THE NORTH CAROLINA RACIAL JUSTICE ACT AT A CROSSROADS: LESSONS LEARNED FROM *STATE V. BACOTE* AND THE ONGOING FIGHT AGAINST RACIAL BIAS IN CAPITAL PUNISHMENT[*]

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Enacted in 2009, the North Carolina Racial Justice Act ("RJA") broke new ground. The RJA was the first United States law to forbid death sentences where statistical racial patterns affected jury selection or sentencing and the second law to allow relief from death sentences based on statistical bias in charging. Since its enactment, the RJA has been both successful and controversial. North Carolina courts have removed five people from death row under the RJA, though litigation in those cases revealed rampant racial bias in capital sentencing. The RJA's unfinished business is due in no small part to the resistance that began almost as soon as it was signed. The North Carolina General Assembly narrowed the RJA in 2012 and repealed it entirely in 2013, preventing the broad remedy its framers envisioned. This Article traces the RJA's legislative history and subsequent litigation from 2009 to the present, focusing on State v. Bacote*, the most recent ruling finding racial bias in a North Carolina capital case. The Article concludes by discussing what the future may hold for the RJA and suggesting lessons that anti-death penalty and civil rights advocates can learn from the Act's successes and challenges.*

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INTRODUCTION

The American criminal justice system was built, at least in part, on racially oppressive beliefs and practices.[1] This is especially true for capital punishment. Our courts have acknowledged the death penalty's connection to slavery.[2] Even after the post-Civil War amendments granted citizenship to Black people, Jim Crow laws continued to discriminate against Black defendants in capital cases.[3] Although the United States Supreme Court has taken occasional action to remedy this discrimination, the existing federal protections have not gone nearly far enough.[4]

1. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (explaining that the use of nonunanimous criminal convictions in Louisiana could be traced to an 1898 constitutional convention where its purpose was to "establish the supremacy of the white race," while the same practice in Oregon could be traced to the rise of the Ku Klux Klan in the 1930s); Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking down a provision of the Alabama Constitution adopted in 1901, which disenfranchised individuals convicted of certain crimes, because the law's "enactment was motivated by a desire to discriminate against blacks on account of race").

2. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring) (describing the death penalty as "disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups" (quoting PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967))); *see also id.* at 308 (Stewart, J., concurring) (explaining that the death penalty serves, in part, to suppress the retributive instinct of people to pursue "vigilante justice" and "lynch law").

3. *See Jim Crow & the Birth of the State-Run Death Penalty (1910-1961)*, RACIST ROOTS, https://racistroots.org/section-2/ [https://perma.cc/Y6U9-7U2A] ("Between 1910 and 1961, the state executed 362 people behind Central Prison's closed doors. Almost [eighty] percent of them were Black.").

4. *See* McCleskey v. Kemp, 481 U.S. 279, 312–13 (1987) (refusing to overturn a tainted conviction because "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system"). *See generally* Swain v. Alabama, 380 U.S. 202 (1965) (purporting to prohibit peremptory

As a result, some state legislatures sought to mitigate the discriminatory effects of the death penalty's racist roots.[5] In 2009, the North Carolina General Assembly enacted the North Carolina Racial Justice Act ("RJA"),[6] which allowed death-sentenced individuals to make claims for relief using statistical data showing their death sentence was sought or imposed on the basis of race.[7] Following the RJA's enactment, several defendants obtained judicial relief.[8] In response, the North Carolina General Assembly amended—and eventually repealed—the RJA.[9] In 2020, however, the Supreme Court of North Carolina ruled that the repeal could not apply retroactively.[10]

State v. Bacote[11] is the most recent development in North Carolina's RJA litigation. Hasson Bacote raised claims of racial bias arising from discriminatory capital sentencing decisions by juries in the county where he was tried, the actions of his prosecutor, as well as broader prosecutorial decisions in other capital cases tried in Johnston County and Prosecutorial District 11.[12] In addition to statistical evidence, Bacote presented historical and social science research illustrating Johnston County's history of racism against Black people.[13] After hearing all the evidence, the superior court issued an order in February 2025, finding that the statistical evidence presented by Bacote showed that race was a significant factor in the prosecution's jury selection decisions in Bacote's individual case, death penalty cases in Johnston County, and death penalty cases in Prosecutorial District 11.[14] Bacote's death sentence was vacated, and he was resentenced to life without parole.[15]

challenges based on the race of potential jurors but refusing to overturn the defendant's conviction unless the defendant proved intentional discrimination); Batson v. Kentucky, 476 U.S. 79 (1986) (implementing a process for challenging discriminatory strikes).

5. *See, e.g.*, California Racial Justice Act of 2020, ch. 317, 2020 Cal. Stat. 3705, 3705–14 (codified at CAL. PENAL CODE § 745 (2025)) (acknowledging racially disproportionate indictment and conviction rates and providing grounds for relief upon a court's finding that race was a factor in the charging or conviction of a defendant).

6. Ch. 464, 2009 N.C. Sess. Laws 1213 (repealed June 19, 2013).

7. *See id.*

8. *See, e.g.*, State v. Robinson, 375 N.C. 173, 181, 846 S.E.2d 711, 718 (2020) ("The trial court, in its meticulously detailed findings, laid out how Robinson had shown that race was a significant factor during jury selection in his case.").

9. An Act to Amend Death Penalty Procedures, ch. 136, §§ 3–10, 2012 N.C. Sess. Laws 471, 471–73 (amending the RJA); Act of June 13, 2013, ch. 154, § 5(a), N.C. Sess. Laws 368, 372 (repealing the RJA).

10. *See Robinson*, 375 N.C. at 183, 846 S.E.2d at 719.

11. Order Granting Relief Under the Racial Justice Act, *State v. Bacote*, No. 07CR051499-500 (N.C. Super. Ct. Feb. 7, 2025) [hereinafter Bacote Order].

12. *Id.* at 2.

13. *See id.* at 24–44.

14. *Id.* at 118–19.

15. *Id.* at 119–20. Bacote's sentence was also commuted to life without parole by Governor Roy Cooper on December 31, 2024. *See* Press Release, N.C. Off. Governor, Governor Cooper Takes

Bacote and its result on appeal are likely to influence the course of more than one hundred pending RJA claims brought by other North Carolina death row prisoners. Because of *Bacote*'s potentially broad impact, this Article will examine the case itself, as well as the background of the RJA leading up to the *Bacote* litigation. The discussion will include a timeline and historical context for the RJA—from its enactment, narrowing, and eventual repeal, as well as several rounds of litigation along the way. It will then describe the superior court's decision in *Bacote*. The conclusion will consider what the *Bacote* decision might mean for those sentenced to death and awaiting RJA litigation in North Carolina and what lessons advocates might take away from the RJA's history to date.

I. HISTORY OF THE RJA

This part will trace the historical and legal history that gave rise to the RJA, the circumstances of its enactment, the initial litigation history, and the evidence of racism that litigation yielded. This backdrop will shed light on the RJA's significance to North Carolina's death penalty history and its place in the broader context of legal campaigns to redress civil rights violations.

A. *Pre-Enactment*

In *McCleskey v. Kemp*,[16] the defendant challenged Georgia's capital sentencing process by using a statistical study.[17] While acknowledging that the study "indicate[d] a discrepancy that appears to correlate with race,"[18] the United States Supreme Court nevertheless rejected McCleskey's challenge, reasoning that allowing disparate impact claims would open the floodgates for criminal defendants to appeal.[19]

Warren McCleskey, a Black man in Georgia, received a death sentence for killing a White police officer during a robbery.[20] McCleskey filed a habeas petition in federal district court where he claimed that the administration of the Georgia capital sentencing process was racially discriminatory.[21] McCleskey presented Professor David Baldus's statistical study, which quantified disparities in the imposition of death sentences in Georgia on the basis of the murder victim's race and the defendant's race.[22] The study showed that Black

Capital Clemency Actions (Dec. 31, 2024) [hereinafter Governor Press Release], https://governor.nc.gov/news/press-releases/2024/12/31/governor-cooper-takes-capital-clemency-actions [https://perma.cc/D9PS-KD68].

16. 481 U.S. 279 (1987).
17. *Id.* at 282–83.
18. *Id.* at 312.
19. *Id.* at 314–18.
20. *Id.* at 279.
21. *Id.* at 286.
22. *Id.*

defendants convicted of killing White victims have "the greatest likelihood of receiving the death penalty."[23] The Supreme Court credited the Baldus study's findings[24] but rejected McCleskey's claim that this discrepancy taints the entire capital sentencing process.[25] The Court reasoned that if it were to accept McCleskey's claim, courts would face race-based disparate impact claims from all corners of the criminal justice system.[26] As framed by Justice Brennan's dissent, the Court accepted that racial discrimination does exist in capital sentencing but cannot be remedied because of the prospect of "too much justice."[27] The *McCleskey* majority held that legislative bodies are better suited to evaluate and apply statistical studies to their capital sentencing schemes.[28]

While *McCleskey* may, as a general matter, have prompted state advocates to look closely for patterns of racial bias in their death penalty systems, the path to North Carolina's RJA was also paved by a series of state specific developments.

The first such development—or more accurately, lack of development—was the persistent failure of North Carolina's appellate courts to enforce protections against race discrimination in jury selection. The United States Supreme Court created a framework for addressing the damage caused by the disfranchisement of Black people in jury service in *Batson v. Kentucky*.[29] While well-intentioned, Justice Marshall accurately foreshadowed how limited *Batson*'s framework would be.[30] Justice Marshall understood that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill[-]equipped to second-guess those reasons."[31] As Justice Marshall predicted, the protection *Batson* promised proved illusory for Black jurors in North Carolina.[32] In 2016, research showed that in 114 cases involving minority jurors where North Carolina appellate courts decided *Batson* challenges on the merits, no appellate court had ever issued a finding that race discrimination

23. *Id.* at 287.

24. *Id.* at 312.

25. *Id.* at 319.

26. *Id.* at 315.

27. *Id.* at 339 (Brennan, J., dissenting).

28. *Id.* at 319 (majority opinion).

29. 476 U.S. 79, 97 (1986).

30. *Id.* at 105 (Marshall, J., concurring) (explaining that "merely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenges").

31. *Id.* at 106.

32. *See generally* Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957 (2016) (arguing that *Batson* is misapplied by North Carolina courts and, as a result, has had little effect on racial discrimination in jury selection).

occurred against a prospective juror of color.[33] A large proportion of these *Batson* denials were in death penalty cases.

The push to enact North Carolina's RJA was also inspired by a 2011 statistical study that revealed the same race-of-victim disparities in North Carolina capital cases that were present in the Baldus study from Georgia.[34] In the North Carolina study, Dr. Issac Unah and Professor Jack Boger examined murder cases occurring in North Carolina from December 31, 1977, to January 1, 1993.[35] The study found stark differences in the imposition of death sentences depending on whether the victim was White versus non-White.[36] It also found the highest death sentence rates occurred when non-White defendants killed White victims.[37]

These statistical patterns gained even more force when paired with the dramatic individual examples of racism in North Carolina capital cases. In 1985, for example, Elton McLaughlin, a Black man, received a death sentence for his involvement in a murder-for-hire plot.[38] McLaughlin raised a claim in state post-conviction proceedings that because of his intellectual disability, his death sentence violated *Atkins v. Virginia*,[39] which left it to the states to determine the evidence necessary to sustain an *Atkins* claim.[40] To prove intellectual disability, North Carolina law required testing by a licensed psychiatrist or psychologist before age eighteen.[41] McLaughlin could not provide this type of evidence, however, due to Jim Crow segregation.[42] The schools he attended did not provide adequate special education services to Black children.[43] In 2006, a federal district court considered this evidence, found McLaughlin to be intellectually disabled, and vacated his death sentence.[44]

In another case in 1992, an all-White jury found Kenneth Rouse, a Black man, guilty of murdering a White woman, and Rouse received a death sentence[45] in addition to forty years for armed robbery and twenty years for attempted first-degree rape.[46] Following the denial of his direct appeal, one of

33. *Id.* at 1963.

34. Isaac Unah, *Empirical Analysis of Race and the Process of Capital Punishment in North Carolina*, 2011 MICH. STATE L. REV. 609, 654.

35. *Id.*

36. *Id.* at 637.

37. *Id.*

38. State v. McLaughlin, 323 N.C. 68, 77, 372 S.E.2d 49, 57 (1988).

39. 536 U.S. 304 (2002).

40. *Id.* at 317; Order at 77, McLaughlin v. Polk, No. 5:99-HC-436-BO (E.D.N.C. Jan. 13, 2006) [hereinafter McLaughlin Order].

41. McLaughlin Order, *supra* note 40, at 79.

42. *Id.*

43. *Id.* at 81.

44. *Id.* at 85.

45. Motion for Appropriate Relief Pursuant to the Racial Justice Act at 1, State v. Rouse, No. 91CR003316-750 (N.C. Super. Ct. Aug. 2, 2010) [hereinafter Rouse Motion].

46. State v. Rouse, 339 N.C. 59, 70, 451 S.E.2d 543, 548 (1994).

the jurors admitted to a law student investigating Rouse's case that during *voir dire*, he purposely withheld information that his mother had been the victim of robbery, rape, and murder by a man who received a death sentence as a result.[47] Even more alarming, the juror admitted in a sworn affidavit that "bigotry" was one of the most influential factors in making his sentencing decision.[48] The juror went on to tell the law student his feelings about Black people, referring to them with racial slurs and claiming they do not value life like White people do and that Black men rape White women so they can brag to their friends.[49] He further characterized Rouse, who suffered from intellectual disability, as "one step above moron."[50] Despite the blatant racial bias and misrepresentation by a member of Rouse's own jury, he has never received "any opportunity to explore [this evidence] at a hearing" in state or federal court.[51] The Fourth Circuit upheld the denial of Rouse's juror misconduct claim because he filed his habeas petition just one day past the statute of limitations period.[52] Rouse remains on death row to this day.[53]

Finally, between 2007 and 2008, three Black men on North Carolina's death row—Jonathan Hoffman, Glenn Chapman, and Levon Jones—were exonerated.[54] Levon Jones was convicted in 1993 despite a lack of physical evidence tying him to the crime.[55] Post-conviction litigation later revealed that Jones's defense attorneys failed to present evidence of his mental disabilities and that the State's main eyewitness was threatened and paid by officers to testify against Jones.[56] Glenn Chapman was convicted in 1994 despite witnesses

47. Rouse v. Lee, 339 F.3d 238, 257 (4th Cir. 2003) (Motz, J., dissenting); *see also* CDPL Staff, *Death Row Profile: Kenneth Rouse*, https://racistroots.org/section-2/death-row-profile-kenneth-rouse/ [https://perma.cc/8TNB-PVZ6] (providing additional information about the racially biased juror in Rouse's case).

48. Rouse Motion, *supra* note 45, at 2.

49. *Rouse*, 339 F.3d at 257; *see also* Rouse Motion, *supra* note 45, at 2.

50. Rouse Motion, *supra* note 45, at 2.

51. *Rouse*, 339 F.3d at 258.

52. *Id.*

53. *See* CDPL Staff, *supra* note 47. One would hope that the explicit racism in Rouse's capital trial was an isolated incident. It was not. In 2001, North Carolina death row prisoner Robert Bacon was granted clemency and removed from death row. *See* Gretchen Engel, *Anniversary Provides Powerful Reminder of Racism That Afflicts NC's Death Penalty*, NC Newsline (Oct. 6, 2021, at 12:00 ET), https://ncnewsline.com/2021/10/06/anniversary-provides-powerful-reminder-of-racism-that-afflicts-ncs-death-penalty/ [https://perma.cc/5JXK-FT54]. Bacon had submitted a clemency petition with an affidavit from one of his jurors. *Id.* In the affidavit, the juror confessed her racist belief that Black people commit more crime, and that Bacon, who was Black, should not have been dating a White woman. *Id.*

54. 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, 2125 n.405 (2010). These cases are also profiled in detail by the National Registry of Exonerations. *See* NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/ [https://perma.cc/JM8H-TJ5F].

55. *Levon Jones*, NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/cases/10567 [https://perma.cc/32ZT-MTWC].

56. *Id.*

identifying someone else as the perpetrator, and another person confessing to the crime.[57] Jonathon Hoffman, convicted in 1996, was sentenced to death by an all-White jury despite no physical evidence linking him to the crime.[58] Combined, these three individuals served thirty-eight years on death row before their exonerations and releases from prison.[59] The relatively sudden revelation that North Carolina had imprisoned these three innocent Black men on death row for decades provided a powerful argument that the state badly needed reform of its capital sentencing laws.

B. *Enactment of the RJA*

Spurred by the cumulative effect of this history, the North Carolina General Assembly sought to address the racial disparities in capital sentencing. The RJA boldly proclaimed that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race."[60] The Act provided a process by which capital defendants could prove that "race was a significant factor" in a district attorney's pursuit of the death penalty or a jury's decision to impose the death penalty in a particular "county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed."[61] The evidence a defendant could use included:

> [S]tatistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:
>
> (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.
>
> (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
>
> (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.[62]

57. *Glen Edward Chapman*, NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/cases/10997 [https://perma.cc/VQB3-XNJ3].

58. *Jonathon Hoffman*, NAT'L REGISTRY OF EXONERATIONS, https://exonerationregistry.org/cases/11001 [https://perma.cc/YG85-JFKA].

59. *See* Kotch & Mosteller, *supra* note 54, at 2125 n.405.

60. Ch. 464, 2009 N.C. Sess. Laws 1213 (repealed June 19, 2013).

61. *Id.*

62. *Id.*

The RJA passed along party lines.[63] While Republicans vehemently opposed the law, its passage was not driven solely by opponents of the death penalty. Some pro-death penalty Democrats voted for the RJA on the theory that, however one feels about capital punishment, there should be broad agreement that no person should be executed due to racial bias.[64] The need for the RJA was apparently so palpable that it was supported by Hugh Holliman, a Democratic legislator who not only supported the death penalty, he had unthinkably tragic personal experience with it. Holliman's teenage daughter was raped and murdered in 1998, and Holliman attended the execution of the man who committed the crime.[65] Holliman nonetheless voted for the RJA because he felt the death penalty needed to be fair.[66] Even with the accumulation of evidence that the RJA was badly needed, its passage was far from a sure thing. It only passed after Senator Floyd McKissick Jr. "[stood] up to the majority leader," and "tenacious[ly]" and "relentlessly" worked to obtain the necessary votes.[67]

C. *Post-Enactment*

The enactment of the RJA led two researchers from the Michigan State University ("MSU") College of Law, Catherine Grosso and Barbara O'Brien, to conduct an empirical study of jury selection patterns in the cases of all North Carolina prisoners on death row as of 2010.[68] This amounted to a study of 173 jury selection proceedings and approximately 7,400 jurors.[69] The researchers discovered that prosecutors struck Black citizens from jury service at twice the rate that they struck other jurors, and this racist pattern persisted even after

63. *See* Jack Brook, *Racism Tainted Their Trials. Should They Still Be Executed?*, MARSHALL PROJ. (Aug. 7, 2019, at 06:00 ET), https://www.themarshallproject.org/2019/08/07/racism-tainted-their-trials-should-they-still-be-executed [https://perma.cc/RMK2-LQD5].

64. Democratic Senator Doug Berger stated that he supported the death penalty, but added: "I think most people in the state want to know, when the death penalty is administered, that race didn't have anything to do with itand [sic] that's what this law is going to do." Matt Saldaña, *North Carolina General Assembly Passes Racial Justice Act*, INDY WEEK (Aug. 6, 2009), https://indyweek.com/news/archives-news/north-carolina-general-assembly-passes-racial-justice-act/ [https://perma.cc/3UXT-58PH].

65. *See N.C. GOP Chair Apologizes for Pain Caused by Mailer*, WRAL NEWS (Oct. 22, 2010, at 06:50 ET), https://www.wral.com/story/8493188/ [https://perma.cc/P9QA-9L7V].

66. Holliman's support for the RJA may have ended his political career. Following the RJA's passage, Holliman was voted out of office on the heels of an election mailer that falsely claimed the RJA would result in death row inmates getting out of prison. *Id.* One of the inmates pictured on the mailer, Henry McCollum, would actually be released—not because of the RJA—but because McCollum was innocent. *See* Eric Garcia, *Henry McCollum's Innocence and the Stakes for Death Row Inmates in a Red State*, AM. PROSPECT (Sep. 25, 2014), https://prospect.org/2014/09/25/henry-mccollum-s-innocence-stakes-death-row-inmates-red-state/ [https://perma.cc/FB3Z-EK5L].

67. *See* Saldaña, *supra* note 64.

68. Catherine M. Grosso & Barbara O'Brien, *A Stubborn Legacy: The Overwhelming Importance of Race in Jury Selection in 173 Post-*Batson *North Carolina Capital Trials*, 97 IOWA L. REV. 1531, 1533 (2012).

69. *Id.* at 1543–44.

controlling for race-neutral variables that might otherwise explain prosecutors' behavior.[70] The evidence this study unearthed provided the basis to support the RJA claims of four death row prisoners who had their cases heard in 2012 over the course of two extensive evidentiary hearings in Cumberland County.[71]

1. The Case of Marcus Robinson

Following the enactment of the RJA in 2009, Marcus Robinson, a Black man on North Carolina's death row for the killing of a White man, filed an RJA motion on the basis that at the time of his trial, race was a significant factor in prosecutions' use of peremptory strikes in Cumberland County and across North Carolina.[72] Robinson was the first individual to receive a hearing and relief under the RJA.[73] Finding the MSU study to be statistically sound, the trial court agreed that racial disparities did in fact exist such that race was a significant factor in prosecutors' use of peremptory strikes in Cumberland County and the state of North Carolina at the time of Robinson's trial in 1994.[74] The court also concluded race was a significant factor in prosecutors' exercise of peremptory strikes in Cumberland County and in the state of North Carolina from 1990 to 2010.[75] The court determined that prosecutors intentionally used the race of jury venire members as a significant factor in deciding whether to exercise peremptory strikes.[76] This is notable because the RJA does not require a showing of intentional discrimination. Ultimately, the presiding judge, Senior Resident Superior Court Judge Gregory A. Weeks, vacated Robinson's death sentence and resentenced him to life without parole.[77]

2. Narrowing of the Racial Justice Act

Nearly three months after Marcus Robinson's successful RJA claim, the newly Republican-controlled legislature enacted an amended RJA statute that created additional barriers to post-conviction relief.[78] The amended act

70. *Id.* at 1548, 1551.

71. *See* Order Granting Motion for Appropriate Relief, State v. Robinson, No. 91CR023143-250 (N.C. Super. Ct. Apr. 20, 2012) [hereinafter Robinson Order]; Order Granting Motions for Appropriate Relief, State v. Augustine, Golphin & Walters, Nos. 97CR047314-250, 98CR034832-250, 98CR035044-250, 01CR065079-250 (N.C. Super. Ct. Dec. 13, 2012) [hereinafter Golphin Order].

72. *See* Robinson Order, *supra* note 71, at 1.

73. Peter J. Tomasek, *Robinson Receives Racial Justice Act Relief in NC*, INTERROGATING JUSTICE (Dec. 28, 2020), https://interrogatingjustice.org/death-sentences/robinson-receives-racial-justice-act-relief-in-nc/ [https://perma.cc/F3TD-63RN].

74. *See* Robinson Order, *supra* note 71, at 162.

75. *Id.*

76. *Id.* at 164.

77. *Id.* at 167; *see also* Robert P. Mosteller, *Responding to* McCleskey *and* Batson*: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 OHIO STATE J. CRIM. L. 103, 134–43 (2012) (providing an in-depth analysis of the *Robinson* evidentiary hearing).

78. An Act to Amend Death Penalty Procedures, ch. 136, §§ 3–10, 2012 N.C. Sess. Laws 471, 471–73 (2012) (codified as amended at N.C. GEN. STAT. §§ 15-188, 15A-2004(b), 15A-2011).

significantly narrowed a statistical study's timeframe, limiting it to ten years before the offense date until two years after the imposition of the death sentence.[79] Under the amended law, a movant had to show race was a significant factor in the State's decision to seek or impose a death sentence in only the county or prosecutorial district.[80] Next, the amended statute required more than statistical evidence to establish that race was significant in the charging or imposition of a death sentence.[81] The amended statute placed a new barrier to entry where a court first had to decide if sufficient evidence was alleged, and if so, only then would the court order an evidentiary hearing.[82] If a court found the defendant failed to state a sufficient RJA claim, it had to dismiss the claim without the benefit of a hearing.[83] Finally, and seemingly targeting Marcus Robinson's case, which by then was pending on the State's appeal, the amended act included a provision applying to any orders granting relief based on an RJA claim that were either vacated or overturned on appellate review.[84]

3. The Cases of Golphin, Walters, and Augustine

Following the substantial narrowing of the RJA statute, an evidentiary hearing on the cases of Tilmon Golphin, Christina Walters, and Quintel Augustine commenced on October 1, 2012, in Cumberland County pursuant to the original and newly amended act.[85] Judge Weeks presided again.[86] Evidence at this hearing included statistical data from the MSU study reflecting disparities in prosecution strike rates; prosecutors' "words and deeds," including notes characterizing Black prospective jurors using racially charged language;[87] and the use of a "cheat sheet" circulated during a state-sponsored prosecutor training on how to circumvent *Batson* challenges.[88]

79. *Id.* § 3(a), 2012 N.C. Sess. Laws at 471.

80. *Id.* § 3(c), 2012 N.C. Sess. Laws at 472. The original statute allowed for evidence of race discrimination in the judicial division and the State in addition to the county and prosecutorial district. *See* ch. 464, 2009 N.C. Sess. Laws 1213 (repealed June 19, 2013).

81. An Act to Amend Death Penalty Procedures § 3(e), 2012 N.C. Sess. Laws at 472.

82. *Id.* § 3(f)(2), 2012 N.C. Sess. Laws at 472.

83. *Id.* § 3(f)(3), 2012 N.C. Sess. Laws at 473. In the original statute, any RJA claim raised was entitled to a hearing. *See* North Carolina Racial Justice Act § 1, 2009 N.C. Sess. Laws at 1214.

84. An Act to Amend Death Penalty Procedures § 8, 2012 N.C. Sess. Laws at 473.

85. Golphin Order, *supra* note 71, at 1.

86. *Id.* at 210.

87. *Id.* at 3. Notes described prospective jurors as, "blk wino," "thug," and being from a "blk/high drug" area while deeming White jurors with criminal records harmless and acceptable, describing them with terms like, "drinks—country boy—ok," "fine guy," and—when describing a White venire member's extensive criminal record—the prosecutor characterized him more sympathetically as a "n[e'er] do well." *Id.* at 50–54 (alteration in original).

88. The North Carolina Conference of District Attorneys sponsored the "Top Gun II" training, and a one-page handout with the title "*Batson* Justifications: Articulating Juror Negatives" was disseminated. *Id.* at 73. This "cheat sheet" contained vague, prefabricated, "race-neutral" reasons for

In an attempt to defend against the evidence of discrimination, the State's expert asked prosecutors from around North Carolina to provide explanations for why they struck Black venire members.[89] In one case, a prosecutor protested, "I left one [B]lack person on the jury already."[90] In others, prosecutors admitted they struck Black jurors for plainly race-based reasons, such as having attended a historically Black college or university.[91] Prosecutors said they struck some Black jurors because they had complained of receiving unfair treatment from White police officers, because they seemed to lack intelligence, or because they had a "militant" demeanor.[92] In some cases, prosecutors examined court records but could not identify any reason why they had removed the Black jurors.[93] In scores of other death penalty cases across North Carolina, prosecutors claimed they struck Black jurors for certain "race-neutral reasons" but then accepted White jurors who had those same characteristics.[94]

After considering the overwhelming evidence of racial discrimination in capital jury selection, Judge Weeks concluded, pursuant to the original and amended RJA statutes, that Golphin, Walters, and Augustine all met their burden of showing that at the time their death sentences were imposed, race was a significant factor in the State's use of peremptory strikes not only in their individual cases but also in Cumberland and Brunswick Counties,[95] and statewide.[96] Judge Weeks vacated the death sentences of Augustine, Golphin, and Walters, and resentenced them to life without parole.[97]

4. Repeal and Retroactivity of the Racial Justice Act

At the time of the *Augustine* decision, Republicans still controlled the General Assembly. Despite Judge Weeks' findings of racial discrimination in

striking Black venire members. *Id.* at 73–81. For example, one prosecutor who employed this cheat sheet when striking a Black venire member for his "body language," "fold[ing] his arms," providing "basically minimal answers," and being "evasive" and "defensive." *Id.* at 74. A decade later, the Supreme Court of North Carolina would issue a decision concluding that this *Batson* training material did not constitute evidence of racial bias. *See* State v. Tucker, 385 N.C. 471, 494–500, 895 S.E.2d 532, 549–53 (2023). However, the dissent in *Tucker* argued that the training content was discriminatory because the prosecutors were "accused of relying on a preprinted list of acceptable strike reasons rather than providing the trial court with the true reason for their peremptory strike." *Id.* at 525, 895 S.E.2d at 569 (Earls, J., dissenting).

89. Golphin Order, *supra* note 71, at 112.

90. *Id.* at 113.

91. *Id.*

92. *Id.* at 114–16.

93. *Id.* at 119.

94. *See id.* at 112–36.

95. The court found Cumberland County to be the appropriate county under the amended RJA for Augustine's jury claims, but the court additionally found that Augustine met his burden as to Brunswick County, where his death sentenced was imposed. *See id.* at 207.

96. *Id.* at 201–07.

97. *Id.* at 210.

capital trials across the state, the legislature repealed the RJA and applied the repeal retroactively. The repeal was enacted in 2013.[98]

Meanwhile, Judge Weeks's decisions in the *Robinson* case, as well as the *Augustine* case, were pending on review in the Supreme Court of North Carolina. In 2015, the court issued decisions that did not address the repeal. Instead, in *Robinson*, the court vacated the order granting RJA relief and remanded for further proceedings, based on the lower court's decision to deny the State a third continuance before commencing the evidentiary hearing.[99] In *Augustine*, the Supreme Court of North Carolina again vacated the lower court order, holding that the continuance denial in *Robinson* prejudiced the State in the subsequent hearing.[100] The Court also said it was error to join three separate defendants—Augustine, Golphin, and Walters—for a single RJA hearing.[101]

On remand, there was a hearing to determine whether the RJA claims of Robinson, Golphin, Walters, and Augustine should be void in light of the repeal enacted during the appeal's pendency.[102] With Judge Weeks now retired, a different trial judge concluded that the repeal retroactively voided their claims and dismissed their RJA motions.[103] Following the dismissal of their claims, all four individuals were sent back to death row.[104]

On Robinson's petition for writ of certiorari, the Supreme Court of North Carolina considered whether the retroactive application of the RJA's repeal violated double jeopardy protections pursuant to North Carolina's constitution. The court held that it did,[105] and subsequently held the same for Golphin, Walters, and Augustine, and remanded all their cases back to the trial court for reinstatement of their sentences to life without parole.[106]

In companion cases *State v. Burke*[107] and *State v. Ramseur*[108]—decided at the same time as *Robinson* and *Augustine*—the Supreme Court of North Carolina addressed the retroactivity provision of the repeal of the RJA and found that it

98. The legislative and voting history on the RJA repeal is available through the North Carolina General Assembly Bill Lookup. *Senate Bill 306*, N.C. GEN. ASSEMB., https://www.ncleg.gov/BillLookup/2013/S306 [https://perma.cc/N762-HKJS].

99. State v. Robinson, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015).

100. State v. Augustine, 368 N.C. 594, 594, 780 S.E.2d 552, 552–53 (2015).

101. *Id.*

102. State v. Robinson, 375 N.C. 173, 182–83, 846 S.E.2d 711, 719 (2020).

103. *Id.*

104. Madeline Carlisle, *Their Death Sentences Were Overturned Because of Racial Bias. Now North Carolina Might Leave Them Back on Death Row*, TIME (Aug. 26, 2019, at 09:55 ET), https://time.com/5659100/north-carolina-death-penalty/ [https://perma.cc/23QW-LCN3].

105. *Robinson*, 375 N.C. at 187, 846 S.E.2d at 722 (reasoning that when "the trial court found that Robinson had proven all of the essential elements under the RJA to bar the imposition of the death penalty, he was acquitted of that capital sentence, jeopardy terminated, and any attempt by the State to reimpose the death penalty would be a violation" of the North Carolina Constitution).

106. State v. Augustine, 375 N.C. 376, 377, 847 S.E.2d 729, 730 (2020).

107. 374 N.C. 617, 843 S.E.2d 246 (2020).

108. 374 N.C. 658, 843 S.E.2d 106 (2020).

was unconstitutional.[109] These decisions restored the rights of over 130 death row prisoners who had filed claims under the law.[110]

5. Chief Justice Beasley's Recognition of Racism in Criminal Justice

These RJA rulings were issued in the summer of 2020 against the backdrop of the nation's "racial reckoning"[111] after the murder of George Floyd. Following Floyd's murder, Chief Justice Cheri Beasley of the Supreme Court of North Carolina held a press conference where she delivered an impassioned public plea for the North Carolina court system to confront the data and experiences that "overwhelmingly bear[] out the truth [that] . . . [i]n our courts, African-Americans are more harshly treated, more severely punished[,] and more likely to be presumed guilty."[112]

Chief Justice Beasley's *Robinson* opinion was the first time in the state's history that a supreme court decision acknowledged and chronicled the intertwined history of racism, racial bias in the selection of juries, and the administration of capital punishment. Chief Justice Beasley wrote: "[t]he same racially oppressive beliefs that fueled segregation manifested themselves through public lynchings, the disproportionate application of the death penalty against African-American defendants, and the exclusion of African-Americans from juries."[113] The *Robinson* opinion is a historic declaration that advocates, particularly those in North Carolina, should carry with them and deploy in future campaigns to persuade state officials to address historically-rooted racial bias in government.

II. *STATE V. BACOTE*

The 2020 RJA decisions, particularly the *Ramseur* decision, paved the way for the RJA's latest lead case, *State v. Bacote*. This part will discuss Bacote's underlying case, the evidence revealed during his 2024 evidentiary hearing, and the superior court's order on his RJA motions for appropriate relief ("MARs").

109. *Burke*, 374 N.C. at 617, 843 S.E.2d at 248; *Ramseur*, 374 N.C. at 660, 843 S.E.2d. at 107–08.

110. *North Carolina Supreme Court Strikes Down Racial Justice Act Repeal, Permits Race Challenges by 140 Death-Row Prisoners*, DEATH PENALTY INFO. CTR. (June 8, 2020), https://deathpenaltyinfo.org/north-carolina-supreme-court-strikes-down-racial-justice-act-repeal-permits-race-challenges-by-130-death-row-prisoners [https://perma.cc/YUS6-RTPH].

111. *See* Nicole Chavez, *2020: The Year America Confronted Racism*, CNN, https://www.cnn.com/interactive/2020/12/us/america-racism-2020/ [https://perma.cc/C5UH-4LED] (describing America in 2020 as the "epicenter of racial reckoning").

112. Press Release, N.C. Jud. Branch, Chief Justice Beasley Addresses the Intersection of Justice and Protests Around the State (June 2, 2020), https://www.nccourts.gov/news/tag/press-release/chief-justice-beasley-addresses-the-intersection-of-justice-and-protests-around-the-state [https://perma.cc/KZL5-VGEB].

113. State v. Robinson, 375 N.C. 173, 178, 846 S.E.2d 711, 716 (2020).

A. *Factual and Procedural History*

On April 2, 2009,[114] Hasson Bacote, a twenty-one-year-old Black man, was found guilty and sentenced to death for the murder of an eighteen-year-old during a robbery in Johnston County.[115]

The road that led to Bacote's death sentence began with abuse at an early age.[116] He was abandoned by his parents, watched his maternal aunt die when he was only seven, and then entered the foster care system where he was physically and sexually abused, and also separated from his brother, the only stable figure in Bacote's life.[117] At just 21 years old, Bacote was involved in a robbery that took place in a trailer.[118] A witness testified that when one of the young men in the trailer fled, Bacote fired a single shot in his direction.[119] Nobody on the scene even realized the man was shot until they went outside the trailer and found him collapsed on the ground.[120]

The State prosecuted Bacote solely on a theory of felony murder, a doctrine holding individuals responsible for murder committed during the course of another felony.[121] At the pretrial charge conference, the prosecution explicitly admitted that the evidence did not support an argument that Bacote premeditated the murder.[122] Thus, the crime itself was not aggravated compared to other crimes where sentences of death are imposed. It is extremely rare for a person to be sentenced to death without a finding that the killing was premeditated.[123]

In February and March 2024, there was a nearly two-week evidentiary hearing on Bacote's RJA MAR in the Criminal Superior Court of Johnston County.[124] Superior Court Judge Wayland Sermons presided.[125]

B. *Judge Sermons's Order*

Judge Sermons's ruling addresses claims alleging race discrimination by prosecutors in jury selection and by jurors in capital sentencing decisions. However, before reaching the claims themselves, Judge Sermons addressed a number of important statutory questions about the RJA's meaning.

114. Bacote Order, *supra* note 11.

115. Kristin Collins, *The Case of Hasson Bacote*, CTR. FOR DEATH PENALTY LITIG. (Feb. 21, 2024), https://www.cdpl.org/the-case-of-hasson-bacote/ [https://perma.cc/42BT-4ETV].

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Bacote Order, *supra* note 11, at 7.

122. *Id.* at 114–15.

123. *Id.*

124. *Id.* at 24.

125. *Id.* at 1.

As a preliminary matter, the court acknowledged that neither the RJA statutes nor North Carolina courts have defined what constitutes "significant" for the purposes of determining whether race was a significant factor, but found that Bacote could prevail on his claims if he could show disparities of "practical and/or statistical significance."[126] The court held that the RJA statutes did not require proof of discrimination in a defendant's individual case.[127] Looking to the plain language of section 15A-2011(a), the court reasoned that a defendant raising an RJA claim does not have to establish racial impacts on the "final composition of the defendant's jury or outcome in the specific case" and held that a successful RJA claim could rely upon statistical proof in the aggregate rather than in the defendant's own case.[128]

1. Statistical Data

Because sufficient evidence of racial discrimination under the RJA has a less exacting burden than under federal constitutional law (which requires an individualized showing of intentional discrimination), the court found that evidence in cases where *Batson* was not raised or where a *Batson* violation was not found was still appropriate to consider in its RJA determination.[129] The court reasoned that strike decisions, regardless of whether a *Batson* objection was raised or sustained, are relevant to a jury selection claim because "a defendant is permitted to use statistical evidence that considers strike decisions in the aggregate to determine if there is a racial disparity."[130] Finally, the court found that evidence from January 1, 1970 to April 9, 2011 tended to show the role of race in jury selection and sentencing was "presumptively relevant."[131] The court kept the door open to any evidence outside of that timeframe if the proponent of the evidence could show its relevance.[132]

During the evidentiary hearing, to prove that race was a significant factor in capital jury selections, counsel for Bacote presented evidence from the MSU study of "176 jury selection proceedings in capital cases in North Carolina" resulting in death sentences.[133] The court agreed and accepted the study as

126. *Id.* at 19–20.

127. *Id.* at 20.

128. *Id.* at 21.

129. *Id.*

130. The court distinguished the use of this evidence from the *Tucker* court's proscription of this evidence used in the 2011 MSU study. The court reasoned that, in *Tucker*, the 2011 MSU study was offered as newly discovered evidence to make a prima facie showing for purposes of *Batson's* first step, which involves a different legal standard that was not at issue in *Bacote*. *See id.* at 22.

131. *Id.* at 23.

132. *Id.*

133. *Id.* at 31. This is the same MSU study referenced *supra* note 64, conducted by MSU College of Law Professors Barbara O'Brien and Catherine Grosso. *See* Bacote Order, *supra* note 11, at 31. Their findings have been at the heart of all North Carolina RJA proceedings. *See id.* at 39. The cases they studied included the individuals on death row at the time the RJA was passed. *See id.* at 32, 39.

evidence in determining whether race played a significant role in jury selection in capital cases in Johnston County, capital cases in Prosecutorial District Eleven, capital cases that Bacote's trial prosecutor ADA Gregory Butler tried, and Bacote's case individually.[134]

The data revealed that in Prosecutorial District Eleven, prosecutors struck 51.4% of eligible Black venire members, compared to 28.5% of non-Black venire members, for a strike ratio of 1.83.[135] In Johnston County, prosecutors struck 54.1% of eligible Black venire members, compared to 28.5% of non-Black venire members, for a strike ratio of 1.9.[136] In the four cases in which Butler was lead counsel during the RJA's enactment, there was a strike ratio of 3.48.[137] All of these strike rates were deemed to be statistically significant.[138] In the seven cases where Butler served as lead counsel, the strike rate was 3.25.[139] The various strike rates in Butler's prosecutions varied based on the race of the defendant, where White defendants had a substantially lower strike rate than Black defendants.[140]

The MSU study also looked for all-White or nearly all-White juries (defined as juries with only one person of color). The study determined that in thirty-five cases, all-White juries sentenced individuals to death, and in forty cases, nearly all-White juries sentenced individuals to death.[141] The court found this to be corroborating evidence in Bacote's claim that race was a significant factor in capital jury selection in North Carolina.[142]

134. *Id.* at 46. The court considered only Bacote's county, district, and case-specific RJA claims. The court declined to reach Bacote's claims based on statewide data, predominantly because the court was not persuaded that the MSU study's methodology could support broad findings on a statewide basis. *Id.* at 37–39.

135. *Id.* at 49.

136. *Id.*

137. *Id.* at 49–50. Butler was the lead prosecutor in Bacote's trial and also served as lead counsel in seven cases. The MSU study included four of these cases, including Bacote's, because the defendants were on death row at the time. *Id.* at 49.

138. *Id.*

139. *Id.* at 51.

140. *Id.*

141. *Id.* at 56.

142. *Id.*

2. Historical Evidence of Discrimination

The court found that Bacote's use of observational and archival studies,[143] experimental studies,[144] historical evidence,[145] and unconscious bias and racial stereotypes[146] corroborated the statistical study. The court heard from Dr. Crystal Sanders, a Johnston County native and an expert in African American Studies and twentieth-century Unites States history;[147] Dr. Seth Kotch, a North Carolina native who has studied and published scholarship on the history of the death penalty in North Carolina and the RJA;[148] and Professor Bryan Stevenson, a preeminent figure and an expert on racial bias in capital punishment and jury selection.[149]

The court acknowledged the history of racial bias in North Carolina, finding ties to the current exclusion of Black jurors.[150] While the court's primary focus was on evidence from 1970 to 2011, it recognized the importance of further historical context and thus admitted evidence of earlier North Carolina history.[151] The court acknowledged Dr. Kotch's and Professor Stevenson's testimony explaining that *Furman* addressed death penalty statutes which gave far too much room for racial bias to influence capital charging and sentencing, however the United States Supreme Court's decision in *Furman* did little to eliminate the issue of Black people being disenfranchised from jury selection.[152] While jury pools in North Carolina became more diverse in the 1970s and 1980s,

143. *Id.* at 74. Dr. Sommers and the MSU researchers cited to studies in different jurisdictions that had similar results. *Id.* A study of 317 capital murder cases in Philadelphia County, Pennsylvania, during a seventeen-year period revealed prosecutors struck on average fifty-one percent of Black potential jurors and twenty-six percent of non-Black potential jurors. *Id.* A similar study of 108 noncapital felony trials in Dallas County, Texas, found that prosecutors excluded Black prospective jurors at more than twice the rate of White prospective jurors. *Id.* Another study from a Louisiana parish from 1976 to 1981 found the striking of jurors was not race neutral. *Id.* Finally, in another North Carolina study, researchers analyzed strike decisions in thirteen non-capital felony trials. They found prosecutors to have used sixty percent of strikes against Black jurors, despite the fact that Black jurors consisted of only thirty-two percent of the venire. *Id.*

144. *Id.* at 74–75. Dr. Sommers and the MSU researchers cited to different studies they conducted tending to show race impacts the use of juror strikes and individuals "are adept at explaining their decisions in nonracial terms"; further, while explicit bias did not exist in these experiments, unconscious bias did. *Id.* at 75.

145. *Id.* at 91.

146. *Id.* at 76–78. ADA Butler acknowledged that unconscious bias exists but stated he took steps to minimize its effect when reviewing case files. *Id.* at 76–77. He did not, however, testify as to how he minimized the impact of unconscious bias during jury selection. *Id.* at 77.

147. *Id.* at 27.

148. *Id.* at 27–28; *see, e.g.*, SETH KOTCH, LETHAL STATE: A HISTORY OF THE DEATH PENALTY IN NORTH CAROLINA 18–21 (2019).

149. Bacote Order, *supra* note 11, at 28–29.

150. *Id.* at 87–91.

151. *Id.* at 81.

152. *Id.* at 83.

prosecutors began exercising peremptory strikes to ensure Black citizens did not make it from the jury pool onto the trial jury itself.[153]

The court found that "the history of racial discrimination in Prosecutorial District Eleven and in Johnston County contributed to biases and racial stereotypes of Black jurors that persist and influence prosecution strikes in these jurisdictions."[154] Dr. Sanders explained that while Black Johnstonians experienced some political advancement during Reconstruction, an 1898 "violent white supremacy campaign" halted any prospect of political advancement by Blacks in Johnston County.[155] Dr. Sanders cited one incident in particular: days before a November 1898 election, the Johnston County newspaper ran an editorial alerting readers against "Negro Rule" and urging White Johnstonians to "redeem the state."[156] Lynching was a tool to suppress Black progress and instill fear in Johnston County.[157] The court further found a correlation between the "historical underrepresentation" of Black people in "every facet of the criminal legal system" and the "historical exclusion" of Black jurors in Prosecutorial District Eleven and in Johnston County.[158] District Eleven did not hire a Black Assistant District Attorney until 1991.[159] At that point, Johnston County and District Eleven were no strangers to racially charged prosecutions.[160] The court cited the case of Robert Henry McDowell, a Black man with dark skin who in 1979 was wrongfully sentenced to death for the murder of a four-year-old child and the felonious assault of a fourteen-year-old, despite the fourteen-year-old's statement that a White man committed the crimes.[161] The District Attorney failed to disclose this statement to the defense, the court, or the jury, and as a result, McDowell served nine years in prison before the Fourth Circuit granted habeas relief.[162]

The court also discussed the case of Terence Garner, a Black child who was wrongfully convicted in the 1997 robbery and attempted murder of a white woman.[163] Garner, who was sixteen at the time, was sentenced to thirty-two to forty-eight years in prison, and despite another man's confession two days following Garner's conviction, Garner was denied multiple requests for a new

153. *Id.*

154. *Id.* at 86.

155. *Id.*

156. *Id.*

157. *Id.* at 86. Between 1884 and 1914, at least four Black men were lynched in Johnston County. *Id.*

158. *Id.* at 87.

159. *Id.*

160. *See id.* at 88.

161. *See* McDowell v. Dixon, 858 F.2d 945, 945, 947, 951 (4th Cir. 1988); *see also* Bacote Order, *supra* note 12, at 87–88 (discussing *McDowell*).

162. *McDowell*, 854 F.2d at 951; *see also* Bacote Order, *supra* note 11, at 88.

163. Bacote Order, *supra* note 11, at 88.

trial.[164] It was not until his story gained national attention prompted by a PBS *Frontline* story, that prosecutors reinvestigated the case and ultimately dismissed the charges against him.[165]

The court acknowledged that Black citizens in Johnston County experienced racial terror into the 2000s when the county was known as "Klan country," a reputation that stemmed from billboards advertising the county as such.[166] One billboard in particular, the court noted, stood a few blocks from the courthouse where Bacote's hearing took place.[167] Local officials granted permits for Klan chapters to have parades in the 1990s and early 2000s.[168]

The court also considered prosecution notes, handwritten during capital jury selection across the state.[169] Notes likening Black potential jurors to animals, using offensive stereotypes to characterize Black potential jurors, and focusing on their affiliations and addresses were rampant.[170] Prosecutor notes from a Cumberland County jury described a juror as a "B/M.[,] early 20s, broad shoulders, strong as a bull."[171] Prosecutors in Harnett County described one woman as a "very outspoken [B]lack woman."[172] In an Iredell County case, a prosecutor made note of the "good address" where a potential juror lived.[173] In a Robeson County trial, a prosecutor described a potential juror as "white living in a [B]lack section."[174] In Lee County, a prosecutor wrote and circled "NAACP" next to a potential juror, and in a Guilford County case, a prosecutor wrote "NC A&T"[175] next to a potential juror's answer on a questionnaire about where they received their master's degree.[176] The court reviewed many other racially motivated prosecution notes. This additional evidence showed that the effects of racial bias went well beyond jury selection.[177] In a Martin County case,

164. *Id.*

165. *Id.*; *An Ordinary Crime: Introduction*, PBS FRONTLINE (Jan. 10, 2002), https://www.pbs.org/wgbh/pages/frontline/shows/ordinary/etc/synopsis.html [https://perma.cc/PJF7-7UZM]; *see also* Maurice Possley, *Terence Garner*, NAT'L REGISTRY OF EXONERATIONS (Aug. 29, 2011), https://exonerationregistry.org/cases/10464 [https:perma.cc/V657-JYDK] (providing additional detail about Garner's exoneration).

166. Bacote Order, *supra* note 11, at 89.

167. *Id.*

168. *Id.*

169. *Id.* at 91.

170. *Id.* at 93.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. North Carolina A&T State University is a historically Black college in Greensboro, North Carolina. *See A&T History and Traditions*, N.C. AGRIC. & TECH. STATE UNIV., https://www.ncat.edu/about/history-and-traditions/index.php [https://perma.cc/DV4M-VSRC].

176. Bacote Order, *supra* note 11, at 94.

177. *See id.* at 93–96.

for example, a prosecutor wrote in a note about a potential juror that she was "[g]ood, keeps up w/gossip—bring her own rope."[178]

3. Butler's Disparate Treatment as to Bacote Individually

The court found the existence of disparate treatment in multiple cases prosecuted by Butler, including Bacote's individual case.[179] Butler's conduct, according to the court, "evince[d] both pretext and intent to discriminate.[180] In Bacote's case, jury selection began with eighteen potential Black jurors.[181] Ten of the jurors were dismissed for cause, and the State removed six of the eight remaining with peremptory strikes.[182] For five of those removed with peremptory strikes, Butler identified Black jurors' reservations about imposing the death penalty as his reason for striking.[183] However, Butler did not strike White jurors who had similar reservations.[184]

4. Johnston County Sentencing

The court found that in Johnston County between 1970 and 2011, every Black defendant with a capital charge who was tried by a jury received a sentence of death.[185] In stark contrast, White defendants tried capitally faced better than even odds of receiving a life sentence.[186] The court also found that the State failed to present significant race-neutral factors that would explain the stark racial disparities in sentencing.[187]

5. Felony Murder

The court accepted evidence that race is least likely to play a role in charging and sentencing when the crime is highly aggravated.[188] Likewise, less aggravated cases invite more discretion, which in turn introduces the possibility for racial bias.[189] The fact that racial bias accompanies felony murder prosecutions is starkly illustrated by this fact: of the eleven people sentenced to death between 1970 to 2011 solely based on the felony murder rule, all eleven are people of color and nine of the eleven are Black.[190] Bacote was the only individual on death row for first-degree murder based solely on felony murder,

178. *Id.* at 96.
179. *Id.* at 97.
180. *Id.*
181. *Id.* at 98.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 105.
186. *Id.*
187. *Id.* at 113.
188. *Id.* at 114.
189. *Id.*
190. *Id.*

and the State never presented evidence to the jury that the murder Bacote committed was premeditated and deliberate.[191]

Moreover, the intent of the death penalty is to punish the "worst of the worst"; the court, however, found that Black defendants have received death sentences in cases involving less aggravated crimes.[192]

6. Explicit Racism

The court also acknowledged that Butler invoked racist dog whistles rooted in anti-Black stereotypes when seeking death sentences for Black people before capital juries.[193] Butler had compared Black defendants to "animals on the African [plain]," described another Black defendant as "a piece of trash," and in Bacote's case, referred to him as a "thug."[194] Perhaps the clearest evidence that racial bias swayed a close sentencing decision in Bacote's case was found on his Sentencing Verdict Form, where the jury foreperson initially wrote "life without parole."[195] But after deliberating further, the jury returned a death sentence.[196] Bryan Stevenson testified that he had reviewed hundreds of capital verdict forms, and this was very unusual and reflected the likelihood that racial bias played a role in Bacote's sentencing.[197]

7. Conclusion of the Bacote Hearing

Ultimately, the court concluded Bacote met his burden of showing race as a significant factor in prosecutorial decisions to seek the death penalty and to strike Black qualified jurors in District Eleven at the time the State sought and imposed the death penalty on Bacote.[198] The court also concluded that race was a significant factor in Butler's prosecutorial decisions in seeking death sentences and striking Black, qualified, prospective jurors in Johnston County at the time of Bacote's trial.[199]

In an unexpected twist, on December 31, 2024, Governor Roy Cooper commuted Bacote's death sentence to life imprisonment without parole.[200] This occurred after the conclusion of the RJA evidentiary hearing, but before Judge Sermons issued his ruling. Even though the commutation meant that the RJA ruling would have no practical impact on Bacote—RJA relief is the same life sentence that Bacote received from Governor Cooper—Judge Sermons issued

191. *Id.* at 114–15.
192. *Id.*
193. *Id.* at 115–16.
194. *Id.*
195. *Id.* at 117.
196. *Id.*
197. *Id.*
198. *Id.* at 118.
199. *Id.* at 119.
200. Governor Press Release, *supra* note 15.

a ruling on the theory that Bacote's case has broader implications for future RJA litigation. Additionally, the conclusions of law the court set forth contemplate possible relief to those tried and sentenced to death either in Johnston County or in Prosecutorial District Eleven between 1970 and 2011, or prosecuted by Gregory Butler.[201]

III. NEXT STEPS AND LESSONS LEARNED

With the *Bacote* hearing concluded and the superior court's decision issued, the case is now pending before the Supreme Court of North Carolina. At this early stage in the appeal, the impact of *Bacote* on other North Carolina death row cases is uncertain. If the Supreme Court of North Carolina finds that *Bacote* is moot in light of the commutation that Governor Cooper granted, then lead-case litigation will begin anew in a different case at the superior court level. If the court does reach the merits in *Bacote*, it may construe the RJA narrowly to only permit relief when a defendant proves that race was a significant factor in his particular case, as opposed to allowing relief when broader patterns of racial bias were present. The court could also choose to revisit its 2020 decision in *Ramseur*, holding that the 2013 repeal of the RJA did not apply to claims filed prior to repeal. In that event, RJA claims might simply no longer exist. Chief Justice Newby espoused both of these views in his dissent in *Ramseur*.[202] Now, five years later, he is part of a conservative majority on the court.[203] The manner in which the Supreme Court of North Carolina interprets the RJA could also give rise to federal constitutional issues that may be pursued through federal court litigation. All of this is to say that the ultimate fate of the RJA remains very much up in the air. But there are still valuable lessons we can take away from the RJA's unfinished story.

First, the RJA experience underscores the familiar axiom, "culture eats policy for lunch." When the push to enact the RJA began around 2007, and culminated in its passage in 2009, the United States was in an era when conservative politics were at a low ebb in the wake of the Iraq War and related controversies.[204] Barack Obama rose to the presidency on a pledge to unite red

201. Bacote Order, *supra* note 11, at 120; NC APP. CTS. EFILING SITE, "State v. Hasson Bacote," 15 results (Nov. 4, 2025), https://www.ncappellatecourts.org/search-results.php?sDocketSearch=360A09-2&exact=1 [https://perma.cc/P5DS-WPP3].

202. *See* State v. Ramseur, 374 N.C. 658, 682–710, 843 S.E.2d 106, 122–39 (2020) (Newby, J., dissenting).

203. *See* Rusty Jacobs, *North Carolina Supreme Court's Conservative Majority Divided on Disputed Judicial Race*, WUNC (Jan. 8, 2025, at 14:57 ET), https://www.wunc.org/2025-01-08/north-carolina-supreme-courts-conservative-majority-divided-on-disputed-judicial-race [https://perma.cc/7UGZ-M3H3].

204. *See* Tom Curry, *10 Years Later, Iraq's Impact Still Pervades Republican Party*, NBC NEWS (Mar. 19, 2013, at 03:43 ET), https://www.nbcnews.com/politics/politics-news/10-years-later-iraqs-impact-still-pervades-republican-party-flna1c8937886 [https://perma.cc/9Z7X-9BJV].

and blue America behind an optimistic, moderately progressive agenda.[205] The RJA would have been viewed as a reflection of that moderation. It was not an effort to abolish the death penalty but to "fix it" by ensuring that it operated as evenhandedly as possible.[206] By 2012 and 2013, the backlash to President Obama's election was in full swing. The shift was racialized, at least in part.[207] It was at this same time that the North Carolina legislature pared back and then repealed the RJA.[208] By 2020, the country was firmly in the midst of the resistance to President Trump's first term and the racial justice protests spurred by George Floyd's murder.[209] This served as the backdrop for the Supreme Court of North Carolina to preserve filed RJA claims despite the repeal.[210] The court issued an opinion that for the first time in state judicial history acknowledged an ongoing legacy of racism in criminal justice and the death penalty.[211] Now, the Supreme Court of North Carolina's orientation has shifted yet again amid a national backlash to diversity initiatives, possibly portending the demise of the RJA. These parallels reveal an influence of politics and culture on legal efforts to address racial injustice that is difficult to ignore.

Second, the RJA experience underscores that racial bias is a particularly difficult policy problem to address. The most frequently cited reason is the emotional, personal, or cultural resistance that some have toward the very idea that racism continues to be a problem in society.[212] There are other factors as well. To begin, there is no societal consensus on what racism or racial bias is. Some define racism in its classic, most explicit form.[213] Prime examples in the legal context include Chief Justice John Roberts' opinions reversing criminal convictions when a prosecutor says he doesn't want a juror from a Black church or a court allowing an "expert" witness to testify to the racist notion that Black

205. *See* Barack Obama, *Keynote Address at the 2004 Democratic National Convention*, AM. PRESIDENCY PROJ. (July 27, 2004), https://www.presidency.ucsb.edu/documents/keynote-address-the-2004-democratic-national-convention [https://perma.cc/4UNH-5WPP].

206. *See* ch. 464, 2009 N.C. Sess. Laws 1213 (repealed June 19, 2013).

207. *See* Paul Harris, *Racial Prejudice in US Worsened During Obama's First Term, Study Shows*, GUARDIAN (Oct. 27, 2012, at 10:12 ET), https://www.theguardian.com/world/2012/oct/27/racial-prejudice-worsened-obama [https://perma.cc/C5X3-V93P].

208. *See* An Act to Amend Death Penalty Procedures, ch. 136, §§ 1–3, 2012 N.C. Sess. Laws 471, 471–72 (codified at N.C. GEN. STAT. §§ 15-188, 15A-2004(b), 15A-2011); Act of June 13, 2013, ch. 154, § 5(a), 2013 N.C. Sess. Laws 368, 372 (codified at N.C. GEN. STAT. §§ 15A-2010 to–15A-2012).

209. *See* Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, at 19:39 ET), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/ [https://perma.cc/DDG8-XUFF].

210. *See* State v. Robinson, 375 N.C. 173, 183, 846 S.E.2d 711, 719 (2020).

211. *Id.* at 175, 846 S.E.2d at 714 (acknowledging "the egregious legacy of the racially discriminatory application of the death penalty in this state").

212. *See, e.g.*, Keon West, *Are We a Racist Society: The Majority of Us Say No—but Science Begs to Differ*, GUARDIAN (Jan. 18, 2025, at 11:00 ET), https://www.theguardian.com/books/2025/jan/18/keon-west-science-of-racism-book-extract [https://perma.cc/297C-UGX8].

213. *See The Four Types of Racism*, UNITED WAY NAT'L CAP. AREA: BLOG (Oct. 9, 2024), https://unitedwaynca.org/blog/levels-of-racism/ [https://perma.cc/5HFC-LMDJ].

people are inherently more violent.[214] Others include in the definition of racism intentional practices that seem neutral or benign on their face but in practice have a disproportionate impact on people of color.[215] Still others define racism to include unconscious or unintentional conduct influenced by racial preferences that operate at a subconscious level, driven by unspoken cultural norms.[216] If people cannot agree on how to define a problem, it is inevitably difficult to work out a solution.

Similarly, even assuming there is consensus that racism in some form is a problem, there are dramatically different ideas about whether and how courts should go about addressing it. Famously, Chief Justice Roberts argued it is like a light switch we can simply turn off: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[217] Justice Clarence Thomas has espoused another school of thought, that racism will always exist and that rather than trying to fruitlessly stamp it out, courts should allow litigants wide latitude to take race-based actions that will "balance out" possible biases and make trials more fair.[218] Then, there are those who believe courts should take a more active role in ferreting out the less obvious vestiges of historic racism that manifest as disproportionate impacts.[219] Still others argue that historic American racism has already been fixed and no longer exists at all in the legal system.[220] In light of the ongoing and fierce debate between these competing schools of thought, it should come as no surprise that the RJA has had such a difficult time maintaining its forward momentum.

A third takeaway from the RJA is that while moderation may be necessary to gain the support needed to enact policy change, it is not at all clear that moderation tempers the backlash or protects the policy from repeal. A classic example is the United States Supreme Court's decision in *Brown v. Board of*

214. *See* Foster v. Chatman, 578 U.S. 488, 512–14 (2016); Buck v. Davis, 580 U.S. 100, 121 (2017).

215. *See The Four Types of Racism*, *supra* note 213.

216. *See id.*

217. Parents Involved in Comm. Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 748 (2007).

218. *See* Campbell v. Louisiana, 523 U.S. 392, 404 (1998) (Thomas, J., dissenting) ("The *Batson* doctrine, rather than helping to ensure the fairness of criminal trials, serves only to undercut that fairness by emphasizing the rights of excluded jurors at the expense of the traditional protections accorded criminal defendants of all races.").

219. *See, e.g.*, Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) ("We must not pretend that the countless people who are routinely targeted by police are 'isolated.' They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but." (citation omitted)).

220. *See, e.g.*, Josh Hammer, *Supreme Court Ends the Last Vestige of "Systemic Racism" in America*, NEWSWEEK (June 30, 2023, at 09:21 ET), https://www.newsweek.com/supreme-court-ends-last-vestige-systemic-racism-america-opinion-1810054 [https://perma.cc/7XAT-RA5G] (remarking that *SFFA* eliminated "[t]he last trace of genuine, government-legitimized 'systemic racism' in America").

Education of Topeka[221] to provide states with flexibility and time to slowly implement racial desegregation of schools.[222] The Court instructed states to act with "all deliberate speed" and to "make a prompt and reasonable start toward full compliance."[223] But rather than adopting plans for gradual compliance, southern states responded with all-out resistance and refusal.[224] In a more modern example, President Obama's decision to model healthcare reform efforts after conservative, market-based proposals seemed to do very little to tamp down opposition, including alarmist warnings about "death panels."[225] The RJA could be similarly viewed as compromise legislation from the perspective of death penalty abolitionists. It accepted the premise of the death penalty's existence and merely sought to remedy prior death sentences tainted by racial bias and to ensure that future death sentences did not need to be remedied in the first place. The law also mandated that the most relief anyone could gain under it was a sentence to life imprisonment without parole, precluding any chance of release even after decades of incarceration.[226] In 2012, the RJA was amended to narrow its scope, making it more difficult to obtain relief.[227] Yet none of this was sufficient to prevent the RJA's total repeal the next year.[228] The familiar lesson here is that adoption of a new racial justice policy—even one that is fairly modest in its means or aims—is not the end of the fight; it is only the beginning.

Fourth, stories and narratives matter a great deal. The RJA was enacted on the heels of the exonerations of three innocent Black men from North Carolina's death row in 2007 and 2008.[229] The North Carolina NAACP president at the time, Reverand William Barber, prioritized the RJA's

221. 349 U.S. 294 (1955).

222. *See id.* at 300–01.

223. *Id.* at 234, 301.

224. *See, e.g.*, *The Southern Manifesto and "Massive Resistance" to* Brown v. Board of Education, LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown [https://perma.cc/825E-DTEC] ("Almost immediately after Chief Justice Earl Warren finished reading the Supreme Court's unanimous opinion in *Brown v. Board of Education* in the early afternoon of May 17, 1954, [s]outhern white political leaders condemned the decision and vowed to defy it.").

225. *See* Don Gonyea, *From the Start, Obama Struggled with Fallout from a Kind of Fake News*, NPR (Jan. 10, 2017, at 16:08 ET), https://www.npr.org/2017/01/10/509164679/from-the-start-obama-struggled-with-fallout-from-a-kind-of-fake-news [https://perma.cc/94C4-Q8N3].

226. Ch. 464, 2009 N.C. Sess. Laws 1213 (repealed June 19, 2013).

227. An Act to Amend Death Penalty Procedures, ch. 136, §§ 1–3, 2012 N.C. Sess. Laws 471, 471–72 (codified at N.C. GEN. STAT. §§ 15-188, 15A-2004(b), 15A-2011).

228. Act of June 13, 2013, ch. 154, § 5(a), 2013 N.C. Sess. Laws 368, 372 (codified at N.C. GEN. STAT. §§ 15A-2010 to–15A-2012).

229. *See supra* Section I.A.

enactment as part of his civil rights agenda.[230] A prominent theme of the legislature's debate on the RJA was that, assuming the death penalty remained on the books in North Carolina, its application should at least be unbiased.[231] When the RJA was repealed in 2013, the North Carolina Conference of District Attorneys brought victims' family members to the legislature to tell the wrenching stories of their loved ones' murders and to talk about the executions they were promised.[232] In 2012, a particularly divisive election mailer criticized a legislator who voted for the RJA by falsely claiming it would result in the release of people who committed murder.[233] And as discussed, when the Supreme Court of North Carolina preserved RJA claims in 2020, the predominant criminal justice stories at that time were harrowing tales of police brutally choking and gunning down unarmed Black people.[234] While data and statistically provable patterns of bias certainly play a critical role in policymaking, it is likely that the stories that bring the data to life are far more powerful.

This lesson seems applicable to the *Bacote* litigation itself. The court there found powerful statistical evidence that Black jurors were far more likely to be excluded in capital cases tried in that county or by Bacote's prosecutor Gregory Butler. This pattern of racial exclusion from civic life is appalling, but likely will not create as searing a memory as the fact that Butler, acting as a representative of the State, called Black capital defendants African animals, trash, and thugs.

Fifth, victory in civil rights litigation or policymaking may not always mean court victory for the client or permanent changes in law—yet these efforts

230. *See Grassroots Leader Rev. Dr. William Barber on the Fight for Voting, Civil Rights in North Carolina*, DEMOCRACY NOW! (Sep. 4, 2012), https://www.democracynow.org/2012/9/4/grassroots_leader_rev_dr_william_barber [https://perma.cc/S7QW-WGBC] (explaining that Barber "helped win passage of the state's Racial Justice Act").

231. *See* State v. Robinson, 375 N.C. 173, 175, 846 S.E.2d 711, 714 (2020) ("The goal of this historic legislation was simple: to abolish racial discrimination from capital sentencing. That is, to ensure that no person in this state is put to death because of the color of their skin.").

232. *See* Bob Geary, *Family Members of Murder Victims Urge Purdue: Keep Racial Justice Act, Veto SB 9*, INDY WK. (Dec. 12, 2011), https://indyweek.com/news/archives-news/family-members-murder-victims-urge-perdue-keep-racial-justice-act-veto-sb-9/ [https://perma.cc/M668-SRSL] ("The DA's group came to Raleigh two weeks ago with other murder victims' family members who support the death penalty and want it imposed in their cases regardless whether racial bias infects the *system* of capital punishment.").

233. *See* Lisa Sorg, *Victims' Families Group Responds to Error-Filled Racial Justice Act Mailer*, INDY WK. (Oct. 28, 2010), https://indyweek.com/news/archives-news/victims-families-group-responds-error-filled-racial-justice-act-mailer/ [https://perma.cc/D3XP-ZSW8] ("The flyer contained numerous blatant errors and scare tactics, falsely stating that prisoners released from death row under the RJA would be freed.").

234. This practice is ongoing. *See* Steven Rich, Tim Arango & Nicholas Bogel-Burroughs, *Since George Floyd's Murder, Police Killings Keep Rising, Not Falling*, N.Y. TIMES (May 24, 2025), https://www.nytimes.com/2025/05/24/us/police-killings-george-floyd.html [https://perma.cc/TA8R-MHGD (dark archive)].

are no less essential. The United States Supreme Court long ago stopped requiring public school systems to take affirmative steps to racially integrate classrooms.[235] In measurable ways, the rollback of constitutional enforcement resulted in a resurgence of racially segregated schools.[236] But after decades of court-ordered desegregation, the anger of the 1950s and 1960s gave way to widespread social acceptance of children of different races attending school under the same roof. Although the constitutional law itself did not endure, its effect on American culture did. Likewise, the RJA itself may not endure, but the evidence of explicit racism and patterns of racial bias it revealed hopefully will positively influence the prosecutors who pursue capital cases, the judges who preside over them, and the lawmakers who shape death penalty statutes.

Finally, the RJA should serve as a reminder for advocates of just how much work and persistence is required to obtain even modest civil rights gains, especially in the criminal justice context. Once its story is fully written, the RJA's tangible impact may not be as sweeping as its framers originally hoped. Given the broad patterns of racial bias that the MSU study identified in existing death row cases, the RJA—now facing a skeptical state appellate court—will likely fall far short of fully remedying the bias that tainted those cases. Yet, any assessment of the RJA's success should account for just how Sisyphean a task it has been to make progress against racism in criminal cases, let alone those that are the most emotional, complex, and challenging. As already described, in *McCleskey*, the United States Supreme Court would not grant relief or recognize any constitutional issue even though it credited and accepted the statistical evidence of racial bias in Georgia capital prosecutions. Following *McCleskey*, under the legal standard it established for obtaining relief based on racially biased death sentencing, it appears that no person has ever received a reversal of their death sentence.[237] Under the *Batson* standard for policing racial bias in jury selection, no person in North Carolina has ever been removed from death row because of racial discrimination against a potential juror.[238] It would be absurd to suggest that these results are because race discrimination does not exist. Rather, these results are more plausibly explained by the political, cultural, and legal headwinds that this Article has explored. Measured against

235. *See* Board of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991); *see also On This Day—Jan. 15, 1991: U.S. Supreme Court Lifts Desegregation Decree, Authorizing One-Race Schools in Oklahoma City*, EQUAL JUSTICE INITIATIVE, https://calendar.eji.org/racial-injustice/jan/15 [https://perma.cc/NXQ8-3PUN] (stating that *Dowell* allowed schools to "resegregate into de facto one-race schools").

236. Daniel S. Levine, *Schools Resegregate After Being Freed from Judicial Oversight, Stanford Study Shows*, STAN. CTR. FOR EDUC. POL'Y ANALYSIS (Dec. 5, 2012), https://cepa.stanford.edu/news/schools-resegregate-after-being-freed-judicial-oversight-stanford-study-shows [https://perma.cc/B4VJ-2DH4].

237. Cassandra Stubbs, *The Dred Scott of Our Time*, ACLU (Apr. 16, 2012) https://www.aclu.org/news/capital-punishment/dred-scott-our-time [https://perma.cc/93VN-T6FD].

238. *See* Pollitt & Warren, *supra* note 32, at 1963.

this backdrop, the RJA can and should be viewed as a landmark success in the broader fight for civil rights. In the space of little more than a decade, the RJA facilitated the removal of five people from death row. A sixth person was removed from death row for mental competency reasons, but his case was resolved only after he raised a compelling RJA claim.[239] Fifteen more received clemency based on a range of factors cited by Governor Cooper, including "[t]he potential influence of race, such as the race of the defendant and victim, composition of the jury pool and the final jury, and evidence and testimony offered at trial."[240] These impressive results are a testament to the vision of the advocates and legislators who crafted the RJA, the tenacity of the litigators who fought to uncover and present evidence in court, and the resilience of the clients who endured collective decades under the threat of execution pursuant to death sentences sought or obtained on the basis of race.

CONCLUSION

As UNC's own Jack Boger has observed, "[a] well-constructed litigation campaign has the potential to shape public understanding, even though it fails in a purely legal setting, *if* it is carried out with the greatest candor, rigor, and transparency."[241] Professor Boger also highlighted the importance of persistence: "[S]ome truths gain their power not on first encounter, but only over time."[242] The RJA may result in more death row prisoners having their death sentences vacated. It may not. That remains to be seen. What we do know is that the truths the RJA uncovered about persistent racism in capital punishment will continue to shape our legal system in the decades to come, especially if we continue to tell them.

239. Staff, *Death Row Inmate Gets Death Sentence Commuted*, ABC 11 NEWS (Feb. 18, 2011), https://abc11.com/archive/7966673/ [https://perma.cc/5HWU-W8LM].

240. Governor Press Release, *supra* note 15.

241. John Charles Boger, *McCleskey v. Kemp: Field Notes from 1977–1991*, 112 NW. L. REV. 1637, 1681 (2018).

242. *Id.* at 1682.