STATE OF NORTH CAROLINA
JOHNSTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 07 CRS 51499

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JOHNSTON COUNTY, C.S.C.

STATE OF NORTH CAROLINA)
)
v.) **AMENDMENT TO MOTION FOR APPROPRIATE RELIEF PURSUANT TO RACIAL JUSTICE ACT**
)
HASSON J. BACOTE,)
)
Defendant.)

Pursuant to SB 416, An Act to Amend Death Penalty Procedures, and N.C. Gen. Stat. §§ 15A-2010 to 15A-2012 as amended in 2012, Art. I, §9 of the United States Constitution, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Art. I, §§ 1, 19, 24, 26, and 27 of the North Carolina Constitution, Bacote files this Amendment to his Motion for Appropriate Relief pursuant to the Racial Justice Act.

INTRODUCTION

113. In 2009, North Carolina enacted the Racial Justice Act, N.C. Gen. Stat. §15A-2010-2012. Bacote timely filed a Motion for Appropriate Relief and Motion for Discovery under the RJA. Bacote properly invoked his rights under the RJA enacted in 2009. As outlined below, Bacote maintains that the procedures and substance of the RJA as originally enacted in 2009 continue to apply to his case. In addition, some of the new procedural and substantive guarantees enacted in 2012 may also apply to Bacote's case.

114. The evidence set out in Bacote's original RJA MAR and this Amendment establishes a history of discrimination in District 11, Johnston County, and in Bacote's case. At the time of Bacote's prosecution and trial, prosecutors in District 11 were nearly two times more likely to exclude people of color from jury service than to exclude whites. In Johnston County, prosecutors struck minority venire members at a rate 1.9 times that for white venire members. In Bacote's own case, the prosecution's strike rate for African-American venire members was 3.3 times the rate for white venire members.

115. The evidence also shows racial disparties in charging and sentencing. At the time the death penalty was sought and imposed in Bacote's case, Johnston County was 1.5 times more likely to impose the death penalty in cases in which the defendant was African-American. In Johnston County, the racial disparity in sentencing was even greater; juries were two times more likely to impose the death sentence in cases with minority defendants. In fact, since 1990,

jurors from Johnston County have imposed the death penalty ***in every single case in which the defendant was African-American***.

PROCEDURAL HISTORY

116. Bacote properly and timely filed a Motion for Appropriate Relief pursuant to the Racial Justice Act on August 5, 2010. Bacote also filed a motion for RJA discovery. The State has never responded to Bacote' RJA MAR.

117. Bacote has a direct appeal from his conviction and death sentence pending with the Supreme Court of North Carolina.

APPLICABLE LAW

118. With this amended RJA MAR, Bacote has now filed claims under both S.L. 2009-464, enacted by the General Assembly August 11, 2009, (herein the "original RJA"),and S.L. 2012-136, enacted by the General Assembly on July 2, 2012 (herein the "revised RJA".) The revised RJA sets forth different rights, different standards of proof, and different procedures, but retained some of the provisions from the original RJA. By its terms, the revised RJA repealed only Section 15A-2012, the hearing procedure of the original RJA. S.L. 2012-136, § 4. It did not change Section 15A-2010, and it modified some portions of 15A-2011. *See* S.L. 2011-416, §§ 3-4.

119. Bacote is entitled to pursue claims under both the original and revised RJA statutes, pursuant to N.C.G.S. §12-2, §15A-2010 et seq. (former and current), Article I, §§ 6, 19, 20, 22, 23 of the North Carolina Constitution, Article I, § 9, and Fifth, Eighth, and Fourteenth Amendments of the United States Constitution

120. Bacote's pending, original RJA claims are protected against the retroactive application of the revised RJA under well-established doctrines of statutory interpretation. The revised RJA is ambiguous about whether it applies retroactively to pending claims, and thus cannot be construed to have retrospective effect to those pending claims. *Landgraf v. USI Film Products*, 511 U.S. 244, 264-65 (1994) ("A law should not be construed to have retroactive effect if the language of the new statute is ambiguous about whether it applies retroactively to pending claims."); *see also Lindh v. Murray*, 521 U.S. 320, 327, 329-31 (1997); N.C.G.S. § 12-2; *City of Wilmington v. Cronly*, 30 S.E. 9 (N.C. 1898). None of the language in the revised RJA clearly spells out that the original RJA is repealed for pending suits, nor that the revised RJA should apply instead of the original RJA to pending suits. Although the statute is clear that a defendant who seeks to file a *new* RJA claim – regardless of the sentence or conviction date – will have the new claim governed by the revised RJA, not the original RJA,[1] the statute is ambiguous and vague about retroactivity and the application of the statutes to pending RJA claims. Under the rule of lenity, any ambiguity must be resolved in favor of the defendant. *See, e.g., State v. Glidden*, 317 N.C. 557, 561 (1986).

[1] Unless such application violates another constitutional provision, such as the prohibition on ex post facto claims.

121. Even if the Court determined that the legislature clearly intended for the law to apply retroactively to pending claims such as those filed by Bacote, application of the revised RJA to the exclusion of Bacote's original RJA would deprive him of a vested right and violate due process. *See, e.g., Gardner v. Gardner*, 300 N.C. 715 (1980); 2 SUTHERLAND STATUTORY CONSTRUCTION § 41:6 (7th ed). Bacote has a constitutionally protected interest in having a court hear his claim for relief based on discrimination statewide, in his judicial division, in his prosecutorial district, and in his case at the time of trial. *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 431 (1982) (holding that "a state-created right to redress discrimination" is a constitutionally protected property right). Bacote's right to be heard under the original RJA vested when he filed his RJA MAR, because his right to a hearing had fully accrued at that point. *See Booker v. Duke Med. Ctr.*, 297 N.C. 458, 466-67 (1979); *Bolick v. American Barmag Corp*., 306 N.C. 364, 371 (1982). Accordingly, even if the revised RJA were interpreted as a matter of statutory construction to apply retroactively, it cannot be applied to defeat Bacote's original RJA MAR as a matter of constitutional law.

122. Application of the revised RJA to bar Bacote's pending RJA claims under the original RJA would also constitute an unconstitutional bill of attainder. The General Assembly singled out the claims of Bacote as the basis for a need to modify the law. By targeting these defendants, and subjecting them to greater punishment, the legislature violated Article I, Section 9 of the United States Constitution.

123. Interpreting the revised RJA to bar the original RJA claims would also violate the state constitutional principle of separation of powers (Art. I, §6), the law of the land clause (Art. I, §19), the guarantee of criminal proceedings initiated by the grand jury (Art. I, §22), and the right to confront one's accusers (Art. I, §23). *See* John V. Orth, The North Carolina State Constitution — A Reference Guide at 57-58; *see also Hoke v. Henderson*, 15 N.C. 1 (1834) (applying the law of the land clause of the state constitution to prevent the legislature from enacting a law to punish persons or to deprive the citizen of his property without trial before the judicial tribunal).

124. A bar against Bacote's pending RJA claims under the original RJA MAR would additionally violate the state and federal constitutions by resulting in the arbitrary and discriminatory infliction of the death penalty in violation of the Eighth Amendment to the United States Constitution and Article 1, Section 27 of the North Carolina Constitution. *Furman v. Georgia*, 408 U.S. 238, 241 (1972); *State v. Case*, 330 N.C. 161, 163 (1991). It further would create an arbitrary class in violation of equal protection, and result in the denial of procedural due process under the Fourteenth Amendment. *Bush v. Gore*, 531 U.S. 98 (2000); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

ADDITIONAL STUDY REQUIRED BY REVISED RJA

125. Assuming the revised RJA applies to Bacote's case, additional investigation and statistical analysis is needed to permit Bacote to present at an evidentiary hearing all relevant evidence that, at the time the death penalty was sought and imposed in Bacote's case, race was a significant factor in the prosecution's charging and strike decisions and in the jury's sentencing decisions in District 11 and Johnston County. In the revised RJA, the General Assembly significantly expanded the relevant time period for which defendants may present evidence

showing that race was a significant factor at the time the death sentence was sought or imposed. Pursuant to N.C. Gen. Stat. §15A-2011(a), Bacote is entitled to demonstrate that racial discrimination occurred during the period from 10 years prior to the capital offense to two years after the death sentence was imposed.

126. Researchers at the Michigan State University College of Law conducted comprehensive studies of capital charging and sentencing and jury selection in connection with the original RJA. The original MSU Study covered the period from 1990 to 2010. In many cases, including Bacote's, the relevant time period concludes after 2010. Consequently, MSU is embarking on an expansion of the original studies so as to provide all death-sentenced prisoners with an opportunity to present relevant evidence under the revised RJA.

127. Bacote's death sentence was imposed on April 9, 2009. Consequently, the period of time for which Bacote may present potentially relevant evidence of racial disparities in charging and sentencing extends until April 9, 2011. MSU intends to conduct further studies of charging and sentencing based on the expanded time period. MSU expects this study to take a minimum of three years. Ex. 1, Affidavit of Grosso & O'Brien

128. Bacote's jury selection claims are based in part on MSU's analysis of unadjusted data. In *State v. Robinson*, the Court additionally considered MSU's controlled regression analysis of Cumberland County jury selection. This analysis examined non-racial factors that might explain the racial disparities observed in the raw numbers or unadjusted data. The Cumberland County controlled regression analysis was critical to the Court's conclusion that race was a significant factor in the prosecution's decisions to strike African-American venire members in Cumberland County and in Robinson's case. *See Robinson* Order at ¶¶ 99-103, 109-119.[2] MSU intends to conduct controlled regression analyses of district and county data throughout North Carolina. MSU expects these analyses to take a minimum of two years. Ex. 1, Affidavit of Grosso & O'Brien

129. Pursuant to N.C. Gen. Stat. § 15A-1420(c)(5), Bacote has the burden of proving by a preponderance of the evidence every fact essential to support his claim that, at the time the death penalty was sought and imposed in Bacote's case, race was a significant factor in the prosecution's charging and strike decisions and in the jury's sentencing decisions in District 11 and Johnston County. Bacote is entitled to fully develop the facts and evidence supporting his RJA claims. *See State v. Bates*, 348 N.C. 29, 37 (1998) (policy of North Carolina is to ensure "thorough and complete review" of "all potential [post-conviction] claims"). Further studies by MSU are integral to this effort.

[2] The April 20, 2012 Order of Senior Resident Superior Court Judge Gregory A. Weeks in *State v. Robinson*, No. 91 CRS 23143, is available online at: http://www.aclu.org/files/assets/marcus_robinson_order.pdf.

CLAIMS FOR RELIEF

XII. AT THE TIME THE DEATH SENTENCE WAS SOUGHT AND IMPOSED IN THIS CASE, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S DECISIONS TO EXERCISE PEREMPTORY STRIKES IN CASES IN DISTRICT 11 AND JOHNSTON COUNTY, INCLUDING DEFENDANT'S CASE.

130. Bacote incorporates by reference all of the allegations and evidence submitted in his original RJA MAR and pertaining to the State's decisions to exercise peremptory strikes.

131. At the time Bacote's death sentence was sought and imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in District 11.

132. At the time Bacote's death sentence was sought and imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in Johnston County.

133. At the time Bacote's death sentence was sought and imposed, race was a significant factor in the State's decisions to exercise peremptory strikes in Geddie's case.

134. Bacote was sentenced to death on April 9, 2009, for a murder committed February 16, 2007.

135. In order to establish proof of racial discrimination pursuant to the July 2012 revision to the RJA, Bacote is entitled to demonstrate that racial discrimination occurred during the period of February 16, 1997 through April 9, 2011. *See* N.C. Gen. Stat. §15A-2011(a) (defining "at the time the death sentence was sought or imposed" as the period 10 years before the offense and two years after imposition of the death sentence).

136. The anecdotal, historical, statistical, and documentary evidence presented at the evidentiary hearing in the Cumberland County case of *State v. Marcus Robinson*, including affidavits from prosecutors and prosecutorial training materials, demonstrate that, at the time Bacote's death sentence was sought and imposed, race was a significant factor in decisions to exercise peremptory challenges during jury selection in District 11, Johnston County and in Bacote's case. The evidence presented in *Robinson* and the Court's findings of fact and conclusions of law that are relevant to Bacote's case are described below.

137. The *Robinson* order specifically cited evidence of intentional discrimination in District 11 and Johnston County capital cases. According to the *Robinson* Court:

> The State submitted an affidavit asserting that, in the 1996 Johnston County case of *State v. Guevara*, the prosecutor struck black venire member Gloria Mobley because of her purported reservations about the death penalty. The State passed Mary Matthews, Carolyn Sapp, Edna Pearson, Teresa Bryant, Walda Stone, and Natalie Beck, all of whom were non-black venire members who indicated reluctance to impose the death penalty except in especially heinous cases.

. . .

> The many instances described here – of striking African-American venire members for their association with African-American institutions, asking African-American venire members race-based questions, ***treating African-American venire members differently from similarly situated non-black venire members***, offering irrational and unconstitutional reasons for striking African-American venire members, and striking African-American venire members for no reason at all – are significant in that they come from cases tried between 1990 and 2009, from a multitude of judicial divisions and prosecutorial districts across North Carolina, including Cumberland County, and including Robinson's case. Robinson's evidence is credible and persuasive and casts doubt on the credibility and reliability of the testimony of Robinson's prosecutor and the prosecutor affidavits reviewed by the State's expert and admitted as substantive evidence.
>
> After considering the totality of Robinson's evidence, including the statistically significant disparities in strike decisions by race, ***the Court finds the evidence that prosecutors*** strike African-American venire members for their association with African-American institutions, ask African-American venire members race-based questions, ***treat African-American venire members differently from similarly situated non-black venire members***, offer irrational and unconstitutional reasons for striking African-American venire members, and strike African-American venire members for no reason at all ***establishes that race was a significant factor in prosecutor's decisions to strike African-Americans in North Carolina***, in the former Second Division, in Cumberland County, and in Robinson's case ***from 1990-2009, from 1990-1999, from 1990-1994***, and at the time of Robinson's trial in 1994, ***and also establishes intentional discrimination based on race in these same geographical regions and time periods***.

¶¶ 314, 353-54 (emphasis added, citations omitted).

138. In addition, the *Robinson* Court made similar specific findings concerning prior discrimination by Assistant District Attorney Greg Butler in capital cases tried outside of the 11th District. Mr. Butler was the person who prosecuted Bacote and who picked the jury in Bacote's case. Clearly, evidence that Mr. Butler discriminated in other cases in other districts is relevant to the issue of his discrimination in Johnston County and the 11th District. Mr. Butler (along with another prosecutor) picked the jury in the 1999 Sampson County case of *State v. Barden* and offered an affidavit purporting to explain the exclusion of qualified African-Americans from the jury. According to the *Robinson* Court:

> The State submitted an affidavit asserting that, in the 1999 Sampson County case of *State v. Barden*, the prosecutor struck black venire member Lemiel Baggett because, when asked if he could impose the death penalty, Baggett spoke very quietly and said, "'Well, in some cases" and "Yes, I **think** so." SE32 (Butler Affidavit) (emphasis in original). The State accepted several non-black venire members who expressed similar views and gave nearly identical answers to the question of whether they could impose the death penalty: Teresa Birch, who was also soft-spoken, said, "Yes, I think I could." Joseph

Berger said, "I guess I could. Yes." Betty Blanchard said, "I think so."

¶ 304 (citations omitted). The *Robinson* Court considered this incident as part of a pattern of disparate treatment of minority jurors supporting a finding of intentional discrimination. ¶ 354.

139. Mr. Butler was also singled out by the *Robinson* Court for offering gender discrimination as a reason for two separate capital jury strikes. The Robinson Court said:

> The State submitted sworn affidavits by a seasoned prosecutor, Gregory C. Butler, ascribing gender as the motive for strikes in two cases. In the 1999 Sampson County case of *State v. Barden,* the prosecutor struck African-American venire member Elizabeth Rich because the State was "looking for strong male jurors." SE32 (Butler Affidavit). In the 2001 Onslow County case of State *v. Sims & Bell,* the prosecutor struck African-American venire member Viola Morrow in part because the State was "looking for male jurors and potential foreperson. Was making a concerted effort to send male jurors to the defense as they were taking off every male juror." SE32 (Butler Affidavit).
>
> The Court finds that the stated reason in these two cases reveals an unconstitutional use of peremptory strikes on the basis of gender, in violation of *Batson* and *J.E.B. v. Alabama ex rel T.B.,* 511 U.S. 127 (1994). The Court also finds that the State's actions in these cases constitute some evidence of a willingness to consciously and intentionally base strike decisions on discriminatory reasons, and some evidence that race was a significant factor in prosecutor strike decisions.

¶¶ 345, 346.

140. These findings by the *Robinson* Court, made after a lengthy and plenary evidentiary hearing, should be accorded weight in this case. The *Robinson* Court's findings of discrimination in other capital cases tried in the same county and district as Bacote's case and with the same prosecutor in other districts are relevant to the question of whether race was a significant factor in the prosecution's decisions to strike minority venire members in this case. Notably, the prosecutor in *Barden* and *Sims & Bell* also prosecuted Bacote.

141. The *Robinson* Court did not exhaustively review every transcript in every capital case to find instances of irrational reasons for excluding African-American citizens from jury service and subjecting African-Americans to disparate questioning and treatment. Rather, the Court included only a number of representative examples. Moreover, prosecutors in Harnett County failed to provide any affidavits to the Court in *Robinson*, but only belatedly produced them after the *Robinson* Court had ruled. A review of the prosecutor's proffered reasons for striking African-American venire members in District 11 reveals additional examples of the kinds of discriminatory treatment condemned by the *Robinson* Court.[3]

[3] The case examples described here utilize MSU data on race of venire members. These data are voluminous and are available upon request. Referenced trial transcripts are also available upon request.

142. In Bacote's, own case, the State peremptorily struck African-American venire member Eula Barnes. The defense lodged a *Batson* objection to the State's strike.[4] The State's recent affidavit suggests the prosecutor struck Barnes in part because she had a nephew who had been convicted of drug charges and was "in and out of jail." In addition, Barnes "felt system could have done something else for him." Ex. 2, Butler Affidavit (Bacote).

143. The State failed to offer this reason at trial when explaining its reasons for striking Barnes. *State v. Bacote*, Vol. III, Tpp. 105-113. This is exactly the type of "newly-minted reason" that the *Robinson* order said was suspect. *Robinson* Order, ¶ 320, fn. 20.

144. Furthermore, the State passed white venire member Dean Chambry, whose brother was charged with arson of a truck and who told the State he was unsure as to whether his brother had been treated fairly. Vol. II, Tp. 2374.

145. In *State v. Brewington*, tried in Harnett County in 1998, the State struck black venire member Ursula McLean. McLean was employed at Harnett Correctional Center and had previously worked for the Sheriff's Department for a year. McLean was working on her college degree and hoping to become a probation or parole officer. She had never been convicted of any crime and had previously served on a jury in a criminal case. No one in her family had been charged with a crime. McLean's paternal aunt had been murdered about a year before the trial. As a result of her work experience and the ongoing investigation into her aunt's murder, McLean was familiar with "most of the people with the Harnett County Sheriff's Department." McLean stated clearly that she could follow the law and impose the death penalty in an appropriate case. *State v. Brewington*, Vol. 7, Tpp. 132-39. The defense objected under *Batson*. The trial court found no prima facie case and the State did not offer any reasons for the strike. Tp. 140.

146. The State now suggests the prosecution struck McLean in part because her favorite TV program was "religious programs" and she "very frequently" attended church. Ex. 3, Beam Affidavit (Brewington).

147. This reason is patently irrational. Church attendance is hardly a reason to exclude a person from jury duty. It is notable that the prosecutor asked McLean no questions about her faith or church affiliation.

148. The State's proffered reason also reveals disparate treatment of black and non-black venire members. McLean's questionnaire reflects that she "very frequently" attended church. Ex. 4, *Brewington* Jury Questionnaires. The State, however, passed numerous white venire members who indicated that they also attended church very frequently.[5] The State passed

[4] The trial judge found no prima facie case but permitted the State to place its reasons for the strike on the record. *State v. Bacote*, Vol. III, 458-64. The North Carolina Supreme Court has not yet considered the State's strike of Barnes; the case is pending on direct appeal. *See State v. Bacote*, 364 N.C. 430 (2010). Regardless, the facts and circumstances of voir dire may be considered as evidence supporting an RJA claim. *See State v. Bone*, 354 N.C. 1, 26-28 (2001) (despite adverse jury finding on question of mental retardation, defendant was entitled to seek relief under newly-enacted mental retardation statute).

[5] A 2010 Gallup poll showed that 53 percent of North Carolinians attend church on a weekly or near weekly basis. *See* http://www.gallup.com/poll/125999/mississippians-go-church-most-vermonters-least.aspx.

the following venire members who indicated on their questionnaires that they also "very frequently" attended church: Edward Bennett, Linda Butler, James Dorman, Melane Faucette, Roger Johnson, Dee Langdon, Terry Manahan, Craig Matthews, William Matthews, Mary Murphy, Kimberly Snead, Eugenia Stewart, Cindy Wilburn, Marie Wilson, and Elizabeth Wood. Ex. 5, *Brewington* Jury Questionnaires. In fact Manaham, had been an ordained minister since 1981, and was still a pastor at the time of Brewington's trial. Vol 2, Tp. 156.

149. The State's recent affidavit also says the prosecution struck McLean because her aunt had been murdered in Harnett County and the crime remained unsolved. Ex. 3, Beam Affidavit (Brewington). The affidavit does not offer any explanation as to why the fact that she had a relative murdered would make her an undesirable juror for the State. On voir dire, McLean expressed no dissatisfaction with the pace or quality of the law enforcement investigation. Moreover, the State passed non-black venire members whose family members had also been the victims of homicide. Eugenia Stewart's brother-in-law was killed by a drunk driver. Vol. 7, Tp. 125. Craig Matthews' second cousin was murdered within a week before he was questioned as a potential juror. Vol. 4, Tp. 67. Yet the State passed both Stewart and Matthews.[6]

150. Also in *State v. Brewington*, the State struck black venire member Pamela Simon. According to the prosecutor's affidavit, Simon was struck in part, because she was "divorced, receives no child support, and is the sole financial provider." Ex. 3, Beam Affidavit (Brewington). It appears that the justification for striking Simon is that serving as a juror would be a hardship for her. The record, however, reflects that Simon's situation would not have been a hardship. After being questioned by the prosecutor, Simon said she believed she would be paid by her employer while serving on the jury and she would be able to find someone to pick up her children at five pm. Vol. 1, Tp. 72.

151. Moreover, the State passed a non-black venire member who had a much more significant hardship concern. White venire member Barbara Roller was also a single mother. Ex. 4, *Brewington* Jury Questionnaires. That, however, was not the hardship Roller brought to the Court's attention. Roller said that she had surgery scheduled for cervical and uturine cancer in three weeks. Roller had been diagnosed with cancer nine months before. Other methods of treatment had failed and surgery was Roller's last resort. Roller explained that she would be in the hospital for three days and then out of work for a month. Roller acknowledged that she was concerned about the operation; this would have been the first time she had had surgery. Vol. 4, Tpp. 34-35.

152. The prosecutor said he could not predict how long the trial would last and stated he could not promise it would conclude in under thre weeks. The prosecutor then asked Roller,"[W]ould rescheduling of the surgery be possible or pose any hazard to you?" Vol. 4, Tpp. 35-36. Roller responded,"It would be possible. As far as I know, it wouldn't cause any

[6] The State's affidavit suggests that, at trial, the prosecutor offered this reason for the strike. In fact, after the defense made its *Batson* objection, the prosecutor commented as to why ***the defense*** should wish to excuse McLean. *See* Vol. 7, Tp. 140 ("I am absolutely incredulous, Your Honor, that defense counsel might want this juror to decide the guilt or innocence of the defendant in light of what she has most recently been through with her aunt."). The State's decision to now adopt this reason as its own further hightlights the irrational and pretextual nature of the strike.

more damage than what it's already caused." Vol. 4, Tp. 36. The state passed Roller.

153. Also in *State v. Brewington*, the State struck black venire member Belinda Moore-Longmire. According to the prosecutor's affidavit, Moore-Longmire was struck for the reasons below:

> The following was found in the Jury Questionnaire:
>
> Juror Moore-Longmire was 22 years old and her hyphenated last name was circled by one of the prosecutors.
>
> The following was found in the Jury Selection Transcript:
>
> Juror Moore-Longmire said she "don't read newspapers and stuff." Juror Moore-Longmire was subject of a Batson challenge. The Court found that "the evidence fails to establish a prima facie case showing purposeful discrimination… objection is overruled."

Ex. 3, Beam Affidavit (Brewington).

154. The fact that a potential juror has a hyphenated name is neither a rational nor legitimate reason to exclude a citizen from jury service. There is nothing in the record to suggest that the prosecutors were bothered by this venire member utilizing a common practice of hyphenating her name after marriage. Moreover, any concerns about this should have been assuaged when the venire member said she preferred to be called Longmire instead of Moore-Longmire. Vol. 3, Tp. 129.

155. While the State claims that one of the reasons for striking Moore-Longmire was her age, the record reflects that the State passed non-black venire members who were around the same age as the 22-year-old Moore-Longmire. Chad McLamb was 21; Paul Crag was 23; and Jerry Tew was 24. Ex. 4, *Brewington* Jury Questionnaires.

156. In addition, while the State also noted that Moore-Longmire said she did not read newspapers, Jerry Tew — who was only two years older than Moore-Longmire — also said he did not read newspapers. Vol. 1, Tp. 58.

157. In *State v. Taylor*, tried in Harnett County in 2005, the State struck black venire member Sharone Stepney. The prosecution has given an affidavit offering these reasons for striking Stepney:

> The following was found in the Jury Questionairre:
>
> Juror Stepney is 28 years old, single and has kids.
>
> The following was found in the Jury Selection Transcript:

> Juror Stepney answered with a qualifier regarding personally giving the death penalty ("If I'm convinced… yes") versus life without parole ("yes"). Juror Stepney also revealed he was still living with his parents.

Ex. 5, Beam Affidavit (Taylor). A review of the record demonstrates that these are not race-neutral reasons.

158. The transcript reveals that the State's citation to this single exchange with Stepney is misleading. Nothing else Stepney said about the death penalty exhibited any hesitation about the death penalty whatsoever. *State v. Taylor*, Tpp. 1739-44. When asked whether he had any hesitations or reservations about serving on a death penalty case, Stepney clearly said, "No, sir." Tp. 1744.

159. Further, the State passed numerous non-black venire members who gave nearly identical answers to the ones deemed unacceptable in Stepney. For example, when Kimberly James was asked if she could personally give the death penalty, she initially told the prosecutors no. Tp. 1882. The prosecutor repeated the question, and again James told the prosecution she could not give the death sentence. Tp. 1883. Finally, James said she could "possibly" vote for death. When she was asked if she could give life without parole, she said she "Yes, I could." Tp. 1883. The State passed James.

160. Similarly, when asked if she could personally give the death penalty, Amy Burr initially said "I could. I'd have to — you, know, if we're talking about a person's life, you'd have to take it all into perspective." When the prosecutor asked her again about personally giving the death penalty, she said "Yes. If it came to that point." When he asked her if she could give life without parole, she just said, "Yes." Tp. 708. The State passed Burr.

161. The State also passed Audrey Godwin despite her answers about whether she could personally give the death penalty. When asked a question similar to the one Stepney was asked about personally giving the death penalty, she said, "If, based on the facts and I — you know, I would take it very seriously. I would think through everything. I'd probably put myself in that situation. If it came to that — if I made that decision, then yes." Tp. 816. When asked if she could personally give LWOP, she just responded, "Yes."

162. The State also passed white venire member Denise Winnie despite her answers about personally giving the death penalty and life without parole. When Winnie was first asked if she could personally give the death penalty, she responded by saying, "Could I?" Tp. 784. After the prosecution responded with "Yes," Winnie said, "I could, but then, again, it depends on the evidence and everything else." *Id*. When asked if she could personally return a sentence of life without parole, she simply replied, "Yes." Tp. 785.

163. The State also offered as a reason for striking Stepney that he was single, 28 years old, and had children. This explanation does not suffice as a race-neutral explanation for the strike. First, contrary to the State's assertion, Stepeny's questionnaire does not say he has children. Also, the State passed non-black venire member Tara Wescott whose questionnaire

showed she was 24 years old, single, and had a seven-year-old daughter. Ex. 6, *Taylor* Jury Questionnaires.

164. In *State v. Lawrence*, tried in Harnett County in 1997, the State struck black venire member Milton Monk. According to the State's recent affidavit, Monk was excused in part because he "had been charged with a crime, DWI, 10-15 years ago." Ex. 8, Beam Affidavit (Lawrence). The record shows the State treated black and non-black venire members with criminal records differently.

165. While striking Monk for having a non-violent crime more than a decade before, the State happily accepted a non-black venire member with a more recent conviction for a violent crime. The State passed David Overby who had been charged with and convicted of Assault on a Female in the last two years. At the time of Lawrence's trial, Overby was still on probation. *State v. Lawrence*, Vol. III Tp. 17.

166. In *State v. DeCastro*, tried in Johnston County in 1993, the State struck black venire member Harry James. The State's purportedly race neutral reasons for striking James consisted entirely of the following:

> This juror was sociology major. I feel some sociologists may be more likely to forgive and have sympathy for defendant based upon socioeconomic circumstances. This juror had a dispute involving landlord tenant relationship. The Decastro case involved landlord tenant relationship. The juror qualified his belief regarding death penalty with "if the law requires it." Because there is some level of discretion in the juror's ultimate decision, I might have concerns regarding that statement.

Ex. 9, Jackson Affidavit (DeCastro, et al).

167. The State's characterization of James ignores what James actually said about these issues. James never told the court he was a sociology major. Rather he said that he had attended college for two years and had taken mostly sociology courses. *State v. DeCastro*, Vol. 2, Tp. 137. Instead of being a sociologist, James had been a member of the United States Army for 17 years and served in Desert Storm. Vol. 2, Tpp. 129, 139. His MOS consisted primarily of training military personnel about how defend themselves against chemical warfare. Vol. 2, Tp. 143.

168. The State's purported concern about James having been involved in a landlord tenant dispute was that Decastro's case involved a landlord tenant relationship. The victims were the landlords for one of DeCastro's codefendants; the codefendant was delinquent on paying his rent; and the victims were seeking new tenants. *State v. Decastro*, 342 N.C. 667, 677 (1996). The implication in the affidavit is that James might have been inclined to sympathize with DeCastro because James also had a dispute with his landlord. In fact, in the only landlord tenant dispute James experienced, James was the landlord! He had tenants who were not paying rent. James had never had a problem with any of his landlords. Vol. 2, Tpp. 135, 144. Thus, if

anything, James would have been more likely to identify with the landlord victims, not with the defendant.

169. Finally, concerning James' views on the death penalty, a review of James' voir dire shows that the State's affidavit is misleading about James' capital punishment beliefs. James was not at all reluctant to consider and impose the death penalty.

> JUROR JAMES: My personal feelings about the death penalty is that if the law requires it and the act is committed, I don't have no problem with it. If there's clear evidence, I don't have no problem with it.

Vol. 2, Tp. 141.

170. James was then asked if he had any moral or religious opposition to the death penalty.

> JUROR JAMES: I'm saying that my moral belief is this: is that in this nation if that's the law and the evidence has proven that an individual's done it, I have no problem with it. The evidence has got to be supported, you know. I have no — My conscience wouldn't have a problem with it if the evidence is there.

Id. James' full statements about the death penalty show that his statement "if the law requires it" was a pretextual reason for striking him.

171. The MSU analyses of unadjusted and adjusted jury selection data and the expert testimony and anecdotal evidence presented and considered in *State v. Robinson*, taken together, support a claim under the revised RJA that, at the time the death penalty was sought and imposed, race was a significant factor in decisions to seek or impose the sentence of death in Bacote's case in Johnston County and/or District 11. In addition, this evidence shows that, at the time the death penalty was sought and imposed, race was a significant factor in decisions to exercise peremptory challenges during jury selection in Bacote's case in Johnston County and/or District 11. Ex. 1, Affidavit of Grosso & O'Brien.

172. Bacote will be in a position to more fully develop this claim when the new MSU study is complete. That further data is not available for inclusion in this Amendment is not due to any fault or lack of diligence on the part of Bacote or his counsel. Bacote intends to supplement this claim with further statistical analyses and relevant non-statistical evidence.

XIII. AT THE TIME THE DEATH SENTENCE WAS SOUGHT AND IMPOSED IN THIS CASE, RACE WAS A SIGNIFICANT FACTOR IN THE STATE'S CAPITAL CHARGING DECISIONS IN DISTRICT 11 AND JOHNSTON COUNTY CAPITAL CASES, INCLUDING DEFENDANT'S CASE.

173. Bacote incorporates by reference all of the allegations and evidence submitted in his original RJA MAR and pertaining to the State's charging decisions.

174. At the time Bacote's death sentence was sought and imposed, race of defendant was a significant factor in decisions to seek the death penalty in District 11.

175. At the time Bacote's death sentence was sought and imposed, race of defendant was a significant factor in decisions to seek the death penalty in Johnston County.

176. At the time Bacote's death sentence was sought and imposed, race of defendant was a significant factor in decisions to seek the death penalty in Geddie's case.

177. Bacote will be in a position to more fully develop this claim when the new MSU study is complete. That further data is not available for inclusion in this Amendment is not due to any fault or lack of diligence on the part of Bacote or his counsel. Bacote intends to supplement this claim with further statistical analyses and relevant non-statistical evidence.

XIV. AT THE TIME THE DEATH SENTENCE WAS SOUGHT AND IMPOSED IN THIS CASE, RACE WAS A SIGNIFICANT FACTOR IN JURY SENTENCING DECISIONS IN DISTRICT 11 AND JOHNSTON COUNTY CAPITAL CASES, INCLUDING DEFENDANT'S CASE.

178. Bacote incorporates by reference all of the allegations and evidence submitted in his original RJA MAR and pertaining to jury sentencing decisions.

179. At the time Bacote's death sentence was sought and imposed, race of defendant was a significant factor in jury decisions to impose the death penalty in District 11.

180. At the time Bacote's death sentence was sought and imposed, race of defendant was a significant factor in the jury's decision to impose the death penalty in Johnston County.

181. At the time Bacote's death sentence was sought and imposed, race of defendant was a significant factor in the jury's decision to impose the death penalty in Bacote's case.

182. Bacote will be in a position to more fully develop this claim when the new MSU study is complete. That further data is not available for inclusion in this Amendment is not due to any fault or lack of diligence on the part of Bacote or his counsel. Bacote intends to supplement this claim with further statistical analyses and relevant non-statistical evidence.

Respectfully submitted this the 30th day of August 2012.

Jonathan E. Broun

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ATTORNEYS FOR HASSON BACOTE

STATEMENT OF COMPLIANCE WITH
N.C. Gen. Stat. § 15A-2011(a1)

I understand that if I am awarded relief under the Racial Justice Act, my death sentence will be vacated and I will be sentenced to life imprisonment without parole. After consulting with my attorneys, I knowingly, intelligently, and voluntarily waive any objection to a sentence of life without parole if the Court finds my rights under the Racial Justice Act have been violated.

I am still litigating claims raised in my first MAR. As to those, if I were granted relief from my conviction or death sentence, I could be entitled to pursue a sentence of life with parole as provided by law at the time of my offense. Apart from the requirements of the recently-amended Racial Justice Act and its provisions, I am not now waiving any right to pursue a sentence of life with parole.

I am not waiving my right to challenge my wrongful and unfair conviction or my unfair and unconstitutional sentence on grounds other than the Racial Justice Act. I will not trade off one constitutional or statutory right for another.

Hasson J. Bacote 7/30/12

Hasson J. Bacote

I hereby certify that I caused to be served a copy of the above and foregoing Defendant's Amendment to Motion for Appropriate Relief pursuant to Racial Justice Act by first class mail upon:

Susan Doyle
District Attorney
P.O. Box 1029
Smithfield, NC 27577

This the ____ day of August 2012.

_____
Robert Almoney