

STATE OF NORTH CAROLINA
COUNTY OF JOHNSTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 07 CRS 1865-66, 51499

STATE OF NORTH CAROLINA)
)
 v.)
)
 HASSON J. BACOTE,)
)
 Defendant.)

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DEFENDANT'S BRIEF IN SUPPORT OF STATEWIDE CLAIM

In response to the Court's order of October 7, 2021; Defendant Hasson J. Bacote, through counsel, submits this Brief in support of his request that the Court conduct a single evidentiary hearing on his claims that race was a significant factor in prosecution jury strike decisions in Johnston County and Prosecutorial District 11, Judicial Division 4, and throughout North Carolina.

Statement of the Case

Defendant Hasson Bacote is one of over 100 men and women sentenced to death in North Carolina who sought relief under the Racial Justice Act (RJA) in 2010, which allowed four alternative bases for proof that race was the basis of the decision to seek or impose a death sentence: evidence that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2011(a). He then amended his claim in 2012, after the General Assembly narrowed the RJA and eliminated statewide discrimination as a basis for relief. In 2013, the General Assembly repealed the RJA altogether, and, in 2020, the Supreme Court of North Carolina held that the repeal of the RJA, after a capital defendant had filed a motion under the RJA alleging that racial bias tainted the death sentence, could not be applied retroactively to bar RJA claims without violating the defendant's right under the North Carolina Constitution to be free from ex post facto punishment. *State v. Ramsey*, 374 N.C. 658, 665, 843 S.E.2d 106, 111 (2020). The Court held that retroactive application of the 2012 amendment to the RJA was likewise unconstitutional. *Id.* at 680-82. Thus, the Court effectively reinstated the statewide discrimination claim alleged by Mr. Bacote in his RJA MAR, and by scores of other individuals incarcerated under sentence of death.

In the 18 months since the decision in *Ramsey*, the State and counsel for several individuals incarcerated on death row have represented to numerous federal courts that Mr. Bacote's case will serve as the next litigated RJA case in North Carolina, and that litigation is not

expected in any other individual RJA case, so this case may proceed first, through any appellate review, to clarify common and broadly applicable issues in an orderly and efficient fashion.

On November 22, 2021, this Court will hear argument on the scope of the evidentiary hearing and attendant discovery in this case. Mr. Bacote submits this brief in support of his request that the Court conduct a single hearing on his claims of past jury discrimination in Johnston County, Prosecutorial District 11, Judicial Division 4, and North Carolina as a whole. In addition, Mr. Bacote offers argument in support of his request for discovery pertinent to his claim of statewide discrimination. Finally, Mr. Bacote considers the Court's prior ruling on the appropriate time frame, January 1, 1980-April 9, 2011, to be correct, but offers no objection to the State's request to expand the temporal scope to include the cases of all individuals sentenced to death since 1980.

Argument

I. The History and Purpose of the RJA, the Plain Language of the Statute, and the Rulings of the North Carolina Supreme Court Confirm that this Court should take Evidence on Mr. Bacote's Statewide Claim.

A. Historical Background of the RJA's Enactment

The RJA was the first law in the country to provide relief to capital defendants based on statistical patterns of racial bias alone, without requiring proof of intentional discrimination. In enacting the RJA, the legislature was responding to, among other things, a long history of exclusion of African Americans from jury service in our state:

- After the Civil War and the end of enslavement of African Americans, North Carolina's 1868 Constitution and Reconstruction "brought a brief era of black jury participation." 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, 2054 (2010); see, e.g., *State v. Holmes*, 63 N.C. 18, 21 (1868) (25 white men and 25 Black men summoned for jury duty; four Blacks served as jurors).
- However, once Reconstruction ended in 1875, and through the first half of the twentieth century, African Americans lost any meaningful opportunity to serve as jurors in North Carolina. Black citizens were largely excluded from the jury pool, because they were not tax-paying property owners or had been determined by local officials to be of insufficient intelligence or moral character. See *State v. Perry*, 250 N.C. 119, 125, 108 S.E.2d 447, 451 (1959) (before 1947, North Carolina law limited jury service to "all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence"); *State v. Lord*, 225 N.C. 354,

355, 34 S.E.2d 205, 206 (1945) (African Americans who were not “freeholders” were lawfully excused from jury service for cause).

- Nearly a century after the Civil War, and for decades after the United States Supreme Court condemned the exclusion of Black citizens from petit and grand juries in *Strauder v. West Virginia*, 100 U.S. 303 (1880), litigants, typically criminal defendants of color, repeatedly had to return to the Court, and to our state supreme court, to seek relief from ever-continuing systematic and purposeful discrimination by officials responsible for administering jury pools. See *Hernandez v. Texas*, 347 U.S. 475 (1954); *Avery v. Georgia*, 345 U.S. 559 (1953); *Patton v. Mississippi*, 332 U.S. 463 (1947); *State v. Peoples*, 131 N.C. 784, 790 (1902) (finding error in forcing Black defendant “to submit to a criminal trial by a jury drawn from a list from which has been excluded the whole of his race, purely and simply because of color, although possessed of the requisite qualifications prescribed by the law”); *State v. Speller*, 229 N.C. 67, 70 (1948) (46 years after *Peoples, supra*, condemned such practices, finding Bertie County Commissioners, over a 17-year period, never once permitted a Black person to be placed on the approved juror list, in a majority Black county).
- Only in the second half of the twentieth century did African Americans start to appear on juries in capital cases in North Carolina. See *Miller v. State*, 237 N.C. 29, 40, 74 S.E.2d 513, 521 (1953) (three African Americans served on the jury in death penalty case); *State v. Roman*, 235 N.C. 627, 628, 70 S.E.2d 857, 857 (1952) (four African Americans on capital jury); cf. *State v. Brown*, 233 N.C. 202, 63 S.E.2d 99 (1951) (African-American defendant executed after being sentenced to death by all-white jury).
- By 1965, the battle for African American participation on juries had shifted from excluding Black citizens from the jury venire to ensuring they were not seated as jurors. Now that African Americans were included in the jury pool, “exclusion through peremptory challenges provided a new barrier.” Kotch & Mosteller, *supra*, at 2086; see also Paul H. Schwartz, *Equal Protection in Jury Selection – the Implementation of Batson v. Kentucky in North Carolina*, 69 N.C. L. Rev. 1533, 1541 (1990) (“As the Court struck down states’ discriminatory practices in [the formation of jury pools] and black persons finally were included on jury lists, however, prosecutors found other ways to prevent black persons from sitting on juries. One method prosecutors used was exercising peremptory challenges.”).
- In *Swain v. Alabama*, 380 U.S. 202, 205 (1965), a case in which the petitioner showed that no African American had served on a jury since “about 1950” even though African Americans constituted 26% of the county population and, since 1953, made up 10-15% of the jury pool, the Court attempted to tackle the discriminatory use of peremptory challenges.

- States, including North Carolina, responded by increasing the number of peremptory challenges available to prosecutors. For more than three decades, since 1935, capital defendants had been given 14 peremptory challenges while prosecutors were given six. Act of May 11, 1935, ch. 475, §§ 2, 3, 1935 N.C. Sess. Laws 834, 835 (current version at N.C. Gen. Stat. § 15A-1217 (1988)). However, in 1971, the number of peremptory challenges for prosecutors was increased to nine in capital cases and, in 1977, following reinstatement of the death penalty, the State was given a total of 14 peremptory challenges in capital cases. Act of March 11, 1971, ch. 75, § 1, 1971 N.C. Sess. Laws 56 (codified as amended at N.C. Gen. Stat. § 9-21(b) (1971)) (current version at N.C. Gen. Stat. § 15A-1217(a)(2) (1988)); Act of June 23, 1977, ch. 711, § 1, 1977 N.C. Sess. Laws, 853, 858 (codified at N.C. Gen. Stat. § 15A-1217 (1988)).
- Two decades after its attempt to rein in the use of discriminatory peremptory challenges, the Supreme Court recognized the persistent and pernicious effect of race in jury selection, and the utter failure of *Swain*. The Court acknowledged that *Swain* placed “a crippling burden of proof” on defendants alleging racially discriminatory peremptory strikes and left prosecutors’ peremptory challenges “largely immune from constitutional scrutiny.” *Batson v. Kentucky*, 476 U.S. 79, 92-93 (1986).

B. Race Discrimination in Capital Jury Selection in the Modern Era

Unfortunately, the purportedly less burdensome *Batson* standard had little effect in North Carolina. In the three decades since *Batson* was decided, the North Carolina appellate courts have *never* found a single instance of discrimination against a minority juror. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina’s Remarkable Appellate Batson Record*, 94 N.C. L. Rev. 1957, 1961-62 (2016); James E. Coleman Jr. & David C. Weiss, *The Role of Race in Jury Selection: A Review of North Carolina Appellate Decisions*, 22 N.C. State Bar J. 1, 13 (2017). As a result, peremptory strikes have been an extraordinarily effective way to exclude Black citizens from capital jury service. See Kotch & Mosteller, *supra*, at 2120, n.356 (as of 2010, more than 30 North Carolina death row prisoners were sentenced to death by all-white juries).

Numerous cases illustrated the pervasive use of racially-motivated peremptory strikes in North Carolina and the laxity of *Batson*’s enforcement by North Carolina courts. For example, prosecutors claimed they struck potential Black jurors in part because they were “[b]oth black females,” *State v. White*, 131 N.C. App. 734, 739, 506 S.E.2d 462, 466 (1998); had a “rather militant animus,” *State v. Golphin*, 352 N.C. 364, 430, 533 S.E.2d 168, 213 (2000); were “physically attractive,” *State v. Barnes*, 345 N.C. 184, 210-11, 481 S.E.2d 44, 58 (1997); and “sat with [their] arms crossed” *State v. White*, 349 N.C. 535, 549, 508 S.E.2d 253, 263 (1998). That North Carolina appellate courts routinely accepted these and other justifications for striking Black jurors rendered *Batson* all but meaningless in the state.

Prosecutors in North Carolina trained one another to evade *Batson*. In 1995, the North Carolina Conference of District Attorneys held a training session to teach prosecutors how to conceal their motivations for striking Black jurors. *See, e.g.*, Equal Justice Initiative, *Race and the Jury: Illegal Discrimination in Jury Selection*, 43 (July 2021), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> (“The *Batson* decision did not deter prosecutors from engaging in illegal race-based peremptory strikes so much as it incentivized them to find ways to keep striking Black jurors without triggering a *Batson* objection.”); *see also* Jacob Biba, Did Prosecutors Use a ‘Cheat Sheet’ to Strike Black Jurors in North Carolina Death Penalty Case?, *The Appeal* (Sept. 4, 2018), <https://theappeal.org/did-prosecutors-use-a-cheat-sheet-to-strike-black-jurors-in-north-carolina-death-penalty-case/>; *State v. Robinson*, 375 N.C. 173, 181 (2020) (describing evidence that “prosecutors attended training to ensure that their race-based reasons for excluding jurors would not be subject to judicial scrutiny”).

Compared to other southern states, North Carolina’s failure to enforce *Batson* is rare. Appellate courts in “six other southern states – Florida, Georgia, Mississippi, Alabama, Arkansas, and Louisiana – have all ordered multiple reversals for substantive *Batson* violations and racially tainted jury selection.” Pollitt & Warren, *supra*, at 1984, n.167. As of 2010, race-motivated jury strikes resulted in 80 appellate reversals in Alabama, 33 in Florida, 12 in Louisiana, 10 each in Mississippi and Arkansas, and 8 in Georgia. *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, 19 (Aug. 2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf>. Amidst this tragic historical context, the RJA afforded North Carolina individuals sentenced to death a basis for challenging their death sentences due to jury discrimination and reflected the General Assembly’s “ongoing concerns with the difficulty of proving covert racial discrimination, particularly in capital sentencing decisions[.]” *Ramseur*, 374 N.C. at 674-75 (citing *Turner v. Murray*, 476 U.S. 28, 35 (1986) (“Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.”))).

Following enactment of the RJA, several studies confirmed the existence of widespread race discrimination in North Carolina jury selection. One study showed that 20% of the 150 people incarcerated on death row in North Carolina in 2010 were sentenced to death by all-white juries. *See* Kotch & Mosteller, *supra*, at 2110-11, n.356. Six were from counties with an African American population of 20% or above; and seven cases were from counties with an African American population ranging from 10% to 20%. *Id.*

In a 2012 study, Michigan State University College of Law researchers analyzed over 7,400 peremptory strikes made by North Carolina prosecutors in 173 capital cases between 1990 and 2010 and determined that prosecutors struck 52.6% of eligible Black jurors and 25.7% of all other eligible jurors. 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, 1548 (2012). The researchers found this difference “statistically significant” and explained that “there is less than a one in one thousand chance we would observe a disparity of this magnitude if the jury selection process were actually race neutral.” *Id.* The researchers also found that, in cases with Black defendants, prosecutors struck 60% of eligible Black jurors, and in cases with non-Black defendants, prosecutors struck 51.4% of eligible Black jurors. *Id.* at 1549. Overall, even when controlling for race-neutral factors, Black jurors were still 2.48 times more likely to be struck than jurors of a different race. *Id.* at 1553.

Similarly, a 2018 study conducted by Wake Forest University professors of non-capital cases demonstrated that North Carolina prosecutors removed Black jurors at twice the rate they removed white jurors. Ronald F. Wright, et al., *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. Ill. L. Rev. 1407, 1425 Table 2 (2018). The study, which looked at data on 29,000 potential jurors in felony trials in North Carolina from 2011 to 2012, showed that prosecutors struck 16% of Black potential jurors and 8% of white potential jurors. *Id.*

The exclusion of Black citizens from juries has led, predictably, to notorious examples of racism in recent death penalty cases. For example, six years before the RJA was enacted, the Fourth Circuit Court of Appeals affirmed the denial of habeas relief to North Carolina death row prisoner Kenneth Rouse because his attorneys had filed his federal petition one day late. *Rouse v. Lee*, 339 F.3d 238 (4th Cir. 2003) (*en banc*). Rouse, who is African American, was convicted and sentenced to death by an all-white jury, one of whom “expressed intense racial prejudice against African Americans, calling them “n[----]s” and opining that African Americans care less about life than white people do and that African-American men rape white women in order to brag to their friends.” *Id.* at 257 (Motz, J., dissenting). A few years before that, after no court would consider similar evidence of racial bias tainting the capital trial of Robert Bacon, another African-American individual convicted and sentenced to death by an all-white jury, Governor Michael F. Easley granted clemency to Bacon. A juror in Bacon’s case provided an affidavit stating that, during deliberations on Bacon’s punishment, jurors disparaged Black people and felt Bacon deserved the death penalty for dating a white woman. Anna Griffin, “Robert Bacon Gets Life for Murder in Case with Racial Overtones,” *Charlotte Observer*, Oct. 3, 2001, at A1.

Perhaps the most poignant examples of racial injustice in the administration of capital punishment were three innocent Black men sentenced to death – Glenn Chapman, Jonathan Hoffman, and Levon Jones. All three had been wrongly convicted of killing white victims, recently released, and exonerated. Kotch & Mosteller, *supra*, at 2125 n.405. Hoffman was released from death row in 2004, while Chapman and Jones were exonerated in 2008, a year before the legislature enacted the RJA. See N.C. Department of Public Safety, List - Removed from Death Row, <https://www.ncdps.gov/our-organization/adult-correction/prisons/death-penalty/list-removed-death-row> (last visited Nov. 15, 2021).

There is a clear link between race discrimination in jury selection and wrongful convictions of Black defendants. Research has shown all-white and nearly all-white juries “deliberate less than diverse juries” and more easily accept mistaken eyewitness identifications. Barry Scheck, *Stunning new case highlights how race bias corrupts juries*, *Salon* (Apr. 15, 2014), https://www.salon.com/2014/04/15/barry_scheck_stunning_new_case_highlights_how_race_bias_corrupts_juries/. In contrast, diverse juries are “less likely to fall back on what may be unconscious stereotypes.” *Id.* Consequently, race discrimination in jury selection “not only contributes to guilty verdicts for the innocent, it tilts the playing field toward death, particularly for defendants of color.” *Id.*

C. The RJA’s Purpose is to Combat Race Discrimination that Constitutional Prohibitions Failed to Eradicate.

The North Carolina General Assembly enacted the RJA as a direct response to *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, the United States Supreme Court reiterated the principle that a defendant alleging an “equal protection violation has the burden of proving the existence of purposeful racial discrimination.” *Id.* at 292 (internal citation omitted). In applying this principle, the Court rejected McCleskey’s equal protection claim that race improperly infected the administration of Georgia’s death penalty due to the higher prevalence of death sentences in cases involving white victims and/or Black defendants. *Id.* McCleskey presented powerful statistical evidence that showed the death penalty was more likely to be sought by a prosecutor, and ultimately imposed as a sentence, in cases with a Black defendant and white victim. *Id.* at 286. In rejecting McCleskey’s argument, Justice Powell, who authored the opinion, reasoned that permitting statistical evidence as proof of racial discrimination in the criminal justice system was better suited for the legislature:

McCleskey’s arguments are best presented to legislative bodies. It is not the responsibility – or indeed even the right – of this Court to determine the appropriate punishment for particular crimes. It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people. Legislatures are also better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with flexibility of approach that is not available to courts.

Id. at 319 (internal quotation marks omitted).

In 2009, North Carolina accepted Justice Powell’s invitation when it enacted the RJA. Indeed, during debate in the North Carolina senate, Senator Doug Berger directly addressed *McCleskey*:



The *McCleskey* decision . . . said that while statistics may show race discrimination, it doesn't rise to the level of being a constitutional violation of the equal protection clause and specifically directed that if states wanted to provide this additional protection and mak[e] it a means by which someone could prove racial discrimination, then they could do it. And that's what we're doing here today.

Robert P. Mosteller, *Responding to McCleskey and Batson: The North Carolina Racial Justice Act Confronts Racial Peremptory Challenges in Death Cases*, 10 Ohio St. J. Crim. L. 103, 116 (2012) (quoting Statement of Sen. Doug Berger, Senate Floor Debate on Racial Justice Act (May 14, 2009)). By enacting the RJA, the "legislature understood that it was creating a different system of proof than that prescribed by *McCleskey*," a decision which required the defendant to prove that decisionmakers in his individual case were motivated by a discriminatory purpose. Kotch & Mosteller, *supra*, at 2111-12.

Unlike *McCleskey*, the RJA explicitly authorized the use of statistical evidence to prove race was a significant factor in the decision to seek or impose a death sentence. Moreover, the RJA did not limit the statistical evidence to an individual case but permitted statistical evidence drawn from the county, prosecutorial district, judicial division, and, importantly, the whole state. *Id.* at 2117.

In view of North Carolina's complete failure to enforce the constitutional prohibition of race discrimination in jury selection set out in *Batson*, the RJA also included a provision designed to address the practical limitations of *Batson*'s three-step framework. Under that framework, the essence – and fundamental weakness – of the *Batson* inquiry is assessing the veracity of the prosecutor's race-neutral justifications. When *Batson* was decided, Justice Marshall warned that "[a]ny prosecutor can easily assert facially neutral reason for striking a juror[.]" *Batson*, 476 U.S. at 106. Justice Marshall's prescient warning uniquely applies to North Carolina, where the appellate courts have been unwilling to apply *Batson* in any meaningful fashion.

To address *Batson*'s failings, the RJA allows racial discrimination in jury selection to be proven "by data, not only in individual cases, but also by state-wide and local data showing systemic practices." Mosteller, 10 Ohio St. J. Crim. L. at 104-05. Allowing proof beyond the individual case is significant as it allows courts to conduct a robust and "systemic examination of the use of race in the examination of peremptory challenges during jury selection." Kotch & Mosteller, *supra*, at 2111. Such meaningful assessments of data across larger geographic units are an important mechanism that gives real meaning to *Batson*'s central goal of eradicating discrimination in jury selection.

D. The Statute's Language and the North Carolina Supreme Court's Decisions Make Clear Mr. Bacote is Entitled to a Hearing on his Statewide RJA Claim.

It was to address these longstanding injustices, against this complex legal backdrop, that North Carolina enacted the original RJA, N.C. Gen. Stat. §§ 15A-2010 to 2012 (eff. August 11, 2009 to July 1, 2012). The RJA provided that: "No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C. Gen. Stat. § 15A-2010. The original statute defined four alternative bases for proof that race was the basis of the decision to seek or impose a death sentence: evidence that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, *or* the State at the time the death sentence was sought or imposed." N.C. Gen. Stat. § 15A-2011(a) (emphasis added).

As our high court has explained, the RJA provides "a statutory mechanism for rooting out the insidious vestiges of racism in the implementation of our state's most extreme punishment." *Robinson*, 375 N.C. at 175. The significance of this effort cannot be overstated and reflected the General Assembly's concern with "the fact that the harm from racial discrimination in criminal cases is not limited to an individual defendant, but rather it undermines the integrity of our judicial system and extends to society as a whole[.]" *Ramseur*, 374 N.C. at 675 (citing *Batson*, 476 U.S. at 87) ("Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. . . . The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.")).

The protections the General Assembly enacted must now be given full effect. The aim is to "combat racial discrimination in our state's application of the death penalty – the most serious and irrevocable of our state's criminal punishments[.]" *Mosteller*, 10 Ohio St. J. Crim. L. at 118. The means to accomplish such a goal is "a new substantive claim that fundamentally changes what is necessary to prove racial discrimination[.]" *Id.*

Through the language of the original RJA, the legislature made its broad objective clear: to solve the perceived statewide problem of racial discrimination in applying the death penalty across North Carolina. The statute's structure reflects the legislature's intent to ensure consideration of systemic evidence from the statewide, judicial division, prosecutorial district, and county levels. For every aspect of the statute establishing proof of racial discrimination for potential relief, the statute specifically lists evidence on the county, prosecutorial district, the judicial division, as well as the statewide level as relevant. N.C. Gen. Stat. §§ 15A-2011 (eff. August 11, 2009 to July 1, 2012). This repetition, combining each geographical unit of proof, evinces the General Assembly's sweeping commitment to restructuring the proof necessary to prevail on a racial discrimination claim.



On July 2, 2012, the North Carolina Legislature enacted a narrowed version of the RJA, which removed the statewide claim and judicial divisions as bases for relief, requiring instead that the defendant prove the claim with evidence only from the county or prosecutorial district. S.L. 2012-136, § 3(c). The Legislature repealed the RJA in its entirety on June 19, 2013. S.L. 2013-154, § 5(d). In *Ramseur*, the North Carolina Supreme Court reinstated not only the amended RJA, but also, importantly, the original RJA, which allows relief on the grounds of statewide discrimination to those who properly pled and supported that claim. The Court specifically ruled that the “evidentiary requirements for an RJA claim” from the original RJA, including permitting judicial division and statewide evidence, would govern those who filed under the original law because the more narrow provisions “constitute changes in the criminal law that cannot be applied retroactively.” *Ramseur*, 374 N.C. at 681-82. In his RJA MAR filed in August of 2010, Mr. Bacote alleged, with supporting evidence, discrimination statewide and in Judicial Division 4, Prosecutorial District 11, and in Johnston County, as well as in his own case. Under the clear holding of *Ramseur*, Mr. Bacote is entitled to an evidentiary hearing on all grounds, including statewide discrimination.

Statewide evidence on juror selection from prior RJA litigation has revealed how patterns of discrimination on the state level impact statewide and more localized discrimination. And, trainings offered to prosecutors statewide on ways to avoid *Batson* are evidence of statewide – and local – race discrimination because, through statewide training seminars, individual prosecutors across the state shared with another and refined their techniques for evading *Batson*. Furthermore, data reflecting wide-spread racial discrimination across geographical units, given these statewide trainings, thus shows the power of statewide patterns of discrimination on individual jury selection proceedings.

II. This Court Would Serve the Interests of Justice and Judicial Economy by Hearing and Deciding Mr. Bacote’s Statewide Claim.

Mr. Bacote was not alone in properly filing an RJA with supporting evidence of statewide discrimination. While the composition of our state’s death row has changed since the time of the filing of Mr. Bacote’s RJA MAR, more than 100 people incarcerated on death row have properly-filed RJA motions still pending.¹ These RJA petitioners have alleged discrimination in their

¹ Nearly 150 death row prisoners filed RJA claims in the summer of 2010. See Samiha Kanna, Forsyth Judge Rules N.C. Racial Justice Act is Constitutional, *INDYweek* (Feb. 10, 2011), <https://indyweek.com/news/archives/forsyth-judge-rules-n.c.-racial-justice-act-constitutional/>. According to the N.C. Department of Public Safety, 10 individuals have since been sentenced to death, while 36 individuals under sentence of death have subsequently been removed from death row, either because they were granted relief or died of natural causes. See N.C. Department of Public Safety, Death Row Roster, <https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster> (last visited Nov. 15, 2021); N.C. Department of Public Safety, List - Removed from Death Row, <https://www.ncdps.gov/our-organization/adult-correction/prisons/death-penalty/list-removed-death-row> (last visited Nov. 15, 2021); see also *Robinson*, 375 N.C. at 176 (at the time of the RJA’s 2013 repeal, more than 100 RJA claims had been filed and “the vast majority of death row inmates were on the precipice of an opportunity to individually demonstrate that the proceedings in which they were sentenced to death were fundamentally flawed by racial animus.”

individual cases, in the RJA's smaller geographic units, and, like Mr. Bacote, statewide. They too are entitled to a hearing on their statewide RJA claims. Given the similarity of the statewide claims Mr. Bacote and more than 100 RJA petitioners have alleged and pled, this Court would serve the interests of justice and judicial economy by considering and deciding the statewide claim in Mr. Bacote's case at the same evidentiary hearing in which he presents evidence of discrimination in his judicial division, prosecutorial district, county and individual case.

Many other death-sentenced individuals have alleged similar, or even identical, statewide discrimination claims to that of Mr. Bacote. The statewide discrimination claims alleged by Mr. Bacote and the more than 100 other death-sentenced individuals are, in most, if not all, respects, identical. These petitioners allege that, throughout the state, race was a significant factor in prosecution decisions to exercise peremptory strikes. These petitioners have all relied on the same evidence, an extensive statistical study conducted by Professors Barbara O'Brien and Catherine Grosso of Michigan State University (MSU) College of Law that showed that prosecutors statewide struck Black jurors at over twice the rate they struck white jurors. *See, e.g., State v. Burke*, 374 N.C. 617, 619, 843 S.E.2d 246, 248 (2020) (describing defendant's RJA evidence, including MSU study); *State v. Robinson*, 368 N.C. 596, 780 S.E.2d 151 (2015) (describing MSU study as evidence central to defendant's case and remanding for further proceedings in order that State might counter that evidence); *State v. Augustine, Golphin, and Walters*, 368 N.C. 594, 780 S.E.2d 552 (2015) (same).

As the North Carolina Supreme Court has made clear, Mr. Bacote and all death-sentenced defendants who properly filed an RJA MAR have a right to be heard and to have their claims considered at an evidentiary hearing. *See Ramseur*, 374 N.C. at 679 (holding its ruling "applies equally to anyone in the same circumstances as defendant – specifically, any capital defendant who filed a motion for appropriate relief under the Original RJA.>").

It is anticipated that, at Mr. Bacote's evidentiary hearing on his claims of discrimination in his prosecutorial district, county and individual case, he will already be offering evidence from the MSU study through the testimony of Dr. O'Brien. Thus, it makes sense and would maximize efficiency to present her expert testimony on the statewide claim at the same time. The statistical methodology upon which Mr. Bacote bases his RJA claims is the same for all of the geographic units set out in the RJA and is not unique to Mr. Bacote's case. Additionally, evidence that Mr. Bacote will offer in support of a statewide discrimination claim is also relevant and persuasive evidence to bolster Mr. Bacote's RJA claims of a pattern and practice of discrimination in jury selection by prosecutors in each of the delineated geographical subdivisions.

Additionally, this Court has ordered, as a part of the discovery process, that the State produce to Mr. Bacote a list of all homicide cases that went to trial with Gregory Butler serving as the prosecutor and selecting the jury, including cases outside Prosecutorial District 11. The State

recently provided such a list.² The 21 homicide trials on this list took place in eight different counties and four different prosecutorial districts. Thus, judicial economy and efficiency would be best served by hearing the statewide discrimination claim in Mr. Bacote's case, given the fact that Mr. Butler's cases are spread across numerous counties, all of which would be addressed as part of both Mr. Bacote's individual RJA claims and as part of a statewide claim.

Significantly, the State and death row prisoners in multiple cases have asserted to numerous courts that Mr. Bacote's case is the leading RJA case in North Carolina and that the litigation in Mr. Bacote's case would ensure, through appellate review, the resolution of issues common to all capital post-conviction cases with pending RJA claims. In light of these representations that litigation in the *Bacote* case is ongoing, numerous federal courts have entered stays pending disposition of Mr. Bacote's RJA claims. Recently, on October 14, 2021, in the case of *Alden Jerome Harden v. Jackson*, Case No. 11-8 (4th Cir.), the parties³ submitted a Joint Status Report to the Fourth Circuit. Docket No. 87. In that joint filing, the parties indicated that "Counsel for the defense and State in *Bacote* anticipate that *Bacote* will serve as the next litigated RJA case in North Carolina. The parties do not anticipate that litigation of any other individual RJA cases will occur until *Bacote* has been litigated and any appellate review completed, in order to clarify common and broadly applicable issues pertaining to the RJA in an orderly and efficient fashion." *See also John Henry Thompson v. Jackson*, Case No. 1:13CV196 (M.D.N.C.), Docket No. 80 (in filing on October 22, 2021, counsel for Respondent⁴ did not oppose renewed motion for stay in light of RJA litigation in *Bacote*), and *Thomas Michael Larry v. Jackson*, Case No. 19-6 (4th Cir.), Docket No. 71 (in Joint Status Report filed on September 27, 2021, parties⁵ identified *Bacote* as next litigated RJA case and indicated that expectation that no other individual RJA cases would proceed).

In conclusion, hearing Mr. Bacote's statewide RJA claim now, along with his RJA claims pertaining to smaller geographic entities, would serve the interests of justice and would promote judicial economy. It would be folly for multiple superior courts across North Carolina to hold hearings on identical issues of fact and for each to issue their own rulings on the myriad issues potentially arising under the RJA. A large number of RJA motions remain pending. Their resolution will undoubtedly entail largely overlapping discovery requests, require resolution of a number of novel, yet identical, and controlling questions of statutory interpretation, and involve complex and yet identical questions regarding statistical evidence in these cases. The most efficient and effective way to litigate these claims and conserve scarce judicial resources is to adjudicate Mr. Bacote's claims that race was a significant factor in the use of peremptory strikes by county, prosecutorial district, judicial division, and statewide.

² This list was recently produced by the State as part of the Court-ordered discovery, NCDOJ H Bacote 000000019.

³ The Respondents, Warden Denise Jackson and Attorney General Josh Stein, are represented in this matter by Special Deputy Attorney General Jonathan P. Babb.

⁴ The Respondent, Warden Denise Jackson, is represented by Special Deputy Attorney General Jonathan P. Babb.

⁵ The Respondent, Warden Denise Jackson, is represented by Special Deputy Attorney General Nicholas G. Vlahos.

III. Mr. Bacote Seeks Discovery on his RJA Claim of Statewide Discrimination.

To ensure his rights to marshal and present all of the evidence supporting his claims, Mr. Bacote seeks discovery of relevant materials possessed by the State. *See State v. Taylor*, 327 N.C. 153, 154, 393 S.E.2d 801, 806 (1990) (ordering post-conviction “disclosure of relevant facts” to “ensure that truth is ascertained and justice served”); *State v. Bates*, 348 N.C. 29, 37, 497 S.E.2d 276, 281 (1998) (provision of full post-conviction discovery ensures “thorough and complete review”).

Mr. Bacote seeks a limited set of jury selection materials from the capital cases around the state and training materials. As shown above, evidence of statewide discrimination is relevant to the question of whether prosecutors in Johnston County and in Mr. Bacote’s own case exercised peremptory strikes based on race as well as to his claim of statewide discrimination. For example, evidence that prosecutors throughout North Carolina were trained to evade the strictures of *Batson* is probative of the prosecution’s decisions to strike Black citizens in individual cases. Likewise, consistent, statistically significant patterns of striking Black venire members at a rate disproportionate to that of non-white potential jurors is evidence that a higher rate of striking Black jurors in an individual case is not the result of chance. For these reasons, Mr. Bacote seeks discovery of jury selection and training materials from prosecutors statewide.

State prosecutors have been on notice of the potential need to gather these materials since the RJA was enacted in 2009, and certainly since 2010, when nearly 150 capital defendants filed MARs under the RJA along with discovery motions. *See supra* n. 1. Many District Attorney offices gathered and reviewed relevant materials from jury selection in capital cases in order to prepare statements as part of a statewide analysis conducted by one of the State’s former RJA experts, Dr. Joseph Katz. *See, e.g., Augustine v. State*, (Dec. 13, 2012 Order), *overturned on other grounds by State v. Augustine*, 368 N.C. 594 (2015) (“In connection with RJA litigation, prosecutors from around the State, including Cumberland County prepared affidavits or unsworn statements purporting to offer race-neutral reasons for the strikes of African-American citizens from capital juries.”).

To ensure that Mr. Bacote receives the discovery to which he is entitled, within a reasonable time and without undue burden on the State, counsel for Mr. Bacote requests that the Court order the State to ask individual district attorneys to collect relevant discovery materials and provide them to his counsel and/or their designees for review and copying or scanning. If needed, counsel for Mr. Bacote and/or their designees can travel to individual District Attorney offices to scan or copy such materials under reasonable conditions designated by the individual District Attorney’s office. This method of providing discovery has been commonplace in capital post-conviction cases since at least 1996, when North Carolina enacted a post-conviction discovery law in capital cases directing the State to “make available to the defendant’s counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes

committed or the prosecution of the defendant.” N.C. Gen. Stat. § 15A-1415(f). The statute specifically contemplates defense counsel’s “inspection” of State files. *Id.* Moreover, this method of providing discovery has been utilized in prior RJA litigation.

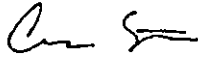
IV. Mr. Bacote Does Not Object to Maintaining or Expanding the Previously-Ordered Temporal Scope of this Litigation.

Having heard and fully considered the positions of the parties at the discovery hearing on May 20, 2021, this Court ruled that the relevant time period for claims and discovery in Mr. Bacote’s case is between January 1, 1980 and April 9, 2011 (two years after the imposition of the death sentence in Mr. Bacote’s case). Before making that ruling, the Court evaluated pleadings from the parties, including written objections and responses on these questions. The Court then scheduled a discovery hearing and heard extensive arguments from the parties on the scope of discovery, including the issue of the relevant time period. The Court rejected the State’s request for a more restrictive time frame, noting its belief that the relevant scope should include time earlier than the MSU study, which began in 1990.

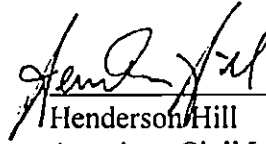
As expressed in Mr. Bacote’s prior pleadings and arguments, the Court’s ruling follows United States and North Carolina Supreme Court precedent recognizing that evidence of discrimination that occurred decades before the jury proceeding can inform whether discrimination occurred in the jury selection itself. *See Miller-El v. Dretke*, 545 U.S. 231, 263-64 (2005) (when analyzing a claim under *Batson* from a late 1980s trial, relying on evidence of discriminatory training practices from the 1950s, 60s, and 70s); *State v. Hobbs*, 374 N.C. 345, 348, 358, 841 S.E.2d 492, 496, 502 (2020) (remanding a *Batson* claim because the trial court failed to consider historical, statistical patterns of discrimination going back at least two decades before trial); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (recognizing, in the context of a constitutional challenge to a zoning decision, that the “historical background of the decision is one evidentiary source” to show purposeful discrimination).

Relying on the time frame this Court ruled relevant, Mr. Bacote’s counsel and experts have been working diligently towards preparing his case for an evidentiary hearing. Nevertheless, Mr. Bacote has no objection to the State’s suggestion to extend the relevant time period to the present and thus to include the cases of seven individuals sentenced to death after April 9, 2011.

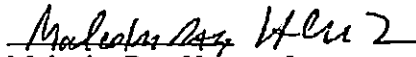
Respectfully submitted, this the 15th day of November 2021.



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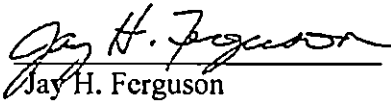
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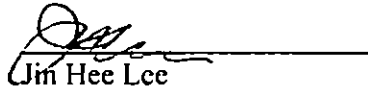
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CERTIFICATE OF SERVICE

The undersigned counsel for the defendant hereby certifies that a copy of this Pleading was delivered to the following counsel for the State by email:

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