose was instrumental in drafting and getting the Racial Justice Act passed. He had a long career as an attorney defending death row inmates, and he is regarded as a brilliant man with an outrage towards injustice. Ken Rose has also played a tremendous role in North Carolina's lethal injection litigation, which—combined with the Racial Justice Act—has helped keep executions in North Carolina to a minimum. Ken Rose began his legal career in Mississippi at a point in time when it was known as a “Death Belt” state because of its lack of antideath penalty organizations and full-time capital defense lawyers. Just as he has left a legacy here in North Carolina of being a fearless and relentless advocate, he left Mississippi better than he found it by establishing the Mississippi Capital Defense Resource Center. Today, he continues his good work by focusing on being a present and loving grandfather.*

#### Gene Nichol

I am not unaware that I'm having a conversation with one of the greatest death penalty lawyers in the history of North Carolina. We are happy to be

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\*\* Ken Rose lives with his wife Beth Silberman in Durham, North Carolina. His decade-long defense of Bo Jones, who was convicted of capital murder in 1987 and ultimately exonerated, is the subject of John Temple's book, *The Last Lawyer: The Fight to Save Death Row Inmates*. Following his graduation from Boston University Law School in 1981, Mr. Rose joined Team Defense Project in Atlanta where he represented clients facing capital punishment. In 1984, he moved to Mississippi, where he directed the Mississippi Capital Defense Resource Center, and was one of a handful of lawyers representing death-sentenced inmates in capital post-conviction proceedings. In 1989, Mr. Rose went into private practice in Durham and continued to represent capital defendants. He became Executive Director of Center for Death Penalty Litigation (“CDPL”) in 1996 and served in that position for ten years, and for another ten years he served as a senior staff attorney. In 2014, he represented Henry McCollum in his successful effort, led by the North Carolina Innocence Inquiry Commission, to demonstrate his innocence after over thirty years on death row. He is a proud part-time caregiver for his grandson, Shiloh Rose, and volunteers as a facilitator for Restorative Justice Durham, and as a member of the Coalition for Alternatives to the Death Penalty.

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doing this work about the Racial Justice Act,<sup>1</sup> a remarkably ambitious and singular statute. We want to concentrate, as I told you, on the movement to get the statute enacted.

There are a thousand things you could talk about with regard to the Racial Justice Act. You could talk about its repeal. You could talk about the *Ramseur*<sup>2</sup> case—the Supreme Court [of North Carolina] case, and retroactivity. I’ve read some of the trial court cases that were decided, which are remarkable. There’s the *Bacote* case that is coming up.<sup>3</sup> So, there are a lot of different things that it would make sense to talk about, but what we thought was perhaps the best help that these conversations could be is at the front end of how this surprising statute got passed—what the story of it is. Part of that is because people are getting older, and so that story needs to be preserved.

I did some work earlier this year on the history of the 1964 Civil Rights Act<sup>4</sup> because of the anniversary that was coming up for that statute. And I was thinking about [the 1964 Civil Rights Act and the Racial Justice Act as] connected—the remarkable ambition of both [and] the fact that folks could come together and believe that we could actually change the civil rights and fairness landscape in a large and potent way in the United States. [This is] something that I think we almost never think of [as possible] now—we certainly don’t think of Congress or legislatures as coming together in a big way anymore. To me, these are two kinds of singular statutes. They had surprising coalitions and levels of support, so it’s interesting to think about as an effort in lawmaking which is ambitious and inspiring. I think that makes it an interesting project.

Ken, the first several questions I want to ask have to do with sort of moving back in time before the bill was introduced, or as it was introduced, [and] certainly before it was enacted. I want to ask you about your own personal position concerning the creation of the Racial Justice Act before it was underway. I want to ask also about the coalition that came together or was organized to push the Racial Justice Act and get it through the General Assembly. We have heard from a lot of different folks that you played a strong

1. North Carolina Racial Justice Act, ch. 464, 2009 N.C. Sess. Laws 1213 (codified at N.C. GEN. STAT. §§ 15A-2010 to -2012), *repealed by* Act of June 13, 2013, ch. 154, sec. 5.(a), §§ 15A-2010 to -2012, 2013 N.C. Sess. Laws 368, 372.

2. *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020).

3. *Closing Arguments in Hasson Bacote’s North Carolina Racial Justice Act Hearing Conclude; Results Could Impact More than 100 People on State’s Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/closing-arguments-in-hasson-bacotes-north-carolina-racial-justice-act-hearing-conclude-results-could-impact-more-than-100-people-on-states-death-row> [https://perma.cc/BB5B-LZTS] (last updated Sept. 25, 2024); Lola Oliverio, *Hasson Bacote’s Challenge of Death Sentence by Majority-White Jury Could Set Precedent*, DAILY TAR HEEL, <https://www.dailytarheel.com/article/2024/09/city-hasson-bacote-death-sentence-challenge> [https://perma.cc/M7JL-KFKM] (last updated Sept. 8, 2024, 9:26 PM).

4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h).

role in that. Though, knowing you, you'll probably deny that. Later, I think my goal would be to turn to the specifics of how the statute operates and why those choices were made. But first, I want to go back to before all that was settled on [and focus on] how the movement was put together and why.

If you would [like], talk about your work, which, of course, for many years was as director at the Center for Death Penalty Litigation [(“CDPL”)].<sup>5</sup> I read a little bit about the Henry McCollum case,<sup>6</sup> which I know had some impact on your view on these fronts. I think, too, if I'm remembering correctly, that you were no longer the director of the CDPL when this [case] came up because you had decided you wanted to get away from the administrative titles and do the direct, hands-on death penalty work.

So, broadly speaking, I was hoping you would start with your work through the CDPL and how that came to have an impact on your belief in the need for the Racial Justice Act.

### Ken Rose

I started [practicing law] in 1981, when I graduated law school. I went to an organization called Team Defense Project,<sup>7</sup> [which] was led by a guy named

5. The CDPL is “a non-profit law firm that represents people on North Carolina’s death row and serves as a clearinghouse for accurate and timely information about the North Carolina death penalty.” *About, CTR. FOR DEATH PENALTY LITIG.*, <https://www.cdpl.org/about/> [<https://perma.cc/E6VS-J4KF>].

6. Henry McCollum and his brother, Leon Brown, were exonerated based on DNA evidence in 2014, regaining their freedom after being sentenced to death for the rape and murder of Sabrina Buie in Robeson County in 1984. *State v. McCollum*, No. 83 CRS 15506-07, 2014 WL 4345428, at \*1–2 (N.C. Super. Ct. Sept. 2, 2014); Kenneth Rose, *McCollum Is Free, but Anger Grips His NC Lawyer*, NEWS & OBSERVER, <https://www.newsobserver.com/opinion/op-ed/article10051685.html> [<https://perma.cc/GRV8-A5MW> (staff-uploaded, dark archive)] (last updated Sept. 6, 2014, 5:00 PM) (“I am angry that we live in a world where two disabled teenagers can have their lives stolen from them, where cops can lie and intimidate with impunity, where innocent people can be condemned to die and where injustice is so difficult to bring to light. As I lie awake at night, mulling over the maddening details of this case, I wonder: How many more Henry McCollums are still imprisoned, waiting for help that will never come?”). In 2021, “[a]n eight-person jury awarded McCollum and Brown \$31 million each in compensatory damages—\$1 million for every year they spent in prison after they were wrongfully convicted, twice, of the 1983 rape and murder of an 11-year-old girl in Red Springs.” Andrew Carter, *Jury Awards Wrongfully Convicted NC Brothers \$75 Million in Federal Civil Rights Case*, NEWS & OBSERVER, <https://www.newsobserver.com/news/local/crime/article251411148.html> [<https://perma.cc/296W-NMF6> (staff-uploaded, dark archive)] (last updated May 15, 2021, 5:48 PM).

7. Team Defense Project was a “group of lawyers and social scientists” who, sponsored by the Southern Poverty Law Center, used “relatively new trial techniques in an effort to avoid executions, even in supposedly hopeless cases.” ASSOCIATED PRESS, *‘Team Defense’ Uses New Methods to Avoid Death Penalty for Clients*, N.Y. TIMES (Dec. 5, 1976), <https://www.nytimes.com/1976/12/05/archives/team-defense-uses-new-methods-to-avoid-death-penalty-for-clients.html> [<https://perma.cc/29SJ-YYNE> (staff-uploaded, dark archive)]. The group was formed in Atlanta, Georgia, “shortly after . . . the United States Supreme Court ruled that death penalty laws in Georgia, Florida, and Texas were constitutional.” *Id.*; *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

Millard Farmer.<sup>8</sup> He had a pivotal role [when it came to race in the criminal justice system, and specifically in the capital justice system]. He was an advisor on the Joan Little case,<sup>9</sup> [which was a case in the] mid-70s, [involving] a young [Black] woman who was raped in jail and defended herself and killed the white deputy with the pickaxe that he had brought into the jail cell to presumably force her to have sex with him. That's how Millard Farmer started out working on death penalty cases, and it was [specifically] in the context of a racial justice case.

At that time, Team Defense [Project] was under the auspices of the Southern Poverty Law Center,<sup>10</sup> and I say that because that kind of focus was how I started out. I spent three years at Team Defense Project, and our primary focus was racial justice within the capital punishment system and trying to represent people with a team that brought a lot of resources to the cases. Millard [Farmer] was really good at it, as were the other attorneys on staff at Team Defense [Project]. We were based in Atlanta. I didn't do much trial work. I was doing mostly post-conviction cases. In my first three years after law school, I

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8. Millard Farmer, described as Coweta County's "most famous attorney," "began his career representing bootleggers" in Georgia where he saw how easily the juror selection process could be used to "reflect the racial bias of a community." *Millard Farmer Dies at 85*, NEWNAN TIMES-HERALD (Mar. 25, 2020), [https://www.times-herald.com/news/local/millard-farmer-dies-at-85/article\\_e7cdd593-08de-55a8-b58d-e8f5a554efe8.html](https://www.times-herald.com/news/local/millard-farmer-dies-at-85/article_e7cdd593-08de-55a8-b58d-e8f5a554efe8.html) [<https://perma.cc/2B96-AU6D>]. He founded the Team Defense Project in 1976 alongside psychologist Courtney Mulin, garnering recognition almost immediately for being the lead defense attorney for the "Dawson Five, five young African American men from Dawson, Georgia, who were arrested for the death of a man who was murdered during the robbery of a convenience store." *Id.* For a collection of Millard Farmers' personal papers "document[ing] his lengthy career as an anti-death penalty attorney," see *Millard Farmer Papers*, GA. ST. UNIV. LIBR., <https://archivesspace.library.gsu.edu/repositories/2/resources/92> [<https://perma.cc/U3QC-86BT>].

9. Joan Little "was charged with first degree murder," which carried the possibility of a death sentence, "after she stabbed a prison guard who sexually assaulted her at Beaufort County jail" in Washington, North Carolina. *Joan Little: Survived and Punished*, BARNARD CTR. FOR RSCH. ON WOMEN, <https://bcw.barnard.edu/videos/joan-little-survived-and-punished/> [<https://perma.cc/R2PT-UFER>]. She was acquitted after a five-week trial amidst widespread protests organized by "prisoners' rights advocates, feminists, people advocating against the death penalty and for racial justice." *Id.* For a collection of materials from Joan Little's trial, see James Reston, Jr., *Collection of Joan Little Trial Materials, 1975-1976*, UNIV. N.C., <https://finding-aids.lib.unc.edu/04006/> [<https://perma.cc/SR8J-JJAX>]. See generally DANIELLE L. MCGUIRE, AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER 202–28 (2010) (tracing the importance of the issue of sexual violence to the civil rights movement and to the white supremacist resistance, including a discussion of Joan Little's case).

10. The Southern Poverty Law Center is "a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people." *About Us*, S. POVERTY L. CTR., <https://www.splcenter.org/about> [<https://perma.cc/96EU-TA55>].

argued a case in the [Eleventh] Circuit and won it in the panel<sup>11</sup> [but] lost it en banc,<sup>12</sup> and [Richard Tucker] was executed.<sup>13</sup>

I then went to Mississippi for five years, and I continued to have a focus of racial justice in my work, but it was primarily just trying to triage death penalty cases in Mississippi. There was no death penalty bar, no capital punishment bar, and the pay was \$1,000 per case max while I was there. So, in one sense, I was three years out of law school, [and] I was able to take as many cases of people on death row as I wanted, and they got the representation that I could provide. But it was lonely, and it was not really a team effort as we had envisioned at Team Defense Project.

There was one case that I wanted to mention because it had a huge effect on me and on how I viewed what was possible and what was so very difficult [about raising] the issue of race discrimination in capital cases. And that was the case of Leo Edwards.<sup>14</sup> I started representing him around 1987 while he was in federal court. He had a claim of racial discrimination that had been filed.

#### Gene Nichol

But you had him on habeas, Ken?

#### Ken Rose

I had him on habeas. I did not have him in state post-conviction or direct appeal, although I represented several people on direct appeal in Mississippi.

11. See *Tucker v. Francis*, 723 F.2d 1504, 1518 (11th Cir. 1984), *aff'd in part sub nom.*, *Tucker v. Kemp*, 762 F.2d 1496 (11th Cir. 1985) (vacating Tucker's two death sentences and remanding his case for a new sentencing trial "[b]ecause the prosecutor's argument during closing argument in the sentencing phase of appellant's trial was improper and prejudicial").

12. *Kemp*, 762 F.2d at 1509–10 (affirming the district court's judgment "denying habeas corpus relief" and remanding "Tucker's claims concerning his rights to an evidentiary hearing in the district court and to effective assistance of counsel at the sentencing phase").

13. *Tucker v. Kemp*, 776 F.2d 1487, 1492 (11th Cir. 1985) (affirming the district court's judgment "denying Tucker an evidentiary hearing and denying the writ of habeas corpus on the ineffective assistance of counsel at sentencing issue"). Richard Tucker was executed via electrocution in Georgia at 7:23 PM on May 23, 1987, only "hours after the United States Supreme Court and the State Board of Pardons and Paroles refused to issue a stay of execution." *Georgia Execution Is Second in Week*, N.Y. TIMES (May 23, 1987), <https://www.nytimes.com/1987/05/23/us/georgia-execution-is-second-in-week.html> [https://perma.cc/DTG5-T39H (staff-uploaded, dark archive)].

14. *Edwards v. Scroggy*, 849 F.2d 204 (5th Cir. 1988); see also *Man Who Called His Trial Unjust Is Executed for Mississippi Killing*, N.Y. TIMES (June 22, 1989), <https://www.nytimes.com/1989/06/22/us/man-who-called-his-trial-unjust-is-executed-for-mississippi-killing.html> [https://perma.cc/CF8K-CWZP (staff-uploaded, dark archive)] [hereinafter *Unjust Trial*].

The prosecutor [for the Leo Edwards case] was the [District Attorney] in Hinds County, which is Jackson, Mississippi. And his name is Ed Peters.<sup>15</sup> Mr. Peters was pretty forthcoming and open, including in the press,<sup>16</sup> about how he tried to strike African American jurors. [He said] that they weren't respected in society, and therefore, they didn't have a stake in society [and had no reason to be on a jury]. He was open and honest, and in Jackson, Mississippi, [he] had no fear of any complications or repercussions of saying that.

So, [my law partner, Dennis Sweet,<sup>17</sup> and I] took a claim that had been raised under *Swain*.<sup>18</sup> We, at that point, knew *Batson*<sup>19</sup> was not going to be applied retroactively to cases in post-conviction proceedings.<sup>20</sup> We asked [Judge William Henry Barbour, Jr.]<sup>21</sup> for depositions. This [was] Judge Barbour, a federal district court judge in Jackson, [Mississippi], [who] granted us the depositions, and so my law partner and I deposed Mr. Peters.

In that deposition, Mr. Peters repeated what he had said in the newspapers, but he went a step further. He said [that he had] a practice of [striking Black jurors], [a] philosophy of [striking Black jurors], and [that he] implemented that philosophy in [his] criminal cases. And then he said [that he had] implemented that philosophy in Mr. Edwards's case, and Mr. Edwards had an all-white jury. So, [Mr. Peters had] admitted intentional discrimination.

When we did that deposition, I thought we should win even under *Swain*, [and] understand [that] no one wins under *Swain*, or very few people have won

15. Ed Peters is a former Hinds County District Attorney who retired in 2001 after serving in that role for thirty years. *Former Miss. DA Disbarred*, NATCHEZ DEMOCRAT (June 12, 2009, 12:00 AM), <https://www.natchezdemocrat.com/2009/06/12/former-miss-da-disbarred/> [<https://perma.cc/V9D5-3XQS>]. He was disbarred in 2009 after being “linked to a high-profile judicial bribery investigation.” *Id.*

16. See, e.g., Douglas Demmons, *Most Death Sentences Dealt by Urban Juries*, CLARION-LEDGER, July 5, 1983, at 12A (“For [Ed] Peters, the ideal juror is ‘a 45-year-old white male with a crewcut and white socks who welds for a living.’ When blacks appear on jury panels in death penalty cases, Peters said, his philosophy is to ‘get rid of as many as you can.’”); cf. *Edwards v. Thigpen*, 682 F. Supp. 1374, 1376 (S.D. Miss. 1987), *aff’d sub nom.*, *Scroggy*, 849 F.2d at 207 (noting that “this Court recognized [Ed] Peters’ had a philosophy of desiring to strike Blacks” during jury selection).

17. Dennis C. Sweet, III founded his own law firm, Sweet & Associates, in Mississippi over forty years ago. *A Reputation for Excellence: 40 Years of Civil and Criminal Justice*, SWEET & ASSOCS., <https://sweetandassociates.net/about/> [<https://perma.cc/4239-K93V>]. He and his firm “have successfully represented clients in criminal and civil matters across the nation” including defendants “accused of murder; black farmers accused of defrauding USDA; elected officials accused of voter fraud; those accused of healthcare fraud, bank fraud and other crimes.” *Id.*

18. *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by* *Batson v. Kentucky*, 476 U.S. 79 (1986).

19. *Batson*, 476 U.S. at 79.

20. *Id.* at 111, 132–33.

21. William Henry Barbour, Jr. “was a federal judge with the United States District Court for the Southern District of Mississippi.” *William Barbour*, BALLOTPEDIA, [https://ballotpedia.org/William\\_Barbour](https://ballotpedia.org/William_Barbour) [<https://perma.cc/B2G2-QHAP>]. He was nominated for this position in 1983 by President Ronald Reagan and he served on the court until 2021, when he died. *Id.*

under *Swain*.<sup>22</sup> But when a prosecutor says [that they] struck every [juror] in [a] case because they were Black, you would think [that] would satisfy the Equal Protection Clause. But it did not.<sup>23</sup>

Judge Barbour gave us more discovery, and we were aware at that point that the prosecutors had notes in their files on jury selection sheets, and they would put “W” for white jurors and “B” for Black jurors, and probably there were a few other persons and other races, but what I recall clearly was “W” and “B,” and they did it for hundreds of cases. We were able to go through hundreds of cases and calculate white-Black strikes for all the prosecutors and for Mr. Peters.<sup>24</sup> I think it ended up being half of the total of criminal cases that went to trial in the county. The strikes were astounding.

So, we had all that evidence, and Judge Barbour ruled against us.<sup>25</sup> It went to the circuit [court].<sup>26</sup> The chief judge was Judge [Charles] Clark,<sup>27</sup> and Judge Clark had defended the state of Mississippi in the integration case of the University of Mississippi.<sup>28</sup> We lost in the Fifth Circuit, and cert was denied, and Mr. Edwards was executed,<sup>29</sup> and that just had a profound influence on

22. Ruth E. Friedman, *Statistics and Death: The Conspicuous Role of Race Bias in the Administration of the Death Penalty*, 11 LA RAZA L.J. 75, 86 n.72 (1999).

23. *Edwards v. Thigpen*, 682 F. Supp. 1374, 1376 (S.D. Miss. 1987), *aff'd sub nom.*, *Edwards v. Scroggy*, 849 F.2d 204 (5th Cir. 1988) (“[I]t is the *practice* of systematic exclusion rather than thought processes which establish a *Swain* claim.” (citing *United States v. Pearson*, 448 F.2d 1207, 1216 (5th Cir. 1971))).

24. *Scroggy*, 849 F.2d at 207–08, 207 n.1 (reporting results of the calculations that the petitioner used to demonstrate prosecutors’ tendency to peremptorily strike Black jurors disproportionately compared to white jurors).

25. *Thigpen*, 682 F. Supp. at 1374.

26. *Scroggy*, 849 F.2d at 204.

27. Charles Clark was a judge on the United States Court of Appeals for the Fifth Circuit from 1969 until 1992, and during his last eleven years, he also served as the chief judge. *Namesake*, MISS. COLL. SCH. L., <https://law.mc.edu/alumni/charlesclarkaic/about-american-inns-court/namesake> [<https://perma.cc/3MH6-YMJL>]. Prior to this, Charles Clark was a Mississippi Special Assistant Attorney General, and his “first case was to defend the state college board in the legal conflict on admitting James Meredith as the first African-American at Ole Miss.” *Id.*

28. *Meredith v. Fair*, 202 F. Supp. 224, 225 (S.D. Miss. 1962), *rev’d*, 305 F.2d 343 (5th Cir. 1962).

29. *General Public: Death Penalty in Mississippi*, MISS. DEP’T CORR., <https://www.mdoc.ms.gov/general-public/death-row/death-penalty-mississippi> [<https://perma.cc/UCQ4-U5X3>] (“Leo Edwards became the last person to be executed in the gas chamber at the Mississippi State Penitentiary on June 21, 1989.”); *Killer Executed in Mississippi*, N.Y. TIMES (June 21, 1989), <https://www.nytimes.com/1989/06/21/us/killer-executed-in-mississippi.html> [<https://perma.cc/646G-7RJR> (staff-uploaded, dark archive)].

me.<sup>30</sup> To give you a sense of how frustrating it was: We appealed to Governor [Ray] Mabus, and he denied commutation.<sup>31</sup>

Just to put it in a nutshell—I couldn’t understand how, regardless of the statistics, if you had an admission of intentional discrimination—how do you lose that? How do they not find intentional discrimination? And it’s because, under *Swain*, they could just ignore the fact that there was [an] admission—in their minds. And, of course, that was our cert petition question: When you have an admission of intentional discrimination, do you even have to go to statistics? And apparently you did. But the U.S. Supreme Court was not that concerned, I think, with cases under *Swain*.

### Gene Nichol

It’s remarkable that if you have an admission, you would ever go to statistics—you can’t fit those two things together. So, you had this powerful draw to these questions of racial exclusion in the process from early on?

### Ken Rose

I saw it as a fundamental part of why I was doing the work. I saw it as a critical thing, not just for capital cases.

And Joan Little along those lines, same thing—I saw that work, and I was not participating in that case, but that work was so important, not just because it was establishing criminal law doctrine; it was establishing equality under the eyes of the law, and I think it did do that to a little extent. It made progress, and that’s what we have to do in this work.

I moved to North Carolina in [19]89, and a few years before I became director of CDPL, I was doing mostly private practice.

### Gene Nichol

Still doing criminal cases, though?

30. For further reflections by Ken Rose on his work on Leo Edwards’ case, see Ken Rose, *Three Decades of Battling Injustice*, NC NEWSLINE (Mar. 24, 2014, 12:45 PM), <https://ncnewslines.com/2014/03/24/three-decades-of-battling-injustice/> [<https://perma.cc/D9U8-UEEY>].

31. Ray Mabus was the sixtieth governor of Mississippi from 1988 to 1992. David Sansing, *Ray Mabus: Sixtieth Governor of Mississippi: 1988–1992*, MISS. HIST. NOW (Aug. 2009), <https://www.mshistorynow.mdah.ms.gov/issue/ray-mabus-sixtieth-governor-of-mississippi-1988-1992> [<https://perma.cc/C49S-CE33>]. In rejecting Leo Edwards’ plea for clemency, Governor Mabus was quoted as saying, “I will not stand in the way of the courts’ justice,” and “Leo Edwards is a mass murderer who killed in cold blood. He tried and failed to get relief in 16 appeals to the courts, and discrimination had no bearing in his case.” *Unjust Trial*, *supra* note 14.



**Ken Rose**

Yeah, I was really just doing capital cases, and I did some Mississippi cases, and I had the luck of having one go to the U.S. Supreme Court. That was *Stringer v. Black*.<sup>32</sup> And I say luck because it was, but the interesting thing about those cases at that time was the U.S. Supreme Court was taking almost one a year from Mississippi for about a period of five to seven years. It was just interesting that [they took] one capital case a year from Mississippi, and, in my view, it was because Mississippi was lawless; there was so much that the courts were doing to ignore the law.

So anyway, we get to North Carolina. When I came [to North Carolina] in [19]89, I took the bar [exam] and became a member of the North Carolina Bar, but I was still practicing with Mississippi cases because I had some death penalty cases, [and] I continued to represent people. Before I left Mississippi, I was the founding director of the Mississippi Capital Defense Resource Center.<sup>33</sup> I was in that position from [19]88 to [19]89. I became director in 1996 of the CDPL [in North Carolina].

**Gene Nichol**

You came in as director, or had you been on the staff first?

**Ken Rose**

I had not been on the staff, but I had taken cases, and I knew everyone, and I worked as co-counsel.

**Gene Nichol**

So, you've been in North Carolina doing serious death penalty work for fourteen years or so?

**Ken Rose**

For seven years by that time. So, from 1989 to 1996. For six months, I worked in the [North Carolina] Resource Center as a staff attorney. I had small children, and decided I didn't want to commute to Raleigh daily, so I decided

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32. 503 U.S. 222 (1992), *abrogated by* *Brown v. Sanders*, 546 U.S. 212 (2006).

33. See JOHN TEMPLE, *LAST LAWYER: THE FIGHT TO SAVE DEATH ROW INMATES* 78–79 (2009) (discussing how Ken Rose moved to Mississippi in 1984 because it was a “Death Belt” state that had no anti-death penalty organizations or lawyers engaging in capital defense full-time, but “[b]y 1989, Ken [Rose] had helped create a small organization of full-time capital defense lawyers in Jackson”).

to keep doing private work. But then, in 1996, I agreed to work as a part-time director at CDPL.

Part of my disease, I guess, is [that] I bring work home—I bring work everywhere. You must know what that’s like. I would do that, and it would cause some stress because I’m trying to raise my kids. My wife, Beth Silberman, is a great physical therapist, and she was [the director] of [the inpatient rehabilitation unit] at Duke Hospital for a while. Between her and I, we were juggling professions that we both believed in and were committed to and trying to share the load. And I think she ended up with a lot more than I did, unfortunately, but I’m trying to make up for it now because I’m trying to be a grandparent.

I want to talk about the coalitions a little bit before the coalition around the Racial Justice Act. We were part of the North Carolina Coalition Against the Death Penalty, [which was later renamed the North Carolina Coalition for Alternatives to the Death Penalty,] going back to at least Paul Green<sup>34</sup> in the sixties, maybe in the fifties, and major efforts in this state to abolish the death penalty, and with some considerable support. North Carolina had the good fortune to have really good social scientists earlier on in the forties, and they had looked at race and the death penalty—[Harold] Garfinkel<sup>35</sup> and [Guy] Johnson<sup>36</sup>—and they came out with these pretty sophisticated statistical reports.<sup>37</sup> So, some of the people involved in the Racial Justice Act had been involved in the coalition work for a while.

34. Paul Green was a “dramatist, author, and teacher,” for whom “[c]ivil rights, poverty, and political oppression were all causes of concern.” William S. Powell, *Green, Paul Eliot*, in 2 *DICTIONARY OF NORTH CAROLINA BIOGRAPHY* 358, 358–59 (William S. Powell ed., 1986). “He spoke out against and wrote plays dealing with war, lynching, chain gangs, prejudice, and superstition.” *Id.* at 359. For a collection of Paul Green’s personal papers documenting his career, see *Paul Green Papers, 1880–2009*, UNIV. N.C., <https://finding-aids.lib.unc.edu/03693/> [<https://perma.cc/R2PY-YLYJ>].

35. Harold Garfinkel was a renowned sociologist who “coined the term ‘ethnomethodology’” and is most known for his work challenging the notion that society is “structured around relatively limited sets of rules and overarching values.” Michael Lynch, *Harold Garfinkel Obituary*, *GUARDIAN* (July 13, 2011), <https://www.theguardian.com/education/2011/jul/13/harold-garfinkel-obituary> [<https://perma.cc/8U9Y-JNTL>].

36. Guy Benton Johnson was a sociologist, anthropologist, “scholar of black culture, and longtime advocate of improved race relations.” *Guy B. Johnson, 90, Longtime Advocate of Interracial Amity*, *N.Y. TIMES*, May 25, 1991, at L29. He was a professor and member of the faculty of the University of North Carolina for forty-five years. *Id.*

37. See generally Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 *SOC. FORCES* 369 (1949) (studying patterns of racial discrimination that emerge when looking at the treatment of offenders involved in inter- and intra-racial homicides in North Carolina); Guy B. Johnson, *The Negro and Crime*, 217 *ANNALS AM. ACAD. POL. & SOC. SCI.* 93 (1941) (examining the differences in treatment that arise between white and Black people when looking at offender-victim categories).

Gene Nichol

Who were the principal players in the coalition when you came?

Ken Rose

Deborah Ross<sup>38</sup> was one of them.

Gene Nichol

What was Deborah [Ross] doing then?

Ken Rose

She was the director of [the North Carolina] American Civil Liberties Union [“ACLU”].<sup>39</sup> She did a considerable amount of lobbying in that position.

I always considered her really good. In fact, she was excellent at her job. She worked on one specific piece of legislation, and that was the bill to exempt persons with, at that time, we called it mental retardation, from the death penalty. Now it’s intellectual disability. That eventually passed in 2001,<sup>40</sup> and that was a kind of first foray into working on coalitions and having attorneys from [CDPL] or other attorneys that were not associated with [CDPL] that worked as a part of that coalition.

38. Deborah Ross is an attorney living in Raleigh, North Carolina, whose career in public service began “when she ran for and won a seat in the N.C. House of Representatives” in 2002 and was re-elected to hold office through 2012. *Meet Deborah Ross*, DEBORAH ROSS, <https://deborahross.com/meet-deborah-ross/> [<https://perma.cc/D34F-35W4>]. In 2020, she was “elected to represent North Carolina’s 2nd Congressional district,” winning re-election in 2022 and 2024. *Id.*; *Deborah Ross*, BALLOTPEdia, [https://ballotpedia.org/Deborah\\_Ross](https://ballotpedia.org/Deborah_Ross) [<https://perma.cc/6EYT-8LXL>]. Prior to running for office, she served as the state director of the American Civil Liberties Union of North Carolina for eight years. *See* Colin Campbell, *Deborah Ross’ ACLU Leadership Looms Large in US Senate Race*, CHARLOTTE OBSERVER, <https://www.charlotteobserver.com/news/politics-government/election/article105164571.html> [<https://perma.cc/QV9S-94VU> (staff-uploaded, dark archive)] (last updated Oct. 1, 2016, 1:51 PM).

39. The ACLU is “the nation’s premier defender of the rights enshrined in the U.S. Constitution” and is known for challenging “government abuse . . . even when the cause is unpopular, and sometimes when nobody else will.” *ACLU History*, ACLU, <https://www.aclu.org/about/aclu-history> [<https://perma.cc/5NQZ-YJP3>].

40. An Act to Provide that a Mentally Retarded Person Convicted of First Degree Murder Shall Not Be Sentenced to Death, ch. 346, 2001 N.C. Sess. Laws 1038 (codified as amended at N.C. GEN. STAT. §§ 15A-2005, -2000(b), -2006).

## Gene Nichol

But not the [North Carolina chapter of the National Association for the Advancement of Colored People] (“NAACP”)<sup>41</sup> at this time?

## Ken Rose

They weren’t a big player at that time, but they certainly were at the Racial Justice Act.

The coalitions were, to some extent but not completely, ad hoc for the issues that we were working on. So, if we were working on intellectual disability, we had [the Arc of North Carolina],<sup>42</sup> we had the [North Carolina] Psychological Association,<sup>43</sup> we had the [North Carolina] Psychiatric Association,<sup>44</sup> we had the [North Carolina] Association of Social Workers,<sup>45</sup>

41. The North Carolina State Conference of the North Carolina chapter of the National Association for the Advancement of Colored People’s (“NAACP”) work “is rooted in racial equity, civic engagement, and supportive policies and institutions for all marginalized people.” *About, NAACP*, <https://ncnaacp.org/mission-vision/> [<https://perma.cc/4TRY-GJA2>]. The organization is “committed to a world without racism where Black people enjoy equitable opportunities in thriving communities.” *Id.*

42. The Arc of North Carolina is a nonprofit organization that has provided “advocacy and services to people with intellectual and developmental disabilities since 1953.” *History, ARC N.C.*, <https://www.arcnc.org/about-us/our-history> [<https://perma.cc/79R2-FWWM>]. The Arc of North Carolina focuses on issues “such as healthcare, education, housing, employment, accessibility, and community inclusion.” *Advocacy at The Arc of North Carolina, ARC N.C.*, <https://www.arcnc.org/advocacy> [<https://perma.cc/Q6P6-LZ3C>].

43. The North Carolina Psychological Association (“NCPA”) “advocates for psychology as a science, a profession, and a means of promoting human welfare” and “provides an organized voice for psychology.” *Mission, Vision, Guiding & Operating Principles, Strategic Goals & Objectives*, N.C. PSYCH. ASS’N, <https://www.ncpsychology.org/mission-vision-guiding-operating-principles-strategic-goals-objectives> [<https://perma.cc/A55M-Z6YV>]. One of NCPA’s goals is to “[u]tilize psychology to make a positive impact on critical societal issues,” which includes expanding “the influence of psychology on policy decisions at the state and local levels.” *Id.*

44. The North Carolina Psychiatric Association is a professional medical organization whose mission, in part, is to “[a]dvance and represent the profession of psychiatry and medicine in North Carolina.” *North Carolina Psychiatric Association, N.C. PSYCHIATRIC ASS’N*, <https://www.ncpsychiatry.org/mission-strategic-plan> [<https://perma.cc/A55M-Z6YV>]. To achieve this mission, the North Carolina Psychiatric Association engages in advocacy efforts through lobbyists and coalitions. *NCPA’s Advocacy Efforts, N.C. PSYCHIATRIC ASS’N*, <https://www.ncpsychiatry.org/advocacy-> [<https://perma.cc/LKH8-GJL3>].

45. The National Association of Social Workers has a North Carolina chapter that acts as an administrative unit of the national association. *About NASW-NC, NASW-NC SOC. WORK BLOG*, <https://ncsocialwork.org/about/> [<https://perma.cc/9X87-DVHW>]. The North Carolina Chapter is “involved in professional advocacy through lobbying efforts in the NC General Assembly and representation on numerous statewide coalitions, committees and task forces, as well as numerous departments with North Carolina State government.” *Id.*

[and Disability Rights North Carolina]<sup>46</sup> all involved in coalition. And I loved it. I love the ability to work cross interests on specific things.

The North Carolina Council of Churches<sup>47</sup> [had] been a big part of it all along, and it morphed into People of Faith Against the Death Penalty.<sup>48</sup>

### Gene Nichol

[Was] Steve Dear<sup>49</sup> part of the earlier coalition, or only the Racial Justice Act coalition?

### Ken Rose

He was part of the moratorium coalition. You may recall this: We—“we” meaning the State—had a legislative proposal to enact a moratorium [on the death penalty] for two years, and the Senate passed it.<sup>50</sup> The House, we were told, had the votes, but they couldn’t get the leadership to move on it. That was a major, major effort.

### Gene Nichol

I didn’t realize that the People of Faith [Against the Death Penalty] was out of the Council of Churches.

46. Disability Rights North Carolina is a “legal advocacy agency that fights for the rights of people with disabilities in North Carolina,” handling cases involving “discrimination, abuse and other rights violations.” *About Us*, DISABILITY RTS. N.C., <https://disabilityrightsncc.org/about/about-us/> [https://perma.cc/3HA8-HUR4].

47. The North Carolina Council of Churches “educates, inspires, and mobilizes faith communities to advocate for justice” by working to “enable denominations, congregations, and people of faith to impact our state on issues such as economic justice and development, human well-being, equality, and compassion and peace.” *About*, N.C. COUNCIL CHURCHES, <https://ncchurches.org/about-the-council/> [https://perma.cc/5VSR-M44D].

48. People of Faith Against the Death Penalty (“PFADP”) was “[f]ounded in North Carolina in 1994” with a mission “to educate and mobilise faith communities to act to abolish the death penalty in the United States,” particularly in the South. *People of Faith Against the Death Penalty*, WORLD COAL. AGAINST DEATH PENALTY, <https://worldcoalition.org/membre/people-of-faith-against-the-death-penalty/> [https://perma.cc/8M65-K4YM].

49. Steve Dear was a “fixture in the restless circle of social justice work in the Triangle” joining the PFADP in 1997 and stepping down as the executive director in 2015. Bob Geary, *Bidding Adieu to Anti-Death Penalty Activist Steve Dear*, INDY WK. (July 29, 2015), <https://indyweek.com/news/bidding-adieu-anti-death-penalty-activist-steve-dear/> [https://perma.cc/9N64-3FW5].

50. S.B. 972, 146th Gen. Assemb., Reg. Sess. (N.C. 2003).

**Ken Rose**

Yeah, that's how it started, and Steve [Dear] broke it off. The significance of that is that it was a substantial, grassroots-focused organization [that] could call on people from all over the state who were concerned about the issue to petition the government to do things. And they were very good at it. Steve [Dear] really worked hard on focusing on a multiracial push on all of our issues, but certainly on the Racial Justice Act. He was involved in [the Historic Thousands on Jones Street] ("HK on J") work, and death penalty [abolition] was one of the tenets of the HK on J.<sup>51</sup>

I should add [that] another big player was Dick Taylor<sup>52</sup> at the [North Carolina Academy of] Trial Lawyers.<sup>53</sup> They were significant. We had meetings in their offices. Dick [Taylor], in particular, was really committed.

**Gene Nichol**

And here we're talking about [the] Racial Justice Act coalition, right?

**Ken Rose**

No, they were involved a lot earlier, and they were [also] involved in the Coalition for the Racial Justice Act. Let me get to the Coalition for Racial Justice Act now.

51. The Historic Thousands on Jones Street ("HK on J") was a march first called for by the North Carolina State Conference of the NAACP in 2007 "to support [a] 14-point public policy strategy" that included abolishing the death penalty, which the movement characterized as racially biased. HISTORIC K(THOUSANDS) ON JONES STREET, N.C. NAACP 1-2 (2007), <https://ncnewslines.com/wp-content/uploads/2007/01/hkonj-flyer.pdf> [<https://perma.cc/YE74-B5T6>].

52. Dick Taylor served as the long-time Chief Executive Officer of the North Carolina Advocates for Justice, formerly the North Carolina Academy of Trial Lawyers, retiring from the position in 2016. Hilary Burns, *Meet the Charlottean Leading North Carolina Advocates for Justice*, CHARLOTTE BUS. J. (Aug. 9, 2016), <https://www.bizjournals.com/charlotte/news/2016/08/09/meet-the-charlottean-leading-north-carolina.html> [<https://perma.cc/U4W4-5CTT>].

53. The North Carolina Academy of Trial Lawyers, known today as the North Carolina Advocates for Justice, was founded in 1962 by "[a] small group of solo and small-firm trial attorneys—Eugene Phillips, William Thorp, Allen Bailey, Charles Blanchard and James Clontz to name a few—who] shared a passion for representing individuals against the big firms." *History*, N.C. ADVOC. FOR JUST., <https://www.ncaj.com/about/history> [<https://perma.cc/X6FH-KJPR>]. After it "expanded its membership to include criminal defense attorneys" in the 1970s, it went on to support advocacy efforts to outlaw the death penalty for the intellectually disabled and to pass the Racial Justice Act, among others. *Id.*

It was the [North Carolina] Advocates for Justice,<sup>54</sup> and it was the NAACP and the HK on J. Steve Dear was out there. It was Lao Rubert<sup>55</sup> [and Charmaine Fuller Cooper]<sup>56</sup> at the Carolina Justice Policy Center.<sup>57</sup> It was [Bill Rowe<sup>58</sup> at] the North Carolina Justice Center.<sup>59</sup> It was the [ACLU's Capital Punishment Project ("CPP") and the ACLU of NC].<sup>60</sup> [Jeremy Collins<sup>61</sup> directed the

54. The North Carolina Advocates for Justice is "a nonpartisan association of legal professionals dedicated to empowering a strong community of trial lawyers by protecting people, preventing injustice and promoting fairness." *About*, N.C. ADVOCS. FOR JUST., <https://www.ncaj.com/about> [https://perma.cc/K2T5-4F3G].

55. Lao Rubert is a former director of the Carolina Justice Policy Center. See Kate Collins, *The Carolina Justice Policy Center*, DUKE UNIV. LIBRS. BLOG: DEVIL'S TALE (June 9, 2023), <https://blogs.library.duke.edu/rubenstein/2023/06/09/the-carolina-justice-policy-center/> [https://perma.cc/VMH8-ARFN]. She spent her career "raising her voice in support of prison reform, economic justice, gun control and abolition of the death penalty." Lao Rubert, *Fearsome Power*, INDY WK. (Nov. 7, 2001), <https://indyweek.com/news/archives-news/fearsome-power/> [https://perma.cc/XZ3P-MB47].

56. Charmaine Fuller Cooper worked at the Carolina Justice Policy Center as a "pretty tenacious" advocate and lobbyist. Samiha Khanna, *Charmaine Fuller Cooper*, INDY WK. (Jan. 18, 2012), <https://indyweek.com/guides/archives-guides/charmaine-fuller-cooper/> [https://perma.cc/7LTZ-4RBR]. She played an instrumental role in getting the Racial Justice Act to enactment. See *id.*; see also Charmaine Fuller Cooper & Gene Nichol, *Conversations with the Coalition that Passed the Racial Justice Act: Charmaine Fuller Cooper Interview*, 103 N.C. L. REV. F. 272, 272 (2025).

57. The Carolina Justice Policy Center "has been fighting for criminal justice reform in North Carolina since the 1970s," moving "most of [its] activities to the Emancipate NC project" in 2019. CAROLINA JUST. POL'Y CTR., <https://www.cjpcenter.org/> [https://perma.cc/98LP-SRK2]. Emancipate NC works to "subvert structural racism, especially as it relates to the criminal legal system," specifically focusing on ending youth confinement and reliance on incarceration, building authentic community safety, and defending families. *What We Do*, EMANCIPATE NC, <https://emancipatenc.org/what-we-do/> [https://perma.cc/YB7V-W897].

58. Bill Rowe is a former Senior Advisor for the North Carolina Justice Center, and he is also an attorney who has represented low-income clients "on issues related to housing, employment, civil rights, consumer rights, tax fairness, reentry, judicial procedures, access to courts, and environmental justice." *Bill Rowe*, N.C. JUST. CTR., <https://www.ncjustice.org/author/bill-rowe/> [https://perma.cc/3UFG-AQ62].

59. The North Carolina Justice Center is a nonprofit organization whose mission is to "eliminate poverty in North Carolina by ensuring that every household in the state has access to the resources, services, and fair treatment it needs to achieve economic security." *Our Mission*, N.C. JUST. CTR., <https://www.ncjustice.org/about/our-mission/> [https://perma.cc/ARY6-S849].

60. As part of the Capital Punishment Project, the ACLU partners with ACLU affiliates in states that use the death penalty to "promote abolition and systemic reform" through various initiatives, including "Systemic Reform," which is focused, in part, on "enhancing the fairness of capital trials and appeals." *The ACLU's Capital Punishment Project*, ACLU (Apr. 9, 2004), <https://www.aclu.org/documents/aclus-capital-punishment-project> [https://perma.cc/3XAM-KZ7Y]. The ACLU of North Carolina "takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach," including "pushing to eradicate our broken and racially biased criminal legal system." *About Us*, ACLU N.C., <https://www.acluofnorthcarolina.org/en/about/about-us> [https://perma.cc/KG4S-V59L].

61. Jeremy Collins is a North Carolina native who "has led successful, collaborative efforts that include repealing Delaware's death penalty, protecting voting rights across the South, creating opportunities for marginalized communities and passing the North Carolina Racial Justice Act." *About Us*, PROVIDENCE OMNISTRUCTURE, <https://providenceomnistructure.org/about/#team> [https://perma.cc/8VRP-E5BA].

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Coalition and Tarrah Callahan<sup>62</sup> was a staff organizer, who later became director].

Gene Nichol

Was Deborah [Ross] still doing the ACLU then, is that right?

Ken Rose

No, she was not. She was not involved in it then. Sarah Preston<sup>63</sup> [led the effort for the ACLU of NC].

Kris Parks<sup>64</sup> [and] Disability Rights [North Carolina] had been involved in things, both with the intellectual disability bill<sup>65</sup> and the bill to exempt persons with serious mental illness<sup>66</sup> from the death penalty.

Gene Nichol

But also, the Racial Justice Act, or no?

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62. Tarrah Callahan is “the Founder and Executive Director of Conservatives for Criminal Justice Reform and Co-Founder of Conservative for Criminal Justice Initiative.” *Staff*, CONSERVATIVES FOR CRIM. JUST. REFORM, <https://www.ccjrc.org/staff/> [<https://perma.cc/U44B-UAV7>]. In 2020, Governor Cooper appointed Tarrah Callahan to the North Carolina Task Force for Racial Equity in Criminal Justice, which was cochaired by Justice Anita Earls and former Attorney General Josh Stein. Ford Porter, *Governor Cooper Appoints Member to North Carolina Task Force for Racial Equity in Criminal Justice*, N.C. OFF. GOVERNOR JOSH STEIN (July 9, 2020), <https://governor.nc.gov/news/governor-cooper-appoints-members-north-carolina-task-force-racial-equity-criminal-justice> [<https://perma.cc/R9WS-L4VV>].

63. Sarah Preston served as the policy director of the ACLU of North Carolina for a decade, leaving to become the executive director of Lillian’s List of North Carolina in 2016. Mike Meno, *Outgoing Policy Director Sarah Preston Looks Back at 10 Years of Lobbying for Liberty at the ACLU-NC*, ACLU N.C. (Aug. 22, 2016, 12:00AM), <https://www.acluofnorthcarolina.org/en/news/outgoing-policy-director-sarah-preston-looks-back-10-years-lobbying-liberty-aclu-nc> [<https://perma.cc/5GB3-W9XD>].

64. Kris Parks is a “capital post-conviction attorney, lobbyist for Disability Rights North Carolina and a clinical professor at Campbell University School of Law.” Wilson Center for Science and Justice at Duke Law, FACEBOOK (July 22, 2024), <https://www.facebook.com/WilsonCSJ/posts/pfbid0nrqUiQCNSE4qSakcV2rhzW8FxKc1BtgCCuwbk33ghdfhp2okx8yqmVHGDKMA5mXl> [<https://perma.cc/F9YM-7TWB> (staff-uploaded archive)].

65. An Act to Provide that a Mentally Retarded Person Conviction of First Degree Murder Shall Not be Sentenced to Death, ch. 346, 2001 N.C. Sess. Laws 1038 (codified as amended at N.C. GEN. STAT. §§ 15A-2005, -2000(b), -2006).

66. H.B. 659, 150th Gen Assemb., Reg. Sess. (N.C. 2011); *Mental Health Experts Say North Carolina Case Shows Need to Exempt Mentally Ill from Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/mental-health-experts-say-north-carolina-case-shows-need-to-exempt-mentally-ill-from-death-penalty> [<https://perma.cc/BE96-FCRU>] (last updated Sept. 25, 2024).



### Ken Rose

To some extent, yeah. There were some exonerees that joined us at various points, and Darryl Hunt<sup>67</sup> was a big piece. Daryl [Hunt] was actually an employee, at some point of the coalition, and was just a wonderful leader in this. There were three other [exonerees]: Glen Chapman,<sup>68</sup> Levon Jones,<sup>69</sup> and [Jonathan] Hoffman.<sup>70</sup> Darryl [Hunt] was not on death row, but the other three were, and they came and personally lobbied the legislators, and I think had an impact. What we were able to do is draw a connection between innocence and racial justice, and we did it, in part, through these guys.

Basically, what we found out [was that] there was one white person and, at that time, maybe eight or nine people of color [who were innocent]. So, it was pretty striking that so many people of color who were innocent were put on death row, and I think that had a huge impact too. Going into the Racial Justice Act, there had been studies by Jack Boger<sup>71</sup> [and Isaac Unah].<sup>72</sup>

### Gene Nichol

Jack [Boger's study] was for the *McCleskey* case?

67. Darryl Hunt was "arrested, charged, and convicted of a 1984 North Carolina murder he didn't commit. Although DNA results proved his innocence in 1994, it took another 10 years of legal appeals to exonerate him." *Darryl Hunt*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/darryl-hunt/> [https://perma.cc/7YV4-86ZN].

68. Glen Chapman was wrongfully convicted in North Carolina and "spent 15 years on death row from a crime he did not commit due to perjury or false accusation, official misconduct, and inadequate legal defense." *Glen E. Chapman*, WITNESS TO INNOCENCE, <https://www.witnesstoinnocence.org/single-post/glen-edward-chapman> [https://perma.cc/LJG6-ASD4].

69. Levon "Bo" Jones "served 15 years in prison, 13 of those on death row, after being wrongfully convicted of robbery and murder. . . . Despite widespread recognition of Bo's innocence prior to his exoneration, he was not freed until the witness officially recanted her testimony in 2008." *Levon "Bo" Jones*, N.C. COAL. FOR ALTS. TO DEATH PENALTY, <https://nccadp.org/stories/levon-bo-jones/> [https://perma.cc/A4JR-3MWR].

70. Jonathan Hoffman was sentenced to death by an all-white jury "[a]t the urging of a [district attorney] who often wore a noose-shaped lapel pin." *Jonathan Hoffman*, N.C. COAL. FOR ALTS. TO DEATH PENALTY, <https://nccadp.org/stories/jonathan-hoffman/> [https://perma.cc/L2K5-RYSP]. He was granted a new trial in 2004, and all charges were subsequently dropped in 2007, after "[p]rosecutors Ken Honeycutt and Scott Brewer were later criminally and civilly investigated for not revealing the deals promised to the witness—and for removing a reference to the deal from the case notes they handed over to the judge." *Id.*

71. John Charles Boger "joined the UNC Law faculty in 1990 and served for 27 years, until his retirement in 2017 as Wade Edwards Distinguished Professor of Law." *John Charles Boger*, UNC SCH. L., <https://law.unc.edu/people/john-charles-boger/> [https://perma.cc/3372-WMQF]. His areas of expertise included civil rights and discrimination and constitutional law. *Id.*

72. Isaac Unah is a Professor of Political Science at the University of North Carolina at Chapel Hill and the research he published with Jack Boger "was the principal basis of the North Carolina Racial Justice Act." *Isaac Unah*, UNIV. N.C. CHAPEL HILL, <https://politicalscience.unc.edu/staff/isaac-unah/> [https://perma.cc/L7JX-USH7]. He is currently "researching punishment politics, especially the political motivations underlying the use of capital punishment in the United States." *Id.*

### Ken Rose

No, this was separate. [David] Baldus did a study in the *McCleskey* case.<sup>73</sup> But Jack [Boger] did his own study in North Carolina from 1993 to 1997.<sup>74</sup> And that showed pretty profound race-of-victim discrimination in North Carolina during that time across the state.<sup>75</sup> [That] really gave us the confidence that, in terms of statistical work, we were going to have a very powerful case.

Keep in mind, in the 1990s, we were sentencing thirty-five persons to death a year.<sup>76</sup> And the reason we were doing that is because we didn't have [district attorney] ("DA") discretion. They had to seek the death penalty if there was evidence of an aggravating circumstance. [North Carolina was] maybe the second highest per capita sentencing state in the country. I attribute that almost entirely to the lack of choice that DAs had to not seek the death penalty and to consider mitigation—they couldn't.

### Gene Nichol

That was their effort to comply with *Furman*?<sup>77</sup>

### Ken Rose

[Yes, but North Carolina was the only jurisdiction in the country that sought to limit prosecutorial discretion as a way of complying with *Furman*.] That was *State v. Case*<sup>78</sup> in 1991. Several [state] cases [limiting prosecutorial discretion in capital cases] preceded *State v. Case*, but *State v. Case* was the wake-up call for DAs. What it did was it overturned a death sentence case, but [the prosecutor and the defense attorney] had agreed not to submit an aggravating

73. See generally David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (finding that Georgia courts impose death sentences in a presumptively excessive way); see also *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("As a black defendant who killed a white victim, McCleskey claims that the Baldus study demonstrates that he was discriminated against because of his race and because of the race of his victim.").

74. Isaac Unah & Jack Boger, *Race and the Death Penalty in North Carolina*, reprinted in DEATH PENALTY INFO. CTR. (2001), <https://deathpenaltyinfo.org/resources/publications-and-testimony/studies/race-and-the-death-penalty-in-north-carolina> [https://perma.cc/2RSS-BEJD].

75. *Id.* ("The odds of receiving a death sentence rose by 3.5 times or more among those defendants (of whatever race) who murdered white persons.").

76. *Death Sentences Become Rarity in N.C.*, WRAL NEWS (Dec. 29, 2008, 5:30 PM), <https://www.wral.com/story/4212176/> [https://perma.cc/YC3Y-RXM5] (last updated Mar. 9, 2009) ("Twenty to 30 North Carolina inmates were sent to death row annually in the 1990s.").

77. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (reversing several death penalty sentences for being in violation of the Eighth and Fourteenth Amendments).

78. 330 N.C. 161, 410 S.E.2d 57 (1991).

circumstance, and the Supreme Court [of North Carolina] said you may not do that, and not only may you not do that, but if we allowed you to do that, then we would risk the whole system being unconstitutional.<sup>79</sup>

So, DAs heard that, and not all of them complied. There was [still] variation, there was [still] arbitrariness, but there [were] several [prosecutors who responded to *State v. Case* by seeking the] death [penalty] almost every time they could, which is almost every murder case. Interestingly, still, [two-thirds] of our death row [today was sentenced before 2002].<sup>80</sup> Because once we had DA discretion, the death sentencing rate dropped like an anchor. And we continue to sentence people to death, but maybe average one a year, or one to two a year. Compared to thirty-four in 1995.

The argument today is that [most] of those people that were sentenced to death in the 1990s would never be sentenced to death today. They wouldn't even be pursued capitally, or even if they were, they would [be] offered [a] plea [bargain].

#### Gene Nichol

Can we move up then to the time immediately before the Racial Justice Act begins to be a thought in people's minds?

#### Ken Rose

The Racial Justice Act was something that [first] had been proposed in 2007, so it was in a different version than the one that was later passed in 2009.<sup>81</sup>

#### Gene Nichol

So, Ken, let me understand, where did that 2007 proposal come from? What did it borrow on?

79. *Id.* at 163, 410 S.E.2d at 58 (“If our law permitted the district attorney to exercise discretion as to when an aggravating circumstance supported by the evidence would or would not be submitted, our death penalty scheme would be arbitrary and, therefore, unconstitutional.”).

80. See *Death Row Roster*, N.C. DEP'T ADULT CORR., <https://www.dac.nc.gov/divisions-and-sections/institutions/death-penalty/death-row-roster> [<https://perma.cc/ZFH6-28NB>] (showing the 121 offenders on death row in North Carolina including when they were “received” their sentence).

81. Compare H.B. 1291, 148th Gen. Assemb., Reg. Sess. (N.C. 2007), with North Carolina Racial Justice Act (codified at N.C. GEN. STAT. §§ 15A-2010 to -2012), ch. 464, 2009 N.C. Sess. Laws 1213, 1214, *repealed by* Act of June 19, 2013, ch. 154, § 5.(a), 2013 N.C. Sess. Laws 368, 372.

**Ken Rose**

My memory is that they did look at Kentucky—they tried to take out some of the worst parts of the Kentucky statute.<sup>82</sup> For example, Kentucky required a showing of discrimination in a particular case, and that's how it was interpreted. And so, what you were left with—in our view, and I think in a lot of people's view—was *McCleskey*.<sup>83</sup>

So, we knew what we were trying to avoid. We knew we didn't want that. We knew we wanted [it] to apply to juries as well as race of victim and race of defendant, and we knew we wanted to make it retroactive, and we wanted a wide base of proof.

So, for example, I talked about the deposition of Ed Peters. We knew we wanted to have an opportunity to depose prosecutors. In *State v. Jackson*,<sup>84</sup> one of the first [cases decided] after *Batson*, [the Supreme Court of North Carolina] said you couldn't call [a] prosecutor as a witness, even in post-conviction proceedings, to testify about his or her jury strikes. And we thought that there should be an opportunity to do that.

**Gene Nichol**

Do you remember what happened in the 2007 proposal?

**Ken Rose**

I don't think it ever got out of committee. That's my memory. But it had a lot of cosponsors. So, the interesting thing is it had, maybe, I'm looking at now, maybe twenty cosponsors or more in the House.<sup>85</sup> So, there they were serious about it, even then.

82. KY. REV. STAT. ANN. § 532.300 (2024); see also Justin R. Arnold, Note, *Race and the Death Penalty After McCleskey: A Case Study of Kentucky's Racial Justice Act*, 12 WASH. & LEE J. C.R. & SOC. JUST. 93, 102–07 (2005) (outlining the passage of the Kentucky Racial Justice Act and how it paved the way for other bills to follow).

83. *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987) (“[T]o prevail under the Equal Protection Clause, [the defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose.”).

84. 322 N.C. 251, 368 S.E.2d 838 (1988).

85. In total, there were thirty-two sponsors in the North Carolina House of Representatives for the 2007 version of the North Carolina Racial Justice Act. *House Bill 1291*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2007/h1291> [<https://perma.cc/99CV-CR3H>]. The bill was referred to the Judiciary II committee in the North Carolina Senate on May 29, 2007, but was not further referred. *Id.*

Gene Nichol

[Was] there any Republican [support] in the House?

Ken Rose

No, I don't think so. Dan Blue<sup>86</sup> [was] one of the House sponsors in 2007 and also Representative [Deborah] Ross.

Gene Nichol

She was there by then?

Ken Rose

That's right. I would say the difference maker for us, in terms of our coalition, was the fact that Reverend Barber<sup>87</sup> weighed in. He was a factor, at least in the second [Racial Justice Act proposal].

Gene Nichol

In the second [Racial Justice Act proposal], but maybe not the first one?

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86. Daniel Blue, Jr. is "a Democratic member of the North Carolina Senate," and has been representing the 14th District in that role since 2009. *Dan Blue, North Carolina State Senator, Senate Democratic Leader*, CONGRESS.GOV, <https://www.congress.gov/116/meeting/house/109315/witnesses/HHRG-116-HA08-Bio-BlueD-20190418.pdf> [<https://perma.cc/AW4X-YYVV> (staff-uploaded archive)]. Dan Blue "was first elected to the North Carolina House of Representative in 1980," and was later elected as Speaker of the House in 1991. *Id.* He ran for U.S. Senate in 2002 but returned to the North Carolina House of Representatives in 2006. *Id.*

87. Dr. Rev. William J. Barber, II is:

President and Senior Lecturer of Repairers of the Breach; a Professor in the Practice of Public Theology and Public Policy and Founding Director of the Center for Public Theology and Public Policy at Yale Divinity School; Co-Chair of the Poor People's Campaign: A National Call For Moral Revival and Bishop with The Fellowship of Affirming Ministries. . . . Bishop Barber served as senior pastor of Greenleaf Christian Church, Disciples of Christ for thirty years and as president of the North Carolina NAACP from 2006–2017, and on the National NAACP Board of Directors from 2008–2020.

*Our Founder*, REPAIRERS BREACH, <https://breachrepairers.org/about-us/our-founder/> [<https://perma.cc/2Z39-N87E>].

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**Ken Rose**

I don't remember him being involved in the first, and I don't really recall us doing much lobbying at that point. So, I could understand why it might have just not gotten out of committee.

**Gene Nichol**

So, 2009 comes up.

**Ken Rose**

A sticking point was statewide [statistics]. It was an easy attack on the Racial Justice Act to say that prosecutors who do nothing wrong—"I don't discriminate," and there's no evidence of their discrimination—nevertheless can be pulled into a statewide claim based on other prosecutors' bad intent or other prosecutors' discriminatory actions, and through no fault of their own.

So, if it was purely focused on the individual prosecutor, and you were thinking from the perspective of that prosecutor in terms of [their individual responsibility for] discrimination, then you would not have a statewide claim, and you wouldn't have a division claim, and, arguably, you wouldn't have a district claim, because it's not the same prosecutor all the time. Although there's a much, much, much stronger argument for the district and for the county.

**Gene Nichol**

So, there must have been great opposition in the DAs generally?

**Ken Rose**

There was tremendous opposition. And they put it a lot of different ways. One of the things [that they would] say [was], "This is just a way to get rid of the death penalty. This is a way of ending it. We can never defend ourselves." And some of that was responded to in the legislation itself. They put in a couple clauses allowing for rebuttal. Well, let's look at it specifically. This is [section] 2011(c) under the version that was actually passed. The second sentence in [section] 2011(c) [provides]:

The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court 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.<sup>88</sup>

Gene Nichol

Sort of corrective steps, right?

Ken Rose

Yeah, so there was a question: If there's a finding of race discrimination, does that finding last forever? You have a finding in 2000 that there's race discrimination, does that mean the prosecutor can never fix it? And so certainly, prospectively, that was an answer. So, for people who are thinking about current prosecutions, they were able to institute programs—assuming they had a finding that they had discriminated previously, and race was a significant factor in seeking or imposing the death penalty—to cure it with this provision at least as to their county.

I think that when we introduced these things, there was some ambiguity as to, what did it actually defend? If you have a statewide claim and you allow evidence of what the specific prosecutor did in a specific county to train his or her staff to not discriminate, and did other things to prevent racial discrimination, does that cure a statewide claim? My thought was it does not. It does not cure it, because that might cure the prosecutorial district claim, but not the statewide claim.

Gene Nichol

How much opposition was there to the use of data or statistics in general?

Ken Rose

Well, that was fundamental. I think there was certainly opposition. In my view, and I think in the advocates' view, this was fundamental, because it was all about *McCleskey*. *McCleskey* was a central [focus] in how we had viewed this, and we knew how no one was able to prove a *McCleskey* claim after *McCleskey*.

So, we knew [that] we had race discrimination by prosecutors—intentional race discrimination. We also knew in *Batson* that [we had] race discrimination. [Yet], we hadn't won one on appeal. And we needed some mechanism that

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88. North Carolina Racial Justice Act, ch. 464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C. GEN. STAT. §§ 15A-2010 to -2012), *repealed by* Act of June 19, 2013, ch. 154, § 5.(a), 2013 N.C. Sess. Laws 368, 372.

addressed the serious problem that we saw of racial discrimination in a more effective way, in an objective way.

#### Gene Nichol

Let me follow up on that. One way of describing this might be, you had *Batson*, which, in theory would work, but in an application didn't actually work. You had *McCleskey* and that didn't provide any chance of success. And the [U.S.] Supreme Court had also said in *McCleskey* that states ought to take this up on their own. It would make more sense for legislatures to consider statistics and data than the Court to do it.<sup>89</sup> So, is one way of looking at this: *Batson* and *McCleskey* didn't work, and so we wanted a mechanism that might provide some chance of relief and success?

#### Ken Rose

Yes, I mean, absolutely. And I would refer you to a law review article that was done [by] Amanda Hitchcock. She published a law review article in the *North Carolina Law Review*, May of 2006, "Deference Does Not by Definition Preclude Relief: The Impact of *Miller-El v. Dretke* on *Batson* Review in North Carolina Capital Appeals."<sup>90</sup> It was a brilliant article. It analyzed the Supreme Court [of North Carolina] decisions, and looked at examples of how a lot of those decisions, several of them, did not fit in with *Miller-El*.<sup>91</sup>

#### Gene Nichol

Let me ask about this, what I would imagine was a more overarching claim that you just referred to a second ago. That is, by opponents surely saying: "This is really just a backhanded way of getting rid of the death penalty. It's not a racial justice issue. This is a more politically palatable way of abolishing the death penalty." That was said a lot, right?

89. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) ("McCleskey's arguments are best presented to the legislative bodies. It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes.").

90. See generally Amanda S. Hitchcock, Recent Development, "Deference Does Not by Definition Preclude Relief": *The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L. REV. 1328 (2006) (exploring how U.S. Supreme Court rationales could potentially impact the Supreme Court of North Carolina's review of *Batson* claims).

91. *Miller-El v. Dretke*, 545 U.S. 231 (2005).



**Ken Rose**

[Yes. But] it was never [likely] to abolish the death penalty, but it was going to show pervasive racial discrimination, as we've seen in Judge Weeks's opinions.<sup>92</sup> It's exactly what we hoped to show, and that's what he found.

And we had some clue about it. I mean, we had some clue, because Dean Boger and Professor Unah had done their report.<sup>93</sup> We had some clue of it because we litigated those direct appeal cases, and Amanda Hitchcock had really chronicled them in a way that was very powerful. We had anecdotal stories of jurors. A juror saying he voted for the death [penalty] because [of], essentially, the race of the defendant. We knew that those were there.

But we didn't know that when we actually did the study of all these juries, that almost everywhere in the state, almost every jurisdiction [was overstriking Black jurors]. [Prosecutorial districts] 19A, 19B, and 25 were the only three jurisdictions in the entire state that were pursuing [the] death penalty where prosecutors were not substantially overstriking Black jurors, if you just looked at the raw numbers. The consistency of that was remarkable. And that's something we didn't know until they actually did the study. Although, of course, we knew that a lot of Black people were being struck. We didn't know that it was pretty uniform.

**Gene Nichol**

Here's what I'm wondering: You have this broad coalition. You're trying to put your arms around what's going to be the content of the Racial Justice Act, what approaches it's going to use. Was it relatively easy to get agreement in this broad coalition?

It seems to me this is a really singular statute, doing some almost not-before-seen things. You've got a bunch of people who care about these questions very deeply. There wasn't great disagreement among your folks about what was the approach to go?

92. Gregory Weeks was a judge for the Fourth Division of the Superior Court of North Carolina and "oversaw some of North Carolina's first hearings on whether racism played a part in death sentences" following the passage of the North Carolina Racial Justice Act. Joe Killian, *Veteran NC Judges: State's Bail System is a "Scam," "Immoral," and in Need of "Massive Change,"* NC NEWSLINE (Apr. 4, 2018, 2:08 PM), <https://ncnewslines.com/2018/04/04/veteran-nc-judges-states-bail-system-is-a-scam-immoral-and-in-need-of-massive-change/> [https://perma.cc/R449-TLHQ]; Order Granting Motion for Appropriate Relief at 3, *State v. Robinson*, No. 91 CRS 23143 (Super. Ct., Cumberland Cnty., Apr. 20, 2012), *vacated*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015) ("In the first case to advance to an evidentiary hearing under the RJA, Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina.").

93. See Unah & Boger, *supra* note 74.

**Ken Rose**

There was not much. The only piece that I think that there was a question about, was at the very end when maybe the senators would go to us and say, “Well, you know, we can get Senator so and so if we take out this provision.” And I can tell you who made the final call on them. That was Reverend Barber. He said, “We’re not giving it up.”

What the lawyers advised, including me, was that there are going to be some counties that have not enough cases to have statistical showings alone, and you’re going to have to have some combination of others to have a statistically significant showing. So that was one reason why the statewide showing [was needed in the statute].

But there’s another more fundamental reason, I think, that’s not talked about enough: if you have a death penalty [system with] widespread [discrimination] statewide, and you’re finding statistically significant [evidence that racial discrimination is a factor] even [after controlling for] a wide range of variables, then the question is, is that [capital] system [itself] fair [and nonarbitrary]? Do you want to kill people [notwithstanding] widespread discrimination in those circumstances?

**Gene Nichol**

Were there any important parts in your mind that were dropped as a result of [the Racial Justice Act] working its way through the legislature?

**Ken Rose**

No, I didn’t think so. I don’t recall anything that we really wanted to have [that was left out].

I think there [were] compromises on things like some procedures, but they applied the [Motion for Appropriate Relief (“MAR rules”)],<sup>94</sup> except as specifically stated in the act. They generally applied MAR rules, and we were pretty used to MAR rules not being favorable to us by that point. But, with the specifics they did provide, there seemed to be enough protections that we felt that we were going to get a fair shot at proving our case.

The provision on when you get an evidentiary hearing—it wasn’t written very specifically, but it seemed to be pretty broad to me. And as a result, we’ve been able to get evidentiary hearings. We wanted post-conviction and pretrial [proceedings], but post-conviction was clearly our [primary] focus.

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94. For the Motion of Appropriate Relief rules in North Carolina, see N.C. GEN. STAT. §§ 15A-1411 to -1422 (2024).

Gene Nichol

What would a pretrial [proceeding] have been like?

Ken Rose

So, we got both. This is at least in the initial law. You had to make the claim by the Rule 24 hearing where the prosecutor states whether he or she is seeking [the] death penalty.<sup>95</sup>

Gene Nichol

It would be on the charging issue only, is that right?

Ken Rose

You get the kind of the tension there, right, because you don't have the jury selection [or the jury's decision]. [In most cases, when the Racial Justice Act claim has been raised pretrial, the parties have stipulated to] just allow it to be raised in post-conviction proceedings.

You ask about what concerns we may have had—there was a specific provision that Senator [Josh] Stein<sup>96</sup> wanted and got that said that life without parole is the sentence [for everyone who prevails under the Racial Justice Act].<sup>97</sup> [That felt] unfair, honestly, to the [handful of] people who [originally] were tried at a time when they were eligible for life with parole [if convicted of first-degree murder]. But that was something that we gave up.

95. N.C. GEN. R. PRAC. SUP. & DIST. CT. CIV. P. R. 24 (2024) (requiring a pretrial conference for crimes that are punishable by death).

96. Josh Stein was a member of the North Carolina Senate from 2009 to 2016, and he represented District 16, which, at the time, encompassed the western region of Wake County. *Josh Stein's Biography*, VOTE SMART, <https://justfacts.votesmart.org/candidate/biography/102971/josh-stein> [<https://perma.cc/32QP-4C53>]. He was the minority whip for the Democratic party in the North Carolina Senate from 2011 to 2016. *Id.* He served as the Attorney General for North Carolina from 2017 to 2024. *Id.* And he ran for North Carolina governor in 2024 and won the election. Dawn Baumgartner Vaughan, Brian Gordon & Renee Umsted, *Stein Defeats Robinson in Race for Governor, Talks About 'Promise of North Carolina,'* NEWS & OBSERVER, <https://www.newsobserver.com/news/politics-government/election/article294841324.html> [<https://perma.cc/JHY6-J8K7> (staff-uploaded archive)] (last updated Nov. 6, 2024, 1:45 PM).

97. North Carolina Racial Justice Act, ch. 464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C. GEN. STAT. §§ 15A-2010 to -2012), *repealed by* Act of June 19, 2013, ch. 154, § 5.(a), 2013 N.C. Sess. Laws 368, 372.

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Gene Nichol

Do you remember, in the final analysis, was there any Republican support?

Ken Rose

No.

Gene Nichol

None?

Ken Rose

None. No, it was purely partisan. It was unfortunate. I don't think one senator would have made a difference, which is all people were saying we were going to get.

Gene Nichol

Do you remember, roughly speaking, what the final vote was?

Ken Rose

Well, what I remember is we got all, but a very few Democrats.

Gene Nichol

You lost a few Democrats?

Ken Rose

Yeah, but not many. I really don't remember them. I believe that one or two may have voted for the amended version of the act that actually passed. But not many. It was almost all the Democrats that voted for it, for the bill.<sup>98</sup>

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98. The North Carolina Racial Justice Act passed in the North Carolina Senate by a vote of thirty-six to ten, with eight of the eighteen Republicans and all Democrats voting in favor of its passage. S. JOURNAL, 149th Gen. Assemb., 1st Sess. 675 (N.C. 2009); *Senate Roll Call Vote Transcript for Roll Call #410*, N.C. GEN. ASSEMBLY, <https://www3.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2009/S/410> [<https://perma.cc/G34B-UZRF>]. It was then passed in the North Carolina House of Representatives by a vote of sixty-three to fifty-five, with no Republicans and all but three Democrats voting in favor of its passage. 2 H.R. JOURNAL, 149th Gen. Assemb., 1st Sess. 1556 (N.C. 2009); *House*

### Gene Nichol

Let me ask some sort of more specific questions. There's a lot of concentration on charging decisions of prosecutors and on the selection of jurors. Explain why that is.

It seems to me, a lot of the Act is directed towards those discretionary decisions which were threatening the racial fairness of the operation of the criminal justice system, [such as] the prosecutors charging people who wouldn't be charged in the same way, on the basis of their race, and then prosecutors excluding jurors on the basis of race. Those are a couple of prosecutorial discretionary areas, which then end up getting, it seems to me, reasonably focused on in the Racial Justice Act—trying to cure the impact of those discretionary or discriminatory decisions.

### Ken Rose

I think that goes to the state's power. I think you can argue, and we talked about this some: What happens if the defense attorney is discriminating? The State is appointing the defense attorneys. So, just like an ineffective assistance of counsel claim, you have state action—the State's paying the defense attorneys for indigent persons, so isn't there a constitutional right? That's a situation for ineffective assistance of counsel. So, shouldn't you also allow for defense attorneys that are discriminating?

I think, arguably, the [Racial Justice] Act does do that. I think you can interpret this as: It's imposed on the basis of race if defense attorneys are discriminating as well as prosecutors. In fact, *Batson* has been interpreted that way. And I think this one could be [because] it's still discretionary acts [by state-empowered actors].

We were influenced a lot by the federal Racial Justice Act that had been proposed and then passed in one house or the other, and that was set up in this way.<sup>99</sup> We were influenced also by civil rights law.

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*Roll Call Vote Transcript for Roll Call #1020*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2009/H/1020> [<https://perma.cc/W6VN-NFP5>].

99. H.R. 4017, 103d Cong. (1994); see also Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 520 (remarking that, at the federal level, “[i]n almost every important area—employment, housing, public benefits, peremptory challenges—proof of racially disparate impact can be used to require the government to prove a non-racial explanation for its actions,” but in the context of “the government determin[ing] who lives and who dies,” such proof cannot be raised).

## Gene Nichol

Sort of a simplistic way of describing this, it seems to me, is that you tried to fix the problem of *Washington v. Davis*,<sup>100</sup> requiring the proof of subjective intent in individual cases, by going the route of the 1964 Civil Rights Act and allowing statistical patterns, rather than just subjective mindsets, to provide the basis for relief. When I first read it, I thought, “Oh, this, for a constitutional lawyer, fixes the problem of *Washington v. Davis* by going the route of the 1964 Civil Rights Act and using disparate impact rather than subjective intent.” Does that sound right?

## Ken Rose

Yeah. In the *Robinson* litigation we spent a lot of time focusing on unconscious bias. Unconscious biases suffuse the system. And you can’t show intent of a specific actor, necessarily, with other types of evidence, but you can show how actors individually or collectively, are impacted by everything around them. What other prosecutors do, and what’s acceptable in their communities. All the factors that we know affect our biases and our prejudices. That was significant to us, and so we put on people like [Samuel] Sommers out of Tufts [University] that has done a lot of research in that early litigation to show how unconscious bias works and how the studies that people have done show that it is legitimate.<sup>101</sup>

## Gene Nichol

Those are ways the statute allows the burden to be shifted to the state without showing that the prosecutor intended to discriminate, right?

## Ken Rose

That’s right, yeah.

100. *Washington v. Davis*, 426 U.S. 229 (1976).

101. Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 269 (2007) (finding, in controlled experiments, that test subjects playing the role of a prosecutor trying a case with an African American defendant were more likely to challenge prospective African American jurors, and when justifying these judgments, they typically focused on race-neutral characteristics and rarely cited race as influential).

**Gene Nichol**

*McCleskey*—in the way [the U.S.] Supreme Court sometimes just pas[ses] the buck—said, “far better for these questions of statistics to be acted upon by state legislatures than federal courts or the [U.S.] Supreme Court.” Were you all sort of conscious of that invitation of an open door from the [U.S.] Supreme Court?

**Ken Rose**

Yes, we were, and it gave us more confidence that when it was challenged—which, of course, it has been and would be—that we had a good shot of having it upheld. We were very conscious that it would be challenged.

**Gene Nichol**

The history of state legislatures on that front would not actually be attractive if you were wanting to get some actual relief?

**Ken Rose**

Well, there’s a reason [that], in the South particularly, the Voting Rights Act carved out places around the South that [had] to still be monitored—we know that discrimination is there. But if they have to get them to admit it, then that’s a different question.

**Gene Nichol**

The statute says [that] the challenger has to show that “race was a [significant] factor in the decision to seek or impose the death penalty.”<sup>102</sup> And then there are those tiers: In the county, the prosecutorial district, the judicial division, or the state. You mentioned that there was great consternation about the statewide focus. But was there a lot of argument about those other separation[s], those other cuts?

**Ken Rose**

No, there wasn’t much. No, I mean, the state had set up the structure for varying reasons, but presumably there was some commonality between

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102. North Carolina Racial Justice Act, ch. 464, § 1, 2009 N.C. Sess. Laws 1213, 1214 (codified at N.C. GEN. STAT. §§ 15A-2010 to -2012), *repealed by* Act of June 19, 2013, ch. 154, § 5.(a), 2013 N.C. Sess. Laws 368, 372.

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prosecutors, judges, lawyers, and those jurisdictional units, and so that's why we did it.

Gene Nichol

The Racial Justice Act—does it allow a challenge brought by a white defendant to the exclusion of Black folks from his jury? It allows that right?

Ken Rose

Yeah. We were borrowing from *Batson* law, and we believed that this was as much about the right of persons to serve on juries as it was about the right of the defendant to have a jury without discrimination in his or her case.

Gene Nichol

It ended up that whole lots of white criminal defendants sued under the Racial Justice Act. Right? Did you anticipate that would happen?

Ken Rose

Yes. What I didn't anticipate is there would only be three small jurisdictions in the whole state [in] places that use the death penalty where there wasn't significant under-representation [of Black jurors due to prosecutors overstriking Black jurors]. I did not anticipate that. I didn't anticipate it would be quite as widespread, pervasive discrimination.

But I did anticipate that white persons would be able to raise it. I do think—if you asked me, “What was a flaw in some of our efforts?”—one possible flaw was not communicating that effectively to all the people that were [going to have to] answer those questions publicly, including maybe the sponsors.

Gene Nichol

Was it important to political accessibility that the remedy be open to white criminal defendants too, instead of just be written in terms of discrimination against Black [people]?

Ken Rose

No, I don't think that was important for us to get that passed. [Everyone supporting the Racial Justice Act] understood how race has been such a primary focus in the criminal justice system and how devastating [racial discrimination



has] been to so many people. We did talk about it, because, as we started out this discussion, a lot of the innocent people [sentenced to die] were persons of color. And so, we were certainly presenting that as an argument why this [was] so desperately needed.

I think there was some tension about white defendants raising discrimination [claims based on the race of the defendant]. [I did not believe that] we had statistical studies that supported those types of claims, although there were [attorneys for white] defendants [who raised the claims in good faith]. But there [were], of course, white defendants [who] had race of victim [and jury selection discrimination] claims, as [almost] everyone did.

#### Gene Nichol

When you were describing in three or four sentences to people, what the goal of the Racial Justice Act was, what did y'all tend to say? What was the elevator version of the pitch?

#### Ken Rose

To give a mechanism to address racial discrimination in the criminal justice system, in the same way we have remedies in employment, we have remedies in housing, we have remedies in voting rights. We have remedies across the board, but in the criminal justice system, we do not treat racial discrimination in the same way in almost any types of claims, and that really is something we can change and just do something about it. That's where my history came into it—probably my whole career, I've been frustrated that that was true. That it felt like prosecutors weren't treated the same way [when they engaged in racial discrimination].

#### Gene Nichol

That extended far enough to say that if you can show the presence of race in the operation of the criminal justice system, we ought to give you relief, even if you can't show that the existence of race hurt in your case. Is that right?

#### Ken Rose

Yeah, and that's going back to some basic death penalty concepts, going back to *Furman*. If you have a corrupt system, in the sense that almost everyone [is] discriminating and they're not being checked, then that's not a system that you can be comfortable with to kill somebody.

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Gene Nichol

*Furman* sort of said the death penalty is so outrageously arbitrary that it needs to be thrown out or fixed. They just said, “You can’t have a death penalty which is this irrational,” right?

Ken Rose

Yeah, and that was the claim in *McCleskey*. It was a statewide claim that was arguing that individual defendants were entitled to relief based on statewide discrimination.

Gene Nichol

The very ambitious goal of the statute, then, was to try and break the link between race and the death penalty, which had always been so strong in North Carolina, probably still is. Is that a way of describing the goal?

Ken Rose

Yes.

Gene Nichol

I was reading something that Bob Mosteller<sup>103</sup> had written, and he [said], like a lot of folks, that [when the Racial Justice Act was passed that] was seen as a new chapter in North Carolina history.<sup>104</sup> Is that the way you thought of it?

Ken Rose

Absolutely, yeah. Ever since the congressional effort to pass the [federal] Racial Justice Act, I thought it would be important to do [that] here, [in North Carolina].

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103. Robert P. Mosteller “joined the Carolina Law faculty in 2009 as the J. Dickson Phillips Distinguished Professor of Law,” where “[h]is teaching and research interests [focus] on the fields of evidence and criminal procedure and various aspects of the criminal justice process.” *Robert P. Mosteller*, UNC SCH. L., <https://law.unc.edu/people/robert-p-mosteller/> [<https://perma.cc/TR6Y-2BLR>].

104. 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, 2036–37 (2010) (“The RJA represents a new chapter in the state’s history. The command of the RJA to ensure that the complex and pernicious relationship between race and the death penalty is finally severed is the challenging task the legislature has entrusted to the courts.”).

I was so grateful to the courageous people that took it up and worked on it, and the legislators, in particular. I don't think they were doing it blind. I think they understood that the way our political system works, that taking on racial discrimination—particularly in the criminal justice system because of the electoral power of prosecutors—is a bold and difficult thing. And yet, they were willing to do it because they thought it was important, too.

I didn't have those kinds of challenges that they did. It was easier for me. I'm an advocate. People expect me to advocate for clients, expect me to advocate for [racial justice].

**Gene Nichol**

It was easier for you because you'd already sacrificed your entire life.

**Ken Rose**

I don't see it that way. I loved doing it.

**Gene Nichol**

No, I understand what you mean. I wanted to ask one little question, which is almost irrelevant, given what our topic is, but I read Judge Weeks's opinion in the *Robinson* case.<sup>105</sup> I was surprised at how much emphasis and attention was on statistical methodologies. It read to me like a graduate student's thesis. Did that surprise you, the extent to which that's the way the litigation has unfolded?

**Ken Rose**

[No, I was not surprised because the Racial Justice Act legislation was written to allow for the statistical evidence that was not permitted to be considered in hearings after *McCleskey* was decided.]

**Gene Nichol**

I know there are instances in those cases of specific, intentional discrimination which are highlighted.

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105. Order Granting Motion for Appropriate Relief, *supra* note 92, at 31.

**Ken Rose**

Yeah, well, [Judge Weeks] does spend a lot of time with examples. Anecdotal evidence, in other words. [Judge Weeks's powerful recitation of that evidence was critical to help convince the public and courts about the extreme nature of the racial discrimination he found to exist, in a manner that statistical evidence alone could not convey.]

I think part of the [quandary], is that the State has argued, and continues to argue, that these cases have all been decided, or at least the great bulk of them, on direct appeal on *Batson* claims. [But the Racial Justice Act did not require us to prove intentional discrimination.] And we have new tools now, and [among] the new tools are very time consuming [and] complicated statistical analyses that were not available to us.

And we have a few other tools—you can call a prosecutor as a witness. For example, you can actually have a hearing where you talk about history. But to me, one of the [most] interesting things about [the Racial Justice Act] litigation, and particularly in light of *Miller-El*, [is] here—maybe for the first time in this day at least—you [are] able to go to past cases of the same prosecutor or even different prosecutors [in the same office], look for rationales [provided by the prosecutors for striking African American jurors, and then [prove] those [pretextual] rationales [do not] hold.

The same prosecutor, let's say, had the same reason in another case for [striking] a white juror but didn't strike that white juror, but struck this African American juror in this case. It changed how we looked at the statistical analysis because, all of a sudden, prosecutors who weren't thinking case to case [about] trying to make consistent answers—because they didn't have to—made a lot of inconsistent decisions [and gave explanations for their strikes] that weren't based in fact. They were coming up with ad hoc explanations because they could, but it didn't hold consistently across a variety of cases that they also prosecuted. So that was really important to us.

**Gene Nichol**

How much impact do you think the Racial Justice Act has had on the reduction or the elimination of the use of the death penalty since, even beyond obvious racial claims?

**Ken Rose**

I think it's had a big effect, if you just look at numbers of when they prosecuted cases.

Plus, it's been since 2006, so it's been eighteen years since we've had an execution. At some point, if you're a prosecutor and you have to put a lot of resources in a case, and you see that [the sentence is] not being carried out, but you also see that you're getting scrutinized very carefully, it's just not worth the effort in their minds.

And the interesting thing though, they also have another remedy, and they have not used it. That is, they could start developing programs, and they [could] start not discriminating, and they [could] start training their assistants.

### Gene Nichol

I was looking at some reports, kind of around the time of the passage of the law, and Joe Hackney,<sup>106</sup> who was the leader of the House then, said that he'd spent his life in North Carolina courtrooms, and he'd seen, firsthand, the subtle impact of race and that the goal of this was to stop it—to break that link.<sup>107</sup> Then, Phil Berger<sup>108</sup> said that this law has little to do with justice and nothing to do with guilt or innocence.<sup>109</sup> I was going to ask you a loaded question, which of those two is right you think?

### Ken Rose

Oh, yeah, [Joe] Hackney was right. [Joe] Hackney is the one who wrote the title, I think. And he did it, of course, because it makes it harder to amend.<sup>110</sup>

106. Joe Hackney “served 32 years in the North Carolina House of Representatives.” *Joe Hackney, EPTING & HACKNEY ATT'YS L.*, <https://eptingandhackney.com/hackney.shtml> [<https://perma.cc/7A4A-LZBY>]. He was Speaker of the House for several years and “also served as Majority Leader, Speaker Pro Tem, and Minority Leader before retiring from the House in 2012.” *Id.*

107. *NC Gov Signs Law on Race Bias Rest in Death Cases*, WCNC CHARLOTTE, <https://www.wcnc.com/article/news/local/nc-gov-signs-law-on-race-bias-test-in-death-cases/275-374753148> [<https://perma.cc/499Q-E9UG>] (last updated Nov. 1, 2009, 3:07 PM) (quoting Joe Hackney: “I’ve spent most of my life in courtrooms across North Carolina and I have seen the subtle impact of race in our courtrooms . . . [The Racial Justice Act] opens the courtroom door for those who believe that they can show that it had an impact on their case.”).

108. Phil Berger “was first elected to the State Senate in 2000. His colleagues elected him minority leader in 2004, and President Pro Tempore in 2010 after Republicans won a Senate majority for the first time since the 19th Century.” *About Senator Phil Berger*, PHIL BERGER N.C. SENATE, [https://www.philberger.org/about\\_phil\\_berger](https://www.philberger.org/about_phil_berger) [<https://perma.cc/LZ8K-PE8U> (staff-uploaded archive)].

109. *NC Gov Signs Law on Race Bias Rest in Death Cases*, *supra* note 107 (quoting Phil Berger: “Make no mistake, this law has little to do with justice and nothing to do with guilt or innocence. For the first time in North Carolina, the statistical composition of the inmates on death row will outweigh the facts of a particular case in the determination of punishment.”).

110. The name of the senate bill that was ratified was:

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Gene Nichol

Well, you would have thought people [would] be embarrassed to repeal the Racial Justice Act, but apparently not?

Ken Rose

Yeah, well, we don't need to go into what other things they're doing that they're not embarrassed about doing.

Gene Nichol

Last question, Ken: You've had this marvelous, inspiring career, working the great bulk of your professional life—maybe almost the whole of your professional life—on the outrages of the death penalty system. Does the passage of the Racial Justice Act seem like a little bit of a capstone in that career? How does it fit in psychologically to you?

Ken Rose

Yeah, well, the decision in *Edwards* particularly hung over me. In some way [the passage of the Racial Justice Act] was a little bit of redemption. I was very angry, and I left Mississippi not long after that. It was at a formative time in my career, and it's something I always felt that I needed to get back to in a big way. And I think we tried and with the repeal we continue to fight. And you know, I love that. I love the fact that we are still in there fighting today. We the greater group.

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An act to prohibit seeking or imposing the death penalty on the basis of race; to establish a process by which relevant evidence may be used to establish that race was a significant factor in seeking or imposing the death penalty within the county, the prosecutorial district, the judicial division, or the state, to identify types of evidence that may be considered by the court when considering whether race was a basis for seeking or imposing the death penalty, including statistical evidence, and to authorize the defendant to raise this claim at the pretrial conference or in postconviction proceedings; to provide that the defendant has the burden of proving that race was a significant factor in seeking or imposing the death penalty and to provide that the state may offer evidence to rebut the claims or evidence of the defendant and in doing so to use statistical evidence as well as any other evidence the court deems relevant and material; to provide that if race is found to be a significant factor in the imposition of the death penalty, the death sentence shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole; to provide that this act is effective when it becomes law and applies retroactively, that motions under this act for those currently under a death sentence shall be filed within one year of the effective date of this act, and that motions for those whose death sentence is imposed on or after the effective date of this act shall be filed as provided in this act.

S.B. 461, 149th Gen. Assemb., Reg. Sess. (N.C. 2009).

**Gene Nichol**

When you get to be our age, the “we the greater group” is a cooler thing when you think about it. I was thinking too, there’s a Bob Dylan song, I stayed in Mississippi just a little too long.<sup>111</sup>

**Ken Rose**

Mississippi stayed with me too long.

**Gene Nichol**

No, just long enough, probably.

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111. BOB DYLAN, *Mississippi, on LOVE AND THEFT* (Columbia 2001) (“Only one thing I did wrong / Stayed in Mississippi a day too long”).