The Racial Justice Act: Pretrial Claims

Jeff Welty

April 2012

This paper discusses the application of the Racial Justice Act ("RJA") to capital cases at the pretrial and trial stages. It does not discuss the application of the RJA in post-conviction proceedings. The RJA is codified at G.S. 15A-2010 et seq. A copy of the Act appears at the end of this manuscript.

Background

Claims of racial discrimination in capital cases have been made as long as the death penalty has existed in North Carolina. Prior to the enactment of the RJA, avenues for raising such claims included the following:

- **Batson claims.** Under Batson v. Kentucky, 476 U.S. 79 (1986), a defendant may seek relief on the grounds that, at his trial, the state exercised its peremptory challenges during jury selection on the basis of race.
- **Fair Cross Section Claims.** Under Duren v. Missouri, 439 U.S. 357 (1979), a defendant may seek relief on the grounds that the jury pool from which his jury was selected systematically excluded a distinctive racial group.
- **Claims of intentional racial discrimination under McCleskey.** In McCleskey v. Kemp, 481 U.S. 279 (1987), the United States Supreme Court rejected equal protection and Eighth Amendment challenges brought by a death-sentenced defendant from Georgia, who relied on a statistical study showing in part that black defendants who killed white victims were much more likely to receive the death penalty than other defendants. The Court stated that a defendant "must prove that the decisionmakers in his case acted with discriminatory purpose" in order to establish an equal protection violation, and that statistics can't show discrimination in any individual case. However, a defendant who can establish, for example, that a prosecutor elected to seek the death penalty in the defendant's case based on racial animus would be entitled to relief under McCleskey.

Some North Carolina legislators and others believed that these mechanisms for claiming discrimination were inadequate, and that race continued to play a substantial role in the administration of the death penalty in the state. They noted, for example, that blacks comprise over 50% of North Carolina's death row but less than 22% of North Carolina's population.

In response to concerns about racial discrimination in the capital punishment system, the General Assembly passed the Racial Justice Act on August 6, 2009. The vote in both chambers divided mostly along party lines, with Democrats supporting the bill and Republicans opposing it. It was signed into law by Governor Perdue on August 11, 2009, and became S.L. 2009-464.

Very generally, the RJA allows a defendant to attempt to establish, through statistical or other evidence, that race has played a significant factor in decisions to seek or impose the death penalty in his county,

prosecutorial district, or judicial division, or in the state as a whole. If he succeeds, the court must bar the state from seeking the death penalty against the defendant. (The RJA also provides for post-conviction challenges to death sentences that have already been imposed. As noted at the outset, however, such claims are beyond the scope of this paper.)

North Carolina is the second state to have legislation that specifically targets racial discrimination in capital cases. The other state is Kentucky, which adopted its racial justice act, Ky. Stat. § 532.300 et seq., in 1998. It is clear from looking at the text of both statutes that Kentucky's law served as a model for North Carolina's. However, North Carolina's law is broader in several important respects.[1]

Overview

As it applies at the trial stage, the RJA requires a trial judge to "order that a death sentence not be sought" if the judge 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" against the defendant. G.S. 15A-2012. Evidence that is "relevant" to such a claim includes evidence that:

(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 for capital offenses against persons of another race.
(3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

G.S. 15A-2011(b). Thus, if a defendant can show significant discrimination based on the race of the defendant or the race of the victim, or significant racial bias in jury selection, at either the county level, the prosecutorial district level, the judicial division level, or the state level, the court must declare the case non-capital. Statistical and other evidence – such as the testimony of lawyers, officers, and jurors – is admissible under the RJA. Of course, the state must be given an opportunity to rebut the defendant's claims.

[1] For example, (1) Kentucky's law allows claims only at the pretrial stage, while North Carolina's provides for both pretrial and post-conviction claims; (2) Kentucky's law requires that the defendant establish his claim by clear and convincing evidence, while North Carolina's statute does not incorporate that elevated burden of proof; (3) North Carolina's law allows a defendant to show that "[r]ace was a significant factor in decisions to exercise peremptory challenges during jury selection," while Kentucky's does not provide for juror-based claims; and (4) while North Carolina allows a defendant to show discrimination in the county, prosecutorial district, judicial division, or state as a whole, Kentucky's statute provides for state-level claims only. The Kentucky law has recently been criticized as ineffective. American Bar Association, *The Kentucky Death Penalty Assessment Report* vii (2011) (concluding that the Kentucky act "appears to have a number of restrictions limiting its effectiveness at identifying and remedying racial discrimination in the administration of the death penalty"); Michael Hewlitt, *N.C., KY Diverge on Racial Justice*, Winston-Salem Journal (Dec. 25, 2011) (quoting a Kentucky law professor describing it as nearly "impossible" to make a successful claim under the state's racial justice law).

Although the overall purpose of the law is clear, the language of the RJA is vague on several important points, and the appellate division has not yet had an opportunity to clarify the RJA. For example:

- **Impact on the defendant's case.** As noted above, G.S. 15A-2012(a)(3) states that the court "shall" strike the death penalty if the defendant can establish discrimination at the county, prosecutorial district, judicial division, or state levels. Thus, relief appears to be mandatory when the defendant establishes a pattern of discrimination, regardless of the court's conclusions about the existence or non-existence of discrimination in the defendant's case. However, G.S. 15A-2011(a) states that an RJA claim "may" be established when a defendant shows discrimination at the county, prosecutorial district, judicial division, or state levels. The use of the permissive term "may" seems to leave open the possibility that a judge could find evidence of historical discrimination, but still deny the defendant relief – for example, if the court determined that there was no discrimination in the defendant's case. Adding to this possibility is 15A-2011(c), which provides that "[t]he 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." If showing discrimination at the county, prosecutorial district, judicial division, or state levels were sufficient to require relief under the RJA, it is not clear why the existence or nonexistence of such a program would be relevant. Finally, the first sentence of the Act states that "[n]o person shall be subject to or given a sentence of death . . . pursuant to any judgment that was sought or obtained on the basis of race." Arguably, that language suggests that the defendant's particular judgment must be tainted by racial bias. One superior court judge has ruled that the RJA does not require a showing of discrimination in the defendant's particular case. (4/20/12 Order of Judge Greg Weeks.) Another has upheld the constitutionality of the RJA in part by concluding that the Act "does provide for consideration of the facts and circumstances of an individual case." (2/24/11 Order of Judge William Wood.)
- **Look-back period.** The RJA requires that the defendant show discrimination "at the time the death sentence was sought." G.S. 15A-2012(a). It is not clear how far back the defendant may reach in attempting to establish discrimination. For example, if the defendant can establish discrimination over the past twenty years, but not over the past two, it is not clear whether the defendant is entitled to relief.
- **Pleading requirements.** The RJA provides that "[t]he defendant shall state with particularity how the evidence supports" his RJA claim. G.S. 15A-2012. The reference to "evidence" suggests that the particularity requirement demands more than identifying the type of discrimination (for example, race of the victim discrimination) that the defendant contends exists and the level (for example, the prosecutorial district) on which the defendant intends to focus. However, it is not clear how detailed the defendant's claim must be, or what the remedy is for insufficient detail.
- **Relationship between pretrial and post-conviction claims.** The RJA states that a defendant's "claim shall be raised . . . at the pretrial conference required by Rule 24 of the General Rules of Practice . . . or in postconviction proceedings" under the MAR statutes. Clearly, defendants who had already been convicted and sentenced to death at the time the RJA was enacted must present their claims in post-conviction proceedings. But what about defendants who had not yet been tried? One could read this section requiring such defendants to raise their RJA claims

pretrial. Alternatively, one could read this provision as allowing pretrial defendants to choose whether to raise an RJA claim prior to trial, after conviction, or both. The latter reading may be the more natural, and may be required by the rule of lenity.

Principal Issues for Trial Judges

Because one possible reading of the RJA's procedural provisions requires defendants who have not yet been tried to bring their RJA claims prior to trial, most capital defendants are filing pretrial RJA claims. In many cases, defendants are filing two motions under the RJA. The first moves to strike the death penalty, alleging each of the three types of racial discrimination covered by the RJA and summarizing existing statistical analyses on point that reach conclusions that are favorable to the defense. The second seeks discovery from the state, including the policies and procedures of the District Attorney concerning capital cases and information about each potentially capital case handled by the prosecutor's office over a specified number of years. Trial judges must be prepared to address these motions.

Whether to Allow Discovery

A sample motion that is posted on the IDS website[2] suggests that defense counsel in capital cases seek discovery regarding items such as: the District Attorney's policy regarding when to pursue the death penalty; any efforts made to address the impact of race when deciding whether to pursue the death penalty; the race of the District Attorney's employees; the District Attorney's plea bargaining policies; any lawsuits against the District Attorney claiming racial discrimination in employment; and information about all first-degree murder cases prosecuted by the office of the District Attorney since 2000 (or 2005, depending on the tenure of the District Attorney), including the race of the defendant, victim, and jurors, the history of plea negotiations, and other matters.

The RJA does not address discovery for pre-trial RJA claims. It is likely that a court has the inherent authority to order appropriate discovery. However, it is also likely that a court has the inherent authority to limit discovery, i.e., to balance the defendant's need for information with the burden imposed on the state. The nature of the defendant's claims and the strength of the evidence forecast by the defendant may be relevant considerations when deciding whether, and to what extent, to allow discovery.

If a court decides to defer a defendant's RJA claims to post-conviction – a topic addressed below – it probably should also defer discovery. Because the RJA is still new, has not yet been authoritatively interpreted by the appellate courts, and is the subject of continued interest at the General Assembly, it is possible that a post-conviction proceeding a year or two down the road will be very different from, and will require very different discovery than, a pretrial claim asserted today.

[2] See "Racial Justice Act Motions" here: http://www.ncids.org/Motions%20Bank/Index%20of%20Motions.htm?c=Training%20%20and%20%20Resources,%20Capital%20Trial%20Motions.

By contrast, if a court decides to address a defendant's RJA claims prior to trial, it probably should allow appropriate discovery. An order that reflects one judge's effort to strike an appropriate balance concerning discovery is attached to this manuscript.

Whether to Defer Claims to Post-Conviction

As noted above, the RJA provides for both pretrial and post-conviction claims. Most judges assigned to capital trials have elected to defer consideration of pretrial RJA claims until post-conviction. There are some advantages to this approach. First, it may promote judicial economy by adjudicating RJA claims only in cases in which the defendant actually receives a death sentence, rather than in the larger number of cases in which a defendant is charged capitally. Second, it may promote speedy trials by avoiding the need to delay proceedings to accommodate extensive discovery and data analysis.

However, deferring a defendant's pretrial RJA claim to post-conviction is not required by the RJA, so whether to defer such a claim remains within the discretion of the presiding judge. Some judges might conclude that judicial economy is best served by adjudicating RJA claims prior to trial. Indeed, a ruling in the defendant's favor on an RJA claim would shorten the trial by making it non-capital.

If a judge elects to defer a pretrial RJA claim, the judge probably should find on the record that the defendant's claim has been timely filed and is preserved, to avoid any argument later that the defendant forfeited his rights under the RJA by failing to pursue his claim pretrial.

Judge Weeks' Ruling and Its Possible Preclusive Effect

Collateral estoppel, or issue preclusion, limits a party's ability to relitigate an issue of fact or law that was decided against it. In April 2012, Superior Court Judge Greg Weeks ruled in *State v. Robinson* that the state discriminated against black prospective jurors in capital cases statewide, based largely on a statistical study by Michigan State University law professors Barbara O'Brien and Catherine Grosso. Defendants may argue that Judge Weeks' ruling prevent the state from contesting the issue of statewide discrimination in other cases.

The basic requirements of collateral estoppel are "(1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." Royster v. McNamara, __ N.C. App. __, 723 S.E.2d 122 (2012) (internal quotation marks and citations omitted).

Some of these requirements clearly are met. However, whether Judge Weeks' ruling constitutes a "final judgment" is open to question because the state is appealing Judge Weeks' ruling.[3] Different jurisdictions have different rules about the preclusive effect of judgments that are being appealed. Compare, e.g., W.F.M., Inc. v. Cherry County, Nebraska, 279 F.3d 640 (8th Cir. 2002) ("[U]nder Nebraska law, a judgment is final for purposes of collateral estoppel . . . even though an appeal has been perfected and is pending."), and Erebia v. Chrysler Plastic Products Corp., 891 F.2d 1212 (6th Cir.1989)

[3] Or at least, it has announced that it plans to appeal. Whether it has an avenue for obtaining appellate review is not clear, as discussed here: http://sogweb.sog.unc.edu/blogs/ncclaw/?p=3468.

("[T]he established rule in the federal courts is that a final judgment retains all of its preclusive effect pending appeal."), with Slip Track Systems, Inc. v. Metal-Lite, Inc., 304 F.3d 1256 (Fed. Cir. 2002) ("Under California law, a California Superior Court judgment is not final for purposes of collateral estoppel until final disposition on appeal."), and Faison v. Hudson, 417 S.E.2d 302 (Va. 1992) ("[A] judgment is not final for the purposes of res judicata or collateral estoppel when it is being appealed or when the time limits fixed for perfecting the appeal have not expired."). No published North Carolina case squarely addresses the issue. Authority can be found for either view. For example, in Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421 (1986), a couple hired an auctioneer to sell their farm. The auction took place and a winning bidder was selected. However, a dispute arose between the bidder and the couple, and the sale was never completed. The auctioneer sued the husband for his fee. He won, but was denied interest from the date of the husband's breach of the auction contract. The auctioneer then sued the wife, seeking the interest. The supreme court found that the auctioneer was collaterally estopped from seeking the interest from the wife because he "did not appeal the adverse determination and the judgment became final." This phrase suggests that if the auctioneer had appealed the denial of interest in the first action, the judgment would not have been final. Cf. also Hampton v. North Carolina Pulp Co., 223 N.C. 535 (1943) (suggesting that a judgment on appeal is not entitled to preclusive effect). But see Miyares v. Forsyth County, 2004 WL 1611494 (N.C. Ct. App. July 20, 2004) (unpublished) ("Plaintiff cites no authority for the proposition that collateral estoppel is inapplicable to a judgment during the pendency of an appeal, and we find none."); State v. Summers, 351 N.C. 620 (2000) "When a fact has been agreed upon or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed."). Judges who conclude that Judge Weeks' order is entitled to preclusive effect while the state's appeal is pending, may wish to consider delaying RJA proceedings until the appeal has been resolved. See generally Collins v. D.R. Horton, Inc., 505 F.3d 874 (9th Cir. 2007) (stating that "a final judgment retains its collateral estoppel effect . . . while pending appeal" and suggesting that "the potential for a collateral estoppel-based judgment based on a prior judgment that is subsequently vacated or reversed on appeal" may be avoided by, inter alia, delaying the later case until the appeal in the earlier case has been resolved). Of course, if Judge Weeks' order is affirmed on appeal, this possible barrier to the application of collateral estoppel will be removed.

There are several other arguments that the state might make in response to a defendant's assertion that Judge Weeks' ruling controls the resolution of the RJA issue. These arguments are briefly noted below, though the author expresses no view as to their merits:

- Judge Weeks' ruling adjudicates only one of several claims made by defendant Robinson. That is, it addresses Robinson's claim of discrimination in jury selection, but not his other claims under the RJA. The state might argue that the fact that the order does not adjudicate all of Robinson's claims renders it something other than a final judgment, and so renders collateral estoppel inapplicable.
- As to the requirement that "identical issues [be] involved" in the two cases, the state might note that Robinson was tried in 1994, and that even Judge Weeks' broadest holding found discrimination in jury selection only between 1990 and 2010. The state might argue that, under

the RJA, any defendant preparing to stand trial in 2012 must establish discrimination "at the time the death penalty was sought," i.e., in 2012, and so cannot rely on Judge Weeks' holding in *Robinson* because it does not reach cases tried after 2010. (This argument would not be available regarding many post-conviction RJA claims, but again, this paper is focused on trial cases.)

- As to the requirement that the ruling in question be "necessary to the judgment," the state might point out that Judge Weeks also ruled that relief was required based on discrimination in jury selection at the level of the county and the judicial division, as well as in Robinson's own case. The state might argue that these additional or alternative holdings render the finding of state-wide discrimination inessential to the judgment.
- Finally, another defendant who argues that Judge Weeks' order should bind the state in his own case is arguing for an "offensive" use of collateral estoppel, i.e., he is seeking to use collateral estoppel to establish a claim rather than to defend against one. The offensive use of collateral estoppel in criminal cases is permitted under State v. Dial, 122 N.C. App. 298 (1986). However, its use is not unlimited. The appellate courts have held that offensive use of collateral estoppel may be denied if equity so requires, for example, if "(1) the defendant had little incentive to defend vigorously in the first action; (2) the judgment relied upon as the basis for the estoppel is inconsistent with previous judgments; [or] (3) the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." Rymer v. Estate of Sorrells By and Through Sorrells, 127 N.C. App. 266 (N.C. App. 1997). Therefore, the state may attempt to identify an equitable reason for not giving Judge Weeks' order preclusive effect.

The Future of the RJA

The future of the RJA is uncertain. During the 2010 legislative session, two bills were introduced that would have eliminated pretrial RJA claims and limited the scope of the RJA to post-conviction claims. Neither bill advanced very far in the legislative process.

During the 2011 legislative session, both chambers of the General Assembly passed a bill (SB 9, HB 12) that would have "supersede[d] and nullifie[d] the provisions of [the RJA] that existed prior to the effective date of this act and which are repealed by this act." In effect, the bill would have rendered the RJA a statutory codification of the McCleskey rule. However, Governor Perdue vetoed the bill, and while the Senate overrode her veto, the House did not.

Instead, the House created a committee on racial discrimination in capital cases to consider the issue further. It is possible that the committee will propose compromise legislation. It is also possible that the political parties will wait to see whether there is a change in party control of the General Assembly or of the office of the governor. Such a change could, of course, catalyze repeal or push repeal or modification of the RJA off the legislative agenda.

Further Reading

- Jessica Smith, *The Racial Justice Act* (2010) (available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/The%20Racial%20Justice%20Act_September%202010%20Cite%20Checked.pdf)
- Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. Rev. 2031 (2010)

Text of the 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. (2009-464, s. 1.)

§ 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. (2009-464, s. 1.)

§ 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. (2009-464, s. 1.)