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"CHANGING THE STATUS QUO OF RACE AND CAPITAL PUNISHMENT?" –

An evaluation of North Carolina's Racial Justice Act

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ABSTRACT

The influence of racial bias on capital punishment in the US is part of a narrative long heard and extensively discussed over the past while nothing much seemed to change. Examples of states taking measures to confront this subject of widespread concern are rare. North Carolina counts as one of the pioneer states to address the issue by means of their Racial Justice Act enacted by the legislature in 2009. If the road to get there was rough and riddled with obstacles, what came after can be considered an equally tough stretch in the endeavor to challenge racial discrimination impacting the death penalty. The Statute had been in effect for a mere three years before it got amended and, ultimately, abolished by the ensuing government. However, despite its short life span, the Racial Justice Act has enabled hearings to take place with extraordinary results: all four defendants who had filed motions and were heard on them, had their death sentences commuted and were resentenced to life imprisonment without parole. As the Statute has been characterized by wins as well as setbacks the question arises to what extent the Racial Justice Act has effectively countered racial bias in capital punishment. Hence, this thesis set outs to examine if and how it has advanced efforts against race discrimination impacting the death penalty.

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GLOSSARY OF ABBREVIATIONS

ACLU	American Civil Liberties Union
BLM	Black Lives Matter
CERD	Committee on the Elimination of Racial Discrimination
CDPL	Center for Death Penalty Litigation
CSO	Civil Society Organization
DPIC	Death Penalty Information Center
EJI	Equal Justice Initiative
HKonJ	“Historic Thousands on Jones Street” grassroot movement
HR	Human Rights
IACHR	Inter-American Commission of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
LDF	Legal Defense and Educational Fund
LOIPR	List of Issues Prior to Reporting
LWOP	Life imprisonment without (the possibility of) parole
MAR	Motion for Appropriate Relief
MSU study	Michigan State University study
NAACP	National Association for the Advancement of Colored People
NCCADP	North Carolina Association for Alternatives to the Death Penalty
NCCM	“North Carolina Coalition for a Moratorium”
OAS	Organization of American States
RJA	Racial Justice Act
UPR	Universal Periodic Review

TERMINOLOGY

RACE – throughout this thesis, the reader will frequently come across the term 'race' (it can even be read on the cover page) and for that reason, some clarifications regarding its meaning and the intent behind its use shall be made here at the beginning.

First of all, it is a very controversial term understood vastly different from individual to individual. Above that, a different meaning is attached to the word varying between different cultures. I would have, personally, preferred to avoid using 'race' all together in order to be as sensitive as possible to the different, possibly negative connotations.

However, the term has also been established and plays an important role in academic literature/ research, prevailingly stemming from the US, concerning the subject dealt with in this paper. Therefore, in the context that the word is used here, it means nothing than to be in line with how the meaning is commonly interpreted. In this sense, race is to be understood as synonymous to ethnicity. With this note, I would like to emphasize that one should be very careful in talking about 'race' and reflect on what it expresses. It is a severe misinterpretation to believe that more than one human race exists and that there could be a distinction/ classification made according to levels of intelligence, inherent capabilities, etc. Especially, the thought of a hierarchy with the Whites (Europeans) at the top, what used to prevail in the past centuries, is without scientific basis and simply wrong.

1 INTRODUCTION

"The politics of fear and anger have made many criminal justice practitioners believe that the goal is conviction and maximum punishment, no matter what it takes – including tolerating racial bias and abuses of power and discrimination [….]. Eradicating racial bias in our courtrooms requires a break from the past. It will take courage and sustained effort. And, yes, it will be difficult. But nothing less than the integrity of our courts and our commitment to true justice is at stake."

- Bryan Stevenson, Equal Justice Initiative

This is a quote by Mr. Bryan Stevenson during a hearing held in 2012 as part of a Racial Justice Act claim filed by a death row prisoner from North Carolina. Those words he chose are very powerful and accurately convey the delicate and critical topic which is at the core of this thesis.

Even though an increasing number of states have, as recent as in this year, abolished capital punishment, the death penalty persists at the federal level as well as in several states, of which North Carolina is one.

At this point, though, the state has not carried out any more execution with a *de facto* moratorium in place since 2006 as can be seen in Figure 1. As a result, North Carolina has not witnessed any death row inmate being executed in a 15-year period and the numbers in the graphic have come to stagnate at level zero.

Nevertheless, death sentences continue to be imposed in recent years as depicted by Figure 2., all while also those numbers remain at a low level.

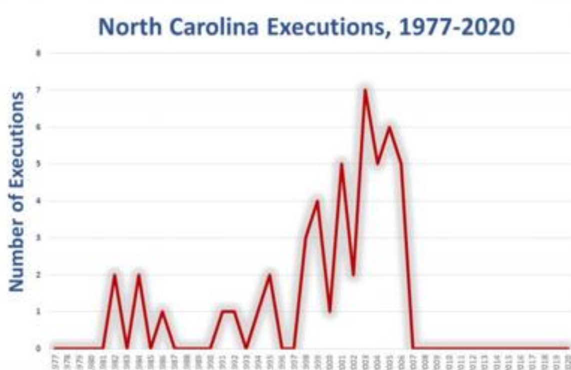

Fig. 1. Source: Dr. Robinson, (2021). *The Death Penalty in North Carolina, 2021,* p. 7.

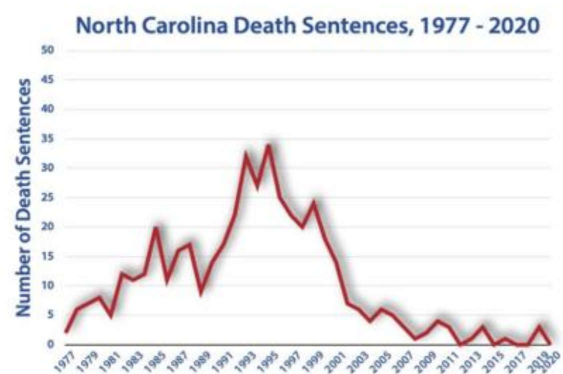

Fig. 2. Source: Dr. Robinson, (2021). *The Death Penalty in North Carolina, 2021,* p. 6.

These statistics certainly show that the death penalty in the state of North Carolina is everything but dead. While there would be enough questions raised from a Human Rights perspective in relation to the practice of capital punishment itself, this is not the only point of concern. About as long as this controversial discussion concerning the death penalty and its legitimacy in the United States has been led, there has, besides that, also been harsh criticism uttered regarding the principles of fairness and non-discrimination in its application.

A starting point for this observation can be the racial inequalities and over-representation of marginalized minority groups in the US prison population. And this phenomenon equally affects capitally and non-capitally charged defendants. In the case of North Carolina, the following percentages (see *Figure 3*) regarding race and gender characteristics of persons executed could be observed between 19884 and 2006, which do not correspond to the respective shares of people with the same race and gender in society overall:

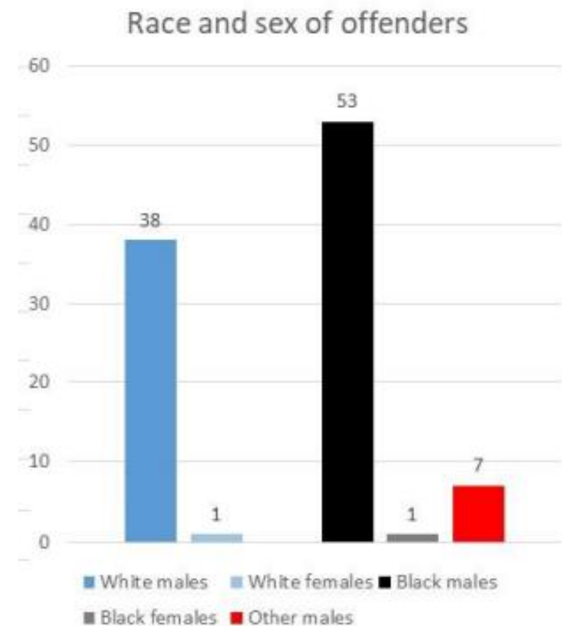

Fig. 3. Source: Dr. Robinson, (2021). *The Death Penalty in North Carolina, 2021,* p. 32.

Whereas the improper influence of racial bias persisting in the criminal justice system and patterns of racial discrimination have long been complained about, North Carolina recognized this and became a pioneer state to in fact address this problem when passing their Racial Justice Act (RJA) in 2009. Afterwards, still a lot of back and forth followed in the judiciary and political battle of what was within and out of the bounds of this Statute, which also had a legal dimension to it as it was partially carried out before the state's courts. And till date, this Act has provided for developments which are interesting to look at in the light of a Human Rights lens.

In that sense, this thesis attempts to capture and analyze both of those aspects in its focus: a legitimacy evaluation of capital punishment in general under a Human Rights framework and, more specifically, the implications of racial bias infecting the death penalty at the intersection of combining the Human Rights discipline and the fields of historical, sociological, political, legal, and ethical research. Socio-

legal research methods will be employed mainly since what lies at the focus are issues of society impacting political change that results in capital defendants in the criminal justice system being granted relief from a death sentence upon a showing of racial discrimination during their trials.

During the desk research part, primary resources such as versions of the RJA draft bill and transcripts of parliamentary debates in this matter were consulted as well as court documents of the Racial Justice Act litigation and proceedings initiated; also consulted were secondary academic works dealing with the history of race and capital punishment and the political division surrounding the path to the passage of the North Carolina RJA and its impact in practice.
As far as field research is concerned, there have unfortunately been major limitations placed on the ability to perform it due to the Covid-19 pandemic. This also reflects in the depth and outcome of the thesis at some points in that only a limited number of virtual interviews with experts on these matters could be arranged and carried out. Their contribution was nevertheless valuable and supported the progress of this study.

In examining the main research question, formulated as "To what extent did North Carolina's Racial Justice Act advance the efforts to counter racial discrimination in capital punishment in the state?", the main body of the thesis has been divided into five chapters. Firstly, light will be shed on the legacy of racial bias interfering with capital punishment in the state of North Carolina. Several studies undertaken over the course of history dealing with this will be presented and their conclusions on various types of discrimination occurring as well as the most relevant case law in this ambit will be laid down.
In the second chapter, the primary forces in the sense of political movements and CSOs, that played an important role in the lobbying campaign for the RJA, will be discussed. A closer look at what strategies HR activists and organizations applied to bring about a change in policy and secure the necessary legislative support to pass the bill shall be taken.

Thirdly, the actual content of the Racial Justice Act will be explored in-depth. Closely analyzing the wording is key in understanding the legislative intent behind it, its meaning and how courts can be expected to interpret it.

The fourth chapter focuses on the claims filed pursuant to the Statute and the merits assessed during court hearings. The history of some of the most prominent cases will be followed to come to an understanding of how the judges passed their judgement and how these were disputed time and time again.

The fifth and last chapter elaborates on the perspective of various persons directly involved in the process and events related to the RJA, such as members of the judiciary, politicians, HR activists and death penalty experts, research authors, and others. All their respective opinions are relevant in order to gauge a full picture of how North Carolina’s Racial Justice Act is viewed (differently) by the wider public and what impact it has made.

2 "REMEMBERING A DARK EPISODE OF THE PAST" – NORTH CAROLINA'S HISTORY OF RACE AND CAPITAL PUNISHMENT

2.1 The early history of the death penalty

Compared to the other States, North Carolina represents no exception as far as its history with regards to the era of slavery, the early beginnings of capital punishment and the interrelationship between the two are concerned. But even if there are apparent parallels with broader trends and developments across the US in general, the State of North Carolina does, nevertheless, have its particularities which have uniquely shaped its own pathway in the sphere of racial discrimination in capital punishment and which are to be explored in this chapter.

The most logical point to start the analysis is the 18th century when the first execution was recorded in North Carolina in the year 1726 (Radelet & Pierce, 2011). This introduction of the system of capital punishment in the State was paralleled with the creation of a corresponding statutory basis, namely a criminal code and death penalty statute. North Carolina's criminal code had, in early times already, been characterized by a "historical breadth" (Radelet & Pierce, 2011, p. 2124) and its laws, traditionally, have been said to be harsh and have "expressly made a wide range of crimes death eligible" (Grosso, O'Brien, Taylor & Woodworth, 2016, p. 2005). One explanation for this can be found in the fact that North Carolina did not have penitentiaries and therewith, no other means to provide for imprisonment as an alternative form of punishment.

Hugo Adam Bedau commented that

> "As late as 1837, North Carolina required death for all the following crimes: murder, rape, statutory rape, arson, castration, burglary, highway robbery, stealing bank notes, slave-stealing, "the crime against nature" (buggery, sodomy, bestiality), dueling if death ensues, burning a public building, assault with intent to kill, breaking out of jail if under a capital indictment, concealing a slave with intent to free him, taking a free Negro or mulatto out of the state with intent to sell him into slavery; the second offense of forgery, mayhem, inciting slaves to insurrection, or of circulating seditious literature among slaves; being an accessory to murder, robbery, burglary, arson, or mayhem" (Radelet & Pierce, 2011, p. 2124).

One must keep in mind, though, that the Black population at that time was almost exclusively constituted by slaves, raising the question of whether and how capital punishment was applied to the enslaved population. Initially, there had been some restraint and doubts about subjecting slaves to a

form of corporal or even capital punishment since an economic loss and one of labor force was linked to it. This attitude changed later, however, when it became allowed to sentence slaves to die, and their previous owners were paid compensation in exchange. The said compensation, as contained in the North Carolina slave code of 1715, could in some instances even surpass the potential cost of replacement and this regulation lasted until the American Revolutionary War (Radelet & Pierce, 2011). This offer of compensation in exchange for the life of a human can already be taken as an indication for the conception that slaves were regarded as mere property; when someone other than the slave owner assaulted or murdered an enslaved person, though, the latter is not considered to be the victim in this case, but primarily the slave owner as the one who incurs the loss (Kotch & Mosteller, 2010). According to Kotch and Mosteller (2010), to settle this kind of cases in front of a judicial organ was one of the reasons, amongst others, why a tribunal was established, specifically for litigation against slave defendants, with a jury exclusively comprised of slave owners. Based on the conviction of the White majority, the argument of deterrence was attached significant importance to and, in line with this strategy, some death sentences were carried out particularly heinously, bodies were mutilated before the execution or displayed to the public afterwards as a sign of warning to fellow slaves (Kotch & Mosteller, 2010).

Furthermore, in the Southern States and North Carolina included, death sentencing played a particularly significant role for the punishment of rape. Research has revealed that Black defendants convicted for having raped White females were considered "the primary targets of the death penalty for rape: eighty-five percent of all executions for rape involved this combination" (Bentele, 1993, p. 256). As observed by Kotch and Mosteller (2010), it is equally noteworthy that the same crime of rape if committed by a White person, so with a reverse race of defendant/ victim constellation, was not counted as a capital offense which lets one suppose that death sentences for rape convicts were a means solely reserved and designed for Black defendant cases with White victims.

Apart from this, it was long justified to resort to disciplinary measures “short of death outside the courts” (Kotch & Mosteller, 2010, p. 2047) without having to fear consequences until, following the *State v Mann* case in 1744, the killing of as well as, more broadly speaking, any other harmful act committed against a slave by a White person was classified as a crime with a legal basis for punishment. And even then, it still took until 1820, when a court imposed the first death sentence to a White offender for having killed a slave.

Despite this one contrary development to the primary trend of designation of (capital) punishment, it

could be confirmed that it was African Americans, almost exclusively slaves, who "constituted 71% of the 242 people executed from 1726 to 1865" (Kotch & Mosteller, 2010, p. 2043). From that point onwards, slavery had officially been abolished and a few years later, in 1868, the number of crimes falling under capital offenses were limited to four: murder, rape, burglary and arson and these were equally applicable to Whites as well as African American citizens (Kotch & Mosteller, 2010).

2.2 20th century capital punishment in North Carolina

While lynching, that was becoming increasingly crueler towards the late 1800s, as well as race-based executions were carried out simultaneously for a long period, this practice started changing around 1900. The latter method decreased in its use and significance and consequently, lynching of Black people took place much more frequently (Kotch & Mosteller, 2010).

Another major change worth noting occurred in 1909. Whereas formerly, local governments had assumed responsibility for executions, this power was transferred and newly conferred upon the State North Carolina (Radelet & Pierce, 2011). In other words, before that year the matter of capital punishment had been in the hands of a number of smaller administrative units, namely local authorities, where it might have been much more difficult to impose uniform standards on a broader scale. From 1909 onwards, this was no longer the case and instead, the State itself commenced killing, which encompassed responsibility for all the legal procedures and structures according to which the death penalty was administered and imposed. Kotch and Mosteller stated that this change from locally organized hangings to centrally planned and conducted electrocutions as execution method signified a major shift pioneered by North Carolina as part of its region and the nation as a whole. They continue to remark that "North Carolina's history reveals a pairing of the desire for progressive change that has bolstered the state's reputation as moderate among southern states and the less forward-thinking attitudes [….] that have long troubled the South" (Kotch & Mosteller, 2010, p. 2036).
Technically speaking, it is only from then on that we can search for answers concerning the impact of racial discrimination on the death penalty in North Carolina as a whole.

Racial disparities continued to cause problems and be reflected in practice, in any case. In the time span between the end of the Civil War and the early 20th century, out of the 160 persons that were executed, African Americans accounted for 74%, whereas this stood in immense disproportion to the mere 38% of the population they represented. Next to this fact, there is further, substantial proof demonstrating race-based unequal treatment in the criminal justice system.

The next period to be discussed, that has attracted research interest of scientists focusing on race-based capital punishment, are the 1930s and 1940s. Firstly, there was the seminar study published by Johnson in 1941 dealing with cases from five counties located in North Carolina and covering the time span between 1930 and 1940. In the second place, Garfinkel engaged in a similar project also investigating the same decade but for ten counties with data demonstrating "that Black defendants who killed White victims were treated more harshly than other homicide cases at all stages of the criminal justice process" (Radelet & Pierce, 2011, p. 2132). Another study by the same researcher provided conclusive proof that "only 5 percent of those who killed blacks were sentenced to death, compared with 24 percent of those who killed whites" (Spohn, 2015, p. 84). Thirdly, Johnson directed another study at a later point, where he examined Black-on-White-crimes and correlating interracial effects from 1909 to 1953. All three of these research projects unanimously "documented bias in death sentencing and execution where the victim was white, regardless of the race of the defendant" (Bjerregaard, Cochran, Fogel, Kavanaugh Earl & Smith, 2008, p. 154).

Similarly as before, the trend of an excessive percentage of African Americans facing execution for rape, and secondly burglary, was still visible as a particular phenomenon in the southern states, such as North Carolina. In total, across all types of crime and defendant categories, 362 people were executed from 1910 – 1961. Thereof, 283 were Black African Americans, amounting to 78%, and adding Native Americans, the figure for racial minority groups rose to 80%. This number was the third highest among the states in the South and on sixth position out of all federal states.

Regarding the share of death sentences where execution ultimately was carried out, "in cases with Black defendants and white victims, 80.5% of cases resulted in execution as compared with 68.3% of cases with white defendants and white victims" (Kotch & Mosteller, 2010, p. 2072). In a similar fashion, Johnson examined the share of capital sentences that proceeded to execution and noted that of all White death row inmates, this was a mere 2.9%, while 57.9% of the Black defendants were executed. Subsequent research let him deduce as well that social class was a decisive factor in the question of execution, and when studying educational attainment and occupational status, he identified those belonging to a lower socio-economic class to be the most affected (Johnson in Radelet & Pierce, 2011).

There has been a row of other pre-*Furman* studies regarding capital sentencing, that showed a significant bias against Black defendants and sometimes even race discrimination on the basis of the defendant's and the victim's race (O'Brien et al., 2016).

Summarizing the main statements of all the studies listed, they seem to conclude that "execution patterns remained largely unchanged between the colonial period and the dawn of the civil rights era, demonstrating the resilient, and indeed dominant, power of race on the death penalty" (Kotch & Mosteller, 2010, p. 2067).

However, it is important to acknowledge that it remains difficult to determine and verify information, such as numbers of capital cases, defendants' racial backgrounds and case outcomes, especially those dating back to the 1700s, with great precision. Therefore, researchers always have to cope with limits to data availability. This holds true despite the fact which one would assume should suggest that sufficient data and statistics be available for examination, namely that "North Carolina ranked among the top ten states for: number of individuals on death row, number of executions carried out after the *Gregg v Georgia* (1976) decision, and ratio of homicides to death sentences" (Wholl, 2015, p. 48).
Relative to other States, North Carolina has been known for collecting little data on cases of homicide which further complicated the endeavor (Radelet & Pierce, 2011).

2.3 Modern death penalty era in the aftermath of *Furman*

More recent and updated research continuously became necessary since some of the external factors and variables changed as well, namely the scope of capital punishment laws. "By the early 1970s, the death penalty statute in North Carolina allowed executions for murder, rape, burglary, arson, and carnal knowledge of a child aged twelve or younger" (Radelet & Pierce, 2011, p. 2126). For a few certain types of crime, the death penalty was even prescribed as compulsory. Still, this indicates that overall, a great reduction could be observed in the numbers of death-eligible capital crimes compared to the scope of death eligible offenses in colonial times or during slavery.

At the same time, this marks North Carolina's last death penalty statute in effect before the momentous *Furman* verdict in 1972 with which the existing capital punishment statute was declared to be unconstitutional due to its arbitrariness and the death penalty having been abolished nationwide. The last execution in North Carolina mandated under this statute took place in 1961. There was even a case specific to North Carolina (*State v Waddell*, 1973) in the aftermath of *Furman*, which ruled part of the rape statute unconstitutional. The reasoning expressed criticism that it allowed for too much discretion. Above that, a mandatory death sentence was meant to be retained for first-degree murder and rape, which was later invalidated in the *Woodson* process (Kotch & Mosteller, 2010).
In the case of North Carolina, capital punishment was struck down and suspended for 5 years until a changed death penalty statute was passed and came into effect in June 1977 (Bjerregaard et al., 2008).

Just like in the case of all other states, the new North Carolina statute had to meet a couple of requirements as well. These were, for instance, "explicit sentencing criteria, separate sentencing hearings, consideration of mitigating circumstances, and automatic appellate review" (Sampson & Lauritsen, 1997, p. 354) and designed to ensure a certain level of fairness and transparency as well as procedural safeguards. There were other States, for instance, Georgia, Florida and Texas, whose newly proposed statutes marked by a so-called 'guided discretion' nature were immediately adopted as constitutional; in contrast, the version initially presented by North Carolina in a first attempt in *Woodson v North Carolina* (1976) was rejected together with the statute proposed by Louisiana (*Roberts v Louisiana*) due to unconstitutionality on the grounds of defining capital punishment as the obligatory sentence for certain types of crime (Bentele, 1993). Although ultimately approved, the statute created by North Carolina was, in the view of some scholars and critics, still characterized by "substantial leeway in interpretation and application, allowing the continuation of both substantial discretion and broad definitions of death eligible cases" (Kotch & Mosteller, 2010, p. 2079), particularly with regard to the aggravating factors defined therein.

Something striking that could be observed in the years after the *Gregg* (1976) judgement, nevertheless, was that exactly the same States, which the highest numbers of executions could be attributed to in the period before *Furman*, also continued to rank at the top of the list when it came to death sentences carried out in the modern era under the newly approved capital punishment statutes. And these were mainly Southern States and North Carolina (Bentele, 1993). That said, the 1976 verdict of *Gregg* simultaneously rang in the beginning of a new phase of studies, capturing the alleged fairness of capital sentencing under the newly actives statutes.

Towards the end of the 20th century, the research undertaken in relation to racial disparities in capital punishment started becoming better structured and was classified into 'four waves'. The first one is dated around the mid-1960s and concentrated more generically on proving the discrimination of minorities in the capital punishment system. Subsequently, the second wave was fueled by the civil rights movement closely after, developed with a more sophisticated approach, such as more variables controlled for, and geared towards attempting to establish if race did play a significant role in capital sentencing. This again was followed by the third wave, mainly set in the 1970s and 1980s, when *the* crucial question was to expose more in detail how the "legal system discriminates on the basis of racial or ethnic group membership" (Sampson & Lauritsen, 1997, p. 346) and, first discussed the notion of race-of-victim bias more profoundly. Last but not least, the fourth wave drew attention to determinate

sentencing and focused more specifically on prior stages of the criminal justice system, where bias can taint the process and prosecutors' discretionary powers can potentially be exercised to the detriment of marginalized groups.

From as early as the timing of the second wave onwards, the 'no discrimination thesis' (NDT) had been introduced by some scholars, by whom the idea that, racial disparities apparent could be related to racially biased attitudes distorting criminal justice, was met with huge resistance (Sampson & Lauritsen, 1997). Studies conducted by Unah in the 1980s and 1990s even excluded the existence of race-of-defendant disparities at all (Unah in O'Brien et al., 2016) and data sets by Stauffer collected from 1977 – 2010 produced the same result (Stauffer in Wholl, 2015). Bjerregaard et al. (2008) supported this thesis but making it conditioned upon the consideration of further factors, primarily those of aggravation and mitigation.
Nevertheless, widespread agreement was present concerning the fact that racial disparities persevered, as determined by Radelet and Pierce (2011) over the period from 1980 until 2007. How and at what stages exactly racial bias influenced trials was the subject of controversy. The prevailing opinion mostly became more differential than just to claim both defendants and victims were discriminated against, a statement asserted by Sampson and Lauritsen (1997).

On the other side, however, a number of distinct researchers, however, distinguished between effects for defendants vs. victims and affirmed in the first place, race-based discrimination against victims at the sentencing stage between 1977 – 1978 (Nakell & Hardy in Kavanaugh Earl, 2005). More precisely, their conclusion stated that "defendants in cases with white victims were six times more likely to be found guilty of first-degree murder than defendants in cases with nonwhite victims" in the 1980s (Nakell & Hardy in O'Brien et al., 2016, p. 2005). Evidence for the race-of-victim theory in the modern era came, for instance, also from Isaac Unah and John Borger, who specified the "odds of a death sentence for defendants, regardless of their race, convicted of killing Whites were approximately 3.5 times higher than the odds of a death sentence for those convicted of killing non-Whites" (Unah & Borger in Radelet & Pierce, 2011, p. 2135). A further example from that research period is data from the study by Radelet & Pierce (2011), which spanned the period of 1980 to 2007, demonstrating that "the race of the victim in homicide cases is a strong predictor of who is sentenced to death in North Carolina" (Radelet & Pierce, 2011, p. 2145), or in other words "a significant factor in the decision to seek and/or impose the death penalty" (Radelet & Pierce, 2011, p. 2146).

Additionally, the study by Radelet and Pierce (2011) found evidence for the death-sentencing rate in cases between 1980 and 2007 with at least one White victim to be at 3.9%, whereas in cases with a Black victim this would merely be a rate of 1.2%. They also regarded cases of solely White victims and concluded that White defendants received the death penalty in 2.9% but Black defendants in 6.1% (Radelet & Pierce in Bjerregaard et al., 2008). This is conclusive evidence that race-of-victim discrimination, when present, can subsequently and indirectly result in race-of-defendant bias as well.

By contrast, a race-of-defendant impact could not be verified at the sentencing stage, but rather at the earlier point of the prosecutor's charging decision by advanced studies that controlled for several factors, including the seriousness of the case (Kavanaugh Earl, 2005).

2.4 Post-1990 research and the role of juries

In 1990, another precedent case was adjudicated in the North Carolina context. The decision reached in *McKoy v NC* bore the consequences of striking the capital punishment statute under the existing conditions once more that had originally been drafted in accordance with the *Furman* verdict. The criticism was regarding the fact that it was demanded that jurors were to unanimously accept mitigating factors, and this rule was changed in a way that every juror from then on remained free in their choice to independently consider whether or not they held any mitigating evidence to be valid (Bjerregaard et al., 2008).

Another more long-term development revealed by research is that the impact of the defendant's race on capital charging practices and death sentencing has declined over the course of time since the *Furman v Georgia* decision from 1972 (O'Brien et al., 2016). As a consequence, the post-1990s studies on capital punishment are mainly characterized less by documenting the race-of defendant effect and more by a race-of-victim bias (Kavanaugh Earl, 2005). There has been similar research indicating that back in the 1980s, the likelihood of a suspect of killing a White person to receive the death penalty and one suspected to have caused the death of a Black person was 3.3 times higher but this discrepancy has reduced to 3 up until 2007 (Radelet & Pierce, 2011). A study taking into account potentially capital offense cases by Unah and Borger (2001) revealed a statistically significant race-of-victim bias, where someone who has murdered a White person was 3.4 times more likely to be sentenced to death. Beyond that a minor race-of-defendant effect could be established in White victim cases, with African American defendants receiving the death penalty at a likelihood of 6.4% compared to White defendants at 2.6% (Kavanaugh Earl, 2005). Further research by Unah also informed that "prosecutors were 43%

more likely to seek the death penalty" (O'Brien et al., 2016, p. 2008) in a scenario with a Black defendant and White victim than vice versa. McAdams reached the conclusion that it is safe to claim that Black defendants charged with the killing of a White victim face the highest chances to be sentenced to die and Blacks, by contrast, who killed a Black person are least likely to receive the death penalty (McAdams in Kavanaugh Earl, 2005).

Adding to that, homicide crimes were punished slightly less harshly, as 2.7% of all homicides of the 1980s committed before the *McKoy* verdict carried a death sentence, whereas 2.3% did so post-*McKoy*, up until 2007 (Radelet & Pierce, 2011). This can be interpreted as a strong sign that there has been a minor decline in racial disparities impacting capital punishment.

On the other hand, the numbers and hard facts speak a clear language. Since North Carolina's renewed capital punishment statute was granted approval after *Woodson*, 391 defendants received the death sentence. This figure is comprised of a share of 44% of Whites, 49% of African Americans, and, more broadly, 55% belonging to minorities (African Americans counted as part of them). A total of 43 people has been executed since then. "Among those executed, 30% were African American (33% belonged to a minority) and 65% were white" (Wholl, 2015, p. 2089). This data let the state rank among the top ten in terms of the number of defendants which have entered death row, ratio of homicides to death sentences (Stauffer et al., in Wholl, 2015) and in terms of number of executions carried out after 1976 even on rank eight (Kotch & Mosteller, 2010). What also remains true is that chances of a death sentence are the greatest in cases involving a non-White defendant and a White victim (6.4%) and the likelihood is the lowest with a White defendant and a non-White victim (1.7%), as reported by Hitchcock (2006).

Moreover, with the advancing of the initial research stages, the finding became further consolidated that neither the victim's nor defendant's race could amount to significantly predict a certain case outcome when other variables such as aggravation and mitigation circumstances as well as gender, were taken into consideration (Bjerregaard et al., 2008). Kremling et al. (2007) made a similar observation when comparing trials pre- and post-*McKoy v North Carolina* (1990) and reported an increased effect of aggravators and, at the same time, a decreased impact of mitigators in the period after 1990 compared to before that time (Kremling in Wholl, 2015). Bjerregaard et al. (2008) are of the opinion that aggravation specifically seemed to have a larger impact on Black defendants if the victim was White. In the view of Stauffer, the number of aggravating factors that were accepted by the jury was the "strongest predictor of death sentencing" (Stauffer et al. in Wholl, 2015, p. 48).

This on the one side contributed to the NDT. Besides that, it supported the theory that racial bias and subtle racism would impact capital sentencing rather as elements having indirect effects (Sampson & Lauritsen, 1997).

Due to the high number of studies led in this field, not all of them have or even could have produced the same unanimous results. It remains a highly controversial debate, always depending on the exact research subject, framework, and methodology. So it is probable to be confronted with varying outcomes.

While certain evidence was perceived as indicating a lesser influence of the classic forms of race-related discrimination, more substantial proof became available for other kinds of racial bias inherent in the criminal justice and capital punishment system. Related to that, the claim was asserted that unconscious discrimination has gained more importance (Kotch & Mosteller, 2010).
An extensive debate started emerging on the phenomenon of juror striking, primarily affecting African American jurors that managed to be taken off the potential jurors record by prosecutors using dubious explanations and motives (Ndulue, 2020).
Even though this discussion was not only led in North Carolina, researchers still investigated this hypothesis as well by regarding a set of capital proceedings having taken place in that State and concluded that "qualified Black jurors were struck from juries at more than twice the rate of qualified white jurors […] between 1990 – 2010" (Ndulue, 2020, p. 47). In conclusion, it has been held that "continued role of discretionary judgments by prosecutors and jurors permits the operation of unconscious racial motivation to affect death penalty decisions" (Kotch & Mosteller, 2010, p. 2106).

3 "A NEW ERA DAWNING" – THE MAIN POLITICAL FACTORS GIVING IMPETUS TO THE ADOPTION OF THE RACIAL JUSTICE ACT

The focus in this current section will now be shifted to reach a better understanding of how the Racial Justice Act (RJA) was born and ultimately passed in North Carolina. Therefore, a clear link will become visible between past developments and those events occurring in the months and years directly leading up to the passing of the RJA, both relevant as they set the scene for this Act to be adopted.

3.1 The litigation strategy: a dead end?

Even though the goal of the legislation and the mindset of its supporters ought not to be mistaken as being the same one that characterizes general abolition movements, there is a certain overlap in the intersection of the two, otherwise distinguishable, fields. What both of them share and use to leverage their cause, is the concern about unproportionally cruel and unusual treatment which is at odds with the Eighth Amendment clause. This concern has been documented, among other sources, by North Carolina case reports dating back to 1801. According to it, a lawyer argued that a punishment of pressing someone to death would be contrary to the principle of prohibition of cruel and unusual punishment as contained in the State Constitution (Bessler, 2009).

A second sign of evidence can be found when considering that delegates from North Carolina and other states took inspiration from the English Bill of Rights, particularly section 10, and demanded to include language similar to such used in the Virginia Bill of Rights, namely, to insert "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (Bessler, 2009, p. 258).

Next to this demonstration that there had always been voices critical of the capital punishment scheme in itself, there was additional motivation coming to play when the idea of drafting what would later be titled as RJA evolved. More precisely, the gradual 'awakening' to the realization of racial disparities existing in capital sentencing, created by the numerous scientific studies published towards the end of the 20th century, was a decisive factor giving fertile ground to the RJA (Spohn, 2015).

The originally primary strategy pursued by death penalty activists in the 1960s to overcome this system corrupted by racial bias illustrated has been a constitutional litigation strategy designated to advance racial grounds to contest the constitutionality of the death penalty. This implies that change to the status

quo was sought via the avenue of courts. Organizations like the National Association for the Advancement of Colored People's (NAACP) Legal Defense and Educational Fund (LDF) assumed an important function in implementing said strategy (Grosso & O'Brien, 2011).

Whereas some wins such as *Furman v Georgia* temporarily striking down the death penalty could be accomplished, even this particular one was later relativized and had, in the overall realm, a rather small and short-lasting impact. Other key cases, that had the potential to impose meaningful limits to race-based capital sentencing were *McCleskey v Georgia* and *Batson v Kentucky* that were decided around the same time. Both did acknowledge the detrimental effect of racial bias in the capital sentencing system as well as in the jury selection process (Mosteller, 2012). What distinguished the two is that *McCleskey* did not go further than pronouncing the simple acceptance of this discriminatory reality and merely declaring that it could or would offer no solution to this.

The *Batson* court, however, arrived at the conclusion that action had to be taken to introduce a remedy, namely affording defendants the right to challenge prosecutors' decisions to exclude potential juror candidates if racial motives could be proven. In the cases of these so-called unlawful peremptory strikes, the prosecutors are required to bring forward race-neutral and objective reasons to explain why they hold the opinion that specific persons would not be qualified to serve as part of a jury (Pollitt & Warren, 2016).

This potentially presents an opportunity for jury members of minority races to dispute situations where they are unduly deprived of their right to jury participation, an important civil right. In turn, it can also become equally relevant for defendants who are impacted by this depending on whether they are tried before a diverse jury representative of the local population or in front of only people from a background to that of the defendant. The future was meant to show, though, that this was more an illusionary remedy working in theory rather than in practice. Prosecutors, being aware of this measure and the risk of an objection by the opposite side, have been smart to take precautions and prepared to purport race-neutral reasons so as to exercise their strikes regardless. In North Carolina, the promise of the *Batson* judgement has been especially disappointing as no complaint raised over the course of years has ever been successful (Pollitt & Warren, 2016).

A further judgement that had from the beginning on symbolized a harsh setback for the critics of the capital punishment regime in North Carolina was *Woodson v North Carolina*, after which the death penalty was reinstated. While demanding several changes from the old statute, that had been declared unconstitutional a couple of years ago, the newly approved version still allowed the prosecutors to have quite much discretion, e.g. with regard to how to apply and interpret aggravating factors (Grosso &

O'Brien, 2011). The influence of this is not to be underestimated and, again, left room for discriminatory practices.

The sum of the aforementioned factors "represent[ed] the bitter end to that [litigation] strategy" (Grosso & O'Brien, 2011, p. 467) and produced a sentiment of dissatisfaction among a share of people, primarily lawyers, civil rights activists, disadvantaged defenders and, naturally, the group of African Americans as a whole. Having witnessed that any efforts to obtain justice by means of relying on courts had been in vain, they were searching for a feasible alternative strategy in "an effort to cure the impact of McCleskey and eliminate the weakness of Batson" (Mosteller, 2012, p. 145).

One very important aspect about the *Furman* court verdict, that is relevant at this point of the movement reorganizing their tactics, needs to be added. In the elaboration of his judgement, Justice Powell stated that the most suitable institution to deal with the role of statistical evidence in assessing racial disparities in capital punishment would be the legislature. He justified it by saying that: "It is the legislatures, the elected representatives of the people, that are constituted to respond to the will and consequently the moral values of the people" (*Furman v Georgia*, 408 U.S. 238, 383 (1972)). In the subsequent *McCleskey* judgement he added that "legislatures also are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts" (*McCleskey v Kemp*, 481 U.S. 279, 319 (1987)).
By delivering such a statement, Justice Lewis Powell extended an invitation to legislative bodies to take charge of this problem within the boundaries of their capacity and this has been a crucial turning point for how the struggle against race discrimination and the death penalty was framed. In the words of Grosso and O'Brien, "McCleskey signaled an abrupt end to the litigation strategy that had dominated death penalty abolition and criminal justice reform since the 1960s" (Grosso & O'Brien, 2011, p. 472).

3.2 Change of course: The policy-based strategy

Efforts of the advocates and grassroot organizations were re-directed more broadly instead of merely following a litigation strategy and parties of the movement started pooling their resources dedicated to their campaign against racial bias in capital punishment. Grosso and O'Brien (2011) identified three main groups that have had a major stake in advancing this pursuit in the legislative fora of North Carolina, such as the House of Representatives and the Senate: legislators, civil rights advocates, and death penalty reformers. Even though each of the various actors might have supported the cause for their own unique reasons, the decision to collaborate with one another certainly multiplied the leverage

potential of the single coalition members. In this sense, it has been essential, but still admirable, how the different partners joined forces in achieving this shared mission.

Apart from the legislative advocates championing the idea of an RJA, there were two primary organizations from the civil rights field that contributed to the movement. To begin with, the NAACP section of North Carolina has been ascribed to have "played a distinct and leading role in the joint RJA campaign" (Grosso & O'Brien, 2011, p. 478). They had a history of pushing for a Human Rights (HR) agenda and with that targeted minority groups less represented in the public space, i.e. African Americans. A crucial change came about when in 2005 Reverend Dr. William J. Barber was elected as the new NAACP president, heralding a new era for the movement. On the one side, he made his mark by concentrating on re-energizing the grouping as a whole and on the other side, he recognized the necessity to stand united and cultivate bonds with other like-minded associations pursuing the same mission (Grosso & O'Brien, 2011). To be precise, he ushered the way for the NAACP to join a coalition counting close to 100 member organizations, that became known as the "Historic Thousands on Jones Street" (HKonJ) grassroot movement.
Together with their partners, Barber's NAACP developed the so-called 14-Point plan defining the focus of their social and civil rights work and, simultaneously serving as the basis for the preparation of bills they wanted to introduce in the legislative bodies. Point 9 of the plan contained a call to abolish racial discrimination engrained in the death penalty (NAACP, 2006). The movement had already provided support to the RJA during previous attempts of the General Assembly to pass the law which had at first been unsuccessful. Their following expanded even further when they, in the run up to the 2008 presidential election, launched a voter empowerment campaign. Among other goals, this initiative aimed at promoting voting among minority communities, such as the African American, where election participation rates were lower than average. The participants of this campaign sought to raise awareness about the importance of casting a vote, facilitate access to voting and lastly, assist with voters' registration. The echo and achieved results were fantastic: North Carolina obtained the highest share of registration among the voting eligible population by nation-wide comparison (Grosso & O'Brien, 2011). To honor this accomplishment, the North Carolina chapter of the NAACP was awarded at the 99th annual NAACP Convention in 2008.

The second major civil rights organization forming part of the coalition movement was the Death Penalty Reform Movement founded in 1965, which was as of 2003 renamed as the "North Carolina Coalition for a Moratorium" (NCCM). The name change was a strategic decision taken to replace the

negative connotation of having an "against" in the name towards a more positive framing. Thereby, it also left behind the most direct sign of its ambition of striving for death penalty abolition and presented itself as something a little more moderate in terms of rather setting proposals for capital punishment on its agenda. Under its umbrella, there were again various smaller NGOs with diverse profiles and expertise comprised. These were united by their shared vision of enabling reform to happen in the field of capital punishment in North Carolina. And in order to fully negotiate and realize their reform ideas, they advocated for a moratorium, temporarily suspending executions. The NCCM was also fortunate to enlist the support of a number of renowned North Carolinians, e.g. lawyers, former elected representatives, district attorneys, leading religious personalities and retired judges (Grosso & O'Brien, 2011).

3.3 Setbacks on the way of enlisting support

And even with the majority of their initiatives centered around an approach targeted to the legislative setting the movement could not totally neglect implementing remedies linked to a litigation strategy. Especially, after the number of executions carried out in the state rose to seven in 2003 and was at the highest level of the modern capital punishment age since the death penalty statute was reintroduced in 1976 (Death Penalty Information Center, 2021). Efforts to convince courts of the unconstitutionality of the death penalty in North Carolina continued alongside and a few cases were brought forward objecting the use of lethal injection in that context (Grosso & O'Brien, 2011). Their challenges succeeded considering that they led to a de facto moratorium passed by the North Carolina senate halting executions from 2006 onwards, which have not been resumed ever since (Death Penalty Information Center, 2021), and creating better chances for the implementation of reforms as the RJA.

Now, that two of the main non-legislative actors involved in this project are better known, how the rest of the story went is still not that straightforward. Even with combined efforts, it took them much perseverance over time until their actions bore fruits, that is to say measurable results. As it has been described, the organizations that later became frontline supporters of the movement had started taking action before there was mentioning of it as part of a more high-level political debate. The first attempt at presenting a draft for the RJA undertaken by Representative Ronnie Sutton dates back to 2001. This came about per a recommendation issued by a Legislative Research Commission. At first, the progress of going through different committees seemed to go well but finally in October 2002, the draft bill was suspended indefinitely (Grosso & O'Brien, 2011).

Several years passed before the RJA became topical again and the General Assembly returned to deal with it, this time following its introduction and the lobbying work by Representatives Larry Womble and Earline Parmon in April 2007 (Grosso & O'Brien, 2011). And in the relatively long time since the last defeat some decisive events had happened. Even though the recognition and condemnation of the impact of race on the death penalty had stagnated or, at least, not advanced much, something else did instead. The overall perspective on the system of capital punishment experienced a profound change. North Carolina came into contact with the issues of innocence and exonerations. Equally by scientific research and its results documented in literature (Baumgartner, De Boeuf, & Boydstun, 2008; Gross, O'Brien, Hu, & Kennedy, 2014; Bjerk, Helland, 2019), this subject was more and more explored and entered into the public discourse. Within the preceding ten years leading up to the adoption of the RJA, there were six cases of exoneration. Even more grave, five out of these involved prisoners on death row (Grosso & O'Brien, 2011). The exonerations were based on grounds of ineffective counsel and prosecutorial misconduct. After these discoveries were picked up and heatedly debated by the media, legitimate concerns started surfacing that, as one of the consequences, caused Justice J. Beverly Lake to assemble the North Carolina Actual Innocence Commission in 2002. As a follow-up action, that previous Commission in 2006 made a recommendation to set up the North Carolina Innocence Inquiry Commission (Grosso & O'Brien, 2011).

Regardless, this second bill of 2007, too, failed as it was rejected by the Senate Committee. But in any case, what could be considered as a first stage-win emerging out of the innocence debate was that it stirred up the traditional image that every (death row) prisoner was a dangerous criminal and capital sentences were entirely justifiable. It altered this perception because the conversation was no longer about anonymous statistics and figures but some of the human faces behind the inmate stories were revealed. The anecdotes of capital defendants helped the population at large to empathize to a certain extent with them and forced people to rethink their opinion on the system of capital punishment. Since a change, slowly under way, in public opinion on this matter could be sensed, the ones leading this movement anticipated they needed more patience before sealing the passage of the act. They continued to believe in the potential of the draft law and were convinced that it was a matter of time until the right moment would present itself to push for the RJA once more.

3.4 The road leading to success in 2009

The already third attempt was hazarded by Representatives Womble and Parmon, once again, in March 2009. The duo reintroduced the Act in the House of Representatives of North Carolina. On the same day, Senator Floyd McKissick Jr. of Durham presented the draft law as well in front of the Senate in a parallel move. From there on, those three mobilized support for their proposed legislation in both political organs and defended what they labeled “an essential civil rights bill” (Grosso & O’Brien, 2011, p. 477). A passionate and extensive speech was given in front of the House of Representatives’ audience by Representative Womble to persuade his listeners of the enormous importance of rendering support to the RJA. McKissick, Parmon and Womble moreover organized a press conference appearance together with Black death row exonerees.

Furthermore, Paul Luebke and Pricey Harrison were co-sponsoring the law and the North Carolina Legislative Black Caucus joined the cause as Senator McKissick was a member of it, too (Grosso & O’Brien, 2011). On top of that, the draft bill found advocates in Senator Dough Berger, Speaker of the North Carolina House Joe Hackney, Representative Rick Glazier, Representative Deborah Ross, Representative Kelly Alexander. Kelly stressed during the House Floor debate on 14 July 2009 that “[t]his bill is not about statistics; this bill is about trying to eliminate and end bias in our system” (Kotch & Mosteller, 2010, p. 2127), meaning to reveal the true intention behind advocating for this draft law.

The legislative support camp could, in addition, draw on the coalition led by the NAACP and the NCCM with their partners, i.e. the ‘Murder Victims’ Families for Reconciliation’ and religious groups, to hold events to advocate for the RJA bill. This fact demonstrates that it was not simply a bill that was of interest to some political officeholders debating, largely disconnected from their voters, behind closed doors but it was of concern to an immense audience of North Carolinian citizens.

However, the draft law surely also attracted a lot of skepticism and opposition. Kotch and Mosteller (2010) pointed out that “[t]hose who opposed passage viewed it as badly misguided legislation that threatened the continued operation of the death penalty” (Kotch & Mosteller, 2010, p. 2127). Some examples of the most outspoken opponents of the Act include Senator Phil Berger, Representative N. Leo Daughtry and Representative Paul Stam. The major points of criticism articulated by the latter concerned the uselessness of introducing yet another type of procedural protections that already exist; the risk of abuse of the possibility to relief when mere statistical but unrelated evidence would suffice; the rarity of innocence among death row inmates; the bureaucratic and financial burden; the perishing

of the death penalty's deterrent effect; and last, but not least, the non-transparence of the sponsors of the bill trying to hide that their real motive was to abolish the death penalty (Stam, 2016).
In his remarks on the second reading in the North Carolina House on 14 July 2009, he addresses his colleagues by saying "[i]f you pass this bill, what you have done is create another three-year (approximately) moratorium on the death penalty for premeditated, deliberate first degree murder" (Stam, 2016, p. 19). This can be seen as him sending a first, very clear signal to discourage the other representatives from supporting the draft law. Phil Berger backed him up by making the appeal, "[m]ake no mistake, this law has little to do with justice and nothing to do with guilt or innocence" (Kotch & Mosteller, 2010, p. 2128) during the Senate Floor Debate on 14 May 2009. Moving on, Paul Stam stated that "[i]t's the retroactive feature of this bill, of course, that creates the huge financial train wreck costs" (Stam, 2016, p. 20). In his view, the way the RJA was formulated and would make every prisoner on death row in North Carolina qualified to file a petition under it was a waste of resources and he feared that countless claims might be raised. Besides that, he accused the supporters of the Act of using the issue of unfair racial bias as a pretext for wanting to end the death penalty once and for all (Kotch & Mosteller, 2010). Towards reaching a conclusion, the Representative remarked that "[t]o me the big problem with the bill is the clogging of the systems so that there will be no death sentences carried out for several years" (Stam, 2016, p. 20) and "one of the ironies of this bill is that it will make seeking the death penalty almost impossible" (Stam, 2016, p. 20). Paul Stam is also worth mentioning at this point already, since he later assumed an important role in repealing the RJA, as will be outlined in the subsequent chapters.

In reaction to the opposing party's argument that presentation of statistical in itself would not meet the threshold of reliable proof, Representative Glazier countered by saying that if statistical is used in employment discrimination cases "to protect property rights, I fail to see why credible statistical evidence ought not be a legislative reason or a legislative priority to allow people to use to fight for their life" (Kotch & Mosteller, 2010, p. 2113). Representative Deborah Ross drew a link to the *McCleskey* opinion and argued in a similar line of thought when conceding that there was no constitutional right entitling persons to bring forward statistical evidence but citing Justice Lewis Powell who clarified that "these arguments are best presented to legislative bodies" (*McCleskey v Kemp*, 481 U.S. 279, 319 (1987)). These statements were, hence, seen as their authors accepting the invitation spelled out by the *McCleskey* court to legislative organs to consider the use of statistical evidence in relation to race discrimination claims in capital proceedings. With this, the RJA resorts to

the well-established pattern of reliance upon statistical proof commonly applied in civil rights litigation (Mosteller, 2012).

At the occasion of the Senate approving Senate Bill 461, which constituted the RJA, Senator Dough Berger affirmed that “[w]ithout this legislation, previous attempts to raise this issue would have been to no avail because of the McCleskey decision” (Kotch & Mosteller, 2010, p. 2112).
All of this can be taken as evidence of the fact that there was a broad alliance of different political and social actors involved, without the efforts and commitment of which the adoption of the Act most likely would have not been feasible. And each individual member of this coalition was responsible for contributing to the success. For this reason, two leading personalities received special acknowledgement for their tireless efforts to win passage of the Act at the ceremony where it was signed into law by Governor Perdue: they were Rev. William Barber, NAACP President of North Carolina, and Charmaine Fuller Cooper, director of the Carolina Justice Policy Center, both part of the coalition of civil rights organizations mentioned earlier (Grosso & O’Brien, 2011).

4 TAKING A CLOSER LOOK – THE CONTENT OF THE RJA AND ITS MEANING

This chapter will examine the content of the North Carolina RJA more in-depth. A careful look at its wording will reveal the legislative intent behind it and help to understand the legal framework that allowed capital defendants to file motions for relief based on establishing race as significant factor in their death sentence proceedings. A historical comparison with the Kentucky Racial Justice Act will be made to point out parallels. Secondly, the evolution of the content from the various draft bills to the final Racial Justice Act version will be outlined. And lastly, the changes made in the amended version from 2012 will be analyzed.

The full version of the Racial Justice Act from 2009 and the amended Act from 2012 are attached in the appendix to this thesis.

4.1 Inspiration drawn from the Kentucky Racial Justice Act

One can say that the earliest inspiring source after which North Carolina's RJA appears to be modeled is the identically titled Racial Justice Act of Kentucky passed in 1998. This difference of eleven years is a considerable time but still, an influence of the latter on the North Carolina Statute can be detected. Both pursue the same aim, which is that of eliminating the negative influence of race in their respective state's capital punishment system. They, furthermore, perceive the basis for determining such an undue interference of race-related factors as being similar grounds and, given that these can be proven, deem them inacceptable and dictate that a death sentence shall not be sought under these circumstances. A very close similarity between the two Racial Justice Acts consists in their established finding of race being the "basis of the decision to seek a death sentence" upon the condition that "race was a significant factor in decisions to seek the sentence of death" (Kentucky General Assembly, 1998). What they agree on, moreover, is the fact that the requirement of proof can be fulfilled by presenting statistical evidence, other evidence or both. Such proof can be of a type to testify as to capital sentences being significantly more frequently sought for persons of one race than for persons of another race, i.e. *race-of-defendant-effect*, or as punishment for capital offenses against members of one race than as punishment for capital crimes against members of another race, i.e. *race-of-victim-effect* (Kentucky General Assembly, 1998).

In addition, the envisioned procedural characteristics are alike as well. The court shall schedule a hearing to deal with the defendant's claim and after the latter's evidence has been presented, the state party is to be given the possibility to offer evidence in rebuttal (Kentucky General Assembly, 1998).

However, since the North Carolina Racial Justice Act was developed on a more advanced basis, in terms of the state of research and knowledge available progressively with more time passed, it equally has features distinguishing it from the earlier Kentucky Racial Justice Act.
The first to mention is that the RJA of North Carolina allows for it to be applied retroactively, while the Kentucky Statute does not (North Carolina General Assembly, 2009). That also opens up the scope of those to potentially benefit from the Act in North Carolina as it includes capital defendants that had been sentenced to death before the adoption of the law as well as anyone receiving the death penalty once the Statute had come into effect. Whereas in the case of Kentucky, the possibility of being granted relief under the Racial Justice Act for those persons who had previously been unfairly tried and who had suffered from racial bias affecting the decision to seek a death sentence for them, was denied. This implies that an interest to denounce and offer redress for the wrongs of the past having occurred in the capital punishment system in relation to race-based death sentencing was not expressed.

Secondly, the Kentucky RJA merely includes language stating that "race was the basis of the decision to *seek* the death sentence" (Kentucky General Assembly, 1998). The use of the verb 'seek' clearly connotates intent or motive on the part of the party that sought to impose the death penalty. North Carolina's legislature decided to go a step further and added "the death sentence was sought *or imposed* on the basis of race" (North Carolina General Assembly, 2009) or, in one instance, "sought or obtained" (North Carolina General Assembly, 2009). This reflects the belief that the possibility of a motion for appropriate relief (MAR) does not only apply in cases where race was the conscious and intentional motive for differential treatment and the discriminatory conduct of the prosecution was overtly visible. At the same time, it proves the progress of time and that more recent studies have underlined that racial bias can very well operate in a hidden manner. This, in turn, poses the challenge of how to detect it and establish well-founded evidence to combat this covert phenomenon, but the RJA of North Carolina has taken this into account in a progressive spirit.

In the third place, there is a clear difference between the Statutes and the types of racially motivated acts it recognizes as grounds for establishing that race had played a significant role in a person's trial. The RJA of Kentucky lists merely two of them, the race-of-defendant bias and the race-of-victim bias (Kentucky General Assembly, 1998). Hence, it misses one that the North Carolina RJA additionally introduces: the race-based peremptory strikes of potential jurors exercised by prosecutors, resulting in

an inequality in jury participation or composition in terms of racial backgrounds represented (North Carolina General Assembly, 2009). That is a factor, which had been more and more explored by modern capital punishment research and consequently, given more weight in importance for guaranteeing fairness in capital trials. While the race-of-defendant has become less significant as evidenced by studies over the last decades, the opposite holds true for the issue of racial discrimination in selecting the jury panel. Increasingly more attention has been paid to this subtle discriminatory mechanism, the effects of it on the impartiality of actors involved in the proceedings and how to expose apparently neutral justifications covering up for strategic and racially motivated juror strikes.

Again, the drafters of the North Carolina Statute demonstrated their consideration of the growing acceptance of the existence of this flaw and incorporated it into their proposed act as something entirely new compared to the model from Kentucky.

Lastly, it must be pointed out that the texts of the two RJA apply different standards of proof for measuring the effect of race. The Kentucky RJA takes the approach to require the defendant to establish with particularity how the evidence testifies to the claim that race has been a significant factor in decisions pertaining to the specific individual's case (Kotch & Mosteller, 2010).

The North Carolina version, on the other hand, imposes a different requirement, namely of connecting the presented evidence to race being a significant factor in decisions of the prosecutor/ jury "in the county, the prosecutorial district, the judicial division, or the State" (North Carolina General Assembly, 2009). Therewith, "compared to the Kentucky statute, the North Carolina RJA imposes a particularity requirement regarding proof as to the four relevant geographical areas and not the individual defendant's case" (Kotch & Mosteller, 2010, p. 2118).

The framework of North Carolina's Act is a reaction to its capital punishment system being orchestrated according to a multi-level structure (Kotch & Mosteller, 2010). It encompasses the county, judicial district, judicial division and the state level as the sum of geographical areas and contends that racial bias influencing the proceedings at the highest level necessarily renders other death penalties administered by the same system as lacking legitimacy. Should this not be the case, the possibility remains for the defendant to build a case on proof of improper racial impact in any smaller unit down to the county.

4.2 RJA drafts presented in the General Assembly

The following paragraphs are dedicated to the RJA's content and the changes made to it at different stages when under scrutiny by two legislative bodies, the House of Representatives and the Senate of North Carolina. The objective is to compare the earliest proposal and understand to what extent it has evolved and been adapted until the Statute was finally passed. In the case of the House of Representatives, there had been four preliminary versions since the bill was first introduced and, what concerns the Senate, six previous proposals had been discussed.

The various drafts dealt with by the House of Representatives are overall marked by great similarities and only feature minor differences and will be analyzed first. In all different versions there has been substantial accordance with regard to the core elements, such as the purpose of it being to "provide for a fair and reliable imposition of capital sentences" (Representative Womble & Parmon, 2009, p. 1). On top of that, they declare that death penalties sought or imposed on the basis of race in defined geographical areas, i.e. the county, the prosecutorial district or the state (Representative Womble & Parmon, 2009), cannot stand. This formulation indicates that the preliminary drafts debated in the House of Representatives merely enumerated three different geographical units, while the final RJA also contained the judicial division as a fourth one at the end. Evidence proving that race was a significant factor in the capital proceedings can be established by a showing of discrimination as entailed by the race-of-defendant effect, the race-of-victim-effect, or peremptory strikes during the jury selection process. The very first version introduced of the House bill, however, provided for one additional avenue of satisfying the proof requirement for the impact of race, namely by means of demonstration of disparities connected to race, which the state could not explain by presenting race-neutral and justifiable reasons (Representative Womble & Parmon, 2009). This, if actually enacted, might have become quite a contentious clause in terms of what the courts ought to accept as compelling evidence of racial disparities and, even more so, what type of counterevidence as legitimate justifications. In any case, this inserted extra category of proving the influence of race did, ultimately, not receive the necessary support and was excluded from the Racial Justice Act.

Apart from these two elements, it can be noticed that already the early drafts of the Act reflected almost the exact same wording as the version that was signed into law at the end.

Secondly, in relation to the drafts bills that were examined by the Senate there had been more points of discussion. Some of them are identical to those that have already been raised when examining the content of the proposals considered by the House of Representatives. This is, for instance, the geographical scope and the introduction of an additional means of satisfying the evidence threshold by

establishing that racial disparities could not reasonably be justified. With this requirement, the same happened as in the case of the House of Representatives, namely that it was decided to strike it off the RJA draft. Concerning the choice of geographical areas to possibly be relied upon when attempting to prove improper influence of race in a defendant's case, there had been a lot of back and forth about which levels precisely to include. The county and the prosecutorial district, being smaller units, were less controversial and continuously mentioned.
On the other side, the "State at large" (Senator McKissick, 2009, p. 1) was a possibility that in later versions became substituted by "any prosecutorial district immediately contiguous to the boundaries of that [respective] prosecutorial district" (North Carolina Senate, 2009, p. 1), completely removed in the meantime and lastly, it was agreed to list four geographical units: "the county, the prosecutorial district, the judicial division, or the State" (North Carolina Senate, 2009, p. 2). That this element had apparently been the subject of a heated debate highlights the point that it had been a critical aspect and the decision in this regard would have important consequences. The views of the political representatives clashed and differed in relation to this disputed issue. The sponsors of the Statute certainly hoped to win another way of contesting racially biased proceedings and knew that such a more generic-level requirement might be easier to satisfy. The opponents of this bill, however, wanted to prevent that, based on systemic racial disparities, conclusions could permissibly be drawn as to the impact of race in the individual's case.

Besides that, the general description by which the Racial Justice Act was headed was kept quite brief in that it read "an act to provide for the fair and reliable imposition of capital sentences" (North Carolina General Assembly, 2009, p. 1), in line with what was stated in the proposal dealt with by the House of Representatives. In the course of discussion at the Senate, this description was expanded considerably. It grew to comprise at the beginning of the RJA a wider range of those substantial and procedural requirements subsequently laid out in the body of the bill, and the positive expression of "providing for fairness and reliability" (Senator McKissick, 2009, p. 1) got transformed into a negative denotation reading as follows: "an act to prohibit seeking or imposing the death penalty on the basis of race" (North Carolina Senate, 2009, p. 1). This had the effect that it aligned the language more closely with the terms used repetitively throughout the rest of the Racial Justice Act.

A further contentious part, where there had been disagreement about and that resulted in changes being made to the wording, was how the rebuttal offered by the State was to be organized. The focal point had unanimously been statistical evidence the State party was permitted to bring forward. However, an

earlier formulation required them to plainly present evidence that “no racial discrimination occurred in the county or the prosecutorial district” (Senator McKissick, 2009, p. 2). This stricter standard was then qualified by inserting “there was no racial discrimination with regard to the decision to seek or impose a sentence of death in the county [….]” (North Carolina Senate, 2009, p. 2). In addition, the scope of the evidence for the court to consider in benefit of the State was softened; it mentioned “any program [….] for the purpose of eliminating racial disparities” (North Carolina Senate, 2009, p. 2) at first and later, referred to “any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death” (North Carolina Senate, 2009, p. 2). The fifth version of the proposed act featured a particularity in that it added some details regarding the rules for the hearing procedure and the basis for that to be found in regulatory codes of the courts.
Out of all the different drafts considered, the one who stands out most is the third. This is due to the fact that, next to the content that all other versions have in common, it incorporated also elements meant to regulate another field. Namely, it spells out regulations concerning the healthcare professionals entrusted with carrying out executions and clarifies some of the operational and procedural technicalities of it.

For this reason, the introductory part of the third draft is altered, and it entails a completely new, second section dealing with aspects related to the practical implementation of the death penalty. It sets out the type of licensed professionals that is authorized to carry out executions, such as physicians, nurses, and pharmacists and protects them from any disciplinary legal action being taken against them based on their assumed role of assisting and being implicated in this process (North Carolina Senate, 2009). This demonstrates that a major objective was to create a legal basis to distinguish the medical tasks and activities undertaken in connection with death sentences from the ordinary practice of medicine. Moreover, the proposal meant to regulate the substances to be used for execution and other matters related to the place and time of the death sentence being carried out (North Carolina Senate, 2009). However, all these rules were struck off the Racial Justice Act in the end and the focus was decided to remain on regulations related to the judicial process, i.e. to the capital proceedings staged in court.

4.3 The final RJA version

For the remainder of this chapter, some additional outstanding features in the final RJA version will be analyzed as well as the change of its content and wording through the 2012 amendment will be elaborated upon.

First of all, it needs to pointed out that the North Carolina Act constitutes a mechanism to investigate whether race was the basis of a decision to seek or to impose a sentence of death. Its unique approach in examining this question is marked by the fact that it establishes a causal link between race-based sentencing and a showing of race being a significant factor in said decisions to seek or to impose the death penalty. The latter is set as the criterion which needs to be satisfied and reveals some important insights as to what the formulation and way in which it has been constructed imply. It is striking to read the term 'significant factor', that, on top of that, bears resemblance to what employment litigation knows as the concept of 'motivating' or 'substantial factor' (Mosteller, 2012). In the case of the RJA, it expresses the necessity that racial considerations must have exerted a considerable influence over the conduct of prosecution/ jury during the proceedings and ultimately, on the decision to impose or even just to seek a capital sentence.

However, meeting the threshold of a 'significant factor' does not introduce exceedingly high demands; there is no requirement to identify racial bias acting as the single determining factor in any death sentence decision or to provide evidence of a scenario where race is the exclusionary 'because of' factor conditioning the death penalty (Mosteller, 2012). The fact that the Statute talks about 'a' and not 'the' significant factor, superficially seen a minor difference, has as a result for the meaning that race need only be one out of possibly more reasons as long as it can be considered a significant cause. Once sufficiently convincing evidence is brought forward to establish this, it shifts the burden of production to the state, i.e. the prosecution, to rebut the claim raised by the defendant (Kotch & Mosteller, 2010).

In its effort to offer rebuttal, the prosecution is granted the use of two possible types of proof to invoke. One can be the so-called 'statutory factors', which encompasses any justifications for racial disparities that can be argued based upon circumstances given in the death penalty statute, such as nature and elements of the crime. The second possibility is to demonstrate evidence, including of a statistical kind or programs striving to eliminate the impact of race on decisions related to the imposition of the death penalty (Mosteller, 2012).

A further minor detail that is not to be disregarded concerns the geographical scope, that has already been explained to comprise the county, the prosecutorial district, the judicial division, and the state

level. In the text of the RJA, all these four components are linked by the conjunction “or” connecting the last two of them in the enumeration. This indicates that the racial discrimination complained about needs to occur in nothing more than just one sole area. At whatever of the four available unit levels racially motivated bias can be proven, it allows for the defendant to be entitled to a hearing in accordance with the formalities and conditions laid out by the Racial Justice Act.
Secondly, it simplifies and reduces the burden for comparisons by means of which the demonstration of racial disparities or strike patterns in the system of capital punishment is even possible in the first place. These phenomena remain much easier to be proven when one does not merely have to rely on a very limited geographical scope. This argument appears even more valid and pressing when taking into account that the kind of discrimination in question is a very subtle one. So, the challenge for the defendant is to gather sufficient evidence to be able to state with particularity in how far the secret and hidden motives of a prosecutor or juror, affecting his or her trial outcome and right to a fair trial, were racially discriminatory. Hence, by opening up the scope offered to the capital defendant to survey in order to support his claim of interference of racial discrimination, those patterns of peremptory strikes can be identified, stand a chance to be tested cumulatively and finally, be exposed if the dimensions are significant enough to establish an illegitimate, racially motivated imposition of a death sentence.

Exactly this problem of unconsciously operating racial bias is, additionally, taken up and addressed in another part of the North Carolina RJA. It is reflected in the threefold variety of types of discrimination that can be testified to. This is based on the assumption that there cannot only be the most ‘conventional’ form of race-of-defendant discrimination; besides that, racial bias can also take the shape of being led by greater empathy with victims or victims’ families of a certain race and therewith, indirectly discriminating against a defendant with a different racial background, for instance. And thirdly, covert racial prejudice can hold a significant influence over the process of jury selection, when there is the desire to have certain attitudes and views held by the prosecutor also perpetuated in the jury body with the ultimate goal that the same desired verdict is to be reached.

Allowing for all three described ways the race factor can have an impact on capital proceedings to be acknowledged as bases for a petition under the RJA is a novelty and breakthrough, which it was not possible to gain in preceding case judgements, most notably in the *McCleskey* and *Batson* verdict (Mosteller, 2012).

Another remedy through which hidden racial bias can be uncovered and countered is by being mindful of the distinction between disparate treatment and disparate impact. These two doctrines are closely

linked but, nevertheless, aim to account for a fundamental difference. The first concept, disparate treatment, requires intent on the part of the person consciously making a difference in the treatment of various individuals, in this case it would be due to race related reason; whereas in the second case, with disparate impact, it can be that there is no intention whatsoever to discriminate and still, it may be that, as we are humans, our actions can sometimes lead to discriminatory results/ outcomes, that we were not able to foresee when sketching them in our minds in the first place (Kotch & Mosteller, 2010). Certainly, disparate treatment is much easier to proof and, as a result, this is the very first conduct that the Racial Justice Act prohibits. But even beyond that, it seeks to be sensitive to disparate impact, supporting such an analysis, and serve as a tool to eliminate this. This can be recognized by turning to the very first lines included in the Statute. It is said there that no death sentence shall be valid once the decision was "sought or obtained on the basis of race". The fact that the term 'obtained' was chosen is crucial as "the word 'obtained' connotes results rather than intent" (Mosteller, 2012, p. 124). Consequently, the focus is explicitly laid upon also detecting supposedly unsuspicious and neutral behavior or policies that disproportionately impact certain groups in a negative sense.
This 'liberty' of not having to proof intent, furthermore, bears an analogy to the handling of the prohibition concerning jury discrimination enshrined in the Constitution of North Carolina. The practices regarding this have shown that the mere proof of discrimination by someone who served on a jury automatically suffices to declare void the given judgement while it does not need to become apparent that the discriminatory conduct ultimately impacted the evaluation or opinions formed about the defendant. The mere damage caused to the perceived integrity and legitimacy of the challenged process is reason enough to raise doubts that require clarification (Kotch & Mosteller, 2010).

Moving on to a different element, the North Carolina Act can also be regarded as progressive with regard to its recommendation of the consequences to be triggered in case of a finding that a certain sentence of death had been imposed based upon race. It is stated very clearly that, given such a determination, the court has not only the option to grant relief, but, more so, it has the duty to grant relief to the defendant (Kotch & Mosteller, 2010). In other words, it is compelled to vacate the death sentence and resentence the petitioner to life imprisonment without parole (LWOP). The clear formulation of the Statute ties the judge's hands and leaves no other choice than to invalidate the penalty of death in such cases.

4.4 How the tide turned and the RJA was amended

With the passage of the Racial Justice Act in North Carolina in 2009, its supporters were able to celebrate a glorious triumph. This success, however, did not last for very long as, right from the moment the bill was passed, the opponents continued lobbying against it in an effort to diminish its effect. The first important event was that, following the elections in 2010, the majority held in the assembly was no longer in the hands of the Democrats, but shifted towards the Republican Party. In April 2011, early on in the new term, the House Majority Leader Paul together with other Republican colleagues "pronounc[ed] their intent to repeal the RJA" (Grosso & O'Brien, 2011, p. 501). He proved to be concerned about abolishing all together the deterring effect of capital punishment when declaring "[t]he death penalty acts as a deterrent only if it is used. The death penalty will obviously not deter if the state only pretends to have a death penalty and never carries out the sentence" (nbcnews, 2012). Fellow Republican agreed with his position by referring to the RJA with the words: "This is about monsters. Monsters. Evil people doing unspeakable, inhuman acts. That's what this is about." (nbcnews, 2012).

The new proposal came to be officially introduced as House Bill 615. It passed the House of Representatives, whereas the Senate did not take it up until November 2011, when they, too, voted in favor of it. However, the Democratic Governor at the time, Bev Perdue, intervened at this stage by using her veto power to stop the bill. Afterwards, the Senate took a vote to override her veto and the House attempted to do the same but failed to reach enough votes. As a result, in January 2012 the bill was referred to a legislative committee (Grosso & O'Brien, 2011) and a reworked version of the bill was produced. Finally, in June of the same year, the General Assembly of North Carolina amended the Racial Justice Act as approved by the House of Representatives with a 73-47 vote in favor (Vidmar, 2012).

The two legislative organs being the House and the Senate had each dealt with drafts for the amendment law separately before its passage. As with the original Statute from 2009, there were strong parallels as well as some differences in the wording the respective versions contained. What they had in common as the bottom line is their principal goal to achieve consistency and bring the amended Act in line with the ideas expressed in the verdict of *McCleskey v Kemp* (North Carolina General Assembly, 2012). This already signals very clearly that the North Carolina lawmakers were taking a step backwards to old standards which they had attempted to overcome by means of enacting the RJA in the first place.

What this meant precisely is that according to the Statute's 2012 amendment, relying merely on the

showing of statistical proof to uphold a claim of racial discrimination no longer satisfied the evidentiary threshold. Instead, a discriminatory motivation or purpose behind the prosecution's decision or that of a juror to seek a sentence of death had to be demonstrated with particularity. This followed from the language "a finding [….] may be established if [….] the State acted with discriminatory purpose" (North Carolina General Assembly, 2012, p. 1). Also, the fact that the word 'imposed' or 'obtained' was omitted leads to the change that from then on, the scope was limited to only focusing on explicit bias, and no more accounting for implicit bias.

In a similar spirit, the number of geographical units from which the evidence concerning the improper influence of race could be derived was significantly decreased. The judicial division and state level no longer pertained to the areas to base the claim on and this, understandably, reduced the potential to obtain such proof (North Carolina General Assembly, 2012).

Out of the three different types of discrimination acknowledged by the Statute from 2009, the race-of-victim discrimination was removed and only the race-of-defendant bias and the innovative element of racially motivated juror strikes were maintained (North Carolina General Assembly, 2012).

Moreover, the trial court is not obliged to even organize an evidentiary hearing on the motion seeking relief from a death penalty; this only needs to take place once the claim filed is regarded to be of sufficient weight. The amended Racial Justice Act does not mandate the defendant be resentenced to LWOP once he or she can substantiate the claim to a satisfactory extent. The petitioner is merely entitled to receive a new sentencing hearing with no specifications on the outcome (North Carolina General Assembly, 2012).

Section three of the altered North Carolina Act emphasized that if any provision contained in it were to be declared invalid, said invalidity does not impact the status of the remaining clauses and provisions, which can be seen as an additional safeguarding mechanism (North Carolina General Assembly, 2012).

What distinguishes the draft which the Senate discussed from the one of the House is mainly that it aimed to create a more explicit reference to the *McCleskey* decision from 1987 and to argue how, based on that opinion and its guarantees, North Carolina legislation before the 2009 RJA had already displayed the necessary safeguards to exclude race from being a factor in capital proceedings. This was done by incorporating terminology equivalent to such that the *McCleskey* court employed, by claiming that equal protection rights were respected through procedural requirements and that it had been the concern all along to eliminate the influence of racial bias from the capital punishment system. It was

meant to convey the impression that the interpretations provided by the newly amended Act had always been intended in this way by the original law and hence, it was simply a matter of clarification (North Carolina Senate, 2012). That concerned one aspect in particular, namely the one of the burden placed on the defendant to establish discriminatory purpose, which was said to have equally existed in the prior Racial Justice Act.

The amendment version debated by the Senate was more radical in that it proposed to strike off the section detailing the 'hearing procedure' (North Carolina Senate, 2012). Lastly, the Senate considered including a clause stating that in case a defendant had filed a claim under the original 2009 Statute already, this person was not entitled to another petition under the altered Racial Justice Act (North Carolina Senate, 2012).

5 "PUT ON THE STAND AND TO THE TEST" – A RECORD OF ADJUDICATION HEARD UNDER THE RJA

5.1 Introduction

After having examined the statutory basis, this chapter will focus on the application of the North Carolina Racial Justice Act in practice. Immediately upon the RJA being signed into law, a vast number of prisoners on death row in the state filed Motions for Appropriate Relief (MAR) and claims under the RJA. Since the law was effective only for a limited period, the time span during which it was possible to file such a petition was definite. Nonetheless, 153 of those prisoners placed on death row in North Carolina "have used the Act to appeal their sentence" (Vidmar, 2012, p. 1971) within the permissible time frame. This can be perceived as a indicative sign of how many individuals saw a legitimate reason to raise a complaint for the purpose of proving race-related unfairness and discrimination having improperly affected the proceedings in their capital cases. If each of them was capable of providing and satisfying the merits and, in fact, qualified to be granted relief is a different question. But undeniably, grievances were there in a countless number.

As one can imagine also in practical terms there were many obstacles to organizing hearings and review under the Racial Justice Act for 153 petitioners in only about four years before the Statute was repealed again in 2013 (Vidmar, 2012). The following paragraphs will show in more detail how slow the process in conducting such hearings was. But the fact that the law has quickly been amended and subsequently abolished could not invalidate the right of those who had filed a petition to be entitled to a hearing. The very first claim that was raised in the context of the Act was by a man named Marcus Raymond Robinson in August 2010. He was equally the first person to receive a review hearing afterwards, which was set in motion in 2011. After him, there have only been proceedings started up to date in the case of three other defendants: Tilmon Golphin, Quintel Augustine and Christina Walters. The cases of the latter three were also in part heard collectively and hence, underwent the same procedural stages and phases. Therefore, it is evident that the case of *State of North Carolina v Marcus Raymond Robinson* was the pioneer case and has been dealt with most profoundly and at greatest length. This argument makes it the most suitable to discuss in more detail at first, while afterwards the nature and the events pertaining to the case of the remaining three claimants will be discussed and scrutinized.

5.2 Background in the *North Carolina v Robinson* case

The case of Marcus Robinson involves a relatively eventful and lengthy procedural history, dating back to the early 1990s. The African American defendant Robinson committed a murder crime on 21 June 1991 causing the death of Erik Tomblom, a Caucasian victim (*North Carolina v Robinson*, 2011). He acted in collaboration with a second person named Roderick Williams, who was charged as co-defendant in the case and at the time a 17-year-old teenager. Due to being a minor, Williams was not eligible to be prosecuted and tried capitally (*North Carolina v Robinson*, 2010).

Robinson himself was put on trial in Cumberland County for “one count of first-degree murder, one count of first-degree kidnapping, one count of robbery with a dangerous weapon, one count of possession of a weapon of mass destruction, one count of felonious larceny, one count of possession of a stolen vehicle” (*North Carolina v Robinson*, 2010, p. 2). Prior to the trial date, on 14 July Marcus Robinson had already pleaded guilty to a part of the charges brought against him, namely robbery with a dangerous weapon, kidnapping, possessing a mass destruction weapon, larceny and possessing a stolen vehicle (*North Carolina v Robinson*, 2010). In August 1994, the Cumberland County Grand Jury, in front of which the defendant appeared, found him guilty and soon after, pronounced the recommendation to impose the death penalty. This recommendation was followed by the Court and presiding judge E. Lynn Johnson and consequently, Robinson was sentenced to death on 5 August 1994 (*North Carolina v Robinson*, 2010).

There are a couple of points relevant to acknowledge. Firstly, that the majority of people serving in critical functions in the proceedings, including the judges, jurors, defense counsel and prosecutors were White. And this was the reality despite the fact that Cumberland County, which at the time of the trial was known as prosecutorial district 12 in the Second Judicial Division, was an interracial community with residents of different colors and cultures. The acting prosecutors managed to exclude 50% of eligible Black venire members, whereas only 15% of prospective non-Black jury members were targeted by prosecutorial strikes. This let the composition of the Grand Jury look as follows: two African Americans, one Native American, nine Caucasians and two Caucasian alternates were called to perform jury service (*North Carolina v Robinson*, 2010).

Secondly, it should be mentioned that the prosecutors articulated that they determined a motive based on racial grounds and proceeded on the assumption that the defendant acted primarily with that mind (*North Carolina v Robinson*, 2010).

In the aftermath of the trial, the defendant appealed the Court's verdict without success (Vidmar, 2012), as no error was found by the Superior Court in November of the same year. A post-appeal motion for appropriate relief from 1999 was equally denied by the exact same institution after conducting an evidentiary hearing. Furthermore, the North Carolina Superior Court rejected a certiorari review of said denial in August 1999. In the following year, Robinson submitted a petition for a writ of habeas corpus (*North Carolina v Robinson*, 2011) which in turn was denied by the District Court for the Eastern District of North Carolina in 2004. Marcus Robinson reacted by appealing and a preliminary brief in the Fourth Circuit Court of Appeals, which in 2006 affirmed the District Court's earlier stance. Still in 2006, the case went up to the Supreme Court which denied the defendant a certiorari review (*North Carolina v Robinson*, 2011). Ultimately, the North Carolina Secretary of Correction ordered to schedule the execution for 13 January 2007 (Vidmar, 2012). A few days later, Robinson filed a petition for clemency and the Governor organized a hearing on this issue but never returned any verdict. At the same time, the defendant filed another MAR and a motion for stay of execution due to "newly discovered evidence related to his brain development and the impact on his conduct in his case" (*North Carolina v Robinson*, 2010, p. 4) which was immediately rejected by judge Lynn Johnson. In reaction, Marcus Robinson filed a civil action (Vidmar, 2012) and motion for preliminary injunction in Wake County Superior Court on 22 January 2007, that was shortly after granted by Senior Resident Superior Court Judge Donald Stephans and remains in effect ever since (*North Carolina v Robinson*, 2012).

5.3 *North Carolina v Robinson* under the RJA

The following actions taken in the case are those relevant under and pursuant to the North Carolina Racial Justice Act. It started with Marcus Robinson, on 6 August 2010, filing a MAR with reference to the RJA Statute, invoking the 6th, 8th and 14th amendment and several provisions contained in the Constitution of North Carolina, i.e. Art. I, §§ 1, 19, 24, 26, and 27 (*North Carolina v Robinson*, 2011). According to the previous chapter, as provided for by the law, a hearing needs to be set to review such a RJA claim. This was initially scheduled by Senior Resident Superior Judge Gregory A. Weeks to take place roughly a year after, in September 2011. Due to various motions for continuance posed by the prosecution (Eacho, 2013), a rescheduling had to occur several times, first to November and then to January 2012, delaying the start for almost another six months. Finally, 30 January was the first day of the evidentiary hearing and it was concluded on 15 February, thus lasting for more than two weeks (*North Carolina v Robinson*, 2012). Robinson, in total, included eleven claims for relief in his RJA petition that identified race as having played a significant role in

"(1) the State's exercise of peremptory strikes throughout the State;
(2) the State's exercise of peremptory strikes in his judicial division [….];
(3) the State's exercise of peremptory strikes in his prosecutorial district [….];
(4) the combined effect of charging and sentencing decisions statewide;
(5) the combined effect of charging and sentencing decisions in his judicial division;
(6) the combined effect of charging and sentencing decisions in his prosecutorial district;
(7) the State's capital charging decisions throughout the State;
(8) the State's capital charging decisions in his judicial division;
(9) the State's charging decisions in his prosecutorial district;
(10) sentencing decisions by juries in his judicial division; and
(11) sentencing decisions by juries in his prosecutorial district" (*North Carolina v Robinson*, 2011, p. 2).

However, only the first three of these claims were considered for discussion during the hearing sessions. This could be explained by the fact that claims (1) to (3), which concerned the question of improper strikes in the jury selection process, were regarded as involving a less complicated statistical analysis and as a result, being the most straightforward ones to settle. The defendant made the offer to merely ground his motion in these three elements, reserving the option to also lay claims to the rest in case his first petition would be unsuccessful (*North Carolina v Robinson*, 2011).

For the duration of the hearing, Marcus Robinson was represented by his counsel, Jay H. Ferguson, Malcom Ray Hunter, Henderson Hill from the ACLU (who was later replaced by James E. Ferguson) and, as pro bono defense attorney, Cassandra Stubbs from the North Carolina ACLU's Capital Punishment Project. On the opposite side, they faced the two State appointed lawyers Calvin W. Colyer and Robert T. Thompson. The defense presented a row of witnesses testifying in support of the defendant Robinson, amongst them Barbara O'Brien (Associate Statistical and Social Science Professor at Michigan State University and author of the MSU study that will be discussed at a later point), George Woodworth (Statistics Professor at the University of Iowa), Samuel R. Sommers (Professor of Psychology), Bryan Stevenson (Professor of Law and Director of the Equal Justice Initiative), Louis A. Trosch (District Court Judge in Mecklenburg County) (*North Carolina v Robinson*, 2012).

On behalf of the State, the following witnesses took the stand: John Wyatt Dickson (District Court Judge in Cumberland County), E. Lynn Johnson (retired Senior Resident Superior Court Judge from

Cumberland County, presided over the 1994 capital trial of Robinson), William Gore (Superior Court Judge, presided over fellow RJA claimant Christina Walter's trial), Thomas Lock (Senior Resident Superior Court Judge), Knox Jenkins (retired Superior Court Judge), Jack A. Thompson (Superior Court Judge in Cumberland County, presided over fellow RJA claimant Quintel Augustine's trial), Joseph Katz (Statistics Professor at Georgia State University, already assisted in *McCleskey v Kemp*), and Christopher Cronin (Assistant Professor of Political Science) (*North Carolina v Robinson*, 2012).
Due to limitations of scope not permitting to recite the testimonies offered by all the witnesses here, only excerpts thereof will be reflected in the paper to cover the key aspects in summary.

The start of the proceedings was characterized by a further request for continuance by the State as it had previously petitioned to allow more time to its commissioned expert Katz to review statistical evidence (*North Carolina v Robinson*, 2012) and by motions *in limine* from both parties moving for limitation, non-admissibility or exclusion of certain parts of testimony, evidence or status/ credibility of witnesses (*North Carolina v Robinson*, 2012).
After that introductory part had been closed and necessary time-setting formalities had been settled, the floor was given to defense counsel as well as the State attorneys to each give their opening statement (*North Carolina v Robinson*, 2012). During the statement made by the defense, they provided an outline of the developed evidence they intended to bring forward throughout the hearing sessions. Counsel Ferguson emphasized the drafting history and the uniqueness in how North Carolina's legislature had designed the RJA. He also delved into the State's and its criminal justice system's history of exclusion of and discrimination against African American people, e.g. in jury participation decisions. Already at that point, he warned about the prospect of having the Statue repealed again. He referred to what was then happening in the General Assembly and political discourse regarding to the interpretation of the Act as "political football" (*North Carolina v Robinson*, 2012, p. 83). Ferguson proceeded to introduce the procedural case history of Marcus Robinson placing it in the context of more general litigation meant to tackle the issue of race-based sentencing. The attorney added visual evidence in the form of a map that illustrated the difference in strike ratios between Black and non-Black jurors and revealed major disparities.
After elaborating on the most significant arguments, he stated "[w]e can stop our case right now and will have met the statutory requirement of showing that race was a significant factor in jury selection in North Carolina during that period. But our experts didn't stop there." (*North Carolina v Robinson*, 2012, p. 88f). Even with accounting for some plausible non-racial explanations in the analysis, the

researchers concluded by saying "[w]hat do we have? Race. Still there, race" (*North Carolina v Robinson*, 2012, p. 89).

Painting the broader picture of what implications those stark disparities provoked, the defense inferred that "we have deprived all of the citizens of fair trials" (*North Carolina v Robinson*, 2012, p. 91). They did, however, notice that realizing and leveraging the potential of the RJA "provides an opportunity for all of us in this courtroom, prosecutors included, to recognize that race for far too long has been a significant factor in jury selection in capital cases and this case provides an opportunity for this Court hearing it as the first case under our Act to provide that relief which the statute compels based upon the evidence which we will bring to the Court" (*North Carolina v Robinson*, 2012, p. 94). By means of anticipating this, counsel left no doubt that they saw their client's claim to relief as valid.

5.4 The MSU study

The first and primary piece entered into evidence was a study by Catherine Grosso and Barbara O'Brien (2011). The latter was present in court to testify but together, as experts in statistical methodology and professors at the Michigan State University, they had investigated the phenomenon of racial bias in North Carolina's justice system and peremptory strikes against venire members in particular selected capital trials of which they presented their findings in the so-called MSU study. In order to do this, the researchers collected data with regard to all death row inmates in the State as of 1 July 2010.

In a first step, it was gathered and stored in one large database containing information related to 7422 jurors and 173 capital cases (Grosso & O'Brien, 2011) and, later, it allowed them to run analyses based on subsets, such as more limited time spans or specifically examining the prosecutorial district of Robinson's trial. The outcome of the various performed analyses unambiguously demonstrated that a likelihood of at least 95% existed that those peremptory challenges were exercised on the basis of race (Eacho, 2013).

Moreover, in statewide comparison from 1990 to 2009 the study detected that in cases that involved at least one White victim the "defendant was 2.6 times more likely to be sentenced to death than if the case did not involve a white victim" (*North Carolina v Robinson*, 2010, p. 7). Already the unadjusted data suggested the interpretation that patterns of implicit racial bias were apparent (Eacho, 2013) and, still, after a controlled-regression analysis taking account of explanatory race-neutral justifications the disparities persisted at all levels: in the State, the judicial division, the prosecutorial district, and the defendant's trial itself. Conducting such a regression provided certainty in terms of being able to

declare that there was no alternative factor or variable which had the capacity to explain the inequal strike rates. To be precise, a Black jury member faced odds of being struck by the State that are 2.39 times higher than those faced by a non-Black venire member (Grosso & O'Brien, 2011).
In relation to the evaluation of the significance of the MSU study, the court applied the four-fifths rule which deems a research finding to be statistically significant "when the minority's success rate is less than four-fifths of the success rate of the majority" (Eacho, 2013, p. 656). This was found to be the case in the trial Marcus Robinson received.

In an affidavit issued by Grosso and O'Brien, they certified that African American jurors were challenged at double the rate than venire members of another race (*North Carolina v Robinson*, 2011). Ms. O'Brien, additionally, clarified and resolved many doubts that could be raised when called to the stand. After the extensive and detailed questioning, the trial court found said study to be statistically significant as well as "reliable, valid and credible" (*North Carolina v Robinson*, 2012, p. 56). Other witnesses such as Bryan Stevenson, subpoenaed to testify as an expert on law and race discrimination and juror strikes, corroborated the findings recorded in the MSU study. Furthermore, he complemented them by naming concrete examples of cases where Black persons were struck, for instance simply because they were a member of the NAACP or a person was excluded for being enrolled in a liberal arts degree at North Carolina A&T University, a historically black college (*North Carolina v Robinson*, 2012). His studies had observed that prospective Black venire members were excluded at a rate two or three times higher than how frequently non-Black jurors would be rejected. In conclusion, Mr. Stevenson stated that he was able to document "dramatic evidence of racial consciousness, racial bias in jury selection [….] in North Carolina capital cases, particularly in this era at the time of Mr. Robinson's trial" (*North Carolina v Robinson*, 2012, p. 7, p. 897).

The nature and facts of those supplementary expert testimonies were a further indicator that also the non-statistical proof that was invoked was in convergence with the results the MSU study had produced (*North Carolina v Robinson*, 2012).
After the abundance of evidence delivered by the defense, the court determined that Robinson had met the burden of production threshold set out to establish a prima facie case pursuant to the Racial Justice Act. Even beyond that, the accumulated evidence was deemed sufficient as to draw the conclusion that it was a matter of intentional discrimination which was not per se required by the RJA. With that determination being made, the burden was shifted to the State to rebut that (*North Carolina v Robinson*, 2012).

The major witness the State relied upon in an effort to counteract the evidence presented by the defense attorneys was Mr. Joseph Katz, an expert in applied statistics and quantitative methods who was tasked to analyze and review the MSU study. He again engaged in carrying out a regression analysis in an attempt to discover factors other than race to be attributed to the strike disparities or any other flaw with regard to the study's validity. However, he testified that after his analyses he did not have reason to doubt or contest the MSU study or to pronounce any of its findings as statistically insignificant (Eacho, 2013). The few points of objection that were in fact uttered by him concerned some of the explanatory variables being defined too broadly. The two directors of the study, Grosso and O'Brien, subsequently corrected this and could demonstrate that the outcomes stayed the same. The remaining criticism raised by Joseph Katz was rejected by the trial court (*North Carolina v Robinson*, 2012). These facts led the court to infer that ultimately, the defense's evidence remained largely unrebutted in comparison to what the State produced and what was considered as insufficient to challenge the position of the defense. It was alluded that "the State is unable to justify demonstrated racial disparities by other legitimate considerations" (*North Carolina v Robinson, 2012*, p. 110) and this implied that the court saw siding with the defense as the only way.

5.5 Interpretation of the RJA

In *North Carolina v Robinson*, the court for the first time had to apply and decide the merits of a claim under the Racial Justice Act which it did on 20 April 2012 (Eacho, 2013). In the written statement of its ruling, it therefore provided its statutory interpretation of what exactly is prescribed by that Statute. The trial court sought guidance in resorting to the legislative intent it saw reflected behind the formulations contained in the Act. Based on this, it attributed the term 'significant', used in the context of 'significant factor', to "instructive decisions of the North Carolina Supreme Court" (*North Carolina v Robinson*, 2012, p. 31) and understood it as "having or likely to have influence or effect" (*North Carolina v Robinson*, 2012, p. 31) on the case outcome. And secondly, the judge noted that the RJA needs to be read in such a way that it is not simply a meaningless recapitulation of McCleskey and Batson without added value as that would ignore the "Rule Against Surplusage method" (Eacho, 2013, p. 670). It would seem ridiculous and render the RJA redundant if the legislature had not drafted it having in mind to introduce a substantial new rule or principle of law.

In the verdict, the trial court acknowledged that Robinson had satisfied the prima facie burden (*North Carolina v Robinson*, 2012) with his evidence that supported the finding that race had been a significant factor in the prosecution's decision to exercise peremptory strikes in jury selection statewide, in the judicial division, and the prosecutorial district and in the defendant's trial itself

(Grosso & O'Brien, 2011). As a consequence, Judge Weeks granted relief, commuted the death sentence of Marcus Robinson and resentenced him to LWOP (Vidmar, 2012).

5.6 Further RJA cases

In the last part of this chapter, the focus shall be on three other defendants that raised a claim pursuant to North Carolina's Racial Justice Act: Tilmon Golphin, Christina Walters and Quintel Augustine. They each filed individual claims for a hearing under the original 2009 version of the RJA but their cases were ruled upon collectively by the Cumberland County Superior Court on 13 December 2012 (Eacho, 2013) and were marked by one significant difference as compared to the proceedings in the Robinson case: namely that there was such considerable delay involved that by the time the hearings were held for the three defendants, the Statute from 2009 had been amended. This posed a challenge to the Court which then had to deal with the question which of the two versions of the Act to apply and to, eventually, provide an interpretation of the 2012 amendment for the first time. In its judgement, the court stated that there was no indication contained in the amended Racial Justice Act to deduce that it was to be applied retroactively and that, in any case, there would be leeway to interpret the 2012 RJA broadly. But, first and foremost, it arrived at the conclusion that, due to the fact that the petitioners had filed their claims timely under the 2009 Act, they were thereby entitled as per constitutional right to receive a hearing under the terms prescribed by the respective Statute and it "allow[ed] [those] previously filed claims to proceed under both versions of the Racial Justice Act" (Eacho, 2013, p. 675).

Based on this determination of formality, the court further found race to be a significant factor in the prosecution's juror strikes and decisions to seek a sentence of death in the individual cases and in Cumberland County (Eacho, 2013). Consequently, Judge Weeks reached the same verdict as before in *Robinson*, that also Golphin, Walters and Augustine's death sentences are to be vacated and they were resentenced to LWOP.

However, this opinion turned out not to be that indisputable after all and a court sequel followed. The State, which could now refer to the RJA amendment from 2012 and a year later even repealed the Act with retroactive effect all together, appealed the decision handed down by the court. Owing to that, in 2015, the North Carolina Supreme Court overturned the life sentences without parole imposed after the hearings in 2012 (Collins, 2020). Its argument was based on procedural grounds, holding that separate hearings should have been organized instead of a collective one and that "the trial court abused its discretion" as the State was not afforded sufficient time to prepare (American Bar Association, 2020). The cases were remanded back to the trial court for review, which rejected to do so since it considered

the petitioners no longer entitled to the possibility of relief due to the repeal of the Racial Justice Act and the death sentences were reimposed (Collins, 2020). The defendants again lodged an appeal with the Supreme Court and in 2020, it issued its ruling that returning the applicants to death row had been unconstitutional and that new hearings will need to be conducted (Collins, 2020).

Secondly, the Supreme Court of North Carolina was also called upon to make a decision on whether the remaining death row prisoners who had filed a claim under the original RJA from 2009 still had the right to also receive a hearing pursuant to the Act. The court of highest instance affirmed this, also in 2020, and ruled in favor of the defendants in the case of Andrew Ramseur (*North Carolina v Ramseur*, 2020) and Rayford Burke (American Bar Association, 2020).

6 "THE BOTTOM LINE" – TAKING STOCK OF THE IMPACT OF THE RJA

After foregoing chapters have shed light on the development of North Carolina's Racial Justice Act from its inception spanning up to the most recent judgements, the previously gained insights regarding the RJA's history shall be evaluated from the perspective different groups of actors have on the Statute. In order to make this as comprehensive and widely encompassing as possible, the angle of a range of diverse parties with an interest or stake in this matter will be covered. This includes voices from the legislature, academia, judges, attorneys, defendants, Human Rights and death penalty activists as well as other experts.

6.1 A pioneer state breaking new ground

To begin with, it needs to be emphasized how the state of North Carolina presents a unique scenario and broke new ground by passing this law (Grosso & O'Brien, 2011). Together with their neighboring Southern States, they share a legacy of race-based discrimination and exclusion that the criminal justice systems, and in particular the administration of capital punishment, were marked by. The situation evolved from completely disregarding the right of African Americans and other minority members to a fair trial and participation in jury service to an improved state, where their entitlement to non-discrimination and serving on a jury was officially recognized but only implemented to a limited extent (Kotch & Mosteller, 2010). At that time, race-based and peremptory juror challenges started being exercised in an effort by the prosecution to strike Black venire members from the pool of eligible jury members. Nevertheless, prosecutors attempted to disguise the true motivation behind their conduct and began to present supposedly racial-neutral reasons, which made this form of bias implicit, subtle, and even harder to detect or combat (Engel, 2021). Hence, against all this backdrop it can be considered a major victory that the opposition spearheaded by a coalition of civil rights as well as law-reform organizations grew so strong and influential to infect a considerable part of the legislature, too, and ultimately convinced them to adopt the Act. It is even more noteworthy, when taking into account how African Americans had historically been marginalized by the criminal justice institutions, how on the contrary, exactly this group assumed an important role in the process of campaigning for and ratifying the bill.

Next to this, the wording and context prescribed by the 2009 Racial Justice Act can be understood as a further success due to the fact that it went beyond the *McCleskey* ruling to fill the voids left by that case verdict and included assertive language as to send a strong signal that any kind of race discrimination at any time and in any place (of the criminal justice system) would not be tolerated and death sentences

secured under these circumstances would not stand (Grosso & O'Brien, 2011). Statements made during speeches of some of the principal sponsors of the RJA bill either in the House of Representatives or in the Senate provide evidence of this achievement. Senator Floyd McKissick Jr., for instance, acknowledged that the Act made a significant contribution to establishing a "fair criminal justice system free of prejudice, free of bias and free of discrimination" (DPIC, 2019). Other supporters joined him by stating that the "policy represented a resounding victory" (Donnelly, 2018, p. 398) and, with regards to the prospects of the Racial Justice Act, that it would facilitate a "meaningful inquiry into the role of race" (Donnelly, 2018, p. 398). The response from civil rights champions and lawyers was equally euphoric; Henderson Hill, an attorney at ACLU who would go on to become the counsel for a petitioner in the RJA proceedings, called its adoption and meaning, namely that no death penalty can be legally imposed when there is proof of racial bias wielding influence, a "small but important step toward achieving the broad-based reform needed in North Carolina" (EJI, 2020) and "a reminder that we must keep working for justice" (EJI, 2020).

Additionally, even political representatives who were not per se rejecting the death penalty expressed their support to this movement. This was the case, for instance, of Governor Beverly Purdue who claimed, "I have always been a supporter of [the] death penalty, but I have always believed it must be carried out fairly" (DPIC, 2021).

Above that, all of the elements that already make the Statute extraordinary when regarded on its own appear to be even more outstanding when contemplating, on a broader scale, that North Carolina is one out of merely two states which has passed legislation in this realm. It was also Senator McKissick who recognized this unique status when commenting on the novelty of the Act and paid tribute to the fact that the other Racial Justice Act, namely the one of Kentucky, was not able to meet the same standard of vigor as the one that North Carolina drew up (nccadp, 2020).

On the other side, because of the potential and the great hopes placed in the RJA by many inmates on North Carolina's death row, there was also a number of fierce opponents to this Act who were members of the General Assembly which testifies to its political controversiality. Nevertheless, that did not prevent any of the in total 153 prisoners on death row to file a claim immediately after the passage in 2009 (Donnelly, 2018). These events manifested the exact fears some of the political opponents had held and fueled them to quickly take action in order to not risk having a majority of the capital sentences questioned or possibly, even commuted.

What followed in the case of those defendants who had timely and successfully filed a petition was that

a hearing was held, evidence was considered, and the judges were required to pronounce a ruling on the facts. The conclusion reached by Judge Gregory Weeks was unambiguous: he found a "persistent, pervasive and distorting role of race in jury selection" (DPIC, 2018) and thereby, indirectly also made a remark speaking to the necessity of such a Statute.

6.2 Factors limiting the effectiveness of the RJA

In a next step, the opposed political candidates and the new Republican majority taking office after North Carolina held elections in 2010 managed to first amend the Racial Justice Act, already considerably limiting its effectiveness, and later, to completely repeal it. This led to the result that a trial court, upon appeal to the vacating of the death penalty and the resentencing to life imprisonment, refused to consider the claim to appropriate relief raised pursuant to the RJA and the four defendants in question were returned to death row. When this occurred, a broad association consisting of civil rights organizations filed amicus curiae briefs (DPIC, 2018). James E. Ferguson II, a prominent lawyer in the state who had also represented Marcus Robinson in during his hearing in *North Carolina v Robinson*, on that occasion reminded everyone that even if the Statute had been repealed one should not be mistaken to believe that the problem of racial bias in criminal, or more specifically capital, proceedings had been solved. "The repeal of the act doesn't change the facts" (nccadp, 2020) since the abundance of evidence remained the same.

But, at the same time, a similarly intense and controversial dispute such as the one that had been witnessed in the legislature for years in the pre-adoption phase of the Act, started to be observed with regard to the judiciary. Rulings were issued by a lower-level court to be overturned by the Supreme Court and then the cases were remanded back for review to appellate courts or the original trials courts. If this demonstrates one finding clearly, that is that there was still a lot of confusion and unclarity about the phenomenon of race-based sentencing and how the state or its courts ought to address this in line with what has been outlined by the Racial Justice Act. The challenges posed under the RJA seemed to be successful at first, when there had still been a stronger backing by the Democratic majority in North Carolina's General Assembly, but that success was soon qualified, and outlooks became more pessimistic (Donnelly, 2018).

6.3 2020 – a decisive year

This journey of wins and setbacks continued for, in total, about eight years until in 2020, the North Carolina Supreme Court preliminarily put an end to a very lengthy legal dispute by making the final decision that the retroactive application of the Statute's repeal was unconstitutional and consequently, all four defendants that were affected deserved a new hearing even though the Racial Justice Act was no longer in effect (American bar, 2020). This judgement was for long awaited full of suspense and, once announced, celebrated, and cherished enormously by the advocates of the Act. Several of them emphasized the important value and gravity of that decision as an indication of what accomplishments could be gained in the future. What was at stake, in the words of Bryan Stevenson, who is the founder and director of the Equal Justice Initiative (EJI), was nothing less than the "integrity of our courts and our commitment to true justice" (DPIC, 2019) and a "much-needed systematic review of race discrimination in capital punishment" (DPIC, 2019).

Other law practitioners, phrasing their view in a similar spirit, concurred with him. For example, LDF senior deputy director of litigation Jin Hee Lee criticized the existing racial bias in this context as a "continuing stain [….] undermin[ing] public confidence in North Carolina's judicial system as a whole" (DPIC, 2021). Even Former Attorney General Mark Early from Virginia cautioned by saying that "execution can never be an option when racial stereotypes are used to keep Black citizens off juries. No civil right is more basic" (DPIC, 2021). Henderson Hill called the verdict "an important step forward in North Carolina's ability to create a more fair and equal justice system" (ACLU, 2020) Beyond that, Hill remarked that the court's action was a further step to "rectify the tremendous harm" (ACLU, 2020) done by racism. As well in 2020, in *North Carolina v Burke* and *North Caroline v Ramseur*, Justice Anita Earls contended that the impact of racial discrimination "undermines the integrity of our judicial system and extends to society as a whole" (American Bar Association, 2020).

Moreover, Gretchen Engel, executive director at the Center for Death Penalty Ligitation (CDPL), drew attention to the relevance of the timing of this ruling. According to Engel, it was an "urgently needed decision as our state and our nation confront a long history of racism" (American Bar Association, 2020). What she refers to and what is simultaneously the reason that the resonance and the reactions to this Supreme Court opinion by the general public were so strong and manyfold lies in the fact that it was handed down during the growing awareness of racism sparked by the Black Lives Matter (BLM) movement. In the eyes of Cassandra Stubbs, director of the ACLU's Capital Punishment Project, the death penalty is responsible for permanently engraining racism and error into the criminal legal system.

She considers the nationwide abolishment of capital punishment a necessary condition if "we are to truly address our racist history and build a justice system worthy of its name" (ACLU, 2020). Chief Justice Cheri Beasley also saw a link to the BLM protests and the pressure exerted by them when conceding that "North Carolina's courts have helped perpetuate racial disparities" (EJI, 2020).

All these testimonies bear witness to two major insights: firstly, how the coalition of individuals and organizations standing behind the RJA of North Carolina was committed to the cause, tirelessly pursued their work to convince their opponents of its significance and continued to defend it whenever it came under attack. And in the second place, it shows that the supporters of the Act were able to mobilize an even bigger crowd to convey the message that the injustice has been endured for too long and that it was urgently time for a fundamental change in terms of thinking and acting in this regard. However, since the final outcome of these claims raised based on the Statute is at this point still left open to be decided in the future, it is difficult to render a judgement on how much of the demanded change will actually be attained. The author of various academic works dealing with the Racial Justice Act, Mosteller, has formulated this as "time and future litigation will resolve the legacy of the RJA" (Mosteller, 2012, p. 145).

6.4 Optimistic hopes and disillusioning facts

There are two prospects that do, nevertheless, give reason to be hopeful. The first out of these is the possibility that different claims brought to seek relief for a defendant from the death penalty could be mutually reinforcing and benefit from spill-over effects. This means that even if a petition filed under the Racial Justice Act fails because the threshold of a showing that race discrimination was a significant factor in the decision to impose a death sentence at trial was not sufficiently met, it might increase the chance of success of other claims, such as an ineffective assistance of counsel claim (Grosso & O'Brien, 2011).

And a second desirable consequence would be that any progress made towards a fairer administration of justice in capital cases and the elimination of the impact of racial bias could have repercussions on non-capital proceedings. This is a realistic expectation as it has been observed in the past that the latter often serve as the source of more broadly targeted reforms (Grosso & O'Brien, 2011). It holds true as capital proceedings only account for a rather small percentage of the overall criminal cases and thereby, potentially lend themselves to undergoing reforms the effects of which can be carefully analyzed, and

the lessons learnt from them can be applied and taken into consideration on a larger scale. Therefore, it could enable the Statute to leave an impact that extends beyond merely capital case trials.

In addition, several experts hold the opinion that allowing these RJA cases to be argued and heard in itself can have positive implications. What they refer to is, among others, the idea that the legal proceedings which take place present a "forum in which to scrutinize how well the system functions" (Grosso & O'Brien, 2011, p. 499). They offer the possibility to not simply accept the status quo but, on the contrary, to enter into debate and to challenge it.

Next to that, the litigation raises public awareness around the subject and stimulates people's consciousness, which is a crucial gain. In order to obtain even just a minor improvement, the very first step is bringing this issue to the attention of society so that, subsequently, it can resort to taking action and correct the deficiencies in the system. Studies have been performed that generated the insight that publicly addressing the problems associated with race-based sentencing can facilitate mitigating race-related bias (Grosso & O'Brien, 2012).

A further argument to be named in favor of the Statute is that a raised level of awareness can also spur a certain sense of accountability on the part of those who are in charge of making relevant decisions pertaining to matters of criminal justice. In other words, once you are aware of a phenomenon or problem, it becomes much easier and more likely that you devote your focus to it. At the same time, you feel slightly pressured, either by yourself or by outsiders, to stay vigilant and exercise your function responsibly because you know that any mistakes you commit would not go unnoticed by the surrounding public (Grosso & O'Brien, 2011). It can, in a way, be considered a mechanism which helps you to monitor yourself to ensure you can deliver your best performance. Knowing this becomes especially relevant in the context of bias which can be explicit or implicit, as was explained in a previous chapter of this paper. Since implicit bias is a phenomenon not necessarily openly visible to other people and hence, difficult to spot for them, the person acting with bias him- or herself is the best one to regulate and monitor it.

A pre-requisite for someone to be able to detect this him- or herself is, certainly, awareness and familiarity with the subject. Once someone can recognize that their behavior may be attributed to possibly unconscious racial motivations the threat or risk of this being revealed to other people can function as a powerful denominator so that everyone reflects on their own conduct and the extent to which their actions might be or in fact are impacted by racial bias. Research insights gained in the field of sociology and psychology suggests that this works as a very effective accountability mechanism,

sometimes even better than other ones that involve external accountability to other persons (Grosso & O'Brien, 2012).

On the downside, a study conducted by the researchers Grosso and O'Brien which has measured the effects of the North Carolina Act on the racial disparities in prosecutorial strike decisions and their development in capital proceedings after 2009 has so far produced disappointing results. They did notice, however, a decrease in disparities in cases where the defendant was a White person.
On the other side, when a Black person was on trial, no positive change could be perceived in relation to the role of race connected to the venire member strike rates (Grosso & O'Brien, 2012). Thus, there was no impact of the Racial Justice Act on prosecutors' juror challenges apparent in cases with Black defendants but overall, the decrease as far as racial disparities are concerned was of a substantial nature. When considering the outcome of this research one needs to keep in mind, though, that the collected data stems from the cases that were charged capitally in North Carolina courts in the aftermath of the RJA's passage and these include only seven cases (Grosso & O'Brien, 2012). This implies that the study faced major limitations and did not have a very representative basis after all wherefrom to draw conclusions.
Another point of criticism is that, on the bottom line, the Racial Justice Act has managed to win only limited relief for those convicted defendants that had filed a motion under it (Donnelly, 2018).

Despite the caution in acknowledging measurable and clearly recognizable success the North Carolina Act might have delivered, what can more certainly and easily be applauded to is that the state proved to be willing to take this bold step of drafting, passing, and applying the law in the first place. It has been commented by Kotch and Mosteller (2010) that, by doing so, it follows the "state's tradition of self-examination and its citizens interest in its fair administration of the death penalty" (Kotch & Mosteller, 2012, p. 2128). And sometimes, creating a "law that breaks new ground in our collective effort to confront the legacy of racism in the criminal justice system" (Grosso & O'Brien, 2011, p. 504) comes at the cost of having its flaws that can only be identified once it is being implemented. The least the Statute could be expected to achieve, which it successfully did, is to pose challenges to the way death sentences are sought in the existing system disproportionately affecting African Americans as well as other minorities. Moreover, the RJA succeeded at encouraging diverse groups of actors to critically assess where the state's criminal legal system stands in that regard and at reviewing the capital sentences of a few prisoners on death row (Donnelly, 2018).

What the Racial Justice Act brings, essentially, is a change of the narrative, touching upon several aspects, that is not to be underestimated. Due to the foregoing history and the perpetuation of unequal treatment of the races, the "politics of fear and anger have made many criminal justice practitioners believe that the goal is conviction and maximum punishment" (EJI, 2012). So, what the Act attempts to do here is to provide a counternarrative.

While it does not plainly dictate to abolish the death penalty once and for all, it does serve the purpose of reminding and warning us to be particularly careful, when deciding about the life or death of another person, to question whether we base our decision on legitimate and objective arguments or whether we are rather led by personal sentiments and perhaps, racial stereotypes. Because it does make a crucial difference whether one deals with a misdemeanor where the accused risks a minor penalty or, instead, with a death-eligible crime where the consequences of the judgement are a lot graver and more far-reaching.

6.5 Status quo and implications for the death penalty

With the current state of knowledge based on scientific research, one has come to accept that, whether we like it or not, decisions taken by us humans are prone to be influenced by certain implicit bias. And this reality holds true for every single person, without prejudice to gender, age, race, education, or political beliefs (nccadp, 2020). As a consequence, the way we respond to this inherent risk of racially motivated rendering of a judgement poses a question of utmost importance to the legitimacy attached to the criminal justice system. And once reforms that bring progress are in sight in the field of capital litigation, the same normative concerns that have instigated such developments might surface with regard to fairness and the administration of justice in criminal but non-capital proceedings (Donnelly, 2018). Grosso and O'Brien (2011) agree with the point that, once racial disparities are uncovered in connection with capital punishment, this should lead one to look beyond to doubt the legitimacy prevailing in the system as a whole and whether comparable flaws cannot be found in other parts, too. While it is understandable that change in either of the two spheres cannot be expected to happen overnight, dedicated law and civil rights activists continuously remind us that the values of racial equality and fairness must be upheld, especially by our criminal justice systems that should serve as an example. Biased juries and racial discrimination experienced by defendants during trial or by a person eligible to become a venire member are at odds with the basic rights and privileges granted to every citizen (nccadp, 2020).

A point in time has been reached nowadays where exonerations of defendants placed on death row have increasingly been witnessed in North Carolina and the death penalty is administered much less frequently than in the previous decades and centuries. In 2021, Virginia has marked the first Southern state and the 23rd state overall to abolish the death penalty (O'Connell, 2021) and in those states, that hold on to capital punishment the recorded numbers point in a downward direction (Death Penalty Information Center, 2021). North Carolina is a good example of this as the death penalty remains legal, but no execution has taken place since 2008 (Death Penalty Information Center, 2021), in part due to a moratorium.

The combination of exonerations, petitions filed under the RJA, and other factors have greatly contributed to the realization that even for these few individuals who are still sent to death row, there is no guarantee that they are in fact guilty of those crimes that they have been convicted of. Under these circumstances, it should not be tolerated that those individuals that still face a death sentence have to do so due to racially discriminating reasons.

Furthermore, as one of the principal motives for the declined use of the death penalty the growing importance of standards of decency and the dignity of human life can be named. A change in the mindset of people has taken place over time condemning and deeming inacceptable the violation of those basic principles of humanity (nccadp, 2020). And the belief in the deterrent effect of capital punishment has evolved in so far as to recognize that it is, if at all, successful in so few isolated cases that what weighs heavier is the perception that it, definitely, does more harm by infringing upon the human dignity and human rights of everyone in a way that cannot be born any longer in modern times (Bailey & Peterson in Radelet & Borg, 2000).

6.6 Human Rights and the death penalty

Whereas the argument of dignity, equality and similar values does not take away much of the potential for controversial discussion surrounding capital punishment, there are other, less ambiguous and subjective angles from which to approach this sensitive issue. The death penalty is frequently discussed as part of a HR discourse by concerned actors, activists, and committees. In as much as matters pertaining to the functioning of the criminal justice system of the US are a matter of national sovereignty, they are also in the position of the duty bearer in the context of HR and bound by various obligations they have committed to by means of becoming party to certain binding international Human Rights treaties. To name some of the most important examples, the US has signed and ratified the International Covenant of Civil and Political Rights (ICCPR), which contains e.g., Art. 10 (1) dealing with the duty to treat persons deprived of liberty with humanity and respect for the inherent dignity of

the human person and Art. 14 prescribing that fair and public hearings must be organized. In the second place, the US is a state party to the International Convention on the Elimination of All Forms of Racial Discrimination since 1966 (UNTC, 2021) which requires, in Art. 2 [1] (c) that measures be taken to "review policies, to amend or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination" (United Nations, 1966, p. 4). Beyond that, Art. 5 states that parties to the Convention are expected to eliminate racial discrimination and, in paragraph (a) the right of every person to equal treatment before organs of law and the justice system is enshrined (United Nations, 1966, p. 5).

Thirdly, the US is also involved in its regional regime of Human Rights protection, namely the Organization of American States (OAS), that has produced the American Convention on Human Rights. Chapter 2 Art. 5 thereof provides for the right to humane treatment, Art. 8 of the same chapter for the right to a fair trial and of every person to enjoy full equality and chapter 2 Art. 24 for the right to equal protection before law (Organization of American States, 1979). Next to the aforementioned obligations spelled out in legally binding sources of International Human Rights Law (IHRL), there are a few other soft law instruments which contain similar wording but are of a non-binding nature, such as the American Declaration of Rights and Duties of Man.

Against this background, not only the improper influence of racial bias can be discussed but the legitimacy question of capital punishment in general. In connection with that the Inter-American Commission on Human Rights (IACHR), that is the competent body of the OAS to review and judge on complaints of alleged Human Rights violations occurring in its territory of jurisdiction, in the case of Missouri death row inmate Russell Bucklew has classified his long-term imprisonment of 20 years on death row as "excessive and inhuman punishment" (DPIC, 2020). As recent as in 2020, the Commission has additionally dealt with a similar case where a prisoner in California named Nvwtohiyada Idehesdi Sequoyah was incarcerated for 27 years awaiting execution. The IACHR pronounced that this equally constituted a grave HR breach and a violation of his "right to humane treatment" (DPIC, 2020). Addressing more specifically the role of racial bias in death penalty cases, the Commission declared in its *Hall* Opinion (Case 12.719) from 2020 that "the use of race and skin color as grounds to set and adjust a criminal sentence are banned by the inter-American system of human rights protection" (IACHR, 2020, p. 13).

The Human Rights Committee of the UN, in charge of monitoring compliance with the ICCPR, is another instance that has scrutinized practices and developments regarding the death penalty in the US.

In the Universal Periodic Review report (UPR) on the US issued in 2014, many countries have been recorded to have urged the US to abolish capital punishment, on which the Committee had requested more detailed information as part of the List of Issues Prior to Reporting (LOIPR) published in 2013 (UN Human Rights Committee, 2013). Moreover, this LOIPR and a previous one dating back to 2006 had inquired into the phenomenon of racial disparities impacting the death penalty (UN Human Rights Committee, 2006). The 2015 UPR report reiterated the concern about this and formulated the recommendation to design studies and strategic plans to eradicate this structural problem (UN Human Rights Committee, 2015). The Concluding Observations closed with a meaningful appeal to "effectively ensure that the death penalty is not imposed as a result of racial bias" (UN Human Rights Committee, 2014, p. 4). And, still in 2020, the subject of capital punishment was topical, when the 2020 UPR report from the subsequent review cycle once again called upon the US to continue the path towards abolishing the death penalty (UN Human Rights Committee, 2020).

Besides that, the Committee on the Elimination of Racial Discrimination (CERD) has dedicated its General Recommendation No. 31 to the issue of prevention of racial discrimination in the administration and functioning of the criminal justice system. Therein, it demands "States parties should strive firmly to ensure a lack of any racial or xenophobic prejudice on the part of judges, jury members and other judicial personnel" (UN Committee on the Elimination of Racial Discrimination, 2005, p. 9). And it makes a reference to the Bangalore Principles of Judicial Conduct from 2002, which consist of independence, impartiality, integrity, propriety, equality, and competence and diligence. Those principles lay down that there shall be awareness and a certain sensitivity on the part of judges about diversity and complexities in society and that "A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds" (UN Judicial Group on Strengthening Judicial Integrity, 2002, p. 6). All this indicates that the attention of several Human Rights mechanisms is drawn towards critical issues related to capital punishment in the US and that diverse channels, ranging from recommendations by UN treaty bodies to rulings by the IACHR, have been and are used to put pressure on the country to work towards the abolishment of the death penalty.

Taking into considerations those developments, less and less space is left to argue in favor of the necessity of leaving the system of capital punishment in place. Nevertheless, as long as that remains the case, it appears as an unlikely prospect to silence the demands to address the constitutionality and legitimacy of the current nature of the death penalty, if not to abandon capital punishment in North

Carolina all together, without the endeavor of a serious review of systemic errors and disparities engrained in capital punishment. Henderson Hill embraced this idea when he commented, “[t]he powerful evidence of racial bias [….] shows not just that her death sentence was wrong, but why it is long past time for America to abandon the death penalty” (apnews, 2020).

7 CONCLUSION

Drawing upon the arguments raised and the insights gained in the discussions of the previous chapters, there has been compelling evidence delivered by empirical research to determine that the early death penalty statutes in North Carolina have historically disadvantaged African Americans and other minority ethnic groups. They have done so in a number of ways: for once, by not applying the laws and statute provisions consistently regardless of someone's race; by adjusting the nature of capital offenses so as to disproportionately subject members of minority groups to capital punishment; and by imposing comparatively longer sentences and invoking aggravating circumstances. Over time, minorities have increasingly gained rights and formally an equal standing in society. Nevertheless, statistics have revealed the finding that the death penalty continues to be imposed in a racially discriminatory manner, despite the discrimination manifesting itself and becoming visible in a more subtle form nowadays in many areas, also non-legal, in which it is experienced. After bias could initially be correlated to the race of the defendant, that came to equally affect the race of the victim later, and more recently, such bias surfaced at the jury selection stage. New excuses and 'race-neutral' pretexts were found to justify why individuals belonging to a certain racial group deserved to be more harshly punished than others who committed the same offense.
These facts clearly demonstrate that it is a problem inherited from the past and how deeply engrained this legacy still is in the system today. Knowing this proves how difficult it will be to overcome that but it is, at the same time, the first step to initiate change.

In reaction to that, Eighth Amendment violations were argued before US courts towards the end of the 20th century. Even though judges acknowledged these discriminatory practices existed they did not present solutions to tackle it. Human Rights and anti-Death Penalty movements all over the US soon realized that their efforts to settle this by means of a strategy pursuing litigation challenges – as with *Furman*, *McCleskey* and *Batson*, for instance – proved to be of little avail.
This seems to be one of the biggest failures and disappointments, the fact that judicial authorities recognized the injustice done but pretend to be powerless in rectifying the situation. It really has been a missed opportunity for the courts to have started redress towards more equality much earlier.

Seeking for an alternative route, a broad coalition was formed in North Carolina spearheaded by the NAACP and the NCCM, that mobilized likeminded, dominantly African American associations to exert pressure to introduce the Racial Justice Act to the state's legislative fora. A fierce struggle

extended over an almost decade-long period with several failed attempts, until in 2009, the General Assembly led by a Democratic majority adopted the Statute. However, what seemed to be a glorious victory was short-lived and did not last for long.
After elections were held the year later and the Republicans came into power in North Carolina, the Racial Justice Act was quickly amended. This 2012 amendment severely weakened the RJA provisions by no longer permitting evidence regarding racial discrimination merely at the state-wide level and, thus, by raising the evidentiary threshold for the burden of proof resting with and to be met by the defendant/ RJA petitioner. By that time, almost all of North Carolina's death row inmates had already filed a claim pursuant to the requirements of the 2009 version of the Act.

The hearings organized to decide on the merits of their claims started with considerable delays but once commenced, both sides sought to convince the presiding judge and had multiple witnesses testify. One major document of decisive importance was the MSU study from 2011 on racial bias in jury selection, conducted by a research duo from Michigan State University. The study was presented in support of the petitioners to speak to the existence of racial disparities, primarily in the exercise of peremptory strikes by prosecutors when selecting suitable candidates to serve as potential jurors from a pool of eligible venire members. When asked to rule upon the validity of the RJA claims, Justice Weeks attached a lot of importance to the study's results and did not deem the prosecutors' arguments fit or persuasive enough to rebut the central hypothesis of the study. As a consequence, the first four RJA claimants had their death sentences commuted and were resentenced to LWOP.

When the Racial Justice Act was entirely repealed in 2012 it was disputed whether hearings could still be held as the law which made that possible was no longer in effect. After several, partially contradictory court rulings, with the defendants meanwhile returned to death row, the Supreme Court in 2020 pronounced, as the court of last instance, that the defendant's entitlement to be heard on their RJA claim remained intact.

Returning to the initial research question that was posed, namely to what extent the North Carolina Racial Justice Act advanced the efforts to counter racial discrimination in capital punishment in the state, one can observe the following: first and foremost, the passage of the RJA definitely raised more awareness around this topic of racial bias in the criminal justice system and in connection to the death penalty. The hearings held in this context have been the most visible part, received wide media coverage and functioned as an incentive to enter into a public debate. Much support for this could certainly also be attributed to the many engaged CSOs, HR movements and NGOs that who had

already championed the cause before the law was enacted. On the other side of the coin, it was not merely a public discussion that was sparked but more so a political debate, too, since it involved the legislature. And this mobilization has been such an achievement because it did not stop with the repeal but it triggered a passionate dialogue which carried on.

In addition, the RJA presented the occasion for researchers and scientists to conduct further studies, e.g. the MSU study, the results of which generated new insights and helped to inform the state of affairs regarding the subject under discussion in the court hearings. These were indispensable to have a scientifically well-founded base for discussion fed by hard facts and not by emotionally charged speculations or rumors. Hence, it goes hand in hand with and accompanied the ongoing civil debate.

Moreover, the Act technically allowed for an extension of the death penalty moratorium in place since 2006. It served to review allegations regarding capital punishment and race discrimination, so as to arrive at a clear stance before moving to take a decision whether the death penalty should continue to be imposed.
This aspect is also closely related to upholding and strengthening defendants' Human Rights since the aim was to obtain clarity on issues of a fair trial, non-discrimination, equality before the law and ultimately, concerning life and liberty. Since there was the criticism or strong suspicion of the capital punishment system being at odds with the fulfilment of some of those basic rights, it could not go without careful consideration of whether those flaws could be verified. The demands to do so were a combination of voices from within the US and external influences, such as other countries and international human rights bodies that have long insisted on an investigation into the matter.

The 2009 Statute was more lenient and granted defendants those long-awaited remedies that had been denied by the *McCleskey* court and rendered existing procedural safeguards from the *Batson* judgement more effective – a major breakthrough. The amended RJA from 2012 dampened hopes and was experienced as a major setback since it still afforded defendants chances to challenge race discrimination but limited their means available to prove that.

In sum, there have been only few cases litigated under the Racial Justice Act so far, involving delays and lengthy proceedings. Nevertheless, they produced outstanding verdicts sending strong and optimistic signals in the eyes of many. It appears as something like a short glimpse of so much more that could have been accomplished, had the Statute lasted longer. For some people, these developments make a feeling of hope flourish of more fundamental reforms in the realms of capital punishment. The

implications for the future and the possibility of abolishing the death penalty in North Carolina remain to be seen in the years to come.

Certainly, there is room for further research, i.e. as time progresses and more recent data becomes available on litigation developments related to the RJA and moves to abolish capital punishment (possibly influenced by the political agenda of the Biden presidency), potentially also in other states. Another aspect which deserves more exploration is indeed spill-over effects of the Statute onto other retentionist states. Lastly, it would be interesting to see the results of studies with attention to the impact of the RJA repeal on public opinion regarding the death penalty.

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9 APPENDICES

Appendix 1 – 2009 North Carolina Racial Justice Act

GENERAL ASSEMBLY OF NORTH CAROLINA SESSION 2009

SENATE BILL 461

RATIFIED BILL

AN ACT TO PROHIBIT SEEKING OR IMPOSING THE DEATH PENALTY ON THE BASIS OF RACE; TO ESTABLISH A PROCESS BY WHICH RELEVANT EVIDENCE MAY BE USED TO ESTABLISH THAT RACE WAS A SIGNIFICANT FACTOR IN SEEKING OR IMPOSING THE DEATH PENALTY WITHIN THE COUNTY, THE PROSECUTORIAL DISTRICT, THE JUDICIAL DIVISION, OR THE STATE, TO IDENTIFY TYPES OF EVIDENCE THAT MAY BE CONSIDERED BY THE COURT WHEN CONSIDERING WHETHER RACE WAS A BASIS FOR SEEKING OR IMPOSING THE DEATH PENALTY, INCLUDING STATISTICAL EVIDENCE, AND TO AUTHORIZE THE DEFENDANT TO RAISE THIS CLAIM AT THE PRETRIAL CONFERENCE OR IN POSTCONVICTION PROCEEDINGS; TO PROVIDE THAT THE DEFENDANT HAS THE BURDEN OF PROVING THAT RACE WAS A SIGNIFICANT FACTOR IN SEEKING OR IMPOSING THE DEATH PENALTY AND TO PROVIDE THAT THE STATE MAY OFFER EVIDENCE TO REBUT THE CLAIMS OR EVIDENCE OF THE DEFENDANT AND IN DOING SO TO USE STATISTICAL EVIDENCE AS WELL AS ANY OTHER EVIDENCE THE COURT DEEMS RELEVANT AND MATERIAL; TO PROVIDE THAT IF RACE IS FOUND TO BE A SIGNIFICANT FACTOR IN THE IMPOSITION OF THE DEATH PENALTY, THE DEATH SENTENCE SHALL BE VACATED AND THE DEFENDANT RESENTENCED TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE; TO PROVIDE THAT THIS ACT IS EFFECTIVE WHEN IT BECOMES LAW AND APPLIES RETROACTIVELY, THAT MOTIONS UNDER THIS ACT FOR THOSE CURRENTLY UNDER A DEATH SENTENCE SHALL BE FILED WITHIN ONE YEAR OF THE EFFECTIVE DATE OF THIS ACT, AND THAT MOTIONS FOR THOSE WHOSE DEATH SENTENCE IS IMPOSED ON OR AFTER THE EFFECTIVE DATE OF THIS ACT SHALL BE FILED AS PROVIDED IN THIS ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 15A of the General Statutes is amended by adding a new Article to read:

"Article 101.

"North Carolina Racial Justice Act.

"§ 15A-2010. North Carolina Racial Justice Act.

No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.

"§ 15A-2011. Proof of racial discrimination.

(a) A finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.

(b) Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:

(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.

(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.

(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

A juror's testimony under this subsection shall be consistent with Rule 606(b) of the North Carolina Rules of Evidence, as contained in G.S. 8C-1.

(c) The defendant has the burden of proving 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. The State may offer evidence in rebuttal of the claims or evidence of the defendant, including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.

"§ 15A-2012. Hearing procedure.

(a) The defendant shall state with particularity how the evidence supports a claim 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.

(1) The claim shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.

(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.

(3) If the court finds 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, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.

(b) Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.

(c) Except as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion seeking relief from a death sentence upon the ground 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 shall follow and comply with G.S. 15A-1420, 15A-1421, and 15A-1422."

SECTION 2. This act is effective when it becomes law and applies retroactively. For persons under a death sentence imposed before the effective date of this act, motions under this act shall be filed within one year of the effective date of this act; for persons whose death sentence is imposed on or after the effective date of this act, motions shall be filed as provided in this act.

In the General Assembly read three times and ratified this the 6th day of August, 2009.

Appendix 2 – 2012 North Carolina Racial Justice Act

GENERAL ASSEMBLY OF NORTH CAROLINA SESSION 2011

SENATE BILL 9
RATIFIED BILL

AN ACT TO REFORM THE RACIAL JUSTICE ACT OF 2009 TO BE CONSISTENT WITH THE UNITED STATES SUPREME COURT'S RULING IN MCCLESKEY V. KEMP.

Whereas, intentional racial discrimination is a violation of a defendant's right to the

equal protection of the law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 19 of Article I of the North Carolina Constitution; and

Whereas, in 1987, the United States Supreme Court held in McCleskey v. Kemp

that (i) a statistical study which showed that the death penalty was more often imposed in Georgia on black defendants and killers of white victims than on white defendants and killers of black victims did not establish that Georgia enacted or maintained the death penalty because of anticipated racially discriminatory effect in violation of equal protection, (ii) the statistical study was insufficient to support an inference that any of the decision makers in the defendant's case acted with discriminatory purpose, and (iii) to prevail in a discrimination claim under the equal protection clause, a capital defendant must prove that decision makers in the defendant's case acted with discriminatory purpose; and

Whereas, Article 101 of Chapter 15A of the General Statutes allows statistical

evidence of a type that the United States Supreme Court found to be insufficient to raise an inference that a state's capital sentencing laws were discriminatory as to an individual defendant's case; and

Whereas, the policy of the State has been to ensure that no death penalty shall be

sought or imposed for any discriminatory purpose and there existed in the North Carolina Rules of Criminal Procedure, prior to the enactment of Article 101 of Chapter 15A of the General Statutes, substantial procedural rights to safeguard a capital defendant's constitutional rights to equal protection of the laws and a trial and sentencing free from racial discrimination, and which required the defendant to show that the decision makers in the defendant's case acted with discriminatory purpose; and

Whereas, it is the intent of the General Assembly to clarify the language in Article 101 of Chapter 15A of the General Statutes, to reflect the burden on the defendant is to show that the decision makers in the defendant's case acted with discriminatory purpose, and to clarify that this burden existed prior to the passage of Article 101 of Chapter 15A of the General Statutes; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. Article 101 of Chapter 15A of the General Statutes reads as rewritten:

"Article 101.

"North Carolina Racial Justice Act.

"§ 15A-2010. North Carolina Racial Justice Act.

No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.

"§ 15A-2011. Proof of racial discrimination.

(a) At trial or upon a motion for appropriate relief filed pursuant to Article 89 of Chapter 15A of the General Statutes, ~~A~~ a finding that race was the basis of the decision to seek or impose a death sentence may be established if the court finds that the State acted with discriminatory purpose in seeking the death penalty or in selecting the jury that sentenced the defendant, or one or more of the jurors acted with discriminatory purpose in the guilt-innocence or sentencing phases of the defendant's trial. ~~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.~~

(b) ~~Evidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:~~

~~(1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.~~

~~(2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.~~

~~(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.~~

~~A juror's testimony under this subsection shall be consistent with Rule 606(b) of the North Carolina Rules of Evidence, as contained in G.S. 8C-1.~~

(c) The defendant has the burden of proving that there was discriminatory purpose ~~race was a significant factor in decisions to seek or impose~~ in seeking or imposing the sentence of ~~death~~ death in the defendant's case. ~~in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.~~ The State may offer evidence in rebuttal of the claims or evidence of the ~~defendant,~~ defendant. ~~including statistical evidence. The court may consider evidence of the impact upon the defendant's trial of any program the purpose of which is to eliminate race as a factor in seeking or imposing a sentence of death.~~

"~~**§ 15A-2012. Hearing procedure.**~~

~~(a) The defendant shall state with particularity how the evidence supports a claim 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.~~

~~(1) The claim shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.~~

~~(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.~~

~~(3) If the court finds 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, the court shall order that a death sentence not be sought, or that the death sentence imposed by the judgment shall be vacated and the defendant resentenced to life imprisonment without the possibility of parole.~~

~~(b) Notwithstanding any other provision or time limitation contained in Article 89 of Chapter 15A of the General Statutes, a defendant may seek relief from the defendant's death sentence upon the ground that racial considerations played a significant part in the decision to seek or impose a death sentence by filing a motion seeking relief.~~

~~(c) Except as specifically stated in subsections (a) and (b) of this section, the procedures and hearing on the motion seeking relief from a death sentence upon the ground 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 shall follow and comply with G.S. 15A 1420, 15A 1421, and 15A 1422.~~"

SECTION 2. This act supersedes and nullifies the provisions of Article 101 of Chapter 15A of the General Statutes that existed prior to the effective date of this act and which are repealed by this act, including the holding of pretrial, trial, or postconviction hearings based upon the prior provisions of Article 101 of Chapter 15A of the General Statutes.

SECTION 3. If any provision of this act or its application is held invalid, the

invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

SECTION 4. Nothing in this act is intended to amend or modify either the
statutory or common law applicable to trial or postconviction proceedings in capital cases that existed prior to July 11, 2009. Consequently, this act does not change any provision in Article 89 of Chapter 15A of the General Statutes concerning the procedure for the filing of motions for appropriate relief in capital cases, including the deadlines and grounds upon which a motion may be filed. This act, in addition to the nullification of hearings based upon the prior provisions of Article 101 of the General Statutes, as explained in Section 2 of this act, is intended only to clarify the law that existed prior to the passage of Article 101 of Chapter 15A of the General Statutes, and add terminology used by the United States Supreme Court in 1987. Specifically, this act does not provide, allow, or authorize any hearings in addition to those already authorized under laws applicable to capital trial procedure or Article 89 of Chapter 15A of the General Statutes, and a capital defendant who filed a trial motion alleging discrimination, or a motion for appropriate relief alleging discrimination, prior to or following the effective date of Article 101 of Chapter 15A of the General Statutes is not entitled or authorized to file any further pleadings based upon this act, including a claim that the decision makers in the defendant's case acted with a discriminatory purpose, whether the defendant's prior motion included a discrimination claim or not, nor does it authorize any hearing on any claim of discrimination that may have been waived.

SECTION 5. This act is effective when it becomes law and applies to all capital
trials held prior to, on, or after the effective date of this act and to all capital defendants sentenced to the death penalty prior to, on, or after the effective date of this act.

In the General Assembly read three times and ratified this the 28th day of November, 2011.

Appendix 3 – Overview of figures

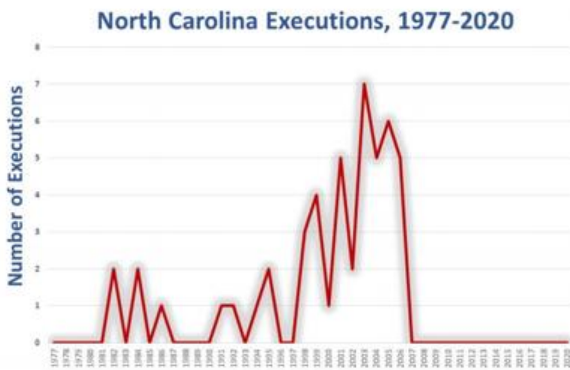

Fig. 1. Source: Dr. Robinson, (2021). *The Death Penalty in North Carolina, 2021,* p. 7.

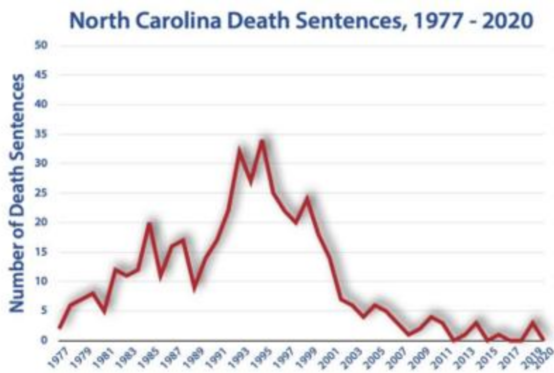

Fig. 2. Source: Dr. Robinson, (2021). *The Death Penalty in North Carolina, 2021,* p. 6.

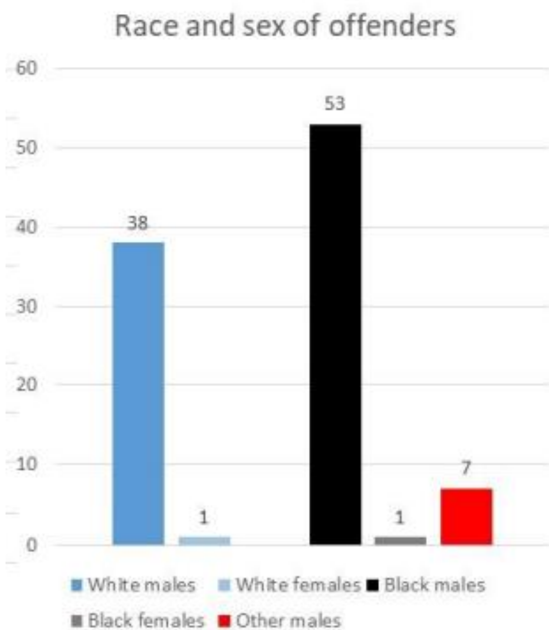

Fig. 3. Source: Dr. Robinson, (2021). *The Death Penalty in North Carolina, 2021,* p. 32.