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| STATE OF NORTH CAROLINA<br>COUNTY OF JOHNSTON | IN THE GENERAL COURT OF JUSTICE<br>SUPERIOR COURT DIVISION<br>FILE NO. 07 CRS 51499 |
| STATE OF NORTH CAROLINA )<br>)<br>v. )<br>)<br>HASSON J. BACOTE, )<br>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. __."

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