STATE OF NORTH CAROLINA COUNTY OF JOHNSTON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 07 CRS 51499
STATE OF NORTH CAROLINA)) v.)) HASSON J. BACOTE,) Defendant.)	**ORDER GRANTING RELIEF UNDER THE RACIAL JUSTICE ACT**

This matter came on for hearing at the February 26, 2024, Session of Criminal Superior Court for Johnston County, before the Honorable Wayland J. Sermons, Jr., on Defendant Hasson Jamaal Bacote's Motion for Appropriate Relief Pursuant to the Racial Justice Act (RJA). The State was represented by Special Deputy Attorney General Jonathan Babb, Special Deputy Attorney General Marissa Jensen, and Assistant Attorney General Ben Szany. Mr. Bacote was represented by counsel of record Jay H. Ferguson, Henderson Hill, Cassandra Stubbs, Ashley Burrell, and Megan Byrne.[1] Based on the entire record, and for the reasons set out in the findings of fact and conclusions of law in this order, the Court both grants and denies relief on Mr. Bacote's claims, vacates his death sentence and resentences him to life imprisonment without the possibility of parole.

INTRODUCTION

The RJA provides "a statutory mechanism for rooting out the insidious vestiges of racism in the implementation of our state's most extreme punishment." *State v. Robinson*, 375 N.C. 173, 175 (2020).

[1] Additional counsel appointed to represent Mr. Bacote were Shelagh Rebecca Kenney and Kailey Morgan. Additional counsel appearing pro hac vice for Mr. Bacote were Kacey Mordecai and Catherine Logue.

In early 2024, the Court heard nearly two weeks of evidence concerning the central issues in this RJA case. The first is whether race was a significant factor in prosecution decisions to strike African American venire members in the entire State of North Carolina, in Prosecutorial District 11, in Johnston County or in cases tried by Assistant District Attorney Gregory Butler, at the time the death penalty was sought and imposed upon Mr. Bacote. The second is whether race was a significant factor in the imposition of the death penalty in Johnston County at the time the death penalty was sought and imposed upon Mr. Bacote.

The Court heard evidence from expert witnesses including statistical analyses, social science research, the historical and present-day influence of race in the administration of the criminal punishment system in North Carolina and Johnston County, as well as the words and actions of North Carolina prosecutors, including the lead prosecutor in Mr. Bacote's case. The Court has also considered documents from superior court files, affidavits of prosecutors, voir dire transcripts, and jury selection notes from the files of prosecutors around the state.

As set out in the findings of fact, statistical evidence shows that race was a significant factor in prosecution decisions about who serves as jurors in death penalty cases in Mr. Bacote's case, in cases in Johnston County, and cases in Prosecutorial District 11, where prosecutors struck Black venire members at vastly disproportionate rates compared to venire members of other races.

In Prosecutorial District 11, prosecutors struck qualified Black venire members at 1.83 times the rate of all other qualified venire members; and in Johnston County, prosecutors struck qualified Black potential jurors at 1.90 times the rate of qualified non-Black jurors. DE3 at 25, 44, 46.[2]

[2] References to defense exhibits appear as "DE_." The State's exhibits appear as "SE_."

The RJA does not require proof of discrimination by a specific prosecutor or in a defendant's own case. This order nonetheless includes findings about the lead prosecutor's strikes in this and other cases because they reinforce the Court's conclusion that race has been a significant factor in strike decisions in Johnston County, and in Prosecutorial District 11 and in cases tried by Gregory C. Butler. In those cases tried by Mr. Butler, the State struck qualified Black venire members 3.48 times higher than the rate for all other venire members. DE3 at 48. In Mr. Bacote's trial, the prosecution struck qualified Black potential jurors at 3.3 times the rate it struck all other qualified jurors. DE3 at 50.

The patterns of discrimination against Black venire members proved consistent. The Court heard a wealth of expert testimony from leading statisticians in the country. Using both traditional methods of analysis like logistic regression as well as causal inference techniques, these experts consistently found a strong causal association between the prosecution's exercise of peremptory strikes and race. The statistical disparities hold true even when accounting for non-racial characteristics frequently cited by prosecutors as reasons to strike potential jurors, such as death penalty opinions, criminal background, employment, marital status, and hardship.

The disparities in Prosecutorial District 11 and in Johnston County, and in the cases tried by Mr. Butler and in Mr. Bacote's own case were very relevant and persuasive, and each are statistically significant. The statistical findings presented to this Court were consistent, too, with the findings from other statistical studies of race and peremptory strikes. Archival and experimental studies further corroborate the statistical evidence and likewise show that race effects strike decisions in jury selection.

Sound statistical evidence also shows that race was a significant factor in Johnston County juries imposing death penalty. In Johnston County, Black defendants like Mr. Bacote have faced

a 100 percent chance of receiving a death sentence, while white defendants have a better than even chance of receiving a life sentence. This difference in jury sentences in Johnston County is statistically significant. Further, Mr. Bacote is one of only 11 people under sentence of death in North Carolina who was convicted solely under the felony murder doctrine and not intentional, premeditated murder. All 11 are people of color; nine are Black men. DE299; HTp. 1095.[3]

The Court has also considered evidence that Mr. Butler, the lead prosecutor in Mr. Bacote's case, has a history of denigrating Black defendants in thinly veiled racist terms. In one capital case, Mr. Butler described Black defendants as "predators of the African plain." DE368, *State v. Bell & Sims*, Tp. 4288. Remarkably, after being admonished by Judge Jay Hockenbury in that capital case "I'm going to instruct you to be very careful about not referring to the defendants as any animal or make an inference to that effect", Mr. Butler's first words once the jury returned to the courtroom were "Just like the animals in the African plain, after having felled their victim, they dragged their victim away; and, finally, they killed their victim." *State v. Sims and Bell*, (Onslow County, August 10th, 2001). In another capital case, Mr. Butler called a Black defendant "a piece of trash." DE367, *State v. Barden*, Tp. 1769. In the trial in this case, Mr. Butler called Mr. Bacote a "thug," a term he conceded has racial connotations. DE2, *State v. Bacote*, Tp. 4027; DE122 at 21; HTpp. 1133-34.

The Court has diligently reviewed the Defendant's evidence as to the statewide claims presented by the Michigan State study and Professor Barbara O'Brien. Likewise, the Court has considered each and every argument of the State as to the process, the methods of data collection, the potential bias caused by the content and manner of the data collection, and all the arguments

[3] References to the transcript of the evidentiary hearing held between February 26 and March 8, 2024 appear as "HTp __" or "HTpp. __."

of the State urging the Court to reject the study in whole or in part. For the reasons set forth below, the Court finds that on a Statewide basis, the study lacks the precision and trustworthiness that would convince the Court to the greater weight of the evidence that the Defendant is entitled to relief on the basis of the Statewide evidence offered and received.

Likewise, the Court requested all of the data regarding the Death cases tried by Assistant District Attorney Gregory C. Butler, and the results of the sentencing phase of all Death cases tried in Johnston County for the relevant period. The results are overwhelmingly instructive to the Court in reaching its decision.

There can be no doubt racially discriminatory jury selection practices "undermine public confidence in the fairness of our system of justice." *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). A death sentence tainted by race likewise harms defendants and impugns the legitimacy of the criminal punishment system as a whole.

When it comes to racism, the United States Supreme Court has observed, even in small doses, "[s]ome toxins can be deadly." *Buck v. Davis*, 580 U.S. 100, 122 (2017). Racial bias is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224 (2017). The evidence that race drives jury selection and jury sentencing decisions in capital cases is repugnant and cries out for a remedy. The RJA is that remedy.

The Supreme Court of North Carolina described the purpose of the RJA this way:

> [I]n its efforts to combat racial discrimination in our state's application of the death penalty — the most serious and irrevocable of our state's criminal punishments — the General Assembly designed a new substantive claim that fundamentally changes what is necessary to prove racial discrimination and, in return, provides a limited grant of relief that is otherwise unavailable.

State v. Ramseur, 374 N.C. 658, 676-77 (2020). In light of the evidence presented, this order fulfills the Court's obligation to honor this statutory purpose and provide the relief mandated under the RJA.

With the foregoing introduction and summary, the Court hereby makes the following:

FINDINGS OF FACT

PROCEDURAL HISTORY

1. At the March 9, 2009, Criminal Session of Superior Court for Johnston County, the Honorable Thomas H. Lock presiding, Mr. Bacote was capitally tried for the death of Anthony Surles. Assistant District Attorney Gregory C. Butler and Assistant District Attorney Lauren Talley represented the State. Robert Cooper and Harold G. Pope represented Mr. Bacote.

2. During jury selection, the State used six of its peremptory strikes against Black prospective jurors. The State used eight of its peremptory strikes against non-Black venire members. Mr. Bacote objected under *Batson v. Kentucky*, 476 U.S. 79 (1986) to the strikes of all six of the Black prospective jurors. *See* DE2, *State v. Bacote*, Tpp. 455 (Sanders, Lyons, Barnes), 600 (Piner), 1363 (Moore), 2463 (Frink).[4] The trial court specifically noted that, for Black prospective jurors Sanders and Lyons, Mr. Bacote had made a prima facie showing of discrimination and required the State to state its reasons for the peremptory strikes of these potential jurors. *Id*. at 459. Referencing its order concerning Sanders and Lyons, the trial court found that Mr. Bacote had made a prima facie showing at each of the next three *Batson* challenges and required the State to articulate race neutral reasons. *Id*. at 601, 1363, 2464. Ultimately,

[4] References to the jury selection transcript in this case appear as "Tp. __."

however, the trial court found that Mr. Bacote had not met *Batson*'s burden of proving the State's strikes of Black potential jurors were motivated by intentional discrimination.

3. On April 2, 2009, Mr. Bacote was found guilty of first-degree murder solely under the theory of felony murder. *Id*. at 3307, 3311, 3470, 3501. The State did not submit any other theory of first-degree murder. Mr. Bacote was also found guilty of conspiracy to commit burglary, conspiracy to commit robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and first-degree burglary. *Id*. at 3499-3501. Following a capital sentencing hearing, the jury recommended a sentence of death, which the trial court imposed. Mr. Bacote entered notice of appeal. *Id*. at 4275.

4. On August 10, 2010, Mr. Bacote filed in this Court a Motion for Appropriate Relief under the Racial Justice Act (RJA MAR). Mr. Bacote additionally filed a Motion for Discovery of Information relevant under the North Carolina Racial Justice Act.

5. On the same date, Mr. Bacote filed an RJA motion in the North Carolina Supreme Court, because jurisdiction over his case had transferred to that Court for his direct appeal.[5] He also filed a motion with that Court asking to proceed with his direct appeal first, and dismiss his RJA claim without prejudice to refile in post-conviction proceedings if he did not win relief on appeal; or, in the alternative, for a stay of direct appeal proceedings and a remand to the Superior Court to proceed on his RJA claim.

6. On September 7, 2010, the North Carolina Supreme Court directed Mr. Bacote's RJA motion to proceed first in this Court. The Court dismissed without prejudice Mr. Bacote's RJA motion pending in the Supreme Court and ordered Mr. Bacote's direct appeal stayed "until

[5] To date, Mr. Bacote has not filed his opening brief for his direct appeal.

after the trial court's hearing and determination of defendant's Motion for Appropriate Relief Pursuant to the Racial Justice Act filed in Superior Court, Johnston County." *State v. Bacote*, 364 N.C. 430, 430 (2010).

7. Following the North Carolina Supreme Court's Order staying Mr. Bacote's direct appeal, this case came before this Court for a status hearing on June 13, 2011.[6] The Court instructed the State's counsel to seek the necessary resources to litigate the RJA claim and advised them to prepare as if it were a major class action suit. 2011.06.13 Preliminary Hearing, HTp. 8. The Court next ordered the State to file an answer to Mr. Bacote's RJA MAR on or before September 1, 2011. The State filed its Answer to Mr. Bacote's RJA MAR on September 1, 2011, and filed its first motion for discovery the same day.

8. The first RJA hearing on jury selection claims was held in *State v. Marcus Robinson* in Cumberland County Superior Court in January 2012. On April 20, 2012, the Honorable Judge Gregory A. Weeks found that race was a significant factor in decisions to exercise peremptory challenges during jury selection at all relevant times in North Carolina, Cumberland County, and during the time of Mr. Robinson's trial. *State v. Robinson*, 375 N.C. at 181.

9. On July 2, 2012, the North Carolina Legislature adopted a narrowed version of the RJA, hereinafter called the Amended RJA. The Amended RJA removed statewide and judicial division claims as bases for relief and required defendants to prove discrimination in their own cases. S.L. 2012-136, §§ 1-10, 2012 N.C. Sess. Laws 471. Pursuant to the Amended RJA, on August 31, 2012, Mr. Bacote filed an amendment to his RJA MAR.

[6] The transcript incorrectly states that the scheduling hearing was held before the Honorable Frank Lanier.

10. In October 2012, the second RJA hearing on jury selection claims was held in the cases of *State v. Quintel Augustine*, *State v. Tilmon Golphin*, and *State v. Christina Walters* in Cumberland County Superior Court. On December 13, 2012, Judge Weeks found race was a significant factor in decisions to exercise peremptory strikes in each of the defendants' cases, in Cumberland County, in their respective judicial division, and in North Carolina at the time the death sentences were sought or imposed.

11. The North Carolina General Assembly repealed the RJA in June 2013. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws 368, 372.

12. In 2018, the North Carolina Supreme Court granted review in several capital cases to consider the repeal's impact on pending RJA claims. Mr. Bacote's RJA proceedings were placed on hold with the consent of the parties while the North Carolina Supreme Court considered the controlling questions of law regarding the retroactive applicability of the repeal statute. March 5, 2021 Discovery Order at 1-2.

13. On June 5, 2020, the North Carolina Supreme Court in *State v. Ramseur*, 374 N.C. 658, 679 (2020) held that the 2013 repeal of the RJA is an unconstitutional ex post facto law when applied retroactively to defendants whose RJA claims were pending at the time of the repeal. The Court further found that the substantive changes in the Amended RJA could not be applied to pending claims. *Ramseur*, 374 N.C. at 679.

14. Following the North Carolina Supreme Court's decision in *Ramseur*, this Court, on October 23, 2020, sent a letter to the parties seeking an update on Mr. Bacote's pending RJA claims. A status conference was then held on February 16, 2021.

15. In an order filed March 5, 2021, this Court determined that the North Carolina Supreme Court's decision in *Ramseur* conclusively addressed the retroactivity question and found that Mr. Bacote was entitled to move forward with his RJA claims.

16. The Court subsequently held numerous hearings related to discovery and pre-hearing matters. The Court held hearings on May 20, 2021; October 7, 2021; November 22, 2021; May 25, 2022; December 16, 2022; May 31, 2023; November 21, 2023; January 10, 2024; and February 9, 2024.

17. With respect to discovery matters in this case, pursuant to the Court's March 5, 2021 Discovery Order, the parties filed amended motions for discovery. On July 21, 2021, the Court granted in part, denied in part, and reserved in part Defendant's First Amended Request for Discovery. On July 26, 2021, the Court granted in part, reserved in part, and denied in part the State's Amended Post-Conviction Motion for Discovery. On December 15, 2021, the Court issued its Second Discovery Order Granting Defendant's Request for Statewide Discovery.

18. On January 18, 2022, Mr. Bacote moved for a bifurcation order staying the production of discovery and evidentiary hearing regarding his charging and sentencing RJA claims until after final adjudication of his jury selection RJA claims. In that motion, Mr. Bacote sought in the alternative, discovery related to his charging and sentencing claims.

19. On May 17, 2022, Mr. Bacote filed a Notice of Withdrawal of Statewide and Judicial Division Charging and Sentencing Claims. In that Notice of Withdrawal, Mr. Bacote withdrew the following claims raised in his MAR filed pursuant to the RJA as amended on August 30, 2012: Claim VII (judicial division sentencing), Claim VIII (judicial division charging and sentencing), Claim IX (judicial division charging), Claim X (statewide charging and sentencing),

and Claim XI (statewide charging). Mr. Bacote also withdrew all requests for discovery related to these claims.

20. During the May 25, 2022 hearing, the Court conducted a colloquy with Mr. Bacote regarding his decision to withdraw those claims, and Mr. Bacote stated on the record that it was his decision, after consultation with counsel, to withdraw those claims.

21. On September 26, 2022, the Court reserved ruling on Mr. Bacote's bifurcation motion but granted in part and denied in part Mr. Bacote's discovery requests for his remaining charging and sentencing claims.

22. On February 10, 2023, the Court issued an order on the previously reserved portions of the State's Amended Post-Conviction Motion for Discovery.

23. On April 24, 2023, Mr. Bacote filed a Notice of Withdrawal of Prosecutorial District Charging and Sentencing Claims and Johnston County Charging Claims. In that Notice of Withdrawal, he withdrew the following claims included in his RJA MAR as amended on August 30, 2012: Claims VI (prosecutorial district sentencing), Claim XIII (judicial division charging and sentencing), and Claim XIV (only with respect to jury sentencing decisions in Prosecutorial District 11). Also on April 24, 2023, Mr. Bacote filed a Notice of Withdrawal of Discovery Requests and Motion to Set an Evidentiary Hearing. A sworn declaration from Mr. Bacote was attached to the Notice of Withdrawal affirming his decision to withdraw these claims and discovery requests related to those claims.

24. At a May 31, 2023, hearing on the Defendant's Notices of Withdrawal, the Court conducted a colloquy regarding Mr. Bacote's decision to withdraw these additional claims and related discovery requests. Counsel for Mr. Bacote informed the Court that the withdrawal of claims and attendant discovery requests constituted an effort to expedite the setting of an

evidentiary hearing. May 31, 2023 HTpp. 6, 11. The Court granted Mr. Bacote's withdrawal of claims and withdrawal of discovery requests and set the matter for an evidentiary hearing on his remaining RJA claims on February 26, 2024. The Court set deadlines for discovery, including expert reports, and for prehearing matters. At the conclusion of the discovery phase, the parties had exchanged hundreds of thousands of pages of discovery related to Mr. Bacote's RJA claims.

25. Approximately six months later, in an order dated December 5, 2023, the Court set additional pre-hearing deadlines. In that order, the Court confirmed the evidentiary hearing would begin on February 26, 2024. On January 23, 2024, the Court issued an order further revising some of the pre-hearing deadlines with the consent of the parties, but kept all other deadlines in effect, including the February 26, 2024 date for the commencement of the evidentiary hearing.

26. On January 5, 2024, the State filed two motions: State's Motion to Deny Defendant's Jury Selection Claims Without a Hearing Pursuant to N.C. Gen. Stat. § 15A-1420 and State's Alternative Motion to Continue Scheduled Evidentiary Hearing. Following a hearing held on January 10, 2024, the Court, on January 24, 2024, issued an order denying the State's motion to deny Mr. Bacote's jury selection claims without a hearing as well as an order denying and granting in part the State's request for a continuance. In that order, the Court set new deadlines for the State's Surrebuttal Expert Report.

27. In its Motion to Continue, the State asked the Court to continue the February 26, 2024, evidentiary hearing for at least 60 days to provide the State additional time to prepare for the testimony of its statistical expert. The Court granted in part and denied in part the State's continuance request. The Court denied the State's motion to continue "the start of this long-scheduled evidentiary hearing" and confirmed that the presentation of Mr. Bacote's evidence would commence on February 26, 2024. The Court granted, however, the State's request for

additional time to prepare the testimony of its expert. The Court further stated that, if requested by the State, the Court would pause the hearing to afford the State additional time to prepare its expert testimony.

28. The parties filed pre-hearing motions by the February 2, 2024 deadline set by the Court and the Court held a motions hearing on February 9, 2024.

29. On February 25, 2024, the State contacted the Court and counsel for Mr. Bacote informing them of the State's request for a continuance of 30 days in light of the health situation concerning a family member of one of the attorneys for the State, Nicholaos Vlahos. During a Webex conference with the parties, the State represented that Mr. Vlahos would not be able to participate as counsel for the hearing. The Court inquired about which witnesses Mr. Vlahos had prepared to cross-examine. The Court denied the State's request for a 30-day continuance but instructed counsel for Mr. Bacote to change the order of their witnesses.

30. At the start of the hearing on February 26, 2024, the State announced it was prepared to proceed with the original order of witnesses. HTpp. 6-7. The State also requested that the Court order a week-long break between the conclusion of Mr. Bacote's statistical experts and the remainder of his evidence. *Id*. The Court took the State's request under advisement. HTp. 9.

31. In light of Mr. Vlahos' unavailability, the Court altered the hearing schedule. On Thursday, February 29, 2024, the Court ended the session after the conclusion of the examination of Mr. Bacote's last statistical witness and adjourned the hearing until Monday, March 4, 2024. Before adjourning, the Court inquired of the State as to whether there was anything the Court could "do to help the State with whatever [it] need[ed] to do to try to get ready for the rest of the witnesses." HTp. 592. Counsel for Mr. Bacote provided the Court and the State with their remaining witness schedule and the State indicated no additional needs from the Court. HTp. 594.

The State repeatedly declined the Court's offer for additional time to prepare for the hearing. *See, e.g.*, HTpp. 1006-07 (in response to questioning by the Court, counsel for the State confirmed it did not wish for additional time: "I'm not asking for more time. The State is not asking for more time[.]"); *see also* HTpp. 515, 594, 883-85. The Court finds that the State's counsel were well prepared and vigorously cross-examined all of Mr. Bacote's expert witnesses. The Court further finds that the State suffered no prejudice as a result of Mr. Vlahos' absence.

32. On August 21, 2024, the Court heard closing arguments from counsel for both parties.

33. At the hearing, the Court had before it the following RJA claims: Claim I (statewide jury selection), Claim II (judicial division jury selection), Claim III (prosecutorial district jury selection), Claim IV (county jury selection), Claim V (county jury sentencing), Claim XII (prosecutorial district, county, and Defendant's own case jury selection), and Claim XIV (county and Defendant's own case jury sentencing).[7]

GOVERNING LAW

The Purpose of the RJA

34. North Carolina enacted the RJA because of the failures of "the existing legal doctrines and mechanisms for addressing racial discrimination in the criminal justice system." *Ramseur*, 374 N.C. at 677 n.9. This included *McCleskey v. Kemp*, a decision by the United States Supreme Court that eschewed the use of statistical evidence to establish a constitutional violation and instead demanded "evidence specific to [the defendant's] own case that would support an

[7] The Court notes that no evidence was presented at the hearing related to Mr. Bacote's judicial division claim (Claim II). Thus, the Court considers that claim withdrawn and makes no findings as to that claim.

inference that racial considerations played a part in his sentence" and proof that "the decisionmakers in *his* case acted with discriminatory purpose." 481 U.S. 279, 292-93 (1987) (emphasis in original). By creating "a new substantive claim permitting the use of statistical evidence of racial disparities across different geographic areas and periods of time," the General Assembly responded to the limitations of *McCleskey*. *Ramseur,* 374 N.C. at 673.

35. Likewise, the General Assembly responded to the limitations of *Batson v. Kentucky*, 476 U.S. 79 (1986). Although *Batson* and its progeny "sought to eliminate discrimination through the use of peremptory challenges," as of 2020, the Supreme Court of North Carolina had "*never* held that a prosecutor intentionally discriminated against a juror of color." *Robinson*, 375 N.C. at 178-79 (emphasis in original).[8]

36. The RJA notably expanded the type of evidence available to prove racial discrimination. *See id*. at 176-77. In *McCleskey*, while the U.S. Supreme Court rejected the use of statistical evidence alone to show purposeful racial discrimination in the administration of the death penalty, it invited legislatures to examine statistical disparities in capital sentencing. 481 U.S. at 319. Decades later, the North Carolina General Assembly responded to this invitation by enacting the RJA, a statute that "permit[ed] the use of statistical evidence of racial disparities across different geographic areas and periods of time to establish racial discrimination in capital sentencing." *Ramseur*, 374 N.C. at 673.

37. The law further altered the burden and relief available. To prevail under the constitution, defendants must show purposeful discrimination in their own cases. *McCleskey*, 481 U.S. at 292-93. The RJA replaced this high constitutional burden with a lower statutory burden of

[8] Since the decision in *Robinson*, the Court has in a single instance concluded that a prosecutor exercised a peremptory strike in a discriminatory manner against a potential juror of color. *State v. Clegg*, 380 N.C. 127 (2022).

showing only that race was "a significant factor" across a geographic area. N.C. Gen. Stat. § 15A-2011(a) (2009). While a defendant who proves a *Batson* violation of purposeful discrimination in jury selection is entitled to a new trial, the relief under the RJA for showing that race was a significant factor in the exercise of peremptory strikes is limited to resentencing to life without parole. *See* N.C. Gen Stat. § 15A-2012(a)(3).

38. In sum, the RJA "fundamentally changes what is necessary to prove racial discrimination and, in return, provides a limited grant of relief that is otherwise unavailable" under federal or other North Carolina law. *Ramseur*, 374 N.C. at 676-77. The RJA's "substantive guarantees" are unquestionably more "robust" than previously available. *Id*. at 677 n.9.

I. Language and Structure of RJA

39. Pursuant to subsection (a) of the RJA statute, this Court must determine whether the evidence presented supports a finding 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) (2009). The RJA contemplates *aggregate*, rather than individual, proof of race's impact in a decision to seek or impose a death sentence. 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.

40. Subsection (b) mandates that an individual can prove an RJA claim by showing evidence that one or more of the following forms of discrimination occurred:

> (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.

N.C. Gen. Stat. § 15A-2011(b)(1)-(3) (2009).

41. A defendant may show this form of discrimination for one or more of four specified geographical divisions. N.C. Gen. Stat. § 15A-2012(a)(3). If there is a finding "that race was a significant factor . . . in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed," a defendant's death sentence must be vacated, and the defendant will be sentenced to life without the possibility of parole. *Id.*

42. This Court must determine whether Mr. Bacote has met his burden under the specific RJA claims he has raised. Specifically, the Court must evaluate whether the evidence admitted at the hearing showed that race was "a significant factor in decisions to exercise peremptory challenges during jury selection" in Johnston County, Prosecutorial District 11, and/or statewide. N.C. Gen. Stat. § 15A-2011(b)(3) (2009). The Court must also determine whether the evidence showed that death sentences were imposed significantly more frequently against African Americans compared to white defendants in Johnston County. N.C. Gen. Stat. § 15A-2011(b)(1) (2009).

II. Burden of Proof Under the RJA – A Preponderance of the Evidence

43. To prevail under the RJA, a defendant must prove by a preponderance of the 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-1420(c)(5), 15A-2011(c) (2009). By its terms, the RJA places the burden of proof on the defendant. When an evidentiary hearing is held, pursuant

to § 15A-1420(c)(5), "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5).

44. The RJA statute establishes a burden-shifting process. Section 15A-2011(c) (2009) states: "[t]he State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence." The ultimate burden of persuasion remains on the defendant.

45. Evidence permitted to meet this burden is broad and unrestricted. It includes "statistical 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 . . . ." N.C. Gen. Stat. § 15A-2011(b) (2009) (emphasis added). The RJA does not limit consideration of each category of evidence alone or in combination with other types of evidence. Thus, statistical evidence alone, or in combination with other evidence, can establish that race was a significant factor.

III. <u>The Original RJA Governs</u>

46. The July 2012 Amended RJA narrowed the original RJA statute in several key aspects: (1) it removed statewide claims and judicial divisions claims as bases for relief; (2) it required defendants to prove discrimination in their own cases; (3) it narrowed the relevant time period to "the period from 10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence;" and (4) it imposed a higher standard for the types of evidence required to prove discrimination, dictating that a defendant could not solely rely on statistical evidence to establish that race was a significant factor. S.L. 2012-136 § 3, 2012 N.C. Sess. Laws 471, 472-73.

47. Then, in 2013, the General Assembly repealed the RJA in its entirety and included an explicit provision applying the repeal retroactively to void pending RJA claims. S.L. 2013-154 § 5.(d), 2013 N.C. Sess. Laws at 372.

48. As discussed in the procedural history, in 2020, the North Carolina Supreme Court addressed the constitutionality of the retroactive application of the RJA repeal. It ruled that 1) the repeal "cannot constitutionally apply retroactively to pending RJA motions" and 2) for those who filed under the original law, like Mr. Bacote, the broader evidentiary requirements from the original RJA govern. *Ramseur*, 374 N.C. at 679, 682. The Court held that the narrowed provisions of the Amended RJA "constitute[s] impermissible *ex post facto* laws and cannot be constitutionally applied retroactively." *Id.* at 683.[9] Consistent with *Ramseur*, Mr. Bacote's claims must be reviewed under the substantive provisions of the original RJA.

49. Mr. Bacote seeks to show that "death sentences were . . . imposed significantly more frequently upon persons of one race that upon persons of another race" in Johnston County. N.C. Gen. Stat. § 15A-2011(b)(1) (2009). The State has argued, and the Court accepts, that a defendant need not show any evidence of bias in decision-making by juries imposing death sentences when proving a claim under this standard. March 7, 2022 State's Response to Defendant's Requests for Bifurcation and Charging and Sentencing Discovery at 5-6. To prevail on his claim under this provision, a defendant must only show that death sentences were imposed "significantly more frequently" upon persons of one race than upon persons of another race.

50. Neither the statute nor North Carolina courts have defined "significantly more frequently." Applying the same principles identified above, the Court concludes that Mr. Bacote may prevail by showing that death sentences are imposed upon Black defendants in Johnston

[9] The North Carolina Supreme Court recognized a single aspect of the Amended RJA governs pending claims: whether the trial court is required to schedule an evidentiary hearing. While under the original RJA the trial court was required to hold an evidentiary hearing, under the Amended RJA the trial court need only hold an evidentiary hearing if the defendant's motion states a claim under the RJA. As noted in the procedural history, this Court determined Mr. Bacote was entitled to an evidentiary hearing on the claims alleged in his motion.

County more often than upon white defendants, and that disparity has practical and/or statistical significance.[10]

The RJA Does Not Require Intentional Discrimination

51. The RJA does not require a finding of intentional discrimination. *Robinson*, 375 N.C. at 176-77. In contrast to a *Batson* claim where an individual must prove purposeful discrimination by a single prosecutor in a single case, an RJA claim looks at whether race was a significant factor over a period of time in a geographic location. *Compare* N.C. Gen. Stat. § 15A-2011(c) (2009) *with, e.g., Flowers v. Mississippi*, 588 U.S. 284, 303 (2019) ("The ultimate inquiry is whether the State was motivated in substantial part by discriminatory intent") (internal citations and quotations omitted). This is settled law, *Robinson*, 375 N.C. at 176-77, and makes sense. Relief under *Batson*, a higher evidentiary burden compared to the RJA, is reversal of the underlying conviction; the RJA requires a lower standard of proof but provides narrower relief, resentencing a defendant to life without the possibility of parole.

There is No Requirement that Discrimination be Proven in an Individual's Case

[10] This is in accord with published cases from other jurisdictions using this language to mean substantially more often or a disparity that is large or statistically significant. *See, e.g., Aldasoro v. Kennerson*, 922 F. Supp. 339, 355 (S.D. Cal. 1995) (voting system proven in research to elect minorities "significantly more frequently" than other systems); *Henderson v. Mass. Bay Trans. Auth.*, 384 F. Supp. 3d 199, 207 (D. Mass. 2019) (referring to disparate promotion rates by race that showed white employees were promoted "significantly more frequently" than Black employees). *Hawkins v. Coleman*, 376 F. Supp. 1330 (N.D. Tex. 1974) (using "significantly more frequently" to mean statistically significant differences in rates); *Jones v. Shinseki*, No. 13-1578, 2014 WL 1275460, *3 (Vet. App. Mar. 31, 2014) (using "significantly more frequently" to mean substantially more often when describing how often a veteran's injuries disrupted his day to day living); *Pierce v. Colvin*, No. 13-00750 AJW, 2014 WL 2159388, *3 (C.D. Cal. May 23, 2014) (finding the plaintiff saw a doctor "significantly more frequently" than reported by the administrative law judge).

52. This Court finds that, in order to establish that race was a significant factor, a defendant is not required to establish that race had an impact on the final composition of the defendant's jury or outcome in the specific case. A plain reading of the original RJA statute makes this clear. Section 15A-2011(a) (2009) states: "A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in *decisions* to seek or impose the sentence of death." (emphasis added). Thus, Section 15A-2011(a) (2009) establishes that a court can look at *decisions* to seek or impose the sentence of death anywhere in one of the four geographical areas identified in the statute. The collective nature of the claim indicates that a finding of discrimination in a defendant's individual case is not required.

53. Second, by permitting statistical evidence, the RJA contemplates proof in the *aggregate*, rather than proof of race's impact in the defendant's own case. *See* N.C. Gen. Stat. § 15A-2011(b) (2009).

It is Appropriate to Consider Evidence from Cases where *Batson* Was Not Raised or where *Batson* Violation Was Not Found

54. In determining whether race was a significant factor in decisions to exercise peremptory challenges during jury selection, this Court can consider peremptory strike decisions where a *Batson* objection was raised but sustained; a *Batson* objection was made and there was a prima facie finding of discrimination, but a court ultimately determined there was no intentional discrimination; as well as peremptory strike decisions where no *Batson* objection was lodged.

55. Strike decisions where a *Batson* objection was sustained, or *Batson* was never raised, are relevant to an RJA 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.

A prima facie showing of discrimination, even if a *Batson* violation was not found, is also relevant evidence. This is because, as noted previously, the RJA does not require a showing of intent.

56. In the recent decision of *State v. Tucker*, the Supreme Court rejected Mr. Tucker's proffer of a statistical study showing racial disparities in peremptory strike rates.[11] 385 N.C. 471, 502 (2023). The Court dismissed the 2011 MSU study because it included cases in which prior courts had "neither weighed in nor found *Batson* violations by the State." *Id*. at 504. This decision is inapposite to Mr. Bacote's claims under the RJA.

57. First, the statistical evidence in *Tucker* was offered as newly discovered evidence establishing a prima facie case at *Batson*'s first step. *Id.* at 484. The *Tucker* Court confined its holding to *Batson* and explicitly stated that Mr. Tucker's pending RJA claims were "beyond the scope" of its decision. *Id*. at 513.

58. Second, the focus of *Batson* is a single strike by a single prosecutor in a single case. This is not the context in which peremptory strike decisions in prior cases are used under the RJA, a statute that concerns entirely different legal claims, a different evidentiary burden of proof, and a different scope of relief.

59. Finally, in *Tucker*, there was no evidentiary hearing where the court had an opportunity to hear evidence about defendant's statistical study. In contrast, this Court held a two-week hearing, heard live testimony, and assessed the credibility of multiple experts who testified about the robustness of the 2023 MSU study's methodology and results and other statistical analyses that corroborated the findings.

[11] The study at issue was an earlier iteration of the MSU Study. The 2011 MSU statewide data and analysis discussed in *Tucker* has since been updated, most recently in 2023, with new (but similar) results. The 2023 MSU statewide study looked at the underlying data and analyses on possible confounding factors statewide. In addition, Mr. Bacote presented new data and analysis from Prosecutorial District 11 and Johnston County.

IV. The Evidence in Support of Mr. Bacote's Claims is Not Temporally Limited

60. The Court addressed the issue of the time frame for relevant evidence to Mr. Bacote's RJA claim in its pretrial order and held that evidence bearing on the role of race on jury selection or jury sentencing from January 1, 1970, to April 9, 2011, was presumptively relevant. February 19, 2024 Order Denying State's Motion to Exclude Evidence Outside Legally Relevant Time Period at 5 (hereinafter "Court's Order on Relevant Time Period"). The Court further ruled that evidence before 1970 or after 2011 was not foreclosed, but the proponent of such evidence must bear the burden of showing its relevance.

61. In setting this framework, the Court was guided by the *Ramseur* decision. The Amended RJA imposed a temporal limit for relevant evidence, by defining "at the time the death sentence was sought or imposed" to be a period from 10 years before the capital offense to two years after imposition of the death sentence. S.L. 2012-136 § 3. The North Carolina Supreme Court deemed this to be more restrictive than the original RJA and ruled it could not be applied to pending claims. *Ramseur*, 374 N.C. at 682 (finding the amended RJA which included a temporal range was "a different, more stringent, standard of proof in showing the racially discriminatory imposition of the death penalty" and so "cannot be applied retroactively"). Thus, the time limit contained in the Amended RJA does not apply in Mr. Bacote's case.

62. Subsection (b) of the original RJA "does not define the temporal parameters of the phrase 'at the time the death sentence was sought or imposed.'" *Id.* at 672 n.5. The Court adopted the forty-year period of presumptive relevance in recognition that "at the time the death sentence was sought or imposed" must be interpreted more broadly than the decade plus term of the Amended RJA. Court's Order on Relevant Time Period.

HEARING OVERVIEW

63. On February 26, 2024, the Court convened an evidentiary hearing in the Superior Court of Johnston County on Mr. Bacote's RJA claims. Over the course of two weeks, this Court heard evidence from ten witnesses and received approximately 300 exhibits, including trial transcripts, expert reports, and underlying data, scientific research articles, affidavits, and other documentary evidence.

64. At the hearing, Mr. Bacote presented evidence from the following witnesses:

- Barbara O'Brien, Ph.D., a Professor of Law at Michigan State University College of Law, Editor of the National Registry of Exonerations, and a member of the American Law Institute, a leading independent organization that produces scholarly work to clarify, modernize, and otherwise improve the law. Dr. O'Brien received a J.D. in 1996 from the University of Colorado School of Law. After completing law school, Dr. O'Brien was an Assistant Appellate Defender in Illinois and then obtained two federal clerkships in the Central District of Illinois. In 2007, Dr. O'Brien earned a Ph.D. in Social Psychology from the University of Michigan. To obtain her Doctorate, Dr. O'Brien completed numerous intensive graduate classes on methodology and statistics. Dr. O'Brien has designed and conducted approximately one dozen empirical studies, applying her legal, methodological, and statistical training. Dr. O'Brien also has served as a peer reviewer several dozen times and published over 20 articles in many journals, including the Journal of Empirical Legal Studies and the Journal of Applied Social Psychology. This Court accepted Dr. O'Brien as an expert in social science research and empirical legal studies. HTp. 36.

- Nandita Mitra, Ph.D., a professor of Biostatistics at the Perelman School of Medicine, University of Pennsylvania, as well as a professor of Statistics and Data Science at The Wharton School, University of Pennsylvania. Dr. Mitra is the co-director of the Center for Causal Inference at the University of Pennsylvania, Chair of the Statistics in Epidemiology Section of the American Statistical Association (ASA), and the Secretary for the Society for Causal Inference. Dr. Mitra earned an M.A. in Biostatistics in 1996 from the University of California at Berkeley, a Ph.D. in Biostatistics from Columbia University in 2001, and completed her post-doctoral fellowship at the Harvard School of Public Health in 2002. Dr. Mitra has published over 300 peer-reviewed articles in the leading medical, public health and statistical journals in the nation. She received the L. Adrienne Cupples Award in 2024, a high honor and award given to just one statistician each year for excellence in teaching, research, and service in biostatistics. HTp. 354. She is also the Editor-in-Chief of the Journal of Observational Studies. The Court accepted Dr. Mitra as an expert in statistical analysis and causal inference. HTp. 361.

- Richard Smith, Ph.D., the Mark L. Reed III Distinguished Professor of Statistics and Professor of Biostatistics at the University of North Carolina at Chapel Hill. He received his undergraduate degree in mathematics from Oxford University and his Ph.D. in operations research at Cornell University. HTp. 460; DE106. His teaching and research concentrate in theoretical mathematics and applied statistics, including environmental applications. HTp. 462. He is a fellow at the American Statistical Association and the Institute of Mathematical Statistics, and an elected member of the International Statistical Institute. Dr. Smith is the recipient of numerous

awards including the Guy Medal in Silver of the Royal Statistical Society and the Distinguished Achievement Medal of the Section on Statistics and the Environment from the American Statistical Association. In addition, Dr. Smith is a chartered statistician of the Royal Statistical Society. The Court accepted Dr. Smith as an expert in statistical analysis. HTp. 466.

- Samuel R. Sommers, Ph.D., a Professor at Tufts University School of Arts and Sciences and the Chair of the Department of Psychology at Tufts University. Dr. Sommers is a social psychologist, and a member of the American Psychology-Law Society and the Association for Psychological Sciences. Dr. Sommers' scholarship examines the influence of race and racial diversity on perception, judgment, and decision-making, with a particular focus on race and the legal system in the United States. Dr. Sommers also studies the psychology of bias, implicit forms of bias and unconscious bias, and more overt forms of bias. Since 1997, he has published several dozen articles and book chapters on these topics. Additionally, he has previously testified as an expert witness in more than 20 cases, including two in North Carolina. Dr. Sommers testified for the defense in *State v. Robinson*, Case No. 91 CRS 23143 (Cumberland Cty.), and for the State in *State v. Hicks*, Case No. 15 CRS 51212-14, 531 (Durham Cty.). Dr. Sommers received his Doctoral and Master's Degrees in Psychology from the University of Michigan, Ann Arbor, and his Bachelor's Degree in Psychology from Williams College. The Court accepted Dr. Sommers as an expert in research methodology, decision-making in a potentially racial context, and unconscious biases and decision-making, and their possible impacts on jury selection. HTp. 617.

- Crystal Sanders, Ph.D., an Associate Professor of African American Studies at Emory University. Dr. Sanders is a historian and researcher, born and raised in Johnston County. Dr. Sanders received her M.A. and Ph.D. in History from Northwestern University, and her B.A. in History and Public Policy from Duke University Dr. Sanders previously served as an Associate Professor of History and the Director of the Africana Research Center at Pennsylvania State University. Dr. Sanders has authored significant scholarship on the history of the American South, including work published in the Journal of Southern History, the North Carolina Historical Review, and the Journal of African American History. Dr. Sanders is a recipient of the C. Vann Woodward Prize from the Southern Historical Association, the Huggins-Quarles Award from the Organization of American Historians, and the Equity Award from the American Historical Association, among other fellowships and prizes. The Court accepted Dr. Sanders as an expert in in history and African American studies, specifically, 20th century U.S. history. HTp. 727.

- Seth Kotch, Ph.D., an Associate Professor in the Department of American Studies and the Director of the Southern Oral History Program at the University of North Carolina at Chapel Hill. Dr. Kotch received his Doctoral and Master's Degrees from the University of North Carolina at Chapel Hill, and his Bachelor's Degree in History from Columbia University. Dr. Kotch has authored various scholarship on the death penalty and racial violence in North Carolina, including the book *Lethal State: A History of the Death Penalty in North Carolina*, which was published in 2019 by UNC Press, and a 2010 law review article, "The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina," which was published in

the North Carolina Law Review. He received the Graduate Education Advancement Board Impact Award and the M.E. Bradford Dissertation Prize, and, in 2020, he was inducted into the Historical Society of North Carolina.[12]

- Bryan Stevenson, a Professor of Law at the New York University School of Law and the Director of the Equal Justice Initiative (EJI) in Montgomery, Alabama. Professor Stevenson received a J.D. from Harvard University Law School and a master's degree in public policy from the John F. Kennedy School of Government. Professor Stevenson is the recipient of an array of honors including the MacArthur Award, the National Medal of Humanities awarded by the President, and the ABA medal. Professor Stevenson teaches in the areas of criminal justice, Eighth Amendment law, capital punishment law, and criminal procedure. He has conducted research and published in the areas of race and gender discrimination in jury selection, and racial bias in sentencing in criminal cases. In 2010 and 2021, Professor Stevenson published studies examining the issue of racial bias in jury selection across the South.

[12] When counsel moved for the admission of Dr. Kotch as an expert witness, the State objected and noted that much of the testimony was outside of the time frame. HTp. 812. The Court sustained the State's timeframe objection. HTp.815. The Court intended, as the parties clearly understood from subsequent objections and questions, to admit Dr. Kotch but restrict his testimony to the time limitations previously ordered. *Compare, e.g.,* HTpp. 819, 820, 822 (The Court permitting testimony from Dr. Kotch about incidents that occurred during the presumptively relevant time frame, and their respective historical significance) *with, e.g.,* HTp. 835, when the Court sustains an objection based on an exhibit outside the timeframe. *See State v. Godwin*, 369 N.C. 604, 609 (2017) ("In assessing how a witness may be qualified as an expert, we have held that when the record contains sufficient evidence upon which the trial court could have based an explicit finding that the witness was an expert, an appellate court may conclude that the trial court found the witness to be an expert.") (Collecting cases on implicit expert qualification); *see also State v. Wise*, 326 N.C. 421, 432 (1990) ("Assuming arguendo that the trial court's failure to formally qualify the witness as an expert was error, it was harmless error in light of the evidence of her qualifications, the court's obvious conviction that the witness was an expert, and the fact that the witness' opinion testimony fit within the definition of expert testimony").

Professor Stevenson has been admitted as an expert on race in jury selection in several states, including North Carolina in *State v. Robinson*, Case No. 91 CRS 23143 (Cumberland Cty.). This Court accepted Professor Stevenson as an expert in bias in criminal law, bias in capital punishment, and racial bias in jury selection. HTpp. 1050-51. Professor Stevenson testified about the underrepresentation of African Americans in jury pools and how *Furman v. Georgia*, 408 U.S. 238 (1972) shed a spotlight on racial discrimination on juries. He testified about the misapplication of *Batson* and how Black jurors are often excluded from juries due to purported race neutral reasons that are applied in a racially discriminatory manner.

- Gregory C. Butler, an assistant district attorney in Johnston County from 2006-2016, and in Cumberland County from 2003 to 2006. He also worked as a prosecutor in Onslow, Jones, Duplin and Sampson Counties, then the Fourth Prosecutorial District, between 1985 and 2002.

- Shelagh Rebecca Kenney, a capital defense attorney with the Center for Death Penalty Litigation and appointed counsel for Hasson Bacote. Ms. Kenney has practiced capital litigation since 2001 and was appointed by the Office of Indigent Defense Services to represent Mr. Bacote in this case in 2021. Ms. Kenney reviewed the extensive discovery from the State and public records and testified regarding lists of capitally-tried cases in different counties across the state, including Johnston County, and related post-conviction documentation; Johnston County census data; and materials from post-*Batson* "Top Gun" trainings for prosecutors on jury voir dire. She also testified to a list of capital cases prosecuted by Mr. Butler; a summary chart of defendants on death row, indicating the theories of first degree murder they were

convicted under; jury selection materials produced by the State; summaries of juror strike rate information for cases capitally tried by Mr. Butler for individuals no longer on death row; and a list of employees in the District Attorney's office in District 11.

65. The State called one witness, Fan Li, Ph.D. Dr. Li is a professor in the Department of Statistical Science and the Department of Biostatistics and Bioinformatics at Duke University. She has taught at Duke University for approximately 16 years. Dr. Li received her bachelor's degree in mathematics from Peking University in China in 2001, a Ph.D. degree in Biostatistics from John Hopkins University, and completed a two-year post-doctoral fellowship in statistics in the Department of Health Care Policy at the Harvard Medical School. Dr. Li is codirector of Comparative Effectiveness Methodology Program at Duke Clinical Research Institute and a Fellow of the American Statistical Association. The Court accepted Dr. Li as an expert in statistics and caul inference. HTp. 1203.

66. Mr. Bacote presented rebuttal testimony from Dr. Smith and Dr. Mitra. The evidentiary hearing concluded on March 8, 2024.

67. As Mr. Bacote's experts explained, observational and experimental studies are two approaches to answering research questions, each with its own strengths and drawbacks. Observational studies (sometimes referred to as archival studies) rely on actual data from real world experiences, but conclusions may be subject to distortion if potential confounding factors are not adequately identified and considered. Medical decisions are routinely based on observational studies. HTp. 405.

68. In contrast to observational studies, well-designed experimental studies remove the risk of confounding but are conducted under mock or hypothetical conditions and thus may not adequately capture real world conditions. All of the experts agreed that the strongest conclusions

can be drawn when experimental and observational studies reach consistent results. HTpp. 154, 418, 673, 691, 707-08, 1336. In this case, the large body of evidence introduced by Mr. Bacote, including both experimental and observational research, along with historical and case evidence, points to a consistent picture of the role race has played in jury selection throughout Johnston County and Prosecutorial District 11, and in the capital cases tried by prosecutor Mr. Butler, including in Mr. Bacote's trial.

69. **Experts in Statistical Data**. Mr. Bacote presented evidence from an observational study of 176 jury selection proceedings in capital cases in North Carolina conducted by two principal investigators, Michigan State University College of Law Professors Barbara O'Brien and Catherine Grosso (herein "Jury Selection Study"). Dr. O'Brien testified in detail about the research question, data sources, data collection and coding, and statistical analysis. Dr. O'Brien has both experience and expertise in research study design. HTpp. 23-25. She has conducted multiple large empirical studies using statistical analysis, including examinations of exoneration rates and characteristics of jury selection in capital cases. HTpp. 29-30. Dr. O'Brien has significant expertise and training in criminal law and jury selection. HTpp. 28; DE1. Dr. O'Brien has published multiple papers where she collaborated with statisticians or epidemiologists to examine empirical legal questions. *See* DE1, CV of Barbara O'Brien; HTpp. 26, 30.

70. Four other experts testified about the Jury Selection Study: Dr. Samuel Sommers, who also holds a doctorate in psychology, and statisticians Dr. Richard Smith, Dr. Nandita Mitra, and Dr. Fan Li. Accepted by the Court as an expert in research methodology, Dr. Sommers testified about the study design, data collection, analysis and findings of the Jury Selection Study. Like Dr. O'Brien, Dr. Sommers has previously published on the topic of jury selection research.

71. Dr. Mitra, Dr. Smith and Dr. Li each testified about their review and own statistical analyses of the data from the Jury Selection Study. HTpp. 362, 366-67, 466-67, 1203. None of these three has subject area expertise in criminal cases or jury selection. Their area of expertise lies in statistics and methodology. All three are accomplished statisticians, with extensive teaching and publication resumes and are elected fellows of the American Statistical Association. DE103, DE107, SE22. They regularly publish collaborative research papers in the applied fields of medicine and health with co-authors who have medical subject matter expertise. *Id*.

72. **The Jury Selection Study.** Shortly after the passage of the Racial Justice Act in 2009, Dr. O'Brien and her colleague, Catherine Grosso, began conducting research and collecting data for an empirical study of jury selection in capital cases in North Carolina. They undertook an extensive literature review of prior observational and experimental studies in jury selection. The literature review, set out in their report, showed that race played a role in mock jury studies and in prior observational studies of jury selection in many jurisdictions. DE7. Dr. Li read a few of the cited papers and agreed that the MSU professors appropriately summarized those studies. HTp. 1337.

73. In designing their study, Dr. O'Brien and Professor Grosso (collectively, "MSU researchers") sought to answer the question posed by the RJA statute itself, whether race was a significant factor in jury selection in capital cases in jurisdictions within North Carolina. HTp. 41. Accordingly, the MSU researchers attempted to collect relevant documents for every jury selection proceeding in North Carolina in which the defendants were sentenced to death and on death row. The study ultimately included 176 proceedings: 173 related to individuals on death row at the time of the initial RJA filings in 2010 and the inclusion of three additional cases decided before April of 2011, the time period ordered by the Court.

74. The MSU researchers considered but ultimately rejected including in the Jury Selection Study cases tried capitally that resulted in life verdicts. They did so for three reasons. First, they had no reason to believe that jury selection would differ in cases that resulted in death or life since they were all tried capitally, and at the time of the jury selection, the outcome was unknown. HTpp. 42-43. Second, as a matter of practicality, many of the documents necessary for the study were more available in the cases that resulted in death verdicts. HTp. 43. Third, and perhaps most importantly, they concluded that information about life sentenced cases could only strengthen any conclusion that race was significant in jury selection and could not refute such a finding. If race was not correlated with strike decisions in the death verdict cases, then the results in the life sentenced cases would be insufficient to warrant relief under the statute. *See* N.C. Gen. Stat. § 15A-2012(a)(3). On the other hand, if race was correlated with strike decisions in death verdict cases, the decisions in life sentenced cases could only provide additional support. This point, described at length by Dr. O'Brien in her testimony, is best captured in a table format:

POSSIBLE OUTCOMES FOR CASES WITH LIFE VERDICTS

Given that prosecutors struck Black venire members at twice the rate of all other jurors in those capital trials resulting in death verdict cases, what would be the potential impact of any conclusion regarding strike rates in capital cases in capital trials resulting in life verdicts?

Possibility	**Could this be additional evidence of racial bias?**	**Could refute the finding of discrimination in death cases?**
1. Prosecutors struck Black venire members at *higher rates* or *similar rates* in life verdict cases.	Yes. A finding that the disparate strikes against Black venire members in cases resulting in life would be additional evidence that prosecutors exercised peremptory strikes based on race.	No.

2. Prosecutors struck Black potential jurors at *lower rates* than it struck all other potential jurors in life verdict cases.	Yes. This would show that prosecutors were more likely to strike Black venire members in those cases that resulted in death, implying either that prosecutors had different approaches to jury selection in those cases resulting in death, or that cases with more discrimination were more likely to result in death.	No.

HTpp. 231-32, 321-23.

75. Dr. Sommers testified that he agreed that the decision to focus on cases resulting in death sentences alone was a reasonable one that did not weaken the analysis. HTpp. 669-71. The Court agrees with this testimony from Dr. Sommers and Dr. O'Brien and finds that the universe of cases in the Jury Selection Study was appropriately defined for determining whether race played a significant role in jury selection in capital cases in Johnston County, Prosecutorial District 11, and the capital cases tried by Mr. Butler, including Mr. Bacote's case.

76. The Jury Selection Study required labor intensive, difficult data collection. HTp. 667. The MSU researchers hired a team of attorneys and investigators to gather files from courthouses and storage locations across the state of North Carolina. HTp. 44. They instructed staff to collect and scan jury selection questionnaires, transcripts, and jury charts, among other files. HTpp. 44-45.

77. Although Dr. O'Brien and Professor Grosso did not charge for their own work, they provided compensation to the hired staff for document collection and record coding. Along with the Jury Selection Study, they simultaneously conducted a statewide charging and sentencing study. Collectively, these two studies cost nearly a million dollars, mostly in labor. Defense counsel provided some of the funding, but the bulk of the funding came from foundations.

78. The MSU researchers undertook precautions to ensure the transparency and accuracy of the data at each stage of the Jury Selection Study. They created an organized digital

file, with unique identification numbers assigned to each case and to each prospective juror. The researchers also maintained and organized all the available source materials relied upon in the study.

79. With respect to creating the data set, the researchers took multiple steps to ensure accuracy and reliability. First, they developed standardized "data collection instruments" (DCIs), or forms that governed the collection of data in each case and for each prospective juror. They developed and used standardized instructions for data collection and coding. HTpp. 45, 50; DE7. The DCIs asked a series of questions about the jury selection and prospective jurors, including questions about the jurors' demographic data and whether the juror was struck, seated, or removed for cause. *Id*. The researchers maintained a log which listed in detail each step they took to clean or correct any errors in the data. HTp. 124.

80. The MSU researchers hired law graduates as coders to complete the DCIs using the collected data sources. The researchers closely supervised the coders. The coders used paper DCIs to minimize errors and increase transparency, and the researchers maintained those hard copies. HTp. 52. The hard copies were scanned, and the data source files, electronic data sets, data collection instruments, training manuals, data cleaning logs, and data analysis files were all provided to the State and its expert, Dr. Li. Ultimately, this Court admitted much of this information into evidence. *See* DE2 (jury selection transcripts); DE4 (other jury study source documents, like questionnaires and public records); DE7 (Report on NC Jury Selection Study 2023, with attachments of training instructions, data collection instrument); DE8 (supplemental DCIs); DE6 (electronic data set).

81. Dr. O'Brien testified that the MSU coders were able to complete the DCIs with strike information for all 7,530 prospective jurors in the study. Only jurors eligible to be struck by

the State were included in the study. In addition to the main DCIs for basic available strike and demographic data, coders used a supplemental race coding DCI for more complex coding when race was not self-reported on a jury questionnaire or transcript. HTpp. 59, 63. For those instances without self-reported race information, coders used public records to determine race. In order to minimize the risk of bias, coders used a survey form that was blind to outcome at the time they were making race determinations.

82. The protocol for assigning race when not self-reported was stringent. DE7, Appendix, Instructions for Race Coding. The instructions required coders to match the name and the address or date of birth between the venire member and the public record reporting the person's race. If there was no match among those categories, the coder had to consult additional public record data, like address history, and satisfy the alternative criteria before assigning race to the venire member. Ultimately, the researchers were able to identify race information for all but three of the 7,530 prospective jurors in the Jury Selection Study.

83. For some groups of prospective jurors, MSU researchers also collected additional descriptive information about marital status, prior jury service, and whether the potential juror knew any of the parties in the case. This information, which had its own accompanying coding protocol, was coded and collected with the descriptive coding DCI. When designing the protocol and deciding what fields to examine, MSU relied heavily on the academic literature about the *Batson* decision and subsequent cases interpreting that decision, prior jury selection studies, and published *Batson* cases decided by the North Carolina appellate courts. Filling out the DCI was time consuming and required close reading of the jury questionnaires and transcripts. To improve reliability, MSU had two coders independently review and code the information for the descriptive coding. If there was any discrepancy between the two independent coding forms, Dr. O'Brien

personally resolved the discrepancy. These discrepancies and their resolution were recorded in the log for transparency.

84. The Court finds that the MSU Study has limitations in many respects, especially in the analysis and methodology of the statewide data. According to Defendant's experts, the MSU Study did not account for jurors' nonverbal communications and how those communications impacted prosecutors' decisions to exercise peremptory strikes. As such, all nonverbal communications constitute unmeasured confounders or unmeasured confounding variables with regard to the MSU Study. A confounding variable is an unaccounted for factor that impacts both the potential cause and effect of the dependent variable in a statistical analysis and can distort the results of that analysis. (*See* ET V1 pp. 26-27) Essentially, the MSU Study ignored nonverbal communications and did not account for them when evaluating whether race was a significant factor in prosecutors' decisions to exercise peremptory strikes in North Carolina capital cases tried between 1985 and 2010.

85. Defendant's own expert on behavioral science and the effects of implicit bias on decision making and jury selection, Dr. Samuel Sommers, testified that nonverbal communication is an important part of how people communicate and is a "known channel of communication" in scientific circles. (ET V5 pp. 681–82) For instance, Dr. Sommers acknowledged that, if a person claims to be paying attention, but is playing with his phone, the nonverbal communication says more about whether the person is actually paying attention than his statement. (*Id.*) The evidence presented at the RJA evidentiary hearing shows that the MSU Study failed to take into account nonverbal communications such as facial expressions, gestures, tone of voice, loudness, inflection, pitch of voice, body language, posture, eye contact, appearance, and attire or artifacts.

86. Additionally, the MSU Study fails to accurately consider all the race-neutral reasons supporting prosecutors' decisions to exercise peremptory strikes against individual venire members. Dr. O'Brien was the only researcher from the MSU Study who testified at the evidentiary hearing. Dr. O'Brien has a bachelor's degree in economics from Bowdoin College, a juris doctor from the University of Colorado School of Law, and a PhD in social psychology from University of Michigan. (ET V1 pp. 22–23) Dr. O'Brien does not possess a degree in statistics, statistical analysis, or causal inference.

87. Though she holds no statistical degrees, Dr. O'Brien took a yearlong class on statistics and took "intensive summer classes" at University of Michigan for graduate students and professors interested in learning new methods. These included a class on multiple regression, a class on hierarchical linear modeling, and a class on structure 11 - equation modeling. (ET V1 p. 25) Dr. O'Brien worked for about two years at the Illinois Office of the State Appellate Defender and clerked for a federal district judge in the Central District of Illinois. She then moved to Michigan, did some adjunct teaching and worked for an old employer before beginning graduate school. (ET V1 p. 27) Dr. O'Brien is currently a tenured professor and teaches criminal law as well as criminal procedure classes. She has taught seminars on social science and juries and teaches a seminar on wrongful convictions. She is also the editor of the National Registry for Exonerations. (ET V1 p. 28) Dr. O'Brien previously testified as an expert witness three times in North Carolina and once in South Carolina. (ET V1 p. 32) Based on these qualifications, Defendant tendered, and the Court received Dr. O'Brien as an expert in social science research and empirical legal studies. (ET V1, pp. 34–36) Dr. O'Brien was not tendered, and the Court did not receive her, as an expert in statistical analysis or causal inference.

88. The MSU Study Dr. O'Brien completed consisted of two parts. The first part was an analysis of prosecutorial peremptory strike patterns in capital cases in North Carolina. In this analysis, she was investigating the role that race might play in the exercise of prosecutorial peremptory strikes. The second part was a charging and sentencing study. (ET V1 pp. 37–39) Defendant does not rely on the charging and sentencing study to support any of his remaining RJA clams. Instead, he relies almost entirely on a sentencing analysis conducted by Dr. Richard Smith, a statistician and professor, on certain capital cases from Johnston County.

89. Dr. O'Brien's study process began in the summer of 2009, and almost a million dollars was spent on the jury selection portion and charging and sentencing portion of the MSU Study. (ET V1 pp. 39–40) Dr. O'Brien testified that her "research question was dictated by the Racial Justice Act itself." (ET V1 p. 41) She testified that the RJA referred to race being a significant factor in jury selection in capital cases and that is what framed her research question. (ET V1 p. 41) Dr. O'Brien acknowledged that the MSU Study was created specifically to explore the possibility of bringing claims under the RJA, and that the study was originally called "the Racial Justice Act study project." (ET V1 p. 175)

90. From the evidence presented at the RJA MAR evidentiary hearing, the MSU Study is a tool designed by the MSU researchers and CDPL to assist defendants on death row to bring claims under the RJA in an attempt to overturn their death sentences by claiming racial discrimination in jury selection and in the charging and sentencing of capital offenses.

91. According to Dr. O'Brien, the "universe of cases" used in the MSU Study was comprised of everyone who was on death row at the time the Racial Justice Act was passed. (ET V1 p. 41) Dr. O'Brien chose that "universe" because she believed those are the cases the Racial Justice Act spoke to. She did not include cases that ended in a life sentence because she "couldn't

think of any reason why jury selection in a capital case would be different in a case that ended in death versus one that ended in life." (ET V1 p. 42) Additionally, she testified that there tends to be more documents available for review in cases that end in a death sentence. (ET V1 p. 43)

92. There was a team of staff attorneys and volunteers who volunteered their time to go around the state and collect the data for the MSU Study. (ET V1 p. 44) The staff attorneys who were responsible for coding the data in the jury selection study were at Michigan State University and were all "trained law graduates." (ET V1 p. 49) These coders only considered jurors who were eligible to be struck by the State when conducting the study. If a juror was excused for cause or peremptorily stricken by the defense, they were not included in the study. (ET V1 p. 46) There were 7,552 venire members included in the statewide study. (ET V1 p. 47)

93. Coders used a Data Collection Instrument ("DCI") to collect data on each venire member. The purpose of the DCI is to organize information to be put into a database so that it can be analyzed. Dr. O'Brien testified that researchers often skip this whole step and put information directly into a database, but that they felt there would be fewer opportunities for errors by including this intermediate step. (ET V1 pp. 51–52) The coders did not code for more detailed descriptors for all of the 7,530 venire members. They collected more detailed information for just a "random sample" of the jurors because, according to Dr. O'Brien, "it makes sense to just do a random sample." (ET V1 p. 53) Coders used supplemental DCIs when they had to turn to public records to determine the race of a juror. Over two thirds of venire members self-reported race on their juror questionnaires. The coders had to use public records for twenty-five percent of the jurors. (ET V1 pp. 55–57) The race coding involved a "triangulation" of sources, including public records, jury summons lists, voter registration records, etc. (ET V1 pp. 62–64)

94. If there was a discrepancy during the coding process, Dr. O'Brien resolved the discrepancy. (ET V1 p. 122) After coding, the information was put into the database. There were fields set up that would prevent someone from putting in an invalid code. (ET V1 p. 124) In a situation where two coders read the same information and coded it differently, Dr. O'Brien made the decision as to how it would ultimately be coded. (ET V1 p. 128)

95. Dr. O'Brien defined the term "statistical significance" as a "phrase that reflects sort of that a particular disparity that you observed is very likely not due to statistical fluke…" (ET V1 pp. 72–73) She defined the term "p-value" as "a measure of the likelihood or probability that you would observe a disparity of this magnitude, and in this context, a disparity of this magnitude if black jurors and all other jurors were actually struck at the same rate." (ET V1 pp. 72–73) Dr. O'Brien testified that she is not a statistician and that it was prudent to "run your decision-making by somebody who truly is a statistician…." (ET V1 pp. 73–74) Dr. O'Brien testified that "this analysis is not purporting to say we're comparing apples to apples. What we're trying to do is establish are black people in fact more – struck more often than their non-black counterparts. Now what causes that disparity is a different question that this analysis is not equipped to answer." (ET V1 p. 81) The Court finds that, due to Dr. O'Brien's lack of statistical expertise, the design of the MSU Study suffers from several flaws that bring its reliability into question. Additionally, the Court finds that, even if the MSU Study was flawless, it fails to determine what causes the racial disparity identified in the raw data collected because it is merely an observational study. In other words, due to the nature of the MSU Study, it fails to establish a causal connection between the race of the venire member and the exercise of a peremptory strike by the prosecution.

96. Additionally, the MSU Study fails to take into account prosecutorial jury strikes that have been deemed race-neutral by North Carolina trial and appellate courts. During her testimony,

Dr. O'Brien admitted that The MSU Study does not have any way to account for jury strikes that have been deemed race-neutral by North Carolina appellate courts and was not designed for that purpose. (ET V1 p. 90) This very defect drew the attention of the North Carolina Supreme Court when it held in a recent case that the MSU Study is "fundamentally flawed" "lacks relevance" and has "no probative value" when determining the issue of whether race was a significant factor in decisions to exercise peremptory challenges during jury selection. *State v. Tucker*, 385 N.C. 471, 504, 895 S.E.2d 532, 556 (2023). The defendant in *Tucker* challenged his conviction and death sentence under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), rather than seeking relief under the RJA, and was analyzed under Batson standards and not the RJA. In addition, the MSU study was supplemented after the Tucker decision.

97. While the MSU Study was admitted into evidence (D MARE# 7), Dr. O'Brien testified that she did not know if the MSU Study had ever been cited by any scientific journal and would not expect it to be cited by any journals or organizations such as the American Statistical Association or the National Academies of Science, Engineering, and Math. (ET V1 p. 89) According to Dr. O'Brien, the results of the MSU Study show that black potential jurors were struck at a higher rate than non-black potential jurors. (ET V1 p. 99; p. 106) However, Dr. O'Brien acknowledged that the analyses in the study are based upon which venire members get called into the jury box and are not based on the entire population of venire members. She acknowledged that the State does not have control over which venire members get called into the jury box to be questioned, and that the prosecutor does not have control over the population they are questioning. She also acknowledged that the venire members who get called into the jury box affect the overall proportions of races represented in the study, i.e., if there are fewer African American jurors in a jury pool, the strike rate of African Americans will be higher. (ET V1 p. 174)

98. Dr. O'Brien also acknowledged that she is aware of statistical literature discussing the dangers of misinterpreting statistics in social sciences and acknowledged that in looking at different sets of data, it is possible to calculate how different things are associated and whether that association is "statistically significant." (ET V1 pp. 179-180) Based on her analysis of the raw numbers which she called her "unadjusted analysis," Dr. O'Brien testified that it was her opinion that race was a "statistically significant factor" in the State's decisions to exercise peremptory challenges when seeking to impose death penalties in North Carolina during the entirety of the MSU Study period. (ET V1 p. 115) However, Dr. O'Brien admitted that none of the individual characteristics of any jurors were adjusted to account for confounding variables in the unadjusted analyses within the MSU Study. (ET V1 pp. 111-112) In other words, the raw numbers upon which Dr. O'Brien based her expert opinion that race was a "statistically significant factor" in the State's decisions to exercise peremptory challenges when seeking to impose death penalties in North Carolina did not account for any confounding variables in the data collected, and thus was not a statistical analysis at all.

99. Additionally, Dr. O'Brien acknowledged that the use of the term "race-neutral peremptory strike system" in the analysis implies that all the other characteristics of the things being compared are the same, which is not the case in the unadjusted analysis because nothing is controlled for in the unadjusted analyses. (ET V1 p. 188) Based on the unadjusted analysis alone, Dr. O'Brien opined that race was a "statistically significant factor" in the State's decision to exercise peremptory challenges when seeking to impose death penalties in North Carolina, in Prosecutorial District 11, in Johnston County, and in the four cases included in the MSU Study that were prosecuted by Assistant District Attorney Gregory Clement Butler ("ADA Butler" or "Mr. Butler") where a death sentence was sought or imposed. (ET V1 pp. 115-16) The Court finds

that Dr. O'Brien's opinion that race was a "statistically significant factor" in the State's decisions to exercise peremptory challenges on the Statewide challenges, must be viewed in light of the limitations brought out by the State. The Court considers the Study helpful in its' analysis of the Johnston County, Prosecutorial District, and in Mr. Butler's cases.

100. The State called Dr. Fan Li as its only live witness. In her written reports and testimony, Dr. Li initially expressed criticism of the Jury Selection Study because there were changes in the underlying data set. HTp. 1254. On cross-examination, however, it became clear that Dr. Li's criticisms stemmed from her misunderstandings about the data set and its prior versions. HTpp. 1262-81.

101. The State sought, and this Court ordered, extremely broad discovery of the MSU files and research. The discovery sought by the State and produced by Mr. Bacote included all versions of the Jury Selection Study data set. Consistent with the Court's order, Mr. Bacote produced the 2012 versions of the data set, along with data sets updated in 2021. The Court also ordered broad discovery of the State, and the State produced, on a rolling basis, documents relevant to the Jury Selection Study, which led to further updates of the data sets.

102. On May 31, 2023, the Court set a scheduling order for final reports and final discovery deadlines. The Court ordered both sides to complete discovery by September 1, 2023, and to file expert reports by October of 2023. *See* August 10, 2023 Discovery Order at 4. Mr. Bacote disclosed the 2023 data set used in the Jury Selection Study on September 1, 2023, and then on October 1, 2023, he disclosed a report on the North Carolina Jury Selection Study, which relied on the September 1, 2023 data in its analysis.

103. On cross-examination, Dr. Li confirmed that she initially had the 2012 data, and then received a data set from 2021. She testified that no subject matter expert in jury selection or

jury trials assisted her or helped her navigate the data set and files. HTpp. 1262-63. Dr. Li was not aware that the 2012 and 2021 versions of the data set were not going to be used by Mr. Bacote for this litigation and were produced in response to the State's request. HTp. 1272. Dr. Li wrote her expert report using the older data set that was not used in the Jury Selection Study, and indeed had already completed her report when the data set that was ultimately used in the study was produced in September of 2023. No one from the State asked Dr. Li to ensure that her October report be based on the September 2023 data set or explained to Dr. Li that the Jury Selection Study would be based on the September 2023 data set. HTpp. 1272-74.

104. On December 13, 2023, Mr. Bacote produced an updated expert report in this case and disclosed it to the State. This updated report incorporated new data that had been disclosed by the State for the September 2023 deadline.[13] The new data did not meaningfully change the results of the Jury Selection Study in any way. Indeed, Dr. Li characterized the differences between the September 2023 and December 2023 data sets as miniscule. HTp. 1274.

105. Dr. Li also did not understand that some venire members who were excused for cause were included in the data set that was produced by Mr. Bacote only at the State's request, not because they were part of the Jury Selection Study. The State requested production of all the data collected in the Jury Selection Study about potential jurors removed for cause. In capital jury selection, jurors may be disqualified for service for a host of reasons, including unwillingness to vote for the death penalty or life without parole. These jurors are removed from the pool of potential jurors eligible for jury service "for cause." Accordingly, even though these jurors may have been questioned during voir dire by the parties, they are not included in the Jury Selection

[13] Dr. Li agreed that if given new information, it is appropriate to update the data, HTp. 1282, as the MSU researchers did here.

Study. The Jury Selection Study was designed to investigate potential discrimination at the stage of peremptory strikes and did not collect data or analyze the State's practices with respect to cause challenges. Dr. Li was unaware that the prospective jurors who were struck for cause were included in the data set produced to the State. HTp. 1276. She did not know that she needed to remove those jurors from any probative analysis of peremptory strikes by prosecutors. *Id.* This misunderstanding led Dr. Li to erroneously conclude that some venire members were missing data about the strike outcome, when in fact those venire members were not strike eligible. HTpp. 1277-81.

106. In sum, the Court has reviewed all of Dr. Li's critiques of the Jury Selection Study and has considered them in assigning the proper weight in reaching its decision on a Statewide basis, but the Court cannot give the Study the weight which the Defendant would have the Court assign. However, the Court finds the data from just Johnston County and District 11 and concerning Prosecutor Greg Butler is much more relevant and finds it most relevant to the question before the Court.

Statistical Analysis.

107. Much of the testimony at the hearing centered on statistical analyses conducted using the data set of qualified prospective jurors that had been used in the Jury Selection Study. All experts, including the State's expert, agreed that the raw or unadjusted numbers showed disparities by race; all experts agreed that traditional statistical methods like regression, and causal inference techniques like propensity scores, are useful to test the relationship between race and jury strike ratios, and all experts found statistically significant statewide disparities based on race using these techniques. The main difference in expert opinion involved whether the Jury Selection Study adequately considered alternative explanations for the observed disparities.

108. **Unadjusted Disparities**. The starting point for the experts' analyses is the total number of strikes of Black venire members and non-Black venire members by prosecutors. The MSU researchers tabulated this information for qualified prospective jurors in the 176 statewide proceedings, as well as the cases in Prosecutorial District 11, Johnston County, and the four cases tried by prosecutor Mr. Butler included in the Jury Selection Study, including Mr. Bacote's case. Table 1 of the MSU report shows the respective strike and pass rates by the prosecution for Black venire members and all other venire members.

TABLE 1
Statewide Prosecutorial Peremptory Strike Patterns
(Strikes against venire members aggregated across cases)

		A Black Venire members	B All Other Venire members
1.	**Passed**	591 (47.5%)	4,664 (74.2%)
2.	**Struck**	654 (52.5%)	1,618 (25.8%)
3.	**Total**	1,245 (100.0%)	6,282 (100.0%)

*Chi square tests (Pearson Chi-Square, Continuity Correction, Likelihood Ratio, Fisher's Exact Test, and Linear-by-Linear Association) indicate that these differences in strike rates are significant at $p < .001$.

DE7 at 16.

109. Using the totals, Dr. O'Brien calculated the strike rate ratio, or the ratio of the proportion of peremptory strikes prosecutors used to remove Black potential jurors to the proportion of peremptory strikes prosecutors used to remove all other potential jurors.[14] Across all of the cases statewide, prosecutors struck Black eligible venire members at 2.03 times the rate they struck all other venire members. DE3 at 25. Dr. O'Brien testified that she ran multiple tests of statistical significance and found that the difference in strike ratios was highly statistically

[14] In epidemiology, this statistic is referred to as the "Relative Risk." *See* Fed. Jud. Ctr. & Nat'l Rsch. Council, *Reference Manual on Scientific Evidence* 234 (3d. ed. 2011).

significant. All three statisticians replicated these results and found statistical significance for the statewide strike ratios. HTpp. 399-400, 495-96, 1266-67.

110. Throughout the expert testimony, the Court heard extensive opinions about whether the results were "statistically significant." The experts defined this term as a measure of the probability that the null hypothesis is true. HTpp. 79, 95, 551. A "null hypothesis" is one in which there is no relationship between the two factors analyzed: here, that there is no relationship between the race of venire member and the prosecutor's exercise of peremptory strikes. *Id*. In other words, statistical significance testing is a way to consider the likelihood that the observed outcome is due to chance.

111. Researchers commonly report statistical significance by using a **p-value** or confidence interval.[15] A p-value is a measure of the likelihood that the observed disparity is due to chance. A p-value of less than 0.05 is the threshold most commonly used to assess statistical significance. Although this threshold continues to be widely used today and some journals insist on it as a criterion for publication, there are substantial concerns among the statistical community that p-values have been misused. HTpp. 551-555, 582-83; SE18.

112. The concerns with p-values stem from the practice of using 0.05 as a hard cut-off for publication and research. HTp. 552. On the one hand, this cut-off may be overly stringent for cases where effects are large, but samples are small. As a result, it may cause academic journals to decline to publish important research that does not satisfy the 0.05 threshold. On the other hand, the cut-off has sometimes been overly permissive, resulting in the publication of research

[15] As explained in the Manual on Scientific Evidence, a confidence interval is "[a]n estimate, expressed as a range, for a parameter. For estimates such as averages or rates computed from large samples, a 95% confidence interval is the range from two standard errors below to two standard errors above the estimate." Fed. Jud. Ctr. & Nat'l Rsch. Council, *Reference Manual on Scientific Evidence* 260, 284-85 (3d. ed. 2011).

exceeding the 0.05 threshold that does not otherwise have results supporting statistical significance. Such statistical results are particularly suspect in new research, where the results have not been replicated. In response to these concerns, the American Statistical Association published a definitive statement regarding the use of p-values in 2016. HTp. 553; SE18. The statement directed that a p-value is not a measure of the importance or size of effect, and by itself should not be taken as a good measure of evidence. SE18. It also directed that p-values be reported for all analyses conducted, to avoid cherry picking data. *Id*. The Court finds that the concerns about p-values are academic to the Jury Selection Study, which uses p-values consistent with the ASA's 2016 statement. Here, the vast majority of the measures of statistical significance in the Jury Selection Study far exceeds the standard threshold of 0.05, and the findings are consistent with and corroborated by the experimental, documentary, and historical evidence. Consequently, the Court accepts the usage of p-values in the Jury Selection Study as evidence of statistical significance.

113. The strike disparities were observed in prosecutorial districts and counties across North Carolina. These patterns persisted in Mr. Bacote's own case, in Johnston County, and in Prosecutorial District 11. Prosecutors in District 11 struck 51.4% (37/72) of the eligible Black venire members compared to 28.1% (126/449) of all other eligible venire members, for a strike ratio of 1.83. The difference in the strike rates is statistically significant at a p-value of less than 0.001. In Johnston County, prosecutors struck 54.1% (20/37) of the eligible Black venire members compared to 28.5% (75/263) of all other venire members, a difference that is statistically significant with a p-value at the 0.01 level and that yields a strike rate ratio of 1.9. Mr. Butler served as the lead counsel for the State at Mr. Bacote's trial. Across the state, Mr. Butler tried eight capital cases – seven as lead counsel. Four of these cases were in the Jury Selection Study because

the defendants, including Mr. Bacote, were on death row at the time of the study. Dr. O'Brien testified about the strike ratio across these four cases, a ratio of 3.48, which is a finding statistically significant with a p-value at the 0.001 level. DE3 at 48. The prosecution struck Black potential jurors at 3.3 times the rate it struck all other potential jurors in Mr. Bacote's trial. DE3 at 50.

114. During the hearing, the Court instructed counsel to obtain jury selection materials from the other four cases Mr. Butler tried capitally. Although those cases had resulted in death verdicts, they were not included in the Jury Selection Study because they were either outside of the requisite time frame or the defendants had been executed, died, or won sentencing relief, rendering them ineligible for inclusion in the study. Mr. Bacote electronically provided the materials from these four cases to the Court. One of the cases, that of Jonathan Richardson, was tried in 2014, after the passage and repeal of the RJA. In the case of John Wesley Jones, Mr. Butler was second chair and not present for all of the jury selection. DE313; DE323, *State v. Jones* transcript.

115. In the eight capital cases prosecuted by Mr. Butler, the State exercised its peremptory challenges as follows:

PROSECUTORIAL STRIKES IN MR. BUTLER'S CAPITAL CASES				
Defendant	Race of Defendant	% of Black VM Struck	% of non-Black VM struck	Strike Ratio
Bell & Sims	Black, Black	81.8	26.3	3.11
Nobles	Black	75.0	16.7	4.49
Jones	Black	50.0	19.3	2.59
Basden	White	35.0	29.2	1.20
Richardson	White	50.0	31.7	1.58
Parker	White	60.0	18.2	3.30
Barden	Black	80.0	13.8	5.80
Bacote	Black	75.0	22.9	3.28

116. The average strike ratio of all eight cases tried by Mr. Butler is 3.17. DE313. The average strike ratio including only the seven cases in which Mr. Butler served as lead counsel is 3.25.

117. The strike rates in Mr. Butler's capital prosecutions also varied based on the race of the defendant. *Id.* In cases of white defendants prosecuted by Mr. Butler (Basden (1.20), Richardson (1.58), and Parker (3.30)), the average strike rate ratio was substantially lower than the average for Black defendants (Jones (2.59), Bacote (3.28), Bell & Sims (3.11), Barden (5.8), and Nobles (4.49)); 2.0 (white strike rate) versus 3.9 (Black strike rate).

118. Dr. Smith and Dr. Li replicated the strike rate disparities calculated by the MSU researchers for Prosecutorial District 11, Johnston County, and the four cases prosecuted by Mr. Butler, including Mr. Bacote's case. HTpp. 483-84, 1266-67. The MSU researchers confirmed these results were statistically significant. *Id*. The Court finds that these large and statistically significant observed racial disparities in strikes against qualified Black venire members in the Jury Selection Study constitute troubling and more than just coincidental evidence of discrimination against Black citizens. Both the consistency across geographic areas, uniformity of the disparity through the entire study period, and the magnitude of the disparities, create a pattern of discrimination. The Court credits this statistical evidence supporting a finding that race is playing a significant role in the exercise of peremptory strikes by prosecutors in Johnston County, in Prosecutorial District 11, and in the capital cases tried by Mr. Butler, including Mr. Bacote's case.

119. **Logistic regression and other statistical models**. As described earlier, the Jury Selection Study gathered extensive data of descriptive characteristics about prospective jurors, like employment status and death penalty views, in addition to strike and race data. The MSU researchers gathered this information for the four capital cases in the Jury Selection Study tried by

Mr. Butler, all capital cases in Johnston County and Prosecutorial District 11, and for a random 23% sample of capital cases statewide. Dr. O'Brien, Dr. Smith, Dr. Mitra, and Dr. Li used the descriptive data set to perform several statistical analyses to investigate the likelihood that the observed racial disparities were due to another explanation. These statistical analyses in the Jury Selection Study and those conducted by testifying experts, including both standard regression models and cutting-edge causal inference techniques, lead the Court to find that race is a significant factor in jury selection.

120. Regression models are commonplace in social sciences and the courtroom alike and are used to infer causation from association. Fed. Jud. Ctr. & Nat'l Rsch. Council, *Reference Manual on Scientific Evidence* 260 (3d. ed. 2011). A **regression model** allows researchers to explore the likelihood that one or more other factors, called confounding factors (or confounders), may account for some or all of the observed relationship between the two factors of interest (typically referred to as the exposure and outcome). HTpp. 26-27. A **confounding factor** is a separate factor that will cause bias in the results if it is not controlled for, or adjusted, in the analysis. *Id*., HTp. 1206. **Logistic regression** is a type of regression appropriate where the outcome variable, or response variable is binary (here, juror struck or not struck by the prosecution). HTpp. 489-90. The results of logistic regression are typically reported as **odds ratios**, or the relative odds of the occurrence of the outcome variable. If the odds are even, with no increase or decrease because of the exposure, the odds ratio will be one. HTpp. 135, 141, 413.

121. The MSU researchers identified and collected information about more than 100 variables or potential confounding factors for the peremptory challenges by prosecutors in the Jury Selection Study. DE104 at 3. The statistical experts built several models, using various techniques, drawing from these variables. These models included far more variables than are typically

available in medical observational studies. HTp. 412. All of the models reached the same conclusion: prosecutors struck Black potential jurors in Prosecutorial District 11, Johnston County, and in the cases tried by Mr. Butler at significantly higher rates than other potential jurors, even after controlling for alternative explanations.

122. The logistic regression models for District 11 and Johnston County were revealing. In Prosecutorial District 11, Black eligible venire members had an increased odds ratio of being struck by 2.172, even after controlling for other factors. The results were statistically significant, and the p-value was 0.018825. DE9 at 3. In Johnston County, the odds ratio for Black potential jurors being struck was 4.11, with a p-value of 0.001975. DE9 at 4. The logistic regression model for the four cases in the Jury Selection Study tried by Mr. Butler also showed that race remained a strong predictor of strikes after controlling for other factors, and the odds ratio reveals an astonishing 10.314 increased odds of Black venire members being struck when compared to other venire members. This too, was highly statistically significant, with a p-value of 0.00000001822. DE9 at 5.

123. Dr. Smith, Dr. Mitra, and Dr. Li all used a free, open-source programming language and software called R to conduct their statistical analyses.[16] HTpp. 471, 1290-91; DE108 at 7. Using R, they replicated the logistic regression models and results of Dr. O'Brien. The Court finds that this replication of Dr. O'Brien's logistic regression models is another indication of the transparency and reliability of the underlying data and processes of the Jury Selection Study.[17] Dr.

[16] *See generally* "What is R?," r-project.org/about.html (last visited June 2, 2024).

[17] "Transparency and the ability to reproduce study results can help increase confidence in study results." DE105, NAS, *Advancing the Causality Framework*, 132. Transparency is the greatest when the data and code are available for review, *id,* as in this case.

Smith independently tested the variable selection for statewide regression using two common methods of model selection.[18] HTp. 498. In each model constructed by Dr. Smith, race remained statistically significant, and, in each model, the p-values were less than 0.05. HTpp. 500-05. The Court credits Dr. Smith's conclusion that the results were "very robust against the method of variable selection." HTp. 505. In other words, strong racial disparities are present for Johnston County, Prosecutorial District 11, and the four capital cases tried by Mr. Butler when applying all of the standard methods for constructing regression models.

124. Despite the consistency and strength of these findings, Dr. Li criticized the regression models because of what she characterized as their low R-squared values. HTpp. 1217-20. R-squared is a statistical measure for a *linear* regression model that reports the proportion of the variance explained by the model. Dr. Li concluded that low R-squared values meant that the models did not explain much of the data's variability and were evidence of unmeasured confounding. HTpp. 1217-20. Dr. Smith and Dr. Mitra, however, persuasively explained two fundamental problems with Dr. Li's criticism. HTpp. 374, 492. First, R-squared is generally not a meaningful measure for logistic regression; as a result, it is inappropriate to rely on an R-squared measure to interpret a logistic regression model. HTpp. 375, 490-93. Dr. Li herself conceded that the R-squared value is "not directly applicable" to logistic regression. HTp. 1216. There are accepted alternative methods for calculating a comparable R-squared measure for logistic regression models, none of which Dr. Li attempted. HTpp. 490-92. Even those accepted alternatives, however, do not reflect whether the model is a quality model. *Id*. Rather, these alternative R-squared measures should only be used to compare different constructed models. Dr.

[18] Dr. Smith described in detail the two methods, AIC and BIC, in his report and testimony. HTp. 498; DE 104.

Smith cited a leading treatise for the proposition that these statistics are useful only for comparison of one logistic regression model to another. *Id*.

125. Dr. Li's statement that the R-squared value shows unmeasured confounding is also misplaced. As Dr. Mitra explained in her testimony, R-squared values cannot and do not inform the researcher about unmeasured confounding. HTpp. 374-75. The Court finds that although Dr. Li's criticisms of the logistic regression models for the Statewide model appear to be valid, they are not persuasive as to Prosecution District 11, Johnston County, and cases tried by Mr. Butler due to the difference in size and scope of the data set, and due to the vast difference in the data sets. significant difference with a p-value of less than 0.001. These analyses provide an intuitive illustration of how persistent the racial disparity in strikes against Black potential jurors remains throughout the data set used in the Jury Selection Study.

126. Although there were some fluctuations over time, the strike disparities were consistent and statistically significant throughout the time period of the Jury Selection Study. DE104 at 9. This included the time of Mr. Bacote's trial. In order to estimate the effect of race on strike decisions at the time of Mr. Bacote's trial in April of 2009, Dr. Smith conducted a smoothing analysis to average the odds ratio over a window of time. HTp. 507; DE104 at 8-9. Dr. Smith repeated the odds ratio at an increment of 50 days and defined the bandwidth, which is the interval around any given point used for calculating the odds ratio as two years. DE104 at 8. Dr. Smith concluded that the odds ratio remained above 2.0 at the time of Mr. Bacote's trial and remained statistically significant, with a p-value of 0.0003. HTpp. 507-08. The Court credits this unrefuted testimony and finds that the odds ratio for the striking of Black jurors by prosecutors in North Carolina at the time of Mr. Bacote's trial was above 2.0, and further finds that this 2.0 odds ratio is statistically significant. *Id*.

127. Of the cases in the Jury Selection Study, Dr. O'Brien determined that defendants were sentenced to death by all-white juries in 35 cases and by nearly all-white juries, with a single juror of color, in 40 cases. HTpp. 152-53. The Court finds this large number of all-white and nearly all-white juries, and the evidence from the shadow coding, corroborates and contributes to the body of evidence presented by Mr. Bacote, and demonstrates the significant role race plays in capital jury selection in North Carolina.

128. ***Causal Inference***. Both Dr. Mitra and Dr. Li are specialists in the relatively new field of causal inference, "an intellectual discipline that considers the assumptions, study designs, and estimation strategies that allow researchers to draw causal conclusions based on data." DE111 at 9 (internal citation omitted); HTpp. 511-12. Dr. Mitra and Dr. Li each used two common causal inference techniques to investigate the likelihood that race was a causal factor in the prosecutions' exercise of peremptory strikes in North Carolina: propensity scores and a sensitivity analysis called an E-value.

129. **Propensity scores** examine the relationship between two variables while controlling for measured confounding factors by balancing differences in the two groups. SE24 at 19; DE108. A **sensitivity analysis** examines the likelihood that unmeasured confounding factors could explain away the disparate results. SE24 at 11. The results of these common causal inference techniques further strengthen the Court's finding that race plays a significant factor in capital jury selection in Johnston County, Prosecutorial District 11, and in cases tried by Mr. Butler.

130. Before turning to these analyses, the Court briefly addresses the topic of missing data. Dr. O'Brien and the three statisticians each took different approaches to addressing the fact that some of the descriptive information was missing for some venire members in the September 2023 data set, often because the subject was not addressed during jury selection or on a jury

questionnaire. The Court notes initially that there was a relatively low amount of missing data. HTp. 1240.

131. The program Dr. O'Brien used for the Jury Selection Study, SPSS, simply dropped venire members with missing information from the analysis. Dr. Smith used a subset of venire members for whom there was no missing data to identify the variables of interest for the models, and then applied those variables to the full data set for the analysis itself. DE104 at 1-2. Dr. Mitra and Dr. Li imputed the missing data with two alternative approaches multiple imputation with chained equations (MICE) and mean imputation. HTp. 1240; DE108 at 11; DE371 at 15. The Court need not consider which approach was superior because ultimately the results were very similar, and all experts agreed that the missing data proved insignificant to the analyses. HTpp. 367-68, 409, 1240.

132. Both Dr. Mitra and Dr. Li used propensity scores to explore the relationship of race and jury strikes in the Jury Selection Study data. Propensity scores allow a researcher to balance important factors between the two groups of comparison, creating a propensity score for each qualified venire member and then using that propensity score to compare each juror in the analysis. SE24 at 19. This method allowed Dr. Mitra and Dr. Li to compare Black and Non-Black venire members after balancing for potential confounders. *Id*. Dr. Mitra used a program called SuperLearner to estimate the propensity scores and calculate the adjusted strike rate. The SuperLearner program identified 27 variables to use in the propensity scores and calculated that, after controlling for other measured factors, Black venire members have a 1.58 relative risk of being struck (a 58% increase of a risk of being struck compared to other venire members). HTpp.

371-72. Dr. Li also conducted a propensity score weighting analysis,[19] and found that after controlling for the measured confounders, Black venire members have a relative risk of 1.45 (a 45% increased risk of being struck). SE24 at 20.

133. The propensity scores are reported as relative risks, not odds ratios. To compare the logistic regression run by Dr. O'Brien to Dr. Mitra's findings, Dr. Mitra transformed the results of the logistic regression from an odds ratio to a relative risk analysis. A direct comparison of the results from the three common causal inference approaches utilized by the testifying experts shows the similarity in results, and that all methods reveal a large, statistically significant, robust increased likelihood of eligible Black prospective venire members being struck by prosecutors in capital cases across North Carolina.[20]

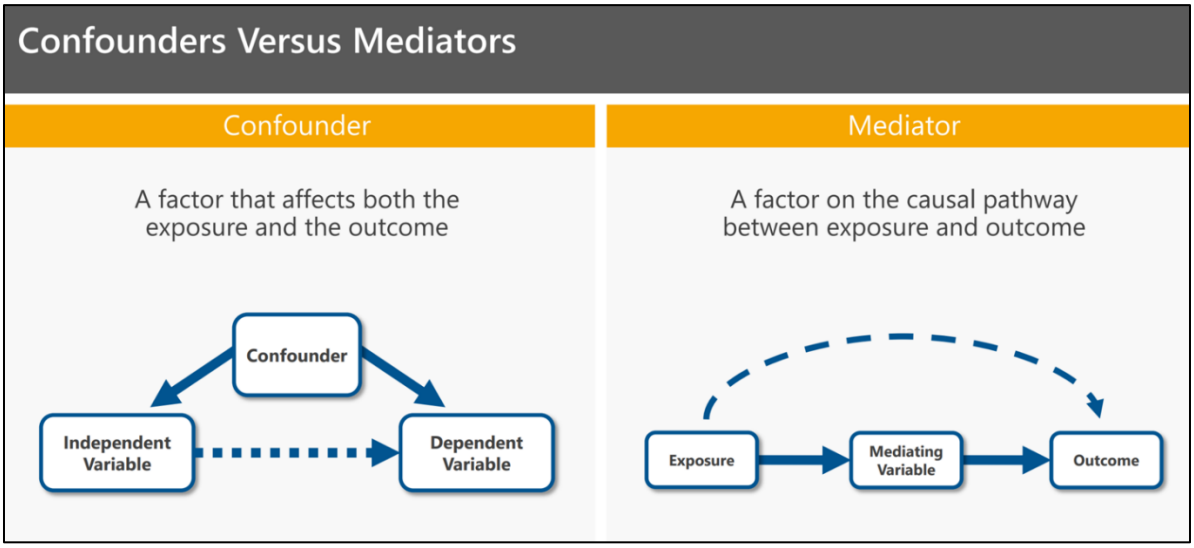
RELATIVE RISK RATIOS OF RACE IN STRIKE DECISIONS FROM STATISTICAL MODELS		
Grosso & O'Brien (Converted Odds Ratio)	Mitra Relative Risk (Propensity Score)	Li Relative Risk (Propensity Score)
1.62	1.58	1.45

[19] Dr. Li did not identify the precise method she used in her testimony. In her written report, she stated that the technical details of the analysis were contained in an Appendix to her report, but that Appendix was not introduced at the hearing. *See* SE24 at 20, 28.

[20] Dr. Li misleadingly compared the relative risk she calculated of 1.45 as "much smaller" than the 2.5 odds ratio Dr. O'Brien and Professor Grosso calculated from the logistic regression. HTp. 1246; SE24 at 20. But odds ratio versus relative risks are an apples-to-apples comparison. Even Dr. Li's graduate student, who replicated the logistic regressions, noted in his code file that "for the same probabilities, odds ratio is usually larger than [the] relative risk," and the two are not directly comparable. DE 370 at 60 ("[S]imilar to how mile and kilometer are both used to measure distances.").

DE108 at 14.

134. Dr. Mitra also used propensity weights to calculate the relative risk in a model that did not adjust, or control, for death penalty reservations. One important approach in causal inference is to identify the mechanisms or plausible pathways from exposure to outcome before beginning the research. HTpp. 376-77. A true confounding factor affects both the exposure and outcome. In contrast, a mediator is a factor that is on the causal pathway between exposure (here, being Black) and outcome (the strike decision), such that the exposure causes the mediating variable. Causal inference uses figures to explore the relationship between exposure and outcomes, as shown in these figures from Dr. Mitra's testimony:



DE111 at 28.

135. This difference is important because to capture the total effect of a particular exposure, the researcher should not control for the mediator. By controlling for the mediator, the researcher will capture the direct effect between the exposure and outcome but miss the indirect effect of the mediating variable. HTpp. 378-79. Controlling for a mediator will introduce bias in the total effect and will most often lead to an underestimate of the real effect. HTp. 379.

136. Dr. Mitra reviewed published academic literature about death qualification and determined that death qualification is best treated as a mediator because the experience and history of being Black may influence whether a person is opposed to the death penalty, which in turn may influence whether the person is struck. HTpp. 388-89. In other words, some Black individuals may be opposed to the death penalty as a result of their history and experience, and may be struck for that reason, while other Black individuals may be struck for reasons totally unrelated to death penalty reservations. When Dr. Mitra analyzed the data used in the Jury Selection Study by not controlling for death penalty reservations and instead treating death penalty rates as a mediator, she found an even larger effect from the race of the prospective venire member. HTpp. 389-91. Estimating the total effect, a Black venire member has a 75% increased risk of being struck as compared to all other venire members. *Id.*

137. Dr. Li agreed that mediators measure the indirect effect and did not dispute that death penalty reservations may appropriately be considered a mediator. HTp. 1244. Dr. Li further testified: (1) whether death penalty reservations are part of a direct or indirect effect is irrelevant; and (2) death penalty reservations should be treated as a confounder not a mediator. HTpp. 1244-45. The Court finds these statements by Dr. Li at the hearing are internally contradictory and contrary to the evidence. Dr. Li's assertion that the distinction is irrelevant was demonstrably false. The total effect (direct and indirect combined) — a relative risk of 1.75 for Black venire members to be struck — is larger than the direct effect only, which is a relative risk of 1.58. The Court credits Dr. Mitra's opinions as being clear, internally coherent, and supported by published authority. The Court concludes however, that it need not resolve whether to use the total effect or direct effect because, in this instance, the direct effect itself is powerful evidence of the increased risk for Black venire members of being struck.

138. Dr. Mitra conducted one additional analysis with the propensity weights: she stratified the results by race of defendant. Similar to the evidence produced of the race-of-defendant strike ratios of capital cases prosecuted by Mr. Butler, this analysis resulted in yet larger disparities: Black venire members faced a 58% increased risk of being struck when the defendant in the case was not Black, but a 94% increased risk of being struck in cases with Black defendants. In other words, both the race of the defendant and the race of the potential juror influenced the State's exercise of peremptory strikes.

139. ***Unmeasured confounding***. Drs. O'Brien, Smith and Mitra all testified that the large, robust association between race and strike outcomes in the Jury Selection Study was unlikely to be explained away by unmeasured confounding factors. Dr. Li disagreed. Dr. Li based her disagreement on three things: (1) her beliefs about potential unmeasured confounders; (2) her interpretation, contrary to the statistical literature, about how to interpret the result of an analysis she performed regarding how strong unmeasured confounders would need to be to explain away the results; and (3) her analysis of a sophisticated statistical model constructed by her graduate student, called a "mixed effects" model. The evidence at the hearing conclusively showed each of these bases to be erroneous.

140. Dr. Li testified that there were multiple unobserved confounders that she, as a "lay person," could identify: the nature of the case, attorney characteristics, demeanor and body language of the potential juror, and race of the defendant. HTpp. 1210-11. The Court first finds, as Dr. Li herself readily conceded, Dr. Li has no expertise in jury selection and did not consult with anyone about the jury selection process in North Carolina. HTpp. 1262-63, 1300. Dr. Li did not know, for example, that, in North Carolina, the State asks potential jurors questions before defense counsel. In order to identify confounders in an observational study, statistical experts

typically work with subject matter experts for the reasons Dr. Mitra explained in her testimony. HTp. 376. Dr. Li did not do so in this case; therefore, she does not meet the requirements of Rule 702 as an expert in jury selection.

141. There are other significant problems with Dr. Li's proposed list of likely, unmeasured confounders, which she contended could explain away the strong results of the Jury Selection Study if measured and analyzed. One of variables on her list of unmeasured confounders, race of defendant, was not, in fact, unmeasured in the study, as Dr. Li conceded on cross-examination. HTp. 1325. Indeed, race of defendant was analyzed by Dr. Mitra and included in her written report and testimony. In short: Dr. Li was demonstrably wrong about one of the key examples of purportedly unmeasured confounders that she offered in her criticism of the Jury Selection Study. The Court finds this substantial error by Dr. Li to be a troubling indication of her lack of understanding and familiarity with the data set used in the Jury Selection Study.

142. In addition, Dr. Li's approach to identifying unmeasured confounders revealed a lack of substantive understanding of the RJA and the issue of racial bias in jury selection. Dr. Li admitted she was unfamiliar with the concept of unconscious bias, a further reason the Court discounts her lay opinions. HTp. 1210. Due to unconscious bias, demeanor and body language, another of the few unmeasured confounders Dr. Li offered as possible alternative explanations, are not independent of race a fact to which Dr. Sommers, an expert in this field, testified conclusively at the hearing. HTpp. 656-57.

143. Moreover, some of the resulting opinions Dr. Li offered not only fail to support a rejection of the expert testimony presented by Mr. Bacote, but instead a basis for finding in his favor. She testified that it is "common sense" that the race of the defendant would affect a prosecutor's decision to strike a juror, HTp. 1326, as Dr. Mitra also found. Thus, if the race of a

defendant affects strike decisions, race in fact plays a "significant role" in jury selection. Dr. Li's "common sense" assumption is tantamount to a concession from the State's own expert that prosecutors, either because of explicit or unconscious racial bias, rely on race to make decisions in jury selection. The Court finds both that Dr. Li is unqualified to offer substantive opinions about specific, uncollected confounding factors and that she has failed to identify any specific, unmeasured confounding factor likely to account for the large disparities observed in the Jury Selection Study.

144. Both Dr. Mitra and Dr. Li conducted a sensitivity analysis called an **E-Value** as an additional inquiry into whether the Jury Selection Study results are due to unmeasured confounding. While regression models and propensity weights are concerned with exploring the relationship between the exposure and outcome (here, race and strikes) after accounting for measured confounders, E-values are intended to help researchers gauge how large unmeasured confounding factors would need to be to explain away the observed relationship. HTpp. 391, 1248. The E-value corresponds to the minimum size of the association an unmeasured confounder would need to have with both the exposure and outcome of interest in order to fully explain away the observed association. *Id*.; DE373 at 3. Statisticians conclude that large E-values indicate that confounding factors are unlikely to explain away the results, or, that the observed results are "robust [] to unmeasured confounding." HTpp. 391-92. In the academic literature, an E-value of 2 or more signifies that considerable unmeasured confounding would be necessary to explain away the observed relationship. *Id.*

145. Dr. Mitra calculated the E-value to be 2.9, which means that there would have to be some factor, not captured in the Jury Selection Study, that had both a relative risk that is 2.9 higher for Black jurors, and independently, a 2.9 relative risk associated with being struck, after

controlling for all other factors. HTp. 398. Dr. Li calculated the E-value to be 2.3, also a large result, and one considered as strong evidence of robustness to unobserved confounding, including by the researchers who developed the E-value, Tyler VanderWeele and Peng Ding. HTpp. 1302-05; DE108 at 17; DE373 at 33. Dr. Li conceded that an E-value of 2 to 3 was generally considered large to unobserved confounding for biomedical research, but asserted, without any citation or authority, that in social and behavioral science an E-value of 2 to 3 would be much less convincing as evidence for reliable causal interpretation. HTpp. 1303-04. Under cross-examination, Dr. Li further conceded that Drs. VanderWeele and Ding are leaders in the field of causal inference and that they specifically describe an E-value of 2 to 3 as strong evidence for both biomedical and social science research. *Id*. at 1304-1306; DE373 at 33. Dr. Li testified that she disagreed with their description, but Dr. Li did not offer any authority or source for her belief, which is contrary to Dr. Mitra's testimony, evidence of the published literature, and the authoritative opinion of the authors of the E-value test itself. *Id*; DE108 at 18-20.

146. Dr. Li's testimony is further undercut by the characterization of her own graduate student, who described the E-Value of 2.3 as "large." Dr. Li relied upon graduate students to perform statistical coding in this case. HTpp. 1260-61. Dr. Li and her graduate student Robert Wan are listed as the authors of a coding file titled "Milestone Two Update," HTpp. 1290, 1297; DE372. This document shows the code and results for the E-value and then describes the findings as follows:

- E-Value: how large an unobserved difference between Black VMs and non-Black VMs has to be in order to render the reported Relative Risk meaningless
  - The larger the E-Value, the more likely that the reported effect of VM being Black actually exists
  - Here, the E-Values are large, suggesting that being Black may have caused the VM to be struck by the state more likely

DE 372 at 5-6.[21] Notably, Dr. Li's graduate student, in a file in which Dr. Li is listed as a co-author, characterized the E-value as "large." *Id*. Dr. Li's testimony is thus contrary to both the established field leaders and her own graduate student, writing under her personal supervision. The Court rejects Dr. Li's unsupported opinion and declines to hold that E-values must be higher in the fields of social and behavioral science than biomedical science. The Court concludes that the E-value found by Dr. Li is strong evidence that unmeasured confounding is unlikely to explain away the observed results in the Jury Selection Study and additional, corroborating evidence that race was causally associated with strike decisions.

147. Dr. Mitra determined that any unmeasured confounder would have to be larger than death penalty reservations, after adjusting for all of the other factors. HTp. 1374. In the statewide regression models run by Dr. O'Brien and Dr. Smith, death penalty reservations were the largest potential confounding factor. Dr. Mitra calculated the relative risk (RR) for death penalty reservations on both strike and race, accounting for all other factors, with propensity weights. After controlling for other factors, jurors with death penalty reservations were 70 percent more likely to be Black (RR of 1.70), and 190 percent more likely to be struck (RR of 2.90). HTp. 1374; DE376 at 3. Because both relative risks would need to be above 2.3, even death penalty reservations would not be a large enough unmeasured confounder to account for the effect of race on prosecution strike decisions because the relative risk of the association between death penalty reservations and Black venire members was only 1.7 and thus not higher than 2.3. *Id*.

[21] Dr. Li was questioned about this file and testified that she disagreed with her student on this point. HTp. 1299. Dr. Li did not, however, contemporaneously note that disagreement, and she remained listed as an author of the comment.

148. The Court concludes that the sensitivity analysis constitutes further evidence of a strong causal association between race and strike decisions that is highly unlikely to be explained by unmeasured confounding.

149. The mixed-effect model is the third and last basis Dr. Li offered for why unmeasured confounding can account for the observed association between strikes and race. HTp. 1314. A **multi-level or hierarchical model** is a statistical analysis that can be applied to grouped data, or tiered data. Dr. Li testified that hierarchical modeling showed that the results of the Prosecutorial District 11 and Johnston County data used in the Jury Selection Study were not statistically significant. Dr. Mitra and Dr. Smith, however, showed that Dr. Li's interpretation of the results was based on errors in interpretation, testimony that was not refuted by Dr. Li or anyone else at the hearing. HTpp. 1357, 1369.

150. A **random effects model** is one kind of hierarchical model that can be used to test whether case-to-case variability is itself a potential confounding factor. HTpp. 1357-58. Dr. Smith testified that he constructed a random effects model that allowed the rate at which jurors are struck to differ from one proceeding to the next due to differences, for example, among prosecutors or other circumstances. This model showed the variance of random effects is small and does not make any meaningful difference. HTpp. 1358-59. Dr. Smith noted that although Dr. Li did not acknowledge it in her testimony or written report, her code output produced in discovery shows that she too ran this model with the same result. HTp. 1358.

151. Dr. Li sharply criticized Dr. O'Brien for not considering hierarchical modeling, but she overlooked the portion of Dr. O'Brien's report that discussed hierarchical modeling. HTpp. 1314-15. Dr. O'Brien, in consultation with a statistician, determined this hierarchical modeling was not necessary by examining the **interclass correlation**, which measures the variability among

cases. Dr. O'Brien found a negative interclass correlation, which means that venire members within a case were no more likely to be struck or passed than were venire members between cases. HTpp. 202, 1314-15; DE7 at 18.[22] This finding was consistent with the finding from the random effects model that showed variability in strike rates among trials was not an important factor. HTpp. 1358-59.

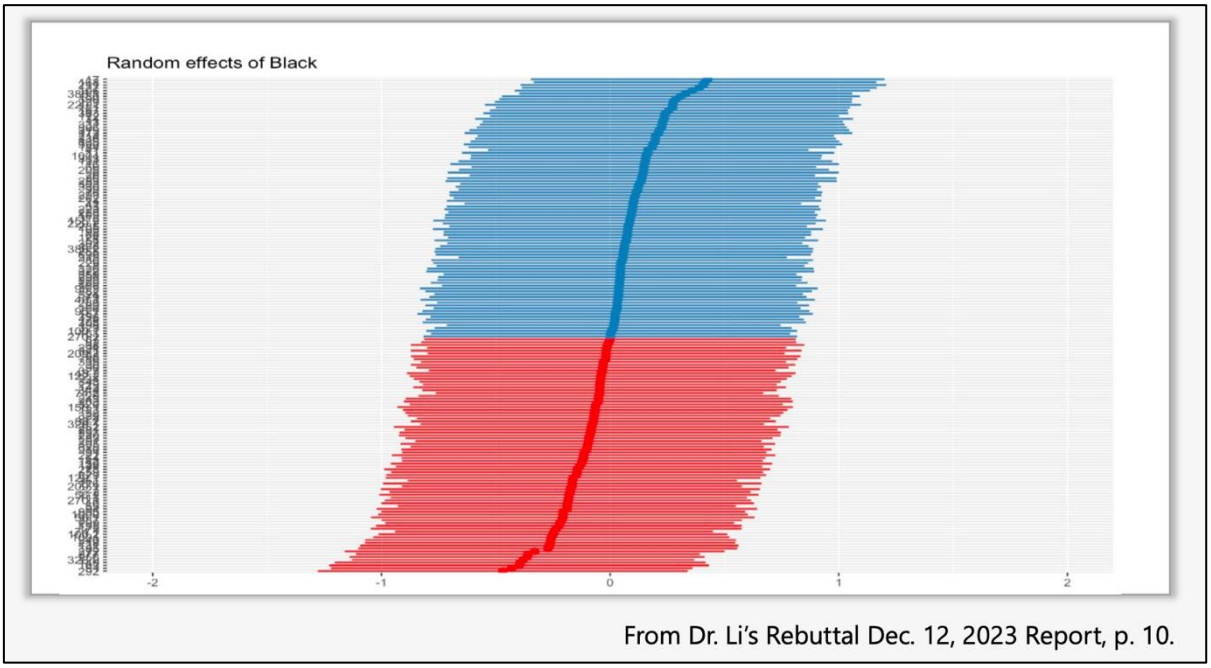
152. A **mixed effect model** is a more advanced hierarchical model that introduces a second random effect. In the mixed effect model for the Jury Selection Study data, the model allows the strike rates to vary among capital proceedings, as in the random effects model, but it also allows the amount of bias to vary between whether prosecutors struck Black or non-Black potential jurors. HTp. 1359. Dr. Li's graduate student ran these models for North Carolina, Prosecutorial District 11, and Johnston County. Dr. Li reported their p-values and concluded that the models for Prosecutorial District 11 and Johnston County were not statistically significant. HTpp. 1359-60.

153. Dr. Smith and Dr. Mitra showed these p-values and conclusions to be erroneous. Dr. Li relied on the wrong p-values for this analysis by using p-values calculated only for the fixed effects portion of the model and that did not include the random effects. *Id.* For most analyses, the statistical package R will generate the appropriate p-value in the output. Dr. Smith explained that this is not true for the mixed effect model. Dr. Smith teaches an advanced statistics course in mixed effect modeling, and this is a topic on which he regularly instructs students. HTp. 1363. To generate the correct p-value, the user needs to conduct additional analysis. HTpp. 1360-63. The

[22] In other words, the finding of Dr. Smith and Dr. Li with respect to the case to case variability was consistent with the finding of Dr. O'Brien. Dr. Li's oversight of this area of analysis demonstrated her lack of familiarity with the Jury Selection Study and previous analyses performed as well as an inattention to detail.

researcher must use a bootstrap method to simulate the data set to generate the p-value for the random effect. HTp. 1360. When Dr. Smith performed this analysis, taking into account both the fixed and random portions of the model, the results were statistically significant, with p-values of 0.0022 for Prosecutorial District 11 and 0.0058 for Johnston County. The results therefore remained highly statistically significant. HTpp. 1362-63, 1369.

154. Dr. Li further erred when she only discussed the random effect and ignored the fixed effects. HTp. 1364. Dr. Li gave misleading testimony and used a misleading visual figure on this point. Dr. Li produced a chart of the proceeding-specific effect of being Black statewide that included only the random effect:



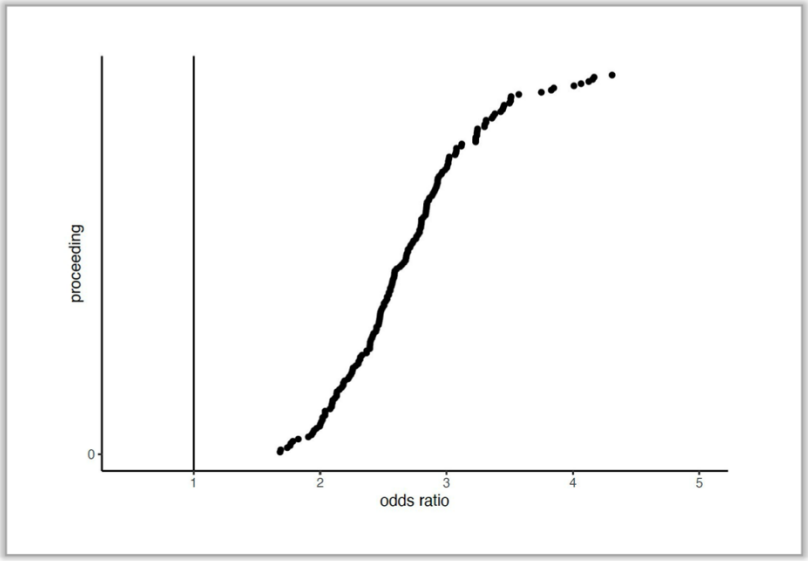
From Dr. Li's Rebuttal Dec. 12, 2023 Report, p. 10.

SE23 at 10; DE376 at 2. She testified that this chart indicated that in about half of the cases there was a decreased chance of being struck if Black, and in the other half, an increased chance. HTp. 1235.

In other words, Dr. Li's figure and testimony erroneously implied that there is no increased risk of being struck for Black venire members. But this visualization is of the model's generated

random effect *only*. Dr. Mitra explained that the random effect itself "has nothing to do with the likelihood of being struck," and that it is a plot only of the deviations from the original effect. HTpp. 1369-70.[23] The meaningful output for the mixed effects model is not the random effect by itself, but the main (fixed) effect *plus* the random effect for each proceeding. HTp. 1364. Dr. Mitra created a statewide figure with the main (fixed) effect plus the random effect for each proceeding. DE376 at 3. DE376 at 3. Both Dr. Mitra and Dr. Smith agreed about Dr. Li's error, and both testified that when the random and fixed effects were taken into account, the results show a strong association between race and strikes by prosecutors. HTpp. 1363-64, 1369.

Main (Fixed) Effect of Black Plus Random Effects of Black for Each Proceeding



[23] Dr. Mitra offered an analogy, where a researcher could try to take the average of every person's height in the courtroom and conclude that the average height was 5 feet, 8 inches. The deviation for a shorter person from the average, might be minus five inches, and the deviation for a tall person, plus five inches. A researcher who erroneously represented the average courtroom height as zero inches, because plus five and minus five equals zero would be committing an analogous error to Dr. Li's representation. HTpp. 1369-70.

155. The Court finds that Dr. Li's testimony and reports regarding the mixed effect model are erroneous. The Court credits the clear testimony of Dr. Mitra and Dr. Smith that the mixed effect model, when interpreted correctly, shows that the association between prosecutors' strikes and the race of qualified Black prospective jurors remains highly statistically significant in Prosecutorial District 11, and Johnston County.

156. ***Credibility of Experts***. After several days of hearing testimony, close review of their expert reports and visual exhibits, observation of their demeanor and tone, and considering other evidence presented, the Court makes additional findings regarding the credibility and expertise of the testifying experts regarding the statistical evidence.

157. **Dr. O'Brien**. The Court found Dr. O'Brien to be knowledgeable, transparent, reliable, and clear in her testimony. When Dr. O'Brien was cross-examined about a mistake in coding, she fully accepted the mistake and noted her intention to immediately correct the mistake. HTpp. 281-95.

158. Dr. O'Brien was questioned about a court order from a South Carolina case where the trial court rejected her report as sufficient evidence of purposeful race discrimination. HTpp. 286-88, 311-13. In fact, the basis for the trial court's rejection was that her report in that case did not include the kind of compelling analysis conducted by Dr. O'Brien in this case. HTpp. 311-13. Dr. O'Brien was also questioned and cross-examined about her work on a death qualification study of Wake County capital trials. Dr. O'Brien's study initially overlooked one capitally tried case during the relevant study period. HTp. 172. This was an oversight of defense counsel, who had provided the case list to her and thus does not adversely affect the Court's opinion of the rigor of Dr. O'Brien's research. *Id*.[24] Dr. O'Brien was also asked about an error in a table in her report in

the Wake County case. The table was labeled erroneously and was misleading. *Id*. Dr. O'Brien explained that this error was unintentional and expressed regret for the mistake. She further testified that the error was wholly inconsequential: it affected none of the results in the case. HTpp. 302, 304. The Court is persuaded that while this error is unfortunate, Dr. O'Brien's sincere explanations regarding the error were consistent with her honest and forthright testimony in this case. Overall, the matters of record concerning Dr. O'Brien's work in South Carolina and Wake County do not undermine the Court's confidence in her methodology.

159. **Dr. Mitra and Dr. Smith.** The Court finds Dr. Mitra and Dr. Smith to be highly credible witnesses with clear, easy to follow explanations of sophisticated statistical concepts.

160. **Dr. Li**. The Court found Dr. Li's direct testimony about some statistical concepts, like the definitions of confounding factors and causal inference, to be clear and persuasive. However, several areas of Dr. Li's testimony were troubling to the Court and cause the Court to have grave reservations about the veracity of Dr. Li's testimony overall. In multiple instances, Dr. Li's testimony was overly partisan, contradictory, and not credible as identified in the sections above. There are still other examples. Dr. Li wrote in her report and testified that she thinks a more stringent p-value of 0.005 is the threshold for determining statistical significance. She testified that she herself does not use p-values and only uses confidence intervals in her own research. HTp. 1284. On cross-examination, she admitted she published one study citing a p-value of 0.05 but characterized that citation as "cherry picked." HTp. 1333. When defense counsel began to question Dr. Li about other studies she had published, she then admitted that she had published multiple articles with a p-value of 0.05 (and higher than 0.05 on occasions). She explained that she continued to use 0.05 because that was the only way to publish her research. HTpp. 1334-35. On this topic, Dr. Li thus both denied and admitted personally using p-values; denied and admitted

personally using the specific p-value of 0.05; and denied and admitted that the p-value of 0.05 remains the default standard for journal publications. HTpp. 1224, 1284, 1333-35. Dr. Li conceded that the only time she had ever advocated in writing for a more stringent p-value was in this case. HTp. 1335. During her testimony about p-values, Dr. Li also tried to avoid these contradictions by stating that she has been listed as an author on papers she has not reviewed. HTp. 1333. The Court is troubled by this testimony and agrees with Dr. Mitra's testimony that this is a reason to doubt her testimony.

161. Dr. Li's partisanship in this litigation was further reflected in the written code of her graduate student, who described many different analyses of models to explore the effect of being Black on jury strikes. HTp. 1339. The models did not improve on the model selection except that there was a narrower, more precise confidence interval, strengthening the conclusion that race was associated with jury strikes. HTp. 1339. The student then wrote that the statistical models were "not good for our case." HTp. 1340. Under cross-examination, Dr. Li disavowed this statement and said she did not agree with it. *Id*. But Dr. Li did not instruct her student that this characterization was incorrect. *Id*. Nor could Dr. Li explain during her testimony why this student working under her direction approached the case in such partisan terms. Further, Dr. Li did not report all of her analyses and findings and overreached in her characterizations. The Court reluctantly finds that, to the extent uncorroborated by Mr. Bacote's experts, Dr. Li's testimony is lacking in credibility.

162. Dr. Li's additional criticisms of the Jury Selection Study were not supported by the evidence. For example, Dr. Li opined in her August 18, 2023 Expert Report that 12.8% of the race coding within the MSU study was "likely unreliable." SE24 at 14. However, the State produced

no evidence at the hearing that the race coding of any of the 7,530 venire members in the study was erroneous, let alone unreliable. This criticism of the study is unfounded.

V. The Jury Selection Study's Findings Regarding Prosecutors Disproportionately using Peremptory Strikes against Black Potential Jurors are Supported and Corroborated by Multiple Converging Sources

163. The Court finds that the Jury Selection Study findings regarding the disproportionate striking of Black North Carolinians from juries are supported and corroborated by multiple different types of studies—a concept referred to as "converging validity." HTp. 673. Accepted by the Court as an expert in research methodology, unconscious bias, and the effect of race on decision-making, Dr. Sommers testified about the significance of converging validity in research methods generally, and as applied in this case. HTpp. 673-76. Converging validity refers to "the idea that with multiple methods you're getting similar findings[.]" HTp. 642; *see also* HTp. 1336 (Dr. Li, agreeing with the concept). In other words, when a set of results "resembles results of other instruments that assess the same or a similar construct," this supports that those results "accurately reflect reality." Fed. Jud. Ctr. & Nat'l Rsch. Council, *Reference Manual on Scientific Evidence* 222, 885 (3d. ed. 2011); *see also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 41 (2011) (noting that when considering evidence of causation, the FDA considers factors such as the "consistency of findings across available data sources").

164. The sources of converging validity in this case include archival and observational research, experimental studies, behavioral science research on unconscious bias and decision-making, and historical evidence of the exclusion of Black jurors. Collectively, these sources show how and why race influences peremptory challenges in capital cases. The Court credits Dr. Sommers' ability, as an expert in research methodology, to review and affirm these different sources of converging validity, something he referred to as "hugely important in research methods." HTpp. 617, 673.

165. **Observations and Archival Studies**. As Dr. Sommers and the MSU researchers described, other observational and archival studies of race and jury selection reached similar conclusions as the Jury Selection Study regarding the role of race in jury selection. DE7 at 4 n.7; HTp. 643. For instance, a study of 317 capital murder trials in Philadelphia County over a seventeen-year period found that prosecutors struck an average of 51% of Black potential jurors but only 26% of non-Black potential jurors. DE7 at 4 n.7. As with the Jury Selection Study, this disparity persisted even after controls. *Id.* Similarly, researchers found that prosecutors in 108 non-capital felony trials in Dallas County, Texas, excluded Black prospective jurors at more than twice the rate of White prospective jurors, even controlling for non-racial juror characteristics. *Id.* A study of peremptory strikes of jurors in a Louisiana parish from 1976 to 1981 found that the striking of jurors was not race neutral. *Id.* A study of two counties in a southeastern state found that race was a "statistically significant" predictor in jury selection and that prosecutors struck disproportionately more Black potential jurors. *Id.* And closer to home, a study that looked at peremptory strike decisions in 13 non-capital felony trials in North Carolina found that prosecutors used 60% of strikes against Black jurors even though they made up only 32% of the venire. *Id.*

166. **Experimental Studies**. Both Dr. Sommers and the MSU researchers also described evidence from experimental and mock jury studies, including some conducted by Dr. Sommers, showing that race influences strike decisions. *See* HTpp. 635-42, 665-66, 675-76; DE7 at 2-3.

167. Dr. Sommers testified in detail about an experimental study he performed, the results of which he published in a peer-reviewed paper, "Race-Based Judgments, Race Neutral Justifications, the Experimental Examination of Peremptory Use and the *Batson* Challenge Procedure." HTpp. 635-42. In that study, Dr. Sommers and fellow researchers instructed college students, law students, and lawyers to use their last remaining strike to remove one of two potential

jurors, one white and one Black, each of whom had one of two alternating profiles. HTpp. 636-40. Each group was more likely to strike the Black juror, no matter which of the two alternating profiles they had at the time. *Id.* When giving their reasons for striking a prospective juror, the participants never mentioned race despite disproportionately striking the Black potential juror. HTpp. 640-42. Dr. Sommers drew several important conclusions from this research: (1) race affected the exercise of jury strikes; (2) people are adept at explaining their decisions in non-racial terms, and (3) this gap in awareness of the role of race was likely due to the fact that, even if the participants did not have explicit bias, they still had what behavioral scientists refer to as "unconscious bias." HTpp. 618, 640-42. Other experimental research has reached the same conclusion, DE7 at 4 n.7.

168. Similarly, the MSU researchers provided information about an experiment in which attorneys viewed videotaped voir dire and decided which mock jurors to strike based on their role of judge, defense, attorney, or prosecutor, an identity given to them based on experience in those respective roles. DE7 at 2-3. The study found that those assigned the role of prosecutor were far more likely to strike the Black prospective jurors than jurors of another race. And in another experimental study it was found that participants were more likely to use a peremptory challenge to strike Black potential jurors rather than identical white potential jurors. DE7 at 3.

169. These findings complement the observational studies before the Court because, unlike observational studies, experimental studies by definition control for all of the variables in the universe of the experiment. HTp. 691. A well-designed experimental study will remove the risk that an unforeseen "confounding" variable will affect the results of an experimental study. HTpp. 691, 707-08. Thus, as testified by Dr. Sommers, although experimental studies deal with smaller amounts of data, when converging with observational studies that take place in a less "controlled" universe, they corroborate the observational findings. *Id.*

170. It is for this reason that the Court does not credit the State's attempt to undermine the importance of the experimental studies by critiquing the small number of study participants. In doing so, the State merely reiterated the testimony of Dr. Sommers as to the well-known limitations of experimental studies without addressing the convergence of those studies with other sources of information like observational studies. Nor did the State cite or introduce any research, of any type, to the contrary. As Dr. Sommers testified, "It's easy to point out the limitation of any type of study," but one must take note of the significance "when you've got convergence from all of these different triangulating methods." HTpp. 707-08. Given the overwhelming amount of convergence in the evidence submitted, the Court concludes that the above-described studies are important evidence showing that race plays a role in jury selection, consistent with the Jury Selection Study.

171. **Unconscious Bias and Racial Stereotypes**. Dr. Sommers testified about the behavioral science behind the concept of unconscious bias and explained why this is yet another source of information contributing to the converging validity of the effect of race on jury selection. Unconscious bias, like the related concept of stereotyping, is an "implicit" form of bias that operates even when individuals are not aware that it exists or that it is affecting their decisions. HTpp. 618, 631. Dr. Sommers testified that behavioral scientists have formed tests, such as the popular Implicit Association Test, that provide a way to uncover one's own unconscious biases. HTpp. 624-27. Subjects, including Black participants, are consistently and significantly more likely to associate Black faces with negative concepts rather than positive ones. *Id.* Indeed, behavioral science shows that most people have unconscious biases and are not aware of them. HTpp. 618, 623-27. Even Mr. Butler acknowledged the existence of unconscious bias but testified that he went out of his way to minimize its effect by reviewing case files without looking at the

race of the defendant or victims. HTp. 921. Mr. Butler did not describe a method for minimizing bias after perceiving the race of potential jurors during jury selection.

172. Dr. Sommers testified that unconscious bias not only affects most people, but that it is more likely to affect a person in the very circumstances that often characterize jury selection. For instance, when a decision must be made in a limited amount of time based on limited information, unconscious bias is more likely to influence it. HTp. 619. This is particularly true when the decision is of a subjective, rather than objective, nature. *Id.*; s*ee also* HTp. 623 (discussing study in which "snap judgments" are made by human resource managers quickly reviewing dozens of resumes, resulting in a higher rate of call back for applicants without traditionally Black-sounding names).

173. As in his own experimental study, Dr. Sommers testified that behavioral science as a whole supports the notion that most people are unaware when their decisions have been influenced by unconscious bias. HTp. 621. Most individuals deny they are motivated by biases. HTp. 621. This means that the procedure set forth in *Batson v. Kentucky*, which relies on an attorney to explain their own race neutral basis for striking a juror, is not particularly effective at addressing unconscious bias. HTpp. 635-36, 662-64. Many people attempt to justify their decisions by referring to their gut feelings. HTp. 618.

174. Dr. Sommers explained distrust stemming from unconscious bias can also manifest by causing a lawyer to perceive a negative demeanor in an individual—a common reason given for peremptory strikes of jurors. HTpp. 656-57, 659-60. Dr. Sommers testified about research showing that Black people, in particular, are often perceived as less friendly or more hostile due to unconscious bias. HTpp. 656-57.

175. As Dr. Sommers testified, the bottom line is that people sometimes "form impressions about another person, about the kind of person they are, we make decisions about other people, and we don't fully have a grasp on what the factors are that influence us." HTp. 618. These factors include race, *id.*, and, as this Court has recognized, the "thoughts, ideas, or perceptions" that we are exposed to throughout our lives. Court's Order on Relevant Time Period at 4.

176. Each of these environmental, cultural, and historical factors can "influence our perceptions and decision-making," HTp. 618, by making us susceptible to stereotype, or judge an individual "based on their group membership." HTpp. 630-31. For example, the cultural and historical associations of one's community and the environment in which one lives may contribute to the idea that people of a particular race are "more dangerous or more likely to commit crime." *Id.* Like this Court, defense lawyers, potential jurors and others, prosecutors are not immune to these forces, a fact of significance in this RJA litigation given that claims under the RJA, as previously discussed, need not rely on evidence of intentional discrimination.

VI. Historical Evidence Explains and Corroborates the Observed Peremptory Strike Disparities

177. The U.S. Supreme Court has long recognized that "both history and math" are essential to understanding the role of race in our criminal legal system. *See Flowers,* 588 U.S. at 300. This Court finds that the statistical evidence presented by Mr. Bacote is corroborated by historical evidence. The disproportionate removal of African Americans in capital jury selection in Prosecutorial District 11, Johnston County, and Mr. Bacote's individual case are not isolated, unexpected events. Rather, the prosecutorial strike disparities are due in significant part to race and fit within a long history of racial discrimination.

178. Courts routinely consider historical evidence when evaluating a *Batson* claim where the standard of proof is more onerous. For example, in *Miller-El v. Dretke*, the U.S. Supreme Court considered and relied on evidence of discriminatory training practices from the 1950s, 60s, and 70s in its analysis of a *Batson* claim that arose in a trial in the late 1980s. 545 U.S. 231, 263-64 (2005) ("*Miller-El II*").[25] *See also Patton v. Mississippi*, 332 U.S. 463, 466 (1947) (evidence over a period of 30 years "created a very strong showing" that African Americans "were systematically excluded from jury service because of race"), *State v. Cofield*, 320 N.C. 297, 309 (1987) (evidence that only one Black citizen had served as grand jury foreperson in 18 years preceding defendant's trial established *prima facie* case of racial discrimination).

179. In addition, Dr. Sommers testified how unconscious biases "owe themselves to culture and to history." HTp. 618. Thus, takers of the Implicit Associate Test from other cultures do not respond the same as Americans when tested on things specific to American culture, like racially coded names. HTpp. 628-29. On the other hand, those with a shared history are likely to share these common unconscious biases. For example, Dr. Sommers testified about a study conducted at the University of North Carolina that found there was a statistically significant relationship between rates of slavery before the civil war and unconscious bias. HTp. 630. Citizens of North Carolina counties with higher rates of slavery were found to have higher levels of anti-Black unconscious bias today, over a hundred years later. *Id.* Thus, as Dr. Sommers testified, history is another piece of the foundation supporting the converging validity that Black people are disproportionately excluded from juries due to their race.

[25] While this Court remains mindful that the RJA claims at issue here are distinct from *Batson* claims, it finds the *Batson* reasoning and analysis relevant in light of the RJA's purpose of rooting out discrimination that may escape the rule of *Batson*.

A. An Overview of Witnesses who Presented Historical Evidence

180. This Court heard testimony from Dr. Sanders, Dr. Kotch, and Professor Stevenson. The witnesses' testimony provided a historical framework that allows this Court to examine the "whole picture." *Flowers*, 588 U.S. at 314.

181. Dr. Sanders, an expert in African American Studies and 20th Century United States History, was born and raised in Johnston County, North Carolina. HTp. 726. Before attending Duke University in Durham, North Carolina, Dr. Sanders graduated from Clayton High School in Johnston County. HTp. 710. Dr. Sanders is uniquely qualified to speak about the history, culture, and environment in Johnston County. In a report submitted to the Court, Dr. Sanders concluded that in her expert opinion, the racial disparities in capital cases in North Carolina, Prosecutorial District 11, and Johnston County "form part of a larger pattern in the history of this county, prosecutorial district, and state." DE120 at 2.

182. Dr. Kotch, a North Carolina native and Professor at the University of North Carolina also testified at the evidentiary hearing. Dr. Kotch explained how facets of the modern-day execution of Black defendants parallel the history of racial violence experienced by Black North Carolinians. Admitted portions of Dr. Kotch's law review article, "The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina," and Dr. Kotch's testimony provided additional context for how a longstanding history of racial discrimination makes its way into jury selection.

183. Professor Stevenson, the founder and Executive Director of the Equal Justice Initiative (EJI), Professor of Law at the New York University School of Law, and an expert on racial bias within jury selection and the criminal legal system testified about the larger historical context of jury discrimination. He demonstrated how the history of racial discrimination informs and persists through jury selection practice today. Professor Stevenson reviewed extensive

materials from jury selection cases in North Carolina and determined that there is "substantial evidence of racial bias in jury selection" in North Carolina. HTp. 1093.

B. The Historical Exclusion of Black Jurors in North Carolina

184. There has been a long history of discrimination in jury selection in the United States and, specifically, in North Carolina, which has created biases against Black prospective jurors that persist to the present day. Our state supreme court summarized that history as follows:

> After the Civil War, the Supreme Court of the United States barred statutes that excluded African-Americans from serving as jurors. *Strauder v. West Virginia*, 100 U.S. 303 (1879) . . . . Discrimination still occurred in practice as local jurisdictions excluded African-Americans from being in jury venires, preventing them from being in the jury pool.
>
> The Supreme Court of the United States addressed this newest form of discrimination by prohibiting "any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers" that led to the exclusion of African-American jurors. *Carter v. Texas*, 177 U.S. 442, 447 (1900).
>
> Following these decisions, neither statutes nor local practices could legally exclude African-Americans from jury service. After the Civil War and Reconstruction, however, racism and legal segregation remained rampant in North Carolina and across the South. . .
>
> The 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. Given the racially oppressive practices and beliefs that permeated every level of American society during the Jim Crow era, the constitutionally protected right of African-American defendants to be tried by a jury of their peers became increasingly important. . . .. The Supreme Court recognized that putting the fate of African-American defendants in the hands of all-white juries contradicted "our basic concepts of a democratic society and a representative government." *Id.*

State v. Robinson, 375 N.C. 173, 177-79 (2020) (internal citations simplified or omitted).

185. At the hearing, the Court directed the parties to focus their evidence on the period from 1970 through 2011, but also admitted limited evidence corroborating the earlier history described in *Robinson*.

186. "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers*, 588 U.S. at 293. Thus, it is of little surprise that the history of exclusion of African Americans from jury service parallels exclusion from the political process. DE120 at 28; HTp. 1067. Dr. Sanders and Professor Stevenson linked the history of African American disenfranchisement and exclusion from the political process to the history of exclusion from jury service in North Carolina. DE120 at 7-8, 28; HTp. 1067.

187. For instance, in 1899, an African American lawyer, George Henry White was elected to Congress. HTp. 722. It would be nearly 100 years before the next African American would represent North Carolina in Congress. HTp. 723. And from the turn of the twentieth century into the Jim Crow era, jury participation by African Americans in North Carolina was also negligible. DE120 at 2-13; DE135 at 9. There is no evidence of an African American serving on a jury in North Carolina until the middle of the twentieth century. DE135 at 10. As Professor Stevenson explained, there was an understanding that most juries would not represent the population, resulting in Black men convicted by all white juries, despite overwhelming evidence of racial bias. HTp. 1055. Peremptory strikes were not a significant mechanism of exclusion of Black jurors at the time because the pools of prospective jurors did not include representative numbers of Black citizens. HTp. 1052.

188. By way of example, the clerk of the Board of Commissioners in Bertie County confirmed that even though African Americans comprised 60 percent of the county population and approximately 35 to 40 percent of taxpayers, he had never seen an African American placed on the approved list of prospective jurors. *See State v. Speller*, 229 N.C. 67, 68-69 (1948). The clerk insisted that there was no intentional racial discrimination but also confirmed that the county

employed a practice of placing Black prospective jurors on red scrolls and white prospective jurors on black scrolls "for the convenience of the Sheriff in summoning the prospective jurors." *Id.* at 70. The red scrolls never made it "beyond the Commissioners." *Id.*

189. In the 1970s, these practices began to shift. In 1972, in *Furman v. Georgia*, the U.S. Supreme Court held that capital punishment was being applied in a discriminatory and arbitrary manner and decreed the death penalty cruel and unusual punishment in violation of the Eighth Amendment. 408 U.S. 238 (1972). As a result, all existing death penalty statutes were invalidated. *Id.* This decision was a "watershed moment" for how the United States thought about race and the death penalty and applied pressure on states to be attentive to the history of racial bias that had been largely ignored. HTp. 1051.[26] Unfortunately, as both Dr. Kotch and Professor Stevenson confirmed, the new attention and pressure ultimately did not eliminate the problem of discrimination against Black citizens in jury selection. DE135 at 16; HTpp. 1052, 1056-57.

190. In the wake of *Furman*, advocates increased efforts to address the underrepresentation of people in the jury pool, with increasing success. HTp. 1052. In the late 1970s and 1980s, jury pools in many places in North Carolina became more diverse, but exclusion of Black prospective jurors persisted. HTpp. 1056-57.[27] Instead of racially discriminatory practices that shaped the make-up of the jury pool, prosecutors employed a new discriminatory tactic of peremptory strikes to remove Black potential jurors. HTp. 1057; DE135 at 11; *see also State v.*

[26] Immediately after *Furman*, North Carolina instated a new death penalty statute that mandated automatic death for murder, rape, burglary, and arson. DE120 at 34; DE135 at 11. The U.S. Supreme Court declared the statute unconstitutional, *Woodson v. North Carolina*, 428 U.S. 280 (1976), and it was not until 1977 that North Carolina enacted a revised capital punishment statute that remains in effect today. DE120 at 34; DE135 at 12; HTp. 1056.

[27] Professor Stevenson testified that the problem of underrepresentation of people of color in jury pools remains an issue in many counties. HTp. 1058.

Clegg, 380 N.C. 127, 142 (N.C 2022) (describing how peremptory strikes were used as a "discriminatory tool" to exclude Black persons from jury service") (cleaned up).

191. Professor Stevenson explained how in North Carolina, peremptory strikes "in many ways offered the greatest opportunity for discrimination." HTp. 1057. Prior to 1977, defense attorneys in North Carolina had 14 peremptory strikes while prosecutors had only six. *Id*. Then, in 1977, the number of peremptory strikes for prosecutors increased to 14, while the number allotted to defense attorneys remained the same. *Id*. With increased numbers of peremptory strikes, prosecutors had increased opportunities and no practical barriers to striking jurors based on their race, and the exclusions of Black jurors persisted. HTpp. 1057-58. Professor Stevenson explained how many lawyers, and prosecutors in particular, believed that it was appropriate to exclude someone on the basis of race. *Id.*

192. The United States Supreme Court sought to address this problem in 1986, in *Batson v. Kentucky*, by establishing the three-part test that allowed attorneys to challenge discriminatory peremptory challenges based on the purposeful exclusion of one or more jurors of color. 476 U.S. 79 (1986). Professor Stevenson and his research team investigated the response and effectiveness of *Batson*, ultimately publishing two reports on jury selection post-*Batson* in capital cases. DE273; DE274. Their overarching conclusion is that the *Batson* framework has proven inadequate, and that racial discrimination persists in jury selection. *Id*. Professor Stevenson attributed part of this failure to the prosecutors' resistance to change. To accept and embrace the importance of trying cases before racially diverse juries, a major cultural shift is necessary. Prosecutors would need to organize trainings on how to change their approach to jury selection and how to become comfortable trying cases with diverse juries. HTpp. 1059-60. This occurred in a few places. The United States Attorney in Memphis, for example, sought training to build an office culture that

rejected the exclusion of women and people of color in jury selection. *Id*. But this approach was rare. Instead, most prosecution trainings focused on how to circumvent *Batson* violations. HTp. 1060.

193. In 1994 and 1995, the North Carolina Conference of District Attorneys held training sessions that distributed a list of 10 categories of explanations for peremptory strikes that could be used as "justifications." DE274 at 43; DE304 (N.C. District Attorney training materials). The North Carolina Supreme Court has alternatively referred to this list as a "cheat sheet" for *Batson* objections, *Clegg*, 380 N.C. at 155, and as a CLE handout with case law summaries. *State v. Tucker*, 385 N.C. 471, 497-500 (2023); *but see State v. Augustine*, 375 N.C. 376, 382 (2020) (quoting the lower court's characterization of this handout as a "cheat sheet" for responding to *Batson* objections). Regardless of intent behind the handout, it was used by a prosecutor in at least one capital case in North Carolina to fabricate race neutral justifications. *Augustine*, 375 N.C. at 382 (reciting the lower court's discussion of the matter); *State v. Augustine, Golphin, Walters*, 97 CRS 47314-15, 98 CRS 34832, 35044, 01 CRS 65079 (N.C. Sup. Ct. Dec. 13, 2012) (in *Batson* violation sustained by original trial court, cheat sheet showed prosecutor had read directly from the list). Professor Stevenson testified that some North Carolina attorneys failed to understand *Batson*'s purpose. Attorneys often viewed *Batson* as a sort of quota requirement — if there were one or two Black jurors, there could be no finding of discrimination. HTp. 1064. Mr. Butler provided an example of this flawed mindset. He defended against a claim of racial discrimination by arguing in essence that since he had accepted one Black juror and struck one white juror, he could not be found to discriminate. HTp. 1065.

194. Defense attorneys contributed, too, to the ineffectiveness of *Batson* by hesitating to object to the exclusion of Black prospective jurors. HTp. 1062. The result in North Carolina was

cases with evidence of racial discrimination, but no objection made by defense counsel and therefore no mechanism for a remedy. *Id.*

C. Historical Exclusion of Black Jurors in Prosecutorial District 11 and Johnston County

195. This Court also finds that the history of racial discrimination in Prosecutorial District 11 and Johnston County contributed to biases and racial stereotypes of Black jurors that persist and influence prosecution strikes in these jurisdictions.

196. During the Reconstruction era, much like elsewhere throughout the state and country, Black Johnstonians experienced a brief period of political advancement. DE120 at 8. This came to a swift halt in 1898 with a "violent white supremacy campaign." *Id*. at 10. Dr. Sanders described how, in November 1898, four days before an election, an editorial in Johnston County's paper of record "alerted readers to the fact that Black people served as magistrates and on juries in other parts of North Carolina." *Id*. The editorialist wrote that "the greatest issue now confronting our people is . . . Negro Rule . . ." and urged white Johnstonians to "redeem the state[.]" *Id*. (internal citations omitted). Both throughout the state and in Johnston County, "lynching became a tool used by white supremacists to suppress African Americans' civil rights and instill fear in Black communities[.]" *Id*. at 4. Between 1884 and 1914 at least four Black men were lynched in Johnston County. *Id*. at 5.

197. Exclusion from the political process continued into the twentieth century. Dr. Sanders provided concrete examples of racial exclusion in her report and testimony. For instance, "in 1945, only seventy African Americans in Smithfield could vote." *Id*. at 14. In the 250 years since the county's incorporation, an African American has never served on the Johnston County Board of Commissioners. HTp. 748. The first African American to hold elected office in the county since the nineteenth century was Mack Sowell who won election to the Selma Town Council in

1969. DE120 at 16. Dr. Sanders explained that while there is a general belief that "in a democratic society," an individual can "exercise [their] satisfaction or dissatisfaction through the ballot," for Black Johnstonians "for much of the 20th century" this avenue "was closed." HTp. 744.

D. Exclusion in the Criminal Legal System in Prosecutorial District 11 and Johnston County

198. The historical underrepresentation of African Americans in every facet of the criminal legal system parallels the historical exclusion of African Americans in jury service in Prosecutorial District 11 and in Johnston County.

199. Through the 1970s, there were no African American bailiffs, judges, or district attorneys in Johnston County. HTp. 743. In the 1940s, Black residents in Smithfield called for the hiring of Black police officers. HTpp. 743-44. Two Black officers were eventually hired in 1958, however, they were only permitted to patrol in Black neighborhoods. HTp. 744. And it was not until 1991 that Prosecutorial District 11 and Johnston County hired its first Black Assistant District Attorney. DE120 at 36. Professor Stevenson testified about how lack of diversity can fuel discrimination: "[I]f you work in an office that it's [sic] overwhelming white, you live in a neighborhood that's overwhelmingly white, you've been practicing your whole career in front of juries that are overwhelmingly white, that bias against things [that] are different and new which you may not think of as racial bias will still manifest itself in a racially discriminatory manner." HTp. 1073.

200. During this long era of underrepresentation, racially charged prosecutions in Prosecutorial District 11 and Johnston County occurred. In 1979, in Lee County, a four-year-old girl was tragically murdered, and a 14-year-old girl was assaulted. DE120 at 35. The 14-year-old victim initially reported that a white man committed the crimes. *Id.* at 35-36. Nevertheless, the District Attorney charged Robert Henry McDowell, a Black man with a dark complexion, with

first-degree murder and felonious assault. *Id.* at 36. The District Attorney neither disclosed the victim's initial statement nor the reports of prior white intruders at the scene to the court or to the defense, and then persuaded a jury to sentence Mr. McDowell to death. *Id.* Mr. McDowell's death sentence was not overturned until 1988, when the U.S. Court of Appeals for the Fourth Circuit ordered habeas relief. *Id.; McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988).

201. In 1998, a Johnston County jury wrongfully convicted Terence Garner, a Black man, of robbery and attempted murder of a white woman. DE120 at 36. Two days after Mr. Garner's conviction, another man confessed to the crime, and then recanted. *Id.* at 36-37. Multiple courts denied Mr. Garner's requests for a new trial, and he served four years in prison until national and international public pressure prompted by a PBS *Frontline* story led the Superior Court to grant him a new trial. *Id*. at 37; *see also Terence Garner*, Nat'l Registry of Exonerations.[28]

202. It is notable that studies have revealed that throughout North Carolina, Black defendants have been disproportionately granted clemency and "disproportionately removed from death row because they were denied rights going to the basic fairness of the trial process or to values fundamental to the integrity of the death penalty." DE135 at 2091. These disparities "suggest the operation of a pernicious impact of race on the initial process of reaching a death sentence." *Id.* at 2093.

203. Racial discrimination in jury selection not only harms the group excluded, it also "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. Wrongful convictions reflect the most profound of many adverse consequences from racial exclusion in jury selection. As Professor Stevenson noted, "all-white and nearly all-white juries

[28] Available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3232 (last visited June 2, 2024).

are less likely to hold prosecutors to their burden of proof, especially when the defendant is not white, because they apply a presumption of guilt rather than a presumption that the defendant is innocent." DE274 at 57.

204. The historical evidence received by this Court reveals that racial intimidation and discrimination continued in Johnston County for many years, including right outside the courthouse doors. Into the early 2000s, Johnston County remained known as "Klan country." HTp. 738. This reputation stemmed, in part, from the landscape itself: For years, the major entrances to towns such as Smithfield, Princeton, and Benson, were marked by a series of imposing billboards advertising the county as home to the Ku Klux Klan. HTpp. 737-38; *see, also* DE123; DE120 at 23-24; DE122 at 4.

205. One billboard that read "Join and Support the United Klans of America, Help Fight Communism & Integration" stood just two or three blocks from the courthouse where this hearing was held. HTpp. 737-38. Dr. Sanders described the experience of approaching downtown Smithfield from the west, as many would do, and confronting the billboards en route to the courthouse.

206. As Dr. Sanders testified, the "signs [were] meant to intimidate. We know that the Klan is a terrorist organization, has a history of terrorizing Black communities, and these signs are meant to instill fear." HTp. 741; *see also id.* at 741-42 (explaining that the iconography evokes "the Klan patrolling areas to maintain a racial status quo"). Articles from the Smithfield Herald, Johnston County's paper of record, HTpp. 733-34, describe local officials granting permits for Klan chapters to parade through the county in the 1990s. *See e.g.,* DE129; HTp. 763 (explaining that "this Klan incident would be one of several in the 1990s, even the early 2000s, where

Klansmen are requesting and sometimes successfully getting permits to hold demonstrations at various points in the county").

207. These parades sent the message "that [the Klan] continue[d] to have a presence. . . that they are watching." HTp. 754. In this way, for decades after the signs came down, "the Klan would use marches to . . . assert its presence in communities, to remind residents, especially Black residents, that they still existed." HTp. 763. Indeed, the Klan held "several" demonstrations at "various points in the county" in the 1990s and "even the early 2000s." *Id*. Like the Klan billboards, these marches served as a visual reminder of the racial environment in Johnston County, North Carolina, reinforcing the culture of bias and fear. And that culture held strong through the turn of the century: In 2001, the Klan marched through Benson at the annual Mule Days celebration, a celebration which Dr. Sanders herself was warned not to attend because of fears of racial tensions boiling over. *Id*. at 763-64; *see also* DE120 at 28.

208. In her testimony, Dr. Sanders described a young Black couple who moved into a previously all-white neighborhood in 1977. At the time, "Johnston County was residentially segregated." HTp. 760. Their arrival was met with gunshots fired through their front window, and a cross embedded in a watermelon and set ablaze on their front lawn. HTpp. 760-61; DE128. Black families in Johnston County were met with similar acts of violence for running for public office, HTpp. 762-63, and sending their children to previously white elementary schools. HTp. 765; DE122 at 12. As Dr. Sanders explained, "it was quite common for crosses to be burned on the yards of African Americans who transgress[ed] the racial status quo, African Americans who did something that was deemed unacceptable or beyond the appropriate place of African Americans." HTp. 765.

209. As Dr. Sanders described, in 1977, two Black men, David Smith and Henry Stuart, were charged in the fatal shooting of two white men police officers. DE120 at 35. Attorneys for the defendants later learned that the grand jury had disproportionately few Black jurors; while there should have been four Black residents, there were only two. *Id.* A Superior Court judge ruled that the grand jury was selected "without adequate assurance that it reflected the racial and gender demographics of the community." *Id.* Notably, this capital prosecution was the first case post-*Furman* prosecuted in North Carolina after the state enacted the current death penalty statute. *Id*.

210. This Court finds that the history of race relations and racial discrimination in Prosecutorial District 11 and Johnston County corroborates the statistical findings and demonstrates that race played a significant role in the prosecutor's peremptory strikes across the district, the county, and in cases tried by Mr. Butler.

VII. Prosecution Notes Corroborate the Statistical Evidence

211. The statistical evidence presented by Mr. Bacote is corroborated by handwritten notes prosecution team members wrote during capital jury selection in cases across the state. These documents, introduced as Defense Exhibits 150-270, 300, span hundreds of pages turned over in discovery this Court ordered. This Court observes that the United States Supreme Court has considered prosecutor notes in finding intentional discrimination under *Batson*. *See Foster v. Chatman*, 578 U.S. 488, 513, 516 (2016) (reviewing prosecution notes identifying multiple Black jurors as "B" and finding they "belie[d] the State's claim that it exercised its strikes in a 'color-blind' manner" and the "sheer number of references to race in that file is arresting").

212. Professor Stevenson explained several ways in which prosecutorial statements (contained in notes or otherwise) may reveal a discriminatory or a race-conscious mindset. Prosecutors used race to attempt to gain a tactical advantage due to assumptions and distrust based on skin color. HTpp. 1071-76. As Professor Stevenson explained, this mindset occurs when

prosecutors see a person who is Black and presume they are going to act differently because of their color. HTp. 1071. For example, a prosecutor might think because a Black person was the victim of racial discrimination, that person will be less receptive to testimony from police officers. *Id.* This is problematic, Professor Stevenson explained, because the assumption of bias goes untested. HTp. 1072. Based on this rationale, prosecutors in this state have been trained to avoid Black jurors and to think of racial exclusions as a tactical advantage. HTpp. 1075-77 (discussing DE289; DE290; DE326).

213. Second, Professor Stevenson testified about factors related to a prosecutor's strike decision that represent proxies for race and thereby undermine and exclude people of color from serving on juries. HTpp. 1073-74. As examples, he cited references to particular neighborhoods associated with Black populations, publications and books associated with Black people, as well as civic groups and schools associated with Black Americans, such as the NAACP or historically Black colleges and universities (HBCUs). HTpp. 1088-89, 1091.

214. Third, Professor Stevenson testified that prosecution notes may evince a presumption, by prosecutors, of exclusion for Black jurors, whose answers and actions are never deemed desirable for service. HTpp. 1089. As he explained, the presumption forces Black potential jurors to "prove to" the State that they are someone who can serve on the jury despite being Black. HTp. 1090.

215. Fourth, Professor Stevenson discussed the related problem of exclusion from jury service due to gender. HTpp. 1060, 1067. Here, too, a discriminatory mindset may exist in which predominantly male prosecution offices have prosecutors who distrust women because of their gender, rather than based on the merits of their qualifications for jury duty. HTp. 1070. As discussed below, this issue also arose in the testimony and affidavit of Mr. Butler. While the Court

reiterates that Professor Stevenson's testimony both meets the criteria for expert testimony and aids the Court in deciding the questions at issue here, the Court also notes that the voluminous prosecutor notes introduced into the record, in many respects, speak for themselves. They open a window into the mindset of prosecutors selecting capital juries in this state. Numerous Notes Reveal an Explicit Prosecutorial Focus on Race, Often Accompanied by Offensive Racial Stereotypes

216. Other prosecutors introduced offensive stereotypes and characterizations, commented on skin shade and body types, denigrated women, and/or used animal imagery. For example, a prosecutor in Cumberland County described one juror as "B/M, early 20s, broad shoulders, strong as a bull." DE259 (*State v. Everett Huff*).

217. Similarly, a prosecutor in Halifax County noted that one woman was "obese in jungle print dress" while another was "heavy" and white with "stringy red hair" and "big breasts." DE260 at 1 (*State v. Joe Johnston*). He also referenced an "Indian lady" and "2 Black ladies." *Id.* A prosecutor in Alamance County wrote that one juror "may be light skin BF" with "big butt small top" while another was "40's BM - ? Dark Skin[.]" DE217 at 5 (*State v. John Burr*).

218. Invoking yet another stereotype, prosecutors in Harnett County wrote of a potential juror with whom they (or someone connected with the prosecution) had worked with and called her a "very outspoken black woman." DE213 at 16 (*State v. Quincy Amerson*).

219. The race-conscious commentary also pertained to where Black people live. For example, in the Iredell County case of Rayford Burke, a prosecutor wrote of one potential juror: "[R.B.] – good address - affluent people who have blacks living behind them." DE150 at 4. Similarly, in the Robeson County trial of Herbert Barton, a prosecutor wrote that a potential juror was a "white living in black section." DE194 at 1.

220. These examples represent the tip of a large iceberg of racially conscious notes admitted at the evidentiary hearing. *See* DE151, 154, 188-220, 234-62.

E. Other Prosecutorial Notes Employed Proxies for Race

221. In the Johnston County case of Angel Guevara, prosecutors wrote that "Drake" and another (illegible) street "have been drug areas. Watch out for Sharpsburg." DE182. The Court takes judicial notice that Sharpsburg, North Carolina, sits outside of Johnston County and is a majority-Black city.[29]

222. Other prosecutors homed in on potential jurors' affiliations with particular groups or universities. In Lee County, a prosecutor wrote and circled NAACP next to the name of a juror who "could follow law." DE222 at 2 (*State v. Anthony McKoy*). In the Guilford County case of Dwight Robinson, a prosecutor wrote "NC A&T" next to a juror's answer on a questionnaire that she had obtained a master's degree in education. DE225. A juror in Wayne County responded to questionnaire items asking for the names of clubs and organizations to which jurors belonged or led, answering "Neo Black Society" and "Black Business Students Association," and designating that she was chair of that student group. DE226 at 4 (*State v. Edward Lemons*). Notably, of 37 different answers on her questionnaire (some multi-part), these two items are the only items the prosecutor highlighted. *Id.* These notes align with Professor Stevenson's credited testimony explaining that prosecutors who do not know Black people make assumptions about them based on their membership or affiliations, rather than their individual characteristics. HTpp. 1073-74.

223. Similarly, prosecutors focused on media outlets and literature associated with Black communities. In Sampson County, a prosecutor highlighted the answer *Ebony Magazine* on a

[29] *See Sharpsburg Town, N.C.*, U.S. Census Bureau, https://data.census.gov/profile/Sharpsburg_town,_North_Carolina?g=160XX00US3761060 (last visited June 3, 2024) (documenting that 1,054 of the town's 1,697 residents are Black).

questionnaire in which potential jurors were asked to identify the magazines they read. DE223 at 4 (*State v. Cornelius Nobles*). A Scotland County prosecutor circled BET on one juror's questionnaire, *The Color Purple* on another, and *Jet* magazine on a third. DE228 at 3; DE229 at 3; DE230 (*State v. Jimmy McNeil*). *See also* DE232 at 2 (prosecutor circling *Ebony Magazine* in *State v. Warren Gregory*, Pitt County); DE156; DE183-87; DE224; DE227; DE231; DE233; DE257; DE258; DE263; DE269; DE270 (similar notes focusing on proxies for race).

224. Professor Stevenson discussed a "presumption of exclusion" for Black jurors. HTp. 1090. In lay terms, this is the idea that white people have to talk their way off a jury and Black people have to talk their way on. Mr. Bacote's exhibits illustrate that this presumption is often applied, even by prosecutors who likely would not readily admit it or even be conscious of it. As discussed above, Dr. Sommers testified that a person's "gut feeling" against a person of color (but in favor of a white person) reflects unconscious bias, even if the overt intent is not to discriminate. HTpp. 654-55.

F. Prosecutorial Notes Reveal the Impermissible Consideration of Gender and a Discriminatory Mindset During Jury Selection

225. The United States Supreme Court has observed that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (internal citation omitted). Although Mr. Bacote's claims here arise under the RJA, which does not provide relief based on gender or sex discrimination,[30] Mr. Bacote's prosecutor, Mr. Butler, raised the intersection of gender with RJA claims in affidavits he wrote explaining strikes he exercised in *State v. Bell* and *State v. Barden*. *See* DE11 at 40

[30] As the U.S. Supreme Court held three decades ago, the U.S. Constitution forbids gender discrimination in jury selection. *See J. E. B. v. Alabama*, 511 U.S. 127 (1994).

(explaining that, in *Barden*, he struck E. R., a Black woman, in part because "State was way ahead on peremptory challenge and was looking for strong male jurors" and stating he simultaneously used a peremptory challenge to strike a white woman for same reason); s*ee also* DE11 at 42 (explaining that, in *Bell*, he struck Black prospective juror V.M. because he was "making a concerted effort to send male jurors to the Defense[.]"); HTpp. 957-61 (Mr. Butler's testimony discussing the affidavit).[31]

226. In his testimony, Professor Stevenson identified a prosecutorial mindset about *Batson* that highlights the need the General Assembly must have seen when it enacted the RJA. As discussed above, this mindset views *Batson* as a quota requirement: allowing one or two Black jurors to serve is viewed as both sufficient and protection against a claim under *Batson*. HTpp. 1064-65. Indeed, the prosecutor notes in this case reflect that at least some prosecutors believed that to be the case. *See* DE209 at 30 (noting next to the name of a potential juror "already seated and passed several B").

227. But what Professor Stevenson saw as a focus on race was not limited to the *removal* of Black women or Black potential jurors as a group. HTp. 1089. It also determined whom the State selected to serve. In the 1997 capital cases of *State v. Richard Smith & Jimmy Smith*, in Martin County, for example, a prosecutor wrote that a juror was "Good, keeps up w/gossip - bring her own rope." DE300 at 38. The Court finds, based on all the evidence, that this is another reference to lynching. As Dr. Kotch explained, the historical allusion invokes a person who could potentially bring to a trial "the same spirit of vengeance" that animated our state's shameful history of racial violence and lynching. HTpp. 832-33. In the context of *Batson*, courts examining allegations of intentional discrimination in jury selection look to "'all relevant circumstances.'"

[31] Jurors are identified by their initials to protect their privacy. HTpp. 645-46, 649.

Flowers, 588 U.S. at 304-05 (quoting *Batson*, 476 U.S. at 96-97). *Batson* litigants may cast a "'wide net' to gather 'relevant' evidence." *Id.* (quoting *Miller-El*, 545 U.S. at 239-40 (cleaned up)).

VIII. Comparative Juror Analysis of Cases Tried by Mr. Butler, including in Mr. Bacote's Case, Corroborates the Statistical Evidence

228. In the *Batson* context, the United States Supreme Court has consistently held that disparate treatment of white and Black potential jurors is probative of discriminatory intent. *See Foster v. Chatman*, 578 U.S. 488, 505-06, 512 (2016); *see also Snyder v. Louisiana*, 552 U.S. 472, 483-85 (2008). "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 241 (2005).

229. In determining whether race was a significant factor in prosecution strike decisions in Mr. Bacote's individual case and capital cases prosecuted by Mr. Butler, the Court has considered evidence of disparate treatment. The Court examined jury selection transcripts and prosecutor affidavits[32] setting out reasons for strikes of Black venire members in these cases. The Court has also considered the testimony of defense expert Professor Bryan Stevenson. The Court finds evidence of disparate treatment by Mr. Butler in multiple capital cases, including Mr. Bacote's individual case. Mr. Butler's conduct over several cases evinces both pretext and intent to discriminate.

[32] Before the 2012 RJA hearings in Cumberland County, the State asked prosecutors statewide to provide written explanations of-the bases for exercising peremptory strikes against Black jurors in capital trials in their respective districts. These affidavits and statements were admitted at the 2012 RJA hearings. During this hearing, the State stipulated the authenticity of the affidavits and statements. February 17, 2024 Pretrial Order. The Court admitted the affidavits as Defense Exhibits 10 and 11. HTpp. 168-69.

A. Death Penalty Reservations

230. The evidence reviewed by this Court reveals that disparate treatment was present in Mr. Bacote's own case. Eighteen Black Johnstonians presented themselves as potential jurors for Mr. Bacote's case. DE283 at 4. After ten of the 18 were removed for cause, seven on the State's motion for their death-penalty opposition, eight Black potential jurors remained. *Id.* The State removed six of the eight with peremptory strikes. *Id.* The trial court found a prima facie case of discrimination as to five of the six strikes of Black potential jurors.

231. For five of the six Black jurors that Mr. Butler removed with peremptory challenges, he identified death penalty reservations among the reasons for his strikes. DE11 at 171. Yet, Mr. Butler did not strike white jurors who expressed reservations, in some cases with nearly identical language:

Statement	Outcome	Race
"I feel I could be a part, but I wouldn't want to be a part." T. p. 132	Struck	Black (R.L.)
"If I have to, but I don't want to. T. p. 1185	Struck	Black (R.M.)
"I wouldn't want to, but if it shows he was guilty I could." T. v3, p. 551	Accepted	White (M.V.)
"I don't want to" and "I don't know" T. v. 12, p. 2544	Accepted	White (B.B.)
"Probably could" T. p. 273	Struck	Black (B.S.)
"In appropriate cases, I guess yes." T. p. 111	Struck	Black (E.B.)
"I'm kind of torn." T. p. 1621	Accepted	White (K.D.)
"I'm not real sure about that." T. v. 4 p. 758	Accepted	White (J.H.)
"I don't think I can do that." T. v. 8. p. 1716	Accepted	White (T.B.)
"If the State could present me with that, enough information that I have to make that decision, I believe I can." T. p. 561	Struck	Black (K.P.)
"It's one that makes me uneasy." T. v. 10 p. 2195	Accepted	White (V.H.)

DE325 at 8.

232. Having reviewed these materials, Professor Stevenson concluded there was evidence of disparate treatment in Mr. Bacote's case. HTpp. 1087-1088. Indeed, Professor

Stevenson believed that the statements of the white jurors Mr. Butler passed revealed, if anything, "even more resistance or discomfort" with the death penalty. HTp. 1087. The Court finds this evidence of disparate treatment is relevant to Mr. Bacote's RJA claims regardless of whether it establishes a violation of *Batson*.

233. In Mr. Butler's other capital cases, Black venire members faced a risk of removal by State peremptory challenges of more than 10 times that of their non-Black counterparts. HTp. 147; DE7 at 26. Mr. Butler could not explain these disparities, *see, e.g.,* HTp. 990, and remained adamant that he never struck a juror for a "racial reason" or without a race neutral reason.[33] HTp. 906. A review of the transcripts, however, suggests otherwise. *See generally* HTpp. 620-21 (Dr. Sommers explaining why self-reporting is unreliable and reconciling disparities when an individual insists that they are not biased). The Court notes as well that *Batson* held that a prosecutor may not "rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'" 476 U.S. at 98, quoting *Alexander v. Louisiana,* 405 U.S. 625, 632 (1972) (brackets in original). Most people, including "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton,* 682 F.2d 1055, 1064 (4th Cir. 1982). The Court has considered but gives limited weight to the prosecutor's denials of discriminatory intent.

234. For example, in the Sampson County capital case of *State. v. Barden*, Mr. Butler struck Black jurors BC and LB. *State v. Barden*, Vol. I, Tpp. 197, 555. The State defended striking

[33] In all of the examples cited as evidence of disparate treatment, excluding instances where explicitly discussed, a *Batson* challenge was never raised, thus, the trial court was never asked to consider evidence of discrimination.

these jurors based on their equivocal responses to questions about the death penalty. DE283 at 6. Mr. Butler claimed in his affidavit to have struck BC for answering that she "[didn't] know" and "[i]t depends on the case," when asked if she could vote to impose the death penalty. DE11 at 40. He also claimed that she would not be "a strong leader and that she was not a strong and unequivocal supporter of the Death Penalty." DE11 at 40. Mr. Butler similarly explained his strike of LB, who had responded, "Yes, [I] think so," when asked if he could impose death. DE11 at 40-41.

235. In contrast, TB, JB, and BLB, also made equivocal statements about the death penalty. Yet this did not prompt Mr. Butler to strike any of them. TB responded to the question about her ability to impose death that "[it] would depend what happened" and later "[y]es, I think I could." DE2, *State v. Barden*, Vol. III, Tp. 538. JB answered, "I guess I could, yes." DE2, *State v. Barden*, Vol. III, Tp. 579. BLB answered, "I think so. I think so, yes" and then "I don't hardly know" when asked about her opinion on the death penalty. *State v. Barden*, Vol. I, Tpp. 249, 245. [34]

236. Notably, the defense raised a *Batson* challenge after Mr. Butler struck Black prospective LB and BC. On appeal, the North Carolina Supreme Court found the trial court erred when it ruled there was no prima facie case of racial discrimination and remanded for an evidentiary hearing. *State v. Barden*, 356 N.C. 316 (2002). The Court subsequently remanded the case again because of deficiencies in the first evidentiary hearing. *State v. Barden*, 362 NC 277 (2008). A decision remains pending.

[34] If not in the material already cited, the race of the jurors in this section, and the one that follows, are confirmed by reference to the database of potential jurors created by the MSU researchers and admitted into evidence. DE6 (NC Jury Selection Study Database with Cause (6 Dec 2023).

B. Targeted Questioning of Black Potential Jurors

237. Professor Stevenson explained how a prosecutor can use targeted questioning to elicit answers justifying the exclusion of Black potential jurors. He testified that in some instances Black potential jurors are grilled about education, employment, religion or connections to the criminal punishment system in ways that white venire members are not. Through extensive questioning, a prosecutor can obtain information that provides a basis for the prosecution to "articulate something that sounds race neutral, but the process of getting that information was in itself not neutral." HTp. 1092; *see also Flowers*, 139 S.Ct. at 2248 (disparate questioning "can produce a record that says little about white prospective jurors and is therefore resistant to characteristic-by-characteristic comparisons of struck black prospective jurors and seated white jurors. Prosecutors can decline to seek what they do not want to find about white prospective jurors.").

238. The Court recognizes such targeting of a Black potential juror in Mr. Bacote's own case. Mr. Butler questioned a Black prospective juror, KP, extensively about his role as the financial provider for two children with cerebral palsy and his ability to juggle his job in trucking and jury duty before ultimately, trying, unsuccessfully to remove him for cause. DE2, *State v. Bacote*, Tpp. 594-600 (asking 24 follow-up questions). Thereafter, Mr. Butler removed this juror with a peremptory and, challenged under *Batson*, stated that KP had "two cerebral palsy children at home, his wife doesn't work" and his work would be on his mind. *Id.* at 602. *But see* DE11 at 171 (Mr. Butler acknowledging that KP did not believe it would be a hardship).

239. Mr. Butler, however, accepted four white jurors who had family responsibilities that may also have interfered with their ability to be present and focused during trial, with little to no follow up. DE283 at 14. Among them, SH and LS also had children with disabilities. DE2, *State v. Bacote*, Tpp. 1351, 2051-52. LS's child had autism and pervasive developmental disorders

for which he was receiving medical treatment, but Mr. Butler asked her no follow-up questions about her ability to serve and focus. *Id.* at 1451. And SH, like KP, had a child with cerebral palsy with medical appointments. *Id.* at 2051-52. She told Mr. Butler "it will be hard" to make other arrangements for her son but, when Mr. Butler asked her four follow-up questions, including this leading one, "[y]ou feel like you could resolve it some it wouldn't be a distraction to you or anything," she responded that she could resolve it. *Id*. at 2051-52.

240. Similarly, the record discloses that BB was the primary caregiver for two children ages three and five. *Id.* at 1296. Mr. Butler asked BB no questions about her ability to serve and focus on the trial, accepted her, and she was seated as an alternate. *Id*. at 1530. Similarly, MS volunteered that her 100-year-old aunt, who lived out of state, might interfere with her ability to serve. *Id.* at 2601-02. After asking a leading question she would be "fine to serve on the jury" Mr. Butler also accepted MS. *Id.*

IX. Comparative Juror Analysis in Capital Cases Across North Carolina Further Corroborates the Statistical Evidence

241. As Professor Stevenson testified, Black citizens suffer real harm when they are struck from a jury based on race and their white peers are allowed to serve, despite offering the same or similar answers on voir dire. HTpp. 1053, 1068-69, 1076. Subjected to disparate treatment, excluded Black venire members "leave really feeling disfavored. It's humiliating. It's painful to be excluded and marginalized because of your color. . . ." HTp. 1069. This Court credits Professor Stevenson's testimony that disparate treatment harms Black citizens, especially when considering the myriad pretextual excuses the State may employ to strike Black venire members while not striking similarly situated white venire members. Based on a review of prosecutors' strikes in capital cases and their reasons given in transcripts, affidavits, and statements, the Court also finds that, like the social science, history and documentary evidence reviewed above, evidence of

disparate treatment in Johnston County and the 11th Prosecutorial District, and in the Butler cases corroborates the robust statistical evidence discussed above.

242. The following stark examples of exclusion, organized by category, illustrate the variety of reasons North Carolina prosecutors have claimed for striking Black venire members while passing similarly situated non-Black venire members.

A. Disparate Use of Purported Lack of Intelligence to Exclude Black Jurors

243. Professor Stevenson testified that if the State claims it struck a Black venire member based on educational level but accepted white venire members with similar educational levels, that evinces race consciousness. HTp. 1089. He relied in part on Equal Justice Initiative (EJI) reports from 2010 and 2021, which this Court admitted into evidence. DE273; DE274; HTpp. 1046. The EJI reports state that "low intelligence is a negative stereotype that has been used throughout our nation's history to illegally exclude African Americans from jury service and is therefore a particularly suspicious explanation." DE274 at 43-44 (internal citation omitted); *see also* DE273 at 16. Across capital cases in North Carolina, prosecutors have struck Black citizens because of a perceived lack of intelligence, while keeping white citizens with the same or lower educational level. This Court finds multiple examples of this type of disparate treatment.

244. In the Brunswick County capital case, *State v. Darrell Maness*, the State struck African American venire member TAJ based on misspelled words on her jury questionnaire, specifically, — "fort lift driver" rather than "fork" — and the name of the town where she worked — "Reilgwood" instead of "Riegelwood." DE11 at 200-03.

245. The State however passed and seated several non-Black venire members who made similar spelling mistakes on their questionnaires: a seated non-Black juror, BW, wrote "land scap" for "landscape" and "feild" for "field" on their juror questionnaire; another seated non-Black juror, MG, wrote "construstion" for "construction" and "robery" for "robbery"; and a non-Black

alternate juror, TW, misspelled his employer's name and the name of his wife's employee. DE4, *State v. Maness*, juror questionnaires, Part 1, pp. 51-52, 62, Part 3, p. 103.

246. In this same case, the prosecution also struck a Black juror, TR, in part because he had a 10th grade education, DE11 at 210, yet passed two non-Black venire members who also did not complete high school — one non-Black seated juror, JF, had a 10th grade education, the second, GC, had an 11th grade education. DE4, *State v. Maness*, juror questionnaires, Part 1, pp. 103-04; Part 3, pp. 23.

247. In *State v. Ted Prevatte*, a capital case from Anson County, the State purportedly struck Black venire member SW because he attended Shaw University, a historically Black institution, but did not obtain a degree. DE11 at 243-46. First, as Professor Stevenson testified, striking a potential juror because of an association with an African American university is not a race neutral explanation. HTpp. 1088-89. Second, the State passed at least nine non-Black potential jurors who had less education than SW.[35]

X. Race was a Significant Factor in Jury Sentencing at the Time of Mr. Bacote's Trial in Determining who Received a Death Sentence in Johnston County

248. The overwhelming bulk of this order, thus far, has addressed Mr. Bacote's jury selection claims. The Court turns now to his Johnston County sentencing claim. The Court notes that while much of the evidence reviewed so far is specific to jury selection, some of the history and social science evidence discussed earlier is relevant to this claim as well. The Court has already addressed the legal standard to be applied to this claim. The Court turns now to the evidence to

[35] ET who had a 9th grade education, BT and JH who had an 11th grade education, BG, JT, HN, GP, and CC who had a high school degree, and MW who simply wrote "high school" as the level and extent of her education. DE4, State v. *Prevatte I*, juror questionnaires, pp. 7-8; 11-16; 27-30; 35-36; 43-44.

determine whether, as Mr. Bacote alleges, death sentences were imposed significantly more frequently on Black defendants than white defendants in Johnston County.

249. The imposition of death sentences in Johnston County from 1970 to 2011, the presumptive period of relevance this Court has identified, is marked by racial disparities. As outlined below, during this period, *every* Black defendant in Johnston County received a sentence of death after a capital trial. By comparison, white defendants tried capitally in Johnston faced better than even odds of receiving a life sentence.

250. These racial disparities are statistically significant. During the hearing, Dr. Smith, an expert in statistical analysis, HTp. 466, testified to a statistically significant difference between the death-sentencing rate for Black and white defendants in this county. HTpp. 466-67. Dr. Smith found "strong evidence" of an association between race and sentence, or that racial bias infected the distribution of death sentences. HTpp. 468; *see also* DE106 at 4-5; HTpp. 470, 478, 545. In other words, in Johnston County, capitally tried Black defendants found guilty of murder were far more statistically likely to be sentenced to death.

251. On these numbers alone, Mr. Bacote has plainly established that race was a significant factor in sentencing in Johnston County at the time his sentence was sought or imposed. This difference is practically significant as well. There are compelling reasons to believe this disparity is not due to chance. As with the peremptory strike data, the Court finds Dr. Smith's statistical findings are corroborated by other studies, patterns of jury sentencing, historical evidence of discrimination and racial terror in Johnston County, and the social science of unconscious bias, jury sentencing and decision-making.

252. Looking to both "history and math," *Flowers,* 588 U.S. at 300, the record is clear that stark racial disparities in Johnston County death sentences cannot be explained away as mere

coincidence. Rather, at the time of Mr. Bacote's trial, race was a significant factor in jury sentencing in Johnston County, North Carolina.

253. From 1970 through 2011, six Black men were charged by District 11 prosecutors and tried capitally in Johnston County before a Johnston County jury. *All six were sentenced to death*. *See* DE305 (memorializing updated list of Johnston County cases); *see also* DE21 (summarizing the race and sentence for each defendant based on court and public records); DE22–102 (collecting court and public records relied upon to determine the race and sentence of each defendant); HTpp. 438-40, 444 (testimony about sources used to determine race).

254. By comparison, white defendants in Johnston County were significantly more likely to be sentenced to life than to death. During this same period, six of 11 white defendants charged and tried capitally in Johnston County — or more than half — received sentences of life or life without parole. HTp. 477; DE106 at 4-5.

255. The Court notes that the identification of the relevant universe was surprisingly difficult. DE305 (final case universe list); HTpp. 535-38. The State was under a Court discovery order to produce a list of cases capitally tried in Johnston County, and it disclosed a list to Mr. Bacote on January 13, 2023 (hereinafter "State's case list"). DE17.[36] The State did not update its list before the hearing. Ms. Kenney, an attorney for Mr. Bacote, testified to an error in the State's list: Michael Sistler, a white man, was incorrectly included but his trial was noncapital. HTpp. 432-34; *see also* DE18; DE19. After it became clear that the State's case list was inaccurate, the Court questioned the parties about their efforts to identify the relevant cases. HTpp. 534-38.

[36] In the accompanying letter, the State represented that the list, while potentially not conclusive, included every such case of which the State was aware, consistent with their discovery obligations. DE16. Although the Court in its last discovery order discharged the State from its obligation to provide additional statewide discovery, the Court specifically directed that the State maintained its on-going obligation to produce any responsive materials from Johnston County.

256. Counsel for the State noted that the DA's office staff had worked conscientiously to produce the State's case list, but there were no definitive lists of cases kept by the clerk's office, the Administrative Office of the Courts, or the DA's office. HTp. 538. The Court accepts this representation but notes that the error identified by the defense was an obvious one. The fact that Mr. Sistler's trial was noncapital is easily surmised from the case file and direct appeal opinion. *See* DE18, DE19. The State's later suggestion that the Court should reject the case list as unreliable because of the State's own error is not well taken. HTpp. 472-74 (State objecting to testimony about the updated list because of the errors in the data); 537-38 (describing possible errors in the State's list). A party may not act with undue diligence and then seek to benefit from the lack of diligence. *See, e.g., State v. Anderson*, 303 N.C. 185, 193-94 (1981) (defendant who did not diligently pursue discovery could not then complain of lack of discovery), *overruled on other grounds by State v. Shank*, 322 N.C. 243 (1988).[37]

257. In his original RJA pleading, the defense prepared a list of cases that included cases with Johnston County juries but were prosecuted by other district attorney offices. The Court believes these cases should not be included in the Johnston County list of capital trials. HTp. 539.

[37] Similarly, the Court is unpersuaded by the State's suggestion that Mr. Bacote's withdrawal of his statewide discovery motion affected the State's ability to prepare a list of Johnston County capital trials. The Court ordered the State to produce the Johnston County capital trial cases in the spring of 2021, and the State's duty to produce these materials was ongoing. July 21, 2021 Discovery Order Granting in Part Defendant Hasson Bacote's First Amended Discovery Request at 3; December 15, 2021 Second Discovery Order Granting Defendant's Request for Statewide Discovery at 4; August 10, 2023 Order Allowing Withdrawal of Claims, Withdrawal of Discovery Requests, and Scheduling Order at 3-4; November 21, 2023 Status Hearing, Tp. 14 (State recognizing that "Discovery is a continuing duty"); DE16 at 1-2 (State will continue to provide discovery if it finds additional capitally tried cases in Johnston, Harnett, or Lee); Court's Order on Relevant Time Period. The Court notes as well that the Administrative Office of the Court authorized funding two retired Senior Assistant District Attorneys and administrative support staff to assist with the discovery in Johnston, Harnett, and Lee counties. May 25, 2022 Discovery Hearing, HTpp. 15-16. The staff of the district attorney offices used institutional knowledge, Westlaw, and case lists from AOC, and review of the case files to determine the list. *Id*. at 18.

The defense then sought to use the State's list, but with corrections. HTpp. 430-38, 458; *see also* HTpp. 538-39. This included the removal of Mr. Sistler, who was not capitally tried.

258. The Court instructed the parties to create a definitive list of how many actual cases were tried in Johnston County before the conclusion of the hearing. HTp. 536. There were two other changes to the State's list during the course of the hearing. Robert Henry McDowell, a Black man, who was sentenced to death by a Johnston County jury on December 10, 1979 was added to the list. HTpp. 436-38; *see also* DE20. After this Court determined the presumptively relevant timeframe for this hearing—from 1970 through 2011—Mr. McDowell's case fell within this time frame. Court's Order on Relevant Time Period at 5.

259. The other change was the removal of a case tried by Johnston County District Attorney's office for a Johnston County crime, where venue was moved out of county. HTpp. 537, 863. George Earle Goode, a Black man, was tried in Harnett County with a Harnett County jury and sentenced to death. *Id.*; HTp. 537.[38] After discussion among the parties, Mr. Goode's case was excluded. The Court accepted this corrected State's list as the appropriate list for analysis. HTpp. 866-67. In total, there were 17 total capital trials held in Johnston County as shown below:

JOHNSTON COUNTY CAPITAL TRIALS BY DEFENDANT		
Defendant	**Race**	**Sentence**
Bacote, Hasson	Black	Death
Chapman, LaMorris	Black	Death
DeCastro, Eugene	Black	Death
Geddie, Malcolm	Black	Death
Holmes, Mitchell	Black	Death
McDowell, Robert	Black	Death
Barrow, James (2001)	White	Life

[38] Angel Guevara was tried in Johnston County with a jury from Nash County. *Id*. Mr. Guevara is Hispanic and was not included in either the white or Black defendant lists.

Howell, Franklin (1995)	White	Life
Jones, Robert	White	Life
Ley, Kurt	White	Life
Marlow, Gordon	White	Life
Salentine, Matthew	White	Life
Barrow, James (1996)	White	Death
Daughtry, Johnny	White	Death
Howell, Franklin (1991)	White	Death
Richardson, Jonathan	White	Death
Stephens, Davey	White	Death

DE305. These cases can be tabulated in a simple two by two table:[39]

JOHNSTON COUNTY CAPITAL TRIAL TOTALS			
Race of Defendant	**Life in Prison**	**Death**	**Total Trials**
Black	0	6 (100%)	6
White	6	5 (45%)	11
Total Sentencing Verdicts	6	11	17

DE305.

260. The racial disparity is glaring: 100 percent of Black defendants received death sentences while more than 50 percent of their white counterparts received life. Compared to white defendants, Black defendants were more than *twice as likely* to receive a death sentence in Johnston County from 1970 to 2011.[40] The impact of race on sentencing in Johnston County is statistically

[39] In his testimony, Dr. Smith explained that a two by two table, or a two-way table, allows a statistician to classify information according to two different criteria. HTp. 467.

[40] The relative risk of receiving a death sentence is 2.2. As explained earlier, the relative risk is the ratio of two the rates. The death sentencing rate for Black defendants is 100% (6/6) and the death sentencing rate for white defendants is 45% (5/11).

significant. HTp. 482. During the evidentiary hearing, Dr. Smith testified to "*strong evidence*" of an association between race and sentence. HTp. 468. In laymen's terms, Dr. Smith explained, his analysis demonstrated that the stark racial disparities observed in the raw data resulted from racial bias. HTp. 545. This Court agrees.

261. Dr. Smith reached this conclusion by performing the Fisher's Exact test, "an exact method of calculating the P-value for this kind of situation." HTp. 468. Developed over 100 years ago, the Fisher's Exact test is widely accepted in the scientific community and the "most appropriate" test to use for a small data set, such as this one. HTpp. 583, 468. It is a standard part of every statistical package and widely available. HTpp. 471, 477. When determining the probability of observing a disparity of the size observed or more extreme among all of the probabilities possible, Fisher's Exact test is the test that "gives you that exact answer." HTpp. 470, 583-84.

262. Dr. Smith testified about how Fisher's Exact test works and showed how to manually calculate the test using the list of Johnston County capital trials as an example. HTpp. 467-69; DE106 at 5. During the hearing, Dr. Smith was presented with an amended list redressing two errors in the State's list of cases tried capitally in Johnston County. Live in the courtroom—for the first time—Dr. Smith then conducted the Fisher's Exact test, HTpp. 477-79, using the R-programming software. HTp. 471. Dr. Li was present in the courtroom during Dr. Smith's testimony. HTp. 476.

263. The results of this test also showed a statistically significant association between race and jury sentencing, with a p-value below 0.05. DE106 at 4-5; HTp. 478; *see also* HTp. 468;

470.[41] Thus, Dr. Smith concluded that there was strong evidence that the uneven distribution of death sentences in Johnston County was not random, but the result of an association between race and sentencing. HTpp. 468.

264. The Court observes that the State did not ask its expert, Dr. Li, to conduct her own analysis of racial disparities in sentencing in Johnston County. HTp. 1336. The State nonetheless sought to portray the stark disparities in Johnston County jury sentencing as meaningless. For the following reasons, this Court finds that the State has not presented sufficient evidence to rebut the strong statistical evidence that race was a significant factor in sentencing presented by Mr. Bacote.

265. First, this Court flatly rejects the State's suggestion that the list of Johnston County cases the State provided, as corrected and accepted by this Court, is unreliable. Mr. Bacote filed his pleading in 2010 alleging disparate sentencing by Johnston County juries, and the State has been on notice since May 20, 2021 that it would need to disclose a list of all capital cases tried in Johnston County. May 20, 2021 Motions Hearing, Tpp. 92-94; *see also* June 13, 2011 Status Hearing, Tpp. 5-6 (discussing the discovery generally and structure for hearing for Johnston County RJA claims).

266. This Court ordered the State to produce such a list on July 21, 2021, and the State remained under an ongoing discovery obligation to identify and disclose any additional cases through this evidentiary hearing. Mr. Bacote identified the (now corrected) errors in the State's list

[41] The State included two cases on its list where the crime occurred during the time period set by the Court, but the trials came after. Mr. Salentine (white) was tried in 2012 (life) and Mr. Richardson (white) was tried in 2014 (death). Because both men were white, and their cases ended in life and death verdicts, respectively, their inclusion does not meaningful change the results. Using one of the many on-line calculators for Fisher's Exact test, the Court notes that the p-value for the numbers as presented in the Johnston County Capital Trial Totals table (0, 6 and 6,5) is 0.043 while the p-value for the numbers with the two cases removed (0, 6 and 5,4) is 0.44. *See Easy Fisher Exact Test Calculator*, Soc. Sci. Stat., https://www.socscistatistics.com/tests/fisher/default2.aspx (last visited June 4, 2024).

discussed above. The State itself has presented no evidence of any further errors or that the list remains incomplete. DE305.

267. Second, the Court rejects the State's argument based on the testimony of Dr. Li that it should find the results not statistically significant. Dr. Li testified that Dr. Smith, in reaching his initial conclusions, conducted three separate significance tests: The Fisher's Exact test, the Chi-Square test, and the Continuity Corrected Chi-Square test. HTp. 1255; SE23. The Fisher's Exact test and Chi-Square test both resulted in a finding of a statistically significant association between race and sentencing, or the conclusion that there was racial bias in sentencing in Johnston County. *Id*. As Dr. Li noted, however, the third test, the Continuity Corrected Chi-Square test, yielded a p-value above 0.05, the threshold for statistical significance. *Id*.

268. Dr. Smith persuasively explained in his testimony that both the corrected and uncorrected Chi-Square test are "unsuitable in small sample sizes" and, as a result, attempts to run them using R-programming language yielded "warning messages" to that effect. HTp. 556. Selection of the most appropriate methodology is paramount when dealing with a small sample size given that, "in practical terms, if the sample size is too small, you may be unable to detect the effect with a suitable statistical test even if in fact the effect is very large and is important in the outcome." HTp. 582. For this reason, Dr. Smith ultimately relied on the Fisher's Exact Test, the "most appropriate" test for a small data set and a test widely used in the scientific community. *Id.* at 583.

269. Dr. Li did not dispute that the Fisher's Exact test was most appropriate for small sample sizes and affirmed the test is standard. HTp. 477. She also testified that she would do "exactly the same as Dr. Smith did." HTp. 1336.

270. Finally, the Court rejects the State's contention that the steep racial disparities in death sentencing could be the result of potential confounding factors. HTpp. 1256-57. The Court finds this argument clashes both with the mandate of the RJA and the State's prior pleadings with this Court. The RJA requires evidence that "death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race." N.C. Gen. Stat. § 15A-2011(b)(1) (2009). And the State has accordingly represented that under "a proper interpretation of the RJA" the jury sentencing claim is "narrowly focused on the significant disparities (if any) [in] the rate of . . . sentencing" and therefore does not require "complex statistical analysis." March 7, 2022 State's Response to Defendant's Requests for Bifurcation and Charging and Sentencing Discovery at 2, 5-6. Dr. Smith thus appropriately focused his analysis on the comparison of the relative rates that capital sentences were imposed by race, without analysis of possible confounders.

271. This Court finds that the State has presented no evidence that there are, or are likely to be, significant confounding—and *race neutral*—factors driving the racial disparities in sentencing. Thus, this Court finds that race was a statistically significant factor in the disparate imposition of death sentences between 1970 through 2011 in Johnston County.

272. Taken on its own, this statistical evidence tells a powerful story: A Black defendant was far more likely to be sentenced to death than a white defendant in Johnston County. Although not required by the statute, Mr. Bacote introduced additional evidence that showed that these numbers did not stand alone. Examination of racial disparities in who was sentenced to death for felony murder further shows evidence of racial bias in capital sentencing. Throughout the hearing, expert social scientists, historians, and legal scholars presented extensive evidence of racial

discrimination and violence in Johnston County during the relevant period, and how that atmosphere would have influenced local jurors.[42]

273. **Felony Murder Evidence**. Capital studies of charging and sentencing have long shown that race is least likely to play a role in sentencing at the most extreme cases: where the crime is "highly aggravated," such as a crime that resulted in a large number of deaths. HTpp. 1096-97. In less aggravated cases, however, discretion plays a greater role, and in turn, there is a greater risk for racial biases. *Id*. Racial disparities in capital sentencing for felony murder are relevant for a question of whether racial bias is influencing death sentences because they speak to the "added aggravation" applied to Black defendants. HTpp. 1094-96 ("[R]ace of the defendant becomes an aggravator that makes the person more likely to get a death sentence."). As Professor Stevenson explained, the death penalty is intended for "the worst of the worst" or the "worst offenders who commit the worst crimes." HTp. 1095. Yet, this Court finds, Black defendants have been sentenced to death in cases which are arguably less aggravated. HTpp. 1094-96.

274. Specifically, "felony murder is categorically a harder area to get aggravation to outweigh mitigation." HTp. 1095. Eleven people sentenced to death during the requisite time period and currently on death row were convicted for felony murder only. *All 11 are people of color. Nine of 11 are Black*. DE299; HTpp. 1094-96. Moreover, Mr. Bacote is the only defendant

[42] *See also* DE135 at 2102-03 ("Racially motivated conduct is unfortunately not a relic of the past, but it is rarely displayed openly in contemporary death penalty cases. Instead, racial prejudice more often operates covertly rather than openly, and it often goes unrecognized even by the individual who responds unconsciously to such motivation. One of the important features of the RJA is that it does not require proof of intentional racial motivation and instead authorizes proof by use of statistical disparate impact evidence. The result is that relief is to be granted when race was a significant factor in the decision on death both if the evidence discrimination was effectively hidden from view and even if its operation was unconscious.").

on death row today for first-degree murder based solely on felony murder and the State did not even attempt to convince the jury that the murder was premeditated.

275. This harsh treatment of Mr. Bacote — and the other men of color on death row for felony murder — comports with "historic trends, demonstrating that those executed for non-homicide crimes such as rape and burglary have been overwhelmingly Black." HTpp. 833-36. The death sentences of two other Black men sentenced to death by Johnston County juries corroborates the point that race drives punishment in less aggravated cases. LaMorris Chapman was only 17 at the time of the capital offense and his death sentence was ultimately vacated by the North Carolina Supreme Court after the execution of juveniles was ruled unconstitutional. *See* DE37; DE40. Kevin Golphin's death sentence was vacated because he too was only 17 at the time of the crime. *State v. Golphin*, 898 S.E.2d 37, 41 (N.C. 2024).

A. Mr. Bacote's Own Case Illustrates that Race Played a Significant Role in the Jury Sentencing in Johnston County

276. Today, Mr. Bacote is the *only* person on death row for whom the jury never heard evidence or argument that the murder was premeditated and deliberate. *See* DE2, *State v. Bacote*, Tp. 3307 (During Mr. Bacote's charge conference, Mr. Butler noting that while the evidence supports felony murder, stated, "I do not believe the evidence supports [premeditation and deliberation]").

277. The Court finds that Mr. Butler, on more than one occasion, has stood before capital juries and deployed racist language designed to evoke the very prejudices and stereotypes that have long caused jurors to punish Black defendants more harshly. In 2001, he sought a death sentence for two Black men arguing, "just like the animals on the African [plain], after having felled their victim, they dragged their victim away; and finally, they killed their victim." DE368, *State v. Bell & Sims*, Tp. 4291. Mr. Butler also argued:

> He who hunts with the pack is responsible for the kill. Each of you have seen those nature shows, Discovery Channel, Animal Planet. You've seen where a pack of wild dogs or hyenas in a group attack a herd of wildebeests, and they do it as a group. . .. He who hunts with the pack is responsible for the kill. Each and every one of those animals are responsible for that kill. Each and every one of those animals will feast on the spoils of that kill. He who hunts with the pack is responsible for the kill. Just like the predators of the African plain, Jack Williams, Antwaun Sims, and Christopher Bell stalked their prey. They chased after their prey. They attacked their prey. Ultimately, they fell their prey.

DE368, *State v. Bell & Sims*, Tpp. 4288-89. On the witness stand, Mr. Butler insisted his argument "had nothing to do with animals, comparing animals to any kind of man, white or Black." HTp. 1126. He could not however name a case where he compared a non-Black defendant to the "predators of an African plain." HTp. 1127. *But see* DE367, *State v. Barden*, Tp. 1769 (Mr. Butler described another Black defendant, Isiah Barden, a "piece of trash"). The Court does not credit Mr. Butler's explanation for his conduct, which in fact continued in Mr. Bacote's own sentencing.

278. In this case, Mr. Butler stood before the jury and argued, "Hasson Bacote is a thug, cold-hearted and without remorse." DE2, *State v. Bacote*, Tp. 4027; DE122 at 21. That "thug" is a racially coded word used to evoke racist stereotypes about Black people is beyond dispute. As Dr. Sanders explained, the "use of the term thug is part of this long history of dehumanizing language to characterize African Americans." HTp. 781. In other words, "[It]'s a negative stereotype. It connotes ideas of Black people as criminal, Black people as delinquent, Black people as, again, animalistic." *Id*. Dr. Sommers gave similar testimony. HTp. 705.

279. Testifying at the evidentiary hearing, Mr. Butler conceded the word "thug" has a racial connotation. HTpp. 1133-34; 1136. Nevertheless, he attempted to explain that he "didn't mean it in a racist way." HTp. 1135. The Court finds that explanation unbelievable and without credibility.

280. As the Equal Justice Initiative has explained, this line of racialized argumentation is too often effective. White jurors are more likely to view Black defendants as "coldhearted,

remorseless, and dangerous" and, as a result, they also tend to treat Black defendants more punitively than white defendants. DE274 at 58. Thus, though "youth" is typically considered to be a mitigating factor, during this same period, statistics indicate that, in North Carolina, youth had less significance as a mitigating factor to predominately or exclusively white juries when the defendant was African American. DE135 at 2092.

281. The Court finds that the transcripts of Mr. Butler's arguments reveal an explicit and troubling use of racial stereotypes and dog-whistles to influence decision-making. As Dr. Sommers, Dr. Kotch, and Dr. Sanders each explained, this racialized language called upon conscious and unconscious biases long embedded in the culture of Johnston County and therefore invited racial stereotypes into the deliberation room. HTpp. 633-34, 705, 780-81, 840; *see also* DE274 at 43-44, 61 (Equal Justice Initiative Report discussing harmful stereotypes of African Americans).

282. In this way, Mr. Bacote's case was among those most vulnerable to bias. *See* HTpp. 1094-96 (Professor Stevenson explaining that, "in less aggravated cases" there is a "greater risk" that factors such as race will influence sentence.) The Sentencing Verdict Form itself, on which the jury foreperson initially wrote "life without parole" reflects this risk. DE325 at 10; DE2, *State v. Bacote*, Tpp. 4245-46. After further instructions from the trial judge, the jurors returned to deliberations, crossed out the original sentence, and condemned Mr. Bacote to his death. DE2, *State v. Bacote*, Tpp. 4245-46, 4265. As Professor Stevenson explained, as someone who has "reviewed hundreds of verdict forms,"

> It's a very, very unusual thing to have a jury come back and say life without parole and then come back and say death. And I just think it reflects the way in which race is aggravating, if you will, the offense in a way that is not consistent with our constitutional principles.

HTpp. 1096-97.

283. The Court finds that the direct statistical evidence from Johnston County, Prosecutorial District 11, and the Greg Butler cases, together with the historical social science research, and evidence presented of discrimination against people of color in Johnston County is clear and persuasive and establishes to the greater weight of the evidence that the sentence of death in this case was sought or obtained on the basis of race, standing on its own, separate and apart from the MSU study.

284. Taken together, this Court finds that the evidence is clear that race has had an influence on capital sentencing both in Johnston County and in Mr. Bacote's own case.

NOW, THEREFORE, based on the entire record, including pertinent legal authorities and the credibility determinations and Findings of Fact set out in this order, the Court enters the following conclusions of law:

CONCLUSIONS OF LAW

1. Because of the limitations and questions of reliability of the MSU Study on a Statewide basis, the Court determines that the Defendant has not shown to the greater weight of the evidence that race was a significant factor in prosecution decisions to seek the Death Penalty and to strike qualified Black venire on a Statewide basis, and the Defendant is not entitled to relief under Claim I; and

2. The Defendant did not present any evidence regarding Juridical Division Jury Selection and thus the Defendant is not entitled to relief under Claim II; and

3. Race was a significant factor in prosecution decisions to seek the Death Penalty, and to strike qualified Black venire members in Prosecutorial District 11 at the time the death penalty was sought and imposed on Mr. Bacote, and he is thus entitled to relief on Claim III pursuant to N.C. Gen. Stat. §§15A-2010 and 15A-2011(b)(3) (2009); and

4. Race was a significant factor in prosecution decisions by Prosecutor Greg Butler, both in seeking this death sentence and decisions to strike qualified Black venire members in Johnston County at the time the death penalty was sought and imposed on Mr. Bacote and he is thus entitled to relief on Claim IV pursuant to N.C. Gen. Stat. §§15A-2010 and 15A-2011(b)(3) (2009); and

5. Race was the basis of the decision to impose death sentences in Johnston County at the time the death penalty was sought and imposed on Mr. Bacote and death sentences were imposed significantly more frequently on Black defendants in Johnston County at the time the death penalty was sought and imposed on Mr. Bacote and he is thus entitled to relief on Claim V pursuant to N.C. Gen. Stat. §§15A-2010 and 15A-2011(b)(1) (2009).

Although not essential to Mr. Bacote's statutory claims in view of the Court's interpretation of the original RJA, in an abundance of caution, the Court makes the following additional conclusions of law:

6. Race was a significant factor in prosecution decisions to strike qualified Black venire members in Mr. Bacote's individual case and he is thus entitled to relief on Claim XII pursuant to N.C. Gen. Stat. §§15A-2010 and 15A-2011(b)(3) (2009); and

7. Race was the basis of the decision to impose a death sentence on Mr. Bacote and he is thus entitled to relief on Claim XIV pursuant to N.C. Gen. Stat. §§15A-2010 and 15A-2011(b)(1) (2009).

NOW, THEREFORE, IT IS ORDERED THAT:

The Court, having determined that Hasson Jamal Bacote is entitled to appropriate relief on his RJA jury selection and jury sentencing claims, concludes that Hasson Jamal Bacote is entitled

to have his sentence of death vacated. Hasson Jamal Bacote is hereby resentenced to life imprisonment without the possibility of parole.

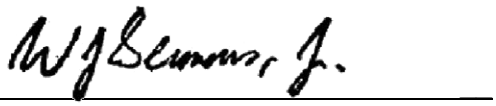
It is obvious to the Court, after having managed this action for many years, that the claims of Mr. Bacote must be decided primarily upon the facts and circumstances of his individual case, and the statistical evidence of the County and District and any other relevant acts of the State and applying the language of the Racial Justice Act to those facts to reach a proper determination. This means that every pending RJA should be handled separately, individually, and on the basis of their facts, with all the statistical cultural, historical, social science, and other evidence produced in this case as a guide to follow to in order to determine whether the Defendant in such cases has shown to the greater weight of the evidence that a sentence of death was sought or obtained on the basis of race.

The Court hereby retains jurisdiction over this matter to hear any post-verdict motions and appeal entries.

This order is entered in open court in the presence of Mr. Bacote, his attorneys, and counsel for the State.

2/7/2025 10:26:43 AM

The 7th day of February, 2025.



The Honorable Wayland J. Sermons, Jr.
Superior Court Judge Presiding