NO. 360A09 **THIRTEENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA	**)**	
	)	**From Johnston**
v.	**)**	**07 CRS 1855-56,**
	)	**07 CRS 51499**
HASSON JAMAAL BACOTE	**)**	

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DEFENDANT'S OPPOSITION TO
STATE'S PETITION FOR WRIT OF SUPERSEDEAS
AND APPLICATION FOR TEMPORARY STAY

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Respondent, Hasson Jamaal Bacote, through undersigned counsel, responds, pursuant to Rule 23(d) to the North Carolina Rules of Appellate Procedure, to the State's Petition for Writ of Supersedeas and Application for Temporary Stay.

PROCEDURAL HISTORY

On April 6, 2010, Mr. Bacote filed a Motion for Appropriate Relief (MAR) under the Racial Justice Act (RJA) in the Superior Court of Johnston County. On August 31, 2012, Mr. Bacote filed an amended MAR under the Amended Racial Justice Act. Mr. Bacote attached affidavits to his motions arising from a study conducted by Michigan State University law professors Catherine Grosso and Barbara O'Brien (the MSU study).

Since 2021, the Honorable Wayland Sermons, Jr. has actively managed the litigation of Mr. Bacote's pending RJA claims in anticipation of an evidentiary hearing covering, *inter alia*, Mr. Bacote's statewide, judicial division, prosecutorial district, county, and individual case claims of racial discrimination in jury selection, as well as his county-specific sentencing claims

under the RJA. The Superior Court has conducted nine hearings in anticipation of the February 26, 2024, evidentiary hearing (February 16, 2021; May 20, 2021; October 7, 2021; November 22, 2021; May 25, 2022; December 16, 2022; May 31, 2023; November 21, 2023; and January 10, 2024).

Pursuant to the Court's orders granting the parties' motions for discovery, beginning on February 24, 2022, the State began to provide discovery to Mr. Bacote. Over the course of two years, the State produced over 680,000 pages of discovery. On May 31, 2023, Judge Sermons scheduled an evidentiary hearing on Mr. Bacote's motion and amended motion to begin on February 26, 2024. And, on August 8, 2023, Judge Sermons entered a scheduling order for the February 26, 2024, evidentiary hearing. Two amended scheduling orders were entered on December 4, 2023 and January 22, 2024.

In October 2023, the parties began the exchange of expert reports. On October 2, 2023, Mr. Bacote disclosed seven expert witnesses in support of his RJA claims — Dr. Crystal Sanders, a historian born and raised in Johnston County and professor at Emory University; Dr. Seth Kotch, a history professor at the University of North Carolina at Chapel Hill and author of *Lethal State: A History of the Death Penalty in North Carolina*; Dr. Samuel Sommers, a social psychologist and professor at Tufts University; Dr. Richard Smith, a Distinguished Professor of Statistics at the University of North Carolina at Chapel Hill, Barbara O'Brien, co-author of the 2023 Updated North Carolina jury study and a professor at MSU; and attorney Bryan Stevenson, the founder of the Legacy Museum and the National Memorial for Peace and Justice in Montgomery and Professor of Law at New York University School of Law. Then, on December 1, 2023, Mr. Bacote disclosed a rebuttal expert witness — Dr. Nandita Mitra, Co-Director of the Center for Causal Inference at the Perelman School of Medicine, University of Pennsylvania. All

seven experts are prepared to testify beginning on February 26, 2024. The State has disclosed one expert witness, Dr. Fan Li.

The parties have exchanged witness lists and will soon exchange exhibit lists. On January 5, 2024, the State moved for a continuance of the evidentiary hearing and its motion was denied. Now, less than one month before the beginning of the hearing, the State raises the concern of "wasting judicial resources" and seeks to halt the proceedings by seeking a stay.

The State has not followed rules governing interlocutory petitions, has established no grounds for interlocutory review, and previews meritless arguments that are contrary to established case law from the United States Supreme Court, the North Carolina Supreme Court, and the legislative history of the RJA. The State appears motivated by its knowledge of the strength of Defendant's evidence, its reluctance to face that evidence in open court, and its fear of losing. The Court should deny the State's application and petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE STATE'S PETITION ABUSES THE WRIT OF SUPERSEDEAS.

Writs of supersedeas under Rule 23 of the North Carolina Rules of Appellate Procedure are available only when needed to prevent the immediate enforcement or execution of a judgment or order, which may substantially or irreparably harm a party, if such judgement or order is enforced, and then later determined to be invalid. Writs of supersedeas are ancillary to this Court's appellate authority and should not be issued absent a right of appeal. This Court has held, "one court cannot supersede the process of another, however superior the one may be to the other, *but in the exercise of and as ancillary to its revising power." Seaboard A. L.R. Co. v. Horton*, 176 N.C. 115, 118 (1918) (emphasis in original).

Moreover, "[e]ven when allowable, a writ of this kind is only granted in case of necessity." *McArthur v. Commonwealth Land & Timber Co*., 164 N.C. 383, 384, 80 S.E. 403, 403 (1913) (*per curiam*). There is no necessity here, as the State cannot show that it will be harmed by allowing the trial court to proceed with its scheduled evidentiary hearing. Counsel are aware of no case in which the North Carolina appellate courts have granted a writ of supersedeas in order to prohibit a trial court from deciding an evidentiary issue.

Rule 23 is not intended to stay trial proceedings; it is not intended to create a back door to a continuance. If this Court grants the writ in this instance, it will be opening the door to both civil and criminal litigants seeking a writ in this Court or the Court of Appeals to delay trials or evidentiary hearings.

II. THE TRIAL COURT ORDER DENYING THE STATE'S MOTION TO DENY CLAIMS IN THE MAR IS INTERLOCUTORY AND THE STATE HAS NOT EVEN ALLEGED SUBSTANTIAL HARM.

It is well settled that an order is interlocutory if "it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citation omitted).

The order denying the State's Motion to Deny Defendant's Jury Selection Claims Without a Hearing is indisputably interlocutory. There is no final order in the case, and no final order even on Mr. Bacote's jury selection claims. Mr. Bacote's claims of sentencing discrimination under the RJA remain pending below and are not subject to the State's petition. A party is only entitled to review of an interlocutory order "where 'the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.'" *Id.*

The State does not even allege that it is being deprived of a substantial right. It nonetheless argues that this Court should consider this an extraordinary circumstance because "proceeding to an evidentiary hearing at this point would result in a waste of judicial resources." (State's Motion for PWS, at pp. 5-6). But it is the State's request for interlocutory review that poses the greatest threat to judicial resources. If the evidentiary hearing goes forward, and the State prevails, the Order for which it seeks review will be moot. If the State does not prevail at the hearing, it may seek review of the very question it now presents to this Court. Moreover, this Court will have a more complete record on which to determine issues of vital importance regarding the rights of North Carolina citizens to serve as jurors, and the strength and fairness of North Carolina's criminal justice system.

The State's claim of judicial efficiency is further undermined because it does not contest Mr. Bacote's right to an evidentiary hearing on his claims of discrimination in jury sentencing under the RJA. Mr. Bacote filed his claims in 2010, and the superior court has overseen more than three years of discovery and pre-trial conferences in his case since the decision by this Court in *State v. Ramseur*, 374 N.C. 658 (2020). After negotiations between the parties concerning expert disclosures and documents, a three-week evidentiary hearing is scheduled to begin in just a few weeks, with dedicated court and attorney time. With the agreement of the State, Mr. Bacote's case has been designated as the lead case under the RJA, with others held in abeyance pending this hearing. This approach, where either side may seek appellate review after a full evidentiary hearing, will facilitate the uniform resolution of critical questions under the RJA. The piecemeal and incomplete interlocutory review the State seeks will have the opposite effect.

In addition, as the State acknowledges in its Motion, <u>all</u> evidentiary hearings utilize judicial resources. (State's Motion for PWS at p. 7). If this Court allows the State's motion, the

Court's action will greenlight every litigant who loses a preliminary motion to seek immediate review of such orders.

III. THE STATE'S MOTION ADDRESSES ONLY A PORTION OF THE EVIDENCE THAT MR. BACOTE INTENDS TO INTRODUCE AT THE HEARING.

At the core of the State's pleadings is the contention that this Court, in *State v. Tucker*, No. 113A96-4, 2023 WL 866161 (N.C. Dec. 15, 2023), criticizes a portion of the evidence on which Mr. Bacote intends to rely at the scheduled evidentiary hearing, namely the MSU study. In Point IV below, Mr. Bacote demonstrates that *Tucker* does not foreclose his ability to introduce the MSU study or argue its relevance in the context of an RJA MAR. The State also errs in claiming that, absent the MSU study, Mr. Bacote's jury selection claims under the RJA lack evidentiary support. The State mischaracterizes the depth and breadth of statistical evidence in Mr. Bacote's case, and it discounts the extensive, corroborating evidence from prosecution files and transcripts, revealing that race factored into the State's exercise of peremptory strikes in Mr. Bacote's case, in Johnston County, in Prosecutorial District 11, and through the State of North Carolina.

In brief, a small sampling of the evidence Mr. Bacote intends to offer at the evidentiary hearing follows. Unless already cited, documents referenced are all in the Superior Court record and will be cited in Mr. Bacote's opposition to certiorari.

A. The Statistical and Social Science Evidence is Far Broader than the MSU Study in *Tucker*.

The 2011 MSU study addressed in *Tucker* concerned the 2011 statewide jury study as described by Michigan State University authors Barbara O'Brien and Catherine Grosso. That statewide data has been updated, most recently in 2023, with new results and a new report disclosed to the State in Mr. Bacote's case. The updated MSU study incorporates information

gleaned from some of the discovery produced by the State – the most comprehensive discovery ever provided by the State on jury selection issues in North Carolina. In addition, MSU has collected and analyzed data on possible confounding factors for Prosecutorial District 11, Johnston County and the four cases of death-sentenced individuals tried by prosecutor Gregory Butler (including Mr. Bacote's case). This information has never been presented or considered by any court.

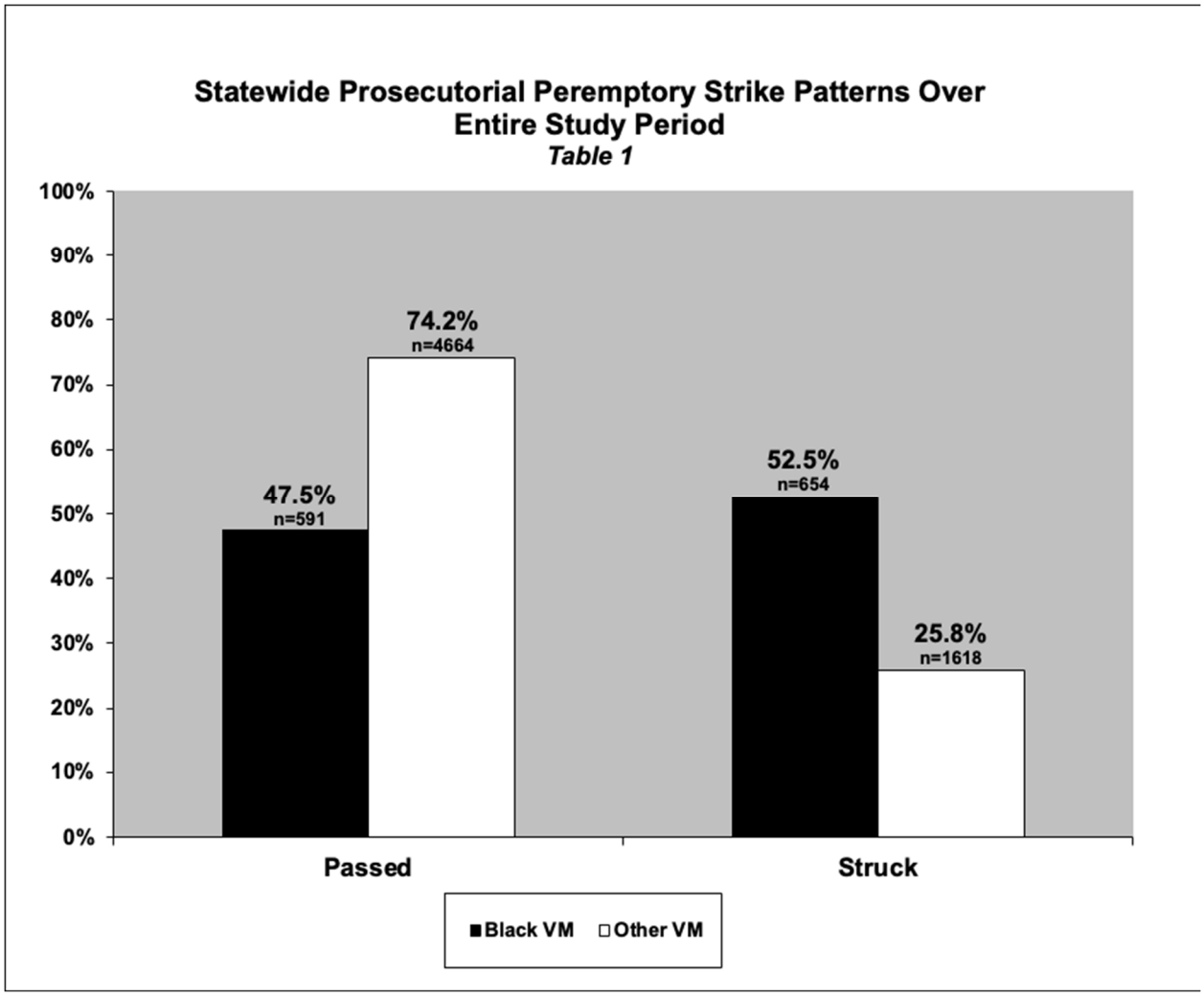
In addition to additional data, this case involves additional methods of statistical analysis, including methods specifically targeted to the question of causation. In addition to Dr. O'Brien, Mr. Bacote is prepared to present statistical evidence from two statisticians, Dr. Richard Smith and Dr. Nandita Mitra, both experienced in using statistics to address causation in real world applications. All three experts, Dr. O'Brien, Dr. Smith, and Dr. Mitra evaluate the prosecutorial strike decisions of Black jurors independently, and all concur that race played a significant role in the decisions.

Further, Mr. Bacote intends to produce corroborating evidence from the State's statisticians, not presented or available to this Court in *Tucker*. First, Mr. Bacote will introduce the prior testimony of Dr. Joseph Katz, the State's statistician in the RJA hearing in *State v. Marcus Robinson*, that the strike disparities seen in North Carolina raise a *prima facie* inference of discrimination. Mr. Bacote will additionally introduce the analyses of the State's newly designated statistical expert, Dr. Fan Li, that add to the evidence of the role race has played in jury selection. Dr. Li, a Duke professor of statistics, and an expert on statistical methods for causal inference, analyzed the prosecutor and defense strikes using what she describes as a "state-of-the-art propensity score method." Dr. Li concluded that the data reveal a statistically significant association between race and peremptory strikes. Dr. Li then performed a sensitivity

analysis using a measure called the "E-value" to consider the likelihood that the observed association between race and strikes was due to unobserved confounding factors. Dr. Li calculated the E-value as 2.3, a value she concedes the authors of the E-value method defined as good evidence for robustness to unobserved confounding.

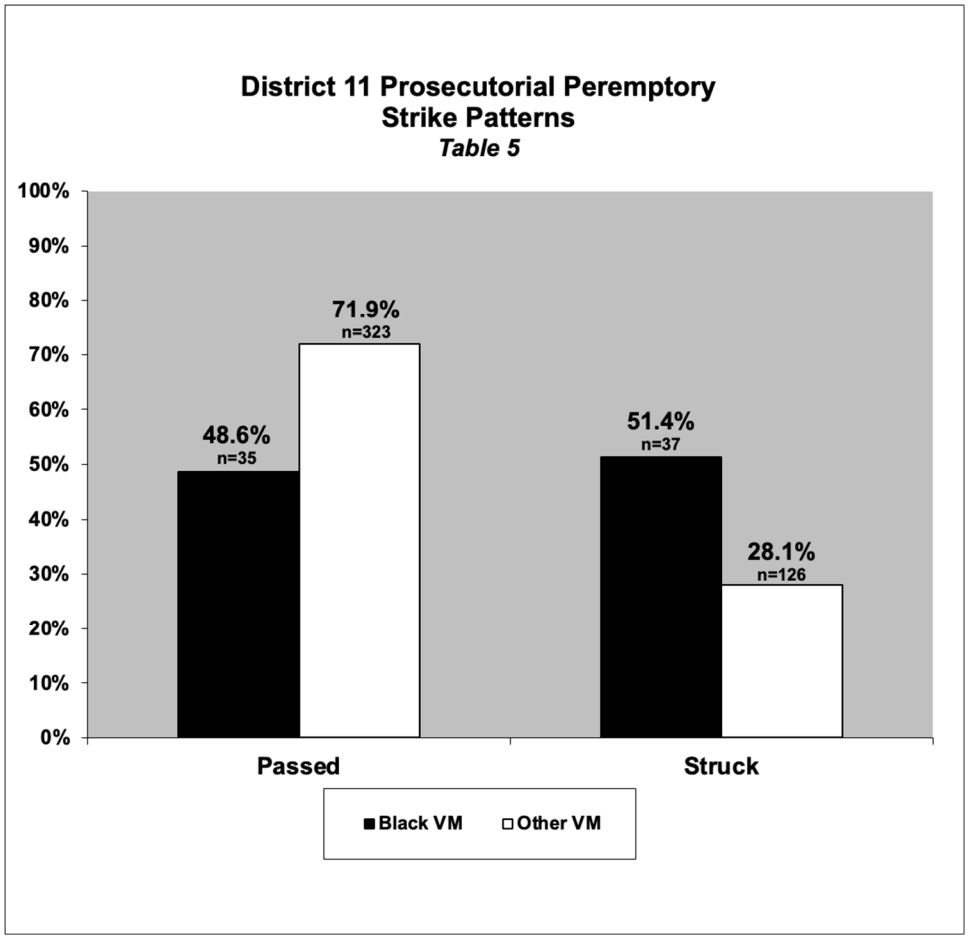
i. The MSU Study

The updated MSU study analyzes the strike patterns of prosecutors in capital cases for death-sentenced individuals in North Carolina, Prosecutorial District 11, Johnston County and the four cases of death-sentenced individuals tried by prosecutor Gregory Butler. In its first analysis, the study only looks at the raw numbers (counts) of strikes, with no consideration of the individual characteristics of the jurors. The race of all but three of the eligible, death-qualified 7,530 jurors were determined, primarily through the self-report of race of jury questionnaires, with the remainder through the voir dire transcripts, official clerk charts and public records. Viewing only the race of the juror and the strike decision of the prosecutors, Black jurors are struck twice as often as other jurors.

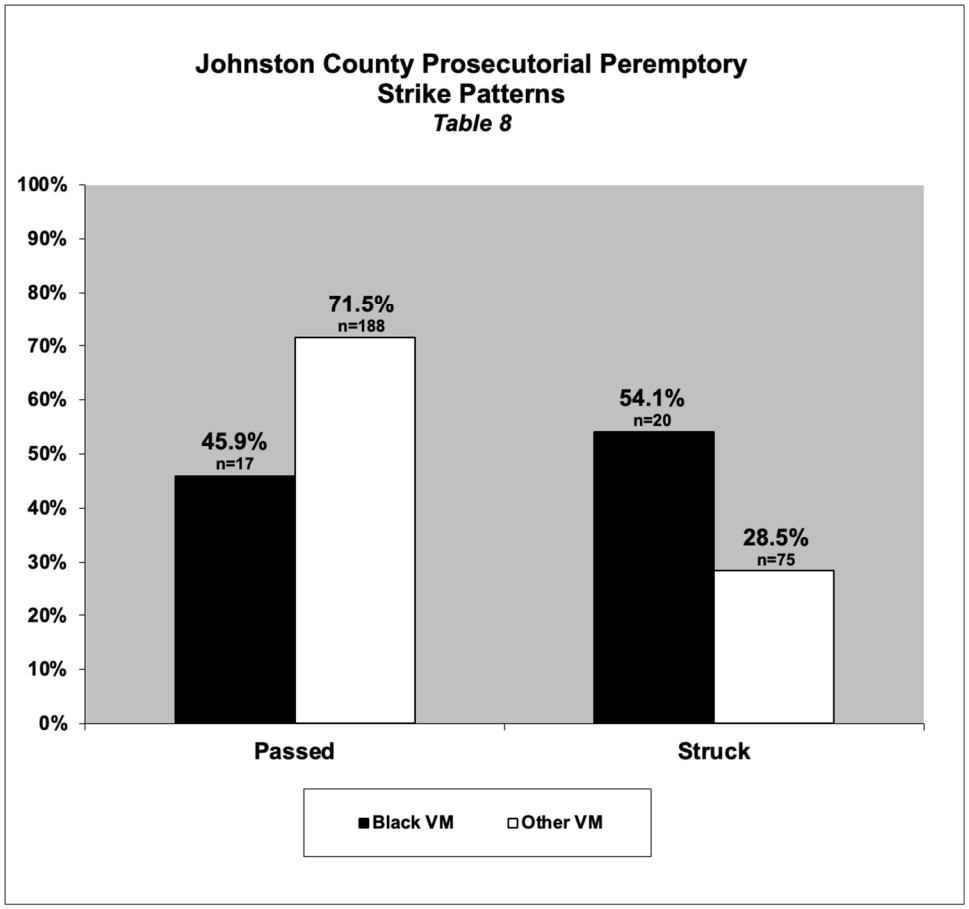


The probability of seeing this strike disparity in a jury selection process that is race-neutral is less than 1 in 1,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000,000.

The prosecution struck Black jurors at higher rates in Prosecutorial District 11, Johnston County and the cases prosecuted by Gregory Butler:

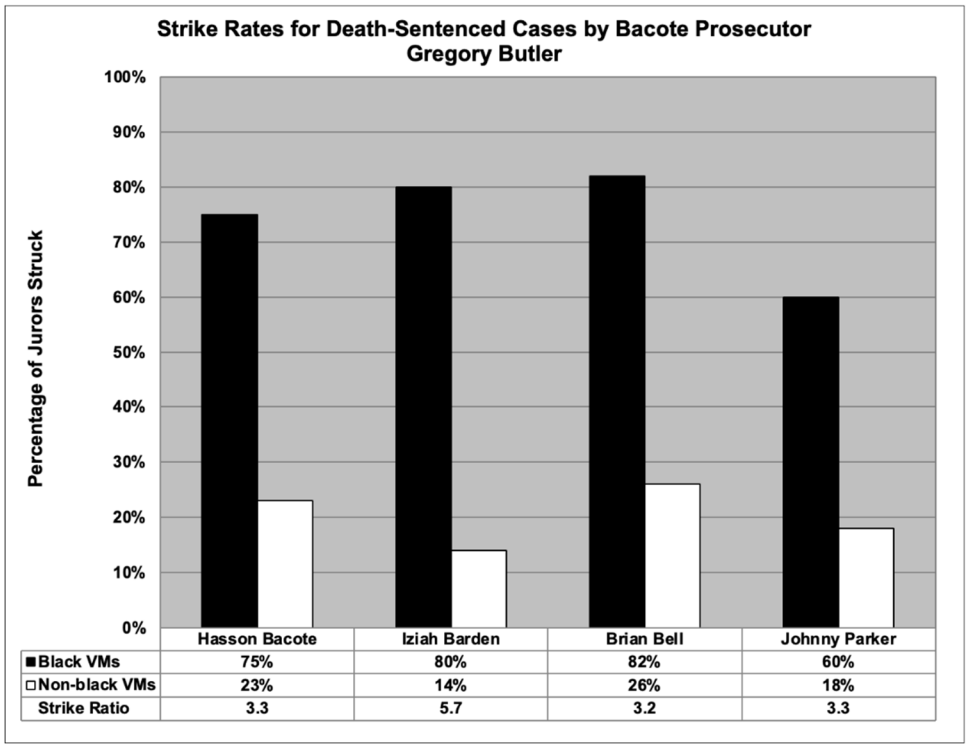


The probability of seeing this disparity in a race-neutral selection process is less than 1 in 5,000.



The probability of seeing this disparity in a race-neutral selection process is 1 in 500.

The strike disparity in the four capital cases prosecuted by Gregory Butler is more pronounced:



	Hasson Bacote	Iziah Barden	Brian Bell	Johnny Parker
■Black VMs	75%	80%	82%	60%
□Non-black VMs	23%	14%	26%	18%
Strike Ratio	3.3	5.7	3.2	3.3

The probability of this disparate strike pattern in a race-neutral jury selection process is approximately 1 in 1,000,000,000. Compared to the strike rate ratios with other capital cases, Mr. Butler's disparity of 3.5 stands out – meaning he was 3.5 times more likely to strike Black than non-Black jurors. By comparison, the average statewide disparity is 2.0.

The above charts derive solely from viewing the strike decisions of the prosecutors and comparing them – Black v. Non-Black. This is simply the raw strike data of qualified, death-eligible jurors by prosecutors in North Carolina capital cases, unadjusted and without logistic regression analysis. Nothing presented by the State disputes these numbers. In fact, Dr. Joseph Katz, in the RJA hearing in *State v. Robinson*, acknowledged that these numbers provide *prima facie* evidence of discrimination.

The MSU researchers did not stop there. The second phase of the MSU study analyzed individual characteristics of the jurors, focusing on variables prosecutors would use in making strike decisions - whether the juror expressed reservations of the death penalty, knew the

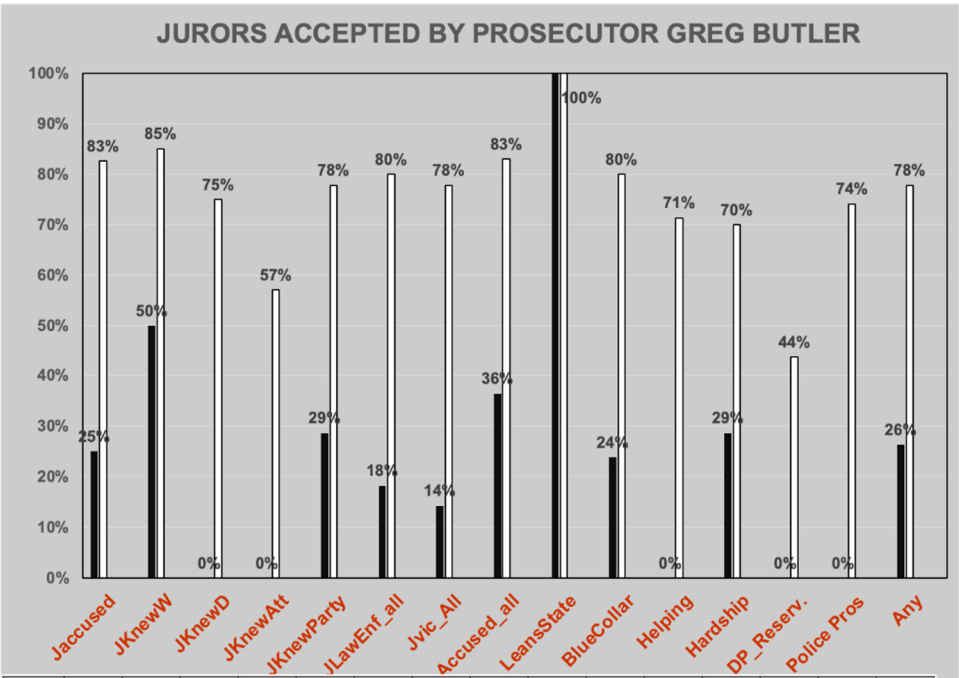
defendant, a lawyer or other trial participant, expressed skepticism of law enforcement testimony, their employment, whether they believed jury service would be a hardship, etc. - all relevant factors. Using a statistical analysis known as logistic regression, the researchers measured whether race was a significant factor in the strike decisions of prosecutors, controlling for all these other variables.[1] Even after controlling for all the variables, race remained a significant factor in prosecutorial strike decisions in North Carolina, Prosecutorial District 11, Johnston County and the cases prosecuted by Mr. Butler. Logistic regression reports its results by an odds ratio, meaning if a variable is significant in the analysis, the odds of a person with that characteristic being struck by the prosecution is greater than the odds of a person without that characteristic being struck.

For example, in North Carolina, if a juror expressed reservations about the death penalty not sufficient to be excluded for cause, the juror was 13 times more likely to be struck than a juror without such a reservation. This makes sense. After controlling for all of the variables, the odds of a Black juror being struck were 2.5 times greater than a similarly situated non-Black juror. In Prosecutorial District 11, the odds ratio was 2.2. In Johnston County, the odds were higher, 4.1. In cases prosecuted by Mr. Butler, the odds ratio of striking a Black juror was 10.1

[1] Multiple logistic regression examines a series of predictor variables to determine which variables predict a certain outcome – in this case prosecutorial strike decisions. This technique is commonly used and has been admitted on many occasions in the state and federal courts of North Carolina. *United States v. Johnson*, 122 F. Supp. 3d 272 (M.D.N.C. 2015) (government's expert used logistic regression model to demonstrate racial discrimination in traffic stops); *Stark v. N.C. Dep't of Env't & Natural Res.*, 224 N.C. App. 491 (2012) (finding State's expert testimony using multiple regression analysis admissible with respect to mining permit modification); *State v. Kelliher*, 381 N.C. 558 (2022) (relying on multiple regression analysis with respect to juvenile life without parole sentences in counties with higher Black population); *Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 533 (2007) (finding contentions about the methodology of a multiple regression analysis only "goes to the weight of [the] testimony and not the admissibility").

times greater than a similarly-situated non-Black juror, even higher than the odds ratio of him striking a juror who expressed reservations about the death penalty (8.5). All of these findings were statistically significant of $p<0.001$ (more than three standard deviations from the mean).

Another way to view Mr. Butler's strike decisions is to examine his treatment of jurors with similar characteristics. MSU blind-coded these variables, revealing an extreme strike pattern:



Black	2/8	2/4	0/1	0/3	2/7	2/11	1/7	8/22	1/1	5/21	0/5	2/7	0/12	0/8	10/38
Non-black	19/23	17/20	3/4	4/7	21/27	28/35	21/27	39/47	19/19	32/40	20/28	14/20	7/16	20/27	105/135

The variables included the following — jurors who were accused of a crime; knew the defendant; knew one of the attorneys; knew a party; worked in law enforcement or had a close friend or family in law enforcement; was a victim of a crime; had been accused of a crime or had a close friend or family who was accused; expressed something that revealed they leaned toward the State; worked in a blue collar job; worked in a helping profession; expressed a hardship about serving on a jury; expressed reservations about the death penalty; worked with police or a prosecutor or had a close friend or family member who did so; or finally, had any of these

characteristics. In sum, regardless of their individual characteristics, Mr. Butler found non-Black jurors far more acceptable than Black jurors.

ii. Richard Smith, Ph.D.

Dr. Richard Smith, Distinguished Professor of Statistics at the University of North Carolina at Chapel Hill, is prepared to testify that, as a statistician, he is very impressed with the thoroughness of the MSU study. He believes it is methodologically sound and that its findings are appropriate and robust. Dr. Smith performed his own multiple regression analysis and also found that race was a significant factor in the prosecutorial strike decisions in North Carolina.

iii. Nandita Mitra, Ph.D.

Dr. Nandita Mitra used different statistical analyses. Like Dr. Fan Li, the State's expert, Dr. Mitra performed a propensity score matching analysis and sensitivity analysis. Propensity matching is a statistical technique to match each juror by characteristics to see if matched jurors with similar characteristics were treated the same by North Carolina prosecutors. Dr. Fan Li describes this as the "state of the art" technique in statistics. Like Dr. Li, Dr. Mitra found a strong statistically significant association between race and prosecution strikes using propensity matching. This relationship was even stronger in cases where the defendant was Black, like Mr. Bacote. Dr. Mitra, like Dr. Li, calculated an E-value, and concluded that it is highly unlikely the observed discrimination is due to unmeasured confounders.

iv. Samuel Sommers, Ph.D.

Dr. Samuel Sommers, an award-winning Professor of Psychology and Psychology Department Chair at Tufts University, is an expert on the influence of implicit bias and race on decision-making, particularly with regard to jury selection and jury deliberation. Dr. Sommers is prepared to testify regarding the copious studies that demonstrate that prosecutors

disproportionately use peremptory strikes to remove Black potential jurors. He will explain the significance of the consistency of such findings, as well as the convergence of these findings across both archival and experimental research. Dr. Sommers will further explain that implicit bias, born out of history and culture, is a significant driver of the disproportionate striking of Black potential jurors. He will discuss the ability of the human mind to easily conjure "race neutral" reasons for juror strikes, even when such decisions are influenced by race-driven implicit bias. Dr. Sommers will further testify that racially diverse juries perform better than racially homogenous juries, leading to more fair outcomes for criminal defendants and to greater trust in the legitimacy of the criminal legal system as a whole.

B. The Trial Court Will Need to Resolve a Disputed Statistical Issue.

Dr. Joseph Katz, the State's expert in *State v. Robinson*, concurred that the raw strike numbers presented a *prima facie* inference of discrimination. Dr. Fan Li, the State's disclosed expert concurs with Dr. Mitra that the propensity score matching shows a statistically significant relationship between being Black and being struck. The only dispute is the likelihood that unmeasured confounding factors, unaccounted for by the MSU study, explain the consistent, strong, and observed pattern of strikes. The trial court will need to resolve this question of fact in the context of the expert testimony, and all of the corroborating historical, experimental, and case evidence.

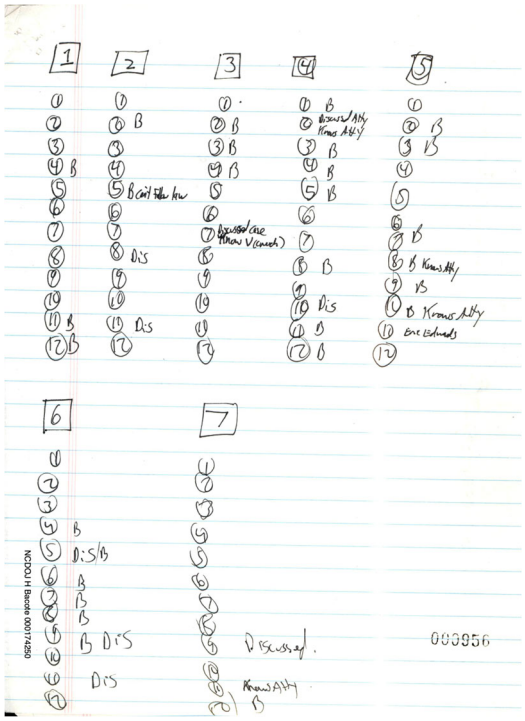
Dr. Li observes that juror's body language and demeanor are not measured and suggests that these things could explain away these statistically significant findings. Dr. Mitra disputes this assertion, relying in part on the state-of-the-art sensitivity analyses utilized by Drs. Mitra and Li. This is a disputed issue for the factfinder below to determine.

At the hearing, the defense will introduce affidavits and statements of prosecutors throughout North Carolina that the State introduced in the *Robinson* RJA hearing and defendants offered at the *Augustine, Golphin and Walters* RJA hearing. At the direction of Dr. Katz, prosecutors prepared these affidavits and statements to explain why they struck Black jurors in North Carolina capital cases. Mr. Bacote will show through these prosecutor affidavits and statements that the theoretical unmeasured confounding factors proposed by Dr. Li, in fact and reality, account for only a very small percentage of the reasons given by prosecutors for striking Black jurors, and cannot explain the huge disparity seen in either the raw strike numbers or the controlled analysis by MSU.

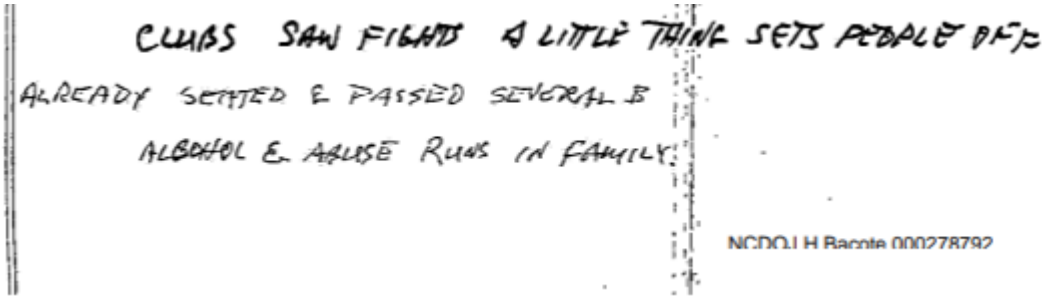
C. The Trial Court Will Hear Corroborating Case File and Transcript Evidence.

Over the past three years, the parties have exchanged hundreds of thousands of pages of discovery, including over 680,000 pages of documents that the State has provided to Mr. Bacote. The voir dire transcripts and prosecutions' own handwritten jury selection documents reveal that race permeated the State's approach to jury selection. Mr. Bacote will introduce expert testimony and hundreds of exhibits showing race consciousness by the prosecution.

For example, in one capital trial in Johnston County, the prosecution flagged every juror who was Black with a B next to their juror number across seven different panels, but did not note the race of any other juror:



The State's notes reveal its frequent preoccupation with the race of jurors. In Eric Murillo's capital trial, for example, the State noted in the comments for an individual Black juror, that it had "already seated and passed several B[Black]" prospective jurors:

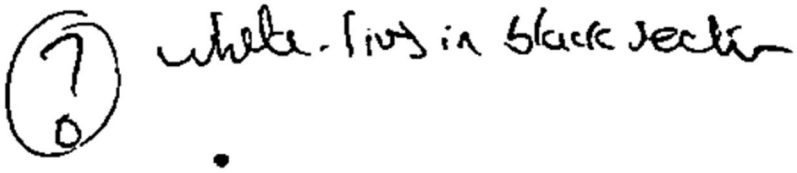


In other instances, the prosecution notes reveal views critical of interracial relationships and neighborhoods. In Iredell County, the prosecution was critical of a 64-year-old Black woman who "lives w/ a group of black & white trash:"

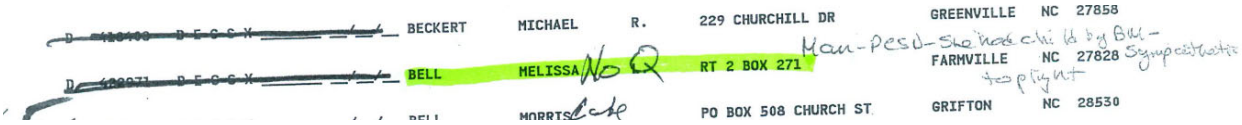
who lives w/ a group of black + white trash, have served a lot of papers on her for back rent and bad bills

NCDOJ H Bacote 000350368.[2] The prosecution described another juror as having a "good address," and then commented: "affluent people who have blacks living behind them." NC DOJ H Bacote 000350528.

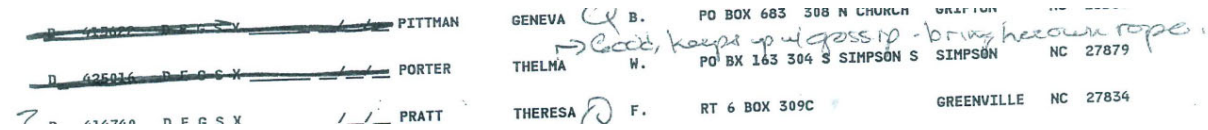
In Robeson County, the prosecution expressed concern about a prospective juror who was "white living in in black section" when picking the juror for Herbert Barton's case. NCDOJ H Bacote 557254:



Similarly, in Washington County, the prosecution did not want a venire member who would be "sympathetic to plight" because "she had child by BM[.]"

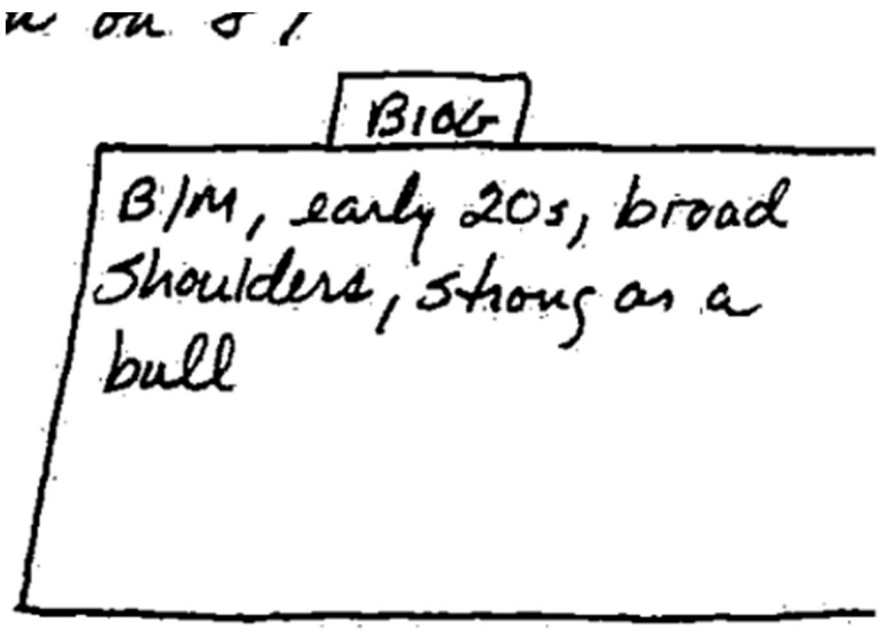


In that same case, the prosecution wanted a juror who was good, because she would "bring her own rope."

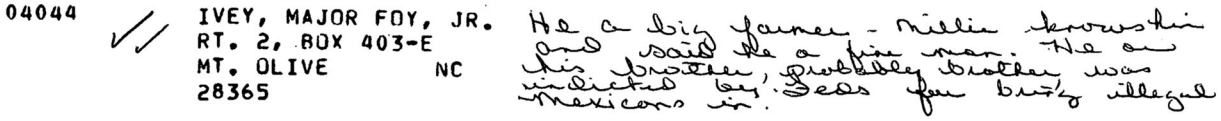


[2] The citation refers to the batestamping used by the State in its production of documents in discovery.

In *State v. Huff*, NCDOJ H Bacote 513308-09, a prosecutor compared a potential juror to an animal: "B/M, early 20s, broad shoulders, strong as a bull."

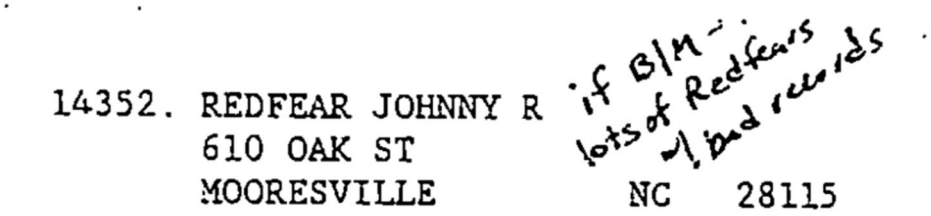


The notes reflect different standards of acceptability for white jurors than Black jurors. For example, in Russell Holden's case in Duplin County, a white prospective juror was described as a "big farmer" and "fine man," even though "he or his brother, probably his brother, was indicted by feds for bringing illegal Mexicans in."



NCDOJ H Bacote 444737-748.

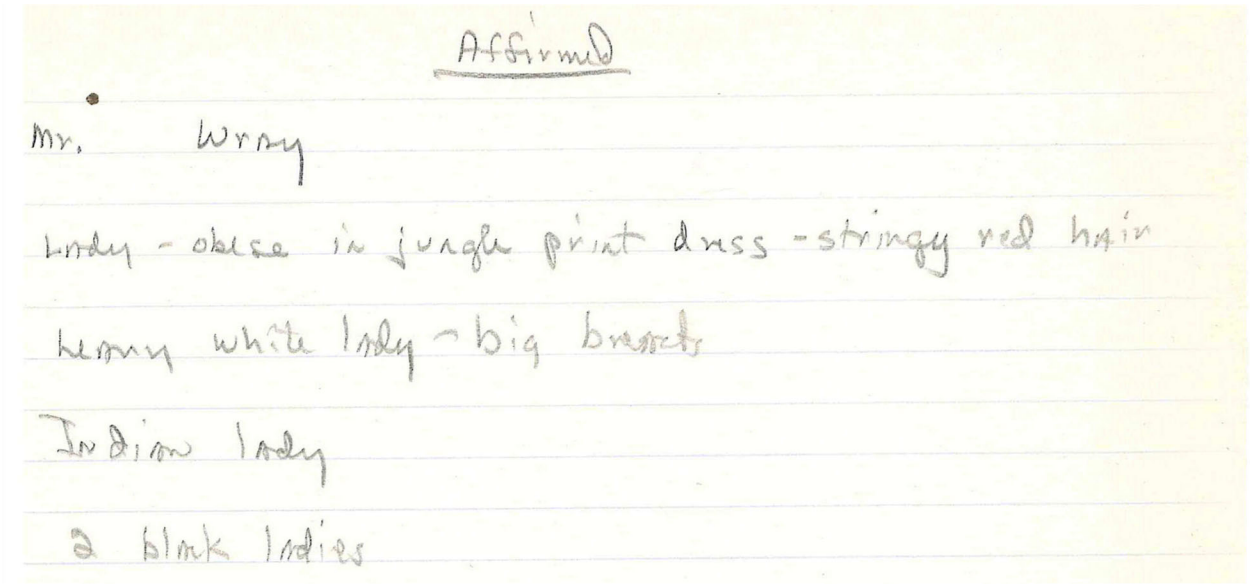
In contrast, the prosecutor in Jathiyah Al-Bayyinah's case, disparaged a Black potential juror because his family members had criminal records.


14352. REDFEAR JOHNNY R
610 OAK ST
MOORESVILLE NC 28115

if B/M - lots of Redfears w/ bad records

NCDOJ H Bacote 000063210.

In Joe Johnson's capital trial in Halifax County, a prosecutor's list of jurors referred to jurors differently depending on race and gender. For Mr. Wray (identified later in the prosecution's notes as Mr. Rhea), the prosecution used his last name and an honorific. By contrast, to refer to two white women, prosecutors omitted names and used only insulting physical descriptions. And prosecutors described Black and Indian women only by their race and gender.


Affirmed

Mr. Wray

Lady - obese in jungle print dress - stringy red hair

Young white lady - big breasts

Indian lady

2 black ladies

NCDOJ H Bacote 223928, 223941.

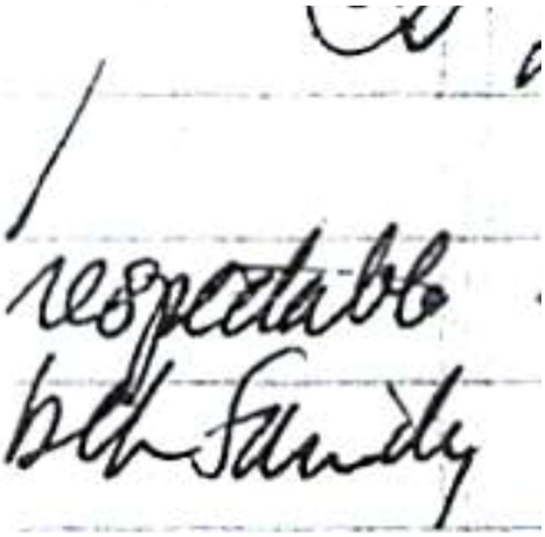
In Quintel Augustine's capital case, the prosecution condemned a Black potential juror as a drinker.

State v. Augustine, DE 99 (filed as exhibit in Superior Court).

Elsewhere, the prosecutor in *State v. Augustine* expressed approval of a white potential juror who drank.

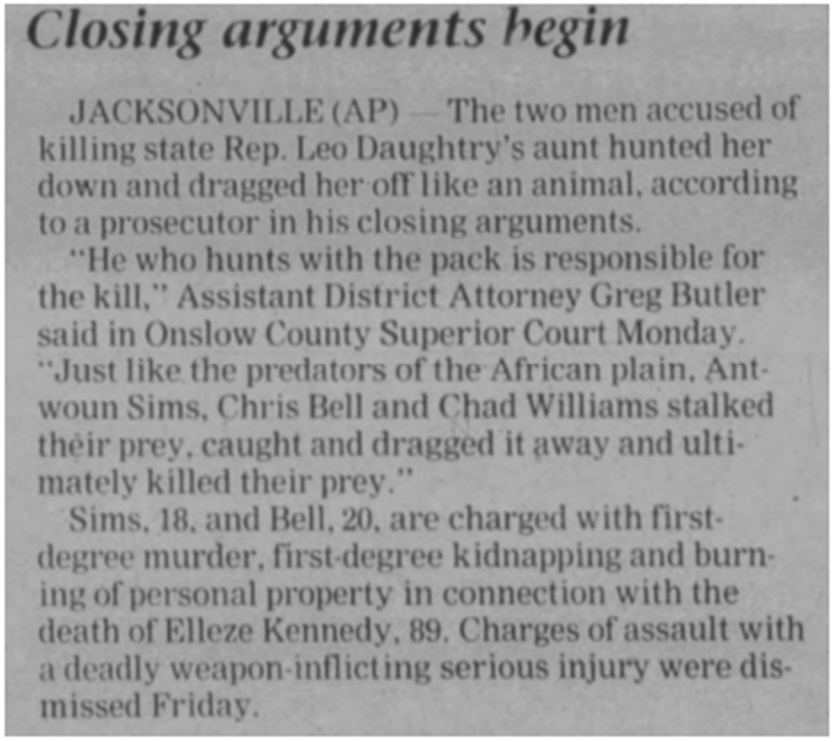
State v. Augustine, DE 99 (filed as exhibit in Superior Court).

The *Augustine* prosecutor also thought it remarkable that a Black potential juror exhibited a positive characteristic.



State v. Augustine, DE 102 (filed as exhibit in Superior Court).

Further, prosecutor Gregory Butler, who also prosecuted Mr. Bacote, has been found to have discriminated against a Black female juror in jury selection, based on her gender. In another capital prosecution, Mr. Butler compared the Black defendants in closing argument to wild dogs and hyenas, and predators of the African plain. *State v. Sims*, 161 N.C. App. 183 (2003) (concluding that Mr. Butler's "multiple references to hunting on the 'African Plain,'" and comparisons to wild animals were improper); *cf., State v. Bell*, 359 N.C. 1, 603 S.E.2d 93, 116 (2004) (rejecting challenge to "he who hunts with the pack is responsible for the kill" closing argument as improper).



Closing arguments begin

JACKSONVILLE (AP) — The two men accused of killing state Rep. Leo Daughtry's aunt hunted her down and dragged her off like an animal, according to a prosecutor in his closing arguments.

"He who hunts with the pack is responsible for the kill," Assistant District Attorney Greg Butler said in Onslow County Superior Court Monday. "Just like the predators of the African plain, Antwoun Sims, Chris Bell and Chad Williams stalked their prey, caught and dragged it away and ultimately killed their prey."

Sims, 18, and Bell, 20, are charged with first-degree murder, first-degree kidnapping and burning of personal property in connection with the death of Elleze Kennedy, 89. Charges of assault with a deadly weapon-inflicting serious injury were dismissed Friday.

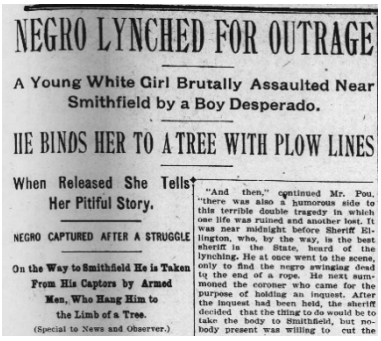
D. The Trial Court Will Hear Corroborating Historical Evidence.

The evidence of discrimination revealed in discovery aligns with the historical context in which it arose. Mr. Bacote is prepared to present two history experts — Dr. Crystal Sanders,

Associate Professor of African American Studies at Emory University, and Dr. Seth Kotch, Professor and Director of the Southern Oral History Program at the University of Carolina Chapel Hill. Dr. Sanders is prepared to offer historical evidence to contextualize racial disparities in the administration of the death penalty in North Carolina with a specific focus on Johnston County. Dr Sanders has submitted an expert report that lays out much of this evidence. HB0193353-HB0193391.

In her report, Dr. Sanders explains: "North Carolina, unlike many of its southern peers, has long had a progressive reputation with respect to public education and race relations. This image, however, has masked a history of racial violence, Black disfranchisement, and white supremacy. In eastern North Carolina locales such as Johnston County, African Americans have experienced lynching, segregation, disfranchisement, and discrimination in public accommodations and services." HB0193354.

Dr. Sanders' report and anticipated testimony marshals archival evidence of this history. For example:



NEGRO LYNCHED FOR OUTRAGE

A Young White Girl Brutally Assaulted Near Smithfield by a Boy Desperado.

HE BINDS HER TO A TREE WITH PLOW LINES

When Released She Tells Her Pitiful Story.

NEGRO CAPTURED AFTER A STRUGGLE

On the Way to Smithfield He is Taken From His Captors by Armed Men, Who Hang Him to the Limb of a Tree.

(Special to News and Observer.)

"And then," continued Mr. Pou, "there was also a humorous side to this terrible double tragedy in which one life was ruined and another lost. It was near midnight before Sheriff Ellington, who, by the way, is the best sheriff in the State, heard of the lynching. He at once went to the scene, only to find the negro swinging dead to the end of a rope. He next summoned the coroner who came for the purpose of holding an inquest. After the inquest had been held, the sheriff decided that the thing to do would be to take the body to Smithfield, but nobody present was willing to cut the

The Smithfield Herald, 1965.

3,500 Attend Rally Of KKK Near Clayton

By PETE HULTH
Herald Staff Writer

As Dr. Sanders concludes, "African Americans in Johnston County have experienced racial discrimination in every facet of life including in the administration of justice. Despite outward signs of racial progress such as the hiring of a Black superintendent of the county school system or a Black chief deputy in the sheriff's office, racism and prejudice remain pervasive." HB0193391.

Dr. Kotch is prepared to provide expert testimony that explains how, historically, punishment by death—whether by lynch mobs or the State—has always targeted Black North Carolinians and has been driven by the race of the victim. His testimony will place in historical context statistics concerning racial disparities in the State's use of peremptory strikes and racial disparities in capital sentencing in Johnston County, North Carolina. It will show how executions, lynchings and exclusion from juries arise in an interlocking pattern from white supremacy. Lynchings were justified in this state by a false mythology of Black offenders, particularly the rapes of white women by Black men. That same justification was used to

disenfranchise Black voters and Black service on juries – twin civic duties. And in turn, lynchings gave rise to executions, seen as more palatable and more in keeping with North Carolina's relatively more progressive image.

For instance, there were more than 170 documented lynchings in North Carolina between 1865 and 1946. Twenty-six of the victims were white, two were Native American, and the remaining 142 victims were Black. Of 77 men executed in North Carolina for rape, 86% were Black men. Of eleven men executed for burglary – often linked with the suggestion of rape, but used when there was insufficient evidence – all eleven men were Black. Mr. Bacote is one of only eleven men sentenced to death in North Carolina after being convicted of first-degree murder solely under the theory of felony murder. All eleven are men of color.

***

It is the prerogative of the trial court, and not the State to determine the probative value of the evidence presented by both parties. For full and proper appellate review, this Court must rely on the trial court to hear all the evidence, and to determine whether and how the evidence supports the claims alleged by Mr. Bacote in his MAR and amendment. The State's objection to certain evidence may be heard by the trial court – and indeed here Judge Sermons specifically invited a motion *in limine* in the course of denying the State's motion to dismiss Mr. Bacote's jury-selection claims. State's App. 508 at 8. A motion *in limine* is the appropriate vehicle for the State to challenge the MSU study under the rules of evidence; to date, the State has not filed one. The State's objections in no way obviate the need for a hearing.

If not in a pretrial motion, then, at the evidentiary hearing, the State will have its opportunity to contest the validity of the MSU study and its probative value, in light of all the evidence presented, through the "greatest legal engine ever invented for the discovery of truth."

California v. Green, 399 U.S. 149, 158 & n.1 (1970) (citing 5 Wigmore on Evidence § 1367). As Justice Scalia wrote in *Crawford v. Washington*, 541 U.S. 36 (2003), the reliability of evidence is best tested in the "crucible of cross-examination." *Id.* at 61. The State's attempt, through this Petition, to avoid the opportunity to confront Mr. Bacote's case tacitly concedes its concern about the strength of Mr. Bacote's evidence and the potential outcome of the evidentiary hearing.

IV. THIS COURT'S DECISION IN *STATE V. TUCKER* DOES NOT COLLATERALLY ESTOP MR. BACOTE FROM LITIGATING JURY SELECTION ISSUES IN HIS CASE.

As the trial court properly recognized, this Court's decision in *State v. Tucker,* 895 S.E. 2d 532, 536 (N.C. 2023), does not predetermine the outcome of Mr. Bacote's RJA jury-selection claims. First, *Tucker* addressed a separate legal issue from Mr. Bacote's jury-selection claims under the RJA. The issue in *Tucker* was whether the 2011 MSU Study could be offered as "newly discovered evidence" to overcome a procedural bar on a post-conviction motion for relief. *Id.* at 553-58. More specifically, the *Tucker* decision concerns whether the 2011 MSU Study constituted "newly discovered evidence" of *Batson* violations that required Mr. Tucker's conviction for first-degree murder and sentence of death to be set aside. *Id.* at 536. This Court acknowledged in *Tucker* that its decision did not impact the pending RJA litigation in *Tucker*: "all of [d]efendant's RJA MARs are still pending and are beyond the scope of this [o]rder." *Id.* at 561. *See also id.* at 562 ("Resentencing is not the remedy defendant requests here. Instead, defendant seeks to have his conviction vacated and a new trial ordered—the appropriate remedy for a violation of *Batson*. Thus, it is plainly apparent that the claim advanced by defendant and addressed by the MAR court below was not an RJA claim.").

Indeed, the State itself previously acknowledged the same in its Brief to the North Carolina Supreme Court in *Tucker*. *See State of North Carolina v. Tucker*, Brief for State at 41,

n. 5 ("[H]ere the issue is not relevance or admissibility, but is solely the question of whether such a study constitutes newly discovered evidence allowing for overcoming the procedural bar."). Just as Mr. Tucker's RJA MAR was beyond the scope of the *Tucker* decision, so too is Mr. Bacote's RJA MAR.

Significantly, this Court in *Tucker* not only specifically excepted RJA claims from its law-of-the-case *Batson* critique of the MSU study, it also refrained from any critique of the MSU study's scientific reliability as an evidentiary matter. As the Superior Court noted in its January 24, 2024 Order in *State v. Tucker*, *Tucker* did not reference Rule 702 or any other authority as it relates to the reliability of expert testimony. Moreover, here, the State has not raised a 702 challenge.

The second reason that *Tucker* does not predetermine Mr. Bacote's RJA claims is that the RJA creates a separate legal framework and a separate remedy than the rights and remedies set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). A *Batson* claim on appeal offers greater relief to a defendant, specifically the reversal of the underlying conviction, and requires proof of purposeful discrimination by a particular prosecutor against a particular juror in the defendant's own case. *Batson*, 476 U.S. at 98, 100 (holding the objecting party must "establish[] purposeful discrimination" and that the relief on appeal is reversal of conviction); *See also Tucker*, 895 S.E. 2d at 532 (emphasizing the need for a defendant to prove "purposeful discrimination" to prevail on a *Batson* claim).

The RJA, by contrast, does not require a finding of intentional discrimination. *Robinson*, 375 N.C. at 176-77. To prevail under a claim of racial discrimination in jury selection under the RJA, an individual need only show that "race was a significant factor in decisions to exercise peremptory challenges during jury selection." *State v. Augustine*, 375 N.C. 376, 381 (2020). The

RJA established a lower burden for defendants and a correspondingly narrower remedy. It bars execution by prohibiting any person from being "subject to or given a sentence of death ... that was sought or obtained on the basis of race." *Id.* at 378 (citing the North Carolina Racial Justice Act.)

In *Tucker,* this Court questioned the relevance of statistical evidence in proving racial animus in the exclusion of jurors under *Batson*. *Tucker*, 895 S.E. 2d at 556. This analysis begins by affirming the MAR court's finding in *Tucker* that the 2011 MSU study "was created to assist capital defendants [...] to file under the RJA," and ultimately concludes that the study has "no bearing on Defendant's *Batson* claim." *Tucker*, 895 S.E. 2d at 554.

This analysis demonstrates the difference between *Batson* and the RJA. The use of statistical evidence as proof of racial discrimination was written into the text of the RJA statute. *See State v. Robinson*, 375 N.C. 173, 179–80 (2020) ("The Act established both the type and scope of evidence that [the individual] could use to meet his burden."). Statistical evidence could be offered to prove 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." *Augustine*, 375 N.C. at 378 (citing RJA, § 1, 2009 N.C. Sess. Laws at 1214.)[3]

Given the significance of the legal questions raised in the RJA, and their importance to all North Carolinians, this Court should allow the evidentiary hearing to go forward. A hearing will

[3] The Act was later amended and narrowed to the individual's specific county or prosecutorial district, but statistical evidence still formed a critical component of an individual's evidentiary burden under the Act. *See State v. Augustine*, 375 N.C. 376, 380 (2020) (citing Amended RJA, § 3, 2012 N.C. Sess. Laws at 472).

allow Mr. Bacote and the State to fully present their respective cases, and this Court, in proper order, may review the decision below on appeal, with a complete record.

Respectfully submitted this the 31st day of January, 2024.

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This the 31st day of January, 2024.

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